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

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

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Case No. 2013-CP-23-02001

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Greenville Hospital System and
GHS Partners in Health, Inc., ..... Respondents,

v.

Juliet Elizabeth Cromer, ..... Appellant.

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# INITIAL BRIEF OF RESPONDENTS

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## STATEMENT OF ISSUES ON APPEAL

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II. Whether the circuit court was correct in not accepting Defendant's arguments that a cause of action arises based upon "privity of contract" or "third party beneficiary" when no such claim is alleged in Defendant's counterclaims and is contrary to settled South Carolina law?

III. Whether the circuit court was correct in not accepting Defendant's argument that a cause of action arises based on "substantive and procedural due process" when no such claim is alleged in Defendant's counterclaims and is contrary to settled South Carolina law?

IV. Whether the circuit court correctly applied the Rule 12(b)(6), SCRCP, standard of review when ruling on the legal question of whether Defendant has alleged cognizable claims under South Carolina law?

## STATEMENT OF THE CASE

This appeal stems from an action brought by Greenville Hospital System and GHS Partners in Health, Inc. (collectively, "GHS") to collect amounts owed by Defendant Juliet Elizabeth Cromer for medical treatment she received from GHS and its physicians in September 2011, but for which she has not paid. GHS filed this action on April 10, 2013. Defendant filed and served her Answer on May 9, 2013, asserting counterclaims for violation of the South Carolina Unfair Trade Practices Act, negligence *per se*, negligence, gross negligence, and breach of fiduciary duty. Defendant's counterclaims are based on allegations that GHS failed to comply with the requirements of two statutes: the South Carolina Medically Indigent Assistance Act, S.C. Code Ann. §§ 44-6-132 *et seq.*, and the purported "South Carolina Disproportionate Share Program." GHS moved to dismiss these counterclaims pursuant to Rule 12(b)(6) SCRCP, on the grounds there is no private right of action under the statutes and regulations cited by Defendant and that Defendant's counterclaims otherwise failed to state a claim for relief under South Carolina law. (GHS Mot. to Dismiss and Supporting Mem., R. at __.)

A hearing on GHS's Motion to Dismiss was held on June 21, 2013. On July 16, 2013, the Honorable Letitia H. Verdin, Circuit Court Judge, issued a written order granting GHS's Motion to Dismiss as to Defendant's counterclaims. (R. at __.) Thereafter, Defendant filed a motion to reconsider pursuant to Rule 59(e), SCRCP, which the circuit court denied on August 14, 2013. (R. at __.) Defendant filed a notice of appeal on September 12, 2013.

## STATEMENT OF THE FACTS

Defendant was treated at GHS on September 11, 2011. (Compl. ¶¶ 5-6, R. at __.) Defendant received diagnostic and therapeutic medical services, accommodations, and drugs. (*Id.* at ¶ 6, R. at __.) Defendant is responsible for the charges incurred for her treatment. (Compl. ¶ 8, R. at __.) However, despite demand for payment, Defendant refused to pay the charges, and GHS brought this action to collect the amounts Defendant owed to the hospital and the treating physicians. Defendant has still not paid for the treatment provided to her.

In her Answer and Counterclaims, Defendant did not deny that she was treated at GHS, did not claim that she received inadequate or deficient care, nor did she claim she was charged for any service or medication she did not receive. Instead, Defendant's grievance—***and the sole basis for her counterclaims as alleged in the four corners of her pleading***—is that GHS allegedly failed to comply with the South Carolina Medically Indigent Assistance Act, S.C. Code Ann. §§ 44-6-132 *et seq.* ("MIAA"), and the purported "South Carolina Disproportionate Share Program." (*Id.* at ¶¶ 10, 16, R. at __.)

With regard to the MIAA, Defendant alleges GHS "failed to properly advise of, and refer the Defendant to the county designee" to apply for benefits under the MIAA's Medically Indigent Assistance Program and that, as a result, Defendant "has been denied her otherwise lawful opportunity to apply for benefits under the program which, properly applied, would have fully satisfied [her] obligation to Plaintiffs." (*Id.* at ¶¶ 14, 17, R. at __.)

