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.

RETURN TO PETITION FOR REHEARING

Respondents respectfully submit this Return to Petition for Rehearing with respect to the Court's rulings in Opinion No. 27484, heard April 1, 2014, and filed January 21, 2015. The decision of the Court is sound. For the reasons set forth below and for the reasons stated in the Respondents' Brief and the Opinion, this Court's decision should stand.

STATEMENT OF THE CASE

For the purposes of this filing, the Respondent generally adopts and incorporates the facts and procedural history as set forth in the Opinion of the South Carolina Supreme Court as well as the Statement of the Case and Statement of Facts from the Respondent's Final Brief in this matter.

ARGUMENT

I. THE INDEMNITY ACTION IS NOT SEPARATE FROM THE MEDICAL MALPRACTICE CLAIM; THUS, THE STATUTE OF REPOSE APPLIES.

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). A statute of repose creates a substantive right in those protected to be free from liability after a 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. 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 . . . ." *Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 40 (2006) (quoting *School Board of the City of Norfolk v. U.S. Gypsum*, 360 S.E.2d 325, 327 (Va. 1987)).

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.

New Mexico courts also hold an indemnity claim will be construed as a malpractice claim if "the gravamen of the third-party action is predicated upon the allegation of professional negligence by a practicing physician." *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara,* 267 P.3d 70, 74 (N.M. App. 2011) (*cert. granted*, 289 P.3d 1254 (N.M. 2011)) (internal quotations omitted). In that case, the court held: "that the gravamen of Medical Center's equitable indemnification claim is predicated upon the allegation that [the doctors] negligently caused, and were partly liable for, [the patient's] injuries. As such, we hold that Medical Center's equitable indemnification claim is a malpractice claim...." *Id.* Thus, the Court applied New Mexico's statute of repose to the indemnification action.

Missouri courts also reach the same conclusion. In *Nat'l Credit Associates, Inc. v. Tinker,* 401 S.W.2d 954, 957 (Mo. Ct. App. 1966), a physician sued a wife and husband for past amounts due. The wife and husband counterclaimed. The wife and husband asserted that their claim against the physician was an action for fraud and was restricted only by the limitation of five years as provided by statute. *Id.* The court determined that the "gravamen or gist of the action is defendant's wrongful act," and held that the counterclaim was barred. *Id.* Because the medical malpractice statute barred "all actions" against physicians and surgeons for damages for malpractice brought outside of two years, the counterclaim was barred, and "any action for damages, regardless of the form thereof, based upon such improper act, comes within the inhibition of the two-year statute of limitation." *Id.* (emphasis added). The limitation was determined by the object of the action, not the form, and the claim was one of malpractice. *Id.* at 959. The medical malpractice statute in *Tinker* did not mention indemnification, just as the South Carolina medical malpractice statute of repose does not specifically mention indemnification though it does specify that it applies to "any action." *Id.* at 956; *see*, S.C. Code § 15-3-545.

Courts do not elevate form over substance. *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 for damages arising from medical malpractice. To recover, Columbia/CSA must prove Dr. Taillon committed medical malpractice. Without this proof, Columbia/CSA cannot prevail. This Court correctly found that Columbia/CSA "may not prevail on its equitable indemnification claim *unless* it proves that Dr. Taillon is liable to Sharpe for damages for injury to the person, which falls

squarely within the language of the statute of repose." *Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S. Carolina Med. Malpractice Liab. Joint Underwriting Ass'n,* No. 2011-197986, 2015 WL 249536, at *2 (S.C. Jan. 21, 2015). Columbia/CSA's action relies upon medical malpractice and seeks to recover for injuries to the person because to recover, it must prove Dr. Taillon committed malpractice which injured the patient.

Columbia/CSA has attempted to rename a malpractice action as an indemnity action to circumvent the statute of repose. This Court, like the courts cited above, was not persuaded by this attempt. This Court properly found Columbia/CSA's indemnification action is not distinct from the malpractice action. Indemnity actions which rely upon medical malpractice are not exempt from the statute of repose. Since Columbia/CSA sued to recover damages 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.

II. THE PLAIN MEANING OF THE MEDICAL MALPRACTICE STATUTE OF REPOSE INCLUDES MEDICAL MALPRACTICE INDEMNITY ACTIONS.

In interpreting a statute, the court's primary function is to ascertain the legislature's intent. When the terms of the statute are clear and unambiguous, the court applies them according to their meaning. Words must be given their plain meaning without resort to forced construction to limit or expand the statute's operation. *State v. Blackmon,* 304 S.C. 270, 273, 403 S.E.2d 660, 662 (1991) (citations omitted); *see also Kerr v. State,* 345 S.C. 183, 188, 547 S.E.2d 494, 496–97 (2001); *State v. Johnson,* 347 S.C. 67, 70, 552 S.E.2d 339, 340 (Ct. App. 2001). "All rules of statutory construction are

subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994).

