

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

RECEIVED

Alison Renee Lee, Circuit Court Judge

MAR 24 2015

Case No. 2007-CP-40-3564
Appellate Case No. 2011-197986

S.C. Supreme Court

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.

Reply to Return to Petition for Rehearing

Pursuant to Rule 240(f) of the South Carolina Appellate Court Rules, Petitioner Columbia/CSA-HS Greater Columbia Healthcare System d/b/a Providence Hospital (“Providence Hospital”) files this Reply to Respondents’ Return to the Petition for 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). As set forth in the Petition for Rehearing and this Reply, rehearing and/or the issuance of a new opinion reversing the Court of Appeals in full is warranted in this matter.

The majority opinion and Respondents’ arguments overlook or misapprehend the fact that our General Assembly did not expressly include an indemnity action in the

medical malpractice statute of repose because an indemnity action constitutes a wholly separate and distinct action from the underlying medical malpractice action, with unrelated accrual dates and different damages. In fact, neither the majority nor Respondents cited any authority to support the claim that indemnity and the underlying medical malpractice action are the same.

Respondents in their Return attempt to defend the majority's opinion by repeating their prior arguments and authority from their briefing, which were not relied upon by the majority opinion. To paraphrase William Shakespeare's famous quote, Respondents "doth protest too much, methinks," by again including these same arguments in the Return.

By contrast, Providence Hospital has cited on-point authorities that establish the General Assembly did not intend to include an indemnity action in the medical malpractice statute of repose. First, Providence Hospital's authorities show that an equitable indemnification is a distinct action separate from the underlying medical malpractice action, and the timing of the medical malpractice plaintiff's injury is irrelevant to the indemnity action because the relevant trigger or accrual date for the indemnity action is the damage to Providence Hospital caused by the payment of settlement funds. Second, our rules of statutory construction show the General Assembly drafted the medical malpractice statute of repose to exclude a subsequent indemnification action, and the majority opinion's interpretation nullified and rendered meaningless language included in the statute. Third, the majority opinion improperly judicially expands the reach of the statute in contravention of the intent of the General

Assembly. Therefore, rehearing and/or the issuance of a new opinion reversing the Court of Appeals in full is warranted.

I. Respondents' claim that Providence Hospital attempts to rename a medical malpractice action as an indemnification action lacks merit.

Respondents claim that Providence Hospital attempts to rename a medical malpractice action as an indemnification action. {Return p. 3, 5}. Respondents again cite *Krasaeath v. Parker*, 441 S.E.2d 868 (Ga. App. 1994), to support this position. Respondents continue to misconstrue the holding of that case in attempt to provide support for the majority opinion. Notably, the majority did not rely on that case for the proposition advanced by Respondents. That is because *Krasaeath* has no application in this matter and is wholly distinguishable from the indemnity claim advanced by Providence Hospital. *Krasaeath* cannot be read to equate a wholly distinct indemnity action with the unrelated underlying medical malpractice action against the at-fault doctor. The facts of *Krasaeath* illustrate the distinction from this matter.

In *Krasaeath*, the court did not analyze a direct indemnity action brought by a hospital against an at-fault doctor. Instead, the court analyzed a situation where the tort plaintiff in *Krasaeath* took an assignment from one of the doctors that she had originally pursued for medical malpractice. *Krasaeath*, 441 S.E.2d at 868-69. The doctor assigned his rights against the other at-fault doctor to the plaintiff after the assigning doctor and plaintiff had settled. *Id.* Then, more than five years after the date of treatment, Parker (the plaintiff injured by two doctors' medical malpractice) attempted to bring a new medical malpractice action against the non-settling doctor, *Krasaeath*. *Id.*

Parker's new medical malpractice action, however, would have been time barred because the applicable medical malpractice statute of repose and limitations previously expired for actions against the other doctors. *Id.* Thus, Parker sought contribution from Krasaeath, the separate doctor from the assigning doctor. *Id.* While Parker captioned the action as one for contribution, it was actually a disguised medical malpractice action against Krasaeath brought by the person he allegedly injured through medical malpractice. *Id.* at 870. Concluding that the underlying medical malpractice action against Krasaeath was untimely, the court held Parker could not circumvent the statute of repose by claiming her action was one for contribution. *Id.*

