

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Number 2019-CP-21-00777

Dr. Gregory A. May,

Respondent,

v.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe

Appellants.

APPENDIX

Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
GIBBS & HOLMES
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033
ATTORNEYS FOR THE APPELLANTS

Other Counsel of Record:
Mark W. Buyck, III
WILLCOX, BUYCK & WILLIAMS
Post Office Box 1909
Florence, South Carolina 29503
(843) 662-3258
ATTORNEY FOR RESPONDENT

RECEIVED

JUL 22 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Number 2019-CP-21-00777

Dr. Gregory A. May,

Respondent,

v.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe

Appellants.

RECORD ON APPEAL

Allan R. Holmes
Rebecca J. Wolfe
GIBBS & HOLMES
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033
ATTORNEYS FOR THE APPELLANTS

Mark W. Buyck, III
WILLCOX, BUYCK & WILLIAMS, P.A.
Post Office Box 1909
Florence, South Carolina 29503
(943) 662-3258
ATTORNEY FOR THE RESPONDENT

INDEX

Order of June 17, 2019	1
Order of October 21, 2019	4
Order of November 20, 2019	10
Complaint and Exhibits	13
Answer and Exhibits	34
Transcript of October 2, 2019 Proceedings.....	58
Plaintiff's Motion for Restraining Order and Injunction	93
Plaintiff's Memorandum in Support of Motion for Restraining Order and Injunction.....	94
Plaintiff's Motion for Summary Judgment	99
Plaintiff's Memorandum in Support of Motion for Summary Judgment and Exhibits.....	101
Defendants' Motion for Summary Judgment	122
Defendants' Memorandum in Support of Motion for Summary Judgment and Response In Opposition to Plaintiff's Motion for Summary Judgment and Exhibits ¹	124
Defendants' Motion for Reconsideration	190
Defendant's Memorandum in Support of Motion for Reconsideration.....	192
Testimony	
Excerpts from Deposition of Dr. Gregory A. May	200
Excerpts from Deposition of Dr. Llewellyn A. Rowe	207
Excerpts from Deposition of Theresa Rowe	215
Certificate of Appellant	216

¹ Exhibits A-D to Defendants' Memorandum in Support of Motion for Summary Judgment and Response In Opposition to Plaintiff's Motion for Summary Judgment (R. pp. 150-190) were presented directly to the Court and opposing counsel upon the filing of this Motion but were not filed contemporaneously with the Clerk of Court.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	FOR THE TWELFTH JUDICIAL CIRCUIT
Dr. Gregory A. May,	)	Case No.: 2019-CP-21-00777
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
Advanced Cardiology Consultants, P.C.,	)	
Dr. Lew A. Rowe, and Theresa Rowe,	)	
	)	
Defendants.	)	
_____	)	

This matter comes before the Court on Motion of the Plaintiff for a Temporary Injunction. A hearing was held at Noon on June 10, 2019. Mark W. Buyck, III, Esq., of the firm Wilcox, Buyck, & Williams, P.A., appeared for the Plaintiff. Allan R. Holmes, Esq., and Rebecca J. Wolfe, Esq., of the firm, Gibbs & Holmes, appeared for the Defendants.

Upon due consideration of the pleadings, memoranda, affidavits, and arguments of counsel, the Court denies the Plaintiff's Motion for Temporary Injunction. The Court finds that the Plaintiff has failed to make the necessary showing for the entry of a Temporary Injunction. The Court also finds that the appropriate process for addressing the issues between the parties is a proceeding which will allow an expedited consideration of the merits of Plaintiff's claim for a declaratory judgment, as well as the merits of the other claims of both parties.

In order to expedite the matter, the Court Orders that the parties engage in discovery so as to complete all discovery within sixty (60) days of the entry of this Order. This Court will make itself available as needed by the parties to resolve any discovery disputes and keep this matter on track for expedited consideration of its merits thereafter by motions for summary judgment and/or trial.

It is THEREFORE ORDERED that:

- 1) the Motion of the Plaintiff for a Temporary Injunction is denied;
- 2) this matter will be expedited, and the parties shall engage in discovery so as to complete all discovery within sixty (60) days of the entry of this Order. This Court will make itself available as needed by the parties to resolve any discovery disputes and keep this matter on track for expedited consideration of its merits by motions for summary judgment and/or trial.

AND IT IS SO ORDERED.

MICHAEL G. NETTLES
CHIEF ADMINISTRATIVE JUDGE

June , 2019

Florence, South Carolina



Florence Common Pleas

Case Caption: Gregory A May VS Advanced Cardiology Consultants , defendant,
et al

Case Number: 2019CP2100777

Type: Order/Temporary Injunction

So Ordered

s/ The Honorable Michael G. Nettles #2140

Electronically signed on 2019-06-17 11:16:06 .page 3 of 3

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	FOR THE TWELFTH JUDICIAL CIRCUIT
	)	
Dr. Gregory A. May,	)	Case No.: 2019-CP-21-00777
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
Advanced Cardiology Consultants, P.C.,	)	
Dr. Lew A. Rowe, and Theresa Rowe,	)	
	)	
Defendants.	)	
	)	

This matter came before the Court on the Plaintiff's motion for a declaratory judgment that the restrictive covenant contained in his employment contract with the Defendant Advanced Cardiology Consultants, P.C. ("ACC") is over-broad and unenforceable. The Plaintiff also sought a declaration that the Defendants breached the contract between the parties and was thus unenforceable. The Defendants have also filed a Motion for Summary Judgment seeking dismissal of the entire matter based on their contention that the restrictive covenant is valid pursuant to South Carolina law and enforceable against the Plaintiff. A hearing was held on October 2, 2019. The record also contains the depositions of the parties as well as verified pleadings and affidavits. For the reasons stated herein, the Plaintiff's motion for a declaration that the covenant is unenforceable is granted. The Defendants' Motion for Summary Judgment is denied and the Plaintiff's motion with regards to the Defendants' alleged breach of contract is also denied.

The Plaintiff is a board-certified interventional cardiologist. He was employed by the Defendant ACC from 2007 until his resignation effective March 31, 2019. Upon his employment with the Defendants, he entered into an employment agreement which contained the restrictive covenant at issue in this litigation. The contract between the parties was renewed on several

occasions, most recently on March 30, 2018; and the terms of the restrictive covenant remained constant throughout the Plaintiff's employment with the Defendant.

The restrictive covenant reads as follows:

In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination.

Dr. Rowe, the sole owner of Advanced Cardiology Consultants and the founder and practice president, testified that his physician contracts had contained this exact restriction since his founding of the business in 1994. This is noteworthy because in the last five years both of the primary care hospitals which service the Florence market and which ACC provided services have purchased private cardiology practices. Both McLeod Regional Medical Center in Florence and Carolinas Hospital System (now MUSC) are now "engaged in the practice of cardiology." Dr. Rowe further testified that until approximately five years ago all of the cardiologists in Florence were engaged in private practice and not employees of the hospitals. At the current time, ACC is the only private cardiology practice in the Florence area.

Covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer. *Rental Uniform Services of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983); see also *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (S.C. App. 1992); see also *Faces Boutiques v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App. 1995). A restriction against competition must be narrowly drawn to protect the

legitimate interest of the employer. *Almers v. South Carolina National Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975). A covenant not to compete will be upheld only if it is:

- (1) Necessary for the protection of the legitimate interest of the employer;
- (2) Reasonably limited in its operation with respect to time and place;
- (3) Not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (4) Reasonable from the standpoint of sound public policy; and
- (5) Supported by valuable consideration.

Faces Boutiques, 455 S.E.2d at 708.

“If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved.” *Faces Boutiques* at 709, see also *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972). The court “cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally.” *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) (“if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements.”)

Dr. May is trained and practiced in the medical field for over 30 years. He is more than qualified to perform a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology. In this respect, the covenant not to compete cannot be upheld since it is not necessary for the protection of the legitimate interest of the employer to prevent Dr. May from seeking any type of employment with the two hospitals. Likewise, the restriction against competition is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood.

The Defendants cite the case of *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013) as an example of South Carolina Appellate Courts upholding a similar covenant not to compete. This Court finds that the two covenants are clearly distinguishable. In *Baugh*, the sole prohibition was the physician continuing or commencing the active practice of medicine “in the field of cardiology”. The covenant at issue here involves a blanket prohibition for the physician becoming “employed by or associated in (with) ... another business entity, engaged in the practice of cardiology.” The restrictive covenant at issue here is similar to that found in *Faces Boutiques* which prohibited the employee from being connected “in any manner” with “any business in direct competition with the type of business conducted by [Faces].” *Faces Boutiques v. Gibbs*, 318 S.C. 39 - 41, 455 S.E.2d 707, 708 (S.C. App. 1995).

The Defendants also argue that Dr. May has essentially acquiesced in the Defendants’ interpretation of the covenant. The interpretation of the agreement is a legal matter and “[I]n South Carolina, [**325] the restrictions in a [noncompete] clause cannot be rewritten by a court or limited by the parties’ agreement, but must stand or fall on their own terms.”); *Stonhard*, 366 S.C. at 160, 621 S.E.2d at 354 (“The agreement fails to limit the covenant to a particular geographical area. To add and enforce such a term requires this [c]ourt to bind these parties to a term that does not reflect the parties’ original intention. Therefore, we hold that the covenant, despite any reformation, is void and unenforceable as a matter of public policy.”). *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 633, 799 S.E.2d 318, 324-325, 2017 S.C. App. LEXIS 25, *16, 2017 WL 798496.

NOW THEREFORE,

(1) The Court finds that the restrictive covenant between the parties is unenforceable; and

(2) The Court denies both the Plaintiff and Defendants' motions regarding breach of contract insofar as both of those motions involve disputed issues of material fact.

AND IT IS SO ORDERED.

MICHAEL G. NETTLES
CHIEF ADMINISTRATIVE JUDGE

_____, 2019

Florence, South Carolina



Florence Common Pleas

Case Caption: Gregory A May VS Advanced Cardiology Consultants , defendant,
et al
Case Number: 2019CP2100777
Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140

Electronically signed on 2019-10-21 11:58:25 page 6 of 6

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Florence
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP2100777

Gregory A May
PLAINTIFF(S)

Advanced Cardiology Consultants et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled);
☐ Other
- ☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant's Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration is Denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/20/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Florence Common Pleas

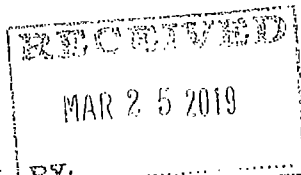
Case Caption: Gregory A May VS Advanced Cardiology Consultants , defendant,
et al
Case Number: 2019CP2100777
Type: Order/Electronic Form 4

So Ordered

s/ The Honorable Michael G. Nettles #2140

Electronically signed on 2019-11-20 11:55:40 page 3 of 3

ELECTRONICALLY FILED - 2019 Nov 20 12:55 PM - FLORENCE - COMMON PLEAS - CASE#2019CP2100777



Mark W. Buyck, Jr.
Hugh L. Willcox, Jr.
Wm. Reynolds Williams
Mark W. Buyck, III
E. Lloyd Willcox, II
John H. Muench † GA & KY
Tracy L. Wright
J. Scott Kozacki
Walker H. Willcox
Paula A. Sartor
Katherine M. Ryan † AL

BY:

LAW OFFICES
WILLCOX, BUYCK, & WILLIAMS

PROFESSIONAL ASSOCIATION

WWW.WILLCOXLAW.COM

248 WEST EVANS STREET (29501)

POST OFFICE BOX 1909

FLORENCE, SOUTH CAROLINA 29503-1909

2050 Corporate Centre Dr.
Suite 230
Myrtle Beach, SC 29577
Telephone (843) 650-6777
Fax (843) 650-6767

† Additionally Licensed
♦ Certified Mediator

ESTABLISHED 1895

Reply To: Florence

Telephone (843) 662-3258

Fax (843) 662-1342

March 22, 2019

Allan R. Holmes, Esquire
Gibbs & Holmes
P O Box 938
Charleston, SC 29402-0938

Re: Dr. Gregory A. May v. Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe and Theresa Rowe
Case No.: 2019-CP-21-00777
Our File No.: 16325.17418

Dear Allan:

Enclosed please find a Summons and Complaint which we have filed on behalf of Dr. May. I would appreciate it if you would let me know whether you can accept service on behalf of the Defendants. I note that Dr. Rowe is the Registered Agent for Advanced Cardiology Consultants, P.C.

Dr. May has instructed me to attempt to get this matter in front of a judge as quickly as possible. In that vein, I anticipate that I will be seeking an expedited hearing or a TRO.

If you cannot accept service, please let me know as soon as possible so that I can make alternative arrangements.

Yours very truly,

Mark W. Buyck, III

Email: mb3@willcoxlaw.com

MWB, III/tpb
Enclosures
Cc: Dr. Gregory A. May

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Dr. Gregory A. May,

Plaintiff,

vs.

Advanced Cardiology Consultants, P.C.,

Dr. Lew A. Rowe, and Theresa Rowe,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FOR THE TWELFTH JUDICIAL CIRCUIT
) C/A: 2019-CP-21-00777

ACCEPTANCE OF SERVICE

I, Allan R. Holmes, Esquire, am authorized to accept service of process of the following:

Summons and Complaint with attached Exhibit A

in the above captioned matter on behalf of Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe.

Therefore, I hereby ACCEPT SERVICE of the above listed pleadings on behalf of Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe.

Allan R. Holmes

Dated

STATE OF SOUTH CAROLINA
COUNTY OF FLORENCE

) IN THE COURT OF COMMON PLEAS
) FOR THE TWELFTH JUDICIAL CIRCUIT
) C/A: 2019-CP-21-_____

Dr. Gregory A. May,

Plaintiff,

vs.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe,

Defendants.

**SUMMONS
(JURY TRIAL REQUESTED)**

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices: 248 West Evans Street, P O Box 1909, Florence, South Carolina 29503-1909, Tel. No. (843) 662-3258, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

DATED at Florence, S.C., this 20th day of March, 2019.

WILLCOX, BUYCK, & WILLIAMS, P.A.

By: s/Mark W. Buyck, III

Mark W. Buyck, III #011902

PO Box 1909

Florence, S C 29503-1909

(843) 662-3258 - Tel.

(843) 662-1342 - Fax

Email: mb3@willcoxlaw.com

ATTORNEYS FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	FOR THE TWELFTH JUDICIAL CIRCUIT
	)	
Dr. Gregory A. May,	)	Case No.: 2019-CP-21-_____
	)	
Plaintiff,	)	
	)	
v.	)	COMPLAINT
	)	(Verified)
	)	(Jury Trial Requested)
Advanced Cardiology Consultants, P.C.,	)	
Dr. Lew A. Rowe, and Theresa Rowe,	)	
	)	
Defendants.	)	
	)	

The Plaintiff complaining of the Defendants would allege as follows:

1. The Plaintiff is a Board Certified Cardiologist residing in Florence, South Carolina.
2. The Defendant Advanced Cardiology Consultants, P.A. is a South Carolina corporation.
3. The Defendants Dr. Lew A. Rowe and Theresa Rowe are residents of Florence, South Carolina.
4. Upon information and belief, the Defendant Dr. Lew A. Rowe ("Dr. Rowe") is the President and sole shareholder of Advanced Cardiology Consultants, P.A., hereinafter, "ACC" or the "Practice".
5. The Defendant Theresa Rowe is the Office Manager of the Practice and the spouse of the Defendant Dr. Rowe.
6. ACC is a professional medical practice with its office in the City of Florence, South Carolina.
7. Jurisdiction and venue is proper in Florence County, South Carolina.

8. The Plaintiff has been employed with Dr. Rowe and the Practice since April 22, 2008.

9. The Plaintiff's initial Employment contract was for a period of five (5) years. The parties renewed and executed a second contract for an additional 5-year term.

10. On or about March 30, 2018, Dr. Rowe and the Practice presented Dr. May with a 1-year contract commencing March 30, 2018 and ending on March 31, 2019. (See attached Exhibit "A").

11. The three contracts are identical in all respects other than the duration and include a restrictive covenant which purports to prevent Dr. May from being employed as a cardiologist for a period of two (2) years after termination within a 25 mile radius of McLeod Regional Medical Center, Florence, South Carolina.

12. While employed at the Practice, Dr. May and the other Employed Physicians would cover both McLeod Hospital and Carolinas Hospital in Florence.

13. Dr. May maintained privileges at both hospitals.

14. As of November 1, 2018, the Practice employed five (5) physicians (hereinafter the "Employed Physicians") in addition to the owner, Dr. Rowe.

15. In late October, early November 2018, Dr. Rowe informed the five (5) Employed Physicians of the Practice that he would no longer participate in the call schedule. At that time, the six physicians were covering call at both Carolinas Hospital in Florence as well as the McLeod Hospital in Florence.

16. As a consequence of Dr. Rowe refusing to take any further calls, the call schedule for the remaining Employed Physicians was increased and more frequent. Dr. Rowe stated that he did not plan on hiring another physician at that time.

17. Dr. May had a conversation with Dr. Rowe during which Dr. Rowe indicated that he was no longer interested in hospital practice and was interested in restricting himself to a non-hospital practice.

18. Other Employed Physicians other than Dr. May indicated they too would consider switching to an office practice only business model, thereby threatening Dr. May's future full-time interventional cardiology practice.

19. Dr. May discussed these concerns with Dr. Rowe who then informed him "You can do whatever you want to do; work in the hospital if you want."

20. Within days Dr. May then inquired of Dr. Rowe if he intended to enforce the restrictive covenant contained in the employment agreement in the event Dr. May sought employment at a local hospital. Dr. Rowe indicated that he would not enforce the restrictive covenant contained in the employment agreement.

21. With the assurances of Dr. Rowe, Dr. May initiated discussions with both local hospitals regarding hospital employment opportunities.

22. Dr. May initially contacted McLeod Health regarding employment.

23. After discussing the covenant not to compete, individuals at McLeod Health informed Dr. May that they would not discuss employment opportunities with him unless they were assured in writing that the Practice did not object.

24. On November 15, 2018, Theresa Rowe sent an email to McLeod Health indicating that the Practice did not object to Dr. May pursuing employment opportunities at the hospital.

25. On or about December 26, 2018, the six physicians held a meeting to discuss call coverage. During this meeting, Dr. Rowe informed the Employed Physicians that he was not planning to hire an additional physician to replace him on the call schedule.

26. It was proposed that the Practice drop coverage of Carolinas Hospital, one of the reasons being that calls had become more frequent without Dr. Rowe's participation.

27. Dr. May opposed cancelling the Practice's coverage of Carolinas Hospital; however, Dr. Rowe indicated that he would abide by whatever vote the Employed Physicians made. The remaining Employed Physicians voted to discontinue the Carolinas coverage over Dr. May's objections.

28. Carolinas Hospital maintains a policy that M.D's must participate in call coverage to maintain hospital privileges.

29. Dr. May could not continue call coverage at Carolinas Hospital without the assistance of the fellow physicians of his Practice. He was forced to inform the hospital that he would no longer be able to take call and would therefore have to drop his privileges.

30. On January 14, 2019, Dr. Ng., one of the remaining Employed Physicians, abruptly departed the Practice after being offered a one (1) month renewal of his employment agreement. This left only four (4) physicians to cover call.

31. Dr. May has been practicing in the Florence area for nearly eleven (11) years. He is a Board Certified Cardiologist specializing in interventional cardiology. He has an established doctor-patient relationship with thousands of patients.

32. Many of Dr. May's patients prefer Carolinas Hospital to McLeod Health and he has provided services at both hospitals the entire time he has been with the Practice, until January 1, 2019.

33. The Practice's decision to discontinue call coverage at Carolinas Hospital has deprived patients of Dr. May's care at that facility. The decision also deprives Dr. May full access to his patients as well as limits his ability to perform his professional duties.

34. Based on the representations of Dr. Rowe, Dr. May discussed employment opportunities with Carolinas Hospital.

35. Carolinas Hospital has offered Dr. May a position practicing interventional cardiology conditioned on Dr. Rowe's reducing his promise not to enforce the restrictive covenant to writing.

36. Dr. May contacted Dr. Rowe and informed him of his negotiations with Carolinas Hospital and their indication that they would hire him if the Practice would provide a waiver of the non-compete. Dr. Rowe indicated to Dr. May that he would have the Practice's Office Manager prepare the waiver.

37. Several days later, Dr. May inquired of the hospital whether they had received the waiver. He was informed that they had not.

38. Dr. May then contacted the Practice's Office Manager regarding the status of the waiver and Mrs. Rowe informed Dr. May that the Practice would not provide a waiver.

39. Upon information and belief, Mrs. Rowe had a discussion with a representative of Carolinas Hospital regarding the restrictive covenant and informed them that the employment agreement had a \$500,000 buy-out and requested the hospital's offer.

40. Subsequent to this conversation, Dr. May has learned that the Practice has hired an attorney who has sent a Cease and Desist letter to Carolinas Hospital threatening litigation in the event of any further communications with Dr. May regarding employment.

41. Faced with the diminishment of practice opportunities and the Practice's refusal to honor its promise to release him from the restrictive covenant, Dr. May submitted a 30-day notice to terminate the agreement on March 19, 2019, twelve (12) days prior to the end of the contractual term, but in compliance with the terms of the agreement.

42. A third Employed Physician, Dr. Brady, has tendered his resignation from the Practice effective April 12, 2019.

43. The Practice has notified McLeod Health that it would no longer provide call coverage to that Hospital effective April 1, 2019. As a result of this action, the Practice will not be covering either hospital in Florence. Patients of the Practice will not be seen for either cardiac admission or cardiac consultation at either hospital by the Practice.

**FOR A FIRST CAUSE OF ACTION
(Breach of Contract)**

44. The Plaintiff realleges and reiterates Paragraphs 1 through 44 above as if fully set out herein.

45. Under the terms of the employment agreement, Dr. May's compensation is based on 50% of the collected fees generated by him.

46. In the employment agreement, the Practice promises to provide the physician "such facilities, equipment, and supplies as it deems necessary for physician's performance of his professional duties under this agreement, including... such other facilities and services as are suitable to his position and necessary to the adequate performance of his duties."

47. The employment agreement also requires the physician and the Practice to provide "equitable call coverage."

48. The Practice's decision to refuse call coverage at Carolinas Hospital impairs Dr. May's ability to provide care to his patients and fully practice his profession in the community, disrupting patients' continuity of care, and depriving the public of medical services.

49. The Practice's refusal to provide call coverage to Carolinas Hospital Systems has deprived and hindered Dr. May's ability to care for his patients who prefer Carolinas Hospital, disrupting the continuity of care in treating his patients in an office and hospital setting, and impairing his ability to fully practice his specialty.

50. The Defendants have breached the contract as adequate call coverage is not equitably distributed among the Physicians.

51. The Defendants have breached the contract in that they have not provided Dr. May access to continue his practice at Carolinas Hospital, thereby depriving his patients continuity of care and seriously impairing his earnings potential.

52. The actions described above have and will continue to cause monetary damage to Dr. May including a loss of earning capacity and a loss of income which will extend into the future.

53. Plaintiff seeks actual, consequential, and exemplary damages as a direct and proximate result of the Defendants' breach of the agreement.

**FOR A SECOND CAUSE OF ACTION
(Tortious Interference with Contract)**

54. The Plaintiff realleges and reiterates Paragraphs 1 through 54 above as if fully set out herein.

55. Based on Dr. Rowe's and the Practice's representations, Dr. May has sought alternative employment.

56. Dr. Rowe and the Practice were fully aware that Dr. May was pursuing employment opportunities in the Florence area and even encouraged him to do so.

57. After obtaining an offer from Carolinas Hospital to practice interventional cardiology at its Florence facility, Dr. Rowe informed Dr. May that he would provide the hospital written confirmation that he and the Practice would waive the covenant not to compete contained in the employment agreement.

58. Instead of waiving the provision of the contract, the Practice now demands that Dr. May "buy out his contract" for the sum of \$500,000.

59. The Office Manager of the Practice, the Defendant Theresa Rowe, has indicated to Dr. May that if he would prefer, he could get a loan and purchase the Practice.

60. The Practice, Dr. Rowe, and Theresa Rowe intentionally interfered with Dr. May's potential contractual relations for an improper purpose and by improper means attempting to secure monies from Dr. May. The Defendants' actions in interfering with Dr. May's contractual relationship with Carolinas Hospital has caused Dr. May immediate and irrevocable damages.

61. Dr. May is an 11-year employee of the Practice and has practiced interventional cardiology in the community the entire 11 years. He maintains a home in Florence and has children in elementary and high school.

62. Dr. May's current contract with the Practice and Dr. Rowe expires by its terms on March 31, 2019.

63. The Defendants are fully aware that Dr. May requires privileges at a hospital in order to practice his specialty, interventional cardiology.

64. The Defendants are also fully aware that the time required to obtain privileges at any hospital whether within or without the restrictive area is generally a period of 90 days, a period of time during which Dr. May would be unemployed and his patients would not have access to his services.

65. At the time Dr. May secured an employment offer from Carolinas Hospital, there was ample time for him to begin and complete the credentialing process prior to April 1, 2019.

66. As of the date of this Complaint, there is likely not ample time to receive credentialing at any hospital prior to April 1, 2019.

67. Dr. May will experience a period of unemployment or no fee generation while waiting for credentialing from any future employer. His patients will be deprived of his full range of services during this period.

68. The facts above are all known to the Defendants who are now using the threat of unemployment as essentially a tool to extort funds from Dr. May or Carolinas Hospital in order for the Defendants to release him from the covenant not to compete.

69. As a direct and proximate result of the tortious inference with Plaintiff's employment agreement with Carolinas Hospital, Plaintiff has sustained damages including a loss of earning capacity and a loss of income, which will extend into the future.

70. The Plaintiff has further suffered emotional distress and mental anguish as a result of Defendant's actions.

71. Plaintiff is entitled to an award of actual damages against the Defendants as well as punitive damages against the Defendants for their malicious and bad faith actions in harming Plaintiff, in amounts to be determined by a jury.

72. The Plaintiff is further entitled to an award of reasonable attorney's fees and costs for this action.

**FOR A THIRD CAUSE OF ACTION
(Promissory Estoppel)**

73. The Plaintiff realleges and reiterates Paragraphs 1 through 73 above as if fully set out herein.

74. The Defendants made an unambiguous promise to the Plaintiff that they would not enforce the covenant not to compete in the event the Plaintiff secured a job within the restrictive covenant area.

75. Dr. May reasonably relied on the Defendants' promise and searched and obtained alternative employment.

76. The Defendants made the unambiguous promise expecting that Mr. May would rely on the promise in securing alternative employment.

77. It was foreseeable to the Defendants that Dr. May would rely on the promise.

78. Dr. May has sustained injury in reliance on the promise in that the Defendants now demand \$500,000 from him or in the alternative that he experience a prolonged period of unemployment. Further Dr. May has or will suffer other monetary and non-monetary damages, including lost wages and attorney's fees and costs.

**FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment Under SC Code Anno. §§ 15-53-10 et seq.)**

79. The Plaintiff realleges and reiterates Paragraphs 1 through 79 above as if fully set out herein.

80. Based upon the foregoing, the Plaintiff requests that this court enter an Order declaring that the employment agreement between the parties, in particular anything contained therein applying to restriction of the Plaintiff's future employment, is an unenforceable contract at law and that the Defendants' conduct as alleged herein constitutes a breach of the agreement.

81. Further, the Plaintiff requests that he be awarded reasonable attorney's fees and costs in seeking this declaration by the court.

WHEREFORE, the Plaintiff seeks an entry of judgment against the Defendants for all the relief requested herein and to which the Plaintiff may otherwise be entitled, including without limitation:

- (1) Entering judgment in favor of the Plaintiff against the Defendants in the final order;
- (2) Enjoining the Defendants from interfering with the efforts of the Plaintiff to secure alternative employment as well as enjoining them from threatening potential employers with legal action in the event of Dr. May's employment;
- (3) An order declaring the Restrictive Covenants contained in the Parties' Employment Agreement as null and voided by virtue of the Defendants' breach of the Employment Agreement;
- (4) Actual, consequential, and exemplary damages as a direct and proximate result of the Defendants' breach of the Employment Agreement;
- (5) Actual and punitive damages against the Defendants for their malicious and bad faith actions in tortiously harming Plaintiff;

- (6) Any lost wages which the Plaintiff may suffer by virtue of the Defendants' tortious interference with Plaintiff's prospective employment opportunities; and
- (7) Plaintiff is further and entitled to an award of reasonable attorney's fees and costs in this action.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/Mark W. Buyck, III
Mark W. Buyck, III #011902
248 West Evans Street
P.O. Box 1909 (29503-1909)
Florence, South Carolina 29501
Telephone: (843) 662-3258
Facsimile: (843) 662-1342
Email: mb3@willcoxlaw.com

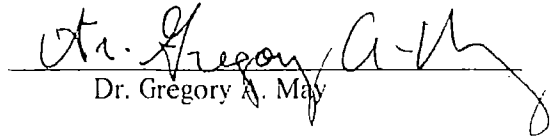
ATTORNEYS FOR PLAINTIFF

Florence, SC
March 20, 2019

STATE OF SOUTH CAROLINA)
) **VERIFICATION**
COUNTY OF FLORENCE)

PERSONALLY APPEARED before me, Dr. Gregory A. May, who being first duly sworn, deposes and says:

1. That I am the Plaintiff in the attached lawsuit;
2. That I have read all of the statements contained in the attached legal pleadings;
3. All of the statement and facts alleged in the attached pleadings are true and correct based upon my personal knowledge, except those facts and statements alleged upon information and belief, and concerning those, verily believe them to be true;
4. The attached pleadings were prepared by the law firm of Willcox, Buyck & Williams, P.A., at my request;
5. I have authorized the aforesaid attorneys to file the attached pleadings, to present them to the Court, and to serve the attached pleadings upon the Defendants named therein by whatever process if necessary, and to seek the relief requested in the attached pleadings.


Dr. Gregory A. May

SWORN to before me this
18th day of March, 2019.

 (L.S.)
Print: TRUDY P. HUMPHRIES
Notary Public in and for State of South Carolina
My Commission Expires: 9/22/2027

STATE OF SOUTH CAROLINA}
EMPLOYMENT AGREEMENT}
COUNTY OF FLORENCE}

THIS AGREEMENT is made this this day of March 30, 2018 by and between **ADVANCED CARDIOLOGY CONSULTANTS, PC**, a professional corporation organized and existing under the laws of the State of South Carolina ("Employer"), and Gregory May, M.D. ("Physician").

The parties hereto, intending to be legally bound hereby, agree upon the following terms of employment of Physician by Employer.

1. **Term.** Physician is hereby employed by Employer for a term of one (1) year commencing March 30, 2018 and ending at midnight March 31, 2019, unless sooner terminated in accordance with the provisions of Paragraph 7. It is contemplated that Physician's employment may be extended beyond March 31, 2019, such extension must be in writing and on such terms as the parties may then agree.

2. **Duties.** The Physician shall perform such professional duties for Employer as may be requested of him by the practice president in keeping with his professional status as a Board Certified cardiologist. The Physician shall do all things reasonably necessary to maintain and improve his professional skills during the term of this Agreement. He shall foster the professional practice of Employer to the best of his professional ethics.

3. **Extent of services.** Physician shall devote his full time and best efforts to the performance of his duties hereunder, including equitable call coverage and shall not engage in any business or perform any services in any capacity other for Employer without the prior written consent of Employer. However, nothing in this Agreement shall prevent the physician from engaging in activities such as investing in stocks, bonds, securities, commodities, real estate and other forms of investment as will not require any services on the part of the physician in the operation of the affairs of the companies in which such investments are made.

Compensation. For all duties to be performed by Physician hereunder, Physician shall be entitled to compensation based solely upon the physician's own collections. Compensation shall generally be payable monthly based upon the preceding month's collections at 50% of the physician's collected fees generated by the physician, subject to applicable federal and state with-holding. The physician receive a bonus, the amount of which shall be proportionate to the total sum collected by the Physician. Such bonus, if any, maybe payable as the employer may determine, but if paid, it shall be paid at least annually.

(a) **Continuing Medical Education.** Employer will reimburse Physician for tuition expenses, up to \$2,000.00, relating to one (1) meeting or seminar each year during the term of his Agreement, attended by Physician for the purposes of continuing medical education (CME). Physician may attend such meeting or seminar upon the prior approval of Employer, which approval shall not unreasonably be withheld. All other expenses relating to such CME shall be Physician's responsibility. It is contemplated that Physician's attendance at such



CME shall not exceed two (2) weeks during the term hereof.

(b) Sick Pay. Inasmuch as Physician's compensation is based upon the preceding month's collections as provided in Paragraph 4, no separate or distinct sick pay will be available to Physician in the event he becomes unable to perform his services hereunder by reason of illness or accident.

(c) Vacation. Physician shall be entitled to 10 working days, regular vacation during the term hereof. This vacation shall be non-cumulative; such vacation shall not interfere with the practice schedules, his commitments to his patients, and obligations to Employer. The time or times during which the vacation is to be taken shall first be approved by the Employer, which approval shall not reasonably be withheld.

(d) Facilities and Services. The Employer shall provide such facilities, equipment and supplies as it deems necessary for physician's performance of his professional duties under this Agreement, including technical and stenographic help and such other facilities and services as are suitable to his position and necessary to the adequate performance of his duties. Physician shall have, maintain and use, when appropriate, an automobile, home telephone, and other facilities needed in connection with his employment under this Agreement, all of which shall be at the physician's expense, unless reimbursement by Employer is approved in advance. Physician shall also, at his expense, carry automobile liability insurance protecting himself and Employer against claims arising out of the use of an automobile in the course of his employment by Employer.

(e) Malpractice Insurance. As of the commencement date of employment, employer agrees to provide Physician with professional liability insurance, commonly called "malpractice insurance" on an "occurrence" basis, with such limits, terms and conditions as is otherwise commonly provided by Employer to or for the benefit of its other professionally licensed employees and physicians; provided, however, that such amounts shall be at least in maximum amounts as are offered by the Joint Underwriters Association and the South Carolina Patient's Compensation Fund, or, if with another insurance company licensed in the State of South Carolina, coverage of at least \$200,000.00 / \$600,000.00 aggregate.

5. Disclosure of Information. During or any time after termination of employment hereunder, The Physician will not, without authorization of Employer, disclose to or use for the benefit of any person, corporation or other entity, or himself, any files or other confidential information concerning the business, methods, operation, financing, services, or Employer "Confidential information" as used herein shall mean information particular to Employer, that is disclosed to employee or known by him as a consequence of his employment by Employer, whether or not pursuant to this Agreement. Confidential information shall include, but not limited to, all information designated by Employer as confidential, or in the future so designated, including financial information, books, records, financial statements, business plans, prices, and credit terms, and contract terms or other business arrangements. The Physician shall keep and maintain appropriate charts, files, and records of all professional services rendered by him under this Agreement, and he shall prepare in connection with these services all reports and correspondence necessary or appropriate in the

circumstance All of these records, reports, claims and correspondence shall belong to the Employer.

6. **Surrender of Books and Records.** Physician acknowledges that all files, patient records and charts, lists, books, records, literature, products, and other materials owned by Employer or used by it in connection with the conduct of its business shall at all times remain the property of Employer, and that upon termination of employment hereunder, irrespective of the time, manner or cause of said termination, physician will surrender to Employer all such files, patient records and charts, lists, books, records, literature, products, and other materials. Employer agrees that, upon any patient's request, copies of patient medical records and charts shall be provided to the patient.

7. **Termination.** Either party may terminate this Agreement with or without cause upon thirty (30) day written notice to the other. Cause shall be deemed to be any one of the following:

- (a) Revocation or suspension of physician's license to practice medicine in the state of South Carolina.
- (b) Dishonesty detrimental to the best interests of Employer.
- (c) Continuing inattention to, or neglect of, the duties to be performed by Physician.
- (d) The death of Physician.
- (e) Participation by Physician in any fraud.
- (f) Imparting any confidential information in violation of this Agreement.

Employer's Authority: The physician agrees to observe and comply with the rules and regulations of the Employer either orally or in writing, respecting performance of his duties and to carry out and to perform orders, directions and policies stated by Employer to him, from time to time, either orally or in writing. Physician specifically understands that Employer shall have final authority over acceptance or refusal of any patient for professional services.

8. **Compensation Upon Termination.** Upon termination of this Agreement for any event described in Subparagraphs (b), (e), or (f) of Paragraph 7, Physician shall not be entitled to receive such compensation beyond the termination date even for services rendered through the date of termination. Any compensation the Physician may be entitled shall be paid within sixty (60) days, of termination, allowing for collection of fees.

9. **Restrictive Covenant; Liquidated Damages.** In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two

years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the foregoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

10. **Severability.** If any provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect. If any provision is held invalid or unenforceable with respect to any particular circumstances, it shall nevertheless remain in full force and effect in all other circumstances.

11. **Benefit.** This Agreement shall inure to and shall be binding upon the parties hereto, the successors and assigns of Employer, and the heirs and assigns of the Physician; provided, however, that this Agreement may not be assigned without prior written consent of both parties.

12. **Notice.** All notices required to be given under the terms of this Agreement shall be in writing, shall be effective upon receipt, and shall be delivered to the addressee in person or mailed by certified mail, return receipt requested, as follows:

If to Employer, address to:

ADVANCED CARDIOLOGY CONSULTANTS, P.C.
1706 Second Loop Road
Florence, S.C. 29501

If to Physician, address to:

Gregory May, M.D.
2494 Parsons Gate
Florence, S.C. 29501

or such other address as either party shall have designed for notices to be given to him or it in accordance with this Paragraph.

13. **Waiver.** The waiver by either party of any breach or violation of any provision of this Agreement shall not operate or be construed as a waiver of any

subsequent breach or violation hereof.

14. **Governing Law.** This Agreement has been negotiated and executed in the State of South Carolina, and the laws of the State of South Carolina shall govern its construction and validity; and jurisdiction and venue of any action to enforce the proceedings hereof or for damages shall lie in the City of Florence, Florence County, South Carolina.

15. **Entire Agreement.** This Agreement constitutes the entire Agreement between the parties hereto and supersedes any and all prior agreements, understandings, and representations with respect to the subject matter hereof. No change, addition, or amendment shall be made except by written agreement signed by the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

WITNESSES: ADVANCED CARDIOLOGY CONSULTANTS, PC

Melissa H. Byrd
As to Employer
Melissa H. Byrd
As to Employee

BY: L. A. Rowe
Its: President - Lew A. Rowe, M.D.

Gregory May
Gregory May, M.D.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	
	)	
Dr. Gregory A. May,	)	CASE NO.: 2019-CP-21-00777
	)	
Plaintiff,	)	
	)	DEFENDANTS' ANSWER WITH
vs.	)	COUNTERCLAIM TO PLAINTIFF'S
	)	VERIFIED COMPLAINT
Advanced Cardiology Consultants, P.C.,	)	
Dr. Lew A. Rowe, and Theresa Rowe,	)	
	)	
Defendants.	)	
_____	)	

Pursuant to South Carolina Rule of Civil Procedure 12(a), Defendants Advanced Cardiology Consultants, P.C. and Dr. Lew A. Rowe, by and through their undersigned counsel, hereby answer the Verified Complaint of the Plaintiff Dr. Gregory A. May as follows:

GENERAL DENIAL

All allegations in the Verified Complaint of Plaintiff not specifically admitted, qualified, or explained herein are denied and strict proof thereof is demanded.

SPECIFIC DENIAL

FOR A FIRST DEFENSE

1. The claims of the Plaintiff fail to state a claim upon which relief may be granted.

FOR A SECOND DEFENSE

2. The Defendants incorporate all prior and subsequent paragraphs of this Answer.
3. Each and every allegation contained within the claims of the Plaintiff's Verified Complaint not hereinafter specifically admitted, qualified, or explained, is denied.
4. The Defendants lack information sufficient to either admit or deny the allegations

of Paragraph 1, and therefore, denies the same.

5. The Defendants admit only so much of Paragraph 2 as alleges that Advanced Cardiology Consultants is a South Carolina corporation. Further answering the Complaint, the Defendants aver that the Defendant Advanced Cardiology Consultants' name as registered with the State of South Carolina is Advanced Cardiology Consultants, P.C.

6. The Defendants admit the allegations in Paragraph 3.

7. The Defendants admit the allegations contained in Paragraph 4 as allege that Dr. Lew A. Rowe is the President and sole shareholder of Advanced Cardiology Consultants, P.C. ("ACC").

8. The Defendants admit the allegations in Paragraph 5 as allege that Theresa Rowe is the spouse of Dr. Lew A. Rowe. Further answering the Verified Complaint, Defendants aver that Theresa Rowe is the Practice Administrator of ACC.

9. The Defendants admit the allegations in Paragraph 6.

10. The allegations in Paragraph 7 of the Verified Complaint constitute conclusions of law which require no answer from these Defendants.

11. The Defendants deny the allegations in Paragraph 8. Further answering the Verified Complaint, Defendants aver that Plaintiff has been employed with ACC since May 1, 2007.

12. The Defendants admit only as much of the allegations in Paragraph 9 as allege that Plaintiff's initial employment agreement was for a period of five years. Defendants deny the remainder of said paragraph. Further answering the Verified Complaint, Defendants aver that subsequent to this initial contract, the parties executed a second and a third contract, each for a

term of two years.

13. The Defendants admit the allegations in Paragraph 10.

14. The Defendants admit only the allegations in Paragraph 11 as allege that the agreement contains a restrictive covenant that requires the Plaintiff to pay damages to the Defendant if Plaintiff chooses to become employed as a cardiologist for a period of two years after termination within a 25 mile radius of McLeod Regional Medical Center, Florence, South Carolina.

15. The Defendants admit the allegations in Paragraphs 12, 13, 14, and 15.

16. The Defendants deny the allegations in Paragraphs 16, 17, 18, 19, and 20. Further answering the Verified Complaint, at no time did Dr. Rowe ever inform Plaintiff that the restrictive covenant would not be enforced against him if violated.

17. The Defendants deny the allegations in Paragraph 21. Further answering the Verified Complaint, Defendants aver that Dr. Rowe never made any assurances to Plaintiff that the restrictive covenant would not be enforced.

18. The Defendants admit the allegations in Paragraph 22.

19. The Defendants lack sufficient knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 23 of the Verified Complaint and therefore deny them.

20. The Defendants deny the allegations in Paragraph 24.

21. The Defendants admit only as much of the allegations in Paragraph 25 as allege that on or about December 26, 2018, a meeting was held among six physicians employed by the Practice. The remainder of said paragraph is denied.

22. The Defendants admit only so much of the allegations of Paragraph 26 as alleged that at this meeting, it was proposed the Practice drop coverage of Carolinas Hospital. The Defendants deny the remainder of said paragraph.

23. The Defendants admit only so much of the allegations in Paragraph 27 as allege that the physicians voted to discontinue the coverage of Carolinas Hospital and that Dr. Rowe would respect any decision regarding coverage the physicians made among themselves.

24. The Defendants lack information sufficient to either admit or deny the allegations of Paragraph 28, and therefore, denies the same.

25. The Defendants deny the allegations in Paragraph 29.

26. The Defendants admit the allegations in Paragraph 30.

27. The Defendants admit only so much of the allegations in Paragraph 31 as allege that Plaintiff is a Board Certified Cardiologist specializing in interventional cardiology that has been practicing in the Florence area for almost eleven years. Defendants are without information sufficient to either admit or deny the remainder of the allegations of said paragraph, and therefore, deny the same.

28. The Defendants are without information sufficient to either admit or deny the allegations of Paragraph 32 and therefore, denies the same.

29. The Defendants deny the allegations in Paragraphs 33 and 34.

30. The Defendants are without information sufficient to either admit or deny the allegations of Paragraph 35 and therefore, denies the same. Further answering the Verified Complaint, Defendants aver that Dr. Rowe never promised Plaintiff not to enforce the restrictive covenant contained in the employment agreement.

31. The Defendants deny the allegations in Paragraph 36.

32. The Defendants are without information sufficient to either admit or deny the allegations of Paragraph 37 and therefore, denies the same.

33. The Defendants deny the allegations in Paragraph 38. Further answering the Verified Complaint, Defendants received a letter from Plaintiff's counsel dated January 18, 2019, (Exhibit A) threatening litigation against the Defendants if Defendants did not agree to execute an attached "Release from Non-Compete Agreement" in exchange for ten dollars (\$10.00) within one week. The Defendants had never made any representation that the non-compete restrictive covenant would not be enforced and declined to execute this waiver.

34. The Defendants admit only so much of Paragraph 39 as alleges that Theresa Rowe had a conversation with an individual from Carolinas Hospital regarding the restrictive covenant. Further answering the Verified Complaint, Defendants aver that this individual told Ms. Rowe to "make him an offer" on the amount of money required to waive the restrictive covenant. Ms. Rowe informed the individual that the employment agreement contained a liquidated damages provision, requiring the amount of \$500,000 to be paid to ACC in the event of a violation of the restrictive covenant.

35. The Defendants deny the allegations of Paragraph 40. Further answering the Verified Complaint, Defendants aver that on February 20, 2019, counsel for Defendants sent to Carolinas Hospital a letter (Exhibit B) notifying Carolinas that Defendants had been made aware that a number of physicians employed by ACC had been approached by a representative of Carolinas Hospital for discussions of future employment at Carolinas. This letter further notified Carolinas that these physicians were employed under agreements which contained post-

employment obligations, including provisions which prohibited the physician from being engaged in the practice of cardiology for a period of two-years post-termination within a twenty-five mile radius of McLeod Regional Medical Center unless the physician paid damages pursuant to the terms of the covenant. Defendants' counsel notified the Carolinas Hospital of its legal obligation not to knowingly procure breaches of these valid restrictive covenants by seeking to employ the physicians.

36. The Defendants admit only so much of the allegations of Paragraph 41 as allege that Plaintiff submitted a notice to terminate his employment on March 19, 2019. The remainder of said paragraph is denied.

37. The Defendants admit the allegations in Paragraphs 42 and 43.

38. Paragraph 44 of the Verified Complaint realleges and reiterates the previous paragraphs and in response, the Defendants incorporate the previous paragraphs of this Answer and reiterate the responses contained therein.

39. The Defendants admit the allegations contained in Paragraph 45.

40. The Defendants admit the allegations contained in Paragraph 46. Further answering the Verified Complaint, Defendants aver that the Defendants have not breached this obligation to the Plaintiff at any time.

41. The Defendants admit the allegations contained in Paragraph 47.

42. The Defendants deny the allegations contained in Paragraphs 48, 49, 50, 51, 52, and 53 and further deny that the Plaintiff is entitled to any relief whatsoever from these Defendants.

43. Paragraph 54 of the Verified Complaint realleges and reiterates the previous

paragraphs and in response, the Defendants incorporate the previous paragraphs of this Answer and reiterate the responses contained therein.

44. The Defendants deny the allegations contained in Paragraphs 55, 56, 57, 58, 59, and 60.

45. The Defendants admit only so much of the allegations contained in Paragraph 61 as allege that Plaintiff was an eleven-year employee of the practice and practiced interventional cardiology in the community during that time. Defendants are without information sufficient to either admit or deny the remainder of the allegations of Paragraph 61 and therefore, denies the same.

46. The Defendants admit the allegations in Paragraph 62.

47. The Defendants deny the allegations in Paragraphs 63, 64, 65, 66, 67, 68, 69, 70, 71, and 72 and further deny that the Plaintiff is entitled to any relief whatsoever from these Defendants.

48. Paragraph 73 of the Verified Complaint realleges and reiterates the previous paragraphs and in response, the Defendants incorporate the previous paragraphs of this Answer and reiterate the responses contained therein.

49. The Defendants deny the allegations in Paragraphs 74, 75, 76, 77, and 78 and further deny that the Plaintiff is entitled to any relief whatsoever from these Defendants.

50. Paragraph 79 of the Verified Complaint realleges and reiterates the previous paragraphs and in response, the Defendants incorporate the previous paragraphs of this Answer and reiterate the responses contained therein.

51. The Defendants deny the allegations in Paragraphs 80 and 81 and further deny that

the Plaintiff is entitled to any relief from these Defendants or from this Court.

FOR A THIRD AND AFFIRMATIVE DEFENSE

52. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

53. Plaintiff's claims are subject to their duty to mitigate his damages, and to the extent that he has failed to do so, Plaintiff's damages are so limited.

FOR A FOURTH AND AFFIRMATIVE DEFENSE

54. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

55. Some or all of the Plaintiff's claims are barred by the doctrines of waiver, accord, satisfaction, release, estoppel, fair use, unclean hands, equitable estoppel, *in pari delicto*, consent, and mistake.

FOR A FIFTH AND AFFIRMATIVE DEFENSE

56. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

57. The imposition of punitive or trebled damages on the basis of the acts or omissions of the Defendants would represent the deprivation of liberty and property without due process of law, the imposition of cruel and unusual punishment, and excessive fines and deny the equal protection of laws, in violation of the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and pertinent provisions of the Constitution of the State of South Carolina.

FOR A SIXTH AND AFFIRMATIVE DEFENSE

58. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

59. Plaintiffs' claims for punitive or trebled damages are barred because the acts and omissions of the Defendants complained of by the Plaintiffs fail to rise to the level required to sustain such an award of punitive damages. Defendants did not engage in any malicious, reckless,

wrongful, or intentional conduct upon which an award of punitive damages would be based.

FOR A SEVENTH AND AFFIRMATIVE DEFENSE

60. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

61. Some or all of the Plaintiff's claims are barred by the applicable statute of limitations, laches, or repose.

FOR AN EIGHTH AND AFFIRMATIVE DEFENSE
(South Carolina Frivolous Civil Proceedings Sanctions Act)

62. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

63. The Plaintiff's action is in violation of the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 *et seq.* and South Carolina Rule of Civil Procedure 11. The Defendants are therefore entitled to attorney's fees and costs associated with the defending of this suit.

FOR A NINTH AND AFFIRMATIVE DEFENSE
(Reservation of Rights)

64. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

65. Defendants hereby give notice that they intend to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserve the right to amend this Answer to assert any such defenses.

FOR A FIRST COUNTERCLAIM
(Breach of Contract)

66. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

67. The parties entered into a valid and binding employment agreement between them. The Plaintiff willfully entered into this agreement, which includes the following provision relating to

Plaintiff's post-employment obligations:

9. Restrictive Covenant; Liquidated Damages. In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the foregoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

68. This provision in the agreement is a valid and enforceable as it is supported by valuable consideration, reasonable and necessary to protect Defendant's legitimate business interests, is not unduly harsh or burdensome on Plaintiff's ability to earn a livelihood, and is reasonably

limited with respect to both duration and place. Plaintiff was paid considerably more than Five Hundred Thousand Dollars (\$500,000) per year under the terms of his employment agreement.

69. Upon information and belief, Plaintiff is in violation of the restrictive covenant and has breached the terms of the employment agreement, as Defendants believe he has entered into an agreement to engage in the practice of cardiology with Carolinas Hospital, in violation of both the time and place requirements. Two years have not passed since the termination of his employment and Carolina Hospitals is within twenty-five miles of McLeod Regional Medical Center, Florence, South Carolina.

70. This breach of the employment agreement by Plaintiff has proximately caused damages to the Defendants, for which they are entitled to an award of liquidated damages in the amount of \$500,000, as the agreement itself provides that the Defendants shall be entitled to in the case of any such breach of this provision. By willfully entering into this Agreement, Plaintiff agreed that this sum shall be paid to the Defendant, as a reasonable estimate of the damages likely to be suffered by the employer should Plaintiff violate this restrictive covenant.

71. The Defendants are therefore entitled to recover compensatory damages in the amount of \$500,000 for the breach of this contract.

WHEREFORE, having fully replied to Plaintiffs' Verified Complaint, Defendants Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe respectfully request that the Court grant them the relief sought below:

1. Dismiss the Plaintiff's claims contained in the Verified Complaint in their entirety with prejudice;

2. Order Plaintiff to pay Defendants' costs, expenses and attorneys' fees reasonably incurred in the defense of this action pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act and South Carolina Rule of Civil Procedure 11;
3. An award of compensatory damages in an amount equal to \$500,000 for Plaintiff's breach of the restrictive covenant; and
4. Render to Defendants any additional relief that this Court deems just and proper.

All of which is respectfully submitted.

GIBBS & HOLMES

/s/ Allan R. Holmes
Allan R. Holmes, SC Bar # 2576
Rebecca J. Wolfe, SC Bar # 102867
Post Office Box 938
171 Church Street, Suite 110
Charleston, South Carolina 29401
(843) 722-0033 (telephone)
(843) 722-0114 (facsimile)

ATTORNEYS FOR THE DEFENDANTS

April 23, 2019
Charleston, South Carolina

EXHIBIT A

Mark W. Buyck, Jr.
Hugh I. Wilcox, Jr.
Wm. Reynolds Williams♦
Mark W. Buyck, III
E. Lloyd Wilcox, II
John H. Maceneh * GA & KY
Tracy L. Wright
J. Scott Kozacki
Walker H. Wilcox
Paula A. Sanor
Katherine M. Ryan * AL

LAW OFFICES
WILCOX, BUYCK, & WILLIAMS
PROFESSIONAL ASSOCIATION
www.WilcoxLaw.com
248 West Evans Street (29501)
Post Office Box 1909
Florence, South Carolina 29503-1909

2050 Corporate Centre Dr
Suite 230
Myrtle Beach, SC 29577
Telephone (843) 650-6777
Fax (843) 650-6767

ESTABLISHED 1895

* Additionally Licensed
♦ Certified Mediator

Telephone (843) 662-3258
Fax (843) 662-1342

Reply To: Florence

January 18, 2019

DR LEW A. ROWE
ADVANCED CARDIOLOGY CONSULTANTS
1706 SECOND LOOP RD
FLORENCE SC 29505

Dear Lew:

We represent Dr. Greg May in connection with his employment with your practice. He has advised us of the changes that are occurring at Advanced Cardiology Consultants and we believe these are in violation of the terms of the employment agreement.

Your decision to remove yourself from call coverage has created a situation where the practice no longer has equitable call coverage. Dr. Ng's departure has further added to the call inequality. Since the practice has decided not to provide full services to Carolinas Hospital, you have further impaired Dr. May's ability to provide care to his patients and fully practice his profession in the community. Many of Dr. May's patients prefer Carolinas Hospital and the practice's decision regarding its relationship with Carolinas disrupts patient's continuity of care and potentially deprives the public of medical services. It also deprives Dr. May of full access to his patients as well as limits his ability to perform his professional duties and maximize his income potential. These actions are a direct breach of the practice's obligations under the employment agreement to provide facilities and services suitable to Dr. May's positions as a Board Certified cardiologist.

We understand that you advised him that while you believe you could enforce the non-compete covenant, that you would not do so given the restructuring at the practice. In reliance on this representation, he has pursued additional practice opportunities with local employers. We believe you would be legally estopped from now attempting to enforce the non-compete. Moreover, we understand some of the changes that have occurred since Dr. May entered into his employment agreement and we believe that these substantially change the nature of the practice and his ability to maintain his current income potential. Your actions in urging Dr. May to secure alternative employment and then reneging on your pledge also constitutes a tortious interference with his employment opportunities at both Carolinas and McLeod.

Dr. Lew A. Rowe
January 18, 2019
Page 2

Dr. May would like to have a cordial disassociation from Advanced Cardiology Consultants, and he is willing to discuss his departure in good faith. If we are not able to promptly resolve the matter, we are prepared to initiate legal proceedings. There are other legal matters we would pursue in litigation which we believe would not be in the best interest of the stockholders of Advanced Cardiology Consultants. In particular, it will be necessary for us to pursue the financial status of the practice as well as the accuracy of the financial records. Please consider this matter and let me know if you are willing to allow Dr. May to withdraw from the practice and seek another association in the Florence area.

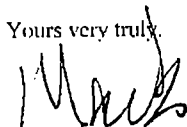
We are enclosing an agreement releasing Dr. May from the non-compete provisions of his employment agreement. We will expect a response by the end of business on January 25th. If we have not heard from you by then, we will proceed accordingly.

