ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
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

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Appellant's Final Brief of Respondent/Appellant AMISUB OF SOUTH CAROLINA, INC., D/B/A PIEDMONT MEDICAL CENTER

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STATEMENT OF THE CASE

On November 24, 2009, Gladys Sims, as the duly appointed guardian and conservator of Kristy L. Orlowski (A/K/A Kristy Wood) (hereinafter, "Ms. Orlowski"), filed this medical malpractice action against Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center ("Amisub"), C. Edward Creagh, M.D. (hereinafter, "Dr. Creagh"), and William Alleyne, M.D. (hereinafter, "Dr. Alleyne") (hereinafter, "Orlowski II"). (R. pp. 18 - 30). Orlowski II concerns treatment which Amisub and Dr. Creagh provided to Ms. Orlowski between November 27 - 29, 2003. (R. pp. 276:7 - 24). Drs. Creagh and Alleyne timely answered on March 29, 2010, and Amisub timely answered on May 4, 2010.

On April 15, 2010, Drs. Creagh and Alleyne filed a motion to dismiss or, alternatively, for summary judgment on the grounds that Orlowski II was barred by the applicable statute of limitations found in S.C. Code Ann. § 15-3-545 (Supp. 2011) (hereinafter, "Section 15-3-545").

(R. pp. 46 - 47).[1] Both Ms. Orlowski and Drs. Creagh and Alleyne provided detailed memoranda to the lower court. (R pp. 48 - 55, 56 - 58). Ms. Orlowski attached as Exhibit A to her memorandum an affidavit of guardian and conservator Gladys Sims in which Ms. Sims states her opinion that Ms. Orlowski has been mentally incompetent since September 12, 2003. (R. pp. 366 - 68).

On June 17, 2010, the Honorable S. Jackson Kimball presided over the hearing on Drs. Creagh and Alleyne's April 15, 2010 Motion. By Order filed June 25, 2010, the lower court denied the Motion on the ground that S.C. Code Ann. § 15-3-40 (Supp. 2003) (hereinafter, "Section 15-3-40") tolled the statute of limitations found in Section 15-3-545(A) because Ms. Orlowski had been "insane" for purposes of Section 15-3-40 since September 12, 2003. (R. p. 1).

On September 19, 2011, Drs. Creagh and Alleyne and Amisub served Ms. Orlowski with joint Requests to Admit concerning testimony and evidence which Ms. Orlowski presented in a prior case, Christopher T. Orlowski, as the duly appointed guardian and conservator of Kristy L. Orlowski (a/k/a Kristy Wood) v. Rock Hill Gynecological & Obstetrical Associates, P.A. and R. Norman Taylor, III, M.D., 2006-CP-46-2213 (hereinafter "Orlowski I"). (R. pp. 63 - 73). Ms. Orlowski responded to the September 19, 2011 Requests on November 3, 2011, admitting the accuracy of Dr. Creagh, Dr. Alleyne, and Amisub's recitations of certain testimony which she presented at the trial of Orlowski I. (R. pp. 75 - 76).

On October 20, 2011, Drs. Creagh and Alleyne and Amisub filed Second Joint Requests

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[1] Mr. McGowan of McGowan, Hood & Felder, LLC was substituted as Ms. Orlowski's attorney on April 27, 2010. Subsequently, on July 2, 2010, John F. Eversole, III was admitted *pro hac vice* as Mr. McGowan's co-counsel.

to Admit of Defendants to Plaintiffs, seeking admission that Ms. Orlowski presented additional certain testimony and evidence in Orlowski I. (R. pp. 291 - 365). Ms. Orlowski responded to those requests on November 22, 2011, admitting the accuracy of certain characterizations and representations of evidence and testimony which she presented at the trial of Orlowski I. (R. pp. 117 - 19).[2]

On November 29, 2011, Dr. Creagh and Amisub filed a joint motion requesting that the lower court determine the sufficiency or, alternatively, strike a portion of Ms. Orlowski's November 3, 2011 Responses. (R. pp. 59 - 76). On January 17, 2012, that motion was resolved by agreement of Ms. Orlowski to strike certain qualifying language from her November 3, 2011 Responses. (R. p. 374).

