THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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

Pee Dee Health Care, P.A.,

Appellant,

v.

Estate of Hugh S. Thompson,

Respondent.

FINAL BRIEF OF APPELLANT

Tony R. Megna, Esquire
Benjamin R. Matthews, Esquire
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STANDARD OF REVIEW ON APPEAL

In reviewing a motion for summary judgment, the Appellate Court applies the same standard of review as the trial court under Rule 56(c), SCRCP. Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005).

STATEMENT OF ISSUES ON APPEAL

1. Whether the Trial Court erred in granting summary judgment to the Estate of Hugh S. Thompson?

2. Whether the Trial Court erred in Ruling that Appellant had no Right to Rely on Decedents Misrepresentation and that Appellant was at Fault for its Losses?

3. Whether the trial court erred in ruling that no fiduciary relationship existed between Appellant and Decedent?

4. Whether the Trial Court erred in applying the doctrine of non mutual collateral estoppel to the facts of this case?

5. Whether the Trial Court erred in applying the equitable doctrine of "unclean hands" to the facts of this case?

6. Whether the Trial Court erred in refusing to apply the Doctrine of Preclusion to the facts of this case?

7. Whether the Trial Court erred in holding that Appellant could have prevented the damages it sustained by taking actions to save the decedent from his own wrongdoing?

8. Whether the Trial Court erred in failing to provide the Appellant relief in the form of its' equitable restitution, quantum meruit, and implied by law claims?

9. Whether the Trial Court erred in failing to apply the Doctrine of Estoppel by concealment against Respondent?

10. Whether the Trial Court erred in ruling that Appellant had no right to rely on decedent's misrepresentation?

11. Whether the Trial Court erred in acting on the motion for summary judgment as the order disqualifying counsel for Appellant was simultaneously on appeal [tracking number: 2011197671], and such actions were stayed under Rules 205 and 241, SCACR?

STATEMENT OF THE CASE

I

APELLANT

Appellant, Pee Dee Health Care, P.A. is a professional medical association doing business in Darlington, SC; Olanta, SC; and Columbia, SC.

II

RESPONDENT

Respondent is the Estate of Hugh S. Thompson, M.D. Dr. Thompson died on November 5, 2009. The Personal Representatives of the Decedent's estate [Defendant] are trustees of the estate and the sole successors as defined by S.C. Code Ann. Section 62-1-201(42) to the assets of the estate – other than the claim of the Appellant.[1]

III

THE ACTION

A

The current action was commenced on May 20, 2010 in the Darlington County circuit court. Appellant requested a trial by jury. The heart of Appellant's complaint is that, beginning in 1998, prior to and during the decedent's employment with Appellant, the decedent knowingly failed to inform Appellant that he had been disbarred from Medicare in March, 1996. Moreover, the decedent failed to inform Appellant he had received actual notice form Medicare of his disbarment and the steps he must take to be re-admitted to the Medicare program. (R. pp. 505-510). In correspondence received during discovery,

[1] There is another claim against the estate that is being defended by the Decedent's professional malpractice carrier.

Respondent subsequently admitted to receiving the letter of disbarment and notification of the requirements to be re-admitted to the Medicare program.

An employer of a disbarred physician is strictly liable to Medicare for all funds paid to or on behalf of a disbarred employee. In 2007, Medicare demanded from Appellant repayment of the funds it paid to the decedent. In May, 2008, after exhausting all federal administrative remedies available to it, Appellant was required to pay Medicare the funds received by Appellant on the decedent's behalf during the time of his disbarment from Medicare - $226,740.19. Appellant sustained additional damages that exceed $500,000.00.

Appellant filed a claim with Dr. Thompson's probate estate, which was denied. This litigation followed.

B

Appellant filed its motion for summary judgment (R. pp. 196-197) on December 9, 2010 based upon admissions made by Respondent in its Answer filed on June 17, 2010 (R. pp. 183-195) and documents obtained during the limited discovery process allowed by the circuit court. The circuit court would not allow depositions to be taken by Appellant even though the Appellant raised the issues on several occasions. Respondent filed its' counter motion for summary judgment on May 20, 2011. The motions were set for hearing in Darlington on July 19, 2011.

Prior to the hearing, the Circuit Court issued an order dated April 15, 2011 disqualifying Appellant's counsel on the grounds that he may be a witness at trial.[2] (R. pp. 4-12). Appellant filed a motion to reconsider this decision. The Circuit Court subsequently stayed its April 15 order disqualifying Appellant's counsel, thus permitting counsel for both

[2] This matter is pending before this Court as appeal number 2011197671.

parties to argue: (a) Appellant's motion for reconsideration of the April 15 order of disqualification, (b) Appellant's motion for summary judgment, and (c) Respondent's motion for summary judgment. At the end of the July 19th hearing, the Court then took all matters under advisement.

C

By written order dated August 12, 2011, (R. p. 13) the circuit court denied Appellant's motion to reconsider the order disqualifying counsel. On August 15, 2011, Appellant filed a Notice of Appeal (R. p. 329) in regard to the final decision by the Circuit Court disqualifying Appellant's counsel. The Notice of Appeal was filed in regard to the Circuit Court's order disqualifying counsel for Appellant. It was filed fifteen (15) days prior to Appellant filing its' motion for reconsideration of the circuit court's order granting the Respondent summary judgment, which forms the basis of the current appeal. At the time of the filing of the Notice of Appeal, Appellant objected to the circuit court issuing its' decisions on the motions for summary judgment pursuant to Rules 205 and 241, SCACR. No request was made by any party for the trial court or this Court to lift the automatic stay.

