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THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
Honorable J. Michael Baxley
Circuit Court Judge

CIVIL ACTION NO: 2010-CP-16-0332
TRACKING NO: 2011203391

RECEIVED

JUN 10 2013

Pee Dee Health Care, P.A.,

SC Court of Appeals

Appellant,

v.

Estate of Hugh S.
Thompson, III,

Respondent.

**MOTION TO VACATE ORDER OF SUMMARY JUDGMENT FOR LACK OF
JURISDICTION AS THE LOWER COURT HAD NEITHER (A) SUBJECT-MATTER
JURISDICTION OF THE CASE NOR (B) THE AUTHORITY TO PROCEED WITH
OTHER MATTERS IN THE CASE ONCE THE APPELLANT SERVED ITS NOTICE
OF APPEAL ON RESPONDENT ON AUGUST 15, 2011**

A

Appellant respectfully moves this Court to vacate the order of summary judgment granted to the Respondent by order of the lower court as the lower court was divested of subject-matter jurisdiction when Appellant's Notice of Appeal of the order of disqualification was served on this Respondent on August 15, 2011. Appellant's notice of appeal was subsequently filed with this Court on August 24, 2011. Service of the notice of appeal divested the lower court of subject-matter jurisdiction over the order being appealed, except for matters not affected by the

appeal. Thus, upon the filing of the notice of appeal, the lower court lost jurisdiction of the matters in the order as well as the matters affected by the order because the appellate court assumed exclusive jurisdiction upon service of the Notice of Appeal. See Rule 205, SCACR. Pursuant to Rule 241(a), SCACR, the automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. There is no order lifting the automatic stay. The Respondent made no Motion to Lift the Automatic Stay to the trial court or this Court nor did the trial court raise the matter *sua sponte*.

Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong. In South Carolina, subject matter jurisdiction can be raised for the first time on appeal. See *In re November 4, 2008 Bluffton Town Council Election*, 385 S.C. 632, 637, 686 S.E.2d 683, 685-86 (2009).

In *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005), this Court held:

an order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2). Such an order implicitly falls within the statutory definition of a substantial right under Section 14-3-330(2)(a). The right to be represented by an attorney of one's choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case.

Hagood at 197-198.

The *Hagood* Court further stated:

We further conclude, as we have with regard to the right to a particular mode of trial, an order granting a motion to disqualify a party's preferred attorney *must* be immediately appealed or any later objection in a subsequent appeal will be waived. Cf. *Flagstar Corp.*, 341 S.C. at 72, 533 S.E.2d at 333 (party is required to immediately appeal if denied a mode of trial to which he is entitled as a matter of right, and failure to do so forever bars appellate review of the issue).

Hagood 198.

Because the order of disqualification deprived the Appellant of a substantial right which this Court has previously determined to be on equal footing with the denial of a mode of trial to which a party is entitled as a matter of right [*Hagood*, supra], and because the order of disqualification had to be immediately appealed or waived, the lower court lost subject-matter jurisdiction of the case when the order disqualifying counsel for Appellant was served upon counsel for Respondent on August 15, 2011, and received by this Court on August 24, 2011. No order of any court has lifted or modified the automatic stay.

B

Alternatively, Appellant respectfully moves this Court to vacate the lower court's order of summary judgment as the lower court was divested of jurisdiction and authority over the case once the Notice of Appeal of the order granting Respondent summary judgment was served on Respondent. Under the last sentence of Rule 241, SCACR, the lower court could act only to enforce matters not stayed by the appeal. See *Arnal v. Fraser*, 614 SE 2d 419 (2007)(the family court could enforce the child support and medical expenses because they were not stayed pursuant to Rule 225(b)(6) but the court did not have jurisdiction to modify the alimony payments because the issue was on appeal. Moreover, the Court could not hold the Father in contempt for violating an order relating to visitation because the order of contempt *affected* a matter on appeal and the lower court lacked jurisdiction to do so).

The order disqualifying counsel for Appellant deprived the Appellant of a substantial right, which, in turn, deprived the lower court of authority under Rule 241(a), SCACR to determine or enforce other matters in the case until the order disqualifying

counsel for Appellant was finally determined by this Court. *Theisen v. Theisen*, 394 S.C. 434, 440-41, 716 S.E.2d 271, 274 (2011) (stating subject matter jurisdiction is the power to hear cases of the general class to which the proceedings belong, while "jurisdiction" and "authority" concern the limits of what a tribunal may properly consider or order regarding a case within the tribunal's general class). See *Hagood*, supra.

In the case at bar, the trial court had neither subject-matter jurisdiction nor the authority to enter summary judgment in favor of the Respondent following the filing of the Notice of Appeal disqualifying Appellant's counsel because this Court had exclusive jurisdiction of the case at the time the trial court entered summary judgment.

II

The sequence of events is as follows:¹

Document	Dates	Exhibit
Written order of circuit court disqualifying counsel for Appellant	a. Dated April 15, 2011 [Signing date noted – ROA 12] b. Filed with Darlington County Clerk of Court on April 19, 2011 [Filing date noted ROA 12] c. Received by Appellant on April 21, 2011	A

¹ For the Court's convenience, the Appellant has attached the documents noted herein as Exhibits to this Motion.

Appellant's 59(e) Motion for Reconsideration of order of disqualification	a. Filed by Darlington Country Clerk of Court on May 2, 2011* [ROA 332] and served on Respondents on May 2, 2011 [ROA 334] *Filing of Rule 59(e) Motion for Reconsideration suspended the finality of order of disqualification. At the time the court entered its order denying the Motion for Reconsideration, the finality of the order was restored. <i>See Se. Hous. Found. v. Smith</i>, 380 S.C. 621, 640, 670 S.E.2d 680, 690 (Ct. App. 2008) (indicating that a Rule 59(e) motion removes the finality of the challenged judgment). While a 59(e) motion is pending because the finality of the challenged judgment has been removed. <i>Southeastern Housing v. Smith</i>, 370 SE 2d 680 (2008). See also <i>Coward Hund Const. Co., Inc. v. Ball Corp.</i>, 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct.App.1999) (basing the commencement of the time period for appeal on the finality of a judgment).	B
Order of circuit court denying Appellant's motion for reconsideration of order of disqualification of Appellant's counsel	a. Signed by lower court on August 12, 2011. [ROA 14] b. Received by Appellant on August 15, 2011	C
Appellant's Notice of Appeal of order of disqualification of	a. Served on Respondent on August 15, 2011. [ROA 331]	D

Appellant's counsel [Tracking No: 201197671]	b. Received by Clerk of Court of Appeals on August 24, 2011 [ROA 331, 329]* *A copy of the order of disqualification was also attached to the Notice of Appeal of the order granting Respondent's summary judgment as noted on the document as being filed with the Darlington County Clerk on October 13, 2011.	
Written order of Circuit court granting Summary Judgment to Respondent	a. Signed by lower court on August 29, 2011. [ROA 33] b. Filed with Darlington Clerk of Court - September 1, 2011 [ROA 33]	E
Written order of circuit court denying Appellant's Motion for Reconsideration of order of circuit court granting summary judgment to Respondent	a. Dated September 28, 2011 by trial court. [ROA 36] b. Filed October 4, 2011 with the Darlington County Clerk of Court. [ROA 36]	F

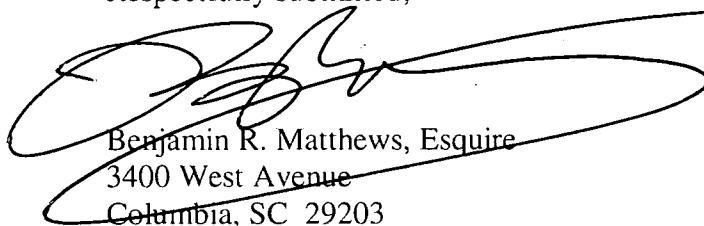
Notice of Appeal of lower court order granting summary judgment to Respondent [Tracking No: 2011203391]	Served on Defendant and filed on October 28, 2011 with Darlington County Clerk of Court. [ROA 348-351]	G
Letter of Tony R Megna to Judge Baxley explaining confusion over the effects of the filing of Motion for Reconsideration	Mailed October 10, 2011	H
Letter of Judge Baxley to attorney for Appellant, Tony R. Megna,	Letter from Judge Baxley (copied to counsel for Respondent and filed with Darlington County Clerk of Court) stating his appreciation for Mr. Megna voluntarily agreeing not to take further action in circuit court. Ben Matthews then filed the Notice of Appeal.	I

CONCLUSION

Because the order disqualifying Appellant's counsel affected a substantial right of Appellant and had to be immediately appealed or waived, the Appellant's Notice of Appeal served on counsel for Respondent on August 15, 2011, see copy of notice attached hereto and incorporated herein by reference as Exhibit D, rendered all other matters in the case speculative, and deprived the lower court of both (a) subject-matter jurisdiction and/or (b) the authority to determine or enforce any other matters in the case until the lower court's order of disqualification was determined on appeal. Rules 205 and

241, SCACR. Therefore, the order of the trial court granting the Respondent summary judgment filed forty-nine days (49) after this Court obtained exclusive jurisdiction of the case on October 4, 2011 with the Darlington County Clerk of Court, see copy of order granting summary judgment attached hereto and incorporated herein by reference as Exhibit F is void *ab initio*. Appellant requests this Court to vacate the order of summary judgment granted to Respondent.

Respectfully submitted,

A large, stylized handwritten signature in black ink, likely belonging to Benjamin R. Matthews, is written over the printed name and address.

Benjamin R. Matthews, Esquire
3400 West Avenue
Columbia, SC 29203
803.254.3678
Attorney for Appellant

June 10, 2013.

**THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals**

**APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas
Honorable J. Michael Baxley
Circuit Court Judge**

**CIVIL ACTION NO: 2010-CP-16-0332
TRACKING NO: 2011203391**

RECEIVED
JUN 10 2013
SC Court of Appeals

Pee Dee Health Care, P.A.,

Appellant,

v.

**Estate of Hugh S.
Thompson, III,**

Respondent.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Motion to Vacate was served on counsel for Defendant on the 10th day of June, 2013.

- a. Jay James, PO Box 507, Darlington, SC 29540
- b. Renee Josey, PO Box 5478, Florence, SC 29501
- c. The Honorable Jenny Abbott Kitchings, Clerk, SC Court of Appeals, P.O. Box 11629, Columbia, SC 29211 [hand-delivered to 1015 Sumter Street, Columbia, SC]

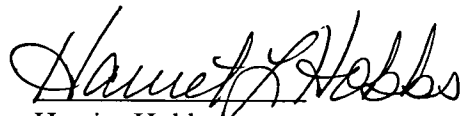

Harriet Hobbs

EXHIBIT A

STATE OF SOUTH CAROLINA,

COUNTY OF DARLINGTON.

IN THE COURT OF COMMON PLEAS
2010-CP-16-0332

Pee Dee Health Care, P.A.,

Plaintiff,

vs.

Estate of Hugh S. Thompson,

Defendant.

ORDER DISQUALIFYING
PLAINTIFF'S COUNSEL TONY R. MEGNA

2011 APR 16 PM 2:11
SCOTT A. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

 This is an action originally filed in the Probate Court wherein the Plaintiff is attempting to recover reimbursement from the Defendant estate for losses in Medicare reimbursements allegedly occasioned by the actions of Dr. Hugh S. Thompson during his period of practice with Plaintiff. Counsel for the Defendant has now moved this Court for an Order disqualifying Plaintiff's counsel Tony R. Megna. This motion is based upon the Rules of Professional Conduct, as found in SCACR 407, and supporting case law. Plaintiff filed a response to the motion on March 11, 2011, and the matter was heard by the Court on March 16, 2011. After consideration of all the pleadings, motions, exhibits, and the arguments of counsel, the Court finds that Attorney Megna should be disqualified from further representation of the Plaintiff in this matter. This determination is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

(1) Counsel Tony R. Megna has identified himself as the Chief Executive Officer ("CEO") of Plaintiff Pee Dee Health Care, P.A. ("PDHC"). In addition to such identification made to the Court at the March 16th hearing, the response of PDHC to the pending motion to

disqualify states that Mr. Megna "has been the CEO and General Counsel to the Plaintiff since 1995." Plaintiff's Return (see footnote 1 below).

