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"Look Mom, I can do it on my own": A Child's Independent Right to Recover Medical Expenses in Missouri

*Boley v. Knowles*¹

I. INTRODUCTION

Since the beginning of this great nation, there has always been an ideal among our society of what the American family is supposed to be. While it would be nice for all children to have caring and concerned parents that are there to comfort and nurture them, it is far from reality to assume such a scenario in today's world. In *Boley v. Knowles*, the Missouri Supreme Court took a significant step in furthering a child's right to fully recover for medical injuries.

In Missouri, it has long been held that "when an infant² is wrongfully injured, two distinct causes of action accrue—one to the infant for the elements of damage from personal injury and another in favor of the parent for certain items, including medical expenses."³ The reasoning behind the rule was that parents have a duty to support their child⁴, and in turn are entitled to the "custody, control, services, and earnings of the child."⁵ By separating the causes of action between the child and parents, the rule allowed the party that suffered the loss to recover from the tortfeasor for that specific loss.⁶ In addition, the rule helped to prevent double recovery by children and their parents.

Although the right to maintain an action for medical expenses was primarily vested in the parent, over time some courts allowed the child to recover such costs under limited circumstances.⁷ Generally, such cases involved a waiver by the parents of their right to recover medical expenses.⁸

1. 905 S.W.2d 86 (Mo. 1995).

2. In Missouri, a minor or infant is defined as any person who has not attained the age of eighteen years. MO. REV. STAT. § 507.115 (1994).

3. Hufft v. Kuhn, 277 S.W.2d 552, 555 (Mo. 1955).

4. For purposes of this Note, the term "child" is defined the same as "infant." See *supra* note 2.

5. *Boley*, 905 S.W.2d at 88.

6. See *infra* note 33 and accompanying text.

7. See *infra* notes 38-43 and accompanying text.

8. See *infra* notes 41-51 and accompanying text.

Other jurisdictions have followed the common law rule that the right to recover medical expenses is only vested in the parent.⁹

The issue of who may recover medical expenses becomes further complicated when statute of limitations questions arise. When the statute of limitations for the parents' cause of action is shorter than the statute of limitations for the child's cause of action, the problem of parents' circumventing the statute by waiver or assignment arises.¹⁰

In *Boley v. Knowles*, the Missouri Supreme Court overturned prior Missouri case law allowing only parents to recover for their child's medical expenses. The Court settled the issue in Missouri and held that "the right to maintain an action to recover medical expenses related to a child's treatment is vested jointly in the child and the parents."¹¹ Under the new law of Missouri, a child may recover medical expenses even though the parent's claim for medical expenses may be barred by the statute of limitations.¹²

II. FACTS AND HOLDING

On June 29, 1989, B. Kevin Knowles, a doctor of osteopathy, treated Kimberly Boley for a laceration of her right knee.¹³ Following medical treatment, Kimberly experienced medical complications compelling further treatment by Dr. Knowles.¹⁴ At the time of Kimberly's injury, she was a minor in the custody of her natural mother, Carolyn Boley.¹⁵

On April 21, 1992, Kimberly, by her mother as next friend, filed a petition for damages alleging that her adverse medical complications were caused by Dr. Knowles' negligence.¹⁶ Carolyn Boley then joined the action in her individual capacity, claiming that, as Kimberly's parent, she incurred medical expenses for the extended medical treatment resulting from Dr. Knowles' negligence.¹⁷ Dr. Knowles moved to dismiss Carolyn Boley's

9. See, e.g., *Dewey v. Zack*, 651 N.E.2d 643 (Ill. App. Ct. 1995); *Macku v. Drackett Prods. Co.*, 343 N.W.2d 58 (Neb. 1984); *Korth by Lukas v. American Family Ins. Co.*, 340 N.W.2d 494 (Wis. 1983).

10. *Boley v. Knowles*, No. WD 47959, 1994 WL 256209, at *4 (Mo. Ct. App. June 14, 1994).

11. *Boley*, 905 S.W.2d at 90.

