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. 27561 (Filed Aug. 12, 2015)
Appellate Case No. 2014-001179

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.

PETITION FOR REHEARING

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Petitioner Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski petitions the Court for rehearing and reconsideration of Opinion No. 27561 filed August 12, 2015, pursuant to Rule 221(a), SCACR. Petitioner specifically asks this Court to reconsider the statutory interpretation and interplay of the general tolling provision for mental incapacity under section 15-3-40 of the South Carolina Code as provided by the medical malpractice statute pursuant to 15-3-545(D), and thus, whether Petitioner's medical malpractice claims were timely filed. This Court's interpretation of the tolling provisions for medical malpractice claims ignores the plain language of statutory provisions and ignores the safeguards established by the Legislature to protect those unable to advocate for themselves.

ARGUMENTS

I. The Opinion Misapprehends and Misconstrues the Language of section 15-3-545

The medical malpractice statute explicitly provides for the general tolling provision of section 15-3-40; thereby, establishing an outer limit of eight years for an insane person to bring a claim. Subsection (A) of 15-3-545 sets forth (1) a three year statute of limitations; (2) a six year statute of repose; and (3) a tolling provision, which invokes the general tolling provision of 15-3-40 for insane persons under subsection (D) of 15-3-545. Subsection (D) allows an insane person to toll the statute of limitations for five years in addition to the three year statute of limitations. While Petitioner filed her medical negligence claims more than three years after the date of Ms. Orlowski's injury and more than three years after the injury was discovered, Petitioner's claims were timely because Ms. Orlowski's condition qualified her for disability tolling. S.C. Code Ann. § 15-3-40. The Legislature expressly recognized disability tolling for medical malpractice claims in section 15-3-545 through subsection (D). This Court held that "the Legislature did not intend the insanity tolling provision in section 15-3-40 to apply in a medical malpractice action"

because Section 15-3-545(D) "provides for tolling only" for minors. *Sims v. Amisub of S.C., Inc.*, Opinion No. 2014-001179, 2015 WL 4751030 at *4 (S.C. S. Ct. Aug. 12, 2015). However, the expressed statutory language demonstrates that subsection (D) does not *provide* tolling in only circumstance but rather *limits* disability tolling in only one circumstance. The Court's holding failed to properly apply legislative intent clearly expressed in the statutory language, and therefore, Petitioner respectful requests the Court to reconsider its ruling.

This case presented the Court with a question of pure statutory interpretation focusing on South Carolina's disability tolling statute and a subsequently enacted provision related to the statute of limitations in medical malpractice cases. By its plain language, the disability tolling statute applies to a class of civil legal actions, including medical malpractice claims.[1] In support of its decision to deny disability tolling to Petitioner's claim, the Court focused on language in subsection (A) of 15-3-545 limiting disability tolling for medical malpractice as described in subsections (B)-(D) of 15-3-545 and, most importantly, the Court's conclusion that subsection (D) of 15-3-545 "provides for tolling only in one circumstance." *Sims*, 2015 WL 4751030 at *4. Section 15-3-545(D), the pivotal statute of this appeal, states:

> 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 us 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.

[1] Disability tolling applies to "an action mentioned in Article 5 of this chapter." S.C. Code Ann. § 15-3-40. Medical malpractice claims are discussed in Section 15-3-545, codified in Article 5.

Because of the explicit language it chose in subsection (D), the Legislature intended to apply disability tolling generally while altering its application ***only*** when the disability asserted is an injured person's minority.

The Legislature's intent is evident beginning from the subsection's opening clause. When used in a statutory provision, the meaning of "notwithstanding" carries two components: (1) an acknowledgment; and (2) an alteration. For example, in *Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993), the United States Supreme Court considered whether federal rental subsidies eligible for statutory annual increases were also subject to an independent limitation based on comparable rental prices.[2] The contract in question included a provision imposing an independent limitation "[n]otwithstanding any other provisions of th[e] contract," including the provision that permitted annual increases. In interpreting "notwithstanding," the Court first found that the contract acknowledged the right to annual increases. 508 U.S. at 17 ("To be sure" the contract provided for annual increases). The Supreme Court then found that the "notwithstanding" clause altered the annual increases ***but only in the specific ways stated in the "notwithstanding" clause***. The annual increases were only disallowed in instances where permitting them would be inconsistent with comparable rental prices—i.e. the alteration specified in the "notwithstanding" clause. *Id.* at 18 (holding that "notwithstanding" requires only "overrid[ing] conflicting provisions") (emphasis added). When annual increases coincided with comparable rental prices, the "notwithstanding" clause acknowledged and recognized the increases and did nothing to hinder their collection.