On April 16, 2012, Dr. Creagh filed a Motion for Summary Judgment on the grounds that Ms. Orlowski's action is barred by the statute of limitations provided in Section 15-3-545(A) and by the doctrines of collateral estoppel and issue preclusion. (R. pp. 77 - 79). On July 2, 2012, Amisub filed a Motion for Summary Judgment on the same grounds. (R. pp. 80 - 81). The parties prepared and presented detailed memoranda of law addressing the Motions. (R. pp. 82 - 87, 88 - 96, 97 - 232). On July 18, 2012, Judge Kimball heard the Motions. (R. pp. 233 - 90). On August 15, 2012, he entered an Order granting Dr. Creagh and Amisub's Motions on the ground of collateral estoppel and/or estoppel by judgment and denying their Motions as to expiration of the statute of limitations provided within Section 15-3-545. (R. pp. 2 - 11).

On September 4, 2012, Ms. Orlowski filed her Notice of Appeal. On September 10,

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[2] On November 23, 2011, Ms. Orlowski dismissed Dr. Alleyne from the case, and he is not a party to Amisub's appeal.

2012, Dr. Creagh filed his Notice of Appeal. On September 12, 2012, Amisub filed its Notice of Appeal. On October 29, 2012, Amisub filed its Amended Notice of Appeal.

STATEMENT OF THE FACTS

In 2003, Dr. Norman Taylor (hereinafter, "Dr. Taylor") and Rock Hill Gynecological & Obstetrical Associates, P.A. (hereinafter, "Rock Hill OB") provided prenatal care to Ms. Orlowski. (R. p. 300, ¶ 18). On September 12, 2003, Ms. Orlowski suffered an eclamptic seizure during pregnancy. (R. pp. 240:24 - 241:2). Following the seizure, she was hospitalized at Amisub from September 12, 2003 until November 24, 2003. (R. p. 241:18 - 21).

On November 25, 2003, Dr. Creagh re-admitted Ms. Orlowski to Amisub, diagnosing her with a left pleural effusion. (R. p. 20, ¶¶ 12 - 13). She was discharged on November 27, 2003. (R. p. 242:5 - 7). On November 29, 2003, Ms. Orlowski was re-admitted to Amisub for persistent vomiting and empyema. (R. p. 242:20 - 21). She contends that she suffered a cardiopulmonary arrest on December 8, 2003 and her condition worsened. (R. p. 243:7 - 10). On December 11, 2003, Ms. Orlowski was discharged to Carolinas Medical Center. (R. p. 243:10 - 11).

Ms. Orlowski claims that she has been mentally incompetent since September 12, 2003, the day of her eclamptic seizure. (R. p. 238:19 - 24). However, on March 5, 2004, Ms. Orlowski was appointed a guardian and conservator. (R. p. 370). The Certificate of Appointment charged Ms. Orlowski's guardian and conservator with all authority which those positions are granted by law. (R. p. 370).

On August 24, 2006, Ms. Orlowski, through her guardian and conservator, commenced Orlowski I. Within Orlowski I, Ms. Orlowski alleged that "as a direct and proximate result" of

Dr. Taylor and Rock Hill OB's medical negligence, she "suffered severe, debilitating, and permanent neurological deficits." (R. p. 302, ¶ 27). Specifically, Ms. Orlowski claimed past, present, and future injuries and damages, including "chronic pain and suffering;" "substantial medical expenses;" "disfigurement;" "mental anguish;" "loss of enjoyment of life;" "loss of income and related benefits;" "need for full time medical and nursing care to assist her with her activities of daily living;" "permanent restrictions and impairments that make it impractical for her to care for even her most basic of personal needs;" and "for such other damages as may be identified during the course of this litigation...." (R. pp. 302 - 03, ¶ 29(a) - (i)).[3]

