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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
S. Jackson Kimball, Special Circuit Court Judge

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SC Court of Appeals

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

Appellant's Final Reply Brief of Respondent/Appellant

~~OF APPELLANT~~ AMISUB OF SOUTH CAROLINA, INC., D/B/A PIEDMONT MEDICAL CENTER

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REPLY ARGUMENT

I. Amisub has properly preserved its argument concerning expiration of the statute of limitations because it is an additional sustaining ground before this Court on appeal.

Within her Respondent's Brief, Ms. Orlowski overlooks the impetus behind Amisub filing a cross-appeal in this matter. In its Brief as Appellant, Amisub clearly sets forth that it will raise all arguments raised on cross-appeal as additional sustaining grounds within its brief as Respondent to Ms. Orlowski's appeal. Amisub Brief as Appellant, n. 4, citing I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); Rule 220(C), SCACR. This additional sustaining ground is presented to this Court only out of an abundance of caution to ensure that the issue properly is before this Court and is not deemed waived or abandoned in any respect.

It is well-settled that a party "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724; see also Rule 220(c), SCACR. The only requirement is that the additional sustaining ground appears in the Record on Appeal. I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724. Though it is within the appellate court's discretion whether to consider additional sustaining grounds, the Supreme Court has recognized that "it would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review." Id. Indeed, "[a]n affirmance promotes judicial economy and finality in private and public affairs which are important public policies." Id. at 421, 526 S.E.2d at 723.

Ms. Orlowski incorrectly argues that expiration of the statute of limitations is not an

additional ground before this Court upon which the Lower Court's grant of summary judgment may be sustained. At the July 18, 2012 Motion Hearing, Amisub argued two grounds for summary judgment: (1) estoppel and (2) expiration of the medical negligence statute of limitations provided in S.C. Code Ann. § 15-3-545(A) (Supp. 2011) (hereinafter, "Section 15-3-545"). (R. p. 240:11 - 20). Within her brief as Respondent, Ms. Orlowski admits that Amisub raised expiration of the statute of limitations pursuant to Section 15-3-545 as a ground for summary judgment stating, "Amisub also moved for summary judgment based on the statute of limitations...." Orlowski Brief as Respondent, p. 7.

Nonetheless, Ms. Orlowski attempts to dichotomize Amisub's argument as to expiration of the statute of limitations. She asserts that Amisub did not raise the issue of interaction between S.C. Code Ann. § 15-3-40 (Supp. 2003) (hereinafter, "Section 15-3-40"), a general tolling statute, and Section 15-3-545(A). However, as Ms. Orlowski concedes in her Brief as Appellant, there can be no dispute that Amisub briefed, raised, and argued its point that Ms. Orlwoski's action is time-barred pursuant to Section 15-4-545(A). (R. p. 240:11 - 20.) Additionally, the transcript of the July 18, 2012 hearing on Amisub and Dr. Creagh's Motions for Summary Judgment demonstrates that consideration of the interaction between Sections 15-3-545(A) and 15-3-40 is necessary to Amisub's statute of limitations argument. Indeed, the Lower Court considered the interaction between Sections 15-3-545(A) and 15-3-40 on the record. (R. p. 258:25 - 60:1).

Further, whether the Lower Court ruled against Amisub as to the statute of limitations defense is irrelevant.[1] The statute of limitations provided in Section 15-3-545(A) remains an

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[1] The Lower Court denied Amisub's Motion for Summary Judgment on the statute of limitations grounds, violating the recognized principle "that a court usually should refrain from deciding unnecessary questions." I'On, L.L.C. at 419, 526 S.E.2d at 723. (R. p. 6 - 7).

additional ground appearing in the Record on Appeal. Also, the Lower Court's denial of this defense does not form the law of the case. See Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again....").

Finally, policy concerns weigh in favor of this Court exercising its discretion and considering the expiration of the limitations period as an additional ground for affirming summary judgment. Ms. Orlowski's counsel briefed the issue of the expiration of the statute of limitations to the Lower Court and addressed it at the July 18, 2012 Motion Hearing. (R. p. 83 - 85, 254:1 - 56:19). Also, the issue was considered by the Lower Court on the record at the July 18, 2012 Motion Hearing. (R. p. 258:25 - 59:12). Finally, as briefed in greater detail in Argument I of its Brief as Appellant, Amisub sets forth a statute of limitations defense based upon Supreme Court precedent. Should this Court decline to consider the application of Section 15-3-545(A) as an additional sustaining ground and otherwise decide to remand the case to the Lower Court, the principles of judicial economy and efficiency discussed in I'On, L.L.C. will not be served. Instead, as recognized in Ballenger, Amisub will be free to renew its Motion for Summary Judgment on the statute of limitations ground—a ground currently briefed by the parties, considered on record by the Lower Court, and properly before this Court as an additional sustaining ground.

