THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Circuit Court

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SC Court of Appeals

J. Michael Baxley and Paul M. Burch, Circuit Court Judges
Case No. 10-CP-16-0332
Appellate Case No. 2014-001275

Pee Dee Health Care, P.A.....Appellant-Respondent.

v.

Estate of Hugh S. Thompson, III.....Respondent-Appellant.

RECORD ON APPEAL
VOLUME TWO
(pp. 495 - 991)

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Table of Contents

ORDERS

Order of Disqualification, filed April 15, 2011 1

Order Denying Rule 59(e) Motion on Disqualification, filed August 15, 2011 10

Order Granting Summary Judgment, filed September 1, 2011 12

Order Denying 59(e) Motion to Reconsider Summary Judgment, filed September 28, 2011 28

Order for Sanctions against Tony R. Megna, filed February 23, 2013 30

Unpublished Decision of the Court of Appeals, dated July 3, 2013 47

Circuit Court Order Dismissing Criminal Contempt Proceedings, filed March 31, 2014 49

South Carolina Court Of Appeals Order Granting Motion for Costs and Attorneys' Fees, filed March 28, 2014 50

South Carolina Court of Appeals Order Denying Motion for Sanctions, filed March 28, 2014 ... 52

Order Granting Rule 11 Sanctions against Plaintiffs and Any Successors or Assignees, filed April 21, 2014 54

Order Denying Motion to Alter or Amend, filed May 14, 2014 59

PLEADINGS

Complaint 62

TRANSCRIPTS

Transcript of March 16, 2011 Hearing 82

Transcript of January 18, 2012 Hearing 123

Transcript of March 27, 2014 Hearing 143

MOTIONS AND MEMORANDA

Motion to Disqualify, filed January 31, 2011 204

Rule 59(e) Motion, filed May 2, 2011 219

Response to Motion to Disqualify Tony R. Megna, filed March 3, 2011 222

Motion for Protective Order filed by J. Rene Josey, with Exhibits, filed August 9, 2011 271

Motion for Circuit Court Sanctions, with exhibits, dated January 16, 2014 278
Exhibit A – Copy of Motion for Sanctions in Court of Appeals (without attachments in hard copy) 319
Exhibit B – Order of Summary Judgment 421
Exhibit C – Mr. Matthews Letter Date June 24, 2010 Representing Administrative Record 437
Exhibit D – March 16, 2011 Transcript 441
Exhibit E – Mr. Megna's Litigate for Years Letter of February 16, 2011 482
Exhibit F – Transcript of January 18, 2011 483
Exhibit G – Original Disqualification Order 507
Exhibit H – Order Denying Reconsideration of Disqualification 517
Exhibit I – Court of Appeals Opinion 519
Exhibit J – Complaint 524
Exhibit K – Alleged Smoking Gun Letter as Submitted March 16 547
Exhibit L – Return to the Motion to Disqualify 548
Exhibit M – PDHC's Answer to Production Requests 596
Exhibit N – Grounds for Probate Appeal as Filed in Circuit Court and Probate Court 598
Exhibit O – April 13, 2010, E-Mail Exchange re: Megna As Witness Concern 616
Exhibit P – Mark Matthews' 59 (E) Affidavit and its Attachment 618
Exhibit Q – Transcript of July Argument 622
Exhibit R – Plaintiff's Filed Letter to Trial Court of July 8, 2011 680
Exhibit S – PDHC's Brief in Court of Appeals Summary Judgment 693
Exhibit T – Court's Letter of June 23, 2011 (without Enclosures) 730
Exhibit U – Megna Letter to the Court of February 4, 2011 734
Exhibit V – Motion to Reconsider Disqualification Filed May 2, 2011 737
Exhibit W – Appellate Motion to Stay, Vacate & Disqualify 753
Exhibit X – Mr. Megna's E-Mail of July 26, 2011 771
Exhibit Y – Mr. Megna E-Mail of January 17, 2013 773
Exhibit Z – July 27th Letter of Mr. Megna (without enclosed subpoenas) 775
Exhibit AA – Court's Summary Judgment Letter of August 12, 2011 779
Exhibit BB – Estate Counsel Letter to the Trial Court May 20, 2011 781
Exhibit CC – Estate Response to Motion to Reconsider Summary Judgment 783
Exhibit DD – Estate Counter-Motion, Court of Appeals, September 2011 790
Exhibit EE – Matthews Responses to Request to Admit 805
Exhibit FF – Matthews E-mails of August 13, 2010 and August 24, 2010 814
Exhibit GG – Josey Letter to Matthews of August 20, 2010 Seeking Conflict Details 817
Exhibit HH – Motion to Strike Answer E-Mailed February 17, 2011 818
Exhibit II – Motion for Reconsideration of Summary Judgment 839
Exhibit JJ – Megna Letter to Josey of July 20, 2011 Demanding Conflict Fix 847
Exhibit KK – Megna E-mail of August 10, 2011 without attachment 848

Exhibit LL – Affidavit of Nathan M. Crystal 849
Exhibit MM – Cohen Affidavit 860
Exhibit NN – E-mail Exchange between Mr. James, Mr. Matthews, and Mr. Megna of May 21, 2010 862

Motion to Strike, filed March 13, 2014 864

Defendant's Response to Motion to Strike Circuit Court Sanctions, with exhibits, dated March 24, 2014 870

Memorandum In Opposition To Motion for Sanctions, filed March 26, 2014 916

Response to Defendant's Amended Fee Affidavit, filed April 8, 2014 926

Respondent's Petition for Rehearing, dated April 14, 2014 934

Motion to Alter or Amend Order of This Court, filed May 5, 2014 955

AFFIDAVITS

Fee Affidavit of J. Rene Josey and John Jay James, II, dated March 25, 2014 967

Court Required Supplemental Affidavit Segregating Fee Components Sought in Sanctions Request, dated April 1, 2014 973

OTHER DOCUMENTS

Pee Dee Health Care, P.A. Subpoena to J. Rene Josey, John Jay James, II, et al., Dated July 28, 2011 979

Certification of Counsel 991

specifically address this situation. It was a mistake. It was timely filed. It was filed in this court as opposed to the Probate Court. It was a mistake. And under the Appellate Court Rules 204, the rules specifically say that the document is to be filed in the correct court. That is the whole issue, and I don't understand. And with all due respect to opposing counsel, why they would ask this court to --- or why this court would enforce --- set a third sentence of a possible of a statute that doesn't mention the fact that it is jurisdictional, and not apply the Appellate Court Rules, which the Supreme Court has addressed as directly providing that this court should apply. In some it is very simple. The Notice of Intention to Appeal under the Appellate Court Rules, starts the ball rolling.

The second grounds for appeal is analogous to the record on appeal, or the analogous to the statement of issues on appeal. If they are filed in the wrong court, they are filed in the proper court. That's it. And I would suggest to the Court that this court has, with all due respect, no flexibility in applying South Carolina Appellate Court Rules, and applying Rule 204 to simply put this document in the right court. There has been no prejudice. They have not mentioned any prejudice. They have gotten all of these documents. They got them

timely. It is the grounds for appeal. It is not the Notice of Intention to Appeal. The Notice of Intent to Appeal is jurisdictional, and that is Witzig. Witzig does not mention the other one.

THE COURT: All right.

MR. MEGNA: There has been no finding that the third sentence is jurisdictional, and I submit to this court it is not jurisdictional.

THE COURT: Help me understand the big picture. Why were you aggrieved by the judge's decision not to require bond?

MR. MEGNA: Your Honor, during that session that they did an expedited complaint to sell some property. What we did is we did a return to that, and on the date that they had set the expedited hearing, he simultaneously heard our request for a bond. We told him --- asked the judge very specifically at the time, we were not prepared to argue that. And in Probate Court they specifically must apply the Rules of Civil Procedure, and say that we simply ask for enough time to take some depositions. We have asked for enough time to make sure of what was going on. And he denied our request. He said, I am going to hear it right today. And you can't do that. I said --- I can't remember the name of the rule, but you have a hundred and twenty days

before it can be put on the docket. And we had no opportunity whatsoever to have any type of discovery, to ask any type of questions, to do anything. This was done on a --- And I actually agreed or would actually agree that the sale of property that they wanted to do was appropriate. We did not have any objection to that. What we had an objection to, was not understanding the situation prior to a decision being made. In other words, we did not have enough time to make an informed decision. That is all we requested that the court do. Judge Lawson, for his own reasons, denied that outright. He did not give us one single day.

THE COURT: And Mr. Megna, I don't have the benefit of the probate file. Are you a major creditor of the estate?

MR. MEGNA: We are the only creditor, yes, sir. It is likely that if our claim is adjudged, then conceivably it could be more than the amount of the estate. So we are a significant creditor. And which brings up another issue why we are being so very careful and thoughtful. Because the personal representatives of the estate are also in a fiduciary duty to the estate, and we are the only creditor in the estate, yet they are fighting all of this in our opinion, and again this process will take care of itself in the context of our

money. And we think --- and they are the only recipients of the estate. And we think there is a breach of fiduciary duty there also.

We are trying to be careful, Your Honor. We are not trying to do anything other than to dot our I's, and cross our T's, and make sure that everything we do, and we understand every single piece of it.

THE COURT: All right.

MR. MEGNA: That's it.

THE COURT: Thank you, Mr. Megna.

MR. MEGNA: Thank you, Your Honor.

THE COURT: Do you want to reply Mr. Josey? I would ask you to reply, how are you prejudice. I realize you said this is a bright line test. This is not a prejudicial issue. But I would like to hear from you if you believe somehow your client has been prejudiced by your delay.

MR. JOSEY: Judge, we think the claim is frivolous. We think the appeal is frivolous. We think that our clients are being put through a whole lot of litigious procedural mechanisms that are costing them money that they shouldn't have to be going through. So I am using the best arrow I have right now to get rid of at least one part of these frivolous proceedings. That is just as nicely as I can put it.

Now, judge, in reply. Mr. Megna says that his filing on November 9th in Circuit Court was on time, it wasn't on time. That was five days late. I'll let you count the days and see if your calender agrees with my calender. But when he filed his Notice of Appeal on September 17th or September 20th, that's right, the order is dated September 17th, he filed it on the 20th. If you count forty-five days from there, it comes out to be November the 4th, which is what I have recited. It was filed on November 9th.

And, Mr. Megna says that that third sentence has not been held to be jurisdictional, I would urge you to look at the Evert decision, or the Gallagher versus Evert decision. Because they did mention both the second and third sentences that seemed a problem.

The matter of the Howard decision that he talked about, we weren't prepared to deal with that. I haven't seen it, but I do know that it was a decision before Judge Hearn ruled in Witzig. And in Witzig, somewhat similar to this, the appellate for Probate Court was saying, look, we ought to have thirty days to file our Notice of Appeal, that is dealing with the second sentence, that's true. But they said we ought to have thirty days, because Rule 74 of the Rules of Civil Procedure says you have thirty days generally to appeal

from a lower court to a higher court. Well, Judge Hearn said look, we have a specific uniform Probate Code that has been adopted by the legislature that trumps any general rule of the Rules of Civil Procedure. She held that then. We still have the same statute, and the same trumping applies today.

And to the extent that Mr. Megna made it sound like it was dealing with a standard of review, and not the jurisdictional requirements to perfect the --- it was the standard of review after you got the appeal into the Appellate Court.

THE COURT: All right. Thank you. And then finally, Mr. Megna in reply, what do you say about the fact that Mr. Josey contends that it was late in Circuit Court?

MR. MEGNA: Your Honor, I would have to go back and count it up again. But when I counted it, it was within the forty-five days. And I will assert to the Court that I have not verified that. That is my understanding, and that is what my position is right now. And I will certainly rectify that if that is not an issue.

THE COURT: All right.

MR. MEGNA: However, I would say, Your Honor, that in the Supreme Court under the Appellate Court Rules, if

I filed something in the Supreme Court inappropriately, even the Notice of Intent to Appeal, and it is filed in the Court of Appeals under Rule 204, there is no difference in this court whatsoever. I am doing the same thing. If I filed it, I filed it, and this court would look at those cases. There is nothing in those cases that says that is jurisdictional. As a matter of fact, the Court specifically did not rule on that issue. Those are two separate sentences. The Notice of Appeal --- Now prior to that, it wasn't the case. If I recall correctly, prior to the Uniform Code, it said together with. The Legislature omitted the words together with. It is now two separate statements. You don't have to do one to do the other. There is nothing jurisdictional about that. And the Notice of Intent to Appeal, as everybody has agreed. Notice of Intent to Appeal, which in every instance that I am aware of, perfects an appeal was filed timely.

THE COURT: All right. Let's do this then, gentlemen and ladies. I am going to ask you to just remain at ease for a few moments. I am going to step back, we have been on the bench for about an hour and a half, and take a little break, make a decision in this, and I will come back and tell you what my decision is.

MR. JOSEY: Your Honor, do you want us to wait

here, or come back at a time certain?

THE COURT: No, how about just wait here for us for a few minutes. And we will be back shortly.

(Whereupon, a recess was taken from 10:26 a.m. until 11:00 a.m..)

RULING BY THE COURT

THE COURT: All right. Thank you for your patience, while this matter has been under advisement.

What I have done is, I have gone back, and I have reviewed §62-1-308 really in its entirety, not just subsection (a). But I have also looked at the cases that have been cited, as well as an Appellate Rule that was cited to me by the appellant.

I have reviewed the case of Cretzmeyer, which was referred to earlier as well as the case of Evert.

Mr. Megna, I am going to grant the motion to dismiss your appeal, and I am going to do this for the following reasons.

First of all, I do not find this is jurisdictional. We have a case in the case of Evert where there was a failure to timely appeal, as well as a failure to timely set forth your grounds of appeal. And the Appellate Court lumped them together and said that was jurisdictional. And it would seem appropriate, because it involved the grounds of appeal.

But what I do find is while it is not jurisdiction, §62-1-308 is mandatory. And I am going to quote from Cretzmeyer, the Court said something in Cretzmeyer that I thought was instructive. It says:

> *We decline Appellant's invitation to construe the statute in a manner inconsistent with its unambiguous terms. Our settled rules of statutory construction mandate the result we reach, for the statute is clear that the notice of appeal must be filed in the circuit court within the ten-day period.*

Well, it is equally clear that the grounds of appeal must be filed within forty-five days. And the reason for that is because, then there are other things that have to happen in sequence behind that, if you will look at §362-1-308(b) that is within a thirty-day period for which there must be what I call, a return provided by the Probate Court to the Appellate Court.

So it is a structured process. If you had filed within the forty-five days, Mr. Megna, I would grant your argument that your Appellate Court Rules would say, all right it is in the wrong court, then we will just deem that it was filed in the correct court. But by my

counting of the days specifically, it is fifty days out, thus it is not timely filed. It is a mandatory statute. And the Court grants the dismissal of the appeal for all of those reasons.

Now, it doesn't appear to me that a written order is necessary. As I have just stated the reasons for my order on the record with detail.

If anyone wishes to appeal that decision, then they may order this transcript and go forward, and I will not enter an order other than a Form 4 Order that I am going to dismiss the appeal for reasons stated on the record.

All right. Now, is there anything further with regard to this issue today?

Mr. Megna?

MR. MEGNA: I just had one question. I just wanted to just clarify. But you are not holding that that second sentence is jurisdictional?

THE COURT: No. I don't find it to be jurisdictional, and I don't have to reach that finding. I don't see where any appellate court has said it is jurisdictional, when they cupulate it with the time you have to appeal, it becomes jurisdictional. But nevertheless, I believe it to be mandatory for the reasons set out in the statutory scheme.

All right. Anything further from the respondents?

MR. JOSEY: None, Your Honor.

THE COURT: All right. We will notify the Probate Court of our decision as well, and enter a Form 4 today that dismisses the appeal.

All right.

MR. JOSEY: Thank you, Your Honor.

MR. MEGNA: Thank you, Your Honor.

THE COURT: Have a good day.

(Whereupon, this hearing was concluded at 11:05 a.m. on Tuesday, January 18, 2011.)

-- END OF TRANSCRIPT --

CERTIFICATE OF REPORTER

I, the undersigned, Pamela Ozment-Cartee, official court reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the hearing of the above captioned case, relative to appeal, in The Court of Common Pleas in Darlington County, South Carolina, on the 18th day of January 2011.

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

May 23, 2011

_____

Pamela Ozment-Cartee
Circuit Court Reporter

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

J. MICHAEL BAXLEY
JUDGE

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April 15, 2011

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Re: Pee Dee Health Care v. Estate of Hugh S. Thompson
C/A No: 2010-CP-16-0332

Counsel:

Enclosed please find the original signed Order in the above-entitled matter. **Please be aware that it is your responsibility to file this Order with the Clerk of Court and serve clocked copies on all parties.** Thank you for your attention to this matter.

Sincerely yours,

J. Michael Baxley

JMB/jlc
Enclosure

STATE OF SOUTH CAROLINA,	)	
	)	IN THE COURT OF COMMON PLEAS
	)	2010-CP-16-0332
COUNTY OF DARLINGTON.	)	
Pee Dee Health Care, P.A.,	)	
	)	
Plaintiff,	)	
	)	ORDER DISQUALIFYING
vs.	)	PLAINTIFF'S COUNSEL TONY R. MEGNA
	)	
Estate of Hugh S. Thompson,	)	
	)	
Defendant.	)	
	)	

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

FINDINGS OF FACT

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

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

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

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

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

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

communications described in these initial interrogatory answers and in the complaint[3] make Mr. Megna a witness to relevant issues in this matter.

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

(B) The first two exceptions allowed by Rule of Professional Conduct 3.7, SCACR 407, are not applicable here. Mr. Megna's testimony relates, in part, to contested communications with the decedent at the heart of the claims and defenses in this case. In addition, Mr. Megna's testimony relates to contested administrative issues of Medicare compliance (such as employee screening, due diligence, and record keeping) and the contested issue of Plaintiff's alleged damages. Mr. Megna's testimony does not relate to "legal services rendered" in this Court of Common Pleas matter.

(C) The hardship exception of Rule 3.7 provides no relief here. A South Carolina District Court has noted that the hardship exception to Rule 3.7 should be construed very narrowly. Brown v. Daniel, 180 F.R.D. 298, 302 (D.S.C. 1998). Simple extra expense or the loss of time that is inherent in any disqualification is not a substantial hardship. To find substantial hardship, "courts have required something beyond the normal incidents of changing counsel, such as the loss of extensive knowledge of a case based upon a long-term relationship between the client and counsel and substantial discovery conducted in the actual litigation." Id. Here, the normal incidents of changing counsel are not even present as Rule 3.7(b) will allow for Mr. Megna's non-witness partner Mr. Matthews to continue in his existing representation of PDHC.

(D) The Dead Man Statute[6] does not change Mr. Megna's status as a fact witness in this case under Rule 3.7 of the Rules of Professional Conduct – regardless of how it might apply in the ultimate trial of this matter. Moreover, the Dead Man Statute has no effect upon the discoverability of information allegedly known by Megna as a fact witness.[7]

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

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

(E) Mr. Megna's role as general counsel to PDHC does not change Mr. Megna's status as a fact witness in this case under Rule 3.7 of the Rules of Professional Conduct – regardless of how this status might trigger evidentiary privileges. While PDHC asserts that privileges attach to anything and everything that Mr. Megna might say, thereby freeing him to act only as counsel, this Court concludes that the potential application of attorney-client privilege[8] does not preclude anything and everything that Mr. Megna might say as a witness.

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

IT IS SO ORDERED.

J. Michael Baxley
Presiding Judge

April 15, 2011
Hartsville, South Carolina

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2010-CP-16-0332
COUNTY OF DARLINGTON	)	
Pee Dee Health Care, P.A.,	)	ORDER DENYING PLAINTIFF'S 59(E) MOTION FOR RECONSIDERATION OF ORDER DISQUALIFYING COUNSEL AND QUASHING ALL MOTIONS, SUBPOENAS, AND FILINGS SIGNED ONLY BY DISQUALIFIED COUNSEL TONY R. MEGNA AND ISSUED AFTER JUNE 17, 2011
Plaintiff,	)	
v	)	
Estate of Hugh S. Thompson,	)	
Defendant.	)	

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

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

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

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

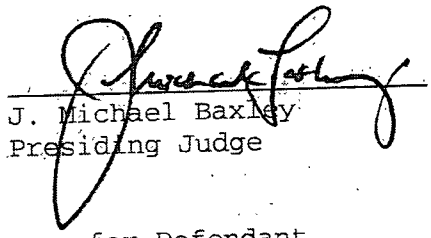
However, the Court does find that its decision to allow Plaintiff's counsel oral argument on previously-filed Summary Judgment Motions did not attenuate its Order of Disqualification. The Court granted Plaintiff's counsel a limited appearance only. Therefore, all motions, subpoenas, and filings signed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

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

FILED
2011 AUG 15 AM 10:41
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

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

IT IS SO ORDERED.



J. Michael Baxley
Presiding Judge

Hartsville, South Carolina
August 12, 2011

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FILED
2011 AUG 15 AM 10:41
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Pee Dee Health Care, P.A., Appellant,

v.

Hugh S. Thompson, III, and Louise T. Dailey, as Personal Representatives of the Estate of Hugh S. Thompson, Respondents.

Appellate Case No. 2011-185767

Appeal From Darlington County
J. Michael Baxley, Circuit Court Judge

Unpublished Opinion No. 2013-UP-311
Heard June 5, 2013 – Filed July 3, 2013

AFFIRMED IN PART, DISMISSED IN PART

Benjamin Rushton Matthews and Tony Ray Megna, both of Matthews & Megna, LLC, of Columbia, for Appellant.

John J. James, II of Paulling & James, LLP, of Darlington, and Jon Rene Josey, of Turner Padget Graham & Laney, PA, of Florence, for Respondents.

PER CURIAM: This appeal arises from three claims made by Pee Dee Health Care, P.A. ("PDHC") against the estate of Hugh S. Thompson, Jr. ("the Estate").[1] PDHC appeals the following orders of the circuit court: (1) the order dismissing its appeal of a Darlington County probate court order for failing to timely file its grounds of appeal with the probate court, (2) the order granting summary judgment in favor of the Estate, and (3) the order disqualifying PDHC's counsel, Tony Ray Megna. We affirm in part and dismiss in part.

1. We find the circuit court properly dismissed PDHC's appeal of the Darlington County probate court order for failure to timely file its grounds of appeal in probate court. The probate court issued an order approving the sale of Dr. Thompson's former residence on September 17, 2010. In compliance with section 62-1-308(a) of the South Carolina Code (2009), PDHC filed its notice of intent to appeal on September 20, 2010, in circuit court and probate court. *See* § 62-1-308(a) ("The notice of intention to appeal to the circuit court must be filed in the office of the circuit court and in the office of the probate court and a copy served on all parties within ten days after receipt of written notice of the appealed from order, sentence, or decree of the probate court."). However, PDHC failed to comply with the second requirement of section 62-1-308(a) in two respects. First, PDHC improperly filed its grounds of appeal in circuit court as opposed to probate court. *Id.* ("The grounds of appeal must be filed in the office of the probate court and a copy served on all parties within forty-five days after receipt of written notice of the order, sentence, or decree of the probate court."). Second, and most importantly, PDHC filed its grounds of appeal outside the forty-five day time period prescribed by section 62-1-308(a). *Id.* It is undisputed PDHC received notice of the probate court's order no later than September 20, 2010, the date on which PDHC filed its notice of intent to appeal. However, PDHC failed to file its grounds of appeal in circuit court until November 9, 2010, fifty days after it received notice of the probate court's order. Although PDHC attempts to argue that Rule 204(a),[2] SCACR, and Rule 82(b),[3] SCRCP, required the circuit court to

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[1] This appeal originated as three separate appeals; however, the parties agreed at oral argument to consolidate the cases. Accordingly, we address all three appeals in the instant opinion.

[2] Rule 204(a), SCACR, states: "In the event that the notice of appeal is filed in the wrong appellate court, the appellate court in which the matter is filed shall issue an order transferring the case to the appropriate appellate court."

transfer PDHC's appeal to the court in which the appeal should have been filed, these rules only apply for a timely-filed appeal. Because PDHC failed to timely file its grounds of appeal, these rules are inapposite. Accordingly, we affirm the circuit court's dismissal of PDHC's appeal from probate court.

2. We find the appeal of the circuit court's order granting the Estate summary judgment is untimely. The circuit court filed its formal order granting the Estate summary judgment on September 1, 2011. PDHC filed a motion to reconsider the ruling; however, the motion to reconsider was signed by Mr. Megna only. Because the circuit court had disqualified Mr. Megna as counsel except for the limited purpose of arguing the pending motions for summary judgment, the circuit court dismissed the motion to reconsider its ruling on the summary judgment motions as "void ab initio." No other Rule 59(e) motion was submitted prior to PDHC filing and serving its notice of appeal on October 28, 2011.

We agree with the circuit court that PDHC did not file a proper Rule 59(e), SCRCP, motion. The circuit court filed its order denying PDHC's Rule 59(e) motion on Mr. Megna's disqualification on August 24, 2011. In the order, the circuit court explicitly stated that the only exception to the order was to allow Mr. Megna to represent PDHC at the hearing on the motions for summary judgment. However, the circuit court clarified that this exception was for a limited appearance only and did not otherwise attenuate the order of disqualification. Accordingly, the circuit court provided clear and unequivocal notice to PDHC that Mr. Megna was only allowed to orally argue the motions for summary judgment and was disqualified from all other appearances and activities following his disqualification. Mr. Megna's subsequent submission of PDHC's motion to reconsider the order granting the Estate summary judgment was in clear and direct violation of the circuit court's order disqualifying him as counsel. PDHC served the notice of appeal of the circuit court's summary judgment order on October 28, 2011. Without a valid Rule 59(e) motion to toll the time for filing an appeal, this notice was untimely. *See* Rule 203(b)(1), SCACR (requiring a notice of appeal to be served on all respondents within thirty days after receipt of written notice of

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[3] Rule 82(b), SCRCP, states: "When an action is brought in the wrong county or in the wrong court, the court shall not dismiss the action but shall transfer it to any proper county or court in which it could have been brought."

entry of the order or judgment); *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 15, 602 S.E.2d 772, 775 (2004) ("A timely post-trial motion, including a motion to alter or amend the judgment pursuant to Rule 59(e), SCRCP, stays the time for an appeal for all parties until receipt of written notice of entry of the order granting or denying such motion."). Accordingly, we dismiss PDHC's appeal of the circuit court's order entering summary judgment in favor of the Estate as untimely.

3. Because, as discussed above, we dismiss PDHC's appeal of summary judgment in favor of the Estate, we find its appeal of Mr. Megna's disqualification is moot. *See Sloan v. Friends of the Hunley, Inc.*, 369 S.C. 20, 26, 630 S.E.2d 474, 477 (2006) ("A moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court.").

Moreover, even if the issue were not moot, we find the circuit court did not err in disqualifying Mr. Megna as counsel for PDHC. Rule 3.7 of the Rules of Professional Conduct prohibits an attorney from acting as advocate at a trial in which he is likely to be a necessary witness unless certain exceptions apply. Mr. Megna is the chief executive officer of PDHC. Due to this position, Mr. Megna has exclusive and first-hand knowledge of many of the facts at issue in the instant case, including, but not limited to, PDHC's communications with Dr. Thompson, PDHC's compliance with Medicare regulations, and PDHC's role in Medicare's administrative action against it to recoup funds paid by Medicare to patients treated by Dr. Thompson. Based on Mr. Megna's position with PDHC, we find the circuit court did not err in disqualifying Mr. Megna as a necessary witness.

In addition, we find no abuse of discretion in the circuit court's disqualification of Mr. Megna prior to trial. Mr. Megna's partner, Benjamin Matthews, who was not disqualified, was an attorney-of-record in the case and had previously submitted pleadings on PDHC's behalf. Accordingly, PDHC suffered no hardship from Mr. Megna's pretrial disqualification. Further, Mr. Megna points to no South Carolina cases precluding the disqualification of counsel prior to trial.

Finally, we agree with the circuit court that PDHC's assertion that the attorney-client privilege, the work product doctrine, and the Dead Man's Statute would bar his testimony is without merit. At this stage, PDHC has failed to demonstrate that Mr. Megna's testimony would be excluded under these doctrines. Moreover, the fact that certain portions of his testimony could potentially be barred at trial due to certain evidentiary rulings is irrelevant to Mr. Megna's status as a necessary

witness. Accordingly, PDHC's appeal of the circuit court's order disqualifying Mr. Megna fails on the merits as well.

Based on the foregoing, PDHC's appeal is

AFFIRMED IN PART and DISMISSED IN PART.

HUFF and WILLIAMS, JJ., and CURETON, A.J., concur.

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

PEE DEE HEALTH CARE, P. A.)
Plaintiff(s))

vs.)

ESTATE HIGH THOMPASON, M. D.)
Defendant(s))

CIVIL ACTION COVERSHEET

-CP- -

10 CP 16 0332

FILED
2010 MAY 20 P 2:53
SCOTT B. SUGGS
CLERK OF COURT
DARLINGTON, S.C.

(Please Print)
Submitted By: BENJAMIN R. MATTHEWS, ESQUIRE
Address: 3400 WEST AVENUE, COLUMBIA, SC 29203

SC Bar #: 3332
Telephone #: 803. 799. 1700
Fax #: 803. 254. 3678
Other:
E-mail: BEN@PDHC.COM

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION *(Check all that apply)*

**If Action is Judgment/Settlement do not complete*

☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION *(Check One Box Below)*

Contracts	Torts - Professional Malpractice	Torts – Personal Injury	Real Property
☐ Constructions (100)	☐ Dental Malpractice (200)	☐ Assault/Slander/Libel (300)	☐ Claim & Delivery (400)
☐ Debt Collection (110)	☐ Legal Malpractice (210)	☐ Conversion (310)	☐ Condemnation (410)
☐ Employment (120)	☐ Medical Malpractice (220)	☐ Motor Vehicle Accident (320)	☐ Foreclosure (420)
☐ General (130)	Previous Notice of Intent Case #	☐ Premises Liability (330)	☐ Mechanic's Lien (430)
☐ Breach of Contract (140)	20___-CP-___-_____	☐ Products Liability (340)	☐ Partition (440)
☒ Other (199)	☐ Notice/ File Med Mal (230)	☐ Personal Injury (350)	☐ Possession (450)
	☐ Other (299)	☐ Wrongful Death (360)	☐ Building Code Violation (460)
		☐ Other (399)	☐ Other (499)

Inmate Petitions	Judgments/Settlements	Administrative Law/Relief	Appeals
☐ PCR (500)	☐ Death Settlement (700)	☐ Reinstate Driver's License (800)	☐ Arbitration (900)
☐ Mandamus (520)	☐ Foreign Judgment (710)	☐ Judicial Review (810)	☐ Magistrate-Civil (910)
☐ Habeas Corpus (530)	☐ Magistrate's Judgment (720)	☐ Relief (820)	☐ Magistrate-Criminal (920)
☐ Other (599)	☐ Minor Settlement (730)	☐ Permanent Injunction (830)	☐ Municipal (930)
	☐ Transcript Judgment (740)	☐ Forfeiture-Petition (840)	☐ Probate Court (940)
	☐ Lis Pendens (750)	☐ Forfeiture—Consent Order (850)	☐ SCDOT (950)
	☐ Transfer of Structured Settlement Payment Rights Application (760)	☐ Other (899)	☐ Worker's Comp (960)
	☐ Other (799)		☐ Zoning Board (970)
			☐ Public Service Commission (990)
			☐ Employment Security Comm (991)
			☐ Other (999)

Special/Complex /Other	
☐ Environmental (600)	☐ Pharmaceuticals (630)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)
☐ Medical (620)	☐ Out-of State Depositions (650)
☐ Other (699)	☐ Motion to Quash Subpoena in an Out-of-County Action (660)
	☐ Sexual Predator (510)

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

Submitting Party Signature: _____ **Date:** May 19, 2010

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lexington, Pickens (Family Court Only), Richland, Union and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.

2. The initial ADR conference must be held within 300 days after the filing of the action.

3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)

4. Cases are exempt from ADR only upon the following grounds:

    a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;

    b. Requests for temporary relief;

    c. Appeals

    d. Post Conviction relief matters;

    e. Contempt of Court proceedings;

    f. Forfeiture proceedings brought by governmental entities;

    g. Mortgage foreclosures; and

    h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.

5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.

6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: **You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**

FILED
2010 MAY 20 PM 2:53
SCOTT A. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA,	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	
	)	
Pee Dee Health Care, P.A.	)	SUMMONS
Plaintiff,	)	
	)	
vs.	)	FILE NO.
	)	
Estate of Hugh S. Thompson, M.D.	)	10 CP 16 0332
Defendant.	)	

TO THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

Columbia, South Carolina

Dated: May 19, 2010

Plaintiff/Attorney for Plaintiff

Address: Benjamin R. Matthews
3400 West Avenue
Columbia, Sc 29203
803.799.1700
E-mail: ben@pdhc.com

SCCA 401 (5/02)

FILED
2010 MAY 20 PM 2:53
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

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

10 CP 16 0332

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**COMPLAINT**
Estate of Hugh S. Thompson,	**JURY TRIAL DEMANDED**
Defendant.	

THE PARTIES

1. The Plaintiff, Pee Dee Health Care, P.A. is a professional medical association doing business in Darlington, SC.

2. The Defendant is the Estate of Hugh S. Thompson, M.D. Dr. Thompson died on December 5, 2009. His estate is being probated in the Darlington County Probate Court, Case number 2009-ES-16--424.

VENUE AND JURISDICTION

3. This court has jurisdiction pursuant to S.C. Code Ann. § 62-3-803 et. seq., and in particular §62-3-804.

4. Venue is proper in Darlington County.

NATURE OF ACTION

5. The action brought by Plaintiff is primarily legal in nature, and the Plaintiff respectfully requests a trial by jury.

THE FACTS

6. On or about October 26, 1998, the decedent entered into an 'at-will' employment contract with Plaintiff's medical practice as a physician.

7. The decedent's medical employment continued until on or about December 10, 2001, when the decedent left the employ of Plaintiff's medical practice.

8. As part of the employment process and relationship, the Defendant provided information to Plaintiff representing that Defendant was fully and completely authorized under state and federal law to provide medical services to Plaintiff's patients who were Medicare beneficiaries. To this end, the decedent completed a Medicare provider application (known as a HCFA 855] and an "assignment of benefits" application to allow Plaintiff to employ Defendant and to provide the Defendant permission to treat Plaintiff's Medicare beneficiaries. The Medicare applications were provided to Palmetto GBA (a private contractor who contracted with the Centers for Medicare and Medicaid Services [CMS]). Decedent certified the information he was providing to Medicare and to Plaintiff was true and correct while decedent actually knew this certification was false.

9. Unbeknownst to the Plaintiff, the decedent provided false and misleading information to Plaintiff and on the applications submitted to Palmetto GBA. Specifically, Dr. Thompson failed to provide the information that he had had been previously suspended from treating Medicare patients as he had been suspended by the Medicare Office of Inspector General from the Medicare program effective on or about May 31, 1994. Dr. Thompson's failure to provide the required information concerning his suspension resulted in the continuation of his suspension as a Medicare provider of healthcare service. Dr. Thompson had been notified in writing by the Office of Inspector General in on March 31, 1996:

a. That he was suspended and excluded as a provider from the Medicare program as well as all other federal health care programs, and

b. That he could not be reinstated in the federal Medicaid program until he requested such in writing and was approved in writing.

11. After the SC Board of Medical examiners reinstated Dr. Thompson's medical license in 1998 [his medical license had been suspended on or about May 31, 1994], Dr. Thompson failed to seek reinstatement to the Medicare program through the Office of Inspector General as he was required to do but instead filed a false application with Palmetto GBA, GBA [the Medicare contractor who administers Medicare in South Carolina on behalf of the federal government through the agency known as the Centers for Medicare and Medicaid Services [CMS]). However, decedent omitted any reference in regard to this suspension from the Medicare program. Nor did decedent inform Plaintiff of this suspension from the Medicare program. Decedent certified the information he was providing to Medicare and to Plaintiff was true and correct while decedent actually knew this certification was false.

10. As a result of the false information provided by decedent on the application to Palmetto GBA, and to Plaintiff, decedent (a) was assigned a Medicare provider number (D993211724 - effective October 26, 1998, see Exhibit A) by Palmetto and (b) was employed by Plaintiff to provide medical services to Plaintiff's patients, including Medicare patients. Even though the provider numbers were issued, they were in violation of 42 CFR 1001.1901(1) which provides that Dr. Thompson's suspension from the Medicare program continued until the suspension was lifted by the Medicare Office of Inspector General. Dr. Thompson failed to do this, failed to notify Plaintiff, and continued to provide false information to the Plaintiff during the remainder of his employment with Plaintiff.

11. On or about August 9, 2002, Dr. Thompson's filed a subsequent Medicare enrollment application for reenrollment in the Medicare program. In this application, Dr. Thompson admitted he had been previously suspended as a Medicare health care. On or about this same date, Dr. Thompson was reinstated as a provider of Medicare healthcare services by the Medicare Office of Inspector General.

12. On or about June 7, 2007, Plaintiff 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 (sanctioned) 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 Plaintiff for services decedent provided to Medicare beneficiaries because the decedent had completed an 'assignment of benefits' to Plaintiff. However, decedent omitted any reference in regard to this suspension from the Medicare program.

c. That Plaintiff was liable for the funds paid regardless of the fact that Plaintiff had no knowledge of the matter and that Dr. Thompson had provided both Plaintiff 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%.

13. Plaintiff was contacted by decedent shortly after Plaintiff received the letter received by Plaintiff in June, 2007 as decedent had received the same information. A copy of the letter sent

by decedent is attached hereto as Exhibit. At this time, Decedent admitted that he had not provided accurate information to Plaintiff upon and during his employment with Plaintiff or to Medicare [Palmetto GBA] on his provider and 'assignment of benefits' applications to Medicare.

14. Following due On May 1, 2008, Plaintiff paid to Medicare the sum of $226,740.19.

15. On or about April 13, 2010, Plaintiff filed a claim with decedent's estate. A copy of that claim is attached hereto as Exhibit B.

16. On or about May 19, 2010, Plaintiff filed an amended claim with decedent's estate. A copy of that claim is attached hereto as Exhibit C.

17. On May 10, 2010, the personal representative of the decedent's denied the Plaintiff's claim.

FOR A FIRST CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY)

18. All foregoing allegations are incorporated herein by reference as if set forth herein verbatim.

19. The Plaintiff placed special confidence in the truthfulness of decedent so that the decedent in good conscience and equity as bound to act in good faith and with due regard to the interests of the Plaintiff.

20. The decedent violated his duty of ordinary care by his knowing failure to make full disclosure of material facts of his suspension from the Medicare program.

21. Decedent's failure to make full disclosure of material facts of his suspension from the Medicare program was intentional, willful, wanton, and/or in reckless disregard of his duty to Plaintiff and of Plaintiff's rightful expectation of decedent to be truthful and honest in his dealings with Plaintiff, as decedent's employer.

22. The decedent's conduct was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

23. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(NEGLIGENT MISREPRESENTATION
BASED ON DEFENDANT'S PECUNIARY INTEREST)

17. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

18. The decedent made a false representation to Plaintiff as more fully described herein.

19. The decedent had a pecuniary interest in making the statement.

20. The decedent owed a duty to care to Plaintiff, independent of the Plaintiff's employment contract with decedent due to decedent's ethical obligations a physician, decedent's legal duty to be truthful on his applications to Medicare, decedent's affirmations and certifications on his Medicare applications that he was truthful on his applications, decedent's legal obligations under federal law to be a Medicare-certified provider, and decedent's special relationship with Plaintiff as a physician and employee to see that the decedent communicated truthful information to the Plaintiff.

21. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

22. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(BREACH OF DUTY OF LOYALTY TO EMPLOYER)

23. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

24. The decedent made a false representation to Plaintiff as more fully described herein.

25. Decedent's duties to Plaintiff, as his employer, included the duty of loyalty. Decedent's was duty-bound to refrain from behaving in a manner that would be contrary to his employer's interests, an obligation often given the shorthand name "duty of loyalty."

26. The degree of decedent's duty of loyalty is related to the degree of responsibility and trust that Plaintiff provided decedent. In this case, as a physician, decedent had an extensive independent responsibility and access to confidential information that he alone knew. As a result, decedent's duty of loyalty to Plaintiff was much higher, and was obligated to handle Plaintiff's matters with the highest degree of integrity and fidelity and to deal fairly, openly, and totally for the Plaintiff's benefit, which defendant intentional, recklessly or with deliberate indifference, failed to do.

27. The decedent used his relationship with Plaintiff relationship to help with his own personal interests without the knowledge and consent of Plaintiff.

28. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

29. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A FOURTH CAUSE OF ACTION
(NEGLIGENCE)

30. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

31. The decedent owed a duty to care to Plaintiff, independent of the Plaintiff's employment contract with decedent due to:

a. decedent's ethical obligations to Plaintiff as a physician,

b. decedent's legal duty to be truthful on his applications to Medicare,

c. decedent's affirmations and certifications on his Medicare applications that he was truthful on his applications,

d. decedent's legal obligations under federal law to be a Medicare-certified provider, and decedent's special relationship with Plaintiff as a physician and employee to see that the decedent communicated truthful information to the Plaintiff, and

e. decedent's creation of risk to Plaintiff directly caused by decedent's untruthful certification to both Medicare and to Plaintiff.

32. Decedent breached his duty to Plaintiff:

a. By act of certifying to Plaintiff personally and on his Medicare applications that he was that he was truthful

b. By omission failing to inform Plaintiff of the falsity of his affirmations and certifications that he barred from medically treating Plaintiff's Medicare patients

33. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

34. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A FIFTH CAUSE OF ACTION
(BREACH OF CONTRACT)

35. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

36. The parties entered into a binding at-will employment agreement as more fully described hereinabove.

37. The decedent unjustifiably breached that contact, and in particular, those provisions of the contract relating to fair dealing, good faith honesty, and treating Plaintiff's Medicare patients when decedent actually knew he was not entitled to do so,

38. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

39. As a result of the foregoing, Plaintiff is entitled to its actual damages.

FOR A SIXTH CAUSE OF ACTION
(BREACH OF CONTRACT AACCOMPANIED BY A FRAUDULENT ACT)

40. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

41. The decedent unjustifiably breached that contact, and in particular, those provisions of the contract relating to fair dealing, good faith honesty, and treating Plaintiff's Medicare patients when decedent actually knew he was not entitled to do so,

42. The decedent :

a. made false representations to Plaintiff, to wit, that he was certified to treat Medicare beneficiaries,

b. the decedent made the foregoing false misrepresentation with actual knowledge of its falsity and/or with reckless disregard of the truth or falsity of the matter as demonstrated by the decedent's filing of false applications with Medicare,

c. the decedent intended that the Plaintiff act upon the falsity of his misrepresentations,

d. the Plaintiff had no knowledge of the falsity of the misrepresentations made by decedent,

e. the Plaintiff relied upon, and had a right to rely upon, the truthfulness of the representations made by decedent, and

f. the Plaintiff suffered actual and proximate injury as a direct result of the false representations made by decedent.

43. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

44. As a result of the foregoing, Plaintiff is entitled to its actual damages as well as an award of punitive damages.

FOR A SEVENTH CAUSE OF ACTION
(INTERFERENCE WITH CONTRACTUAL RELATIONS)

45. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

46. The Plaintiff has a contractual relationship with Medicare.

47. The decedent knew that Plaintiff had a contractual relationship with Medicare.

48. The decedent, by his knowingly false statements and certifications on his Medicare applications, and to Plaintiff, intentionally and knowingly procured the breach of that contract,

49. Their was no justification for the decedent's unlawful behavior other than his own selfish pecuniary gain,

50. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

51. As a result of the foregoing, Plaintiff is entitled to its actual damages as well as an award of punitive damages.

FOR A EIGHTH CAUSE OF ACTION
(FRAUD AND MISREPRESENTATION)

52. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

53. The decedent :

g. the decedent made a false misrepresentation to Plaintiff, to wit, that he was certified to treat Medicare beneficiaries,

h. the decedent made the foregoing false misrepresentation with actual knowledge of its falsity and/or with reckless disregard of the truth or falsity of the matter as demonstrated by the decedent's filing of false applications with Medicare,

i. the decedent intended that the Plaintiff act upon the falsity of his misrepresentations,

j. the Plaintiff had no knowledge of the falsity of the misrepresentations made by decedent,

k. the Plaintiff relied upon, and had a right to rely upon, the truthfulness of the representations made by decedent, and

l. the Plaintiff suffered actual and proximate injury as a direct result of the false representations made by decedent.

54. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

55. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A NINTH CAUSE OF ACTION
(FAILURE TO DISCLOSE)

56. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

57. The decedent had a duty to disclose the truth of his legal inability to treat Medicare patients of the Plaintiff including but not limited to the special relation of employer-employee

between Plaintiff and decedent, decedent's legal and ethical obligations as a physician under state and federal law, and decedents duty of fair dealing that required the disclosure of the truth to Plaintiff,

58. The decedent was aware of the misrepresentations that could not be reasonably determined by Plaintiff,

59. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

60. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A TENTH CAUSE OF ACTION
(DELIBERATE CONCEALMENT)

61. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

62. The decedent deliberately, recklessly, intentionally and/or with deliberate indifference to the rights of Plaintiff concealed the truth of his inability to legally treat Plaintiff's Medicare patients.

63. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

64. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR AN ELEVENTH CAUSE OF ACTION
PROFESSIONAL MALPRACTICE
(FRAUD, MISREPRESENTATION AND NEGLIGENCE)

65. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

66. The decedent deliberately, recklessly, intentionally and/or with deliberate indifference to the rights of Plaintiff concealed the truth of his inability to legally treat Plaintiff's Medicare patients in contravention of his professional and ethical responsibilities under state and federal law as a physician.

67. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

68. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A TWELTH CAUSE OF ACTION
(MONEY HAD AND RECEIVED)

69. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

70. The Defendant holds money that, in good conscience, belongs to the Plaintiff due to decedent's knowing wrongdoing.

71. The Defendant, in equity and good conscience should be required to pay the money wrongfully held over to the Plaintiff,

72. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

73. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A THIRTEENTH CAUSE OF ACTION
(PROMISSORY ESTOPPEL)

74. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

75. The decedent deliberately, recklessly, intentionally and/or with deliberate indifference to the rights of Plaintiff concealed the truth of his inability to legally treat Plaintiff's Medicare patients in contravention of his professional and ethical responsibilities under state and federal law as a physician.

76. The decedent's promise to Plaintiff on his application and certifications to Medicare were unambiguous in their terms.

77. Plaintiff reasonably relied upon the false promises and certifications of decedent,

78. Plaintiff's reliance upon the false promises and certifications of decedent was expected and foreseeable by decedent.

79. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

80. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A FOURTEENTH CAUSE OF ACTION
(QUANTUM MERUIT)

81. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

82. The Plaintiff conferred a substantial professional and financial benefit upon decedent by employing decedent, and paying decedent substantial sums of money as well as providing decedent clinical and administrative support.

83. Without regard to the employment contract between the parties, the decedent realized the benefit conferred upon him by Plaintiff and substantially and indubitably benefited thereby,

84. The decedent retained the benefits conferred upon him by Plaintiff under conditions that make it unjust for decedent's estate to retain such benefits without paying their value

85. The decedent deliberately, recklessly, intentionally and/or with deliberate indifference to the rights of Plaintiff concealed the truth of his inability to legally treat Plaintiff's Medicare patients in contravention of his professional and ethical responsibilities under state and federal law as a physician.

86. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

87. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A FIFTEENTH CAUSE OF ACTION
(CONSTRUCTIVE FRAUD AND CONSTRUCTIVE TRUST)

88. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

89. The decedent:

a. made false representations to Plaintiff,

b. knew of the false representations made to Plaintiff,

c. the false representations were material to the legal ability of the decedent to medically treat Plaintiff's Medicare patients,

d. The false representation was made with the intent that they be acted upon by Plaintiff.

e. knew the Plaintiff had no knowledge of the falsity of decedent's misrepresentations,

f. knew the Plaintiff innocently relied upon decedent's false representations,

g. knew the Plaintiff had a right to rely upon the representations of decedent,

90. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

91. As a result of the foregoing, Plaintiff is entitled to its actual damages as a constructive trust imposed by this Court to benefit Plaintiff, who has been wrongfully deprived of its rights due to decedent and decedent's estate holding legal right to property which they should not possess due to decedent's unjust enrichment, negligence, deliberate indifference, fraud and interference with the rights of Plaintiff.

92. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

93. As a result of the foregoing, Plaintiff is entitled to its actual damages, the imposition of a constructive trust, and an award of punitive damages.

FOR AN SIXTEENTH CAUSE OF ACTION
(CONSTRUCTIVE FRAUD WITHOUT SCIENTER)

94. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

95. The decedent:

a. made false representations to Plaintiff,

b. the false representations were material to the legal ability of the decedent to medically treat Plaintiff's Medicare patients,

c. The false representation was made with the intent that they be acted upon by Plaintiff.

d. knew the Plaintiff had no knowledge of the falsity of decedent's misrepresentations,

e. knew the Plaintiff innocently relied upon decedent's false representations,

f. knew the Plaintiff had a right to rely upon the representations of decedent,

96. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

97. As a result of the foregoing, Plaintiff is entitled to its actual damages as a constructive trust imposed by this Court to benefit Plaintiff, who has been wrongfully deprived of its rights due to decedent and decedent's estate holding legal right to property which they should not possess due to decedent's unjust enrichment, negligence, deliberate indifference, fraud and interference with the rights of Plaintiff.

98. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

99. As a result of the foregoing, Plaintiff is entitled to its actual damages, the imposition of a constructive trust, and an award of punitive damages.

FOR AN SEVENTEENTH CAUSE OF ACTION
(EQUITABLE INDEMNITY)

100. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

101. Plaintiff is entitled to indemnity from decedent for the loss or damage the decedent caused to Plaintiff.

102. The Plaintiff's right to equitable indemnity arises by contract, by express contract, implied contract, and by operation of law as a matter of equity between the parties.

103. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

104. As a result of the foregoing, Plaintiff is entitled to its actual damages.

FOR AN EIGHTEENTH CAUSE OF ACTION
(CONVERSION)

105. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

106. The Plaintiff:

a. Had a pecuniary interest in the funds created by the medical services provided to Medicare patients by decedent,

b. The decedent converted the medical services provided to Plaintiff's Medicare patients by falsely failing claims for the services provided to such patients,

107. The use of the proceeds of the funds received by decedent were without the permission or consent of Plaintiff,

108. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

109. As a result of the foregoing, Plaintiff is entitled to its actual damages, the imposition of a constructive trust, and an award of punitive damages.

FOR AN NINETEENTH CAUSE OF ACTION
(EQUITABLE RESTITUTION)

110. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

111. Plaintiff is entitled to equitable restitution from decedent for the purpose of restoring to the Plaintiff the funds or property loss or damage the decedent caused Plaintiff.

112. The Plaintiff's right to equitable restitution arises by contract, by express contract, implied contract, and by operation of law as a matter of equity between the parties.

113. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

114. As a result of the foregoing, Plaintiff is entitled to its actual damages.

FOR A TWENTIETH CAUSE OF ACTION
(CIVIL CONSPIRACY)

115. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

116. The decedent, in combination with his estate, and the personal representative thereof, together for the purpose of injuring Plaintiff, have caused the Plaintiff special damages, to wit, the continuing loss of use of its money to hire additional providers which has cost Plaintiff in excess of $35,000.00 *net* per month beginning June 1, 2008 to date plus prejudgment interest thereon.

DAMAGES INCURRED BY PLAINTIFF

Based on the foregoing allegations, Plaintiff has suffered the following damages:

1. The Plaintiff has paid to Medicare on behalf of the decedent the amount of $226,740.19
2. The Plaintiff is entitled to prejudgment statutory interest at the rate of 8.75% beginning May 1, 2008 forward,

3. The Plaintiff has incurred the loss of use of its money to hire additional providers which has cost Plaintiff in excess of $35,000.00 *net* per month beginning June 1, 2008 to date plus prejudgment interest thereon.

4. The funds paid to decedent as an employee of decedent and in support of decedent which are in excess of $500,000.00

5. Punitive damages in an amount to be determined by a jury.

6. Such further and other relief as this Court deems just and proper.

WHEREFORE, the Plaintiff respectfully request this Court to inquire into these matters and to provide the Plaintiff awards of actual and punitive damages based on the cause of actions as more fully stated hereinabove, as well as such further relief as this Court deems just and proper.

Respectfully submitted,

Benjamin R. Matthews
Attorney-at-Law
3400 West Avenue
Columbia, SC 29203
803.799.1700
Email: matthews@pdhc.com

May 19, 2010.

HH

Dear Tony,

I have been awfully rushed since I got back from Columbia (late last night). Sorry I haven't found all the documents you need. I will get the rest of them together as soon as possible, and if necessary, bring them up to you in Columbia.
You will find two "private agreements" with the Board: the earlier dated one (which has probably been superseded by the one executed this year) was the result of the settlement in Federal Court I referred to.
I've got literally a box full of documents concerning the arduous struggle with the Board. Any of them I can make available to you if you need them.
I think the current "private agreement" is the index document now. I'm sure I'll be talking to you again soon, and I'll try to locate everything before I do.

Thanks,

Hugh Thompson

copied/sent 2/9/18

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

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**10-CP-16-0332**
Estate of Hugh S. Thompson,	
Defendant.	

FILED
2011 MAR 11 AM 10:45
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

RETURN OF PEE DEE HEALTH CARE, P.A. TO DEFENDANT'S MOTION TO DISQUALIFY

INTRODUCTION

PART I

The Plaintiff, Pee Dee Health Care, P.A. is a professional medical association with clinical offices in Darlington, SC and Olanta, SC. The Defendant is the Estate of Hugh S. Thompson, M.D. Dr. Thompson died on November 5, 2009.[1] This action is a proceeding pursuant to S.C. Code Ann. Section 62-1-201(32). The Plaintiff is a claimant of the estate S.C. Code Ann. Section 62-1-201(4). The Personal Representatives of the Decedent's estate [the Decedent's grown children] are 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 Plaintiff[2]], and trustees to the estate as defined by S.C. Code Ann. Section 62-1-201(45) with corollary fiduciary duties to the estate.

[1] The undersigned has been the CEO and General Counsel to Plaintiff since 1995. The undersigned had no conversations with the Decedent in regard to any of the matters contained in this lawsuit. However, the Decedent initiated a telephone call indicating he was sending unspecified documents to the Plaintiff. Those documents have been provided to the Defendant during discovery. During discovery, the Defendant was notified of the employees of the Plaintiff who did, in fact, have actual contact with the Decedent.

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

Both the Plaintiff and the Personal Representatives of the Estate are "Interested Persons" as defined by S.C. Code Ann. Section 62-1-201(20). Apparently, Mr. James and Mr. Josey are representing both the Defendant estate and the Personal Representatives[3] of the Estate as defined by S.C. Code Ann. Section 62-1-201(30). This is problematic as the Personal Representatives are fiduciaries to the estate, and must exclude all selfish interest in its dealings with others who make claim to the assets of the estate. *Cartee v. Lesley*, 290 S.C. 333, 350 S.E. (2d) 388 (1986). "Consequently, it is generally undesirable for one of the beneficiaries of a trust to act as trustee, since he is thereby put in a position to favor himself at the expense of the other beneficiaries." *Yates v. Yates*, 255 Ill. 66, 99 N.E. 360 (1912); *Selleck v. Hawley*, 331 Mo. 1038, 56 S.W. (2d) 387 (1932). A "fiduciary" includes a personal representative under § 62-1-201(13) (1987).

In evaluating an attorney's duties to third parties under the probate code, the Supreme Court stated, in *In Douglas ex rel. Louthian v. Boyce*, 542 S.E. 2d 715 (2001),

> "...[W]e emphasize that attorneys must conduct themselves ethically in all matters. The fact the legislature has seen fit to limit an attorney's responsibility to third parties when representing a fiduciary does not diminish this overriding ethical obligation.

PART II

The Plaintiff submits that the purpose of the Motion to Disqualify, as noted herein, violates, among other rules, Rule 407, Rule 4.4(a) of the SCACR in that the motion serves no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. Comment 1 to Rule 4.4 states:

> Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may

[3] It is unclear whether Mr. James and Mr. Josey are representing the Personal Representatives of the Estate in their individual capacities as well. If so, this implicates at least Rule 407, Rules 1.7, 1.8(g), and 2.3. If not, then Rule 407, Rules 1.18 and 4.3 are implicated as well as the application [or lack thereof] of the attorney-client privilege.

disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client lawyer relationship.

PART III

The Decedent, Dr. Hugh Thompson, was disbarred[4] as a physician from the Medicare program effective March 31, 1996. The Defendant admitted this fact on page 2, ¶ 10 of Defendants Answer filed June 17, 2010]. The Decedent admitted this fact in a statement he made dated May 28, 2004 [Exhibit E][5], and the letter from the Medicare OIG evidencing Decedent's disbarment is attached as Exhibit F. For the Court's convenience, the exhibits[6] Plaintiff refers to herein have been bound in a separate volume; and are incorporated hereinto be reference.

In early 1998, Decedent was employed by the medical offices of Don Fowler in Marion, SC. While working in Dr. Fowler's medical offices, the Decedent filed an application with Medicare to be approved as an eligible physician to see those patients enrolled in the Medicare program. That application is attached as Exhibit A, and is discussed in more depth below. On June 12, 1998, Medicare sent Dr. Thompson a request that stated his original application was

[4] Disbarment of a physician such as Decedent from the Medicare program excludes the offending physician from participation in the Medicare and State health care programs so that no payment is made for any items or services (other than an emergency item or service) furnished, ordered or prescribed by you under the above-mentioned programs. The foregoing explanation excludes possible criminal implications to disbarment which are not present in the instant case.

[5] The two-page document [Exhibit E] was provided to the Plaintiff by Mr. James by letter dated July 9, 2010 (a copy of Mr. James' letter is attached hereto as Exhibit GG, see item 2).

[6] In its various Motions, the Defendant has referred to several of the exhibits Plaintiff has provided this Court. The Defendant, however, reserved objections to their admissibility. Most, if not all, of the documents were obtained by both Plaintiff and Defendant from public sources, government offices or businesses that retained the documents in the ordinary course of their business. Regardless, there is little doubt the documents are admissible under the SC rules of evidence, including but not limited to Rules 803, 804, 901, 1003, 1004, 1005, 1007, 1008, and 1101.

incomplete. Page 2 of that letter requested that he provide Medicare with a copy of his reinstatement letter from the Medicare OIG. The letter was sent to Decedent at the work address of his then employer, Medical Offices of Dr. Don Fowler, PO Box 875, Marion, SC 29571. [Exhibit FF]. On September 14, 1998, Medicare sent Dr. Thompson a second request that stated his original application was incomplete. Page 2 of that letter again requested that he provide Medicare with a copy of his reinstatement letter from the Medicare OIG. The letter was again sent to Decedent at the work address of his then employer, Medical Offices of Dr. Don Fowler, PO Box 875, Marion, SC 29571. [Exhibit O]. The Decedent never provided this reinstatement letter nor did the Decedent otherwise respond to either the June 12, 1998 nor the September 14, 1998 letters from Medicare.[7]

PART IV

In the Fall of 1998, the Decedent left the employ of Dr. Fowler and was employed by Plaintiff. When the Decedent began his employment with Plaintiff, he completed and signed what Medicare refers to as a "Reassignment of Benefits." See Exhibit B. This document, the Reassignment of Benefits, is a required document for Medicare as funds paid for services performed by a Medicare provider are the responsibility of that provider. Dr. Thompson assigned to Plaintiff the reimbursement he received from seeing patients in Plaintiff's offices, and, in return was an employee of Plaintiff and received a substantial salary.

Medicare sent the Plaintiff a letter approving the Decedent's request that his

[7] As noted in its Answer filed with this Court on June 17, 2010, the Defendant has admitted that the relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." **[Page 4, 21 of Defendants Answer filed June 17, 2010]**. The relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff. Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." **[Page 5, 26 of Defendants Answer filed June 17, 2010]**.

Reassignment of Benefits be assigned to Plaintiff's offices. See Exhibit C. Neither the Decedent nor Medicare nor the offices of Dr. Fowler informed the Plaintiff of the June 12, 1998 letter from Medicare or the September 14, 1998 letters from Medicare, all requesting the Decedent provide Medicare the Decedent's reinstatement letter from the OIG's disbarment of Decedent in 1996. Decedent continued to work for Plaintiff without providing the Plaintiff any information as to his disbarment from the Medicare program. He left the employ of Plaintiff and went to work for FirstChoice [a medical practice in Florence, SC] in December, 2000. Apparently, sometime in 2002, the Decedent and FirstChoice was advised by Medicare the Decedent was a disbarred physician with the Medicare program. Once again, neither the Decedent nor FirstChoice nor anyone else informed the Plaintiff the Decedent had been and remained disbarred from the Medicare program.[8]

In the early summer of 2007, the Plaintiff was first notified by Medicare that Dr. Thompson had been disbarred as a physician in the Medicare program during the time period he was employed by Plaintiff. A disbarred physician, such as Decedent, is not entitled to treat Medicare patients during the time of his disbarment. Likewise, a medical practice, such as Plaintiff, is not entitled to receive funds from Medicare that are assigned to it by a disbarred

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[8] "Estoppel by silence arises where a person *owing another a duty to speak* refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." *Id.* (emphasis added). A duty to speak or disclose may be found in three distinct scenarios:
(1) where it arises from a preexisting definite fiduciary relation between the parties;
(2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; and
(3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties. *Jacobson v. Yaschik,* 249 S.C. 577, 155 S.E.2d 601 (1967); *Kiriakides v. Atlas Food Sys. & Serv. Inc.,* 338 S.C. 572, 527 362*362 S.E.2d 371 (Ct.App.2000), *affirmed as modified and remanded,* 343 S.C. 587, 541 S.E.2d 257 (2001).

physician during the time period of the physician's disbarment. Once the Plaintiff was notified by Medicare of Decedent's disbarment in 2007, Mr. Mark Matthews contacted both the Decedent and his current employer, FirstChoice Health Care of Florence, SC to determine the facts of the matter. Mr. Matthews's affidavit is attached as Exhibit Z.

The undersigned represented Plaintiff during the Medicare proceedings against Pee Dee Health Care, P.A. As noted herein, the Decedent had separate counsel – Wes Jackson of Nexsen Pruett. Exhibit Q. The undersigned had no conversations with the Decedent in regard to any of the matters contained in this lawsuit. The Defendant's correctly assert the undersigned never represented the Decedent. However, the Decedent initiated a telephone call indicating he was sending unspecified documents to the Plaintiff. Those documents have been provided to the Defendant during discovery. At this time, the undersigned closed any further discussions with Decedent and advised Decedent the undersigned could not discuss the matter with him. That was the end of the conversation. During discovery, the Defendant was notified of the employees of the Plaintiff who did, in fact, have actual contact with the Decedent.

Mr. Dean Banks, the owner of FirstChoice [the Decedent's then-current employer] informed Mr. Mark Matthews that Medicare had made a similar demand of FirstChoice and FirstChoice had secured the services of a law firm in Columbia, SC, [Nexsen Pruett] to represent both, FirstChoice and Dr. Thompson, the Decedent. Mr. Banks sent Plaintiff a letter from Nexsen Pruett [Exhibit Q] contesting Medicare's determination to 'recoup' funds from FirstChoice for funds FirstChoice received during the time period Decedent worked for FirstChoice that was prior to his reinstatement to the Medicare program in 2004. The letter from Nexsen Pruett [Exhibit Q] stated in part as follows:

The excluded provider designation was imposed as a result of the suspension

of Dr. Thompson's license to practice medicine after Dr. Thompson refused to pay a fine owed to the South Carolina Board of Medical Examiners. Dr. Thompson paid this fine and his license was reinstated in 1998. Unfortunately, Dr. Thompson was unaware that he was required to file any additional paperwork and thus failed to complete the appropriate paperwork to remove his name from the OIG's excluded provider list. Thus, while he had satisfied all the necessary criteria to obtain reimbursement from Medicare and obtained the appropriate permission to do so, he was still erroneously listed as an excluded provider. Dr. Thompson and FirstChoice first became aware of Dr. Thompson's presence on the OIG's excluded provider list in 2002 when Dr. Thompson referred a Medicare patient for physical therapy in North Carolina. The practice manager of the physical therapy practice called FirstChoice and indicated that she received a letter from HCFA that Dr. Thompson was excluded from Medicare effective March 31, 1996. Up and until the point the physical therapy practice manager notified FirstChoice of Dr. Thompson's excluded provider status, Dr. Thompson and FirstChoice had no knowledge of any such designation. In response to the practice manager's discovery, FirstChoice called Palmetto GBA and spoke to Tina Houser (803.786.1034, ext. 34620), who informed FirstChoice that Dr. Thompson was in good standing with Medicare and that FirstChoice could bill and be reimbursed in South Carolina. Dr. Thompson had further conversations with the OIG and HCFA and was sent a reinstatement form in February 2002, which indicated that FirstChoice could not participate in Medicare or Medicaid until the reinstatement was completed. FirstChoice again called Palmetto GBA and was told that Dr Thompson's Medicare number was active and that FirstChoice could bill Medicare for Dr. Thompson's services.

The administrative appeals initiated by Nexsen Pruett's on behalf of Decedent and FirstChoice resulted in the decision of the Medicare Administrative Law Court, known herein as the [the 'ALJ Joe' order dated January 22, 2008] [Exhibit M], on behalf of Dr. Thompson and FirstChoice Health Care of Florence. The 'ALJ Joe' decision 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[9] to Plaintiff, even though they had agreed to provide such information to Plaintiff. [See Exhibit U - email dated July 11, 2007 from the undersigned to Mr. Banks enclosing a copy of Plaintiff's response to Medicare]. *In their memorandum to this Court [page 4], counsel for the Defendants assert that the Plaintiff's failure to communicate with the Decedent interfered with the Decedent's right to protect his own interest. In point of fact, and as demonstrated by the foregoing, just the opposite is true. The Medicare ALJ 'Joe decision' that was favorable to the Decedent and FirstChoice was dated January 22, 2008, and was never provided to the Plaintiff.* If it had been, the outcome of the Medicare recoupment from Plaintiff would likely have been different. For this reason, the Defendant is equitably estopped from asserting any defense against Plaintiff do to the Decedent's own silence.

The Plaintiff received no further communications from the Decedent or Mr. Banks even though such communications had been promised. [See Exhibit P]. Nor was the Plaintiff aware of the favorable Medicare ALJ 'Joe' decision obtained by the Decedent and FirstChoice until the 'Joe' decision was produced during discovery in this case because neither FirstChoice nor the Decedent provided the information to Plaintiff. On March 14, 2008, the Plaintiff received an order [Exhibit N] from the Medicare ALJ that required Plaintiff to pay Medicare the funds it received from Medicare during the time the Decedent was disbarred from Medicare. Because of the Decedent's failure [as well as FirstChoice to provide the 'ALJ order to Plaintiff], PDHC did not have the opportunity to present the favorable 'ALJ Joe determination' as a defense to the

[9] Sometime in 2007, Dr. Thompson did contact the undersigned to inform him that the Decedent was providing 'some papers' to Plaintiff. The Decedent further informed the undersigned he was represented by a 'lawyer in Columbia.' The undersigned and the Decedent had no substantive communications concerning these matters whatsoever at any time. The Decedent, however, did send the Plaintiff a few documents which have been produced to the Defendant. [Exhibit V], and as noted herein below, the Defendant has obtained from other sources. All other conversions between Plaintiff and Decedent in regard to these matters, both prior to and following 2007, took place with Mr. Mark Matthews and other employees of Plaintiff. [See Exhibit Z].

claims made by Medicare against PDHC and Dr. Thompson, the Medicare Independent Review Board [QIC], the Medicare ALJ, or to the Medicare Appeals Council; and the Defendant is collaterally estopped [as well as equitably estopped due to his own silence] from re-litigating the matter in any manner whatsoever.[10]

PART V

Regardless of all of the Defendant's claims, the Defendant, while blaming the Plaintiff's for Decedent's woes, has never identified the source of any legal duty of the Plaintiff to act to protect the interests of the Decedent in any instance. The Decedent had not been employed by Plaintiff for over seven years, had never informed Plaintiff of any of the issues relating his disbarment in 1996, nor his reinstatement in 2002. In addition, in his statement dated May 28, 2004, he admits his own negligence. [See Exhibit E]. Regardless, and in all instances in which Plaintiff was involved in opposing Medicare's attempts to recoup funds obtained by Plaintiff during Decedent's disbarment from Medicare, Medicare was making demands of the Plaintiff in regard to payments received by Plaintiff under the terms of the Reassignment of Benefits executed by the Decedent on November 4, 1998 [Exhibit B]. And the Decedent actually [and constructively] knew of the matter as demonstrated by the email between Mr. Banks and Mr. Mark Matthews. [Exhibit Q]. As noted herein in more detail,

a. Decedent was represented by independent counsel of his own choosing beginning

[10] See for instance *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 324 n.4, 99 S.Ct. 645, 649 n.4, 58 L.Ed.2d 552, 559 n.4 (1979) (approving use of offensive collateral when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully even in an action with another party. SC law provides the same. See n *Graham v. State Farm Fire and Casualty Ins. Co.*, 277 S.C. 389, 391, 287 S.E. (2d) 495, 496 (1982), the Supreme Court held that a lack of privity would not prevent the application of the defense of collateral estoppel where "the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action." *See also Watson v. Goldsmith*, 205 S.C. 215, 31 S.E. (2d) 317 (1944); *Jenkins v. Atlantic Coast Line R. Co.*, 89 S.C. 408, 71 S.E. 1010 (1910).

in 2002 and during the proceedings that led to the adverse decision requiring the recoupment of funds of the Decedent that had been assigned to the Plaintiff,

b. Decedent and FirstChoice, regardless of the reason, failed to provide the Plaintiff the very information [the 'ALJ Joe' order dated January 22, 2008] [Exhibit M]] that would have negated the Decedent's liability in the first instance.

c. Decedent and FirstChoice failed to communicate with Plaintiff even though they both agreed to do so. As a result of the foregoing, the Defendant, as a matter of law, is estopped from asserting any claim defense against Plaintiff because, in South Carolina, negligence takes the place of the intent to deceive when there is a duty to disclose. *Id; 3 Pomeroy's Equity Jurisprudence* §809 at 218 (5th 1941).

d. Decedent and FirstChoice failed to notify Plaintiff for over five years of the difficulties of the Decedent in regard to his disbarment status.[11]

Following the foregoing, the Plaintiff learned the Decedent had been diagnosed with terminal brain cancer. Under the circumstances, the Plaintiff decided not to initiate litigation. Following the Decedent's death, the Plaintiff filed a claim [Exhibit J] with the Decedent's estate. The Defendant denied the Plaintiff's claim. This litigation followed.

PART VI

FACTS ADMITTED IN THE DEFENDANT'S ANSWER FILED WITH THIS COURT ON JUNE 17, 2010

Following the denial of the Plaintiff's probate claim, this litigation was initiated. In response, the Defendant filed an Answer to the Plaintiff's complaint on June 17, 2010 in which

[11] Defendant is subject to, and Plaintiff hereby claims that the doctrines of laches, estoppel, waiver, abandonment, acquiescence, and stale demand [and the other defenses asserted by Plaintiff] all prevent the Defendant from asserting any and all defenses to the claims of Plaintiff.

the Defendant made numerous admissions of fact and law.

The admissions in the Defendant's answer are as follows:

1. The Decedent's medical license was suspended by the SC Board of Medical Examiners on or about May 31,1994 and that his license to practice medicine was reinstated on or about April 14, 1998. **[Page 2, ¶ 11 of Defendants Answer filed June 17, 2010]**.

2. On or about March 31,1996, the Decedent was disbarred from the Medicare program by the Office of Inspector General who oversees physician participation in the Medicare program. **[Page 2, ¶ 10 of Defendants Answer filed June 17, 2010]**.

3. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." **[Page 3, ¶ 12 of Defendants Answer filed June 17,2010]**. **[Page 8, ¶¶ 61 and 62 of Defendants Answer filed June 17,2010]**.

4. In 1998, the Decedent failed to seek reinstatement to the Medicare program by the Medicare Office of Inspector General. **[Page 2, ¶ 11, Answer filed June 17, 2010]**.

5. Following the Decedent's disbarment from Medicare, by the Medicare Office of Inspector General, "provisions of federal law provide that a suspension of Medicare privileges [i.e., the Decedent's disbarment from the Medicare program in 1996] continues until [the Decedent was] reinstated by the Office of Inspector General [of the Medicare program]." **[Page 3, ¶ 12 of Defendants Answer filed June 17, 2010]**.

6. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." **[Page 3, ¶ 12 of Defendants Answer filed June 17, 2010]**.

7. The relationship of Decedent with Plaintiff was such that Decedent had a pecuniary

interest since he was paid by Plaintiff as a physician to provide medical services. [**Page 5, ¶25 of Defendants Answer filed June 17, 2010**].

8. The relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." [**Page 4, ¶ 21 of Defendants Answer filed June 17, 2010**].

9. The relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff. Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." [**Page 5, ¶ 26 of Defendants Answer filed June 17, 2010**].

10. Defendant admits a Medicare provider application and an 'reassignment of benefits [application] were prepared [with Decedent's signature on the certifications affixed by Decedent – see Exhibits A and B attached hereto and incorporated herein by reference] so as to permit Decedent to treat Medicare patients and for Plaintiff to receive payments therefore." [**Page 2, ¶ 9 of Defendants Answer filed June 17, 2010**].

11. "Defendant admits that Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Plaintiff." [**Page 6, ¶ 34 of Defendants Answer filed June 17, 2010**].