With regard to the purported "South Carolina Disproportionate Share Program," Defendant alleges that GHS:

> failed to set-off her account under a Medicaid disproportionate share rate and further failed to correctly classify her as an indigent under the *South Carolina Disproportionate Share Program* (hereinafter "SCDSH") as funds realized and distributed to General Hospitals in South Carolina under the federal *Medicaid Disproportionate Share Hospital Allotment Program*, as provided by the *American Recovery and Reinvestment Act of 2009, Section 5002* (hereinafter "ARRA") of which the Plaintiff, as a General Hospital is entitled to receive, and is receiving such funds to offset the costs borne by the Plaintiff in providing indigent care.

(*Id.* at ¶ 16, R. at __.)

GHS strongly denies that it has acted in any way contrary to South Carolina or federal law. However, as discussed below, even assuming the allegations of Defendant's counterclaims are true for purposes of GHS's Motion to Dismiss, the law is clear that there is no private right of action under these statutes and related government programs. The circuit court's dismissal of Defendant's counterclaims for failure to state a claim should therefore be affirmed.

## ARGUMENT

The circuit court correctly ruled that the statutes forming the sole basis for Defendant's counterclaims do not create private causes of action based on the plain statutory language, the General Assembly's "Legislative Findings and Intent," and the fact that the authority to enforce the statute and impose civil penalties for its violation is expressly vested with state agencies, SCDHEC and SCDHHS. In an apparent concession that the circuit court's analysis was correct, Defendant's brief does not challenge the reasoning in the circuit court's order but instead attempts to recast Defendant's counterclaims as causes of action based on contract theories of "privity" and "third party beneficiary," as well as alleged violations of "substantive and procedural due process"—none of which have any application to an analysis of the Unfair Trade Practices Act, negligence, and breach of fiduciary duty counterclaims asserted by Defendant in her pleading. In order to properly respond to Defendant's misplaced and irrelevant arguments, GHS will first address why the circuit court's analysis of Defendant's counterclaims—as alleged in her pleadings—is correct and should be affirmed. GHS will then address the inapposite and erroneous arguments and theories the circuit court did not accept but that Defendant now puts forward to this Court on appeal.

### I. No private right of action exists under any of the state and federal statutes and regulations alleged in Defendant's counterclaims.

#### A. No private right of action exists under the MIAA.

Defendant does not assert a viable claim under South Carolina law arising from the alleged violation of the MIAA. There is no express or implied private right of action created by the statute and no basis for allowing such a cause of action, whether styled as a

claim under the UTPA, or common law negligence *per se*, negligence, or breach of fiduciary duty theory.

A statute must permit a private cause of action, either expressly or by implication, in order for a party to maintain a civil suit based on the statute. *Whitworth v. Fast Fare Markets of S.C., Inc.*, 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985) ("[T]he general rule is that a statute which does not purport to establish a civil liability, but merely makes a provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability." (quoting 73 Am. Jur. 2d *Statutes* § 432 (1974)). "In determining whether a statute creates a private cause of action [in South Carolina], the main factor is legislative intent." *Doe v. Marion*, 373 S.C. 390, 396, 645 S.E.2d 245, 248 (2007).

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute . . . . In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability. When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party.

*Id.* (internal citations omitted). "Legislative intent to grant or withhold a private right of action for a violation of the statute is determined primarily from the language of the statute." *Georgetown County League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 353, 713 S.E.2d 287, 289 (2011); *see also Whitworth*, 289 S.C. at 420, 338 S.E.2d at 156 ("A primary consideration in deciding whether a private cause of action should be

implied under this type of statute is the legislature's intent . . . determined primarily from the form or language of the statute.").

In determining whether a private right of action exists under a statute, two issues are examined: (1) whether the express language of the statute permits a private cause of action; and (2) whether a private cause of action can be implied. *See, e.g., Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 569, 743 S.E.2d 778, 782 (2013). As discussed above, discerning the intent of the Legislature is always the guiding principle in deciding whether a private right of action exists under a statute.[1] Looking specifically to the MIAA, it is clear the General Assembly did not intend to create a private right of action.

