THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2009-CP-46-5178

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

v.

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

RESPONDENT'S FINAL BRIEF OF RESPONDENT-APPELLANT CREAGH

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STATEMENT OF THE CASE

This is a medical malpractice action. The Appellant-Respondent 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 Respondents-Appellant C. Edward Creagh, M.D. and Amisub of South Carolina, Inc. d/b/a Piedmont Medical Center ("Hospital").

In 2003, Kristy L. Orlowski a/k/a Kristy Wood was provided prenatal care by R. Norman Taylor, III, M.D. and his practice, Rock Hill Gynecological & Obstetrical Associates, P.A. (R. 14-15). On September 12, 2003, Orlowski suffered an eclamptic seizure with aspiration and apoxia. (R. 66. 76). Following the seizure, she was hospitalized at Piedmont Medical Center from September 12, 2003 until November 24, 2003. (R. 120-121, 124).

On November 25, 2003, Orlowski was re-admitted to the Hospital by Dr. Creagh,[1] who diagnosed her with a left pleural effusion. (R. 20). She was discharged on November 27, 2003. (R. 20). On November 29, 2003, Orlowski was re-admitted to the Hospital for persistent vomiting likely related to the parapneumonic effusion (PPE). (R. 21). Her conditions continued to decline, and

[1] Dr. Creagh is a board-certified pulmonologist.

on December 11, 2003, she was transferred to Carolinas Medical Center in Charlotte, North Carolina.

Orlowski alleges that she has been mentally incompetent since September 12, 2003, the date of the eclamptic seizure. On March 5, 2004, the Chester County Probate Court appointed Orlowski's husband, Christopher T. Orlowski, as her guardian and conservator. (R. 370). Orlowski's mother, Gladys Sims, is her current guardian and conservator. (R. 372-373).

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 (hereafter referred to as the "Taylor lawsuit"). Dr. Taylor and his practice were the sole defendants. (R. 12-17). In that lawsuit, Orlowski alleged that "as a direct and proximate result" of Dr. Taylor's medical negligence, she "suffered severe, debilitating, and permanent neurological deficits." (Complaint, para. 27). (R. 16). Specifically, she claimed past, present, and future injuries and damages, including "chronic pain and suffering," "substantial medical expenses," "disfigurement," "mental anguish," "loss of enjoyment of life," "loss of income and related benefits," "need for full time medical and nursing care to assist her with her activities of daily living," "permanent restrictions and impairments that make it impractical for her to care for even her most basic of personal needs," and "for

such other damages as may be identified during the course of this litigation." (Complaint, para. 29). (R. 16-17).

The Taylor 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. (R. 244). During the trial, Orlowski presented expert medical testimony that all damages incurred by Orlowski, and to be incurred in the future, were attributable to Dr. Taylor's negligence. Orlowski presented the expert testimony of Dr. Stephen Pliskow, who opined, to a reasonable degree of medical certainty, that all of Orlowski's medical problems were caused by the September 12, 2003 eclamptic seizure and that the seizure could have been avoided had Dr. Taylor hospitalized Ms. Orlowski on September 11, 2003. (R. 66-67, 76). Orlowski also presented expert testimony from economist Oliver Wood, Ph.D. in support of her claim for economic losses, lost earning capacity, medical expenses, and future life care planning needs from September 12, 2003 forward. (R. 67-73, 76). Orlowski's experts testified that all of her claimed damages were a direct and proximate result of Dr. Taylor's negligence occurring on or before September 12, 2003. (R. 122-123, 125).

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. (R. 18). Orlowski alleged that the medical negligence of Dr. Creagh and the Hospital occurring between November and December 2003 caused her to suffer "severe debilitating injuries which have resulted in her incompetent state due to the hypotensive episode and hypoxic condition which has caused physical suffering, severe physical, cognitive and emotional pain and distress, and has ultimately caused Kristy Orlowski's permanent and severely disabled physical and mental state." (R. 29). In the current suit, Orlowski seeks damages against Dr. Creagh and the Hospital for the same exact list of injuries and damages claimed in the Taylor lawsuit. (R. 17, 29-30).

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 and the adjudication of the Taylor lawsuit. (R. 77-81). 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. (R. 2-11).

Orlowski then filed a notice of appeal to this Court. 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.

ARGUMENTS

I. The Circuit Court correctly ruled that the Appellant's medical malpractice action is barred by collateral estoppel or estoppel by judgment.

Special Circuit Court Judge S. Jackson Kimball granted summary judgment to C. Edward Creagh, M.D. and the Hospital on a collateral estoppel or estoppel by judgment defense. Judge Kimball based his ruling on the positions taken by Orlowski and the ultimate adjudication of the prior medical malpractice action brought against R. Norman Taylor, III, M.D. and his practice.