[2] While the "notwithstanding" clause was taken directly from a contract between the government and private property owners, the Court noted that the contract language largely tracked the language of the United States Housing Act. *Cisneros*, 508 U.S. at 14 (citing 42 U.S.C. § 1437f(c)(2)(C)).

The "notwithstanding" clause in section 15-3-545(D) must be interpreted accordingly. The clause acknowledges disability tolling by specifically referencing section 15-3-40. The statute then alters section 15-3-40's application to medical malpractice claims but crucially ***only*** choosing to limit the alteration to the "disability" of minority. Through these choices of recognizing the disability tolling in the "notwithstanding" clause and limiting the alteration to a single disability of minority, the Legislature unambiguously expressed its intent to apply disability tolling generally while curtailing its application only when the disability at issue is a litigant's age.[3]

This interpretation is the only way to give proper meaning to the Legislature's chosen language. "Notwithstanding" clauses are routinely used by the Legislature to reject the assertion that the alteration following the clause implicitly and totally repeals a previously-enacted statute to which the alteration applies. The primary purpose of a "notwithstanding" clause is to impose an explicit, limited exception to an existing statute. *See e.g.* S.C. Code Ann. § 50-1-136 (using "Notwithstanding the provisions of Section 16-17-410 . . ." to identify that a statute for conspiracy as a felony—§ 16-17-410—is subject to newly-established but limited exception for fish and game-related offenses). In essence, a "notwithstanding" clause is the Legislature's way of explaining: "Our previous statement is still the law in every instance except for the one(s) we are identifying now." *See e.g.* S.C. Code Ann. § 15-61-11 (using "Notwithstanding the

[3] If the Legislature's intent was to start from the premise of no disability tolling for medical malpractice claims and add in a limited form of tolling for minors, then Section 15-3-545(D)'s language would be a very strange way to pursue that goal. The provision does not start from zero and add tolling in; tolling is first mentioned in the negative—i.e. "are not tolled." The most natural reading of this language is that the Legislature recognizes disability tolling as codified in Section 15-3-40 while also defining instances that "are not tolled." Courts must apply the reasonable interpretation of statutory language "without resorting to a tortured construction which limits or expands the statute's operation." *Hall v. United Rentals, Inc.*, 371 S.C. 69, 81, 636 S.E.2d 876, 883 (Ct. App. 2006) (citations omitted).

provisions of § 15-61-10" to note the general rule permitting judicial partition—§ 15-61-11—continues to apply in all instances except for the unusual instance where the land may be used for an electricity plant).

Section 15-3-545(D) is the Legislature's way of conveying that its previous rule applying disability tolling generally to personal injury claims, pursuant to 15-3-40, is still the controlling law except for instances where a plaintiff asserts minority as a disability and does so in a medical malpractice case. Interpreting section 15-3-545(D) to implicitly repeal section 15-3-40 for medical malpractice claims, but for a limited form of minor disability tolling, overlooks the way in which the Legislature routinely uses "notwithstanding" clauses and, as a result, fails to follow the Legislature's intent as clearly indicated in the language it chose.

This statutory interpretation and application has previously been recognized by this Court in *Harrison v. Bevilacqua*. 354 S.C. 129, 580 S.E.2d 109 (2003). This Court stated in Footnote 5 that it is possible for an insane plaintiff to bring a medical malpractice claim within seven years against a state entity based upon a two-year statute of limitations, pursuant to the Tort Claims Act, and the five-year tolling provision allowed for insane persons. *Id.* at 140, 580 S.E.2d at 115 n. 5. *Harrison* is significant because it (1) was written ten years after *Langley* v. *Pierce* and (2) it is an expressed acknowledgment by this Court that the Legislature intended statutory interplay between the general tolling provision and the medical malpractice statute.

