THE STATE OF SOUTH CAROLINA
In the 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)

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.

AMENDED APPENDIX

Volume II of II

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

Case No. 2009-CP-46-5178

Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (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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STATEMENT OF ISSUE ON APPEAL

1. Whether the circuit court erred in estopping Kristy Orlowski from pursuing a medical negligence claim against Dr. C. Edward Creagh and Piedmont Medical Center based on an entirely distinct medical negligence claim against Ms. Orlowski's other medical providers.

STATEMENT OF THE CASE

Kristy Orlowski was pregnant in 2003 with her first child when she sought prenatal care from Dr. R. Norman Taylor and Rock Hill Gynecological & Obstetrics, P.A. ("RH GYNOB"). (R. p. 14 at ¶ 10-11). Kristy had headaches, dizziness, nausea, and extremity swelling for several months during the summer of 2003. (R. p. 14 at ¶ 17-18). Kristy saw Dr. Taylor for a regularly scheduled prenatal visit on September 11, 2003, and discussed her symptoms with Dr. Taylor. (R. p. 14 at ¶ 18-19). Dr. Taylor led Kristy to believe her condition was normal and sent her home without further treatment. (R. p. 15 at ¶ 20). Hours later, Kristy suffered a seizure and was found unresponsive in her home. (R. p. 15 at ¶ 21). Kristy was rushed to Piedmont Medical Center ("PMC") where she was placed on a ventilator. (R. p. 15 at ¶ 22). Her doctors delivered baby Brianna by cesarean section. (R. p. 15 at ¶ 23).

Kristy 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. Id. 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. Edward Creagh admitted Kristy and was responsible for her care during this hospitalization. (R. p. 20 at ¶ 12). Dr. Creagh diagnosed a left pleural effusion and performed a thoracentesis for suspected empyema but still chose to send Kristy home on November 27, 2003. (R. p. 20 at ¶ 12-13). Two days later, Kristy returned to PMC with severe nausea and vomiting. (R. p. 21 at ¶ 14). Dr. Creagh finally ordered a CT scan on November 30th that revealed a hydropneumothorax in Kristy's left lung. Id.

Kristy's condition deteriorated rapidly over the next several days. She developed metabolic acidosis, stiff lungs, and continued having severe respiratory difficulties even with a ventilator. (R. p. 21 at ¶ 17). 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.

Kristy, through her husband and guardian/conservator, filed a medical negligence claim against Dr. Taylor and RH GYNOB in August 2006. Kristy alleged Dr. Taylor and RH GYNOB improperly responded to Kristy's preeclampsia symptoms during the September 11, 2003 office visit causing Kristy to suffer a seizure, extended hospitalization, and permanent impairments. (R. p. 16-17 at ¶ 28-30). This will be referred to as the "Taylor Case."

The Taylor Case was based on alleged negligence occurring in September 2003. In preparation for trial of the Taylor Case, Kristy retained medical experts who testified that Kristy's permanent impairments were proximately caused by the negligence of Dr. Taylor and RH GYNOB. These witnesses testified accordingly at the April 2009 trial. For example, Plaintiff's expert Dr. Barry S. Schifrin testified that Kristy had signs and symptoms consistent with eclampsia during her visit to Dr. Taylor's office on September 11, 2003. (R. p. 64). The presence of those signs and symptoms required a different type of care than Dr. Taylor actually provided. Id. The preeclamptic episode Kristy suffered on September 12th would not have happened had Dr. Taylor responded properly to the signs and symptoms Kristy displayed on the 11th. (R. p. 65). Dr. Schifrin concluded that

Kristy's permanent injuries would not have occurred but for Dr. Taylor's improper conduct. See (R. p. 8).

None of this testimony addressed Dr. Creagh's conduct, or any negligence occurring during the November 25th hospital admission. This testimony never claimed Dr. Taylor' negligence was the sole cause of Kristy's injuries, to the exclusion of other potentially liable parties. Simply put, the medical negligence occurring during the November 25 hospital admission was never at issue in the Taylor Case.

The Taylor Case ended in a Defense Verdict.

Kristy filed the "Creagh Case" in November based on Dr. Creagh and PMC's negligence arising out of Kristy's November 2003 hospital admission. Dr. Creagh was NOT a party to the Taylor Case, his conduct was never examined in that litigation, and his alleged negligence arises out of a different hospital admission. The Creagh Complaint alleged that Dr. Creagh and PMC negligently provided Kristy's medical treatment beginning with the November 25, 2003 hospitalization. (R. p. 22-23 at ¶¶ 21-25; (R. p. 27-30 at ¶¶ 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. (R. p. 29 at ¶ 34). Although discovery is incomplete in this case, Defendants moved for summary judgment based on collateral estoppel in April 2012 and the motions were granted by order dated August 10, 2012.

Thus, the Circuit Court dismissed the instant case, based on testimony given in an earlier case that involved different parties, different allegations of medical negligence, and a different hospital visit. This was error.

STANDARD OF REVIEW

Summary judgment is appropriate only if the pleadings, discovery responses, and affidavits show "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. On a motion for summary judgment, a court must "construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party." Byers v. Westinghouse Elec. Corp., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Summary judgment should be granted "only where it is perfectly clear that no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of the law." Wortman v. City of Spartanburg, 310 S.C. 1, 4, 425 S.E.2d 18, 20 (1992). On appeal, the court "applies the same standard used by the trial court" when reviewing a summary judgment order. Epstein v. Coastal Timber Co., 393 S.C. 276, 281, 711 S.E.2d 912, 915 (2011).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN ESTOPPING KRISTY ORLOWSKI FROM PURSUING A MEDICAL NEGLIGENCE CLAIM AGAINST DR. C. EDWARD CREAGH AND PIEDMONT MEDICAL CENTER BASED ON AN ENTIRELY DISTINCT MEDICAL NEGLIGENCE CLAIM AGAINST MS. ORLOWKSI'S OTHER MEDICAL PROVIDERS.

There are several clear rules of law applicable to this case:

1) A plaintiff is the master of her complaint. See Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 344, 698 S.E.2d 559, 560 (2010)("It is well-settled that a plaintiff has the sole right to determine which co-tortfeasor(s) she will sue")(citing Doctor v. Robert Lee, Inc., 215 S.C. 332, 335, 55 S.E.2d 68, 69 (1949)("One who is injured by the wrongful act of two or more joint tort-feasors has the option of bring an action against either one or all of them as parties defendants")).

2) A negligent party is liable for all reasonably foreseeable injuries a plaintiff suffers including subsequent medical malpractice. Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984).

3) For acts of medical negligence performed by different providers during different hospital admissions separated by two months, the South Carolina Rules of Civil Procedure do not call for joinder of parties. See Rule 19(a), SCRCP (limiting involuntary joinder to indispensible parties whose absence would prevent "complete relief...among those already parties"); Rule 20(a), SCRCP (permitting but not requiring a claiming party to join all defendants in a single action). Thus, as a matter of law, where the Taylor Case alleged different negligent conduct performed by different parties during different hospital admissions, the Taylor Case's outcome has no effect on the Creagh Case.

Despite these clear legal principles, the circuit court found that the Taylor Case also concluded the Creagh Case. The basis for the circuit court's decision was not clear. During the proceedings related to Respondents' Motions for Summary Judgment, the court referred to several different types of estoppel as a potential basis for dismissing Appellant's Complaint. At various times, the court discussed (1) collateral estoppel[1]; (2) judicial estoppel[2]; (3) "estoppel of a judgment"[3]; and (4) "estoppel by judgment.[4]" The court appeared unsure as to which type of estoppel formed the basis for its decision. See (R. p. 11)("whether the legal theory of the defense is collateral estoppel or estoppel by judgment..."); (R. p. 287, lines 1-2)(applying a "collateral estoppel—if that's the right word—argument"). Accordingly, all of these terms are addressed below.

[1] (R. p. 287, line 1); (R. p. 7)
[2] (R. p. 274, line 3)
[3] (R. p. 11)(quoting Jenkins v. Atl. Coastline R.R. Co., 89 S.C. 408, 421, 71 S.E. 1010, 1012 (1911))
[4] (R. p. 7).

A. The circuit court's order was not a proper application of collateral estoppel.

Collateral estoppel or issue preclusion is a bar on relitigation of issues previously decided in earlier proceedings. This legal doctrine is based on the "public interest [that] demands an end to the litigation" where a party has once litigated and lost the issue in question. Beall v. Doe, 281 S.C. 363, 370, 315 S.E.2d 186, 190 (Ct. App. 1984). A proper application of collateral estoppel supports the "[p]rinciples of finality, certainty, and the proper administration of justice." Id. Collateral estoppel applies only if the particular issue was "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009).

Of all the estoppel iterations mentioned in the proceedings below, collateral estoppel is the most prevalent. Collateral estoppel is the doctrine cited by Dr. Creagh and PMC in their respective motions. See (R. p. 78); (R. p. 81). The Order's section discussing estoppel is titled "Collateral estoppel," and collateral estoppel is the doctrine Judge Kimball explicitly cited in announcing his decision to grant Respondents' motions. (R. p. 7); (R. p. 287, line 1).

Collateral estoppel was cited as a basis for dismissing Appellant's complaint. The court reviewed testimony from Appellant's trial against Dr. Taylor and RH GYNOB and concluded Appellant asserted "that all of Kristy's injuries, damages, expenses of every kind, past and future, were directly and proximately caused by the negligence of Dr. Taylor and his group." (R. p. 10). This statement is true yet incomplete as Creagh and PMC were also proximate causes of Kristy's damages. Even so, the court used this premise as the basis for its conclusion that Ms. Orlowski was collaterally estopped from asserting a claim for the later negligence of Dr. Creagh and PMC. However, the collateral

estoppel elements are not satisfied here, and the court erred in applying the doctrine in this case.

As noted above, Ms. Orlowski cannot be collaterally estopped from asserting a negligence claim against Dr. Creagh and Piedmont unless the issue of these parties' negligence was "actually litigated" in the previous suit. An issue is "actually litigated" when there is testimony on the issue in the previous litigation. See e.g., Carolina Renewal, Inc., 385 S.C. at 557-58, 684 S.E.2d at 783-84 (finding contract damages issue "actually litigated" where party testified on damages at earlier trial). This court has turned to the Restatement for guidance as to when an issue is "actually litigated". See Smith v. Hastie, 367 S.C. 410, 420, 626 S.E.2d 13, 18 n. 15 (Ct. App. 2005)(citing Restatement (Second) of Judgments § 27 (1982)). The Restatement indicates that an issue is "actually litigated" when it is "properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined." Restatement (Second) of Judgments § 27 cmt. d.

None of these indicators are present here. Dr. Creagh's and PMC's alleged negligence were never raised in the Taylor Case and none of the trial testimony Respondents' cited below indicates otherwise. There was no need to raise these two parties' negligence in the Taylor trial since neither was a party to the suit. Only Dr. Taylor and RH GYNOB's negligence were presented to the jury for decision. The jury's verdict was limited to those parties because no other party's conduct was at issue. Similarly, Respondents produced no evidence that their negligence was either directly determined or necessary to the judgment in the Taylor Case. Respondents produced no evidence on these points because the issue of their negligence was not pertinent to the Taylor case and was never determined in that litigation.

The trial court relied heavily on Graham v. State Farm Fire & Casualty Insurance Co., 277 S.C. 389, 287 S.E.2d 495 (1982), in granting Respondents' motions. See (R. p. 10-11). In Graham, a homeowner's car and a portion of his house were destroyed by a fire that started in the garage. 277 S.C. at 390, 287 S.E.2d at 495. The homeowner originally sued to recover on his auto insurance police. In its defense, the insurer claimed the fire was "of incendiary origin," i.e. intentionally set by the homeowner. Id. at 390, 287 S.E.2d at 496. This case resulted in a verdict for the insurer. The homeowner then filed a claim on his homeowner's insurance policy, and filed a second lawsuit when that insurer refused to pay the claim. Id. The trial court granted summary judgment to the insurer concluding the homeowner was collaterally estopped from denying that the fire was of an incendiary origin. The Supreme Court affirmed summary judgment. Id.

The Graham court used several different terms in reference to the estoppel doctrine it applied including "collateral estoppel by judgment," "estoppel by judgment," and "estoppel of a judgment." 277 S.C. at 391, 287 S.E.2d at 496. Citations to Graham since it was decided show that all of these terms refer to the single doctrine now referred to simply as "collateral estoppel." Graham has been called "the defensive application of nonmutual collateral estoppel." Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984). As recently as 2009, this Court acknowledged the doctrine at issue in Graham was collateral estoppel. See Carolina Renewal, Inc., 385 S.C. at 555, 684 S.E.2d at 782 (discussing Graham's holding eliminating mutuality as collateral estoppel requirement).

Regardless of the various labels given to the doctrine, the Graham court was applying collateral estoppel. The Graham facts clearly meet all three collateral estoppel elements. The homeowner's suit against his auto insurer "actually litigated" whether the

fire was of an incendiary origin as this issue "was vigorously pursued" by the homeowner's attorney during the first trial. Graham, 277 S.C. at 391, 287 S.E.2d at 496. The fire's origin was directly determined with the appellate court noting the first trial "resulted in an adjudication as to the origin of the fire." Id. The fire origin issue was necessary to the prior judgment since the fire's origin was the "sole issue in both actions." Id. To apply Graham is to apply the doctrine the Graham court applied. In other words, applying Graham means applying collateral estoppel and meeting all three collateral estoppel elements. Since Respondents cannot meet these elements, Graham offers no support for their position and cannot serve as basis for summary judgment in this case.

The other cases Respondents cited in their motions and supporting memoranda also meet collateral estoppel's three elements. In Irby v. Richardson, 278 S.C. 484, 298 S.E.2d 452 (1982), a litigant sued his attorney for malpractice following a child custody dispute, arguing the attorney failed to adequately prepare his case. The court applied collateral estoppel because the litigant consented to his wife's custody of the children and was, therefore, not permitted to pursue a suit against his attorney premised on a contested custody claim. Id. at 485, 298 S.E.2d at 453. Child custody was a key issue in the divorce case and subsequent proceedings and the court made specific findings granting custody to the mother. In Nelson v. QHG of South Carolina, Inc., 362 S.C. 421, 608 S.E.2d 855 (2005), the issue in both suits was whether a particular doctor was negligent. This issue was litigated in the first suit and was both directly determined and necessary to the court's order granting summary judgment in the first suit.

Respondents moved for summary judgment based on collateral estoppel. They bore the burden of establishing the doctrine for the facts of this case. Since none of collateral estoppel's essential elements were demonstrated, Respondents did not meet their burden. Accordingly, the circuit court erred in granting summary judgment based on collateral estoppel.

B. The circuit court's order was not a proper application of judicial estoppel.

Judge Kimball referred to "judicial estoppel" during the hearing on Respondents' motions. (R. p. 274, line 3). Although judicial estoppel is not cited in the circuit court's order, the judge's reference to this doctrine during the hearing was not merely in passing. Judge Kimball referred to "judicial estoppel" as the term for the doctrine he would ultimately apply in this case. (R. p. 274, lines 3-6). However, this case does not meet the established elements for judicial estoppel and this doctrine does not support the court's summary judgment order.

Judicial estoppel, an equitable doctrine that "should be applied sparingly," is designed to prevent a party from advocating a position that conflicts with one the party has previous taken in the same or a related case. Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004). Judicial estoppel applies only if all of the following five elements are present:

> (1) two inconsistent positions taken by the same party or parties in privity with one another;
> (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other;
> (3) the party taking the position must have been successful in maintaining that position and have received some benefit;
> (4) the inconsistency must be part of an intentional effort to mislead the court; and
> (5) the two positions must be totally inconsistent.

Id. at 215-16, 592 S.E.2d at 632 (citing Carrigg v. Cannon, 347 S.C. 75, 83, 552 S.E.2d 767, 772 (Ct. App. 2001)). Judicial estoppel is designed to protect judicial integrity rather than protect litigants from their opponent's perceived improper conduct. Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997).

This doctrine does not apply primarily because Ms. Orlowski has not taken two inconsistent positions. In the Taylor Case, Ms. Orlowski took the position that Dr. Taylor and RH GYNOB provided negligent medical care that caused Ms. Orlowski to suffer a seizure leading to a series of hospitalizations and eventually the permanent damages she continues to experience today. (R. p. 16 at ¶ 27-29). This position was supported by expert testimony, including some of the testimony Respondents cite in their motions. South Carolina law holds a negligent party liable for all damages proximately caused by the party's negligent act or omission. See Mellen v. Lane, 377 S.C. 261, 287, 659 S.E.2d 236, 250 (Ct. App. 2008)(noting actual damages include "all injuries which are naturally the proximate result of the alleged wrongful conduct"). A person injured by a negligent act who receives negligent medical treatment for the injury may pursue the original negligent actor for the original injury **and** all damages caused by the negligent medical care. Graham v. Whitaker, 282 S.C. 393, 399, 321 S.E.2d 40, 44 (1984). In such circumstances, the later-arising negligent medical care is "part of the immediate and direct damages which naturally flow from the original injury." Id. (citing Bessinger v. DeLoach, 230 S.C. 1, 94 S.E.2d 3 (1956)).

Ms. Orlowski's negligence claim against Dr. Taylor/RH GYNOB for all damages proximately flowing from their conduct does not preclude her from asserting that Respondents' actions were proximate causes of her damages flowing from the late-

November 2003 hospitalization. Taylor/RH GYNOB, Dr. Creagh, and PMC can all be proximate causes of Ms. Orlowski's permanent damages. A party's unreasonable conduct need not be the "sole cause" of the plaintiff's injury to meet the proximate cause element of a negligence claim. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977).

The proximate cause requirement is satisfied so long as the defendant's unreasonable act "was at least one of the proximate, concurring causes" of the plaintiff's injury. Id.; see also Madison v. Babcock Ctr., Inc., 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006)("the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury"). "The fact that other causes also contribute" to a plaintiff's injury "does not relieve the defendant from responsibility." Mellen, 377 S.C. at 282, 659 S.E.2d at 247 (quoting State v. Burton, 302 S.C. 494, 496-97, 397 S.E.2d 90, 91 (1990)). Accordingly, even for those areas where the alleged damages overlap, there is no inconsistency between Ms. Orlowski's position regarding Dr. Taylor/RH GYNOB in the Taylor Case and her position on Respondents' conduct in the Creagh Case. Without inconsistent positions, Respondents cannot satisfy the first or fifth judicial estoppel elements and summary judgment on this basis is improper.

Respondents are also unable to meet the third judicial estoppel element requiring that the party to be estopped has been successful in maintaining the prohibited position and has garnered some benefit. Dr. Creagh and PMC contend Ms. Orlowski previously claimed Dr. Taylor and RH GYNOB were responsible for all her damages to the exclusion of all other medical providers. That conclusion is not supported by the evidence in this case. Even if the Court concludes Appellant took this position, she certainly was

not successful in maintaining it and garnered no benefit as the jury rendered a defense verdict in the Taylor trial. This is an additional ground to refuse application of judicial estoppel in this case. Several of the required elements are not present and this doctrine does not apply. Summary judgment based on judicial estoppel should not have been granted.

CONCLUSION

Based on the arguments stated above, Appellant respectfully requests that the Court reverse the circuit court's summary judgment order. Respondents have failed to satisfy the required elements for either collateral estoppel or judicial estoppel. Accordingly, they have failed to meet their burden for summary judgment and the motions should be denied.

Respectfully submitted,

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April 23, 2013
Rock Hill, South Carolina

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CERTIFICATE OF COUNSEL

Counsel hereby certifies that the following briefs comply with Rule 211(b), SCACR:

(1) Appellant's Final Brief of Appellant/Respondent;

(2) Appellant's Final Reply Brief of Appellant/Respondent; and

(3) Respondent's Final Brief of Appellant/Respondent.

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PROOF OF SERVICE

The undersigned hereby certifies that on this 23rd day of April, 2013, he served counsel for the Defendants with a copy of the following documents:

(1) Appellant's Final Brief of Appellant/Respondent;
(2) Appellant's Final Reply Brief of Appellant/Respondent; and
(3) Respondent's Final Brief of Appellant/Respondent

in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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RESPONDENT'S FINAL BRIEF OF RESPONDENT-APPELLANT CREAGH

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Statutes and Rules

STATEMENT OF THE CASE

This is a medical malpractice action. The Appellant-Respondent 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 Respondents-Appellant C. Edward Creagh, M.D. and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Hospital").

In 2003, Kristy L. Orlowski a/k/a Kristy Wood was provided prenatal care by R. Norman Taylor, III, M.D. and his practice, Rock Hill Gynecological & Obstetrical Associates, P.A. (R. 14-15). On September 12, 2003, Orlowski suffered an eclamptic seizure with aspiration and apoxia. (R. 66. 76). Following the seizure, she was hospitalized at Piedmont Medical Center from September 12, 2003 until November 24, 2003. (R. 120-121, 124).

On November 25, 2003, Orlowski was re-admitted to the Hospital by Dr. Creagh,[1] who diagnosed her with a left pleural effusion. (R. 20). She was discharged on November 27, 2003. (R. 20). On November 29, 2003, Orlowski was re-admitted to the Hospital for persistent vomiting likely related to the parapneumonic effusion (PPE). (R. 21). Her conditions continued to decline, and

[1] Dr. Creagh is a board-certified pulmonologist.

on December 11, 2003, she was transferred to Carolinas Medical Center in Charlotte, North Carolina.

Orlowski alleges that she has been mentally incompetent since September 12, 2003, the date of the eclamptic seizure. On March 5, 2004, the Chester County Probate Court appointed Orlowski's husband, Christopher T. Orlowski, as her guardian and conservator. (R. 370). Orlowski's mother, Gladys Sims, is her current guardian and conservator. (R. 372-373).

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 (hereafter referred to as the "Taylor lawsuit"). Dr. Taylor and his practice were the sole defendants. (R. 12-17). In that lawsuit, Orlowski alleged that "as a direct and proximate result" of Dr. Taylor's medical negligence, she "suffered severe, debilitating, and permanent neurological deficits." (Complaint, para. 27). (R. 16). Specifically, she claimed past, present, and future injuries and damages, including "chronic pain and suffering," "substantial medical expenses," "disfigurement," "mental anguish," "loss of enjoyment of life," "loss of income and related benefits," "need for full time medical and nursing care to assist her with her activities of daily living," "permanent restrictions and impairments that make it impractical for her to care for even her most basic of personal needs," and "for

such other damages as may be identified during the course of this litigation." (Complaint, para. 29). (R. 16-17).

The Taylor 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. (R. 244). During the trial, Orlowski presented expert medical testimony that all damages incurred by Orlowski, and to be incurred in the future, were attributable to Dr. Taylor's negligence. Orlowski presented the expert testimony of Dr. Stephen Pliskow, who opined, to a reasonable degree of medical certainty, that all of Orlowski's medical problems were caused by the September 12, 2003 eclamptic seizure and that the seizure could have been avoided had Dr. Taylor hospitalized Ms. Orlowski on September 11, 2003. (R. 66-67, 76). Orlowski also presented expert testimony from economist Oliver Wood, Ph.D. in support of her claim for economic losses, lost earning capacity, medical expenses, and future life care planning needs from September 12, 2003 forward. (R. 67-73, 76). Orlowski's experts testified that all of her claimed damages were a direct and proximate result of Dr. Taylor's negligence occurring on or before September 12, 2003. (R. 122-123, 125).

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. (R. 18). Orlowski alleged that the medical negligence of Dr. Creagh and the Hospital occurring between November and December 2003 caused her to suffer "severe debilitating injuries which have resulted in her incompetent state due to the hypotensive episode and hypoxic condition which has caused physical suffering, severe physical, cognitive and emotional pain and distress, and has ultimately caused Kristy Orlowski's permanent and severely disabled physical and mental state." (R. 29). In the current suit, Orlowski seeks damages against Dr. Creagh and the Hospital for the same exact list of injuries and damages claimed in the Taylor lawsuit. (R. 17, 29-30).

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 and the adjudication of the Taylor lawsuit. (R. 77-81). 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. (R. 2-11).

Orlowski then filed a notice of appeal to this Court. 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.

ARGUMENTS

I. The Circuit Court correctly ruled that the Appellant's medical malpractice action is barred by collateral estoppel or estoppel by judgment.

Special Circuit Court Judge S. Jackson Kimball granted summary judgment to C. Edward Creagh, M.D. and the Hospital on a collateral estoppel or estoppel by judgment defense. Judge Kimball based his ruling on the positions taken by Orlowski and the ultimate adjudication of the prior medical malpractice action brought against R. Norman Taylor, III, M.D. and his practice.

In the Taylor lawsuit, filed on August 24, 2006, Orlowski alleged that she was totally and permanently disabled as a result of medical negligence attributable to Dr. Taylor occurring on or before September 12, 2003. The Taylor lawsuit was tried in April 2009, resulting in a defense verdict although Orlowski did receive a $300,000 settlement per a high-low agreement. During the trial of that case, Orlowski took the position that her total and permanent disability was the sole result of the negligence of Dr. Taylor. Orlowski did not place any blame on Dr. Creagh or the Hospital nor did Orlowski argue that medical negligence was committed after Orlowski was re-admitted to the Hospital on November 25, 2003. Orlowski took the position instead that all damages sustained by her flowed directly from the negligence of Dr. Taylor. (R. 12-17, 106-118, 120-125).

The pertinent portions of the trial record from the Taylor lawsuit were presented to the Circuit Court in the present case by way of requests for admissions. In the Taylor lawsuit, Orlowski presented by expert testimony evidence that all of the hospitalizations, injuries, disability, and need for a life care plan were causally related to the eclamptic seizure resulting from the alleged deficient care by Dr. Taylor. Specifically, Orlowski presented the expert medical opinions of Dr. Stephen Pliskow, who testified as follows:

> Q: Within a reasonable degree of medical certainty were all of Kristy's problems; medical problems, were they caused by the eclamptic episode on September 12th?
>
> A: *Yes they were.* Kristy eventually went home after her recovery from the seizure at Piedmont but was never really well. She was having chest pains and difficulty breathing, panic attacks. Went back to the hospital for a two day stay only one or two days after she had gone home. She really wanted to go back home. They sent her home and subsequently two days later was put right back in the hospital. She was diagnosed with an empiema which is an abscess or an infection on the outside of the lungs and that was from the tube, the breathing tube that she had because -- well the chest tubes that she had because when she was admitted with the eclampsia and had the aspiration of pneumonia she would up developing pneumothorax. Pneumothorax is basically when the lungs collapse. And the way they treat that is they put chest tubes in they suck the air out of the chest wall and allows the walls of the lungs to re-expand. So those cites from the foreign bodies that were in her chest cavity wound up getting infected

> and those got infected with MRSA so that was defiantly [sic] related to the hospitalization. Also she wound up with pseudopneumonia. Pseudopneumonia is not a normal pneumonia that you would get community acquired. It's something that you definitely see hospital acquired and that's from her being intubated for a long time. Having had aspiration pneumonia *so the answer is yes her readmission to Piedmont, her subsequent cardiac arrest during that admission and then her transfer to CMC the Carolina's Medical Center was all related back to her eclamptic seizure.*

(R. 109-110). (Emphasis added). Dr. Pliskow further testified as follows:

> Q: Within a reasonable degree of medical certainty could all of that in your opinion Breanna's death, all of Kristy's problems that she has today been prevented by hospitalization of Kristy Wood on September 11, 2003?
>
> A: Yes, I believe that if she was admitted on the 11th within a reasonable degree of medical certainty she would have been delivered before the seizure. But even if we say that she would have seized in the hospital she would have been fine. Most patients more likely than not patients that seize in the hospital with the medical care that we have for them there they do much better and she would be fine.

