

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Dale E. Van Slambrook, Circuit Court Judge

Jessica A. Salvini, Circuit Court Judge

Appellate Case No. Case: 2025-001304

Case No. 2021-CP-10-03379

Carolina Neurosurgery & Orthopedics, Inc.....Appellant/Respondent

v.

Michael A. Maucher, Esq. and DeLuca & Maucher, LLP,.....Respondents /Appellants

**RECORD ON APPEAL
VOLUME IV**

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SC Court of Appeals

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON
IN THE COURT OF COMMON PLEAS
C.A. NO.: 2021-CP-10-03379

CAROLINA NEUROSURGERY & ORTHOPEDICS INC.,

PLAINTIFF,

vs.

MICHAEL A. MAUCHER,

DEFENDANT.

H E A R I N G
BEFORE THE HONORABLE EDGAR W. DICKSON

DATE: MARCH 3, 2022
LOCATION: SOUTH CAROLINA CIRCUIT COURT 9
TRANSCRIBED BY: KRISTEN PRIMM

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THE COURT: Mr. Masciale, this is your motion. You represent DeLuca. Is that right?

MR. MASCIALE: That's correct, Your Honor. I represent Defendants DeLuca and Maucher as well as Michael A. Maucher.

THE COURT: Okay. All right. And y'all understand it's just being recorded. There's no court reporter. Why is the clerk punishing you by having all your cases in front of me?

MR. PENDARVIS: I don't think it's punishment, Your Honor, but it's good to get to see you again today.

THE COURT: Yeah. Thank you, sir.

MR. PENDARVIS: Like I said, Your Honor, Plaintiff consents to the video recording.

THE COURT: Okay.

MR. MASCIALE: No issues from the Defendants' side, either, Your Honor.

THE COURT: All right. This is case 2021-CP-10-3379, *Carolina Neurosurgery and Orthopedics vs. Michael Maucher and DeLuca and Maucher*, and I guess that should be about it. This is their motion to dismiss?

MR. MASCIALE: That's correct, Your Honor. This is Defendant's motion to dismiss.

THE COURT: Okay. Let me hear from you, please.

MR. MASCIALE: Thank you, Your Honor. May it please the

1 Court, just a bit of actual background. This case kind of
2 arises primarily from my clients' issuance of a letter of
3 protection to the Plaintiff for surgical care that the
4 Plaintiff provided to their client, Scott DeMaskey.

5 My clients are essentially litigation attorneys who
6 represent, I think, a lot of personal injury clients, and the
7 Plaintiff is a neurosurgery practice. Mr. DeMaskey was
8 injured in an auto accident back in December of 2018, and he
9 had retained my clients to pursue those personal injury
10 claims against the other driver involved.

11 And because he was a prior surgery patient of the
12 Plaintiff, he chose them for his treatment with regard to
13 this auto accident. So on December 20, 2018, at
14 Mr. DeMaskey's request, my client sent a letter of protection
15 to Carolina Neurosurgery, the Plaintiff, which promised,
16 essentially, or which agreed to protect, any claims for their
17 surgical services that they may have.

18 They would protect that out of the settlement proceeds
19 recovered from Mr. DeMaskey. On January 3, 2019,
20 Mr. DeMaskey executed Plaintiff's financial policy, which is
21 noteworthy, requires some Plaintiffs to file claims for their
22 services with a patient's private health insurance before
23 they look to bill the patient directly.

24 So that'll kind of be important. And at the time,
25 Mr. DeMaskey did have private health insurance through Blue

1 Cross, Blue Shield. And he had confirmed this with clients
2 in office on several occasions before and after he executed
3 financial policy. On January 16, 2019, Kiara Goodwine, who
4 is with the Plaintiff's office, contacted Tina Bennett, who's
5 a paralegal for my clients, and requested the at-fault
6 drivers policy limits.

7 Now on the 21st of January, Ms. Bennett responded, said
8 that she couldn't confirm the policy limits at that time
9 because the at-fault drivers insurance carrier was in North
10 Carolina and needed a medical authorization in order to
11 disclose that. But Ms. Bennett stated her belief that there
12 was approximately \$1,100,000 in potential or potentially
13 available insurance coverage through Mr.

14 DeMaskey's UIM policy, or his occupational accident
15 policy. Now, the same day, just a few hours later,
16 Ms. Bennett again replied to Ms. Goodwine via email, and
17 basically said, Mr. DeMaskey has informed us that he's going
18 to need surgery, and due to the nature and extent of his pre-
19 existing injuries, we prefer that the treatment not be done
20 under the letter of protection.

21 So in other words, they weren't going to honor that, and
22 that all the claims for the Plaintiff's services should be
23 filed with Mr. DeMaskey's private health insurance, which is
24 at the time, Blue Cross, Blue Shield. There were no
25 instructions about filing any claims, or even potential to

1 file any claims with Mr. DeMaskey's UIM or other carrier.
2 And Ms. Goodwine acknowledged receipt of that email, and
3 these emails attached to the Plaintiff's exhibits, so I think
4 it's proper for the Court to consider them on the motion to
5 dismiss.

6 She acknowledges receipt of the email and Ms. Bennett's
7 instructions, and that was pretty much it at that point.
8 Now, on March 7, 2019, prior to Mr. DeMaskey's first surgery,
9 my client sent a second letter of protection to the
10 Plaintiff, which agreed to protect out of those proceeds, any
11 claims that the Plaintiff might have that were not paid by
12 Mr. DeMaskey's private health insurance.

13 So again, there's the obligation there to attempt to
14 collect under the private health insurance (indiscernible)
15 under the letter of protection. The first surgery was
16 performed about a week later on March 15, 2019, at an
17 approximate cost of \$62,451.87.

18 As Mr. DeMaskey's personal injury case developed, it was
19 determined that the at-fault driver did not have sufficient
20 policy coverage to cover all of Mr. DeMaskey's surgical
21 treatments, and importantly, the other two policies, the UIM,
22 the occupational accident policies, also were not going to be
23 applicable here.

24 It turned out they didn't provide coverage. And so I
25 think it's from paragraph 29 of the complaint, the Plaintiff

1 was made aware of these issues April 29, 2019, email from
2 Tina Bennett, which stated that the at-fault drivers policy
3 limits were only \$30,000 and so obviously were insufficient
4 to cover the surgical treatment, that my clients would not be
5 able to honor the second letter of protection, the one from
6 March 7, 2019, and that all treatment, and I believe, all,
7 was small caps, emphasized it must be filed with
8 Mr. DeMaskey's private health insurance.

9 Despite being put on notice of that, Mr. DeMaskey's
10 second surgery went forward on May 2, 2019, at a cost of
11 approximately \$65,000, and despite being instructed on
12 several occasions back on January 21st, March 7th, 2019, and
13 the letter of protection itself, and then this last email I
14 referred to, despite being instructed, filed, Mr. DeMaskey's
15 private health insurance, the Plaintiff never attempted to do
16 so.

17 In fact, the Plaintiff waited until around November 2,
18 2020, to send Mr. DeMaskey a bill for its services in the
19 amount of \$125,409.28. And shortly thereafter, demanded
20 obtainment under the March 7, 2019 letter of protection.
21 Now, because Mr. DeMaskey I don't believe was able to pay
22 that bill, the Plaintiff initiated a debt collection action
23 against him, and that's pending in Berkeley County on May 21,
24 2021.

25 And I understand this is outside the complaint, but kind

1 of for a better understanding of the factual background in
2 this case, my clients offered to pay out of the \$30,000 that
3 they're holding a trust under the settlement. And it's my
4 understanding that the Plaintiff rejected that and instead
5 filed this action on July 22, 2021, asserting various claims
6 relating to this, essentially, this March 7, 2019, letter of
7 protection.

8 MR. PENDARVIS: Your Honor, I regret having to object,
9 but there's rules of evidence, and you can't present
10 arguments about settlement and compromise, and I object to
11 the Court. It's outside the pleadings. This is a 12(B)
12 motion. It's clearly improper to even be discussing this.

13 THE COURT: All right. I'm going to note it, and
14 actually, I wasn't going to pay any attention to it anyway,
15 but if you just refrain from talking about that, okay?

16 MR. MASCIALE: Yes, Your Honor.

17 THE COURT: That's not going to affect my decision one
18 way or the other, okay?

19 MR. MASCIALE: Yes, Your Honor.

20 THE COURT: Okay. Go ahead.

21 MR. MASCIALE: Now getting into my argument, first, the
22 complaint alleges about seven causes of action, the first
23 being breach of contract, then breach of contract accompanied
24 by fraudulent act, violation of the unfair trade practices
25 act, fraud, constructed fraud, unjust enrichment, and

1 negligence. And I'll start with breach of contract
2 accompanied by a fraudulent act.

3 And as we stated in our memorandum, and I'm sure the
4 Court is aware of the required elements for that claim, the
5 Plaintiff must allege facts to show that, one, there's a
6 breach of a contract; two, that there's a fraudulent intent
7 relating not to the making of the contract, but to the breach
8 itself; and then three, a fraudulent act accompanying the
9 breach, again, the breach, not the making of the contract.
10 And for purposes of this argument, we'll take as true that
11 the March 7, 2019, letter of protection is a contract,
12 although we don't admit that.

13 But again, for purposes of this motion, we will. So
14 even if they've pled a viable claim for breach of contract,
15 there's been no facts alleged to show any fraudulent intent
16 or fraudulent act actually leading to or accompanying the
17 actual breach.

18 All of the allegations in the complaint and the
19 statements in Plaintiff's memorandum and opposition all
20 relate to the actual making of the supposed contract back in
21 March of 2019, in which, essentially, my clients would offer
22 to protect the claims not paid by private insurance out of
23 the settlement proceeds if the Plaintiff provided these
24 surgical surgeries to their client, which, of course, the
25 Plaintiff allegedly did by providing the services. However,

1 the breach occurred almost a year later, when the Plaintiff
2 demanded payment under that letter of protection, and my
3 clients allegedly refused to pay.

4 There's no allegations of fraudulent intent or acts
5 relating to that. All of the allegations there relate to the
6 Plaintiff providing those services a year before and entering
7 into that alleged contract. Based on representations from
8 Ms. Bennett, there was sufficient, or potentially sufficient,
9 insurance coverage from Mr. DeMaskey's other carriers.

10 I think in this memorandum they either expressly or
11 might reference a case that says they were induced into
12 providing these services, i.e., making the contract. But
13 there's nothing temporally related or just related at all, to
14 the breach, other than a mere alleged failure to pay.

15 And so as a matter of law, the complaint fails to state
16 facts that support that claim. That claim should be
17 dismissed with prejudice. Now, getting to complainant's
18 fraud claims that pled fraud and constructive fraud, and I'm
19 not going to go denying elements of fraud or the aid of
20 constructed fraud.