12. *Id.*

13. *Id.* at 87.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

claim and asserted that the statute of limitations barred Carolyn Boley's claim for medical expenses.¹⁸

The trial court granted the motion to dismiss.¹⁹ Subsequently, Kimberly sought leave of the court to amend her petition to seek damages for the medical bills incurred as a result of Dr. Knowles' negligence.²⁰ Dr. Knowles asserted that Kimberly Boley's claim for medical expenses was barred by the statute of limitations because such a claim could only belong to Kimberly's parents, and any claim her mother may have had was already barred by the statute of limitations.²¹ Kimberly argued that the statute of limitations defense asserted against her mother's claim for medical expenses was inapplicable to her own claim, because her claim existed independently of and concurrently with her mother's claim.²² In denying the motion for leave to amend, the trial court held that granting Kimberly leave to amend her petition would effectively extend the statute of limitations that barred her mother's claim.²³ The trial court then amended its order, pursuant to Rule 74.01(b),²⁴ stating that "there was no just reason to delay appeal of the order."²⁵

Kimberly Boley, by her mother Carolyn Boley as next friend, appealed the order of the trial court denying leave to amend her petition for damages to include costs of medical treatment resulting from the alleged negligence of Dr. Knowles.²⁶ On appeal, the Western District of Missouri affirmed the trial court's decision.²⁷ Upon application, the Missouri Supreme Court granted transfer.²⁸

The Supreme Court of Missouri held that ". . . the right to maintain an action to recover medical expenses related to a child's treatment is vested jointly in the child and the parents. Either the parents or the minor may

18. *Id.* MO. REV. STAT. § 516.105 (1994) bars medical malpractice actions not brought within two years from the date of the alleged negligence.

19. *Boley*, 905 S.W.2d at 87.

20. *Id.* at 88. Section 516.105 is inapplicable to minors. *See Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 12 (Mo. 1986) (holding that section 516.105, as applied to minors, violates their constitutionally guaranteed right of access to the courts); MO. REV. STAT. § 516.105 (1994).

21. *Boley*, 905 S.W.2d at 88.

22. *Id.*

23. *Id.*

24. MO. SUP. CT. R. 74.01(b).

25. *Boley*, 905 S.W.2d at 88.

26. *Id.* at 87.

27. *Id.*

28. *Id.*

maintain an action, although under no circumstances will a double recovery be allowed."²⁹

III. LEGAL BACKGROUND

A. *The Missouri Common Law Rule and its Exceptions*

In Missouri, prior to *Boley v. Knowles*, the common law rule stated that two causes of action arise when a minor child is injured—"one on behalf of the child for pain and suffering, his [or her] 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"³⁰ Children only had a claim for damages from the injury suffered³¹, while their parents had a cause of action to recover medical expenses and loss of the child's services.³²

The rationale behind the common law rule was to (1) allow the party that actually suffered the loss to recover for that particular loss,³³ and (2) to prevent double recoveries.³⁴ The common law rule developed out of the parents' duty to support their child and the child's reciprocal duty to render its services and earnings to the parents.³⁵ The parents' duty included paying for the medical expenses of their child's injury.³⁶ As a result, the parents' common law right to recover arose out of the injury directly sustained by the parents—their pecuniary loss in paying the medical expenses—rather than the injury to the child.³⁷ Such a rule helped ensure that the party that actually suffered the loss would recover for that particular loss.

29. *Id.* at 90.

30. *Evans v. Farmers Elevator Co.*, 147 S.W.2d 593, 599 (Mo. 1941); for other jurisdictions *see also* *West v. Tilley*, 461 S.E.2d 1, 4 (N.C. Ct. App. 1995); *Sanders v. Scheideler*, 816 F. Supp. 1338, 1344 (W.D. Wis. 1993).

31. *Wilson v. Lockwood*, 711 S.W.2d 545, 554 (Mo. Ct. App. 1986).

32. *Id.*

33. *See Sox v. United States*, 187 F. Supp. 465, 469 (E.D.S.C. 1960).

34. *Id.*

35. *Mennemeyer v. Hart*, 221 S.W.2d 960, 962 (Mo. 1949).

36. *Id.*

37. *Sommers v. Hartford Accident & Indem. Co.*, 277 S.W.2d 645, 649 (Mo. Ct. App. 1955); *Boley*, 905 S.W.2d at 89.

Over time, several logical exceptions to the common law rule developed in Missouri, allowing the child, rather than the parents, to recover medical expenses in certain situations. For example, if the minor child actually pays for the medical expenses, then the child is entitled to recover such expenses.³⁸ Another exception exists where the child is emancipated.³⁹ In this situation, medical expenses are a proper element of damages that the child may recover.⁴⁰ Each of these exceptions help to satisfy the common law concern that the party who suffered the damage should recover for that damage.

