

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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Case No. 2007-CP-40-3564

Appellate Case No. 2011-197986

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**RECEIVED**

MAR 27 2015

**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.

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**REPLY TO SOUTH CAROLINA HOSPITAL ASSOCIATION'S  
MOTION TO APPEAR AS AMICUS CURIAE**

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**INTRODUCTION**

This Court should deny the Hospital Association's motion to appear as *amicus curiae* for the following reasons:

- A. The Hospital Association filed the motion after all briefing deadlines have elapsed;
- B. The motion and accompanying brief contain affirmative misrepresentations and omissions of fact and law; and

C. The law firm representing the Hospital Association previously appeared in this litigation representing Columbia/CSA such that this appearance appears to be an attempt for Columbia/CSA to submit additional briefing after all deadlines have elapsed.

### **DISCUSSION**

#### **A. THE HOSPITAL ASSOCIATION FILED ITS BRIEF AFTER ALL DEADLINES ELAPSED.**

Nexsen Pruet filed the Hospital Association's motion on March 17, 2015, about four years after the Court of Appeals' published decision and about two months after the Supreme Court's published decision.

Columbia/CSA filed its motion for rehearing on February 19, 2015. Dr. Taillon and the JUA responded on March 12, 2015. Columbia/CSA's reply was originally due March 17, 2015. Columbia/CSA requested an extension based on its attorneys' workload to which counsel for Dr. Taillon consented. This extension made its reply due March 24, 2015. Nexsen Pruet filed its motion on behalf of the Hospital Association on March 17, 2015, the original due date for Columbia/CSA's reply.

Rule 213 addresses the filing of an *amicus curiae* brief. This rule requires that the brief comply with the requirements of Rule 211. Rule 211 requires final briefs to be served within 20 days of the record on appeal. Columbia/CSA's final brief was filed on August 5, 2013, and Dr. Taillon's final brief was filed on October 4, 2013 – over a year ago. Columbia/CSA filed its motion for rehearing on February 19, 2015, and Dr. Taillon replied on March 12, 2015. Nexsen Pruet submitted the *amicus* motion five days after Dr. Taillon's reply.

Most importantly, this is not an issue that should have just become known to the Hospital Association. The Court of Appeals issued its *published* decision on April 13, 2011, affirming that the medical malpractice statute of repose applies to an equitable indemnity claim brought by a hospital against a doctor. Thereafter, this Court granted the writ of certiorari on April 4, 2013 – almost two years ago. Yet, the Hospital Association now claims that this issue is so critical to its member hospitals that it should be allowed to file an *amicus curiae* brief in support of a petition for rehearing. The Hospital Association has had four years to attempt to participate in this dialogue before this Court. It offers no excuse or explanation for its delay. The Hospital Association clearly knew or should have known of this issue when the Court of Appeals issued its published decision four years ago. There is a well known equitable maxim that "[e]quity aids the vigilant, not those who slumber on their rights." *Eldridge v. Eldridge*, 398 S.C. 113, 728 S.E.2d 24, 28 (2012). With all due respect, that should apply equally to any "rights" as may be enjoyed by a potential *amicus* such as the Hospital Association. This litigation has been pending or threatened since 1999. Now is not the time for a new party to be added, even as an *amicus curiae*.

In sum, the proposed brief was filed well beyond the deadlines required in the appellate rules, and this Court should not allow the Hospital Association to appear as *amicus curiae* at this late date – four years after the Court of Appeals' published decision and two months after the Supreme Court's published decision.

**B. THE HOSPITAL ASSOCIATION'S MOTION AND PROPOSED BRIEF CONTAIN AFFIRMATIVE MISREPRESENTATIONS AND OMISSIONS.**

The Hospital Association argues that this Court's ruling is incorrect because it will preclude a hospital from bringing indemnity cases. The Association's motion and

brief argue that hospitals' indemnity actions "may often only arise after the six year statute of repose" (SCHA Motion p. 2). According to the Association, this will happen because an injured patient has three years to bring a medical malpractice action and medical malpractice actions often take years to resolve. It argues that an equitable indemnity claim does not arise until the hospital is compelled to pay damages to an injured patient. To support this assertion, the Association cites *Fowler v. Hunter*, 388 S.C. 355, 363, 697 S.E.2d 531, 535 (2010). This assertion is wrong, and *Fowler v. Hunter* does not support it.