21 The salient element here, the important one, is the
22 Plaintiff's rights rely on a few representations that my
23 clients made. And so the law in South Carolina is clear.
24 There are two situations in which a recipient of a statement
25 has no right to rely on any statement by a Defendant, and the

1 first one is where a confidential or fiduciary relationship
2 exists between the two parties.

3 And here that's clearly just not the case, and it's not
4 alleged to be the case. My client, as I've said, represented
5 Mr. DeMaskey. That was the attorney/client relationship. My
6 client had no relationship with the Plaintiff. The Plaintiff
7 provided the medical services to Mr. DeMaskey, but had no
8 confidential relationship or other with my client.

9 At best, again, although we don't admit the letter of
10 protection constitutes a contract, but at best, it was an
11 arm's length contractual relationship between those two
12 parties. And just because a party makes certain
13 representations to pay or promise to pay, that's just a
14 contractual obligation, and without more, their failure to do
15 so doesn't constitute fraud.

16 At best, it would just be breach of contract. So
17 there's no fiduciary confidential relationship here, and I
18 believe in their memorandum, they refer to basically the
19 Plaintiff proposing some trust and confidence in my client by
20 virtue of the representations in the letter of protection.
21 But again, at best, those are simply contractual obligations.
22 It's an arm's length transaction between two otherwise
23 unrelated parties.

24 So in the absence of a confidential fiduciary
25 relationship, a Plaintiff is under a legal duty to exercise

1 reasonable care and diligence to protect its interests. And
2 here there's no facts that have been alleged showing the
3 Plaintiff did that, other than asking Ms. Bennett once about
4 the at-fault drivers insurance coverage.

5 They didn't take any other steps to follow up and obtain
6 written confirmation of that, you know, alleged additional
7 coverage through Mr. DeMaskey's other policies. And it's
8 noteworthy, especially under the complaint, if we take it as
9 true, they allege that all parties at all times, including
10 the Plaintiff, were essentially aware that the Plaintiff was
11 an out-of-network provider under Mr. DeMaskey's private
12 health insurance.

13 And so those emails from Ms. Bennett to Ms. Goodwine,
14 where she states, one, we can't honor any letters of
15 protection, so essentially, that's out as an avenue for
16 recovery. There's nothing about filing with the other two
17 carriers.

18 You have to file exclusively through the private
19 insurance carrier. Well, if the Plaintiff knew that they
20 wouldn't be able to do that because they're an out-of-network
21 provider and their claims wouldn't be paid, they should have
22 exercised some sort of due diligence there to investigate
23 whether or not, okay, our only potential avenue for recovery
24 now is these other two carriers.

25 We need to obtain some sort of written confirmation of

1 coverage from them or do something to confirm that before
2 they went ahead and proceeded with approximately \$120,000 in
3 surgical services. And the law is clear that a Plaintiff is
4 under duty to exercise that diligence to protect their
5 interests, and they failed to do that.

6 And the complaint doesn't allege anything to the
7 contrary. And because it's arm's length transaction, again,
8 the complaint is defective on its face and fails to state
9 valid causes of action for fraud or constructive. And
10 getting to Plaintiff's negligence claim, I think the law is
11 also clear that attorneys generally, in the course and scope
12 of their representation of a client, don't owe a duty of care
13 to a non-client third party.

14 Here, obviously, my clients' actions and their
15 statements to Plaintiff were obviously done in the course and
16 scope of their representation of Mr. DeMaskey in pursuit of
17 his personal injury claim. Again, absent war, I think it's
18 clear that there's no duty here owed by my client to the
19 Plaintiff, and so as a matter of law, even if you take their
20 allegations as true, there's no claim here, and so that
21 negligence claim should also be dismissed under Rule
22 12(b) (6).

23 And also the negligence claim, I think, is essentially
24 the same as -- and I think they even reference in their
25 motion, although it's not pled anywhere in the complaint,

1 it's essentially just a negligent misrepresentation claim
2 that, again, implicates a Plaintiff's right to rely on any
3 representations made by the Defendant.

4 As I've discussed, there's nothing to establish there's
5 a right to rely there. And I believe, just to back up really
6 briefly on the fraud claim, I think, in their memorandum,
7 they say that they did plead generally that the Plaintiff had
8 a right to rely on these representations.

9 But the rules of civil procedure are clear that in a
10 fraud claim, or constructive fraud claim, those circumstances
11 and the facts underlying their right to rely have to be pled
12 with specificity, and so there's a complete lack of that.
13 And so it fails again for that reason.

14 Now, moving on to Plaintiff's unjust enrichment claim,
15 they essentially claim that because they perform the surgical
16 services for Mr. DeMaskey, that my client received a benefit
17 in the form of increase in settlement value of his case. And
18 first, under South Carolina law, for an unjust enrichment
19 claim, the Plaintiff not only has to confer a benefit, but it
20 has to be received and realized (indiscernible) by a
21 Defendant to support a valid claim for unjust enrichment.

22 And in here, I think I've cited a case in my memorandum
23 that I believe is very on point, *Bouchard vs. Price*, 694
24 Atlantic second, 670 (phonetic), which basically says that,
25 you know, profits that a Plaintiff anticipated Defendant

1 might make by selling rights to his story at some unspecified
2 time in the future, are insufficient to constitute a concrete
3 benefit realized by a Defendant.

4 Here, there's been no facts to establish, one, that
5 settlement at the time was imminent, or how these surgeries
6 influence settlement value in the case at all. It's just
7 essentially a speculative claim that at one point in the
8 future, this case might settle, and it might settle for more
9 money because of these services.

10 That's clearly insufficient to constitute a concrete
11 benefit received or realized by my client. First,
12 Mr. DeMaskey owns the personal injury claim, not my client.
13 So to the extent any claim was increased in value that would
14 benefit him.

15 The Plaintiff rendered its surgical services to
16 Mr. DeMaskey, not my clients. And I think in their
17 memorandum, they cite an increase of fees for my client, but
18 the complaint doesn't mention my client's attorneys' fees at
19 all, and it doesn't allege any sort of fee agreement that my
20 client may or may not have even had with Mr. DeMaskey.

21 I think, absent more, it's just too speculative to
22 constitute a concrete benefit. And I think it can be
23 analogized to buying and selling stock, where you buy a
24 stock, and it can appreciate in value, but you don't realize
25 any gain until you actually sell it.

1 And so here they're just kind of relying on the
2 speculative claim that it may settle for more money in the
3 future, but it can also go to trial and they could get
4 nothing. So absent anything further, it's certainly
5 insufficient to support a claim for unjust enrichment.

6 For that reason, that claim should be dismissed as well.
7 So Your Honor, in addition to anything else that we've
8 included memorandum in support, which we submitted I think
9 about last week or so, we would ask that the Court dismiss
10 this action with prejudice and for the cost of this motion be
11 awarded to my clients. Thank you.

12 THE COURT: Thank you, sir. Mr. Pendarvis.

13 MR. PENDARVIS: Thank you, Your Honor. May it please
14 the Court, Your Honor, my name is Thomas Pendarvis. I'm
15 Counsel for the Plaintiff, Carolina Neurosurgery and
16 Orthopedics Incorporated, this entity, operated by Dr.
17 Highsmith, provided elective surgery to the Defendant's
18 client.

19 On representations made by the Defendants on coverage
20 and their letter of protection and the amount of complaint
21 value -- and this is not in the complaint, but it's a matter
22 of backgrounds, since you heard a little bit of that in the
23 arguments in support of the motion. Plaintiff has worked
24 with lawyers at this law firm many times, and they've worked
25 together on injured clients of the law firm who became

1 patients of Carolina Neurosurgery and Orthopedics.

2 And the history behind them supported the series of
3 events that happened, and the reliance that was made. And
4 turning to the ---

5 MR. MASCIALE: Your Honor, briefly, I'll just similarly
6 object to that as well, any argument outside of the
7 complaint. Just for the record.

8 THE COURT: Okay.

9 MR. PENDARVIS: Well, the standard of review is
10 important here. As Your Honor knows, everything stated in
11 the complaint must be taken as true, as well as inferences
12 from the complaint. So one can infer from the fact that one
13 of the Defendants is a lawyer, and his law firm, have duties
14 to make truthful representations.

15 And so those inferences support the reliance that was
16 made in one respect in terms of reliance on statements from
17 the Defendants. In addition throughout the complaint and the
18 exhibits -- and I'm going to be touching on how these
19 arguments play into supporting the causes of action more in
20 the fraudulent intent for breaching the contract, the fraud
21 and constructive fraud allegations, because the court of
22 appeals has made it clear -- and I cited this in Plaintiff's
23 memorandum in opposition to the motion.

24 The Court has made it clear that there are circumstances
25 where a party cannot simply rely on the statements by the

1 Defendant, person they're making claims against. But this is
2 not what's alleged in the complaint.

3 The Defendant was relying on DeMaskey as well, and the
4 statements Mr. DeMaskey made. And as the court of appeals
5 explained -- and I did, regrettably, to a degree, I really
6 hate block quoting, but the court of appeals statements in
7 *Armstrong vs. Collins* were so on point for the Court's
8 analysis, I thought it would be of some benefit to the Court
9 to lay it out.

10 The court of appeals in *Armstrong vs. Collins* was
11 dealing with claims for fraud, constructive fraud, and
12 negligent misrepresentation. And in their opinion, there's a
13 section under the fraud caption where it says, a party may
14 not rely upon a misstatement of fact when the truth is easily
15 within his reach.

16 It's the policy of the Courts, not only to discourage
17 fraud, but also to discourage negligence and inattention to
18 one's own interest. However, a party may rely on
19 representations without making further inquiry when there's a
20 fiduciary confidential relationship between the parties.

21 We agree there was not a confidential or fiduciary
22 relationship. But from that sentence, Your Honor, the
23 further inquiry part was satisfied here, because the
24 Plaintiff's surgical center did inquire of sources
25 independent of the Defendants.

1 That is Mr. DeMaskey, the patient, a client of the
2 Defendants. So the allegations that we simply relied on just
3 what the lawyer said is not what's alleged in the complaint.
4 And so to the extent that there is a right to rely stated
5 throughout the complaint, we've satisfied those obligations
6 for each of those causes of action.

7 And that was the thrust of the arguments in support of
8 the motion to dismiss those three causes of action, was there
9 was really no right to rely, but there was, because the
10 surgical center did its own investigation, and what they were
11 hearing from the patient is what they were hearing from the
12 lawyers. Turning to the arguments that there's no negligence
13 cause of action stated in the complaint, Your Honor, they're
14 asking the Court to make a new rule only for lawyers.

15 The lawyers made representations about promises to pay
16 and surgery and the two letters of protection. Lawyers can
17 be liable for making false, inaccurate, misleading
18 representations like anyone else. And the suggestion that
19 lawyers should be treated separately, a little bit different,
20 because, if you think about it, Your Honor, there are many
21 cases where lawyers have been disciplined for not paying
22 court reporters and other services rendered by people
23 supporting claims like this.

