

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Court of Appeals Case No. 2015-000187

RECEIVED

OCT 16 2015

S.C. Supreme Court

Dr. Cynthia Holmes, M.D.,

Petitioner,

v.

East Cooper Community Hospital Inc., and
Tenet HealthSystem Meical, Inc.,

Respondents.

APPENDIX

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chalmersjohnson@gmail.com
For Petitioner

Other Counsel of Record:
L. Smith-Yancey
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Charleston, SC 29413
843.727.2200
For Respondents

THE STATE OF SOUTH CAROLINA
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Court of Appeals Case No. 2015 - 000187

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S.C. Supreme Court

APPENDIX

1. September 2, 2015, order.
2. May 8, 2015, order.
3. NOA and orders on appeal.
4. Motion to Dismiss.
5. Transcript excerpt of Defendant Tenet's counsel testifying under oath that counsel was unaware that the cause of action on appeal herein includes claims for wrongful termination and for denial of Fair Hearing at termination, claims which have never been made before and which are addressed in the Affidavit of the Expert Witness timely filed herein.
6. Affidavit of the Expert Witness timely filed herein.
7. Order of Circuit Court, now Court of Appeals, Judge Daniel Pieper denying Defendant Tenet's motion for summary judgment.
8. Return.
9. Reply.
10. Rule 240(j), SCACR, Motion.
11. Return.
12. Reply.
13. Correspondence - lower appellate court clerk.

#1

The South Carolina Court of Appeals

Dr. Cynthia Holmes, M.D., Appellant,

v.

East Cooper Community Hospital, Inc. and Tenet
HealthSystem Medical, Inc., Respondents.

Appellate Case No. 2015-000187

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

H. Bruce Wilcox J.

John D. Beathum J.

Gregory M. Cretton A.J.

Columbia, South Carolina

cc:

Erskine Douglas Pratt-Thomas, Esquire
Lindsay K Smith-Yancey, Esquire
Chalmers Carey Johnson, Esquire
Daniel Simmons McQueeney, Jr., Esquire



#2

The South Carolina Court of Appeals

Dr. Cynthia Holmes, M.D., Appellant,

v.

East Cooper Community Hospital, Inc. and Tenet
HealthSystem Medical, Inc., Respondents.

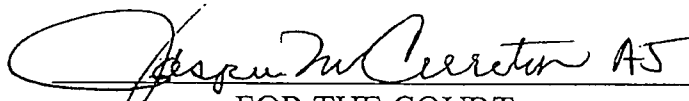
Appellate Case No. 2015-000187

ORDER

On July 29, 2011, the circuit court granted summary judgment in favor of Respondents and on January 27, 2012, the circuit court sanctioned Appellant pursuant to the South Carolina Frivolous Proceedings Act. On March 26, 2014, the Supreme Court of South Carolina affirmed both of the circuit court's decisions. *See Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014). On June 13, 2014, the remittitur was properly sent down pursuant to Rule 221(b), SCACR. Thereafter, Appellant filed a post-remittitur motion with the circuit court seeking to withdraw a motion to dismiss counterclaims she had filed with the circuit court prior to its July 29, 2011 entry of summary judgement. On November 3, 2014, the circuit court issued an order that stated "[Appellant's] Motion to Withdraw the Motion to Dismiss, filed on 7/07/2014, is not a viable motion; No viable motions pending in this resolved case." Appellant then filed a pro se Rule 59(e), SCRCP, motion for reconsideration. The circuit court issued an order finding that motion to be improper, stating "[Appellant's] Rule 59(e) Motion, filed on 11/19/2014, is improper; [the circuit court] declines any request for reconsideration of the order entered 11/3/2014 due to the status of this case as closed and in accordance with the Supreme Court's order dated 12/2/2009."¹

¹ In the December 2, 2009 order, the Supreme Court of South Carolina directed "the Clerks of Court in this state to refuse to accept further filings from [Appellant] in actions related in any way to the revocation of her medical staff privileges at East Cooper Community Hospital unless they are filed by an attorney, other than petitioner, licensed to practice law in this state.

Appellant has now attempted to serve and file a notice of appeal from the circuit court's November 3, 2014 order finding her motion to withdraw her motion to dismiss "is not a viable motion" and the December 9, 2014 order finding her motion for reconsideration is not proper due to the case being closed and Appellant's pro se status. After careful consideration, this appeal is dismissed because "no actual controversy capable of specific relief exists." *See Sloan v. Greenville Cnty.*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009) ("The court does not concern itself with moot or speculative questions. An appellate court will not pass judgment on moot and academic questions; it will not adjudicate a matter when no actual controversy capable of specific relief exists. A case becomes moot when judgment, if rendered, will have no practical legal effect upon the existing controversy."). Here, because summary judgment has been granted, affirmed on appeal, and the remittitur sent down, there is no longer an existing controversy. The remittitur will be sent down as provided by Rule 221(b), SCACR.


FOR THE COURT

Columbia, South Carolina

cc:

Ersine Douglas Pratt-Thomas, Esquire
Lindsay K Smith-Yancey, Esquire
Chalmers Carey Johnson, Esquire
Daniel Simmons McQueeney, Jr., Esquire



⑤

#3

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

MAY 26 2015

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

App. Case No. 2015 - 000187

C. Holmes, M.D.

Appellant,

v.

East Cooper Community Hospital, Inc.; and
Tenet HealthSystem Medical, Inc.,

Respondents.

AMENDED
NOTICE OF APPEAL

The Appellant timely appeals the orders of the Honorable R. Markley Dennis, Jr., entered December 9, 2014, and entered November 3, 2014.

Dated May 22, 2015


Chalmers C. Johnson
1029 Bay St., #7
Port Orchard, WA 98366
425.999.0900

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-10-3410

FILED

Dr. Cynthia Holmes, MD

East Cooper Community Hospital Inc., et al

2014 NOV -3 PM 1:14

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

JULIE L ARMSTRONG
CLERK OF COURT

BY

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion to Withdraw the Motion to Dismiss, filed on 7/07/2014, is not a viable motion; No viable motions pending in this resolved case.

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)
N/A		\$
		\$
		\$

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

2060

Judge Code

10/29/2014

Date

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-10-3410

Dr. Cynthia Holmes, M.D.

East Cooper Community Hospital, Inc. and Tenet
HealthSystem Medical, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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.
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- ☐ **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.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Rule 59(e) Motion, filed on 11/19/2014, is improper; Judge Dennis declines any request for reconsideration of the order entered 11/3/2014 due to the status of this case as closed and in accordance with the Supreme Court's order dated 12/2/2009.

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.

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N/A		\$
		\$
		\$

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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

2060

Judge Code

12/3/2014

Date

#4

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-3410

RECEIVED

MAR 06 2015

SC Court of Appeals

C. Holmes, M.D.

Petitioner,

175272

v.

East Cooper Community Hospital, Inc.
and Tenet HealthSystem Medical, Inc.

Respondents.

RESPONDENTS' MOTION TO DISMISS APPEAL

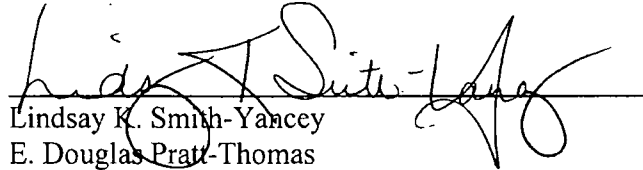
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E. Douglas Pratt-Thomas
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(843) 727-2200
Attorneys for Respondents

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(425) 999-0900
Attorney for Appellant

Respondents East Cooper Community Hospital, Inc., and Tenet HealthSystem Medical, Inc. (collectively "Respondents"), by and through their undersigned counsel, move this Court to dismiss Appellant's appeal. As shown fully in the attached Memoranda, Appellant's appeal and notice of appeal itself violates an order of the South Carolina Supreme Court Order, is not timely, was not served on Respondents, was not filed by Appellant's attorney of record, and remains procedurally deficient and improper despite subsequent "curative" filings. As such, Appellant's appeal should be DISMISSED and REMITTED to the circuit court.

March 4, 2015

Respectfully submitted,



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Attorneys for Respondents

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-3410

C. Holmes, M.D.

Petitioner,

v.

East Cooper Community Hospital, Inc.,
and Tenet HealthSystem Medical, Inc.

Respondents.

**RESPONDENTS' MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS APPEAL**

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Attorneys for Respondents

RECEIVED
MAR 06 2015
SC Court of Appeals

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Facts and Procedural Background

Appellant Cynthia Collie Holmes is a medical doctor and attorney who has, over the last 16 years, filed multiple lawsuits arising out of her applications for medical staff privileges at East Cooper Medical Center. Her litigation activities have resulted in a number of reprimands and sanctions judgments issued against her, including the suspension of her license to practice law in South Carolina ("SC"), and an Order of the SC Supreme Court directing the clerks of court of this State to reject any filings by her unless signed by another attorney. **Ex. 1, December 2, 2009 Order of SC Supreme Court; November 26, 2014 Order of Definite Suspension of SC Supreme Court.**

The present notice of appeal arises out of Civil Action Case No.: 2010-CP-10-3410 filed in the Charleston County Court of Common Pleas. This action also relates to Appellant's application for medical staff privileges at East Cooper Medical Center. Appellant is represented by Chalmers Johnson, Esq., in this matter. The case was initiated on April 26, 2010, by a Summons and Complaint filed by Mr. Johnson. **Ex. 2, Complaint.** On July 29, 2011, the Honorable Kristi Lea Harrington granted summary judgment to Respondents, and on January 27, 2012, Judge Harrington issued an order levying sanctions against Appellant pursuant to the SC Frivolous Proceedings Act. **Ex. 3, Summary Judgment Order and Ex. 4, Order Awarding Sanctions.** Appellant was represented by Mr. Johnson throughout the entirety of the trial court proceedings in this matter.

Thereafter, Appellant appealed both the summary judgment order and the sanctions order to the SC Court of Appeals. **Ex. 5, Appellant's Notices of Appeal.** The appeals were assigned Appellate Case Numbers 2011-198092 and 2012-209666, were consolidated, and

then certified to the SC Supreme Court. Both orders were affirmed by the Supreme Court and on June 13, 2014, Remittitur was issued. **Ex. 6, SC Supreme Court Order March 26, 2014, and June 13, 2014, Remittitur.** Again, Mr. Johnson represented Appellant throughout the first appellate process involving this matter.

As demonstrated by the above, this case has already been fully and finally adjudicated by the trial and appellate courts of this State. Despite this, on July 7, 2014, Appellant filed a post-remittitur motion in the trial court seeking to withdraw a motion to dismiss counterclaims she had filed before entry of summary judgment and the aforementioned appellate process. **Ex. 7, Plaintiff's Motion to Withdraw Plaintiff's Motion to Dismiss Defendant's Counterclaims.** This motion was filed by Mr. Johnson who appeared and gave oral argument on behalf of Appellant at a hearing on October 27, 2014, presided over by The Honorable Markley Dennis, Jr. Judge Dennis ruled that the case, including the counterclaims, had been fully adjudicated by way of Judge Harrington's previous orders and the appeal of same. **Ex. 8, Transcript of October 27, 2014 hearing.** He further ruled that because there were no remaining issues Appellant's motion was moot and not viable, stating "there's no motion to dismiss because there's nothing to dismiss." **Id. at page 5.** On October 29, 2014, Judge Dennis signed a Form 4 order stating "Plaintiff's Motion to Withdraw the Motion to Dismiss, filed on 7/07/2014, is not a viable motion; No viable motions pending in this resolved case." **Ex. 9, October 29, 2014 Form 4 Order.** This order was filed on November 3, 2014.

On December 3, 2014, Appellant attempted to file in the Court of Appeals a *pro se* notice of appeal of Judge Dennis' October 29, 2014 order. **Ex. 10, December 3, 2014, Pro Se Notice of Appeal.** The notice was not signed by Mr. Johnson or any other attorney.

Appellant's notice was rejected by The Honorable Jenny A. Kitchings pursuant to the aforementioned 2009 order of the SC Supreme Court requiring clerks of court to reject any filings attempted by Appellant regarding her medical staff privileges unless signed by another attorney. **Ex. 11, January 21, 2015 letter of Kitchings.**

Appellant also attempted a *pro se* Rule 59(e) motion in the trial court seeking reconsideration of Judge Dennis's October 29, 2014 order. **Ex. 12, *Pro Se* Notice of Motion and Rule 59(e) SCRCF Motion.** On December 3, 2014, Judge Dennis signed another Form 4 order rejecting Appellant's *pro se* motion, reiterating that the case was "closed" and that the *pro se* motion was "improper...in accordance with the Supreme Court's order dated 12/2/09." **Ex. 13, December 3, 2014 Form 4 Order.** This order was filed December 9, 2014.

On January 20, 2015, Appellant served Respondents with yet another *pro se* notice of appeal, this one purporting to appeal the December 3, 2014, order of Judge Dennis rejecting her *pro se* motion for reconsideration. **Ex. 14, *Pro Se* Notice of Appeal dated January 14, 2015.** Again, the notice was not signed or co-signed by another attorney and the undersigned is unaware of whether this particular notice was ever filed with the Court of Appeals. Importantly, this is the only notice with which Respondents have been served concerning Judge Dennis' December 3, 2009 order. **Ex. 15, Affidavits of Smith-Yancey, Pratt-Thomas, Catapano and Dennis.**

On February 5, 2015, Respondents received copies of two correspondences sent to Charles Goldberg, Esq., from Court of Appeals Deputy Clerk V. Claire Allen. **Ex. 16, February 3, 2015, letters of Allen.** The correspondences indicated Mr. Goldberg had filed a notice of appeal on behalf of Appellant purporting to appeal both of the aforementioned

orders of Judge Dennis. **Id.** The correspondences also indicated a request for the transcript had been filed. **Id.** Ms. Allen's letters set forth a number of deficiencies in the filings, including that the notice of appeal did not indicate when notice of the entry of judgment was received and that the transcript request was not signed and did not indicate service on opposing counsel. **Id.**

Once made aware of the notice filed by Mr. Goldberg, the undersigned obtained copies of same and the accompanying documents from the Court of Appeals' online filing system. **Ex. 15, Affidavit of Smith-Yancey.** In addition to those deficiencies set forth by Ms. Allen, it was discovered that the proof of service accompanying the notice is only signed by Appellant herself. Mr. Goldberg's signature does not appear on the proof of service, nor does that of any other attorney other than Appellant. Further, the cover letter to the Court of Appeals enclosing the notice, proof of service, and transcript request is not dated, is not signed, and contains no letter head or signature line indicating from whom the letter was sent.

Again, Ms. Allen's correspondences were the first notice Respondents received of Mr. Goldberg's involvement in this matter, that he had filed a notice of appeal on behalf of Appellant, and that a request for transcript had been made. **Ex. 15, Affidavits of Smith-Yancey, Pratt-Thomas, Catapano and Dennis.** Indeed, and as indicated above, Chalmers Johnson, Esq., has been Appellant's attorney of record throughout the trial and previous appellate court proceedings in this very matter. Respondents are not aware of any motion to withdraw filed by Mr. Johnson or order of substitution allowing Mr. Goldberg to take over as Appellant's attorney of record.

On February 11, 2015, Appellant made more *pro se* filings with the Court of Appeals, these purportedly to address the deficiencies set forth by Ms. Allen. While the filings appear

to have been transmitted to the Court of Appeals via facsimile from Mr. Goldberg's office, the filings are signed by Appellant and not Mr. Goldberg. The first filing is an amended transcript request. The amended request now contains a signature but the signature is that of Appellant, not Mr. Goldberg. The transcript request remains undated. The second filing is an affidavit of Appellant purporting to address when notice of entry of the orders on appeal were received. Appellant's affidavit states notice was received "on or after December 15, 2014" and fails to set forth a finite date in this regard. The affidavit does not specify to which order on appeal this "on or after" date of notice applies. It is assumed that said language applies to notice of entry of the December 3, 2014 order of Judge Dennis. There is no statement indicating when entry of the November 3, 2014 order, also on appeal, was received.

On February 12, 2015, Mr. Goldberg filed a notice of substitution of counsel purporting to substitute Mr. Chalmers, Appellant's attorney of record, for himself. The accompanying consent signature page signed by Appellant and Messrs. Johnson and Goldberg is not dated. On February 26, 2015, the Court of Appeals issued an order allowing Mr. Goldberg to withdraw. **See February 26, 2015, Order of Court of Appeals.**

Standards governing notices of appeal and representation of appellants

The SC Appellate Court Rules (ACR) set forth several procedural requirements an appellant must follow when appealing an order or judgment from the trial court. Rule 203(a) requires a party intending to appeal to serve and file a notice of appeal and otherwise comply with the ACR. Rule 203(b)(1) requires a notice of appeal to be served on all respondents "within thirty (30) days after receipt of written notice of entry of the order or judgment."

Rule 203(d)(B) requires the notice to be accompanied by a proof of service showing service of the notice on all respondents. Rule 203(e)(1)(c) requires that the notice contain a statement of when the appealing party received notice of the order or judgment from which the appeal is taken. Rule 207 requires an appellant to order the transcript of the proceeding at issue within ten (10) days after the date of service of the notice of appeal. Lastly, Rule 203(d)(B) requires the appellant to file the notice with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served.

The ACR likewise set forth requirements for legal representation of litigants in the appellate courts. Rule 264(a) titled "Continued Representation" states "[t]he attorneys and/or guardians ad litem of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties in the appellate court until withdrawal is approved and notice is given as provided in this Rule." Rule 264(b) states "[a]n attorney of record in a matter pending before an appellate court may not withdraw from representation of his client without justifiable cause, or the consent of his client; and then only after proper written notice to his client, on petition to and by written order of the appellate court, and with notice to the adverse party."

I. Appellant's appeal of the October 29, 2014 order is untimely.

As indicated above, Appellant originally attempted to appeal the October 29, 2014, order of Judge Dennis by way of a *pro se* notice of appeal dated December 3, 2014. **Ex. 10, December 3, 2014, Pro Se Notice of Appeal.** The notice was properly rejected by the Clerk of Court as in violation of the 2009 SC Supreme Court order because it was not signed by another attorney licensed to practice law in this state. **Ex. 1, December 2, 2009 Order of**

Supreme Court; Ex. 11, January 21, 2015 letter of Kitchings. Appellant's actions in this regard show she was in receipt of written notice of the entry of Judge Dennis' October 29, 2014 order by at least December 3, 2104, the date of her of *pro se* notice. As such, Appellant would have needed to serve Respondents with a proper notice of appeal, signed by another attorney, by January 2, 2015, and serve the clerks of the lower and appellate courts with it by January 12, 2015, to be in compliance with ACR Rules 203(b)(1) and 203(d)(B), respectively. The notice of appeal signed by Mr. Goldberg, however, was not served on the Court of Appeals until January 30, 2015, well beyond these deadlines. For this reason alone, regardless of the fact that Mr. Goldberg's notice was never served on Respondents, Appellant's appeal of the October 29, 2014, is untimely under the ACR and should be dismissed.

II. Appellant's appeal of Judge Dennis' December 3, 2014, is improper as it arises from a *pro se* motion in violation of the December 2009 order of the SC Supreme Court.

As indicated above, after the conclusion of the first appellate process in this very same case, Mr. Johnson filed a post-remittitur motion in the trial court on behalf of Appellant. This motion was denied by Judge Dennis in his order dated October 29, 2014, the first order on appeal herein. Thereafter, Appellant, in a *pro se* capacity, attempted to move the trial court for reconsideration of this order by way of a *pro se* Rule 59(e) motion. **Ex. 12, *Pro Se* Notice of Motion and Rule 59(e) SCRCF Motion.** The Rule 59(e) motion was signed by Appellant only. It was not signed by Mr. Johnson, her attorney of record, or any other attorney. **Id.** In response thereto, Judge Dennis issued another order, entered December 3, 2014, the second order on appeal herein. In his December 3, 2014 order Judge Dennis

rejected Appellant's *pro se* motion as improper under the 2009 Supreme Court order. **Ex. 13, December 3, 2014 Form 4 Order.**

Judge Dennis' December 3, 2014 order was in direct response to an improper *pro se* motion made by Appellant in violation of the 2009 Supreme Court order. As such, any attempted appeal of same is improper and should be dismissed.

III. The required filings accompanying Appellant's notice of appeal are contrary to the 2009 order of the SC Supreme Court.

While Appellant was ultimately successful in having Mr. Goldberg sign a notice appeal on her behalf, the attending documents required by the ACR are not signed by Mr. Goldberg and contain only the signature of Appellant. For instance, the proof of service required under Rule 203 (d)(B) is signed by Appellant only. **See Proof of Service received by SC Court of Appeals February 12, 2015.** Likewise, the transcript request required of ACR Rule 207 is signed by Appellant only. **See letter to Anderson received by SC Court of Appeals February 12, 2015.** Importantly, Respondents have no record of having ever been served with the notice of appeal or the transcript request, and there is no proof of service filed by an attorney other than Appellant indicating otherwise. **Ex. 15, Affidavits of Smith-Yancey, Pratt-Thomas, Catapano and Dennis.**

Rule 203 of the ACR requires a party intending an appeal to comply with the ACR and the ACR specifically require a proof of service and a transcript request to be filed with the Court of Appeals. As such, these documents constitute filings under the ACR and in this case, pursuant to the Supreme Court's 2009 order, they must be filed by another attorney. Because the proof of service and transcript request herein are signed by Appellant only, they are in contradiction of the Supreme Court order and should be rejected.

