THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

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

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

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

v.

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

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

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

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

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

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

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

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

Circuit Court Judge S. Jackson Kimball on July 18, 2012. Thereafter, on August 15, 2012, Judge Kimball entered an order granting summary judgment on the estoppel defense but denying summary judgment on the statute of limitations defense. (App. 42-51).

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

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

ARGUMENTS

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

As her first issue on appeal, Orlowski contends that the Court of Appeals should not have disregarded a "concession" made by Dr. Creagh and the Hospital in the lower court, and as a result, erred in affirming the judgment on the basis of the expiration of the statute of limitations. Specifically, Orlowski argues that Dr. Creagh and the Hospital took an inconsistent legal position in the lower court, agreeing that "an eight-year statute of limitations could exist until or without the appointment of a conservator." *See*, Petitioner's Brief, p. 6. Orlowski argues that the Court of Appeals "expanded the additional sustaining grounds doctrine" by allowing Dr. Creagh and the Hospital to argue against a position conceded in the lower court. *See*, Petitioner's Brief, p. 5. In effect, Orlowski insists that Dr. Creagh and the Hospital cannot "recant a concession" on appeal. *See*, Petitioner's Brief, p. 7.

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

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

On the first point, the Court of Appeals ruled: "Although the circuit court denied the statute of limitations defense, the Respondents are not precluded from raising this defense as an additional sustaining ground." (App 10). While Orlowski opposed that ruling in the Court of Appeals, she now has abandoned that argument. She is no longer arguing to this Court that an appellate court should be precluded from considering an adverse summary judgment ruling on appeal as an additional sustaining ground. Instead, Orlowski contends only that the additional sustaining ground could not be considered because of a "concession" made in the lower court.[1]

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[1] The Court of Appeals correctly ruled that an appellate court may treat an adverse summary judgment ruling as an additional sustaining ground and, if fair and proper to do so, may affirm on that basis. The Court of Appeals correctly followed the reasoning from *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), wherein this 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. In the present case, 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. As the Court of Appeals agreed, the fact that Judge Kimball ruled incorrectly on that ground does not change its characterization as an additional sustaining ground. Judge Kimball's ruling on the statute of limitations defense did not establish the law of the case, and his denial of summary judgment on that issue does not decide the merits. As the Court of Appeals recognized, 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 remains subject to adjudication in the lower court, it was therefore appropriate for the Court of Appeals to have considered the defense as an additional sustaining ground on appeal.

The record from the hearing below is far from conclusive that a "concession" as described by Orlowski was made. Certainly, there is no indication that Dr. Creagh and the Hospital expressly and intentionally waived any argument, as Orlowski now claims.[2] In fact, counsel for the Hospital followed the colloquy included by Orlowski in her petition with the following statement: "So, it does come into play -- or, conceivably, arguably, it could hypothetically come into play that way." (App. 298, lines 8–10). To state that an opponent's legal interpretation of a statute is "arguable" or "conceivable" is not a concession or, more specifically, a stipulation.[3]

At any rate, to the extent that counsel for Dr. Creagh and/or the Hospital "agreed" that absent the appointment of the conservator there "may well" be an eight year statute of limitations, that would have been incorrect as a statement of

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

[3] Likewise, the record from the hearing appears to evidence that Judge Kimball did not interpret counsel's position as a concession or stipulation as Orlowski now argues. Following his discussion with counsel for the Hospital, Judge Kimball noted that the interaction between Sections 15-3-40 and 15-3-545 was "sort of perplexing." (App. 299, line 1). Judge Kimball then "reconstruct[ed] [his] thought process" about the interaction between the two statutes before ruling on the statute of limitations argument. (App. 299, line 14-15). If Judge Kimball believed that counsel for the Hospital had "conceded" application of Section 15-3-40, it seems very unlikely that Judge Kimball would have devoted such attention to considering and ruling on the issue.

applicable law. An eight-year statute of limitations in a medical malpractice case is a legal impossibility. An eight-year statute of limitations would clearly contravene the six-year statute of repose set forth in Section 15-3-545(A). *See*, *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003).

Therefore, assuming, *arguendo*, that the colloquy between counsel and Judge Kimball suggests that an eight-year statute of limitations is even possible, that is a mistaken statement of law. A mistaken statement of law or even a stipulation of law is not binding on appeal.[4] South Carolina law is clear on this specific point. In *Walterboro Community Hospital v. Meacher*, 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2011), the Court of Appeals recently held that stipulations as to the law are not binding on the appellate court and may not be adjudged to be "conclusive proof." 709 S.E.2d at 75. The Court of Appeals further cited to this Court's decision in *Greenville County Fair Association v. Christenberry*, 198 S.C. 338, 17 S.E.2d 857 (1941), for the proposition that a "stipulation as to the law" is generally not binding upon the courts. 17 S.E.2d at 859. *See also*, *McDuffie v. McDuffie*, 308 S.C. 401, 418 S.E.2d 331, 336 (Ct. App. 1992) (holding a stipulation concerning a question of law is not binding on the court); *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313,

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[4] *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").

