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S.C. Supreme Court

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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

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

v.

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is a medical malpractice action. The Petitioner Gladys Sims, as the duly appointed guardian and conservator of Kristy L. Orlowski (hereafter referred to as "Orlowski"), brought a medical malpractice action against the Respondent C. Edward Creagh, M.D. and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Hospital").

In 2003, Orlowski was provided prenatal care by R. Norman Taylor, III, M.D. and his practice, Rock Hill Gynecological & Obstetrical Associates, P.A. (App. 54-55). On September 12, 2003, Orlowski suffered an eclamptic seizure with aspiration and apoxia. (App. 106, 116). Following the seizure, she was hospitalized at the Hospital from September 12, 2003 until November 24, 2003. (App. 160-161, 164).

On November 25, 2003, Orlowski was re-admitted to the Hospital by Dr. Creagh, a board-certified pulmonologist who diagnosed her with a left pleural effusion. (App. 60). She was discharged on November 27, 2003. (App. 60). On November 29, 2003, Orlowski was re-admitted to the Hospital for persistent vomiting likely related to the parapneumonic effusion (PPE). (App. 61). Her conditions continued to decline, and on December 11, 2003, she was transferred to Carolinas Medical Center in Charlotte, North Carolina. (App. 441-442).

Orlowski alleges that she has been mentally incompetent since September 12, 2003, the date of the eclamptic seizure. (App. 442). On March 5, 2004, the Chester County Probate Court appointed Orlowski's husband, Christopher T. Orlowski, as her guardian and conservator. (App. 410). Orlowski's mother, Gladys Sims, is her current guardian and conservator. (App. 412-413).

On August 24, 2006, Orlowski, through her guardian and conservator, filed a medical malpractice action against R. Norman Taylor, III, M.D. and his practice. Dr. Taylor and his practice were the sole defendants. (App. 52-57). That lawsuit was tried in April 2009, and the jury returned a defense verdict, although Orlowski did receive $300,000.00 as a result of a high-low agreement that was in place. (App. 284).

Despite the defense verdict and the subsequent receipt of $300,000.00 per the high-low agreement, Orlowski, through her guardian and conservator, commenced the present action against Dr. Creagh and the Hospital on November 24, 2009. (App. 58). Dr. Creagh and the Hospital filed similar motions for summary judgment asserting that Orlowski's current lawsuit is barred by the statute of limitations for medical malpractice actions, S.C. Code Ann. § 15-3-545(A). They further argued that Orlowski's action is barred by collateral estoppel or estoppel by judgment based upon the positions taken during and the adjudication of the Taylor lawsuit. (App. 117-121). Those motions were heard by Special Circuit Court Judge S. Jackson Kimball on July 18, 2012. Thereafter, on August

15, 2012, Judge Kimball entered an order granting summary judgment on the estoppel defense but denying summary judgment on the statute of limitations defense. (App. 42-51).

Orlowski then filed a notice of appeal with the Court of Appeals. Dr. Creagh and the Hospital both filed cross-appeals in order to preserve and argue the statute of limitations defense as an additional sustaining ground for the judgment entered in the Circuit Court.

On February 12, 2014, the Court of Appeals issued a published decision which affirmed as modified the judgment entered in favor of Dr. Creagh and the Hospital. The Court of Appeals reversed the lower court on the collateral estoppel issue. However, the Court of Appeals did consider the statute of limitations as an additional sustaining ground and, based on this Court's decision in *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), the Court of Appeals ruled that Orlowski's action against Dr. Creagh and the Hospital is barred by the statute of limitations as set forth in Section 15-3-545 of the Code of Laws. A subsequent petition for rehearing *en banc* was denied.

ARGUMENTS

I. The Court of Appeals did not unfairly utilize an additional sustaining ground or improperly disregard any "concession" made by Respondents' counsel in the court below.

As her first argument for the issuance of a writ of certiorari, Orlowski contends that the Court of Appeals should not have disregarded a "concession" made by Dr. Creagh and the Hospital in the lower court, and as a result, erred in affirming the judgment on the basis of the expiration of the statute of limitations. Specifically, Orlowski 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 until or without the appointment of a conservator." *See*, Petition for Writ of Certiorari, p. 6. Orlowski insists that Dr. Creagh and the Hospital cannot "recant a concession" on appeal. She maintains that the Court of Appeals has "condone[d] using an argument waived by a party as an additional sustaining ground." *See*, Petition for Writ of Certiorari, p. 7.

There is no merit to Orlowski's arguments for several reasons. First, as the Court of Appeals correctly recognized, the statute of limitations defense was preserved and could be properly raised as an additional sustaining ground. Second, Dr. Creagh and the Hospital did not make the "concession" that the statute of

limitations is eight years for Orlowski's claim. Third, even if such a "concession" was made, that would be a stipulation of law which is not binding on the court.

The record from the hearing below is far from conclusive that a "concession" as described by Orlowski was made. Certainly, there is no indication that Dr. Creagh and the Hospital expressly and intentionally waived any argument, as Orlowski now claims.[1] In fact, counsel for the Hospital followed the colloquy included by Orlowski in her petition with the following statement: "So, it does come into play -- or, conceivably, arguably, it could hypothetically come into play that way." (App. 298, lines 8–10). To state that an opponent's legal interpretation of a statute is "arguable" or "conceivable" is not a concession or stipulation.

At any rate, 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 Orlowski 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).