We would advise the practice to preserve all data of any type relating to these matters. This includes any written materials such as employment contracts, time records, insurance policies, all e-mails between Dr. May and Dr. Rowe, all e-mails between Dr. May and Mrs. Rowe, records of any discussions or communications regarding the employment agreement between Dr. May and the PC, and all records of wage and salary payments to Dr. May from his initial hiring to the present. Wage and salary information includes all documents, billing records, spreadsheets, expenses, and any calculations used to determine any wage payments to Dr. May and records of all collected fees of the practice from work performed by Dr. May.

Failure to preserve this material will result in a request for a spoliation instruction at any trial in this matter as well as any other legal remedies which Dr. May would be entitled to. Please be advised to not dispose of any of this material as I expect that it will be both discoverable and admissible in any litigation that may arise out of this matter.

With kind regards,

Yours very truly,



Mark W. Buyck, Jr.

Email: mwbuyck@WillcoxLaw.com

MWB/rgk
Enclosure

STATE OF SOUTH CAROLINA)
) RELEASE FROM
COUNTY OF FLORENCE)

FOR AND IN CONSIDERATION OF TEN DOLLARS (\$10.00) and mutual agreement by and between Advanced Cardiology Consultants, P.C., Employer, and Gregory A. May, M.D., Physician, I, Lew A. Rowe, President of Advanced Cardiology Consultants, P.C., agree that the non-compete provisions of any employment agreement between the parties hereto specifically the agreement dated March 30, 2018, are hereby released and Gregory A. May, M.D. is free to engage in any cardiology related practice at any location he desires without further obligation to the practice. The geographic restriction of a twenty-five-mile radius from McLeod Regional Medical Center of Florence, South Carolina, and a time restriction of two years are hereby abolished and terminated.

This constitutes the entire agreement between the parties hereto and supercedes any and all other agreements, understandings and representations with respect to the subject matter herein.

IN WITNESS WHEREOF, the parties hereto have executed this Release from the Non-Compete provisions of the agreement on the ____ day of January, 2019.

WITNESSES: ADVANCED CARDIOLOGY CONSULTANTS, P.C.

By: Lew A. Rowe, President and Stockholder

Gregory A. May, M.D.

STATE OF SOUTH CAROLINA}
 EMPLOYMENT AGREEMENT}
 COUNTY OF FLORENCE}

THIS AGREEMENT is made this this day of March 30, 2018 by and between **ADVANCED CARDIOLOGY CONSULTANTS, PC**, a professional corporation organized and existing under the laws of the State of South Carolina ("Employer"), and Gregory May, **M.D.** ("Physician").

The parties hereto, intending to be legally bound hereby, agree upon the following terms of employment of Physician by Employer.

1. **Term.** Physician is hereby employed by Employer for a term of one (1) year commencing March 30, 2018 and ending at midnight March 31, 2019, unless sooner terminated in accordance with the provisions of Paragraph 7. It is contemplated that Physician's employment may be extended beyond March 31, 2019, such extension must be in writing and on such terms as the parties may then agree.

2. **Duties.** The Physician shall perform such professional duties for Employer as may be requested of him by the practice president in keeping with his professional status as a Board Certified cardiologist. The Physician shall do all things reasonably necessary to maintain and improve his professional skills during the term of this Agreement. He shall foster the professional practice of Employer to the best of his professional ethics.

3. **Extent of services.** Physician shall devote his full time and best efforts to the performance of his duties hereunder, including equitable call coverage and shall not engage in any business or perform any services in any capacity other for Employer without the prior written consent of Employer. However, nothing in this Agreement shall prevent the physician from engaging in activities such as investing in stocks, bonds, securities, commodities, real estate and other forms of investment as will not require any services on the part of the physician in the operation of the affairs of the companies in which such investments are made.

Compensation. For all duties to be performed by Physician hereunder, Physician shall be entitled to compensation based solely upon the physician's own collections. Compensation shall generally be payable monthly based upon the preceding month's collections at 50% of the physician's collected fees generated by the physician, subject to applicable federal and state with-holding. The physician receive a bonus, the amount of which shall be proportionate to the total sum collected by the Physician. Such bonus, if any, maybe payable as the employer may determine, but if paid, it shall be paid at least annually.

(a) **Continuing Medical Education.** Employer will reimburse Physician for tuition expenses, up to \$2,000.00, relating to one (1) meeting or seminar each year during the term of his Agreement, attended by Physician for the purposes of continuing medical education (CME). Physician may attend such meeting or seminar upon the prior approval of Employer, which approval shall not unreasonably be withheld. All other expenses relating to such CME shall be Physician's responsibility. It is contemplated that Physician's attendance at such

CME shall not exceed two (2) weeks during the term hereof.

(b) Sick Pay. Inasmuch as Physician's compensation is based upon the preceding month's collections as provided in Paragraph 4, no separate or distinct sick pay will be available to Physician in the event he becomes unable to perform his services hereunder by reason of illness or accident.

(c) Vacation. Physician shall be entitled to 10 working days, regular vacation during the term hereof. This vacation shall be non-cumulative; such vacation shall not interfere with the practice schedules, his commitments to his patients, and obligations to Employer. The time or times during which the vacation is to be taken shall first be approved by the Employer, which approval shall not reasonably be withheld.

(d) Facilities and Services. The Employer shall provide such facilities, equipment and supplies as it deems necessary for physician's performance of his professional duties under this Agreement, including technical and stenographic help and such other facilities and services as are suitable to his position and necessary to the adequate performance of his duties. Physician shall have, maintain and use, when appropriate, an automobile, home telephone, and other facilities needed in connection with his employment under this Agreement, all of which shall be at the physician's expense, unless reimbursement by Employer is approved in advance. Physician shall also, at his expense, carry automobile liability insurance protecting himself and Employer against claims arising out of the use of an automobile in the course of his employment by Employer.

(e) Malpractice Insurance. As of the commencement date of employment, employer agrees to provide Physician with professional liability insurance, commonly called "malpractice insurance" on an "occurrence" basis, with such limits, terms and conditions as is otherwise commonly provided by Employer to or for the benefit of its other professionally licensed employees and physicians; provided, however, that such amounts shall be at least in maximum amounts as are offered by the Joint Underwriters Association and the South Carolina Patient's Compensation Fund, or, if with another insurance company licensed in the State of South Carolina, coverage of at least \$200,000.00 / \$600,000.00 aggregate.

5. Disclosure of Information. During or any time after termination of employment hereunder, The Physician will not, without authorization of Employer, disclose to or use for the benefit of any person, corporation or other entity, or himself, any files or other confidential information concerning the business, methods, operation, financing, services, or Employer "Confidential information" as used herein shall mean information particular to Employer, that is disclosed to employee or known by him as a consequence of his employment by Employer, whether or not pursuant to this Agreement. Confidential information shall included, but not limited to, all information designated by Employer as confidential, or in the future so designated, including financial information, books, records, financial statements, business plans, prices, and credit terms, and contract terms or other business arrangements. The Physician shall keep and maintain appropriate charts, files, and records of all professional services rendered by him under this Agreement, and he shall prepare in connection with these services all reports and correspondence necessary or appropriate in the

circumstances. All of these records, reports, claims and correspondence shall belong to the Employer.

6. **Surrender of Books and Records.** Physician acknowledges that all files, patient records and charts, lists, books, records, literature, products, and other materials owned by Employer or used by it in connection with the conduct of its business shall at all times remain the property of Employer, and that upon termination of employment hereunder, irrespective of the time, manner or cause of said termination, physician will surrender to Employer all such files, patient records and charts, lists, books, records, literature, products, and other materials. Employer agrees that, upon any patient's request, copies of patient medical records and charts shall be provided to the patient.

7. **Termination.** Either party may terminate this Agreement with or without cause upon thirty (30) day written notice to the other. Cause shall be deemed to be any one of the following:

- (a) Revocation or suspension of physician's license to practice medicine in the state of South Carolina.
- (b) Dishonesty detrimental to the best interests of Employer.
- (c) Continuing inattention to, or neglect of, the duties to be performed by Physician.
- (d) The death of Physician.
- (e) Participation by Physician in any fraud.
- (f) Imparting any confidential information in violation of this Agreement.

Employer's Authority: The physician agrees to observe and comply with the rules and regulations of the Employer either orally or in writing, respecting performance of his duties and to carry out and to perform orders, directions and policies stated by Employer to him, from time to time, either orally or in writing. Physician specifically understands that Employer shall have final authority over acceptance or refusal of any patient for professional services.

8. **Compensation Upon Termination.** Upon termination of this Agreement for any event described in Subparagraphs (b), (e), or (f) of Paragraph 7, Physician shall not be entitled to receive such compensation beyond the termination date even for services rendered through the date of termination. Any compensation the Physician maybe entitled shall be paid within sixty (60) days, of termination, allowing for collection of fees.

9. **Restrictive Covenant; Liquidated Damages.** In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two

years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the foregoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

10. **Severability.** If any provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect. If any provision is held invalid or unenforceable with respect to any particular circumstances, it shall nevertheless remain in full force and effect in all other circumstances.

11. **Benefits.** This Agreement shall inure to and shall be binding upon the parties hereto, the successors and assigns of Employer, and the heirs and assigns of the Physician; provided, however, that this Agreement may not be assigned without prior written consent of both parties.

12. **Notice.** All notices required to be given under the terms of this Agreement shall be in writing, shall be effective upon receipt, and shall be delivered to the addressee in person or mailed by certified mail, return receipt requested, as follows:

If to Employer, address to:

ADVANCED CARDIOLOGY CONSULTANTS, P.C.
1706 Second Loop Road
Florence, S.C. 29501

If to Physician, address to:

Gregory May, M.D.
2494 Parsons Gate
Florence, S.C. 29501

or such other address as either party shall have designed for notices to be given to him or it in accordance with this Paragraph.

13. **Waiver.** The waiver by either party of any breach or violation of any provision of this Agreement shall not operate or be construed as a waiver of any

subsequent breach or violation hereof.

14. **Governing Law.** This Agreement has been negotiated and executed in the State of South Carolina, and the laws of the State of South Carolina shall govern its construction and validity; and jurisdiction and venue of any action to enforce the proceedings hereof or for damages shall lie in the City of Florence, Florence County, South Carolina.

15. **Entire Agreement.** This Agreement constitutes the entire Agreement between the parties hereto and supersedes any and all prior agreements, understandings, and representations with respect to the subject matter hereof. No change, addition, or amendment shall be made except by written agreement signed by the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

WITNESSES: ADVANCED CARDIOLOGY CONSULTANTS, PC

Melanie H. Byrd
Dana C. Hobson
As to Employer
Melanie H. Byrd
Dana C. Hobson
As to Employee

BY: L. A. Rowe
Its: President - Lew A. Rowe, M.D.

Gregory May
Gregory May, M.D.

EXHIBIT B

LAW OFFICES
GIBBS & HOLMES
171 CHURCH STREET, SUITE 110
POST OFFICE BOX 938
CHARLESTON, SOUTH CAROLINA 29402-0938

ALLAN R. HOLMES
PARTNER
CERTIFIED SPECIALIST IN LABOR
AND EMPLOYMENT LAW

TELEPHONE (843) 722-0033
TELECOPIER (843) 722-0114
E-MAIL
aholmes@gibbs-holmes.com

February 20, 2019

PERSONAL AND CONFIDENTIAL
VIA EMAIL [rseif@carolinashospital.com]
Mr. Randy W. Seif
Director of Business Development
Carolinas Hospital
805 Pamplico Hwy. Medical Mall B Suite 330
Florence, SC 29505

Re: Advanced Cardiology Consultants, P.C.

Dear Mr. Seif:

We have been retained by Advanced Cardiology Consultants, P.C. We are advised that you and the hospital at which you are employed have approached physicians who have been employed by our client. Our understanding is that these approaches have included discussions of future employment.

Please be advised that the relevant employment agreements between our client and these contain the following post-employment obligations:

9. **Restrictive Covenant; Liquidated Damages.** In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology; within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the foregoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

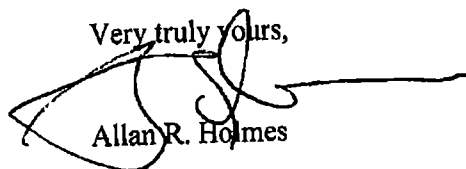
I am in possession of a February 11, 2019, from you to Ms. Theresa Rowe. In that email, you state that the liquidated damages due for a violation of the above-referenced covenant would have "nothing to do with Carolinas Hospital System." In our judgment, your hospital has a legal obligation not to procure a breach of a valid covenant, and a knowing violation of this obligation could subject the hospital to a claim for damages. To establish a cause of action for tortious interference with contractual relations, a plaintiff need only show: 1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages. *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993).

We caution you to review this issue with legal counsel. Because we understand that your hospital is now owned by the Medical University of South Carolina, I am copying its General Counsel on the chance that she may soon be undertaking representation of your hospital. If you are currently represented by MUSC's counsel or some other lawyer with regard to this matter, please do not reply to this letter, but forward it to your lawyer. I have regular dealings with MUSC and its counsel in matters involving physicians' restrictive covenants and liquidated damages. It is my experience that MUSC intends these covenants to be honored, and I am certain it would not approve of tortious interference with my clients' employment agreements.

Please confirm within five (5) days that your hospital will not be procuring any breaches of the valid restrictive covenants contained in my client's employment agreements.

With kind regards, I am

Very truly yours,



Allan R. Holmes

Cc: Annette R. Drachman, Esq.

STATE OF SOUTH CAROLINA

County of Florence

GREGORY MAY,

PLAINTIFF,

vs.

ADVANCED CARDIOLOGY

CONSULTANTS, THERESA ROWE,

LEW ROWE,

DEFENDANTS,

COURT OF COMMON PLEAS
2019CP2100777

TRANSCRIPT OF RECORD

October 2, 2019
Florence, South Carolina

BEFORE:

THE HONORABLE MICHAEL NETTLES, JUDGE.

APPEARANCES:

MARK W. BUYCK, III, ESQ.
Attorney for the Plaintiff

ALLAN R. HOLMES, SR., ESQ.
Attorney for the Defendant

KAREN AMBROZIAK
Official Court Reporter

C O N T E N T S

INDEX OF EXHIBITS:

(There were no exhibits introduced.)

INDEX OF WITNESSES:

(There were no witnesses called.)

1 THE COURT: All right. Before we get started, this
2 is the first I've seen of this particular case, and I
3 assume it's Gregory A. May vs. Advanced Cardiology
4 Consultants?

5 MR. HOLMES: Yes, sir.

6 THE COURT: All right.

7 MR. BUYCK: Your Honor, you heard a motion back in --

8 THE COURT: Who all are the principles of Advanced
9 Cardiology?

10 MR. HOLMES: Dr. Rowe, Dr. Lew Rowe and his business
11 manager, Theresa Rowe. He's the owner.

12 THE COURT: Oh, okay. All right.

13 MR. BUYCK: Dr. Rowe is the sole owner of the
14 practice.

15 THE COURT: Okay. All right. That's right. I do
16 recall -- I do recall the matter. I'll be glad to hear
17 from the moving party.

18 MR. HOLMES: We both are, but we'll let him go first,
19 Judge.

20 THE COURT: Okay.

21 MR. BUYCK: Your Honor, this is a restricted covenant
22 case. These are excerpts from the briefs, the depositions
23 and then some recitation of law.

24 Your Honor, we were previously before you several
25 months ago on the plaintiff, Dr. May's, motion for a --

1 for an injunction.

2 Your Honor ordered expedited discovery and entered a
3 scheduling order, which we have taken the depositions of
4 the principles and some of the witnesses, as well, as
5 there's some affidavits previously in the record, as well
6 as verified complaints.

7 Dr. May is an interventional cardiologist. He has
8 been practicing since the -- as an interventional
9 cardiologist since 1999, came to Florence in 2007 and went
10 to work for Advanced Cardiology Consultants.

11 At -- at that time and through most of the time that
12 Dr. May was employed there, from 2007 through March of
13 this year, there were approximately six cardiologists that
14 were employed with the practice, but the practice was
15 solely owned by Dr. Rowe.

16 The six cardiologists practiced in both hospitals.
17 Actually, all three when Dr. Rowe started the practice in
18 1994, which at that time was McLeod, Florence General, and
19 Bruce. But when Bruce and Florence General merged and it
20 became Carolinas Hospital Systems, they covered the two
21 hospitals, and they had call coverage.

22 THE COURT: The two being Carolinas and McLeod?

23 MR. BUYCK: Carolinas and McLeod, saw patients at
24 both hospitals. The six doctors split the call coverage.
25 Dr. May has testified in his deposition, and you'll see it

1 in -- in what we have passed up in our memo, that he was
2 as busy as he wanted to be. It was a great place to work.
3 Everything was -- everything was great.

4 Well, then the nature of the practice, the nature of
5 the practice of cardiology, has changed over the years.
6 Dr. May -- excuse me, Dr. Rowe's contract, however, is the
7 same contract that he started out with in 1994. And the
8 testimony in the record from Dr. Rowe and also from
9 Mrs. Rowe is that it is, in fact, the same contract, the
10 same coverage.

11 And at that time, in 1994, and in 2007, when Dr. May
12 came to Florence, there was no such thing as a
13 hospital-based cardiologist. Every cardiologist in
14 Florence was in private practice. Either McLeod or
15 Advanced Cardiology or another group that was maybe
16 primarily servicing Carolinas, but they were all private
17 practitioners. They didn't work for the hospitals.

18 The testimony in the record is that it was only
19 approximately five years ago that Carolinas began hiring
20 in-house cardiologists, and McLeod has only done that in
21 the last two or three years.

22 Right now, the only private practice cardiologists in
23 Florence are what are now -- what's left of Advanced
24 Cardiology Consultants, which is Dr. Rowe and two other
25 physicians.

1 They don't go to either one of the hospitals. They
2 have changed their -- the nature of their practice from
3 covering two hospitals to now essentially, they do -- they
4 have an office-based practice.

5 They can't do any procedures that require a cath lab.
6 They don't do angioplasties. They can't do
7 catheterizations because those have to be done in a
8 hospital with backup from heart surgeons, cardiothoracic
9 surgeons.

10 And the -- this case really started back last fall,
11 about year ago when Dr. Rowe made it known to the
12 practicing cardiologists in the practice that he was
13 essentially ready to phase out. He didn't want to go to
14 the hospitals anymore. He didn't want to take call. He
15 wanted to have an office-based practice.

16 Well, Dr. May got concerned about that, concerned
17 because one, he knows that they're the only game in town
18 as far as a private cardiologist, but he was also
19 concerned that his -- I mean, he calls them his partners,
20 but they're really just employed physicians because they
21 all work for Dr. Rowe.

22 He was concerned that the remaining physicians, once
23 Dr. Rowe was not going to be taking call anymore, that
24 they would use that as an excuse to cut down on the hours
25 that they were working. And the contracts and the

1 compensation system is based on something that lawyers are
2 familiar with: Basically, eat what you kill. You get 50
3 percent of what you collect.

4 And that, Dr. May, has no intention of going to an
5 office-based cardiology practice. He wants to do what
6 he's trained to do as an interventional cardiologist. He
7 can't do that in his office.

8 And so Dr. May starts talking to Dr. Rowe, and he
9 says, you know, I've been with you 11, 12 years. It
10 sounds to me like this practice is changing. I need to
11 continue working.

12 Dr. May tells him -- excuse me, Dr. Rowe tells him
13 yes, by all means, go ahead, look for a job, and we've got
14 some quotes in here. I'll -- let me briefly tell you what
15 Dr. Rowe testified in his deposition.

16 He testified that regards to discussions that he was
17 having with Dr. May: "Consistently, I and Theresa told
18 him look around. Go to other places, interview."

19 I asked him, "Did he discuss with you employment
20 options at the two local hospitals?"

21 The answer was yes.

22 "And what was your response to that?"

23 "Okay. I had no response. Okay."

24 I asked him, "Dr. May specifically told you or asked
25 you if you would have any objection to him going to work

1 for McLeod."

2 Dr. Rowe said, "I probably said do whatever you want.
3 I would have said that multiple times. This was not one
4 conversation. This was a series of hall, parking lot
5 grabbing sort of things, and I would have said, do
6 whatever you want, absolutely."

7 I asked him, "Now, did Dr. May ask you" -- or excuse
8 me. "Did he tell you that he was having conversations
9 with Marie Saleeby about employment opportunities at
10 McLeod?" Ms. Saleeby works at McLeod.

11 Dr. Rowe testified, "I can't recall if he mentioned
12 Marie Saleeby, but he definitely mentioned that one of the
13 places he was looking at was McLeod."

14 Question, "What other places did he say he was
15 looking at?"

16 He says: "Locals, Carolina is the beach. It varied
17 from time to time."

18 I asked him, "Did you ever tell Dr. May that you were
19 not opposed to him seeking employment or accepting
20 employment at either one of the local hospitals?"

21 The answer was, "I told him that he needs to explore
22 his options."

23 "All right. Did you tell him?"

24 And Dr. Rowe says, "I never told Dr. May that he
25 should seek work at McLeod Hospital or at Carolinas

1 Hospital. I would never prohibit him from discussing
2 employment options with either of those entities,
3 however."

4 I asked him about Carolinas. "Well, did you have any
5 problems with him having discussions with Carolinas
6 Hospital regarding employment?"

7 The answer: "No. I wouldn't have a problem with it.
8 In fact, I told him look at all of your options, many
9 times."

10 I asked him, "Did you ever tell him to look at all of
11 his options, including the hospitals here in Florence?"

12 He answered, "look at everywhere is what I told him,
13 don't limit yourself."

14 Now, what Dr. May did in reliance on these
15 conversations that he was having with Dr. Rowe, he went
16 out, and he looked for employment. He interviewed at
17 McLeod, and as part of that interview process, Ms. Saleeby
18 asked him if he could get a release or something from
19 Dr. Rowe indicating that it was okay to have these
20 discussions.

21 That is attached in the materials that I sent up
22 about the fifth page back. It is an email from Mrs. Rowe,
23 who is the office manager of the practice, and it was to
24 Marie Saleeby with a carbon copy to Dr. Rowe. Subject:
25 Dr. Greg May. "Hi, Marie. Dr. May has expressed that he

1 would like to explore an employment opportunity with
2 McLeod Health. We do not object to him interviewing with
3 McLeod Health."

4 Dr. Rowe -- excuse me, Dr. May did not get offered a
5 position at McLeod Health. However, he did go talk to
6 Randy Sithe, who was responsible for hiring at Carolinas
7 Hospital, and this was in about the January of this year.

8 And according to the information in the record and
9 Dr. May's testimony, as well as an affidavit from Mr.
10 Sithe, they reached a conditional arrangement for Dr. May
11 to go to work at Carolinas Hospital. Of course, Carolinas
12 wanted the same release from -- assurances from Dr. Rowe
13 that -- that McLeod had asked for.

14 Dr. May goes to Dr. Rowe and says, "I've got this job
15 offer. Can I get a release?"

16 According to Dr. May's testimony, Dr. Rowe says,
17 "Sure. Talk to Theresa," his wife. "She'll send it."

18 Well, she didn't. She and Mr. Sithe had a phone
19 conversation. The upshot of that phone conversation was
20 Mrs. Rowe tells Mr. Sithe that they had no intention of
21 releasing Dr. May from the restricted covenant. There is
22 a \$500,000 liquidated damages penalty in the restrictive
23 covenant and maybe they can start negotiating there.

24 THE COURT: Now, is Mrs. Rowe a principal of this
25 corporation?

1 MR. BUYCK: She is the office manager and the wife of
2 Dr. Rowe, who is the sole owner of the corporation.

3 THE COURT: She wasn't a party to the contract, and
4 she's not a stockholder?

5 MR. BUYCK: No. She -- she's not a stockholder, but
6 she is --

7 THE COURT: She's his wife.

8 MR. BUYCK: Well, not only is she the wife, she's the
9 office manager, and she also negotiates the contracts.
10 That's in the record. She -- she's the one that puts
11 together the contracts. Dr. Rowe testified that he relied
12 on his wife to handle all of those contracts. So she had
13 the authority to negotiate all of this.

14 Now, of course, according the contract, the contract
15 he, -- he is the one that's solely responsible. You know,
16 he's the one that owns the practice, and he's the one that
17 does sign the contract.

18 But getting back to the nature of the practice, in
19 December of last year after Dr. Rowe had announced that he
20 was no longer going to be taking call and he was
21 interested in an office-based practice, the physicians,
22 the remaining physicians have a meeting along with
23 Dr. Rowe and Mrs. Rowe.

24 The topic of that meeting was dropping privileges at
25 the hospital, at Carolinas Hospital, no longer seeing

1 patients at Carolinas.

2 Dr. Rowe, eventually, after several questions in his
3 deposition, he admitted that 30 to 40 percent of the
4 practice's patients or revenues came from work that they
5 were doing at Carolinas Hospital. They said that while
6 they do the majority of their work at McLeod, Carolinas
7 still made up 30 to 40 percent of their practice work.

8 There was a meeting. The other employed physicians,
9 basically without input from Dr. Rowe, voted to basically
10 abandon Carolinas Hospital. They were going to surrender
11 their privilege. There was no longer going to do call
12 there.

13 Dr. May then goes to Mrs. Rowe, who, apparently --
14 who, according to her testimony, was against that very
15 action that they were doing. She wanted them to stay at
16 Carolinas, but Dr. Rowe did not. Even though he had the
17 authority to basically tell everybody where they were
18 going to work, he did not insert himself in that
19 discussion.

20 And Dr. May then talked to Mrs. Rowe and said, what
21 if I could continue seeing patients at Carolinas, to which
22 she said let me check with the malpractice carrier, which
23 she did.

24 And not surprisingly, the carrier said that's not a
25 good idea. He's going to have to be covering for patients

1 that are these Carolinas Hospital patients, and that's not
2 a good idea. So they couldn't get the malpractice
3 coverage for him to work at Carolinas.

4 So then he's faced with only working at McLeod, and
5 that's when he has the conversation with Carolinas, with
6 what he thinks is Dr. May's [sic] blessings because
7 Dr. May has already told him on numerous occasions --

8 THE COURT: Through McLeod.

9 MR. BUYCK: -- check out what you want to do, and
10 you're welcome to apply here at Carolinas.

11 And so he gets the job offer. They refuse to let him
12 go from the contract. He tenders his resignation and we
13 file this lawsuit.

14 Now, we have asked that the court enter under the
15 declaration -- declaratory judgment act that the court
16 enter an order declaring that the restricted covenant is
17 inapplicable in this action. That it is overly broad.
18 That it -- and that the liquidated damages --

19 THE COURT: Against public policy and owners?

20 MR. BUYCK: Well, against public policy, too, but,
21 you know, he's -- like I say, he's got patients at
22 Carolinas -- the practice has patients at Carolinas that
23 they can't see.

24 The patients drive where they -- I mean, they decide
25 where they want to go to the hospital, and if they

1 can't -- if they want to go -- if they want to go to
2 Carolinas, which is now MUSC, but if that's where they
3 want to go, the physicians at Advanced Cardiology and, in
4 particular, Dr. May can't see them.

5 Dr. May has not been -- he's not in violation of the
6 restrictive covenant. He has not worked in Florence since
7 he left the practice at the end of March. It's caused
8 great hardship on him and his family.

9 He's got family here in Florence. He's married.
10 He's been here for 12 years. His children are still in
11 school, two children. He wants to stay here and he
12 believed that he had Dr. Rowe's blessing in staying.

13 He is doing locums work now. He is leaving in the
14 morning for Appleton, Wisconsin, where he's been for the
15 last -- I think working for maybe over the last month or
16 so, but this has caused a great financial hardship on him.

17 Now, if we look at the contract -- and that's on the
18 first page of what I passed up, the restrictive covenant,
19 paragraph nine, it's at the bottom of the paragraph. And
20 what this restrictive covenant says is in the event this
21 agreement is terminated for whatever reason, ad libbing,
22 the physician covenants and agrees that he will not become
23 employed by or associated in the capacity of an officer,
24 partner, stockholder, member, director, consultant,
25 independent contractor, adviser or employee of another

1 business entity engaged in the practice of cardiology nor
2 will he otherwise engage directly or indirectly in the
3 practice of cardiology within a 25-mile radius of McLeod
4 Regional Medical Center, Florence, South Carolina for a
5 period of two years.

6 We believe this is overbroad. And the reason is this
7 particular agreement prohibits him as literally written
8 there -- and written in 1994 when there was no such thing
9 as a hospital-based cardiologist. That restrictive
10 covenant prohibits Dr. May from working at either one of
11 the local hospitals in any capacity.

12 Now, the law disfavors restrictive covenants. And if
13 the restrictive covenant is overly broad, it must fall.
14 It has to be read intricately. And those are some of the
15 cites that I have back behind this, Faces Boutique being
16 the -- vs. Gibbes being the principle case.

17 In that case, what the -- what the court said was
18 that you cannot prohibit an employee from working in --
19 say in this one, any business in direct competition in the
20 type of business conducted by Faces. It is understood and
21 agreed that this prohibition applies to facials, selling
22 cosmetics, blah, blah, blah, blah.

23 In this case, Dr. May, if he goes to work for McLeod
24 Hospital as a hospitalist, as an internist -- I mean, he's
25 certified to be an internist. In any position, as an

1 administrator, he would be in violation of this
2 restrictive covenant because it prohibits him from being
3 employed in any business entity engaged in the practice of
4 cardiology.

5 Both of these entities are engaged in the practice of
6 cardiology. Both of them own cardiology groups, but --
7 and this is a technical argument, but it's applicable and
8 Faces recognizes this.

9 Dr. May could work in either one of those hospitals,
10 and it would not cause one lick of damage to Advance
11 Cardiology Consultants if he goes to work as an
12 administrator, as an internist, in any capacity other than
13 a cardiologist, but by the terms of this agreement, they
14 are restricting him from doing that. And South Carolina
15 does not allow for blue penciling.

16 You can't make this restrictive covenant valid by
17 doing what Dr. May argues in his deposition, which is oh,
18 I wouldn't stop him from going to work at Carolinas or
19 McLeod if he was doing something other than cardiology.
20 And Dr. Rowe testified to that; that he would not stop him
21 or try to stop him from going to work there.

22 Now, Faces was very clear about that. The defendants
23 have cited another case Ball vs. Columbia Heart Clinic,
24 which also involves cardiologists. In Ball, two of the
25 Columbia Heart Clinic cardiologists set up their own

1 office about 400 yards away from their old office. But
2 the restrictive covenant in that case talked about the
3 active practice of medicine in the field of cardiology.

4 That's not what we have here. What we have is a
5 general prohibition on Dr. May working at either one of
6 these hospitals, and what we have here is very similar to
7 the covenant in Faces Boutique, which says that they would
8 not work in any capacity in a competitive company.

9 Now, as I mentioned, if the restriction is overbroad,
10 it's no good. It has to be -- it has to fall and there's
11 no need to even look at any of the other bases for what we
12 say the problem is with this restrictive covenant. But I
13 do have some other basis that I want to touch on. And
14 that is that the covenant in the contract, the entire
15 contract has been breached by the practice. And the
16 breach of the contract -- and we set it out on the first
17 page of what I handed up, the duties of Dr. May would be
18 to perform professional duties as may be requested of him
19 by the practice president in keeping with his professional
20 status as a board certified cardiologist.

21 The physician shall do all things reasonably
22 necessary to maintain and improve his professional skills
23 during the term of this agreement. Now, the argument
24 there being he cannot maintain and improve his
25 professional skills when this practice would not allow him

1 to. They don't go to hospitals. They don't practice in
2 McLeod now either. They're completely office-based.

3 The contract also requires in paragraph three that
4 the physician shall devote his full-time and best efforts
5 to the performance of his duties hereunder, including
6 equable call coverage.

7 Now, the practice has no call coverage, but even when
8 Dr. May was there, the call coverage couldn't have been
9 equitable because Dr. Rowe had removed himself from the
10 call coverage.

11 Part of removing himself from the call coverage, and
12 one of the reasons Dr. May objected so strenuously and had
13 the conversation about looking for another job was that he
14 understood that his partners were probably just -- they
15 were going to want to abandon the call coverage, too.
16 They did not want to do -- they did not want to work as
17 hard as he did.

18 In particular, I point out paragraph four, subsection
19 D, facilities and services. It says the employer -- and
20 this is about the only thing in the contract other than
21 payment of compensation that the employer agrees to, but
22 the employer shall provide such facilities, equipment and
23 supplies as it deems necessary for physicians' performance
24 in his professional duties under this agreement, including
25 technical and sonographic health and such other facilities

1 and services as are suitable for his position and
2 necessary to the adequate performance of his duties.

3 And we would make the argument that allowing him to
4 see his patients at the cath lab at Carolinas Hospital are
5 part of the facilities and services that the employer
6 shall provide, because they were providing all of this.

7 When he came to work there, they were seeing patients
8 at both of the hospitals and the practice -- I mean, as a
9 practical matter, what's happened is this practice hasn't
10 kept up with the times. This practice is contracting, and
11 they've gone from six physicians to three and three that
12 are not seeing -- are not going to any of the hospitals.

13 Now, they may say that's because Dr. May has left,
14 but he didn't see that he had any choice at that time but
15 to seek an alternative. But he also sought alternative
16 employment with what he believed was the blessing of the
17 practice owner. And you can see from the excerpts that he
18 did, in fact, have the blessing of the practice owner.
19 And he had the email from November 15th, you're free to go
20 work at McLeod Health, or we do not object to you
21 interviewing with McLeod Health.

22 I don't want to misrepresent exactly what it said,
23 but under the circumstances, not objecting to an interview
24 is akin to me of saying fine. Go look for another job.
25 There's nothing in that email that suggests that there is

1 a covenant not to compete that he would be in violation
2 of.

3 And that particular email -- I mean, if -- they argue
4 that well, when we said McLeod Health, we were talking
5 about the overall McLeod Health, you know, the McLeod
6 Seacoast, McLeod Loris, McLeod Dillon.

7 We didn't -- we weren't talking about McLeod here in
8 Florence. Well, that's not what it says. There's no
9 reference in there that there's any restrictive covenant
10 that he might be violating, and it wouldn't make any sense
11 for him to even request that.

12 If that was an issue with McLeod, he could just show
13 them his contract and say here's what the contract says.
14 And McLeod was probably fully aware of what the contract
15 was anyway because he's been using the same one for 25
16 years. But, you know, relying on that, to his detriment,
17 went out looking for alternative employment.

18 He found alternative employment. He is not in
19 violation of -- he would be in violation of a literal
20 reading of this restrictive covenant, but this restrictive
21 covenant is overly broad and McLeod -- or excuse me,
22 Advanced Cardiology -- there is no legitimate business
23 interest for Advanced Cardiology to prohibit him from
24 working in either one of these local hospitals, which this
25 agreement requires that he not do.

1 THE COURT: If he were to go on and work for McLeod,
2 I assume he would be in, like the equivalent of a
3 hospital. He would be there waiting on and treating
4 people in the hospital. I mean, he would not have an
5 office in Florence?

6 MR. BUYCK: Well --

7 THE COURT: Yay or nay?

8 MR. BUYCK: That would be speculating. The argument
9 I'm making is this --

10 THE COURT: I'm just trying to determine whether or
11 not they would -- it would be an -- if they're going to do
12 nothing but office work, really, what difference does it
13 make? I'm just asking.

14 MR. BUYCK: Well, I've asked that question, too. I
15 can't -- I haven't gotten a good response.

16 THE COURT: Certainly not, Rowe, who owns it, is not
17 going into the hospital.

18 MR. BUYCK: No, if he -- the positions that he was
19 offered at Carolinas and also, what he envisioned he was
20 applying for at McLeod, although the record doesn't
21 indicate that there was actually a position at McLeod that
22 he was applying for. He was over there talking to them,
23 but --

24 THE COURT: You're talking about talking as an
25 individual cardiologist who would have privileges there as

1 a private practice individual?

2 MR. BUYCK: No.

3 THE COURT: Not employed by them?

4 MR. BUYCK: No, they're -- like I said, Advanced
5 Cardiology is the only group that has any private
6 cardiologists in Florence. What he was -- the point in
7 talking to McLeod and the point in talking to Carolinas
8 was that they hired him as a cardiologist.

9 THE COURT: Right.

10 MR. BUYCK: And that he become part of the
11 cardiologists that are supplying services at that -- at
12 one of those two particular hospitals. Marie Saleeby
13 testified that they have some doctors that go back and
14 forth to the other hospitals, but they're based at McLeod.

15 THE COURT: Right.

16 MR. BUYCK: That's what they're doing. And
17 Carolinas, we didn't get into that detail as far as the
18 nature of their practice, but they are -- according to
19 Dr. Rowe, they're owned cardiologists, and they work for
20 the hospital.

21 THE COURT: All right.

22 MR. BUYCK: They get paid by the hospital. They're
23 not in private practice to the extent --

24 THE COURT: All right. I think I've got a pretty
25 good feel for that.

1 MR. BUYCK: To the extent --

2 THE COURT: Let's hear what Advance Cardiologist has
3 to say about that.

4 MR. HOLMES: May it please the Court. Allan Holmes
5 and at counsel table, I have Rebecca Wolfe and Mrs. Rowe,
6 as we've already explained.

7 I would start first by saying my good friend, Mr.
8 Buyck, is much like myself in that I get all wrapped up in
9 these things, and I have a view of the facts. But when
10 we're talking about summary judgment, if the facts are
11 controverted, you can't just say whatever you want to say.

12 For example, in his affidavit, Dr. Rowe says -- and
13 this is sort of becoming irrelevant, quickly irrelevant.
14 I'll go ahead read it. At no time -- talking about when
15 they left the practice, they decided to leave Carolinas
16 together, the other cardiologists.

17 "At no time before or after this vote was taken did I
18 indicate to Dr. May that the restrictive covenant
19 contained in his employment agreement would not be
20 enforced against him if he chose to seek employment within
21 the geographical limitations set forth in the agreement.

22 At no time did I indicate to Dr. May that I would
23 contact Theresa Rowe about preparing a waiver of the
24 restrictive covenant contained in the employment agreement
25 so that Dr. May could seek alternate employment with

1 Carolinas Hospital as Dr. May has alleged. At no time did
2 I contact Theresa Rowe and ask her to prepare such a
3 waiver.

4 A letter from plaintiff's counsel dated January 18th,
5 2018, was received at the practice that threatened
6 litigation if I did not agree to sign the enclosed release
7 from non-compete agreement in exchange for consideration
8 of \$10.

9 Neither I nor any other members of Advanced
10 Cardiology Associates ever agreed to release Dr. May from
11 the obligations of his employment agreement, including the
12 restrictive covenant."

13 In fairness, the -- that's all true according to
14 Dr. Rowe. The confusion, if there is confusion, is that
15 Dr. Rowe said over the years Dr. May was a
16 non-considerate. And when he would come up, he'd just say
17 well, go find somewhere else. So he gathers that from
18 that, that Dr. May have decided that he was approved to do
19 whatever he wanted to do, but there is no basis for it.
20 And what's more important -- I think this is probably the
21 answer and why we think we're entitled to summary judgment
22 in this case.

23 The first thing is what happens after Dr. May left
24 the practice is of no consequence. I mean, we could have
25 an affidavit from Theresa May [sic] to the effect that the

1 practice is recruiting hospital -- excuse me,
2 interventionist cardiologists and intends to go back into
3 the hospitals and was disabled by Dr. May leaving. We
4 could do that, but that's irrelevant.

5 The issue is what were the duties under the contract;
6 did the employer breach the contract and why, or if the
7 employer did breach.

8 What we know for sure is that for 11 years, Dr. May
9 signed the same contract with the same covenant. At the
10 time Dr. May gave notice, and that was in, I think,
11 mid-February of 2019, he knew that the practice was not
12 going to waive the non-compete.

13 You may recall just a moment ago I read the letter or
14 referenced the letter from my friend, Mr. Buyck, who wrote
15 on January 18th, to the practice, to Dr. Lew Rowe.

16 Among other things, he said, "Your actions in urging
17 Dr. May to secure alternative employment and then reneging
18 on your pledge also constitutes a tortious interference
19 with his employment opportunities at both Carolina and
20 McLeod."

21 The point being that he's not only aware of this in a
22 waiver. He's hired a lawyer who's threatened to sue about
23 the fact that it's in a waiver, and this is 60 days before
24 he decides on his own to leave the practice.

25 At that time, he was paid pursuant to the terms of

1 the contract. He made almost \$500,000 -- around \$500,000,
2 a little more than \$500,000 in the past 12 months. He was
3 practicing medicine. He was practicing intervention
4 cardiology, as a matter of fact, even though he was only
5 employed under the contract as a cardiologist.

6 Not one single written term of the contract had been
7 breached by my client, nothing. There is no reference --
8 there's not even a reference to hospital privileges in the
9 contract. Privileges are obtained by a physician from a
10 hospital, not by a practice from a hospital.

11 I had seen employment agreements in which the doctor
12 was subject to termination if he lost his privileges at a
13 hospital. This agreement doesn't require that. All the
14 sections that Mr. Buyck and the plaintiff would try to
15 turn into conditions of employment are duties of the
16 physician. For example, "The employer shall provide such
17 facilities, equipment and supplies as it deems necessary."
18 Not what Dr. May thinks is necessary, what the employer
19 thinks is necessary.

20 The extent of services, he has to provide full-time
21 service. The duties, he has performed professional duties
22 in keeping with his professional status as a board
23 certified cardiologist.

24 THE COURT: You know, one thing based on what you
25 told me here, I do believe there is, indeed, a factual

1 controversy as to whether or not he's waived the
2 restrictive covenant. They say he did. You say he didn't
3 and --

4 MR. BUYCK: But if it's -- excuse me for
5 interrupting.

6 THE COURT: Apparently, in the depositions and the
7 documents that you're referring to and Mr. Buyck's letter,
8 there would, at least, be an indication there's a factual
9 controversy as to whether or not there's a waiver.

10 My question to you is do you feel the issue about it
11 being overbroad is ripe for me to determine here today?

12 MR. HOLMES: Well --

13 THE COURT: That's a question of law, perhaps, that
14 isn't going to change regardless.

15 MR. HOLMES: I could certainly speak to it, but the
16 other thing I would say on the question of whether or
17 not -- if I might, on the question of whether or not there
18 was an acquiescence, there was no consideration of the
19 acquiescence. He wasn't offered a job at McLeod. In
20 fact --

21 THE COURT: I think really for purposes of this
22 hearing, the question is whether or not there's a
23 scintilla of evidence, whether or not there's a factual
24 controversy.

25 MR. HOLMES: All right, sir.

1 THE COURT: Whether or not there was a waiver or
2 acquiescence, that's a factual question.

3 MR. HOLMES: All right, sir.

4 THE COURT: There's no question in my mind about
5 that. My question to you is whether or not -- the legal
6 issue about whether or not this restrictive covenant on
7 its face is overbroad?

8 MR. HOLMES: Yes, sir. First, there's no issue about
9 the territorial restriction. There's no issue about
10 consideration. There's no issue about the length of the
11 covenant. The issue is whether or not the restriction or
12 restraint in terms of his practice or future practice is
13 overbroad.

14 THE COURT: Right.

15 MR. HOLMES: And so --

16 THE COURT: I think this pretty much tracks what's --
17 I mean, it's not an unreasonable amount of time and it's
18 not an unreasonable geographic. I think that's good. I
19 think they do raise a good point about the fact that he
20 can't do other things that he's licensed to do.

21 MR. HOLMES: So what we did was we --

22 THE COURT: It would not be in competition with
23 Advanced Cardiology.

24 MR. HOLMES: Well, we are -- we asked him first in
25 his deposition to read a section and tell us what it

1 meant. In fact, when it says -- when you say in your
2 complaint that it purports to prevent you from being
3 employed as a cardiologist for a period of two years after
4 termination with a 25-mile radius of McLeod Regional
5 Medical Center in Florence, South Carolina, that's how you
6 read that provision, correct?

7 THE COURT: Well, now, really and truly, what he
8 thinks it means as a matter of law really makes no
9 difference, does it?

10 MR. HOLMES: If it's admission of a party opponent,
11 that's the issue. If I read a document and I say this is
12 what it meant, I think it's kind of hard to argue that's
13 not what it means. I guess you could say that with a
14 mental disability or --

15 THE COURT: But the plain language says it's
16 something different.

17 MR. HOLMES: Well, exactly. But he says, I'm a
18 cardiologist, so I wouldn't be seeking employment as a
19 bottle washer or dishwasher. You don't read this as an
20 agreement to keep you from being a bottle washer or a
21 dishwasher. I haven't looked at the document in some
22 time, but this is what you put in your complaint.

23 Answer, what it's stating about the restrictive
24 covenant, yes. Okay. Yes. I mean, the answer to that is
25 yes. There is a restrictive covenant, yes. And it says,

1 according to you, it's intended to prevent you from being
2 employed as a cardiologist for a period of two years after
3 termination within a 25-mile radius of McLeod Regional
4 Medical Center in Florence, South Carolina.

5 Answer, Yes.

6 THE COURT: Well, do you think -- this is my
7 question. I understand all that and I see where you're
8 going with that.

9 MR. HOLMES: Okay.

10 THE COURT: My question to you is do you believe
11 whether or not that's overbroad as a question of law and
12 not a fact?

13 MR. HOLMES: It's a mixed question, but the only
14 facts that matter are the facts that existed at the time
15 he decided to leave the practice. That the court is
16 not -- there are restrictive covenants enforced in
17 bankruptcy in which one -- the organization has completely
18 abandoned its economic mission.

19 The question is whether or not when the agreement was
20 accepted and the agreement was agreed to by the employee
21 that the restrictions that were placed at that time were
22 reasonable in furtherance of the employer's interest. And
23 that, to me, the answer is we have -- at that time, until
24 the day he left, we have I think four interventional
25 cardiologists working at hospitals, working at a hospital,

1 at McLeod. The only person withdrawing was Dr. Rowe. And
2 under those circumstances, those are the facts and this
3 restriction to my way of thinking is perfectly reasonable.
4 It does not prohibit him from doing anything.

5 THE COURT: I think you misunderstand my question.

6 MR. BUYCK: I'm sure I do.

7 THE COURT: My question is this, is the validity of
8 that restrictive covenant a question of fact or a question
9 of law? You seem to indicate that it matters what he
10 thinks it means and whether or not and that's different
11 than the plain language of the restrictive covenant,
12 which, in my mind, would be a question of law.

13 MR. HOLMES: I think that the language of the
14 restrictive covenant itself and what it means is
15 questionable. I think the surrounding circumstances
16 really aren't controverted facts. So from my perspective,
17 they're not questions of fact. They're settled.

18 THE COURT: So you think that the restrictive
19 covenant issues and whether or not it's overbroad is a
20 question of law that's ripe for me to determine here
21 today?

22 MR. HOLMES: I think I'd say well, how are you going
23 to determine it?

24 THE COURT: Well, it depends on -- I'm just asking.

25 MR. HOLMES: I think --

1 THE COURT: I'm asking because I want to hear what
2 you have to say.

3 MR. HOLMES: Yes, on the record that's been presented
4 to you, that yes, this issue can be determined as a matter
5 of law. I think that the record needs to be carefully
6 edited in the sense that the only facts that matter are
7 uncontroverted and those are those that existed at the
8 time that he left the practice. We're entitled to enforce
9 the covenant on the basis of the language of the covenant
10 and the circumstances of the business at that time. What
11 happens later is irrelevant.

12 THE COURT: All right. Why don't --

13 MR. HOLMES: I can't cite a case precisely for that
14 except for the fact if you go into bankruptcy, it doesn't
15 matter.

16 THE COURT: All right. Well, my ruling here today is
17 that the issue about whether or not the restrictive
18 covenant was waived is, indeed, a question of fact. And I
19 find that the restrictive covenant, the language of it is,
20 indeed, a question of law, and I'm going to ask that y'all
21 send proposed orders in that respect.

22 MR. HOLMES: Thank you, Your Honor. Appreciate
23 you --

24 THE COURT: How long do you anticipate that will
25 take?

1 MR. HOLMES: Your Honor, I have --

2 MS. WOLFE: I'm sorry?

3 MR. HOLMES: You think we can provide a proposed
4 order in a week?

5 MS. WOLFE: Yes, yes, we can.

6 THE COURT: Mr. Buyck.

7 MR. BUYCK: Yes, sir, Your Honor.

8 THE COURT: I'll entertain that.

9 Is there anything else y'all think we need to talk
10 about before we...

11 MR. BUYCK: Your Honor, with regards to -- well, this
12 is a question of law, refer you to the Faces case. In
13 this case, and I've got it in my materials, it says the
14 apparent willingness of Faces, the employer, to accept an
15 interpretation of the covenant which would render the
16 covenant proper in scope does not aid the invalidity of
17 the covenant as written.

18 THE COURT: I think that would be a good thing to put
19 in the order, and we'll address all of that. I'm sure he
20 will have a different take on that, but I think that's
21 certainly what I'll -- I think that's where this case is
22 going or this ruling is going.

23 MR. HOLMES: We think we have a different covenant,
24 you know, it is different, the language is different, so
25 we will address that. Thank you.

1 THE COURT: Okay.

2 MR. BUYCK: And, Your Honor, just for the record,
3 that was not my letter. I'm Mark Buyck, III. That letter
4 was signed by Mark Buyck, Jr.

5 THE COURT: All right.

6 MR. BUYCK: I'm not going to --

7 MR. HOLMES: I assume that's your son.

8 MR. BUYCK: Yeah.

9 (Whereupon, there was an off-the-record discussion).

10 MR. HOLMES: Thank you, Judge.

11 THE COURT: All right.

12 MR. HOLMES: Take care.

13 (Whereupon, the proceedings were concluded.)
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

I, Karen Ambroziak, Official Court Reporter for the
5th Judicial Circuit of the State of South Carolina, do
hereby certify that the foregoing is a true, accurate and
complete Transcript of Record of the proceedings had and
evidence introduced in the trial of the captioned case,
relative to appeal, in the Court of Common Pleas for
Florence County, South Carolina, on the 2nd day of
October, 2019.

Type text here
February 27, 2020

Karen Ambroziak

Karen Ambroziak, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	FOR THE TWELFTH JUDICIAL CIRCUIT
	)	
Dr. Gregory A. May,	)	Case No.: 2019-CP-21-00777
	)	
Plaintiff,	)	
	)	
v.	)	MOTION FOR RESTRAINING
	)	ORDER AND INJUNCTION
	)	(Priority Matter)
Advanced Cardiology Consultants, P.C.,	)	
Dr. Lew A. Rowe, and Theresa Rowe,	)	
	)	
Defendants.	)	
	)	

The Plaintiff hereby moves for a restraining order and an injunction based upon the verified Complaint in this matter, restraining and enjoining the Defendants from interfering with his practicing medicine in the Florence area.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/Mark W. Buyck, III
Mark W. Buyck, III #011902
248 West Evans Street
P.O. Box 1909 (29503-1909)
Florence, South Carolina 29501
Telephone: (843) 662-3258
Facsimile: (843) 662-1342
Email: mb3@willcoxlaw.com

ATTORNEYS FOR PLAINTIFF

Florence, SC
April 18, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF FLORENCE	)	FOR THE TWELFTH JUDICIAL CIRCUIT
	)	
Dr. Gregory A. May,	)	Case No.: 2019-CP-21-00777
	)	
Plaintiff,	)	
	)	
v.	)	MEMORANDUM IN SUPPORT OF
	)	MOTION FOR RESTRAINING
	)	ORDER AND INJUNCTION
Advanced Cardiology Consultants, P.C.,	)	
Dr. Lew A. Rowe, and Theresa Rowe,	)	
	)	
Defendants.	)	
	)	

In support of his Motion for Restraining Order and Injunction, the Plaintiff, Dr. Gregory A. May (hereinafter "Dr. May") submits the within Memorandum of Authorities. Rule 65 SCRPC governs the application for and issuance of temporary injunctions and temporary restraining Orders.

Dr. May is an interventional cardiologist. He was employed with the Defendant Advanced Cardiology Consultants, P.C. (hereinafter "ACC" or "the Practice") for ten (10) years. He and other Practice physicians maintained privileges at both primary hospitals in the community. The Verified Complaint in this matter details the last several months of Dr. May's employment with the Practice. Specifically, Dr. May was informed by the Practice's sole owner, Dr. Lew A. Rowe (hereinafter "Dr. Rowe"), that he intended to adopt an office based practice and no longer perform services in either hospital. (See Verified Complaint, ¶¶ 12-18). Over Dr. May's objections, Dr. Rowe and the Practice surrendered their privileges at Carolinas Hospital effective January 1, 2019. Dr. Rowe also informed the employed physicians that he did not intend to hire any additional physicians to cover his former call schedule. This had the

effect of depriving Dr. May from treating any of his patients who choose Carolinas Hospital as their preferred hospital. (See Verified Complaint, ¶¶16 and 25-29).

Dr. Rowe informed the Plaintiff that he was free to secure alternative employment within or without the 25-mile radius contained in a covenant not to compete in the parties' employment contract. (See Verified Complaint, ¶¶19 and 20). Based on these and subsequent conversations with Dr. Rowe, Dr. May has secured an offer of employment from MUSC (formerly Carolinas Hospital Systems) at its Florence location. (See Verified Complaint, ¶¶34 and 35). The offer was conditioned on Dr. Rowe releasing Dr. May in writing from the covenant not to compete. (See Verified Complaint, ¶35). Instead of adhering to his agreement, Dr. Rowe and the Practice are now demanding payment for releasing Dr. May from the covenant not to compete. By all accounts, Dr. Rowe's representation that he was changing the business model for the Practice is ongoing. The Practice has now withdrawn from McLeod Hospital and no longer has privileges at either of the two major hospitals in Florence. Dr. May has developed an extensive patient referral base which greatly benefits his professional practice as well as the health of his patients and access by the community. Had Dr. May remained an employee of ACC, he would not be able to practice his specialty, interventional cardiology, in the Florence area.

To obtain an injunction, the Plaintiff must allege facts sufficient to constitute a cause of action for injunction and demonstrate the injunction as reasonably necessary to protect the legal rights pending in the litigation. *Peek v. Spartanburg Regional Healthcare System*, 367 S.C. 450, 626 S.E.2d 34 (S.C. App. 2005). To establish a cause of action for injunction, the Plaintiff must show "(1) it would suffer irreparable harm if the injunction is not granted; (2) it will likely succeed on the merits of the litigations; and (3) there is an inadequate remedy at law." *Peek* at

454). The *Peek* case involved a private practice physician. The court noted that like Dr. May, Peek had lived and practiced in the Spartanburg community for fourteen years. She had “built a patient referral base, which fueled her professional practice. The loss of privileges at the hospital would lead to the loss of her patient referral base, which would, in turn, lead to the loss of her professional practice. The complete loss of a professional practice can be an irreparable harm.” The trial judge found, and the court agreed, that in such a situation, a physician would suffer irreparable harm if the status quo was not maintained.

When seeking a preliminary injunction, the Plaintiff need not prove an absolute legal right; the plaintiff need only present “a fair question to raise as to the existence of such a right.” *Williams v. Jones*, 92 S.C. 342, 347, 75 S.E. 705, 710 (1912). (Cited in *Peek*). The determination of whether to grant an injunction should not be based on the merits of the underlying case except insofar as the merits may assist the trial court in determining whether a prima facie showing has been made. *MailSource, LLC v. M. A. Bailey & Associates*, 356 S.C. 363, 588 S.E.2d 635 (S.C. App. 2003). “Once a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits.” *Helsel v. City of North Myrtle Beach*, 307 S.C. 29, 413 S.E.2d 824 (1992).

The third prong in determining whether injunctive relief should be granted is whether there exists an adequate remedy at law. As noted above, the purpose of an injunction is the preservation of the status quo. Unless Dr. May is allowed to continue his professional practice in a hospital setting in the Florence area, the status quo cannot be maintained. As noted in *Peek*, “if Peek lost her privileges at the hospital, her professional practice and, by extension, her career would be lost long before her claims... were adjudicated. Furthermore, Peek, who both sides

agree is a competent and capable anesthesiologist, would lose expertise if she were not otherwise allowed to exercise her privileges at the hospital while this case is pending, and therefore her future ability to practice anesthesiology would be compromised.” The *Peek* court also noted “while courts do often award monetary damages when a plaintiff can no longer work, such damages are usually the only possible remedy and serve to make the plaintiff as whole as possible under the circumstances. Here, monetary damages are not the only option, an injunctive relief is a better remedy because it would allow Peek to retain both her patient base and her expertise while also retaining her income.”