Pursuant to Rule 14(a) of the South Carolina Rules of Civil Procedure, a defendant may serve a summons and complaint upon a person not a party to the action who is or may be liable to the defendant for all or part of the plaintiff's claim. S.C.R. Civ. P. 14(a); *Glen Falls Indem. Co. v. Atlantic Bldg. Corp.*, 199 F.2d 60, 63 (4<sup>th</sup> Cir. 1952). The basic purpose of Rule 14 is to avoid additional actions and to promote judicial efficiency by combining in one action all claims that arise out of the same set of facts. 6 Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE 2D § 1442 (West 2003); *Noland Co. v. Graver Tank & Manufacturing Co.*, 301 F.2d 43, 50 (4<sup>th</sup> Cir. 1962).

A defendant may assert a third-party claim under Rule 14(a) when a third party's liability is in some way dependent on the outcome of the main claim or when the third party is secondarily liable to the defendant. 6 Wright & Miller § 1446. The notion of secondary or derivative liability is central, and "it is irrelevant whether the basis of the third party claim is indemnity, subrogation, contribution, express or implied warranty or some other theory." *Id.* Under Rule 14(a), impleader is proper where a right to relief

exists under applicable substantive law. *Id.* See also, *First General Services of Charleston, Inc., v. Servicemaster, Inc.*, 314 S.C. 439, 442, 445 S.E.2d 446, 447 (S.C. 1994).

South Carolina has long recognized equitable indemnification. *Vermeer Carolina's Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 60, 518 S.E.2d 301, 305 (S.C. Ct. App. 1999). "Traditionally, courts have allowed equitable indemnity in cases of imputed fault or where some special relationship exists between the first and second parties." *Id.* South Carolina will allow a defendant to maintain a third party action for equitable indemnity under Rule 14. *First General Services of Charleston, Inc. v. Servicemaster, Inc.*, 314 S.C. at 443; 445 S.E.2d at 448 (applying SCRCP 14). See also, *Winnsboro v. Wiedeman-Singleton, Inc.*, 307 S.C. 128, 414 S.E.2d 118 (1991); *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971); *Griffin v. Van Norman*, 302 S.C. 520, 397 S.E.2d 378 (Ct. App. 1990).

Despite the representations in the Association's brief, *Fowler v. Hunter* does not change the rule that a defendant may implead another party under Rule 14 for equitable indemnity. In *Fowler v. Hunter*, a defendant asserted a cross-claim for equitable indemnity against a co-defendant. This Court allowed the claim to go forward but reversed the trial court's grant of summary judgment finding that a factual issue existed.

In fact, on June 9, 2000, Providence Hospital did move under Rule 14(a) to file a third-party indemnity claim and filed a third-party complaint as part of that motion. (Motion and complaint attached as Exhibit A). This third-party complaint names Dr. Taillon as a third-party defendant, and it was filed within the statute of repose. It was never served on Dr. Taillon, and it was withdrawn by Providence on July 21, 2000.

(Notice of withdrawal attached as Exhibit B). The third-party complaint and the withdrawal were filed by Nexsen Pruet when it defended Columbia/CSA in the original malpractice lawsuit. Nexsen Pruet now appears on behalf of the Hospital Association and asserts that the claim it filed against Dr. Taillon on behalf of Columbia/CSA “cannot arise under settled South Carolina law until a hospital is compelled to pay damages imputed to it ....” (SCHA Motion p. 2).

There is no case law or statutory support for this assertion, and it is directly contradicted by the pleadings filed by Nexsen Pruet on behalf of Columbia/CSA in the malpractice case. Nexsen Pruet now appears on behalf of the Hospital Association and takes a position directly opposed to the pleadings it filed on behalf of Columbia/CSA in the original lawsuit.

