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AUG - 5 2013

S.C. Supreme Court

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

Appellate Case No. 2011-197986

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. Taillon, ... Respondents.

Brief of Petitioner

C. Mitchell Brown
Michael J. Anzelmo
NELSON MULLINS RILEY & SCARBOROUGH LLP
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Monteith P. Todd
SOWELL GRAY STEPP & LAFFITTE LLC
Post Office Box 11449
Columbia, South Carolina 29211
803.929.1400

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

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Statement of the Case and Facts[1]

This equitable indemnification action followed an underlying medical malpractice action by Arthur Sharpe and his wife against Providence Hospital and Michael Haynes, M.D. ("Dr. Haynes"). The underlying medical malpractice action was filed in Richland County in May 1999 (hereinafter the "underlying tort action"). {R. 28; App. p. 31}. The underlying tort action related to the treatment and alleged misdiagnosis of Sharp's condition by the emergency room physicians at Providence Hospital. {R. 30-31; App. p. 33-34}. Notably, Sharpe made no allegations of independent negligence or fault by Providence Hospital or its employees. Sharpe sought relief against Providence Hospital only under a vicarious liability theory.

By way of background, Arthur Sharpe experienced chest pains and sought treatment at the Providence Hospital emergency room for evaluation, diagnosis, and treatment in May of 1997. {Complaint dated 5/25/99; R. 30; App. p. 33}. At Providence Hospital, Dr. Haynes, an independent contractor emergency room physician, initially treated Sharpe. {*Id.*; R. 30; App. p. 33}. Dr. Taillon, also an independent contractor emergency room physician at Providence Hospital, later assumed the care and treatment of Sharpe. {R. 131; App. p. 134}. Taillon diagnosed Sharpe's condition as reflux and discharged him. {R. 30; App. p. 33}. Ultimately, Sharpe's pain persisted, and he sought additional treatment at Lexington County Hospital. {*Id.*; R. 30; App. p. 33}. Sharpe was then diagnosed as having suffered a heart attack. {*Id.*; R. 30; App p. 33}.

[1] Providence Hospital combines the Statement of Case and Statement of Facts to eliminate repetition emanating from the overlap of the procedural history with the facts of the case and for ease of reference.

Sharpe thereafter initiated the underlying tort action against Providence Hospital and Haynes. {R. 30-31; App. p. 33-34}. Sharpe alleged that the emergency room physicians at Providence Hospital breached the standard of care by misdiagnosing his condition and that this failure to diagnose caused him to suffer severe and permanent damage to his heart muscles. {*Id.*; R. 30-31; App. p. 33-34}. Sharpe sought to hold Providence Hospital liable for the actions of Hayes and Taillon 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). {R. 131; App. p. 134}.

Providence Hospital answered and denied the allegations contained in Sharpe's lawsuit. {Answer of Providence Hospital; R. 33; App. p. 36}. Providence Hospital made a demand on Taillon and his insurer, the South Carolina Medical Malpractice Liability Underwriting Association ("JUA"), requesting that those parties assume the defense of and indemnify Providence Hospital for the vicarious liability-based claims against the hospital in the underlying action. {R. 11; App. p. 14}. Taillon and the JUA refused. {*Id.*; R. 11; App. p. 14}. After the refusal by Taillon and the JUA, Providence Hospital settled the underlying action for $350,000 in order to best protect its interests. {R. 130; App. p. 133}. The parties finalized the settlement on June 10, 2004. {*Id.*}.

After settlement of the underlying tort action, Providence Hospital brought this separate and independent equitable indemnification action against Dr. Taillon and the JUA (collectively "Respondents" and individually as indicated herein) on June 7, 2007. {R. 8; App. p. 11}. Over one year after Providence Hospital initiated the indemnification action, Respondents moved to amend their answer to include a defense under the medical malpractice statute of repose contained in section 15-3-545(A) of the South Carolina Code (2005). The trial court granted that motion. {R. 6; App. p. 9}.

Respondents also moved for summary judgment, arguing that the medical malpractice statute of repose barred Providence Hospital's claim for equitable indemnification. {R. 70-74; 80; App. p. 73-77; 83}. Providence Hospital countered that the medical malpractice statute of repose was inapplicable to its indemnity action.