Dr. May does not contest the fact that he has entered into the employment agreement containing the covenant not to compete. The Practice however has not met its contractual obligation to Dr. May, specifically the decision to discontinue performing services at the two hospitals. In the circumstances as described in the Verified Complaint, it would be inequitable for the Defendants to seek liquidated damages from Dr. May while at the same time preventing him from seeing his patients in a hospital setting and performing interventional cardiology.

Dr. May would also point out that the paragraph in the contract containing the covenant not to compete (¶ 9 of Exhibit A to the Complaint) states that the “Employer shall have no right to obtain injunctive relief for the Physician’s breach of this Paragraph 9.” There is no prohibition on the Physician seeking such relief in the contract.

For the reasons stated herein, and in the Motion, the Plaintiff requests an injunction and/or restraining order enjoining the Defendants from attempting to enforce the covenant not to compete pending the completion of this pending action.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/Mark W. Buyck, III
Mark W. Buyck, III #011902
248 West Evans Street
P.O. Box 1909 (29503-1909)
Florence, South Carolina 29501
Telephone: (843) 662-3258
Facsimile: (843) 662-1342
Email: mb3@willcoxlaw.com

ATTORNEYS FOR PLAINTIFF

Florence, SC
April 18, 2019

STATE OF SOUTH CAROLINA)

COUNTY OF FLORENCE)

Dr. Gregory A. May,)

Plaintiff,)

v.)

Advanced Cardiology Consultants, P.C.,)

Dr. Lew A. Rowe, and Theresa Rowe,)

Defendants.)

IN THE COURT OF COMMON PLEAS

FOR THE TWELFTH JUDICIAL CIRCUIT

Case No.: 2019-CP-21-00777

**PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT**

The Plaintiff hereby moves for summary judgment as to Plaintiff's fourth cause of action brought pursuant to the South Carolina Declaratory Judgment Act, S.C. Code Ann. §15-53-10 et. seq. The Plaintiff requests that the Court enter an order declaring that the employment agreement between the parties, in particular those portions of the contract which seek to restrict the Plaintiff's ability to practice interventional cardiology within the restricted area is unenforceable and does not subject the Plaintiff to the payment of liquidated damages to the Defendant, Advanced Cardiology Consultants, P.C. The Plaintiff also requests as an alternative that the court find that the Defendants have breached the underlying employment agreement thereby nullifying the restrictive covenant contained therein. The Plaintiff relies on the previously filed pleadings in this case including the previously filed affidavits. The Plaintiff also relies on the Memorandum of Law accompanying this Motion.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/Mark W. Buyck, III
Mark W. Buyck, III #011902
248 West Evans Street
P.O. Box 1909 (29503-1909)
Florence, South Carolina 29501
Telephone: (843) 662-3258
Facsimile: (843) 662-1342
Email: mb3@willcoxlaw.com
ATTORNEYS FOR PLAINTIFF

Florence, SC
September 16, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE)
Dr. Gregory A. May,)
Plaintiff,)
v.)
Advanced Cardiology Consultants, P.C.,)
Dr. Lew A. Rowe, and Theresa Rowe,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT
Case No.: 2019-CP-21-00777

**MEMORANDUM IN SUPPORT
OF PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

Dr. May is an interventional cardiologist and has been engaged in the private practice of cardiology from 1992 until March 2019. He relocated to Florence from the Orlando area in April 2008 after accepting a position with Advanced Cardiology Consultants, P.C. (See May Depo., pgs. 4 – 7).

The Defendant Dr. Lew Rowe moved to Florence in 1994 after completing his cardiology training program. Dr. Rowe founded Advanced Cardiology Consultants, P.C. in March 1994 and has been the Practice President and the sole owner/operator since that time. (See Dr. Rowe Depo., pgs. 4 – 6, 14). The Defendant Theresa Rowe has worked as the Practice's office manager since its founding. She and Dr. Rowe married in October 2007. (See Dr. Rowe Depo., pg. 10). Beginning at its founding in 1994, Advanced Cardiology Consultant's physicians have maintained privileges at each of Florence's primary care hospitals. The Practice has also maintained physician privileges at other regional hospitals including Hartsville, Kingstree, and Lake City, though none of these hospitals provide interventional cardiology services. (See Dr. Rowe Depo., pgs. 27 and 41). The Practice and its physicians maintained privileges at McLeod Hospital, Bruce Hospital, and Florence General beginning in 1994. The

physicians continued their privileges when Bruce Hospital and Florence General merged and became Carolinas Hospital System. (See Dr. Rowe Depo., pg. 16). Dr. Rowe and members of the Practice provided call at both McLeod and Carolinas Hospital System until relinquishing privileges in 2019. (Dr. Rowe Depo., pg. 17).

THE PRACTICE

Dr. May described his perception of the Practice as follows:

A. So when I first started with the practice in 2008, everybody in the group, including Dr. Rowe, was taking fairly equal call. At that time when I started, we were going to both Carolinas Hospital and McLeod Hospital. I was absolutely as busy as I possibly could be. Going to both hospitals, we saw consults in the hospital, we saw our own patients who came to the emergency rooms in both hospitals. I performed heart cath and did cardiac intervention, which includes stents and whatnot, at both hospitals.

Now, I don't know if you're aware but in the town of Florence some people prefer McLeod Hospital and some people prefer Carolina Hospital. So we had a fairly large number of patients at both places. In addition, we had a fairly -- actually, a very busy office practice. I had never seen that many patients in one day during an office practice in Orlando, and I thought I was very busy in Orlando. So we were extremely busy. I felt like my production was as good as it could get. Everything was fine and good.

Over the years, we did acquire some new partners which had some different ways of looking at work. So that was one of the issues that came up. In addition to that, Ms. Rowe frequently would give me indications that she was uncertain about the future of the practice, if we were going to be able to compete as a private-practice group with the hospitals for contracts. That was one of the things that I kept hearing over and over, louder and louder, as the years went by. So I was concerned about that.

But, you know, things went along pretty good even despite the cuts that we had, reimbursement. Things were acceptable and we had a good group. We were -- we had good comradery. We had a good thing with the way things were handled during the day. You know, the doctors were in the office, didn't have to run back and forth to the hospitals. We didn't have to -- I thought it was about as stress-free as you could get for a busy practice.

May Depo., pg. 24, l. 21 -- pg. 26, l. 13.

In the Fall of 2018, Dr. Rowe determines that he will surrender his privileges and become an office-based cardiologist.

A. That's correct. September, October 2018.

Theresa Rowe had indicated to me that Dr. Rowe might not want to take call anymore. I told her I didn't think that was going to be very good for the group's health and that it had always been that way and how was that going to work out. I had a concern that the other physicians in the group would be reluctant to want to take more call because they're already not wanting to take call and taking a lot of time off. A big problem in the group was doctors taking time off, several weeks a year time off. Not myself, but other physicians in the group took advantage of Theresa's open policy to get whatever time off they requested. It caused problems.

So in late September, early October, I finally approached Dr. Rowe. And I said, you know, "What's this I hear about you not wanting to take call anymore? And what do you think about the practice, the health of the practice, and all this Theresa is talking about?"

He goes, "Yeah." He goes, "I'm really not sure what's going to happen. Billing, everything is up in the air. We have to see what happens. But I have decided that I am no longer going to take call."

Q. Did he say he was going to resign his privileges as well?

A. He did. He said he was going to resign his privileges at both McLeod and Conway (*sic*) Hospital at the 1st of the year. That would be 1/1/19.¹

May Depo., pg. 26, l. 17 – pg. 27, l. 23.

Dr. Rowe's indication that he intended to resign his hospital privileges caused Dr. May great concern about the health of the practice as well as his personal financial well-being. He began discussing his options with Dr. Rowe.

A. So Dr. - - so Dr. Rowe has decided he's going to drop his privileges at both hospitals and no longer take call. So we were standing right out in front of his office between the nursing area and his office when he told me

¹ Dr. Rowe testified that he resigned his privileges at both McLeod and Carolinas Hospital on January 1, 2019. (Rowe Depo., pg. ____).

this. So that was the first time that I had actually heard that from his mouth.

So, you know, he said, "I've been thinking about this for a while, and that's what I've decided to do. I want to just be an office-based physician."

And I said, "Well, where does that leave the rest of us?"

And he looked at me and he said, "You can do whatever you want to do."

And I said, "What does that mean?"

He says, "You can go to work for one of the hospitals in town. You can" - - "You know, you can do whatever you want to do."

So I was kind of set back, to be honest. I was surprised at his not wanting to take call. And I was happy to hear him say that I could stay in town. And to be honest, you know, I had been a very productive employee for the group. I had made a lot of money for Dr. Rowe, probably \$5 million or \$6 million over the time that I was there, I made for him. So I felt like that was the gentlemanly thing to do would be to make the comment that he made. So I was not shocked that he said that. I felt like that's what I would have done if I was in his position.

May Depo., pg. 29, l. 12 - pg. 30, l. 17.

A. So probably two days after Dr. Rowe had told me that he was no longer going to take call, I approached him and said, "You said I could go to work for one of the local hospitals, but I have a restrictive covenant. What about that?"

And he said, "You know, I don't want to make any enemies." These are almost his exact words. "I don't want to make any enemies. And I could invoke the restrictive covenant, but in your case I will not enforce the restrictive covenant."

So I said, "All right." Well, I said, "I'll keep you abreast of everything that I have planned. And I think I'm going to go talk to McLeod about a job."

And he said, "That'd be fine."

So I contacted Ms. Saleeby, Marie Saleeby, at McLeod. And I asked her - - I asked to meet with her. And when I met with her, she said, you know, "What's going on?"

I said, "I'm really not sure. The group's kind of" - - "The group's kind of on shaky ground. And Dr. Rowe's not going to take call, and he's told me that I can look for local employment, that I have no restrictive covenant."

And she said, "Well, we'd love to have you over here, but I'm going to need something in writing from the Rowses saying that that's" - - "that that's the case."

So I went back to Dr. Rowe and I said, you know, "They're going to need something in writing."

So, he said "No problem."

So we both walked back to Theresa, and she typed this e-mail to Marie Saleeby. Shortly after that, when I confirmed - - I got a copy of the e-mail. And I believe you'll see a copy was also sent to Dr. Rowe stating that I could talk about employment there.

May Depo., pg. 31, l. 9 - pg. 32, l. 21. (See also Exhibit "A" - November 15, 2018 e-mail from Theresa Rowe to Marie Saleeby).

Dr. May was not offered a position with McLeod. He then approached the physician recruiter at Carolinas Hospital, Randy Seif.

A. So at that point, since I had already had these conversations with Dr. Rowe about him being okay with me working in town and no restrictive covenant, I went ahead and spoke with - - I made an appointment to speak with Randy Seif. I spoke with Mr. Seif about employment. It was the same feeling that I had from Ms. Saleeby, they would be glad to have me. We could - - you know, we discussed some details about salary and RVU basis at work. We discussed some details like that. And I said, "It sound good to me. Let's do it."

And he said, "Well, our legal department says that you need to get an actual letter of release from the restrictive covenant from Dr. Rowe before we can negotiate your - - before we can actually, you know, finish up your contract." And he said, "By the way, it's going to take three months for us to credential you, so time is of the essence."

May Depo., pg. 34, l. 11 – pg. 35, l. 5.

A. So I believe that these conversations were sometime in January with Mr. Seif or it could have been December, I'm not sure.

May Depo., pg. 35, ll. 10-12.

A. So the very day that I decided, I talked to my wife, and I said, "You know, this is kind of a scary moment, but I don't want to have to move from Florence with our kids in school. They have friends. We're settled there. I don't want to have to move, and Rowe said I didn't have to and he wouldn't enforce it, so I'm going to do this. I don't like the idea of working for the hospital, but at least I know I really have no other good options."

So I went, I told Dr. Rowe, I said, "Can I talk to you in my office?" He came into my office. I said, "You know, I've talked to Carolinas, and I've decided I'm going to do that."

And I think he was surprised, but he ultimately said, you know, "Congratulations." I told him what I needed. I told him I needed a letter of release from the restrictive covenant. He said, "No problem. I'll have Theresa do that, make that letter."

So I waited to get my letter. And it was about two days later, and I went into Theresa's office because I knew she was the one that was going to do the letter. And I asked her, "Did you send the letter, or did you make up the letter that I need?"

And she became extremely nasty about the whole situation. She told me that she would handle that, and I had no business even asking her about that. And she was extremely rude to me, you know, for me being a professional. She said this was above my pay grade, that she would handle that, and just who did I talk to over there at Carolinas.

And I said, "I talked to Randy Seif."

And she - - her words were, "Oh, little Randy. You talked to little Randy? Well, why don't you have little Randy call me."

So I had little Randy call Theresa. And Theresa informed him that - - she was basically trying to get him to buy out my contract after Dr. Rowe said that he wasn't going to enforce the restrictive covenant.

May Depo., pg. 35, l. 19 – pg. 37, l. 10. See also, Seif Affidavit.

WITHDRAWAL FROM CAROLINAS HOSPITAL

In December 2018, after Dr. Rowe had informed the physicians that he intended to drop all his hospital privileges effective January 1, 2019, the physicians met with Dr. and Mrs. Rowe to discuss the Practice's relationship with Carolinas Hospital. A discussion ensued whereby the employed physicians indicated that they no longer wished to provide call coverage to Carolinas thus resulting in the necessity of the entire Practice withdrawing from the hospital. Dr. Rowe testified that he essentially took a passive role in the discussions regarding the withdrawal from Carolinas Hospital. (Dr. Rowe Depo., pg. 48, l. 20 – pg. 49, l. 14). This despite the fact that he testified that when he gave up his hospital privileges, he was giving up "a huge revenue stream that's no longer coming to me." Dr. Rowe Depo., pg. 43, ll. 8-11). He also testified that he anticipated that the Practice would not be forgoing a revenue stream since his personal revenue stream would be divided among the remaining employed physicians. (Dr. Rowe Depo., pg. 43, ll. 11-16). Dr. Rowe also testified that at the time of the meeting, 30% to 40% of the Practice's in-patient business was at Carolinas. (Dr. Rowe Depo., pg. 107, l. 22 – pg. 108, l. 8). Dr. May testified that Mrs. Rowe indicated to him that the financial impact to him would be between \$100,000 and \$150,000 a year. (May Depo. , pg. 45, ll. 1- 18). Mrs. Rowe did not recall that conversation; however, she did testify

A. I was taken completely off guard and shocked by the behavior of these five physicians.

Q. What five physicians are you referring to?

A. Dr. May, Dr. Ng, Dr. Brady, Dr. Wolery, and Dr. Debsikdar.

Q. All five of them shocked you?

A. Absolutely. I thought they would have continued to do the work at two hospitals, not given up anything because they would have made more money.

Q. At two hospitals?

A. Going - - they would have made more money with Dr. Rowe dropping his privileges.

Theresa Rowe Depo., pg. 10, l. 12 – pg. 11, l. 1.

She also testified:

Q. Did you on your own make the point that you just made very vocally with me that by doing so it was going to hurt the practice, at least the revenue for the practice?

A. It would hurt the revenues of the practice, if that's what you're asking, yes.

Q. Did you express that at the meeting in December?

A. I think I said something to the effect of, "Do you guys really want to give up this hospital?"

Theresa Rowe Depo., pg. 12, ll. 15 – 25.

After the employed physicians voted to discontinue call coverage at Carolinas Hospitals, Dr. May approached Mrs. Rowe regarding the possibility of his remaining on the call schedule at Carolinas, albeit without Practice call coverage. Mrs. Rowe testified that she contacted the Practice's malpractice carrier,

A. I believe what was said was that I think the malpractice carrier would have a hard time, because I'd actually called the malpractice carrier, and they said that they didn't feel like the practice should allow that.

Q. That the practice should not allow what?

A. Him to cover patients for the other practice.

Theresa Rowe Depo., pg. 17, ll. 8 – 15.

THE CONTRACT

Dr. and Mrs. Rowe testified that the employment agreement between the Practice and Dr. May was essentially the same agreement which the Practice has used since opening in 1994.

Paragraph 2 of the contract reads as follows:

Duties. The physician shall perform such professional duties for employer as may be requested of him by the practice president in keeping with his professional status as a Board-Certified Cardiologist. The physician shall do all things reasonably necessary to maintain and improve his professional skills during the term of this agreement.

Paragraph 3 reads:

Extent of Services. Physician shall devote his full time and best efforts to the performance of his duties hereunder, including equitable call coverage ...

Paragraph 4 reads:

Compensation. For all duties to be performed by physician hereunder, physician shall be entitled to compensation based solely upon the physician's own collections. Compensation shall generally be payable monthly based upon the preceding month's collections at 50% of the physician's collected fees generated by the physician ...

Paragraph 4 contains subsection (d).

Facilities and Services. The employer shall provide such facilities, equipment and supplies as it deems necessary for physician's performance in his professional duties under this agreement, including technical and stenographic help **and such other facilities and services as are suitable for his position and necessary to the adequate performance of his duties.**

Paragraph 9 contains the restrictive covenant:

Restrictive Covenant; Liquidated Damages. In the event this agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a 25 mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination. Employer and the physician

acknowledge that in the event the physician violates the provisions of this Paragraph 9, the damages suffered by the employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), (See attached Exhibit "B").

DISCUSSION

Covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer. *Rental Uniform Services of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983); see also *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (S.C. App. 1992); see also *Faces Boutiques v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App. 1995). A restriction against competition must be narrowly drawn to protect the legitimate interest of the employer. *Almers v. South Carolina National Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975). A covenant not to compete will be upheld only if it is:

- (1) Necessary for the protection of the legitimate interest of the employer;
- (2) Reasonably limited in its operation with respect to time and place;
- (3) Not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (4) Reasonable from the standpoint of sound public policy; and
- (5) Supported by valuable consideration.

Faces Boutiques, 455 S.E.2d at 708.

The restrictive covenant here, just as the covenant in *Faces Boutiques*, violates the requirements that a covenant must be "necessary for the protection for the legitimate interest of the employer", and "not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood." The Advanced Cardiology Consultant agreement specifically

states that in the event of its termination, physician will not become employed by or associated with an entity, “engaged in the practice of cardiology ... within a 25 mile radius of McLeod Regional Medical Center, ... for a period of two years from the date of such termination.” The plain construction of the covenant not to compete prevents Dr. May from working in any capacity with the largest and third largest employers in Florence County, South Carolina. The covenant as written is not necessary for the protection of the legitimate interests of Advanced Cardiology Consultants, P.C. It is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood within the field of medicine. The Defendants can not possibly articulate a legitimate reason to prohibit Dr. May from pursuing employment with either hospital in an administrative capacity. There is no legitimate argument that can be made that Advanced Cardiology Consultants would be harmed in any way if Dr. May chooses to pursue employment at the hospitals, for example, as a physician assistant or hospitalist.

The terms of the restrictive covenant are too broad and unenforceable. “If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved.” *Faces Boutiques* at 709, see also *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (The court “cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally.” *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) (if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements.”)

The Defendants, verbally and in writing, encouraged Dr. May to seek employment within the 25-mile geographic range. Dr. Rowe encouraged this with the knowledge that if Dr. May was seeking an interventional cardiology position, the nearest hospitals offering these services

outside the 25 mile radius are in Murrells Inlet and Columbia.² (Dr. Rowe Depo., pg. 65). Dr. Rowe testified that with regards to his discussions with Dr. May “consistently I and Theresa told him, “Look around. Go to other places. Interview.” (Dr. Rowe Depo., pg. 68, ll. 21-23). Dr. Rowe testified:

Q. Did he discuss with you employment options at two local hospitals?

A. Yes.

Q. And what was your response to that?

A. Okay. I had no response. Okay.

Dr. Rowe Depo., pg. 70, ll.13 - 17.

Q. Dr. May specifically told you or asked you if you would have any objection to him going to work for McLeod?

A. And I probably said, “Do whatever you want.” I would have said that multiple times. This was not one conversation. This was a series of hall, parking lot, grabbing sort of things. And I would have said, “Do whatever you want,” Absolutely.

Dr. Rowe Depo., pg. 72, ll. 9 - 18.

Dr. Rowe acknowledges that he was aware that Dr. May was looking for alternative employment.

Q. Now did Dr. May ask you – or, excuse me, did he tell you that he was having conversations with Marie Saleeby about employment opportunities at McLeod?

A. I can’t recall if he mentioned Marie Saleeby. But he definitely mentioned that one of the places he was looking at was McLeod.

Q. What other places did he say he was looking at?

A. Locums, Carolinas, the beach. It varied from time to time.

² Marie Saleeby testified that there was a cath lab at the Loris Hospital. (Saleeby Depo. pg. ___, l. ____)

Dr. Rowe Depo., pg. 76, l. 17 – pg. 77, l. 2.

Q. Did you ever tell Dr. May that you were not opposed to him seeking employment or accepting employment at either one of the local hospitals?

A. I told him that he needs to explore his options.

Q. Alright. But did you tell him –

A. I never told Dr. May that he should work at McLeod Hospital or at Carolinas Hospital. I would never prohibit him from discussing employment options with either or those entities, however.

Dr. Rowe Depo., pg. 77, l. 22 – pg. 78, 7.

When asked about Carolinas Hospital, Dr. Rowe testified:

Q. And did you have any problems with him having discussions with Carolinas Hospital regarding employment?

A. No, I wouldn't have a problem with it. In fact, I told him, "Look at all your options," many times.

Q. Did you ever tell him to look at all of his options, including the hospitals here in Florence?

A. I said, "Look at everywhere," is what I told him. "Don't limit yourself."

Dr. Rowe Depo., pg. 102, ll. 6 - 16.

**THE PRACTICE HAS BREACHED THE EMPLOYMENT AGREEMENT AND IT
WOULD BE INEQUITABLE TO ALLOW IT TO ENFORCE THE RESTRICTICE
COVENANT**

When Dr. May was hired in 2008, Advanced Cardiology Consultants was a much different practice than exists today. The physicians provided call coverage to two hospitals. Dr. May testified that he was as busy as he wanted to be. From 2008 to 2018, Dr. May was able to do all things reasonably necessary to maintain and improve his professional skills as outlined in paragraph 2 of the employment agreement. When Dr. Rowe announced that he was surrendering

his privileges in favor of an office-based practice, this caused Dr. May great concern.³ Dr. May was also concerned that Dr. Rowe's decision to drop call coverage would prompt the other physicians to seek a similar arrangement. This is exactly what happened when those physicians voted to cease practicing at Carolinas Hospital. While Dr. Rowe seems to have taken a passive attitude towards this decision, Mrs. Rowe's reaction was anything but, testifying that she was "taken completely off guard and shocked". (Theresa Rowe Depo., pg. 10). She was convinced that the Practice was abandoning revenues in refusing to provide call coverage.

Paragraph 3(d) of the employment agreement provides that ACC shall provide such facilities ... for physician's performance of his professional duties under this agreement, including ... such other facilities and services as are suitable to his position and necessary for the adequate performance of his duties. As of August 1, 2019, Advanced Cardiology Consultants does not have any employed physician with privileges at a hospital providing interventional cardiology services. Dr. Rowe testified that he has no intention of ever pursuing his subspecialty of interventional cardiology. Dr. May was adamant in his testimony that he intends to continue practicing interventional cardiology for at least ten (10) years if given the opportunity. Mrs. Rowe confirms that she and Dr. May discussed the possibility of his providing solo call coverage to Carolinas; however, that opportunity was not pursued at the insistence of the Practice's malpractice carrier.

The compensation arrangement for the Practice is a classic "eat what you kill." Dr. Rowe's acquiescence in the decision to abandon 30% to 40% of the Practice's revenue was in direct breach of the employment agreement's paragraph 3(d). Given that the Defendants have

³ Dr. Rowe testified that his time devoted to his cardiology practice is approximately 50% less since dropping call coverage. (Dr. Rowe Depo., pg. 19).

breached the employment agreement, it would be inequitable to allow them to enforce the restrictive covenant and/or request liquidated damages under the facts of this case.

WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/Mark W. Buyck, III
Mark W. Buyck, III #011902
248 West Evans Street
P.O. Box 1909 (29503-1909)
Florence, South Carolina 29501
Telephone: (843) 662-3258
Facsimile: (843) 662-1342
Email: mb3@willcoxlaw.com
ATTORNEYS FOR PLAINTIFF

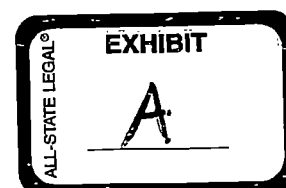
Florence, SC
September 16, 2019

From: Theresa Rowe <T.Rowe@acccheartline.com>
Date: November 16, 2018 at 10:35:16 AM EST
To: "Greg May, M.D. (greg.may55@yahoo.com)" <greg.may55@yahoo.com>
Subject: Fw: Dr. Greg May

From: Theresa Rowe
Sent: Thursday, November 15, 2018 6:24 PM
To: Marie Saleeby
Cc: lew_rowe
Subject: Dr. Greg May

Hi Marie,

Dr. May has expressed that he would like to explore an employment opportunity with McLeod Health. We do not object to him interviewing with McLeod Health.



STATE OF SOUTH CAROLINA)
 EMPLOYMENT AGREEMENT)
 COUNTY OF FLORENCE}

THIS AGREEMENT is made this this day of March 30, 2018 by and between **ADVANCED CARDIOLOGY CONSULTANTS, PC**, a professional corporation organized and existing under the laws of the State of South Carolina ("Employer"), and Gregory May, M.D. ("Physician").

The parties hereto, intending to be legally bound hereby, agree upon the following terms of employment of Physician by Employer.

1. **Term.** Physician is hereby employed by Employer for a term of one (1) year commencing March 30, 2018 and ending at midnight March 31, 2019, unless sooner terminated in accordance with the provisions of Paragraph 7. It is contemplated that Physician's employment may be extended beyond March 31, 2019, such extension must be in writing and on such terms as the parties may then agree.

2. **Duties.** The Physician shall perform such professional duties for Employer as may be requested of him by the practice president in keeping with his professional status as a Board Certified cardiologist. The Physician shall do all things reasonably necessary to maintain and improve his professional skills during the term of this Agreement. He shall foster the professional practice of Employer to the best of his professional ethics.

3. **Extent of services.** Physician shall devote his full time and best efforts to the performance of his duties hereunder, including equitable call coverage and shall not engage in any business or perform any services in any capacity other for Employer without the prior written consent of Employer. However, nothing in this Agreement shall prevent the physician from engaging in activities such as investing in stocks, bonds, securities, commodities, real estate and other forms of investment as will not require any services on the part of the physician in the operation of the affairs of the companies in which such investments are made.

Compensation. For all duties to be performed by Physician hereunder, Physician shall be entitled to compensation based solely upon the physician's own collections. Compensation shall generally be payable monthly based upon the preceding month's collections at 50% of the physician's collected fees generated by the physician, subject to applicable federal and state with-holding. The physician receive a bonus, the amount of which shall be proportionate to the total sum collected by the Physician. Such bonus, if any, maybe payable as the employer may determine, but if paid, it shall be paid at least annually.

(a) **Continuing Medical Education.** Employer will reimburse Physician for tuition expenses, up to \$2,000.00, relating to one (1) meeting or seminar each year during the term of his Agreement, attended by Physician for the purposes of continuing medical education (CME). Physician may attend such meeting or seminar upon the prior approval of Employer, which approval shall not unreasonably be withheld. All other expenses relating to such CME shall be Physician's responsibility. It is contemplated that Physician's attendance at such



CME shall not exceed two (2) weeks during the term hereof.

(b) Sick Pay. Inasmuch as Physician's compensation is based upon the preceding month's collections as provided in Paragraph 4, no separate or distinct sick pay will be available to Physician in the event he becomes unable to perform his services hereunder by reason of illness or accident.

(c) Vacation. Physician shall be entitled to 10 working days, regular vacation during the term hereof. This vacation shall be non-cumulative; such vacation shall not interfere with the practice schedules, his commitments to his patients, and obligations to Employer. The time or times during which the vacation is to be taken shall first be approved by the Employer, which approval shall not reasonably be withheld.

(d) Facilities and Services. The Employer shall provide such facilities, equipment and supplies as it deems necessary for physician's performance of his professional duties under this Agreement, including technical and stenographic help and such other facilities and services as are suitable to his position and necessary to the adequate performance of his duties. Physician shall have, maintain and use, when appropriate, an automobile, home telephone, and other facilities needed in connection with his employment under this Agreement, all of which shall be at the physician's expense, unless reimbursement by Employer is approved in advance. Physician shall also, at his expense, carry automobile liability insurance protecting himself and Employer against claims arising out of the use of an automobile in the course of his employment by Employer.

(e) Malpractice Insurance. As of the commencement date of employment, employer agrees to provide Physician with professional liability insurance, commonly called "malpractice insurance" on an "occurrence" basis, with such limits, terms and conditions as is otherwise commonly provided by Employer to or for the benefit of its other professionally licensed employees and physicians; provided, however, that such amounts shall be at least in maximum amounts as are offered by the Joint Underwriters Association and the South Carolina Patient's Compensation Fund, or, if with another insurance company licensed in the State of South Carolina, coverage of at least \$200,000.00 / \$600,000.00 aggregate.

5. Disclosure of Information. During or any time after termination of employment hereunder, The Physician will not, without authorization of Employer, disclose to or use for the benefit of any person, corporation or other entity, or himself, any files or other confidential information concerning the business, methods, operation, financing, services, or Employer "Confidential information" as used herein shall mean information particular to Employer, that is disclosed to employee or known by him as a consequence of his employment by Employer, whether or not pursuant to this Agreement. Confidential information shall include, but not limited to, all information designated by Employer as confidential, or in the future so designated, including financial information, books, records, financial statements, business plans, prices, and credit terms, and contract terms or other business arrangements. The Physician shall keep and maintain appropriate charts, files, and records of all professional services rendered by him under this Agreement, and he shall prepare in connection with these services all reports and correspondence necessary or appropriate in the

circumstances. All of these records, reports, claims and correspondence shall belong to the Employer.

6. Surrender of Books and Records. Physician acknowledges that all files, patient records and charts, lists, books, records, literature, products, and other materials owned by Employer or used by it in connection with the conduct of its business shall at all times remain the property of Employer, and that upon termination of employment hereunder, irrespective of the time, manner or cause of said termination, physician will surrender to Employer all such files, patient records and charts, lists, books, records, literature, products, and other materials. Employer agrees that, upon any patient's request, copies of patient medical records and charts shall be provided to the patient.

7. Termination. Either party may terminate this Agreement with or without cause upon thirty (30) day written notice to the other. Cause shall be deemed to be any one of the following:

- (a) Revocation or suspension of physician's license to practice medicine in the state of South Carolina.
- (b) Dishonesty detrimental to the best interests of Employer.
- (c) Continuing inattention to, or neglect of, the duties to be performed by Physician.
- (d) The death of Physician.
- (e) Participation by Physician in any fraud.
- (f) Imparting any confidential information in violation of this Agreement.

Employer's Authority: The physician agrees to observe and comply with the rules and regulations of the Employer either orally or in writing, respecting performance of his duties and to carry out and to perform orders, directions and policies stated by Employer to him, from time to time, either orally or in writing. Physician specifically understands that Employer shall have final authority over acceptance or refusal of any patient for professional services.

8. Compensation Upon Termination. Upon termination of this Agreement for any event described in Subparagraphs (b), (e), or (f) of Paragraph 7, Physician shall not be entitled to receive such compensation beyond the termination date even for services rendered through the date of termination. Any compensation the Physician maybe entitled shall be paid within sixty (60) days, of termination, allowing for collection of fees.

9. Restrictive Covenant: Liquidated Damages. In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two

years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the foregoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

10. **Severability.** If any provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect. If any provision is held invalid or unenforceable with respect to any particular circumstances, it shall nevertheless remain in full force and effect in all other circumstances.

11. **Benefits.** This Agreement shall inure to and shall be binding upon the parties hereto, the successors and assigns of Employer, and the heirs and assigns of the Physician; provided, however, that this Agreement may not be assigned without prior written consent of both parties.

12. **Notice.** All notices required to be given under the terms of this Agreement shall be in writing, shall be effective upon receipt, and shall be delivered to the addressee in person or mailed by certified mail, return receipt requested, as follows:

If to Employer, address to:

ADVANCED CARDIOLOGY CONSULTANTS, P.C.
1706 Second Loop Road
Florence, S.C. 29501

If to Physician, address to:

Gregory May, M.D.
2494 Parsons Gate
Florence, S.C. 29501

or such other address as either party shall have designed for notices to be given to him or it in accordance with this Paragraph.

13. **Waiver.** The waiver by either party of any breach or violation of any provision of this Agreement shall not operate or be construed as a waiver of any

subsequent breach or violation hereof.

14. **Governing Law.** This Agreement has been negotiated and executed in the State of South Carolina, and the laws of the State of South Carolina shall govern its construction and validity; and jurisdiction and venue of any action to enforce the proceedings hereof or for damages shall lie in the City of Florence, Florence County, South Carolina.

15. **Entire Agreement.** This Agreement constitutes the entire Agreement between the parties hereto and supersedes any and all prior agreements, understandings, and representations with respect to the subject matter hereof. No change, addition, or amendment shall be made except by written agreement signed by the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

WITNESSES: ADVANCED CARDIOLOGY CONSULTANTS, PC

<u>Melissa H. Byrd</u>	BY: <u>L. A. Rowe</u>
<u>Dina C. Robinson</u>	Its: President - Lew A. Rowe, M.D.
As to Employer	
<u>Melissa H. Byrd</u>	<u>Gregory May</u>
<u>Dina C. Robinson</u>	Gregory May, M.D.
As to Employee	

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	
	)	
Dr. Gregory A. May,	)	
	)	
	)	CASE NO.: 2019-CP-21-00777
Plaintiff,	)	
	)	DEFENDANTS'
	)	MOTION FOR SUMMARY
vs.	)	JUDGMENT
	)	
Advanced Cardiology Consultants, P.C.	)	
Dr. Lew A. Rowe, and Theresa Rowe,	)	
	)	
Defendants.	)	
	)	

You will please take NOTICE that the above-named defendants hereby move, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for summary judgment in favor of the defendants, on the grounds that the pleadings and discovery, together with the affidavits, memorandum, and authorities presented in support of this motion show that there is no genuine issue as to any material fact and that the defendants are entitled to a judgment finding the restrictive covenant contained in the employment agreement between the parties is enforceable as a matter of law. More complete reasons for, and authority in support of this Motion are fully set forth in the supporting memorandum and materials filed contemporaneously with this Motion.

.All of which is respectfully submitted.

GIBBS & HOLMES

By: /s/ Allan R. Holmes
Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033

ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina
September 26, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	
	)	
Dr. Gregory A. May,	)	
	)	
	)	CASE NO.: 2019-CP-21-00777
Plaintiff,	)	
	)	DEFENDANTS' MEMORANDUM
	)	IN SUPPORT OF ITS MOTION
vs.	)	FOR SUMMARY JUDGMENT
	)	AND RESPONSE IN OPPOSITION
Advanced Cardiology Consultants, P.C.	)	TO PLAINTIFF'S MOTION FOR
Dr. Lew A. Rowe, and Theresa Rowe,	)	SUMMARY JUDGMENT
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

The Defendants, Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe, hereby submit this Memorandum in Support of their Motion for Summary Judgment. ,

I. BACKGROUND/FACTS

The Plaintiff filed a Complaint against these Defendants on March 20, 2019, bringing claims for breach of contract, tortious interference with contract, promissory estoppel, and for a declaratory judgment. The central dispute in this matter is the enforceability of a restrictive covenant contained within Dr. May's employment agreement with the Practice. Even when the facts, as set forth below, are viewed in a light favorable to the Plaintiff, however, it is clear that this restrictive covenant is enforceable against the Plaintiff and no genuine dispute of material fact exists that indicates otherwise.

Advanced Cardiology Consultants, P.C. (“ACC” or “the Practice”) is a medical group practice located in Florence, South Carolina that specializes in diagnosing and treating cardiovascular diseases. (Affidavit of Dr. Lew A. Rowe, Exhibit A to Defs.’ Resp. in Opp. to Mot. for Prelim. Inj.). Dr. Lew A. Rowe is the President and sole shareholder of ACC, and the Defendant Theresa Rowe is Dr. Rowe’s spouse who is employed as the group’s Practice Administrator. (*Id.* ¶ 2). The Plaintiff, Dr. Gregory May, was employed as an interventional cardiologist from May 1, 2007 until his resignation from the Practice effective on March 19, 2019. (Complaint ¶ 41, Defs.’ Answer ¶ 11).

From the time he began his employment with the Practice, Dr. May has operated under a series of employment agreements with the Practice, which were all substantially similar in their terms, and varied only in their duration. (Compl. ¶ 11). The Practice has, in fact, used the same basic employment contract for all of its employed physicians since the opening of the Practice in 1994. (Deposition of Dr. Lew A. Rowe, p. 20, Exhibit A). The Plaintiff’s most recent employment agreement, and the contract at issue in the present dispute, was a one-year contract commencing March 20, 2018 and ending on March 31, 2019. (Contract, Exhibit A to Compl.). The employment agreement, which the Plaintiff does not dispute is a valid and binding agreement which the parties entered into knowingly and willingly, contains the following restrictive covenant:

9. Restrictive Covenant; Liquidated Damages. In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years

thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the forgoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

In sum, the agreement contains a non-compete provision that restrains Plaintiff from engaging in the practice of cardiology within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years after the termination of employment. This provision in the agreement is a valid and enforceable as it is supported by valuable consideration, reasonable and necessary to protect Defendant's legitimate business interests, is not unduly harsh or burdensome on Plaintiff's ability to earn a livelihood, and is reasonably limited with respect to both duration and place. Plaintiff was paid considerably more than Five Hundred Thousand Dollars (\$500,000) per year under the terms of his employment agreement, that allowed Plaintiff to be compensated 50% of his collected fees generated the preceding month. (*Id.* ¶ 3; *Rowe Aff.* ¶ 5). The Agreement does not guarantee the Plaintiff a specific level of yearly or monthly income, only that he shall receive 50% of his collected fees generated the preceding month.

The employment agreement also provides under Section 3(d) "Facilities and Services," that the Practice "shall provide such facilities, equipment and supplies as it deems necessary for physician's performance of his professional duties under this Agreement, including technical and stenographic help and other such facilities and services as are suitable to his position and necessary to the adequate performance of his duties." (*Id.*). The agreement also provides that either party may terminate the Agreement, either with or without cause, upon providing a thirty-day written notice to the other. (*Id.* ¶ 7). The Agreement requires *the Physician* to "devote his full time and best efforts to the performance of his duties hereunder, including equitable call coverage." (*Id.* ¶ 3). Noticeably absent from the terms of the Agreement are any provisions requiring that the Practice require its physicians to maintain privileges or provide call coverage at any certain facilities or local hospitals. Indeed, the Agreement explicitly provides that the Practice "shall have final authority over acceptance or refusal of any patient for professional services." (*Id.* ¶ 7). The Agreement does not guarantee the Plaintiff any specific call coverage terms, access to cath labs, or guarantee that the Practice must generate a certain amount of revenue from the employed physicians maintaining privileges at hospital facilities.

Since the Practice's founding in 1994, the physicians employed by the Practice have maintained privileges to practice at various regional hospitals, including McLeod Regional Medical Center ("McLeod Hospital"), Hartsville, Williamsburg Regional Hospital, Lake City, Bruce Hospital, Carolinas Hospital, and Florence General. (Rowe Depo., p. 16, 27, 41). Each individual physician maintains privileges with a hospital that allows the physician to provide care to patients at the hospital's facilities. It is a relationship between the hospital and the physician, *not* between the Practice and hospital. (*See* Deposition of Theresa Rowe, p. 11, Exhibit B). During Plaintiff's employment with the Practice, the Practice's physicians, including

Plaintiff, maintained privileges and provided call coverage at two local hospitals in Florence, McLeod Hospital and Carolinas Hospital System. (Dr. Rowe Depo., p. 17). Both of these local hospitals have facilities, including a cath lab, that Plaintiff has contended is necessary for the practice of his specialty, interventional cardiology, and that he contends are not present in an office-based practice. (Plaintiff Depo., p. 85, Exhibit C). The closest hospitals that Plaintiff contends that have a cath lab that would permit him to perform interventional cardiology services outside the 25-mile radius of the covenant are in Grand Strand, Columbia, or Loris, South Carolina. (See Rowe Depo., 65, Deposition of Marie Saleeby, p. 6, Exhibit D).

In September of 2018, Dr. Rowe made the decision and informed the physicians employed at the Practice that he was resigning his privileges at McLeod and Carolinas and wanted to focus his work on seeing patients in the office. (Dr. Rowe Dep., p. 18, 43). As there were five other practicing physicians who still providing call coverage at the two hospitals, the impact on the other physicians' call coverage and schedules was expected to be minimal, as the Plaintiff himself testified that Dr. Rowe resigning his privileges was "probably not going to be a big deal." (Pl. Depo., p. 30).

Throughout his years at Advanced Cardiology Consultants, the Plaintiff had at various times expressed his desire to leave and go practice elsewhere to Dr. Rowe, including mentioning leaving the Practice five or six years ago. (Dr. Rowe Depo., p. 68). Plaintiff consistently complained to Dr. Rowe that he needed to make more money than he was making at ACC, to which Dr. Rowe consistently would tell Plaintiff to go "look at other options," and encouraged him to interview elsewhere. (*Id.* at 66, 68, 70). After Dr. Rowe informed the physicians of his plans to resign his hospital privileges, Plaintiff began to seek employment as an interventional cardiologist in Florence within the radius of the restrictive covenant. Despite initially thinking to

himself that Dr. Rowe's resigning of privileges was "no big deal," Plaintiff apparently became concerned that the other physicians in the Practice would not sufficiently pull their weight in the call schedule with Dr. Rowe out, and based upon these anticipated events, began to seek employment in Florence. (Pl. Depo., p. 30-31).

Plaintiff approached Dr. Rowe a couple of days after learning of Dr. Rowe's intention to give up his privileges and informed Dr. Rowe of his desire to look for a job practicing cardiology at McLeod. (Rowe Depo., p. 70-72, 74). Dr. Rowe's response to Plaintiff was to tell him "Ok," and "Do whatever you want." (*Id.* at 72). As Dr. Rowe testified, when Dr. Rowe told Plaintiff he was "fine with" with Plaintiff seeking employment with McLeod, Dr. Rowe was referring to Plaintiff obtaining a job not with McLeod Hospital in Florence, and within the 25-mile radius of the restrictive covenant, but in a cardiologist position within the larger McLeod Health network, which has locations looking for cardiologists in other locations outside the 25-mile radius of the covenant, including Loris, South Carolina. (Rowe Depo., p. 73). When Plaintiff approached Dr. Rowe about seeking employment at McLeod, he did not specify that he was interested in practicing cardiology at McLeod Hospital in Florence. Dr. Rowe testified that if Plaintiff *had* mentioned McLeod Hospital specifically, Dr. Rowe would have told him "no" and that he would not have been not fine with it because of the restrictive covenant. (*Id.* at 74). As Dr. Rowe testified:

11 Q. When Dr. May asked you whether it was
12 okay with you if he discusses employment
13 opportunities with McLeod Hospital, did it not
14 occur to you that he was referring to the McLeod
15 Hospital here in Florence?

16 A. Well, he didn't say -- he would never
17 have said with McLeod Hospital because I would have
18 said no. He would have said with McLeod. And the
19 contract does not preclude him from working for

20 McLeod or for any place, just so it's 25 miles.
 21 And I know and he knows that he signed
 22 that contract, which would say 25 miles. And I
 23 know that he would uphold that because he signed
 24 it. So it really wouldn't enter my mind. He's
 25 aware of his contract, as I was too. He could

75

1 easily work for McLeod and uphold the contract.
 2 There would be no issues.

(*Id.* at 74-75). At no time did Dr. Rowe indicate to the Plaintiff that he was prepared to waive the restrictive covenant, or that he would be willing to have a written waiver of the covenant prepared. (*Id.* at 130; Rowe Aff. ¶ 7-10).

14 Q. Just to make it clear, did you ever
 15 specifically tell Dr. May that the practice would
 16 waive or forget about or cancel or negate the
 17 restrictive covenant in his employment agreement?

18 A. No, I did not.

(Rowe Depo., p. 130).

Plaintiff thereafter took steps to inquire whether McLeod had any job openings or interest in hiring him, contacting Marie Saleeby at McLeod. Dr. Rowe testified that Plaintiff did not notify him about Plaintiff's interest in seeking a job with McLeod Hospital, locally, nor did Plaintiff ask Dr. Rowe to contact Ms. Saleeby on Plaintiff's behalf to give Plaintiff permission to practice cardiology within the geographical radius of the restrictive covenant. (*Id.* at 89-90). Plaintiff approached Theresa Rowe, ACC's Practice Administrator, and asked that Mrs. Rowe send an email to Marie Saleeby at McLeod, telling Mrs. Rowe that he needed "a letter saying I can speak with McLeod Health." (T. Rowe Depo., p. 19-20). Mrs. Rowe had no reservations about sending any such letter, she testified, because the McLeod Health network had locations outside of Florence, and therefore outside of the radius of Plaintiff's restrictive covenant. (*Id.* at 20).

After Plaintiff made this request, Mrs. Rowe send an email to Marie Saleeby on November 15, 2018, which stated: “Dr. May has expressed that he would like to explore an employment opportunity with McLeod Health. We do not object to him interviewing with McLeod Health.” (See Email, Exhibit A to Plaintiff’s Motion for Summary Judgment). Significantly, Mrs. Rowe in this email makes reference to “McLeod Health,” referring to the larger McLeod healthcare systems, *not* the McLeod Regional Medical Center in Florence. Also noticeably lacking from this email is any mention of the restrictive covenant at issue, much less an explicit waiver of the Practice’s right to enforce the covenant. Plaintiff apparently made no real effort to obtain employment with McLeod beyond speaking with Ms. Saleeby, however, as Ms. Saleeby told Plaintiff when he came to talk to her that she really wasn’t the person responsible for hiring cardiologists, and referred Plaintiff to the individual responsible for hiring cardiologists, Donna Isgett. (Salebey Depo., p. 8-10).

On or around December 26, 2018, the Practice’s six physicians at a staff meeting voted amongst themselves to resign their privileges at Carolinas Hospital, but to keep privileges at McLeod Hospital. (Dr. Rowe Dep., p. 46-47). Plaintiff became very animated during this meeting as he was not in favor of dropping privileges at Carolinas, calling everyone in the room a “lazy f*ck,” and even almost entered into a physical altercation with another physician that had to be broken up. (*Id.* at 47-48). Plaintiff ended up abstaining from the vote, as did Dr. Rowe, while the four other physicians voted unanimously to drop privileges at Carolinas. (*Id.* at 48). Dr. Rowe testified that while dropping privileges at Carolinas would have a financial impact on the Practice, the vast majority of the physicians’ patients were seen at McLeod, and Dr. Rowe saw the opportunity of developing additional revenue streams for the Practice from McLeod’s referral base with the Practice’s focus now on McLeod. (*Id.* at 54-56). Even after the other physicians

had voted to drop privileges from Carolinas Hospital, and Plaintiff, too, was required to drop his privileges at Carolinas, privileges at McLeod were maintained.

Accordingly, until the time of his resignation from the Practice effective March 31, 2019, Plaintiff continued to practice his specialty of interventional cardiology and maintained privileges at McLeod Hospital. It wasn't until after Plaintiff's resignation and after the term of Plaintiff's employment agreement had expired on March 31, 2019 that the Practice's remaining physicians dropped their privileges at McLeod, effective April 1, 2019. (Compl. ¶ 43). The Plaintiff attempts to make much of the fact that the Practice currently isn't covering either hospital in Florence that would have allowed Plaintiff to practice his specialty of interventional cardiology, and seeks to prevent the Practice from enforcing the restrictive covenant based upon this fact. It is undisputed, however, that the employment agreement at issue guarantees Plaintiff employment as a cardiologist, not necessarily as an interventional cardiologist, and Plaintiff was actively practicing interventional cardiology at the time of his resignation. Any decision that the remaining physicians at ACC made to drop privileges at McLeod Regional Hospital *after* Plaintiff resigned and his contract ended have no bearing whatsoever on the issue of the enforceability of the employment agreement and the restrictive covenant contained therein.

Although Plaintiff was not offered a job at McLeod, he continued to seek employment in Florence in hopes that the Practice would waive the restrictive covenant, next contacting Randy Seif, the recruiter at Carolinas Hospital, for a job opportunity there. Theresa Rowe testified that Plaintiff entered her office one day and made the following request of her:

- 24 I just
 25 know he comes in my office and slams both doors and
 32
 1 says that he is talking -- wants something from me
 2 to say he can talk to Carolina Hospital System.
 3 Q. Was this before or after the privileges

4 had been -- or the physicians had resigned their
5 privileges at Carolinas Hospital?

6 A. I don't know.

7 Q. What was your response when Dr. May
8 made that request of you?

9 A. I said okay.

10 Q. You were in your office at the
11 practice?

12 A. That's correct.

.....

3 Q. What did you tell him?

4 A. His -- he said to me, "Randy wants to
5 talk to you. Will you talk to Randy?"

6 I said, "If he calls me, I'll talk to
7 him."

(T. Rowe Depo., p. 32-33). Shortly after this encounter, Mr. Seif called Theresa Rowe, who testified that the following conversation took place:

12 A. He just called up and said, "Dr. May
13 would like to explore an opportunity with Carolina
14 Hospital System."

15 Q. All right.

16 A. And. . .

17 Q. What did you say?

18 A. I said, "Well, Dr. May has a contract
19 with Advanced Cardiology." And he asked me if it
20 had a non-compete, and I said, "Yes, it does." He
21 asked me what it was, and I told him 25 miles from
22 McLeod Regional Medical Center. And he asked me
23 what the liquidated damages were, and I told him
24 500,000.

25 And he says to me, "Well, you know,

36

1 there's been several physicians recently we haven't
2 upheld their non-competes with the hospital. Why
3 would you uphold your non-compete with Dr. May?"

4 I said, "Dr. May has a contract. He
5 has a non-compete. He has liquidated damages."

6 And he said, "Well, how much would it
7 take?"

8 And I said, knee-jerk response, "Make
9 me an offer."

10 He said, "I'll get back to you."

11 And that's how the conversation went.

12 Q. Did you have any conversation with him
13 subsequent to that?

14 A. He e-mailed me and said, "I don't know
15 why you called me," and then in parenthesis, "(the
16 hospital)." Basically, "The contract's between you
17 and the physician."

18 And I said back, "I didn't call you.
19 You called me." And that was it.

20 Q. Was an offer ever made?

21 A. No.

22 Q. Did you make a demand of \$500,000?

23 A. No.

(*Id.* at 35-36).

Dr. Rowe, for his part, testified that he was not aware that Plaintiff was having serious discussions with Carolinas Hospital for an employment opportunity, and that Plaintiff never requested a waiver or release of the covenant from the Practice in order to pursue employment with Carolinas Hospital. (Rowe Depo., p. 99-100). It was not until Dr. Rowe received a letter from Plaintiff's counsel that Dr. Rowe became aware that Plaintiff intended to practice cardiology at Carolinas Hospital within the 25-mile radius of the restrictive covenant, which is still Plaintiff's intent. (*Id.*). When it had become clear that the Practice was not willing to waive Plaintiff's restrictive covenant, Plaintiff tendered to the Practice his notice of intent to terminate the agreement, effective March 19, 2019. (Compl. ¶ 41).

Plaintiff thereafter filed suit against the Defendants, bringing claims for breach of contract, tortious interference with contract, promissory estoppel, and for a declaratory judgment from the Court declaring that the restrictive covenant is unenforceable as to any restriction of Plaintiff's future employment and that the Defendants have breached the employment agreement. (Compl. ¶ 80). The Plaintiff testified that he had a standing job offer to perform interventional cardiology at the MUSC Health Florence Medical Center, formerly Carolinas Hospital, which he

intended to accept, pending resolution of this action. (Pl. Depo., p. 17). The Plaintiff subsequently moved this Court for a Temporary Injunction preventing the Defendants from seeking to enforce the restrictive covenant, arguing that the Practice breached its contract with the Plaintiff by the “decision to discontinue performing services at the two hospitals” in Florence and it would therefore be inequitable to enforce the covenant. (Pl. Memo. in Supp. of Inj. at 4). The Court denied Plaintiff’s Motion after holding a hearing on the Motion on June 10, 2019, and ordered the parties to conduct expedited discovery so the merits of Plaintiff’s claims could be determined by motions for summary judgment and/or trial. (Order at 1).

Plaintiff filed a Motion for Summary Judgment as to Plaintiff claim for a declaratory judgment, requesting the Court enter an Order declaring that the restrictive covenant is unenforceable. In particular, Plaintiff argues that: 1). the restrictive covenant as written is not necessary for the protection of the legitimate interests of ACC, as Plaintiff argues that it prohibits Plaintiff from working *in any capacity* at a hospital within the 25-mile radius and is therefore unenforceable; 2). the Defendants verbally and in writing encouraged Plaintiff to seek employment within the 25-mile radius of the covenant; and 3). Defendants breached the employment agreement in acquiescing to the physicians’ decision to drop privileges at Carolinas Hospital, depriving the Plaintiff of the ability to treat patients at Carolinas, and therefore it would be “inequitable” to allow Defendant to enforce the restrictive covenant against the Plaintiff. (Pl. Memo. in Supp. of Sum. J.). Not only has the Plaintiff failed to establish there is no genuine issue as to any of these material facts, an examination of the evidence in the record demonstrates: 1) the covenant not to compete is enforceable as a matter of law and was not waived by the Defendants; and 2) the Practice did not breach its employment agreement with Plaintiff. The

Defendants therefore respectfully request that the Court grant its Motion for Summary Judgment on these grounds and deny Plaintiff's own pending Motion for Summary Judgment.

II. LEGAL STANDARD

Summary judgment is proper when the moving party demonstrates that there is no genuine issue as to any material fact, such that the moving party is entitled to judgment as a matter of law. S.C.R. Civ. P. 56, *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E. 2d 857, 860 (2002). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show that there is a genuine issue of fact to be tried. *Sides v. Greenville Hosp. Sys.*, 362 S.C. 250, 255, 607 S.E. 2d 362, 364 (S.C. Ct. App. 2004). "Further, Rule 56(e), SCRCF requires that when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings. *SSI Medical Services, Inc. v. Cox*, 301 S.C. 493, 497, 392 S.E.2d 789, 792 (1990).

III. ARGUMENT

A. The Restrictive Covenant is Valid and Enforceable Against the Plaintiff.

The Plaintiff does not dispute that the employment agreement is a valid agreement entered into by the parties knowingly and willingly. Rather, he contends that it is unenforceable as overly broad and unduly harsh and oppressive. (Pl. Memo. in Supp. of Sum. J. at 10). "While recognizing the legitimate interest of a business in protecting its clientele and goodwill, we are equally concerned with the right of a person to use his talents to earn a living." *Sermons v. Caine*

& *Estes Ins. Agency, Inc.*, 275 S.C. 506, 509, 273 S.E.2d 338, 338 (1980). Restrictive covenants not to compete are therefore generally disfavored and will be strictly construed against the employer. *Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983). Therefore, such a covenant is only enforceable if it is: (1) supported by valuable consideration; (2) necessary to protect the employer in some legitimate interest; (3) not unduly harsh and oppressive in curtailing the employee's legitimate efforts to earn a livelihood; and (4) otherwise reasonable from the standpoint of sound public policy. *Rental Uniform Serv.*, 278 S.C. at 675-76, 301 S.E.2d at 143. The covenant must also be reasonable with respect to time and place. *Id.* The restrictive covenant at issue in the present case meets all of the requirements above. It is not disputed that the agreement was supported by valuable consideration, but the Plaintiff appears to contend that the covenant is deficient with regard to the second and third requirements.

