THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

RECEIVED
FEB 19 2015
S.C. Supreme Court

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.

Petition for Rehearing

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Petitioner Columbia/CSA-HS Greater Columbia Healthcare System d/b/a Providence Hospital ("Providence Hospital") requests rehearing of *Columbia/CSA-HS Greater Columbia Healthcare System d/b/a Providence Hospital v. The South Carolina Medical Malpractice Liability Joint Underwriting Association and Michael P. Taillon*, Op. No. 27484 (S.C. Sup. Ct. filed January 21, 2015) (Shearouse Adv. Sh. No. 3 at 59) (Toal, C.J. and Hearn, J. dissenting) ("the opinion"). Providence Hospital respectfully submits that rehearing and/or issuance of a new opinion reversing the Court of Appeals in full is warranted because the Court overlooked or misapprehended several matters of both fact and law.

Rehearing is proper in this action for several reasons. First, the majority opinion misapprehends and overlooks the fact that the equitable indemnification action is a distinct action separate from the underlying medical malpractice action and does not accrue until the underlying action is resolved via adjudication or settlement. The timing of the medical malpractice plaintiff's injury is irrelevant to the indemnity action. The relevant trigger or accrual date for the indemnity action is damage to Providence Hospital. Second, the majority opinion overlooked or misapprehended the fact that the General Assembly drafted the medical malpractice statute of repose to exclude a subsequent indemnification action. Third, the majority opinion overlooks our rules of statutory construction by nullifying language included in the medical malpractice statute of repose and rendering the language meaningless. Fourth, the majority opinion overlooked the negative practical impact of the decision, which impact demonstrates that the majority opinion constitutes an incorrect construction of the repose statute. Rehearing and/or the issuance of a new opinion reversing the Court of Appeals in full is warranted as a result.

I. The timing of the medical malpractice plaintiff's injury and the nature of the medical malpractice plaintiff's injury is irrelevant to Providence Hospital's indemnity action.

Providence Hospital's equitable indemnification action is a distinct action separate from the underlying medical malpractice and does not accrue until the underlying action is resolved via adjudication or settlement. The majority opinion relies upon the fact that the medical malpractice plaintiff "walked into Providence Hospital's emergency room over seventeen years ago." *See Taillon*, Op. No. 27484 at 64. This factual point is apparently intended to project the point that surely the repose statute

would have been intended to apply here. However, had the medical malpractice plaintiff entered the emergency room 6 years and 1 day prior to the bringing of the indemnity action, the majority's opinion would logically remain the same. When the medical malpractice plaintiff entered the emergency room is not relevant to the accrual of the indemnity action.

The majority misapprehends the fact that the settlement costs and expenses recoverable in the indemnity action are not "damages for injury to the person" as contemplated by the medical malpractice repose statute. A settlement sum can be paid and is recoverable in indemnity if reasonable, for reasons having little to do with the "injury to the person," i.e., the medical malpractice plaintiff. For example, settlement monies may be paid in part to avoid the risk of negative publicity, because certain witnesses have become unavailable, or to avoid large legal expenses, among other reasons.

The well-settled rule is that indemnity actions are wholly distinct from the underlying action which gave rise to the right of indemnity. An indemnity action does not arise when the underlying tort plaintiff suffered the damage. Instead, equitable indemnity accrues upon payment of the underlying claim or payment of a judgment or settlement. *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, 117 (W.D. Va. 2007) (holding that an indemnity claim does not seek to recover for any direct harm caused by the at-fault defendant in the underlying tort 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."); *Central Wash. Refrigeration, Inc. v. Barbee*, 946 P.2d 760, 764 (Wa. 1997) (stating that "indemnity actions are distinct, separate causes of action from the underlying wrong"); 41 Am. Jur. 2d Indemnity § 38 (2008) ("It is axiomatic that indemnity actions are 'wholly distinct from the underlying action which gave rise to the right of indemnity'"); *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).

Notably, the majority opinion cites no authority to counter these settled rules. This misapprehension of the separate and distinct nature of an indemnity action led to the issuance of an opinion in direct conflict with these accepted rules. Indemnity and the underlying medical malpractice are not one in the same. Rather, Providence Hospital sued for equitable indemnity 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. The settlement costs and expenses sought in the indemnity action are legally distinct and separate from the medical malpractice damages.

The majority also equates an indemnity action with the underlying medical malpractice action, finding indemnity seeks to recover damages for injury to person. *See Taillon*, Op. No. 27484 at 62. The majority opinion, however, does not cite any authority for this holding. The majority opinion overlooks the fact that such rationale has been rejected by other courts.

