

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 Appellant
Guardian and Conservator of Kristy
L. Orłowski (a/k/a Kristy Wood)

v.

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

PETITION FOR REHEARING AND PETITION FOR EN BANC

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SC Court of Appeals

Appellant Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski petitions the Court for rehearing and reconsideration of Opinion No. 5197 filed February 12, 2014, pursuant to Rule 221(a), SCACR. Appellant specifically asks this Court to reconsider: (1) the preservation of the statute of limitations argument because Respondents took a position on appeal inconsistent with their position at the trial court and (2) the applicability of the tolling provision of section 15-3-40 of the South Carolina Code (2005). In support of the petition, Appellant respectfully submits the following:

I. Pertinent Facts

Gladys Sims, as Kristy's guardian and conservator filed suit on November 24, 2009, based on Dr. Edward Creagh and Piedmont Medical Center's ("PMC") negligence arising out of Kristy's November 2003 hospital admission.¹ 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.

¹ 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 PMC where she was placed on a ventilator. (R. p. 15 at ¶ 22). She 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. Creagh admitted Kristy and was responsible for her care during this hospitalization. (R. p. 20 at ¶ 12). Kristy was sent home on November 27, 2003, but returned to PMC two days later. (R. p. 20 at ¶ 12-13). A CT scan revealed a hydropneumothorax in Kristy's left lung. *Id.* Kristy's condition deteriorated rapidly over the next several days. 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.

(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.

At the summary judgment hearing, Appellant's counsel took the position that section 15-3-40 and section 15-3-545 provided an eight year statute of limitations for Kristy's claim to be filed. (R. 254). Respondents contended that the appointment of a conservator or guardian removed the disability, thereby causing the statute of limitations to run. The trial court sought clarification on the interplay between the statutes and Respondent counsel's concern over the effect of an appointment of a conservator. The following was stated:

THE COURT: Okay. Just to be sure we've got all the record straight here, I think I sort of directed you away from talking about 15-3-545 awhile ago. But, your position on that is that 15-3-40 doesn't have any effect - - that it stands alone, in medical malpractice cases.

MR. GUNN: Yes, sir. I think - -

THE COURT: With an outside limit, --

MR. GUNN: Right.

THE COURT: -- regardless of 15-3-40

MR. GUNN: No, I think that if - - I think that if a - - for purpose 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. 257-258) (emphasis added).

The trial court denied the motion on the statute of limitations issue and granted the motion on collateral estoppel.

II. Preservation

The Court erred in finding the statute of limitations issue was preserved for review. The Court stated “[a] respondent ‘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.’” *Sims v. Amisub of South Carolina*, Op. No. 5197 (S.C. Ct. App. filed February 11, 2014) (Shearouse Adv. Sh. No. 6 at 34) (quoting *I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000)). The issue now before the Court of Appeals is not as simple as whether an issue was raised and/or ruled upon by the lower court and found within the record. In this instance, Respondents took the position that an eight year statute of limitations could exist but for the appointment of a conservator. On appeal, Respondents now argue that an eight year statute of limitations cannot exist. This position is inconsistent and Respondents should be barred from changing their stated position.

I’On stands for the proposition that additional sustaining grounds are an available resource upon which an appellate court can rely. *Id.*, 338 S.C. at 421, 526 at 723. They undoubtedly promote both judicial economy and finality. However, in this instance the use of this argument as an additional sustaining ground is unjust. This opinion unfairly rewards an inconsistency between a concession made to the trial court and the arguments presented to an appellate court. The South Carolina Supreme Court explained in *I’On* that additional sustaining grounds should be used unless they are “unjust” or “unwise.” *Id.*, 338 S.C. at 420, 526 at 723. Allowing a concession to be recanted on appeal undermines the traditional notions of equity and the principles driving the South Carolina Rules of Civil Procedure. It would be a mistake to

allow a concession that would be viewed as a waiver in any other context to be condoned as an additional sustaining ground. Therefore, Appellant respectfully requests this Court to reconsider its position on preservation.

