

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital, ... Petitioner,

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Tallion, ... Respondents.

APPENDIX

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital,.....

Appellant.

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Taillon, ...

Respondents,

RECORD ON APPEAL

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Certificate of Compliance

Certificate of Counsel

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Columbia/CSA-HS Greater Columbia
Healthcare System, LP d/b/a Providence
Hospital,

Plaintiff,

vs.

The South Carolina Medical Malpractice
Liability Joint Underwriting Association
and Michael P. Tallion,

Defendants.

IN THE COURT OF COMMON PLEAS

C/A No. 07-CP-40-3564

**ORDER GRANTING DEFENDANTS'
MOTIONS TO AMEND PLEADINGS
AND FOR SUMMARY JUDGMENT**

RICHLAND COUNTY
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JEANETTE W. McBRIDE
C.C.P. & G.S.

I. INTRODUCTION

This matter came before the Court on the Defendants' motion to amend pleadings and motion for summary judgment. Upon a review of the materials submitted by the parties and oral argument, the Court grants the Defendants' motion to amend pleading pursuant to Rule 15, SCRPC. The Court also grants the Defendants' motion for summary judgment on the basis that the statute of repose bars the Plaintiff's claims.

II. DISCUSSION

This lawsuit is an action for equitable indemnification, breach of contract and declaratory judgment. Columbia/CSA brought this lawsuit against Dr. Tallion who is an emergency room doctor for Providence Hospital. Columbia/CSA alleges that Dr. Tallion and his insurer the JUA should pay Columbia/CSA for a settlement it reached with Arthur Sharpe and Patricia Sharpe. Dr. Tallion treated Mr. Sharpe in the Providence Hospital emergency room on May 31, 1997. Mr. Sharpe had a heart attack on June 9, 1997. Mr. Sharpe filed suit against Providence Hospital on May 25, 1999. Dr. Tallion was not sued. On June 10, 2004 Providence Hospital settled the

lawsuit with Mr. and Mrs. Sharpe. Providence Hospital sued Dr. Tallion and the JUA on June 7, 2007, more than ten years after Dr. Tallion treated Mr. Sharpe.

A. Motion to Amend

The Defendants have asked the Court for permission to amend their pleadings to add the statute of repose as a defense. Leave of court to amend pleadings "shall be freely given when justice so requires and does not prejudice any other party." Rule 15, SCRPC. "[T]his rule strongly favors amendments, and the court is encouraged to freely grant leave to amend." *Jarrell v. Seaboard Systems R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987).

"In the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion." *Forrester v. Smith & Steele Builders*, 295 S.C. 504, 508, 369 S.E.2d 156, 158 (Ct. App. 1988). "It is the responsibility of a party opposing an amendment to establish prejudice." *Id.* "The prejudice Rule 15 envisions is a lack of notice that a new issue is going to be tried, and a lack of opportunity to refute it." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716-17 (Ct. App. 2005).

The Defendants answered this lawsuit in November 2007 and served discovery. Five months later, the Defendants filed their motion to amend to add the statute of repose as a defense. At the time the Defendants moved to amend, the Plaintiff had not served discovery or responded to the Defendants' discovery. In fact, when the Defendants filed the motion to amend, the Plaintiff had not served discovery, had not responded to discovery, and had made no motions. Therefore, the Plaintiff was not prejudiced in any way by learning of the statute of repose as a defense in April 2008. The Defendants did not move to amend in bad faith nor to cause undue delay. Columbia/CSA will not be prejudiced by the amendment and will have ample notice of

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the new defense as well as opportunity to refute it. The interests of justice require that the Defendants receive leave to amend their pleadings to include the statute of repose as a defense.

B. Statute of Repose

The Defendants are entitled to summary judgment because Columbia/CSA filed its lawsuit after the six year statute of repose expired. The statute of repose for medical malpractice actions is in Code Section 15-3-545(A) which states that:

In any action, . . . to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession must be commenced within three years from the date of 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. (emphasis added).

S.C. Code § 15-3-545(A) (1976).

The treatment giving rise to this lawsuit occurred May 31, 1997 when Dr. Tallion treated Mr. Sharpe at the Providence Hospital emergency room. On June 9, 1997, Mr. Sharpe suffered a heart attack. On May 25, 1999, Mr. Sharpe filed suit against Columbia/CSA. Columbia/CSA did not file this lawsuit until June 7, 2007 – more than ten years after Dr. Tallion treated Mr. Sharpe. The time between the treatment, which occurred on May 31, 1997, and the date this lawsuit was filed, June 7, 2007, is well past the six year maximum deadline set forth in Section 15-3-545(A).

While the statute of repose does not specifically contain language regarding actions for contribution or indemnity, the clear application of the statute and case law in South Carolina and other jurisdictions bars Columbia/CSA's lawsuit. Statutes of repose apply to actions for contribution and indemnification. *See, Florence County School District # 2 v. Interkal, Inc.*, 348

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S.C. 446, 559 S.E.2d 866, (Ct. App. 2002); *Capco of Summerville, Inc. v. J.H. Gayle Construction Company, Inc.*, 368 S.C. 137, 628 S.E.2d 38 (2006).

In *Florence County School District #2*, the School District sued a bleacher manufacturer after settling a claim with a spectator who was injured when the bleachers collapsed. 348 S.C. at 446, 559 S.E.2d at 866. The bleachers were installed in 1971 and earlier. *Id.* at 448, 867. The bleachers collapsed in 1991, and the injured spectator sued the school district. *Id.* The School District settled the lawsuit. It then sued the manufacturer for contribution. *Id.* The special referee found that although the bleacher manufacturer would have been liable, the statute of repose for improvements to real property barred any recovery. *Id.* at 450, 868. The statute of repose for improvements to real property at the time was thirteen years. The School District did not bring the lawsuit within the thirteen year limitation period set forth in the statute. *Id.*

The Court of Appeals upheld the special referee's finding stating that "the Statute of Repose specifically applies to actions for contribution." *Id.* at 452, 869. The court noted that "neighboring jurisdictions have similarly held a statute of repose bars any action for contribution after the statutory time period." *Id.* citing *Standard Fire Ins. Co. v. Kent & Assocs., Inc.*, 232 Ga. App. 419, 501 S.E.2d 858 (1998) (claims for indemnification and contribution were among those contemplated by the legislature when it enacted the statute of repose); *Krasaeath v. Parker*, 212 Ga. App. 525, 441 S.E.2d 868 (1994) (five-year statute of repose for medical malpractice cases barred contribution claim even though suit was timely under the twenty-year statute of limitations governing contribution actions); *New Bern Assocs. v. Celotex Corp.*, 87 N.C. App. 65, 359 S.E.2d 481 (1987) (six-year statute of repose governing actions to recover damages for injuries arising out of defective improvements to real estate property also governs actions for contribution arising out of the improvements). ad
by

Likewise, in *Capco of Summerville v. J.H. Gayle Construction*, 368 S.C. 137, 628 S.E.2d 38 (2006), the South Carolina Supreme Court ruled that the statute of repose barred a claim for contribution. The Supreme Court relied upon the Court of Appeals' decision in *Florence County School District* holding that the statute of repose bars actions for contribution brought after its expiration. The Supreme Court explained as follows:

A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time. *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Id.* at 404, 438 S.E.2d at 243. A statute of repose is "[a] statute barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1451 (8th Ed. 2004). "Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49, 54, n.6 (Minn. 2005) citing *W. Page Keeton, et. al., Prosser and Keeton on the Law of Torts* § 30, p.168 (5th ed. 1984). As noted by the Virginia Supreme Court, "[a] statute of repose differs from a statute of limitations. . . . [T]he expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." *School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325, 327-328 (1987).

368 S.C. 137, 142, 628 S.E.2d 38, 40 (2006). As a result, the Supreme Court affirmed the trial court's ruling that the statute of repose barred the claim for contribution.

The medical malpractice statute of repose requires that "any action . . . to recover damages for any injury to the person arising out of any medical, surgical or dental treatment . . . must be commenced within three years from the date of treatment . . . not to exceed six years from the date of occurrence. . . ." S.C. Code Ann. § 15-3-545(A) (emphasis added). This statute has been consistently held a statute of repose for actions against physicians. See, *Huffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); *Shadwell v. Craigie*, 361 S.C. 492, 608 S.E.2d 567 (Ct. App. 2004); *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000). Thus, Dr.

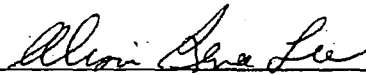
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Tallion and his insurers are entitled to summary judgment because Columbia/CSA sued them well after the statute of repose expired.

III. CONCLUSION

The Court finds that amendment of the Defendants' pleading is proper under Rule 15, SCRPC, and therefore grants the Defendants' Motion to Amend. The Court also grants Defendants' Motion for Summary Judgment because Columbia/CSA's lawsuit is barred by the South Carolina statute of repose for medical malpractice actions.

AND IT IS SO ORDERED.


The Honorable Alison Renee Lee
Fifth Judicial Circuit

Columbia, South Carolina

February 9, 2009

ad
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FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2007-CP-40-3564

Columbia/CSA-Greater Columbia
Healthcare, et al.
PLAINTIFF

SC Medical Malpractice Liability JUA, et al.
DEFENDANT

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 1(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Defendant's Rule 59(e) motion is denied. Rule 15 allows liberal amendment of pleadings. No prejudice has been demonstrated. Section 15-3-545 relates to any action to recover damages for injury to a person for medical treatment. The action for contribution or indemnification seeks to recover damages paid to a person for injury arising out of medical treatment by a practitioner. This action is barred by the statute of repose.

Dated at Columbia, South Carolina, this 11th day of March, 2009.

Alfred Lee
PRESIDING JUDGE

This judgment was entered on the ___ day of March, 2009, and a copy mailed first class this ___ day of March, 2009 to attorneys of record or to parties (when appearing pro se) as follows:

Monteith P. Todd
ATTORNEY(S) FOR THE APPLICANT(S)

James Edward Bradley
ATTORNEY(S) FOR THE RESPONDENT(S)

Jeanette W. McBride
CLERK OF COURT

SCRCP FORM 4 (Revised 5/00)

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APPENDIX_0010

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RICHLAND COUNTY
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JEANETTE W. McBRIDE
Clerk of Court

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND)

Columbia/CSA-HS Greater Columbia
Healthcare System, LP d/b/a Providence
Hospital,

Plaintiff,

vs.

The South Carolina Medical Malpractice
Liability Joint Underwriting Association and
Michael P. Tallion,

Defendants.

Civil Action No.: 07-CP-40-

COMPLAINT

Non-Jury)
(Declaratory Judgment)

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BARBARA A. SCOTT
C.C.C. & G.S.

RICHLAND COUNTY
FILED

The Plaintiff, complaining of the Defendants, will respectfully show unto the Court as follows:

THE PARTIES

1. This is a declaratory judgment action brought pursuant to S.C. Code Ann. §15-53-10 et seq. (1976, as amended) to determine that Plaintiff is entitled to indemnification from Defendants.
2. The Plaintiff operated Providence Hospital in Richland County, South Carolina.
3. The South Carolina Medical Malpractice Liability Joint Underwriting Association (JUA) is a South Carolina Corporation writing policies of insurance for physicians and, upon information and belief, insured Michael P. Tallion at all times referred to below. It owns policies and does business in Richland County.

4. The Defendant, Michael P. Tallion, is a physician practicing emergency medicine and contracted with Plaintiff to provide professional services at Providence Hospital.

5. Venue for this action is appropriate in Richland County, South Carolina.

FACTUAL ALLEGATIONS

6. The Plaintiff and Michael P. Tallion entered into a professional services agreement (Agreement) whereby Providence Hospital contracted with Michael P. Tallion to provide emergency medicine services at its facilities.

7. Under the Agreement, Michael P. Tallion agreed to keep and maintain professional liability insurance coverage for himself and agreed to provide insurance coverage that would provide Plaintiff a defense for claims arising solely on the basis of vicarious liability or ostensible agency or apparent agency.

8. The Agreement further provided that each party specifically reserved any common law right of indemnity which either party may have against the other.

9. In order for Michael P. Tallion to be credentialed and approved as a medical provider of emergency services at Providence Hospital's emergency department, he represented to Plaintiff that he was insured for liability by the South Carolina Medical Malpractice Liability Joint Underwriting Association (JUA) and the South Carolina Patients Compensation Fund. He documented the representation by furnishing Certificates of Coverage to Plaintiff. Plaintiff was entitled to rely upon his representation that he was covered for professional liability by JUA.

10. On May 25, 1999, Arthur and Patricia Sharpe filed a lawsuit (the Sharpe lawsuit) against Columbia/CSA-HS Greater Columbia Area Healthcare System, LP d/b/a Providence Hospital alleging that Arthur Sharpe received treatment as a patient in the Providence Hospital

emergency room on May 31, 1997 and had a heart attack on June 9, 1997 as a result of the failure of the emergency department physician to correctly diagnose and treat his condition. A copy of the Complaint is attached as Exhibit A and incorporated herein by reference.

11. The only allegations made against Providence Hospital in the Sharpe lawsuit and in subsequent expert testimony were to the effect that the emergency physicians, S. Michael Hayes and Michael P. Tallion, failed to make the proper diagnosis.

12. The subsequent testimony of Plaintiff's experts did not identify alleged acts or omissions on the part of any of the staff at Providence Hospital other than the Defendant. The demand for indemnification by Plaintiff was denied by Defendants through its agent, Marsh.

13. The Sharpe lawsuit was settled by Plaintiff and a Release executed on June 10, 2004.

14. The only theory of liability as to Providence Hospital in the Sharpe lawsuit was based upon the holding of the South Carolina Supreme Court in Simmons v. Tuomey Hospital.

15. During the Sharpe lawsuit, the Sharpes did not present any evidence of any negligent or otherwise wrongful act or omission on the part of the Providence Hospital employees.

16. The alleged liability of Providence Hospital in the Sharpe lawsuit was based solely on the alleged acts or omissions of the emergency department physician.

17. Michael P. Tallion is a qualified emergency physician.

18. Plaintiff was not negligent in their selection and approval of Defendant Tallion to furnish medical services as an emergency physician in Providence Hospital's emergency department.

19. Sharpe's attorney stipulated to the Court that they were not alleging any act or omission on the part of Providence Hospital and that Sharpe was seeking to hold the hospital liable solely under a theory of vicarious liability or ostensible agency.

20. But for Michael P. Tallion's alleged failure to diagnose the heart condition in Sharpe or refer him to a cardiologist, Providence Hospital would not have been exposed to the lawsuit by Sharpe.

21. The settlement of the Sharpe lawsuit was reasonable under the facts of the case and the testimony presented.

22. The settlement of the Sharpe lawsuit was bonafide.

23. The settlement of the Sharpe lawsuit was without fraud or collusion by the parties.

24. Providence Hospital acted prudently and reasonably in deciding to settle the Sharpe lawsuit.

25. Providence Hospital, through its attorney, demanded indemnification from Defendants and this was denied.

26. Defendant Tallion, through his liability insurance carrier, JUA, has refused to indemnify Providence Hospital for its settlement contribution.

FOR A FIRST CAUSE OF ACTION

27. Plaintiff realleges the allegations set forth above.

28. Plaintiff's decision to settle the Sharpe lawsuit was a reasonable means of protecting its interest and limiting its exposure.

29. A sufficient special relationship exists between Providence Hospital and the Defendant Michael P. Tallion and Defendant JUA to support a claim by the hospital for equitable

indemnity.

30. The settlement paid in the Sharpe lawsuit by Plaintiff was reasonable in light of the Sharpes' alleged damages and the risk and extent of the hospital's exposure if the jury had been allowed to decide the issue of liability and subsequent damages.

31. Plaintiff is entitled to equitable indemnity from the Defendants for its payment of the settlement and prejudgment interest since the date of payment, June 10, 2004.

FOR A SECOND CAUSE OF ACTION

32. Plaintiff and Defendant Michael P. Tallion entered into the Agreement, which was in effect on May 31, 1997.

33. Pursuant to the Agreement, Defendant Michael P. Tallion agreed to purchase professional liability insurance and that such coverage would provide Plaintiff with a defense for claims arising solely on the basis of vicarious liability or ostensible agency or apparent agency for the acts or inactions of Defendant Tallion.

34. Defendants represented to Plaintiff that such coverage had been obtained from the South Carolina Medical Malpractice Joint Underwriting Association and the South Carolina Patients Compensation Fund.

35. Plaintiff made timely and proper demand upon Defendants for indemnification regarding the Sharpe lawsuit but Defendants failed and refused to indemnify Plaintiff.

36. Defendants breached the terms and provisions of the Agreement by failing to obtain professional liability coverages that provided Plaintiff with "... a defense for claims arising solely on the basis of vicarious liability or ostensible or apparent agency, for the acts or inaction of Contractor and/or Contractor's Representatives ... such insurance shall provide

coverage in the amount of \$100,000.00 per occurrence and \$300,000.00 in the aggregate and is a member of the South Carolina Patients Fund which provides coverage as authorized by the statute and is agreed that such coverages are reasonably acceptable to the facility."

37. Following Defendant's failure to provide coverage as required, Plaintiff settled the Sharpe lawsuit and incurred costs as a result of Defendant's breach of contract.

38. Plaintiff is entitled to recover damages for the breach of contract in the amount of the settlement paid to settle the Sharpe lawsuit, and prejudgment interest since the date of payment of the settlement amount from June 10, 2004.

FOR A THIRD CAUSE OF ACTION

39. The JUA is an association created by S.C. Code Ann. §38-79-110 et seq. and issued policies of insurance to Defendant Tallion.

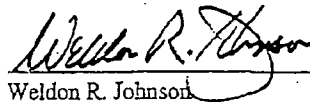
40. The policy issued to Defendant Tallion by JUA provided liability coverage to Defendant for the matters alleged above in the first cause of action and in the second cause of action.

41. JUA, through its agent, Marsh, has denied Plaintiff's claim for indemnification.

42. Plaintiff is entitled to payment by JUA for its indemnification claims against Defendant Tallion and Defendant Tallion is covered by the policy issued to him by JUA for the matters alleged above.

Wherefore, Plaintiff petitions the Court to inquire into these matters and issue its judgment on behalf of Plaintiff against the Defendants in an amount sufficient to compensate the Plaintiff for its actual damages, for the cost of this action, for prejudgment interest and such additional relief as the Court deems appropriate.

Barnes, Alford, Stork & Johnson, LLP



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Post Office Box 8448
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(803)799-1111
Attorney for Plaintiff

June 5, 2007

EXHIBIT A

RoA 000015

APPENDIX_0018

99CP401802

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

ARTHUR SHARPE (a/k/a Arthur Lee
Sharpe, Jr.) and PATRICIA GAIL
SHARPE,

Plaintiffs,

vs.

COLUMBIA-CSA/HS GREATER
COLUMBIA AREA HEALTH CARE
SYSTEM, L.P., d/b/a PROVIDENCE
HOSPITAL, and MICHAEL HAYES,
M.D.,

Defendants

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 99-CP-40-___

SUMMONS FOR RELIEF

(Medical Malpractice)

(Jury Trial Requested)

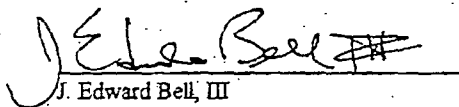
99 MAY 25 AM 8:54
BARBARA A. SCOTT
C.C.C. & C.S.

FILED

TO: THE DEFENDANTS ABOVE NAMED.

YOU ARE HEREBY SUMMONED and required to answer the complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber at his offices at 26 North Main Street, Post Office Box 460, Sumter, South Carolina 29151-0460, within thirty (30) days after the service hereof, exclusive of the date of service; and upon your failure to do so, judgment by default will be rendered against you for the relief demanded in the complaint.

BELL & MOORE, P. A.



J. Edward Bell, III
26 North Main Street
Post Office Box 460
Sumter, SC 29151-0460

ATTORNEYS FOR THE PLAINTIFFS
(803) 778-7531.

May 19, 1999

PH 00009

RoA 000016

APPENDIX_0019

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

ARTHUR SHARPE (a/k/a Arthur Lee
Sharpe, Jr.) and PATRICIA GAIL
SHARPE,

Plaintiffs,

vs.

COLUMBIA-CSA/HS GREATER
COLUMBIA AREA HEALTH CARE
SYSTEM, L.P., d/b/a PROVIDENCE
HOSPITAL, and MICHAEL HAYES,
M.D.,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
) CIVIL ACTION NO. 99-CP-40-__

COMPLAINT

(Medical Malpractice)
(Jury Trial Requested)

99 MAY 25 AM 8:54
BANKS A. SCOTT
C.C. & G.S.

FILED

The plaintiffs, Arthur Sharpe (a/k/a Arthur Lee Sharpe, Jr.) and Patricia Gail Sharpe, complaining of the defendants, Columbia-CSA/HS Greater Columbia Area Health Care System, L.P., d/b/a Providence Hospital, and Michael Hayes, M.D., would respectfully show unto this Honorable Court:

STATEMENT OF FACTS

1. The plaintiffs are husband and wife and citizens and residents of the County of Lexington, State of South Carolina, and at all times hereinafter mentioned the plaintiff Arthur Sharpe had a doctor-patient relationship with the defendants Columbia-CSA/HS Greater Columbia Area Health Care System, L.P., d/b/a Providence Hospital, and Michael Hayes, M.D.

2. The defendant, Columbia-CSA/HS Greater Columbia Area Health Care System, L.P., d/b/a Providence Hospital (hereinafter referred to as defendant "hospital"), upon information and belief, is a hospital corporation organized and existing under the laws of the State of South Carolina and carries on substantial business within and throughout the County of Richland, State of South

PH 00010

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APPENDIX_0020

Carolina, and at all times relevant herein had a doctor-patient relationship with the plaintiff Arthur Sharpe.

2. The defendant, Michael Hayes, M.D. (hereinafter referred to as defendant "Hayes"), upon information and belief, is a citizen and resident of the County of Richland, State of South Carolina, and at all times relevant herein was acting individually and as an employee of the defendant hospital, had a doctor-patient relationship with the plaintiff Arthur Sharpe.

3. In the early morning hours of May 31, 1997, the plaintiff Arthur Sharpe presented himself to the defendant hospital's emergency room with symptoms of a heart attack.

4. The defendant hospital and the defendant Hayes failed to properly treat and care for the plaintiff and diagnosed him as having reflux. He was released and discharged from the emergency room of Providence.

5. On the 9th day of June, 1997, Mr. Sharpe was admitted to Lexington Medical Center where he was diagnosed as having had a heart attack with resulting severe muscle damage.

6. As a direct and proximate result of the defendants' actions, the plaintiff Mr. Sharpe has suffered severe and permanent damage to his heart and other damages.

FOR A FIRST CAUSE OF ACTION

(Negligence)

7. The factual allegations above are made a part of this First Cause of Action through incorporation by reference.

8. The above set forth incident and the resulting injuries and damages to the plaintiff's heart were caused by the negligent, grossly negligent, reckless, willful and wanton acts of the defendants, and each of them, in one, more or all of the following particulars:

(a) in failing to care for and treat the plaintiff;

PH 00011

RoA 000018

APPENDIX_0021

- (b) in failing to properly diagnose the plaintiff's true condition;
- (c) in misdiagnosing the plaintiff;
- (d) in failing to properly medicate the plaintiff;
- (e) in discharging the plaintiff prior to an appropriate diagnosis;
- (f) in failing to follow the standard protocol for presumed heart attack;
- (g) in failing to treat the plaintiff after appropriate informed consent; and
- (h) in failing to give the plaintiff proper follow-up directions.

9. As a direct and proximate result of the aforementioned acts on behalf of the defendant Hayes, the plaintiff Arthur Sharpe has been injured and damaged in ACTUAL, CONSEQUENTIAL and PUNITIVE damages, and as a direct and proximate result of the aforementioned acts on behalf of the defendant hospital, the plaintiff Arthur Sharpe has been injured and damaged in ACTUAL and CONSEQUENTIAL damages.

FOR A SECOND CAUSE OF ACTION

(Loss of Consortium)

10. The factual allegations above and the allegations of the First Cause of Action, are made a part of this Second Cause of Action through incorporation by reference.

11. The plaintiff Patricia Gail Sharpe is the wife of the plaintiff Arthur Sharpe, and the above set forth incident and Arthur Sharpe's resulting injuries and damages were proximately caused by the defendants' actions in the above set forth cause of action and, as a result of the injuries suffered by the plaintiff Arthur Sharpe, the plaintiff Patricia Gail Sharpe has been injured and damaged in that she has lost the services of her husband, his companionship, his society, his conjugal affection, and other related damages to the marital and family relationship.

PH 00012

RoA 000019

APPENDIX_0022

12. That as a direct and proximate result of the injuries sustained by the plaintiff

Arthur Sharpe, the plaintiff Patricia Gail Sharpe has suffered ACTUAL AND CONSEQUENTIAL DAMAGES.

WHEREFORE, plaintiffs pray judgment against the defendants for ACTUAL and CONSEQUENTIAL DAMAGES, said amount to be determined by the jury which is fair, just and reasonable and that which will completely and lawfully compensate the plaintiffs for any and all injuries both presently and in the future, and plaintiff Arthur Sharpe respectfully requests that this Honorable Jury inquire into the facts and circumstances surrounding this matter and determine whether or not PUNITIVE DAMAGES as to the defendant Hayes are appropriate and if appropriate to so award PUNITIVE DAMAGES in an amount which will be in accordance with the law and evidence in this case, together with the costs of this action and such other and further relief as this court may deem fit, just and proper.

BELL & MOORE, P. A.


J. Edward Bell, III
26 North Main Street
Post Office Box 460
Sumter, SC 29151-0460
ATTORNEYS FOR THE PLAINTIFFS
(803) 778-6531.

May 19, 1999

PH 00013

RoA 000020

APPENDIX_0023

11/2

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Columbia/CSA-HS Greater Columbia
Healthcare System, LP d/b/a Providence
Hospital,

Plaintiff,

vs.

The South Carolina Medical Malpractice
Liability Joint Underwriting Association
and Michael P. Tallion,

Defendants.

C/A No: 07-CP-40-3564

ANSWER

(JURY TRIAL REQUESTED)

The Defendants respond to the Complaint as follows:

FOR A FIRST DEFENSE

1. Unless specifically admitted in this Answer, the Defendants deny each and every allegation of the Complaint.
2. The Defendants deny the allegations of paragraphs 1 and 2.
3. In response to paragraph 3, the Defendants admit that the South Carolina Medical Malpractice Liability Joint Underwriting Association (JUA) is a South Carolina entity writing policies of insurance for physicians which insured Michael P. Tallion. The Defendants deny the remaining allegations of paragraph 3.
4. In response to paragraph 4, the Defendants admit that Michael P. Tallion is a physician practicing emergency medicine. The Defendants deny the remaining allegations of paragraph 4.
5. The Defendants deny the allegations of paragraph 5.

6. In response to paragraph 6, the Defendants admit that the Defendant Michael P. Tallion entered into an agreement for emergency room services. The Defendants deny the remaining allegations of paragraph 6.

7. In response to paragraph 7, the Defendants admit Michael P. Tallion agreed to keep and maintain professional liability insurance coverage. The Defendants deny the remaining allegations of paragraph 7.

8. In response to paragraph 8, the Defendants refer to the agreement. The Defendants admit such allegations as are consistent with that agreement and deny such allegations as are inconsistent with that agreement.

9. In response to paragraph 9, the Defendants admit that Michael P. Tallion was insured by the JUA. The Defendants deny the remaining allegations of paragraph 9.

10. In response to paragraph 10, the Defendants admit that Arthur and Patricia Sharpe filed a lawsuit against Columbia/CSA-HS Greater Columbia Area Healthcare System, LP d/b/a Providence Hospital. The Defendants admit that a copy of that complaint is attached to the Complaint in this lawsuit. The Defendants deny the remaining allegations of this paragraph.

11. The Defendants deny the allegations of paragraphs 11, 12, 13, 14, 15, and 16.

12. The Defendants admit the allegations of paragraph 17.

13. In response to paragraph 18, the Defendants admit that Michael P. Tallion is a qualified emergency room physician and that the hiring of Dr. Tallion to perform emergency room services would not constitute negligence. The Defendants deny the remaining allegations of paragraph 18.

14. The Defendants deny the allegations of paragraphs 19, 20, 21, 22, 23, 24, 25, and 26.
15. In response to paragraph 27, the Defendants reallege their previous allegations and denials.
16. The Defendants deny the allegations of paragraphs 28, 29, 30, and 31.
17. In response to paragraph 32, Defendant Tallion admits to signing an agreement. The Defendants deny the remaining allegations of paragraph 32.
18. In response to paragraph 33, the Defendants admit that Defendant Tallion agreed to purchase professional liability insurance. The Defendants deny the remaining allegations of paragraph 33.
19. In response to paragraph 34, the Defendants admit that Defendant Tallion purchased insurance from the South Carolina Medical Malpractice Liability Joint Underwriting Association. The Defendants deny the remaining allegations of paragraph 34.
20. The Defendants deny the allegations of paragraphs 35, 36, 37, and 38.
21. The Defendants admit the allegations of paragraph 39.
22. The Defendants deny the allegations of paragraphs 40, 41, and 42.

FOR A SECOND DEFENSE

23. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.
24. Any settlement entered into by the Plaintiff or other parties was not a reasonable settlement after a proper defense of the case. Therefore, the Defendants are not obligated to make any sort of payment based upon the unreasonable settlement of the underlying lawsuit.

FOR A THIRD DEFENSE

25. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

26. As no judgment has ever been entered against either the Plaintiff or any other party, there is no duty to pay and the Defendants are not liable for any amounts voluntarily paid without a judgment.

FOR A FOURTH DEFENSE

27. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

28. To the extent that *Osborne v. Adams*, 550 S.E.2 319 (S.C. 2001), sets forth the public policy of South Carolina, the Plaintiff should not be allowed to go forward with this case as it is in direct violation of South Carolina public policy which requires that hospitals assume responsibility for injuries to patients while in the hospital's care.

FOR A FIFTH DEFENSE

29. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

30. The Plaintiff in this action was not the party making any payments to the alleged injured medical malpractice plaintiff. As a result, the Plaintiff in this case does not have any claim against these Defendants for money paid as it did not make any payments itself.

FOR AN SIXTH DEFENSE

31. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

32. The Plaintiff comes to this action with unclean hands for its actions as alleged above, its own negligence, and its actions involving the defense of the Sharpe lawsuit. For this reason, this action should be dismissed.

FOR A SEVENTH DEFENSE

33. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

34. The Plaintiff has unreasonably delayed in asserting claims in this matter the prejudice of the Defendants, and the Defendants plead laches as a complete and total defense in this matter.

FOR AN EIGHTH DEFENSE

35. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

36. This action was brought outside of the relevant statute of limitations, and the Defendants plead the statute of limitations as a complete defense in this matter.

FOR AN NINTH DEFENSE

37. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

38. With regard to any settlement made in this matter, the Plaintiff acted as a volunteer in paying the amounts paid. As a result, the Plaintiff does not have any right to seek contribution or indemnification from these Defendants.

FOR A TENTH DEFENSE

39. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

40. The Complaint fails to make a claim upon which relief may be granted.

FOR A ELEVENTH DEFENSE

41. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

42. The Plaintiff has breached the contract alleged in the pleadings between the parties by bringing this lawsuit in violation of the alternate dispute resolution terms of the contract. As a result, the Defendants are entitled to have the lawsuit dismissed with prejudice.

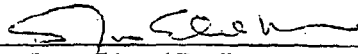
FOR A TWELFTH DEFENSE

43. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

44. The Defendant JUA has no relationship whatsoever with the Plaintiff in this case. For this reason Defendant JUA has no special relationship or duty to the Plaintiff, and this case must be dismissed with prejudice.

WHEREFORE, the Defendants having responded to the Complaint ask that the Complaint be dismissed and for such other relief as the Court deems fair and equitable.

MOORE, TAYLOR & THOMAS, P.A.

By: 

James Edward Bradley
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Attorneys for Defendants

West Columbia, South Carolina

November 1, 2007

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
) CIVIL ACTION NO. 99-CP-40-____

ARTHUR SHARPE (a/k/a Arthur Lee
Sharpe, Jr.) and PATRICIA GAIL
SHARPE,

Plaintiffs,

vs.

COLUMBIA-CSA/HS GREATER
COLUMBIA AREA HEALTH CARE
SYSTEM, L.P., d/b/a PROVIDENCE
HOSPITAL, and MICHAEL HAYES,
M.D.,

Defendants.

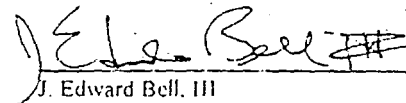
SUMMONS FOR RELIEF
(Medical Malpractice)
(Jury Trial Requested)

99 MAY 23 AM 8:54
J. SCOTT
CLERK, U.S.

TO: THE DEFENDANTS ABOVE NAMED.

YOU ARE HEREBY SUMMONED and required to answer the complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint on the subscriber at his offices at 26 North Main Street, Post Office Box 460, Sumter, South Carolina 29151-0460, within thirty (30) days after the service hereof, exclusive of the date of service; and upon your failure to do so, judgment by default will be rendered against you for the relief demanded in the complaint.

BELL & MOORE, P. A.



J. Edward Bell, III
26 North Main Street
Post Office Box 460
Sumter, SC 29151-0460

ATTORNEYS FOR THE PLAINTIFFS
(803) 778-7531

May 19, 1999

RoA 000028

APPENDIX_0031

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

ARTHUR SHARPE (a/k/a Arthur Lee
Sharpe, Jr.) and PATRICIA GAIL
SHARPE,

Plaintiffs,

vs.

COLUMBIA-CSA/HS GREATER
COLUMBIA AREA HEALTH CARE
SYSTEM, L.P., d/b/a PROVIDENCE
HOSPITAL, and MICHAEL HAYES,
M.D.,

Defendants.

) IN THE COURT OF COMMON PLEAS

) FIFTH JUDICIAL CIRCUIT

) CIVIL ACTION NO. 99-CP-40-_____

COMPLAINT

(Medical Malpractice)

(Jury Trial Requested)

59 MAR 25 AM 8:54
CLERK OF COURT
S.C.

The plaintiffs, Arthur Sharpe (a/k/a Arthur Lee Sharpe, Jr.) and Patricia Gail Sharpe, complaining of the defendants, Columbia-CSA/HS Greater Columbia Area Health Care System, L.P., d/b/a Providence Hospital, and Michael Hayes, M.D., would respectfully show unto this Honorable Court:

STATEMENT OF FACTS

1. The plaintiffs are husband and wife and citizens and residents of the County of Lexington, State of South Carolina, and at all times hereinafter mentioned the plaintiff Arthur Sharpe had a doctor-patient relationship with the defendants Columbia-CSA/HS Greater Columbia Area Health Care System, L.P., d/b/a Providence Hospital, and Michael Hayes, M.D.

2. The defendant, Columbia-CSA/HS Greater Columbia Area Health Care System, L.P., d/b/a Providence Hospital (hereinafter referred to as defendant "hospital"), upon information and belief, is a hospital corporation organized and existing under the laws of the State of South Carolina and carries on substantial business within and throughout the County of Richland, State of South

RoA 000029

APPENDIX_0032

Carolina, and at all times relevant herein had a doctor-patient relationship with the plaintiff Arthur Sharpe.

2. The defendant, Michael Hayes, M.D. (hereinafter referred to as defendant "Hayes"), upon information and belief, is a citizen and resident of the County of Richland, State of South Carolina, and at all times relevant herein was acting individually and as an employee of the defendant hospital, had a doctor-patient relationship with the plaintiff Arthur Sharpe.

3. In the early morning hours of May 31, 1997, the plaintiff Arthur Sharpe presented himself to the defendant hospital's emergency room with symptoms of a heart attack.

4. The defendant hospital and the defendant Hayes failed to properly treat and care for the plaintiff and diagnosed him as having reflux. He was released and discharged from the emergency room of Providence.

5. On the 9th day of June, 1997, Mr. Sharpe was admitted to Lexington Medical Center where he was diagnosed as having had a heart attack with resulting severe muscle damage.

6. As a direct and proximate result of the defendants' actions, the plaintiff Mr. Sharpe has suffered severe and permanent damage to his heart and other damages.

FOR A FIRST CAUSE OF ACTION

(Negligence)

7. The factual allegations above are made a part of this First Cause of Action through incorporation by reference.

8. The above set forth incident and the resulting injuries and damages to the plaintiff's heart were caused by the negligent, grossly negligent, reckless, willful and wanton acts of the defendants, and each of them, in one, more or all of the following particulars:

(a) in failing to care for and treat the plaintiff;

RoA 000030

APPENDIX_0033

- (b) in failing to properly diagnose the plaintiff's true condition;
- (c) in misdiagnosing the plaintiff;
- (d) in failing to properly medicate the plaintiff;
- (e) in discharging the plaintiff prior to an appropriate diagnosis;
- (f) in failing to follow the standard protocol for presumed heart attack;
- (g) in failing to treat the plaintiff after appropriate informed consent; and
- (h) in failing to give the plaintiff proper follow-up directions.

9. As a direct and proximate result of the aforementioned acts on behalf of the defendant Hayes, the plaintiff Arthur Sharpe has been injured and damaged in ACTUAL, CONSEQUENTIAL and PUNITIVE damages, and as a direct and proximate result of the aforementioned acts on behalf of the defendant hospital, the plaintiff Arthur Sharpe has been injured and damaged in ACTUAL and CONSEQUENTIAL damages.

FOR A SECOND CAUSE OF ACTION

(Loss of Consortium)

10. The factual allegations above and the allegations of the First Cause of Action, are made a part of this Second Cause of Action through incorporation by reference.

11. The plaintiff Patricia Gail Sharpe is the wife of the plaintiff Arthur Sharpe, and the above set forth incident and Arthur Sharpe's resulting injuries and damages were proximately caused by the Defendants' actions in the above set forth cause of action and, as a result of the injuries suffered by the plaintiff Arthur Sharpe, the plaintiff Patricia Gail Sharpe has been injured and damaged in that she has lost the services of her husband, his companionship, his society, his conjugal affection, and other related damages to the marital and family relationship.

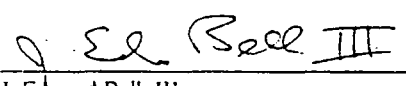
RoA 000031

APPENDIX_0034

12. That as a direct and proximate result of the injuries sustained by the plaintiff Arthur Sharpe, the plaintiff Patricia Gail Sharpe has suffered ACTUAL AND CONSEQUENTIAL DAMAGES.

WHEREFORE, plaintiffs pray judgment against the defendants for ACTUAL and CONSEQUENTIAL DAMAGES, said amount to be determined by the jury which is fair, just and reasonable and that which will completely and lawfully compensate the plaintiffs for any and all injuries both presently and in the future, and plaintiff Arthur Sharpe respectfully requests that this Honorable Jury inquire into the facts and circumstances surrounding this matter and determine whether or not PUNITIVE DAMAGES as to the defendant Hayes are appropriate and if appropriate to so award PUNITIVE DAMAGES in an amount which will be in accordance with the law and evidence in this case, together with the costs of this action and such other and further relief as this court may deem fit, just and proper.

BELL & MOORE, P. A.


J. Edward Bell, III
26 North Main Street
Post Office Box 460
Sumter, SC 29151-0460
ATTORNEYS FOR THE PLAINTIFFS
(803) 778-6531

May 19, 1999

RoA 000032

APPENDIX_0035

STATE OF SOUTH CAROLINA)

IN THE CIRCUIT COURT)

COUNTY OF RICHLAND)

Case No.: 99-CP-40-1802

Arthur Sharpe (a/k/a Arthur Lee Sharpe, Jr.))
and Patricia Gail Sharpe,)

Plaintiffs,)

vs.)

ANSWER OF DEFENDANT
PROVIDENCE HOSPITAL

Columbia-CSA/HS Greater Columbia)
Healthcare System L.P. d/b/a Providence)
Hospital and Michael Hayes, M.D.,)

Defendants.)

Defendant, Columbia-CSA/HS Greater Columbia Healthcare System, L.P. d/b/a Providence

Hospital ("Providence") answering the Complaint herein will respectfully show the Court that:

FOR A FIRST DEFENSE

1. Defendant Providence denies each and every allegation hereinafter not expressly admitted.
2. Answering Paragraph 1 of the Complaint, Defendant Providence denies that it had a doctor-patient relationship with Arthur Sharpe. Defendant Providence lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 1 of the Complaint and, therefore, denies the same.
3. Answering the allegations of Paragraph 2 of the Complaint, Defendant Providence is incorrectly designated as Columbia-CSA/HS Greater Columbia Area Health Care System, L.P. Defendant Providence further admits its correct name is Columbia-CSA/HS Greater Columbia Healthcare System, L.P. d/b/a Providence Hospital and that it operates Providence Hospital in the

RoA 000033

APPENDIX_0036

County of Richland, State of South Carolina. Defendant Providence denies that it had a doctor-patient relationship with Arthur Sharpe.

4. Answering Paragraph 2 (the third paragraph, incorrectly enumerated as 2) of the Complaint, Defendant Providence denies that Michael Hayes, M.D. was acting as an employee of Providence. Defendant Providence lacks knowledge or information sufficient to form a belief as to the remaining allegations of Paragraph 2 of the Complaint and, therefore, denies the same.

5. Answering Paragraph 3 of the Complaint, Defendant Providence admits that Arthur Sharpe was treated in the Emergency Room at Providence Hospital on May 31, 1997, and released. Defendant Providence denies the remaining allegations of Paragraph 3 of the Complaint.

6. Answering Paragraph 4 of the Complaint, Defendant Providence admits that Arthur Sharpe was diagnosed with reflux and was released from the Emergency Room on May 31, 1997. Defendant Providence denies the remaining allegations of Paragraph 4 of the Complaint.

7. Defendant Providence lacks knowledge or information sufficient to form a belief as to the allegations of Paragraph 5 of the Complaint and, therefore, denies the same.

8. Defendant Providence denies the allegations of Paragraph 6 of the Complaint.

FOR A FIRST CAUSE OF ACTION
(Negligence)

9. Answer the allegations of Paragraph 7 of the Complaint. Defendant Providence incorporates herein by reference the allegations of Paragraphs 1 - 8, inclusive, of this Answer as if set forth verbatim.

