THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2009-CP-46-5178

Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (a/k/a Kristy Wood) ..... Appellant-Respondent

v.

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, and C. Edward Creagh, M.D., ... Respondents-Appellants

RESPONDENT'S FINAL BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF THE CASE

Kristy Orlowski was pregnant with her first child and suffered severe complications near the delivery in September 2003. Kristy suffered a seizure and was found unresponsive in her home. (R. p. 15 at ¶ 21). Kristy was rushed to Piedmont Medical Center ("PMC")[1] where she was placed on a ventilator. (R. p. 15 at ¶ 22). Her doctors delivered baby Brianna by cesarean section. (R. p. 15 at ¶ 23). Kristy remained hospitalized from September 12 through most of November 2003. (R. p. 15 at ¶ 24). During this hospitalization, Kristy endured multiple surgical procedures, severe respiratory distress, and other life-threatening conditions. (R. p. 15 at ¶ 24). Kristy was discharged on November 24th but was rushed back to PMC hours later with severe chest pain and shortness of breath. (R. p. 20 at ¶ 12). Dr. Edward Creagh admitted Kristy and was responsible for her care during this hospitalization. (R. p. 20 at ¶ 12). Dr. Creagh diagnosed a left pleural effusion and performed a thoracentesis for suspected empyema but still chose to send Kristy home on November 27, 2003. (R. p. 20 at ¶ 12-13). Two days later, Kristy returned to PMC with severe nausea and vomiting. (R. p. 21 at ¶ 14). Dr. Creagh finally ordered a CT scan on November 30th that revealed a hydropneumothorax in Kristy's left lung. Id.

Kristy's condition deteriorated rapidly over the next several days. She developed metabolic acidosis, stiff lungs, and continued having severe respiratory difficulties even with a ventilator. (R. p. 21 at ¶ 17). On December 3, 2003, Kristy suffered a cardiopulmonary arrest. (R. p. 21 at ¶ 17-18). Kristy was resuscitated but suffered permanent and severe damages caused by extended oxygen deprivation. (R. p. 21 at ¶ 19-20). Kristy was rendered permanently unable to care for any of her own needs.

[1] The legal entity that owns and operates PMC is AMISUB of South Carolina, Inc. ("AMISUB").

Gladys Sims, as Kristy's guardian and conservator filed suit on November 24, 2009 based on Dr. Creagh and PMC's negligence arising out of Kristy's November 2003 hospital admission. The Complaint alleged that Dr. Creagh and PMC negligently provided Kristy's medical treatment beginning with the November 25, 2003 hospitalization. (R. p. 22-28 at ¶ 21-25; 31-35). Kristy alleged Dr. Creagh and PMC failed to timely diagnose her condition, failed to properly monitor her, and failed to take proper interventions. (R. p. 28 at ¶ 33). Kristy suffered cardiopulmonary arrest, hypoxic brain injury, and permanent impairment as a direct and proximate result of Dr. Creagh and PMC's negligence. (R. p. 29 at ¶ 34). Defendants moved for summary judgment on two grounds: (1) Kristy is estopped from pursuing a claim against Dr. Creagh and AMISUB because of a previous claim filed on her behalf against her obstetrician; and (2) Kristy's 2009 Complaint was filed outside the applicable statute of limitations. Judge S. Jackson Kimball heard oral arguments and granted the motions on the estoppel issue and denied the motions on the limitations issue.

A timely appeal was noticed on Judge Kimball's ruling on estoppel. This appeal is currently pending before the court. In the current appeal, Dr. Creagh and AMISUB appeal Judge Kimball's ruling on the statute of limitations.