12. "Defendant admits so much of ¶10 of the Complaint as alleges 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..." See Exhibit C attached hereto. [**Page 3, ¶ 12 of Defendants Answer filed June 17, 2010**].

13. On or about June 17, 2007, the Plaintiff received a demand letter from Medicare that "would have had a content similar to that set forth in paragraph 12 of the Complaint." [**Page 3, ¶**

14 of Defendants Answer filed June 17, 2010]. Paragraph 12 of the Plaintiff's Complaint stated as follows:

> On or about June 7, 2007, Plaintiff 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 (sanctioned) 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 Plaintiff for services Decedent provided to Medicare beneficiaries because the Decedent had completed an 'assignment of benefits' to Plaintiff. However, Decedent omitted any reference in regard to this suspension from the Medicare program.
>
> c. That Plaintiff was liable for the funds paid regardless of the fact that Plaintiff had no knowledge of the matter and that Dr. Thompson had provided both Plaintiff 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%.
>
> The letter of June 17, 2010 is attached hereto as Exhibit X.

14. On May 10, 2010, the personal representative of the Decedent's denied the Plaintiff's claim. [**Page 4, ¶ 18 of Defendants Answer filed June 17, 2010**].

15. Defendants have no knowledge of "any.... Representations made by Decedent to Plaintiff..." [**Page 2, ¶ 10 of Defendants Answer filed June 17, 2010**].

16. To the extent that Decedent was an employee of Plaintiff, Decedent admits that a duty of loyalty to Plaintiff was owed." [**Page 6, ¶ 30 of Defendants Answer filed June 17, 2010**].

17. "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." [**top**

of Page 3, ¶ 11 of Defendants Answer filed June 17, 2010 and Exhibit E].

18. On or about April 13, 2010, Plaintiff filed a claim with Decedent's estate. On or about May 19, 2010, Plaintiff filed an amended claim with Decedent's estate which was denied by the personal representative of the Decedent's estate, i.e., the Defendants. **[Page 4, ¶¶ 17 and 18 of Defendants Answer filed June 17, 2010].**

19. Defendants have no information in their possession in regard to the allegations of ¶32 of the Plaintiff's Complaint, and therefore deny same.

20. Paragraph 32 of the Plaintiff's Complaint states:

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

Respectfully, the Defendant has many documents in its possession which are direct evidence of the allegations made in paragraph 32. Please see documents A, B, E, F, O, FF, Y, Z, AA, BB, CC, DD and EE.

PART VII

FACTS ADMITTED BY THE DECEDENT IN THE WRITTEN STATEMENT OF THE DECEDENT DATED MAY 28, 2004 [EXHIBIT E]

In its Motion to Disqualify the undersigned from representing Plaintiff, the Defendant argues that the undersigned is a necessary witness because the Defendant needs to determine questions surrounding a statement dated May 28, 2004 written by the Decedent and documents obtained by the undersigned from the SC Board of Medical Examiners. The Defendant knows the undersigned's testimony is neither necessary nor proper in any instance. First, Mr. James

produced the same documents to the Plaintiff after he received them from the SC Board of Medical Examiners pursuant to requests he made. [See Exhibits GG evidencing Mr. James requests and his production of those documents to Plaintiff], And the Plaintiff produced the document to the Defendant pursuant to documents it received from the Board of Medical Examiners pursuant to subpoena. [See Exhibit NN]. Second, the May 28, 2004 two-page letter prepared by the Decedent [Exhibit E] is the same two-page document that was produced to Plaintiff by Mr. James by letter dated July 9, 2010. The two-page letter dated May 28, 2004 [Exhibit E] is a summary of events prepared by the Decedent in regard to matters surrounding his disbarment from Medicare. A copy of Mr. James' letter is included as Exhibit GG (see item 2). The cover letter Decedent addressed to undersigned is Exhibit HH. Exhibit V is the remaining documents provided by Decedent. The undersigned had no conversations with the Decedent concerning any of the documents Decedent provided as the Decedent informed the undersigned he was being represented by "an attorney in Columbia." The Defendant's arguments it uses to request this Court to Disqualify the undersigned from representing the Plaintiff are not simply 'red herrings,' they are contrived.

21. On his statement dated May 28, 2004 [Exhibit E], the Decedent avowed, among matters:

> **a. 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. [See Exhibit F]. 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 by the Spring of 1998, when I was in the process of resuming medical practice.**

22. As noted above, the Decedent has admitted to his own disbarment, and his own failure to rectify the matter – regardless of the reason. Moreover, it is undisputable that Plaintiff had no

knowledge of the matter while Decedent had repeated actual knowledge of the matter, but, again, for whatever reason, ignored the matter.

23. Respectfully, the statements made in the Motion to Disqualify are misleading and inappropriate. The only reasonable inference is that the Defendant, and its counsel, has provided information to this court in the Motion to Disqualify that, in its best possible light, is misleading. See Rule 407, Rule 3.3, [Comment 2] SCRAP, which states ".... although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false. As noted in Comment 3 to Rule 3.3, "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.[12] The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. It is undisputed that Mr. James, by letter dated July 9, 2010, provided the Decedent's statement as part of the documents held by the Defendant. Plaintiff obtained the same two-page version of the document from FirstChoice and provided to the Defendant on July 30, 2010 [See Exhibit MM]. Moreover, the Defendant had ALL of the documents the Plaintiff has now presented to this Court ***prior to*** filing its Motion to Disqualify. For instance, and just to demonstrate a few of the matters *actually known* to the Defendant and its counsel *that are in addition to the admissions made by the Defendant and its counsel in its Answer filed with this Court on June 17, 2010,* and in addition to the additional matters stated herein:

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[12] Comment 8 to Rule 3.3 provides" ... A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

a. On August 31, 1998, Medicare sent a letter to Decedent's then employer, Dr. Don Fowler, reassigning Decedent's Medicare billings to Dr. Fowler's office. [Exhibit W]. The letter from Medicare was sent to Decedent at the work address of his then employer, Dr. Don Fowler, PO Box 875, Marion, SC 29571. It was signed by Ms. Gina Kelly of Medicare.

b. **On September 14, 1998, Medicare sent Dr. Thompson a request that specifically requested on page 2 that he provide Medicare with a copy of his reinstatement from the Medicare OIG.** This request was again signed by Ms. Kelly of Medicare. The letter was again sent to Decedent at the work address of his then employer, Dr. Don Fowler, PO Box 875, Marion, SC 29571. [Exhibit O]. **As noted previously, and unknown to Plaintiff, *this was the third letter the Decedent had received from* Medicare in regard to his disbarment as a provide from Medicare, the first being dated March 11, 1996 [Exhibit F] and the second being dated June 12, 1998 [Exhibit FF].**

c. In late September or early October, 1998, just days after receiving the September 14, 1998 letter from Medicare], the Decedent requested he be employed by Plaintiff. [See affidavit of Mark Matthews].

d. **At no time prior to or during his employment with Plaintiff did Decedent inform Plaintiff nor anyone employed by Plaintiff that he had been disbarred by Medicare in 1996 [Exhibit F] nor that he had received two additional letter from Medicare dated June 12 and September 14, 1998 [Exhibit FF and O] requesting Decedent provide a copy of Decedent's re-instatement from the Medicare OIG.**

PART VIII

PREDJUCIAL USE OF UNRELATED, INAPPROPRIATE INFORMAITON, AND DEFAMATORY LITAGATION STATEGY

The undersigned submits that not only do the Personal Representatives of the Estate of the Decedent have conflicts of interest in the case at bar, and not only have they made mis-statements of material facts by co-mission and omission, but that they have also resorted to an inappropriate and demeaning litigation strategy in the case at bar that is, in its best light, dishonorable. The Defendant has produced absolutely no evidence whatsoever that the undersigned had any contact with the Decedent other than the Decedent providing limited documents to the Plaintiff that have been disclosed to the Defendant during discovery. Mr. Josey and Mr. James also know they obtained these same documents from the SC Board of Medical Examiners, see Mr. James letter dated June 2, 2010 [See Exhibit KK]. It is not much of a leap to conclude that that there was and is no reasonable basis to file the Motion to Disqualify in the first instance.[13]

The Motion to Disqualify is replete with implied [and not so implied] offensive and unjustified personal and professional attacks on the integrity of the undersigned. It is no secret that the Plaintiff and the undersigned are involved in litigation now pending in Florence County that is completely unrelated to the case at bar. Nor is it a secret that the undersigned was the CEO of MCHG, LLC, the holding company that is at the center of the Lake City litigation. Mr. Josey's and Mr. James' attaching a copy of the Medicare 855 to the Motion to Disqualify noting that fact is for no legitimate reason other than to inflame the passions of this Court. The undersigned is extremely aware that Mr. Josey and Mr. James are attempting to convey to the

[13] Mr. Josey's law firm has been previously admonished for discovery misconduct. The Plaintiff remains astounded that Mr. James' has participated in such matters.

Court the misleading, insulting and not so subtle message to this Court that the undersigned is somehow "dishonest, untrustworthy", etc. They can phrase the issue however they wish. But the truth is they have underestimated the undersigned's absolute unwillingness to bend to such baseless, self-serving, dishonorable actions. The undersigned's association with MCHG and the "Lake City' litigation issues occurred no less than seven [7] years *AFTER* the Decedent left the employ of the Plaintiff. Moreover, the Decedent *has actually admitted his own wrongdoing.* [See Exhibit E]. Mr. Josey, Mr. James, and the Personal Representatives of the Estate of the Decedent have seriously miscalculated the determination of the Plaintiff, and the undersigned, to remedy the wrong that has occurred in the case at bar – as well as in the Lake City matters.

The undersigned has no qualms in informing this Court that the 'Lake City litigation' involves significant allegations of unethical and unprofessional conduct by lawyers of one of the largest law firms in this state, allegations of unethical and unprofessional conduct by lawyers in an influential firm in the Pee Dee, allegations of unethical and unprofessional conduct by relatives of a judge in Florence County, allegations of unethical and unprofessional conduct by physicians with medical practices in Lake City, SC, and allegations of conspiracy, fraud and unprofessional conduct by many others. Neither is it a secret that the 'Lake City litigation' began with the foregoing lawyers and physicians providing *ex parte* information to a Florence County judge[14] that led to the issuance of an *ex parte* restraining order against the undersigned and others. Nor is it secret that the *ex parte* order, as intended by the unethical conduct of many, destroyed a business venture in which the Plaintiff, the undersigned and others were partners.

While the undersigned is perhaps prohibited from discussing the precise nature of the

[14] The undersigned was the Chief Executive Officer of the venture. That is no secret and the undersigned has never denied it. However, the undersigned's position as CEO of that venture, that was initiated in 2007-08 has nothing to do with the current proceedings before this Court.

pending investigations surrounding the matters, the undersigned can attest to the fact, that nearly three years after the initial events, no allegations of wrongdoing against the Plaintiff nor the undersigned have been proven true for the simple reason that there was no wrongdoing by the Plaintiff nor the undersigned in the first instance.

In sum, the Plaintiff and the undersigned, as well as many others, were victimized by many in the Pee Dee area in regard to the Lake City matters. Neither the Plaintiff nor the undersigned has asked for nor expect compassion, empathy, or even understanding from anyone. Additional litigation against those involved in the events leading up to and including the obtaining of the fraudulently obtained *ex parte* order is forthcoming. The Plaintiff provides the foregoing information to this Court for one simple reason. Counsel for the Defendants have unnecessarily, maliciously, and unethically interjected the 'Lake City litigation' into this lawsuit by their personal attacks and insinuations of improper conduct by the undersigned; and have attached a Lake City document to their Motion to Disqualify for the sole realistic reason of prejudicing these proceedings. The Motion to Disqualify crosses the line from advocacy to obstructionism. See the foregoing discussion in relation to Rule 401, Rules 3.3 and 3.4.

The false and unprincipled personal accusations and innuendos being made by Mr. James and Mr. Josey against the undersigned have placed this Court in the unfair and unenviable position of determining whether or not Mr. James and Mr. Josey's accusations [implied and explicit] have prejudiced these proceedings to the extent this Court should *sua sponte* recuse itself from hearing and determining these matters. In the Lake City litigation, the Chief Justice of the SC Supreme Court specifically assigned the proceedings to a jurist outside of the immediate Pee Dee area because of concerns of actual and perceived conflicts of interest as well as the appearance of such conflicts. Mr. James' and Mr. Josey's unprincipled attacks on the

undersigned and the Plaintiff have placed this Court in a similar position considering the distasteful circumstances we collectively find ourselves discussing.

Regardless of the Court's determination of the foregoing, the Plaintiff responds to the Defendant's Motion as follows with the foregoing and the following.

PART IX

1. The basic dispute between the parties revolves about funds repaid to Medicare by Plaintiff on Decedent's behalf during a time period [1999-2000] when, unknown to Plaintiff, Decedent was admittedly disbarred as a provider of medical services under the Medicare program. As noted herein,

   a. Decedent admitted in May, 2004 that, in March 1996 [the first letter], he received a letter from the Medicare OIG stating he had been disbarred as a provider in the Medicare program. [See Exhibit F].

   b. The Defendant's issue as to the undersigned's 'necessary' testimony concerning the document and the authenticity of this document in the first instance has been obviously, purposely and patently intended to mislead this Court because:

      1) As noted previously, Mr. Jay James, by letter dated July 9, 2010 (a copy of which is attached hereto as Exhibit GG) actually provided both pages 1 and 2 of the document to the Plaintiff. As noted, **Mr. James specifically entitled the document "Summary of events and observations believed to have been prepared by Hugh S. Thompson. Jr. May 28, 2004.**

      2} A two-page version of this document was produced and provided to Plaintiff during discovery in this case from FirstChoice Health. The two page version of the document is attached hereto as Exhibit II. This same document (as all documents provided by FirstChoice) was provided to the Defendant by Plaintiff on July 30, 2010. A copy of the email evidencing the documents produced from First Choice to Defendant's counsel, Jay James, is attached hereto as Exhibit MM.

The Plaintiff's answers to interrogatories have been updated to reflect the complete document was obtained by Plaintiff as noted above even though the Defendant's received the document from Plaintiff months prior to the filing of their Motion and provided the Plaintiff the document.

THE SECOND MEDICARE LETTER TO THE DECEDENT DATED JUNE 12, 1998

Unknown to Plaintiff, Decedent received a second letter from Medicare dated June 12, 1998, advising him that Medicare needed additional documentation proving that he had been reinstated to the Medicare program by the OIG. See Exhibit FF. The first letter from Medicare to Decedent was the March, 1996 letter of disbarment from the Medicare OIG. This document was provided to the Defendant months ago but the Defendants have failed to note it in any of their declarations to this Court. As noted on the affidavits provided by Plaintiff, the Decedent never informed anyone at PDHC that he had been disbarred from Medicare [see Exhibits Y, Z, AA, BB, CC, DD, and EE], *and*, as noted above, he received written notices from Medicare concerning the matter at least three times prior to his employment with Plaintiff. [See Exhibits F, O, and FF].

THE THIRD MEDICARE LETTER TO THE DECEDENT DATED SEPTEMBER 14, 1998

Also unknown to Plaintiff, Decedent received a third letter from Medicare in September, 1998, [just a few weeks before Plaintiff hired Decedent as an employee] advising him that Medicare needed additional documentation that he had been readmitted to the Medicare program by the OIG. See Exhibit O. Decedent did not provide the additional documentation to Medicare nor to Plaintiff. See affidavit of Mark Matthews – Exhibit Z. This document was provided to the Defendant months ago but the Defendants have failed to note it in any of their declarations to this Court. As noted on the affidavits provided by Plaintiff, the Decedent never informed anyone at PDHC that he had been disbarred from Medicare [see Exhibits Y, Z, AA, BB, CC, DD, and EE], *and*, as noted above, he received written notices from Medicare concerning the matter at least three times prior to his employment with Plaintiff. [See Exhibits F, O and FF].

Decedent continued a pattern of misrepresenting his disbarment from Medicare on other applications. For instance, see the answer to question in regard to a uniform insurance application from Cigna. [See Exhibit JJ, pg 7].

> To **question #9:** *Has your participation in Medicare, Medicaid, or any other government program ever been limited, curtailed or have you voluntarily excluded yourself from any of these programs.*
>
> **I left the practice of medicine for several years in the mid 1990s. Since I did not bill Medicare for 4 consecutive months my Medicare number was suspended and made inactive per Medicare policy. I had to reapply for a new number when I returned to Medicine. My participation with Medicare and Medicaid is active and without restrictions currently.**

24. As noted by the affidavit of Mr. Mark Matthews, he was the employee of PDHC who handled all matters with Dr. Thompson in the first instance. See Exhibit Z. Moreover, as noted on the other affidavits provided by employees of the Plaintiff, the Decedent never informed anyone at PDHC of is disbarment from Medicare. [See Exhibits Y, AA, BB, CC, DD, and EE].

25. Decedent's original application for Medicare privileges [a Medicare form 855] dated June 19, 1998, was completed by Decedent *prior to* Decedent's employment with Plaintiff. [Exhibit A]. This document was obtained during discovery from the Defendant. Plaintiff did not have this application in its possession at the time it employed Decedent. The certification signed by Decedent on the original Medicare application he completed and signed for him to treat and bill for services provided to Medicare patient states as follows:

> I, the undersigned, [the 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]

26. Plaintiff did **NOT** complete the foregoing application with, for, or, on behalf of Decedent. It was completed while the Decedent worked at the medical office of Don Fowler in Marion, SC. In fact, until this litigation began, the Plaintiff never saw a copy of the Decedent's original Medicare application.

27. When Plaintiff employed Decedent, the Decedent completed a Medicare reassignment of benefits so that Plaintiff could bill for Decedent's medical services to its Medicare patients. [Exhibit B]. The certification signed by Decedent on the reassignment of benefits application states:

By signing this reassignment of benefits statement, you [Decedent] are authorizing the entity identified in section 1 [Plaintiff] to receive Medicare payments on your behalf.

I understand that, under the terms of my contract, Pee Dee Health Care, P.A., is entitled to claim or receive any fees or charges for my services.

[signed by Hugh S. Thompson, M.D.]

PART X

ADDITIONAL FACTS OBTAINED THROUGH DISCOVERY [AND AFFIDAVITS OF EMPLOYEES PROVIDED BY PLAINTIFF]

28. The Decedent's medical employment with PDHC continued until on or about December 10, 2000, when the Decedent left the employ of Plaintiff's medical practice of his own volition.

29. As part of the initial employment process and relationship, the Defendant provided information to Plaintiff representing that Defendant was fully and completely authorized under state and federal law to provide medical services to Plaintiff's patients who were Medicare beneficiaries. To this end, the Decedent completed a Medicare provider application (known as a HCFA 855] and a "reassignment of benefits" application to allow Plaintiff to employ Defendant and to provide the Defendant permission to treat Plaintiff's Medicare beneficiaries. [These documents are attached as Exhibits A and B]. The Medicare applications were provided to Palmetto GBA (a private contractor who contracted with the Centers for Medicare and Medicaid Services [CMS]).

30. Decedent certified the information he was providing to Medicare and to Plaintiff was true and correct while Decedent actually knew this certification was false. [See Exhibits A and B attached hereto.]

31. Unbeknownst to the Plaintiff, the Decedent provided false and misleading information to Plaintiff and on the applications submitted to Palmetto GBA – even though the Defendant admitted in their Answer filed with this Court that Decedent had been associated with medical practices prior to this employment with Plaintiff. **[Page 3, ¶ 11 of Defendants' Answer filed with this Court on June 17, 2010]**.

32. Specifically, Decedent failed to provide the information that he had had been previously suspended from treating Medicare patients as he had been suspended by the Medicare Office of Inspector General from the Medicare program in 1996. Dr. Thompson's failure to provide the required information concerning his suspension resulted in the continuation of his suspension as a Medicare provider of healthcare service. Dr. Thompson had been notified in writing by the Office of Inspector General on or about March 31, 1996: [See Exhibit F]

a. That he was suspended and excluded as a provider from the Medicare program as well as all other federal health care programs, and

b. That he could not be reinstated in the federal Medicaid program until he requested such in writing and was approved in writing.

33. After the SC Board of Medical examiners reinstated Dr. Thompson's medical license in 1998 [his medical license had been suspended on or about May 31, 1994] [See Exhibit G], Dr. Thompson failed to seek reinstatement to the Medicare program through the Office of Inspector General as he was required to do, but instead filed a false application with Palmetto GBA [the Medicare contractor who administers Medicare in South Carolina on behalf of the federal government through the agency known as the Centers for Medicare and Medicaid Services [CMS]. Decedent thus certified the information he was providing to Medicare and to Plaintiff was true and correct while Decedent actually knew this certification was false.

34. Decedent failed to inform Plaintiff of this suspension from the Medicare program. [See affidavit of Mark Matthews, Exhibit Z]. See also affidavits of other employees of Plaintiff stating the same. [Exhibits Y, AA, BB, CC, DD and EE].

35. As a result of the false information provided by Decedent on the application to Palmetto GBA [the Medicare contractor], and to Plaintiff, Decedent:

a. was assigned a Medicare provider number (D993211724 - effective October 26, 1998, see Exhibit C by Palmetto GBA, and

b. was employed by Plaintiff to provide medical services to Plaintiff's patients, including Medicare patients.

36. Even though the Medicare provider numbers were issued, the Defendants admitted they were in violation of 42 CFR 1001.1901(1) which provides that Dr. Thompson's suspension from

the Medicare program continued until the suspension was lifted by the Medicare Office of Inspector General. Defendant also admitted in its Answer that the Decedent's Medicare disbarment continued until [the Decedent was] reinstated by the Office of Inspector General [of the Medicare program]." **[Page 3, ¶ 12 of Defendants Answer filed June 17, 2010]**. Dr. Thompson failed to do this, failed to notify Plaintiff, and continued to provide false information to the Plaintiff during the remainder of his employment with Plaintiff.

37. On or about August 9, 2002, Dr. Thompson's filed a subsequent Medicare enrollment application for reenrollment in the Medicare program. [See Exhibit H] In this application, Dr. Thompson admitted he had been previously suspended as a Medicare health care provider. On or about this same date, Dr. Thompson was reinstated as a provider of Medicare healthcare services by the Medicare Office of Inspector General. [See Exhibit I].

38. On or about June 7, 2007, Plaintiff received a letter dated May 30, 2007 from Palmetto GBA [See Exhibit X] in regard to medical services provided by Decedent on behalf of Medicare beneficiaries for the dates of October 26, 1998 to December 10, 2001.

39. On or about July 11, 2007, Plaintiff received information from the Decedent's then-current employer, FirstChoice Health Care indicating Decedent's attorneys [Wes Jackson of Nexsen Pruett] had filed a request for reconsideration request to Medicare. A copy of the letter from Mr. Jackson is attached hereto as Exhibit Q.

40. Plaintiff appealed the requests for recoupment of the funds noted above. The appeals were not successful. The Decedent was aware of the appeals being conducted by Plaintiff, and provided the Plaintiff limited documents to assist in the appeal. [See Exhibit V].

41. The Plaintiff did not receive further documents or information from Decedent or his employer even though such information was promised. [See Exhibit P and U]

42. Regardless, Plaintiff appealed Medicare's adverse determinations concerning Dr. Thompson. [See Exhibits R and T].

43. The administrative appeals ended in decisions of both the Medicare Administrative Law Court and the Medicare Appeals Council denial of the appeals. [See Exhibits N and S]. In this regard, the Decedent and his representatives and agents obtained an order, known as the [the 'ALJ Joe' order dated January 22, 2008] [Exhibit M] on behalf of Dr. Thompson and his then-current employer, FirstChoice Health Care of Florence, that was favorable to his position, and would have been favorable to Plaintiff. However, the Decedent, his agents and representatives failed to provide the 'ALJ Joe determination' even though they had promised to keep Plaintiff apprised of such matters. As a result, PDHC 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. This is very important as the ALJ determination made on behalf of PDHC and Dr. Thompson was dated March 14, 2008 [Exhibit N] while the 'ALJ Joe order,' as noted above was filed January 22, 2008.

44. Following the denial of all administrative appeals, and on or about May 1, 2008, Plaintiff paid to Medicare the sum of $226,740.19.

45. On or about April 13, 2010, Plaintiff filed a claim with Decedent's estate. A copy of that claim is attached hereto as Exhibit J.

46. On or about May 19, 2010, Plaintiff filed an amended claim with Decedent's estate. A copy of that claim is attached hereto as Exhibit K.

47. On May 10, 2010, the personal representative of the Decedent's denied Plaintiff's claim.

PART XI

THE LAW

Rule 3.7, SCACR, 401 is the guidance for when a lawyer should be disqualified, states as follows:

(a) A lawyer shall not act as advocate ***at a trial*** in which the lawyer is likely to be a ***necessary witness*** except where:

(1) The testimony relates to an uncontested issue;

(2) The testimony relates to the nature and value of legal services rendered in the case; or

(3) Disqualification of the lawyer would work substantial hardship on the client.

Our Supreme Court has held that choice of one's attorney in any action is substantial right of a party. In *Hagood v Summerville*, 607 S.E. 2d (SCSC 2005), the Court stated:

> 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. *See Whiteside v. Cherokee County School Dist. No. One,* 311 S.C. 335, 428 S.E.2d 886 (1993).

As in South Carolina, most courts have concluded that the right to one's chosen counsel is a substantial right, and that "[m]otions to disqualify opposing counsel are viewed with disfavor ... because they are `often interposed for tactical reasons and result in unnecessary delay." *Bennett Silvershein Assocs. v. Furman,* 776 F.Supp. 800, 802 (S.D.N.Y. 1991). For instance, the Second Circuit has "been loathe to separate a client from his chosen attorney." *Bohack Corp. v. Gulf & Western Indus., Inc.,* 607 F.2d 258, 263 (2d Cir.1979), noting that "[t]he delay and additional expense created by substitution of counsel is a factor to which [it has] attached considerable significance...." *Id.(citing Lefrak v. Arabian Am. Oil Co.,* 527 F.2d 1136, 1138-40 (2d Cir.1975).

PART XII

ARGUMENTS

A

The undersigned cannot be a witness due to the application of the South Carolina Dead man's statute

The South Carolina "Dead man Statute" provides:

> [N]o party to an action or proceeding, no person who has a legal or equitable interest which may be affected by the event of the action or proceeding, ***no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, ... shall be examined*** in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person ... when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness....[emphasis added]

S.C. Code Ann. § 19-11-20 (1985).

Section 19-11-20 of the South Carolina Code (1976) bars the ***"examination"*** of a person with an interest from testifying regarding a conversation with a deceased individual, however that interest may have arisen. The Plaintiff admits that Josiah S. Matthews, III, M.D., Alexander H. Cohen, M.D., and Tony R. Megna have an interest in the outcome of the lawsuit; and further agree that they cannot "...be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased." There is nothing in the statute that allows the Defendant, the Plaintiff or this Court to waive the statutory requirement of barring the ***"examination"*** of any person who examination is prohibited by the statute.

In *Osterneck v. Osterneck*, 6749 S.E. 2d 127 (COA 2007), our court of Appeals, specifically held that "Section 19-11-20 of the South Carolina Code (1976), the "Deadman's" statute ***bars the testimony*** of a person with an interest from testifying regarding a conversation

with a deceased individual." The *Osterneck* opinion does not discriminate between pre-trial testimony of a witness before trial and examination of a witness at trial. In fact, Rule 30 is entitled "Depositions upon Oral Examination." Similarly, our Supreme Court has used the words "examination" and deposition interchangeably – and always in the context of testimony provided under oath. See, for instance, *Cooke v. Douglas*, 240 S.C. 373, 126 S.E. 2d 20 (1962).

The Defendant has argued that the Deadman statute is intended to protect the Decedent. However, the Supreme court, in Hanahan v. Simpson, 485 SE 2d 903 (1997) stated:

> Professor McCormick calls it a "blind and brainless" technique which, in seeking to avoid injustice on one side, ignores the equal possibility of creating injustice to the other. 1 *McCorrnick on Evidence*§ 65 (4th Ed.1992).

In the current case, the Plaintiff admits the undersigned has an interest in the outcome of the litigation, and the actual language of the statute, as well our Supreme Court's interpretation of the statute, bars the examination of the undersigned in any context as to any dealings he had with the Decedent.[15]

If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); *see also City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. *Bayle*, 344 S.C. at 122, 542 S.E.2d

[15] This statement is not intended and does not mean, implicitly or otherwise, that the undersigned had any contact with the Decedent other than the contact initiated by the Decedent informing the undersigned that Decedent was sending documents to the undersigned [which have all been produced to the Defendant] as stated herein.

at 740 (Ct.App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. *Durham v. United Cos. Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); *Adkins v. Comcar Indus., Inc.*, 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); *Worsley Cos. v. S.C. Dep't of Health & Envtl. Control*, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct.App.2002); *see also Timmons v. S.C. Tricentennial Comm'n*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *Hodges v. Rainey,* 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *Bayle,* 344 S.C. at 122, 542 S.E.2d at 739.

B

EVEN IF* Rule 3.7 applies in the case at bar (which the Plaintiff denies), it only applies when an attorney, such as the undersigned, actually serves as an advocate *at trial; thus the undersigned is not disqualified from acting as an advocate in regard to pre-trial matters

In a recently published case, the United States District Court for Pennsylvania, in *Townsend v. M & T Mortgage Corporation,* ____ F. 3d____ (Case No. 3:09cv1866 USDC PA. February 8, 2010) stated:

> Courts have found that "*Rule 3.7 pertains only to the lawyer-witness's representation of her client* ***at trial***; a lawyer that may be a witness at trial is able to represent her client in pretrial matters." *Evans v. Chichester Sch. Dist.*, 533 F.2d 523, 538 (E.D. Pa. 2008); see also, *Foster v. JLG Indus.*, 372 F. Supp. 2d. 792, 798 (M.D. Pa. 2005) (finding that "The rule states that an attorney is prohibited from acting as an advocate *at* trial; however, ***there is no indication that an attorney is prohibited from acting as an advocate during pre-trial proceedings.")*** (emphasis added]).
>
> ***Disqualification under subsection (a) is triggered only when the attorney actually serves as an advocate before the jury.*** *See Murray v. Met. Life Ins. Co.*, 583 F.3d 173, 179 (2d Cir. 2009); *see also Ramey*, 378 F.3d at 282 ("The advocate-witness rule applies, first and foremost, where the attorney representing

the client before a jury seeks to serve as a fact witness *in that very proceeding.*" (emphasis added).

Similarly, the *Hagood* Court (*Hagood v. Summerville*, supra) also referred to Rule 3.7 in the context of "jury confusion." The Court stated:

> Jurors are not likely to be confused by a lawyer's employee testifying as a witness for a client while the lawyer serves as the client's advocate. Jurors should readily perceive the distinction, particularly since the opposing party may emphasize the fact of the witness's employment.

See also *Evans v. Chichester Sch. Dist.*, 533 F.2d 523, 538 (E.D. Pa. 2008); see also, *Foster v. JLG Indus.*, 372 F. Supp. 2d. 792, 798 (M.D. Pa. 2005) (finding that "The rule states that an attorney is prohibited from acting as an advocate *at* trial; however, there is no indication that an attorney is prohibited from acting as an advocate during pre-trial proceedings.") (emphasis in original).

Similarly, in *Culebras v. Rivera-Ros*, 846 F.2d 94 (First Cir. 1988)

> That Rule 3.7 is limited to situations where the lawyer-witness acts as trial counsel is underscored by the purposes most often cited as being served by the general advocate-witness rule: Three of these are 1) the possibility that, in addressing the jury, the lawyer will appear to vouch for his own credibility; 2) the unfair and difficult situation which arises when an opposing counsel has to cross-examine a lawyer-adversary and seek to impeach his credibility; and 3) the appearance of impropriety created, *i.e.*, the likely implication that the testifying lawyer may well be distorting the truth for the sake of his client. *Bottaro v. Hatton Associates*, 680 F.2d at 897; *International Electronics v. Flanzer*, 527 F.2d at 1294; *MacArthur v. Bank of New York*, 524 F.Supp. 1205, 1208-09 (S.D.N.Y.1981); *see* 6 J. Wigmore, *Evidence* § 1911 (Chadbourn rev. 1976). ABA background materials to Rule 3.7 conclude that the "most cogent rationale" for the rule is 1) the interest in protecting the integrity of the advocate's professional role by eliminating the opportunity of mixing law and fact, and 2) preventing a lawyer from injecting his or her personal belief as to the cause into the lawyer's argument to the jury. *Annotated Model Rules of Professional Conduct, ABA,* Rule 3.7, Legal Background, at 251-52. *See* A. Enker, *The Rationale of the Rule that Forbids a Lawyer to be Advocate and Witness in the Same Case,* 1977 Am.B. Found. Research J. 455.

The above concerns are absent or, at least, greatly reduced, when the lawyer-witness does not act as trial counsel, even if he performs behind-the-scenes work for the client in the same case. One who is not trial counsel will be unable to vouch for his own credibility, *Duncan v. Poythress*, 777 F.2d 1508, 1515 n. 21 (11th Cir.1985), *cert. denied*, 475 U.S. 1129, 106 S.Ct. 1659, 90 L.Ed.2d 201 (1986); *Flanzer*, 527 F.2d at 1294, and he will be unable to mix the law and the facts in the presence of court and jury. Opposing counsel, when cross-examining, will not have to cope with the lawyer-witness's enhanced status as trial counsel. And the appearance to jurors and others that the lawyer-witness may be distorting the truth will at least be diminished so long as he is not also seen to perform in the high visibility position of trial counsel. *See General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d at 717. Finally there is no danger that the lawyer-witness might inject his or her personal belief into the advocate's argument to the jury. Even under DR 5-101(B) some courts have allowed a lawyer-witness to continue as counsel in pretrial matters, though disqualified at the trial. *Moyer v. 1330 Nineteenth Street Corp.*, 597 F.Supp. 14, 17 (D.D.C.1984); *Brotherhood of Railway Carmen v. Delpro Co.*, 549 F.Supp. 780, 789 (D.Del.1982); *Norman Norell, Inc. v. Federated Department Stores, Inc.*, 450 F.Supp. 127, 130-31 (S.D.N.Y.1978). *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1503 (1983). See also "[A] lawyer who is likely to be a necessary witness may still represent a client in the pretrial stage." *DiMartino v. Eighth Jud. Dist. Ct.*, 119 Nev. 119, 66 P.3d 945, 946 (2003)(citing *Culebras Enters. Corp. v. Rivera-Rios*, 846 F.2d 94 (1st Cir.1988); *United States v. Castellano*, 610 F.Supp. 1151, 1167 (S.D.N.Y.1985); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1529 (1989); and State Bar of Mich. Comm. on Prof'l and Jud. Ethics, RI-299 (Dec. 18, 1997)); *see also World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc.*, 866 F.Supp. 1297, 1303 (D.Colo.1994) ("Rule 3.7 applies only to an attorney acting as an

advocate at trial. Thus, with the informed consent of the client, a lawyer who is likely to be a necessary witness may accept employment and continue to represent the client in all litigation roles short of trial advocacy." (internal quotations omitted)); *Cerillo v. Highley*, 797 So.2d 1288, 1289 (Fla.Dist.Ct.App. 2001) (concluding trial court erred in disqualifying counsel who would be witness at trial from participating in pretrial depositions); *In re Bahn*, 13 S.W.3d 865, 873 (Tex.App.2000) ("[A]n attorney who is disqualified from representation at trial can continue to participate in the client's case until trial commences.").

In addition to the foregoing, there is a substantial line of case that hold "`[D]isqualification is considered a drastic measure which courts should hesitate to impose except when absolutely necessary.'" *Wyeth v. Abbott Labs.*, 692 F. Supp. 2d 453, 457 (D.N.J. 2010) (quoting *Carlyle Towers Condo. Ass'n, Inc. v. Crossland Sav., FSB*, 944 F. Supp. 341, 345 (D.N.J. 1996))). "[M]otions to disqualify opposing counsel are disfavored . . . not only because disqualification robs one's adversary of her counsel of choice, but also because of the risk . . . that one could subvert the ethical rules in an attempt to use them as a procedural weapon." *Wolf, Block, Schorr & Solis-Cohen LLP*, Civ. A. No. 05-6038, 2006 WL 680915, at *1 (E.D. Pa. Mar. 9, 2006) (citing *Cohen v. Oasin*, 844 F. Supp. 1065, 1067 (E.D. Pa. 1994), *Commonwealth Ins. Co. v. Graphix Hotline, Inc.*, 808 F. Supp. 1200, 1203 (E.D. Pa. 1992), *Hamilton v. Merrill Lynch*, 645 F. Supp. 60, 61 (E.D. Pa. 1986), and Pa. Rules of Prof'l Conduct, Preamble and Scope ¶ 19 ("[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.")); see also Caracciolo v. Ballard, 687 F. Supp. 159, 160-61 (E.D. Pa. 1988) ("The Code of Professional Responsibility is applied to deter professional misconduct, and to preserve the profession's standing in the community-it was not

intended as an addition to the depressingly formidable array of dilatory strategies already part of the litigator's arsenal.").

The Defendants have not produced one scintilla of evidence that the undersigned has any knowledge whatsoever of any document provided by the Decedent for one reason – the undersigned knows nothing other than the documents which exist and have been produced to the Defendant. The Defendants proclaim the undersigned is a witness due to the litigation involving the Plaintiff with Medicare over the purported need of the Defendant to determine the Plaintiff's dealings with the undersigned during the Plaintiff's administrative appeals of the adverse decisions made by Medicare against Plaintiff. Other than the obvious attorney-client and work-product privilege issues related to this issue between Plaintiff and the undersigned, the primary answer to this demand by the Defendant is:

a. The issue in the Medicare administrative proceedings were Medicare's decision to hold Plaintiff liable as the assignee of the Decedent's billings to Medicare. See Exhibits N and S.

b. **The Decedent and his representatives and agents obtained an order, known as the [the 'ALJ Joe' order dated January 22, 2008] [Exhibit M] on behalf of Dr. Thompson and his then-current employer, FirstChoice Health Care of Florence, that was favorable to his position, and would have been favorable to Plaintiff. However, the Decedent, his agents and representatives failed to provide the 'ALJ Joe determination' even though they had promised to keep Plaintiff apprised of such matters. [See affidavit of Mark Matthews, Exhibit Z, and Exhibit P] As a result of the failure of the Decedent to provide the 'ALJ Joe Order', the Plaintiff 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. The importance of the issue is demonstrated by the fact that the ALJ determination made on behalf of PDHC and Dr. Thompson was dated March 14, 2008 [Exhibit N] while the 'ALJ Joe order,' as noted above was filed January 22, 2008. Once again, the failure of the Decedent and his agents, i.e., their own negligence, caused avoidable damage. As a result, the Defendant is estopped from asserting any action against the Plaintiff in light of his duty to disclose the 'Joe' order to the Plaintiff in the first instance.**

Our Supreme Court has held:

> ... Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. *Ridgill v. Clarendon County,* 192 S.C. 321, 6 S.E.2d 766 (1939). Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel. *Welch v. Edisto Realty Co.,* 170 S.C. 31, 169 S.E. 667 (1933). There is no requirement that the person whose silence misleads another have actual knowledge of the true facts if circumstances are such that knowledge is necessarily imputed to him. *Accord Alwes v. Hartford Life & Accident Ins. Co.,* 372 N.W.2d 376 (Minn.Ct.App.1985). Negligence will take the place of the intent to deceive when there is a duty to disclose. *Id; see also* 3 *Pomeroy's Equity Jurisprudence* § 809 at 218 (5th ed. 1941).
>
> *Southern Dev. Land and Golf Co. v. South Carolina Pub. Serv. Auth.,* 426 S.E.2d 748 (1993), *aff'g in part and rev'g in part* 305 S.C. 507, 409 S.E.2d 428 (Ct.App.1991).
>
> See also *Macaulay v. Howard,* 230 S.C. 140, 94 S.E. (2d) 393. In *Hubbard v. Beverly,* 197 S.C. 476, 15 S.E. (2d) 740, 135 A.L.R. 1206, we 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.

C

There is no testimony to be given by Mr. Megna as he did not have discussions with the Decedent concerning the issues in dispute

The Defendants have provided no evidence of any substantive discussions between Mr. Megna and Dr. Thompson for the simple reason that there were none. While it is also true that Mr. Megna performed the legal work on behalf of PDHC in regard to the claim made against PDHC by Medicare, *the decedent had his own independent counsel representing both him and his current employer, FirstChoice Health Care.* See Exhibit Q.

Moreover, as evidenced by the attached affidavits of Mark Matthews, he worked with Dr. Thompson in all matters related to the completion of applications and other matters in the case at bar. As Mr. Matthews notes, at no time was he aware of any discussions between Dr. Thompson and Mr. Megna. Moreover, the undersigned has attached his affidavit that he had no

conversations with Dr. Thompson other than Dr. Thompson indicating he was being represented by independent counsel in Columbia who had been secured by his then-current employer, FirstChoice Health Care of Florence. See Exhibit Q. With all due respect, the Defendant's arguments that Mr. Megna is disqualified from representing Plaintiff in these matters are inappropriate, and, at best, intended for reasons of tactics and harassment.

Finally, as the Second Circuit has stated, "[t]he delay and additional expense created by substitution of counsel is a factor to which [it has] attached considerable significance...." Mr. Megna has been handling this litigation for several years, his testimony at trial is not necessary and the Defendant's suggestions to the contrary are untrue.

D

Even if there is any testimony that is to be given by counsel for Plaintiff at trial (which Plaintiff denies) any such testimony by counsel for Plaintiff is not "necessary"

The Plaintiff respectfully directs the Court's attention to the recent case of *Jones v. Omaha Housing Authority*, ____ F. 3d ____ (Case No. 3:09cv1866 USDC Nebraska) February 18, 2010) in which the Court stated and held that:

> [T]he extreme measure of disqualifying a party's counsel of choice should be imposed only when absolutely necessary." *Macheca Transp. Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006). Further, "[b]ecause of the potential for abuse by opposing counsel, [motions to disqualify counsel] should be subjected to particular scrutiny." *Id.* (internal quotations omitted); see *Droste v. Julien*, 477 F.3d 1030, 1035 (8th Cir. 2007). Pursuant to the Nebraska Rules of Professional Conduct, Rule 3.7: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.. . ." Neb. Ct. R. of Prof. Cond. § 3-503.7 (also providing exceptions to the rule that are not relevant here).
>
> "A court cannot order disqualification simply upon the moving party's representation that the lawyer it seeks to disqualify is a necessary witness; the key is the evidence showing that the lawyer is a necessary witness." *Beller v. Crow*, 742 N.W.2d 230, 235 (Neb. 2007). The movant may show counsel is a necessary witness when "(1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable

elsewhere." *Id.* In any event, "[i]n most jurisdictions, a lawyer who is likely to be a necessary witness may still represent a client in the pretrial stage." *Droste,* 477 F.3d at 1035 (quotation omitted) (citing cases). (emphasis added).

...[D]isqualification is warranted only where the testimony given by counsel is "necessary." *Purgess v. Sharrock,* 33 F.3d 134, 144 (2d Cir. 194) (internal quotation marks and citation omitted); *see also Capponi v. Murphy,* No. 08 Civ. 4449 (VM), 2009 WL 2957804, at *10 (S.D.N.Y. Sept. 11, 2009) ("Courts have interpreted [the witness-advocate rule] to require disqualification where the attorney's testimony is necessary." (internal quotation marks omitted)). When considering the necessity of testimony, "[a] court should examine factors such as the significance of the matters, weight of the testimony, and availability of other evidence." *Kubin v. Miller,* 801 F. Supp. 1101, 1113 (S.D.N.Y. 1992)(internal quotation marks and citation omitted). Furthermore, to the extent that the attorney would not be providing testimony on his client's behalf, the party seeking to disqualify the attorney must show that there is a substantial likelihood that the testimony would be prejudicial to the witness-advocate's client. *Murray v. Met. Life Ins. Co.,* 583 F.3d 173, 178 (2d Cir. 2009) ("The movant, therefore, `bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring [to the witness-advocate's client] is substantial.'" (quoting *Lamborn v. Dittmer,* 873 F.2d 522, 531 (2d Cir. 1989) (alteration in original))). Prejudice exists where the testimony would be "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony." *Lamborn,* 873 F.2d at 531 (citation omitted).

It is certainly beyond any reasonable dispute at this time that the additional information which the Defendants wish to obtain from the Plaintiff are the work product of Plaintiff's counsel actually prepared during the course of litigation on behalf of PDHC ***while Dr. Thompson was independently represented*** by counsel from another law firm. [See Exhibits Q and LL].

"The movant, ... bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring [to the witness-advocate's client] is substantial.'" (quoting *Lamborn v. Dittmer,* 873 F.2d 522, 531 (2d Cir. 1989) (alteration in original))).

Murray v. Met. Life Ins. Co., 583 F.3d 173, 179 (2d Cir. 2009)

"For a lawyer to be a necessary witness, his testimony must be relevant, material, and unobtainable elsewhere." *Rothberg v. Cincinnati Insurance Co.*, 2008 WL 2401190 (E.D. Tenn. June 11, 2008). Thus, an attorney is a "necessary witness" only if "there are things to which he will be the only one available to testify."

D*roste v. Julien*, 477 F.3d 1030, 1035 n. 7 (8th Cir. 2007)).

Prejudice exists where the testimony would be "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony. See *Lamborn v. Dittmer,* 873 F.2d 522, 531 (2nd Cir. 1989). Similarly, many courts have held that "an attorney is a "necessary witness" only if "there are things to which he will be the only one available to testify." *State ex rel. Wallace v. Munton,* 989 S.W.2d 641, 646 (Mo.Ct. App.1999) (citing *State v. Werneke,* 958 S.W.2d 314, 321 (Mo.Ct.App.1997); *State v. Mason,*862 S.W.2d 519, 521 (Mo.Ct.App. 1993)).

In any event, the issue is academic as South Carolina, the Deadman statute, prohibits the undersigned's examination under oath as well as that of Drs. Cohen and Matthews under any circumstances.

PART XIII

SUMMARY

A

The Plaintiff's action against the Defendant is based on the Decedent's responsibilities of honesty and corresponding duties to the Plaintiff – as the Defendant admitted he was duty-bound to do in regard to his employment position with Plaintiff. (Decedent had a pecuniary interest since he was paid by Plaintiff as a physician to provide medical services.) [**Page 5, ¶ 25 of Defendants Answer filed June 17, 2010,** "the relationship of Decedent with Plaintiff was such

that Decedent 'was bound to act in good faith and with due regard to Plaintiffs' interest." **[Page 4, ¶ 21 of Defendants Answer filed June 17, 2010**, the relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff." Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." **[Page 5, ¶ 26 of Defendants Answer filed June 17, 2010]**, and, "Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Plaintiff." **[Page 6, ¶ 34 of Defendants Answer filed June 17, 2010]**.

It is undisputed that the Decedent received three letters from Medicare regarding his disbarment from Medicare. The first letter was dated March 11, 1996, [Exhibit F], the second letter was dated June 12, 1998, the third letter was dated September 14, 1998. For his own reasons, the Decedent failed to provide the information requested by Medicare and failed to inform Plaintiff. Affidavits of employees of Plaintiff - Exhibits Y, Z, AA, BB, CC, DD, and EE.

It is undisputed that the Plaintiff paid Medicare $226,740.19 to settle the liability of Plaintiff to Medicare based on the assignment of the Defendant's billings from treating Medicare patients to Plaintiff. See Exhibit B in which the Decedent assigned his Medicare billings to Plaintiff and simultaneously certified he was an eligible Medicare provider. See also the letter of September 14, 2008 from Medicare to Decedent. The sad, undeniable truth is that that the Decedent was untruthful to Medicare and to Plaintiff as well as others.

The Defendant has identified no legal duty owed to the Decedent by Plaintiff to assure the Decedent was not deceitful in the first instance. There is no legal duty owed by the Plaintiff under such circumstances. Even so, the Plaintiff undertook to protect its own interests, and appealed the administrative decisions of Medicare to recoup the funds. During this time, the Decedent was represented by independent counsel, obtained a favorable decision in a separate

proceeding concerning similar circumstances, *and failed to advise the Plaintiff.* As the favorable 'ALJ Joe' decision *preceded* the adverse determination made against the Plaintiff, and the Decedent and his agents and counsel, failed to inform Plaintiff, the Decedent, once again, was silent in the fact of his obligation to be truthful. He and his agents were silent to their own detriment. As a result, their own concealment of material information estops them from making any claim or defense against the Plaintiff.

B

The right to counsel of one's choosing is, our Supreme Court has noted, a substantial right that no Court should interfere short of extraordinary circumstances. The Defendants have not demonstrated any fact whatsoever to which Mr. Megna will or could testify to in the first instance as a necessary witness.

C

Rule 3.7 specifically provides only that chosen counsel of a party may only be barred from representing his client [if he is disqualified at all] only at trial – not pretrial matters. Courts considering the matters, as noted above, have specifically excluded pre-trial matters from the reach of Rule 3.7. In any and all events, the case law interpreting Rule 3.7 , as noted above, specifically holds that the strictures of Rule 3.7, even if applicable, which the Plaintiff denies, only applies at a trial before a jury.

D

As noted on the attached affidavits, the conversations in regard to the matters that form the basis of the lawsuit between the parties primarily involved Mr. Mark Matthews, James D. McInnis, M.D., and Decedent. It is admittedly true that Decedent had conversations with both Drs. Matthews and McInnis, the conversations centered about the Decedent informing them he

could treat any patient as long as he worked under the supervision of physicians who were approved by the state Board of Medical Examiners. It is also true that the decedent never told Drs. Matthews or Cohen, or any other person in the employ of PDHC, that he had ever been disbarred by Medicare in the first instance. [See Exhibits Y, Z, AA, BB, CC, DD, and EE]. The Decedent never informed any employee of Plaintiff he had been disbarred by Medicare, nor provided them any other information that would have placed them on notice to believe Dr. Thompson was not telling them the truth on his applications to Medicare. Their collective statements are that the Decedent, knowing of his disbarment from Medicare, failed to advise Plaintiff, failed to advise them individually, failed to advise Medicare. Moreover, the Decedent did not simply forget to provide the Plaintiff and others of the original March, 1996 letter from Medicare disbarring him from the Medicare program [See Exhibit F], the Decedent 'forgot' a second letter from Medicare dated June 12, 1998, [Exhibit FF], and a third letter from Medicare dated September 14, 2008 from Medicare [Exhibit O], just weeks before he was employed by Plaintiff. It defies all reason that the Decedent 'forgot' all three letters from Medicare. And it defies all reasonableness of the Personal Representatives of the Decedent's estate, in their roles as fiduciaries, to place any blame whatsoever on the Plaintiff when they know:

a. The Decedent was represented by independent counsel during the time in question,

b. The Decedent as well as his independent counsel have actually admitted Decedent's malfeasance,

c. The Decedent nor his independent counsel nor his then-employer, FirstChoice disclosed to Plaintiff the favorable 'Medicare ALC Joe' decision that the Plaintiff could have used to the Decedent's as well as the Plaintiff's benefit if

the Medicare ALC Joe' had been disclosed in the first instance as the Decedent promised to do,

d. They have neither produced nor know [because none exists] of a scintilla of evidence to demonstrate the undersigned has any conflict of interest in these matters.

Regardless of the reasons, decedent breached his fiduciary duties to Plaintiff to be truthful as he did to his then current employer, FirstChoice. The only evidence available to this Court demonstrates the Decedent, in particular:

a. concealed information he was lawfully obliged to provide Plaintiff,

b. provided facially and factually fraudulent applications to Medicare and others,

c. ignored and did not provide to Plaintiff the three letters from Medicare informing him of his disbarment from Medicare [see Exhibits F, O and FF] even though the Defendant has admitted in its Answer filed with this Court on June 17, 2010 that Decedent had a fiduciary duty to do so,

d. negligently, purposely, and/or with deliberate indifference caused Plaintiff substantial damage.

E

The undersigned has been CEO and General Counsel to Plaintiff for fifteen (15) years. and has been handling the litigation involved in these proceedings since 2007. Not only is there wrongdoing involved in such matters, but the Defendant has not demonstrated one matter which the undersigned could testify other than matters of pure and complete speculation with no foundation in fact or reality. It would be unnecessarily burdensome, expensive and cause the Plaintiff additional damage for the Plaintiff to change attorneys. It is not reasonable for the

Motion to Disqualify to be interpreted as anything other than an inappropriate litigation tactic by the Defendant as well as their attorneys. – in spite of their ethical and fiduciary responsibilities to the contrary.

As noted by the Second Circuit Court of Appeals in *Murray v. Metropolitan Ins. Co.*, 583 F.2d 173 (2009):

> Rule [3.7] lends itself to opportunistic abuse. "Because courts must guard against the tactical use of motions to disqualify counsel, they are subject to fairly strict scrutiny, particularly motions" under the witness-advocate rule. *Lamborn v. Dittmer*, 873 F.2d 522, 531 (2d Cir.1989). The movant, therefore, "bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring [to the witness-advocate's client] is substantial." *Id.* "Prejudice" in this context means testimony that is "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony."

Respectfully, the Defendant's Motion to Disqualify the undersigned is nothing more than "opportunistic abuse" of the litigation process.

F

As noted above, the behaviors of counsel for the Defendant's in these matters, in their best light, have crossed the line from advocacy on behalf of the Defendant, to a dishonest manipulation of the facts and attempts to smear the professional integrity of the undersigned with mistruths and untruths. Not only has the undersigned never represented the interests of the Decedent, the Decedent obtained independent counsel in regard to these matters, and the undersigned has consistently represented the interest of Plaintiff. The Defendant has not produced one scintilla of evidence that the undersigned ever discussed or had knowledge of any of the events surrounding the Decedent's continuing misconduct.

The Plaintiff, however, has demonstrated that the Decedent repeatedly failed to be forthcoming and truthful about his disbarment from Medicare in the face of his admitted duty to disclose all facts pertinent to his ability to treat and bill Medicare in the first instance. ... Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. *Ridgill v. Clarendon County,* 192 S.C. 321, 6 S.E.2d 766 (1939). There is no requirement that the person whose silence misleads another have actual knowledge of the true facts if circumstances are such that knowledge is necessarily imputed to him. *Accord Alwes v. Hartford Life & Accident Ins. Co.*, 372 N.W.2d 376 (Minn.Ct.App.1985). Negligence takes the place of the intent to deceive when there is a duty to disclose. *Id; see also* 3 *Pomeroy's Equity Jurisprudence* § 809 at 218 (5th ed. 1941). *Southern Dev. Land and Golf Co. v. South Carolina Pub. Serv. Auth.*, 426 S.E.2d 748 (1993), *aff'g in part and rev'g in part* 305 S.C. 507, 409 S.E.2d 428 (Ct.App.1991).

G

The undersigned has an admitted interest in the outcome in the litigation, and the South Carolina "Dead Man " statute, by its plain language, bars "the examination" of the undersigned in any and all events. The wording of the statute is plain on its face. It is not simply a defense available to the Defendant or the Plaintiff. It is what it is – a legislative determination and mandate that the undersigned [as well as Drs. Cohen and Matthews] cannot be 'examined' in regard to any such matters. As a result, undersigned counsel is unable, in any circumstances and as a matter of law, to provide testimony under oath in any venue, including but not limited to the trial of this matter.

H

While the Motion to Disqualify the undersigned [and the disparagement of the personal and professional character of the undersigned] is distasteful, the Defendant's attempts to prejudice this Court with regard to matters related to the 'Lake City litigation' is contemptuous. At the last hearing before this Court, Mr. Josey stated he would use every arrow in his quiver to defeat the claims of the Plaintiff against Defendant. A false arrow, however, will neither fly straight nor will it find its true mark. Hence Mr. Josey's metaphor of "firing arrows" is specious in form and in content. True arrows are those which are formed in evidentiary truth and achieve their mark in justice. The Motion to Disqualify the undersigned has no merit, no weight, and no validity in law or fact – and cannot be reasonably said to be filed for any purpose other than to embarrass, hinder, and delay these proceedings. As offered by Mr. James and Mr. Josey, the Motion to Disqualify violates their basic obligations and duties of candor and honesty to this Court, and fairness to opposing council, [Rule 401, Rules 3.3 and 3.4, SCACR] as well as Rule 4.4.[16] In any and all events, the undersigned has never represented the Decedent in any matter, nor has the undersigned had any conversations with the undersigned in regard to these matters excepting the one conversation that Decedent initiated to provide the Plaintiff with limited documents that were disclosed to the Defendant during discovery. The Decedent obtained independent counsel in regard to these matters, and the undersigned has consistently represented the interest of Plaintiff. The Defendant has not produced one scintilla of evidence that the undersigned ever discussed or had knowledge of any of the events surrounding the Decedent's disbarment from Medicare for the simple reason no such evidence exists in the first instance.

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[16] Earlier this week, our Supreme Court issued its decision in *In re: White*, ___ S.C.___. [Opinion No. 26939 March 7, 2011].. The Court's discussions of duties of counsel to opposing parties, to third parties, to this Court, and to opposing counsel should provide, at the minimum, pause for thought.

The Plaintiff respectfully requests the Motion to Disqualify filed by Defendant be denied, and for this Court to provide such other and further relief as is just and appropriate, including reasonable attorney's fees and costs for the defense of the matter.

Respectfully submitted,

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

March 11 2011.

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

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

Pee Dee Health Care, P.A.

Plaintiff.

v.

Estate of Hugh S. Thompson,

Defendant.

ANSWERS TO DEFENDANT'S REQUEST FOR PRODUCTION OF DOCUMENTS

The Plaintiff has submitted documents to the Defendant in it possession, including but not limited to documents from the SC Board of Medical Examiners [sent to Jay James by email on July 26, 2010], documents evidencing and detailing by line-item the funds paid to Medicare on behalf of decedent by PDHC for medical services rendered during a time when decedent represented to Medicare and Plaintiff and others that he was eligible to provide medical services to Medicare patients but he was not so eligible. These documents were sent to Jay James by email dated April 13, 2010. In addition, Plaintiff has provided an undated letter sent to Tony Megna from Dr. Thompson as well as information sent to Tony Megna by Dr. Thompson relating to the Sc Board of Medical examiners. [These documents were sent to Jay James by email dated June, 2010].

Plaintiff has also subpoenaed documents from First Choice Health Care in Florence, SC. This was Dr. Thompson's employer subsequent to his employment at PDHC. When those documents are received by Plaintiff, they will be made available to Defendant. It is also possible that past or present employees of the medical offices of Dr. Don Fowler could be witnesses

based on information and/or documents that Plaintiff has recently received concerning the deceased's employment with Dr. Fowler and information that decedent received approximately three months prior to his employment with Plaintiff did not provide to Plaintiff. The best address that Plaintiff is aware of for Dr. Fowler's office is 1106 Lombardy Street, Marion, SC.

s/Ben R. Matthews, Esquire
Ben R. Matthews, Esquire
3400 West Avenue
Columbia, SC 29203
803.254.3676
ben@pdhc.net

July 28, 2010.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

Pee Dee Health Care, P.A. **Appellant,** **V.** **Hugh S. Thompson, III, Louise T. Dailey as Personal Representatives of the Estate of Hugh S. Thompson, [Probate Case No: 2009-ES-16-424],** **Respondent.**	**Estate of Hugh S. Thompson, Case No.: 2009-ES-16-424**

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SCOTT B. SUGGS
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DARLINGTON COUNTY, S.C.

GROUNDS FOR APPEAL

AS A FIRST GROUND FOR APPEAL AND REQUEST FOR RELIEF

Pee Dee Health Care, P.A. respectfully provides the following as the grounds for appeal of the order of the probate court under appeal in this matter.

1. Pee Dee Health Care, PA [hereinafter PDHC] is a creditor of the above-named estate and is a party-in-interest pursuant in this case as defined by S.C. Code Section 62-1-21(20) which provides:

> "Interested person" includes heirs, devisees, children, spouses, *creditors*, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding. [Emphasis added].

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10

2. Pee Dee Health Care, PA [hereinafter PDHC] is also a beneficiary of the above-named estate by virtue of its contingent interest in the estate as defined by S.C. Code Section 62-1-21(20) which provides:

> (2) "Beneficiary", as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and, as it relates to a charitable trust, includes any person entitled to enforce the trust.

3. The probate estate of the deceased is separate entity as defined by S.C. Code Section 62-1-21(11), and "includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration."

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AS A SECOND GROUND FOR APPEAL AND REQUEST FOR RELIEF

[REQUEST FOR SURETY BOND]

4. The Probate Court erred in failing to require the personal representative to obtain a surety bond as required by S.C. Code Ann. §62-3-605 (and S.C. Code Ann. §62-3-1310) to insure the PR is performing her fiduciary duties on behalf of the entire estate - including creditors - and not simply themselves. 62-3-605 provides:

> Demand for bond by interested person.
>
> Any person apparently having an interest in the estate worth in excess of one thousand dollars, or any creditor having a claim in excess of one thousand dollars, may make a written demand that a personal representative give bond. The demand must be filed with the court and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required in an amount determined by the court as sufficient to protect the interest of the person or creditor demanding bond, but the requirement ceases if the person or creditor demanding bond ceases to have an interest in the estate worth in excess of one thousand dollars or a claim in excess of one thousand dollars. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate or to pay the person or creditor demanding bond. Failure of the personal representative to meet a requirement of

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bond by giving suitable bond within thirty days after receipt of notice is cause for his removal and appointment of a successor personal representative. PDHC respectfully requests this Court require a surety bond in such amount to "to protect the interest of the person or creditor demanding bond" as required by 62-3-605 and in conformance with the requirements of S.C. Code Ann. Section 62-3-606.

SECTION 62-3-604, Bond amount; security; procedure; reduction, states:

If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the court indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal estate during the next year, and he shall execute and file a bond with the court, or give other suitable security, in an amount not less than the estimate. The court shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. The court may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in Section 62-6-101) in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person the court may increase or reduce the amount of the bond, release sureties, dispense with security or securities, or permit the substitution of another bond with the same or different sureties.

9. S.C. Code Section 62-3-1310. Bond for handling of proceeds by personal representative provides:

The regular bond of the personal representative must protect the creditors, heirs, devisees, or other interested persons, if any, in the handling of the proceeds of sale by the personal representative, but in case no such bond has been given, the court shall require the giving of a bond by such personal representative as provided in Sections 62-3-603, 62-3-604, and 62-3-605.

10. The probate overlooked that S.C. Code Ann. Section 62-3-711 requires the PR to act a s a fiduciary to the creditors of the estate, to wit, "Until termination of his appointment or unless otherwise provided in Section 62-3-910, a personal representative has the same power over the title to property of the estate that an absolute owner would have, **in trust however, for the benefit of the creditors and others interested in the estate**... [emphasis added].

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AS A THIRD GROUND FOR APPEAL AND REQUEST FOR RELIEF

[DENIAL OF REQUEST FOR HEARING]

11. The probate court overlooked its responsibility to hold a hearing following appropriate time for PDHC to conduct discovery and to prepare for such hearing to allow PDHC to submit testimony and evidence as to the amount of the surety bond needed to protect its interests. The probate court's refusal to do so denied PDHC due process and equal protection of the law. "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Ogburn-Matthews*, 332 S.C. at 562, 505 S.E.2d at 603; *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (stating that the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *cf.* S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard..."). See also Rule 81 SCRCP which requires application of the rules of civil procedure to the degree they are not inconsistent with the statutes governing probate in South Carolina. There is no statute that abrogates the right of meaningful notice and opportunity to be heard by any party. See also Rule 6(d), SCRCP. See also Rule 40(h) which requires that no contested nonjury action may be called for trial on the merits until 120 days after the filing of the summons and complaint, or the last pleading that adds a new party to the action, unless agreed to in writing by all parties. It is undisputed that in this case that the Probate Court required PDHC's objections to be heard prior to the expiration of the 120 day requirement of Rule 40(h), SCRCP.

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AS A FOURTH GROUND FOR APPEAL AND REQUEST FOR RELIEF

[REQUEST TO APPOINT SPECIAL ADMINISTRATOR]

12. The probate court overlooked PDHC's request to appoint a special administrator pursuant to S.C. Code Section 62-3-614 based on the inherent conflicts of interest between the PR as a beneficiary of the estate and the PR as a fiduciary of the estate acting on behalf of all interested parties as required by S.C. Code Ann. Section 62-3-703(a) which requires that a PR is a

> "A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by Section 62-7-933. A personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this Code, the terms of the will, and any order in proceedings to which he is party for the best interests of successors to the estate.

12. PDHC requests this Honorable Court to inquire into the propriety of the personal representative retaining Mr. Renee Josey of the Turner Padgett Law firm. PDHC is informed and believes a conflict of interest is inherent in such retention. Such action, while beneficial to the PRs, is not in the best interests of the estate. The concerns of PDHC include but are not limited to the need for any and all representatives of the estate to protect the interests of the estate as opposed to the interests of the PRs. PDHC's concerns are that Mr. Renee Josey of Turner Padgett cannot adequately and appropriately represent the interests of the probate estate [which includes the creditors such as PDHC under the probate code] as Mr. Josey was the U.S. Attorney investigating the decedent for the same matters that are the subject of PDHC's claim against the probate estate, i.e., Medicare fraud and abuse. PDHC respectfully maintains this matter is exacerbated in light of the probate code's express disapproval of conflicts of interest. See, for example,

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S.C. Code Ann. 62-3-713 -- and 62-7-933 which requires that a personal representative be "a fiduciary who shall observe the standards of care applicable to trustees as described by Section 62-7-933. While Mr. Josey has refuted claims of conflicts of interest, PDHC respectfully submits there has been no adequate investigation as to the involvement of the US Attorney in this matter.

13. In addition, PDHC respectfully requests this Court to inquire into the actual roles of Turner Padgett, who they are representing, as well as estimated fees and expenses, and the resulting benefit to the estate as opposed to the PRs. PDHC makes its request pursuant to S.C. Code Section 62-3-711(a), which provides:

> (a) After notice to all interested persons, on petition of an interested person or on appropriate motion if administration is under Part 5 [Sections 62-3-501 et seq.], the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds..

AS A FIFTH GROUND FOR APPEAL AND REQUEST FOR RELIEF [DENIAL OF REQUEST FOR HEARING]

[REQUEST FOR ADEQUATE TIME TO COMPLETE DISCOVERY AND HAVE A MENAINFULOPPORTUNITY TO BE HEARD AS REQUIRED BY S.C. SECTION 62-1-403(2).

14. The probate court overlooked PDHC's request that it allow PDHC sufficient time to complete discovery and other inquiries prior to allowing the personal representative to make further disbursements or retention of professionals representing the estate without notice to all parties, including PDHC, with the opportunity to be heard by this Court in a meaningful manner as required by S.C. Section 62-1-403(2).

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Scott B. Suggs
CLERK OF COURT/PMC
DARLINGTON COUNTY, S.C.

15. PDHC is informed and believes it is undesirable for one of the beneficiaries to act as PR and trustee, since she is thereby put in a position to favor herself at the expense of other proper claimants and beneficiaries of the estate. See *Cartee v. Lesley*, 290 S.C. 333, 350 S.E. (2d) 388 (1986). *Yates v. Yates*, 255 Ill. 66, 99 N.E. 360 (1912); *Selleck v. Hawley*, 331 Mo. 1038, 56 S.W. (2d) 387 (1932). In the event this Court finds the personal representative of the estate to be in conflict with other claimants and beneficiaries of the estate, PDHC respectfully requests this Court to terminate the appointment of the personal representative and to replace the personal representative with a neutral party who is able to fairly and appropriately assess and protect the interests of all claimants and beneficiaries of the estate, and who is capable of discharging the duties of her office for the benefit of all claimants. PDHC makes it request pursuant to S.C. Code Section 62-3-611: Termination of appointment by removal; cause; procedure.

> (a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in Section 62-3-607, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration, or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.
>
> (b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this State to administer local assets.

16. PDHC further respectfully directs this Court's attention to S.C. Code Ann. 62-3-703 which states "A personal representative is a fiduciary who shall observe the standards of care

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

applicable to trustees as described by Section 62-7-933. Our Court of Appeals has addressed the matter of a trustee as a fiduciary and stated:

> Proper grounds for removal include the existence of hostility and friction between the trustee and the beneficiaries, or between the trustee and his co-trustees, causing interference with the proper administration of the trust. Also, where ill-feeling between the trustee and the beneficiaries or between the trustee and his co-trustees reaches such a level that future cooperation and proper administration become improbable, the trustee may be removed even if misconduct is not proven. The court's paramount regard must be for the interest of the trust and the rights of the beneficiaries.
>
> In *Wilson v. Wilson*, 145 Mass. 490, 14 N.E. 521 (1888), the Supreme Judicial Court of Massachusetts decreed: "As to the removal of trustees without misconduct attributable to hostility, courts will remove them whenever it is essential to the due 98*98 exercise of the trust, even when they have been guilty of no misconduct and wish to remain." *Id.* at 522.
>
> In *Maydwell v. Maydwell*, 135 Tenn. 1, 185 S.W. 712 (1916), the daughter of the testator and income beneficiary of a trust sought to have her mother removed as trustee. The court had no doubts about the "honesty or acumen" of the mother and found she had managed the estate well. However, the evidence showed the relationship between the mother and daughter was such that "it would be inadvisable and prejudicial to the best interests of both and of the estate for [the mother] to be continued as trustee." *Id.* at 713. Thus, the Tennessee Supreme Court reversed the lower court's decision to leave the mother as trustee.
>
> *Floyd v. Floyd*, 615 SE 2d 465 (COA 2005).

17. In addition, PDHC makes its request on the basis of SC Code Ann. Section 62-6-203.

WHEREFORE, PDHC respectfully requests this court to reverse the order of the probate court

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and to provide the relief as requested hereinabove by PDHC.

Respectfully submitted,

s/ Benjamin R. Matthews, Esquire
Benjamin R. Matthews, Esquire
Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
Attorneys for PDHC
803.799.1700
tmegna@gmail.com
ben@pdhc.com

November 9, 2010.

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SCOTT B. SUGGS
CLERK OF COURT
DARLINGTON COUNTY, SC.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

IN THE PROBATE COURT

Pee Dee Health Care, P.A. **Appellant,** **V.** **Hugh S. Thompson, III, Louise T. Dailey as Personal Representatives of the Estate of Hugh S. Thompson, [Probate Case No: 2009-ES-16-424],** **Respondent.**	**Estate of Hugh S. Thompson, Case No.: 2009-ES-16-424**

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GROUNDS FOR APPEAL

AS A FIRST GROUND FOR APPEAL AND REQUEST FOR RELIEF

Pee Dee Health Care, P.A. respectfully provides the following as the grounds for appeal of the order of the probate court under appeal in this matter.

1. Pee Dee Health Care, PA [hereinafter PDHC] is a creditor of the above-named estate and is a party-in-interest pursuant in this case as defined by S.C. Code Section 62-1-21(20) which provides:

> "Interested person" includes heirs, devisees, children, spouses, *creditors*, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding. [Emphasis added].

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2. Pee Dee Health Care, PA [hereinafter PDHC] is also a beneficiary of the above-named estate by virtue of its contingent interest in the estate as defined by S.C. Code Section 62-1-21(20) which provides:

> (2) "Beneficiary", as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and, as it relates to a charitable trust, includes any person entitled to enforce the trust.

3. The probate estate of the deceased is separate entity as defined by S.C. Code Section 62-1-21(11), and "includes the property of the decedent, trust, or other person whose affairs are subject to this Code as originally constituted and as it exists from time to time during administration."

AS A SECOND GROUND FOR APPEAL AND REQUEST FOR RELIEF

[REQUEST FOR SURETY BOND]

4. The Probate Court erred in failing to require the personal representative to obtain a surety bond as required by S.C. Code Ann. §62-3-605 (and S.C. Code Ann. §62-3-1310) to insure the PR is performing her fiduciary duties on behalf of the entire estate - including creditors - and not simply themselves. 62-3-605 provides:

> Demand for bond by interested person.
>
> Any person apparently having an interest in the estate worth in excess of one thousand dollars, or any creditor having a claim in excess of one thousand dollars, may make a written demand that a personal representative give bond. The demand must be filed with the court and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required in an amount determined by the court as sufficient to protect the interest of the person or creditor demanding bond, but the requirement ceases if the person or creditor demanding bond ceases to have an interest in the estate worth in excess of one thousand dollars or a claim in excess of one thousand dollars. After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate or to pay the person or creditor demanding bond. Failure of the personal representative to meet a requirement of

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bond by giving suitable bond within thirty days after receipt of notice is cause for his removal and appointment of a successor personal representative. PDHC respectfully requests this Court require a surety bond in such amount to "to protect the interest of the person or creditor demanding bond" as required by 62-3-605 and in conformance with the requirements of S.C. Code Ann. Section 62-3-606.

SECTION 62-3-604, Bond amount; security; procedure; reduction, states:

If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the court indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal estate during the next year, and he shall execute and file a bond with the court, or give other suitable security, in an amount not less than the estimate. The court shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. The court may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in Section 62-6-101) in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person the court may increase or reduce the amount of the bond, release sureties, dispense with security or securities, or permit the substitution of another bond with the same or different sureties.

9. S.C. Code Section 62-3-1310. Bond for handling of proceeds by personal representative provides:

The regular bond of the personal representative must protect the creditors, heirs, devisees, or other interested persons, if any, in the handling of the proceeds of sale by the personal representative, but in case no such bond has been given, the court shall require the giving of a bond by such personal representative as provided in Sections 62-3-603, 62-3-604, and 62-3-605.

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10. The probate overlooked that S.C. Code Ann. Section 62-3-711 requires the PR to act a s a fiduciary to the creditors of the estate, to wit, "Until termination of his appointment or unless otherwise provided in Section 62-3-910, a personal representative has the same power over the title to property of the estate that an absolute owner would have, **in trust however, for the benefit of the creditors and others interested in the estate**. .. [emphasis added].