10. Defendant Providence denies the allegations of Paragraphs 8 and 9 of the Complaint.

FOR A SECOND CAUSE OF ACTION
(Loss of Consortium)

11. Answer the allegations of Paragraphs 9 and 10 of the Complaint, Defendant Providence incorporates herein by reference the allegations of Paragraphs 1 - 10, inclusive, of this Answer as if set forth verbatim.

12. Defendant Providence denies the allegations of paragraphs 11 and 12 of the Complaint.

FOR A SECOND DEFENSE

13. The Complaint fails to allege facts sufficient to constitute a cause of action as to Defendant Providence.

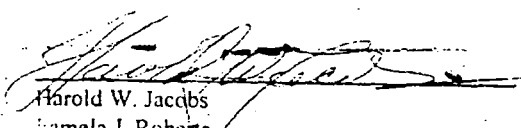
FOR A THIRD DEFENSE

14. Any injury or damages suffered by the Plaintiff, as a result of the matters alleged in the Complaint were the direct and proximate cause of one or more independent, efficient, or intervening causes which Defendant Providence affirmatively pleads as a bar to this action.

FOR A FOURTH DEFENSE

15. Any injury or damages sustained by the Plaintiff as a result of the matters alleged in the Complaint were due to the Plaintiff's physical infirmities and were the result of a natural disease process, and Defendant Providence pleads such physical infirmities and natural disease as a complete bar to this action.

WHEREFORE, Defendant prays that the Complaint be dismissed with prejudice and judgment be entered on its behalf, with costs, and for such other and further relief as the Court deems just and proper.



Harold W. Jacobs

Patricia J. Roberts

NEXSEN PRUET JACOBS & POLLARD, LLP

1441 Main Street, Suite 1500

Post Office Drawer 2426

Columbia, South Carolina 29202

(803) 771-8900

Attorneys for Defendant Columbia-CSA/HS

Greater Columbia Healthcare System, L.P. d/b/a

Providence Hospital

July 24, 1999

Columbia, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
COUNTY OF, RICHLAND) 2007-CP-40-3564
 2006-CP-40-2930

COLUMBIA/CSA-HS GREATER)
COLUMBIA HEALTHCARE SYSTEM)
LP D/B/A PROVIDENCE HOSPITAL)

PLAINTIFF,)

VS.)

TRANSCRIPT OF RECORD

THE SOUTH CAROLINA MEDICAL)
MALPRACTICE LIABILITY JOINT)
UNDERWRITING ASSOCIATION AND)
MICHAEL P. TALLION AND DONALD)
MOORE,)

DEFENDANTS.)

NOVEMBER 7, 2008
COLUMBIA, SOUTH CAROLINA

B E F O R E:

THE HONORABLE ALISON RENEE LEE, JUDGE

A P P E A R A N C E S:

MONTEITH P. TODD, ESQUIRE
WELDON JOHNSON, ESQUIRE
ATTORNEYS FOR THE PLAINTIFF

JAMES EDWARD BRADLEY, ESQUIRE
ATTORNEY FOR THE DEFENDANT

BONNIE H. KELLY
CIRCUIT COURT REPORTER

RoA 000037

APPENDIX_0040

I N D E X

	<u>WITNESS/DESCRIPTION</u>	<u>PAGE NO.</u>
4	MOTION TO COMPEL/MR. BRADLEY	7
5	RESPONSE/MR. TODD	13
6	RESPONSE/MR. JOHNSON	20
7	DECISION OF THE COURT	27
8	MOTION TO AMEND/MR. BRADLEY	33
9	RESPONSE/MR. TODD	43
10	DECISION OF THE COURT	53
11	CERTIFICATE PAGE	56

RoA 000038

APPENDIX_0041

EXHIBITS

NO.	DESCRIPTION	I.D.	EVID.
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NO EXHIBITS WERE INTRODUCED DURING THIS PROCEEDING

RoA 000039

APPENDIX_0042

1 THE COURT: Good morning. We are here on two cases.
2 There are separate motions on them, and so, let's -- and I
3 know that some of the basic factual information will kind
4 of overlap a little bit in terms of how the cases came to
5 be in court. But let's take them up one at a time.

6 What I'd like to take up first is the one that I
7 consider to be the easier of the two and that would be
8 *Columbia Healthcare -- Columbia CSA vs. JUA and Donald*
9 *Moore*. That's Docket No. 06-CP-40-02930. The plaintiff is
10 represented by Monty Todd and I -- slash, Weldon Johnson,
11 and the defense is represented by Ward Bradley.

12 And I have received your memoranda; I have read them.
13 I've looked at the cases. I noticed in this -- in the --
14 the *Moore* case that there's also a motion to compel that I
15 couldn't tell whether that's ever been heard or not. It
16 appears that the motion to compel is still similar in
17 nature to the -- to the other case. I didn't know whether
18 y'all were aware of that or whether that's been taken care
19 of and there's just not an order in the file.

20 MR. TODD: Let me tell you my understanding and it may
21 be -- and I may be confused, which wouldn't be the first
22 time --

23 THE COURT: Okay.

24 MR. TODD: -- is that in the *Moore* case, there's a
25 motion to compel; and in the *Tallion* case, there's a motion

RoA 000040

APPENDIX_0043

1 to amend to add the statute of repose.

2 THE COURT: You're right, because that's what -- yeah.
3 You're -- you're absolutely right. But I also saw -- maybe
4 I'm -- I'm just totally confused.

5 MR. TODD: Well, I think ---

6 THE COURT: That's correct. There were -- there were
7 -- I guess there were two motions to compel in -- in the
8 Moore case, I think. And the primary issue was about
9 basically documents from Mr. Johnson's file, along with
10 some other information pertinent to the underlying medical
11 malpractice case, right?

12 MR. TODD: Yes, ma'am. I think the documents that are
13 in issue was Mr. Johnson's billing records, Mr. Johnson's
14 file, and the adjuster for the insurance company's file. I
15 believe those are the documents that are being sought, and
16 their production opposed.

17 THE COURT: Okay. And it might just be that I just --
18 I just flagged -- there was a motion to compel that was
19 filed on May 7th of 2007, and then there's another motion
20 to compel that's filed April the 22nd of 2008.

21 MR. BRADLEY: Your Honor, I think initially they did
22 not respond to discovery at all, and then I filed a motion
23 to compel. Since then, they have answered discovery, but
24 have not -- have asserted privilege as to these documents -
25 --

RoA 000041

APPENDIX_0044

1 THE COURT: Okay.

2 MR. BRADLEY: --- we're arguing about. So, I believe

3 ---

4 THE COURT: So, the first one's been resolved.

5 MR. BRADLEY: I think so, Your Honor.

6 THE COURT: Okay.

7 MR. BRADLEY: I'm not -- I don't have -- I don't think
8 I have that in front of me.

9 THE COURT: Okay.

10 MR. BRADLEY: But my memory is that that may explain
11 your --

12 THE COURT: Okay.

13 MR. BRADLEY: -- what's -- what we've done to confuse
14 the Court, Your Honor.

15 THE COURT: Okay. And it does -- and in actually
16 reading the motion at -- the motion in May of '07, it does
17 indicate that there -- that you had not received any
18 responses. So, then that's been resolved. Okay.

19 MR. BRADLEY: Yes. They have responded, but asserted
20 privilege as to these documents.

21 THE COURT: Right. Okay. Thank you. I think now
22 we're clear.

23 And therefore, Mr. Bradley, since this is your motion,
24 I'll give you the opportunity to make the argument. And
25 we'll go from there.

RoA 000042

APPENDIX_0045

1 MR. BRADLEY: Thank you, Your Honor.

2 THE COURT: And I -- and as I say that, I -- while I
3 may sound confused this morning, I did read all the
4 information. And I did read your briefs and -- and the
5 cases and the information that was attached. And I think
6 there was some depositions that were attached, and I -- I
7 looked at that and I looked at Mr. Weldon's affidavit with
8 all the attachments and the letters that were attached as
9 well.

10 MR. BRADLEY: Thank you, Your Honor. The background
11 of this case, as the Court's aware, is that Providence
12 Hospital -- or Columbia HSA -- was sued by a gentleman
13 named "Waugh" for -- well, actually, his estate -- for
14 medical malpractice. And Dr. Moore had treated Mr. Waugh
15 in the emergency room as an independent contractor at
16 Providence. He was not sued, not a defendant in that
17 lawsuit.

18 Weldon Johnson represented Providence in that lawsuit.
19 I do not know who the adjuster was; but I assume they had
20 one, because it was paid for under insurance.

21 That case was then settled, and Columbia, with Mr.
22 Johnson representing it, sued Dr. Moore. During the
23 lawsuit, Mr. Johnson had met with Dr. Moore, prepared him
24 for his deposition, gone with him to the deposition,
25 counseled him regarding the deposition. Then, after the

RoA 000043

APPENDIX_0046

1 lawsuit was settled, Mr. Johnson, on behalf of Columbia,
2 sued Dr. Moore. And then I was retained to defend Dr.
3 Moore.

4 As we've gone through this lawsuit, what they've
5 alleged is contractual indemnification, equitable
6 indemnification, and a declaratory judgement action. This
7 is the lawsuit we're here about today, Judge.

8 And they're seeking to be paid their attorney's fees
9 for representing -- for -- in the first case, with the
10 *Waugh* case; as well as what they paid to settle the *Waugh*
11 case.

12 As we've gone through -- I had noticed a 30(B)(6)
13 deposition, I was surprised to hear that Mr. Johnson would
14 be the 30(B)(6) designee. In addition, we have requested
15 this information from the underlying case they're seeking
16 contribution on, and then they moved for summary judgement.
17 And to support that motion, they submitted Mr. Johnson's
18 affidavit testifying against Dr. Moore, and as well,
19 rendering expert opinions in his own affidavit regarding
20 the reasonableness of the settlement, the probable verdicts
21 that he was facing; and all within a reasonable degree of
22 legal certainty, per his own affidavit.

23 So, he's now appeared as lawyer; but he's not, I
24 understand, now representing Columbia. He's only a
25 witness.

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1 The 30(B)(6) designee for them -- he counseled Dr.
2 Moore regarding his deposition, and was there at the
3 deposition. And now they submit an affidavit, as well as
4 an expert opinion in this case regarding the reasonableness
5 of the settlement; which I understand to be an issue that
6 would be for trial, Your Honor.

7 Based on that, we think we're entitled to the records
8 from the adjuster and Mr. Johnson, because he's going to be
9 an expert and say to the Court and the jury, "What we did
10 was reasonable. This was the proper way to resolve this.
11 And Dr. Moore should pay us for it, because he's the one
12 who did something wrong."

13 Then we're entitled to see the documents that he's
14 relying on to form these opinions he purports to give to
15 the Court and the jury in this case; which he's already
16 done through an affidavit.

17 Certainly, in any expert situation, if it wasn't Mr.
18 Johnson and a lawyer, we would be entitled to it, there'd
19 be no question. But here, what they've done is said, "No.
20 You cannot see this, because Mr. Johnson is a lawyer and he
21 represented them and is cloaked in the attorney/client
22 privilege."

23 Our response is this, Judge: That's fine. But when
24 you submit this man as an expert witness to testify in
25 court as well as a fact witness and he counsels our client

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APPENDIX_0048

1 and goes with him to the deposition, you've waived that
2 privilege by bringing this lawsuit and putting this man out
3 as your expert witness.

4 We're entitled to know what an expert witness relies
5 on. If this case does try and we put up our own expert
6 witness, then we're entitled to have that expert witness
7 look at the same thing Mr. Johnson's looked at to form
8 their opinions. And if we are forced to cross-examine Mr.
9 Johnson, we're entitled to know what he relied on so we can
10 use it as cross-examination material, Your Honor.

11 That's the basis for why we're seeking it, and we
12 would not be the first people in this situation. And of
13 course, there are a lot of cases like this across the
14 nation. Judge Seymore had one that was somewhat similar,
15 where the parties submitted attorney/client privilege/work-
16 product privilege information to an expert, and the other
17 side sought to discover that information.

18 And Judge Seymore said, "Once you've submitted it to
19 an expert, once you've said this person's our expert, and
20 you've given them this information, the other side is
21 entitled to it despite the fact that it may have been
22 privileged. And if you had not done that, it's now not
23 privileged."

24 There's another case in here, but there's -- not from
25 this jurisdiction -- had to do with Nationwide Insurance

RoA 000046

APPENDIX_0049

1 Company putting up coverage counsel as a witness in a bad
2 faith case as an expert witness. The Court said when you
3 put up a lawyer -- if you put up your own lawyer as an
4 expert witness, you've waived the privilege, because now
5 they're an expert; and the other side's entitled to know
6 what they looked at and relied on in coming to their
7 opinions for the purpose of their defense, or in that case,
8 prosecution of the case.

9 This is a similar situation in the sense that now Mr.
10 Johnson has become an expert, he is -- he has offered
11 expert-witness testimony to the Court through an affidavit
12 already, he has been presented as an expert witness to
13 testify in court regarding the reasonableness of the
14 settlement and the probable verdicts in the case.

15 For us to defend the case, we need to know what he
16 relies on in forming those opinions. And our expert needs
17 to know what they looked at, so our expert can form their
18 own opinions in this case, if we're going to go about it
19 this way as they've presented with Mr. Johnson being an
20 expert in the case.

21 In addition, to the extent they are seeking attorney's
22 fees -- and we've had discussions over this and it hasn't
23 been waived yet. And I'm hoping that they're going to do
24 that, but I haven't received the waiver.

25 If they're -- if they're seeking attorney's fees, they

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APPENDIX_0050

1 have to show us what they are. I mean, that's just -- they
2 can't seek a part of damages and not tell us what it is.
3 That's not -- you know, that's not in accord with the
4 discovery rules.

5 So, if they ---

6 THE COURT: Wait. Just to make sure -- I'm sure what
7 -- what they'd say is this is what we've expended or this -
8 - these were our costs. And you're saying that because
9 they're -- you're entitled to look at the -- the documents
10 that support the dollar amount.

11 MR. BRADLEY: Yes, Your Honor. To the extent they're
12 seeking -- not in this case, but in the previous case that
13 they're suing us about. And they want to say, "This is our
14 reasonable attorney's fees. This is the reasonable
15 settlement. This is the way we did it. This is fair. You
16 should believe us that this is fair."

17 We're entitled to see the underlying information
18 before we get to the courthouse, including the itemized
19 bills; not only because they've sought attorney's fees, but
20 also because they've put up Mr. Johnson as an expert now.
21 And part of one of the issues that they've put in through
22 their own affidavits is, you know, this was a reasonable
23 settlement, an arm's-length settlement, and the -- all the
24 evidence was against Dr. Moore; and it was reasonable thing
25 to do at the time and the jury verdict I expected would

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APPENDIX_0051

1 have been in this way. And all these opinions are to a
2 reasonable degree of legal certainty.

3 Once he steps on that expert stand, they've done it.
4 They've presented their own lawyer as an expert witness.
5 It's not like somebody else. And so, they've waived that
6 privilege themselves by presenting him as a -- as a witness
7 in this case, Your Honor.

8 THE COURT: Okay. Yes, sir, Mr. Todd.

9 MR. TODD: Your Honor, one thing -- this -- this would
10 be, I think, easy -- is we -- and I believe there's
11 correspondence to Mr. Bradley where we have informed him
12 that we are not seeking to recover the cost of attorney's
13 fees in the previous action, in the underlying action about
14 Waugh against Providence Hospital. And so, because we're
15 not seeking to recover the attorney's fees defending the
16 underlying action, we don't think that Mr. Bradley or that
17 the defendants are entitled to review or to -- for copies
18 of Mr. Johnson's bills.

19 There should be some correspondence. I don't -- I
20 can't put my hands on it right now, but I will state here
21 on the record that in the case involving Dr. Moore as a
22 defendant, we are not seeking attorney's fees for the --
23 defending the underlying action.

24 As far as -- as the other claims, Mr. Johnson -- what
25 -- what we have given them is in all of the pleadings, all

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APPENDIX_0052

1 of the medical records, all of the depositions, and all of
2 the discovery in the underlying action. So in other words,
3 they would have all of the information that Mr. Johnson
4 relied upon to evaluate the case, and that he will rely
5 upon to give his opinions in this case.

6 What we are objecting to giving him is his
7 communications with his client, which -- you know, which
8 would either be Providence or the insurance company.

9 And so, the plaintiffs have all of the data, all of
10 the -- the records, the pleadings, the depositions, and any
11 of the discoveries. So, they have what is necessary to
12 form an opinion as to the -- whether or not this settlement
13 was bonafide, whether it -- the decision to settle was a
14 reasonable means of protecting Providence, and whether or
15 not the amount of the settlement was reasonable.

16 THE COURT: Well, let -- let me ask you this: While I
17 would agree that providing the -- the underlying
18 information would allow others to -- to come to that
19 conclusion, isn't this case really about whether the
20 recommendation that's made by Mr. Johnson to Providence and
21 their insurance company and then ultimately their decision
22 to in fact settle is reasonable, not necessarily whether
23 the -- whether the documents reflect one or the other. I
24 mean, in other words, isn't it -- isn't it really Mr.
25 Johnson's recommendations to Providence and including his

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APPENDIX_0053

1 thought processes and the things that Providence would have
2 used and the insurance company would have used to evaluate
3 whether or not to -- to make the decision to settle that's
4 at issue; and not -- not the underlying documentation so
5 much?

6 MR. TODD: And I'm going to try to answer your
7 questions. And I may not -- if -- if I'm not answering it
8 let me know, and I'll try to be more direct.

9 But our lawsuit is essentially based on the elements
10 that are set forth in the *Otis Elevator* case. And -- and
11 what that holds is where an innocent indemnity has settled,
12 then that person, they recover the cost of settling the
13 case.

14 And it sets forth essentially three, perhaps four,
15 elements: One, is the settlement bonafide? Two, is the
16 settlement a reasonable means of protecting the innocent
17 party's interest? And three, was the amount of the
18 settlement reasonable?

19 And the case goes on to say is -- is that in seeking
20 indemnity, if you've given the party notice of an
21 opportunity to come in and defend, you don't have to prove
22 that the plaintiff -- the plaintiff in the underlying
23 case's actual ability to recover. You just have to prove
24 that settling the case was a reasonable decision to protect
25 the innocent party's interest.

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1 So I think those -- those would be what we consider
2 the elements of this case. And so, in -- in applying
3 those, the plaintiffs have the data that would be used to
4 make a decision on those elements.

5 THE COURT: But ---

6 MR. TODD: Because they have the discovery, the
7 pleadings, the medical records, and all of that.

8 Presumably, it's an objective decision. Obviously,
9 Mr. Johnson felt that -- and the client felt that it was a
10 reasonable thing to do to settle this case, the underlying
11 case.

12 I think that the plaintiff having that information
13 does not mean that he's entitled to the actual
14 communications between Mr. Johnson and the client.

15 Did I answer your question?

16 THE COURT: Partially. I mean, I guess my thought is
17 is that, you know, reasonable minds can differ.

18 MR. TODD: No doubt about that, Your Honor.

19 THE COURT: And if -- if the idea is to -- to
20 demonstrate that basically Providence's conclusion and --
21 and Mr. Johnson's conclusions in -- in making the -- the
22 recommendation, assuming -- assuming that he made the
23 recommendation to his client -- that there would tend to
24 have to therefore be more evidence to demonstrate that what
25 he did was reasonable under the circumstances, as opposed

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APPENDIX_0055

1 to what the underlying information showed.

2 Because if reasonable minds can differ as to whether
3 or not they should have settled, then there has to be some
4 additional evidence to show why Mr. Johnson, and therefore
5 Providence, felt that it was reasonable to enter into the
6 settlement under the circumstances; and to be able to
7 outline their reasons for it, and demonstrate that those
8 reasons were in fact reasonable. Do you see what I'm
9 saying?

10 MR. TODD: Yes, sir -- yes, ma'am. And I -- I think
11 that's what we'll do in this case, is to -- to demonstrate
12 why -- you know, obviously any -- any time there's a
13 lawsuit, there's -- there's -- there's risk involved. And
14 why, in this case, Providence elected to settle the case to
15 --

16 THE COURT: Okay.

17 MR. TODD: -- take that risk away.

18 THE COURT: Let -- let me ask the question this way:
19 Is Mr. Johnson a witness in the case?

20 MR. TODD: He is a witness.

21 THE COURT: Okay. And is he a witness not only based
22 upon the facts of what actually happened, but also he's
23 going to offer a legal opinion as to why this was
24 reasonable under the circumstances?

25 MR. TODD: Yes, ma'am.

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APPENDIX_0056

1 THE COURT: Okay. Then why should the defense not
2 have the opportunity to find out what those were and what
3 it was based on? And -- and I would assume that some
4 representative from Providence is also going to testify as
5 to, you know, their view -- what they considered from their
6 side -- or at least may or may not be an insurance adjuster
7 or someone from the insurance company. But that someone's
8 going to testify as -- you know, we received this
9 information from Mr. Johnson, and in our evaluation, we
10 decided "x, y, z."

11 And so therefore, would it not be relevant to think
12 that -- that the communications between them and how they
13 developed their thought processes would be at issue and
14 would be discoverable?

15 MR. TODD: Well, Your Honor, it -- you know, it gets
16 down to the issue of the attorney/client privilege and
17 whether or not it's been waived. And in this case --

18 THE COURT: Well, I -- I tell you, I think it's been
19 waived.

20 MR. TODD: All right.

21 THE COURT: Now, I'm at -- I'm looking for a way for
22 you to convince me that it hasn't been waived, because I --
23 I -- I agree with -- with -- with Judge Seymore's decision
24 in the *American Fidelity* case. That's 225 FRD 520. And
25 while I don't necessarily follow California, I think that

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APPENDIX_0057

1 the reasoning, at least, set forth in -- in that California
2 case that Mr. Bradley submitted, provides pretty good
3 information and -- and pretty sound reasoning. And then,
4 the same with the *Nationwide* case.

5 And I -- I guess I'm looking for something that's
6 going to tell me something differently.

7 MR. TODD: Okay. Your Honor, about the only thing I -
8 - I could add is -- is that in -- in this case, in deciding
9 whether the settlement was bonafide, whether or not the
10 decision to settle was reasonable and the amount was
11 reasonable, when it goes to either before the -- the Court
12 or a jury, it will be an objective standard.

13 But you know, we can -- obviously, Mr. Johnson's going
14 to be a witness; he's going to offer his opinions on that.
15 And what we would ask is that if the production of -- of
16 the information provided be limited to his opinions, his
17 correspondence to and from the client regarding the
18 decision to settle, the reasonableness of the settlement.

19 THE COURT: As opposed to his entire file.

20 MR. TODD: Yes, ma'am.

21 THE COURT: Well, let me ask you this: What else --
22 what else would be contained in his file that -- that you
23 feel would -- would ---

24 (Sotto voce discussion between Mr. Todd and Mr. Johnson.)

25 MR. TODD: I'm going to ask Mr. Johnson to respond to

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APPENDIX_0058

1 that.

2 THE COURT: Because I hear a whispering over there,
3 too. I mean, I -- obviously -- obviously, their
4 communications -- obviously there are -- there are mental
5 impressions, presumably where you've taken notes or you've
6 had discussions with individuals. You know, there may very
7 well be research in the file. I assume, at least, the
8 research would go towards any conclusions that you would
9 have reached that you would ultimately be testifying to at
10 trial any way.

11 So I can't see that requiring that to be disclosed
12 would necessarily be any more invasive than the
13 correspondence. But there may be something else that's in
14 your file that I'm just not -- you know, I don't -- since I
15 don't do medical malpractice, I don't -- I don't grasp all
16 the things that may go into -- to what's in the file.

17 So, I mean, Mr. Johnson, if --

18 MR. JOHNSON: Your Honor, I'm trying to recall two
19 years worth of material in the file, but what I would -- I
20 understand that I will testify to is what information did I
21 have that I utilized in forming my opinions that led to the
22 recommendation to my clients that this case needed to be
23 settled. Those things would have been interviews with
24 expert witnesses and there's not going to be anything in my
25 file of my own personal 30-plus years of experience as to

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APPENDIX_0059

1 what a jury might do or might not do, those kinds of
2 things. But that's just generic experience at handling
3 this kind of -- of material.

4 The other thing would be the correspondence that I
5 generated to the JUA in this file, which has already been a
6 part of their motion. I would certainly testify as to my
7 communications with the insurance representative for Dr.
8 Waugh in -- I'm sorry -- Dr. Moore in my efforts to -- to
9 get them to come in and take over and defend Dr. Moore so
10 that we wouldn't be here today. They abjectly refused
11 every one of those entreaties. I went to Greenville twice
12 to meet with the JUA to try and persuade them to take over
13 the defense in this case.

14 Those are the things I would testify to. I -- I
15 probably have notes of my interviews with the expert
16 witnesses that I sent out the files to, and certainly their
17 opinions back to me. I formed a basis for my
18 recommendation to settle the case, and I'm certain there
19 are numbers of correspondence not dealing with those issues
20 to and from my clients and to others involving various and
21 sundry things..

22 Certainly, all of my correspondence to plaintiff's
23 counsel in the underlying case they're welcome to. I even
24 offered some time ago for them to come and review my file,
25 except for the matters I considered privileged; and would

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APPENDIX_0060

1 up sending everything except my personal notes in the
2 correspondence file.

3 So if -- if it would be helpful to the Court, I could
4 go back and go through my correspondence file. There may
5 well be things in there that are not objectionable. But
6 that's the only thing I can think of that we have so far
7 withheld would be my correspondence file and my legal pad
8 notes of my interviews, my deposition notes of the claims
9 experts, those kinds of things. I think that would be the
10 content of my file, other than what we've already produced.

11 THE COURT: What about information at mediation? Was
12 there anything additionally? I mean, I know that -- I know
13 there was a lot of correspondence before the mediation
14 inviting the -- the JUA and -- and the adjuster to -- to
15 communicate before you all went to mediation. And I
16 understand the case was ultimately settled either at
17 mediation or ---

18 MR. JOHNSON: At mediation.

19 THE COURT: --- shortly ---

20 MR. JOHNSON: It -- it was, Your Honor. We went to
21 Charleston and Tom Wills mediated the case. My insurance
22 representative was there. I'm blanking on whether there
23 was somebody from the hospital there at the time, because
24 there was a transition from the previous owner of
25 Providence to the Sisters of Charity. And I think that was

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APPENDIX_0061

1 during that time.

2 And I'm -- I likely have notes made during the
3 mediation of the back and forth, although I'm a bit
4 concerned that the mediation process is confidential.
5 Other than we abide that, but I would have no objection,
6 assuming my client will, to releasing my notes of the
7 mediation process. We invited them to join us at
8 mediation; they declined.

9 THE COURT: Anything further, Mr. Todd, before I go
10 back to Mr. Bradley?

11 MR. TODD: No, sir -- I mean, no, ma'am. But have --
12 have I answered your question? I assume partially. I
13 don't know whether I ---

14 THE COURT: Yeah. I -- I -- I think so. I mean, I --
15 I think I -- I understand your position. We just may have
16 a difference of opinion on it.

17 MR. TODD: Like you said, reasonable minds can differ.

18 THE COURT: And -- and that's my point, you know. And
19 for me, you know, certainly the filing of the lawsuit would
20 not in and of itself have waived the privilege in my view.
21 But certainly at -- at the time that Mr. Johnson became a
22 witness, and particularly became an expert witness, I think
23 that changed the whole tenor of -- of what you're looking
24 at. And so that's why I'm sympathetic to Mr. Bradley's
25 position.

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APPENDIX_0062

1 And -- and I'll give you, Mr. Bradley, anything else
2 to comment on that -- what Mr. Todd has stated?

3 MR. BRADLEY: Your Honor, I know enough that if you're
4 inclined to grant my motion, I don't have anything else.
5 It's taken me a long time to learn that, but I figured that
6 much out about it.

7 THE COURT: And -- and I -- and I -- as I said, I did
8 review the affidavit filed by Mr. -- that was filed -- the
9 affidavit from Mr. Johnson that was filed in the case,
10 along with the correspondence that was there. And most of
11 -- and I guess, the correspondence, primarily, is with
12 representatives of -- of the JUA. And -- and it also
13 includes, I think, the actual settlement and release that
14 was executed by the parties in the underlying medical
15 malpractice case, and the order approving the settlement.

16 I still -- in having heard of the information that's
17 in Mr. Johnson's file, the information that he withheld
18 which is communications as well as his handwritten notes, I
19 think -- and you're saying that -- Mr. Johnson, that
20 there's -- there's more communication than just between the
21 -- the defendant in this case and primarily, I think, what
22 we're talking about is any correspondence that would have
23 been to proposed experts, as well as the expert that was
24 actually retained?

25 MR. JOHNSON: Yes, Your Honor. One expert -- and I

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APPENDIX_0063

1 put this in discovery responses. One of the experts I
2 consulted with and relied upon was a Rule 26 witness that I
3 did not disclose to the plaintiff in the underlying case
4 because he was not going to be a trial witness. And I
5 would not want to have to disclose the identity of that
6 witness, because I didn't plan to use him as a witness in
7 the underlying case. But what he told me was -- was a
8 factor among the other doctors I communicated with. So I
9 would ask that I be allowed to withhold in this action the
10 identity of the witness I did not disclose under Rule 26 as
11 a consultant.

12 THE COURT: Okay. But if I were to agree -- if I were
13 to require you to disclose that information generally as to
14 your conversations, you're just saying that I at least just
15 protect his identity, not necessarily --

16 MR. JOHNSON: Yes, Your Honor.

17 THE COURT: -- that information, if I'm going to rule
18 that the information should be disclosed.

19 MR. JOHNSON: Yes, Your Honor.

20 THE COURT: Okay. So to the extent that you've got
21 notes or -- or correspondence addressed to that individual,
22 you're just asking to be able to redact his name off the
23 correspondence.

24 MR. JOHNSON: Yes, Your Honor.

25 THE COURT: Okay. Is there -- would there be a -- do

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1 you foresee a problem at this particular point, Mr.
2 Bradley, about that?

3 MR. BRADLEY: Here is the -- my concern, Your Honor.
4 I don't want to unduly complicate this. But the testimony,
5 as I understand, is going to be, "This was bad malpractice
6 for Dr. Moore, and I talked to this doctor and he said it
7 was bad."

8 And that's going to be a factor that he's going to
9 testify to to the judge and the jury in this case. He's
10 going to say, "I called the doctor, but I'm not going to
11 tell you who he is. And he said it was malpractice," and
12 which is going to be part of the issues in this case.

13 THE COURT: In -- in addition to the expert who was
14 actually retained and -- and identified.

15 MR. BRADLEY: Right.

16 THE COURT: So I mean, we're talking about more than
17 one ---

18 MR. BRADLEY: So there's apparently some expert -- but
19 I don't know that one either -- that was going to testify
20 it wasn't malpractice if he retained that expert to testify
21 in the case. I would assume that he wouldn't retain an
22 expert to testify that there was malpractice on behalf of
23 his own client. But I don't know the answer to that, but I
24 can't imagine that would happen.

25 The problem is if we get into court and we testify I

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APPENDIX_0065

1 consulted these experts and they all said it was
2 malpractice and it's malpractice and that's part of the
3 basis for my opinion, then there's no way for me to examine
4 that basis, because it's like saying the invisible person
5 told me. There's no way for me to follow it up to see who
6 it was, what they said happened: Where? How? Why? What did
7 you rely on?

8 That's the problem with amending the ruling that way -
9 --

10 THE COURT: Okay.

11 MR. BRADLEY: --- from our standpoint, Your Honor.

12 THE COURT: Okay. What I'm going to require at this
13 point, I believe under -- under the appropriate case law
14 that -- as I've indicated that I -- I think that the
15 privilege has been waived. Not so much by the filing of
16 the lawsuit, but by the identification of Mr. Johnson as a
17 witness; not only a fact witness, but also an expert
18 witness. And I think that the defense is therefore
19 entitled to be able to discover those things that form --
20 formulated the basis for Mr. Johnson's opinions and
21 conclusions; particularly those things that went into his
22 mental impressions to be able to make the recommendation to
23 the client.

24 And while the -- the depositions and the pleadings and
25 the other things that amounted to the discovery in the

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1 underlying malpractice, may -- may formulate the factual
2 basis, I think that more importantly what's at issue here
3 is -- is the mental conclusions and the decisions that were
4 made that led Mr. Johnson to make the recommendation to his
5 client to -- who ultimately, you know, made the decision to
6 settle the case. And whether or not that was reasonable I
7 think are -- are things that would be at issue in this
8 trial. And in an effort to make sure that the defendant in
9 this case has the opportunity to adequately discover those
10 -- those -- those facts and documents and mental
11 impressions and -- and what he considered to the extent
12 that that's in -- in -- within the file, whether it's in
13 the fact -- in the form of correspondence or whether it's
14 in the form of -- of notes, I think that that's relevant
15 and it should be disclosed.

16 At this particular point, what I'm going to do is
17 allow Mr. Johnson to not disclose the identification of
18 that one particular witness who he has identified as
19 someone under Rule 26(C), was it?

20 MR. JOHNSON: (Nods head up and down.)

21 THE COURT: That he discussed the matter with and --
22 and -- and whose -- in the conversations in which he -- he
23 also used in formulating his conclusion. I will, however,
24 give Mr. Bradley, the opportunity, once all of the other
25 information has been disclosed, to determine whether or not

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1 it's something that he still needs to require the identity
2 of that person or not; and we can take up the issue at that
3 particular point.

4 And it may be -- I don't know whether depositions have
5 already been scheduled and -- and whether Mr. Johnson's
6 deposition's been taken or not, but it may be something
7 that -- that we may not be able to get to until that
8 particular point where you've been able to determine how
9 much he relied on it and -- or when you actually have a
10 chance to see the documents and determine whether you --
11 you really need to have his identity. And you can make an
12 argument at that particular point. But -- but at this
13 particular point, I would not require the disclosure of his
14 -- his or her identity.

15 As it relates to the correspondence, I mean, you know,
16 certainly there may -- there may very well be
17 correspondence in that file that's not even necessarily
18 relevant to the issues in this case. And I -- I know
19 there's always the question when you allow someone to make
20 a judgement call as to whether or not to release it,
21 there's going to be a discussion as to why this one wasn't
22 released. You know, to the extent that it's not -- that
23 it's, you know, correspondence that's not related to a
24 client or a fact witness or a potential expert witness or
25 to, you know, any one of the defendants or their agents, I

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1 don't see a reason to necessarily have to disclose it. I
2 mean, if it's -- that's something completely unrelatef.
3 You know, here -- here is a copy of this document, I mean,
4 that may or may not be relevant. Or -- or -- yeah.

5 But to the extent that -- that those documents would
6 not be disclosed, I think there at least needs to be a --
7 some type of a log to identify the documents were there and
8 that they weren't disclosed and the reasons for not
9 disclosing them; so if -- in case there's an argument about
10 it, we can address those.

11 Anything else on this particular issue that I missed?

12 (No audible response from counsel on either side.)

13 THE COURT: And I'll ask Mr. Bradley to prepare the
14 order.

15 MR. TODD: Just one thing you're going to cover, is
16 we're going to ask if there was -- his bills, whether or
17 not they're --

18 THE COURT: If -- what I heard, Mr. Bradley, is that
19 they're withdrawing all claims relating to the bill. So it
20 would seem to me, therefore, that the bills aren't
21 relevant, but -- and they're not at issue and therefore
22 there's no reason to disclose them. Would you agree with
23 that?

24 MR. BRADLEY: Thank you, Your Honor. That's fine.
25 Now that we have a representation on the record they're not

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1 seeking to be paid any attorney's fees in this case. I
2 understand your ruling that they don't have to disclose the
3 bill.

4 THE COURT: Okay. Anything else on this one?

5 MR. TODD: Your Honor, the only thing is we may ask
6 the court reporter to get a transcript of your ruling, so
7 we'll be clear.

8 (To associate counsel) Or you -- or you think you got
9 it?

10 ASSOCIATE COUNSEL: (No audible answer.)

11 MR. TODD: He's got it. Okay.

12 THE COURT: Okay.

13 MR. TODD: We're good.

14 THE COURT: It's kind of easy. It's basically
15 everything except for disclosing the -- the name of the
16 expert -- potential expert.

17 MR. TODD: Well, I think that simplifies it then.

18 THE COURT: Okay. Like I said, this was the easy one.
19 Let's switch gears then and let me gather my documents.

20 The other case is same plaintiff, *Columbia CSA vs. the*
21 *JUA and Michael P. Tallion*. That's T-a-l-l-i-o-n. It's
22 Docket No. 2007-CP-40-03564. The same attorneys in the
23 same capacities.

24 And this is a motion -- there are two -- there -- I
25 guess there's combination of motions: One, it's a motion

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1 to amend the answer to assert a statute of repose, and the
2 accompanying motion for summary judgement on that
3 particular basis. Am I right on that one?

4 MR. BRADLEY: Yes, Your Honor.

5 THE COURT: Okay. And so, I -- again, I have read the
6 information that you all have provided to me. I have tried
7 my best to read the -- the case law and follow along with
8 it. In my view, statutes of repose and statutes of
9 limitations are kind of tricky to figure out which is which
10 and how to view those. And so, Mr. Bradley, I'll -- I'll
11 hear your arguments.

12 They really kind of mesh together. I'm not so much
13 concerned with whether or not the answer should be amended,
14 as I -- as I am with what we're dealing with in terms of
15 how, Mr. Bradley, you view that the statute applies or
16 should apply.

17 And so, if we can -- if we can focus on the statute
18 itself and why you believe it applies, as opposed to
19 whether or not the answer should be amended to -- to add
20 it. I think that would -- that would help me more.

21 Because obviously, if -- if -- my general view is I
22 understand that it's to be an affirmative defense. You're
23 asking to amend your answer to include it. You're claiming
24 that there was no prejudice to the plaintiff. And the
25 plaintiff is basically saying if doesn't apply, so why

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1 allow them to amend it to add it, because it just simply
2 doesn't apply.

3 And if I've oversimplified your positions, then you
4 can let me know that.

5 MR. BRADLEY: Thank you, Your Honor. Briefly the
6 facts of this. Like Dr. Moore, Dr. Tallion was a physician
7 employed at the Providence emergency room. In 1997, he
8 treated a man named "Sharpe." This was about in June, but
9 the months are not as important as the years.

10 Mr. Sharpe later had a heart attack. In 1999,
11 Providence and some other doctors were sued, but Dr.
12 Tallion was not sued.

13 In 2005, Providence settled that lawsuit with Mr.
14 Sharpe. In 2007, Providence sued Dr. Tallion for
15 contribution. So there's no question but that the lawsuit
16 was filed 10 years after Dr. Tallion saw the patient. I
17 don't think that the plaintiffs will contest those facts.
18 In fact, they're laid out in their own complaint. So I
19 think that -- that's the factual scenario.

20 So the question now is -- there's no question it was
21 outside the statute of repose, and the only question really
22 is: Does the statute of repose bar this action for
23 contribution, equitable and contractual, against Dr.
24 Tallion.

25 Now, the statute of repose, as the Court's aware,

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1 there's a copy that I submitted with my memo. It's in
2 Title 15, 15-3-545. And in South Carolina the way the
3 statute of repose has been interpreted consistently by the
4 appellate courts is six years from the time the medical
5 services were rendered.

6 No question how long it runs and when it starts: It
7 starts when the services are rendered and it runs for six
8 years. And it doesn't have anything to do with discovery.
9 If you discover malpractice has been committed seven years
10 after you received the medical treatment, then you just
11 don't have a case.

12 THE COURT: So is that what makes it different from a
13 statute of limitations?

14 MR. BRADLEY: Yes, Your Honor. Statutes of
15 limitations generally run from when you discover or should
16 discover the wrong. So, for instance, if -- now, there are
17 some specific differences that don't apply in this case
18 that have to do with minors and left surgical objects in
19 someone, but that doesn't apply here

20 So, just to say this is in general. Some of those
21 specifics may change the rules, but if you find out a year
22 after you have a surgery that the surgeon did wrong and
23 that's why you've had a bellyache for the last year, and
24 then you file your lawsuit within three years of when you
25 found out -- so, four years after you've had the surgery,

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1 but three years after you found out -- then you would be
2 within the statute of limitations.

3 If you filed your -- if you found out five years after
4 you had the surgery, it was reasonable that you wouldn't
5 find out for those five years that the surgeon had done
6 something wrong, and you filed a lawsuit, then you still --
7 the statute of limitations would start to run five years
8 afterwards.

9 THE COURT: So does -- in reading -- in the -- the
10 portion of the statute we're talking about is 15-3-545(A).

11 MR. BRADLEY: That's correct, Your Honor.

12 THE COURT: And there's a part -- a part of it that
13 talks about commencing within three years from the date of
14 treatment. Are you saying that -- does that make it --
15 like the three-year part is the statute of limitations, but
16 in no event shall a lawsuit occur more than six years. And
17 then six years makes it the statute of repose?

18 MR. BRADLEY: Yes, Your Honor. And in fact, the
19 statute even says -- and it says -- the -- the hypothetical
20 we've been dealing with is an operation. But it says (as
21 read): "The operation giving rise to cause of action three
22 years from the date of discovery" -- that would be when you
23 found out that it was done improperly -- "or when it
24 reasonably ought to be discovered."

25 So maybe you didn't really find out, but if you had

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1 been a reasonable person you would have. And then the
2 statute of repose is the last part of that sentence (as
3 read): "Not to exceed six years from date of occurrence,"
4 or as tolled by the section in the tolling provisions
5 having to do with minors and some other things that don't
6 apply here.

7 But -- so it's six years from the date of occurrence.
8 And the way the courts have interpreted that in their
9 annotations is that, for instance, if you -- and it applies
10 quite often in construction sentence as well, which is
11 another statute of repose that's used quite often in -- in
12 the cases that I've cited, in South Carolina based on
13 construction cases. But if for instance, you found out
14 seven years after the doctor performed some surgery on you
15 that the doctor had done it wrong, perhaps -- you know,
16 maybe, you just -- there was no way you could find out
17 earlier. Okay.. And -- and that would be a reasonable time
18 for someone to find out. The Court says, "Yes. I could
19 see why it took you seven years. Yet you're outside the
20 six years from the date of occurrence. That claim is still
21 extinguished by the statute of repose."