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file...show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. On review, the appellate court applies the same standard as the trial court. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

ARGUMENT

I. THE CIRCUIT COURT'S ORDER DENYING APPELLANTS' SUMMARY JUDGMENT MOTIONS IS NOT SUBJECT TO APPEAL.

Appellants' right to appeal is limited to "any final judgment, appealable order or decision." Rule 201(a), SCACR. Rule 201's provisions speak to the appellate court's jurisdiction. Wright v. Dickey, 370 S.C. 517, 520, 636 S.E.2d 1, 2 (Ct. App. 2006)(citing Rule 201(a) in noting court "lacks jurisdiction to review this appeal"). South Carolina law is clear that denial of a summary judgment motion does not create a "final judgment" and may not be appealed. A denied summary judgment motion "does not finally determine anything" and cannot qualify as an appealable final order. Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). A trial court's denial of summary judgment "does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings." Id. As AMISUB acknowledges in its brief, South Carolina law clearly bars an appeal from denial of a summary judgment motion. Initial Br. of Appellant (AMISUB) at 7.

AMISUB cites McLeod v. Starnes, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012), as support for the proposition that the courts are free to revisit past precedent and reverse that precedent where necessary. However, AMISUB fails to provide any reason

why the current law should be changed on appeals from orders denying summary judgment. The current law on this point is not influx or based on an isolated court ruling. As the Ballenger court noted, courts have "repeatedly" refused to hear appeals based on denied summary judgment motions. 313 S.C. at 476, 443 S.E.2d at 380. The Ballenger court cited nearly ten cases on this point. McLeod recognized that deviation from precedent can be proper in some circumstances but also recognized that deviating from precedent usually requires that precedent was wrongly decided. 396 S.C. at 654, 723 S.E.2d at 202. AMISUB does not even attempt to explain how the courts have been wrong in concluding that an order denying summary judgment is not appealable. Existing precedent is on point and controls this issue. Appellants' claims on this cross-appeal are not properly appealable.

Dr. Creagh asks the court to deviate from its well-established precedent refusing consideration of denied summary judgment motions based on the claim that his statute of limitations argument represents an additional sustaining ground. An additional sustaining ground is raised by "the party who prevailed in the lower court" and "urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 417, 526 S.E.2d 716 (2000). A "respondent may raise an additional sustaining ground for th[e] court to consider." Semken v. Semken, 379 S.C. 71, 664 S.E.2d 493 (Ct. App. 2008).

For purposes of the statute of limitations matter with which he takes issue in this appeal, Dr. Creagh is not the party who prevailed in the lower court and he does not ask the court to affirm the lower court's ruling. Judge Kimball plainly denied Dr. Creagh's motion on the statute of limitations. Dr. Creagh noticed an appeal for the purpose of

seeking reversal of the circuit court's ruling on the statute of limitations. As the "party appealing," Dr. Creagh is "the appellant" for the purposes of the appeal he noticed. Rule 202(a), SCACR. Accordingly, the additional sustaining ground doctrine recognized in the court rules and discussed in I'On does not apply here. Dr. Creagh's additional sustaining ground discussion does not change the essential facts: Dr. Creagh and AMISUB noticed an appeal challenging an order denying summary judgment and orders denying summary judgment are not rulings from which an appeal may be taken.

II. APPELLANTS' STATUTE OF LIMITATIONS ARGUMENT WAS NOT PROPERLY PRESERVED FOR APPEAL.

This court will not consider an issue on appeal unless the issue was properly preserved at the trial court level. Issue preservation is a "threshold matter" the court must resolve before reaching the merits. Fettler v. Gentner, 396 S.C. 461, 469, 722 S.E.2d 26, 30 (Ct. App. 2012). Issues are properly preserved for appeal "only when they are raised to and ruled on by the lower court." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004). In other words, "it is axiomatic that an issue cannot be raised for the first time on appeal." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The South Carolina Supreme Court has identified specific requirements for issue preservation. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007). These requirements include timely identification of the issue during trial court proceedings that is "sufficiently specific[]" to be considered and ruled on by the trial judge. Id.

Issue preservation is a threshold question because proper preservation is important in maintaining the court system's established structure. The Court of Appeals, like the Supreme Court, is "a court of review." Powers v. City of Aiken, 255 S.C. 115, 117, 177

S.E.2d 370, 371 (1970). Courts of review are charged with determining "if the lower court did something that it should not have done, or omitted doing something it should have done." Id. The appellate court cannot serve its established purpose if a party raises an issue for the first time at the appellate court level. See Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004)("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error"). By raising all issues at the trial court level, parties also provide the trial judge a complete picture of the dispute on which a decision must be made. As this Court noted, issue preservation rules "are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006).