IV. Appellant's Notice of Appeal has not been served on Respondents.

Rule 203(b)(1) requires a notice of appeal to be served on all respondents "within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203 (d)(B) requires the notice to be accompanied by a proof of service showing service of the notice on all respondents.

Respondents have never been served with the instant notice of appeal and were only made aware of it through the deficiency notices of Deputy Clerk Allen. **Ex. 15, Affidavits of Smith-Yancey, Pratt-Thomas, Catapano and Dennis.** The *pro se* proof of service signed only by Appellant is prohibited by the December 2009 order of the SC Supreme Court and, therefore, cannot be considered as credible evidence to the contrary. The deadline to serve the Respondents with the notice of appeal has long expired as to each order on appeal. Because the notice of appeal was never served on Respondents and because there is no proper proof of service to contrary, Appellant's notice of appeal should be dismissed.

V. Appellant's affidavit is improper and does not cure the deficiencies in the notice of appeal.

As noted by Deputy Clerk Allen in her February 3, 2015, letter to Mr. Goldberg, the notice of appeal fails to contain a statement of when notice of written entry of the judgments on appeal were received. **Ex. 16, February 3, 2015, letters of Allen.** Deputy Allen gave notice that the deficiency must be corrected within ten (10) days of the date of her letter. **Id.** Appellant's affidavit notarized on February 9, 2015, fails to cure this deficiency.

First and foremost, the filing purported to cure the deficiency is not signed by an attorney other than Appellant. While Appellant was represented by Mr. Johnson when both orders on appeal were entered, the only evidence Appellant has submitted on this issue is her

own affidavit. For the same reasons set forth in the proceeding Section III of this Memorandum, Respondents do not believe this affidavit complies with the Supreme Court's 2009 order requiring all filings made by Appellant to be filed by another attorney.

Further, the content of the affidavit itself does not cure the deficiency. Appellant's affidavit fails to set forth a finite date on which notice of entry of either order on appeal was received. Rather, Appellant states notice was received "on or after December 15, 2014." The affidavit does not identify which order on appeal was received on this "on or after date." While it is assumed this language applies to notice of entry of the December 3, 2014 order on appeal, this language is insufficient to constitute a statement of when the appealing party received notice of the order or judgment from which the appeal is taken as required under ACR 203(e)(1)(c). The "or after" portion of this statement is insufficient for the Court of Appeals and Respondents to determine appropriate filing and service deadlines under the ACR. Further, the affidavit fails to contain any statement at all as to when notice of entry of the December 3, 2014, order on appeal was received.

The *pro se* affidavit is improper under the 2009 Supreme Court order and its content testimony does not cure the deficiencies in the notice of appeal. As such Appellant's notice of appeal remains procedurally deficient and should be dismissed.

VI. The notice of appeal was not filed by Appellant's attorney of record.

Rule 264(a) of the ACR specifically states that the attorneys of the respective parties in the trial court proceedings shall be deemed the attorneys of record for the same parties in the appellate court until withdrawal is approved and notice is given. In order to withdraw as attorney of record for a party, an attorney must petition the appellate upon justifiable cause

after notice to the adverse party. Rule 264(b). This process was not followed in this case.

Chalmers Johnson, Esq., has always been attorney of record for Appellant in this matter. As indicated above, Mr. Johnson has represented Appellant not only in the trial court proceedings, but in the previous appellate proceedings in this very matter as well. Indeed, Mr. Johnson filed and argued the very post-remittitur motion from which the present appeal partially arises. At no time has Mr. Johnson ever petitioned the trial court or the Court of Appeals for withdrawal of representation of Appellant. And at no time prior to his filing of the notice of appeal did Mr. Goldberg move to be substituted as counsel for Appellant.

Because Mr. Goldberg was not Appellant's counsel of record at the time he filed the notice of appeal on her behalf, the notice is improper and should be dismissed.

VII. Appellant's appeal is the product of hybrid legal representation not recognized in S.C.

Hybrid representation is defined as representation which is partially *pro se* and partially by counsel. See *State v. Sanders*, 269 S.C. 215, 237 S.E. (2d) 53 (1977). There is no constitutional right to hybrid representation either at trial or on appeal. *Foster v. State*, 298 S.C. 306, 306-307, 1989. "At the appellate stage, particularly, succinct, relevant legal arguments are most likely to be persuasive. Counsel is best able to use professional judgment to determine which arguments are relevant and should be presented for appellate review. While counsel may choose to submit arguments urged by his client, counsel has an obligation to review those arguments for possible relevance and merit before submitting them. In other words, counsel cannot serve as a mere conduit for *pro se* documents in an effort to avoid the prohibition against hybrid representation and the displeasure of his client." *Foster, supra*. Courts should not accept *pro se* filings simply forwarded through counsel. *Jones v. State*,

348, S.C. 13, 558 S.E. 2d 517 (2002). Instead, counsel shall use professional judgment in reviewing documents and shall submit a client's arguments only if relevant and only after they have been edited by counsel for review by the Court. *Id.*

Hybrid representation is clearly present in this case. Appellant has attempted multiple *pro se* filings outright, including her *pro se* notice of appeal of the October 29, 2014 order on appeal, her *pro se* motion to reconsider this order, and her *pro se* notice of appeal of the December 3, 2009 order rejecting her *pro se* motion to reconsider. **Ex. 10, December 3, 2014, *Pro Se* Notice of Appeal; Ex. 12, *Pro Se* Notice of Motion and Rule 59(e) SCRCP Motion; and Ex. 14, *Pro Se* Notice of Appeal dated January 14, 2015.** These *pro se* filings should not now be allowed to be prosecuted by Mr. Johnson who was Appellant's attorney of record when these very *pro se* filings were made. Mr. Johnson's agreement to prosecute these *pro se* filings after the fact show he is serving as a mere conduit for Appellant's *pro se* practice and that his representation of Appellant in this appeal is hybrid in nature.

Mr. Goldberg's previous involvement in this appeal appears to have been hybrid in nature as well. While Mr. Goldberg did sign the instant notice of appeal itself, he did not sign the attending proof of service or the transcript request. **See Proof of Service and letter to Anderson received by Court of Appeals January 30, 2015.** Significantly, Mr. Goldberg did not even sign the cover letter to the Court of Appeals enclosing the notice of appeal, proof of service and transcript request, nor is this letter on Mr. Goldberg's business letterhead. Further, the filings made in response to Deputy Clerk Allen's deficiency notices are all signed by Appellant, rather than Mr. Goldberg. **See Affidavit of Appellant and Letter to Anderson received by Court of Appeals February 11, 2015.** While the filings in

response to the deficiency notices are accompanied by a facsimile cover sheet from Mr. Goldberg's office, the handwritten notes thereon are unidentified and do not contain Mr. Goldberg's signature. **See Fax Cover Sheets of The Steinberg Law Firm received by Court of Appeals February 11, 2015.** Lastly, communications made by Mr. Goldberg to the Court of Appeals and to the undersigned indicate he had no intention of prosecuting this appeal and was merely serving as a conduit for Appellant's *pro se* filings until she could reach her attorney of record, Mr. Johnson, to do so. **Ex. 17, February 6, 2015, correspondence from Goldberg received by Court of Appeals February 9, 2015 and electronic communications between Goldberg and undersigned.**

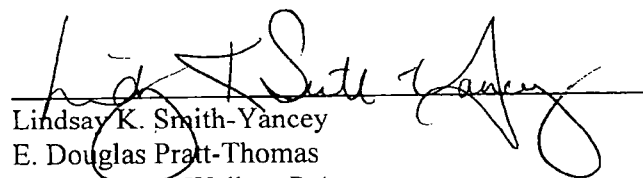
As indicated above, the present notice of appeal is a product of hybrid representation and should be dismissed.

Conclusion

Based on the foregoing, Appellant's appeal should be DISMISSED and REMITTED to the circuit court.

Respectfully submitted,

March 4, 2015


Lindsay K. Smith-Yancey
E. Douglas Pratt-Thomas
Pratt-Thomas Walker, P.A.
Post Office Drawer 22247
Charleston, South Carolina 29413-2247
(843) 727-2200
Attorneys for Respondents

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**TABLE OF CONTENTS
OF EXHIBITS TO RESPONDENTS' MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS**

Respondents herein list the following Exhibits to Respondents' Memorandum in Support of Motion to Dismiss Appeal:

Exhibit 1 – December 2, 2009 Order of SC Supreme Court; November 26, 2014 Order of Definite Suspension of SC Supreme Court

Exhibit 2 – April 13, 2010 Complaint

Exhibit 3 – July 26, 2011 Summary Judgment Order

Exhibit 4 – January 27, 2012 Order Awarding Sanctions

Exhibit 5 – March 1, 2012 and August 24, 2011 Appellant's Notices of Appeal

Exhibit 6 – SC Supreme Court Order March 26, 2014, and June 13, 2014, Remittitur

Exhibit 7 – July 7, 2014 Plaintiff's Motion to Withdraw Plaintiff's Motion to Dismiss Defendant's Counterclaims

Exhibit 8 – Transcript of October 27, 2014 hearing

Exhibit 9 – October 29, 2014 Form 4 Order

Exhibit 10 – December 3, 2014, *Pro Se* Notice of Appeal

Exhibit 11 – January 21, 2015 letter of Kitchings

Exhibit 12 – *Pro Se* Notice of Motion and Rule 59(e) SCRCP Motion

Exhibit 13 – December 3, 2014 Form 4 Order

Exhibit 14 – *Pro Se* Notice of Appeal dated January 14, 2015

Exhibit 15 – Affidavits of Smith-Yancey, Pratt-Thomas, Catapano and Dennis

Exhibit 16 – February 3, 2015, letters of Allen

Exhibit 17 – February 6, 2015, correspondence from Goldberg received by Court of Appeals February 9, 2015 and electronic communications between Goldberg and undersigned

RECEIVED

MAR 06 2015

SC Court of Appeals

The Supreme Court of South Carolina

05-CP-10-4351

J. Doe,¹

Petitioner,

v.

Richard L. Duncan, Meredith
Bond, Sidney Gilreath and
Gilreath & Associates,

Respondents.

RECEIVED

MAR 06 2015

SC Court of Appeals

ORDER

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2009 DEC -3 AM 11:35

FILED

Petitioner has filed a petition for a writ of certiorari seeking review of the Court of Appeals' decision in Doe v. Duncan, Op. No. 2008-UP-596 (S.C. Ct. App. filed Oct. 17, 2008). The petition is denied.

However, this action is just one in a number of frivolous actions petitioner has filed relating to the revocation of her medical staff privileges at East Cooper Community Hospital *in 1997*.² Because we find petitioner has

¹ It is unclear why petitioner was allowed to proceed anonymously in this action. We note further that petitioner has at various times in other actions gone by the name Cynthia Holmes and Cynthia Collie. In order to avoid any confusion, we point out that J. Doe, Cynthia Holmes and Cynthia Collie are one and the same.

² A circuit court judge presiding over one of petitioner's lawsuits, found the following in a recent order imposing sanctions on petitioner:

Throughout the history of this case, Dr. Holmes has proven herself to be profoundly litigious. Since being assigned to Courtesy Staff at East Cooper Hospital in 1997, Dr. Holmes engaged in a lengthy, albeit fruitless, administrative appeal of the

EXHIBIT

tabbles

1

Hospital's decision. She then sued the Hospital in federal court, and failing there, in state court. She sued Mr. Becker and Mr. Grier and their law firm over the handling of the federal case. She sued two Tennessee lawyers in both South Carolina and Tennessee state courts over their role in achieving a settlement of her state court case against the Hospital. In 2005, Dr. Holmes sued the Hospital in a second action, alleging a wide array of complaints against the Hospital and several physicians, the gist of which was that the Hospital continued to refuse to increase her level of privileges. In Dr. Holmes' 2005 case against East Cooper Hospital, which the Court deemed to be barred by her settlement of the 2000 case, the Court imposed a \$90,000 sanction for violation of the [South Carolina Frivolous Proceedings] Act. In each of the cases Plaintiff has filed *pro se* since settling her 2000 state court case against East Cooper Hospital, Plaintiff has asserted baseless and frivolous claims for which she lacked any evidentiary support. She has launched numerous pointless appeals, every one of which has been resolved in favor of the respondents. Throughout, Plaintiff has made baseless, maybe scandalous, allegations against numerous physicians and lawyers without care, and in absence of evidentiary support. Her tactics have been dilatory, vexatious, that is brought without sufficient grounds, oppressive and unreasonable.

Plaintiff['s] conduct through the case appears to have been nothing but vexatious, that is, brought without sufficient grounds, and the maintenance of this completely frivolous claim can only be characterized as unreasonable. As before, Dr. Holmes was the losing party in a lawsuit a decade ago. She has persisted in pursuing this case for nearly a decade yet has never adduced a shred of evidence that anything the Defendants did made any difference in the outcome of the federal court action about which she complains.

Clearly, Plaintiff has abused the judicial system generally, and these Defendants in particular, with her unreasonable and ill-considered frivolous lawsuit. Throughout this matter, and in her other cases, Dr. Holmes has repeatedly shown that she is unwilling and unable to evaluate the merits of her own cases, and that she is unable to present any evidence to support her claims. She has evidenced a pattern of abusing the legal process in bringing frivolous actions and the potential remains for her to continue that practice unless severe sanctions are levied against her.

engaged, and continues to engage in, vexatious litigation related to that issue, we hereby direct the Clerks of Court in this state to refuse to accept further filings from petitioner in actions related in any way to the revocation of her medical staff privileges at East Cooper Community Hospital unless they are filed by an attorney, other than petitioner, licensed to practice law in this state.³

³ In addition to the above captioned action, petitioner has filed notices of appeal and petitions for a writ of certiorari in the following actions:

J. Doe v. Manton Grier James Y. Becker and Haynsworth Sinkler Boyd, P. A., as successor to Sinkler & Boyd, P. A. (2002-CP-01-1448 and 2002-CP-40-3705)

Cynthia Holmes, M.D. v. Haynsworth, Sinkler & Boyd, P.A., successor to Sinkler & Boyd, P.A., Manton Grier, and James Y. Becker (2007-CP-10-1444)

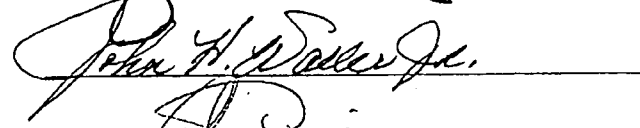
Cynthia Holmes, M.D. v. East Cooper Community Hospital, Inc.; Tenet Healthsystem Medical, Inc.; John Grady, M.D.; Paul Yantis, M.D. (2005-CP-10-5113)

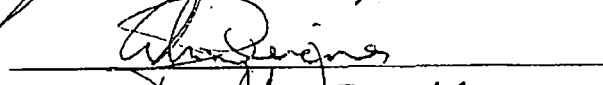
The latter action is now pending in this Court. Only the appeal at issue has resulted in the issuance of an opinion by the Court of Appeals. The remaining appeals were dismissed by order of the Court of Appeals prior to the issuance of an opinion because the appeals were interlocutory. We note that in these matters, petitioner has filed numerous frivolous motions, indicating her lack of knowledge of or complete disregard for the appellate process.

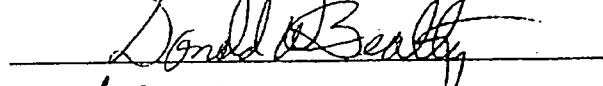
We also note that petitioner has recently been sanctioned in two of these matters (2005-CP-10-5113 and 2007-CP-10-1444) by the circuit court. By order dated July 27, 2009, the circuit court ordered petitioner to pay \$90,000 in attorney's fees to opposing counsel based on her frivolous initiation and continuation of the proceeding. By order dated November 18, 2009, the circuit court, as noted in footnote 1 above, sanctioned petitioner and entered judgment against her in the amount of \$200,000, noting the amount was not as much as was justified by the facts.

IT IS SO ORDERED.


C. J.


J.


J.


J.


J.

Columbia, South Carolina

December 2, 2009

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

In the Matter of Cynthia E. Collie, Respondent.

Appellate Case No. 2014-000324

Opinion No. 27467

Heard October 7, 2014 – Filed November 26, 2014

DEFINITE SUSPENSION

Lesley M. Coggiola, Disciplinary Counsel and Deputy
Disciplinary Counsel Barbara M. Seymour, both of
Columbia, for the Office of Disciplinary Counsel.

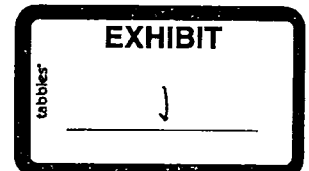
Chalmers Carey Johnson, of Port Orchard, Washington,
for Respondent.

PER CURIAM: In this attorney discipline matter, the Office of Disciplinary Counsel (ODC) filed formal charges with the Commission on Lawyer Conduct (the Commission) against Cynthia E. Collie¹ (Respondent) on July 2, 2012. On July 31, 2012, Respondent was served with a notice of filing of formal charges and formal charges by certified mail. After several extensions, Respondent's answer was due on February 25, 2013. Respondent failed to file an answer.

On February 28, 2013, an administrative panel of the Commission found Respondent to be in default for failing to respond to the formal charges. Thus, the Commission deemed the facts contained in the formal charges admitted,² and a

¹ In other litigation before this Court, Respondent has been referred to as "Cynthia Holmes."

² See Rule 24(a), RLDE, Rule 413, SCACR ("Failure to answer the formal charges shall constitute an admission of the allegations. On motion of disciplinary counsel, the administrative chair may issue a default order setting a hearing to determine the



hearing was held on August 13 and 14, 2013, before a hearing panel of the Commission (the Panel) for the sole purpose of considering mitigating and aggravating circumstances to determine a sanctions recommendation. Respondent appeared *pro se*. Following the hearing, the Panel recommended that Respondent be disbarred, as well as other conditions. Respondent took exception the Panel's report and recommendation (the Report) by filing a brief. At the hearing before this Court, Respondent was represented by counsel. We decline to adopt the recommended sanction of disbarment, and instead impose a definite suspension of two years.

FACTUAL/PROCEDURAL BACKGROUND

As a consequence of Respondent's default, she is deemed to have admitted the following factual allegations set forth in the formal charges:

I. The 1999 Lawsuit

In March 1999, Respondent filed a lawsuit in the United States District Court for the District of South Carolina (the 1999 lawsuit) against Tenet HealthSystem Medical, Inc. (Tenet HealthSystem), and East Cooper Community Hospital, Inc. (East Cooper). Respondent was represented by attorneys Manton Grier and James Y. Becker of Sinkler & Boyd, P.A. The 1999 lawsuit related to credentialing decisions made by East Cooper regarding Respondent's privileges to practice medicine at East Cooper. Respondent's amended complaint listed twelve causes of action, two of which were based on federal law.

In April 2000, the district court granted the defendants' motion for summary judgment as to the federal causes of action and dismissed the remaining state law claims without prejudice. Respondent appealed the dismissal of the federal causes of action to the Fourth Circuit Court of Appeals, which affirmed the summary judgment. Respondent's petition for a writ of certiorari in the United States Supreme Court was denied.

II. The 2000 Lawsuit

In May 2000, Respondent filed a *pro se* lawsuit in the Court of Common Pleas in Charleston County (the 2000 lawsuit) against Tenet HealthSystem, East

appropriate sanction to recommend to the Supreme Court.").

Cooper, John Grady, M.D., Paul Yantis, M.D., William Cone, and Coastal Emergency Services, Inc. Ten of the causes of action brought against these defendants in the 2000 lawsuit were the same as those brought in the 1999 lawsuit. After filing the complaint, Respondent retained lawyers from a law firm located in Tennessee to represent her.

Respondent and the defendants resolved the 2000 lawsuit and placed a settlement agreement and general release on the record in October 2002 (the 2002 settlement agreement). Respondent subsequently refused to sign the 2002 settlement agreement, and the defendants filed a motion to compel the settlement. After a hearing in January 2003, the judge granted the motion to compel and ordered Respondent to sign the 2002 settlement agreement within seven days of the hearing. Respondent signed the 2002 settlement agreement on January 14, 2003.

The 2002 settlement agreement provided that Respondent would be reappointed to a consulting status at East Cooper for a term of two years, with the right to apply for a change in status in accordance with the bylaws of the hospital. Moreover, the parties agreed "to settle any and every claim which [Respondent] has asserted, might assert, or which [Respondent] may have against the [the defendants] in this case." The 2002 settlement agreement further provided that the parties

completely release each other and forever discharge each other from any and all claims, demands, obligations, causes of action, rights, damages, costs, losses of service, fees, expenses and compensation of any nature whatsoever, whether based on a tort, contract, or other theory of recovery, which the parties now have, or which may hereafter accrue or otherwise be acquired, on account of, or may in any way grow out of, or which are the subject of the Complaint (and all related pleadings) including, without limitation, any and all known or unknown claims for injuries and damages to the parties which may have resulted, or may result from any alleged acts or omissions of the parties which are the subject of the complaint (and all related pleadings).

