THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

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Opinion No. 5197 (Ct. App. Filed Feb. 12, 2014)
Case No. 2009-CP-46-5178

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

v.

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

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INDEX

PAGE

TABLE OF AUTHORITIES iii

CERTIFICATION OF COUNSEL 1

QUESTIONS PRESENTED FOR REVIEW 2

STATEMENT OF THE CASE 3

ARGUMENT 5

I. THE COURT OF APPEALS ERRED BY ADDRESSING THE STATUTE OF LIMITATIONS ISSUE AS AN ADDITIONAL SUSTAINING GROUND 5

II. THE COURT OF APPEALS' INTERPRETATION OF THE GENERAL TOLLING PROVISION FOR INSANE PERSONS IN THE CONTEXT OF THE MEDICAL MALPRACTICE ACT'S STATUTE OF LIMITATIONS INVOLVES A NOVEL APPLICATION OF LAW 7

III. THE SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE DETERMINING THE APPLICABILITY OF THE TOLLING PROVISIONS FOR SOUTH CAROLINA CITIZENS DEEMED INSANE, PURSUANT TO § 15-3-40, IN THE MEDICAL MALPRACTICE CONTEXT IS A QUESTION OF SIGNIFICANT CONSEQUENCE 9

CONCLUSION 14

TABLE OF AUTHORITIES

Cases

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406,

526 S.E.2d 716 (2000)... 5, 6

Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243
(1993)... 5

Multi–Cinema, Ltd. v. S.C. Tax Comm'n, 292 S.C. 411, 413, 357 S.E.2d 6, 7

(1987) 11, 12

Richland County v. Carolina Chloride, Inc., 382 S.C. 634,

677 S.E.2d 892 (Ct. App. 2009) 9, 10

Santee Cooper Resort v. S.C. Pub. Serv. Comm'n., 298 S.C. 179, 184,

379 S.E.2d 119, 122 (1989).. 5

Statutes

S.C. Code Ann. § 15-3-40 3-10

S.C. Code Ann. § 15-3-545.. 3-10

Court Rules

Rule 242, SCACR... 9

CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies the Petition for Rehearing was made and ruled upon by the Court of Appeals on May 19, 2014.

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in affirming the trial court on additional sustaining grounds and expanded the additional sustaining grounds doctrine when Respondents' argument was conceded at trial?

II. Whether the Court of Appeals erred in its statutory interpretation of the tolling provision of Section 15-3-40 of the South Carolina Code (2005) in the context of the Medical Malpractice Act; the merits of which involve a novel application of the law?

III. Whether the Supreme Court should grant a writ of certiorari because determining the applicability of the tolling provisions for South Carolina citizens deemed insane, pursuant to the § 15-3-40, in the medical malpractice context is a question of significant consequence?

STATEMENT OF THE CASE

This writ of certiorari seeks a review of the Court of Appeals' decision denying the tolling of the statute of limitations in a medical malpractice action for a person deemed insane for the purpose of Section 15-3-40 of the South Carolina Code (2005). On November 24, 2009, Gladys Sims as the duly appointed guardian and conservator of Kristy L. Orlowski, (hereinafter "Petitioner") filed a medical malpractice action against Amsiub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Amisub"), C. Edward Creagh, M.D. ("Dr. Creagh"), and William Alleyne, M.D. ("Dr. Alleyne"). (App. pp. 60-68). This case arises from the treatment provided by Amisub and Dr. Creagh to Ms. Orlowski between November 27-29, 2003.

During the summer of 2003, Ms. Orlowski was pregnant with her first child and endured severe complications near the end of her pregnancy. (App. p. 52). She suffered a seizure and was found unresponsive in her home. She was rushed to Piedmont Medical Center ("PMC") where she was placed on a ventilator. (App. p. 53). Her doctors delivered her baby by cesarean section. (*Id.*). Ms. Orlowski remained at PMC from September 12, 2003, through most of November 2003. (*Id.*). During this hospitalization, she endured multiple surgical procedures, severe respiratory distress, and other life-threatening conditions. (*Id.*) Ms. Orlowski was discharged on November 24, 2003, but was rushed back to PMC hours later with severe chest pain and shortness of breath. (App. p. 58).

Dr. Edward Creagh admitted Ms. Orlowski and was responsible for her care during this hospitalization. (*Id.*). Dr. Creagh diagnosed a left pleural effusion and performed a thoracentesis for suspected empyema but still chose to send her home on November 27, 2003. (*Id.*) Two days later, Ms. Orlowski returned to PMC with severe nausea and vomiting. (App. p. 59). Dr. Creagh finally ordered a CT scan on November 30, 2003, that revealed a hydropneumothorax in Ms. Orlwoski's left lung. (*Id.*).