Dr. Creagh and AMISUB assert Ms. Orlowski's claims are barred by a three-year medical malpractice statute of limitations. See Initial Br. of Appellant (AMISUB) at 8-11; Initial Br. of Appellant (Creagh) at 7-10 (citing S.C. Code Ann. § 15-3-545). Dr. Creagh and AMISUB argue disability tolling for "insane" persons under S.C. Code Ann. § 15-3-40 does not apply to medical malpractice claims. Accordingly, the statute of limitations for Ms. Orlowski's claims against Dr. Creagh and AMISUB expired three years after the claims reasonably should have been discovered regardless of Ms. Orlowski's "sanity" at the time of accrual or at any point within the three years following accrual. Both parties supported this claim with citations to Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993).

This appellate brief argument was not the parties' trial court argument. While both parties cited the statute of limitations in their summary judgment motions, their assertion of why Ms. Orlowski's claims fell outside the statute did not include the argument that drives the current limitations dispute. Dr. Creagh's summary judgment motion simply asserted that Ms. Orlowski's claim violated § 15-3-545's statute of limitations. The same motion acknowledged disability tolling as indicated by § 15-3-40. The motion went on to claim the statute was violated even with operation of disability tolling because a conservator was appointed for Ms. Orlowski in early 2004 and the otherwise tolled statute commenced at his appointment. Dr. Creagh's statute of limitations argument is even more clearly outlined in his memorandum of law supporting summary judgment. There, Dr. Creagh argued Ms. Orlowski (1) was not "insane" at the time of Dr. Creagh's alleged negligence as physical disability does not qualify as insanity for § 15-3-40 purposes; and (2) ceased to be insane for § 15-3-40 purposes when a conservator was appointed for her. (R. p. 78). Dr. Creagh summed up his statute of limitations argument as follows: "Based on the lack of disability at the time the alleged negligence occurred and the appointment of a Conservator to represent Kristy's interest, the statute of limitations barred the claim." (R. p. 101).

AMISUB also moved for summary judgment based on the statute of limitations and its basis for claiming Ms. Orlowski's claims were time barred are clear from the oral argument transcript. A survey of Mr. Gunn's oral argument shows that AMISUB took the position, unsupported by the language of § 15-3-40 or § 15-3-545, that Ms. Orlowski's insanity ceased when her now-former husband was appointed as conservator. (R. p. 249, lines 8-12). The flaws in this argument are discussed in detail below. Mr. Gunn never

took the position AMISUB advocates now, i.e. disability tolling does not apply to medical malpractice claims and the Orlowski claims expired three years following date of injury or date of discovery. In fact, Mr. Gunn explicitly advocated a contrary position during the oral argument. During the course of the argument, Mr. Gunn conceded that the statute was tolled from the time of Ms. Orlowski's incapacitating injury to the date a conservator was appointed. See (R. p. 256 line 24- p. 257, line 1)("I'm willing to concede that the statute was suspended or tolled, until a conservator was appointed").

Moments before the court denied AMISUB/Dr. Creagh's motions based on the statute of limitations, Mr. Gunn admitted that, but for the appointment of a conservator, Ms. Orlowski could have eight years from date of injury to file within the statute. Specifically, Mr. Gunn argued

> "for purposes of the statute of limitations, if a conservator had never been appointed, the Plaintiff might well have—even though the three-year statute is pursuant to Section 15-3-545, applies to a three-year statute from the date of discovery, 15-3-40, **in the absence of a conservator might well give the Plaintiff eight years, no question.**"

(R. p. 257, line 21-p. 258, line 3)(emphasis added).

Eight years to file suit is only possible by combining the three year medical malpractice statute of limitations and the five years of disability tolling for insane persons codified in § 15-3-40. In short, AMISUB never raised its current statute of limitations argument at the trial court below so that Judge Kimball could hear and consider that argument in his ruling. Instead, AMISUB took a position that contradicts the position it now takes on the statute. Dr. Creagh's counsel joined in AMISUB's argument at the hearing. See (R. p. 252, line 8)(Mr. King told court, "I agree with everything Mr. Gunn said"). Additionally, during trial court proceedings, neither AMISUB nor Dr. Creagh

cited or mentioned Langley, the case on which the current iteration of their statute of limitations argument relies on so heavily.