(R. 110). In addition, Orlowski presented the testimony of Dr. Oliver Wood to establish the amount of her economic damages, including the future costs of the life care plan presented to the jury. (R. 110-116). Orlowski took the position that those damages were all proximately caused by the alleged negligence of Dr. Taylor. (R. 122-123, 125). Those are the same damages claimed in the present

action; yet, as indicated, Orlowski never took the position in the Taylor lawsuit that Dr. Creagh or the Hospital had any legal responsibility for those damages.

As Judge Kimball recognized, which Orlowski does not refute or challenge on appeal,

> [B]y the time of trial in Plaintiff's action against Dr. Taylor in April, 2009, Plaintiff and her counsel were fully apprised through discovery of the entire and extensive medical record in this case, including every aspect of these Defendants involvement in Kristy's treatment and care. This includes every act which Plaintiff now claims to be negligent treatment and care causing Kristy's injuries and damages.

(R. 10). Judge Kimball further observed that at the hearing Orlowski's counsel acknowledged that Dr. Creagh and the Hospital could have been joined as party-defendants and their alleged liability for the claimed damages could have been litigated. (R. 10). Yet, Orlowski took the position in the Taylor lawsuit that her damages and injuries were solely caused by the eclamptic seizure occurring on September 12, 2003, long before Dr. Creagh was involved in her care.

As Judge Kimball correctly determined, Orlowski is barred by collateral estoppel or estoppel by judgment from taking different positions and from re-litigating issues decided in the Taylor lawsuit. Judge Kimball's application of estoppel is supported by several cases, as well as by principles of judicial estoppel as discussed below. In *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944), the Supreme Court held that "[a]n estoppel by record is the preclusion to deny the

truth of matters set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction." 31 S.E.2d at 320. "It is binding on parties and those in privity with them." *Id.* Similarly, in *Mackey v. Frazier*, 234 S.C. 81, 106 S.E.2d 895 (1959), the Supreme Court held:

> The doctrine of estoppel by judgment proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment in personam in a former suit.

106 S.E.2d at 898. Later, in *Graham v. State Farm Fire & Casualty Ins. Co.*, 277 S.C. 389, 287 S.E.2d 495 (1982), the Supreme Court confirmed that estoppel by judgment, which was also referred to as collateral estoppel, applied notwithstanding a lack of privity. The Court also explained that nonmutual collateral estoppel could, of course, be applied defensively. *See also*, *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984).

In *Graham v. State Farm Fire & Casualty Ins. Co.*, 277 S.C. 389, 287 S.E.2d 495 (1982), the Supreme Court ruled that the plaintiff was collaterally estopped by prior judgment from bringing a similar action against a different defendant. In that case, the plaintiff's automobile was destroyed by fire while parked in the garage of his residence. The plaintiff first sued his auto insurance

company for insurance proceeds, and the jury ruled in favor of the insurer. The plaintiff then brought a subsequent suit under his homeowner's policy for breach of contract. In that action the lower court granted summary judgment for the homeowner's insurer and ruled that the insured was collaterally estopped by the prior judgment to bring the second lawsuit. The Supreme Court affirmed finding that "[i]t appears from the transcript of record that the appellant has had his day in court." 287 S.E.2d at 496.

The Supreme Court in *Graham* cited favorably to the case of *Jenkins v. Atlantic Coast Line Railroad Co.*, 89 S.C. 408, 71 S.E. 1010 (1911), in which the plaintiff was injured in a train accident. The plaintiff brought suit against one railroad company which owned the tracks where the accident occurred. The case was tried on the merits, and judgment was entered in favor of that railroad company. The plaintiff then brought a second suit against another railroad company that owned and operated the train at the time of the accident. The Supreme Court barred the second suit on the following reasoning:

> [T]he true ground upon which a former judgment, in a case like this, should be allowed to operate as a bar to a second action is not *res judicata*, or technical estoppel, because the parties are not the same, and there is no such privity between them as is necessary for the application of that doctrine; but that in such cases, on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment, persons who are not, strictly speaking, either parties or privies. *It is rested upon the wholesome*

> *principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity.*

71 S.E. at 1012. (Emphasis added).

Importantly, the injuries and damages that Orlowski sought in the Taylor lawsuit are precisely the same as she is seeking in the present lawsuit. In the complaints filed in both actions, the list of the injuries and damages claimed by Orlowski are identical. The injuries and damages alleged in paragraph 29 of the complaint against Dr. Taylor are identical to those alleged in paragraph 35 of the complaint against Dr. Creagh. (R. 17, 29-30). The evidence to be presented on damages in the present case, including the economic damages and the life care plan, is the same as already presented to and rejected by the jury in the Taylor lawsuit. (R. 122-123, 125).

This Court's decision in *Carolina Renewal, Inc. v. South Carolina Department of Transportation*, 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009), is instructive.[2] There were two separate lawsuits brought against SCDOT. The first suit was brought by the sole shareholder and owner of Carolina Renewal alleging slander against SCDOT. In that slander action, the owner claimed damages that flowed from the contract between Carolina Renewal and SCDOT. After the owner

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[2] The South Carolina Supreme Court denied a writ of certiorari in *Carolina Renewal*.

received a verdict against SCDOT, Carolina Renewal commenced a second suit for breach of contract against SCDOT. The Circuit Court dismissed the second suit on the basis of collateral estoppel finding that the issue of contract damages had already been litigated in the first case. On appeal, this Court affirmed. This Court explained that the plaintiff had introduced evidence of damages flowing from the breach of contract in the slander action. As a result, this Court concluded that the plaintiff sought to recover for the same injuries and damages in both actions, which the Court did not permit. This Court ultimately concluded that the second suit for those same injuries and damages was barred by collateral estoppel. The same is true in the present case – Orlowski should be barred from re-litigating the same injuries and damages that were denied in the first suit.

In sum, Judge Kimball concluded that the "wholesome principle" described in *Graham* and *Jenkins* was equally applicable here. He ruled that Orlowski had had her day in court. She made the conscious decision to assert that Dr. Taylor and his practice – and no one else – had caused all of injuries and damages that she claimed. As a result, Orlowski should be bound by the positions that were actually litigated and decided adversely in the Taylor lawsuit. She should be precluded from taking inconsistent positions on the facts – after losing on those positions. She should be precluded from now arguing that other parties are legally responsible for the same injuries and damages. And finally, she should be

precluded from relitigating the issue of damages – an issue already litigated in the Taylor lawsuit. The decision of the Circuit Court is supported by the case law and should be affirmed.

II. The Appellant's medical malpractice action is also barred by the doctrine of judicial estoppel.

As Orlowski concedes in her brief, Judge Kimball referenced the doctrine of judicial estoppel during the hearing and ultimately applied the concepts of judicial estoppel as part of his application of general estoppel principles in dismissing Orlowski's second suit. Regardless of whether "judicial estoppel" as developed in South Carolina jurisprudence over the past fifteen years was a basis for Judge Kimball's ruling or is simply an additional sustaining ground,[3] the Court is urged to apply that analysis to the present case to affirm the judgment entered in favor of Dr. Creagh.

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[3] In the case of *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained that 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." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* *See also*, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

The position taken by Dr. Creagh on the application of principles of judicial estoppel is identical to that taken by the Hospital. Both parties contend that Orlowski has intentionally taken inconsistent positions in the two lawsuits thereby triggering the bar of judicial estoppel. Instead of repeating the arguments already made by the Hospital, Dr. Creagh hereby adopts by reference and incorporates herein Argument II as set forth on pages 15 through 20 of the brief filed by the Hospital.[4] Dr. Creagh submits on that basis that Judge Kimball was correct in barring Orlowski from taking inconsistent positions from those positions that served as the basis for her ultimate settlement of the Taylor lawsuit for $300,000 on a high-low agreement, and that Judge Kimball was also correct in ultimately entering summary judgment in favor of Dr. Creagh and the Hospital.

III. As an additional sustaining ground, 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.

As an additional sustaining ground on appeal, Dr. Creagh contends that the medical malpractice action filed on behalf of Kristy Orlowski is barred by the

[4] Rule 208(b)(6), SCACR, provides: "In cases involving more than one appellant or respondent ... any party may adopt by reference all of any part of the brief of another." Rule 208(b)(6), SCACR.

three-year statute of limitations set forth in Section 15-3-545(A).[5] Orlowski alleges that Dr. Creagh's negligence occurred between November 24, 2003 and December 8, 2003; yet, the Complaint was not filed until six years later on November 24, 2009, which was beyond the three-year statute of limitations. Orlowski contends, however, that she was mentally incompetent beginning on September 12, 2003, and as a result was entitled to eight years to file suit based on the tolling provision in Section 15-3-40 applicable to insane persons.

Section 15-3-545 establishes the statute of limitations specifically for medical malpractice actions. 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 tolling provision referenced in Section 15-3-545(A) is set forth in Section 15-3-545(D), which provides as follows:

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[5] This same statute of limitations defense is asserted by Dr. Creagh in his cross-appeal. As Dr. Creagh explains in his Appellant's Brief, this additional sustaining ground has been presented by way of a cross-appeal only out of an abundance of caution. While it is likely most appropriate to present the issue in his Respondent's Brief, Dr. Creagh also raised the statute of limitations defense by way of a cross-appeal to ensure that the issue is properly presented to this Court and is not deemed waived or abandoned in any respect. Again, to ensure that Dr. Creagh has properly preserved and presented this issue for the Court's consideration, it is being re-asserted verbatim in the Respondent's Brief as an additional sustaining ground.

> *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.

S.C. Code Ann. § 15-3-545(D). (Emphasis added).[6]

Section 15-3-545(D) allows for tolling of the medical malpractice statute of limitations only for minority. It does *not* provide for tolling for any other disability including insanity. In *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), the South Carolina 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. (Emphasis added). 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 held that Section 15-3-

[6] Section 15-3-545(A) uses the phrase "as tolled by this section." "Section" refers to Section 15-3-545. Importantly, the General Assembly did not use the language "as tolled by this chapter" or "as tolled by Section 15-3-40."

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.

Nonetheless, without any supporting authority, Orlowski contends that the tolling provisions of Section 15-3-40 apply to medical malpractice cases. As indicated above, that position is contrary to the Supreme Court's holding in *Langley* which established that Section 15-3-545(D) provides for the "only tolling" of the medical malpractice statute of limitations. Orlowski's position is also contrary to the express language of Section 15-3-545(D), which is prefaced by the phrase "[n]otwithstanding the provisions of Section 15-3-40." Therefore, regardless of the tolling provisions in Section 15-3-40, only the tolling provision of Section 15-3-545(D) governs in medical malpractice actions and that provision limits tolling to medical malpractice claims brought on behalf of minors.[7]

In sum, Orlowski's medical malpractice action against Dr. Creagh was required to be filed by December 8, 2006, at the latest. The filing of this action nearly three years later on November 24, 2009, was untimely. The Supreme

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[7] It is also clear that the General Assembly did not intend Section 15-3-40 to apply to medical malpractice cases because its application would be in conflict with the six-year statute of repose set forth in Section 15-3-545(A). Section 15-3-40 "extends" the time for an insane person to commence an action by a maximum of five years. *See*, *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109, 115, n.5 (2003). In effect, it allows an insane person to have eight years to file a tort action, but in the context of a medical malpractice action, that obviously conflicts with the six-year statute of repose. Clearly, the General Assembly did not intend for an insane person to have a statute of limitations that exceeds the statute of repose. That simply makes no sense and does not support Orlowski's reliance on Section 15-3-40.

Court's holding in *Langley* is dispositive. Orlowski's medical malpractice claims against the Defendants are barred by the statute of limitations.

Nonetheless, 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.

Orlowski contends that she has been mentally incompetent since September 12, 2003. She further contends that Dr. Creagh's negligence occurred between November 24, 2003 and December 8, 2003. As a result, in applying the tolling provisions of Section 15-3-40 for insane persons, Orlowski claims that the limitations period was extended from three years to eight years.

However, Orlowski has had the benefit and protection of a conservator since March 5, 2004, the date of the appointment of a conservator by the Chester County Probate Court. (R. 370). Orlowski's husband, Christopher T. Orlowski, was appointed as conservator on March 5, 2004. (R. 370). Thus, even if Orlowski was deemed disabled under Section 15-3-40, her husband was appointed to a fiduciary position to represent her interests. As provided by Section 62-5-424(B)(17) of the South Carolina Probate Code, one of the duties of a conservator is to "prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties." S.C. Code Ann. § 62-5-424(B)(17). Similarly, Rule 17(c), SCRCP, provides that "[w]henever

a minor or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person." Rule 17(c), SCRCP.

At the time that Orlowski was appointed a conservator on March 5, 2004, the period of disability ended. Orlowski no longer should be permitted to rely on her mental incompetence when the Probate Court has appointed a conservator to protect her interests and to pursue litigation on her behalf. This is particularly true under the facts of this case because Christopher T. Orlowski, in his capacity as the conservator for Kristy L. Orlowski, did file a medical malpractice action against R. Norman Taylor, III, M.D. and his practice on August 24, 2006. (R. 12-17). The record thus shows conclusively that Orlowski's interests were being actively protected by her conservator. Therefore, using the March 5, 2004 date as the end of disability and commencement of the three-year statute of limitations, Orlowski's suit against Dr. Creagh needed to be filed by March 5, 2007. However, Orlowski's conservator did not file suit against Dr. Creagh and the Hospital until November 24, 2009, long after the statute of limitations expired.

Alternatively, the Court could use August 24, 2006, as the commencement date. There is no dispute that Orlowski's conservator knew by that date that Orlowski was allegedly a victim of medical malpractice because August 24, 2006 was the date that her conservator actually filed the first medical malpractice action

on her behalf. Even if the Court uses August 24, 2006 as the commencement date, the suit against Dr. Creagh and the Hospital needed to be filed by August 24, 2009, but the suit was not actually filed until three months later. Clearly, by August 24, 2006, Orlowski no longer needed the protection of Section 15-3-40. Her interests were represented by a conservator, as they are today. Her conservator chose to proceed with filing suit and abandon any protection that Section 15-3-40 provides against the statute of limitations. Consequently, Orlowski should not be able to re-assert the tolling provisions abandoned in August 2006 to seek protection from the statute of limitations in this litigation.

In sum, the tolling provisions of Section 15-3-40, even if applicable to medical malpractice actions, do not protect Orlowski's current action from the statute of limitations. The filing of this action against Dr. Creagh and the Hospital on November 24, 2009 was untimely, and the action should be dismissed on that basis.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent-Appellant C. Edward Creagh, M.D. respectfully requests that this Court affirm the judgment entered in his favor in the Circuit Court. If the Court does not affirm the judgment based on the estoppel defense as adjudicated by Special Circuit Court Judge S. Jackson Kimball in his Order filed August 15, 2012, the Court is respectfully requested to affirm the judgment below based on the statute of limitations defense.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent-Appellant C. Edward Creagh, M.D. certifies that the Respondent's Final Brief of Respondent-Appellant Creagh complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent-Appellant C. Edward Creagh, M.D. that the Respondent's Final Brief of Respondent-Appellant Creagh complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent-Appellant, C. Edward Creagh, M.D., does hereby certify that service of **Respondent's Final Brief of Respondent-Appellant Creagh** 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 23rd day of April 2013:

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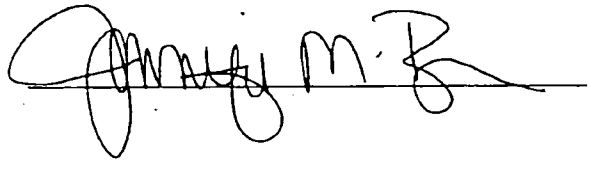

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2009-CP-46-5178

Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (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

Respondent's Final Brief of Respondent/Appellant

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STATEMENT OF THE CASE

On November 24, 2009, Gladys Sims, as the duly appointed guardian and conservator of Kristy L. Orlowski (A/K/A Kristy Wood) (hereinafter, "Ms. Orlowski"), filed this medical malpractice action against Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center ("Amisub"), C. Edward Creagh, M.D. (hereinafter, "Dr. Creagh"), and William Alleyne, M.D. (hereinafter, "Dr. Alleyne") (hereinafter, "Orlowski II"). (R. pp. 18 - 30). Orlowski II concerns treatment which Amisub and Dr. Creagh provided to Ms. Orlowski between November 27 - 29, 2003. (R. pp. 276:7 - 24). Drs. Creagh and Alleyne timely answered on March 29, 2010, and Amisub timely answered on May 4, 2010.

On April 15, 2010, Drs. Creagh and Alleyne filed a motion to dismiss or, alternatively, for summary judgment on the grounds that Orlowski II was barred by the applicable statute of limitations found in S.C. Code Ann. § 15-3-545 (Supp. 2011) (hereinafter, "Section 15-3-545").

(R. pp. 46 - 47).[1] Both Ms. Orlowski and Drs. Creagh and Alleyne provided detailed memoranda to the lower court. (R pp. 48 - 55, 56 - 58). Ms. Orlowski attached as Exhibit A to her memorandum an affidavit of guardian and conservator Gladys Sims in which Ms. Sims states her opinion that Ms. Orlowski has been mentally incompetent since September 12, 2003. (R. pp. 366 - 68).

Following a June 17, 2010 hearing, the Lower Court denied Drs. Creagh and Alleyne's April 15, 2010 Motion on the ground that S.C. Code Ann. § 15-3-40 (Supp. 2003) (hereinafter, "Section 15-3-40") tolled the statute of limitations found in S.C. Code Ann. § 15-3-545(A) (Supp. 2011) (hereinafter, "Section 15-3-545(A)") because Ms. Orlowski has been "insane" for purposes of Section 15-3-40 since September 12, 2003. (R. p. 1).

On September 19, 2011, Drs. Creagh and Alleyne and Amisub served Ms. Orlowski with joint Requests to Admit concerning testimony and evidence which she presented in a prior case, Christopher T. Orlowski, as the duly appointed guardian and conservator of Kristy L. Orlowski (a/k/a Kristy Wood) v. Rock Hill Gynecological & Obstetrical Associates, P.A. and R. Norman Taylor, III, M.D., 2006-CP-46-2213 (hereinafter "Orlowski I"). (R. pp. 63 - 73). In response, Ms. Orlowski admitted the accuracy of certain testimony which she presented at the trial of Orlowski I. (R. pp. 75 - 76). On October 20, 2011, Drs. Creagh and Alleyne and Amisub filed Second Joint Requests to Admit of Defendants to Plaintiffs, seeking admission that Ms. Orlowski presented additional certain testimony and evidence in Orlowski I. (R. pp. 291 - 365). In response, Ms. Orlowski again admitted the accuracy of certain characterizations and representations of evidence

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[1] Mr. McGowan of McGowan, Hood & Felder, LLC was substituted as Ms. Orlowski's attorney on April 27, 2010. Subsequently, on July 2, 2010, John F. Eversole, III was admitted *pro hac vice* as Mr. McGowan's co-counsel.

and testimony which she presented at the trial of Orlowski I. (R. pp. 117 - 19).[2]

On November 29, 2011, Dr. Creagh and Amisub filed a joint motion requesting that the Lower Court determine the sufficiency or, alternatively, strike a portion of Ms. Orlowski's November 3, 2011 Responses. (R. pp. 59 - 76). On January 17, 2012, that motion was resolved by agreement of Ms. Orlowski to strike certain qualifying language from her November 3, 2011 Responses. (R. p. 374).

On April 16, 2012, Dr. Creagh filed a Motion for Summary Judgment on the grounds that Ms. Orlowski's action is barred by the statute of limitations provided in Section 15-3-545(A) and by the doctrines of collateral estoppel and issue preclusion. (R. pp. 77 - 79). On July 2, 2012, Amisub filed a Motion for Summary Judgment on the same grounds. (R. pp. 80 - 81). The parties prepared and presented detailed memoranda of law addressing the Motions. (R. pp. 82 - 87, 88 - 96, 97 - 232). On July 18, 2012, Judge Kimball heard the Motions. (R. pp. 233 - 90). [3] On August 15, 2012, he entered an Order granting Dr. Creagh and Amisub's Motions on the ground of collateral estoppel or estoppel by judgment and denying their Motions as to expiration of the statute of limitations provided within Section 15-3-545. (R. pp. 2 - 11).

On September 4, 2012, Ms. Orlowski filed her Notice of Appeal. On September 10,

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[2] Ms. Orlowski dismissed Dr. Alleyne on November 23, 2011. He is not a party to this appeal.

[3] Ms. Orlowski notes, "Although discovery is incomplete in this case, Defendants moved for summary judgment based on collateral estoppel in April 2012 and the motions were granted by order dated August 10, 2012." See Appellant's Brief, p. 3. This issue was not raised to and ruled upon by the Lower Court and it was not set out in Ms. Orlowski's statement of issues on appeal. As such, any argument concerning discovery is not properly before the Court on appeal. See Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved."); State v. Culbreath, 377 S.C. 326, 332, 659 S.E.2d 268, 271 (Ct.App. 2008) ("In order for an issue to be properly presented for appeal, the appellant's brief must set forth the issue in the statement of issues on appeal.").

2012, Dr. Creagh and Amisub filed cross-appeals in order to preserve and argue the statute of limitations defense as an additional ground for affirming summary judgment in their favor.

STATEMENT OF THE FACTS

In 2003, Dr. Norman Taylor (hereinafter, "Dr. Taylor") and Rock Hill Gynecological & Obstetrical Associates, P.A. (hereinafter, "Rock Hill OB") provided prenatal care to Ms. Orlowski. (R. p. 14, ¶ 18). On September 12, 2003, she suffered an eclamptic seizure during pregnancy. (R. pp. 240:24 - 41:2). Following the seizure, she was hospitalized at Amisub from September 12 - November 24, 2003. (R. p. 241:18 - 21).

On November 25, 2003, Dr. Creagh re-admitted Ms. Orlowski to Amisub, diagnosing her with a left pleural effusion. (R. p. 20, ¶¶ 12 - 13). She was discharged on November 27, 2003 only to be readmitted on November 29, 2003 for persistent vomiting and empyema. (R. p. 242:5 - 21). She contends that she suffered a cardiopulmonary arrest on December 8, 2003 and her condition worsened. (R. p. 243:7 - 10). On December 11, 2003, Ms. Orlowski was discharged to Carolinas Medical Center. (R. p. 243:10 - 11).

Ms. Orlowski claims that she has been mentally incompetent since September 12, 2003, the day of her eclamptic seizure. (R. p. 238:19 - 24). She was appointed a guardian and conservator on March 5, 2004. (R. p. 370). On August 24, 2006, Ms. Orlowski, through her guardian and conservator, commenced Orlowski I. In that action, she alleged that "as a direct and proximate result" of Dr. Taylor and Rock Hill OB's medical negligence, she "suffered severe, debilitating, and permanent neurological deficits." (R. p. 16, ¶ 27). Specifically, Ms. Orlowski claimed past, present, and future injuries and damages, including "chronic pain and suffering;" "substantial medical expenses;" "disfigurement;" "mental anguish;" "loss of enjoyment of life;"

"loss of income and related benefits;" "need for full time medical and nursing care to assist her with her activities of daily living;" "permanent restrictions and impairments that make it impractical for her to care for even her most basic of personal needs;" and "for such other damages as may be identified during the course of this litigation...." (R. pp. 302 - 03, ¶ 29(a) - (i)).[4]

At the trial of Orlowski I, Ms. Orlowski presented expert testimony opining that all damages incurred by Ms. Orlowski, and to be incurred in the future, were attributable to Dr. Taylor and Rock Hill OB. (R. p. 9). For example, Ms. Orlowski presented expert testimony of Stephen Pliskow, M.D. that, to a reasonable degree of medical certainty, *all* of Ms. Orlowski's medical problems have been caused by the September 12, 2003 eclamptic seizure. (R. pp. 66 - 67, 76). Specifically, Dr. Pliskow testified, "[H]er readmission to [Amisub], her subsequent cardiac arrest during that admission and then her transfer to CMC...was all related back to her eclamptic seizure." (R. p. 66 - 67, 76).

Ms. Orlowski also presented testimony from expert economist Oliver Wood, Ph.D., seeking recovery from Dr. Taylor and Rock Hill OB for economic losses, lost earning capacity, medical expenses, future life care planning needs, and the like from September 12, 2003 forward. (R. pp. 67 - 73, 76). As indicated by Dr. Wood's testimony, Ms. Orlowski argued that all of the damages sought in Orlowski I were a direct and proximate result of Dr. Taylor and Rock Hill OB's negligence occurring on or before September 12, 2003. (R. pp. 122 - 23, 125). Though a defense verdict was returned, Ms. Orlowski received $300,000.00 pursuant to high-low

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[4] During the pendency of Orlowski I, Ms. Orlowski was divorced, and her mother, Gladys Sims, was substituted as her guardian and conservator in the place of her ex-husband. (R. p. 5 - 6).

agreement approved before the verdict was returned. (R. p. 6).

Seemingly dissatisfied with her settlement in Orlowski I, Ms. Orlowski, again through her guardian and conservator, commenced Orlowski II on November 24, 2009, almost six years after the alleged negligent care, over five years after her guardian and conservator was appointed, and more than three years after she filed Orlowski I. (R. pp. 18 - 30). In this action, Ms. Orlowski alleges that due to medical negligence of Dr. Creagh and Amisub occurring between November and December 2003, she "suffered severe debilitating injuries which have resulted in her incompetent state due to the hypotensive episode and hypoxic condition which has caused physical suffering, severe physical, cognitive and emotional pain and distress, and has ultimately caused Kristy Orlowski's permanent and severely disabled physical and mental state,...." (R. p. 24, ¶ 24). She seeks recovery for the exact injuries and damages claimed in Orlowski I against Dr. Taylor and Rock Hill OB. (R. pp. 16 - 17, ¶ 29(a) - (i); 24 - 25, ¶ 25(a) - (l), 27, ¶ 30(a) - (i)).