24 And there's a case -- I didn't cite it in the --
25 opinions came in late from the opposing party's memorandum.

1 But there's a case called *Ray Conway* (phonetic), one of the
2 more recent disciplinary matters, where a lawyer was
3 disciplined for not paying expenses related to a case.

4 And so if the lawyer has professional duties, those are
5 easily translated to contractual duties. The lawyer clearly
6 has duties to pay for services they order in *Ray Conway*, and
7 I'm just for the Court's benefit, the cite is 374, South
8 Carolina, 75, and the portion of the disciplinary opinion is
9 at page 77 of the South Carolina site.

10 This is a 2007 case by the South Carolina Supreme Court,
11 supporting duties a lawyer has to pay costs and things they
12 ordered for the benefit of the client. There's no doubt
13 about it. These surgical procedures were requested by the
14 Defendants.

15 They were asking for medical records as part of that,
16 and the surgical center provided everything they were asked
17 for, did the elective surgery on the basis of the
18 representations by Mr. DeMaskey and the Defendants. Next,
19 there's an argument in the memorandum.

20 It wasn't heavily argued in the oral arguments today,
21 but just for the record, want to make sure it's clear.
22 There's a suggestion or an argument that this negligence
23 claim should be dismissed because it's not supported by an
24 expert affidavit.

25 As Your Honor is familiar from some other arguments this

1 week, there are obviously obligations lawyers have when
2 filing a claim, typically by a client against a lawyer, or
3 former client against a lawyer, for alleged negligence while
4 the lawyer was handling a matter for the client. In those
5 circumstances, an affidavit is required when there's an
6 allegation of a breach of a professional duty.

7 There are no such allegations in this complaint;
8 everyone's in agreement. There was no attorney/client
9 relationship between the Plaintiff's surgical center and any
10 of the Defendants. There was never a suggestion that the
11 Plaintiff hired the Defendants to do any legal work for the
12 benefit of the Plaintiff.

13 Didn't happen. They have not alleged that the lawyers
14 breached some duty while they were handling any matter for
15 the Defendant. So the idea that an expert affidavit is
16 needed to support the allegations of simple negligence and
17 making representations about payments, it just doesn't square
18 with the provisions in the South Carolina code requiring
19 expert affidavits.

20 There's a case cited in the memorandum, Your Honor, the
21 *Swanigan* -- if I'm pronouncing that correctly, *vs. American*
22 *National Red Cross*, a 1993 case where the Supreme Court
23 acknowledged that claims against the blood collection agency
24 were not in the scope of the professional licensed healthcare
25 provider statute, which is analogous to the statute requiring

1 expert affidavits on professional negligence claim. The
2 point is this claim is just not within the scope of what's
3 governed by the statute requiring an expert affidavit.

4 As I mentioned, Your Honor, the allegations that support
5 the surgical center's right to rely on the information coming
6 from Mr. DeMaskey, the patient, and from the Defendants, are
7 stated in paragraphs 12, 16, 18 through 19. I'm not going to
8 read the (indiscernible) site, Your Honor.

9 It's on page 5 and 6 of Plaintiff's memorandum in
10 opposition that cite the specific paragraphs supporting the
11 right to rely, and the exhibits to the complaint also have
12 statements signed by Mr. DeMaskey, again, verifying the
13 Plaintiff did inquire from third parties to support it. They
14 just didn't simply rely on everything the lawyer said.

15 They did independent verification which supports the
16 causes of action. And as to unjust enrichment, Your Honor,
17 not a critical allegation to complaint, but there's no
18 question that when -- and the Court can readily infer this
19 from the allegations.

20 When lawyers handling a personal injury claim are
21 presenting arguments for damages, the greater the expenses
22 incurred, medical expenses, lost wages, the likely higher the
23 recovery is going to be for the Plaintiff. And almost all of
24 these cases are being handled on a contingency fee, which
25 increases the value to the lawyer.

1 So we believe the complaint states the cause of action
2 for unjust enrichment. And we didn't hear anything in the
3 arguments today, but for the same reasons, the complaint also
4 states claims for violations of the South Carolina Unfair
5 Trade Practices Act, because it alleges the lawyers engaged
6 in unfair and deceptive acts and practices while within
7 practicing in trade and commerce in South Carolina.

8 So we believe that all the causes of action in the
9 complaint are state claims, and the case should go forward as
10 under the allegations. And if, you know, matters of fact are
11 proven differently, that'll be for summary judgment or
12 directed verdict later in the case. But we will argue, Your
13 Honor, the motion should be denied.

14 THE COURT: Yes, sir.

15 MR. MASCIALE: I'm sorry. Go ahead, Your Honor.

16 THE COURT: I was going to say, I'm going to read
17 y'all's memos and go back over them. But if you need to tell
18 me something briefly, I'll be glad to hear it. But I'm
19 planning to read these.

20 MR. MASCIALE: Yes, Your Honor.

21 THE COURT: Mr. Pendarvis has given me all kinds of good
22 cases to read and things like that this week. So this is
23 just another day of it. So if there's something you feel
24 like you need to tell me, I'll be happy to hear from you.

25 MR. MASCIALE: Okay. Thank you, Your Honor. And first,

1 I'm sorry to have to add to your caseload to read, but we
2 also have some in our memorandum, so I apologize.

3 THE COURT: I get paid the same amount, so go ahead.

4 MR. MASCIALE: Just in brief response to some of the
5 things Plaintiff's Counsel mentioned, first, I was just
6 flipping back through the complaint again to make sure I
7 didn't miss anything, and I don't see any allegations to
8 support the fact that Plaintiff allegedly also inquired of
9 Mr. DeMaskey about his insurance and information. I think
10 that's all outside the scope of the complaint.

11 And just looking at all these allegations, paragraph 11
12 states the lawyers sent Carolina Neurosurgery a letter of
13 protection. In paragraph 12, on January 3, 2019, based on
14 the lawyers' representations and the first letter of
15 protection, I guess maybe the Plaintiff's Counsel is
16 referring to the lawyers' client signing Defendant's
17 financial policy.

18 But again, there's no statements about his insurance
19 coverage or lack thereof in that. He simply signed their
20 financial policy so he could receive treatment, which he
21 requested the treatment. I believe that is also something
22 that's in the financial policies.

23 Plaintiff is rendering that treatment to the signatory,
24 not at the request of some other party. Then paragraph 16,
25 at this time, based on representations of the lawyers and the

1 first letter of protection -- let's see. In paragraph 24, in
2 the letter of protection, the lawyers made an agreement to
3 protect any portion of your bill not paid by private health
4 insurance.

5 Twenty-five, the lawyers made no communications to
6 Carolina Neurosurgery, et cetera. Twenty-six, on March 15,
7 2019, Carolina Neurosurgery and Dr. Highsmith and their
8 staff, relying on the lawyer's representations of insurance
9 coverage and the letter of protection, performed surgery on
10 the lawyer's client.

11 And there's a reference in paragraph 28 to a document
12 that Mr. DeMaskey signed which indicated he did not have
13 health insurance at that time. Well, we dispute that.
14 Again, this is on April 26, 2019. The second surgery didn't
15 occur until May.

16 And so, you know, to the extent they're claiming they
17 relied on Mr. DeMaskey, well, assuming this is true, it's
18 right out there in the open for them that there wasn't health
19 insurance to cover this, and yet they still proceeded with
20 this \$60,000 surgery. So you know, again, even if they're
21 going to say, yeah, they did that and they relied on
22 Mr. DeMaskey, well, to the extent it's true, he told them he
23 didn't have any health insurance, and they still went forward
24 with it.

25 Let's see. Paragraph 31, on May 2, 2019, Carolina

1 Neurosurgery, relying on the lawyer's promises and assurances
2 and the lawyer's promises assurances in the letter of
3 protection, again, Your Honor, there's just no allegations in
4 the complaint that the Plaintiff conducted any sort of other
5 due diligence to protect their interests, which as class
6 Counsel admitted, they were under a legal duty to do, since
7 there was no confidential or fiduciary relationship between
8 my clients and the Plaintiff.

9 And then, just briefly, to address the negligence
10 arguments, I think Plaintiff's Counsel referred to his
11 representations about a promise to pay. But at best, that's
12 a contractual obligation in the March 7, 2019, letter of
13 protection.

14 And so if they failed to pay under that, it's a breach
15 of contract. But you can't simultaneously bring a negligence
16 claim based on breach of contract. So again, the negligence
17 claim, if that's what they're using to support it, fails.
18 And then last, on the right-to-rely portion, I think that the
19 case that Plaintiff's Counsel cites also has some good about
20 in determining a right to rely -- I'm sorry.

21 I think that's for the negligence. But anyway, in the
22 matter of *Conway*, where I guess the attorney was disciplined
23 for failing to pay costs of litigation, well, the law in
24 South Carolina is clear that, you know, that's an issue under
25 the rules of professional conduct, which don't in and of

1 themselves provide a basis for liability or some duty to
2 third parties.

3 It's kind of an internal rule governing attorney
4 conduct. And so, you know, because that doesn't create some
5 independent duty to third parties, the Plaintiff can't rely
6 on that in failing to conduct due diligence to protect its
7 own interests.

8 So again, we just think that the complaint, as I
9 previously noted, fails to establish these causes of action
10 on its face, and we would just ask the Court to dismiss it
11 with prejudice. Thank you.

12 THE COURT: Thank y'all. I'm going to go read this.
13 I'll get back to y'all. Appreciate it.

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(THERE BEING NOTHING FURTHER, THE HEARING CONCLUDED.)

CERTIFICATE OF TRANSCRIBER

I, Kristen Primm, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the South Carolina Circuit Court 9 for Charleston County, South Carolina, on the 3rd day of March 2022.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

November 12, 2025



Kristen Primm
Certified Transcriber

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1 THE COURT: This is case
2 number 2021-CP-10-03379, Carolina Neurosurgery and
3 Orthopedics, Inc., Plaintiff, versus Michael A.
4 Maucher, Esq., and DaLuca & Maucher, LLP,
5 Defendants. And this is a motion to reconsider a
6 partial motion to dismiss that was granted
7 June 28th, 2022?

