

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM YORK COUNTY
Court of Common Pleas

JAN 30 2015

S. Jackson Kimball, Special Circuit Court Judge **S.C. Supreme Court**

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

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

v.

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

REPLY BRIEF

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INDEX

	PAGE
TABLE OF AUTHORITIES.....	ii
ARGUMENT	1
I. THE COURT OF APPEALS ERRED IN RELYING ON AN ADDITIONAL SUSTAINING GROUND TO AFFIRM THE TRIAL COURT.....	1
II. SECTION 15-3-545 (D) ALLOWS FOR FIVE YEARS OF TOLLING FOR INSANE PERSONS PURSUANT TO SECTION 15-3- 40.....	3
III. THE APPOINTMENT OF A CONSERVATOR HAS NO EFFECT ON THE TOLLING OF MS. ORLOWSKI'S CLAIMS.....	5
CONCLUSION.....	10

TABLE OF AUTHORITIES

Cases

South Carolina

<i>Hainer v. American Medical International</i> , 328 S.C. 128, 492 S.E.2d 103 (1997).....	10
<i>Harrison v. Bevilacqua</i> , 354 S.C. 129, 580 S.E.2d 109 (2003)	6
<i>I'On, LLC v. Town of Mt. Pleasant</i> , 338 S.C. 406, 526 S.E.2d 716 (2000)	1, 2
<i>Langley v. Pierce</i> , 313 S.C. 401, 438 S.E.2d 242 (1993).....	5
<i>Tilley v. Pacesetter Corp.</i> , 333 S.C. 33, 508 S.E.2d 16 (1998)	10
<i>Wiggins v. Edwards</i> , 314 S.C. 126, 442 S.E.2d 169 (1994)	4

Other Jurisdictions

<i>Abels v. Genie Industries, Inc.</i> , 202 S.W.3d 99 (Tenn. 2006)	6
<i>Camps v. City of Warner Robins</i> , 822 F. Supp. 724 (M.D. Ga. 1993).....	9
<i>Cisneros v. Alpine Ridge Grp.</i> , 508 U.S. 10 (1993).....	4
<i>City of Cleburne, Tex. v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985).....	11
<i>First-Citizens Bank & Trust Co. V. Willis</i> , 125 S.E.2d 359 (1962).....	9
<i>Liberty Mar. Corp. v. United States</i> , 928 F.2d 413, 416 (D.C. Cir. 1991).....	4
<i>Stewart v. Robinson</i> , 115 F. Supp. 2d 188 (D.N.H. 2000).....	9
<i>Talley v. Portland Residence, Inc.</i> , 582 N.W.2d 590 (Minn. App. 1998)	6
<i>Unkert v. General Motors Corp.</i> , 694 A.2d 306 (N.J. App. 1997)	7
<i>Weaver v. Edwin Shaw Hospital</i> , 819 N.E.2d 1079 (Ohio 2004)	6

ARGUMENT

I. The Court of Appeals Erred in Relying on an Additional Sustaining Ground to Affirm the Trial Court

The court of appeals erred in affirming the trial court on an additional sustaining ground when the basis of the additional sustaining ground was not preserved for review because Respondents conceded the issue to the trial court. Respondents mischaracterize Petitioner's position on this issue by framing it as "properly raised as an additional sustaining ground." (Respondents' Brief, p. 4). Generally, an appellate court has broad discretion to affirm a trial court on an additional sustaining ground found in the record. However, Respondents conceded the issue to the trial court and by doing so Respondents lost the right to rely on that issue as an additional sustaining ground before the court of appeals. A review of the hearing transcript shows that prior to a ruling on Respondents' motion for summary judgment trial counsel for Respondent Amisub of South Carolina, Inc. ("Amisub") stated:

for purposes of the statute of limitations, if a conservator had never been appointed, the Plaintiff might well have—even though the three-year statute is pursuant to Section 15-3-545, applies to a three-year statute from the date of discovery, 15-3-40, **in the absence of a conservator might well give the Plaintiff eight years, no question.**

(App. pp. 297-298). Counsel for Respondent Dr. Creagh joined in Amisub's argument, stating "I agree with everything [Amisub's counsel] said." (App. pp. 295-296). Respondents' counsel's comment "**no question**" to there being an eight year statute of limitations should control. (App. p. 296) (emphasis added). Under these circumstances, additional sustaining grounds should not be relied on pursuant to this Court's reasoning in *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000) (holding additional sustaining grounds should not be used if it is "unjust" or "unwise").