The circuit court signed an order of dismissal with prejudice in February 2003.

III. The 2005 Lawsuit

In October 2004, Respondent applied to East Cooper for a change in staff category from consulting status to associate active status, which includes privileges to perform surgery at East Cooper.

In November 2004, the hospital advised Respondent in writing that her application was incomplete and would not be forwarded to the credentialing committee for consideration unless she provided additional information on the application. Credentialing staff informed Respondent that without the necessary information, they would process her application as a request for reappointment to consulting status. Respondent did not submit the requested information. Thus, in December 2004, Respondent was reappointed to consulting status, and was not granted surgical privileges.

Thereafter, in December 2005, Respondent, represented by Chalmers Johnson, again filed a lawsuit (the 2005 lawsuit) in the Court of Common Pleas in Charleston County against Tenet HealthSystem, East Cooper, John Grady, M.D., and Paul Yantis, M.D.

In April 2006, Respondent filed an amended complaint. The causes of action in the amended complaint arose out of credentialing decisions that occurred in 2002 and 2004. Specifically, Respondent alleged that her reappointment to East Cooper's consulting staff in 2002 violated the hospital's by-laws and was the result of a conspiracy among the defendants. Respondent's causes of action concerning her 2004 appointment relied upon a statement allegedly made by one of the defendant doctors at a 1997 credentialing committee meeting.

In May 2007, the circuit court filed an order granting the defendants' motion for summary judgment stating that "the evidence shows that the Plaintiff has already been compensated for this same alleged conspiratorial statement in the settlement of a previous action against these Defendants."

The defendants then filed a motion for sanctions against Respondent. The motion was stayed pending Respondent's appeal of the summary judgment to the court of appeals. In July 2008, the court of appeals dismissed Respondent's appeal of the summary judgment order. In June 2009, the circuit court issued a form order granting the motion for sanctions and assessing sanctions against Respondent in the amount of \$90,000. Respondent subsequently filed a motion for

reconsideration and a motion for relief from judgment. Both motions were denied.

In August 2009, the circuit court awarded sanctions in the amount of \$90,000 in a full written order to be paid to the defendants by Respondent for her frivolous initiation and continuation of the proceedings. Respondent filed a second motion for reconsideration, which was also denied.

Respondent then filed multiple notices of appeal in the court of appeals, all of which were dismissed. In its order issued in December 2009, the court of appeals stated that if Respondent "again attempts to pursue appeals of [the court's dismissal orders] she will be sanctioned."

Thereafter, Respondent filed multiple petitions for a writ of certiorari in this Court, all of which were denied. In an order issued in July 2010, the Court stated that it would "not accept for filing anything further in this case. Such action is necessitated by [Respondent's] long history of abusing the legal process at both the trial and appellate levels."

IV. The 2010 Lawsuit

In 2006 and 2008, Respondent again applied to East Cooper for a change in staff category from consulting status to associate active status. Her applications were denied. In 2010, Respondent, represented by Chalmers Johnson, filed another lawsuit (the 2010 lawsuit) in the Court of Common Pleas in Charleston County against Tenet HealthSystem and East Cooper. Respondent alleged that East Cooper's denial of her 2006 and 2008 applications for a change in status and privileges violated East Cooper's by-laws and breached the terms of the 2002 settlement agreement. Respondent essentially alleged the same breach of contract allegations as the 2005 lawsuit, in direct contradiction to the previous orders of dismissal and summary judgment and the orders of the court of appeals and this Court.

In July 2011, the circuit court granted the defendants' motion for summary judgment on the grounds that the 2010 lawsuit arose from the same process that was the basis for the previous lawsuits and that the court lacked jurisdiction to decide the matter. In February 2012, the circuit court granted the defendants' motion for sanctions, finding that Respondent engaged in a "pattern of filing abusive and frivolous litigation" and that prior sanction orders and injunctions from other judges had not deterred her conduct. The circuit court awarded the

defendants \$53,447.15. Further, the court enjoined Respondent from filing future lawsuits against the defendants or other agents or employees of the defendants, unless accompanied by a \$50,000 bond or letter of credit. Respondent appealed both the summary judgment and the sanctions orders.³

V. The 2002 Malpractice Lawsuit

In April 2002, Respondent filed a *pro se* complaint (the 2002 malpractice lawsuit) in the Court of Common Pleas of Charleston County against Manton Grier, James Y. Becker, and Sinkler & Boyd, P.A. Respondent alleged legal malpractice against the attorneys who had represented her in the 1999 Lawsuit against Tenet HealthSystem and East Cooper.⁴

Venue was transferred to Richland County on motion of the defendants. Respondent appealed both the order transferring venue and the court's denial of her motion for clarification of the order transferring venue to Richland County. Respondent invoked a wide array of appellate procedures, extending the interlocutory appeal of a change of venue for more than a year. Respondent moved for transfer of venue back to Charleston County, citing the convenience of numerous physicians who resided and worked in Charleston and who would be witnesses in her case-in-chief. Respondent frequently referred to fifty physicians whom she intended to call as witnesses. Virtually none of those witnesses testified at trial, and the one witness who did appear at trial testified regarding matters that were immaterial to Respondent's claims against her former lawyers.

While the appeal concerning venue was pending, Respondent filed numerous motions in Charleston County, which the court denied based upon lack of jurisdiction, as the case had been transferred to Richland County. Respondent appealed and, upon dismissal of the appeal, Respondent moved for rehearing and petitioned for a writ of certiorari from this Court. That round of appeals continued for nearly two years until October 2006.

³ The Court certified the appeal from the court of appeals, and the appeal was pending when ODC filed the formal charges. The Court has since affirmed the summary judgment and sanctions orders. See *Holmes v. E. Cooper Cmty. Hosp., Inc.*, 408 S.C. 138, 758 S.E.2d 483 (2014).

⁴ Respondent also sued her Tennessee lawyers for malpractice. That suit was dismissed.

In April 2007, Respondent filed an amended complaint *pro se* in the Court of Common Pleas in Richland County naming as defendants Manton Grier, James Y. Becker, and Haynsworth Sinkler Boyd, P.A., successor firm to Sinkler & Boyd, P.A. The case was transferred to the Court of Common Pleas in Charleston County pursuant to Respondent's change of venue motion.

Thereafter, Respondent filed numerous motions, including motions to "strike defendants' motion to quash"; a "request that defendants produce 'all documents'"; a "request that defendants supplement their response regarding Continuing Legal Education"; a "motion to compel regarding professional negligence actions"; a "motion to compel regarding defendants' insurance policy"; a "motion to compel with respect to legal articles, treatises, and like"; and a "motion to compel employment contracts." Respondent's motions were denied. Respondent filed a notice of appeal in the court of appeals appealing all of the orders denying her motions. Respondent then filed a Supplemental Notice of Appeal appealing additional orders the circuit court entered in March and July 2008. The court of appeals filed an order dismissing all of Respondent's appeals as interlocutory. Respondent then filed an "Amended Supplemental Notice of Appeal" appealing an order the circuit court filed in May 2008. That appeal was also dismissed. Respondent filed petitions for certiorari regarding both dismissals, which were denied. Respondent's petition for rehearing was also denied.

The case proceeded to trial on June 8, 2009. The circuit court granted a directed verdict in favor of all the malpractice defendants on all claims because the Respondent failed to present any evidence or expert testimony to establish the elements of her claims and on other grounds. The circuit court also dismissed the claims against the individual malpractice defendants because Respondent failed to file her lawsuit within the statute of limitations.

The malpractice defendants filed a motion for sanctions. Respondent then filed a motion to strike or dismiss the malpractice defendants' motion for sanctions, a motion for a new trial, a motion for reconsideration of the court's order denying Respondent's motion for continuance, and a motion for sanctions.

In November 2009, the circuit court denied all of the motions filed by Respondent and granted the malpractice defendants' motion for sanctions. The court awarded the malpractice defendants \$200,000 in sanctions against Respondent, finding that she had "filed a nonmeritorious and baseless lawsuit" and

that she "lacked any substantial evidence to support her claims[,] that [her] initiation and continuation of this lawsuit was done with no reasonable cause, and that any reasonable attorney would have believed that the proceedings to date have been frivolous." The order also stated that Respondent "engaged in dilatory litigation tactics and appealed numerous interlocutory matters" which were "likewise frivolous and dilatory."

Respondent filed a notice of appeal in the court of appeals. In February 2010, the court of appeals dismissed the appeal.

In April 2010, Respondent hired Chalmers Johnson, who filed a notice of appearance and an amended notice of appeal, which appealed virtually every order issued in all Respondent's cases. The court of appeals dismissed that appeal in June 2011 for failure to file an initial brief and failure to communicate with the court. Respondent filed another appeal of the directed verdict and the sanctions order in the court of appeals. This Court certified the appeal.⁵

VI. Panel's Finding of Misconduct

Based on the above facts, the Panel found that Respondent committed misconduct as defined in Rule 7(a), RLDE, Rule 413, SCACR, by violating Rules 3.1, 3.2, 3.3(a), 3.4, and 8.4(e), Rule 407, SCACR, and that Respondent is subject to discipline pursuant to Rules 7(a)(1) and (5), RLDE, Rule 413, SCACR.

VII. Panel's Disciplinary Sanctions Recommendation

The Panel held a hearing on sanctions at which both parties presented evidence on August 13–14, 2013.

In considering the sanction recommendation, the Panel considered the following aggravating factors: (1) Respondent's multiple offenses and pattern of misconduct; (2) Respondent's failure to acknowledge the wrongfulness of her actions or express any remorse; (3) Respondent's indifference to her obligations to pay court-ordered sanctions; (4) Respondent's willful attempts to obstruct the

⁵ The appeal was pending at the time ODC filed the formal charges. The Court has since affirmed the circuit court. *See Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 760 S.E.2d 399 (2014).

disciplinary process; and (5) Respondent's false statements in connection with these disciplinary proceedings.

Furthermore, the Panel considered the following mitigating factors: (1) Respondent's cooperation in the disciplinary process; (2) Respondent's lack of disciplinary history; and (3) the fact that some of Respondent's pleadings and appeals were filed with the assistance of counsel. The Panel explicitly rejected the following mitigating circumstances propounded by Respondent: (1) lack of dishonest or selfish motive; and (2) that there were delays in the disciplinary proceedings that were prejudicial to Respondent.

Based on the foregoing, the Panel recommended that this Court disbar Respondent; order her to pay the costs of the disciplinary investigation and formal proceedings; and order her to pay restitution in the following amounts:

1. \$90,000 plus interest pursuant to the August 2009 sanctions order;
2. \$200,000 plus interest pursuant to the November 2009 sanctions order (pending affirmation of that sanctions order by the supreme court on appeal); and
3. \$53,447.15 plus interest pursuant to the February 2012 sanctions order (pending affirmation of that sanctions order by the supreme court on appeal).

DISCUSSION

I. Standard of Review

The sole authority to discipline attorneys and decide appropriate sanctions rests with this Court. *In re Welch*, 355 S.C. 93, 96, 584 S.E.2d 369, 370 (2003); *In re Thompson*, 343 S.C. 1, 10–11, 539 S.E.2d 396, 401 (2000). We are not bound by the Panel's recommendation and may make our own findings of fact and conclusions of law. *In re Hazzard*, 377 S.C. 482, 488, 661 S.E.2d 102, 106 (2008). Nonetheless, the findings and conclusions of the Panel are entitled much respect and consideration. *Thompson*, 343 S.C. at 11, 539 S.E.2d at 401. Moreover, "[a] disciplinary violation must be proven by clear and convincing evidence." *In re Greene*, 371 S.C. 207, 216, 638 S.E.2d 677, 682 (2006); *see also* Rule 8, RLDE, Rule 413, SCACR ("Charges of misconduct or incapacity shall be established by clear and convincing evidence, and the burden of proof of the charges shall be on

the disciplinary counsel.").

II. Misconduct

Because Respondent is deemed to have admitted the factual allegations against her, we adopt the Panel's recommendation as to the finding of misconduct. Thus, we find Respondent violated Rules 3.1, 3.2, 3.3(a), 3.4, and 8.4(e), Rule 407, SCACR, and that Respondent is subject to discipline pursuant to Rules 7(a)(1) and (5), RLDE, Rule 413, SCACR.

III. Exceptions

Respondent takes exception to the Panel's Report, claiming the Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §§ 15-36-10 to -100 (2009) (the FCPSA), on which basis sanctions were assessed against Respondent in the underlying cases, is unconstitutional. ODC argues the Court should accept the Panel's recommendation because the investigation and formal proceedings were conducted in accordance with Rule 19, RLDE, Rule 413, SCACR.

We agree with ODC that the primary focus of Respondent's brief—the merits of the underlying sanctions awards pursuant to the FCPSA—is irrelevant to this disciplinary action. Respondent simply repeats her previous positions in the 1999, 2000, 2005, and 2010 lawsuits, but does not challenge any of the Panel's findings concerning aggravation or mitigation of the sanction. Therefore, Respondent's brief does not constitute an exception to the Panel's Report, and we deem Respondent to have accepted the findings of fact, conclusions of law, and recommendations contained therein. *See* Rule 27(a), RLDE, Rule 413, SCACR ("The failure of a party to file a brief taking exceptions to the report constitutes acceptance of the findings of fact, conclusions of law, and recommendations."); *In re Prendergast*, 390 S.C. 395, 396 n.2, 702 S.E.2d 364, 365 n.2 (2010).⁶

⁶ To the extent Respondent's brief accuses ODC of misconduct during the disciplinary process, not only do these contentions lack merit, but each of these arguments is conclusory. For example, Respondent accuses ODC of failing to provide her with notice; engaging in professional misconduct; prematurely filing formal charges because there had not yet been an adjudication on the merits; and failing to timely disclose the name of the Panel chair. The conclusory fashion in which these contentions are addressed in her brief constitutes abandonment of these issues. *See In re McCracken*, 346 S.C. 87, 92, 551 S.E.2d 235, 238 (2001)

IV. Sanctions

We find that the allegations of misconduct during the underlying litigation warrant Respondent's suspension from the practice of law. *See* Rule 7(b)(2), RLDE, Rule 413, SCACR.⁷

We further decline to adopt the Panel's recommendation regarding restitution, the sums of which are based on the various sanctions orders in the underlying litigation. We remind Respondent that she must comply with all of the court orders regarding sanctions. Additionally, we refer persons or parties seeking to separately enforce those court orders imposing monetary sanctions to the provisions of our laws concerning the enforcement of civil judgments. *See* Rule 69, SCRPC; S.C. Code Ann. §§ 15-39-10 to -50 (Supp. 2013).

CONCLUSION

Based on the foregoing, we impose a definite suspension of two years pursuant to Rule 7(b)(2), RLDE, Rule 413, SCACR, and order Respondent to pay the costs of these proceedings. Within fifteen (15) days of the date of this opinion, Respondent shall file an affidavit with the Clerk of Court showing that she has complied with Rule 30 of Rule 413, SCACR.

TWO YEAR DEFINITE SUSPENSION.

**TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.**

(holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory).

⁷ Respondent is currently under interim suspension for failing to register a valid e-mail address with the South Carolina Bar's Attorney Information System. *See In re Collie*, 406 S.C. 181, 749 S.E.2d 522 (2013).

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS

C.A. 10-CP-10. 3410

DR. CYNTHIA HOLMES, M.D.,)
Plaintiff,)

Vs.)

EAST COOPER COMMUNITY)
HOSPITAL, INC., TENETHEALTH)
SYSTEM MEDICAL, INC.,)
Defendants.)

COMPLAINT
(Jury Trial Requested)

2010 APR 26 AM 11:22
JULIE J. ARISTON
CLERK OF COURT
BY _____

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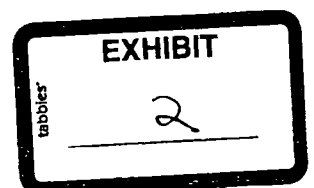
The Plaintiff, by and through her undersigned counsel, hereby makes the following claims and allegations:

JURISDICTION

1. The Defendants, East Cooper Regional Medical Center, Tenethealth System (hereinafter referred to as Defendants), comprise an entity which is located in, does business in, and which derives benefit from the laws of the State of South Carolina, and which is subject to the jurisdiction of this Honorable Court.
2. The Plaintiff, Dr. Cynthia Holmes (hereinafter referred to as Plaintiff), is a resident of the State of South Carolina, and is subject to the jurisdiction of this Honorable Court.
3. That all parties and subject matter herein mentioned are within the jurisdiction of this Honorable Court.

FACTS

4. The Plaintiff is an Ophthalmology Doctor, who practices in the Sullivan's Island area of the East Cooper region of Charleston, SC.



5. East Cooper is the sole hospital with Operating Room facilities which is located in and directly serves the immediate geographic location in which the Plaintiff's practice is located.
6. In or about 2002, Plaintiff and the Defendants entered into a contract, the terms of which required Defendants to, in good faith, provide a fair consideration of Plaintiff's future applications for privileges with the Defendants' Hospital.
7. The Defendants breached the contract with the Plaintiff on separate and independent dates, which, seen as a whole, shows a pattern of actions taken in bad faith, designed to and which successfully have, to date, resulted in Plaintiff being denied a fair opportunity to obtain or be considered, in good faith for certain privileges at the Defendant Hospital, and thereby caused the Plaintiff to suffer foreseeable special damages.
8. As set forth more specifically below (and hereby incorporated into the facts as set forth), the Defendants have engaged in several distinct breaches of the contract between the parties, breaching the language of the contract which required it to provide and afford the Plaintiff, in good faith, with a fair opportunity to apply for and obtain application for advancement in staff privileges with the Defendants' hospital. In doing so, the Defendants also breached the implied covenant of good faith and fair dealing, implied in the contractual relationship between the parties on each of the dates on which it denied the Plaintiff's attempts to apply for an advancement in staff privileges.
9. That, as a direct and proximate result of the Defendants' actions, as plead herein, occurring in the years 2006-2007 and 2008-2009 (the last two times Plaintiff

applied for a change in status for medical privileges with the Defendants), Plaintiff has suffered severe damages, in the form of actual damages, consequential damages, and compensatory damages. Plaintiff has also incurred attorneys fees and costs in pursuing this action and in mitigation of her losses due to actions of the Defendants.

10. The damages that the Plaintiff has suffered are the foreseeable results of the Defendants' actions.

**FOR A FIRST CAUSE OF ACTION
BREACH OF CONTRACT/ BREACH OF COVENANT OF GOOD
FAITH AND FAIR DEALING**

11. Paragraphs one (1) through ten (10) are hereby incorporated verbatim.
12. The Plaintiff and Defendant were and are parties to a contractual agreement, the terms of which are set forth as part of a settlement agreement.
13. As with every contractual relationship, this contract involved an implied covenant of good faith and fair dealing.
14. That the Defendant breached this duty by attempting (successfully to date) to block Plaintiff from being able to seek review of its decision to deny her application for advancement in staff privileges in violation of the letter and the spirit of the applicable bylaws.
15. In 2006-2007 and 2008-2009 (in each of the two years), Plaintiff submitted an application for advancement in staff privileges, which was complete on its face.
16. The Credentials Committee then denied the Plaintiff's application, an act which should have given Plaintiff the right to pursue an appeal, under the applicable bylaws.

17. When Plaintiff did timely pursue an appeal, the Defendants, in bad faith, denied her access to a complete, fair and full review.
18. The Defendant's actions were taken in bad faith, and in willful and knowing violation of the implied covenant of good faith and fair dealing, with the purpose of denying the Plaintiff access to the administrative process, and in an attempt to restrict Plaintiff from seeking a judicial remedy for the denial of her application for advancement in staff privileges through appropriate litigation.
19. That, as a direct and proximate result of the Defendants' breach of contract, the Plaintiff has suffered actual damages and special damages, in the form of lost income, and loss of business to her practice, as she has been unable to admit any patients to the hospital to perform medical procedures from 2007 through the date of the filing of this Complaint, and continuing presently.
20. The damages and injury suffered by Plaintiff were the foreseeable result of the Defendants' willful and knowing breach of contract, and breach of the covenant of good faith and fair dealing.
21. Plaintiff is entitled to an award of damages against the Defendant in the amount of actual damages, compensatory damages, an injunction, requiring Defendant to proceed under the terms of its contract with Plaintiff, and other damages such as this Honorable Court deems appropriate and just.

PRAYER FOR DAMAGES

WHEREFORE, the Plaintiff prays for an award of damages against the Defendants, jointly and severally, and as specifically set forth above (as to each cause of action), in the amount of:

- A. Actual damages;
- B. Consequential damages;
- C. Compensatory damages;
- D. equitable enforcement of the terms of the contract between Plaintiff and Defendant by permanent injunction;
- E. Other damages and remedies such as this Honorable Court deems appropriate and just.



Chalmers C. Johnson
S.C. Bar # 11583
523 So. G Street, Apt. # 402
Tacoma, WA 98405
(425) 999-0900
Counsel for the Plaintiff

April 13, 2010

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
C.A. NO.: 2010-CP-10-3410

Dr. Cynthia Holmes, M.D.,
Plaintiff,

vs.