On September 6, 2011, Appellant received the order of the circuit court [dated August 29, 2011,] granting summary judgment to the Respondent. On September 13, 2011, Appellant moved the circuit court pursuant to Rule 59(e), SCRCP to reconsider the order granting summary judgment to Respondent. The circuit court denied the Appellant's motion for reconsideration by order dated September 28, 2011 on the grounds that the circuit court's previous order disqualifying counsel from representing Appellant mooted the summary judgment motion to reconsider, even though (a) Appellant had admittedly appealed the order of disqualification prior to filing the summary judgment motion for reconsideration being

entered, and (b) objected to the circuit court's issuance of further orders following the first Notice of Appeal being filed. The circuit court neither discussed its' decision allowing Appellant's to continue representation of Appellant in the first instance, nor the automatic stay provisions of Rule 241, SCACR that stayed the effect of order of disqualification pending this Court's resolution of the appeal of that order.

D

On October 28, 2011, Appellant filed a Notice of Appeal in regards to the order granting summary judgment in the present appeal as well as the Order dismissing Appellant's Rule 59(e) motion to reconsider. (R. p. 349). On November 14, 2011, Respondent filed a motion to dismiss Appellant's appeal in the current matter based on the same reasoning that the circuit court's used to deny Appellant's motion to reconsider. (R. p. 356).

On January 9, 2012, Judge Few issued his order denying Defendant's motion to dismiss the present appeal. (R. p. 37).

STATEMENT OF FACTS

INTRODUCTION

A

In June 2007 [seven years after decedent left the employ of Appellant], the Appellant received a letter from Medicare requesting repayment of funds paid on behalf of decedent during the time period he was employed by Appellant - October 26, 1998 to early December, 2000. The Appellant had no knowledge of the matter (R. pp. 381-389). The documents indicating the decedent had actual knowledge of his disbarment from the Medicare program in 1996 were not provided to Appellant until 2010 during discovery in the present case. (R.

p. 628). Nor was the Appellant aware of the fact that Decedent was not re-admitted to the Medicare program until 2002. Appellant pursued the administrative remedies available to it under the Medicare appeals process. After exhausting all Medicare administrative appeal remedies, Appellant paid Medicare the sum of $226,740.19 on or about May 1, 2008.

Appellant subsequently discovered that Dr. Thompson had been diagnosed with cancer. He died on November 5, 2019. Appellant filed a claim with Decedent's probate estate, which was denied. Appellant timely filed suit against the Respondent probate estate in Darlington County.

Appellant's lawsuit is premised on the decedent's state-law liabilities to Appellant that could not be determined in the Medicare administrative proceedings. The Medicare Administrative Appeals system has no jurisdiction to determine such matters.

HISTORY OF DECDENT'S EMPLOYMENT WITH APPELLANT

A

In early 1998, Decedent was a physician employed by the medical offices of Don Fowler in Marion, SC. While employed by Dr. Fowler, Decedent filed an application with Medicare to be approved to treat Medicare beneficiaries (R. pp. 491-504) because he had been disbarred as a Medicare provider in March, 1996. (R. p. 489). During discovery in the present case, Appellant discovered that, in 2002, decedent admitted receiving this letter from the Medicare OIG and further admitted the letter contained the requirements for re-admission to the Medicare program. (R. pp. 183-195). The statement of decedent admitting he had actual knowledge of his disbarment from Medicare, and the steps hew must take to be re-admitted, was provided by counsel for Respondent (Jay James) by letter dated July 9, 2010

(R. pp. 528-529). The letter from Mr. James described the document written by the decedent as "Summary of events and observations" believed to have been prepared by Hugh S. Thompson. Jr. May 28, 2004. (R. pp. 628-640).

By application dated May 5, 1998, prior to Appellant having any contact with Appellant, the decedent applied for re-enrollment to the Medicare program.

On June 12, 1998, Medicare sent decedent a request at Dr. Fowler's address: Medical Offices of Dr. Don Fowler, PO Box 875, Marion, SC 29571. (R. p. 505) On June 19, 1998, as part the employment process with Appellant, decedent completed a Medicare "Reassignment of Benefits" (R. pp. 491 and 511) that assigned to Appellant the reimbursement he would received from treating Medicare patients in Appellant's offices. In so doing, Dr. Thompson certified to Medicare and Appellant as follows:

> I, the undersigned, [Decedent] certify the following:
>
> * * * *
>
> 3. I am familiar with and agree to abide by the Medicare laws and regulations that apply to my provider/supplier type (the Medicare laws and regulations are available though the Medicare contractor).
>
> 4. **Neither the individual practitioner, the company, or the owner, director, officer, employee of the company, or any contractor retained by the company or any of the aforementioned persons, currently is subject to sanction under the Medicare/Medicaid program, or debarment, suspension, or exclusion under any federal agency or program, or otherwise is prohibited from providing services to Medicare beneficiaries.**
>
> 5. I agree that any existing or future overpayment to me by the Medicare program may be recouped by Medicare through withholding future payments.
>
> **[signed by Hugh S. Thompson, M.D. on June 19, 1998]** [emphasis added].