(2) Mr. Megna's admitted position as the CEO for PDHC confirms his focal point as a witness in this matter. By his signature in Section 15 of a "Medicare Enrollment Application" submitted to the Centers for Medicare and Medicaid Services (CMS) within the United States Department of Health and Human Services (Exhibit B to the Motion), "completed for" PDHC, Mr. Megna "binds this provider to the laws, regulations, and program instructions of the Medicare program."¹ Accordingly, Mr. Megna is positioned to be a person with knowledge at PDHC about the efforts of that organization to comply with Medicare "laws, regulations, and program instructions." PDHC's adjudicated non-compliance led to the adverse Medicare decision at the heart of this case. Thus, Mr. Megna is a necessary witness to matters raised in this case.

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(3) PDHC has answered interrogatories propounded pursuant to Rule 33 of the South Carolina Rules of Civil Procedure (responses dated July 28, 2010 attached as Exhibit C to the Motion). In response to interrogatory 1, which calls for the identification of witnesses, PDHC lists Tony R. Megna.² In addition, the response to Interrogatory 8 identifies Tony Megna as the only person known to PDHC with whom Hugh S. Thompson (the "decedent") communicated about the adverse Medicare determination for recoupment. While the motion response of PDHC now seeks to minimize Attorney Megna's communications with Dr. Thompson, the

¹ At the close of argument, PDHC suggested that this document is not supportive of Megna's CEO status - a status now admitted by PDHC. While the application cover letter indicates that it generally relates to Lower Florence County Hospital, the letter specifically provides that sections 6 and 15 relate to PDHC of Darlington. These sections identify Megna as an owner of PDHC, a managing employee of PDHC, and as a "Director/Officer" of PDHC - all uncontested at this point according to PDHC positions at the hearing. In the PDHC written response to the Motion to Disqualify, Megna is specifically confirmed to have an interest in the outcome of this lawsuit. Response page 30.

² PDHC's interrogatory answer asserts that "Mr. Megna is not likely to testify...." This anticipatory disclaimer does not alter Defendant's right to discover information from witness Megna and this alone requires disqualification whether called at trial as a witness, by either party, or not.

communications described in these initial interrogatory answers and in the complaint³ make Mr. Megna a witness to relevant issues in this matter.

(4) The appeal of the adverse PDHC Medicare determination is relevant in this matter. While PDHC asserts that the Defendant should be estopped, even by the decedent's alleged silence, from denying liability for the indemnification of Plaintiff's Medicare overpayment, there would have been no liability to Medicare at all if the PDHC appeal had been successful like the appeal of decedent's other employer, Firstchoice Healthcare, which arose over the same issue. The claim to equitable indemnification referenced by PDHC in argument at this motion hearing requires a finding that the proposed indemnitee (PDHC) was without fault or liability for the damages. See Fowler v. Hunter, 388 S.C. 355, 697 S.E.2d 531 (2010). Thus, PDHC's fault is at issue in this case and the decision of federal Administrative Law Judge Metry (Exhibit A to the Motion) speaks to that issue directly and decisively. The appeal of Judge Metry's Order, if any, would be relevant in this matter on the preclusive finding that PDHC was at fault and therefore could not be indemnified.⁴

Mr. Megna is identified in PDHC's answer to interrogatory 9 as the person involved with the defense of the adverse Medicare determination. He has firsthand knowledge regarding the status and results of any administrative appeals.

³ In its complaint (§ 13), PDHC alleges that the decedent Thompson made "contact" with PDHC by sending a letter to the Plaintiff in which he is alleged to have "admitted" not providing "accurate information to Plaintiff upon and during his employment with the Plaintiff...." The unsigned letter was submitted at the hearing, without objection, as Defense Hearing Exhibit 1, and is directed to "Tony" - current counsel for PDHC. The complaint purports to attach a copy of the alleged letter as an exhibit. The same document is submitted in the motion response of PDHC as Exhibit HH.

PDHC's answer to Interrogatory 2 identifies the same alleged letter from decedent Thompson to Tony Megna as a document that relates to a claim or defense in the case. That interrogatory answer also references other "information sent to Tony Megna by Dr. Thompson relating to the SC Board of Medical Examiners." Thus, by the Plaintiff's own responses, Mr. Megna is the alleged recipient of documents and information relevant to claims and defenses in the case. Questions regarding the authenticity of this letter, the circumstances of its alleged receipt, and its alleged contextual meaning are all fairly directed to Mr. Megna.

⁴ Judge Metry's finding of fault was based upon the affirmative duty of employers to perform due diligence by investigating the program exclusion status of prospective employees lest they face liability for exclusion facts they "should know." See 42 U.S.C. § 1320a-7a(a)(6); 42 CFR 1003.102(a)(2).

(5) Even if PDHC were not at fault, communications between PDHC and Thompson about the Medicare claim and appeals process are relevant to the issues raised in this case. At least in part, PDHC's claim to equitable indemnification also depends upon showing that Dr. Thompson was provided timely notification and an opportunity to participate and help defend the claim Medicare made against PDHC. This is because one who seeks equity must do equity.⁵

(6) Disqualification of Mr. Megna will not work a substantial hardship. This matter is early in the discovery phase. No depositions have been taken. Thus, there is minimal extra expense or loss of time, if any. Both Mr. Megna and attorney Benjamin Matthews have made appearances on behalf of PDHC in this action; indeed, it is Mr. Matthews who executed the complaint in this Court. Further, Mr. Megna represented to the Court that the Plaintiff has 75-80 employees; the Court finds that Plaintiff has the resources to add additional counsel if needed.

CONCLUSIONS OF LAW

Job
4 (A) In South Carolina, an attorney cannot "act as an advocate at a trial in which the lawyer is likely to be a necessary witness," unless the issue about which the attorney will testify (1) is uncontested, (2) relates to the nature or the value of the legal services rendered, or (3) disqualification would work a substantial hardship on the attorney's client. Rule of Prof. Conduct 3.7, SCACR 407. Rule 3.7 is absolute; only when one of the three delineated exceptions applies may a witness also serve as an advocate. 1 S. C. Juris. *Attorney and Client* § 53; ROBERT M. WILCOX, South Carolina Legal Ethics § 9.1.1. An adversary, such as the Estate of Dr. Thompson, has an obligation to immediately move for disqualification when there is an issue of the opposing advocate's position as a witness. Comment (1), RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108.

⁵ Accord *Otis Elevator, Inc. v. Hardin Constr. Co. Group*, 316 S.C. 292, 296-97 450 S.E.2d 41, 44 (1994) (allowing indemnification where "indemnitee gave the indemnitor notice and an opportunity to participate in the litigation....").

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(D) The Dead Man Statute⁶ does not change Mr. Megna's status as a fact witness in this case under Rule 3.7 of the Rules of Professional Conduct – regardless of how it might apply in the ultimate trial of this matter. Moreover, the Dead Man Statute has no effect upon the discoverability of information allegedly known by Megna as a fact witness.⁷

⁴ The Dead Man Statute, codified in South Carolina as S.C. Code § 19-11-20, is an evidentiary rule that relates to the competency of a witness to testify about certain matters. The statute exists to prevent interested parties from offering self-serving, incontrovertible testimony that may be unreliable. Harris v. Berry, 231 S.C. 201, 98 S.E.2d 251 (1957); Trimmler v. Thomson, 41 S.C. 125, 19 S.E. 291 (1894). Specifically, a competency objection may be raised by the decedent's representatives to prohibit a person or party with an interest in the matter from testifying about communications or transactions with another person who is deceased at the time of such testimony. See, e.g., Estate of Revis by Revis v. Revis, 326 S.C. 470, 484 S.E.2d 112 (Cl. App. 1997) ("The 'dead man's' statute is an exception to the general rule of witness competency. It is to be read restrictively, and the party requesting its use bears the burden of establishing its applicability.").

7 While the competency objection may be waived by the decedent's representatives at trial, the Court of Appeals has previously held that a discovery deposition regarding the communications between a decedent and an interested person or party does not "open the door" or waive the availability of the objection at trial. Thomas v. Taylor, 300 S.C. 127, 386 S.E.2d 630 (Cl. App. 1989)(Sanders, Chief Judge)(Relying, in part, on SCRPC 32(d)(3)(A) which provides that "Objections to the competency of a witness ... are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time."). Obviously, Dr. Thompson's death cannot be removed or obviated "before or during" any Megna deposition so waiver is not possible at a deposition. PDHC's assertion that the statute acts as a complete bar to any examination is belied, however, by the statute's own provision for "opening the door" to otherwise incompetent testimony. See, e.g., Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997).

(E) Mr. Megna's role as general counsel to PDHC does not change Mr. Megna's status as a fact witness in this case under Rule 3.7 of the Rules of Professional Conduct – regardless of how this status might trigger evidentiary privileges. While PDHC asserts that privileges attach to anything and everything that Mr. Megna might say, thereby freeing him to act only as counsel, this Court concludes that the potential application of attorney-client privilege⁸ does not preclude anything and everything that Mr. Megna might say as a witness.

PDHC's complaint is that decedent Thompson did not disclose information to PDHC or gave wrong information to PDHC – in part through its CEO Tony Megna. Under the guise of privilege, Mr. Megna cannot avoid examination on the disclosures and communications made to him that he now claims were tortious.⁹

JMS
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In further support of the court's decision, focusing narrowly on PDHC's exhibit HH submitted in response to the motion to disqualify, there is nothing in that alleged Thompson letter to Mr. Megna that indicates that Thompson is seeking legal advice. Furthermore, that communication has already been divulged by PDHC as part of its complaint – so even if it arguably related to legal advice needed by PDHC at the time, that privilege has clearly been

⁸ South Carolina has long recognized the attorney-client privilege against the disclosure of confidential communications by a client to his attorney. State v. Loya, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980). The privilege applies only to "confidential disclosures by a client to an attorney made in order to obtain legal assistance." Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 186 (1980). The burden is on the proponent of the privilege to demonstrate its applicability. United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982). The party asserting the attorney-client privilege must establish not only that the attorney-client relationship existed, but also that the particular communication at issue is privileged and that the privilege was not waived. Cameron v. Gen. Motors Corp., 158 F.R.D. 581, 584 (D.S.C. 1994), vacated by, in part In re Gen. Motors Corp., No. 94-2435, 1995 U.S. App. LEXIS 41270 (4th Cir. 1995).

⁹ The precise boundaries of any applicable privilege are not before the court in this motion. As noted by the Defendant, however, PDHC may have implicitly waived any possible remaining or existing privilege by placing the subject of communications and disclosures between the decedent and Mr. Megna (on behalf of PDHC) into controversy. See Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1161 (D.S.C. 1975). See also In re Long Point Road Ltd. P'ship, No. 93-72769-JW, 1997 Bank. LEXIS 2403, at *9-10 (Bankr. D.S.C. Sept. 8, 1997); see also Heam v. Rhay, 68 F.R.D. 574, 580 (E.D. Wash. 1975). Fairness is the underlying touchstone for implicit waiver; the rationale is that privileged materials ought not be used as both a shield and sword. See In re: United Supermarkets, Inc., 36 S.W.3d 619, 621 (Tex. Ct. App. 2000) ("a party who is seeking affirmative relief should not be permitted to maintain an action, and at the same time, maintain evidentiary privileges that protect from discovery outcome determinative information not otherwise available to the other party."); see also Hagards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("a party may not insist on the protection of the attorney-client privilege for damaging communications while disclosing other selected communications because they are self-serving").

waived by its disclosure. Thus, Mr. Megna is now subject to examination as to details of that document.

More broadly, the privilege would only extend to Mr. Megna's communications where the medical practice of PDHC is seeking legal advice. The privilege would not extend to Mr. Megna when acting in the capacity of CEO of the medical practice; for example, Mr. Megna's communications with third parties such as government regulators, insurers, and Medicare program administrators is clearly not privileged and would be relevant to issues in this case. Likewise, questions directed to the CEO's knowledge of business operations, finances, and damages would not infringe upon privileged communications. Further, the existence of other persons who may also have knowledge in these areas does not remove Mr. Megna from the witness list prohibited by Rule 3.7.