Ms. Orlowski's condition deteriorated rapidly over the next several days. (App. p. 59). She developed metabolic acidosis, stiff lungs, and continued having severe respiratory difficulties even with a ventilator. (*Id.*). On December 3, 2003, Ms. Orlowski suffered a cardiopulmonary arrest. (*Id.*). Ms. Orlowski was resuscitated but suffered permanent and severe damages caused by extended oxygen deprivation. (*Id.*). Ms. Orlowski was rendered permanently unable to care for any of her own needs. A guardian was appointed on March 5, 2004. (App. pp. 404-406).

Petitioner, as Ms. Orlowski's guardian and conservator, filed suit on November 24, 2009, based on Dr. Edward Creagh and PMC's negligence arising out of Ms. Orlowski's November 2003 hospital admission. The Complaint alleged that Dr. Creagh and PMC negligently provided Ms. Orlowski's medical treatment beginning with the November 25, 2003 hospitalization by failing to timely diagnose her condition, properly monitor her, and failing to take proper interventions. (App. pp. 60-61). Ms. Orlowski suffered cardiopulmonary arrest, hypoxic brain injury, and permanent impairment as a direct and proximate result of Dr. Creagh and PMC's negligence. Respondents moved for summary judgment on two grounds: (1) Ms. Orlowski was estopped from pursuing a claim against Dr. Creagh and AMISUB because of a previous claim filed on her behalf against her obstetrician; and (2) Ms. Orlowski's 2009 Complaint was filed outside the applicable statute of limitations. (App. pp. 115-119).

At the summary judgment hearing, Petitioner's counsel took the position that § 15-3-40 and Section 15-3-545 of the South Carolina Code (2005) provided an eight year statute of limitations for Ms. Orlowski's claim to be filed. (App. p. 292). 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

Respondents 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.*

(App. pp. 295-296) (emphasis added). The trial court denied the motion on the statute of limitations issue and granted the motion on collateral estoppel. (App. pp. 40-51).

On September 4, 2012, Petitioner filed a Notice of Appeal. On September 10, 2012, Dr. Creagh and Amisub filed cross-appeals on statute of limitations defenses as an additional sustaining ground for affirming the trial court. After briefing and oral argument, the Court of Appeals entered an Opinion on February 12, 2014 affirming the trial court as modified. (App. pp. 1-13). The Court of Appeals, relying on additional sustaining grounds, found "tolling for minors was the only tolling of the medical malpractice statute of limitations." (App. p. 11). Petitioner filed a Petition for Rehearing and Petition for En Banc, which were denied on May 19, 2014. (App. p. 15).

ARGUMENTS

I. THE COURT OF APPEALS ERRED BY ADDRESSING THE STATUTE OF LIMITATIONS ISSUE AS AN ADDITIONAL SUSTAINING GROUND.

"Under the present rules, a respondent - the 'winner' in the lower court - 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. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000). The basis for a respondent's additional sustaining ground must appear in the record on appeal. *Id.* Additional sustaining grounds undoubtedly promote both judicial economy and finality, serving as a vital resource upon which an appellate court can rely. *Id.* at 421, 526 S.E.2d at 723. Despite these well-known benefits, this Court explained in *I'On* that additional sustaining grounds should not be used if it is "unjust" or "unwise." *Id.* at 420, 526 S.E.2d at 723.

The Court of Appeals' reliance on the additional sustaining grounds doctrine in this case was in error because Respondents conceded the length of the statute of limitations to the trial court. Respondents took the position that an eight year statute of limitations could exist until or without the appointment of a conservator. On appeal, Respondents argued that an eight year statute of limitations cannot exist. This position is both inconsistent and contrary to Respondents' concession at the trial court. As explained in *I'on*, additional sustaining grounds allow an appellate court to review any additional reasons the trial court should be affirmed. Additional sustaining grounds were not meant to expunge an unfavorable concession made by counsel to the trial court under the guise of "any reason." Such an application undermines separate and well-established principles of waiver. *Richland County v. Carolina Chloride, Inc.*, 382 S.C. 634, 677 S.E.2d 892 (Ct. App. 2009) (holding where a party waives an argument at trial, it cannot be raised on appeal).

As it stands, the Court of Appeals' Opinion unfairly rewards an inconsistency between a concession made to the trial court and the arguments presented to an appellate court. Allowing a concession to be recanted on appeal undermines traditional notions of equity and the principles driving the South Carolina Rules of Civil Procedure. The Opinion essentially condones using an argument waived by a party as an additional sustaining ground. Therefore, Petitioner respectfully requests this Court to review the Court of Appeals' expansion of the additional sustaining grounds doctrine.

II. THE COURT OF APPEALS' INTERPRETATION OF THE GENERAL TOLLING PROVISION FOR INSANE PERSONS IN THE CONTEXT OF THE MEDICAL MALPRACTICE ACT'S STATUTE OF LIMITATION INVOLVES A NOVEL APPLICATION OF LAW.