At the trial of Orlowski I, Ms. Orlowski presented expert testimony opining that all damages incurred by Ms. Orlowski, and to be incurred in the future, were attributable to Dr. Taylor and Rock Hill OB. (R. p. 9). For example, Ms. Orlowski presented expert testimony of Stephen Pliskow, M.D. that, to a reasonable degree of medical certainty, all of Ms. Orlowski's medical problems have been caused by the September 12, 2003 eclamptic episode and that episode could have been avoided had Dr. Taylor hospitalized Ms. Orlowski on September 11, 2003. (R. pp. 66 - 67, 76). Ms. Orlowski also presented testimony from expert economist Oliver Wood, Ph.D. seeking recovery from Dr. Taylor and Rock Hill OB for economic losses, lost earning capacity, medical expenses, future life care planning needs, and the like from September 12, 2003 forward. (R. pp. 67 - 73, 76).

Most significantly, as indicated by Dr. Wood's testimony, Ms. Orlowski argued that all damages sought during that trial were a direct and proximate result of Dr. Taylor and Rock Hill

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[3] During the pendency of Orlowski I, Ms. Orlowski was divorced, and her mother, Gladys Sims, was substituted as her guardian and conservator in the place of her ex-husband, Christopher T. Orlowski. (R. p. 5 - 6).

OB's negligence occurring on or before September 12, 2003. (R. pp. 122 - 23, 125). Though a defense verdict was returned, Ms. Orlowski benefitted from her efforts at trial through the receipt of $300,000.00 pursuant to high-low agreement approved before the verdict was entered. (R. p. 6).

Seemingly dissatisfied with the benefit received from Orlowski I, Ms. Orlowski, again through her guardian and conservator, commenced Orlowski II on November 24, 2009, almost six years after the alleged negligent care and over five years after she had been appointed a guardian and conservator. (R. pp. 18 - 30). Within Orlowski II, Ms. Orlowski alleges that due to medical negligence of Dr. Creagh and Amisub occurring between November and December 2003, she "suffered severe debilitating injuries which have resulted in her incompetent state due to the hypotensive episode and hypoxic condition which has caused physical suffering, severe physical, cognitive and emotional pain and distress, and has ultimately caused Kristy Orlowski's permanent and severely disabled physical and mental state,...." (R. p. 24, ¶ 24). Orlowski II seeks damages against Dr. Creagh and Amisub for the same exact list of injuries and damages claimed in Orlowski I against Dr. Taylor and Rock Hill OB. (R. pp. 16 - 17, ¶ 29(a) - (i); 24 - 25, ¶ 25(a) - (I), 27, ¶ 30(a) - (i)).

The lower court granted Dr. Creagh and Amisub's Motions for Summary Judgment on the ground that Ms. Orlowski is collaterally estopped and/or estopped by judgment from claiming that Dr. Creagh and Amisub are liable for the same injuries and damages that her expert witnesses attributed to Dr. Taylor and Rock Hill OB in Orlowski I. However, the lower court denied Dr. Creagh and Amisub's Motions as to the argument that Ms. Orlowski's action was barred by the applicable statute of limitations, Section 15-3-545. Based upon the evidence before and

considered by the lower court, Judge Kimball erred in denying Amisub's Motion on the ground that Orlowski II is barred by the three year statute of limitations pursuant to Section 15-3-545.

STANDARD OF REVIEW

Amisub recognizes that, under the current state of appellate law, the denial of a motion for summary judgment is not immediately appealable.[4] Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003). Amisub also recognizes that the Court is free to revisit past precedent and reverse the same where necessary. See, e.g., McLeod v. Starnes, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012) cert. denied, No. 11-1472, 2012 WL 2050445 (U.S.S.C. Oct. 1, 2012) ("We are not unmindful of the imprimatur of correctness which stare decisis lends to that decision. However, stare decisis is not an inexorable command....").

