THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Richland County
G. Thomas Cooper, Jr., Circuit Court Judge
Circuit Court Case No. 2007-CP-40-03365
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, Kathy Lacy, and Stan Butkus,
Respondents

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BRIEF OF AMICI CURIAE

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Brief of Amici Curiae

Protection and Advocacy for People with Disabilities, Inc. (P&A), the National Academy of Elder Law Attorneys (NAELA), and the South Carolina Chapter of the National Academy of Elder Law Attorneys (SCNAELA) respectfully submit this brief as amici curiae on questions of law relevant to this appeal.

Clients of P&A and clients of members of NAELA and SCNAELA receive services through the South Carolina Department of Disabilities and Special Needs (DDSN). The amici have taken a special interest in this case because it affects the rights of their clients, some of whom are individuals with disabilities who have guardians.

Issues on Appeal of Interest to the Amici

Of particular interest to the amici is the issue of statutes of limitations as they apply to people who have been assigned guardians. Because this is a novel issue in South Carolina, and because publication would provide much-needed guidance, the amici will below ask this Court to publish their decision in this case.

In their unpublished Opinion of November 8, 2017, this Court joined a majority of states holding that the appointment of a guardian for a disabled person does not cause the disability to "cease" for the purpose of the tolling statute at S.C. Code Ann. § 15-3-40. The amici agree that the statute should indeed be tolled because the cause of action does not belong to the guardian; it belongs to the ward, whose disability does not in fact cease upon the appointment of a guardian, as the states in the majority have held.

Argument

I. S.C. Code Ann. § 15-3-40 applies to all persons who meet the definition of "insane" for purposes of the statute, regardless of appointment of a guardian.

Statutes 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) (quoting *Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct.App.2009)). "One 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.*

South Carolina law recognizes the difference between a plaintiff who sleeps on his rights and one who lacks the capacity to advocate for himself. S.C. Code Ann. § 15-3-40 states:

> 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.

"Insanity" for the purposes of S.C. Code § 15-3-40 is defined thus:

> Insanity or mental incompetency that tolls the statute of limitations consists of a mental condition which precludes understanding the nature or effects of one's acts, an incapacity to manage one's affairs, an inability to function in society, or to understand, or protect one's rights.

54 C.J.S. Limitations of Actions § 172 (internal citations omitted).

DDSN called Mr. Mims "profoundly retarded" in 2001 when the agency took action to have him adjudicated incompetent, telling the Probate Court he was nonverbal with the mental age of a two-year-old child. R. 3242, 3301. DDSN's psychologist said that Mr. Mims required one-on-one care and could not be left alone. R. 3301; *see also* R. 314, 3270. Respondents have not, in their Memorandum in Support of Petition for Rehearing (Respondents' Memorandum), argued that Mr. Mims does not meet the definition of "insanity" for purposes of the tolling statute.

Respondents argue in Respondents' Memorandum that South Carolina should adopt a minority view that a disability "ceases" when a guardian is appointed. Respondents' Memorandum at 2-4. This Court in its November 8, 2017 Opinion rightly rejected Respondents' argument. The amici believe the Court was correct in doing so for several reasons, including the following: 1. as a practical matter, Mr. Mims' disability did not in fact cease; 2. a guardian's relationship to his ward is like a parent unto his child, and a child's statute of limitations tolls until majority; 3. the causes of action attach to Mr. Mims, not to his guardian; and 4. the minority of states holding that a disability ceases upon appointment of a guardian have materially different guardianship statutes from that of South Carolina.

1. Mr. Mims' disability never "ceased."

First, Mr. Mims did in fact remain disabled until his death, which occurred while this appeal was pending. As Mr. Mims was always profoundly intellectually disabled, and always nonverbal, he never gained the ability to express himself or advocate on his own behalf in a manner sufficient to bring a lawsuit for abuse and neglect. His circumstances could not be cured by appointment of a guardian, because the appointment did not suddenly enable Mr. Mims to communicate the facts surrounding his abuse and neglect to his guardian or others in a timely fashion. The Supreme Court of Indiana recognized this reality in 1990 in rejecting the minority view:

> The statutory language is clear and unambiguous. A person of unsound mind is, by express statutory definition, under a legal disability. **The appointment of a guardian does not alter the fact of mental unsoundness.** Therefore, it does not terminate the legal disability.

Barton-Malow Co. v. Wilburn, 556 N.E.2d 324, 325 (Ind. 1990) (emphasis added).

2. A guardian's relationship to his ward is like a parent's unto his child.

Second, South Carolina's guardianship statute specifies 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." S.C. Code Ann. § 62-5-312(a). Notably, the statute of limitations is tolled for children under the age of eighteen. S.C. Code Ann. §15-3-40. The relationship between these two statutes makes clear to potential litigants that a guardian does not have an affirmative duty to litigate any claims of the ward any more than a parent has a duty to litigate claims of a minor child.