On August 31, 1998, (R. p. 508), Medicare sent Dr. Thompson and Appellant a letter assigning Dr. Thompson a Medicare provider number and assigning his reimbursement to

Appellant. Dr. Thompson never informed Appellant of any of the two letters he concurrently received from Medicare informing him that his May, 1998 Medicare application for re-admission to the Medicare program was incomplete because he had not been re-admitted pursuant to the requirements of the March, 1996 letter from the Medicare OIG.

On September 14, 1998, Medicare sent Dr. Thompson a second letter (R. p. 509-510) that again stated Decedent's original application filed while he remain employed by Dr. Fowler was incomplete because, as noted on page two of the second letter, he had failed to provide a copy of his reinstatement letter from the Medicare OIG.

Because Decedent did not seek reinstatement from the Medicare Office of Inspector General (OIG), as he later admitted he actually knew was a mandatory part of the reinstatement process, Decedent's original application to be re-admitted to the Medicare program was denied. (R. p. 184 ¶ 11). During discovery in the present case, Appellant discovered that, in 2002, decedent admitted receiving the March, 1996 letter from the Medicare OIG and further admitted the OIG disbarment letter contained the requirements for re-admission to the Medicare program. (R. pp. 183-195) He never informed Appellant of the denial of the application even though the Respondent admitted in its' answer filed in circuit court that "[t]he relationship of Decedent with Appellant was such that Decedent had a pecuniary interest since he was paid by Appellant as a physician to provide medical services. (R. p. 187 ¶ 25) As noted by the uncontested affidavits filed by the Appellant in the circuit court, Appellant had no knowledge at the time of the filing of the Assignment of Benefits that decedent had been disbarred from the Medicare program in 1996. (R. pp. 381-389) In direct contrast, decedent admitted in 2002 he had actual knowledge of his disbarment (R. p. 628) and knowingly filed false certifications to both Medicare and

Appellant.

In sum, and unknown to Appellant, the decedent had received a letter of disbarment from Medicare on March 11, 1996 (R. p. 489). Decedent then re-applied to be re-enrolled in Medicare. The re-enrollment was denied because decedent did not obtain a letter of reinstatement from the Medicare OIG, a requirement of reinstatement of which he admittedly had actual knowledge. (R. p. 628) During the same time period, decedent received *two additional letters* (R. p. 505 and R. p. 509) notifying decedent he must submit a letter of readmission from the Medicare OIG to be re-admitted to the Medicare program. In the same time period, decedent submitted a false application for assignment of his reimbursement to Appellant. Decedent was issued a Medicare provider number based on the false application he filed with Medicare. (R. p. 628). Based on the false certification executed by decedent, Medicare approved the Assignment of Benefits from decedent to Appellant (R. p. 511).

Decedent left the employ of Appellant in December, 2000, to work for FirstChoice [a medical practice in Florence, SC]. He was re-admitted to Medicare program in 2002.

B

ADMISSIONS MADE BY RESPONDENT IN ITS' ANSWER FILED IN THE CIRCUIT COURT ON JUNE 17, 2010

Respondent filed an Answer to Appellant's complaint on June 17, 2010 in which Respondent made numerous admissions of fact and law. They are:

> 1. On or about March 31, 1996, Decedent was disbarred from the Medicare program by the Office of Inspector General who oversees physician participation in the Medicare program. (R. p. 184 ¶10).
>
> [During the discovery process, Respondent provided a two page document written by Decedent to Medicare (R. p. 628) in which he stated]:

I concede that in 1996 I received from US Health and Human Services, or the Office of the US Inspector General, a letter informing me of my status as a Medicare provider. The document addressed procedures for reinstating such status, I concede, as well, that I do not have this document, and that I have completely forgotten it in by the Spring of 1998, when I was in the process of resuming medical practice.

s/Hugh Thompson]

2. "[P]rovisions of federal law provide that a suspension of Medicare privileges [i.e., Decedent's disbarment from the Medicare program in 1996] continues until [Decedent was] reinstated by the Office of Inspector General [of the Medicare program]." (R. p. 185 ¶12).

3. On or about June 17, 2007, the Appellant received a demand letter from Medicare that "would have had content similar to that set forth in paragraph 12 of the Complaint." (R. p. 185 ¶ 12). Paragraph 12 of the Appellant's Complaint stated as follows:

> On or about June 7, 2007, Appellant received a letter dated May 30, 2007 from Palmetto GBA in regard to medical services provided by Decedent on behalf of Medicare beneficiaries for the dates of October 26, 1998 to December 10, 2001. The letter stated, among other matters:
>
> a. That the Decedent had been suspended (disbarred) from participation in the Medicare program during the time periods March 31, 1996 to June 20, 2002.
>
> b. That during the sanction period as stated in (a), Medicare payments were paid to Appellant for services Decedent provided to Medicare beneficiaries because the Decedent had completed an 'assignment of benefits' to Appellant. However, Decedent omitted any reference in regard to this suspension from the Medicare program.
>
> c. That Appellant was liable for the funds paid [by Medicare] regardless of the fact that Appellant had no knowledge of the matter and that Dr. Thompson had provided both Appellant and Medicare with false information.
>
> d. That the estimated overpayment made by Medicare for patients provided by Decedent during the time he was suspended from the Medicare program was $208,821.03 plus interest at 12.375%.

4. In 1998, Decedent failed to seek reinstatement to the Medicare program by the Medicare Office of Inspector General. (R. p. 184 ¶ 11).