Jan 7
(F) The work-product privilege also does not preclude anything and everything that Mr. Megna might say as a witness. The work-product doctrine seeks to protect things or information "prepared in anticipation of litigation or for the trial ..." SCRCP 26(b)(3). Specifically, the rule protects "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." The work-product doctrine does not, however, extend to anything and everything an attorney might have done – particularly when acting in the capacity of a CEO of a medical practice.¹⁰

¹⁰ The work-product privilege applies only to "attorneys' or legal representatives mental impressions, conclusions, opinions, or legal theories authored in anticipation of litigation." Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 668 (10th Cir. 2006). Fact work product is not absolutely privileged and discovery of fact or non-opinion work product may be compelled in some circumstances. In re Qwest Communications Int'l. Inc., 450 F.3d 1179, 1186 (10th Cir. 2006). "Work product which is primarily factual in nature is not absolutely immune from discovery under the rule. At best, it receives a qualified protection which is overcome if the opposing party shows substantial need of the material and inability to obtain it elsewhere without undue hardship." Transit Authority of River City v. Vinson, 703 S.W.2d 482, 486 (Ky. App. 1985); see also Duffy v. Wilson, 289 S.W.3d 555, 559 (Ky. 2009).

While the Court can address specific assertions of privilege if and when they arise, the Defendant correctly points out that the work-product doctrine is limited to protecting such things in the context of the litigation to which the information relates – *not other litigation*. Accord Kirschbaum v. WRGSB Assocs., No. 97-5532, 1998 U.S. Dist. LEXIS 8860, at *3 (E.D. Pa. June 18, 1998). In this case, the Defendant is not interested in Mr. Megna's thoughts about the present litigation with the Estate; rather, its interest is in the litigation with Medicare. The litigation with Medicare is now concluded and the work product protection, if applicable at all, would only apply in the context of that litigation – protecting against disclosure to Medicare.

Even where applicable, Rule 26(b)(3) provides for an exception when a party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Absent some audio recording, the only means to get the substantial equivalent of Dr. Thompson's alleged conversations with the CEO of PDHC is to ask the surviving party to those conversations.



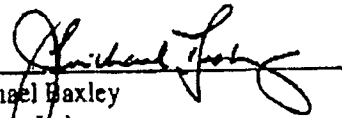
CONCLUSION

This is the type of factual scenario for which Rule 3.7 was written. Mr. Megna is the CEO of the Plaintiff organization and is an owner with a financial stake in the outcome of this litigation. By his position alone, Mr. Megna is central to the issues involved in this case. In addition, Mr. Megna was intimately involved in the relationship between Plaintiff and the Decedent Hugh S. Thompson, and was responsible for many decisions that were made regarding the employment relationship between the two parties. Mr. Megna's knowledge of these important facts assure that his testimony will be necessary in this case.

The Court is not persuaded by the Plaintiff's assertions of various privileges. Even if applicable in some limited context, the applicability of any particular privilege does not change

Mr. Megna's obvious status as a witness. In discovery or at trial or both, Mr. Megna may be called upon to testify regarding facts at issue in the present action, and thus, Mr. Megna cannot proceed as an advocate for the Plaintiff in this proceeding. The Court orders complete disqualification effective with the execution of this Order.¹¹

IT IS SO ORDERED.


J. Michael Baxley
Presiding Judge

April 15, 2011
Hartsville, South Carolina

FILED
2011 APR 19 PM 2:11
SCOTT B. SUECS
CLERK OF COURT/T.R.O.D.
DARLINGTON COUNTY, S.C.

¹¹ The Court concludes that it is not feasible for Mr. Megna to remain involved as counsel of record even before trial. The potential for problems would exist with depositions and other pre-trial functions. The immediate availability of Mr. Megna's partner eliminates any hardship or difficulty associated with this effective date.

EXHIBIT B

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

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

10-CP-16-0332

2011 MAY -2 AM 11:12
SCOTT B. SUGGS
CLERK OF COURT
DARLINGTON COUNTY, S.C.

FILED

PLAINTIFF'S MOTION TO RECONSIDER

Pursuant to Rule 59(e), SCRPC, the Plaintiff, Pee Dee Health Care, P.A. [PDHC], respectfully requests this to Court to reconsider its order [dated April 15, 2011, filed April 19, 2011, and received by mail by Plaintiff on April 21, 2011] disqualifying the undersigned from representing Plaintiff on the following grounds:

1. The Plaintiff incorporates herein its response to the Defendant's Motion to Disqualify previously filed with this Court.
2. As indicated by the attached affidavit of Mark Matthews, the document [Exhibit HH] that this Court primarily relied upon to disqualify the undersigned was obtained during the course of discovery in this case between the parties.¹ The document in Plaintiff's files is attached to his affidavit. The Court's reliance on Exhibit HH to Disqualify the undersigned is error.
3. The Court overlooked the Plaintiff's request that the Court should recuse itself from hearing matters concerning the Plaintiff and the undersigned due to the litigation now pending in Florence County where this Court often sits by designation.
4. The Court overlooked that the Medicare 855 attached to the Defendant's Motion to

¹ The document was either provided by the Defendant or was a documents obtained by subpoena or requests under the FOIA.

Disqualify the undersigned has no bearing whatsoever on the case at bar and only indicates that the undersigned was an interested party in Mid-Carolina Hospital Group [MCHG].

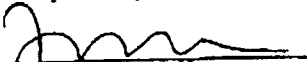
5. The Court further overlooked that the 'Medicare 855 document' it relied upon was not created *until eight years after the deceased left the employ of Plaintiff*.

6. The Court overlooked the fact that the actual, plain wording of Rule 3.7, SCACR, 401 [and all the case law interpreting the plain wording of Rule 3.7] states that disqualification, if appropriate in the first instance, which the Plaintiff denies, is limited to disqualification *at trial* as opposed to total disqualification as this Court so provided. Respectfully, disregarding the plain wording of Rule 3.7 sets a troubling precedent for litigants, attorneys and this Court. As noted in the attached affidavits of Josiah Matthews, M.D., Alexander H. Cohen, M.D., James D McInnis, M.D., Mark Matthews and Katie Noyes, there is no reasonable basis for this court to expect or to anticipate that the undersigned will be a fact witness at all, much less a necessary fact witness as required by Rule 3.7 for disqualification.

7. The Court made conclusions of fact that are incorrect in regard to the nature of the undersigned's relationship with the Plaintiff as well as Dr. Thompson as more fully set forth in the affidavits attached hereto.

8. The Plaintiff respectfully requests this Court to withdraw its order disqualifying the undersigned from representing Plaintiff, and to provide the Plaintiff the relief previously requested.

Respectfully submitted,


Tony R. Megna
Attorney-at-Law
3400 West Avenue
Columbia, SC 29203
803.799.1700

2011 MAY -2 AM 11:12
SCOTT B. SUEGS
CLERK OF COURT/R.D.
DARLINGTON COUNTY, S.C.

FILED

May 2, 2011.

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

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

CERTIFICATE OF SERVICE

10-CP-16-0332

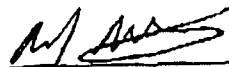
The undersigned hereby certifies, on the date indicated below, copies of the following documents in the above-captioned matter were served upon the following:

Plaintiff's Motion to Reconsider

The Honorable J. Michael Baxley
531 East Carolina Avenue
Hartsville, SC 29550-4311
[By United States Mail, first class, postage
prepaid.]

John Jay James, Esquire
PO Box 507
Darlington, SC 29540
[By United States Mail, first class, postage
prepaid.]

Rence Josey
1851 W. Evans Street, 4th Floor
Florence, SC 29501
[By United States Mail, first class, postage
prepaid.]


Mark Matthews

May 2, 2011.

**STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS**

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

AFFIDAVIT

10-CP-16-0332

2011 MAY -2 AM 11:13
FILED
SCOTT R. SUGGS
CLERK OF COURT
DARLINGTON COUNTY, S.C.

NOW COMES Alexander H. Cohen, M.D. who first being duly sworn, deposes and says:

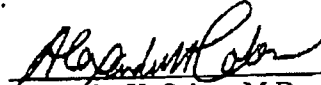
1. I am a physician and Vice-President of Pee Dee Health Care, PA, and have been so since 1995.
2. I have an interest in the outcome of the lawsuit against the estate of Dr. Thompson.
3. I was an owner and shareholder of Pee Dee Health Care at the time Dr. Thompson was hired as a physician at Pee Dee Health Care in 1998. The initial conversations with Dr. Thompson occurred with the President of Pee Dee Health Care, PA at the time, Dr. James McInnis and Dr. Josiah Matthews. While Tony and I agreed to the arrangement, neither he nor I was involved in those discussions with Dr. Thompson. Nor did Tony supervise Dr. Thompson. That task was assigned to Drs. McInnis with the permission of the SC Board of Medical Examiners. Dr. Matthews assisted Dr. McInnis.
4. I knew Dr. Thompson for in excess of fifteen years. In the entire time I knew Dr. Thompson, he never told me he had been disbarred by Medicare. I saw Dr. Thompson several times per week, and often several times per day as we often worked on the same hall. I was completely surprised when we were informed by Medicare that Dr. Thompson was not a Medicare provider during the time he worked for Pee Dee Health Care. It was particularly difficult to understand as Dr. Thompson was specifically hired to treat all patients and he and I regularly spoke about referrals, including referrals of Medicare patients, he requested I make to him.
5. Tony Megna has been our General Counsel since 1995. It would cause substantial hardship and prejudice to me, Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason.
6. I do not agree to waive any attorney-client privilege I have with Tony in his capacity as an attorney advising me in regard to legal matters, individually, or in his capacity

TRUE CERTIFIED COPY!
Scott R. Suggs
CLERK OF COURT / RMC
DARLINGTON COUNTY, S.C.

advising me as to legal matters in my capacity as an officer and owner of Pee Dee Health Care. I consider all conversations in which we discussed matters relating to Dr. Thompson to be matters I discussed with Tony as an attorney, and not as CEO of Pee Dee Health Care. We have always made the effort to keep matters regarding the employment of physicians as a matter decided and determined by the physician officers of Pee Dee Health Care. We have done so in order that Tony could handle the legal matters regarding such transactions in his capacity as an attorney, and so that our conversations with him in such a capacity were and would remain confidential. Over the years, we have made considerable efforts to insure all such matters were discussed in private without the presence of third parties to maintain the sanctity of the attorney-client relationship. We have taken the same approach in our practice in regard to the physician-patient privilege of confidentiality.

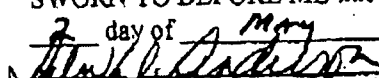
7. I respectfully request this Court to honor the sanctity and confidentiality of the attorney-client relationship between Tony Megna and Pee Dee Health Care as well to honor the sanctity and confidentiality of the attorney-client relationship of Mr. Megna and myself now and in the future. We have spent the last fifteen years carefully cultivating a culture and relationships that separate business matters from legal matters and I have no desire to waive any confidential relationships I have under the law in any capacity, and I specifically do not waive any privilege, whether attorney-client or physician-patient or any other privilege, however defined, in regard to any communication of any type or relationship of any type I have now with Mr. Megna or have ever had with Mr. Megna.

FURTHER THE AFFIANT SAYETH NOT.


Alexander H. Cohen, M.D.