The Lower Court granted Dr. Creagh and Amisub's Motion for Summary Judgment on the ground that Ms. Orlowski is collaterally estopped and/or estopped by judgment from claiming that they are liable for the same injuries and damages that she attributed to Dr. Taylor and Rock Hill OB in Orlowski I. (R. p. 7 - 11).

STANDARD OF REVIEW

An appellate court reviews summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). "'The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.'" Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 545, 694 S.E.2d 1, 4 (2010) (internal citation omitted). As such, "[s]ummary judgment

is properly granted when: '[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. at 545-46, 694 S.E.2d at 4, quoting Rule 56(c), SCRCP.

ARGUMENT

I. The Lower Court properly ruled that the doctrine of collateral estoppel by judgment bars Ms. Orlowski from relitigating the cause of her alleged injuries and damages where she sought to recover identical damages for identical injuries in a prior lawsuit.

The Lower Court granted summary judgment in Amisub's favor based upon the doctrine of collateral estoppel as applied in Graham v. State Farm Fire & Cas. Ins. Co., 277 S.C. 389, 287 S.E.2d 495 (1982) and its progeny. Graham most clearly labeled this doctrine "collateral estoppel by judgment" and Amisub will reference the doctrine as such.

Collateral estoppel "prevents the relitigation of *issues*, not claims." Carolina Renewal, Inc. v. S.C. Dept. of Transp., 385 S.C. 550, 556, 684 S.E.2d 779, 783 (Ct.App. 2009) (emphasis original). It does not matter whether the causes of action in successive lawsuits are the same. Id. A party asserting collateral estoppel against re-litigation of an issue must show that the issue was "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Id. at 555, 684 S.E.2d at 782 (internal citation omitted).

Collateral estoppel by judgment rests "upon the wholesome principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity." Jenkins v. Atlantic Coast Line R. Co., 89 S.C. 408, 71 S.E. 1010, 1012 (1911). Unlike traditional estoppel, collateral estoppel by judgment does not require that the party

claiming collateral estoppel be a party or in privity with a party to the prior action. Carolina Renewal, 385 S.C. at 555, 684 S.E.2d at 782, citing Graham, 277 S.C. at 391, 287 S.E.2d at 496; Irby v. Richardson, 278 S.C. 484, 487, 298 S.E.2d 452, 454 (1982). Instead, courts consider (1) whether collateral estoppel is being applied offensively or defensively and (2) "whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action." Graham, 277 S.C. at 390-91, 287 S.E.2d at 496, citing 31 A.L.R.3d 1052 (1970). "[W]here a plaintiff brings a subsequent action involving the same issues against a person whom he could have joined in as a co-defendant in the first action, only strongly compelling circumstances justify withholding preclusion." Restatement (Second) of Judgments § 29 (1982).[5]

Collateral estoppel by judgment applies where a plaintiff seeks damages identical to those sought in a prior suit. In Carolina Renewal, the plaintiff had been awarded a SCDOT construction contract. Id. at 553, 684 S.E.2d at 781. An SCDOT employee slandered the plaintiff's owner, the plaintiff's employees quit, and the plaintiff went out of business. In the first action, the plaintiff's owner sued the SCDOT for slander. He sought damages flowing from the breach of contract in his complaint and stated that he was seeking the same within his discovery responses. At trial, the plaintiff's owner presented testimony concerning contractual damages. A verdict was returned in the plaintiff's owner's favor. The plaintiff then initiated a second action against the SCDOT seeking contractual damages. The SCDOT defensively asserted collateral estoppel by judgment and the lower court dismissed the second action on that basis. Id.

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[5] Decisional courts of this State "have relied heavily on the Restatement (Second) of Judgments in developing collateral estoppel jurisprudence." Carolina Renewal, 385 S.C. at 556, 684 S.E.2d at 783, n. 2. Ms. Orlowski recognizes application of the Restatement (Second) of Judgments within her brief as well. See Appellant's Brief, p. 8.

The Court of Appeals held that the plaintiff's owner actually litigated the issue of identical damages in the first action by introducing "damages flowing from the alleged breach of contract" in the first action through his pleadings, discovery responses, and trial testimony. Id. at 556-58, 684 S.E.2d at 783-84. The Court affirmed dismissal in the SCDOT's favor holding, "[B]ecause the doctrine of collateral estoppel prevents the relitigation of issues, the trial court did not err in determining collateral estoppel barred [the plaintiff] from relitigating the issue of contract damages in [the second action]." Id. at 556, 684 S.E.2d at 783.

In Graham, the plaintiff's house caught on fire, causing damage to his automobile. 277 S.C. at 390, 287 S.E.2d at 495. In the first action, the plaintiff sued his automobile insurance carrier for damages to the automobile and the jury returned a verdict in favor of the carrier. Id. at 390, 287 S.E.2d at 495-96. The plaintiff then sued his home insurance carrier for the same damages to the automobile. The home insurance carrier raised the defense of collateral estoppel. Id. at 390, 287 S.E.2d at 496. The court noted that the plaintiff received his day in court in the first action and that the first action was vigorously pursued by the plaintiff's lawyer. Id. at 391, 287 S.E.2d at 496. Applying the above-recited principles of the doctrine of collateral estoppel by judgment, the Supreme Court affirmed summary judgment in favor of the home insurance carrier. Id.

a. The Record on Appeal contains vast evidence that Ms. Orlowski sought recovery in Orlowski I for all of the injuries and damages which she now seeks to recover against Amisub in Orlowski II.

Like the plaintiffs in both Carolina Renewal and Graham, Amisub presented to the Lower Court voluminous evidence that Ms. Orlowski now seeks to maintain a second lawsuit for injuries and damages identical to those sought in her prior suit. For example, within her

Complaint filed in Orlowski I, Ms. Orlowski alleged that Dr. Taylor and Rock Hill OB's negligence caused her to suffer eclamptic seizures and hypoxia and resulted in her severe mental incompetence. (R. pp. 15 - 17, ¶¶ 24 - 27, 29). In her Complaint filed in Orlowski II, Ms. Orlowski alleges that Amisub's medical negligence caused her hypoxia and severe mental incompetence. (R. pp. 18 - 30, ¶ 3, 20, 24, 34). Likewise, Orlowski II seeks damages against Amisub for the same exact list of injuries and damages claimed in Orlowski I against Dr. Taylor and Rock Hill OB. (R. pp. 16 - 17, ¶ 29(a) - (i); 24 - 25, ¶ 25(a) - (l), 27, ¶ 30(a) - (i)).

Ms. Orlowski filed an affidavit of her mother, Gladys Sims, in Orlowski II in which Ms. Sims refers to Ms. Orlowski's condition since suffering an eclamptic seizure on September 12, 2003–the seizure which she blamed on Dr. Taylor and Rock Hill OB's negligence in Orlowski I. (R. p. 366 - 68). Ms. Sims states that since September 12, 2003, Ms. Orlowski has been mentally incapacitated and has required assistance to complete all activities of daily living. (R. p. 366 - 68). Not surprisingly, Ms. Sims' testimony relays the same exact "injuries and damages" alleged by Ms. Orlowski to be caused by Amisub during her November - December 2003 hospitalizations. (R. p. 24 - 25, ¶¶ 25(a) - (i), 27, 30(a) - (i)).

Further, Ms. Orlowski maintains that she suffered cardiopulmonary arrest, hypoxic brain injury, and permanent impairment as a "direct and proximate result of Dr. Creagh and Amisub's negligence." See Appellant's Brief, p. 3. However, Ms. Orlowski admits that her own medical expert, Stephen Pliskow, M.D., testified at the trial of Orlowski I:

> Question: Within a reasonable degree of medical certainty were all of [Ms. Orlowski's] problems; medical problems, were they caused by the eclamptic episode on September 12th?
>
> Answer: Yes they were. Kristy eventually went home after her recovery

> from the seizure at Piedmont but was never really well....[S]o the answer is yes her readmission to Piedmont, her subsequent cardiac arrest during that admission and then her transfer to CMS the Carolina's Medical Center was all related back to her eclamptic seizure.

(R. pp. 66 - 67, 76). Ms. Orlowski also admits that at the trial of Orlowski I, she argued that all damages presented by her life care planning expert and her economic damages expert were the "direct and proximate result of the negligence of Dr. Taylor occurring on or before September 12, 2003." (R. pp. 122 - 23, 125). The life care plan presented in Orlowski I set forth damages for all "damages and injuries" alleged to be caused by Amisub in Orlowski II. (R. pp. 304 - 337; 24 - 25, ¶¶ 25(a) - (i), 27, 30(a) - (i)).

Finally, Ms. Orlowski has conceded that she is seeking recovery in Orlowski II for the same injuries and damages claimed in Orlowski I. At the July 18, 2012 Motion Hearing, the Lower Court observed that the life care plan presented in Orlowski I contemplated and proposed recovery against Dr. Taylor and Rock Hill OB for all injuries and damages as of the date of the trial in 2009, including all damages now alleged to be caused by Amisub. (R. p. 279:16 - 21). Reluctantly, Ms. Orlowski's counsel agreed, "And I guess - - I guess the issue is, yes, that care plan incorporated those damages;..." (R. pp. 279:22 - 23).

b. Ms. Orlowski's injuries and damages claimed in this action were actually litigated in Orlowski I through the presentation of evidence in pleadings, expert reports, and trial testimony.

As stated above, the doctrine of collateral estoppel by judgment requires that an issue actually be litigated in a prior matter. The facts of this case are quite similar to Carolina Renewal in which the Court of Appeals found that the plaintiff had litigated the issue of contractual damages in the first action. Just as the plaintiff did in Carolina Renewal, Ms. Orlowski introduced

evidence through pleadings, expert reports, and trial testimony in Orlowski I litigating all injuries and damages claimed in the present action. Again parallel to Carolina Renewal, Ms. Orlowski chose in Orlowski I to introduce evidence of injuries and damages which she now claims flow from the Amisub's medical negligence.

Ms. Orlowski admits that she presented expert testimony in Orlowski I that all of her damages and expenses, past and future, were directly and proximately caused by Dr. Taylor and Rock Hill OB. See Appellant's Brief, p. 7. However, she argues, "This statement is true yet incomplete as Creagh and [Amisub] were also proximate causes of Kristy's damages." See Appellant's Brief, p. 7. Ms. Orlowski claims that she only meant to argue in Orlowski I that Dr. Taylor and Rock Hill OB were liable for the injuries and damages claimed against Amisub because negligent providers are liable for subsequent negligent medical care. However, the Record on Appeal indicates that Ms. Orlowski never pleaded or argued this theory as a basis of Dr. Taylor and Rock Hill OB's negligence in Orlowski I. Instead, as set forth in greater detail in subsection (a) above and as admitted by Ms. Orlowski, she presented evidence that Dr. Taylor and Rock Hill OB's medical negligence was the direct cause of all of her injuries and damages that she now claims in Orlowski II.

c. Ms. Orlowski has abandoned any argument concerning the second and third elements of collateral estoppel by judgment. Alternatively, Ms. Orlowski's injuries and damages claimed in this action were necessarily considered and determined by the jury in Orlowski I.

Collateral Estoppel by judgment also requires that the precluded issue be determined in the prior matter and be necessary to support the prior judgment. Ms. Orlowski's Brief presents only a brief, conclusory argument as to these second and third elements of collateral estoppel by

judgment. See Appellant's Brief, p. 8 ("Similarly, Respondents produced no evidence that their negligence was either directly determined or necessary to the judgment in the Taylor case. Respondents produced no evidence on these points because the issue of their negligence was not pertinent to the Taylor case and was never determined in that litigation."). As such, she has abandoned any challenge on these two issues. See Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 106, 439 S.E.2d 283, 285, n. 3 (Ct.App. 1993) ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.").

Even if Ms. Orlowski had not abandoned argument on these elements, through her pleadings, expert reports, and trial testimony in Orlowski I, she presented and submitted to the jury all injuries and damages that she now claims in Orlowski II. She admits that a trial was held on those facts. (R. pp. 122 - 23, 125). Ms. Orlowski also concedes that Orlowski I was determined by jury verdict. See Appellant's Brief, p. 3. The issue of injuries and damages claimed in this matter was submitted to the jury for determination in Orlowski I, that jury necessarily considered Ms. Orlowski's injuries and damages in weighing its verdict, and that jury finally determined that issue by its verdict. There is no evidence to the contrary.

d. Ms. Orlowski has abandoned any argument concerning the Graham Court's additional elements necessary for collateral estoppel by judgment. Alternatively, she fairly had the opportunity to present her injuries and damages in Orlowski I and may not relitigate them in this matter.

As stated above, when applying collateral estoppel by judgment, courts consider whether the doctrine is being argued offensively or defensively and "whether the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action."

Graham, 277 S.C. at 390-91, 287 S.E.2d at 496, citing 31 A.L.R.3d 1052 (1970). Ms. Orlowski's brief does not reference, much less argue, these two elements. As such, any argument on these elements must be considered abandoned. See Carolina Renewal, 385 S.C. at 557, 684 S.E.2d at 783, n. 3 (noting that it is especially true that a party abandons issues on appeal concerning certain elements of a legal doctrine when the party fails altogether to cite those elements).

Even if Ms. Orlowski had not abandoned argument as to these elements of collateral estoppel by judgment, Amisub has submitted sufficient evidence that in Orlowski I, Ms. Orlowski's able counsel vigorously pursued her claim against Dr. Taylor and Rock Hill OB for the same injuries and damages sought in this action. The Record on Appeal demonstrates that Ms. Orlowski had no less than four expert witnesses and that she tried her case all the way to jury verdict.

Further, as the Lower Court recognized in its August 15, 2012 Order, by the time that Orlowski I was tried, Ms. Orlowski's team of lawyers and experts were fully aware of her entire medical history, including Amisub and Dr. Creagh's treatment at issue in this matter. (R. p. 10). Also as recognized by the Lower Court, there was absolutely no bar, be it jurisdiction, venue, or otherwise, preventing Ms. Orlowski from naming Amisub as a co-defendant in Orlowski I and litigating her claims against Amisub in that matter. (R. p. 10). Still, she chose to bring Orlowski I against only Dr. Taylor and Rock Hill OB. Further, Ms. Orlowski voluntarily chose which injuries and damages she would pursue against Dr. Taylor and Rock Hill OB based upon a September 12, 2003 incident occurring months before Amisub's alleged negligent care.

As such, Amisub asserts collateral estoppel by judgment defensively against a plaintiff who has been in control of the course of her own litigation. The Lower Court correctly

determined that in choosing to litigate her injuries and damages against Dr. Taylor and Rock Hill OB without including Amisub as a co-defendant and without even acknowledging Amisub's potential liability, Ms. Orlowski fully and fairly exercised her one opportunity to litigate her claims. She also barred herself from attempting to relitigate the cause of her injuries and damages against Amisub. Unfortunately for Ms. Orlowski, entry of a defense verdict in the prior action is not an exception to application of collateral estoppel by judgment. As stated in Jenkins, the public's interest in limiting Ms. Orlowski to one attempt to try the issues of injuries and damages on the merits must prevail, and the Lower Court's grant of summary judgment in Amisub's favor must be affirmed.

II. The Lower Court properly ruled that the doctrine of judicial estoppel bars Ms. Orlowski from taking the inconsistent position that Amisub is liable for her injuries and damages which she presented and tried to verdict in Orlowski I.

Ms. Orlowski argues that it is unclear if the doctrine applied was collateral estoppel by judgment or judicial estoppel and briefs both issues. Whether it be viewed as a basis for the Lower Court's ruling in Amisub's favor or as a additional sustaining ground found in the record pursuant to Rule 220(c), SCACR,[6] judicial estoppel is also a proper ground for summary judgment in Amisub's favor.

The South Carolina Supreme Court expressly adopted judicial estoppel in Hayne Fed. Credit Union v. Bailey. 327 S.C. 242, 489 S.E.2d 472 (1997). In Hayne, the defendant had purchased a home but titled it in his son's name. Id. at 247, 489 S.E.2d at 474. Subsequently, the

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[6] See infra Argument III(a). The 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." I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); see also Rule 220(c), SCACR.

defendant swore under oath in a divorce proceeding that his son owned the home and only let the plaintiff live there. Id. at 252, 489 S.E.2d at 477. Sometime later, the son's wife mortgaged the home and filed bankruptcy. Id. at 247, 489 S.E.2d at 475. The defendant bought the house from the bankruptcy trustee subject to the mortgage. Soon after, the plaintiff lender instituted foreclosure proceedings. Id. at 247-48, 489 S.E.2d at 475. The defendant answered and counterclaimed on the grounds that he owned the home through a resulting trust, and the master-in-equity agreed. Id.

The plaintiff argued that the doctrine of judicial estoppel barred the defendant from claiming that he owned the home because he had taken an inconsistent position in his prior divorce proceeding. Id. at 251, 489 S.E.2d at 476. The Court stated, "Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation." Id. at 251, 489 S.E.2d at 477. It explained, "When a party has formally asserted a certain version of the facts in litigation, he cannot change those facts when the initial version no longer suits him....[T]he truth-seeking function of the judicial process is undermined if parties are allowed to change positions as to the facts of the case, unless compelled by newly discovered evidence." Id. at 252, 489 S.E.2d at 477. Accordingly, the Court held that the defendant was judicially estopped from asserting that he owned the home and reversed the master's finding in the defendant's favor. Id.

Building on Hayne, this State's decisional courts have outlined five elements required for application of judicial estoppel: (1) two inconsistent statements; (2) taken by the same or related parties in the same or related proceedings; (3) which result in a success or benefit to the party(ies) taking the inconsistent positions; (4) where the inconsistency is part of an effort to mislead the

court; and (5) the positions are totally inconsistent. Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004).

In her Brief, Ms. Orlowski presents arguments only as to the first and third elements necessary for judicial estoppel. As to the remaining elements, Ms. Orlowski includes only the conclusory statement, "Several of the required elements are not present and this doctrine does not apply." See Appellant's Brief, p. 14. Thus, she has abandoned any argument as to the second, fourth, and fifth elements of the doctrine and those elements must be deemed admitted as present in this matter. See Fields, 312 S.C. at 106, 439 S.E.2d at 285, n. 3 ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.").

Even if Ms. Orlowski had not abandoned any argument as to most of the elements necessary for judicial estoppel, the Record on Appeal supports application of the doctrine. As set forth in greater detail in Argument I(a) above, Ms. Orlowski has taken two inconsistent positions in Orlowski I and Orlowski II. Satisfying the second element necessary for judicial estoppel, in Orlowski I, Ms. Orlowski pleaded, retained experts, and presented sworn trial testimony in an attempt to establish that the same exact list of injuries and damages claimed in this action were caused by Dr. Taylor and Rock Hill OB. See supra Argument I(a). Ms. Orlowski admits that she presented expert testimony in Orlowski I that all of her damages, and expenses, past and future, were directly and proximately caused by Dr. Taylor and Rock Hill OB. See Appellant's Brief, p. 7.

In an attempt to avoid the implications of her prior inconsistency, Ms. Orlowski argues, "This statement is true yet incomplete as Creagh and [Amisub] were also proximate causes of

Kristy's damages." See Appellant's Brief, p. 7. Ms. Orlowski makes much of the fact that a medical provider who commits medical negligence may be liable for subsequent negligent medical treatment. See Appellant's Brief, p. 12. However, in pursuing recovery for the same exact injuries and damages in Orlowski I, she and her experts did not characterize Dr. Taylor and Rock Hill OB's negligence as liability for subsequent negligent medical care.

Indeed, the pleadings and testimony from Orlowski I contained within the Record on Appeal make no reference to any alleged negligence of Amisub. When the Lower Court made this point to Ms. Orlowski's counsel at the July 18, 2012 Motion hearing, she had no reply:

> [Counsel]: It's not inconsistent to sue Dr. Creagh and say he was also negligent. Dr. Taylor certainly can still be on the hook for that.
>
> The Court: Yes, but what if - - That wasn't the testimony. The testimony was that, to a reasonable degree of medical certainty, all of her - - I'm paraphrasing - - condition, at the time of the trial was directly the result of the pre-eclamptic seizure, which was Dr. Taylor's treatment.
>
> [Counsel]: Correct. And then that - - that has to incorporate the subsequent treatment that she says now, that - -
>
> The Court: That's not what he said, though.
>
> [Counsel]: - - she pleads now.
>
> The Court: That isn't what he said though.
>
> [Counsel]: Okay. And I apologize, I don't have the transcript in front of me today.

(R. p. 273:3 - 19). She offers no explanation, such as the discovery of new evidence, which supports her inconsistent positions. Instead, like the defendant in Hayne, Ms. Orlowski wishes to change her position now that it benefits her. Satisfying the fifth element necessary for judicial

estoppel, the total inconsistency in Ms. Orlowski's position is clear and she has supplied no justification for this inconsistency.

Further, as to the fourth element necessary for judicial estoppel, Ms. Orlowski's pleadings in this matter demonstrate that she has intentionally presented inconsistent statements. Within her Complaint filed in Orlowski I, Ms. Orlowski alleged that Dr. Taylor and Rock Hill OB's negligence caused her to suffer eclamptic seizures, aspiration, and hypoxia and resulted in her severe mental incompetence. (R. p. 15 - 17, ¶ 24 - 27, 29.) Within her Complaint filed in Orlowski II, Ms. Orlowski alleges that Amisub's medical negligence caused her hypoxia and severe mental incompetence. (R. pp. 18 - 30, ¶ 3, 20, 24, 34.) Likewise, Orlowski II seeks damages against Amisub for the same exact list of injuries and damages claimed in Orlowski I against Dr. Taylor and Rock Hill OB. (R. pp. 16 - 17, ¶ 29(a) - (i); 24 - 25, ¶ 25(a) - (l), 27, ¶ 30(a) - (i)). When a party merely duplicates injuries and damages, blaming the same on two different sets of medical providers as Ms. Orlowski has done in Orlowski I and Orlowski II, she cannot argue that she does not intend to maintain two inconsistent positions.

Finally, as to the third element of judicial estoppel, Ms. Orlowski claims she was unsuccessful in maintaining her prior inconsistent position taken in Orlowski I. See Appellant's Brief, p. 13 - 14. However, Ms. Orlowski fails to mention that her vigorous efforts in building her case and her willingness to try Orlowski I caused defense counsel to enter into a high-low settlement agreement pursuant to which she received $300,000.00. (R. p. 6).

The crux of judicial estoppel is that it is an affront to the integrity of the judicial process for a litigant to maintain two inconsistent positions before the judiciary. Hayne, 327 S.C. at 251, 489 S.E.2d at 477. As such, "success" or "benefit" in maintaining a position means only that the

party being judicially estopped presented a prior inconsistent position to a court and garnered a benefit based upon taking that position. Indeed, courts of other jurisdictions have held that presenting an inconsistent position and receiving a settlement based on that position, even absent judicial determination, is adequate to satisfy the third element of judicial estoppel. See, e.g., Rissetto v. Plumbers and Steamfitters Local 343, 94 F.3d 597, 604-05 (9th Cir. 1996) ("We are thus confronted with the question of whether obtaining a favorable settlement is equivalent to winning a judgment for purposes of applying judicial estoppel....We hold that a favorable settlement constitutes success...."); Kale v. Obuchowski, 985 F.2d 360 (7th Cir. 1993) ("[T]he rule, as we have stated it, speaks of prevailing in the first case, not of obtaining a judicial decision....[A] settlement represents capitulation. Persons who triumph by inducing their opponents to surrender have 'prevailed' as surely as persons who induce the judge to grant summary judgment.").

In Orlowski I, Ms. Orlowski steadfastly maintained that Dr. Taylor and Rock Hill OB caused all of the injuries and damages that she now claims against Amisub in this action. Had Ms. Orlowski not presented multiple experts opining on vast injuries and damages which she attributed solely to Dr. Taylor and Rock Hill OB and had Ms. Orlowski not been willing to try her case, she would have not convinced Dr. Taylor and Rock Hill OB that they needed to control their risk and enter into a high-low agreement. Through the high-low agreement, Ms. Orlowski received a $300,000.00 benefit for her efforts regardless of the jury's verdict.

III. The Lower Court's grant of summary judgment in Amisub's favor should be affirmed on the additional ground that Ms. Orlowski's action is barred by the limitations period provided in S.C. Code Ann. § 15-3-545(A).

At the July 18, 2012 Motion Hearing, Amisub argued two grounds for summary

judgment: (1) estoppel and (2) expiration of the medical negligence statute of limitations provided in Section 15-3-545(A). (R. p. 240:11 - 20). As to Amisub's statute of limitations defense, Ms. Orlowski argues that Section 15-3-40, a general tolling statute, applies to toll the limitations period provided in Section 15-3-545(A). At the July 18, 2012 Motion Hearing, the Lower Court considered the interaction between Sections 15-3-545(A) and 15-3-40 at length, ultimately deciding that Section 15-3-40 applies to toll Section 15-3-545(A). (R. pp. 258:25 - 260:1). However, as set forth in greater detail below, the Lower Court's ruling was in error because Section 15-3-40 is inapplicable to Section 15-3-545.

a. This Court should consider Amisub's statute of limitations defense as an additional sustaining ground based upon considerations of judicial economy because the parties have had opportunity to argue the issue and it was considered by the Lower Court.

It is well-settled that 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." I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724; see also Rule 220(c), SCACR. The only requirement is that the additional sustaining ground appears in the Record on Appeal. Id. Though it is within the appellate court's discretion whether to consider additional sustaining grounds, the Supreme Court has recognized that "it would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review." Id. Indeed, "[a]n affirmance promotes judicial economy and finality in private and public affairs which are important public policies." Id. at 421, 526 S.E.2d at 723.