AS A THIRD GROUND FOR APPEAL AND REQUEST FOR RELIEF

[DENIAL OF REQUEST FOR HEARING]

11. The probate court overlooked its responsibility to hold a hearing following appropriate time for PDHC to conduct discovery and to prepare for such hearing to allow PDHC to submit testimony and evidence as to the amount of the surety bond needed to protect its interests. The probate court's refusal to do so denied PDHC due process and equal protection of the law. "The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Ogburn-Matthews,*332 S.C. at 562, 505 S.E.2d at 603; *see also Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950) (stating that the Due Process Clause demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"); *cf.* S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard..."). See also Rule 81 SCRCP which requires application of the rules of civil procedure to the degree they are not inconsistent with the statutes governing probate in South Carolina. There is no statute that abrogates the right of meaningful notice and opportunity to be heard by any party. See also Rule 6(d), SCRCP. See also Rule 40(h) which requires that no contested nonjury action may be called for trial on the merits until 120 days after the filing of the summons and complaint, or the last pleading that adds a new party to the action, unless agreed to in writing by all parties. It is undisputed that in this case that the Probate Court required PDHC's objections to be heard prior to the expiration of the 120 day requirement of Rule 40(h), SCRCP.

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AS A FOURTH GROUND FOR APPEAL AND REQUEST FOR RELIEF

[REQUEST TO APPOINT SPECIAL ADMINISTRATOR]

12. The probate court overlooked PDHC's request to appoint a special administrator pursuant to S.C. Code Section 62-3-614 based on the inherent conflicts of interest between the PR as a beneficiary of the estate and the PR as a fiduciary of the estate acting on behalf of all interested parties as required by S.C. Code Ann. Section 62-3-703(a) which requires that a PR is a

> "A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by Section 62-7-933. A personal representative has a duty to settle and distribute the estate of the decedent in accordance with the terms of a probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this Code, the terms of the will, and any order in proceedings to which he is party for the best interests of successors to the estate.

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12. PDHC requests this Honorable Court to inquire into the propriety of the personal representative retaining Mr. Renee Josey of the Turner Padgett Law firm. PDHC is informed and believes a conflict of interest is inherent in such retention. Such action, while beneficial to the PRs, is not in the best interests of the estate. The concerns of PDHC include but are not limited to the need for any and all representatives of the estate to protect the interests of the estate as opposed to the interests of the PRs. PDHC's concerns are that Mr. Renee Josey of Turner Padgett cannot adequately and appropriately represent the interests of the probate estate [which includes the creditors such as PDHC under the probate code] as Mr. Josey was the U.S. Attorney investigating the decedent for the same matters that are the subject of PDHC's claim against the probate estate, i.e., Medicare fraud and abuse. PDHC respectfully maintains this matter is exacerbated in light of the probate code's express disapproval of conflicts of interest. See, for example,

S.C. Code Ann. 62-3-713 -- and 62-7-933 which requires that a personal representative be "a fiduciary who shall observe the standards of care applicable to trustees as described by Section 62-7-933. While Mr. Josey has refuted claims of conflicts of interest, PDHC respectfully submits there has been no adequate investigation as to the involvement of the US Attorney in this matter.

13. In addition, PDHC respectfully requests this Court to inquire into the actual roles of Turner Padgett, who they are representing, as well as estimated fees and expenses, and the resulting benefit to the estate as opposed to the PRs. PDHC makes its request pursuant to S.C. Code Section 62-3-711(a), which provides:

> (a) After notice to all interested persons, on petition of an interested person or on appropriate motion if administration is under Part 5 [Sections 62-3-501 et seq.], the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds..

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ALLENDALE COUNTY, SC

AS A FIFTH GROUND FOR APPEAL AND REQUEST FOR RELIEF [DENIAL OF REQUEST FOR HEARING]

[REQUEST FOR ADEQUATE TIME TO COMPLETE DISCOVERY AND HAVE A MENAINFULOPPORTUNITY TO BE HEARD AS REQUIRED BY S.C. SECTION 62-1-403(2).

14. The probate court overlooked PDHC's request that it allow PDHC sufficient time to complete discovery and other inquiries prior to allowing the personal representative to make further disbursements or retention of professionals representing the estate without notice to all parties, including PDHC, with the opportunity to be heard by this Court in a meaningful manner as required by S.C. Section 62-1-403(2).

15. PDHC is informed and believes it is undesirable for one of the beneficiaries to act as PR and trustee, since she is thereby put in a position to favor herself at the expense of other proper claimants and beneficiaries of the estate. See *Cartee v. Lesley*, 290 S.C. 333, 350 S.E. (2d) 388 (1986). *Yates v. Yates*, 255 Ill. 66, 99 N.E. 360 (1912); *Selleck v. Hawley*, 331 Mo. 1038, 56 S.W. (2d) 387 (1932). In the event this Court finds the personal representative of the estate to be in conflict with other claimants and beneficiaries of the estate, PDHC respectfully requests this Court to terminate the appointment of the personal representative and to replace the personal representative with a neutral party who is able to fairly and appropriately assess and protect the interests of all claimants and beneficiaries of the estate, and who is capable of discharging the duties of her office for the benefit of all claimants. PDHC makes it request pursuant to S.C. Code Section 62-3-611: Termination of appointment by removal; cause; procedure.

> (a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in Section 62-3-607, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration, or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.
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> (b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this State to administer local assets.

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16. PDHC further respectfully directs this Court's attention to S.C. Code Ann. 62-3-703 which states "A personal representative is a fiduciary who shall observe the standards of care

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applicable to trustees as described by Section 62-7-933. Our Court of Appeals has addressed the matter of a trustee as a fiduciary and stated:

> Proper grounds for removal include the existence of hostility and friction between the trustee and the beneficiaries, or between the trustee and his co-trustees, causing interference with the proper administration of the trust. Also, where ill-feeling between the trustee and the beneficiaries or between the trustee and his co-trustees reaches such a level that future cooperation and proper administration become improbable, the trustee may be removed even if misconduct is not proven. The court's paramount regard must be for the interest of the trust and the rights of the beneficiaries.
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> *Floyd v. Floyd*, 615 SE 2d 465 (COA 2005).

17. In addition, PDHC makes its request on the basis of SC Code Ann. Section 62-6-203.

WHEREFORE, PDHC respectfully requests this court to reverse the order of the probate court

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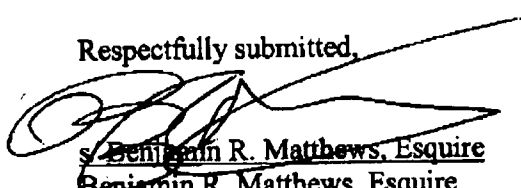
and to provide the relief as requested hereinabove by PDHC.

Respectfully submitted,



s/ Benjamin R. Matthews, Esquire
Benjamin R. Matthews, Esquire
Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
Attorneys for PDHC
803.799.1700
tmegna@gmail.com
ben@pdhc.com

December 17, 2010.

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2010 DEC 17 PM 1:39
JUDGE OF PROBATE
DARLINGTON COUNTY, SC

Jay James

From: "Tony R. Megna" <tmegna@gmail.com>
To: "Jay James" <pjlaw507@bellsouth.net>
Sent: Tuesday, April 13, 2010 4:46 PM
Subject: Re: Thompson estate

I will represent PDHC for now. If the PR decides to dispute the claim, & I am a witness, we will go from there. I had hoped to keep this as simple as possible but will do as needed. In the meantime, please send all correspondence to me if you would please - preferably by email. I am working with Ben & will see that he is brought up to speed in case we are unable to resolve matters.

Also, I am out of the office & was informed a little while ago that a copy of the claim had been mailed to the PR & sent to Darlington for filing. I will make certain all further correspondence goes directly to you.

I was also told someone from First Health had called me at the Darlington office. I do not know if it is about this but they obviously have similar concerns. I am to contact them when I am in Darlington. I will let them know we have talked & will work with both of you to resolve the matters.

Thanks, Tony

On 04/13/2010, Jay James <pjlaw507@bellsouth.net> wrote:
> Tony,
>
> You may mail any legal documents pertaining to the claim of PDHC to me as
> attorney for the personal representatives of the estate of Hugh Thompson.
>
> Are you counsel of record for PDHC? If not, who is? I suspect that if the
> matter is controverted, it will be necessary for you to be a witness.
>
> Jay James
> ----- Original Message -----
> From: Tony R. Megna
> To: pjlaw507
> Sent: Tuesday, April 13, 2010 11:30 AM
> Subject: Thompson estate
>
>
> Jay-
>
>
> Please forgive the additional e-mail. However, I meant to request in my
> previous correspondence that all communications and correspondence in regard
> to the claim of Pee Dee Health Care, P.A. be directed to me at the below
> physical address and e-mail address. In the event that the PR determines to
> disallow the claim of PDHC for any reason, I would appreciate being notified

> by e-mail as well as regular mail as I do not want their to be any
> controversy surrounding the question of the receipt of information by any
> party, and/or issues relating to statutory time bars. Also, could you
> please confirm whether or not you wish me to mail a copy of the proof of
> claim to the PR directly or whether providing the claim to you as her
> attorney directly is sufficient? Let me know and I will do whatever you
> request.
>
> Thanks, Tony
>
> Please send all written correspondence to:
>
> Tony R. Megna, Esquire
> 3400 West Avenue
> Columbia, SC 29203
> tmegna@gmail.com
> Office telephone: 803.799.1700
>
> This message is intended for the use of the person or entity to which it
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> information, that is privileged, confidential, and the disclosure of which
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> have received this in error, please notify us immediately and destroy the
> related message. Thank you.
>
>

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Sent from my mobile device

Thanks, Tony

Please send all written correspondence to:

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
tmegna@gmail.com
Office telephone: 803.799.1700

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**AFFIDAVIT**
Estate of Hugh S. Thompson,	
Defendant.	
	10-CP-16-0332

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CLERK OF COURT/R.M.C.
DARLINGTON COUNTY, S.C.

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

1. I am an employee of Pee Dee Health Care, P.A, and was so employed during the time Dr. Hugh Thompson practiced at Pee Dee Health Care, PA.

2. I have assisted in organizing the documents and exhibits for this case, and have had possession of the documents in this case for the past several months. .

3. Exhibit HH is not the original document from the files of Plaintiff. The documents provided during discovery were not separated in such a manner that allows me to know with certainty where it originated. I do not know if it was provided by the Defendant or as a result of the subpoenas to First Choice, the SC Board of Medical Examiners, Medicare, the US Department of Justice, or elsewhere. I do know however that I had never seen the document in any file maintained by our offices that we had obtained prior to this case.

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

4. The files of the Plaintiff contain the letter attached hereto as Exhibit A. Exhibit A is the same letter as Exhibit HH except that Exhibit A does not have any notations on the bottom of the page.

5. I have searched all the files and records of Plaintiff, and Exhibit HH is not in these files. I have also asked others in our offices to search for this document. No one in our office has seen the document nor has any file that contains the documents HH.

6. In regard to the Medicare 855 attached to the Defendant's Motion to Disqualify, I had an opportunity to review this document during the hearing before this Court. The document only evidenced that the 855 was being filed to initiate a change of ownership to Lake City Community Hospital. It was signed by Pete Bowman as President of Lake City Community Hospital. As the Court knows, these matters are now in litigation in Florence County Court of Common Pleas, and known generally as the 'Lake City' litigation. The '855' document has nothing to do with the case at bar as Dr. Thompson left the employ

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

7. At no time did Dr. Thompson inform me that he was barred from the Medicare program or he could not provide billable services to Medicare patients.

8. Tony Megna has been General Counsel to Pee Dee Health Care since 1995. It would cause substantial hardship and prejudice to Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it likely be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason. I cannot imagine this occurring without considerable harm and expense to PDHC, which I respectfully submit is simply unfair and inappropriate.

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

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

FURTHER THE AFFIANT SAYETH NOT.

Warren Mark Matthews, Sr.

SWORN TO BEFORE ME this
2 day of May, 2011.
(L.S.)
Notary Public for South Carolina
My Commission Expires: My Commission Expires August 10, 2017

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

Dear Tony,

I have been awfully rushed since I got back from Columbia (late last night). Sorry I haven't found all the documents you need. I will get the rest of them together as soon as possible, and if necessary, bring them up to you in Columbia.
You will find two "private agreements" with the Board: the earlier dated one (which has probably been superseded by the one executed this year) was the result of the settlement in Federal Court I referred to.
I've got literally a box full of documents concerning the arduous struggle with the Board. Any of them I can make available to you if you need them.
I think the current "private agreement" is the index document now. I'm sure I'll be talking to you again soon, and I'll try to locate everything before I do.

Thanks,

Hugh Thompson

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

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DARLINGTON	)	
	)	
PEE DEE HEALTH CARE, P.A.	)	JULY 19, 2011
	)	
PLAINTIFF,	)	
	)	MOTION HEARING
VERSUS	)	
	)	
THE ESTATE OF HUGH S. THOMPSON	)	2010-CP-16-00332
	)	
DEFENDANT.	)	
	)	

BEFORE

THE HONORABLE J. MICHAEL BAXLEY

APPEARANCES

Tony R. Megna, Esquire
Mark Matthews
Attorney for Pee Dee Mental Health

Jon Rene' Josey, Esquire
John Jay James, Esquire
ATTORNEYS FOR THE DEFENDANT

Pamela Ozment-Cartee
Circuit Court Reporter

Motion for Summary Judgment Page 03

Motion for Rule 59(e) Page 46

Certificate of Reporter Page 58

PLAINTIFF'S EXHIBIT

NUMBER	DESCRIPTION	PAGE
1	Letter to Ms. Kim Weatherford Dated July 15, 2011	07
2	Order dated January 17, 2011	47

DEFENDANT'S EXHIBITS

NUMBER	DESCRIPTION	PAGE
1	Email Dated December 9, 1:57 p.m.	29
2	Email dated December 9, 7:01p.m. Clocked at 4:21 p.m.	29

(Whereupon, this hearing began 4:22 p.m. on Tuesday, July 21, 2011.)

THE COURT: All right. Let's let the record reflect that we are now in the matter of PDHC that is Pee Dee Health Care versus The Estate of Thompson, which is case number 2010-CP-16-332 on the Court's docket.

We have today, cross motions for Summary Judgment, as well as Mr. Megna's Motion for me to reconsider disqualifying him as counsel.

We also have outstanding Motions, one from the plaintiff, which is to, leave to amend complaint, and one from the defendant, which is to compel discovery.

It will be, my intention, that we will proceed in the following way.

First. We would hear from the parties. If there is some objection to this Court having this hearing today, and structuring the hearing as it has been structured. That is, the Summary Judgment Motions coming before the Reconsideration Motion. And, whether or not we will get to the other two outstanding motions I am not certain at this point. But, that would be my intention to proceed in that fashion.

Is there an objection to that from Plaintiff?

MR. MEGNA: No, Your Honor.

THE COURT: All right. From Defendants?

MR. JOSEY: No, sir.

THE COURT: All right. Very good. Then let me first ask either party, if there is some objection to this hearing being scheduled today, or the way in which the Court would intend to proceed. From Plaintiff?

MR. MEGNA: Your Honor, the only thing --- the only comment that I would have, is that the Plaintiff's certainly apologizes if there was any inconvenience caused, because of some kind of miscommunication between our offices. And, I just want you to know that it certainly was not intentionally. And, I have canvassed my office, and they say they have not received anything. But, I have spoken to them about the need that when a court calls our office, that it is to be dealt with immediately. So, I just want you to know to the extent there was that type of issue, that you know, we offer our apologizes.

THE COURT: Very good. And that was not my point in asking you. But thank you for the courtesy of that comment. We did have a little bit of communication difficulty, but that is not a problem in any way.

What I really was focusing on was the fact that in order to allow you the benefit of your institutional knowledge of this case, is to take the Summary Judgment Motions before we take the Reconsideration Motion on the

Order to disqualify you. And, I will hold that Order in abeyance for purposes of the Summary Judgment Motions, and then decide afterwards about the reconsideration. Is there an objection to that Mr. Megna?

MR. MEGNA: Your Honor, I don't think there would be an objection to that. Although, we would like to point out one thing --- and I will think about that as I mention this to the Court.

And, we have already provided a copy to counsel, the defendants, about an hour prior to this hearing. I was in our conference room, and provided --- a letter came in the mail indicating apparently that Turner Padget has been representing our office for a number of years on a Workers' Compensation claim. I only had about three minutes to discuss this with Dr. Cohen. {sic.} It was not sent to me. It was given to me this afternoon right before the hearing to ask what they wanted to do with it, and I had not seen it prior to that time. And he says, Dr. Cohen is the President of the P.A., and he indicates that he does not wish to waive any conflict of interest, particularly without having time to consider it. Mr. James indicated that Turner Padget was willing to pull out of that Workers' Comp. case. I don't know if that is true or not true. I know that this case has been going on for a number of

years, and I do not know if that would be appropriate under the circumstances. But, I would bring that attention --- that matter to the attention of the Court, and for the record.

THE COURT: All right. That of course is the first I have heard of that. Mr. Josey, do you wish to respond?

MR. JOSEY: Yes, sir. And to answer your question you were asking to begin with; we have no objection to you proceeding in the fashion that you suggest.

THE COURT: Okay. Thank you.

MR. JOSEY: We have no objection to making argument on Summary Judgment Motion before you hear the 59(e).

THE COURT: All right.

MR. JOSEY: This conflict issue was apparently raised in the hall while I was getting water for our client. Mr. James, brought it to my attention. I called my office, and my office has checked the computer records, and we show no open files, or that we represent Pee Dee Health Care. I can tell you that when I opened this file, we did a conflict check as anytime we open any file, we go through a conflict check. When I opened this file, the computer records did show that in the

past we had represented, I believe, Pee Dee Health Care on Workers' Comp. matters, through a Workers' Compensation insurance carrier. Those matters were closed, so they did not present an ongoing conflict. I suspect that this is a closed matter, because like I say, during --- while you were concluding your criminal matter, I called one of the Workers' Comp. lawyers, who checked our computers, and he is not seeing it. I'll be glad to check it again when I get back. But I suspect that is a closed matter.

THE COURT: All right. Do you want to just note this for our record, Mr. Megna?

MR. MEGNA: Yes, sir. The only thing I would say to that is, that I do have personal knowledge and Mr. Matthews does also, that has been going on for several years. And I had, quite frankly, forgotten about it. But, it is an issue that Mr. Josey will need to address. And again, Dr. Cohen does not waive the conflict.

THE COURT: Well, let's do this. I am going to mark it as Plaintiff's Exhibit Number 1 for this proceeding. And we will take that up, as this matter progresses, as to whether there should be or will be a disqualification of Mr. Josey as well.

WHEREUPON, PLAINTIFF'S

EXHIBIT NUMBER 1 IS MARKED

AND ADMITTED INTO THE RECORD.

MR. JOSEY: Judge, since I don't have the benefit of a copy of that letter, it might help if you would just give me the --- or I can get it from the court reporter --- maybe the file number and I can look it up by the file number.

THE COURT: Ms. O'Neal will make a copy for you.

MR. JOSEY: Thank you. That will help.

THE COURT: Thank you. All right. Which of the summary judgment motions were filed first?

MR. MEGNA: I'm not sure, Your Honor.

MR. JOSEY: The Plaintiff's Motion for Summary Judgment was filed first, Your Honor.

THE COURT: All right. Let's proceed in this fashion. Of course, both of you have Summary Judgment Motions pending. So, what I would like to do is, begin with the plaintiff arguing their Summary Judgment Motion, give the defendant's an opportunity to respond to that, and at the same time, argue their Summary Judgment Motions, and then come back to Mr. Megna to respond to the Defendant's Summary Judgment Motions. So, we will hear from you first, Mr. Megna.

MR. MEGNA: Yes, sir. I mean --- I think that would be appropriate.

THE COURT: Okay.

MR. MEGNA: That we would hope the Court, at some point in time, would also consider the reconsideration of the disqualification issue.

THE COURT: Yes, sir.

MR. MEGNA: Your Honor, the Plaintiff's Motion for Summary Judgment --- First of all on the side there has been no, if I am correct, no Affidavit's filed. Nothing that would contravene any of the statements made by the plaintiffs. There has been, several Affidavits filed by the plaintiff that indicates Dr. Thompson, the deceased, came to work with Pee Dee Health Care in approximately September of 1998. At that point in time, he had already been enrolled in Medicare, and that document has been provided to the Court. And that he had enrolled sometime earlier in 1998. That is just my recollection. We can find the exact document for the Court.

All of the Affidavits indicate that when he came to work for Pee Dee Health Care, and after he came to work for Pee Dee Health Care until he left Pee Dee Health Care, no one knew anything that he had been disqualified or disbarred from Medicare. Nobody. We have uncontested Affidavits, and that is the only information before this court other than their denial. Period.

That is the only indication. So, from that standpoint, we would ask for summary judgment as to those facts, just starting off, because they are uncontested. There is no issue whatsoever as to those issues. They have not contested those Affidavits. And that is, to the Affidavits of Dr. McInnis, who indicated that in his Affidavit --- Mark, if you can tell me what those Affidavits are? We have provided those exhibits to the Court. We have that. We provided this to the Court. We have Dr. McInnis' Affidavit, which is Exhibit Y, that we provided to the Court. We have Dr. Matthew's Affidavit, which is Exhibit Z attached --- I'm sorry, Mark Matthew's exhibit that was dated 3/9/2011 provided to the Court. Exhibit AA, which is Mr. James Goodson, who is a nurse practitioner in our office. Exhibit BB, Exhibit CC, Exhibit DD, EE, and they are all saying basically the same thing, except for EE, which is the Affidavit of Ms. Noyes, indicating also the amount of the money that Pee Dee Health Care paid back to Medicare as a result of what we content was Dr. Thompson's breach of contract and breach of fiduciary duty. Those are uncontested Affidavits. They have been presented to the Court. There has been absolutely no information whatsoever presented to the defendant, contrary to those Affidavits, or to oppose those Affidavits.

In addition to that, Your Honor, when he came to Pee Dee Health Care, Dr. Thompson, if I remember correctly, it has been a while, it was 1998. He was doing pain management, and mostly pain management. And he was a paid employee of Pee Dee Health Care. That is all here. Apparently, there is no contest to that. And in the Defendant's Answer, on several times, they indicated that on or about October 25, 1998 --- this is in their Answer, they agreed or stipulated or admitted that the decedent entered into the relationship with the plaintiff providing medical service to his patients, including Medicare patients. That is on page 3, paragraph 12 of the defendant's anser, filed June 17, 2010. And this is outlined on one place in my letter that has been filed with the Court dated July 15, 2011. It says they admitted that the defendant the decedent Dr. Thompson had a --

MR. JOSEY: We don't have a letter dated July 15, 2011.

MR. MEGNA: I don't understand that. It was certainly provided to you.

Do we have another copy?

MR. JOSEY: I haven't received one.

THE COURT: All right. Just a moment, we will get you a copy.

(PAUSE.)

MR. MEGNA: Well, it was certainly copied to him.

MR. JOSEY: I would point out at this point, Judge, and I have written Mr. Megna about this. He continually sends mail to my old street address, and I have asked him to send it to a P. O. Box. We are not even at that street address anymore. That may be part of my delay, but --- You haven't received in the mail a July 15th, letter have you?

MR. JAMES: Your Honor, I have not received it in the mail. I will tell the Court that late yesterday afternoon, I went downstairs to check the original file for something else. This was between 4:30 and 5:00, and I came upon the July 15th letter, which had been filed in the Clerk of Court, I think, at 9:52 a.m. Friday morning the 15th. It said --- it had on the top of it that it had been addressed to you, and had been hand delivered. It was not hand delivered to me. Apparently not hand delivered to Mr. Megna, nor had it arrived at my Post Office box. I did make a copy of it yesterday about 4:45.

THE COURT: All right. Do you have a copy?

MR. MEGNA: I don't have any additional copies.

MR. MATTHEWS: I know they have a copy of it.

MR. JOSEY: Mr. James has a copy.

THE COURT: All right. Very good.

MR. MEGNA: They say they have a copy of it.

MR. JAMES: We did not get a copy of it at the same time that apparently you got a copy of it, Your Honor.

THE COURT: All right. This is noted for the record. Go ahead, Mr. Megna with your argument.

MR. MEGNA: Relationship with the plaintiff --- had a pecuniary interest. They admitted it. He was paid as a physician. They admit that the decedent --

THE COURT: -- Let me get you to slow down --

MR. MEGNA: -- Oh, I apologize --

THE COURT: -- for our court reporter.

MR. MEGNA: They admitted that Dr. Thompson had a relationship with the plaintiff such that he had a pecuniary interest since he was paid by the plaintiff as a physician to provide medical services.

At Page 5, paragraph 25, the defendant's answered. They admit that to that to the extent that the decedent was an employee of the plaintiff, which is opposed, that he had a duty of loyalty to the plaintiff.

They admit that he was bound to act in good faith and with due regard to the plaintiff interest.

They admit that he was obligated to communicate truthfully with the plaintiff.

They also admitted that he had not been reinstated by the Office of the Inspector General at the time he worked with the plaintiff.

They admit that his medical licenses were suspended by the South Carolina Board of Medical Examiners on or about May 31, 1994, and his licenses to practice medicine was reinstated on April 14, 1998.

They admit that he was disbarred from Medicare on or about March 31, 1996.

In another place they admit again that as an employee of the plaintiff, he had a duty of loyalty to the plaintiff.

They admit that following the decedent's, Dr. Thompson's disbarment from Medicare, by the Medicare Office of Inspector General, provisions of Federal Law provide that his Medicare privileges be suspended.

They admit that he failed --- I'm sorry. That he be suspended until the Office of Inspector General actually readmitted him.

They admit that he failed to be reinstated to the Medicare program. And that he was not reinstated by the Office of Inspector General. That is Page 2, paragraph 11 of their Answer.

They admit that the Medicare Provider Application, and a reassignment of benefits applications was prepared

to permit Dr. Thompson to treat Medicare patients.

They admit that Dr. Thompson had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or the Plaintiff.

They admit, in Paragraph 10, that Palmetto GBA, which is the Medicare contractor for South Carolina, oversees the Medicare program. But they inadvertently issued the decedent, a Medicare provider number.

All of the Affidavits indicate, like we said, that we had no knowledge of it, at all. Period. We were not told about it under the Affidavits and all the documents in this record, until 2007, if I remember --- 2008, 2007 or 2008. During this entire time we knew nothing about it until we get a letter from Medicare indicating that Pee Dee Health Care owed Medicare $226,000 plus interest, I believe.

Under federal law, we are basically stickily Pee Dee Health Care is stickily liable for the fact that Dr. Thompson did not have a --- had been disbarred from Medicare. That was our independent liability to Medicare. Period. There is no doubt that --- and we appealed that. Pee Dee Health Care appealed that obligation the whole way through the office --- the final Office of Appeals, Office of Hearings and Appeals through Medicare. There is no doubt that the Office of

Appeals --- Hearings and Appeals indicated that we were stickily liable for that amount, regardless of what Dr. Thompson did, and we paid it to the tune of $226,000 plus accrued interest.

There is also no doubt that after Dr. Thompson left from us he went to work for someone else, First Choice of Columbia --- Florence, I'm sorry. And that they also filed claims to Medicare for Dr. Thompson. That at some point in time Medicare also sent him a letter. They appealed it, and they got the opposite result. There is no doubt about that. There were two different judges, and they came up with two different results.

Now, I know that we have heard from Mr. Josey that much of it had to do with apparently my inability apparently to properly represent Pee Dee Health Care, which I find amazing. He hasn't looked at any of the information that I sent them. We sent the same thing, and got two different results. Imagine that. I cannot explain why they came up with two different results. I can explain that the record indicated that we contacted First Choice prior to that time, and they promised to send us any information on their case while ours were pending before The Department of Hearing and Appeals. We've got an email from Dr. --- that was sent to Mark Matthews confirming it, and that is Exhibit --- Mark

will tell us in a minute. It indicated that he --- excuse me?

MR. MATTHEWS: P.

MR. MEGNA: Exhibit P, indicated that they would send us that Order, or any information they got. They got that Order prior to an Order being entered against Pee Dee Health Care. If we had had that Order, as they promised, we would have sent that to the Department of Office of Hearing and Appeals, and said that it was --- whatever it was, *res judicata, collateral estoppel,* issue preclusion, you know, they had already made a determination. They decided however not to do that, for whatever reason. We don't know what happened. You know, we've not been --- we've not been able to complete discovery. And that is one of the concerns that I have, because we have not been able to take the depositions of the defendants, which we have asked the Court on a number of occasions to. So discovery in that context is incomplete.

However, at the time that we filed this Motion, we had their Answer. We had all the documents that we provided to the Court. We had also provided, to the Court, that we made a request that depositions be made. They wanted to postpone that until after the Court determined the Rule 59 --- not the Rule 59, but the

Motion to Disqualify, which was, quite frankly, not inappropriate. But that we are still missing information in the context of what else they know that I have no idea of. I have no idea of, and I have not been able to take their depositions of First Health, since, I believe it was when this Court held its hearing on March 16th, this Court at this time disqualified me. And, I have not been able to take any action, because I filed a Rule 59(e) Motion shortly thereafter. The Rule 59(e) Motion did not stay the Court's order, but did stay the time for the appeal process to proceed. So, in some ways, while I certainly agree that the Court should hear, I have no problem with the Court hearing these Motions in this context. I want the Court to understand that the information that we are giving the Court, and are able to give the Court on these motions are incomplete. And that Dr. Cohen has provided an Affidavit pursuant to Rule 56(f) which requested that this Court provide additional time to complete the discovery process. And, I don't know what they are going to say on their depositions. I can only say what it says now, and what the documents say, and what the answers say.

The latest issue, and what the defendant has argued all along, is that somehow the plaintiff had a duty to

prevent Dr. Thompson from hurting himself. From not telling the truth, which is in complete with their Answer.

First of all, we have provided the case law to this court that said in South Carolina prevention is not a defense to breach of contract cause of action. Mr. Josey, if I remember correctly, wrote back to the Court and said this isn't a breach of court action. However, he filed a Memo that indicated that it was a breach of contract action a while back. And our Complaint specifically indicates, I believe it is in cause of action number 5, that we are requesting relief based on breach of contract. So, on that one issue alone, that one issue alone, Pee Dee Health Care has no duty to these folks. They say the duty springs somehow from the fact that we had an independent duty supposedly to have Medicare and to make sure he was --- he was reinstated properly before he did this. This was 1998. They have made no showing whatsoever that we had that capability that the data base even existed that there was any place to even get that information other than from Dr. Thompson himself. At best it would be purely speculative to say that, oh yeah, they should have prevented this. Well, the Court of Appeals had already ruled that prevention is not a defense in a contract

case.

In addition to that, they have already admitted that he has breached his fiduciary duty. That he owed a fiduciary duty to the plaintiff. They admit that he basically did not tell us, that he owed a duty of truth to us. All the Affidavits indicate that he told no one, zero, no one.

We paid, we actually paid out his salary --- we paid him, like he worked for us, and then Medicare went back and we paid them another, I believe, it was $226,000. We are entitled respectfully to a judgment against them simply on these facts. And the Court doesn't even have to get into breach of fiduciary duty, but he has already admitted it. There is enough here in the Answer by itself, plus the unopposed Affidavits. All you are going to hear on the other side are arguments of counsel. The Supreme Court, The Court of Appeals have repeatedly said arguments of counsel are not testimony. They are not evidence. None of it matters. They can say whatever they want to. They can try to convince you as a Court, they can try to talk to you about the law. All of that is fine with me. But they have no facts other than saying that somehow we were supposed to prevent him from doing what he did, even though, if the Court will look at Exhibit A, Dr.

Thompson himself signed all of these documents, and certified to Pee Dee Health Care, certified to Medicare, certified to anything that he was telling the truth. And none of these applications indicate that he had been disbarred from Medicare. They all say that he had lost his licenses from The South Carolina Medical Association, but he didn't tell the truth. I don't know why Dr. Thompson didn't tell the truth. Personally, I always liked Dr. Thompson. I have nothing as a person to say but nice things. I don't know why he did this. I have not been able to take depositions to understand if anybody knows why he did this. They have presented no testimony at all before this Court; zero. There is nothing for this Court to consider in from of testimony or evidence, except for the documentary evidence that has been showed. And the most that they can show for that is that somehow we had an obligation to prevent. And the question is, what obligation, what duty do they base our obligation on? They have never identified a duty that an employer has to an employee, or --- they also maintain he was an independent contractor. If he was an independent contractor, what duty did I have to make sure that he was telling me the truth other than taking his word that when he signs his name, and attested to the truth, that he told the truth. The only

argument is that we have an independent duty under federal law, which they have not shown. We have a individual liability under law, which is a strict liability in effect. But we do not have --- there is no duty that I am aware of, no common law duty, no statutory duty state or federal that an employer has to go try to figure out if a defendant is telling them the truth. It is bazaar. All that we want is our money back. This is money that he's collected twice. We paid him. Then we paid out another $226,000 plus interest, plus all the lost income we had, and we just simply want a chance to prove that. And in the mean time, as this Court considers this, I think it is well within this Court's jurisdiction, and well within this Court's concept of reasonableness, to take this, whatever is said here under advisement, and allow us to take these peoples' depositions. I just want to find out what they have to say.

You know, they are also arguing here a Motion to Amend. I have no idea what these folks have to say about a Motion to Amend. None. I have a veer argument of counsel here that they want Amend, and basically strike out what Mr. James has already admitted. I have never heard of such a thing. How do you admit something and then un-admit it? How do you do that? If nothing

else, my question to Mr. James, and I think I should be allowed to take his deposition. Did you file that under Rule 11? You asked me the same question. I ask the same question. He had a duty to tell the truth. And the truth of the matter is, I think Mr. James did tell the truth. I think that is the real conundrum here. Mr. James did tell the truth. When he did that Answer, it is a financier, and he told the truth. They want to now amend that answer and make us, the plaintiff, now go prove issues that they have already previously admitted and then somehow tell us that we had a duty to prevent.

Again, as you consider the argument of counsel, my only request is this. It is very simple. There is zero evidence before this court to oppose the Affidavits in the record. They have not filed a single Affidavit. None. They have taken no depositions. None. The only evidence of record is the documentary evidence. The documentary evidence, Exhibit A, shows Dr. Thompson signed a Medicare application under oath, and attested that he was telling the truth. He did the same thing on the reassignment of benefits. Mark, would you find which exhibit, that is, please.

MR. MATTHEWS: B.

MR. MEGNA: Exhibit B. He has done it repeatedly through here. And somehow another, we are suppose to go

back and figure out he is not telling the truth. That is their only sliver of hope that this Court will somehow believe that we did something wrong when we did not determine that he had been disbarred by the Office of Inspector General, and that he had never been readmitted by the Office of Inspector General, because he never decided to do it.

In addition, we have Dr. Thompson's own statement which is Exhibit C, --- E, I'm sorry. Where he explains what had happened, and where he thought that he was in good order. But he didn't follow up. He did nothing to follow up. He admits it by his own hand. He said he has executed all government forms with as much accuracy as possible. But he is not here today. He can't testify. I can't put up my clients because of the Dead Man's Statute to testify to the conversations he had with him. There is only evidence that shows one conclusion. Dr. Thompson regardless of the reason, and I am telling the Court now, and I would tell his children, I liked your father. He was a good man. For whatever reason however, whether it is negligence, recklessness, forgetting, I don't know. He didn't tell the truth. And it is not just me he didn't tell the truth to, everybody at Pee Dee Health Care that worked wit him, the Affidavits are in here, and I have already

mentioned them. He never mentioned it to them. They are uncontroverted. He signed his application to Medicare, an swore he told the truth. I won't bore the Court with all of the things that he attested to. But his attestation is in the exhibits. And there are about ten different attestations, all of the indicating the same thing. Tell the truth. Ne never told anyone. That is it in a nutshell. We suffered over $226,000 in real money that we sent out. This is not some kind of speculative damage. That is real money that we wrote a check to Medicare for, after paying him as an employee of Pee Dee Health Care. He knew, one way or the other, and he was the only person of record with that knowledge. Any other evidence that they decide to put up or discuss or any other arguments I would have to object to, because there is no evidence of record, zero evidence of record that we had access to anything from the Office of Inspector General. There is no evidence of record that we did not check anything from The Office of Inspector General. They have put up nothing. We deserve summary judgment. This is not a case for a jury to determine liability. There are several causes of actions here, and any of them and all of them could be encompassed in this summary judgment, including indemnification, including equitable relief, including a

trust --- a constructive trust. All of the causes of action. It is nonsensical to me that any person could make that kind of mistake, turn around cost a third party that kind of money, when the evidence is uncontroverted that he never told that third party. And that he affirmatively made statements that omitted the pertinent information deliberately. Exhibit A, Exhibit B, and if he even explains it on Exhibit C. I don't understand. The only issue is one of prevention. The only other issue is perhaps we should have done a better job in the way we prepared for some judge --- Administrative Law Judge. However, there is no evidence before the Court to that. No evidence whatsoever. In other words, when the Court looks at this, I only ask they look at the record.

THE COURT: Very good.

MR. MEGNA: And that Mr. Josey, confines himself to the record.

Thank you, Your Honor.

THE COURT: All right. Now, let's hear from the defense. And, Mr. Megna, we have a microphone on your table, and there are some papers on top of them.

MR. MEGNA: I apologize.

MR. JOSEY: I might need to move mine over?

MADAME COURT REPORTER: You are good. Thank you.

MR. JOSEY: Judge, I do have some comments prepared, and I did kind of interlace our Counter Motion for Summary Judgment with our opposition with theirs.

THE COURT: All right.

MR. JOSEY: The same way that I did my memorandum.

Before I get to that, let me respond to some specific things that Mr. Megna said.

First of all, the issue of whether his Summary Judgment Motion is right, because he hasn't had an opportunity to take depositions.

As I pointed out in my Reply to the Memoranda, depositions have not been re-noticed since there was an agreement to delay the depositions.

And, we have no objections to Mr. Megna withdrawing his Motion for Summary Judgment without prejudice, if he feels it is not right at this time. Of course, I think you invited him to object to it being held today, and he declined to do so as well.

The other thing that I wanted to respond, and I think the Court probably understands it. Mr. Megna said at one point in his argument that Dr. Thompson had collected the money twice. First as his salary, and then as the $230,000 that was repaid. Of course, that $236,000 that they repaid didn't go to Dr. Thompson, it

went to Medicare. So, he has not collected any money twice.

And then the certifications that Mr. Megna repeatedly references. The certification in Exhibit A, his Exhibit A, is a certification made to Medicare by Dr. Thompson, which may have been in error. But, that certification was made at a time when he was working in Marion for Dr. Fowler, and the plaintiff has admitted, and we referenced it in a footnote in our Memoranda that they didn't have that certification when they hired him. They didn't know about it until discovery in this case. So there is no way the relied on that certification found in Exhibit A, and it wasn't made to this.

The Exhibit B, which I think is where he signed to reassign the benefits to Pee Dee Health Care does not represent his certification or his credentials at that point.

Judge, I want to speak briefly, kind of an introduction about our Motion to Amend. I understand that you are not going to rule on that right now. You are hearing the summary judgment first. But they overlap in their history.

On Thursday, December 9, 2010 this past December, I sent out an email to counsel for the plaintiff, that said that we had decided that we thought that we needed

to amend our answer. That email was sent at 1:57 in the afternoon on December 9th. It had attached to a proposed Amended Answer using what is called the red-line feature, or the blue-line feature on the computer, so it showed what we were changing. What we were adding to make it easy. I'd like to submit that as an exhibit today, as Exhibit 1, just for the background, judge. I have a copy here for Mr. Megna, and I have a copy for the Court and an extra one for your law clerk.

THE COURT: Thank you.

WHEREUPON, DEFENDANT'S EXHIBIT NUMBER 1 IS MARKED AND ADMITTED INTO THE RECORD.

MR. JOSEY: Now, that email was sent Judge, December 9th at 1:57 in the afternoon. I received an email back that same day at 7:01 p.m. from Mr. Megna, advising that the plaintiff could not consent to our proposed amendment, because coincidentally, the plaintiff had already filed a Motion for Summary Judgment. That email I have, and I would like to mark it for the Court as Exhibit 2. And it had attached to it the Motion for Summary Judgment of the plaintiff that we are arguing now.

WHEREUPON, DEFENDANT'S

EXHIBIT NUMBER 2 IS MARKED AND ADMITTED IN THE RECORD.

MR. JOSEY: Now, the Motion attached as Exhibit 2, to that 7:00 email on December 9th, was stamped/filed at the Clerk's Office that same day, December 9th at 4:21 in the afternoon, which, of course, was after our email of 1:57 requesting that they allow us to amend the answer.

Mr. Megna's email suggests that that is a coincidence. That it was coincidental, and that their Summary Judgment Motion was already done. In fact, if you look at their Summary Judgment Motion, the certificate of mailing says it was mailed the day before. But, when Mr. James and I received our mailed copies, and the certificate saying they were mailed on December 8th, they in fact were stamped by the Clerk's Office December 9th. So they couldn't have been there, December 8th as indicated in the Certificate of Mailing.

Now, all of that seems important to Mr. Megna, because he thinks his Summary Judgment Motion is important that it was conceived before our Amendments, because he thinks our Answer has all of these despositive admissions in it. The reason why I think it is important, and it is important to these defendants is

that good time and money are being spent in a game where Motions for Summary Judgment are being submitted that are not signed by lawyers. Certificate of Service indicates that they were served on days when they were not served. Putting all of that aside Judge, let's turn to the merits of that Motion.

It is predicated upon facts and duties which were admitted in the Answer, and they are still admitted. They are not denied. They are not denied in the Amended Answer. What are those admissions?

One. Dr. Thompson was an employee.

Two. Dr. Thompson, like any employee, owes a duty of good faith, fair dealing, honesty, and loyalty to their employee.

Three. Dr. Thompson was in fact not reinstated by the Medicare OIG, at the time he worked for Pee Dee Health Care. Those are the admissions. There is no admission that he owed a fiduciary duty. There is no admission of anything else. But, those are the core admissions.

Now, we believe that that reinstatement failure of the OIG was simply an oversight or a misunderstanding that carried over, in fact, to three different employers. It is not just Pee Dee Health Care. That oversight, that misunderstanding carried through to Dr.

Fowler that he worked for, Pee Dee Health Care who he worked for, and First Choice who he worked for. Of course out of those three employers, the only one who is not trying to blame Dr. Thompson, is Pee Dee Health Care.

Now, we agree with Mr. Megna that probably Exhibit E, which he references, is probably the most reliable summary of what Dr. Thompson would have to say. And, of course, it is not a signed document. We believe that it is a summary that was prepared while he was working with First Choice, or right after he worked for First Choice, in conjunction with their request that he work with their lawyers, Nexsen Pruet in their effort to fight repayment of Medicare.

Now, Mr. Megna likes to pick and choose the sentences out of this exhibit. But if you read Paragraph 2, of this --- the second paragraph of Section 1, I'll say, in its' entirety it reads:

> I can see that I relied on office personnel who, I believe, were conversant with Medicare regulations and procedures through daily contact with Medicare and other third party carriers, and whose specific duties were to deal with the operational details of billing, coding, and credentialing. I further

concede my ignorance of such details. With this help I executed what I believed to be the appropriate documents for re-credentialing. I have never had a reason to think that the persons assisting me had any reason to deliberately misrepresent me, or take clerical shortcuts in the process. I do know that during the process the office manager had several conversations with people in the offices involved --- in the process in order to get instructions, and to insure that the process was correctly completed. I had no reason to think that the process that we went through was not a proper one, or was incomplete.

Now, the reason that is important, Judge, is because it is not strict liability to Medicare. Medicare would let a assignee off the hook if that assignee can show that they were without fault in taking the Medicare benefits. What has happened in this case, and is the basis for our Summary Judgment Motion is that this party under these circumstances has been adjudicated to be with fault. It is not strict liability. They were found to be with fault in not doing their own proper credentialing, which an employer

and assignee has a duty to do.

Now, even if you take the admissions and the Answer, and even if you assume the worse case scenario. If you assume that Dr. Thompson intentionally misrepresented his credentialing status to Pee Dee Health Care, the plaintiff is still not entitled to Summary Judgment, because it has absolutely no right to rely on Dr. Thompson. Not only because it is the common law of South Carolina, but it is the adjudicated for Pee Dee Health Care in the Federal Courts, or in the Federal Administrative Law Judge in the appellate process. This particular litigant, these particular facts.

Now, of course, again that is the Motion --- our Motion for Counter Summary Judgment.

Let's look at South Carolina Common Law first. South Carolina Common Law is seen in a long line of cases, and I was going to recite for you --- South Carolina Common Law has seen in a long line of cases, Judge, does not allow unjustified reliance. And that is what we have here.

First of all, I would read from King versus Oxford, 1984, this is Judge Randy Bell. Now, Judge, I am going to skip --- I am not going to read you the entire opinion. But Judge Randy Bell writes in parts:

It is the policy of the courts not only

to discourage fraud, but also to discourage negligence and inattention to one's one interest. Courts do not sit for the purpose of relieving parties who refuse to exercise reasonable diligence or discretion to protect their own interest. A party must avail himself of the knowledge or means of knowledge open to him. The Court will not protect a person who with full opportunity to do so will not protect themself.

That is exactly what the Medicare court said Pee Dee Health Care under these circumstances failed to do is to protect themself.

Now, Mr. Megna and his argument says, we haven't proven that they had access to the data base. We don't need to prove that. It has been adjudicated. It has been adjudicated in a case where they had an opportunity to fight. They had an opportunity to present an innocent payee defense, just like First Choice did. They could have explained why they didn't have a data base. But it has been adjudicated that they did have access to a data base.

Now, not only Judge Bell, but Judge Ralph King Anderson has similar language. This is in the Regions Bank versus Schmauch. These are all in our Memorandums

Judge. This is from 2003.

> Judge Anderson said: There is no right to rely as required to establish fraud where there is no confidential or a fiduciary relationship, and there is an arms-length transaction between mature educated people. This is especially true in circumstances where one should have used precaution and protection to safeguard his own interest. The principle on the right to reliance upon representations is closely bound up with the duty on the part of the plaintiff to use some measure of protection and precaution to safeguard its own interest.

Finally, Judge, one other case that is even more recent. This is from last year.

Justice Beatty on the Supreme Court in the case of Quail Hill verus Richland County. This is a case where a Richland County employee misrepresented the status of zoning on a piece of property, and somebody relied on it.

Justice Beatty writes for the Court and says: Even if the doctrine of estoppel --- now these cases all deal with either fraud, estoppel, misrepresentation, most of them deal with a combination of them all. He

says: Even if the doctrine of estoppel were applicable to the county, and he has gone through this discussion of how estoppel is usually not applicable to a governmental entity. He says, even if it were applicable to a governmental entity, we find that Quail Hill failed to establish the requisite elements. Admittedly, Quail Hill had an experienced, prejudicial change of position due to the erroneous zoning information. However, Quail Hill had the means of knowledge to determine the correct zoning classification, and could not justifiably rely solely on information provided by staff members. He goes on later to discuss the negligence cause of action. We agree with the county that Quail Hill's claims of negligence, and negligence misrepresentation should be treated solely as one for negligent misrepresentation, which are consumed together which we have here as well. And he says, we find this claim is controlled by the question as to whether Quail Hill could have justifiably relied on representations of county staff. As previously stated Quail Hill could have reviewed the official zoning map to ascertain the correct zoning classification.

Moreover, given the fact that Brown, as agent of Quail Hill was an experienced real estate broker. Of

course, here we have experienced medical administrators, it would be difficult to conclude that his reliance solely on the statements of Gosline and the tax assessor's records was reasonable. It is our view at the conclusion that Quail Hill's negligence and misrepresentation claims fail as a matter of law.

Of course, Judge, it is not only South Carolina Common Law, that requires that any reliance be justifiable. In this case, we have adjudicated federal law, binding on this party, this plaintiff, Pee Dee Health Care, that has already held that this plaintiff had access to the information that it needed to check the true credentialing and thus could have not avoided Medicare liability by feigning reliance on this point. They litigated that. They tried to say our employee told us wrong. And the Federal Administrative Law Judge and the Medicare Appeals Counsel said, you cannot rely on your employee. You have your own duty. You had access to the information. That has all been adjudicated.

Now, the plaintiff is trying to ignore that precedented part now by suggesting that there is something unique about the employment relationship. That either employers and employees have a fiduciary relationship, or that there is something that gets them

around that Medicare precedence.

But the truth is, the employment relationship generally is not a fiduciary relationship. And in this case, there is no evidence to suggest that it is a fiduciary relationship. We have not admitted a fiduciary relationship. And in fact it can't be a fiduciary relationship, and I will tell you why, Judge. Judge Anderson, Ralph King Anderson, in that Schmauch --- that Regions Bank versus Schmauch case points out that you cannot unilaterally stumble your way into a fiduciary relationship. It has to be the kind of relationship where one, reposes trust in the other. The other knows he is reposing trust, does something to encourage that reposition of trust. It is a bilateral arrangement for expectation. You cannot have a plaintiff here say that they relied on the fiduciary duties of this employee when federal law tells them they can't make them their fiduciary. Federal law says you cannot make your employee your fiduciary, because you have your own duty to do credentialing. You can't delegate it to some employee that you want to later claim his fiduciary.

And, of course, South Carolina Common Law says, you cannot claim somebody is fiduciary when you have equal access to the information. How can the rely on the

special position of Dr. Thompson, when they are in an equally good position?

Now, in their latest twist, and Mr. Megna mentioned this today. They want to say well maybe forget all of the Tort stuff. This is simply a contract claim. And they do allege a contract claim. It is addressed in our Memorandum. Our Memorandum addresses all twenty of their causes of action. But, if you look at it from a contract standpoint, Judge, and you say well, justifiable reliance, or unclean hands, is not a key component of that contract cause of action, they are still charged in a contract cause of action with constructive knowledge the second that contract begins. The second that contract began in 1998, the day that Dr. Thompson went to work for them, they are constructively charged with knowledge that he lacked credentials. How can I say that? Because, a federal judge has already held it against him. They are charged with the knowledge that he was uncredentialed. So, they want to say well he breached our contract by coming to us uncredentialed. Well, they are charged with knowledge that he was uncredentialed. And if they knew he was uncredentialed, as the federal judge says, they should have known in 1998, they should have brought that breach of contract claim within three years of 1998. They

didn't do that. They waited a decade. More than a decade. But they had constructive knowledge the day he went to work for them. And, even forgetting the statute of limitations, if they have constructive knowledge, which the federal judge has said, they have constructive knowledge that he was lacking credentials from day one, they could have stopped all of these damages. They could have sat him down and said, oh, we have constructive you are not credentialed. Quit seeing patients until we get you credentialed. They didn't mitigate their damages, but they should have known, and knowing what they should have known, they could have mitigated these damages. That's is also a point raised in our Memorandum, Judge. This could have all been avoided if they had done what the federal law and what the South Carolina Common Law requires them to do.

Judge, the plaintiffs have plead some twenty different causes of action, but other than the conversion claim, the civil conspiracy claim, and the contractual interference claim, justifiable reliance doesn't seem to be as obvious of a component. It still may be a component of the contractual interference claim. But, those three claims, as I pointed out in our Memorandum just don't fit these facts. We have not --- This defendant has not converted anything that will

lawfully belong to these plaintiffs. If this Medicare benefit that they received was converted, they had to be lawfully entitled to it, and they were lawfully entitled to it. That has already been adjudicated. Civil conspiracy, they alleged that the conspiracy was between the decedent and his own estate. That is not possible. They allege that the contractual interference is between the decedent and the Medicare program. Well, their relationship to Medicare, this government entitle program is not a contract. And there is no evidence to suggest that even if it is a contract, that we interfered.

Judge, this litigation as you can tell has been tortuous and expensive for these two folks sitting back here. And it is against an estate of modest and limited value. And our Supreme Court has said, and as pointed out in our memorandum in the standard of review and the Corley case from 1984, --- I just wanted to read a few quotes.

In the Corley case from 1984, our Supreme Court said. The trial court is not required to single out some morsel of evidence to create an issue of fact that is not genuine.

Also the Supreme Court case in the Fabri case, which is also cited in our Memorandum said. The purpose

of summary judgment is to expedite the disposition of cases, not required to services of a fact finder.

Judge, this case is right for summary judgment. For the defendants, there is no point in further litigating issues that have already been adjudicated by this plaintiff, to finality that are despositive in your court.

Thank you.

THE COURT: Thank you. And, now, in reply, Mr. Megna.

MR. MEGNA: Well, first of all my main office is in Columbia, and I have an office here and in Atlanta. And quite frankly these documents because the court sits here in Darlington were filed by Mr. Matthews and other people on staff in my office, with my full knowledge. You know, for them to make implications is just ridiculous. And they are right about one thing. I do work late, I work all kind of hours, and I am certainly not going to say otherwise. And they can call it what they want. But when we got these documents, we knew what we had. We had a genuine reason to file summary judgment based on the documents and the answers they provided and we did so.

They still have not identified, to this court, a single duty that we owe the defendant under federal law.

Not a single duty. The statutes that they refer to go to the duty that Medicare imposes upon the plaintiff. We did everything we could to say that Dr. Thompson nor I, nor Pee Dee Health Care, were responsible. They have twisted and turned that into somehow with nebulously saying that we had a duty. The Court has got to find the core of the duty. Where is the duty? Federal law? What federal law, did he point to, what specific federal law, did he point to that said, we have that duty, not to Medicare, to Dr. Thompson. We are not talking Dr. Thompson's what he owed Medicare. We are talking about what we paid on behalf of Dr. Thompson's behalf so there was conversion. He was paid twice. We paid him for his services. The documents show that he reassigned what he got for those services to us, and then we repaid them back to Medicare again.

As far as not having any statements by Dr. Thompson, the same case law that he cited --- I won't go over it again. Mr. Josey, cited --- said, that a person is responsible, particularly an informed intelligent person. And he is, was an informed intelligent person for what he signed. Exhibit A, number 4, and he signed this. Neither the individual practitioner, nor any owner, director, officer, an affiliate, an employee of the company. We all have

Affidavits to that effect. Or any contractor retained by the company currently subject to sanction under the Medicare/Medicaid program, or disbarment, suspension or exclusion under any other federal agency program, or likewise evident by providing services to Medicare beneficiaries. Signed by Hugh S. Thompson. June 19, 1998. He made that statement within three months of coming to our office. Three months.

Dr. Thompson, already part of the record on appeal --- I'm sorry, the record before this court --- I'm sorry. Just one second. I just had it here. I apologize.

On September 14, 1998, a month before Dr. Thompson comes to work for us, Medicare sent Dr. Thompson a request, a specific request on page 2, that he provide Medicare with a copy of his reinstatement. He never showed it to us. Exhibit FF.

On August 31, 1998, Medicare sent a letter to Dr. Thompson, Dr. Fowler, Exhibit W, reassigning Medicare billing to Dr. Fowler's office. Medicare was sent to the decedent. They did the same thing, signed for by Ms. Kelly at First Choice. He gets another letter on September 14, 1998, saying the same thing. And unknown to the plaintiff, three times --- three times, he has received from Medicare letters saying please, send us

information about your disbarment. March 11, 1996, Exhibit F. June 2, 1998, Exhibit FF. September 18, 1998, when he signed the certification. He doesn't provide us with anything. Nothing. Neither does Dr. Fowler's office. Neither is there anything on the record at all about that.

I have to smile because in their Answer, page 6, paragraph 34, Defendant admits that decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Plaintiff. How much clearer does it get? How much clearer does it get regardless of the oratory, that we have listened to today from Mr. Josey.

THE COURT: All right. Counsel, I think I've got an understanding of both sides of the summary judgment issue.

Let's move forward to 59(e), and let me hear from you briefly why you believe we should reconsider the decision to disqualify.

MR. MEGNA: Your Honor, we have signed Affidavits with the Court indicating that Dr. Matthews, Dr. McInnis, Dr. Pellman {sic.} --- I would segregate it from Dr. Thompson and the providers. Yes, I had at some point ultimate control, if I really wanted something done, I guess. I was the CEO of the organization. But,

we purposely, our entire time we have been together, we have always, always dealt with providers differently than the administrative staff. I have never had any contact with it. I have had nothing to do with it. And there is not a bit of evidence before this court, zero that I had anything that I needed to testify about. That I have anything --- I had no meetings with Dr. Thompson about this. I didn't know about it. They haven't produced anything. Zero. Nothing. Nothing. As a matter of fact, where is that paper that you got today, that you showed me today. We just want to show you something. We are going to admit it as an exhibit, because it came from --- There was a big discussion about what was on the bottom of Exhibit HH, this is an Order that was filed January 18, in this same case. And it has very similar writing on the bottom. It didn't come from our office. And, unless you have --- take judicial notice, as a matter of fact, Mark seems to think it came from your office, if you look at the bottom of it. The defendant took some writing on the bottom of Exhibit HH, and said that somehow another they needed to depose me to find out what happened to it.

THE COURT: All right. That will be Defendant 2.

MR. MEGNA: The point of this document --

THE COURT: Let's wait just one moment while we

mark it.

WHEREUPON, DEFENDANT'S EXHIBIT NUMBER 2, IS MARKED AND ADMITTED INTO THE RECORD.

THE COURT: All right. Thank you.

MR. MEGNA: The point of this document, and then we submit it is that the writing that appears on this document is very similar to the document that they previously said was Document HH. You know, there is some notation made at the bottom of it. You know, I got a date and a time or something like that. It had nothing to do with us. And that was with the Court --- that they were focusing on with the Court to base its decision. There is not one bit of evidence --- evidence before this court; none, that I have anything to do or had any conversation with Dr. Thompson about this. None. You know, on pure speculation, they decided that somehow I needed to be deposed. All the Affidavits --- the only evidence before the Court indicates just the contrary. And, I simply don't understand how on that kind of speculation that something as important as a chosen counsel --- a chosen choice of counsel that the Court could just decide to disqualify me, because somebody says I might have something. And that is my

concern. It just doesn't make sense.

THE COURT: All right.

MR. MEGNA: And my other concern, Your Honor, and just the final analysis is that we put out $226,000. We admit our liability to Medicare.

And I close with saying this is not about our liability to Medicare. What about his liability to tell the truth to Medicare, and to us. And we do have a lot of causes of action, because we want to give this court a lot of alternatives. Breach of contract, breach of fiduciary duty, indemnification, and the list goes on. We think that even under these limited circumstances, we are entitled to summary judgment. But even if the Court decides that under these circumstances it can't we need to take the depositions of these folks to find out what is going on.

THE COURT: All right. Thank you.

MR. MEGNA: Thank you, Your Honor.

THE COURT: And again on 59(e), is there a reply?

MR. JOSEY: First of all, Your Honor, on the 59(e), I guess we would argue in the alternative that there should be a dismissal for failure of timely filed after service. And then we would argue in the alternative that the Motion should be denied on the merits.

As we pointed out in our Memorandum, while they timely served their 59(e) Motion, they apparently took it down to the Clerk's Office, without the necessary cover sheet, without the necessary $25.00 filing fee. The Clerk's Office accommodated them by clocking it in, but told them, as I understand, that it would not be under --

MR. MEGNA: -- Your Honor, I am going to object if he is going to testify. I mean, that is not appropriate.

THE COURT: All right, the objection is noted for the record. Let me just hear what it is that he is going to say.

MR. JAMES: But, in any event, the Motion's cover sheet did not accompany the filing. The $25.00 did not accompany the filing. Rule 5(d) says that the filing must be made within five days of service. They did not, other than having the document clocked in, they did not perfect the filing. They attempted to perfect the filing on May 26th. At that time they gave to the Clerk's Office the $25.00. They gave to it a cover sheet that is unsigned by anybody. The cover sheet said that oral arguments were not needed. The cover sheet did not give the information as to who the attorneys were. No information as to the attorneys. It was

slightly more than a blank cover sheet. But that was it. Rule 5(d) says that where there is not proper filing, the Court can either accept the filing if it is made late, or the Court can dismiss. So, the question here is, should there be any remedy or penalty for failure to do this thing correct. As the Court is aware, this is not the first time that this plaintiff has stumped its toe on procedural grounds.

MR. MEGNA: I object again, Your Honor. I have no idea what he is talking about.

MR. JAMES: I am talking about the Probate Court, failure to file the --

MR. MEGNA: -- That is on appeal, Your Honor. That order has been stayed, and I do oppose it, and I think it is absolutely out of order.

THE COURT: All right. Well, Mr. Megna, I am again going to note your objection for the record. And I am going to allow Mr. James to make his argument.

Go ahead, sir.

MR. JAMES: In summary, we would ask the Court to just dismiss the Rule 59(e) Motion, because of the imperfections in the filing.

THE COURT: All right.

MR. JAMES: But, in the alternative, we would ask the Court to deny --- We think the Court correctly

stated and applied the law to the facts of this case, in its order of April 15th.

And, then the Court said that Mr. Megna was a necessary witness, and he should be disqualified. We would point out that Mr. Megna's law partner, Ben Matthews, who is here again today, signed the Summons and Complaint in this case last May. He further signed the plaintiff's first interrogatories; first Request for Production for Documents. He also signed the Plaintiff's Answers to the Defendant's first Interrogatories, and the Answer the Defendant's first Request for Production of Documents. He also signed Amended Answers to the Interrogatories. He signed the Plaintiff's Response to the Defendant's Request for Admissions. That was no November 9, 2010. His signature further appears on the Motion's cover sheet for the Summary Judgment on December 9, 2010. So, Mr. Matthews has been heavily involved in this case. Since December 9, 2010, Mr. Matthews, for reasons we do not know, has seemingly disappeared from the case. But, he has not given any Notice of Withdrawal, so we assume that he is still one of the counsel of record.

Mr. Megna's overt role in terms of signing pleadings and other discovery documents did not become apparent until he signed the Motion for Summary

Judgement, or had the Motion signed for him shortly before Christmas 2010, December 9th. And we moved promptly after the first of the year to disqualify him for the grounds stated in our Motion to Disqualify.

We think the Court correctly ruled that no prejudice should occur to the plaintiff by disqualifying Mr. Megna, since his law partner, Mr. Matthews, was available and was already heavily involved in the case.

We think further that the Court correctly ruled that Mr. Megna was a necessary witness, despite his protest to the contraire. In his Rule 59(e) Motion, the plaintiff set forth four basic grounds for this Court to reconsider its April 15 Order. The first ground was that the Court's reliance on the Exhibit HH, which was also the omitted exhibit from the Complaint, that the reliance on that exhibit to disqualify Mr. Megna was in error. The apparent basis for this argument is that plaintiff now contends that Exhibit HH, which it submitted to this court is not the authentic document, and that the authentic HH does not contain the partial handwritten notation in the lower right-hand corner. Mr. Mark Matthews, in his Affidavit in support of plaintiff's Rule 59(e) Motion, attached a "Clean Exhibit HH" and said that plaintiff had no document in its files such as the Exhibit HH, which it filed with the notation

in the lower right-hand corner. Mr. Matthews further professed bewilderment as to how subject document came into the plaintiff's possession. We responded to that with a series of correspondences in late May of 2010, and included in that correspondence is an email from Mr. Megna to me where he sent me the --- what is now Exhibit HH. It was meant to be attached to the complaint, but it was omitted from the complaint. He now says, in his response to our response to the 59(e) Motion, Mr. Megna says that Exhibit HH and the writing on the bottom of it and any similar matters are at best a "red hearing." I guess he says that we are now trying to mislead the Court with his exhibit. It is his exhibit to the complaint, his Exhibit HH. That is preposterous. He further says that the Defendants arguments concerning this exhibit, is nothing but a rhetorical and literary tactics to defer attention from the real issues. What the defendant showed in its response to the Rule 59(e) Motion was that Exhibit HH was the handwritten notation, was furnished by Mr. Megna himself, shortly after the commencement of litigation, and before the allegedly altered document to come into plaintiffs' possession through a third party. Frankly, it looks like to me they have disowned Mr. Mark Matthew's Affidavit and perhaps thrown him under the bus.

But it is just not the Court's reliance on Exhibit HH that makes --- It is not just Exhibit HH that makes Mr. Megna a necessary witness. In the complaint, Exhibit HH was said to be the smoking gun given by Dr. Thompson who Mr. Megna that he made certain admissions at about that time. Well, we need to ask Mr. Megna a lot of questions about the unsigned, undated document. When he got it, what its context is, whatever handwritten notation, etcetera. But there are other matters that Mr. Megna as the CEO would be very important as a witness. Matters as to credentialing. Matters as to due diligence. Matters as to records keeping. Matters as to file destruction. Matters as to communication in the Medicare litigation. And we have asked for various documents that might have been in Dr. Thompson's file, such as employment applications. We are told that in the normal course of things they destroy files after so many years, and most of Dr. Thompson's files have been destroyed. Well, we need to know from the CEO of that organization what is going on.

The plaintiff's response further said that the 59(e) Motion should be granted because this court failed to recuse itself from hearing matters concerning the plaintiff, due to litigation pending in Florence County, where this court often sits by designation. And I don't

know if that is still the position, or if he has dropped that position.

MR. MEGNA: No, sir. Our position is that it is the Court's decision. I think it was our opportunity, and our duty to raise the issue. We don't know the rest of it. We know that we have a responsibility, and that I strongly object to the use of the word preposterous. If there is anything preposterous, it is your strategies.

THE COURT: All right. Gentlemen, let's do this. Mr. James, rather than take further argument, I have had the opportunity to review your Memoranda that you filed on these points. And, I have heard sufficient argument really from both sides. We are on a Motion to Reconsider, and thus I am going to end argument at this time, and take that matter under advisement, and rule at a later time. And accept your Memoranda as your final argument.

MR. JAMES: I am basically rehashing the Memoranda, Your Honor.

THE COURT: Yes, sir. I follow that. So, what we are going to do is, we are going to end the record for the day. We have reached far beyond our court time generally. And take both these matters, really all three, Summary Judgment times two, plus this

Reconsideration Motion under advisement.

We will be in touch with you in the near future with a decision.

MR. MEGNA: Your Honor, just for the record. We want to make sure that the record reflects that there were documents collected prior to any of this, and that his arguments are preposterous.

THE COURT: Well, we will leave the issues where we are, and close the record for the day.

This court is now in recess.

(Whereupon, this hearing was concluded at 6:03 p.m..) On Tuesday, July 19, 2011.)

-- END OF RECORD --

CERTIFICATE OF REPORTER

I, the undersigned, Pamela Ozment-Cartee, official Court Reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the hearing of the above captioned case, relative to appeal, in The Court of Common Pleas in Darlington County, South Carolina, on the 19th day of July 2011.

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

August 15, 2011

_____

Pamela Ozment-Cartee
Circuit Court Reporter

Matthews and Megna, LLC

Attorneys and Counselors at Law
3400 West Avenue
Columbia, SC 29203
TELEPHONE: 803-799-1700
E-mail: tmegna@gmail.com

July 8, 2011

HAND-DELIVERED

FILED
2011 JUL -8 AM 11:04
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

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

Re: Estate of Hugh S. Thompson, Case No: 10-CP-16-0332

Matthews and Megna, LLC

Attorneys and Counselors at Law
3400 West Avenue
Columbia, SC 29203
TELEPHONE: 803-799-1700
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DARLINGTON COUNTY, S.C.

July 8, 2011

HAND-DELIVERED

The Honorable J. Michael Baxley
531 East Carolina Avenue1
Hartsville, SC 29550-4311

Re: Estate of Hugh S. Thompson, Case No: 10-CP-16-0332

Dear Judge Baxley:

I am in receipt of your letter dated June 23, 2011. I genuinely appreciate you taking the time to respond to my continuing concerns that the Plaintiff has been denied the opportunity to complete discovery to properly present its' case, and has been denied the opportunity to complete discovery in order to properly present its' Motion for Summary Judgment as well as to oppose the pending motions of the Defendant that the Court has indicated it will address on July 19. As you know, the Plaintiff's continuing requests to complete the taking of depositions, and to complete discovery that occurs as a result of those depositions, have been delayed though no fault of the Plaintiff.

Part 1

1. On January 27, 2011, the Plaintiff noticed the depositions of the personal representatives of the estate for February 10, 2011. [See attached]. The Defendants replied that the taking of the depositions was premature until the Court ruled on the Motion to Disqualify.

2. On February 24, 2011, the Defendant wrote the Court requesting that the Motion to Disqualify be heard and determined first. [See attached].

3. The Plaintiff filed returns to the Motions of the Defendant as well as in support of its' Motion for Summary Judgment and the Plaintiff advised and informed the court that discovery, other than depositions, had been completed. [See attached].

4. By order dated March 7, 2011, this Court continued all pending motions of all parties. [See attached].

5. On March 16, 2011, the Motion to Disqualify was heard by the court, the court granted the motion of the Defendant disqualifying Plaintiff's choice of counsel, the court orally ruled that Plaintiff's choice of counsel was effective immediately upon its' oral ruling on March 16, and the court continued all outstanding motions of the parties. The Court requested counsel for the Defendants to prepare a written proposed order.

6. On March 22, 2011, the attorneys for the Defendant e-mailed the Court a proposed order based on the Court's determination at the hearing of March 1, 2011 to grant the Defendant's Motion for Disqualification of Plaintiff's choice of counsel.

7. On April 19, 2011, the Court entered a written order disqualifying Plaintiff's choice of counsel. [See attached].

8. The Plaintiff subsequently filed its Rule 59(e) Motion requesting the Court to reconsider its order disqualifying Plaintiff's counsel of choice. [See attached]. Plaintiff's 59(e) motion stayed the time for appeal of the court's order disqualifying Plaintiff's choice of counsel, but did not stay the order of the Court disqualifying Plaintiff's choice of counsel. The Court's ruling on the disqualification issue has prevented Plaintiff's choice of counsel from participating in the case since the March 16th hearing, and thus has prevented participation in any matter other than the Rule 59(e) motion requesting the Court to alter or amend its order disqualifying Plaintiff's choice of counsel.

The Plaintiff has attempted continuously since January, 2011 to have the depositions of the personal representatives of the Defendant taken in support of all its' motions in order to determine what additional discovery may be needed. It is neither fair nor reasonable to expect the Plaintiff to argue its' Motion for Summary Judgment nor is it fair or reasonable to expect the Plaintiff to defend against the motions of Defendant, including its' Motion for Summary Judgment, while:

1. an outstanding order of this Court has disqualified Plaintiff's choice of counsel from representing Plaintiff in these matters since March 16, 2011.

2. By the time of the hearing on July 19 this court has scheduled for the Plaintiff's Rule 59(e) motion as to the disqualification matter, it will have been four months since the Plaintiff's choice of counsel has had the opportunity to actively participate in the case as a result of the March 16th order of this Court. Moreover, the Plaintiff has not had the opportunity to pursue its' appellate rights as this Court has not ruled on Plaintiff's outstanding Rule 59(e) motion. Our Supreme Court has held:

> We conclude an order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2). Such an order implicitly falls within the statutory definition of a substantial right under Section 14-3-330(2)(a). The right to be represented by an attorney of ones choosing is one of those rare orders which, in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on both the attorney-client relationship and the overall litigation and trial of the case. Moreover, the right to be represented by ones preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right.
>
> Deprivation of the right to ones preferred attorney would affect the attorney-client relationship, which is extremely important in our adversarial system. Furthermore, an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification.
>
> We further conclude, as we have with regard to the right to a particular mode of trial, an order granting a motion to disqualify a party's preferred attorney *must* be immediately appealed or any later objection in a subsequent appeal will be waived. *Cf. Flagstar Corp.*, 341 S.C. at 72, 533 S.E.2d at 333 (party is required to immediately appeal if denied a mode of trial to which he is entitled as a matter of right, and failure to do so forever bars appellate review of the issue).
>
> *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (citing *Mid-State Distribs., Inc. v. Century Imps., Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 781 (1993); S.C. Code Ann. § 14-3-330(1) (1976); Rule 72, SCRCP; and Rule 201(a), SCACR).

Therefore, it is imprudent and unjust for this Court to require the Plaintiff to argue its' Motion for Summary Judgment or to defend against the motions of the Defendant under such circumstances.

PART 2

In addition to the foregoing, the undersigned is troubled by the Court's remark in its' recent letter that Rule 11, S.C.R.Civ.P. requires a reasonable basis for the filing of a motion, the insinuation being Plaintiff's pending Motion for Summary Judgment is not adequately supported under the facts of the case. The record demonstrates the opposite. The Defendant filed its' answer making several admissions that, in and of themselves, provides more than a reasonable basis for the filing and granting of Plaintiff's Motion for Summary Judgment. As our Supreme Court held in *Father v. South Carolina Dep't of Soc. Servs.*, 353 S.C. 254, 578 S.E.2d 11 (2003), the standard for making such observations is whether a party reasonably believes that under those facts his claim may be valid under the existing or developing law. I have noted many of the admissions made by the Defendant in its' original answer filed with the Court prior to the filing of the Plaintiff's Motion for Summary Judgment. Moreover, Rule 56(a) specifically allows for the filing of the Motion for Summary Judgment, with or without, supporting affidavits in his favor upon all or any part thereof. The Plaintiff, however, supplied over 350 pages of supporting documents in its filings in this Court dated March 11, 2011, including multiple affidavits supporting its' position. The Defendant, on the other hand, has produced no evidence to the contrary. To be fair, the Defendant has claimed the Plaintiff could have prevented the decedent's misconduct, a notion that that is legally ineffective and factually inaccurate. *Champion*, supra.