The trial court granted summary judgment in favor of Dr. Taillon and the JUA. {R. 6; App. p. 9}. The trial court found that the medical malpractice statute of repose in section 15-3-545(A)) barred Providence Hospital's equitable indemnification action. {*Id.*; R. 6; App. p. 9}. The trial court subsequently denied Providence Hospital's Rule 59(e), SCRCP, motion. {R. 7; App. p. 10}.

Providence Hospital timely sought review by the Court of Appeals. {R. 144; App. p. 147}. After oral argument, the Court of Appeals affirmed the trial court's grant of summary judgment in Opinion No. 4819. {App. p. 243}. Providence Hospital filed a timely petition for rehearing and rehearing *en banc*. {App. p. 247}. By order dated August 23, 2011, the Court of Appeals denied the petition for rehearing and rehearing *en banc*. {App. p. 286}. This Court granted Providence Hospital's petition for a writ of certiorari on April 4, 2013.

Argument

Section 15-3-545(A) of the South Carolina Code does not bar Providence Hospital's claims for equitable indemnification against Dr. Taillon and the JUA. The plain and unambiguous language of section 15-3-545(A) demonstrates that the General Assembly did not intend for claims for equitable indemnification to be barred by the statute of repose for medical malpractice. The General Assembly drafted the statute of repose to cover actions "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—section 15-3-545(A) only operates to bar actions that seek to recover damages suffered by the person injured by medical malpractice.

Providence Hospital has not brought an action "for injury to the person." Instead, Providence Hospital seeks indemnification of costs and settlement expenses. Those sums do not compensate Providence Hospital for any damages it sustained resulting from medical malpractice. The settlement costs and expenses maintain a separate and distinct identity from the "damages for injury to the person" sought in an underlying medical malpractice action. Moreover, the statute never mentions, addresses, references, or otherwise contemplates a claim for indemnification. The trial court and Court of Appeals' decisions result in a forced construction that expands the statute's operation in contravention of the intent of the General Assembly.

I. The Court of Appeals misconstrued the plain and unambiguous language of section 15-3-545(A) in granting Respondents summary judgment based on the statute of repose.

Application of well-settled statutory construction principles leads to the inescapable conclusion that the General Assembly did not intend for the medical malpractice statute of repose to bar a subsequent and separate indemnity action. Rather than apply these settled principles, the Court of Appeals' opinion misconstrued the plain language of the statute to expand the reach of the statute to find that such an action would be barred. This was error. This Court should reverse.

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). "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); *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). 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. *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).

The Court of Appeals failed to apply these rules and, instead, focused on the "any action" and "arising out of" medical malpractice language contained in section 15-3-545(A), to the exclusion of the rest of the statute. {Op. No. 4819 at p. 85; App. p. 244-45}. Such a reading effectively caused the redrafting of section 15-3-545(A) to include actions that were not included by the legislature. This is improper. *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").[2] A plain reading of section 15-3-545(A) illustrates this error.

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). This section applies, by its plain terms, only to actions that seek to recover damages "**for injury to the person**" resulting from medical malpractice. *Id.* (emphasis added). This language is not ambiguous and clearly defines the scope of the statute of repose. This phrase triggers the scope of this particular statute of repose as drafted by the General Assembly. This triggering language establishes that the legislature drafted section 15-3-545(A) to only operate to bar actions

[2] The Respondents can seek to have the General Assembly change the statutory language in the medical malpractice statute of repose if they so desire, but it was not the Court of Appeals' role to do so.

that seek to recover damages suffered by the person injured by medical malpractice and does not apply to a subsequent indemnity action.

Further support is found from the fact that the damages sought in an indemnification action differ from those sought in a medical malpractice action. Providence Hospital does not seek damages "for an injury" to a person. Providence Hospital also did not suffer an injury by medical malpractice. Rather, Providence Hospital was damaged by the payment of the costs and settlement expenses it sustained defending the underlying tort action, which Providence Hospital was forced to do through no fault of its own.[3] The recovery of these costs and settlement expenses do not compensate Providence Hospital for any damages it sustained resulting from medical malpractice. Those sums are separate and distinct. *See* Section II, *infra*. This Court should thus reverse the trial court and Court of Appeals.