In the Taylor lawsuit, filed on August 24, 2006, Orlowski alleged that she was totally and permanently disabled as a result of medical negligence attributable to Dr. Taylor occurring on or before September 12, 2003. The Taylor lawsuit was tried in April 2009, resulting in a defense verdict although Orlowski did receive a $300,000 settlement per a high-low agreement. During the trial of that case, Orlowski took the position that her total and permanent disability was the sole result of the negligence of Dr. Taylor. Orlowski did not place any blame on Dr. Creagh or the Hospital nor did Orlowski argue that medical negligence was committed after Orlowski was re-admitted to the Hospital on November 25, 2003. Orlowski took the position instead that all damages sustained by her flowed directly from the negligence of Dr. Taylor. (R. 12-17, 106-118, 120-125).

The pertinent portions of the trial record from the Taylor lawsuit were presented to the Circuit Court in the present case by way of requests for admissions. In the Taylor lawsuit, Orlowski presented by expert testimony evidence that all of the hospitalizations, injuries, disability, and need for a life care plan were causally related to the eclamptic seizure resulting from the alleged deficient care by Dr. Taylor. Specifically, Orlowski presented the expert medical opinions of Dr. Stephen Pliskow, who testified as follows:

> Q: Within a reasonable degree of medical certainty were all of Kristy's problems; medical problems, were they caused by the eclamptic episode on September 12th?
>
> A: *Yes they were.* Kristy eventually went home after her recovery from the seizure at Piedmont but was never really well. She was having chest pains and difficulty breathing, panic attacks. Went back to the hospital for a two day stay only one or two days after she had gone home. She really wanted to go back home. They sent her home and subsequently two days later was put right back in the hospital. She was diagnosed with an empiema which is an abscess or an infection on the outside of the lungs and that was from the tube, the breathing tube that she had because -- well the chest tubes that she had because when she was admitted with the eclampsia and had the aspiration of pneumonia she would up developing pneumothorax. Pneumothorax is basically when the lungs collapse. And the way they treat that is they put chest tubes in they suck the air out of the chest wall and allows the walls of the lungs to re-expand. So those cites from the foreign bodies that were in her chest cavity wound up getting infected

> and those got infected with MRSA so that was defiantly [sic] related to the hospitalization. Also she wound up with pseudopneumonia. Pseudopneumonia is not a normal pneumonia that you would get community acquired. It's something that you definitely see hospital acquired and that's from her being intubated for a long time. Having had aspiration pneumonia *so the answer is yes her readmission to Piedmont, her subsequent cardiac arrest during that admission and then her transfer to CMC the Carolina's Medical Center was all related back to her eclamptic seizure.*

(R. 109-110). (Emphasis added). Dr. Pliskow further testified as follows:

> Q: Within a reasonable degree of medical certainty could all of that in your opinion Breanna's death, all of Kristy's problems that she has today been prevented by hospitalization of Kristy Wood on September 11, 2003?
>
> A: Yes, I believe that if she was admitted on the 11th within a reasonable degree of medical certainty she would have been delivered before the seizure. But even if we say that she would have seized in the hospital she would have been fine. Most patients more likely than not patients that seize in the hospital with the medical care that we have for them there they do much better and she would be fine.

(R. 110). In addition, Orlowski presented the testimony of Dr. Oliver Wood to establish the amount of her economic damages, including the future costs of the life care plan presented to the jury. (R. 110-116). Orlowski took the position that those damages were all proximately caused by the alleged negligence of Dr. Taylor. (R. 122-123, 125). Those are the same damages claimed in the present

action; yet, as indicated, Orlowski never took the position in the Taylor lawsuit that Dr. Creagh or the Hospital had any legal responsibility for those damages.

As Judge Kimball recognized, which Orlowski does not refute or challenge on appeal,

> [B]y the time of trial in Plaintiff's action against Dr. Taylor in April, 2009, Plaintiff and her counsel were fully apprised through discovery of the entire and extensive medical record in this case, including every aspect of these Defendants involvement in Kristy's treatment and care. This includes every act which Plaintiff now claims to be negligent treatment and care causing Kristy's injuries and damages.

(R. 10). Judge Kimball further observed that at the hearing Orlowski's counsel acknowledged that Dr. Creagh and the Hospital could have been joined as party-defendants and their alleged liability for the claimed damages could have been litigated. (R. 10). Yet, Orlowski took the position in the Taylor lawsuit that her damages and injuries were solely caused by the eclamptic seizure occurring on September 12, 2003, long before Dr. Creagh was involved in her care.