The Association also argues that applying the medical malpractice statute of repose as written is unfair because a “faultless healthcare provider” cannot recover from a “tortfeasor physician.” (SCHA Brief p. 3). In fact, when Nexsen Pruet appeared on behalf of Columbia/CSA in the malpractice lawsuit, it asserted a third-party claim within the statute of repose, but never served it and withdrew it. There has been no finding that Columbia/CSA is a “faultless healthcare provider” or that Dr. Taillon committed medical malpractice. In fact, Columbia/CSA responded to the medical malpractice plaintiff’s interrogatories by denying that any person was negligent in the treatment of the malpractice plaintiff. (Columbia/CSA’s answer to plaintiff’s supplemental interrogatories attached was Exhibit C).

Finally, the Hospital Association argues that the filing of a third-party claim for equitable indemnity may impact “the usual defense strategy of not ‘finger-pointing’ at trial

at other defendants." (SCHA Brief p. 2). However, that concern is actually unfounded. It is well settled that a cause of action for equitable indemnity is equitable in nature, and as a result, there is no right to a trial by jury on an equitable indemnity claim. *See, Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771, 774, n.6 (2010); *Loyola Federal Savings Bank v. Thomasson Properties*, 318 S.C. 92, 456 S.E.2d 423, 424 (Ct. App. 1995). Therefore, where a hospital finds it necessary to bring a third-party claim for equitable indemnity against a doctor before the statute of repose expires, that claim would be decided by the judge and not a jury, which eliminates any "finger-pointing" in arguing the case to the jury.

**C. NEXSEN PRUET REPRESENTS COLUMBIA/CSA AND APPEARED ON ITS BEHALF IN THE MEDICAL MALPRACTICE CASE. ITS APPEARANCE ON BEHALF OF THE HOSPITAL ASSOCIATION APPEARS TO BE AN ATTEMPT FOR COLUMBIA/CSA TO SUBMIT ADDITIONAL BRIEFING AFTER ALL DEADLINES HAVE ELAPSED.**

This Court should not allow the *amicus curiae* brief submitted by Nexsen Pruet on behalf of the Hospital Association. Doing so allows Columbia/CSA to have two separate opportunities to brief a case already decided against it by the trial court, the Court of Appeals, and this Court. Nexsen Pruet originally defended Columbia/CSA in the medical malpractice case. (Answer submitted by Nexsen Pruet on behalf of Columbia/CSA at App. 36-39).

Nexsen Pruet then filed a motion under Rule 14(a) to join Dr. Taillon as a defendant, but withdrew the motion. It later withdrew from the case only to re-emerge as counsel for the Hospital Association advocating that it could not file the pleadings it already filed in the case.

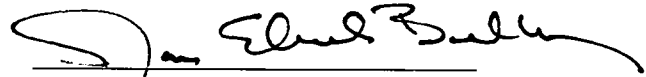
This Court should not allow Columbia/CSA to submit additional briefs as *amicus curiae* briefs when these briefs are submitted by Columbia/CSA's attorneys and advocate an approach to Rule 14(a) impleader at odds with the position those very attorneys took in the underlying litigation.

**CONCLUSION**

This Court should deny the petition to appear as *amicus curiae* because:

1. It is filed after all deadlines have elapsed;
2. It is incorrect factually and legally; and
3. It allows Columbia/CSA to rebrief the issues after all deadlines have passed.

Respectfully submitted,



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Attorneys for Respondents

March 27, 2015

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
  
Arthur Sharpe (a/k/a Arthur Lee Sharpe, Jr.  
and Patricia Gail Sharpe,

Plaintiffs,

vs.

Columbia-CSA/HS Greater Columbia  
Healthcare System L.P. d/b/a Providence  
Hospital and Michael Hayes, M.D.,

Defendants,

Providence Hospital,

Third-Party Plaintiff,

vs.