This matter is factually distinct and does not present the same concerns raised to the *Krasaeath* court. Providence Hospital did not receive an assignment from Taillon in order to pursue another doctor in an attempt to improperly circumvent any limitations period. Critically, Providence Hospital is not an injured person seeking to recover for injuries caused by deficient medical care. Rather, Providence Hospital seeks to enforce its own right to equitable indemnification, which is a separate and distinct action from the underlying tort action and arose upon payment of the settlement funds. Hence, the *Krasaeath* case has no application to this matter and does not support Respondents' position.

Second, Respondents make a blanket statement that Providence Hospital's action "relies upon medical malpractice" and, therefore, it is one and the same as an indemnity action. {Return p. 5}. Respondents again fail to cite any authority that

states an “indemnification action is not distinct from the malpractice action.” *{Id.}*.¹ This is because such a position conflicts with the well-established fact that an indemnity action is legally separate, distinct, and independent from the underlying tort action and does not seek to recover for the damages suffered by the underlying tort plaintiff in the underlying tort action.

Respondents and the majority overlooked the numerous cases and treatises that establish this well-settled rule and reject Respondents’ unsupported rationale. *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 (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

¹ 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, also does not cite any authority for this holding. The majority opinion overlooks the fact that such rationale has been rejected by other courts.

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).

As a result, Providence Hospital does not seek to elevate form over substance as claimed by Respondents. Providence seeks in its indemnity action to recover different damages than those recoverable by the injured party in the underlying tort action. The majority overlooked these well-settled authorities and principles in rendering the opinion.

Moreover, the medical malpractice statute of repose comports with this logic by limiting its application to actions that seek to recover “damages for injury to the person” resulting from medical treatment. Providence Hospital’s indemnity action is not such an action. Providence Hospital was not injured by medical malpractice. Providence Hospital was damaged by virtue of its payment of the costs and settlement expenses it sustained defending the underlying action due the fault of Respondents.

Respondents also rely on *National Credit Associates, Inc. v. Tinker*, 401 S.W2d 954 (Mo. Ct. App. 1966), to support its claim that indemnity is not distinct from a medical malpractice action. {Return p. 4}. This contention lacks any merit. The *Tinker* court did not address indemnity at all. In that case, Tinker brought a counterclaim against a doctor “alleging fraud in the prescription and application of *professional treatment* by her physician” *Tinker*, 401 S.W.2d at 955 (emphasis added). Tinker alleged the counterclaim was not barred by the medical malpractice

statute because it was a claim for fraud. *Id.* at 956-57. The court rejected the argument, finding the claim was a direct medical malpractice action by Tinker against her doctor for injuries sustained from medical treatment. *Id.* at 957. This action is wholly distinct. Providence Hospital was not injured by medical malpractice and does not seek to recover damages for deficient medical care. Respondents' reliance on this case is misplaced and should be rejected.

Respondents' position has been rejected by Missouri courts addressing the issues. *See Roland v. Skaggs Companies, Inc.*, 666 S.W.2d 770, 772 (Mo. 1984). In that case, 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 of Missouri disagreed because "while [the medical malpractice statute of limitations] clearly covers all claims brought by consumers of health care services against health care providers for injuries related to such services, *we find no words indicating a legislative intent* to include suits for contribution among health care providers." *Id.* (emphasis added). The *Roland* Court also reasoned that "claims for . . . apportionment of fault need not be subject to the statute of limitations applicable to medical malpractice actions . . . because of the independent nature of that claim from the underlying claim of [the patient] for damages." *Aherron v. St. John's Mercy Med. Center*, 713 S.W.2d 498, 499 (Mo. 1986); *see also Breeden v. Hueser*, 273 S.W.3d 1, 11 (Mo. 2008) (holding the "claims that fall within the scope of [the medical malpractice statute] are those for damages resulting from the acts of a physician in the delivery of health care to the consumer"). That logic supports the legal separation between the underlying tort action and the subsequent indemnity action. Thus, Respondents' position lacks merit.

