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.

APPELLANT'S FINAL REPLY BRIEF OF RESPONDENT-APPELLANT CREAGH

Andrew F. Lindemann
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

H. Spencer King
THE WARD LAW FIRM, P.A.
233 South Pine Street
Post Office Box 5663
Spartanburg, South Carolina 29304
(864) 573-8500

Counsel for Respondent-Appellant C. Edward Creagh, M.D.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Rules

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.

The Appellant-Respondent Gladys Sims, as the duly appointed guardian and conservator of Kristy L. Orlowski (hereafter referred to as "Orlowski"), argues that the cross-appeal filed by the Respondent-Appellant C. Edward Creagh, M.D. is improper. Orlowski, however, overlooks Dr. Creagh's explanation for filing the cross-appeal. Dr. Creagh fully acknowledges that an order denying summary judgment is not ordinarily appealable. Yet, he filed this cross-appeal in order to preserve the statute of limitations issue for consideration by this Court as an additional sustaining ground. As explained in his opening brief, Dr. Creagh 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. Dr. Creagh believes that the issue is best presented as an additional sustaining ground but filed the cross-appeal out of an abundance of caution.

To the extent that Orlowski contends that the statute of limitations defense may not be presented on appeal as an additional sustaining ground, Dr. Creagh disagrees. In *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the South Carolina 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 statute of limitations defense is a defense appearing in the record below. Moreover, the defense was presented to and ruled upon by the lower court, and hence, it meets the requirements of an additional sustaining ground.

The fact that Judge Kimball ruled incorrectly on that ground does not change its characterization as an additional sustaining ground. Without question, 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. Indeed, as Orlowski does not dispute, South Carolina law provides that "[t]he 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." *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379, 380 (1994). Because the statute of limitations defense is still subject to adjudication in the lower court, it is appropriate for this Court to consider the defense as an additional sustaining ground on appeal.

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(A). Section 15-3-545, which establishes the statute of limitations for medical malpractice claims, includes a tolling provision within Section 15-3-545(D). The South Carolina Supreme Court has explained that the tolling provision of 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. *See*, *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993).

In response to Dr. Creagh's statute of limitations argument, Orlowski first argues that the issue is not preserved for appeal because it was not made in the court below. Orlowski bases her argument on the fact that the *Langley* case was not expressly cited to Judge Kimball. Even if that were the case, there is no dispute that Dr. Creagh raised a statute of limitations defense based on Section 15-3-545 in the court below. The fact that an additional case citation was offered on appeal does not make an issue non-preserved for appeal.

At any rate, the statute of limitations defense based on Section 15-3-545 as

interpreted in *Langley* qualifies as an additional sustaining ground. As a technical matter, additional sustaining grounds may be argued on appeal "regardless of whether those reasons have been presented to or ruled on by the lower court." *I'On*, 526 S.E.2d at 723. Thus, whether or not *Langley* was cited to or considered by Judge Kimball is not controlling. The statute of limitations as governed by the holding in *Langley* may be considered by this Court as an additional sustaining ground.

Furthermore, it is illogical and contrary to notions of judicial economy to suggest that this Court cannot consider the statute of limitations defense based on the dispositive precedent of the *Langley* case. The statute of limitations defense as presented is purely an issue of law; there are no disputed issues of fact. The issue is specifically one of statutory construction. *See*, *Jennings v. Jennings*, 401 S.C. 1, 736 S.E.2d 242, 243 (2012) ("[d]etermining the proper interpretation of a statute is a question of law"). The issue appears in the record, and the parties have had a full opportunity to brief it. Orlowski presents no reason why this Court is not in a proper position to decide the issue as an additional sustaining ground. Frankly, there is no reason for this purely legal issue to be remanded to the lower court to be decided when it is ripe for adjudication as part of this appeal. To remand this issue of statutory construction would be contrary to all notions of judicial economy and would only delay the inevitable given that *Langley* is controlling precedent.

Significantly, Orlowski expends great effort to argue that *Langley* was not cited in the lower court, but she fails to argue that *Langley* is wrongly decided. In *Langley*, the 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. 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.

Orlowski attempts to "distinguish" *Langley* by arguing that the Supreme Court was addressing the impact of a different tolling provision, Section 15-3-30 rather than Section 15-3-40. Orlowski also argues that the issue in *Langley* involved the tolling of a statute of repose rather than a statute of limitations. Yet, in actuality, the Supreme Court was addressing the impact of a tolling provision on Section 15-3-545(A), which includes both a statute of limitations and a statute of repose. 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 Supreme Court construed the italicized language – "or as tolled by this section" – in *Langley* as "clearly indicat[ing] that the *only* tolling of § 15-3-545(A) intended by the legislature is that contained in subsection (D)." *Langley*, 438 S.E.2d at 243. (Emphasis in original). The Supreme Court expressly used the words "only tolling" meaning that Section 15-3-545(D) trumps all other tolling statutes – not just Section 15-3-30. The Supreme Court then explained in clear terms that "[s]ubsection (D) of 15-3-545 provides a limited tolling provision, applicable only to minors." *Id.* In short, the Supreme Court's analysis cannot be read as limited to the tolling of the statute of repose and not to the tolling of the statute of limitations, both of which are contained in Section 15-3-545(A). Indeed, Orlowski offers no explanation for the express language of Section 15-3-545(D), which is prefaced by the phrase "[n]otwithstanding the provisions of Section 15-3-40." Clearly, that language demonstrates that the tolling provisions of Section 15-3-40 have no application to medical malpractice actions.