The Missouri Supreme Court distinguished the majority's rationale in a setting with an analogous limitations statute to that of our medical malpractice statute of repose. 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).[1] The trial court held that an action for contribution was barred by the two-year medical malpractice statute of limitations. *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. 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.***" (emphasis added); *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 that the "claims that fall within the scope of [the medical malpractice statute] are

[1] *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.

those for damages resulting from the acts of a physician in the delivery of health care to the consumer"). The Court held that the contribution action is not subject to the medical malpractice statute of repose because "an action for contribution is neither grounded in tort nor reasonably related to the types of actions enumerated" by the legislature in the statute of repose. *Roland*, 666 S.W.2d at 773. Instead, the Court recognized that such an action "accrues form the existence of a join obligation on a liability shared by tortfeasors." *Id.*

This rationale applies equally to South Carolina's medical malpractice statute of repose. Our statute, 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. Its action for indemnity accrued from the payment of settlement funds resulting from a theory of liability (i.e., vicarious liability) imposed by law. Rehearing should be granted to correct this misapprehension.

Lastly, but importantly, the fact that the indemnity plaintiff must prove Dr. Taillon's liability as part of the indemnity suit does not transform the indemnity claim into an action barred by the medical malpractice statute of repose. Statutes of repose apply to "actions," not to portions or elements of actions. An ***action for medical malpractice for injury to the person*** is controlled by the medical malpractice statute of repose. An ***action for indemnity*** for the recovery of damages is not.

II. The majority opinion overlooked or misapprehended the fact the General Assembly drafted the medical malpractice statute of repose to exclude a subsequent indemnification action.

The majority found that the medical malpractice statute of repose includes the indemnity action because "[i]ndemnity actions are not excluded." *See* Op. No. 27484 at 63. The majority does not offer any support for construing the statute in such a manner. In fact, such a construction contradicts our rules of construction and the manner in which the General Assembly drafted our limitation and repose statutes.

The majority overlooked or misapprehended that section 15-3-545 is not drafted in the manner cited in the opinion. This is evident from the manner in which the General Assembly drafted section 15-3-545 in several ways.

First, the statute's later subsections (cited by the majority) do not contain a list of exceptions, negative words, or any exceptions at all. Rather, those subsections created separate limitation periods unrelated to section 15-3-545(A). 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. Subsection (D) affirmatively permits tolling for causes of action held by a minor. Thus, the majority overlooked that these subsections do not support a finding that the medical malpractice statute of repose includes the indemnity action because indemnity actions were not excluded.

Second, the General Assembly drafted each of the limitations and repose statutes in Title 15, Chapter 3 to include indemnity actions when the General Assembly intended such actions to fall with the reach of the individual section. This is illustrated by the legislature's drafting of the other limitations and repose statutes in chapters 3 and 5 of Title 15. The general rule 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); *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 particular cause of action continues throughout Title 15. Each subsequent 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 majority opinion overlooked the fact that the legislature limited each repose or limitations period to the respective individual cause of action in each section. The majority opinion, if left as is, would render section 15-3-545 as on outlier and as the only section in chapters 3 and 5 of Title 15 to be construed in such a manner. The General Assembly did not intend for such a construction.

Third, the majority overlooked the doctrine of "expressio unius est exclusio alterius" or "inclusio est exclusio alterius." That construction doctrine, as applied to Title 15 and the medical malpractice statute of repose, further establishes 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. 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 General Assembly intended to ***exclude*** indemnity in those statutes in which indemnity was not specifically mentioned. *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).

Fourth, when the General Assembly wanted to include a subsequent indemnity action within the reach of a statute of repose, it did so explicitly. Section 15-3-640 illustrates this fact. In that statute, the General Assembly explicitly 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 to "an action for contribution or indemnification for damages sustained on account of an action described in this section"). In contrast, the medical malpractice statute of repose contains no mention of applicability to indemnity actions. If the legislature wanted to extend the reach of section 15-3-545(A) to include indemnity actions, then it knew how to do so. The majority opinion misapprehended this fact. Rehearing and/or issuance of a new opinion reversing the Court of Appeals in full is warranted.

III. The majority opinion overlooks our rules of statutory construction by nullifying language included in the medical malpractice statute of repose by our General Assembly.