22 That's what I understand the distinction is: The
23 statute of repose starts from a set date. For construction
24 it's the date of substantial completion; for medical it's
25 the date that you received the service.

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1 THE COURT: The treatment.

2 MR. BRADLEY: Okay. So there's no question that the
3 statute of repose had run by the time Dr. Tallion was sued
4 for contribution. The question is: Does the running of
5 the statute of repose from the date service was rendered
6 extinguish the action for contribution?

7 And there are two cases in South Carolina that deal
8 with the construction statute of repose, and the answer in
9 both those cases is "yes" to that question.

10 And the first case is the *Florence County School*
11 *District* case that we attached to our memo; it's cited in
12 there. In that case, Florence County was sued because
13 someone was injured on some bleachers that the school had.
14 And they settled with the person who sued them, and then
15 turned around and sued the bleacher manufacturer for
16 contribution and said, "You should pay up, because the
17 reason we got sued was your bleachers were bad and you
18 built them wrong."

19 And the bleacher manufacturer said, "No. You're
20 outside" -- at that time, 13-year statute of repose for
21 construction cases. It's now eight. But at that time, it
22 was 13.

23 "You're outside of the 13-year statute of repose, and
24 we can't be responsible for it outside the 13 years."

25 And the trial court granted that motion which was

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1 affirmed by the Court of the Appeals. And when the Court
2 of Appeals affirmed that summary judgement based on the
3 statute of repose, they actually cited to a case from
4 Georgia -- and it's also attached to the memo -- called
5 *Krasaeath vs. Parker*. And that had to do with the medical
6 malpractice statute of repose in Georgia, which is very
7 similar to the one here in South Carolina. And for the
8 Court's convenience, I do have a copy of that statute.

9 If I may approach, Your Honor.

10 THE COURT: Yes, sir.

11 (Mr. Bradley hands documents to the Court.)

12 THE COURT: Thank you.

13 MR. BRADLEY: The reason we've provided the Georgia
14 statute is to show the similarities in that statute --
15 between that statute and the South Carolina statute. And -
16 - and the way it defined medical malpractice is very
17 similar. In the Georgia statute it means (as read) "any
18 claim or damages resulting from the death or injury to a
19 person arising out of ..." and then it lists all the
20 different medical services.

21 And then in the South Carolina it says (as read) "any
22 action to recover damages from injury to person, arising
23 out of any medical services."

24 So the South Carolina says "for injury to the person,"
25 and the Georgia statute says "for damages resulting from

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1 the death or injury to the person."

2 Very similar language. They're not the same statute,
3 but you can see that the words are very similar the way
4 they define what kind of actions are protected by the
5 statute of repose.

6 And in the *Krasaeath* case, the Georgia court found
7 that it was a similar situation. A hospital went back and
8 sued a doctor later saying that they got sued for something
9 the doctor did wrong. And the Court said, no. You're
10 outside our statute of repose in Georgia. You cannot bring
11 an action for contribution. And it's based on this statute
12 of repose that I've handed up to the Court, which is
13 similar to South Carolina's.

14 That case, *Krasaeath vs. Parker*, was cited by the
15 Court of Appeals when it decided that the South Carolina
16 construction statute of repose barred an action for
17 contribution.

18 There's also a case from the Supreme Court, *J.H.*
19 *Gayle*, which is another case that we indicated, where the
20 same issue came up. And the Court said, "The Court of
21 Appeals has already said this in the *Florence County School*
22 *District* case, and we agree with them. This is the way it
23 is."

24 The -- the plaintiff made a different argument in
25 *Gayle*, and their argument was the Contribution Among

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1 Tortfeasors Act -- which has a one year statute of
2 limitations from -- from the day you have to pay more than
3 your share -- that act supercedes the statute of repose,
4 because it was passed after the statute of repose. And
5 therefore, if you're a tortfeasor and you bring an action
6 under the Tortfeasor's Act, then you are entitled to do it
7 one year from when you had to pay; and it basically extends
8 the statute of repose.

9 And the Supreme Court said, "No. A statute of repose
10 is a statute of repose. And although the Contribution Act
11 was filed later, it does not extend the time."

12 Now, that argument doesn't really apply here, because
13 they haven't sued us under that act. They've sued us for
14 common law contribution. So we haven't been sued under the
15 Contribution Among Joint Tortfeasors Act. But that was the
16 argument the Court was dealing with in the *J.H. Gayle* case.

17 And I've cited some of the language, but you can see
18 from the language in the case that the Supreme Court uses,
19 it even says (as read): "A statute of repose creates a
20 sublatative right for those protected to be free from
21 liability after a statutorily determined period of time.
22 The statute of repose is an absolute time limit, beyond
23 which liability no longer exists. Statute of repose bars
24 any suit that is brought after a specified time since the
25 defendant acted, even if the period ends before the

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1 plaintiff has suffered a resulting injury."

2 That's language quoted by the Supreme Court in *J.H.*
3 *Gayle* case under headnotes 5, 6, and 7. And they even
4 quote a case from Virginia where they say (as read): "The
5 expiration of the time extinguishes not only the legal
6 remedy, but also all causes of action; including those
7 which may later accrue, as well as those which have already
8 accrued."

9 So they cite that case from Virginia that says all
10 causes of action are tolled by the statute of repose. And
11 in fact, we looked across the country to see if we could
12 find other cases, either in the construction context or the
13 medical context where this has happened. And we found 18
14 cases from about a dozen different states. And they all
15 hold this same way, where you have one party is sued and
16 says that somebody else caused me to be sued, but there's a
17 statute of repose that bars that contribution. The statute
18 of repose's run before the contribution action's filed.
19 And in every one of those cases, the Court's have said
20 statute of repose bars the action.

21 And I have a copy of those cases here, Your Honor. I
22 know you don't want to read them all. I didn't get them
23 just so you'd have something to keep you busy at night.

24 THE COURT: Keep my law clerk busy?

25 MR. BRADLEY: Certainly, Your Honor. I've already

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1 given them to opposing counsel.

2 (Mr. Bradley hands up documents to the Court.)

3 But the point is from all across the country, what
4 we're asking the Court to do every other court has done
5 that. There's one case that we found where a court did not
6 do that. That is a case from Georgia. I just want -- I
7 don't want to misrepresent to the Court that there aren't
8 any cases. Because there is one case from Georgia, which
9 is *Virginia Insurance Reciprocal vs. Pilzer*.

10 In that case -- here it is, Judge -- the Court
11 actually discussed the *Krasaeath* case, which I previously
12 discussed with you, from Georgia. And the Court said in
13 the *Virginia* case, in that case, the doctor and the
14 hospital were sued at the same time, and a verdict was
15 rendered against both of them jointly. And later the
16 hospital said, "Well, we wound up paying more than our
17 share, and we should get the -- the rest from you," under,
18 basically, Georgia's version of the Tortfeasors Act --
19 which is not what we've been sued under here.

20 And the Court says, "In this situation, where there's
21 a judgement against both of you and you're seeking
22 contribution back, we hold that the statute of repose
23 doesn't bar that because there's already been a judgement
24 entered."

25 And so nothing's at issue on that, because there's

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1 already a judgement entered. That's what that *Pilzer* case
2 says, Your Honor. Otherwise, the other 18 cases all say in
3 a situation where you're seeking to sue someone else for
4 contribution and the statute of repose against those people
5 has already run, you're out of luck.

6 And there's two cases from South Carolina and like I
7 said, about 18 from cases -- other states that all say the
8 same thing. And for that reason, we think that this case
9 should be dismissed because the statute of repose did run
10 before Dr. Tallion was sued, Your Honor.

11 MR. TODD: May it please the Court?

12 THE COURT: Yes, sir.

13 MR. TODD: Your Honor, what we're talking about here
14 are two statutes, and they're South Carolina statutes. So
15 what we have to do is interpret the statutes. And cases
16 from 18 other states other than South Carolina would have
17 no bearing on the interpretation of these statutes.

18 So, in the cases that Mr. Bradley's cited from South
19 Carolina were involving another statute of repose involving
20 defective conditions to real estate. And so, I want to
21 talk first about the statute of repose that the defendants
22 are attempting to amend their complaint to plead in this
23 case and to apply. And that's found in section 15-3-545.

24 And what it applies to is an action to recover damages
25 for injury to the person arising out of medical, surgical,

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1 or dental treatment.

2 Now, this is not a case -- these cases pending before
3 this Court, are not an action to recover damages for injury
4 to the person. They are actions to recover for the cost of
5 settling an underlying case. It is an action for
6 indemnification. It is not, as this statute says, to
7 recover damages for the injury to the person. So on the --
8 the language -- the express language in the statute, it
9 does not apply to an action for indemnification.

10 Now, to -- to further determine what the Legislature
11 intended when it enacted this statute, we can look at the
12 statute of repose regarding defective conditions to real
13 estate, which is found at 15-3-640. It's in the same
14 chapter as the statute of repose regarding medical
15 malpractice cases...

16 (Sotto voce discussion between the Court and law clerk.)

17 MR. TODD: And that was the case -- the statute that
18 was interpreted in the *Florence School District* case and in
19 the *J.H. Gayle* case. Now, that statute specifically states
20 at section 6 that it -- that it covers (as read) "an action
21 for contribution or indemnification for damages sustained
22 on account of an action described in this subsection."

23 So when the Legislature enacted the statute of repose
24 that covers actions for damages for defective real estate,
25 they specifically included in the express language of the

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1 statute, that it applied and barred actions for
2 contribution or indemnification.

3 And I think the fact that in the other statute of
4 repose found in the same chapter as the statute of repose
5 for medical malpractice, that they expressly included those
6 in the statute tells us that the section at issue here --
7 the statute at issue here, 15-3-545, does not bar actions
8 for contribution or indemnification.

9 The Legislature knew and expressly included actions
10 for contribution and indemnification within the reach of
11 the statute when it enacted another statute of repose
12 related to real property. I think it -- under standard
13 rules of statutory construction, the -- when the
14 Legislature's included a bar in another statute, but has
15 not included it in the statute at issue, that the only --
16 the -- the way to interpret the statute is to assume that
17 the Legislature did not -- did not intend to include
18 indemnification or contribution actions within the grasp of
19 the medical malpractice statute of repose.

20 And there's -- Your Honor, I can hand up a case I
21 cited in my brief. It's the *State vs. Thomas* case. It
22 involved the statute provision as to whether or not
23 sentencing -- according to what the Legislature intended to
24 include a limited provision in sentencing, that they could
25 have done so as they had in other sentencing statutes

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1 within the same chapter.

2 THE COURT: But just ---

3 MR. TODD: But it's essentially ---

4 THE COURT: Just give me the cite on that just to make
5 sure I have it, so I --

6 (Mr. Todd approaches the bench.)

7 MR. TODD: I'll just hand it up. *State vs. Thomas*. I
8 did not bring an extra copy.

9 THE COURT: It's 372 SC 466, 642 SE 2nd 724, Supreme
10 Court 2007 case.

11 MR. TODD: So, to summarize, Your Honor, the statute
12 of repose related to medical malpractice actions by it's
13 expressed language covers only actions for injury to the
14 person. These -- these are actions for indemnification,
15 and they are not actions for damages or injuries to the
16 person.

17 Plus, when the Legislature enacted another statute of
18 repose, they specifically included an action for
19 indemnification or contribution within the reach of that
20 statute. Since they did not include an action for
21 indemnification within the reach of the medical malpractice
22 action, then under rules of statutory construction, we can
23 conclude that the Legislature did not intend to have
24 actions of contribution or indemnification covered within
25 this statute.

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1 THE COURT: Mr. Bradley, any response?

2 MR. BRADLEY: Yes, Your Honor. First, the reason that
3 we have a statute from Georgia here before us today is
4 because the case of *Krasaeth vs. Parker*. In that case, the
5 Georgia court, Court of Appeal, held exactly as we're
6 urging the Court to hold today: That the Georgia statute
7 of repose barred a medical malpractice contribution action.

8 And that statute, the language where Mr. Todd makes
9 the argument, Well, our action is for contribution. It's
10 not for injuries to the person, and so the statute of
11 repose doesn't apply.

12 Well, the Georgia statute says the same thing. It
13 says "injuries to the person." And in that case, based on
14 that statute, the Georgia court said, We find that this
15 bars a contribution action as well.

16 And that case, because it's from Georgia, is one that
17 we would urge the Court as persuasive here. But it's more
18 than that in this case, because it was actually relied on
19 by the Court of Appeals in the *Florence County School*
20 *District* case and cited as their justification for their
21 ruling in that case; which was later cited by the Supreme
22 Court as the right way to interpret the law.

23 So, this case has been relied on by the Court of
24 Appeals. In fact, when they relied on that case, they
25 cited two other cases -- one more from North Carolina and

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1 one more from Georgia -- saying the same things, with their
2 conclusion that statutes of repose, in general, are actions
3 for contribution, as they cite these two other cases.

4 And like I said, every other case in the country, with
5 the exclusion of that one case in the odd situation, has
6 held exactly the same way. And the Georgia statute didn't
7 have anything about barring actions for contribution. It
8 said injuries to the body.

9 So, Mr. Todd's argument that this is not an action for
10 injuries of the body, it's injuries for contribution and
11 therefore the statute of repose doesn't apply, did not
12 carry the day in the *Krasaeth* case, which has been cited by
13 the South Carolina Court of Appeals as justification for
14 its holding in construction cases.

15 Now, I understand that statutory argument which is
16 basically because the construction section says "no action
17 for contribution," and the med-mal section doesn't say
18 that, then necessarily the Legislature meant you could
19 still bring an action for contribution. I mean, that's
20 there argument that they're making.

21 The fact is though, the interpretation that has been
22 interpreted universally on statutes of repose is that they
23 apply to all actions. That -- that -- that holding has
24 been held in those 18 cases I handed to you.

25 But not only in those cases, the South Carolina

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1 Supreme Court has said that, Your Honor. And that's in the
2 J.H. Gayle case when they explicitly cited to other states
3 -- the Supreme Court cited these other states and said (as
4 read): "A statute of repose bars all actions."

5 So, the uniform understanding of a statute of repose
6 across the country and from our own Supreme Court is it
7 bars all actions against the party who's protected. And
8 even, according to the Supreme Court, if the action hasn't
9 even arisen it bars the party. That's what the Supreme
10 Court said in the Gayle case.

11 And so, certainly Legislature is aware, or is deemed
12 to be aware, of what the state of the law is across the
13 country. And the fact that they did not include specific
14 language on contribution doesn't mean they meant to exclude
15 that by any means; especially in light of the fact of the
16 existing law -- which they are assumed to know when they
17 pass statutes -- that says all statutes -- statutes of
18 repose bar all actions. And the Supreme Court has even
19 said that in the J.H. Gayle case.

20 So, you know, canons of statutory interpretation are
21 kind of like citing the Bible to support your belief. You
22 can pretty much find some cite in the Bible to support
23 whatever it is you might want to do anyway, or at least a
24 lot of people do. In canons of statutory interpretation
25 they say, Well, it's left out here. That means it's not

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1 there."

2 On the other hand, the canon of statutory
3 interpretation is the Legislature is assumed to know the
4 state of the common law in law across the country. And
5 when it's not in there -- and yet the law across the
6 country -- and clearly articulated by the Supreme Court --
7 and it's that statutes of repose bar all actions. They're
8 assumed to know that, so there wouldn't be any reason they
9 had to put it in.

10 So, there's at least one canon of interpretation that
11 goes the other way comparing the two statutes. And the law
12 is clear from our own Supreme Court and courts across the
13 country that a statute of repose bars all actions, which is
14 what we're asking the Court to do here, Your Honor. Thank
15 you.

16 THE COURT: Yes, sir.

17 MR. TODD: Your Honor, I may be repeating myself, but
18 I want to be clear. The two cases that he cited from South
19 Carolina have to do with the statute of repose that relate
20 to actions for defective conditions for real property. And
21 that statute, by it's express terms, includes an action for
22 contribution or indemnification for damages sustained on an
23 account of an action described in the subdivision. The
24 Legislature specifically included it in the statute of
25 repose which is found only a few pages away from the

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1 statute of repose that is at issue in this case. There is
2 no case law say -- in South Carolina say that statute of
3 repose apply -- for medical malpractice action applies to
4 indemnification or contribution actions.

5 THE COURT: Would you dis -- and I understand your
6 position. But those cases also provide the general state
7 of the law as to how statute -- statutes of repose are
8 considered.

9 Do you disagree with their general statements that are
10 contained in those statutes?

11 MR. TODD: I'm sorry. Are we talking about the 18
12 cases from ---

13 THE COURT: No. I'm -- I'm talking about the South
14 Carolina cases. Because before -- before South Carolina --
15 before the Supreme Court addresses specifically the terms
16 of the -- the construction statute of repose statute, they
17 talk generally about the principals behind, you know, what
18 a statute of repose does and -- and what it's designed to
19 do. And they cite "Black's Law Dictionary" and ---

20 MR. TODD: Well, it gets down to an issue of statutory
21 construction.

22 THE COURT: Right.

23 MR. TODD: And when you've got an expressed provision
24 in the statutes that says it applies, it makes it pretty
25 simple.

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1 THE COURT: But my -- but my question to you is that
2 you don't disagree generally with the general statements of
3 law that are set forth by the Supreme Court before they
4 begin to interpret that particular statute?

5 MR. TODD: Well, it's not applicable to the medical
6 malpractice. It's -- it's merely would be dicta. This is
7 a case of statutory construction and when the Legislature
8 decided to expressly include it in the statutes -- statute
9 of repose related to real estate, then if they had intended
10 to include it in the medical malpractice action, they could
11 have easily done so as they did in the real estate statutes
12 of repose. And the fact that they didn't is -- is proof of
13 what their intent was, which is what this Court's job is,
14 is to apply the intention of the Legislature.

15 I don't think you'll find any -- I mean, I -- you
16 know, obviously, I've not seen any rule of statutory
17 construction that the Legislature's deemed to know what the
18 common law is in -- in 18 other states across the country.
19 And I don't believe there's -- there's a rule of statutory
20 construction that states that.

21 But it's a rule of statutory construction and it --
22 it's -- it's -- the express language in the statute says it
23 applies to actions for damage to the person. This is an
24 action for indemnification, it's an action for breach of
25 contract. It's not a personal injury action, albeit it

RoA 000088

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1 does arise out of an underlying personal injury action.

2 Plus, we have this -- the Legislature expressly
3 including indemnification actions within the grasp of
4 another statute of repose, but not in this one.

5 THE COURT: As I stated, I think this is the more
6 difficult issue. What I'd like to do is to review some of
7 the cases that are presented -- been presented in light of
8 your arguments, now that I understand your arguments a
9 little bit better. And most likely, what I will do is I
10 will write a letter that I ask one side or the other to
11 prepare an order, instead of trying to re-craft it all
12 myself. But I'll -- I'll -- I'll outline specifically the
13 points that I believe should be included and the reasons
14 why and -- in -- in that letter.

15 And hopefully I'll do that, I'll say, by Thanksgiving.
16 I'll be out of town next week. And so ---

17 MR. TODD: You going somewhere fun?

18 THE COURT: No. I'm not. I'm going to Laurens to
19 hold court. I know Laurens can be fun.

20 MR. TODD: That's where I grew up.

21 THE COURT: But -- but I would like -- even -- I've
22 read it and you know, I'm sure when I've got some down time
23 I'll go back and look at them again; and -- and read it
24 anew with fresh understanding. And I'll get that answer to
25 you as soon as possible. All right.

RoA 000089

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1 MR. BRADLEY: Thank you, Your Honor.

2 THE COURT: Are there any other issues we need to take
3 up?

4 MR. TODD: One thing, Your Honor. And this doesn't
5 need to be on the record, but it can be on the record if
6 you want it to.

7 You had asked us, when we met before, when Judge
8 Buckner ruled. He has ruled now and we have a pending
9 motion to alter or amend. So you can take it that -- but
10 basically, he ruled ---

11 THE COURT: On -- on this particular issue as to the
12 statute of repose or the other one?

13 MR. TODD: Oh, no, no, no.

14 THE COURT: Oh.

15 MR. TODD: This -- this is the case in general.

16 THE COURT: Okay.

17 MR. TODD: Would you like us to either hand up his
18 order or ---

19 THE COURT: Yeah. I wouldn't mind having it. I think
20 -- you know, it's always -- I'll -- I'll always -- you
21 know, reasonable minds can differ. And so I'm always
22 interested in someone else's opinion. But I -- I
23 ultimately have to make the decisions, I guess. So ...

24 MR. TODD: And I'm also going to hand up our motion to
25 alter or amend for a complete ---

RoA 000090

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1 THE COURT: That's fine. And that says to the
2 underlying issues altogether.

3 MR. TODD: Yes.

4 THE COURT: Because he did it -- he did it as a judge
5 trial -- non-jury trial -- bench trial. And so he heard
6 the facts and the issues in another lawsuit that's very
7 similar in nature. Okay.

8 That's fine. Yeah. I'll be happy to look at it.

9 The only thing I realize I neglected to state was a
10 time for producing the documents in the other case. How
11 bout if I say within 25 days from the date of -- of the
12 order? And that accounts -- gives you time to get it in
13 the mail and all that.

14 MR. BRADLEY: And you would like me to prepare an
15 order?

16 THE COURT: I would, yes. And -- and if you would --
17 you can send it electronically, if you like. And you can
18 send it to alee -- a-l-e-e -- lc@sccourts.org. And of
19 course, you'll send it to opposing counsel and they'll have
20 a chance to make any comments.

21 MR. BRADLEY: Yes, ma'am.

22 THE COURT: Short of rehashing all of the issues.
23 Okay. Thank you.

24 -- END OF TRANSCRIPT OF RECORD --

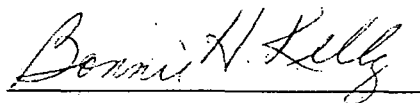
RoA 000091

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CERTIFICATE

I, THE UNDERSIGNED BONNIE H. KELLY, OFFICIAL COURT REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THIS PORTION OF THE HEARING OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON THE 7TH OF NOVEMBER, 2008.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST IN ANY PARTY HERETO.



BONNIE H. KELLY

COLUMBIA, SOUTH CAROLINA

APRIL 13TH, 2009.

RoA 000092

APPENDIX_0095

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Columbia/CSA-HS Greater Columbia
Healthcare System, LP d/b/a Providence
Hospital,

C/A No. 07-CP-40-3564

Plaintiff,

vs.

MOTION TO AMEND

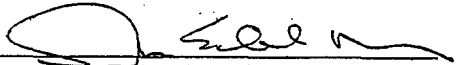
The South Carolina Medical Malpractice
Liability Joint Underwriting Association
and Michael P. Tallion,

Defendants.

The Defendants hereby move to amend their answer to add the defense of the statute of repose. A copy of the proposed amended answer is attached as Exhibit A to this motion. No discovery whatsoever has taken place in this matter. The matter has not been scheduled for trial, and there would be no prejudice whatsoever to the Plaintiff in allowing an amendment of the answer to add the defense of the statute of repose. In addition, amendments to pleadings are to be freely given especially at the pre-trial and pre-discovery stage.

For these reasons, the Defendants move to amend to add the defense of the statute of repose to their answer.

MOORE, TAYLOR & THOMAS, P.A.

By: 

James Edward Bradley
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Attorney for Defendants

West Columbia, South Carolina
April 16, 2008

RoA 000093

APPENDIX_0096

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Columbia/CSA-HS Greater Columbia
Healthcare System, LP d/b/a Providence
Hospital,

Plaintiff,

vs.

The South Carolina Medical Malpractice
Liability Joint Underwriting Association
and Michael P. Tallion,

Defendants.

C/A No. 07-CP-40-3564

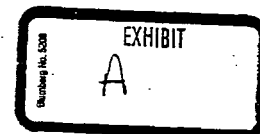
AMENDED ANSWER

(JURY TRIAL REQUESTED)

The Defendants respond to the Complaint as follows:

FOR A FIRST DEFENSE

1. Unless specifically admitted in this Answer, the Defendants deny each and every allegation of the Complaint.
2. The Defendants deny the allegations of paragraphs 1 and 2.
3. In response to paragraph 3, the Defendants admit that the South Carolina Medical Malpractice Liability Joint Underwriting Association (JUA) is a South Carolina entity writing policies of insurance for physicians which insured Michael P. Tallion. The Defendants deny the remaining allegations of paragraph 3.
4. In response to paragraph 4, the Defendants admit that Michael P. Tallion is a physician practicing emergency medicine. The Defendants deny the remaining allegations of paragraph 4.
5. The Defendants deny the allegations of paragraph 5.



RoA 000094

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6. In response to paragraph 6, the Defendants admit that the Defendant Michael P. Tallion entered into an agreement for emergency room services. The Defendants deny the remaining allegations of paragraph 6.

7. In response to paragraph 7, the Defendants admit Michael P. Tallion agreed to keep and maintain professional liability insurance coverage. The Defendants deny the remaining allegations of paragraph 7.

8. In response to paragraph 8, the Defendants refer to the agreement. The Defendants admit such allegations as are consistent with that agreement and deny such allegations as are inconsistent with that agreement.

9. In response to paragraph 9, the Defendants admit that Michael P. Tallion was insured by the JUA. The Defendants deny the remaining allegations of paragraph 9.

10. In response to paragraph 10, the Defendants admit that Arthur and Patricia Sharpe filed a lawsuit against Columbia/CSA-HS Greater Columbia Area Healthcare System, LP d/b/a Providence Hospital. The Defendants admit that a copy of that complaint is attached to the Complaint in this lawsuit. The Defendants deny the remaining allegations of this paragraph.

11. The Defendants deny the allegations of paragraphs 11, 12, 13, 14, 15, and 16.

12. The Defendants admit the allegations of paragraph 17.

13. In response to paragraph 18, the Defendants admit that Michael P. Tallion is a qualified emergency room physician and that the hiring of Dr. Tallion to perform emergency room services would not constitute negligence. The Defendants deny the remaining allegations of paragraph 18.

14. The Defendants deny the allegations of paragraphs 19, 20, 21, 22, 23, 24, 25, and 26.

15. In response to paragraph 27, the Defendants reallege their previous allegations and denials.

16. The Defendants deny the allegations of paragraphs 28, 29, 30, and 31.

17. In response to paragraph 32, Defendant Tallion admits to signing an agreement. The Defendants deny the remaining allegations of paragraph 32.

18. In response to paragraph 33, the Defendants admit that Defendant Tallion agreed to purchase professional liability insurance. The Defendants deny the remaining allegations of paragraph 33.

19. In response to paragraph 34, the Defendants admit that Defendant Tallion purchased insurance from the South Carolina Medical Malpractice Liability Joint Underwriting Association. The Defendants deny the remaining allegations of paragraph 34.

20. The Defendants deny the allegations of paragraphs 35, 36, 37, and 38.

21. The Defendants admit the allegations of paragraph 39.

22. The Defendants deny the allegations of paragraphs 40, 41, and 42.

FOR A SECOND DEFENSE

23. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

24. Any settlement entered into by the Plaintiff or other parties was not a reasonable settlement after a proper defense of the case. Therefore, the Defendants are not obligated to make any sort of payment based upon the unreasonable settlement of the underlying lawsuit.

FOR A THIRD DEFENSE

25. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

26. As no judgment has ever been entered against either the Plaintiff or any other party, there is no duty to pay and the Defendants are not liable for any amounts voluntarily paid without a judgment.

FOR A FOURTH DEFENSE

27. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

28. To the extent that *Osborne v. Adams*, 550 S.E.2 319 (S.C. 2001), sets forth the public policy of South Carolina, the Plaintiff should not be allowed to go forward with this case as it is in direct violation of South Carolina public policy which requires that hospitals assume responsibility for injuries to patients while in the hospital's care.

FOR A FIFTH DEFENSE

29. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

30. The Plaintiff in this action was not the party making any payments to the alleged injured medical malpractice plaintiff. As a result, the Plaintiff in this case does not have any claim against these Defendants for money paid as it did not make any payments itself.

FOR AN SIXTH DEFENSE

31. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

32. The Plaintiff comes to this action with unclean hands for its actions as alleged above, its own negligence, and its actions involving the defense of the Sharpe lawsuit. For this reason, this action should be dismissed.

FOR A SEVENTH DEFENSE

33. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

34. The Plaintiff has unreasonably delayed in asserting claims in this matter the prejudice of the Defendants, and the Defendants plead laches as a complete and total defense in this matter.

FOR AN EIGHTH DEFENSE

35. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

36. This action was brought outside of the relevant statute of limitations, and the Defendants plead the statute of limitations as a complete defense in this matter.

FOR AN NINTH DEFENSE

37. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

38. With regard to any settlement made in this matter, the Plaintiff acted as a volunteer in paying the amounts paid. As a result, the Plaintiff does not have any right to seek contribution or indemnification from these Defendants.

FOR A TENTH DEFENSE

39. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

40. The Complaint fails to make a claim upon which relief may be granted.

FOR A ELEVENTH DEFENSE

41. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

42. The Plaintiff has breached the contract alleged in the pleadings between the parties by bringing this lawsuit in violation of the alternate dispute resolution terms of the contract. As a result, the Defendants are entitled to have the lawsuit dismissed with prejudice.

FOR A TWELFTH DEFENSE

43. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

44. The Defendant JUA has no relationship whatsoever with the Plaintiff in this case. For this reason Defendant JUA has no special relationship or duty to the Plaintiff, and this case must be dismissed with prejudice.

FOR A THIRTEENTH DEFENSE

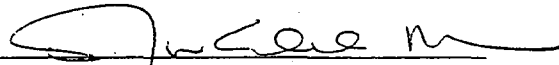
45. Each and every allegation set forth above is hereby reasserted and realleged as fully as if set forth verbatim.

46. This lawsuit was brought outside of the statute of repose for suits upon medical malpractice. For that reason, the lawsuit must be dismissed with prejudice.

WHEREFORE, the Defendants having responded to the Complaint ask that the Complaint be dismissed and for such other relief as the Court deems fair and equitable.

MOORE, TAYLOR & THOMAS, P.A.

By:



James Edward Bradley
1700 Sunset Boulevard
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Attorneys for Defendants

West Columbia, South Carolina

April 16, 2008

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Columbia/CSA-HS Greater Columbia
Healthcare System, LP d/b/a Providence
Hospital,

C/A No. 07-CP-40-3564

Plaintiff,

vs.

CERTIFICATE OF SERVICE BY MAIL

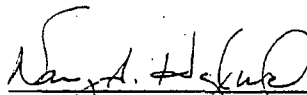
The South Carolina Medical Malpractice
Liability Joint Underwriting Association
and Michael P. Tallion,

Defendants.

I, Nancy A. Hazelwood, an employee of Moore, Taylor, & Thomas, P.A., certify that I have on this day effected service of the below listed documents on counsel for the Plaintiff in this action by placing a copy of same in the United States mail, certified mail, return receipt requested, in an envelope with sufficient postage affixed thereto, addressed as follows:

Weldon R. Johnson, Esquire
P.O. Box 8448
Columbia, SC 29202

DOCUMENT: 1. Amended Answer


Nancy A. Hazelwood

West Columbia, South Carolina

April 21, 2008

RoA 000101

APPENDIX_0104

STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Columbia/CSA-HS Greater Columbia)
Healthcare System, LP d/b/a Providence)
Hospital,)

C/A No. 07-CP-40-3564

Plaintiff,)

vs.)

The South Carolina Medical Malpractice)
Liability Joint Underwriting Association)
and Michael P. Tallion,)

Defendants.)

DEFENDANTS' MEMORANDUM
IN SUPPORT OF MOTION TO
AMEND PLEADINGS AND MOTION
FOR SUMMARY JUDGMENT

FILED
08 OCT 30 PM 12:24
BARBARA A. SCOTT
C.C. & G.S.

The Defendants submit this memorandum in support of their motion to amend pleadings to add the statute of repose as a defense and their motion for summary judgment.

INTRODUCTION

Michael P. Tallion is an emergency room doctor for Providence Hospital. He bought insurance from the JUA.

On June 7, 2007, Columbia/CSA filed a lawsuit against Dr. Tallion and the JUA for equitable indemnification, breach of contract and declaratory judgment. Columbia/CSA alleges that Dr. Tallion and the JUA should pay it for a settlement it reached with Arthur Sharpe and Patricia Sharpe. (Compl. ¶ 20). Dr. Tallion treated Mr. Sharpe in the Providence Hospital emergency room on May 31, 1997. (Compl. ¶ 10). Mr. Sharpe had a heart attack on June 9, 1997. *Id.* Mr. Sharpe filed suit against Providence Hospital on May 25, 1999. *Id.* Dr. Tallion was not sued. On June 10, 2004 Providence Hospital settled the lawsuit with Mr. and Mrs. Sharpe. (Compl. ¶ 13). Providence Hospital sued Dr. Tallion and the JUA on June 7, 2007, more than ten years after Dr. Tallion treated Mr. Sharpe.

ARGUMENT

I. This Court should allow the Defendants to amend their pleadings to include the statute of repose as a defense.

Leave of the court to amend pleadings "shall be freely given when justice so requires and does not prejudice any other party." Rule 15, SCRPC. "[T]his rule strongly favors amendments, and the court is encouraged to freely grant leave to amend." *Jarrell v. Seaboard Systems R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987).

"In the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion." *Forrester v. Smith & Steele Builders*, 295 S.C. 504, 508, 369 S.E.2d 156, 158 (Ct. App. 1988). "It is the responsibility of a party opposing an amendment to establish prejudice." *Id.* "The prejudice Rule 15 envisions is a lack of notice that a new issue is going to be tried, and a lack of opportunity to refute it." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716-17 (Ct. App. 2005).

This Court should grant Defendants motion to amend their pleadings to include the statute of repose as a defense. The Defendants answered this lawsuit in November 2007 and served discovery. Five months later, the Defendants filed their motion to amend to add the statute of repose as a defense. At the time the Defendants moved to amend, the Plaintiff had not served discovery or responded to the Defendants' discovery. In fact, when the Defendants filed the motion to amend, the Plaintiff had not served discovery, had not responded to discovery, and had made no motions. Therefore, the Plaintiff was not prejudiced in any way by learning of the statute of repose as a defense in April 2008. The Defendants did not move to amend in bad faith, nor to cause undue delay. Columbia/CSA will not be prejudiced by the amendment and will have ample notice of the new defense as well as opportunity to refute it. The interests of justice

require that the Defendants receive leave to amend their pleadings to include the statute of repose as a defense.

II. The Statute of Repose bars Columbia/CSA's claim.

Defendants are entitled to summary judgment because Columbia/CSA filed its lawsuit after the six year statute of repose expired. The statute of repose for medical malpractice actions is in Code Section 15-3-545(A) which states that:

In any action, . . . to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession must be commenced within three years from the date of 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. (emphasis added).

S.C. Code § 15-3-545(A) (1976).

The treatment giving rise to this lawsuit occurred May 31, 1997 when Dr. Tallion treated Mr. Sharpe at the Providence Hospital emergency room. (Compl. ¶ 10). On June 9, 1997, Mr. Sharpe suffered a heart attack. *Id.* On May 25, 1999, Mr. Sharpe filed suit against Columbia/CSA. *Id.* Columbia/CSA did not file this lawsuit until June 7, 2007 – more than ten years after Dr. Tallion treated Mr. Sharpe. The time between the treatment, which occurred on May 31, 1997, and the date this lawsuit was filed, June 7, 2007, is well past the six year maximum deadline set forth in Section 15-3-545(A).

The statute of repose applies even though this lawsuit relies upon indemnification. Statutes of repose apply to actions for contribution and indemnification. *See, Florence County School District # 2 v. Interkal, Inc.*, 348 S.C. 446, 559 S.E.2d 866, (Ct. App. 2002); *Capco of Summerville, Inc. v. J.H. Gayle Construction Company, Inc.*, 368 S.C. 137, 628 S.E.2d 38 (2006).

In *Florence County School District #2*, the School District sued a bleacher manufacturer after settling a claim with a spectator who was injured when bleachers collapsed. 348 S.C. at 446, 559 S.E.2d at 866. The bleachers were installed in 1971 and earlier. *Id.* at 448, 867. The bleachers collapsed in 1991, and the injured spectator sued the school district. *Id.* The School District settled the lawsuit. It then sued the manufacturer for contribution. *Id.* The special referee found that although the bleacher manufacturer would have been liable, the statute of repose for improvements to real property barred any recovery. *Id.* at 450, 868. The statute of repose for improvements to real property at the time was thirteen years. The School District did not bring the lawsuit within the thirteen year limitation period set forth in the statute. *Id.*

The Court of Appeals upheld the special referee's finding stating that "the Statute of Repose specifically applies to actions for contribution." *Id.* at 452, 869. The court noted that "neighboring jurisdictions have similarly held a statute of repose bars any action for contribution after the statutory time period." *Id.* citing *Standard Fire Ins. Co. v. Kent & Assocs., Inc.*, 232 Ga. App. 419, 501 S.E.2d 858 (1998) (claims for indemnification and contribution were among those contemplated by the legislature when it enacted the statute of repose); *Krasaeath v. Parker*, 212 Ga. App. 525, 441 S.E.2d 868 (1994) (five-year statute of repose for medical malpractice cases barred contribution claim even though suit was timely under the twenty-year statute of limitations governing contribution actions); *New Bern Assocs. v. Celotex Corp.*, 87 N.C. App. 65, 359 S.E.2d 481 (1987) (six-year statute of repose governing actions to recover damages for injuries arising out of defective improvements to real estate property also governs actions for contribution arising out of the improvements).

Likewise, in *Capco of Summerville v. J.H. Gayle Construction*, 368 S.C. 137, 628 S.E.2d 38 (2006), the South Carolina Supreme Court ruled that the statute of repose barred a claim for

contribution. The Supreme Court relied upon the Court of Appeals' decision in *Florence County School District* holding that the statute of repose bars actions for contribution brought after its expiration. The Supreme Court explained as follows:

A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time. *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Id.* at 404, 438 S.E.2d at 243. A statute of repose is "[a] statute barring any suit that is brought after a specified time since the defendant acted ... even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1451 (8th Ed. 2004). "Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49, 54, n.6 (Minn. 2005) citing *W. Page Keeton, et. al., Prosser and Keeton on the Law of Torts* § 30, p.168 (5th ed. 1984). As noted by the Virginia Supreme Court, "[a] statute of repose differs from a statute of limitations.... [T]he expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." *School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325, 327-328 (1987).

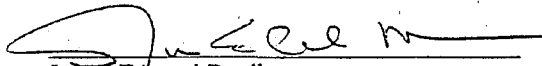
368 S.C. 137, 142, 628 S.E.2d 38, 40 (2006). As a result, the Supreme Court affirmed the trial court's ruling that the statute of repose barred the claim for contribution.

The medical malpractice statute of repose requires that "any action . . . to recover damages for any injury to the person arising out of any medical, surgical or dental treatment . . . must be commenced within three years from the date of treatment . . . not to exceed six years from the date of occurrence" S.C. Code Ann. § 15-3-545(A) (emphasis added). This statute has been consistently held a statute of repose for actions against physicians. See, *Huffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); *Shadwell v. Craigie*, 361 S.C. 492, 608 S.E.2d 567 (Ct. App. 2004); *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000). Thus, Dr. Moore and his insurers are entitled to summary judgment because Columbia/CSA sued them well after the statute of repose expired.

CONCLUSION

This Court should grant Defendants' Motion to Amend Pleadings because Providence Hospital will not be prejudiced and the interests of justice demand the Defendants the opportunity to amend their pleadings. This Court should also grant Defendants' Motion for Summary Judgment because Providence Hospital's lawsuit is barred by the South Carolina's statute of repose for medical malpractice actions.

Respectfully submitted,



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Attorney for Defendants

West Columbia, South Carolina

October 29, 2008

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	
Columbia/CSA-HS Greater Columbia	)	C/A No. 07-CP-40-3564
Healthcare System, LP d/b/a Providence	)	
Hospital,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	DEFENDANTS' MEMORANDUM
	)	IN SUPPORT OF MOTION TO
The South Carolina Medical Malpractice	)	AMEND PLEADINGS AND MOTION
Liability Joint Underwriting Association	)	FOR SUMMARY JUDGMENT
and Michael P. Tallion,	)	
	)	
Defendants.	)	

INDEX TO ATTACHMENTS

South Carolina Code Section 15-3-545	1
<i>Florence County School District # 2 vs. Interkal, Inc.</i> , 348 S.C. 446, 559 S.E.2d 866, (Ct. App. 2002);	2
<i>Capco of Summerville, Inc. v. J.H. Gayle Construction Company, Inc.</i> , 368 S.C. 137, 628 S.E.2d 38 (2006)	3
<i>Krasaeath v. Parker</i> , 212 Ga. App. 525, 441 S.E.2d 868 (1994)	4

CCode of Laws of South Carolina 1976 Annotated Currentness

Title 15. Civil Remedies and Procedures

Chapter 3. Limitation of Civil Actions

Article 5. Actions Other Than for Recovery of Real Property

→ § 15-3-545. Actions for medical malpractice.

(A) In any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider as defined in Article 5, Chapter 79, Title 38 acting within the scope of his profession 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.

(B) When the action is for damages arising out of the placement and inadvertent, accidental, or unintentional leaving of a foreign object in the body or person of any one or the negligent placement of any appliance or apparatus in or upon any such person by any licensed health care provider acting within the scope of his profession by reason of any medical, surgical, or dental treatment or operation, the action must be commenced within two years from date of discovery or when it reasonably ought to have been discovered; provided, that, in no event shall there be a limitation on the commencement of the action less than three years after the placement or leaving of the appliance or apparatus.

(C) The provisions of this section apply only to causes of action which arise after June 10, 1977, and, as to causes of action which arise prior to June 10, 1977, the statute of limitations existing prior to June 10, 1977, applies.

(D) 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.

CREDIT(S)

HISTORY: 1962 Code § 10-145.1; 1977 Act No. 182, § 2; 1988 Act No. 432, § 3.