East Cooper Community Hospital, Inc.,
and Tenet HealthSystem Medical, Inc.,
Defendants.

SUMMARY JUDGMENT ORDER

FILED
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JULIE J. ARMSTRONG
CLERK OF COURT

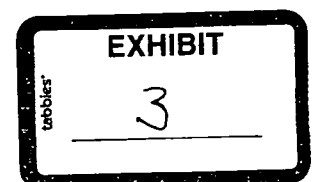
This action came before the undersigned on July 8, 2011, on Defendants' Motion for Summary Judgment. Counsel for Plaintiff and Defendants submitted Memoranda of Law, Affidavits, and oral argument, which have been considered by the Court and incorporated into the record. As explained more fully below, the Court finds there is no genuine issue of material fact as to Plaintiff's claims and that Defendants are entitled to summary judgment.

Undisputed Facts

Plaintiff is a medical doctor specializing in the field of Ophthalmology. Defendant East Cooper Community Hospital, Inc., owns operates, and does business as East Cooper Medical Center (hereinafter referred to as the "Hospital") and is a wholly owned subsidiary of Defendant Tenet HealthSystem Medical, Inc.

At the times relevant herein, Plaintiff was a member of the Hospital's Consulting Medical Staff. All appointments to the Hospital's Medical Staff are for a limited two (2) year term. Plaintiff's 2004 appointment to the Medical Staff, which was the subject of previous litigation between the parties, was nearing expiration in October of 2006, at

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which time Plaintiff submitted a reappointment application. In her application Plaintiff requested advancement in Medical Staff category and clinical privileges to perform surgery on the eye. The Hospital's Credentials and Medical Executive Committees found Plaintiff's application to contain insufficient evidence that she was currently clinically competent for the Medical Staff category and surgical privileges requested and recommended that she be reappointed to the Consulting Staff category. Plaintiff requested and was granted an administrative hearing of this recommendation. The Hospital's Governing Board upheld the recommendation and Plaintiff was reappointed to the Consulting Medical Staff for another two year term.

Prior to the expiration of this 2006 appointment, in or around October of 2008, Plaintiff submitted another reappointment application again requesting advancement in Medical Staff category and surgical privileges. The Hospital, through its Credentials Committee, Medical Executive Committee, and Governing Board, this time determined Plaintiff's application to be incomplete and a deemed voluntary resignation from the Medical Staff without appellate rights under the Medical Staff Bylaws.

On April 26, 2010, Plaintiff instituted this civil action against Defendants alleging causes of action for breach of contract and breach of the covenant of good faith and fair dealing. Plaintiff alleges the actions taken with respect to her 2006 and 2008 reappointment applications breached a Settlement Agreement among the parties arising from a previous lawsuit filed against these same Defendants also regarding her Medical Staff privileges at the Hospital. The Settlement Agreement, entered in 2003, called for Plaintiff's reappointment to the Hospital's Consulting Medical Staff from 2002 to 2004 with "the right to apply for a change in status in accordance with the Bylaws."



Standard of Review

Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law. Rule 56(c) S.C.R.Civ.P; City of Columbia v. American Civil Liberties Union, 323 S.C. 384, 475 S.E.2d 747 (1996). Summary judgment is proper where plain, palpable and indisputable facts exist on which reasonable minds cannot differ. *Byerly v. Conner*, 307 S.C. 441, 415 S.E.2d 796 (1992). Summary judgment is not a "disfavored procedural shortcut," but an important mechanism for weeding out "claims and defenses [that] have no factual basis." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). The party seeking summary judgment has the burden of establishing the absence of a genuine issue of material fact. McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations contained in the pleadings. Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). The nonmoving party must come forward with specific facts showing there is a genuine issue for trial. Rife v. Hitachi Constr. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). A party's response to the motion must set forth specific facts, admissible evidence, showing that there is a genuine issue for trial. It is not sufficient that one create an inference which is not reasonable or an issue of fact that is not genuine. Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 411 S.E.2d 672 (Ct. App. 1991).

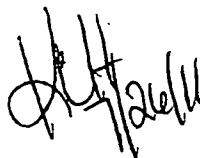
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I. This Court lacks subject matter jurisdiction to review the actions of private hospitals concerning medical staff privileges.

"Subject matter jurisdiction refers to the court's power to hear and determine cases of the general class to which the proceedings in question belong." Bunkum v. Manor Properties, 321 S.C. 95, 100, 467 S.E.2d 758, 761 (Ct. App. 1996). "Claims of lack of subject matter jurisdiction may be raised at any time, and subject matter jurisdiction may not be waived by filing responsive pleadings or otherwise consenting to the jurisdiction of a particular court." Eldridge v. City of Greenwood, 331 S.C. 398, 408, 503 S.E.2d 191, 196 (Ct. App. 1998).

South Carolina courts have consistently held that private hospitals are free in the absence of regulatory provisions to decide the nature and extent of medical practice permitted to persons to whom it grants medical staff privileges. "A private hospital is free to adopt reasonable regulations for the conduct of its affairs." Gowan v. St. Francis Cmty. Hosp., 275 S.C. 203, 204, 268 S.E.2d 580, 581 (1980). It is well settled in South Carolina that the Court does not have jurisdiction to review the decisions of the medical staff of a private hospital concerning the membership and credentialing of its physicians. Strauss v. Marlboro County Gen. Hosp., 185 S.C. 425, 194 S.E. 65, 65 (1937); Wood v. Hilton Head Hosp., Inc., 292 S.C. 403, 405, 356 S.E.2d 841, 842 (1987); Gowan, 275 S.C. at 204, 268 S.E.2d at 581.

It is undisputed that the Defendant Hospital herein is a private, for-profit hospital governed by a Board of Directors. It is also undisputed that its Medical Staff operates pursuant to written Medical Staff Bylaws, Rules and Regulations, which have been approved by the Governing Board of the Hospital, and by which all physicians receiving

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privileges at the Hospital agree to be bound as a condition of membership in the Medical Staff.

Plaintiff alleges that her present lawsuit is not a challenge of the Hospital's implementation of the Medical Staff Bylaws, nor of the Hospital's credentialing decisions concerning her reappointment applications, but, rather, of the term of the previous Settlement Agreement allowing her the right to apply for a change in status in accordance with the Bylaws. Indeed, Plaintiff conceded at the hearing of this Motion that a challenge of the Hospital's implementation of its Bylaws and credentialing decisions are matters outside the scope of this Court's subject matter jurisdiction.

Despite Plaintiff's argument that her claim is one for breach of the Settlement Agreement, the Plaintiff's Complaint and the evidence in the record clearly show she is indeed seeking a judicial interpretation of the Hospital's implementation of its Medical Staff Bylaws and of the decisions regarding her Medical Staff privileges. Specifically, the Plaintiff requests this Court to review whether the Hospital's denial of advancement in Medical Staff category and surgical privileges in 2006; reappointment of her to the Consulting Medical Staff in 2006; refusal to accept her 2008 application as complete; refusal to process and consider her 2008 application for advancement in Medical Staff category and surgical privileges; and denial of an administrative hearing regarding her 2008 reappointment process were decisions made in accordance with the applicable Bylaws.

Though styled as a breach of contract action, as her multiple previous lawsuits against Defendants were, the Plaintiff's claims all arise out of the peer review process at the Hospital and, as such, are not subject to judicial review. Both the Plaintiff's

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Complaint and the Affidavits submitted by the Plaintiff in opposition to summary judgment support this conclusion. In fact, the Affidavit of Plaintiff's expert witness contains a lengthy discussion and interpretation of the Bylaws, but omits any reference to the subject Settlement Agreement. This Affidavit unequivocally shows the Plaintiff's claims are dependent upon the issue of whether the Hospital properly applied the Bylaws in reviewing the Plaintiff's 2006 and 2008 reappointment applications, as this is the sole basis on which the expert opines. None of the evidence or testimony submitted by the Plaintiff demonstrates a genuine issue of material fact as to whether the subject Settlement Agreement was breached, but, rather, only challenges the decisions regarding her peer review processes. The Court does not have jurisdiction to determine these issues, and the Plaintiff has presented no evidence or reason to persuade the Court to depart from the long-standing principle that such actions are not subject to judicial review.

The Plaintiff contends that the Court has jurisdiction over this matter based on Lee v. Chesterfield General Hosp., 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). The Court declines to adopt the Plaintiff's interpretation of the Lee decision and, in any event, Lee applies only to actions for civil conspiracy, not claimed herein, rather than causes of action sounding in contract. In Lee, the Court of Appeals confirmed the decision reached by the Supreme Court in Gowan but found subject matter jurisdiction where the Plaintiff did not seek to conduct a judicial review of internal hospital rules, but claimed that the Bylaws were imposed in furtherance of a conspiracy, the purpose of which was to injure the Plaintiff. Id. In this case, Plaintiff asks the Court to review the basis for the Hospital's privileging decisions and substitute its judgment for the Hospital

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and its review committees by determining that the decisions were inappropriately made. This is precisely the type of intervention that the Supreme Court of South Carolina in Strauss, Gowen, and Wood sought to prevent.¹

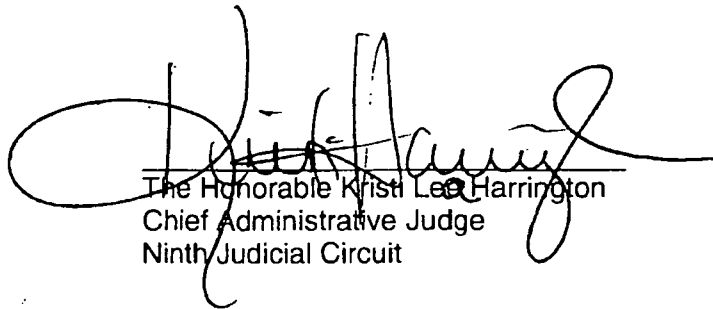
Finally, the Plaintiff's contentions that this Court has previously ruled on and agreed to accept subject matter jurisdiction of this controversy are without merit. Plaintiff argues the Court's previous denial of Defendants' Motion to Dismiss and Motion for Judgment on the Pleadings based, in part, on lack of subject matter jurisdiction, now confer subject matter jurisdiction on this Court. Plaintiff concedes that the Court's denial of said Motion was based upon prematurity of the issues rather than merit. Regardless, an Order denying a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable and does not, as the Plaintiff contends, bind the parties. See Deskins v. Boltin, 319 S.C. 356, 357, 461 S.E.2d 395, 396 (1995) ("The denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable."); Woodard v. Westvaco Corp., 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995) overruled on other grounds by Sabb v. S.C. State Univ., 350 S.C. 416, 567 S.E.2d 231 (2002) ("An order *denying* a motion to dismiss for lack of subject matter jurisdiction does not *finally* determine anything.").

¹ In deciding this issue, this Court relies only on the Plaintiff's Complaint and the Plaintiff's own Affidavits in opposition to summary judgment. This Court does not rely on filings and orders from previous actions; however, at least two prior orders entered by The Honorable R. Markley Dennis, Jr., in a previous case between these parties operate as res judicata and/or collateral estoppel as to this issue, and these also support the Court's decision herein.

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Conclusion

For the foregoing reasons, there is no genuine issue of material fact as to the causes of action asserted by the Plaintiff and Defendants' Motion for Summary Judgment is GRANTED.



The Honorable Kristi Lee Harrington
Chief Administrative Judge
Ninth Judicial Circuit

July 26, 2011
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF COMMON PLEAS
)
) C.A. NO.: 2010-CP-10-3410
)

Dr. Cynthia Holmes, M.D.,
Plaintiff,

vs.

East Cooper Community Hospital, Inc.,
and Tenet HealthSystem Medical, Inc.,
Defendants.

ORDER AWARDING SANCTIONS

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JILLIE J. ARMSTRONG
CLERK OF COURT
BY L

This matter came before the Court on Defendants' motion pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, codified at section 15-36-10 of the South Carolina Code (hereinafter referred to as the "FCPSA" or "the Act"). A hearing on Defendants' motion was held on November 22, 2011. As indicated more fully below, this Court grants Defendants' motion, sanctions the Plaintiff pursuant to the Act, and awards judgment against Plaintiff in the amount of \$53,447.15 (Fifty-Three Thousand Four Hundred Forty-Seven and 15/100 Dollars) payable to Defendants for reimbursement of attorneys' fees and other expenses incurred in the defense of this action.

In addition, in light of the Plaintiff's long history of litigation against Defendants and others, the Court finds injunctive relief pursuant to section 15-36-10(G)(3) appropriate. Consequently, this Court hereby orders that any future litigation filed on behalf of the Plaintiff against the Defendants in any way premised upon the status of her medical staff membership, categorization, or privileges or her prior litigation with the Defendants shall be accompanied by a \$50,000.00 bond or letter of credit, paid in to the

KLH

EXHIBIT

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Clerk of Court, to be applied to Defendants' attorneys' fees and other litigation expenses in the event Defendants are the prevailing party and the Court finds them to be entitled to reimbursement of their attorneys' fees and other litigation expenses. If the Plaintiff fails to post such a bond or letter of credit, Defendants may present a certified copy of this Order to the Clerk of Court, upon which the Clerk shall summarily dismiss the action.

Factual/Procedural Background

The Plaintiff herein is a medical doctor specializing in the field of ophthalmology. Her current Complaint alleges causes of action for breach of contract and breach of the covenant of good faith and fair dealing concerning her medical staff privileges at Defendant East Cooper Community Hospital, Inc., which owns and operates East Cooper Medical Center (hereinafter referred to as the "Hospital").

This is the fourth lawsuit filed by the Plaintiff against Defendants arising out of her medical staff privileges at the Hospital. The Plaintiff's first lawsuit, Doe v. Tenet HealthSystem Medical, Inc., et al., Civil Action Number 2:99-0833-23, was filed in the United States District Court for the District of South Carolina, and Defendants were granted summary judgment. The Plaintiff's second lawsuit, Doe v. Tenet HealthSystem Medical, Inc., et al., Civil Action Number 2000-CP-10-1888, was filed in the Charleston County Court of Common Pleas. The parties resolved the second lawsuit through a Settlement Agreement and General Release in Full (the "Settlement Agreement") in 2002.

The Plaintiff's third lawsuit, Holmes v. East Cooper Community Hosp., Inc., et al., Civil Action Number 2005-CP-10-5113, was also filed in the Charleston County Court of

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Common Pleas. The Plaintiff's allegations in Paragraphs 31-36 of the Amended Complaint in Case Number 2005-CP-5113, stating an alleged cause of action for breach of a covenant of good faith and fair dealing, are almost identical to the allegations in Paragraphs 12-16 of the Plaintiff's Complaint in the present lawsuit.¹ In her third lawsuit, the Plaintiff contended, among other things, that the Defendants breached the Settlement Agreement in their consideration of her 2002 and 2004 applications for reappointment to the Hospital's medical staff, advancement in staff category, and surgical privileges. She made the same argument in the instant case with respect to her 2006 and 2008 applications.

Defendants were awarded summary judgment in the Plaintiff's third lawsuit, and Plaintiff was ultimately sanctioned pursuant to the Act. Defendants were awarded a \$90,000.00 judgment against Plaintiff. The Plaintiff's appeals of these orders were dismissed and remitted by the South Carolina Court of Appeals.

Plaintiff's allegations in the current lawsuit relate to her applications for reappointment to the Hospital's medical staff, advancement in staff category, and request for surgical privileges in 2006 and 2008. On July 29, 2011, this Court entered an order granting summary judgment to Defendants. On August 8, 2011, Defendants filed and served this motion.

Law/Analysis

I. The FCPSA Standard

¹ The Plaintiff's Amended Complaint in Case Number 2005-CP-10-5113 includes two separate paragraphs labeled 31 through 36. This Court is referring to the second such set of paragraphs therein.



The FCPSA allows for the imposition of sanctions for the initiation and prosecution of civil lawsuits without merit. Section 15-36-10(C)(1) of the FCPSA provides when an action has been dismissed by summary judgment, upon motion of the prevailing party, "the court shall proceed to determine if the claim . . . was frivolous." Section 15-36-10(C)(1) further provides that a party shall be sanctioned for a frivolous claim if the Court finds that the party failed to comply with one of the following conditions:

(a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(b) a reasonable attorney in the same circumstances would believe that *his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party*; or

(c) a reasonable attorney in the same circumstances would believe that *the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.*

(emphasis added).

Section 15-36-10(E) of the Act sets forth the elements a Court should consider when determining whether a party has violated the provisions of the Act, stating the Court shall take into account the following:

- (1) the number of parties;
- (2) the complexity of the claims and defenses;
- (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);



- (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
- (5) previous violations of the provisions of this section;
- (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
- (7) other factors the court considers just, equitable, or appropriate under the circumstances.

Section 15-36-10(G) of Act sets forth the sanctions allowable, including (1) reasonable costs and attorneys' fees; (2) 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.

In Rutland v. Holler, Dennis, Corbett, Ormond & Garner, 371 S.C. 91, 98, 637 S.E.2d 316, 320 (Ct. App. 2006), the South Carolina Court of Appeals affirmed the circuit court's award of sanctions to the defendant, emphasizing that "Respondents were able to show that the primary purpose for which the proceedings were initiated 'was not that' of securing the proper . . . adjudication of the civil proceedings.'" The Court recognized: "A review of the record reveals that the lawsuit at issue alleged causes of action for the same complaint as the previous lawsuits, *i.e.*, Rutland's dissatisfaction with Corbett and his law firm." Id. "In light of this unsuccessful procedural history, it is inconceivable that Rutland reasonably believed that his claims against Respondents were valid." Id.

II. Defendants are entitled to sanctions under the FCPSA for continuing to argue that this Court has jurisdiction to review the privileging decisions of a private, for-profit hospital.

The Plaintiff herein violated the Act by initiating and continuing this litigation despite this Court's lack of subject matter jurisdiction, despite a prior ruling against the



Plaintiff that this Court lacks subject matter jurisdiction, and despite being sanctioned for arguing that this Court has subject matter jurisdiction in a previous case based on the very same allegations.

The Plaintiff contends in this action, as she did in Case Number 2005-CP-10-5113, that rather than asking the Court to review the decisions made regarding her credentialing process, she seeks a determination of whether Defendants breached the Settlement Agreement in their consideration of her applications for advancement in staff category and surgical privileges. In the previous lawsuit, the Honorable R. Markley Dennis, Jr., not only granted summary judgment to Defendants on the basis that the circuit court lacked jurisdiction over such claims, but also sanctioned the Plaintiff for raising the argument.

"Generally speaking, subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Metts v. Mims, 384 S.C. 491, 498, 682 S.E.2d 813, 817 (2009). "It is well settled in South Carolina, and throughout the country, that it is improper for the courts to review the decisions of governing boards of private hospitals concerning the staff privileges of practitioners." Wood v. Hilton Head Hosp., Inc., 292 S.C. 403, 405, 356 S.E.2d 841, 842 (1987). Thus, "the implementation of the regulations of a private hospital which are initiated to restrict a practitioner's practices are not subject to judicial review." Id.

As this Court recognized in its Order granting summary judgment to Defendants: "Though styled as a breach of contract action, as her multiple previous lawsuits against Defendants were, the Plaintiff's claims all arise out of the peer review process at the

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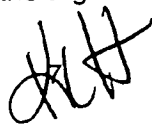
Hospital and, as such, are not subject to judicial review." **Summ. J. Order filed 07/29/2011, p.5.**

As previously discussed, in the 2005 lawsuit, Judge Dennis granted summary judgment to Defendants. **Summ. J. Order filed 05/23/2007 in 2005-CP-10-5113.** In addressing the allegations set forth above relating to the Plaintiff's 2004 application, which are almost identical to the claims set forth in the current case relating to the Plaintiff's 2006 and 2008 applications, Judge Dennis held, in pertinent part:

The Plaintiff's Amended Complaint seeks judicial determination of whether the decisions regarding her credentialing and privileges at East Cooper Hospital were reasonable and in compliance with the Hospital's Bylaws. Specifically, she requests the Court to review whether the failure to process and consider her application for associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. The Plaintiff's claims all arise out of the peer review process at East Cooper Hospital and, as such, are not subject to judicial review. The Court does not have jurisdiction to determine these issues and the Plaintiff has presented no evidence or reason to persuade the Court to depart from the long-standing principle that such actions are not subject to judicial review.

Summ. J. Order filed 05/23/2007 in 2005-CP-10-5113, p.4 (double emphasis added).

The present lawsuit restates the Plaintiff's allegations and arguments in her 2005 lawsuit. The Plaintiff alleges, as she did in 2005, that the Defendants breached the Settlement Agreement in reviewing her applications for medical staff privileges. **Compl.** In the 2005 lawsuit, Judge Dennis considered this argument and rejected it in two separate orders. In one of those orders, he sanctioned the Plaintiff for making the argument. With the Plaintiff being sanctioned in 2005 for making the argument, no reasonable attorney could contend that the argument is not frivolous in this action.