First, there is no express provision in the MIAA which allows a private citizen to sue a hospital for its alleged failure to comply with any provision of the MIAA or the Medically Indigent Assistance Program it created. There is no provision in the MIAA which makes a hospital liable for damages to any individual due to the hospital's failure to comply with the MIAA. Similarly, there is no provision which makes a violation of the MIAA an unfair trade practice—as is found in many other statutes in the South Carolina Code.[2] "The legislature's statutory silence in failing to expressly provide a

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[1] Recent decisions of the South Carolina Supreme Court have reinforced our State's longstanding adherence to strict separation of powers doctrine whereby the Judiciary shall not exercise legislative functions. *See, e.g., Hampton v. Haley*, 403 S.C. 395, 403-404, 743 S.E.2d 258, 262 (2013) (holding that "[i]ncluded within the legislative power is the sole prerogative to make policy decisions; to exercise discretion as to what the law will be" and any attempt to make those type of policy choices is "an intrusion upon the legislative power" ).

[2] For example, in the Physical Fitness Services Act (also in Title 44 of the Code), the Legislature specifically provided that "[a] violation of any provision of this chapter is

private right of action is a strong indication it did not intend such a remedy for an alleged violation of the statute." 73 Am. Jur. 2d *Statutes* § 307 (Supp. 2012). Moreover, there is no case in South Carolina recognizing any statutory duty giving rise to a private right of action under the MIAA, and Defendant cites no case in her brief.

Second, "[w]hen a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party." *Doe v. Marion*, 361 S.C. 463, 473-74, 605 S.E.2d 556, 561-62 (Ct. App. 2004). The fact that the General Assembly did not intend to create a private right of action is demonstrated by the General Assembly's express "Legislative Findings and Intent" codified in Section 44-6-132 of the MIAA. These Findings and Intent make clear that the MIAA is not intended for the special benefit of a narrow class of individuals, but instead expressly states that the legislation is intended for the benefit and protection of all those who participate in and are affected by the health care system in South Carolina—including patients, health care providers, government entities, and taxpayers. As stated by the General Assembly in Section 44-6-132:

> The General Assembly finds that:
>
> (1) There are ***citizens who cannot afford to pay for hospital care*** because of inadequate financial resources or catastrophic medical expenses.
>
> (2) Rising health care costs and the growth of the medically indigent population have ***increased the strains on the health care system with a growing burden on the hospital industry, health insurance companies, and paying patients***.

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considered a violation of the South Carolina Unfair Trade Practices Act." S.C. Code Ann. § 44-79-120 (2012).

(3) This burden ***has affected businesses, which are large purchasers of health care services through employee insurance benefits, and taxpayers in counties which support public hospitals***, and it causes the cost of services provided to paying patients to increase in a manner unrelated to the actual cost of services delivered to them.

(4) ***Hospitals which provide the bulk of unreimbursed services cannot compete economically*** with hospitals which provide relatively little care to indigent persons.

(5) Because of the complexity of the health care system, any effort to resolve the problem of paying for care for medically indigent persons must be multifaceted and shall include at least four general principles:

a. Funds must be made available to assure continued ***access to quality health care for medically indigent patients***.

b. ***Cost containment measures and competitive incentives*** must be placed into the health care system along with the additional funds.

c. ***The cost of providing indigent care must be equitably borne by the State, the counties, and the providers of care***.

d. State residents must be ***guaranteed access to emergency medical care*** regardless of their ability to pay or county of residence.

It is the ***intent of the General Assembly*** to:

(1) ***assure care for the largest possible number of its medically indigent citizens*** within funds available by:

a. expanding the number of persons eligible for Medicaid services, using additional state and county funds to take advantage of matching federal funds;

b. creating a fund based on provider and local government contributions to provide medical assistance to those citizens who do not qualify for Medicaid or any other government assistance and

who do not have the means to pay for hospital care; and

c. mandating access to emergency medical care for all state residents in need of the care;

(2) ***Provide incentives for cost containment to providers of care*** to indigent patients by implementing a prospective payment system in the Medicaid and Medically Indigent Assistance Fund programs;

(3) ***Monitor efforts to foster competition in the health care market place*** while being prepared to make adjustments in the system through regulatory intervention if needed;

(4) ***Promote market reforms***, as the single largest employer in the State, by structuring its health insurance program to encourage healthy lifestyles and prudent use of medical services; and

(5) Reduce where possible or maintain the current rate schedules of hospitals to ***keep costs from escalating***.