In its August 15, 2012 Order, the Lower Court granted Amisub's Motion for Summary

Judgment on estoppel grounds. (R. pp. 2 - 11). However, the Lower Court denied Amisub's Motion for Summary Judgment on the statute of limitations grounds, violating the recognized principle "that a court usually should refrain from deciding unnecessary questions." Id. at 419, 526 S.E.2d at 723. (R. pp. 2 - 11). Whether the Lower Court ruled against Amisub as to the statute of limitations defense is irrelevant. The statute of limitations provided in Section 15-3-545(A) remains an additional ground appearing in the Record on Appeal and the Lower Court's denial of this defense does not form the law of the case. See Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again....").[7]

Additionally, policy concerns weigh in favor of this Court exercising its discretion and considering the expiration of the limitations as an additional ground for affirming summary judgment. First, Ms. Orlowski's counsel briefed the issue to the Lower Court and addressed it at the July 18, 2012 Motion Hearing. (R. pp. 83 - 85, 254:1 - 56:19). Also, the issue was considered by the Lower Court on the record at the July 18, 2012 Motion Hearing. (R. pp. 258:25 - 59:12). Finally, as set forth in greater detail in Argument III(b) below, Amisub sets forth a statute of limitations defense based upon Supreme Court precedent. Should this Court decline to consider the application of Section 15-3-545(A) as an additional sustaining ground and otherwise decide to remand the case to the Lower Court, the principles of judicial economy and efficiency discussed in I'On, L.L.C. will not be served. Instead, as recognized in Ballenger, Amisub will be

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[7] Amisub asserts this statute of limitations defense in its cross-appeal. This additional sustaining ground has been presented by way of a cross-appeal only out of an abundance of caution. While it is likely most appropriate to present the issue in its Respondent's Brief, Amisub also raised the statute of limitations defense by way of a cross-appeal to ensure that the issue is properly presented to this Court for the Court's consideration and is not deemed waived or abandoned in any respect.

free to renew its Motion for Summary Judgment on the statute of limitations ground—a ground currently briefed by the parties, considered on record by the Lower Court, and properly before this Court as an additional sustaining ground.

b. Ms. Orlowski's action against Amisub is barred by application of the statute of limitations provided in Section 15-3-545(A) because Section 15-3-40 is inapplicable to toll the limitations period on her claims.

This is a medical malpractice action (R. p. 5). Section 15-3-545(A) provides that an action for medical negligence must be commenced within three years from the date of the alleged negligent treatment or within three years from when the same is discovered or reasonably ought to have been discovered. Further, Section 15-3-545(A) specifies that a medical malpractice action must be either commenced during the above limitations period or "**as tolled by the section.**" (Emphasis added). The only tolling provision in Section 15-3-545 is Subsection 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.

S.C. Code Ann. § 15-3-545(D) (Supp. 2011).

A court's "primary function in interpreting a statute is to ascertain the intent of the legislature." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) (internal citation omitted). "The best evidence of intent is in the statute itself." Media Gen'l Comm., Inc. v. S.C. Dep't of Rev., 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010). "Laws giving specific

treatment to a given situation take precedence over general laws on the subject, and later legislation takes precedence over earlier laws." Duke Power Co. v. S.C. Public Service Com'n, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985).

Applying the above rules of statutory construction, the South Carolina Supreme Court answered a certified question from the Fourth Circuit Court of Appeals, holding that (1) Section 15-3-545(D) provides tolling only for minors and (2) Subsection D is the exclusive tolling provision applicable to Section 15-3-545. Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993). In the underlying case, the defendant doctor removed two lesions from the plaintiff's leg in 1979 and 1980. Id. at 402, 438 S.E.2d at 242. In 1984, the doctor moved out of South Carolina. Id. In 1990, the plaintiff discovered that the lesions had been malignant at the time of removal. Id. In 1991, he filed suit against the doctor in the United States District Court, Anderson Division. Id.

The District Court granted the doctor summary judgment on the grounds that the six year statute of repose in Section 15-3-545(A) barred the plaintiff's action. Id. Plaintiff argued on appeal to the Fourth Circuit Court of Appeals that the six year statute of repose in Section 15-3-545(A) was tolled by S.C. Code Ann. § 15-3-30 (Supp. 2011), a general tolling statute. Id. The Fourth Circuit certified that question to the South Carolina Supreme Court. Id.

The Supreme Court emphasized that Section 15-3-545(A) states, "or as tolled by this section.'" Id. at 402, 438 S.E.2d at 243, quoting S.C. Code Ann. § 15-3-545(A). The Court next quoted Section 15-3-30: "'If when a cause of action shall accrue against any person he shall be out of the State, such *action may be commenced within the terms in this chapter*...after the return of such person into this State.'" Id. at 403, 438 S.E.2d at 243 (emphasis original). The plaintiff

argued that inclusion of "in this chapter" caused Section 15-3-30 to apply to Section 15-3-545. Id.

The Supreme Court disagreed. Id. The applicable holding is two-fold. First, Langley holds that Section 15-3-545(D) "provides a limited tolling provision, applicable only to minors." Id. Secondly, Langley holds, "Inclusion 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., quoting Section 15-3-545 (emphasis original). The Court refused to apply the more general tolling statute, Section 15-3-30, to toll the more specific Section 15-3-545(A), answering the Fourth Circuit's question by holding that the plaintiff's action was barred by the six year statute of repose contained in Section 15-3-545(A). Id. at 405, 438 S.E.2d at 244.

In the present case, Ms. Orlowski argues that a more general tolling statute, Section 15-3-40, applies to toll the limitations period in Section 15-3-545 and saves her claim from application of the statute of limitations.[8] (R. p. 254:1 - 8). Section 15-3-40 states:

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

S.C. Code Ann. § 15-3-40 (Supp. 2003). Noting that "it's sort of perplexing," the trial judge

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[8] Within his Order, the trial judge states, "Defendants do not dispute the applicability of the tolling statute,...." (R. p. 7). In fact, Amisub did dispute application of Section 15-4-40. When the trial judge asked counsel for Amisub what his position would be "about the running of the statute as it pertains to 15-3-40," counsel responded, "I don't think this affects it,...." (R. pp. 246:19 - 22, 247:6 - 10). Later, the Court reiterated to counsel for Amisub, "But, your position on that is that 15-3-40 doesn't have any effect - - that it stands alone, in medical malpractice cases," to which counsel for Amisub replied, "Yes sir." (R. p. 257:14 - 17).

expressed concern over the interaction between Sections 15-3-545 and 15-3-40. (R. pp. 258:25 - 259:2). He recognized that "15-3-545 obviously acknowledges an interaction with 15-3-40." (R. p. 259:1 - 2). He also noted that Section 15-3-545(D) only "addresses the result of the effect of minority" but "does not address anything to do with insanity." (R. p. 259:5 - 9). The trial judge concluded that Section 15-3-40 applied to toll the statute of limitations provided in Section 15-3-545(A) stating, "So, I think that, to the extent 15-3-545 conflicts with - - the times periods in 15-3-545...that 15-3-40....trumps 15-3-545." (R. p. 259:9 - 12).

Applying Langley to the present case, the Lower Court's analysis of Section 15-3-545 is in error. Like the plaintiff in Langley, Ms. Orlowski brings a medical malpractice action. Also like the plaintiff in Langley, Ms. Orlowski attempts to save her case by arguing that a general tolling statute should somehow trump a complete, self-contained statute specifically applicable to medical malpractice actions. Finally, both the general tolling statute at issue in Langley and the general tolling statute at issue in this case contain language claiming that they are applicable to all causes of action in Chapter 15.

The Langley Court was expressly clear in its interpretation of Section 15-3-545: the only tolling provision applicable to Section 15-3-545 is contained in Subsection (D) thereof and only applies to minors. Ms. Orlowski is not a minor. Section 15-3-40 does not apply to toll Ms. Orlowski's limitations period. Consequently, Ms. Orlowski's action is barred by the three-year limitations period contained within Section 15-3-545(A) and summary judgment in Amisub's favor should be affirmed on this ground.

c. Ms. Orlowski's action against Amisub is barred by application of the limitations period provided in Section 15-3-545(A) because she has been appointed a guardian and conservator since March 5, 2004.

Alternatively, even if Section 15-3-40 applied to toll Ms. Orlowski's limitations period to commence the present, her claims are still time-barred pursuant to Section 15-3-545. Although she did not commence Orlowski II until November 24, 2009, almost six years after Amisub's alleged negligent treatment, Ms. Orlowski argues that she should be excused from application of Section 15-3-545(A)'s limitations period because she has been mentally incompetent since September 13, 2003. Specifically, she claims that Section 15-3-40 applies to extend her limitations period from three years to eight years because she qualifies as "insane."[9] Section 15-3-40 reflects a balancing between the need to preserve the legal rights of those who are unable to bring suit to protect their own rights and the need to guard individuals against the uncertainty of open-ended potential claims. Thus, Section 15-3-40 is general tolling provision that protects a person from application of the statute of limitations for a certain period, but not more than five years.

Ms. Orlowski has been entitled to the protections of a guardian and conservator since March 5, 2004. (R. p. 370). The South Carolina Probate Code authorizes both guardians and conservators with the power and right to bring actions on behalf of incompetent persons. See S.C. Code Ann. § 62-5-312(a) (Supp. 2009); S.C. Code Ann. § 62-5-424(17)(Supp. 2009). Further, Rule 17, SCRCP provides guardians and conservators with the procedural mechanism to put this authority into action, providing that when a real party in interest is incompetent, her guardian

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[9] It stands to reason that the General Assembly did not intend Section 15-3-40 to apply to medical malpractice cases because its application would be in conflict with the six-year statute of repose set forth in Section 15-3-545(A). In effect, application of Section 15-3-40 to Section 15-3-545(A) would allow an insane person to have eight years to file a tort action, exceeding Section 15-3-545(A)'s six-year statute of repose. It is highly unlikely that the General Assembly intended for an insane person to have a limitations period exceeding the statute of repose.

and/or conservator is entitled to file suit on her behalf. See Rule 17(c), SCRCP.

As such, even if Section 15-3-40 applied to toll Ms. Orlowski's limitations period against Amisub, her period of insanity ceased on March 5, 2004. Ms. Orlowski's guardian and conservator was empowered to prosecute actions on her behalf. Ms. Orlowski no longer needed or qualified for the protections supporting application of Section 15-3-40. Further, Ms. Orlowski has put forth no evidence that her guardian and conservator was incompetent or was otherwise unable to act to protect and preserve her legal rights. Ms. Orlowski's then-husband, Christopher T. Orlowski, first served as her guardian and conservator. (R. p. 370). Mr. Orlowski had been in the best possible position of any third party to observe Ms. Orlowski's unfortunate demise between September - December 2003. He was fully aware of her injuries. Through the exercise of reasonable diligence, on March 5, 2004, he knew or should have known of any potential claim he was empowered to assert for Ms. Orlowski based upon her September 12, 2003 - December 8, 2003 hospitalizations.

Consequently, the three year statute of limitations provided by Section 15-3-545(A) and applicable to Ms. Orlowski's action against Amisub commenced running on March 5, 2004. For the next three years, the guardian and conservator could and should have investigated and commenced all claims that he deemed prudent. In fact, the guardian and conservator did just that, commencing Orlowski I against Dr. Taylor and Rock Hill OB on August 24, 2006. (R. pp. 12 - 17). However, the three year limitations period on Ms. Orlowski's claim against Amisub expired on March 5, 2007, and the guardian and conservator chose not to institute an action against Amisub before that date.

d. Ms. Orlowski's action against Amisub is time-barred pursuant to Section 15-3-545(A) because her guardian and conservator abandoned any tolling of the limitations period when he commenced Orlowski I.

Alternatively, even if Section 15-3-40 were to apply, Ms. Orlowski's limitations period as to Amisub commenced running on August 24, 2006, at the latest, when her guardian and conservator filed Orlowski I, alleging negligence and seeking recovery for the same damages sought in this action. Hypothetically tolling Ms. Orlowski's limitations period to commence suit against Amisub to the above latest possible date that her claim against Amisub ought to have discovered, Ms. Orlowski was required to commence her action against Amisub on or before August 24, 2009, three years from the filing date of Orlowski I. Again, the guardian and conservator failed to do so.

At the July 18, 2012 Motion Hearing, Ms. Orlowski's counsel argued that Section 15-3-40 provides Ms. Orlowski and her guardian and conservator with an eight-year limitations period to commence the instant action. (R. p. 255:16 - 19). The blatant inconsistency in Ms. Orlowski's position is not lost on Amisub. Ms. Orlowski and her guardian and conservator argue that she is entitled to the benefit of Section 15-3-40, a statute designed to protect the rights of those whose rights would otherwise go unprotected. However, on August 24, 2006, Ms. Orlowski and her guardian and conservator, acting to protect Ms. Orlwoski's legal rights, took up the sword and commenced Orlowski I against Dr. Taylor and Rock Hill OB. Consequently, on that same day, Ms. Orlowski and her guardian and conservator consciously abandoned Ms. Orlowski's mental incompetence as a shield against application of the statute of limitations.

It is unfortunate for Ms. Orlowski that Orlowski I did not reach the result which Ms. Orlowski, and her guardian and conservator desired. However, there is no tolling provision

applicable to Section 15-3-545 that allows a claimant and her representatives to take an untimely second bite at the apple when the first bite turns out to be sour. By November 24, 2009 when Orlowski II was commenced, Ms. Orlowski's limitations period had expired. The present action is barred by application of Section 15-3-545(A), and the Lower Court's grant of summary judgment in Amisub's favor should be affirmed on this ground.

CONCLUSION

The Lower Court properly granted Amisub summary judgment on the grounds of collateral estoppel by judgment and judicial estoppel because Ms. Orlowski seeks recovery in this action against Amisub for the exact same injuries and damages which she previously sought to recover from Dr. Taylor and Rock Hill OB in Orlowski I. Further, this Court should exercise its discretion and affirm summary judgment in Amisub's favor because Ms. Orlowski's action is barred by the statute of limitations provided in Section 15-3-545(A) and Langley makes clear that Section 15-3-40 is inapplicable to toll the statute of limitations found within Section 15-4-545(A).

Respectfully submitted,

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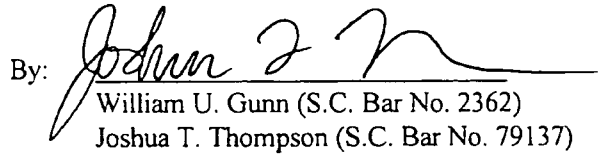
By: 

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April 10, 2013

Spartanburg, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2009-CP-46-5178

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

v.

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

of whom, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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of whom, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center is the Respondent and Cross-Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on this 17th day of April 2013, he has served counsel for Appellant-Respondent Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (a/k/a Kristy Wood) and counsel for Respondent-Appellant C. Edward Creagh, M.D. with copies of (1) the Final Brief of Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center; (2) the Final Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center; and (3) the Final Reply Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center in this matter by mailing copies of the same by United States Mail, postage

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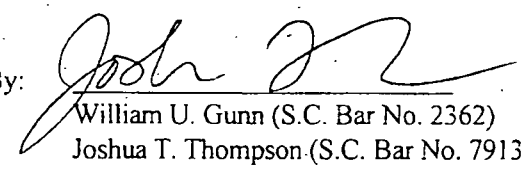
By: 

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Spartanburg, SC
April 17, 2013

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 Guardian and Conservator of Kristy L. Orlowski (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.

APPELLANT'S FINAL REPLY BRIEF OF APPELLANT/RESPONDENT

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I. Respondents inaccurately frame the issue to which estoppel purportedly applies.

Respondents' briefs assert that Ms. Orlowski's claims against Dr. Creagh and AMISUB are an attempt to relitigate "*the* cause of her alleged injuries." Respondent's Brief (AMISUB) at 7 (emphasis added). In fact, the issue is whether collateral estoppel bars Ms. Orlowski from litigating, for the first time, the unresolved issue of whether Dr. Creagh and AMISUB's treatment fell below the standard of care and was *a* proximate cause of Ms. Orlowski's injuries. Accordingly, Respondents' task in asking the Court to affirm Judge Kimball's order is to show that Orlowski's suit against Dr. Taylor[1] actually litigated and directly determined Dr. Creagh and AMISUB's potential liability in a way that was necessary to the judgment reached by the jury in the Taylor case. Respondents endeavor to accomplish this task with an argument that contravenes the rudiments of South Carolina civil procedure.

Respondents' framing of the issue supposes the Taylor case jury decided Dr. Taylor and all other potential but unnamed medical providers were not liable for Ms. Orlowski's injuries. That is, by filing suit against Taylor alone and presenting evidence that he was a proximate cause of Ms. Orlowski's injuries, Orlowski barred herself from claiming others were a proximate cause of the injuries. Judge Kimball accepted this line of reasoning. He applied estoppel as a basis for barring Ms. Orlowski's claims after concluding Ms. Orlowski presented evidence in the Taylor trial that her injuries and damages "were directly and proximately caused by the negligence of Dr. Taylor and his

[1] For ease of reference, Appellant refers to the defendants from the Taylor trial simply as Dr. Taylor. The Taylor suit also named Dr. Taylor's medical practice, Rock Hill Gynecological & Obstetrical Associates, P.A.

group." Order at 7. In other words, Respondents' estoppel argument and the circuit court's decision are grounded in the notion that a person's tort injury can have but a single proximate cause.

This notion violates the first principles of the law of causation. As the courts have recognized and as juries have been instructed, "the law recognizes further there may be more than one proximate cause." Mellen v. Lane, 377 S.C. 261, 281, 659 S.E.2d 236, 247 (Ct. App. 2008)(quoting State v. Burton, 302 S.C. 494, 496-97, 397 S.E.2d 90, 91 (1990)).[2] It is "well recognized that an act or omission need not be the sole cause" since "[a] given injury may result from multiple causes." McPherson v. Michigan Mut. Ins. Co., 306 S.C. 456, 461, 412 S.E.2d 445, 448 (Ct. App. 1991). Courts often refrain from referring to "the proximate cause" of an injury recognizing that "[w]hen we speak of proximate cause, we are not referring to the 'sole cause.'" Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 269 S.E.2d 753, 757 (1977). For purposes of pursuing a claim against a particular defendant and to prevail against a defendant on a negligence claim, "[i]t is enough if the negligent act complained of is at least one of the causes without which the injury would not have occurred." Shepard v. S.C. Dep't of Corrections, 299 S.C. 370, 374, 385 S.E.2d 35, 37 (Ct. App. 1989).

Respondents' briefs imply that an overlap in damages between Ms. Orlowski's claim against Dr. Taylor and her current claims against Dr. Creagh and AMISUB is a conclusive indication that Ms. Orlowski must be estopped from pursuing her current claims. Respondent's Brief (AMISUB) at 9-11, Respondent's Brief (Creagh) at 7. However, the cases cited above show that South Carolina law expressly permits a

[2] Judge Kimball appeared to acknowledge this point at oral argument. When Ms. Orlowski's attorney argued "Dr. Creagh can be completely at fault" even when Dr. Taylor was alleged to have been at fault, Judge Kimball replied, "I don't disagree with that...as a general principal of law." (R. p. 285, lines 8-15).

plaintiff to claim, prove, and potentially recover from multiple defendants for the same injury.[3] Dr. Creagh and AMISUB can be a proximate cause of Ms. Orlowski's injuries even if Ms. Orlowski previously claimed Dr. Taylor was a proximate cause. There is nothing in South Carolina law that supports the position that a claim of proximate causation for damages identified in the Taylor suit prevents a claim of proximate causation against Respondents now.

Respondents also offer nothing from the record of the Taylor case to support their conclusion. AMISUB's brief points to a similarity between allegations in Ms. Orlowski's complaint in the Taylor case and her allegations in the present case. Respondents Brief (AMISUB) at 9. There is a clear distinction between the deviations in the standard of care claimed against Dr. Taylor and those claimed against Dr. Creagh and AMISUB. Dr. Creagh's brief cites testimony from Ms. Orlowski's expert in the Taylor trial (Dr. Stephen Pliskow) as well as testimony from that trial on economic damages from expert Dr. Oliver Wood. Respondents Brief (AMISUB) at 9. It is clear Ms. Orlowski's experts testified that Dr. Taylor was a proximate cause of Ms. Orlowski's injuries including her permanent impairment. But, as discussed above, that testimony does not foreclose a later claim that a different medical provider was also a proximate cause of the injuries. In fact, to support the conclusion Respondents ask the Court to reach, there would need to be evidence that Ms. Orlowski excluded the possibility of a non-Dr. Taylor cause for Ms. Orlowski's injuries. Dr. Pliskow's causation opinion against Dr. Taylor certainly does not

[3] Appellant acknowledges that rule permitting claimant to sue multiple parties for the same injury does not allow the claimant to recover more than the actual damage sustained as a result of the injury. Truesdale v. S.C. Hwy. Dep't, 264 S.C. 221, 234-35, 213 S.E.2d 740, 746 (1975)(discussing set-off and noting "there can be only one satisfaction for an injury or wrong").

make such a claim, and Respondents point to nothing else in the record from the Taylor case to support that claim.

Respondents err in framing the issue to which estoppel should be applied as "the cause of [Ms. Orlowski's] injuries and damages." The framing fails because it is based on an inaccurate statement of South Carolina law on proximate causation. This framing error infects the application of every variety of estoppel cited in Judge Kimball's order and argued in Respondents' briefs.

A. With the issues in question properly framed, it is evident collateral estoppel does not apply.

Collateral estoppel applies only if the issue in question was, in a prior action, (1) "actually litigated"; (2) "directly determined"; and (3) "necessary to support the prior judgment." Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Even if all collateral estoppel elements are present, the doctrine "should not be rigidly or mechanically applied." Carrigg v. Cannon, 347 S.C. 75, 81, 552 S.E.2d 767, 770 (Ct. App. 2001). Respondents frame the issue in question for collateral estoppel as "the issue of damages—an issue already litigated in the Taylor lawsuit." Respondent's Brief (Creagh) at 12-13. This is not an accurate statement of the issue resolved in the Taylor case. It was only "the issue of damages" relative to Dr. Taylor that was litigated and resolved in the earlier case. Whether Dr. Creagh and AMISUB breached their duty to Ms. Orlowski and whether any such breach proximately caused Ms. Orlowski injury are issues that have never been litigated. The jury never passed on Dr. Creagh's conduct and never considered whether AMISUB's care proximately caused Ms. Orlowski's injuries. The first element of collateral estoppel is not present and the doctrine cannot be applied here.

This is the point that distinguishes the current case from many of the cases on which the Circuit Court ruled and on which Respondents now rely. In those cases, the same issue a party sought to litigate was litigated in an earlier action. Judge Kimball's order quotes from Graham v. State Farm Fire & Casualty Insurance Co., 277 S.C. 389, 287 S.E.2d 495 (1982), an insurance case where the court applied defensive nonmutual collateral estoppel. Order at 7-8; see also Beall v. Doe, 281 S.C. 363, 368, 315 S.E.2d 186, 189 (Ct. App. 1984)(noting Graham "involved the defensive application of nonmutual collateral estoppel"). The plaintiff in Graham suffered damage to his car and home from a fire originating in his garage. 277 S.C. at 390, 287 S.E.2d at 495-96. In a suit against his auto insurer, the insurer argued the plaintiff started the fire and willfully caused the damage. The veracity of this allegation "was the sole issue before the jury and the jury returned a verdict for the insurer." Id. The plaintiff tried to prove he did not cause the fire, but the jury disagreed and the law prevented the plaintiff from making a second effort in a different case to prevail on this issue. Thus, when the plaintiff sued his homeowner insurer, he was estopped from denying that he started the fire and summary judgment to the insurer was granted since the fire's origin was "the sole issue in both actions." Id. at 391, 287 S.E.2d at 496. The plaintiff was not estopped, as Respondents suggest, simply because both suits sought the same damages. See Respondent's Brief (AMISUB) at 9; Respondent's Brief (Creagh) at 11. Issue identity was the key component in Graham.

The same is true in the other cases cited by the circuit court and Respondents. There is no "reason or justice" in permitting a second opportunity to litigate "the identical issue" litigated in an earlier case. Watson v. Goldsmith, 205 S.C. 215, 222, 31 S.E.2d

317, 320 (1944). In Mackey v. Frazier, 234 S.C. 81, 106 S.E.2d 895 (1959), the court refused to permit Mackey to claim another driver was the cause of an auto accident when Mackey raised the driver's alleged negligence as a counterclaim in an earlier suit. The issue in both suits was whether the driver was negligent. Collateral estoppel was appropriate because Mackey actually litigated this issue in the first suit and lost.

Respondents' briefs also rely on Carolina Renewal. However, this case is distinguishable on its facts. Carolina Renewal and SCDOT entered a contract for road construction. After an SCDOT employee's false statements about Carolina Renewal's sole shareholder led to resignation of the company's employees and thwarted the company's efforts to perform its contractual duties, the shareholder sued SCDOT for slander. 385 S.C. at 553, 684 S.E.2d at 781. The shareholder sought benefits due Carolina Renewal under the contract as damages in his slander suit. The shareholder received a verdict and over $100,000 in damages.

Later, Carolina Renewal sued SCDOT for breach of contract and sought contract damages. This Court affirmed summary judgment to SCDOT since the issue of damages SCDOT's conduct caused on the contract was actually litigated in the slander suit. Id. at 558, 684 S.E.2d at 784. In essence, Carolina Renewal simply barred a claimant who recovered for contract damages from later coming back to the same defendant for a greater damage award on the same contract. Carolina Renewal took its shot against SCDOT on the contract by seeking contract damages in the slander claim. The company was not permitted a second shot. The current case is very different. Ms. Orlowski did not take her shot against Dr. Creagh or AMISUB in the Taylor suit, and Ms. Orlowski is not attempting a second shot against Dr. Taylor. Carolina Renewal is simply another case of

identical issues where collateral estoppel was appropriate. Since identity of issues is not present here, Carolina Renewal does not support the circuit court's order.

The issue of Dr. Creagh and AMISUB's alleged negligence was not "actually litigated" in the Taylor case. An essential element of collateral estoppel was absent and the circuit court erred in applying the doctrine and awarding summary judgment. The "actually litigated" element is not met because the Taylor case did not litigate Dr. Creagh or AMISUB's alleged negligence or the damages flowing from their alleged negligence. The deficiency on the "actually litigated" element spills over to the other collateral estoppel elements.[4] The issue of Dr. Creagh and AMISUB's negligence was not "directly determined." The Taylor case jury rendered a verdict on Dr. Taylor's care but not on Dr. Creagh or AMISUB, which is understandable since issues related to care they provided were not actually litigated. Clearly, issues related to Dr. Creagh and AMISUB were not necessary to the final judgment in the Taylor case since those were neither determined nor litigated in the Taylor case.