Other exceptions have been more illusory. Rather than focusing on compensating the party who suffered the damage, the courts began to focus on the common law rule's other purpose of preventing double recovery. In *Eaves v. Boswell*⁴¹ the court, relying on *Garrison v. Ryno*,⁴² held that "[o]bviously damages for medical care and loss of services arising out of bodily injury suffered by a child are recoverable by the parents, not the child, unless the parents waive the claim."⁴³

The Missouri Supreme Court held in *Garrison v. Ryno* that a child may recover such damages in his or her own separate action only where the parents either waived their claim for medical expenses or were estopped from asserting a claim.⁴⁴ In *Garrison*, counsel for the minor child informed the court that the child's parents wanted to waive their right to recover medical expenses in a separate action and permit the expenses to be recovered in the child's action.⁴⁵ In addition, the child's parents testified at trial that they waived any future rights to recover medical expenses from the defendant and agreed to be bound by the verdict in their child's suit.⁴⁶

The *Garrison* court relied upon *Hufft v. Kuhn*⁴⁷ to define when an express waiver or estoppel occurs.⁴⁸ The court in *Garrison* held that:

38. *Sommers*, 277 S.W.2d at 649.

39. *Evans v. Farmers Elevator Co.*, 147 S.W.2d 593, 599 (Mo. 1941).

40. *Id.*

41. 852 S.W.2d 353 (Mo. Ct. App. 1993).

42. 328 S.W.2d 557 (Mo. 1959).

43. *Eaves*, 852 S.W.2d at 358 (emphasis added).

44. *Garrison*, 328 S.W.2d at 564; see also *Bolkhir v. North Carolina State Univ.*, 365 S.E.2d 898, 902 (N.C. 1988) (father waives right to medical expenses by participating as guardian ad litem in a trial in which the minor is awarded medical expenses); *Shields v. McKay*, 84 S.E.2d 286 (N.C. 1954).

45. *Garrison*, 328 S.W.2d at 564.

46. *Id.*

47. 277 S.W.2d 552 (Mo. 1955).

48. *Garrison*, 328 S.W.2d at 564.

[s]uch waiver or estoppel occurs when a parent, acting as next friend, guardian ad litem, or guardian and curator of the minor child, voluntarily and affirmatively waives his rights, or with full knowledge of the contents of the pleadings and in full control of the prosecution of the minor's claims, stands by without objection and permits such a claim to be pressed for the minor and consents that the minor recover items of damage which otherwise belong to the parent.⁴⁹

The *Garrison* court further relied on *Scanlon v. Kansas City*⁵⁰ in ruling that the trial court properly allowed the child to amend his petition to include medical expenses.⁵¹ The court in *Scanlon* stated that, "the parent is not bound by the judgment in the child's action merely because he acted as next friend . . . except where he has permitted the child to recover or litigate the right to damages which would otherwise belong to the parent."⁵² This is consistent with the common law's original concern with preventing double recovery.

Generally, the exceptions to the common law rule were consistent with the underlying goals of the rule: to prevent double recovery and to recompense the injured party.⁵³ However, while the waiver exception developed, the exact legal basis for the child's action remained unclear. There was no resolution of whether the child acquired the parents' right to recover medical expenses through assignment, or whether the child's right to recover medical expenses was based on an independent and concurrent cause of action.⁵⁴ Ordinarily, such a determination has no practical significance.⁵⁵ However, when the parents' claim is barred by the applicable statute of limitations, whether the child's right is independent or through assignment is determinative of whether the child can maintain the action.⁵⁶

In Missouri, the statute of limitations is two years for medical malpractice actions against health care providers.⁵⁷ However, the Supreme Court of Missouri, in *Strahler v. St. Luke's Hospital*,⁵⁸ held that section 516.105 of the Missouri Revised Statutes was unconstitutional,⁵⁹ as applied to minors,

49. *Id.*

50. 28 S.W.2d 84 (Mo. 1930).

51. *Garrison*, 328 S.W.2d at 564.

52. *Scanlon*, 28 S.W.2d at 88.

53. *Boley v. Knowles*, 905 S.W.2d 86, 88 (Mo. 1995).

54. *Id.* at 89.