5. (Respondent) admits a Medicare provider application and a "reassignment of benefits [application] were prepared [with Decedent's signature on the certifications affixed by Decedent] so as to permit Decedent to treat Medicare patients and for Appellant to receive payments therefore." (R. p. 184 ¶ 9).

6. "(Respondent) admits that Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Appellant." (R. p. 188 ¶ 34).

7. On or about October 26, 1998, the "Decedent entered into a relationship with Appellant to provide medical services to its patients, including Medicare patients." (R. p. 185 ¶ 12).

8. The relationship of Decedent with Appellant was such that Decedent "was obligated to communicate truthfully with Appellant. (Respondent) would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Appellant..." (R. p. 187 ¶ 26).

9. The relationship of Decedent with Appellant was such that Decedent had a pecuniary interest since he was paid by Appellant as a physician to provide medical services. (R. p. 187 ¶ 25).

10. The relationship of Decedent with Appellant was such that Decedent "was bound to act in good faith and with due regard to Appellants' interest." (R. p. 186 ¶ 21).

11. "(Respondent) admits ... that Palmetto GBA [the Medicare representative that oversees the payment of claims for the Medicare program in South Carolina] issued to Decedent Medicare provider number D993211724..." (R. p. 185 ¶ 12).

12. On May 10, 2010, the personal representative of the Decedent's denied Appellant's claim. (R. p. 186 ¶ 18).

13. To the extent that Decedent was an employee of (Appellant), Decedent admits that a duty of loyalty to Appellant was owed." (R. p. 188, ¶ 30).

14. "Decedent ... erroneously believed that filing a provider application to Palmetto GBA (a Medicare contractor) was sufficient to reinstate Decedent's status as a Medicare provider." (R. p. 185 ¶ 11).

15. On or about April 13, 2010, (Appellant) filed a claim with Decedent's estate. On or about May 19, 2010, (Appellant) filed an amended claim with Decedent's estate which was denied by the personal representative of the Decedent's estate; i.e., the (Respondent's). (R. p. 186 ¶¶ 17 and 18).

16. (Respondents) have no information in their possession which denies the allegations of paragraph 32 of the Appellant's Complaint (R. p. 170). Paragraph 32 of the Appellant's Complaint states:

> Decedent breached his duty to Appellant:
>
> a. By act of certifying to Appellant personally and on his Medicare applications that he was truthful, and
>
> b. By omission failing to inform Appellant of the falsity of his affirmations and certifications that he was barred from medically treating Appellant's Medicare patients.

C

When Appellant was notified by Medicare of Decedent's Medicare disbarment in 2007, Mr. Mark Matthews, an employee of Appellant, contacted both the Decedent and his current employer, FirstChoice Health Care of Florence, SC. Mr. Matthews's affidavit is

noted at (R. p. 382). The federal administrative appeal initiated by Nexsen Pruett's representation of the Decedent resulted in the decision of the Medicare Administrative Law Court to issue an order, known as the [the 'ALJ Joe' order dated January 22, 2008] (ROA 60), that overturned the initial decision of Medicare to 'recoup' funds from FirstChoice during the time of the Decedent's disbarment from Medicare. Neither FirstChoice nor Dr. Thompson provided a copy of the 'ALJ Joe' order dated January 22, 2008 until it was produced during discovery in 2010 – even though they has previously agreed to do so. Thus, Appellant did not have the opportunity to present the favorable 'ALJ Joe determination' as a defense to the claims made by Medicare against Appellant, did not have the opportunity to know that the order even existed so as to call into question decedent's liability to Appellant for failing to provide the documents as requested.

On March 14, 2008, [seven weeks after the decedent obtained the 'Joe' order] Appellant received an order on its Medicare administrative appeal (the 'Mabry' order) that required Appellant to pay Medicare the funds it received from Medicare during the time decedent was disbarred from Medicare and employed by Appellant. Although it did not prevail, Appellant appealed the 'Mabry order' through the remainder of the Medicare administrative appeals process.

ARGUMENT

I. The Trial Court Erred in Granting Defendant's Motion for Summary Judgment.

A

The essence of the dispute between the parties is:

a. the decedent's admitted failure to be truthful and forthcoming that he was disbarred form the Medicare program when his employment with Appellant began in 1998 despite his admitted duties of honesty, loyalty and fealty to Appellant as admitted in his answer filed in circuit court on June 17, 2010 (R. p. 183),

b. the decedent's admitted false certifications to Medicare and Appellant that he was not disbarment from the Medicare program that prohibited him from providing services to Medicare beneficiaries at Appellant's offices, and

c. the Appellant's lack of knowledge of the truth of the matters until receipt of documents produced during discovery in 2010 by Respondent that decedent admittedly had in his possession and control since 1996.

B

"Our Supreme Court has recently stated that where the burden of proof is the preponderance of the evidence, "the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). As noted herein, Appellant has produced extensive evidence of record that forecloses the granting summary judgment to the Respondent.

C

The defense of the Respondent is that Appellant should have known of the decedent's

disbarment from the Medicare program, and saved the decedent from his own wrongdoing when decedent was first employed by Appellant. Even if one liberally construes the evidence of record in favor of Respondent, as the non-moving party, there is not even a scintilla of evidence in the record on appeal to draw a favorable inference to such a defense.

First and foremost is the fact that here is no evidence of record of that Dr. Thompson's name, or any name, was on any publicly accessible website, or other document publicly accessible by Appellant and/or maintained by the Medicare OIG *in 1998*. There is no such evidence of record. Rule 210(h), SCACR.