731 S.E.2d 869, 872 (2012) (holding that an "issue of law [is] to be decided by the court, rather than the parties" and "courts are not bound by parties' stipulations of law").[5] In short, even if counsel's statement that absent the appointment of the conservator there "may well" be an eight year statute of limitations was construed as a "concession" or "stipulation," it involved an issue of law, that is, an issue of statutory interpretation, and that mistaken statement of law is not dispositive or "conclusive proof" or binding on this Court.

In sum, there was no "concession" or "waiver" that was improperly disregarded by the Court of Appeals. Likewise, the Court of Appeals did not commit any error in treating the statute of limitations as an additional sustaining ground and in affirming the judgment entered in the lower court on that basis.[6]

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[5] In *McDuffie*, the Court of Appeals further explained that "[i]t has generally been stated that the resolution of questions of law rests upon the court, uninfluenced by stipulations of the parties, and accordingly, virtually all jurisdictions recognize that stipulations as to the law are invalid and ineffective." 418 S.E.2d at 336-337, *citing* 73 Am. Jur.2d *Stipulations* § 5, at 539-40.

[6] Notably, Orlowski does not argue that Dr. Creagh or the Hospital should be judicially estopped from changing any legal position taken in the lower court. Judicial estoppel does not apply here because one of the elements for judicial estoppel requires proof that "the party taking the position must have been successful in maintaining that position and have received some benefit." *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629, 631 (2004). Dr. Creagh and the Hospital achieved no benefit or success by even agreeing that there "may well" be an eight year statute of limitations.

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

Orlowski further contends that the Court of Appeals erred in its reliance on this Court's decision in *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993). To the contrary, *Langley* is dispositive of the statute of limitations defense, and the Court of Appeals' reliance on *Langley* was proper and, in fact, mandated by the doctrine of *stare decisis*.

Section 15-3-545, which establishes the statute of limitations for medical malpractice claims, includes a tolling provision within Section 15-3-545(D). In *Langley*, this Court, in answering a certified question posed by the Fourth Circuit Court of Appeals, held that "[s]ubsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors." 438 S.E.2d at 243. This Court further explained that "[i]nclusion of the phrase '*or as tolled by this section*' in subsection (A) clearly indicates that the *only* tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D)." *Id.* (Emphasis in original). Thus, this Court has clearly held that Section 15-3-545(D) provides tolling only for minors and that Section 15-3-545(D) provides for the "only tolling" of the medical

malpractice statute of limitations.[7]

Orlowski attempts to "distinguish" *Langley* by arguing that this Court was addressing the impact of a different tolling provision, Section 15-3-30 rather than Section 15-3-40. Orlowski also argues that the issue in *Langley* involved the tolling of a statute of repose rather than a statute of limitations. Yet, in actuality, this Court in *Langley* was addressing the impact of a tolling provision on Section 15-3-545(A), which includes both a statute of limitations and a statute of repose. Section 15-3-545(A) provides that a medical malpractice action "must be commenced within three years from the date of the treatment, omission, or operation giving rise to the cause of action or three years from date of discovery or when it reasonably ought to have been discovered, not to exceed six years from date of occurrence, *or as tolled by this section.*" S.C. Code Ann. § 15-3-545(A). (Emphasis added). This Court construed the italicized language – "or as tolled by

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[7] The Court of Appeals in the case of *Shadwell v. Craigie*, 361 S.C. 492, 605 S.E.2d 567 (Ct. App. 2004), read *Langley* in the same manner:

> In *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), our supreme court discussed the tolling language in S.C. Code Ann. § 15-3-545(A). The court noted that the tolling language 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*, 313 S.C. at 403, 438 S.E.2d at 243. Subsection (D) provides that the statute will be tolled to a certain extent for minors injured by healthcare providers. S.C. Code Ann. § 15-3-545(D) (Supp. 2003).

Shadwell, 605 S.E.2d 567 at 570, n.2.

this section" – in *Langley* as "clearly indicat[ing] that the *only* tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D)." *Langley*, 438 S.E.2d at 243. (Emphasis in original). This Court expressly used the words "only tolling" meaning that Section 15-3-545(D) trumps all other tolling statutes – not just Section 15-3-30. This Court further explained in clear terms that "[s]ubsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors." *Id.* In short, this Court's analysis in *Langley* cannot be read as limited to the tolling of the statute of repose and not to the tolling of the statute of limitations, both of which are contained in Section 15-3-545(A).