An appellate court reviews summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). "'The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.'" Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 545, 694 S.E.2d 1, 4 (2010) (internal citation omitted). As such, "[s]ummary judgment is properly granted when: '[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id., 387 S.C. at 545-46, 694 S.E.2d at 4, quoting Rule 56(c), SCRCP.

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[4] Recognizing the holding in Olson, Amisub intends to also raise the arguments raised in this cross-appeal within its respondent's brief filed in response to Ms. Orlowski's appeal pursuant to Rule 220(C), SCACR and I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

ARGUMENT

I. The Lower Court erred in denying Amisub's Motion for Summary Judgment pursuant to S.C. Code Ann. § 15-3-545 by erroneously applying S.C. Code Ann. § 15-3-40 to toll the applicable limitations period.

This is a medical malpractice action (R. p. 5). Section 15-3-545(A) provides that an action for medical negligence must be commenced within three years from the date of the alleged negligent treatment or within three years from when the same is discovered or reasonably ought to have been discovered. Further, Section 15-3-545(A) specifies that a medical malpractice action must be either commenced during the above limitations period or "**as tolled by the section**." (Emphasis added). The only tolling provision in Section 15-3-545 is Subsection D:

> Notwithstanding the provisions of Section 15-3-40, if a person entitled to bring an action against a licensed health care provider acting within the scope of his profession is under the age of majority at the date of the treatment, omission, or operation giving rise to the cause of action, the time period or periods limiting filing of the action are not tolled for a period of more than seven years on account of minority, and in any case more than one year after the disability ceases. Such time limitation is tolled for minors for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion in the failure to bring an action on behalf of the injured minor.

S.C. Code Ann. § 15-3-545(D) (Supp. 2011).

At the July 15, 2012 Motion for Summary Judgment hearing, the trial judge recognized that Section 15-3-545(D) addresses minority but does not address insanity. (R. p. 259:5 - 9). A court's "primary function in interpreting a statute is to ascertain the intent of the legislature." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) (internal citation omitted). "The best evidence of intent is in the statute itself." Media Gen'l Comm., Inc. v. S.C. Dep't of Rev., 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010). "Laws giving specific treatment

to a given situation take precedence over general laws on the subject, and later legislation takes precedence over earlier laws." Duke Power Co. v. S.C. Public Service Com'n, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985).

Applying the above rules of statutory construction, the South Carolina Supreme Court answered a certified question from the Fourth Circuit Court of Appeals, holding that (1) Section 15-3-545(D) provides tolling only for minors and (2) Subsection D is the exclusive tolling provision applicable to Section 15-3-545. Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993). In the underlying case, the defendant doctor removed two lesions from the plaintiff's leg in 1979 and 1980. Id. at 402, 438 S.E.2d at 242. In 1984, the doctor moved out of South Carolina. Id. In 1990, the plaintiff discovered that the lesions had been malignant at the time of removal. Id. In 1991, he filed suit against the doctor in the United States District Court, Anderson Division. Id.

The District Court granted the doctor summary judgment on the grounds that the six year statute of repose in Section 15-3-545(A) barred the plaintiff's action. Id. Plaintiff argued on appeal to the Fourth Circuit Court of Appeals that the six year statute of repose in Section 15-3-545(A) was tolled by S.C. Code Ann. § 15-3-30 (Supp. 2011), a general tolling statute. Id. The Fourth Circuit certified that question to the South Carolina Supreme Court. Id.

The Supreme Court emphasized that Section 15-3-545(A) stated, "or as tolled by this section.'" Id. at 402, 438 S.E.2d at 243, quoting S.C. Code Ann. § 15-3-545(A). The Court next quoted Section 15-3-30: "'If when a cause of action shall accrue against any person he shall be out of the State, such *action may be commenced within the terms in this chapter*...after the return of such person into this State.'" Id. at 403, 438 S.E.2d at 243 (emphasis original). The plaintiff

argued that inclusion of "in this chapter" caused Section 15-3-30 to apply to Section 15-3-545. Id.