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Limitation of Actions  31.C.J.S. Limitations of Actions §§ 68 to 70.

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5 ALR 6th 133, Validity of Medical Malpractice Statutes of Repose.

71 ALR 5th 307, Medical Malpractice Statutes of Limitation Minority Provisions.

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S.C. Jur. Attorney and Client § 69, Statute of Limitations.

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S.C. Jur. Limitation of Actions § 56, Ignorance of Cause of Action.

S.C. Jur. Limitation of Actions § 63, Statutory Framework.

S.C. Jur. Limitation of Actions § 67, Tacking of Disabilities.

S.C. Jur. Medical and Health Professionals § 26, Scope of Statute of Limitations.

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LAW REVIEW AND JOURNAL COMMENTARIES

South Carolina Tort Law: For Whom the Statute of Limitations Tolls--The *Epstein* Court's Rejection of the Continuous Representation Rule, 57 SC L Rev 643 (Spring 2006).

The continuous treatment rule: ameliorating the harsh result of the statute of limitations in medical malpractice cases.
52 SC L Rev 955 (Summer 2001).

ATTORNEY GENERAL'S OPINIONS

In light of the fact that doctors and physicians are professional persons with a higher obligation to their patients than the ordinary employees of a medical facility, there is a strong factual basis for their exemption from the limitations of [1977] Act No. 182; the classification of the Act is not suspect, is not outside the scope of the legislature to regulate sovereign/charitable immunity, and therefore is not unconstitutional. 1978 Op Atty Gen, No 78-67, p 94.

There is no constitutional barrier for the proposed medical malpractice legislation to place a statute of limitations upon minors. 1976-77 Op Atty Gen, No 77-85, p. 78.

NOTES OF DECISIONS

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I. Validity

Continuous treatment doctrine could not apply to toll statute of repose for medical malpractice action while patient was under the care of defendant physician. Shadwell v. Craigie (S.C.App. 2004) 361 S.C. 492, 605 S.E.2d 567, rehearing denied, certiorari granted. Limitation Of Actions ¶55(3)

The 2-year "foreign object" limitations period of the pre-1988 version of § 15-3-545, which created 2 classes of medical malpractice plaintiffs, satisfied the requirements of equal protection since a rational basis existed for distinguishing between "foreign object" plaintiffs and other medical malpractice plaintiffs; the direct causal connection between a foreign object and its attendant negligent conduct justified exempting such negligence from any "repose" limitation while, on the other hand, reducing the period in which to bring suit once the object is discovered. Jenkins v. Meares (S.C. 1990) 302 S.C. 142, 394 S.E.2d 317.

The 6-year repose provision of § 15-3-545 for medical malpractice actions does not violate equal protection and due process guarantees. The statute does not deny equal protection because it applies in the same manner to medical malpractice plaintiffs, whether their injuries are latent or readily apparent. Moreover, it bears a rational relationship to a legitimate legislative objective--reduction of liability exposure and, thereby, fostering the delivery of quality health care services. Finally, the statute does not violate due process by barring a potential claim before a plaintiff has knowledge, directly or by exercise of due care, that an injury has been inflicted since a 6-year outer limit within which to file a complaint for medical malpractice, regardless of discovery of the malpractice, is not unreasonable. Hoffman v. Powell (S.C. 1989) 298 S.C. 338, 380 S.E.2d 821. Constitutional Law ¶3454; Limitation Of Actions ¶4(2)

Section 15-3-545, establishing statutory limitation period for medical malpractice actions, is constitutional as classification of persons which legislature sought to protect is reasonable and bears rational relationship to legitimate legislative purpose of reducing health care providers' exposure to liability and continued delivery of reasonable health services, all members of protected class are treated alike under similar circumstances and conditions, and

classification rests on rational basis; parents who consulted with attorneys on several occasions concerning malpractice action against doctor following stillborn birth of child indicates parents had discovered or reasonably ought to have discovered potential medical malpractice action at that time, such that action filed more than 3 years from that time was time barred; § 15-3-545 specifically covers any action to recover damages for injury to persons arising out of any medical treatment, and thus includes contract actions resulting from alleged malpractice. Smith v. Smith (S.C. 1987) 291 S.C. 420, 354 S.E.2d 36.

2. In general

Since proviso of Code 1976 § 15-3-545 limits application of lowered statute of limitations to causes of action arising after effective date of act, court could not dismiss cause of action arising prior to June 10, 1977, even though complaint was filed over 4 years from date of treatment giving rise to cause of action and over 4 years from date of discovery. Peters v. McCalla (D.C.S.C. 1978) 461 F.Supp. 14. Limitation Of Actions ↪6(1)

The statute of repose imposes an outer limit for filing a medical malpractice action, regardless of when it is discovered. Dunbar v. Carlson (S.C.App. 2000) 341 S.C. 261, 533 S.E.2d 913, rehearing denied. Limitation Of Actions ↪95(12)

Date on which discovery of facts giving notice of medical malpractice claim should have been made is objective, not subjective, question. Arant v. Kressler (S.C. 1997) 327 S.C. 225, 489 S.E.2d 206. Limitation Of Actions ↪95(12)

An action against a blood collection agency for negligent collection and processing of blood was governed by the general statute of limitations for negligence actions, § 15-3-530(5), rather than by the 3-year statute of limitations and repose for medical malpractice actions, § 15-3-545. Swanigan v. American Nat. Red Cross (S.C. 1993) 313 S.C. 416, 438 S.E.2d 251. Products Liability ↪71.5

The entire 1988 Tort Reform Act, including the amendment to § 15-3-545, which, among other things, amended the limitations period in "foreign object" cases, is to be applied prospectively. Thus, a plaintiff's action alleging that a gauze pad was negligently left in her abdomen following surgery, did not receive the benefit of the more liberal limitations period under the amended § 15-3-545 where the action accrued prior to the effective date of the amended statutes. Jenkins v. Meares (S.C. 1990) 302 S.C. 142, 394 S.E.2d 317.

3. Pleading limitations as bar to action

The physician who delivered the plaintiff's daughter was not equitably estopped from asserting the statute of limitations in an action arising from the death of the daughter from seizures where the action was brought more than 3 years after the mother requested documents which indicated that the daughter's condition could have resulted from lack of oxygen during delivery. Brayboy v. Ewing (S.C.App. 1993) 311 S.C. 272, 428 S.E.2d 731. Limitation Of Actions ↪13

4. Discovery of cause of action

Issue of whether South Carolina would apply the "discovery rule" in interpreting its statute of limitations in medical malpractice cases is one of first impression. Gattis v. Chavez (D.C.S.C. 1976) 413 F.Supp. 33.

In an action for medical malpractice, the statute of limitations commences to run when the plaintiff discovered, or with reasonable efforts should have discovered, the act of malpractice. Gattis v. Chavez (D.C.S.C. 1976) 413 F.Supp. 33. Limitation Of Actions ↪95(12)

Six-year statute of repose for medical malpractice action based on consulting physician's failure to inform patient of laboratory test results showing that she had an elevated creatinine level began to run when physician should have informed patient of the results, which was, at the latest, during an appointment in the month following the tests, regardless of when patient discovered the omission. Shadwell v. Craigie (S.C.App. 2004) 361 S.C. 492, 605 S.E.2d 567, rehearing denied, certiorari granted. Limitation Of Actions ¶53(3); Limitation Of Actions ¶95(12)

The three-year statute of limitations governing medical malpractice actions begins to run when the facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of hers has been invaded or that some claim against a party might exist. Dunbar v. Carlson (S.C.App. 2000) 341 S.C. 261, 533 S.E.2d 913, rehearing denied. Limitation Of Actions ¶95(12)

Statute of limitations for medical malpractice begins to run where facts and circumstances of injury would put person of common knowledge and experience on notice that some right of hers has been invaded or that some claim against party might exist. Arant v. Kressler (S.C. 1997) 327 S.C. 225, 489 S.E.2d 206. Limitation Of Actions ¶95(12)

Patient's medical malpractice claim against obstetrician arising from delivery of child was time barred, as another physician told her more than three years before commencement of action that reason patient was bleeding was because obstetrician had not removed all of the placenta; that information was sufficient to put patient on notice of claim against obstetrician. Arant v. Kressler (S.C. 1997) 327 S.C. 225, 489 S.E.2d 206. Limitation Of Actions ¶95(12)

Statute of limitations applicable to patient's medical malpractice action claiming that he had become addicted to drug as result of physician's negligence began to run on date that patient had knowledge of his addiction. Preer v. Mims (S.C. 1996) 323 S.C. 516, 476 S.E.2d 472. Limitation Of Actions ¶95(12)

In a medical malpractice action based upon care following surgery, the statute of limitations began to run at the time the follow up care ceased, since the cause of the injury was readily discoverable by a person of common knowledge through reasonable diligence at that time; thus, the discovery rule did not delay the running of the statute of limitations until the plaintiff's attorney reviewed the medical records. Strong v. University of South Carolina School of Medicine (S.C. 1994) 316 S.C. 189, 447 S.E.2d 850.

Under the discovery rule, an action accrues when the injury is discovered or "reasonably ought to have been discovered"; the "reasonably ought to have been discovered" requirement is the "reasonable diligence" requirement. Strong v. University of South Carolina School of Medicine (S.C. 1994) 316 S.C. 189, 447 S.E.2d 850. Limitation Of Actions ¶95(1)

A patient alleging medical malpractice against her physician knew or should have known that her claim existed no later than the date on which she continued to have problems with her knees and sought legal advice regarding a claim against her physician. Johnston v. Bowen (S.C. 1993) 313 S.C. 61, 437 S.E.2d 45. Limitation Of Actions ¶95(12)

A plaintiff was chargeable with discovery of the defendant's alleged negligence as of April 8, 1981, such that the plaintiff's medical malpractice action alleging that the defendant was negligent in using the drug Valium to treat him for chronic anxiety and depression, which was filed and served on October 2, 1984, was barred by § 15-3-545 where, no later than April 8, 1981, the plaintiff was told by another physician that he should not be taking Valium but instead should be taking an antidepressant. Wilson v. Shannon (S.C.App. 1989) 299 S.C. 512, 386 S.E.2d 257.

Action alleging medical malpractice commenced within 3 years from date hospital forwarded deceased husband's medical records but more than 3 years after death of husband was not timely where wife was present at time of death and witnessed events leading up to death, as such events were more than sufficient to put person of common knowledge and experience on notice that some claim against another party might exist. Austin v. Conway Hosp., Inc. (S.C.App. 1987) 292 S.C. 334, 356 S.E.2d 153. Limitation Of Actions ¶95(12)

5. Physician moving from state

Statute of repose contained in § 15-3-545 was not tolled by § 15-3-30 when defendant doctor moved from the state in 1984. Langley v. Pierce (C.A.4 (S.C.) 1994) 15 F.3d 312.

In a medical malpractice action, the statute of repose contained in § 15-3-545 was not tolled when the defendant physician moved from South Carolina, since the general tolling statute (§ 15-3-30) is not applicable to medical malpractice claims. Langley v. Pierce (S.C. 1993) 313 S.C. 401, 438 S.E.2d 242, answer to certified question conformed to 15 F.3d 312. Limitation Of Actions ⚡85(2)

6. Damages

Medicaid payments to defendant physician for medical services provided to patient were a wholly independent collateral source, and thus, patient's damages in medical malpractice action against physician were not limited by the amounts paid by Medicaid. Haselden v. Davis (S.C. 2003) 353 S.C. 481, 579 S.E.2d 293. Damages ⚡64

7. Wrongful death

In a wrongful death action based upon alleged medical malpractice, the trial court improperly granted the defendants' motion for summary judgment on statute of limitations grounds where, although the plaintiff was unhappy with the decedent's nursing care prior to her death, there was no evidence conclusively showing that the plaintiff should have suspected negligence on the part of her physicians during the period the decedent was hospitalized. Garner v. Houck (S.C. 1993) 312 S.C. 481, 435 S.E.2d 847, rehearing denied. Limitation Of Actions ⚡199(1)

Wrongful death actions are actions to recover damages for injury to the person, and therefore, in a wrongful death action based on medical malpractice, the health care provider statute of limitations, § 15-3-545, is applicable. Garner v. Houck (S.C. 1993) 312 S.C. 481, 435 S.E.2d 847, rehearing denied. Death ⚡37

8. Verdict

General defense verdict would be sustained pursuant to two-issue rule on parents' medical negligence action against physician and her medical practice on behalf of son alleging failures regarding birth of son; case involved both issue of negligence properly submitted to jury and defense of assumption of risk, and parents conceded negligence claim involved disputed issues of fact and was properly submitted to jury. Cole v. Raut (S.C.App. 2004) 2004 WL 2851531, opinion superseded on rehearing 365 S.C. 434, 617 S.E.2d 740, rehearing denied, certiorari granted. Appeal And Error ⚡1136

Code 1976 § 15-3-545, SC ST § 15-3-545

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C

Court of Appeals of South Carolina.
FLORENCE COUNTY SCHOOL DISTRICT # 2,
Appellant/Respondent,
v.
INTERKAL, INC., and United Industrial Syndicate,
Inc., Respondents/Appellants.
No. 3443.

Submitted Nov. 6, 2001.

Decided Feb. 11, 2002.

School district brought contribution action against bleacher manufacturer following settlement with spectator for injuries he suffered when bleachers collapsed during a high school basketball game. The Circuit Court, Florence County, Cody W. Smith, Jr., Special Referee, ruled that school district was not entitled to contribution, that manufacturer would have been liable on underlying suit absent its affirmative defense and that school district's negligence did not supersede manufacturer's negligence. School district and manufacturer appealed. The Court of Appeals, Connor, J., held that the 13-year statute of repose applied to and barred school district's action for contribution.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ⇨ 1017**30 Appeal and Error****30XVI Review**

30XVI(D) Questions of Fact, Verdicts, and Findings

30XVI(D4) Findings of Referee, Master, Commissioner, or Auditor

30k1017 k. Conclusiveness in General.

Most Cited Cases

Reference 327 ⇨ 100(6)

327 Reference

327III Report and Findings

327k100 Objections and Exceptions, and Hearing Thereof in General

327k100(6) k. Hearing and Determination.

Most Cited Cases

In actions in equity referred to a special referee with finality, the appellate court may view the evidence to determine the facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee.

[2] Appeal and Error 30 ⇨ 173(10)**30 Appeal and Error**

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(A) Issues and Questions in Lower Court

30k173 Grounds of Defense or Opposition

30k173(10) k. Time of Bringing Suit, Limitations, and Laches. Most Cited Cases

Although issue of whether 13-year statute of repose barred school district's contribution action against manufacturer of bleachers which collapsed and injured spectator 20 and more years after installation appeared not to have been preserved for appeal, court would address issue because of equitable nature of proceedings and uncertainty regarding issues actually raised and ruled upon. Code 1976, § 15-3-640.

[3] Statutes 361 ⇨ 181(1)**361 Statutes**

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k181 In General

361k181(1) k. In General. Most Cited Cases

Statutes 361 ⇨ 184**361 Statutes**

361VI Construction and Operation

361VI(A) General Rules of Construction

361k180 Intention of Legislature

361k184 k. Policy and Purpose of Act.

Most Cited Cases

When interpreting statutes, courts are concerned with ascertaining and effectuating legislative intent if it reasonably can be discovered in the language when construed in light of its intended purpose.

[4] Statutes 361 ➡ 190

361 Statutes

361VI Construction and Operation

361VI(A) General Rules of Construction

361k187 Meaning of Language

361k190 k. Existence of Ambiguity.

Most Cited Cases

If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning.

[5] Contribution 96 ➡ 9(3)

96 Contribution

96k9 Actions

96k9(3) k. Time for Bringing Action. Most Cited Cases

Limitation of Actions 241 ➡ 49(6)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k49 Implied Contracts

241k49(6) k. Liability to Contribution.

Most Cited Cases

Statute of repose of 13 years for actions involving defective or unsafe condition of improvements to real property applied to and barred school district's action for contribution against manufacturer of bleachers which collapsed more than 13 years after the bleachers were installed at school. Code 1976, § 15-3-640.

[6] Contribution 96 ➡ 9(3)

96 Contribution

96k9 Actions

96k9(3) k. Time for Bringing Action. Most Cited Cases

Limitation of Actions 241 ➡ 49(6)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(A) Accrual of Right of Action or Defense

241k49 Implied Contracts

241k49(6) k. Liability to Contribution.

Most Cited Cases

Statute of repose bars actions for contribution under the Uniform Contribution Among Tortfeasors Act brought more than 13 years after the completion of an improvement to real property. Code 1976, §§ 15-3-640, 15-38-20.

****866*447 Saunders M. Bridges, Jr.**, of Bridges, Orr & Ervin, of Florence, for appellant/respondent. **R. David Howser, George V. Hanna, IV and Andrew E. Haselden**, all of Howser, Newman & Besley, for respondents/appellants.

CONNOR, J.

In this contribution action, Florence County School District # 2 (School District) appeals the finding that it was not ***448** entitled to contribution from Interkal.^{FN1} Interkal appeals ****867** the findings that it would have been liable on the underlying suit absent its affirmative defense and that the School District's negligence did not supersede Interkal's negligence. We affirm.

^{FN1}. For purposes of this appeal, Interkal and United Industrial Syndicate, Inc. have stipulated they may be considered as one entity.

FACTUAL/PROCEDURAL BACKGROUND

On February 22, 1991, a bleacher collapsed during a basketball game in the Hannah-Pamplico High School gymnasium seriously injuring eleven-year-old Anthony Altman. Altman suffered fractures to his right femur, tibia, and fibula.

Hannah-Pamplico High School is a school within Florence County School District # 2. Altman sued the School District and Interkal, the manufacturer and seller of the bleachers, for negligence, breach of warranty, and violations of the consumer protection code. The School District eventually settled the case with Altman. It then sued Interkal to recover a pro rata

share of the settlement under the Uniform Contribution Among Tortfeasors Act, South Carolina Code Annotated Section 15-38-10 (Supp.2000).

The first set of bleachers in the Hannah-Pamplico High School gymnasium was installed in 1969, and the second set was installed in 1971. Interkal designed, manufactured, sold, and distributed the bleachers. In 1979, Interkal became aware of problems associated with the type of bleachers installed at Hannah-Pamplico High School. Interkal sent a safety bulletin to all its customers, including the School District, warning that the bleachers might fail and cause personal injury if they were not properly maintained. The safety bulletin urged customers to inspect the bleachers for particular problems, including bent guides, damaged finger locks, missing or damaged slide stops, and loose or missing bolts. Interkal sent another safety bulletin to the School District in 1985 warning about potential safety problems with the bleachers and giving detailed instructions on how to inspect the bleachers. In 1989 Interkal also sent the School District two copies of a Safety Alert Manual which contained additional warnings that failure to properly maintain and inspect the *449 bleachers could result in a safety hazard. The School District did not retain maintenance records concerning the bleachers, nor did it maintain a regular maintenance schedule.

The School District contacted Mastercraft Renovations Systems in 1990 to inspect the bleachers and submit a proposal for repairing them. Mastercraft representative Martin Rapp inspected the bleachers and submitted a proposal for repair which included replacing the truck assembly for the bleachers on the home side of the gymnasium and repairing the bleachers on the visitor's side with parts from the home side which were still safe and operable. Harvey Putnam, the School District's maintenance director, was concerned with the cost of the proposal and requested that Rapp re-inspect the bleachers. After another inspection, Rapp submitted a second proposal in July 1990, which suggested realigning the trucks and welding the stress fractures on the bleachers. Neither proposal was submitted to the school board for consideration.

James Samuel McKnight, Ph.D., testified via deposition for Interkal that the collapse of the bleachers was caused by the School District's failure

to follow the recommendations in the safety bulletins provided by Interkal, failure to follow Mastercraft's proposals for renovations, and failure to establish a regular maintenance program.

Melvin Richardson, Ph.D., an engineering expert, was also deposed. Richardson admitted that performing the repairs to the bleachers as suggested by Mastercraft and following a regular maintenance schedule may have reduced the chances for bleacher collapse. However, he opined that because the bleachers were not "precisely restrained," the hooks would not line up and would not always latch. According to Richardson, the bleachers were defectively designed and the design defects caused the latch failures which led to the collapse.

The School District's action for contribution was referred to a special referee with finality. Interkal argued recovery against it was barred by the South Carolina Statute of Repose because the action was brought more than thirteen years after the installation of the bleachers. Alternatively, Interkal argued the School District's negligence rendered**868 it solely responsible for the injury to Altman.

*450 The special referee considered, among other things, the parties' oral arguments and the depositions of McKnight and Richardson in rendering his decision. He found the settlement with Altman was reasonable and fair under the circumstances. He further found Interkal was negligent in designing the bleachers and breached its warranty regarding the bleachers. However, the special referee also held the South Carolina Statute of Repose provided an absolute defense to the School District's contribution action and protected Interkal from liability because the bleachers were improvements to real property and the lawsuit was not brought within the statutorily required thirteen-year period. Finally, the special referee held any negligence on the part of the School District in failing to inspect or maintain the bleachers was not an intervening act of negligence and Interkal's defective design was the contributing proximate cause to Altman's injury. Thus, absent the Statute of Repose defense, the special referee found Interkal would have been liable for the injuries to Altman.

Both parties now appeal.

STANDARD OF REVIEW

[1] Principles of equity are applicable to actions determining the pro rata liability of tortfeasors. S.C.Code Ann. § 15-38-30 (Supp.2000). In actions in equity referred to a special referee with finality, the appellate court may view the evidence to determine the facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee. See Pinckney v. Warren, 344 S.C. 382, 544 S.E.2d 620 (2001); Wilder Corp. v. Wilke, 324 S.C. 570, 479 S.E.2d 510 (Ct.App.1996).

DISCUSSION

The School District argues the special referee erred in finding that where the underlying liability of a joint tortfeasor is barred by the Statute of Repose, the joint liability under the Uniform Contribution Among Tortfeasors Act is also time-barred. The School District urges us to adopt the findings of other jurisdictions that the existence of a cause of action, *451 rather than the right to enforce the cause of action, is the trigger for the right of contribution.

[2] Initially, we are not convinced this issue is preserved for review. The special referee's order states the parties argued their positions on the right to contribution. However, the School District did not include the transcript of the oral arguments before the special referee in the Record on Appeal. Furthermore, it appears from the special referee's order that the only issue in controversy was whether the bleachers constituted "improvements to real property," thereby triggering the Statute of Repose. The School District's current argument, that it may recover under the Uniform Contribution Among Tortfeasors Act despite the operation of the Statute of Repose, was never ruled upon by the special referee. Because we are unable to discern what arguments were actually raised before the special referee and because the special referee did not rule upon the School District's current argument, it does not appear that this issue is preserved for review. See State v. Hicks, 330 S.C. 207, 499 S.E.2d 209 (1998) (issue must have been raised to and ruled upon by the lower court in order to be preserved for appellate review). However, because of the equitable nature of the proceedings and the uncertainty regarding the issues actually raised and ruled upon, we address this issue. See State ex rel. Daniel v. Strong, 185 S.C. 27, 192 S.E. 671 (1937) (equity looks

beneath the rigid rules of the law to seek justice).

[3][4] When interpreting statutes, we are concerned with ascertaining and effectuating legislative intent if it reasonably can be discovered in the language when construed in light of its intended purpose. Singletary v. South Carolina Dep't of Educ., 316 S.C. 153, 447 S.E.2d 231 (Ct.App.1994). "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the Court has no right to look for or impose another meaning." Lester v. South Carolina Workers' Comp. Comm'n, 334 S.C. 557, 561, 514 S.E.2d 751, 752 (1999).

The Uniform Contribution Among Tortfeasors Act provides that "where two or more persons become jointly or severally liable in tort for the same injury to person or property**869 or for *452 the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them." S.C.Code Ann. § 15-38-20(A) (Supp.2000). A right of contribution exists in favor of a tortfeasor who pays more than his pro rata share of the common liability. S.C.Code Ann. § 15-38-20(B) (Supp.2000).

The South Carolina Statute of Repose provides that no action to "recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after substantial completion of such an improvement." S.C.Code Ann. § 15-3-640 (Supp.2000). The definition of an action "based upon or arising out of the defective or unsafe condition of an improvement to real property includes: ... an action for contribution or indemnification for damages sustained on account of an action described in this subdivision." S.C.Code Ann. § 15-3-640(6) (Supp.2000).

[5] In this case, the parties do not dispute that Altman's personal injury action arose more than thirteen years after the installation of the bleachers. The School District concedes the Statute of Repose applies to the underlying personal injury action against Interkal. Because the Statute of Repose specifically applies to actions for contribution, it is clear the General Assembly intended that persons who improve real property should be given the statutory right to protection from claims for contribution after the

statutory period. We note that neighboring jurisdictions have similarly held a statute of repose bars any action for contribution after the statutory time period. See Standard Fire Ins. Co. v. Kent & Assocs., Inc., 232 Ga.App. 419, 501 S.E.2d 858 (1998) (claims for indemnification and contribution were among those contemplated by the legislature when it enacted the statute of repose); Krasaeath v. Parker, 212 Ga.App. 525, 441 S.E.2d 868 (1994) (five-year statute of repose for medical malpractice cases barred contribution claim even though suit was timely under the twenty-year statute of limitations governing contribution actions); New Bern Assocs. v. Celotex Corp., 87 N.C.App. 65, 359 S.E.2d 481 (1987) (six-year statute of repose governing actions to recover damages for injuries arising out of defective improvements to real property also governs actions for contribution arising out of the improvements).

*453 The cases cited by the School District do not address statutes of repose. These cases do not reflect the difference between a statute of limitations and a statute of repose and merely stand for the proposition that the running of a statute of limitations against one tortfeasor does not affect another tortfeasor's ability to sustain a contribution action. Our Supreme Court stated:

A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time.... [A] statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body.

Langley v. Pierce, 313 S.C. 401, 403-404, 438 S.E.2d 242, 243 (1993) (quoting First United Methodist Church v. U.S. Gypsum Co., 882 F.2d 862, 865-866 (4th Cir.1989) (internal citations omitted).

[6] The Statute of Repose bars actions for contribution under the Uniform Contribution Among Tortfeasors Act brought more than thirteen years after the completion of an improvement to real property. Accordingly, there is no error in the special referee's finding that the Statute of Repose bars the School District's action for contribution.^{FN2}

FN2. Because of our disposition of this issue we need not address Interkal's cross-appeal.

CONCLUSION

For the foregoing reasons, the judgment below is

AFFIRMED.

ANDERSON and HOWARD, JJ., concur.
S.C.App.,2002.
Florence County School Dist. No. 2 v. Interkal, Inc.
348 S.C. 446, 359 S.E.2d 866, 162 Ed. Law Rep. 600,
Prod.Liab.Rep. (CCH) P 16,275

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C

Supreme Court of South Carolina.
CAPCO OF SUMMERVILLE, INC., Appellant,
v.
J.H. GAYLE CONSTRUCTION COMPANY, INC.,
Respondent.
No. 26118.

Heard Jan. 19, 2006.
Decided Feb. 27, 2006.

Background: Property owner brought contribution action against contractor less than one year after settling tort claim, but more than thirteen years after completion of improvement. The Circuit Court, Colleton County, Jackson V. Gregory, J., entered summary judgment in favor of contractor. Owner appealed.

Holding: The Supreme Court, Toal, C.J., held that the one-year statute of limitations for settling tortfeasor to bring contribution action was not in irreconcilable conflict with and, therefore, did not impliedly repeal thirteen-year statute of repose.

Affirmed.

West Headnotes

[1] Contribution 96 ⚡9(3)

96 Contribution
96k9 Actions
96k9(3) k. Time for Bringing Action. Most Cited Cases

Limitation of Actions 241 ⚡49(6)

241 Limitation of Actions
241II Computation of Period of Limitation
241III(A) Accrual of Right of Action or Defense
241k49 Implied Contracts
241k49(6) k. Liability to Contribution.
Most Cited Cases
One-year statute of limitations for settling tortfeasor to

bring contribution action was not in irreconcilable conflict with and, therefore, did not impliedly repeal thirteen-year statute of repose to bring an action for contribution based upon or arising out of the defective or unsafe condition of an improvement to real property; thus, the statute of repose barred property owner's contribution claim against contractor more than thirteen years after completion, but less than one year after settlement of tort claim. Code 1976, §§ 15-3-640(6), 15-38-40(D).

[2] Statutes 361 ⚡158

361 Statutes
361V Repeal, Suspension, Expiration, and Revival
361k158 k. Implied Repeal in General. Most Cited Cases

Statutes 361 ⚡159

361 Statutes
361V Repeal, Suspension, Expiration, and Revival
361k159 k. Implied Repeal by Inconsistent or Repugnant Act. Most Cited Cases
Repeal by implication is disfavored and is found only when two statutes are incapable of any reasonable reconciliation.

[3] Statutes 361 ⚡159

361 Statutes
361V Repeal, Suspension, Expiration, and Revival
361k159 k. Implied Repeal by Inconsistent or Repugnant Act. Most Cited Cases
The repugnancy of two statutes must be plain in order for a court to find repeal by implication, and if the two provisions can be construed so that both can stand, a court shall so construe them.

[4] Statutes 361 ⚡223.4

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k223 Construction with Reference to Other Statutes
361k223.4 k. General and Special

Statutes. Most Cited Cases

Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect.

[5] Limitation of Actions 241 ↪ 1

241 Limitation of Actions

241I Statutes of Limitation

241I(A) Nature, Validity, and Construction in General:

241k1 k. Nature of Statutory Limitation.

Most Cited Cases

A "statute of limitations" is a procedural device that operates as a defense to limit the remedy available from an existing cause of action.

[6] Limitation of Actions 241 ↪ 1

241 Limitation of Actions

241I Statutes of Limitation

241I(A) Nature, Validity, and Construction in General

241k1 k. Nature of Statutory Limitation.

Most Cited Cases

Limitation of Actions 241 ↪ 104.5

241 Limitation of Actions

241I Computation of Period of Limitation

241I(G) Pendency of Legal Proceedings, Injunction, Stay, or War

241k104.5 k. Suspension or Stay in General; Equitable Tolling. Most Cited Cases

A "statute of repose" creates a substantive right in those protected to be free from liability after a legislatively determined period of time; it is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body.

[7] Limitation of Actions 241 ↪ 1

241 Limitation of Actions

241I Statutes of Limitation

241I(A) Nature, Validity, and Construction in

General

241k1 k. Nature of Statutory Limitation.

Most Cited Cases

A "statute of repose" is a statute barring any suit that is brought after a specified time since the defendant acted, even if this period ends before the plaintiff has suffered a resulting injury.

****39 John H. Tiller**, of Haynsworth, Sinkler Boyd, P.A., of Charleston, for Appellant.
Erin DuBose Dean, of Tupper, Grimsley & Dean, P.A., of Beaufort, for Respondent.

Chief Justice TOAL:

***139** Capco of Summerville, Inc. (Capco) appeals an order of the circuit court holding its contribution action against respondent, J.H. Gayle Construction Company (Gayle), was barred by the statute of repose set forth in S.C.Code Ann. § 15-3-640(6) (1986). We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Capco owns Dixie Plaza Shopping Center in Colleton County. The parking lot of the shopping center was constructed by Gayle and was substantially completed on November 1, 1986. On May 19, 1996, Pauline Conner was involved in an automobile accident with James Hogan in the parking lot of Dixie ****40** Plaza. Conner entered a settlement agreement with Hogan for \$5000.00. In August 1998, Conner and her husband filed lawsuits against Capco and Gayle, alleging negligent design ***140** and construction of the parking lot. On June 13, 2003, Capco settled the Conners' claims for \$500,000.00. Although Gayle did not participate in the settlement, the settlement expressly released Gayle from any liability to the Conners.

On September 22, 2003, Capco filed this contribution action against Gayle. Gayle moved for summary judgment contending Capco's claim was barred by the thirteen year statute of repose set forth in S.C.Code Ann. § 15-3-640(6) (2005), as it was commenced seventeen years after completion of the parking lot. Capco responded, contending the thirteen year statute of repose had been impliedly repealed by the Legislature's adoption of the one-year limitation period set forth in S.C.Code Ann. § 15-38-40(D) of the Uniform Contribution Among Tortfeasors Act. The trial court held § 15-3-640(6) controlled such that

Capco's contribution action was barred.

The issue presented by Capco is whether S.C.Code Ann. § 15-3-640(6) was implied repealed by the Legislature's 1988 adoption of S.C.Code Ann. § 15-38-40(D), and whether the two statutes are irreconcilably conflicting. Although we are deeply troubled by the result in this case, we are constrained to hold that the thirteen year period set forth in § 15-3-640(6) controls, such that the trial court properly granted summary judgment to Gayle.

LAW/ANALYSIS

[1] At the time this action was commenced, S.C.Code Ann. § 15-3-640 (1986), provided:

No actions to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property may be brought more than thirteen years after substantial completion of such an improvement. For purposes of this section, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:

(6) an action for contribution or indemnification for damages sustained on account of an action described in this subdivision.

However, the Uniform Contribution Among Tortfeasors Act (Contribution Act), S.C.Code Ann. § 15-38-40(D) (2005), which was enacted in 1988, provides that an action for contribution*141 is barred unless a settling tortfeasor has "agreed while action is pending against him to discharge the common liability and has within one year after the agreement paid the liability and commenced his action for contribution."

In this case, Capco settled the pending case with the Conners on June 13, 2003, discharging the liability of both itself and Gayle, and brought this contribution suit three months later, well within the one year time period provided by § 15-38-40(D). However, although the contribution action was commenced within the one-year period set forth in the Contribution Act, it was not brought within 13 years of the substantial completion of the parking lot, as required by § 15-3-640(6). The circuit court, relying upon the Court of Appeals' opinion in Florence County School

District No. 2 v. Interkal, Inc., 348 S.C. 446, 559 S.E.2d 866 (Ct.App.2002), held § 15-3-640(6) controlled such that Capco's contribution action was barred. We agree.

In Interkal, a school bleacher collapsed in February 1991, injuring a student. The bleachers had been installed in 1969 and 1971. The student sued the school district and Interkal, the manufacturer of the bleachers. The school district settled with the student, then sought contribution from Interkal under S.C.Code Ann. § 15-38-10 et. seq. (the Contribution Act). The Court of Appeals held that "[t]he Statute of Repose bars actions for contribution under the Uniform Contribution Among Tortfeasors Act brought more than thirteen years after the completion of an improvement to real property." 348 S.C. at 453, 559 S.E.2d at 869. We find Interkal is clearly dispositive of the issue; accordingly, the trial court properly held the statute of repose applied to bar Capco's action.

**41 Notwithstanding the Court of Appeals' opinion in Interkal, Capco asserts the two statutes are irreconcilably conflicting. It contends the statute of repose was repealed by implication by adoption of the one-year period in the Contribution Act. We disagree.

[2][3][4] Repeal by implication is disfavored, and is found only when two statutes are incapable of any reasonable reconciliation. Mims v. Alston, 312 S.C. 311, 440 S.E.2d 357 (1994). Moreover, the repugnancy must be plain, and if the two provisions can be construed so that both can stand, a *142 court shall so construe them. City of Rock Hill v. South Carolina DHEC, 302 S.C. 161, 167, 394 S.E.2d 327, 331 (1990). Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect. Wilder v. South Carolina Hwy. Dep't, 228 S.C. 448, 90 S.E.2d 635 (1955). See also Wooten ex rel. Wooten v. S.C. Dep't of Transp., 333 S.C. 464, 468, 311 S.E.2d 355, 357 (1999) (a specific statutory provision prevails over a more general one); Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (general rule of statutory construction is that a specific statute prevails over a more general one).

27, § 2, eff. July 1, 2005.

[5][6][7] A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time. Langlev v. Pierce, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. Id. at 404, 438 S.E.2d at 243. A statute of repose is "[a] statute barring any suit that is brought after a specified time since the defendant acted ... even if this period ends before the plaintiff has suffered a resulting injury." Black's Law Dictionary 1451 (8th Ed. 2004). "Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." Camacho v. Todd and Leiser Homes, 706 N.W.2d 49, 54, n. 6 (Minn.2005) citing W. Page Keeton, et. al., Prosser and Keeton on the Law of Torts § 30, p. 168 (5th ed. 1984). As noted by the Virginia Supreme Court, "[a] statute of repose differs from a statute of limitations.... [T]he expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." School Bd. of the City of Norfolk v. U.S. Gypsum, 234 Va. 32, 360 S.E.2d 325, 327-328 (1987).

*143 The statutes at issue do not irreconcilably conflict. Section 15-3-640(6) is a statute of repose setting forth the outside time period in which an action arising out of the defective condition of an improvement to real property must be brought, which date begins to run from completion of the project. Section 15-38-40(D), on the other hand, is a statute of limitations which governs contribution actions, and begins to run from the date of settling a common liability. We find neither an irreconcilable conflict, nor an implied repeal of section 15-3-640(6).^{FN1}

^{FN1} We note that Section 15-3-640 was amended in 2005 and now contains an outside limitation of eight years in which to file suit. Notably, the 2005 amendment did not delete or otherwise amend subsection (6), clearly indicating the legislature did not intend to repeal this subsection. 2005 Act No.

Moreover, section 15-3-640(6) specifically applies to "an action for contribution or indemnification for damages sustained on account of an action" arising out of the defective or unsafe condition of an improvement to real property. Section 15-38-40(D), on the other hand, applies generally to all contribution actions. Given that section 15-3-640(6) applies not simply to contribution actions, but to this specific class of contribution actions, we find it is the more specific statute and therefore controls. **42 Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors Div. of Unidynamics Corp., 319 S.C. 556, 558, 462 S.E.2d 858, 859 (1995) (general rule of statutory construction is that a specific statute prevails over a more general one). See also State v. Life Ins. Co. of Georgia, 254 S.C. 286, 175 S.E.2d 203 (1970) (court will apply a more specific statute of limitations instead of a general one).^{FN2}

^{FN2} Capco asserts this case is analogous to Southeastern Freight Lines v. City of Hartsville, 313 S.C. 466, 443 S.E.2d 395 (1994), superseded by statute as stated in Steinke v. S.C. Dep't of Labor, Licensing and Reg., 336 S.C. 373, 520 S.E.2d 142 (1999). In Southeastern, we held the Contribution Act, to the extent it provided unlimited pro rata liability for joint tortfeasors, was inconsistent with, and had effectively repealed those portions of the South Carolina Tort Claims Act, S.C. Code Ann. §§ 15-78-100(c) and 15-78120(a)(1), which required apportioned liability and a limitation on damages against state agencies. Southeastern is inapposite. There, the limits on liability in the Tort Claims Act were inconsistent with unlimited pro rata liability. Here, the statutes simply set forth time periods to establish when a claim is barred.

*144 CONCLUSION

We find Capco's action is time-barred by the thirteen year time-period set forth in § 15-3-640(6). However, we are troubled by the harsh result in the case. As Capco correctly points out, where a lawsuit is filed on the eve of the running of the statute of repose, but is not resolved until after the statute has run, the

contribution action will be barred before the right has even accrued, placing an undue burden on a single tortfeasor. This is clearly contrary to the purposes of the Contribution Act, which was to "ameliorate the unfairness vested on all joint tortfeasors by the common law's prohibition against contribution." Southeastern, 313 S.C. at 470, 443 S.E.2d at 397. However, although we are troubled by this result, we are not at liberty to rewrite the statutes, and any amendment must come from the Legislature. Hodges v. Ruiney, 341 S.C. 79, 533 S.E.2d 578 (2000). The trial court's order granting summary judgment to Gayle is affirmed.

AFFIRMED.

MOORE, BURNETT, PLEICONES, JJ., and Acting Justice CLYDE N. DAVIS, JR., concur.
S.C., 2006.
Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.
368 S.C. 137, 628 S.E.2d 38

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Court of Appeals of Georgia.
KRASAEATH
v.
PARKER.
No. A93A2133.

Feb. 28, 1994.
Reconsideration Denied March 23, 1994.
Certiorari Denied May 13, 1994.

Deceased patient's parent, as assignee of emergency room physician, brought contribution claim against radiologist alleging that x-ray studies were negligently interpreted. Radiologist's motion to dismiss was denied by the Superior Court, Toombs County, McMillan, J. Radiologist appealed. The Court of Appeals, Beasley, P.J., held that: (1) claim for contribution could be brought as separate independent suit, but (2) five-year statute of repose for medical malpractice cases barred contribution claim.

Reversed.

West Headnotes

[1] Contribution 96 ⇨ 9(1)

96 Contribution
96k9 Actions
96k9(1) k. Nature of Action. Most Cited Cases

Contribution 96 ⇨ 9(3)

96 Contribution
96k9 Actions
96k9(3) k. Time for Bringing Action. Most Cited Cases
Claim for contribution may be brought as separate independent suit after judgment is entered in underlying tort action. O.C.G.A. § 51-12-32.

[2] Contribution 96 ⇨ 9(4)

96 Contribution
96k9 Actions

96k9(4) k. Parties. Most Cited Cases

Party against whom contribution is sought need not be named in original action. O.C.G.A. § 51-12-32.

[3] Contribution 96 ⇨ 9(3)

96 Contribution
96k9 Actions
96k9(3) k. Time for Bringing Action. Most Cited Cases
Twenty-year statute of limitations applies to contribution actions. O.C.G.A. § 9-3-22.

[4] Contribution 96 ⇨ 9(3)

96 Contribution
96k9 Actions
96k9(3) k. Time for Bringing Action. Most Cited Cases
Five-year statute of repose for medical malpractice cases barred contribution claim against radiologist who was allegedly negligent when interpreting x-ray studies, even though suit was timely under 20-year statute of limitations that governs contribution claims. O.C.G.A. §§ 9-3-22, 9-3-71(b).

*527 **868 Sullivan, Hall, Booth & Smith, John E. Hall, Jr., T. Andrew Graham, Atlanta, for appellant. Bennett, Callahan & Schloegel, Michael T. Bennett, Jennifer T. *528 Schloegel, Atlanta, Edward J. Walsh, Dunwoody, Hugh B. McNatt, Vidalia, for appellee.