55. *Id.*

56. *Id.*

57. MO. REV. STAT. § 516.105 (1994) states that the two year limitations period begins on the date that the alleged negligence occurred.

58. 706 S.W.2d 7, 12 (Mo. 1986).

59. MO. CONST. art. I, § 14 guarantees to Missouri citizens "[t]hat the courts of

because it violates their constitutionally guaranteed right of access to the courts.⁶⁰ *Boley* settled the issue of what legal principle forms the basis of a child's cause of action for medical expenses, holding that a child's cause of action is independent from the parents' action.⁶¹

B. Jurisdictions Following the Traditional Common Law Rule

Many courts have held that a claim for medical expenses is vested solely in the parents; thus, if the parents' cause of action is barred by the statute of limitations, any derivative action that the child may have had is also barred.⁶² In *Hutto v. BIC Corporation*,⁶³ a Virginia federal court held that assignment of the parents' claim for medical expenses to the child does not extend the statute of limitations.⁶⁴ The court concluded that allowing the parents to assign the claim to an infant would defeat the purpose of the limitations period.⁶⁵

In *Vaughn v. Moore*,⁶⁶ a North Carolina appeals court held that the child's claim for medical expenses was barred because the child's parents had waived the claim for medical expenses after the statute of limitations had already expired.⁶⁷ While recognizing that allowing the child to recover medical expenses would not subject the defendants to the risk of double liability, the *Vaughn* court refused to give effect to the waiver because it would extend the statute of limitations.⁶⁸

Many jurisdictions that follow the traditional common law rule also allow some form of waiver—where the child may recover medical expenses if the parents waive their claim to such expenses.⁶⁹ A waiver claim in these jurisdictions is generally viewed as a derivative claim of the parents and

justice shall be open to every person, . . ."

60. *Id.*

61. *Boley*, 905 S.W.2d at 90.

62. *Id.* at 90. See also *Rose v. Hamilton Medical Ctr., Inc.*, 361 S.E.2d 1, 2 (Ga. Ct. App. 1987) (action to recover medical expenses of a minor is vested exclusively in the parents).

63. 800 F. Supp. 1367 (E.D. Va. 1992).

64. *Id.* at 1372.

65. *Id.*

66. 366 S.E.2d 518 (N.C. Ct. App. 1988).

67. *Id.* at 520. If the parents had waived the claim prior to the statute of limitations expiring, then the child would have a valid assignment of the parents' right and the child could recover medical expenses. *Id.*

68. *Id.*

69. See *Lasselle v. Special Prod. Co.*, 677 P.2d 483, 486 (Idaho 1983); *Cabaniss v. Cook*, 353 So. 2d 784, 786 (Ala. 1977).

cannot be used to circumvent the statute of limitations.⁷⁰ Waiver simply permits the damages to the child and the medical expenses of the parents to be decided in one lawsuit.⁷¹

C. Jurisdictions Abrogating the Traditional Common Law Rule

Several jurisdictions have permitted the child's right to recover medical expenses in a separate cause of action. Although these jurisdictions often traveled down different roads of legal analysis, all have ultimately reached the same destination—allowing the child to recover medical expenses regardless of various statutes of limitations barring claims by the parents.

For example, in *Myer v. Dyer*,⁷² the parents of the injured child chose to file their claim seeking medical expenses after the applicable statute of limitations had expired. The court in *Myer* held that, because the statute of limitations had already expired, the parents had waived their claims for medical expenses and a separate claim existed on behalf of the child.⁷³

In *Davis v. Drackett Products Company*,⁷⁴ the court held that, although the parents may waive or be estopped from asserting their right to recover medical expenses, the child is permitted to recover the full amount that either the child or the parent would be entitled to recover.⁷⁵ The court in *Davis* held that a minor's claim for damages and the parents' claim for medical expenses are separate and distinct claims for the purposes of the Ohio tolling statute.⁷⁶ The *Davis* court allowed the minor child to amend his complaint so that recovery for medical expenses was included in the damages, even though the parents claim for medical expenses was barred.⁷⁷

In *McNeill v. United States*,⁷⁸ the minor child, by his guardian ad litem, brought suit under the Federal Tort Claims Act alleging medical negligence on the part of physicians at a military hospital. At the time of trial, the child's parents had not filed suit, and the time when suit could have been filed had past.⁷⁹ However, the child included medical expenses incurred due to the physician's negligence in his petition for damages.⁸⁰ The *McNeill* court held

70. *Kennedy v. Kiss*, 412 N.E.2d 624, 628 (Ill. App. Ct. 1980).

