THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

Opinion No. 27561
(S.C. S.Ct. filed August 12, 2015)

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.

RESPONDENTS' RETURN TO PETITION FOR REHEARING

On August 12, 2015, this Court issued a published decision affirming the decision of the South Carolina Court of Appeals, which in turn had affirmed as modified the Circuit Court's grant of summary judgment based upon the expiration of the statute of limitations.

The Petitioner Gladys Sims, as the Duly Appointed Guardian and Conservator of Kristy L. Orlowski (hereafter referred to as "Orlowski"), has now filed a petition for rehearing. In response, the Respondents submit that this Court correctly and appropriately addressed each of the issues raised by Orlowski in her petition for rehearing. The Respondents submit the following discussion with respect to the arguments raised in the petition:

I.

As an initial argument for rehearing, Orlowski contends that this Court erred in its reliance on its earlier 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 issue, and this Court's reliance on *Langley* was proper.

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.

That has consistently been how this Court and the Court of Appeals have read and applied *Langley* for the past twenty plus years. For example, in the case of *Shadwell v. Craigie*, 361 S.C. 492, 605 S.E.2d 567 (Ct. App. 2004), the Court of Appeals explained *Langley* as follows:

> 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).

605 S.E.2d 567 at 570, n.2. Much more recently, this Court addressed the import of *Langley* in the *Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Liability Joint Underwriting Association*, 411 S.C. 557, 769 S.E.2d 847 (2015). In both the majority opinion and the dissent, members of this Court agreed that Section 15-3-545(D) provides for only minority tolling. The Majority states: "...and section 15-3-545(D) contains a tolling provision for persons under the age of majority." 769 S.E.2d at 849. Similarly, in the dissent, Chief Justice Toal, as joined by Justice Hearn, incorporates the minority language parenthetically into Section 15-3-545(A) as follows:

> South Carolina's medical malpractice statute of repose provides, in relevant part:
>
> [A]ny action ... to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession 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 the date of occurrence, or as tolled by this section [because the person is under the age of majority].

769 S.E.2d at 851. Therefore, the meaning and import of *Langley* have been well established, and this Court was correct in reaffirming that decision and its holding in deciding the present case.

Furthermore, as this Court correctly observed in its opinion in this case, 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 more twenty years and the General Assembly has taken no action to amend that statute to provide for insanity tolling. If that had not been the intent of the General Assembly, the statute would certainly have been amended to make that clarification or correction. The Court's citation to *Wigfall v. Tideland Utilities, Inc.*, 354 S.C. 100, 580 S.E.2d 100 (2003), is particularly appropriate. In that case, this Court explained that "[b]uttressing a plain reading of the statute is the Legislature's inactivity on the issue over the last forty years since *Singleton*. ...

When the Legislature fails over a forty-year period to alter a statute, its inaction is evidence the Legislature agrees with this Court's interpretation." 580 S.E.2d at 105. The same is true with *Langley*. The inaction by the General Assembly for over twenty years is evidence that legislators agree that minority tolling is the "only tolling" applicable to medical malpractice actions.

Nonetheless, in an effort to overturn *Langley* and the cases applying *Langley*, Orlowski focuses on the "[n]otwithstanding the provisions of Section 15-3-40" language that prefaces Section 15-3-545(D). Orlowski cites to that clause as supporting her position that Section 15-3-545(D) was intended by the General Assembly to apply insanity tolling to medical malpractice actions. Orlowski is mistaken as to the 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). In other words, 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.

As the Respondents have previously pointed out, 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 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.

This is particularly true because, 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.

In sum, this Court was correct in concluding that the 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 the Respondents, her action is barred by the statute of limitations. Quite simply, there is no basis for a rehearing.

II.

As her second argument for rehearing, Orlowski takes issue with the Court's recitation of the procedural history of the case and in particular the fact that Orlowski had brought a prior lawsuit against other medical providers which resulted in a defense verdict. She also takes issue with footnote #7 of the opinion which mentions the additional sustaining ground raised by the Respondents and then declines to address it while nonetheless recognizing that there is authority from other jurisdictions supporting the Respondents' position. These points do not impact or detract from the Court's ultimate ruling which is the reaffirmance of its decision in *Langley* that minority tolling is the "only tolling" applicable in medical malpractice cases. The procedural history and a brief statement of an additional sustaining ground were appropriately included in the opinion and certainly do not warrant any rehearing as to the merits of the case.

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 deny the petition for rehearing.

Respectfully submitted,

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September 3, 2015

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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 **Respondents' Return to Petition for Rehearing** in the above-captioned matter 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 3rd day of September 2015:

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