Dr. Creagh and AMISUB have supplemented an unsuccessful statute of limitations argument with one they hope will be more successful. The rules of issue preservation do not permit this legal maneuver. This issue has not been properly preserved for appeal and should not be considered.

III. KRISTY ORLOWSKI'S CLAIMS WERE COMMENCED WITHIN THE STATUTE OF LIMITATIONS AS TOLLED BY S.C. CODE ANN. § 15-3-40.

Dr. Creagh and AMISUB employees/agents provided the care at issue in Kristy's claims in late November and December 2003. A suit alleging medical negligence was commenced on Kristy's behalf on November 24, 2009. The statute of limitations for a medical malpractice action is "three years from date of discovery or when it reasonably ought to have been discovered." S.C. Code Ann. § 15-3-545(A). However, South Carolina law allows for tolling of a statute of limitations for up to five years where a claimant suffers from a disability at the time a cause of action accrues. S.C. Code Ann. § 15-3-40. A person is disabled for tolling purposes if he/she is under the age of 18 or "insane." Id. Kristy was "insane" at the time her causes of action against Dr. Creagh and AMISUB accrued. The suit commenced on November 24, 2009, was timely.

The term "insane" carries different meanings in different areas of the law. For example, the term has a very specific meaning when used in the context of a criminal prosecution. See State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992)(discussing meaning of insane for criminal defendant's insanity defense). "Insane" is not defined in the disability tolling statute but has been interpreted by the courts. For purposes of this

statute, insanity means a "mental condition which precludes understanding the nature or effects of one's acts, an incapacity to manage one's affairs, an inability to understand or protect one's rights, because of an over-all inability to function in society." Wiggins v. Edwards, 314 S.C. 126, 129, 442 S.E.2d 169, 170 (1994)(quoting 54 C.J.S. Limitations of Actions § 117 at 159-69).

Kristy Orlowski was "insane" following Dr. Creagh and AMISUB's care in November 2003. Kristy's condition deteriorated rapidly following her admission to PMC on November 27, 2003. (R. p. 20 at ¶ 13). Kristy underwent surgery on December 3rd and developed metabolic acidosis and stiff lungs in the days that followed. (R. p. 21 at ¶ 16). On December 6th, Kristy had a hypotensive and bradycardic episode and suffered a cardiopulmonary arrest. Although Kristy was resuscitated, her condition continued to decline. Kristy's breathing problems continued to worsen to the point of needing a ventilator. Kristy was airlifted to Carolinas Medical Center ("CMC") in Charlotte, North Carolina. Once at CMC, Kristy's neurological status was severely compromised and her condition continued to decline. (R. p. 21 at ¶¶ 18-20). In short, Kristy suffers from permanent hypoxic encephalopathy and other mental disabilities that prevent her from caring for herself. (R. p. 21 at ¶ 19-20).

Kristy was rendered bed-ridden with severely compromised breathing and decreased neurologic function following Dr. Creagh and AMISUB's care. Kristy's illness prevented her from understanding the nature of her own acts, made her incapable of managing her own affairs, and generally made her unable to function in society. AMISUB acknowledges Kristy was insane beginning in late November 2003. See Initial Brief of Appellant (AMISUB) at 13 ("Ms. Orlowski's mental incompetence rendered her

'insane' for purposes of Section 15-3-40 at the time of accrual of her alleged claims against Amisub"). Kristy's insanity continues as her medical condition has continued to prevent her from engaging in the activities of "sane" persons discussed in Wiggins.

Kristy's condition left her insane at the time her claims accrued and renders her insane still today. Kristy is entitled to the full benefit of five years of tolling if the disability tolling statute applies to her claims. By § 15-3-40's plain language, tolling does apply to her claims. Disability tolling applies to any action "mentioned in Article 5 of this chapter or an action under Chapter 78 of this title." Chapter 78 is a reference to the South Carolina Tort Claims Act, a statute governing claims against governmental entities that does not apply to this case. "Article 5 of this chapter" refers to all claims mentioned in Chapter 15, Article 5 of the South Carolina Code. This Article covers "actions other than for recovery of real property" and includes a medical negligence claim, the statute of limitations for which is codified at § 15-3-545.