While Orlowski raises distinctions without differences in her discussion of *Langley*, she fails to provide any argument to suggest why the tolling provisions of Section 15-3-40 for insanity are applicable to medical malpractice actions given the specific language of Section 15-3-545(A) and (D). In short, it is quite clear that

the Supreme Court's 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 Dr. Creagh, her action is barred by the statute of limitations.

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. Dr. Creagh contends that the three-year statute of limitations should run from the date that Orlowski was appointed a conservator, which was March 5, 2004, or at a minimum, from August 24, 2006, which is the date that her conservator filed her medical malpractice action against R. Norman Taylor, III, M.D. and his practice. Under either scenario, the statute of limitations expired by November 24, 2009, when this action against Dr. Creagh was filed.

In response, Orlowski cites case law from other jurisdictions for the position that the appointment of a guardian or conservator has no effect on the tolling of a statute of limitations. However, there is case law from other jurisdictions not cited

by Orlowski that supports Dr. Creagh's position. For example, in *Stewart v. Robinson*, 115 F. Supp. 2d 188 (D.N.H. 2000), the federal district court rejected the majority rule and was "persuaded ... that the minority view – that the statute of limitations is tolled only until the appointment of a capable guardian – is better reasoned and both 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." 115 F. Supp. 2d at 195. The court further explained the interests served by what it described as the "more sensible view":

> [C]onstruing New Hampshire's tolling provision in that manner serves several interests: (1) it protects a ward's legal rights for an additional two years 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.

Id.

North Carolina and Georgia also follow this minority yet "more sensible" view. The North Carolina Supreme Court recognizes that, as in South Carolina,[1] statutory laws authorize "the guardian to bring suit, when necessary, upon the

[1] *See*, S.C. Code Ann. § 62-5-424(B)(17) (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").

choses in action belonging to the ward's estate, and to recover any moneys due him, and to plead any equitable matter that may be necessary for recovery in such action." *Johnson v. Pilot Life Ins. Co.*, 217 N.C. 139, 7 S.E.2d 475, 477 (1940). The Court concluded, as a result, that the statute of limitations begins to run from the appointment of a guardian and that "the failure of the guardian to sue in apt time is the failure of the ward, entailing the same legal consequence with respect to the bar of the statute." 7 S.E.2d at 477-78. *See also*, *First-Citizens Bank & Trust v. Willis*, 257 N.C. 59, 125 S.E.2d 359 (1962) (the statute of limitations for guardian to file suit for ward began to run on date guardian was appointed).

Similarly, in *Camps v. City of Warner Robins*, 822 F.Supp. 724 (M.D. Ga. 1993), the federal district court, applying Georgia law, ruled that the statute of limitations began to run on the date of appointment of the ward's guardians. The court relied on *Cline v. Lever Brothers Co.*, 124 Ga. App. 22, 183 S.E.2d 63 (1971), in which the Georgia Court of Appeals explained that "the statute of limitations for bringing of an action is tolled until such time as he regains capacity to act for himself or until such time as a guardian is appointed and actually does act for him." 183 S.E.2d at 66.[2]

---

[2] *See also*, *Zator v. State Farm Mutual Auto. Ins. Co.*, 69 Haw. 594, 752 P.2d 1073, 1075 (1988) ("[a] guardian of the property of a disabled person has the power to prosecute claims for the protection of assets unless otherwise limited. ... Absent such limitations [the guardian's] appointment gave her the right of action to bring [her ward's] claim. Consequently, we hold that the statute of limitations commenced running upon her appointment").

In the case at bar, Orlowski had a conservator appointed for her on March 5, 2004, and that conservator acted for her by filing a medical malpractice suit (*Orlowski I*) on August 24, 2006. (R. 12-17, 370). Certainly, by that latter date, if not on March 5, 2004, the statute of limitations began to run. Without dispute, Orlowski's interests were protected by a conservator by that date. The conservator chose only to sue Dr. Taylor and his practice, but he was not precluded or barred on that date from also suing Dr. Creagh. There is no reasonable basis for allowing an insane person, whose rights are protected by a conservator, to extend the period of disability beyond the date that the conservator was appointed and indeed took action to protect the ward's interests by filing suit. 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 renews his request 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,

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

H. SPENCER KING
THE WARD LAW FIRM, P.A.
233 South Pine Street
Post Office Box 5663
Spartanburg, South Carolina 29304
(864) 573-8500

Counsel for Respondent-Appellant
C. Edward Creagh, M.D.

Columbia, South Carolina
April 23, 2013

CERTIFICATE OF COUNSEL

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

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

H. SPENCER KING
THE WARD LAW FIRM, P.A.
233 South Pine Street
Post Office Box 5663
Spartanburg, South Carolina 29304
(864) 573-8500

Counsel for Respondent-Appellant
C. Edward Creagh, M.D.

Columbia, South Carolina

April 23, 2013

RECEIVED
APR 23 2013
SC Court of Appeals

CERTIFICATE OF COMPLIANCE

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

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

H. SPENCER KING
THE WARD LAW FIRM, P.A.
233 South Pine Street
Post Office Box 5663
Spartanburg, South Carolina 29304
(864) 573-8500

Counsel for Respondent-Appellant
C. Edward Creagh, M.D.

Columbia, South Carolina

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 **Appellant's Final Reply 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:

Chad A. McGowan, Esquire
Ashley White Creech, Esquire
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732

John F. Eversole, III, Esquire
Mase Lara Eversole
2601 South Bayshore Drive - Suite 800
Miami, Florida 33133

William U. Gunn, Esquire
Joshua T. Thompson, Esquire
Holcombe Bomar, P.A.
Post Office Drawer 1897
Spartanburg, South Carolina 29304

H. Spencer King, Esquire
The Ward Law Firm, P.A.
Post Office Box 5663
Spartanburg, South Carolina 29304