8 MR. PENDARVIS: That's correct, Your
9 Honor.

10 THE COURT: Okay. All right. And
11 Mr. Pendarvis, I'll be glad to hear from you.

12 MR. PENDARVIS: Thank you, Your
13 Honor.

14 THE COURT: Yes, sir.

15 MR. PENDARVIS: May it please the
16 Court.

17 THE COURT: Yes, sir.

18 MR. PENDARVIS: My name is Thomas
19 Pendarvis. I represent the plaintiff Carolina
20 Neurosurgery and Orthopaedics, Incorporated, in this
21 motion under Rule 59 to alter or amend the judgment.
22 I will state from the getgo, Your Honor, we are not
23 asking the Court to modify any conclusions of law.
24 The rulings, we accept. The background that might
25 be important for why some of the factual statements

1 in the order are the subject of this motion while we
2 propose they be modified, but the Court's ruling --
3 we're not kicking any mules today on the Court's
4 ruling -- the -- there are some factual findings
5 that -- that needed some, some attention ---

6 THE COURT: Okay.

7 MR. PENDARVIS: --- in context.

8 THE COURT: Okay.

9 MR. PENDARVIS: Carolina Neurosurgery
10 and Orthopaedics and the background of the facts in
11 this dispute, had a patient that needed some
12 treatments, elective surgery treatments; and it was
13 clear to everyone involved, the doctor, the
14 facility, was an out-of-network provider, was not
15 going to be covered underneath the policy so the
16 decision about proceeding with the claim and as
17 alleged in the Complaint all related to
18 representations that were being made about coverage
19 and resolution of the claim that the patient had
20 against an alleged at-fault driver in a car accident
21 outside of what we're dealing with, but that was the
22 patient that was walking in the door of Carolina
23 Neurosurgery.

24 THE COURT: Uh-huh.

25 MR. PENDARVIS: So the Court's ruling

1 -- we filed a complaint, multiple causes of action.

2 THE COURT: Right.

3 MR. PENDARVIS: The Court has granted
4 the motion to dismiss leaving two causes of action,
5 a breach of contract cause of action and an Unfair
6 Trade Practices Act violation cause of action. We
7 are scheduled to mediate fairly soon, a global
8 mediation. There's a dispute between the patient
9 and the doctor in another matter. We're set for a
10 global mediation. But in the event that's
11 unsuccessful and these claims aren't resolved, we're
12 going to be proceeding forward. And as the Court
13 understands, this was a motion to dismiss all facts
14 alleged in the Complaint are accepted as true and
15 this whether as a matter of law these claims
16 survive.

17 THE COURT: Right.

18 MR. PENDARVIS: So the factual
19 findings in the order that are inconsistent with the
20 allegations in the Complaint are what is this
21 motion.

22 THE COURT: Okay.

23 MR. PENDARVIS: On the second page of
24 Plaintiff's motion, we put together a table that --
25 and it's really that one page and what this ---

1 THE COURT: And I hate to interrupt
2 you. Do you have an ex---

3 MR. PENDARVIS: No problem.

4 THE COURT: Do you have an extra copy
5 of that?

6 MR. PENDARVIS: I certainly do, Your
7 Honor.

8 THE COURT: Yeah, if you don't mind.

9 MR. PENDARVIS: I certainly do. My
10 apologies, Your Honor.

11 THE COURT: Okay. Is that something
12 I can have?

13 MR. PENDARVIS: Certainly. I have an
14 extra copy.

15 THE COURT: Okay. All right.

16 MR. PENDARVIS: And so, Your Honor,
17 on Page 2 of the motion we have put together a table
18 that identifies in the left column a paragraph in
19 the order that we'd ask the Court to take look at
20 the language under and we -- the second column has a
21 proposed change in the order.

22 THE COURT: Okay. So just let me
23 look at number seven first.

24 MR. PENDARVIS: Certainly.
25 Certainly.

1 THE COURT: Okay. So number 7 what
2 you would want me to do, it would just read on
3 December 20th, 2018, D&M sent plaintiff and you
4 leave out at plaintiff client's request.

5 MR. PENDARVIS: Yes, Your Honor.
6 That'd be the proposal.

7 THE COURT: Okay.

8 MR. PENDARVIS: And likewise, for
9 each of the following paragraphs there are the
10 paragraphs 10 through 13 of the order, for example,
11 and I don't know this is the best time for the Court
12 do it if the Court wants to look but. Those
13 findings in Paragraphs 10, 11, 12 and 13 are simply
14 not in the Complaint, and there's no basis for the
15 Court to insert a fact into the record that's going
16 to be binding on the Plaintiff as the case goes
17 forward when that fact was not alleged in the
18 Complaint under the standard for a 12(b)(6) motion.
19 So that's why our proposal that those four
20 paragraphs be removed from the order.

21 THE COURT: Okay.

22 MR. PENDARVIS: And again, the result
23 of the Court's order, the conclusions, all the
24 causes of action survive remain unchanged through
25 this whole analysis.

1 THE COURT: Okay. You just want --
2 don't want anybody to argue that because statements
3 were made in this, the Court made a finding of those
4 things.

5 MR. PENDARVIS: Correct.

6 THE COURT: Yeah, because we didn't
7 take any te-- I didn't take any testimony or
8 anything like that.

9 MR. PENDARVIS: That's right. It's a
10 12(b) ---

11 THE COURT: This is a virtual hearing
12 that we had; is that correct?

13 MR. PENDARVIS: Yes, Your Honor, it
14 was.

15 THE COURT: And this is -- and the
16 basis for this is -- and I don't -- and, you know, I
17 don't want to blame you, Mr. Wilson, but I think we
18 asked you to draft or somebody in your office to
19 draft the order and then we modified that order some
20 way, I think, is what we did.

21 MR. PENDARVIS: Well, part of the
22 context, Your Honor, and counsel for the defendant
23 did exactly what the Court directed. A copy was
24 sent to me.

25 THE COURT: Right.

1 MR. PENDARVIS: Before we had the
2 hearing, it was a -- I like the new style of
3 protection for going on vacation; but we had a
4 order, protective order for a vacation I had
5 planned.

6 THE COURT: Uh-huh.

7 MR. PENDARVIS: And the proposed
8 order came in while I was in Europe and I didn't
9 have a chance to comment on it or make any things.
10 I come back, there's an order ---

11 THE COURT: It was done.

12 MR. PENDARVIS: So I had to hustle
13 up. I got back barely in time to file it within the
14 ten days so I had to hustle up and file this motion.

15 THE COURT: Okay.

16 MR. PENDARVIS: So, and I, again,
17 without no real fault to the Defense, but I didn't
18 have a real valuable opportunity to comment and so.

19 THE COURT: Oh, yeah. No, I'm with
20 you, okay.

21 MR. PENDARVIS: And so those are
22 the -- each of these -- and it shows on the
23 right-hand column, by the way, the basis for the
24 argument for the modification.

25 THE COURT: Okay.

1 MR. PENDARVIS: Most of them are
2 facts that weren't alleged in the Complaint.
3 There's one, Paragraph 14, has some modified
4 language from an actual exhibit and we're proposing
5 that the actual language in the exhibit to the
6 Complaint be inserted into Paragraph 14 to make it
7 consistent with what was before the Court.

8 THE COURT: Okay.

9 MR. PENDARVIS: Paragraph 16 through
10 24, again, same point, not alleged in the Complaint
11 and not needed to support the Court's conclusions of
12 law.

13 THE COURT: Okay.

14 MR. PENDARVIS: All right. Same
15 thing in Paragraph 41. Yeah, that's right.
16 Paragraph 41, the quoted portion of that, it's in
17 the first sentence of the -- in the little table --
18 needs to be replaced with the language from the
19 Court's email because the Court directed that the,
20 you know, the plaintiff -- the Court found and
21 directed the lawyers to prepare this order that said
22 the court has not alleged -- plaintiff had not
23 alleged any facts sufficient, and we'd propose that
24 the language from the Court's email be ---

25 THE COURT: Used.

1 MR. PENDARVIS: --- put into the
2 order. The rest of it is unnecessary, and the
3 remaining paragraphs that we propose be modified are
4 correct that were actually removed are Paragraphs
5 45, 48, 50 through 62, 68 and 75. And again, Your
6 Honor, our -- my understanding is looking at what
7 would be -- I did draft an order that would assume
8 the Court had adopted all this, ---

9 THE COURT: Uh-huh.

10 MR. PENDARVIS: --- but it's got some
11 formatting issues and I would propose to submit
12 that, let opposing counsel see it and all that
13 because I've looked at it absent the formatting
14 issues, the findings of fact, the conclusions of
15 law, support the Court's ultimate conclusions on
16 dismissing these other causes of action.

17 THE COURT: Okay.

18 MR. PENDARVIS: So we believe this
19 modified order accomplishes everybody's goals, these
20 causes of actions are gone, ---

21 THE COURT: Uh-huh.

22 MR. PENDARVIS: --- factual record,
23 and the order is accurate and we can proceed and
24 maybe with fingers crossed we can get this thing
25 resolved in mediation.

1 THE COURT: Okay. All right. Thank
2 you, sir.

3 MR. PENDARVIS: Anything else, Your
4 Honor?

5 THE COURT: No, no, no. But I always
6 have problems with formatting. You weren't doing it
7 yourself, were you?

8 MR. PENDARVIS: I was.

9 THE COURT: I'm sorry.

10 MR. PENDARVIS: Early this morning I
11 was hustling and I -- anyway, that's so ---

12 THE COURT: Okay.

13 MR. PENDARVIS: But if the Court's
14 willing, we'll present- I'll certainly do what the
15 Court proposes, but I'm happy to ---

16 THE COURT: Right.

17 MR. PENDARVIS: --- present a
18 proposed order that, you know, adopts these proposed
19 changes and let everyone look it over and I'm not
20 certain what the Defense might say about that; but
21 anyway, that's the proposal I would suggest ---

22 THE COURT: Okay.

23 MR. PENDARVIS: --- you reconsider.

24 THE COURT: Let's hear what Mr.
25 Wilson wants to say.

1 MR. PENDARVIS: Thank you, Your
2 Honor.

3 THE COURT: Okay.

4 MR. WILSON: Thank you, Your Honor.
5 Scott Wilson on behalf of defendants.

6 THE COURT: Yes, sir.

7 MR. WILSON: I do have a couple of, I
8 guess, disagreements with the way that Mr. Pendarvis
9 has characterized, I guess, the way that we've gone
10 about preparing the motion and an order for Your
11 Honor's consideration.

12 THE COURT: Right.

13 MR. WILSON: I'm new to this case. I
14 just filed notice of appearance about a month ago I
15 think. The attorney that handled this left for
16 bigger, better things so I'm kind of a little bit
17 looser on the facts. But I took a look at what the
18 motion said and then what the emails between the
19 Court and the parties were, and I just want to go
20 over a little bit more of a specific timeline just
21 to kind of show the Court that the -- Mr. Pendarvis
22 and his associate had an opportunity to review this
23 order before Your Honor signed it.

24 THE COURT: Right.

25 MR. WILSON: And the order is that

1 was proposed by previous counsel in our firm is our
2 motion that Your Honor agreed with on those
3 different grounds on saying that you considered the
4 motion to dismiss and arguments consent within the
5 motion and then ruled as a matter of law that the
6 four causes of action were dismissed and the two
7 survived, which as Mr. Pendarvis mentioned, was the
8 breach of contract in the scope of it.