Appellants argue disability tolling does not apply to medical negligence claims and wholly ground this position in a single Supreme Court opinion, Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993). Langley is distinguishable on multiple points. The Langley court construed a completely different tolling provision than the one at issue in the present case. The Langley defendant was a doctor who moved from South Carolina to Florida before the claim accrued. 313 S.C. at 402, 438 S.E.2d at 242. The plaintiff was attempting to toll the statute of limitations under S.C. Code Ann. § 15-3-30, which prevents the statute from running for periods where the defendant is out of state. Id. The disability tolling provision and the statute at issue in Langley have very different

language that represents potentially different legislative intent. It is inappropriate, therefore, to simply apply the holding in Langley in this case.

Additionally, Langley's interpretation of § 15-3-545 was limited to the statute of repose. The certified question the Court received from the 4th Circuit Court of Appeals was "Whether the Statute of Repose in S.C. Code Ann. § 15-3-545" was tolled by the out-of-state defendant tolling provision. Langley, 313 S.C. at 401, 438 S.E.2d at 242. All of the Court's public policy discussion concerns specific policy justifications unique to statutes of repose. Id. at 403-04, 438 S.E.2d at 243-44. The Court took efforts to distinguish other cases that "involved a statute of limitations, not one of repose." Id. at 405, 438 S.E.2d at 244. The distinction between a statute of limitation and statute of repose in an important one and severely limits the utility of Langley in the present case. A statute of repose "constitutes a substantive definition of rights" that confer "substantive grants of immunity" while a statute of limitation is simply a "procedural limitation." Id. at 404, 438 S.E.2d at 243-44 (internal citations omitted).

Langley holds only that the out-of-state defendant tolling provision does not toll the medical malpractice statute of repose in § 15-3-545. This holding does not portend the result Appellants seek in this case. By its terms, the disability tolling provision applies to all claims mentioned in Article 5 of Chapter 15. Medical negligence claims clearly fall within that category. Giving effect to § 15-3-40's unambiguous language requires tolling of Kristy's medical negligence claims during the period of her insanity. Langley does not compel a different result.

IV. CHRISTOPHER ORLOWSKI'S APPOINTMENT AS KRISTY ORLOWSKI'S CONSERVATOR HAD NO EFFECT ON HER STATUS AS AN "INSANE" PERSON FOR PURPOSES OF § 15-3-40.

If a person entitled to pursue a legal claim is "insane" at the time of the claim's accrual, then "the time of the disability is not a part of the time limited for the commencement of the action." S.C. Code Ann. § 15-3-40. Thus, if a person meets the definition of "insane," then the statute of limitations for her claim is tolled for "the time of the disability" up to the statutory maximum of 5 years.[2] As discussed above, Kristy's medical records show that she was "insane" in November 2003 under the Wiggins description and remains insane today. Appellants have even admitted that Kristy's condition was dire enough to qualify as insane.

Appellants do not claim Kristy's post-December 2003 condition changed in such a way that she no longer qualifies as insane for purposes of the disability tolling statute. Instead, they argue a change in circumstances external to Kristy's physical condition somehow rendered her no longer insane. This conclusion is not supported by the statute's text. As Judge Kimball noted, the statute makes no mention of conservator/guardian appointment and certainly does not establish such appointment as a terminating factor for a physically-incapacitated person's "insanity." (R. p. 259). Section 15-3-40 explicitly states the measuring period for disability tolling as "the time of the disability." The time of Kristy's disability has not ended. Therefore, she is entitled to the full five years of tolling permitted by the statute.

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[2] The express language of § 15-3-40 shows that disability tolling "extend[s]" the time for filing rather than defining the time for filing. Where a person is insane at accrual and remains insane, disability tolling extends a three year statute of limitations by five years, resulting in an eight year period in which the claim may be filed. See Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 n. 5 (2003)(concluding insane plaintiff would have "seven years from discovery" of claim to file suit under South Carolina Tort Claims Act's two-year statute of limitations).