*525 BEASLEY, Presiding Judge.
Interlocutory review is given to the denial of Krasaeath's motion to dismiss plaintiff's complaint, made on the basis that the action is in essence one for medical malpractice. At issue is whether the action is maintainable under a twenty-year statute of limitation for actions for contribution between joint tortfeasors, O.C.G.A. §§ 51-12-32 and 23-2-71, or whether it is barred by the five-year statute of repose for medical malpractice actions, O.C.G.A. § 9-3-73. In this case of first impression, we hold that the latter statute bars plaintiff's claim.

Plaintiff sought contribution based on an earlier medical malpractice action she filed on August 26,

1988. It was alleged that plaintiff's decedent (her son) was presented at Meadows Memorial Hospital on September 3, 1986, complaining of chest pain and shortness of breath. He was evaluated by emergency room physician Martin. Chest x-rays were ordered and were interpreted as normal by appellant Dr. Krasaeath, a radiologist. **869 The patient was discharged from the hospital but returned two days later and was found to have a pulmonary embolus, from which he died.

Dr. Martin, but not Dr. Krasaeath, was among the multiple defendants named in that medical malpractice action. On September 26, 1990, Ms. Parker settled with Dr. Martin for \$325,000 and obtained an assignment of his right of contribution.

On May 5, 1992, more than five years and eight months after the treatment of her son, Ms. Parker as assignee of Dr. Martin filed the present "complaint for contribution," naming Dr. Krasaeath and his insurer as party defendants. The insurance carrier was voluntarily dismissed by consent order. The complaint alleged that Dr. Krasaeath "was negligent and fell below the standard of care required of physicians generally in connection with his care and treatment of [the decedent], in particular, his interpretation of x-ray studies," and that *526 his negligence proximately resulted in the decedent's injuries and death. An OCCA § 9-11-9.1 expert's affidavit was filed with the complaint, according to plaintiff, "out of an abundance of caution."

1. As is evident in the complaint, the claim for contribution is predicated upon proof that Dr. Krasaeath was a joint tortfeasor along with Dr. Martin in acts of negligence relating to plaintiff's decedent. His liability for contribution depends solely on whether he was negligent in his professional capacity. "Contribution exists between joint wrongdoers whose several acts of negligence combine to injure the plaintiff." Travelers Indem. Co. v. Liberty Loan Corp. of Poplar, 140 Ga.App. 458, 231 S.E.2d 399 (1976).

[1][2][3] A claim for contribution may be brought as a separate independent suit after a judgment is entered in the underlying tort action, Tenneco Oil Co. v. Templin, 201 Ga.App. 30(1), 410 S.E.2d 154 (1991), and it is not required that the party against whom contribution is sought was named in the original action, OCCA § 51-12-32. The 20-year statute of

limitation for contribution actions is governed by OCCA § 9-3-22. See Independent Mfg. Co. v. Auto. Products, 141 Ga.App. 518(1), 233 S.E.2d 874 (1977) and Champion v. Wells, 139 Ga.App. 759, 762, 229 S.E.2d 479 (1976), both decided under the predecessor to OCCA § 9-3-22.

[4] "In 1985, the legislature enacted a five-year statute of repose for medical malpractice cases. In pertinent part it reads: 'Notwithstanding (the two-year statute of limitation), in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred.' OCCA § 9-3-71(b). Subsection (c) of the same statute goes further and provides: 'Subsection (b) of this Code section is intended to create a five-year statute of ultimate repose and abrogation.' OCCA § 9-3-71(c)." (Intentions omitted.) Wright v. Robinson, 262 Ga. 844, 845(1), 426 S.E.2d 870 (1993).

The legislative intent is explained in OCCA § 9-3-73(f): "The findings of the General Assembly under this Code section include, without limitation, that a reasonable relationship exists between the provisions, goals, and classifications of this Code section and the rational, legitimate state objectives of providing quality health care, assuring the availability of physicians, preventing the curtailment of medical services, stabilizing insurance and medical costs, ... and providing for the public safety, health, and welfare as a whole."

Hill v. Fordham, 186 Ga.App. 354, 357(2), 367 S.E.2d 128 (1988), distinguishes between statutes of limitation and repose: "A statute of limitation is a procedural rule limiting the time in which a party may bring an action for a right which has already accrued. A statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that period, it is not actionable. [Cit.] ... A statute of ultimate repose sets an ultimate limit on which injuries shall be actionable."

When faced in other situations with issues of whether a statutory right of recovery must yield to a statute of repose, our courts have held that the ultimate statute of repose prevails. In Hatcher v. Allied Products Corp., 256 Ga. 100(1), 344 S.E.2d 418 (1986), the Court determined that a ten-year statute of repose applicable to products liability actions served as a complete bar to

an action regardless**870 of any applicable statutes of limitation. In *Siler v. Block*, 263 Ga. 257, 429 S.E.2d 523 (1993), the statute of repose barred the refiling of a medical malpractice claim which would otherwise have been allowed within the renewal provision of OCGA § 9-2-61. Likewise, *Wright supra*, held that the expiration of the medical malpractice statute of repose bars renewal of a claim under OCGA § 9-2-61. The Court reasoned: "Both logic and the plain language of the statutes lead us to conclude that the legislature never intended for the dismissal and renewal statutes to overcome the statute of repose." *Id.* 262 Ga. at 846, 426 S.E.2d 870.

The same logic applies here. Although the claim is couched as one for contribution, and but for the statute of repose would have been timely, substance prevails over form. Recovery is predicated on proof of Dr. Krasaeath's professional negligence. The statute of repose specifies that "in no event" may a claim for medical malpractice be brought more than five years after the negligent act or omission occurred. Recovery could have been sought against Dr. Krasaeath at various times in this litigation: as a defendant in the original action; by impleading him as a third-party defendant in that suit under OCGA § 9-11-14(a); in a separate action for contribution brought by Ms. Parker after settlement with Dr. Martin and within the five-year statute of repose. Plaintiff cannot be permitted to do indirectly what the law does not permit her to do directly. That is, she cannot in effect hold Dr. Krasaeath liable for professional negligence through a dilatory third-party action for contribution. Logic and fairness dictate the conclusion that the present claim came too late.

2. It is unnecessary to reach appellant's laches defense.

Judgment reversed.

COOPER and SMITH, JJ., concur.

Ga.App., 1994.
Krasaeath v. Parker
212 Ga.App. 525, 441 S.E.2d 868

END OF DOCUMENT

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Columbia/CSA-HS Greater Columbia
Healthcare System, LP d/b/a Providence
Hospital,

C/A No. 07-CP-40-3564

Plaintiff,

vs.

MOTION FOR SUMMARY JUDGMENT

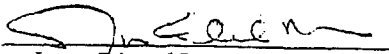
The South Carolina Medical Malpractice
Liability Joint Underwriting Association
and Michael P. Tallion,

Defendants.

The Defendant The South Carolina Medical Malpractice Liability Joint Underwriting Association hereby moves for summary judgment in this matter. The Complaint in this matter is based on breach of contract and equitable indemnification. The Defendant The South Carolina Medical Malpractice Liability Joint Underwriting Association is not a party to the contract which is referenced in the Complaint. Therefore, it cannot be in breach of the contract. In addition, The South Carolina Medical Malpractice Liability Joint Underwriting Association does not have a agreement with the Plaintiff which would lead to equitable indemnification. For these reasons, the Defendant The South Carolina Medical Malpractice Liability Joint Underwriting Association hereby moves for summary judgment.

MOORE, TAYLOR & THOMAS, P.A.

By:



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1700 Sunset Boulevard
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West Columbia, SC 29171
(803) 796-9160
Attorney for Defendants

West Columbia, South Carolina

November 1, 2007

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Columbia/CSA-HS Greater Columbia
Healthcare System, LP d/b/a Providence
Hospital,

Plaintiff,

v.

The South Carolina Medical Malpractice
Liability Joint Underwriting Association
and Michael P. Taillon,

Defendants.

Civil Action No. 07-CP-40-3564

**MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO
AMEND TO PLEAD THE STATUTE
OF REPOSE AS AN AFFIRMATIVE
DEFENSE**

The defendants' motion to amend their Answer to add the Statute of Repose as an affirmative defense should be denied because the Statute of Repose does not apply to this action for equitable indemnification and breach of contract. This case is not an action for medical malpractice or an action "to recover damages for injury to the person arising out of any medical . . . omission." (See S.C. Code Ann. §15-3-545) It is an action for equitable indemnification and breach of contract. This case involves a dispute about an independent contractor's duty to indemnify an entity which has been embroiled in litigation because of the independent contractor's actions and a tortfeasor's obligations to indemnify an entity vicariously liable for the tortfeasor's actions. Therefore, the Statute of Repose found at §15-3-545 does not apply and the defendants' motion to amend their Answer should be denied.

FACTUAL BACKGROUND

This case arises out of the underlying case of Arthur Sharpe (a/k/a Arthur Lee Sharpe, Jr.) and Patricia Gail Sharpe v. Columbia-CSA/HS Greater Columbia Area Healthcare System, LP d/b/a Providence Hospital and Michael Hayes, MD, Civil Action No. 99-CP-40-

RoA 000130

APPENDIX_0133

1802, a medical malpractice case filed in the Richland County Court of Common Pleas in May 1999. Arthur Sharpe experienced chest pain and sought care at the Providence Hospital Emergency Room on May 31, 1997. Dr. Michael Hayes had a brief initial encounter with Mr. Sharpe and then Dr. Michael P. Taillon assumed the care of Mr. Sharpe. Dr. Taillon examined and diagnosed Mr. Sharpe's condition as reflux and discharged Mr. Sharpe. Mr. Sharpe sought treatment at Lexington County Hospital several days later and was diagnosed as having suffered a heart attack.

Mr. and Mrs. Sharpe brought an action against Providence Hospital and Dr. Hayes alleging that the emergency room physicians at Providence breached the standard of care by misdiagnosing Mr. Sharpe and that this failure to diagnose and treat caused the plaintiff to suffer severe and permanent damage to his heart muscle. Providence Hospital answered denying the material allegations of the complaint. The parties then pursued written and deposition discovery. This discovery revealed that Dr. Taillon, an emergency room physician at Providence, was the physician who examined, diagnosed and treated Mr. Sharpe for reflux. Discovery also revealed that the Sharpes sought to hold Providence Hospital vicariously liable for the actions of Hayes and Taillon under the principles of ostensible agency set forth in Simmons v. Tuomey Hospital, 341 S.C. 32, 533 S.E.2d 312 (2000).

Weldon Johnson, attorney for Providence Hospital in the Sharpe case, made a demand on the attorney for Dr. Taillon and the JUA requesting Dr. Taillon and the JUA assume the defense of and indemnify Providence for the Sharpes' claims against Providence. On May 4, 2004, the attorney for Dr. Taillon and the JUA declined to assume the defense or indemnify Providence for the acts of the emergency room physicians. After Taillon and the JUA refused Providence's request for indemnification, Providence, to protect its interests, settled the Sharpes'

claims against it for Three Hundred Fifty Thousand and No/100 (\$350,000.00) Dollars on June 10, 2004. Providence then brought this action for equitable indemnification and breach of contract on June 5, 2007.

The Defendants' Motion to Amend Should be Denied.

On June 27, 2008, the defendants moved to amend their Answer to add the defense of the Statute of Repose. The defendants have not offered any explanation for waiting a year to move to include this defense in its Answer. Furthermore, the Statute of Repose is not applicable to this case. The Statute of Repose, found at S.C. Code Ann. §15-3-545, applies to actions "to recover damages for injury to the person arising out of any medical, surgical, or dental treatment omission or operation by any licensed healthcare provider . . ." This statute does not apply because this action is not an action "to recover damages for injury to the person." Rather, it is an action for equitable indemnification as a result of the JUA and Taillon's failure to defend and indemnify Providence in an action against Providence based on Providence's vicarious liability for the actions of Dr. Taillon and for breach of Dr. Taillon's contract to provide insurance coverage for Providence to cover such a claim. This cause of action did not arise until Providence settled the underlying action on June 10, 2004, to resolve its potential vicarious liability for the alleged negligent actions of Taillon. Because this indemnification action is not an action to recover damages for injury to the person, but instead is an action premised on the JUA's and Dr. Taillon's breach of their equitable and contractual obligations to defend and indemnify Providence, the Statute of Repose found at S.C. Code Ann. §15-3-545 does not apply and the defendants' motion to amend should be denied.

In their memorandum, defendants cite two cases, Florence County School District Two v. Interkal, Inc., 348 S.C. 446, 559 S.E.2d 866 (Ct. App. 2002) and Capco of Summerville.

Inc. v. J. H. Gayle Construction Company, Inc., 368 S.C. 137, 628 S.E.2d 38 (2006) for the proposition that the Statute of Repose applies to actions for indemnification and contribution. These cases involve the interpretation of the Statute of Repose found at South Carolina Code Ann. §15-3-640 applicable to actions arising out of a defective condition of improvements to real estate. This Statute of Repose, which bars actions to recover damages based on or arising out of the defective or unsafe conditions to an improvement to real property brought more than 13 years after the substantial completion of such an improvement, contains specific language that this Statute of Repose applies to "an action for contribution or indemnification for damages sustained on account of an action described in this subdivision;" S.C. Code Ann. §15-3-640(6). The Statute of Repose applicable to this case regarding actions for medical malpractice does not contain any language referencing an action for contribution or indemnification. The legislature, in enacting the Statute of Repose found at §15-3-640, specifically considered and decided to include actions for contribution and indemnification within the reach of the Statute of Repose regarding actions for improvements to real property. Because the legislature did not include such language in the Statute of Repose applicable to medical malpractice actions, the legislature decided to exclude actions for contribution and indemnification from the reach of the Statute of Repose found at S.C. Code §15-3-545. See State v. Thomas, 372 S.C. 466, 642 S.E.2d 724 (2007), and Hodges v. Rainy, 341 S.C. 79, 533 S.E.2d 578 (2000).

CONCLUSION

Because this case does not involve an action "to recover damages for injury to the person" and the applicable Statute of Repose does not include a provision including an action for indemnification within the scope of the statute, which has been included in another Statute of Repose, the Statute of Repose found at S.C. Code §15-3-545 does not apply to this action.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: Monty Todd
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(803) 929-1400

Attorneys for Plaintiff

Columbia, South Carolina

Nov 3, 2008

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Columbia/CSA-HS Greater Columbia)
Healthcare System, LP d/b/a Providence)
Hospital,)

Plaintiff,)

v.)

The South Carolina Medical Malpractice)
Liability Joint Underwriting Association)
and Michael P. Taillon,)

Defendants.)

Civil Action No. 07-CP-40-3564

PLAINTIFF'S RULE 59(e) MOTION

2009 FEB 25 PM 1:35
JEANETTE W. McBRIDE
C.C.P. & J.S.

FILED

RICHLAND COUNTY

Plaintiff hereby moves, pursuant to Rule 59(e), SCRCP, for the Court to alter or amend its order granting the Defendants' motion to amend their Answer to add SC Code Ann. Section 15-3-545 (1976) as a defense and granting summary judgment in favor of the Defendants. Plaintiff moves that the Court reconsider and deny the motion to amend as no basis or reason was given for the failure to initially plead the aforementioned statute. Plaintiff also asks that if the Court declines to reconsider its decision to allow the amendment, that it reconsider its conclusion regarding summary judgment and deny summary judgment to the Defendants.

The grounds for this motion are that the Court failed to expressly address Plaintiff's argument that the Defendants provided no reason for their failure to initially plead Section 15-3-545 as a defense, and that the Court failed to expressly address Plaintiff's argument that if Section 15-3-545 is permitted to be pled, it is inapplicable by its very language to this indemnity action. Section 15-3-545 states, in pertinent part, that it applies to "...an action to recover damages for injury to the person...." This indemnity action is not such an action.

RoA 000135

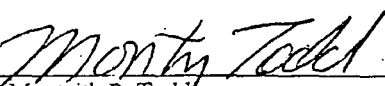
APPENDIX_0138

Rather, it is an action to recover monies paid. Hence, Section 15-3-545 is inapplicable to this matter and summary judgment should have been denied.

As further grounds for this motion, the Plaintiff renews as if set forth verbatim herein its prior written and oral arguments in their totality and requests that the Court reconsider those arguments and rule in Plaintiff's favor.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By:



Monteith P. Todd
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(803) 929-1400

Attorneys for Plaintiff

Columbia, South Carolina

Feb 25, 2009

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Columbia/CSA-HS Greater Columbia)
Healthcare System, LP d/b/a Providence)
Hospital,)

C/A No. 07-CP-40-3564

Plaintiff,)

vs.)

**DEFENDANTS' REPLY TO
PLAINTIFF'S RULE 59(e) MOTION**

The South Carolina Medical Malpractice)
Liability Joint Underwriting Association)
and Michael P. Taillon,)

Defendants.)

RICHLAND COUNTY
FILED
2009 MAR -5 AM 11:37
JEANETTE M. MCBRIDE
C.C.P. & G.S.

INTRODUCTION

On February 9, 2009, the Court issued an order allowing the Defendants to amend their answer to allege the six-year medical malpractice statute of repose as a defense. S.C. Code Ann. §15-3-545. The order also granted the Defendants summary judgment on the basis that the Plaintiffs brought suit outside of the statute of repose. On February 25, 2009, the Plaintiffs served a Rule 59(e) motion asking the court to reconsider its order on the following grounds:

[T]hat the Court failed to expressly address Plaintiff's argument that the Defendants provided no reason for their failure to initially plead Section 15-3-545 [Statute of Repose] as a defense, and that the Court failed to expressly address Plaintiff's argument that if Section 15-3-545 is permitted to be pled, it is inapplicable by its very language to this immediate action. Section 15-3-545 states, in pertinent part, that it applies to "... an action to recover damages for injury to the person" This indemnity action is not such an action. Rather, it is an action to recover monies paid. Hence, Section 15-3-545 is inapplicable to this matter and summary judgment should have been denied.

The Defendants submit this reply in support of the court's ruling.

FACTS

Michael P. Tallion is an emergency room doctor for Providence Hospital. He bought insurance from the JUA.

On June 7, 2007, Columbia/CSA filed a lawsuit against Dr. Tallion and the JUA for equitable indemnification, breach of contract and declaratory judgment. Columbia/CSA alleges that Dr. Tallion and the JUA should pay it for a settlement it reached with Arthur Sharpe and Patricia Sharpe. (Compl. ¶ 20). Dr. Tallion treated Mr. Sharpe in the Providence Hospital emergency room on May 31, 1997. (Compl. ¶ 10). Mr. Sharpe had a heart attack on June 9, 1997. *Id.* Mr. Sharpe filed suit against Providence Hospital on May 25, 1999. *Id.* Dr. Tallion was not sued. On June 10, 2004 Providence Hospital settled the lawsuit with Mr. and Mrs. Sharpe. (Compl. ¶ 13). Providence Hospital sued Dr. Tallion and the JUA on June 7, 2007, more than ten years after Dr. Tallion treated Mr. Sharpe.

A. Motion to Amend

The Plaintiff contends that the Court erred in granting the Defendant's motion to amend because the Defendants did not provide a reason for omitting the statute of repose from their initial answer. This is not a sufficient reason to deny a motion to amend.

Rule 15 of the South Carolina Rules of Civil Procedure requires that leave of court to amend pleadings "shall be freely given when justice requires and does not prejudice any other party." This rule "strongly favors amendments, and the court is encouraged to freely grant leave to amend." *Jarrell v. Seaboard Systems R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987). In fact, "in the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion." *Forrester v. Smith & Steele Builders*, 295 S.C. 504, 508, 369 S.E.2d 156, 158 (Ct. App. 1988). "It is the responsibility of a

party opposing an amendment to establish prejudice.” *Id.* “The prejudice Rule 15 envisions is a lack of notice that a new issue is going to be tried, and a lack of opportunity to refute it.” *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716-17 (Ct. App. 2005).

Thus, Dr. Taillon need not provide a reason the defense was omitted from the initial answer. Instead, the Plaintiff must provide a reason it would be unfairly prejudiced by allowing the amendment. In fact, the Plaintiff has had proper notice of the statute of repose as a defense, and it has had ample time to prepare for the defense. Thus, it cannot show prejudice.

The Defendants answered this lawsuit in November 2007 and served discovery. Five months later, the Defendants filed their motion to amend to add the statute of repose as a defense. At the time the Defendants moved to amend, the Plaintiff had not served discovery or responded to the Defendants’ discovery. In fact, when the Defendants filed the motion to amend, the Plaintiff had not served discovery, had not responded to discovery, and had made no motions.

Therefore, the Plaintiff was not prejudiced in any way by learning of the statute of repose as a defense in April 2008. The Defendants did not move to amend in bad faith or to cause undue delay.

B. The Statute of Repose

The Plaintiff also alleges that the Court failed to expressly address its argument that the statute of repose does not apply because its action is for contribution and not to recover for personal injuries. In fact, the Court did address this argument in its order. The order states: “[w]hile the statute of repose does not specifically contain language regarding actions for contribution or indemnity, the clear application of the statute and case law in South Carolina and other jurisdictions bars Columbia/CSA’s lawsuit.” Judge Lee Order of February 9, 2009, p.3.

The statute of repose bars actions against doctors "to recover damages for injury to the person." S.C. Code Ann. § 15-3-545(A). Columbia/CSA argues that its claim is not to recover "damages for injury to the person." Instead Columbia/CSA argues that its claim is to recover contribution for amounts it paid Mr. Sharpe for personal injuries. Thus, Columbia/CSA argues that its lawsuit is not to recover "damages for injury to the person." Instead, Columbia/CSA argues its lawsuit is to recover amounts it paid due to "damages for injury to the person." Thus, Columbia/CSA argues that the statute of repose does not apply to its lawsuit.

In *Krasaeath v. Parker*, 212 Ga. App. 525, 441 S.E.2d 868 (1994), the Georgia Court of Appeals considered a similar argument concerning Georgia's Statute of Repose.¹ That court found that a contribution suit could not be brought after the expiration of the medical malpractice statute of repose. Dr. Krasaeath reviewed Mr. Parker's chest x-rays at Meadows Memorial Hospital's emergency room. Mr. Parker later died of a pulmonary embolism. His estate sued Doctor Martin who had treated him in the emergency room. The estate settled the lawsuit and took an assignment from Dr. Martin of his right to claim contribution from Dr. Krasaeath. The estate then sued Dr. Krasaeath for contribution.

The Georgia medical malpractice statute of repose required that "in no event may an action for medical malpractice be brought more than five years after the date on which the negligent or wrongful act or omission occurred." OCGA §9-3-71(b). The plaintiff argued that the statute of repose did not apply because its claim was for contribution and not malpractice. Thus, the plaintiff contended, the contribution claim was not barred because the statute only barred claims for malpractice. The court found that the statute of repose barred the claim for contribution. It held that "[a]lthough the claim is couched as one for contribution, and but for the

¹ This case was cited with approval in *Florence County School Dist. v. Interkal, Inc.*, 348 S.C. 446, 559 S.E.2d 866, (Ct. App. 2002)

statute of repose would have been timely, substance prevails over form.” *Id.* at 526, 441 S.E.2d at 870.

Similarly, Columbia/CSA argues that its action is not “to recover damages for injury to the person.” Instead it is for contribution to pay back funds Columbia/CSA paid Mr. Sharpe for “injury to the person.” This argument elevates form over substance. It is inconsistent with South Carolina law and other states’ statutes of repose. *See, Standard Fire Ins. Co. v. Kent & Assocs., Inc.*, 232 Ga. App. 419, 501 S.E.2d 858 (1998) (claims for indemnification and contribution were among those contemplated by the legislature when it enacted the statute of repose); *New Bern Assocs. v. Celotex Corp.*, 87 N.C. App. 65, 359 S.E.2d 481 (1987) (six-year statute of repose governing actions to recover damages for injuries arising out of defective improvements to real estate property also governs actions for contribution arising out of the improvements).

In *Smith v. Smith*, 291 S.C. 420, 354 S.E.2d 36 (1987), the Supreme Court addressed a claim for personal injuries against a doctor based upon breach of contract. At that time, the statute of limitations for contract actions was six years, but the statute of limitations for medical malpractice actions was three years. Thus, the plaintiffs characterized their claims as breach of contract to take advantage of the longer limitation period. The court found that section 15-3-545(A) specifically covers “any action to recover damages for injury to the person arising out of any medical . . . treatment.” *Id.* at 426, 354 S.E.2d at 40. The court held the language “any action” covered the plaintiff’s contract claims. Thus, the court held the contract claims were barred by Section 15-3-545(A).

Although Columbia/CSA has pled its case as one for contribution, it seeks to be paid money based on a medical malpractice action. Thus, Section 15-3-545 covers its claim just as it covers claims for contract actions according to *Smith v. Smith*.

Likewise, in *Capco of Summerville v. J.H. Gayle Construction*, 368 S.C. 137, 628 S.E.2d 38 (2006), the South Carolina Supreme Court ruled that the statute of repose barred a claim for contribution. The Supreme Court relied upon the Court of Appeals' decision in *Florence County School District* holding that the statute of repose bars actions for contribution brought after its expiration. The Supreme Court explained as follows:

A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time. *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Id.* at 404, 438 S.E.2d at 243. A statute of repose is "[a] statute barring any suit that is brought after a specified time since the defendant acted ... even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1451 (8th Ed. 2004). "Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49, 54, n.6 (Minn. 2005) citing W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* § 30, p.168 (5th ed. 1984). As noted by the Virginia Supreme Court, "[a] statute of repose differs from a statute of limitations.... [T]he expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." *School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325, 327-328 (1987).

368 S.C. 137, 142, 628 S.E.2d 38, 40 (2006). As a result, the Supreme Court affirmed the trial court's ruling that the statute of repose barred the claim for contribution.

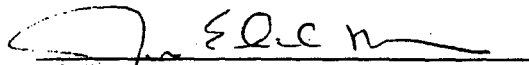
The medical malpractice statute of repose requires that "any action . . . to recover damages for any injury to the person arising out of any medical, surgical or dental treatment . . . must be commenced within three years from the date of treatment . . . not to exceed six years from the date of occurrence" S.C. Code Ann. § 15-3-545(A) (emphasis added). This statute has been consistently held a statute of repose for actions against physicians. See, *Huffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); *Shadwell v. Craigie*, 361 S.C. 492, 608 S.E.2d 567 (Ct. App. 2004); *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000).

Thus, Dr. Taillon and his insurers are entitled to summary judgment because Columbia/CSA sued them well after the statute of repose expired.

CONCLUSION

This Court should deny the Plaintiff's motion to reconsider. The Plaintiff must show prejudice from an amendment, and the Plaintiff has not done so. In addition, South Carolina authority is clear that the statute of repose bars the Plaintiff's claim for contribution. To do otherwise would elevate form over substance and defeat the clear purpose of the statute of repose.

Respectfully submitted,



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Attorney for Defendants

West Columbia, South Carolina

March 4, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

MAR 20 2009

SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 07-CP-40-3564

Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital,.....

Appellant,

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Tallion, ...

Respondent.

NOTICE OF APPEAL

Pursuant to Rule 203 of the South Carolina Appellate Court Rules, Columbia/CSA-HS Greater Columbia Healthcare System, LP d/b/a Providence Hospital ("Providence"), hereby appeals the following orders of the Honorable Alison Renee Lee:

1. The Order dated March 11, 2009 and filed March 13, 2009, denying Providence's Motion to Alter or Amend Judgment pursuant to Rule 59, SCRCP.¹ Providence received written notice of the signed order on March 19, 2009.
2. The Order dated February 9, 2009 and filed February 10, 2009, granting The South Carolina Medical Malpractice Liability Joint Underwriting

¹ The March 11, 2009 Order refers to this motion as "Defendant's Rule 59(e) motion." However, Providence, as plaintiff, filed this Motion. The reference otherwise is a mere scrivener's error.

RoA 000144

APPENDIX_0147

Association and Michael P. Tallion's Motion to Amend the Pleadings and Motion for Summary Judgment, Civil Action No. 07-CP-40-3564.

Copies of both the March 11, 2009 order and the February 9, 2009 order are attached hereto for reference.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: 

~~C. Mitchell Brown~~

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Attorneys for Appellant Columbia/CSA-HS Greater
Columbia Healthcare System d/b/a Providence
Hospital

Columbia, South Carolina

March 20, 2009

Exhibit A

RoA 000146

APPENDIX_0149

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2007-CP-40-3564

Columbia/CSA-Greater Columbia
Healthcare, et al.
PLAINTIFF

SC Medical Malpractice Liability JUA, et al.
DEFENDANT

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 1(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Defendant's Rule 59(e) motion is denied. Rule 15 allows liberal amendment of pleadings. No prejudice has been demonstrated. Section 15-3-545 relates to any action to recover damages for injury to a person for medical treatment. The action for contribution or indemnification seeks to recover damages paid to a person for injury arising out of medical treatment by a practitioner. This action is barred by the statute of repose.

Dated at Columbia, South Carolina, this 11th day of March, 2009.

Alfred Lee
PRESIDING JUDGE

This judgment was entered on the ___ day of March, 2009, and a copy mailed first class this ___ day of March, 2009 to attorneys of record or to parties (when appearing pro se) as follows:

Monteith P. Todd
ATTORNEY(S) FOR THE APPLICANT(S)

James Edward Bradley
ATTORNEY(S) FOR THE RESPONDENT(S)

Jeanette W. McBride
CLERK OF COURT

SCRPC FORM 4 (Revised 5/00)

RoA 000147

APPENDIX_0150

Exhibit B

RoA 000148

APPENDIX_0151

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF RICHLAND

CASE NO: 2007CP4003564

IN THE COURT OF COMMON PLEAS

Columbia CSA HS Greater Columbia
Healthcare System LPvs. Writing South Carolina Medical Malpractice
Liability Joint Under

Plaintiff

Defendant

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(c), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy: _____
- ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☒ See attached order;☐ Statement of Judgment by the Court:

Dated at Columbia, South Carolina, this _____ day of _____, 2009.

PRESIDING JUDGE

This judgment was entered on the _____ day of _____, 2009, and a copy mailed first class this _____ day of _____, 2009, to attorneys of record or to parties (when appearing pro se) as follows:

Weldon R Johnson
Monteith Powell Todd

ATTORNEY(S) FOR THE PLAINTIFF(S)

James Edward Bradley

ATTORNEY(S) FOR THE DEFENDANT(S)

SCRCP APP-24/FORM 4

Clerk of Court

RoA 000149

APPENDIX_0152

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS

Columbia/CSA-HS Greater Columbia
Healthcare System, LP d/b/a Providence
Hospital,

C/A No. 07-CP-40-3564

Plaintiff,

vs.

The South Carolina Medical Malpractice
Liability Joint Underwriting Association
and Michael P. Tallion,

Defendants.

**ORDER GRANTING DEFENDANTS'
MOTIONS TO AMEND PLEADINGS
AND FOR SUMMARY JUDGMENT**

JEANETTE W. McBRIDE
C.C.P. & G.S.

2009 FEB 10 AM 10:57

RICHLAND COUNTY
FILED

I. INTRODUCTION

This matter came before the Court on the Defendants' motion to amend pleadings and motion for summary judgment. Upon a review of the materials submitted by the parties and oral argument, the Court grants the Defendants' motion to amend pleading pursuant to Rule 15, SCRPC. The Court also grants the Defendants' motion for summary judgment on the basis that the statute of repose bars the Plaintiff's claims.

II. DISCUSSION

This lawsuit is an action for equitable indemnification, breach of contract and declaratory judgment. Columbia/CSA brought this lawsuit against Dr. Tallion who is an emergency room doctor for Providence Hospital. Columbia/CSA alleges that Dr. Tallion and his insurer the JUA should pay Columbia/CSA for a settlement it reached with Arthur Sharpe and Patricia Sharpe. Dr. Tallion treated Mr. Sharpe in the Providence Hospital emergency room on May 31, 1997. Mr. Sharpe had a heart attack on June 9, 1997. Mr. Sharpe filed suit against Providence Hospital on May 25, 1999. Dr. Tallion was not sued. On June 10, 2004 Providence Hospital settled the

lawsuit with Mr. and Mrs. Sharpe. Providence Hospital sued Dr. Tallion and the JUA on June 7, 2007, more than ten years after Dr. Tallion treated Mr. Sharpe.

A. Motion to Amend

The Defendants have asked the Court for permission to amend their pleadings to add the statute of repose as a defense. Leave of court to amend pleadings "shall be freely given when justice so requires and does not prejudice any other party." Rule 15, SCRPC. "[T]his rule strongly favors amendments, and the court is encouraged to freely grant leave to amend." *Jarrell v. Seaboard Systems R.R., Inc.*, 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987).

"In the absence of a proper reason, such as bad faith, undue delay, or prejudice, a denial of leave to amend is an abuse of discretion." *Forrester v. Smith & Steele Builders*, 295 S.C. 504, 508, 369 S.E.2d 156, 158 (Ct. App. 1988). "It is the responsibility of a party opposing an amendment to establish prejudice." *Id.* "The prejudice Rule 15 envisions is a lack of notice that a new issue is going to be tried, and a lack of opportunity to refute it." *Parker v. Spartanburg Sanitary Sewer Dist.*, 362 S.C. 276, 286, 607 S.E.2d 711, 716-17 (Ct. App. 2005).

The Defendants answered this lawsuit in November 2007 and served discovery. Five months later, the Defendants filed their motion to amend to add the statute of repose as a defense. At the time the Defendants moved to amend, the Plaintiff had not served discovery or responded to the Defendants' discovery. In fact, when the Defendants filed the motion to amend, the Plaintiff had not served discovery, had not responded to discovery, and had made no motions. Therefore, the Plaintiff was not prejudiced in any way by learning of the statute of repose as a defense in April 2008. The Defendants did not move to amend in bad faith nor to cause undue delay. Columbia/CSA will not be prejudiced by the amendment and will have ample notice of

ad #2

the new defense as well as opportunity to refute it. The interests of justice require that the Defendants receive leave to amend their pleadings to include the statute of repose as a defense.

B. Statute of Repose

The Defendants are entitled to summary judgment because Columbia/CSA filed its lawsuit after the six year statute of repose expired. The statute of repose for medical malpractice actions is in Code Section 15-3-545(A) which states that:

In any action, . . . to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession must be commenced within three years from the date of 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. (emphasis added).

S.C. Code § 15-3-545(A) (1976).

The treatment giving rise to this lawsuit occurred May 31, 1997 when Dr. Tallion treated Mr. Sharpe at the Providence Hospital emergency room. On June 9, 1997, Mr. Sharpe suffered a heart attack. On May 25, 1999, Mr. Sharpe filed suit against Columbia/CSA. Columbia/CSA did not file this lawsuit until June 7, 2007 – more than ten years after Dr. Tallion treated Mr. Sharpe. The time between the treatment, which occurred on May 31, 1997, and the date this lawsuit was filed, June 7, 2007, is well past the six year maximum deadline set forth in Section 15-3-545(A).

While the statute of repose does not specifically contain language regarding actions for contribution or indemnity, the clear application of the statute and case law in South Carolina and other jurisdictions bars Columbia/CSA's lawsuit. Statutes of repose apply to actions for contribution and indemnification. *See, Florence County School District # 2 v. Interkal, Inc.*, 348

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S.C. 446, 559 S.E.2d 866, (Ct. App. 2002); *Capco of Summerville, Inc. v. J.H. Gayle Construction Company, Inc.*, 368 S.C. 137, 628 S.E.2d 38 (2006).

In *Florence County School District #2*, the School District sued a bleacher manufacturer after settling a claim with a spectator who was injured when the bleachers collapsed. 348 S.C. at 446, 559 S.E.2d at 866. The bleachers were installed in 1971 and earlier. *Id.* at 448, 867. The bleachers collapsed in 1991, and the injured spectator sued the school district. *Id.* The School District settled the lawsuit. It then sued the manufacturer for contribution. *Id.* The special referee found that although the bleacher manufacturer would have been liable, the statute of repose for improvements to real property barred any recovery. *Id.* at 450, 868. The statute of repose for improvements to real property at the time was thirteen years. The School District did not bring the lawsuit within the thirteen year limitation period set forth in the statute. *Id.*

The Court of Appeals upheld the special referee's finding stating that "the Statute of Repose specifically applies to actions for contribution." *Id.* at 452, 869. The court noted that "neighboring jurisdictions have similarly held a statute of repose bars any action for contribution after the statutory time period." *Id.* citing *Standard Fire Ins. Co. v. Kent & Assocs., Inc.*, 232 Ga. App. 419, 501 S.E.2d 858 (1998) (claims for indemnification and contribution were among those contemplated by the legislature when it enacted the statute of repose); *Krasaeath v. Parker*, 212 Ga. App. 525, 441 S.E.2d 868 (1994) (five-year statute of repose for medical malpractice cases barred contribution claim even though suit was timely under the twenty-year statute of limitations governing contribution actions); *New Bern Assocs. v. Celotex Corp.*, 87 N.C. App. 65, 359 S.E.2d 481 (1987) (six-year statute of repose governing actions to recover damages for injuries arising out of defective improvements to real estate property also governs actions for contribution arising out of the improvements). ad
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Likewise, in *Capco of Summerville v. J.H. Gayle Construction*, 368 S.C. 137, 628 S.E.2d 38 (2006), the South Carolina Supreme Court ruled that the statute of repose barred a claim for contribution. The Supreme Court relied upon the Court of Appeals' decision in *Florence County School District* holding that the statute of repose bars actions for contribution brought after its expiration. The Supreme Court explained as follows:

A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time. *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Id.* at 404, 438 S.E.2d at 243. A statute of repose is "[a] statute barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1451 (8th Ed. 2004). "Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49, 54, n.6 (Minn. 2005) citing *W. Page Keeton, et. al., Prosser and Keeton on the Law of Torts* § 30, p.168 (5th ed. 1984). As noted by the Virginia Supreme Court, "[a] statute of repose differs from a statute of limitations. . . . [T]he expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." *School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325, 327-328 (1987).

368 S.C. 137, 142, 628 S.E.2d 38, 40 (2006). As a result, the Supreme Court affirmed the trial court's ruling that the statute of repose barred the claim for contribution.

The medical malpractice statute of repose requires that "any action . . . to recover damages for any injury to the person arising out of any medical, surgical or dental treatment . . . must be commenced within three years from the date of treatment . . . not to exceed six years from the date of occurrence. . . ." S.C. Code Ann. § 15-3-545(A) (emphasis added). This statute has been consistently held a statute of repose for actions against physicians. *See, Huffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); *Shadwell v. Craigie*, 361 S.C. 492, 608 S.E.2d 567 (Ct. App. 2004); *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000). Thus, Dr.

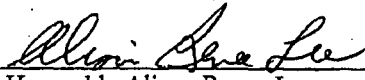
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Tallion and his insurers are entitled to summary judgment because Columbia/CSA sued them well after the statute of repose expired.

III. CONCLUSION

The Court finds that amendment of the Defendants' pleading is proper under Rule 15, SCRPC, and therefore grants the Defendants' Motion to Amend. The Court also grants Defendants' Motion for Summary Judgment because Columbia/CSA's lawsuit is barred by the South Carolina statute of repose for medical malpractice actions.

AND IT IS SO ORDERED.



The Honorable Alison Renee Lee
Fifth Judicial Circuit

Columbia, South Carolina

February 9, 2009

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital, ...

Appellant.

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Tallion, ...

Respondents,

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The undersigned hereby certifies that the Record on Appeal complies with Supreme Court Order dated August 13, 2007 regarding personal identifiers and sensitive information.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
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Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital, ...

Appellant.

v.

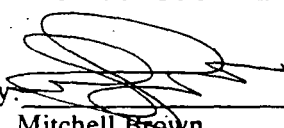
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The undersigned hereby certifies that the Record on Appeal contains all materials
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

The South Carolina Medical Malpractice Liability Joint Respondent,
Underwriting Association and Michael P. Tallion, ...

v.

Columbia/CSA-HS Greater Columbia Healthcare Appellant.
System db/a Providence Hospital,.....

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Plaintiff, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
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Alison Renee Lee, Circuit Court Judge

Case No. 07-CP-40-3564

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System d/b/a Providence Hospital, ...

Appellant,

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Tallion, ...

Respondents.

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STATEMENT OF ISSUES ON APPEAL

The trial court erred in holding that Section 15-3-545(A) of the South Carolina Code barred Providence Hospital's claims for equitable indemnification against Tallion and the JUA.

STATEMENT OF CASE

This is an action for indemnification by Appellant Columbia/CSA-HS Greater Columbia Healthcare System d/b/a Providence Hospital ("Providence Hospital") against Michael P. Tallion, M.D. ("Tallion") and his insurer, the South Carolina Medical Malpractice Liability Underwriting Association ("JUA") (collectively Respondents), filed in Richland County in June 2007. {Complaint dated 6/7/2007 ¶ ____; R. 8}. This indemnification action arises out of an action captioned Arthur Sharpe (a/k/a Arthur Lee Sharpe, Jr.) and Patricia Gail Sharpe v. Columbia/CSA-HS Greater Columbia Healthcare System d/b/a Providence Hospital and Michael Haynes, MD, Civil Action No. 99-CP-40-1802 ("underlying action"), filed in Richland County in May 1999. {Complaint dated 5/25/99; R. 28}. Providence Hospital made a demand on Tallion and the JUA requesting those parties assume the defense of and indemnify Providence Hospital for the claims against the hospital in the underlying action. {Complaint dated 6/7/07 ¶ 25; R. 11}. Tallion and the JUA refused to assume the defense or indemnify Providence Hospital. {Id.; R. 11}. After Tallion and the JUA refused Providence Hospital's request for indemnification, Providence Hospital, in order to best protect its interests, settled the underlying action for Three Hundred Fifty Thousand Dollars and 00/100 (\$350,000.00) on June 10, 2004. {Providence Hospital's Memorandum in Opposition to Defendant's Motion to Amend to Plead the Statute of Repose as an Affirmative Defense dated 11/03/2008; R. 130}.