This Court in *I'on* explained:

In clarifying the law, we do not mean to dilute the important principle that all parties should raise all necessary issues and arguments to the lower court and attempt to obtain a ruling. While the current rules do not require the respondent to present an issue to the lower court in order to raise it as an additional sustaining ground, an appellate court is less likely to rely on such a ground when the respondent has failed to present it to the lower court. In such cases, the appellate court likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal. Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it.

Id. at 421, 526 S.E.2d at 724. The basis of this Court's reasoning in *I'On* was the inequity of considering an additional sustaining ground when it was never raised to the trial court. This rationale is analogous to the preservation concerns expressed by Petitioner of the "unfair" or "unwise" resolution of this case on the basis of a concession.

Respondents attempt to side step this logic by arguing that the statement "**in the absence of a conservator might well give the Plaintiff eight years, no question**" was a misstatement of law. Respondents' counsel's statement was something more than a misstatement of law, it was a concession. (Respondent's Brief, pg. 7) (App. pp. 297-298). Respondents did not just stipulate to an application of the law, as they suggest, rather counsel acquiesced the statute of limitations argument. In fact, counsel for Respondent Amisub stated earlier in the hearing:

MR. GUNN: Your Honor, all I was going to say is, insofar as the hospital - - and this is sort of a response to a question Your Honor asked Counsel - **I'm willing to concede that the statute was suspended or tolled, until a conservator was appointed.**

(App. p. 296) (emphasis added). This concession coupled with the concession that there is “no question” that an eight year statute of limitations could exist demonstrates Respondents’ decision to discard this issue. If an unraised proposed additional sustaining ground is likely improper, then a proposed additional sustaining ground that the proponent conceded is even more likely improper. Accordingly, both the court of appeals and Respondents inequitably relied on this position as an additional sustaining ground.

II. Section 15-3-545 (D) Allows for Five Years of Tolling for Insane Persons Pursuant to Section 15-3-40

Section 15-3-545 (D) of the South Carolina Code allows tolling for insane persons pursuant to section 15-3-40 of the South Carolina Code. Section 15-3-545 (D) alters the general tolling provision for minors in the medical malpractice context but does not modify the general tolling benefits conferred by the Legislature for the protection of insane persons. As such, a plain reading of the statute entitles Ms. Orłowski to the full benefit of five years of tolling. S.C. Code § 15-3-40.

The term “notwithstanding” has well-established meaning in legislative enactments.¹ Respondents’ reliance on prior interpretations of the phrase “notwithstanding” by the United States Supreme Court and the Fourth Circuit to resolve this issue is nothing more than a red herring. (Respondents’ Brief, p. 12). In fact, these interpretations support Petitioner’s position that section 15-3-545 (D) overrides section 15-3-40’s general tolling for minors and does not limit the tolling rights for insane persons. *Cisneros v. Alpine Ridge Grp.*, 508 U.S. 10, 18, 113 S. Ct. 1898, 1903, 123 L.

¹ *Black’s Law Dictionary* 1168 (9th ed. 2009) (meaning “despite” or “in spite of”).

Ed. 2d 572 (1993) (holding “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); *Liberty Mar. Corp. v. United States*, 928 F.2d 413, 416 (D.C. Cir. 1991) (explaining “[t]his court has interpreted similar ‘notwithstanding’ language in other cases to supersede all other laws”). Subsection (D) does “override” the general tolling by modifying the rights of minors, but does nothing to the rights of insane persons. If the Legislature had wished to override tolling for insane persons, it could easily, and explicitly have done so by listing insane persons in addition to minors in section 15-3-545 (D).

The Legislature purposefully retained the right to toll for insane persons. If this Court were to adopt Respondents’ interpretation of this statute it would require a determination that insane persons are entitled to no tolling benefits in medical malpractice actions.² Such a determination is in complete contradiction to the Legislature’s general intent to protect those individuals in our society who cannot protect themselves. S.C. Code § 15-3-40. The Legislature’s intent is evident from the words it chose when it drafted section 15-3-40. The Legislature’s choice of “insane” acknowledges the extreme vulnerability of a person in Ms. Orłowski’s position. As this Court has acknowledged, “insanity” as the term is used in this section, refers to a person who cannot understand the nature of her acts, manage her own affairs, or protect her own rights due to “an overall inability to function in society.” *Wiggins v. Edwards*, 314 S.C. 126, 129, 442 S.E.2d 169, 170 (1994).