71. *Anderson v. Jenkins*, 70 So. 2d 535, 539 (Miss. 1954).

72. 643 A.2d 1382 (Del. Super. Ct. 1994).

73. *Id.*

74. 536 F. Supp. 694, 697 (S.D. Ohio 1982).

75. *Id.*

76. *Id.*

77. *Id.*

78. 519 F. Supp 283, 284 (D.S.C. 1981).

79. *Id.* at 290.

80. *Id.*

that, because the parents failed to bring a claim before the statute of limitations had expired, the parents effectively waived their right to recover medical expenses and the child could recover such expenses.⁸¹

The issue of whether a child could maintain an action to recover medical expenses separate from the parents' claim was far from settled in Missouri. Prior to *Boley v. Knowles*,⁸² Missouri courts had not addressed the issue of whether the child's action may effectively extend the statute of limitations.

IV. THE INSTANT DECISION

In *Boley v. Knowles*, the Supreme Court of Missouri began its analysis by reviewing the common law causes of action that arise when a child is injured.⁸³ The court noted that the common law rule originated in order to allow the party that actually suffered the loss to recover for that particular loss,⁸⁴ and to prevent double recoveries.⁸⁵ The common law rule developed out of the parents' duty to support their child and the child's reciprocal duty to render its services and earnings to the parents.⁸⁶

The court then examined the exceptions to the common law rule, noting that all of the exceptions are consistent with the common law goals of recompensing the actual suffering party and preventing double recoveries.⁸⁷ The court discussed its earlier decision in *Garrison v. Ryno*, where it held that a child may recover for medical expenses upon a showing that the parents have waived their claim in favor of the child.⁸⁸ The court maintained that the child may only recover when the parents are estopped from asserting a claim, thus avoiding any problems of double recovery.⁸⁹

Next, Chief Justice Covington, the author of the opinion, pointed out that the common law vested the cause of action for medical expenses in the parents because the parents were responsible for paying any expenses incurred from the injury to the child.⁹⁰ The court then noted that many situations exist where the child, rather than the parents, may be held liable for medical

81. *Id.*; see also *Hughey v. Ausborn*, 154 S.E.2d 839, 841 (S.C. 1967); *Kapuschinsky v. United States*, 259 F. Supp. 1, 7 (D.S.C. 1966).

82. 905 S.W.2d 86 (Mo. 1995).

83. *Id.* at 88.

84. *Id.*

85. *Id.* See also *Sox v. United States*, 187 F. Supp. 465, 469 (E.D.S.C. 1960).

86. *Mennemeyer v. Hart*, 221 S.W.2d 960, 962 (Mo. 1949).

87. *Boley*, 905 S.W.2d at 89.

88. *Id.* (citing *Garrison*, 328 S.W.2d at 564).

89. *Id.*

90. *Id.*

expenses.⁹¹ For example, the court cited *Merrick v. Stephens*⁹² where a minor was compelled to pay medical expenses when it was found that such expenses were necessary.⁹³ In addition, the court stated that Missouri statutes and federal law permit hospitals, under certain circumstances, to claim a lien upon the proceeds of a child's action for injuries.⁹⁴ The court went on to say that granting parents the right to recover medical expenses, based on the notion that parents are responsible for paying such expenses, is "questionable" at best, because the child is no longer immune from responsibility.⁹⁵

The court then explored the reasons for permitting minors to recover medical expenses.⁹⁶ The court noted that Missouri law is unclear as to whether a child acquired the parents' right to recover medical expenses by assignment or whether a child had an independent right to bring the action.⁹⁷ While most of the time this distinction is "without practical significance,"⁹⁸ the court pointed out that in the instant case, it was determinative of whether Kimberly could maintain the action.⁹⁹ The court referred to *Senn v. Manchester Bank of St. Louis*¹⁰⁰ to illustrate that "an assignee acquires no greater rights than those of the assignor at the time of the assignment."¹⁰¹ Thus implying that if Kimberly had been assigned her parents' right to recover medical expenses, she actually would have acquired nothing because their claim had already expired.