3. The cause of action belongs to the ward, not the guardian.

Third, and most importantly, the condition of Mr. Mims is the only relevant question because the case is personal to him, not his guardian. In adopting the majority view that a disability does not cease upon appointment of a guardian, the Supreme Court of Tennessee wrote:

> The import . . . is that the cause of action remains personal to the plaintiff insofar as the running of the statute of limitations is concerned. That is, the statute of limitations either runs or is tolled depending upon the status of the plaintiff, irrespective of whether a legal guardian exists. If the plaintiff is under some form of legally recognized disability which tolls the statute of limitations, the statute of limitations remains tolled despite the possibility that some representative could bring the action on the plaintiff's behalf.

Abels ex rel. Hunt v. Genie Indus., Inc., 202 S.W.3d 99, 103 (Tenn. 2006). Similarly, the Supreme Court of Ohio held that "the cause of action belongs to the ward, not to the guardian; hence, the tolling provided by R.C. 2305.16 applies as long as the ward suffers from the disability." *Weaver v. Edwin Shaw Hosp.*, 2004-Ohio-6549, ¶ 22, 104 Ohio St. 3d 390, 394, 819 N.E.2d 1079,

1083 (Ohio 2004). Indeed, the cause of action remains personal to Mr. Mims, and it is his continuing status as a person with disabilities until his death that matters for the statute, as the states in the majority have found.

Joining Tennessee and Ohio in the majority are states such as California (*Gottesman v. Simon*, 169 Cal. App. 2d 494, 502–03, 337 P.2d 906 (1959) ("Since the right of action vests in the ward, it is not affected by the failure of the guardian to sue within the prescribed time")); Michigan (*Paavola v. Saint Joseph Hosp. Corp.*, 119 Mich. App. 10, 14, 325 N.W.2d 609, 611 (1982) ("We adopt the view generally held in other jurisdictions and hold that the appointment of a guardian for an insane person does not constitute removal of the insane person's disability. . .")); Oklahoma (*Freeman v. Alex Brown & Sons, Inc.*, 73 F.3d 279, 281 (10th Cir. 1996) ("Here, the language is broad and inclusive: if a person is legally disabled, he is protected by the provision")); Arizona (*Sahf v. Lake Havasu City Ass'n for the Retarded & Handicapped*, 150 Ariz. 50, 56, 721 P.2d 1177, 1183 (Ct. App. 1986) ("Obviously, the effect of preventing a guardian from bringing an action would be to punish the incapacitated person")); Arkansas (*Mason v. Sorrell*, 260 Ark. 27, 29, 551 S.W.2d 184, 185 (1976) ("We can find nothing in our guardian and ward statute that would require us to follow the minority view expressed in the cases cited by appellee when construing the savings clause set forth in Ark.Stat.Ann. s 37-226, supra. Of course, the rule with respect to infants under Ark.Stat.Ann. s 37-226 is equally applicable to incompetents")); Georgia (*Whalen v. Certain-Teed Prod. Corp.*, 108 Ga. App. 686, 687–88, 134 S.E.2d 528, 530 (1963) ("We think that the question has been definitely and conclusively settled that as to a minor, the appointment of a guardian does not operate to start the statute of limitation running against the minor or the guardian . . . Since all the parties enumerated in [Georgia statute] are in the same class, it follows that the law applicable to a minor is equally applicable to the other classes of persons enumerated")); New

York (*Young v. State Dep't of Soc. Servs., Dep't of Mental Hygiene*, 92 Misc. 2d 795, 800, 401 N.Y.S.2d 955 (Ct. Cl. 1978) ("This court sees no justification for applying a different rule to incompetents than that pertaining to infants. The State Constitution applies equally to both, and purports to protect the rights of both. The real party in interest in this case is the incompetent . . .")); Washington (*Young v. Key Pharmaceuticals, Inc.*, 112 Wash. 2d 216, 222, 770 P.2d 182 (Wash. S.Ct. 1989) (the tolling statute "tolls the statute of limitations for a legally incompetent person notwithstanding the appointment of a guardian")); Illinois (*Pardy v. United States*, 548 F.Supp. 682, 684 (S.D.Ill. 1982) (noting that Illinois courts have held that the appointment of a guardian does not affect the tolling provision with regard to a minor because "the minor is the true owner of the action.")); and Alabama (*Emerson v. S. Ry. Co.*, 404 So. 2d 576, 579 (Ala. 1981) (". . . the right of action resides in the injured party and not in the guardian or representative. This is not to say that a guardian, next friend, or guardian ad litem cannot file a claim on behalf of the ward. It is clear to us, however, that failure on the part of the representative to file or pursue this claim within the limitation period does not bar recovery . . .)).

