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SC Court of Appeals

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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JAN 28 2014

SC Court of Appeals

Opinion No. 5197  
(S.C. Ct. App. filed February 12, 2014)

Gladys Sims, as the Duly Appointed Guardian  
and Conservator of Kristy L. Orłowski  
(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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**RESPONDENTS-APPELLANTS' RETURN TO  
PETITION FOR REHEARING  
AND PETITION FOR REHEARING EN BANC**

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On February 12, 2014, this Court issued a published decision affirming as modified the order of Special Circuit Court Judge S. Jackson Kimball granting

summary judgment to the Respondents-Appellants C. Edward Creagh, M.D. and Amisub of South Carolina, Inc. ("Hospital") on the basis of their statute of limitations defense.

The Appellant-Respondent Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orłowski (hereafter referred to as "Orłowski"), has now filed a petition for rehearing *en banc*. In response, Dr. Creagh and the Hospital submit that this Court correctly addressed each of the issues raised by Orłowski in her petition for rehearing *en banc*. Dr. Creagh and the Hospital submit the following discussion with respect to the arguments raised in the petition:

#### I.

As an initial argument for rehearing, Orłowski contends that this Court erred in finding that the statute of limitations was preserved for appellate review. More specifically, Orłowski argues that Dr. Creagh and the Hospital took an inconsistent legal position in the lower court, agreeing that "an eight-year statute of limitations could exist but for the appointment of a conservator." Orłowski insists that Dr. Creagh and the Hospital cannot "recant a concession" or change their "stated position" on appeal. As this Court correctly ruled, there is no merit to Orłowski's argument. This Court correctly recognized that the statute of limitations defense was preserved and could be properly raised as an additional sustaining ground.

To the extent that counsel for Dr. Creagh and/or the Hospital "agreed" that absent the appointment of the conservator there "may well" be an eight year statute of limitations, that would have been incorrect as a statement of applicable law. Without question, an eight-year statute of limitations in a medical malpractice case is a legal impossibility, and Orłowski does not argue to the contrary. An eight-year statute of limitations would clearly contravene the six-year statute of repose set forth in Section 15-3-545(A). *See, Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003).

Therefore, if the colloquy between counsel and Judge Kimball suggests that an eight-year statute of limitations is possible, that is a mistaken statement of law. The colloquy likewise cannot be read as a concession or stipulation made by Dr. Creagh and/or the Hospital.<sup>1</sup> But even if construed as such, a mistaken statement of law or even a stipulation of law is not binding on appeal.<sup>2</sup> South Carolina law is clear on this specific point. In *Walterboro Community Hospital v. Meacher*, 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2011), this Court recently held that stipulations as to the law are not binding on the appellate court and may not be adjudged to be

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<sup>1</sup> The record from the hearing below is far from conclusive that such a "concession" was even made. Counsel for the Hospital followed the colloquy included by Orłowski in her petition with the following statement: "So, it does come into play -- or, conceivably, arguably, it could hypothetically come into play that way." (R. 258, lines 8–10). To state that an opponent's legal interpretation of a statute is "arguable" or "conceivable" is not a concession or stipulation.

<sup>2</sup> *See, Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242, 243 (2012) ("[d]etermining the proper interpretation of a statute is a question of law").

"conclusive proof." 709 S.E.2d at 75. This Court further cited to the Supreme Court case of *Greenville County Fair Association v. Christenberry*, 198 S.C. 338, 17 S.E.2d 857 (1941), for the proposition that a "stipulation as to the law" is generally not binding upon the courts. 17 S.E.2d at 859. *See also, McDuffie v. McDuffie*, 308 S.C. 401, 418 S.E.2d 331, 336 (Ct. App. 1992) (holding a stipulation concerning a question of law is not binding on the court); *Alltel Communications, Inc. v. South Carolina Department. of Revenue*, 399 S.C. 313, 731 S.E.2d 869,872 (2012) (holding that an "issue of law [is] to be decided by the court, rather than the parties" and "courts are not bound by parties' stipulations of law").<sup>3</sup> In short, even if counsel's statement that absent the appointment of the conservator there "may well" be an eight year statute of limitations was construed as a "concession" or "stipulation," it involved an issue of law, that is, an issue of statutory interpretation, and that mistaken statement of law is not dispositive or "conclusive proof" or binding on this Court.<sup>4</sup>

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<sup>3</sup> In *McDuffie v. McDuffie*, 308 S.C. 401, 418 S.E.2d 331 (Ct. App. 1992), this court further explained that "[i]t has generally been stated that the resolution of questions of law rests upon the court, uninfluenced by stipulations of the parties, and accordingly, virtually all jurisdictions recognize that stipulations as to the law are invalid and ineffective." 418 S.E.2d at 336-337, *citing* 73 Am. Jur.2d *Stipulations* § 5, at 539-40.