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[1] "[A] waiver is a voluntary and intentional abandonment or relinquishment of a known right," and "a party claiming waiver must show the other party possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they were dependent." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384, 387-88 (1992). Here, there is no evidence that Dr. Creagh or the Hospital waived its position that the statute of limitations barred Orlowski's claim.

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. As indicated, the colloquy should not be read as a concession or stipulation made by Dr. Creagh and/or the Hospital. But even if construed as such, a mistaken statement of law or even a stipulation of law is not binding on appeal.[2] 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), the Court of Appeals recently held that stipulations as to the law are not binding on the appellate court and may not be adjudged to be "conclusive proof." 709 S.E.2d at 75. The Court of Appeals further cited to this Court's decision in *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'

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[2] *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").

stipulations of law").[3] 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.

In sum, there was no "concession" or "waiver" that was improperly disregarded by the Court of Appeals, and accordingly, a writ of certiorari is not warranted on this issue.[4]

II. The Court of Appeals was correct in ruling that the medical malpractice action filed on behalf of Kristy Orlowski is barred by the three-year statute of limitations set forth in Section 15-3-545 and that Section 15-3-40 does not toll the limitations period for medical malpractice claims.

Orlowski further contends that the Court of Appeals erred in its reliance on this Court's decision in *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993).

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[3] In *McDuffie v. McDuffie*, 308 S.C. 401, 418 S.E.2d 331 (Ct. App. 1992), the Court of Appeals 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.

[4] 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 achieved no benefit or success by even agreeing that there "may well" be an eight year statute of limitations.

To the contrary, *Langley* is dispositive of the statute of limitations issue, and the Court of Appeals' 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*, this 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. This 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, this 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.

Orlowski attempts to "distinguish" *Langley* by arguing that this Court was addressing the impact of a different tolling provision, Section 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, this Court in *Langley* 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). This 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). This 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. This Court further explained in clear terms that "[s]ubsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors." *Id.* In short, this Court's analysis in *Langley* 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).

In sum, the Court of Appeals was absolutely correct in concluding that this 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. Quite simply, there is no basis for the issuance of a writ of certiorari to review the Court

of Appeals' decision which was based exclusively on this Court's established precedent.[5]

III. Contrary to Petitioner's assertions, a writ of certiorari is not needed to answer any novel issue or unsettled question of statutory interpretation.

Rule 242(b), SCACR, sets forth general factors considered by this Court in determining whether issues require review on certiorari. Orlowski makes no specific mention of these factors in her petition.[6] Dr. Creagh and the Hospital submit that, aside from the merits which are addressed above, there are nonetheless several factors that demonstrate that a writ of certiorari is truly unwarranted in this case.

First, the decision of the three-judge panel in the Court of Appeals was unanimous; there was no dissenting opinion. Second, the decision of the Court of Appeals does not conflict with any existing decisions of this Court. Certainly, Orlowski has not directed the Court to any conflicting decisions. In actuality, the

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[5] 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. The Court of Appeals did not find it necessary to reach this issue because "*Langley* is controlling in this case," but the Court of Appeals 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." (App. 12). In the event that this Court grants a writ of certiorari, Dr. Creagh and the Hospital reserve the right to re-assert this alternative ground for dismissal.

[6] Instead, Orlowski simply points out that a writ of certiorari may be granted "for special and important reasons." *See*, Petition for Writ of Certiorari, p. 9.

Court of Appeals' ruling on the statute of limitations defense is based *exclusively* on this Court's decision in *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993). Finally, this case does not involve any issue of first impression nor any issue of great public interest or importance. As set forth above and reiterated below, this Court's decision in *Langley* controls the issue presently before this Court and sets forth clear guidance for all similarly situated litigants. Therefore, based upon the considerations outlined in Rule 242(b), there is simply no need for this Court to review the decision of the Court of Appeals.

Nonetheless, Orlowski insists that a writ of certiorari is necessary because "[w]ithout 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." *See*, Petition for Writ of Certiorari, p. 10. Orlowski seeks a "definitive answer" as to whether the tolling provisions of Section 15-3-40 apply to medical malpractice actions. However, this Court has already answered that very question in *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993). As discussed above, this Court in *Langley* held that "[s]ubsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors." 438 S.E.2d at 243. This 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).

That is the definitive answer to the question posed. There is no uncertainty or ambiguity. A writ of certiorari is simply not warranted.

CONCLUSION

Based on the foregoing discussion, the Respondents C. Edward Creagh, M.D. and Amisub of South Carolina, Inc. respectfully request that this Court deny the Petitioner's petition for writ of certiorari.

Respectfully submitted,

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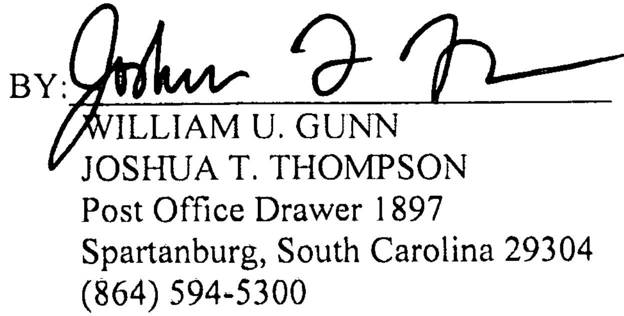

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for Respondent C. Edward Creagh, M.D., does hereby certify that service of the **Return to Petition for Writ of Certiorari** 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 15th day of August 2014:

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