As Judge Kimball correctly determined, Orlowski is barred by collateral estoppel or estoppel by judgment from taking different positions and from re-litigating issues decided in the Taylor lawsuit. Judge Kimball's application of estoppel is supported by several cases, as well as by principles of judicial estoppel as discussed below. In *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944), the Supreme Court held that "[a]n estoppel by record is the preclusion to deny the

truth of matters set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction." 31 S.E.2d at 320. "It is binding on parties and those in privity with them." *Id.* Similarly, in *Mackey v. Frazier*, 234 S.C. 81, 106 S.E.2d 895 (1959), the Supreme Court held:

> The doctrine of estoppel by judgment proceeds upon the principle that one person shall not a second time litigate, with the same person or with another so identified in interest with such person that he represents the same legal right, precisely the same question, particular controversy, or issue which has been necessarily tried and finally determined, upon its merits, by a court of competent jurisdiction, in a judgment in personam in a former suit.

106 S.E.2d at 898. Later, in *Graham v. State Farm Fire & Casualty Ins. Co.*, 277 S.C. 389, 287 S.E.2d 495 (1982), the Supreme Court confirmed that estoppel by judgment, which was also referred to as collateral estoppel, applied notwithstanding a lack of privity. The Court also explained that nonmutual collateral estoppel could, of course, be applied defensively. *See also*, *Beall v. Doe*, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984).

In *Graham v. State Farm Fire & Casualty Ins. Co.*, 277 S.C. 389, 287 S.E.2d 495 (1982), the Supreme Court ruled that the plaintiff was collaterally estopped by prior judgment from bringing a similar action against a different defendant. In that case, the plaintiff's automobile was destroyed by fire while parked in the garage of his residence. The plaintiff first sued his auto insurance

company for insurance proceeds, and the jury ruled in favor of the insurer. The plaintiff then brought a subsequent suit under his homeowner's policy for breach of contract. In that action the lower court granted summary judgment for the homeowner's insurer and ruled that the insured was collaterally estopped by the prior judgment to bring the second lawsuit. The Supreme Court affirmed finding that "[i]t appears from the transcript of record that the appellant has had his day in court." 287 S.E.2d at 496.

The Supreme Court in *Graham* cited favorably to the case of *Jenkins v. Atlantic Coast Line Railroad Co.*, 89 S.C. 408, 71 S.E. 1010 (1911), in which the plaintiff was injured in a train accident. The plaintiff brought suit against one railroad company which owned the tracks where the accident occurred. The case was tried on the merits, and judgment was entered in favor of that railroad company. The plaintiff then brought a second suit against another railroad company that owned and operated the train at the time of the accident. The Supreme Court barred the second suit on the following reasoning:

> [T]he true ground upon which a former judgment, in a case like this, should be allowed to operate as a bar to a second action is not *res judicata*, or technical estoppel, because the parties are not the same, and there is no such privity between them as is necessary for the application of that doctrine; but that in such cases, on grounds of public policy, the principle of estoppel should be expanded, so as to embrace within the estoppel of a judgment, persons who are not, strictly speaking, either parties or privies. *It is rested upon the wholesome*

> *principle which allows every litigant one opportunity to try his case on the merits, but limits him, in the interest of the public, to one such opportunity.*

71 S.E. at 1012. (Emphasis added).

Importantly, the injuries and damages that Orlowski sought in the Taylor lawsuit are precisely the same as she is seeking in the present lawsuit. In the complaints filed in both actions, the list of the injuries and damages claimed by Orlowski are identical. The injuries and damages alleged in paragraph 29 of the complaint against Dr. Taylor are identical to those alleged in paragraph 35 of the complaint against Dr. Creagh. (R. 17, 29-30). The evidence to be presented on damages in the present case, including the economic damages and the life care plan, is the same as already presented to and rejected by the jury in the Taylor lawsuit. (R. 122-123, 125).

This Court's decision in *Carolina Renewal, Inc. v. South Carolina Department of Transportation*, 385 S.C. 550, 684 S.E.2d 779 (Ct. App. 2009), is instructive.[2] There were two separate lawsuits brought against SCDOT. The first suit was brought by the sole shareholder and owner of Carolina Renewal alleging slander against SCDOT. In that slander action, the owner claimed damages that flowed from the contract between Carolina Renewal and SCDOT. After the owner

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[2] The South Carolina Supreme Court denied a writ of certiorari in *Carolina Renewal.*

received a verdict against SCDOT, Carolina Renewal commenced a second suit for breach of contract against SCDOT. The Circuit Court dismissed the second suit on the basis of collateral estoppel finding that the issue of contract damages had already been litigated in the first case. On appeal, this Court affirmed. This Court explained that the plaintiff had introduced evidence of damages flowing from the breach of contract in the slander action. As a result, this Court concluded that the plaintiff sought to recover for the same injuries and damages in both actions, which the Court did not permit. This Court ultimately concluded that the second suit for those same injuries and damages was barred by collateral estoppel. The same is true in the present case – Orlowski should be barred from re-litigating the same injuries and damages that were denied in the first suit.

