THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

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.

BRIEF OF PETITIONER

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Secondary Source

54 C.J.S. Limitations of Actions § 117 10

QUESTIONS PRESENTED[1]

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 conceded Petitioner's position 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 medical malpractice claims; the merits of which involve a novel application of the law?

STATEMENT OF THE CASE

On November 24, 2009, Gladys Sims, as the guardian and conservator of Kristy L. Orlowski, ("Petitioner") filed a medical malpractice action against Amisub 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. First responders rushed her to Amisub where medical providers placed her on a ventilator. (App. p. 53). Her doctors delivered her baby by cesarean section. (*Id.*). Ms. Orlowski remained at Amisub from September 12, 2003, through most of November 2003. (*Id.*). During this hospitalization, she endured multiple surgeries, severe respiratory distress, and other life-threatening conditions. (*Id.*). Ms. Orlowski was discharged on

[1] Respondents' Return states they may assert as an additional sustaining ground that assuming section 15-3-40 applied, the appointment of a conservator ended Ms. Orlowski's disability. (Respondent's Return, p. 11). In the event Respondents raise this issue, Petitioner will address this in Reply.

November 24, 2003, but returned to Amisub hours later with severe chest pain and shortness of breath. (App. p. 58).

Dr. 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 Amisub 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 she continued to have 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.*). Although Ms. Orlowski was resuscitated, her breathing problems continued to worsen. She was airlifted to Carolinas Medical Center ("CMC") in Charlotte, North Carolina. Once at CMC, her neurological status was severely compromised and her condition continued to decline. (App. p. 61)

As a result of Dr. Creagh and Amisub's negligence, Ms. Orlowski is permanently unable to care for any of her own needs. She is bed-ridden with severely compromised breathing and decreased neurologic function. Ms. Orlowski's illness prevented her from understanding the nature of her own acts, made her incapable of managing her own affairs, and generally made her unable to function in society. The probate court appointed a guardian on March 5, 2004. (App. pp. 404-406). Ms. Orlowski's insanity continues as her medical condition has continued to prevent her from engaging with society.

Petitioner, as Ms. Orlowski's guardian and conservator, filed suit on November 24, 2009, based on Dr. Creagh and Amisub's negligence arising out of Ms. Orlowski's November 2003 hospital admission. The Complaint alleged that Dr. Creagh and Amisub negligently provided Ms. Orlowski's medical treatment beginning with the November 25, 2003 hospitalization by failing to timely diagnose her condition, failing to properly monitor her progress, and failing to take proper interventions. (App. pp. 60-61). 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) Petitioner filed Ms. Orlowski's 2009 Complaint outside the applicable statute of limitations. (App. pp. 115-119).

At the summary judgment hearing, Petitioner took the position that section 15-3-40 and section 15-3-545 of the South Carolina Code (2005) tolled the applicable statute of limitations to provide an outer limit of eight years for Ms. Orlowski to file her claim. (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). Petitioner timely filed a Petition for a Writ of Certiorari, which this Court granted on November 19, 2014. These proceedings followed.

ARGUMENT

This Court should reverse the court of appeals for two reasons.

First, the court of appeals' opinion does not properly apply the preservation rules upon which it relies. While it is true that this state's appellate courts have recognized the use of additional sustaining grounds to affirm a court ruling in some circumstances, parties cannot use sustaining grounds to retroactively change the position Respondents took before the trial court. Additional sustaining grounds are proper when their application is fair and just. In this

circumstance, allowing a party to assert a contradictory position on appeal is unjust. As a result, the court of appeals addressed the merits of the statute of limitations issue in error.

In addition, the court of appeals' reversal of the trial court's denial of summary judgment – based on an erroneous reliance on a case addressing the statute of repose – improperly curtails the general tolling provision for insane persons. Significantly, an insane person's ability to toll the medical malpractice statute of limitations is a novel issue. When our Legislature drafted section 15-3-545, it intended the tolling provision of section 15-3-40 to apply to medical malpractice cases brought by insane persons, particularly in cases such as this, in which Ms. Orlowski's insanity originated from the very acts of negligence underlying the medical malpractice claim. The court of appeals' opinion for all practical purposes strips away the protections purposefully enacted by our Legislature to safeguard those individuals who are most in need of them.

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

The court of appeals erred in affirming the trial court on additional sustaining grounds and improperly expanded the additional sustaining grounds doctrine because Respondents conceded Petitioner's position at trial. As such, the court of appeals unnecessarily addressed the statute of limitations issue by allowing Respondents to assert their argument 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, 419, 526 S.E.2d 716, 723 (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 erred in its reliance on the additional sustaining grounds doctrine 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. (App. pp. 295-296). Moments before the trial court denied Respondents' motions for summary judgment based on the statute of limitations, counsel for Amisub, admitted that, but for the appointment of a conservator, Ms. Orlowski could have eight years from date of injury to file within the statute. Specifically, counsel stated:

> "for purposes 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). Respondent counsel for Dr. Creagh joined in Amisub's argument, stating "I agree with everything [Amisub's counsel] said." (App. pp. 295-296)

On appeal, Respondents argued that an eight year statute of limitations cannot exist. (App. p. 456-460). This position is 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 the 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 and the South Carolina Appellate Court Rules.