The covenant is necessary to protect the Practice's legitimate business interests in protecting the goodwill in the Florence medical community that it has spent building up since 1994, as well as protecting its patient base from being unfairly encroached upon by a former physician practicing in that same area almost immediately after his employment with the Practice ended. South Carolina courts have recognized the legitimacy of a medical practice's interests in upholding such covenants against their employed physicians. For example, in *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 15, 738 S.E.2d 480, 488 (Ct. App. 2013), the Court of Appeals upheld a restrictive covenant very similar to the one at issue here, that purported to prevent a physician from engaging or assisting in the practice of cardiology for a period of one year within a twenty-mile radius of the defendant's office. In recognizing the legitimate interest that Columbia Heart had in imposing this restriction, the court reasoned:

Here, the record evidences that Columbia Heart's patients, referral sources, and other goodwill would be at risk if Respondents were able to assist others to

engage in the practice of cardiology. Patients stay with and follow their doctors, and general practitioners refer patients to cardiologists based upon both the reputation of the doctor and the doctor's practice, current and past. If the Agreements did not prohibit Respondents from assisting another person to engage in the practice of medicine in the field of cardiology, Respondents could treat Columbia Heart's patients and use Columbia Heart's referral sources and goodwill simply by staying one step from the medical services provided. Therefore, the restriction is necessary to protect a legitimate interest of Columbia Heart.

Id. at 16.

If Plaintiff is permitted to accept employment at the MUSC Health Florence Medical Center, formerly Carolinas Hospital, and engage in the practice of interventional cardiology there, those very same legitimate interests of protecting ACC's clientele, referral sources, and patient base would be threatened here. Not only is Plaintiff seeking employment with a hospital inside the radius of the restrictive covenant, he is actively seeking to practice medicine immediately at one of the two hospitals that he practiced at and had privileges with when he was employed by the Practice. (Pl. Depo., p. 17). Dr. Rowe testified that the Plaintiff's immediate practice of cardiology in Florence would have the enormous and negative impact of "cannibalizing" the Practice's business. (Rowe Depo., p. 79).

81

16 Q. Do you think Dr. May working at
17 Carolinas Hospital right now would have an adverse
18 impact on Advanced Cardiology since the practice
19 doesn't intend to do any work there?

20 A. It would.

21 Q. How is that? How so?

22 A. Because he would be working at, say,
23 Carolinas, and he would be doing cardiology. Now,
24 a very small part of our daily work is actually
25 doing interventional cardiology. The vast majority

82

1 in this area, and this is not everywhere but it's
2 in this area, it's seeing patients, interpreting
3 stress tests, echoes, that sort of thing that don't
4 involve interventional cardiology whatsoever. So
5 it would have a huge impact on us.

6 Q. So you're thinking that the patients
7 that he currently sees would see him at Carolinas
8 rather than come to your office?

9 A. It's possible that some might.

10 Q. So that's your fear?

11 A. I wouldn't say it's a fear. I think
12 it's a pretty good estimate of what would happen.

(*Id.* at 81-82).

The covenant is similarly not unduly harsh and oppressive in curtailing Plaintiff's legitimate efforts to earn a livelihood. Beyond the covenant preventing him from accepting a job in Florence at a hospital he had privileges at when he was employed at the Practice, Plaintiff has failed to articulate the specific economic impact that practicing interventional cardiology outside the 25-mile radius of the covenant would have. Hospitals with the facilities Plaintiff contends he needs to practice interventional cardiology in particular are located in Columbia, Loris and Murrells Inlet. (Rowe Depo., p. 65). Indeed, Plaintiff testified that his principal motivation in wanting to stay and practice medicine in Florence and not search for a position outside the 25-mile radius was a desire to prevent his children from having to move to a new location for school. (Pl. Depo., p. 61). Plaintiff further testified that he was familiar with such restrictive covenants, as he was bound by one in his prior practice in Orlando, Florida, and he "gladly left" the Orlando area after leaving that practice because of that covenant's requirements. (*Id.* at 57-58). The apparent distinction in Plaintiff's willingness to relocate from the Orlando area but not Florence is the fact that his children are older and in high school, and not a uniquely "burdensome" or "oppressive" characteristic of this restrictive covenant. (*Id.* at 61-62).

The relevant language in the restrictive covenant itself states:

In the event this Agreement is terminated . . . Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of

cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination.

The Plaintiff contends in his Motion that the language of the restrictive covenant as it is written is too broad, as it “prevents Dr. May from working *in any capacity* with the largest and third largest employers in Florence County, South Carolina,” not just as a cardiologist. (Pl.’s Memo. in Supp. of Sum. J. at 11). Plaintiff contends that this language prevents him from working in any capacity, including as a hospital administrator or even as a janitor, for the hospitals in Florence, because they are “entit[ies] engaged in the practice of cardiology.” Plaintiff then contends, relying upon the case of *Faces Boutiques v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App. 1995), that this language allows the entire covenant to be stricken as void and unenforceable.

As an initial matter, the language in the covenant at issue here is not nearly as broad as the covenant found to be unenforceable in *Faces Boutique*, where the covenant prohibited an employee from:

directly or indirectly, own, manage, operate, control, be employed by, participate in, **or be connected in any manner** with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces].

Id. at 41. (emphasis added). Unlike the restrictive covenant in *Faces*, the covenant here clearly only seeks to prohibit Plaintiff from engaging in the practice of cardiology, not from being employed in any other position or profession by those entities, as the modifying phrase “nor will he otherwise engage directly or indirectly in the practice of cardiology,” makes clear. In fact, it is plain from the Plaintiff’s own testimony that he understood the covenant only from prohibiting

him from practicing cardiology at one of the hospitals in town, not from working as a secretary, or in a capacity *other* than as a cardiologist:

11 Q. Okay. In fact, and when it says --
12 when you say in your complaint that it purports to
13 prevent you "from being employed as a cardiologist
14 for a period of two years after termination within
15 a 25-mile radius of McLeod Regional Medical Center,
16 Florence, South Carolina, that's how you read that
17 provision," correct?

18 A. I can read it the same as you. Yes,
19 sir. That's what it says.

20 Q. Okay. It doesn't say anything more
21 than that?

22 A. That's correct.

23 Q. Okay. So the plain language or as you
24 understand it, the plain language of the contract
25 is that you simply can't be employed as a

23

1 cardiologist for a period of two years after
2 termination within a 25-mile radius of McLeod
3 Regional Medical Center, correct?

4 A. That's right.

5 Q. Okay.

6 A. That's what it says.

7 Q. Doesn't say you can't be employed as
8 anything else?

9 A. I -- I have no idea what you're talking
10 about right now.

11 Q. Well, it's not important. It's just
12 the question is whether or not this agreement says
13 you can't be employed --

14 A. I'm a cardiologist, so I wouldn't be
15 seeking employment as a bottle washer or a
16 dishwasher.

17 Q. Okay. And you don't read this
18 agreement to keep you from being a bottle washer or
19 a dishwasher, correct?

20 A. I haven't looked at that document in
21 quite some time, so I haven't hashed that out,
22 exactly what the document says.

23 Q. But this is what you put in your
24 complaint?

25 A. What it's stating about the restrictive

24

1 covenant?

2 Q. Yes.

3 A. Okay.

4 Q. Okay. I mean, the answer to that is

5 yes?

6 A. There is a restrictive covenant, yes.

7 Q. And it says, according to you, that

8 it's intended to prevent you "from being employed

9 as a cardiologist for a period of two years after

10 termination within a 25-mile radius of McLeod

11 Regional Medical Center, Florence, South Carolina"?

12 A. Yeah.

13 Q. And that's all it says?

14 A. That's all it says.

(Pl. Depo., p. 22-24). Plaintiff's own testimony on this issue establishes that Plaintiff, as well as his employer, understood the covenant to prohibit him from being employed as a cardiologist, and Plaintiff's attempts to stretch the intent of the covenant far beyond its plain meaning, and far beyond what the parties intended, should be rejected by the Court.

Both the geographical and time limitations contained in the covenant, 25-miles and two years, are reasonable and similar restrictions have been repeatedly upheld by South Carolina courts. "The principle of customer-contact protection finds its expression in the general rule that the territorial restraint in a covenant not to compete will, generally speaking, be considered reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961). The area at issue here plainly covers a geographical area in and around Florence in which the Plaintiff was able, during his term with the Practice, to establish contact with the Practice's patients. Not only is Plaintiff seeking employment with a hospital inside the radius of the restrictive covenant, he is actively seeking to practice medicine at one of the two hospitals that he practiced at and had privileges with when he was employed by the Practice. The geographical

limitation of 25 miles is not so overly broad as to encompass an area unreasonable for Dr. May's practice, especially given the fact that Dr. May testified that he had patients come from as far away as Kentucky to be seen by him. (Pl. Depo., p. 68). The two-year restriction is similarly reasonable and has been found to be "reasonable in a number of cases." *Id.* at 69. *See also Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 676 (1983) (holding that the covenant was valid and enforceable because the three-year time restraint was not unreasonable on its own, and the geographic restriction was reasonably restricted to the area in which respondent worked or to which he was assigned at any time during his employment).

Plaintiff's argument that the Defendants allegedly "verbally and in writing, encouraged Dr. May to seek employment within the 25-mile geographic range," and therefore should be prevented by the Court from enforcing the restrictive covenant similarly fails. (Pl. Memo. in Supp. of Sum. J. at 11). Dr. Rowe's general comments to Plaintiff when Plaintiff approached him regarding alternate employment to "Do whatever you want" and "look at other options," in no way suggest that Dr. Rowe actively encouraged Plaintiff to apply within the covenant's territory restriction, much less constitute a waiver of the Practice's right to enforce the restrictive covenant. At no time did Dr. Rowe indicate to the Plaintiff that he was prepared to waive the restrictive covenant, or that he would be willing to have a written waiver of the covenant prepared. (*Id.* at 130; Rowe Aff. ¶ 7-10). When Plaintiff mentioned seeking employment with McLeod, both Dr. Rowe and Theresa Rowe understood Dr. May to be referring to a job opportunity within the larger McLeod Health services network, which includes cardiology positions outside of the 25-mile radius restriction. Marie Saleeby, the administrator for McLeod Regional Medical Center that Plaintiff originally approached for employment with McLeod, testified to the fact that the McLeod health network had at least one other location in Loris, South

Carolina with a cath lab and invasive cardiology services that would have allowed Plaintiff to seek employment with McLeod as an interventional cardiologist outside of the covenant's geographical limitation. (Saleeby Dep., p. 6). Plaintiff has failed to show what he claims was "encouragement" to seek employment within the Florence area constituted a legal waiver of the Practice's right to enforce the restrictive covenant. *See Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387-88 (1992) (defining a waiver as a voluntary and intentional abandonment or relinquishment of a known right by a party who possessed actual or constructive knowledge of its rights, or of all the material facts upon which they depended).

However, even if Plaintiff *had* established a waiver of the restrictive covenant or modification of the employment agreement by virtue of any subsequent oral agreement he contends he had with Dr. Rowe, any such waiver or modification would be unenforceable as a matter of law for lack of consideration. While a written contract may be modified by an oral agreement, the general rule is that the modification of the written contract must fulfill all the elements required for a valid contract, including an offer, acceptance, and valuable consideration. *Roberts v. Gaskins*, 327 S.C. 478, 483, 486 S.E.2d 771, 773 (Ct. App. 1997). Plaintiff does not contend that he paid any amount of money to the Practice or to Dr. Rowe for its supposed agreement to release him from the covenant's requirements, and admitted in his testimony that he did not pay any money for any "release" from the non-compete. (Pl. Depo., p. 42). No benefit was conferred on the Practice for any agreement to modify the employment agreement, and Plaintiff cannot articulate any real detriment that he suffered from relying upon what he contends was Dr. Rowe's promise not to enforce the covenant.

Although Plaintiff initially sought employment with McLeod, McLeod ended up not even offering Plaintiff a position on their staff, so he was not harmed in the slightest by Defendants' alleged representations about the restrictive covenant. Marie Saleeby testified, in fact, that McLeod did not have any real interest in hiring Plaintiff, as McLeod was looking to hire a physician with a different skill set than Plaintiff possessed. (Saleeby Depo., 19-20). Additionally, it was not on a reliance on Defendants' alleged promise to release Plaintiff from his non-compete that prompted Plaintiff to end his employment relationship with the Practice and alter his financial position. Plaintiff altered his position and left the Practice only after it became clear to him that the Practice would not agree to any waiver of the covenant and would not permit him to seek employment as a cardiologist in Florence without paying the liquidated damages provision of the non-compete.

To the extent that the Plaintiff attempts to use events that occurred after he left the Practice, the dropping of privileges at McLeod effective April 1, 2019, this change in the Practice's circumstances after Plaintiff's employment ended has no effect whatsoever on the enforceability of the restrictive covenant now. Even where there is a drastic change in a business's circumstances after an employee bound by a covenant not to compete has departed, the employee is still bound by the requirements of that non-compete. This contention is supported by the fact that, as a general rule, non-competes remain enforceable even after a business files for bankruptcy. *See In re Central Watch, Inc.*, 22 B.R. 561, 565 (E.D. Wisc. B.C. 1982).

The Defendants have established, contrary to the Plaintiff's contentions otherwise, that the restrictive covenant is enforceable and the Plaintiff should not be permitted to avoid his obligations under the Agreement that he knowingly and willingly entered into. Defendants

therefore respectfully request that this Court grant its Motion for Summary Judgment on these grounds and find that the restrictive covenant is valid and enforceable against the Plaintiff.

B. The Defendants did not Breach the Employment Agreement.

The Plaintiff has argued in his Complaint and continues to do so in his Motion for Summary Judgment, that it would be “inequitable” to allow the Defendants to enforce the restrictive covenant, given Defendants’ alleged breach of the employment agreement. (Pl. Memo. in Supp. of Sum. J. at 14-15). Plaintiff alleges that the Practice breached Paragraph 3(d) of the employment agreement by failing to provide “facilities ... for physician’s performance of his professional duties under this agreement, including ... such other facilities and services as are suitable to his position and necessary for the adequate performance of his duties.” (*Id.* at 13-14). The Practice apparently breached this provision of the Agreement when Dr. Rowe made the decision to give up his privileges at Carolinas and McLeod Hospitals and the Practice’s employed physicians voted among themselves to drop their privileges at Carolinas Hospital. (*See id.*). Plaintiff contends that these actions led to a decline in revenues for the Practice and the Plaintiff, as he was no longer able to continue seeing patients at Carolinas Hospital. Further, the Plaintiff argues that these actions led to his inability to continue practicing his specialty, interventional cardiology, in a hospital setting, arguing that the fact that the remaining physicians at the practice relinquished their privileges to McLeod Hospital effective April 1, 2019, *after* Plaintiff was no longer with the practice is further proof of the Defendants’ breach of the agreement. (*Id.* at 14).

There are several flaws in Plaintiff's theory of the breach of the agreement. Notably, it is undisputed that up until the time that Plaintiff submitted his notice to terminate the employment agreement effective March 19, 2019, he was still actively practicing interventional cardiology and maintained privileges at McLeod Hospital. Further, the language that the Plaintiff relies upon in Paragraph 3(d) speaks to the Practice's obligation to provide Plaintiff with such facilities and services as was suitable for his position as a "Board Certified cardiologist." (Employment Agreement, Paragraph 2). The Agreement guarantees Plaintiff employment as a cardiologist, not necessarily as an "interventional cardiologist." Similarly, there are no provisions in the Agreement that guarantee Plaintiff the right to maintain privileges at any certain facility, the right to have access to cath labs, specific call terms, or that would otherwise protect Plaintiff from the consequences of other employed physicians taking a vote to drop their privileges at Carolinas.

Insofar as Plaintiff attempts to rely on the fact that the remaining physicians dropped their privileges to McLeod, he cannot rely on other physicians' actions that took place *after* the term of the parties' contract ended to claim Defendants breached that contract. Although the Plaintiff may claim that the decision to stop providing call coverage at Carolinas Hospital led to a drop in revenue for him and the Practice, the agreement clearly does not guarantee him a certain amount of income, only that is he entitled to 50% of whatever he generated the previous month in billings. The Practice clearly fulfilled its obligations to the Plaintiff under the Agreement, and therefore should not be precluded from enforcing the restrictive covenant on these grounds.

CONCLUSION

The Defendants have established that there is no genuine issue of material fact regarding the enforceability of the restrictive covenant and therefore respectfully request that the Court

GRANT this Motion for Summary Judgment and DENY Plaintiff's Motion for Summary Judgment.

Respectfully submitted,

GIBBS & HOLMES

By: /s/ Allan R. Holmes
Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29401
(843) 722-0033

ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina
September 26, 2019

EXHIBIT A

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF FLORENCE

DR. GREGORY A. MAY,

Plaintiff,

vs. CASE NO. 2019-CP-21-00777

ADVANCED CARDIOLOGY CONSULTANTS, P.C., DR. LEW A.
ROWE, and THERESA ROWE,

Defendants.

DEPOSITION OF: DR. LLEWELLYN A. ROWE

DATE: August 1, 2019

TIME: 3:05 p.m.

LOCATION: Law Offices of
WILLCOX, BUYCK & WILLIAMS, P.A.
248 West Evans Street
Florence, South Carolina

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: ALISON N. PETERSON, Court
Reporter

1 sort of thing, it's important to have everybody's
2 consent. So, number one, the person that is
3 interviewing has to show interest and be excited.
4 But also myself, Theresa, and anyone else in the
5 practice can certainly have input since they're
6 going to be working fairly close. We listen to
7 everyone's input, of course.
8 Q. Advanced Cardiology Consultants, what
9 is the ownership of that particular entity?
10 A. It's a PC, and I own the shares in the
11 company.
12 Q. Okay. Has anyone other than yourself
13 ever owned any shares in Advanced Cardiology
14 Consultants, PC?
15 A. No.
16 Q. And that has been the operational unit
17 for your practice since 1994?
18 A. Yes.
19 Q. Has your business model -- I note from
20 this contract that the compensation is the
21 proceeding month's collections at 50 percent of the
22 physician's collected fees generated by the
23 physician; is that correct?
24 A. Yes.
25 Q. Has that been the practice of the

1 receive?
2 A. Theresa does.
3 Q. Have you ever had any years when you
4 did not pay a bonus because there were not excess
5 funds left over at the end of the year?
6 A. I do not know the answer to that.
7 Not -- recently, the number has gone up and down.
8 It's usually not constant. And some years, it's
9 higher than other years. Recently, we have always
10 had some to pay out. It may not be a large amount.
11 Earlier in the practice, I can't recall.
12 Q. All right. Over the last ten years
13 since Dr. May has been there, do you recall any
14 year when there was not a bonus pool at December to
15 distribute among the physicians?
16 A. I'm not sure of that. I'm just not
17 sure.
18 Q. All right. But --
19 A. There usually is. I can say that. But
20 I'm not sure for ten years.
21 Q. Now, when you began practice in
22 Florence in 1994, what hospitals did you receive
23 privileges to?
24 A. I would say, initially, McLeod Regional
25 Medical Center was the first. Then Bruce Hospital

1 practice since 1994?
2 A. Yes, it has been.
3 Q. All right. Have you ever wavered in
4 that in any respect?
5 A. No.
6 Q. All right. How about is there a -- I
7 also note that "The physician receives a bonus, the
8 amount of which shall be proportionate to the total
9 sum collected by the physician. Such bonus, if
10 any, may be payable as the employer may determine,
11 but if paid, it shall be paid at least annually."
12 How are the bonuses determined?
13 A. Well, it depends on if there's any
14 money, obviously, to be bonused. That would be the
15 first order of business because if there's no
16 excess funds for light bill, et cetera, et cetera,
17 that would all come first. So we pay, of course,
18 the overheads first. And then towards the end of
19 the year, usually in December, we look back and see
20 is there any excess funds that we don't think we'll
21 need over the next several weeks to months for
22 operating. And that amount of money is considered
23 the possibility for bonus.
24 Q. All right. Who determines the
25 proportion of the bonus that each physician would

1 and Florence General.
2 Q. All right. So you had privileges at
3 all three of the hospitals at the time?
4 A. Yes.
5 Q. All right. And that was before Bruce
6 and Florence General merged?
7 A. Yes.
8 Q. All right. And then once they did
9 merge, did you maintain your privileges at the new
10 entity, the merged entity?
11 A. Yes.
12 Q. All right. And then did you have
13 privileges at both McLeod and we'll call the merged
14 entity Carolinas Hospital System from the time you
15 began practice until just recently?
16 A. Yes.
17 Q. Do you still have privileges at both
18 hospitals?
19 A. No.
20 Q. Do you have privileges at either
21 hospital?
22 A. No.
23 Q. Did you resign your privileges at the
24 two hospitals?
25 A. Yes.

1 Q. When did you give up those privileges?
 2 A. January 1 of this year, six months ago.
 3 Q. What was your reason for doing that?
 4 A. I didn't wish to do hospital work
 5 anymore.
 6 Q. Was there any particular reason why you
 7 did not want to do any more hospital work?
 8 A. I enjoyed other interests. I still
 9 enjoyed seeing patients at the office. Twenty-five
 10 years is a long time to do one thing. A lot of
 11 reasons, no one overriding.
 12 Q. Are you doing the same volume of work
 13 today as you were ten years ago?
 14 A. I need a little clarification on that
 15 question. Volume with respect to the group,
 16 myself? Volume with respect to the hospital types
 17 of things? I, you know. . .
 18 Q. Well, let me put it this way: Are you
 19 spending as much time in your cardiology practice
 20 today as you were ten years ago?
 21 A. No.
 22 Q. What do you attribute that to?
 23 A. Because I relinquished hospital
 24 privileges in January.
 25 Q. What are you doing with your time that

1 A. I believe that this has been the basic
 2 contract since opening the practice.
 3 Q. 1994?
 4 A. Correct.
 5 Q. Did you have a covenant not to compete
 6 in your original 1994 agreement with Dr. Duncan?
 7 A. Yes, I believe that all the contracts
 8 have had that part to it.
 9 Q. Are there any cardiologists that have
 10 worked with you at Advanced Cardiology Consultants
 11 that are now or ever practiced medicine in Florence
 12 after leaving your practice?
 13 A. No.
 14 Q. How many different physicians since
 15 1994 have you had working for Advanced Cardiology
 16 Consultants? And it doesn't have to be an exact
 17 number but just. . .
 18 A. In the range of seven to twelve,
 19 ballpark, is the best I can tell you right now.
 20 Q. I noted in the contract that it says,
 21 "The physician shall devote his full time and best
 22 efforts to the performance of his duties hereunder,
 23 including equitable call coverage."
 24 Who establishes the call coverage?
 25 A. Advanced Cardiology does.

1 was formerly spent working at the hospital?
 2 A. I have a lot of outside interests that
 3 are not medical.
 4 Q. Okay. How much time do you believe has
 5 been freed up by you resigning your privileges?
 6 A. A large amount.
 7 Q. Okay. More than half?
 8 A. Could you rephrase that one more time
 9 for me?
 10 Q. You say that you gave up a large amount
 11 of the time that you formerly devoted to your
 12 cardiology practice?
 13 A. Uh-huh. Correct.
 14 Q. And I am looking for, like, maybe a
 15 percentage or a proportion. How much extra time do
 16 you have now that you did not have when you were
 17 doing hospital -- you were working in the
 18 hospitals, both hospitals?
 19 A. I would say, approximately, 50 percent
 20 more.
 21 Q. All right. Do you know who originally
 22 prepared this, your contract?
 23 A. No, I do not.
 24 Q. Do you know how long you have been
 25 using this contract or a similar version of it?

1 Q. Who within Advanced Cardiology sets the
 2 call schedules?
 3 A. Well, in general, we've had a meeting
 4 every month. And a schedule's developed, people
 5 input for the next month. So we try to stay two to
 6 three months ahead. So we discuss what should show
 7 up for two to three months before that, and we tend
 8 to lock in the one for the upcoming month at that
 9 meeting. So we're talking usually about two or
 10 three schedules at one meeting, but we're locking
 11 in one of the schedules on a monthly basis, really.
 12 Q. Who's making the decision about what
 13 the call schedule will actually be?
 14 A. It's general agreement. Someone will
 15 say, "I need this week off. I'm going on a trip,
 16 so I need to be off there." Someone else will say,
 17 "I need that weekend off," that sort of thing.
 18 Q. Does Mrs. Rowe participate in those
 19 meetings?
 20 A. She does. She's the practice
 21 administrator. She's intimately involved in those
 22 meetings, as is our nurse coordinator and a few
 23 other people in the practice.
 24 Q. Do any of the support staff -- are they
 25 on call also or is it just the physician?

1 you are shuttering your office there in Hartsville
2 and coming back to Florence?

3 A. No, it wasn't that simple because one
4 of the groups in Columbia also had a large presence
5 there, much more so than their one or two
6 cardiologists they had hired intermittently. And
7 the relationship of the group in Columbia to that
8 present administration at the hospital tended to go
9 up and down somewhat. It's not a very simple
10 equation, and our referrals would reflect that
11 relationship regardless of if they hired someone or
12 not. That wasn't as important as the relationship
13 they had with the Columbia group. It's difficult
14 to quantify.

15 Q. All right. Let me ask you this: Has
16 Advanced Cardiology ever had a relationship with
17 any other hospitals?

18 A. Yes.

19 Q. You mentioned Carolina Pines,
20 Carolinas, and McLeod. Have you had a relationship
21 with any other hospital where you would provide
22 services or have privileges and see patients?

23 A. Yes.

24 Q. Which ones are those?

25 A. Besides Hartsville, we had a

1 Williamsburg facility several years back. We were
2 there for years, but we gave up going there. And I
3 can't tell you the date, but it was more than a few
4 years ago.

5 Q. Okay. Was it when the -- when they
6 abandoned the hospital?

7 A. It was pre-the-flooding issue. It was
8 before that.

9 Q. Okay.

10 A. That didn't actually play into it at
11 all. It was probably at least a year or two before
12 that. I heard about it. I haven't been back down
13 there since.

14 Q. And do you have privileges at Lake City
15 Community Hospital?

16 A. Yes, to do consults and tests and what
17 we're doing, yes.

18 Q. Currently, is that the only hospital
19 where you have privileges?

20 A. Correct.

21 Q. Do Drs. Debsikdar and Wolery, do they
22 have privileges at Lake City Community Hospital?

23 A. Yes, we split our time down there. All
24 three of us go down there.

25 Q. Wolery and Debsikdar, do they have

1 relationship with Williamsburg Regional Hospital in
2 Kingstree. We had offices there and went down
3 there for many years. We also continue to have a
4 relationship with Lake City Community Hospital, and
5 we are there five days a week. I think they would
6 be the only other hospitals that we have had
7 relationships with.

8 Q. When you say you are at Lake City
9 Community five days a week --

10 A. Yes.

11 Q. -- what would that entail?

12 A. One of the cardiologists -- actually,
13 today was me -- would go down there. We have a
14 clinic there. We see patients there. We see
15 inpatient consults there. We do procedures there.
16 We read EKGs there. We read echocardiograms there.
17 We do stress tests there. We help out in the
18 emergency room if needed down there. That would be
19 general responsibilities from day to day.

20 Q. Is there a cath lab at the Lake City
21 Community Hospital?

22 A. No, there's not.

23 Q. How about what is your current
24 relationship with Williamsburg?

25 A. We actually gave up privileges with the

1 privileges at any other hospitals other than Lake
2 City Community Hospital?

3 A. Not to my knowledge.

4 Q. Did they both give up their privileges
5 at McLeod and Carolinas?

6 A. I believe they did. However, you would
7 probably -- I can't say for sure.

8 Q. But they are not seeing patients at
9 either?

10 A. Correct, they are not seeing patients
11 at either McLeod's or Carolinas. Yes, that's true.

12 Q. So the only hospital that Advanced
13 Cardiology is currently receiving any sort of
14 referrals or payments from is Lake City Community
15 Hospital?

16 A. We -- we only see inpatients at Lake
17 City at this time, correct.

18 Q. Is Advanced Cardiology profitable?

19 A. How would you define profitability?

20 Q. Well, at the end of the year, have you
21 made money?

22 A. Some years. Some years not.

23 Q. When is the last year that you did not
24 make a profit?

25 A. I don't recall.

1 A. Yes.
 2 Q. Where is that?
 3 A. He's across the street from me.
 4 Q. Across the street?
 5 A. He lives across the road from me.
 6 That's where he is right now.
 7 Q. Is he still practicing?
 8 A. I do not know.
 9 Q. Where do you live?
 10 A. I live 327, near the interstate.
 11 Q. Excuse me?
 12 A. Near the interstate on 327. He has the
 13 house catty corner. I see him around, but I don't
 14 know what he's doing. He was working at Marion
 15 Hospital, but I'm not sure he still is. He was
 16 talking about leaving, and I don't know if he left
 17 or not. So he had been working there, but I'm not
 18 sure if he is currently.
 19 Q. How about Dr. Ng?
 20 A. I don't know.
 21 Q. Do you know how long he was with you?
 22 A. Once again, it was in that range. More
 23 than two years, probably up to ten.
 24 Q. Do you know what he is doing now?
 25 A. I was told, and this is secondhand,

1 to take call that that would be equitable call
 2 coverage for the remaining physicians?
 3 A. Yes.
 4 Q. How was that?
 5 A. Because I was giving up hospital
 6 privileges. I was not dropping out of the call
 7 schedule. There is a large difference. When, in
 8 the medical world, when someone drops out of the
 9 call rotation or call schedule, they are still
 10 actively involved in hospital care, meaning they
 11 are admitting, discharging, doing procedures, going
 12 to meetings at the hospital, doing consultations,
 13 being part of the medical staff. However, when
 14 they are dropping call, they no longer get called.
 15 They do everything else. That's the difference.
 16 I actually gave up hospital privileges,
 17 so I no longer am part of that medical community of
 18 either hospital. And there's a large difference in
 19 those terms. The reason is because there is a
 20 large revenue stream that is produced by all those
 21 hospital activities, which I would no longer be
 22 getting, obviously, since I don't go to the
 23 hospital.
 24 Q. But if you had six physicians covering
 25 call at two hospitals?

1 that he went to work in Marion. But I don't have
 2 personal confirmation there.
 3 Q. What were the circumstances about
 4 Dr. Ng leaving the practice?
 5 A. My understanding was that he did not
 6 wish to sign a contract.
 7 Q. Did you have any conversation with
 8 Dr. Ng about the contract?
 9 A. No, except after he had left. So not
 10 prior to.
 11 Q. What did he tell you after he had left?
 12 A. He -- I got a message that he wanted me
 13 to call him, and I called him. It wasn't an
 14 in-person meeting. And it was a very brief
 15 conversation, and he stated that he was going to be
 16 exploring other options. That's about it.
 17 Q. Did he tell you that Mrs. Rowe had told
 18 him to leave the office?
 19 A. No.
 20 Q. Now, let's go and get back to call.
 21 Have you always, prior to January 1st, had you
 22 always participated in the call coverage the same
 23 as the other employed physicians?
 24 A. Yes.
 25 Q. Did you think that when you decided not

1 A. Uh-huh.
 2 Q. You drop out.
 3 A. Yes.
 4 Q. You resigned both your privileges and
 5 your...
 6 A. I resign my privileges at both, yes.
 7 Q. And so you have no privileges and so
 8 you're not on the call schedule. So, now, you have
 9 five physicians?
 10 A. Correct.
 11 Q. Covering the two hospitals?
 12 A. Correct.
 13 Q. All right. But you don't consider that
 14 it would -- well, let me ask you this: Did you
 15 consider hiring another physician so that the other
 16 physicians would not be as overworked as they were
 17 before you had left?
 18 MR. HOLMES: Object to the form.
 19 Object to the form. There's no testimony that he's
 20 overworked.
 21 THE WITNESS: I wouldn't characterize
 22 anything they did was overworked. Throughout the
 23 years of the practice, we had much more than just
 24 two places of hospitals we worked at. As I noted,
 25 we worked at Hartsville, Kingstree, Lake City,

1 usually with three, four, or five doctors. And
2 even more recently our hospital census has been a
3 lot less than it was just five years ago. The
4 amount of work was definitely not overwhelming. In
5 fact, it may have been more right sized.
6 BY MR. BUYCK:
7 Q. Right sized without you participating?
8 A. Absolutely.
9 Q. But would you agree with me that it
10 would result in the physicians having more days of
11 call than they would with you being on the call
12 schedule?
13 A. Yes, by one to two a month. You are
14 correct.
15 Q. Well, it's more than one to two a
16 month. It would be one day every six days, one day
17 more. So that would be about five a month,
18 correct?
19 A. They would split it up. We do weekends
20 in blocks, and that would split it up that way.
21 Q. So the end result of you not having
22 call, in other words, is each one of the other
23 physicians has five extra days per month of call?
24 A. They would have more call if I'm not on
25 the schedule, absolutely.

1 tell them each individually?
2 A. No. Theresa informed them
3 individually, and then I discussed it with them.
4 It was not done in a formal meeting, no.
5 Q. Did you have a conversation, do you
6 recall a conversation, with Dr. May where you
7 informed him that you were no longer going to be
8 doing any hospital practice?
9 A. I don't recall.
10 Q. Did you anticipate that the practice
11 would -- the practice income would go down with you
12 resigning your hospital privileges?
13 A. No.
14 Q. So it was your expectation that the
15 other physicians would pick up the slack?
16 A. It was my expectation that the overall
17 hospital or the overall income of the practice
18 would not be impacted in any way by myself not
19 having privileges at the hospital. We would still
20 be participating in patient care at those
21 hospitals. The revenue stream would still be
22 there. I would not be receiving that revenue
23 stream, but the other guys would, so...
24 Q. And they were going to have to perform
25 additional work, however, to get that revenue

1 Q. All right. And so you never considered
2 hiring another physician at that time to cover what
3 was going on?
4 A. We always consider hiring at any time
5 if a great candidate comes along, which are
6 sometimes far and few between. However, I did not
7 feel that the other physicians would be amenable to
8 that in any way. Because, remember, when I give up
9 my hospital privileges, I give up a huge revenue
10 stream that's no longer coming to me. That revenue
11 stream is then going to the other physicians. For
12 example, if I need someone admitted, I used to
13 admit myself. No, the call person would now admit.
14 The same with procedures. All of that hospital
15 revenue stream that I had been getting was going to
16 be divided among the other physicians.
17 So I'm not sure if, and I don't know,
18 but I'm not sure if they would have been jumping
19 with joy to decrease that revenue stream since they
20 would be doing better financially after my
21 resigning hospital privileges. I don't know.
22 Q. When did you notify the physicians that
23 you were dropping hospital privileges?
24 A. September of last year.
25 Q. Did you do it in a meeting, or did you

1 stream?
2 A. Correct.
3 Q. Did any of the other physicians
4 indicate to you that they didn't feel like they
5 should -- they wanted to do any additional work for
6 an additional revenue stream?
7 A. They didn't chat with me about it.
8 Q. All right. Well, tell me about the
9 meeting that was held among the physicians when a
10 decision was made for the practice to withdraw from
11 Carolinas Hospital.
12 A. As we talked about before, we did have
13 a monthly scheduling staff meeting where the
14 physicians are all invited as well as a few of our
15 staff members. And during that time, we talk about
16 practice issues as well as doing the schedule. And
17 during that meeting, several of the physicians in
18 the group wanted to suggest that we give up
19 privileges at Carolinas and maintain them at
20 McLeod.
21 Q. All right. Was this after the
22 September meeting when you announced that you --
23 A. They all knew, yeah.
24 Q. -- were no longer going to participate
25 in call coverage?

1 A. They were all aware of my plans no
2 longer to have hospital privileges.
3 Q. And so the meeting that you're
4 referring to about the discussion regarding
5 dropping coverage of Carolinas Hospital, when was
6 that?
7 A. I believe in December. It might have
8 been January. I'm not sure. In that time frame.
9 Q. All right. Well, tell me about that
10 meeting. What transpired during that meeting?
11 A. Well, with respect to the current
12 issue, many of the physicians said that they did
13 not want to go to Carolinas anymore and that they
14 just wanted to go to McLeod and...
15 Q. What was their reasoning behind that?
16 What would they express was the reason for dropping
17 out of Carolinas?
18 A. I don't know. I think they all had
19 possibly different reasons for wanting to do that.
20 Some of it might have been lifestyle since it's
21 obviously easier to cover one institution than two.
22 Some of it might have been because the
23 administration -- well, let me say that they felt
24 the administration at Carolinas had been less
25 supportive of our group over the years than they

1 expletives used during that conversation, and it
2 was embarrassing to me and the other members of the
3 group. He called everyone in the room a lazy fuck
4 at that point and got into almost an altercation
5 with one of the other physicians that a third
6 physician had to break up in the conference room.
7 Q. Was that Dr. Brady that he had words
8 with?
9 A. Yes.
10 Q. Who broke it up?
11 A. Dr. Wolery.
12 Q. So it was clear to everybody in the
13 room that Dr. May opposed to leaving Carolinas
14 Hospital at that time?
15 A. It was. However, when the vote came,
16 he said, "Do whatever you want." He did not vote
17 against it.
18 Q. Well, was there anyone -- was anybody
19 else --
20 A. I did not vote either way. I said to
21 them, "Feel free to do whatever you want to do.
22 Whatever you want to do is great with me." So I
23 was neutral. He abstained. The other doctors all
24 voted for leaving.
25 Q. And who were the doctors at that time?

1 should have been. Some of it could have been that
2 they felt that the care provided and the facilities
3 provided at Carolinas were not up to what they had
4 wanted it to be. I think they are some of the
5 potential reasons. And I'm sure it might have been
6 a mix of those, or it might have been the fact that
7 we had a very small percentage of our patients
8 there anywhere. So they probably, and I'm speaking
9 for them, they probably didn't think that it would
10 financially impact the practice tremendously since
11 the vast majority of our patients at that point
12 were at McLeod.
13 Q. Was Dr. May at that meeting?
14 A. Yes, he was.
15 Q. Did he participate in the meeting?
16 A. Yes.
17 Q. What was his opinion about dropping
18 Carolinas from the schedule?
19 A. He was not in favor of dropping
20 privileges at Carolinas.
21 Q. Did he make that known to the group?
22 A. He did.
23 Q. What was his explanation for why he
24 thought it was a bad idea?
25 A. I'm not sure. There were a lot of

1 A. It was Dr. Brady, Dr. Wolery, Dr. Ng,
2 and Dr. Debsikdar.
3 Q. All right. And did you express an
4 opinion one way or the other about whether or not
5 the practice should stay at Carolinas?
6 A. I did not.
7 Q. Did you have an opinion one way or the
8 other?
9 A. No, I really did not. I thought there
10 were pros and cons both ways, and I wanted the guys
11 to do what they felt most comfortable with. And I
12 saw the arguments both ways. I didn't really have
13 a strong opinion either way, no. But I didn't
14 discuss it during the meeting.
15 Q. Did you ask Theresa for any backup
16 material about how much business the practice was
17 doing at Carolinas and how much business y'all
18 would forego by not practicing there any further?
19 A. No, but it was obvious to the
20 physicians there because they deal with the census
21 on an intimately daily basis, and they're all very
22 aware of how many patients for Carolinas, where the
23 referrals are coming from. And the vast majority
24 at that point, and maybe not always, but at that
25 point, we were at McLeod. And I think that

1 A. Yeah, sure. And they may go to a
2 different hospital the next month, and they often
3 do that. And they may go to a totally different
4 city the next month, which they often do. And I
5 can tell just by seeing the referrals, looking at
6 the patient census, you can tell that the vast
7 majority of our patients were at McLeod. No
8 question about that.
9 And whether we would have retained some
10 of those patients that were previously at
11 Carolinas, we may have. Moving to McLeod
12 exclusively probably would have given us more
13 patients from McLeod. So the actual end game may
14 have been a draw. I don't know. But it's
15 certainly not as simple as you're losing 20 percent
16 or 30 percent. It's not that simple, and that's
17 not how it's run.
18 Q. All right. But would you agree with me
19 that if you are going to grow your business at
20 McLeod it would be to the detriment to McLeod's
21 in-house cardiology group?
22 A. No, their in-house cardiology group was
23 hoping we would stay, and they wanted us to come
24 there because they wanted help because they were
25 very busy. And they were very supportive. We

1 A. Easily. McLeod has a huge referral
2 base, huge ERs in all their facilities, and there's
3 lots of opportunities for patients that are no
4 longer -- that have not been attached to one entity
5 or the other. That's the group. We would never be
6 looking to take one of McLeod Cardiology's
7 established patients. That's not in any way -- we
8 would never want to do that. Availability was how
9 this practice was built.

10 Q. Availability?

11 A. Yes, to be available.

12 Q. And were you, in fact, available?

13 A. For 25 years, very available.

14 Q. If you have got a practice based on
15 availability, why would you leave --

16 A. Because I have. . .

17 Q. -- one of the two hospitals in
18 Florence, make yourself unavailable to them?

19 A. Well, it's -- that was -- I was giving
20 some possible arguments that some of the fellas in
21 the room had. It's not my argument. Like I said,
22 there's pros and cons here. I was not for it or
23 against it. I left it up to them. I think I see
24 both sides of that.

25 MR. HOLMES: Off the record.

1 always had good relationships with them. There was
2 no animosity whatsoever, and there hasn't been for
3 25 years. We have a working relationship. When
4 there's a patient of ours that gets admitted and
5 they're consulted by mistake, they'll call up and
6 say, "Hey, this is your patient. You know them."
7 From a physician standpoint, that
8 physician does not want to rebuild the whole city
9 here. There -- this patient has extensive records,
10 has had multiple testing done over the years. They
11 don't want to try to have to figure it all out.
12 They want to say, "Hey, you see Dr. X over there.
13 We'll call him up. He'll come see you."
14 And I'll say, "Fine."
15 They don't want to get involved. The
16 physicians don't want to cross-pollinate.
17 That's -- it creates bad care. It creates an
18 environment for malpractice. It creates a bad
19 feeling for the patient. It's very inefficient.
20 It's not a good situation. Those doctors don't
21 want our patients, they really don't. And same
22 versus -- if they're seeing the other group, we'll
23 say the same thing.
24 Q. Well, how are you going to develop
25 additional revenue streams at McLeod?

1 (Off-the-record conference.)

2 BY MR. BUYCK:

3 Q. But you did not consider putting your
4 foot down and saying, "No, we're not leaving
5 Carolinas Hospital"?

6 A. No. I told them that they get to pick.
7 That's why I had a vote. They get to do what they
8 want to do. I mean, they're all grownups. They
9 have, you know, opinions. And I want to work with
10 them. I don't want to create animosity, you know.

11 Q. You were phasing out?

12 A. And if I had a big opinion, I would
13 have expressed it. I did not have an opinion. As
14 I said, I saw the pros and cons. I did not have a
15 strong opinion either way.

16 Q. All right. And you had already, by
17 that time, had made your determination that you
18 were going to phase yourself out of. . .

19 A. I had already planned to give up
20 privileges at both hospitals, and I had already
21 informed everybody. And I hadn't -- I don't know
22 if I'd done it physically, but yeah. Because I
23 physically did it January 1st, so you know. But
24 everybody knew that, and that's what I told
25 everybody. It was no surprise.

1 Q. Have you located any candidates?
 2 A. Yes.
 3 Q. Have you made any offers?
 4 A. Not yet.
 5 Q. Why did the hospital drop its -- well,
 6 has -- scratch all that.
 7 Does the practice still provide call
 8 coverage at McLeod?
 9 A. Say it one more time for me.
 10 Q. Does the practice -- I believe you
 11 testified about this already. Does the practice
 12 still provide call coverage at McLeod?
 13 A. No.
 14 Q. When was the decision made not to
 15 provide call coverage at McLeod?
 16 A. It was made within the last few months
 17 by Dr. Debsikdar and Dr. Wolery.
 18 Q. What was the reason for that decision?
 19 A. I -- I wasn't privy to their
 20 discussions. They had met with the hospital
 21 several times. And they had told me they decided
 22 that they wanted to give up privileges, at least
 23 for now. I don't know the details.
 24 Q. Did you ask them the reason for it?
 25 A. No.

1 Q. Did you think that would have a
 2 negative impact on the bottom line of the practice?
 3 A. Yeah, it probably would.
 4 Q. But you just encouraged them to carry
 5 on?
 6 A. I told them, "I want you guys to do
 7 what you feel comfortable doing." I encouraged
 8 them if they wish to continue in the hospital, I
 9 have no problem with that. If they wish to not
 10 temporarily or long term, I have no problem with
 11 that.
 12 Q. Do what you want to do?
 13 A. Basically, with respect to that issue,
 14 yes. Whatever you're comfortable doing, I'm
 15 supportive 100 percent.
 16 Q. So now you have three physicians who
 17 are all office based?
 18 A. Except for Lake City.
 19 Q. All right. Do you have a cardiology
 20 specialty?
 21 A. Yeah, interventional cardiology. It's
 22 a subspecialty.
 23 Q. Subspecialty. Is that what Dr. May is,
 24 an interventional cardiologist?
 25 A. Correct.

1 Q. What other hospitals in the immediate
 2 area provide interventional cardiology services?
 3 A. In Florence, I believe it's just McLeod
 4 and Carolinas.
 5 Q. All right. How about any others within
 6 a 25-mile radius?
 7 A. No.
 8 Q. Any others within a 50-mile radius?
 9 A. I -- I'm not aware of any, but...
 10 Q. How about what is the closest hospital
 11 to Florence that provides interventional cardiology
 12 services?
 13 A. Well, I'm not sure if Grand Strand at
 14 the beach or the Columbia hospitals would be
 15 closer. I believe it would be one of those, but
 16 I'm not sure of the exact distance.
 17 Q. All right. So if Dr. May were to not
 18 practice within 25 miles of McLeod Hospital, he
 19 would have to either practice in Georgetown -- or,
 20 excuse me, Murrells Inlet or Columbia? Those would
 21 be the two places?
 22 A. Could you rephrase that one more time?
 23 Q. All right. The covenant not to compete
 24 that's in Dr. May's contract says that he will not
 25 provide cardiology services within 25 miles of

1 McLeod Regional Medical Center. And in order for
 2 him to honor that 25-mile radius, he would have to
 3 go to either Murrells Inlet or Columbia --
 4 MR. HOLMES: Object to the form. You
 5 said cardiology services.
 6 MR. BUYCK: Yeah.
 7 MR. HOLMES: Instead of interventional
 8 cardiology services.
 9 BY MR. BUYCK:
 10 Q. All right. If he were to provide
 11 interventional cardiology services, would he have
 12 to go outside to either Grand Strand or the
 13 Columbia hospitals?
 14 A. Or any other hospital in the United
 15 States.
 16 Q. I'm talking about the closest ones.
 17 A. The closest? They would be, for my
 18 understanding, the closest, yes.
 19 Q. Grand Strand or Columbia?
 20 A. I believe so.
 21 Q. All right. And when you made the
 22 decision personally to be an office-based
 23 physician, did you anticipate that your
 24 compensation was going to go down?
 25 A. Yes, absolutely.

1 Q. How much were you anticipating at the
2 time?

3 A. I didn't really know. I knew it would
4 be significantly lower. But as far as a number, I
5 don't know.

6 Q. Do you believe that you have done your
7 last interventional cardiology procedure?

8 A. Yes.

9 Q. Now, do you recall the discussion you
10 had with Dr. May about your plans to become office
11 based and his future plans?

12 A. There were multiple interactions with
13 Dr. May. I would not characterize them -- or I
14 wouldn't characterize any of them as discussions.
15 If one is having a discussion, one needs to sit
16 down and talk about a topic in a normal tone of
17 voice, as we are doing today. I would characterize
18 my interactions as brief rants in the hallway or in
19 the parking lot, which are mostly one-sided from
20 his standpoint.

21 Q. Well, when you said you informed each
22 one of the physicians individually of your plans to
23 drop your privileges, where did you have that
24 conversation with Dr. May?

25 A. I don't recall.

1 Duke University was going to affiliate with them.
2 He told me that he had talked with them several
3 times and that he wanted to become the chief of
4 cardiology there and run a new interventional
5 program there. And he was very excited about this
6 opportunity. And so he told me that Conway was
7 partnering with Duke, and they were going to bring
8 cardiologists down from Duke as well as the local
9 cardiologists. And he was very excited about it.

10 Q. Did Dr. May ever come to you and tell
11 you that he was looking for alternative employment?

12 A. Many times.

13 Q. When was the first time that you
14 recall?

15 A. For years.

16 Q. All right. Tell me about that.

17 A. Five years ago, six years ago. He went
18 through periods where he expressed to me and to
19 everyone in the group that he needed more money,
20 the pay was not enough. And he became very, shall
21 we say, excited about that issue. And consistently
22 I and Theresa told him, "Look around. Go to other
23 places. Interview," which I believe he did.

24 And I only would say that because he
25 came back at one point, and this is not recent,

1 Q. Would it have been in the office or in
2 the parking lot?

3 A. I don't recall.

4 Q. What do you recall about that
5 conversation?

6 A. I don't recall. I -- I don't recall.

7 Q. When you tell the other physicians --
8 well, prior to telling them, what did you expect
9 that their reaction to your decision would be?

10 A. I don't know.

11 Q. What was Dr. May's reaction?

12 A. Neutral, from what I remember. He
13 didn't seem to say a lot about it.

14 Q. And it was your expectation that once
15 you dropped call or privileges that the other
16 physicians would just continue on covering the two
17 hospitals and operating in the same fashion they
18 had been minus --

19 A. Me.

20 Q. -- one physician, minus you?

21 A. That was my expectation. Yes, it was.

22 Q. Why did Dr. Brady leave Advanced
23 Cardiology?

24 A. Well, he told me. He told me that he
25 had a great opportunity at Conway. He told me that

1 this is several years ago, that, "This shitty
2 contract is as good as the other shitty contract,
3 so I may as well stay." So from that, I gathered
4 that he had looked at other places.

5 Q. Let's look at the period of the last
6 quarter, 2018. Did he come to you and say that he
7 was looking at other opportunities?

8 A. As I said, intermittently, consistently
9 over the years, including that time period, yes.

10 Q. All right. Let's focus on that time
11 period.

12 A. The answer would be yes.

13 Q. Tell me about that.

14 A. It was the same scenario as had been
15 going on. Not enough money. "I got to make more
16 money," was the type of thing.

17 My response -- I had no real response
18 except to say, "Look at other options." The reason
19 is that he would not -- I could not predict that he
20 would make any more money with our group than the
21 present amount. I mean, and I didn't want to lead
22 him down the road and say, "Hey, it's going to be
23 great next year. Just stick around," or -- I did
24 not want to lead him to think that I would give him
25 a different deal than I gave the other physicians

1 in the group. And I did not want to mislead him.
2 So my only option was to say, "Explore your options
3 in the world. Maybe you'll find someone you're
4 happy with. I don't know." Many times, I told
5 him, "I haven't looked around for years. There may
6 be better-paying jobs out there. I don't know."

7 But I definitely encouraged him to look
8 elsewhere, that quarter and other quarters. It was
9 nothing new. If he's not happy, I don't want him
10 here. I want people that are happy and want to
11 work there. And he went through these stages over
12 the years.

13 Q. Did he discuss with you employment
14 options at two local hospitals?

15 A. Yes.

16 Q. And what was your response to that?

17 A. Okay. I had no response. Okay.

18 Q. Did he have any conversations with you
19 regarding the restrictive covenant in his contract?

20 A. Yes, intermittently over the years.

21 Q. Let's talk about most recently. Let's
22 focus on the last quarter of 2018. Did you have
23 any conversations with Dr. May about the
24 restrictive covenants in his contract?

25 A. Yes.

1 A. I don't recall saying. . .

2 Q. -- employment options at McLeod
3 Hospital?

4 A. I don't recall saying that to him.

5 However, based on the contract, the contract does
6 not define what entity or company he can work for.
7 It merely defines a radius where he cannot practice
8 cardiology.

9 Q. I understand that. But Dr. May
10 specifically told you or asked you if you would
11 have any objection to him going to work for McLeod
12 Hospital.

13 A. And I probably said, "Do whatever you
14 want." I would have said that multiple times.
15 This was not one conversation. This was a series
16 of hall, parking lot, grabbing sort of things. And
17 I would have said, "Do whatever you want."
18 Absolutely.

19 Q. And when you said, "Do whatever you
20 want," were you referring to it was fine with you
21 if he accepted a job practicing cardiology at
22 McLeod Hospital?

23 A. Not at McLeod Hospital, with McLeod
24 Health.

25 Q. Well, who else would he work for at

1 Q. Tell me about those conversations.

2 A. Within the context of looking for other
3 jobs he mentioned to me that he wanted to be let
4 out of his restrictive covenant intermittently over
5 the last six months and before that as well.

6 Q. What was your response?

7 A. It varied, depending on the time. It
8 was usually, "I don't know about that. I'm not a
9 contract lawyer." Sometimes it would be, "Talk to
10 Theresa." It was like -- or other times, "I got to
11 go back to work. I'm seeing patients." They were
12 my general responses.

13 Q. All right. Did you ever tell him it
14 would be fine for him to go to work for McLeod
15 Hospital?

16 A. I don't know. The contract does not
17 state what entity he can or cannot work for as long
18 as the contract is upheld, which means 25 miles
19 from McLeod. The contract doesn't say who anyone
20 can work for. That would be unenforceable and
21 insane. So I may have said that or may have not.
22 I don't recall. But I certainly would agree with
23 that.

24 Q. You would agree that you told him that
25 it was fine for him to explore --

1 McLeod Hospital?

2 A. McLeod is a very big entity. It used
3 to be just McLeod Regional Medical Center. They
4 have renamed themselves. Now, they're McLeod
5 Health. McLeod Hospital is just one part of their
6 huge facility-expansion plan. They are doing
7 cardiology at the beach. They're at Seacoast.
8 They're at Loris. They at Clarendon. They bought
9 up what used to be Sisters of Charity in Cheraw and
10 other places that I don't even know about. They're
11 huge. And they're looking for cardiologists at all
12 those places.

13 So I would have, and the company would
14 have, and the contract would have no problem with
15 him working for McLeod Health whatsoever as long as
16 it was not him doing cardiology within 25 miles of
17 McLeod Hospital. There are lots of jobs available.

18 Q. Well, when Dr. May says that he was
19 interested in going to work for McLeod, has
20 Advanced Cardiology provided cardiology services to
21 any McLeod-affiliated hospital other than the
22 Florence campus of McLeod Regional Medical Center?

23 A. Not in person, but certainly by
24 interpretation of tests and discussing with various
25 ER physicians. But not in person.

1 Q. So when Dr. May comes to you and says
2 that he wants to explore employment opportunities
3 at McLeod Hospital and you tell him sure, you did
4 not -- you were not concerned that he would
5 interpret that to mean you were fine with him
6 talking to the McLeod people here in Florence?
7 MR. HOLMES: Object to the form.
8 But go ahead. You can answer.
9 THE WITNESS: Say that one more time.
10 BY MR. BUYCK:
11 Q. When Dr. May asked you whether it was
12 okay with you if he discusses employment
13 opportunities with McLeod Hospital, did it not
14 occur to you that he was referring to the McLeod
15 Hospital here in Florence?
16 A. Well, he didn't say -- he would never
17 have said with McLeod Hospital because I would have
18 said no. He would have said with McLeod. And the
19 contract does not preclude him from working for
20 McLeod or for any place, just so it's 25 miles.
21 And I know and he knows that he signed
22 that contract, which would say 25 miles. And I
23 know that he would uphold that because he signed
24 it. So it really wouldn't enter my mind. He's
25 aware of his contract, as I was too. He could

1 Q. Which is Exhibit 2 to Dr. May's
2 deposition. Do you recognize that e-mail?
3 A. I'm not sure I recognize it. But,
4 yeah, it looks appropriate.
5 Q. All right. It's addressed to -- you
6 are carbon copied on it, correct?
7 A. Yeah, it probably is.
8 Q. Well, I mean, not probably. You're
9 right there, Lew Rowe, right, CC?
10 A. Oh, okay. Yes, you're correct.
11 Q. And it's from Theresa on Thursday,
12 November 15th, correct?
13 A. Correct.
14 Q. Okay. And then up top it looks like it
15 was forwarded to Dr. May; is that correct?
16 A. Yes, it does.
17 Q. All right. Now, did Dr. May ask you --
18 or, excuse me, did he tell you that he was having
19 conversations with Marie Saleeby about employment
20 opportunities at McLeod Hospital?
21 A. I can't recall if he mentioned Marie
22 Saleeby. But he definitely mentioned as one of the
23 places he was looking at was McLeod.
24 Q. What other places did he say he was
25 looking at?