B. The required elements of judicial estoppel are not present.

The required elements for judicial estoppel include: (1) two inconsistent positions taken by the same party; (2) taken in same or related proceedings by same parties or parties in privity with each other; (3) party taking earlier position was "successful in maintaining the position that position and have received some benefit"; (4) inconsistency was part of an intentional effort to mislead the court; and (5) positions were totally

[4] AMISUB claims Appellant abandoned arguments on the "directly determined" and "necessary to prior judgment" elements of collateral estoppel. Respondent's Brief (AMISUB) at 12. As AMISUB acknowledges, however, Appellant's Initial Brief outlined collateral estoppel's essential elements and presented arguments demonstrating that all of these elements were not present. See Initial Brief of Appellant at 7-11. The failure of all three collateral estoppel elements is evident from the overarching claim in Appellant's Initial Brief, i.e. issues of Dr. Creagh and AMISUB's deviations from the standard of care and damages proximately caused by these deviations were not present or litigated in the Taylor suit.

inconsistent." Cothran v. Brown, 357 S.C. 210, 215-16, 592 S.E.2d 629, 632 (2004). Judicial estoppel is to be applied "sparingly." Id. at 216, 592 S.E.2d at 632. Respondents' misapprehension on the effect of Ms. Orlowski's trial posture in the Taylor case on the viability of her current claims is as applicable to judicial estoppel as it was to collateral estoppel and it touches all five of judicial estoppel's five required elements.

As Respondents argue in their brief "[t]he crux of judicial estoppel" is an inconsistency between factual positions taken in the same or related cases. Respondent's Brief (AMISUB) at 19.[5] There is no inconsistency between Ms. Orlowski's position against Dr. Taylor in the Taylor case and her position against Dr. Creagh and AMISUB in the current litigation. Ms. Orlowski has acted in compliance with the first principles of negligence law which, as cited above, recognize that an injury can have multiple proximate causes. These two positions are not incompatible or contradictory. See Black's Law Dictionary 834 (9th ed. 2009)(defining "inconsistent" as "not compatible with another fact or claim"). They can be simultaneously true, and their assertion in the same or different lawsuits comports with South Carolina substantive negligence law and the South Carolina Rules of Civil Procedure.

Respondents also claim Ms. Orlowski "wishes to changer her position now." Respondent's Brief (AMISUB) at 18. When the issues in question are properly understood, it is clear Respondents' argument is not possible. Ms. Orlowski took no position on Dr. Creagh or AMISUB's alleged deviations from the standard of care and proximate causation in the Taylor case. Before filing the current suit, Ms. Orlowski had never taken a position on these issues. There is no change in position because there was

[5] Dr. Creagh has adopted AMISUB's judicial estoppel argument in full and incorporated it by reference in his brief. Respondent's Brief (Creagh) at 14. Accordingly, Appellant refers to the judicial estoppel arguments in AMISUB's brief as Respondents' claims.

no previous position from which Ms. Orlowski could change. See City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC, 397 S.C. 497, 725 S.E.2d 676 (2012)(refusing judicial estoppel where order from previous litigation "fail[ed] to demonstrate a definition position taken" by party to whom estoppel was to be applied"). Respondents' judicial estoppel claim never gets off the ground since it does not meet the first required element. Since the first judicial estoppel element is not present here, then the fifth element is not either. There are no inconsistent claims and, therefore, Respondents cannot meet their burden of showing the claims are completely inconsistent.

The third element of judicial estoppel requires two things. The party to be estopped "must have been successful in maintaining the position" and must have "received some benefit" from taking the position. Cothran, 357 S.C. at 216, 592 S.E.2d at 632. Assuming for the sake of argument that Respondents could meet their burden of showing Ms. Orlowski has presented inconsistent positions, Respondents cannot make the required showing on this third element. Respondents' brief argues Ms. Orlowski was successful in the Taylor case notwithstanding a defense verdict. Respondent's Brief (AMISUB) at 19. There is no South Carolina authority to support this position. The only authority Respondents cite for this argument are two federal cases from distant jurisdictions.

There are several factors that militate against applying these cases to the present case. Both cases Respondents cite are federal cases. Federal cases sitting in diversity and ruling on issues of judicial estoppel apply federal law. Rissetto v. Plumbers & Steamfitters Local 343, 94 F.3d 597, 602 (9th Cir. 1996). Federal judicial estoppel jurisprudence does include a success/benefit element and the U.S. Supreme Court's

discussion on the requirements for this element is instructive. In New Hampshire v. Maine, 532 U.S. 742, 750-51 (2001), the Court held that one factor in applying judicial estoppel is whether the party to be estopped was successful "in persuading a court to accept that party's earlier position." Additionally, the Rissetto court acknowledged that not all federal courts hold that a settlement meets the success/benefit element. 94 F.3d at 605 n. 6 (citing Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982)("If the initial proceeding results in settlement, the position cannot be viewed as having been successful"). Many other federal courts have found that a court must affirmatively accept the party's position for the success/benefit element to apply.[6]

In the Taylor case, Dr. Taylor was the successful party. The jury rendered a defense verdict and the benefit of that verdict belongs to Dr. Taylor. The high/low agreement does not meet the success/benefit element of judicial estoppel. No court adopted a position inconsistent with the position Ms. Orlowski takes in the present case. The absence of judicial estoppel's third element is an additional basis to not to apply the doctrine here.

II. The Circuit Court's ruling conflicts with important civil procedure principles.

Judge Kimball's order applied collateral estoppel after noting "there is no reason Creagh and Amisub could not have been named" as defendants in the Taylor case. (R. p. 10). Respondents also take up this argument in their briefs. See Respondent's Brief

[6] See e.g. Bates v. Long Island R.R. Co., 997 F.2d 1028, 1038 (2nd Cir. 1993)("prior inconsistent position must have been adopted by the court in some manner"); U.S. v. 49.01 Acres of Land, More or Less, 802 F.2d 387, 390 (10th Cir. 1986)("The integrity of the court is not threatened if the court failed to adopt the party's prior position"); Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980)("A settlement neither requires nor implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel"); Original Appalachian Artworks, Inc. v. S. Diamond Associates, Inc., 44 F.3d 925, 930 (11th Cir. 1995)(citing Konstantinidis and suggesting settlement would not meet success/benefit element under Georgia law).

(AMISUB) at 14; Respondent's Brief (Creagh) at 8. The implication from this argument is that since Ms. Orlowski could have joined AMISUB and Dr. Creagh as parties to the Taylor case, she should face dismissal of her claims against these parties for choosing not to join them. The joinder Judge Kimball mentions in his order would fall within Rule 20, SCRCP. Rule 20 governs "Permissive Joinder of Parties" and clearly uses discretionary language. See Rule 20(a)("All persons may be joined in one action as defendants..."). In other words, a party may choose to join multiple parties as defendants but joinder is not required. A party's decision not to join multiple parties in the same suit is also permissible, and a party who chooses this litigation tactic should not be punished for it.

AMISUB also claims collateral estoppel should be applied against Ms. Orlowski, "a plaintiff who has been in control of the course of her own litigation." Respondent's Brief (AMISUB) at 14. As a plaintiff, Ms. Orlowski should be allowed to control the course of her claims within the bounds of the rules of civil procedure. It is the plaintiff who has "the sole right" to determine the parties she chooses to sue. Chester v. S.C. Dep't of Pub. Safety, 388 S.C. 343, 344, 698 S.E.2d 559, 560 (2010). The Circuit Court's estoppel ruling wrestles some of that control away from Ms. Orlowski by terminating her claims against Dr. Creagh and AMISUB notwithstanding Ms. Orlowski's compliance with the rules of civil procedure. Ms. Orlowski is allowed to sue parties to the same transaction or occurrence in separate suits. She is allowed to claim that multiple parties are proximate causes for her injuries. Judge Kimball's ruling lays a heavy blow to a plaintiff's power to control her claim and a return to the established norm for plaintiff control requires reversal.

III. Ms. Orlowski's claims were filed within the statute of limitations.

Respondents briefs state substantially the same argument on the statute of limitations as they assert in their initial briefs for the their cross-appeal on that issue. Accordingly, Appellant hereby adopts and incorporates by reference the statute of limitations argument in her initial brief on the cross-appeal. Based on this argument, it is evident that the Circuit Court was correct in its conclusion that Ms. Orlowski's suit was filed within the statute of limitations. Appellant recognizes Respondents still have the opportunity to file reply briefs in the cross-appeal and Appellant will reply to any arguments Respondents might make in their reply briefs in the cross-appeal.

CONCLUSION

Based on the arguments above and those in Appellant's Initial Brief, Plaintiff respectfully that the Court issue an order reversing the Circuit Court's ruling on estoppel and affirm the Circuit Court's ruling on the statute of limitations.

Respectfully submitted,

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April 23, 2013
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CERTIFICATE OF COUNSEL

Counsel hereby certifies that the following briefs comply with Rule 211(b), SCACR:

(1) Appellant's Final Brief of Appellant/Respondent;

(2) Appellant's Final Reply Brief of Appellant/Respondent; and

(3) Respondent's Final Brief of Appellant/Respondent.

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PROOF OF SERVICE

The undersigned hereby certifies that on this 23rd day of April, 2013, he served counsel for the Defendants with a copy of the following documents:

(1) Appellant's Final Brief of Appellant/Respondent;
(2) Appellant's Final Reply Brief of Appellant/Respondent; and
(3) Respondent's Final Brief of Appellant/Respondent

in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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APPELLANT'S FINAL BRIEF OF RESPONDENT-APPELLANT CREAGH

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STATEMENT OF ISSUES ON APPEAL

I. Are the tolling provisions provided in S.C. Code Ann. § 15-3-40 for insane persons applicable to a medical malpractice action?

II. Is the medical malpractice action filed on behalf of Kristy Orlowski barred by the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-545?

STATEMENT OF THE CASE

This is a medical malpractice action. The Appellant-Respondent 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 Respondents-Appellant C. Edward Creagh, M.D. and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Hospital").

In accordance with Rule 208(b)(6), SCACR, Dr. Creagh hereby adopts by reference and incorporates herein the "Statement of the Case" included in the brief filed by the Hospital.[1]

[1] Rule 208(b)(6), SCACR, provides: "In cases involving more than one appellant or respondent ... any party may adopt by reference all of any part of the brief of another." Rule 208(b)(6), SCACR.

ARGUMENTS

I. The Court should address Dr. Creagh's statute of limitations defense as an additional sustaining ground for the judgment entered by the Circuit Court.

In the Circuit Court, C. Edward Creagh, M.D. moved for summary judgment on two separate grounds: (1) a statute of limitations defense and (2) a collateral estoppel or estoppel by judgment defense. Special Circuit Court Judge S. Jackson Kimball granted summary judgment on the estoppel defense but denied summary judgment on the statute of limitations defense.[2]

Dr. Creagh has filed this cross-appeal in order to preserve the statute of limitations issue for consideration by this Court as an additional sustaining ground. Dr. Creagh fully recognizes and accepts that an order denying summary judgment is not ordinarily appealable. *See, Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003). However, current jurisprudence will allow the appellate court to consider any sustaining ground appearing in the record, and that

[2] Given that Judge Kimball granted summary judgment to the Defendants on the estoppel defense, it was actually unnecessary for him to rule on the statute of limitations defense. In denying summary judgment on the statute of limitations defense, Judge Kimball violated "the principle the a court should usually refrain from deciding unnecessary questions." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 723 (2000).

should also include any sustaining ground on which the lower court either did not rule or ruled incorrectly.[3]

In *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court discussed at length the law governing additional sustaining grounds. The Supreme Court explained that "in raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court." 526 S.E.2d at 722. The Supreme Court further explained that 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." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* *See also*, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also

[3] Dr. Creagh has presented this additional sustaining ground by way of a cross-appeal out of an abundance of caution. While it is likely most appropriate to present the issue in his respondent's brief, Dr. Creagh has also raised the statute of limitations defense by way of a cross-appeal to ensure that the issue is properly presented to this Court and is not deemed waived or abandoned in any respect.

contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

An appellate court should in its discretion be permitted to consider as additional sustaining grounds even those grounds raised below on which the lower court ruled adversely to the ultimate prevailing party (i.e., normally the respondent on appeal). The reason for that is two-fold: First, the lower court may have ruled in error on a particular issue, and that issue nonetheless is a ground appearing in the record on which the appellate court may affirm the judgment entered for the respondent. Second, and more importantly in the context of a summary judgment motion, the law is well settled that "[a] denial of a motion for summary judgment decides nothing about the merits of the case." *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379, 380 (1994). "The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings." *Id. See, PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988) (party may make a renewed motion for summary judgment); *Crosswell Enterprises, Inc. v. Arnold*, 309 S.C. 276, 422 S.E.2d 157, 159 (Ct. App. 1992) ("If the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial"). Therefore, because the denial of summary judgment does not establish the law of the case and does not decide the

merits of the issue presented, the issue is ripe for reconsideration by the lower court. The issue should also be ripe for consideration by the appellate court as an additional sustaining ground on appeal.

In the case at bar, Judge Kimball's ruling on Dr. Creagh's statute of limitations defense is not the law of the case, and his denial of summary judgment on that issue does not decide the merits. Accordingly, Dr. Creagh contends that this Court may consider his statute of limitations defense as an additional sustaining ground on appeal even though Judge Kimball denied summary judgment on that issue in the court below.

It is well settled under *I'On* and subsequent case law that this Court could consider Dr. Creagh's statute of limitations defense as an additional sustaining ground had Judge Kimball granted summary judgment on the estoppel defense and then not ruled on any other issue because it was unnecessary. But, the fact that Judge Kimball did rule on the statute of limitations defense should not preclude this Court from considering that issue, if it so chooses. As the Supreme Court explained in *I'On*, "[a]n affirmance promotes judicial economy and finality in private and public affairs, which are important public policies." *I'On*, 526 S.E.2d at 723. Therefore, an appellate court should be able to affirm the judgment entered below on any ground appearing in the record, and that should include a ground on which the lower court committed error.

In sum, the Court is urged to consider the statute of limitations defense as a basis for affirming the judgment entered for Dr. Creagh and the Hospital in the court below. For the reasons discussed below, the Defendants' entitlement to summary judgment on the statute of limitations defense is supported by Supreme Court precedent and presents this Court with an issue on which the judgment below may easily be affirmed on a purely legal basis.[4] Without question, Dr. Creagh is free to renew his motion for summary judgment on the statute of limitations defense should this Court reverse on the estoppel defense and remand to the Circuit Court. Thus, judicial economy is best served by allowing this Court to consider that defense on appeal as an additional sustaining ground if a remand can be avoided.

II. The tolling provisions provided in Section 15-3-40 for insane persons are not applicable to a medical malpractice action, and as a result, 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.

As an additional sustaining ground on appeal, Dr. Creagh contends 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. Orlowski alleges

[4] As will be shown below, Judge Kimball's denial of summary judgment on the statute of limitations defense was based on an error of law. There was no finding or contention that a genuine issue of material fact precluded summary judgment.

that Dr. Creagh's negligence occurred between November 24, 2003 and December 8, 2003; yet, the Complaint was not filed until six years later on November 24, 2009, which was beyond the three-year statute of limitations. Orlowski contends, however, that she was mentally incompetent beginning on September 12, 2003, and as a result was entitled to eight years to file suit based on the tolling provision in Section 15-3-40 applicable to insane persons.

Section 15-3-545 establishes the statute of limitations specifically for medical malpractice actions. 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 tolling provision referenced in Section 15-3-545(A) is set forth in Section 15-3-545(D), which provides as follows:

> *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.

S.C. Code Ann. § 15-3-545(D). (Emphasis added).[5]

Section 15-3-545(D) allows for tolling of the medical malpractice statute of limitations only for minority. It does *not* provide for tolling for any other disability including insanity. In *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), the South Carolina 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. (Emphasis added). 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 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.

Nonetheless, without any supporting authority, Orlowski contends that the tolling provisions of Section 15-3-40 apply to medical malpractice cases. As indicated above, that position is contrary to the Supreme Court's holding in

[5] Section 15-3-545(A) uses the phrase "as tolled by this section." "Section" refers to Section 15-3-545. Importantly, the General Assembly did not use the language "as tolled by this chapter" or "as tolled by Section 15-3-40."

Langley which established that Section 15-3-545(D) provides for the "only tolling" of the medical malpractice statute of limitations. Orlowski's position is also contrary to the express language of Section 15-3-545(D), which is prefaced by the phrase "[n]otwithstanding the provisions of Section 15-3-40." Therefore, regardless of the tolling provisions in Section 15-3-40, only the tolling provision of Section 15-3-545(D) governs in medical malpractice actions and that provision limits tolling to medical malpractice claims brought on behalf of minors.[6]

In sum, Orlowski's medical malpractice action against Dr. Creagh was required to be filed by December 8, 2006, at the latest. The filing of this action nearly three years later on November 24, 2009, was untimely. The Supreme Court's holding in *Langley* is dispositive. Orlowski's medical malpractice claims against the Defendants are barred by the statute of limitations.

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[6] It is also clear that the General Assembly did not intend Section 15-3-40 to apply to medical malpractice cases because its application would be in conflict with the six-year statute of repose set forth in Section 15-3-545(A). Section 15-3-40 "extends" the time for an insane person to commence an action by a maximum of five years. *See*, *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109, 115, n.5 (2003). In effect, it allows an insane person to have eight years to file a tort action, but in the context of a medical malpractice action, that obviously conflicts with the six-year statute of repose. Clearly, the General Assembly did not intend for an insane person to have a statute of limitations that exceeds the statute of repose. That simply makes no sense and does not support Orlowski's reliance on Section 15-3-40.

III. Even if the Court finds that the tolling provisions of Section 15-3-40 are applicable to a medical malpractice action, the three-year statute of limitations expired prior to the filing of this action on November 24, 2009.

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.

Orlowski contends that she has been mentally incompetent since September 13, 2003. She further contends that Dr. Creagh's negligence occurred between November 24, 2003 and December 8, 2003. As a result, in applying the tolling provisions of Section 15-3-40 for insane persons, Orlowski claims that the limitations period was extended from three years to eight years.

However, Orlowski has had the benefit and protection of a conservator since March 5, 2004, the date of the appointment of a conservator by the Chester County Probate Court. (R. 370). Orlowski's husband, Christopher T. Orlowski, was appointed as conservator on March 5, 2004. (R. 370). Thus, even if Orlowski was deemed disabled under Section 15-3-40, her husband was appointed to a fiduciary position to represent her interests. As provided by Section 62-5-424(B)(17) of the South Carolina Probate Code, one of the duties of a conservator is to "prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties." S.C. Code

Ann. § 62-5-424)(B)(17). Similarly, Rule 17(c), SCRCP, provides that "[w]henever a minor or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person." Rule 17(c), SCRCP.

At the time that Orlowski was appointed a conservator on March 5, 2004, the period of disability ended. Orlowski no longer should be permitted to rely on her mental incompetence when the Probate Court has appointed a conservator to protect her interests and to pursue litigation on her behalf. This is particularly true under the facts of this case because Christopher T. Orlowski, in his capacity as the conservator for Kristy L. Orlowski, did file a medical malpractice action against R. Norman Taylor, III, M.D. and his practice on August 24, 2006. (R. 12-17). The record thus shows conclusively that Orlowski's interests were being actively protected by her conservator. Therefore, using the March 5, 2004 date as the end of disability and commencement of the three-year statute of limitations, Orlowski's suit against Dr. Creagh needed to be filed by March 5, 2007. However, Orlowski's conservator did not file suit against Dr. Creagh and the Hospital until November 24, 2009, long after the statute of limitations expired.

Alternatively, the Court could use August 24, 2006, as the commencement date. There is no dispute that Orlowski's conservator knew by that date that Orlowski was allegedly a victim of medical malpractice because August 24, 2006

was the date that her conservator actually filed the first medical malpractice action on her behalf. (R. 12-17). Even if the Court uses August 24, 2006 as the commencement date, the suit against Dr. Creagh and the Hospital needed to be filed by August 24, 2009, but the suit was not actually filed until three months later. Clearly, by August 24, 2006, Orlowski no longer needed the protection of Section 15-3-40. Her interests were represented by a conservator, as they are today. Her conservator chose to proceed with filing suit and abandon any protection that Section 15-3-40 provides against the statute of limitations. Consequently, Orlowski should not be able to re-assert the tolling provisions abandoned in August 2006 to seek protection from the statute of limitations in this litigation.

In sum, the tolling provisions of Section 15-3-40, even if applicable to medical malpractice actions, do not protect Orlowski's current action from the statute of limitations. The filing of this action against Dr. Creagh and the Hospital on November 24, 2009 was untimely, and the action should be dismissed on that basis.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent-Appellant C. Edward Creagh, M.D. respectfully requests that this Court affirm the judgment entered in his favor in the Circuit Court. If the Court does not affirm the judgment based on the estoppel defense as adjudicated by Special Circuit Court Judge S. Jackson Kimball in his Order filed August 15, 2012, the Court is respectfully requested to affirm the judgment below based on the statute of limitations defense as discussed herein.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent-Appellant C. Edward Creagh, M.D. certifies that the Appellant's Final Brief of Respondent-Appellant Creagh complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent-Appellant C. Edward Creagh, M.D. that the Appellant's Final Brief of Respondent-Appellant Creagh complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent-Appellant, C. Edward Creagh, M.D., does hereby certify that service of **Appellant's Final Brief of Respondent-Appellant Creagh** 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 23rd day of April 2013:

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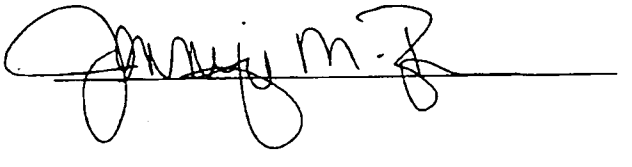

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2009-CP-46-5178

Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (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

Appellant's Final Brief of Respondent/Appellant

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STATEMENT OF THE CASE

On November 24, 2009, Gladys Sims, as the duly appointed guardian and conservator of Kristy L. Orlowski (A/K/A Kristy Wood) (hereinafter, "Ms. Orlowski"), filed this medical malpractice action against Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center ("Amisub"), C. Edward Creagh, M.D. (hereinafter, "Dr. Creagh"), and William Alleyne, M.D. (hereinafter, "Dr. Alleyne") (hereinafter, "Orlowski II"). (R. pp. 18 - 30). Orlowski II concerns treatment which Amisub and Dr. Creagh provided to Ms. Orlowski between November 27 - 29, 2003. (R. pp. 276:7 - 24). Drs. Creagh and Alleyne timely answered on March 29, 2010, and Amisub timely answered on May 4, 2010.

On April 15, 2010, Drs. Creagh and Alleyne filed a motion to dismiss or, alternatively, for summary judgment on the grounds that Orlowski II was barred by the applicable statute of limitations found in S.C. Code Ann. § 15-3-545 (Supp. 2011) (hereinafter, "Section 15-3-545").

(R. pp. 46 - 47).[1] Both Ms. Orlowski and Drs. Creagh and Alleyne provided detailed memoranda to the lower court. (R pp. 48 - 55, 56 - 58). Ms. Orlowski attached as Exhibit A to her memorandum an affidavit of guardian and conservator Gladys Sims in which Ms. Sims states her opinion that Ms. Orlowski has been mentally incompetent since September 12, 2003. (R. pp. 366 - 68).

On June 17, 2010, the Honorable S. Jackson Kimball presided over the hearing on Drs. Creagh and Alleyne's April 15, 2010 Motion. By Order filed June 25, 2010, the lower court denied the Motion on the ground that S.C. Code Ann. § 15-3-40 (Supp. 2003) (hereinafter, "Section 15-3-40") tolled the statute of limitations found in Section 15-3-545(A) because Ms. Orlowski had been "insane" for purposes of Section 15-3-40 since September 12, 2003. (R. p. 1).

On September 19, 2011, Drs. Creagh and Alleyne and Amisub served Ms. Orlowski with joint Requests to Admit concerning testimony and evidence which Ms. Orlowski presented in a prior case, Christopher T. Orlowski, as the duly appointed guardian and conservator of Kristy L. Orlowski (a/k/a Kristy Wood) v. Rock Hill Gynecological & Obstetrical Associates, P.A. and R. Norman Taylor, III, M.D., 2006-CP-46-2213 (hereinafter "Orlowski I"). (R. pp. 63 - 73). Ms. Orlowski responded to the September 19, 2011 Requests on November 3, 2011, admitting the accuracy of Dr. Creagh, Dr. Alleyne, and Amisub's recitations of certain testimony which she presented at the trial of Orlowski I. (R. pp. 75 - 76).

On October 20, 2011, Drs. Creagh and Alleyne and Amisub filed Second Joint Requests

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[1] Mr. McGowan of McGowan, Hood & Felder, LLC was substituted as Ms. Orlowski's attorney on April 27, 2010. Subsequently, on July 2, 2010, John F. Eversole, III was admitted *pro hac vice* as Mr. McGowan's co-counsel.

to Admit of Defendants to Plaintiffs, seeking admission that Ms. Orlowski presented additional certain testimony and evidence in Orlowski I. (R. pp. 291 - 365). Ms. Orlowski responded to those requests on November 22, 2011, admitting the accuracy of certain characterizations and representations of evidence and testimony which she presented at the trial of Orlowski I. (R. pp. 117 - 19).[2]

On November 29, 2011, Dr. Creagh and Amisub filed a joint motion requesting that the lower court determine the sufficiency or, alternatively, strike a portion of Ms. Orlowski's November 3, 2011 Responses. (R. pp. 59 - 76). On January 17, 2012, that motion was resolved by agreement of Ms. Orlowski to strike certain qualifying language from her November 3, 2011 Responses. (R. p. 374).

On April 16, 2012, Dr. Creagh filed a Motion for Summary Judgment on the grounds that Ms. Orlowski's action is barred by the statute of limitations provided in Section 15-3-545(A) and by the doctrines of collateral estoppel and issue preclusion. (R. pp. 77 - 79). On July 2, 2012, Amisub filed a Motion for Summary Judgment on the same grounds. (R. pp. 80 - 81). The parties prepared and presented detailed memoranda of law addressing the Motions. (R. pp. 82 - 87, 88 - 96, 97 - 232). On July 18, 2012, Judge Kimball heard the Motions. (R. pp. 233 - 90). On August 15, 2012, he entered an Order granting Dr. Creagh and Amisub's Motions on the ground of collateral estoppel and/or estoppel by judgment and denying their Motions as to expiration of the statute of limitations provided within Section 15-3-545. (R. pp. 2 - 11).

On September 4, 2012, Ms. Orlowski filed her Notice of Appeal. On September 10,

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[2] On November 23, 2011, Ms. Orlowski dismissed Dr. Alleyne from the case, and he is not a party to Amisub's appeal.

