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, ...Appellant,

v.

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

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

THE COURT OF APPEALS PROPERLY HELD THAT THE MEDICAL MALPRACTICE STATUTE OF REPOSE PROHIBITS COLUMBIA/CSA'S CLAIM FOR MEDICAL MALPRACTICE INDEMNIFICATION BROUGHT FOUR YEARS AFTER THE STATUTE OF REPOSE EXPIRED.

STATEMENT OF THE CASE

Dr. Michael Taillon worked at Providence Hospital 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).

Almost three years later, 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 appealed to the South Carolina Court of Appeals which affirmed the decision of the trial court on April 13, 2011. (R. p. 243). Columbia/CSA filed a Petition for Rehearing and Rehearing En Banc which was denied by the Court of Appeals on August 23, 2011. (R. p. 286). Columbia/CSA then filed a Petition for Writ of Certiorari to this Court which was granted.

ARGUMENTS

I. The Court of Appeals Properly Found The Plain Language Of The Statute Of Repose Bars *Any Action* For Injuries From Medical Malpractice, Including Medical Malpractice Indemnification Actions.

A. The Court Properly Found That A Medical Malpractice Indemnification Action Relies On An Injury To The Person.

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).

The Court of Appeals found that "[b]ecause Providence Hospital must establish Taillon's liability for Sharpe's damages in order to show it is entitled to equitable indemnification, . . . Providence Hospital's action is an action to recover damages for injury to the person." *Columbia/CSA-HS Greater Columbia Healthcare Sys. v. S. Carolina Med. Malpractice Liab. Joint Underwriting Ass'n*, 394 S.C. 68, 73, 713 S.E.2d 639, 641 (Ct. App. 2011), *reh'g denied* (Aug. 23, 2011), *cert. granted* (April 4, 2013).

Columbia/CSA maintains its lawsuit is for indemnification to recover money it paid for personal injuries but not for "damages for injury to the person." As a result, Columbia/CSA alleges the statute of repose should not apply because its lawsuit is for indemnification, not medical malpractice.

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 seeks indemnification only for damages arising from medical malpractice. To recover, Columbia/CSA must prove Dr. Taillon committed medical malpractice. Without this proof, Columbia/CSA cannot prevail. The Court of Appeals correctly found that any "entitlement to equitable indemnification was predicated upon Taillon's liability to Sharpe in tort," since Dr. Taillon's negligence is a requirement to recovery. *Id.*

Columbia/CSA seeks to circumvent the statute by calling the damages it seeks "settlement costs." These costs are for a release due to Mr. Sharpe's personal injury. Columbia/CSA claims the money has now transformed from money for personal injuries into money for indemnification. This assertion improperly elevates form over substance. After paying Mr. Sharpe for his personal injuries, Columbia/CSA sued Dr. Taillon to

recover the money it paid for Mr. Sharpe's personal injuries. 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 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*, 313 S.C. at 404, 438 S.E.2d at 243. This Court should not allow Columbia/CSA to transform its claim to avoid the purpose of the statute of repose.

Re-naming an action does not change its substance. *Krasaeath v. Parker*, 441 S.E.2d 868 (Ga. App. 1994). In *Krasaeath*, Parker 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 Georgia Court of Appeals recognized that the claim was truly a malpractice action against Krasaeath. The court noted that Krasaeath's "liability for contribution depends solely on whether he was negligent in his professional capacity" 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, like Parker, attempts to rename a malpractice action as an indemnification action to circumvent the statute of repose. The South Carolina Court of Appeals, like the Georgia Court of Appeals, was not persuaded by this attempt. The Court properly found Columbia/CSA's indemnification action is not distinct from the

malpractice action. Therefore, indemnification actions which rely upon medical malpractice are not exempt from the statute of repose. 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.

B. The Court of Appeals Properly Found That The Term "Any Action" Includes A Medical Malpractice Indemnification Action.

The plain language of the statute of repose applies to "*any action* . . . 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)); *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.").

"What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Grier v. AMISUB of S. Carolina, Inc.*, 397 S.C. 532, 535-36, 725 S.E.2d 693, 695-96 (2012), *quoting Hodges,* 341 S.C. at 85, 533 S.E.2d at 581. Courts "follow the plain and unambiguous language in a statute and have no right to impose another meaning. *Id.* at 536, 533 S.E.2d at 581.