II. Ms. Orlowski incorrectly argues that she timely filed this action because Section 15-3-40 is inapplicable to toll the limitations period on her claims against Amisub.

As set forth in Amisub's Brief as Appellant, Langley v. Pierce is dispositive of this case. 313 S.C. 401, 438 S.E.2d 242 (1993). In Langley, the South Carolina Supreme Court applied

elemental statutory interpretation principles in 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. Id. at 403, 438 S.E.2d at 243. Langley is clear: Ms. Orlowski's action is time-barred because she is not a minor and because Section 15-3-40 does not apply to toll her limitations period.

Within her Brief as Respondent, Ms. Orlowski first tries to distinguish this case from Langley by arguing that the plain language of Section 15-3-40 states that it applies to any action mentioned in Article 5 of Chapter 3, including Section 15-3-545. See Orlowski Brief as Respondent, p. 11. However, Ms. Orlowski overlooks the fact that Section 15-3-30, the tolling statute in Langley, contains similar language of broad applicability. See S.C. Code Ann. § 15-3-30 (Providing that when an action accrues against a defendant when he is out of South Carolina, "such action may be commenced within the terms in this chapter respectively limited after the return of such person into this State."). Regardless of the broad applicability language contained in Section 15-3-30, the Langley Court still held that the general tolling statute was inapplicable to Section 15-3-545 based upon the Court's construction of Section 15-3-545.

The Supreme Court's reasoning in Langley is sound: "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)." Langley at 403, 438 S.E.2d at 243, quoting S.C. Code Ann. § 15-3-545 (emphasis original). Considering the Langley Court's interpretation of Section 15-3-545, Ms. Orlowski has failed to set forth any argument as to why broad applicability language in Section 15-3-40 should trump the more specific language of Section 15-3-545, a medical negligence-specific statute with its own exclusive tolling provisions.

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

Next, Ms. Orlowski attempts to distinguish Langley on the basis that the Langley Court considered Section 15-3-30, and not Section 15-3-40. She argues that the two tolling provisions have "potentially different legislative intent" and that makes it "inappropriate" to apply Langley to this case. Orlowski Brief as Respondent, p. 11 - 12. In telling fashion, Ms. Orlowski provides absolutely no authority in support of this argument. Indeed, the instant case and Langley are indistinguishable because they both involve tolling statutes of general application that do not impact the Court's construction of Section 15-3-545. In Langley, the Supreme Court focused upon the language of Section 15-3-545, finding that it was a specifically-applicable and self-contained statute that did not allow for application of general tolling statutes. Langley at 403, 438 S.E.2d at 243, quoting Section 15-3-545. This analysis does not change whether one attempts to apply Section 15-3-30 or Section 15-3-40.

Finally, Ms. Orlowski asserts that Langley is distinguishable from the instant case on the grounds that Langley involves application of the statute of repose, and not the statute of limitations. In making this argument, Ms. Orlowski overlooks the main holding in Langley. The Langley Court spends the first half of its discussion considering the language of Section 15-3-545 and reciting statutory interpretation principles that are not limited to statutes of repose. Id. at 402-03, 438 S.E.2d at 242-43. The central holding in Langley is that based upon the plain language of Section 15-3-545, general tolling statutes are inapplicable to toll the limitations period provided in that Section:

> Langley contends that inclusion of the language "in this chapter" renders the tolling statute applicable to claims under § 15-3-545. We disagree....Subsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors. 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. at 403, 438 S.E.2d at 243. The Langley Court includes the fact that the statute of repose had expired as an *additional* ground for concluding that the general tolling statute at issue in that matter did not apply to Section 15-3-545. Indeed, this is evidenced by the Langley Court beginning its discussion of the statute of repose with the word, "Moreover." Id.

While Ms. Orlowski attempts to distinguish Langley from the instant case, she only manages to raise distinctions without differences. Langley focuses upon construction of Section 15-3-545, the very statute at issue in this matter. The Langley Court's holding is inescapable: Section 15-3-545 provides a limited tolling provision only applicable to minors. Ms. Orlowski is not a minor, Section 15-3-40 does not apply to toll the limitations period on her claim, and her action is time-barred pursuant to Section 15-3-545(A).