The Supreme Court disagreed. Id. The applicable holding is two-fold. First, Langley holds that Section 15-3-545(D) "provides a limited tolling provision, applicable only to minors." Id. Secondly, Langley holds, "Inclusion of the phrase '*or as tolled by this section*' in subsection (A) clearly indicates that the *only* tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D)." Id., quoting S.C. Code Ann. § 15-3-545 (emphasis original). The Court refused to apply the more general tolling statute, Section 15-3-30, to toll the more specific Section 15-3-545(A), answering the Fourth Circuit's question by holding that the plaintiff's action was barred by the six year statute of repose contained in Section 15-3-545(A). Id. at 405, 438 S.E.2d at 244.

In the present case, Ms. Orlowski's argument is that a more general tolling statute, Section 15-3-40, applies to toll the limitations period in Section 15-3-545 and saves her claim from application of the statute of limitations.[5] (R. p. 254:1 - 8). Section 15-3-40 states,

> If a person entitled to bring an action mentioned in Article 5 of this chapter or an action under Chapter 78 of this title,...is at the time the cause of action accrued either: (1) within the age of eighteen years; or (2) insane; the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended: (a) more than five years by any such disability, except infancy; nor (b) in any case longer than one year after the disability ceases.

S.C. Code Ann. § 15-3-40 (Supp. 2003). Noting that "it's sort of perplexing," the trial judge

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[5] Within his Order, the trial judge states, "Defendants do not dispute the applicability of the tolling statute,...." (R. p. 7). In fact, Amisub did dispute application of Section 15-4-40. When the trial judge asked counsel for Amisub what his position would be "about the running of the statute as it pertains to 15-3-40," counsel responded, "I don't think this affects it,...." (R. pp. 246:19 - 22, 247:6 - 10). Later, the Court reiterated to counsel for Amisub, "But, your position on that is that 15-3-40 doesn't have any effect - - that it stands alone, in medical malpractice cases," to which counsel for Amisub replied, "Yes sir." (R. p. 257:14 - 17).

expressed concern over the interaction between Sections 15-3-545 and 15-3-40. (R. pp. 258:25 - 259:2). He recognized that "15-3-545 obviously acknowledges an interaction with 15-3-40." (R. p. 259:1 - 2). He also noted that Section 15-3-545(D) only "addresses the result of the effect of minority" but "does not address anything to do with insanity." (R. p. 259:5 - 9). The trial judge concluded that Section 15-3-40 applied to toll the statute of limitations provided in Section 15-3-545(A) stating, "So, I think that, to the extent 15-3-545 conflicts with - - the times periods in 15-3-545...that 15-3-40....trumps 15-3-545." (R. p. 259:9 - 12).

Applying Langley to the present case, the lower court's construction and analysis of Section 15-3-545 is in error. Like the plaintiff in Langley, Ms. Orlowski brings a medical malpractice action. Also like the plaintiff in Langley, Ms. Orlowski attempts to save her case by arguing that a general tolling statute should somehow trump a complete, self-contained statute specifically applicable to medical malpractice actions. Finally, both the general tolling statute at issue in Langley and the general tolling statute at issue in this case contain language claiming that they are applicable to all causes of action in Chapter 15.

The Langley Court was expressly clear in its interpretation of Section 15-3-545: the only tolling provision applicable to Section 15-3-545 is contained in Subsection (D) thereto and only applies to minors. Ms. Orlowski is not a minor. Section 15-3-40 does not apply to toll Ms. Orlowski's limitations period. Consequently, the trial judge misapplied Section 15-3-545 and erred in denying Amisub summary judgement on the ground that Ms. Orlowski's action is barred by the three-year limitations period contained within Section 15-3-545(A).