² Respondents conceded to the trial court that tolling was allowed. (App. p. 256). On appeal, Respondents are now suggesting that no tolling can exist for insane persons.

Affirming the court of appeals would result in a tortured statutory interpretation, ignoring the last three decades of advocacy by our courts and lawmakers on behalf of those with mental illness. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 461, 105 S. Ct. 3249, 3266, 87 L. Ed. 2d 313 (1985) (concurrency MARSHALL, J) (“[T]he mentally retarded have been subject to a ‘lengthy and tragic history,’ of segregation and discrimination that can only be called grotesque.”) (internal citations omitted). This seems even more egregious in circumstances like this one, in which Ms. Orłowski’s incapacity is a result of Respondents’ negligence. Abandoning the procedural safeguards for persons like Ms. Orłowski was not the Legislature’s intent.

Additionally, Respondents’ belief that *stare decisis* controls this issue is incorrect. *Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993), does not address section 15-3-40 or section 15-3-545’s statute of limitations, but rather addressed a tolling provision of a statute of repose for an out-of-state defendant not referenced or envisioned in the medical malpractice statute. 313 S.C. at 402, 438 S.E.2d at 243. This is a novel issue ripe for this Court’s review.

Ms. Orłowski is entitled to the full benefit of five years of tolling. By its terms, the disability tolling provision applies to all claims mentioned in Article 5 of Chapter 15. Giving effect to section 15-3-40’s unambiguous language requires tolling of Ms. Orłowski’s medical negligence claims during the period of her insanity.

III. The Appointment of a Conservator Has No Effect on the Tolling of Ms. Orłowski’s Claims

The appointment of a conservator does not terminate the benefit of tolling for those who are deemed insane. Section 15-3-40 states that 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. 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 five years.³ It is important to note that Respondents do not dispute that Ms. Orłowski qualifies as “insane,” rather they contend that the appointment of a conservator curtails her rights to toll the statute of limitations despite section 15-3-40.

No South Carolina case has addressed whether the appointment of a conservator eliminates the protections afforded by the tolling statute for those with disabilities. 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). Courts have repeatedly noted 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

³ The express language of section 15-3-40 shows that disability tolling extends 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).

conservator in no way ‘removed’ [disabled person’s] mental retardation”). Other courts have explained 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”).

Respondents argue the appointment of a conservator supplied Ms. Orłowski with capacity and the conservator had a duty to protect her rights. Based on these conclusory statements, Respondents encourage this Court to disregard section 15-3-40 and adopt the minority view, which goes against the fundamental purpose of the statute.

Respondents’ position must fail for four reasons. First, the adoption of the minority view is unnecessary because section 15-3-40 limits the length of time a party is entitled to tolling, unlike the states who have adopted a minority view. Section 15-3-40 provides:

If a person entitled to bring an action . . . under Chapter 78 of this title . . . is at the time the cause of action accrued either:

(1) within the age of eighteen years; or

(2) insane;

the time of the disability is not a part of the time limited for the commencement of the action, **except that the period within which the action must be brought cannot be extended:**

(a) more than five years by any such disability, except infancy; nor

(b) in any case longer than one year after the disability ceases.

(emphasis added). The Legislature has created a statutory mechanism that entitles a party to additional tolling with the caveat that the benefit of tolling is limited to a certain amount of time under subsection (a) or (b) of section 15-3-40. For example, if a party is insane, and remains so, she is entitled to an additional five years of tolling pursuant to section 15-3-40 (a). However, if a party is seventeen-years-old at the time the cause of action occurs she would only be entitled to two years of tolling under 15-3-40 (b), which would include one year for her to reach majority and then the additional year after the disability has ended.

In the three states with the minority view, each state statute failed to provide a finite amount of time to limit the tolling benefit. Rather, the statutes were drafted in such a manner that tolling can extend for an indeterminable period of time because tolling remains until (1) the removal of the disability or (2) the appointment of a conservator through the adoption of the minority view. In many ways, defendants in these states are indefinitely waiting for claims unless one of these two condition precedents is met. This is distinguishable from South Carolina where the Legislature has placed a finite limitation to bring a claim, uninfluenced by the appointment of a conservator.