1 easily work for McLeod and uphold the contract.
2 There would be no issues.
3 And it's happened before. It's not a
4 new thing. Dr. Dedonis had conversations with
5 Carolinas, the other hospital, and he worked for
6 them just a few years before. I had no problem
7 with that. In fact, I encouraged it. He was a
8 great guy and a great cardiologist. And the pace
9 was just a bit much for him, and he wanted to do a
10 change, and I said fine. He talked to them -- in
11 fact, we called them and actually got him a job set
12 up with them. And he's worked out of Marion for
13 many years up until, I think, just recently. But
14 he did very well there.
15 So I have no problem. It's happened
16 before. It didn't enter my mind, no.
17 Q. During these conversations that you
18 were having in the third quarter of 2018 with
19 Dr. May, did you ever remind him that the contract
20 had a 25-mile-radius restriction?
21 A. No, because it's not something I would
22 say in the hallway. And, like, no. I never
23 reminded Dr. Dedonis either.
24 Q. All right. This is Exhibit 2.
25 A. Okay.

1 A. Locums, Carolinas, the beach. It
2 varied from time to time.
3 Q. Did you consider Dr. May a problem
4 employee?
5 A. Dr. May had definite challenges as an
6 employee.
7 Q. Tell me what those challenges are, the
8 major ones that you saw.
9 A. Well, I would say that personality-wise
10 was a problem. I thought that his work was always
11 very good with respect to the cath lab and with
12 respect to his management of very sick patients.
13 The problem areas were his attitudes and quite
14 extreme mood swings. And that made the environment
15 in the office very difficult. That would be my
16 comment.
17 Q. Do you believe the other physicians got
18 along with him?
19 A. I would say intermittently, yes, and at
20 other times, no. It depends on the situation and
21 the time period.
22 Q. Did you ever tell Dr. May that you were
23 not opposed to him seeking employment or accepting
24 employment at either one of the local hospitals?
25 A. I told him that he needs to explore his

1 options.
2 Q. All right. But did you tell him --
3 A. I never told Dr. May that he should
4 work at McLeod Hospital or at Carolinas Hospital.
5 I would never prohibit him from discussing
6 employment options with either of those entities,
7 however.
8 Q. All right. When you say "entity," you
9 are saying it would be fine --
10 A. McLeod Health.
11 Q. -- for him to work for McLeod --
12 A. Health.
13 Q. -- Health or Carolinas Hospital, so
14 long as he worked more than 25 miles from McLeod
15 Hospital?
16 A. Correct.
17 Q. What was the importance of, why did you
18 feel it necessary, to restrict Dr. May or any other
19 physician from working within 25 miles of McLeod
20 Hospital for a period of two years after the ending
21 of their employment with your group?
22 A. Well, that goes to just the definition
23 of what the point of a non-compete clause in a
24 contract is.
25 Q. Well, I want to know your --

1 BY MR. BUYCK:
2 Q. What would be the adverse impact?
3 A. Loss of revenue.
4 Q. And why would there be a loss of
5 revenue if Dr. May left the employment of Advanced
6 Cardiology and practiced within 25 miles of McLeod
7 Hospital?
8 A. Because it would be unfair competition
9 to us based on his contract.
10 Q. Well, how would it impact you? Tell me
11 what would be the --
12 A. We would lose revenue.
13 Q. How would you lose revenue?
14 A. Because we would have more competition.
15 Q. Competition for what?
16 A. Patients, procedures. It's what we do.
17 We see patients, do procedures.
18 Q. You don't do procedures, do you?
19 A. In the office.
20 Q. What procedures do you do?
21 A. Stress nuclear scans, echocardiograms.
22 Q. All right. But as far as
23 hospital-based procedures, would there be any?
24 What would be the competition?
25 MR. HOLMES: I object to the relevance.

1 A. Well, I don't...
2 Q. -- what is your motivation for making
3 sure that Dr. May does not work within 25 miles of
4 McLeod for two years after he finishes working with
5 you?
6 A. I think my motivation is the same as
7 any company or any entity that has a non-compete,
8 which would include a large number of corporations
9 in various different disciplines throughout the
10 state and the country. They want to basically
11 prevent their business from being cannibalized.
12 Q. All right. How could Dr. May
13 cannibalize Advanced Cardiology Consultants if he
14 worked within 25 miles of McLeod Hospital for a
15 period of two years after leaving the employment of
16 ACC?
17 A. Very easily: advertising, billboards,
18 mailers, doing talks, visiting other doctors. It's
19 all the ways how to market a company.
20 Q. And so your concern would be that his
21 patients would follow him wherever he went?
22 MR. HOLMES: Objection to the form.
23 THE WITNESS: My concern is that it
24 would be an adverse impact on the company that I
25 built over 25 years. That is my concern.

1 But you can answer.
2 THE WITNESS: Can you ask that one more
3 time?
4 BY MR. BUYCK:
5 Q. Well, if he would perform an
6 angioplasty or a heart catheter, how would that be
7 adverse to Advanced Cardiology Consultants?
8 A. Because that would be revenue that we
9 would not be getting.
10 Q. Well, you're not getting it anyway.
11 A. We were getting it. Dr. Wolery and
12 Dr. Debsikdar are very interested in doing hospital
13 work, although I'm not. Once again, it wouldn't
14 impact me personally, but it would impact the
15 company.
16 Q. Do you think Dr. May working at
17 Carolinas Hospital right now would have an adverse
18 impact on Advanced Cardiology since the practice
19 doesn't intend to do any work there?
20 A. It would.
21 Q. How is that? How so?
22 A. Because he would be working at, say,
23 Carolinas, and he would be doing cardiology. Now,
24 a very small part of our daily work is actually
25 doing interventional cardiology. The vast majority

1 in this area, and this is not everywhere but it's
2 in this area, it's seeing patients, interpreting
3 stress tests, echoes, that sort of thing that don't
4 involve interventional cardiology whatsoever. So
5 it would have a huge impact on us.

6 Q. So you're thinking that the patients
7 that he currently sees would see him at Carolinas
8 rather than come to your office?

9 A. It's possible that some might.

10 Q. So that's your fear?

11 A. I wouldn't say it's a fear. I think
12 it's a pretty good estimate of what would happen.

13 Q. So you would take away the choice of
14 the patient to see the physician of their choice?

15 MR. HOLMES: Object to the form.

16 BY MR. BUYCK:

17 Q. Rather than --

18 A. I would never take away patient choice.

19 The patient is free to see whoever they want to
20 see, absolutely free to see whoever they want to

21 see after they consult with their insurance
22 companies. I think the insurance industry has done
23 more to take away patient choice than any physician
24 ever has or ever will.

25 Q. Does Dr. May, are you aware of any

1 community.

2 Q. Because his patients know him?

3 A. He's known in the community, including
4 the patients at our practice. They're not his
5 patients. They're Advanced Cardiology's patients.
6 He never bought in. He's not a partner. He is not
7 a shareholder. He never put a dime into the place.

8 Q. Did you ever offer Dr. May a share in
9 the company?

10 A. Let me characterize that. I did not
11 offer him to buy shares. However, towards the last
12 several months of grumbling, shall we say, I said,
13 "If you want to buy it, make me an offer."
14 Absolutely did say it. I got crickets.

15 Q. How much do you believe the company is
16 worth?

17 MR. HOLMES: Object to that. How can
18 that possibly be relevant to this?

19 BY MR. BUYCK:

20 Q. Well, you said you offered it to him?

21 A. I did.

22 MR. HOLMES: I heard you say that but,
23 I mean, we don't even have a confidentiality order.

24 MR. BUYCK: Well, let's enter into one.
25 I'm fine with that.

1 covenant not to compete he has with any insurance
2 company?

3 A. No, but we're talking about patient
4 choice.

5 Q. And if Dr. May is not practicing in
6 Florence, then that's one less choice that the
7 patient would have as far as who to see for a
8 cardiology consult?

9 MR. HOLMES: Object to the relevance.

10 Go ahead and answer.

11 THE WITNESS: No, I disagree with that
12 because the hospital will hire someone else because
13 both hospitals are very large corporations. They
14 know how many cardiologists that they need and want
15 and will get those cardiologists. Whether it's
16 Dr. May or another doctor, I don't think it will
17 take away patient choice. The patient will have
18 that many cardiologists to choose from.

19 BY MR. BUYCK:

20 Q. Well, why would Dr. May be more of a
21 threat to the income of Advanced Cardiology than
22 the new cardiologist that Carolinas would hire?

23 A. He would be because --

24 Q. Instead...

25 A. -- he is a known entity in the

1 MR. HOLMES: Okay. Okay. We
2 contractually agree to a confidentiality order?

3 MR. BUYCK: Yeah, we can agree to a
4 confidentiality order.

5 MR. HOLMES: I mean, you will agree to
6 that?

7 MR. BUYCK: Yeah.

8 MR. HOLMES: And you agree doing it
9 now? So if he says how much the company is worth,
10 we agree it's confidential and cannot be disclosed
11 to a third party?

12 MR. BUYCK: Well, let me consult with
13 my client but --

14 MR. HOLMES: Because I really don't
15 think it has any relevance at all to anything.

16 THE WITNESS: Well, let me shorten
17 this. I don't have an answer because I have no
18 idea. These -- it's not relevant because I don't
19 know the answer. Valuations of medical practices
20 are extremely difficult. And you're going to get
21 numbers from zero to millions. And it's tough to
22 evaluate them, so there is no answer here. It's
23 what the buyer will offer. It really is.

24 BY MR. BUYCK:

25 Q. All right. So when you say, "Well, go

1 ahead and buy it," that was more of a whim than a
2 serious --

3 A. It was, because I was sick of getting
4 complaints about everything all the time. I was
5 tired. I said, "Well, make me an offer. You buy
6 it if you have so many great ideas." Yeah, that
7 was it. So apart from that outburst, yeah, that
8 was it. Yeah.

9 Q. All right. Now, when Dr. May is, as
10 you characterize it, grumbling about his income
11 opportunities, what did you anticipate his response
12 would be having to forego seeing any patients at
13 Carolinas Hospital?

14 A. I -- I didn't think financially, as I
15 said before, that it would have a huge impact on
16 the practice at all. If I did, I probably would
17 have spoke up in the meeting or at least made my
18 thoughts known. I don't really think it would, in
19 the long term, have that much of an impact. That's
20 my best guess, although it's hard to say.

21 Q. All right. Dr. May, he has a contract
22 dated March 30, 2018. When he originally went to
23 work there, there was a contract that was for five
24 years. Do you recall that?

25 A. I believe that that's correct.

1 felt would be appropriate.

2 Q. All right. Did you have any
3 conversations with her about the appropriateness of
4 offering Dr. Ng a one-month contract?

5 A. I don't recall either way what was
6 mentioned with respect to the one month. I had
7 always made it clear to her that I wanted the
8 contracts, especially the main provisions, to be
9 very similar for all of the physicians, and that's
10 what she carried out. As far as the durations, I
11 didn't really have input.

12 Q. Do you know why Dr. Ng was offered a
13 one-month contract?

14 A. No.

15 Q. Did you have any discussion with
16 Theresa about why Dr. Ng was offered a one-month
17 contract?

18 A. No.

19 Q. What would have been the purpose of
20 offering Dr. Ng a one-month contract?

21 A. I don't have an answer.

22 Q. And Dr. Ng was actually employed there
23 before Dr. May; is that correct?

24 A. I don't recall.

25 Q. Dr. May testified earlier today in his

1 Q. Was that the typical length of the
2 contracts that you were offering in the time frame
3 of 2008?

4 A. I do not know.

5 Q. All right. And I believe you admitted
6 in the complaint that it was two five-year
7 contracts?

8 A. Okay.

9 Q. And then why in March of 2018 did you
10 go from a five-year contract to a one-year
11 contract?

12 A. I don't have an answer for that. I
13 really did not get into the details of the
14 contract-length timelines.

15 Q. Well, who would have made that decision
16 to go from a five-year renewal to a one-year
17 renewal?

18 A. Theresa would have.

19 Q. Would she have done that with
20 consultation with you or would that have been her
21 decision?

22 A. That would have been her decision.
23 We've been doing this long enough that she knows
24 that I don't really have a lot of input with
25 respect to duration of contracts. Whatever she

1 deposition that Dr. Ng was there when he began.

2 DR. MAY: No. Sorry.

3 THE WITNESS: I don't recall.

4 BY MR. BUYCK:

5 Q. All right. Sitting here today you have
6 no idea why Dr. Ng was first given a three-month
7 contract and then a one-month contract and then
8 another one-month renewal?

9 A. Correct.

10 Q. Did you ever have any discussions with
11 Theresa about the --

12 A. Not about contract.

13 Q. -- the reduction of the terms?

14 A. Not about contract length. I mean,
15 I've always made it clear that I wanted the
16 contracts for all the physicians to be similar.

17 Q. All right. Do you have any idea why
18 she would first give Dr. May only a one-year
19 renewal instead of a five-year renewal and then
20 Dr. Ng an even shorter renewal period?

21 A. No.

22 Q. All right. Going back to Exhibit
23 Number 2, the e-mail, did Dr. May come to you and
24 ask and tell you that he was having these
25 discussions with Ms. Saleeby?

1 A. He had told me, as we discussed
2 earlier, that he was looking at his options. And
3 one of those options that he mentioned was McLeod
4 Health.
5 Q. Did he ask you to communicate with
6 Ms. Saleeby regarding the practice's position
7 regarding his having those discussions?
8 A. No.
9 Q. Why did Theresa send Exhibit Number 2
10 to Marie Saleeby?
11 A. I don't know. I wasn't involved.
12 Q. You don't recall Dr. May asking you or
13 telling you that he was having discussions with
14 McLeod Hospital and needed a permission from you to
15 continue those discussions?
16 A. No.
17 Q. When you got the copy of the e-mail
18 from Theresa, did you and Theresa have any
19 discussions about that e-mail?
20 A. I believe she mentioned that she had
21 given McLeod Health -- they had asked. She told me
22 that they had asked. And she said she'd given them
23 permission to talk with him about opportunities. I
24 said okay. That was the extent of it. I never
25 chatted with Ms. Saleeby or anybody over there at

concerning job opportunities?

A. Not beyond he told me he was looking into McLeod as well as a number of other places. That was -- that was it.

Q. Did you have any specific conversations with Dr. May regarding the restrictive covenant? And I am talking about in this time period of late 2018, early 2019 -- excuse me, 2018 to 2019. Did you have any specific conversations with Dr. May regarding the restrictive covenant in the contract?

A. No more than we've already discussed.

Q. Do you recall the statement made to Dr. May that you made to Dr. May to the effect that you did not want to make enemies and even though you could invoke the restrictive covenant that in his case you would not?

A. No.

Q. Is it your testimony that you did not instruct Mrs. Rowe to send this Exhibit Number 2 to Marie Saleeby or anyone at McLeod?

A. Could you say that one more time? I don't understand.

Q. Is it your testimony that you did not instruct Mrs. Rowe to send Defendant's Exhibit 2 to Ms. Saleeby?

1 all. I didn't have any correspondence with them or
2 talk with them.
3 Q. All right. Subsequent to that e-mail,
4 did you have any conversations with McLeod Health
5 about the possibility of Dr. May going to work with
6 them here in Florence?
7 A. I didn't, no.
8 Q. Do you know whether or not Mrs. Rowe
9 had any conversations with McLeod Health about the
10 possibilities of Dr. May going to work for McLeod
11 here in Florence?
12 A. She never said that she did to me, so I
13 don't know of any. I was aware of this, but that
14 was the only thing I was aware of.
15 Q. And you were aware of that based on
16 Mrs. Rowe's comment to you that McLeod had asked
17 for something in writing saying it was okay to talk
18 to him?
19 A. That's what she had told me. McLeod
20 had asked if they could talk to him about
21 opportunities. And she told me that she said that
22 would be fine, and I said okay. And that was --
23 that was this Exhibit A, yes.
24 Q. Did you have any conversations with
25 Dr. May about his interactions with McLeod

A. I don't recall. I was fine with it. I mean, she told me that she had told McLeod that it was fine for him to go and discuss things with them, and I said okay. I -- that was the extent of our interactions.

Q. When you saw that e-mail, did it concern you that there was no references in there or that Mrs. Rowe did not make any reference to the restrictive covenant in terms of the restrictive covenant?

A. No.

Q. Do you know whether or not McLeod ever specifically asked what the restrictive covenant with Dr. May was?

A. I don't know. I had no interaction with McLeod whatsoever beyond seeing this.

Q. Did you have any conversations with Mrs. Rowe where she indicated that there was any conversation at all with McLeod's representatives regarding the terms of Dr. May's restrictive covenant?

A. I don't recall if it was discussed. I don't recall. I certainly did not discuss it with anyone from McLeod.

Q. Now, the restrictive covenant in the

1 about job opportunities?
 2 A. He told me that he had been talking to
 3 them on and off in the past. So, no, it's not. He
 4 had said he talked to them. But I don't know how
 5 far those conversations went, whether it was an in
 6 the hall sort of thing or it was more formal or it
 7 had developed to the point that legal teams were
 8 involved. I don't know. So it depends on how you
 9 define that. He had mentioned their name and
 10 mentioned McLeod and mentioned others on and off
 11 for months.
 12 I was never formally told by Carolinas
 13 that "We are employing Dr. May for a job." I was
 14 never told that and have never been told that. I
 15 am not in communication with anyone from Carolinas,
 16 and they have not updated me on any of their
 17 recruitment issues.
 18 Q. Did Dr. May come to you and tell you
 19 that he was accepting a job at Carolinas Hospital
 20 and needed a release or a waiver from you for the
 21 restrictive covenant?
 22 A. Dr. May had told me multiple times that
 23 he was looking to work at different places,
 24 including locums, McLeod, out of state, the beach.
 25 That was a recurrent theme. And within that theme,

1 the restrictive covenant was mentioned. And at
 2 that point, I said, "I don't want to deal with it."
 3 I just got away from the conversation.
 4 Now, these were not formal discussions
 5 as we are having today. Once again, these are in
 6 the hallway, a quick in the office between
 7 patients. There was never a formal discussion like
 8 our formal meetings we have every month. That
 9 would be a discussion. This is in the hallway,
 10 "Oh, I'm going to go over there. I'm going to do
 11 locums." And once he asked me, "I need some
 12 recommendations because I'm thinking about doing
 13 locums and I need you to sign some stuff."
 14 And I said, "Fine. Okay. No problem."
 15 That was the type of discussion it was.
 16 Q. Did Dr. May come to you and tell you
 17 that he needed a release from the practice in order
 18 to accept a job at Carolinas Hospital?
 19 A. No. He had mentioned he wanted to get
 20 out of the non-compete many times. He never said
 21 he needed it for a job at Carolinas. Absolutely
 22 not, no.
 23 Q. All right. Prior to receiving a letter
 24 from this office, did you know that Dr. May was in
 25 serious discussions with Carolinas Hospital

1 concerning a job with them here in Florence?
 2 A. Prior to receiving this letter, your
 3 letter, I was never aware that Dr. May was in
 4 serious discussions with anyone whatsoever except
 5 for Exhibit A where he went to talk, apparently, to
 6 McLeod and from a locums company that I got called
 7 for to fill out a survey on. Those are the only
 8 two instances where I was actually aware that he
 9 was in serious discussions versus "I'm looking at a
 10 place" or "I might go there."
 11 Q. Did Dr. May ever tell you that he had
 12 been offered a position at MUSC or Carolinas here
 13 in Florence?
 14 A. No.
 15 Q. After receiving the letter from this
 16 office, did you engage counsel to communicate with
 17 Carolinas Hospital about Dr. May's contract with
 18 ACC?
 19 A. We did engage counsel, but I cannot
 20 tell you the date that we did it. It was certainly
 21 after the first letter, but I don't know the time
 22 period. I just don't know.
 23 Q. Did Mr. Holmes, on behalf of the
 24 practice, communicate with Carolinas Hospital
 25 regarding the employment of Dr. May?

1 A. I don't know.
 2 Q. Did you not receive any type of letter
 3 from your counsel that had been sent to Carolinas
 4 and carbon copied to you regarding Dr. May?
 5 A. I receive a lot of mail, a lot of
 6 letters. And I may have received it and not
 7 reviewed it.
 8 MR. HOLMES: Off the record.
 9 (Off-the-record conference.)
 10 BY MR. BUYCK:
 11 Q. Did Dr. May tell you that he had a job
 12 offer from Carolinas Hospital?
 13 A. No more so than, "I might go over there
 14 and talk to them" or "I'm talking to them" or "That
 15 could be an option for me." I was never shown any
 16 contract or any offer or there was never anything
 17 in stone. I had no communication with anyone at
 18 Carolinas at any time about whether they offered
 19 him anything or not. I don't know.
 20 Q. Did he ever ask you for a letter of
 21 release from the contract to be sent to Carolinas
 22 Hospital?
 23 A. No, not to Carolinas. No.
 24 Q. Did he ever ask you to sign a letter of
 25 release to go to anyone other than Carolinas?

1 A. Yes, he did.
2 Q. And residence at NewYork--Presbyterian
3 Hospital?
4 A. Yes, he did.
5 Q. So at least on the basis of this
6 website, he is no longer practicing with McLeod; is
7 that correct?
8 A. Yes, that's correct.
9 Q. Okay. That's all. Let me look real
10 quickly through my notes.
11 MR. HOLMES: Off the record.
12 (Off-the-record conference.)
13 BY MR. HOLMES:
14 Q. Just to make it clear, did you ever
15 specifically tell Dr. May that the practice would
16 waive or forget about or cancel or negate the
17 restrictive covenant in his employment agreement?
18 A. No, I did not.
19 MR. HOLMES: Okay. That's all I have.
20 Thank you.
21 MR. BUYCK: I don't have anything
22 further.
23 (The deposition was concluded at 6:17
24 p.m.)
25

INDEX	
	Page
WITNESS/EXAMINATION	
LEW ROWE, M.D.	3
EXAMINATION	3
BY MR. BUYCK:	
EXAMINATION	129
BY MR. HOLMES:	
CERTIFICATE OF REPORTER	131
REQUESTED INFORMATION INDEX	
(No Information Requested)	
EXHIBITS	
(No Exhibits Proffered)	

1 CERTIFICATE OF REPORTER
2
3 I, Alison N. Peterson, Court Reporter
4 and Notary Public for the State of South Carolina
5 at Large, do hereby certify
6
7 That the foregoing transcript was taken
8 before me on the date and at the time and location
9 stated on Page 1, that the deponent was duly sworn
10 to testify to the truth; that the testimony of the
11 deponent and all objections made at the time of the
12 examination were recorded stenographically by me
13 and were thereafter transcribed; that the foregoing
14 transcript as typed is a true, accurate, and
15 complete record of the testimony of the deponent
16 and all objections made at the time of examination
17 to the best of my ability.
18
19 I further certify I am neither related
20 to nor counsel for any party to the cause pending
21 or interested in the events hereafter.
22
23 Witness my hand, I have hereunto
24 affixed my official seal this 8th day of August,
25 2019, at Myrtle Beach, Horry County, South
Carolina.

Alison N. Peterson,
Court Reporter
My Commission expires
April 11, 2023

EXHIBIT B

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF FLORENCE

DR. GREGORY A. MAY,

Plaintiff,

vs. CASE NO. 2019-CP-21-00777

ADVANCED CARDIOLOGY CONSULTANTS, P.C., DR. LEW A.
ROWE, and THERESA ROWE,

Defendants.

DEPOSITION OF: THERESA ROWE

DATE: August 1, 2019

TIME: 6:18 p.m.

LOCATION: Law Offices of
WILLCOX, BUYCK & WILLIAMS, P.A.
248 West Evans Street
Florence, South Carolina

TAKEN BY: Counsel for the Plaintiff

REPORTED BY: ALISON N. PETERSON, Court
Reporter

1 A. No.
2 Q. All right. Tell me why there is the --
3 why the money is short.
4 A. Well, the money is short because, it's
5 obvious, there's three physicians working where
6 they were six.
7 Q. Right.
8 A. So the money is going to be short.
9 Q. Well, you are not going to have as
10 much. I will grant you that. But how come there
11 are only three as opposed to six?
12 A. It's how it worked out. I was taken
13 completely off guard and shocked by the behavior of
14 these five physicians.
15 Q. What five physicians are you referring
16 to?
17 A. Dr. May, Dr. Ng, Dr. Brady, Dr. Wolery,
18 and Dr. Debsikdar.
19 Q. All five of them shocked you?
20 A. Absolutely. I thought they would have
21 continued to do the work at two hospitals, not
22 given up anything because they would have made more
23 money.
24 Q. At two hospitals?
25 A. Going -- they would have made more

1 the physicians who make up the practice intended to
2 or that there was a possibility that they would
3 drop their privileges --
4 A. At that meeting.
5 Q. -- at Carolinas Hospital?
6 A. At that meeting.
7 Q. Was any question posed -- you were at
8 that meeting, correct?
9 A. Correct.
10 Q. Was any question posed to you at that
11 meeting about the financial impact on the practice
12 for dropping privileges at the hospital?
13 A. Not that I'm aware of. Not that I
14 recall.
15 Q. Did you on your own make the point that
16 you just made very vocally with me that by doing so
17 it was going to hurt the practice, at least the
18 revenue for the practice?
19 A. It would hurt the revenues of the
20 practice, if that's what you're asking, yes.
21 Q. Did you express that at the meeting in
22 December?
23 A. I think I said something to the effect
24 of, "Do you guys really want to give up this
25 hospital?"

1 money with Dr. Rowe dropping his privileges.
2 Q. If they had worked at both hospitals?
3 A. Either way they would have made more
4 money.
5 Q. You and Dr. May had a conversation
6 though, didn't you, about the financial impact of
7 the practice on dropping Carolinas Hospital?
8 A. Not that I recall.
9 Q. You don't remember sitting in --
10 Dr. May coming into your office and having a
11 conversation about Carolinas Hospital, the fact
12 that they did make up a fairly large portion of the
13 revenues of the practice and that the practice
14 would be foregoing most of that revenue if you
15 were -- no longer have privileges at the hospital?
16 A. I do not recall that conversation.
17 Q. How long prior to the meeting that
18 occurred -- I believe your husband testified it was
19 in December. How long prior to that meeting did
20 you have any indication that there was a
21 possibility that the practice would drop privileges
22 at Carolinas Hospital?
23 A. The practice did not drop privileges.
24 Q. All right. How long prior to that
25 meeting in December did you have an indication that

1 Q. Do you recall a conversation with
2 Dr. May either before or after that meeting or even
3 maybe during the meeting where you estimated that
4 the personal impact to him would be between \$100,00
5 to \$150,000 a year?
6 A. I don't recall that.
7 Q. Do you think had Dr. May remained with
8 the practice, would you agree that the impact to
9 him would be between \$100,000 to \$150,000 a year by
10 not having privileges at Carolinas Hospital?
11 A. I'd be guessing.
12 MR. HOLMES: Object to the form --
13 THE WITNESS: And I can't guess that.
14 MR. HOLMES: Give me a second. You can
15 answer. You're going to have to answer it.
16 I object because there was no
17 foundation for her testimony.
18 But go ahead, you can answer.
19 THE WITNESS: I would be speculating.
20 I would be guessing, and I will not guess.
21 BY MR. BUYCK:
22 Q. All right. If you went back and looked
23 at Dr. May's -- well, let me ask you this: Have
24 you ever gone back and looked at Dr. May's or any
25 other physician's collections and attributed them

1 Dr. May?
2 A. I believe that.
3 Q. And that's what the malpractice carrier
4 told you?
5 A. Yes.
6 Q. Did you have that conversation with
7 Dr. May and tell him about that, about your
8 conversation with the carrier?
9 A. I believe I did.
10 Q. What was his reaction to that?
11 A. Okay, I think is all he said. Okay.
12 Q. Did he seem disappointed?
13 A. I don't think he seemed one way or the
14 other. Just okay.
15 Q. Did the carrier give you any indication
16 about how that would impact the practice's premiums
17 if Dr. May were to be the only physician practicing
18 at Carolinas Hospital?
19 A. No.
20 Q. Did you ask that question?
21 A. No.
22 Q. Was it your impression that it would be
23 a significant amount of money?
24 A. I'd be guessing.
25 Q. Well, I didn't ask you to guess. I

1 can speak with McLeod Health."
2 Q. Was that all that he said, or did he
3 elaborate further?
4 A. That's what I heard. You know, I hear
5 a lot. But that's all I remember hearing is, "I
6 need a letter saying I can speak with them."
7 Q. Did you have any qualms about preparing
8 that letter?
9 A. No.
10 Q. Why not?
11 A. Because McLeod has locations outside of
12 Florence.
13 Q. Was it your impression that he was
14 interviewing for one of those locations outside of
15 Florence?
16 A. Well, there was an opening in Sumter.
17 Q. Does Sumter have interventional
18 cardiology facilities?
19 A. They have cardiology.
20 Q. Do they have interventional cardiology
21 facilities?
22 A. Nowhere in the contract does it say
23 interventional.
24 Q. I didn't ask that, Ms. Rowe.
25 MR. HOLMES: Well, don't raise your

1 just said was that your impression?
2 A. I don't have an impression. They never
3 quoted me any money, and I couldn't make a decision
4 one way or the other, yes or no, was it high or not
5 high. I don't have a number to say was it high or
6 not high.
7 Q. So you did not ask for a number. You
8 just asked whether or not it would increase y'all's
9 premiums, and they said --
10 A. No, risk.
11 Q. Well, okay. Increase the risk and
12 increase the premiums?
13 A. I don't know about that. All I know is
14 it would increase his risk and the practice's risk.
15 Q. All right. Let's go to the e-mail that
16 we've discussed. What was your reasons for
17 preparing this e-mail, which is Exhibit 2 in front
18 of you?
19 A. He asked me to.
20 Q. "He" being Dr. May?
21 A. That's correct.
22 Q. Did you have any -- what was your
23 discussions with Dr. May about the necessity for
24 you preparing that particular e-mail?
25 A. He just said, "I need a letter saying I

1 voice.
2 MR. BUYCK: I'm trying not to, but she
3 will not answer the question, and it's a very
4 direct question.
5 BY MR. BUYCK:
6 Q. Does Sumter have interventional
7 cardiology facilities?
8 A. No.
9 Q. Thank you.
10 Did you have a discussion with Dr. Rowe
11 concerning that particular e-mail?
12 A. Just that I was sending it.
13 Q. What was his response to your
14 indication that you were sending it?
15 A. He let's me do those things. He
16 doesn't interfere with that.
17 Q. Did you and Dr. Rowe have any
18 discussions about Exhibit Number 2?
19 A. No.
20 Q. To this day, have you and Dr. Rowe had
21 any discussions about Exhibit Number 2?
22 A. Just that it's Exhibit Number 2.
23 Q. Had any discussions at all about it?
24 A. No.
25 Q. Do you recall even sending it?

1 one month. You had a reason to go from a year to
2 three months. Why didn't you have a reason to go
3 from one year to one month?

4 A. It's the same reason. He had not
5 passed his boards.

6 Q. So you thought he was going to pass his
7 boards within that one month?

8 A. I was going to do a one-month contract
9 until I had his board certificate in my hand.

10 Q. Had he passed the boards by that point?

11 A. No.

12 Q. Do you know whether he has ever passed
13 the board?

14 A. I have no knowledge.

15 Q. Why didn't you put anything in the
16 Exhibit 2 about the fact that there was a
17 restrictive covenant that the practice had with
18 Dr. May?

19 A. No particular reason. I was only asked
20 to send a letter saying that we did not object to
21 him interviewing at McLeod health. That's what I
22 was asked to do and that's what I did.

23 Q. And who asked you to do that?

24 A. Dr. May.

25 Q. So your testimony is that you were

1 says that he is talking -- wants something from me
2 to say he can talk to Carolina Hospital System.

3 Q. Was this before or after the privileges
4 had been -- or the physicians had resigned their
5 privileges at Carolinas Hospital?

6 A. I don't know.

7 Q. What was your response when Dr. May
8 made that request of you?

9 A. I said okay.

10 Q. You were in your office at the
11 practice?

12 A. That's correct.

13 Q. And your testimony is he walked in and
14 slammed both doors?

15 A. As he typically did a lot.

16 Q. Was he slamming them in anger or...

17 A. I don't know. It's the same result.

18 The staff heard him slam doors.

19 Q. Did --

20 A. Which makes me look bad.

21 Q. Well, did he appear to be angry when he
22 asked you for a favor? Did he look like he was
23 angry?

24 A. He was excited.

25 Q. I mean, I get excited. I'm not mad.

1 responding to Dr. May when you prepared Exhibit
2 Number 2?

3 A. That's correct.

4 Q. With no input from Dr. Rowe?

5 A. None.

6 Q. And no input from yourself?

7 A. What do you mean no input from myself?

8 Just...

9 Q. You were preparing exactly what Dr. May
10 asked you to prepare when you did Exhibit Number 2?

11 A. Correct.

12 Q. Did Dr. May say that he had had a
13 discussion with your husband about the discussions
14 he was having with McLeod Hospital?

15 A. No.

16 Q. Did Dr. May tell you that he was having
17 conversations with Carolinas Hospital about
18 employment opportunities there?

19 A. Yes.

20 Q. Was that a yes?

21 A. Yes. Uh-huh.

22 Q. When did you have those conversations
23 with Dr. May?

24 A. I don't know the exact date. I just
25 know he comes in my office and slams both doors and

1 Was he angry?

2 A. He was excited.

3 Q. What did you tell him?

4 A. His -- he said to me, "Randy wants to
5 talk to you. Will you talk to Randy?"

6 I said, "If he calls me, I'll talk to
7 him."

8 Q. Did Dr. May tell you that he had a job
9 offer from Carolinas Hospital?

10 A. No.

11 Q. Did you prepare a letter to Carolinas
12 Hospital saying essentially what's in Exhibit
13 Number 2?

14 A. No.

15 Q. Why not?

16 A. He didn't ask me to.

17 Q. All right. So when he walked in the
18 office and slammed the door, he just wanted you
19 to --

20 A. Talk to Randy.

21 Q. -- talk to Randy?

22 That's all that was said?

23 A. Pretty much, yeah.

24 Q. Anything else?

25 A. That's all I recall. That's all I

1 recall.
 2 Q. You did not ask him why he wanted the
 3 letter?
 4 A. No. He didn't ask for a letter.
 5 Q. Oh, okay. You did not ask him why --
 6 you did not ask him why Mr. Seif wanted to talk to
 7 him -- talk to you?
 8 A. No, I did not.
 9 Q. He didn't tell you what Mr. Seif wanted
 10 to talk to you about?
 11 A. I know who Mr. Seif is. I know he's
 12 the recruiter for Carolinas Hospital System. Why
 13 would I ask him, "What does Randy want to talk to
 14 me about?"
 15 Q. Did you remind Dr. May that he had a
 16 covenant not to compete?
 17 A. Why would I do that? He signed the
 18 contract 11 times or more or whatever it was.
 19 Every year or every five years, he signed this.
 20 And he knew he had one or he wouldn't have been
 21 wanting things. I mean, that's a moot point. He
 22 knew he had a non-compete.
 23 Q. Did you talk with Mr. Seif?
 24 A. Mr. Seif called me.
 25 Q. How long after the meeting with

1 there's been several physicians recently we haven't
 2 upheld their non-competes with the hospital. Why
 3 would you uphold your non-compete with Dr. May?"
 4 I said, "Dr. May has a contract. He
 5 has a non-compete. He has liquidated damages."
 6 And he said, "Well, how much would it
 7 take?"
 8 And I said, knee-jerk response, "Make
 9 me an offer."
 10 He said, "I'll get back to you."
 11 And that's how the conversation went.
 12 Q. Did you have any conversation with him
 13 subsequent to that?
 14 A. He e-mailed me and said, "I don't know
 15 why you called me," and then in parenthesis, "(the
 16 hospital)." Basically, "The contract's between you
 17 and the physician."
 18 And I said back, "I didn't call you.
 19 You called me." And that was it.
 20 Q. Was an offer ever made?
 21 A. No.
 22 Q. Did you make a demand of \$500,000?
 23 A. No.
 24 Q. Did Mr. Seif tell you that Carolinas
 25 Hospital was interested in hiring Dr. May in

1 Dr. May?
 2 A. I don't -- I don't recall. But it was
 3 in short order. Maybe -- maybe it was that
 4 afternoon or the next day or within two days.
 5 Q. All right. Let me back up. Did you
 6 tell Dr. Rowe about Dr. May coming to your office
 7 and slamming the doors and asking you to call Randy
 8 Seif?
 9 A. No.
 10 Q. All right. Tell me about your
 11 conversation with Mr. Seif.
 12 A. He just called up and said, "Dr. May
 13 would like to explore an opportunity with Carolina
 14 Hospital System."
 15 Q. All right.
 16 A. And...
 17 Q. What did you say?
 18 A. I said, "Well, Dr. May has a contract
 19 with Advanced Cardiology." And he asked me if it
 20 had a non-compete, and I said, "Yes, it does." He
 21 asked me what it was, and I told him 25 miles from
 22 McLeod Regional Medical Center. And he asked me
 23 what the liquidated damages were, and I told him
 24 500,000.
 25 And he says to me, "Well, you know,

1 Florence?
 2 A. No.
 3 Q. Did Mr. Seif indicate to you that
 4 Carolinas Hospital had offered Dr. May a position?
 5 A. No.
 6 Q. Did you tell Mr. Seif that under no
 7 circumstances would you allow Dr. May to work in
 8 Florence?
 9 A. No.
 10 Q. Did you ever tell Dr. May that he
 11 should start his own practice in Florence?
 12 A. I may have told him that more than
 13 once.
 14 Q. Why would you tell him that?
 15 A. You could buy the practice.
 16 Q. Did you ever suggest a figure to
 17 Dr. May about what it might cost to buy the
 18 practice?
 19 A. No.
 20 Q. How would you determine a price for the
 21 practice if Dr. May or anyone else expressed an
 22 interest in it?
 23 A. Practice is not for sale.
 24 Q. All right. I believe your testimony
 25 was before the vote you did not have an opportunity

EXHIBIT C

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF FLORENCE

DR. GREGORY A. MAY,

Plaintiff,

vs. CASE NO. 2019-CP-21-00777

ADVANCED CARDIOLOGY CONSULTANTS, P.C., DR. LEW A.
ROWE, and THERESA ROWE,

Defendants.

DEPOSITION OF: DR. GREGORY A. MAY

DATE: August 1, 2019

TIME: 10:05 a.m.

LOCATION: Law Offices of
WILLCOX, BUYCK & WILLIAMS, P.A.
248 West Evans Street
Florence, South Carolina

TAKEN BY: Counsel for the Defendant

REPORTED BY: ALISON N. PETERSON, Court
Reporter

1 A. I don't -- I don't have it.
 2 Q. Okay. Do you think they gave you a
 3 copy and you just don't have it anymore?
 4 A. I'm just not sure.
 5 Q. Okay. And you did not have any e-mails
 6 between you and Mr. Seif?
 7 A. No, sir. I'm not a big e-mailer.
 8 Q. Okay.
 9 A. It's not my generation.
 10 Q. I guess we --
 11 A. I'm a doctor, not an attorney.
 12 Q. I was going to say, I don't have to ask
 13 you about Twitter.
 14 A. Don't ask me about Twitter.
 15 Q. And we asked the same kind of questions
 16 about correspondence, text messages, e-mails
 17 between you and McLeod Regional Medical Center, any
 18 representative of McLeod Medical Center or McLeod
 19 Health during that same time period. And I assume
 20 there are none?
 21 A. You have the e-mail that I requested.
 22 Q. Right.
 23 A. Ms. Saleeby requested that I get
 24 permission from Advanced Cardiology to speak with
 25 them about employment. Since that was a verbal

1 mean, you need to read all those.
 2 A. I did. Oh, you mean this page? I'm
 3 sorry.
 4 Q. Yeah, there's more than one page.
 5 A. I don't save text messages, just so
 6 you're aware of that. So I'm not aware of any text
 7 messages between me and MUSC Florence or with
 8 McLeod. And there is no written correspondence or
 9 e-mails between me and them.
 10 Q. Okay.
 11 A. We have a document about some damages
 12 that's from the insurance company. The contracts
 13 that we have stated that there was the type of
 14 malpractice purchased that we would not have to
 15 purchase a tail.
 16 Q. Okay.
 17 A. However, that turned out to not be the
 18 case. And I had to purchase a tail coverage for
 19 \$35,000 from MagMutual. So that is one damage that
 20 I do have a copy of. I sent that to --
 21 MR. BUYCK: I've got it. It's sitting
 22 on the -- it's on top of my desk.
 23 MR. HOLMES: We can get it later.
 24 MR. BUYCK: I can get it to you when we
 25 take a break.

1 agreement between Dr. Rowe and I, I went to
 2 Dr. Rowe and asked him for proof in writing that I
 3 had permission to speak with them about employment.
 4 And this -- this e-mail was sent by Theresa Rowe, I
 5 believe, on November 15th to Ms. Saleeby.
 6 Q. Okay. Well, here's what I'm going to
 7 do. I'm going to mark this as an exhibit.
 8 (MAY EXH. 1, Request for Production,
 9 was marked for identification.)
 10 BY MR. HOLMES:
 11 Q. And I know you are not offended. I'm
 12 not trying to offend you. I just have to make sure
 13 I've got whatever record there is.
 14 A. No problem.
 15 Q. So these are requests for production.
 16 I want you to read these and tell me if there are
 17 any documents that have not been provided that are
 18 requested by those requests that are within your
 19 custody, possession, or control. And by control,
 20 that means essentially that you can get a copy. It
 21 doesn't have to be right on your person. So if you
 22 can look at that. And if there are none, that's
 23 fine.
 24 A. There are none.
 25 Q. Well, you need to read them all. I

1 THE WITNESS: Any documents -- I don't
 2 have documents, but I've looked for locum positions
 3 ever since I quit. Nothing has come to fruition on
 4 that yet.
 5 BY MR. HOLMES:
 6 Q. No documents?
 7 A. No documents.
 8 Q. Okay. And what is your current
 9 situation with -- well, let me see if I can --
 10 that's right. It's MUSC now, right, the hospital?
 11 A. Correct.
 12 Q. It was Carolinas Health before?
 13 A. Before.
 14 Q. So when you first started talking to
 15 them, I guess Randy Seif was still there?
 16 A. Yes.
 17 Q. Okay. When you first started talking
 18 to them, it was Carolinas, and now it's MUSC?
 19 A. MUSC Florence, right.
 20 Q. Okay. What is your status with them?
 21 Are they prepared to accept you if this case is
 22 ended and you are freed from your non-compete?
 23 A. Last I heard, that was the case.
 24 Q. When was that?
 25 A. Before I stopped working at ACC.

1 A. That's part of my complaint.
 2 Q. I'll give you an opportunity and you
 3 can, of course -- Mr. Buyck can ask you questions
 4 as well.
 5 A. Yeah, your -- what your statement is
 6 just stating what the contracts state. So, yes,
 7 you would be correct.
 8 Q. That is what it says?
 9 A. That's straight off the contract,
 10 right.
 11 Q. Okay. In fact, and when it says --
 12 when you say in your complaint that it purports to
 13 prevent you "from being employed as a cardiologist
 14 for a period of two years after termination within
 15 a 25-mile radius of McLeod Regional Medical Center,
 16 Florence, South Carolina, that's how you read that
 17 provision," correct?
 18 A. I can read it the same as you. Yes,
 19 sir. That's what it says.
 20 Q. Okay. It doesn't say anything more
 21 than that?
 22 A. That's correct.
 23 Q. Okay. So the plain language or as you
 24 understand it, the plain language of the contract
 25 is that you simply can't be employed as a

1 covenant?
 2 Q. Yes.
 3 A. Okay.
 4 Q. Okay. I mean, the answer to that is
 5 yes?
 6 A. There is a restrictive covenant, yes.
 7 Q. And it says, according to you, that
 8 it's intended to prevent you "from being employed
 9 as a cardiologist for a period of two years after
 10 termination within a 25-mile radius of McLeod
 11 Regional Medical Center, Florence, South Carolina"?
 12 A. Yeah.
 13 Q. And that's all it says?
 14 A. That's all it says.
 15 Q. Okay. Going through the process that
 16 led to your leaving, you want to tell me what
 17 happened? And then I may come back and ask you
 18 some questions.
 19 A. I'd be happy to.
 20 Q. Sure.
 21 A. So when I first started with the
 22 practice in 2008, everybody in the group, including
 23 Dr. Rowe, was taking fairly equal call. At that
 24 time when I started, we were going to both Carolina
 25 Hospital and McLeod Hospital. I was absolutely as

1 cardiologist for a period of two years after
 2 termination within a 25-mile radius of McLeod
 3 Regional Medical Center, correct?
 4 A. That's right.
 5 Q. Okay.
 6 A. That's what it says.
 7 Q. Doesn't say you can't be employed as
 8 anything else?
 9 A. I -- I have no idea what you're talking
 10 about right now.
 11 Q. Well, it's not important. It's just
 12 the question is whether or not this agreement says
 13 you can't be employed --
 14 A. I'm a cardiologist, so I wouldn't be
 15 seeking employment as a bottle washer or a
 16 dishwasher.
 17 Q. Okay. And you don't read this
 18 agreement to keep you from being a bottle washer or
 19 a dishwasher, correct?
 20 A. I haven't looked at that document in
 21 quite some time, so I haven't hashed that out,
 22 exactly what the document says.
 23 Q. But this is what you put in your
 24 complaint?
 25 A. What it's stating about the restrictive

1 busy as I possibly could be. Going to both
 2 hospitals, we saw consults in the hospital, we saw
 3 our own patients who came to the emergency rooms in
 4 both hospitals. I performed heart cath and did
 5 cardiac intervention, which includes stents and
 6 whatnot, at both hospitals.

7 Now, I don't know if you're aware but
 8 in the town of Florence some people prefer McLeod
 9 Hospital and some people prefer Carolina Hospital.
 10 So we had a fairly large number of patients at both
 11 places. In addition, we had a fairly -- actually,
 12 a very busy office practice. I had never seen that
 13 many patients in one day during an office practice
 14 in Orlando, and I thought I was very busy in
 15 Orlando. So we were extremely busy. I felt like
 16 my production was as good as it could get.
 17 Everything was fine and good.

18 Over the years, we did acquire some new
 19 partners which had some different ways of looking
 20 at work. So that was one of the issues that came
 21 up. In addition to that, Ms. Rowe frequently would
 22 give me indications that she was uncertain about
 23 the future of the practice, if we were going to be
 24 able to compete as a private-practice group with
 25 the hospitals for contracts. That was one of the

1 can do whatever you want to do."

2 And I said, "What does that mean?"

3 He says, "You can go to work for one of
4 the hospitals in town. You can" -- "You know, you
5 can do whatever you want to do."

6 So I was kind of set back, to be
7 honest. I was surprised at his not wanting to take
8 call. And I was happy to hear him say that I could
9 stay in town. And to be honest, you know, I had
10 been a very productive employee for the group. I
11 had made a lot of money for Dr. Rowe, probably \$5
12 million or \$6 million over the time that I was
13 there, I made for him. So I felt like that was the
14 gentlemanly thing to do would be to make the
15 comment that he made. So I was not shocked that he
16 said that. I felt like that's what I would have
17 done if I was in his position.

18 So I went ahead and kept seeing
19 patients that day. And I talked to my wife about
20 it, and I told her what was going on. And she
21 said, "Well, you know, it's one less guy taking
22 call. That shouldn't, you know, be a major deal."

23 And I said, "I agree, it's probably not
24 going to be a major deal."

25 And I mentioned that I would probably

1 meet with her. And when I met with her, she said,
2 you know, "What's going on?"

3 I said, "I'm really not sure. The
4 group's kind of" -- "The group's kind of on shaky
5 ground. And Dr. Rowe's not going to take call, and
6 he's told me that I can look for local employment,
7 that I have no restrictive covenant."

8 And she said, "Well, we'd love to have
9 you over here, but I'm going to need something in
10 writing from the Rows saying that that's" -- "that
11 that's the case."

12 So I went back to Dr. Rowe and I said,
13 you know, "They're going to need something in
14 writing."

15 So he said "No problem."

16 So we both walked back to Theresa, and
17 she typed this e-mail to Marie Saleeby. Shortly
18 after that, when I confirmed -- I got a copy of the
19 e-mail. And I believe you'll see a copy was also
20 sent to Dr. Rowe stating that I could talk about
21 employment there.

22 And, by the way, already you can see
23 that from what's written on the restrictive
24 covenant about not seeking employment within a
25 25-mile radius, that that has been broken by this

1 want to take over the call schedule to make sure
2 these guys didn't keep taking so much time off.
3 And Theresa was okay with that. However, I quickly
4 found out the physicians that were going to
5 continue to take call were still going to play the
6 same game of wanting to take several weeks off a
7 year. And I saw myself painted into a corner. I
8 was going to be working very, very hard.

9 So probably two days after Dr. Rowe had
10 told me that he was no longer going to take call, I
11 approached him and said, "You said I could go to
12 work for one of the local hospitals, but I have a
13 restrictive covenant. What about that?"

14 And he said, "You know, I don't want to
15 make any enemies." These are almost his exact
16 words. "I don't want to make any enemies. And I
17 could invoke the restrictive covenant, but in your
18 case I will not enforce the restrictive covenant."

19 So I said, "All right." Well, I said,
20 "I'll keep you abreast of everything that I have
21 planned. And I think I'm going to go talk to
22 McLeod about a job."

23 And he said, "That'd be fine."

24 So I contacted Ms. Saleeby, Marie
25 Saleeby, at McLeod. And I asked her -- I asked to

1 e-mail. That is no longer valid once this e-mail
2 had been sent, in my opinion.

3 So I went in to talk to Ms. Saleeby
4 after she had gotten the e-mail. She said same
5 thing, you know, "We'd love to have you. You've
6 been in town. You're a good doctor. We'd love to
7 have you in town."

8 Q. Just so we're clear, the document that
9 you're making reference to, I'm going to mark it as
10 Defendant's Exhibit 2.

11 (MAY EXH. 2, E-mail, was marked for
12 identification.)

13 BY MR. HOLMES:

14 Q. And that's the e-mail that you have
15 referenced, correct?

16 A. That's the one.

17 Q. Okay. It's also got a Marker A because
18 it was attached to your affidavit in the case.

19 A. Okay.

20 Q. And that is the basis for which you
21 say, as of that e-mail, in your opinion, the
22 covenant's no longer valid?

23 A. Yeah.

24 Can I proceed?

25 Q. Sure, please.

1 working for Advanced Cardiology Consultants,
2 correct?
3 A. That's right.
4 Q. And did you pay any money to Dr. Rowe
5 for what you contend was a release from the
6 non-compete?
7 A. No.
8 Q. How were you -- I'm assuming the truth
9 of what you're saying for purposes of the
10 deposition, not for purposes of the case. But
11 assuming that you were told that you could get
12 relief, how did that act to your detriment? What
13 did you do that changed your position?
14 A. What did I do to change position?
15 Q. No, no. Let's explain it a different
16 way.
17 A. Yeah.
18 Q. I'm trying to find out what kind of
19 detrimental circumstances there were. Let me go
20 through it.
21 At the time you tell me that Dr. Rowe
22 said you could get relief from the non-compete, you
23 were employed with Advanced Cardiology Consultants
24 with a contract, correct?
25 A. That's right.

1 to follow up on what they stated to me.
2 Q. And but at that point you still have
3 not given notice that you're leaving Advanced
4 Cardiology, correct?
5 A. Not yet.
6 Q. You're still under contract, correct?
7 A. Still under contract.
8 Q. And --
9 A. But they both know that I'm planning to
10 leave.
11 Q. Well, you're unhappy, right?
12 A. Not necessarily unhappy, just trying to
13 get my -- get a stable future.
14 Q. Okay. But at that point you're still
15 under the contract, you haven't given up any rights
16 under the contract, and nobody has terminated you
17 or done anything like that?
18 A. Yeah. But the contract's going to be
19 done at the end of March, right?
20 Q. Correct.
21 A. Correct. So the clock's ticking.
22 Q. Well, did you think you were not going
23 to be offered another contract at the end of March,
24 or did you know?
25 A. I -- I didn't know. I thought I might,

1 Q. Nobody had terminated you?
2 A. That's right.
3 Q. And you had not terminated the
4 contract?
5 A. That's right.
6 Q. And so your testimony is you were told
7 that you could go find a job and forget about the
8 covenant, but you did not find a job at that point,
9 correct?
10 A. I did find a job.
11 Q. Not with McLeod?
12 A. Not with McLeod but with Carolinas.
13 Q. Okay. And then when you go to
14 Carolinas and you're telling me you're being
15 offered a job -- if the covenant is revoked, right?
16 A. If I get in writing that the covenant's
17 revoked --
18 Q. Okay.
19 A. -- which I already had a verbal
20 agreement by Dr. Rowe that it was revoked.
21 Q. Right. And based on your testimony
22 Dr. Rowe and Ms. Rowe are the associated -- excuse
23 me, Advanced Cardiology Consultants reneged on
24 their agreement to waive the covenant?
25 A. They now -- yeah, they're now refusing

1 but with the nature of the group and the things
2 that I mentioned to you about people wanting to
3 take too much time off and not work and Dr. Rowe
4 not taking call, and then subsequently they
5 decide -- the lazy guys in the group decide that
6 they don't want to go to Carolina Hospital anymore.
7 So suddenly -- and I asked Theresa about that. I
8 said, you know, "If we drop Carolina Hospital, how
9 much is that going to drop my salary?"
10 And her answer to me was, "I would
11 guess between \$100,000 and \$150,000 a year."
12 Q. So Theresa Rowe told you --
13 A. Theresa Rowe told me that we would have
14 a drop in income if we dropped Carolina Hospital.
15 And I was dead set against dropping Carolina
16 Hospital. All the rest of them decided that
17 they -- they were fine with that, that they didn't
18 care if we dropped Carolina Hospital.
19 Q. Now, the contract you had with Advanced
20 Cardiology Consultants, it didn't promise you any
21 particular level of income, did it?
22 A. No, but it promised that I would be
23 given the ability to have full access to practice
24 my profession. There's some wording in there that
25 talks about that.

1 Q. Were there ever any -- to the best of
2 your knowledge, did you have any written agreements
3 with the practice that are not -- written
4 agreements that are not embodied in this contract?
5 A. Other written agreements?
6 Q. Yes.
7 A. I don't think so.
8 Q. You're not aware of any?
9 A. I'm not aware of any.
10 Q. Okay. And it's not your contention
11 that this contract -- how should I put this? Let
12 me put it a different way.
13 It's your contention that regardless of
14 what this contract says, it's unfair the way you've
15 been treated, correct?
16 MR. BUYCK: Object to the form of the
17 question.
18 THE WITNESS: Do I think I've been
19 treated unfairly? Is that your question?
20 BY MR. HOLMES:
21 Q. Yes.
22 A. With regard to being told I could look
23 for employment and that they would have no problem
24 in invoking the restrictive covenant. In that
25 regard, I've been treated unfairly.