9 THE COURT: And he -- and
10 Mr. Pendarvis is in agreement with that?

11 MR. WILSON: With the effect, yes,
12 Your Honor.

13 THE COURT: Yeah. Okay.

14 MR. WILSON: My -- there are really
15 just two arguments that I wanted to bring to your
16 attention.

17 THE COURT: Go ahead.

18 MR. WILSON: First I believe they did
19 have the amount of time necessary to review the
20 order I think, and there's communications with the
21 Court about submitting a proposed order as requested
22 to be submitted within ten days.

23 THE COURT: Right.

24 MR. WILSON: Your Honor was retiring.
25 I see that's not going as well maybe as you think it

1 would have but.

2 THE COURT: No. Actually, retirement
3 is going about as well as retirement can go. Let me
4 suggest to you that once you retire, you need to
5 have something to do, I don't. Okay.

6 MR. WILSON: I appreciate the wisdom.

7 THE COURT: You reach an age in your
8 life where you can't play basketball and golf never
9 something -- it is a good walk sport, you know, so.

10 MR. WILSON: Your Honor, I'm writing
11 that down. Well, Your Honor, and --

12 THE COURT: That's a Mark Twain
13 quote.

14 MR. WILSON: There was a request for
15 an extension.

16 THE COURT: Right.

17 MR. WILSON: The Court granted it
18 within circumstances ---

19 THE COURT: Right.

20 MR. WILSON: --- in light of the
21 request for protection which I would note protects
22 from court appearances. I'm not necessarily in
23 court filing deadlines and then having, I think Mr.
24 Pendarvis' volunteer associates to help him out with
25 that while he was on vacation with reviewing the

1 proposed order.

2 THE COURT: Right.

3 MR. WILSON: But even past that, I do
4 disagree that 33 of these paragraphs are not alleged
5 within the Complaint. If you take a look at the
6 order the motion that we filed, the amended -- the
7 Complaint is a verified Complaint. It's attested to
8 by the plaintiff, and it incorporates 11 different
9 exhibits. And when you have verified Complaints out
10 of exhibits at 12(b)(6) standard, those exhibits and
11 the facts which are apparently verified because
12 they're incorporated as exhibits become a matter for
13 the Court to consider when ruling on a 12(b)(6)
14 motion as a matter of law. So I've gone through
15 actually the order and all of the exhibits and
16 paragraphs in the Complaint and noted that some of
17 this language is taken from the -- from the
18 different exhibits. And I'm happy to go through
19 each paragraph that I believe is supported by the
20 Complaint and exhibits, or I would leave that up to
21 the Court, the Court's discretion.

22 THE COURT: Well, let me, let me just
23 suggest something. If Mr. Pendarvis can get his
24 proposed order formatted, okay, and he sends it to
25 both you and me and then you can ref-- you can --

1 I'm happy for you to actually point out where you
2 believe the appropriate language is, you know, in
3 those paragraphs, you know. And then I can come to
4 a decision that way, you know. But the other thing
5 I don't want to get into -- and I -- is, and we can
6 put this in the order if -- when I recited things in
7 here about what I considered in making my decision,
8 okay, these are not supposed -- these are not
9 supposed to be findings of fact even though it does
10 say findings of fact, but it's -- it's what I used
11 to make up my mind. I'm not saying that if y'all
12 went to trial on this -- you know, you allege things
13 in your Complaint, you allege things in your Answer,
14 that you believe to be true, but until there's
15 testimony in it, none of these things are what I
16 would consider set in stone findings of fact, you
17 know what I'm saying.

18 MR. WILSON: Yes, Your Honor, I
19 agree. And just maybe it's just semantics about the
20 way the order is prepared.

21 THE COURT: Yeah.

22 MR. WILSON: But after Paragraph 25,
23 it's our -- the conclusions of law and they're
24 labeled conclusions of law and I'm all for some of
25 these paragraphs I would say, Your Honor, that I

1 don't think that they would necessarily have -- the
2 order would not have an effect on my understanding
3 of the remaining claims.

4 THE COURT: Right.

5 MR. WILSON: So I, I mean, I'm happy
6 to work with Mr. Pendarvis and the Court, however we
7 want to make sure that that's on the record. We can
8 go forward and dispute whatever. It's relevant to
9 the Unfair Trade Practices claim ---

10 THE COURT: Right.

11 MR. WILSON: --- and breach of
12 contract claim. I just don't want to rehash certain
13 issues with all the other claims that were
14 dismissed.

15 THE COURT: No, I -- and neither do
16 I. I mean, I think as long as the findings and --
17 or let's for purposes of the order, the findings of
18 fact that are in this order, as long as none of
19 those findings affect the two claims that you still
20 want to go forward on or still -- that I allowed you
21 to go forward on, not that you want to go forward
22 on, I don't think there's really need to change it
23 so.

24 You understand what I'm getting at,
25 Mr. Pendarvis?

1 MR. PENDARVIS: I certainly do, Your
2 Honor.

3 THE COURT: Okay.

4 MR. PENDARVIS: But that's driving
5 the very concern for the motion. We don't want to
6 be stuck with findings when none of the depositions
7 have been taken yet.

8 THE COURT: Okay. If -- yeah, I
9 mean, and if y'all have -- if y'all have any
10 suggestions about -- I don't mind you in your doing
11 your proposed order and you make any changes to it
12 and if we put something -- I just want something in
13 there to make it clear that any findings related to
14 the two causes of action to go forward, there's not
15 been a -- there's been no evidence or testimony
16 about this. So it's not going to be binding on any
17 other -- it's not going to be binding on the court.
18 Maybe we can just add a paragraph on that.

19 MR. WILSON: I'll be happy to come to
20 a stipulation agreement with Mr. Pendarvis. I just
21 have to wait till I get client approval so we can
22 work with that ---

23 THE COURT: Oh, no, no --

24 MR. WILSON: -- in the next week or
25 so then I can --

1 MR. PENDARVIS: It's scary how great
2 we get along, but yes --

3 THE COURT: Yeah.

4 MR. PENDARVIS: But we're hap-- we
5 can consider something like that and we can provide
6 it in Word processing format where ---

7 THE COURT: Yeah.

8 MR. WILSON: -- Mr. Scott on his
9 clients can do redline changes and --

10 THE COURT: Uh-huh.

11 MR. PENDARVIS: -- the Court can see
12 ---

13 THE COURT: Yeah.

14 MR. WILSON: --- what everyone wants
15 to propose.

16 THE COURT: I mean, that will be
17 fine. I mean, basically I understand. I mean,
18 Mr. Pendarvis, I understand your, your concern,
19 because I wouldn't want that thrown up in the middle
20 of trial. And if the trial begins, the judge has
21 already found this, the judge -- I mean, the judge
22 for purposes of this, these are the findings that
23 I've made, but it's not for purposes of an -- like
24 an admission of fact or anything like that.

25 MR. WILSON: Something like that

1 would pass the test for me, Your Honor.

2 THE COURT: Okay. So if y'all don't
3 mind doing that, that would be great.

4 MR. PENDARVIS: Certainly, Your
5 Honor.

6 THE COURT: And I'm welcome for y'all
7 simplifying it. Usually I -- usually I, a lot of
8 times on these I just do Form 40s and go denied,
9 denied, denied, granted, granted. You know, if
10 something happens they need -- everybody saved y'all
11 a lot of trouble, both of y'all a lot of trouble.
12 But you get the bill for this so look on the bright
13 side, right?

14 MR. WILSON: I don't get the bill for
15 running down the street though apparently, but.

16 MR. PENDARVIS: But you take an extra
17 loop around.

18 THE COURT: Yeah. I mean, does that
19 put us in a position we can go forward, or is that
20 ---

21 MR. PENDARVIS: I believe so, Your
22 Honor.

23 THE COURT: Anything else I need to
24 ---

25 MR. PENDARVIS: I think that will

1 give us the mechanism to present what needs to be
2 presented to the Court, ---

3 THE COURT: Okay.

4 MR. PENDARVIS: --- make a final
5 ruling, get to a final order that would then allow
6 an answer to be filed ---

7 THE COURT: Right.

8 MR. PENDARVIS: --- and we can get
9 the case going.

10 THE COURT: Okay. Is that all right
11 with you, Mr. Wilson?

12 MR. WILSON: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. WILSON: We can work together
15 after, after the hearing this week and submit
16 something to you.

17 THE COURT: Okay. I know y'all --
18 since y'all got the mediation coming up, I know
19 y'all are under a timeline yourself; but if y'all
20 get it to me as soon as you can. As soon as you can
21 turn it over to a admin who can correct your
22 formating, it'll be really good.

23 MR. WILSON: That's in the record
24 now.

25 THE COURT: Okay.

1 MR. PENDARVIS: All right.

2 THE COURT: Anything else we need to
3 discuss?

4 MR. PENDARVIS: No, Your Honor.
5 Thank you for your time today and we'll have
6 something to you probably next week.

7 THE COURT: Okay. Now remember, send
8 it to the, you know, the edixonj@sccourts.org.

9 MR. PENDARVIS: Your Honor, should we
10 submit the proposed order through the e-filing
11 system or just to you and your --

12 THE COURT: If y'all, if y'all agree
13 on it you can submit it to -- just to e-filing. I
14 mean, if y'all go --

15 MR. WILSON: If we do a stipulation,
16 then we don't have to invest the time and effort
17 going through a ---

18 MR. PENDARVIS: We'll talk about
19 that.

20 THE COURT: I mean, or -- I think I
21 overheard Mr. Wilson indicating we just do an
22 amended order that stipulates that. So you don't
23 have to go through each line, you just stipulate
24 these are just findings in regard to these motions
25 and doesn't have anything to do with the actual

1 findings of the case.

2 MR. PENDARVIS: Or something like
3 findings were directed to these causes of action
4 that have been dismissed.

5 THE COURT: Right.

6 MR. PENDARVIS: And have no effect on
7 the remaining causes of action.

8 THE COURT: Yeah, that'd be great.

9 MR. PENDARVIS: And then if that's
10 the case, I, we're good with that.

11 THE COURT: The simpler y'all can do
12 it, the better off we all are.

13 MR. PENDARVIS: Very well.

14 THE COURT: Okay?

15 MR. WILSON: Yes.

16 MR. PENDARVIS: And if we do that,
17 Your Honor, if we do come to a Rule 41 stipulation,
18 we'll file that, but we'll certainly provide the
19 Court ---

20 THE COURT: Yeah.

21 MR. PENDARVIS: --- and that will
22 resolve ---

23 THE COURT: Because then it's kind of
24 -- then it'll go into my queue and, you know, and I
25 can knock it out and I'll be so proud of y'all, you

1 know.