Respondents further cite *Christus St. Vincent Regional Medical Center v. Duarte-Afara*, 267 P.3d 70 (N.M. 2011), to support its claim that Providence Hospital's indemnification action qualifies as a medical malpractice action under Section 15-3-545(A). {Return p. 6-8}. In that case, the court did find that a subsequent indemnification action was subject to the medical malpractice statute's repose period. *Christus*, 267 P.3d at 74. However, the court in *Christus* was compelled to make such a finding for policy reasons not present with regard to Section 15-3-545(A). *Id.* at 75.

In *Christus*, the court viewed the hospital's indemnification action through the prism of the New Mexico Medical Malpractice Act, referred to as the MMA. *Id.* at 72. The court noted that "[t]he MMA was enacted in response to a perceived malpractice crisis in New Mexico" in the 1970s. *Id.* The MMA required health care providers to opt-in in order to receive the benefits under the act. *Id.* The hospital argued (1) indemnity could not fall within the ambit of the medical malpractice statute of repose because indemnity is a separate and distinct cause of action and (2) the Missouri opinions of *Roland v. Skaggs* and *Aherron v. St. John's Mercy* refuted such a finding. *Id.* at 74-75. The at-fault doctor countered with the public policy reasons behind the MMA. *Id.*

The court found the Hospital's arguments distinguishable "from New Mexico law based on policy considerations" presented by the MMA. *Id.* at 75. Thus, the 1970s New Mexico policy considerations formed the sole basis of the decision. The court's focus on the policy reasons for its ruling indicates that had the policy

considerations not been present, the court would not have found the indemnity action barred by the statute of repose.

This matter is distinguishable because such policy concerns are not present in South Carolina. Rather, as discussed herein, our General Assembly's focus in enacting Section 15-3-545(A) was to have the repose period apply solely to *actions* by a patient against the at-fault health care provider for deficient medical treatment. Thus, *Christus* is distinguishable from this matter and does not support the majority opinion. As a result, rehearing and/or the issuance of a new opinion reversing the Court of Appeals in full is warranted.

II. Respondents and the majority opinion improperly focused on the “any action” language of the medical malpractice statute of repose in contravention of our rules of statutory interpretation.

In the Return, Respondents claim the majority correctly construes the statute of repose to “appl[y] to ‘any action’ that relies upon personal injuries to establish damages.” {Return p. 6, 7-10}. This is error. Such an 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 in the statute. The majority interpretation 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.

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); *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) (holding that 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). 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 healthcare to the consumer. *See Davenport v. City of Rock Hill*, 315 S.C. 114, 117, 432 S.E.2d 451, 453 (1993) ("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"); *CFRE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous).

Respondents ask the Court to ignore this language. That is improper. *See 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"). The qualifying language employed by the General Assembly must be given meaning and effect. *Breeden v. TCW, Inc./Tennessee Exp.*, 355 S.C. 112, 120, 584 S.E.2d 379, 383 (2003) ("Every word, clause, and sentence must be given some meaning, force, and effect, if it can be done by any reasonable construction"). Providence Hospital's interpretation provides the effect intended by the

General Assembly—namely, the statute of repose applies to actions by the party injured by deficient medical care against the party causing such injuries. Thus, Respondents’ interpretation lacks merit.

Respondents’ position likewise fails because it ignores a critical fact. The fact that the indemnity plaintiff must prove the at-fault doctor’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. The language in Section 15-3-545(A) applies to “actions.” An *action* for medical malpractice for injury to the person is controlled by the medical malpractice statute of repose. While an *action* for indemnity may have some connection to certain elements of the medical malpractice action, the indemnity action is not a medical malpractice action where damages for injury to the person are sought by the plaintiff. See Section I, *supra*.

Lastly, Respondents claim that South Dakota has “interpreted South Carolina’s statute similarly” and cite *Avera St. Luke’s Hospital v. Karamali*, 848 F. Supp. 2d 1017 (D. S.D. 2012), in support. {Return p. 8}. Respondents misconstrue *Karamali*. The South Dakota court *did not* apply rules of construction to interpret the South Carolina medical malpractice statute of repose. Rather, the court merely cited to the South Carolina Court of Appeals’ opinion *in this matter*. Rehearing and/or issuance of a new opinion reversing the Court of Appeals in full is warranted in order to properly construe Section 15-3-545(A) as intended by the General Assembly.