Facts in Defendant's Answer Supporting Plaintiff's Motion for Summary Judgment

1. The Defendant filed its' answer on to the Defendant's June 17, 2010. The answer of the Defendant admitted that:

   a. The relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." **[Page 4, 21 of Defendants Answer filed June 17, 2010]**.

   b. The relationship of Decedent with Plaintiff was such that Decedent had a pecuniary interest since he was paid by Plaintiff as a physician to provide medical services. **[Page 5, ¶25 of Defendants Answer filed June 17, 2010]**.

   c. The relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." **[Page 4, ¶ 21 of Defendants Answer filed June 17, 2010]**.

   d. The relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff. Defendant would admit that

the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." **[Page 5, ¶ 26 of Defendants Answer filed June 17, 2010]**.

e. The relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff. Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." **[Page 5, 26 of Defendants Answer filed June 17, 2010]**.

f. The Decedent's medical license was suspended by the SC Board of Medical Examiners on or about May 31, 1994 and that his license to practice medicine was reinstated on or about April 14, 1998. **[Page 2, ¶ 11 of Defendants Answer filed June 17, 2010]**.

g. On or about March 31, 1996, the Decedent was disbarred from the Medicare program by the Office of Inspector General who oversees physician participation in the Medicare program. **[Page 2, ¶ 10 of Defendants Answer filed June 17, 2010]**.

h. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." **[Page 3, ¶ 12 of Defendants Answer filed June 17,2010]**. **[Page 8, ¶¶ 61 and 62 of Defendants Answer filed June 17,2010]**.

i. To the extent that Decedent was an employee of Plaintiff, Decedent admits that a duty of loyalty to Plaintiff was owed." **[Page 6, ¶ 30 of Defendants Answer filed June 17, 2010]**.

j. Following the Decedent's disbarment from Medicare, by the Medicare Office of Inspector General, "provisions of federal law provide that a suspension of Medicare privileges [i.e., the Decedent's disbarment from the Medicare program in 1996] continues until [the Decedent was] reinstated by the Office of Inspector General [of the Medicare program]." **[Page 3, ¶ 12 of Defendants Answer filed June 17, 2010]**.

k. In 1998, the Decedent failed to seek reinstatement to the Medicare program by the Medicare Office of Inspector General. **[Page 2, ¶ 11, Answer filed June 17, 2010]**.

l. Defendant admits a Medicare provider application and an 'reassignment of benefits [application] were prepared [with Decedent's signature on the certifications affixed by Decedent – see Exhibits A and B attached hereto and incorporated herein by reference] so as to permit Decedent to treat Medicare patients and for Plaintiff to receive payments therefore." **[Page 2, ¶ 9 of Defendants Answer filed June 17, 2010]**.

m. "Defendant admits that Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Plaintiff." **[Page 6, ¶ 34 of Defendants Answer filed June 17, 2010]**.

n. "Defendant admits so much of ¶10 of the Complaint as alleges 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..." See Exhibit C attached hereto. **[Page 3, ¶ 12 of Defendants Answer filed June 17, 2010]**.

o. On or about June 17, 2007, the Plaintiff received a demand letter from Medicare that "would have had a content similar to that set forth in paragraph 12 of the Complaint." **[Page 3, ¶ 14 of Defendants Answer filed June 17, 2010]**. Paragraph 12 of the Plaintiff's Complaint stated as follows:

> On or about June 7, 2007, Plaintiff 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:

I. That the Decedent had been suspended (sanctioned) from participation in the Medicare program during the time periods March 31, 1996 to June 20, 2002.

II. That during the sanction period ..., Medicare payments were paid to Plaintiff for services Decedent provided to Medicare beneficiaries because the Decedent had completed an 'assignment of benefits' to Plaintiff. However, Decedent omitted any reference in regard to this suspension from the Medicare program.

III. That Plaintiff was liable for the funds paid regardless of the fact that Plaintiff had no knowledge of the matter and that Dr. Thompson had provided both Plaintiff and Medicare with false information.

IV. 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%.

The letter of June 17, 2010 has been previously submitted to the Court as Exhibit X.

2. "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." **[top of Page 3, ¶ 11 of Defendants Answer filed June 17, 2010 and Exhibit E]**. [The Defendant does not explain how it came to this conclusion as it is a statement by the deceased, making the need for depositions to explore this and other related matters.]

3. Defendants have no information in their possession in regard to the allegations of ¶32 of the Plaintiff's Complaint, and therefore deny same. Paragraph 32 of the Plaintiff's Complaint states:

Decedent breached his duty to Plaintiff:

a. By act of certifying to Plaintiff personally and on his Medicare applications that he was truthful

b. By omission failing to inform Plaintiff of the falsity of his affirmations and certifications that he was barred from medically treating Plaintiff's Medicare patients

The Plaintiff, however, has provided numerous unopposed documents to this Court in support of the allegations made in paragraph 32. Please see documents A, B, E, F, O, FF, Y, Z, AA, BB, CC, DD and EE previously filed with this Court, and attached hereto.

4. Any and all claims, however posed by Defendant, that Plaintiff could have 'prevented' the Decedent's wrongdoing and/or the negative consequences of the Defendant's

admitted misconduct have been addressed by our appellate courts, and rejected. *See Wilms Trucking v. JW Construction,* 442 SE 2d 197(1994) *citing Morgan v. Crowley,* 91 Ga.App. 58, 85 S.E.2d 40 (1954) (a party cannot take advantage of his own default in the performance of a contract); 17A Am. Jur.2d *Contracts* § 621 (1991) (where a contract is not performed, the party who is guilty of the first breach is generally the one upon whom all liability for the nonperformance rests). *Cf. Champion v. Whaley,* 280 S.C. 116, 311 S.E.2d 404 (Ct.App.1984) (party to a contract cannot take advantage of the uncertainty created by his own wrongdoing).

Further, Exhibit "E" [see attached] reasonably demonstrates that the Decedent admitted he failed to provide Medicare the information needed to have him reinstated to the Medicare program after his disbarment. The affidavits submitted by Plaintiff [Exhibits Y, Z, AA, BB, CC, DD and EE] [see attached], and Decedent's own statement further indicate Dr. Thompson never informed Plaintiff that he was 'disbarred' from the Medicare program both prior to, during, and after his employment with Plaintiff. As a matter of settled law in South Carolina, Decedent's estate cannot now assert the Plaintiff could have 'prevented' the matter by taking additional actions to save the Decedent from his own wrongdoing. As noted above, our Court of Appeals has stated the Defendant's assertion of 'prevention' as a defense is not allowed or recognized under South Carolina law. *The Huffines Co., LLC v. Lockhart,* 617 SE 2d 125 (2005).

Part II

The Plaintiff has previously requested this Court consider recusing itself from hearing the case because of pending litigation in Florence County concerning judges that this Court regular associates with as a part of its' duties with neighboring jurisdictions. A copy of the Plaintiff's most recent amended complaint is attached hereto. The complaint involves matters and parties which this Court regularly encounters when sitting in Florence County. While it may be argued that recusal is not required under the canons of Judicial Conduct, Canon 3(E) of the Code of Judicial Conduct counsels that recusal is reasonable and appropriate in matter such as the current when the court and the parties are so intertwined.

Therefore, the Plaintiff requests this Court to act first upon its' pending Rule 59(e) motion and/or to allow Plaintiff 's requests choice of counsel to make a formal motion of recusal in order that the matter can be properly addressed if the Court determines a formal motion is preferable to recusal on the court's own initiative.

CONCLUSION

The Plaintiff's position remains straightforward and consistent. The Plaintiff:

a. has not had the opportunity to pursue its' discovery rights, and respectfully requests, pursuant to Rule 56(f), S.C.R.Civ.P. (and the affidavit of the President of Plaintiff attached hereto and incorporated herein by reference) that the Court allow the completion of discovery prior to hearing any pending motions of the parties other then the Plaintiff's pending Rule 59(e) Motion to Reconsider,

b. has not had the opportunity to pursue its' appellate rights as our Supreme Court has held it must do in order to preserve the issue of disqualification of counsel for review,

c. has not had the opportunity to pursue any preparation of the case since the entry of this Court's order of disqualification of Plaintiff's choice of counsel since March 16, 2011,

d. cannot act until this Court makes a final disposition of the Plaintiff's pending Rule 59(e) motion. Currently, Plaintiff's choice of counsel is in limbo as it has been since this Court's order of March 16. Consistent with our Supreme Court's directives of immediate appeal in such matters, Plaintiff does not wish to waive its' right to its' chosen choice of counsel. The Plaintiff is willing to waive oral arguments on the pending Rule 59(e) motion. If the Court grants the Plaintiff's motion, the Plaintiff requests it allow ninety (90) days to complete discovery. If the Court denies the Plaintiff's 59(e) motion, the Plaintiff requests the Court allow it the time set-forth under Rule 203(b)(1) to file its appeal as the Supreme Court has deemed necessary to preserve the issue. *Hagood*, supra. In the interim, Plaintiff maintains its' continuing objections to pending motions being heard [other than the Plaintiff's Rule 59(e) motion] until all discovery is complete. Fundamental concerns of fair play and due process necessitate such a reasonable result.

e. submits this Court should recuse itself from hearing any further matters in this case on its own motion or allow Plaintiff's choice of counsel to file a motion requesting recusal for the reasons set forth hereinabove.

I will be in the Darlington area on July 19, and will be available at the Court's discretion both prior to and following the scheduled 4:00 p.m. hearing time. I will be in Washington the

week of July 11, 2011 but will make time for the Court, at its' convenience if you so desire, to hold a telephone conference or hearing. My goal is to be accommodate the Court's scheduling needs to any extent necessary to resolve these matters justly and appropriately. I request adequate notice to insure the privacy needed for a conference call. The Court can reach me on my mobile number [803.606.5983], and my email address [tmegna@gmail.com].

With kind regards, and respectfully, I remain

Sincerely yours,

Tony R. Megna

Cc:

John Jay James, Esquire
PO Box 507
Darlington, SC 29540
[attachments previously provided]

Renee Josey
1851 W. Evans Street, 4th Floor
Florence, SC 29501
[attachments previously provided]

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

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

FILED
2011 JUL -8 AM 11:05
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

10-CP-16-0332

AFFIDAVIT IN SUPPORT OF RULE 56(F) REQUEST FOR COMPLETION OF DISCOVERY

I, Alexander H. Cohen, M.D., the President of Pee Dee Health Care, P.A., being duly sworn, state as follows:

1. I have read and reviewed the foregoing attached motion. The continuing requests of Plaintiff's counsel to complete discovery (including but not limited to the taking of the depositions of the Personal Representatives of the Defendant and such other discovery as needed) are reasonable, necessary, and essential to the opposition of the Plaintiff to the pending motions of Defendant before the Court for reasons including but not limited to the following:

    a. the Defendant's refusal to participate in the taking of the depositions of the personal representatives by the Plaintiff prior to this Court's final determination of the Defendant's Motion to Disqualify the undersigned from representing the Plaintiff,

    b. the Court's previous order disqualifying Plaintiff's choice of counsel, Tony R. Megna, from representing the Plaintiff in these matters, and thus effectively concluding the opportunity of the Plaintiff to complete discovery until the Court determines the Plaintiff's pending motion pursuant to Rule 59(e), S.C.R.Civ.P.

c. The SC Supreme Court's determination that choice of one's attorney in any action is a substantial right of a party, and that an order disqualifying counsel must be immediately appealed or any later objection in a subsequent appeal will be waived.

d. Plaintiff incorporates the communications attached hereto as exhibits evidencing the Plaintiff's prior requests to this Court and to the Defendants that depositions be allowed to be taken and discovery completed prior to the Court scheduling any hearing on all outstanding motions of the parties.

2. PDHC again requests this court to allow Mr. Megna to represent Plaintiff in these matters. Alternatively, Plaintiff requests this Court to allow sufficient time to appeal the order of the court disqualifying Mr. Megna to the SC Supreme Court.

Alexander H. Cohen, M.D.

Sworn to and subscribed before me this
7th day of ~~June~~ July, 2011.

Notary Public for South Carolina
My commission expires: ~~My Commission Expires~~ August 10, 2017

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.

Hugh S. Thompson, III,
Louise T. Dailey as Personal
Representatives of the Estate
of Hugh S. Thompson,

Respondent.

INITIAL BRIEF OF APPELLANT

Tony R. Megna, Esquire
Matthews and Megna, LLC
3400 West Avenue
Columbia. SC 29203
(803) 254-3676
Attorneys for Appellant
tmegna@gmail.com

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TABLE OF CONTENTS

Table of Contents.....

Table of Cases.....

Standard of Review.....

Statement of Issues on Appeal.....

Statement of the Case.....

Argument 1: The Trial Court erred in Granting Defendant's Motion for Summary Judgment.....

Argument 2: The Trial Court erred in applying the doctrine of non-mutual offensive collateral estoppel against Appellant.....

Argument 3: The Trial Court Erred in Ruling that Appellant had no right to rely on decedent's misrepresentation.....

Argument 4: The Circuit Court erred in ruling that no fiduciary relationship existed between Appellant and Decedent.....

Argument 5: The Trial Court erred in Applying the Doctrine of "Unclean Hands" against Appellant.....

Argument 6: The Trial Court erred in failing to apply the doctrine of estoppel by concealment against Respondent.....

Argument 7: 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.....

Argument 8: 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.....

Argument 9: The Trial Court erred in acting on the motion for summary judgment because the order disqualifying counsel for Appellant was on appeal [tracking number: _____], and therefore the trial court lacked jurisdiction under Rules 205 and 241, SCACR.....

Conclusion .....

Relief Requested by Appellant.....

Request for Oral Argument .....

Certificate of Compliance with Rule 211(b).....

Certificate of Service.....

Table of Cases

Anthony v. Padmar, Inc., 320 S.C. 436, 449, 465 S.E.2d 745, 752 (Ct.App.1995)..... 29

Arnold v. City of Spartanburg, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943)..... 30

Burwell v. South Carolina Nat'l Bank, 288 S.C. 34, 41, 340 S.E.2d 786, 790 (1986).... 29

Carolina Renewal, Inc. v. S.C. Dep't of Transp., 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009)..... 26

Champion v. Whaley, 311 SE 2d 404 (COA 1984)..... 34

Cowburn v. Leventis, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005)..... 5

Crosby v. Prysmian Communications Cables And Systems USA, LLC, ____ S.C. ____ (Opinion No. 4876 Decided August 24, 2011)..... 25

Ellis v. Davidson, 358 S.C. 509, 519, 595 S.E.2d 817, 822 (Ct.App.2004)..... 28, 29

First Union National Bank of S.C. v. Soden, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998) 30

Grooms v. Kennedy, 401 SE 2d 190 (1991)..... 24

Gruber v. Santee Frozen Foods, Inc, 309 S.C. 13, 20, 419 S.E.2d 795, 800 (1992)..... 26

Hendricks v. Clemson Univ., 353 S.C. 449, 458, 578 S.E.2d 711, 715 (2003)..... 28

Hagood v Summerville, 607 S.E. 2d (SCSC 2005)..... 35

Hood v. Life & Casualty Ins. Co. of Tenn., 173 S.C. 139, 175 S.E. 76 (1934)..... 27

Higgins v. Med. Univ. of S.C., 326 S.C. 592, 599, 486 S.E.2d 269, 272 1997)..... 23

Island Car Wash, Inc. v. Norris, 292 S.C. 595, 3538 S.E.2d 150 (Ct. App. 1987)..... 29

Key Corporate Capital, Inc. v. County of Beaufort, 373 S.C. 55, 63, 644 S.E.2d 675, 679 (2007) (Toil, C.J. dissenting) (noting disgorgement results from the equitable remedy of restitution)..... 23, 34

McLaughlin v. Williams, 379 S.C. 451, 458, 665 S.E.2d 667, 671 (Ct. App. 2008)..... 26

McPherson v. SC Dept. of Hwys and Public Trans., 297 S.C. 303, 376 S.E.2d 780 (Ct. App. 1989)..... 25

Moore v. Moore, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004)..... 30

Myrtle Beach Hospital, Inc. v. City of Myrtle Beach, 522 SE 2d, 868 (2000)..... 33

Roberts v. Recovery Bur., Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994) 25

Souba v. Life Ins. Co. of Va., 187 S.C. 311, 197 S.E. 826 (1938)..... 27

Straight v. Goss, 383 S.C. 180, 206-07, 678 S.E.2d 443, 457-58 (Ct. App. 2009)..... 30

Taff v. Smith, 11 S.C. 306, 103 S.E. 551 (1920)..... 24, 33

The Huffines Co., LLC v. Lockhart, 617 SE 2d 125 (2005)..... 34

Thomas v. Am. Workmen , S.C. 178, 14 S.E.2d 886, 887 (1941)..... 27

Wachovia Bank, N.A. v. Coffey, 389 S.C. 68, 75, 698 S.E.2d 244, 247 (Ct. App. 2010)..... 31

West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000)..... 26, 34

Zurcher v. Bilton, 379 S.C. 132, 135, 666 S.E.2d 224, 226 (2008)..... 26

Rule 56, SCCP..... 23

Rule 205, SCACR..... 2, 10, 24, 35

Rule 210(h), SCACR..... 23

Rule 241, SCACR 2, 10, 24, 35

Rule 402k, SCACR 34

Rule 407, SCACR 34

42 C.F.R. 405.801 et. seq. 24

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: _____], 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 he had received actual notice form Medicare of his disbarment and the steps he must take to be re-admitted to the Medicare program. ROA 35. 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 ot 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 on December 9, 2010 based upon admissions made by Respondent in its Answer filed on June 17, 2010 [ROA ___] 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. ROA _____ Respondent filed its' counter motion for summary judgment on May 20, 2011. ROA _____ 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] ROA _____ 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 _____.

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, ROA _____ the circuit court denied Appellant's motion to reconsider the order disqualifying counsel. On August 15, 2011, Appellant filed a Notice of Appeal [ROA _____, tracking no. _____] in regard to the final decision by the Circuit Court disqualifying Appellant's counsel. The Notice of Appeal (filed September 1, 2011) was filed in regard to the Circuit Court's order disqualifying counsel for Appellant. It was filed nineteen fifteen (15) 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. ROA _____ 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. ROA _____

On January 9, 2012, Judge Few issued his order denying Defendant's motion to dismiss the present appeal. ROA _____

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 (ROA 19, 20, 21, 22, 23, 24, 25). 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. (ROA _____). 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, 2010. Appellant filed a claim (ROA 32) 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 (ROA 14) because he had been disbarred as a Medicare provider in March, 1996. (ROA 5, 1996 Medicare OIG Letter of Disbarment to Decedent). During discovery in the present case, Appellant discovered that, in 2002, decedent admitted receiving this letter from the Medicare OIG (ROA _____) and further admitted the letter contained the requirements for re-admission to the Medicare

program. ROA _____, admission in paragraph ____ of Respondent's answer filed June 17, 2010. 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 (Exhibit GG, ROA ____). 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].

By application dated In May 5, 1998, prior to Appellant having any contact with Appellant, the decedent applied for re-enrollment to the Medicare program. ROA 14.

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. (Medicare letter to Decedent, ROA 15) informing decedent (and Dr. Fowler) that decedent's application to be readmitted to the Medicare program was incomplete because, as noted on page 2 of the letter number (ROA 15), Dr. Thompson had not provided Medicare with a copy of his reinstatement letter from the Medicare OIG as required by the 1996 letter from the OIG (ROA 5).

On June 19, 1998, as part the employment process with Appellant, decedent completed a Medicare "Reassignment of Benefits" (ROA 17) 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 (ROA 17) 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 13, 1998, (ROA 38), 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 (ROA ____).

On September 14, 1998, Medicare sent Dr. Thompson a second letter that again stated Decedent's original application (ROA 16) 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 (ROA 35), Decedent's original application to be re-admitted to the Medicare program was denied. (See admission of Respondent on page 2, ¶ 11 of its' answer filed June 17, 2010 at ROA 33). During discovery in the present case, Appellant discovered that, in 2002, decedent admitted receiving the March, 1996 letter from the Medicare OIG (ROA _____) and further admitted the OIG disbarment letter contained the requirements for re-admission to the Medicare program. ROA _____, admission in paragraph ____ of

Respondent's answer filed June 17, 2010. 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. (Page 5, ¶25 of Respondent's Answer filed June 17, 2010, ROA 33). 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. (ROA 19, 20, 21, 22, 23, 24, 25). In direct contrast, decedent admitted in 2002 he had actual knowledge his disbarment (ROA ____), 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 (Exhibit F, ROA ____). Decedent then re-applied to be re-enrolled in Medicare in May, 1998. ROA ____. 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. ROA ____. During the same time period, decedent received *two additional letters* (June 12, 1998, Exhibit FF, ROA ____ and September 14, 1998, ROA ____) 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 (ROA ____). Decedent was issued a Medicare provider number based on the false application he filed with Medicare. (ROA ____) (See decedent's letter provided by counsel for Respondent in which 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). ROA ___. Based on the false certification executed by decedent, Medicare approved the Assignment of Benefits from decedent to Appellant (ROA 18).

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. (Page 2, Paragraph 10 of Respondent's Answer filed June 17, 2010 at ROA 33)." (See also ROA 5 – letter of disbarment from Medicare OIG).

[During the discovery process, Respondent provided a two page document written by Decedent to Medicare (ROA 35) 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. (ROA 36). 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]

ROA at ___

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]." (Page 3, Paragraph 12 of Respondent's Answer, ROA 33).

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." (Page 3, Paragraph 14 of Respondent's Answer, ROA 33). 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%.
>
> ROA 34.

4. In 1998, Decedent failed to seek reinstatement to the Medicare program by the Medicare Office of Inspector General. (Page 2, ¶ 11, ROA 33).

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 (ROA 51 and 52) so as to permit Decedent to treat Medicare patients and for Appellant to receive payments therefore." (Page 2, ¶ 9 of Respondent's Answer, ROA 33).

6. "(Respondent) admits that Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Appellant." (Page 6, ¶ 34 of Respondent's Answer, ROA 33).

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." (Page 3, Paragraph 12 of Respondent's Answer filed June 17, 2010 at ROA 33). (Page 8, ¶¶ 61 and 62 of Respondent's Answer, ROA 33).

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..." (Page 5, ¶ 26 of Respondent's Answer, ROA 33).

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. (Page 5, ¶ 25 of Respondent's Answer, ROA 33).

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." (Page 4, ¶ 21 of Respondent's Answer, ROA 33).

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..." (Page 3, ¶ 12 of Respondent's Answer, ROA 33).

12. On May 10, 2010, the personal representative of the Decedent's denied Appellant's claim. (Page 4, Paragraph 18 of Respondent's Answer filed June 17, 2010 at ROA 33).

13. To the extent that Decedent was an employee of (Appellant), Decedent admits that a duty of loyalty to Appellant was owed." (Page 6, ¶ 30 of Respondent's Answer ROA 33).

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." (top of Page 3, ¶ 11 of Respondent's Answer, ROA 33).

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). (Page 4, ¶¶ 17 and 18 of Respondent's Answer, ROA 33).

16. (Respondents) have no information in their possession which denies the allegations of paragraph 32 of the Appellant's Complaint. ¶ 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 in ROA 20. 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

27), 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 (ROA 29) 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 (ROA [redacted]),

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 (ROA [redacted]), 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.

B

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. (ROA 19, 20, 21, 22, 23, 24, 25). Nor does the Respondent contest that [decedent wrote a two page letter to Medicare (ROA 35) 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. (ROA 36). Instead, the Respondent and rested simply on the allegations contained in its' Answer.

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

Medicare in 1996 and never readmitted,[3] (ROA _____), the certifications he repeatedly signed attesting to the truth of his statements to both Medicare and Appellant (ROA ____), and the admissions made in his answer filed in circuit court on June 17, 2010 (ROA ____) 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, (ROA ___), 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

[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.

between Appellant and decedent. See generally, 42 C.F.R. 405.801 et. seq. Nor did 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 (ROA ____) until the document was provided to Appellant during the discovery process after the filing of the lawsuit.

In sum, thus, the Medicare appeals process [the 'Mabry' order] 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 [the 'Joe' order] 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. (ROA ____). Decedent himself 'conceded' the same by admitting he actually received the 1996 letter of disbarment from the Medicare OIG. (ROA at ____). 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. (ROA ____). 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. (Page 5, ¶ 25 of Respondent's Answer filed June 17, 2010 at ROA 33), the relationship of Decedent with Appellant was such that Decedent "was bound to act in good faith and with due regard to Appellants' interest." (Page 4, ¶ 21 of Respondent's Answer filed June 17, 2010 at ROA 33), and Decedent had a duty of loyalty to Appellant. (Page 6, ¶ 30 of Respondent's Answer filed June 17, 2010 at ROA 33). 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. ROA ____.

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..." (Page 5, ¶ 26 of Respondent's Answer filed June 17, 2010, ROA 33).
>
> 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. (Page 5, ¶ 25 of Respondent's Answer filed June 17, 2010 at ROA 33).
>
> The relationship of Decedent with Appellant was such that Decedent "was bound to act in good faith and with due regard to Appellants' interest." (Page 4, ¶ 21 of Respondent's Answer filed June 17, 2010 at ROA 33).

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 (ROA ___) 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 [ROA ____]. 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 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 (ROA ___). He admitted

he was actually notified by Medicare of the steps he had to go through in order to be reinstated. (ROA ___) 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 '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 [ROA ____(Exhibits A and B)], 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. [ROA ____ Exhibits A, B, F, O, and FF]. Neither the 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, [ROA ____ Exhibits Y, Z, AA, BB, CC, DD and EE], the 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 the Appellant in his assurances that the statements of the Medicare intermediary were true. Finally, as the 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. [See page 2, ¶ 10, second sentence, of Answer of Defendants filed June 17, 2010, ROA ____].

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, [the 'ALJ Joe' order dated January 22, 2008] [ROA ____] prior to the Medicare 'Joe order,' [dated March 14, 2008 Exhibit N, ROA ____]. 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. [ROA____, See Exhibits U and P]. 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 from 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.

The 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. (Page 5, ¶ 25 of Respondent's Answer filed June 17, 2010 at ROA 33). 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." (Page 4, ¶ 21 of Respondent's Answer filed June 17, 2010 at ROA 33). 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..." (Page 5, ¶ 26 of Respondent's Answer filed June 17, 2010 at ROA 33). 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. See also the reassignment of benefits from decedent to Appellant. ROA ____. 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 [Exhibit EE, ROA ___], 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 a Appellant to prove a case of prevention. *Champion v. Whaley*, 311 SE 2d 404 (COA 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, (ROA ____) fraudulently executed by the Decedent on November 4, 1998. [ROA ____, Exhibit B]. 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 he do 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 the Appellant substantial damage, and that the 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 the 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: _____], 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 Summerville, 607 S.E. 2d (SCSC 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]

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.

Respectfully submitted,

Tony R. Megna, Esquire
Matthews and Megna, LLC
3400 West Avenue
Columbia, SC 29016
(803) 254-3676
ATTORNEYS FOR APPELLANT

February 9, 2012.

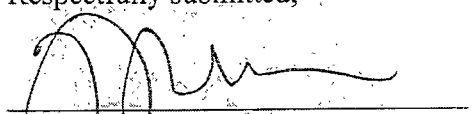
[4] In an unpublished opinion (Estate of Connor, Opinion No. 2009-UP-502, COA Filed October 29, 2009), this Court, citing Rules 205 and 241(a), SCACR, reversed decisions of the lower court that were in contradiction of the automatic stay provisions.

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements
Number of Pages – 37 (including certificate of service)

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.

Respectfully submitted,



Tony R. Megna, Esquire
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3400 West Avenue
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(803) 254-3676
tmegna@gmail.com
ATTORNEYS FOR APPELLANT

February 9, 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

Pee Dee Health Care, P.A.,

Appellant,

v.

Estate of Hugh S. Thompson,

Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 9th day of February, 2012, the foregoing Initial 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:

Jay James, Esquire
PO Box 507
Darlington, SC 29540

Renee Josey, Esquire
319 S. Irby St.
Florence, SC 29501

The Honorable Tanya Gee
Clerk of Court, SC Court of Appeals
PO Box 11629
Columbia, SC 29211
(HAND DELIVERED)

RECEIVED
FEB 09 2012
SC Court of Appeals

Harriet Hobbs

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

J. MICHAEL BAXLEY
JUDGE

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

June 23, 2011

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

Re: PDHC v Estate of Thompson; 10-CP-16-0332
Motions Hearing Scheduled for July 19 in Darlington, SC

Dear Mr. Megna:

I have received your letter of June 20, 2011, which was received after the Notice of Hearing for July 19 was sent out in this matter. Our office attempted to contact you unsuccessfully several times prior to setting the July 19 hearing date and issuing the notice of hearing. Unfortunately, there was no response to our contacts or messages until your letter of June 20.

Previously, you expressed a concern that the reason the Defendant in this case moved to disqualify you as counsel was to prevent you from arguing your Summary Judgment Motion on behalf of your clients (Attachment A). The Notice of Hearing and the structure of the upcoming hearings were promulgated to satisfy your concerns, as you can readily see from the wording (Attachment B). Now you complain that Defendant has refused to participate in discovery and you are therefore not prepared to argue the Summary Judgment Motions. Because you filed a motion for Summary Judgment, Rule 11 SCRCP, requires that you must have a basis from which to argue that motion, and we will go forward.

Respectfully, the Court cannot accommodate conflicting and changing positions. Further, for reasons of judicial economy and proper case administration, the Court requires that the Summary Judgment Motions be heard before Plaintiff's 59(e) Motion for Reconsideration at the 4:00 p.m. hearing on July 19, 2011, in Darlington, South Carolina, as scheduled.

Sincerely,

J. Michael Baxley
JMB/elo
Attachments

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

Matthews and Megna, LLC

Attorneys and Counselors at Law
3400 West Avenue
Columbia, SC 29203
TELEPHONE: 803-799-1700
E-mail: tmegna@gmail.com

FILED
2011 MAY 26 PM 12:38
SCOTT B. SPROUSE
CLERK OF COURT C.C.P.
DARLINGTON COUNTY, S.C.

May 26, 2011

The Honorable J. Michael Baxley
531 East Carolina Avenue
Hartsville, SC 29550-4311
[Via email to JBaxleyLC@sccourts.org]

Re: Estate of Hugh S. Thompson, Case No: 10-CP-16-0332

Dear Judge Baxley:

Please find enclosed the Plaintiff's Reply to the Defendant's objection o the Motion for Reconsideration pending before the Court.

As to the Defendant's request to expedite the pending motions that the Court previously struck from the roster, the Plaintiff respectfully notes:

1. The Defendant's request to demonstrates the true motives behind their motion to relieve Plaintiff's counsel in the first instance, i.e., the Defendant's has sought a procedural advantage, has initially obtained it, and now seeks to use it as an additional weapon to hasten a decision on the case that equity and due process of law proscribes, and to do exactly what Courts addressing the matter of disqualification have forewarned:

   > "[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."); see also *Caracciolo v. Ballard*, 687 F. Supp. 159, 160-61 (E.D. Pa. 1988) ("The Code of Professional Responsibility is applied to deter professional misconduct, and to preserve the profession's standing in the community - it was not intended as an addition to the depressingly formidable array of dilatory strategies already part of the litigator's arsenal.").
   >
   > *Martin v. Turner*, ___ *F3d* ____ (USDC ED PA Civil Action No. 10-1874 February 18, 2011).

2. There is no deposition testimony included in support of the motions as the Plaintiff noticed the depositions of the representatives of the Defendant. Counsel for the Defendant refused to make them available when the Plaintiff previously requested. The Plaintiff formerly requested the Court allow the depositions to be completed prior to having these motions determined. It is

not realistic to hear the motions until discovery has been completed.

3. Any expediting of the motions denies the Plaintiff the opportunity to consider the immediate appeal of this Court's order disqualifying the undersigned if this Court does not grant the pending Motion to Reconsider. Such a result is not reasonable in light of the fact that the Supreme Court specifically granted the right of immediate appeal in such situations. *Hagood v Summerville*, 607 S.E. 2d (SCSC 2005).

Thank you for you for the opportunity to respond to the Defendant response as well as your consideration in these matters.

Sincerely yours,

Tony R. Megna

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CLERK OF COURT
DARLINGTON COUNTY, S.C.

Cc:

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

Renee Josey
1831 W. Evans Street
Florence, SC 29501
[Via email to
RJosey@turnerpadget.com]

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

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	2010-CP-16-0332
COUNTY OF DARLINGTON	)	
Pee Dee Health Care, P.A.,	)	
Plaintiff,	)	**NOTICE OF HEARING**
v	)	
Estate of Hugh S. Thompson,	)	
Defendant.	)	

TO: TONY R. MEGNA, ESQ., AND BENJAMIN R. MATTHEWS, ESQ., FOR PLAINTIFF
JOHN JAY JAMES, II, ESQ., AND J. RENE JOSEY, ESQ., FOR DEFENDANT

A MOTIONS HEARING has been set in the above entitled action for the 19th day of July, 2011, at 4:00 o'clock p.m., in the fifth floor courtroom of the Darlington County Courthouse. The Court attempted to set the date and time of this hearing by consent, but was unable, after multiple attempts, to reach Mr. Megna. At the hearing, the Court will consider Plaintiff's motion to reconsider the Court's decision disqualifying Plaintiff's counsel Mr. Megna, as well as both parties' motions for summary judgment. Mr. Megna will be permitted to argue his summary judgment motion, any decision on the motion for disqualification will be rendered thereafter.

You are hereby notified to be present on the fifth floor of the Darlington County Courthouse at the aforesaid time. A copy of this Notice is being served on the following parties/counsel this 17th June, 2011, by being placed in the United States mails, first class postage paid, addressed as follows:

J. Michael Baxley
Chief Administrative Judge
Fourth Judicial Circuit

Hartsville, South Carolina
June 17, 2011

Attorneys for Plaintiff
Tony R. Megna, Esq.
3400 West Avenue
Columbia, S.C. 29203

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

Attorneys for Defendant
J. Rene Josey, Esq.
1831 West Evans Street
Florence, S.C. 29501

John Jay James, II, Esq.
Post Office Box 507
Darlington, S.C. 29540

CC:
Honorable Scott B. Suggs, Clerk of Court, Darlington County (by mail)

Attachment B

Matthews and Megna, LLC

Attorneys and Counselors at Law
3400 West Avenue
Columbia, SC 29203
TELEPHONE: 803-799-1700
E-mail: tmegna@gmail.com

February 4, 2011

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

Re: Estate of Hugh S. Thompson, Case No: 10-CP-16-0332

Dear Judge Baxley:

The Plaintiff, pursuant to Rule 16(a), S.C.R.Civ.P., respectfully requests the Court to hold a pre-trial hearing to bring order to the motions and other matters now pending before the Court. At this time, the parties have agreed to suspend further discovery pending the decisions of the Court on the various motions that are now pending. Most discovery has been completed other then the taking of depositions. There are, however, several outstanding matters pending before the Court, and being considered by the parties. They include the following:

Outstanding Matters of Plaintiff:

a. Motion for Summary Judgment [The Plaintiffs had scheduled to the depositions of the Defendants so this matter could be heard and determined. However, the Defendants objected.]

COPY FOR YOUR INFORMATION

b. The Plaintiff intends to file additional motions including but not limited to a Motion to Compel Answers to Interrogatories and a Motion to Disqualify the Personal Representatives due to a conflict with their breach of fiduciary duties to the creditors of the estate.

c. The Plaintiff is contemplating filing an additional action against the Personal Representatives for breach of their fiduciary duties. If so, the Plaintiff will request the matter be consolidated with the current case.

d. The Plaintiff is also considering adding additional parties to the lawsuit pending before the Court, but is unable to make an informed decision on the matter until discovery is complete.

Outstanding Matters of Defendant:

a. Motion to Amend Answer filed after the Plaintiff filed its Motion for Summary Judgment

b. Motion to Compel Production of documents. Plaintiff contends the documents are protected by the work-product doctrine and the attorney-client privilege.

c. Matters relating to the Defendant's objections to the taking of the depositions of the owners of Plaintiff. The Plaintiff has objected to the request by the Defendants for these depositions to be taken based on the application of the S.C. Dead Man statute as well as the attorney-client privilege.

d. Motion to Disqualify Plaintiff's counsel. The Plaintiff believes this motion to be without merit, and that it has been filed for the purpose of harassment and delay. Obviously, the Defendants disagree.

As is usual in these cases, neither party believes the other party's positions are well-founded.

The differences of the parties aside, the controversy is before the Court, and the Plaintiff respectfully suggests that a formal pre-trial conference in compliance with Rule 16, S.C.R.Civ.P., is in the best interests of all concerned in order that the Court has the full information needed to make the determinations it is called upon to make.

The Plaintiff further respectfully suggests, considering the nature of the case, and the limited time of the Court, that the Court require the parties comply to with the formal requirement of Rule 16. If the Court agrees, the Plaintiff respectfully suggests that formal compliance also serve as the parties' replies to the various motions of the Court in a time schedule determined by the Court. Such a procedure will simplify the issues and meet the goals of Rule 16 – regardless of the parties' respective positions on the validity of the other's case. The Plaintiff further suggests that the Court require formal written briefs that address the matters contemplated by Rule 16 and that they are served upon the parties and the Court in a manner that provides the Court and the parties adequate time to review the information.

If possible, I would appreciate you considering scheduling the pre-trial conference after March as I am scheduled to be unavailable much of the time until then. I am also amenable to any reasonable requests of counsel for the Defendants as to the time for the pre-trial conference as I imagine they may have similar scheduling issues they wish the Court to take into consideration. By making this request, the Plaintiff is not requesting the Court to expedite any matter but to assure that matters involved in resolving the controversies between the parties are considered in an orderly fashion. I am more than happy to draft a order effecting the foregoing if the Court wishes me to do so.

Please feel free to contact me at your convenience if you desire additional information. My mobile number is 803.606.59836. I am often out-of-town but can always be reached by email at tmegna@gmail.com. By copy of this letter to counsel for the Defendants, I am advising them of my requests and requesting they advise of any dates after March they may not be available.

With kind regards, I remain

Sincerely yours,

Tony R. Megna

Cc: Renee Josey
1831 W. Evans Street
Florence, SC 29501

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

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**10-CP-16-0332**
Estate of Hugh S. Thompson,	
Defendant.	

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SCOTT B. SIGGS
CLERK OF COURT/R.M.C.
DARLINGTON COUNTY, S.C.

PLAINTIFF'S MOTION TO RECONSIDER

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

1. The Plaintiff incorporates herein its response to the Defendant's Motion to Disqualify previously filed with this Court.

2. As indicated by the attached affidavit of Mark Matthews, the document [Exhibit HH] that this Court primarily relied upon to disqualify the undersigned was obtained during the course of discovery in this case between the parties.[1] The document in Plaintiff's files is attached to his affidavit. The Court's reliance on Exhibit HH to Disqualify the undersigned is error.

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

3. The Court overlooked the Plaintiff's request that the Court should recuse itself from hearing matters concerning the Plaintiff and the undersigned due to the litigation now pending in Florence County where this Court often sits by designation.

4. The Court overlooked that the Medicare 855 attached to the Defendant's Motion to

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

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

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

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

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

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

Respectfully submitted,

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

FILED
2011 MAY -2 AM 11:12
SCOTT D. SIGGS
CLERK OF COURT/REG'D
CARLISLE COUNTY, S.C.

May 2, 2011.

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**CERTIFICATE OF SERVICE**
Estate of Hugh S. Thompson,	
Defendant.	
	10-CP-16-0332

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

Plaintiff's Motion to Reconsider

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

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

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

Mark Matthews

May 2, 2011.

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**AFFIDAVIT**
Estate of Hugh S. Thompson,	
Defendant.	
	10-CP-16-0332

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

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

1. I am a physician and Vice-President of Pee Dee Health Care, PA, and have been so since 1995.

2. I have an interest in the outcome of the lawsuit against the estate of Dr. Thompson.

3. I was an owner and shareholder of Pee Dee Health Care at the time Dr. Thompson was hired as a physician at Pee Dee Health Care in 1998. The initial conversations with Dr. Thompson occurred with the President of Pee Dee Health Care, PA at the time, Dr. James McInnis and Dr. Josiah Matthews. While Tony and I agreed to the arrangement, neither he nor I was involved in those discussions with Dr. Thompson. Nor did Tony supervise Dr. Thompson. That task was assigned to Drs. McInnis with the permission of the SC Board of Medical Examiners. Dr. Matthews assisted Dr. McInnis.

4. I knew Dr. Thompson for in excess of fifteen years. In the entire time I knew Dr. Thompson, he never told me he had been disbarred by Medicare. I saw Dr. Thompson several times per week, and often several times per day as we often worked on the same hall. I was completely surprised when we were informed by Medicare that Dr. Thompson was not a Medicare provider during the time he worked for Pee Dee Health Care. It was particularly difficult to understand as Dr. Thompson was specifically hired to treat all patients and he and I regularly spoke about referrals, including referrals of Medicare patients, he requested I make to him.

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

5. Tony Megna has been our General Counsel since 1995. It would cause substantial hardship and prejudice to me, Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it likely be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason.

6. I do not agree to waive any attorney-client privilege I have with Tony in his capacity as an attorney advising me in regard to legal matters, individually, or in his capacity

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

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

FURTHER THE AFFIANT SAYETH NOT.

Alexander H. Cohen, M.D.

SWORN TO BEFORE ME this
2 day of May, 2011.
(L.S.)
Notary Public for South Carolina
My Commission Expires: My Commission Expires August 10, 2017

FILED
2011 MAY -2 AM 11:13
SCOTT B. SIGGS
CLERK OF COURT/DC
DARLINGTON COUNTY, S.C.

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**AFFIDAVIT**
Estate of Hugh S. Thompson,	
Defendant.	
	10-CP-16-0332

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

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

1. I am a physician and Vice-President of Pee Dee Health Care, PA, and was the founding physician of Pee Dee Health Care in 1975.

2. I have an interest in the outcome of the lawsuit against the estate of Dr. Thompson.

3. I had the initial conversations that led to Pee Dee Health Care hiring Dr. Thompson in 1998. After the initial conversations, the President of Pee Dee Health Care, PA at the time Dr. James McInnis and I, had conversations with Dr. Thompson, and we hired Dr. Thompson. While Tony agreed to the arrangement, he was not involved in any of the discussions with Dr. Thompson. Nor did Tony supervise Dr. Thompson. Dr. McInnis did so with the permission of the SC Board of Medical examiners. I assisted Dr. McInnis.

4. I knew Dr. Thompson for in excess of thirty years. In the entire time I knew Dr. Thompson, he never told me he had been disbarred by Medicare. I was completely surprised when we were informed by Medicare that Dr. Thompson was not a provider during the time he worked for Pee Dee Health Care. It was particularly difficult to understand as Dr. Thompson was specifically hired to treat all patients and we regularly spoke about referral, including referrals of Medicare patients, made to him.

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

5. Tony Megna has been our General Counsel since 1995. It would cause substantial hardship and prejudice to me, Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it likely be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason.

6. I do not agree to waive any attorney-client privilege I have with Tony in his capacity as an attorney advising me in regard to legal matters, individually, or in his capacity advising me as to legal matters in my capacity as an officer and owner of Pee Dee Health Care. I consider all conversations in which we discussed matters relating to Dr.

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

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

FURTHER THE AFFIANT SAYETH NOT.

Josiah S. Matthews, M.D.

SWORN TO BEFORE ME this
2 day of May, 2011.
(L.S.)
Notary Public for South Carolina
My Commission Expires: ~~My Commission Expires~~
August 10, 2017

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

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**AFFIDAVIT**
Estate of Hugh S. Thompson,	
Defendant.	
	10-CP-16-0332

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

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

1. I am an employee of Pee Dee Health Care, P.A, and was so employed during the time Dr. Hugh Thompson practiced at Pee Dee Health Care, PA.

2. I have assisted in organizing the documents and exhibits for this case, and have had possession of the documents in this case for the past several months. .

3. Exhibit HH is not the original document from the files of Plaintiff. The documents provided during discovery were not separated in such a manner that allows me to know with certainty where it originated. I do not know if it was provided by the Defendant or as a result of the subpoenas to First Choice, the SC Board of Medical Examiners, Medicare, the US Department of Justice, or elsewhere. I do know however that I had never seen the document in any file maintained by our offices that we had produced prior to this case.

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

4. The files of the Plaintiff contain the letter attached hereto as Exhibit A. Exhibit A is the same letter as Exhibit HH except that Exhibit A does not have any notations on the bottom of the page.

5. I have searched all the files and records of Plaintiff, and Exhibit HH is not in these files. I have also asked others in our offices to search for this document. No one in our office has seen the document nor has any file that contains the documents HH.

6. In regard to the Medicare 855 attached to the Defendant's Motion to Disqualify, I had an opportunity to review this document during the hearing before this Court. The document only evidenced that the 855 was being filed to initiate a change of ownership to Lake City Community Hospital. It was signed by Pete Bowman as President of Lake City Community Hospital. As the Court knows, these matters are now in litigation in Florence County Court of Common Pleas, and known generally as the 'Lake City' litigation. The '855' document has nothing to do with the case at bar as Dr. Thompson left the employ

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

7. At no time did Dr. Thompson inform me that he was barred from the Medicare program or he could not provide billable services to Medicare patients.

8. Tony Megna has been General Counsel to Pee Dee Health Care since 1995. It would cause substantial hardship and prejudice to Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it likely be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason. I cannot imagine this occurring without considerable harm and expense to PDHC, which I respectfully submit is simply unfair and inappropriate.

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

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

FURTHER THE AFFIANT SAYETH NOT.

Warren Mark Matthews, Sr.

SWORN TO BEFORE ME this
2 day of May, 2011.
(L.S.)
Notary Public for South Carolina
My Commission Expires: My Commission Expires August 10, 2017

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

Ex: A

Dear Tony,

I have been awfully rushed since I got back from Columbia (late last night). Sorry I haven't found all the documents you need. I will get the rest of them together as soon as possible, and if necessary, bring them up to you in Columbia.
You will find two "private agreements" with the Board: the earlier dated one (which has probably been superseded by the one executed this year) was the result of the settlement in Federal Court I referred to.
I've got literally a box full of documents concerning the arduous struggle with the Board. Any of them I can make available to you if you need them.
I think the current "private agreement" is the index document now. I'm sure I'll be talking to you again soon, and I'll try to locate everything before I do.

Thanks,

Hugh Thompson

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

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**AFFIDAVIT**
Estate of Hugh S. Thompson,	
Defendant.	
	10-CP-16-0332

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

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

1. I am an employee of Pee Dee Health Care, Pa, and was so employed during the time Dr. Hugh Thompson practiced at Pee Dee Health Care, PA. At the time, I was also the President of Pee Dee Health Care, P.A.

2. During Dr. Thompson's employment with PDHC, I referred patients to him for pain management services. These patients had many different insurance plans including Medicare.

3. At no time did Dr. Thompson ask me to stop referring Medicare patients to him. In addition he never informed me that he was barred from seeing Medicare patients.

4. Prior to Dr. Thompson being employed at Pee Dee Health Care, I had extensive conversations with Dr. Thompson about his past troubles with the state Board of Medical Examiners. During these conversations, and during his employ at Pee Dee Health Care, he never mentioned or suggested that he had any ongoing issues with any insurance program or that he could not provide medical services to whomever he chose. I had known Dr. Thompson may years prior to his employment at Pee Dee Health Care, and had no reason not to believe the statements he was making. Nor did I have any reason to question his judgment, his honesty, or his ability to treat medically patients referred to him.

5. After the initial conversations, we hired Dr. Thompson. While Tony agreed to the arrangement, he was not involved in the discussions with Dr. Thompson. Those were conducted by Dr. Matthews and me. Nor did Tony supervise Dr. Thompson. I mainly managed those matters with the permission of the SC Board of Medical Examiners and the assistance of Dr. Matthews.

6. At his request, I accompanied Dr. Thompson to the offices of the state Board of Medical examiners in order to appear before the Board with Dr. Thompson so that he could work at Pee Dee Health, P.A. We spent several hours together that day and discussed the matters that led to his having to appear before the Board in order to his license to practice

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

medicine in the offices of Pee Dee Health Care approved. At no time did Dr. Thompson ever inform me that he was barred from the Medicare program or he could not provide billable services to Medicare patients. Nor did I ever hear Dr. Thompson have any conversation with anyone to the effect that he was unable to provide medical services to patients with Medicare. Moreover, during our meeting at the medical board, Dr. Thomson very specifically informed me that he was able and willing to see and treat any patient, regardless of insurance coverage.

7. I never heard Dr. Thompson, at any time, object to the billing of the medical services he performed on any patient.

8. Tony Megna has been General Counsel to Pee Dee Health Care since 1995. It would cause substantial hardship and prejudice to me, Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it likely be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason.

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

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

FURTHER THE AFFIANT SAYETH NOT.

James D. McInnis, MD

SWORN TO BEFORE ME this

SCOTT B. SUGGS
CLERK OF COURT/PD
FLORENCE, S.C.
2011 MAY -2 AM 11:12
FILED

2nd day of May, 2011.

(L.S.)

Notary Public for South Carolina

My Commission Expires: My Commission Expires August 10, 2017

FILED

2011 MAY -2 AM 11:12

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

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**AFFIDAVIT**
Estate of Hugh S. Thompson,	
Defendant.	
	10-CP-16-0332

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

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

1. I am an employee of Pee Dee Health Care, PA, and was so employed during the time Dr. Hugh Thompson practiced at Pee Dee Health Care, PA. as the Vice President of Business Operations. In such capacity, I saw and spoke to Dr. Thompson on many occasions.

2. I am now President of Business Operations.

3. At no time did Dr. Thompson inform me that he was barred from the Medicare program or he could not provide billable services to Medicare patients.

4. My staff billed Medicare on numerous occasions for serviced performed by Dr. Thompson and at no time did he object to the billing of these services nor inform us any reason he was unable to provide medical services to Medicare beneficiaries.

5. In early June 2007, my office received a letter from Palmetto GBA [Exhibit X] stating that we had been overpaid $208,821.03 due to Dr. Thompson being sanctioned by the Office of Inspector General since 1996. Including interest, the total amount our office repaid to Palmetto GBA was $226,740.19.

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

6. Tony Megna has been General Counsel to Pee Dee Health Care since 1995. It would cause substantial hardship and prejudice to Pee Dee Health Care and others to obtain additional counsel to represent it in the matters currently before this Court. Not only would it likely be prohibitively expensive, it would take another attorney a significant amount of time and effort to familiarize him or her with these matters and would cause delay for no justifiable reason.

7. I do not agree to waive any attorney-client privilege I have with Tony in his capacity as an attorney advising me in regard to legal matters, individually, or in his capacity advising me as to legal matters in my capacity as Vice President (now President) of Business Operations for Pee Dee Health Care. I consider all conversations in which we discussed matters relating to Dr. Thompson to be matters I discussed with Tony as an attorney, and not as CEO of Pee Dee Health Care. We have always made the effort to keep matters regarding the employment of physicians as a matter decided and determined by the physician officers of Pee Dee Health Care. We have done so in order that Tony

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

8. In addition to the foregoing, and in my position as President of Business Operations of Pee Dee Health Care, I am the person responsibility for the financial operations of the company. Tony certainly has access to the financial information, and I review it with him regularly, but any information he could obtain for this Court or in the dispute with Dr. Thompson's estate would have to first come through me because, as a practical matter, I and my staff have the information and compile it on a daily basis as it changes on a daily basis. With all due respect, it would be not be appropriate to say that Tony is the person with primary access and understanding of the information. Again, he has had access to it just as any other attorney would have such access. But it is not realistic to expect that Tony could testify to the financial information relating to these matters without either first consulting with me or him first completing much work and research.

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

FURTHER THE AFFIANT SAYETH NOT.

Katherine Noyes

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

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

RECEIVED
AUG 24 2011
SC Court of Appeals

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

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Michael J. Baxley, Jr., Circuit Court Judge

CIVIL ACTION NO: 2010-CP-16-0332

Pee Dee Health Care, Inc.

Appellant,

v.

Estate of Hugh S. Thompson,

Respondents.

APPELLANT'S MOTION

(A) TO STAY APPELLATE PROCEEDINGS PENDING FURTHER ORDER OF THIS COURT,

(B) TO VACATE ALL PROCEEDINGS AND ORDERS RESULTING THEREFROM IN THE CIRCUIT COURT, AND

(C) TO DISQUALIFY COUNSEL FOR RESPONDENT FROM PAST AND FUTURE REPRESENTATION OF RESPONDENT BECAUSE OF MATTERS INCLUDING:

I. Dual representation of appellant and respondent by attorneys for Respondent and resulting breaches of attorney-client relationship, and

II. Breach of attorney-client relationship with Appellant by counsel for Respondent.

Counsel of record listed on following page

Counsel of Record:

Counsel for Appellant

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203

Counsel for Respondent

Renee Josey, Esquire
Turner Padget Graham and Laney, P.A.
1851 W. Evans Street, 4th Floor
Florence, SC 29501

and

John Jay James, Esquire
PO Box 507
Darlington, SC 29540

Facts – Section I

On July 21, 2011, the circuit court scheduled and held a hearing on the parties' cross-motions for summary judgment.[1] Approximately twenty minutes prior to the July 21st hearing, the undersigned was informed that Appellant had received a letter from Brad Hylton, an attorney for Turner Padget Graham and Laney, P.A., [hereinafter 'Turner Padget.' Both Mr. Hylton and Mr. Josey are partners at Turner Padgett, and work from Turner Padget's Florence, South Carolina office. The letter indicated Turner Padget had been representing Appellant, and was currently representing Appellant, in the defense of a claim

[1] The trial court sent Appellant by email an un-signed written order dated August 12, 2011. The trial court sent a signed copy of the order to Appellant which was received by Appellant on Monday, August 15, 2011 (Exhibit A). Exhibit A is the subject of the Appellant's underlying appeal to this Court together with the trial court's order quashing all documents presented to the trial court since June 17, 2011 by counsel for Appellant.

brought by an employee of Appellant. Turner Padget's representation of Appellant has been on-going since 2003, **eight years prior** to Mr. Josey's and Mr. James' representation of the Respondent in the case at bar.

The letter from Mr. Hylton of Turner Padget (Exhibit B) explained that a hearing before the Worker's Compensation Commission had been scheduled for the matters at issue in the adverse representation for September 1, 2011. The letter further requested Appellant Pee Dee Health Care, P.A. to provide documents needed for the hearing, and to meet Mr. Hylton at a time and place as detailed in the letter. The additional monetary claims that Turner Padgett was defending on behalf of Appellant amounted to a minimum amount of $250,000.00 and a maximum amount of $350,000.00. (See Exhibit C). This amount is in addition to the claims previously made against Appellant, the total sum of which the Appellant has not yet ascertained. The size of the claim is significant. The ramifications to Pee Dee Health Care have been and continue to be both significant and material to the interests of Appellant.

Upon receipt of the letter from Mr. Hylton of Turner Padget on July 21, 2011, Appellant immediately verbally informed counsel for the Respondent (Mr. James) of the matter. Mr. James informed Mr. Josey of the conflict of interest. Counsel for Appellant informed the trial court as soon as the hearing began of the conflict of interest between Turner Padgett and Appellant. Mr. Josey, a partner at Turner Padget, informed the Court that he had contacted his office, and confirmed that Turner Padget was not actively representing the Appellant in any on-going matter. [Pages 6-7, Transcript at line 17, Exhibit D]. A copy of Mr. Hylton's letter (Exhibit B) was admitted into evidence at the hearing without objection by either party. The trial court ordered the hearing to continue without further

discussion of the conflict issue. The trial indicated, however, it would address the conflict of interest issue. (See page 7, line 21, Exhibit D). The trial court then heard oral arguments on the parties' cross-motions for summary judgment and a motion for reconsideration that had been previously filed by the Appellant.[2] At the conclusion of the hearing, the trial court took all matters under advisement.

By signed order received by Appellant on Monday, August 15, 2011 from the circuit court (Exhibit A), the trial court denied the Appellant's Rule 59(e) motion and quashed all documents presented to the trial court since June 17, 2011 by counsel for Appellant, including the Appellant's request that Turner Padgett be disqualified from representing Respondent and that all matters submitted by Turner Padgett to the circuit court that were adverse to Appellant be stricken from the record. The order of the circuit court did not address the conflict interest. Instead, the circuit court struck the documents filed by Appellant bringing the conflicts of interest issue before the Court in the first instance. As noted later herein, Mr. Hylton of Turner Padgett signed a consent order on behalf of Appellant in the case (in which Turner Padgett had been representing Appellant for eight years) without consulting with or obtaining the consent of Appellant. The consent order provided for the substitution of counsel in the case. Mr. Hylton did not inform the attorneys that agreed to undertake the representation of Appellant of the conflicts of interest that led to

[2] The motion for reconsideration was in regard to a previous order of the circuit court disqualifying Appellant's counsel of choice (the undersigned) from further activity on the case pursuant to Rule 4.7. There were neither accusations nor findings of misconduct. At the previous hearing held on March 16, 2011, counsel for Respondent stated: "Mr. James: "We have not accused Mr. Megna of professional misconduct." (Transcript of hearing dated March 16, 2011, page 10, Exhibit E): Page 10, lines 3-4: The questions on appeal are, among others, whether counsel for Appellant is a necessary witness as defined under Rule 4.7, and whether or not counsel for Appellant is disqualified from representing Appellant at trial as the wording of Rule 4.7 states, or in all proceedings, as the trial court held.

the substitution of counsel. (Exhibit I-1). Mr. Josey (with Mr. James) has continued to represent the Respondent. The order of the circuit court (Exhibit A) is the subject of the Appellant's underlying appeal to this Court.

Facts -- Section II

Following the conclusion of the July 21th hearing, and upon further investigation, Appellant discovered that Turner Padget was, in fact, actively representing Appellant, and had been actively representing Appellant since 2003 – **eight (8) years prior to undertaking the representation of the Respondent in the case at bar**. Appellant immediately notified the trial court and counsel for the Respondent of the confirmation of the dual representation by Turner Padgett (Exhibits F), the incorrect statements made by Mr. Josey at the July 21th hearing, and Appellant's refusal to waive the conflicts of interest. Appellant, by letter dated July 20, 2011, also requested copies of the file from Mr. Hylton (Exhibit G). See also letter to Mr. Josey, Mr. James and the trial court dated Tuesday, July 26, 2011 (Exhibit H). Appellant further requested that Turner Padget be disqualified from further representation of the Respondent. In addition, Appellant served subpoenas on several parties in order to gather additional evidence that the counsel for the Respondent had been actively working with other parties to the material disadvantage of Appellant.[3]

Facts -- Section III

Following confirmation by Appellant that Turner Padget was indeed representing clients with interests adverse to the interests of Appellant, Mr. Hylton, the other attorney from Turner Padgett representing Appellant, unilaterally drafted and sent to the Commission

[3] Appellant had time records from another law firm indicating that Turner Padgett had extensive conversations with opposing counsel in cases which materially adverse to the interests of Appellant. Exhibit H-1 is an example of the subpoenas served by Appellant.

a consent order for substitution of counsel signed on behalf of Appellant by Mr. Hylton. Mr. Hylton drafted the consent order without Appellant's knowledge, and signed the consent order without Appellant's consent (Exhibit I).[4] Turner Padget did not inform the Commission of the conflicts of interest issues, nor the objections of the Appellant, nor any other pertinent issues regarding the preparation and submission of the unauthorized consent order. Further, Turner Padget did not inform the law firm assuming the representation of Appellant of any matters regarding the Appellant's desire that the original counsel who had been handling the case for eight (8) years (Turner Padgett) continue the case to conclusion. (See attached affidavit of William Littlejohn, Esquire. Exhibit I-1). The Appellant informed the Commissioner that Turner Padget had not been authorized to take such actions, and that the actions taken by Turner Padget were directly contrary to the interests of the Appellant. See Exhibit J. Appellant notified the circuit court of the foregoing on July 27, 2011 (again providing copies to Mr. Hylton, Mr. Josey and Mr. James) (Exhibit K), and included subpoenas that Appellant had issued for records from several parties. The subpoenas were aimed at gathering evidence to discover the individuals with knowledge of the dual representation and breaches of responsibilities due Appellant by Turner Padget. Exhibit H-1 is an example of the subpoenas served by Appellant.

Counsel for the Respondent filed a Motion for a Protective Order. See Exhibit L. Appellant replied to the Motion for Protective Order requesting enforcement of the subpoenas and other relief, including the immediate disqualification of counsel for Respondent. Exhibit M. The trial court, without holding a hearing, entered an order dated August 12, 2011 (Exhibit A) denying Appellant's Rule 59(e) motion and quashing all

[4] The law firm contacted by Turner Padget is not involved in the matters.

documents filed by Appellant since June 17, 2011.[5] That order is the underlying subject of Appellant's appeal.

Facts -- Section IV

It is undisputed that Turner Padget drafted, executed, and sent an unauthorized consent order substituting counsel to the Commission on behalf of PDHC. The clear and only reasonable inference to the Commission and the other law firm assuming the representation of Appellant in that matter was that Appellant consented to the order substituting counsel in the first instance. Turner Padgett knew just the opposite is true. The unauthorized consent order, signed by Mr. Hylton, [Exhibit I] was signed ***after*** Mr. Hylton and Turner Padget received copies of the letters to the circuit court dated July 25, 2010 (Exhibit F) that were provided to Mr. Hylton and Mr. Josey, as well as to Mr. James.

On Monday August 15, 2007, an informal telephone conference was held with the Worker's Compensation Commissioner, Mr. Hylton and Ms. Cynthia Dooley of Turner Padget as well as the attorney that replaced Turner Padget. During the conference, Mr. Hylton stated he was intentionally silent[6] as to the nature of the matters that led Turner Padget to withdraw from the current case because Turner Padget was, in fact, representing

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[5] The trial court quashed the subpoenas and other documents on the grounds of its' finding that counsel for Appellant was a necessary witness in the trial of the matter at bar. Rule 45(a)(3) states, however, that "An attorney as officer of the court may also issue and sign a subpoena on behalf of a court in which the attorney is authorized to practice." The plain wording of the rule states an attorney signs a subpoena in his capacity as an officer of the Court, not simply in his representative capacity on behalf of a party. The order by the trial court did not involve any allegations of impropriety or misconduct, and did not remove Appellant's counsel as an officer of the court.

[6] "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." See *Moore v. Moore*, 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct.App.2004).

Appellant at the time he executed the consent order, and Turner Padget was implicitly authorized to sign the unauthorized consent order on behalf of Appellant under the second sentence of Rule 407, Rule 1.2 because Turner Padget was, in fact, representing the Appellant. Mr. Hylton confirmed to the Commissioner that it was Turner Padget's decision, as opposed to the Appellant as the client's decision, to withdraw from representing Appellant in the matter that had been on-going for eight (8) years. Based on Mr. Hylton's argument that Turner Padgett was the attorney of record for Appellant, and had been Appellant's attorney of record for eight (8) years, the Commissioner determined that Mr. Hylton was impliedly authorized to sign the consent order substituting counsel on behalf of Appellant. The Commissioner was persuaded by Mr. Hylton's argument that the second sentence[7] of Rule 407, Rule 1.2, SCACR authorized Turner Padget to take such action on behalf of Appellant even though Mr. Hylton stated he signed the consent order substituting counsel because Turner Padget had decided to end its' eight (8) year representation of Appellant so Turner Padget could continue to represent Respondent in the case at bar.

SUMMARY OF FACTS

a. Turner Padget admittedly represented the Appellant from 2003 until the time it signed an unauthorized consent order on behalf of Appellant, after a period of eight (8) years, substituting another law firm to represent the interest of Appellant,

[7] Mr. Hylton and Ms. Dooley failed to inform the Commissioner of the **first** sentence of Rule 1.2 which states "(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. It is undisputed that the client, Pee Dee Health Care, P.A. (the Appellant) was not "consulted" by Turner Padget nor were the client's decision concerning the "objectives of representation" ever considered in any manner by Turner Padget.

b. Turner Padget signed the unauthorized consent order on behalf of Appellant in direct contravention of the instructions of Appellant,

c. Turner Padget signed the unauthorized consent order on behalf of Appellant without the "objectives of representation" being considered in any manner,

d. Turner Padget admitted that it purposely, by the silence of their attorneys, intentionally failed to provide the Commission (and the law firm assuming the representation of Appellant) with information necessary to make an informed decision,

e. Turner Padget justified its' decisions and actions to the Commissioner by stating that Turner Padget was impliedly authorized to sign the order substituting counsel because of the second sentence of Rule 407, Rule 1.2, yet Turner Padget did not inform the Commissioner of the first sentence of Rule 407, Rule 1.2, nor did Turner Padget confirm the consent order was signed without consulting Appellant, and in direct contravention to the Appellant's expectations,

f. Turner Padget admittedly did not take into account any of the negative implications to Appellant nor its' legal fiduciary and professional duties to Pee Dee Health Care.

THE LAW

PART 1

Turner Padget violated the spirit, intent and actual wording of Rule 3.3: Candor Toward the Tribunal. Rule 1.2: Scope and Allocation of Authority between Client ands Lawyer, and Rule 1.2 [Communication].

"It is a well-settled equitable rule that anyone acting in a fiduciary relationship shall not be permitted to make use of that relationship to benefit his own personal interests. It is a doctrine repeatedly announced by the courts of this nation that courts of equity will scrutinize

with the most zealous vigilance transactions between parties occupying confidential relations toward each other and particularly any transaction between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence. 36A C.J.S. *Fiduciary* at 388 (1983)." *Island Car Wash v. Norris*, 358 SE 2d 150 (SCCOA 1987). The relationship between an attorney and a client is highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith. *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct.App.2000); 7 Am.Jur.2d *Attorneys at Law* § 137 (1997). See also *De Pass v. Piedmont Interstate Fair Ass'n*, 217 S.C. 38, 59 S.E.2d 495 (1950) (stating that a fiduciary relationship always exists between attorney and client). It is similarly well-established that one who speaks must say enough to prevent his words from misleading the other party. *Klein v. First Edina Nat'l Bank*, 293 Minn. 418, 196 N.W.2d 619 (Minn.1972); (where a fiduciary relationship exists, silence may constitute fraud) See also *Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601 (1967) (non-disclosure becomes fraudulent when it is the duty of the party having knowledge of the facts to uncover them to the other).

By its' own admissions, Turner Padget said much less than was expected as a fiduciary to its' client, Pee Dee Health Care, P.A., and as an officer of the Court, to prevent Turner Padget's words and omissions from misleading[8] the Commission. The Commission is a judicial tribunal under Rule 407, Rule 1.0(p). Comment 6 to Rule 1.0, RPC:

> As noted by comment 6 to Rule 1.0, RPC:
>
> ... The lawyer must make reasonable efforts to ensure that the client **or other person** possesses information reasonably adequate to make an informed

[8] Rule 407, Rule 1.0 (h) specifically states that "...A person's knowledge may be inferred from circumstances."

> decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. ... A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, **a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid...** [emphasis added].

Clearly, Turner Padget violated not only its' fiduciary duties to Pee Dee Health Care, P.A., but also violated the spirit, intent and plain wording of Rule 3.3: Candor Toward the Tribunal[9]. Rule 1.2: Scope and Allocation of Authority between Client and Lawyer, and Rule 1.2 [Communication]. Turner Padget actions signing the unauthorized consent order are invalid under Comment 6 to Rule 1, RPC, and directly violated Turner Padgett's fiduciary duties to Appellant.

Part 2

Turner Padget abandoned its' representation of Appellant Pee Dee Health Care in violation of Rule 407, Rule 1.2 and Turner Padget's duties to Pee Dee Health Care.

This Court has held:

> An attorney who undertakes the representation of a client in a cause impliedly agrees to see it thorough to its termination and is not at liberty to abandon it.
>
> *Floyd v. Kosko*, 329 SE2d 459 (1985); Citing *Graham, v. Town of Loris*, 248 SE 2d 594 (1978). [Rule 407, Rule 1.2, SCACR states: An attorney who undertakes the conduct of an action impliedly stipulates to carry it to its termination and is not at liberty to abandon it without reasonable cause and reasonable notice. Cited in *Perkins v. Sykes*, 233 N.C. 147, 63 S.E. (2d) 133 (1951)].

[9] (f) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction or which has a purpose to deceive. As noted previously, Mr. Hylton admitted Turner Padget was intentionally silent as to all parties, including Appellant and the Commission, in regard to the all issues surrounding the unilateral drafting of the consent order.

In *In re: White*, 663 SE 2d 21 (2008), our Supreme Court found an attorney violated his ethical responsibilities when he settled a client's case without her consent and despite the knowledge that she was still receiving medical treatment for her injuries. The Court found such conduct violated of Rule 1.1 (Competence); Rule 1.2 (Scope of Representation; Allocation of Authority between Client and Lawyer); and Rule 1.4 (Communication)." Similarly, our Supreme Court found that an attorney, even when there is no on-going attorney-client relationship, owes a duty to deal in good faith and not actively misrepresent the facts in any context. See *Hotz v. Minyard*, 403 SE2s 634 (1991). This principle is recognized in the preamble to Rule 407, which states in part:

> ...The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, ***a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid.*** In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent.

There is no reasonable dispute that Turner Padget had [and has] a continuing duty to complete the representation of Appellant that it began several years prior to representing Respondent. There is no reasonable dispute that Turner Padget abandoned the representation of Appellant by intentionally filing an unauthorized order relieving itself of

the responsibility to complete its' representation of the Appellant in a case in which it had been representing Appellant since 2003.

Part 3

After determining the actual existence of the adverse conflict of interest, Turner Padget continued its' representation of Respondent before the circuit court, and continues to represent the Respondent in this Court against the interests of Appellant in violation of the rules of this Court.

Rule 407, Rule 1.7, SCACR, provides:

(a) ... a lawyer ***shall not represent a client*** if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client;

....

and

(4) each affected client gives informed consent, confirmed in writing.

Comment 6 to Rule 1.7 is plain and direct:

Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client...

Rule 407, Rule 1.7, SCACR, is stated in mandatory terms, i.e., Turner Padget **shall not represent a client** if the representation involves a concurrent conflict of interest. In the 2005 preamble to the adoption of the rules, our Supreme Court stated:

> Some of the Rules are imperatives; cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline.

The test under Rule 1.7 is objective. See *Matter of Anonymous Member*, 432 SE 2d 467 (SCSC 1993). Similarly, in the *Matter of Estate of Jones*, 495 SE 2d 450 (1998), our Supreme Court noted with approval its' determination in *Matter of Anonymous Member,* Id., that "a lawyer may represent clients with adverse interests **only with** the consent of each after client has full disclosure of the possible effects of such representation." [emphasis added]. The latest determination of our Supreme Court in regard to its' interpretation of Rule 1.7 was *In the matter of Anonymous Member of South Carolina Bar*, 432 S.E.2d 467 (2010. The Court held "... that a sexual relationship with the spouse of a current client is a *per se* violation of Rule 1.7, as it creates the significant risk that the representation of the client will be limited by the personal interests of the attorney." The obvious concern of our Supreme Court is not simply a technical determination of when a matter is adverse, but an objective determination that the on-going representation will be limited by the opportunity for the enmity and ill-feeling such divided interests inevitably provoke. This is consistent with the Court's determination in *Matter of Anonymous Member*, 432 SE 2d 467 (SCSC 1993) that the standard is objective reasonableness. It is undisputed that the Appellant has never provided its' consent to the adverse representation of Respondent or any such client by Turner Padget.

As noted by the second part of Rule 1.7, and the divided interests of Turner Padget's dual representation of clients with adverse interests are clearly and "inevitably provoked."

CONCLUSION

Part 1

Appellant has made a *prima facie* showing of previous and on-going ethical violations of the Rules of Professional Responsibility by Turner Padget. Once a prima facie showing is made, the burden shifts to the other party to rebut the resulting presumption of misconduct. *State v. Jones*, 358 SE2d 701 (1987). The prima facie showing of the legal and ethical violations by counsel for Respondent include, but are not limited to, patterns of unprofessional conduct that demonstrate an indisputable, definite and plain intent that counsel for Respondent has acted and continues to act in violation of the Rules of Professional Responsibility, and in bad faith toward Appellant. As our Supreme Court has noted, the behavior of counsel for Respondent has invoked "inevitable feelings of enmity and ill-feeling that are clearly foreseeable in the context of divided interests." *Matter of Anonymous Member*, 432 SE 2d 467 (SCSC 1993). The continuing representation of Respondent in this Court (or the circuit court) by counsel for Respondent before this Court and the underlying trial court proceedings have been and remain in direct violation of the rules of this Court and have in fact invoked feelings of enmity and ill-feeling that are clearly foreseeable in the context of divided interests. (Exhibit N, Affidavit of President of Appellant].

In sum, Turner Padget has consciously, intentionally, and clearly violated their ethical responsibilities to Appellant Rule 407, including Rules 1.7, (Conflicts of Interest; Current Clients) 1.2, (Scope of Representation and Allocation of Authority Between Client and Lawyer), 1.4. (Communication), 3.3 (Candor toward the tribunal), 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in statements to others), 4.4 (Respect for Rights of

Third Parties), 8.3 (Reporting Professional Misconduct) and 8.4 (Misconduct). Under the facts of the case at bar, counsel for Respondent cannot hold an objectively reasonable belief that their representation of the Respondent before this Court (or the circuit court) is proper or permitted. And, the Appellant respectfully submits this Court cannot countenance counsel for Respondent's past and on-going violations of this Court's rules.