The Court of Appeals also found that section 15-3-545(A) defines its scope negatively.[4] {Op. No. 4819 at 86; App. p. 245-46}. This is incorrect. Rather, the legislature drafted the limitations and repose statutes to include indemnity actions **only**

[3] Again, Providence was pursued solely under a vicarious liability theory in the underlying action.

[4] When the Court of Appeals stated that section 15-3-545(A) defines its scope "negatively," the court meant that the statute applied to all medical malpractice suits except for those expressly excluded by the statute's later subsections. *See* Op. No. 4819 at 86; App. p. 245-46 (stating that the statute's later subsections "enumerate the specific claims to which the statute of repose is inapplicable"). In the Court of Appeals view, this meant that section 15-3-545(A) applies to indemnity actions because the statute does not exclude indemnity actions. This conclusion is incorrect. Section 15-3-545 is not drafted "negatively." Rather, the statute's later subsections do not contain a list of exceptions, negative words, or any exceptions at all. Rather, subsection (B) affirmatively sets out a different, two-year limitations period for suits alleging a foreign object was left in the body after a surgery; subsection (C) affirmatively states that the statute is not retroactive; and subsection (D) affirmatively permits tolling for causes of action held by a minor.

when such actions were specifically **included** in the individual section.[5] This intention is evident in two ways.

First, the General Assembly drafted Title 15 to link the applicable limitations or repose periods to the distinct cause of action set forth in each individual section. 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); *see also State v. McClinton*, 369 S.C. 167, 173, 631 S.E.2d 895, 898 (2006) (recognizing that Title 15 is limited to the individualized cause of action to each section, noting "[t]he Legislature has provided in Title 15, which contains the statutes of limitations governing **various causes of action** . . .") (emphasis added). This manner of limiting actions based on the type of cause of action continues throughout Title 15.

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). The Court of Appeals' analysis of this issue ignored the desire of the General Assembly to limit each

[5] Providence Hospital does not argue that this Court should construe the medical malpractice statute of repose "in light of the statutes of limitations also set forth in Title 15 of the South Carolina Code" as alleged by Respondents. {Return to the Petition for a Writ of Certiorari p. 9}. Rather, Providence Hospital utilizes the manner in which the General Assembly drafted the entirety of Title 15 to illustrate that the General Assembly took clear steps to include indemnity actions in the underlying action's statute of repose when the General Assembly wanted the repose period to apply to indemnity. .

repose or limitations period to the respective individual cause of action in each section. Had the Court of Appeals done so, then the only reasonable conclusion is that the statute of repose in section 15-3-545(A) only applies to actions for medical malpractice and that indemnity actions do not fall within its reach. Thus, the Court of Appeals erred in holding otherwise.

Second, Title 15 illustrates that the General Assembly knew how to include a subsequent indemnity action within the ambit of a statute of repose when it so desired. When the General Assembly intended to do so, it included indemnity actions in the specific section of Title 15. The doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius" applies to this analysis and establishes that section 15-3-545(A) is not defined negatively. *See, e.g., German Evangelical Lutheran Church of Charleston v. City of Charleston*, 352 S.C. 600, 576 S.E.2d 150 (2003) (holding that the doctrine means that "to express or include one thing implies the exclusion of another"); *Hodges v. Rainey*, 341 S.C. 79, 533 S.E.2d 578 (2000) (same). Under that well-settled doctrine, the decision of the legislature to specifically ***include*** indemnity actions specifically in a statute of repose in another section of Title 15 establishes that the legislature intended to ***exclude*** indemnity in those statutes in which indemnity was not specifically mentioned.[6]

[6] Before the Court of Appeals, Respondents alleged that the inclusion of indemnity actions by the legislature in section 15-3-640 supports a finding that the legislature meant to include indemnity as well in the medical malpractice statute of repose. {Resp. Br. p. 6; App. p. 204} The statutory interpretations doctrines do not support such a conclusion. The doctrine *expressio unius est exclusio alterius* means to express or include one thing implies the **exclusion** of another. Therefore, the inclusion of the express language respecting indemnity 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.