The Plaintiff contends that the present lawsuit was filed under a good faith argument for the extension of Lee v. Chesterfield Gen. Hosp., Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). This argument has no merit. Initially, Judge Dennis considered and rejected this exact same argument in his order sanctioning the Plaintiff in the 2005 case:

Plaintiff's interpretation and reliance on *Lee v. Chesterfield General Hospital*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986), in an effort to justify her quest to have the Court review the decisions regarding her credentialing is without merit. In *Lee* the Court confirmed the decision reached in *Gowan* but found subject matter jurisdiction where the Plaintiff did not seek to conduct a judicial review of internal hospital rules, but claimed that the Bylaws were imposed in furtherance of a conspiracy, the purpose of which was to injure the Plaintiff. *Lee* at 10. Here the Plaintiff asked the Court to review the basis for the credentialing decisions and substitute its judgment for the Hospital and its review committees by determining that the credentialing decisions were made inappropriately. This is precisely the type of intervention that *Strauss*, *Gowan*, and *Wood* decisions sought to prevent.

Sanctions Order filed 08/06/2009 in 2005-CP-10-5113, pp.15-16.

While the Plaintiff contends that this previous circuit court order is not binding precedent and that Judge Dennis's decision in this instance was incorrect, the Plaintiff ignores that, "[u]nder the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." Carman v. S.C. Alcoholic Beverage Control Comm'n, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994). Plaintiff failed to offer any argument as to why Judge Dennis's decision does not



collaterally estop her in this action. Moreover, the Plaintiff's argument on this point emphasizes her intention to re-litigate the case she lost in 2005.

In addition, by its express terms, the Lee decision was limited to civil conspiracy claims and has no application to the actions alleged by the Plaintiff in this case. The Plaintiff cites no cases or authority from South Carolina or any other jurisdiction purporting to extend the Lee decision to her breach of contract claim asserted in this case. The Plaintiff also fails to distinguish the well-settled rule in South Carolina that the parties may not, by agreement or otherwise, consent to confer subject matter jurisdiction on the court. See Eldridge v. City of Greenwood, 331 S.C. 398, 408, 503 S.E.2d 191, 196 (Ct. App. 1998) ("Claims of lack of subject matter jurisdiction may be raised at any time, and subject matter jurisdiction may not be waived by filing responsive pleadings or otherwise consenting to the jurisdiction of a particular court.").

Based on the ample case law on this issue, a reasonable attorney in the same circumstances would believe that under the facts herein, the Plaintiff's claim was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law. As such, Defendants are entitled to sanctions under the Act.

III. Defendants are entitled to sanctions under the Act because the Plaintiff initiated and continued the present action despite the Defendants' compliance with the plain language of the Bylaws.

Even if this Court had subject matter jurisdiction to review the privileging decisions of the Hospital, there is absolutely no evidence that the Defendants failed to comply with the Settlement Agreement or the Medical Staff Bylaws in reviewing the Plaintiff's application.

A handwritten signature, possibly reading "J. H. H.", is written in black ink at the bottom center of the page.

The Settlement Agreement provides, in pertinent part: "Dr. Holmes shall have the right to apply for a change in status in accordance with the Bylaws." **Settlement Agreement, pp.1-2.** The construction of a clear and unambiguous contract is a question of law for the court. Gardner v. Mozingo, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987).

The record in this case shows that the Plaintiff failed to produce any evidence in support of her allegations that the subject Settlement Agreement was breached. Indeed, the affidavit of her expert witness failed to even mention the Settlement Agreement and only addressed whether the Hospital's Bylaws were followed. Defendants produced testimony from relevant committee and board members involved in the Plaintiff's credentialing process, who all testified that the Plaintiff's reappointments were conducted in compliance with the Bylaws.

Notwithstanding the foregoing, the Plaintiff failed to conduct *any* discovery on these allegations (or otherwise) until the eve of the summary judgment hearing, when she noticed and took the deposition of Janie Sinacore-Jaberg, the Hospital's former CEO. In the 2005 lawsuit, the circuit court looked to the Plaintiff's failure to conduct any discovery as supporting its award of sanctions: "[Plaintiff] failed to conduct any discovery, written or otherwise, on this or any other claim pled in her Complaint." **Sanctions Order, p.13.**

In this case, after the hearing on Defendants' motion for summary judgment was set, Plaintiff noticed and took the deposition of Sinacore-Jaberg. **Ex. 3 to Plt.'s Response to Defs.' Mot. for Sanctions.** While the Plaintiff points to Sinacore-Jaberg's deposition transcript to show that she conducted discovery in the present case, it is



telling that the Plaintiff did not cite to Sinacore-Jaberg's substantive testimony in either her response to Defendants' motion for summary judgment or her response to Defendants' motion for sanctions. Moreover, the Plaintiff's expert witness never even mentioned Sinacore-Jaberg's testimony in his affidavit, and Sinacore-Jaberg was never asked about the Settlement Agreement. Defendants never designated Sinacore-Jaberg as a witness or submitted an affidavit from her in support of their motions.

The Plaintiff produced absolutely no evidence that Defendants failed to comply with the Settlement Agreement or the Bylaws in considering her 2006 or 2008 reappointment applications. The lack of any factual basis for the Plaintiff's claim and the Plaintiff's failure to conduct substantive discovery relating to the Settlement Agreement also support sanctions against her.

IV. The factors in section 15-36-10(E) of the Act support an award of sanctions.

This Court has considered each of the factors in section 15-36-10(E) of the Act in determining whether the Plaintiff violated the Act. Neither the number of parties nor the complexity of the legal issues involved in this case appears to have confused the Plaintiff in any manner. It is the Plaintiff's continued refusal to consider applicable case law and prior court orders which caused her to file this frivolous lawsuit, not the complexity of the issues involved. If the Plaintiff had even cursorily reviewed her previous filings, prior Court orders, the Settlement Agreement, and the Bylaws prior to filing this lawsuit, it would have shown her the unreasonableness of her actions.

The Plaintiff has been in possession of or had access to the dispositive facts of this action—the 1999 federal suit complaint, the 2000 state court complaint, the Settlement Agreement, the 2005 filings, the prior Court orders, and the Bylaws—since

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before she filed this action. As the Court's records reflect, she also had roughly four (4) months to reconsider the filing of this lawsuit before she served it.

Factor five requires this Court to consider previous violations of this section in determining whether the Plaintiff violated the Act. This factor weighs strongly in favor of sanctions against the Plaintiff. Two separate circuit court judges have sanctioned the Plaintiff under the Act. In addition, the Supreme Court of South Carolina has emphasized the Plaintiff's vexatious litigation activities involving the Defendants in two separate orders. Judge Dennis in the instant case warned the Plaintiff that she might be sanctioned during a hearing on Defendants' motion to dismiss. Despite these sanctions and warnings, the Plaintiff has continued her litigation against the Defendants. This factor also strongly supports the injunctive relief provided herein.

With respect to the sixth factor, while the Plaintiff has asserted several procedural reasons as to why she believes she should not be sanctioned, the only substantive argument she offered was her apparent belief that the Lee decision supported this lawsuit. As previously discussed, the Plaintiff was placed on notice in her 2005 lawsuit that Lee afforded her no relief.

V. Pursuant to section 15-36-10(G)(1) of the South Carolina Code, Defendants are entitled to their attorneys' fees and other litigation expenses incurred in defending this lawsuit against the Plaintiff.

Section 15-36-10(G)(1) of the South Carolina Code provides that sanctions under the Act may include: "[A]n order for the party represented by an attorney . . . to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section." "Costs shall include, but not be limited to, the following: the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage,

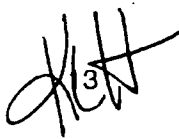
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parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding" Id.

In Glasscock v. Glasscock, 304 S.C. 158, 161, 403 S.E.2d 313, 315 (1991), the Supreme Court of South Carolina set forth the six (6) factors a court should use in determining a reasonable attorney's fee: "(1) the nature, extent, and difficulty of the case; (2) the time necessarily devoted to the case; (3) professional standing of counsel; (4) contingency of compensation; (5) beneficial results obtained; (6) customary legal fees for similar services."

In support of their request for attorneys' fees, Defendants submitted an affidavit setting forth the actual fees incurred in the defense of this action and a detailed itemization of said fees. Defendants request costs and attorneys' fees in the amount of \$53,447.15 (Fifty-Three Thousand Four Hundred Forty-Seven and 15/100ths Dollars).

In considering the factors set forth in Glasscock, the Court finds that the time and charges submitted for defending this action is comparable to the compensation charged by and paid to other attorneys with comparable legal ability, experience, success and standing within the South Carolina Bar in connection with healthcare litigation throughout the State of South Carolina; that the services set forth in the record for defending this matter were reasonable under the circumstances; that Defendants' requirement to pay for the defense of this case was not contingent on the outcome; and that counsel for Defendants obtained beneficial results in this action through the granting of summary judgment of the remaining claims and the successful prosecution of the present motion.



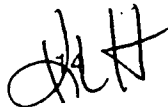
Based on the foregoing, I hereby order judgment entered in favor of Defendants against the Plaintiff in the amount of \$53,447.15 (Fifty-Three Thousand Four Hundred Forty-Seven and 15/100ths Dollars), with said judgment to be enrolled against the Plaintiff Cynthia Holmes, as well as against her alias, Cynthia Elaine Collie.

VI. Pursuant to section 15-36-10(G)(3) of the South Carolina Code, Defendants are entitled to injunctive relief.

Section 15-36-10(G)(3) of the South Carolina Code provides that sanctions may include "a directive of a nonmonetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith." "The court has the discretion and the power to restrict a litigant who abuses the judicial system, and has authority to enjoin persons engaged in a manifest abuse of judicial process." 43A C.J.S. Injunctions § 96. "A court has both the duty and the power to protect the courts, citizens, and opposing parties from the abuse of a party who uses the judicial process not to vindicate his or her rights, but to harass and intimidate his or her adversaries by repeatedly filing groundless and vexatious claims against them." Id. "In order to preserve court resources, courts may place reasonable limits on the filings of litigants who abuse the judicial system, although such a sanction should be drawn narrowly." Id.

"A court's equity jurisdiction may properly be invoked to enjoin a multiplicity of successive suits at law by the same plaintiffs." 43A C.J.S. Injunctions § 99. "A party litigant who brings successive law suits involving the same issues against the same parties that are vexatious in nature may be enjoined from continuing such actions." Id.

"The power of the court to grant an injunction is in equity." Strategic Res. Co. v. BCS Life Ins. Co., 367 S.C. 540, 544, 627 S.E.2d 687, 689 (2006). "The court will reserve its equitable powers for situations when there is no adequate remedy at law."



Id. "The party seeking an injunction has the burden of demonstrating facts and circumstances warranting an injunction." Id. "In deciding whether to grant an injunction, the court must balance the benefit of an injunction to the plaintiff against the inconvenience and damage to the defendant, and grant an injunction which seems most consistent with justice and equity under the circumstances of the case." Id.

In this case, the Defendants have made a detailed showing of the Plaintiff's pattern of filing abusive and frivolous litigation. The Plaintiff has filed several lawsuits against Defendants, as well as two separate lawsuits against her former attorneys, all arising from a medical privileging dispute which began in 1997.

It is also clear that the Defendants have no adequate remedy at law. Defendants have already been awarded their attorneys' fees and costs under the Act in the 2005 lawsuit, and this judgment had no impact on the Plaintiff's desire to file the current frivolous lawsuit. The Honorable Thomas L. Hughston, Jr., has also sanctioned the Plaintiff in another lawsuit, against her former attorneys, awarding those former attorneys \$200,000.00 in attorneys' fees and costs in an order filed on November 18, 2009. This Order had no impact on the Plaintiff's decision to file the present lawsuit, and the Plaintiff has shown that she is unwilling to be deterred by judgments against her. Simply put, the Defendants have no other avenue of relief short of an injunction.

This Court also notes that Judge Hughston and the Supreme Court of South Carolina have already enjoined the Plaintiff from filing lawsuits in South Carolina courts without a licensed attorney signing on her behalf. These injunctions also provided no relief to Defendants.

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This Court hereby enjoins the Plaintiff, or anyone on her behalf, filing a lawsuit against East Cooper Community Hospital, Inc.; Tenet HealthSystem Medical, Inc.; or their directors, officers, agents, servants, employees, attorneys, or related entities without such filing being accompanied by a bond or letter of credit, paid into the Clerk of Court at the time of filing, in the amount of \$50,000.00. Such bond or letter of credit will be applied to pay the attorneys' fees and other litigation expenses of any of the foregoing if they are the prevailing party in the action and if they are entitled to such attorneys' fees and other litigation expenses through the imposition of sanctions or otherwise. Furthermore, if the Plaintiff, or anyone on her behalf, files a lawsuit without such a bond or letter of credit, the Defendants may present a certified copy of this Order to the Clerk of Court and, upon presentation, the action should be summarily dismissed by the Clerk.

This Court has carefully considered this relief in an attempt to issue an injunction which is no more comprehensive than required by the facts of this case and the long history of the Plaintiff's litigation activities. The Plaintiff has been sanctioned or warned multiple times by multiple courts. She has been given every opportunity to conform her conduct to the standards of a reasonable attorney.

VII. Plaintiff's procedural arguments for denying Defendants' motion are without merit.

Most of the Plaintiff's arguments for denying the Plaintiff's motion are procedural in nature. This Court rejects these arguments for the following reasons:

1. Plaintiff contends the pending appeal of this Court's summary judgment order warrants a stay of this motion. In Hudson v. Hudson, 290 S.C. 215, 216, 349 S.E.2d 341, 341-42 (1986), the Supreme Court of South Carolina held that a notice of appeal



does not deprive the circuit court of jurisdiction to consider a timely post-trial motion, which includes a motion for sanctions under the Act.

2. Plaintiff contends that Defendants failed to comply with Rule 59(g), SCRPC, which requires a party to provide a copy of a motion to alter or amend to the judge within ten (10) days after the filing of the motion. In Gallagher v. Evert, 353 S.C. 59, 63-64, 577 S.E.2d 217, 219 (Ct. App. 2002), the South Carolina Court of Appeals held that Rule 59(g) does not affect the timeliness of a post-trial motion, nor does it impact the circuit court's jurisdiction.

3. Plaintiff contends that Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997), compels this Court to deny the Defendants' motion. In Hanahan, the Supreme Court of South Carolina recognized: "Other courts . . . hold that a party who survives pre-trial motions to dismiss and for summary judgment are not subject to sanctions after a trial on the surviving claims." Id. at 157, 485 S.E.2d at 912. "The theory behind these cases is that if a case is submitted to the jury, it cannot be deemed frivolous." Id. Hanahan has no applicability to the facts of the case because this case was not submitted to the jury, and the Plaintiff did not survive pre-trial motions to dismiss or for summary judgment. While the Plaintiff points to the consideration by Judge Dennis of a previous motion to dismiss in this matter as supporting a finding that she survived a pre-trial motion, Judge Dennis clearly stated at the hearing of that motion that he deemed the motion premature and was not ruling on its merits. He never denied the motion. The motion was renewed after a sufficient time to conduct discovery, and summary judgment was entered against the Plaintiff.



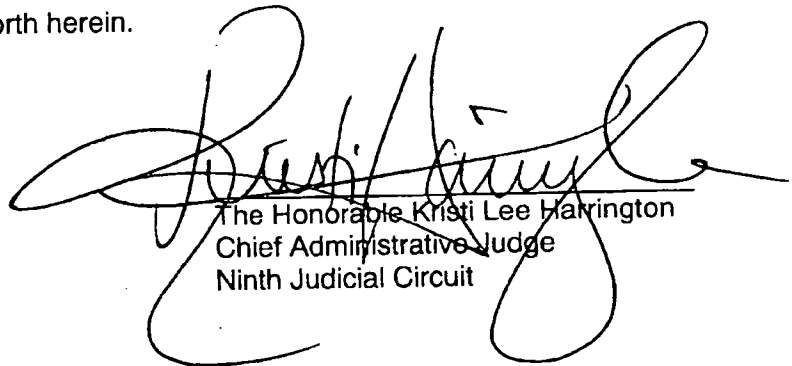


Conclusion

Defendants have shown that this lawsuit was a renewal of the Plaintiff's 2005 lawsuit against them. The allegations and arguments were the same, and the Plaintiff fails to explain how they are different.

The Plaintiff has shown a long history of ignoring plain facts, clear legal precedent, and previous warnings and sanctions of other Courts.

Under the circumstances, this Court hereby sanctions the Plaintiff pursuant to the Act, awards Defendants their requested attorneys' fees and other litigation expenses, and enjoins the Plaintiff from filing further lawsuits against the Defendants without a bond or letter of credit as set forth herein.



The Honorable Kristi Lee Harrington
Chief Administrative Judge
Ninth Judicial Circuit

January 27, 2012
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lee Harrington, Circuit Court Judge

Case No. 2010-CP-10-3410

Dr. Cynthia Holmes, M.D.

Appellant,

v.

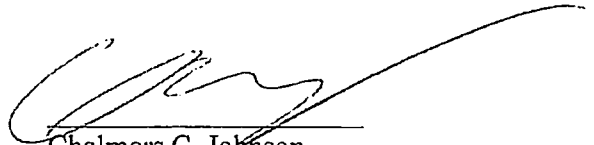
East Cooper Community Hospital, Inc.;
Tenet HealthSystem Medical, Inc.,

Respondents.

NOTICE OF APPEAL

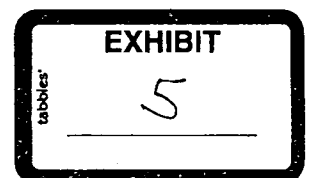
The Appellant appeals the Order of Judge Kristi Lee Harrington Filed February 1, 2012. Plaintiff received notice of the order by mail from the Court on February 6, 2012. A copy of the Order under appeal is attached.

Dated: March 1, 2012



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Attorney for the Appellant

Counsel of Record for Respondents:
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Charleston, SC 29413



THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Kristi Lee Harrington, Circuit Court Judge

Case No. 2010-CP-10-3410

Dr. Cynthia Holmes, M.D.

Appellant,

v.

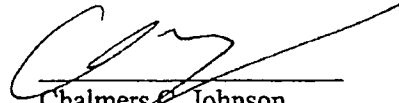
East Cooper Community Hospital, Inc.;
Tenet HealthSystem Medical, Inc.,

Respondents.

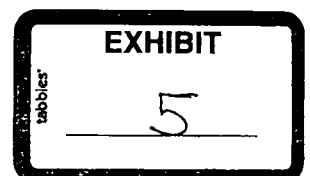
NOTICE OF APPEAL

The Appellant appeals the Order of Judge Kristi Lee Harrington entered Filed July 29, 2011. A copy of the Order under appeal is attached.

Dated: August 24, 2011


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**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

Dr. Cynthia Holmes, M.D., Appellant,

v.

East Cooper Community Hospital, Inc., and Tenet
HealthSystem Medical, Inc., Respondents.

Appellate Case No. 2011-198092;
Appellate Case No. 2012-209666

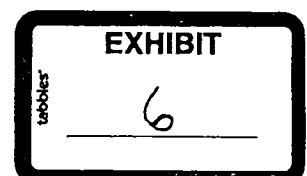
Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Opinion No. 27370
Heard March 19, 2013 – Filed March 26, 2014

AFFIRMED

Chalmers Carey Johnson, of Tacoma, Washington, for
Appellant.

Erskine Douglas Pratt-Thomas, Lindsay Kathryn Smith-
Yancey, and Daniel Simmons McQueeney, Jr., all of
Pratt-Thomas Walker, PA, of Charleston, for
Respondents.



CHIEF JUSTICE TOAL: In this consolidated appeal, Dr. Cynthia Holmes, M.D. (Appellant) asks this Court to reverse the circuit court's decisions granting summary judgment in favor of East Cooper Community Hospital, Incorporated, and Tenet HealthSystem Medical, Incorporated (collectively, Respondents), and sanctioning her pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act, section 15-36-10 of the South Carolina Code (the FCPSA). We affirm the circuit court's grant of summary judgment in favor of Respondents and the award of sanctions against Appellant.

FACTS/PROCEDURAL BACKGROUND

Respondent East Cooper Community Hospital, Incorporated, is a subsidiary of Respondent Tenet HealthSystem Medical, Incorporated, and owns, operates and does business as East Cooper Medical Center (the Hospital), a private hospital in Mount Pleasant, South Carolina. Appellant is a doctor, who currently practices ophthalmology in Sullivan's Island, South Carolina, and was previously a member of the consulting medical staff of the Hospital.¹ During the relevant time period, Appellant was a member of the Hospital's medical consulting staff, appointed in two-year increments. In October 2006, Appellant submitted a reappointment application seeking advancement in medical staff category and clinical privileges to perform surgery on the eye. The Hospital's credentialing committee found Appellant unqualified for the level of privileges she requested. Appellant received administrative review of this decision, and was ultimately reappointed as consulting medical staff for another two-year term. In October 2008, Appellant submitted another reappointment application requesting advancement. This time, the Hospital determined that Appellant's application was incomplete and requested she voluntarily resign from the medical staff without appellate rights under the medical staff bylaws. The current appeal stems from these privileging decisions.