II. The Lower Court erred in denying Amisub's Motion for Summary Judgment pursuant to S.C. Code Ann. § 15-4-545 by erroneously finding that any tolling provided by S.C. Code Ann. § 15-3-40 did not cease upon appointment of a guardian and conservator on March 5, 2004 or, alternatively, no later than August 26, 2006.

As set forth above, Section 15-3-545(A) provides that an action for medical negligence must be commenced within three years from the date of the alleged negligent treatment or within three years from when such is discovered or reasonably ought to have been discovered. Discovery of a claim occurs when, acting with some promptness, "'the facts and circumstances of the injury would put a person of common knowledge on notice that some right of his has been invaded or that some claim against another party might exist.'" Strong v. Univ. of S.C. School of Med., 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994), quoting Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 333, 278 S.E.2d 333, 334 (1981).

Although she did not commence Orlowski II until November 24, 2009, Ms. Orlowski argues that she should be excused from application of Section 15-3-545(A)'s limitations period because she has been mentally incompetent since September 13, 2003. Specifically, she claims that Section 15-3-40 applies to extend her limitations period from three years to eight years because she qualifies as "insane." As stated in Argument I above, Section 15-3-40 provides that when a person is insane at the time that a claim arises in her favor, the time of her insanity is not counted against her time limitation to commence an action on that claim. However, as to insanity based upon mental incompetency, the limitations period cannot be extended for "more than five years." S.C. Code Ann. § 15-3-40.

The definition of "insanity" illuminates the purpose behind Section 15-4-30. "Insanity" is defined as "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) (internal citation omitted). Section 15-3-40 reflects a balancing between the need to preserve the legal rights of those who are unable to bring suit to protect their own rights and the need to guard individuals against the uncertainty of open-ended potential claims. Thus, Section 15-3-40 is general tolling provision that protects a person from application of the statute of limitations for a certain period, but not more than five years.

Amisub urges that Section 15-3-40 does not apply to toll the statute of limitations in Section 15-3-545(A). However, hypothetically applying Section 15-3-40 to this action, Amisub concedes that 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 (R. p. 267:18 - 19). Under this hypothetical, Ms. Orlowski would, indeed, be entitled to tolling of her limitations period to commence suit against Amisub during the period of time which she had no means to protect and preserve her own legal rights.

However, Ms. Orlowski has been entitled to the protections of a guardian and conservator since March 5, 2004. (R. p. 370). The South Carolina Probate Code authorizes both guardians and conservators with the power and right to bring actions on behalf of incompetent persons. See S.C. Code Ann. § 62-5-312(a) (Supp. 2009); S.C. Code Ann. § 62-5-424(17)(Supp. 2009). Further, Rule 17, SCRCP provides guardians and conservators with the procedural mechanism to put this authority into action, providing that when a real party in interest is incompetent, her guardian and/or conservator is entitled to file suit on her behalf. See Rule 17(c), SCRCP.

As such, even if Section 15-3-40 applied to toll Ms. Orlowski's limitations period against Amisub, her period of insanity ceased on March 5, 2004. Ms. Orlowski's guardian and conservator was fully empowered to prosecute actions on her behalf. Ms. Orlowski no longer needed or qualified for the protections supporting application of Section 15-3-40. Further, Ms. Orlowski has put forth no evidence that her guardian and conservator was incompetent or was otherwise unable to act to protect and preserve her legal rights. Ms. Orlowski's then-husband, Christopher T. Orlowski, first served as her guardian and conservator. (R. p. 370). Mr. Orlowski had been in the best possible position of any third party to observe Ms. Orlowski's unfortunate demise between September - December 2003. He was fully aware of her injuries and, through the exercise of reasonable diligence, on March 5, 2004, he knew or should have known of any potential claim he was empowered to assert for Ms. Orlowski based upon her September 12, 2003 - December 8, 2003 hospitalizations.