III. Respondents' position on interpreting Section 15-3-545(A) is not supported by our rules of statutory construction.

Respondents allege that Section 15-3-545 includes indemnity actions because the statute “excludes three separate categories of claims.” {Return p. 8-9}. This position misconstrues how the General Assembly drafted Section 15-3-545. Also, Respondents fail to cite any authority to support its interpretation.² Respondents' position is not supported by our rules of statutory construction.

First, the statute's later subsections do not contain any words excluding three separate claims as alleged by Respondent. {Return p. 8-9}. Rather, the General Assembly drafted the other three subsections to create separate limitation periods unrelated to Section 15-3-545(A).³ These subsections create stand alone limitations periods for different actions unrelated to those in Section 15-3-545(A). The General Assembly could have accomplished the same result by designating subsections (B), (C), and (D) as separate statutes and had the same effect as how the statute was drafted.

² Respondents claim that *German Evangelical Lutheran Church of Charleston v. City of Charleston*, 352 S.C. 600, 576 S.E.2d 150 (2003), allows for such an interpretation. {Return p. 9}. Respondents misapply that case. *German Evangelical* actually supports Providence Hospital's interpretation of Section 15-3-545. As shown by that case, the doctrine of “expressio unius est exclusio alterius” or “inclusio est exclusio alterius,” 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. The only evidence in the Record is that when the General Assembly intended to do so, it included indemnity actions in the specific section of Title 15. This is evident from the inclusion of indemnity actions by name in Section 15-3-640. Thus, under that well-settled doctrine, the decision of the legislature to specifically *include* indemnity actions 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). Respondents and the majority overlook or misapprehend the application of this doctrine.

³ 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, 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, Respondents claim that the General Assembly's decision to specifically include indemnity actions within the repose period in Section 15-3-640 has no impact on the interpretation of Section 15-3-545(A). Respondents also allege Providence Hospital requests that Section 15-3-545(A) be construed "exactly like" Section 15-3-640. {Return p. 9}. This is incorrect and not what Providence Hospital contends. Providence Hospital utilized Section 15-3-640 to illustrate the fact that when the General Assembly wanted to include a subsequent indemnity action within the reach of a statute of repose, it did so explicitly as in Section 15-3-640.

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"). The General Assembly did not draft the medical malpractice statute of repose to contain any mention of applicability to indemnity actions. Thus, Section 15-3-640 demonstrated that the General Assembly knew how to extend the reach of Section 15-3-545(A) to include indemnity actions. The General Assembly chose not to do so in Section 15-3-545(A). Respondents and the majority opinion misapprehend this fact.

Moreover, Respondents' reliance on the amendments to Section 15-3-640 and 15-3-545(A) is misplaced. Respondents claim that the fact that the two sections were amended at different times supports a finding that the medical malpractice statute of

repose includes indemnity because it was not excluded from Section 15-3-545(A). {Return p. 10}. This is incorrect. In fact, the amendment dates actually support Providence Hospital's interpretation of Section 15-3-545(A). {Return p. 10}. The General Assembly added a repose period to the medical malpractice statute of repose in 1977. *See* 1977 S.C. Acts 182. That addition did not expressly include indemnity actions. *Id.* Thereafter, in 1986, the General Assembly expressly included a subsequent indemnity action to the construction statute of repose when it passed Section 15-3-640 in its current form.

The fact that the General Assembly included indemnity actions in Section 15-3-640 after the passage of Section 15-3-545(A) actually establishes that the General Assembly recognized the need to expressly include indemnity in the underlying repose period if it intended to do so. If the General Assembly believed indemnity was included by exclusion (as Respondents claim Section 15-3-545(A) did in 1977), then it would not have been necessary to expressly include indemnity in Section 15-3-640 in 1986. The decision to expressly include indemnity in Section 15-3-640 after the passage of Section 15-3-545(A) proves that the General Assembly intend to include indemnity actions only when specifically included. 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 would have amended the statute the way it did in 1986 with respect to Section 15-3-640. The General Assembly chose not to do so. Respondents and the majority opinion misapprehend this fact. Rehearing and/or issuance of a new opinion reversing the Court of Appeals in full is warranted.