In section 15-3-640), the General Assembly specifically included indemnity actions within the application of the statute of repose for defective or unsafe improvements to real property. *See* S.C. Code Ann. § 15-3-640(6) (the repose period applies specifically to "an action for contribution or indemnification for damages sustained on account of an action described in this section"). The General Assembly recognized the practical implications of including indemnity actions in section 15-3-640, and assigned an outermost repose period of eight (8) years in which an action can be maintained. That extended repose period allows additional time for the parties to any underlying action to seek indemnity or contribution. However, the medical malpractice statute of repose contains no mention of any applicability to indemnity actions and has a shorter repose period. In drafting section 15-3-545, and its 1982 and 1988 amendments, the General Assembly never enlarged the repose period from the six (6) years originally set forth. Additionally, the General Assembly 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—to provide a repose time that bars medical malpractice actions. If the General Assembly wanted to extend the reach of section 15-3-545(A), then it would have provided a longer repose period as it did in section 15-3-640. The General Assembly has never chosen to do so. Thus, the Court of Appeals erred, and this Court should reverse.

II. The trial court and Court of Appeals' application of section 15-3-545(A) conflicts with the established fact that an indemnity action is an action separate, distinct, and independent from the underlying tort action.

The Court of Appeals found the settlement cost that Providence Hospital sought to recover arose from the medical malpractice of the underlying tort defendant. {Op. No. 4819 at p. 86; App. p 245-46}. However, an indemnity action is a separate and distinct action from the underlying tort action. Settlement costs and expenses to be recovered in the indemnity action are not the same as "damages for injury to the person" sought in the underlying tort action. Therefore, the Court of Appeals erred, and this Court should reverse.

It is axiomatic that indemnity actions are "wholly distinct from the underlying action which gave rise to the right of indemnity." 41 Am. Jur. 2d Indemnity § 38 (2008); *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."). An indemnity claim does not seek to recover for any direct harm caused by the tort defendant to the underlying tort plaintiff. *Canal Ins. Co. v. Lebanon Ins. Agency, Inc.* 504 F.Supp.2d 113, 117 (W. Dist. Va. 2007). Indemnity is distinct from the underlying tort action because indemnity does not arise when the underlying damage occurs. 41 Am. Jur.2d Indemnity § 38.

The Court of Appeals failed to appreciate and apply these important distinctions to this indemnity action. The Court of Appeals instead essentially equated the indemnity action with the underlying tort action. This directly conflicts with the nature

of an indemnity action. Providence Hospital sued for equitable indemnity action to recover the costs and settlement expenses incurred in defending the underlying tort action - an action in which Providence Hospital was not at fault and was pursued solely under a vicarious liability theory.

Further, Indemnity actions do not arise when the underlying tort plaintiff suffered the damage. *See* 41 Am. Jur. 2d Indemnity § 38. Instead, equitable indemnity accrues upon payment of the underlying claim or payment of a judgment or settlement. *Id*; *Walker Mfg. Co. v. Dickerson, Inc.*, 619 F.2d 305 (4th Cir. 2005) (recognizing that a cause of action for indemnity normally accrues when the indemnitee suffers actual loss); *In re Fela Asbestos Litig.*, 638 F.Supp. 107, 113 (W.D. Va. 1986) (holding that "accrual of a cause of action for indemnity . . . is better linked to a time at which the indemnitee is injured, not the time at which the original plaintiff was injured"), *rev'd on other grounds*; *Burlington N. R.R. v. Hyundai Merchant Marine Co.*, 63 F.3d 1227, 1230 (3rd Cir. 1995) (stating the general rule is that an indemnity claim does not accrue until the indemnitee suffers a loss); *Central Wash. Refrigeration, Inc. v. Barbee*, 946 P.2d 760, 764 (1997) (stating that "indemnity actions are distinct, separate causes of action from the underlying wrong").

Thus, the underlying medical malpractice that causes the damages to the underlying plaintiff does not trigger equitable indemnification. Rather, indemnity damages suffered by a party such as Providence Hospital do not ripen until the payment of the settlement amount. Such settlement could be for any number of reasons, including the attempt to avoid litigation expenses, etc. The Court of Appeals' opinion

thus conflicts with the well-settled nature of an indemnity action. This Court should reverse.