The court then cited several cases outside of Missouri that have permitted the child to recover medical expenses in a separate action,¹⁰² pointing out that all of these courts viewed the cause of action as a joint right available to both the child and parents.¹⁰³ The court noted that such cases recognized the child's right, at least implicitly, so that the statute of limitations could be avoided.¹⁰⁴ The court continued by mentioning several cases outside of Missouri that have held the claim for medical expenses is vested solely in the

91. *Id.*

92. 337 S.W.2d 713 (Mo. Ct. App. 1960).

93. *Id.* at 719.

94. MO. REV. STAT. § 430.230 (1994); *see* *Riley v. Herbes*, 524 N.W.2d 523, 529 (Minn. Ct. App. 1994).

95. *Boley*, 905 S.W.2d at 89.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. 583 S.W.2d 119, 129 (Mo. 1979).

101. *Boley*, 905 S.W.2d at 89.

102. *See supra* notes 69-78 and accompanying text.

103. *Boley*, 905 S.W.2d at 89.

104. *Id.*; *see supra* note 67 and accompanying text.

parents, and consequently, if the parents' cause of action is barred by the statute of limitations, any derivative action that the child might have had is also barred.¹⁰⁵

After reviewing the cases in Missouri, as well as other jurisdictions, the court stressed that the "primary underlying concern of the courts has been to avoid multiple judgments for recovery of medical expenses."¹⁰⁶ It further stated that the courts which have allowed the child to recover medical expenses have only done so when the parents could not bring the claim themselves,¹⁰⁷ hence addressing this concern.

Therefore, the Missouri Supreme Court concluded that, "[t]here is no persuasive reason to retain the common law rule that conferred upon the parents the primary right to recover medical expenses."¹⁰⁸ The court stated that, "[t]he factors and concerns that gave rise to the common law rule limiting the child's action in this respect are often illusory or can be otherwise addressed."¹⁰⁹ It further held that, "[a] procedural bar that would prevent the parents from maintaining an action no longer affects the child's right to recover,"¹¹⁰ and that either the parents or the minor may maintain an action, although under no circumstances will a double recovery be allowed.¹¹¹ In allowing the child to recover medical expenses in his or her own action, the Supreme Court of Missouri overruled all prior cases in conflict with the *Boley* decision. The court held that "the right to maintain an action to recover medical expenses related to a child's treatment is vested jointly in the child and the parents."¹¹²

V. COMMENT

While the Missouri Supreme Court's ruling in *Boley v. Knowles*—that either a parent or a minor can sue to recover the minor's medical expenses in a tort action¹¹³—seems relatively unimportant at first glance, it provides a number of strategic options and significant issues for attorneys to consider.

For example, when an attorney represents both the minor child and the parents, the court's decision in *Boley* becomes very significant. The ability

105. *Boley*, 905 S.W.2d at 89. See *supra* notes 69-75 and accompanying text.

106. *Boley*, 905 S.W.2d at 90.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

to assign the claim for medical expenses to either the child or the parents presents new strategic options that were formerly unavailable to attorneys.

[T]he attorney can either sue for the minor's medical expenses in the name of the parents and commence an action within the normal limitation period, or wait, allow the injuries to fully manifest themselves over time, and then file suit on behalf of the child for medical and other expenses, using the extended limitation period provided for minors' lawsuits.¹¹⁴

Thus, *Boley* gives an attorney the option to choose either to sue presently for estimated future medical expenses, or sue later for what has then become past medical expenses. Ultimately, this will determine what the child recovers.

Secondly, *Boley* creates new obligations for attorneys as to how to deal with damage awards. When children sue in their own name for medical expenses, the recovery is theirs, not their parents'. As a minor, a child will probably not be able to properly manage his award. Thus, the child's attorney should create a trust,¹¹⁵ or take other precautions to assure that the damage award is used for its designated purpose. In addition, a trust can serve to protect the child's award from any creditors of the parents.

On the other hand, if the claim for medical expenses is brought by the parents, the damages will belong to the parents and not the child. The court in *Clarke v. Eighth Avenue Railroad Company*¹¹⁶ described the adverse consequences that may result if the parents, rather than the child, recover future medical expenses:

He [the parent] can do with it as he sees fit. He can will it away, or, if he dies without a will, it becomes part of his estate. In either case, the infant might receive little or no benefit from it. The natural instinct of a parent to properly support his infant children does not always prevail.¹¹⁷

114. Jessica Sutin, Note, *Tort Law—Either the Parents or the Child May Claim Compensation for the Child's Medical and Non-Medical Damages*, 23 N.M. L. REV. 373, 378 (1993).