AMISUB/Dr. Creagh specifically claim Kristy's insanity concluded in March 2004 when a conservator and guardian were appointed for her. This claim is not supported by South Carolina law and represents a view on disability tolling rejected by the vast majority of courts to consider the issue in other jurisdictions. The tolling statute's structure is quite basic. Tolling applies if the person in question is "insane" at a claim's accrual and tolling continues for the time of the insanity up to a total of five years. As AMISUB notes in its brief, Wiggins provides further insight as to the degree of impairment required for a person to be considered "insane." It is the condition of the insane person not any other person that determines the continued application of disability tolling. If AMISUB/Dr. Creagh hope to show Kristy is entitled to less than five years of disability tolling, then their task is to point to some marked improvement in Kristy's prognosis or increased autonomy—i.e. some indication that her physical condition is no longer "insane" as stated in the statute and described in Wiggins. The appointment of a conservator does not speak to Kristy's physical capability, the only factor that matters in determining the existence and continuance of disability tolling.

South Carolina courts have not directly decided this issue. However, the majority of courts in other jurisdictions have held that the appointment of a conservator has no bearing on the continued viability of a person's insanity for tolling purposes. After surveying many decisions on this issue, the Supreme Court of Ohio found "[t]he overwhelming majority of courts...have concluded that the appointment of a guardian has no effect on the tolling of the statute of limitations." Weaver v. Edwin Shaw Hosp., 819 N.E.2d 1079, 1085 (Ohio 2004). Retaining disability tolling notwithstanding conservator appointment has become the majority rule for a variety of reasons. For

example, courts have made the common sense observation that a conservator's appointment does nothing to alter the injured person's insane status. See e.g. Abels v. Genie Indus., Inc.; 202 S.W.3d 99, 105 (Tenn. 2006)(finding "disability of unsound mind is removed when the individual is no longer of unsound mind, due either to a change in the individual's condition or the individual's death"); Talley v. Portland Residence, Inc., 582 N.W.2d 590, 591 (Minn. App. 1998)("The appointment of a conservator in no way 'removed' [disabled person's] mental retardation"). Other courts have noted that, for the length of their insanity, an insane person is incapable of participation in the case even if a conservator is appointed. See e.g., Unkert v. General Motors Corp., 694 A.2d 306, 310 (N.J. App. 1997)("so long as the injured party remains incompetent, he is unable to assist in the preparation and presentation of his case").

Even the arguments Appellants rely on so heavily have proven unsuccessful in other jurisdictions. AMISUB/Dr. Creagh point to provisions of the South Carolina Rules of Civil Procedure and the South Carolina Probate Code for the proposition that Kristy's conservator had the capacity or even the duty to file suit on Kristy's behalf much earlier. AMISUB/Dr. Creagh also claim Kristy's conservator had all the knowledge he needed to file suit and, therefore, his appointment should end Kristy's disability. Similar arguments were considered and rejected in Sahf v. Lake Havasu City Association for the Retarded & Handicapped, 721 P.2d 1177 (Ariz. App. Div. 1 1986). The Sahf court refused to cut disability tolling short following a guardian's appointment even "where a guardian with a legal duty to bring appropriate lawsuits on behalf of her ward has been appointed and where that guardian has full knowledge of the facts." 721 P.2d at 1182.

Appellants' interpretation of § 15-3-40 suffers several flaws. First, it requires a strained, unnatural reading of the statute's unambiguous language. Second, it fails to give proper consideration to the legislature's choice, expressed through the statute's language, to extend tolling for "the time of the disability." Third, it inserts language about conservatorship in the statute that the legislature chose not to include. If the legislature intended to discontinue disability tolling at the appointment of a conservator, then the legislature could have said so. Legislatures from other jurisdictions have made this choice. See e.g., Va. Code Ann. § 65.2-528 (tolling statute of limitations for "any person who is incapacitated...so long as he has no guardian, trustee, or conservator"). South Carolina's legislature has not made this choice and such language should not be read into the statute. Tilley v. Pacesetter Corp., 333 S.C. 33, 40, 508 S.E.2d 16, 20 (1998)(citing Hainer v. Am. Med. Int'l, 328 S.C. 128, 492 S.E.2d 103 (1997)(if legislature had intended certain result in statute, it would have said so).