IV. Respondents' reliance on cases applying the medical malpractice statute of repose to medical malpractice actions brought by the injured party against the at-fault medical provider do not address the issue before this Court and have no bearing on Providence Hospital's indemnity action.

Respondents also extensively rely on opinions in which the courts applied the medical malpractice statute of repose to a direct medical malpractice action brought by the tort plaintiff injured by the medical malpractice of the medical provider. {Return p. 11-13}. None of the cases cited by Respondents analyzed whether the medical malpractice statute of repose bars a subsequent and legally distinct indemnity action.

The fact that Section 15-3-545(A) is universally regarded as the statute of repose applicable to *medical malpractice* actions does not mean it bars *indemnity and contribution* actions. *See, e.g., Lone Mountain*, 94 Fed. Appx. at 158 (stating that indemnity actions are “distinct, separate causes of action from the underlying wrong. Respondents cite *Kerr v. Richland Memorial Hospital*, 383 S.C. 146, 678 S.E.2d 809 (2009), for the proposition that this Court has refused to limit the statute of repose. This misconstrues the actual holding and impact of that case. In *Kerr*, this Court determined that the medical malpractice statute of repose applied to a medical malpractice action brought under the South Carolina Tort Claims Act. *Kerr*, 383 S.C. at 148, 678 S.E.2d at 810. This Court was not asked to determine whether the medical malpractice statute of repose applied to an action for indemnity. This Court simply applied the existing medical malpractice statute of repose to a medical malpractice action brought under a different statutory vehicle. *Id.*

In fact, *Kerr* actually demonstrates that the statute of repose set forth in Section 15-3-545(A) applies only to medical malpractice actions. Throughout the opinion, this

Court consistently referred to the Section 15-3-545(A) statute of repose as applicable to medical malpractice actions, indicating the statute of repose is limited to *only* medical malpractice actions. *Id.*; *see also Id.* at 147 and 149, 678 S.E.2d at 810 and 811.

Respondents' reliance on *Harrison v. Bevilacqua*, 354 S.C. 129, 580 S.E.2d 109 (2003), and *Langley v. Pierce*, 313 S.C. 401, 438 S.E.2d 242 (1993), likewise has no impact on the issues before this Court. Each of those cases merely addressed the medical malpractice statute of repose in the context of a medical malpractice action. However, neither case analyzed, or even addressed, whether the medical malpractice statute of repose bars a subsequent action for indemnity.

The damages sought to be recovered in Providence Hospital's indemnity action differ from those sought in a medical malpractice action as set forth in Section 15-3-545(A). Therefore, the recovery sought by Providence Hospital does not fall within the ambit of Section 15-3-545(A). The three cases cited by Respondents offer no guidance on the issue presented in this matter and do not alter this fact. Therefore, these three cases do not support the majority opinion. Rehearing and/or issuance of a new opinion reversing the Court of Appeals in full is thus warranted.

V. Rule 14, SCRCP, does not alleviate the fact that the majority opinion will flood the courts with unripe and/or unnecessary litigation.

Respondents claim that Rule 14, SCRCP, alleviates any practical problems created by the majority opinion. {Return p. 14-16}. Simply put, Respondents' position is that because Rule 14, SCRCP, allows filing of an indemnity action, then it does not matter that those indemnity actions are not ripe, may be unnecessary, or rendered moot by the underlying tort litigation. Those unnecessary actions will exist 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.

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—indemnity actions are filed when ripe and under the limitations period applicable to indemnity actions. The majority opinion overlooked this impact of the opinion. Therefore, rehearing and/or issuance of a new opinion reversing the Court of Appeals in full is warranted.

VI. The majority opinion's interpretation of Section 15-3-545(A) constitutes an impermissible expansion of the General Assembly's intent.