In the opinion, the majority finds that Providence Hospital will have to prove the medical malpractice of the treating doctor in order to recover indemnification, and as such, the indemnity action applies. *See* Op. No. 27484 at 62. This interpretation of the medical malpractice statute of repose effectively eliminates the "arising out of any medical . . . treatment" language from the statute and focuses improperly on "damages for injuries to the person" language. If left as written, the majority opinion expands the scope of the statute and negates qualifying language that limits the scope of the statute to actions that accrue due to medical treatment. Such a construction contravenes our well-settled rules of statutory construction.

Courts should seek a construction of a statute that gives meaning to every word of a statute rather than one that renders a portion meaningless. *Hinton v. S. Carolina Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 342, 592 S.E.2d 335, 343 (Ct. App. 2004); *Steinke v. S. Carolina Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 396, 520 S.E.2d 142, 154 (1999) (stating that courts should "avoid a construction that would read a provision out of a statute"). "Every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction." *Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003). "It is never to be supposed that a single word was inserted in the law of this state without the intention of thereby conveying some meaning." *Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011); *Matter of Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) (citations omitted).

The placing of the "arising out of any medical . . . treatment" immediately after the "damages for injuries to the person" language signifies the legislature's intent to modify, qualify, or limit the broad "damages for injuries to the person" language relied upon by the majority. *See, e.g., Total Environmental Solutions, Inc. v. S.C. Pub. Servs. Comm'n*, 351 S.C. 175, 181-82, 568 S.E.2d 365, 369 (2002) (finding a subsequent phrase in the statute modified a preceding phrase and defined the scope of the statute). Such a grammatical construction demonstrates the legislature's intent to limit the scope of the medical malpractice statute of repose to actions by the injured party to recover damages resulting from the acts of a physician in the delivery of health care to the consumer. Rehearing and/or issuance of a new opinion reversing the Court of Appeals in full is warranted as a result.

IV. The majority opinion overlooked the negative practical impact of the decision, which demonstrates its construction of the statute is incorrect.

The opinion will create practical problems not addressed by the majority. If left to stand as written, the majority opinion will force 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.

By contrast, Providence Hospital's approach to interpreting the medical malpractice statute of repose avoids such results. Providence Hospital's position allows a clean, straightforward interpretation of the statute. Therefore, rehearing and/or issuance of a new opinion reversing the Court of Appeals in full is warranted.

Conclusion

The medical malpractice statute of repose does not bar Providence Hospital's claims for equitable indemnification. The plain and unambiguous language of the statute demonstrates that the legislature did not intend for claims for equitable indemnification to be controlled thereby. Instead, the legislature limited the statute of repose to cover actions seeking "damages for injury to the person" resulting from "medical, surgical, or dental treatment, omission, or operation by any licensed health care provider."

Providence Hospital has not brought an action seeking "damages for injury to the person." Instead, Providence Hospital seeks indemnification of costs and settlement expenses. The majority opinion results in a forced construction that expands the statute's operation in contravention of the intent of the General Assembly. Therefore, rehearing and/or issuance of a new opinion reversing the Court of Appeals in full is warranted.

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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):

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RECEIVED
FEB 19 2015
S.C. Supreme Court

February 18, 2015

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
Post Office Box 11330
Columbia, SC 29211

RE: Columbia/CSA-HS Greater Columbia Healthcare System, LP d/b/a Providence Hospital v. The South Carolina Medical Malpractice Liability Joint Underwriting Association and Michael P. Tallion
Civil Action No. 07-CP-40-3564
SC Court of Appeals Case Tracking No.: 2009121507
SC Supreme Court Case Tracking No.: 2011197986
Our File No. 19793/01512

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of a Petition for Rehearing in regard to the above-referenced matter. We would ask that you file the original and return a clocked-in copy to us via our courier. Also enclosed is our check in the amount of $25.00 as the required filing fee.

By copy of this letter to counsel of record, we are serving them with a copy of this Petition.

With kind regards, I remain

Sincerely yours,

C. Mitchell Brown

CMB:lpw
Enclosures
cc: James Edward Bradley, Esquire
Andrew F. Lindemann, Esquire
Monteith P. Todd, Esquire

The Supreme Court of South Carolina

Nelson Mullins

02/20/2015

RECEIPT #75119

Case No:	2011-197986
Case Short Title:	Columbia/CSA v. SC Medical Malpractice
Event:	
Fee Type:	Motion Fee
Amount:	$25.00
Payment Type:	Check
Reference No:	781737
Check/Money Order Date:	02/18/2015
Comments:	