Michael P. Tallion, M.D.

Third-Party Defendant.

IN THE CIRCUIT COURT

Case No.: 99-CP-40-1802

**DEFENDANT PROVIDENCE'S  
NOTICE OF MOTION and  
MOTION FOR LEAVE TO  
FILE A THIRD-PARTY  
COMPLAINT**

DOUGLAS B. SCOTT  
CLERK OF COURT  
JUN 9 9 41 AM '99

**TO: J. EDWARD BELL, III, COUNSEL FOR THE PLAINTIFFS:**

PLEASE TAKE NOTICE that the defendant, Columbia-CSA/HS Greater Columbia Healthcare System L.P. d/b/a Providence Hospital (hereinafter "Providence") by and through its undersigned counsel, will move before the Presiding Judge of the Fifth Judicial Circuit at the Richland County Court House on the tenth (10th) day after service hereof, or at such time as counsel may be heard, for an Order granting leave to file third-party claims against Michael P. Tallion, M.D. This motion is made on grounds that, pursuant to SCRCP 14(a), it is in the best interests of justice



to allow such third-party claims to be brought and that allowing the third-party claims will neither cause prejudice to the defendants nor cause any delay in trial of this case.

Additionally, Providence will move, pursuant to SCRC 14© that Third-Party Defendant, Michael P. Taillon, M.D. be joined as a party defendant pursuant to SCRC 19(a)(1) as a person whose joinder will not deprive the Court of its jurisdiction and in whose absence complete relief cannot be accorded among those already parties.

This motion is based upon the pleadings herein, the applicable law, and the memorandum of law in support hereof which will be submitted in support hereof.

The proposed third-party claim are attached hereto.

Respectfully submitted,



Harold W. Jacobs  
Pamela J. Roberts  
Richard S. Dukes, Jr.  
NEXSEN PRUET JACOBS & POLLARD, LLP  
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P.O. Drawer 2426  
Columbia, South Carolina 29202  
(803) 771-8900

Attorneys for Defendant Columbia-CSA/HS Greater  
Columbia Healthcare System L.P. d/b/a Providence Hospital

June 9, 2000

Columbia, South Carolina

STATE OF SOUTH CAROLINA ) IN THE CIRCUIT COURT  
 )  
 COUNTY OF RICHLAND ) Case No.: 99-CP-40-1802

Arthur Sharpe (a/k/a Arthur Lee Sharpe, Jr.) )  
 and Patricia Gail Sharpe, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Columbia-CSA/HS Greater Columbia )  
 Healthcare System L.P. d/b/a Providence )  
 Hospital and Michael Hayes, M.D., )  
 )  
 Defendants, )  
 )  
 Providence Hospital, )  
 )  
 Third-Party Plaintiff, )  
 )  
 vs. )  
 )  
 Michael P. Tallion, M.D. )  
 )  
 Third-Party Defendant. )  
 )

**THIRD-PARTY  
 COMPLAINT**

NOW COMES DEFENDANT, Columbia-CSA/HS Greater Columbia Healthcare System L.P. d/b/a Providence Hospital (hereinafter "Providence") who complains as follows against Third-Party Defendant Michael P. Tallion, M.D.:

1. Plaintiffs, Arthur Sharpe (a/k/a Arthur Lee Sharpe) and Patricia Gail Sharpe have made allegations that they suffered injury as a result of the negligence of Defendant Providence and/or Defendant Michael Hayes, M.D., an independent contractor practicing in Providence. (A copy of the Complaint is attached hereto as *Exhibit A*).

2. Upon information and belief, Third-Party Defendant, Michael P. Tallion, M.D., also an independent contractor physician practicing in Providence's Emergency Room, was a treating of Plaintiff Arthur Sharpe in the Providence Hospital Emergency Department on May 31, 1997.

3. If Providence is found liable in this case, its liability will arise solely from the actions of either Dr. Hayes and/or Dr. Tallion.