2 MR. PENDARVIS: Fingers and toes
3 crossed, Your Honor.

4 THE COURT: All right. Gentlemen,
5 have a good weekend.

6

7 * * * END OF REQUESTED TRANSCRIPT OF RECORD * * *

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STATE OF SOUTH CAROLINA
CHARLESTON COUNTY
SOUTH CAROLINA CIRCUIT COURT 9
DOCKET: 2021-CP-10-03379

CAROLINA NEUROSURGERY

PLAINTIFF,

VS

MICHAEL A. MAUCHER

DEFENDANT.

H E A R I N G

BEFORE THE HONORABLE DALE E. VAN SLAMBROOK

DATE: NOVEMBER 4, 2024

LOCATION: SOUTH CAROLINA CIRCUIT COURT 9

TRANSCRIBER: JENNIFER JAEGER

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REPRESENTING THE DEFENSE

ALSO PRESENT :

NONE

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(NONE MARKED)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL
IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

1 THE COURT: The next matter I have is 2021-CP-
2 1003379. Carolina Neurosurgery versus Maucher and
3 others. Anybody here on that one?

4 MR. PENDARVIS: Yes, Your Honor.

5 MR. WILSON: Yes.

6 THE COURT: Are you expecting anybody else?

7 MR. PENDARVIS: Not for the plaintiff, Your Honor.

8 MR. WILSON: Not for the defense.

9 THE COURT: It is my understanding that there's two
10 motions. Motion to strike and a motion for summary
11 judgment. Is that correct?

12 MR. PENDARVIS: That is correct.

13 THE COURT: Gentlemen if you would identify
14 yourselves and who you're representing?

15 MR. WILSON: Sklyler Wilson on behalf of Deluca
16 Maucher Law Firm and attorney Mike Maucher.

17 MR. PENDARIVIS: Thomas Penadarvis, Carolina
18 Neurosurgery.

19 THE COURT: The first motion I have is the motion
20 to strike. Whose motion is that?

21 MR. WILSON: Defendants.

22 THE COURT: I am sorry?

23 MR. WILSON: Defendants, Your Honor.

24 THE COURT: Okay. All right. I'm happy to hear
25 from you.

1 MR. WILSON: Thank you, Judge. This case is just
2 overarching view is about a medical practice attempting
3 to hold a law firm responsible for the law firm's
4 clients medical bills and other damages based on one
5 email between a paralegal of the law firm to a
6 administrative assistant with the medical practice.
7 Nutshell has that's what -- what's about the attempted
8 those liability based on some comments and email about
9 insurance coverage. But it all began in December of
10 2018 when the law firm's client was in a car wreck and
11 sustained some injuries and needed treatment. And he
12 had previously been treated with Dr. Highsmith, who was
13 the principal and owner of Carolina Neurosurgery.

14 He was a plaintiff, so client went back to Dr.
15 Highsmith for treatment for the injury sustained car
16 wreck. The defendants represented this client, and in
17 December of 2018 the defense sent plaintiff a letter of
18 protection that basically said, "We will protect any
19 claim that you may have to insurance or to settlement,
20 any proceeds to be received in settlement." And the
21 client has been informed that the client remains
22 personally responsible for -- in the event of an
23 insufficient recovery. So we're going to go get --
24 we're pursuing -- on behalf of this client, and there
25 might be proceeds, but if there aren't enough proceeds,

1 clients still responsible.

2 The client started getting treatment with plaintiff
3 and the -- in around January 2019, this is the critical
4 time frame, because the case is all about this one email
5 during this time frame. In January 2019 before any
6 surgeries were performed, the office assistant with the
7 plaintiff reached out to the paralegal of the defendants
8 and said, "What is the client's limits?" And the
9 paralegal responded and said, "The at fault party, we
10 don't know the limits, because in the North Carolina
11 policy, there's no claim yet." But the client has
12 \$100,000 in UIM, and then there's a one million
13 occupational accident covered with One Beacon, and we
14 are not concerned about their being enough coverage to
15 pay for their claim.

16 But a mere two hours after that, after my clients
17 learned that the patient, client needed surgery and had
18 pre existing injuries, they responded back to Ms.
19 Goodwine who's the office assistant said, "Do not do any
20 services under a letter of protection or under the
21 assignment of interest. He has pre existing issues, we
22 would like to bill his private health insurance, which
23 happened to be Blue Cross Blue Shield." So the -- and
24 the office assistant responded and said, "Yes. Okay.
25 Thanks for the update."

1 So that was the status as it was in around January
2 2019, he starts to get that -- he gets the surgery.
3 There's some more communications between the parties
4 we'll get into later, because after this motion to
5 strike is the motion for summary judgment. And gave --
6 the client who gave the medical practice his Blue Cross
7 Blue Shield and said, "Bill insurance." The plaintiff
8 never billed insurance.

9 They just kept track of the coverages or the
10 (inaudible) charged the plaintiff, and it was \$125,000 a
11 little bit more than that. During that process, the
12 defense's paralegal reached out, said, "Hey, there's no
13 coverage from these other policies. We only got \$30,000
14 there's 200 total in meds, we need to figure out how to
15 allocate this." And that's when everything kind of went
16 south. And the medical practice sued the client and to
17 collect the medical bills under its financial policy.

18 That financial policy says that the client's
19 responsible. And then, a couple of months later, sued
20 the law firm and the lawyer independently and
21 individually with -- for separate cause of action,
22 including breach of contracts, breach of contract
23 accompanied by fraud -- fraud, instructive fraud, unjust
24 enrichment and negligence, and then violation of unfair
25 trade practices.

1 So basically, everything (inaudible) into it. We
2 moved to dismiss. Five of the claims were dismissed,
3 the court entered an order with many findings of facts
4 and conclusions of law, and there's a caveat in the
5 order that says, there, there are -- this order is not
6 admissible to -- in defense of or in relation to
7 plaintiff's remaining claims for breach of contract and
8 unfair trade practice. Okay, so that order happened.
9 We moved for summary judgment. The plaintiff moved to
10 amend.

11 We had the amending -- the motion to amend, heard
12 by Judge Young, who granted it and then pushed off the
13 motion for summary judgment. The complaint was amended,
14 which is the subject of the motion to strike. Now in
15 this process, Your Honor, we had been engaging in
16 litigation for years by this point, and the plaintiff
17 had already asked permission to amend the complaint. It
18 was granted.

19 They filed an amended complaint. They attempted to
20 file a different amended complaint that wasn't included
21 in the proposed order with the court. Plaintiff's
22 counsel and I discussed it, (inaudible) and then
23 Plaintiff filed the amended complaint that was within
24 the proposed order and within their memorandum. And
25 said, "We want permission, we want leave from the court

1 to grant this to allow us to file this amended
2 complaint."

3 So we talked about it. Plaintiff then filed that
4 correct one. Defendants answered it, and then
5 plaintiff, without leave or consent, filed a different
6 second amended complaint that made substantive changes
7 to the fact of allegations. And there was never any
8 motion for relief again.

9 There was never any consent granted. There wasn't
10 even consent requested. So we have here today is a
11 motion to strike that second amended complaint. And
12 Rule 15 is fairly clear. You can't have immediate --
13 you one period of time within which to amend your
14 complaint, as of right, it's before any answer, or 30
15 days after responsive pleading. We filed a motion to
16 dismiss that was granted.

17 We answered and then we moved for summary judgment.
18 Then plaintiff requested permission via a motion to
19 amend, include (inaudible) proposed amendment complaint.
20 Had it heard. The Court granted it. That was the
21 amendment as of right that does not revive. Now, our
22 rules are very similar to the federal court rules, and
23 the courts -- appellate courts, all rely on
24 interpretations of the federal rules and the commentary
25 for Rule 15 to determine what the parameters are of

1 consent (inaudible).

2 And those rules in those cases distinctively say
3 that you have one amendment as of right. If you use it,
4 it is not revived. So once you have your amendment, you
5 cannot then provide it, you will get a new 30 day period
6 to file something different. And so that (inaudible)
7 Judge Childs in one of the opinions, says that a
8 pleading file without legal consent under Rule 15 is a
9 legal nullity and it has to be struck.

10 And I've had this issue before in a different case
11 where the court has struck the pleading that was filed
12 without leave or consent. And here, Your Honor, I think
13 there's just a couple of issues. It's not just a simple
14 as something that's filed without leave or consent. It
15 was -- we litigated this case. Plaintiff asked for
16 leave to consent, including a complaint. Post amended
17 complaint said, "This is what we want to file for."
18 Comes around for a hearing after a year supplemental,
19 same proposed amended complaint with very specific
20 factual allegations, the Court says, "Yes, you have
21 permission to be granted."

22 Plaintiff tries file something different. Fully
23 changes the theory of the case and adds eight different
24 factual allegations, and that's when we discussed it.
25 It was withdrawn. We answered and then plaintiff just

1 filed it at the second amendment, like any of us. So I
2 think that it's just a clear violation of Rule 15.

3 There was never any consent, there was never any
4 leave by the court to file a second amended complaint.
5 And then -- so I would ask this Court to strike up a
6 second amendment because it was filed without leave or
7 consent. And I know that there's probably going to be
8 some argument about prejudice, but prejudice doesn't
9 factor into it when you don't even follow what the Rule
10 15 allows in the first place and you've engaged in a
11 conduct that shows you don't really care about what the
12 court order or what Rule 15 says. He filed a complaint
13 without permission or court consent.

14 THE COURT: Thank you, Mr. Pendarvis.

15 MR. PENDARVIS: Thank you, Your Honor. May it
16 please the court this morning, I say off as an aside,
17 all of last week, I sat in those chairs. I was on the
18 jury. It's kind of nice being a lawyer again this week.
19 We're here on a motion to strike, a pleading, and it's
20 clear after an answer is filed, the Rule 15 provides 30
21 days to file responsive pleading. We were in that
22 moment when the first motion to compel was filed.

23 The answer had been filed away, but the motion to
24 dismiss was filed, and their answer ultimately was
25 filed, and when the motion to amend was filed way after

1 the motion to dismiss and the answer had been filed by
2 the defense. So we (inaudible) 15(a) to ask for leave
3 to amend the complaint. The -- obviously this complaint
4 is a notice complete as Defense counsel just recognize
5 that the only parts of this second amended complaint
6 that they're (inaudible) factual allegations. The same
7 three causes of action that were approved in the -- we
8 have a complaint, an amended complaint and the second
9 amended complaint.

10 The second amended complaint that was files that
11 targeted this motion today. Second amended complaint
12 and the first amended complaint contains the same,
13 identical cause of action. So we're not going in front
14 of a jury on anything in new terms of claims. The eight
15 factual allegations that were updated were more than
16 terms of notice to the defendant. Here's what the core
17 issues are. We are in discovery. We have peeled the
18 onion to the core issues that are in dispute.