Thereafter, Providence Hospital brought this action against Tallion and the JUA for equitable indemnification and breach of contract on June 7, 2007. {Complaint dated 6/07/2007; R.8}. Respondents answered on November 1, 2007, denying liability. {Answer dated 11/01/2007; R. 21}. Then, on June 27, 2008, Respondents moved (1)

to amend their answer to include the statute of repose for medical malpractice actions under section 15-3-545(A) of the South Carolina Code, and (2) for summary judgment based on that statute of repose. {JUA/Tallion's Memorandum in Support of Motion to Amend Pleadings and for Summary Judgment filed 10/30/2008; R. 102}. On February 9, 2009, the trial court granted the motion to amend, and additionally, granted summary judgment in favor of Tallion and the JUA based on the statute of repose contained in section 15-3-545(A). {Order dated 2/9/09 p.6; R. 6}. Providence Hospital filed a Rule 59(e), SCRCF, motion, which the trial court denied on March 11, 2009. {Order dated 3/11/09 p.1; R. 7}. Providence Hospital timely filed a notice of appeal with this Court. {Notice of Appeal; R. 144}.

STATEMENT OF FACTS

On May 31, 1997, Arthur Sharpe experienced chest pains and sought treatment at the Providence Hospital emergency room. {Complaint dated 5/25/99 p.____; R. 30}. At Providence Hospital, Sharpe was briefly treated by Dr. Michael Hayes, an independent contractor emergency room physician. {Id.; R. 30}. Dr. Michael P. Tallion, also an independent contractor emergency room physician at Providence Hospital, then assumed the care and treatment of Sharpe. {R. 131}. Tallion diagnosed Sharpe's condition as reflux and discharged him. {R. 30}. Ultimately, Sharpe sought additional treatment at Lexington County Hospital and was diagnosed as having suffered a heart attack on June 9, 1997. {Id.; R. 30}.

Sharpe brought a medical malpractice action against Providence Hospital and Hayes, alleging that the emergency room physicians at Providence Hospital breached the standard of care by misdiagnosing Sharpe's condition and that this failure to diagnose caused Sharpe to suffer severe and permanent damage to his heart muscles.

{R. 30-31}. Tallion was not named in the lawsuit. Providence Hospital answered and denied the allegations contained in Sharpe's lawsuit. {Answer of Providence Hospital; R. 33}. Discovery revealed that Tallion was the emergency room physician that examined, diagnosed, and treated Sharpe on May 31. {Providence Hospital's Memorandum in Opposition to Defendant's Motion to Amend to Plead the Statute of Repose as an Affirmative Defense dated 11/03/2008; R. 131}. Additionally, discovery revealed that Sharpe sought to hold Providence Hospital liable for the actions of Hayes and Tallion solely under the theory of vicarious liability set forth in Simmons v. Tuomey Regional Medical Center, 341 S.C. 32, 533 S.E.2d 312 (2000). {Id.; R. 131}.

Prior to trial in the Sharpe action, Providence Hospital demanded that Tallion and the JUA assume the defense of and indemnify the hospital for the Sharpe's vicarious liability claims against Providence Hospital. {Complaint dated 6/7/07 ¶ 25; R. 11}. Tallion and the JUA refused to assume the defense or indemnify Providence Hospital. {Id.}. After Tallion and the JUA refused Providence Hospital's request for indemnification, Providence Hospital, in order to best protect its interests, settled the underlying action, for Three Hundred Fifty Thousand Dollars and 00/100 (\$350,000.00). {Providence Hospital's Memorandum in Opposition to Defendants' Motion to Amend to Plead the Statute of Repose as an Affirmative Defense dated 11/03/2008; R.132}.

After settlement of the underlying action, Providence Hospital brought this action for equitable indemnification and breach of contract against Tallion and the JUA. {Complaint dated 6/07/2007; R. 8}. Over one year after Providence Hospital filed the complaint, Tallion and the JUA moved to amend their answer to add the statute of

repose contained in section 15-3-545(A) of the South Carolina Code as a defense. {JUA/Tallion's Memorandum in Support of Motion to Amend Pleadings and for Summary Judgment filed 10/30/2008; R. 102}. Additionally, Tallion and the JUA moved for summary judgment based on section 15-3-54(A). {Id.}. At the hearing, Tallion and the JUA argued that section 15-3-545(A) barred Providence Hospital's claim for equitable indemnification, relying predominately on foreign precedent and South Carolina Courts' interpretation of the statute of repose found in section 15-3-640, which concerns defective conditions to real property. {11/07/08 Transcript pp. 34-38, 44; R. 70-74; 80}. Providence Hospital argued, inter alia, that section 15-3-545(A) was inapplicable to this indemnity action because (1) the legislature did not intend for the medical malpractice statute of repose in section 15-3-545(A) to bar actions for equitable indemnification; (2) section 15-3-545(A) is unambiguous and by its own terms only applies to medical malpractice actions and not to indemnity actions; (3) the South Carolina cases relied on by Respondents are inapplicable to this action because those case do not address section 15-3-545(A) but instead interpret section 15-3-640; and (4) an indemnity action does not involve "injuries to the person" as contemplated by section 15-3-545. {Id. at pp.43-46; R. 79-82}.

On February 9, 2009, the trial court issued an order allowing Tallion and the JUA to amend their answer and granted summary judgment on the basis of the statute of repose. {Order dated 2/9/09 p. 3-6; R. 3-6}. Providence Hospital filed a Rule 59(e), SCRCp, motion, which the trial court denied on March 11, 2009. {Order dated 3/11/09 p.1; R. 7}. Providence Hospital timely filed a notice of appeal with this Court. {Notice of Appeal; R. 144}.

STANDARD OF REVIEW

Summary judgment is a drastic remedy that "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (internal citation omitted). When reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005).

ARGUMENT

The rules of statutory interpretation are well-settled—intent of the legislature controls and a court should not resort to rules of statutory interpretation absent a finding that the statute is ambiguous. The trial court erred in holding that section 15-3-545(A) bars Providence Hospital's claims.

Section 15-3-545(A) of the South Carolina Code does not bar Providence Hospital's claims for equitable indemnification against Tallion and the JUA. The plain and unambiguous meaning of section 15-3-545(A) demonstrates that our Legislature did not intend for claims for equitable indemnification to be barred by the statute of repose for medical malpractice actions contained in section 15-3-545(A). Therefore, because the language of section 15-3-545(A) is plain and unambiguous the trial court erred in interpreting the statute without first finding it to be ambiguous. Moreover, even if section 15-3-545(A) is ambiguous, the trial court erred in interpreting the statute to preclude Providence Hospital's claims for equitable indemnification against Tallion and

the JUA. Accordingly, this matter must be remanded to the trial court for a determination as to Providence Hospital's claims for equitable indemnification.

The cardinal rule of statutory interpretation is to determine the intent of the legislature above all else. Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005). In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the legislature. Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003). "All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used" McClanahan v. Richland County Council, 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002) (emphasis added); Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998). Moreover, "if a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (internal quotes and citation omitted).

Instead, the words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Id. Courts will reject an interpretation leading to an absurd result clearly unintended by the legislature. Unisun Ins. Co. v. Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). Further, it is beyond a court's "power to effect a change in the statutes enacted by the Legislature." State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000); see also Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (holding that South Carolina appellate courts do "not sit as a

superlegislature to second guess the wisdom or folly of decisions of the General Assembly").

In this matter, the trial court ignored these fundamental tenants of statutory interpretation and resorted to the rules of statutory interpretation without first finding section 15-3-545(A) was ambiguous. {Order dated 2/9/09 pp.3-6; R. 3-6}. This was error. The purpose and intent of section 15-3-545(A) can be seen from the plain, unambiguous language of the statute.

Section 15-3-545(A)—the medical malpractice statute of repose—provides:

In any action . . . to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . must be commenced within three years from the date of treatment, omission, or operation giving rise to the cause of action or three years from the 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) (1988). By its plain language, this statute of repose covers actions "to recover damages for injury to the person" resulting from "medical, surgical, or dental treatment, omission, or operation by any licensed health care provider." These phrases are not ambiguous and clearly define the scope of the statute of repose. This section applies when a person seeks to recover for injuries sustained as a result of deficient medical treatment via a medical malpractice cause of action.¹ Moreover, the statute never mentions, addresses, references, or otherwise contemplates

¹ Our courts have consistently acknowledged that section 15-3-545(A) establishes a statute of repose for medical malpractice actions. See e.g., *Hoffman v. Powell*, 298 S.C. 338, 339-40, 380 S.E.2d 821, 822 (1989) (stating that "the six-year period, commonly referred to as a statute of repose, constitutes an outer limit beyond which a medical malpractice claim is barred. No court has ever interpreted section 15-3-545(A) to apply to any other cause of action.

a claim for indemnification.² When the words in this section are given their plain and ordinary meaning it becomes evident that this section only applies to actions seeking to recover damages suffered by an underlying plaintiff that result from medical malpractice. To hold otherwise, as the trial court did, would result in a forced construction that expands the statute's operation.

Our legislature drafted Title 15 of the South Carolina Code, which includes section 15-3-545(A)'s medical malpractice statute of repose, to apply to the enumerated and individual causes of action addressed in each section only. By its own terms, Title 15 limits the application of each code section to the specific cause of action for which it was drafted. Stated differently, each section of Title 15 was drafted to apply to a specific cause of action only unless otherwise stated by the statute itself. This recognition is evident in the general rule, which states that "[c]ivil actions may only be commenced within the periods prescribed in this title after the **cause of action** has accrued, except when, in special cases, a different limitation is prescribed by statute." S.C. Code Ann. § 15-3-20(A) (2002). This rationale of limiting action based on the type of cause of action continues throughout Title 15. See, e.g., S.C. Code Ann. § 15-3-330 (applying to "actions by individual for recovery of real property"); S.C. Code Ann. § 15-3-530 (creating a three-year limitation period for causes of actions upon contract, damage to real property, or insurance, among others); S.C. Code Ann. § 15-3-550 (creating a two-year limitation period for slander, libel, and false imprisonment causes of action). Our legislature titled section 15-3-545(A) as "actions for medical malpractice." S.C. Code Ann. § 15-3-545(A) (titled the section as "actions for

² The trial court recognized this omission in its order in stating that "... the statute of repose does not specifically contain language regarding actions for contribution or indemnity. . . ." {Order dated 2/9/09 p. 3; R. 3}.

medical malpractice"). Therefore, the legislature drafted section 15-3-545(A) to apply only to "actions for medical malpractice."

Hence, section 15-3-545(A) does not apply to Providence Hospital's claim for equitable indemnification because it is *not* an action "to recover damages for injury to the person arising out of any medical . . . treatment, omission, or operation." Providence Hospital is not an injured party seeking to recover damages based on the medical malpractice of a doctor. Rather, this is an equitable indemnification action, which is a separate and distinct action from the underlying tort action. See, e.g., Lone Mountain Processing, Inc. v. Browser-Morner, 94 Fed. Appx. 149, 158 (4th Cir. 2004) (stating that indemnity actions are "distinct, separate causes of action from the underlying wrong"); Canal Ins. Co. v. Lebanon Ins. Agency, Inc., 504 F. Supp.2d 113 (W. Dist. Va. 2007) ("An indemnity claim does not seek recovery for any direct harm caused by the [underlying] defendant to the [underlying] plaintiff—it is clearly distinct from a direct cause of action."); McDermott v. City of New York, 406 N.E.2d 460, 462-63 (N.Y. 1980) ("[T]he indemnity claim is a separate substantive cause of action, independent of the underlying wrong."); 41 Am. Jur.2d Indemnity § 38 (2008) ("[C]ommon law indemnity is . . . wholly distinct from the underlying action which gave rise to the right of indemnity.").

As a result, the damages sought to be recovered differ from those sought for an "injury to the person" in a medical malpractice action as set forth in section 15-3-545(A). Providence Hospital seeks to recover the costs and settlement expenses it sustained defending the underlying tort action in which Providence Hospital was pursued solely under a vicarious liability theory. This recovery sought by Providence Hospital does not fall within the ambit of section 15-3-545(A). Therefore, it was

unnecessary for the trial court to resort to the rules of statutory interpretation in order to determine the purpose of the statute. Accordingly, the trial court's grant of summary judgment in favor of Respondent must be reversed.

Moreover, even if section 15-3-545(A) is ambiguous and statutory interpretation is necessary, the trial court erred in granting summary judgment in favor of Respondents. Under our statutory construction rules, Section 15-3-545(A) must be strictly construed in order to properly achieve the result intended by the legislature.³ Under a strict interpretation, section 15-3-545(A) would not bar Providence Hospital's claim for indemnification. The trial court liberally construed the statute of repose to restrict Appellant's rights and improperly granted summary judgment to Respondents.

In granting summary judgment, the trial court employed rationale that is inapplicable to the interpretation of section 15-3-545(A). In its order, the trial court relied on Florence County School District #2 v. Interkal, Inc.⁴ and Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.⁵ for the proposition that the medical malpractice statute of repose applies to actions for indemnification. {Order dated 2/9/09 pp.3-4; R. 3-4}. These cases, however, do not address the statute of repose contained in section 15-3-545(A); rather, they address the statute of repose for defective or unsafe improvements to real property contained in section 15-3-640 of the South Carolina Code (2005). The statute of repose in section 15-3-640 has no relation to the medical malpractice statute of repose of section 15-3-545(A). Therefore, the trial court erred in granting summary judgment based on section 15-3-545(A).

³ Statutes that destroy private rights should be strictly construed. See, e.g., Independence Ins. Co. v. Independent Life & Acc. Ins. Co., 218 S.C. 22, ___, 61 S.E.2d 399, 404 (1950).

⁴ 348 S.C. 446, 559 S.E.2d 866 (Ct. App. 2002).

⁵ 368 S.C. 137, 628 S.E.2d 38 (2006).

Moreover, unlike section 15-3-545(A), section 15-3-640 contains *specific direction* from the legislature that the statute of repose for defective or unsafe improvements to real property *applies* to actions for indemnification. The legislature explicitly drafted section 15-3-640 to apply to "an action for contribution or indemnification for damages sustained on account of an action described in this section." S.C. Code Ann. § 15-3-640(6). The inclusion of this language in section 15-3-640 does not demonstrate the legislature's intent to bar indemnity actions under the medical malpractice statute of repose. In fact, the inclusion of the express language in section 15-3-640 coupled with the *exclusion* of the same language in section 15-3-545(A) demonstrates a clear legislative intent that section 15-3-545(A) does *not* bar indemnity actions.

South Carolina adheres to the canon of statutory construction known as the doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius." German Evangelical Lutheran Church of Charleston v. City of Charleston, 352 S.C. 600, 576 S.E.2d 150 (2003); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). This canon of statutory construction holds that "to express or include one thing implies the exclusion of another." German Evangelical, 352 S.C. at 153, 576 S.E.2d at 606 (citing Black's Law Dictionary 602 (7th ed. 1999)). This canon is applicable here.

Our legislature specifically included indemnity actions within the application of the statute of repose for defective or unsafe improvements to real property in section 15-3-640. However, in drafting the remainder of the same chapter of the code, the legislature drafted section 15-3-545(A) without this same language. The legislature could have very easily included this same language in section 15-3-545(A) but did not do so. Therefore, under the doctrine of "expressio unius est exclusio alterius" or

"inclusio est exclusio alterius," the trial court's decision is contrary to this canon of statutory interpretation and must be reversed.

Moreover, section 15-3-640 provides additional support that the legislature did not intend for the medical malpractice statute of repose to apply to actions for indemnity. As stated above, the legislature drafted section 15-3-640 to apply to "an action for contribution or indemnification for damages sustained on account of an action described in this section." S.C. Code Ann. § 15-3-640(6). Section 15-3-640 specifically and expressly bars actions for indemnity. As a result, the legislature recognized the implications of including actions such as indemnity, which might not have accrued under a shorter repose period, and assigned an outermost repose period of eight (8) years in which an action can be maintained. This extended repose period allows all parties an ample 8 year time period to file and maintain actions, including indemnity actions. Stated differently, the 8 year repose period allows reasonable protections to plaintiffs and defendants by providing ample time for the parties to any underlying action to seek indemnity or contribution.

The medical malpractice statute of repose, by contrast, contains no mention of any applicability to indemnity actions and has a shorter repose period. In drafting section 15-3-545, and throughout its various amendments, the legislature never enlarged the repose period from the six (6) years originally set forth.⁶ Moreover, the legislature never altered the language of the medical malpractice statute of repose to apply to indemnity actions. Section 15-3-545(A)'s shorter repose period remained appropriate because there was only one concern of the legislature—provide a repose time that bars medical malpractice actions. If the legislature wished to extend the reach of section 15-

⁶ This section was amended in 1982 and 1988.

3-545(A), then it would have provided a longer repose period as it did in section 15-3-640. It, however, has never chosen to do so.

Additionally, a practical look into the effect of section 15-3-545(A) demonstrates that the legislature did not intend to include actions for indemnification in the medical malpractice statute of repose. The position advanced by Respondents would have adverse ramifications to South Carolina's judicial system. If the court were to adopt Respondents' argument that section 15-3-545(A) encompasses claims for indemnification and contribution, then all persons, corporations, or other entities seeking indemnification or contribution in the numerous medical malpractice actions filed each year in South Carolina would be forced to file these claims before the indemnification or contribution action was ripe. Such a requirement would generate wholly unnecessary litigation in many instances. This cannot be the result the legislature intended in drafting the medical malpractice statute of repose.

Other practical consequences demonstrate the legislature did not intend for section 15-3-545(A) to be interpreted as Respondents request. First, under the holding of the trial court, in some settings the doctor that provided the deficient and substandard care to the underlying patient plaintiff could escape all personal liability even though that doctor was the only at-fault party in the medical malpractice action. For example, assume that a doctor and nurses provide emergency room care to a patient. Assume further that the treatment causes the patient to suffer damages. The injured patient then files a medical malpractice action against the hospital for direct negligence of its nurses and via vicarious liability for the negligence of the doctor. Assume malpractice is denied as to the doctor and nurses. Then assume that delay causes the trial to take place just prior to the expiration of the medical malpractice statute of repose. At the

trial, the jury finds no direct hospital negligence, but finds that the negligence of the doctor caused the patient's injuries and renders a verdict against the hospital based on vicarious liability. Under the trial court's interpretation, when the hospital seeks indemnity from the clearly at-fault doctor, the action would be barred by the statute of repose. This situation allows the only truly at-fault party—the doctor—to escape any personal liability permanently and shifts the doctor's negligence to a faultless third party. This is an absurd result which the legislature did not intend in drafting section 15-3-545(A).

However, Providence Hospital's approach to interpreting the medical malpractice statute of repose avoids such results. Providence Hospital's approach does not prejudice the doctor, the patient, or the hospital. If an injured patient files a medical malpractice action outside of the three-year statute of limitations or six-year statute of repose, the action is barred. If the injured patient files a medical malpractice action against the doctor as well as the hospital via vicarious liability for the negligence of the at-fault doctor within the time limits allowed in section 15-3-545(A), the doctor has full notice of and is involved in a medical malpractice action regarding his care. If the action is settled by the hospital to avoid trial—and South Carolina public policy encourages settlements—a subsequent indemnity action by the hospital to recover against the doctor should not be time barred. There is no surprise to the doctor. He had notice of the lawsuit regarding his care and is charged with knowledge of the law that indemnity might be sought against him by a hospital liable to the patient by virtue of his actions. This interpretation allows the faultless hospital to shift the ultimate liability for the patients injuries to the at-fault doctor who was sued in a timely filed medical malpractice action under section 15-3-545(A). This result is the proper one

under the practical and reasonable interpretation of section 15-3-545(A) intended by our legislature.

Lastly, at the hearing, Respondent relied heavily on Krasaeath v. Parker, 441 S.E.2d 868 (Ga. App. 1994), in support of its position. That case is distinguishable from this action. First, Parker focused on whether contribution, not indemnity, was barred under the medical malpractice statute of repose. Id. at 868. In this action, Providence did not pursue Respondents based on contribution; rather, Providence Hospital sought indemnification. Indemnification and contribution are separate causes of action and are not interchangeable under South Carolina law. See, generally, 7 S.C. Jur. Contribution § 3 (2008) (describing the differences between indemnity and contribution actions).

Next, in Parker, the underlying tort plaintiff, Parker, brought a medical malpractice action against several doctors, including Martin and Krasaeath, for the negligent treatment of her son. Id. at 868. Parker eventually reached an out of court settlement with Martin, in which she obtained an assignment of Martin's right of contribution. Id. at 869. More than five years after the date of treatment of her son, Parker sought contribution from Krasaeath. Id. The trial court ruled the action was timely despite the lapse of the medical malpractice statute of repose. Id. The Georgia court was concerned with the substance of Parker's action. Id. at 870. The court construed it as one for medical malpractice rather than contribution, and held her action was barred. Id. The court reasoned that because the action was really a medical malpractice action against Krasaeath, and that such an action would be untimely under the statute of repose, then "[Parker] cannot be permitted to do indirectly what the law does not permit her to do directly. That is, [Parker] cannot in effect hold Dr.

Krasaeath liable for professional negligence through a dilatory . . . action Logic and fairness dictate the conclusion that the present claim came to late." Id.

However, such concerns are not present in this matter. Providence Hospital is not an injured party seeking to recover damages based on the medical malpractice of a doctor. Rather, this is an equitable indemnification action, which is a separate and distinct action from the underlying tort action. Therefore, the trial court improperly relied on Parker and summary judgment was improperly granted to Respondents.

Further, the Missouri Supreme Court has rejected a rationale like that relied on in Parker. In Roland v. Skaggs Companies, Inc., the court addressed whether the medical malpractice statute of limitations barred a subsequent contribution action. 666 S.W.2d 770, 772 (Mo. 1984). The trial court held that an action for contribution was barred by the two-year medical malpractice statute of limitations.⁷ Id. at 773. The Supreme Court disagreed, holding that

While [the medical malpractice statute of limitations] clearly covers all claims brought by consumers of health care services against health care providers for injuries related to such services, **we find no words indicating a legislative intent** to include suits for contribution among health care providers.

Id. (emphasis added). The court reasoned that "claims for . . . apportionment of fault need not be subject to the statute of limitations applicable to medical malpractice actions . . . because of the independent nature of that claim from the underlying claim of [the patient] for damages." Aherron v. St. John's Mercy Med. Center, 713 S.W.2d 498, 499 (Mo. 1986); see also Breeden v. Hueser, 273 S.W.3d 1, 11 (Mo. 2008) (holding the "claims that fall within the scope of [the medical malpractice statute] are those for

⁷ While this case was addressed in the context of the statute of limitations, the logic remains applicable to an analysis of the statute of repose.

damages resulting from the acts of a physician in the delivery of health care to the consumer").

Our section 15-3-545(A), like the Missouri statute, contains no language that indicates the legislature intended to bar indemnity or contribution actions. In this action, Providence Hospital is not an injured party seeking to recover damages based on the medical malpractice of a doctor. Rather, this is an equitable indemnification action, which is a separate and distinct action from the underlying tort action. As such, section 15-3-545(A) does not bar Providence Hospital's indemnity action against Tallion and the JUA. Therefore, the trial court improperly granted summary judgment to Respondents.

Lastly, other courts that have addressed similar issues have dealt with statutes which are clearly distinguishable from section 15-3-545(A). In Illinois, the legislature drafted a broadly worded medical malpractice statute of repose that supports its courts' decisions that the statute of repose bars indemnity action against a doctor. The Illinois statute provides that no action may be maintained against a physician or hospital "based on tort, or breach of contract, or otherwise, arising out of patient care" 735 Ill. Stat. Ann. § 5/13-212 (2008) (emphasis added). It is this broad, all-encompassing language used by the Illinois legislature that supports the finding by the courts there that the statute of repose can bar an action for indemnity. South Carolina's medical malpractice statute of repose is distinguishable because our legislature employed no such similar language in section 15-3-545(A). Our legislature specifically drafted section 15-3-545(A) much more narrowly.

Similarly, Florida has statutorily defined a medical malpractice action to encompass actions for indemnity. There, the legislature drafted the medical

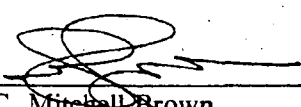
malpractice statute of repose to apply to "a claim in tort or contract for damages because of the death, injury, or monetary loss to any person" Fla. Stat. Ann. § 95.11(4)(b) (2009) (emphasis added). Florida, as did Illinois, drafted a broadly worded medical malpractice statute of repose that differs greatly from the language employed by our legislature in section 15-3-545(A). Accordingly, Florida's interpretation of its medical malpractice statute of repose offers no guidance in interpreting section 15-3-545(A). The plain language of South Carolina's medical malpractice statute of repose expresses our legislature's clear desire to cover only actions "to recover damages for injury to the person" resulting from "medical, surgical, or dental treatment, omission, or operation by any licensed health care provider." These phrases are not ambiguous and clearly define the scope of the statute of repose. Therefore, section 15-3-545(A) applies when a person seeks to recover for injuries sustained as a result of deficient medical treatment via a medical malpractice cause of action.

CONCLUSION

Based on the foregoing, the trial court erred in granting summary judgment in favor of Respondents based on section 15-3-545(A) of the South Carolina Code. As a result of this error, this matter must be reversed and remanded to the trial court for trial on Providence Hospital's claims for equitable indemnification.

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October 20, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital,.....

Appellant.

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Tallion, ...

Respondents,

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The undersigned hereby certifies that the Appellant's Final Brief complies with Supreme Court Order dated August 13, 2007 regarding personal identifiers and sensitive information.

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Respondents,

CERTIFICATE OF COUNSEL

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Alison Renee Lee, Circuit Court Judge

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Underwriting Association and Michael P. Tallion, ...

v.

Columbia/CSA-HS Greater Columbia Healthcare Appellant.
System db/a Providence Hospital,.....

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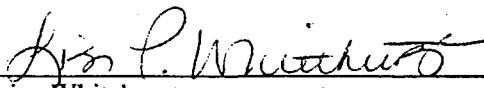
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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

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Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital,.....Appellant,

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Taillon,.....Respondents.

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STATEMENT OF ISSUES ON APPEAL

The medical malpractice statute of repose prohibits Columbia/CSA's claim for indemnification when it settled a claim for personal injury to which the doctor was not a party and sought indemnification from him more than six years after the claim arose.

STATEMENT OF THE CASE

Dr. Michael Taillon worked for Columbia/CSA as an emergency room doctor. Columbia/CSA operated Providence Hospital. (R. pp. 8-9). On May 31, 1997, Arthur Sharpe was admitted and treated by Dr. Taillon and Dr. Michael Haynes. (R. pp. 9-10). Over a week later, Mr. Sharpe was diagnosed with a heart attack. (R. p. 30). On May 25, 1999, Mr. Sharpe sued Dr. Haynes and Columbia/CSA alleging that they breached the standard of care by failing to diagnose his heart condition. (R. p. 30). He did not sue Dr. Taillon. Columbia/CSA settled the lawsuit on June 10, 2004. (R. p. 10).

Columbia/CSA sued Dr. Taillon and his insurance company the South Carolina Joint Underwriting Association (JUA) for indemnification. It filed the suit June 7, 2007, more than ten years after Dr. Taillon treated Mr. Sharpe. (R. p. 8). Dr. Taillon and the JUA answered November 1, 2007. (R. p. 21). In April 2008, Dr. Taillon and the JUA moved to amend their answer to include the six year medical malpractice statute of repose as a defense. S.C. Code Ann. § 15-3-545. (R. p. 93). They also moved for summary judgment based upon the six year statute of repose. (R. pp. 102-127).

Judge Allison Lee heard oral arguments on the motion to amend and motion for summary judgment on November 7, 2008. (R. pp. 67-68). Judge Lee granted the motion to amend and the motion for summary judgment in favor of Dr. Taillon and the JUA. (R. pp. 1-6).

Columbia/CSA filed a Rule 59(e) motion which Judge Lee denied March 11, 2009. (R. p. 7). Columbia/CSA then filed this appeal March 20, 2009.

ARGUMENT

I. **JUDGE LEE PROPERLY GRANTED DR. TAILLON AND THE JUA SUMMARY JUDGMENT BECAUSE THE SOUTH CAROLINA MEDICAL MALPRACTICE STATUTE OF REPOSE PROTECTS DOCTORS FROM LAWSUITS BROUGHT MORE THAN SIX YEARS AFTER TREATMENT, AND COLUMBIA/CSA FILED ITS INDEMNIFICATION LAWSUIT AFTER THE STATUTE OF REPOSE EXPIRED.**

The treatment giving rise to this lawsuit occurred May 31, 1997, when Dr. Taillon treated Mr. Sharpe at Columbia/CSA's emergency room. (R. pp. 9-10). On June 9, 1997, Mr. Sharpe suffered a heart attack. *Id.* On May 25, 1999, Mr. Sharpe sued Columbia/CSA. *Id.* Columbia/CSA did not file its indemnification lawsuit until June 7, 2007 – more than ten years after Dr. Taillon treated Mr. Sharpe. The time between the treatment, which occurred on May 31, 1997, and the date this lawsuit was filed, June 7, 2007, is well past the six year maximum deadline set forth in Section 15-3-545(A).

South Carolina Code Section 15-3-545(A) contains the medical malpractice statute of repose. This statute creates an “absolute time limit beyond which liability no longer exists.” *Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993). It reads as follows:

In any action, . . . to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession must be commenced within three years from the date of treatment, omission, or operation giving rise to the cause of action or three years from the 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) (1976) (emphasis added). Judge Lee properly granted Dr. Taillon's motion for summary judgment because Columbia/CSA sued him for indemnification after the statute of repose expired.

A. South Carolina Courts Have Held That The Statute Of Repose For Construction Claims Bars Actions For Contribution. This Court Should Interpret The Medical Statute Of Repose Similarly.

The medical statute of repose bars actions brought more than six years after treatment. *See*, S.C. Code § 15-3-545. Similarly, the construction statute of repose bars claims brought more than eight years after a building is complete. *See*, S.C. Code § 15-3-640. In *Florence County School District v. Interkal*, 348 S.C. 446, 559 S.E.2d 866 (Ct. App. 2002), the Court of Appeals held that the construction statute of repose barred a claim for contribution brought after the statute expired. The Supreme Court came to the same conclusion in *Capco v. J.H. Gayle Construction*, 368 S.C. 137, 628 S.E.2d 38 (2006).

This Court should interpret the medical statute of repose similarly and affirm Judge Lee's order granting summary judgment because Columbia/CSA sued for indemnification after the statute of repose expired.

In *Florence County School District*, the School District sued a bleacher manufacturer after settling a claim with a spectator who was injured when bleachers collapsed. 348 S.C. at 446, 559 S.E.2d at 866. The bleachers were installed in 1971 and earlier. *Id.* at 448, 867. The bleachers collapsed in 1991, and the injured spectator sued the school district. *Id.* The School District settled the lawsuit. It then sued the manufacturer for contribution. *Id.* The special referee found that although the bleacher manufacturer would have been liable, the statute of repose for improvements to real

property barred any recovery. *Id.* at 450, 868. The statute of repose for improvements to real property at the time was thirteen years. The School District did not bring the lawsuit within the thirteen year limitation period set forth in the statute. *Id.*

The Court of Appeals upheld the special referee's finding. *Id.* at 452, 869. The court noted that "neighboring jurisdictions have similarly held a statute of repose bars any action for contribution after the statutory time period." *Id.* citing *Standard Fire Ins. Co. v. Kent & Assocs., Inc.*, 501 S.E.2d 858 (Ga. Ct. App. 1998) (claims for indemnification and contribution were among those contemplated by the legislature when it enacted the statute of repose); *Krasaeath v. Parker*, 441 S.E.2d 868 (Ga. Ct. App. 1994) (five-year statute of repose for medical malpractice cases barred contribution claim even though suit was timely under the twenty-year statute of limitations governing contribution actions); *New Bern Assocs. v. Celotex Corp.*, 359 S.E.2d 481 (N.C. App. 1987) (six-year statute of repose governing actions to recover damages for injuries arising out of defective improvements to real estate property also governs actions for contribution arising out of the improvements).

Likewise, in *Capco v. J.H. Gayle Construction*, the South Carolina Supreme Court ruled that the statute of repose barred a claim for contribution. The Supreme Court relied upon the Court of Appeals' decision in *Florence County School District* holding that the statute of repose bars actions for contribution brought after its expiration. The Supreme Court explained as follows:

A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time. *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Id.* at 404, 438 S.E.2d at

243. A statute of repose is “[a] statute barring any suit that is brought after a specified time since the defendant acted ... even if this period ends before the plaintiff has suffered a resulting injury.” *Black’s Law Dictionary* 1451 (8th Ed. 2004). “Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists.” *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49, 54, n.6 (Minn. 2005) citing W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* § 30, p.168 (5th ed. 1984). As noted by the Virginia Supreme Court, “[a] statute of repose differs from a statute of limitations.... [T]he expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued.” *School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325, 327-328 (1987).

368 S.C. 137, 142, 628 S.E.2d 38, 40 (2006). As a result, the Supreme Court affirmed the trial court’s ruling that the statute of repose barred the claim for contribution.

The medical statute of repose requires that “any action . . . to recover damages for any injury to the person arising out of any medical, surgical or dental treatment . . . must be commenced within three years from the date of treatment . . . not to exceed six years from the date of occurrence. . . .” S.C. Code Ann. § 15-3-545(A) (emphasis added). Our courts have consistently held that this language creates a statute of repose. See, *Hoffman v. Powell*, 298 S.C. 338, 380 S.E.2d 821 (1989); *Shadwell v. Craigie*, 361 S.C. 492, 605 S.E.2d 567 (Ct. App. 2004); *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000). This Court should follow the interpretation previously applied to the construction statute. Thus, it should affirm Judge Lee’s order granting summary judgment because Columbia/CSA sued Dr. Taillon four years after the statute of repose expired.

Columbia/CSA argues that *Florence County School District* and *Capco* do not apply because these cases only address the statute of repose for construction claims. Thus, they argue that these cases are not relevant to the interpretation of the medical statute of repose. In fact, both cases speak in much broader terms than the language of

the construction statute of repose. Both cases rely upon the general understanding that statutes of repose apply to all claims arising from a particular action. As the Supreme Court explained in *Capco*, “the expiration of the time extinguishes not only the legal remedy but also all causes of action” 368 S.C. at 142, 628 S.E.2d at 40 (quoting *School Board of the City of Norfolk v. U.S. Gypsum*, 360 S.E.2d 325, 327 (Va. 1987)).

The construction statute of repose specifies that it applies to actions for indemnification. *See*, S.C. Code § 15-3-640(6). The medical statute of repose does not specifically mention indemnification though it does specify that it applies to “all actions.” *See*, S.C. Code § 15-3-545. This does not mean, as Columbia/CSA argues, that the medical statute of repose exempts indemnity actions from its scope. The statutes define their scope in different ways. The construction statute defines its scope positively. That is, it lists nine specific categories of actions to which it applies. *See*, S.C. Code § 15-3-640 (1) – (9). The medical statute of repose defines its scope negatively. That is, it initially applies to “any action to recover damages for injuries to the person arising out of any medical . . . treatment.” The statute then excludes three separate categories of claims. *See*, S.C. Code Ann. § 15-3-545(A) – (D). It does not exclude indemnity actions. The medical statute broadly defines the claims to which it applies. It then excludes several categories of claims. Because it does not exclude indemnity, it applies to indemnity actions.

B. South Carolina Courts Have Repeatedly Refused To Limit The Medical Statute Of Repose. Thus, This Court Should Not Now Exempt Indemnification Actions From The Medical Statute Of Repose.

In *Kerr v. Richland Memorial Hospital*, 2009 WL 1679936 (S.C. June 15, 2009), the South Carolina Supreme Court held that the statute of repose applies to government entities under the Tort Claims Act. Despite the plaintiff's claim that the Tort Claims Act supplanted the statute of repose, the Court applied the statute as "an absolute outer limit applicable in any medical malpractice action." *Id.* In 1996, Mrs. Kerr had a mole excised which was diagnosed as benign by a pathologist at Richland Memorial Hospital. Five years later, she learned that the earlier examination was wrong. The mole was cancerous. She later died of melanoma cancer. Her estate sued Richland Memorial Hospital in 2003. *Id.* The estate asserted that the statute of repose did not apply to its claim because the claim was controlled by the Tort Claims Act. *Id.* at 2. The Court rejected this position. It held the statute "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." *Id.* (quoting *Harrison v. Bevilacqua*, 354 S.C. 129, 137-38, 580 S.E.2d 109, 113 (2003)).

In reaching this conclusion, the court reaffirmed that the statute of repose "is substantive law, unlike a statute of limitations which is procedural law." *Id.* Thus the court determined that "[a] statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Id.*

Likewise, in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003), the Supreme Court refused to apply the continuing treatment rule to toll the medical statute of repose. Ms. Harrison sued as guardian for James McLean alleging that the Department

of Mental Health and doctors there improperly committed Mr. McLean for thirteen years. She argued that the continuing care Mr. McLean received should toll the statute of repose. The Supreme Court rejected this argument. It noted that the "statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *Id.* at 138, 580 S.E.2d at 114 (quoting *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993)).

In *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), the Supreme Court refused to toll the statute of repose against a doctor who had moved out of South Carolina. Although Code Section 15-3-30 tolled the statute of limitations, the Court held it did not toll the statute of repose. The Court explained the distinction as follows:

A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation. See *Bolick v. American Barmag Corp.*, 306 N.C. 364, 293 S.E.2d 415 (1982).

....

Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.

....

Society benefits when claims and causes are laid to rest after having been viable for reasonable time. When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission. This is not only for the convenience of society but also due to necessity. At that point, society is secure and stable.

Id. at 404, 438 S.E.2d at 243 (quoting *Kissel v. Rosenbaum*, 579 N.E.2d 1322, 1326 (Ind. App. 1st Dist. 1991)).

In *Hoffman v. Powell*, 298 S.C. at 340, 380 S.E.2d at 822, Ms. Hoffman challenged the statute of repose contending it violated due process guarantees. She argued that the statute of repose violates due process by extinguishing a claim before the claim could be made. Nevertheless, the Supreme Court upheld the statute as constitutional. It reasoned that “[a]lthough such a result – a cause of action barred before its discovery – seems harsh and unfair, the reasonableness of the statute must be judged in light of the circumstances confronting the legislature and the end which it sought to accomplish.” *Id.* at 341, 380 S.E.2d at 822 (quoting *Anderson v. Wagener*, 402 N.E.2d 560 (Ill. 1979)).

Thus, our Supreme Court has refused to limit the statute of repose in numerous settings.

- In *Kerr v. Richland Memorial Hospital*, the Supreme Court refused to allow the Tort Claims Act to supplant the statute of repose.
- In *Harrison v. Bevilacqua*, the Supreme Court refused to allow the continuing treatment rule to supplant the statute of repose.
- In *Langley v. Pierce*, the Supreme Court refused to allow out of state tolling to toll the statute of repose.
- In *Hoffman v. Powell*, the Supreme Court upheld the statute of repose against a due process challenge.

Because the Supreme Court has consistently rejected attempts to limit the medical statute of repose, this Court should not now exempt indemnification actions from the medical statute of repose.¹

C. **This Court Should Follow Precedent From Other States And Apply The Medical Statute Of Repose To Actions For Indemnification.**

Other states routinely apply medical statutes of repose to actions for indemnity. This Court should do likewise. In *Krasaeath v. Parker*, 441 S.E.2d 868 (Ga. Ct. Ap. 1994), the Georgia Court of Appeals ruled that Georgia's medical statute of repose applied to an action for contribution. The Georgia statute required that "in no event may an action for medical malpractice be brought more than five years after the date on which the negligent act or omission occurred." OLGA §9-3-71(c). The plaintiff maintained the claim for contribution was not barred by the statute of repose because the claim was not an action for medical malpractice. The Court determined that the statute of repose barred the contribution claim. It reasoned that "[a]lthough the claim is couched as one for contribution, and but for the statute of repose would have been timely, substance prevails over form." 441 S.E.2d at 869. The court concluded that "[a] statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that period, it is not actionable." *Id.* In fact, the South Carolina Court of Appeals relied on

¹ Columbia/CSA also argues that applying the medical statute of repose to indemnity actions will create unnecessary litigation by requiring indemnification actions to be filed during underlying tort actions. In fact, South Carolina specifically allows a defendant to assert an indemnification claim against a third party who may be liable to the defendant for the plaintiff's claims. See, Rule 14, SCRCP; *First General Services v. Miller*, 314 S.C. 439, 444 S.E.2d 446 (1996). The purpose of this rule is to promote judicial efficiency by hearing all claims involved in one lawsuit. 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* 2d §1442 (West 2003). Columbia/CSA could have filed its indemnification action during the underlying lawsuit, but it did not.

this case when deciding *Florence County School District v. Interkal*, 348 S.C. 446, 559 S.E.2d 866 (Ct. App. 2002).²

Likewise, in *Hayes v. Mercy Hospital*, 557 N.E.2d 873 (Ill. 1990), a defendant asserted contribution claims against a doctor after the medical statute of repose expired. The Illinois medical statute of repose prohibits a claim against a doctor “for damages for injury or death” four years after the doctor renders treatment. Like Columbia/CSA, the defendant argued its action was not for “damages for injury.” Instead the defendant claimed its action was merely to apportion liability in equity through a separate contribution action. The Illinois Supreme Court was not fooled. The court noted that the “basis for a contributor’s obligation rests on his liability in tort to the injured party.” *Id.* at 876. It concluded that “an action for contribution is an action for damages under the medical malpractice statute of repose.” *Id.*

Many other states have ruled similarly when addressing a contribution action brought after the expiration of a statute of repose. See, *Department of Transportation v. Echeverri*, 736 S.E.2d 791 (Fl. Ct. Ap. 1999) (holding statute of repose for action founded on design, planning or construction applied to action for indemnity and contribution); *New Bern Assocs. v. Celotex*, 359 S.E.2d 481 (N.C. App. 1987) (holding statute of repose applied to action for contribution or indemnity arising from defective improvement to property); *Standard Fire and Insurance v. Kent & Assocs.*, 501 S.E.2d 858 (Ga. App. 1998) (holding construction statute of repose barred action for contribution and indemnity); *Thompson v. Walters*, 565 N.E.2d 1385 (Ill. App. 1991) (holding product liability statute of repose barred third-party action for contribution); *Heneghan v. Sekula*,

² For a discussion of this case, see page 3 of this brief.