2012, Dr. Creagh filed his Notice of Appeal. On September 12, 2012, Amisub filed its Notice of Appeal. On October 29, 2012, Amisub filed its Amended Notice of Appeal.

STATEMENT OF THE FACTS

In 2003, Dr. Norman Taylor (hereinafter, "Dr. Taylor") and Rock Hill Gynecological & Obstetrical Associates, P.A. (hereinafter, "Rock Hill OB") provided prenatal care to Ms. Orlowski. (R. p. 300, ¶ 18). On September 12, 2003, Ms. Orlowski suffered an eclamptic seizure during pregnancy. (R. pp. 240:24 - 241:2). Following the seizure, she was hospitalized at Amisub from September 12, 2003 until November 24, 2003. (R. p. 241:18 - 21).

On November 25, 2003, Dr. Creagh re-admitted Ms. Orlowski to Amisub, diagnosing her with a left pleural effusion. (R. p. 20, ¶¶ 12 - 13). She was discharged on November 27, 2003. (R. p. 242:5 - 7). On November 29, 2003, Ms. Orlowski was re-admitted to Amisub for persistent vomiting and empyema. (R. p. 242:20 - 21). She contends that she suffered a cardiopulmonary arrest on December 8, 2003 and her condition worsened. (R. p. 243:7 - 10). On December 11, 2003, Ms. Orlowski was discharged to Carolinas Medical Center. (R. p. 243:10 - 11).

Ms. Orlowski claims that she has been mentally incompetent since September 12, 2003, the day of her eclamptic seizure. (R. p. 238:19 - 24). However, on March 5, 2004, Ms. Orlowski was appointed a guardian and conservator. (R. p. 370). The Certificate of Appointment charged Ms. Orlowski's guardian and conservator with all authority which those positions are granted by law. (R. p. 370).

On August 24, 2006, Ms. Orlowski, through her guardian and conservator, commenced Orlowski I. Within Orlowski I, Ms. Orlowski alleged that "as a direct and proximate result" of

Dr. Taylor and Rock Hill OB's medical negligence, she "suffered severe, debilitating, and permanent neurological deficits." (R. p. 302, ¶ 27). Specifically, Ms. Orlowski claimed past, present, and future injuries and damages, including "chronic pain and suffering;" "substantial medical expenses;" "disfigurement;" "mental anguish;" "loss of enjoyment of life;" "loss of income and related benefits;" "need for full time medical and nursing care to assist her with her activities of daily living;" "permanent restrictions and impairments that make it impractical for her to care for even her most basic of personal needs;" and "for such other damages as may be identified during the course of this litigation...." (R. pp. 302 - 03, ¶ 29(a) - (i)).[3]

At the trial of Orlowski I, Ms. Orlowski presented expert testimony opining that all damages incurred by Ms. Orlowski, and to be incurred in the future, were attributable to Dr. Taylor and Rock Hill OB. (R. p. 9). For example, Ms. Orlowski presented expert testimony of Stephen Pliskow, M.D. that, to a reasonable degree of medical certainty, all of Ms. Orlowski's medical problems have been caused by the September 12, 2003 eclamptic episode and that episode could have been avoided had Dr. Taylor hospitalized Ms. Orlowski on September 11, 2003. (R. pp. 66 - 67, 76). Ms. Orlowski also presented testimony from expert economist Oliver Wood, Ph.D. seeking recovery from Dr. Taylor and Rock Hill OB for economic losses, lost earning capacity, medical expenses, future life care planning needs, and the like from September 12, 2003 forward. (R. pp. 67 - 73, 76).

Most significantly, as indicated by Dr. Wood's testimony, Ms. Orlowski argued that all damages sought during that trial were a direct and proximate result of Dr. Taylor and Rock Hill

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[3] During the pendency of Orlowski I, Ms. Orlowski was divorced, and her mother, Gladys Sims, was substituted as her guardian and conservator in the place of her ex-husband, Christopher T. Orlowski. (R. p. 5 - 6).

OB's negligence occurring on or before September 12, 2003. (R. pp. 122 - 23, 125). Though a defense verdict was returned, Ms. Orlowski benefitted from her efforts at trial through the receipt of $300,000.00 pursuant to high-low agreement approved before the verdict was entered. (R. p. 6).

Seemingly dissatisfied with the benefit received from Orlowski I, Ms. Orlowski, again through her guardian and conservator, commenced Orlowski II on November 24, 2009, almost six years after the alleged negligent care and over five years after she had been appointed a guardian and conservator. (R. pp. 18 - 30). Within Orlowski II, Ms. Orlowski alleges that due to medical negligence of Dr. Creagh and Amisub occurring between November and December 2003, she "suffered severe debilitating injuries which have resulted in her incompetent state due to the hypotensive episode and hypoxic condition which has caused physical suffering, severe physical, cognitive and emotional pain and distress, and has ultimately caused Kristy Orlowski's permanent and severely disabled physical and mental state,...." (R. p. 24, ¶ 24). Orlowski II seeks damages against Dr. Creagh and Amisub for the same exact list of injuries and damages claimed in Orlowski I against Dr. Taylor and Rock Hill OB. (R. pp. 16 - 17, ¶ 29(a) - (i); 24 - 25, ¶ 25(a) - (I), 27, ¶ 30(a) - (i)).

The lower court granted Dr. Creagh and Amisub's Motions for Summary Judgment on the ground that Ms. Orlowski is collaterally estopped and/or estopped by judgment from claiming that Dr. Creagh and Amisub are liable for the same injuries and damages that her expert witnesses attributed to Dr. Taylor and Rock Hill OB in Orlowski I. However, the lower court denied Dr. Creagh and Amisub's Motions as to the argument that Ms. Orlowski's action was barred by the applicable statute of limitations, Section 15-3-545. Based upon the evidence before and

considered by the lower court, Judge Kimball erred in denying Amisub's Motion on the ground that Orlowski II is barred by the three year statute of limitations pursuant to Section 15-3-545.

STANDARD OF REVIEW

Amisub recognizes that, under the current state of appellate law, the denial of a motion for summary judgment is not immediately appealable.[4] Olson v. Faculty House of Carolina, Inc., 354 S.C. 161, 167, 580 S.E.2d 440, 443 (2003). Amisub also recognizes that the Court is free to revisit past precedent and reverse the same where necessary. See, e.g., McLeod v. Starnes, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012) cert. denied, No. 11-1472, 2012 WL 2050445 (U.S.S.C. Oct. 1, 2012) ("We are not unmindful of the imprimatur of correctness which stare decisis lends to that decision. However, stare decisis is not an inexorable command....").

An appellate court reviews summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP. Baughman v. Am. Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991). "'The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.'" Hoard ex rel. Hoard v. Roper Hosp., Inc., 387 S.C. 539, 545, 694 S.E.2d 1, 4 (2010) (internal citation omitted). As such, "[s]ummary judgment is properly granted when: '[T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id., 387 S.C. at 545-46, 694 S.E.2d at 4, quoting Rule 56(c), SCRCP.

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[4] Recognizing the holding in Olson, Amisub intends to also raise the arguments raised in this cross-appeal within its respondent's brief filed in response to Ms. Orlowski's appeal pursuant to Rule 220(C), SCACR and I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000).

ARGUMENT

I. The Lower Court erred in denying Amisub's Motion for Summary Judgment pursuant to S.C. Code Ann. § 15-3-545 by erroneously applying S.C. Code Ann. § 15-3-40 to toll the applicable limitations period.

This is a medical malpractice action (R. p. 5). Section 15-3-545(A) provides that an action for medical negligence must be commenced within three years from the date of the alleged negligent treatment or within three years from when the same is discovered or reasonably ought to have been discovered. Further, Section 15-3-545(A) specifies that a medical malpractice action must be either commenced during the above limitations period or "**as tolled by the section.**" (Emphasis added). The only tolling provision in Section 15-3-545 is Subsection 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.

S.C. Code Ann. § 15-3-545(D) (Supp. 2011).

At the July 15, 2012 Motion for Summary Judgment hearing, the trial judge recognized that Section 15-3-545(D) addresses minority but does not address insanity. (R. p. 259:5 - 9). A court's "primary function in interpreting a statute is to ascertain the intent of the legislature." Browning v. Hartvigsen, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992) (internal citation omitted). "The best evidence of intent is in the statute itself." Media Gen'l Comm., Inc. v. S.C. Dep't of Rev., 388 S.C. 138, 148, 694 S.E.2d 525, 530 (2010). "Laws giving specific treatment

to a given situation take precedence over general laws on the subject, and later legislation takes precedence over earlier laws." Duke Power Co. v. S.C. Public Service Com'n, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985).

Applying the above rules of statutory construction, the South Carolina Supreme Court answered a certified question from the Fourth Circuit Court of Appeals, holding that (1) Section 15-3-545(D) provides tolling only for minors and (2) Subsection D is the exclusive tolling provision applicable to Section 15-3-545. Langley v. Pierce, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993). In the underlying case, the defendant doctor removed two lesions from the plaintiff's leg in 1979 and 1980. Id. at 402, 438 S.E.2d at 242. In 1984, the doctor moved out of South Carolina. Id. In 1990, the plaintiff discovered that the lesions had been malignant at the time of removal. Id. In 1991, he filed suit against the doctor in the United States District Court, Anderson Division. Id.

The District Court granted the doctor summary judgment on the grounds that the six year statute of repose in Section 15-3-545(A) barred the plaintiff's action. Id. Plaintiff argued on appeal to the Fourth Circuit Court of Appeals that the six year statute of repose in Section 15-3-545(A) was tolled by S.C. Code Ann. §.15-3-30 (Supp. 2011), a general tolling statute. Id. The Fourth Circuit certified that question to the South Carolina Supreme Court. Id.

The Supreme Court emphasized that Section 15-3-545(A) stated, "or as tolled by this section.'" Id. at 402, 438 S.E.2d at 243, quoting S.C. Code Ann. § 15-3-545(A). The Court next quoted Section 15-3-30: "'If when a cause of action shall accrue against any person he shall be out of the State, such *action may be commenced within the terms in this chapter*...after the return of such person into this State.'" Id. at 403, 438 S.E.2d at 243 (emphasis original). The plaintiff

argued that inclusion of "in this chapter" caused Section 15-3-30 to apply to Section 15-3-545. Id.

The Supreme Court disagreed. Id. The applicable holding is two-fold. First, Langley holds that Section 15-3-545(D) "provides a limited tolling provision, applicable only to minors." Id. Secondly, Langley holds, "Inclusion 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., quoting S.C. Code Ann. § 15-3-545 (emphasis original). The Court refused to apply the more general tolling statute, Section 15-3-30, to toll the more specific Section 15-3-545(A), answering the Fourth Circuit's question by holding that the plaintiff's action was barred by the six year statute of repose contained in Section 15-3-545(A). Id. at 405, 438 S.E.2d at 244.

In the present case, Ms. Orlowski's argument is that a more general tolling statute, Section 15-3-40, applies to toll the limitations period in Section 15-3-545 and saves her claim from application of the statute of limitations.[5] (R. p. 254:1 - 8). Section 15-3-40 states,

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

S.C. Code Ann. § 15-3-40 (Supp. 2003). Noting that "it's sort of perplexing," the trial judge

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[5] Within his Order, the trial judge states, "Defendants do not dispute the applicability of the tolling statute,...." (R. p. 7). In fact, Amisub did dispute application of Section 15-4-40. When the trial judge asked counsel for Amisub what his position would be "about the running of the statute as it pertains to 15-3-40," counsel responded, "I don't think this affects it,...." (R. pp. 246:19 - 22, 247:6 - 10). Later, the Court reiterated to counsel for Amisub, "But, your position on that is that 15-3-40 doesn't have any effect - - that it stands alone, in medical malpractice cases," to which counsel for Amisub replied, "Yes sir." (R. p. 257:14 - 17).

expressed concern over the interaction between Sections 15-3-545 and 15-3-40. (R. pp. 258:25 - 259:2). He recognized that "15-3-545 obviously acknowledges an interaction with 15-3-40." (R. p. 259:1 - 2). He also noted that Section 15-3-545(D) only "addresses the result of the effect of minority" but "does not address anything to do with insanity." (R. p. 259:5 - 9). The trial judge concluded that Section 15-3-40 applied to toll the statute of limitations provided in Section 15-3-545(A) stating, "So, I think that, to the extent 15-3-545 conflicts with - - the times periods in 15-3-545...that 15-3-40....trumps 15-3-545." (R. p. 259:9 - 12).

Applying Langley to the present case, the lower court's construction and analysis of Section 15-3-545 is in error. Like the plaintiff in Langley, Ms. Orlowski brings a medical malpractice action. Also like the plaintiff in Langley, Ms. Orlowski attempts to save her case by arguing that a general tolling statute should somehow trump a complete, self-contained statute specifically applicable to medical malpractice actions. Finally, both the general tolling statute at issue in Langley and the general tolling statute at issue in this case contain language claiming that they are applicable to all causes of action in Chapter 15.

The Langley Court was expressly clear in its interpretation of Section 15-3-545: the only tolling provision applicable to Section 15-3-545 is contained in Subsection (D) thereto and only applies to minors. Ms. Orlowski is not a minor. Section 15-3-40 does not apply to toll Ms. Orlowski's limitations period. Consequently, the trial judge misapplied Section 15-3-545 and erred in denying Amisub summary judgement on the ground that Ms. Orlowski's action is barred by the three-year limitations period contained within Section 15-3-545(A).

II. **The Lower Court erred in denying Amisub's Motion for Summary Judgment pursuant to S.C. Code Ann. § 15-4-545 by erroneously finding that any tolling provided by S.C. Code Ann. § 15-3-40 did not cease upon appointment of a guardian and conservator on March 5, 2004 or, alternatively, no later than August 26, 2006.**

As set forth above, Section 15-3-545(A) provides that an action for medical negligence must be commenced within three years from the date of the alleged negligent treatment or within three years from when such is discovered or reasonably ought to have been discovered. Discovery of a claim occurs when, acting with some promptness, "'the facts and circumstances of the injury would put a person of common knowledge on notice that some right of his has been invaded or that some claim against another party might exist.'" Strong v. Univ. of S.C. School of Med., 316 S.C. 189, 191, 447 S.E.2d 850, 852 (1994), quoting Snell v. Columbia Gun Exchange, Inc., 276 S.C. 301, 333, 278 S.E.2d 333, 334 (1981).

Although she did not commence Orlowski II until November 24, 2009, Ms. Orlowski argues that she should be excused from application of Section 15-3-545(A)'s limitations period because she has been mentally incompetent since September 13, 2003. Specifically, she claims that Section 15-3-40 applies to extend her limitations period from three years to eight years because she qualifies as "insane." As stated in Argument I above, Section 15-3-40 provides that when a person is insane at the time that a claim arises in her favor, the time of her insanity is not counted against her time limitation to commence an action on that claim. However, as to insanity based upon mental incompetency, the limitations period cannot be extended for "more than five years." S.C. Code Ann. § 15-3-40.

The definition of "insanity" illuminates the purpose behind Section 15-4-30. "Insanity" is defined as "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 v. Edwards, 314 S.C. 126, 129, 442 S.E.2d 169, 170 (1994) (internal citation omitted). Section 15-3-40 reflects a balancing between the need to preserve the legal rights of those who are unable to bring suit to protect their own rights and the need to guard individuals against the uncertainty of open-ended potential claims. Thus, Section 15-3-40 is general tolling provision that protects a person from application of the statute of limitations for a certain period, but not more than five years.

Amisub urges that Section 15-3-40 does not apply to toll the statute of limitations in Section 15-3-545(A). However, hypothetically applying Section 15-3-40 to this action, Amisub concedes that Ms. Orlowski's mental incompetence rendered her "insane" for purposes of Section 15-3-40 at the time of accrual of her alleged claims against Amisub (R. p. 267:18 - 19). Under this hypothetical, Ms. Orlowski would, indeed, be entitled to tolling of her limitations period to commence suit against Amisub during the period of time which she had no means to protect and preserve her own legal rights.

However, Ms. Orlowski has been entitled to the protections of a guardian and conservator since March 5, 2004. (R. p. 370). The South Carolina Probate Code authorizes both guardians and conservators with the power and right to bring actions on behalf of incompetent persons. See S.C. Code Ann. § 62-5-312(a) (Supp. 2009); S.C. Code Ann. § 62-5-424(17)(Supp. 2009). Further, Rule 17, SCRCP provides guardians and conservators with the procedural mechanism to put this authority into action, providing that when a real party in interest is incompetent, her guardian and/or conservator is entitled to file suit on her behalf. See Rule 17(c), SCRCP.

As such, even if Section 15-3-40 applied to toll Ms. Orlowski's limitations period against Amisub, her period of insanity ceased on March 5, 2004. Ms. Orlowski's guardian and conservator was fully empowered to prosecute actions on her behalf. Ms. Orlowski no longer needed or qualified for the protections supporting application of Section 15-3-40. Further, Ms. Orlowski has put forth no evidence that her guardian and conservator was incompetent or was otherwise unable to act to protect and preserve her legal rights. Ms. Orlowski's then-husband, Christopher T. Orlowski, first served as her guardian and conservator. (R. p. 370). Mr. Orlowski had been in the best possible position of any third party to observe Ms. Orlowski's unfortunate demise between September - December 2003. He was fully aware of her injuries and, through the exercise of reasonable diligence, on March 5, 2004, he knew or should have known of any potential claim he was empowered to assert for Ms. Orlowski based upon her September 12, 2003 - December 8, 2003 hospitalizations.

Consequently, the three year statute of limitations provided by Section 15-3-545(A) and applicable to Ms. Orlowski's action against Amisub commenced running on March 5, 2004. For the next three years, the guardian and conservator could and should have investigated and commenced all claims that he deemed prudent. In fact, the guardian and conservator did just that, commencing Orlowski I against Dr. Taylor and Rock Hill OB on August 24, 2006. However, the three year limitations period on Ms. Orlowski's claim against Amisub expired on March 5, 2007, and the guardian and conservator chose not to institute an action against Amisub before that date.

Alternatively, and at the latest, Ms. Orlowski's limitations period as to Amisub commenced running on August 24, 2006 when her guardian and conservator filed Orlowski I, alleging negligence and seeking recovery for the same damages sought in this action.

Hypothetically tolling Ms. Orlowski's limitations period to commence suit against Amisub to the above latest possible date that her claim against Amisub ought to have been discovered, Ms. Orlowski was required to commence her action against Amisub on or before August 24, 2009, three years from the filing date of Orlowski I. Again, the guardian and conservator failed to do so.

At the hearing on Dr. Creagh and Amisub's Motions for Summary Judgment, Ms. Orlowski's counsel argued that Section 15-3-40 provides Ms. Orlowski and her guardian and conservator with an eight-year limitations period to commence the instant action. (R. p. 255:16-19). The blatant inconsistency in Ms. Orlowski's position is not lost on Amisub. Ms. Orlowski and her guardian and conservator argue that she is entitled to the benefit of Section 15-3-40, a statute designed to protect the rights of those whose rights would otherwise go unprotected. However, on August 24, 2006, Ms. Orlowski and her guardian and conservator, acting to protect Ms. Orlwoski's legal rights, took up the sword and commenced Orlowski I against Dr. Taylor and Rock Hill OB. Consequently, on that same day, Ms. Orlowski and her guardian and conservator consciously abandoned Ms. Orlowski's mental incompetence as a shield against application of the statute of limitations.

It is unfortunate for Ms. Orlowski that Orlowski I did not reach the result which Ms. Orlowski, her guardian and conservator, and her *pro hac vice* counsel desired. However, there is no tolling provision applicable to Section 15-3-545 that allows a claimant and her representatives to take an untimely, second bite at the apple when the first bite turns out to be sour. By November 24, 2009 when Orlowski II was commenced, Ms. Orlowski's limitations period had expired. The present action is barred by application of Section 15-3-545(A), and the

lower court erred in denying Amisub summary judgment on that ground.

III. The Lower Court erred in denying Amisub's Motion for Summary Judgment pursuant to S.C. Code Ann. § 15-3-545 by improperly applying S.C. Code Ann. § 15-3-40 to toll the limitations period applicable to Ms. Orlowski's guardian and conservator.

As stated above, Section 15-3-545(A) provides a three-year limitations period on any claim arising out of medical malpractice. Ms. Orlowski argues, and the lower court agreed, that Section 15-4-30 applies to toll the limitations period provided in Section 15-3-545(A) because Ms. Orlowski is insane. Amisub argues that Section 15-3-40 has no application to Section 15-3-545. However, hypothetically applying Section 15-3-40, both Ms. Orlowski and the trial judge have overlooked the fact that Ms. Orlowski's guardian and conservator, and not Ms. Orlowski, instituted Orlowski II.

On the one hand, Ms. Orlowski's guardian and conservator separates herself from Ms. Orlowski and takes advantage of the authority granted by the Probate Code and Rule 17, SCRCP to maintain this action on Ms. Orlowski's behalf. Indeed, if Ms. Orlowski had attempted to bring this action in her own name, Amisub would be allowed to raise the issue of her competency as an affirmative defense pursuant to Rules 9 and 17, SCRCP. On the other hand, to avoid Amisub's statute of limitations defense, the guardian and conservator attempts to claim the tolling benefit of Ms. Orlowski's insanity as her own. The inconsistency in the two positions is apparent.

If Section 15-3-40 is to apply at all, it must apply specifically to each person entitled to bring an action. Ms. Orlowski had appointed a guardian and conservator on March 5, 2004. As stated in Argument II above, Section 62-5-312(a) and 62-5-424(17) authorized the guardian and conservator to bring actions on Ms. Orlowski's behalf. The guardian and conservator was

intimately familiar with Ms. Orlowski's September 12, 2003 - December 8, 2003 hospitalizations and reasonably ought to have discovered any action he was authorized to bring on Ms. Orlowski's behalf against Amisub no later than August 24, 2006 when Orlowski I was commenced. Pursuant to Section 15-3-545(A), the guardian and conservator's three year limitations period to commence any such claim expired no later than August 24, 2009, three months before the guardian and conservator filed Orlowski II.

At the hearing on Amisub's Motion for Summary Judgment, Ms. Orlowski's counsel argued that "the applicable statute of limitations is eight years," meaning that Orlowski II was timely commenced. (R. p. 255:16 - 19). Hypothetically applying Section 15-3-40 to this action, if Ms. Orlowski's disability had ceased on or before November 29, 2011 and Ms. Orlowski instituted this action before the earlier of one year from the date her disability ceased or November 29, 2011, her action might have been saved from application of Section 15-3-545(A).

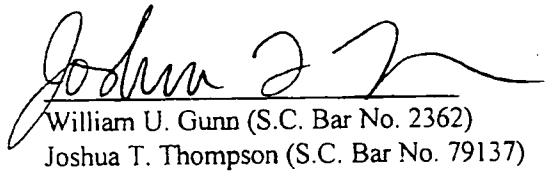
However, that is not the case. Ms. Orlowski's disability continues, and the present action has been commenced by Ms. Orlowski's guardian and conservator. Section 15-3-40 provides no authority for the guardian and conservator to avail herself of Ms. Orlowski's disability for purposes of tolling the guardian and conservator's own limitations period. Ms. Orlowski's initial guardian and conservator discovered or reasonably ought to have discovered the claim against Amisub no later than August 24, 2006. At the latest, the guardian and conservator's limitations period expired as of August 24, 2009—three months before Orlowski II was commenced, and the trial judge erred in denying Amisub's Motion for Summary Judgment pursuant to Section 15-3-545(A).

CONCLUSION

The trial judge erred in denying Amisub summary judgment on the grounds that Ms. Orlowski's claim is barred by the applicable statute of limitations. Primarily, he incorrectly interpreted Section 15-3-545(A) and applied a general tolling statute that is inapplicable to that Section. Secondly, assuming that the lower court did properly apply Section 15-3-40, it erred in failing to find that any tolling to which Ms. Orlowski and her guardian and conservator were entitled ceased no later than August 26, 2006. Because this action was commenced on November 24, 2009, the action is barred by application of the statute of limitations provided in Section 15-3-545, and the lower court's denial of summary judgment in favor of Amisub on this ground must be reversed.

Respectfully submitted,

HOLCOMBE BOMAR, P.A.

By: 

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April 10, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2009-CP-46-5178

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

v.

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

of whom, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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Piedmont Medical Center and
C. Edward Creagh, M.D., ...Respondents,

of whom, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center is the Respondent and Cross-Appellant.

PROOF OF SERVICE

The undersigned hereby certifies that on this 17th day of April 2013, he has served counsel for Appellant-Respondent Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (a/k/a Kristy Wood) and counsel for Respondent-Appellant C. Edward Creagh, M.D. with copies of (1) the Final Brief of Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center; (2) the Final Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center; and (3) the Final Reply Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center in this matter by mailing copies of the same by United States Mail, postage

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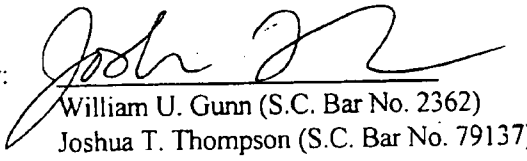
By: 

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC 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 Guardian and Conservator of Kristy L. Orlowski (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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2. Whether Appellants' statute of limitations argument was properly preserved for appeal

3. Whether Kristy Orlowski's claim was commenced within the statute of limitations as tolled by S.C. Code Ann. § 15-3-40

4. Whether appointment of a conservator/guardian for Kristy Orlowski changed her status as an "insane" person for purposes of S.C. Code Ann. § 15-3-40

STATEMENT OF THE CASE

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 Piedmont Medical Center ("PMC")[1] where she was placed on a ventilator. (R. p. 15 at ¶ 22). Her doctors delivered baby Brianna by cesarean section. (R. p. 15 at ¶ 23). Kristy 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. Edward Creagh admitted Kristy and was responsible for her care during this hospitalization. (R. p. 20 at ¶ 12). Dr. Creagh diagnosed a left pleural effusion and performed a thoracentesis for suspected empyema but still chose to send Kristy home on November 27, 2003. (R. p. 20 at ¶ 12-13). Two days later, Kristy returned to PMC with severe nausea and vomiting. (R. p. 21 at ¶ 14). Dr. Creagh finally ordered a CT scan on November 30th that revealed a hydropneumothorax in Kristy's left lung. Id.

Kristy's condition deteriorated rapidly over the next several days. She developed metabolic acidosis, stiff lungs, and continued having severe respiratory difficulties even with a ventilator. (R. p. 21 at ¶ 17). 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.

[1] The legal entity that owns and operates PMC is AMISUB of South Carolina, Inc. ("AMISUB").