4. South Carolina's guardian statute is materially different from the statutes of the states in the minority.

Fourth, unlike in the minority of states where the disability ends upon the appointment of a guardian, South Carolina's guardian statute, at S.C. Code Ann. § 62-5-312 and titled "General powers and duties of guardian," does not obligate a guardian to prosecute lawsuits on behalf of the disabled person. Contrast South Carolina's statute with that of New Hampshire, which is among the minority of states Respondents would have this Court follow:

> 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, to account

> for it faithfully, to perform all other duties required by law, and at the termination of the guardianship to deliver the assets of the ward to the persons entitled thereto.

N.H. Rev. Stat. Ann. § 464-A:26, General Powers and Duties of Guardian of the Estate (emphasis added).

Respondents' argument rests heavily on *Stewart v. Robinson*, 115 F.Supp.2d 188 (D.N.H. 2000), despite the clear language in that New Hampshire case that explicitly ties that court's decision to their materially different guardianship statute.[1] The equivalent South Carolina statute contains no such language.[2] No mention of prosecuting actions or claims is made in S.C. Code Ann. § 62-5-312. As such, a South Carolina guardian is not put on notice that they must discover, investigate, and bring all possible claims – within one year, if Respondents' theory is adopted. Even in New Hampshire, which Respondents would have us emulate, the statute of limitations expires *two* years after the disability "ceases" via guardian appointment, not a mere one year. *Stewart* at 195.

The logic behind this minority view fails even when a guardianship statute explicitly imposes a duty to prosecute claims. *See Barton-Malow Co. v. Wilburn*, 547 N.E.2d 1123, 1125 (Ind. Ct. App. 1989), *aff'd in part, vacated in part*, 556 N.E.2d 324 (Ind. 1990). Indiana, like New Hampshire and North Carolina, specifically charges a guardian with prosecuting legal claims. The Court of Appeals of Indiana, on an issue of first impression, noted:

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[1] "Plaintiff was appointed guardian of the Estate of George Stewart on January 22, 1996. On that date, she assumed the duty to protect and preserve Stewart's estate and the obligation "to prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of the estate's assets." N.H.Rev.Stat.Ann. ("RSA") 464–A:26, I." *Stewart* at 194.

[2] South Carolina's conservatorship statute, unlike its guardianship statute, does mention the possibility of prosecuting claims, but uses permissive, rather than mandatory language, saying a conservator "may . . . (17) 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. (In any case, Mr. Mims did not have a conservator.)

> North Carolina has adopted a different rule, which Barton–Malow urges us to follow. In North Carolina, the appointment of a guardian for a minor or an incompetent does remove the legal disability for purposes of the saving clause and begins the running of the time limitation. *Johnson v. Pilot Life Ins. Co.* (1940), 217 N.C. 139, 7 S.E.2d 475. The rationale for this rule is that North Carolina guardianship statutes require a guardian to take possession of the ward's estate and impose on the guardian the duty to bring all necessary actions to protect the estate. *Id.* Barton–Malow correctly points out that Indiana's guardianship statutes also require the guardian to take possession of the ward's estate and impose on the guardian the duty to bring necessary actions. . . In contrast, other jurisdictions have declined to hold that an appointment of a guardian removes the disability because their statutes do not impose such a duty on the guardian. *See e.g. Emerson*, supra; *Mason v. Sorrell* (1976), 260 Ark. 27, 551 S.W.2d 184.
>
> We are persuaded that this distinction warrants a departure from the majority rule.

Barton-Malow at 1125 (Ind. Ct. App. 1989). Despite this reasoning for adopting the minority view, the Supreme Court of Indiana nevertheless reversed the Court of Appeals, pointing out, as discussed above, that "[t]he appointment of a guardian does not alter the fact of mental unsoundness." *Barton-Malow Co. v. Wilburn*, 556 N.E.2d 324, 325 (Ind. 1990).

The North Carolina Court of Appeals has also questioned the *Johnson* case construed in *Barton-Malow*. *See Osborne by Williams v. Annie Penn Mem'l Hosp.*, Inc., 95 N.C. App. 96, 102, 381 S.E.2d 794, 797 (1989).[3]

The logic behind the application of the minority rule does not apply to South Carolina's guardianship statute. Furthermore, the amici agree with the Indiana Court that it would not apply even if our guardianship statute were amended to impose a duty to prosecute actions. This Court rightly rejected Respondents' request to adopt the minority view in their Opinion.

