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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
G. Thomas Cooper, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2007-CP-40-3365
Appellate Case No. 2014-001373

Estate of Edward James Mims,
Laura M. Cole, Personal Representative, ... Appellant,

v.

The South Carolina Department of Disabilities
and Special Needs, Kathi Lacy, and Stan Butkus, ... Respondents.

RESPONDENTS' RESPONSE BRIEF TO AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT

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STATEMENT

This brief is submitted in response to the amicus curiae brief filed by Protection and Advocacy for People with Disabilities, Inc., the National Academy of Elder Law Attorneys, and the South Carolina Chapter of the National Academy of Elder Law Attorneys. The amici have presented additional authorities in support of Plaintiff-Appellant's contention that the appointment of a guardian did not affect the tolling of the statute of limitations based on incapacity..

As the Court is aware, the applicable statute of limitations in this case is S.C. Code Ann. § 15-3-40(2). The entire statute is set forth below:

> SECTION 15-3-40. Exceptions as to persons under disability.
>
> If a person entitled to bring an action mentioned in Article 5 of this chapter or an action under Chapter 78 of this title, except for a penalty or forfeiture or against a sheriff or other officer for an escape, 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.

In this case, this Court has held that Plaintiff Mims met the definition of "insane" in 2005 and earlier, even though he not been declared incompetent by a probate court until 2005. Mims, who was born in 1981, never claimed the exception applicable to minors.

The sole statute of limitations question presented in this case is whether appointment of a guardian for a person disabled by reason of insanity, or mental disability, is an event that causes the tolling of the statute due to disability to cease. If it does, the statute still allows the guardian one full year after being appointed to file any claims that were less than five years old, in addition to the number of years remaining in the applicable statute of limitations. The statute provides that once the disability ceases, the limitation period is extended for one more year, but the statute does not specifically define what events might constitute the ceasing of the disability.

The guardian in this case was first appointed by order dated on or about June 14, 2005. R. II, 262.[1] If the appointment of a guardian affected the statute's tolling, then the minimum time period for filing suit would be the original limitation period plus one year. The maximum time period would be the original statutory period plus five years, regardless of whether a guardian was appointed. The present case involves a two-year statute for the state tort claims and a three-year statute for the

[1] The precise dates for this computation are not material, because there is no claim in this case involving an issue of whether the statute was missed by a day or two.

federal Section 1983 claim, so the minimum periods, if they ran from the appointment of a guardian, would be three and four years, respectively. These periods are still generous. The maximum periods would be seven and eight years, respectively, or somewhere in between, if a guardian were to be appointed at some point other than the beginning or end of the normal statutory period.

ARGUMENT

1. The circuit court's adoption of the rule followed in some jurisdictions, holding that the appointment of a guardian causes the disability to cease, struck a fair balance between the competing interests involved in the application of statutes of limitations.

a. Statutes of limitation promote diligence by plaintiffs and their representatives, and protect defendants against stale claims.

As Defendants have previously pointed out in their Memorandum in Support of Petition for Rehearing, p. 2, it is held in this state that "[s]tatutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs," *Stokes–Craven Holding Corp. v. Robinson*, 416 S.C. 517, 526, 787 S.E.2d 485, 490 (2016), and that "[o]ne purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights." *Id.* The same case further holds that "[a]nother purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation[,]"

and that"[s]tatutes of limitations are, indeed, fundamental to our judicial system." *Id.*

This Court has articulated similar bases for statutes of limitation:

> The cornerstone policy consideration underlying statutes of limitations is the laudable goal of law to promote and achieve finality in litigation. . . . "[s]tatutes of limitations provide potential defendants with certainty that after a set period of time, they will not be hailed [sic] into court to defend time-barred claims."

Carolina Marine Handling, Inc. v. Lasch, 363 S.C. 169, 175, 609 S.E.2d 548, 552 (Ct. App. 2005)

The U.S. Supreme Court has held to the same effect:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348–49 (1944)(emphases added). The Fourth Circuit has stated the same or similar principles, using the following language: "[T]he ultimate purpose of a statute of limitations is to ensure that causes of action be brought within a reasonable period of time. [Citation omitted] . . . . [Statutes of limitation] reflect[ ] legislative

purposes of encouraging promptness in the initiation of claims, and of avoiding stale claims, inconvenience, and fraud that may result from the untimely assertion of such claims." *Delebreau v. Bayview Loan Servicing, LLC*, 680 F.3d 412, 415 (4th Cir. 2012). In accordance with these principles, "tolling provisions should not readily be given an expansive interpretation tending to undermine the basic purposes behind the Statutes of Limitation." *McCarthy v. Volkswagen of Am., Inc.*, 55 N.Y.2d 543, 548, 435 N.E.2d 1072, 1074 (1982).

The fact of the matter is that once a guardian has been appointed for a person who is actually disabled, the rights of the disabled person are no longer incapable of being protected. There is accordingly no reason to treat a person who has a guardian the same as a person without a guardian, because in the former case, the inability to protect the person's rights no longer exists. By giving a newly-appointed guardian for a legally disabled person at least one year beyond the normal time period in which to file suit, the statute achieves a balance between unfairly having the statute run out on a disabled person without a guardian on the one hand, and on the other hand subjecting defendants to liability for as long as five years beyond the time when the disabled person's interests are being handled by a non-disabled person.

b. The better balance of interests is represented by cases holding that the appointment of a guardian causes the disability to cease.

The circuit court in this case noted, R. I, 56-57, that as held in *Stewart v. Robinson*, 115 F.Supp.2d 188, 195 (D.N.H. 2000), a rule holding that the disability ceases is one that "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." The same case further holds that this rule serves several interests:

> (1) it protects a ward's legal rights for an additional two years (one year in South Carolina] 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.