Applying the statute's plain meaning comports with Title 15's purpose which is to have clear, defined limitations on 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. A holding that indemnity actions are not "any action" under the statute would narrow the statute to exclude a medical malpractice indemnity action creating an exception that the legislature did not include. The argument that such an action does not seek "damages for injury to the person" improperly elevates form over substance. It would impose another meaning of the statute that was not intended by the legislature. *See, South Carolina Second Injury Fund,* 330 S.C. at 23, 496 S.E.2d at 864.

In *Christus St. Vincent Reg'l Med. Ctr. v. Duarte-Afara,* 267 P.3d 70, 75 (N.M. 2011), the court held its medical malpractice statute of repose barred equitable indemnity claims brought after the statutory time limit. The New Mexico act defines a malpractice claim as "any cause of action arising in this state against a health care provider for medical treatment, lack of medical treatment or other claimed departure from accepted standards of health care which proximately results in injury to the patient, whether the patient's claim or cause of action sounds in tort or contract, and includes but is not limited to actions based on battery or wrongful death." N.M. Stat. Ann. § 41-5-13 (West). The

court found the language of the act was broad and that the legislature intended for it to be applied broadly. *Christus,* 267 P.3d at 73. The court then determined the statute applies to equitable indemnification claims. Just as in South Carolina, a New Mexico equitable indemnification claim requires that the indemnitor must be liable to the original plaintiff. "In other words, a properly pled indemnity claim must allege that the defendant caused some *direct harm* to a third party." *Id.* The court held that the equitable indemnification claim relied upon the physician's alleged medical malpractice, and was subject to the medical malpractice statute limitations. *Id.* at 74. The court also held that this conclusion furthered the policy goals the Legislature intended when passing the medical malpractice act, stating that the equitable indemnification claims would expose the physician to the identical liability as the first party action.

The court concluded that permitting the indemnity claim to proceed when a personal injury claim based on the same liability would not elevates form over substance and frustrates the purpose of the act. *Id.* While the court recognized that a cause of action for indemnification is different from the underlying tort, it reiterated that the medical malpractice statute of repose applies to medical malpractice indemnity claims. "The controlling inquiry in determining whether a claim constitutes a malpractice claim under the [act] is merely whether the gravamen of the claim is predicated upon the allegation of professional negligence." *Id.*

Similarly, South Carolina statutes define medical malpractice broadly: "Medical malpractice means doing that which the reasonably prudent health care provider or health care institution would not do or not doing that which the reasonably prudent health care provider or health care institution would do in the same or similar circumstances." S.C.

Code Ann. § 15-79-110 (6). Code section 15-3-545(A) sets out the time limitations for these actions: Any action for medical malpractice must be commenced within three years of discovery and six years of occurrence. Therefore, like the New Mexico statute, a medical malpractice claim is one which relies upon proving the negligence of a health care provider.

Just as in New Mexico, South Carolina courts require that the defendant in the indemnity action be liable for the original plaintiff's injuries. The indemnity plaintiff must prove that the defendant caused some direct harm to a third party to recover in an equitable indemnification claim. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 63, 518 S.E.2d 301, 307 (Ct. App. 1999).

Other courts interpret South Carolina's statute similarly. In *Avera St. Luke's Hosp. v. Karamali,* 848 F. Supp. 2d 1017 (D.S.D. 2012), the court compared South Carolina's, Illinois', and Georgia's statutes of repose for medical malpractice actions with South Dakota's statute. Using a "straightforward textual analysis," the court found that South Dakota's statute did not include the broad language in South Carolina's statute. *Id.* It noted that the South Carolina legislature "provided instruction that *any* action '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 in the Illinois and Georgia statutes which included all claims arising out of a medical malpractice claim. *Id.*

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. "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). 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 statute of repose defines its scope negatively. 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 indemnification, it applies to indemnity actions.

Thus, the General Assembly knew how to include or exclude an indemnity action within a statute of repose. If the General Assembly intended to exclude indemnity actions from section 15-3-545(A), it could have listed indemnity 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, this Court properly concluded that the medical malpractice statute of repose includes indemnity actions.

Columbia/CSA incorrectly assumes that because the medical malpractice statute of repose and the construction statute of repose are both in title 15 of the South Carolina Code, they should be identically constructed. However, the statutes are not part of a common act regarding limitations on actions. 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.

III. THE MEDICAL MALPRACTICE STATUTE OF REPOSE IS "AN ABSOLUTE OUTER LIMIT" ON CLAIMS WHICH RELY UPON MEDICAL MALPRACTICE; THUS, EXEMPTING MEDICAL MALPRACTICE INDEMNITY WOULD FRUSTRATE THE STATUTE'S PURPOSE.

In *Kerr v. Richland Mem'l Hosp.*, 383 S.C. 146, 678 S.E.2d 809 (2009), this 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 cancer. Her estate sued Richland Memorial Hospital in 2003. *Id.* The estate asserted that the statute of repose did not apply to its claim because the claim was controlled by the Tort Claims Act. *Id.* at 2. The Court rejected this position. It held the statute "constitutes an outer limit beyond which a medical malpractice claim is barred, regardless of whether it has or should have been discovered." *Id.* (quoting *Harrison v. Bevilacqua*, 354 S.C. 129, 137-38, 580 S.E.2d 109, 113 (2003)).