By way of background, this case represents the fourth lawsuit filed by Appellant against Respondents regarding credentialing decisions.² In each case,

¹ Appellant is also a licensed attorney and member of the South Carolina Bar.

² Appellant has also brought two legal malpractice claims against the attorneys who represented her in the first two lawsuits.

Appellant has alleged breach of contract and breach of the covenant of good faith and fair dealing arising out of Respondents' alleged mishandling of Appellant's medical staff privileging applications. Appellant filed her first lawsuit against Respondents in federal court in 1999, alleging violations of the Sherman Anti-Trust Act, 15 U.S.C. §§ 1, et seq. (2004), and pendant state law claims, including *inter alia*, claims for wrongful termination of hospital privileges, breach of contract, breach of contract accompanied by a fraudulent act, civil conspiracy, and unfair trade practices. That lawsuit ended when the district court granted summary judgment in favor of Respondents on the federal claim, and dismissed the remaining state law claims pursuant to 28 U.S.C. § 1367(c)(3) (providing a court may decline to exercise supplemental jurisdiction over state law claims in cases where the district court has dismissed all claims over which it has original jurisdiction).³

On May 16, 2000, Appellant again challenged the Hospital's credentialing decisions, this time in circuit court. On January 20, 2003, the parties executed a settlement agreement in the second lawsuit (the Settlement Agreement). The Settlement Agreement provided, in part, that Appellant be reappointed to the consulting medical staff position from 2002 until 2004 with "the right to apply for a change in status in accordance with the Bylaws."

In 2005, Appellant filed a third lawsuit against Respondents alleging, *inter alia*, that Respondents breached the Settlement Agreement and the covenant of good faith and fair dealing in reviewing Appellant's applications for medical staff privileges in 2002 and 2004. More specifically, Appellant alleged that she and Respondents were parties to a contractual agreement "the terms of which are set forth in the Medical Staff Bylaws, Rules and Regulations, and related documents."

The circuit court ultimately granted summary judgment in favor of Respondents in the 2005 lawsuit on May 23, 2007. In addressing the allegations relating to Appellant's 2004 application, Circuit Court Judge R. Markley Dennis, Jr., stated, in pertinent part:

The [Appellant's] Amended Complaint seeks judicial determination of

³ Appellant filed a pro se appeal from the district court's decision in the United States Court of Appeals for the Fourth Circuit, which was dismissed on November 17, 2000. She subsequently sought a writ of certiorari from the United States Supreme Court, which was denied on October 1, 2001.

whether the decisions regarding her credentialing and privileges at East Cooper Hospital were reasonable and in compliance with the Hospital's Bylaws. Specifically, she requests the Court to review whether the failure to process and consider her application for associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. The [Appellant's] claims all arise out of the peer review process at [the Hospital] and, as such, are not subject to judicial review. The Court does not have jurisdiction to determine these issues and [Appellant] has presented no evidence or reason to persuade the Court to depart from the long-standing principle that such actions are not subject to judicial review.

Judge Dennis explained further:

[Appellant] argues that the Court does have jurisdiction over this matter based on *Lee v. Chesterfield General Hospital*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). The Court declines to adopt [Appellant's] interpretation of the *Lee* decision as applicable to the matter herein. In *Lee* the Court confirmed the decision reached in *Gowen* [sic]⁴ but found subject matter jurisdiction where [Appellant] did not seek to conduct a judicial review of internal hospital rules, but claimed that the Bylaws were imposed in furtherance of a conspiracy, the purpose of which was to injure [Appellant]. *Lee*[, 289 S.C.] at 10. Here [Appellant] asks the Court to review the basis for the credentialing decisions and substitute its judgment for the Hospital and its review committees by determining that the credentialing decisions were made inappropriately. This is precisely the type of intervention that [the] *Strauss*,⁵ *Gowen* [sic], and *Wood*⁶ decisions sought to prevent.⁷

⁴ *Gowan v. St. Francis Comty. Hosp.*, 275 S.C. 203, 268 S.E.2d 580 (1980).

⁵ *Strauss v. Marlboro Cnty. Gen. Hosp.*, 185 S.C. 425, 194 S.E. 65 (1937).

⁶ *Wood v. Hilton Head Hosp., Inc.*, 292 S.C. 403, 405, 356 S.E.2d 841, 842 (1987).

⁷ Appellant appealed this order to the court of appeals on three separate occasions, and the court of appeals dismissed and remitted the case each time.

In a subsequent order, dated August 6, 2009, sanctioning Appellant pursuant to the FCPSA, Judge Dennis stated:

Despite clear case law to the contrary, [Appellant] filed this action seeking judicial determination of whether the decisions regarding her credentialing and privileges were reasonable and in compliance with the Hospital's Bylaws. Specifically, she sought the Court to review whether the failure to process and consider her application for associate status and surgical privileges, her reappointment to the consulting staff, and the denial of an administrative hearing were reasonable decisions made in accordance with the Bylaws. [Appellant's] claims all arose out of the peer review process and, under South Carolina law, are not subject to judicial review, and [Appellant] presented no evidence or reason to persuade the Court to depart from this longstanding principle.

On April 26, 2010, Appellant filed her complaint in the instant action,⁸ alleging Respondents breached their contract and covenant of good faith and fair dealing by "attempting (successfully to date) to block [Appellant] from being able to seek review of its decision to deny her application for advancement in staff privileges in violation of the letter and the spirit of the applicable bylaws." As a result, Appellant submitted that she "suffered actual damages and special damages, in the form of lost income, and loss of business to her practice, as she has been unable to admit any patients to the hospital to perform medical procedures from 2007 . . . and continuing presently." Appellant sought review of the specific decisions of the Hospital to deny her application for surgical privileges in 2006 and to reject her 2008 application as incomplete.

On September 17, 2010, Respondents filed an answer and counterclaims for abuse of process and malicious prosecution. As part of their Answer, Respondents also moved for sanctions under the FCPSA.

On September 24, 2010, Respondents moved for judgment on the pleadings pursuant to 12(c), SCRCP.⁹ In their motion, Respondents argued that, based on the

⁸ Appellant is represented in this litigation by the same counsel who represented her in the 2005 litigation.

⁹ Rule 12(c), SCRCP, provides:

pleadings, the circuit court lacked jurisdiction to consider Appellant's claims. A hearing was convened before Judge Dennis to hear arguments on Respondents' motion on December 16, 2010. At the hearing, Judge Dennis orally denied the motion on the basis that it would be more appropriately considered as a motion for summary judgment:

I think the safest for everybody, for review purposes is to have this matter resolved not on a [m]otion on the pleadings but on a [m]otion for summary judgment. I just am not—I understand the jurisdictional issue. There are matters, though, that I—I really would have to rely on certain things outside of the context of the pleadings.

In denying the motion, Judge Dennis not only warned Appellant's counsel against engaging in frivolous proceedings, but took care to reiterate he was not making any ruling with respect to the merits of Respondents' claims that the circuit court lacked subject matter jurisdiction:

I don't quarrel with anything you've [Respondents' counsel] said. I would remind everybody—I don't have to, we have very competent lawyers involved in this, but if this is another effort that really is nothing more than—could be considered frivolous, though I am not making that finding now, and I would not hesitate, nor am I sure any other judge would hesitate to impose sanctions.

So I—I just remind everybody what we're doing here because I think it has to be looked at in a real sense. I think that the [sic] there are things, [Appellant's counsel],—no disrespect to you, sir, but—I understand what you say sounds like that might be creative lawyering, too, by using semantics—and I don't think that it is there. That's not

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

for me to judge today.

I agree with you that it would be a mistake to grant this on the basis of the pleadings. So that's the reason that I am denying it—not anything about the merits.

Respondents filed a motion to reconsider pursuant to Rule 59(e), SCRCP. Judge Dennis held a hearing on this motion on March 8, 2011, and orally denied the motion. On March 9, 2011, Judge Dennis denied this motion in a form order.

On June 6, 2011, Respondents filed a motion for summary judgment on several grounds, including that the circuit court lacked subject matter jurisdiction to review the medical staff privileging decisions of a private hospital. A hearing was convened on July 8, 2011, before the Honorable Kristi Lee Harrington. By order dated July 29, 2011, Judge Harrington entered summary judgment in favor of Respondents (the Summary Judgment Order). In the Summary Judgment Order, Judge Harrington found that the circuit court lacked subject matter jurisdiction to review the Hospital's privileging decisions with respect to Appellant.

On August 8, 2011, Respondents filed a motion for sanctions under the FCPSA, arguing, *inter alia*, that the circuit court should sanction Appellant for "seeking adjudication of claims over which this Court does not have jurisdiction" and "raising issues which have been previously adjudicated against [Appellant] and in [Respondents'] favor."

On August 24, 2011, Appellant appealed the Summary Judgment Order. Appellant also filed a response to Respondents' motion for sanctions in the circuit court, arguing that the circuit court could not grant sanctions against her where the court had previously denied Respondents' motion to dismiss; that she was competently represented by counsel, and therefore, immune from sanctions; and that Respondents' motion was premature because of the pending appeal of the Summary Judgment Order.

On November 22, 2011, Judge Harrington heard arguments concerning Respondents' motion for sanctions. During the hearing, Appellant argued that the FCPSA unconstitutionally holds pro se litigants to a reasonable attorney standard and deprives litigants of due process by requiring the circuit court to report any violation of the FCPSA directly to this Court. No other constitutional issues were raised by Appellant during this hearing.

By order dated February 1, 2012, Judge Harrington awarded sanctions against Appellant for violating the FCPSA (the Sanctions Order) by "initiating and continuing this litigation despite this Court's lack of subject matter jurisdiction, despite a prior ruling against [Appellant] that this Court lacks subject matter jurisdiction, and despite being sanctioned for arguing that this Court has subject matter jurisdiction in a previous case based on the very same allegations." Judge Harrington further found that Appellant violated the FCPSA by initiating and continuing "the present action despite [Respondents'] compliance with the plain language of [the Hospital's] Bylaws." Judge Harrington also noted:

While [Appellant] contends that this previous circuit court order is not binding precedent and that Judge Dennis's decision in this instance was incorrect, [Appellant] ignores that "[u]nder the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Carman v. S.C. Alcoholic Beverage Control Comm'n*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994). [Appellant] failed to offer any argument as to why Judge Dennis's decision does not collaterally estop her in this action. Moreover, [Appellant's] argument on this point emphasizes her willingness to re-litigate the case she lost in 2005.

Therefore, Judge Harrington ordered Appellant to pay Respondents' attorneys' fees and other costs associated with this action in the amount of \$53,447.15 and enjoined Appellant from any future filings against Respondents absent the posting of a bond to pay Respondents' attorneys' fees and costs in the event Respondents prevail in future litigation and upon a showing that Respondents would be entitled to such fees and costs.¹⁰

On February 21, 2012, Appellant filed a motion to reconsider the Sanctions Order.¹¹ Appellant appealed the Sanctions Order on March 6, 2012. On March 7,

¹⁰ Noticeably, the Sanctions Order did not address any constitutional arguments made by Appellant.

¹¹ In her motion to reconsider, Appellant sought a ruling on her prior constitutional

2012, Judge Harrington denied Appellant's motion to reconsider the Sanctions Order. On March 21, 2012, Appellant filed an amended notice of appeal of the Sanctions Order after the circuit court denied her motion to reconsider.

On May 24, 2012, this Court certified these cases for review pursuant to Rule 204(b), SCACR, and consolidated Appellant's two appeals for purposes of briefing and oral argument.

ISSUES

- I.** Whether the circuit court erred in awarding sanctions against Appellant?
- II.** Whether the FCPSA is unconstitutional?

ANALYSIS

I. Successive "Motions to Dismiss"

Appellant argues that because the hospital failed to prevail on its first and second "motions to dismiss" for lack of subject matter jurisdiction before Judge Dennis, South Carolina law prohibits a finding of frivolity where the case was ultimately dismissed on a third, identical "motion to dismiss" before a different judge, Judge Harrington. On the other hand, Respondents contend that the circuit court's ruling with respect to Respondents' motion for judgment on the pleadings and summary judgment motion does not preclude sanctions under the FCPSA.

First, we find that Appellant mischaracterizes the nature of Respondents' motions. The characterization of Respondents' motions as "motions to dismiss" contradicts the Record. Initially, Respondents submitted a motion for judgment on the pleadings to Judge Dennis, followed not by a second "motion to dismiss," but a subsequent motion to reconsider the denial of that motion. In discussing the motion for judgment on the pleadings, Judge Dennis explicitly stated that he was not denying the motion on the merits, finding instead that summary judgment would be the proper avenue to consider Respondents' arguments. Therefore,

argument that the "reasonable attorney" standard in the FCPSA violates due process. However, for the first time, Appellant argued that the FCPSA inhibits free speech.

Respondents filed a motion for summary judgment, which Judge Harrington ultimately granted in their favor. This was not a third motion to dismiss, as Appellant claims.

Appellant's attempt to characterize these motions as successive "motions to dismiss" is a veiled effort to make the facts of this case conform to those in *Hanahan v. Simpson*, 326 S.C. 140, 485 S.E.2d 903 (1997), as Appellant relies on *Hanahan* for the proposition that sanctions were inappropriate based on the posture of her case. In that case, the Court, acting under a prior version of the FCPSA, reversed the award of sanctions after the sanctioned party prevailed on a summary judgment motion, but lost the case after a full trial on the merits. *Id.* at 158, 485 S.E.2d at 913. The Court adopted the rationale "that a party who survives pre-trial motions to dismiss and for summary judgment are not subject to sanctions after a trial on the surviving claims," stating that "[t]he theory behind these cases is that if a case is submitted to the jury, it cannot be deemed frivolous." *Id.* at 157, 485 S.E.2d at 912 (citation omitted). Thus, by claiming that she survived successive motions to dismiss, Appellant attempts to utilize *Hanahan* to avoid sanctions.

However, the present case is distinguishable from *Hanahan* in that, here, Appellant did not "survive" a pre-trial motion to dismiss or for summary judgment and never made it to a trial on the merits. Rather, Judge Dennis expressly deferred a decision on the merits until such motion was in the proper procedural posture. Therefore, because Judge Harrington granted Respondents' motion for summary judgment and Appellant's case was never tried on the merits, Appellant is not immune from sanctions under *Hanahan*'s rationale.

Nevertheless, *Hanahan* was decided in 1997 under a prior version of the FCPSA. At that time, the FCSPA provided:

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 if:

(1) he does so primarily for a purpose other than that of securing the proper discovery, joinder of parties, or adjudication of the claim upon which the proceedings are based; and

(2) the proceedings have terminated in favor of the person seeking an assessment of the fees and costs.

S.C. Code Ann. § 15-36-10 (2005). Under the prior version of the Act, the party seeking sanctions bore the burden of proving:

(1) the other party has procured, initiated, continued, or defended the civil proceedings against him;

(2) the proceedings were terminated in his favor;

(3) the primary purpose for which the proceedings were procured, initiated, continued, or defended was not that of securing the proper discovery, joinder of parties, or adjudication of the civil proceedings;

(4) the aggrieved person has incurred attorney's fees and court costs;
and

(5) the amount of the fees and costs set forth in item (4).

Id. § 15-36-40.

In 2005, the General Assembly substantially amended section 15-36-10, and repealed sections 15-36-20 through -50. *See* Act No. 27, 2005 S.C. Acts 114, § 5 (effective July 1, 2005) (revising § 15-36-10); Act No. 27, 2005 S.C. Acts 121, § 12 (effective March 21, 2005) (repealing §§ 15-36-20 through -50). Section 15-36-10 now reads, in pertinent part:

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 Ann. § 15-36-10(C)(1) (Supp. 2012).

Under the plain terms of this new section of the FCPSA, *Hanahan's* reasoning as to the disposition of pre-trial motions no longer applies. *See Hodges v. Rainey*, 341 S.C. 79, 87, 533 S.E.2d 578, 582 (2000) ("When the language of a

statute is clear and explicit, a court cannot rewrite the statute and inject matters into it which are not in the legislature's language, and there is no need to resort to statutory interpretation or legislative intent to determine its meaning.") (citation omitted). Rather, sanctions may be awarded under section 15-36-10 regardless of whether or not the case has been tried to verdict so long as the trial court finds by a preponderance of the evidence that the party should be sanctioned under the terms of the FCPSA. S.C. Code Ann. § 15-36-10(C).

Here, Appellant lost at the summary judgment stage. Therefore, while the circuit court erred in relying on *Hanahan*, the circuit court did not err in assessing sanctions pursuant to the FCPSA at that point.

II. Merits of Appellant's Case under Existing Law

However, Appellant further argues that her position on subject matter jurisdiction is supported by existing law, and therefore, the circuit court erred in finding that she frivolously pursued her claims. *See* S.C. Code Ann. § 15-36-10(J) (stating the provisions of the FCPSA "shall not apply where an attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law."). On the other hand, Respondents argue that the circuit court acted within its discretion in finding that a reasonable attorney under the same circumstances would believe that under the facts, Appellant's claim was unwarranted under existing law, and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law.

Appellant's argument concerning sanctions hinges on the validity of the Summary Judgment Order. In this respect, Appellant argues that sanctions were not warranted under the FCPSA where summary judgment was inappropriate as a matter of law and fact. Of course, Respondents argue that summary judgment was appropriate as a matter of law.¹²

Summary judgment should be granted when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C.

¹² We note that in the proceedings below, the parties stipulated that the matters under consideration were matters of law for the court.

356, 361, 563 S.E.2d 331, 333 (2002) ("An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRPC." (citation omitted)). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law" and "should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham*, 349 S.C. at 362, 563 S.E.2d at 333 (citations omitted). As in the trial court, "[o]n appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.* (citing *Williams v. Chesterfield Lumber Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976)). "[I]n cases applying the preponderance of the evidence burden of proof, 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). Nevertheless, "when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997) (citation omitted).

Appellant contends that her subject matter jurisdiction argument is based on a good faith or reasonable extension of the court of appeals' decision in *Lee v. Chesterfield General Hospital, Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986).

We agree with Respondents that Appellant made this exact legal argument in the 2005 litigation before Judge Dennis and has provided no reason why her argument is any different in this case, aside from the dates of the credentialing decisions. In fact, at the hearing on sanctions, Appellant's counsel indicated that he wanted another "bite of the apple," as he aimed to obtain a ruling by an appellate court that Judge Dennis's interpretation of *Lee* was wrong, and Appellant's interpretation was indeed correct.¹³ In granting summary judgment to

¹³ At the sanctions hearing, Appellant's counsel argued:

Your order was issued on your interpretation [in the present lawsuit] and Judge Dennis's interpretation [in the 2005 lawsuit] of the *Lee* case. And while I fully respect that the Court has the authority to interpret these cases and issue an order, the only other order in existence that supports Your Honor's order is Judge Dennis's [order in the 2005 lawsuit], which is a circuit court order and not an appellate

Respondents, Judge Harrington found that "at least two prior orders entered by [Judge Dennis] in a previous case between these parties operate as res judicata and/or collateral estoppel as to this issue, and these also support the Court's decision herein."

We affirm the grant of summary judgment in favor of Respondents on the basis that Appellant is collaterally estopped from bringing this suit.

opinion. And we're in the Court of Appeals now for me to challenge that order, which is the proper way to do it.

....

In fact, attorneys are allowed to even go against existing appellate opinion if they have a good-faith argument against it. In this case I wasn't going against appellate law. I felt that Judge Dennis was incorrect, and you felt that I was incorrect, and now we are in the Court of Appeals. That's the way the system is supposed to work. It's not a frivolous lawsuit.

....

The second sanctions order [issued by Judge Dennis in the 2005 case] I'm very well aware of. And I was aware of that when I took this case which is why I did the research, I talked to other lawyers in the community to see what they thought.

And the question was, was Judge Dennis right about *Lee versus Chesterfield*. The consensus that I got was that he wasn't right about *Lee versus Chesterfield*. I don't think he was right about *Lee versus Chesterfield*.

And it does me no good to say that to anybody except to you and then to the [a]ppellate [c]ourt, which is exactly where I'm going. The case was very specifically tailored for that purpose . . . was either I'm going to convince a judge this time that I'm right about *Lee versus Chesterfield*, or I'm going to convince an appellate panel on the Supreme Court that I'm right about *Lee versus Chesterfield*, or I'm just dead wrong and everybody is going to tell me so all the way up.

"Under the doctrine of collateral estoppel, when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Carman*, 317 S.C. at 6, 451 S.E.2d at 386 (citing *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 403 S.E.2d 625 (1991)). "The estoppel of a judgment does not extend to matters not expressly adjudicated, and which can be inferred only by argument or construction from the judgment, except where they are necessary and inevitable inferences in the sense that the judgment could not have been rendered as it was without deciding such points." *Id.* (citing *Dunlap & Dunlap v. Zimmerman*, 188 S.C. 322, 199 S.E. 296 (1938)).