Part 2

The Appellant requests this Court to take the following actions:

1. to stay further proceedings on the underlying appeal in the case at bar until the matters regarding the propriety of the representation by counsel for Respondent in all venues is ascertained and determined,

2. to disqualify counsel for Respondent from participating in further proceedings in this appeal and in all other venues in which the case at bar may be pursued,

3. to vacate all proceedings, and orders resulting therefrom, in the lower court in which counsel for Respondent acted adversely to the interests of Appellant,

Part 3

4. as alternative relief, Appellant requests this Court to remand the specific matter of the conflict of interest issue raised by Appellant to a circuit court for further development of the record for this Court to make a fully informed decision on the requests for relief of Appellant. In the event this Court determines it is appropriate to remand matters to the circuit court for further development of the record, the Appellant requests this Court:

   a. to provide its' order of remand be governed by the South Carolina Rules of Civil Procedure in order to fully develop the record, and

   b. to remand to a circuit court outside of the judicial circuits comprising the Pee

Dee region because of potential and actual conflicts of interest with the matters being heard in the judicial districts located in the Pee Dee area of South Carolina because of pending litigation in Florence County which involves the Appellant and family members of a Florence County sitting judge, as well as actions taken by a sitting circuit court judge in Florence County.[10] These are central issues in the other pending litigation. All judges within the counties of Darlington and Florence rotate between the circuits for purposes of conflicts as well as administration of dockets, and regularly interact on a personal and professional level. See Canon 3(E)(judge shall disqualify himself in a proceeding in which the judges' impartiality might be reasonably questioned). Rule 501, Canon 2 [Commentary to Canon 2(A): The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception[11] that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.]. As noted by the United States Supreme Court, ... objective standards may also require recusal whether or not actual bias

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[10] The original judge recused himself from further involvement in the matter after signing the *ex parte* order. Despite repeated entreaties of Appellant, the circuit court in the case at bar would not address the matter. The U.S. Supreme Court has stated: "When there is ground for believing that such unconscious feelings may operate in the ultimate judgment, or may not unfairly lead others to believe they are operating, judges recuse themselves. They do not sit in judgment. ...The guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." *Public Utilities Comm'n of D. C. v. Pollak*, 343 U. S. 451, 466-467 (1952) (Frankfurter, J., in chambers). Our Supreme Court is equally concerned that heightened standards are applied to judicial officers in circumstances such as the current. See *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). *Murphy v. Murphy*, ___ S.C. ___, 461 S.E.2d 39 (1995). The "ground for believing that such unconscious feelings may operate in the ultimate judgment" derives from the same extrajudicial source that the Chief Justice implicitly recognized in her order dated February 5, 2009 assigning that case to a circuit court judge in Sumter. See Exhibit O.

[11] Canon 3(E) has been addressed in disciplinary proceedings concerning magistrate level judges. *In re: Dillon County Magistrate Davis*, 368 SC 662, 630 SE 281 (2006).

exists or can be proved. Due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). The circuit court failed to address the Appellant's concerns as to the matter of Turner Padget's disqualification as it indicated it would do at the July 21st hearing. (See page 7, line 21, Exhibit D). Nor did the circuit court address the issues regarding recusal and the appearance of judicial bias, even though the Appellant repeatedly requested it to do so.[12] Instead, as noted herein, the circuit simply issued the order under appeal, and struck all documents filed by Appellant from June 17, 2011 forward.

c. For such other and further relief as this Court deems just and proper.

Respectfully submitted,

Tony R. Megna
3400 West Avenue
Columbia, SC 29203
803.254.3676
Attorney for Appellant

August 24, 2011.

[12] Litigation involving a judicial colleague's family member where the judge commonly presides, the concerns evidenced by Rule 501, Canon 2A are reasonably implicated.

Josey, J. Rene

From: Tony R. Megna <tmegna@gmail.com>
Sent: Tuesday, July 26, 2011 2:40 PM
To: Josey, J. Rene; pjlaw507
Cc: Hylton, Brandon; Stewart, Christina B.; BrandonHylton-Group
Subject: PDHC v Estate of Thompson

Renee-

I have information that both you and Jay James have had extensive and multiple conversations with Douglas Truslow over the past several months. Based on the information in my possession, the contacts by both you and Jay with Mr. Truslow were adverse to the interests of PDHC - and extremely inappropriate under the circumstances as the contacts occurred during the same time period your law firm was representing Pee Dee Health Care.

At the point, you and Jay are likely witnesses, if not possible Defendants, in the Lake City litigation for multiple reasons including but not limited to aiding and abbetting and breach of fiduciary duties to an existing client. For personal reasons, Drs. Matthews and Cohen have requested you and Jay be allowed the opportunity to withdraw voluntarily from representation of the Thompson matter prior to me requesting the Court to intervene and direct your collective disqualification. For differing personal reasons, I agree with their request. This is not intended as a release of liability of any kind for any reason. It is only a suggestion, and a means of allowing matters to settle out prior to further action(s) being considered.

I am out of town and, beginning tomorrow, I will be on vacation for the rest of this week and next week. Unless I hear from you and Jay that you are withdrawing from the Thompson estate litigation, I will write Judge Baxley tomorrow morning and include the foregoing information with the request your firm be disqualified in the Thompson estate litigation. I will also request the Court take both retroactive and prospective action to protect and preserve the legal interests of PDHC in all matters - particularly as PDHC was a client to your law firm long prior to the Thompson estate. In this regard, I request once again that you rectify the inaccurate statements made you made on the record at oral arguments on July 19, 2011 in which you stated your firm did not represent PDHC.

As to Mr. Hylton, it appears you have placed him in a untenable position. His unilateral decision to withdraw from the litigation on behalf of PDHC, and throw aside ethical and legal considerations, is in direct conflict with his legal and ethical obligations to PDHC in that litigation as well as in all other matters that adversely or may adversely effect the interests of PDHC. Moreover, his complete failure to consult and communicate with me in light of my specific request to do so prior to taking such actions is astounding.

Tony R. Megna

Please send all written correspondence to:

Tony R. Megna, Esquire
3400 West Avenue

Columbia, SC 29203
tmegna@gmail.com
Office telephone: 803.799.1700

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Josey, J. Rene

From: Tony R. Megna <tmegna@gmail.com>
Sent: Thursday, January 17, 2013 1:21 PM
To: Jay James; Josey, J. Rene; Ben Matthews
Cc: Harriet
Subject: Re: Thompson appeal

Jay

Your communications are always very helpful. Thank you very much. Harriet sends het apologies in regards to the spelling of Renée's name. She will go over the supplemental ROA taking into account your thoughts. We're truly appreciative and grateful of your comments and assistance. As I've stated in the past, I continue to object to Turner Padget's continuing representation of respondent due to the obvious violation of ethical rule 1.7. I object to your continuing representation by association with Turner Padgett as well as for the reasons I have noted previously. I'm out of town, and will get you the ROA next week.

Best regards, Tony

On Thursday, January 17, 2013, Jay James wrote:

See attached.

****

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Thanks, Tony

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3400 West Avenue

Columbia, SC 29203
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Matthews and Megna, LLC

Attorneys and Counselors at Law
3400 West Avenue
Columbia, SC 29203
TELEPHONE: 803-799-1700
E-mail: tmegna@gmail.com

July 27, 2011

The Honorable J. Michael Baxley
531 East Carolina Avenue
Hartsville, SC 29550-4311
[Via email to JBaxleyLC@sccourts.org and first class mail]

Re: Estate of Hugh S. Thompson, Case No: 10-CP-16-0332

Dear Judge Baxley:

As you know, the Plaintiff's recently discovered and reported to the Court that Mr. Josey's law firm, Turner Padgett Graham and Laney, P.A. is representing Pee Dee Health Care, P.A. in on-going litigation during its' representation of the Defendant in the case at bar. Mr. Josey's law firm has now informed this Court and the Plaintiff they are withdrawing from the representation of Pee Dee Health Care [PDHC]. However, Turner Padgett has not filed a motion to be relieved as counsel and the Plaintiff has not had been advised by any court that the withdrawal has been noticed or accepted. Moreover, the withdrawal is a unilateral decision made by Mr. Josey and his partners without consulting the Plaintiff which is plainly adverse to the interests of PDHC. The Plaintiff has yet to receive any response to the concerns of the Plaintiff from Turner Padgett or Mr. James other than a CD that purports to be a copy of the litigation file Turner Padgett has been conducting on behalf of PDHC. PDHC's concerns remain that Mr. Josey's law firm has taken actions without the consent of the Plaintiff, without considering the interests of the Plaintiff, and is [and Mr. James by association and imputation] in violation of at least Rule 407, Rules 1.4, 1.6 and 1.7, the concepts of imputed disqualification as noted by Rule 1.10, the requirements of terminating representation of Rule 1.16, Rule 2.3, Rule 3.7 and Rule 8.4.

In addition to the above, I have been provided information that both Mr. Josey and Mr. James have had multiple conversations and conferences with at least one, if not several attorneys, involved with parties whose interests are adverse to the Plaintiff. As evidenced by the actual time and billing records in the possession of the Plaintiff [see below], these communications occurred during the same time period Turner Padgett has been representing Pee Dee Health Care. These communications concern matters involved in the 'Lake City litigation' to which the Plaintiff has previously referred the Court, and to other matters involving the undersigned. Counsel for the Defendant has made assertions before this Court that maintaining the "Lake city' litigation is not a factor in the current matter. The assertions appear incorrect based on the very limited information available to the Plaintiff. The following excerpts are copies of actual time and billing entries of an attorney who has had significant contact with the McNair Law Firm [a Defendant in the Lake City litigation] as well as significant contact with Mr. James and Mr.

Josey – all in matters directly adverse to the legal interests of the Plaintiff. The information in our possession is limited to time and billing statements which end on May 1, 2011.

May-22-08	Telephone conference(s) with McNair Law Firm re: files, status on Appeal and legal issue	1.00	295.00	DNT
Feb-04-11	Various work and conferences with J. James and R. Jossey and follow up regarding comparison cases and ethics issues	4.00	1,180.00	DNT
Mar-07-11	Revision of Motion and research	2.00	590.00	DNT
	Telephone conference with J.J. and follow up	0.50	147.50	DNT
Mar-14-11	Telephone conference with J.J.	0.30	88.50	DNT
	Correspondence to Megna	0.10	7.50	ADH
Mar-15-11	Prepare letter; conference with J.J.; research issues (multiple) and follow up	2.00	590.00	DNT
Mar-28-11	Telephone call with J.J. and follow up	0.25	73.75	DNT
	Review of letters, memos and materials from Atty. Megna	0.75	221.25	DNT
	Correspondence to court	0.10	7.50	ADH
Apr-05-11	Telephone call with James re appeal, status of case and follow up	0.75	221.25	DNT

I have previously requested Mr. Josey and Mr. James withdraw from the current litigation due to the ethical and legal issues involved. Copies of the correspondence are included in the email with this letter to the Court. At this point, both Mr. James as well as Mr. Josey are likely necessary witnesses, if not Defendants, in adverse litigation that involves the Plaintiff as well as the principals of the Plaintiff, its' employees, and others. While we cannot be certain of their

exact involvement in the matters at this time, the foregoing clearly evidence silent[1] involvement in matters not countenanced by PDHC or the undersigned.

I am on vacation for the rest of this week and next week. I respectfully request the Court review this information, and delay any further actions on the case at bar until I return. Upon return, I will file a formal motion requesting the disqualification of both Mr. Josey and Mr. James. The additional time will also allow time for the attached subpoenas to be responded to by Mr. James, Mr. Josey and others so that the parties and this Court will have the benefit of more information on which to base decisions. I request the Court accept this letter as an informal request to disqualify Mr. Josey and Mr. James from representing the Defendant. I will have the letter filed with the Clerk of Court this week. I make this request as attorney for the Plaintiff based on this Court's decision at the July 19th oral arguments staying it's previous order as it pertained to my continuing representation of PDHC. I previously notified both Mr. James and Mr. Josey of the requests PDHC is making of the Court, and requested their voluntary withdrawal. Neither has responded to any of the Plaintiff's attempts to keep these issues from escalating, other than the letter Mr. Josey provided to your office and the CD provided to my office. I have not had the opportunity to inspect the CD as I have been out of the office.

I respectfully request the Court take both retroactive and prospective action to protect and preserve the legal interests of PDHC in these matters as PDHC was a client to Turner Padgett prior to the Turner Padgett agreeing to the engagement of the Thompson estate. For unknown reasons, Mr. Josey nor Mr. James have chosen not to correct the inaccurate statements he made to you on the record at oral arguments of July 19, 2011 in which Mr. Josey stated his firm did not represent PDHC prior to its' representation of the Defendant. The statements were inaccurate as evidenced by the foregoing time and billing statements. Moreover, their silence concerning their knowledge of and involvement in the 'Lake City litigation' matters is of grave concern to the

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[1] *Moore v. Moore,* 360 S.C. 241, 251, 599 S.E.2d 467, 472 (Ct.App.2004) ("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."); 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. "It is axiomatic that a conspiracy may be proved by direct or circumstantial evidence or by circumstantial evidence alone." *Horne,* 324 S.C. at 381, 478 S.E.2d at 294 (citing *State v. Childs,* 299 S.C. 471, 385 S.E.2d 839 (1989)). Indeed, *State v. Miller,* 223 S.C. 128, 74 S.E.2d 582 (1953), notes: "Often proof of conspiracy is necessarily by circumstantial evidence alone." *Id.* at 133, 74 S.E.2d at 585 (citation omitted).

Plaintiff with far-reaching implications. I fail to understand how it is not reasonable to conclude their silence has been intended to misdirect or deceive both the Plaintiff and the Court.

These matters have developed very quickly and the Plaintiff has had very little time to evaluate and organize matters and documents to provide the Court a more complete picture of the extent of the legal and ethical concerns. However, the seriousness of the matter required your immediate notification. As noted above, and as attached hereto, I have subpoenaed records of parties which may bear upon the matters at bar. The subpoenas will be served in the next few days.

Concluding, the Plaintiff requests the Court not consider any of the information or documents provided by Mr. Josey or his law firm in the case at bar, and to stay all pending motions in order to allow sufficient time for these matters to be appropriately developed. Finally, the Plaintiff reserves its' right to take further actions following the determination of all foregoing matters.

Thanking you for your consideration, I remain

Sincerely yours,

s/Tony R. Megna

Cc:

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

Renee Josey
1831 W. Evans Street
Florence, SC 29501
[Via email to
RJosey@turnerpadget.com]

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

Attachments:

1. Subpoena directed to Renee Josey
2. Subpoena directed to Jay James
3. Subpoena directed to Desa Ballard
4. Subpoena directed to Kenneth Woodington
5. Subpoena directed to Brad Hylton
6. Subpoena directed to Celeste Jones

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

J. MICHAEL
BAXLEY
JUDGE

531 EAST CAROLINA AVENUE
HARTSVILLE, SOUTH CAROLINA 29550
TELEPHONE: (843) 383-4114
FAX: (843) 383-4116
E-MAIL: jbaxleyj@sccourts.org

August 12, 2011

John Jay James, II, Esquire
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Darlington, SC 29540

J. Rene Josey, Esquire
Turner, Padget, Graham & Laney
Post Office Box 5478
Florence, SC 29502

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

Re: Pee Dee Health Care, PA v. Estate of Hugh S. Thompson
Case Number: 2010-CP-16-0332

Gentlemen:

Thank you for your patience while the cross motions for summary judgment have been under advisement in this case. I have now had the opportunity to further review this matter, applicable statutes, prevailing case law, the extensive memoranda and exhibits, and further consider the arguments of counsel. Please accept this letter as notice of the Court's decision.

The Plaintiff's motion for summary judgment is denied, while that of the Defendant is granted. The basis for this decision is that the Court finds, as a matter of law and fact, that the Plaintiff cannot prove an absence of fault in causing the existence of the underlying debt being sued upon, and is collaterally estopped from asserting such a position. In spite of the fact that Plaintiff has asserted multiple causes of action in its complaint, all claims derive from a core set of facts that have already been adjudicated with finality against Plaintiff by federal administrative decisions.

Over and above the federal decisions, the established facts of this case do not permit recovery by the Plaintiff under South Carolina substantive law. In reaching this decision, the Court is persuaded by the words of Judge Ralph K. Anderson in Regions Bank v. Schmauch, 582 SE 2d 432 (Ct. App. 2003), "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled." This is particularly true where the claim comes years later after the death of a principal witness and party to the events in question.

Attorney James is requested to prepare an Order within ten (10) days of the date of this letter detailing the decision stated herein and forward the same to opposing counsel. Attorney Matthews is not asked to agree or consent to the Order, but is requested to review it for mistake of fact or misstatement of your party's position; thereafter, Attorney James is asked to forward the finalized Order to the Court. Attorney James is requested to send an electronic copy in Word format via email (jbaxleylc@sccourts.org) to my office for signature, which will then be finalized, signed, and returned to Attorney James for filing and formal service on the parties.

I have enjoyed working with you in this matter, and look forward to the time when we shall have the opportunity to work together again.

Sincerely yours,

J. Michael Baxley
JMB/jlc

cc: Honorable Scott B. Suggs (for filing)

TURNER PADGET
TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

J. RENÉ JOSEY

REPLY TO: FLORENCE OFFICE
E-MAIL: RJOSEY@TURNERPADGET.COM
WRITER'S DIRECT DIAL: (843) 656-4451
WRITER'S DIRECT FAX: (843) 413-5818

May 20, 2011

Honorable J. Michael Baxley
Chief Administrative Judge
Fourth Judicial Circuit
531 East Carolina Avenue
Hartsville, SC 29550

Re: *Pee Dee Health Care, P.A. v Estate of Hugh S. Thompson*
C/A No.: 10-CP-16-0332
TPGL File No.: 10667.101

Dear Judge Baxley:

As you are undoubtedly aware, disqualified Plaintiff's counsel, Tony Megna, has filed a Rule 59(e) Motion for Reconsideration of his disqualification. Enclosed you will find a courtesy copy of the Defendant's response to the Motion for Reconsideration. As you will see, this response not only addresses the merits of reconsideration directly, it also includes a motion to dismiss the Motion for Reconsideration procedurally as well.

This response has been filed with the clerk of court today and by mailed copy of this letter, it is being served on both Mr. Megna and Mr. Matthews. Because the Court's Order directed that the disqualification would be effective immediately, we are mailing separate copies of this correspondence to both Mr. Megna and his partner, Ben Matthews (who remains counsel of record in this matter).

In addition to providing you with the courtesy copy of our 59(e) motion response, we are writing today to request your consideration of other motions in this matter at the same time you are considering Plaintiff's Motion for Reconsideration. We make this request in an effort to more efficiently use both your time, appellate court time, and the resources of the parties.

In particular, we would like the Court to simultaneously consider the Plaintiff's Motion for Summary Judgment and the Defendant's Counter Motion for Summary Judgment (also filed today). A courtesy copy of Defendant's Counter Motion for Summary Judgment is enclosed for the Court and a copy is being served herewith upon both Mr. Megna and Mr. Matthews. Our further research supporting a defensive motion for summary judgment and plaintiff's suspected disqualification appeal led us to file our summary judgment motion today and make this request.

Because we anticipate that the Plaintiff might appeal Mr. Megna's disqualification, it would likely be more efficient for both this Court and then the Court of Appeals to consider the summary judgment issues at the same time. In other words, if this Court were to grant summary judgment for either party, these merits could be considered on appeal at the same time of counsel's disqualification. Moreover, if the Court were to grant summary judgment for the Defendant, that decision, if affirmed, might render the disqualification of Plaintiff's counsel moot for the appellate court.

Naturally, we will make ourselves available for any needed hearings on these matters at the Court's convenience. Other than a family vacation to Alaska June 15 through June 24, Jay James and I will be available at any venue convenient to the Court. We appreciate your consideration of these matters.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ:mjs
Enclosures

cc: Benjamin R. Matthews, Esquire (with enclosures)
Tony Megna, Esquire (with enclosures)
John Jay James, II (without enclosures)

STATE OF SOUTH CAROLINA **COUNTY OF DARLINGTON** Pee Dee Health Care, P.A., Plaintiff, v. Estate of Hugh S. Thompson, Defendant.	**IN THE COURT OF COMMON PLEAS** **C/A # 2010-CP-16-0332** **DEFENDANT'S RESPONSE TO MOTION FOR RECONSIDERATION OF SUMMARY JUDGMENT**

By document dated September 13, 2011, and titled "Motion to Reconsider", the Plaintiff purports to move this Court under Rule 59(e) for reconsideration of its September 1, 1011 Order granting summary judgment against the Plaintiff and ending this matter. Because the issues in this matter have been excessively briefed and patiently considered by the Court, the Defendant will endeavor to make this response short.

I. The Motion Is Filed By A Disqualified Attorney And Is Not Properly Before The Court.

The present Motion of Defendant was executed by an attorney disqualified by this Court. In reaffirming that disqualification, this Court *sua sponte* ordered the quashing of additional activities conducted in contempt of the court's earlier disqualification. That *sua sponte* provision stated:

> "The Court granted Plaintiff's counsel [Megna] a limited appearance only. Therefore, all motions, subpoenas, and filings signed only by disqualified counsel, Tony R. Megna, and made subsequent to the Notice of Hearing dated June 17, 2011 in which the Court formally announced the parameters of its accommodation to Plaintiff and its counsel, are hereby QUASHED."

August 12, 2011 Order at page 1. Thus, as a preliminary matter, this Court should consider whether the Motion to Reconsider is effective given the disqualified status of counsel.

Because the disqualification of counsel is an injunction against his continued involvement, that disqualification is not subject to an automatic stay under SCACR 241(b)(8) even though an interlocutory appeal of the issue is allowed. Plaintiff has other counsel of record (Benjamin R. Matthews, Esq.) that could have, but did not, execute the Motion to Reconsider.

Rule 11(a) of the SCRCP requires that *every* pleading, motion, or other *paper filed by a party represented by counsel must be executed by an attorney of record* for that party. Plaintiff continues to be represented by Mr. Matthews, but Mr. Megna, who executed the Motion for Reconsideration, has been disqualified and thus is no longer an attorney of record. Accordingly Mr. Megna's motion is unauthorized under South Carolina procedure and should be dismissed as void *ab initio*.

II. The Trial Court's Continuing Jurisdiction To Order Summary Judgment After Appeal Of The Disqualification Order Was Anticipated And Appropriately Addressed By The Summary Judgment Order.

In support of this Court's decision to proceed and issue a detailed order of summary judgment, the Court observed:

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

Summary Judgment Order of August 29, 2011 at page 3 (emphasis added).

The Court's reasoning was right then and it is right now. Plaintiff offers nothing new to counter the Court's application of SCRAP 205 and 241(a). The Court's Order need not be reconsidered for lack of jurisdiction.

III. Issues Raised In Motion To Reconsider Were Fully Considered And Determined By The Court.

In the purported Motion for Reconsideration, the Plaintiff raises numerous issues previously considered and ruled upon by the Court. Plaintiff raises nothing new in regard to these issues. These issues include: the Plaintiff's alleged need for discovery (so as to evaluate other defenses and proposed Amendments to the Answer – all rendered moot by the Order anyway), the extensive list of admissions made by Defendant either in pleadings or discovery (all of which have been considered by the Court and found to be non-controlling), and the alleged unclean hands of decedent Thompson as in the Medicare form (never seen by PDHC until litigation and thus not relied upon by PDHC in employment decisions) submitted while Thompson worked in Marion (also previously addressed by the Court and not relevant to the preclusion of Plaintiff's claim by offensive collateral estoppel). There is no need for the Court to address these matters which have been thoroughly addressed and properly disposed of in its previous Orders.

IV. New Collateral Estoppel Case Supports The Court's Determination Of Issue Preclusion.

Plaintiff's motion does cite a very recent South Carolina Court of Appeals' case on the issue of collateral estoppel. That case is Crosby v. Prysmian Communications Cables And Systems USA, LLC, (Opinion No. 4876)(decided August 24, 2011). This case, however, does not change the law of offensive collateral estoppel that was fatal to Plaintiff's claims. This case

only re-examines the necessary elements of such issue preclusion under the facts presented in that matter. This is the same thing appropriately done by this Court in the case at hand. There is nothing new that alters the Court's prior analysis.

V. The Suggested Disqualification Of Defense Counsel Is Not Properly Before The Court And Lacks Merit.

As part of the document titled "Motion for Reconsideration" , the Plaintiff references a purported[1] motion pending in the Court of Appeals to disqualify the firm of Turner Padget Graham & Laney P.A. in this matter. The Plaintiff asks this Court to either delay ruling on the pending Motion to Reconsider or alternatively, disqualify counsel for Respondent. The Plaintiff then incorporates its Motion to Disqualify which is now pending in the Court of Appeals.

While Plaintiff suggests that efficiency supports a delay in ruling on its Rule 59(e) motion, exactly the opposite is true. As this Court previously recognized, "this Court believes that considerations of appellate judicial economy are best served by the rendering of this decision at the present time." Summary Judgment Order of August 29, 2011 at page 3. As the Court can see in the attached Exhibit A (the Estate's response to the Motion to Disqualify in the Court of Appeals), the Defendant seeks to have all of the issues expedited and consolidated in the Court of Appeals for final and efficient disposition. In contrast, the Plaintiff only seeks to continue piecemeal consideration of matters which the attached appellate response appropriately characterizes as "death by a thousand cuts." Accordingly, the Defendant asks this Court to dismiss or deny the Motion to Reconsider as soon as possible.

[1] The Defendant refers to this document as purported for the same reason that Defendant is unsure it the present Motion to Reconsider is valid – both being executed by disqualified counsel. The Defendant has also asked the Court of Appeals to dismiss that Motion as unauthorized. This request is part of the Defendant's motion response filed in that Court which is incorporated into this trial court motion response as Exhibit A.

With regard to the alternative effort to disqualify counsel, this is not properly incorporated as part of a Motion to Reconsider – and but for the Motion to Reconsider, this matter is ended in the trial court. Specifically, the requested reconsideration is of the Order of Summary Judgment and there was no Order or even a motion to disqualify defense counsel previously made or considered by this Court;[2] thus, there is nothing to reconsider in that regard. The Plaintiff had the opportunity, even the invitation, to make such a motion in the trial court but never did choosing instead to engage in an informal campaign of letters and e-mails. Again, this matter is not properly before the Court.

If the Court feels the matter is proper for consideration, the Defendant urges that any such alternative motion be denied as lacking in merit. The Defendant will not repeat in totality but hereby incorporates all of the arguments and reasoning found in the attached Exhibit A as to why the firm of Turner Padget Graham & Laney P.A. need not be disqualified in this matter. While Plaintiff has been critical of defense counsel Jay James, it does not appear as though Plaintiff seeks his disqualification; there has been no motion to that effect.

In summary, TPGL need not be disqualified because the conflict of interest discovered has ended and was inadvertent, superficial, and of no consequence. This position is consistent with the applicable rules of professional conduct and is supported by ethics expert Nathan M. Crystal, Professor Emeritus of the University of South Carolina School of Law and Distinguished Visiting Professor at the Charleston School of Law. (Affidavit of Professor Crystal is attached as an Exhibit to the Motion Response which is Exhibit A to this Response).

[2] Rule 7(b)(1) of the SCRCP provides that "An application to the court for an order *shall be by motion* which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." (emphasis added).

CONCLUSION

The purported Motion to Reconsider should be dismissed as unauthorized and filed in contempt of this Court's Order of Disqualification. In the alternative, it should be denied promptly without delay or even a hearing (unless the Court finds it needed).

September 19, 2011

PAULLING & JAMES

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Paulling & James
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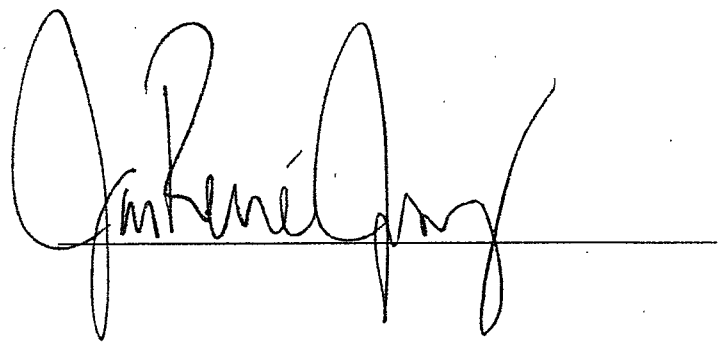
ATTORNEYS FOR RESPONDENTS

STATE OF SOUTH CAROLINA,	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	DOCKET NO.: 10-CP-16-0332
Pee Dee Health Care, P.A.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CERTIFICATE OF SERVICE
	)	
Estate of Hugh S. Thompson,	)	
	)	
Defendant.	)	
	)	

I hereby certify that on this 19th day of September, 2011 a copy of the above and foregoing **Defendant's Response To Motion For Reconsideration Of Summary Judgment,** has been mailed to all counsel of record, past and present, postage prepaid and properly addressed as follows:

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

Tony Ray Megna, Esquire
Matthews & Megna, LLC
3400 West Avenue
Columbia, SC 29203



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SEP 27 2011
SC Court of Appeals

THE STATE OF SOUTH CAROLINA,
IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY
COURT OF COMMON PLEAS
J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE

CASE NO. 2010-CP-16-0332

Pee Dee Health Care, P.A. .... Appellant

versus

Estate of Hugh S. Thompson.... Respondent

Respondent's Response To Motion To Stay, To Vacate, And To Disqualify

And

Respondent's Counter-Motion To Dismiss The Appeal And/Or Have Accelerated And Consolidated Consideration of The Case Merits Under SCACR 214 And 263(b)

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ATTORNEYS FOR RESPONDENT

NATURE OF THE CASE

This case arises from Pee Dee Health Care, P.A.'s (hereinafter "PDHC") negligent failure to perform required due diligence before collecting Medicare benefits for work performed by its employee, Dr. Hugh S. Thompson (Respondent's decedent). As the assignee of Medicare program benefits, PDHC failed to confirm the program eligibility of Dr. Thompson who was excluded from the program for a period of time. As a result of this failure, the Medicare program subsequently sought and obtained repayment of the ineligible benefits from PDHC. Now, years later, PDHC seeks to ignore the affirmative non-delegable statutory duty placed upon it by the Medicare program and instead seeks to shift blame for its lapse to the deceased. The crux of the PDHC complaint is that decedent Thompson did not disclose information to PDHC or gave wrong information to PDHC.

PROCEDURAL POSITION OF THE CASE

The Complaint alleges, in part, that Thompson's misrepresentations were made to PDHC through its CEO and General Counsel Tony R. Megna. The trial court has twice ruled that Megna's status as a witness to such alleged misrepresentations, among other items, disqualifies his continued service as counsel in the matter. (Orders of April 15, 2011 and August 12, 2011).

The trial court's recent reaffirmation of that disqualification[1] triggered the notice of appeal served August 15, 2011.[2] In addition to denying the Motion to Reconsider

[1] Specifically, the trial court's order dated August 12, 2011, found that the court's earlier findings of fact and conclusions of law (Order dated April 15, 2011) were "replete." The trial court also noted that its "decision to allow Plaintiff's counsel [Megna] oral argument on previously-filed Summary Judgment Motions did not attenuate its Order of Disqualification. The Court granted Plaintiff's counsel [Megna] a limited appearance only."

[2] This appeal is one of two related interlocutory appeals arising from the same basic dispute. The other pending appeal has Court of Appeals tracking number 2011185767 (this appeal being 2011197671). The other appeal originates from a probate court ruling appealed to the Circuit Court and identified there as 2010-CP-16-0633. That appeal seeks to reverse the Probate Court's decision not to require a bond for this largely non-liquid estate – a bond inexplicably sought in an amount exceeding the value of the estate. The Circuit Court determined to dismiss the

Disqualification by order of August 12, 2011, the trial court announced its decision to grant the Respondent's summary judgment on the merits by letter of August 12, 2011. The trial court's detailed order of summary judgment was executed August 29, 2011.

The trial judge's August 29, 2011, Order reads, in part:

> Embodied within all of PDHC's causes of action is the requirement that PDHC be without fault. In this State, there is no right to rely in an arm's length relationship between mature, educated people and our courts have found "this is especially true when one should have utilized precaution and protection to safeguard his interests." Indeed, there can be no liability for "matters which Plaintiff could ascertain on his own in the exercise of due diligence." "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled."

Order at pages 7-8, Conclusion C (citations ommitted). Continuing, the trial judge's August 29, 2011, Order also provides, in part:

> [A]ll of Plaintiff's claims derive from a core set of factual claims – and preclusive facts have been adjudicated with finality by federal administrative decisions. These adjudications have determined that PDHC's losses were its own fault, arising out of its own failure to undertake the basic due diligence required of all medical practices planning to accept Medicare payments. Stated differently, PDHC was not entitled to rely on any misstatements or omissions of Decedent with regard to his Medicare status.
>
> In this case, PDHC has already unsuccessfully litigated to finality the issue of its causative fault through the federal administrative appeals process. The conclusions of Judge Metry and the Medicare Appeals Council are binding upon PDHC in this matter pursuant to the doctrine of non-mutual offensive collateral estoppel.

Order at page 9, Conclusion D (footnote ommitted).

In his earlier April 15, 2011 order of disqualification, the trial judge had noted that both federal statute, 42 U.S.C. § 1320a-7a(a)(6), and federal regulation, 42 CFR 1003.102(a)(2),

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Probate Court appeal due to the Appellant's failure to timely serve its grounds of appeal as mandated by statute. Appellant has appealed that dismissal to this Court.

impose liability upon employers who "should know" of the program exclusion of their employees. Order of April 15, 2011, page 3 footnote 4. Thus, the employer is imposed with a non-delegable duty under federal law.

The August 29, 2011, summary judgment order asserted the trial court's continuing jurisdiction of matters unaffected by the appeal of the disqualification – like the merits of the underlying case. See footnote 19 below. The trial court had allowed disqualified counsel leave to argue the summary judgment motions so as to avoid any prejudice to Appellant – even before this appeal was taken.[3]

THE CONFLICT ISSUE DISCOVERED JULY 19, 2011

At the hearing on summary judgment motions held July 19, 2011, counsel for Appellant (again, both CEO and general counsel) raised a conflict of interest concern. The concern was with the law firm of Turner Padget Graham & Laney P.A. (hereinafter "TPGL"), one part of the Respondent's legal team. Specifically the concern was with the representation of Appellant PDHC by TPGL in an on-going worker's compensation matter while at the same time opposing Appellant in this matter. This conflict, now resolved, does not require TPGL disqualification as will be discussed in greater detail in a section below.

THIS APPEAL AND RELATED MOTIONS SHOULD BE DISMISSED

Both the Notice of Appeal and the present Motions of Appellant were executed by an attorney disqualified by the trial court. In reaffirming that disqualification, the trial court *sua*

[3] The trial court's accomodation of Appellant's counsel is stated in the Judge's letter to Mr. Megna of June 23, 2011. In the letter, the Court notes, "The Notice of Hearing and structure of the upcoming hearings were promulgated to satisfy your concerns...." In response to Mr. Megna's request to delay consideration of summary judgment for lack of discovery (after filing his motion without such discovery and agreeing to stay discovery), the letter advises, " Respectfully, the Court cannot accommodate conflicting and changing positions. Further, for reasons of judicial economy and proper case administration, the Court requires that the Summary Judgment Motions be heard before Plaintiff's 59(e) Motion for Reconsideration ... in Darlington as scheduled."

sponte ordered the quashing of additional activities conducted in contempt of the court's earlier disqualification. That *sua sponte* provision stated:

> "The Court granted Plaintiff's counsel [Megna] a limited appearance only. Therefore, all motions, subpoenas, and filings signed only by disqualified counsel, Tony R. Megna, and made subsequent to the Notice of Hearing dated June 17, 2011 in which the Court formally announced the parameters of its accommodation to Plaintiff and its counsel, are hereby QUASHED." [4]

August 12, 2011 Order at page 1. Thus, as a preliminary matter, this Court should consider whether the Notice of Appeal was effective given the disqualified status of counsel.

Because the trial court's disqualification of counsel is an injunction against his continued involvement, that disqualification is not subject to an automatic stay under SCACR 241(b)(8) even though an interlocutory appeal of the issue is allowed. Appellant has other counsel of record (Benjamin R. Matthews, Esq.) that could have, but did not, execute the necessary jurisdictional notice of appeal.

Rule 11(a) of the SCRCP requires that *every* pleading, motion, or other *paper filed by a party represented by counsel must be executed by an attorney of record* for that party. Rule 1 of

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[4] Disqualified counsel had, among other things, sent out multiple subpoena's to numerous uninvolved attorneys across the state including Desa Ballard, Celeste Jones of the McNair Firm, and Kenneth P. Woodington of Davidson & Lindemann, PA. These subpoenas provoked a series of filed objections, motions for protection, and a motion for sanctions – all rendered moot by the Court's *sua sponte* quashing of such material.

While the purpose of these quashed subpoenas is not entirely clear, they echoed discovery sent out in other litigation seeking to solicit the communications of various members of the bar involved in litigation with attorney Megna. As undersigned counsel explained at the March hearing on the motion to disqualify Mr. Megna, a public document in the so-called "Lake City litigation" was attached to the motion to disqualify solely to demonstrate that Mr. Megna was CEO of PDHC and therefore likely to be a witness. Transcript of March 16, 2011, page 11 lines 2-14. Attorneys in the "Lake City litigation" helped undersigned counsel locate those public documents. Undersigned counsel are not involved in the "Lake City litigation" but believe it concerns ownership/control of the Lake City hospital.

Similarly, because Mr. Megna is a witness in the matter at bar, undersigned counsel sought to monitor the proceedings of Richland County litigation where court findings might be relevant to Mr. Megna's credibility. See Anasti v. Wilson, unpublished opinion 2011-UP-187 (filed April 28, 2011)(dismissing appeal from trial court order which found Mr. Megna "was not credible as to any contested issue").

the SCRCP provides that the Rules of Civil Procedure "govern the procedure in all South Carolina Courts...." (emphasis added). Rule 81 of the SCRCP would not appear to exclude the applicability of Rule 11 to the appellate courts – applicability mandated by Rule 1 SCRCP.

In any event, Appellant continues to be represented by Mr. Matthews, but Mr. Megna, who executed the notice of appeal and pending motion in this Court, has been disqualified and thus is no longer an attorney of record. Accordingly Mr. Megna's notice of appeal and motions are unauthorized under South Carolina procedure and should be dismissed as void *ab initio*.

CONFLICT ISSUE NOT RAISED BY REQUIRED MOTION IN THE TRIAL COURT

Having withdrawn as required from the worker's compensation matter, the remaining issue for TPGL was whether the firm could and should continue in representation of the Respondent who knowingly consented to, requested, and authorized such continued representation. Although this issue was considered internally by TPGL before continuing in Respondent's representation, it was never raised by motion of the Appellant in the trial court despite the knowledge, opportunity, and even an invitation by the trial court at the last hearing (July 19, 2011).[5]

Indeed, the jurisdiction of the trial court to consider such a motion was ongoing until the matter was ended by summary judgment. See SCACR Rule 205 (last sentence) and Rule 241(a)(last sentence of this subsection) (trial court has continuing jurisdiction of case matters not affected by the pending appeal); see also South Carolina National Bank v. Devine Blossom, 321 S.C. 110, 467 S.E.2d 767 (Ct. App. 1996). This is not a situation where the issue's existence was

[5] Transcript page 7, lines 11-13 ("Do you want to just note this for our record, Mr. Megna?" Answer: "Yes, sir."). The trial court agreed to take the matter up again if raised in the progression of the case. Transcript page 7, lines 21-23. No motion was ever filed in the trial court.

not known until after a notice of appeal was filed. In other words, this issue is not arising for the first time in the Court of Appeals.

Previously, Appellant has also suggested that the trial judge should recuse himself[6] but filed no motion. Rather than filing motions to disqualify TPGL and disqualify Judge Baxley, however, Appellant's counsel – himself disqualified – instead continued a pattern of sending letters and e-mails to Respondent's counsel and the trial court. These communications often made hyperbolic suggestions of severe consequences,[7] but they never complied with the

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[6] In addition to letters (e.g. that filed July 8, 2011), this suggested recusal is found in the following pleadings (trial and appellate) of Appellant: the pending Motion in the Court of Appeals (footnote 10 and related text), the Motion to Reconsider, p.1 item 3; and the March 2011 Return to Defendant's Motion to Disqualify, p. 20. When asked at the July 19, 2011 hearing whether PDHC intended to pursue disqualification of the trial judge, counsel advised that he did not. Transcript page 55 line 21- page 57 line 9.

[7] A recent example is the July 27th letter of Mr. Megna to the trial judge sent by e-mail with copy to Respondent's counsel. In that letter, Mr. Megna offers the following (emphasis added):

> At this point, both Mr. James as well as Mr. Josey are likely necessary witnesses, *if not Defendants*, in adverse litigation that involves the Plaintiff ..... Moreover, their silence concerning their knowledge of and involvement in the 'Lake City litigation' matters is of *grave concern* to the Plaintiff *with far-reaching implications*. I fail to understand how it is not reasonable to conclude *their silence has been intended to misdirect or deceive* both the Plaintiff and the Court. ..... the Plaintiff has had very little time to evaluate and organize matters and documents to provide the Court a more complete picture of the extent of the *legal and ethical concerns*. However, the seriousness of the matter required your *immediate* notification.

In his March 11, 2011 response to the Motion to Disqualify him, Mr. Megna accused Respondent and its counsel of "defamatory litagation [sic] strategy." Specifically, Mr. Megna alleged, *inter alia*:

> The Motion to Disqualify is replete with implied [and not so implied] offensive and unjustified personal and professional attacks on the integrity of the undersigned. ... The undersigned is extremely aware that Mr. Josey and Mr. James are attempting to convey to the Court the misleading, insulting and not so subtle message to this Court that the undersigned is somehow "dishonest, untrustworthy", etc. ... Mr. Josey, Mr. James, and the Personal Representatives of the Estate of the Decedent have seriously miscalculated the determination of the Plaintiff, and the undersigned, to remedy the wrong that has occurred in the case at bar - as well as in the Lake City matters.
>
> The undersigned has no qualms in informing this Court that *the 'Lake City litigation' involves significant allegations of unethical and unprofessional conduct by lawyers of one of the largest law firms in this state, allegations of unethical and unprofessional conduct by lawyers in an influential firm in the Pee Dee, allegations of unethical and unprofessional conduct by relatives of a judge in Florence County, allegations of unethical and unprofessional conduct by physicians with medical practices in Lake City, SC, and allegations of conspiracy, fraud and unprofessional conduct by many others.*

simplicity of Rule 7(b)(1) which provides for due process by requiring that "An application to the court for an order *shall be by motion* which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought." (emphasis added). Rather than file a disqualification motion in the trial court, Appellant waited until the trial court's adverse decision on the merits and then filed the motion in this Court seeking to also vacate the trial court's well considered rulings and seeking to retroactively disqualify counsel's untainted[8] representation of Respondent. No motion was made for disqualification in the trial court and as this Court well knows, raising issues in the trial court is a prerequisite to consideration in the appellate court.[9]

> ... In sum, the Plaintiff and the undersigned, as well as many others, were victimized by many in the Pee Dee area in regard to the Lake City matters. ....
>
> Additional litigation against those involved ... is forthcoming. ....Counsel for the Defendants have unnecessarily, maliciously, and unethically interjected the 'Lake City litigation' into this lawsuit by their personal attacks and insinuations of improper conduct by the undersigned; and have attached a Lake City document to their Motion to Disqualify for the sole realistic reason of prejudicing these proceedings. *The Motion to Disqualify crosses the line from advocacy to obstructionism.* See the foregoing discussion in relation to Rule 401, Rules 3.3 and 3.4.
>
> *The false and unprincipled personal accusations and innuendos being made by Mr. James and Mr. Josey against the undersigned have placed this Court in the unfair and unenviable position of determining whether or not Mr. James and Mr. Josey's accusations [implied and explicit] have prejudiced these proceedings to the extent this Court should sua sponte recuse itself*.... ... Mr. James' and Mr. Josey's unprincipled attacks on the undersigned and the Plaintiff have placed this Court in a similar position considering the distasteful circumstances we collectively find ourselves discussing.

Even earlier Mr. Megna had suggested there would be other parties added to the lawsuit (Megna letter to the trial judge of February 4, 2011). Also in February 2011, Mr. Megna suggested that counsel was "aiding and abetting" a breach of fiduciary duty by the personal representatives of the Estate (who do not owe a fiduciary duty to a disputed creditor of the Estate). This subtle suggestion appeared in a Motion to Strike prepared by Appellant's counsel and e-mailed to Respondent's counsel on February 17, 2011. The Motion to Strike was never filed.

[8] The lack of taint to this representation will be discussed in the following section.

[9] In order to preserve an issue for appeal, a party needs only to "raise all necessary issues and arguments to the lower court and attempt to obtain a ruling." I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 421, 526 S.E.2d 716, 724 (2000). Excepting questions of subject matter jurisdiction, issues must be raised in a timely or

Unlike the typical case lacking issue preservation, however, it isn't the issue appealed (disqualification) that has not been preserved; rather, Appellant is attempting to use an interlocutory appeal on the disqualification issue to by-pass the trial court's consideration of other issues. The Appellant is forum shopping between the trial court and the appellate court on a matter ripe for consideration in the trial court. Thus, even if this appeal is not dismissed for the jurisdictional lack of an authorized signature, the pending motions should be dismissed for lack of issue preservation.

DISQUALIFICATION NOT REQUIRED

INADVERTENT, SUPERFICIAL CONFLICT IS ENDED & WAS OF NO CONSEQUENCE

If this appeal is not dismissed, and the Appellant's motions are not dismissed, the Appellant's motions should be denied on their merits. These motions are focused on the Appellant's manufactured outrage over an inadvertent, superficial, and inconsequential conflict of interest.[10] The conflict issue raised by the Appellant has no relevance to the merits of this matter. Moreover, under the circumstances here, TPGL has no obligation to withdraw from representation of Respondent and disqualification is not required.

As it turns out, TPGL mistakenly concluded in July 2010, when they joined in Respondent's representation, that an unrelated PDHC worker's compensation matter (where

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contemporaneous fashion or they are waived. See, e.g., Bardoon Properties, NV v. Eidolon Corp., 326 S.C. 166, 485 S.E.2d 633 (1997) (issue of real party in interest waived where not raised prior to default damages determination). Issue preservation has thus been described as encompassing four basic requirements: (1) the issue must have been raised to and ruled upon by the trial court, (2) the issue must have been raised by the Appellant, (3) the issue must have been raised in a timely manner, and (4) the issue must have been raised with sufficient specificity. Toal, Appellate Practice in South Carolina , 2d Ed. (2002), p. 57.

[10] This is not to suggest at all that undersigned counsel does not take the ethical obligation to avoid conflicts seriously. This description of the conflicts at hand only reflects the reality of the circumstances presented here.

TPGL was engaged by the Appellant's former insurance carrier) was closed .[11] The Worker's Compensation Commission record demonstrates that this employee injury claim was settled as to liability including disability amount and wages on February 29, 2008 – more than two years before TPGL became involved in the instant unrelated case involving the Medicare credentialing of one of Appellant's physician employees. Indeed, the only remaining issues in the worker's compensation claim involve the claimant's right to continued medical care related to the compensable injury and it is PDHC's former insurance carrier who is obligated to provide for that care – not PDHC.

When TPGL's conflicting representation was raised on July 19, 2011, and subsequently confirmed, Appellant made it clear that it would not consent to continued representation as could be allowed under Rule 1.7 (b) of the Rules of Professional Conduct. Appellant's general counsel Megna specifically suggested that Respondent's counsel "resolve the matter."[12] Accordingly, TPGL took steps to withdraw from Appellant's representation as required – in coordination with the insurance carrier – the real party in interest with the contractual right to engage counsel for its insured.

New worker's compensation counsel was quickly secured by the carrier and a substitution approved by the Worker's Compensation Commissioner.[13] PDHC was never

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[11] Although many of Appellant's documents suggest that all of Respondent's counsel are conflicted, the Respondent's other counsel, John Jay James, II of Paulling and James, LLP, was never involved in the conflicting worker's compensation matter and his continued representation of Respondent is not affected by Appellant's present complaint.

[12] Transcript of July 19, 2011, page 5 lines 19-22 and page 7 line 18. See also Megna letter to J. René Josey of July 20, 2011 ("To reiterate, Pee Dee Health Care, P.A has not waived and does not waive the conflict of interest. I request you and Jay resolve the matter immediately so that the legal and financial interests of Pee Dee Health Care, P.A. in both matters are absolutely protected.").

[13] In an effort to stop or reverse the substitution of counsel, after raising the conflict requiring it, counsel Megna for PDHC requested (letter of August 8, 2011) a follow-up hearing with the Worker's Compensation Commissioner T. Scott Beck which was accommodated by conference call. In that conference call Commissioner Beck denied any relief from the order of substitution despite Mr. Megna's suggestion that the Commissioner had approved the

without counsel and moreover, nothing procedurally significant occurred in the worker's compensation case between the time of the 2008 settlement and the time of counsel substitution in 2011. Thus, despite unsupported and unspecified assertions of harm, PDHC was not harmed in the worker's compensation change of counsel. Appellant's motion offers no indication of how it has been harmed. Indeed, shortly after the discovery of the conflicting representation, TPGL provided PDHC an entire copy of its file in the worker's compensation matter and PDHC can point to nothing therein as prejudicial.[14]

Certainly, if Appellant had any actual evidence that confidential information learned by TPGL in the worker's compensation matter was being used against PDHC in the instant Medicare credentialing matter, then Appellant would identify the information that had been so used. Of course, there is no such information and assertions[15] to the contrary are merely an effort to divert and delay Court attention from clearly dispositive issues. In addition, a review of

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consent substitution order *"ex parte."* Like the motion before this Court, the PDHC request to Commissioner Beck also included a needless request to stay the worker's compensation case and hold a hearing on the requested perfunctory consent substitution of counsel. That request was refused.

[14] See Josey letter to The Honorable J. Michael Baxley of July 25, 2011 and letter of J. Brandon Hylton to Mr. Megna of July 25, 2011 (hand-delivered). As a review of this worker's compensation file also confirms, the contact between TPGL and PDHC regarding the worker's compensation matter was minimal – in fact, so slight and dated that the Appellant's counsel admitted to the trial court that he had forgotten the worker's compensation representation. Transcript of July 19, 2011, page 7 line 16.

[15] Typical of the Appellant's bold but bald assertions are those found in the affidavit of PDHC physician Alexander H. Cohen, submitted in support of the pending motion (Appellant's Exhibit N). Paragraph 2 of that affidavit reads as follows (emphasis added):

> As a physician, I can't believe that the legal profession would allow the attorneys at Turner Padget to represent Dr. Thompson's estate in the Darlington court, and in this appeal, while knowing that Turner Paget has represented my company since 2003. *I have no idea what they have learned about PDHC in the last eight years, but they have had access to our employees, files, and other company information. I understand that they must have information that they would only have had because they represented us and were our attorneys.* We provided the information because they were our attorneys, and it never occurred to me that one day they would be representing someone else against my company while they representing me. Moreover, I am personally stunned Jay James would participate in such a matter. I have known Jay for years and I don't think he would ever knowingly do anything like this.

the trial court's order granting summary judgment confirms that it was not based upon anything gleaned in an unrelated worker's compensation matter.

TPGL having done what was ethically required, and what was demanded, PDHC now simply wishes for a different outcome – one where TPGL cannot represent Respondent; but that is not what is required by the Rules. Mandatory withdrawal from representation of the Respondent's is not required by the Rules of Professional Conduct where the representation of PDHC has ended, consent of the Respondent has been provided, and ongoing representation of the Respondent is untainted by anything learned in the worker's compensation matter.[16]

THIS APPEAL NEEDS TO BE EXPEDITED, NOT STAYED

Appellant has moved this Court to stay further appellate proceedings for the Court to consider the unripe and irrelevant request to disqualify TPGL. As the Court can see from this response, Respondent's counsel have no difficulty responding to the superficial asserted grounds for disqualification; but a thorough review of the context of the Appellant's present motion reveals the Appellant's true objective of avoiding consideration of the underlying claim which is wholly without merit as the trial court has now concluded.

Appellant strategically seeks to impose death by a thousand cuts rather than suffer defeat by adjudication of the merits. In this case, former counsel Megna signaled early on that the Respondent Estate would be tied up for years with litigation and appeals.[17] Without adequate Court control, this signaled strategy will come to pass. Accordingly, Appellant's motion to stay should be denied.

Moreover, unlike the unripe, unpreserved question of TPGL disqualification, the crux of the underlying case is ripe for appeal. The trial court has properly concluded that the Appellant

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[16] See Affidavit of Nathan M. Crystal submitted in support of this response.

[17] See Megna letter to Jay James of February 16, 2011 (transmitting the first interlocutory notice of appeal).

was at fault in this Medicare credentialing matter both under South Carolina common law and federal law – and that conclusion is not impacted in the least by a law firm's representation of PDHC in an unrelated injury of an employee – a claim largely settled years earlier.

Thus, in response to the delay effort of Appellant, the Respondent asks this Court to expedite consideration of the merits of this matter – specifically the trial court's decision to grant summary judgment. This request is made to promote the ends of justice and judicial economy – just as the Respondent urged the trial court to proceed and grant summary judgment avoiding needless motions practice on the non-controlling issues raised by PDHC.

While Appellant has not yet filed a notice of appeal from the trial court's form order (letter of August 12, 2011) or actual order of summary judgment (signed August 29, 2011), Respondent urges this Court to consider the merits of that anticipated appeal as soon as possible and together with, if not before, this appeal and the pending probate appeal. An affirmation of the lack of merit in the underlying claim would render the disqualification of Appellant's counsel moot. Such a decision would also render another pending interlocutory appeal from the probate court moot.[18] Such a decision would thereby bring this litigious drain on judicial resources to a merciful end.

Accordingly, pursuant to Rule 263(b), the Respondent would move the Court to direct any necessary briefing or argument on an expedited basis and consolidate matters as it deems advantageous under SCACR 214. *The trial court determined to proceed to summary judgment and this Court should as well – nipping the superfluous death by a thousand cuts tactic in the bud – for the sake of justice.*[19]

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[18] The identity of that other appeal is addressed in footnote 2 of this response and counter-motions.

[19] In support of his decision to proceed and issue a detailed order of summary judgment, the trial court observed:

CONCLUSION

This pending appeal should be dismissed for lack of jurisdiction resulting from an the lack of an authorized signature on the notice of appeal. The requests to stay the appeal, vacate matters in the trial court, and disqualify counsel should be denied as unnecessary, unpreserved, and lacking in merit. Additionally, all related appeals should be expedited so that the merits of the trial court's summary judgment decision can be considered now.

September 6th, 2011

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ATTORNEYS FOR RESPONDENT

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

Summary Judgment Order of August 29, 2011 at page 3 (emphasis added).

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SC Court of Appeals

APPEAL FROM DARLINGTON COUNTY
COURT OF COMMON PLEAS
J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE

CASE NO. 2010-CP-16-0633

Pee Dee Health Care, P.A. .... Appellant

versus

Estate of Hugh S. Thompson....Respondent

PROOF OF SERVICE

I certify that I have served Respondent's Response to Motion and Counter-MotionS on Pee Dee Health Care, P.A., by depositing copies of the same in the United States mail, postage prepaid, on September 6th, 2011, to its attorney of record, Benjamin R. Matthews, 3400 West Avenue, Columbia, SC 29203 as well as its former attorney, Tony R. Megna, 3400 West Avenue, Columbia, SC 29203 .

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ATTORNEYS FOR RESPONDENT

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

Case Number: 10-CP-16-0332

Pee Dee Health Care, P.A., **Plaintiff,** **v.** **Estate of Hugh S. Thompson,** **Defendant.**	**ANSWERS TO REQUESTS TO PRODUCE DATED NOVEMBER 1, 2010 AND RECEIVED BY PLAINTIFF ON NOVEMBER 3, 2010**

PLEASE TAKE NOTICE that plaintiff, by the undersigned attorney, hereby answers the Defendant's Request to Admit dated November 1, 2010, and received on November 3, 2010 as follows:

1) Admit that Pee Dee Health Care, PA, contested the claim of United States Department Of Health And Human Services to reimbursement of payments made for services performed by Dr. Thompson while employed at Pee Dee Health Care, PA (1999 -2000) by appealing the matter to Administrative Law Judge Dean C. Metry in ALJ Appeal No. 1-223311931.

Denied. The Plaintiff appealed the claim of the U.S. Department of Health and Human Services to reimbursements made for services performed by Dr. Thompson to Medicare beneficiaries by appealing the matter through the Medicare administrative appeal process, which included all administrative appeals available to PDHC including:

a. Step 1: The local Medicare carrier for both initial determination and reconsideration, which was denied.

b. Step 2: The Medicare Qualified Independent Contractor, which appeal was denied.

c. Step 3: The Medicare Administrative Law Judge, which appeal was denied.

d. Step 4: The Medicare Departmental Appeals Council, which appeal was denied.

All such documents evidencing the foregoing have been provided to the Defendant. The Plaintiff further notes that Dr. Thompson was appealing a separate determination made by the Administrative Law Judge Joe, which was determined in Dr. Thompson's favor by order of Judge Joe dated January 22, 2008, several weeks prior to a determination being made by ALC Judge Metry in the PDHC matter even though Dr. Thompson had promised to keep PDHC advised of the results of the proceedings. Inexplicably, however, Dr. Thomson failed to notify

PDHC of the favorable ruling of Judge Joe. This ruling became final and binding on Medicare as to all issues determined by Judge Joe pursuant to matters of issue preclusion. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own actions, in failing to inform PDHC of the Joe ALC decisions, caused an adverse judgment to be entered against PDHC and Dr. Thompson. PDHC respectfully submits the determination made against it would have been otherwise subject to preclusion defenses if Dr. Thompson had provided the favorable decision of Judge Joe to PDHC and the ALC considering the matter concerning PDHC and Dr. Thompson.

In any event, Dr. Thompson actions and behaviors were consistent with a continuing pattern of conduct evidencing non-disclosure of relevant facts actually known to him, as well as the false statements and attestations he personally made to Medicare and others on applications he filed under oath and with a legal obligation to be truthful. All such statements and attestations made by Dr. Thompson were false, known to him to be false, and were violations of both state and federal law. See, for example, Section S.C. Code Section 40-47-111 which defines misconduct of a physician to include a fraudulent, deceitful, or dishonest act in connection with a licensing requirement. In addition, the failure of Dr. Thompson to inform PDHC of facts actually known to Dr. Thompson was a violation of his ethical responsibilities as a physician and violations of the duties to PDHC as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court. In short, Dr. Thompson cannot benefit from his own wrongdoing.

2) Admit that Pee Dee Health Care, PA did not appeal the March 14, 2008 order of Administrative Law Judge Dean C. Metry in ALJ Appeal No. 1-223311931.

Denied. See response to answer 1. In any event, however, Dr. Thompson never informed PDHC that his Medicare privileges had been suspended, nor that he had been disbarred as a provider to Medicare beneficiaries in the first instance even though he personally had actual knowledge that the information he was supplying to PDHC and the attestations he was making on applications to Medicare and others were false. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own intentional actions were designed to deceive PDHC, or, were designed to deceive Medicare as evidenced by his false attestations to Medicare, and were deliberately indifferent to his obligation as an employee of PDHC. In addition, the failure of Dr. Thompson to inform PDHC of facts actually known to Dr. Thompson was a violation of his ethical responsibilities as a physician and violations of the duties to PDHC as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court. In short, Dr. Thompson cannot benefit from his own wrongdoing.

3) Admit that on November 16, 1998, Pee Dee Health Care, PA knew that Dr. Thompson's license had previously been suspended and that he had received a conditional reinstatement after four years.

Denied due to lack of specificity. At no time did PDHC know that Dr. Thompson had been disbarred from Medicare. PDHC admits, however, that Dr. Thompson supplied PDHC information that indicated:

a. his license had been reinstated by the SC Medical Board and he had been employed prior to his employment with PDHC and treated all patients, including Medicare

patients – even though he knew he was violating federal law. Dr. Thompson never informed PDHC that his Medicare license had been suspended in the first instance even though he personally had actual knowledge that the information he was supplying to PDHC and the attestations he was making on applications to Medicare and others were false. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own intentional actions were designed to deceive PDHC and/or were designed to deceive Medicare as evidenced by his false attestations to Medicare, and were deliberately indifferent to his obligation as an employee of PDHC. In addition, the failure of Dr. Thompson to inform PDHC of facts actually known to Dr. Thompson was a violation of his ethical responsibilities as a physician and violations of the duties to PDHC as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court.

b. He had been previously employed in the Pee Dee area by the Medical Offices of Don Fowler, and had been seeing all types of patient, including Medicare, Medicaid, etc. In fact, he presented PDHC with a Medicare and Medicaid billing numbers that were in use prior to his employment with PDHC. Dr. Thompson never informed PDHC that his Medicare license had been suspended in the first instance even though he personally had actual knowledge that the information he was supplying to PDHC and the attestations he was making on applications to Medicare and others were false. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own intentional actions were designed to deceive PDHC, or, were designed to deceive Medicare as evidenced by his false attestations to Medicare, and were deliberately indifferent to his obligation as an employee of PDHC. In addition, the failure of Dr. Thompson to inform PDHC of facts actually known to him was a violation of his ethical responsibilities as a physician and violations of the duties to PDHC as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court. In short, Dr. Thompson cannot benefit from his own wrongdoing.

4) Admit that on November 16, 1998, Pee Dee Health Care, PA, through its then President, James D. McInnis, did certify that it was eligible to receive United States Department of Health and Human Services benefits reassigned from the services of Dr. Thompson.

Denied. PDHC admits that based on, and relying upon, Dr. Thompson's false attestations made while under oath and in violation of state law, federal law as well as his ethical responsibilities as a physician and duties to PDHC as his employer, that representatives of PDHC were knowingly misled into signing documents that Dr. Thompson knew were false. Dr. Thompson is equitably estopped from asserting any lack of information on the part of PDHC or the affirmative information provided by PDHC, which Dr. Thompson provided and actually knew was misleading and false, as a defense to his personal liability in these matters. In short, Dr. Thompson cannot benefit form his own wrongdoing. Dr. Thompson never informed PDHC that his Medicare licensure had been suspended in the first instance even though he personally had actual knowledge that the information he was supplying to PDHC and the attestations he was making on applications to Medicare and others were false. Dr. Thompson is further equitably estopped from asserting any defense against PDHC as his own intentional actions were designed to deceive PDHC and/or were designed to deceive Medicare as evidenced by his false

attestations to Medicare, and were deliberately indifferent to his obligation as an employee of PDHC. In addition, the failure of Dr. Thompson to inform PDHC of facts actually known to Dr. Thompson was a violation of his ethical responsibilities as a physician and violations of the duties to PDHC as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court. In short, Dr. Thompson cannot benefit from his own wrongdoing.

5) Admit that, on or before November 16, 1998, Pee Dee Health Care, PA failed to call the United States Department of Health and Human Services-Office of Inspector General or visit the United States Department of Health and Human Services-Office of the Inspector General web site to determine if Dr. Thompson was excluded from the Medicare program.

Denied. PDHC had no information that information as to whether Dr. Thompson's disbarment was available on the Medicare website at the time of his employment with PDHC indicating Dr. Thompson was disbarred as a Medicare provider in the first instance. Moreover, PDHC was in contact with Medicare in regard to the status of Dr. Thompson as a Medicare provider, and in fact, was assured Dr. Thompson was a certified Medicare provider as noted by the letter from Medicare that is in the possession of the Defendants. At the same time, Dr. Thompson had actual knowledge that he had been disbarred from participating in Medicare yet failed to inform PDHC his Medicare license had been previously suspended even though he personally had actual knowledge that the information he was supplying to PDHC and the attestations he was making on applications to Medicare and others were knowingly false or in reckless disregard of the truth. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own intentional actions were designed to deceive PDHC and/or were designed to deceive Medicare as evidenced by his false attestations to Medicare, and, at best, were deliberately indifferent to his obligation as an employee of PDHC. In addition, the failure of Dr. Thompson to inform PDHC of facts actually known to Dr. Thompson was a violation of his ethical responsibilities as a physician and violations of the duties to PDHC as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court. In short, Dr. Thompson cannot benefit from his own wrongdoing.

6) Admit that, on or before November 16, 1998, a call to the United States Department of Health and Human Services-Office of Inspector General or a visit to the United States Department of Health and Human Services-Office of Inspector General website, would have revealed Dr. Thompson's exclusion from the Medicare program.

Denied. PDHC has no information as to what information was or was not available in the records of the Department of Health and Human Services or on its website in 1998 or where those records of Dr. Thompson's disbarment were located. PDHC depended upon the honesty of Dr. Thompson and the fact that it was provided by the South Carolina CMS Medicare intermediary, PGBA, with information that Dr. Thompson was a certified Medicare provider and in good standing with Medicare. Moreover, the evidence produced during the course of this litigation demonstrates that Dr. Thompson had actual knowledge of these facts, and, in fact, had actual possession of such records but despite his legal and ethical obligations to PDHC and Medicare, failed to provide the information to Medicare of PDHC. In fact, Dr. Thompson made affirmative attestations under oath to both Medicare and others that he was, in fact, a certified

Medicare provider as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own intentional actions were designed to deceive PDHC, or, were designed to deceive Medicare as evidenced by his false attestations to Medicare, and were deliberately indifferent to his obligation as an employee of PDHC. In short, Dr. Thompson cannot benefit from his own wrongdoing.

7) Admit that Pee Dee Health Care, PA did not give to Dr. Thompson during his lifetime written notification of the United States Department of Health and Human Services claim against it.

Denied. PDHC is informed and believes Dr. Thompson was provided copies of the Medicare administrative decisions during the course of the Medicare appeals process, and kept abreast of the developments. In any event, Dr. Thompson never informed PDHC that his Medicare license had been suspended in the first instance even though he personally had actual knowledge that the information he was supplying to PDHC and the attestations he was making on applications to Medicare and others were false. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own intentional actions were designed to deceive PDHC, or, were designed to deceive Medicare as evidenced by his false attestations to Medicare, and were deliberately indifferent to his obligation as an employee of PDHC. In addition, the failure of Dr. Thompson to inform PDHC of facts actually known to Dr. Thompson was a violation of his ethical responsibilities as a physician and violations of the duties to PDHC as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court. In short, Dr. Thompson cannot benefit from his own wrongdoing.

8) Admit that Pee Dee Health Care, PA did not given written notification to Dr. Thompson during his lifetime that it looked to him for indemnification of the United States Department of Health and Human Services claim and of his right to participate in defense of the United States Department of Health and Human Services claim.

Denied. PDHC is informed and believes Dr. Thompson was provided copies of the Medicare administrative decisions during the course of the Medicare appeals process, and kept abreast of the developments. In any event, Dr. Thompson never informed PDHC that his Medicare license had been suspended in the first instance even though he personally had actual knowledge that the information he was supplying to PDHC and the attestations he was making on applications to Medicare and others were false. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own intentional actions were designed to deceive PDHC, or, were designed to deceive Medicare as evidenced by his false attestations to Medicare, and were deliberately indifferent to his obligation as an employee of PDHC. In addition, the failure of Dr. Thompson to inform PDHC of facts actually known to Dr. Thompson was a violation of his ethical responsibilities as a physician and violations of the duties to PDHC as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court. In short, Dr. Thompson cannot benefit from his own wrongdoing.

The Plaintiff further notes that Dr. Thompson was appealing a separate determination made by the Administrative Law Judge Joe, which was determined in Dr. Thompson's favor by order of Judge Joe dated January 22, 2008, several weeks prior to a determination being made by ALC

Judge Metry in the PDHC matter even though Dr. Thompson had promised to keep PDHC advised of the results of the proceedings. Inexplicably, however, Dr. Thomson failed to notify PDHC of the favorable ruling of Judge Joe. This ruling became final and binding on Medicare as to all issues determined by Judge Joe pursuant to matters of issue preclusion. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own actions, in failing to inform PDHC of the Joe ALC decisions, caused an adverse judgment to be entered against PDHC and Dr. Thompson. PDHC respectfully submits the determination made against it would have been otherwise subject to preclusion defenses if Dr. Thompson had provided the favorable decision of Judge Joe to PDHC and the ALC considering the matter concerning PDHC and Dr. Thompson.

9) Admit that Pee Dee Health Care, PA did not give Dr. Thompson during his lifetime written notification of the adverse administrative decisions at any level rendered with respect to its appeal of the United States Department of Health and Human Services claim.

Denied. Dr. Thompson was kept abreast of all matters relating to the appeal of the administrative decisions made by Medicare. PDHC is informed and believes he was proved copies of the administrative decisions made during the course of the Medicare appeals process. In any event, Dr. Thompson never informed PDHC that his Medicare license had been suspended in the first instance even though he personally had actual knowledge that the information he was supplying to PDHC and the attestations he was making on applications to Medicare and others were false. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own intentional actions were designed to deceive PDHC, or, were designed to deceive Medicare as evidenced by his false attestations to Medicare, and were deliberately indifferent to his obligation as an employee of PDHC. In addition, the failure of Dr. Thompson to inform PDHC of facts actually known to Dr. Thompson was a violation of his ethical responsibilities as a physician and violations of the duties to PDHC as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court. In short, Dr. Thompson cannot benefit from his own wrongdoing.

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10) Admit that Pee Dee Health Care, PA did not give Dr. Thompson during his lifetime written notification of its intent not to appeal the decision of Administrative Law Judge Dean C. Metry in ALJ Appeal No. 1-223311931.

Denied. PDHC is informed and believes he was proved copies of the administrative decisions made during the course of the Medicare appeals process. In any event, Dr. Thompson never informed PDHC that his Medicare license had been suspended in the first instance even though he personally had actual knowledge that the information he was supplying to PDHC and the attestations he was making on applications to Medicare and others were false. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own intentional actions were designed to deceive PDHC, or, were designed to deceive Medicare as evidenced by his false attestations to Medicare, and were deliberately indifferent to his obligation as an employee of PDHC. In addition, the failure of Dr. Thompson to inform PDHC of facts actually known to Dr. Thompson was a violation of his ethical responsibilities as a physician and violations of the duties to PDHC as further detailed in the Complaint filed by PDHC against Dr. Thompson in this Court. In short, Dr. Thompson cannot benefit from his own wrongdoing.

The Plaintiff further notes that Dr. Thompson was appealing a separate determination made by the Administrative Law Judge Joe, which was determined in Dr. Thompson's favor by order of Judge Joe dated January 22, 2008, several weeks prior to a determination being made by ALC Judge Metry in the PDHC matter even though Dr. Thompson had promised to keep PDHC advised of the results of the proceedings. Inexplicably, however, Dr. Thomson failed to notify PDHC of the favorable ruling of Judge Joe. This ruling became final and binding on Medicare as to all issues determined by Judge Joe pursuant to matters of issue preclusion. Dr. Thompson is equitably estopped from asserting any defense against PDHC as his own actions, in failing to inform PDHC of the Joe ALC decisions, caused an adverse judgment to be entered against PDHC and Dr. Thompson. PDHC respectfully submits the determination made against it would have been otherwise subject to preclusion defenses if Dr. Thompson had provided the favorable decision of Judge Joe to PDHC and the ALC considering the matter concerning PDHC and Dr. Thompson.

In supplement to all of the foregoing answers to the Requests to Admit of Defendant, PDHC respectfully submits as follows:

a. that Dr. Thompson actions, conduct, words and silence amounted to false representations and concealment of material facts calculated to convey the impression that the facts were otherwise than, and inconsistent with, those which Dr. Thompson's estate is subsequently attempting to now assert.

b. that Dr. Thompson's intent was that his concealments and false attestations would be, and in fact, were, acted upon by PDHC even though Dr. Thompson had both actual or constructive knowledge of the real facts, i.e., that he had been disbarred as Medicare provider and never readmitted to the Medicare program. Dr. Thompson's false representations, as well as a concealment of material information known only to Dr.

Thompson and his attestations to such false statements under penalty of oath and law caused PDHC to alter its position to its prejudice and substantial injury.

c. that Dr. Thompson's actions and conduct were in violation of S.C. Code Ann. Section 40-47-630 which prohibits a physician from using deceitful or dishonest acts in connection with any certification requirement.

d. that Dr. Thompson's actions and conduct were in violation of the Principles of Medical Ethics. [SC ADC 81-60].

e. that Dr. Thompson's actions and conduct were in violation of federal law, including but not limited to the knowingly false attestations made in the various applications to Medicare and others which define Dr. Thompson's obligations of truthfulness under federal law.

f. that Dr. Thompson's actions and conduct were in violation of his common law and statutory duties to PDHC as noted in PDHC's complaint filed in this action as well as admitted in the answer of the Defendant which has been filed in this Court. PDHC respectfully incorporates the admissions of the Defendant's answer herein as if recited verbatim.

g. that, in any event, and in the best light to Dr. Thompson, his actions, conduct and behaviors were deliberately misleading and/or deliberately indifferent to his legal obligations to PDHC and others, and he is equitably estopped as a matter of law and equity based on the doctrine of 'unclean hands' from asserting any defense against PDHC regardless of its origin or legal basis. It is a well founded policy of law that no person be permitted to benefit from their own unlawful acts.

Benjamin R. Matthews
Attorney at Law
3400 West Avenue
Columbia, SC 29203
Office: 803.799.1700

November 9, 2010.

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

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

CERTIFICATE OF SERVICE

The undersigned hereby certifies, on the date indicated below, copies of the following documents in the above-captioned matter were mailed to counsel for the Defendant by United States Mail, first class, postage prepaid.

Counsel for Defendant:

John Jay James, Esquire
PO Box 507
Darlington, SC 29540
e-mail: pjlaw@bellsouth.net

Answers to Requests to Admit

Tony R. Megna

November 9, 2010.

Jay James

From: "Benjamin R. Matthews" <ben@pdhc.com>
To: "pjlaw507" <pjlaw507@bellsouth.net>
Sent: Friday, August 13, 2010 11:16 PM
Subject: PDHC v Thompson

Jay-

I have confirmed Renee was US Attorney form 1996-2001, the same time period the matters in involving Hubie's disbarment from Medicare was being investigated and apparently negotiated by the office of the US Attorney without the knowledge of PDHC. Obviously, there is a conflict of interest. Again, I suggest you review the documents from First Choice and that you join with me in obtaining the documents from the US Attorney's office so we can all be clear of exactly what occurred and when - and who was involved. As you said early on, we all need to know the facts. Please advise Renee of the matter. I imagine he will agree he cannot proceed to represent anyone under the circumstances.