4. As a result thereof, should judgment be entered against Providence herein, it is entitled to indemnification from either Dr. Hayes or Dr. Tallion or both.

WHEREFORE Defendant Providence prays that should judgment be entered against it, that it be indemnified from such judgment by the co-defendant, the third-party defendant, or both as appropriate.



Harold W. Jacobs

Pamela J. Roberts

Richard S. Dukes, Jr.

NEXSEN PRUET JACOBS & POLLARD, LLP

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P.O. Drawer 2426

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(803) 771-8900

Attorneys for Defendant Columbia-CSA/HS Greater  
Columbia Healthcare System L.P. d/b/a Providence Hospital

June 9, 2000

Columbia, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF RICHLAND )

IN THE CIRCUIT COURT  
  
Case No.: 99-CP-40-1802

Arthur Sharpe (a/k/a Arthur Lee Sharpe, Jr.) )  
and Patricia Gail Sharpe, )  
 )  
Plaintiffs, )

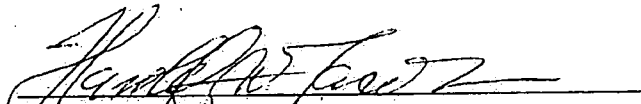
vs. )

Columbia-CSA/HS Greater Columbia )  
Healthcare System L.P. d/b/a Providence )  
Hospital and Michael Hayes, M.D., )  
 )  
Defendants. )

**DEFENDANT PROVIDENCE'S  
WITHDRAWAL OF MOTION  
FOR LEAVE TO FILE THIRD-  
PARTY COMPLAINT**

**TO: J. EDWARD BELL, III, COUNSEL FOR PLAINTIFFS, JOHN HAMILTON SMITH,  
COUNSEL FOR DEFENDANT, MICHAEL HAYES, and JOHN BRADLEY,  
COUNSEL FOR PROPOSED THIRD-PARTY DEFENDANT.**

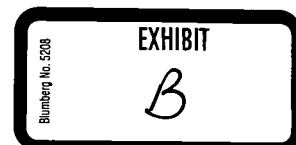
DEFENDANT Columbia-CSA/HS Greater Columbia Healthcare System L.P. d/b/a  
Providence Hospital hereby withdraws its Motion for Leave to File Third Party Complaint against  
Michael P. Taillon, M.D., filed on June 9, 2000.

  
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Pamela J. Roberts  
Richard S. Dukes, Jr.  
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Attorneys for Columbia-CSA/HS Greater Columbia  
Healthcare System L.P. d/b/a Providence Hospital

July 21, 2000

Columbia, South Carolina



STATE OF SOUTH CAROLINA )  
 ) IN THE COURT OF COMMON PLEAS  
COUNTY OF RICHLAND )

Arthur Sharpe (a/k/a Arthur Lee Sharpe, Jr.) ) Docket No.: 01-CP-40-4797R  
And Patricia Gail Sharpe, )

Plaintiffs, )

vs. )

Columbia-CSA/HS Greater Columbia )  
Healthcare System, L.P., d/b/a Providence )  
Hospital, and Michael Hayes, M.D., )

Defendants. )

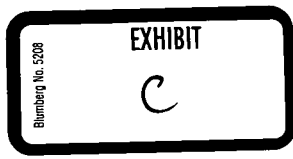
**DEFENDANT COLUMBIA-CSA/HS  
GREATER COLUMBIA HEALTHCARE  
SYSTEM L.P. D/B/A PROVIDENCE  
HOSPITAL'S ANSWERS TO  
PLAINTIFFS' SUPPLEMENTAL  
INTERROGATORIES**

**TO: PLAINTIFFS AND J. EDWARD BELL, III, ESQUIRE AND ANNE M. BELL,  
ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS:**

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, the Defendant hereby  
Answers Plaintiff's Supplemental Interrogatories as follows:

**GENERAL OBJECTIONS AND RESERVATIONS**

1. All objections regarding the relevancy, admissibility at trial, or other use of any information, document or other tangible item provided or identified in response to these Interrogatories are expressly reserved.
2. The Defendant objects to all Interrogatories to the extent they seek information protected from disclosure by the attorney/client and work product privileges.
3. Discovery is continuing in this case. The Defendant's responses are based on the information obtained thus far. Further investigation and discovery may reveal information requiring the Defendant to supplement, modify or otherwise alter these responses.