536 N.E.2d 963 (Ill. App. 1989) (holding contribution action against doctor barred by medical statute of repose).

D. Columbia/CSA's Argument That Its Lawsuit Is Not For "Damages For Injury To The Person" Elevates Form Over Substance. This Court Should Not Allow Columbia/CSA To Frustrate The Purpose Of The Statute Of Repose By Transforming Its Claim To Recover Money For Personal Injuries.

Columbia/CSA argues that the statute of repose does not apply to its suit against Dr. Taillon to recover medical malpractice damages. It maintains its lawsuit is for indemnification to recover money it paid for personal injuries, but not for "damages for injury to the person." Thus, it concludes the medical statute of repose does not apply. Columbia/CSA is wrong. Courts do not elevate form over substance as Columbia/CSA demands. *See, South Carolina Second Injury Fund v. American Yard Products*, 330 S.C. 20, 23, 496 S.E.2d 862, 864 (1998).

Columbia/CSA sued Dr. Taillon to recover money it paid for Mr. Sharpe's personal injuries. Columbia/CSA paid \$350,000 for a release from Mr. Sharpe's personal injury claim. After paying \$350,000 to Mr. Sharpe for his personal injuries, Columbia/CSA sued Dr. Taillon to recover its money. It now maintains that the money it demands is not for damages for personal injuries. Instead, it claims the money has transformed. What was once money for personal injuries is now money for contribution. As a result, Columbia/CSA alleges the statute of repose should not apply because its lawsuit is for contribution, not medical malpractice.

This legal magic trick elevates form over substance. In fact, Columbia/CSA's lawyer candidly told Judge Lee that "[t]his is an action for indemnification . . . albeit it does arise out of an underlying personal injury action." (R. p. 88, line 23 - p. 89, line 1)

(emphasis added). Since Columbia/CSA has sued to recover damages it paid for Mr. Sharpe's personal injuries and the statute clearly includes "any action . . . to recover damages for injury to the person," the statute bars Columbia/CSA's claim. A statute as a whole must receive a practical, reasonable, and fair interpretation consistent with the purpose, design, and policy of the lawmakers." *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). The statute of repose exists to create "a time beyond which liability no longer exists." *Langley v. Pierce*, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993). This Court should not allow Columbia/CSA to transform its claim to avoid the purpose of the statute of repose.

E. **The Plain Language of the Medical Malpractice Statute of Repose Applies To "Any Action . . . To Recover Damages For Injury To The Person" This Includes Actions For Indemnity Which Rely Upon Personal Injury.**

The statute of repose applies to "any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical . . . treatment." S.C. Code Ann. §15-3-545(A). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed." *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). By its plain meaning, the statute applies to "any action" which relies upon personal injuries to establish damages. Columbia/CSA's lawsuit is just such an action. It relies upon personal injuries to Mr. Sharpe. And it seeks to collect money for those injuries from Dr. Taillon and the JUA. Thus, Columbia/CSA's claims to recover damages for personal injuries to Mr. Sharpe is controlled by the statute of repose, and this court should affirm Judge Lee's order in favor of Dr. Taillon and the JUA.

Furthermore, subsection 15-3-545(B) provides exceptions to this general rule. It requires that actions based upon leaving a foreign object in the body must be brought within three years of the placement. Likewise, subsection 15-3-545(C) creates an exception for actions arising before June 10, 1977. Finally, subsection 15-3-545(D) provides an exception for minors. Thus, subsection 15-3-545(A) applies to any action with the three exceptions in subsections 15-3-545(B) (foreign object), 15-3-545(C) (date), and 15-3-545(D) (age). There is no exception for indemnity.

Code section 15-3-545 creates specific deadlines for lawsuits against doctors. It then carves out three exceptions which do not include indemnity actions. The legislature included three exceptions, but did not include indemnity as an exception. “[T]o express or include one thing implies the exclusion of another.” *German Evangelical Lutheran Church v. Charleston*, 352 S.C. 600, 576 S.E.2d 150 (2003). The statute expressly limits its scope in the categories of foreign objects, date and age. The statute could have easily included an exception for indemnity, but it does not.

Columbia/CSA also argues that this Court should apply the title to Code Section 15-3-545 to limit its scope. Columbia/CSA maintains that the section title “Actions for Medical Malpractice” limits the medical statute of repose solely to lawsuits brought by injured patients alleging negligence against doctors. This argument is wrong. “Although the title and headings are part of the statute, they may not be construed to limit the plain meaning of the text.” *Garner v. Houck*, 312 S.C. 481, 487, 435 S.E.2d 847, 849 (1993). Thus, the statutory title “Actions for Medical Malpractice” does not limit the scope of the statute itself which refers to “any action . . . to recover damages for injury to the person arising out of any medical . . . treatment. . . .” S.C. Code § 15-3-545(A).

CONCLUSION

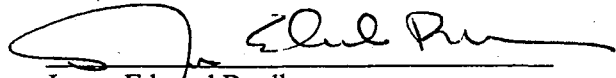
The medical malpractice statute of repose requires that “any action . . . to recover damages for any injury to the person arising out of any medical, surgical or dental treatment . . . must be commenced within three years from the date of treatment . . . not to exceed six years from the date of occurrence” S.C. Code Ann. § 15-3-545(A) (emphasis added). This statute has been consistently held a statute of repose for actions against physicians. *See, Hoffman*, 298 S.C. 338, 380 S.E.2d 821 (1989); *Shadwell v. Craigie*, 361 S.C. 492, 605 S.E.2d 567 (Ct. App. 2004); *Dunbar v. Carlson*, 341 S.C. 261, 533 S.E.2d 913 (Ct. App. 2000). Thus, the statute of repose bars Columbia/CSA’s lawsuit for indemnification which was brought after the statute expired.

Dr. Taillon and the JUA respectfully ask this Court to affirm Judge Lee’s order of summary judgment in their favor for the following reasons:

- Columbia/CSA sued Dr. Taillon and the JUA after the statute of repose expired;
- South Carolina courts apply statutes of repose to indemnification actions;
- South Carolina courts have repeatedly refused to limit the medical statute of repose;
- Other state courts apply their medical statute of repose to indemnity actions; and
- The broad, plain language of the statute of repose shows that it includes indemnity actions arising from medical malpractice lawsuits.

Respectfully submitted,

October 14, 2009



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital, ...Appellant,

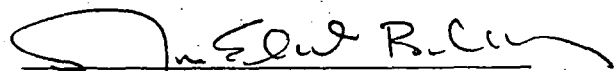
v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Taillon Respondent.

CERTIFICATE OF COUNSEL

I certify that this Final Brief of Respondent complies with Rule 211(b), SCACR.

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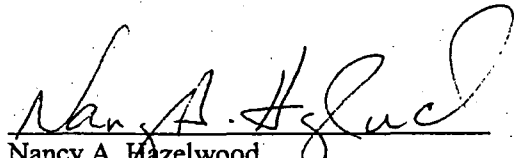
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I certify that I have served the Final Brief of Respondent on the Appellant and Certificate of Counsel by depositing a copy of it in the United States Mail, postage prepaid, on October 20, 2009, addressed to its attorneys of record as follows:

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OCT 20 2009

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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Appellant.

v.

The South Carolina Medical Malpractice Liability Joint
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ARGUMENT

Providence Hospital hereby replies to the arguments raised in Respondents' initial brief as set forth below. Section 15-3-545(A) of the South Carolina Code does not bar Providence Hospital's claims for equitable indemnification against Dr. Tallion and the JUA (herein "Respondents"). The plain and unambiguous language of section 15-3-545(A) demonstrates that our Legislature did not intend for claims for equitable indemnification to be barred by the statute of repose for medical malpractice. By its plain language, this statute of repose covers actions "to recover damages for injury to the person" resulting from "medical, surgical, or dental treatment, omission, or operation by any licensed health care provider." These phrases are not ambiguous and clearly define the scope of the statute of repose. Moreover, the statute never mentions, addresses, references, or otherwise contemplates a claim for indemnification. To hold otherwise, as urged by Respondents, would result in a forced construction that expands the statute's operation.

I. The clear and unambiguous language of Section 15-3-545(A) renders the rules of statutory construction immaterial in this matter.

Initially, Respondents urge this Court to interpret the medical malpractice statute of repose in similar fashion to the statute of repose contained in section 15-3-640 of the South Carolina Code. The statute of repose contained in section 15-3-640 has no relation to the medical malpractice statute of repose, and Respondents' argument should be rejected. Importantly, with respect to the cases cited by Respondents, our courts in those cases were not required to apply the rules of statutory interpretation to section 15-3-640, since the language therein is plain and unambiguous. Therefore, Respondents'

argument that this court should "*interpret* the medical malpractice statute of repose similarly" to the *interpretation* of section 15-3-640 is without merit. (emphasis added). {Resp. Br. p. 3}.

Accordingly, Respondents' reliance on Florence County School District #2 v. Interkal, Inc.¹ and Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.² is misplaced. {Resp. Br. p. 3-5}. While both cases addressed the statute of repose contained in section 15-3-640, neither case resorted to the rules of statutory interpretation to hold that actions for indemnity and contribution were included in section 15-3-640's statute of repose. Unlike section 15-3-545(A), section 15-3-640 contains *specific direction* from the legislature that the statute of repose for defective or unsafe improvements to real property *applies* to actions for indemnification. The legislature explicitly drafted section 15-3-640 to apply to "an action for contribution or indemnification for damages sustained on account of an action described in this section." S.C. Code Ann. § 15-3-640(6). Therefore, because section 15-3-640 was plain and unambiguous, the courts in Florence County and Capco merely applied the unambiguous language of the statute to the issue presented to the court.³ Hence, this Court should follow the guidance of the Florence County and Capco courts and hold that the clear and unambiguous language of section 15-3-545(A) establishes that indemnity actions are *not* encompassed by section 15-3-545(A). By its plain language, section 15-3-545(A) covers actions "to recover damages for injury to the person"

¹ 348 S.C. 446, 559 S.E.2d 866 (Ct. App. 2002).

² 368 S.C. 137, 628 S.E.2d 38 (2006).

³ The Florence County Court recognized the clarity of the statute and stated that "because the [s]tatute of [r]epose specifically applies to actions for contribution, it is *clear* the General Assembly intended..." for the statute of repose to apply to contribution actions in that context. 248 S.C. at 452, 559 S.E.2d at 869.

resulting from "medical, surgical, or dental treatment, omission, or operation by any licensed health care provider." These phrases are not ambiguous and clearly define the scope of the statute of repose. Therefore, just as the Florence County and Capco correctly declined to employ rules of statutory interpretation in addressing the plain language of section 15-3-640, so too should this Court hold that section 15-3-545(A) does not apply to indemnity actions. See Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 636, 640 (2006) (holding that "if a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning").

Respondents claim Capco addressed broader implications of the statute of repose. {Resp. Br. p. 6}. However, this again misconstrues the holding of Capco. In Capco, the court addressed whether one specific action—a claim for contribution—was controlled by the unambiguous bar in section 15-3-640 or a competing provision of the Contribution Act. 368 S.C. at 141, 628 S.E.2d at 41. The court simply held that the action pursued in Capco fit squarely within section 15-3-640 to bar the action under the statute of repose. Id. at 143, 628 S.E.2d at 41. The court barred that specific cause of action because the statute encompassed this cause of action by including it directly in the statute itself—the court did not extrapolate or expand any language of the bar in section 15-3-640 nor did the court address whether any other causes of action would be included in that statute of repose. Therefore, Respondents' contention that the court *interpreted* section 15-3-640 to bar actions for indemnity and contribution is without merit, and these cases offer no guidance to this Court in *interpreting* or *construing* the medical malpractice statute of repose.

II. Respondents' position on interpreting section 15-3-545(A) is not supported by our ruled of statutory construction in any event.

Moreover, Respondents' logic as to why section 15-3-545(A) should be construed to include indemnity actions is flawed. {Resp. Br. p. 6}. First, Respondents misconstrue the doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius." Respondents allege that the inclusion of indemnity actions by the legislature in section 15-3-640 supports a finding that the legislature did not exclude indemnity from the medical malpractice statute of repose. The doctrine does not support such a conclusion. The doctrine means to express or include one thing implies the *exclusion* of another. It does not mean the inclusion of one thing implies the inclusion of another as argued by Respondents. {Resp. Br. p. 6}. Therefore, the inclusion of the express language in section 15-3-640 coupled with the *exclusion* of the same language in section 15-3-545(A) demonstrates a clear legislative intent that section 15-3-545(A) does *not* bar indemnity actions. See German Evangelical Lutheran Church of Charleston v. City of Charleston, 352 S.C. 600, 576 S.E.2d 150 (2003) (applying the doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius"); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (finding that this canon of statutory construction holds that "to express or include one thing implies the exclusion of another").

Second, Respondents claim that because section 15-3-640 extinguishes all causes of action, including indemnity and contribution, then the inclusion of the words "all actions" in section 15-3-545(A) likewise bars indemnity actions. {Resp. Br. p. 6} If Respondents' argument were correct (it is not) then the legislature engaged in a futile

act when it specifically added language to section 15-3-640 to bar indemnity actions. If Respondents were right, the legislature would not have needed to list indemnity at all; instead indemnity actions would have been assumed to have fallen within the broader contexts of the statute without mention. Again, this would mean the legislature engaged in an act of futility in specifically listing indemnity claims in 15-3-640. Such a position is contrary to the rules of our State. See, e.g., Denene, Inc. v. City of Charleston, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (holding that it must be presumed the Legislature did not intend a futile act, but rather intended that its statutes accomplish something). As a result, the legislature's specific inclusion of the indemnity bar in section 15-3-640(6) was necessary to accomplish the legislature's goal of including indemnity actions in the statute of repose there, because the other language in that statute was insufficient to do so. Thus, in section 15-3-545(A), the "all actions" language is insufficient to bring indemnity actions within the ambit of the medical malpractice statute of repose absent specific direction from the legislature.

III. The cases relied on by Respondents discussing the applicability of 15-3-545(A) to medical malpractice actions do not address the issue presented in this matter.

Next, in their brief, Respondents' rely extensively on opinions that apply the medical malpractice statute of repose *to medical malpractice actions*. However, none of those cases address the issue presented in this matter—the statutory interpretation of section 15-3-545(A). The fact that section 15-3-545(A) is universally regarded as the statute of repose applicable to *medical malpractice* actions does not mean it bars *indemnity and contribution* actions. See, e.g., Lone Mountain Processing, Inc. v. Browser-Morner, 94 Fed. Appx. 149, 158 (4th Cir. 2004) (stating that indemnity

actions are "distinct, separate causes of action from the underlying wrong"); Canal Ins. Co. v. Lebanon Ins. Agency, Inc., 504 F. Supp.2d 113 (W. Dist. Va. 2007) ("An indemnity claim does not seek recovery for any direct harm caused by the [underlying] defendant to the [underlying] plaintiff—it is clearly distinct from a direct cause of action."); McDermott v. City of New York, 406 N.E.2d 460, 462-63 (N.Y. 1980) ("[T]he indemnity claim is a separate substantive cause of action, independent of the underlying wrong."); 41 Am. Jur.2d Indemnity § 38 (2008) ("[C]ommon law indemnity is . . . wholly distinct from the underlying action which gave rise to the right of indemnity."). As a result, the damages sought to be recovered differ from those sought for an "injury to the person" in a medical malpractice action as set forth in section 15-3-545(A). Therefore, the recovery sought by Providence Hospital does not fall within the ambit of section 15-3-545(A). Similarly, Respondents' recitation of general rules regarding the effect the medical malpractice statute of repose has on claims against physicians or hospitals for their acts of medical malpractice does not impact this matter.

Respondents' cite Kerr v. Richland Memorial Hospital, Op. No. 26667 (S.C. Sup. Ct. filed June 15, 2009) (Shearouse Adv. Sh. No. 26 at 30), for the proposition that the supreme court has refused to limit the statute of repose. {Resp. Br. p. 9}. This misconstrues the actual holding and impact of that case. In Kerr, the supreme court was asked to determine whether the medical malpractice statute of repose applied to a medical malpractice action brought under the South Carolina Tort Claims Act. Id. at _____. The court was not asked to determine whether the medical malpractice statute of repose applies to actions for indemnity. At no time did the court ever address whether the medical malpractice statute of repose applies outside of the context of a

medical malpractice action. The court merely applied the existing medical malpractice statute of repose to a medical malpractice action brought under a different statutory vehicle. Id. at _____. Therefore, the Court did not reject an attempt to limit the medical malpractice statute of repose as argued by the Respondents, but rather applied the medical malpractice statute of repose to a medical malpractice action. In fact, Kerr actually provides insight to the supreme court's view that the statute of repose in section 15-3-545(A) is applicable *only* to medical malpractice actions. Throughout the opinion, the supreme court refers to this statute of repose as applicable to medical malpractice actions, indicating the statute of repose is limited to *only* medical malpractice actions. Providence Hospital is not an injured party seeking to recover damages based on the medical malpractice of a doctor; instead, Providence Hospital seeks to recover the costs and settlement expenses it sustained defending the underlying tort action in which Providence Hospital was pursued solely under a vicarious liability theory. It has brought an equitable indemnification action. As discussed, an equitable indemnification action is a separate and distinct action from the underlying tort action.

Respondents' reliance on Harrison v. Bevilacqua, 354 S.C. 129, 580 S.E.2d 109 (2003), Langley v. Pierce, 313 S.C. 401, 438 S.E.2d 242 (1993), and Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989), is likewise misplaced. These three cases all merely address the medical malpractice statute of repose in the context of a medical malpractice action. However, none of these cases address whether the medical malpractice statute of repose bars actions for indemnity. The cases cited by Respondent fail to address and offer no guidance on the issue presented in this matter; therefore, Respondents' reliance on these cases is misplaced.

IV. The foreign authorities cited by Respondent are distinguishable and do not support Respondents.

Next, Respondents rely heavily on Krasaeath v. Parker, 441 S.E.2d 868 (Ga. App. 1994), in support of their position. That case is distinguishable from this action for two reasons. First, in Krasaeath, the plaintiff took an assignment from one of the doctors she pursued for medical malpractice after settlement of the claim. Id. at 868-69. More than five years after the date of treatment, and after the expiration of the applicable repose and limitations periods expired for actions against the other doctors, Parker sought contribution from Krasaeath, a separate doctor. Id. While Parker captioned the action as one for contribution, it was really a medical malpractice action against Krasaeath, brought by the person he allegedly personally injured through medical malpractice. Id. at 870. Because the action was untimely against Krasaeath, the court held Parker could not circumvent the statute of repose by claiming it was an action for contribution. Id. However, such concerns are not present in this matter. Providence Hospital took no assignment in an attempt to circumvent any limitations period and is not an injured person seeking to recover for injuries. Rather, Providence Hospital seeks to enforce its own right to equitable indemnification, which is a separate and distinct action from the underlying tort action, and arose only upon payment of the settlement funds. Further, in Krasaeath the court addressed whether contribution, not indemnity, was barred under the medical malpractice statute of repose. Id. at 868. In this action, Providence did not pursue Respondents based on contribution; rather, Providence Hospital sought indemnification. Indemnification and contribution are separate causes of action and are not interchangeable under South Carolina law. See,

generally, 7 S.C. Jur. Contribution § 3 (2008) (describing the differences between indemnity and contribution actions). Hence, the Krasaeath case is distinguishable for this reason as well.

Moreover, the other states courts relied on by Respondents in support of their argument address statutes which are clearly distinguishable from section 15-3-545(A). In Illinois, the legislature drafted a broadly worded statute of repose that supports its courts' decisions that the statute of repose bars an indemnity action against a doctor. The Illinois statute provides that no action may be maintained against a physician or hospital "based on tort, or breach of contract, or otherwise, arising out of patient care . . ." 735 Ill. Stat. Ann. § 5/13-212 (2008) (emphasis added). It is this broad, all-encompassing language used by the Illinois legislature that supports the finding by the courts there that the statute of repose can bar an action for indemnity. South Carolina's medical malpractice statute of repose is distinguishable because our legislature employed no such similar language in section 15-3-545(A). Our legislature specifically drafted section 15-3-545(A) much more narrowly. Similarly, Florida has statutorily defined a medical malpractice action to encompass actions for indemnity. There, the legislature drafted the medical malpractice statute of repose to apply to "a claim in tort or contract for damages because of the death, injury, or monetary loss to any person . . ." Fla. Stat. Ann. § 95.11(4)(b) (2009) (emphasis added). Accordingly, Florida's interpretation of its statute of repose offers no guidance in interpreting section 15-3-545(A). The plain language of South Carolina's medical malpractice statute of repose expresses our legislature's clear desire to cover only actions "to recover damages for injury to the person" resulting from "medical, surgical, or dental treatment, omission,

or operation by any licensed health care provider." These phrases are not ambiguous and clearly define the scope of the statute of repose.

Further, the Missouri Supreme Court has rejected Respondents' arguments. In Roland v. Skaggs Companies, Inc., the court addressed whether the medical malpractice statute of limitations barred a subsequent contribution action. 666 S.W.2d 770, 772 (Mo. 1984). The trial court held that an action for contribution was barred by the two-year medical malpractice statute of limitations.⁴ Id. at 773. The Supreme Court disagreed, holding that

While [the medical malpractice statute of limitations] clearly covers all claims brought by consumers of health care services against health care providers for injuries related to such services, **we find no words indicating a legislative intent** to include suits for contribution among health care providers.

Id. (emphasis added). The court reasoned that "claims for . . . apportionment of fault need not be subject to the statute of limitations applicable to medical malpractice actions . . . because of the independent nature of that claim from the underlying claim of [the patient] for damages." Aherron v. St. John's Mercy Med. Center, 713 S.W.2d 498, 499 (Mo. 1986); see also Breeden v. Hueser, 273 S.W.3d 1, 11 (Mo. 2008) (holding the "claims that fall within the scope of [the medical malpractice statute] are those for damages resulting from the acts of a physician in the delivery of health care to the consumer").

Our section 15-3-545(A), like the Missouri statute, contains no language that indicates the legislature intended to bar indemnity or contribution actions. In this

⁴ While this case was addressed in the context of the statute of limitations, the logic remains applicable to an analysis of the statute of repose.

action, Providence Hospital is not an injured party seeking to recover damages based on the medical malpractice of a doctor. Rather, this is an equitable indemnification action, which is a separate and distinct action from the underlying tort action. As such, section 15-3-545(A) does not bar Providence Hospital's indemnity action against Tallion and the JUA. Therefore, the trial court improperly granted summary judgment to Respondents.

V. An indemnity action to recover costs of settlement is not an action for damages to an injured patient resulting from deficient medical treatment.

Next, Respondents claim that Providence Hospital's argument elevates form of the action over substance, claiming this indemnification action is actually an action to recover "damages for injury to the person" under section 15-3-545(A). {Resp. Br. p. 12}. This, however, again fails to recognize the fact that the medical malpractice statute of repose does not apply to actions seeking recovery of costs and settlement expenses. By its terms, section 15-3-545(A) applies only to an action "to recover damages for injury to the person arising out of any medical . . . treatment, omission, or operation." Providence Hospital is not an injured party seeking to recover damages based on the medical malpractice of a doctor; instead, Providence Hospital seeks to recover the costs and settlement expenses it sustained defending the underlying tort action in which Providence Hospital was pursued solely under a vicarious liability theory. Simply put, this is an equitable indemnification action, which is a separate and distinct action from the underlying tort action. See, e.g., Lone Mountain Processing, Inc. v. Browser-Morner, 94 Fed. Appx. 149, 158 (4th Cir. 2004) (stating that indemnity actions are "distinct, separate causes of action from the underlying wrong");

Canal Ins. Co. v. Lebanon Ins. Agency, Inc., 504 F. Supp.2d 113 (W. Dist. Va. 2007)

("An indemnity claim does not seek recovery for any direct harm caused by the [underlying] defendant to the [underlying] plaintiff—it is clearly distinct from a direct cause of action."); McDermott v. City of New York, 406 N.E.2d 460, 462-63 (N.Y. 1980) ("[T]he indemnity claim is a separate substantive cause of action, independent of the underlying wrong."); 41 Am. Jur.2d Indemnity § 38 (2008) ("[C]ommon law indemnity is . . . wholly distinct from the underlying action which gave rise to the right of indemnity."). As a result, the damages sought to be recovered differ from those sought for an "injury to the person" in a medical malpractice action as set forth in section 15-3-545(A). Therefore, the recovery sought by Providence Hospital does not fall within the ambit of section 15-3-545(A). As a result, Respondents argument, if adopted, would effectively cause the redrafting of section 15-3-545(A) to include actions that were not included. This argument should be rejected by this Court. See Keyserling v. Beasley, 322 S.C. 83, 86, 470 S.E.2d 100, 101 (1996) (holding that South Carolina appellate courts do "not sit as a superlegislature to second guess the wisdom or folly of decisions of the General Assembly"). The Respondents can seek to have the General Assembly change the statutory language in the medical malpractice statute of repose if they so desire.

Respondents fail to rebut Providence Hospital's argument that Title 15 limits each of its limitations sections to the corresponding enumerated and individual causes of action addressed. This is evident in the general rule, which states that "[c]ivil actions may only be commenced within the periods prescribed in this title after the *cause of action* has accrued, except when, in special cases, a different limitation is prescribed by

statute." S.C. Code Ann. § 15-3-20(A) (2002). This rationale of limiting actions based on the type of cause of action continues throughout Title 15. Each section sets forth the *cause of action* to which it applies. See, e.g., S.C. Code Ann. § 15-3-330 (applying to "actions by individual for recovery of real property"); S.C. Code Ann. § 15-3-530 (creating a three-year limitation period for causes of actions upon contract, damage to real property, or insurance, among others); S.C. Code Ann. § 15-3-550 (creating a two-year limitation period for slander, libel, and false imprisonment causes of action). From the guidance provided by our Legislature throughout Title 15, it is evident that section 15-3-545(A) applies to actions for medical malpractice only. See S.C. Code Ann. § 15-3-545(A) (applies to actions for "any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider"). Therefore, the legislature drafted section 15-3-545(A) to apply only to actions for medical malpractice.

Additionally, a practical look into the effect of section 15-3-545(A) based on the competing meanings advanced by the parties demonstrates that the legislature did not intend to include actions for indemnification in the medical malpractice statute of repose. The argument advanced by Respondents would produce different limitations periods based upon different types of actions, medical malpractice or otherwise, if adopted by this Court. Respondent claims that section 15-3-545(A) encompasses all medical malpractice actions except for those covered by 15-3-545(B). {Resp. Br. p. 6}. Respondents' position would create the following result: (1) one statute of repose period for medical malpractice actions and corresponding indemnity and contribution actions brought under section 15-3-545(A); (2) a different limitation period for any medical malpractice actions brought as the result of the placement or leaving of a

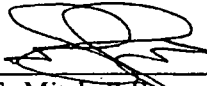
foreign object in the body under section 15-3-545(B) and no corresponding repose period for indemnity and contribution actions brought under section 15-3-545(B); (3) a separate limitation and repose period for medical malpractice actions brought under section 15-3-545(D); and (4) two different limitations periods for the subsequent indemnity and contribution suits, depending on whether the underlying action was brought under sections 15-3-545(A) or 15-3-545(B). Surely the legislature did not intend such an absurd result when it drafted the medical malpractice statute of repose. This would mean a different indemnity limitations period would apply depending upon the underlying type of malpractice engaged in by the medical provider. Yet, the act of paying settlement monies and then seeking indemnity is the same regardless. Respondents' position would greatly complicate this area of the law should this Court affirm the result of the trial court.

By contrast, Providence Hospital's approach to interpreting the medical malpractice statute of repose avoids such results. Providence Hospital's approach to section 15-3-545 would allow a simple and efficient interpretation of the statute—the medical malpractice repose statute applies only to medical malpractice actions. Indemnity actions are unaffected by that statute, and only a statute of limitations would be applicable. This result is the proper one under section 15-3-545(A) intended by our legislature.

CONCLUSION

Section 15-3-545(A) of the South Carolina Code does not bar Providence Hospital's claims for equitable indemnification against Tallion and the JUA. The plain and unambiguous language of section 15-3-545(A) demonstrates that our Legislature did not intend for claims for equitable indemnification to be barred by the statute of repose for medical malpractice actions contained in section 15-3-545(A). Therefore, because the language of section 15-3-545(A) is plain and unambiguous the trial court erred in interpreting the statute without first finding it to be ambiguous. Moreover, even if section 15-3-545(A) is ambiguous, the trial court erred in interpreting the statute to preclude Providence Hospital's claims for equitable indemnification against Tallion and the JUA. Accordingly, this matter must be remanded to the trial court for a determination as to Providence Hospital's claims for equitable indemnification.

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October 20, 2009

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital, ...

Appellant.

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Tallion, ...

Respondents,

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Appellant's Final Reply Brief complies with Supreme Court Order dated August 13, 2007 regarding personal identifiers and sensitive information.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Appellant.

v.

The South Carolina Medical Malpractice Liability Joint
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Respondents,

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The undersigned hereby certifies that the Final Briefs of Appellant contain all materials proposed to be included by any of the parties and not any other material.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

The South Carolina Medical Malpractice Liability Joint Respondent,
Underwriting Association and Michael P. Tallion, ...

v.

Columbia/CSA-HS Greater Columbia Healthcare Appellant.
System db/a Providence Hospital,.....

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

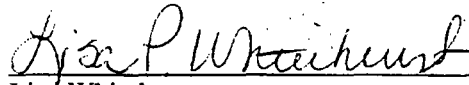
Final Reply Brief of Appellant

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October 20, 2009

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Columbia/CSA-HS Greater Columbia Healthcare System, LP
d/b/a Providence Hospital, Appellant,

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Taillon, Respondents.

Appeal From Richland County
Alison Renee Lee, Circuit Court Judge

Opinion No. 4819
Heard December 9, 2010 – Filed April 13, 2011

AFFIRMED

C. Mitchell Brown, William C. Wood, Jr., Michael J. Anzelmo,
and Monteith P. Todd, all of Columbia, for Appellant.

Andrew F. Lindemann and J. Edward Bradley, both of West
Columbia, for Respondents.

LOCKEMY, J.: In this action for equitable indemnification, Columbia/CSA-HA Greater Columbia Healthcare System d/b/a Providence Hospital (Providence Hospital) appeals, arguing the trial court erred in granting the South Carolina Medical Malpractice Liability Joint Underwriting Association (the JUA) and Dr. Michael P. Taillon's motion for summary judgment based upon the six-year medical malpractice statute of repose. We affirm.

FACTS

On May 31, 1997, Arthur Sharpe sought treatment for chest pain at Providence Hospital's emergency room. Dr. Michael Hayes treated Sharpe initially; however, shortly thereafter Taillon assumed Sharpe's care. Taillon diagnosed Sharpe with reflux and discharged him. Several days later, Sharpe sought treatment at Lexington County Hospital and was diagnosed as having suffered a heart attack. Two years later, on May 25, 1999, Sharpe sued Dr. Hayes and Providence Hospital based upon an apparent agency theory. See, e.g., Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 533 S.E.2d 312 (2000). Discovery revealed Taillon examined, diagnosed, and treated Sharpe. At some point afterward, the record is silent as to exactly when, Providence Hospital demanded indemnification from Taillon and the JUA. Taillon and the JUA declined to assume the defense or indemnify Providence Hospital on May 4, 2004. On June 10, 2004, Providence Hospital settled Sharpe's lawsuit for \$350,000. [1]

Three years later, on June 7, 2007, Providence Hospital brought this action against Taillon and the JUA for equitable indemnification. Approximately a year after filing an answer, Taillon and the JUA moved to amend their answer to assert a statute of repose defense pursuant to section 15-3-545(A) of the South Carolina Code (2005), and for summary judgment based upon the statute of repose. After a hearing, the trial court

granted Taillon and the JUA leave to amend their answer and granted summary judgment, finding Providence Hospital's action for equitable indemnification was barred by the statute of repose. Providence Hospital filed a Rule 59(e), SCRPC, motion, arguing the trial court erred in allowing Taillon and the JUA to amend their answer and in granting summary judgment. The trial court denied Providence Hospital's motion. This appeal followed.

ISSUE ON APPEAL

Did the trial court err in finding section 15-3-545(A) of the South Carolina Code (2005) barred Providence Hospital's claim for equitable indemnification against Tallion and the JUA?

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRPC." Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Pursuant to Rule 56(c), summary judgment is appropriate when "there is no genuine issue as to any material fact [such] that the moving party is entitled to a judgment as a matter of law." "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." Fleming, 350 S.C. at 493-94, 567 S.E.2d at 860.

LAW/ANALYSIS

Providence Hospital argues the trial court erred in finding section 15-3-545(A) of the South Carolina Code (2005) barred its claim for equitable indemnification. Specifically, Providence Hospital contends the plain language of section 15-3-545(A) indicates it does not apply to its action for equitable indemnification. We disagree.

Section 15-3-545(A), titled "Actions for medical malpractice," provides:

In any action . . . to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . acting within the scope of his profession 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.

The plain language of section 15-3-545(A) indicates it applies to "any action" that seeks "to recover damages for injury to the person" arising out of medical malpractice. See First Baptist Church of Mauldin v. City of Mauldin, 308 S.C. 226, 229, 417 S.E.2d 592, 593 (1992) ("In construing a statute, its words must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation.").

Generally, "[a] plaintiff may maintain an equitable indemnification action if he was compelled to pay damages because of negligence imputed to him as the result of another's tortious act." Fowler v. Hunter, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010). In order to prove it is entitled to equitable indemnification, Providence Hospital must show (1) Taillon was liable for causing Sharpe's damages, (2) it was exonerated from any liability for those damages, and (3) it suffered damages as a result of Sharpe's medical malpractice action which was eventually proven to be the fault of Taillon. See id. To recover settlement costs under the rule of equitable indemnification, Providence Hospital must also prove (1) the settlement is bona fide, with no fraud or collusion by the parties, (2) under the circumstances, the decision to settle was a reasonable means of protecting its interest, and (3) the amount of the settlement was reasonable in light of Sharpe's damages and the risk and extent of its exposure if the case is tried. See Vermeer Carolina's, Inc. v. Wood/Chuck Chipper

Corp., 336 S.C. 53, 62, 518 S.E.2d 301, 306 (Ct. App. 1999).

Under our equitable indemnification rule, Providence Hospital's entitlement to equitable indemnification is predicated upon Taillon's liability to Sharpe in tort. Here, Taillon's liability for Sharpe's injuries is undetermined. Because Providence Hospital must establish Taillon's liability for Sharpe's damages in order to show it is entitled to equitable indemnification, we find Providence Hospital's action is an action to recover damages for injury to the person.

Providence Hospital argues it is seeking settlement costs, not damages for injury to the person. We find this distinction unavailing. Providence Hospital's entitlement to equitable indemnification rests upon its obligation to pay damages because of negligence imputed to it as the result of Taillon's allegedly tortious acts. Further, settlement costs are recoverable only if they are reasonable in light of plaintiff's damages and the risk and extent of the defendant's exposure if the case is tried. Id. The \$350,000 Providence Hospital paid for a release from Sharpe's action is directly related to and arises from Sharpe's damages.

Furthermore, section 15-3-545 defines its scope negatively. Section 15-3-545(A) defines the general scope of the medical malpractice statute of repose, while sections 15-3-545(B)-(D) enumerate the specific claims to which statute of repose is inapplicable. Section 15-3-545 does not expressly exclude actions for equitable indemnification predicated upon proving liability in the underlying medical malpractice action. "The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded." German Evangelical Lutheran Church of Charleston v. City of Charleston, 352 S.C. 600, 607, 576 S.E.2d 150, 153 (2003) (internal quotation marks and citation omitted). "Exceptions strengthen the force of the general law and enumeration weakens it as to things not expressed." Id. (internal quotation marks and citation omitted). For the foregoing reasons, we conclude section 15-3-545(A) bars Providence Hospital's claim for equitable indemnification.

Our conclusion is consistent with the holdings of several other courts which have considered similar issues. See, e.g., Hayes v. Mercy Hosp. & Med. Ctr., 557 N.E.2d 873, 876 (Ill. 1990) (holding an action for contribution is an "action for damages" under Illinois's medical malpractice statute of repose because the basis for a contributor's liability rests in tort to the injured party); Ashley v. Evangelical Hosp. Corp., 594 N.E.2d 1269, 1271-76 (Ill. App. Ct. 1992) (applying the reasoning employed in Hayes and holding Illinois's medical malpractice statute of repose applies to actions for indemnity); Krasaeath v. Parker, 441 S.E.2d 868, 870 (Ga. Ct. App. 1994) (finding an action for contribution was barred by Georgia's medical malpractice statute of repose because it was predicated on proof of the alleged contributor's professional negligence); cf. Virginia Ins. Reciprocal v. Pilzer, 599 S.E.2d 182, 184 (Ga. 2004) (holding Georgia's medical malpractice statute of repose does not apply to contribution actions when the contributor's negligence was established in the underlying medical malpractice action).

Finally, our conclusion comports with the policy considerations supporting South Carolina's medical malpractice statute of repose. "A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time." Langley v. Pierce, 313 S.C. 401, 404, 438 S.E.2d 242, 243 (1993). The Langley court continued:

Statutes of repose are based upon considerations of the economic best interests of the public as a whole and are substantive grants of immunity based upon a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists.

Society benefits when claims and causes are laid to rest after having been viable for reasonable time. When causes of action are extinguished after such time, society generally may continue its business and personal relationships in peace, without worry that some cause of action may arise to haunt it because of some long-forgotten act or omission. This is not only for the convenience

of society but also due to necessity. At that point, society is secure and stable.

Id. at 404-05, 438 S.E.2d at 244 (quoting Kissel v. Rosenbaum, 579 N.E.2d 1322, 1328 (Ind. Ct. App. 1991)). The expiration of a statute of repose extinguishes all causes of action, including those that may later accrue and those that have already accrued. Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). Here, Providence Hospital brought its action for equitable indemnification ten years after the date of treatment and four years after the statute of repose expired. Providence Hospital knew Taillon may be responsible for some or all of Sharpe's damages as early as discovery in the underlying medical malpractice action. Allowing Providence Hospital's claim for equitable indemnification predicated upon proving Taillon's liability would, in effect, allow Providence Hospital to subject Taillon to liability for medical malpractice after the legislatively proscribed six-year statute of repose expired and run afoul of the policy considerations supporting section 15-3-545(A).

CONCLUSION

We hold the trial court properly granted Taillon and the JUA's motion for summary judgment. The decision of the trial court is hereby

AFFIRMED.

HUFF and KONDUROS, JJ., concur.

[1] Providence Hospital never sought to implead Taillon and the JUA pursuant to Rule 14(a), SCRCP.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital,.....

Appellant.

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Tallion, ...

Respondents,

PETITION FOR REHEARING AND REHEARING *EN BANC*

Pursuant to Rules 219 and 221(a) of the South Carolina Appellate Court Rules, Appellant Columbia/CSA-HS Greater Columbia Healthcare System d/b/a Providence Hospital ("Providence Hospital") hereby files this petition for rehearing and rehearing *en banc*. Providence Hospital respectfully submits that rehearing and/or issuance of a new opinion reversing the trial court's decision is warranted. The grounds for this petition are that the Panel's opinion in this matter overlooked or misapprehended several matters of fact and law. This matter is of exceptional importance as it involves where the medical malpractice statute of repose affects cases for contribution and/or indemnity.

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INTRODUCTION

In Opinion No. 4819 filed April 13, 2011, a Panel of this Court affirmed the trial court's order denying Providence Hospital's claim for equitable indemnification against Respondents The South Carolina Medical Malpractice Liability Joint Underwriting Association and Michael P. Tallion ("JUA" or "Tallion" or collectively "Respondents"). The Panel overlooked or misapprehended several matters of law and fact in rendering this opinion. First, the Panel misapprehended the plain language of section 15-3-545(A) that limits application of the statute of repose to actions *for* injuries to the person from medical malpractice. Second, the Panel's interpretation of section 15-3-545(A) is in conflict with the established rule that indemnity constitutes an action separate and distinct from the underlying medical malpractice action. Third, the Panel misapprehended that the lack of express inclusion of indemnity actions in section 15-3-545(A) establishes that the statute of repose is inapplicable to an indemnity claim. Fourth, the Panel overlooked the split of authority that exists in other jurisdictions, as to whether a medical malpractice statute of repose bars an indemnity action. The Panel did not cite to the jurisdiction which held contrary to the Panel's ruling. Fifth, the Panel misapprehended Capco of Summerville, Inc. v. J.H. Gayle Constr. Co. 368 S.C. 137, 628 S.E.2d 38 (2006) and its reliance thereon is misplaced. As a result, this Court should grant rehearing and/or rehearing *en banc* in this matter.

ARGUMENT

- I. The Panel misapprehended the plain language of section 15-3-545(A) that limits application of the statute of repose to actions for injuries to the person from medical malpractice.

In the opinion, the Panel grounded its decision on the "arising out of" medical malpractice language contained in section 15-3-545(A). Op. No. 4819 at p. 2-3. This misapprehended and overlooked the clear language that limits the statutes applicability to actions "to recover damages *for* injuries to the person." (emphasis added). The Panel's holding impermissibly altered the statute to eliminate that language. Thus, this Court should grant rehearing and/or rehearing *en banc* in this matter.

The medical malpractice statute of repose provides:

In any action . . . to recover damages for injury to the person arising out of any medical, surgical, or dental treatment, omission, or operation by any licensed health care provider . . . must be commenced within three years from the date of treatment, omission, or operation giving rise to the cause of action or three years from the 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) (1988) (emphasis added). Words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation. Buist v. Huggins, 367 S.C. 268, 276, 625 S.E.2d 725, 729 (2006). Further, it is beyond a court's "power to effect a change in the statutes enacted by the Legislature." State v. Corey D., 339 S.C. 107, 120, 529 S.E.2d 20, 27 (2000).

By its plain language, this statute of repose covers actions "to recover damages for injury to the person" resulting from medical malpractice. This phrase is not

ambiguous and clearly defines the scope of this particular statute of repose. The legislature drafted section 15-3-545(A) to be limited to malpractice actions that result in bodily injury. The Panel's opinion results in a forced construction that expands the statute's operation to include any action arising out of a medical malpractice action. Such a reading violates the plain meaning rule and effectively caused the redrafting of section 15-3-545(A) to include actions that were not included by the legislature.