The primary function in interpreting a statute is to ascertain the intent of the Legislature. *Multi–Cinema, Ltd. v. S.C. Tax Comm'n*, 292 S.C. 411, 413, 357 S.E.2d 6, 7 (1987). "[I]ntent must be gleaned from the language chosen by the [L]egislature." *Carolina Alliance for Fair Emp't v. S.C. Dept. of Labor, Licensing, & Regulation*, 337 S.C. 476, 489, 523 S.E.2d 795, 802 (Ct. App. 1999). "Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation." *Santee Cooper Resort v. S.C. Pub. Serv. Comm'n.*, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989). "Where the [L]egislature elects not to define the term in the statute, the court will interpret the term in accord with its usual and customary meaning." *Carolina Alliance for Fair Emp't*, 337 S.C. at 490, 523 S.E.2d at 802. "The court must then apply that term according to its literal meaning." *Id.* "Finally, a statute must receive a practical, reasonable, and fair interpretation consistent with the purpose, design, and policy of the lawmakers." *Id.*

§ 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.

§ 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.

The Court of Appeals held § 15-3-40 is inapplicable to toll Petitioner's claims because the claims are governed by § 15-3-545, which the Court of Appeals' found to only toll the statute of limitations for minors. The Court of Appeals reached this decision based on *Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993). Reliance on *Langley* is misplaced. The *Langley* decision does not address § 15-30-40 nor § 15-3-545's statute of limitations. *Langley* analyzed 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. This Court found the only tolling intended by the Legislature was what was found in § 15-3-545. *Id.* Unlike the statutory provision reviewed in *Langley*, § 15-3-40's tolling provision is specifically included and referenced in subsection (D) of § 15-3-545, thereby demonstrating the Legislature's intent to narrow the scope of the minors' tolling provisions while acknowledging and allowing tolling for those who are insane under § 15-3-545.

Furthermore, the *Langley* Court's interpretation of § 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 restricts *Langley*'s utility in this context. As such, there is no applicable case law to rely upon in interpreting the statute. Therefore, this issue is novel in South Carolina.

III. THE SUPREME COURT SHOULD GRANT CERTIORARI BECAUSE DETERMINING THE APPLICABILITY OF THE TOLLING PROVISIONS FOR SOUTH CAROLINA CITIZENS DEEMED INSANE, PURSUANT TO 15-3-40, IN THE MEDICAL MALPRACTICE CONTEXT IS A QUESTION With SIGNIFICANT CONSEQUENCE.

Pursuant to Rule 242, SCACR, this Court has the discretion to grant a writ of certiorari for "special and important reasons." In this case, a determination of the applicability of the tolling provision for insane individuals in the medical malpractice context is a question of significant consequence. This issue is imperative not only to Ms. Orlowski and her conservator, but to all future insane persons seeking relief through medical malpractice actions along with their conservators and guardians. Addressing this issue will add indispensable clarity by explicitly stating the time afforded to an insane person to bring a medical malpractice claim,

thereby ensuring the protection of the most basic fundamental right, afforded regardless of disability: the right to due process.

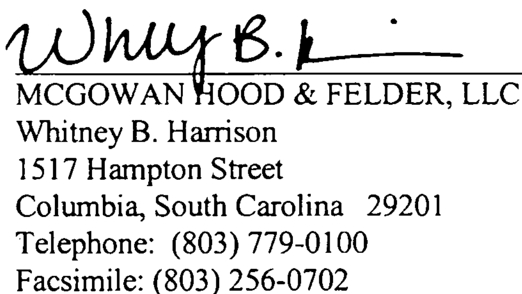
Without this Court's review, the law governing the statute of limitations for insane persons in the medical malpractice context will remain ambiguous for all parties involved. There needs to be a procedurally precise answer for the length of time an insane person has to bring a medical malpractice claim. While Petitioner adamantly believes the Legislature intended and envisioned the tolling provisions of § 15-3-40 to apply in medical malpractice cases, a definitive answer, regardless of the outcome, by this Court will allow families, guardians, lawyers, and our judicial system to better protect individuals who are wholly unable to protect themselves.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully asks this Court to grant her writ of certiorari and review the Court of Appeals' decision to affirm the trial court.

Respectfully submitted,

July 1~~8~~6, 2014



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PROOF OF SERVICE

I, Whitney B. Harrison, Attorney with McGowan, Hood & Felder, LLC do hereby certify that on July 16, 2014, I served a copy of the Petition for a Writ of Certiorari and Appendix by depositing in the United States mail in Columbia, South Carolina with proper postage prepaid to the following:

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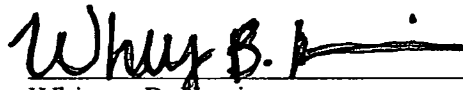

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