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

The court of appeals' interpretation of tolling provisions for medical malpractice claims eliminates the general safeguards established by the Legislature to protect those unable to advocate for themselves. The Legislature created section 15-3-40 to protect disable persons' individual rights and access to the courts. *See* §15-3-40; *Wiggins v. Edwards*, 314 S.C. 126, 129, 442 S.E.2d 169, 170-71 (1994). Abolishing the general tolling provision for medical malpractice claims undermines Legislature's intent and grotesquely deprives insane persons of necessary legal protections. This decision is even more egregious in a case like this one, in which Ms. Orlowski's incapacity is the basis of her medical malpractice claims against Respondents.

The primary function in interpreting a statute is to ascertain the Legislature's intent. *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.*

Section 15-3-40 provides:

> If a person entitled to bring an action mentioned in Article 5 of this chapter. . . 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

(emphasis added).

The disability tolling statute does not define "insane," but this Court found that for purposes of section 15-3-40 insanity means a "mental condition which precludes understanding the nature or effects of one's acts, an incapacity to manage one's affairs, an inability to understand or protect one's rights, because of an over-all inability to function in society." *Wiggins*, 314 S.C. at 129, 442 S.E.2d at 170 (quoting 54 C.J.S. *Limitations of Actions* § 117 at 159-69). Ms. Orlowski suffers from permanent hypoxic encephalopathy and other mental disabilities that prevent her from caring for herself. (App. p. 61). As such, Ms. Orlowski meets the statutory meaning of insane to qualify for protections afforded under the general tolling provision of section 15-3-40.

Section 15-3-545 provides, in pertinent part, that a medical malpractice claim:

> (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 section 15-3-40 is inapplicable to toll Petitioner's claims because the claims are governed by section 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 section 15-3-40 or section 15-3-545's statute of limitation, but rather addressed a tolling provision of a statute of repose 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 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.

The Legislature narrows section 15-3-40's scope as to minors, but implicitly acknowledges and allows tolling for those who are insane under section 15-3-545.

The court of appeals' and Respondents' reasoning is dependent on *Langley*'s language stating, "Subsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors." *Id.*, 313 S.C. at 403, 438 S.E.2d at 243. When taken out of context this quoted proposition is incorrect. The limitation discussed by this Court addresses the alteration of section 15-3-40's tolling provision by subsection (D) for a minor's right to toll, but does not relinquish the general tolling benefits provided to insane persons pursuant to section 15-3-40. The Legislature intended the language "notwithstanding section 15-3-40" in subsection (D) of 15-3-545 to include the full benefit of tolling for insane persons in medical malpractices cases. The legislative history of section 15-3-40 demonstrates that the Legislature purposefully retained the category of insanity for permissible tolling in Article 5 when it removed incarceration as a form of disability in 1996, signaling the Legislature's intent to protect insane persons and their access to the courts. *See* Act 234, H.B. No. 3204 1996 Sess. (1996). If the Legislature intended to terminate the general safeguards established by section 15-3-40's tolling provision for insane persons, it could have directly removed insane persons from the list of permissible tolling, as it did with incarceration.

The *Langley* Court's interpretation of section 15-3-545 was limited to the six-year statute of repose for medical malpractice actions, which is inapplicable to this case. *Id.*, 401, 438 S.E.2d at 242. In *Langley*, the statute of limitations did not address disability tolling of the statute of limitations. *Id.* at 403-04, 438 S.E.2d at 243-44.

Subsection (A)'s six year statute of repose acknowledges and relies upon subsection (D)'s statute of limitations to evaluate the length of time an individual has to bring a claim. As

stated *supra*, section (A) of 15-3-545's statute of repose states an 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**." § 15-3-545 (emphasis added). The use of the word "or" allows for an individual entitled to tolling to exceed the general six year statute of repose through the use of the statute of limitations. *Michau v. Georgetown Cnty. ex rel. S. Carolina Counties Workers Comp. Trust*, 396 S.C. 589, 595, 723 S.E.2d 805, 808 (2012) (internal citations omitted). ("As this Court has recognized, the "use of the word 'or' in a statute 'is a disjunctive particle that marks an alternative.' "). When tolling applies, as with Ms. Orlowski, the specific tolling provision provides the outer limit of time in which a claimant may bring an action for medical malpractice.

Ms. Orlowski's incapacity, originating from Respondents' underlying negligence, left her insane at the time her claims accrued and she remains insane today. Ms. Orlowski is entitled to the full benefit of five years of tolling. By its terms, the disability tolling provision applies to all claims mentioned in Article 5 of Chapter 15. Giving effect to section 15-3-40's unambiguous language requires tolling of Ms. Orlowski's medical negligence claims during the period of her insanity. *Langley*'s reasoning does not compel a different result.

CONCLUSION

Based on the foregoing reasons, this Court should reverse the court of appeals. Reliance on additional sustaining grounds, in this particular case, goes against well recognized principles of equity and improperly expands the doctrine. Further, the statutory interpretation by the court of appeals ignores the general intent of the Legislature to adamantly protect those deemed insane.

Respectfully submitted,

December 19, 2014

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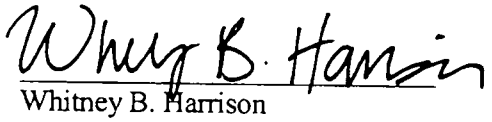

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v.

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CERTIFICATE OF SERVICE

I, Whitney B. Harrison, Attorney with McGowan, Hood & Felder, LLC do hereby certify that on December 19, 2014, I served a copy of the following ***Brief of Petitioner and an Amended Appendix*** by depositing in the United States mail in Columbia, South Carolina with proper postage prepaid to the following:

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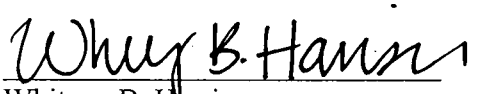

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