Second, under Rule 56, SCRCP, when a party makes a motion for summary judgment and supports it by affidavits the adverse party may not rest on the allegations of his pleadings but must respond by affidavits or other evidence demonstrating a genuine issue of material fact. Higgins v. Med. Univ. of S.C., 326 S.C. 592, 599, 486 S.E.2d 269, 272 (Ct. App. 1997) (holding the trial court ordinarily may not consider factual statements made during argument on the summary judgment issue). The Respondent's filed no affidavits to contest the affidavits filed by Appellant that it had no knowledge of the decedent's disbarment from Medicare. (R. pp. 381-389). Nor does the Respondent contest that [decedent wrote a two page letter to Medicare (R. p. 628) in which he "...concede[d] that in 1996 [he] received [a letter] from US the Health and Human Services, or the Office of the US Inspector General, a letter informing [him] of [his] status as a [disbarred] Medicare provider. Instead, the Respondent and rested simply on the allegations contained in its' Answer.

Finally, the actual admissions made in the Respondent's answer, the Respondent's actual admission he prepared stating he 'conceded' he had been disbarred from Medicare in

1996 and never readmitted,[3] the certifications he repeatedly signed attesting to the truth of his statements to both Medicare and Appellant, and the admissions made in his answer filed in circuit court on June 17, 2010 are overwhelming evidence that Appellant is entitled to summary judgment as to the issue of liability.

In sum, there is no evidence of record that supports any suggestion that, in 1998, nor to this date, that Dr. Thompson's name was *actually listed* on a publicly accessible federal database, website or other record that was would have provided notice to Appellant, or anyone else, that he was ever disbarred as a Medicare provider. However, as the documents produced during the discovery process after the Appellant's lawsuit was filed, the evidence of record does definitively demonstrate that decedent was disbarred as a Medicare provider in 1996, that decedent actually knew he had been disbarred as a Medicare provider in 1996, and that decedent never provided the information to Appellant until it was produced during discovery in the case at bar. A Court of Equity will not lend its aid to one seeking to profit from his own wrongdoing. Taff v. Smith, 11 S.C. 306, 103 S.E. 551 (1920) cited by the Court of Appeals in Grooms v. Kennedy, 401 SE 2d 190 (1991).

II. The Trial Court Erred in Applying the Doctrine of Non-Mutual Offensive Collateral Estoppel against Appellant

The doctrine of non-mutual offensive collateral estoppel is not applicable against Appellant in this case because the Medicare administrative appeals process has no jurisdiction to consider state-law actions between Appellant and Respondent, and therefore any decision by Medicare administrative appeals process could not create a binding judgment between Appellant and decedent. *See* generally, 42 C.F.R. 405.801 et. seq. Nor did

[3] As noted herein, Appellant had no knowledge of this concession made by decedent in 2004 until the document was provided to Appellant during the discovery process in 2010.

Appellant have opportunity to present its' action against the decedent. A party is barred from re-litigating issues determined in a prior action *only if* it had a full and fair opportunity to litigate the issues in the first action and nothing justifies an opportunity to retry the issues. Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984); Roberts v. Recovery Bur., Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994) (citing McPherson v. South Carolina Department of Highways and Public Transportation, 297 S.C. 303, 376 S.E.2d 780 (Ct. App. 1989). It is indisputable that Appellant never had a full and fair opportunity to litigate the issues in the first action because it could not as a matter of law. Moreover, Appellant had no knowledge of this concession made by decedent until the document was provided to Appellant during the discovery process after the filing of the lawsuit.

In sum, thus, the Medicare appeals process does not have preclusive effect under South Carolina state law because:

a. the Medicare appeals process has no jurisdiction to consider Appellant's state-law claims against the Respondent,

b. the Appellant was unable to litigate its' state court claims against the Decedent as the Medicare administrative law court has no jurisdiction of state law claims,

c. the Appellant was liable to Medicare under federal regulatory law regardless of the decedent's liability to Appellant under state law, and

d. the "Mabry" order was directly contrary to a Medicare administrative law court decision obtained several weeks earlier by the decedent (R. p. 89) which the decent did not inform Appellant although he had agreed to do so, and thus severely prejudiced the Appellant.

In Crosby v. Prysmian Communications Cables And Systems USA, LLC, ____ S.C. ____ (Opinion No. 4876 Decided August 24, 2011), this court stated:

> 1. ...A party claiming preclusive effect under collateral estoppel must demonstrate that the particular issue was "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment."

2. Under a standard issue preclusion analysis, "even if all the elements for collateral estoppel are met, when unfairness or injustice results or public policy requires it, courts may refuse to apply it." *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009).

3. "The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action." *Zurcher v. Bilton*, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008).

Thus, the trial court erred in applying the doctrine of offensive collateral estoppel.

III. The Trial Court Erred in Ruling that Appellant had no right to rely on decedent's misrepresentation.

"[I]f the undisputed evidence clearly shows the party asserting reliance has knowledge of the truth of the matter, there is no genuine issue of material fact." McLaughlin v. Williams, 379 S.C. 451, 458, 665 S.E.2d 667, 671 (Ct. App. 2008) (quoting Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 800 (Ct. App. 1992)). A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties. West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000).