Judge Dennis rejected Appellant's *Lee* argument in the 2005 lawsuit:

[Appellant] argues that the Court does have jurisdiction over this matter based on *Lee v. Chesterfield General Hospital*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986). The Court declines to adopt [Appellant's] interpretation of the *Lee* decision as applicable to the matter herein. In *Lee* the Court confirmed the decision reached in *Gowen* [sic] but found subject matter jurisdiction where [Appellant] did not seek to conduct a judicial review of internal hospital rules, but claimed that the Bylaws were imposed in furtherance of a conspiracy, the purpose of which was to injure [Appellant]. *Lee*, 289 S.C.] at 10. Here [Appellant] asks the Court to review the basis for the credentialing decisions and substitute its judgment for the Hospital and its review committees by determining that the credentialing decisions were made inappropriately. This is precisely the type of intervention that [the] *Strauss*, *Gowen* [sic], and *Wood* decisions sought to prevent.

Because Judge Dennis issued a final ruling on whether Respondents breached the Settlement Agreement with respect to privileging decisions made in 2002 and 2004 based on the *Lee v. Chesterfield* decision, Appellant is estopped from bringing the exact legal arguments against Respondents with respect to the 2006 and 2008 credentialing decisions.

Nevertheless, Appellant's argument that existing law supports her claim fails on the merits. Appellant argues that her attorney was concerned with the dismissal for lack of subject matter jurisdiction in the 2005 case, so he specifically limited the claims in this case to fall within the ambit of the *Lee* holding, "which he read as

restricting the immunity granted to private hospitals from suits requesting a due process review, rather than other types of common law claims." Therefore, Appellant contends that her claims are specifically tailored to the Settlement Agreement, and not the Hospital's by-laws. At the hearing before Judge Harrington on Respondents' summary judgment motion, Respondents again argued that the circuit court lacked jurisdiction to hear this claim under *Gowan v. St. Francis Community Hospital*, 275 S.C. 203, 268 S.E.2d 580 (1980) and its progeny. On the other hand, Appellant again argued that the facts alleged in Appellant's complaint were indistinguishable from those in *Lee*. Judge Harrington ruled in favor of Respondents, finding that *Lee* was inapplicable to this case, and stating Appellant's "claims all arise out of the peer review process at the Hospital and, as such, are not subject to judicial review."

In *Lee*, a licensed and certified physician's assistant, Lee, and a licensed physician, Newson, had been granted staff privileges to perform procedures by Chesterfield General Hospital (the hospital) for several years. *Lee*, 289 S.C. at 8, 344 S.E.2d at 380. In October 1982, Lee reapplied for privileges to perform a host of medical procedures at the hospital. *Id.* In January 1983, the hospital approved privileges to perform some of these procedures, but not all of them. *Id.* In February 1983, the hospital's board of trustees again limited Lee's privileges. *Id.* at 7, 344 S.E.2d at 381. In their complaints, Lee and Newson alleged that the hospital administrator, the hospital and other members of the medical staff conspired "'to dominate the practice of medicine by licensed physicians in Chesterfield County' and 'to restrain and eliminate, for their own financial advantage and professional enhancement, the element of fair competition' in the practice of medicine in Chesterfield County." *Id.* at 9, 344 S.E.2d at 381. As a result, Lee and Newson alleged that they had suffered damages, including mental anguish, loss of professional reputation, and loss of trade. *Id.*

Citing *Gowan*, the court of appeals restated the general rule¹⁴ with respect to

¹⁴ In *Wood*, this Court explained:

It is well settled in South Carolina, and throughout the country, that it is improper for the courts to review the decisions of governing boards of private hospitals concerning the staff privileges of practitioners. This Court adopted the majority rule many years ago in the case of *Strauss v. Marlboro County General Hospital*, 185 S.C. 425, 194 S.E. 65 (1937). In the recent decision of *Gowan v. St. Francis Community*

challenging hospital staff privileging decisions:

We agree that a private hospital is free, in the absence of controlling legislation or regulatory provisions, to decide the nature and extent of medical practice permitted to persons it grants staff privileges. Ordinarily, such decisions involve matters of expert medical judgment not subject to judicial review.

Id. Moreover, the court reiterated that "[a] medical professional has no right, simply because he is licensed by state authority[,] to claim unrestricted staff privileges in a hospital." *Id.* Nevertheless, that court found:

These principles are not dispositive of the present cases, however. In ruling on the demurrers, the circuit court did not conduct a judicial review of internal hospital rules. The question to be decided is not whether the rules are valid or reasonable or medically sound, but whether the rules were imposed in furtherance of a conspiracy, the primary purpose of which was to injure the plaintiffs. If the complaints, liberally construed, allege such a conspiracy, it is irrelevant that the Hospital has the legal right to restrict staff privileges and that its rules are not subject to judicial review.

Id. at 9–10, 344 S.E.2d at 381.

Appellant now contends that the *Lee* decision does not stand for the proposition that a party must make a claim for civil conspiracy to avoid dismissal for lack of subject matter jurisdiction to review a hospital's staff decisions. Therefore, she contends that the Summary Judgment Order is erroneous as a matter of law because it "circumvents the clear ruling of the *Lee* Court by interpreting the

Hospital, 275 S.C. 203, 268 S.E.2d 580 (1980), *cert. denied*, 449 U.S. 1062 (1980), we affirmed our view that the implementation of the regulations of a private hospital which are initiated to restrict a practitioner's practices are not subject to judicial review. We stated that we would not "depart from the longstanding principle that such action [by the hospital] is not subject to judicial review." *Gowan*, 275 S.C. at 204, 268 S.E.2d at 581 (citations omitted).

292 S.C. at 405, 356 S.E.2d at 842.

opinion as meant only to apply to cases in which the [p]laintiff has alleged civil conspiracy."

While we agree with the gravamen of Appellant's argument that *Lee* might not be limited to claims of civil conspiracy, the import of *Lee* is that any claim involving staffing decisions made by a private hospital must require review beyond the internal procedures, e.g. bylaws, of a private hospital, to fall within an exception to the general rule that courts will not delve into a hospital's internal affairs with regard to credentialing or other staffing decisions. Here, despite her attempt to characterize her claims as a challenge to the Settlement Agreement, in our view, Appellant's lawsuit constitutes another attempt on her part to get at the heart of the hospital's internal procedures and staffing decisions. At its core, Appellant's lawsuit challenges staff decisions made after the Hospital complied with the express terms of the Settlement Agreement. No review of the Hospital's decisions can be had here without reviewing the Hospital's 2006 and 2008 privileging decisions and its by-laws.¹⁵

¹⁵ Even Appellant's complaint proclaims that Respondents breached a duty to Appellant "by attempting (successfully to date) to block [Appellant] from being able to seek review of its decision to deny her application for advancement in staff privileges *in violation of the letter and the spirit of the applicable bylaws*." (Emphasis added). Likewise, during a later hearing, Appellant characterized the arguments contained in her complaint as follows:

[Respondents] claim[] that a settlement agreement executed by the parties which required that [Appellant] be reappointed to the consulting staff in 2002 precludes [Appellant] from suing in this case because she was, actually, reappointed to the consulting staff in 2002. [Respondents] misinterpret[] the complaint, which should be clear on its face. [Appellant] was given two rights under the former agreement. One was to be reappointed to the consulting staff in 2002 for two years. The other, as [Respondents] explain[] in [their] own brief, was that [Appellant] would have the right to apply for a change in status pursuant to the by-laws. *It is the denial of [Appellant's] right to apply for a change in status pursuant to the by-laws which is the basis of her claims in this case.*

(Emphasis added).

Therefore, because Appellant again attempts to challenge the internal decision-making process of the Hospital with respect to staff credentials, which has been already adjudicated as clearly improper under our jurisprudence, Appellant's lawsuit lacked merit from the outset. Accordingly, we affirm the circuit court's grant of summary judgment to Respondents. Moreover, we find that Respondents were justified in seeking sanctions against Appellant here because there was clearly no "good faith argument for an extension, modification, or reversal of the existing law," especially in light of Judge Dennis's prior ruling in the 2005 lawsuit. *See* S.C. Code Ann. § 15-36-10(J).

III. Timing

Despite obvious preservation issues,¹⁶ Appellant argues that to allow the circuit court to determine whether a claim is frivolous on a motion for sanctions under the FCPSA while the order dismissing the case is under appeal creates a conflict with the South Carolina Appellate Court Rules, and causes unnecessary litigation. Appellant contends that this conflict may be resolved by requiring circuit courts confronted with this situation to stay their consideration of frivolity until after the resolution of the appeal of the underlying dispositive judgment. To the contrary, Respondents contend that the circuit court acted within its discretion by hearing Respondents' motion for sanctions after Appellant filed her notice of appeal. We agree.

Motions made pursuant to the FCPSA are post-trial motions. *See* S.C. Code Ann. 15-36-10(C)(1) (Supp. 2012) ("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."). As such, a party has ten days after the filing of a court order to file a motion pursuant to the FCPSA. *See In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004) (referring to motions made under the

¹⁶ Appellant failed to raise the conflict she proposes between the South Carolina Appellate Court Rules and the FCPSA before the circuit court in either her brief opposing sanctions, at the hearing, in her proposed order, or in her motion to reconsider. *See Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 510 (2006) ("It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved.").

FCPSA as "post-trial motions for sanctions" and finding that the general ten-day limitation for post-trial motions applies to motion made pursuant to the FCPSA); *Pitman v. Republic Leasing Co.*, 351 S.C. 429, 432–33, 570 S.E.2d 187, 189–90 (Ct. App. 2002) ("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."); *Rutland v. Holler, Dennis, Corbett, Ormond & Garner (Law Firm)*, 371 S.C. 91, 96, 637 S.E.2d 316, 319 (Ct. App. 2006) ("[B]ecause a trial judge retains jurisdiction pursuant to Rule 59(e), SCRCF, 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." (alteration in original)).¹⁷

Nevertheless, Appellant contends that the requirement that a motion pursuant to the FCPSA be made within ten days of a final judgment conflicts with Rule 241(a), SCACR, which provides:

As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. This automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court. The lower court or administrative tribunal retains jurisdiction over matters not affected by the appeal including the authority to enforce any matters not stayed by the appeal.

Appellant argues that the circuit court should have awarded sanctions prior to the outcome on appeal of the order upon which the sanctions were based, or the Summary Judgment Order. However, this Court has held that the filing of a notice of appeal does not deprive the circuit court of jurisdiction to consider a timely post-trial motion. *See, e.g., Hudson v. Hudson*, 290 S.C. 215, 215, 349 S.E.2d 341, 341 (1986). For example, in *Hudson*, the order appealed was filed on March 18, 1986, and a notice of appeal was filed on March 24, 1986. *Id.* On March 27,

¹⁷ Appellant concedes in her brief that 10 days is the appropriate time to file a motion for sanctions.

1986, timely post-trial motions were made pursuant to Rule 59(e), SCRCP. *Id.* at 215–16, 349 S.E.2d at 341. Holding "that the service and filing of a Notice of Appeal before the filing of timely post-trial motions under Rule 59 by any party does not deprive the lower court of jurisdiction to consider the motions," *id.* at 216, 349 S.E.2d at 341, the Court ordered the notice of appeal to be dismissed without prejudice as prematurely filed, *id.* at 216, 349 S.E.2d at 341–42 ("[I]n the event timely post-trial motions are filed under Rule 59, simultaneously with or subsequent to the filing of a Notice of Appeal, the appellant shall notify the Clerk of this Court in writing. Upon receipt of such notice, the appeal shall be dismissed without prejudice. Any party can appeal within ten (10) days after the order disposing of the post-trial motions. A second filing fee will not be collected from a party who previously appealed." (footnote omitted)). This way, all ancillary matters can be timely heard, and appealed, if necessary, in an efficient and wholesale manner, and not, as Appellant suggests, in a piecemeal fashion.

Accordingly, Appellant's contention that the FCPSA and the South Carolina Appellate Court Rules contain conflicting terms lacks merit, and the circuit court acted properly and well within its jurisdiction in hearing Respondents' sanctions motion, even though Appellant already had filed a Notice of Appeal in this case.

IV. The Constitutionality of the FCPSA

Appellant argues that the FCPSA is unconstitutional. Respondents contend that Appellant's "everything-but-the-kitchen-sink" approach must fail her because she did not preserve her arguments for review in the circuit court and because her arguments lack merit.

We agree with Respondents that Appellant did not preserve most of her constitutional arguments for review. Appellant never argued the following to the circuit court: (1) that the FCPSA is redundant to a claim for abuse of process or a request for sanctions under Rule 11, SCRCP; (2) that the FCPSA deprives litigants of their rights to a jury trial; or (3) that the FCPSA violates the prohibition against double jeopardy. Finally, Appellant raised her argument that the FCPSA constitutes an unconstitutional inhibition on free speech for the first time in her motion to reconsider the Sanctions Order. Therefore, we will not consider the merits of those arguments.

With respect to her due process argument, despite Respondents' assertion to the contrary, Appellant did argue this issue to the circuit court and again raised it in

her motion for reconsideration of the Sanctions Order. Appellant argues that the FCPSA denies litigants procedural due process because "the *pro se* litigant or non-attorney party is held to a standard of expertise which the layperson and affected party do not possess." Respondents contend that Appellant lacks standing to bring this argument, and regardless, the FCPSA provides constitutionally adequate procedural due process.

We agree with Respondent that Appellant lacks standing to bring this argument because she is a licensed attorney in good standing with the South Carolina Bar. In addition, Appellant has been represented in this action by a licensed attorney. As such, Appellant cannot test the constitutionality of the statute from the standpoint of a *pro se* litigant or non-attorney party. *See United States v. Raines*, 362 U.S. 17, 21 (1960) ("[O]ne to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." (citations omitted)).

V. Sanctions

Appellant also argues that she should not be subject to sanctions because she was competently represented by counsel in these proceedings, and section 15-36-10's "reasonable attorney" standard has been met, precluding a finding of frivolity.

Under the FCPSA,

An attorney or *pro se* litigant participating in a civil or administrative action or defense may be sanctioned for:

(a) filing a frivolous pleading, motion, or document if:

(i) the person has not read the frivolous pleading, motion, or document;

(ii) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing

law;

(iii) a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or

(iv) a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous, interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;

(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or

(c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

S.C. Code Ann. § 15-36-10(A)(4)(a)–(c) (Supp. 2012).

To begin with, Appellant argues that she cannot be sanctioned under the FCPSA because she was represented by competent counsel in these proceedings. Under the prior iteration of the FCPSA, section 15-36-20 provided that "[a]ny person who takes part in the procurement, initiation, continuation, or defense of civil proceedings must be considered to have acted to secure a proper purpose . . . if he reasonably believes in the existence of the facts upon which his claim is based and . . . (2) relies upon the advice of counsel, sought in good faith and given after full disclosure of all facts within his knowledge and information which may be relevant to the cause of action" *See* S.C. Code Ann. § 15-36-20 (2005). There is no corresponding provision in the amended version of the FCPSA. *See* S.C. Code Ann. § 15-36-10 (Supp. 2012). However, the new version of the FCPSA repeatedly speaks in terms of sanctioning a "party" in addition to an

attorney or pro se litigant. *See, e.g.*, S.C. Code Ann. § 15-36-10(C)(1) (stating "[a]n attorney, party, or pro se litigant shall be sanctioned . . ."). Thus, we must presume that the legislature intended for a *party*, even a party represented by counsel, to be sanctionable under the FCPSA.¹⁸ *See Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 157, 135 S.E.2d 841, 844 (1964) ("It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law.").

Appellant further contends that sanctions were unwarranted here.

Under the FCPSA:

(1) An attorney, party, or pro se litigant shall be sanctioned for a frivolous claim or defense if the court finds the attorney, party, or pro se litigant failed to comply with one of the following conditions:

(a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law;

(b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil suit was intended merely to harass or injure the other party; or

¹⁸ The dissent would not award sanctions against Appellant alone. We disagree. We call attention to the circumstances of this particular case. In December 2009, this Court ordered all clerks of court to refuse filings from Appellant, unless she was represented by a licensed attorney (other than herself), due to her vexatious and meritless filings. *See Doe v. Duncan*, S.C. Sup. Ct. Order dated Dec. 2, 2009 (Appellate Case No. 2009-115446). Consequently, counsel graciously agreed to represent Appellant. However, Appellant drove this lawsuit (and many others) with the knowledge that she did not have a claim. As an attorney, she is familiar with the law and understands the court system, yet has continuously pursued frivolous proceedings. Thus, counsel, merely assisting her in filing papers with the court, should not also be penalized under these facts.

(c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

(2) Unless the court finds by a preponderance of the evidence that an attorney, party, or pro se litigant engaged in advancing a frivolous claim or defense, the attorney, party, or pro se litigant shall not be sanctioned.

S.C. Code Ann. § 15-36-10(C)(1)–(2). The sanctioning court is entitled to consider the following in awarding sanctions:

- (1) the number of parties;
- (2) the complexity of the claims and defenses;
- (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
- (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
- (5) previous violations of the provisions of this section;
- (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
- (7) other factors the court considers just, equitable, or appropriate under the circumstances.

S.C. Code Ann. § 15-36-10(E)(1)–(7). Moreover, "[i]n determining whether sanctions are appropriate or the severity of a sanction, the court shall consider previous violations of the provisions of this section." S.C. Code Ann. § 15-36-10(F).

Nevertheless, Appellant argues that she should not be subject to sanctions under section 15-36-10(J), which provides the FCPSA "shall not apply where an

attorney or pro se litigant establishes a basis to proceed with litigation, or to assert or controvert an issue therein, that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of the existing law."

Here, the circuit court sanctioned Appellant because she continued the lawsuit despite a prior ruling that the court lacked subject matter jurisdiction, despite previously receiving sanctions for arguing that the court lacked jurisdiction based on the exact same allegations, and despite Respondents' compliance with the plain language of the Hospital's by-laws.

Because "the decision whether to impose sanctions under the FCPSA is a decision for the judge, not the jury, it sounds in equity rather than at law." *Father v. S.C. Dep't of Soc. Servs.*, 353 S.C. 254, 260, 578 S.E.2d 11, 14 (2003) (refusing to adopt the more deferential "abuse of discretion" federal standard of review in assessing decisions to impose sanctions under the FCPSA). Therefore, an appellate court must review the findings of fact with respect to the decision to grant sanctions under the FCPSA by "taking its own view of the evidence." *Id.* (citing S.C. Const. art. V, § 5); *see also* S.C. Code Ann. § 14-3-320 (Supp. 2012). However, "[t]he 'abuse of discretion' standard . . . does . . . play a role in the appellate review of a sanctions award." *Father*, 353 S.C. at 261, 578 S.E.2d at 14. For example, "where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." *Ex parte Gregory*, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (citation omitted); *Se. Site Prep, L.L.C. v. Atl. Coast Builders & Contractors, L.L.C.*, 394 S.C. 97, 104, 713 S.E.2d 650, 654 (Ct. App. 2011). "An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions." *Father*, 353 S.C. at 261, 578 S.E.2d at 14.

In our view, Judge Harrington was warranted in ordering sanctions in this case, especially because Appellant, a licensed attorney, made identical legal arguments in the 2005 litigation and did not prevail on the merits. Appellant has continuously and repeatedly challenged the Hospital's credentialing decisions without any legal basis to do so, and in the process, has cost the Hospital untold amounts of time and resources in defending these claims. Therefore, we further find that Judge Harrington was warranted in enjoining Appellant from filing any future claims in the circuit court without first posting bond.

Accordingly, we affirm the award of sanctions under the FCPSA.

CONCLUSION

Based on the foregoing, both the Summary Judgment Order and the Sanctions Order are

AFFIRMED.

BEATTY, KITTREDGE and HEARN, JJ., concur. PLEICONES, J., concurring in part and dissenting in part in a separate opinion.

JUSTICE PLEICONES: We consolidated appeals from a 2011 order granting respondents summary judgment and from a 2012 order sanctioning the appellant pursuant to the Frivolous Civil Proceedings Sanctions Act (FCPSA).¹⁹ I would affirm the summary judgment order but reverse the sanctions order.

Appellant is represented in this case by a well-respected member of the bar.²⁰ The sanctions were imposed on appellant as a party based upon a number of findings by the trial judge. As explained below, I do not find that any of the bases relied upon by the circuit court support the imposition of sanctions on appellant.

The FCPSA allows for sanctions at two different points in litigation. First, the statute provides that an attorney or pro se litigant who signs a pleading certifies that a reasonable attorney in the same circumstances would believe that under the facts his claim may be warranted by a good faith extension of the law, is not intended to harass the other party, and is not brought for any improper purpose. S.C. Code Ann. § 15-36-10(A)(1) (Supp. 2012). A violation of subsection (A) may result in the lawyer or pro se litigant being sanctioned.

The second point at which the FCPSA provides for sanctions is set forth in § 15-36-10(C). Section (C) provides that after a verdict, a directed verdict, or a judgment non obstante veredicto has been entered a party,²¹ an attorney, or a pro se litigant may be sanctioned if that individual "engaged in advancing a frivolous claim or defense." While subsection (A) is concerned with frivolous filings, subsection (C) permits sanctions only where it is

¹⁹ S.C. Code Ann. §§ 15-36-10 et seq. (Supp. 2012).

²⁰ As explained *infra* I interpret the FCSPA differently than does the majority and conclude that no sanction is appropriate against appellant who is merely a party in this case. The interpretation the Court adopts today will apply to every request for sanctions under the FCSPA, and I do not believe that we can create a special rule because a litigant is also an attorney even if that individual has a history with the court system.