Also, I am unsure of who the PR is in the estate. Is it one or both of the heirs? I would appreciate you identifying the PR. Please let me know. I suggest you prepare a consent order on regard to the sale of the property but that you agree that no estate funds will be expended [other than for preservation of estate property] pending further order of the court. We need to sort this out and I would prefer to do it with you and Tony directly as opposed to a drawn out and possibly unnecessary hearing in the probate court. If we cannot agree, then we can present the matters on which we disagree to the Court as we haven all had sufficient time to examine and understand the facts. In addition, we would appreciate a complete accounting be filed immediately with the Court as to all expenses paid by the estate so we can review it as required by the probate code. We do not agree that all the expenses you named can be paid by the estate without Court approval. Finally, I have only completed preliminary research but it appears the surety required of the PR on request of a creditor is not an estate expense especially in a situation where there is only one creditor estate is the beneficiaries.

I look forward to hearing from you as to when we can all meet. To keep your travel to a minimum, we are willing to meet in our office in Darlington. Please provide some dates. The week after next would be best.

Thanks, Ben

Please send all written correspondence to:

Benjamin R. Matthews, Esquire
3400 West Avenue
Columbia, SC 29203
ben@pdhc.com
Office telephone: 803.799.1700

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Josey, J. Rene

From: tmegna@gmail.com on behalf of Benjamin R. Matthews <ben@pdhc.com>
Sent: Tuesday, August 24, 2010 8:50 AM
To: pjlaw507; Josey, J. Rene
Subject: PDHC v Estate of Thompson

Jay-

FYI, I reviewed the Thomas case last evening. Although it was decided several years prior to Hanahan, we apparently agree that the Dead Man statute prohibits the owners of PDHC and Tony from, as the statute says, being 'examined' by those 'prosecuting or defending' in the action. Please let us know if you disagree with this assessment. As we go forward, it will simplify matters if we are on the same page.

We remain confused as to how Renee can represent the interests of the estate [which includes the creditors such as PDHC under the probate code] considering his prior involvement as US Attorney investigating Hubie for the same matters he is now apparently defending him on. Is he being directed and paid by the PR who is also the beneficiary? This seems odd in light of the probate code's express disapproval of conflicts of interest. See, for example, S.C. Code Ann. 62-3-713 -- and 62-7-933 which requires that a personal representative be "a fiduciary who shall observe the standards of care applicable to trustees as described by Section 62-7-933. I suggest you both at least consider waiting to make a final decision until we get the documents from the DOJ. As I told you, we made that request last week. We will let you know when we receive them. Just to be clear, our concerns with Renee and the PR is their being disinterested as to the estate. Renee seemed to indicate in his letter the conflict may be with the government. That is not our concern. Our concern is that representatives of the estate be disinterested as to the claims of interested parties other than themselves. How the beneficiaries proceed among themselves is obviously a different analysis. Also, as we previous noted, we remain unclear if there is one or two PRs. Please clarify if you will. Also, please provide all documents filed in the probate court to date. There is no problem with you sending the documents by email in a pdf format.

Prior to our filing motions concerning the foregoing, we have a duty to consult with you. Please advise if you can consent to the filing of a surety bond by the PR(s) on behalf of the creditors to protect all interested parties of the estate or if you would be willing to replace the PR(s) with a disinterested party, or take similar action contemplated by the probate court in order to keep the interests of the estate and its creditors separate from the interests of the beneficiaries. Of course, none of the foregoing resolve our conflict concern as to Renee.

Finally, please provide the item number of the specific interrogatories and the responses you find objectionable. It would be most helpful if you would be more specific as to what you are looking for as I remain unsure of your objections. In any event, I will certainly review any of our responses in light of more specific objections on your part - and will respond accordingly.

Tony received a letter from Renee about his involvement in the case, so I am also copying this email to him. Thank you both for your cooperation to date and I trust we are able to continue to keep matters moving smoothly even though it appears we may disagree on certain issues.

Ben

Please send all written correspondence to:

Benjamin R. Matthews, Esquire
3400 West Avenue
Columbia, SC 29203
ben@pdhc.com
Office telephone: 803.799.1700

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TURNER PADGET
TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

J. RENÉ JOSEY

REPLY TO: FLORENCE OFFICE
E-MAIL: RJOSEY@TURNERPADGET.COM
WRITER'S DIRECT DIAL: (843) 656-4451
WRITER'S DIRECT FAX: (843) 413-5818

August 20, 2010

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

Re: Estate of Hugh S. Thompson
Our File No.: 10667.101

Dear Ben:

Jay James of Darlington has shared with me your e-mail of August 13, 2010 at 11:16 p.m. Rather than further respond with an e-mail, I wanted to formally write and respond to your suggestion that I have a conflict of interest in representing the Estate of Dr. Thompson.

The mere fact that Dr. Thompson interacted with a Federal agency in an administrative capacity during my tenure as United States Attorney is not disqualifying.[1] Your e-mail suggests that Dr. Thompson's disbarment from Medicare was "negotiated by the Office of the United States Attorney . . . ." That is not consistent with the information we have and is certainly not remembered by me.

If you develop any information that suggests actual involvement by the U.S. Attorney's Office with Dr. Thompson during the period of time that I was U.S. Attorney, please let me know.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ/rmd

Cc: John J. James, II, Esquire

[1] Rule 1.11 of the Rules of Professional Conduct only prohibits my participation in matters in which I was "personally and substantially" a participant -- and even under those circumstances, the appropriate government agency can consent to my representation.

Josey, J. Rene

From: Tony R. Megna <tmegna@gmail.com>
Sent: Thursday, February 17, 2011 11:06 AM
To: Josey, J. Rene; pjlaw507
Subject: PDHC v Thompson
Attachments: Finalized Motion to Strike 02172011.pdf

Jay and Renee-

I am in the process of responding to Renee's recent letter and preparing to file several documents, returns to motions, etc. with the Court. I will send them to you in the next dew days.

One is a Motion to Strike that I have attached for your consideration as Rule 11 contemplates. I have not attached the documents that support the motion as they were exchanged during discovery and you have copies of them. When I file the other documents, I will however, provide them to you again for your convenience in a pdf file on a CD along with an index if you wish. If you are able to agree to the Motion to Strike, or need a particular document I have listed as an Exhibit, please let me know. I will send it you by email or hard-copy as you request.

Also, I have changed my March schedule so that I am available [other than the 8th to the 13th to attend an out of state CLE I attend every year] so we can go forward with a pretrial hearing in March if you so desire. It appears [as of today at least] the Court is not interested in scheduling anything this month as Renee requested. If you receive any information to the contrary, please let me know.

Thanks for your consideration.

Regards, Tony

Please send all written correspondence to:

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
tmegna@gmail.com
Office telephone: 803.799.1700

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**10-CP-16-0332**
Estate of Hugh S. Thompson,	
Defendant.	

PLAINTIFF'S MOTION TO STRIKE

1. The Plaintiff, Pee Dee Health Care, P.A. is a professional medical association doing business in Darlington, SC.

2. The Defendant is the Estate of Hugh S. Thompson, M.D. Dr. Thompson died on November 5, 2009. His estate is being probated in the Darlington County Probate Court, Case number 2009-ES-16-424.

3. This court has jurisdiction pursuant to S.C. Code Ann. § 62-3-803 et. seq., and in particular §62-3-804. Venue is proper in Darlington County.

FACTS

4. The basic dispute between the parties revolves about funds repaid to Medicare by Plaintiff on Decedent's behalf during a time period when, unknown to Plaintiff, Decedent was admittedly disbarred as a provider of medical services under the Medicare program, to wit:

   a. Decedent admitted in May, 2004 that, in 1996, he received a letter from Medicare stating he had been disbarred as a provider in the Medicare program. [Exhibit E].

   b. Decedent also received *a second letter* from Medicare in September, 1998 advising him that Medicare needed additional documentation that he had been readmitted to the Medicare program by the OIG. Decedent did not provide the additional documentation. See Exhibit O.

As noted on the affidavits provided by Plaintiff, the Decedent never informed anyone at PDHC that he had been disbarred [see Exhibits Y, Z, AA, BB, CC, DD, and EE], *and*, as noted above, he received written notices from Medicare concerning the matter *at least twice prior to his employment with Plaintiff*. [See Exhibits E and O].

5. Plaintiff maintains the Defendant is responsible for the damages it suffered as a result as detailed in Plaintiff's Complaint.

6. Decedent's original application for Medicare privileges [a Medicare form 855] dated June 16, 1998, was completed by Decedent ***prior to*** his employment with Plaintiff. [Exhibit A]. This document was obtained during discovery from the Defendant. Plaintiff did not have this application in its possession at the time it employed Decedent. The certification signed by Decedent on the original application for him to treat and bill for services provided to Medicare patient states as follows:

> I, the undersigned, 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]

7. Plaintiff did **NOT** complete this application with, for, or, on behalf of Decedent.

8. When Plaintiff employed Decedent, the Decedent completed a Medicare reassignment of benefits so that Plaintiff could bill for Decedent's medical services to its Medicare patients. [See Exhibit B] The certification signed by Decedent on the reassignment of benefits application states:

> By signing this reassignment of benefits statement, you [Decedent] are authorizing the entity identified in section 1 [Plaintiff] to receive Medicare payments on your behalf.
>
> [signed by Hugh S. Thompson, M.D. on June 19, 1998]

As noted above and below in more detail, the decedent had received a second letter from Medicare in September, 1998 informing him a second time of his disbarment status as a Medicare provider and requesting he provide Medicare with his reenlistment letter from the Medicare OIG. Decedent failed t inform Plainitff of either the March, 1996 letter [Exhibit E] or the September, 1998 letter [Exhibit O].

ADMITTED STATEMENTS OF DECEDENT FROM HIS WRITTEN STATEMENT DATED MAY 28, 2004 [EXHIBIT E]

9. The Decedent stated in Exhibit E:

   a. **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. [See Exhibit E]. The document addressed procedures for reinstating such status. [sic] I concede, as well, that I do not have this document, and that I had [sic] completely forgotten it in by the Spring of 1998, when I was in the process of resuming medical practice.**

10. On August 31, 1998, Medicare sent a letter to Decedent's then employer, Dr. Don Fowler, reassigning Decedent's Medicare billings to Dr. Fowler's office. [Exhibit W]. The letter

from Medicare was signed by Ms. Gina Kelly.

11. On September 14, 1998, Medicare sent Dr. Thompson a request that specifically requested on page 2 that he provide Medicare with a copy of his reinstatement from the Medicare OIG. This request was signed by Ms. Kelly. The letter was sent to Decedent at the work address of his then employer, Dr. Don Fowler, PO Box 873, Marion, SC 29571. [Exhibit O].

12. In later September or early October, 1998, the Decedent approached Plaintiff requesting he be employed. [See affidavit of Mark Matthews].

13. **At no time prior to or during his employment with Plaintiff did Decedent mention he had been disbarred by Medicare in March, 1996 [Exhibit E] nor that he had received a letter from Medicare dated September 14, 1998 [Exhibit O] requesting Decedent be provided with a copy of Decedent's reinstatement from the Medicare OIG.**

ADMITTED FACTS AS STATED IN ANSWER OF DEFENDANT FILED WITH THIS COURT ON JUNE 17, 2010

14. The Decedent's medical license was suspended by the SC Board of Medical Examiners on or about May 31, 1994 and that his license to practice medicine was reinstated on or about April 14, 1998. **[Page 2, Paragraph 11 of Defendants Answer filed June 17, 2010]**.

15. On or about March 31, 1996, the Decedent was disbarred from the Medicare program by the Office of Inspector General who oversees physician participation in the Medicare program. **[Page 2, Paragraph 10 of Defendants Answer filed June 17, 2010]**.

16. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." **[Page 3, Paragraph 12 of Defendants Answer filed June 17, 2010]**. **[Page 8, Paragraphs 61 and 62 of Defendants Answer filed June 17, 2010]**.

17. In 1998, the Decedent failed to seek reinstatement to the Medicare program by the

Medicare Office of Inspector General. **[Page 2, Paragraph 11, Answer filed June 17, 2010]**.

18. Following the Decedent's disbarment from Medicare, by the Medicare Office of Inspector General, "provisions of federal law provide that a suspension of Medicare privileges [i.e., the Decedent's disbarment from the Medicare program in 1996] continues until [the Decedent was] reinstated by the Office of Inspector General [of the Medicare program]." **[Page 3, Paragraph 12 of Defendants Answer filed June 17, 2010]**.

19. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." **[Page 3, Paragraph 12 of Defendants Answer filed June 17, 2010]**.

20. The relationship of Decedent with Plaintiff was such that Decedent had a pecuniary interest since he was paid by Plaintiff as a physician to provide medical services. **[Page 5, Paragraph 25 of Defendants Answer filed June 17, 2010]**.

21. The relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." **[Page 4, Paragraph 21 of Defendants Answer filed June 17, 2010]**.

22. The relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff. Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." **[Page 5, Paragraph 26 of Defendants Answer filed June 17, 2010]**.

23. Defendant admits a Medicare provider application and an 'assignment of benefits [application] were prepared [with Decedent's signature on the certifications affixed by Decedent – see Exhibits A and B attached hereto and incorporated herein by reference] so as to permit Decedent to treat Medicare patient and for Plaintiff to receive payments therefore." **[Page 2,**

Paragraph 9 of Defendants Answer filed June 17, 2010].

24. "Defendant admits that Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Plaintiff." [**Page 6, Paragraph 34 of Defendants Answer filed June 17, 2010**].

25. "Defendant admits so much of Paragraph 10 of the Complaint as alleges 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..." See Exhibit C attached hereto. [**Page 3, Paragraph 11 of Defendants Answer filed June 17, 2010**].

26. On or about June 17, 2007, the Plaintiff received a demand letter from Medicare that "would have had a content similar to that set forth in paragraph 12 of the Complaint." [**Page 3, Paragraph 14 of Defendants Answer filed June 17, 2010**]. Paragraph 12 of the Plaintiff's Complaint stated as follows:

> On or about June 7, 2007, Plaintiff 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 (sanctioned) 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 Plaintiff for services Decedent provided to Medicare beneficiaries because the Decedent had completed an 'assignment of benefits' to Plaintiff. However, Decedent omitted any reference in regard to this suspension from the Medicare program.
>
> c. That Plaintiff was liable for the funds paid regardless of the fact that Plaintiff had no knowledge of the matter and that Dr. Thompson had provided both Plaintiff 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%.

The letter of June 17, 2010 is attached hereto as Exhibit X.

27. On May 10, 2010, the personal representative of the Decedent's denied the Plaintiff's claim. **[Page 4, Paragraph 18 of Defendants Answer filed June 17, 2010]**.

28. Defendants have no knowledge of "any.... Representations made by Decedent to Plaintiff..." **[Page 2, Paragraph 10 of Defendants Answer filed June 17, 2010]**.

29. To the extent that Decedent was an employee of Plaintiff, Decedent admits that a duty of loyalty to Plaintiff was owed." **[Page 6, Paragraph 30 of Defendants Answer filed June 17, 2010]**.

30. "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." **[top of Page 3, Paragraph 11 of Defendants Answer filed June 17, 2010 and Exhibit E]**.

31. On or about April 13, 2010, Plaintiff filed a claim with Decedent's estate. On or about May 19, 2010, Plaintiff filed an amended claim with Decedent's estate which was denied by the personal representative of the Decedent's estate, i.e., the Defendants. **[Page 4, Paragraphs 17 and 18 of Defendants Answer filed June 17, 2010]**.

32. Defendants have no information in their possession which denies the allegations of paragraph 32 of the Plaintiff's Complaint. Paragraph 32 of the Plaintiff's Complaint states:

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

ADDITIONAL FACTS OBTAINED THROUGH DISCOVERY [AND AFFIDAVITS OF EMPLOYEES PROVIDED BY PLAINTIFF]

33. The Decedent's medical employment with PDHC continued until on or about December 10, 2001, when the Decedent left the employ of Plaintiff's medical practice of his own volition.

34. As part of the initial employment process and relationship, the Defendant provided information to Plaintiff representing that Defendant was fully and completely authorized under state and federal law to provide medical services to Plaintiff's patients who were Medicare beneficiaries. To this end, the Decedent completed a Medicare provider application (known as a HCFA 855] and an "assignment of benefits" application to allow Plaintiff to employ Defendant and to provide the Defendant permission to treat Plaintiff's Medicare beneficiaries. [These documents are attached as Exhibits A and B]. The Medicare applications were provided to Palmetto GBA (a private contractor who contracted with the Centers for Medicare and Medicaid Services [CMS]).

35. Decedent certified the information he was providing to Medicare and to Plaintiff was true and correct while Decedent actually knew this certification was false. [See Exhibits A and B attached hereto.]

36. Unbeknownst to the Plaintiff, the Decedent provided false and misleading information to Plaintiff and on the applications submitted to Palmetto GBA – even though the Defendant admitted in their Answer filed with this Court that Decedent had been associated with medical practices prior to this employment with Plaintiff. [**Page 3, paragraph 11 of Defendants' Answer filed with this Court on June 17, 2010**].

37. Specifically, Decedent failed to provide the information that he had been previously suspended from treating Medicare patients as he had been suspended by the Medicare Office of Inspector General from the Medicare program in 1996. Dr. Thompson's failure to provide the

required information concerning his suspension resulted in the continuation of his suspension as a Medicare provider of healthcare service. Dr. Thompson had been notified in writing by the Office of Inspector General on or about March 31, 1996: [See Exhibit F]

a. That he was suspended and excluded as a provider from the Medicare program as well as all other federal health care programs, and

b. That he could not be reinstated in the federal Medicaid program until he requested such in writing and was approved in writing.

38. After the SC Board of Medical examiners reinstated Dr. Thompson's medical license in 1998 [his medical license had been suspended on or about May 31, 1994] [See Exhibit G], Dr. Thompson failed to seek reinstatement to the Medicare program through the Office of Inspector General as he was required to do but instead filed a false application with Palmetto GBA [the Medicare contractor who administers Medicare in South Carolina on behalf of the federal government through the agency known as the Centers for Medicare and Medicaid Services [CMS]. Decedent thus certified the information he was providing to Medicare and to Plaintiff was true and correct while Decedent actually knew this certification was false.

39. Decedent failed to inform Plaintiff of this suspension from the Medicare program.

40. As a result of the false information provided by Decedent on the application to Palmetto GBA [the Medicare contractor], and to Plaintiff, Decedent:

a. was assigned a Medicare provider number (D993211724 - effective October 26, 1998, see Exhibit C by Palmetto GBA, and

b. was employed by Plaintiff to provide medical services to Plaintiff's patients, including Medicare patients.

41. Even though the Medicare provider numbers were issued, the Defendants admitted they

were in violation of 42 CFR 1001.1901(1) which provides that Dr. Thompson's suspension from the Medicare program continued until the suspension was lifted by the Medicare Office of Inspector General. Defendant also admitted in its Answer that the Decedent's Medicare disbarment continues until [the Decedent was] reinstated by the Office of Inspector General [of the Medicare program]." [**Page 3, Paragraph 12 of Defendants Answer filed June 17, 2010**]. Dr. Thompson failed to do this, failed to notify Plaintiff, and continued to provide false information to the Plaintiff during the remainder of his employment with Plaintiff.

42. On or about July 30, 2002, Dr. Thompson's filed a subsequent Medicare enrollment application for reenrollment in the Medicare program. [See Exhibit H] In this application, Dr. Thompson admitted he had been previously suspended as a Medicare health care. On or about this same date, Dr. Thompson was reinstated as a provider of Medicare healthcare services by the Medicare Office of Inspector General. [See Exhibit I]

43. On or about June 7, 2007, Plaintiff received a letter dated May 30, 2007 from Palmetto GBA [See Exhibit X] in regard to medical services provided by Decedent on behalf of Medicare beneficiaries for the dates of October 26, 1998 to December 10, 2001.

44. On or about July 11, 2007, Plaintiff received a letter from the Decedent's then-current employer, First Health Care, [See Exhibit U] indicating Decedent's attorneys [Wes Jackson of Nexsen Pruett] had filed a request for reconsideration request to Medicare. A copy of the letter from Mr. Jackson is attached hereto as Exhibit Q.

45. Plaintiff appealed the requests for recoupment of the funds noted above. The appeals were not successful. The Decedent was aware of the appeals being conducted by Plaintiff, and provided the Plaintiff limited documents to assist in the appeal. See Exhibit V.

46. The Plaintiff did not receive further documents or information from Decedent or his

employer even though such information was promised. See Exhibit P and U.

47. Regardless, Plaintiff appealed Medicare's adverse determinations concerning Dr. Thompson. See Exhibits R and T.

48. The administrative appeals ended in decisions of both the Medicare Administrative Law Court and the Medicare Appeals Council denied the appeals. [See Exhibits N and S].

49. Following the denial of all administrative appeals, and on or about May 1, 2008, Plaintiff paid to Medicare the sum of $226,740.19.

50. On or about April 13, 2010, Plaintiff filed a claim with Decedent's estate. A copy of that claim is attached hereto as Exhibit J.

51. On or about May 19, 2010, Plaintiff filed an amended claim with Decedent's estate. A copy of that claim is attached hereto as Exhibit K.

52. On May 10, 2010, the personal representative of the Decedent's denied the Plaintiff's claim.

The Law supporting Plaintiff's Motion

Pursuant to Rules 12(f) and 12(h)(3), the Plaintiff respectfully requests this Court to strike all defenses of the Defendants in its Answers [Exhibit L] that fail to state a legal defense to the claims of Plaintiff, including but not limited to those defense are legally and factually insufficient, redundant, and/or immaterial as a matter law, including but not limited to all of the Defendants defenses to the action bought by Plaintiff.

A

ESTOPPEL BY SILENCE

Negligence will take the place of the intent to deceive when there is a duty to disclose."
Southern Dev. Land and Golf Co, Id.
[See paragraphs 26 and 34 of their Answer filed with this Court on June 17, 2010]

Estoppel by silence arises when the estopped party owes a duty to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts, and that a "manifest intent" to mislead is not required for estoppel by silence. Estoppel by silence arises when the silence is intended ***or*** has the effect of misleading the other party. In addition, estoppel arises when the estopped party fails to act at the "first proper and opportune moment." *Metromont Materials Corp. v. Pennell,* 270 S.C. 9, 239 S.E.2d 753 (1977).

Our Supreme Court has held:

> ... Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. *Ridgill v. Clarendon County,* 192 S.C. 321, 6 S.E.2d 766 (1939). Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel. *Welch v. Edisto Realty Co.,* 170 S.C. 31, 169 S.E. 667 (1933). There is no requirement that the person whose silence misleads another have actual knowledge of the true facts if circumstances are such that knowledge is necessarily imputed to him. *Accord Alwes v. Hartford Life & Accident Ins. Co.,* 372 N.W.2d 376 (Minn.Ct.App.1985). Negligence will take the place of the intent to deceive when there is a duty to disclose. *Id; see also* 3 *Pomeroy's Equity Jurisprudence* § 809 at 218 (5th ed. 1941).
>
> *Southern Dev. Land and Golf Co. v. South Carolina Pub. Serv. Auth.,* 426 S.E.2d 748 (1993), *aff'g in part and rev'g in part* 305 S.C. 507, 409 S.E.2d 428 (Ct.App.1991).
>
> See also *Macaulay v. Howard*, 230 S.C. 140, 94 S.E. (2d) 393. In *Hubbard v. Beverly*, 197 S.C. 476, 15 S.E. (2d) 740, 135 A.L.R. 1206, we 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.

As noted above, the Defendants have admitted facts supporting the application of the doctrine of estoppel by silence and concealing material facts from Plaintiff [as well as the doctrine of unclean hands] including but not limited to the following:

a. The Decedent's license to practice medicine was revoked in 1994 (**paragraph 11 of Answer**),

b. The Decedent was disbarred by Medicare Office of Inspector General on March 31, 2006,

c. The Decedent's license to practice medicine was revoked in 1994 (**paragraph 10 of Answer**),

d. The Decedent's failed to seek reinstatement to provide services to Medicare patients (**paragraph 11 of Answer**), and

e. The Decedent's disbarment as a Medicare physician provider of medical services, under federal law, continued until he was reinstated by the federal Office of Inspector General which admittedly did not occur until 2002 (**see paragraph 12 of the Decedent's Answer**).

f. The Decedent had a duty to be truthful on both the Medicare applications and all documents he certified and signed,

g. The Decedent had a duty to be truthful in his dealings with the Plaintiff. **See paragraphs 26 and 34 of their Answer filed with this Court on June 17, 2010.**

h. The relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." [**Page 4, Paragraph 21 of Defendants Answer filed June 17, 2010**].

In addition to the foregoing, the attached affidavits and documents (that have been provided to all parties during discovery) confirm that the only credible and reasonable evidence before this Court is that Dr. Thompson, having a an admitted duty to speak the truth to the Plaintiff and to protect Plaintiff's interests, did not do so, staying silent (negligently or otherwise) concerning his status as a disbarred physician from the Medicare program during his employ with Plaintiff.

Even if this Court finds that the Decedent did not intentionally mislead the Plaintiff (which Plaintiff respectfully asserts is not a reasonable conclusion based on the evidence before this Court), our Supreme Court has held that "...negligence will take the place of the intent to deceive when there is a duty to disclose." *Southern Dev. Land and Golf Co,* supra. *As stated in their Answer filed June 17, 2010 filed in this Court, and as noted above, the Defendants have admitted that the Decedent had a duty to be truthful on both the Medicare applications he signed, had a duty to be truthful in his dealings with the Plaintiff.* **See paragraphs 26 and 34 of their Answer filed with this Court on June 17, 2010.**

Based on the admissions of the Answer of the Defendants as more fully stated hereinabove, it can reasonably be inferred that, at best, the Defendant negligently failed to provide the truth of his status as disbarred physician from Medicare. As the Defendants have admitted in their Answer that the Decedent had a duty to disclose the truth of his disbarment from Medicare, (see paragraphs 26 and 34), the Defendant's admitted negligence is sufficient to take the place of the intent to deceive.

B

DOCTRINE OF UNCLEAN HANDS

In addition to the foregoing, none of the defenses asserted in the Defendants Answer are available to the Defendants due to the doctrine of 'unclean hands.' The doctrine of "unclean hands" precludes a party from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the other. *Arnold v. City of Spartanburg,* 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943); *First Union Nat'l Bank of S.C. v. Soden,* 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998); *Robinson v. Estate of Harris,* ____ S.C. ____, (Opinion no. 26914 Filed January 24, 2011]. ["See also the discussion in 4 A. L. R., 58, and the cases

cited in subsection (c) on that page, for authority for the proposition that the party to a suit complaining of a wrong must have been injured thereby in order to justify the application of the principle of "unclean hands" to the case of his opponent. See also the further discussion in 4 A. L. R. 106, sub section (b)."]

As evidenced by his signatures on the documents and certification signed by Decedent, the sad and un-debatable truth is that the Decedent knowingly misrepresented to Medicare, the Plaintiff, and others the truth surrounding his disbarment from the Medicare program. He did so repeatedly; and he did so after:

a. Not responding to the requirements for readmission set forth in the original debarment letter of March, 1996,

b. Not responding to a second letter form Medicare in September, 1998 [Exhibit O], and

c. Not informing the Plaintiff of either the original debarment notification of March, 1996 nor the letter of September, 1998. [Exhibit F].

d. Not providing the Plaintiff a copy of the 'ALJ Joe" order dated January 22, 2008] [Exhibit M] after obtaining independent counsel [Exhibit Q] and, and promising to provide Plaintiff all such information. [Exhibit P].

Knowledge is seldom susceptible of proof by direct evidence and may be proved by circumstances from which such knowledge may be inferred. See *State v. Atkins*, 205 S.C. 450, 32 S.E. (2d) 372; *State v. White*, 211 S.C. 276, 44 S.E. (2d) 741 (1947). Neither the Plaintiff nor its representatives knew nor had reason to know of the Decedent's disbarment from the Medicare program. [See exhibits attached hereto.] In fact, as demonstrated by Exhibit O, Decedent had actual notice of his disbarment form Medicare <u>again</u> in September, 1998. Moreover, as noted on

the attached affidavits [Exhibits Y, Z, AA, BB,CC, DD, EE] the Plaintiff specifically relied upon the Decedent's representations to both Plaintiff and Medicare that he was being truthful – which he was not. The Defendants have admitted in their Answer, they have no knowledge or information that would rebut the allegations of the Plaintiff and the supporting affidavits attached hereto. **[Page 2, ¶ 10, second sentence, of Answer of Defendants filed June 17, 2010]**.

In reliance on the false statements and misrepresentations of the Decedent, the Plaintiff submitted claims to Medicare on behalf of Decedent that Decedent *actually knew were false.* ["[A]though the parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process.... When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472, 477 (1997). *See Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) ("He who seeks equity must do equity.") (quoting *Norton v. Matthews*, 249 S.C. 71, 152 S.E.2d 680 (1967)).

The Plaintiff respectfully submits it is difficult to fathom a scenario as to how the Defendant could reasonably request this Court to deny the relief requested by Plaintiff considering:

a. the facts admitted by the Decedent himself, and

b. the facts admitted in the Defendants Answer, and

c. the remaining documents and affidavits before this Court.

It is equally difficult to imagine how the Plaintiff could have acted more reasonably and equitably than it did in contesting the claim of Medicare when it was first advised of the matter in 2007 -- particularly in light of the Decedent's proven failure to advise of the 'ALC Joe order.'

In this regard, the Decedent and his representatives and agents obtained an order, known as the [the 'ALJ Joe' order dated January 22, 2008] [Exhibit M] on behalf of Dr. Thompson and his then-current employer, First Choice Health Care of Florence, that was favorable to his position, and would have been favorable to Plaintiff. However, the Decedent, his agents and representatives failed to provide the 'ALJ Joe determination' [Exhibit M] even though they had promised to keep Plaintiff apprised of such matters. [Exhibit P]. As a result, PDHC 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. This is particularly relevant as the ALJ determination made on behalf of PDHC and Dr. Thompson was dated March 14, 2008 [Exhibit N] while the 'ALJ Joe order,' as noted above was filed January 22, 2008.

These matters are further complicated by the fact that the Defendant probate estate is represented by the sole beneficiaries of the estate. The estate representatives, however, are bound to act in the best interests of the beneficiaries of the estate, of which Plaintiff is one. The inherent conflicts of interest for the Defendant and the probate estate, and their counsel, in the case at bar are particularly remarkable in light of:

1. The fact that the Defendant and the Personal Representatives of the probate estate are being represented by the same counsel as the representatives of the estate,

2. The admissions made by the Defendant in its original answer, the admissions of the Decedent, the documents available to all parties, and

3. The Motion to Amend the original answer in which the Defendant seeks to modify it answer to deny facts it has previously admitted and certified as true under the attestation

provisions of Rule 11, S.C.R.Civ.P.[1] This issue is addressed further in the Plaintiff's Return to the Defendant's Motion to Amend.

Either negligently or intentionally, the Decedent, as well as his agent and representatives, failed to provide the "Joe ALC order" to Plaintiff. In addition to issues of negligence, breach of fiduciary duties for duties voluntarily undertaken, and others, the Plaintiff respectfully submits, at the least, that in light of the admissions made by the Defendants in their Answer as well as the attached documentation and affidavits, the doctrines of 'unclean hands," the doctrine of 'estoppel by silence,' and negligence, at the minimum, prevent the Defendants from asserting any defense to the claims of Plaintiff.

CONCLUSION

Based on the Decedent's own admissions, the Decedent's own certifications, the admissions as stated in Defendant's answer filed with this Court on June 17, 2010, and the additional reasons stated herein, Plaintiff requests pursuant to Rules 12(f) and 12(h)(3), S.C.R.Civ.P. that all defenses asserted by the Defendants in its Answer to the Plaintiff's Complaint be stricken as legally and factually insufficient, redundant, and/or immaterial as a matter of law due to Decedent's 'unclean hands.' In the alternative, and additionally, the Defendant is estopped from asserting any defense to the Plaintiff's claims due to the Decedent's intentional or negligent silence in the face of his admitted duty to speak the truth to Plaintiff in the first instance based on the March,

[1] *Aiding and Abetting a Client's Breach of Fiduciary Duty*, Katrina Lewinbuk, College of Law, Arizona State Law Journal, Vol. 40, No 1, 2008.

1996 debarment letter [Exhibit F], and in the second instance, based on the September, 1998 letter. [Exhibit O].

Respectfully submitted,

_____

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

February ____, 2011.

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**CERTIFICATE OF SERVICE**
Estate of Hugh S. Thompson,	
Defendant.	**10-CP-16-0332**

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

John Jay James, Esquire
PO Box 507
Darlington, SC 29540
[hand-delivery]

Renee Josey
1851 W. Evans Street, 4th Floor
Florence, SC 29501

1. Plaintiff's Memorandum in support of its Motion for Summary Judgment
2. Plaintiff's Return to Defendant's Motion to Compel
3. Plaintiff's Return to Defendant's Motion to Amend its Answer
4. Plaintiff's Return to Defendant's Motion to Disqualify Counsel
5. Plaintiff's Motion to Strike together with its supporting Memorandum
6. Plaintiff's documents and affidavits in support of its Returns, Motions and request for a pretrial conference.

_____
Mark Matthews

February _____, 2010.

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

Pee Dee Health Care, P.A.,	
Plaintiff,	
v.	**10-CP-16-0332**
Estate of Hugh S. Thompson,	
Defendant.	

MOTION TO RECONSIDER

The Plaintiff, by and through undersigned counsel, hereby moves this Court pursuant to Rule 59(e), SCRCP, to amend its' order dated September 1, 2011, received by Plaintiff on September 6, 2011. The grounds for Plaintiff's motion include but are not limited to the following:

a. The order of this court is *void ab initio*. As noted by Exhibit A, attached hereto and incorporated herein by reference, the Plaintiff served its' Notice of Appeal on August 15, 2011, and subsequently filed it with the SC Court of Appeals on August 24, 2011 within the ten day requirements of the appellate rules. Pursuant to Rule 205, SCACR, exclusive jurisdiction of the case was vested in the Supreme Court, and the automatic stay of Rule 241, SCACR, was effective. This Court subsequently indicated its' intent to file an order. The Plaintiff disputed the Court's jurisdiction to do so. When there is a dispute concerning the application of the automatic stay of Rule 225, SCACR, exclusive jurisdiction resides the appellate courts of our state to determine the applicability of the stay. In *State v. Cooper*, 536 SE 2d 870 (2000), our Supreme Court stated:

> In *Kearney v. Allen,* 287 S.C. 324, 338 S.E.2d 335 (1985), we held that when there is a dispute as to whether an automatic stay exists under our rule, "authority to resolve such a dispute is vested in the Supreme Court." When *Kearney* was decided, our appellate procedural rules provided that appeals were filed and finalized in the Supreme Court, then transferred to the Court of Appeals. Since disagreements over the meaning of the rules almost always arose while jurisdiction over the appeal was vested in the Supreme Court, it was sensible that the Supreme Court resolve the disputes. Under our current procedure, the vast majority of appeals are filed, processed, and decided by the Court of Appeals. We, therefore, modify *Kearney* and hold the Court of Appeals has the power and the authority to rule upon issues arising under SCACR, including those arising under Rule 225. [*Kearney* involves Rule 41 of the former Supreme Court Rules. Rule 225, SCACR, replaced this rule. *See* Appendix A, Table of Comparative Rules, SCACR].

Based on the forgoing, this Court did not have jurisdiction to enter its' order dated September 1, 2011, and does not have jurisdiction to determine the applicability of the automatic stay of rule 241, SCACR.

2. *Hoard v. Roper Hosp., Inc.*, 387 S.C. 539, 545-46, 694 S.E.2d 1, 4 (2010) ("Summary judgment is a drastic remedy and should be cautiously invoked so that a litigant will not be improperly deprived of trial on disputed factual issues."). The Defendant admitted the following in its answer filed with this Court:

   a. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." **[Page 3, Paragraph 12 of Defendants Answer filed June 17, 2010]**.

   b. The relationship of Decedent with Plaintiff was such that Decedent had a pecuniary interest since he was paid by Plaintiff as a physician to provide medical services. **[Page 5, Paragraph 25 of Defendants Answer filed June 17, 2010]**.

   c. The relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." **[Page 4, Paragraph 21 of Defendants Answer filed June 17, 2010]**.

d. The relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff. Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." **[Page 5, Paragraph 26 of Defendants Answer filed June 17, 2010]**.

e. Defendant admits a Medicare provider application and an 'reassignment of benefits [application] were prepared so as to permit Decedent to treat Medicare patients and for Plaintiff to receive payments therefore." **[Page 2, Paragraph 9 of Defendants Answer filed June 17, 2010]**.

f. "Defendant admits that Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Plaintiff." **[Page 6, Paragraph 34 of Defendants Answer filed June 17, 2010]**.

3. The order of Medicare Administrative Law Court [the 'Mabry' order] does not have preclusive effect under South Carolina law because:

a. the decedent was not a party to the administrative proceedings between Medicare and the decedent.

b. the Plaintiff 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 Plaintiff was liable to Medicare under federal regulatory law regardless of the decedent's liability to Plaintiff under state law,

d. the 'Mabry' order was directly contrary to a Medicare administrative law court decision obtained several weeks earlier by the decedent [the 'Joe' order] which the decent did not inform Plaintiff although he had agreed to do so.

e. In *Crosby v. Prysmian Communications Cables And Systems USA, LLC*, ____ S.C. ____ (Opinion No. 4876 Decided August 24, 2011), our Court of Appeals stated:

i. In order to determine whether an agency's factual finding is preclusive, we must first determine whether the particular finding meets the traditional elements of collateral estoppel. We must then examine whether there is some countervailing consideration which necessitates relitigation. 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.".

ii. 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).

iii. "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).

4. The doctrine of unclean hands precludes a party from recovering in equity if the party acted unfairly in the matter that is the subject of the litigation to the prejudice of the opposing party). See generally *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998). For instance, in 1998, Dr. Thompson submitted an application to Medicare [Exhibit A previously filed with this Court] of which Plaintiff was not involved. Dr. Thompson certified unequivocally that he was familiar with Medicare laws and regulations and that he was in compliance with such laws and regulations as noted below.

I, the undersigned, certify to the following:

a.) I have read the contents of the application and the information contained herein is true, correct, and complete. If I become aware that any information in this application is not true, correct, or complete, I agree to notify the Medicare Contractor of this fact immediately.

b.) I authorize the Medicare Contractor to verify the information contained herein. I agree to notify the Medicare Contractor of any changes in this form within 30 days of the effective date of the change. I understand that a change in the incorporation of my organization or my status as an individual or group biller may require a new application.

c.) 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 through the Medicare Contractor.)

d.) Neither the individual practitioner, nor the company, nor any 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 other Federal agency or program, or otherwise is prohibited from providing services to Medicare beneficiaries.

e.) I agree that any existing or future overpayment to me by the Medicare program may be recouped by Medicare through withholding future payments.

f.) I understand that only the Medicare billing number for the provider/supplier who performed the service or to whom benefits have been reassigned under current Medicare regulations may be used when billing Medicare for services.

g.) I understand that any omission, misrepresentation or falsification of any information contained in this application or contained in any communication supplying information to Medicare to complete or clarify this application may be punishable by criminal, civil, or other administrative actions (including revocation of Medicare billing number(s), fines, penalties, damages and/or imprisonment under Federal law).

h.) I further certify that I am the individual practitioner who is applying for the billing number, or in the case of a business organization, I am an officer, chief executive officer, or general partner of the business organization that is applying for the Medicare billing number.

Group Member/Partner Name (Type)	First	Middle	Last	Jr., Sr., MD., etc.
	[illegible]	S	[illegible]	MD
Group Member/Partner Signature	First, Middle, Last, Jr., Sr., M.D., D.O., etc.)		Date (MM/DD/YYYY)	
[signature]				06/19/1998

If for groups/partnerships filing individual practitioners or reporting a change of member/partner status:

5. Additional discovery is necessary for reasons including but not limited to the following:

a. the Defendant's refusal to participate in the taking of depositions has denied Plaintiff the right, *in toto*, to take the depositions of the Personal Representatives of the Defendant who are the children of the deceased and by definition are those in a position to describe their knowledge of the deceased and the facts surrounding the matters complained of by Plaintiff,

b. the Defendant has moved before this Court to amend its answer. The Plaintiff has no reasonable method, other than the taking of depositions and completing needed discovery, of ascertaining why the Defendant would move to amend its answer to deny matters previously admitted unless allowed to take depositions.

c. the Defendant has moved before this Court for summary judgment. The Plaintiff has no reasonable method, other than the taking of depositions and completing needed discovery, of ascertaining the knowledge of the personal representatives and/or others to defend against the motion.

d. the Plaintiff is unable to evaluate the demeanor of the personal representatives, and their knowledge of the facts surrounding the matters complained of by Plaintiff in order to understand to what the personal representatives and/or others can testify,

e. the Plaintiff is unable to evaluate the demeanor of the personal representatives, and their lack of knowledge of the facts surrounding the matters complained of by Plaintiff in order to understand to what the personal representatives and/or others cannot testify,

f. the Court's continuing evaluation of the Plaintiff's pending Rule 59(e) motion,

g. the decisions of our appellate courts that "...[a] defendant cannot take advantage of the uncertainty created by his own wrongdoing..." The Plaintiff must ascertain the factual basis of any additional defenses the Defendant intends to pursue.

4. As noted by Exhibit B, attached hereto and incorporated herein by reference, there is a motion to disqualify counsel for Respondent pending before the SC court of Appeals. The Plaintiff suggests that concepts of administrative efficiency suggest that the Court delay ruling on the matter at bar until the Court of Appeals makes it determination. Alternatively, the Plaintiff requests this Court to disqualify counsel for Respondent for the reasons stated more fully in Exhibit B.

5. In further support of it's' motion to reconsider, the Plaintiff incorporates herein by reference all affidavits, documents and other communications previously filed in this Court.

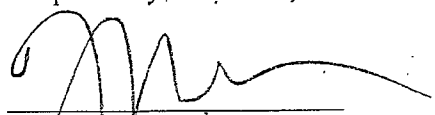
CONCLUSION

This Court lacked jurisdiction to enter its' order dated September 1, 2011. The order is *void ab initio* and should be vacated by the Court for the efficient administration of justice and to avoid an unnecessary appeal between the parties. In addition, there is an existing motion pending before the Court of Appeals to disqualify counsel for Respondent. For the efficient administration of justice, this Court should refrain from issuing further orders until the motion is resolved on appeal.

As a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975); *see also Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E. (2d) 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, *Federal Practice and Procedure* § 2741, p. 543 (1983); 6 *Moore's Federal Practice* ¶ 56.02[6], p. 56-39 (2d) ed. 1990); *see, e.g., First Chicago Int'l v. United Exchange Co.*, 836 F. (2d) 1375 (D.C. Cir.1988); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F. (2d) 230 (2d Cir.1985); *Tyler v. City of Enterprise*, 521 So. (2d) 951 (Ala. 1988). See *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)("[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete

discovery.").

Respectfully submitted,



Tony R. Megna[1]
Attorney-at-Law
3400 West Avenue
Columbia, SC 29203
803.799.1700

September 13, 2011.

[1] The previous order of this Court disqualifying counsel is stayed pursuant to the appeal filed by the Appellant. In addition, this Court graciously allowed the continued representation of Appellant in regard to the matters of summary judgment, to which this motion directly pertains.

PEE DEE HEALTH CARE, P.A.

3400 WEST AVENUE
COLUMBIA, SOUTH CAROLINA 29203
803.254.3676

July 20, 2011

Renee Josey
Turner Padget Graham and Laney, P.A.
PO Box 5478
Florence, SC 29502
Sent via email to "Josey, J. Rene" <RJosey@turnerpadget.com>

Re: Representation of Pee Dee Health Care, P.A. by Turner Padgett Graham and Laney, P.A. in conflicting matters

Dear Renee:

I have verified that your law firm represents the interests of Pee Dee Health Care, P.A. in the following matter:

Tanya S. Langston
Employer: Pee Dee Health Care, P.A.
Claim No: 5000892
WCC File: 0320562
Your file no: 00576.00798

The statements and representations to the contrary made by you and Jay yesterday to Judge Baxley during oral arguments were inaccurate. To reiterate, Pee Dee Health Care, P.A has not waived and does not waive the conflict of interest. I request you and Jay resolve the matter immediately so that the legal and financial interests of Pee Dee Health Care, P.A. in both matters are absolutely protected.

With kind regards, I remain

Sincerely yours,

s/Tony R. Megna

Cc: Jay James via email to "pjlaw507" <pjlaw507@bellsouth.net>

Josey, J. Rene

From: Tony R. Megna <tmegna@gmail.com>
Sent: Wednesday, August 10, 2011 4:19 PM
To: abracy@wcc.sc.gov
Cc: Hylton, Brandon; Josey, J. Rene
Subject: WC File: 0320562
Attachments: Baxley letter 8-8-2011.pdf

Dear Commissioner Beck:

I am in receipt of a copy of a recent letter that Turner Padgett's sent to you in regard to the above matter. Regardless of Turner Padgett's stated concerns to the Commission, it is undisputed that Mr. Hylton unlawfully signed a consent order on behalf of Pee Dee Health Care in direct contravention of Pee Dee Health Care's directives to the contrary. Respectfully, it is well within PDHC's rights to request the Commission hold a contested hearing on the matter.

I have attached hereto documents that have been forwarded to the the Darlington County Court of Common Pleas that are self-explanatory and will assist the Commission in understanding Pee Dee Health Care's concerns. I would appreciate you making these documents part of your record.

If Turner Padgett requests substitute counsel in the case by motion, then PDHC respectfully requests the Commission take no action on the matter until and unless a contested hearing is scheduled and heard before the Commission with notice to me. PDHC's wishes to have the the Commission consider the matter in its entirety on the record. In addtion, I again respectfully request the Commission stay all matters, including but not limited to the hearing scheduled for September 1, 2011, until this issue is resolved, as, obviously, as of this time, Turner Padgett has abandoned the legal interests of Pee Dee Health Care in contravention of its legal and ethical responsibilities and duties.

I would also appreciate my name being added to any mailing lists maintained by the Commission on this file.

Thank you, Tony Megna

Please send all written correspondence to:

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
tmegna@gmail.com
Office telephone: 803.799.1700

This message is intended for the use of the person or entity to which it is addressed and may contain information, including legal and/or health information, that is privileged, confidential, and the disclosure of which is governed by applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this information is STRICTLY PROHIBITED. If you have received this in error, please notify us immediately and destroy the related message. Thank you.

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Fax Cover Sheet

Date 9/6/11

Number of pages 11 (including cover page)

To:

Name Rene Josey

Company Turner Padget

Telephone 843-656-4451

Fax 843 413 5818

From:

Name Nathan Crystal

Company Crystal & Giannoni-Crystal LLC

Telephone 803-331-2826

Comments Please call 803-331-2826 to acknowledge receipt.

7 90363 00711 1
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22705

THE STATE OF SOUTH CAROLINA,
IN THE COURT OF APPEALS

APPEAL FROM DARLINGTON COUNTY
COURT OF COMMON PLEAS
J. MICHAEL BAXLEY, CIRCUIT COURT JUDGE

CASE NO. 2010-CP-16-0332

Pee Dee Health Care, P.A. .... Appellant

versus

Estate of Hugh S. Thompson.... Respondent

Affidavit of Nathan M. Crystal in Support of Respondent's Response to Appellant's Motion to Disqualify Respondent's Counsel

---

The undersigned, Nathan M. Crystal, provides the following affidavit under oath:

ROLE AND EXPERT QUALIFICATIONS

1. I am providing this affidavit in support of Respondent's Response to Appellant's Motion to disqualify Respondent's counsel, Turner Padget Graham & Laney, P.A. (TPGL).

2. My qualifications to give expert testimony include the following: I am a Distinguished Visiting Professor of Law at the Charleston Law School and Class of 1969 Professor of Professional Responsibility and Contract Law Emeritus at the University of South Carolina School of Law. I have taught professional responsibility and related subjects for more than 35 years. I am the author or coauthor of three books on Professional Responsibility and Legal Ethics, along with numerous articles in this field. My scholarly work includes examination of issues of judicial conduct and disqualification. One of my books is THE ANNOTATED SOUTH CAROLINA RULES OF PROFESSIONAL CONDUCT (2010 ed.) (with Dean Robert Wilcox), a comprehensive treatment of professional ethics in this state. I write a bimonthly column on legal ethics for the *South Carolina Lawyer* entitled "Ethics Watch." I was a member of the South Carolina Bar's Ethics Advisory Committee for more than 15 years and have authored a number of opinions that were adopted by the Committee on issues of legal ethics. I was appointed by the President of the South Carolina Bar as chair of the committee from 2002-2003. I also represented the South Carolina Bar in its petition to the Supreme Court in 1990 to adopt the South Carolina Rules of Professional Conduct. I have delivered more than 100 speeches, presentations, and continuing legal education programs to law firms, bar organizations, and other groups, both in South Carolina and nationally. I have appeared as an expert witness by way of testimony, deposition, or affidavit in more than 40 cases involving questions of professional responsibility and legal ethics. Attached is the most recent copy of my resume.

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DOCUMENTS REVIEWED

3. In preparing this affidavit I have reviewed:

(a) Appellant's Motion for various relief including disqualification of counsel;

(b) Respondent's response to Appellant's motion;

(c) Emails and other documents related to the alleged conflict of interest in this case.

(d) Various filings in the trial court in this case.

4. In forming my opinion I have taken into account relevant authorities, including the South Carolina Rules of Professional Conduct, case law, and legal literature. This factual and legal material is of a type reasonably relied on by experts on legal ethics, professional responsibility, and legal malpractice in forming their opinions.

FACTUAL BASIS OF OPINION

5. TPGL began representing the defendant, the Estate of Hugh S. Thompson, in late July, 2010, in a case brought by Pee Dee Health Care ("Pee Dee"). Rene Josey is the partner principally responsible for this case.

6. Before undertaking representation of the Thompson estate in July 2010, Mr. Josey conducted a review of firm matters to determine if a conflict of interest existed. The review began on July 14, 2010. A computer search identified a worker's compensation matter opened in 2005 -- Tanya S. Langston v. Pee Dee Health Care, P.A. and Companion Property & Casualty -- in which TPGL had been engaged by Companion to represent Companion and Pee Dec in the matter..

7. Mr. Josey made further inquiry into the possible conflict and was informed that the case was over even though the firm's file had not been formally closed. Having concluded

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that no conflict existed, Mr. Josey proceeded to accept the engagement to represent the Thompson estate.

8. Unfortunately, the information Mr. Josey received was only partially correct. The Langston case had been settled and a settlement agreement had been filed with the Workers Compensation Commission on February 29, 2008. This agreement called for payment of plaintiff's future medical expenses incurred as a result of the accident. However, since late 2009 there had also been some discussions about the possibility of future medical expenses being handled through a Medicare Set-Aside Agreement. Counsel in TPGL who were responsible for the *Langston* matter were involved to a limited extent in discussions about an MSA. Josey was never involved in *Langston* and was unaware of the ongoing discussions. In addition, after the firm agreed to represent the Thompson estate, a dispute developed about whether Companion was liable for a small amount (approximately $3500) for past prescriptions and mileage. TPGL did not become aware of this dispute until May, 2011, long after the firm accepted representation of the Thompson Estate.

9. On May 24, 2011, Langston's attorney filed a claim for past prescriptions and mileage with the South Carolina Worker's Compensation Commission. On June 23, 2011, TPGL responded to this claim though J. Brandon Hylton, the lawyer in the firm who at that time had responsibility for the matter. The claim was set for a hearing on September 1. Hylton's paralegal notified Pee Dee that a hearing in the matter had been scheduled .

10. In the meantime, Josey had filed a motion for summary judgment on behalf of the Thompson Estate. The motion was set for a hearing before Judge Baxley. Minutes before the late-afternoon hearing, Mr. Megna, purporting to represent the plaintiff although he had been

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disqualified from doing so,[1] informed Mr. James of the conflict arising from the firm's representation of Pee Dee before the Workers' Compensation Commission in the *Langston* case. Josey tried but was unable to confirm representation in the *Langston* case until the following day.

11. The firm investigated the conflict and discussed the matter with Companion, which was the real party in interest in the *Langston* case since it would be liable for any award in the matter. With the consent of Companion and the substitution of counsel, TPGL withdrew from representing Companion and Pee Dee in the *Langston* case before the Workers Compensation Commission.

SUMMARY OF OPINION

12. In my opinion TPGL is not disqualified from representing the Thompson Estate in this matter for two reasons: First, TPGL properly withdrew from representing Companion and Pee Dee in the *Langston* case. A lawyer may ethically withdraw from representing a client if the lawyer can do so "without material adverse effect on the interests of the client." The *Langston* case was a relatively simple matter involving only the question of recovery of prescription costs and mileage. The matter could easily be taken over by substitute counsel without delay of the proceeding or increased expense, and in fact that is exactly what happened. In addition, the real party in interest in the matter was the insurance company, Companion, not Pee Dee because Companion was liable for medical expenses under the settlement agreement and its insurance policy. Companion consented to the substitute of counsel for TPGL. The lack of involvement of Pee Dee in the matter is shown by the fact that it did not even know about the filing of the matter until it received notice of the hearing from TPGL. Second, disqualification

[1] Mr. Megna's disqualification is discussed in more detail in Respondent's Response to Appellant's Motion.

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motions rest with the equitable discretion of the court. In this case all of the equitable factors point against disqualification. It is apparent that Pee Dee does not have a legitimate interest in continuing to employ TPGL. It seeks the firm's disqualification as a tactical matter to delay the entry of judgment against it in the *Thompson* case. Courts rightfully frown on the use of disqualification motions for tactical reasons. On the other hand, the Thompson estate has a substantial interest in being able to employ counsel of its choice and in not losing its counsel when it is on the verge of obtaining a final judgment against Pee Dee's claims.

OPINION

A. TPGL's Withdrawal from Representation of Companion and Pee Dee in the *Langston* Case Was Ethically Proper Because Withdrawal Could be Accomplished Without Material Adverse Effect on the Clients under SCRPC 1.16(b)(1).

13. South Carolina Rule of Professional Conduct 1.16(b) dealing with withdrawal provides as follows:

> Except as stated in paragraph (c),[2] a lawyer may withdraw from representing a client if:
>
> > (1) withdrawal can be accomplished without material adverse effect on the interests of the client;

14. Whether withdrawal would have a material adverse effect on the client is a question of fact. Restatement (Third) of the Law Governing Lawyers §32, comment h(ii) states:

> Whether material adverse effect results is a question of fact. The client might have to expend time and expense searching for another lawyer. The successor lawyer might have to be paid what in effect are duplicated fees for becoming familiar with the matter. A lawyer wishing to withdraw can ameliorate those effects by assisting the client to obtain successor counsel and forgoing or refunding fees. But other material adverse effects might be beyond the withdrawing lawyer's power to mitigate. Delay necessitated by the change of counsel might materially prejudice the client's matter. An equally qualified lawyer might be unavailable or available only at material inconvenience to the client. In some circumstances, the nature of confidential information relevant to the representation might make the client reasonably reluctant to retain another lawyer.

---

2 Rule 1.16(c) deals with court permission for withdrawal if a case is pending before a tribunal.

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15. The comment identifies a number of factors that might show a material adverse effect:

- Time and expense in searching for another lawyer. That factor is not present here. Substitute counsel in the *Langston* matter was arranged without Pee Dee having to incur any time or expense.
- Delay necessitated by change of counsel. This factor is not present. There has been no delay in the *Langston* case.
- Absence of an equally qualified lawyer. TPGL is an outstanding firm, but the *Langston* case was not complex either factually or legally. Substitute counsel could easily take over the matter (and has in fact done so).
- Nature of confidential information might make the client reluctant to retain another lawyer. Appellant has claimed that TGPL has confidential information from the *Langston* case that would be material to the *Thompson* case. This claim is implausible because no information obtained in this worker's compensation case is relevant to a case involving liability for Medicare reimbursement. In any event it is irrelevant to the question of whether the firm's withdrawal from the *Langston* case would have a material adverse effect on the client. If the firm had material confidential information from the *Langston* case (which it did not) it would have a duty to protect that information regardless of whether it withdrew from the case or not.

16. In addition, another factor present in this case supports the conclusion that TPGL's withdrawal from *Langston* did not have a material adverse effect on Pee Dee. The issue in *Langston* is the responsibility of Companion for prescription costs and mileage. Pee Dee

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does not face any liability. Thus, Companion not Pee Dee is the real party in interest. Companion readily consented to TPGL withdrawing from representation in *Langston* and to the substitution of new counsel. If withdrawal would have had a material adverse effect, it would have been on Companion. The lack of involvement of Pee Dee in the matter is shown by the fact that it did not even know about the filing of the matter until it received notice of the hearing from TPGL.

17. Since TPGL properly withdrew from representing Pee Dee and Companion in the *Langston* case, it does not have a concurrent client conflict under SCRPC 1.7.

B. Disqualification Motions Rest with the Equitable Discretion of the Court. All of the Equitable Factors Involved in the Case Support Denial of the Motion.

18. It is well established that courts have equitable discretion to decide whether to grant or deny disqualification motions. See *Calpitano v. Fountain Pointe, LLC*, 2011 WL 1759804 (Conn.Super. 2011); *In re Southern Textile Knitters, Inc.*, 1999 WL 33485636, Bkrtcy (D.S.C. 1999).

19. In this case all of the equitable factors support denial of the motion. First, Pee Dee's interest in maintaining an attorney-client relationship with TPGL is nonexistent. Pee Dee does not have an ongoing relationship with the firm and has offered no evidence or even plausible inferences that TPGL has any confidential information that would be material to the *Thompson* case. On the other hand, the Thompson estate has a substantial interest in continuing to employ TPGL. The firm has devoted substantial time to the litigation and is on the verge of obtaining a final judgment in the client's favor. To disqualify TPGL now at this very late stage in the proceeding would case delay, unnecessary expense, and would be unjust. Further, the Draconian relief sought by Appellant (including striking the pleadings and disqualification of

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counsel) would be even more inequitable because it would "protect" a nonexistent interest of the Appellant at the cost of substantial harm to the Respondent and the system of justice.

20. Finally, in my opinion Mr. Josey and TPGL followed ethically proper procedures in determining whether a conflict of interest existed in this case. In accordance with standard firm procedures, Mr. Josey sent a conflicts memorandum to attorneys in the firm and asked for a computer search for conflicts of interest of the relevant entities and individuals. Based on the results of this inquiry, Mr. Josey made further inquiries into specific matters, including the *Langston* case, to determine if a conflict existed. Unfortunately, it appears that Mr. Josey received incomplete information about the *Langston* case. However, the procedures that were followed were ethically proper, and Mr. Josey and TPGL were acting in good faith in determining if a conflict existed.

21. Courts frown on the use of disqualification motions for tactical reasons. Comment 7 to the Scope Section of the Model Rules states:

> Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

In my opinion the Appellant continues to make the same disqualification arguments over and over again for tactical reasons. The Appellant has no interest in maintaining an attorney-client relationship with TPGL. Instead, it is interested in delaying resolution of this matter because it is on the verge of losing. In my opinion, the court should not allow the Appellant to make this claim of disqualification for tactical reasons and should deny the relief sought by Appellant.

nmc

This 6th day of September 2011.

Nathan M. Crystal

Nathan M. Crystal

Sworn to and subscribe before me

this 6 day of September, 2011

Notary Public of New York

My Commission expires:

STACIE FRASER
Notary Public - State of New York
No. 01FR6072461
Qualified in Bronx County
My Commission Expires February 03, 2015

Exhibit N

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

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Michael J. Baxley, Jr., Circuit Court **Judge**

CIVIL ACT10N **NO: 2010-CP-16-0332**

Pee Dee Health Care, Inc.

Appellant,

Estate of Bugh S. Thompson,

v.

Respondents.

AFnDAVIT OF ALEXANDER H. COHEN, M.D.
PRESIDENT OF PEE DEE HEALTH CARE, P.A.

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

1. I am a physician and the President of Pee Dee Health Care, PA.

2. I have an interest in the outcome of the lawsuit against the estate of Dr. Thompson.

3. As a physician, I can't believe that the **legal** profession would allow the attorneys at Turner Padget to **represent** Dr. Thompson's estate in the Darlington court, and in this appeal, while knowing that Turner Paget has represented my company since 2003. I have no **idea** what they have learned about PDHC in the last eight years, but they have had access to our employees, files, **and** other company infonnation. I understand that they must have infonnation that they would only have had because they represented us and were our attorneys. We provided the information because they were our attorneys, and it never occurred to me that one **day** they would be representing someone else against my company while they representing me. Moreover, I am personally stunned Jay James would **participate** in such a matter. I have known Jay for years and I don't think he would ever **knowingly** do anything like this.

4. J have also been recently infonned of attorneys at Turner Padgett signing an unauthorized **affidavit** on behalf of Pee Dee Health **Care,** P.A. so that they would have another attorney to finish representing **us** and they could then complete their representation of Dr. Thompson's estate against us. It is nearly incomprehensible to me that such action on their part is appropriate. I cannot imagine the State Medical Board would look kindly on

my (i) discharging a patient without any notice to the patient, (ii) my signing the consent to discharge on behalf of the patient being discharged without telling the patient, (iii) my treating another patient with medications I was using for the patient I discharged, and/or (iv) my telling the first patient to go get another physician and, by the way, best of luck to you. My point is - What's the difference? Regardless of what it is called, abandonment is abandonment. Betrayal is betrayal. Lack of ethics is lack is ethics.

5. Mr. Tony Megna has been our General Counsel since 1995. It is not much of a stretch for anyone to understand that it would cause substantial hardship and prejudice to **me,** Pee **Dee** Health **Care** and **others** to obtain other counsel to **represent** us. It would be very expensive and time consuming just to get someone else started on a case.

6. I previously infonned the circuit court that I did not [and **still** do not] agree to waive any attorney-client privilege I have with Tony in his capacity as an attorney advising me in regard to legal matters, individually, or in his capacity advising me as to legal matters in my capacity as an officer and owner of Pee Dee Health Care. We have always made the effort to keep matters regarding the employment of physicians as a matter decided and detennined by the physician officers of Pee **Dee** Health Care. We have done so in order that Tony could handle the legal matters regarding such transactions in his capacity as an attorney, and so that our conversations with him in such **a** capacity were and would remain confidential. Over the years, we have made considerable efforts to insure all such matters were discussed in private without the presence of third parties to maintain the sanctity of the attorney-client relationship. We **have** taken the same approach in our practice in regard to the physician-patient privilege of confidentiality.

7. I respectfully request this Court honor the relationship Tony, **I,** and our employees have developed over the last seventeen years, and honor the sanctity and confidentiality of the attorney-client relationship between Tony, my company, me, and my employees now and in the future. We have spent many years carefully cultivating a culture and relationships that separate business matters from legal matters and I have no desire to waive any confidential relationships I have under the law in any capacity, **and,** with all due respect to this Court, I specifically do not waive any privilege, whether attorney-client or physician-patient or any other privilege, however defined, in regard to any communication of any type or relationship of any type I have now with Mr. Megna or have ever had with Mr. Megna.

FURTHER THE AFFIANT SAYETH NOT.

Alexander H. Cohen, M.D.

SWORN TO BEFORE ME this
22nd day of August, 2011.
(L.S.)
Notary Public for South Carolina
My Commission Expires: My Commission Expires
August 10, 2017

Jay James

From: "Tony R. Megna" <tmegna@gmail.com>
To: "Ben Matthews" <benrusmat@gmail.com>
Cc: <pjlaw507@bellsouth.net>
Sent: Friday, May 21, 2010 4:43 PM
Subject: Re: Thompson claim

Jay-

Think as you please. I am General Counsel to PDHC. Hubie did not tell the truth & others will testify as to those matters. My involvement was minimal other than Hubie's admission in 2007 to me that he did not tell the truth when he signed the original Medicare application. Ben's involvement is out of an abundance of caution. The estate has no reasonable defense to PDHCs claims & we intend to pursue every option available to recapture the total losses sustained - which are considerably more than the amount PDHC had to pay Medicare. As I told you originally, neither Alex, Joe nor I like any of this but the estate denied the initial claim (which was beyond reasonable) & forced PDHC to file the lawsuit.

As you speak to your clients, please let them we did not wish to go this route but that your denial of the claim left no reasonable alternative. And if you expect to resolve the matter short of trial, I suggest you reconsider your email to Ben.

Regards, Tony

On 05/21/2010, Ben Matthews <benrusmat@gmail.com> wrote:
> FYI
>
> ---------- Forwarded message ----------
> From: Jay James <pjlaw507@bellsouth.net>
> Date: Fri, May 21, 2010 at 3:13 PM
> Subject: Thompson claim
> To: benrusmat@gmail.com
>
>
> I hereby acknowledge that I received the summons and complaint, the amended
> probate claim and the first set of interrogatories and first request for
> production. I am confirming with my clients that I am authorized to accept
> service and as soon as I get this authorization I will give you formal
> notification of that.
>
> As you probably have seen, I also received an email from Tony Friday
> morning. I recommend that all communications be between you and me. At
> this stage of things I consider Tony to be a fact witness as well as the
> chief executive officer of the adverse party. I simply should not be
> communicating with him.
>
> Also please send to me the three exhibits referred to in the complaint.

> I will be planning to file appropriate responsive pleadings to both the
> probate and common pleas courts.
>
> Jay James
>
>
>
>
> --
> Benjamin R. Matthews
> Matthews and Megna, LLC
> Attorneys and Counselors At Law
> 843-395-8431
> 877-253-7705
>

--
Sent from my mobile device

Thanks, Tony

Please send all written correspondence to:

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
tmegna@gmail.com
Office telephone: 803.799.1700

This message is intended for the use of the person or entity to which it is addressed and may contain information, including legal and/or health information, that is privileged, confidential, and the disclosure of which is governed by applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this information is STRICTLY PROHIBITED. If you have received this in error, please notify us immediately and destroy the related message. Thank you.

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON) TWELFTH JUDICIAL CIRCUIT
)
) CASE NO.: 2010-CP-16-0332 (Probate Claim)
2010-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A.)
Plaintiff,)
vs.)
)
Estate of Hugh S. Thompson)
Defendant.)

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

COPY

Plaintiff's Attorney:	Defendant's Attorney:
James M. Griffin, Bar No. 9995 Address: 1513 Hampton Street, Columbia, SC 29201 Phone: 803-771-8000Fax 803-731-3541 E-mail: ____Other: ____	J. Rene Josey, Bar No. 03230 Address: P.O. Box 5478, Florence SC 29502 Phone: 843-662-9008 Fax843-667-0828 E-mail: ____Other: ____

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion To Strike
Estimated Time Needed: 20 minutes Court Reporter Needed: ☒ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order
I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff/☐ Defendant 3-11-14 Date submitted

FILED
2014 MAR 13 PM 1:25
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: ____
☐ Other: ____

JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: ____	JUDGE CODE ____ Date: ____

CLERK'S VERIFICATION

Collected by: ____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

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

SCCA 233 (11/2003)

FILED
2014 MAR 13 PM 1:25
SCOTT B. SUGGS
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DARLINGTON COUNTY, S.C.

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STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT
Pee Dee Health Care, P.A., Plaintiff v. Estate of Hugh S. Thompson Defendant	Case No. 2010-CP-16-0332 Case No. 2010-CP-16-0633 MOTION TO STRIKE

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DARLINGTON COUNTY, S.C.

Plaintiff Pee Dee Healthcare, P.A. by and through its undersigned counsel hereby moves to strike Defendants' claim for sanctions under the South Carolina Frivolous Proceedings Act ("the Act"), S.C. Code § 15-36-10, on the grounds that this Court lacks subject matter jurisdiction to consider the motion. In *Pittman v. Republic Leasing Co., Inc.* 351 S.C. 429, 570 S.E.2d 187 (2002), the South Carolina Supreme Court ruled that a party must file a motion under the Act within the ten (10) day time limit applicable to post-trial motions under Rule 59. Furthermore, if the party does not file the motion within the ten (10) days as provided under Rule 59, the trial judge loses jurisdiction to hear the matter. Specifically, the Court explained:

> Because a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment. Here, however, Republic Leasing waited until almost two months after the grant of summary judgment to move for sanctions under the Act. At that time, the trial judge no longer had jurisdiction over the case.
>
> We cannot accept Republic Leasing's argument that because proceedings under the Act sound in equity, the trial judge retains jurisdiction to consider a motion for sanctions limited only by the equitable defenses of estoppel and laches. Absent specific statutory language vesting the trial judge with continuing jurisdiction, we refuse to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment. Such an interpretation would run counter to our established case law that a trial

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> trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed. *See Cox v. Fleetwood Homes of Ga., Inc.*, 334 S.C. 55, 58, 512 S.E.2d 498, 500 (1999) (stating that an exception to the rule that a judge assigned to a circuit must exercise his judicial powers while within the territorial limits of that circuit "is that a judge retains jurisdiction to consider timely post-trial motions even though no longer assigned to the circuit.") (citing Rules 50(e), 52(c), and 59(f), SCRCP).
>
> 351 S.C. at 432-433, 570 S.E.2d at 189-190.

The Supreme Court re-affirmed this ruling two years later in *In re: Beard*, 359 S.C. 351, 597 S.E.2d 835 (2004), stating "[t]he established case law is that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed."

Defendants appear to argue in their motion that the time period to file the motion was tolled pending the appeal of this action. See Motion, fn.2. This is not correct. The filing and service of a notice of appeal before a party files a timely post-trial motion does not deprive the lower court of jurisdiction to consider the motion. *Hudson v. Hudson* 290 S.C. 215, 349 S.E.2d 341 (1986). Therefore, under *Pittman* and *Beard*, the Defendants were required to file the motion for sanctions under the Act within ten (10) days of this Court's order granting summary judgment,[1] even if there was a notice of appeal was filed before the expiration of the ten (10) day period to file a motion for sanctions under the Act.

Because the Defendant failed to file the motion within ten (10) days from the date this Court entered summary judgment, this Court no longer has jurisdiction to consider the motion.

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[1] The decision of *McDowell v. South Carolina Department of Social Services*, 300 S.C.24, 386 S.E.2d 280 (Ct. App. 1989) cited by the Defendant has no bearing on this issue. *McDowell* involved the interpretation of a statute that allows for the recovery of attorneys fees "as court costs" from the State in certain civil actions brought by the State. The statute requires that the party must file a petition "within 30 days *following final disposition of the case.*" S.C. Code § 15-77-310. Here, the Act requires that the motion be made "*at the conclusion of a trial and after a verdict for or against damages has been rendered or a case has been dismissed by direct verdict, summary judgment, or judgment notwithstanding the verdict.*" S.C.Code §15-36-10 (C)(1).

Respectfully submitted.

A. Camden Lewis
James M. Griffin
Lewis, Babcock & Griffin, L.L.P.
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

March 11, 2014

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STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON Pee Dee Health Care, P.A., Plaintiff v. Estate of Hugh S. Thompson Defendant	IN THE COURT OF COMMON PLEAS TWELF JUDICIAL CIRCUIT Case No. 2010-CP-16-0332 Case No. 2010-CP-16-0633 **CERTIFICATE OF SERVICE**

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Pee Dee Health Care, P.A., do hereby certified that I have served a copy of the foregoing **Motion to Strike**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses on March 11, 2014:

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

Renee Josey
P.O. Box 5478
Florence, SC 29501

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SCOTT B. SUGGS
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DARLINGTON COUNTY, S.C.

Jaime Harmon

Columbia, South Carolina
March 11, 2014

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

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NO. 10-CP-16-0332 (Probate Claim)
DOCKET NO. 10-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A.,,

Plaintiff,

vs.

Estate of Hugh S. Thompson ,

Defendant.

DEFENDANT'S RESPONSE TO MOTION TO STRIKE CIRCUIT COURT SANCTIONS MOTION

The Plaintiff has moved to dismiss the pending motion for circuit court sanctions as untimely – and thereby outside the Court's subject matter jurisdiction. Specifically, Plaintiff suggests that the Defendant's motion should have been filed within 10 days of the Court's decision to grant summary judgment; ironically, Plaintiff has previously argued to both this Court and the Court of Appeals that the summary judgment order itself was entered without jurisdiction because of the previous interlocutory appeal of counsel's disqualification. Indeed, the additional confusion and litigation effort necessitated by Plaintiff's multi-staged appeals and repetitive manipulative efforts is part of the very basis of Defendant's present motion for sanctions and the very reason that this motion was more efficiently filed and considered upon remittitur of these consolidated appeals.

The argument now made was anticipated by the Defendant and addressed in footnote 2 of the Motion for Sanctions. That footnote provided:

> Although the Supreme Court has noted that there may be different time limits for a motion made under Rule 11 and one made pursuant to S.C. Code § 15-36-10, see Russell v. Wachovia, 370 S.C. 5, 633 S.E.2d 722 (2006) (discussion at

footnote 11) (case involved a dispute over the Estate of the late Judge Donald Russell), the Defendant here is timely under any standard.

While FCPSA sanctions must be sought within the time that a trial court retains jurisdiction, Ex parte Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004) (pursuant to general rule limitations, FCPSA motion too late when filed 363 days after the attempted claim was denied – but parallel Rule 11 motion treated timely with merits addressed), the final disposition of a case that has been appealed does not occur until the remittitur is returned by the appellate court and filed with the lower court. McDowell v. South Carolina Department Of Social Services, 300 S.C. 24; 386 S.E.2d 280 (Ct. App. 1989) (holding that statutory time within which to petition for attorney's fees began to run following remittitur – the "final disposition"). Once the remittitur is returned to the trial court, that trial court reacquires jurisdiction to enforce the judgment as affirmed and take any further action consistent with that appellate ruling. Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993)(following remittitur Circuit Court was vested with jurisdiction to award statutory attorney's fees in mechanic's lien foreclosure).