SWORN TO BEFORE ME this

2 day of May, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: My Commission Expires
August 10, 2017

2011 MAY -2 AM 11:13
SCOTT B. SURGE
CLERK OF COURT/R.D.O.
DARLINGTON COUNTY, S.C.

FILED

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

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

AFFIDAVIT

10-CP-16-0332

2011 MAY -2 AM 11:13
FILED
SCOTT A. SUGGS
CLERK OF COURT/REG.
DARLINGTON COUNTY, S.C.

NOW COMES Josiah S. Matthews, M.D. who first being duly sworn, deposes and says:

1. I am a physician and Vice-President of Pee Dee Health Care, PA, and was the founding physician of Pee Dee Health Care in 1975.
2. I have an interest in the outcome of the lawsuit against the estate of Dr. Thompson.
3. I had the initial conversations that led to Pee Dee Health Care hiring Dr. Thompson in 1998. After the initial conversations, the President of Pee Dee Health Care, PA at the time Dr. James McInnis and I, had conversations with Dr. Thompson, and we hired Dr. Thompson. While Tony agreed to the arrangement, he was not involved in any of the discussions with Dr. Thompson. Nor did Tony supervise Dr. Thompson. Dr. McInnis did so with the permission of the SC Board of Medical examiners. I assisted Dr. McInnis.
4. I knew Dr. Thompson for in excess of thirty years. In the entire time I knew Dr. Thompson, he never told me he had been disbarred by Medicare. I was completely surprised when we were informed by Medicare that Dr. Thompson was not a Medicare provider during the time he worked for Pee Dee Health Care. It was particularly difficult to understand as Dr. Thompson was specifically hired to treat all patients and we regularly spoke about referral, including referrals of Medicare patients, made to him.
5. Tony Megna has been our General Counsel since 1995. It would cause substantial hardship and prejudice to me, Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it likely be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason.
6. I do not agree to waive any attorney-client privilege I have with Tony in his capacity as an attorney advising me in regard to legal matters, individually, or in his capacity advising me as to legal matters in my capacity as an officer and owner of Pee Dee Health Care. I consider all conversations in which we discussed matters relating to Dr.

TRUE CERTIFIED COPY,
Scott A. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

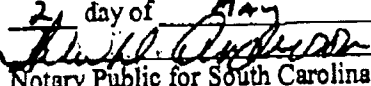
Thompson to be matters I discussed with Tony as an attorney, and not as CEO of Pee Dee Health Care. We have always made the effort to keep matters regarding the employment of physicians as a matter decided and determined by the physician officers of Pee Dee Health Care. We have done so in order that Tony could handle the legal matters regarding such transactions in his capacity as an attorney, and so that our conversations with him in such a capacity were and would remain confidential. Over the years, we have made considerable efforts to insure all such matters were discussed in private without the presence of third parties to maintain the sanctity of the attorney-client relationship. We have taken the same approach in our practice in regard to the physician-patient privilege of confidentiality.

7. I respectfully request this Court to honor the sanctity and confidentiality of the attorney-client relationship between Tony Megna and Pee Dee Health Care as well to honor the sanctity and confidentiality of the attorney-client relationship as Mr. Megna and myself now and in the future. We have spent the last fifteen years carefully cultivating a culture and relationships that separate business matters from legal matters and I have no desire to waive any confidential relationships I have under the law in any capacity, and I specifically do not waive any privilege, whether attorney-client or physician-patient or any other privilege, however defined, in regard to any communication of any type or relationship of any type I have now with Mr. Megna or have ever had with Mr. Megna.

FURTHER THE AFFIANT SAYETH NOT.


Josiah S. Matthews, M.D.

SWORN TO BEFORE ME this

2 day of May, 2011.
 (L.S.)
Notary Public for South Carolina

My Commission Expires: ~~My Commission Expires~~
August 10, 2017

2011 MAY -2 AM 11:13
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

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

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

AFFIDAVIT

10-CP-16-0332

2011 MAY -2 AM 11:13
SCOTT B. SUGGS
CLERK OF COURT/T.M.C.
DARLINGTON COUNTY, S.C.

FILED

NOW COMES Warren Mark Matthews, Sr, Deponent, who first being duly sworn, deposes and says:

1. I am an employee of Pee Dee Health Care, P.A., and was so employed during the time Dr. Hugh Thompson practiced at Pee Dee Health Care, PA.
2. I have assisted in organizing the documents and exhibits for this case, and have had possession of the documents in this case for the past several months.
3. Exhibit HH is not the original document from the files of Plaintiff. The documents provided during discovery were not separated in such a manner that allows me to know with certainty where it originated. I do not know if it was provided by the Defendant or as a result of the subpoenas to First Choice, the SC Board of Medical Examiners, Medicare, the US Department of Justice, or elsewhere. I do know however that I had never seen the document in any file maintained by our offices that we had prior to this case.
4. The files of the Plaintiff contain the letter attached hereto as Exhibit A. Exhibit A is the same letter as Exhibit HH except that Exhibit A does not have any notations on the bottom of the page.
5. I have searched all the files and records of Plaintiff, and Exhibit HH is not in these files. I have also asked others in our offices to search for this document. No one in our office has seen the document nor has any file that contains the documents HH.
6. In regard to the Medicare 855 attached to the Defendant's Motion to Disqualify, I had an opportunity to review this document during the hearing before this Court. The document only evidenced that the 855 was being filed to initiate a change of ownership to Lake City Community Hospital. It was signed by Pete Bowman as President of Lake City Community Hospital. As the Court knows, these matters are now in litigation in Florence County Court of Common Pleas, and known generally as the 'Lake City' litigation. The '855' document has nothing to do with the case at bar as Dr. Thompson left the employ

TRUE & CORRECT COPY,
Scott B. Suggs
CLERK OF COURT/T.M.C.
DARLINGTON COUNTY, S.C.

of PDHC seven years prior to the 'Lake City' events. It was signed by Mr. Megna as a representative of Mid-Carolina Hospital Group [MCHG].

7. At no time did Dr. Thompson inform me that he was barred from the Medicare program or he could not provide billable services to Medicare patients.
8. Tony Megna has been General Counsel to Pee Dee Health Care since 1995. It would cause substantial hardship and prejudice to Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it likely be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason. I cannot imagine this occurring without considerable harm and expense to PDHC, which I respectfully submit is simply unfair and inappropriate.
9. I do not agree to waive any attorney-client privilege I have with Tony in his capacity as an attorney advising me in regard to legal matters, individually, or in his capacity advising me as to legal matters in my capacity as an officer of Pee Dee Health Care. I consider all conversations in which we discussed matters relating to Dr. Thompson to be matters I discussed with Tony as an attorney, and not as CEO of Pee Dee Health Care. We have always made the effort to keep matters regarding the employment of physicians as a matter decided and determined by the physician officers of Pee Dee Health Care. We have done so in order that Tony could handle the legal matters regarding such transactions in his capacity as an attorney, and so that our conversations with him in such a capacity were and would remain confidential. Over the years, we have made considerable efforts to insure all such matters were discussed in private without the presence of third parties to maintain the sanctity of the attorney-client relationship. We have taken the same approach in our practice in regard to the physician-patient privilege of confidentiality.
10. I respectfully request this Court to honor the sanctity and confidentiality of the attorney-client relationship between Tony Megna and Pee Dee Health Care as well to honor the sanctity and confidentiality of the attorney-client relationship as Mr. Megna and myself now and in the future. We have spent the last fifteen years carefully cultivating a culture and relationships that separate business matters from legal matters and I have no desire to waive any confidential relationships I have under the law in any capacity, and I specifically do not waive any privilege, whether attorney-client or physician-patient or any other privilege, however defined, in regard to any communication of any type or relationship of any type I have now with Mr. Megna or have ever had with Mr. Megna.

FURTHER THE AFFIANT SAYETH NOT.

Warren Mark Matthews, Sr.
Warren Mark Matthews, Sr.

SWORN TO BEFORE ME this

7 day of May, 2011.
John D. Anderson (L.S.)

Notary Public for South Carolina

My Commission Expires: My Commission Expires
August 10, 2017

FILED
2011 MAY -2 AM 11:13
SCOTT B. SUGGS
CLERK OF COURT, R.O.D.
DARLINGTON COUNTY, S.C.

Ex: A

Dear Tony,

I have been awfully rushed since I got back from Columbia (late last night). Sorry I haven't found all the documents you need. I will get the rest of them together as soon as possible, and if necessary, bring them up to you in Columbia.

You will find two "private agreements" with the Board: the earlier dated one (which has probably been superseded by the one executed this year) was the result of the settlement in Federal Court I referred to.

I've got literally a box full of documents concerning the arduous struggle with the Board. Any of them I can make available to you if you need them.

I think the current "private agreement" is the index document now. I'm sure I'll be talking to you again soon, and I'll try to locate everything before I do.

Thanks,

Hugh Thompson

2011 MAY -2 AM 11:13
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

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

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

AFFIDAVIT

10-CP-16-0332

2011 MAY -2 AM 11:12
SCOTT B. SUGGS
CLERK OF COURT/J.D.
DARLINGTON COUNTY, S.C.

FILED

NOW COMES James D. McInnis, MD, Deponent, who first being duly sworn, deposes and says:

1. I am an employee of Pee Dee Health Care, Pa, and was so employed during the time Dr. Hugh Thompson practiced at Pee Dee Health Care, PA. At the time, I was also the President of Pee Dee Health Care, P.A.
2. During Dr. Thompson's employment with PDHC, I referred patients to him for pain management services. These patients had many different insurance plans including Medicare.
3. At no time did Dr. Thompson ask me to stop referring Medicare patients to him. In addition he never informed me that he was barred from seeing Medicare patients.
4. Prior to Dr. Thompson being employed at Pee Dee Health Care, I had extensive conversations with Dr. Thompson about his past troubles with the state Board of Medical Examiners. During these conversations, and during his employ at Pee Dee Health Care, he never mentioned or suggested that he had any ongoing issues with any insurance program or that he could not provide medical services to whomever he chose. I had known Dr. Thompson many years prior to his employment at Pee Dee Health Care, and had no reason not to believe the statements he was making. Nor did I have any reason to question his judgment, his honesty, or his ability to treat medically patients referred to him.
5. After the initial conversations, we hired Dr. Thompson. While Tony agreed to the arrangement, he was not involved in the discussions with Dr. Thompson. Those were conducted by Dr. Matthews and me. Nor did Tony supervise Dr. Thompson. I mainly managed those matters with the permission of the SC Board of Medical Examiners and the assistance of Dr. Matthews.
6. At his request, I accompanied Dr. Thompson to the offices of the state Board of Medical examiners in order to appear before the Board with Dr. Thompson so that he could work at Pee Dee Health, P.A. We spent several hours together that day and discussed the matters that led to his having to appear before the Board in order to be licensed to practice.

TRUE CERTIFIED COPY

CLERK OF COURT/J.D.
DARLINGTON COUNTY, S.C.

7. I never heard Dr. Thompson, at any time, object to the billing of the medical services he performed on any patient.
8. Tony Megna has been General Counsel to Pee Dee Health Care since 1995. It would cause substantial hardship and prejudice to me, Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it likely be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason.
9. I do not agree to waive any attorney-client privilege I have with Tony in his capacity as an attorney advising me in regard to legal matters, individually, or in his capacity advising me as to legal matters in my capacity as an officer and owner of Pee Dee Health Care. I consider all conversations in which we discussed matters relating to Dr. Thompson to be matters I discussed with Tony as an attorney, and not as CEO of Pee Dee Health Care. We have always made the effort to keep matters regarding the employment of physicians as a matter decided and determined by the physician officers of Pee Dee Health Care. We have done so in order that Tony could handle the legal matters regarding such transactions in his capacity as an attorney, and so that our conversations with him in such a capacity were and would remain confidential. Over the years, we have made considerable efforts to insure all such matters were discussed in private without the presence of third parties to maintain the sanctity of the attorney-client relationship. We have taken the same approach in our practice in regard to the physician-patient privilege of confidentiality.
10. I respectfully request this Court to honor the sanctity and confidentiality of the attorney-client relationship between Tony Megna and Pee Dee Health Care as well to honor the sanctity and confidentiality of the attorney-client relationship as Mr. Megna and myself now and in the future. We have spent the last fifteen years carefully cultivating a culture and relationships that separate business matters from legal matters and I have no desire to waive any confidential relationships I have under the law in any capacity, and I specifically do not waive any privilege, whether attorney-client or physician-patient or any other privilege, however defined, in regard to any communication of any type or relationship of any type I have now with Mr. Megna or have ever had with Mr. Megna.

James D. McInnis, MD

2

2 day of May, 2011.
William O. Anderson (L.S.)
Notary Public for South Carolina
My Commission Expires: ~~My~~ Commission Expires
August 10, 2017

FILED

2011 MAY -2 AM 11:12

SCOTT B. SUGGS
CLERK OF COURT/R.D.
DARLINGTON COUNTY, S.C.