Applying the plain meaning of the statute comports with the purpose of Title 15, which is to have clear, defined limitations on bringing civil actions. The statute is not ambiguous. It 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 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 a medical malpractice indemnification action based upon 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,* 330 S.C. at 23, 496 S.E.2d at 864. Columbia/CSA is seeking to recover money it paid for injuries to a person. The statute of repose includes this action.

Other courts have interpreted South Carolina's statute similarly. In *Avera St. Luke's Hosp. v. Karamali,* 848 F. Supp. 2d 1017 (D.S.D. 2012), Judge Kornmann compared South Carolina's, Illinois', and Georgia's statutes of repose for medical malpractice actions with South Dakota's statute. That court, using a "straightforward textual analysis," found that its home state statute did not include the broad language used in South Carolina's statute. *Id.* The court noted that the South Carolina legislature "provided instruction that *any* actions 'arising out of' a medical malpractice claim fell under the statute of repose, indicating all actions of law and equity were so bound." *Id.* The court found similar language used in the Illinois and Georgia statutes, and that the language unequivocally described *all* claims arising out of a medical malpractice claim. *Id.*

C. The Court of Appeals Properly Found That The Statute of Repose Includes Medical Malpractice Indemnification Actions.

The Appellant's brief states that the Court of Appeals failed to apply the statutory rules of construction and focused on the language of the statute "to the exclusion of the rest of the statute." (Brief of Petitioner, p. 7). This is incorrect. The Court of Appeals used the rest of the statute to find that Section 15-3-545 defines its scope broadly, enumerates specific claims to which it does not apply, and applies to all medical malpractice actions. Thus, the statute includes medical malpractice indemnification actions.

The Court of Appeals found that "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." *Columbia/CSA-HS Greater Columbia Healthcare Sys.,* 394 S.C. at 73, 713 S.E.2d at 641.

"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). By its terms, 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). Subsection 15-3-545(B) requires actions based upon leaving a foreign object in the body 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. 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 indemnification actions.

Columbia/CSA also contends section 15-3-545 should be interpreted exactly like the construction statute of repose which specifically includes indemnification actions. *See,* S.C. Code Ann. § 15-3-640. 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 including indemnification actions. *See,* S.C. Code Ann. § 15-3-640 (1)-(9).

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). Thus, the General Assembly knew how to include or exclude an indemnity action within a statute of repose through both methods. If the General Assembly intended to exclude indemnification actions from section 15-3-545(A), it could have included indemnification actions as a specific exclusion as it did for foreign objects, date of claim, and age of plaintiff. It did not do so. Instead, the legislature has kept the broad language of "any action" having a six year outer limitation. Therefore, the Court of Appeals properly concluded that the medical malpractice statute of repose includes indemnification actions.

Although the medical malpractice statute of repose and the construction statute of repose are both located in title 15 of the South Carolina Code, they are not part of a common act regarding limitations on actions and should not be forced into identical construction as Columbia/CSA implies on pages 9-11 of its brief.

The medical malpractice statute of repose located at code section 15-3-545 and the construction statute of repose located at code section 15-3-640 were passed and amended at different times. The malpractice statute added the repose period in 1977. *See* 1977 S.C. Acts 182. The construction statute of repose was adopted in its current format in 1986 after being declared unconstitutional in 1978. *See* 1986 S.C. Acts 412 and *Broome v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978).

Thus, the code sections were passed and amended at different times which accounts for the different ways in which they define their scope.

II. The Court Of Appeals Properly Considered The Public Policy And The Purpose Of The Statute Of Repose When Applying It To A Medical Malpractice Indemnification Action.

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). "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." *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006), *quoting School Bd. of the City of Norfolk v. U.S. Gypsum*, 234 Va. 32, 360 S.E.2d 325, 327–328 (1987).

The Court of Appeals' holding "comports with the policy considerations supporting South Carolina's medical malpractice statute of repose." *Columbia/CSA-HS Greater Columbia Healthcare Sys.*, 394 S.C. at 74, 713 S.E.2d at 642. In reaching this conclusion, the Court of Appeals quoted from *Langley*:

> A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. . . . 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., quoting *Langley*, 313 S.C. at 404–05, 438 S.E.2d at 243–44 (quoting *Kissel v. Rosenbaum*, 579 N.E.2d 1322, 1328 (Ind. Ct. App. 1991)).