The continued reliance on *Langley* incorrectly narrows the statutory interpretation of subsection (A) of 15-3-545. The plaintiff in *Langley* did not meet the requirements to fall within the exceptions of the statute of repose provided for in subsection (B)-(D) of 15-3-545, especially not the tolling provision of subsection (D). The *Langley* decision set forth that in order for tolling to apply in a medical malpractice case it must be "*tolled by this section.*" 313 S.C. at 403,

438 S.E.2d at 243. Specifically, *Langley* states that "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)" and "[s]ubsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors." *Id.* (emphasis in the original). *Langley* requires a court to determine whether tolling is allowed, which once again returns the analysis back to a plain reading of statutory language and the meaning of "notwithstanding." As discussed *supra*, the "notwithstanding" clause allows and recognizes that general tolling continues for insane persons while limiting the extent of tolling for minors. Therefore, the Legislature through subsection (D) proscribed two explicit forms of tolling within the medical malpractice statute, which meet the requisite standard of subsection (A) of 15-3-545. *Langley* merely required that tolling be recognized in the medical malpractice statute and acknowledged there was a limitation of the general tolling provisions as to minors. The *Harrison* court applied the reasoning in *Langley* and acknowledged that there were two forms of tolling expressed, along with the caveat that there is indeed a limitation applicable only to minors. The limitation to minors does not negate the general tolling provision explicitly stated within subsection (D) as applied to insane persons. *Harrison* extracts the principles of *Langley* without disregarding a practical reading of this Court's reasoning. As it stands, a narrow interpretation of *Langley* misconstrues a plain reading of the statute and tortures an ordinary reading of this Court's reasoning in *Langley*.

Petitioner qualifies for tolling as allowed under subsection (D), along with the Court's interpretation under *Langley* and *Harrison*. Petitioner falls within the exception to the statute of repose under subsection (D) and is entitled to the full benefit of five years in addition to the three year statute of limitations. *See Columbia/CSA—HS Greater Columbia Healthcare Sys., LP v.*

S.C. Med. Malpractice Liab. Joint Underwriting Assoc., 411 S.C. 557, 562, 769 S.E.2d 847, 850 (2015) ("The medical malpractice statute of repose expressly *excludes* several categories of claims from its reach, as not above. S.C. Code Ann. § 15-3-545 (B)-(D)") (emphasis in original). The Legislature drafted subsection (D) to override the general provision of 15-3-40 for minors by limiting their time bring a claim to seven years while providing for general tolling with an eight year outer limit for insane persons as tolled by subsection (D). Based on these foregoing reasons, Petitioner requests this Court reexamine the meaning of a "notwithstanding" clause within its statutory construction and interpretation, along with its reading of *Langley*.

II. References to Petitioner's Previous Claim and the Appointment of Ms. Orlowski's Conservator Detract from the Issue before this Court.

This case presents a question of pure statutory interpretation. The fact that a previous lawsuit was pursued regarding Ms. Orlowski's 2003 injury and the fact that a conservator was appointed on her behalf in 2004 have no bearing on the interaction between section 15-3-40 and section 15-3-545 or on the legislative intent embodied in section 15-3-545(D). At the lower courts, Respondents furthered the notion that Petitioner has already had her opportunity to pursue these claims in the earlier suit and should not be permitted a second. That argument was considered and rejected in Respondents' cross-appeal. The Court of Appeals held that Respondents could not meet the elements of collateral estoppel and that their arguments were foreclosed by the South Carolina Rules of Civil Procedure. *Sims v. Amisub of S.C., Inc.*, 408 S.C. 202, 211-12, 758 S.E.2d 187, 192 (Ct. App. 2014). Respondents did not challenge the court of appeals' ruling on this issue. Accordingly, the "second bite of the apple" argument cannot be

considered and relied upon in resolving the current dispute.[4] As written, there is an implied suggestion that this litigation strategy has some effect on this Court's decision.