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

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

AFFIDAVIT

10-CP-16-0332

2011 MAY -2 AM 11:12
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

NOW COMES Katherine Noyes, Deponent; who first being duly sworn, deposes and says:

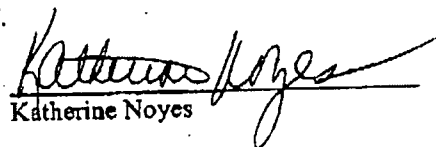
1. I am an employee of Pee Dee Health Care, PA, and was so employed during the time Dr. Hugh Thompson practiced at Pee Dee Health Care, PA. as the Vice President of Business Operations. In such capacity, I saw and spoke to Dr. Thompson on many occasions.
2. I am now President of Business Operations.
3. At no time did Dr. Thompson inform me that he was barred from the Medicare program or he could not provide billable services to Medicare patients.
4. My staff billed Medicare on numerous occasions for serviced performed by Dr. Thompson and at no time did he object to the billing of these services nor inform us any reason he was unable to provide medical services to Medicare beneficiaries.
5. In early June 2007, my office received a letter from Palmetto GBA [BAM 01 X] stating that we had been overpaid \$208,821.03 due to Dr. Thompson being sanctioned by the Office of Inspector General since 1996. Including interest, the total amount our office repaid to Palmetto GBA was \$226,740.19.
6. Tony Megna has been General Counsel to Pee Dee Health Care since 1995. It would cause substantial hardship and prejudice to Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it likely be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason.
7. I do not agree to waive any attorney-client privilege I have with Tony in his capacity as an attorney advising me in regard to legal matters, individually, or in his capacity advising me as to legal matters in my capacity as Vice President (now President) of Business Operations for Pee Dee Health Care. I consider all conversations in which we discussed matters relating to Dr. Thompson to be matters I discussed with Tony as an attorney, and not as CEO of Pee Dee Health Care. We have always made the effort to keep matters regarding the employment of physicians as a matter decided and determined by the physician officers of Pee Dee Health Care. We have done so in order that Tony

TRUE CERTIFIED COPY!
SUGGS
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

could handle the legal matters regarding such transactions in his capacity as an attorney, and so that our conversations with him in such a capacity were and would remain confidential. Over the years, we have made considerable efforts to insure all such matters were discussed in private without the presence of third parties to maintain the sanctity of the attorney-client relationship. We have taken the same approach in our practice in regard to the physician-patient privilege of confidentiality.

8. In addition to the foregoing, and in my position as President of Business Operations of Pee Dee Health Care, I am the person responsible for the financial operations of the company. Tony certainly has access to the financial information, and I review it with him regularly, but any information he could obtain for this Court or in the dispute with Dr. Thompson's estate would have to first come through me because, as a practical matter, I and my staff have the information and compile it on a daily basis as it changes on a daily basis. With all due respect, it would not be appropriate to say that Tony is the person with primary access and understanding of the information. Again, he has had access to it just as any other attorney would have such access. But it is not realistic to expect that Tony could testify to the financial information relating to these matters without either first consulting with me or him first completing much work and research.
9. I respectfully request this Court to honor the sanctity and confidentiality of the attorney-client relationship between Tony Megna and Pee Dee Health Care as well as to honor the sanctity and confidentiality of the attorney-client relationship as Mr. Megna and myself now and in the future. We have spent the last fifteen years carefully cultivating a culture and relationships that separate business matters from legal matters and I have no desire to waive any confidential relationships I have under the law in any capacity, and I specifically do not waive any privilege, whether attorney-client or physician-patient or any other privilege, however defined, in regard to any communication of any type or relationship of any type I have now with Mr. Megna or have ever had with Mr. Megna.

FURTHER THE AFFIANT SAYETH NOT.


Katherine Noyes

SWORN TO BEFORE ME this
day of May, 2011.
(L.S.)
Notary Public for South Carolina
My Commission Expires: 3-9-2019

2011 MAY -2 AM 11:12
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

FILED

EXHIBIT C

IN THE COURT OF COMMON PLEAS
2010-CP-16-0332

This matter is before the Court on Plaintiff's SCRCP 59(e) Motion for Reconsideration of an Order dated April 15, 2011, which disqualified Plaintiff's counsel from representing Plaintiff in this matter. Plaintiff filed the present motion to reconsider on May 2, 2011. On May 20, 2011, Defendant filed a Motion to Dismiss Plaintiff's Rule 59(e) motion and Memorandum in Opposition to Plaintiff's Motion. Plaintiff then filed a Reply to Defendant's Motion in Opposition on May 26, 2011. All these filings have been considered by the Court in reaching this decision.

On July 19, 2011, the Court conducted a hearing on this matter as well as cross motions for Summary Judgment filed by both parties. Prior to this hearing, in its Notice of Hearing dated June 17, 2011, and to avoid any prejudice to Plaintiff, the Court permitted Plaintiff's disqualified counsel to argue the outstanding Summary Judgment Motions before it would render a decision on Plaintiff's 59(e) Motion. The Court took all three Motions under advisement. The Cross-Motions for Summary Judgment remain under advisement as of the date of this Order.

After careful consideration of the extensive record submitted by both parties, as well as the arguments heard on July 19, Plaintiff's Motion for Reconsideration under SCRCP 59(e) is **DENIED**.

The findings of fact and conclusions of law in the Order Disqualifying Counsel are replete. Thus, the Court declines to offer additional reasoning for its decision to uphold that determination, without alteration.

However, the Court does find that its decision to allow Plaintiff's counsel oral argument on previously-filed Summary Judgment Motions did not attenuate its Order of Disqualification. The Court granted Plaintiff's counsel a limited appearance only. Therefore, all motions, subpoenas, and filings signed only by disqualified-counsel, Tony R. Megna, and made subsequent to the Notice of Hearing dated June 17, 2011 in which the Court formally announced the parameters of its accommodation to Plaintiff and its counsel, are hereby **QUASHED**.

Plaintiff's remaining counsel is Ordered to personally serve a copy of this Order on all parties affected by the Court's decision herein, including counsel for Defendant, within 5 days of service from the Clerk of Court.

RECEIVED

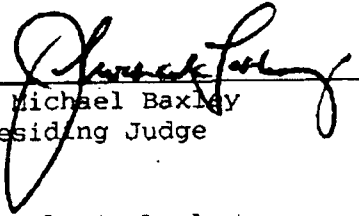
AUG 24 2011

SC Court of Appeals

IT IS SO ORDERED.

Hartsville, South Carolina
August 12, 2011

Attorney for Plaintiff
Benjamin R. Matthews, Esq.
3400 West Avenue
Columbia, S.C. 29203


J. Michael Baxley
Presiding Judge

Attorneys for Defendant
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CC:
Tony R. Megna, Esq.
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EXHIBIT D

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON

CASE NO: 2010-CP-16-0332
The Honorable J. Michael Baxley, Jr.

PEE DEE HEALTH CARE, P.A.,

APPELLANT,

v.

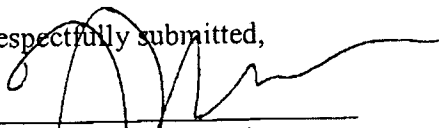
HUGH S. THOMPSON, III, LOUISE T.
DAILEY AS PERSONAL
REPRESENTATIVES OF THE ESTATE
OF HUGH S. THOMPSON,

RESPONDENT.

NOTICE OF APPEAL

The Appellant, Pee Dee Health Care, P.A. hereby appeals the order of the Honorable J. Michael Baxley dated August 12, 2011, the signed copy by the Court being received by Appellant on August 15, 2011, a copy being attached hereto. A copy of the underlying order dated April 15, 2011, [filed April 19, 2011, and received by Appellant on Thursday, April 21, 2011] as well as a copy of the Rule 59(e) Motion to Reconsider filed Monday, May 2, 2011 are attached hereto.

Respectfully submitted,


Tony R. Megna, Esquire
Attorney for Appellant
3400 West Avenue
Columbia, South Carolina 29203
803.254.3676
Attorneys for Appellant

August 15, 2011.

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AUG 24 2011

SC Court of Appeals

Attorneys for Respondent:

Jay James
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Renee Josey
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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON

CASE NO: 2010-CP-16-0332

PEE DEE HEALTH CARE, P.A.,

APPELLANT,

v.

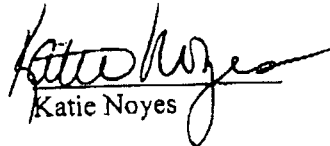
HUGH S. THOMPSON, III, LOUISE T.
DAILEY AS PERSONAL
REPRESENTATIVES OF THE ESTATE
OF HUGH S. THOMPSON,

RESPONDENT.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Notice of Appeal was served on counsel for Defendant on the 15th day of August, 2011.

- a. Jay James, PO Box 507, Darlington, SC 29540 and by email to pjlaw507@bellsouth.net, and
- b. Renee Josey, 319 S. Irby Street, Florence, SC 29501 and by email to RJosey@turnerpadget.com.


Katie Noyes

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SC Court of Appeals

EXHIBIT E

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

IN THE COURT OF COMMON PLEAS

C/A # 2010-CP-16-0332

TRUE CERTIFIED COPY
CLERK OF COURT/CMC
DARLINGTON COUNTY, S.C.

ORDER OF SUMMARY JUDGMENT IN
FAVOR OF DEFENDANT
(Ending Case)

2011 SEP -1 AM 11:50
SCOTT B. SUGGS
CLERK OF COURT/CMC
DARLINGTON COUNTY, S.C.

FILED

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This matter is before the Court on cross-motions of the parties for summary judgment. The Plaintiff filed its motion for summary judgment on December 9, 2010, based upon admissions made by Defendant in its Answer. The Defendant filed its counter motion for summary judgment on May 20, 2011. The Defendant's motion is based upon the Plaintiff's alleged fault in causing the debt sued upon by the complaint and the alleged dispositive nature of that fault with regard to all of Plaintiff's causes of action. While some factual issues not pertinent to this decision might remain in dispute, the Defendant asserts that dispositive adjudication of fault by the Plaintiff has been resolved in an appropriate forum and is binding upon the Plaintiff here as to the entire case.

Both motions have been extensively briefed by the parties, in memoranda filed with the Court, and in letters - also filed with the Court or made part of the record by attachment to other filed memoranda. After this extensive briefing, the matter was set for hearing in Darlington on July 19, 2011. At this hearing, the Court allowed the Plaintiff's preferred counsel to argue the motions for summary judgment despite his general disqualification as counsel ordered by the

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DARLINGTON COUNTY, S.C.

Court earlier in the matter¹; this was done to eliminate any alleged prejudice or disadvantage with regard to the summary judgment motion presentation.

After consideration of all of the record including: the pleadings, motions, exhibits, filed letters, and argument, the Court finds that summary judgment for the Defendant is appropriate. This determination is based upon the findings of fact and conclusions of law as outlined below.

PROCEDURAL STATUS OF CASE

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Because the Plaintiff has raised an objection to the Court's present jurisdiction to enter this Order, a brief review of the history of this matter is instructive. This matter, before this Court upon removal from the Probate Court of Darlington County, has been hotly contested, and the parties have been before this Court on multiple issues. As stated above, upon motion of Defendant after full argument and briefing, this Court issued an Order dated April 15, 2011 disqualifying Plaintiff's counsel Tony R. Megna. Attorney Megna then moved to reconsider this decision, taking the position, *inter alia*, that the Plaintiff would be unduly prejudiced by attorney Megna not being allowed to argue the summary judgment motions that were pending. The Court took this reconsideration motion under advisement and stayed its Order disqualifying counsel, and then permitted counsel to argue the reconsideration motion on July 19, 2011, the same day that the summary judgment motions were argued, so that Plaintiff would have the benefit of Mr. Megna's representation at summary judgment arguments. At the end of the hearings, the Court then took all matters under advisement.

By Order dated August, 12, 2011, this Court denied Plaintiff's motion to reconsider the Order disqualifying counsel. On that same date, the Court issued a letter addressed to counsel advising that the Court was persuaded that Summary judgment was appropriate in this case on

¹ Plaintiff's initial counsel Tony R. Megna also serves as CEO of Plaintiff and this Court has found him to be a necessary witness in the matter.

behalf of the Defendants, and directing defense counsel to prepare a proposed order to that effect.