III. The Court of Appeals' opinion contradicts this Court's pronouncement that a statute of repose can act as bar to a subsequent action only when the General Assembly expressly included the subsequent action within the statute of repose scope.

In *Capco of Summerville, Inc. v. J.H. Gayle Construction Co.*, 368 S.C. 137, 628 S.E.2d 38 (2006), this Court held that a subsequent contribution action to recover from an at-fault tortfeasor can be barred by the underlying action's statute of repose when the statute of repose contains explicit language including such causes of action within its scope. The medical malpractice statute of repose in section 15-3-545(A) does not explicitly include a subsequent indemnity action within its scope. The Court of Appeals' opinion expands section 15-3-545(A) to bar the subsequent indemnity action, and is thus in conflict with *Capco*. Therefore, this Court should reverse the Court of Appeals' opinion.

In *Capco*, the question before this Court was whether the statute of repose for defective or unsafe improvements to real property found in section 15-3-640 of the South Carolina Code barred plaintiff's subsequent contribution action. *Capco*, 368 S.C. at 141, 628 S.E.2d at 40. This Court reluctantly found it did. This Court undertook an analysis of the general policy reasons of a statute of repose. *Id.* at 142, 628 S.E.2d at 41. However, the Court did not base its decision to apply the statute of repose to an indemnity action on these general policy reasons. *Id.* Rather, this Court barred the action **solely** because section 15-3-640 contained explicit language that included the contribution cause of action in the repose period. *Id.* at 144, 628 S.E.2d

at 42. In so doing, this Court stated:

> [W]e 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 []action will be barred before the right has even accrued, placing an undue burden on a single tortfeasor.

Id. The Court further stated 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." *Id.* Thus, but for the express language of section 15-3-640 that **included indemnity and contribution** in the statute of repose for defective or unsafe improvements to real property, this Court would not have found the subsequent contribution action barred by the statute of repose in *Capco*.

The Court of Appeals' opinion conflicts with this critical feature of *Capco*. The repose statute at issue here—section 15-3-545(A)—does not contain any language expressly including indemnity actions in the medical malpractice statute of repose. 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). Therefore, under this Court's *Capco* precedent, the failure of the General Assembly to specifically include indemnity actions in section 15-3-545(A) required a finding that Providence Hospital's indemnity action was not barred

by the medical malpractice statute of repose. As a result, this Court should reverse the Court of Appeals and adhere to its prior precedent.

IV. The cases cited in Court of Appeals decision do not support a bar of Providence Hospital's indemnity action.

In its opinion, the Court of Appeals relied on cases from Illinois and Georgia to lend support to the erroneous finding that the medical malpractice statue of repose would bar Providence Hospital's indemnity action. {Op. No. 4819; App. p 245}. Those cases do not support such a finding.

The Court of Appeals cited two cases from Illinois to support its ruling. {Op. No. 4819; App. p 245}. Those cases stand for the proposition that an action for contribution[7] and indemnity[8] are "an 'action for damages' under Illinois's medical malpractice statute of repose . . . ." {Op. No. 4819; App. p 245}. As noted by the Court of Appeals, those courts based their decision on the language of the Illinois medical malpractice statute of repose. The Illinois medical malpractice statute of repose offers no guidance in analyzing our medical malpractice statute of repose and is clearly distinguishable from section 15-3-545(A).

The Illinois 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). This broad, all-encompassing language used by the Illinois legislature supports the finding by the

[7] *Hayes v. Mercy Hospital & Medical Center*, 557 N.E.2d 873, 876 (Ill. 1990).

[8] *Ashley v. Evangelical Hospital Corp.*, 594 N.E.2d 1269, 71-76 (Ill. App. Ct. 1992).

courts there that the statute of repose can bar an action for indemnity. The South Carolina medical malpractice statute of repose is distinguishable because our General Assembly drafted section 15-3-545(A) much more narrowly and did not employ such far-reaching language. Thus, the interpretations by the Illinois appellate courts of the Illinois statute of repose have no bearing on the matter before this Court.