The Court of Appeals did not expand the medical malpractice statute of repose. Instead it held that Columbia/CSA's medical malpractice indemnity action was barred by the statute. To hold otherwise would thwart both the purpose of the statute and judicial economy. If the statute of repose does not apply, then medical malpractice cases can re-surface as medical malpractice indemnity actions just as this one did ten years after Dr. Taillon treated the patient. There would be no way to insure that evidence had been kept. The memory of witnesses will have faltered. Doctors and other medical practitioners would not have the peace of mind intended by the statute. Thus, the Court properly held

that the medical malpractice statute of repose includes medical malpractice indemnification actions.

III. South Carolina Courts Have Repeatedly Refused To Limit The Medical Statute Of Repose. Thus, This Court Should Not Now Exempt Medical Malpractice Indemnification Actions From The Medical Statute Of Repose.

In *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 678 S.E.2d 809 (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,* this 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 Court rejected this argument, stating that it would not "run afoul of the absolute limitations policy the Legislature has clearly set via the statutes. . . ." *Id.* at 138, 580 S.E.2d at 114. The Court also 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.*, quoting *Langley*, 313 S.C. at 404, 438 S.E.2d at 243.

In *Langley,* this 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, this 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, this Court has refused to limit the statute of repose in numerous settings.

- In *Kerr v. Richland Memorial Hospital*, this Court refused to allow the Tort Claims Act to supplant the statute of repose.
- In *Harrison v. Bevilacqua*, this Court refused to allow the continuing treatment rule to supplant the statute of repose.
- In *Langley v. Pierce*, this Court refused to allow out of state tolling to toll the statute of repose.
- In *Hoffman v. Powell*, this Court upheld the statute of repose against a due process challenge.

Because this Court has consistently rejected attempts to limit the medical statute of repose, it should not now exempt indemnification actions from the medical statute of repose.

IV. The Medical Malpractice Indemnification Depends Upon Medical Malpractice. Therefore, The Statute Of Repose Applies To Both.

Columbia/CSA 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).

According to Rule 14, "at any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him." S.C.R. Civ. P. 14. The purpose of Rule 14 is to promote judicial efficiency by hearing all claims involved in one lawsuit. 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1442 (2d ed. 2003). Not only does this save the time and cost of duplicating evidence, but it promotes consistent results and prevents the disadvantage of a delay between judgments. *Am. Exp. Lines, Inc. v. Revel,* 262 F.2d 122, 124-25 (4th Cir. 1958), citing 1 Barron and Holtzoff, *Federal Practice and Procedure* (1950 Ed.), Sec. 422, p. 838.

"Rule 14 was designed to prevent this circuity of action and to enable the rights of an indemnitee against an indemnitor and the rights of the latter against a wrongdoer to be finally settled in one and the same suit." *Id.* Thus, Columbia/CSA's medical malpractice

indemnity claim could have been brought at the time of the original suit. Columbia/CSA chose not to do so, and has now sued outside of the statute of repose.

Columbia/CSA also argues that medical malpractice indemnity actions are wholly distinct and separate from the underlying medical malpractice action. This is not the law in South Carolina. In fact, "[a] third-party claim may be asserted under Rule 14(a)(1) ... *when the third party's liability is in some way dependent on the outcome of the main claim .... The claim against the third-party defendant must be based upon plaintiff's claim against defendant.*" *Tetra Tech EC/Tesoro Joint Venture v. Sam Temples Masonry, Inc.*, 2011 WL 1048964 *3 (D.S.C. Mar. 21, 2011), *citing* Wright & Miller, *supra,* § 1446 (emphasis added in original); *see also Carolina Buggy Tours, LLC v. Gay*, 2008 WL 2872208 (D.S.C. July 24, 2008) ("Adding a claim against a third-party defendant is proper only when the third party's liability is in some way dependent on the outcome of the main claim.").