19 What's also important for this motion is the
20 defense motion to strike close quoted when they're
21 quoting our rule and then ad lib on some things that
22 were supporting their motion. But it's not consistent
23 with what our Rule 15 says. It -- our Rule 15 says,
24 "The party may amend his pleadings once, as a matter of
25 course, at any time before or within 30 days after a

1 responsive pleading is served."

2 We filed the amended complaint -- excuse me --
3 first amended complaint, approved by the court on
4 plaintiff's motion to amend. I agree with the argument
5 that the incorrect complaint that was filed -- it's
6 filed before their answer for the first amended
7 complaint was filed. So we refuted.

8 They filed their answer. Now we're into the
9 provisions. It's specifically stated in 15(a), the
10 second amendment complaint was filed four days in the
11 thirt -- within the 30 days provided in Rule 15(a).
12 It's a notice pleading there's no harm. It's -- it's
13 the same issues that people have testified about in the
14 documents that were exchanged in discovery. So this is
15 more of a notice issue, and there are no new claims, and
16 we believe the motion to strike should be denied, and we
17 should go forward on this pleading and case.

18 MR. WILSON: Just a couple of things in response,
19 Your Honor, briefly, that's it's just (inaudible), and I
20 think we've cited the law in our -- in our brief, but
21 just to reiterate the comments to Rule 15, which there's
22 a plethora of case law in South Carolina. And the
23 reason why we go look at federal case law and federal
24 rules, because there's not South Carolina case law on
25 point. They cite Wright and Miller's Federal Practice,

1 and then Judge Childs, when she was a district court
2 judge in District for South Carolina, made it clear that
3 hey, comments, the rules, the federal rules, say you do
4 not get a revived period.

5 So you filed your pleading, your complaint, you
6 filed your pleading, we answered, 30 days have passed.
7 You asked for consent or you got a need to amend and
8 filed it, we got the response. There is no -- you don't
9 revive that 30 day period. The reason it is, Your
10 Honor, you don't do that is because, as a plaintiff, if
11 I wanted to amend my complaint for some innocuous
12 reason, I could go to another side and I could say,
13 "Hey, I want to change this one allegation that is not
14 correct, and I have consent to amend my pleading?", and
15 maybe the other side says, "Yeah, that's not a big, a
16 big issue. I understand. Let's let you amend it."

17 By plaintiff's counsel's argument, there's
18 absolutely no problem with that party going and filing
19 within 30 days, whatever they wanted to, because they'd
20 be within that new, revived 30 day period. I think the
21 case law is very clear on the issue. And then one point
22 on the changes aren't just to add factual allegations,
23 Your Honor. If you look and compare the difference
24 between the two complaints, the first amended complaint,
25 which twice plaintiff has put before the court and asked

1 permission to amend, has allegations that it'll become
2 more clear when we get the motion for summary judgment,
3 but it's about an email that apparently they never got.

4 So in the first amendment and in the original
5 complaints, they alleged that they received an email
6 from April of 2019 that says that there was essentially
7 no coverage. We've admitted that twice now, and it's in
8 the motion to dismiss order or the order granting motion
9 to dismiss. They've removed that, and now they want to
10 make that issue in the case. So they're saying, "Oh,
11 wait a second, we didn't get that email." And now that
12 you're saying that you sent it, here's all of these
13 factual allegations, a full page talking about how
14 unfair, deceptive -- deceptive it is for them to receive
15 the email afterwards, and you're saying that you read
16 (inaudible). It just -- it over complicates things
17 completely changes their theory for breach of con -- for
18 Unfair Trade Practices Act.

19 It's not just a matter of notice pleading. The
20 rule says you have a right to amend it one time, within
21 30 days if there's been no response that has happened.
22 There's been no consent, and would ask support to -- to
23 strike the second amendment complaint and let the first
24 amended complaint to proceed on.

25 THE COURT: Thank you. All right. There's the

1 motion for summary judgment.

2 MR. WILSON: Yes, Your Honor, me again. Skyler
3 Wilson. On behalf of the Defendants, we have a motion
4 for summary judgment.

5 THE COURT: Let me start on that motion for summary
6 judgment. Is all discovery complete?

7 MR. PENDARVIS: No, Your Honor. We are scheduling
8 some depositions and there's a motion to compel, or
9 documents and things of -- discovery is not complete.

10 THE COURT: I'm not going to hear the motion for
11 summary judgment if discovery is incomplete.

12 MR. WILSON: Well, okay, we've completed -- can I
13 make one point on that?

14 THE COURT: Sure.

15 MR. WILSON: I understand that we have to get a
16 deposition schedule, Your Honor. That was by virtue of
17 plaintiff changing the pleadings and differences. But
18 it doesn't matter for the purposes of there being a
19 motion to dismiss order that has findings of fact that
20 are the law of the case that cannot be changed by this
21 Court, and that this Court can base its order on for
22 summary judgment on findings in that order that can be
23 changed that hasn't been appealed. So we can still go
24 forward on that and say, "Hey, actually, summary
25 judgment could be granted because you're bringing in

1 (inaudible) for promissory estoppel and negligent
2 misrepresentation." But there's a (inaudible) to the
3 conclusion of law in this order that you did not appeal,
4 that says you did not justifiably rely and cannot rely
5 on safe coverage, which is what they're trying to say
6 that their claims are. So we can wait and redo this
7 again after ruling on motion to strike, or we can go ...

8 THE COURT: Yes, I think the motion to strike
9 probably needs to be addressed as well. To be safe, and
10 certainly, if there's any discovery that's outstanding
11 there's no -- if there's depositions being scheduled
12 motion to compel, you may be may be correct, it may be
13 dispositive, that other order may be dispositive of some
14 issues, but possibly not all. In any situation with
15 discovery is not complete, I'm not going to hear the
16 motion for summary judgment. So, we'll just mark that
17 one as continued, and I'll review and issue a ruling
18 relative to the motion to strike. Thank you.

19 MR. WILSON: Thank you.

20 MR. PENDARVIS: Thank you. It is still great being
21 here as a lawyer.

22
23 (THERE BEING NOTHING FURTHER, THE HEARING CONCLUDED.)

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CERTIFICATE OF TRANSCRIBER

State of South Carolina
County of Charleston

I, JENNIFER JAEGER, a court-approved transcriber, do hereby certify that the foregoing is a true and accurate Transcript of Record of the proceedings and evidence that were audible and introduced in the hearing of the captioned case, relative to appeal, in South Carolina Circuit Court 9, Charleston County, South Carolina, on the 4th day of November, 2024.

That I am not related to nor the employee of any of the parties hereto, nor related to or employed by any attorney or counsel employed by the parties hereto, nor interested in the outcome of this action.

Jennifer Jaeger

Jennifer Jaeger, Transcriber
Notary Public for S.C.
Commission Expires: 10/28/2032

STATE OF SOUTH CAROLINA * COURT OF COMMON PLEAS
*
COUNTY OF CHARLESTON * TRANSCRIPT OF RECORD

-----X
CAROLINA NEUROSURGERY & *
ORTHOPEDECS, INC., *
*
Plaintiff, *
vs. * Case No. 2021-CP-10-03379
*
MICHAEL A. MAUCHER, ESQ., and *
DELUCA & MAUCHER, LLP, *
*
Defendants. *
-----X

March 31, 2025

B E F O R E:

The Honorable Jessica Ann Salvini, Presiding Judge

A P P E A R A N C E S:

Thomas Pendarvis, Esq.
Attorney for the Plaintiff

Skyler Wilson, Esq.
Attorney for the Defendant

Recorded by: WebEx Recording

Court Transcriber: Bobbi Fisher, RPR
SC Official Court Reporter III

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E X H I B I T S

(None.)

COURT REPORTER LEGEND

Dash (--)	Indicates an interruption in speech
Ellipses (...)	Indicates trailing off in speech
(ph)	Indicates phonetic word
[Verbatim]	Indicates the word is said as written
(Indiscernible)[Transcription]	Indicates word(s) is not known due to audio recording quality

P R O C E E D I N G S

1
2 THE COURT: All right. That's going to bring me to my
3 next matter, which is Carolina Neurosurgery & Orthopedics,
4 Inc., versus Michael A. Maucher and DeLuca & Maucher -- I hope
5 I'm pronouncing that correctly; I'm probably not.

6 This is Case No. 2021-CP-10-03379, and it looks like I've
7 got all counsel present. This is Defendants' Motion for
8 Summary Judgment.

9 So, gentlemen, I'm happy to hear from y'all.

10 MR. WILSON: Yes, Your Honor. Thank you. Skyler Wilson
11 on behalf of the defendants, the law firm DeLuca & Maucher and
12 Attorney Mike Maucher. So you're very close.

13 THE COURT: Thank you.

14 MR. WILSON: Mr. Maucher and DeLuca & Maucher.

15 The plaintiff in this case is a medical practice,
16 Carolina Neurosurgery. And this case involves claims by a
17 medical provider, Carolina Neurosurgery and its principal,
18 Dr. Highsmith, against my clients, an attorney and law firm,
19 trying to collect payment from medical costs for services that
20 the plaintiff provided to my client's client, Mr. Scott
21 Demaskey.

22 And today we're asking this Court to grant us summary
23 judgment on the remaining claims for two overarching reasons.
24 The first is there's, on appeal of the Order by Judge Dickson
25 that makes numerous findings of facts and conclusions of law

1 that is not appealed, and they preempt these changed claims
2 that Plaintiff has brought. In addition, there are no genuine
3 issues of material fact for multiple elements on the
4 plaintiff's claims.

5 Now, beginning with a little bit of a factual background,
6 DeLuca & Maucher and Mike Maucher represented a client by the
7 name of Mr. Demaskey in a personal injury claim arising from a
8 motor vehicle accident in 2018. Now, Mr. Demaskey was a prior
9 patient of Dr. Highsmith and, as a result of those injuries,
10 went back to Dr. Highsmith to seek treatment. Dr. Highsmith
11 had just opened up Carolina Neurosurgery towards the end of
12 2018.

13 Now, as a part of that, word had gotten back to our
14 client, DeLuca & Maucher, that they would have accepted a
15 Letter of Protection and inquired about it. So our client
16 sent them a Letter of Protection related to the personal
17 injury claim.

18 And the language in some of the documents that we're
19 going to discuss today is pretty critical. So before
20 Mr. Demaskey went to see Dr. Highsmith for treatment for these
21 injuries, the defendant sent him, Plaintiff, a Letter of
22 Protection that stated that they will "agree to protect any
23 claim which you," Carolina Neurosurgery, "may have out of any
24 settlement proceeds we may receive arising out of the incident
25 referred to above. The above-named individual," referring to

1 Mr. Demaskey, "has been informed that, in the event of an
2 insufficient recovery, he remains personally responsible for
3 your outstanding account balance."