1 Q. Okay. Anything else?
2 A. Nothing else.
3 Q. Okay. And then going back to my
4 question, you think you are unfairly treated in
5 regard to that offering to let you out, then
6 reneging on it?
7 A. That's correct.
8 Q. Okay. But is there anything in the
9 contract that does not allow them to do that?
10 A. Anything in the contract that does not
11 allow them to do that?
12 Q. Yeah.
13 A. Yeah, they contradicted themselves by
14 saying I could. The restrictive covenant says I
15 can't work within a 25-mile radius, yet they'd send
16 an e-mail saying that I can, so...
17 Q. And then they said that -- I guess they
18 said the e-mail's inoperative, would be the way to
19 put it, right?
20 A. The e-mail is inoperative?
21 Q. Meaning, like --
22 A. It doesn't mean anything?
23 Q. Yeah.
24 A. Is that what they're saying?
25 Q. I'm just asking you. I mean, what did

1 they do, according to you?
2 A. They --
3 Q. According to you, they said you could
4 do it --
5 A. They just said they weren't going to
6 provide a letter, and Ms. Rowe tried to get
7 \$500,000 out of the hospital.
8 Q. All right. And the contract says that
9 they can require you to pay \$500,000 if you
10 practice within 25 miles of that hospital, correct?
11 A. Yeah. But at no point did Dr. Rowe say
12 I needed to pay 500,000 or Ms. Rowe say I needed to
13 pay 500,000. She tried to extort that from the
14 hospital.
15 Q. So if they ask you to pay 500,000,
16 you'd be willing to do that?
17 A. Absolutely not.
18 Q. Okay.
19 A. If I thought that -- if Dr. Rowe had
20 simply said the day that he said he wasn't going to
21 take call that, you know, that "You can find
22 another job somewhere else," then I would have done
23 that. I would have been in another town by now
24 working. We wouldn't be here.
25 Q. Well, before you --

1 A. But the fact -- the fact is that he did
2 say it, and he did -- and I have proof that he said
3 it. And only at the eleventh hour did they decide,
4 oh, no, we're losing our best guy. We need to stop
5 him from doing that. So they're holding me for
6 ransom for \$500,000, making my life, you know, the
7 way it is.
8 Q. When was that?
9 A. What's that? When was what?
10 Q. When they decided that they were
11 holding you for ransom.
12 A. When Ms. Rowe talked to Mr. Seif and
13 said, you know, that she wasn't going to send a
14 letter, that they were going to have to pay
15 \$500,000.
16 Q. Roughly, what date was that?
17 A. I don't know.
18 Q. Okay. And if they had told you that to
19 begin with, then you would have found a job at
20 another town and we wouldn't be here?
21 A. That's correct. In my last practice --
22 I'm aware of restrictive covenants.
23 Q. Right.
24 A. We -- I left my last practice. I
25 didn't have any negotiations with them about

1 staying in Orlando. I knew that I had a
2 restrictive covenant, and I left. I gladly left.
3 Q. So that --
4 A. And that was a big -- that was a big
5 thing on me because I had three sons that were
6 still living in Orlando that I had to leave behind.
7 So I'm fully aware of that situation, okay. And I
8 wouldn't have been talking with Dr. Rowe. I
9 thought it was extremely appropriate for him to
10 tell me, after I had worked like a dog for that
11 practice and made him that much money and he's at
12 the end of his career, obviously, by not going to
13 the hospital, and now he's down to two doctors
14 going to neither hospital, he's obviously on his
15 last leg over there. So for him to extend me the
16 courtesy of saying, "Hey, you don't need to move.
17 You can stay in town," that seemed totally
18 appropriate to me. That's, like, what any normal
19 person would do.
20 Q. But let me see if I understand what you
21 told me. I get that part. I get what you're
22 telling me.
23 A. Okay.
24 Q. But the other side --
25 A. I mean, it's the truth. That's exactly

1 I'm like, "Hey, that's cool. I don't
2 need to go."
3 Q. So when you found out that he was not
4 going to let you out of the non-compete, assuming
5 that's what you found out, okay?
6 A. Yeah. When he reneged at the eleventh
7 hour, it made me mad.
8 Q. I understand.
9 A. Because he broke his word.
10 Q. I hear you.
11 A. Okay.
12 Q. Okay. But if he told you, as I
13 understand it, if he had told you that from the
14 beginning and not misled you, I guess you would
15 say -- okay, if he hadn't misled you, you would
16 have just found a job somewhere else, correct?
17 A. I wouldn't have had any choice, would
18 I?
19 Q. Right. Okay.
20 Now, let's assume he's reneged on it.
21 Why have you not found a job somewhere else?
22 A. Because he told me that I could. He
23 broke his word, and that's why we're here.
24 Q. Okay. So that's --
25 A. A verbal agreement is a verbal

1 what happened.
2 Q. I got you. But the converse of it was,
3 I think you said, "If he had told me that I'm not
4 going to waive the covenant," you would have gone
5 and gotten a job outside of the 25-mile radius?
6 A. I would have had no choice.
7 Q. Right.
8 A. I would have had no choice.
9 Q. And that's what you would have done?
10 A. I would have had no choice.
11 Q. Okay.
12 A. And the fact is, is he did tell me, and
13 I took action on it. I went and talked to Saleeby.
14 I went and talked to Seif. So the fact -- you're
15 saying, "Oh, he didn't tell you," I'm just making
16 this up.
17 Q. No, no. I'm just asking you --
18 A. No, I'm just saying. I'm just saying.
19 I'm an educated man. I'm not going to go talk to
20 people about jobs and make stuff up. I'm a grown
21 man. I know what I need to do. I have to take
22 care of my family. I have to pay my bills. If
23 I -- if I knew that I had to go, then I would have
24 just gone. But Rowe told me, "No, you don't need
25 to go."

1 agreement. In my mind, it's a gentleman's
2 agreement.
3 Q. Right.
4 A. Okay. The fact that he told me that,
5 the fact that I took action on it, proves that
6 he -- he said it.
7 Q. And that's the only reason you have not
8 found a job outside of the 25-mile radius?
9 A. That's not the only reason.
10 Q. What --
11 A. I want to stay here because of my kids.
12 Q. Okay. But that would have been the
13 case back, if he had not --
14 A. Do you have children?
15 Q. Yes.
16 A. How would you feel if they were in
17 school and you had to say, "Hey, we're moving," and
18 they have to go make -- go to a whole different
19 school, make new friends. Do you know what that's
20 like for a kid?
21 Q. Well --
22 A. That's not good.
23 Q. You signed the agreement, correct?
24 A. I signed the agreement, but I was told
25 the agreement wasn't in play.

1 Q. Not until 12 years after you signed it
2 the first time?
3 A. Eleven years.
4 Q. Okay. And how old were your children
5 when you signed the first one?
6 A. Well, you do the math. My son would
7 have been 5.
8 Q. Would it have been better then to
9 leave?
10 A. Yeah, as a 5-year old versus a high
11 school kid, yeah, absolutely.
12 Q. Okay. So the point that it became
13 impossible for you to leave without injuring your
14 children was in the eleventh year of the agreement.
15 Before then, it would have just been a picnic,
16 right? Is that what you're telling me?
17 A. I don't think it would have been a
18 picnic, okay. I put a lot of sweat and blood into
19 this practice, and it was supposed to be my last
20 practice. When I came here, I considered it to be
21 my last job.
22 Q. That was your consideration?
23 A. That was -- this was going to be my
24 last job.
25 Q. And you got two five-year contracts and

1 A. Well, I don't know what I would have
2 done.
3 Q. Okay.
4 A. I mean. . .
5 Q. What have you done to find a job
6 somewhere else since you left?
7 A. You know, you can't go and look for a
8 job on bad faith. I would not go and talk to
9 people about a job when we have this going on. So
10 I haven't looked for a permanent position. I've
11 tried to find locums work, which is, you know,
12 where you go away from your family for a week at a
13 time and then you come back. So I've looked for
14 that. And, you know, it takes a long time to get
15 other state licenses and DEA. So, you know, that's
16 been difficult. I'm trying.
17 Q. So you have not done anything to find a
18 permanent position out of the 25 miles?
19 A. No, because I don't want to negotiate
20 in bad faith.
21 Q. When you say you don't want to
22 negotiate in bad faith, meaning that if you're
23 successful with this, you think you're going to be
24 practicing here?
25 A. Yes.

1 a one-year contract, correct?
2 A. Yeah. And do you ever wonder why it
3 would be a one-year contract? And did you know
4 that Dr. Ng was offered a one-month contract?
5 Q. My question to you is you knew the
6 contracts you signed were for the terms you signed
7 them for, right?
8 A. That's correct. Until I had the verbal
9 agreement, they were totally understandable.
10 Q. Now, what have you done -- as I
11 understand your testimony, and we can go back
12 through this over and over again. My understanding
13 is if Dr. Rowe had not told you that you were going
14 to be freed from this non-compete, that's your
15 testimony, then you would have immediately gone and
16 found a job somewhere else, correct?
17 A. I don't know. You know, I don't know
18 if I would have stayed there and seen how things
19 played out. I might have --
20 Q. You've testified three times now that
21 you would have had no choice?
22 A. I would have had no choice if I was
23 going to leave.
24 Q. Okay. Well, you've said you would have
25 left, is what you've said.

1 Q. Okay. And who will you be working for?
2 A. MUSC Florence.
3 Q. Okay. Even though you have not talked
4 to anybody there since before it became MUSC?
5 A. That's right.
6 Q. Have you not talked to any
7 representative of Medical University of South
8 Carolina?
9 A. No.
10 Q. Okay. And Mr. Seif, the last time you
11 talked to him, he was working for Carolinas?
12 A. Carolinas.
13 Q. Okay. So and you really have not had
14 any communication with him or with anybody at the
15 hospital since before MUSC bought it?
16 A. Not that I recall.
17 Q. Well, now, that would be your most
18 recent communication. So, surely, you can recall
19 whether or not you talked to them?
20 A. I don't. I haven't talked to them
21 ever -- back in -- before all this started.
22 Q. Okay. Is there a reason for that?
23 A. Yeah, because I -- everything's dead
24 until I get my letter of release from the
25 restrictive covenant. Until I have that in my

1 hand, there's no point.
 2 Q. Okay. The patients that you saw when
 3 you were working with Advanced Cardiology, where do
 4 the patients, to the best of your knowledge, if you
 5 know, where do the patients reside that came to
 6 Advanced Cardiology Consultants when you were
 7 working for them?
 8 A. Where do they reside?
 9 Q. Yes.
 10 A. Some live in Florence. Some live in
 11 outside communities, Lake City. We saw patients in
 12 Lake City. You know, people live all over.
 13 Q. I mean, like, Myrtle Beach. Do some of
 14 them live in Myrtle Beach?
 15 A. Doubtful.
 16 Q. Okay. What is the furthest away that
 17 you would get patients?
 18 A. I don't know. I'm not good on
 19 geography.
 20 Q. Okay. What's the nearest -- well, who
 21 are the other advanced -- excuse me. Who are the
 22 other interventional cardiologists in this area?
 23 A. Who are the others?
 24 Q. Yeah, other than this practice.
 25 A. Well, it would have to be McLeod

1 25 miles from McLeod Hospital?
 2 A. Well, I mean, we would only normally
 3 see patients that would end up at one of our
 4 hospitals.
 5 Q. Right.
 6 A. The vast majority of our people would
 7 never end up in one of those outside hospitals that
 8 we just mentioned. They would either wind up at
 9 Carolinas or McLeod.
 10 Q. Right. But some of those people would
 11 live more than 25 miles from Florence?
 12 A. Again, I don't know where they live.
 13 Q. Okay. All right.
 14 A. I mean, I had a guy that came all the
 15 way to see me from Kentucky.
 16 Q. Really?
 17 A. Yeah.
 18 Q. And the last -- I am just looking at
 19 the last couple of years that you worked with
 20 Advanced Cardiology Consultants. And we can have a
 21 confidentiality order about what I am going to be
 22 asking about. You made over 500 grand a year each
 23 of those years, right?
 24 A. I don't have my W-2s with me.
 25 Q. Do you know?

1 Cardiology.
 2 Q. Okay. And where are they?
 3 A. At McLeod Hospital.
 4 Q. Okay. Where is the closest place
 5 beyond McLeod Cardiology in Florence that you could
 6 go see an interventional cardiologist?
 7 A. You could go to Columbia.
 8 Q. Okay. How far is that?
 9 A. I'm not good on geography.
 10 Q. That's somewhere you could go and see
 11 an interventional cardiologist.
 12 A. You could go there. You could go to --
 13 I guess you could go to Charleston. I guess you
 14 could go to Myrtle Beach.
 15 Q. Okay.
 16 A. Usually where there's cardiac surgery,
 17 because what we do involves cardiac surgical backup
 18 in most cases.
 19 Q. Right.
 20 MR. HOLMES: Off the record.
 21 (Off-the-record conference.)
 22 MR. HOLMES:
 23 Q. The places you are talking about are --
 24 well, you don't know the geography, but it's fair
 25 to say you got a good number of patients more than

1 A. I don't know what I made.
 2 Q. You have any idea? Do you take
 3 Dr. Rowe's word for it, if he said that?
 4 A. Yeah, I think it was around 500.
 5 Q. Okay.
 6 A. Pretax.
 7 Q. I get it.
 8 A. Gross.
 9 Q. I get it. I get it all.
 10 A. That's not the real number.
 11 Q. Yeah, it sounds like a lot of money.
 12 A. That's Monopoly money, right? It
 13 sounds really good until you get the taxes out.
 14 MR. HOLMES: Off the record.
 15 (Off-the-record conference.)
 16 BY MR. HOLMES:
 17 Q. There's an allegation in your complaint
 18 that Ms. Rowe, Theresa Rowe, has indicated to you
 19 that if you would prefer, this is in terms of
 20 paying out \$500,000, you could get a loan and
 21 purchase the practice?
 22 A. Yeah, she told me that one day.
 23 Q. When was that, I mean, roughly?
 24 A. I don't know.
 25 Q. Before you left?

1 to do what I was trained to do. I enjoy being in
2 the hospital and doing the cath lab stuff. I mean,
3 it's stressful, but it's what I was trained to do
4 and what I like. So I didn't want to be office
5 based, so we did discuss that.
6 Some of the doctors, after he did that
7 and Dr. Rowe made the comment like, "You can do
8 whatever you want to do," I think Dr. Brady even
9 said, "Well, I'll just be office based too." And I
10 don't know where that went, but obviously not very
11 well since he's gone. Dr. Ng mentioned to me that
12 he wanted to work several more years as well. And
13 the other two, I'm not sure. The other two, I'm
14 not really sure of what they said at that point.
15 But I knew that I wanted, I needed, to
16 work several more years. So that conversation did
17 not -- you know, about him not just being office
18 based, I mean, that didn't really fit in with my
19 plans of what I need to do. And it didn't look
20 like the practice was going to be the kind of
21 practice I would want to finish up my career.
22 BY MR. BUYCK:
23 Q. What is the difference in an
24 office-based practice and the practice at Advanced
25 Cardiology during the period that you were employed

1 patients are going to switch. The patients are
2 going to eventually be lost to the other practices.
3 Q. In your observation, is that, in fact,
4 what is happening at Advanced Cardiology now?
5 MR. HOLMES: Object to the form.
6 You can go ahead and answer.
7 THE WITNESS: I -- I would assume that
8 they're losing a lot of patients. I don't think
9 too many patients want to go see a cardiologist
10 that doesn't go to the hospital. I also wouldn't
11 think that too many doctors that are referring
12 doctors would want to refer patients to a
13 cardiologist who no longer has hospital practice.
14 I mean, that's what they want you for. They want
15 you to take care of the bad things that happen.
16 And with cardiology, there's a lot of bad things
17 that can happen. So office-based cardiology is
18 kind of a joke. I mean, if you don't do the
19 hospital, then in my opinion, you ought to not be a
20 cardiologist -- or call yourself a cardiologist.
21 BY MR. BUYCK:
22 Q. Your specialty is interventional
23 cardiology?
24 A. That's right.
25 Q. Is there any way that you can practice

1 there actively working?
2 A. Well, I mean, when I first worked
3 there, like we said, we went to both hospitals.
4 And you're on call, you ran back and forth between
5 hospitals doing consults, admitting patients to the
6 ER. Those may be new patients or established
7 patients of the practice. Doing procedures in both
8 hospitals. I mean, we were running hard between
9 both hospitals, and the office was always full. I
10 mean, I would see up to 50 patients a day on a
11 full-day office. So the practice, you know, was
12 very busy and extremely productive at that time.
13 If you became office based, you totally
14 give up all hospital business. And not just that,
15 but you're giving up the patients. If the patients
16 go to the hospital and are taken care of by other
17 doctors and they find out that you no longer go to
18 the hospital, you know, what's going to happen?
19 Patients are going to just switch to cardiologists
20 that actually provide full service.
21 So, you know, it was the beginning of
22 the end is the way I could see it, but the
23 beginning of the end that now we're not going to go
24 to the hospital. You know, nobody cares about the
25 patients and who takes care of them. And the

1 interventional cardiology in an office-based
2 practice?
3 A. No.
4 Q. Why not?
5 A. There's no cath lab in the office. You
6 have to perform heart catheterization and
7 angioplasty and stents. You need to perform that
8 in a hospital setting.
9 Q. Why is it important to do that in a
10 hospital setting?
11 A. Because it's dangerous. I mean,
12 complications can occur. If somebody needs
13 emergent bypass surgery, you know, then that needs
14 to sometimes happen very quickly or they're going
15 to die. Also, if somebody's having a heart attack,
16 you can't bring them to the office and treat them.
17 You need to bring them to the cath lab and open up
18 their vessel. If they're in terrible heart
19 failure, you need to give intravenous drugs. Those
20 can't be given in the office. So you have a lot of
21 limitations in the office on what you can do. If
22 you don't have a hospital, then there's a lot of
23 things you're not going to be able to deal with.
24 Q. So if, in theory, if you had an
25 office-based practice and a patient calls you and

EXHIBIT D

State of South Carolina
County of Florence

In Common Pleas Court

Dr. Gregory A. May,

plaintiff,

V.

2019-CP-21-00777

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe and Theresa Rowe,
defendants.

Deposition of: Marie Saleeby

Location: 555 West Cheves Street
Florence, South Carolina

Date: Tuesday, September 3, 2019

Time: 4:02 p.m. - 4:34 p.m.

Court Reporter: Erica Creel

The deposition is taken pursuant to notice and/or agreement, in the above-entitled cause pending in the above-named court and pursuant to the South Carolina Rules of Civil Procedure.

Q & A COURT REPORTING SERVICES
Post Office Box 4563 (29502)
273 West Evans Street (29501)
Florence, South Carolina
Telephone: (843) 673-9845
E-mail: info@qacourtreportingonline.com
Visit: www.qacourtreportingonline.com

1 Q And what is Dr. May's specialty?
 2 A Cardiology.
 3 Q Does he have a subspecialty within
 4 cardiology?
 5 A He's an invasive cardiologist, which
 6 means he can do catheterizations and
 7 interventions. And he's credentialed as an
 8 invasive cardiology -- cardiologist.
 9 Q All right. Do any of McLeod's other
 10 six locations, meaning the ones other than
 11 Florence --
 12 A Uh-huh.
 13 Q -- do they have a cath lab and offer
 14 invasive cardiology services?
 15 A There's a cath lab at Loris, at -- in
 16 Loris, South Carolina.
 17 Q Do you know how long that cath lab has
 18 been there?
 19 A Since before we acquired that
 20 hospital.
 21 Q And when did McLeod acquire Loris?
 22 A I don't remember exactly, but seven,
 23 eight years.
 24 Q All right. Do you recall Dr. May
 25 contacting you in a November timeframe of last

1 year --
 2 A Uh-huh.
 3 Q -- inquiring about possible employment
 4 positions with the hospital?
 5 A Uh-huh. Dr. May made an appointment
 6 through my secretary to see me on November the
 7 14th. And he came to see me at 2:00.
 8 Q All right. Do you have a calendar --
 9 A I do.
 10 Q -- with that on there?
 11 A I do.
 12 Court Reporter: And if you could,
 13 allow him to finish his question before you
 14 respond just so we don't speak over each other.
 15 The Deponent: Okay.
 16 By Mr. Buyck:
 17 Q All right. Can you tell from your
 18 calendar when you actually made that appointment?
 19 A No. I can't.
 20 Q All right. Where did you meet with
 21 Dr. May?
 22 A In my office.
 23 Q And that's here at the medical center?
 24 A Uh-huh. Right. In the main tower on
 25 the second floor.

1 Q All right. Tell me what you recall
 2 about that initial conversation with Dr. May?
 3 A Dr. May came to the office. He shared
 4 with me that he felt like Advanced Cardiology was
 5 going to have a dramatic change this the practice,
 6 that Dr. Rowe, who we know is the practice leader,
 7 was changing his practice. And he -- Dr. May
 8 speculated that Dr. Rowe was going to stop coming
 9 to the hospital and have an office-based practice
 10 only and that he and the other physicians were
 11 going to need to make other arrangements if they
 12 wanted a hospital-based practice.
 13 He said that it was important to him
 14 to live in the Florence area because of some
 15 family matters and being near children, that he
 16 did not want to leave the Pee Dee area. And he
 17 certainly didn't want to have to leave South
 18 Carolina. He was inquiring of me if we had
 19 employment opportunities for him.
 20 Q Now, are you responsible for hiring
 21 the cardiologists for McLeod Hospital?
 22 A No, I'm not.
 23 Q Where would that -- who would have
 24 that role?
 25 A That would come under the -- what we

1 call MPA, McLeod Physicians Associates. It's an
 2 arm of our business where we have primary care and
 3 specialty care physicians -- employed physicians.
 4 Q Who -- are you responsible for hiring,
 5 say, the --
 6 Mr. Holmes: I'm sorry. I'm hear
 7 having trouble hearing again. Could you speak --
 8 Mr. Buyck: I'm sorry. I was leaning
 9 away.
 10 By Mr. Buyck:
 11 Q Would you be responsible for hiring
 12 some of the other, say, hospital-based physicians
 13 here at McLeod?
 14 A Yes, I am. I am.
 15 Q And give me some examples of those.
 16 A As you said, hospital-based physicians
 17 fall under my purview and under my responsibility.
 18 Hospitalists, intensivists, O.B. hospitalists, the
 19 emergency department physicians. We also have a
 20 select group of what we call hospital-based
 21 specialists. Neurology, have a handful of
 22 neurologists. I have a psychiatrist. And those
 23 are physician who don't have an office space
 24 practice. They only work in the hospital. They
 25 take admissions on behalf of other physicians or

1 they accept transfers from other hospitals. And
2 they work only in the hospital.
3 Q Did you -- excuse me, did you refer
4 Dr. May to anyone in particular at MPA?
5 A On that day, I told doctor -- Dr. May
6 asked me if I thought we would have an opening for
7 him in our practice. We do have a cardiac
8 practice. I think Dr. May was coming to me to
9 find out did I think he had a chance. He -- he
10 knows me. He didn't know the person responsible
11 for MPA. I gave him the name of that individual.
12 That person is Donna Isgett. Donna, at that time,
13 was the vice-president responsible for MPA. And
14 I -- I did ask Dr. May if he had -- was he still
15 employed and had he cleared that information with
16 his employer.
17 Q What -- cleared what information?
18 What would you have been referring to there?
19 A Is he -- was he open to employment.
20 Was he ready to be employed. What was the
21 situation he was in. Had he already quit his job
22 with Advanced? Those kind of things.
23 Q Do you recall what he -- what Dr. May
24 told you regarding his then status with Advanced
25 Cardiology?

1 And he asked me, how would we go about
2 getting that --
3 Mr. Holmes: Object --
4 The Deponent: Yes, sir.
5 Mr. Holmes: I object to you saying
6 what he said. But it's okay. Go ahead.
7 The Deponent: Okay. Well, I can only
8 say what he said.
9 Mr. Holmes: I understand.
10 The Deponent: So he -- he asked me
11 how did he go about getting that? And I told him
12 he would get that information from his employer
13 and that we would have to have that in writing.
14 By Mr. Buyck:
15 Q All right. Did -- are you familiar
16 with Dr. Rowe?
17 A With Dr. Rowe, yes. Uh-huh.
18 Q How long have you known Dr. Rowe?
19 A Since Dr. Rowe came to town.
20 Q All right?
21 A Yeah.
22 Q And that would have been --
23 A Longer than I can remember.
24 Q -- 25 years --
25 A Twenty-five or thirty years. Yes.

1 A Uh-huh.
2 Mr. Holmes: I object. But you can
3 answer, please.
4 The Deponent: Okay. He -- he told me
5 that he expected that many of the members of the
6 group might be making other arrangements and that
7 he had spoken with Dr. Rowe and with Teresa Rowe,
8 the practice administrator, about he was looking
9 for a job and that they had encouraged him to
10 look.
11 By Mr. Buyck:
12 Q Did you request any type of written
13 confirmation from Dr. May that it was appropriate
14 for him to continue his discussions with this
15 hospital?
16 A What I told him that day was that I --
17 I was neither the person to talk to him about a
18 job with cardiology, nor would any of us be able
19 to talk to him until we knew that he had a release
20 from his -- if there were any contractual
21 restrictions on his ability to work locally, did
22 he have a non-compete in his contract, that we
23 would not -- it was our practice not to talk to
24 him about employment until we were clear that he
25 was not violating a non-compete.

1 Q All right. How about Mrs. Rowe? Are
2 you familiar with --
3 A I know --
4 Q -- Teresa?
5 A Yes.
6 Q Do you know -- how long have you known
7 Teresa?
8 A Just about the same amount of time.
9 Q All right. And you --
10 A Longer than I can remember.
11 Q Okay. And you are aware that Teresa
12 is the office manager or the practice manager
13 for --
14 A Yes.
15 Q -- Advanced Cardiology?
16 A Yes.
17 Q All right. Did -- did you get a --
18 any kind of indication from Teresa about Dr. May's
19 inquiries at McLeod and whether or not they
20 would -- they objected to them?
21 A Yes. I got an e-mail from trees STA
22 Rowe the next day saying that Dr. May, I assume,
23 had talked to her and he had expressed that he
24 would like to look at employment at McLeod Health
25 and that they did not object to him interviewing

1 was here for.
2 By Mr. Buyck:
3 Q Did you have any follow up with
4 Dr. Rowe or Teresa Rowe after this with a we've
5 marked as exhibit 1?
6 A I did not.
7 Q What is your understanding currently
8 as to the status of Advanced Cardiology within the
9 hospital or any of their --
10 A Here?
11 Q Yes, ma'am.
12 A One by one at different times, the
13 members of the group -- other -- Dr. Rowe still
14 has privileges. Our privileging cycle is a
15 two-year cycle, so he's still in the midst of
16 privileges. One by one, the others have allowed
17 their privileges to lapse or to -- or they've
18 dropped off as they have made other arrangements
19 or moved.
20 Q Do you -- do you know if Dr. Rowe is
21 doing any hospital practices at all?
22 A He's -- he's not doing any hospital
23 practice.
24 Q All right?
25 A He is not actively coming to the

1 particular procedure. We were looking for
2 cardiologists that could do a TAVR and we were
3 looking for somebody who had some
4 electrophysiology background. And so while
5 Dr. May had worked here and had done good work
6 here as a general invasive cardiologist, we
7 were -- we were looking for some very specific
8 skills. And so we didn't feel like he was going
9 to fill in what we needed at that time.
10 Q Have you in fact filled that spot?
11 A We have not filled the
12 electrophysiology spot as of yet. We have made a
13 job offer to somebody with the TAVR skills.
14 They've not arrived yet.
15 Q Do you recall a Dr. Brady who also
16 worked for Advanced Cardiology?
17 A Worked with -- yes. Uh-huh.
18 Q Is he -- is he a McLeod physician now,
19 currently?
20 A I think he has consult privileges. I
21 don't -- I don't know his exact status, but I
22 believe he has consult privileges. He left and
23 went to Conway, South Carolina.
24 Q All right. And Conway is not a McLeod
25 Hospital?

1 hospital here.
2 Q All right. And -- and to your
3 knowledge, no other Advanced Cardiology physicians
4 are actively working here at McLeod?
5 A No.
6 Mr. Holmes: Object as too relevance,
7 but you can answer.
8 The Deponent: No, they are not.
9 Dr. Rowe still sends patients here.
10 By Mr. Buyck:
11 Q Did Donna Isgett ever indicate to you
12 whether there was in fact a spot for Dr. May here
13 at the hospital?
14 Mr. Holmes: Object to the form. You
15 can answer.
16 The Deponent: The discussion we had
17 about filling the vacancies were some very
18 specific skill sets we were looking for. We
19 were -- we had just had a resignation from a
20 physician that had some particular skills around a
21 procedure called TAVR, T-A-V-R. We wanted to
22 replace with somebody that could do TAVR. That
23 was not necessarily a skill -- if Dr. May has that
24 skill, he's gotten it since he's been gone.
25 At that time, he wasn't doing that

1 A No, sir.
2 Q Do you know whether -- whether he sees
3 patients here in the Florence cath lab?
4 A He -- his privileges would allow him
5 to do cases here as a consultant. Whether or not
6 he has done anything in that capacity, I don't
7 have -- I could find that out, but I don't know it
8 right this minute. It's not something I
9 personally would keep up with.
10 Q Did you have any follow-up
11 conversation with Dr. May about there not being an
12 open position at McLeod?
13 A Sometime within a few weeks after he
14 had and I had met on the 14th of November, we
15 passed each other in the hallway, actually down by
16 the cath lab. And I asked him if he had -- who --
17 had he talked to anyone. I had explained to him I
18 wasn't going to be the person when we met on the
19 14th. And he had talked to a variety of people at
20 that time. We talked about, we're looking for
21 somebody to replace the physician who did the TAVR
22 work and we're looking for somebody to do E.P.,
23 electrophysiology. And he -- he was understanding
24 of that, that those were positions that were --
25 had specificity that he didn't have. He was

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	
	)	
Dr. Gregory A. May,	)	
	)	
	)	CASE NO.: 2019-CP-21-00777
Plaintiff,	)	
	)	DEFENDANTS' MOTION
	)	FOR RECONSIDERATION
vs.	)	
	)	
Advanced Cardiology Consultants, P.C.	)	
Dr. Lew A. Rowe, and Theresa Rowe,	)	
	)	
Defendants.	)	

The Defendants hereby move the Court pursuant to Rule 59(e), SCRCP, and *Elam v. SCDOT*, 361 S.C. 9, 602 S.E.2d 772 (2004), for reconsideration of its October 21, 2019 Order granting Plaintiff's Motion for Summary Judgment and denying Defendants' Motion for Summary Judgment. The Defendants move the Court for reconsideration of its finding that the restrictive covenant between the parties is unenforceable. Defendants respectfully request that this Court review the materials before it and issue an Order DENYING Plaintiff's Motion for Summary Judgment and GRANTING Defendants' Motion for Summary Judgment on this issue in reconsideration of its initial October 21, 2019 Order.

All of which is respectfully submitted.

GIBBS & HOLMES

By: By: /s/ Allan R. Holmes
Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29402

October 30, 2019

(843) 722-0033
ATTORNEYS FOR THE DEFENDANTS

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	
	)	
Dr. Gregory A. May,	)	
	)	
	)	CASE NO.: 2019-CP-21-00777
Plaintiff,	)	
	)	DEFENDANTS' MEMORANDUM
	)	IN SUPPORT OF ITS MOTION
vs.	)	FOR RECONSIDERATION
	)	
Advanced Cardiology Consultants, P.C.	)	
Dr. Lew A. Rowe, and Theresa Rowe,	)	
	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

The Defendants, Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe, hereby submit this Memorandum in Support of their Motion for Reconsideration.

I. Background/Facts

The Plaintiff, Dr. Gregory A. May, previously moved this Court for summary judgment as to his claim for a declaratory judgment on September 16, 2019, seeking an order from the Court declaring that the employment agreement between the parties, in particular the restrictive covenant contained in that agreement, is unenforceable. The Defendants, on September 26, 2019, moved for summary judgment as to the enforceability of the restrictive covenant, seeking an Order declaring that restrictive covenant between the parties to be valid and enforceable. On October 21, 2019, the Court issued its Order granting Plaintiff's motion for summary judgment

and denying Defendants' motion for summary judgment.¹ The Court declared the restrictive covenant between the parties to be unenforceable and granted summary judgment to the Plaintiff on his declaratory judgment claim.

In granting summary judgment to the Plaintiff, the Court found that the restrictive covenant could not be upheld because the covenant would prohibit Plaintiff from performing "a myriad of jobs at either hospital [in Florence] which are wholly unconnected to the practice of cardiology."² (Order at 3). In this respect, the Court found "the covenant not to compete cannot be upheld since it is not necessary for the protection of the legitimate interest of the employer to prevent Dr. May from seeking any type of employment with the two hospitals. Likewise, the restriction against competition is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood." (*Id.*).

The language in the restrictive covenant which the Court concluded was overly broad was language which prohibited Plaintiff from "becom[ing] employed by or associated in the capacity of an . . . employee of another business entity, engaged in the practice of cardiology." In

¹ The Court also denied both parties' motions for summary judgment as to the claim for breach of contract, a finding not at issue in the present motion. As the Court's October 21, 2019 Order adjudicated fewer than all the claims or the rights and liabilities of fewer than all the parties, the Defendants intend to move the Court to direct an entry for final judgment pursuant to Rule 54(b) of the South Carolina Rules of Civil Procedure.

² As a whole, this provision of the restrictive covenant reads:

In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination.

(Contract ¶ 9, Exhibit A to Compl.)

this respect, the Plaintiff had argued and the Court agreed, this prohibition would prevent Plaintiff from being employed in any capacity by one of the local hospitals, because those hospitals are entities “engaged in the practice of cardiology.” In finding this particular language in the restrictive covenant unenforceable, the Court relied on the case of *Faces Boutiques v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App. 1995). The Court found that the language at issue in the parties’ restrictive covenant was similar enough to a prohibition in *Faces* which was found unenforceable and prohibited the employee from being connected “in any manner” with “any business in direct competition with the type of business conducted by [Faces].” (Order at 4).

The Court rejected the Defendants’ contention that the restrictive covenant should be upheld as valid under the case of *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013). The Court found the restrictive covenant at issue here to be more similar to *Faces*, rather than *Baugh*, because in *Baugh* “the sole prohibition was the physician continuing or commencing the active practice of medicine ‘in the field of cardiology’”. (Order at 4). The Defendants respectfully request that the Court reconsider its finding on this issue and find the restrictive covenant enforceable.

II. Legal Standard

Rule 54(b) of the South Carolina Rules of Civil Procedure provides that any order that adjudicates fewer than all the claims in an action may be revised at any time before the entry of a judgment adjudicating all claims and all of the parties’ rights and liabilities. *See* SCRCP 54(b). Rule 59(e) of the South Carolina Rules of Civil Procedure allows for a party to file a motion to “amend or alter the judgment” of the court no later than 10 days after the entry of a judgment. S.C. R. Civ. P. 59(e). “The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to ‘reconsider matters properly encompassed in a decision on the

merits.” *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200, 108 S. Ct. 1717 (1988)). A motion under Rule 59(e) long has been viewed as a “motion for reconsideration” despite the absence of those words from the rule. *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 21 (2004). It is therefore proper to view a Rule 59(e) motion not only as a vehicle to request the trial court “alter or amend the judgment,” but also as a vehicle to seek “reconsideration” of issues and arguments that a party claims the court misapprehended. *Id.*

The rules contemplate two situations where a party may properly file a motion for reconsideration: A party may wish to file such a motion when he believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. Second, a party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. *Id.* at 24. Consequently, a party is permitted to ask the court to reconsider its decision even if it means rehashing all, or part of an argument previously presented. *Id.* Thus, the motion for reconsideration may be utilized when the order contains erroneous findings of fact or a clear misapplication of established legal principles and is also appropriate if there has been intervening authority relevant to an issue in the case. *See id.*

In *Elam v. SCDOT*, 361 S.C. 9, 602 S.E.2d 772 (2004); the South Carolina Supreme Court discussed the function of SCRCP 59(e), stating:

[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court “alter or amend the judgment,” but also as a vehicle to seek “reconsideration” of issues and arguments. A motion under Rule 59(e) long has been viewed as “motion for reconsideration” despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented. There is nothing inherently unfair in allowing a party one final chance not only to call the court’s attention to a possible misapprehension of

an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity . . .

A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it.

Id. at 21-23 (internal citations omitted). The decision whether to reconsider a motion for summary judgment is within the trial judge's discretion. *PPG Indus., Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 375 S.E.2d 331 (Ct. App. 1988).

III. Argument

A. The Restrictive Covenant is Distinguishable from *Faces Boutique*.

The Defendants request that the Court reconsider its conclusion that the restrictive covenant at issue should be found overbroad and unenforceable under the logic of *Faces Boutique*. Defendants submit that there are several defining characteristics of the language of the restrictive covenant that distinguish it from the language at issue in *Faces Boutique* that the Court did not adequately address in its earlier Order. Notably, the restrictive covenant at issue here does not contain a prohibition that prevents Plaintiff from being associated “in any manner” with “any business in direct competition with the type of business conducted by [Advanced Cardiology].” This sweeping “in any manner” language that troubled the *Faces* court so greatly is simply not present in the parties’ agreement here. 318 S.C. at 42-43.

The language at issue in the restrictive covenant here is much more clearly limited to prevent Plaintiff only from engaging in the practice of cardiology, as the restrictive covenant prevents Plaintiff from being employed “by another business entity, engaged in the practice of cardiology, *nor will he otherwise engage directly or indirectly in the practice of cardiology.*” (Contract ¶ 9, Exhibit A to Compl.) (emphasis added). The use of the modifying phrase “nor will he otherwise engage directly or indirectly in the practice of cardiology” indicates clearly that the

preceding language has a narrower scope than the Court interpreted, and the Court failed to adequately address this issue.

The Defendants request the Court reconsider its finding that the instant case is more similar to *Faces Boutique* than *Baugh*, as the record is entirely devoid of any testimony or other evidence which would support the Court's conclusion that the restrictive covenant prohibits Plaintiff from being employed in any capacity not related to the practice of cardiology. By contrast, in *Faces Boutique*, the South Carolina Court of Appeals relied heavily on the fact that at trial in the lower court, the boutique's owner testified explicitly to the fact that the former employee would be in violation of the covenant not to compete if she became "employed at any place of business engaged in the selling of cosmetics or giving facials, even if [plaintiff] herself did not participate in these activities." 318 S.C. at 43. Defendant's owner further testified that "the covenant would have this effect even though, in such a situation, her business would not be threatened." *Id.* The *Faces* court concluded that by the Defendant's *own admission*, "the terms of the covenant restrict [plaintiff's] employment opportunities beyond what is necessary for the protection of [defendant's] legitimate business interests." *Id.*

There is no such testimony from the president and sole shareholder of Advanced Cardiology, Dr. Lew A. Rowe, to this effect in the present case. In fact, the only testimony introduced into the record on this issue is Plaintiff's own admission that the language of the restrictive covenant only prevents him from being employed *as a cardiologist* for a period of two years after termination within a 25-mile radius of McLeod Regional Medical Center, Florence, South Carolina, and not in some other profession or position. (Pl. Depo., p. 22-24, Exhibit C to Defs.' Memo. in Supp. Mot. for Sum. J.).

On this issue, the Court rejected Defendants' arguments about Plaintiff's own admission as to the meaning of the language in the restrictive covenant, stating "The interpretation of the agreement is a legal matter and '[I]n South Carolina, . . . the restrictions in a [noncompete] clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms.'" (Order at 4) (citing *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 633, 799 S.E.2d 318, 324-325 (2010)). The use of Plaintiff's own admission here is not an attempt to have the Court rewrite the terms of the restrictive covenant or limit the covenant's terms so as to render the agreement enforceable, as the Court concluded.

Rather, the use of Plaintiff's testimony can be used to ascribe meaning to the phrase "will not become employed by . . . another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology." A court may properly rely upon a party's interpretation of the language of the restrictive covenant without "rewriting" or "limiting" that agreement, as the *Faces Boutique* court's reliance upon the boutique owner's testimony and admissions about the meaning of the language at issue aptly demonstrates.

Further, the cases relied upon by the Court for the proposition that "the restrictions in a [noncompete] clause cannot be rewritten by a court," are distinguishable in that they involve courts declining to "blue pencil", add or infer provisions into restrictive covenants that simply are not present. For example, in *Poynter Invs. v. Century Builders of Piedmont*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010), the court held that a territorial restriction could not be revised to be more narrowly drawn by the court. Similarly, in *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 160, 621 S.E.2d 352, 354 (2005), the court refused to impose a geographical limitation where the agreement did not contain one, reasoning that the addition of

such a term “requires this Court to bind these parties to a term that does not reflect the parties' original intention.” In contrast, the Defendants here are presenting testimony from the Plaintiff that demonstrates what the parties intended this language to mean--not requesting the Court infer an additional term or create a geographical limitation to the agreement that is not already present. Defendants submit that taking Plaintiff's own testimony into account on this issue does not constitute an impermissible “blue penciling” of the restrictive covenant.

CONCLUSION

The Defendants respectfully request the Court reconsider its October 21, 2019 Order granting summary judgment to the Plaintiff and denying Defendants' Motion for Summary Judgment. In reconsideration of its Order, the Defendants respectfully request that the Court GRANT their Motion for Summary Judgment and find the restrictive covenant at issue enforceable.

Respectfully submitted,

GIBBS & HOLMES

By: /s/ Allan R. Holmes
Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29401
(843) 722-0033

ATTORNEYS FOR DEFENDANTS

Charleston, South Carolina
October 30, 2019

1 A. Okay.

2 Q. Okay. All right. Having gone through
3 that, where are you from originally, Dr. May?

4 A. I was born and raised in Tampa,
5 Florida.

6 Q. Okay. And where did you go to medical
7 school?

8 A. University of Miami, School of
9 Medicine.

10 Q. Okay. You did your residency where?

11 A. Emory.

12 Q. Okay. And did you go fellowship after
13 that?

14 A. I did.

15 Q. Where was that?

16 A. Emory.

17 Q. Okay. Where does that take us in terms
18 of years, you being through with your --

19 A. I was there for seven years after
20 medical school.

21 Q. Okay. And so you started practice,
22 cardiology?

23 A. In 1992.

24 Q. Okay. Where did you first work?

25 A. That was in Orlando, Florida.

1 Q. And was it in practice with a group or
2 with a --

3 A. Yes, I was in practice with a group
4 named Central Florida Cardiology Group.

5 Q. Central -- I'm sorry.

6 A. Central Florida Cardiology Group.

7 Q. All right. And that was located in
8 Orlando?

9 A. Correct.

10 Q. How long did you stay with them?

11 A. I was there from '92 until I came here
12 in 2007.

13 Q. Okay. Why did you leave the Central
14 Florida Cardiology Group?

15 A. The group was 13 people, I think, when
16 I left. And there was some political problems in
17 the group regarding financial situations.

18 Q. So you decided to make a fresh start?

19 A. Fresh start.

20 Q. Okay. Did you have any ownership
21 interest in that group?

22 A. We were considered partners. But final
23 analysis, I did not get too much when I left. They
24 were able to negotiate that down.

25 Q. How did you find out about Dr. Rowe and

1 the practice here?

2 A. Actually, I got a thing in the mail.
3 It was from their recruiter, I guess. I just had
4 it laying on my desk. And one day I kind of got
5 fed up with things and decided to call.

6 Q. And who did you talk to here?

7 A. I'm not sure who my initial contact
8 would have been, possibly Theresa.

9 Q. Okay.

10 A. Or it could have been Dr. Rowe. I'm
11 not sure.

12 Q. Okay. And so you started. And your
13 first contract, I don't have a copy of it with me,
14 was when, roughly?

15 A. I was -- because of the delay in
16 getting a South Carolina license, I actually
17 started, I believe, in May of two-thousand -- it's
18 either 2007 or 2008.

19 Q. Okay.

20 A. I get confused about that. I think it
21 was 2008.

22 Q. And you have been with them ever since?

23 A. Ever since.

24 Q. Okay. And you don't have any ownership
25 interest in --

1 A. That's correct.

2 Q. Okay. That's been the case since the
3 beginning, correct?

4 A. Correct.

5 Q. And you had two five-year contracts
6 initially; is that right?

7 A. I'm not sure. We'd have to check the
8 record.

9 Q. Okay. I looked into your complaint
10 that you filed, and it said you had been employed
11 with Dr. Rowe in the practice since April 22nd,
12 2008. Does that sound about right?

13 A. About right.

14 Q. Okay. And that your initial employment
15 contract was for a period of five years. The
16 parties renewed and executed a second contract for
17 an additional five-year term. Does that sound
18 about right?

19 A. If that's what it says, I guess that's
20 right.

21 Q. Okay. And then March 30th, 2018,
22 Dr. Rowe and the practice presented you with a
23 one-year contract commencing March 30th, 2018, and
24 ending on March 31st, 2019, correct?

25 A. I guess that's correct.

1 did not have any written confirmation or offers,
2 correct?

3 A. Now, I think anything that you're
4 inquiring in that regard would be in Mr. Randy
5 Seif's affidavit.

6 Q. Well, he didn't attach any documents.

7 A. There aren't any that I know of.

8 Q. Okay. So there was never anything to
9 you saying, "We hereby offer a position"?

10 A. They did.

11 Q. And they did it in writing?

12 A. There -- there was a contract that we
13 looked at.

14 Q. Okay.

15 A. But I didn't sign it. It was something
16 that we had in front of us. And they said, "Before
17 we put this through, we're going to need a letter
18 of release from your restrictive covenant with
19 Dr. Rowe."

20 Q. Okay.

21 A. And I said, "I don't think that will be
22 a problem because he's told me that he'll give me
23 that."

24 Q. Did they give you a copy of that
25 proposed contract?

1 things that I kept hearing over and over, louder
2 and louder, as the years went by. So I was
3 concerned about that.

4 But, you know, things went along pretty
5 good even despite the cuts that we had,
6 reimbursement. Things were acceptable and we had a
7 good group. We were -- we had good comradery. We
8 had a good thing with the way things were handled
9 during the day. You know, the doctors were in the
10 office, didn't have to run back and forth to the
11 hospitals. We didn't have to -- I thought it was
12 about as stress-free as you could get for a busy
13 practice.

14 At the end of September or beginning of
15 October, Theresa had --

16 Q. This is 2018?

17 A. That's correct. September,
18 October 2018.

19 Theresa Rowe had indicated to me that
20 Dr. Rowe might not want to take call anymore. I
21 told her I didn't think that was going to be very
22 good for the group's health and that it had always
23 been that way and how was that going to work out.
24 I had a concern that the other physicians in the
25 group would be reluctant to want to take more call

1 because they're already not wanting to take call
2 and taking a lot of time off. A big problem in the
3 group was doctors taking time off, several weeks a
4 year time off. Not myself, but other physicians in
5 the group took advantage of Theresa's open policy
6 to get whatever time off they requested. It caused
7 problems.

8 So in late September, early October, I
9 finally approached Dr. Rowe. And I said, you know,
10 "What's this I hear about you not wanting to take
11 call anymore? And what do you think about the
12 practice, the health of the practice, and all this
13 Theresa is talking about?"

14 He goes, "Yeah." He goes, "I'm really
15 not sure what's going to happen. Billing,
16 everything is up in the air. We have to see what
17 happens. But I have decided that I am no longer
18 going to take call."

19 Q. Did he say he was going to resign his
20 privileges as well?

21 A. He did. He said he was going to resign
22 his privileges at both McLeod and Conway Hospital
23 at the 1st of the year. That would be 1/1/19.

24 Q. I don't want to interrupt you too much.
25 But is there a rule at either or both of these

1 Q. Where is Essentia?

2 A. It's near Episcopal. It's another
3 school.

4 Q. I had two girls go to Episcopal.

5 A. Yep, that's a much bigger school.

6 Q. Yeah? Okay. When did you graduate
7 from Essentia?

8 A. 1980.

9 Q. Tell me about your education after
10 that.

11 A. Well, I attended college at Johns
12 Hopkins. That would have been 1980 to 1984. And
13 then that was a bachelor's degree. Then I went on
14 to medical school. That was at University of
15 Virginia, and that was '84 to '88. Then I did
16 internal medicine residency which was three years,
17 and that was '88 to '91. And that was at Wake
18 Forest, North Carolina. And then I did a
19 three-year-training program in cardiology, and that
20 was in Dayton, Ohio.

21 Q. What hospital was that?

22 A. Good Samaritan.

23 Q. Did you grow up in Alexandria?

24 A. Yes.

25 Q. All right. When did you -- what did

1 you do after finishing your training program?

2 A. I moved to Florence.

3 Q. All right. What brought you to
4 Florence?

5 A. I like the area.

6 Q. Were you familiar with it at all prior
7 to. . .

8 A. I vacationed down in the beach area
9 before, so I had been through the area. I wouldn't
10 say I was intimately familiar with it. I'd been
11 through the area.

12 Q. Was Florence underserved for
13 cardiologists at the time?

14 A. It seemed like there was some fairly
15 good opportunities, but there were a lot of things
16 that go into deciding where to locate. I liked the
17 place. I liked the climate, thought the people
18 were great. I liked being near the ocean. It had
19 good facilities for what I was interested in doing.
20 It all came together.

21 Q. Now, when you came to Florence, did you
22 go immediately into private practice?

23 A. Yes.

24 Q. Who did you practice with, if anyone?

25 A. There was -- it was alone, but I hired

1 another cardiologist initially. And then over the
2 years there were other cardiologists, but I started
3 the practice in 1994.

4 Q. Who was your first cardiologist?

5 A. Dr. Duncan.

6 Q. Was he also a new cardiologist?

7 A. Yes, I believe so. Yes.

8 Q. How many cardiologists have you --
9 well, let me -- let's back up. I noticed with the
10 secretary of state's office that the Advanced
11 Cardiology Consultants was incorporated on
12 March 21, 1994. Does that sound correct?

13 A. That sounds correct.

14 Q. The address of the incorporation is 710
15 South Irby Street, which I think I recognize as
16 there used to be an MRI in there or something. How
17 long were you at that South Irby Street address?

18 A. That's not familiar to me at all. That
19 may have been the attorney's address.

20 Q. Actually, it was South Coit Street.

21 A. Oh.

22 Q. South Coit Street.

23 A. Yeah, the attorney might have been on
24 Irby. But the address was Coit Street, yeah.

25 Q. Okay.

1 Q. Do you know of other cardiology groups
2 that are essentially owned by one physician and
3 have another group of physicians who are --

4 A. Years ago. . .

5 Q. -- physician employees?

6 A. Sorry. Years ago when the group was
7 established, that model was one of the more common
8 models. Obviously, things have changed over the
9 last 25 years. But back in the '90s, that was not
10 an uncommon approach at all.

11 Q. Okay. Did you have a, say, business
12 manager or an office manager when you started the
13 practice?

14 A. Yes.

15 Q. Who was that?

16 A. Theresa.

17 Q. All right. Is that Theresa Rowe, your
18 wife?

19 A. Yes, correct.

20 Q. Okay. How long have you and Theresa
21 been married?

22 A. We got married in October 2007.

23 Q. Have you had any other -- have you been
24 married other than Theresa?

25 A. Yes, prior to.

1 A. No, just the physicians.

2 Q. What is the Advanced Cardiology's
3 competition in your market?

4 A. There's two other cardiology groups at
5 present. One would be McLeod Cardiology, which had
6 been known as Pee Dee Cardiology before they were
7 bought out by the hospital. And the other would be
8 CMA Cardiology. And that's the group that is owned
9 by Carolinas Hospital System, which is no longer
10 Carolinas Hospital System. But that's what it was
11 called when they were there. So I'm not sure the
12 new name of the group, but I understand it's still
13 there.

14 Q. All right. So do you know,
15 approximately, how many cardiologists work for
16 McLeod Cardiology?

17 A. No. It seems to vary a lot, and I
18 don't have a good feeling for that because they
19 have a lot of outlying offices and practices. I
20 don't have a good feeling for it. I don't know.

21 Q. How about CMA? Do you know how many
22 employees they might have?

23 A. Once again, when I was in the hospital,
24 which was back last year, they tended to keep
25 anywhere from one to three cardiologists in their

1 group. That, of course, may have changed. That
2 was six months ago. I'm not sure what they're
3 doing now.

4 Q. When did Carolinas begin hiring their
5 own cardiologists?

6 A. I do not have a specific date.
7 However, it was within the last five years, would
8 be my best estimate.

9 Q. Do you recall, and what is your best
10 estimate, of when McLeod Hospital bought Pee Dee
11 Cardiology?

12 A. I don't have a good estimate because
13 they were in negotiations with McLeod's for
14 several, several years before the actual finalized
15 date, and I'm not sure when that date is. I don't
16 have a good feeling for that. However, they have
17 been owned by the hospital certainly for the last
18 two years.

19 Q. All right. Prior to McLeod purchasing
20 McLeod Cardiology and Carolinas creating CMA
21 Cardiology, were the cardiologists in Florence
22 generally all in private practice?

23 A. Yes.

24 Q. And that's been the case since you
25 arrived in 1994?

1 A. Yes.

2 Q. Are there any cardiologists in Florence
3 currently that are in private practice other than
4 the physicians at ACC?

5 A. Not to my knowledge.

6 Q. All right. Who do you currently have
7 employed as cardiologists?

8 A. At Advanced Cardiology?

9 Q. Right.

10 A. Besides myself, there is Dr. Scott
11 Wolery and Dr. Jaideep Debsikdar.

12 Q. Has the fact that the hospitals have
13 bought out the other private practice physicians in
14 Florence had a financial impact on Advanced
15 Cardiology Consultants?

16 A. I would say yes. But the degree of
17 that impact is very difficult to determine.

18 Q. All right. Explain that to me, if you
19 would.

20 A. There's a lot of moving parts to this.
21 And to say what impacts the bottom line positively
22 or negatively is very difficult to say. There's so
23 many factors that can go into that, and most of
24 them are not of our control either. So I'd say
25 yes, there's an impact, but it's hard to say how

1 A. No. He talked about the non-compete in
2 general terms. He never asked for a letter from me
3 to send to Carolinas or to send to McLeod or to
4 send for any specific job that he apparently had
5 been discussing. I don't know.

6 Q. And did you have any problem with him
7 having discussions with Carolinas Hospital
8 regarding employment?

9 A. No, I wouldn't have a problem with it.
10 In fact, I told him, "Look at all your options,"
11 many time.

12 Q. Did you ever tell him to look at all of
13 his options, including the hospitals here in
14 Florence?

15 A. I said, "Look at everywhere," is what I
16 told him. "Don't limit yourself."

17 Q. So having told him that, why are you
18 surprised that he would look at the local
19 hospitals?

20 A. He can look at the local hospital
21 corporations, but he cannot practice within that
22 25 miles. No one has ever done that, and he signed
23 a contract saying he would not do that. So I would
24 be surprised. I would not be surprised that he
25 spoke with McLeod or Carolinas about employment.

1 the malpractice coverage?

2 A. Can you rephrase that? Because I'm
3 really confused at how -- what you're getting at.

4 Q. Did you express to Dr. May that you had
5 a concern that there would be increased exposure to
6 the practice if he was the only physician taking
7 call and seeing patients at Carolinas Hospital?

8 A. I believe what was said was that I
9 think the malpractice carrier would have a hard
10 time, because I'd actually called the malpractice
11 carrier, and they said that they didn't feel like
12 the practice should allow that.

13 Q. That the practice should allow what?

14 A. Him to cover patients for the other
15 practice.

16 Q. To have --

17 A. Patients not known to him. He would be
18 covering those patients for the other practice.
19 And therefore, those patients aren't known to him.

20 Q. And that --

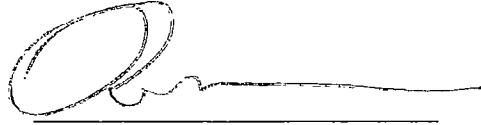
21 A. That would set him up for higher risk
22 of actions of another physician.

23 Q. Okay. If he was the only member of
24 your practice to go to maintain privileges at
25 Carolinas, it would be a higher exposure for

Certificate of Counsel

Pursuant to SCACR 210(g), the undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 7, 2020

A handwritten signature in black ink, appearing to read 'Rebecca J. Wolfe', is written over a horizontal line.