115 F.Supp.2d at 197." That case has been cited for this point just once, but that one citation was by the Supreme Court of South Carolina in *Sims v. Amisub of S.C., Inc.*, 414 S.C. 109, 117 n. 7, 777 S.E.2d 379, 384 n. 7 (2015), where the Court appeared to take a favorable view of the holding of *Stewart*, although holding that the issue did not need to be reached in *Sims*.

As the court below further held, "[t]his rule is clearly the better rule, because it prevents undue lengthening of the limitations period, while also protecting the incapacitated plaintiff. This rule therefore not only protects potential defendants, it

also protects potential plaintiffs against the loss of relevant evidence as a result of the passage of time. *Accord, e.g., Hernandez v. New York City Health and Hospitals Corp.,* 78 N.Y.2d 687, 694, 585 N.E.2d 822, 826 (1991)(statute of limitations "tolled only until appointment of a guardian"); *Fox v. Health Force, Inc.*, 143 N.C. App. 501, 507, 547 S.E.2d 83, 87 (N.C. App. 2001)(limitation period began to run from the time of appointment of a guardian)." R. I, 57. To these cases may be added *Zator v. State Farm Mut. Auto. Ins. Co.*, 69 Haw. 594, 598, 752 P.2d 1073, 1076 (1988)(statute of limitations commenced running upon appointment of a guardian); *Camps v. City of Warner Robins*, 822 F. Supp. 724, 730 (M.D. Ga. 1993)(under Georgia law, statute of limitations began to run upon appointment of guardians)(citing *Cline v. Lever Brothers Co.*, 124 Ga. App. 22, 183 S.E.2d 63 (1971)).

The amici cite cases from a number of different jurisdictions that reach a contrary view. Br. of Amici at 4-6. Some of those cases are based on different statutory language, some purport to find legislative intent where none is actually stated in the statutes, and others simply reach the opposite result from that advocated by Defendants here. The common thread running through most or all of these cases is that they contain little or no discussion of the principles discussed above, that is, the need to protect defendants from stale claims as well as the need for representatives of plaintiffs to act promptly on claims that existed at the time of

the representatives' appointment. Defendants would therefore submit that such cases are based on an incomplete analysis of the interests of all parties concerned, and that they unduly skew the balance in favor of plaintiffs.

Defendants would also point out that cases such *as Barton-Malow Co. v. Wilburn*, 556 N.E.2d 324, 325 (Ind. 1990) focus on the wrong issue. The court in *Barton-Malow* held that "[t]he appointment of a guardian does not alter the fact of mental unsoundness." This Court, following *Barton-Malow,* also held that "Mims' disability did not end when his mother was appointed guardian." Slip op. at 6. However, the question is not whether the person remains mentally unsound when a guardian is appointed. Indeed, a guardian would never be appointed if the person were no longer mentally incompetent.[2] Instead, the question is how long, as a matter of fairness to both sides, the time for filing a claim on behalf of a mentally incompetent person should remain open without being barred by a statute of limitations once a guardian is appointed. South Carolina's statute strikes an appropriate balance by allowing the entire normal statutory period plus another

[2] For the same reason, the fact that the actual disability of Mims in this case never ceased, as amici note at p. 3-4 of their brief, is immaterial to the tolling issue. The issue is one of fairness of extending a tolling provision, and not one of how long a person remains actually disabled. The argument of amici, Am.Br. at 4-6, that the claim belongs to the ward and not the guardian, is similarly flawed, because it does not attempt to balance the interests of the parties in tolling the statute in a situation where the statute itself is not specific.

year after the appointment of a guardian. There is nothing in the statutory language that compels a different result.

2. The contentions of the amici based on allegedly-differing statutes pertaining to guardianship are without merit.

The amici contend that the cases cited by Defendants and the circuit court are distinguishable because they are based on statutory provisions dissimilar from those in South Carolina. This is not an accurate description of the powers and duties of a guardian in South Carolina.

In *Stewart v. Robinson, supra,* the New Hampshire guardianship statute did provide that "It is the duty of the guardian of the estate to protect and preserve it, to retain, sell and invest it as hereinafter provided, to prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of the estate's assets. . . ." N.H. Rev. Stat. Ann. § 464-A:26, cited at 115 F.S.2d at 194. However, South Carolina law is effectively the same. S.C. Code Ann. § 62-5-312(a) provides in pertinent part that "A guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child. . . ." Section 63-5-30, which sets forth the duties of parents, provides in turn that "The mother and father are the joint natural guardians of their minor children and are equally charged with the welfare and education of their minor children and the care and management of the estates of their minor

children. . . ." This is effectively no different from the New Hampshire statute. (As to the power of a guardian to bring an action such as this, neither the Plaintiff and the amici argue that the guardian lacks such power.) Of course, S.C. Code Ann. § 15-3-40(a) is different for minors, providing that the statute is tolled through the person's 18th birthday, but this difference does not affect the duties of a guardian.

3. Defendants agree with amici that the final decision of this Court should be published.

The final argument of the amici is that the opinion of this Court should be published. While Defendants contend that this case should be reheard and the opinion of this Court amended in whole or in part, Defendants agree that the final decision of this Court should be published. The issue of the operation of the statute of limitations is a broad legal issue of first impression in South Carolina, and this Court's interpretation of it should be published.

CONCLUSION

For the foregoing reasons, Defendants-Respondents respectfully submit that this Court should hold that the contentions of the amici are without merit, and that this Court should grant the relief sought by Defendants-Respondents in their Petition for Rehearing.

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CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of **Respondents' Response Brief to *Amici Curiae* Brief in Support of Appellant** was made upon Appellant's counsel by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 12th day of January 2018:

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