<sup>4</sup> Notably, Orlowski does not argue that Dr. Creagh or the Hospital should be judicially estopped from changing any legal position taken in the lower court. Judicial estoppel does not apply here because one of the elements for judicial estoppel requires proof that "the party taking the position must have been successful in maintaining that position and have received some benefit." *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629, 631 (2004). Dr. Creagh and the Hospital lost on the statute of limitations in the court below, and as a result, no

## II.

As her second issue for rehearing, Orłowski contends that this Court erred in its reliance on the Supreme Court's decision in *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993). To the contrary, *Langley* is dispositive of the statute of limitations issue, and this Court's reliance on *Langley* was proper.

Section 15-3-545, which establishes the statute of limitations for medical malpractice claims, includes a tolling provision within Section 15-3-545(D). In *Langley*, the Supreme Court, in answering a certified question posed by the Fourth Circuit Court of Appeals, held that "[s]ubsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors." 438 S.E.2d at 243. The Court further explained that "[i]nclusion 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.* (Emphasis in original). Thus, the Supreme Court has clearly held that Section 15-3-545(D) provides tolling only for minors and that Section 15-3-545(D) provides for the "only tolling" of the medical malpractice statute of limitations.

Orłowski again attempts to "distinguish" *Langley* by arguing that the Supreme Court was addressing the impact of a different tolling provision, Section

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benefit or success was achieved by even agreeing that there "may well" be an eight year statute of limitations.

15-3-30 rather than Section 15-3-40. Orlowski also argues that the issue in *Langley* involved the tolling of a statute of repose rather than a statute of limitations. Yet, in actuality, the Supreme Court was addressing the impact of a tolling provision on Section 15-3-545(A), which includes both a statute of limitations and a statute of repose. Section 15-3-545(A) provides that a medical malpractice action "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.*" S.C. Code Ann. § 15-3-545(A). (Emphasis added). The Supreme Court construed the italicized language – "or as tolled by this section" – in *Langley* as "clearly indicat[ing] that the *only* tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D)." *Langley*, 438 S.E.2d at 243. (Emphasis in original). The Supreme Court expressly used the words "only tolling" meaning that Section 15-3-545(D) trumps all other tolling statutes – not just Section 15-3-30. The Supreme Court then explained in clear terms that "[s]ubsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors." *Id.* In short, the Supreme Court's analysis cannot be read as limited to the tolling of the statute of repose and not to the tolling of the statute of limitations, both of which are contained in Section 15-3-545(A).

This Court was correct in concluding that the Supreme Court's analysis in *Langley* is controlling and that tolling for insanity is not available in medical malpractice actions. Because Orlowski filed her medical malpractice action more than three years after the alleged negligence by Dr. Creagh and the Hospital, her action is barred by the statute of limitations. There is no basis for a rehearing or a rehearing *en banc*.<sup>5</sup>

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<sup>5</sup> Even if Orlowski is correct and the tolling provisions of Section 15-3-40 apply to a medical malpractice case despite the language in Sections 15-3-545(A) and (D) to the contrary, her claims are still time-barred. Dr. Creagh and the Hospital contend that the three-year statute of limitations should run from the date that Orlowski was appointed a conservator or at a minimum from the date that her conservator took action to protect her interests and filed her medical malpractice action against R. Norman Taylor, III, M.D. and his practice. This Court did not find it necessary to reach this issue because "*Langley* is controlling in this case," but this Court did note the "persuasive authority from Georgia, North Carolina, and New Hampshire supporting [the] position that the appointment of a conservator affects the viability of a person's insanity for tolling purposes." In the event that this Court grants a rehearing, Dr. Creagh and the Hospital request that the Court rule on this alternative ground.

**CONCLUSION**

Based on the foregoing discussion, the Respondent-Appellants C. Edward Creagh, M.D. and Amisub of South Carolina, Inc. respectfully request that this Court deny the petition for rehearing *en banc*.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY:  \_\_\_\_\_

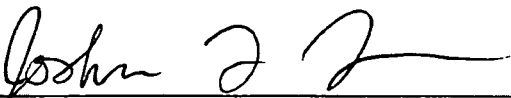
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**CERTIFICATE OF SERVICE**

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondents-Appellants, does hereby certify that service of **Respondents-Appellants' Return to Petition for Rehearing and Petition for Rehearing En Banc** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 28th day of February 2014:

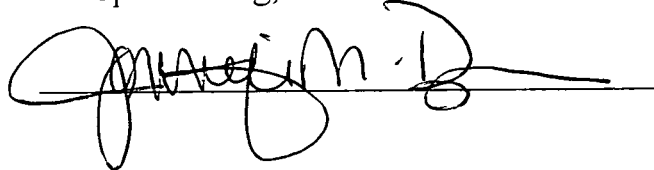
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A handwritten signature in black ink, appearing to read "William U. Gunn", is written over a horizontal line. The signature is stylized and cursive.