115. *Id.* at 378:

To create a trust for the child, the trial judge may order the defendants to transfer the minor's medical expenses and non-medical expenses (pain and suffering and lost earning capacity) into the court account until the representative for the minor comes forward with proof that he or she has established a trust fund in the minor's name which will adequately protect the child's interests. Moreover, the court may require court approval for withdrawals made from the trust.

116. *Clarke v. Eighth Ave. R. Co.*, 144 N.E. 516 (N.Y. 1924).

117. *Id.* at 517-18.

An attorney cannot assume that the child's parents will only use the damage award for their child's medical care. If a parent has financial difficulties, creditors of the parent may look to the child's damage award to satisfy debts not related to the child's medical care.¹¹⁸

To avoid these problems, the plaintiff's attorney should consider pleading the claim for future medical expenses as a part of the child's cause of action rather than that of the parents. In addition, the plaintiff's attorney should also ensure that the proceeds are set apart from the assets of the parents and a reasonable amount of the damage award is specifically designated to the minor and used for expenses related to medical and non-medical care.¹¹⁹

Another issue that arises as a result of *Boley* is the parents' circumvention of the statute of limitations. In the cases that have held that a child cannot recover if the parents' claim for medical expenses is barred by the statute of limitations, the primary concern has been that the purpose of the statute be effectuated.¹²⁰

When the Missouri legislature passed section 516.105 of the Missouri Revised Statutes it intended to limit the number of lawsuits that might be brought by forcing a prospective plaintiff to file their action within two years or lose it.¹²¹ The number of tort claims has risen enormously in the last ten years and there has been much societal pressure on legislatures to reform the current system. Allowing parents to circumvent the applicable statute of limitations—by simply bringing the action in the name of the child—appears to invite even more litigation. However, most of the time the claim for medical expenses would simply be tacked on to the child's other claims, resulting in no net increase in lawsuits, but rather litigation of all the damages in a single suit. As a result, the new rule may actually consolidate more lawsuits and free up precious court resources for other cases.

Boley illustrates that an attorney employed by parents to recover damages for their child's injury has two clients—the parents and the child.¹²² The attorney must allocate damage claims between the parents and the child when filing the complaint. The child possesses the right to recover for the child's

118. If the parents set up a trust in the child's name then creditors would be prohibited from acquiring any of the trust property. "[C]reditors have no rights or remedies as far as the trust property [is concerned]." GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 227 (2d ed. 1979) (replacement vol. 1992).

119. Sutin, *supra* note 114, at 380.

120. See *supra* notes 69-75 and accompanying text.

121. *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 11 (Mo. 1986).

122. See also Sutin, *supra* note 114, at 381.

pain and suffering and lost earning capacity.¹²³ The parents have the right to recover for past medical expenses paid by them on behalf of the child.¹²⁴ Often it will be difficult for the attorney and the parents to determine whether a claim for medical expenses should be made now or later. Ultimately, the answer seems to depend upon the facts of the given situation—the health of the child, the financial needs of the parents and child, the likelihood of future medical expenses, and the severity of the injury may all help the parties to decide what is best for the child under the circumstances.

VI. CONCLUSION

Boley v. Knowles confronted the issue of whether a child's right to recover medical expenses is independent of the parents' right to recover such expenses. The court surveyed the underlying reasons the common law rule—allowing only parents to recover for the medical expenses of the child—developed, and addressed the rule's primary concerns with just compensation and multiple recoveries. The Missouri Supreme Court ruled that the child can maintain an independent claim for medical expenses; however, it adopted the bright-line proviso that under no circumstances will a double recovery be allowed. Some courts believe that such a ruling creates a means to circumvent the statute of limitations on the parents' cause of action. It is possible that this ruling will open the door to more litigation in this area of law. The decision in *Boley* provides new considerations for attorneys seeking to recover children's future medical expenses. It also makes a strong stand in favor of children's rights and helps to ensure full compensation for the child, prompting injured children in Missouri to finally exclaim, "Look mom, I can do it on my own!"

MARK A. REITER

123. See *supra* notes 31-37 and accompanying text.

124. See *supra* notes 31-37 and accompanying text.