Gladys Sims, as Kristy's guardian and conservator filed suit on November 24, 2009 based on Dr. Creagh and PMC's negligence arising out of Kristy's November 2003 hospital admission. 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. (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. Judge S. Jackson Kimball heard oral arguments and granted the motions on the estoppel issue and denied the motions on the limitations issue.

A timely appeal was noticed on Judge Kimball's ruling on estoppel. This appeal is currently pending before the court. In the current appeal, Dr. Creagh and AMISUB appeal Judge Kimball's ruling on the statute of limitations.

STANDARD OF REVIEW

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file...show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP. On review, the appellate court applies the same standard as the trial court. Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

ARGUMENT

I. THE CIRCUIT COURT'S ORDER DENYING APPELLANTS' SUMMARY JUDGMENT MOTIONS IS NOT SUBJECT TO APPEAL.

Appellants' right to appeal is limited to "any final judgment, appealable order or decision." Rule 201(a), SCACR. Rule 201's provisions speak to the appellate court's jurisdiction. Wright v. Dickey, 370 S.C. 517, 520, 636 S.E.2d 1, 2 (Ct. App. 2006)(citing Rule 201(a) in noting court "lacks jurisdiction to review this appeal"). South Carolina law is clear that denial of a summary judgment motion does not create a "final judgment" and may not be appealed. A denied summary judgment motion "does not finally determine anything" and cannot qualify as an appealable final order. Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). A trial court's denial of summary judgment "does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings." Id. As AMISUB acknowledges in its brief, South Carolina law clearly bars an appeal from denial of a summary judgment motion. Initial Br. of Appellant (AMISUB) at 7.

AMISUB cites McLeod v. Starnes, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012), as support for the proposition that the courts are free to revisit past precedent and reverse that precedent where necessary. However, AMISUB fails to provide any reason

why the current law should be changed on appeals from orders denying summary judgment. The current law on this point is not influx or based on an isolated court ruling. As the Ballenger court noted, courts have "repeatedly" refused to hear appeals based on denied summary judgment motions. 313 S.C. at 476, 443 S.E.2d at 380. The Ballenger court cited nearly ten cases on this point. McLeod recognized that deviation from precedent can be proper in some circumstances but also recognized that deviating from precedent usually requires that precedent was wrongly decided. 396 S.C. at 654, 723 S.E.2d at 202. AMISUB does not even attempt to explain how the courts have been wrong in concluding that an order denying summary judgment is not appealable. Existing precedent is on point and controls this issue. Appellants' claims on this cross-appeal are not properly appealable.

Dr. Creagh asks the court to deviate from its well-established precedent refusing consideration of denied summary judgment motions based on the claim that his statute of limitations argument represents an additional sustaining ground. An additional sustaining ground is raised by "the party who prevailed in the lower court" and "urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 417, 526 S.E.2d 716 (2000). A "respondent may raise an additional sustaining ground for th[e] court to consider." Semken v. Semken, 379 S.C. 71, 664 S.E.2d 493 (Ct. App. 2008).

For purposes of the statute of limitations matter with which he takes issue in this appeal, Dr. Creagh is not the party who prevailed in the lower court and he does not ask the court to affirm the lower court's ruling. Judge Kimball plainly denied Dr. Creagh's motion on the statute of limitations. Dr. Creagh noticed an appeal for the purpose of

seeking reversal of the circuit court's ruling on the statute of limitations. As the "party appealing," Dr. Creagh is "the appellant" for the purposes of the appeal he noticed. Rule 202(a), SCACR. Accordingly, the additional sustaining ground doctrine recognized in the court rules and discussed in I'On does not apply here. Dr. Creagh's additional sustaining ground discussion does not change the essential facts: Dr. Creagh and AMISUB noticed an appeal challenging an order denying summary judgment and orders denying summary judgment are not rulings from which an appeal may be taken.

II. APPELLANTS' STATUTE OF LIMITATIONS ARGUMENT WAS NOT PROPERLY PRESERVED FOR APPEAL.

This court will not consider an issue on appeal unless the issue was properly preserved at the trial court level. Issue preservation is a "threshold matter" the court must resolve before reaching the merits. Fettler v. Gentner, 396 S.C. 461, 469, 722 S.E.2d 26, 30 (Ct. App. 2012). Issues are properly preserved for appeal "only when they are raised to and ruled on by the lower court." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004). In other words, "it is axiomatic that an issue cannot be raised for the first time on appeal." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). The South Carolina Supreme Court has identified specific requirements for issue preservation. See S.C. Dep't of Transp. v. First Carolina Corp. of S.C., 372 S.C. 295, 301-02, 641 S.E.2d 903, 907 (2007). These requirements include timely identification of the issue during trial court proceedings that is "sufficiently specific[]" to be considered and ruled on by the trial judge. Id.

Issue preservation is a threshold question because proper preservation is important in maintaining the court system's established structure. The Court of Appeals, like the Supreme Court, is "a court of review." Powers v. City of Aiken, 255 S.C. 115, 117, 177

S.E.2d 370, 371 (1970). Courts of review are charged with determining "if the lower court did something that it should not have done, or omitted doing something it should have done." Id. The appellate court cannot serve its established purpose if a party raises an issue for the first time at the appellate court level. See Ellie, Inc. v. Miccichi, 358 S.C. 78, 103, 594 S.E.2d 485, 498 (Ct. App. 2004)("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error"). By raising all issues at the trial court level, parties also provide the trial judge a complete picture of the dispute on which a decision must be made. As this Court noted, issue preservation rules "are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments." Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006).

Dr. Creagh and AMISUB assert Ms. Orlowski's claims are barred by a three-year medical malpractice statute of limitations. See Initial Br. of Appellant (AMISUB) at 8-11; Initial Br. of Appellant (Creagh) at 7-10 (citing S.C. Code Ann. § 15-3-545). Dr. Creagh and AMISUB argue disability tolling for "insane" persons under S.C. Code Ann. § 15-3-40 does not apply to medical malpractice claims. Accordingly, the statute of limitations for Ms. Orlowski's claims against Dr. Creagh and AMISUB expired three years after the claims reasonably should have been discovered regardless of Ms. Orlowski's "sanity" at the time of accrual or at any point within the three years following accrual. Both parties supported this claim with citations to Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993).

This appellate brief argument was not the parties' trial court argument. While both parties cited the statute of limitations in their summary judgment motions, their assertion of why Ms. Orlowski's claims fell outside the statute did not include the argument that drives the current limitations dispute. Dr. Creagh's summary judgment motion simply asserted that Ms. Orlowski's claim violated § 15-3-545's statute of limitations. The same motion acknowledged disability tolling as indicated by § 15-3-40. The motion went on to claim the statute was violated even with operation of disability tolling because a conservator was appointed for Ms. Orlowski in early 2004 and the otherwise tolled statute commenced at his appointment. Dr. Creagh's statute of limitations argument is even more clearly outlined in his memorandum of law supporting summary judgment. There, Dr. Creagh argued Ms. Orlowski (1) was not "insane" at the time of Dr. Creagh's alleged negligence as physical disability does not qualify as insanity for § 15-3-40 purposes; and (2) ceased to be insane for § 15-3-40 purposes when a conservator was appointed for her. (R. p. 78). Dr. Creagh summed up his statute of limitations argument as follows: "Based on the lack of disability at the time the alleged negligence occurred and the appointment of a Conservator to represent Kristy's interest, the statute of limitations barred the claim." (R. p. 101).

AMISUB also moved for summary judgment based on the statute of limitations and its basis for claiming Ms. Orlowski's claims were time barred are clear from the oral argument transcript. A survey of Mr. Gunn's oral argument shows that AMISUB took the position, unsupported by the language of § 15-3-40 or § 15-3-545, that Ms. Orlowski's insanity ceased when her now-former husband was appointed as conservator. (R. p. 249, lines 8-12). The flaws in this argument are discussed in detail below. Mr. Gunn never

took the position AMISUB advocates now, i.e. disability tolling does not apply to medical malpractice claims and the Orlowski claims expired three years following date of injury or date of discovery. In fact, Mr. Gunn explicitly advocated a contrary position during the oral argument. During the course of the argument, Mr. Gunn conceded that the statute was tolled from the time of Ms. Orlowski's incapacitating injury to the date a conservator was appointed. See (R. p. 256 line 24- p. 257, line 1)("I'm willing to concede that the statute was suspended or tolled, until a conservator was appointed").

Moments before the court denied AMISUB/Dr. Creagh's motions based on the statute of limitations, Mr. Gunn 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, Mr. Gunn argued

> "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**."

(R. p. 257, line 21-p. 258, line 3)(emphasis added).

Eight years to file suit is only possible by combining the three year medical malpractice statute of limitations and the five years of disability tolling for insane persons codified in § 15-3-40. In short, AMISUB never raised its current statute of limitations argument at the trial court below so that Judge Kimball could hear and consider that argument in his ruling. Instead, AMISUB took a position that contradicts the position it now takes on the statute. Dr. Creagh's counsel joined in AMISUB's argument at the hearing. See (R. p. 252, line 8)(Mr. King told court, "I agree with everything Mr. Gunn said"). Additionally, during trial court proceedings, neither AMISUB nor Dr. Creagh

cited or mentioned Langley, the case on which the current iteration of their statute of limitations argument relies on so heavily.

Dr. Creagh and AMISUB have supplemented an unsuccessful statute of limitations argument with one they hope will be more successful. The rules of issue preservation do not permit this legal maneuver. This issue has not been properly preserved for appeal and should not be considered.

III. KRISTY ORLOWSKI'S CLAIMS WERE COMMENCED WITHIN THE STATUTE OF LIMITATIONS AS TOLLED BY S.C. CODE ANN. § 15-3-40.

Dr. Creagh and AMISUB employees/agents provided the care at issue in Kristy's claims in late November and December 2003. A suit alleging medical negligence was commenced on Kristy's behalf on November 24, 2009. The statute of limitations for a medical malpractice action is "three years from date of discovery or when it reasonably ought to have been discovered." S.C. Code Ann. § 15-3-545(A). However, South Carolina law allows for tolling of a statute of limitations for up to five years where a claimant suffers from a disability at the time a cause of action accrues. S.C. Code Ann. § 15-3-40. A person is disabled for tolling purposes if he/she is under the age of 18 or "insane." Id. Kristy was "insane" at the time her causes of action against Dr. Creagh and AMISUB accrued. The suit commenced on November 24, 2009, was timely.

The term "insane" carries different meanings in different areas of the law. For example, the term has a very specific meaning when used in the context of a criminal prosecution. See State v. Wilson, 306 S.C. 498, 413 S.E.2d 19 (1992)(discussing meaning of insane for criminal defendant's insanity defense). "Insane" is not defined in the disability tolling statute but has been interpreted by the courts. For purposes of this

statute, 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 v. Edwards, 314 S.C. 126, 129, 442 S.E.2d 169, 170 (1994)(quoting 54 C.J.S. Limitations of Actions § 117 at 159-69).

Kristy Orlowski was "insane" following Dr. Creagh and AMISUB's care in November 2003. Kristy's condition deteriorated rapidly following her admission to PMC on November 27, 2003. (R. p. 20 at ¶ 13). Kristy underwent surgery on December 3rd and developed metabolic acidosis and stiff lungs in the days that followed. (R. p. 21 at ¶ 16). On December 6th, Kristy had a hypotensive and bradycardic episode and suffered a cardiopulmonary arrest. Although Kristy was resuscitated, her condition continued to decline. Kristy's breathing problems continued to worsen to the point of needing a ventilator. Kristy was airlifted to Carolinas Medical Center ("CMC") in Charlotte, North Carolina. Once at CMC, Kristy's neurological status was severely compromised and her condition continued to decline. (R. p. 21 at ¶¶ 18-20). In short, Kristy suffers from permanent hypoxic encephalopathy and other mental disabilities that prevent her from caring for herself. (R. p. 21 at ¶ 19-20).

Kristy was rendered bed-ridden with severely compromised breathing and decreased neurologic function following Dr. Creagh and AMISUB's care. Kristy'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. AMISUB acknowledges Kristy was insane beginning in late November 2003. See Initial Brief of Appellant (AMISUB) at 13 ("Ms. Orlowski's mental incompetence rendered her

'insane' for purposes of Section 15-3-40 at the time of accrual of her alleged claims against Amisub"). Kristy's insanity continues as her medical condition has continued to prevent her from engaging in the activities of "sane" persons discussed in Wiggins.

Kristy's condition left her insane at the time her claims accrued and renders her insane still today. Kristy is entitled to the full benefit of five years of tolling if the disability tolling statute applies to her claims. By § 15-3-40's plain language, tolling does apply to her claims. Disability tolling applies to any action "mentioned in Article 5 of this chapter or an action under Chapter 78 of this title." Chapter 78 is a reference to the South Carolina Tort Claims Act, a statute governing claims against governmental entities that does not apply to this case. "Article 5 of this chapter" refers to all claims mentioned in Chapter 15, Article 5 of the South Carolina Code. This Article covers "actions other than for recovery of real property" and includes a medical negligence claim, the statute of limitations for which is codified at § 15-3-545.

Appellants argue disability tolling does not apply to medical negligence claims and wholly ground this position in a single Supreme Court opinion, Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993). Langley is distinguishable on multiple points. The Langley court construed a completely different tolling provision than the one at issue in the present case. The Langley defendant was a doctor who moved from South Carolina to Florida before the claim accrued. 313 S.C. at 402, 438 S.E.2d at 242. The plaintiff was attempting to toll the statute of limitations under S.C. Code Ann. § 15-3-30, which prevents the statute from running for periods where the defendant is out of state. Id. The disability tolling provision and the statute at issue in Langley have very different

language that represents potentially different legislative intent. It is inappropriate, therefore, to simply apply the holding in Langley in this case.

Additionally, Langley's interpretation of § 15-3-545 was limited to the statute of repose. The certified question the Court received from the 4th Circuit Court of Appeals was "Whether the Statute of Repose in S.C. Code Ann. § 15-3-545" was tolled by the out-of-state defendant tolling provision. Langley, 313 S.C. at 401, 438 S.E.2d at 242. All of the Court's public policy discussion concerns specific policy justifications unique to statutes of repose. Id. at 403-04, 438 S.E.2d at 243-44. The Court took efforts to distinguish other cases that "involved a statute of limitations, not one of repose." Id. at 405, 438 S.E.2d at 244. The distinction between a statute of limitation and statute of repose in an important one and severely limits the utility of Langley in the present case. A statute of repose "constitutes a substantive definition of rights" that confer "substantive grants of immunity" while a statute of limitation is simply a "procedural limitation." Id. at 404, 438 S.E.2d at 243-44 (internal citations omitted).

Langley holds only that the out-of-state defendant tolling provision does not toll the medical malpractice statute of repose in § 15-3-545. This holding does not portend the result Appellants seek in this case. By its terms, the disability tolling provision applies to all claims mentioned in Article 5 of Chapter 15. Medical negligence claims clearly fall within that category. Giving effect to § 15-3-40's unambiguous language requires tolling of Kristy's medical negligence claims during the period of her insanity. Langley does not compel a different result.

IV. CHRISTOPHER ORLOWSKI'S APPOINTMENT AS KRISTY ORLOWSKI'S CONSERVATOR HAD NO EFFECT ON HER STATUS AS AN "INSANE" PERSON FOR PURPOSES OF § 15-3-40.

If a person entitled to pursue a legal claim is "insane" at the time of the claim's accrual, then "the time of the disability is not a part of the time limited for the commencement of the action." S.C. Code Ann. § 15-3-40. Thus, if a person meets the definition of "insane," then the statute of limitations for her claim is tolled for "the time of the disability" up to the statutory maximum of 5 years.[2] As discussed above, Kristy's medical records show that she was "insane" in November 2003 under the Wiggins description and remains insane today. Appellants have even admitted that Kristy's condition was dire enough to qualify as insane.

Appellants do not claim Kristy's post-December 2003 condition changed in such a way that she no longer qualifies as insane for purposes of the disability tolling statute. Instead, they argue a change in circumstances external to Kristy's physical condition somehow rendered her no longer insane. This conclusion is not supported by the statute's text. As Judge Kimball noted, the statute makes no mention of conservator/guardian appointment and certainly does not establish such appointment as a terminating factor for a physically-incapacitated person's "insanity." (R. p. 259). Section 15-3-40 explicitly states the measuring period for disability tolling as "the time of the disability." The time of Kristy's disability has not ended. Therefore, she is entitled to the full five years of tolling permitted by the statute.

[2] The express language of § 15-3-40 shows that disability tolling "extend[s]" the time for filing rather than defining the time for filing. Where a person is insane at accrual and remains insane, disability tolling extends a three year statute of limitations by five years, resulting in an eight year period in which the claim may be filed. See Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 n. 5 (2003)(concluding insane plaintiff would have "seven years from discovery" of claim to file suit under South Carolina Tort Claims Act's two-year statute of limitations).

AMISUB/Dr. Creagh specifically claim Kristy's insanity concluded in March 2004 when a conservator and guardian were appointed for her. This claim is not supported by South Carolina law and represents a view on disability tolling rejected by the vast majority of courts to consider the issue in other jurisdictions. The tolling statute's structure is quite basic. Tolling applies if the person in question is "insane" at a claim's accrual and tolling continues for the time of the insanity up to a total of five years. As AMISUB notes in its brief, Wiggins provides further insight as to the degree of impairment required for a person to be considered "insane." It is the condition of the insane person not any other person that determines the continued application of disability tolling. If AMISUB/Dr. Creagh hope to show Kristy is entitled to less than five years of disability tolling, then their task is to point to some marked improvement in Kristy's prognosis or increased autonomy—i.e. some indication that her physical condition is no longer "insane" as stated in the statute and described in Wiggins. The appointment of a conservator does not speak to Kristy's physical capability, the only factor that matters in determining the existence and continuance of disability tolling.

South Carolina courts have not directly decided this issue. However, the majority of courts in other jurisdictions have held that the appointment of a conservator has no bearing on the continued viability of a person's insanity for tolling purposes. After surveying many decisions on this issue, the Supreme Court of Ohio found "[t]he overwhelming majority of courts...have concluded that the appointment of a guardian has no effect on the tolling of the statute of limitations." Weaver v. Edwin Shaw Hosp., 819 N.E.2d 1079, 1085 (Ohio 2004). Retaining disability tolling notwithstanding conservator appointment has become the majority rule for a variety of reasons. For

example, courts have made the common sense observation that a conservator's appointment does nothing to alter the injured person's insane status. See e.g. Abels v. Genie Indus., Inc., 202 S.W.3d 99, 105 (Tenn. 2006)(finding "disability of unsound mind is removed when the individual is no longer of unsound mind, due either to a change in the individual's condition or the individual's death"); Talley v. Portland Residence, Inc., 582 N.W.2d 590, 591 (Minn. App. 1998)("The appointment of a conservator in no way 'removed' [disabled person's] mental retardation"). Other courts have noted that, for the length of their insanity, an insane person is incapable of participation in the case even if a conservator is appointed. See e.g., Unkert v. General Motors Corp., 694 A.2d 306, 310 (N.J. App. 1997)("so long as the injured party remains incompetent, he is unable to assist in the preparation and presentation of his case").

Even the arguments Appellants rely on so heavily have proven unsuccessful in other jurisdictions. AMISUB/Dr. Creagh point to provisions of the South Carolina Rules of Civil Procedure and the South Carolina Probate Code for the proposition that Kristy's conservator had the capacity or even the duty to file suit on Kristy's behalf much earlier. AMISUB/Dr. Creagh also claim Kristy's conservator had all the knowledge he needed to file suit and, therefore, his appointment should end Kristy's disability. Similar arguments were considered and rejected in Sahf v. Lake Havasu City Association for the Retarded & Handicapped, 721 P.2d 1177 (Ariz. App. Div. 1 1986). The Sahf court refused to cut disability tolling short following a guardian's appointment even "where a guardian with a legal duty to bring appropriate lawsuits on behalf of her ward has been appointed and where that guardian has full knowledge of the facts." 721 P.2d at 1182.

Appellants' interpretation of § 15-3-40 suffers several flaws. First, it requires a strained, unnatural reading of the statute's unambiguous language. Second, it fails to give proper consideration to the legislature's choice, expressed through the statute's language, to extend tolling for "the time of the disability." Third, it inserts language about conservatorship in the statute that the legislature chose not to include. If the legislature intended to discontinue disability tolling at the appointment of a conservator, then the legislature could have said so. Legislatures from other jurisdictions have made this choice. See e.g., Va. Code Ann. § 65.2-528 (tolling statute of limitations for "any person who is incapacitated...so long as he has no guardian, trustee, or conservator"). South Carolina's legislature has not made this choice and such language should not be read into the statute. Tilley v. Pacesetter Corp., 333 S.C. 33, 40, 508 S.E.2d 16, 20 (1998)(citing Hainer v. Am. Med. Int'l, 328 S.C. 128, 492 S.E.2d 103 (1997)(if legislature had intended certain result in statute, it would have said so).

AMISUB also claims the trial court erred in applying disability tolling to Respondent's claim because Gladys Sims, Kristy's guardian and conservator, is not personally "insane" and does not personally qualify for disability tolling. Initial Br. of Appellant (AMISUB) at 15-17. This claim misunderstands the fundamental role Ms. Sims has in this litigation. As a representative of an incompetent person, Ms. Sims "may sue...on behalf of" Kristy Orlowski. Rule 17(c), SCRCP. It is Kristy's injuries that are claimed as damages in the suit Ms. Sims filed and Kristy's rights that are to be vindicated by resolution of this matter. It is well understood in state and federal jurisdictions that the individual to consider when making key determinations is the individual whose rights are at issue, not the person who simply stands in for purposes of filing suit. Under federal

law, the legal representative of an incompetent person "shall be deemed to be a citizen only of the same State as the...incompetent" person. 28 U.S.C. § 1332(c)(2). Accordingly, in a suit filed by an incompetent South Carolina nursing home resident's legal representative, it was the resident's citizenship that was important for jurisdictional purposes as the legal representative's citizenship was deemed the same as the resident's. See Long v. Sasser, 91 F.3d 645 (4th Cir. 1996).

AMISUB invites the Court to adopt an interpretation of the statute that leads to absurd results the legislature did not intend. Section 15-3-40 grants insane individuals the benefit of five years of disability tolling. Under AMISUB's approach, many insane individuals would be denied the full benefit of the five years. The present case presents a useful example. Suppose a person's insanity is caused by a defendant's allegedly tortious conduct and the length of that insanity is uncertain. If the insane person is approaching the end of the disability tolling period and statute of limitations period and the insanity-producing condition remains, then the insane person's claim will be lost if not filed by a legal representative. AMISUB's approach would bar any such claim because the representative is not insane, does not qualify for disability tolling, and therefore will have filed out of time. To ensure a timely suit under AMISUB's approach, a legal representative would have to file within the statute of limitations even if the injured person remains insane and entitled to the tolling explicitly stated in § 15-3-40. This approach belies the statute's clear language and denies vulnerable individuals the benefit the statute was designed to confer.

Kristy's "insanity" was present immediately after Appellants' allegedly negligent acts, at the time of her former husband's appointment as a conservator, and to this date.

Since her insanity persisted for at least five years following the date of accrual, she is entitled to the full five years of tolling provided by § 15-3-40. The five years of tolling combined with the applicable three year statute of limitations gave Kristy eight years from accrual to file suit. Accordingly, Respondent's November 24, 2009 Complaint was timely and Judge Kimball's order denying Appellants' summary judgment motion on statute of limitations grounds should be affirmed.

CONCLUSION

Based on the arguments stated above, the circuit court's ruling on the statute of limitations issue should be affirmed. This appeal is improper because denial of a summary judgment motion is not properly appealable and the issue was not properly preserved for appeal. Additionally, the circuit court properly ruled that Respondent's claim was commenced within the statute of limitations.

Respectfully submitted,

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April 23, 2013

Rock Hill, South Carolina

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/Respondent.
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/Appellants.

CERTIFICATE OF COUNSEL

Counsel hereby certifies that the following briefs comply with Rule 211(b), SCACR:

(1) Appellant's Final Brief of Appellant/Respondent;

(2) Appellant's Final Reply Brief of Appellant/Respondent; and

(3) Respondent's Final Brief of Appellant/Respondent.

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APPEAL FROM YORK COUNTY
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v.

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

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PROOF OF SERVICE

The undersigned hereby certifies that on this 23rd day of April, 2013, he served counsel for the Defendants with a copy of the following documents:

(1) Appellant's Final Brief of Appellant/Respondent;
(2) Appellant's Final Reply Brief of Appellant/Respondent; and
(3) Respondent's Final Brief of Appellant/Respondent

in this matter by mailing a copy of the same by United States Mail with first class postage prepaid to the following addresses:

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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S. Jackson Kimball, Special Circuit Court Judge

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(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.

APPELLANT'S FINAL REPLY BRIEF OF RESPONDENT-APPELLANT CREAGH

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ARGUMENTS

I. The Court should address Dr. Creagh's statute of limitations defense as an additional sustaining ground for the judgment entered by the Circuit Court.

The Appellant-Respondent Gladys Sims, as the duly appointed guardian and conservator of Kristy L. Orlowski (hereafter referred to as "Orlowski"), argues that the cross-appeal filed by the Respondent-Appellant C. Edward Creagh, M.D. is improper. Orlowski, however, overlooks Dr. Creagh's explanation for filing the cross-appeal. Dr. Creagh fully acknowledges that an order denying summary judgment is not ordinarily appealable. Yet, he filed this cross-appeal in order to preserve the statute of limitations issue for consideration by this Court as an additional sustaining ground. As explained in his opening brief, Dr. Creagh raised the statute of limitations defense by way of a cross-appeal to ensure that the issue is properly presented to this Court and is not deemed waived or abandoned in any respect. Dr. Creagh believes that the issue is best presented as an additional sustaining ground but filed the cross-appeal out of an abundance of caution.

To the extent that Orlowski contends that the statute of limitations defense may not be presented on appeal as an additional sustaining ground, Dr. Creagh disagrees. In *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the South Carolina Supreme Court explained that "in raising an additional

sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court." 526 S.E.2d at 722. The statute of limitations defense is a defense appearing in the record below. Moreover, the defense was presented to and ruled upon by the lower court, and hence, it meets the requirements of an additional sustaining ground.

The fact that Judge Kimball ruled incorrectly on that ground does not change its characterization as an additional sustaining ground. Without question, Judge Kimball's ruling on Dr. Creagh's statute of limitations defense is not the law of the case, and his denial of summary judgment on that issue does not decide the merits. Indeed, as Orlowski does not dispute, South Carolina law provides that "[t]he denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings." *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379, 380 (1994). Because the statute of limitations defense is still subject to adjudication in the lower court, it is appropriate for this Court to consider the defense as an additional sustaining ground on appeal.