Nor should the Court consider what Ms. Orlowski's conservator could or allegedly should have done earlier to pursue her claims against Respondents. Nothing in South Carolina's disability tolling statute, section 15-3-40, establishes conservator appointment as a limitation on tolling for an "insane" person. As the statute plainly states, "insanity" tolling ends only after the permitted five years elapse or the individual's insanity ceases. Ms. Orlowski is "insane" because she suffers from a condition that "precludes understanding the nature or effects of [her] acts." *Wiggins v. Edwards*, 314 S.C. 126, 129, 442 S.E.2d 169, 170 (1994). The appointment of a conservator had no effect on the severity of Ms. Orlowski's condition and it would be inconsistent with *Wiggins*' definition of "insanity" to conclude that naming a conservator ended her insanity. This conclusion is not only inconsistent with the statute and this Court's precedent, it is also contrary to what "[t]he overwhelming majority of courts" have held when ruling on this issue. *Weaver v. Edwin Shaw Hosp.*, 819 N.E.2d 1079, 1085 (Ohio 2004). The opinion broadly suggests a reliance on the minority rule, which ignores the fact that a majority of courts in other jurisdictions have held that the appointment of a guardian has no effect on the benefits of tolling. Other courts have reasoned that a cause of action remains personal to the insane plaintiff and the benefits of tolling are dependent on the status of the plaintiff's mental health, regardless of whether a guardian exists. *See Abels v. Genie Industries, Inc.*, 202 S.W.3d 99 (Tenn. 2006). The courts in the majority have rejected the limitation on tolling based upon their reasoning that it

[4] The Court of Appeals specifically rejected the argument that Petitioner's second suit is essentially the same as the first. *Sims*, 408 S.C. at 212, 758 S.E.2d at 192 (finding Petitioner's current claim is "for a separate negligence which she contends contributed to the worsening of her condition").

would be (1) inconsistent with the plain-language of the statute and (2) it would go against the general purpose of protecting disabled persons.

The Court cited one case applying the minority rule but that case was a response to a potentially absurd result made possible by a very different type of disability tolling statute. *Sims*, 2015 WL 4751030 at *4 n. 7 (citing *Stewart v. Robinson*, 115 F. Supp. 2d 188 (D.N.H. 2000)). Since New Hampshire's disability tolling statute had no limitation other than disability cessation, the district court in *Stewart* had to consider the possibility that tolling could extend to a disabled party's death "decades from now." 115 F. Supp. 2d at 194. Given this gap in the statute, the district court acted to install conservator appointment as a limitation. No such action is required here because section 15-3-40 definitively limits tolling to five years. In contrast to *Stewart* and other cases comprising the minority rule on this issue, judicial installation of a conservatorship limitation is unnecessary in this case and would be contrary to established statutory parameters on disability tolling. Referencing a minority rule through a footnote, advocates for a strained, unnatural reading of the statute's unambiguous language and fails to give proper consideration to the Legislature's expressed choice by inserting language into a statute.

Ms. Orlowski's perceived equitable deficits to which the Court's opinion alludes[5] are irrelevant to the statutory interpretation issue before the Court. These equitable deficiencies should not be considered or referenced within the opinion in light of the fact that the Court's interpretation of the relevant statutes affects future access to the courts for all disabled litigants, regardless of their perceived equitable standing.

[5] *Sims*, 2015 WL 4751030 at *4 n. 7.

Respectfully submitted,

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August 24, 2015
Rock Hill, South Carolina

THE STATE OF SOUTH CAROLINA
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APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

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v.

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and C. Edward Creagh, M.D., ... Respondents.

CERTIFICATE OF SERVICE

I, Jordan Calloway, Attorney with McGowan, Hood & Felder, LLC do hereby certify that on August 24, 2015, I served a copy of the following ***Petition for Rehearing*** by depositing in the United States mail in Rock Hill, South Carolina with proper postage prepaid to the following:

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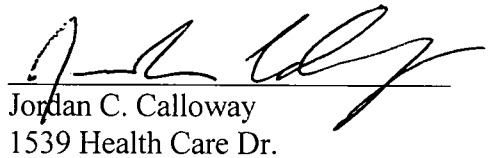

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