On August 15, 2011, Plaintiff filed a notice of Intent to Appeal the final decision disqualifying counsel. Plaintiff's counsel further argues that this appeal operates as a Stay for all proceedings in the case. This Court disagrees. Both Rules 205 and 241(a), SCRAP, provide that the trial court has continuing jurisdiction of case issues not affected by the pending appeal. Clearly, the disqualification of counsel issue does not impact the merits of the case addressed by summary judgment. Moreover, this Court believes that considerations of appellate judicial economy are best served by the rendering of this decision at the present time.

FINDINGS OF FACT

(1) Hugh S. Thompson, Jr. (Decedent) died on November 5, 2009, as a resident of Darlington County. His Will dated June 26, 2008, was admitted to probate by the Darlington County Probate Court on November 11, 2009, and his children Louise T. Dailey and Hugh S. Thompson, III, were nominated by the Will as Personal Representatives and were duly appointed by the Probate Court.

(2) On April 14, 2010, Pee Dee Health Care, P.A. (PDHC) filed a claim against the estate to recover reimbursement for losses allegedly occasioned by the actions of the Decedent (a medical doctor) during his period of practice with PDHC during the years 1998-2000. The estate disallowed the claim on May 7, 2010. Subsequently PDHC filed an amended claim and Summons and Complaint in the Probate Court and petitioned for removal of this action to the Court of Common Pleas pursuant to S.C. Code Ann. §62-1-302(d)(2009). Respondent filed an Answer and the case is now before the Circuit Court on cross-motions for summary judgment.

(3) Prior to commencing employment as a physician with PDHC, Decedent's medical license had been suspended in 1994 by the South Carolina Board of Medical Examiners. As a consequence of this action, Decedent was "debarred" by the Medicare Office of the Inspector General. While Decedent regained his license to practice medicine in April 1998, he did not seek reinstatement from the Medicare Office of Inspector General until 2002.²

(4) Decedent was employed by PDHC for approximately two years, from late 1998 to sometime in 2000. Prior to employing Decedent, PDHC had Decedent sign a Medicare form re-assigning to PDHC Medicare payments arising out of Decedent's service to Medicare patients as an employee-physician.³ After leaving the employment of PDHC, Decedent was employed by First Choice Healthcare, a medical practice in Florence, South Carolina.

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(5) In June 2007, PDHC was notified by Medicare that it owed Medicare more than \$200,000.00 by reason of "overpayments" to PDHC made with respect to Decedent's services before he was reinstated by the Medicare Office of Inspector General.⁴ PDHC opposed this Medicare overpayment claim through multiple levels of administrative appeals.

(6) In a matter fully litigated by PDHC, Federal Administrative Law Judge Dean C. Metry found that PDHC "is reasonably expected to know and has an affirmative duty to know the exclusion status of its employees through due diligence prior to entering the employment relationship." Moreover, Judge Metry found that PDHC "knew that Dr. Thompson's license was suspended indefinitely and that he received a conditional reinstatement after four years." The

² Upon resuming the practice of medicine, Decedent was given a Medicare "provider" number by PGBA, the Medicare contractor for South Carolina. He did not seek reinstatement with the Medicare OIG until 2002, and therefore was not on the Medicare-approved list of providers (even though he had been given a provider number).

³ Thus, PDHC was able to receive from Medicare payments arising out of Decedent's services on behalf of Medicare patients.

⁴ First Choice Healthcare received a similar notice and independently of PDHC litigated a completely favorable outcome within the Medicare administrative appeals system.

Judge further noted that PDHC's applications for Medicare payments for Dr. Thompson's services "inquired about any exclusions or sanctions" and that Dr. Thompson's exclusion "could easily have been found by calling the Office of Inspector General or visiting their website which lists excluded individuals..." Accordingly, Judge Metry concluded that PDHC was "at fault regarding the overpayment."⁵ On October 6, 2008, the Medicare Appeals Council upheld the finding of Judge Metry that PDHC "failed to exercise due diligence in determining the physician's exclusion status during the hiring process and when completing federal application forms, including a review of excluded individuals listed on the website of the Office of Inspector General (OIG)."

15 (7) Eighteen months after the final decision of the Medicare Appeals Council, and after the death of Defendant Dr. Thompson, who would have been a pivotal witness as to what representations passed between the parties as to Dr. Thompson's Medicare provider eligibility, this claim was brought in the Probate Court.

CONCLUSIONS OF LAW

(A) Summary Judgment Standard.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Summary Judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001);

⁵ Decision of Administrative Law Judge Dean Metry dated March 14, 2008.

Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991).

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). While the court must view the evidence in the light most favorable to the nonmoving party, the Plaintiff cannot defeat Summary Judgment by relying on mere allegations in its Complaint. Rule 56(e), SCRCP; Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994).

Instead, the Plaintiff must set forth specific facts showing there is a genuine issue of material fact. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994). The trial judge is not required to single out some small piece of evidence and attach to it a great significance when that evidence is introduced solely to create an issue of fact that is not genuine. Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984) (Court is not "required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine.")). In other words, the Plaintiff must present more than a mere scintilla of evidence to overcome a Defendant's Motion for Summary Judgment. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994).

Where a defendant establishes an entitlement to judgment as a matter of law, the court must grant Summary Judgment. Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991); Dyer v. Moss, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). The purpose of Summary Judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

(B) The Legal Nature of Plaintiff's Claims.

The crux of the PDHC complaint is that Decedent did not disclose information to PDHC or gave wrong information to PDHC. While PDHC asserted multiple causes of action in its Complaint,⁶ all claims derive from a core set of factual claims. While some tangential facts may yet be disputed, sufficient core facts have been legally determined and they are dispositive.

(C) The Plaintiff Must Be Without Fault.

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Embodied within all of PDHC's causes of action is the requirement that PDHC be without fault. In this State, there is no right to rely in an arm's length relationship between mature, educated people and our courts have found "this is especially true when one should have utilized precaution and protection to safeguard his interests." Ardis v. Cox, 314 S.C. 512, 431 S.E.2d 267 (1993) (sale of underground gasoline tanks) (citing Poco-Grande Investments v. C & S Family Credit, Inc., 301 S.C. 322, 391 S.E.2d 735 (Ct. App. 1990); See also Jones v. Cooper, 234 S.C. 477, 109 S.E.2d 5 (1959) (sale of hotdog cooking machine); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (no negligence, no fiduciary duty, no conversion of pledged assets where guarantor fails to read/understand guaranty obligations to bank). "One cannot rely on the misstatement of fact if the truth is easily within his reach." Jones v. Cooper, 234 S.C. at 488, 109 S.E.2d at 11 (citing Mobley v. Quattlebaum, 101 S.C. 221, 85 S.E. 585 (1915); Whitman v. Seaboard Airline Ry Co., 107 S.C. 200, 92 S.E. 861 (1917); Flowers v. Price 190 S.C. 392, 3 S.E.2d 38 (1939). Indeed, there can be no liability for "matters which Plaintiff could ascertain on his own in the exercise of due diligence." Quail Hill, LLC v.

⁶ In all there were twenty causes of action: (i) breach of fiduciary duty; (ii) negligent misrepresentation; (iii) breach of duty of loyalty to employer; (iv) negligence; (v) breach of contract; (vi) breach of contract accompanied by a fraudulent act; (vii) interference with contractual relations; (viii) fraud and misrepresentation; (ix) failure to disclose; (x) deliberate concealment; (xi) professional malpractice accompanied by fraud, misrepresentation, and negligence; (xii) money had and received; (xiii) promissory estoppel; (xiv) quantum meruit; (xv) constructive fraud and constructive trust; (xvi) constructive fraud without scienter; (xvii) equitable indemnity; (xviii) conversion; (xix) equitable restitution; and (xx) civil conspiracy.

County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010) (citing AMA Mgt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled." Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432, 446 (quoting Southern Development Land & Golf Co., v. South Carolina Public Service Authority, 311 S.C. 29, 426 S.E.2d 748, 751 (1993).

As noted in the case law cited above, direct claims of negligence and other breaches of duty found in Causes of Action 1, 2, 3, 4, and 11 require PDHC to show its justifiable reliance on the Decedent's representations or omissions.⁷ Claims of fraud, found in Causes of Action 8, 9, 10, 15, and 16 require PDHC to show a right to rely on the representation or omission allegedly made by Decedent.⁸ PDHC's Cause of Action 13, promissory estoppel, also requires reasonable reliance.⁹ Powers Construction Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984).

Claims governed by equity, found in Causes of Action 12, 14, 17, and 19, require PDHC to have clean hands or its own lack of fault.¹⁰ "The 'unclean hands' doctrine closes the door of a court of equity to one tainted with inequity or bad faith in relation to the matter in which

⁷ Of course, multiple causes of action based on the same theory of liability are fairly treated as subsumed into a single cause of action. Accord Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010). ("Although pled separately, we find Quail Hill's claim for negligence is essentially subsumed in the negligent misrepresentation cause of action.")

⁸ The absence of the justifiable reliance element above is enough to defeat the claim of fraud. O'Shield v. Southern Fountain Mobile Homes, Inc., 262 S.C. 276, 204 S.E.2d (50) (1974).

⁹ Moreover, promissory estoppel must be based on unambiguous promise—not silence or an omission. Woods v. State, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993).

¹⁰ Both the action for Money Had and Received and Quantum Merit are governed by equitable principles although they are actions at law. See Myrtle Beach Hosp. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000); Bennettsville v. Bledsoe, 226 S.C. 214, 845 S.E.2d 554 (1954); McDonald's Corp. v. Moore, 237 F. Supp. 874 (D.S.C. 1965). These claims are, of course, inconsistent with PDHC's contract based claims.

he seeks relief, however improper may have been the behavior of the Defendant." ABF Freight System, Inc. v. N.L.R.B., 510 U.S. 317 1994 (quoting Precision Instruments Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814 (1945); see also National Bank of Savannah v. All, 260 F. 370 (4th Cir. 1919) (applying South Carolina law)(Plaintiff is equally guilty with Defendant and comes into Court with unclean hands; under the circumstances a court of equity will not permit Plaintiff to take advantage of her own wrong.). The case of Fowler v. Hunter, 388 S.C. 355, 697 S.E.2d 531 (2010), holds that an equitable indemnitee (as PDHC proposes itself to be) must demonstrate that it was without fault or liability for the damages it seeks.

(D) The Previous Fault Adjudication Binds Plaintiff in This Case.

As noted above, all of Plaintiff's claims derive from a core set of factual claims – and preclusive facts have been adjudicated with finality by federal administrative decisions. These adjudications have determined that PDHC's losses were its own fault, arising out of its own failure to undertake the basic due diligence required of all medical practices planning to accept Medicare payments. Stated differently, PDHC was not entitled to rely on any misstatements or omissions of Decedent with regard to his Medicare status.¹¹

In this case, PDHC has already unsuccessfully litigated to finality the issue of its causative fault through the federal administrative appeals process. The conclusions of Judge Metry and the Medicare Appeals Council are binding upon PDHC in this matter pursuant to the doctrine of non-mutual offensive collateral estoppel.

The doctrine of non-mutual offensive collateral estoppel was initially adopted in this state by the Court of Appeals in Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984).

¹¹ Indeed, had PDHC checked the Medicare OIG website or called the OIG office, Decedent's status could have been determined. At that point, he could have been reinstated (as he easily was in 2002) or employment could have been denied. In either case, PDHC would not have suffered any loss.

Subsequently, the Supreme Court of South Carolina confirmed non-mutual offensive collateral estoppel as the law of this state, in Prop. and Cas. Ins. Guar. Assn. v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991). Pursuant to this doctrine, a party is barred from re-litigating issues determined in a prior action so long as it had a full and fair opportunity to litigate the issues in the first action and nothing justifies an opportunity to retry the issues. Beall v. Doe, supra; Roberts v. Recovery Bur., Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994) (citing McPherson v. South Carolina Department of Highways and Pub. Transp., 297 S.C. 303, 376 S.E.2d 780 (Ct. App. 1989).