III. Statute of Limitations

The Court erred in its interpretation of the statutory interplay between Section 15-3-545 of the South Carolina Code (2005), which establishes the statute of limitations for medical malpractice actions, and section 15-3-40, which extends limitations periods for “insane” persons. Specifically, this Court found section 15-3-40 is inapplicable to toll Appellant’s claims because the claims arise under section 15-3-545, which in this Court’s opinion only tolls for minors. This finding misconstrues a plain reading of 15-3-545(D) and completely ignores the Legislature’s overarching intent to protect those citizens who are deemed insane; as set forth in section 15-3-40. Section 15-3-40 provides:

If a person entitled to bring 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.

Section 15-3-545 provides, in pertinent part:

(A) . . . must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, or as tolled by this section.

...

(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.

Section 15-3-545(D) narrowly tailors the tolling provisions related to minors, while acknowledging the existence of section 15-3-40. Subsection (D) plainly states "[n]otwithstanding the provisions of Section 15-3-40." The Legislature only modified the tolling provision of minors and maintained the tolling provisions for insane persons. Without a statutory modification for insane persons, section 15-3-40 must stand and Appellant should be afforded the full benefit of the tolling provision as the Legislature intended.

The Court and Respondents relied on *Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993), in justifying the Opinion's statutory interpretation. The statutory design of section 15-3-40 and the text of *Langley* are inconsistent with this Court's holding that section 15-3-40 cannot operate to toll Appellant's statute of limitations. The South Carolina Supreme Court in *Langley* was addressing a tolling provision for an out-of-state defendant not referenced or envisioned in the medical malpractice statute. 313 S.C. at 402, 438 S.E.2d at 243. The Supreme Court found the only tolling intended by the Legislature was what found in section 15-3-545. *Id.* Unlike the statutory provision reviewed in *Langley*, section 15-3-40's tolling provision is specifically included and referenced in subsection (D) of section 15-3-545, thereby demonstrating the Legislature's intent to narrow the minors' tolling provisions while

acknowledging and allowing the general tolling on those who are insane under section 15-3-545. Furthermore, the *Langley* Court's interpretation of section 15-3-545 was limited to the statute of repose. *Id.*, 313 S.C. at 401, 438 S.E.2d at 242. All of the Court's public policy discussion concerned specific policy justifications unique to the statute of repose, not the statute of limitations. *Id.* at 403-04, 438 S.E.2d at 243-44. The distinction between a statute of limitations and a statute of repose is an important one and severely limits the utility of *Langley* in the present case.

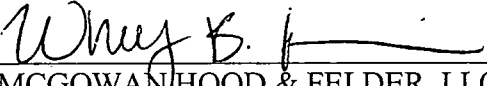
By its terms, the disability tolling provision for insane persons applies to all claims mentioned in Article 5 of Chapter 15 of the South Carolina Code. Medical negligence claims fall within this category, thereby entitling Kristy to the benefit of tolling. Therefore, Appellant respectfully requests this Court to reconsider the interpretation of section 15-3-40.

CONCLUSION

For the foregoing reasons, Appellant requests this Court to grant this Petition for Rehearing and Petition for En Banc.

Respectfully submitted,

February 19, 2014


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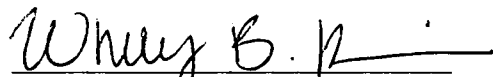
CERTIFICATE OF SERVICE

I, Whitney B. Harrison, Attorney with McGowan, Hood & Felder, LLC do hereby certify
that on February 19, 2014, I served a copy of the following *Petition for Rehearing and Petition
for En Banc* by depositing in the United States mail in Columbia, South Carolina with proper
postage prepaid to the following:

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A handwritten signature in dark ink, appearing to read "Whitney B. Harrison", written over a horizontal line.

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