§ 44-6-132 (emphasis added); *Doe v. Marion*, 361 S.C. at 473-74, 605 S.E.2d at 561-62 (holding that "the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability").

Additionally, the MIAA expressly delegates authority to administer and enforce the statute to the South Carolina Department of Health and Human Services ("DHHS") and to the South Carolina Department of Health and Environmental Control ("DHEC"). *See* S.C. Code Ann. § 44-6-150(A) ("There is created the South Carolina Medically Indigent Assistance Program administered by the department."). Specifically, section 44-6-150 of the MIAA expressly provides that DHEC has the authority to pursue civil penalties against a hospital or any of its employees or staff for violation of the statute:

> In addition to or in lieu of an action taken affecting the license of the hospital, when it is established that an officer, employee, or member of the hospital medical staff has violated this section, the South Carolina Department of Health and Environmental Control shall require the hospital to pay a civil penalty of up to ten thousand dollars.

S.C. Code Ann. § 44-6-150(A).[3]

The fact that the General Assembly expressly provided in the MIAA that DHEC could impose a civil penalty on hospitals that fail to comply with the statute is further indication that no private right of action was intended. *See Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 122, 678 S.E.2d 430, 433-34 (2009) ("The fact that the [Certificate of Need] Act considers violations a misdemeanor and imposes fines as well as license denial, revocation, or suspension further supports the conclusion that the CON Act does not create a private cause of action by implication. . . . In other words, the enforcement mechanism of the CON Act is DHEC's authority to impose sanctions and not civil liability."); *Byrd v. Irmo High Sch.*, 321 S.C. 426, 433-34, 468 S.E.2d 861, 865 (1996) (finding when one statutory provision does not include a right that is included in a related provision, legislative intent is that a right will not be implied where it does not exist).

Because there is no provision in the MIAA allowing an individual patient to assert a private cause of action against a hospital and the legislative intent indicates no such right of action can be implied, Defendant's purported counterclaims based on the MIAA

[3] The MIAA further provides that "[u]nless otherwise specified in this chapter, an individual or facility violating this chapter or a regulation under this chapter is guilty of a misdemeanor and, upon conviction, must be fined not more than one hundred dollars for the first offense and not more than five thousand dollars for a subsequent offense." S.C. Code Ann. § 44-6-200.

were properly dismissed. *See, e.g., Doe v. Wal-Mart Stores, Inc.*, 393 S.C. 240, 245, 711 S.E.2d 908, 910-11 (2011) (upholding dismissal of plaintiff's negligence claims for alleged violation of Reporter's Statute because other provisions of the statute did create civil liability and the purpose of the statute as a whole was not to protect an individual's private right); *Adkins v. South Carolina Dep't of Corrections*, 360 S.C. 413, 418-19, 602 S.E.2d 51, 54-55 (2004) (dismissing plaintiff-prisoner's claims against the Department of Corrections under the Tort Claims Act for alleged violation of the Prevailing Wage statutes requiring inmates be paid wages comparable to wages paid for the same work in the private sector because the Prevailing Wage statutes created no private right of action in favor of inmates); *Dorman v. Aiken Communications, Inc.*, 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990) (dismissing plaintiff's tort claims based on newspaper's alleged violation of statute prohibiting publication of the names of sexual assault victims because the statute did not create a private right of action and no basis for civil liability could be implied because, "[a]lthough [plaintiff] may benefit from its enforcement, the statutory provision is primarily for the protection of the public as an entity, and this Court does not construe it to establish a private right of action"); *Whitworth*, 289 S.C. at 420-21, 338 S.E.2d at 156 (holding that merchant's violation of a statute prohibiting sale of cigarettes to a minor did not establish a private right of action for damages); *Doe v. Marion*, 361 S.C. at 475, 605 S.E.2d at 562 (holding that alleged violation of child abuse reporting statute did not give rise to a private right of action or cause of action for negligence *per se*); *Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 107-108, 374 S.E.2d 910, 917 (Ct. App. 1988) (holding that the defendant's alleged violation of a statute did not give rise to a private cause of action for negligence *per se* where the "essential

purpose of the statute" was not to protect against the particular kind of harm claimed by the plaintiff).