Respondents claim that this "Court should not create a judicially imposed limit on the medical malpractice statute of repose . . ." as drafted by the General Assembly. {Return p. 13-14}. Providence Hospital's position does not deviate from legislative intent. Rather, the majority opinion and Respondents' interpretation improperly judicially expands the reach of the statute in contravention of the intent of the General Assembly. Section 15-3-545(A) does not explicitly include a subsequent indemnity action within its scope. Thus, any judicial expansion of the medical malpractice statute of repose to cover indemnity actions must come from the General Assembly.

This Court recognized this limitation in *Capco of Summerville, Inc. v. J.H. Gayle Construction Co.*, 368 S.C. 137, 628 S.E.2d 38 (2006). That case established that a subsequent contribution action to recover from an at-fault tortfeasor can be barred by the underlying action's statute of repose if the statute of repose contains explicit language including such causes of action within its scope.

In *Capco*, the question was whether Capco’s subsequent contribution action was barred by the statute of repose for defective or unsafe improvements to real property found in Section 15-3-640 of the South Carolina Code. *Capco*, 368 S.C. at 141, 628 S.E.2d at 40. This Court reluctantly found it was. In analyzing the issue, this Court noted the general policy reasons of a statute of repose. *Id.* at 142, 628 S.E.2d at 41. While this Court did recite the general public policy reasoning behind the purpose of a statute of repose, it did not base its decision to apply the statute of repose on this general policy. *Id.*

Notably, this Court barred the action for one reason only—namely, the contribution action was barred because the General Assembly included *explicit language that included the contribution cause of action* in Section 15-3-640. *Id.* at 144, 628 S.E.2d at 42. In so doing, this Court stated:

[W]e are troubled by the harsh result in the case. As Capco correctly points out, where a lawsuit is filed on the eve of the running of the statute of repose, but is not resolved until after the statute has run, the [a]ction will be barred before the right has even accrued, placing an undue burden on a single tortfeasor.

Id. This language indicated that the Court would likely have ruled that a subsequent contribution action would *not* be included in the general repose period in Section 15-3-640 but for the express inclusion of contribution actions in that statute. The Court noted that, while troubled by the harsh result, the express language of the statute of repose forced the Court to find the subsequent contribution action to be barred.

The Court did not seek to alter the interpretation of the statute to reach a different result. Importantly, the Court stated that “although we are troubled by this

result, we are not at liberty to rewrite the statutes, and any amendment must come from the Legislature.” *Id.*

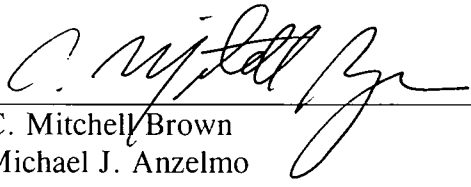
The majority should have applied this rationale to the plain language of Section 15-3-545(A). Rehearing is warranted to reverse the Court of Appeals and limit Section 15-3-545(A) as intended by the General Assembly. If left as written, unnecessary corrective legislative action by impacted parties will be required to return this area of the law to the intended aims of the General Assembly. This Court should grant rehearing and/or issue a corrective opinion to obviate the need for such unnecessary action, and this Court should adhere to its own prior analysis in *Capco*.

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 such an action. 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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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

RECEIVED

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System db/a Providence Hospital, ... Petitioner,

v.

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

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Appellant, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings:

Reply to Return to Petition for Rehearing

Counsel Served:

J. Edward Bradley, Esquire
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Post Office Box 5709
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Monteith P. Todd, Esquire
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Post Office Box 11449
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A handwritten signature in black ink, appearing to read "J. Lee", written over a horizontal line.

Jennifer B. Lee
Administrative Assistant

March 24, 2015

Nelson Mullins

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RECEIVED

March 24, 2015

MAR 24 2015

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

S.C. Supreme Court

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. Taillon
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

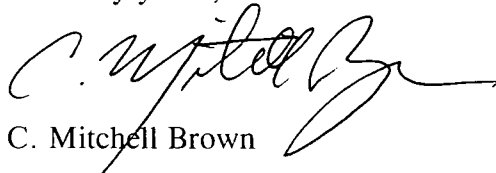
Dear Mr. Shearouse:

Enclosed please find the original and seven copies of a Reply to the Return to the 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.

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

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