The Respondent admitted in its' answer filed in the circuit court that decedent knew he was disbarred as a provider from Medicare in 1996. Decedent himself 'conceded' the same by admitting he actually received the 1996 letter of disbarment from the Medicare OIG. (R. p. 628). Moreover, the 1996 letter from the Medicare OIG that the same letter he conceded receiving in 1996, by its' own plain wording, specifically stated decedent could be re-admitted to the Medicare program only by the Medicare OIG. It is indisputable that the decedent actually knew he was disbarred as a provider from Medicare prior to, during, and following his employment with Appellant. Moreover, the Respondent admitted in its' answer filed in the circuit court that the relationship of Decedent with Appellant was such

that Decedent had a pecuniary interest since he was paid by Appellant as a physician to provide medical services. (R. p. 187 ¶ 25), the relationship of Decedent with Appellant was such that Decedent "was bound to act in good faith and with due regard to Appellants' interest." (R. p. 186 ¶ 21), and Decedent had a duty of loyalty to Appellant. (R. p. 188 ¶ 30). Finally, the only evidence of record is that the Appellant had no knowledge of decedent's disbarment from Medicare and his intentional failure to be honest.

The Respondent's argument that the Appellant should have known of the decedent's status as disbarred Medicare provider, and should have contacted someone at Medicare to confirm that the decedent was being truthful in his attestations to both, as a matter of law, further ignores the complete lack of evidence of record that decedent's disbarment ever appeared, in 1998, on any publicly accessible website or database showing that Decedent in the first instance. Whether or not Decedent was negligent, deceitful, willfully ignorant, deliberate indifferent, or simply uncaring in the discharge of his duties to Appellant is ultimately irrelevant because the conduct, however it is characterized as intentional or unintentional, does not change the outcome - harm to himself, and the damages sustained by Appellant.

> ...[T]the unmistakable drift is toward the just doctrine that a wrongdoer cannot shield himself from liability by asking the law to condemn the credulity of the ignorant and unwary.

Thomas v. Am. Workmen, 197 S.C. 178, 14 S.E.2d 886, 887 (1941). See also Souba v. Life Insurance Company of Virginia, 187 S.C. 311, 197 S.E. 826 (1938); Hood v. Life & Casualty Insurance Company of Tennessee, 173 S.C. 139, 175 S.E. 76 (1934).

IV. The circuit court erred in ruling that no fiduciary relationship existed between Appellant and Decedent.

A

The Respondent has repeatedly admitted a relationship of trust, honesty, and good faith existed between Appellant and decedent.

> The relationship of Decedent with Appellant was such that Decedent "was obligated to communicate truthfully with Appellant. (Respondent) would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Appellant..." (R. p. 187 ¶ 26).
>
> The relationship of Decedent with Appellant was such that Decedent had a pecuniary interest since he was paid by Appellant as a physician to provide medical services. (R. p. 187 ¶ 25).
>
> The relationship of Decedent with Appellant was such that Decedent "was bound to act in good faith and with due regard to Appellants' interest." (R. p. 186 ¶ 21).

A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another. Ellis v. Davidson, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct. App. 2004). A 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. Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003).

As Respondent admitted in its' answer filed in the circuit court, Appellant placed a special confidence in Decedent when it employed him to become part of Appellant's staff. Additionally, Appellant believed that Decedent was fully licensed and certified with Medicare for reimbursements. To establish the existence of a fiduciary relationship, the facts and circumstances must indicate the party reposing trust in another has some foundation for believing the one so entrusted will act not on his own behalf but in the interest of the party so

reposing. Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986); Ellis, 358 S.C. at 509, 595 S.E.2d at 822. Appellant expected Decedent to act as a physician should under similar circumstances. Someone with as much experience and education as Decedent would certainly expect that his employer to believe that he was fully licensed with Medicare, and would act in the interest of Appellant while employed – particularly when he repeatedly signed attestations to the same effect. However, Decedent continued to intentionally withhold information regarding his Medicare status from Appellant, thereby acting in his own best interests.

B

"Parties in a fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud." Anthony v. Padmar, Inc., 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct.App.1995)). Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other circumstances. Island Car Wash, Inc. v. Norris, 292 S.C. 595, 3538 S.E.2d 150 (Ct. App. 1987). "Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence. . . ." Id. at 601, S.E.2d at 153.

As a result of the fiduciary relationship that existed, Appellant had a right to rely on the misrepresentations made by Decedent. Furthermore, Decedent had a duty to disclose that he had not complied with the required procedures in order to be fully reinstated with Medicare. One's standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. In a breach of fiduciary case, the Appellant is entitled to damages for harm caused by the breach of a

fiduciary duty owed to him or her. Damages in an action for breach of a fiduciary duty are those proximately resulting from the wrongful conduct of the defendant. Moore v. Moore, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004).

V. The Trial Court Erred in Applying the Doctrine of "Unclean Hands" against Appellant

A

The trial court erred in applying the doctrine of "unclean hands" to the facts of this case. South Carolina Courts have held that the doctrine of unclean hands precludes a Appellant from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant." First Union Nat'l Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). *See also* Arnold v. City of Spartanburg, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943)("The expression 'clean hands' means a clean record with respect to the transaction with the Respondent's themselves and not with respect to others.") The rule must be understood to refer to some misconduct concerning the matter in litigation of which the opposing party can, in good conscience, complain in a court of equity. Id. *See also* Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010). It is a self-imposed ordinance that closes the door of the court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief." Straight v. Goss, 383 S.C. 180, 206-07, 678 S.E.2d 443, 457-58 (Ct. App. 2009).