In reaching this conclusion, the Court reaffirmed that the statute of repose "is substantive law, unlike a statute of limitations which is procedural law." *Id.* Thus the Court determined that "[a] statute of repose creates a substantive right in those protected to be free from liability after a legislatively determined period of time." *Id.*

Likewise, in *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003), this Court refused to apply the continuing treatment rule to toll the medical malpractice statute of repose. Ms. Harrison sued as guardian for James McLean alleging that the Department of Mental Health and doctors there improperly committed Mr. McLean for

thirteen years. She argued that the continuing care Mr. McLean received should toll the statute of repose. The Supreme Court rejected this argument. It noted that the "statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body." *Id.* at 138, 580 S.E.2d at 114 (quoting *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993)).

In *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), 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 a 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)).

Thus, this Court has refused to limit the statute of repose in numerous settings. Because this Court has consistently rejected attempts to limit the medical malpractice statute of repose, this Court held correctly that indemnity actions are not exempt from the medical statute of repose.

IV. THIS COURT SHOULD NOT CREATE A JUDICIALLY IMPOSED LIMIT ON THE MEDICAL MALPRACTICE STATUTE OF REPOSE'S BROAD LANGUAGE.

Columbia/CSA asserts that applying the medical malpractice statute of repose to its indemnity action eliminates the statute's "arising out of any medical ... treatment" language and renders it meaningless. It argues this language modifies the phrase "injuries to person." Thus, it concludes that this Court should limit the statute's language and apply it only to cases brought by an injured person or an estate. But, the statute does not limit itself to claims brought by a person or estate. Instead, it applies to "any action ... to recover damages for injuries to the person...." S.C. Code Ann. §15-3-545.

The "arising out of any medical ... treatment" language modifies "damages." The entire text distinguishes damages arising from medical treatment from damages not arising from medical treatment. For example, a patient's slip and fall accident while using the doctor's restroom would not be related to any medical treatment and not covered by the medical malpractice statute of limitations.

Columbia/CSA's medical malpractice indemnity action relies upon medical malpractice and seeks to recover damages arising from alleged medical malpractice. 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). "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)). Columbia/CSA's lawsuit seeks to recover money it paid for "injury to the person." Thus, the medical malpractice statute of repose applies to its claims. This Court was correct in its Opinion No. 27484, and should deny Columbia/CSA's Petition for Rehearing.

V. APPLYING THE STATUTE OF REPOSE AS IT IS WRITTEN WILL NOT CREATE UNNECESSARY LITIGATION.

Columbia/CSA argues that applying the medical malpractice statute of repose to medical malpractice indemnity actions will create unnecessary litigation by requiring that indemnification actions 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. Rule 14 promotes 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, it also 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. Holding that medical malpractice indemnity actions are not covered by the statute would actually increase the workload of the courts and undermine judicial efficiency because a party seeking medical malpractice indemnity could wait over six years after the treatment was rendered and after the initial suit was settled to assert its claims. This creates two lawsuits to resolve one issue and is exactly what Columbia/CSA did to Dr. Taillon. It also allows the indemnity suit to drag on for years after the initial malpractice suit is resolved. For instance, Dr. Taillon treated Mr. Sharpe almost 18 years ago and the initial lawsuit against Columbia/CSA was filed almost 16 years ago. Columbia/CSA settled the lawsuit over 10 years ago.

"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 is now barred by the statute of repose.

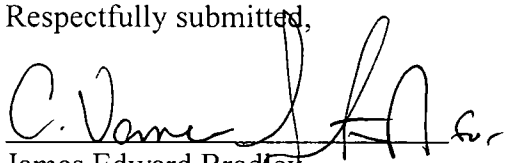
This Court should not create an exception to the medical malpractice statute of repose as Columbia/CSA asks. This would thwart the purpose of the statute and judicial economy. If the medical malpractice statute of repose does not apply to medical malpractice indemnity claims, then medical malpractice cases can re-surface as medical malpractice indemnity actions decades after a patient's treatment. This is exactly the problem the legislature sought to prevent by passing the statute. Doctors and other medical practitioners would not have the peace of mind intended by the statute. Thus,

this Court properly held that the medical malpractice statute of repose includes medical malpractice indemnification actions.

CONCLUSION

Circuit Judge Alison Lee, the three-judge panel of the Court of Appeals, and this Court were correct in refusing to create an indemnity exception to the medical malpractice statute of repose. The indemnity action relies upon proof of medical malpractice and injuries to the body. The plain meaning of the statute includes medical malpractice indemnity actions. The purpose of the statute of repose includes protection from indemnity actions. And, applying the statute of repose as written will not burden the court system.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served the Return to Petition for Rehearing on the Appellant by depositing a copy of same in the United States Mail, postage prepaid, on March 12, 2015, addressed to its attorneys of record as follows:

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