Consequently, the three year statute of limitations provided by Section 15-3-545(A) and applicable to Ms. Orlowski's action against Amisub commenced running on March 5, 2004. For the next three years, the guardian and conservator could and should have investigated and commenced all claims that he deemed prudent. In fact, the guardian and conservator did just that, commencing Orlowski I against Dr. Taylor and Rock Hill OB on August 24, 2006. However, the three year limitations period on Ms. Orlowski's claim against Amisub expired on March 5, 2007, and the guardian and conservator chose not to institute an action against Amisub before that date.

Alternatively, and at the latest, Ms. Orlowski's limitations period as to Amisub commenced running on August 24, 2006 when her guardian and conservator filed Orlowski I, alleging negligence and seeking recovery for the same damages sought in this action.

Hypothetically tolling Ms. Orlowski's limitations period to commence suit against Amisub to the above latest possible date that her claim against Amisub ought to have been discovered, Ms. Orlowski was required to commence her action against Amisub on or before August 24, 2009, three years from the filing date of Orlowski I. Again, the guardian and conservator failed to do so.

At the hearing on Dr. Creagh and Amisub's Motions for Summary Judgment, Ms. Orlowski's counsel argued that Section 15-3-40 provides Ms. Orlowski and her guardian and conservator with an eight-year limitations period to commence the instant action. (R. p. 255:16 - 19). The blatant inconsistency in Ms. Orlowski's position is not lost on Amisub. Ms. Orlowski and her guardian and conservator argue that she is entitled to the benefit of Section 15-3-40, a statute designed to protect the rights of those whose rights would otherwise go unprotected. However, on August 24, 2006, Ms. Orlowski and her guardian and conservator, acting to protect Ms. Orlwoski's legal rights, took up the sword and commenced Orlowski I against Dr. Taylor and Rock Hill OB. Consequently, on that same day, Ms. Orlowski and her guardian and conservator consciously abandoned Ms. Orlowski's mental incompetence as a shield against application of the statute of limitations.

It is unfortunate for Ms. Orlowski that Orlowski I did not reach the result which Ms. Orlowski, her guardian and conservator, and her *pro hac vice* counsel desired. However, there is no tolling provision applicable to Section 15-3-545 that allows a claimant and her representatives to take an untimely, second bite at the apple when the first bite turns out to be sour. By November 24, 2009 when Orlowski II was commenced, Ms. Orlowski's limitations period had expired. The present action is barred by application of Section 15-3-545(A), and the

lower court erred in denying Amisub summary judgment on that ground.

III. The Lower Court erred in denying Amisub's Motion for Summary Judgment pursuant to S.C. Code Ann. § 15-3-545 by improperly applying S.C. Code Ann. § 15-3-40 to toll the limitations period applicable to Ms. Orlowski's guardian and conservator.

As stated above, Section 15-3-545(A) provides a three-year limitations period on any claim arising out of medical malpractice. Ms. Orlowski argues, and the lower court agreed, that Section 15-4-30 applies to toll the limitations period provided in Section 15-3-545(A) because Ms. Orlowski is insane. Amisub argues that Section 15-3-40 has no application to Section 15-3-545. However, hypothetically applying Section 15-3-40, both Ms. Orlowski and the trial judge have overlooked the fact that Ms. Orlowski's guardian and conservator, and not Ms. Orlowski, instituted Orlowski II.

On the one hand, Ms. Orlowski's guardian and conservator separates herself from Ms. Orlowski and takes advantage of the authority granted by the Probate Code and Rule 17, SCRCP to maintain this action on Ms. Orlowski's behalf. Indeed, if Ms. Orlowski had attempted to bring this action in her own name, Amisub would be allowed to raise the issue of her competency as an affirmative defense pursuant to Rules 9 and 17, SCRCP. On the other hand, to avoid Amisub's statute of limitations defense, the guardian and conservator attempts to claim the tolling benefit of Ms. Orlowski's insanity as her own. The inconsistency in the two positions is apparent.