Rebecca J. Wolfe

Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
GIBBS & HOLMES
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033

ATTORNEYS FOR THE APPELLANTS

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Number 2019-CP-21-00777

Dr. Gregory A. May,

Respondent,

v.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe

Appellants.

FINAL BRIEF OF APPELLANTS

Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
GIBBS & HOLMES
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033
ATTORNEYS FOR THE APPELLANTS

TABLE OF CONTENTS

Table of Authorities	i
Statement of Issues on Appeal	1
Statement of the Case	1
Standard of Review	3
Statement of Facts	4
Argument	
A. THE TRIAL COURT ERRED IN FINDING THE RESTRICTIVE COVENANT OVERBROAD AND UNENFORCEABLE.....	11
1. The restrictive covenant is valid and enforceable.....	13
a. The restrictive covenant is necessary for the protection of the legitimate interests of the Practice.....	15
b. The restrictive covenant is not unduly harsh and oppressive in curtailing the legitimate efforts of Respondent to earn a livelihood.....	20
Conclusion.....	26

TABLE OF AUTHORITIES

CASES

<i>Baugh v. Columbia Heart Clinic, P.A.</i> , 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013).....	passim
<i>Brockbank v. Best Capital Corp.</i> , 341 S.C. 372, 534 S.E.2d 688 (2000)	4
<i>E. Bus. Forms, Inc. v. Kistler</i> , 258 S.C. 429, 189 S.E.2d 22 (1972).....	14, 24
<i>Faces Boutique v. Gibbs</i> , 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995)	passim
<i>Fay v. Total Quality Logistics, LLC</i> , 419 S.C. 622, 799 S.E.2d 318 (Ct. App. 2017).....	3, 14
<i>Ferguson v. Charleston Lincoln Mercury, Inc.</i> , 349 S.C. 558, 564 S.E.2d 94 (2002)	4, 26
<i>Goldston v. State Farm Mut. Auto. Ins. Co.</i> , 358 S.C. 157, 594 S.E.2d 511 (Ct. App. 2004).....	3
<i>Hagemeyer N. Am., Inc. v. Thompson</i> , 2006 U.S. Dist. LEXIS 19468 (D.S.C. March 1, 2006). 14,	
25	
<i>Hancock v. Mid-South Mgmt. Co., Inc.</i> , 381 S.C. 326, 673 S.E.2d 801 (2009)	4
<i>Herring v. Lapolla Indus.</i> , 2013 U.S. Dist. LEXIS 195826 (D.S.C. Nov. 26, 2013)	15, 24
<i>Intermountain Eye & Laser Ctrs., P.L.L.C. v. Miller</i> , 127 P.3d 121 (2005)	15
<i>Lanham v. Blue Cross and Blue Shield of S.C., Inc.</i> , 349 S.C. 356, 536 S.E.2d 331 (2002).....	3
<i>McLaughlin v. Williams</i> , 379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008)	4
<i>Miller v. Blumenthal Mills, Inc.</i> , 365 S.C. 204, 616 S.E.2d 722 (Ct. App. 2005)	4
<i>Milliken & Co. v. Morin</i> , 399 S.C. 23, 731 S.E.2d 288 (2012)	3
<i>Nationwide Ins. Co. of Am. v. Knight</i> , 428 S.C. 451, 835 S.E.2d 538 (Ct. App. 2019).....	3
<i>Owens v. Crabtree</i> , 425 S.C. 513, 823 S.E.2d 224 (Ct. App. 2019).....	3
<i>Palmetto Mortuary Transp., Inc. v. Knight Sys.</i> , 424 S.C. 444, 818 S.E.2d 724 (2018)	15
<i>Pearl Ins. Grp., LLC v. Baker</i> , 2018 U.S. Dist. LEXIS 146849 (D.S.C. Aug. 29, 2018)	24
<i>Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.</i> , 387 S.C. 583, 694 S.E.2d 15 (2010) .	14

<i>Preferred Research, Inc. v. Reeve</i> , 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987).....	18
<i>Rental Uniform Serv. v. Dudley</i> , 278 S.C. 674, 301 S.E.2d 142 (1983).....	13, 15
<i>Schulmeyer v. State Farm Fire & Cas. Co.</i> , 353 S.C. 491, 579 S.E.2d 132 (2003).....	15
<i>Sermons v. Caine & Estes Ins. Agency, Inc.</i> , 275 S.C. 506, 273 S.E.2d 338 (1980).....	13
<i>Smalls v. State</i> , 422 S.C. 174, 810 S.E.2d 836 (2018).....	3
<i>Stonhard, Inc. v. Carolina Flooring Specialists, Inc.</i> , 366 S.C. 156, 621 S.E.2d 352 (2005).....	23
<i>Stringer v. Herron</i> , 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992).....	14
<i>Team IA, Inc. v. Lucas</i> , 395 S.C. 237, 717 S.E.2d 103 (Ct. App. 2011).....	14
<i>Town of Summerville v. City of N. Charleston</i> , 378 S.C. 107, 662 S.E.2d 40 (2008)	3
<i>Turner v. Milliman</i> , 392 S.C. 116, 708 S.E.2d 766 (2011).....	3
<i>Vessel Med., Inc. v. Elliott</i> , 2015 U.S. Dist. LEXIS 122436 (D.S.C. Sept. 15, 2015).....	24
<i>Wolf v. Colonial Life & Accident Ins. Co.</i> , 309 S.C. 100, 420 S.E.2d 217 (Ct. App. 1992)	13

STATUTES

S.C. Code Ann. § 15-53-110 (1976)	3

RULES

Rule 56(c), SCRCP	3

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in finding that the restrictive covenant contained in the parties' employment agreement was unenforceable as it was not necessary for the protection of the legitimate interest of the employer and was unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood?

STATEMENT OF THE CASE

The Respondent, Dr. Gregory A. May, commenced this civil action against the Appellants, Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe, on March 20, 2019 by filing his Summons and Complaint in the Florence County Court of Common Pleas. (*See* Complaint filed March 20, 2019) (R. pp. 16-27). Respondent's Complaint alleged causes of action for: 1). breach of contract; 2). tortious interference with contract; 3). promissory estoppel; and 4). a declaratory judgment pursuant to S.C. Code Ann. § 15-53-10 *et seq.* (*See generally id.*). Respondent's claim for a declaratory judgment sought an order declaring, in part, that the restrictive covenant contained in the employment agreement between the parties is an unenforceable contract at law. (Complaint p. 11) (R. p. 26). Appellants filed their Answer to the Complaint of Respondent on April 23, 2019, denying many of the allegations made by Respondent and positing numerous defenses, as well as asserting a counterclaim for breach of contract. (Answer pp. 9-11) (R. pp. 42-44).

After the parties conducted expedited discovery as ordered by the trial court, Respondent filed his Motion for Summary Judgment on September 16, 2019. (*See* Resp't Mot. Summ. J. p. 1) (R. p. 99). In this Motion, Respondent moved for summary judgment on his fourth cause of action for a declaratory judgment, seeking an order from the trial court declaring that the employment agreement between the parties, in particular those portions of the contract which seek to restrict the Respondent's ability to practice interventional cardiology within the restricted area, is

unenforceable. (*Id.*). The Respondent also moved the trial court for summary judgment in the alternative on the grounds that the Appellants breached the underlying employment agreement, rendering the restrictive covenant null and unenforceable. (*Id.*). On September 26, 2019, the Appellants filed an opposing Motion for Summary Judgment with the trial court. (Appellants' Mot. Summ. J. p. 1) (R. p. 122). In their Motion, Appellants sought a judgment from the trial court that the restrictive covenant contained in the employment agreement was enforceable against the Respondent and that Appellants had not waived the restrictive covenant or otherwise breached the employment agreement. (*See id.* p. 1, Appellants' Memo. in Supp. Mot. Summ. J. pp. 12-13) (R. p. 122, 135-36).

The trial court held a hearing and heard oral arguments on the parties' respective motions for summary judgment on October 2, 2019, with the Honorable Michael G. Nettles presiding. (Transcript of Oct. 2 Proceeding p.1 ("Transcript" hereinafter)) (R. pp. 58-92). After hearing oral arguments from parties' counsel and considering proposed orders submitted by both parties, the trial court on October 21, 2019 issued its order granting Respondent's Motion for Summary Judgment on the declaratory judgment cause of action and finding the restrictive covenant to be unenforceable. (Order p.5) (R. p. 8). The trial court in its order denied both the Respondent's and the Appellants' opposing summary judgment motions on the breach of contract issue, finding disputed issues of material fact existed for trial. (*Id.*). Appellants on October 30, 2019 filed a Motion for Reconsideration, requesting that the trial court reconsider its grant of summary judgment to the Respondent. (*See* Appellants' Mot. Recons. p.1, Appellants' Memo. in Supp. Mot. Recons. p. 8) (R. p. 190, 199). The trial court denied this motion on November 20, 2019. (R. pp. 10-12). It is the trial court's grant of partial summary judgment to the Respondent finding the

restrictive covenant to be unenforceable that is at issue in the current appeal. On December 19, 2019, Appellants served their Notice of Appeal.

STANDARD OF REVIEW

Declaratory judgment actions are neither legal nor equitable, therefore the standard of review “depends on the nature of the underlying issues.” *Nationwide Ins. Co. of Am. v. Knight*, 428 S.C. 451, 455, 835 S.E.2d 538, 540 (Ct. App. 2019) (citing *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 166, 594 S.E.2d 511, 516 (Ct. App. 2004)). Orders on declaratory judgments brought pursuant to S.C. Code Ann. § 15-53-10 *et seq.* “may be reviewed as other orders, judgments and decrees.” S.C. Code Ann. § 15-53-110 (1976). “Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court.” *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) (internal citation omitted). *See also Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 629, 799 S.E.2d 318, 322 (Ct. App. 2017). When a lower court grants summary judgment on a question of law, on appeal the ruling is reviewed *de novo*. *See Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). *See also Owens v. Crabtree*, 425 S.C. 513, 518, 823 S.E.2d 224, 227 (Ct. App. 2019). “[A]ppellate courts review questions of law *de novo*, with no deference to trial courts.” *Smalls v. State*, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 (2018).

“When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court.” *Town of Summerville*, 378 S.C. at 109 (citing *Lanham v. Blue Cross and Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 536 S.E.2d 331, 333 (2002)). “Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); *see also* Rule 56(c),

SCRCP. “To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party.” *McLaughlin v. Williams*, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008). *See also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) (“On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.”). To survive a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party must only submit a mere scintilla of evidence. *See Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case . . . the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (internal citation omitted). “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Similarly, “[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” *Id.*

STATEMENT OF FACTS

Advanced Cardiology Consultants, P.C. (“ACC” or “the Practice”) is a private medical group practice located in Florence, South Carolina that specializes in diagnosing and treating cardiovascular diseases and provides comprehensive cardiology services. (*See Appellants’ Memo. in Supp. Mot. Summ. J.* p. 2; Answer p.2) (R. p. 125; R. p. 35). The Appellant Dr. Lew A. Rowe

is the President and sole shareholder of ACC and the Appellant Theresa Rowe is his spouse who is employed as ACC's Practice Administrator. (*See* Appellants' Memo. in Supp. Mot. Summ. J. p. 2; Transcript p. 3:10-14, 10:24-11:9) (R. p. 125; R. p. 60, lines 8-14, p. 67 lines 24-25, p. 68, lines 1-9). The Respondent, Dr. Gregory A. May is an interventional cardiologist¹ who was employed by ACC from May 1, 2007 until his resignation from the Practice effective on March 19, 2019. (*See id.* 4:7-10; Complaint p.6; Answer p. 2) (R. p. 61, lines 7-10; R. p. 21; R. p. 35). During the entirety of his employment by the Practice, Respondent operated under a series of physician employment agreements with ACC that were all substantially similar in their terms but varied in their duration. (Complaint pp. 1-2) (R. pp. 16-17). Respondent's most recent employment agreement with ACC was a one-year contract commencing from March 20, 2018 until March 31, 2019. (Employment Agreement, Exhibit A to Complaint) (R. pp. 29-33).

Contained in each of the employment agreements entered into by the Respondent was a restrictive covenant provision which, by its terms, would restrain Respondent from engaging in the practice of cardiology within a twenty-five mile radius of McLeod Regional Medical Center in Florence, South Carolina, for a period of two years after the termination of the agreement. (*Id.* pp. 3-4) (R. pp. 31-32). The restrictive covenant in its entirety provides:

9. **Restrictive Covenant; Liquidated Damages.** In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination. Physician also agrees that during

¹ Interventional cardiology is a "subspecialty of general cardiology focusing on certain invasive procedures such as the implantation of medical balloons and stents to unblock arteries. Usually interventional cardiology must be performed in a hospital with capability to perform open-heart surgery in case complications arise from interventional procedures." *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 8, 738 S.E.2d 480, 484 (Ct. App. 2013).

the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the forgoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

(*Id.*).

The dispute in this appeal centers around that portion of the "non-compete" restrictive covenant which states Respondent "will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination." (*Id.*). The restrictive covenant provides that liquidated damages in the amount of \$500,000 shall be awarded to the Practice in the event that Respondent breaches this covenant. (*Id.*). Also contained in the agreement was an acknowledgement by the contracting parties that the restrictive covenant and liquidated damages provision "represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon." (*Id.*).

The Practice has used the same basic employment agreement containing this restrictive covenant for all of its employed physicians over the years. (Deposition of Dr. Lew A. Rowe p. 20:1-4, Exhibit A to Appellants' Memo. in Supp. Mot. Summ. J., "Rowe Depo.") (R. p. 152, lines 1-4). Under this employment agreement, Respondent's compensation was set as 50% of his collections generated the preceding month, not as a guaranteed annual or monthly income. (Employment Agreement p. 1) (R. p. 29).

Since the founding of the Practice in 1994, the physicians at ACC have maintained their own individual privileges to practice cardiology at various regional hospitals, located both inside and out of Florence, South Carolina. Those hospitals included McLeod Regional Medical Center ("McLeod Hospital"), Hartsville, Williamsburg Regional Hospital, Lake City Community Hospital, and Carolinas Hospital. (See Rowe Depo., p. 16:24-17:16, 26:19-27:5, 41:21-25) (R. p. 151, lines 24-16, p. 153, lines 19-5, p. 154, lines 21-25). The hospital privileges maintained by each of ACC's physicians that allow the physician to provide call coverage to that hospital are maintained between each individual physician and the respective hospital, not between the Practice and the hospital. The Practice does not "drop privileges" to a hospital on behalf of a physician. (See Deposition of Theresa Rowe p. 11:23, Exhibit B to Appellants' Memo. in Supp. Mot. Summ. J.) (R. p. 170, line 23). During the time that Respondent was employed by ACC, he and the other physicians at the Practice maintained privileges at two hospitals in Florence, South Carolina, McLeod Hospital and Carolinas Hospital.² (Transcript p. 4:7-24) (R. p.61, lines 7-24).

Both of these Florence-area hospitals have facilities, including a cardiac catheterization lab ("cath lab,") that Respondent has contended are necessary for the practice of his specialty,

² Carolinas Hospital has since been purchased by the Medical University of South Carolina ("MUSC") and is now MUSC Health Florence Medical Center. (See Transcript pp. 13:24 -14:4) (R. p. 70, line 24-p. 71, line 4).

interventional cardiology, and that he contends are not present in an office-based cardiology practice. (Plaintiff Depo., pp. 84:22-85:8, Exhibit C to Appellants' Mot. Summ. J.) (R. p. 184, lines 22-8). There are several hospitals that have cath lab facilities where Respondent could practice his specialty located outside of the twenty-five-mile radius of the restrictive covenant, including in the Grand Strand, Columbia, and Loris, South Carolina. (See Rowe Depo., 65:10-20; Deposition of Marie Saleeby, p. 6:9-16, Exhibit D to Appellants' Memo. in Supp. Mot. Summ. J.) (R. p. 158, lines 10-20; R. p. 187, lines 9-16).

The employment agreement at issue does not require the Practice to guarantee the maintenance of hospital privileges with any particular hospital facility, nor does it provide the Respondent with any sort of guarantee of specific call coverage terms with a hospital or access to a cath lab. The employment agreement does provides under Section 3(d)'s "Facilities and Services," that the Practice "shall provide such facilities, equipment and supplies as it deems necessary for physician's performance of his professional duties under this Agreement, including technical and stenographic help and other such facilities and services as are suitable to his position and necessary to the adequate performance of his duties." (Employment Agreement p.2) (R. p. 30). Respondent was employed by the Practice, according to the terms of the employment agreement, as a "Board Certified cardiologist," and the agreement did not guarantee Respondent employment as an "interventional cardiologist." (*Id.* at 1) (R. p. 29).

In September of 2018, Dr. Lew Rowe informed the employed physicians at ACC that he intended to resign his privileges at McLeod Hospital and Carolinas Hospital and wanted to shift the focus of his own practice to seeing patients in an office-based setting. (Rowe Depo. pp. 17:23-18:9, 43:22-44:4) (R. p. 151, lines 23-25, p. 152, lines 1-9, p. 155, lines 22-4). As there were five other practicing physicians who would still be providing call coverage at the two hospitals, the

impact on the other physicians' call coverage and schedules was expected to be minimal, and the Respondent himself testified that Dr. Rowe resigning his privileges was "probably not going to be a major deal." (*See id.* pp. 42:3-44:23; Deposition of Dr. Gregory A. May p. 30:23-24, Exhibit C to Appellants' Memo. in Supp. Mot. Summ. J., "Resp't Depo.") (R. p. 155, lines 2-23; R. p. 178, lines 23-24). Respondent apparently became concerned, however, that Dr. Rowe's decision to resign his privileges at the two Florence Hospitals would cause the other employed physicians to not sufficiently pull their weight with Dr. Rowe out of the call schedule and Respondent thereafter began seeking out alternate employment in Florence within the twenty-five mile radius of the restrictive covenant.³ (*See Id.* pp. 30:3-31:13; Complaint p. 3) (R. p. 178, lines 3-13; R. p. 18).

Respondent took steps to seek out employment as an interventional cardiologist at both local Florence hospitals, McLeod and Carolinas. (Complaint pp. 3-5; Transcript pp. 21:18-22:8) R. pp. 18-20; R. p. 78, lines 18-25, p. 79, lines 1-8). Respondent initially contacted McLeod Hospital in Florence regarding employment, although he was not formally offered a position at McLeod. (Transcript pp. 21:18-23; Complaint p. 3-5) (R. p. 78, lines 18-23; R. pp. 18-20). On or around December 26, 2018, the employed physicians at a staff meeting voted amongst themselves to resign their privileges at Carolinas Hospital, but to keep privileges at McLeod. (Rowe Depo. pp. 46:3-48:24; Complaint p. 4) (R. p. 156, lines 3-24; R. p. 19). While the remaining physicians voted unanimously to drop their privileges at Carolinas Hospital, both Dr. Rowe and Dr. May ended up

³ Dr. Rowe testified that Respondent had continually expressed a desire to him to leave the Practice at various times over the years of his employment. (Rowe Depo. pp. 68:10-69:9) (R. p. 159, lines 10-9). The parties dispute whether the Practice waived the right to enforce the restrictive covenant through a series of verbal representations Respondent alleges Dr. Rowe made to Respondent about not enforcing the non-compete. The parties similarly dispute whether the Appellants otherwise breached Section 3(d), the "Facilities and Services" provision of the employment agreement, by relinquishing privileges at Carolinas Hospital and cutting the revenue stream of the Practice. (*See Resp't Memo. in Supp. Mot. Summ. J.* p. 13-15) (R. pp. 113-15). Neither of these disputes are at issue in the current appeal, however, as the trial court denied the parties' opposing motions for summary judgment on the waiver and breach of contract issues. (Order p. 5) (R. p. 8).

abstaining from the final vote, although Respondent argued for maintaining privileges at Carolinas. (Rowe Depo. pp. 46:3-48:24; Complaint p. 4) (R. p. 156, lines 3-24; R. p. 19).

The other physicians' decision to drop privileges at Carolinas also caused the Respondent to drop his privileges at that hospital because the Practice would have been unable to obtain malpractice coverage for Respondent alone providing call coverage to Carolinas Hospital. (*See* Complaint p. 4; Transcript pp. 12:20-13:3) (R. p. 19; R. p. 69, line 20-p. 70, line 3). Respondent's privileges at McLeod Hospital were not affected by this vote and Respondent continued to provide call coverage to McLeod and continued to actively practice interventional cardiology until the end of his employment on March 19, 2019. (*See* Transcript p. 13:4-7; Complaint p. 6) (R. p. 70, lines 4-7; R. p. 21). Respondent was not offered a position with McLeod Hospital. Dr. May ultimately sought a job opportunity with Carolinas Hospital while still employed by the Practice, contacting the recruiter at Carolinas, who reached out to Theresa Rowe to inquire about the possibility of Carolinas Hospital employing Dr. May. (*See* Depo. of Theresa Rowe pp. 32:1-35:14; Complaint p.5) (R. p. 172, line 1-p. 173, line 14; R. p. 20). Carolinas Hospital offered Dr. May a position practicing interventional cardiology conditioned on Dr. May obtaining a written promise not to enforce the restrictive covenant from Dr. Rowe. (Complaint p. 5) (R. p. 20). Respondent alleged in his Complaint that Dr. Rowe had already made representations to him that Dr. Rowe would have Ms. Rowe prepare a written waiver of the non-compete to send to Carolinas. (*Id.*). Appellants dispute that Dr. Rowe ever made a representation to the Respondent that the restrictive covenant would not be enforced against him or would be waived in any way. (*See* Rowe Depo. pp. 99:16-100:14, 130:14-18) (R. p. 166, lines 16-14, p. 167, lines 14-18).

The Practice's remaining physicians resigned their privileges at McLeod Hospital effective April 1, 2019—after the term of Respondent's employment agreement had expired and

after Respondent's March 19, 2019 resignation from the Practice. (*See* Complaint p. 6) (R. p. 21). Respondent sought a waiver of the restrictive covenant from the Practice through a letter from his counsel on January 18, 2019 in exchange for \$10 in consideration and threatening litigation. (*See* Letter from Counsel pp. 1-3, Exhibit A to Answer) (R. pp. 47-49). The Practice declined to waive the non-compete in response to this letter and the Respondent thereafter filed suit on March 20, 2019, seeking, in part, a declaration that the restrictive covenant was unenforceable. (Complaint pp. 10-11) (R. pp. 25-26).

ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THE RESTRICTIVE COVENANT OVERBROAD AND UNENFORCEABLE.

The trial court, relying upon *Faces Boutique v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995), found the restrictive covenant at issue overbroad and unenforceable in granting Respondent summary judgment. (Order pp. 3-5) (R. pp. 6-8). In particular, the trial court found that the covenant not to compete could not be upheld as it was “unnecessary for the protection of the legitimate interest of the employer to prevent Dr. May from seeking any type of employment with the two hospitals,” and “[l]ikewise the restriction against competition is unduly harsh and oppressive in curtailing the legitimate interests of Dr. May to earn a livelihood.” (*Id.* p. 3) (R. p. 6). In particular, the trial court found that the covenant constituted a “blanket prohibition for the physician becoming ‘employed by or associated in (with) ... another business entity, engaged in the practice of cardiology,’” which was similar to the covenant that had been struck down in *Faces Boutique*.⁴ (*Id.*) The trial court found that the terms of the covenant would prohibit

⁴ The covenant in *Faces Boutique* prohibited the employee from being connected “in any manner” with “any business in direct competition with the type of business conducted by [Faces].” (*Id.*) (citing *Faces Boutique*, 318 S.C. at 39 – 41).

Respondent from being employed “in a myriad of jobs at either hospital [in Florence] which are wholly unconnected to the practice of cardiology,” since the hospitals themselves own cardiology groups that engage in the practice of cardiology. (*Id.* at 2-3) (R. pp. 5-6).

The Respondent himself throughout this litigation has never expressed any intention to perform any service at either Florence hospital that was unrelated to the practice of cardiology. His purpose in bringing this action against the Appellants was to free himself of the restrictive covenant so that he could immediately practice interventional cardiology, the service he provided for the practice while he was employed, within the covenant’s twenty-five mile radius as a physician employed by Carolinas Hospital. (*See generally* Complaint) (R. pp. 16-26). The Respondent and the Appellants understood the covenant to prohibit Dr. May from being employed *as a cardiologist*, not from being employed in a wholly unrelated field at an entity engaging in the practice of cardiology. (*See* Appellants’ Memo. in Supp. Mot. Summ. J. pp. 17-19) (R. pp. 140-42). It was the parties’ intent to restrain Respondent from engaging in the practice of cardiology only, as the plain language of the agreement and the Respondent’s own testimony shows. (Resp’t Depo. 22:11-24:14; Transcript pp. 28:24-30:5) (R. p. 177, lines 11-14; R. p. 85, line 24-p. 87, line 5). The Respondent’s interpretation of the covenant as an unenforceable restraint under *Faces Boutique* that the trial court adopted is one that counsel for Respondent at oral argument acknowledged was a “technical argument.” (Transcript p. 16:5-8) (R. p. 73, lines 5-8). Even so, this “technical argument” that renders the restrictive covenant unenforceable and contravenes the contracting parties’ intent is not supported by South Carolina law or the language of the covenant itself.

1. The Restrictive Covenant is Valid and Enforceable.

Sound public policy generally requires the enforcement of contracts freely entered into by the parties. *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217, 221 (Ct. App. 1992). “While recognizing the legitimate interest of a business in protecting its clientele and goodwill, we are equally concerned with the right of a person to use his talents to earn a living.” *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 509, 273 S.E.2d 338, 338 (1980). Restrictive covenants not to compete are therefore generally disfavored and will be strictly construed against the employer. *Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983).

In South Carolina, a restrictive covenant that arises out of an employment relationship between the contracting parties will be upheld if it:

- (1). is necessary for the protection of the legitimate interest of the employer;
- (2). is reasonably limited in its operation with respect to time and place;
- (3). is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (4). is reasonable from the standpoint of sound public policy; and
- (5). is supported by a valuable consideration.

Id. at 675-76. Only the first and third prongs of the test from *Dudley* are at issue in this current appeal, as the trial court found the covenant not to compete deficient in these two respects.⁵ (Order p. 3) (R. p. 6). “In South Carolina, ‘contracts against competition are held to be unenforceable

⁵ The Parties do not dispute whether the other requirements from *Dudley* are met. The Respondent did not move for summary judgment in the lower court on the issue of whether the covenant was reasonably limited in its operation with respect to time and place, supported by valuable consideration, or otherwise reasonable from the standpoint of sound public policy. (See Resp’t Memo. in Supp. Mot. Summ. J. p. 10) (R. p. 110).

unless they meet certain criteria . . . [because] they constitute a restraint upon trade[,] which is against public policy.” *Fay*, 419 S.C. at 630 (quoting *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 71, 119 S.E.2d 533, 542 (1961)). “Despite the general disposition against such agreements, South Carolina courts have upheld non-compete agreements if they comport with the above requirements.” *Hagemeyer N. Am., Inc. v. Thompson*, 2006 U.S. Dist. LEXIS 19468, at *11 (D.S.C. March 1, 2006).

“[C]ases concerned with the enforceability of covenants not to compete contained in employment contracts must be decided on their own facts.” *Stringer v. Herron*, 309 S.C. 529, 531, 424 S.E.2d 547, 548 (Ct. App. 1992) (internal citation omitted). The South Carolina Supreme Court has held that the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties’ agreement, but must stand or fall on their own terms. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 245-246, 717 S.E.2d 103, 107 (Ct. App. 2011) (citing *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010)). South Carolina courts may not “blue pencil” the restrictions contained in a non-competition provision “by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable.”⁶ *Id.* at 246.

Similarly, where an employer later expresses at trial an intention to enforce the covenant in a way that narrows the scope of the written agreement, the covenant cannot be upheld. *See Faces Boutique*, 318 S.C. at 43-44. However, “[c]onstruing the terms of a contract is not the same as

⁶ While courts in South Carolina generally have declined to “blue pencil” non-competition provisions, “South Carolina has not outright rejected the ‘blue pencil test.’” *Fournil v. Turbeville Ins. Agency, Inc.*, 2008 U.S. Dist. LEXIS 116469, at *16 (D.S.C. Dec. 29, 2008) (discussing South Carolina courts’ treatment of the “blue pencil test”). Where the restrictive covenant’s excessive restraint is severable in terms, it may be disregarded and the remaining part of the contract enforced, but an indivisible covenant may not be enforced even to a reasonable extent. *See id.* *See also Rockford Mfg. v. Bennet*, 296 F. Supp. 2d 681, 687 (D.S.C. 2003) (citing *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1972)).

changing the terms of a contract by reformation.” *Herring v. Lapolla Indus.*, 2013 U.S. Dist. LEXIS 195826, at *4 (D.S.C. Nov. 26, 2013) (applying South Carolina law to determine enforceability of non-compete agreement). “Blue penciling” does not refer to “a cannon of contract construction but a directive to . . . explicitly rewrite the terms of a contract.” *Id.* at *5. “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Palmetto Mortuary Transp., Inc. v. Knight Sys.*, 424 S.C. 444, 460, 818 S.E.2d 724, 733 (2018) (citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)).

The restrictive covenant at issue meets the requirements for enforceability as articulated in *Dudley* and the trial court erred in finding otherwise. It is both necessary for the protection of the legitimate interest of the employer and not unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood practicing cardiology.

A. The Restrictive Covenant is Necessary for the Protection of the Legitimate Interest of the Practice.

The noncompetition provision which restrains Respondent from being “employed by or associated (with) . . . another business entity[] engaged in the practice of cardiology,” or “otherwise engag[ing] directly or indirectly in the practice of cardiology” is necessary for the protection of the legitimate interests of the Practice and it is an interest that courts have repeatedly recognized. *See Baugh*, 402 S.C. at 16 (recognizing medical practice’s interests in upholding covenant against former physicians). *See also Intermountain Eye & Laser Ctrs., P.L.L.C. v. Miller*, 127 P.3d 121, 128 (2005) (discussing medical practice’s protectable interests in its proprietary information, its referral sources, and patient relationships “established and/or nurtured” by employed physician during his employment with the practice).

In *Baugh v. Columbia Heart Clinic, P.A.*, this Court upheld a restrictive covenant very similar to the one at issue here that purported to prevent physicians from engaging or “assisting any [p]erson to engage” in the practice of cardiology for a period of one year within a twenty-mile radius of the defendant’s offices. 402 S.C. 1, 15, 738 S.E.2d 480, 488 (Ct. App. 2013). The factual background and restrictive covenant at issue in *Baugh* are, in fact, strikingly similar to the instant case. In *Baugh*, the defendant Columbia Heart was a comprehensive cardiology practice similar in many ways to ACC. *Id.* at 1. The plaintiffs in *Baugh* were interventional cardiologists who departed the practice and sought to practice cardiology within the radius of a restrictive covenant, like the Respondent. *Id.* at 2-6. The cardiologists in *Baugh* were subject to the following restrictive covenant:

Physician, in the event of termination or expiration of this agreement for any reason, during the twelve (12) month period immediately following the date of termination or expiration of this Agreement, shall not Compete . . . with Columbia Heart . . .

“Compete” means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Columbia Heart and on behalf of Columbia Heart: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; and (C) assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory.

“Business” is defined as “the practice of medicine in the field of cardiology.”
“Territory” is defined as “the area within a twenty (20) mile radius of any Columbia Heart office at which Physician routinely provided services during the year prior to the date of termination or expiration of this Agreement.”

Id. at 4-5 (emphasis added). The lower court in *Baugh* found the activity restriction which prohibited the cardiologists from “assisting any person . . . to engage in the [practice of medicine in the field of cardiology]” was overbroad and unenforceable under *Faces Boutique Ltd. v. Gibbs*. *Id.* at 7-8. The trial court similarly found that this restriction was not necessary to protect a legitimate interest of Columbia Heart, as it “goes beyond restricting [Respondents] from doing

what they did for” Columbia Heart and would bar them from assisting any cardiology practice “in any capacity.” *Id.* at 8.

This Court disagreed with the lower court, finding the activity restriction to be reasonable and necessary to protect Columbia Heart’s legitimate interests. *Baugh*, 402 S.C. at 16-17. In recognizing the legitimate interest that Columbia Heart had in imposing this restriction, the court reasoned:

Here, the record evidences that Columbia Heart's patients, referral sources, and other goodwill would be at risk if Respondents were able to assist others to engage in the practice of cardiology. Patients stay with and follow their doctors, and general practitioners refer patients to cardiologists based upon both the reputation of the doctor and the doctor's practice, current and past. If the Agreements did not prohibit Respondents from assisting another person to engage in the practice of medicine in the field of cardiology, Respondents could treat Columbia Heart's patients and use Columbia Heart's referral sources and goodwill simply by staying one step from the medical services provided. Therefore, the restriction is necessary to protect a legitimate interest of Columbia Heart.

Id. at 16. The *Baugh* court found that “the covenant’s prohibition against assisting the practice of medicine in the field of cardiology is necessary to prevent Respondents from indirectly engaging in activities they clearly could not participate in directly.” *Id.* The practice employer retained these legitimate interests, even though the practice’s office location at issue in Lexington, South Carolina had closed just months after the plaintiff cardiologists had left the practice. *See id.* at 5-6. In coming to this conclusion, the *Baugh* court noted that the restrictive covenant, like the one between Dr. May and the Practice, does not contain the “any capacity restrictions” prohibiting the physician from being associated “*in any capacity*” that the court in *Faces Boutique* had found was overbroad. *Id.* at 19-20.

Stretched to its broadest possible meaning, the restraint found enforceable in *Baugh* against “indirectly . . . assisting” another person as an agent or employee “to engage in the practice of . . . cardiology” could conceivably prohibit a wide range of activities that take place in a medical

practice or in hospital facilities that the interventional cardiologists in *Baugh* did not perform. With this interpretation, an office administrator who assists the physician with billing, scheduling, compensation, and secures the facilities for a medical practice “indirectly assists” in the practice of cardiology. Similarly, a cardiac nurse who assists the physician during a diagnostic procedure could be deemed to “indirectly assist” the practice of cardiology. The *Baugh* court did not construe the restrictive covenant in the broadest possible sense in finding that the restraint against “assisting any Person . . . to engage in [the practice of medicine in the field of cardiology]” was not as broad as the “in any capacity” prohibitions found overbroad by South Carolina courts. *Id.* (citing *Faces Boutique*, 318 S.C. at 41; *Preferred Research, Inc. v. Reeve*, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987)). “Although Respondents do not contest that they breached the restrictions here, whether a shareholder-physician has actually assisted someone to engage in the practice of medicine in the field of cardiology could be a question of fact in other cases.” *Baugh*, 402 S.C. at 19-20.

The restrictive covenant at issue here which restrains Respondent from being “employed by or associated (with) another business entity[] engaged in the practice of cardiology,” or “otherwise engag[ing] directly or indirectly in the practice of cardiology” is necessary to protect the Practice’s legitimate business interests. The restraint is necessary to protect “the goodwill in the Florence medical community that [ACC] has spent building up since 1994, as well as protecting its patient base from being unfairly encroached upon by a former physician practicing his same specialty in the same geographic area almost immediately after his employment with the Practice ended.” (See Appellants’ Memo. in Supp. Mot. Summ. J. p. 14) (R. p. 137). Dr. Rowe has testified that the Plaintiff’s practice of cardiology in Florence at Carolinas Hospital would have the

enormously negative impact of “cannibalizing” the Practice’s business. (Rowe Depo. p. 79:6-25)

(R. p. 162, lines 6-25). Dr. Rowe further testified:

81

16 Q. Do you think Dr. May working at
17 Carolinas Hospital right now would have an adverse
18 impact on Advanced Cardiology since the practice
19 doesn't intend to do any work there?

20 A. It would.

21 Q. How is that? How so?

22 A. Because he would be working at, say,
23 Carolinas, and he would be doing cardiology. Now,
24 a very small part of our daily work is actually
25 doing interventional cardiology. The vast majority

82

1 in this area, and this is not everywhere but it's
2 in this area, it's seeing patients, interpreting
3 stress tests, echoes, that sort of thing that don't
4 involve interventional cardiology whatsoever. So
5 it would have a huge impact on us.

6 Q. So you're thinking that the patients
7 that he currently sees would see him at Carolinas
8 rather than come to your office?

9 A. It's possible that some might.

10 Q. So that's your fear?

11 A. I wouldn't say it's a fear. I think
12 it's a pretty good estimate of what would happen.

(*Id.* at 81:16-82:12) (R. p. 162, lines 16-12).

Like the restrictive covenant in *Baugh* that prevented the physician from “assisting any Person . . . to engage in . . . the practice of . . . cardiology,” the language here against Respondent being “employed by” another entity “engaged in the practice of cardiology . . . *nor will he otherwise engage directly or indirectly in the practice of cardiology*” prevents Respondent “from indirectly engaging in activities [he] clearly could not participate in directly.” *See Baugh*, 402 S.C. at 16. Like the departing cardiologists in *Baugh*, Respondent does not dispute his practice of cardiology within the geographical limit of the covenant would violate the agreement. This Court in *Baugh* made clear that a medical practice has a legitimate, protectible interest in restraining a

formerly employed physician from continuing to practice his medical specialty within the geographic bounds of a noncompetition agreement. The restrictive covenant is necessary to prevent Respondent from continuing to practice cardiology in Florence, South Carolina and therefore should be deemed enforceable by the Court.

B. The Covenant is not Unduly harsh and Oppressive in Curtailing the Legitimate Efforts of Respondent to Earn a Livelihood.

The trial court also erred in its finding that the restrictive covenant was “unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood.” (Order p. 3) (R. p. 6). In coming to this conclusion, the trial court relied on *Faces Boutique v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995). In *Faces Boutique*, a facial spa brought suit to enjoin the defendant from being employed at a competing business. *Id.* at 41. The noncompetition agreement in *Faces Boutique* provided:

For a period of three (3) years after the termination of this agreement, the Employee will not, WITHIN THE TOWN OF HILTON HEAD ISLAND, SC, directly or indirectly, own, manage, operate, control, be employed by, participate in, *or be connected in any manner* with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces].

Id. (emphasis added). The defendant was employed by Faces Boutique as an esthetician. *Id.* The defendant in *Faces Boutique* had demonstrated legitimate efforts to earn a livelihood providing services not related to her former job as an aesthetician with Faces Boutique. After she left employment at the facial spa, the defendant went to work in a different profession as a manicurist⁷ in a Hilton Head beauty salon. *Id.* Faces Boutique brought suit seeking to enjoin the former

⁷ An esthetician is a licensed skin care professional, while a manicurist is licensed to practice manicuring or pedicuring the nails or similar work. *See id.* at 41 n. 1-2.

employee from providing services as a manicurist, because the defendant's new employer derived part of its revenue from performing facials. *Id.*

The court in *Faces Boutique* held the covenant restricted the defendant's employment opportunities beyond what was necessary for the protection of the spa's legitimate business interests and was unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood. *Id.* at 43-44. The court relied on the fact that the owner of Faces Boutique admitted at trial that the covenant prohibited the defendant from being employed "at any place of business engaged in the selling of cosmetics or giving facials, even if [the defendant] herself did not participate in these activities" and "even though, in such a situation, [Faces'] business would not be threatened." *Id.* The trial court erred in finding *Baugh* distinguishable but *Faces Boutique* controlling in granting summary judgment to the Respondent. (Order p. 3-5) (R. pp. 6-8).

An evaluation of both the language and the circumstances dictates a conclusion that *Baugh*, not *Faces* is controlling and the covenant should be upheld on these grounds. There are several factors which distinguish this case from *Faces Boutique*. The most important distinction between the two restrictive covenants is that the restrictive covenant here does not contain the "in any capacity/manner" language that is present in the covenant in *Faces Boutique*. See *Faces Boutique*, 318 S.C. at 41. The *Baugh* court upheld the agreement at issue there because the covenant did not contain the sweeping "in any capacity/manner" language that the courts in *Faces Boutique* and *Preferred Research* court found so objectionable. *Baugh*, 402 S.C. at 19-20. The restrictive covenant between the Practice and Respondent does not contain this language that would so clearly demonstrate an intent to prevent the Respondent from being employed or connected *in any manner* with an entity engaged in the practice of cardiology.

Additionally, unlike the Respondent, the defendant in *Faces Boutique* made legitimate efforts and sought employment in a different profession than she had provided for her previous employer. *See Faces Boutique*, 318 S.C. at 41. The trial court found the restrictive covenant to be “unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood” because it would restrain him from performing “a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology”--jobs which it is undisputed that the Respondent has no intention of seeking. (Order p. 3) (R. p. 6). The Respondent has made clear that he intends to practice interventional cardiology if he is not bound by this covenant. Respondent does not appear to contend that the covenant is unduly oppressive in curtailing his legitimate efforts to earn a livelihood as a cardiologist. Rather, the covenant threatens his efforts to earn a livelihood in a variety of unrelated and hypothetical professions that he has expressed no interest in pursuing and would not even perform if hired by one of the local hospitals. (*See* Resp’t Depo. pp. 23:14-17; Transcript pp. 13:11-16:8) (R. p. 177, lines 14-17; R. p. 70, line 11-p. 73, line 8). Respondent has not articulated interest in or expended *any* legitimate effort in earning a livelihood in one of these theoretical jobs “wholly unconnected to the practice of cardiology.” (Order p. 3) (R. p. 6). Respondent filed suit against these Appellants for the very purpose of freeing himself from the restrictive covenant that he agreed to so that he could practice the same medical specialty in Florence within the bounds of the covenant. (*See generally* Complaint) (R. pp. 16-27). A sense of reality must always influence the interpretation of contract language. Noncompetition agreements entered into with board certified cardiologists are created to restrain them from providing services related to their practice of cardiology—not services provided by employees holding positions board certified cardiologists would consider entirely unsuitable. Respondent acknowledged that

he would not be “seeking employment as a bottle washer or dishwasher” because he is a cardiologist. (Resp’t Depo. p. 23:14-16) (R. p. 177, lines 14-16).

The *Faces Boutique* court relied upon critical testimony from the employer’s owner regarding the construction of the restrictive covenant that is not present here from Dr. Rowe. The owner of Faces Boutique had conceded at trial that:

Gibbs would be in violation of the covenant not to compete if Gibbs became employed at any place of business engaged in the selling of cosmetics or giving facials, even if Gibbs herself did not participate in these activities. Owens also admitted the covenant would have this effect even though, in such a situation, her business would not be threatened. Thus, by Owens's own admission, the terms of the covenant restrict Gibbs's employment opportunities beyond what is necessary for the protection of [Faces] legitimate business interests.

Faces Boutique, 318 S.C. at 43. In fact, the defendant Gibbs was apparently performing work as a manicurist that was unrelated to her services as an esthetician when Faces Boutique brought suit against her. *See id.* at 41.

The agreement at issue here does not prohibit Respondent from being employed “in any capacity” for an entity practicing cardiology, nor was it intended by the parties to have that meaning. The inclusion of the phrase “nor will he otherwise engage directly or indirectly in the practice of cardiology” immediately following the prohibition against Respondent being “employed by or associated (with) ... another business entity[] engaged in the practice of cardiology” makes the parties’ intent clear in this respect. (Employment Agreement p. 3) (R. p. 31). The parties to the agreement clearly contemplated and intended to restrict Respondent’s future employment as a cardiologist *only* and not in some other, unrelated field. (*See* Resp’t Depo. pp. 22:11-24:14) (R. p. 177, lines 11-14). The trial court’s finding, insofar as it is inconsistent with this intent, fashions a new agreement between the parties that was never intended. *See Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 160, 621 S.E.2d 352, 354 (2005)

(declining to add geographical limitation to restrictive covenant because it would bind the parties to a “term that does not reflect the parties’ original intention.”). *See also E. Bus. Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (finding the court may not make a new agreement for the parties into which they did not voluntarily enter). The trial court erred in finding that construing the covenant consistent with the parties’ intent in this respect amounts to an impermissible re-writing or “blue penciling” of the agreement. (Order p. 4) (R. p. 7). “[C]onstruing the terms of a contract is not the same as changing the terms of a contract by reformation.” *Herring*, 2013 U.S. Dist. LEXIS 195826, at *4.

The restrictive covenant is not unduly oppressive in curtailing Respondent’s legitimate efforts to earn a livelihood as a practicing cardiologist. The effect of the restrictive covenant is to restrain Respondent from actively practicing cardiology at either of the two local Florence hospitals that he maintained privileges with while he was employed by the Practice in Florence so that the Practice may protect its patient and referral base and goodwill in the community that it has been developing since 1994. (*See Employment Agreement* pp. 3-4) (R. pp. 31-32). Respondent may practice cardiology anywhere outside of the twenty-five mile radius of the covenant and the fact that he is restrained from practicing cardiology within this very limited geographical area is not itself overly burdensome or oppressive.

The Respondent still has “ample opportunity to work within his industry,” and has not alleged or shown that he would have difficulty finding employment practicing interventional cardiology outside of the twenty-five-mile radius surrounding McLeod hospital. *See Vessel Med., Inc. v. Elliott*, 2015 U.S. Dist. LEXIS 122436 at *17 (D.S.C. Sept. 15, 2015) (applying South Carolina law to uphold eighteen month and twenty-mile non-solicitation restriction). *See also Pearl Ins. Grp., LLC v. Baker*, 2018 U.S. Dist. LEXIS 146849 at *13 (D.S.C. Aug. 29, 2018)

(applying South Carolina law to uphold two-year non-solicitation provision). Respondent is not even necessarily shut out of practicing his specialty within the state itself if he were to abide by the restrictive covenant. Hospitals with the cath lab facilities Plaintiff contends he needs to practice interventional cardiology are located in the Grand Strand, Columbia, and Loris, South Carolina. (Rowe Depo., 65:10-20; Saleeby Depo. p. 6:9-16) (R. p. 158, lines 10-20; R. p. 187, lines 9-16). The restriction at issue does not prevent Respondent from practicing in his field “far beyond the technical terms of the provision.” *Baugh*, 402 S.C. at 25. The Respondent can continue to work in his field of interventional cardiology—just not inside the twenty-five mile radius. The fact that Respondent is restrained from practicing cardiology within Florence does not render the restrictive covenant unduly harsh or oppressive. *See id.* Moreover, the fact that the parties’ employment agreement contains a provision explicitly ratifying that the terms of the restrictive covenant are “fair and reasonable”⁸ to the contracting parties is another practical consideration that weighs against the covenant being found unduly harsh or oppressive to the Respondent. *See Thompson*, 2006 U.S. Dist. LEXIS 19468 at *11 (noting the fact that defendant signed the noncompete which explicitly described its restrictions as reasonable weighed in favor of finding noncompete enforceable).

In finding that the covenant would prohibit the Respondent from being employed or associated in any manner with an entity engaged in the practice of cardiology, the trial court construed the language of the agreement to its broadest possible sense and far beyond what the

⁸ The restrictive covenant contains the following language:

Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

(Employment Agreement p. 4) (R. p. 32) (emphasis added).

parties intended. Just as the court in *Baugh* did not construe the restrictive covenant at issue in that case so broadly past its plain meaning, so should the Court decline to do so here. All the inferences and conclusions arising from the evidence submitted about the alleged burden placed upon the Respondent's efforts to earn a livelihood must be viewed by this Court in a light most favorable to the Appellants, the non-moving party in the trial court. *See Ferguson*, 349 S.C. at 563. When the this evidence is considered in the light most favorable to the Appellants, it is clear that the restrictive covenant is necessary for the protection of the legitimate interest of the Practice and is not unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood practicing cardiology. For these reasons, the Court should reverse the trial court's finding granting summary judgment to the Respondent.

CONCLUSION

For the reasons set forth above, the trial court's ruling that the restrictive covenant is unenforceable and grant of summary judgment to the Respondent on these grounds should be reversed.

By: _____



Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
GIBBS & HOLMES
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033

ATTORNEYS FOR THE APPELLANTS

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Number 2019-CP-21-00777

Dr. Gregory A. May,

Respondent,

v.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe

Appellants.

CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellants certifies that this **Final Brief of Appellants** complies with Rule 211(b), SCACR.

By: 

Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
GIBBS & HOLMES
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033

ATTORNEYS FOR THE APPELLANTS

Dated: August 24, 2020

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Number 2019-CP-21-00777

Dr. Gregory A. May,

Respondent,

v.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe

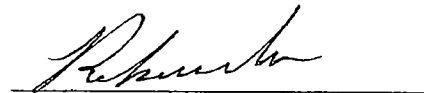
Appellants.

PROOF OF SERVICE

This is to certify that a copy of the foregoing FINAL BRIEF OF APPELLANTS has been served upon the following counsel of record by placing a copy of the same via US Mail to the following address as shown below this 27th day of August 2020.

Mark W. Buyck, III, Esq.
WILLCOX, BUYCK, & WILLIAMS, PA
248 West Evans Street
Florence, SC 29501

ATTORNEY FOR RESPONDENT



Rebecca J. Wolfe

Mark W. Buyck, Jr.
Hugh L. Willcox, Jr.
Wm. Reynolds Williams♦
Mark W. Buyck, III
E. Lloyd Willcox, II
Tracy L. Wright
J. Scott Kozacki
Walker H. Willcox
Paula A. Sartor
Katherine M. Ryan † AL

LAW OFFICES
WILLCOX, BUYCK, & WILLIAMS
PROFESSIONAL ASSOCIATION
WWW.WILLCOXLAW.COM
248 WEST EVANS STREET (29501)
POST OFFICE BOX 1909
FLORENCE, SOUTH CAROLINA 29503-1909

2050 Corporate Center Dr
Suite 230
Myrtle Beach, SC 29577
Telephone (843) 650-6777
Fax (843) 650-6767

† Additionally Licensed
♦ Certified Mediator

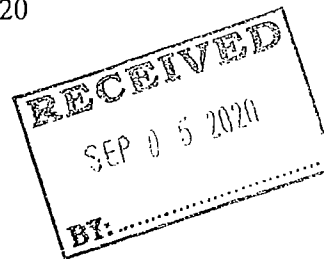
ESTABLISHED 1895

Reply To: Florence

Telephone (843) 662-3258
Fax (843) 662-1342

August 27, 2020

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201



RE: Dr. Gregory A. May v. Advanced Cardiology, et al
Appellate Case No.: **2019-002114**
Our File No.: 16325.17418.

Dear Ms. Kitchings:

Enclosed please find the following documents in connection with the above-referenced matter for filing:

1. The original unbound and one bound copy of the Final Brief of Respondent;
2. The original and one copy of a Rule 211(b) Certificate of Compliance for the Final Brief of Respondent; and
3. The original and one copy of the Proof of Service of the Final Brief of Respondent.

Please file the original of these documents and return a stamped clocked copy of each to us in the self-addressed stamped envelope provided for your convenience.

August 27, 2020
Page 2

By copy of this letter, we are serving a copy of the above-stated pleadings on Allan R. Holmes and Rebecca J. Wolfe, attorneys for Appellants.

Yours very truly,



Mark W. Buyck, III
Email: mb3@willcoxlaw.com

MWB, III/tpb
Enclosures

Cc: ✓ Allan R. Holmes, Esquire (w/enclosures)
Rebecca J. Wolfe, Esquire (w/enclosures)
Dr. Gregory A. May (w/enclosures)

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HURLOCK COUNTY

Circuit Court of Appeals

Walter C. Hester, Grand Juror

Case No. 10-07-00077

Appellate Case No. 10-07-00077

D. Gladys A. Myn

Respondent

Attorney at Law, Consultants, P.A., Dr. Lew A. Rowe

And Thomas Rowe

Appellant

ORIGINAL PETITION OF RESPONDENT

WILLCOX, HUYCK & WILLIAMS, P.A.

Mark W. Huyck III

Post Office Box 1909

Florence, South Carolina 29506

803-662-3753

MH372@willcoxdaw.com

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	1
Standard of Review	3
Facts	3
Arguments	
I. THE TRIAL COURT PROPERLY FOUND THE RESTRICTIVE COVENANT OVERLY BROAD AND UNENFORCEABLE	8
A. The restrictive covenant is a restraint of trade and contrary to public policy	8
B. The restrictive covenant is unenforceable and cannot be rewritten by the courts	10
Conclusion	14

TABLE OF AUTHORITIES

CASES

<i>Almers v. South Carolina Nat'l Bank</i> , 265 S.C. 48 217 S.E.2d 135 (1975)	9
<i>Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.</i> , 410 F. Supp. 967 (D.S.C. 1976); 1976 U.S. Dist. LEXIS 16645	8
<i>Baugh v. Columbia Heart Clinic, P.A.</i> , 402 S.C. 1, 15, 738 S.E.2d 480, 488 (Ct. App. 2013)) .	10
<i>Eastern Business Forms, Inc. v. Kistler</i> , 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972).....	10, 11
<i>Faces Boutique Ltd. v. Gibbs</i> , 318 S.C. 39, 455 S.E.2d 707 (S. C. App, 1995).....	passim
<i>Rental Uniform Serv. v. Dudley</i> , 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983))	8, 11
<i>Sermons v. Caine & Estes Ins. Agency, Inc.</i> , 275 S.C. 506, 509, 273 S.E.2d 338 (1980).....	8
<i>Somerset v. Reyner</i> , 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958)	10, 11, 13
<i>Stringer v. Herron</i> , 309 S.C. 529, 424 S.E.2d 547 (S.C. App. 1992).....	8

STATUTES

S.C. Code Ann. § 15-53-10, et seq. (1976).....	1

STATEMENT OF ISSUES ON APPEAL

1. **DID THE TRIAL COURT PROPERLY FIND THE RESTRICTIVE COVENANT OVERLY BROAD AND UNENFORCEABLE?**

STATEMENT OF THE CASE

The Respondent, Dr. Gregory A. May, commenced this civil action against the Appellants, Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe, on March 20, 2019 by filing his Verified Summons and Complaint in the Florence County Court of Common Pleas. R. pp. 15-33. Respondent's Complaint alleged causes of action for: 1). breach of contract; 2). tortious interference with contract; 3). promissory estoppel; and 4). a declaratory judgment pursuant to S.C. Code Ann. § 15-53-10 *et seq.* (*See generally id.*). Respondent's claim for a declaratory judgment sought an order declaring, in part, that the restrictive covenant contained in the employment agreement between the parties is an unenforceable contract at law. R. p. 26. Appellants filed their Answer to the Complaint of Respondent on April 23, 2019, denying many of the allegations made by Respondent and positing numerous defenses, as well as asserting a counterclaim for breach of contract. R. pp. 42-45.

The Respondent filed a Motion for Restraining Order and Injunction on April 18, 2019 asking the court to issue an injunction to prevent the Appellants from interfering with his practicing medicine in the Florence area. R. pp. 93-98. After a hearing on the motion on June 10, 2019, the lower court denied the Respondent's Motion for Temporary Injunction and entered an Order that the parties conduct expedited discovery. R. pp. 1-3.

After the parties conducted expedited discovery as ordered by the trial court, Respondent filed his Motion for Summary Judgment on September 16, 2019. R. pp. 99-121. In this Motion, Respondent moved for summary judgment on his fourth cause of action for a declaratory judgment, seeking an order from the trial court declaring that the employment agreement between the parties, in particular those portions of the contract which seek to restrict the Respondent's ability to practice interventional cardiology within the restricted area, is unenforceable. (*Id.*). The Respondent also moved the trial court for summary judgment on the alternative that the Appellants breached the underlying employment agreement, rendering the restrictive covenant null and unenforceable. (*Id.*). On September 26, 2019, the Appellants filed an opposing Motion for Summary Judgment with the trial court. R. p. 122. In their Motion, Appellants sought a judgment from the trial court that the restrictive covenant contained in the employment agreement was enforceable against the Respondent and that Appellants had not waived the restrictive covenant or otherwise breached the employment agreement. R. p. 122; pp. 135-136.