The Court of Appeals also cited *Krasaeath v. Parker*, 441 S.E.2d 868 (Ga. App. 1994), in support of its position. That case is distinguishable from this action for two reasons. First, the Georgia court was not analyzing a direct indemnity action brought by a hospital against an at-fault doctor. Rather, the plaintiff in *Krasaeath* took an assignment from of one of the doctors that she had originally pursued for medical malpractice. *Id.* at 868-69. The doctor assigned his rights against the other doctor to the plaintiff after the assigning doctor and plaintiff had settled. *Id.* Then, more than five years after the date of treatment, and after the applicable repose and limitations periods expired for actions against the other doctors, Parker sought contribution from Krasaeath, a separate doctor from the assigning doctor. *Id.* While Parker captioned the action as one for contribution, it was actually a disguised medical malpractice action against Krasaeath brought by the person he allegedly injured through medical malpractice. *Id.* at 870. Concluding that the underlying medical malpractice action against Krasaeath was untimely, the court held Parker could not circumvent the statute of repose by claiming her action was for contribution. *Id.*

Such concerns do not exist in this matter. Providence Hospital did not receive an assignment, does not seek to improperly 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 upon payment of the settlement funds. Hence, the *Krasaeath* case is distinguishable and does not support the Court of Appeals' decision.

The Missouri Supreme Court has rejected the rationale of the Court of Appeals in a setting with an analogous limitations statute to that of section 15-3-545(A). 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).[9] The trial court held that an action for contribution was barred by the two-year medical malpractice statute of limitations.[10] *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 *Roland* Court has also 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,

[9] Roland was overruled in part by *McNeil Trucking Co. v. Missouri State Highway*, 35 S.W.3d 846 (2001). The issue overruled has no bearing on the analysis of the limitations period issue.

[10] 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. Moreover, the rationale employed by the Missouri Court dovetails with this Court's holding in *Capco*.

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").

Section 15-3-545(A), like the Missouri statute, contains no language that indicates the General Assembly intended to bar indemnity or contribution actions. As noted, Providence Hospital is not an injured party seeking to recover damages resulting from the medical malpractice of a doctor. Hence, this Court should reverse the Court of Appeals.

V. The Court of Appeals erred in using the general public policy regarding repose statutes to expand the reach of the medical malpractice statute of repose to an action not included by the legislature.

In its opinion, the Court of Appeals found that the decision to bar Providence Hospital's indemnity action "comports with the policy considerations supporting South Carolina's medical malpractice statute of repose." {Op. No. 4819 at p. 86; App. p 245-46}. The general public policy behind a statute of repose cannot be used to expand section 15-3-545(A) to find that Providence Hospital's indemnity action was barred by the medical malpractice statute of repose. Statutes which limit a party's right to bring suit "are to be strictly construed." *See, e.g., Grier v. AMISUB of S.C., Inc.*, 397 S.C. 536, 725 S.E.2d 693 (2012) (citing this rule and recognizing that such statutes will "not be extended beyond the clear intent of the legislature") (*citing Crosby v. Glasscock Trucking Co.*, 340 S.C. 626, 628, 532 S.E.2d 856, 857 (2000)); *Ariail v. Ariail*, 29 S.C. 84, 93, 7 S.E. 35, 40 (1888) ("The statute of limitations may sometimes work a great hardship in special cases; but under the principle that litigation and contention must have an ending, and that the repose and quiet of the many compensates for the

loss of the few, *such statutes have been adopted and strictly enforced in most countries*, as wise, and as contributing to the best interests of society. *Such is the doctrine in this state.*") (emphasis added). Specifically, the general public policy is that repose periods exist to apply an absolute bar for reasons "struck by the legislative body." *See Capco*, 368 S.C. at 142, 628 S.E.2d at 41 (emphasis added). Therefore, the general repose policy can **only** apply to actions **as directed by the General Assembly**. The general policy cannot be used to expand the reach of the statute beyond its plain terms. As shown in Section I, the general policy and applicability of a repose period was designed to bar the specific, enumerated causes of action set forth by the legislature in Title 15. The General Assembly did not specifically enumerate indemnity actions in that section. Thus, the Court of Appeals' opinion actually conflicts with the general policy behind the statute of repose. This Court should reverse.

VI. The Court of Appeals' ruling thwarts judicial economy and creates practical problems that lead to unnecessary confusion in this area of the law.