If Section 15-3-40 is to apply at all, it must apply specifically to each person entitled to bring an action. Ms. Orlowski had appointed a guardian and conservator on March 5, 2004. As stated in Argument II above, Section 62-5-312(a) and 62-5-424(17) authorized the guardian and conservator to bring actions on Ms. Orlowski's behalf. The guardian and conservator was

intimately familiar with Ms. Orlowski's September 12, 2003 - December 8, 2003 hospitalizations and reasonably ought to have discovered any action he was authorized to bring on Ms. Orlowski's behalf against Amisub no later than August 24, 2006 when Orlowski I was commenced. Pursuant to Section 15-3-545(A), the guardian and conservator's three year limitations period to commence any such claim expired no later than August 24, 2009, three months before the guardian and conservator filed Orlowski II.

At the hearing on Amisub's Motion for Summary Judgment, Ms. Orlowski's counsel argued that "the applicable statute of limitations is eight years," meaning that Orlowski II was timely commenced. (R. p. 255:16 - 19). Hypothetically applying Section 15-3-40 to this action, if Ms. Orlowski's disability had ceased on or before November 29, 2011 and Ms. Orlowski instituted this action before the earlier of one year from the date her disability ceased or November 29, 2011, her action might have been saved from application of Section 15-3-545(A).

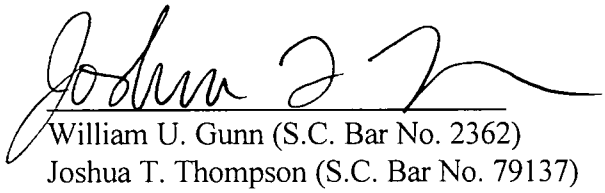
However, that is not the case. Ms. Orlowski's disability continues, and the present action has been commenced by Ms. Orlowski's guardian and conservator. Section 15-3-40 provides no authority for the guardian and conservator to avail herself of Ms. Orlowski's disability for purposes of tolling the guardian and conservator's own limitations period. Ms. Orlowski's initial guardian and conservator discovered or reasonably ought to have discovered the claim against Amisub no later than August 24, 2006. At the latest, the guardian and conservator's limitations period expired as of August 24, 2009—three months before Orlowski II was commenced, and the trial judge erred in denying Amisub's Motion for Summary Judgment pursuant to Section 15-3-545(A).

CONCLUSION

The trial judge erred in denying Amisub summary judgment on the grounds that Ms. Orlowski's claim is barred by the applicable statute of limitations. Primarily, he incorrectly interpreted Section 15-3-545(A) and applied a general tolling statute that is inapplicable to that Section. Secondly, assuming that the lower court did properly apply Section 15-3-40, it erred in failing to find that any tolling to which Ms. Orlowski and her guardian and conservator were entitled ceased no later than August 26, 2006. Because this action was commenced on November 24, 2009, the action is barred by application of the statute of limitations provided in Section 15-3-545, and the lower court's denial of summary judgment in favor of Amisub on this ground must be reversed.

Respectfully submitted,

HOLCOMBE BOMAR, P.A.

By: 

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Spartanburg, SC

April 10, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
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,

v.

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

of whom, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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of whom, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center is the Respondent and Cross-Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on this 17th day of April 2013, he has served counsel for Appellant-Respondent Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (a/k/a Kristy Wood) and counsel for Respondent-Appellant C. Edward Creagh, M.D. with copies of (1) the Final Brief of Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center; (2) the Final Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center; and (3) the Final Reply Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center in this matter by mailing copies of the same by United States Mail, postage

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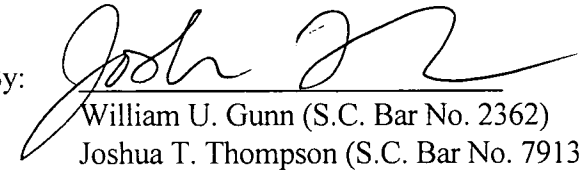
By: 

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