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[3] "Furthermore, we reject that part of defendant's argument which is based upon *Johnson v. Insurance Co.*, 217 N.C. 139, 7 S.E.2d 475 (1940). Defendant asserts that the *Johnson* case, and cases which follow it, stand for the proposition that exposure to a suit by a guardian for the allotted time would constitute a bar to the action of the ward. Even if that assertion is a correct one, a fact of which we are not wholly convinced, the *Johnson* court was required to construe a different statute, G.S. 407, in order to reach its decision." Note: G.S. 407 no longer exists.

From the perspective of the amici, the decision to have a guardian appointed for an individual is fraught with difficult considerations. While guardianship is sometimes a necessary step, the amici organizations advocate for the least restrictive alternatives when it comes to helping disabled individuals make decisions. Less restrictive alternatives allow the individual to retain autonomy and protect their own rights, to the extent to which they are able.

The amici are concerned that the adoption of the minority rule, espoused by Respondents, could have unintended consequences. The rule could incentivize facilities that care for disabled individuals to encourage the appointment of guardians as a risk-management strategy. The amici feel it is not in the interest of public policy to adopt a rule that guardianship cuts short the tolling statute, as the rule could incentivize facilities to encourage guardianship in order to force the statute of limitations on abuse and neglect actions to run more quickly.

II. Need for Publication

On November 8, this Court joined a majority of states who have held that the appointment of a guardian does not cause a disability to cease for purposes of a tolling statute. However, the Opinion was issued without publication, and with a clear instruction in the heading that "THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(D)(2), SCACR."

This decision not to publish the case leaves potential South Carolina litigants in limbo. In this case, the potential litigants are people who are vulnerable to abuse or neglect because of cognitive limitations that affect their ability to oversee their own affairs. The amici believe there are special circumstances surrounding litigation on behalf of vulnerable people. There are difficulties inherent in discerning the facts of a case of abuse and neglect when the victim may not

be able to easily communicate what happened to him. These difficulties can naturally lead to delays that could jeopardize the outcome of a case if the statute of limitations is not clear.

Organizations who dedicate their time to helping the vulnerable, like the amici, have limited resources. Publication of this case would allow the amici and similarly situated organizations to rely on the tolling statute when evaluating a case for potential representation, and prevent them from expending resources litigating this specific issue repeatedly.

Putting this rule in published form will prevent future errors like that of the Circuit Court in the instant case, promoting judicial economy and consistency.

In the year 2000, an Eighth Circuit case written by Circuit Judge Richard S. Arnold penned a passionate plea for the importance of precedent, even when unpublished. *See Anastasoff v. United States*, 223 F.3d 898 (8th Cir.), *opinion vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000). The case was ultimately vacated as moot, but according to Westlaw has been cited in 91 decisions in states across the country as of this writing, a record which likely reflects frustration experienced by members of the bar when they have insufficient precedent to guide them. The opinion quoted founding father Alexander Hamilton at length, and reviews important public policy considerations:

> In addition to keeping the law stable, this doctrine is also essential, according to Blackstone, for the separation of legislative and judicial power. In his discussion of the separation of governmental powers, Blackstone identifies this limit on the "judicial power," *i.e.*, that judges must observe established laws, as that which separates it from the "legislative" power and in which "consists one main preservative of public liberty." 1 Blackstone, Commentaries *258-59. If judges had the legislative power to "depart from" established legal principles, "the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions...." *Id.* at *259. . . Hamilton concludes that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them...." *Id.* at 510.12

> The Framers thought that, under the Constitution, judicial decisions would become binding precedents in subsequent cases. Hamilton anticipated that the record of federal precedents "must unavoidably swell to a very considerable bulk...." *Id.*

Anastasoff v. United States at 902.

Since *Anastasoff* was decided (and reversed), Alexander Hamilton and Circuit Judge Arnold's views have been vindicated by the adoption of Rule 32.1 of the Federal Rules of Appellate Procedure, which is titled Citing Judicial Opinions and reads:

> (a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:
> (i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and
> (ii) issued on or after January 1, 2007.

Fed. R. App. P. 32.1. While the amici understand that this is a federal rule that does not bind the South Carolina Court of Appeals, the amici respectfully request that this Court consider the important public policy implications behind the rule. Since this Court does not allow citation to or reliance on unpublished cases, the publication of this Opinion would provide useful guidance to the bar and to potential litigants.

Conclusion

South Carolina should adopt the majority view that guardianship does not cause a disability to cease for purposes of the tolling statute. The amici expect to face this statute of limitations issue with future clients, and are concerned that fears related to an unclear statute of limitations will discourage attorneys from undertaking representation of persons who have disabilities. The undersigned respectfully request that this Court place their November 8, 2017 Opinion on the record so that South Carolina attorneys and potential litigants will have needed guidance regarding the viability of potential claims.

Respectfully submitted,

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