### B. No private right of action exists under the alleged "Disproportionate Share Program."

Equally flawed are Defendant's claims based on an alleged violation of what is referred to in her counterclaims as the "South Carolina Disproportionate Share Program." As described above, Defendant alleges in her counterclaims that GHS "failed to set-off" her accounts "under a Medicaid disproportionate share rate." (*See* Answer ¶ 16, R. at __.) However, Defendant does not and cannot point to any state or federal statute, regulation, or rule that requires GHS to apply a "set off" on the amount owed under any patient's account—whether indigent or otherwise—based on any "disproportionate share" funds or allotment the Hospital may receive from the state or federal government under the Medicaid or Medicare programs.

The federal Medicaid statute requires that each state must provide Medicaid under a "State Plan" that complies with numerous federal requirements. *See* 42 U.S.C. § 1396a(a)(1)-(81); 42 C.F.R. § 430.12. Among those requirements is that states set Medicaid payment rates that take into account "the situation of hospitals which serve a disproportionate number of low-income patients with special needs." 42 U.S.C. § 1396a(a)(13)(A)(iv). This requirement is commonly referred to as the Medicaid "disproportionate share hospital payment adjustment" (DSH). These DSH payments are designed to assist "safety net" hospitals in making up for high levels of uncompensated care. *See Ashley County Med. Ctr. v. Thompson*, 205 F. Supp. 2d 1026, 1031 (E.D. Ark. 2002). Whether a hospital qualifies for a Medicaid DSH adjustment, and the amount of

the adjustment it receives, depends on the hospital's "disproportionate patient percentage," which is determined according to a complex statutory formula. According to the statutory formula, the disproportionate patient percentage is the sum of two fractions which have no relation or connection to any individual patient's account:

1. the percentage of Medicare inpatient days attributable to patients entitled to both Medicare Part A and Supplemental Security Income; and
2. the percentage of total inpatient days attributable to patients eligible for Medicaid but not eligible for Medicare Part A.

*See* 42 U.S.C. § 1395ww(d)(5)(F)(vi)(I)-(II).

The DSH program contains no provisions which require, contemplate, or touch upon a "set off" or "offset" of an individual patient's account based on the supplemental funds received through the DSH program. Defendant does not allege and cannot point to any provision of the Medicare or Medicaid statute that requires or even mentions an obligation on the part of the Hospital to apply such an "offset" or "set off" to a particular patient's account as a result of any funds received from the federal Department of Health and Human Services under the DSH program.

However, even if Defendant could point to such a requirement under any provision of the Medicare or Medicaid statutes or regulations, this Court has already held that no private right of action arises under the federal Medicare and Medicaid programs. *See Wogan v. Kunze*, 366 S.C. 583, 601-602, 623 S.E.2d 107, 117 (Ct. App. 2005) (finding plaintiff could not assert state law tort claims against physician who failed to file a claim for benefits as required by the Medicare Act because there was no private right of action created under the Medicare Act: "The Medicare Act provides for specific remedies

in the form of sanctions and penalties, and this weighs against finding that Congress intended to create the remedy of a private right of action."); *Brogdon ex rel. Cline v. National Healthcare Corp.*, 103 F. Supp. 2d 1322, 1331-32 (N.D. Ga. 2000) (cited in *Wogan* with approval and holding that private individual did not have a right to bring a private cause of action for failure to comply with the federal Medicare and Medicaid programs).

### C. No private right of action exists under the Internal Revenue Code provisions related to charitable entities.

In Paragraphs 28 and 30 of her counterclaims, Defendant alleges GHS failed to comply with the requirement of "Internal Revenue Code § 501(c)(3)" and "IRC § 501(r)(4)(v)" to "widely publicize the policy within the community to be served by the organization." Although these federal statutory provisions are not alleged elsewhere in the pleading and do not appear to be the focus of Defendant's counterclaims, the circuit court nevertheless addressed this point, correctly finding these provisions do not create a private right of action for individuals. (Order, R. at __.)