For example, in North Carolina:

the statute of limitations begins to run against an infant or an insane person who is represented by a guardian at the time the cause of action accrues. If he has no guardian at that time, then the statute begins to run upon the appointment of a guardian **or upon the removal of his disability** as provided by G.S. s 1-17, whichever shall occur first.

First-Citizens Bank & Trust Co. v. Willis, 257 N.C. 59, 62, 125 S.E.2d 359, 361 (1962)

(explaining the two conditions to limit tolling in the North Carolina through (1) statute

and (2) the minority view) (emphasis added). Thus, in North Carolina a claim for an insane person could remain unaddressed for an indefinite period of time if a conservator was never appointed. The same is true for New Hampshire where, “[a]n infant or mentally incompetent person may bring a personal action within 2 years **after such disability is removed.**” *Stewart v. Robinson*, 115 F. Supp. 2d 188, 194 (D.N.H. 2000) (emphasis added). Georgia’s statute states:

[P]ersons who are legally incompetent because of mental retardation or mental illness, who are such when the cause of action accrues, shall be entitled to the same time after their **disability is removed** to bring an action as is prescribed for other persons.

Camps v. City of Warner Robins, 822 F. Supp. 724, 730 (M.D. Ga. 1993) (emphasis added).

The state courts adopting the minority view were rightly attempting to provide limitations to tolling where their state legislatures failed to provide a limitation like the one found in our statute. South Carolina does not need this rule because, as it stands, the Legislature had the foresight to create the balance between allowing an incapacitated plaintiff additional time to bring a claim while also establishing a maximum amount of time for a plaintiff to pursue a claim, thereby protecting the interests of a defendant. Put simply, in South Carolina there is a definitive amount of time upon which a party can bring a claim, regardless of the appointment of a conservator.

Second, Respondent’s reasoning must fail because it requires a strained, unnatural reading of the statute’s unambiguous language. Third, Respondents’ position 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.” Fourth, 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 done 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) (explaining if the legislature had intended certain result in statute, it would have said so).

Section 15-3-40, when applied properly, entitles a plaintiff to additional tolling as intended by the Legislature while affording defendants with necessary protections of finality. The policy and purposes advocated on behalf of the minority view by Respondents are fully achieved under the current statute with the time limitations. Further, section 15-3-40 makes no reference to a limitation on the tolling, instead it allows for tolling if a person meets the definition of insane and provides a crest of time upon which a claim can be brought. There is no question that based on Ms. Orłowski’s medical records that she was insane beginning in November 2003. Ms. Orłowski should be entitled to the full benefit of the tolling statute as envisioned by the Legislature.

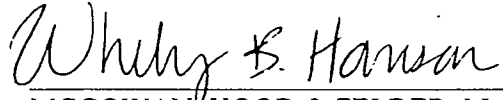
CONCLUSION

Based on the foregoing reasons, Petitioner requests this Court find that the court of appeals erred in relying on additional sustaining grounds to affirm the trial court. Further, this Court should find that insane persons are entitled to the full benefit of the

general tolling provision of section 15-3-40, regardless of the appointment of the conservator, in medical malpractice cases.

January 30, 2015

Respectfully submitted,



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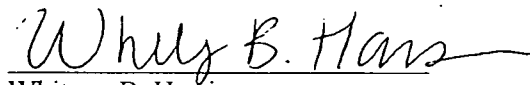
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I, Whitney B. Harrison, Attorney with McGowan, Hood & Felder, LLC do hereby certify that on January 30, 2015, I served a copy of the following *Reply Brief* by depositing in the United States mail in Columbia, South Carolina with proper postage prepaid to the following:

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January 30, 2015

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S.C. Supreme Court

Re: *Gladys Sims v. Amisub*, Appellate Case No. 2014-001179

Dear Mr. Shearouse

Enclosed for filing with the Court are 15 copies of the Reply Brief of the Petitioner. A copy of the Reply Brief has been served to opposing counsel and a certificate of service has been attached. Please let me know if you have any questions or concerns.

Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in black ink that reads "Whitney B. Harrison". The signature is written in a cursive, flowing style.
Whitney B. Harrison

cc: William U. Gunn, Esquire
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