II. The tolling provisions provided in Section 15-3-40 for insane persons are not applicable to a medical malpractice action, and as a result, 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.

As an additional sustaining ground on appeal, Dr. Creagh contends 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(A). Section 15-3-545, which establishes the statute of limitations for medical malpractice claims, includes a tolling provision within Section 15-3-545(D). The South Carolina Supreme Court has explained that the tolling provision of Section 15-3-545(D) allows for tolling of the medical malpractice statute of limitations only for minority. It does *not* provide for tolling for any other disability including insanity. *See, Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993).

In response to Dr. Creagh's statute of limitations argument, Orlowski first argues that the issue is not preserved for appeal because it was not made in the court below. Orlowski bases her argument on the fact that the *Langley* case was not expressly cited to Judge Kimball. Even if that were the case, there is no dispute that Dr. Creagh raised a statute of limitations defense based on Section 15-3-545 in the court below. The fact that an additional case citation was offered on appeal does not make an issue non-preserved for appeal.

At any rate, the statute of limitations defense based on Section 15-3-545 as

interpreted in *Langley* qualifies as an additional sustaining ground. As a technical matter, additional sustaining grounds may be argued on appeal "regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On*, 526 S.E.2d at 723. Thus, whether or not *Langley* was cited to or considered by Judge Kimball is not controlling. The statute of limitations as governed by the holding in *Langley* may be considered by this Court as an additional sustaining ground.

Furthermore, it is illogical and contrary to notions of judicial economy to suggest that this Court cannot consider the statute of limitations defense based on the dispositive precedent of the *Langley* case. The statute of limitations defense as presented is purely an issue of law; there are no disputed issues of fact. The issue is specifically one of statutory construction. *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"). The issue appears in the record, and the parties have had a full opportunity to brief it. Orlowski presents no reason why this Court is not in a proper position to decide the issue as an additional sustaining ground. Frankly, there is no reason for this purely legal issue to be remanded to the lower court to be decided when it is ripe for adjudication as part of this appeal. To remand this issue of statutory construction would be contrary to all notions of judicial economy and would only delay the inevitable given that *Langley* is controlling precedent.

Significantly, Orlowski expends great effort to argue that *Langley* was not cited in the lower court, but she fails to argue that *Langley* is wrongly decided. 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 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 the Supreme 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, 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). Indeed, Orlowski offers no explanation for the express language of Section 15-3-545(D), which is prefaced by the phrase "[n]otwithstanding the provisions of Section 15-3-40." Clearly, that language demonstrates that the tolling provisions of Section 15-3-40 have no application to medical malpractice actions.

While Orlowski raises distinctions without differences in her discussion of *Langley*, she fails to provide any argument to suggest why the tolling provisions of Section 15-3-40 for insanity are applicable to medical malpractice actions given the specific language of Section 15-3-545(A) and (D). In short, it is quite clear 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, her action is barred by the statute of limitations.

III. Even if the Court finds that the tolling provisions of Section 15-3-40 are applicable to a medical malpractice action, the three-year statute of limitations expired prior to the filing of this action on November 24, 2009.

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 contends that the three-year statute of limitations should run from the date that Orlowski was appointed a conservator, which was March 5, 2004, or at a minimum, from August 24, 2006, which is the date that her conservator filed her medical malpractice action against R. Norman Taylor, III, M.D. and his practice. Under either scenario, the statute of limitations expired by November 24, 2009, when this action against Dr. Creagh was filed.

In response, Orlowski cites case law from other jurisdictions for the position that the appointment of a guardian or conservator has no effect on the tolling of a statute of limitations. However, there is case law from other jurisdictions not cited

by Orlowski that supports Dr. Creagh's position. For example, in *Stewart v. Robinson*, 115 F. Supp. 2d 188 (D.N.H. 2000), the federal district court rejected the majority rule and was "persuaded ... that the minority view – that the statute of limitations is tolled only until the appointment of a capable guardian – is better reasoned and both gives effect to society's compelling interest in effectively protecting the rights of those who are disabled ... while also serving the important interests underlying statutes of limitations." 115 F. Supp. 2d at 195. The court further explained the interests served by what it described as the "more sensible view":

> [C]onstruing New Hampshire's tolling provision in that manner serves several interests: (1) it protects a ward's legal rights for an additional two years after a guardian acquires the legal ability to vindicate those rights; (2) it encourages guardians to act in a timely manner to preserve and prosecute claims of the ward, gather relevant evidence, and identify potential defendants, and (3) it protects defendants from potentially timeless liability.

Id.

North Carolina and Georgia also follow this minority yet "more sensible" view. The North Carolina Supreme Court recognizes that, as in South Carolina,[1] statutory laws authorize "the guardian to bring suit, when necessary, upon the

[1] *See*, S.C. Code Ann. § 62-5-424(B)(17) (one of the duties of a conservator is to "prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties").

choses in action belonging to the ward's estate, and to recover any moneys due him, and to plead any equitable matter that may be necessary for recovery in such action." *Johnson v. Pilot Life Ins. Co.*, 217 N.C. 139, 7 S.E.2d 475, 477 (1940). The Court concluded, as a result, that the statute of limitations begins to run from the appointment of a guardian and that "the failure of the guardian to sue in apt time is the failure of the ward, entailing the same legal consequence with respect to the bar of the statute." 7 S.E.2d at 477-78. *See also, First-Citizens Bank & Trust v. Willis*, 257 N.C. 59, 125 S.E.2d 359 (1962) (the statute of limitations for guardian to file suit for ward began to run on date guardian was appointed).

Similarly, in *Camps v. City of Warner Robins*, 822 F.Supp. 724 (M.D. Ga. 1993), the federal district court, applying Georgia law, ruled that the statute of limitations began to run on the date of appointment of the ward's guardians. The court relied on *Cline v. Lever Brothers Co.*, 124 Ga. App. 22, 183 S.E.2d 63 (1971), in which the Georgia Court of Appeals explained that "the statute of limitations for bringing of an action is tolled until such time as he regains capacity to act for himself or until such time as a guardian is appointed and actually does act for him." 183 S.E.2d at 66.[2]

[2] *See also, Zator v. State Farm Mutual Auto. Ins. Co.*, 69 Haw. 594, 752 P.2d 1073, 1075 (1988) ("[a] guardian of the property of a disabled person has the power to prosecute claims for the protection of assets unless otherwise limited. ... Absent such limitations [the guardian's] appointment gave her the right of action to bring [her ward's] claim. Consequently, we hold that the statute of limitations commenced running upon her appointment").

In the case at bar, Orlowski had a conservator appointed for her on March 5, 2004, and that conservator acted for her by filing a medical malpractice suit (*Orlowski I*) on August 24, 2006. (R. 12-17, 370). Certainly, by that latter date, if not on March 5, 2004, the statute of limitations began to run. Without dispute, Orlowski's interests were protected by a conservator by that date. The conservator chose only to sue Dr. Taylor and his practice, but he was not precluded or barred on that date from also suing Dr. Creagh. There is no reasonable basis for allowing an insane person, whose rights are protected by a conservator, to extend the period of disability beyond the date that the conservator was appointed and indeed took action to protect the ward's interests by filing suit. In sum, the tolling provisions of Section 15-3-40, even if applicable to medical malpractice actions, do not protect Orlowski's current action from the statute of limitations. The filing of this action against Dr. Creagh and the Hospital on November 24, 2009 was untimely, and the action should be dismissed on that basis.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent-Appellant C. Edward Creagh, M.D. respectfully renews his request that this Court affirm the judgment entered in his favor in the Circuit Court. If the Court does not affirm the judgment based on the estoppel defense as adjudicated by Special Circuit Court Judge S. Jackson Kimball in his Order filed August 15, 2012, the Court is respectfully requested to affirm the judgment below based on the statute of limitations defense as discussed herein.

Respectfully submitted,

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April 23, 2013

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent-Appellant C. Edward Creagh, M.D. certifies that the Appellant's Final Reply Brief of Respondent-Appellant Creagh complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent-Appellant C. Edward Creagh, M.D. that the Appellant's Final Reply Brief of Respondent-Appellant Creagh complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent-Appellant, C. Edward Creagh, M.D., does hereby certify that service of **Appellant's Final Reply Brief of Respondent-Appellant Creagh** 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 23rd day of April 2013:

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ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2009-CP-46-5178

Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (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

Appellant's Final Reply Brief of Respondent/Appellant

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REPLY ARGUMENT

I. Amisub has properly preserved its argument concerning expiration of the statute of limitations because it is an additional sustaining ground before this Court on appeal.

Within her Respondent's Brief, Ms. Orlowski overlooks the impetus behind Amisub filing a cross-appeal in this matter. In its Brief as Appellant, Amisub clearly sets forth that it will raise all arguments raised on cross-appeal as additional sustaining grounds within its brief as Respondent to Ms. Orlowski's appeal. Amisub Brief as Appellant, n. 4, citing I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); Rule 220(C), SCACR. This additional sustaining ground is presented to this Court only out of an abundance of caution to ensure that the issue properly is before this Court and is not deemed waived or abandoned in any respect.

It is well-settled that a party "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., 338 S.C. at 422, 526 S.E.2d at 724; see also Rule 220(c), SCACR. The only requirement is that the additional sustaining ground appears in the Record on Appeal. I'On, L.L.C., 338 S.C. at 422, 526 S.E.2d at 724. Though it is within the appellate court's discretion whether to consider additional sustaining grounds, the Supreme Court has recognized that "it would be inefficient and pointless to require a respondent to return to the judge and ask for a ruling on other arguments to preserve them for appellate review." Id. Indeed, "[a]n affirmance promotes judicial economy and finality in private and public affairs which are important public policies." Id. at 421, 526 S.E.2d at 723.

Ms. Orlowski incorrectly argues that expiration of the statute of limitations is not an

additional ground before this Court upon which the Lower Court's grant of summary judgment may be sustained. At the July 18, 2012 Motion Hearing, Amisub argued two grounds for summary judgment: (1) estoppel and (2) expiration of the medical negligence statute of limitations provided in S.C. Code Ann. § 15-3-545(A) (Supp. 2011) (hereinafter, "Section 15-3-545"). (R. p. 240:11 - 20). Within her brief as Respondent, Ms. Orlowski admits that Amisub raised expiration of the statute of limitations pursuant to Section 15-3-545 as a ground for summary judgment stating, "Amisub also moved for summary judgment based on the statute of limitations...." Orlowski Brief as Respondent, p. 7.

Nonetheless, Ms. Orlowski attempts to dichotomize Amisub's argument as to expiration of the statute of limitations. She asserts that Amisub did not raise the issue of interaction between S.C. Code Ann. § 15-3-40 (Supp. 2003) (hereinafter, "Section 15-3-40"), a general tolling statute, and Section 15-3-545(A). However, as Ms. Orlowski concedes in her Brief as Appellant, there can be no dispute that Amisub briefed, raised, and argued its point that Ms. Orlwoski's action is time-barred pursuant to Section 15-4-545(A). (R. p. 240:11 - 20.) Additionally, the transcript of the July 18, 2012 hearing on Amisub and Dr. Creagh's Motions for Summary Judgment demonstrates that consideration of the interaction between Sections 15-3-545(A) and 15-3-40 is necessary to Amisub's statute of limitations argument. Indeed, the Lower Court considered the interaction between Sections 15-3-545(A) and 15-3-40 on the record. (R. p. 258:25 - 60:1).

Further, whether the Lower Court ruled against Amisub as to the statute of limitations defense is irrelevant.[1] The statute of limitations provided in Section 15-3-545(A) remains an

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[1] The Lower Court denied Amisub's Motion for Summary Judgment on the statute of limitations grounds, violating the recognized principle "that a court usually should refrain from deciding unnecessary questions." I'On, L.L.C. at 419, 526 S.E.2d at 723. (R. p. 6 - 7).

additional ground appearing in the Record on Appeal. Also, the Lower Court's denial of this defense does not form the law of the case. See Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again....").

Finally, policy concerns weigh in favor of this Court exercising its discretion and considering the expiration of the limitations period as an additional ground for affirming summary judgment. Ms. Orlowski's counsel briefed the issue of the expiration of the statute of limitations to the Lower Court and addressed it at the July 18, 2012 Motion Hearing. (R. p. 83 - 85, 254:1 - 56:19). Also, the issue was considered by the Lower Court on the record at the July 18, 2012 Motion Hearing. (R. p. 258:25 - 59:12). Finally, as briefed in greater detail in Argument I of its Brief as Appellant, Amisub sets forth a statute of limitations defense based upon Supreme Court precedent. Should this Court decline to consider the application of Section 15-3-545(A) as an additional sustaining ground and otherwise decide to remand the case to the Lower Court, the principles of judicial economy and efficiency discussed in I'On, L.L.C. will not be served. Instead, as recognized in Ballenger, Amisub will be free to renew its Motion for Summary Judgment on the statute of limitations ground—a ground currently briefed by the parties, considered on record by the Lower Court, and properly before this Court as an additional sustaining ground.

II. Ms. Orlowski incorrectly argues that she timely filed this action because Section 15-3-40 is inapplicable to toll the limitations period on her claims against Amisub.

As set forth in Amisub's Brief as Appellant, Langley v. Pierce is dispositive of this case. 313 S.C. 401, 438 S.E.2d 242 (1993). In Langley, the South Carolina Supreme Court applied

elemental statutory interpretation principles in holding that (1) Section 15-3-545(D) provides tolling only for minors and (2) Subsection D is the exclusive tolling provision applicable to Section 15-3-545. Id. at 403, 438 S.E.2d at 243. Langley is clear: Ms. Orlowski's action is time-barred because she is not a minor and because Section 15-3-40 does not apply to toll her limitations period.

Within her Brief as Respondent, Ms. Orlowski first tries to distinguish this case from Langley by arguing that the plain language of Section 15-3-40 states that it applies to any action mentioned in Article 5 of Chapter 3, including Section 15-3-545. See Orlowski Brief as Respondent, p. 11. However, Ms. Orlowski overlooks the fact that Section 15-3-30, the tolling statute in Langley, contains similar language of broad applicability. See S.C. Code Ann. § 15-3-30 (Providing that when an action accrues against a defendant when he is out of South Carolina, "such action may be commenced within the terms in this chapter respectively limited after the return of such person into this State."). Regardless of the broad applicability language contained in Section 15-3-30, the Langley Court still held that the general tolling statute was inapplicable to Section 15-3-545 based upon the Court's construction of Section 15-3-545.

The Supreme Court's reasoning in Langley is sound: "Inclusion 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)." Langley at 403, 438 S.E.2d at 243, quoting S.C. Code Ann. § 15-3-545 (emphasis original). Considering the Langley Court's interpretation of Section 15-3-545, Ms. Orlowski has failed to set forth any argument as to why broad applicability language in Section 15-3-40 should trump the more specific language of Section 15-3-545, a medical negligence-specific statute with its own exclusive tolling provisions.

See Duke Power Co. v. S.C. Public Service Com'n, 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985) ("Laws giving specific treatment to a given situation take precedence over general laws on the subject, and later legislation takes precedence over earlier laws.").

Next, Ms. Orlowski attempts to distinguish Langley on the basis that the Langley Court considered Section 15-3-30, and not Section 15-3-40. She argues that the two tolling provisions have "potentially different legislative intent" and that makes it "inappropriate" to apply Langley to this case. Orlowski Brief as Respondent, p. 11 - 12. In telling fashion, Ms. Orlowski provides absolutely no authority in support of this argument. Indeed, the instant case and Langley are indistinguishable because they both involve tolling statutes of general application that do not impact the Court's construction of Section 15-3-545. In Langley, the Supreme Court focused upon the language of Section 15-3-545, finding that it was a specifically-applicable and self-contained statute that did not allow for application of general tolling statutes. Langley at 403, 438 S.E.2d at 243, quoting Section 15-3-545. This analysis does not change whether one attempts to apply Section 15-3-30 or Section 15-3-40.

Finally, Ms. Orlowski asserts that Langley is distinguishable from the instant case on the grounds that Langley involves application of the statute of repose, and not the statute of limitations. In making this argument, Ms. Orlowski overlooks the main holding in Langley. The Langley Court spends the first half of its discussion considering the language of Section 15-3-545 and reciting statutory interpretation principles that are not limited to statutes of repose. Id. at 402-03, 438 S.E.2d at 242-43. The central holding in Langley is that based upon the plain language of Section 15-3-545, general tolling statutes are inapplicable to toll the limitations period provided in that Section:

> Langley contends that inclusion of the language "in this chapter" renders the tolling statute applicable to claims under § 15-3-545. We disagree....Subsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors. Inclusion 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. at 403, 438 S.E.2d at 243. The Langley Court includes the fact that the statute of repose had expired as an *additional* ground for concluding that the general tolling statute at issue in that matter did not apply to Section 15-3-545. Indeed, this is evidenced by the Langley Court beginning its discussion of the statute of repose with the word, "Moreover." Id.

While Ms. Orlowski attempts to distinguish Langley from the instant case, she only manages to raise distinctions without differences. Langley focuses upon construction of Section 15-3-545, the very statute at issue in this matter. The Langley Court's holding is inescapable: Section 15-3-545 provides a limited tolling provision only applicable to minors. Ms. Orlowski is not a minor, Section 15-3-40 does not apply to toll the limitations period on her claim, and her action is time-barred pursuant to Section 15-3-545(A).

III. Even if Section 15-3-40 applied to toll the limitations period provided in Section 15-3-545, Ms. Orlowski's action is timed-barred based upon the appointment of a legal guardian and conservator or, alternatively, the filing of Orlowski I.

Ms. Orlowski, through her guardian and conservator, failed to institute Orlowski II against Amisub and Dr. Creagh until November 24, 2009. Within Arguments II and III of its Brief as Appellant, Amisub argues that, even if this Court finds that Section 15-3-40 applies to toll the limitations period provided in Section 15-3-545, Ms. Orlowski's action still is time-barred because (1) the statute of limitations would have started running upon appointment of a guardian and conservator on March 5, 2004; (2) alternatively, the limitations period would have started

running on August 24, 2006 when her guardian and conservator filed Orlowski I, alleging negligence and seeking recovery for the same damages sought in this action; or (3) alternatively, any tolling of the limitations period in favor of Ms. Orlowski's guardian and conservator ceased by August 24, 2006 when the guardian and conservator filed Orlowski I, alleging negligence and seeking recovery for the same damages sought in this action.

Amisub will not re-argue the above points in this Reply. However, in response to Ms. Orlowski's argument citing non-authoritative case law,[2] Amisub notes that equally compelling authority exists in favor of Amisub and Dr. Creagh's argument that the appointment of a guardian and conservator ceased any possible tolling provided to Ms. Orlowski pursuant to Section 15-3-40. The federal district court for New Hampshire has set forth best the policy considerations underlying Amisub and Dr. Creagh's argument. In Stewart v. Robinson, the plaintiff's husband was incapacitated after attempting suicide in a correctional facility on October 27, 1995. 115 F.Supp.2d 188, 191-92 (D.N.H. 2000). A three year statute of limitations applied to the husband's claim. Id. at 194. On January 22, 1996, the plaintiff was appointed guardian over her husband. Id. However, she did not commence suit against various employees of the facility until February 11, 1999, more than three years after her appointment as guardian. Id.

Similar to Section 15-3-40 which provides that a mentally incompetent person may bring a cause of action within one year from when the disability ceases, New Hampshire Rev. Stat. Ann. § 508.8 provided that a "mentally incompetent person may bring a personal injury action

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[2] Ms. Orlowski cites Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 n. 5 (2003) for the proposition that Section 15-3-40 extends Ms. Orlowski's limitations period from three years to eight years. See Orlowski's Brief as Appellant, p. 13, n. 2. Ms. Orlowski's reliance on Harrison is in error. Harrison involved an action against a governmental entity subject to the two-year statute of limitations provided in S.C. Code Ann. § 15-78-110. While Section 15-78-110 expressly provides for application Section 15-3-40, Section 15-3-545 expressly excludes application of Section 15-3-40.

within 2 years after such disability is removed." Applying Section 508.8, the District Court held "that the statute of limitations is tolled only until the appointment of a capable guardian." Id. at 195. Much like Amisub and Dr. Creagh's arguments concerning the guardian and conservator's awareness of any claims which Ms. Orlowski held, the District Court noted, "At the time of [the guardian's] appointment, she was completely familiar with the circumstances giving rise to [her husband]'s injuries and was on notice that viable causes of action against" the defendants. Id.

Considering public policy, the District Court further reasoned that tolling the statute of limitations on a incapacitated person's claim only until appointment of a guardian best reconciles two competing public policy considerations. It protects "society's compelling interest in effectively protecting the rights of those who are disabled..., while also serving the important interests underlying statutes of limitations." Id. Grounding its decision in both the awareness of the guardian as well as public policy considerations, the District Court ruled, "When plaintiff was appointed guardian of his estate, [her husband]'s disability was...effectively removed, and the two-year limitations period set forth in RSA 508:8 began to run." Id.

Likewise, considering a disability tolling statute very similar to Section 15-3-40, North Carolina courts have held that the statute of limitations "begins to run upon the appointment of a guardian or upon the removal of his disability..., whichever shall occur first." First-Citizens Bank & Trust Co. v. Willis, 125 S.E.2d 359, 361 (N.C.Sup.Ct. 1962). In Johnson v. Pilot Life Insurance Company, the North Carolina Supreme Court considered whether a general disability tolling statute tolled a claimant's limitations period where the incompetent claimant had been appointed a guardian. 7 S.E.2d 475 (N.C.Sup.Ct. 1940). The plaintiff claimed that while he was incompetent, the defendant insurer unfairly had him sign a settlement and waiver of his right to

disability payments under an insurance policy. Id. at 475. The defendant claimed that the plaintiff's action was barred by the statute of limitations, in part due to the appointment of a guardian on March 21, 1933, approximately four years after the plaintiff's May 20, 1929 disabling accident. Id. at 476.

Similar to Section 15-3-40 which provides that a mentally incompetent person may bring a cause of action within one year from when the disability ceases, the applicable North Carolina general tolling statute provided that a mentally incompetent person may bring an action "within the times herein limited, after the disability is removed." Id. at 477, citing N.C. Gen. Stat. § 407 (recodified at N.C. Gen. Stat. § 1-17) (2001)). The Johnson Court noted that, much like S.C. Code Ann. § 62-5-312(a) (Supp. 2009) and S.C. Code Ann. § 62-5-424(17) (Supp. 2009), N.C. Gen. Stat. § 2169 provided guardians with the power to institute actions on behalf of incompetent persons. Id.

Though the matter was ultimately decided upon different considerations, applying N.C. Gen. Stat. § 2169, the Court reasoned, "[W]e apprehend that it is the duty of the guardian to bring suit, when necessary, upon the choses in action belonging to the ward's estate, and to recover any moneys due him, and to plead any equitable matter that may be necessary for recovery in such action." Id. As such, the Court noted, "[O]rdinarily the failure of the guardian to sue in apt time is the failure of the ward, entailing the same legal consequence with respect to the bar of the statute." Id. (internal citation omitted). Likewise, the Court noted, "Exposure to a suit by the guardian,-one which was within the scope of both his authority and duty,-for a sufficient length of time, would constitute a bar to the action of the ward." Id. (internal citation omitted).

The above cases highlight the crux of Amisub's argument: there is no need to continue

to toll the applicable statute of limitations pursuant to Section 15-3-40 once a guardian and conservator, authorized with the power to institute suit, is appointed to represent an incompetent person. When the guardian and conservator is appointed, the incompetent person's disability "ceases" for purposes of Section 15-3-40 and protection of the incompetent person must yield to fulfilling the policy behind the statute of limitations. Further, once a guardian and conservator begins filing suit on behalf of the incompetent person–exposing potential defendants to suit as the Johnson Court words it, there can be no doubt that the incompetent person has been adequately protected by Section 15-3-40 and the statute of limitations should recommence running.

In this matter, Ms. Orlowski's guardian and conservator was given the authority to file suit on her behalf on March 5, 2004, the date of his appointment. For the reasons set forth in Stewart and Johnson, Ms. Orlowski's disability ceased on that day and any tolling possibly provided by Section 15-3-40 also ceased. In the alternative, when Ms. Orlowski's guardian and conservator took to the offensive and exercised his powers to bring suit on her behalf by filing Orlowski I on August 24, 2006, any tolling provided by Section 15-3-40 certainly ceased. Under either theory, by waiting to file the present action until November 24, 2009, Ms. Orlowski failed to commence this action within the limitations period and the action is time-barred pursuant to Section 15-3-545.

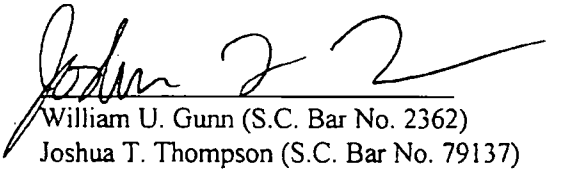
CONCLUSION

Amisub and Dr. Creagh continuously have argued that Ms. Orlowski's action is barred by the applicable statute of limitations provided in Section 15-3-545. The parties briefed this issue, the Lower Court considered this issue, and it is properly before this Court as an additional

ground upon which the Lower Court's grant of summary judgment may be sustained. Even if Section 15-3-40 applied to toll Ms. Orlowski's limitations period, any tolling necessarily ceased upon appointment of a guardian and conservator and/or the guardian and conservator's filing of Orlowski I. As such, Ms. Orlowski's action against Amisub and Dr. Creagh is time-barred and this Court should affirm summary judgment on this additional ground found in the record.

Respectfully submitted,

HOLCOMBE BOMAR, P.A.

By: 

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April 10, 2013

Spartanburg, SC

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2009-CP-46-5178

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

v.

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

of whom, Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

The undersigned hereby certifies that on this 17th day of April 2013, he has served counsel for Appellant-Respondent Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (a/k/a Kristy Wood) and counsel for Respondent-Appellant C. Edward Creagh, M.D. with copies of (1) the Final Brief of Respondent Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center; (2) the Final Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center; and (3) the Final Reply Brief of Appellant Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center in this matter by mailing copies of the same by United States Mail, postage

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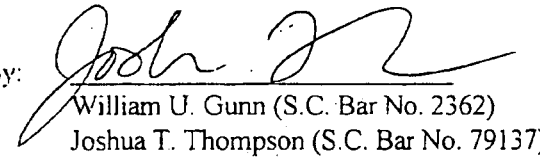
By: 

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