INTERROGATORIES/ANSWERS

1. Do you contend that any person or entity was negligent or deviated from the accepted standard of medical and/or nursing care in the care and treatment of Arthur Sharpe? If so, please explain your answer in detail.

**ANSWER:**

No.

2. During Mr. Sharpe's admission to the Defendant hospital, do you have any evidence or are aware of any evidence which would inferentially show that the defendant Hayes failed to properly inform you of Mr. Sharpe's status in a timely manner? If so, please explain your answer in detail.

**ANSWER:**

Objection. Mr. Sharpe was not admitted to the Defendant Hospital.

3. Do you have any criticism of any care rendered to Mr. Sharpe during his stay at the defendant hospital? If so, please identify the name of the person(s) who rendered the care, their last known address and their job title.

**ANSWER:**

No.

4. Assume for the purpose of this Interrogatory that you are found to be negligent in the care and treatment of Mr. Sharpe. If you are found to be negligent in your care and treatment of Mr.

Sharpe, do you contend that anyone other than yourself was medically negligent in their care and treatment rendered to Mr. Sharpe? If so, please explain your answer in detail.

**ANSWER:**

Objection. This question cannot be answered in that it is vague and makes assumptions without support. In addition, this question cannot be answered as Defendants do not know what specific act of negligence that the Plaintiff is assuming to be found. Finally, this finding would only be made by a jury and the negligence of any parties would be for a jury to determine. We contend that no one was negligent. If the hospital is found to be negligent, it can only be as the result of the actions of independent physicians. At this time, discovery on this issue is continuing.

5. Do you plan to introduce any evidence at the trial of this case which would indicate that anyone who provided medical care and treatment to Mr. Sharpe could have or should have performed their medical care and treatment in a better manner, even if the other person(s) care and treatment would not have been considered a deviation from the accepted standard of medical and/or nursing care.

**ANSWER:**

It is not anticipated that evidence of this nature would be offered or be admissible, however, discovery has not been completed in this case and no decisions on trial evidence have been made at this time.

6. Please identify the names and last known addresses of all individuals who had contact with and/or provided medical services to Mr. Sharpe while he was at the defendant hospital.

**ANSWER:**

Any individuals who had contact with and/or provided medical services to Mr. Sharpe, would be identified in the Plaintiff's medical record, a copy of which has been provided to counsel for the Plaintiff.

7. In regards to each individual named above, please identify their shift, what services they rendered to Mr. Sharpe, whether or not they are still employed by the Hospital and their last known address if they are no longer employed by the Hospital.

**ANSWER:**

See Answer to Interrogatory Number 6 above as to identity of individuals who treated the plaintiff.

Barnes, Alford, Stork & Johnson, LLP

By: \_\_\_\_\_

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Attorney for Defendant

April 6, 2004

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2011-197986

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**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.

**PROOF OF SERVICE**

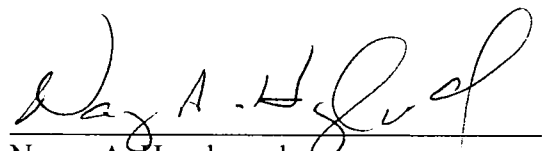
I certify that I have served the Reply to South Carolina Hospital Association's Motion to Appear as Amicus Curiae on the Petitioners by depositing a copy of same in the United States Mail, postage prepaid, on March 27, 2015, addressed to their attorneys of record as follows:

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Russell T. Burke, Esquire  
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Columbia, SC 29202

March 27, 2015

  
\_\_\_\_\_  
Nancy A. Hazelwood  
Legal Assistant to James Edward Bradley