The equitable defense of "unclean hands" raised by Respondent does not apply to the facts of this case. The equitable defense of "unclean hands" includes three key elements: 1) inequitable conduct by the plaintiff, 2) related directly to the subject matter of the litigation, and 3) causes prejudice or injury to the defendant. Straight v. Gross, 678 S.E.2d 443 (S.C. App. 2009). There has been no inequitable conduct by Appellant in the pending action. The

only alleged "misconduct" by Appellant is a failure to thoroughly investigate the background of decedent. Also, there was no harm to Respondent resulting from any action or inaction by Appellant. Furthermore, the court in Ex Parte Dibble stated that courts have the inherent power to do all things reasonably necessary to insure that just results are reached to the fullest extent possible. 310 S.E. 440, 442 (S.C. Ct. App. 1983). Appellant does not contest that it is liable to Medicare. Appellant has already reimbursed Medicare for overpayments to decedent. However, Appellant's liability to Medicare arose directly from decedent's misleading and deceitful representations to Appellant. To insure that just results are reached in the pending action, it seems only appropriate that the liability for such representations should fall upon Respondent and not Appellant.

The misconduct in this case came from Dr. Thompson consistently providing false and/or misleading information over a period of years to both Appellant and to Medicare. Unbeknown to Appellant until 2010, Dr. Thompson *admitted in 2004 he actually knew* of the steps he had to go through to be reinstated to the Medicare program. He admitted he was actually notified by Medicare of the steps he had to go through in order to be reinstated. (R. p. 628). There is nothing in the record on appeal that indicates inequitableness or bad faith by Appellant relative to the matter in which Appellant seeks relief. The only charge leveled against Appellant was that it should have "looked and searched harder" for evidence of that the decedent had been disbarred from the Medicare program. The doctrine of "unclean hands" does not apply in speculative cases of possible negligence. Respondent cannot be able to shield itself from liability when it is Defendant's falsification of information that is the root of this cause of action in the first instance.

B

Concluding, the only fair characterization of the evidence of record is that the decedent, for his own reasons, failed to inform Appellant of vital information regarding his employment that he held to himself. There is no evidence of record that Appellant, even if it had any duty to prevent decedent (which Appellant denies) from taking actions that were inherently deceitful could have, in fact, prevented the situation that decedent created. As his signatures on the attached documents indicate, the sad and un-debatable truth is that the decedent knowingly misrepresented to Medicare, Appellant, and others the truth surrounding his disbarment from the Medicare program. (R. pp. 381-389). Neither Appellant nor its representatives knew nor had reason to know of the decedent's disbarment from the Medicare program. There is no evidence of record before this Court that the Appellant could have ascertained this fact. As noted on the attached affidavits, (R. pp. 381-389), Appellant specifically relied upon Medicare's representation that the decedent was being truthful, a representation that the decedent actually knew was false *yet the decedent affirmatively misled Appellant* in his assurances that the statements of the Medicare intermediary were true. Finally, as Respondent itself admits in its' answer, they have no knowledge or information that would rebut the allegations of the Appellant and the supporting affidavits attached hereto. (R. p. 184 ¶ 10).

C

By relying on the false statements and misrepresentations of the decedent, the Appellant submitted claims to Medicare on behalf of decedent that decedent *actually knew were false*. The decedent and his representatives and agents, however, admittedly obtained a favorable order, (R. p. 89) prior to the Medicare "Metry" order. (R. p. 101). The decedent,

his agents and representatives failed to provide the 'Joe determination' that was favorable to Dr. Thompson and First Choice to the Appellant even though they had promised to keep Appellant apprised of such matters. As a result, Appellant did not have the opportunity to present the favorable 'ALJ Joe determination' as a defense to the claims made by Medicare against PDHC and Dr. Thompson or to the Independent Review entity for Medicare or to the Medicare Appeals Council.

VI. The trial court erred in failing to apply the doctrine of estoppel by concealment against Respondent.

Our appellate courts have consistently held that the doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury. In the current case, the admitted facts as stated in the Defendant's answer and noted above, as well as the documents obtained during discovery and the affidavits attached hereto, establish that the Defendant, as a matter of law, is estopped from presenting any and all defenses to the claims of the Appellant. A court of equity will not lend its aid to one seeking to profit from his own wrongdoing. Taff v. Smith, 11 S.C. 306, 103 S.E. 551 (1920) cited by the Court of Appeals in Grooms v. Kennedy, 401 SE 2d 190 (1991).

VII. The trial court erred in failing to provide the Appellant relief in the form of equitable restitution, quantum meruit, disgorgement, and implied by law claims.

In Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 522 SE 2d 868 (2000), our Supreme Court adopted the following standard for a claim of compensation in quantum meruit:

1. a benefit conferred by the Appellant upon the defendant;

2. the realization of that benefit by the defendant; and

3. retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value. In Sauner v. Public Service Authority of South Carolina, 354 S.C. 397, 409, 581 S.E.2d 161, 167-68 (2003), the court specified that the benefit conferred must be non-gratuitous.