AMISUB also claims the trial court erred in applying disability tolling to Respondent's claim because Gladys Sims, Kristy's guardian and conservator, is not personally "insane" and does not personally qualify for disability tolling. Initial Br. of Appellant (AMISUB) at 15-17. This claim misunderstands the fundamental role Ms. Sims has in this litigation. As a representative of an incompetent person, Ms. Sims "may sue...on behalf of" Kristy Orlowski. Rule 17(c), SCRCP. It is Kristy's injuries that are claimed as damages in the suit Ms. Sims filed and Kristy's rights that are to be vindicated by resolution of this matter. It is well understood in state and federal jurisdictions that the individual to consider when making key determinations is the individual whose rights are at issue, not the person who simply stands in for purposes of filing suit. Under federal

law, the legal representative of an incompetent person "shall be deemed to be a citizen only of the same State as the...incompetent" person. 28 U.S.C. § 1332(c)(2). Accordingly, in a suit filed by an incompetent South Carolina nursing home resident's legal representative, it was the resident's citizenship that was important for jurisdictional purposes as the legal representative's citizenship was deemed the same as the resident's. See Long v. Sasser, 91 F.3d 645 (4th Cir. 1996).

AMISUB invites the Court to adopt an interpretation of the statute that leads to absurd results the legislature did not intend. Section 15-3-40 grants insane individuals the benefit of five years of disability tolling. Under AMISUB's approach, many insane individuals would be denied the full benefit of the five years. The present case presents a useful example. Suppose a person's insanity is caused by a defendant's allegedly tortious conduct and the length of that insanity is uncertain. If the insane person is approaching the end of the disability tolling period and statute of limitations period and the insanity-producing condition remains, then the insane person's claim will be lost if not filed by a legal representative. AMISUB's approach would bar any such claim because the representative is not insane, does not qualify for disability tolling, and therefore will have filed out of time. To ensure a timely suit under AMISUB's approach, a legal representative would have to file within the statute of limitations even if the injured person remains insane and entitled to the tolling explicitly stated in § 15-3-40. This approach belies the statute's clear language and denies vulnerable individuals the benefit the statute was designed to confer.

Kristy's "insanity" was present immediately after Appellants' allegedly negligent acts, at the time of her former husband's appointment as a conservator, and to this date.

Since her insanity persisted for at least five years following the date of accrual, she is entitled to the full five years of tolling provided by § 15-3-40. The five years of tolling combined with the applicable three year statute of limitations gave Kristy eight years from accrual to file suit. Accordingly, Respondent's November 24, 2009 Complaint was timely and Judge Kimball's order denying Appellants' summary judgment motion on statute of limitations grounds should be affirmed.

CONCLUSION

Based on the arguments stated above, the circuit court's ruling on the statute of limitations issue should be affirmed. This appeal is improper because denial of a summary judgment motion is not properly appealable and the issue was not properly preserved for appeal. Additionally, the circuit court properly ruled that Respondent's claim was commenced within the statute of limitations.

Respectfully submitted,

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April 23, 2013

Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Case No. 2009-CP-46-5178

Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (a/k/a Kristy Wood) ..... Appellant/Respondent.

v.

Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center, and C. Edward Creagh, M.D., ... Respondents/Appellants.

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the following briefs comply with Rule 211(b), SCACR:

(1) Appellant's Final Brief of Appellant/Respondent;

(2) Appellant's Final Reply Brief of Appellant/Respondent; and

(3) Respondent's Final Brief of Appellant/Respondent.

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PROOF OF SERVICE

The undersigned hereby certifies that on this 23rd day of April, 2013, he served counsel for the Defendants with a copy of the following documents:

(1) Appellant's Final Brief of Appellant/Respondent;
(2) Appellant's Final Reply Brief of Appellant/Respondent; and
(3) Respondent's Final Brief of Appellant/Respondent

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