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 clause "[n]otwithstanding the provisions of Section 15-3-40." Interestingly, Orlowski now cites to that very clause as supporting her position that Section 15-3-545(D) was intended by the General Assembly "to include the full benefit of tolling for insane persons in medical malpractices cases." *See*, Petitioner's Brief, p. 10. But Orlowski is mistaken as to the import and meaning of that clause. The use

of the term "notwithstanding" does not subordinate the remainder of Section 15-3-545(D) to Section 15-3-40. The opposite is the case. The clause "[n]otwithstanding the provisions of Section 15-3-40" means that Section 15-3-40 has *no applicability* to the remainder of Section 15-3-545(D).

While there does not appear to be South Carolina appellate authority interpreting the meaning of "notwithstanding" clauses in statutes, that very issue has been addressed by the United States Supreme Court and other courts as well. In *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993), the United States Supreme Court explained that "the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section." 508 U.S. at 18. The Supreme Court also cited with favor the decisions of the Courts of Appeals that "generally have interpreted similar 'notwithstanding' language to supersede all other laws, stating that a clearer statement is difficult to imagine." *Id.*, *citing Liberty Maritime Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991). The Fourth Circuit has similarly construed a "notwithstanding" clause. In *Universal Cooperatives, Inc. v. FCX, Inc.*, 853 F.2d 1149 (4th Cir. 1988), the Fourth Circuit concluded that the statute prefaced by a "notwithstanding" clause should be construed as "overriding" the laws stated in the "notwithstanding" clause. 853 F.2d at 1154.

The same construction should be applied here. The tolling provision set

forth in Section 15-3-545(D) applies "[n]otwithstanding the provisions of Section 15-3-40," meaning that the tolling provision set forth in Section 15-3-545(D) overrides or supersedes the tolling allowed by Section 15-3-40. If there is any doubt as to the General Assembly's intent in using the clause "[n]otwithstanding the provisions of Section 15-3-40," the Court is then urged to review statutes where the General Assembly clearly intended to make a statute of limitations subject to the tolling provisions of Section 15-3-40. Case in point is the Tort Claims Act statute of limitations, which is codified at Sections 15-78-100(a) and 15-78-110, both of which are prefaced with the clause "[e]xcept as provided for in Section 15-3-40." When the Tort Claims Act was originally enacted in 1986, Sections 15-78-100(a) and 15-78-110 did not include that introductory clause, and the Court of Appeals held that the tolling provisions of Section 15-3-40 did not apply to an action brought pursuant to the Tort Claims Act. *See, Searcy v. South Carolina Dept. of Education*, 303 S.C. 544, 402 S.E.2d 486 (Ct. App. 1991). In 1988, the General Assembly enacted 1988 Act No. 352 which added the clause "[e]xcept as provided for in Section 15-3-40" to both Sections 15-78-100(a) and 15-78-110. According to the title to the Act, that amendment was intended to make the tolling provision of Section 15-3-40 applicable to the Tort Claims Act statute of limitations. Importantly, the General Assembly did not use a "notwithstanding" clause to do so. Instead, the General Assembly used the clause "[e]xcept as

provided for in Section 15-3-40." Thus, the "notwithstanding" clause used in Section 15-3-545(D) should not be read as adopting the tolling provisions of Section 15-3-40, as Orlowski suggests.[8]

Moreover, it is 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. The Court of Appeals also made this same observation: "[I]f section 15-3-40 did apply to medical malpractice actions it would be in conflict with the six-year statute of repose set forth in section 15-3-545(A)." (App. 12). 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-

[8] Logically, as this Court recognized in *Langley*, the use of the phrase "or as tolled by this section" specifically limits tolling to that provided by "this section," that being Section 15-3-545. If the General Assembly has intended to include tolling for insanity, it would have specifically referenced Section 15-3-40 in Section 15-3-545(A) or it would have specifically provided for tolling for insanity in Section 15-3-545. The General Assembly did neither.

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Finally, the holding from *Langley* – that Section 15-3-545(D) provides for the "only tolling" of the medical malpractice statute of limitations – has now been the law for over twenty years. If that had not been the intent of the General Assembly, the statute would have been amended to make that clarification or correction. *See*, *Stuckey v. State Budget & Control Board*, 339 S.C. 397, 529 S.E.2d 706 (2000) ("[a] subsequent statutory amendment may be interpreted as clarifying original legislative intent"). *Langley* thus accurately reflects the legislative intent.