The Court of Appeals' decision to expand the medical malpractice statute of repose to include indemnity actions creates numerous practical problems that warrant reversal. These practical problems will broadly impact all indemnification actions following an underlying medical malpractice trial. These problems would bar a wholly faultless healthcare provider from recovering from the true tortfeasors, such as Dr. Taillon, if the Court of Appeals' opinion is allowed to stand. This should not be the law of this State. As a result, this Court should reverse the Court of Appeals.

The practical problems created by the Court of Appeals are threefold. First, the Court of Appeals' opinion thwarts judicial economy in South Carolina. If left to stand

as written, the opinion of the Court of Appeals forces all parties seeking indemnification or contribution in the numerous medical malpractice actions filed each year in South Carolina to file such claims before they are ripe for fear of being barred by a statute of repose time expiration. This requirement will generate wholly unnecessary litigation in many instances and clog the court dockets. This cannot be the result the General Assembly intended in drafting the medical malpractice statute of repose.

Second, the Court of Appeals' opinion allows the doctor that provided the deficient and substandard care to the underlying patient to escape all liability even though that doctor was the only at-fault party in the medical malpractice action. The opinion shifts the doctor's negligence to a faultless third party, such as Providence Hospital. The General Assembly did not intend this absurd result when drafting section 15-3-545(A).

Third, the Court of Appeals' opinion will cause much unnecessary confusion in this area of the law. The opinion creates different limitations periods based upon the specific types of action being litigated, as follows. First, the Court of Appeals' rule creates a statute of repose period for indemnity or contribution actions brought subsequent to the underlying medical malpractice action brought under section 15-3-545(A). Second, it establishes a different limitation period for a medical malpractice action brought as the result of the placement or leaving of a foreign object in the body under section 15-3-545(B), but it imposes no corresponding repose period for indemnity and contribution actions brought under section 15-3-545(B). Subsection B creates a limitations period separate and distinct from section 15-3-545(A):

> 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.

The Court of Appeals' opinion does not address section 15-3-545(B) and does not extend the repose rule announced therein to actions arising under subsection B. Therefore, the Court of Appeals' rule, if left intact, ignores the fact that different limitations and repose rules would exist based solely on the type of underlying medical malpractice depending on whether the underlying action was brought under sections 15-3-545(A) or 15-3-545(B). Such a rule overly complicates this area of law.

Lastly, the opinion imposes a separate limitation and repose period for medical malpractice actions brought under section 15-3-545(D). That subsection tolls certain actions based on the age or disability of the underlying plaintiff, providing:

> [I]f 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.

It makes no sense to impose a different repose period for an indemnity action depending on whether subsection D applies.

Our General Assembly did not intend such a convoluted result when it drafted the medical malpractice statute of repose. The Court of Appeals' opinion, if allowed to stand, would greatly complicate this area of the law and should be reversed.

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 allows a clean, straightforward interpretation of the statute. The medical malpractice repose statute would apply only to medical malpractice actions. Indemnity actions are unaffected by that statute, and only a statute of limitations would be applicable. This is a simple and efficient result. Moreover, this result is proper and the one intended when the General Assembly drafted section 15-3-545(A). Therefore, this Court should reverse the Court of Appeals.

Conclusion

Based on the foregoing, this Court should reverse the Court of Appeals and find the medical malpractice statute of repose is inapplicable to a subsequent and independent equitable indemnification action.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____

C. Mitchell Brown
Michael J. Anzelmo
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Monteith P. Todd
SOWELL GRAY STEPP & LAFFITTE LLC
Post Office Box 11449
Columbia, South Carolina 29211
803.929.1400

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

Columbia, South Carolina

August 5th, 2013

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

Appellate Case No. 2011-197986

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

v.

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

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:

Brief of Petitioner

Counsel Served:

J. Edward Bradley, Esquire
Moore Taylor & Thomas, P.A.
Post Office Box 5709
West Columbia, SC 29171

Andrew F. Lindemann, Esquire
Davidson Morrison & Lindemann, PA
Post Office Box 8568
Columbia, SC 29202-8568

Monteith P. Todd, Esquire
Sowell Gray Stepp & Laffitte, LLC
Post Office Box 11449
Columbia, SC 29211

Lisa P. Whitehurst

Lisa P. Whitehurst
Administrative Assistant

August 5, 2013