III. Even if Section 15-3-40 applied to toll the limitations period provided in Section 15-3-545, Ms. Orlowski's action is timed-barred based upon the appointment of a legal guardian and conservator or, alternatively, the filing of Orlowski I.

Ms. Orlowski, through her guardian and conservator, failed to institute Orlowski II against Amisub and Dr. Creagh until November 24, 2009. Within Arguments II and III of its Brief as Appellant, Amisub argues that, even if this Court finds that Section 15-3-40 applies to toll the limitations period provided in Section 15-3-545, Ms. Orlowski's action still is time-barred because (1) the statute of limitations would have started running upon appointment of a guardian and conservator on March 5, 2004; (2) alternatively, the limitations period would have started

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; or (3) alternatively, any tolling of the limitations period in favor of Ms. Orlowski's guardian and conservator ceased by August 24, 2006 when the guardian and conservator filed Orlowski I, alleging negligence and seeking recovery for the same damages sought in this action.

Amisub will not re-argue the above points in this Reply. However, in response to Ms. Orlowski's argument citing non-authoritative case law,[2] Amisub notes that equally compelling authority exists in favor of Amisub and Dr. Creagh's argument that the appointment of a guardian and conservator ceased any possible tolling provided to Ms. Orlowski pursuant to Section 15-3-40. The federal district court for New Hampshire has set forth best the policy considerations underlying Amisub and Dr. Creagh's argument. In Stewart v. Robinson, the plaintiff's husband was incapacitated after attempting suicide in a correctional facility on October 27, 1995. 115 F.Supp.2d 188, 191-92 (D.N.H. 2000). A three year statute of limitations applied to the husband's claim. Id. at 194. On January 22, 1996, the plaintiff was appointed guardian over her husband. Id. However, she did not commence suit against various employees of the facility until February 11, 1999, more than three years after her appointment as guardian. Id.

Similar to Section 15-3-40 which provides that a mentally incompetent person may bring a cause of action within one year from when the disability ceases, New Hampshire Rev. Stat. Ann. § 508.8 provided that a "mentally incompetent person may bring a personal injury action

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[2] Ms. Orlowski cites Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 n. 5 (2003) for the proposition that Section 15-3-40 extends Ms. Orlowski's limitations period from three years to eight years. See Orlowski's Brief as Appellant, p. 13, n. 2. Ms. Orlowski's reliance on Harrison is in error. Harrison involved an action against a governmental entity subject to the two-year statute of limitations provided in S.C. Code Ann. § 15-78-110. While Section 15-78-110 expressly provides for application Section 15-3-40, Section 15-3-545 expressly excludes application of Section 15-3-40.

within 2 years after such disability is removed." Applying Section 508.8, the District Court held "that the statute of limitations is tolled only until the appointment of a capable guardian." Id. at 195. Much like Amisub and Dr. Creagh's arguments concerning the guardian and conservator's awareness of any claims which Ms. Orlowski held, the District Court noted, "At the time of [the guardian's] appointment, she was completely familiar with the circumstances giving rise to [her husband]'s injuries and was on notice that viable causes of action against" the defendants. Id.

Considering public policy, the District Court further reasoned that tolling the statute of limitations on a incapacitated person's claim only until appointment of a guardian best reconciles two competing public policy considerations. It protects "society's compelling interest in effectively protecting the rights of those who are disabled..., while also serving the important interests underlying statutes of limitations." Id. Grounding its decision in both the awareness of the guardian as well as public policy considerations, the District Court ruled, "When plaintiff was appointed guardian of his estate, [her husband]'s disability was...effectively removed, and the two-year limitations period set forth in RSA 508:8 began to run." Id.

Likewise, considering a disability tolling statute very similar to Section 15-3-40, North Carolina courts have held that the statute of limitations "begins to run upon the appointment of a guardian or upon the removal of his disability..., whichever shall occur first." First-Citizens Bank & Trust Co. v. Willis, 125 S.E.2d 359, 361 (N.C.Sup.Ct. 1962). In Johnson v. Pilot Life Insurance Company, the North Carolina Supreme Court considered whether a general disability tolling statute tolled a claimant's limitations period where the incompetent claimant had been appointed a guardian. 7 S.E.2d 475 (N.C.Sup.Ct. 1940). The plaintiff claimed that while he was incompetent, the defendant insurer unfairly had him sign a settlement and waiver of his right to

disability payments under an insurance policy. Id. at 475. The defendant claimed that the plaintiff's action was barred by the statute of limitations, in part due to the appointment of a guardian on March 21, 1933, approximately four years after the plaintiff's May 20, 1929 disabling accident. Id. at 476.