The provisions of Section 501(r)(4) referenced in Defendant's counterclaims merely impose additional requirements that non-profit hospitals must meet in order to continue to qualify as "charitable organizations" exempt from tax on corporations and trusts under Section 501(c)(3) of the Internal Revenue Code. Section 501(r) does not give individual patients any rights whatsoever, does not purport to create any private rights for individual patients, and does not purport to create a private right of action to enforce any requirement contained in Section 501(r)(4). Courts across the country have repeatedly rejected use of a hospital's not-for-profit, 501(c)(3) status as a basis to create a

private cause of action against a hospital related to charges to patients. *See, e.g., Nygaard v. Sioux Valley Hospital*, 731 N.W.2d 184, 198 n.15 (S.D. 2007); *Amato v. UPMC*, 371 F. Supp. 2d 752, 756 (W.D. Pa. 2005); *Kolari v. N.Y. Presbyterian Hosp.*, 382 F. Supp. 2d 562, 571 (S.D.N.Y. 2005); *Quinn v. BJC Health Sys.*, 364 F. Supp. 2d 1046, 1051 (E.D. Mo. 2005); *Lorens v. Catholic Health Care Partners*, 356 F. Supp. 2d 827, 833 (N.D. Ohio 2005). Indeed, the clear language of 26 U.S.C. § 7401 precludes a civil action or proceeding relating to the enforcement of any section of the Internal Revenue Code without the authorization of the Secretary of the Treasury and the United States Attorney General—which has not been secured in this case.

## II. No cause of action arises based on "rights in privity" or "as third party beneficiary."

Rather than address the plain language of the statutes and the express legislative findings and intent as found by the circuit court and explained above, Defendant asserts a confusing—but ultimately inapplicable and erroneous—argument that a private right of action arises under the statute as a result of "privity of contract" and "third party beneficiary." (Appellants' Br. at 3-4.) Specifically, Defendant argues:

> Privity, or 'horizontal privity' in this instance, includes any additional benefit under the contract which would extend a direct benefit to the Appellant as a third party beneficiary. The Appellant contracted with [GHS] for certain services as an indigent patient. Due to Appellants' [*sic*] statutory and regulatory duty to comply with MIAP provisions as a "General Hospital" under S.C. Code Ann. § 44-7-260(A)(1) (1976 as amended), a special duty in privity exists thereby creating a private right to a cause of action in contract.

(*Id.* at 3 (footnote omitted)). Defendant's arguments based on the contract law concepts of "privity of contract" and Defendant's purported status as a "third-party beneficiary" are erroneous and completely out of place in the case.

### A. No private right of action arises based on "privity of contract."

Privity of contract is "the relationship between the parties of a contract, allowing them to sue each other but preventing a third party from doing so." BLACK'S LAW DICTIONARY 1320 (9th ed. 2009); *see also, e.g., Windsor Green Owners Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004). In the present case, Defendant's counterclaims are based on GHS's alleged violation of a statute and are not based on an alleged failure to comply with a contractual duty owed by GHS to Defendant. Although Defendant repeatedly refers to a purported "breach of contract" in her opening brief (*see* Appellants' Br. at 3-4), there is no breach of contract counterclaim asserted in this case, and the pleadings do not allege the existence of any contract between GHS and Defendant. Defendant certainly does not allege and cannot allege that there is any contract between GHS and Defendant whereby GHS agreed or promised to refer Defendant to any government program or otherwise ensure Defendant was considered for any benefits available from any government source, insurer, or other third party program.

However, even if Defendant's argument that "a special duty in privity exists thereby creating a private right to a cause of action in contract" was correct, her counterclaims would nevertheless fail to state a viable cause of action. "The law is well-settled that breach of contractual duties does not give rise to an action in tort for negligence." *Tadlock Painting Co. v. Maryland Cas. Co.*, 322 S.C. 498, 503 n.5, 472

S.E.2d 52, 55 n.5 (1996); *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 55, 463 S.E.2d 85, 88 (1995) (holding that "[i]n most instances, a negligence action will not lie when the parties are in privity of contract."); *Foxfire Vill. v. Black & Veatch*, 304 S.C. 366, 375, 404 S.E.2d 912, 918 (Ct. App. 1991) ("As a matter of law, if the duty owed arises merely from agreement of the parties, breach of the duty does not create a cause of action for negligent conduct."). Likewise, "[a] mere breach of contract, without more, does not constitute a violation of the unfair trade practices act, even if done intentionally." *D.R. Horton, Inc. v. Wescott Land Co., LLC*, 398 S.C. 528, 549, 730 S.E.2d 340, 351 (Ct. App. 2012). Therefore, even if the Court accepted Defendant's argument that she is entitled to assert claims based on "privity of contract," Defendant's counterclaims for negligence and violation of the UTPA would be fatally flawed and properly dismissed.

