

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

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SC Court of Appeals

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.

**APPELLANT'S FINAL BRIEF
OF RESPONDENT-APPELLANT CREAGH**

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STATEMENT OF ISSUES ON APPEAL

- I. Are the tolling provisions provided in S.C. Code Ann. § 15-3-40 for insane persons applicable to a medical malpractice action?
- II. Is the medical malpractice action filed on behalf of Kristy Orłowski barred by the three-year statute of limitations set forth in S.C. Code Ann. § 15-3-545?

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 accordance with Rule 208(b)(6), SCACR, Dr. Creagh hereby adopts by reference and incorporates herein the "Statement of the Case" included in the brief filed by the Hospital.¹

¹ 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.

ARGUMENTS

I. The Court should address Dr. Creagh's statute of limitations defense as an additional sustaining ground for the judgment entered by the Circuit Court.

In the Circuit Court, C. Edward Creagh, M.D. moved for summary judgment on two separate grounds: (1) a statute of limitations defense and (2) a collateral estoppel or estoppel by judgment defense. Special Circuit Court Judge S. Jackson Kimball granted summary judgment on the estoppel defense but denied summary judgment on the statute of limitations defense.²

Dr. Creagh has filed this cross-appeal in order to preserve the statute of limitations issue for consideration by this Court as an additional sustaining ground. Dr. Creagh fully recognizes and accepts that an order denying summary judgment is not ordinarily appealable. *See, Olson v. Faculty House of Carolina, Inc.*, 354 S.C. 161, 580 S.E.2d 440 (2003). However, current jurisprudence will allow the appellate court to consider any sustaining ground appearing in the record, and that

² Given that Judge Kimball granted summary judgment to the Defendants on the estoppel defense, it was actually unnecessary for him to rule on the statute of limitations defense. In denying summary judgment on the statute of limitations defense, Judge Kimball violated "the principle the a court should usually refrain from deciding unnecessary questions." *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 723 (2000).

should also include any sustaining ground on which the lower court either did not rule or ruled incorrectly.³

In *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court discussed at length the law governing additional sustaining grounds. The Supreme Court explained that "in raising an additional sustaining ground in an appeal, the party who prevailed in the lower court urges an appellate court to affirm the lower court's ruling for a reason other than one primarily relied upon by the lower court." 526 S.E.2d at 722. The Supreme Court further 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

³ Dr. Creagh has presented this additional sustaining ground by way of a cross-appeal out of an abundance of caution. While it is likely most appropriate to present the issue in his respondent's brief, Dr. Creagh has 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.

contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

An appellate court should in its discretion be permitted to consider as additional sustaining grounds even those grounds raised below on which the lower court ruled adversely to the ultimate prevailing party (i.e., normally the respondent on appeal). The reason for that is two-fold: First, the lower court may have ruled in error on a particular issue, and that issue nonetheless is a ground appearing in the record on which the appellate court may affirm the judgment entered for the respondent. Second, and more importantly in the context of a summary judgment motion, the law is well settled that "[a] denial of a motion for summary judgment decides nothing about the merits of the case." *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379, 380 (1994). "The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings." *Id.* See, *PPG Industries, Inc. v. Orangeburg Paint & Decorating Center, Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988) (party may make a renewed motion for summary judgment); *Crosswell Enterprises, Inc. v. Arnold*, 309 S.C. 276, 422 S.E.2d 157, 159 (Ct. App. 1992) ("If the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial"). Therefore, because the denial of summary judgment does not establish the law of the case and does not decide the

merits of the issue presented, the issue is ripe for reconsideration by the lower court. The issue should also be ripe for consideration by the appellate court as an additional sustaining ground on appeal.

In the case at bar, Judge Kimball's ruling on Dr. Creagh's statute of limitations defense is not the law of the case, and his denial of summary judgment on that issue does not decide the merits. Accordingly, Dr. Creagh contends that this Court may consider his statute of limitations defense as an additional sustaining ground on appeal even though Judge Kimball denied summary judgment on that issue in the court below.