In this case, two appeals were already pending at the time the Court issued its Order of summary judgment; thus, there was no final disposition with regard to all trial court issues even when Summary Judgment was determined. Final disposition of all issues litigated in this Court did not occur until the issuance of the remittitur. Here, the remittitur was issued less than 10 days ago and the relief now sought is consistent with the judgment as now affirmed by the appellate courts of this state.

The Defendant could have filed a motion for sanctions after this Court's decision (appealed) to dismiss the Probate Court Appeal (C/A No. 10-CP-16-0633), then filed a second motion for sanctions after this Court's decision (appealed) to disqualify counsel, and then filed a third motion for sanctions within 10 days of this Court's summary judgment decision (also appealed but jurisdictionally challenged in this Court first) – but defense counsel regrets having to file a single motion for sanctions – and certainly did not want to file three such motions further confusing the situation and taxing judicial resources. As discussed briefly in the footnote above, and more completely in this memorandum, such a piecemeal approach is not required by the

Rules and jurisdiction exists for this Court's comprehensive consideration of sanctions in light of the totality of conduct demonstrated in this Court.

The 10 Days Of Pitman: For The FCPSA Only And In A Non-Appealed Case

First and foremost, it should be noted that the 10 day rule expressed in Pitman v. Republic Leasing Company, Inc., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002), is limited to sanctions sought under the South Carolina Frivolous Civil Proceedings Sanctions Act (hereinafter "FCPSA") where the statute provides "*At the conclusion* of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous." S.C. Code § 15-36-10(C)(1)(emphasis added).[1] In Pitman, the Court of Appeals (then Judge Hearn) noted that it was interpreting the statutory phrase "at the conclusion of the trial" for the first time and further noted that the term "trial" was itself a misnomer since any case surviving to trial is presumptively *not* frivolous. The Pitman Court determined that it was *not* going to vary from the

[1] This is the present version of the statute which has been amended since Pitman. In Rutland v. Holler, Dennis, et.al., 371 S.C. 91, 637 S.E.2d 316 (2006), Justice Beatty (then on the Court of Appeals) noted that the original statutes that made up the FCPSA were repealed in 2005 and completely revised with new provisions. The "at the conclusion of a trial" language, however, was repeated in the new provisions.

Rutland is somewhat similar to the case at bar in that it too involved multiple lawsuits (like Hammer discussed below) and Rutland involved a challenge to the trial court's jurisdiction to impose sanctions (also like Hammer discussed below). The sanction's request was filed in the final of three related actions but filed more than 10 days after the form order for summary judgment but before the anticipated follow-up formal order. The Rutland Court found this request timely and then approved the trial court's entry of a sanction's order some 9 ½ months after entry of the final formal order of summary judgment. Both of these cases, like the Defendant's position here, affirm the trial court's ability to consider sanctions during any period of the Court's general jurisdiction.

"established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed."

In Pitman, the party seeking sanctions waited some two months after an order of summary judgment that was not appealed. Obviously, the facts and circumstances presented by this thrice appealed case are different from Pitman and appear not to have been considered by previous appellate decisions of our courts. Specifically, the appellate courts have not addressed a request for sanctions under FCPSA after the successful defense of multi-staged appeals. In addition, the very merits of the matter, which directly bear on these requests for sanctions – at least in part, were under appellate review. Also, in Pitman there is no mention of Rule 11 as an alternative basis for sanctions. In the Defendant's motion here, both the FCPSA and Rule 11 are asserted as co-equal grounds for the imposition of sanctions by this Court – in addition to the Court's inherent general power to impose sanctions as needed to protect the legal system from manipulation.[2]

General 10 Day Window Not Applicable to Rule 11 Sanctions

Subsequent to Pitman, our Supreme Court expressly noted that:

> We do distinguish between the FCPSA and the Rule 11 sanctions. There is no requirement that a motion for sanctions made pursuant to Rule 11 be made within ten days from notice of entry of judgment. As a result, we decline to address what time limit is proper with regard to the Rule 11 sanctions because the issue is not before us.

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[2] In support of these general powers, the Defendants cited to an article by the Hon. G. Ross Anderson, Jr., Discovery Sanctions, 6 S.C. Lawyer 14 (1995), as well as to the case of United States v. Shaffer Equip. Co., 11 F.3d 450, 458-461 (4th Cir. 1993) (a lawyer's duty to "advocate vigorously [is] trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit.")("Due to the very nature of the court as an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers.")("[Any abusive litigation practice is sanctionable against a lawyer or client.").

Russell v. Wachovia, 370 S.C. 5, 633 S.E.2d 722 (2006) (footnote 11) (internal citation ommitted). Plaintiff's present motion to strike the request for trial court sanctions conspicuously fails to address this footnote from Russell although it was proactively referenced in Defendant's original motion (again footnote 2).

While the Russell opinion did not need to reach or specify a specific time window for Rule 11 sanctions, a window as long as 363 days has been approved by the Court of Appeals in Ex parte Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004). Of course, Beard was cited in the Plaintiff's motion to strike because it followed the Court's previous limitation of FCPSA found in Pitman. ***What is most notable about Beard, however, is not that it followed existing law found in Pitman for the FCPSA, but that it inherently made new law by allowing a very different time window for sanctions under Rule 11.*** Again, this different time frame for Rule 11 sanctions is not addressed by the Motion to Strike.[3]

In an award of over $150,000 in sanctions affirmed by the South Carolina Supreme Court *just this week,*[4] Circuit Court Judge George C. James, Jr. recognized how the different time frame allowed by Rule 11 might render a timeliness argument under the FCPSA "moot as a practical matter." See Order attached as Exhibit A, page 10. In the Order, Judge James found that the multiple harassing actions brought by the Plaintiff "have resulted in [Defendant]

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[3] Also important is the type of "jurisdiction" generally lost by a trial court after a matter is concluded – as the Supreme Court also noted in Russell, "Jurisdiction refers to the trial court's authority to retain jurisdiction over the case, *not the court's subject matter jurisdiction.* See Ex parte Beard, 359 S.C. at 358 (Explaining that the ten day rule is a time limitation on the court's ability to retain the case not the power of the trial court to hear cases of that nature)." (emphasis added). In Beard, the Court agreed that the rules limiting time for post trial motions were "rules of limitation, not of jurisdiction." Id.

[4] Hammer v. Hammer, Unpublished Memorandum Opinion No. 2014-MO-007 (Filed March 19, 2014)(FCPSA motion filed while awaiting Judge James' formal order but not served until some 13 days after the formal order).

incurring attorneys' fees and costs in two actions sponsored by him." This timely and similar example serves to further illustrate the need for Court action in this matter as well.

Remittitur Reopens A Window Of Trial Court Jurisdiction

As noted in the Defendant's Motion for Sanctions in this Court, our Supreme Court has clearly provided that the issuance of the remittitur returns jurisdiction to the trial court for action consistent with the appellate court ruling. Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993)(following remittitur Circuit Court was vested with jurisdiction to award statutory attorney's fees in mechanic's lien foreclosure); see also McDowell V. South Carolina Department Of Social Services, 300 S.C. 24; 386 S.E.2d 280 (Ct. App. 1989) (holding that statutory time within which to petition for attorney's fees began to run following remittitur – the "final disposition"). Plaintiff's Motion to Strike fails to address Muller.

In Muller, the prevailing party failed to file his petition for appellate fees and costs (under SCRAP 222) on time as the remittitur had already been sent to the trial court. The prevailing party then petitioned for both trial and appellate fees and costs in the Circuit Court – filing that Circuit Court petition *more than* 26 days after the remittitur had been sent (actually the Rule 222 petition to the Court of Appeals was filed 26 days after remittitur, then, after that appellate petition was rejected as jurisdictionally tardy, the Circuit Court petition was filed).[5] The Muller trial court held that it was without jurisdiction. On appeal, the Supreme Court responded *"The holding of Circuit Court that it was without jurisdiction to adjudicate the issue of attorney's fees was erroneous. Once the remittitur is sent down from this Court, Circuit Court acquires jurisdiction to enforce the judgment and take any action consistent with the Supreme Court*

[5] In this case, the motion in Circuit Court was filed within 10 days of remittitur so no claim of laches or unecessary delay could be asserted.

ruling." Id. at 415, 438 S.E.2d at 249 (emphasis added)(citing Hamm v. Southern Bell, 305 S.C. 1, 406 S.E.2d 157 (1991)[6]; State v. Wise, 33 S.C. 582, 12 S.E. 556 (1891); Brooks v. Brooks, 16 S.C. 621 (1881)); see also Cox v. Fleetwood Homes of Georgia, Inc., 334 S.C. 55, 512 S.E.2d 498,500 (1999)(Supreme Court recognized that original trial judge may exercise jurisdiction following an appeal – in a manner consistent with the appellate decision – even if that original judge is not a resident of or then assigned to the circuit where the case arose).

While Muller did involve a statutory fee award provision, that provision says nothing about the duration of time in which the request must be filed – only that it must be filed in the trial court after a party has "prevailed" (the trigger).[7] While Muller is unlike Pitman because Pitman involved no appeal of the merits, they are similar in that the FCPSA also does not limit the duration of time in which a petition must be brought – instead the FCPSA merely directs that such petition be "at the conclusion of the trial" – presumably the same as after a party has "prevailed" -- to avoid the interlocutory piece-meal approach of filing multiple sanctions requests during on-going trial litigation – this is also what Defendant here sought to avoid. In this case, the "final disposition" or "conclusion" or ultimate "prevailing"[8] did not occur until

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[6] In Hamm, the Supreme Court also made it clear that no specific remand instructions were recquired to re-establish the trial court's jurisdiction upon remittitur. The Court stated, "Further, although we did not expressly "remand" the case, no such instruction was necessary under the facts of this case. Section 18-9-270 provides that "the Supreme Court may reverse, affirm or modify the judgment decree or order appealed from in whole or in part and as to any or all of the parties, and the judgment shall be remitted to the court below to be enforced according to the law."

[7] Section 29-5-10 provides in pertinent part: "The costs which may arise in enforcing or defending against the lien under this chapter, including a reasonable attorney's fee, may be recovered by the prevailing party. The fee must be determined by the court in which the action is brought but the fee and the court costs may not exceed the amount of the lien."

[8] Defendant suggests that the distinction among these statutory triggers is one without a real difference. To that end, Justice (then Judge) Hearn noted in Pitman that "trial" was an irrational

after the appellate decisions and remittitur. Because Pitman and Beard do not address (and did not need to address) the established precedent of a trial court's reaquisiton of jurisdictional authority following an appeal, their holdings of a 10 day window for FCPSA petitions in non-appealed cases are not inconsistent with or prohibitive of another window of FCPSA jurisdiction following an appeal.

This Plaintiff Also Recognizes A Sanctions Window Reopens After An Appeal

In a Brief filed with the Court of Appeals appealing the award of sanctions to Attorney Doug Truslow in the Anasti case, the Plaintiff acknowledged the trial court's reacquistion of jurisdiction to decide a sanction's motion following a remittitur.[9] On page 10 of that Brief, the same Plaintiff asserts an argument entitled "**III. The lower court erred in allowing Truslow to proceed on a motion for sanctions filed more than ten days after remittitur of the Anasti case.**" Citing valid authorities for the trial court's reaquisition of jurisdiction to enforce judgments and take actions consistent with the appellate court's rulings, the Plaintiff states, "Here, the remittitur was issued on October 7, 2011, but Truslow's motion was not filed until November 21, 2011 – much more than ten days after the remittitur." Copies of Pages 10 and 11 of that Brief – together with the identifying cover and signature page are attached hereto as Exhibit B. Having implicitly recognized the trial court's jurisdiction to consider a request for sanctions filed within 10 days of remittitur, the Plaintiff now inconsistently argues that those 10 days are not available to this Defendant. In the Truslow appeal, this Plaintiff thought the

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misnomer. Defendant's position herein, that there is *at least* a renewed 10 day FCPSA window following the "final disposition" of remittitur, is consistent with all such triggers of finality and consistent with the trial court's general jurisdiction to act consistent with the appellate decision. Furthermore, this position of a limited renewed window of jurisdiction promotes sound public policy by encouraginga more complete deliberative consideration of sanctions after completion of the appellate process.

[9] In the Anasti case, Truslow allegedly sought sanctions only after remittitur under Rule 11.

renewed window for Rule 11 Sanctions was open for 10 days; *this Defendant agrees* that the window is open for *at least* 10 days and filed its motion in that time frame.

The window of jurisdiction opened by remittitur may not be limited to 10 days[10] – the Supreme Court allowed more than double that in Muller where, like here, the statutory fee provision expressed no clear cap on the duration of available jurisdiction. In McDowell, the statutory fee provision provided for both a trigger ("final disposition") and aduration of availability ("30 days"). Certainly, the Defendant would concede that any post-Appeal jurisdictional ability to initiate consideration of FCPSA sanctions could be limited by laches.

Inherent Power Of The Court And U.S. Supreme Court Approval

Once again, however, the present motion does not rely on the FCPSA alone. As referenced in footnote one above, the Defendant points to the case of United States v. Shaffer Equip. Co., 11 F.3d 450, 458-461 (4th Cir. 1993) as authority recognizing the inherent power of the courts to protect the integrity of their process through sanctions. Of course, that inherent authority is not proscribed by any statutory language or procedural time limit. Moreover, a study of Shaffer and the Supreme Court authority cited therein is particularly insightful to our facts and circumstances.

Shaffer was an environmental clean-up action brought in the Southern District of West Virginia; accordingly, the South Carolina FCPSA was not at play. In Shaffer, an Assistant

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[10] The authority cited by Plaintiff in its Anasti brief for the 10 day limit to Rule 11 jurisdiction following remittitur includes Pitman which is neither a Rule 11 case or a post-remittitur case. Likewise, Plaintiff also cites SCRCP 59 regarding post-trial motions -- not expressly applicable to the post-remittitur general jurisdiction of the trial court. Finally, the Plaintiff cites Cox v. Fleetwood Homes of Georgia, Inc., 334 S.C. 55, 512 S.E.2d 498,500 (1999). Cox is not a sanctions case but it does stand for the proposition, discussed in the text above, that the original trial judge reaquires jurisdiction to deal with remanded issues following an appeal regardless of that judge's subsequent venue or residency. Defendant here cites Cox as authority supporting this Court's general jurisdiction after remittitur to entertain matters consistent with the appellate court rulings.

United States Attorney and an EPA expert failed to be candid regarding the expert's credentials. The Court imposed sanctions during the on-going discovery phase of the case – dismissing the matter – so post-trial deadlines were not involved.

In Shaffer, the Fourth Circuit quoted from the United States Supreme Court case of Chambers v. NASCO, Inc., 501 U.S. 32 (1991) wherein the Court found that Rule 11 and the federal statute for sanctions did not displace the inherent power of the Court. The Supreme Court stated, "*We discern no basis for holding that the sanctioning scheme of the statute [28 U.S.C. § 1927] and the rules displaces the inherent power to impose sanctions for the bad faith conduct* described above. These other mechanisms, taken alone or together, are not substitutes for the inherent power, for that power is both broader and narrower than other means of imposing sanctions. First, whereas each of the other mechanisms reaches only certain individuals or conduct, the inherent power extends *to a full range of litigation abuses*. At the very least, the inherent power must continue to exist to fill in the interstices." Id. at 46 (emphasis added).

Turning to the underlying facts found in NASCO, the motion for sanctions in the trial court was filed after an appeal and upon remand to the trial court – an appeal, like here, affirming the trial court's decision on the merits for the party seeking sanctions. The sanctions award of almost $1million in attorney's fees and expenses was affirmed by both the United States Court of Appeals for the Fifth Circuit and the United States Supreme Court. Sanctions were also imposed by the Court of Appeals which ruled from the bench immediately following oral argument and found the appeal frivolous; the remand further invited the trial court to determine if further sanctions should be imposed based upon litigation conduct in that court.

NASCO is not only illustrative of the inherent ability to impose comprehensive trial court sanctions following an appeal, it is illustrative of the Court's ability to reach collateral conduct of a litigant that obstructed the legitimate judicial process – conduct arguably outside the reach of Rule 11 for example. While the Defendant here has taken the position that all documents and correspondence signed by counsel is within the reach of Rule 11 if it relates to the litigation whether filed or not, like the settlement demand e-mail sent by counsel that misrepresented the underlying administrative record, the NASCO decision provides that such conduct is reachable even if outside of the scope of Rule 11 or other statute.

Conclusion

In this matter, the interlocutory appeals of probate issues and disqualification issues led Defendant to delay the pursuit of trial court sanctions until the matter was again consolidated and finalized. This delay should be approved by the Court – because it promoted efficient use of legal and judicial resources – and because it is consistent with the case law of this State. Moreover, even if this Court finds this approach inconsistent with the FCPSA, the Court should proceed to approve this approach and the sanctions sought pursuant to Rule 11 of the South Carolina Rules of Civil Procedure as well as the inherent power of this Court.

As a reminder, the Defendant Estate has been subjected to an expensive and toilsome journey – all for a fault-based claim when that fault had already been litigated by Plaintiff to finality. Not only was the primary litigation frivolous, however, most of the spin-off issues of dispute have been frivolous as well including the appeal of the Probate Court rulings and the fully-warranted disqualification of Mr. Megna. Such frivolous pursuits are sanctionable in and of themselves, but in this case, they have been accompanied by deliberate efforts to mislead, manipulate, and intimidate. But for the willingness of the undersigned counsel to continue their

advocacy without compensation, the Thompson heirs might have succumbed to these efforts. Now, through no fault of their own, and without any liability of their father's Estate, the heirs of the Defendant have incurred substantial legal fees far beyond anything they anticipated or could afford.[11] These heirs have already borne the emotional hardship of uncertainty and delay; they should not have to bear these costs as well.

Abusive practices like those pursued by the Plaintiff and its lawyers in this Court are not only harmful to the other litigants in this case and the disposition of justice in this case – but to the public trust in the entire judicial system and the rule of law. Only sanctions will address these abuses and deter others inclined to employ such tactics. Only sanctions can help restore the Defendant to an equitable position and only sanctions can restore the erosion of trust brought about in this case.

[SIGNATURE PAGE TO FOLLOW]

[11] Of course, in the case of Ex Parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008), the Supreme Court approved recovery of the legal fees also incurred in seeking sanctions themselves -- at least under the FCPSA.

Florence, South Carolina

March 24, 2014

Respectfully Submitted,

PAULLING & JAMES, LLP

BY: _____

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843-393-6089 (Fax)

March 24th, 2014

TURNER, PADGET, GRAHAM & LANEY, P.A.

BY: _____

J. René Josey
319 South Irby Street
P.O. Box 5478 (29502-5478)
Florence, SC 29501
843-656-4451 (Telephone)
843-413-5818 (Fax)

ATTORNEYS FOR DEFENDANT

EXHIBIT A

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2009 CP-40-5911

RECEIVED
Via Email from COC 06-14-2013

Howard Hammer

PLAINTIFF(S)

Shirley Hammer, a/k/a Shirley Grace Hightower

DEFENDANT(S)

Submitted by: The Court	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

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

RICHLAND COUNTY FILED
2013 JUN -6 AM 10:05
JEAN HOEFER TOAL, CLERK OF COURT & C.C.P.S.

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

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Shirley Hammer	Howard Hammer	$60,744.30
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge George C. James, Jr. — 2143 Judge Code — Date 6/3/13

For Clerk of Court Office Use Only

This judgment was entered on the 4 day of June, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this ____ day of ____, 20__ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
	FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND)	2009-CP-40-05911 and
	2010-CP-40-2889
Howard Hammer,)	
Plaintiff,)	
)	
vs)	
)	
Shirley Hammer, a/k/a)	
Shirley Grace Hightower,)	
Defendant,)	
)	**ORDER ADDRESSING POST-TRIAL MOTIONS**
1634 Main, L.P.,)	
Plaintiff,)	
vs)	
Shirley Hammer, a/k/a)	
Shirley Grace Hightower,)	
Defendant/Third Party Plaintiff,)	
vs)	
Howard Hammer,)	
Addition Defendant on)	
Counterclaim,)	

RICHLAND COUNTY
FILED
2013 JUN -6 AM 10:26
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter is before the court for disposition of certain motions made by the parties subsequent to this court's merits order dated January 28, 2013 and filed January 29, 1013. This order is double-captioned, and an original is to be filed in both case files in the office of the Clerk of Court.

In the merits order, the court issued findings and conclusions arising from a nonjury trial held October 29 and 30, 2012, and arising from a hearing held January 15,

2013. Shirley Hammer (alternatively referred to as "Mrs. Hammer") has now moved for sanctions under Rule 11, SCRCP and under S.C. Section 15-36-10, et seq., the South Carolina Frivolous Civil Proceedings Sanctions Act ("the Act"). Howard Hammer (also referred to as "Mr. Hammer") and 1634 Main L.P. have moved to dismiss the motion for sanctions as untimely. Mr. Hammer and 1634 Main L.P. (also referred to as "1634 Main" or "1634") have also moved to amend findings of fact, moved to alter or amend judgment, and moved for a new trial. Mr. Hammer also moves for a mistrial.

A hearing on Mr. Hammer's and 1634 Main's motions to dismiss the motion for sanctions was held on May 1, 2013. A hearing on the motion for sanctions was held in Sumter County on May 17. All parties waived any objection to venue. Appearing for Shirley Hammer at these May hearings was Desa Ballard, Esquire. Mr. Hammer represented himself in the 1634 Main litigation and appeared at both proceedings. Arthur K. Aiken, Esquire represents Mr. Hammer in the Hammer v Hammer litigation and appeared at both proceedings. Susan B. Lipscomb, Esquire appeared at both proceedings as counsel for 1634 Main, L.P. At the May 17 hearing, Mr. Hammer argued that he and 1634 Main were entitled to a hearing on their motions for new trial, to reconsider and/or to alter or amend. The court disagrees and will rule on those motions without a hearing.

I. Motions for New Trial, Motions to Reconsider, Alter, Amend, or Modify Merits Order

A. Mr. Hammer's Motions

Mr. Hammer represents himself in the 1634 action. His motion is forty-four (44) pages long and contains fifty-six (56) numbered paragraphs. In some of these paragraphs, Mr. Hammer raises issues on behalf of 1634 Main, L.P., which

he does not represent. For that reason alone, his arguments on behalf of 1634 Main, L.P. are dismissed. Even if raised properly[1], they are dismissed as set forth below. Similarly, Mr. Hammer also raises in the motion authored by him certain arguments germane to the Hammer v Hammer litigation. Mr. Hammer has an attorney, Mr. Aiken, in that litigation and, in my view, may only advance arguments as a third party defendant in the 1634 Main litigation, in which he represents himself.[2]

All parties agree that page one of the merits order should be amended to correctly reference the fact that in Hammer v Hammer, Mr. Hammer authored and filed the lis pendens and the original summons and complaint, but that Ms. Lipscomb later prepared and filed amended pleadings represented Mr. Hammer for a time. Mr. Aiken began representing Mr. Hammer in Hammer v Hammer on October 29, 2012, the day trial began. The merits order is amended to reflect this information.

In paragraph 1 of Mr. Hammer's motion bearing the 1634 Main caption, Mr. Hammer argues that the court "misperceived the nature of the case of Hammer v Hammer . . . as a contract action . . . when in truth and in fact, the case was one for Declaratory Judgment . . . ." However, the allegations in that action address almost exclusively "a certain contract" (the Hammers' May 2008 property settlement agreement approved by the family court). The declaratory judgment

[1] Attorney Lipscomb, counsel for 1634 Main, L.P., notes in 1634 Main's post-trial motions that 1634 Main incorporates by reference the points raised by Mr. Hammer in his motions. 1634 Main's motion is addressed below.

[2] In the post-trial motions made by Mr. Aiken in the Hammer v Hammer litigation, Mr. Aiken raises only two issues, both of which are addressed herein. The court knows of no legal authority allowing Mr. Hammer to include arguments for himself in litigation in which he has counsel. However, to avoid the absolute certainty of further argument on these issues, the court will rule on these arguments.

action repeatedly referred to the "May 2008 Contract" and how Mr. Hammer contended it was void. It is incomprehensible to this court how reference to this declaratory judgment cause of action as a "contract action" is a ground for a new trial or any other relief. This argument borders on being frivolous and dilatory. The court summarily rejects this argument and all other points raised in Paragraph 1 of Mr. Hammer's motion.

In Paragraph 2, Mr. Hammer argues the court should have directed a verdict for 1634 Main in the 1634 Main action. He does not represent 1634 Main. 1634 Main has counsel, and that counsel did incorporate all grounds raised by Mr. Hammer. The court denies all motions raised in Paragraph 2.

The court dismisses all grounds asserted by Mr. Hammer in Paragraphs 3 through 56 of his motion in Hammer v Hammer, and by extension, dismisses all grounds incorporated by counsel for 1634 Main in the 1634 Main, L.P. litigation. Likewise, to the extent any of Mr. Hammer's grounds can be interpreted to be made for himself as a third party defendant in the 1634 Main action (in which Mr. Hammer has an attorney), all such claims for relief are denied.

The court denies Mr. Hammer's motion for mistrial made in Paragraph 7.

In Paragraphs 9 and 10, Mr. Hammer addresses the court's two "Findings of Fact Applicable to Both Actions". He claims that this essentially amounts to a denial of due process since the actions, though consolidated and tried on the same days, were separated insofar as questioning of witnesses by counsel and Mr. Hammer were concerned. This argument is without merit, especially since Finding Number 1 applicable to both actions was a finding as to Mr. Hammer's

credibility as a witness, and Finding Number 2 applicable to both actions was (1) that Mr. and Mrs. Hammer were divorced as of May 12, 2008 but that family court litigation was still ongoing, and (2) that Mr. Hammer had threatened to engage Mrs. Hammer in litigation until she was bankrupt. These findings are germane to both captioned cases, and there are no adverse due process ramifications to Mr. Hammer. This argument borders on being frivolous and dilatory.

As noted above, all other grounds for relief asserted by Mr. Hammer are denied.

B. Hammer v. Hammer Motion Made by Mr. Aiken

Mr. Aiken represents Mr. Hammer in Hammer v Hammer and raises two issues in his "Motions to Amend Findings of Fact, to Alter or Amend Judgment and for a New Trial". First, he requests amendment of this court's finding as to the history of representation of Mr. Hammer in this action, which the court has already granted above. Second, he argues that the award of damages to Mrs. Hammer for "frustration" in her abuse of process counterclaim is against the weight of authority in South Carolina, and further, that since Mrs. Hammer had withdrawn her claim for emotional distress, any claim based on "frustration" was likewise withdrawn. The court disagrees and denies the request for relief.

C. 1634 Main, L.P.'s motions for new trial, etc.

1634 Main raises the impropriety of awarding damages for "frustration", as did Mr. Aiken. This ground is dismissed.

1634 Main asserts the court erred in finding that Mr. Hammer provided all information to CPA Ackerman for preparation of 1634 Main's tax returns and provided all information about tax planning related to Mrs. Hammer's interest in the building and real estate. 1634 Main claims the deposition of Mr. Ackerman establishes all this information was provided by Mr. Hammer, Mr. Turbeville, and a tax attorney. Even if the court erred in this regard, it would have no impact on the ultimate findings and the judgment entered against 1634 Main.

1634 Main adopted all grounds raised by Mr. Hammer in his motion, as noted above. All grounds raised by Mr. Hammer have been dismissed.

II. Timeliness of Mrs. Hammer's Motions for Sanctions

Mrs. Hammer moves for sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code §15-36-10 (C)(1) ("the Act") and under Rule 11, SCRCP. Mr. Hammer and 1634 Main first argue the motion under the Act was not timely made.

As noted above, the trial was held October 29 and 30, 2012. On November 15, 2012, the court emailed counsel and Mr. Hammer and attached thereto a memorandum outlining its findings and requested Ms. Ballard, counsel for Mrs. Hammer, to prepare a proposed order. The court signed the order in its final form on January 28, 2013 and it was filed January 29, 2013. In the interim, the court convened a hearing on January 15, intending to receive evidence and argument on the issues pertaining to (1) punitive damages, (2) attorney's fees as actual damages for abuse of process, and (3) any motions under the Act. The January 15 hearing took place, but the court agreed with Mr. Hammer and 1634 Main that the taking of additional evidence and argument on punitive damages

and attorney's fees as actual damages would be improper since the trial was concluded and the record closed on October 30. The court also agreed with Mr. Hammer and 1634 Main that a hearing of a motion under the Act would be premature, since §15-36-10(D) provides that the target of a motion under the Act "has thirty (30) days to respond to the allegations".

Ms. Ballard, counsel for Mrs. Hammer, asserts in her affidavit that she provided Mr. Hammer, Mr. Aiken, and Ms. Lipscomb with separate copies of the unfiled motion for sanctions at the January 15 hearing. Mr. Hammer, Mr. Aiken, and Ms. Lipscomb assert in their affidavits that only one copy of the motion was placed on their counsel table. Mr. Aiken asserts in his affidavit that Ms. Lipscomb asked Ms. Ballard if she had copies for all three of them, and that Ms. Ballard replied that she only had one copy. Ms. Lipscomb and Mr. Hammer concur with this account. All agree that Ms. Ballard provided the court with a copy of the unfiled motion at the January 15 hearing. All agree the motion was mailed to them on February 13, 2013.

Aside from their argument that only one copy of the motion was provided to the three of them on January 15, Mr. Hammer, Mr. Aiken, and 1634 Main contend that §15-36-10(C)(1) renders any service of the motion on them as January 15 moot. §15-36-10(C)(1) provides:

> At the conclusion of a trial and after a verdict . . . has been rendered or a case has been dismissed . . ., upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.
>
> (emphasis added)

Mr. Hammer, Mr. Aiken, and 1634 Main (collectively referred to as "the target parties") claim that even if all of them received a copy of the motion on January 15, the Act

specifically provides that such a motion can be made only after trial and verdict. They claim that the Act provides that the motion is to be made by "the prevailing party", and that there could be no prevailing party in this case until the merits order was filed on January 29. They assert that since Ms. Ballard received the order from the Clerk of Court on January 30, she had until February 10 (February 9 was a Sunday) to serve her motion for sanctions. Case law interpreting the prior version of the Act held that motions under the former Act had to be made within ten (10) days of receipt of written notice of entry of judgment. See Pitman v Republic Leasing Company, 351 S.C. 429, 570 S.E. 2d 187 (Ct. App. 2002) and Ex parte Beard, 359 S.C. 351, 597 S.E. 2d 835 (Ct. App. 2004). The court concludes that the changes in the Act adopted in 2005 and effective today would not lead to Pitman and Beard being decided differently today.

However, the Court of Appeals' decision in Rutland v Holler, Dennis, Corbett, Ormond & Garner, 371 S.C. 91, 637 S.E. 2d 316 (Ct. App. 2006) merits examination. In Rutland, the circuit court granted the defendant's motion to dismiss and signed a form order on August 9, 2004 to that effect, with a notation in the form order that a formal order would follow. The clerk of court mailed the form order to the parties on August 10, 2004. The defendant moved for sanctions on September 1, 2004. The circuit court issued its formal order on December 7, 2004. The motion for sanctions was heard in April 2005.

The plaintiff in Rutland argued that the September 1 motion was untimely because it was made more than ten (10) days after counsel would have received the August 9 form order. The Court of Appeals disagreed, ruling that the form order was not a final order

because it specified that a formal order would be issued, thereby rendering the form order merely interlocutory.

The Rutland court did not address the scenario in the instant case, i.e., a motion for sanctions is ostensibly served after a judge advises by unfiled memorandum that he has decided the relevant issues, spells out the details of his findings, and requests the prevailing party's counsel to prepare a proposed order, but the prevailing part does not re-serve the motion after the formal order is filed and mailed to all parties.

The target parties point to paragraph 133 of the merits order as further support for their argument that the motion had to be re-served. In that paragraph, this court acknowledged that at the conclusion of the January 15 hearing, Mrs. Hammer asserted a claim for sanctions under the Act. The court further stated that the Act was "not a factor at this stage as the very terms of the Act do not apply until the post-trial stage . . . ." The court denied the sanctions claims without prejudice to Mrs. Hammer's right to seek relief under the Act "after this matter is concluded." The court instructed counsel for Mrs. Hammer "to serve a filed copy of the motion upon all other parties and to mail the court a copy of the filed motion." Mrs. Hammer's counsel mailed a filed copy of the motion to the target parties on February 13, 2013. If the ten (10) day deadline applies as argued by the target parties, the motion was served two (2) days late.

Mrs. Hammer claims Rutland stands for the proposition that a motion for sanctions under the Act can be made before a final order is issued. Therefore, she claims, the court's directive in paragraph 133 is irrelevant to the timeliness issue, and that even so, she complied with the directive when she mailed the filed motion to the target parties on February 13.

In my view, the unique posture of this case on January 15 compels the conclusion that the motion was timely "made", i.e. served, on January 15. See Curtis v Blake, 381 S.C. 189, 672 S.E. 2d 576 (2009) for the proposition that "made" means "served"). The target parties were fully aware that Mrs. Hammer had prevailed on the merits, and they were fully aware she had moved for sanctions. I conclude they were properly served with the motion on January 15, 2013.

In light of this ruling, the court need not address Mrs. Hammer's other arguments about the timeliness of her motion.

The court further notes that the foregoing timeliness discussion may be moot as a practical matter, as Mrs. Hammer also seeks sanctions against the target parties under Rule 11, SCRCP. In Russell v Wachovia Bank, N.A., 370 S.C. 5, 633 S.E. 2d 722 (2006), the Supreme Court stated:

> We do distinguish between [the Act] and the Rule 11 sanctions. There is no requirement that a motion for sanctions made pursuant to Rule 11 be made within ten days from notice of entry of judgment. As a result, we decline to address what time limit is proper with regard to Rule 11 sanctions because the issue is not before us.
>
> 633 S.C. 2d at 730 (fn11)
> (emphasis added)

Mrs. Hammer's Rule 11 motion is grounded on the same allegations as her motion under the Act. Rule 11 issues are decided by employing a subjective standard, while application of the Act requires employment of an objective standard.

III. Merits of Sanctions Motion

A. Preliminary Issues

The court will first address two issues raised by Mr. Hammer in the motion against him in the 1634 Main action. He suggests, but does not demand, that I may recuse myself from hearing the sanctions motions because I may not be able to be impartial, in light of my ruling in many particulars in the merits order that his tactics and actions were frivolous and grounded in bad faith. These finds were pertinent to findings of fact and conclusions of law in the abuse of process counterclaim of Mrs. Hammer, and were also pertinent to the issue of punitive damages. Mr. Hammer claims the Act does not require the initial trial judge to hear the motion for sanctions. Mr. Aiken, for himself and for Mr. Hammer in Hammer v Hammer, and Ms. Lipscomb, for 1634 Main, do not advance this position. I have no doubt I can resolve these issues impartially and will not recuse myself.

Second, Mr. Hammer addresses the provisions of the Act requiring the court to report findings to the Commission on Lawyer Conduct and the Supreme Court, and the provision requiring reporting to the Governor, Senate, and House of Representatives. He claims these requirements chill the viability of any appeal he may pursue, deny the opportunity for a fair hearing, and serve to deny him due process. The court disagrees.

The court next addresses Mrs. Hammer's claim for sanctions against Mr. Aiken, counsel for Mr. Hammer in Hammer v Hammer from the day of trial through the present, and as counsel for Mr. Hammer in the third party action in the 1634 Main action from October 28, 2011 through October 29, 2012, the day trial began. Mrs. Hammer claims Mr. Aiken is subject to sanctions because he, among other things, made motions for continuance, prepared subpoenas, etc. It is important to note that Mr. Aiken was at all times defending Mrs. Hammer's counterclaims or third party claims. While the Act and

Rule 11 allow for sanctions for activity in defending claims, the court concludes Mr. Aiken's conduct was in no way sanctionable under either the Act or Rule 11. The fact he sought and received continuances or served subpoenas is not sufficient, without further evidence of sanctionable conduct, to warrant imposition of sanctions.

The target parties claim there can be no award of sanctions because Mrs. Hammer must have been granted summary judgment on Mr. Hammer's and 1634 Main's claims before she can be awarded sanctions under the Act. Case law supports the proposition that if a plaintiff's claims survive a motion for summary judgment, the defendant may not receive sanctions under the Act. See Hanahan v Simpson, 326 S.C. 140, 485 S.E. 2d 903 (1997). Here, however, if Mrs. Hammer filed a motion for summary judgment on 1634 Main's claims against her, it was never heard. In Hammer v Hammer, Mr. Hammer's claims were dismissed by the Honorable L. Casey Manning for lack of subject matter jurisdiction. The target parties cite no authority for the proposition that the moving party must actually move for and be granted summary judgment in order to be entitled to sanctions. Therefore, the court concludes that this particular argument has no merit.

1634 Main also argues there can be no sanctions under the Act because the court denied Mrs. Hammer's motion for involuntary nonsuit at the close of 1634's case. The court disagrees that such a denial renders 1634's claims non-frivolous as a matter of law. The two actions were consolidated for trial, and the 1634 issues were somewhat convoluted, and any denial of the motion for involuntary nonsuit was the product of the court's effort to have all the evidence before it in order to resolve both cases on the merits. Many tenuous issues were raised by Mr. Hammer and by 1634, and the court saw the need to have all evidence before it before issuing the merits order. Technically,

survival of a nonsuit motion might shield a party from sanctions, but as a practical matter, that would have been an illogical and inefficient manner of judicially resolving this case.

Any argument to this effect advanced by Mr. Hammer is dismissed. He was the target of counterclaims in Hammer v. Hammer and was the third party defendant in the 1634 Main action. If any motions for summary relief were made by Mrs. Hammer against Mr. Hammer, such would be irrelevant to the issue of whether Mr. Hammer can be sanctioned.

The target parties also argue that the term "frivolous" as used in §15-36-10 (C)(2) of the Act does not equate to the notion of lack of good faith or the terms "harass", "injure", etc. used in §15-36-10 (C)(1)(a), (b), and (c). However, the term "frivolous" is clearly invoked in the provisions immediately preceding (a), (b), and (c). This argument is totally without merit.

Mr. Hammer also claims that since Paragraph 96 of the merits order sets forth that Ms. Lipscomb's conduct was in no way objectionable, and since she represented Mr. Hammer for a time in Hammer v Hammer, there can be no award of sanctions against anyone in Hammer v Hammer. I disagree. The court's findings in Paragraph 96 dealt solely with Ms. Lipscomb's role as counsel for 1634 Main, and the merits cannot be read in good faith in any other way.

B. Claim for Sanctions under Rule 11, SCRCP

I now turn to the merits of Mrs. Hammer's sanctions claims and will first address her Rule 11 claim. Under Rule 11, SCRCP, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. The party or attorney may also be sanctioned for doing these things in bad

faith whether or not there is good ground to support the filing or argument. Ex parte Gregory, 378 S.C. 430, 663 S.E. 2d 46 (2008). Claims which are not made in good faith are subject to sanction pursuant to Rule 11. Chewning v Ford Motor Co., 354 S.C. 72, 579 S.E. 2d 605 (2003). As noted above, the court is to employ a subjective standard in determining whether Rule 11 sanctions are warranted.

If the court imposes sanctions, it is to describe the conduct determined to constitute a violation of Rule 11 and should explain the basis for the sanctions imposed. Ex Parte Gregory, supra. The sanctions may include an order to pay the reasonable costs and attorney fees incurred by the party defending the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature, or reasonable monetary penalty to the other party. Ex parte Gregory and Runyon v Wright, 322 S.C. 15, 471 S.E. 2d 160 (1996).

This court determines that Howard's conduct warrants an award of sanctions under Rule 11. Applying a subjective standard, this court is absolutely convinced that Howard's initiation of and prolonging both captioned actions were the product of his bad faith desire to harass Mrs. Hammer and cause her the most financial injury possible. With regard to sanctions imposed against Mr. Hammer and 1634 Main, L.P., the court incorporates herein its findings in Paragraphs 1, 2, 13, 14, 20, 22, 30, 32, 37, 39, 40, 41, 42, 43, 46, 53, 58-60, 76, 77, 80, 83, 88-90, 92, 94, 97, 98, 103, 105, 106, 109, 117, 123, 128, 131, and 136 of the merits order. Mr. Hammer's actions have resulted in Mrs. Hammer incurring attorneys' fees and costs in two actions sponsored by him. As noted in the merits order, the court is convinced Mr. Hammer threatened and desired to

bankrupt Mrs. Hammer through this litigation. That is a classic example of the bad faith contemplated by Rule 11.

An award of sanctions against 1634 Main under Rule 11 is also warranted. 1634 Main, acting through Mr. Hammer, engaged in conduct that convinces the court of its bad faith pursuit of a frivolous collection action against Mrs. Hammer. This was a product of Mr. Hammer's bad faith motives that are reviewed in the merits order in detail. It should be again noted that the general partner in 1634 Main is SH5, LLC, of which Mr. Hammer is the sole member. Thus, he controls the actions of 1634 Main. Mr. Hammer is also a limited partner, individually. He prompted the 1634 litigation ostensibly to collect money from Mrs. Hammer for the purpose of making repairs to the building at that address. However, he made sure collection efforts were not directed at him, when he also owned a percentage interest in the property. These efforts to collect against Mrs. Hammer were undertaken in spite of the fact that she had, pursuant to family court order, tendered her interest in the partnership and in the real property, which tender Mr. Hammer refused to accept.

In her Amended Affidavit of Attorneys' Fees and Costs, counsel for Mrs. Hammer divides fees and costs into six categories or "Packets". Packet No. 1 reflects billing for fees and costs incurred for petitioning the Supreme Court to assign one judge to hear circuit court matters and one judge to hear family court matters. I agree with counsel that the necessity of the petition was evident in light of Mr. Hammer's abuse of the system in prolonging litigation. This packet also includes billing for the mediation of all circuit court and family court disputes. The total of fees and costs in Packet No. 1 is $39,480.17. It would not be proper for this court to award fees and costs incurred in

family court litigation and Packet No. 1 does not adequately distinguish between the two. The court realizes this would be a difficult if not impossible task in hindsight. However, the court declines to speculate as to which is which.

Packet No. 2 reflects fees and costs incurred for Mrs. Hammer's defense in Hammer v. Hammer. These fees and costs were incurred in the amount of $19,981.84, and the court concludes they are reasonable, after consideration of the factors set forth in Rule 407, SCACR, Rule 1.5. The target parties have not disputed the amount incurred and have presented no evidence on the requisite factors. The court concludes extensive time and labor was necessarily devoted to defending Mr. Hammer's claims, and great litigation skill and experience were necessary. The amount of time expended was reasonable, and it is clear that counsel was not able to devote substantial time to other matters. The hourly rates charged are reasonable. The results obtained were favorable to Mrs. Hammer. The theories presented by Mr. Hammer were novel (though groundless) to the court of common pleas. Mrs. Hammer faced great financial exposure if the claims were not vigorously defended. Ms. Ballard and those in her firm have the requisite experience and reputation to justify the fees charged. No one can dispute their expertise and ability. Certainly, concentrated effort was necessary to defend these claims and to have a motion to dismiss heard as soon as possible. The court sanctions Mr. Hammer in the amount of $19,981.94.

Packet No. 3 reflects fees and costs incurred in the defense of Mrs. Hammer in the 1634 Main action. In my view, the litigation was baseless. As noted in the merits order, the court concluded the 1634 litigation was promoted and instigated by Mr. Hammer. This is obvious because 1634 Main sued only Mrs. Hammer for her purported share of

the repair/maintenance estimate. Mr. Hammer and his young son were also partners and were not sued for and did not confess judgment for their admitted shares, nor did they pay it. His claim that he did not have the money to pay his share is beside the point, as there is no requirement that a party must "have the money" to pay a debt before he can be sued for collection. It is clear that his marching orders to Mr. Turbeville (the principal in the 1634 Main's property manager) were that 1634 was to sue only Mrs. Hammer. The paragraphs of the merits order referenced on page 12 above are again incorporated herein by reference. The findings pertinent to 1634 Main L.P. are relevant to the rationale in imposing sanctions against 1634 Main.

Mrs. Hammer incurred fees and costs totaling $102,032.87 in defending herself in the 1634 action. Analysis of the foregoing eight factors is much the same as it was for Packet No. 2, and the court is compelled to sanction 1634 Main, L.P. in that amount.

Packet No. 4 sets forth fees and costs of $40,762.46 incurred by Mrs. Hammer in Hammer v. Hammer for combating the appeal filed by Mr. Hammer after Judge Manning dismissed that action for lack of subject matter jurisdiction. The incorporated findings from the merits order set forth on page 12 above pertinent to Mr. Hammer have application to the imposition of sanctions against Mr. Hammer. The analysis of the eight factors set forth above concerning Packet No. 2 is certainly the same for Packet No. 4. The court sanctions Mr. Hammer in the amount of $40,762.46.

The court declines to impose sanctions on either Mr. Hammer or 1634 Main for the fees and costs set forth in Packet Nos. 5 and 6, in the event Mrs. Hammer requests the same. These packets reflect fees and costs incurred in pursuing her counterclaims and in pursuing the instant motion for sanctions.

The court notes that Mr. Hammer, Mr. Aiken, Ms. Lipscomb, and attorney James B. Richardson, Jr. have all submitted affidavits in opposition to the motion for sanctions. Mr. Richardson states that he has read the Court of Appeals decision in Hammer v. Hammer, 399 S.C. 100, 730 S.E. 2d 874 (Ct. App. 2012). This is the opinion affirming Judge Manning's dismissal of Hammer v. Hammer. Of course, Hammer v. Hammer is the contract action upon which this court's merits order awarding damages to Mrs. Hammer for abuse of process is partially based. Mr. Richardson states that the Court of Appeals' decision was a sophisticated, detailed legal analysis of the issues and that he believes the Court of Appeals never has and never will publish an opinion in a case the Court Of Appeals deems frivolous. In my view, while Mr. Richardson is certainly an experienced, exceedingly capable, and highly respected attorney, the fact that the Court of Appeals undertook a detailed and sophisticated analysis of the issues then on appeal does not translate to a finding that the underlying action was not frivolous.

Similarly, while the court respects and appreciates the expertise and experience of Ms. Lipscomb and Mr. Aiken, their opinions as to the merits of the claims in Hammer v. Hammer and in the 1634 Main litigation do not necessarily foreclose the imposition of sanctions under Rule 11. The imposition of sanctions is in my view clearly and convincingly warranted by virtue of the conduct of Mr. Hammer and of 1634 Main, by and through Mr. Hammer.

The total amount of sanctions imposed against Mr. Hammer under Rule 11 is in the amount of $60,744.30, and the total amount of sanctions imposed against 1634 Main, L.P. under Rule 11 is in the amount of $102,032.87.

C. Claim for Sanctions under the Act

Such claims must be analyzed using an objective standard, rather than the subjective standard employed for Rule 11 claims. §15-36-10 C (1)(a)(b) and (c) allow sanctions against a party or an attorney of a party if a reasonable attorney in the same circumstances (a) would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith argument did not exist for changing the law, or (b) would believe that his initiation or continuation of the suit was intended merely to harass or injure the other party, or (c) would believe that the case was frivolous as not reasonably founded in fact or was interposed merely for delay, or was brought for a purpose other than securing proper discovery or adjudication of the claims upon which the action is based.

Under §15-36-10 (E), the court is to take into account the number of parties, the complexity of the claims, information disclosed or undisclosed during discovery and investigation, previous violations of the Act, the response, if any, to the allegations the Act had been violated, and all other factors the court considers just, equitable, or appropriate. In the Hammer v. Hammer case, there were only two parties. The claims of Mr. Hammer were, on their face, not exceedingly complex from a factual standpoint. Information disclosed during discovery and/or investigation was not of much note, as the parties already knew the issues because of the rampant family court litigation. There were no previous violations of the Act committed by Mr. Hammer or by 1634 Main, to the knowledge of the court. The court's main focus concerning sanctions is the egregious conduct of Mr. Hammer and 1634 Main, by and through Mr. Hammer, as set forth herein and as set forth in detail in the merits order. A reasonable attorney in Mr. Hammer's position would know full well that his initiation and continuation of the Hammer v.

Hammer litigation (beginning with the filing of the *lis pendens*) were undertaken to harass and injure Mrs. Hammer and that the action was merely brought for purposes other than securing proper discovery, joinder of parties, or adjudication of the claim upon which the action was based. The same is to be said for the procurement, initiation, and continuation of the 1634 Main action against Mrs. Hammer. Among other things, Mr. Hammer, as sole of member of general partner SH5, LLC, saw to it that only Mrs. Hammer was sued for her purported share of the repair expenses. In addition, this litigation was procured even though Mrs. Hammer had attempted a tender of her interest in the partnership and in the real estate. A reasonable attorney, with knowledge of all pertinent facts and as contemplated in the Act, would believe these actions in both cases were taken in violation of at least §15-36-10 (C) (1) (b) and (c). Mr. Hammer had knowledge of all pertinent facts at the time he filed the *lis pendens* and commenced Hammer v. Hammer. He also had knowledge of all pertinent facts at the time he orchestrated the initiation of the 1634 action. The totality of the circumstances and the greater weight of the evidence establish the claims were frivolous. Therefore, the court awards sanctions in the same foregoing amounts as awarded under Rule 11. Of course, Mrs. Hammer is not entitled to double recovery of these sanctions.

Based on the foregoing, it is ORDERED

1. Shirley Hammer is awarded sanctions against Howard Hammer in the amount of $60,744.30;
2. Shirley Hammer is awarded sanctions against 1634 Main, L.P. in the amount of $102,032.87.
3. No sanctions are awarded against Arthur K. Aiken.

4. All motions for reconsideration, to alter or amend judgment, and/or for a new trial are denied.

AND IT IS SO ORDERED.

George C. James, Jr.
Circuit Court Judge

Sumter, South Carolina

June 3, 2013

EXHIBIT B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY AND DARLINGTON
Circuit Court

J. Michael Baxley, Circuit Court Judge
Case No. 07-CP-40-0576

J. Michael Baxley, Circuit Court Judge
Case No. 40-CP-16-0332

Ex Parte: Douglas N.Truslow, Respondent,

Ex Parte: Tony R. Megna, Appellant,

In re:

James Anasti, Plaintiff,

v.

Lance Wilson, Willis Goodwin, Gina L. Anasti Lee and Richland County Clerk of Court, Defendants.

And

Ex Parte: Desa Ballard, Respondent,

Ex Parte: Tony R. Megna, Appellant,

In re:

Pee Dee Health Care, P.A., Plaintiff,

v.

Estate of Hugh S. Thompson, Defendant.

APPELLANT'S INITIAL BRIEF

Amended Motion in the Circuit Court.

Moreover, the Amended Motion did not include any support for this claim of damages/sanctions in the amount of $500,000.[9] In a footnote, the Amended Motion purported to "supplement the prior motion so as to make clear that the sanctions are not sought against Defendant Lee...." but only against Appellant. The prior motion filed in 2007, to which this Footnote refers, did not specify the amount of sanctions sought.[10] Thus, Appellant was entitled to contest the damages/sanctions sought, especially in light of the fact that the Court of Appeals had already denied Truslow's Motion requesting an assessment of $183,000, yet upon remand, Truslow sought more than double that amount.

III. The lower court erred in allowing Truslow to proceed on a motion for sanctions filed more than ten days after remittitur of the Anasti case.

After remittitur, a circuit court reacquires jurisdiction "to enforce the judgment and take any action consistent with the appellate court's ruling." Bunkum v. Manor Properties, 321 S.C. 95, 98-99, 467 S.E.2d 758, 760 (Ct. App. 1996). See also, Christy v. Christy, 317 S.C. 145, 151, 452 S.E.2d 1, 4 (Ct. App. 1994)("The final disposition of a case occurs when the remittitur is returned by the clerk of the appellate court and filed in the lower court."). Furthermore, all post-judgment motions, including those for sanctions, must be filed within ten days of receipt of notice of the entry of an order. Rule 59, SCRCP; Pitman v. Republic Leasing Co., Inc., 351 S.C. 429, 432-33, 570 S.E.2d 187,

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9 Thus, it is unclear as to whether Truslow was trying to include the $183,000 he sought in this Court that had already been rejected.

10 Furthermore, while Truslow styled his motion as an "amended" motion, it is, in actuality, as completely separate motion than the original sanctions motions filed in 2007, as Judge Baxley recognized: "Prior to Megna's first appeal, Truslow filed a Rule 11 sanctions motion against Lee and Megna. **That motion has not been heard and is not addressed by this Order....**" (R.p. __,Order awarding Sanctions. 2/13/13) (emphasis added).

189-90 (Ct. App. 2002) (holding that a motion for sanction must be made within ten days under Rule 59); Cox v. Fleetwood Homes of Ga., Inc., 334 S.C. 55, 58, 512 S.E.2d 498, 500 (1999) (trial judge loses jurisdiction after the time for post-trial motions has elapsed).

In the Anasti case, the dismissal of Gina Lee's appeals and the remittitur to the Circuit Court constitutes a final judgment. *See*, Bunkham and Christy, *supra*. Here, the remittitur was issued on October 7, 2011, but Truslow's motion was not filed until November 21, 2011 – much more than ten days after the remittitur. As it was untimely, the lower court no longer had jurisdiction to consider the matter. Pitman, *supra*. Since the motion itself was improper, Appellant's conduct in responding to the motion should not constitute sanctionable conduct. Thus, the order granting the motion was an abuse of discretion and must be vacated.

IV. The lower court erred in finding Appellant's discovery efforts as improper because discovery was necessary to contest the sanctions and there was no order limiting discovery.

As a matter of due process, Appellant must be afforded an adequate opportunity to contest the sanctions. *See, e.g.*, In re Kunstler, 914 F.2d 505, 522 (4th Cir. 1990)("We find that appellants were not given an adequate opportunity to respond to the type and amount of sanction imposed, *particularly in light of the large monetary sanction.*") (emphasis added).

Here, the Amended Motion, filed November 21, 2011, for sanctions sought more than $500,000 in damages and sanctions from Appellant. This amount was over twice as much as Truslow sought in the Court of Appeals (and which was denied). There was no affidavit or other attachment indicating how this enormous sum was reached. The only method by which Appellant could contest the sanctions and the large monetary amount was through discovery to determine the how the amount was calculated.

other litigation that was directly adverse to Appellant and Pee Dee. Id. As Ballard herself has acknowledged, she is not representing any party in the Thompson case. (R.p.__, Ballard Motion for Sanctions). Thus, because Ballard had received and reviewed confidential information about Pee Dee while at the same time she engaged in conversations with attorneys in Thompson and the Lake City litigation, Appellant had a good faith basis to investigate the substance of those conversations.

CONCLUSION

As set forth herein, the lower court's order was not supported by the facts and was based on errors of law. Thus, it is respectfully submitted that the lower court abused its discretion in awarding sanctions and the orders must be reversed.

James M. Griffin
Ariail E. King
Lewis, Babcock & Griffin, L.L.P.
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

ATTORNEYS FOR APPELLANT

Columbia, South Carolina
August 26, 2013

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NO. 10-CP-16-0332 (Probate Claim)
DOCKET NO. 10-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A.,,

Plaintiff,

vs.

Estate of Hugh S. Thompson ,

Defendant.

PROOF OF SERVICE

On behalf of the Defendant, the undersigned certifies that he has mailed a copy of the ***Defendant's Response to Motion to Strike Circuit Court Sanctions Motion*** and this Proof of Service to all counsel listed below this 24th day of March 2014, with proper postage attached thereto:

James M. Griffin, Esquire
Ariail E. King, Esquire
Lewis, Babcock & Griffin, L.L.P.
P.O. Box11208
Columbia, SC 29211

Tony R. Megna, Esquire
Matthews & Megna
3400 West Avenue
Columbia, SC 29203

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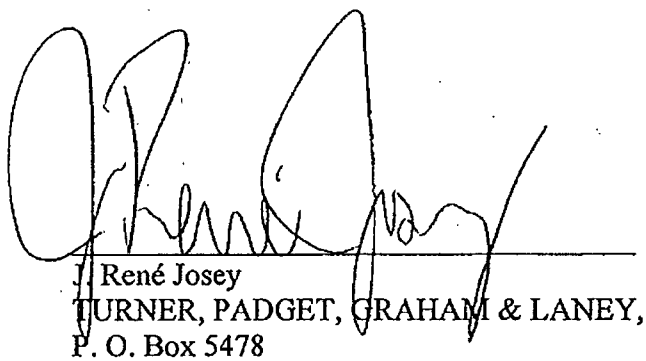

J. René Josey
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ATTORNEYS FOR DEFENDANT

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NO. 10-CP-16-0332 (Probate Claim)
DOCKET NO. 10-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A.,,

Plaintiff,

vs.

Estate of Hugh S. Thompson ,

Defendant.

PROOF OF SERVICE FOR CIRCUIT COURT SANCTION'S MOTION

On behalf of the Defendant, the undersigned certifies that he mailed a copy of the ***Defendant's Motion for Circuit Court Sanctions*** to all counsel listed below on the 16th day of January 2014, with proper postage attached thereto AND has mailed a copy of this proof of service to all counsel listed below on this 24th day of March, 2014, with proper postage attached thereto:

James M. Griffin, Esquire
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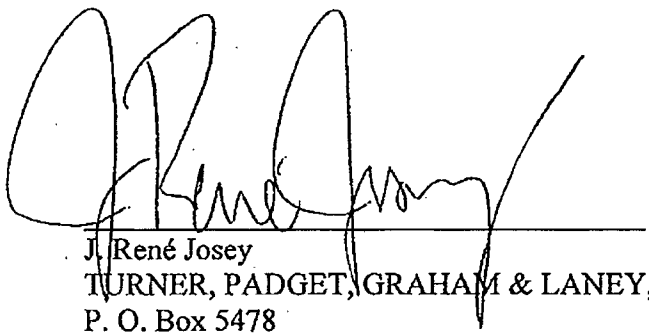

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WRITER'S DIRECT DIAL: (843) 656-4451
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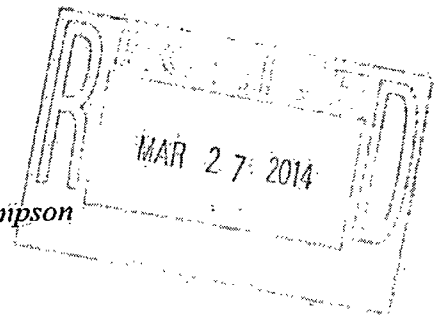
March 24, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211



Re: *Pee Dee Health Care, P.A. v. Estate of Hugh S. Thompson*
Case No.: 2010-CP-16-0332
Tracking No.: 2011-185767 (1st appeal)
Tracking No.: 2011-197671 (2nd appeal)
Tracking No. 2011-203391 (3rd appeal)
TPGL File No.: 10667.101

Dear Ms. Kitchings:

On behalf of the Respondent in the above-referenced matters, I am writing to make your Court aware that a hearing is now scheduled for the parallel motion for sanctions in the circuit court. (A motion for sanctions is already pending in this court). In that parallel motion filed with the trial court, the Respondent is not seeking the attorney's fees requested as a sanction in the motion pending in your Court. That matter is scheduled for hearing in the Circuit Court this Thursday, March 27, 2014.

By copy of this letter to all counsel of record for the appellant, I am making them aware of this communication with the court.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ:vlb
Cc: Jay James, II, Esq
Tony R. Megna, Esq. & Benjamin R. Matthews, Esq.
James M. Griffin, Esq. & Ariail E. King, Esq.

TURNER PADGET
TURNER PADGET GRAHAM & LANEY P.A.

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March 24, 2014

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

Re: *Pee Dee Health Care, P.A. v. Estate of Hugh S. Thompson*
Case No.: 2010-CP-16-0332 (Probate Claim) and 2010-CP-16-0633 (Probate Appeal)
TPGL File No.: 10667.101

Dear Judge Baxley:

Enclosed please find a courtesy copy of the ***Defendant's Response to Motion to Strike Circuit Court Sanctions Motion*** in the above-referenced cases. By copy of this letter hand-delivered to Scott Suggs, the original of this response is being filed for the court's consideration. By mailed and e-mailed copy of this letter to Tony R. Megna, Benjamin R. Matthews, James M. Griffin, and Ariail E. King, we are serving plaintiff's counsel with a copy of this response as well. This Response is accompanied by a Certificate of Service for it – also for filing with the Clerk of Court. In addition, to complete the record, I am enclosing a Certificate of Service on January 16, 2014, for the original Sanction's Motion filed in this Court – I would ask that the Clerk file that separate Certificate of Service as well.

Mr. James and I look forward to discussing these matters with the Court on Thursday afternoon.

Sincerely,
TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ:vlb
Enclosures
cc: Scott B. Suggs, Darlington County Clerk of Court (w/original enclosures)
Tony Ray Megna, Esquire and Benjamin R. Matthews, Esquire (w/enclosures)
James M. Griffin, Esquire and Ariail E. King, Esquire (w/enclosures)
John J. James, II, Esquire (w/enclosures)

COPY

STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON	IN THE COURT OF COMMON PLEAS TWELF JUDICIAL CIRCUIT
Pee Dee Health Care, P.A., Plaintiff v. Estate of Hugh S. Thompson Defendant	Case No. 2010-CP-16-0332 Case No. 2010-CP-16-0633 MEMORANDUM IN OPPOSITION TO MOTION FOR SANCTIONS

INTRODUCTION

Plaintiff Pee Dee Health Care, P.A. (PDHC) and Respondents Matthews and Megna, LLC, Ben Matthews and Tony Megna, by their undersigned counsel, hereby submit this Memorandum in Opposition to Defendant's Motion for sanctions under the South Carolina Frivolous Proceedings Act and Rule 11, S.C. Rules Civ. P. For the reasons stated herein, the Defendant's motion should be denied.

I. DEFENDANT'S MOTION FOR SANCTIONS UNDER THE SOUTH CAROLINA FRIVILOUS PROCEEDINGS ACT AND RULE 11 IS UNTIMELY

PDHC previously filed a motion to strike Defendant's claims for sanctions under the South Carolina Frivolous Proceedings Act (FPA), S.C. Code § 15-36-10, on the grounds that this Court lacks subject matter jurisdiction to consider the motion. Respondents Matthew and Megna LLC, Ben Matthews and Tony Megna likewise oppose the Defendant's motion on the same grounds and hereby incorporate by reference all arguments set forth in the previously filed motion to strike.

In addition, Defendant's claim for sanctions under Rule 11 is also untimely for the same reasons. In *Russell v. Wachovia, NA.* 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006) the Supreme

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CLERK OF COURT
DARLINGTON COUNTY, S.C.

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

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Court reversed the lower court's ruling that a Rule 11 sanctions motion was untimely because it was filed after ten (10) days from the entry of the judgment. The Supreme Court recognized that this ten (10) day jurisdictional limitation applies to Rule 11 sanctions motions, as well as motions under the FPA, but concluded that the trial judge calculated the dates incorrectly. The Court stated:

> Generally, a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed. *Ex parte Beard,* 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct.App.2004). An order is not final until it is entered by the clerk of court; and until the order or judgment is entered by the clerk of court, the judge retains control of the case. *Upchurch v. Upchurch,* 367 S.C. 16, 22, 624 S.E.2d 643, 646 (2006). As a result, a motion for sanctions must be filed within ten days of the notice of entry of judgment. *Pitman v. Republic Leasing Co., Inc.,* 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct.App.2002).
>
> In the present case, the trial judge signed the order granting summary judgment on April 27, 2001....However, judgment was not entered by the clerk until May 8, 2001. The Williams Children filed their motion for sanctions on May 14, 2001, which is within the ten day time limit. Therefore, the trial court erred in finding that it lacked jurisdiction to consider the motion. Accordingly, the issue of sanctions pursuant to the FCPSA and Rule 11 should be remanded to the trial court

370 S.C. at 20, 633 S.E.2d 730 (2006).

II. DEFENDANT MAY NOT RECOVER ATTORNEYS FEES AGAINST PLAINTIFF'S COUNSEL UNDER THE SOUTH CAROLINA FRIVILOUS PROCEEDINGS ACT

As originally enacted the FPA provided that "any person who takes part in the procurement, initiation, continuation, or defense of any civil proceeding is subject to being assessed for payment of all or a portion of the attorney's fees and court costs of the other party" for violating the FPA. In July 2005, the FPA was completely revised. The amended version of the FPA defines what type of sanctions may be imposed at S.C.Code § 15-36-10-(G). This provision states, in part:

> (G) Sanctions may include:

(1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section;

(2) an order for the attorney to pay a reasonable fine to the court; or

(3) a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

Thus, after the 2005 amendments, a party may not obtain an award of attorney's fees from their opponent's lawyer under the FPA.

III. DEFENDANT'S CLAIM FOR ATTORNEYS FEES INCURRED WHILE LITIGATING IN THE COURT OF APPEALS IS IMPROPER

Jurisdiction to award attorney's fees incurred in the appeal of a case before the South Carolina Court of Appeals lies exclusively within the Court of Appeals. Under South Carolina Appellate Court Rule 222(b), attorney's fees are limited to $1,000 unless modified pursuant to motion under Rule 222(e). In order for the Court to award actual attorney's fees incurred, the prevailing party must make a motion to the Court within ten (10) days after the service of the statement of costs. The statement of costs must be served prior to the remittitur. *Rules 222(c), SCACR; Sub-Zero Freezer Co. v. R.L. Clarkson Co.*, --- S.C. ----, 417 S.E.2d 569 (S.C.1992).

In *Bowen & Smoot v. Plumlee*, 308 S.C. 325, 417 S.E.2d 855 (1992), the Supreme Court remanded the case to the lower court for an award of attorneys' fees incurred in defending the action. On remand, the respondents' attorney submitted an affidavit of attorneys' fees which included attorneys' fees in the appeal. The appellant filed a motion for clarification of the Supreme Court's order. The Supreme Court on clarification ruled that:

> 1) That unless otherwise stated by this Court, the prevailing party on appeal is only entitled to recover attorney's fee for the appeal in the amount of $750 as automatically provided by Supreme Court Rule 38, now Rule 222(b), (e), SCACR; 2) that respondents never requested of this Court an order modifying the amount of attorney's fees allowed; 3) that the remand was for the limited

> purpose of determining reasonable attorney's fees incurred in the trial court; and 4) the circuit court was not given authority to award attorney's fees for the appeal.

Defendant therefore may not obtain any award of attorney's fees from this Court for conduct occurring before the South Carolina Court of Appeals.

IV. DEFENDANT'S CLAIM FOR ATTORNEYS FEES FOR LITIGATING IN PROBATE COURT IS LIKEWISE IMPROPER

Defendant also seeks sanctions for matters that occurred in probate court. However, the South Carolina Rules of Civil Procedure, including Rule 11, do not apply to matters that occurr in probate court. Rule 1, S.C. Rules Civ. P. states "[t]hese rules govern the procedure in all South Carolina courts in all suits of a civil nature whether cognizable as cases at law or in equity." Here, Defendant argues that Plaintiff and its attorneys should be sanctioned for requesting that the personal representative obtain a surety bond, for requesting that a special administrator be appointed and for objecting to certain expenditures. These matters are not "suits of a civil nature" but rather involve the administration of an estate. Moreover, to the extent that a court has inherent power to impose sanctions, this power lies in the probate court before whom the actions complained of occurred.

V. DEFENDANT'S ARE NOT ENTITLED TO RULE 11 SANCTIONS AGAINST PLAINTIFF OR PLAINTIFF'S ATTORNEYS

A. Rule 11 Standard

Under Rule 11, S.C. Rules Civ. P. a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith (i.e., to cause unnecessary delay) whether or not there is good ground to support it. *Runyon*

v. Wright, 322 S.C. 15, 18-19, 471 S.E.2d 160, 161-62 (1996) *See Link v. School District of Pickens County,* 302 S.C. 1, 393 S.E.2d 176 (1990). Unlike the FPA[1], the standard for determining whether an attorney's actions violate Rule 11 is subjective. *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 599, 713 S.E.2d 624, 629 (2011)("The notes to the rule demonstrate that the subjective standard has not been changed."); Rule 11, SCRCP note ("This version of Rule 11(a) is not nearly so stringent as the latest version of the Federal Rule which became effective August 1, 1983."). Additionally, Rule 11 sanctions may only be imposed against the represented party and/or the attorney who signed a pleading, motion or other paper in violation of the Rule, or otherwise made a frivolous argument.

B. The Lawsuit Was Not Frivolous

The underlying facts regarding the dispute between Plaintiff and Defendant are fairly straight forward. Plaintiff PDHC employed Dr. Thompson as a physician and paid him to treat patients of PDHC. In exchange for receiving payment for his services directly from PDHC, Dr. Thompson assigned to PDHC his rights to Medicare payments for treating patients. Beginning about 1998 and continuing to sometime in 2000, Dr. Thompson treated patients at PDHC, received payment for his services from PDHC and PDHC billed Medicare for those services under the assignment. Medicare paid PDHC for these assigned claims. However, unbeknownst to PDHC, Dr. Thompson was not approved by Medicare to receive payment for the treatment of patients.

In or about 2007 CMS demanded that PDHC pay back more than $200,000 it had received for the assigned claims. PDHC appealed the decision through the administrative appeals

[1] The 2005 Amendments changed the standard for imposing sanctions to "reasonable attorney" standard. S.C. Code § 15–36–10(A)(4)(a)(iii); *Southeastern Site Prep, LLC v. Atlantic Coast Builders and Contractors, LLC*, 713 S.E.2d 650 (S.C. Ct. App. 2011).

process and lost. The administrative court concluded that PDCH had a non-delegable duty to Medicare. Furthermore, the administrative court found that PDHC should have known about the exclusion status of its employees through due diligence prior to entering the employment relationship and that PDHC could have easily determined Dr. Thompson's status by checking the OIG website. Dr. Thompson was not a party to the administrative appeal and the administrative court did not address whether PDHC could seek indemnification from Dr. Thompson.

Thereafter, PDHC commenced a lawsuit against Dr. Thompson's Estate to obtain reimbursement of the money PDHC had to pay back to CMS. PDHC through its attorneys pled various causes of action seeking to obtain essentially the same relief. In essence, Dr. Thompson provided an assignment of payments from Medicare to PDHC when he did not have the right to receive any such payments. PDHC paid Dr. Thompson for this assignment and ultimately did not receive the benefit of its bargain with Dr. Thompson.

This Court granted Defendant summary judgment concluding that PDHC was collaterally estopped from seeking reimbursement from Dr. Thompson's estate as a result of the administrative ruling. This Court's order granting summary judgment appears to be a ruling of first impression. Although the doctrine of collateral estoppel certainly is not novel, its application to administrative hearings is not always clear. In *Crosby v. Prysmian Commc'ns Cables & Sys. USA, LLC*, 397 S.C. 101, 108-09, 723 S.E.2d 813, 817 (Ct. App. 2012), Chief Judge Few of the S.C. Court of Appeals explained:

> Our courts have applied the doctrine of issue preclusion to the factual determinations of administrative tribunals [citations omitted]. However, not every factual determination by an administrative agency is entitled to preclusive effect. In *Shelton v. Oscar Mayer Foods Corp.*, 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997), our supreme court held that the factual findings of the employment security commission are not preclusive in a subsequent action for wrongful discharge. The *Shelton* court set forth the starting point for analyzing whether a particular agency's findings are preclusive:

> In the abstract, there is no legitimate reason to permit a defendant who has already thoroughly and vigorously litigated an issue and lost the opportunity to relitigate the identical question.... The public interest demands an end to the litigation of the same issue. Principles of finality, certainty, and the proper administration of justice suggest that a decision once rendered should stand *unless some compelling countervailing consideration necessitates relitigation.*

397 S.C. at 108-09, 723 S.E.2d at 817 (emphasis added).

Counsel is unaware of any reported South Carolina decisions, other than this Court's summary judgment Order, applying the doctrine of collateral estoppel to administrative rulings from an appeals of a decision by CMS demanding repayment of Medicare funds. Furthermore, as noted by Judge Few, not all factual determinations are entitled to preclusive effect. Rather, only those determinations that were (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Crosby v. Prysmian Commc'ns Cables & Sys. USA, LLC*, 397 S.C. 101, 109, 723 S.E.2d 813, 817 (Ct. App. 2012). Lastly, collateral estoppel is an affirmative defense that if not pled will be waived. See, *Duckett v. Goforth*, 374 S.C. 446, 465, 649 S.E.2d 72, 82 (Ct. App. 2007)(Collateral estoppel is an affirmative defense which must be pled)

The record in this case fully establishes that there were good grounds to support the Complaint filed and served against the Estate. Clearly, there was a factual basis to believe that the Estate owed PDHC money as a result of the invalid assignment provided to PDHC by Dr. Thompson. Moreover, the administrative ruling did not address the merits of any claims that PDHC may have against Dr. Thompson. Furthermore, until this Court issued its ruling, there does not appear to be any South Carolina decisions applying the doctrine of collateral estoppel from a proceeding involving an appeal of a Medicare decision.

Lastly, it is not at all clear that the factual findings that were used to bar PDHC's claims were necessary to the administrative court's ruling that PDHC had a non-delegable duty to CMS.