In sum, Judge Kimball concluded that the "wholesome principle" described in *Graham* and *Jenkins* was equally applicable here. He ruled that Orlowski had had her day in court. She made the conscious decision to assert that Dr. Taylor and his practice – and no one else – had caused all of injuries and damages that she claimed. As a result, Orlowski should be bound by the positions that were actually litigated and decided adversely in the Taylor lawsuit. She should be precluded from taking inconsistent positions on the facts – after losing on those positions. She should be precluded from now arguing that other parties are legally responsible for the same injuries and damages. And finally, she should be

precluded from relitigating the issue of damages – an issue already litigated in the Taylor lawsuit. The decision of the Circuit Court is supported by the case law and should be affirmed.

II. The Appellant's medical malpractice action is also barred by the doctrine of judicial estoppel.

As Orlowski concedes in her brief, Judge Kimball referenced the doctrine of judicial estoppel during the hearing and ultimately applied the concepts of judicial estoppel as part of his application of general estoppel principles in dismissing Orlowski's second suit. Regardless of whether "judicial estoppel" as developed in South Carolina jurisprudence over the past fifteen years was a basis for Judge Kimball's ruling or is simply an additional sustaining ground,[3] the Court is urged to apply that analysis to the present case to affirm the judgment entered in favor of Dr. Creagh.

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[3] In the case of *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* *See also*, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

The position taken by Dr. Creagh on the application of principles of judicial estoppel is identical to that taken by the Hospital. Both parties contend that Orlowski has intentionally taken inconsistent positions in the two lawsuits thereby triggering the bar of judicial estoppel. Instead of repeating the arguments already made by the Hospital, Dr. Creagh hereby adopts by reference and incorporates herein Argument II as set forth on pages 15 through 20 of the brief filed by the Hospital.[4] Dr. Creagh submits on that basis that Judge Kimball was correct in barring Orlowski from taking inconsistent positions from those positions that served as the basis for her ultimate settlement of the Taylor lawsuit for $300,000 on a high-low agreement, and that Judge Kimball was also correct in ultimately entering summary judgment in favor of Dr. Creagh and the Hospital.

III. As an additional sustaining ground, 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.

As an additional sustaining ground on appeal, Dr. Creagh contends that the medical malpractice action filed on behalf of Kristy Orlowski is barred by the

[4] Rule 208(b)(6), SCACR, provides: "In cases involving more than one appellant or respondent ... any party may adopt by reference all of any part of the brief of another." Rule 208(b)(6), SCACR.

three-year statute of limitations set forth in Section 15-3-545(A).[5] Orlowski alleges that Dr. Creagh's negligence occurred between November 24, 2003 and December 8, 2003; yet, the Complaint was not filed until six years later on November 24, 2009, which was beyond the three-year statute of limitations. Orlowski contends, however, that she was mentally incompetent beginning on September 12, 2003, and as a result was entitled to eight years to file suit based on the tolling provision in Section 15-3-40 applicable to insane persons.

Section 15-3-545 establishes the statute of limitations specifically for medical malpractice actions. 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). The tolling provision referenced in Section 15-3-545(A) is set forth in Section 15-3-545(D), which provides as follows:

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[5] This same statute of limitations defense is asserted by Dr. Creagh in his cross-appeal. As Dr. Creagh explains in his Appellant's Brief, this additional sustaining ground has been presented by way of a cross-appeal only out of an abundance of caution. While it is likely most appropriate to present the issue in his Respondent's Brief, Dr. Creagh also raised the statute of limitations defense by way of a cross-appeal to ensure that the issue is properly presented to this Court and is not deemed waived or abandoned in any respect. Again, to ensure that Dr. Creagh has properly preserved and presented this issue for the Court's consideration, it is being re-asserted verbatim in the Respondent's Brief as an additional sustaining ground.

> *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 is 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.