Here, PDHC had a full and fair opportunity to litigate the issue of its fault and there is no reason to allow it to be re-litigated in this collateral action. See also Middleborough v. Montedison USA, Inc., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995) (affirming Trial Court's partial Summary Judgment against PVC manufacturer on issues of agency and defectiveness where those issues had been previously litigated by manufacturer in Minnesota). PDHC's argument that collateral estoppel should not apply because a different litigant (First Choice) achieved a different result in presumably similar litigation is unpersuasive; it is the full and fair litigation opportunity of PDHC that controls their legal position now - not the opportunity and result of a third party. There is no exception to the doctrine of collateral estoppel for cases where a different result was achieved in similar litigation by a third party.¹²

PDHC also suggests that summary judgment is not appropriate because of the lack of additional discovery in the case. Additional discovery is not needed in this case, however, to

¹² Plaintiff has suggested the existence of a duty of the Decedent to keep the Plaintiff informed of legal steps and procedures taken by a third party (First Choice) in litigation where the Plaintiff was not a party. This alleged duty is not the basis of any pleaded claim in the plaintiff's complaint and the Plaintiff offers no legal authority supporting the existence of such a duty. This Court finds no reason to imply or impose such a duty - particularly with a sophisticated employer like the Plaintiff. Moreover, the record made by Plaintiff confirms that it made contact directly with that third-party and its counsel - confirming that these professional medical practice administrators did not need the Decedent to attempt voluntary collaboration with other parties similarly situated.

determine the preclusive effect of the Plaintiff's prior litigation. Plaintiff has failed to identify any discovery that might alter the applicability of the Medicare administrative determination. Plaintiff suggest that it would like to depose the Decedent's children perhaps to expose additional facts relevant to the Decedent's alleged misrepresentations or omissions – but such discovery would not alter the finding that the Plaintiff had a statutory duty of due diligence such that it could not rely upon the Decedent, regardless of any misrepresentation or omission. Thus, the Court is convinced that additional discovery is not needed, and would be unjust to permit.

(E) South Carolina Common Law Precludes Plaintiff's Reliance on Decedent.

Just This case is indistinguishable from last year's South Carolina Supreme Court decision in Quail Hill. In that case, the Supreme Court reversed the Court of Appeals decision and affirmed the Trial Court's Order of Summary Judgment against a property purchaser's claims of estoppel and misrepresentation arising from the County's employee's issuance of erroneous zoning information where the property's true zoning classification could have been determined by due diligence in reviewing public records. Just as the information was publicly available in Quail Hill, the OIG exclusion status of Decedent was only a phone call or mouse click away. Moreover, in Quail Hill, the purchaser could not blame the County despite affirmative misstatements by County employees. The case at bar is even less supportive of liability since PDHC cannot point to any affirmative misstatements made to it by Decedent.

(F) There Is No Fiduciary Duty Involved In This Case.

In order to avoid the consequences of its own causative fault, PDHC has also sought to impose an affirmative duty of disclosure on the Decedent by alleging that his status as a physician-employee made him into a fiduciary with respect to PDHC. PDHC has cited no

authority in support of this notion and the Court rejects it.¹³ There is no evidence to support a conclusion that Decedent's relationship with PDHC was anything other than a normal employer-employee relationship.

Decedent's special duties as a physician, if any, were to his patients—not to a sophisticated medical employer with at least seventy-five employees, including other credentialed employees. Despite PDHC's unilateral efforts to assert a fiduciary relationship now, "as a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed in him." Regions Bank v. Schmauch, *supra*. (No fiduciary relationship between a bank and its customer exists when the bank is unaware of any special trust imposed in it.) Here, there is no evidence that PDHC placed any special trust in Decedent with regard to credentialing or that he was aware of any special trust beyond his duties as a physician-employee.

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ir Finally, as this Court has also concluded, regardless of the level of duty owed by Decedent Thompson to PDHC, the Decedent's duty of disclosure or prudence (if any) cannot be relied upon to support any of Plaintiff's claims when federal law imposes an unequivocal duty of diligence and discovery upon PDHC and provides unfettered independent access to the true facts. As a matter of law, Plaintiff has been found to have such an unequivocal duty and found to have such unfettered independent access to the truth.

(G) Contract Claims Involve The Same Duties & Same Reliance Requirement.

PDHC's breach of contract claims, Causes of Action 5 and 6, depend upon the alleged breach of implied employment duties (good faith, honesty, loyalty, and fair dealing)—they are

¹³ PDHC cited the case of State v. Paris, 353 S.C. 582, 578 S.E.2d 736 (Cl. App. 2003) for the proposition that all employer-employee relationships have been deemed fiduciary in all contexts as a matter of law. This case was overruled on appeal, 363 S.C. 477, 611 S.E.2d 501 (2005) and the case did not involve an employer-employee relationship at all.

not based upon any expressed contractual provision. Thus, in the context of this case, these implied employment duties are the same as the tort duties. Accordingly, these claims also require justified reliance. Indeed, in its sixth cause of action (breach of contract accompanied by a fraudulent act), PDHC alleges a right to rely. Having concluded, as a matter of law, that there is no right of PDHC to rely upon Decedent Thompson, these claims must also fail.

(H) Employment Contract Claims Also Untimely and Not Causative.

Despite the context, PDHC seems to suggest that justifiable reliance or clean hands are not elements of an employment contract cause of action. As Defendant noted at the hearing on these matters, even if a presumed failure of the Decedent to disclose his Medicare status in 1998 constituted a breach of contract, PDHC is still charged with knowledge of that breach back in 1998 -- as a matter of adjudicated law -- when they should have determined Decedent's status in 1998 by checking with Medicare OIG. As such, PDHC's contract claim would be barred by the three-year statute of limitations for contract actions, S.C. Code Ann. §15-3-530. Moreover, even if a breach of contract claim were somehow timely, this breach would not have been the proximate cause of PDHC's damages when it had adjudicated knowledge (i.e., it should have known) that would have allowed these damages to have been completely mitigated.

(I) Contractual Interference, Conversion, And Conspiracy Do Not Apply.

Plaintiff has also asserted causes of action for contractual interference (7th), conversion (18th), and conspiracy (20th). None of these causes of action are applicable to the facts of this case. In its contractual interference claims, PDHC alleges that it has a contractual relationship with Medicare. Assuming this to be the case, there is no evidence that PDHC's relationship with Medicare has been disrupted and breach of contract is an "essential element" of a tortious interference claim. BCD, LLC v. BMW Mfg. Co., LLC, 2008 WL 304878 (D.S.C. 2008) (J.

Ross Anderson, Jr.) citing Eldeco, Inc. v. Charleston Sch. Dist., 372 S.C. 470, 642 S.E.2d 726, 732 (S.C. 2007). To the contrary, it was PDHC's ongoing relationship with Medicare that allowed the offset of unauthorized Medicare payments against on-going Medicare payments.

In its conversion cause of action (18th), PDHC alleges that "Decedent converted the medical services provided to Plaintiff's Medicare patients by falsely failing [sic] claims for services provided to such patients...." Conversion is unauthorized assumption and exercise of the right of ownership over the goods or personal chattel of another. Lane v. Citicorp National Services, Inc., 313 S.C. 70, 437 S.E. 2d 50 (1953). This tort does not fit the undisputed facts of this case. "Services" are not goods or personal chattel capable of conversion. Moreover, it was PDHC that filed the unauthorized Medicare claims pursuant to an assignment of benefits and it was PDHC that assumed control over payments received from Medicare.

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In its civil conspiracy cause of action (20th), PDHC alleges that "Decedent in combination with his estate and the Personal Representatives thereof" has caused it injury... "to-wit, the continuing loss of use of its money...." Again, PDHC's effort to create another cause of action lacks merit, and this tort does not fit the facts of this case. First, on its face, the Decedent could not conspire with his estate, which was not a separate entity capable of such combination during Decedent's life. Moreover, the Personal Representatives are the estate's agents—they are not separate legal entities conspiring with the estate. The decision of the Personal Representatives, on behalf of the estate, to deny PDHC's claim does not constitute a combination or agreement between two separate legal entities to injure PDHC. Accord McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 626 S.E.2d 884 (2006) (There can be no conspiracy when acts arise in context of principal-agent relationship because acts in that context do not involve separate entities.).

(J) The "Prevention Defense" Raised By Plaintiff Is Not Applicable.

In letters to the Court, made part of the record and considered as such, the Plaintiff portrays the Defendant's motion for summary judgment as predicated upon the concept of a "prevention" defense. The cases cited by Plaintiff are Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984) and The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 617 S.E.2d 125 (2005). Both Huffines and Champion involved real estate brokers suing the sellers of real estate for sales commissions where a condition precedent to the commission was the sale of the property. The brokers in each case asserted that the sellers prevented the satisfaction of the conditions precedent; therefore, the brokers argued that the sellers could not hide behind the failure of those conditions to avoid payment of the commissions.

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The case at bar is not one of contract with conditions precedent.¹⁴ Moreover, nothing the Decedent Thompson did or failed to do prevented the Plaintiff from fulfilling its statutory obligation of due diligence with the Medicare OIG. Both the existence of that obligation and the failure to satisfy that statutory obligation of due diligence have already been litigated by Plaintiff with a sustained finding by an Administrative Law Judge. These litigated findings bar any right of the Plaintiff to rely upon what the Decedent did or did not do. And as discussed extensively in Conclusion of Law (C) above, South Carolina common law also imposes a duty upon a party with access to true information -- a duty not to rely on the misinformation or lack of information provided by others. See Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010) (availability of county records prevented reliance even upon county employee's misstatement); Regions Bank v. Schmauch, 354 S.C. 648, 675, 582 S.E. 2d 432, 446

¹⁴ Plaintiff has not pleaded any such specific, express contract provision as a basis for its claims. To the extent that Plaintiff now argues that the claim is primarily one of employment contract with some credentialing condition precedent, that is addressed in Conclusion of Law (H).

(Cl. App. 2003)(“One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mis[led].”).

The Defendant’s motion is predicated upon the Plaintiff’s burden to prove a right to rely – as an element of its claims. Proof of that element is legally precluded by the offensive application of collateral estoppel. This has nothing to do with the existence or non-existence of a “prevention” defense.

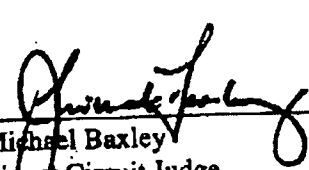
CONCLUSION

The Court finds, as a matter of law and fact, that PDHC cannot prove an absence of fault in causing the existence of the debt being sued upon. PDHC’s fault has been adjudicated with finality in federal administrative proceedings and PDHC is collaterally estopped from asserting that it is not at fault. Furthermore, under South Carolina substantive law as set forth in cases such as Regions Bank v. Schmauch, supra, and Quail Hill, LLC v. County of Richland, supra, PDHC is now barred from asserting this claim—it could have easily discovered the truth of matters and it had a non-delegable duty imposed by federal law to do so.

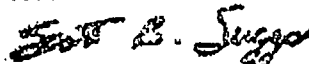
Accordingly, the Motion for Summary Judgment by Plaintiff PDHC is denied and the Motion for Summary Judgment of the Defendant Estate of Hugh S. Thompson is granted.

IT IS SO ORDERED.

August 29, 2011


J. Michael Baxley
Resident Circuit Judge
Fourth Judicial Circuit

FILED
2011 SEP - 1 AM 11:50
SCOTT B. SUGGS
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA)
)
COUNTY OF DARLINGTON)

IN THE COURT OF COMMON PLEAS
2010-CP-16-0332

PEE DEE HEALTH CARE, PA.,)
)
PLAINTIFF)
)
VS.)
)
ESTATE OF HUGH S. THOMPSON,)
)
DEFENDANT.)

CERTIFICATE OF SERVICE

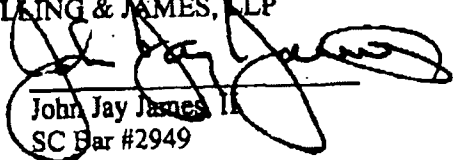
The undersigned hereby certifies that on September 1, 2011, a copy of the following document in the above captioned matter was mailed to Benjamin R. Matthews, Esquire, 3400 West Avenue, Columbia, South Carolina 29203, Counsel for the Plaintiff, by United States mail, First Class, postage prepaid:

Order of Summary Judgment in Favor of Defendant.