Similar to Section 15-3-40 which provides that a mentally incompetent person may bring a cause of action within one year from when the disability ceases, the applicable North Carolina general tolling statute provided that a mentally incompetent person may bring an action "within the times herein limited, after the disability is removed." Id. at 477, citing N.C. Gen. Stat. § 407 (recodified at N.C. Gen. Stat. § 1–17) (2001)). The Johnson Court noted that, much like S.C. Code Ann. § 62-5-312(a) (Supp. 2009) and S.C. Code Ann. § 62-5-424(17) (Supp. 2009), N.C. Gen. Stat. § 2169 provided guardians with the power to institute actions on behalf of incompetent persons. Id.

Though the matter was ultimately decided upon different considerations, applying N.C. Gen. Stat. § 2169, the Court reasoned, "[W]e apprehend that it is the duty of the guardian to bring suit, when necessary, upon the choses in action belonging to the ward's estate, and to recover any moneys due him, and to plead any equitable matter that may be necessary for recovery in such action." Id. As such, the Court noted, "[O]rdinarily the failure of the guardian to sue in apt time is the failure of the ward, entailing the same legal consequence with respect to the bar of the statute." Id. (internal citation omitted). Likewise, the Court noted, "Exposure to a suit by the guardian,-one which was within the scope of both his authority and duty,-for a sufficient length of time, would constitute a bar to the action of the ward." Id. (internal citation omitted).

The above cases highlight the crux of Amisub's argument: there is no need to continue

to toll the applicable statute of limitations pursuant to Section 15-3-40 once a guardian and conservator, authorized with the power to institute suit, is appointed to represent an incompetent person. When the guardian and conservator is appointed, the incompetent person's disability "ceases" for purposes of Section 15-3-40 and protection of the incompetent person must yield to fulfilling the policy behind the statute of limitations. Further, once a guardian and conservator begins filing suit on behalf of the incompetent person–exposing potential defendants to suit as the Johnson Court words it, there can be no doubt that the incompetent person has been adequately protected by Section 15-3-40 and the statute of limitations should recommence running.

In this matter, Ms. Orlowski's guardian and conservator was given the authority to file suit on her behalf on March 5, 2004, the date of his appointment. For the reasons set forth in Stewart and Johnson, Ms. Orlowski's disability ceased on that day and any tolling possibly provided by Section 15-3-40 also ceased. In the alternative, when Ms. Orlowski's guardian and conservator took to the offensive and exercised his powers to bring suit on her behalf by filing Orlowski I on August 24, 2006, any tolling provided by Section 15-3-40 certainly ceased. Under either theory, by waiting to file the present action until November 24, 2009, Ms. Orlowski failed to commence this action within the limitations period and the action is time-barred pursuant to Section 15-3-545.

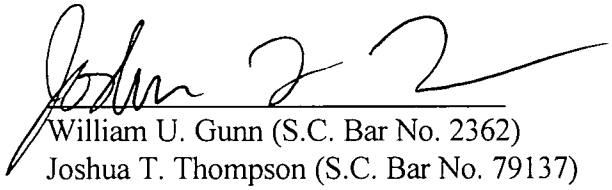
CONCLUSION

Amisub and Dr. Creagh continuously have argued that Ms. Orlowski's action is barred by the applicable statute of limitations provided in Section 15-3-545. The parties briefed this issue, the Lower Court considered this issue, and it is properly before this Court as an additional

ground upon which the Lower Court's grant of summary judgment may be sustained. Even if Section 15-3-40 applied to toll Ms. Orlowski's limitations period, any tolling necessarily ceased upon appointment of a guardian and conservator and/or the guardian and conservator's filing of Orlowski I. As such, Ms. Orlowski's action against Amisub and Dr. Creagh is time-barred and this Court should affirm summary judgment on this additional ground found in the record.

Respectfully submitted,

HOLCOMBE BOMAR, P.A.

By: 

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April 10, 2013

Spartanburg, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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S. Jackson Kimball, Special Circuit Court Judge

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v.

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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 Reply 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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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 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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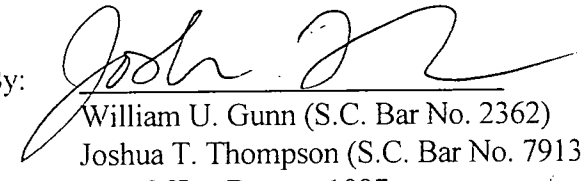
By: 

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