Respondent admitted in its' answer that the relationship of Decedent with Appellant was such that Decedent had a pecuniary interest since he was paid by Appellant as a physician to provide medical services. (R. p. 187 ¶ 25). Moreover, the Respondent admitted the relationship of Decedent with Appellant was such that Decedent "was bound to act in good faith and with due regard to Appellants' interest." (R. p. 186 ¶ 21). And, finally, the Respondent has admitted that "[t]he relationship of Decedent with Appellant was such that Decedent "was obligated to communicate truthfully with Appellant. (Respondent) would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Appellant..." (R. p. 187 ¶ 26). Under such circumstances, there could be, as a matter of law and fact, no reasonable expectation by decedent that Appellant was not expecting to be paid by Medicare for services provided by decedent. It is inequitable for Defendant to retain the value of the funds Appellant was required to pay to Medicare on decedent's behalf. As noted on the attached documents and affidavit of Katie Noyes (R. p. 386), the Appellant has suffered, just in the context of its action for quantum meruit damages that the Appellant has paid to Medicare on behalf of the decedent the amount of $226,740.19 plus prejudgment statutory interest at the rate of 8.75% beginning May 1, 2008 forward. Restitution and disgorgement are equitable remedies. Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 63, 644 S.E.2d 675, 679 (2007) (Toal, C.J. dissenting) (noting disgorgement results from the equitable remedy of restitution); Wallace v. Milliken &

Co., 305 S.C. 118, 120, 406 S.E.2d 358, 359 (1991) (stating restitution is an equitable remedy).

VIII. The trial court erred in holding that Appellant could have prevented the damages it sustained by taking actions to save the decedent from his own wrongdoing.

> [W]e agree with the court in Shear v. National Rifle Association, *supra*, that almost all cases in which prevention is alleged will involve speculation as to what would have happened had the defendant's conduct not taken place. 606 F. (2d) at 1257. The defendant cannot take advantage of the uncertainty created by his own wrongdoing. If it were otherwise, then it would be virtually impossible for Appellant to prove a case of prevention. Champion v. Whaley, 311 SE 2d 404 (Ct. App. 1984); The Huffines Co., LLC v. Lockhart, 617 SE 2d 125 (2005).

In all instances in which Appellant was involved in opposing Medicare's attempts to recoup funds obtained by Appellant during Decedent's disbarment from Medicare, Medicare was making demands of the Appellant in regard to payments received by Appellant under the terms of the reassignment of benefits that was, by decedent's own admission, fraudulently executed by the Decedent on December 8, 1998. (R. p. 511). Under the specific holdings of our appellate courts, the arguments made by the Defendant that the Appellant could have 'prevented' decedent from taking the actions (and non-actions) are completely without merit. Moreover, the Appellant took every possible action to mitigate the damage to the Decedent. The unvarnished truth is that the only direct evidence before this Court is that Decedent's own misconduct caused Appellant substantial damage, and that Appellant did everything possible to mitigate the damage caused by the Decedent's misconduct – even in the face of the continuing misconduct and the continuing failure to provide relevant information to Appellant that was in the sole possession of Decedent, his counsel and FirstChoice.

IX. The trial court erred in acting on the motion for summary judgment because the order disqualifying counsel for Appellant was on appeal [tracking number: 2011197671], and the trial court lacked jurisdiction under Rules 205 and 241, SCACR.

Our Supreme Court has held that choice of one's attorney in any action is a substantial right of a party.

> An order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2). Further, such an order must be immediately appealed or any later objection in a subsequent appeal will be waived.

Hagood v. Sommerville, 362 S.C. 191, 199, 607 S.E.2d 707, 711 (2005).

Basic notions of fairness to opposing parties and counsel [new and old] [Rule 407, Rule 402(k), SCACR] and basic notions of due process of law provide that the Plaintiff have sufficient time to determine if it intends to appeal the order of this Court disqualifying the undersigned and/or to adequately prepare its case for trial after completion of discovery. Otherwise, the right to an effective appeal and the right to counsel of one's own choosing is effectively nullified.[4]

[4] In an unpublished opinion (Estate of Connor, Opinion No. 2009-UP-502, COA Filed October 29, 2009), this Court, citing Rules 205 and 241(a), SCACR, reversed decisions of the lower court that were in contradiction of the automatic stay provisions.

CONCLUSION AND RELIEF REQUESTED BY APPELLANT

The trial court erred in granting Defendant's motion for summary judgment, and in failing to grant the motion for summary judgment made by Appellant. Appellant requests this court to reverse the circuit court's decision grant of summary judgment to Respondent, and to grant judgment in favor of Appellant in the amount of $226,740.19 with instructions to the trial court to hear and determine the remainder of Appellant's claim of damages.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 34(a) of this Court, Appellant respectfully requests that this Court grant oral argument. Appellant believes that oral argument will assist this Court in the decisional process due to the complexity of the facts of this case.

Respectfully submitted,

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May 3, 2012.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

This brief complies with the type-volume limitation because this brief complies with the requirements of Rule 211(b), SCACR, has less than 50 pages and has been prepared in a proportionally spaced typeface using Times New Roman in 12-point font.

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May 3, 2012.

THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

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

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

Pee Dee Health Care, P.A.,

Appellant,

v.

Estate of Hugh S. Thompson,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 3rd day of May 2012, the foregoing Final Brief of Appellant was hereby served upon the following by depositing a copy of same in the United States Mail, with sufficient postage annexed thereto to the following:

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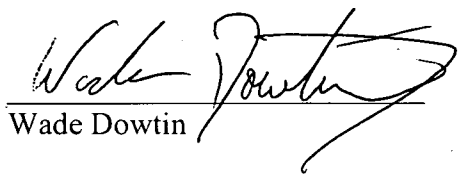

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