The trial court held a hearing and heard oral arguments on the parties' respective motions for summary judgment on October 2, 2019, with the Honorable Michael G. Nettles presiding. R. pp. 58-91. After hearing oral arguments from parties' counsel and considering proposed orders submitted by both parties, the trial court on October 21, 2019 issued its order granting Respondent's Motion for Summary Judgment on the declaratory judgment cause of action and finding the restrictive covenant to be unenforceable. R. pp. 4-8. The trial court in its order denied both the Respondent's and the Appellants' opposing summary judgment motions on the

breach of contract issue, finding disputed issues of materials fact existed for trial. (*Id.*). Appellants on October 30, 2019, filed a Motion for Reconsideration, requesting that the trial court reconsider its grant of summary judgment to the Respondent. R. p. 190; R. p. 199. The trial court denied this motion on November 20, 2019.. R. pp. 10-12. It is the trial court's grant of partial summary judgment to the Respondent finding the restrictive covenant to be unenforceable that is at issue in the current appeal. On December 19, 2019, Appellants served their Notice of Appeal.

STANDARD OF REVIEW

The Respondent is satisfied with the Standard of Review as presented by the Appellants.

FACTS

Dr. May is an interventional cardiologist and has been engaged in the private practice of cardiology since 1992. He relocated to Florence from the Orlando area in April 2008 after accepting a position with Advanced Cardiology Consultants, P.C. ("ACC" or "Practice" hereinafter). R. pp. 200-203.

The Defendant Dr. Lew Rowe moved to Florence in 1994 after completing his cardiology training program. Dr. Rowe founded Advanced Cardiology Consultants, P.C. in March 1994 and has been the Practice President and the sole owner/operator since that time. R. p. 207, line 11 - p. 209, line 13; R. p. 151 (Page 14, lines 8-18). The Defendant Theresa Rowe has worked as the Practice's office manager since its founding. She and Dr. Rowe married in October 2007. R. p. 210, lines 17-22. Beginning at its founding in 1994, Advanced Cardiology Consultant's physicians have maintained privileges at each of Florence's primary care hospitals. From Dr.

May's hiring in 2008 until 2018/2019, Dr. Rowe and each member of the Practice provided call and maintained privileges at both McLeod and Carolinas Hospital System until relinquishing their privileges in 2019. R. p. 151 (Page 17); R. p. 154 (Page 40, line 24-Page 41, line 12); R. p. 156 (Page 46, line 3-Page 47, line 20).

The Practice has utilized essentially the same employment agreement for all its employed physicians since its founding in 1994. R. p. 152 (Page 20, lines 1-8). Under this employment agreement, Respondent's compensation was set at fifty percent (50%) of his collections generated the preceding month. The physicians were not provided a guaranteed income. R. p. 29. Since the founding of the Practice in 1994, the physicians at Advanced Cardiology Consultants, P.C. have maintained their own privileges to practice cardiology at various hospitals in the Pee Dee region including McLeod Regional Medical Center, Carolina Pines Regional Medical Center, Williamsburg Regional Hospital, Lake City Community Hospital, and Carolinas Hospital which is now MUSC Health Florence Medical Center. R. p. 151 (Page 16, line 24-Page 17, line 16); R. p. 153 (Page 26, line 19-Page 27, line 7); R. p. 154 (Page 41, lines 21-25). While the privileges are personal between the hospital and the physicians, given the nature of the practice of cardiology it is not possible for a single physician to provide call coverage to an entire hospital. R. p. 19 (Paragraph 29). In fact, in December 2018, after Dr. Rowe and the other employed physicians of the Practice determined to relinquish their privileges at Carolinas Hospital, Dr. May explored the possibility of single coverage with Mrs. Rowe. She informed him that the Practice would not be able to obtain medical malpractice coverage for such an

arrangement. R. p. 215, lines 4-22. The fact that the Practice could not obtain malpractice coverage for Dr. May foreclosed any opportunity for him to practice his specialty at the hospital.

In the Fall of 2018, Dr. Rowe informed the employed physicians of the Practice that he was removing himself from the call rotation and would no longer see patients at any of the hospitals. It was his desire to become an office-based practitioner. R. p. 205, line 17-p. 206, line 23; R. pp. 151-152 (Page 17, line 12-Page 18, line 5).

Dr. Rowe's indication that he intended to resign his hospital privileges caused Dr. May great concern about the health of the Practice as well as his personal financial wellbeing. He had several conversations with Dr. Rowe which are outlined in the Plaintiff's Motion for Summary Judgment. R. pp. 103-106. As a result of these conversations with Dr. Rowe, Dr. May was under the impression that Dr. Rowe had no objection to his working in the Florence area and that Dr. Rowe would not attempt to enforce the covenant at issue.

The Defendants, verbally and in writing, encouraged Dr. May to seek employment within the 25-mile geographic range. Dr. Rowe encouraged this with the knowledge that if Dr. May was seeking an interventional cardiology position, the nearest hospitals offering these services outside the 25 mile radius are in Murrells Inlet and Columbia.¹ R. p. 158 (Page 65). Dr. Rowe testified that with regards to his discussions with Dr. May "consistently I and Theresa told him, "Look around. Go to other places. Interview." R. p. 159 (Page 68, lines 21-23). Dr. Rowe testified:

Q. Did he discuss with you employment options at two local hospitals?

A. Yes.

¹ Marie Saleeby testified that there was a cath lab at the Loris Hospital. R. p. 187 (Page 6, lines 9-20)

Q. And what was your response to that?

A. Okay. I had no response. Okay.

R. p. 160 (Page 70, lines 13-17).

Q. ... Dr. May specifically told you or asked you if you would have any objection to him going to work for McLeod?

A. And I probably said, "Do whatever you want." I would have said that multiple times. This was not one conversation. This was a series of hall, parking lot, grabbing sort of things. And I would have said, "Do whatever you want." Absolutely.

R. p. 160 (Page 72, lines 9-18).

Dr. Rowe acknowledges that he was aware that Dr. May was looking for alternative employment.

Q. Now did Dr. May ask you – or, excuse me, did he tell you that he was having conversations with Marie Saleeby about employment opportunities at McLeod?

A. I can't recall if he mentioned Marie Saleeby. But he definitely mentioned that one of the places he was looking at was McLeod.

Q. What other places did he say he was looking at?

A. Locums, Carolinas, the beach. It varied from time to time.

R. p. 161 (Page 76, line 17–Page 77, line 2).

Q. Did you ever tell Dr. May that you were not opposed to him seeking employment or accepting employment at either one of the local hospitals?

A. I told him that he needs to explore his options.

Q. Alright. But did you tell him –

A. I never told Dr. May that he should work at McLeod Hospital or at Carolinas Hospital. I would never prohibit him from discussing employment options with either or those entities, however.

R. pp. 161-162 (Page 77, line 22 – Page 78, line 7).

When asked about Carolinas Hospital, Dr. Rowe testified:

Q. And did you have any problems with him having discussions with Carolinas Hospital regarding employment?

A. No, I wouldn't have a problem with it. In fact, I told him, "Look at all your options," many times.

Q. Did you ever tell him to look at all of his options, including the hospitals here in Florence?

A. I said, "Look at everywhere," is what I told him. "Don't limit yourself."

R. p. 214, lines 6-16.

After discussions with both local hospitals, Dr. May received a conditional offer of employment from Carolinas Hospital on or about February, 2019. R. p. 204, lines 8-23. One of the conditions of hire was a written release of the employment agreement between the Practice and Dr. May. Despite the prior assurances given to Dr. May, the Practice refused to provide the hospital with a release and this action ensued.

ARGUMENTS

I. THE TRIAL COURT PROPERLY FOUND THE RESTRICTIVE COVENANT OVERLY BROAD AND UNENFORCEABLE.

The trial court, relying on *Faces Boutique Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App, 1995), and the plain language of the contract, properly found that the restrictive covenant at issue was overly broad and unenforceable. R. pp. 6-8. The covenant plainly provides a prohibition against Dr. May becoming employed in any capacity with any business entity, no matter how large or small, engaged in the practice of cardiology. This blanket prohibition of employment is precisely what this court found unenforceable in *Faces Boutique*.

A. The restrictive covenant is a restraint of trade and contrary to public policy.

"It is a universal maxim that covenants not to compete and similar restrictive covenants are to be strictly construed and enforced only under certain circumstances because they constitute restraints upon trade, and contracts in general restraint of trade are contrary to public policy. *Associated Spring Corp. v. Roy F. Wilson & Avnet, Inc.*, 410 F. Supp. 967 (D.S.C. 1976); 1976 U.S. Dist. LEXIS 16645. "While recognizing the legitimate interest of a business in protecting its clientele and good will, we are equally concerned with the right of a person to use his talents to earn a living." *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 509, 273 S.E.2d 338 (1980).

Restrictive covenants not to compete are disfavored and will be strictly construed against the employer. *Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983); *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (S.C. App. 1992); see also *Faces Boutique Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App, 1995). A restriction against competition

must be narrowly drawn to protect the legitimate interest of the employer. *Almers v. South Carolina National Bank*, 265 S.C. 48 217 S.E.2d 135 (1975). A covenant not to compete will be upheld only if it is:

- (1) Necessary for the protection of the legitimate interest of the employer;
- (2) Reasonably limited in its operation with respect to time and place;
- (3) Not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (4) Reasonable from the standpoint of sound public policy; and
- (5) Supported by valuable consideration.

Faces Boutiques, 455 S.E.2d at 708.

The restrictive covenant here, just as the covenant in *Faces Boutiques*, violates the requirements that a covenant must be "necessary for the protection for the legitimate interest of the employer", and "not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood." The Advanced Cardiology Consultant agreement specifically states that in the event of its termination, physician will not become employed by or associated with **another business entity**, "engaged in the practice of cardiology ... within a 25 mile radius of McLeod Regional Medical Center, ... for a period of two years from the date of such termination." R. pp. 31-32 (Paragraph 9). The plain construction of the covenant not to compete thus prevents Dr. May from working in any capacity with the largest and third largest employers in Florence County, South Carolina.

The covenant as written is not necessary for the protection of the legitimate interests of Advanced Cardiology Consultants, P.C. It is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood within the field of medicine. The Defendants cannot possibly articulate a legitimate reason to prohibit Dr. May from pursuing employment with either hospital in an administrative capacity. There is no legitimate argument that can be made that Advanced Cardiology Consultants would be harmed in any way if Dr. May chooses to pursue employment at the hospitals, for example, as a physician assistant, hospitalist, or as a general practitioner. Likewise, the blanket prohibition of Dr. May's employment with these entities is unduly harsh and oppressive in curtailing his legitimate efforts to earn a livelihood.

B. The restrictive covenant is unenforceable and cannot be re-written by the courts.

The terms of the restrictive covenant are overly broad and unenforceable. "If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved." *Faces Boutiques* at 709, see also *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (The court "cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally." *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) (if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements."))

The Appellants argue that the ACC covenant is similar to the covenant at issue in *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 15, 738 S.E.2d 480, 488 (Ct. App. 2013). Here the

trial court properly found that, contrary to Appellants' assertions, the restrictive covenant is very similar to the blanket prohibition found in the *Faces Boutique* case. The restrictive covenant at issue here reads "In the event this agreement is terminated ..., this physician covenants and agrees that he will not become employed by ... another business entity, engaged in the practice of cardiology,". It is undisputed that both McLeod Regional Medical Center and MUSC Florence are engaged in the practice of cardiology. A plain reading of the contract clearly establishes that Dr. May would be in violation of the covenant if he were employed in any capacity with either of these two institutions.

In responding to the inherent overly broad nature of this covenant, Appellants argue that "the Respondent himself throughout this litigation has never expressed any intention to perform any service at either Florence hospitals that was unrelated to the practice of cardiology." (Initial Brief of Appellants, p. 11). They further argue that the parties "understood" the covenant to apply only to Dr. May's practice as a cardiologist. (Initial Brief of Appellants, p. 12). These arguments ignore the basic tenant of enforceability of restrictive covenants that they are disfavored and will be strictly construed against the employer. *Rental Uniform Serv. at 675*.

Referencing the five *Dudley* factors, the Court below properly noted "If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved." *Faces Boutiques* at 709, see also *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972). The court "cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally." *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346

(1958) ("if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements.")

Dr. Rowe testified extensively as to how his practice had evolved in the 25 years prior to the commencement of this action. He also acknowledged that his employment contract remained the same over that period. R. p. 152 (Page 19, line 24 – Page 20, line 8). In 1994, there were three (3) hospitals in the City of Florence where ACC physicians were performing cardiology services. There were several other private cardiology practices located in Florence and serving these hospitals. None of the hospitals employed cardiologists. R. pp. 211-213. When Dr. May relocated to Florence in 2008, ACC was a much different practice than exists today. The physicians provided call coverage to two (2) hospitals.² Dr. May testified that he was as busy as he wanted to be. R. p. 177 (Page 24, line 21 – Page 25, line 17). From 2008 to 2018, Dr. May was able to do all things reasonably necessary to maintain and improve his professional skills as outlined in Paragraph 2 of the Employment Agreement. R. p. 29. When Dr. Rowe announced that he was surrendering his privileges in favor of an office-based practice, this caused Dr. May great concern. By 2018, ACC was no longer in competition with any other private cardiology group within the Florence service area. By this time, all of the other cardiology practices and physicians had become direct employees of the two hospitals. R. pp. 211-213. There is no evidence in the record that when these parties entered into their initial agreement in 2008 either party contemplated the fact that in 2018, ACC would be the only private practice and every other physician in the area would be employed directly with one of the two hospitals. Respondent would also submit that he never contemplated that the Practice would abandon both hospitals for

² Bruce Hospital and Florence General Hospital had merged to become Carolinas Hospital System.

an office-based practice thereby preventing him from pursuing his specialty as an interventional cardiologist.

The fact remains that the contract as written is a blanket prohibition on Dr. May's employment with either hospital regardless of what capacity he is employed. To change the plain meaning of this covenant would require the court to rewrite the agreement, which existing law provides it cannot do. The court "cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally." *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) ("if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements."). As the lower court notes "Dr. May is trained and practiced in the medical field for over 30 years. He is more than qualified to perform a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology. In this respect, the covenant not to compete cannot be upheld since it is not necessary for the protection of the legitimate interest of the employer to prevent Dr. May from seeking any type of employment with the two hospitals. Likewise, the restriction against competition is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood." R. p. 6.

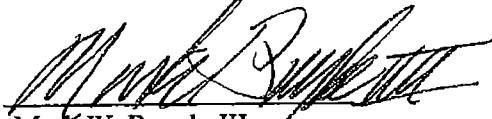
CONCLUSION

For the reasons stated, this Court should acknowledge and confirm the ruling of the trial court.

August 27, 2020

WILLCOX, BUYCK & WILLIAMS, P.A.

BY:


Mark W. Buyck, III
S.C. Bar #11902
Post Office Box 1909
Florence, S.C. 29503
843-662-3258

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No.: 2019-CP-21--00777

Appellate Case No.: 2019-002114

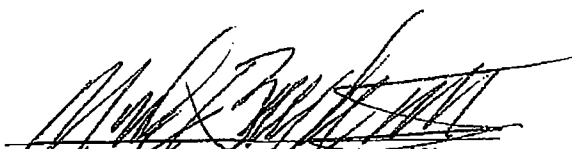
Dr. Gregory A. May, ... Respondent,

v.

Advanced Cardiology Consultants, P.A., Dr. Lew A. Rowe,
and Theresa Rowe, ... Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Final Brief of Respondent complies with Rule 211(b)
SCACR.


Mark W. Buyck, III (SC Bar #11902)
248 West Evan Street (29501)
Post Office Box 4909
Florence, South Carolina 29503
843-662-3258

Attorney for Respondent

August 27, 2020

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No.: 2019-CP-21--00777

Appellate Case No.: 2019-002114

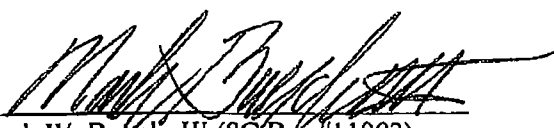
Dr. Gregory A. May, ... Respondent,

v.

Advanced Cardiology Consultants, P.A., Dr. Lew A. Rowe,
and Theresa Rowe, ... Appellants.

PROOF OF SERVICE

I certify that I have served the foregoing **Final Brief of Respondent** on the Appellants through their attorneys of record, Allan R. Holmes and Rebecca J. Wolfe, by depositing a copy of same in the United States Mail, postage prepaid, to Post Office Box 938, Charleston, South Carolina 29402 on August 27, 2020.


Mark W. Buyck, III (SC Bar #11902)
248 West Evan Street (29501)
Post Office Box 1909
Florence, South Carolina 29503
843-662-3258

Attorney for Respondent



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

May 18, 2022

Mr. Allan R. Holmes, Sr., Esquire
Gibbs & Holmes
Suite 110, 171 Church Street
Charleston SC 29401

Ms. Rebecca Jane Wolfe, Esquire
171 Church Street
Suite 110
Charleston SC 29401

Mr. Mark W. Buyck, III, Esquire
PO Box 1909
Florence SC 29503

Re: Dr. Gregory May v. Advanced Cardiology
Appellate Case No. 2019-002114

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

V. Claire Allen
CLERK

cc: The Honorable Michael G. Nettles

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Dr. Gregory A. May, Respondent,

v.

Advanced Cardiology Consultants, P.C.; Dr. Lew A.
Rowe; and Theresa Rowe; Appellants.

Appellate Case No. 2019-002114

Appeal From Florence County
Michael G. Nettles, Circuit Court Judge

Unpublished Opinion No. 2022-UP-213
Submitted March 1, 2022 – Filed May 18, 2022

AFFIRMED

Allan R. Holmes, Sr., and Rebecca Jane Wolfe, both of
Gibbs & Holmes, of Charleston, for Appellants.

Mark W. Buyck, III, of Willcox Buyck & Williams, PA,
of Florence, for Respondent.

PER CURIAM: Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and
Theresa Rowe appeal the grant of summary judgment to Dr. Gregory May, arguing
the circuit court erred in holding a restrictive covenant (the Covenant) contained in

the employment contract between Advanced Cardiology and Dr. May was not enforceable. We affirm pursuant to Rule 220(b), SCACR, and the following authorities: *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 12, 738 S.E.2d 480, 486 (Ct. App. 2013) (stating "the interpretation of an unambiguous contract is a question of law, as is the question of whether a non-competition clause is reasonable" and applying de novo review); *Milliken & Co. v. Morin*, 399 S.C. 23, 36, 731 S.E.2d 288, 295 (2012) (stating that when a contract is unambiguous, the appellate court must apply the contract's plain language); *Baugh*, 402 S.C. at 12, 738 S.E.2d at 486 ("[R]estrictions on competition 'are generally disfavored and will be strictly construed against the employer.'" (quoting *Rental Unif. Serv. of Florence, Inc. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983))); *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 42, 455 S.E.2d 707, 708 (Ct. App. 1995) ("A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer."); *Baugh*, 402 S.C. at 12, 738 S.E.2d at 486 (stating that in order to be enforceable, a restriction on competition must be "(1) supported by valuable consideration; (2) necessary to protect the employer in some legitimate interest; (3) not unduly harsh and oppressive in curtailing the employee's legitimate efforts to earn a livelihood; and (4) otherwise reasonable from the standpoint of sound public policy"); *Faces Boutique*, 318 S.C. at 42, 455 S.E.2d at 709 ("If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved."); *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010) ("[T]he restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms."). We hold the Covenant was unenforceable because by its plain language, it restrained Dr. May from having any position with a business entity, including a hospital, engaged in the practice of cardiology; such a restriction was not necessary to protect Advanced Cardiology's interests and was unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood.

AFFIRMED.¹

THOMAS, MCDONALD, and HEWITT, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

LAW OFFICES
GIBBS & HOLMES
171 CHURCH STREET, SUITE 110
POST OFFICE BOX 938
CHARLESTON, SOUTH CAROLINA 29402-0938

ALLAN R. HOLMES
PARTNER
CERTIFIED SPECIALIST IN LABOR
AND EMPLOYMENT LAW

TELEPHONE (843) 722-0033
TELECOPIER (843) 722-0114
E-MAIL
aholmes@gibbs-holmes.com

June 1, 2022

FEDERAL EXPRESS OVERNIGHT

The Honorable Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

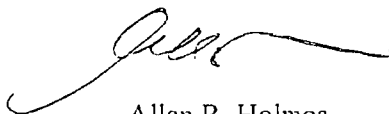
RE: *Dr. Gregory May v. Advanced Cardiology*
Appellate Case No. 2019-002114

Dear Ms. Kitchings,

Please find enclosed for filing the original and six copies of the Appellants' Petition for Rehearing in the above-referenced matter. Please return a clocked-in copy in the self-addressed envelope provided for your convenience. We have also enclosed a check in the amount of \$50.00 for the filing fee for this Petition.

By copy of this letter, we are serving a copy of the above on counsel for Respondent, Mark W. Buyck, III, Esq.

With kind regards, I am



Allan R. Holmes

Cc: Mark W. Buyck, III, Esq. [via email and regular mail]
WILLCOX, BUYCK, & WILLIAMS, PA
248 West Evans Street
Florence, SC 29501

GIBBS & HOLMES PC
171 CHURCH ST STE 110
CHARLESTON, SC 29401-3136

WELLS FARGO BANK, N.A.
www.wellsfargo.com
67-776/532

2758

6/1/2022

PAY TO THE ORDER OF S.C Court of Appeals

\$ **50.00

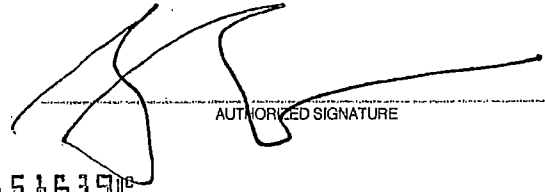
Fifty and 00/100*****

DOLLARS

S.C Court of Appeals

MEMO

Advanced Cardiology


AUTHORIZED SIGNATURE

⑈0000002758⑈ ⑆053207766⑆ ⑆789151639⑈

GIBBS & HOLMES PC
S.C Court of Appeals

6/1/2022

2758

50.00

WellsFargo Operating Advanced Cardiology

50.00

GIBBS & HOLMES PC
S.C Court of Appeals

6/1/2022

2758

50.00

WellsFargo Operating Advanced Cardiology

50.00

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Number 2019-CP-21-00777

Dr. Gregory A. May,

Respondent,

v.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe

Appellants.

APPELLANTS' PETITION FOR REHEARING

Allan R. Holmes, SC No. 2576
Rebecca J. Wolfe, SC No. 102867
GIBBS & HOLMES
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033

ATTORNEYS FOR THE APPELLANTS

Pursuant to the provision of Rule 221(a), Appellants, through their undersigned counsel, respectfully petition this Court for rehearing based on facts, points, and arguments overlooked or misapprehended as set forth herein.

The May 18, 2022, Opinion of this Court is likely to create additional unwarranted confusion and uncertainty on the part of both employers and employees who have entered into, or will enter into, agreements seeking to appropriately address post-employment competition. While it is inarguable that restraints on post-employment competitive activities are permitted, and while the May 18 Opinion does not expressly overrule *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013), the Opinion makes *Baugh* an unreliable precedent while inappropriately expanding the holding of *Gibbs v. Faces Boutique*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995). Appellants respectfully petition for rehearing so as to avoid this result.

The Opinion of the Court Is Erroneous on the Merits

Apart from citations to authorities which generally govern the parameters of employment-related non-competition agreements, the Opinion of this Court addresses the specific covenant at issue in this case as follows:

We hold the Covenant was unenforceable because by its plain language, it restrained Dr. May from having any position with a business entity, including a hospital, engaged in the practice of cardiology; such a restriction was not necessary to protect Advanced Cardiology's interests and was unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood.

May 18, 2022, Opinion, p. 1.

This holding fails to consider the inconsistency between the upholding of the covenant in *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013) and the rejection of the covenant at bar. Correction requires recognition that while the covenant in *Baugh* and that used by Appellant Advanced Cardiology cannot be meaningfully distinguished from each

other, they are easily distinguished from the covenant found invalid by *Gibbs v. Faces Boutique*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995).

The three covenants are set out below. The highlighted language explicates the material distinctions between them.

Baugh:

Physician, in the event of termination or expiration of this agreement for any reason, during the twelve (12) month period immediately following the date of termination or expiration of this Agreement, shall not Compete . . . with Columbia Heart . . .

“Compete” means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Columbia Heart and on behalf of Columbia Heart: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; and (C) ***assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business*** in the Territory.

“Business” is defined as “the practice of medicine in the field of cardiology.” “Territory” is defined as “the area within a twenty (20) mile radius of any Columbia Heart office at which Physician routinely provided services during the year prior to the date of termination or expiration of this Agreement.”

Baugh, 402 S.C. at 9 (emphasis added).

Advanced Cardiology:

Restrictive Covenant; Liquidated Damages. In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that ***he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology,*** within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

(Employment Agreement, Exhibit A to Complaint, pp. 3-4) (R. pp. 31-32) (emphasis added).

Faces:

For a period of three (3) years after the termination of this agreement. *the Employee will not, WITHIN THE TOWN OF HILTON HEAD ISLAND, SC, directly or indirectly, own, manage, operate, control, be employed by, participate in, or be connected in any manner with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces].*

Faces, 318 S.C. at 41.

With appropriate elisions made in service to clarity, the highlighted portions of the three covenants read as follows:

Baugh

“Compete” means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Columbia Heart and on behalf of Columbia Heart . . . C) assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the [practice of medicine in the field of cardiology].

Baugh, 402 S.C. at 9.

Advanced Cardiology

[H]e will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology.

(R. pp. 31-32).

Faces Boutique

[T]he Employee will not . . . directly or indirectly . . . be employed by . . . or be connected in any manner with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces].

Faces, 318 S.C. at 41.

If, as this Court has opined, a hospital is to be deemed a business entity engaged in the practice of cardiology, then anyone employed by the hospital is assisting it to engage in the practice of medicine in the field of cardiology, and the *Baugh* decision erred in sustaining the covenant placed at issue there. Making loans to the hospital, leasing to it, or otherwise assisting the hospital would also violate the terms of the *Baugh* covenant.

In fact, the typical hospital provides a broad range of medical services which sometimes, though not always, include practice in the field of cardiology. Even when cardiology services are provided by a hospital, being employed at that hospital should not be deemed synonymous with being employed by “another business entity, engaged in the practice of cardiology,” – the quote is the precise language used in the covenant executed by Dr. May while employed at Advanced Cardiology, a business entity engaged *only* in the practice of cardiology. (R. pp. 31-32). Dr. May’s covenant is intended to preclude Dr. May from being employed by another cardiology practice, or “otherwise engage directly or indirectly in the practice of cardiology.” This is the same intent and meaning which has to have been ascribed to the covenant that has been approved in *Baugh*. Otherwise, the *Baugh* covenant reaches all who are assisting a hospital [“Person”] which, according to the May 18, Opinion of this Court, must be deemed to be engaged in the practice of medicine in the field of cardiology. See *Baugh*, 402 S.C. at 9.

The covenant in *Faces* serves to illustrate these points. There, the former employee is prohibited from “being employed by” or becoming “connected in any manner with “any business in direct competition with the type of business conducted by [Faces].” *Faces*, 318 S.C. at 41. The *Faces* covenant fails to even suggest a relationship between the activities of the employee while employed by Faces and the employee’s prohibited post-employment activities.

The owner of Faces Boutique had conceded this at trial:

Gibbs would be in violation of the covenant not to compete if Gibbs became employed *at* any place of business engaged in the selling of cosmetics or giving facials, even if Gibbs herself did not participate in these activities. Owens also admitted the covenant would have this effect even though, in such a situation, her business would not be threatened. Thus, by Owens's own admission, the terms of the covenant restrict Gibbs's employment opportunities beyond what is necessary for the protection of [Faces] legitimate business interests.

Faces, 318 S.C. at 43 (emphasis added).

Reconciling *Faces* with both *Baugh* and the case currently before this Court is easily accomplished by acknowledging the difference between the phrases “employed at” and “employed by.” The *Faces* opinion interprets a phrase: “employed by” or “becoming connected in any manner with” any business in direct competition with the type of business conducted by Faces. The *Faces* interpretation is that such a relationship constitutes being “employed at” the business – regardless of what relationship there may be between the actual employment and the competitive activities of the business. Indeed, as the *Faces* opinion notes, and the *Faces* employer conceded, such employment may involve no participation whatsoever in properly prohibited competitive activities. *See id.* However, “employed by” a business “engaged in” a particular business activity should be read to mean “employed in service to” or “assisting” that business activity. For purposes of restraints on competition, being employed by a business engaged in the practice of cardiology is quite different from being employed at a business where your employment has nothing whatsoever to do with cardiology. The restraint on the former, permitted by the *Baugh* and the Advanced Cardiology covenants, should be upheld. The latter, struck down by *Faces*, was properly declared invalid. As this Court has held, there is no ambiguity in Dr. May’s covenant, it should enforce it and reverse its May 13 Opinion. After all, Dr. May, has testified under oath to the unambiguous meaning of the covenant. He understood the covenant only prohibited him from

practicing cardiology at one of the hospitals in town, not from working in a capacity *other* than as a cardiologist:

11 Q. Okay. In fact, and when it says --
12 when you say in your complaint that it purports to
13 prevent you "from being employed as a cardiologist
14 for a period of two years after termination within
15 a 25-mile radius of McLeod Regional Medical Center,
16 Florence, South Carolina, that's how you read that
17 provision," correct?

18 A. I can read it the same as you. Yes,
19 sir. That's what it says.

20 Q. Okay. It doesn't say anything more
21 than that?

22 A. That's correct.

23 Q. Okay. So the plain language or as you
24 understand it, the plain language of the contract
25 is that you simply can't be employed as a

1 cardiologist for a period of two years after
2 termination within a 25-mile radius of McLeod
3 Regional Medical Center, correct?

4 A. That's right.

5 Q. Okay.

6 A. That's what it says.

7 Q. Doesn't say you can't be employed as
8 anything else?

9 A. I -- I have no idea what you're talking
10 about right now.

11 Q. Well, it's not important. It's just
12 the question is whether or not this agreement says
13 you can't be employed --

14 A. I'm a cardiologist, so I wouldn't be
15 seeking employment as a bottle washer or a
16 dishwasher.

17 Q. Okay. And you don't read this
18 agreement to keep you from being a bottle washer or
19 a dishwasher, correct?

20 A. I haven't looked at that document in
21 quite some time, so I haven't hashed that out,
22 exactly what the document says.

23 Q. But this is what you put in your
24 complaint?

25 A. What it's stating about the restrictive
1 covenant?

2 Q. Yes.
3 A. Okay.
4 Q. Okay. I mean, the answer to that is
5 yes?
6 A. There is a restrictive covenant, yes.
7 Q. And it says, according to you, that
8 it's intended to prevent you "from being employed
9 as a cardiologist for a period of two years after
10 termination within a 25-mile radius of McLeod
11 Regional Medical Center, Florence, South Carolina"?
12 A. Yeah.
13 Q. And that's all it says?
14 A. That's all it says.

(Deposition of Dr. Gregory A. May, p. 22:11-24:14) (R. 141-142).

The foregoing argument is buttressed by the Appellants' Brief seeking reversal of the Trial Court's grant of summary judgment, and portions of that Brief are incorporated hereafter with slight modifications.

1. The Restrictive Covenant is Valid and Enforceable.

Sound public policy generally requires the enforcement of contracts freely entered into by the parties. *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217, 221 (Ct. App. 1992). "While recognizing the legitimate interest of a business in protecting its clientele and goodwill, we are equally concerned with the right of a person to use his talents to earn a living." *Sermans v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 509, 273 S.E.2d 338, 338 (1980).

Restrictive covenants not to compete are therefore generally disfavored and will be strictly construed against the employer. *Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983).

In South Carolina, a restrictive covenant that arises out of an employment relationship between the contracting parties will be upheld if it:

(1). is necessary for the protection of the legitimate interest of the employer;

- (2). is reasonably limited in its operation with respect to time and place;
- (3). is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (4). is reasonable from the standpoint of sound public policy; and
- (5). is supported by a valuable consideration.

Id. at 675-76. Only the first and third prongs of the test from *Dudley* are at issue in this current appeal, as the trial court found the covenant not to compete deficient in these two respects.¹ (Order p. 3) (R. p. 6). “In South Carolina, ‘contracts against competition are held to be unenforceable unless they meet certain criteria . . . [because] they constitute a restraint upon trade[,] which is against public policy.’” *Fay*, 419 S.C. at 630 (quoting *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 71, 119 S.E.2d 533, 542 (1961)). “Despite the general disposition against such agreements, South Carolina courts have upheld non-compete agreements if they comport with the above requirements.” *Hagemeyer N. Am., Inc. v. Thompson*, 2006 U.S. Dist. LEXIS 19468, at *11 (D.S.C. March 1, 2006).

“[C]ases concerned with the enforceability of covenants not to compete contained in employment contracts must be decided on their own facts.” *Stringer v. Herron*, 309 S.C. 529, 531, 424 S.E.2d 547, 548 (Ct. App. 1992) (internal citation omitted). The South Carolina Supreme Court has held that the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties’ agreement, but must stand or fall on their own terms. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 245-246, 717 S.E.2d 103, 107 (Ct. App. 2011) (citing *Poynter Invs., Inc. v.*

¹ The Parties do not dispute whether the other requirements from *Dudley* are met. The Respondent did not move for summary judgment in the lower court on the issue of whether the covenant was reasonably limited in its operation with respect to time and place, supported by valuable consideration, or otherwise reasonable from the standpoint of sound public policy. (See Resp’t Memo. in Supp. Mot. Summ. J. p. 10) (R. p. 110).

Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010)). South Carolina courts may not “blue pencil” the restrictions contained in a non-competition provision “by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable.”² *Id.* at 246.

Similarly, where an employer later expresses at trial an intention to enforce the covenant in a way that narrows the scope of the written agreement, the covenant cannot be upheld. *See Faces Boutique*, 318 S.C. at 43-44. However, “[c]onstruing the terms of a contract is not the same as changing the terms of a contract by reformation.” *Herring v. Lapolla Indus.*, 2013 U.S. Dist. LEXIS 195826, at *4 (D.S.C. Nov. 26, 2013) (applying South Carolina law to determine enforceability of non-compete agreement). “Blue penciling” does not refer to “a cannon of contract construction but a directive to . . . explicitly rewrite the terms of a contract.” *Id.* at *5. “The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties’ intentions as determined by the contract language.” *Palmetto Mortuary Transp., Inc. v. Knight Sys.*, 424 S.C. 444, 460, 818 S.E.2d 724, 733 (2018) (citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)).

The restrictive covenant at issue meets the requirements for enforceability as articulated in *Dudley* and the trial court erred in finding otherwise. It is both necessary for the protection of the

² While courts in South Carolina generally have declined to “blue pencil” non-competition provisions, “South Carolina has not outright rejected the ‘blue pencil test.’” *Fournil v. Turbeville Ins. Agency, Inc.*, 2008 U.S. Dist. LEXIS 116469, at *16 (D.S.C. Dec. 29, 2008) (discussing South Carolina courts’ treatment of the “blue pencil test”). Where the restrictive covenant’s excessive restraint is severable in terms, it may be disregarded and the remaining part of the contract enforced, but an indivisible covenant may not be enforced even to a reasonable extent. *See id.* *See also Rockford Mfg. v. Bennet*, 296 F. Supp. 2d 681, 687 (D.S.C. 2003) (citing *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1972)).

legitimate interest of the employer and not unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood practicing cardiology.

A. The Restrictive Covenant is Necessary for the Protection of the Legitimate Interest of the Practice.

The noncompetition provision which restrains Respondent from being “employed by or associated (with) ... another business entity[] engaged in the practice of cardiology,” or “otherwise engag[ing] directly or indirectly in the practice of cardiology” is necessary for the protection of the legitimate interests of the Practice and it is an interest that courts have repeatedly recognized. *See Baugh*, 402 S.C. at 16 (recognizing medical practice’s interests in upholding covenant against former physicians). *See also Intermountain Eye & Laser Ctrs., P.L.L.C. v. Miller*, 127 P.3d 121, 128 (2005) (discussing medical practice’s protectable interests in its proprietary information, its referral sources, and patient relationships “established and/or nurtured” by employed physician during his employment with the practice).

In *Baugh v. Columbia Heart Clinic, P.A.*, this Court upheld a restrictive covenant very similar to the one at issue here that purported to prevent physicians from engaging or “assisting any [p]erson to engage” in the practice of cardiology for a period of one year within a twenty-mile radius of the defendant’s offices. 402 S.C. 1, 15, 738 S.E.2d 480, 488 (Ct. App. 2013). The factual background and restrictive covenant at issue in *Baugh* are, in fact, strikingly similar to the instant case. In *Baugh*, the defendant Columbia Heart was a comprehensive cardiology practice similar in many ways to ACC. *Id.* at 1. The plaintiffs in *Baugh* were interventional cardiologists who departed the practice and sought to practice cardiology within the radius of a restrictive covenant, like the Respondent. *Id.* at 2-6. The cardiologists in *Baugh* were subject to the following restrictive covenant:

Physician, in the event of termination or expiration of this agreement for any reason, during the twelve (12) month period immediately following the date of termination or expiration of this Agreement, shall not Compete . . . with Columbia Heart . . .

“Compete” means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Columbia Heart and on behalf of Columbia Heart: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; and (C) assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory.

“Business” is defined as “the practice of medicine in the field of cardiology.”
“Territory” is defined as “the area within a twenty (20) mile radius of any Columbia Heart office at which Physician routinely provided services during the year prior to the date of termination or expiration of this Agreement.”

Id. at 8-9 (emphasis added). The lower court in *Baugh* found the activity restriction which prohibited the cardiologists from “assisting any person . . . to engage in the [practice of medicine in the field of cardiology]” was overbroad and unenforceable under *Faces Boutique Ltd. v. Gibbs*. *Id.* at 11-12. The trial court similarly found that this restriction was not necessary to protect a legitimate interest of Columbia Heart, as it “goes beyond restricting [Respondents] from doing what they did for” Columbia Heart and would bar them from assisting any cardiology practice “in any capacity.” *Id.*

This Court disagreed with the lower court, finding the activity restriction to be reasonable and necessary to protect Columbia Heart’s legitimate interests. *Baugh*, 402 S.C. at 16-17. In recognizing the legitimate interest that Columbia Heart had in imposing this restriction, the court reasoned:

Here, the record evidences that Columbia Heart’s patients, referral sources, and other goodwill would be at risk if Respondents were able to assist others to engage in the practice of cardiology. Patients stay with and follow their doctors, and general practitioners refer patients to cardiologists based upon both the reputation of the doctor and the doctor’s practice, current and past. If the Agreements did not prohibit Respondents from assisting another person to engage in the practice of medicine in the field of cardiology, Respondents could treat Columbia Heart’s patients and use Columbia Heart’s referral sources and goodwill simply by staying one step from the

medical services provided. Therefore, the restriction is necessary to protect a legitimate interest of Columbia Heart.

Id. at 16. The *Baugh* court found that “the covenant’s prohibition against assisting the practice of medicine in the field of cardiology is necessary to prevent Respondents from indirectly engaging in activities they clearly could not participate in directly.” *Id.* The practice employer retained these legitimate interests, even though the practice’s office location at issue in Lexington, South Carolina had closed just months after the plaintiff cardiologists had left the practice. *See id.* at 5-6. In coming to this conclusion, the *Baugh* court noted that the restrictive covenant, like the one between Dr. May and the Practice, does not contain the “any capacity restrictions” prohibiting the physician from being associated “*in any capacity*” that the court in *Faces Boutique* had found was overbroad. *Id.* at 19-20.

Stretched to its broadest possible meaning, the restraint found enforceable in *Baugh* against “indirectly . . . assisting” another person as an agent or employee “to engage in the practice of . . . cardiology” could conceivably prohibit a wide range of activities that take place in a medical practice or in hospital facilities that the interventional cardiologists in *Baugh* did not perform. With this interpretation, an office administrator who assists the physician with billing, scheduling, compensation, and secures the facilities for a medical practice “indirectly assists” in the practice of cardiology. Similarly, a cardiac nurse who assists the physician during a diagnostic procedure could be deemed to “indirectly assist” the practice of cardiology. The *Baugh* court did not construe the restrictive covenant in the broadest possible sense in finding that the restraint against “assisting any Person . . . to engage in [the practice of medicine in the field of cardiology]” was not as broad as the “in any capacity” prohibitions found overbroad by South Carolina courts. *Id.* (citing *Faces Boutique*, 318 S.C. at 41; *Preferred Research, Inc. v. Reeve*, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987)). “Although Respondents do not contest that they breached the restrictions here,

whether a shareholder-physician has actually assisted someone to engage in the practice of medicine in the field of cardiology could be a question of fact in other cases.” *Baugh*, 402 S.C. at 19-20.

The restrictive covenant at issue here which restrains Respondent from being “employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology” is necessary to protect the Practice’s legitimate business interests. The restraint is necessary to protect “the goodwill in the Florence medical community that [ACC] has spent building up since 1994, as well as protecting its patient base from being unfairly encroached upon by a former physician practicing his same specialty in the same geographic area almost immediately after his employment with the Practice ended.” (*See* Appellants’ Memo. in Supp. Mot. Summ. J. p. 14) (R. p. 137). Dr. Rowe has testified that the Plaintiff’s practice of cardiology in Florence at Carolinas Hospital would have the enormously negative impact of “cannibalizing” the Practice’s business. (Rowe Depo. p. 79:6-25) (R. p. 162, lines 6-25). Dr. Rowe further testified:

81

16 Q. Do you think Dr. May working at
17 Carolinas Hospital right now would have an adverse
18 impact on Advanced Cardiology since the practice
19 doesn't intend to do any work there?

20 A. It would.

21 Q. How is that? How so?

22 A. Because he would be working at, say,
23 Carolinas, and he would be doing cardiology. Now,
24 a very small part of our daily work is actually
25 doing interventional cardiology. The vast majority

82

1 in this area, and this is not everywhere but it's
2 in this area, it's seeing patients, interpreting
3 stress tests, echoes, that sort of thing that don't
4 involve interventional cardiology whatsoever. So

5 it would have a huge impact on us.
6 Q. So you're thinking that the patients
7 that he currently sees would see him at Carolinas
8 rather than come to your office?
9 A. It's possible that some might.
10 Q. So that's your fear?
11 A. I wouldn't say it's a fear. I think
12 it's a pretty good estimate of what would happen.

(*Id.* at 81:16-82:12) (R. p. 162, lines 16-12).

Like the restrictive covenant in *Baugh* that prevented the physician from “assisting any Person . . . to engage in . . . the practice of . . . cardiology,” the language here against Respondent being “employed by” another entity “engaged in the practice of cardiology . . . *nor will he otherwise engage directly or indirectly in the practice of cardiology*” prevents Respondent “from indirectly engaging in activities [he] clearly could not participate in directly.” See *Baugh*, 402 S.C. at 16. Like the departing cardiologists in *Baugh*, Respondent does not dispute his practice of cardiology within the geographical limit of the covenant would violate the agreement. This Court in *Baugh* made clear that a medical practice has a legitimate, protectible interest in restraining a formerly employed physician from continuing to practice his medical specialty within the geographic bounds of a noncompetition agreement. The restrictive covenant is necessary to prevent Respondent from continuing to practice cardiology in Florence, South Carolina and therefore should be deemed enforceable by the Court.

B. The Covenant is not Unduly harsh and Oppressive in Curtailing the Legitimate Efforts of Respondent to Earn a Livelihood.

The trial court also erred in its finding that the restrictive covenant was “unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood.” (Order p. 3) (R. p. 6). In coming to this conclusion, the trial court relied on *Faces Boutique v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995). In *Faces Boutique*, a facial spa brought suit to enjoin the

defendant from being employed at a competing business. *Id.* at 41. The noncompetition agreement in *Faces Boutique* provided:

For a period of three (3) years after the termination of this agreement, the Employee will not, WITHIN THE TOWN OF HILTON HEAD ISLAND, SC, directly or indirectly, own, manage, operate, control, be employed by, participate in, *or be connected in any manner* with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces].

Id. (emphasis added). The defendant was employed by Faces Boutique as an esthetician. *Id.* The defendant in *Faces Boutique* had demonstrated legitimate efforts to earn a livelihood providing services not related to her former job as an esthetician with Faces Boutique. After she left employment at the facial spa, the defendant went to work in a different profession as a manicurist³ in a Hilton Head beauty salon. *Id.* Faces Boutique brought suit seeking to enjoin the former employee from providing services as a manicurist, because the defendant's new employer derived part of its revenue from performing facials. *Id.*

The court in *Faces Boutique* held the covenant restricted the defendant's employment opportunities beyond what was necessary for the protection of the spa's legitimate business interests and was unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood. *Id.* at 43-44. The court relied on the fact that the owner of Faces Boutique admitted at trial that the covenant prohibited the defendant from being employed "at any place of business engaged in the selling of cosmetics or giving facials, even if [the defendant] herself did not participate in these activities" and "even though, in such a situation, [Faces'] business would not be threatened." *Id.* The trial court erred in finding *Baugh* distinguishable but *Faces Boutique* controlling in granting summary judgment to the Respondent. (Order p. 3-5) (R. pp. 6-8).

³ An esthetician is a licensed skin care professional, while a manicurist is licensed to practice manicuring or pedicuring the nails or similar work. See *id.* at 41 n. 1-2.

An evaluation of both the language and the circumstances dictates a conclusion that *Baugh*, not *Faces* is controlling and the covenant should be upheld on these grounds. There are several factors which distinguish this case from *Faces Boutique*. The most important distinction between the two restrictive covenants is that the restrictive covenant here does not contain the “in any capacity/manner” language that is present in the covenant in *Faces Boutique*. See *Faces Boutique*, 318 S.C. at 41. The *Baugh* court upheld the agreement at issue there because the covenant did not contain the sweeping “in any capacity/manner” language that the courts in *Faces Boutique* and *Preferred Research* court found so objectionable. *Baugh*, 402 S.C. at 19-20. The restrictive covenant between the Practice and Respondent does not contain this language that would so clearly demonstrate an intent to prevent the Respondent from being employed or connected *in any manner* with an entity engaged in the practice of cardiology.

Additionally, unlike the Respondent, the defendant in *Faces Boutique* made legitimate efforts and sought employment in a different profession than she had provided for her previous employer. See *Faces Boutique*, 318 S.C. at 41. The trial court found the restrictive covenant to be “unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood” because it would restrain him from performing “a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology”--jobs which it is undisputed that the Respondent has no intention of seeking. (Order p. 3) (R. p. 6). The Respondent has made clear that he intends to practice interventional cardiology if he is not bound by this covenant. Respondent does not appear to contend that the covenant is unduly oppressive in curtailing his legitimate efforts to earn a livelihood as a cardiologist. Rather, the covenant threatens his efforts to earn a livelihood in a variety of unrelated and hypothetical professions that he has expressed no interest in pursuing and would not even perform if hired by one of the local hospitals. (See Resp’t Depo. pp. 23:14-17;

Transcript pp. 13:11-16:8) (R. p. 177, lines 14-17; R. p. 70, line 11-p. 73, line 8). Respondent has not articulated interest in or expended *any* legitimate effort in earning a livelihood in one of these theoretical jobs “wholly unconnected to the practice of cardiology.” (Order p. 3) (R. p. 6). Respondent filed suit against these Appellants for the very purpose of freeing himself from the restrictive covenant that he agreed to so that he could practice the same medical specialty in Florence within the bounds of the covenant. (*See generally* Complaint) (R. pp. 16-27). A sense of reality must always influence the interpretation of contract language. Noncompetition agreements entered into with board certified cardiologists are created to restrain them from providing services related to their practice of cardiology—not services provided by employees holding positions board certified cardiologists would consider entirely unsuitable. Respondent acknowledged that he would not be “seeking employment as a bottle washer or dishwasher” because he is a cardiologist. (Resp’t Depo. p. 23:14-16) (R. p. 177, lines 14-16).

The *Faces Boutique* court relied upon critical testimony from the employer’s owner regarding the construction of the restrictive covenant that is not present here from Dr. Rowe. The owner of Faces Boutique had conceded at trial that:

Gibbs would be in violation of the covenant not to compete if Gibbs became employed at any place of business engaged in the selling of cosmetics or giving facials, even if Gibbs herself did not participate in these activities. Owens also admitted the covenant would have this effect even though, in such a situation, her business would not be threatened. Thus, by Owens's own admission, the terms of the covenant restrict Gibbs's employment opportunities beyond what is necessary for the protection of [Faces] legitimate business interests.

Faces Boutique, 318 S.C. at 43. In fact, the defendant Gibbs was apparently performing work as a manicurist that was unrelated to her services as an esthetician when Faces Boutique brought suit against her. *See id.* at 41.

The agreement at issue here does not prohibit Respondent from being employed "in any capacity" for an entity practicing cardiology, nor was it intended by the parties to have that meaning. The inclusion of the phrase "nor will he otherwise engage directly or indirectly in the practice of cardiology" immediately following the prohibition against Respondent being "employed by or associated (with) ... another business entity[] engaged in the practice of cardiology" makes the parties' intent clear in this respect. (Employment Agreement p. 3) (R. p. 31). The parties to the agreement clearly contemplated and intended to restrict Respondent's future employment as a cardiologist *only* and not in some other, unrelated field. (See Resp't Depo. pp. 22:11-24:14) (R. p. 177, lines 11-14). The trial court's finding, insofar as it is inconsistent with this intent, fashions a new agreement between the parties that was never intended. See *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 160, 621 S.E.2d 352, 354 (2005) (declining to add geographical limitation to restrictive covenant because it would bind the parties to a "term that does not reflect the parties' original intention."). See also *E. Bus. Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (finding the court may not make a new agreement for the parties into which they did not voluntarily enter). The trial court erred in finding that construing the covenant consistent with the parties' intent in this respect amounts to an impermissible re-writing or "blue penciling" of the agreement. (Order p. 4) (R. p. 7). "[C]onstruing the terms of a contract is not the same as changing the terms of a contract by reformation." *Herring*, 2013 U.S. Dist. LEXIS 195826, at *4.

The restrictive covenant is not unduly oppressive in curtailing Respondent's legitimate efforts to earn a livelihood as a practicing cardiologist. The effect of the restrictive covenant is to restrain Respondent from actively practicing cardiology at either of the two local Florence hospitals that he maintained privileges with while he was employed by the Practice in Florence so

that the Practice may protect its patient and referral base and goodwill in the community that it has been developing since 1994. (See Employment Agreement pp. 3-4) (R. pp. 31-32). Respondent may practice cardiology anywhere outside of the twenty-five mile radius of the covenant and the fact that he is restrained from practicing cardiology within this very limited geographical area is not itself overly burdensome or oppressive.

The Respondent still has “ample opportunity to work within his industry,” and has not alleged or shown that he would have difficulty finding employment practicing interventional cardiology outside of the twenty-five-mile radius surrounding McLeod hospital. See *Vessel Med., Inc. v. Elliott*, 2015 U.S. Dist. LEXIS 122436 at *17 (D.S.C. Sept. 15, 2015) (applying South Carolina law to uphold eighteen month and twenty-mile non-solicitation restriction). See also *Pearl Ins. Grp., LLC v. Baker*, 2018 U.S. Dist. LEXIS 146849 at *13 (D.S.C. Aug. 29, 2018) (applying South Carolina law to uphold two-year non-solicitation provision). Respondent is not even necessarily shut out of practicing his specialty within the state itself if he were to abide by the restrictive covenant. Hospitals with the cath lab facilities Plaintiff contends he needs to practice interventional cardiology are located in the Grand Strand, Columbia, and Loris, South Carolina. (Rowe Depo., 65:10-20; Saleeby Depo. p. 6:9-16) (R. p. 158, lines 10-20; R. p. 187, lines 9-16). The restriction at issue does not prevent Respondent from practicing in his field “far beyond the technical terms of the provision.” *Baugh*, 402 S.C. at 25. The Respondent can continue to work in his field of interventional cardiology—just not inside the twenty-five mile radius. The fact that Respondent is restrained from practicing cardiology within Florence does not render the restrictive covenant unduly harsh or oppressive. See *id.* Moreover, the fact that the parties’ employment agreement contains a provision explicitly ratifying that the terms of the restrictive covenant are

“fair and reasonable”⁴ to the contracting parties is another practical consideration that weighs against the covenant being found unduly harsh or oppressive to the Respondent. *See Thompson*, 2006 U.S. Dist. LEXIS 19468 at *11 (noting the fact that defendant signed the noncompete which explicitly described its restrictions as reasonable weighed in favor of finding noncompete enforceable).

In finding that the covenant would prohibit the Respondent from being employed or associated in any manner with an entity engaged in the practice of cardiology, the trial court construed the language of the agreement to its broadest possible sense and far beyond what the parties intended. Just as the court in *Baugh* did not construe the restrictive covenant at issue in that case so broadly past its plain meaning, so should the Court decline to do so here. All the inferences and conclusions arising from the evidence submitted about the alleged burden placed upon the Respondent’s efforts to earn a livelihood must be viewed by this Court in a light most favorable to the Appellants, the non-moving party in the trial court. *See Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 562-63, 564 S.E.2d 94, 96 (2002). When this evidence is considered in the light most favorable to the Appellants, it is clear that the restrictive covenant is necessary for the protection of the legitimate interest of the Practice and is not unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood practicing cardiology.

⁴ The restrictive covenant contains the following language:

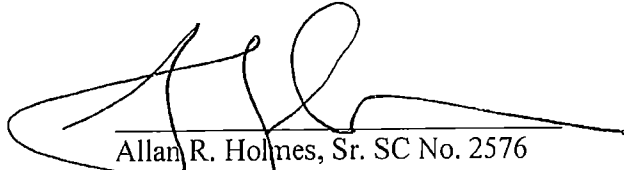
Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

(Employment Agreement p. 4) (R. p. 32) (emphasis added).

CONCLUSION

For the foregoing reasons, the Appellants seek a grant of rehearing.

All of which is respectfully submitted.

A large, stylized handwritten signature in black ink, appearing to read 'ARH', is written over a horizontal line.

Allan R. Holmes, Sr. SC No. 2576
Rebecca J. Wolfe, SC No. 102867
GIBBS & HOLMES
171 Church Street, Suite 110
Post Office Box 938
Charleston, South Carolina 29402
(843) 722-0033

ATTORNEYS FOR THE APPELLANTS

June 1, 2022

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Number 2019-CP-21-00777

Dr. Gregory A. May,

Respondent,

v.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe

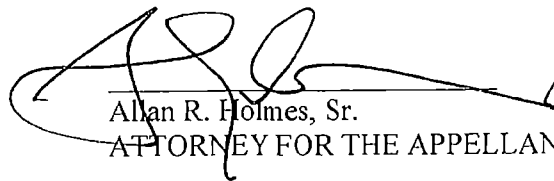
Appellants.

PROOF OF SERVICE

I, Allan R. Holmes, Sr., do hereby certify that I have served all counsel in this action
with a copy of the foregoing Petition for Rehearing by U.S. mail to the following addressees this

1st day of June, 2022:

Mark W. Buyck, III, Esq.
WILLCOX, BUYCK, & WILLIAMS, PA
248 West Evans Street
Florence, SC 29501
ATTORNEY FOR RESPONDENT


Allan R. Holmes, Sr.
ATTORNEY FOR THE APPELLANTS

The South Carolina Court of Appeals

Dr. Gregory A. May, Respondent.

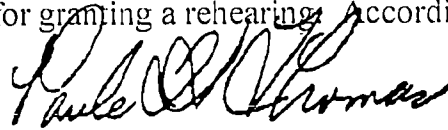
v.

Advanced Cardiology Consultants, P.C.; Dr. Lew A.
Rowe; and Theresa Rowe; Appellants.

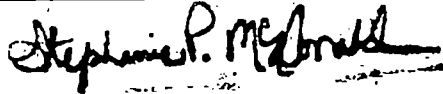
Appellate Case No. 2019-002114

ORDER

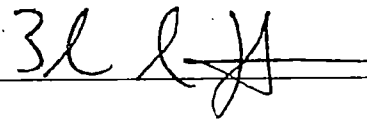
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Allan R. Holmes, Sr., Esquire
Rebecca Jane Wolfe, Esquire
Mark W. Buyck, III, Esquire
The Honorable Michael G. Nettles

FILED
Jun 22 2022