### B. No private right of action arises based on a "third party beneficiary" theory.

Defendant's argument that she has been deprived of a benefit or right as a "third-party beneficiary" is likewise misplaced. "A third party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). "[I]f a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." *Bob Hammond Const. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994). No contract exists between GHS and any other person or entity for which Defendant could claim status as a third-party beneficiary and none is alleged to

exist. 17B C.J.S. *Contracts* § 838 (2013) ("In the absence of a contract between the defendant and someone else for the benefit of plaintiff, the third-party benefit rule has no application."). To the extent Defendant contends she is a "third-party beneficiary" of any statutory or regulatory program, there is no such right recognized under South Carolina law, and Defendant cites no case holding that any such right exists.

### C. No "fiduciary duty of care" recognized under South Carolina law exists.

Defendant's argument that a "fiduciary duty exists between the parties in privity" is also misplaced and contrary to the allegations in her counterclaims. As discussed above, there is no allegation in the pleadings that there is any contract between the parties giving rise to such a duty—fiduciary or otherwise. Indeed, Defendant's counterclaim for breach of fiduciary duty—like her other counterclaims—is based solely on GHS's alleged failure to comply with the two statutes she relies upon. (*See* Answer ¶ 44, R. at __.)

However, even if the Court were to disregard the stated basis for Defendant's counterclaims, Defendant falls far short of pleading a viable breach of fiduciary duty claim. "A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-336, 732 S.E.2d 166, 173 (2012). To establish a counterclaim for breach of fiduciary duty, Defendant must allege the existence of a fiduciary duty recognized under South Carolina law. *Id.* "The existence of a fiduciary duty is a question of law for the court." *Turpin v. Lowther*, 404

S.C. 581, 589, 745 S.E.2d 397, 401 (Ct. App. 2013); *see also Clearwater Trust v. Bunting*, 367 S.C. 340, 346, 626 S.E.2d 334, 337 (2006) (holding same). There is no fiduciary duty owed by a hospital or other healthcare provider to ensure a patient applies or is eligible for benefits or other payment by a government entity or third party. No statute creates such a duty, and no South Carolina court has recognized such a duty.

Moreover, Defendant's conclusory assertions in her brief that "she most certainly reposed a special confidence in the Respondent to act in her best interest" (Appellants' Br. at 4), fail to salvage her counterclaims even if that had been alleged in the pleadings. It is well-settled under South Carolina law that a fiduciary relationship cannot be created by the unilateral action or expectation of one party, but that "[t]he other party must have actually accepted or induced the confidence placed in him." *Steele v. Victory Savings Bank*, 295 S.C. 290, 295, 368 S.E.2d 91, 94 (Ct. App. 1988). There is no allegation that GHS actually accepted or induced any confidence or trust that it would ensure Defendant would apply or be considered for any benefits from a government source or other third-party payor. Therefore, even if Defendant could rewrite her counterclaims to conform to what she argues now in her briefing, her counterclaims would nevertheless fail as a matter of law.

## III. Defendant's argument that GHS violated her "substantive and procedural due process" rights fails to salvage her counterclaims.

Defendant further argues that GHS is a "state agency" and therefore "owes a very specific duty of care to every citizen of this county and state by virtue of the South Carolina Constitution, Art. 1, § 1, Art. 1, § 3 (as amended) which clearly situates a very

specific duty upon the government of this state, including all agencies, to act in a manner consistent with the best interests of its citizenry." (Appellants' Br. at 6-7.)