4 So that was sent before there was any treatment to
5 Demaskey. Come around to January 3rd, 2019, Mr. Demaskey goes
6 in and gets both treatment from Plaintiff. He signs -- the
7 plaintiff or the client, Mr. Demaskey, signs a financial
8 policy with Plaintiff that says that Plaintiff will bill
9 insurance as a courtesy and that the client is responsible for
10 anything not paid by insurance. Plaintiff started treating
11 Mr. Demaskey and charging him for services.

12 Now, in January 21st of 2019, an employee with Carolina
13 Neurosurgery reached out to Tina Bennett, who is a paralegal
14 with my clients, and asked for the limits for Mr. Demaskey.
15 Bennett responded to the inquiry and said, "We don't know what
16 the insurance is for the at-fault party because it's a North
17 Carolina policy, so that we don't have that information. But
18 the client carries \$100,000 in UIM coverage and then a million
19 dollars in occupational accident safety coverage or
20 occupational accident coverage," and that she wasn't concerned
21 at that time about any issues with coverages to pay the
22 claims.

23 Two hours after that email about insurance coverages --
24 because that email about insurance coverages is what their
25 whole case is about now -- Bennett, my client's employee,

1 responded back to Kiara Goodwine and said, "Hey, we just found
2 out that the patient, the client, needs surgery. So instead
3 of doing work under a Letter of Protection, please do --
4 please bill his primary health insurance. It would be better
5 for all of us. We don't do an assignment or a Letter of
6 Protection. Do the services under" -- and bill his BlueCross
7 BlueShield essentially. That's the policy that he had.

8 Now, in March of 2019, there was a second Letter of
9 Protection that again referred to insurance. Said, "Bill
10 insurance, will protect any claims out of settlement proceeds
11 that we receive that insurance doesn't pay, and the client is
12 responsible for your bills."

13 Demaskey went in for his first surgery, provided
14 Plaintiff with his BlueCross BlueShield policy, filled out a
15 health insurance verification form. He had the first surgery.

16 After the first surgery, it was determined that there was
17 insufficient coverage from the at-fault party. There was only
18 \$30,000, and the UIM insurance coverage did not apply. And
19 that was around April 29th. And there's an email that
20 Plaintiff contests wasn't received from Bennett mentioning
21 that information about the policies.

22 But then Plaintiff -- Mr. Demaskey had a second surgery
23 in May of 2019, but Plaintiff never filed anything with
24 Mr. Demaskey's health insurance despite having that
25 information and having direct -- been directed and agreed to

1 bill insurance as a part of that process.

2 So after Plaintiff had provided all the services to
3 Mr. Demaskey, the -- in January of 2020, Bennett followed up
4 again with the plaintiff and said, "Look, we only have
5 \$30,000. There's no underinsured motorist coverage. We need
6 to figure out how to allocate between his medical bills."

7 And then that's when this dispute kicked off about
8 Letters of Protection and insurance coverage representations.

9 Now, in May of 2021, Carolina Neurosurgery sued
10 Mr. Demaskey under its Financial Policy to request (ph) for
11 his medical bills. That case was litigated all the way to the
12 courthouse steps; I think it settled a day or within a few
13 days before trial.

14 And then during that process, they also sued my client.
15 They sued DeLuca & Maucher and Mike Maucher based on these
16 Letters of Protection, and they brought claims -- seven causes
17 of action against the law firm and attorney for breach of
18 contract, breach of contract with fraudulent intent, unfair
19 trade practices, fraud, constructive fraud, unjust enrichment,
20 and negligence.

21 Now, early on in the case, we moved to dismiss, and
22 Judge Dickson heard the motion and he granted it in part and
23 denied it in part, got rid of five of their causes of action,
24 made findings of fact and conclusions of law in that Order.

25 The only remaining cause of action was breach of contract

1 and unfair trade practices based on the Letters of Protection,
2 and I think the Unfair Practices Act appears to be based on
3 some of those coverage representations.

4 The Order, however, has one caveat; it says it won't be
5 admissible to prove facts or conclusions of law on the
6 remaining claims for breach of contract and Unfair Trade
7 Practices Act.

8 So that's where we left it at for the Motion to Dismiss.
9 There was only breach of contract, only unfair trade practice.
10 No other claims. And they were based on these Letters of
11 Protection. We engaged in written discovery, document
12 production, many depositions based on the Complaint and
13 Answer, and then for the past nearly year and a half, we've
14 been going back and forth on this Motion for Summary Judgment
15 where we move for summary judgment, Plaintiff moved to amend,
16 was allowed to amend. We modified our Motion for Summary
17 Judgment, they sought and obtained leave to amend again, so we
18 had to modify our Motion for Summary Judgment a second time,
19 so that's why the memo is the second revised memo in support
20 of summary judgment.

21 And then the most recent amendment Plaintiff added was to
22 include causes of action for promissory estoppel and negligent
23 misrepresentation. And, basically, the Unfair Trade Practices
24 Act claim now is related to this April email that they say
25 they never received and it was unfair and deceitful to say it

1 was received after that they received it. So we'll get into
2 that, I guess, when we get to the Motion for Summary Judgment
3 on the merits.

4 But that's the factual background and procedural history.
5 And, you know, just moving on to the motion itself, one just
6 important element, I think, of the Motion for Summary Judgment
7 standard is just that, once the moving party meets its burden
8 to establish that there is no genuine issue of material fact
9 relying on testimony, evidence, pleadings -- and the
10 pleadings, anything in discovery, the non-moving party has to
11 then point to a specific evidence to create that genuine issue
12 of material facts. You cannot just rely on the pleadings.

13 And if there is no genuine issue of material fact on any
14 one element of any claim, that claim has to be dismissed under
15 that standard.

16 Now, moving to the first reason just about the Order from
17 Judge Dickson, the prior Order is the Motion -- on the Motion
18 to Dismiss, which makes those factual findings and conclusions
19 of law as the law of the case. It cannot be changed by this
20 Court even if it's wrong. Plaintiff has to appeal it. There
21 is no option.

22 And the doctrine applies if there's any determination of
23 a substantial right in that Order, and dismissing five of
24 those seven claims that they brought and making findings of
25 fact contrary to those claims is a determination of a

1 substantial right. And because it's an Order by a different
2 judge in the same circuit, the Court cannot change it, even if
3 it's wrong. It can only be changed on appeal.

4 And Plaintiff clearly takes issue with the Order. I
5 think their Amended Complaint and Second Amended Complaint
6 both indicate reservation of rights to appeal that Motion To
7 Dismiss Order. And they don't have to appeal it until the end
8 of the case, but they still have to deal with the impact on
9 the claims as they are now.

10 And, again, the Order mentions one caveat: that it won't
11 be admissible for remaining claims of breach of contract and
12 Unfair Practice Act. And that was at the time of the court
13 order, and the breach of contract was based on the Letter of
14 Protection saying that that was the contract. But now,
15 according to Plaintiffs' amended allegations, the contract is
16 this email that they -- that Dr. Highsmith never saw when he
17 provided services; that, apparently, created a contract and
18 offer for -- to provide the client services in exchange for
19 representations about insurance coverage.

20 So, in my opinion, Your Honor, you have an Order that
21 makes finding of facts and conclusions of law in a specific
22 point in time where the plaintiffs' theories were different.
23 They have now changed that caveat and that Order that says
24 this order doesn't apply to the remaining claims of breach of
25 contract and Unfair Practices Act, it doesn't apply anymore.

1 And we have to consider the fact that, if this case goes
2 to trial, there's going to be many inconsistent findings with
3 what that Order says and what the jury says. And that's
4 something that just needs to be handled on appeal.

5 Now, regardless of whether or not that caveat applies in
6 the Order, Your Honor, is limited to the two claims for unfair
7 trade and breach of contract. There is no caveat for the
8 negligent misrepresentation of promissory estoppel claims. So
9 it's the content of the Order, the actual findings or the
10 legal conclusions bar those claims, then this Court must grant
11 summary judgment even if that Order is wrong.

12 THE COURT: I understand. You've told me that now three
13 times. Even if the Order is wrong, even if the Order is
14 wrong. I understand.

15 MR. WILSON: That's important.

16 THE COURT: I understand. I understand.

17 MR. WILSON: Thank you, Your Honor. Sorry.

18 THE COURT: It's okay. Yeah, it's dead, and I've got the
19 point -- I've written it down and I've even given some check
20 marks for you every time you say it.

21 You've got to give me your good argument. I mean...

22 MR. WILSON: I'll move on. I promise.

23 THE COURT: Okay.

24 MR. WILSON: So we're moving on now to the Order itself,
25 whether the finding of facts implicate or affect the remaining

1 The end of the day on this entire case begins with a
2 medical practice relying on representations from a law firm.
3 Medical practice is faced with the opportunity to provide
4 elective surgeries to a patient who is being represented by
5 the law firm in a personal injury action. It's not emergent
6 care; there was no requirement. So it was definitely an
7 option for the medical practice.

8 They receive an email advising of insurance coverage, not
9 a policy limit or just a number. The representation from the
10 word "coverage" is there's a policy that covers the claim and
11 then covers the expenses you, medical practice, are
12 anticipating incurring for this patient/our client.

13 Think about it. Medical practice hearing from a law
14 firm. Legal issues about coverage on an insurance policy.
15 They relied on it. That's what Dr. Highsmith said in his
16 deposition, and we've cited that several places.

17 The claims that survive -- and you heard a lot about the
18 prior Order on a Motion to Dismiss. There were two claims
19 that survived that cause of action, and I want to focus on the
20 last one, this Unfair Trade Practices claim.

21 The Unfair Trade Practice claim was not dismissed, and
22 based on the facts presented to the Court on the Motion to
23 Dismiss, the allegation in the Complaint, the Court found
24 merit. And further investigation into the claim also reveals
25 merit.

Certificate of Transcriber

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CASE NAME: Carolina Neurosurgery v. Michael Maucher
DATE OF HEARING: 3/31/25
RECORDING METHOD: WebEx Recording

I, Bobbi Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that I was not present for the live proceeding; and that said proceedings were transcribed to the best of my ability from the audio and/or video recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case; and I have no interest, financial or otherwise, in its outcome.

Bobbi Fisher

/s/ Bobbi Fisher _____

Bobbi Fisher, SC Official Court Reporter III, RPR

Transcript Prepared: 8/14/25

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Apr 23 2026

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

Dale E. Van Slambrook, Circuit Court Judge

Jessica A. Salvini, Circuit Court Judge

Appellate Case No. Case: 2025-001304

Case No. 2021-CP-10-03379

Carolina Neurosurgery & Orthopedics, Inc.,.....Appellant/Respondent

v.

Michael A. Maucher, Esq. and DeLuca & Maucher, LLP,.....Respondents /Appellants

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

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April 23, 2026

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