Also, the Panel overlooked that Title 15 of the South Carolina Code limits each limitation period to the cause of action enumerated in each section unless otherwise provided. The general rule in Title 15 states that "[c]ivil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute." S.C. Code Ann. § 15-3-20(A) (2002) (emphasis added). This rationale of limiting actions based on the type of cause of action continues throughout Title 15. Each section sets forth the cause of action to which it applies. See, e.g., S.C. Code Ann. § 15-3-330 (applying to "actions by individual for recovery of real property"); S.C. Code Ann. § 15-3-530 (creating a three-year limitation period for causes of actions upon contract, damage to real property, or insurance, among others); S.C. Code Ann. § 15-3-550 (creating a two-year limitation period for slander, libel, and false imprisonment causes of action). From the guidance provided by our Legislature throughout Title 15, it is evident that section 15-3-545(A) applies to actions for medical malpractice only. The Panel overlooked and misapprehended this. Therefore, this Court should grant rehearing and/or rehearing *en banc* in this matter.

II. The Panel's interpretation of section 15-3-545(A) is in conflict with the established rule that indemnity constitutes an action separate and distinct from the underlying medical malpractice action.

The Panel found the settlement cost that Providence Hospital sought to recover arose from the medical malpractice actions of the underlying tort plaintiff and, as a result, was barred by the statute of repose. Op. No. 4819 at p. 3. This rationale misapprehended and overlooked the fact that indemnity is a separate and distinct action from the underlying tort action. Therefore, this Court should grant rehearing and/or rehearing *en banc* in this matter.

Indemnity actions are "wholly distinct from the underlying action which gave rise to the right of indemnity." 41 Am. Jur.2d Indemnity § 38 (2008). Indemnity is distinct from the underlying tort action because equitable indemnity is based on a theory of contract implied in law. *Id.* Moreover, equitable indemnity does not arise when the underlying damage occurs. Instead, equitable indemnity accrues at a different time—namely, upon payment of the underlying claim or payment of a judgment or settlement. *Id.* The Panel's opinion overlooked these distinctions and equated an indemnity action with the underlying medical malpractice action. This directly conflicts with the nature of an indemnity action. See, e.g., Lone Mountain Processing, Inc. v. Browser-Morner, 94 Fed. Appx. 149, 158 (4th Cir. 2004) (stating that indemnity actions are "distinct, separate causes of action from the underlying wrong"); McDermott v. City of New York, 406 N.E.2d 460, 462-63 (N.Y. 1980) ("[T]he indemnity claim is a separate substantive cause of action, independent of the underlying wrong."). In fact, in Canal Ins. Co. v. Lebanon Ins. Agency, Inc. 504 F. Supp.2d 113 (W. Dist. Va. 2007) the court held that an indemnity claim does not seek to recover for any direct harm caused

by the tort defendant to the underlying tort plaintiff. Id. at 117. The court noted that indemnity is distinct from the underlying tort cause of action brought by the injured plaintiff. Id.

The Panel overlooked this concept that damages sought to be recovered in this indemnity action differ from those sought for an "injury to the person" in a medical malpractice action as set forth in section 15-3-545(A). Providence Hospital seeks to recover the costs and settlement expenses it sustained defending the underlying tort action in which Providence Hospital was pursued solely under a vicarious liability theory. This recovery sought by Providence Hospital is not to recover for injuries to a person and does not fall within the ambit of section 15-3-545(A). The Panel misapprehended the nature of an indemnity action in holding otherwise and such warrants rehearing and/or rehearing *en banc*.

III. The Panel misapprehended that the lack of express inclusion of indemnity actions in section 15-3-545(A) establishes that the statute of repose was not applicable to Providence Hospital's claim for indemnification in this action.

The Panel overlooked the doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius." This canon of statutory construction holds that "to express or include one thing implies the exclusion of another." German Evangelical Lutheran Church of Charleston v. City of Charleston, 352 S.C. 600, 576 S.E.2d 150 (2003) (citing Black's Law Dictionary 602 (7th ed. 1999)); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000). Application of this doctrine proves section 15-3-545(A) does not apply to a subsequent indemnity action.

Title 15 again provides guidance in this area. When our legislature intended for a statute of repose in Title 15 to bar a subsequent indemnity action, it expressly did so.

Section 15-3-640 illustrates this point, which was overlooked by the Panel. The legislature specifically included indemnity actions within the application of the statute of repose for defective or unsafe improvements to real property in section 15-3-640.¹ However, section 15-3-545(A) was drafted without this same language. The legislature could have very easily included this language in section 15-3-545(A) but did not do so. Therefore, under the doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius," the inclusion of the express language in section 15-3-640, coupled with the *exclusion* of the same language in section 15-3-545(A), demonstrates a clear legislative intent that section 15-3-545(A) does *not* bar indemnity actions. The Panel's failure to consider this doctrine warrants rehearing and/or rehearing *en banc*.

IV. The Panel overlooked the split of authority that exists as to whether a medical malpractice statute of repose can bar an indemnity action.

In the opinion, the Panel stated that its opinion was supported by the other states that have addressed this issue. Op. No. 4819 at p. 3. This holding overlooked, and failed to recognize, the split of authority that exists on this issue. This Court should grant rehearing and/or rehearing *en banc* in this matter.

First, the Panel's reliance on Illinois case law is misplaced. Illinois medical malpractice repose statute is distinguishable from our section 15-3-545(A). The Illinois legislature drafted a broadly worded statute of repose that supports its courts' decisions. The Illinois statute provides that no action may be maintained against a physician or hospital "based on tort, or breach of contract, or otherwise, arising out of patient care" 735 Ill. Stat. Ann. § 5/13-212 (2008) (emphasis added). This language is broad

¹ The legislature explicitly drafted section 15-3-640 to apply to "an action for contribution or indemnification for damages sustained on account of an action described in this section." S.C. Code Ann. § 15-3-640(6).

and all-encompassing. This broad language used by the Illinois legislature supports the finding by the courts there that the statute of repose can bar an action for indemnity. In contrast, our medical malpractice statute of repose is distinguishable because our legislature employed no such language in section 15-3-545(A). Our legislature specifically drafted section 15-3-545(A) much more narrowly to apply only to actions for injuries to the person arising from deficient medical care. The Panel failed to apprehend this distinction and reliance on Illinois case law is misplaced.

Next, the Panel misapprehended Krasaeath v. Parker, 441 S.E.2d 868 (Ga. App. 1994). That case is distinguishable from this action for two reasons. First, the case is factually distinct from this matter. There, the plaintiff took an assignment from one of the doctors—not Krasaeath—that she pursued for medical malpractice after settlement of the claim. Id. at 868-69. More than five years after the date of treatment and after the expiration of the applicable repose and limitations periods expired for actions against the other doctors, Parker, the plaintiff, sought contribution from Krasaeath, the other separate doctor. Id. While Parker captioned the action as one for contribution, it was really a medical malpractice action against Krasaeath, brought by the person he allegedly personally injured through medical malpractice. Id. at 870. Because the action was untimely against Krasaeath, the court held Parker could not circumvent the statute of repose by claiming it was an action for contribution. Id. However, the Panel overlooked that such concerns are not present in this matter. Providence Hospital took no assignment in an attempt to circumvent any limitations period and is not an injured person seeking to recover for injuries. Rather, Providence Hospital seeks to enforce its own right to equitable indemnification, which is a separate

and distinct action from the underlying tort action, and arose only upon payment of the settlement funds. Thus, the Panel misapprehended this case and its reliance is misplaced.

Lastly, the Panel overlooked the fact that a Missouri court has rejected the rationale utilized in the opinion. In Roland v. Skaggs Companies, Inc., the court addressed whether the medical malpractice statute barred a subsequent contribution action. 666 S.W.2d 770, 772 (Mo. 1984). The trial court held that an action for contribution was barred by the two-year medical malpractice statute of limitations.² Id. at 773. The Supreme Court disagreed, holding that

While [the medical malpractice statute of limitations] clearly covers all claims brought by consumers of health care services against health care providers for injuries related to such services, **we find no words indicating a legislative intent** to include suits for contribution among health care providers.

Id. (emphasis added). The court reasoned that "claims for . . . apportionment of fault need not be subject to the statute of limitations applicable to medical malpractice actions . . . because of the independent nature of that claim from the underlying claim of [the patient] for damages." See also Breeden v. Hueser, 273 S.W.3d 1, 11 (Mo. 2008) (holding the "claims that fall within the scope of [the medical malpractice statute] are those for damages resulting from the acts of a physician in the delivery of health care to the consumer").

The Panel overlooked the fact that section 15-3-545(A), like the Missouri statute, contains no language that indicates the legislature intended to bar indemnity or

² While this case was addressed in the context of the statute of limitations, the logic remains applicable to an analysis of the statute of repose.

contribution actions. In this action, Providence Hospital is not an injured party seeking to recover damages based on the medical malpractice of a doctor. Rather, this is an equitable indemnification action, which is a separate and distinct action from the underlying tort action. As such, section 15-3-545(A) does not bar Providence Hospital's indemnity action against Tallion and the JUA. This Court should grant rehearing and/or rehearing *en banc* in this matter.

V. The Panel misapprehended Capco and reliance thereon is misplaced.

The Panel cited Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 628 S.E.2d 38 (2006), for a general proposition regarding statutes of repose to support its policy consideration analysis. Op. No. 4819 at p. 4. However, the Panel overlooked the reasoning and policy concerns behind the Capco decision to apply the statute of repose in that case. Capco illustrated a situation where our Supreme Court reluctantly found a subsequent indemnity action barred by the statute of repose for defective or unsafe improvements to real property. The Supreme Court held indemnity was barred *solely* because that statute contained explicit language to include the indemnity cause of action in the repose period. 368 S.C. at 144, 628 S.E.2d at 42. The court noted it was "troubled by the harsh result" in having to hold indemnity was barred, but that it was constrained by the terms of the statute. Id. The Panel overlooked this critical feature of the holding of Capco.

Additionally, the Panel overlooked the practical problems caused by its holding. The opinion ignores the fact that a practical look into the effect of section 15-3-545(A) demonstrates that the legislature did not intend to include actions for indemnification in the medical malpractice statute of repose. First, the position set forth in the opinion

would have adverse ramifications on South Carolina's judicial system. If the opinion in this matter stands as written, and section 15-3-545(A) encompasses claims for indemnification and contribution, then all persons, corporations, or other entities seeking indemnification or contribution in the numerous medical malpractice actions filed each year in South Carolina would be forced to file these claims before the indemnification or contribution action was ripe. Such a requirement would generate wholly unnecessary litigation in many instances and clog the court dockets. This cannot be the result the legislature intended in drafting the medical malpractice statute of repose.

Second, the Panel overlooked the fact that under its reasoning the doctor that provided the deficient and substandard care to the underlying patient plaintiff could escape all personal liability even though that doctor was the only at-fault party in the medical malpractice action. The Panel's opinion allows a scenario where only truly at-fault party—the doctor—escapes any personal liability permanently and shifts the doctor's negligence to a faultless third party, such as Providence Hospital. Such a scenario would ensue if suit was brought against the hospital only (but based on the doctor's misconduct) on the last day of the statute of repose period. This is an absurd result which the legislature did not intend in drafting section 15-3-545(A).

Third, the Panel overlooked the confusion its opinion will cause in this area of the law. The opinion as currently drafted would produce different limitations periods based upon different types of actions, medical malpractice or otherwise, if adopted by this Court. The opinion would create the following result: (1) one statute of repose period for medical malpractice actions and corresponding indemnity and contribution

actions brought under section 15-3-545(A); (2) a different limitation period for any medical malpractice actions brought as the result of the placement or leaving of a foreign object in the body under section 15-3-545(B) and no corresponding repose period for indemnity and contribution actions brought under section 15-3-545(B); (3) a separate limitation and repose period for medical malpractice actions brought under section 15-3-545(D); and (4) two different limitations periods for the subsequent indemnity and contribution suits, depending on whether the underlying action was brought under sections 15-3-545(A) or 15-3-545(B). Surely the legislature did not intend such a convoluted result when it drafted the medical malpractice statute of repose. The Panel's position would greatly complicate this area of the law.

By contrast, Providence Hospital's approach to interpreting the medical malpractice statute of repose avoids such results. Providence Hospital's approach to section 15-3-545 would allow a simple and efficient interpretation of the statute—the medical malpractice repose statute applies only to medical malpractice actions. Indemnity actions are unaffected by that statute, and only a statute of limitations would be applicable. This result is the proper one under section 15-3-545(A) intended by our legislature. As a result, this Court should grant rehearing and/or rehearing *en banc* in this matter.

CONCLUSION

Based on the foregoing, Providence Hospital respectfully requests this Court grant rehearing or rehearing *en banc* as to the opinion in this matter.

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Columbia, South Carolina

April 28, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

The South Carolina Medical Malpractice Liability Joint Respondent,
Underwriting Association and Michael P. Tallion, ...

v.

Columbia/CSA-HS Greater Columbia Healthcare Appellant.
System db/a Providence Hospital, ...

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Plaintiff, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

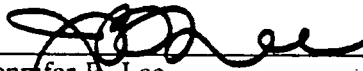
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April 28, 2011

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Richland County
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

Columbia/CSA-HS Greater Columbia Healthcare
System d/b/a Providence Hospital, ...Appellant,

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Taillon, ...Respondents.

RETURN TO PETITION FOR REHEARING AND REHEARING *EN BANC*

Respondents Michael P. Taillon and the South Carolina Medical Malpractice Liability Joint Underwriting Association respectfully submit this Return to Columbia/CSA-HS Greater Columbia Healthcare System d/b/a Providence Hospital's Petition for Rehearing and Rehearing *En Banc* with respect to the Court's rulings in Opinion No. 4819. The decision of the Court is sound. For the reasons set forth below and for the reasons stated in the Respondents' Brief and the Opinion, this Court's decision should stand.

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ARGUMENTS

I. This Court Properly Found The Plain Language Of The Statute Of Repose Bars Any Action For Injuries From Medical Malpractice.

Columbia/CSA contends this Court misconstrued and altered S.C. Code § 15-3-545(A) to improperly expand its scope to bar indemnification actions. *See*, Petition for Rehearing, pp. 3-6. Columbia/CSA is incorrect. The plain language of section 15-3-545(A) clearly bars any action arising from medical malpractice, including indemnification actions.

The plain language of the statute of repose applies to “any action, other than actions controlled by subsection (B), to recover damages for injury to the person arising out of any medical . . . treatment.” S.C. Code Ann. §15-3-545(A) (emphasis added). “Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed.” *State v. Pittman*, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007) (citing *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)). By its plain meaning, the statute applies to “any action” that relies upon personal injuries to establish damages. Columbia/CSA’s lawsuit is just such an action. It relies upon personal injuries. And it seeks to collect money for those personal injuries from Dr. Taillon and the JUA. Columbia/CSA asks this Court to narrow the statute to exclude an indemnification action seeking to recover money paid for personal injuries on the basis that such an action does not seek “damages for injury to the person.” This argument improperly elevates form over substance. *See, South Carolina Second Injury Fund vs. American Yard Products*, 330 S.C. 20, 23, 496 S.E.2d 862, 864 (1998). In fact, Columbia/CSA is seeking to recover money it paid for injuries to a person. The statute of repose includes such an action.

Columbia/CSA also contends the Court erred by failing to interpret Section 15-3-545 in light of the statutes of limitations also set forth in Title 15 of the South Carolina Code. *See*, Petition for Rehearing, p. 4. This is incorrect. The medical malpractice statute of repose "is substantive law, unlike a statute of limitations which is procedural law." *Kerr v. Richland Memorial Hospital*, 383 S.C. 146, 678 S.E.2d 809 (2009). "A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Id.* Thus, the statute of repose and the statutes of limitations in Title 15 are fundamentally different.

"A statute as a whole must receive a practical, reasonable and fair interpretation consistent with the purpose, design and policy of lawmakers." *Browning v. Hartvigsen*, 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992). The Court properly interpreted the plain language of the statute of repose to include indemnification actions.

II. The Court Properly Found Columbia/CSA's Indemnification Action Is An Action To Recover "Damages For Injury To The Person."

Columbia/CSA contends indemnification actions under S.C. Code § 15-3-545(A) are separate and distinct from their accompanying malpractice actions. *See*, Petition for Rehearing, pp. 5-6. Columbia/CSA is incorrect. Columbia/CSA's indemnification action relies upon Dr. Taillon's alleged tort liability. Thus, it is not separate from the underlying malpractice action.

Although Columbia/CSA contends its indemnification action is separate and distinct from the underlying tort cause of action against Dr. Taillon, it is one in the same. Columbia/CSA brought an equitable indemnification action against Dr. Taillon alleging it was compelled to pay damages because of Dr. Taillon's negligence. *See, Fowler v.*

Hunter, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010). To prevail, Columbia/CSA must prove at least the following: (1) Dr. Taillon was liable for the original plaintiff's damages; (2) Columbia/CSA was exonerated from any liability for the damages; and (3) Columbia/CSA suffered damages as a result of the original plaintiff's medical malpractice action, which was proven to be the fault of Dr. Taillon. *See, Id.* In short, Columbia/CSA's indemnification action relies upon Dr. Taillon's malpractice liability to the original plaintiff.

Columbia/CSA attempts to distinguish between damages for "injury to the person" and settlement costs paid for personal injuries. Columbia/CSA may be entitled to seek indemnification only for damages for medical negligence. Columbia/CSA must prove medical malpractice against Dr. Taillon to prevail in its indemnification action. Without such proof, Columbia/CSA cannot prevail. Thus, the Court properly found Columbia/CSA's indemnification action is not separate and distinct from the malpractice action. Indeed, the two are inextricably linked. Therefore, indemnification actions are not exempt from the statute of repose.

III. The Court Properly Found That The Plain Language Of The Medical Malpractice Statute of Repose Includes Indemnification Actions Which Rely Upon Medical Malpractice.

Columbia/CSA contends indemnification actions are excluded from Code Section 15-3-545(A) because indemnification actions are not expressly *included* in the statute's text. *See*, Petition for Rehearing, pp. 5-6. Columbia/CSA is incorrect. Section 15-3-545 defines its scope broadly. It then enumerates the specific claims to which it does not apply. Otherwise, section 15-3-545 applies to all medical malpractice actions. Thus, indemnification actions are included.

“The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded.” *German Evangelical Lutheran Church of Charleston v. City of Charleston*, 352 S.C. 600, 607, 576 S.E.2d 150, 153 (2003). Section 15-3-545 applies to “any action to recover damages for injuries to the person arising out of any medical . . . treatment.” *See*, S.C. Code Ann. § 15-3-545(A). It then specifically excludes three separate categories of claims. *See*, S.C. Code Ann. § 15-3-545(A)-(D). None of the three categories of claims are indemnity actions. The statute expressly limits the categories of foreign objects, date and age. The statute could have easily included an exception for indemnity, but it does not. Therefore, because it does not exclude indemnity, the statute applies to indemnity actions.

Columbia/CSA also contends section 15-3-545 should be interpreted exactly like the construction statute of repose which specifically mentions indemnity actions. *See*, S.C. Code Ann. § 15-3-640 (1976). This argument is incorrect. The construction statute of repose and the medical malpractice statute of repose define their scopes in different ways. The construction statute defines its scope positively. It lists nine specific categories of actions to which it applies. *See*, S.C. Code Ann. § 15-3-640 (1)-(9)(1976). The medical malpractice statute of repose defines its scope negatively. It initially applies to all actions and then excludes three separate categories of claims. *See*, S.C. Code Ann. § 15-3-545(A)-(D). Therefore, the Court properly concluded that the medical malpractice statute of repose includes indemnification actions.

IV. The Court Properly Considered Precedent From Other States To Determine That The Medical Malpractice Statute Of Repose Bars Indemnification Actions.

Columbia/CSA contends that the Court overlooked a split of authority as to whether a medical malpractice statute of repose bars an indemnity action. Columbia/CSA also contends the Court misapplied similar holdings of the authority it did consider. *See*, Petition for Rehearing, pp. 3-6. Columbia/CSA is incorrect. The Court properly considered all of the relevant holdings necessary to decide that the medical malpractice statute of repose bars an indemnity action. Op. No. 4819 at p. 5-6.

The Court's interpretation of the medical malpractice statute of repose is "consistent with the holdings of several other courts which have considered similar issues." Op. No. 4819 at p. 5. The Court cited several decisions, including a Georgia Supreme Court decision declining to apply Georgia's medical malpractice statute of repose to a contribution action. *See, Virginia Ins. Reciprocal v. Pilzer*, 599 S.E.2d 182, 184 (Ga. 2004). The Court considered the relevant law and concluded that the holdings of other jurisdictions were consistent with its decision. *See, Hayes v. Mercy Hosp. & Med. Ctr.*, 557 N.E.2d 873, 876 (Ill. 1990); *Ashley v. Evangelical Hosp. Corp.*, 594 N.E.2d 1269, 1271-76 (Ill. App. Ct. 1992); *Krasaeath v. Parker*, 441 S.E.2d 868, 870 (Ga. Ct. App. 1994).

Columbia/CSA also contends that the Court improperly relied on Illinois case law. *See*, Petition for Rehearing, p. 7. This is incorrect. Columbia/CSA asserts that the Illinois statute of repose applies broadly to more actions than South Carolina's statute. *See*, Petition for Rehearing, pp. 7-8. The Illinois statute of repose provides that "no action for damages for injury . . . against any physician . . . or hospital . . . , whether based

upon tort, or breach of contract, or otherwise, *arising out of patient care* shall be brought more than 2 years after the date” 735 I.L.C.S 5/13-212 (emphasis added). Likewise, the South Carolina statute precludes “*any action . . . to recover damages for injury to the person arising out of any medical, surgical, or dental treatment*” S.C. Code Ann. §15-3-545(A) (emphasis added). If there is a difference, there is no distinction. This Court properly interpreted the Illinois statute and case law when it determined that its conclusion was similar to Illinois courts.

Columbia/CSA further contends that the Court misunderstood *Krasaeath v. Parker*, 441 S.E.2d 868 (Ga. App. 1994). *See*, Petition for Rehearing, p. 8. This is incorrect. *Krasaeath* involved an injured plaintiff, Parker, who took an assignment from one treating physician against another and filed a contribution action after the statute of repose lapsed. *Id.* at 868-69. The *Krasaeath* court recognized that the claim was truly a malpractice action against Krasaeath and held that “[a]lthough the claim is couched as one for contribution, and but for the statute of repose would have been timely, substance prevails over form.” *Id.* at 869.

Columbia/CSA attempts to distinguish *Krasaeath* because it “took no assignment in an attempt to circumvent any limitations period and is not an injured person seeking to recover for injuries.” *See*, Petition for Rehearing, p. 8. Acceptance of an assignment is not the issue. Columbia/CSA, like Parker, attempts to rename a malpractice action as a contribution action to circumvent the statute of repose. This Court, like the Georgia Court of Appeals, was not persuaded by this attempt and correctly noted that its decision was analogous to the court’s in *Krasaeath*.

Columbia/CSA contends that this Court overlooked a Missouri decision holding that contribution claims are not “subject to the statute of limitations applicable to medical malpractice actions.” See, Petition for Rehearing, p. 9 (citing *Roland v. Skaggs Companies, Inc.*, 666 S.W.2d 770, 773 (Mo. 1984)). Columbia/CSA asserts that, though the *Roland* court considered a case involving a statute of limitations, and not a statute of repose, “the logic remains applicable to an analysis of the statute of repose.” See, Petition for Rehearing, p. 9, fn. 1. This is incorrect. “A statute of repose constitutes a substantive definition of rights rather than a procedural limitation provided by a statute of limitation.” *Langley v. Pierce*, 313 S.C. 401, 403, 438 S.E.2d 242, 243 (1993). Furthermore, unlike a statute of limitations, a statute of repose creates an “absolute time limit beyond which liability no longer exists.” *Id.* at 404, 438 S.E.2d at 243. Thus, the Missouri opinion is not relevant to the Court’s analysis.

V. **This Court Properly Applied *Capco Of Summerville v. J.H. Gayle Construction*.**

Columbia/CSA contends that the Court misunderstood *Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 628 S.E.2d 38 (2006) and overlooked the policy concerns behind that decision. See, Petition for Rehearing, p. 10. Columbia/CSA is mistaken. The Court considered the holding in *Capco*, understood the policy considerations, and correctly held that to “allow Providence Hospital to subject Taillon to liability for medical malpractice after the legislatively proscribed six-year statute of repose expired [would] run afoul of the policy considerations supporting section 15-3-545(A).” Opinion No. 4819, at p. 7.

In *Capco*, the South Carolina Supreme Court ruled that the construction statute of repose bars claims for contribution. The Supreme Court relied upon the Court of Appeals' decision in *Florence County School District No. 2 v. Interrkal, Inc.*, 348 S.C. 446, 559 S.E.2d 866 (Ct. App. 2002), holding that the construction statute of repose bars actions for contribution. The Supreme Court explained as follows:

A statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time. *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993). A statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Id.* at 404, 438 S.E.2d at 243. A statute of repose is "[a] statute barring any suit that is brought after a specified time since the defendant acted . . . even if this period ends before the plaintiff has suffered a resulting injury." *Black's Law Dictionary* 1451 (8th Ed. 2004). "Statutes of repose by their nature impose on some plaintiffs the hardship of having a claim extinguished before it is discovered, or perhaps before it even exists." *Camacho v. Todd and Leiser Homes*, 706 N.W.2d 49, 54, n.6 (Minn. 2005) citing W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts* § 30, p. 168 (5th ed. 1984). As noted by the Virginia Supreme Court, "[a] statute of repose differs from a statute of limitations. . . . [T]he expiration of the time extinguishes not only the legal remedy but also all causes of action, including those which may later accrue as well as those already accrued." *School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325, 327-328 (1987).

368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006). As a result, the Supreme Court affirmed the trial court's ruling that the construction statute of repose barred the claim for contribution.

Columbia/CSA argues that this Court misunderstood the *Capco* decision. *See*, Petition for Rehearing, p. 10. Specifically, Columbia/CSA asserts that the Court "overlooked [a] critical feature" of the *Capco* holding: that the *Capco* Court barred the contribution claim based on the language of the statute, "but that it was 'troubled by the harsh result.'" *See*, Petition for Rehearing, p. 10 (citing 368 S.C. at 144, 628 S.E.2d at

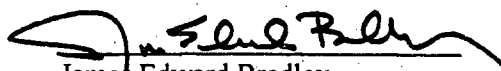
42). This Court also said that, “although we are troubled by this result, we are not at liberty to rewrite the statutes, and any amendment must come from the Legislature.” 368 S.C. at 144, 628 S.E.2d at 42 (citing *Hodge v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000)). The Court applied the holding in *Capco* properly and correctly concluded that the contribution action was barred by the statute of repose.

Columbia/CSA also asserts that this Court overlooked practical policy problems caused by its holding. *See*, Petition for Rehearing, p. 10. This Court considered the relevant policy considerations and held that its “conclusion comports with the policy considerations supporting South Carolina’s medical malpractice statute of repose.” Opinion No. 4819, at p. 6. This Court correctly held that “to subject Taillon to liability for medical malpractice after the legislatively proscribed six-year statute of repose expired [would] run afoul of the policy considerations supporting section 15-3-545(A).” Opinion No. 4819, at p. 7.

CONCLUSION

For these reasons and the reasons discussed in the Respondents' Brief, this Court should deny the petition for rehearing. In addition, there is no basis for an *en banc* rehearing from the full Court.

Respectfully submitted,



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Attorneys for Respondents

May 9, 2011

West Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

RECEIVED
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Columbia/CSA-HS Greater Columbia Healthcare
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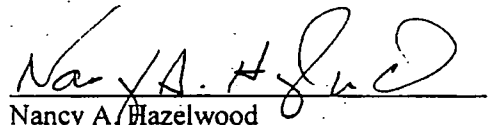
PROOF OF SERVICE

I certify that I have served the Return to Petition for Rehearing and Rehearing *En Banc* by depositing a copy of it in the United States Mail, postage prepaid, on May 9, 2011, addressed to attorneys of record as follows:

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May 9, 2011


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2007-CP-40-3564

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MAY 26 2011

SC Court of Appeals

Columbia/CSA-HS Greater Columbia Healthcare
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Appellant.

v.

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Tallion, ...

Respondents,

**APPELLANT'S REPLY TO RESPONDENTS' RETURN
TO THE PETITION FOR REHEARING AND REHEARING *EN BANC***

Pursuant to Rules 221(a) and 240(f) of the South Carolina Appellate Court Rules, Appellant Columbia/CSA-HS Greater Columbia Healthcare System d/b/a Providence Hospital ("Providence Hospital") hereby files this reply to Respondents' Return to the petition for rehearing and rehearing *en banc*. Providence Hospital respectfully submits that rehearing and/or issuance of a new opinion reversing the trial court's decision is warranted. The grounds for this petition are that the Panel's opinion in this matter overlooked or misapprehended several matters of fact and law. This matter is of exceptional importance as it involves whether the medical malpractice statute of repose affects cases for contribution and/or indemnity.

ARGUMENT

- I. Section 15-3-545 only operates to bar actions that seek to recover damages suffered by the person injured by medical malpractice.

In their return, Respondents claim that section 15-3-545(A) applies to any action “that relies upon personal injuries to establish damages.” {Resp. Return p. 2}. Respondents attempt to alter and enlarge the reach of the unambiguous language of the statute to focus on reliance. This misapprehends the actual language of the statute. The Legislature did not use the phrase “relies upon” as the trigger for the section 15-3-545(A) as claimed by Respondents. Rather, section 15-3-545(A) unambiguously states it is the recovery of damages for “injuries to the person” caused by medical malpractice that the statute addresses. The legislature drafted section 15-3-545(A) to be limited to malpractice actions wherein damages for bodily injury are sought. This is not an action to recover for injuries to the person.

Respondents allege Providence Hospital seeks to “collect money for those personal injuries from Dr. Tallion.” {Resp. Return p. 2}. This also misapprehends and overlooks what Providence Hospital seeks in this separate indemnity action. Providence Hospital attempts to recover the costs and settlement expenses it sustained defending the underlying tort action in which Providence Hospital was pursued solely under a vicarious liability theory. Both Respondents and the Panel misapprehended the nature of an indemnity action in asserting otherwise and such warrants rehearing and/or rehearing *en banc*.

Respondents also claim Providence Hospital “contends the Court erred by failing to interpret section 15-3-545 in light of the statutes of limitations also set forth in

Title 15.” {Resp. Return p. 3}. This misconstrues Providence Hospital’s argument. Providence Hospital has consistently argued that Title 15 of the South Carolina Code limits the applicable limitations or repose periods to the distinct cause(s) of action set forth in each individual section. Simply put, each section applies to one cause of action or claim unless that section says otherwise. See, e.g., S.C. Code Ann. § 15-3-330 (applying to “actions by individual for recovery of real property”); S.C. Code Ann. § 15-3-530 (creating a three-year limitation period for causes of actions upon contract, damage to real property, or insurance, among others); S.C. Code Ann. § 15-3-550 (creating a two-year limitation period for slander, libel, and false imprisonment causes of action). This Court should be guided by the desire of the Legislature to limit each repose or limitations period to the respective individual cause of action in each section. Thus, as set forth in section 15-3-545(A), the limitation and repose period only applies to actions for medical malpractice. The Panel, and Respondents, overlooked and misapprehended this. Therefore, this Court should grant rehearing and/or rehearing *en banc* in this matter.

II. Indemnity constitutes an action separate and distinct from the underlying medical malpractice action.

Respondents claim that Providence Hospital’s indemnity action “is not separate from the underlying malpractice action.” {Resp. Return p. 3}. Respondents offer no support for this claim. In fact, such a contention contradicts the fact that indemnity is a separate and distinct action from the underlying tort action. See, e.g., 41 Am. Jur.2d Indemnity § 38 (2008) (setting forth that (1) indemnity actions are “wholly distinct from the underlying action which gave rise to the right of indemnity; and (2) indemnity is

distinct from the underlying tort action because equitable indemnity is based on a theory of contract implied in law); Lone Mountain Processing, Inc. v. Browser-Morner, 94 Fed. Appx. 149, 158 (4th Cir. 2004) (stating that indemnity actions are “distinct, separate causes of action from the underlying wrong”); Canal Ins. Co. v. Lebanon Ins. Agency, Inc. 504 F. Supp.2d 113, 117 (W. Dist. Va. 2007) (holding that an indemnity claim does not seek to recover for any direct harm caused by the tort defendant to the underlying tort plaintiff); McDermott v. City of New York, 406 N.E.2d 460, 462-63 (N.Y. 1980) (“[T]he indemnity claim is a separate substantive cause of action, independent of the underlying wrong”).

The Panel opinion overlooked these distinctions and equated an indemnity action with the underlying medical malpractice action. Such warrants rehearing and/or rehearing *en banc*.

III. The lack of express inclusion of indemnity actions in section 15-3-545 establishes that the statute of repose was not applicable to Providence Hospital’s claim for indemnification in this action.

Respondents contend that because indemnity was not excluded from section 15-3-545 then “the statute applies to indemnity actions.” {Resp. Return p. 4-5}. Respondents rely on the assertion that section 15-3-545 defines its scope negatively. Respondents offer no authority to support this conclusion. In fact, Title 15 itself defeats this contention.

Title 15 was not drafted with a negative scope.¹ Instead, the Legislature drafted the limitations and repose statutes in Title 15 to include indemnity only when specifically set forth in the individual section. Stated differently, when the legislature intended for indemnity to be included in the repose or limitations period for a cause of action, it was specifically included. An example of this is found in section 15-3-640. There, the legislature specifically included indemnity actions within the application of the statute of repose for defective or unsafe improvements to real property. However, section 15-3-545 was drafted without this same language. Respondents and the Panel overlooked or misapprehended this.

Moreover, the doctrine of “expressio unius est exclusio alterius” or “inclusio est exclusio alterius” lends further support to the fact that section 15-3-545 is not defined negatively. The Panel overlooked, and should have applied, this doctrine to hold that section 15-3-545 does not apply to indemnity actions. Under that doctrine, the decision of the legislature to specifically include indemnity in a statute of repose in Title 15 demonstrates the legislature intended to exclude indemnity in those statutes in which indemnity was not specifically mentioned. Section 15-3-640 again illustrates this point. The legislature specifically included indemnity and contribution in the statute of repose in section 15-3-640. See S.C. Code Ann. § 15-3-640(6). The legislature could have very easily included indemnity in section 15-3-545 but did not do so. Therefore, the statutory construction doctrine of “expressio unius est exclusio alterius” or “inclusio est

¹ All sections in articles 3 and 5 of Title 15 (which is where the limitations and repose statutes are set out in the code) are drafted positively. Respondents ignore this fact and urge this Court to overlook this fact and hold that section 15-3-545 was drafted negatively. If the Court does not grant rehearing on this issue, section 15-3-545 would be the only section in articles 3 and 5 of Title 15 to be construed in such a manner.

exclusio alterius,” should have applied, causing disposition in favor of Providence Hospital here. The Panel’s overlooking or misapprehension of this doctrine warrants rehearing and/or rehearing *en banc*.

IV. The Panel misapprehended the foreign case law cited in the opinion.

Respondents claim the foreign case law cited by the Panel supports its conclusion that section 15-3-545 bars a subsequent indemnity action. {Resp. Return p. 6}. Respondents’ arguments fail for several reasons.

First, Respondents allege that “there is no distinction” between the Illinois statute relied upon by the Panel and section 15-3-545. {Resp. Return p. 7}. This overlooks the unambiguous language of the Illinois repose statute. The Illinois repose statute is a broadly worded statute that applies to actions against a physician or hospital “based on tort, or breach of contract, or otherwise, arising out of patient care” 735 Ill. Stat. Ann. § 5/13-212 (2008) (emphasis added). Respondents ignore this emphasized language.

Our section 15-3-545 contains no such broad language. Our statute of repose only applies to actions for recovery of injuries to the person arising from deficient medical care. As written, our statute of repose is limited to tort actions for medical malpractice. See, e.g., Hoffman v. Powell, 298 S.C. 338, 339-40, 380 S.E.2d 821, 822 (1989) (recognizing that section 15-3-545 is the statute of repose for medical malpractice actions brought by the injured person against the medical provider). Respondents fail to apprehend this distinction and reliance on Illinois case law here is misplaced. The Panel likewise misapprehends or overlooks this distinction and such warrants rehearing and/or rehearing *en banc*.

Second, Respondents allege the Panel properly relied on Krasaeath v. Parker, 441 S.E.2d 868 (Ga. App. 1994). {Resp. Return p. 7}. The Panel, however, overlooked or misapprehended that Krasaeath was based on a unique set of facts not present here. As recognized by Respondents, the Krasaeath court held the person injured by the deficient medical treatment could not use an assignment of a doctor's contribution rights to circumvent the medical malpractice statute of repose. See Resp. Return p. 7 (stating the case "involved an injured plaintiff . . . who took an assignment from one treating physician" to avoid the statute of repose). Respondents claim Providence Hospital is analogous to the Krasaeath plaintiff by "attempt[ing] to rename a malpractice action as a contribution [sic] action to circumvent the statute of repose." {Resp. Return p. 7}. This is incorrect. Providence Hospital is not a person injured by medical malpractice. Providence Hospital seeks to enforce its own right to equitable indemnification, which is a separate and distinct action from the underlying tort action, which action arose only upon payment of the settlement funds. Therefore, the Panel misapprehended this case and its reliance thereon is misplaced.

Third, Roland v. Skaggs Companies, Inc., 666 S.W.2d 770, 772 (Mo. 1984), is applicable to this action and was overlooked by the Panel. Respondents allege that because the Missouri court analyzed an issue in context of the statute of limitations, the case is distinguishable. {Resp. Return p. 8}. This is a distinction without a difference. Providence Hospital recognizes that repose periods are substantive and limitations periods are procedural. However, both are statutes to be construed. Thus, the logic set forth in Roland is applicable to this matter. The court reasoned that "claims for . . . apportionment of fault need not be subject to the statute . . . applicable to medical

malpractice actions . . . because of the independent nature of that claim from the underlying claim of [the patient] for damages.” Id. at 773. The Panel overlooked this reasoning. Therefore, rehearing and/or rehearing *en banc* is warranted.

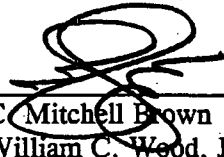
V. The Panel misapprehended the reasoning of Capco and its reliance thereon is misplaced.

Respondents contend the Panel correctly considered Capco of Summerville, Inc. v. J.H. Gayle Constr. Co., 368 S.C. 137, 628 S.E.2d 38 (2006). {Resp. Return p. 8}. In this respect, Respondents stress the general policy behind statutes of repose. {Id. at 9}. In Capco, the Supreme Court did recite the general public policy reasoning behind the purpose of a statute of repose. Capco, 368 S.C. at 142, 628 S.E.2d at 41. However, the Supreme Court did not base its decision to apply the statute of repose to an indemnity action because of this general policy. Instead, the Supreme Court based its decision to bar the indemnity action solely because that statute contained explicit language including the indemnity cause of action in the repose period. Id. at 144, 628 S.E.2d at 42. The court noted it was “troubled by the harsh result” in having to hold indemnity was barred, but that it was constrained to reach that conclusion by the express terms of the statute. Id. The Panel overlooked this critical feature of Capco. Rehearing and/or rehearing *en banc* is warranted.

CONCLUSION

Based on the foregoing, Providence Hospital respectfully requests this Court grant rehearing or rehearing *en banc* as to the opinion in this matter.

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Columbia, South Carolina

May 24, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

RECEIVED

MAY 26 2011

SC Court of Appeals

Case No. 2007-CP-40-3564

The South Carolina Medical Malpractice Liability Joint
Underwriting Association and Michael P. Tallion, ...

Respondent,

v.

Columbia/CSA-HS Greater Columbia Healthcare
System db/a Providence Hospital, ...

Appellant.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

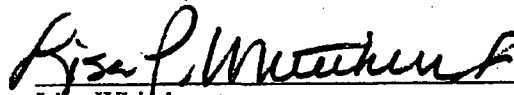
Appellant's Reply to Respondents' Return to the Petition
for Rehearing and Rehearing *En Banc*

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A handwritten signature in cursive script, appearing to read "Lisa P. Whitehurst", written over a horizontal line.

Lisa Whitehurst
Administrative Assistant

May 26, 2011

The South Carolina Court of Appeals

Columbia/CSA-HS Greater Columbia
Healthcare System, LP d/b/a
Providence Hospital,

Appellant,

v.

The South Carolina Medical
Malpractice Liability Joint
Underwriting Association and Michael
P. Tallion,

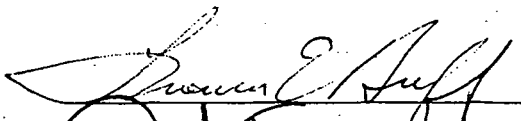
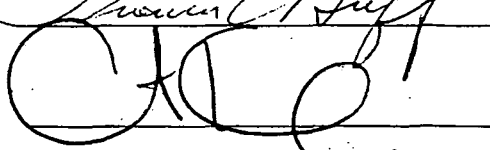
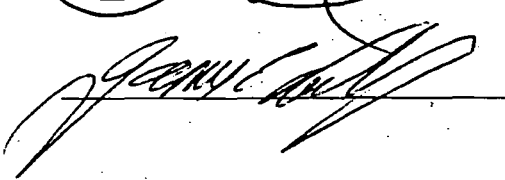
Respondents.

The Honorable Alison Renee Lee
Richland County
Trial Court Case No. 2007-CP-40-03564

ORDER DENYING PETITION FOR REHEARING

PER CURIAM: After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing.

It is, therefore, ordered that the Petition for Rehearing be denied.

 J.
 J.
 J.

Columbia, South Carolina

cc: C. Mitchell Brown, Esquire
Michael J. Anzelmo, Esquire
Monteith P. Todd, Esquire
Andrew F. Lindemann, Esquire
J. Edward Bradley, Esquire

FILED

August 23, 2011