S.C. Code Ann. § 15-3-545(D). (Emphasis added).[6]

Section 15-3-545(D) allows for tolling of the medical malpractice statute of limitations only for minority. It does *not* provide for tolling for any other disability including insanity. In *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), the South Carolina Supreme 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. (Emphasis added). The 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, the Supreme Court has held that Section 15-3-

[6] Section 15-3-545(A) uses the phrase "as tolled by this section." "Section" refers to Section 15-3-545. Importantly, the General Assembly did not use the language "as tolled by this chapter" or "as tolled by Section 15-3-40."

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.

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 phrase "[n]otwithstanding the provisions of Section 15-3-40." 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.[7]

In sum, Orlowski's medical malpractice action against Dr. Creagh was required to be filed by December 8, 2006, at the latest. The filing of this action nearly three years later on November 24, 2009, was untimely. The Supreme

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[7] It is also 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. 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 15-3-40.

Court's holding in *Langley* is dispositive. Orlowski's medical malpractice claims against the Defendants are barred by the statute of limitations.

Nonetheless, 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, her claims are still time-barred.

Orlowski contends that she has been mentally incompetent since September 12, 2003. She further contends that Dr. Creagh's negligence occurred between November 24, 2003 and December 8, 2003. As a result, in applying the tolling provisions of Section 15-3-40 for insane persons, Orlowski claims that the limitations period was extended from three years to eight years.

However, Orlowski has had the benefit and protection of a conservator since March 5, 2004, the date of the appointment of a conservator by the Chester County Probate Court. (R. 370). Orlowski's husband, Christopher T. Orlowski, was appointed as conservator on March 5, 2004. (R. 370). Thus, even if Orlowski was deemed disabled under Section 15-3-40, her husband was appointed to a fiduciary position to represent her interests. As provided by Section 62-5-424(B)(17) of the South Carolina Probate Code, 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." S.C. Code Ann. § 62-5-424(B)(17). Similarly, Rule 17(c), SCRCP, provides that "[w]henever

a minor or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person." Rule 17(c), SCRCP.

At the time that Orlowski was appointed a conservator on March 5, 2004, the period of disability ended. Orlowski no longer should be permitted to rely on her mental incompetence when the Probate Court has appointed a conservator to protect her interests and to pursue litigation on her behalf. This is particularly true under the facts of this case because Christopher T. Orlowski, in his capacity as the conservator for Kristy L. Orlowski, did file a medical malpractice action against R. Norman Taylor, III, M.D. and his practice on August 24, 2006. (R. 12-17). The record thus shows conclusively that Orlowski's interests were being actively protected by her conservator. Therefore, using the March 5, 2004 date as the end of disability and commencement of the three-year statute of limitations, Orlowski's suit against Dr. Creagh needed to be filed by March 5, 2007. However, Orlowski's conservator did not file suit against Dr. Creagh and the Hospital until November 24, 2009, long after the statute of limitations expired.

Alternatively, the Court could use August 24, 2006, as the commencement date. There is no dispute that Orlowski's conservator knew by that date that Orlowski was allegedly a victim of medical malpractice because August 24, 2006 was the date that her conservator actually filed the first medical malpractice action

on her behalf. Even if the Court uses August 24, 2006 as the commencement date, the suit against Dr. Creagh and the Hospital needed to be filed by August 24, 2009, but the suit was not actually filed until three months later. Clearly, by August 24, 2006, Orlowski no longer needed the protection of Section 15-3-40. Her interests were represented by a conservator, as they are today. Her conservator chose to proceed with filing suit and abandon any protection that Section 15-3-40 provides against the statute of limitations. Consequently, Orlowski should not be able to re-assert the tolling provisions abandoned in August 2006 to seek protection from the statute of limitations in this litigation.

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.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent-Appellant C. Edward Creagh, M.D. respectfully requests that this Court affirm the judgment entered in his favor in the Circuit Court. If the Court does not affirm the judgment based on the estoppel defense as adjudicated by Special Circuit Court Judge S. Jackson Kimball in his Order filed August 15, 2012, the Court is respectfully requested to affirm the judgment below based on the statute of limitations defense.

Respectfully submitted,

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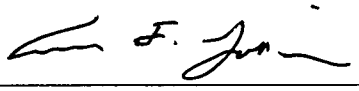
BY: 

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Respondent-Appellant C. Edward Creagh, M.D. certifies that the Respondent's Final Brief of Respondent-Appellant Creagh complies with Rule 211(b), SCACR.

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April 23, 2013

CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Respondent-Appellant C. Edward Creagh, M.D. that the Respondent's Final Brief of Respondent-Appellant Creagh complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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April 23, 2013

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent-Appellant, C. Edward Creagh, M.D., does hereby certify that service of **Respondent's Final Brief of Respondent-Appellant Creagh** 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 23rd day of April 2013:

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