September 1, 2011

PAULKING & JAMES, LLP

BY:


John Jay James II
SC Bar #2949
112 Cashua Street
P. O. Box 507
Darlington, SC 29540
843-393-3881 (Telephone)
843-393-6089 (Fax)
pjlaw507@bellsouth.net (Email)

Attorneys for Defendant

EXHIBIT F

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A # 2010-CP-16-0332ORDER DISMISSING PLAINTIFF'S
MOTION TO RECONSIDER THE ORDER
GRANTING SUMMARY JUDGMENT
(Ending Case)FILED
OCT - 4 PM 2:19
SCOTT B. SUGGS
CLERK OF COURT W.R.O.D.
DARLINGTON COUNTY, S.C.

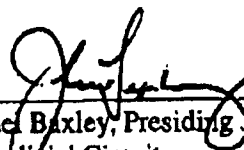
This matter is before the Court on Plaintiff's putative SCRCP 59(e) Motion for Reconsideration of an Order dated September 1, 2011, which granted summary judgment in favor of Defendant. Plaintiff filed the present Motion to Reconsider on September 13, 2011. On September 19, 2011, Defendant filed a Response to Plaintiff's Motion for Reconsideration. Plaintiff then filed a Reply to Defendant's Response on September 20, 2011. All of these filings, as well as previous Orders issued in this case, have been considered by the Court in reaching its decision. As will be explained below, attorney Megna was not authorized to file the present motion on Plaintiff's behalf. Therefore, Plaintiff's Motion for Reconsideration under SCRCP 59(e) is **DISMISSED AS IMPROPER**.

On April 15, 2011, this Court issued an Order disqualifying Plaintiff's counsel, Tony R. Megna, from representing Plaintiff in this matter because Mr. Megna is a necessary witness in the case. Subsequently, in response to Plaintiff's motion to reconsider that ruling, the Court modified this disqualification to avoid any prejudice to Plaintiff, and permitted attorney Megna to argue the then outstanding Summary Judgment Motions. The Court made it clear that this was a limited appearance only, further stating in an Order dated August 12, 2011, that "all motions, subpoenas, and filings signed only by disqualified-counsel, Tony R. Megna, and made subsequent to... June 17, 2011... are hereby **QUASHED**."

By filing and signing the present putative Motion for Reconsideration, Plaintiff's counsel disregarded the Court's previous Orders disqualifying him from representing Plaintiff and then granting him a limited appearance for the sole purpose of arguing an outstanding Motion for Summary Judgment. Plaintiff has other counsel of record (Benjamin R. Matthews, Esq.) that could have, but did not, execute the present Motion for Reconsideration. Rule 11(a) of the SCRCP requires that every pleading, motion, or other paper filed by a party represented by counsel must be executed by an attorney of record for that party. Plaintiff continues to be represented by Mr. Matthews, not by Mr. Megna. Accordingly, Mr. Megna's motion is unauthorized under the Rules of South Carolina Civil Procedure and is therefore **DISMISSED AS VOID ab initio**.

IT IS SO ORDERED.

Dated at Hartsville, South Carolina, this 28th day of September, 2011


J. Michael Baxley, Presiding Judge
Fourth Judicial Circuit

FILED
2011 OCT -4 PM 2:19
SCOTT B. SUGGS
CLERK OF COURT, S.D.
DARLINGTON COUNTY, S.C.

This judgment was entered on the ____ day of September 2011, and a copy mailed first class this ____ day of September, 2011 to attorneys of record or to parties as follows:

Attorney for Plaintiff

Benjamin R. Matthews, Esquire
3400 West Avenue
Columbia, SC 29203

Attorneys for Defendants

J. Rene Josey, Esquire
1831 West Evans, Street
Florence, SC 29501

John Jay James, II, Esquire
Post Office Box 507
Darlington, SC 29540

CLERK OF COURT

EXHIBIT G

Matthews and Megna, LLC

Attorneys and Counselors at Law
3400 West Avenue
Columbia, SC 29203
TELEPHONE: 803-799-1700

October 28, 2011

The Honorable Scott B. Suggs
Clerk Of Court, Darlington County
1 Public Square, Room B-4
Darlington, South Carolina 29532

FILED
2011 OCT 28 AM 11:29
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

Re: PDHC v. Estate of Thompson, Case No: 10-CP-16-0332
Notice of Appeal

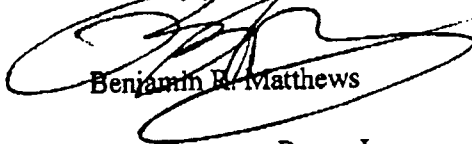
Dear Mr. Suggs:

Please find enclosed the following the Plaintiff's Notice of Appeal of the order of summary judgment of Judge Baxley received by the Plaintiff on September 6, 2011, and the denial of the Plaintiff's Motion for Reconsideration dated October 10, 2011.

By copy of this letter, I am notifying all counsel of record of the filing of the Notice of Appeal. In deference to the Court's order disqualifying Mr. Megna as attorney for Plaintiff was appealed on August 15, 2011, and was automatically stayed by operation of Rule 241(b), SCACR, I am filing the notice with your office. Please advise if there are further actions the Court requests be taken. As all orders of the circuit court concerning the matters in the above-referenced case are now on appeal, I would appreciate you removing the motions from any roster. Please advise if there are further matters to which I need to address.

With kind regards, I remain

Sincerely yours,


Benjamin B. Matthews

Cc:

Jay James
P.O. Box 507
Darlington, SC 29540

The Honorable J. Michael Baxley, 531 East
Carolina Avenue, Hartsville, SC 29550-4311

Renee Josey
1831 W. Evans Street
Florence, SC 29501

Teresa Timmons, Darlington Roster Clerk
timmons@darcosc.com

TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON

CASE NO: 2010-CP-16-0332
The Honorable J. Michael Baxley, Jr.

PEE DEE HEALTH CARE, P.A.,

APPELLANT,

v.

HUGH S. THOMPSON, III, LOUISE T.
DAILEY AS PERSONAL
REPRESENTATIVES OF THE ESTATE
OF HUGH S. THOMPSON,

RESPONDENT.

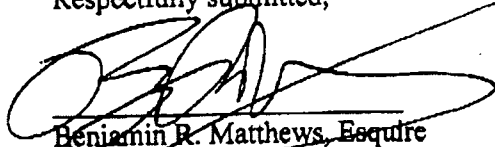
FILED
2011 OCT 28 AM 11:29
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

NOTICE OF APPEAL

The Appellant, Pee Dee Health Care, P.A. hereby appeals the order of the Honorable J. Michael Baxley dated August 29, 2011, the signed copy by the Court being received by Appellant on September 6, 2011, a copy being attached hereto. A copy of the order denying the Appellant's Motion for Reconsideration was received by Appellant on October 10, 2011, and is attached hereto as Exhibit B. Appellant has also attached a letter to the circuit court dated October 10, 2011 indicating the circuit court's inadvertently overlooked that its' prior order had been appealed to the SC Court of Appeals on August 15, 2011, two weeks prior to the filing of the Motion for

Reconsideration in the current matter.

Respectfully submitted,



Benjamin R. Matthews, Esquire
Attorney for Appellant
3400 West Avenue
Columbia, South Carolina 29203
803.254.3676
Attorneys for Appellant

October 28, 2011.

Cc: Tony R. Megna, Esquire
3400 West Avenue
Columbia, South Carolina 29203
803.254.3676

Attorneys for Respondent:

Jay James
PO Box 507
Darlington, SC 29540

Renee Josey
319 S. Irby Street
Florence, SC 29501

FILED
2011 OCT 28 AM 11:29
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON

CASE NO: 2010-CP-16-0332

PEE DEE HEALTH CARE, P.A.,

APPELLANT,

v.

HUGH S. THOMPSON, III, LOUISE T.
DAILEY AS PERSONAL
REPRESENTATIVES OF THE ESTATE
OF HUGH S. THOMPSON,

RESPONDENT.

FILED
2011 OCT 28 AM 11:29
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Notice of Appeal was served on counsel for Defendant on the 28th day of October, 2011.

- a. Jay James, PO Box 507, Darlington, SC 29540 and by email to pjlaw507@bellsouth.net,
- b. Renee Josey, 319 S. Irby Street, Florence, SC 29501 and by email to RJosey@turnerpadget.com,
- c. The Honorable Scott B. Suggs, Clerk Of Court, Darlington County
1 Public Square, Room B-4, Darlington, South Carolina 29532,
- d. The Honorable J. Michael Baxley, 531 East Carolina Avenue,
Hartsville, SC 29550-4311

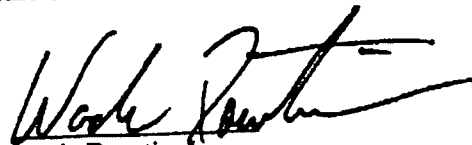

Wade Dowtin
3400 West Avenue
Columbia, SC 29203
803.254.3676

EXHIBIT H

Matthews and Megna, LLC

Attorneys and Counselors at Law

3400 West Avenue

Columbia, SC 29203

TELEPHONE: 803-799-1700

E-mail: tmegna@gmail.com

October 10, 2011

The Honorable J. Michael Baxley

531 East Carolina Avenue

Hartsville, SC 29550-4311

[Via email to JBaxleyLC@sccourts.org and first class mail]

Re: Estate of Hugh S. Thompson, Case No: 10-CP-16-0332
Response to Mr. Josey's letter dated May 26, 2011 and his supplemental memoranda

Dear Judge Baxley:

I am in receipt of your order filed October 4, 2011, and received by me on October 10, 2011.

The order of disqualification was appealed to the SC Court of Appeals by notice dated August 15, 2011 – two weeks prior to the Motion for Reconsideration filed with this Court on September 1, 2011. In addition, as the court graciously allowed me to represent the Plaintiff in the hearing on the Motion for Summary Judgment, it was my sincere belief that the Motion for Reconsideration was a natural extension of the hearing on the motion for summary judgment as well as the other matters that directly involved matters surrounding that motion. I genuinely apologize for any misunderstanding. As a gesture of good faith and deference to the Court, I will request Ben represent the Plaintiff in all further proceedings before the circuit court pending the determination of the appeals.

With kind regards, I remain

Sincerely yours,

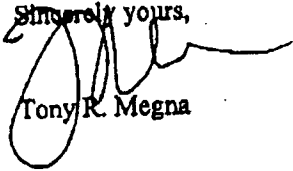

Tony R. Megna

EXHIBIT I



State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

J. MICHAEL BAXLEY
JUDGE

531 EAST CAROLINA AVENUE
HARTSVILLE, SOUTH CAROLINA 29550-4
TELEPHONE: (843) 383-4114
FAX: (843) 383-4116
E-MAIL: jbxleyj@scjd.state.sc.us

October 27, 2011

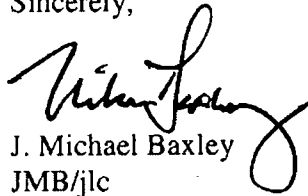
Tony R. Megna, Esquire
Attorney at Law
3400 West Avenue
Columbia, South Carolina 29203

Re: PDHC v Estate of Thompson (Case No. 10-CP-16-0332)

Dear Mr. Megna:

Thank you for your letter of October 10, 2011, stating your intention to refer any further circuit proceedings in this matter to your partner Ben Matthews. This act of good faith and deference to my decision is appreciated. I look forward to working with you on other matters in the future, as well as with Mr. Matthews should there be further circuit proceedings in this case. Until our paths again cross, best wishes to you. Thank you again for your letter.

Sincerely,



J. Michael Baxley
JMB/jlc

cc: John Jay James, II, Esquire
J. Rene Josey, Esquire
Hon. Scott Suggs (for filing)

The Honorable J. Michael Baxley
531 East Carolina Avenue
Hartsville, SC 29550-4311
October 10, 2011
Page 2 of 2

Cc:

Jay James
P.O. Box 507
Darlington, SC 29540
[Via email to
pjlaw507@bellsouth.net

Renee Josey
1831 W. Evans Street
Florence, SC 29501
[Via email to
RJosey@turnerpadget.com
and first class mail

The Honorable Scott B. Suggs
Clerk Of Court,
Darlington County
1 Public Square, Room B-4
Darlington, South Carolina 29532
[Via first class mail]