Columbia/CSA's medical malpractice indemnity claim depends on the medical malpractice claim. Without the medical malpractice claim, there can be no medical malpractice indemnification action. Therefore, the Court properly held that the medical malpractice statute of repose includes medical malpractice indemnification actions.

V. The Court Of Appeals Properly Considered Precedent From South Carolina And Other States To Determine That The Medical Malpractice Statute Of Repose Bars Medical Malpractice Indemnification Actions.

The Court of Appeal's interpretation of the medical malpractice statute of repose is "consistent with the holdings of several other courts which have considered similar issues." *Columbia/CSA-HS Greater Columbia Healthcare Sys.*, 394 S.C. at 73-74, 713 S.E.2d at 642. The Court of Appeals cited several decisions, 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).

In *Krasaeath,* 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 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 noted that recovery required proof of Dr. Krasaeath's malpractice. As a result, the court concluded the claim though pled as contribution relied upon malpractice and was barred by the statute. *Id.*

Likewise, in *Hayes,* a defendant asserted contribution claims against a doctor after the statute of repose expired. The Illinois statute of repose covers actions "for damages for injury . . . against any physician . . . or hospital . . ., whether based upon tort, or breach of contract, or otherwise . . . ." 735 I.L.C.S 5/13-212. The South Carolina statute similarly 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). The Illinois 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, but to apportion liability in equity through a separate contribution action. The Court rejected this view. It 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.*

Other states rule 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*, 536 N.E.2d 963 (Ill. App. 1989) (holding contribution action against doctor barred by medical statute of repose).

The Court of Appeals also properly applied the precedent set forth in *Capco of Summerville, Inc. v. J.H. Gayle Const. Co., Inc.*, 368 S.C. 137, 628 S.E.2d 38 (2006). In that case, this Court held that the construction statute of repose barred a claim for contribution. *Id.* at 144, 628 S.E.2d at 42. The Court addressed the difference between statutes of repose and statutes of limitation and 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. *Florence County School District v. Interkal*, 348 S.C. 446, 559 S.E.2d 866 (Ct. App. 2002).

In *Florence County School District*, the Court of Appeals held that the construction statute of repose barred a claim for contribution brought after the statute expired. The construction statute of repose bars claims brought more than eight years after a building is complete. *See*, S.C. Code § 15-3-640. 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,* this Court ruled that the statute of repose barred a claim for contribution. This 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, this 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.

In *Capco*, this Court noted its holding created a harsh result, but recognized that it was the legislature's intent, as evidenced by the plain language of the statute. *Id.* at 144, 628 S.E.2d at 42, *citing Hodges v. Rainey,* 341 S.C. 79, 533 S.E.2d 578 (2000). 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 this 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.

Just as in *Capco*, the courts may not rewrite the statute. The medical malpractice statute of repose has not been amended since 1988. Applying the language of the statute does not lead to absurd results. Rather, the application of the statute gives clear, definite limits to claims which rely upon medical malpractice. The Court of Appeals properly considered case law and statutes from South Carolina and other states to apply the statute of repose as written such that it bars medical malpractice indemnification actions.

CONCLUSION

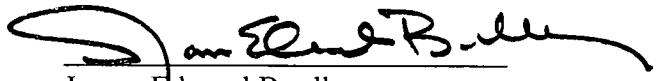
Dr. Taillon and the JUA respectfully ask this Court to affirm the Court of Appeals for the following reasons:

- The plain language of the statute of repose bars *any action* for injuries from medical malpractice, including medical malpractice indemnification actions;
- Public policy and the purpose of the statute support applying the statute of repose to medical malpractice indemnification actions;
- South Carolina courts have repeatedly refused to limit the medical statute of repose;
- The medical malpractice indemnification action depends upon the underlying medical malpractice action; and

- The broad, plain language of the statute of repose shows that it includes medical malpractice indemnity lawsuits.

For these reasons and the reasons discussed in the Respondents' Brief, this Court should affirm the decision of the South Carolina Court of Appeals.

Respectfully submitted,



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October 4, 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 d/b/a Providence Hospital, ... Appellant,

v.

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

PROOF OF SERVICE

I certify that I have served the Brief of Respondents on the Appellant by depositing a copy of same in the United States Mail, postage prepaid, on October 3, 2013, addressed to its attorneys of record as follows:

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