Even if Defendant had asserted a claim in her pleading that GHS is a "state agency" that had violated Defendant's substantive and procedural due process rights, GHS is not aware of any actionable duty imposed upon the governmental bodies of this State to act in the "best interests of its citizenry." The provisions Defendant cites from Article I of the South Carolina Constitution broadly state that "[a]ll political power is vested in and derived from the people only, therefore, they have the right at all times to modify their form of government" (Art. I, § 1) and "[t]he privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." (Art I, § 3). Defendant has not alleged any facts that GHS has engaged in any conduct that has deprived Defendant of "life, liberty, or property without due process of law," nor has Defendant alleged any facts that she has been subject to disparate treatment under the law in violation of her equal protection rights. *See, e.g., Town of Hollywood v. Floyd,* 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013) (holding that "[t]he *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment"); *Seabrook v. Knox*, 369 S.C. 191, 198, 631 S.E.2d 907, 911 (2006) (holding that "[t]o establish a substantive due process claim, a plaintiff must show he possessed a constitutionally protected property interest that was deprived by state action so far beyond the limits of legitimate governmental action, no process could cure the deficiency"); *Olson v. South Carolina Dep't of Health & Envtl. Control*, 379 S.C. 57, 68-

69, 663 S.E.2d 497, 503 (Ct. App. 2008) ("Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests.").

## IV. The circuit court applied the correct standard of review in dismissing Defendant's counterclaims.

Defendant also argues the circuit court failed to apply the correct standard of review in ruling on GHS's Motion to Dismiss. In considering a motion to dismiss under Rule 12(b)(6), SCRCP, a court must base its ruling solely on the allegations set forth in the complaint. *McNeil v. S.C. Dep't of Corrections*, 404 S.C. 186, 190, 743 S.E.2d 843, 846 (Ct. App. 2013). The motion to dismiss must be granted if the "facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001).

Although Defendant claims "[t]he Appellant [*sic*] has cleverly disguised a summary judgment motion under the guise a of Rule 12(b)(6) SCRCP, id., motion to dismiss" (Appellants' Br. at 6), Defendant does not point to any fact or allegation that the circuit court considered beyond the pleadings viewed in the light most favorable to Defendant. Defendant merely quotes from the Rules of Civil Procedure and the cases

setting forth the basic standard of review with which this Court is well-acquainted.[4] None of this points to any error in the circuit court's consideration of and decision on GHS's Motion to Dismiss.

## CONCLUSION

In this case, the circuit court's order dismissing Defendant's counterclaims reflects the correct reasoning and analysis based on a full and deliberate review of Defendant's counterclaims and settled South Carolina law. For all of the above reasons, the order of the circuit court dismissing Defendant's counterclaims should be affirmed.

[*Signature block appears on the following page.*]

[4] Defendant fundamentally misstates South Carolina law on the standard for pleadings under Rule 8, SCRCP, by erroneously asserting that "[p]leadings exist solely for the purposes of placing the adverse party on notice of the moving party's claim for relief and nothing more." (Appellants' Br. at 6.) Contrary to Defendant's assertion, South Carolina does not have a "notice pleading" standard. *See Gaskins v. S. Farm Bureau Cas. Ins. Co.*, 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (finding Rule 12(b)(6) SCRCP, replaces the Code Pleading rules regarding demurrers and "retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules."). Moreover, even under the more lenient federal "notice" standard, a claimant still must allege sufficient facts to "state[] a plausible claim for relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Respectfully submitted,

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February 21, 2014

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

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

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Case No. 2013-CP-23-2001

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Greenville Hospital System and
GHS Partners In Health, Inc., ..... Respondents,

v.

Juliet Elizabeth Cromer, ..... Appellant.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that, on the date indicated below, he served counsel for the Appellants with a copy of Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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February 21, 2014

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
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Re: *Greenville Hospital System and GHS Partners in Health, Inc. v. Juliet Elizabeth Cromer*
Appellate Case No. 2013-001964
Greenville County Case No. 2013-CP-23-2001
HSB No.: 08565.0617

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy each of the Initial Brief of Respondents and Respondents' Designation of Matter to be Included in the Record on Appeal, together with our Proofs of Service of same. After filing, please return a file-stamped copy to me in the enclosed self-addressed, postage paid envelope.

By copy of this letter, I am serving copies of same upon counsel for Appellants, David L. Thomas, Esq.

Please feel free to contact me should you have any questions or concerns.

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.

Charles M. Sprinkle

CMS/lma
Enclosures

cc: David L. Thomas, Esq.