This also highlights the significance of *stare decisis* to this analysis. This Court has explained that "*[s]tare decisis* exists to insure a quality of justice which results from certainty and stability." *State v. One Coin-Operated Video Game Machine*, 321 S.C. 176, 467 S.E.2d 443, 446 (1996). The doctrine "enjoys particular efficacy in the context of challenges concerning the construction of statutes and determination of legislative intent." *Wehle v. South Carolina Retirement System*, 363 S.C. 394, 611 S.E.2d 240, 244 (2005). This Court has further explained: "It is manifestly in the public interest that the law remain

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[9] In attempt to avoid this obvious inconsistency with the statute of repose, Orlowski makes an argument that was not made in the Court of Appeals or in her Petition for Writ of Certiorari. She claims that "[t]he use of the word 'or' allows for an individual entitled to tolling to exceed the general six year statute of repose through the use of the statute of limitations." *See*, Petitioner's Brief, p. 11. In effect, she claims that an insane person has an eight-year statute of limitations and an eight-year statute of repose. That is clearly not a correct reading of the statute.

permanently settled. Especially is this so in the construction of statutes, for if any change in the statutory law is desired, the General Assembly may readily accomplish it." *Id.*, *citing Powers v. Powers*, 239 S.C. 423, 123 S.E.2d 646, 647 (1962). *Langley* is settled law. It is entitled to *stare decisis*. If the General Assembly intended a different result, it could have amended Section 15-3-545(D) to "correct" the *Langley* decision years ago. It has not and for good reason: *Langley* correctly reflects the legislative intent that medical malpractice actions have a "limited tolling provision, applicable only to minors." *Langley*, 438 S.E.2d at 243.[10]

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. The Court of Appeals was absolutely correct in concluding that this Court's analysis in *Langley* is controlling and that tolling for insanity is not

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[10] Orlowski does not suggest that there is no rational basis for the General Assembly to only permit tolling for minors in medical malpractice cases. Nonetheless, it is worth noting that the General Assembly has historically treated medical malpractice actions differently in various respects from other tort actions. For example, unlike general tort actions, medical malpractice actions have a shorter statute of limitations and also are governed by a statute of repose. *See*, S.C. Code Ann. § 15-3-545. Likewise, medical malpractice actions have caps on non-economic damages. *See*, S.C. Code Ann. § 15-32-220. Also, medical malpractice actions require pre-suit mediation. *See*, S.C. Code Ann. § 15-79-120. These measures were taken as part of tort reform to place substantive limitations on the liability of health care providers. One additional such measure was to limit the tolling of the medical malpractice statute of limitations to minors as provided in Section 15-3-545(D), and not to allow tolling for any other disabilities such as insanity.

available in medical malpractice actions. Because Orlowski filed her medical malpractice action more than three years after the alleged negligence by Dr. Creagh and the Hospital, her action is barred by the statute of limitations.

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 and this Court's holding to the contrary in *Langley*, her claims are still time-barred. Dr. Creagh and the Hospital contend that the three-year statute of limitations should run from the date that Orlowski was appointed a conservator, 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 and the Hospital was filed.

Dr. Creagh and the Hospital urge the Court to follow case law from other jurisdictions that supports their position. While such authority has been deemed by some the "minority view," its reasoning is most persuasive, as was the conclusion

drawn by courts in such jurisdictions as Georgia, North Carolina, and New Hampshire.

In *Stewart v. Robinson*, 115 F.Supp.2d 188 (D.N.H. 2000), the federal district court rejected the so-called 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.

As indicated, North Carolina and Georgia also follow this minority yet "more sensible" view. The North Carolina Supreme Court recognizes that, as in

South Carolina,[11] statutory laws authorize "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." *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

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[11] *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").

for him." 183 S.E.2d at 66.[12]

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. (App. 52-57). 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 or the Hospital. 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.

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[12] *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").

CONCLUSION

Based on the foregoing discussion, the Respondents C. Edward Creagh, M.D. and Amisub of South Carolina, Inc., d/b/a Piedmont Medical Center respectfully request that this Court affirm the decision of the South Carolina Court of Appeals and affirm the judgment entered in favor of the Respondents.

Respectfully submitted,

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January 20, 2015

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for Respondent C. Edward Creagh, M.D., does hereby certify that service of the **Brief of Respondents** 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 20th day of January 2015:

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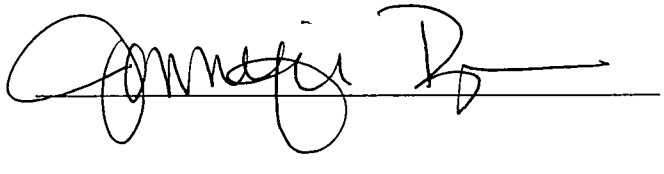

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January 20, 2015

Hand Delivered
The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

RE: Gladys Sims, as the Duly Appointed 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.
Appellate Case Number: 2014-001179
Civil Action Number: 2009-CP-46-5178
Claim Number: CB106189M
Our File Number: 22.9056

Dear Mr. Shearouse:

Please find enclosed for filing the original and fifteen copies of the **Brief of Respondents** in the above referenced matter. Please file the original and return a clocked-in copy to me by way of my courier.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

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cc: (w/ Enclosure)

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