It is well settled under *I'On* and subsequent case law that this Court could consider Dr. Creagh's statute of limitations defense as an additional sustaining ground had Judge Kimball granted summary judgment on the estoppel defense and then not ruled on any other issue because it was unnecessary. But, the fact that Judge Kimball did rule on the statute of limitations defense should not preclude this Court from considering that issue, if it so chooses. As the Supreme Court explained in *I'On*, "[a]n affirmance promotes judicial economy and finality in private and public affairs, which are important public policies." *I'On*, 526 S.E.2d at 723. Therefore, an appellate court should be able to affirm the judgment entered below on any ground appearing in the record, and that should include a ground on which the lower court committed error.

In sum, the Court is urged to consider the statute of limitations defense as a basis for affirming the judgment entered for Dr. Creagh and the Hospital in the court below. For the reasons discussed below, the Defendants' entitlement to summary judgment on the statute of limitations defense is supported by Supreme Court precedent and presents this Court with an issue on which the judgment below may easily be affirmed on a purely legal basis.⁴ Without question, Dr. Creagh is free to renew his motion for summary judgment on the statute of limitations defense should this Court reverse on the estoppel defense and remand to the Circuit Court. Thus, judicial economy is best served by allowing this Court to consider that defense on appeal as an additional sustaining ground if a remand can be avoided.

II. The tolling provisions provided in Section 15-3-40 for insane persons are not applicable to a medical malpractice action, and as a result, 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 three-year statute of limitations set forth in Section 15-3-545. Orlowski alleges

⁴ As will be shown below, Judge Kimball's denial of summary judgment on the statute of limitations defense was based on an error of law. There was no finding or contention that a genuine issue of material fact precluded summary judgment.

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:

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).⁵

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 15-3-545(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

⁵ 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."

Langley which established that Section 15-3-545(D) provides for the "only tolling" of the medical malpractice statute of limitations. Orłowski'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.⁶

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

⁶ 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 Orłowski's reliance on Section 15-3-40.

III. Even if the Court finds that the tolling provisions of Section 15-3-40 are applicable to a medical malpractice action, the three-year statute of limitations expired prior to the filing of this action on November 24, 2009.

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 13, 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]henver 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. (R. 12-17). 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.

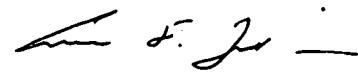
In sum, the tolling provisions of Section 15-3-40, even if applicable to medical malpractice actions, do not protect Orlowski's current action from the statute of limitations. The filing of this action against Dr. Creagh and the Hospital on November 24, 2009 was untimely, and the action should be dismissed 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 as discussed herein.

Respectfully submitted,

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April 23, 2013

CERTIFICATE OF COUNSEL

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

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CERTIFICATE OF COMPLIANCE

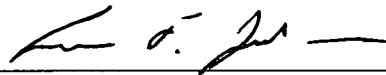
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The undersigned counsel for the Respondent-Appellant C. Edward Creagh, M.D. that the Appellant's Final Brief of Respondent-Appellant Creagh complies with the Supreme Court's Order of August 13, 2007, regarding personal identifiers and sensitive information.

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CERTIFICATE OF SERVICE

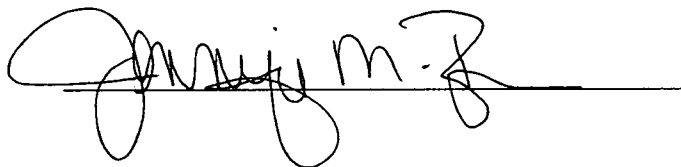
The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent-Appellant, C. Edward Creagh, M.D., does hereby certify that service of **Appellant's Final Brief of Respondent-Appellant Creagh** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 23rd day of April 2013:

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