This Court obviously found those factual determinations were necessary to the administrative court's ruling. However, the fact that this Court granted summary judgment against the Plaintiff is not dispositive of the sanctions issue. Rather, this Court and all others are called upon to decide questions that are not clear.[2]

C. Defendant's Assertion That Plaintiff Was Unreasonable In Regard to the Liquidation of the Assets of the Estate is Not Correct

The initial probate court order did not require the personal representatives to hold the assets of the estate in trust until PDHC claims were concluded, but, rather, allowed the Defendant to request distributions at will and permitted the probate court to authorize such distributions. Because the Probate Court order did not adequately protect the interests of Plaintiff, the Plaintiff appealed the order of the probate court. Thereafter, the parties agreed to execute a consent and release that Mr. James prepared, with both parties agreeing that Plaintiff would continue to appeal other aspects of the Probate Court order. The allegations of the Defendant to the contrary are incorrect. Following the agreement of the parties, the Defendant did not object to the sale of any additional properties. In fact, several additional properties have been sold to which the Plaintiff did not object. Finally, the Defendant never made any further requests of Plaintiff or motions before the probate court or this Court for disbursements of any funds for any purpose. The funds continue to be preserved and protected without payment of bond by mutual agreement of the parties.

CONCLUSION

The undersigned has intentionally not addressed all of the issues raised by counsel for the Defendant in this fourth motion for sanctions. While the Plaintiff and Respondents adamantly

[2] The Court of Appeals did not address the application of collateral estoppel to bar all of Plaintiff's claims. Rather, the Court dismissed the appeal as untimely in an unpublished decision.

deny all of the accusations, the continuation of the disputes between the parties before this Court should end. This Court previously ordered Mr. Megna to report all matters in these proceedings to the Office of Disciplinary Counsel. Mr. Megna did so. Further action in any Court is neither necessary nor required. Litigation must stop between the parties, so the Estate can be closed and judicial resources conserved.

Neither Rule 11 nor the FPA is designed to enforce the Civility Oath that each member of the bar agreed to abide by. Rather, the matters between the lawyers involved in the motion before the Court are best determined by the Office of Disciplinary Counsel as this Court has ordered.

Respectfully submitted.

A. Camden Lewis
James M. Griffin
Lewis, Babcock & Griffin, L.L.P.
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

March 25, 2014

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

STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON Pee Dee Health Care, P.A., Plaintiff v. Estate of Hugh S. Thompson Defendant	IN THE COURT OF COMMON PLEAS TWELF JUDICIAL CIRCUIT Case No. 2010-CP-16-0332 Case No. 2010-CP-16-0633 **CERTIFICATE OF SERVICE**

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Pee Dee Health Care, P.A., do hereby certified that I have served a copy of the foregoing **Memorandum in Opposition to Motion for Sanctions**, in connection with the above-referenced case by mailing a copy of the same by electronic and United States Mail, postage prepaid, to the following addresses on March 25, 2014:

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

Renee Josey
P.O. Box 5478
Florence, SC 29501

FILED
2014 MAR 26 AM 10:49
SCOTT B. SUGGS
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Jaime Harmon

Columbia, South Carolina
March 25, 2014

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COPY

STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON Pee Dee Health Care, P.A., Plaintiff v. Estate of Hugh S. Thompson Defendant	IN THE COURT OF COMMON PLEAS TWELF JUDICIAL CIRCUIT Case No. 2010-CP-16-0332 Case No. 2010-CP-16-0633 RESPONSE TO DEFENDANT'S AMENDED FEE AFFIDAVIT

FILED
2014 APR -8 AM 11:44
SCOTT B. SUGGS
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DARLINGTON COUNTY, S.C.

INTRODUCTION

Plaintiff Pee Dee Health Care, P.A. (PDHC) and Respondents Matthews and Megna, LLC, Ben Matthews and Tony Megna, by their undersigned counsel, hereby responds to the amended fee affidavit submitted to the Court following the Court's ruling that Plaintiff PDHC and Respondent Megna should be sanctioned under Rule 11 for continuing to contest this Court's order of disqualification. The total fees claimed in the amended affidavit far exceed the scope of this Court's sanction ruling.

I. TIME RELATED TO INITIAL MOTION TO DISQUALIFY SHOULD BE DISALLOWED

This Court's sanction order was limited to Megna's continuing opposition to the Court's disqualification ruling by filing a motion for reconsideration of the Order. Counsel understood that the Court did not sanction PDHC or Megna for opposing the original disqualification motion. Rather, as PDHC's counsel argued, one significant issue on disqualification is whether an attorney witness should be disqualified from participating from pre-trial proceedings. See

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Model Rule 3.7[1]("a lawyer shall not act as an advocate **at a trial** in which the lawyer is likely to be a necessary witness"). This Court ruled that Megna should be disqualified pre-trial. However, neither Plaintiff nor Megna's opposition to the pre-trial disqualification motion violated Rule 11. As a result, Plaintiff's claim for $13,000 in attorneys' fees should be disallowed. Amended Fee Application, ¶ 1.

II. TIME RELATED TO RECONSIDERATION OF SUMMARY JUDGMENT MOTION SHOULD BE DISALLOWED

This Court granted sanctions under Rule 11 based upon a finding that Megna continued to oppose this Court's ruling on disqualification. There was no suggestion that the opposition to Defendant's motion for summary judgment or reconsideration of the motion was in violation of Rule 11. The fact that Megna, rather than Matthews, signed the motion to reconsider the summary judgment order is immaterial to whether there were good grounds to support it. Furthermore, after this Court heard argument on the sanctions motion, the South Carolina Court of Appeals ruled upon Defendant's Motion for Sanctions addressing the same issues. The Court of Appeals denied the Defendant's Motion. See, Order of S.C. Court of Appeals, attached. This ruling is controlling on the question of whether there were meritorious grounds to support Plaintiff's claims and the other issues raised in the sanctions motion. As a result, the time related to reconsideration of the summary judgment motion should be disallowed.

III. TIME RELATED TO DISCOVERY REQUESTS SERVED UPON THIRD PARTIES

Defendant seeks to recover more than 30 hours of time relating to "responding to discovery subpoenas issued by disqualified counsel and quashed by this Court followed by participation [sic] as counsel of record in related hearings triggered by successful sanctions

[1] S.C. App. Court Rule 407.

efforts of third-parties." Amended Fee Application, ¶ 4. While this Court indicated that defense counsel's time related to the third party subpoena sanctions hearing should be included, it appears that more than 30 hours exceeds the amount of time that is either reasonable or necessary for defense counsel to prepare for and attend the motion to quash hearing. The Amended Fee Affidavit does not detail what was done in connection with the preparation for this hearing. The Amended Fee Affidavit simply does not provide sufficient information from which this Court can determined that the amount of time claim was reasonable and necessary. See, *First Union Nat. Bank of S. Carolina v. Soden*, 333 S.C. 554, 570, 511 S.E.2d 372, 380 (Ct. App. 1998). Therefore, the Defendant's request for fees relating to the motion to quash the third party discovery should be denied.

IV. TIME RELATED TO INITIAL PREPARATION OF SANCTIONS MOTION AND ARGUING THE MOTION SHOULD BE REDUCED

Defendant seeks an award of $13,320 for the time spent in preparation of the sanctions motion, Amended Fee Affidavit ¶5, and an additional $2,750 for preparing for and arguing the motion, Id. at ¶ 7. Defendant is not entitled to an award of all fees incurred in relation to the sanctions motion because the Defendant did not prevail on all the claims alleged. Defendant sought sanctions under the South Carolina Frivolous Proceedings Act (FPA) and Rule 11 for all of their attorneys' fees incurred in Circuit Court from the inception of the case. However, this Court denied this request and only granted sanctions under Rule 11 for Megna's conduct in relation to the order of disqualification. Thus, the fees for preparation and arguing the motion should be reduced proportionally.

V. TIME RELATED TO RESPONDING TO THE MOTION TO STRIKE SHOULD BE DENIED

Defendant seeks an award of attorneys' fees of $11,170 for responding to the motion to strike. Id. at ¶ 6. In the affidavit defense counsel appears to claim that the Motion to Strike filed by PDHC addressed Defendant's sanctions claims under the FPA and Rule 11. This is not correct. The Motion to Strike was strictly limited to the FPA. The Motion to Strike does not address Rule 11 at all. This Court denied Defendant's request for sanctions under the FPA and limited the award to Rule 11 sanctions. This Court's ruling was in favor of the relief sought by PDHC in the Motion to Strike and Defendant should not be awarded any fees and costs for challenging the Motion to Strike.

VI. RENEWED REQUEST

In the Amended Fee Affidavit, Defendant's counsel renews the request that all their attorneys' fees be awarded as part of the Court's sanctions' order. PDHC and Megna obviously oppose this renewal and incorporate all arguments previously made in opposition to any sanctions award. Instead, PDHC and Megna request this Court to re-consider its ruling in light of the South Carolina Court of Appeals Order denying Defendant's sanctions motion. Furthermore, it appears from records produced in this matter that Mr. Josey's law firm was previously paid approximately $20,000 for representing PDHC in a workers compensation case involving an employee who had a finger amputated (which counsel referred to as a "finger prick" in argument before this Court), and continued to represent both PDCH and Defendant in this action until PDHC complained about this irreconcilable conflict. This Court should take into account this conduct when determining what, if any, fee award should be assessed.

Respectfully submitted.

A. Camden Lewis
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April 4, 2014

FILED
2014 APR -8 AM 11:44
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Scott B. Suggs
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DARLINGTON COUNTY, S.C.

The South Carolina Court of Appeals

Pee Dee Health Care, P.A., Appellant,

v.

Estate of Hugh S. Thompson, and Hugh S. Thompson, III, Louise T. Dailey as Personal Representatives of the Estate of Hugh S. Thompson, Respondents.

Appellate Case Nos. 2011-185767, 2011-197671, 2011-203391

FILED
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DARLINGTON COUNTY, S.C.

ORDER

Respondents filed a motion for appellate court sanctions pursuant to Rule 269 of the South Carolina Appellate Court Rules against Appellant Pee Dee Health Care and Appellant's counsel on the grounds that Appellant engaged in improper conduct during the course of this appeal. This Court held the ruling on Respondents' motion in abeyance pending the Supreme Court's ruling on Appellant's writ of certiorari to the South Carolina Supreme Court. The Supreme Court denied Appellant's writ of certiorari, and the underlying appeals have been remitted for entry of judgment to the lower court. After careful consideration and review of Respondents' motion, Appellant's return, and Respondents' reply, it is hereby ordered that Respondents' motion for sanctions be denied.

Thomas C. Hoff J.

H. Bruce Williams J.

Joseph M. Cureton A.J.

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

Columbia, South Carolina

cc:
Tony Ray Megna, Esquire
John J. James, II, Esquire
Jon Rene Josey, Esquire
Ariail Elizabeth King, Esquire
James Mixon Griffin, Esquire
Scott B. Suggs
Benjamin Rushton Matthews, Esquire

FILED
March 28, 2014

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STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON Pee Dee Health Care, P.A., Plaintiff v. Estate of Hugh S. Thompson Defendant	IN THE COURT OF COMMON PLEAS TWELF JUDICIAL CIRCUIT Case No. 2010-CP-16-0332 Case No. 2010-CP-16-0633 **CERTIFICATE OF SERVICE**

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Pee Dee Health Care, P.A., do hereby certified that I have served a copy of the foregoing **Response to Defendant's Amended Fee Affidavit**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses on April 4, 2014:

John James
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FILED
2014 APR -8 AM 11:45
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Jaime Harmon

Columbia, South Carolina
April 4, 2014

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DARLINGTON COUNTY, S.C.

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332

CONSOLIDATED APPEALS

(Tracking number 2011185767)(1st Appeal)
(Tracking Number 2011203391) (3rd Appeal)
(Tracking Number 2011197671)(2nd Appeal)

Court of Appeals Opinion No. 2013-UP-311

Pee Dee Health Care, P.A. .....Appellant,

v.

Estate of Hugh S. Thompson .....Respondent.

RESPONDENT'S PETITION FOR REHEARING WITH REGARD TO MOTION FOR SANCTIONS AND SUGGESTION THE MATTER BE REHEARD *EN BANC*

Respondent respectfully petitions the Court to reconsider its Order filed March 28, 2014, denying Respondent's Motion for Appellate Court sanctions pursuant to Rule 269 of the South Carolina Appellate Court Rules. Pursuant to Rule 219 (b) SCACR, the Respondent suggests the matter be heard *en banc* as addressing the

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conduct of counsel practicing in this Court is both of exceptional importance and worthy of consistency with all such decisions of this Court.[1]

As this Court is aware, this entire case including the three appeals heard by this Court has been arduous and expensive. Much of it (if not all) has been also completely unnecessary and frivolous. The Court's Order, of course, did not detail the reasons for its ruling and therefore Respondent cannot state with particularity the points which may have been overlooked or misapprehended by this Court. Nevertheless, the Respondent does offer the following points.

ARGUMENT

Without abandoning any of the grounds argued in Respondent's Motion for Sanctions, the Respondent would point out to this Court in particular the arguments made by Appellant with respect to the Probate Court appeal (Tracking Number 2011-185767) and in the disqualification appeal (Tracking Number 2011-196871).

---

[1] In an order dated February 11, 2013 (on appeal to this Court, tracking number 2013-001461), the trial court described counsel's conduct *in this matter* as follows:

> "Megna has shown little regard for the Orders of this Court .... Megna has willfully, deliberately, and unapologetically attempted to misuse the legal process ... he is in willful violation of this Court's orders.... He has engaged in such misconduct for ulterior purposes in seeking to defend his own personal interests .... Megna's conduct is willful, deliberate and unapologetic. *** Perhaps the most egregious part of Megna's conduct is his uncompromised assertion that everyone else is wrong, everyone else is unethical, and he is blameless. This Court would be faced with an entirely different scenario if Megna had admitted his misconduct and shown remorse in any degree, or had he apologized for his continuous affronts upon the Court and his colleagues. The lack of respect Megna has shown for this Court, the legal process, and the purposes of these legal proceedings is unprecedented for this Court. ... Megna's conduct is ill-conceived, vitriolic, and abusive. *** He has engaged in a concerted effort to abuse the legal process in both cases for his own purposes, abusing this Court and his colleagues in the process." (Order ¶¶ 23-29)(copy attached).

In its Brief in the probate appeal, Appellant asserted over and over that its filing of Grounds of Appeal from the Probate Court to the Circuit Court was timely. This is simply untrue and this Court and the Trial Court so found. In spite of how obvious the matter was, Appellant, without regard for the truth, argued to the contrary and imposed upon Respondent the delay and costs of defending the matter on appeal.

In the disqualification appeal, Appellant advanced such inane arguments as (i) the Dead Man's Statute (S.C. Ann. § 19-11-20) would have precluded Mr. Megna from testifying and therefore he should have been allowed to serve as trial counsel; (ii) that the Dead Man's Statute would have precluded Respondent from deposing Mr. Megna and otherwise obtaining in discovery from him information relevant to the case – both points in contradiction to well settled case law in South Carolina; and Appellant argued (iii) that any conversations and communications from the Decedent (whose estate was being sued) were privileged and that Mr. Megna could not therefore be examined concerning those communications ***although Appellant's Complaint stated such communications were the basis for the litigation***; and finally, (iv) in spite of abundant evidence to the contrary and despite allegations in the Complaint, Appellant argued that Mr. Megna should be allowed to serve as trial counsel -- claiming the record showed that he was in no way a party to conversations with the deceased Dr. Thompson involving facts essential to the issues in the case (and apparently if he were such conversations would have been privileged).

CONCLUSION

The detailed Motion for Sanctions filed by Respondent, together with the Reply and supporting documentation and record from the case in this Court makes a compelling

case for sanctions. The appeals to this Court were unnecessary, without merit, and abusive. If ever a case in this Court warranted sanctions, this is it.

Appellant's counsel has most recently argued to the Trial Court that this Court's March 28 ruling "is controlling on the question of whether there were meritorious grounds to support [Appellant's] claims." Thus, counsel for the Appellant is seemingly saying that this Court has condoned the course of conduct described in the Motion for Sanctions.[2]

Respondent believes that conduct set forth in its Motion for Sanctions should be sanctioned. Otherwise, the door would seem to be open for parties to tie up this Court with frivolous appeals and needless maneuvers. Where the arguments advanced are based upon misrepresentation of the facts, the case for sanctions is even more compelling.

For all of the reasons set forth herein, Respondent Thompson Estate respectfully submits that it is entitled to rehearing and reconsideration of the Court's summary Order denying the Motion for Appellate Sanctions.

[SIGNATURE PAGE TO FOLLOW]

[2] The Trial Court, in a ruling from the bench on March 27, 2014, has ruled that Trial Court sanctions will be imposed upon Appellant, Tony R. Megna, and Matthews & Megna, LLC. The parties are awaiting the issuance of the Court's final Order setting the amount of sanctions and detailing the sanctionable conduct. The Trial Court's Order will not pertain to any matters at the Appellate Court level.

April 14, 2014

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ATTORNEYS FOR RESPONDENT

ATTACHMENT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	Case No. 2010-CP-16-0332
COUNTY OF DARLINGTON	)	
Ex Parte:	)	
Desa Ballard	)	
In re:	)	ORDER FOR SANCTIONS AGAINST TONY R. MEGNA
Pee Dee Health Care P.A.,	)	
Plaintiff,	)	
Vs.	)	
Estate of Hugh S. Thompson	)	
Defendant.	)	

Non-party Desa Ballard moved for sanctions, pursuant to Rule 11(a), SCRCP, in connection with a subpoena for records served on her on or about July 30, 2011, ostensibly issued by the plaintiff in this action. The motion is granted.

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2012 FEB 13 PM 2:17
CLERK OF COURT
DARLINGTON COUNTY, S.C.

As will be discussed in more detail below, in order to reach a decision in this case, this Court also was assigned jurisdiction in a Richland County case, *James A. Anasti v. Lance Wilson, Willis Goodwin, Gina L. Lee, Richland County Clerk of Court*, Case No. 2007-CP-40-0576. Stated succinctly, the reason that this Court had to consolidate sanctions motions hearings in two separate and unrelated cases pending in two different circuits is because of Megna's actions that this Court finds to be gross civility and professionalism violations. Having been disqualified as counsel because he was a material witness in *Thompson*, Megna continued to serve discovery under his signature in that case in violation of this Court's Order, which this Court had to quash; thereafter, Megna again served similar and additional discovery, this time under the auspices of the *Anasti* case in Richland, a case that had nothing to do with the

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discovery requests, and which by that time was concluded as to his client. Moreover, the discovery was not meritorious as to any case-related issues, but propounded solely to vex the recipients.

In granting the sanctions motion in this case, the Court makes the following:

FINDINGS OF FACT[1]

1. This action was originally filed in the Darlington County Probate Court by the plaintiff corporation seeking to recover damages from the defendant. The plaintiff corporation was represented by attorney Tony R. Megna (Megna). The matter was removed to the Circuit Court in Darlington County.

2. After removal to this Court, defense counsel made a motion to disqualify attorney Megna from representing the corporate plaintiff, alleging Megna was a necessary witness in that he was, and had been since 1995, the Chief Executive Officer of the plaintiff corporation.

3. By order dated April 15, 2011, this Court made detailed findings of fact concluding that Megna was, in fact, a material witness as to core facts in this action and was disqualified from acting as counsel for the corporate plaintiff. The final sentence of that order stated "The Court orders complete disqualification effective with the execution of this Order. (footnote omitted)."

4. The Court thereafter permitted Megna, at his request, to remain counsel for the plaintiff for the sole and limited purposes of arguing his motion for reconsideration of the disqualification Order and for arguing summary judgment motions. The motion to reconsider was eventually denied, and the issue of Megna's disqualification as

[1] The findings of fact are made from this Court's detailed review of the Clerk of Court's files in both the Richland County case and the instant case, the submissions of counsel, and the oral argument held in these consolidated matters in Darlington County on March 15, 2012.

counsel is on appeal to the South Carolina Court of Appeals as of this writing. As well, Defendant was subsequently granted summary judgment. An appeal from that Order is also pending. No stays were issued by the appellate court. Megna's disqualification to act as counsel in this matter is currently in effect.

5. When Megna was disqualified as counsel in this case, there was separate and unrelated litigation involving different parties pending in the Richland County Court of Common Pleas in a matter entitled *James A. Anasti v. Lance Wilson, Willis Goodwin, Gina L. Lee, Richland County Clerk of Court*, Case No. 2007-CP-40-0576 (the Richland case). Megna represented defendant Gina L. Lee in the Richland County case.

6. Other than Megna being counsel for a party in each case, the two cases are completely unrelated to one another. Megna is the only common denominator.

JMB 3

7. As more fully detailed in an Order issued this date in the Richland case, there have been numerous state court appellate proceedings, all initiated by Megna on behalf of his client Gina Lee, as well as bankruptcy proceedings involving Lee as the debtor in the United States Bankruptcy Court for the District of South Carolina.

8. In the Richland case, the plaintiff James Anasti was represented by attorney Douglas N. Truslow (Truslow). Truslow continued to represent Anasti throughout the several state appeals initiated by Megna on behalf of Lee, all of which appeals were subsequently dismissed based on procedural grounds; the merits of the appeals could not be reached because of Megna's repeated failures to comply with various deadlines.

9. In attempts to escape the consequences of his failure to comply with the rules, Megna made false statements to the circuit court and the appellate court, as more fully described by Judge L. Casey Manning in Orders dated April 8, 2008 and April 1, 2009 in the Richland case, where he found Megna's explanations for his delay to be false and intentionally manipulative.

10. According to Truslow, because of appellate and ethical issues he encountered in dealing with Megna in the Richland case, Truslow associated and consulted with Ballard, who has experience in both fields. In September, 2011, in connection with of one of the appeals filed by Megna (on behalf of Gina Lee) at the South Carolina Court of Appeals, Ballard executed an affidavit which Truslow submitted to the Court of Appeals addressing the insufficiency of an appellate documents filed by Megna.

11. On or about July 30, 2011, Ballard was served with a subpoena signed by Megna as counsel for the plaintiff, bearing the caption in this case, seeking production of certain materials, including copies related to her communications with several attorneys, including Truslow, several of the lawyers involved in this case, and other lawyers which apparently have no relation to this case or the Richland case.

12. Ballard was not counsel for nor otherwise involved in the instant case in any way. The subpoena sought information related to the assistance she provided to Truslow in the Richland County case, and sought to discover if any evidence existed of her communications with a list of attorneys whom Megna apparently believed to be his adversaries in this or other cases. The subpoena sought nothing relevant to this case. The subpoena purported to be issued from Darlington County, although Ballard's

office is in Lexington County. The subpoena to Ballard did not comply with the SCRCP.

13. Ballard had no knowledge of the instant case, but when she received the subpoena, she located information to identify some of the attorneys involved. She obtained a copy of this Court's Order dated April 15, 2011, in which Megna was disqualified as counsel for the corporate plaintiff in this case.

14. Ballard filed and served an Objection to the subpoena. Since Megna had been disqualified in this case as counsel for the plaintiff, she served her objection on attorney Benjamin R. Matthews, who was listed on the Darlington County Clerk's website as Megna's law partner and also counsel for the plaintiff in the instant case.

15. She also filed and served a Motion for Sanctions on August 4, 2011, which argued that Megna had attempted to subpoena her records for an improper purpose, and in violation of this Court's order disqualifying him as counsel.

16. Truslow also filed a motion for sanctions in the Richland County case dated March 9, 2012. Ballard's motion for sanctions in this case was consolidated with Truslow's motion for hearing before this Court.

17. Prior to the hearing in this matter, Megna provided the Court and counsel with a document, bearing the caption in both cases, entitled "Synopsis." This document contained a rambling diatribe of challenges of unethical behavior against Truslow, Ballard, and others. As best the Court can understand Megna's allegations against Ballard, they arise from a contact to her office by Megna in which he sought to associate her on a potential unrelated case on behalf of Pee Dee Health Care. Ballard's associate responded that Ballard would consider looking at the matter if she

was paid hourly and she never heard back from Megna. She was never asked to represent Megna and no confidential information concerning Megna or his client was provided to her[2]. Neither Megna nor his client contacted Ballard again until the subpoena was issued in this case.

18. In order to understand why Megna's efforts to subpoena information from Ballard were improper, a brief history of the litigation in the Richland case is necessary. By Order issued this same date in that case, that history is set forth in detail, and to the extent necessary, the findings in that Order are incorporated herein by reference.

19. By way of summary, the subpoena to Ballard was part of an improper and impermissible attempt by Megna to engage in discovery for purposes of defending himself (not his client) against motions for sanctions that were pending against him in the Richland County case. In addition, it appears that the subpoena was served on Ballard in an effort to punish her for consulting with Truslow in the Richland County case, and to deter her from continuing to assist him.

20. At the time Megna served the subpoena on Ballard, all discovery in the Richland County case had been concluded, Megna's client was no longer an active party to the Richland case, and the only remaining issues in that case in which Megna had any interest concerned the Richland Plaintiff's motions (via Truslow) for sanctions against Megna.

21. The subpoena issued to Ballard sought, among other things, her records of communications with Mr. Truslow in the Richland County case. This Court

[2] Even if the information provided by Megna to Ballard concerning Pee Dee Health Care was considered confidential information under Rule 1.6, and even if Ballard received and reviewed the material, this court finds she would not have been disqualified from continuing to assist Truslow in the Richland case. As stated earlier, the two cases are unrelated, the only common denominator again being Mr. Megna (representing two separate and unrelated clients in the two cases).

specifically finds there could be no other purpose for the discovery sought but to use the information to defend Truslow's claim for sanctions against Megna in the Richland case.

22. The subpoena to Ballard was issued in violation of this Court's order disqualifying Megna as counsel, sought privileged information regarding the advice she had given to Truslow, and constituted a fishing expedition into what other discussions she or others may have had with Truslow, all apparently for the purpose, *inter alia*, of seeking to deflect sanctions against himself in the Richland case.

23. Between his conduct in this case and in the Richland case, Megna has shown little regard for the Orders of this Court or for the legal limitations imposed upon him in his representative capacity as counsel for his client.

24. The inevitable conclusion is that Megna has, under the auspices of this case, attempted to subpoena Ballard, as well as her legally protected files, even though he has been disqualified, and that his intentions were fully improper. The Court has no choice but to conclude that he did so, at least in part, as a pretext to harass her and apparently to dissuade her from providing legal advice to Truslow in the Richland case.

25. Megna has willfully, deliberately, and unapologetically attempted to misuse the legal process through both this case and the Richland case and he is in willful violation of this Court's orders, specifically including the Order disqualifying him as counsel for the plaintiff. He has engaged in such misconduct for ulterior purposes in seeking to defend his own personal interests in the Richland County case.

26. Megna's conduct is willful, deliberate and unapologetic. In both his "Synopsis" (captioned with both cases) and the memorandum he submitted to the Court in connection with the hearing in this matter, Megna continued to hurl fabricated allegations of misconduct upon Ballard, Truslow, and others who he considers to be adverse to him.

27. Perhaps the most egregious part of Megna's conduct is his uncompromised assertion that everyone else is wrong, everyone else is unethical, and he is blameless. This Court would be faced with an entirely different scenario if Megna had admitted his misconduct and shown remorse in any degree, or had he apologized for his continuous affronts upon the Court and his colleagues.

28. The lack of respect Megna has shown for this Court, the legal process, and the purposes of these legal proceedings is unprecedented for this Court.

29. Even viewed separately from Megna's conduct in the Richland case, Megna's conduct is ill-conceived, vitriolic, and abusive. When viewed in conjunction with the lengthy period during which he has engaged in similar conduct in the Richland case (as more thoroughly discussed in an Order issued this date), Megna's conduct is alarming and disturbing. He has engaged in a concerted effort to abuse the legal process in both cases for his own purposes, abusing this Court and his colleagues in the process.

30. Ballard has requested an award of sanctions pursuant to Rule 11(a), SCRCP, for her time in having to respond to the subpoena served upon her by Megna. I find that sanctions under Rule 11(a) are warranted. *Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996).

31. Ballard's original affidavit of fees includes time she has spent in responding to two (2) grievances filed against her with the Office of Disciplinary Counsel which contain similar allegations as those asserted against her in these proceedings by Megna. Those two grievances (which were dismissed) were filed by Mark Matthews, who appears (from the Court's review of filings by Megna in this case) to be an employee and agent of either Megna or Pee Dee Health Care.

32. Although the Court perceives it is highly likely that Megna participated in or facilitated the filings of these grievances against Ballard, this Court concludes that her time spent in defending against these grievances is not within the scope of sanctions which this Court can award under Rule 11(a) or otherwise. At the Court's request, Ballard has submitted an amended affidavit of attorney fees which does not include the time spent in responding to the grievances. She has also included her time spent in attending the hearing on May 15, 2012 and her work since then, including the preparation of a proposed order for the Court, all of which are appropriate.

JWB 9

33. The Court's review of this affidavit finds that the time Ballard spent in responding to the subpoena, appearing before this Court, and preparing the draft order requested by this Court are reasonable.

34. Ballard's hourly rate is her regular hourly rate charged to her clients, and in light of her standing in the legal community and her expertise in these areas, is immensely reasonable. Ballard is a recognized expert in the field of attorney conduct (and misconduct), she has an AV rating with Martindale Hubbell, and she has earned the respect of her peers and of the Courts of this state for her professionalism as a member of the Bar. Her experience and insight in the areas in which Truslow was

attempting to defend against Megna in the Richland case made her an appropriate choice for assistance to Truslow. Her agreement to assist Truslow in the Richland case made her a target of Megna's wrath, and she should be compensated by way of sanctions against Megna for the time she spent in responding to his improper discovery against her. The costs set forth in her affidavit, which consist of filing fees, copying costs and postage, are reasonable and were necessarily incurred in connection with the subpoena served upon her and the subsequent sanctions motion against Megna.

35. Pursuant to Rule 11(a), SCRCP, this Court awards sanction in favor of Ballard against Megna in the amount of seventeen thousand, three hundred and eighty-eight dollars and seventy-five cents ($17,388.75), which constitutes reimbursement for the time and expenses set forth in Ms. Ballard's amended affidavit dated August 8, 2012. These sanctions are not punitive but are compensatory, and are required to be paid notwithstanding any penalties imposed herein. *Cannon v. Georgia Attorney General's Office*, 397 S.C. 541, 725 S.E.2d 698 (2012).

JnB 10

36. The award of fees and costs herein are a sanction (and hence considered to be non-dischargeable except by payment), as well as a civil money judgment so as to carry interest at the legal judgment rate. The Clerk is directed to enroll this sum as a civil judgment in favor of Ballard against Megna.

37. In making this award, the Court is aware of the sanctions also being awarded to Truslow against Megna in the Richland County case. The sanctions awarded to Ballard are not duplicative of the sanctions awarded to Truslow, and the Court finds that both awards are compensatory in nature and are warranted, reasonable, and

supported by the evidence. The sanctions are awarded to pay the reasonable attorneys fees and costs incurred by the moving party. *Ex Parte: Bon Secours and St. Francis Xavier Hospital Inc.*, 393 S.C. 590, 713 S.E.2d 624 (2011).

Criminal Contempt Citation Against Mr. Megna, *sua sponte*

In presiding over these matters, this Court has undertaken a full review of the pleadings, discovery, previous Court Orders, correspondence, memoranda, and emails from Attorney Megna in both cases, together with review of applicable attorney oaths and disciplinary rules, as well as an analysis of prevailing law and Supreme Court decisions involving attorney conduct. As indicated in the language of this Order, this Court is concerned that the conduct of Attorney Megna reveals a continuous pattern of violations of the civility and professionalism requirements of South Carolina's attorney oath with respect to members of the Bar, consistently uses language that is accusatory and demeaning directed at opposing counsel, includes inappropriate references to the judiciary, and contains unwarranted criticisms of other professionals, parties, and witnesses. Moreover, this Court finds that Attorney Megna's actions have resulted in the tremendous unnecessary consumption of attorney time, excessive and unnecessary costs to litigants, and the significant waste of judicial resources and public funds required to operate the Court system.

Because of the willful misconduct set forth throughout the body of the factual findings herein and the factual findings in the Richland County case set forth by Order issued this same date, the Court has determined to conduct a hearing to require Megna to show cause why he should not be held in criminal contempt of this Court for intentionally and willfully violating a Court Order. Megna is hereby advised that he has the right to counsel during such hearing, and shall be given an opportunity to present arguments to the Court. Megna is hereby specifically

advised that a finding of criminal contempt by this Court may subject him up to six (6) months' imprisonment therefor, in addition to other sanctions. This Show Cause and Sanctions hearing is hereby set for March 18, 2013, beginning at 2:00 p.m., after the call of the regular non-jury roster for that day, in the fifth floor courtroom of the Darlington County Courthouse. Service of this Order upon Attorney Megna and his counsel shall constitute service of the Notice of Contempt hearing upon Megna.

Because of the numerous occasions on which Megna has denied receipt of service of an order or other papers (in the Richland case), Ballard shall make arrangements for personal service of a copy of this Order and the Richland County order issued this date upon Megna, unless Megna personally (not through counsel) consents to accept service in some other fashion and executes a written acceptance of service to that effect.

THEREFORE IT IS ORDERED:

1. Ms. Ballard's motion for sanctions is granted.
2. Mr. Megna is ordered to pay Ms. Ballard the sum of seventeen thousand, three hundred and eighty-eight dollars and seventy-five cents ($17,388.75) within thirty (30) days of the date of this Order. The Clerk shall enroll a civil judgment for this sum.
3. Mr. Megna shall be required to show cause why he should not be held in criminal contempt of this Court for the actions outlined in this Order, and shall appear on March 18, 2013, at 2:00 p.m. in the fifth floor courtroom of the Darlington County courthouse for such hearing.

IT IS SO ORDERED.

J. Michael Baxley
Circuit Court Judge

February 11, 2013

FILED
2013 FEB 13 PM 2:47
SCOTT B. SUGGS
CLERK OF COURT/R.M.C.
DARLINGTON COUNTY, S.C.

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Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY S C

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332

CONSOLIDATED APPEALS

(Tracking number 2011185767)(1st Appeal)
(Tracking Number 2011203391) (3rd Appeal)
(Tracking Number 2011197671)(2nd Appeal)

Court of Appeals Opinion No. 2013-UP-311

Pee Dee Health Care, P.A. .....Appellant,

v.

Estate of Hugh S. Thompson .....Respondent.

PROOF OF SERVICE

I certify that J. René Josey of my firm has served Respondents' Petition for Rehearing by depositing one (1) copy of it in the United States Mail, postage prepaid, on April 14, 2014, addressed to:

James M. Griffin, Esquire
Lewis, Babcock & Griffin, L.L.P.
P.O. Box11208
Columbia, SC 29211

RECEIVED
APR 14 2014
SC Court of Appeals

(SIGNATURE PAGE TO FOLLOW.)

April 14, 2014

J. René Josey (Bar No. 3230)
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ATTORNEYS FOR RESPONDENT

COPY

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON) TWELFTH JUDICIAL CIRCUIT
)
) CASE NO.: 2010-CP-16-0332 (Probate Claim)
2010-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A. Plaintiff,)
vs:)
Estate of Hugh S. Thompson Defendant.)

MOTION AND ORDER INFORMATION FORM AND COVERSHEET

FILED
2014 MAY -5 PM 3:03
SCOTT E. SUGGS
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

Plaintiff's Attorney:	Defendant's Attorney:
James M. Griffin, Bar No. 9995	J. Rene Josey, Bar No. 03230
Address:	Address:
1513 Hampton Street, Columbia, SC 29201	P.O. Box 5478, Florence SC 29502
Phone: 803-771-8000Fax 803-731-3541	Phone: 843-662-9008 Fax843-667-0828
E-mail: ____ Other: ____	E-mail: ____ Other: ____

☐ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Alter or Amend Order of this Court filed 4-21-14 and received by the undersigned on April 24, 2014

Estimated Time Needed: ____ Court Reporter Needed: ☐ YES/☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☒ Plaintiff ☐ Defendant — 5-5-14 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $ 25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: ____
☐ Other: ____

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE CODE ____
Date: ____

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

CLERK'S VERIFICATION

Collected by: ____ Date Filed: ____
☐ MOTION FEE COLLECTED: $ ____
☐ CONTESTED – AMOUNT DUE: $ ____

STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON PEE DEE HEALTH CARE, P.A., PLAINTIFF V. ESTATE OF HUGH S. THOMPSON DEFENDANT	IN THE COURT OF COMMON PLEAS TWELFTH JUDICIAL CIRCUIT Case No. 2010-CP-16-0332 Case No. 2010-CP-16-0633 MOTION TO ALTER OR AMEND ORDER OF THIS COURT FILED 4-21-2014 AND RECEIVED BY THE UNDERSIGNED ON APRIL 24, 2014.

FILED
2014 MAY -5 PM 3:05
SCOTT B. SUGGS
CLERK OF COURT/R.M.C.
DARLINGTON COUNTY, S.C.

INTRODUCTION

Plaintiff Pee Dee Health Care, P.A. (PDHC) and Respondents Matthews and Megna, LLC, Ben Matthews and Tony Megna, by their undersigned counsel, hereby move this Court pursuant to Rule 59(e), SCRCP for an order amending and/or altering the judgment of this Court dated April 15, 2014, filed April 21, 2014, received by the undersigned on April 24, 2014.

The Defendant's motion for sanctions was heard by the court on Thursday, March 27, 2014. At the March 27, 2014 hearing, this Court denied the Defendant's requests for sanctions pursuant to S.C. Code Ann. §15-36-10 (the South Carolina Frivolous Civil Proceedings Sanctions Act, hereinafter "FCPSA").[1]

At the March 27 hearing, counsel for the Defendant informed the Court a motion for sanctions was pending before the SC Court of Appeals for the same essential reasons as set forth in the Motion for Sanctions before the trial court. By order dated March 28, 2014, a three-judge panel of the Court of Appeals denied Defendant's Motion for Sanctions against Plaintiff and its' counsel. The Defendant then requested the Court of Appeals determine the matter *en banc*. The

[1] See last two sentences of item 3 on page 2 of order.

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

Court refused to consider Defendant's request. A copy of the order denying Defendant's Motion for Sanction is attached. The Defendant did not request review by the Supreme Court.

ARGUMENTS

For the reasons noted below, the undersigned requests this Court to reverse its' order dated April 21, 2014, and deny the Defendant's motion for Sanctions under Rule 11, SCRCP.

ISSUE I

The defendant's motion for sanctions under Rule 11 (as well as the FPSA) was filed untimely. Thus, this court lacks authority to consider defendant's motion for sanctions.

In Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm), 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006) held:

> Absent specific statutory language vesting the trial judge with continuing jurisdiction, we refuse to hold that a trial judge retains jurisdiction to consider a motion for sanctions beyond ten days after entry of the judgment. Such an interpretation would run counter to our established case law that a trial judge loses jurisdiction over a case when the time to file post-trial motions has elapsed.

The Court's holding accorded with its' previous decision in *Ness v. Eckerd Corp.,* 350 S.C. 399, 402, 566 S.E.2d 193, 195 (Ct.App.2002) ("Although trial judges retain jurisdiction to alter judgments on their own initiative for ten days if a Rule 59(e), SCRCP, motion is filed, after ten days that jurisdiction is lost.").

There is no dispute that the Defendant filed its' Motion for Sanctions under the FPSA and Rule 11 more than 10 days after the filing of the judgment of the Court. Nor is there any dispute that the motion filed under the FPSA was filed untimely as this Court loses the authority to consider motions filed post-judgment following ten days of the entry of the judgment. *Beard,* supra. The issue is whether or not the court retains the

authority to entertain any "post-trial"[2] motion, including a motion for sanctions under Rule 11, SCRCP.

The untimely filing of Defendant's Rule 11 motion is based on clearly defined South Carolina appellate court precedent:

a. First, South Carolina case law, as noted by *Beard*, supra, has historically held that a trial court loses jurisdiction to hear all motions filed more than ten days following the entry of the court's final judgment.

b. Second, service and filing of a notice of appeal before the filing of timely post-trial motions does not deprive the lower court of jurisdiction to consider the motions. *Hudson v. Hudson,*290 S.C. 215, 349 S.E.2d 341 (1986): (A trial the trial court *may consider* a timely filed post-trial motion *even if* a notice of appeal has been filed). Therefore, the filing of the appeals in the current cases did not toll nor stay the requirement that the Plaintiff had to file its' Motion for Sanctions no later than ten-days following the judgments entered in the combined case at bar.

c. Third, our appellate courts have held that "because a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCP, to alter or amend a judgment within ten days of its issuance, a motion for sanctions would be timely if filed within ten days of judgment." *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm),* 371 S.C. 91, 97, 637 S.E.2d 316, 319 (Ct.App.2006); See also *Shumpert v. Time Ins. Co.,* 329 *S.C.* 605, 496 *S.E.*2d 653, 656-58 (Ct.App.1998). Conversely, it is only logical that a motion for sanctions filed more than ten days after the entry of judgment cannot be entertained by the court.

d. Fourth, our appellate courts have repeatedly noted that Rule 82, SCRCP, specifically notes that the Rules of Civil Procedure "shall not be construed to extend or limit the jurisdiction

[2] Black's Law Dictionary defines a "post-trial motion" as "a term that is used for the motions that are made in court after a trial has ended."

of any court of this State". *Beard*, supra. Therefore, a motion for sanctions pursuant to Rule 11, as any other motion filed after the judgment is entered and filed, cannot extend the authority of the court past the ten-day post-trial limitations period.

The foregoing is consistent with the federal courts interpretation of motions made pursuant to Rule 11. The Seventh Circuit Court of Appeals, for instance, has established a "bright-line" test that a Motion for Sanctions pursuant to Rule 11 must be made no later than those 90 days from the date of entry of final judgment. Moreover, the ninety day limitation period is "the outer parameters of the timeliness for sanctions claims." *See Kaplan v. Zenner*, 956 F.2d 149, 151 (7th Cir.1992). The court further stated that:

> filing a Rule 11 motion ninety days from the entry of final judgment is not guaranteed to the parties; we have held this limit will not necessarily protect a sanctions claim if the party bringing it has failed to do so within a reasonable amount of time. *Id.* at 152. Where appropriate, sanctions motions "should be filed at an earlier time—as soon as practicable after discovery of a Rule 11 violation." *Id.* at 151.

Even under the Seventh Circuit's more lenient federal standard for filing a Rule 11 motion, the Defendant's motions for sanctions in the case at bar (both pursuant to Rule 11 and the FCSPA) were filed untimely.

Concluding, the Defendants untimely filing of its' Motion for Sanctions deprived this Curt of the authority to assess Rule 11 sanctions against the Plaintiff.

ISSUE II

Even if the defendant's motion for sanctions was filed timely, the adverse dual representation of counsel of both plaintiff and defendant for defendant precludes the representation of counsel for defendant participating in these proceedings.

The most contentious issue in these matters is that counsel for the Defendant became an adversary against the Plaintiff while **concurrently** representing Plaintiff in a worker's

compensation case. Further, without notice or consent of Plaintiff, counsel for the Defendant "dropped" representation of the Plaintiff in order to continue to represent the Defendant in the case at bar. This Court has never heard the matter, even though the Court stated it would do so at the July 2011 hearing when the issue was brought to the Court's attention. The conduct of counsel for Defendant has been broadly condemned by our appellate courts. *See, e.g. ,State Farm Fire & Cas. Co. v. Mabry,* 255 Va. 286, 497 S.E.2d 844, 847 (1998) ("The attorney employed by the insurer to defend the insured is bound by the same high standards which govern all attorneys, and owes the insured the same duty as if he were privately retained by the insured.") (Internal quotation marks and citation omitted.) *See also Tripartite Relationship* at 294 ("Defense counsel must treat the insured as the client. Recognizing the insured as the attorney's sole client is consistent with recent judicial decisions.") (Footnote omitted.)

Thus, counsel for Defendant's initial and continuing representation of the Defendant violates not only the SC Rules of Professional Responsibility (Subsection (4) of Rule 1.7) but also violates counsel for Defendant's common-law duty of loyalty to the Plaintiff. The comments to Rule 1.7 clearly state that the requirement of written informed consent is not a procedural or technical requirement, but a substantive requirement of Rule 1.7. Under South Carolina law, prejudice is presumed as a matter of law whenever a defendant establishes that his attorney has an actual conflict of interest. *McNair v. Rainsford*, 330 S.C. 332, 344, 499 S.E.2d 488, 494 (Ct.App.1998) ("An attorney who represents more than one client must be cognizant of the vicissitudes of dual representation). (We have held that an actual suspension is appropriate when an attorney's representation of multiple clients creates an actual conflict of interest). *Cuyahoga Cty. Bar Assn. v. Newman*, 102 Ohio St.3d 186, 808 N.E.2d 375 (2004). Counsel for Defendant has consistently argued that the behavior exhibited by counsel has been a "mere

technical" violation of the duty of loyalty owed to Appellant by counsel for Respondent. Rule 407, Rule 1.7, SCACR, clearly states that loyalty is an essential elements in the lawyer's relationship to a client. *In re Trexler*, 327 S.C. 315, 491 S.E.2d 257 (1997). (Attorney publicly reprimanded after a finding by Supreme Court that the client had not been prejudiced).

In sum, as explained by the New York Court of Appeals, the prohibition of Rule 1.7 safeguards violation of the duty of loyalty owed the client, and also against abuse of the adversary system and resulting harm to the public at large. *Greene v. Greene*, 47 N.Y.2d 447, 451 (1979) (citations omitted). Sanctions under Rule 11 are matters determined in equity. *Beard*, supra. "'He who comes into equity must come with clean hands. It is far more than a mere banality. 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.'" *Emery v. Smith*, 361 S.C. 207, 220, 603 S.E.2d 598, 605 (Ct. App. 2004) (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)). It is clear that counsel for Defendant has adversely and concurrently represented Defendant and Plaintiff while concurrently representing in another matter. It is indisputable that counsel for Defendant dropped its representation of Plaintiff in order to continue its' adverse representation of Defendant. At the very least, equity requires that the doors of this Court be closed to Defendant request for equitable relief against Plaintiff and its' attorneys because the Defendant is indisputably "tainted with inequitableness or bad faith relative to the matter" in which sanctions are requested against Plaintiff."

ISSUE III

This court disqualified counsel for plaintiff under Rule 3.7, SCACR. Rule 3.7 states an attorney is prohibited from being an advocate at trial – and does not disqualify an attorney from acting as an advocate in regard to pre-trial matters

Rule 407, Rule 3.7, SCACR, provides an attorney may only be barred from representing

his client [if he is disqualified at all] only at trial – *not* pretrial matters. Courts considering the matters have specifically excluded pre-trial matters from the reach of Rule 3.7. In *Hagood v Summerville*, 607 S.E. 2d (SCSC 2005), the Supreme Court noted Court stated:

> Jurors are not likely to be confused by a lawyer's employee testifying as a witness for a client while the lawyer serves as the client's advocate. Jurors should readily perceive the distinction, particularly since the opposing party may emphasize the fact of the witness's employment.

See also *Foster v. JLG Indus.*, 372 F. Supp. 2d. 792, 798 (M.D. Pa. 2005) (finding that "The rule states that an attorney is prohibited from acting as an advocate *at* trial; however, there is no indication that an attorney is prohibited from acting as an advocate during pre-trial proceedings.") (emphasis in original).

Under Rule 11, a trial court may impose sanctions on a party, a party's attorney, or both "for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments." *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162, (1996).The Rule for awarding sanctions under Rule 11. If the actual wording of Rule 3.7 states an attorney may continue to advocate for his client during pre-trial matters, as 3.7 does, and if many cases support this view, as they do, then it logically follows that the motion for reconsideration of the order of disqualification and the appeal for the same purpose could not be frivolous by definition. The undersigned respectfully requests this Court strike sanctions it imposed for the time spent regarding the Defendant's response to the Motion for Reconsideration of the order of disqualification, and the time spent in preparing the motion for sanctions in regard to the matter. As the clear wording of Rule 407, Rule 3.7, SCACR specifically allows for counsel to participate in pre-trial matters, and the Court of Appeals denied the Defendant's Motion for Sanctions in filing the appeal of the order of disqualification, the Plaintiff's motion for reconsideration was both reasonable and logical. Moreover, the appeal of an order of disqualification must be

immediately appealed or waived. See *Hagood v Summerville*, supra, (An order granting a motion to disqualify a party's attorney in a civil case affects a substantial right that must be immediately appealed under Section 14-3-330(2), or waived.

In sum, while case law provides that an appellate court order denying sanctions does not preclude a trial court from considering granting sanctions, it is inconsistent to assess sanctions for the filing of a Rule 59(e) when such a motion is a logical prerequisite to the filing of a *required* immediate appeal of the trial court's decision in the first instance.

ISSUE IV

Time related to discovery requests served upon third party is not documented.

The Court awarded Defendant $9,071.00 for more than 30 hours of time relating to responding to discovery subpoenas issued by disqualified counsel and quashed by this Court in related hearings triggered by successful sanctions efforts of third-parties. Because no documentation whatsoever has been provided to this Court to show unusual time requirements more than 30 hours exceeds the amount of time that is either reasonable or necessary for defense counsel to prepare for and attend the motion to quash hearing. While this Court indicated that defense counsel's time related to the third party subpoena sanctions hearing should be included, the Amended Fee Affidavit does not detail what was done in connection with the preparation for this hearing, and does not provide sufficient information from which this Court can determined that the amount of time claim was reasonable and necessary. *First Union Nat. Bank of S. Carolina v. Soden*, 333 S.C. 554, 570, 511 S.E.2d 372, 380 (Ct. App. 1998).

ISSUE V

TIME RELATED TO INITIAL PREPARATION OF SANCTIONS MOTION AND ARGUING THE MOTION SHOULD BE REDUCED

The Court awarded $18,170.00 while the Defendant requested $13,320 for the time spent

in preparation of the sanctions motion, Amended Fee Application, ¶5 and an additional $2,750 for preparing for and arguing the motion, Id. at ¶ 7. Defendant is not entitled to an award of all fees incurred in relation to the sanctions motion because the Defendant did not prevail on all the claims alleged. Defendant sought sanctions under the South Carolina Frivolous Proceedings Act (FPA) and Rule 11 for all of their attorneys' fees incurred in Circuit Court from the inception of the case which this court specifically denied. Thus, even if this court does not wish to amend its' order, it should logically reduce the fees for preparation and arguing the motion. Moreover, as noted above, it appears the Court mistakenly provided the Defendant more fees in this regard than were requested.

CONCLUSION

The Court's order awarding Rule 11 sanctions against Plaintiff and its' counsel should be altered and denied for the following reasons:

a. The Motion for Sanctions was untimely filed and this Court dies not have the authority to grant the relief requested by the Defendant.

b. The fact that counsel for Defendant indisputably concurrently and adversely represented both Plaintiff and Defendant in violation of Rule 407, Rule 1.7 disqualifies the Defendant from requesting relief in equity.

c. Rule 3.7 requires that an attorney may only be disqualified "at trial," as opposed to pre-trial matters. The plain wording of Rule 3.7 renders the Plaintiff's Motion for Reconsideration and appeal reasonable.

d. In the absence of documented need to the contrary, the time counsel for counsel for Defendant claims to have spent on matters related to third parties discovery is undocumented and unreasonable.

e. Counsel for Defendant is not entitled to the time it spent on preparing the Motion for Sanctions as Defendant prevailed on only a part of it's' motion.

f. Finally, even if this Court otherwise determines its award of sanctions is just, the amount of the award should be reduced, In particular, the award should be reduced because much of this litigation would likely not have occurred if counsel for the Defendant had not subversively participated in the concurrent adverse representation of both parties.

Respectfully submitted.

A. Camden Lewis
James M. Griffin
Ariail King
Lewis, Babcock & Griffin, L.L.P.
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

SCOTT B. SUGGS
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.
2014 MAY -5 PM 3:03
FILED

May 5 2014.

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

STATE OF SOUTH CAROLINA COUNTY OF DARLINGTON	IN THE COURT OF COMMON PLEAS TWELF JUDICIAL CIRCUIT
Pee Dee Health Care, P.A., Plaintiff v. Estate of Hugh S. Thompson Defendant	Case No. 2010-CP-16-0332 Case No. 2010-CP-16-0633 **CERTIFICATE OF SERVICE**

FILED
2014 MAY -5 PM 3:05
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Pee Dee Health Care, P.A., do hereby certified that I have served a copy of the foregoing **Motion to Alter or Amend Order of this Court Filed 4-21-14 and Received by the Undersigned on April 24, 2014,** in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses on May 5, 2014:

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

Renee Josey
P.O. Box 5478
Florence, SC 29501

Jaime Harmon

Columbia, South Carolina
May 5, 2014

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

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NO. 10-CP-16-0332 (Probate Claim)
DOCKET NO. 10-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A.,,

Plaintiff,

vs.

Estate of Hugh S. Thompson ,

Defendant.

AFFIDAVIT OF J. RENÉ JOSEY

PERSONALLY appeared before me, J. René Josey, who being first duly sworn, deposes and says:

1. I am a member of the South Carolina Bar. I was admitted to the Bar in 1985 and have practiced extensively in the state and federal courts of South Carolina. I have been admitted to practice in the State of South Carolina as well as the United States District Court, the United States Courts of Appeal for the Fourth Circuit and Federal Circuit, and the United States Supreme Court.

2. I served as United States Attorney for almost five years and as a federal law clerk for two. I have decades of private practice experience including extensive appearances in this Court. I have the highest of peer review ratings as published in Martindale Hubbell. I have been listed in Best Lawyers in America and South Carolina Super Lawyers for many years.

3. My rate of compensation in this matter is $300.00 per hour. This is not my highest rate of compensation.

4. I was retained to assist in the representation of the Defendant in the above-referenced action. In my experience and opinion, this complex and aggressively pursued matter

easily warranted two or more attorneys working on the matter. The Plaintiff was represented by two different trial attorneys of record and has been aided since trial by several additional law firms.

5. In this matter and in this Court, I assisted in the preparation of pleadings and discovery requests. I have prepared multiple motions together with supporting memorandum of law. I have spent many hours researching, editing and working with my co-counsel so as not to duplicate efforts. I have advocated for the Defendant in communications with Plaintiff's counsel. I have counseled the Defendant. I also represented the Defendant in multiple hearings.

6. Time records for attorney work are kept in the ordinary course of our law firm's practice and are entered contemporaneously with the events recorded therein.

7. Detailed time records of my firm together with those of Mr. James' firm demonstrate that over 370 hours of counsel's time (combined) have been spent on Circuit Court work in this matter and the Defendant Estate has been or will be billed at least $96,580 for that Circuit Court related time. In addition to the 370 reported here, 45 more hours through January 14, 2014 can be attributed exclusively to the preparation of this motion for sanctions and the extensive record review and analysis needed to summarize years of conduct. Since that date, an additional 38.9 hours of combined time has been spent responding to the Motion to Strike the Sanction's request and preparing for the hearing (through March 24, 2014 only). Defense counsel asks that these hours also be compensated as part of the requested sanctions in this case.

J. RENÉ JOSEY

SWORN to before me this)
25th day of March, 2014.)
)
)
Vanelyn L. Bradley (L.S.)
Notary Public for South Carolina
My Commission Expires 10/5/2015

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NO. 10-CP-16-0332 (Probate Claim)
DOCKET NO. 10-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A.,,

Plaintiff,

vs.

Estate of Hugh S. Thompson ,

Defendant.

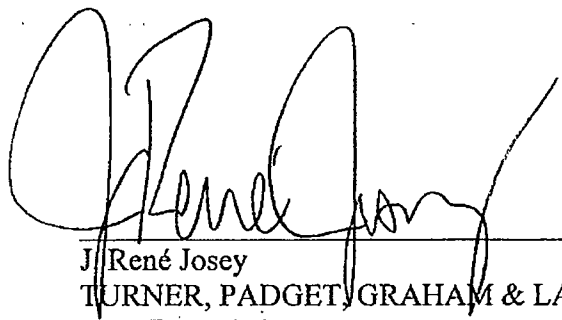
PROOF OF SERVICE

On behalf of the Defendant, the undersigned certifies that he has mailed a copy of the ***Defendant's Two Fee Affidavits (James and Josey)*** and this Proof of Service to all counsel listed below this 25th day of March 2014, with proper postage attached thereto:

James M. Griffin, Esquire
Ariail E. King, Esquire
Lewis, Babcock & Griffin, L.L.P.
P.O. Box11208
Columbia, SC 29211

Tony R. Megna, Esquire
Matthews & Megna
3400 West Avenue
Columbia, SC 29203

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



J. René Josey
TURNER, PADGET, GRAHAM & LANEY, P.A.
P. O. Box 5478
Florence, SC 29502-5478
(843) 662-9008
(843) 667-0828 fax

ATTORNEYS FOR DEFENDANT

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NO. 10-CP-16-0332 (Probate Claim)
DOCKET NO. 10-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A.,

Plaintiff,

vs.

Estate of Hugh S. Thompson,

Defendant.

AFFIDAVIT OF JOHN JAY JAMES, II

PERSONALLY appeared before me, John Jay James, II, who being first duly sworn, deposes and says:

1. I am a member of the South Carolina Bar. I was admitted to the Bar in 1971 and my practice has focused on estate planning, probate matters, and transactional matters.

2. I have the highest of peer review ratings as published in Martindale-Hubbell. I have also been listed in Best Lawyers in America for a number of years.

3. My rate of compensation in this matter is $200.00 per hour, which was the rate I quoted at the beginning of this estate administration in 2009. My rate of compensation for new matters is now higher.

4. I handled the initial responsive pleadings and discovery requests in this matter after the filing of the probate claim by the Plaintiff and the subsequent complaint in Common Pleas Court. Due to the complexity of the matter and the extremely aggressive way in which it was pursued, it was my opinion that an experienced trial attorney was needed to assist me. In the initial

weeks of the matter, when I was handling the matter alone, I was being "tag teamed" by the two attorneys representing the Plaintiff, receiving numerous emails from them each week.

5. After associating Mr. Josey, I continued to serve as co-counsel, assisting in the preparation of pleadings and discovery requests, and the multiple motions and supporting memoranda. Like Mr. Josey, I advocated for the Defendants in communications with the Plaintiff's counsel, I counselled with the Defendants about the matter, and I have represented the Defendants in multiple hearings. I have also continued to represent the Defendants in the normal administrative matters of a probate estate, including petitions seeking Court approval for sale of assets, filing of an accounting, and preparation of fiduciary income tax returns. The time spent in relation to handling of the normal matters of probate are not included within the attorney work for which Defendants are asking the Court to award sanctions.

6. Time records for attorney work are kept in the ordinary course of my practice and are entered contemporaneously with the events recorded therein.

7. Detailed time records of my firm together with those of Mr. Josey's firm demonstrate that over 370 hours of counsel's time (combined) have been spent on Circuit Court work in this matter (not counting Appellate Court work), and the Defendant Estate has been or will be billed at least $96,580 for that Circuit Court related time. In addition to the 370 hours reported here, as of January 14, 2014, 45 additional hours have been expended which can be attributed exclusively to the preparation of this Motion for Sanctions and the extensive record review and analysis needed to summarize years of conduct. Since that date, an additional 38.9 hours of combined time has been spent responding to the Motion to Strike the Sanction's request and preparing for the arguments on the Motion for Sanctions. Defense counsel asks that these hours also be compensated as part of the requested sanctions in this case.

John Jay James, II

SWORN to before me this)
)
25 day of March, 2014.)
)
)
Laura J. Cantrell (L.S.)
Notary Public for South Carolina
My Commission Expires 1/27/2021

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NO. 10-CP-16-0332 (Probate Claim)
DOCKET NO. 10-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A.,,

Plaintiff,

vs.

Estate of Hugh S. Thompson ,

Defendant.

COURT –REQUIRED SUPPLEMENTAL AFFIDAVIT SEGREGATING FEE COMPONENTS SOUGHT IN SANCTION'S REQUEST

PERSONALLY appeared before me, J. René Josey and John Jay James, II, each being first duly sworn, deposes and says:

1. Time Related To *Initial* Motion To Disqualify. Detailed time records of our firms in this matter demonstrate that 47.55 hours of our time involve Circuit Court work related to the initial motion to disqualify Mr. Megna (12.65 James and 34.9 Josey totalling $13,000). Fees for this time should be awarded under Rule 11 because Mr. Megna was identified as a key witness from the beginning in a document addressed to "Tony [Megna]" and attached to the Complaint. Defense counsel identified Mr. Megna's role as a witness from the beginning but he consistently and continually resisted disqualification throughout the Circuit Court proceedings.

2. Time Related to Reconsideration of Disqualification. Detailed time records of our firms in this matter demonstrate that 26.8 hours of our time involve Circuit Court work related to the reconsideration of Mr. Megna's disqualification (11.3 James

and 15.5 Josey totalling $6,910). Fees for this time should be awarded under Rule 11 because this reconsideration was filed by the disqualified Mr. Megna himself and represents part of his unreasonablebut consistent and continual resistance to clear grounds for disqualification.

3. Time Related to Reconsideration of Summary Judgment – not Initial Summary Judgment. Detailed time records of our firms in this matter demonstrate that 7.5 hours of our time involve Circuit Court work related to the reconsideration of the Court's Order of Summary Judgment (2.7 James and 4.8 Josey totalling $1,980). Fees for this time should be awarded under Rule 11 because this reconsideration was filed by the disqualified Mr. Megna himself which was found to be unauthorized by both this Court (and affirmsed by the Court of Appeals). *It is such continued participation after disqualification that has already served as the basis for this Court's award of sanctions to third-parties subpoenaed in this matter* (Desa Ballard and Doug Truslow).

4. Time Related to Discovery Requests Issued By Disqualified Attorney & Follow-Up Thereto. Detailed time records of our firms in this matter demonstrate that 30.8 hours of our time involve Circuit Court work related to responding to discovery subpoenas issued by disqualified counsel and quashed by this Court followed by participaation as counsel of record in related hearings triggered by successful sanctions efforts of third-parties (1.7 James and 29.1 Josey totalling $9,070). Fees for this time should be awarded under Rule 11 because this reconsideration was filed by the disqualified Mr. Megna himself which was found to be unauthorized by both this Court (and affirmsed by the Court of Appeals). *It is such continued participation after disqualification that has already served as*

the basis for this Court's award of sanctions to third-parties subpoenaed in this matter (Desa Ballard and Doug Truslow).

5. Time Related to Initial Preparation of Sanctions Motion. Detailed time records of our firms in this matter demonstrate that 45 hours of our time involve Circuit Court work related to preparation of the Defendant's Motion for Sanctions (4.8 James and 41.2 Josey totalling $13,320). Fees for this time should be awarded. Accord Ex Parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008) (Supreme Court approved recovery of the legal fees also incurred in seeking sanctions themselves).

6. Time Related to Responding to the Motion to Strike the Sanctions Motion. Detailed time records of our firms in this matter demonstrate that 38.9 hours of our time involve Circuit Court work related to responding to the Plaintiff's Motion to Strike the Sanctions request as untimely (5.00 James and 33.9 Josey totalling $11,170). This Court has found the award of some sanctions both timely and appropriate under Rule 11; moreover, at argument Plaintiff's counsel admitted that Russell v. Wachovia, 370 S.C. 5, 633 S.E.2d 722 (2006) contained a footnote (previously overlooked) allowing for a different Rule 11 Sanctions deadline. Counsel further admitted that Ex parte Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004) allowed a very different time window – some 363 days or more -- for sanctions under Rule 11. Thus, the time responding to the Motion to Strike is appropriately included.

7. Other Time Related to Preparing and Arguing The Sanctions Motion. Detailed time records of our firms in this matter demonstrate that 11 hours of our time involve Circuit Court work related to preparation to argue and arguing the Defendant's Motion for Sanctions (5.5 James and 5.5 Josey totalling $2,750).

Fees for this time should be awarded. Accord Ex Parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008)(Supreme Court approved recovery of the legal fees also incurred in seeking sanctions themselves).

8. Time Related to Court Directed Follow-Up To The Sanctions Motion. Detailed time records of our firms in this matter demonstrate that approximately 8 hours of our time involve Circuit Court work related to time segregation by issue and preparation of this Court directed supplement (3.0 James and 5.0 Josey totalling $2,100). Fees for this time should be awarded. Accord Ex Parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008) (Supreme Court approved recovery of the legal fees also incurred in seeking sanctions themselves).

9. Summary of Above-Components. As noted in previous affidavits of defense counsel filed in this Court, a grand total of 453.9 hours combined had been spent by defense counsel on this matter ***related to Circuit Court proceedings alone*** – through March 24, 2014. Through today, that total now exceeds 472 hours (Notably, Mr. James did not record much of his time – particularly in categories 4 and 5 above – to minimize billing to the Defendant for possible duplicative participation – and those unrecorded hours are not part of the 472 hours). Thus, if the Court awards fees only for components 1 through 8 above, the percentage of Circuit Court time compensated will be approximately 45 % of the 472 hours (a total of $60,300).

10. Renewed Request. Defense counsel would renew its request that all their Circuit Court fees be awarded as part of this Court's sanctions order.

JOHN JAY JAMES, II

SWORN to before me this)
1st day of April, 2014.)
)
)
Donna K. Rabon (L.S.)
Notary Public for South Carolina
Our Commission Expires 4/22/19

J. RENÉ JOSEY

SWORN to before me this)
1st day of April, 2014.)
)
)
Donna K. Rabon (L.S.)
Notary Public for South Carolina
Our Commission Expires 4/22/19

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS

FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NO. 10-CP-16-0332 (Probate Claim)
DOCKET NO. 10-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A.,,

Plaintiff,

vs.

Estate of Hugh S. Thompson ,

Defendant.

PROOF OF SERVICE

On behalf of the Defendant, the undersigned certifies that he has e-mailed and mailed a copy of the ***Court –Required Supplemental Affidavit Segregating Fee Components Sought In Sanction's Request*** and this Proof of Service to counsel listed below this 1ST day of April 2014, with proper postage attached thereto:

James M. Griffin, Esquire
Lewis, Babcock & Griffin, L.L.P.
P.O. Box11208
Columbia, SC 29211

J. René Josey
TURNER, PADGET, GRAHAM & LANEY, P.A.
P. O. Box 5478
Florence, SC 29502-5478
(843) 662-9008
(843) 667-0828 fax

ATTORNEYS FOR DEFENDANT

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF DARLINGTON

PEE DEE HEALTH CARE, PA, Plaintiff

v.

ESTATE OF HUGH S. THOMPSON, Defendant

SUBPOENA IN A CIVIL CASE

Case Number: 10-cp-16-0332

Pending in DARLINGTON County

TO: Celeste Jones

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

See Exhibit A.

PLACE	DATE AND TIME
201 Cashua Street, Darlington, SC 29532	Wed, August 17, 2011 , @ 11:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION.

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Tony R. Megna, Attorney for Plaintiff — July 27, 2011

Attorney/Issuing Officer's Signature — Date — Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number:

3400 West Avenue, Columbia, SC 29203 [email: tmegna@gmail.com]; telephone: 803.686.5983

Clerk of Court/Issuing Officer's Signature — Date — Print Name

Pro Se Litigant's Name, Address and Telephone Number

FILED
2011 JUL 28 AM 11:00
SCOTT SUGGS
CLERK OF COURT/TRIAL
DARLINGTON COUNTY, S.C.

SCCA 254 (05/2011)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

i. fails to allow reasonable time for compliance; or

ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

iv. subjects a person to undue burden.

(B) If a subpoena:

i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or

ii. requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF RICHLAND

PEE DEE HEALTH CARE, PA, Plaintiff

v. SUBPOENA IN A CIVIL CASE

ESTATE OF HUGH S. THOMPSON, Defendant Case Number: 10-cp-16-0332

Pending in DARLINGTON County

TO: Desa Ballard

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

See Exhibit A.

PLACE	DATE AND TIME
201 Cashua Street, Darlington, SC 29532	Wed, August 17, 2011, @ 11:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Tony R. Megna, Attorney for Plaintiff July 27, 2011

Attorney/Issuing Officer's Signature Date Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number:

3400 West Avenue, Columbia, SC 29203 [email: tmegna@gmail.com]; telephone: 803.606.5983

Clerk of Court/Issuing Officer's Signature Date Print Name

Pro Se Litigant's Name, Address and Telephone Number:

FILED
2011 JUL 28 AM 11:00
SCOTT B. SUGGS
CLERK OF COURT/R.M.C.
DARLINGTON COUNTY, S.C.

SCCA 254 (05/2011)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

i. fails to allow reasonable time for compliance; or

ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

iv. subjects a person to undue burden.

(B) If a subpoena:

i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or

ii. requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF DARLINGTON

PEE DEE HEALTH CARE, PA, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

ESTATE OF HUGH S. THOMPSON, Defendant Case Number: 10-cp-16-0332

Pending in DARLINGTON County

TO: Jay James

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

See Exhibit A.

PLACE	DATE AND TIME
201 Cashua Street, Darlington, SC 29532	Wed. August 17, 2011 @ 11:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES

Tony R. Megna, Attorney for Plaintiff

Attorney/Issuing Officer's Signature | Date | Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number:

3400 West Avenue, Columbia, SC 29203 [email: tmegna@gmail.com]; telephone: 803.686.5983

Clerk of Court/Issuing Officer's Signature | Date | Print Name

Pro Se Litigant's Name, Address and Telephone Number:

FILED
2011 JUL 28 AM 11:00
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

SCCA 254 (05/2011)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

i. fails to allow reasonable time for compliance; or

ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

iv. subjects a person to undue burden.

(B) If a subpoena:

i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or

ii. requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties In Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF DARLINGTON

PEE DEE HEALTH CARE, PA, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

ESTATE OF HUGH S. THOMPSON, Defendant

Case Number: 10-cp-16-0332

Pending in DARLINGTON County

TO: Brandon Hylton

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

See Exhibit A.

PLACE	DATE AND TIME
201 Cashua Street, Darlington, SC 29532	Wed, August 17, 2011 , @ 11:00 a.m.

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Tony R. Megna, Attorney for Plaintiff — July 27, 2011

Attorney/Issuing Officer's Signature — Date — Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number

3400 West Avenue, Columbia, SC 29203 [email: tmegna@gmail.com]; telephone: 803.665.5983

Clerk of Court/Issuing Officer's Signature — Date — Print Name

Pro Se Litigant's Name, Address and Telephone Number:

FILED
2011 JUL 28 AM 11:00
SCOTT B. SUGGS
CLERK OF COURT P.R.O.C.
DARLINGTON COUNTY, S.C.

SCCA 254 (05/2011)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

SIGNATURE OF SERVER

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures. Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

i. fails to allow reasonable time for compliance; or

ii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

iii. requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

iv. subjects a person to undue burden.

(B) If a subpoena:

i. requires disclosure of a trade secret or other confidential research, development, or commercial information, or

ii. requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

iii. requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties In Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF DARLINGTON

PEE DEE HEALTH CARE, PA, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

ESTATE OF HUGH S. THOMPSON, Defendant

Case Number: 10-cp-16-0332

Pending in DARLINGTON County

TO: Renee Josey

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents of objects:

See Exhibit A.

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PREMISES	DATE AND TIME

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I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES

Tony R. Megna, Attorney for Plaintiff

Attorney/Issuing Officer's Signature — Date — Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number:

3400 West Avenue, Columbia, SC 29203 [email: tmegna@gmail.com]; telephone: 803.606.5983

Clerk of Court/Issuing Officer's Signature — Date — Print Name

Pro Se Litigant's Name, Address and Telephone Number

FILED
2011 JUL 28 AM 11:00
SCOTT B. SUGGS
CLERK OF COURT & C.O.D.
DARLINGTON COUNTY, S.C.

SCCA 254 (05/2011)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

SIGNATURE OF SERVER

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(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

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STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF RICHLAND

PEE DEE HEALTH CARE, PA , Plaintiff

v.

ESTATE OF HUGH S. THOMPSON , Defendant

SUBPOENA IN A CIVIL CASE

Case Number: 10-cp-16-0332

Pending in DARLINGTON County

TO: Kenneth Woodington

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

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Tony R. Megna, Attorney for Plaintiff — July 27, 2011

Attorney/Issuing Officer's Signature — Date — Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number:

3400 West Avenue, Columbia, SC 29203 [email: tmegna@gmail.com]; telephone: 803-606-5983

Clerk of Court/Issuing Officer's Signature — Date — Print Name

Pro Se Litigant's Name, Address and Telephone Number:

FILED
2011 JUL 28 AM 11:00
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

SCCA 254 (05/2011)

(See Rule 45, South Carolina Rules of Civil Procedure, Parts (c) & (d) on next page)

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TENDERED TO WITNESS
	PLACE	☐YES ☐NO AMOUNT $
SERVED ON		MANNER OF SERVICE
SERVED BY		TITLE

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on_____

SIGNATURE OF SERVER

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 11 2015
SC Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Circuit Court

J. Michael Baxley and Paul M. Burch, Circuit Court Judges
Case No. 10-CP-16-0332
Appellate Case No. 2014-001275

Pee Dee Health Care, P.A. .....Appellant-Respondent.

v.

Estate of Hugh S. Thompson.....Respondent-Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material, and that Appellant-Respondent has complied with the August 13, 2007 Order of the Supreme Court on Personal Data Identifiers.

James M. Griffin
Ariail E. King
LEWIS BABCOCK & GRIFFIN, L.L.P.
1513 Hampton Street
Post Office Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Columbia, SC
February 19, 2015

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAR 11 2015
SC Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Circuit Court

J. Michael Baxley and Paul M. Burch, Circuit Court Judges
Case No. 10-CP-16-0332
Appellate Case No. 2014-001275

Pee Dee Health Care, P.A.....Appellant-Respondent.

v.

Estate of Hugh S. Thompson.....Respondent-Appellant.

PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis Babcock & Griffin L.L.P, attorney for Pee Dee Health Care, P.A. do hereby certify that I have served a copy of Record on Appeal on February 19, 2015, by causing a copy of same to be deposited in the U.S. Mail, proper postage prepaid addressed as follows:

John James, Esquire
Paulling & James, LLP
P.O. Box 507
Darlington, SC 29540

Rene Josey, Esquire
Turner Padget Graham & Laney, PA
P.O. Box 5478
Florence, SC 29502

Jaime Harmon

This 19th day of February, 2015.