²¹ I do not agree with the majority that the FCPSA "repeatedly speaks in terms of sanctioning a "party" in addition to an attorney or pro se litigant."

determined, after factual findings are made, that a frivolous claim or defense was advanced. I would not find those circumstances present here.

In my view, subsection (C) permits the party herself to be sanctioned only where the evidence adduced at the trial, or submitted at summary judgment, reveals factual misrepresentations or omissions on the part of that party, not previously known to her attorney, which establish that the party's position in the litigation is frivolous. If the attorney learns of these facts but allows the claim or defense to continue, then she too is subject to sanctions under (C). Where the sanction rests upon facts known to both the lawyer and the party at the time the suit is brought, I would hold no sanction against the party alone is permissible under subsection (C).²² Similarly, I would not read subsection (C) to authorize sanctions upon a party because her attorney's argument against legal precedent was deemed not to have been made in good faith or because the trial judge finds no substantive discovery was undertaken.

The order finds the present lawsuit restates allegations made and denied in a 2005 action. It concludes that had appellant "even cursorily reviewed her previous filings, prior Court orders, the Settlement Agreement, and the Bylaws *prior to filing this lawsuit*, it would have shown her the unreasonableness of her actions." (emphasis supplied). The order goes on to state that appellant "was in possession of or had access to the dispositive facts- the 1999 federal suit complaint, the 2009 state court complaint, the Settlement Agreement, the 2005 filings, the prior Court orders, and the Bylaws- since before she filed this action." I would hold that because this ground rests on public facts known to both appellant and her attorney at the time the suit was brought, and because it punishes appellant for bringing the suit, that if a sanction were to be imposed under the FCPSA for this conduct, it must be imposed under subsection (A) on the lawyer who signed the pleadings. A member of the bar reviewed these facts and determined that he could bring the suit without running afoul of the FCPSA or Rule 11, SCRCP. Under these circumstances, no FCSPA sanction should be imposed on the party under §15-36-10(C). The order also sanctions appellant for contending

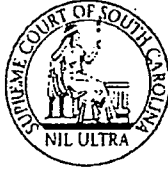
²² For purposes of my analysis, it matters not that appellant is also an attorney. She chose not to represent herself but employed an attorney who brought this suit with full knowledge of the prior proceedings and history of the parties, and was sanctioned solely in her capacity as a party.

that the Settlement Agreement had been breached and then failing to produce evidence of any breach, and for failing to conduct any quasi-substantive discovery "until the eve of the summary judgment hearing. . . ." Again, these alleged delicts should be laid at the feet of the attorney and not the party.

Finally, the judge appears to have read *Lee v. Chesterfield Gen. Hosp. Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986) as limited to civil conspiracy claims, and to have concluded on that basis that no reasonable attorney would have argued for its extension to these facts.²³ I would not hold appellant liable for failing to anticipate that the legal argument for distinguishing the *Lee* case would be deemed not to have been made in good faith, nor would I uphold a sanction that rests, in part, on the trial judge's limited reading of the holding in *Lee*. In my view, the conclusion that it was not reasonable to argue for *Lee's* extension addresses the attorney's conduct and not the client's, and therefore I would hold it is insufficient to form the basis for sanctioning a party under subsection (C).

For the reasons given above, I would affirm the grant of summary judgment but reverse the sanction award.

²³ The majority agrees with appellant that "*Lee* might not be [so] limited. . . ."



The Supreme Court of South Carolina

DANIEL E. SHEAROUSE
CLERK OF COURT

BRENDA F. SHEALY
CHIEF DEPUTY CLERK

POST OFFICE BOX 11330
COLUMBIA, SOUTH CAROLINA
29211
1231 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1080
FAX: (803) 734-1499
www.sccourts.org

June 13, 2014

The Honorable Julie J. Armstrong
Clerk of Court, Charleston County
100 Broad St Ste 106
Charleston SC 29401-2210

REMITTITUR

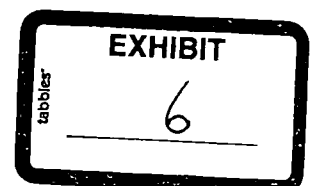
Re: Cynthia Holmes v. East Cooper Community Hospital
Lower Court Case No. 2010-CP-10-03410
Appellate Case No. 2011-198092 and 2012-209666

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK



cc:

Lindsay Kathryn Smith-Yancey, Esquire
Chalmers Carey Johnson, Esquire
Erskine Douglas Pratt-Thomas, Esquire
Daniel Simmons McQueeney, Jr., Esquire

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
DR. CYNTHIA HOLMES, M.D.,)
)
Plaintiff,)
)
Vs.)
)
EAST COOPER COMMUNITY)
HOSPITAL, INC.; TENET)
HEALTHSYSTEM MEDICAL,)
INC.)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
C.A. 2010-CP-10-3410

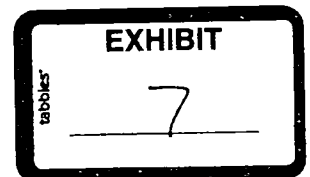
**PLAINTIFF'S MOTION TO WITHDRAW
PLAINTIFF'S MOTIONS TO DISMISS
DEFENDANT'S COUNTERCLAIMS**

2014 JUN -7 AM 8:43
CLERK OF COURT
JULY 1 2014

The Plaintiff hereby withdraws her motions to dismiss Defendant's Counterclaims in this matter.

Plaintiff filed a motion in this case on 10-18-2010, asking the Court to dismiss two of Defendant's counterclaims. One counterclaim was brought under the S.C. Frivolous Proceedings Sanctions Act. The second was a claim for malicious prosecution. The Court the issued an Order granting Defendant's motion for summary judgment, which was filed later, but has never resolved the Plaintiff's motions. Plaintiff appealed the Order granting Defendants' motion for summary judgment, and after post-trial motions as to sanctions, this case has been within the jurisdiction of the S.C. Court of Appeals and the S.C. Supreme Court until recently. Remittitur was sent to the Circuit Court on June 16, 2014.

As jurisdiction is now once again with the Circuit Court for Charleston County, the Plaintiff believes it is appropriate to address remaining claims and issues in this case,

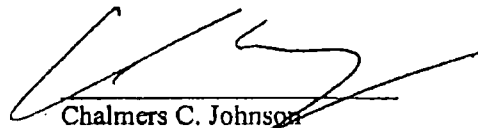


which were left open during the appeal. Plaintiff wishes to withdraw her motions to dismiss the Defendant's counterclaims.

**CONCLUSION
NOTICE OF CHANGE IN ADDRESS
AND REQUEST FOR NOTICE OF A HEARING DATE**

Although the Court granted the Defendant's motion for summary judgment on Plaintiff's claims in 2011, it never ruled on Plaintiff's motions regarding the two of the counterclaims. There are still counterclaims and motions pending before the Circuit Court which need to be resolved. Plaintiff respectfully requests that the Court grant her motion to withdraw her previous motions to dismiss.

Plaintiff's counsel resides in Washington State. He has recently changed his address, and would request that the Court take notice of the new mailing address below. If the Court feels that a hearing is necessary in order to resolve the matters raised in this motion, Plaintiff would like her counsel to appear in person. The undersigned, therefore, would respectfully request that the Court give at least 30 days prior notice of the date of any hearing on this matter, so that Mr. Johnson can have time to make schedule and travel arrangements.



Chalmers C. Johnson
1029 Bay Street, Apt 11
Port Orchard, WA 98366
(425) 999-0900
chalmersjohnson@gmail.com
Attorney for the Plaintiff

July 7, 2014

1 STATE OF SOUTH CAROLINA)
) Court of Common Pleas
 2 COUNTY OF CHARLESTON) Case No. 2010-CP-10-3410
)
 3)
 DR. CYNTHIA HOLMES, M.D.,)
 4)
 Plaintiff,)
 5)
 vs.) Transcript of Record
 6)
 EAST COOPER COMMUNITY)
 7 HOSPITAL, INC., ET AL,)
)
 8 Defendant.)
) DATE: October 27, 2014
 9

10 B E F O R E:

11 THE HONORABLE R. MARKLEY DENNIS, JR.

12

A P P E A R A N C E:

13

CHALMERS CAREY JOHNSON
 For the Plaintiff

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LINDSAY K. SMITH-YANCEY
 For the Defendant

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Karen V. Andersen, RMR, CRR
 Circuit Court Reporter

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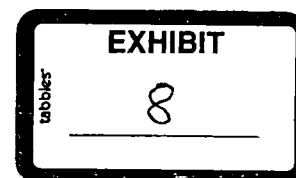
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1 THE COURT: Cynthia Holmes vs. East Cooper Community
2 Hospital.

3 Identify yourselves and the parties you are
4 representing.

5 MR. JOHNSON: My name is Chalmers Johnson from Port
6 Orchard, Washington, and I'm representing Dr. Cynthia
7 Holmes.

8 MS. YANCEY: I'm Lindsey Smith-Yancey, representing
9 the defendants, East Cooper Community Hospital and
10 Tenethealth System Medical, Inc.

11 THE COURT: Thank you very much. I appreciate it.
12 I've reviewed the submissions as well. So this is
13 your motion, Mr. Johnson, to withdraw, as I understand it,
14 your motion to dismiss.

15 MR. JOHNSON: Yes, Your Honor. I guess about three
16 years ago, we filed a motion to dismiss and counterclaim.
17 This case has been --

18 THE COURT: Excuse me for interrupting you, but I
19 need to ask you a question, because I've read it. This is a
20 matter that was appealed where the judge, Judge Harrington I
21 think, granted summary judgment on the claim.

22 MR. JOHNSON: Correct, on Dr. Holmes's claim against
23 the hospital, correct.

24 THE COURT: And how is there any motion that's
25 pending since it's been decided?

1 MR. JOHNSON: Your Honor, the hospital brought three
2 counterclaims against Dr. Holmes. And we moved to dismiss
3 three of the two counterclaims on grounds that I think are no
4 longer applicable. The motion was never responded to by
5 Judge Harrington. So I feel like it's open. Now that we've
6 got a remitter, I'm trying to clean up the record.

7 THE COURT: Well, and I appreciate that, but it
8 would appear to me that we are talking about the action
9 itself. There was a judgment rendered and an appeal taken to
10 provide action.

11 MR. JOHNSON: Correct, Your Honor.

12 THE COURT: Let me hear. What's left?

13 MS. YANCEY: Your Honor, that -- you are stating
14 exactly the hospital's position. This motion was filed --
15 the motion to dismiss was filed in October of 2010. It was
16 heard by Judge Harrington in July of 2011.

17 Subsequent to that hearing, summary judgment was
18 granted to the defendants, at which time we then proceeded
19 with our request for attorney's fees and costs, everything we
20 were seeking in the counterclaims by way of a motion for
21 sanctions. And Judge Harrington granted our motion and
22 awarded us everything we were requesting in our
23 counterclaims.

24 THE COURT: So there really -- those issues were
25 resolved by Judge Harrington in her decision and basically

1 sanctioning --

2 MS. YANCEY: That's correct. And not only was the
3 summary judgment order appealed through the Court of Appeals
4 and the Supreme Court, but the sanctions order was as well.

5 So it's our position that this case has been finally
6 adjudicated and there are no pending claims here for the
7 Court to decide on today.

8 THE COURT: Okay. Mr. Johnson?

9 MR. JOHNSON: Your Honor, I just don't have any
10 order saying that the counterclaims were ever dismissed, and
11 I'm just trying to defend my client.

12 THE COURT: Well, I appreciate that. I think it
13 goes really without an order when everything is resolved.
14 It's basically -- it's been done. It's moot at this point as
15 far as the Court is concerned. So I don't think there's any
16 motion to be heard. Thank you.

17 MS. YANCEY: Thank you, Your Honor.

18 THE COURT: So there is no motion.

19 MR. JOHNSON: Thank you.

20 THE COURT: Okay. Thank you very much. I
21 appreciate that. Good to see you again.

22 MR. JOHNSON: Good to see you too, Judge.

23 THE COURT: We will just do a form order that says
24 no viable motion pending. I don't know of any other -- we've
25 got to do something to dismiss it.

1 MS. YANCEY: Okay. Thank you.

2 THE COURT: Thank you. But there's no motion to
3 dismiss because there's nothing to dismiss. Thank you.

4 (End of transcript.)

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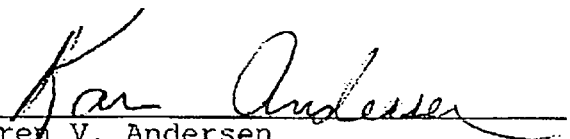
CERTIFICATE OF REPORTER

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I, Karen V. Andersen, Registered Merit Reporter
certified Realtime Reporter, and Notary Public for the State
of South Carolina at Large, do hereby certify that the
foregoing transcript is a true, accurate and complete
Transcript of Record of the proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.

Witness my hand, I have hereunto affixed my official
seal this 20th day of February, 2015, at Charleston,
Charleston County, South Carolina.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter
My Commission expires:
September 14, 2016

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-10-3410

FILED

Dr. Cynthia Holmes, MD

East Cooper Community Hospital Inc., et al

2014 NOV -3 PM 1:14

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

JULIE L ARMSTRONG
CLERK OF COURT

BY

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Motion to Withdraw the Motion to Dismiss, filed on 7/07/2014, is not a viable motion; No viable motions pending in this resolved case.

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)
N/A		\$
		\$
		\$

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

2060

Judge Code

10/29/2014

Date

EXHIBIT

9

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-3410

C. Holmes, M.D.

Appellant,

v.

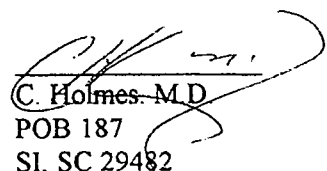
East Cooper Community Hospital, Inc.; and
Tenet HealthSystem Medical, Inc.,

Respondents.

NOTICE OF APPEAL

The Appellant timely appeals the order of the Honorable R. Markley Dennis, Jr.,
entered November 3, 2014.

Dated December 3, 2014.


C. Holmes, M.D.
POB 187
SI, SC 29482
843.883.3010

EXHIBIT

10

tabbles



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

January 21, 2015

C. Holmes, M.D.
PO Box 187
Sullivans Island SC 29482

Re: C. Holmes, M.D. v. East Cooper Comm. Hosp.
Appellate Case No. 2014-002772

Dear Dr. Holmes:

This Court received your notice of appeal dated December 3, 2014. Pursuant to the Supreme Court's December 2, 2009 order directing the clerks of court in this state to refuse to accept filings from you related in any way to the revocation of your medical staff privileges at East Cooper Community Hospital unless they are filed by an attorney, we are returning your filings to you.

Very truly yours,


CLERK

cc: Erskine Douglas Pratt-Thomas, Esquire

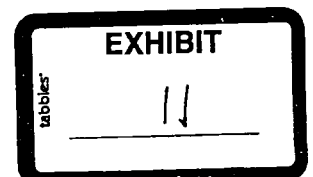


EXHIBIT
12

523, 526 (1972)." This Motion is based on statutory and case law. This Motion will be supported by the pleadings, affidavits submitted in support of the motion, other evidence admitted at the hearing, and memorandum to be submitted to the Court and opposing counsel under separate filing.

For the foregoing reasons and for substantial justice affecting substantial rights, the undersigned respectfully requests this Court alter or amend the order entered November 3, 2014.

Respectfully submitted,

Dated November 15, 2014.


C. Holmes
POB 187
SI, SC 29482-0187
843.883.3010

) IN THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO.: 10-CP-10-3410

) CASE NO.: 10-CP-10-3410

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-10-3410

Dr. Cynthia Holmes, M.D.

East Cooper Community Hospital, Inc. and Tenet
HealthSystem Medical, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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, ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Rule 59(e) Motion, filed on 11/19/2014, is improper; Judge Dennis declines any request for reconsideration of the order entered 11/3/2014 due to the status of this case as closed and in accordance with the Supreme Court's order dated 12/2/2009.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk :

EXHIBIT

13

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)
N/A		\$
		\$
		\$

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

2060
Judge Code

12/3/2014
Date

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-3410

C. Holmes, M.D.

Appellant,

v.

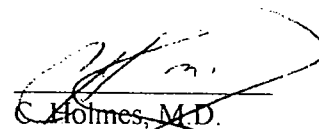
East Cooper Community Hospital, Inc.; and
Tenet HealthSystem Medical, Inc.,

Respondents.

NOTICE OF APPEAL

The Appellant timely appeals the order of the Honorable R. Markley Dennis, Jr.,
entered December 9, 2014.

Dated January 14, 2015.


C. Holmes, M.D.
POB 187
SI, SC 29482
843.883.3010

EXHIBIT

tabbles

14

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY

Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-3410

C. Holmes, M.D.

Petitioner,

v.

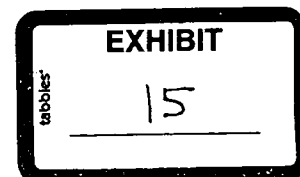
East Cooper Community Hospital, Inc.
and Tenet HealthSystem Medical, Inc.

Respondents.

AFFIDAVIT OF LINDSAY K. SMITH-YANCEY, ESQUIRE

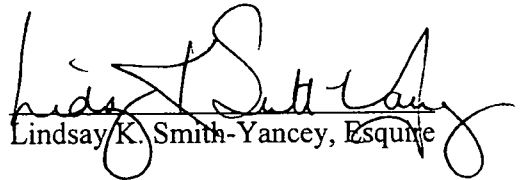
The Affiant, Lindsay K. Smith-Yancey, Esquire, having been duly sworn, testifies as follows:

1. I am over eighteen years of age and competent to make this affidavit. I am an attorney in good standing with the South Carolina Bar and have been licensed to practice law in this State since 1995. I am a shareholder in the law firm Pratt-Thomas Walker, P.A.
2. My law partner, E. Douglas Pratt-Thomas, Esq., and I represent Respondents. Daniel "Chip" McQueeney was previously employed by Pratt-Thomas Walker, P.A., and during

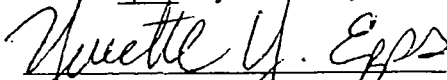


said previous employment Mr. McQueeney represented Respondents along with Mr. Pratt-Thomas and me.

3. On February 5, 2015, I received a copy of correspondence sent in this matter from V. Claire Allen, Deputy Clerk of the SC Court of Appeals. Ms. Allen's letter was addressed to Charles Goldberg, Esq., and referenced a notice of appeal Mr. Goldberg had filed on behalf of Appellant.
4. After receiving Ms. Allen's correspondence, I obtained a copy of the notice of appeal from the Court of Appeals' online filing system and observed it to be dated January 14, 2015, and to have been received by the Court of Appeals on January 30, 2015.
5. Ms. Allen's correspondence was the first notice I received of the notice of appeal filed by Mr. Goldberg in this matter. I have never been served with Mr. Goldberg's notice of appeal as attorney of record for Respondents.


Lindsay K. Smith-Yancey, Esquire

Sworn to and subscribed before me:
On this 4th day of March, 2015


Notary Public for South Carolina
Commission Expires: 3/12/17

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-3410

C. Holmes, M.D.

Petitioner,

v.

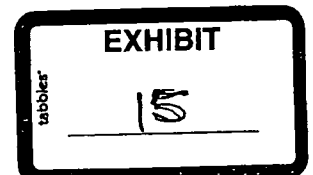
East Cooper Community Hospital, Inc.
and Tenet HealthSystem Medical, Inc.

Respondents.

AFFIDAVIT OF E. DOUGLAS PRATT-THOMAS, ESQUIRE

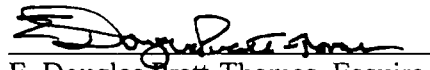
The Affiant, E. Douglas Pratt-Thomas, Esquire, having been duly sworn, testifies as follows:

1. I am over eighteen years of age and competent to make this affidavit. I am an attorney in good standing with the South Carolina Bar and have been licensed to practice law in this State since 1976. I am a shareholder in the law firm Pratt-Thomas Walker, P.A.
2. My law partner, Lindsay K. Smith-Yancey, Esq., and I represent Respondents. Daniel "Chip" McQueeney was previously employed by Pratt-Thomas Walker, P.A., and during



said previous employment Mr. McQueeney represented Respondents along with Ms. Smith-Yancey and me.

3. On February 5, 2015, I received a copy of correspondence in this matter sent from V. Claire Allen, Deputy Clerk of the SC Court of Appeals. Ms. Allen's letter was addressed to Charles Goldberg, Esq., and referenced a notice of appeal Mr. Goldberg had filed on behalf of Appellant.
4. Ms. Allen's correspondence was the first notice I received of the notice of appeal filed by Mr. Goldberg in this matter. I have never been served with Mr. Goldberg's notice of appeal as attorney of record for Respondents.


E. Douglas Pratt-Thomas, Esquire

Sworn to and subscribed before me:

On this 4th day of March, 2015



Notary Public for South Carolina

Commission Expires: 3/12/17

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-3410

C. Holmes, M.D.

Petitioner,

v.

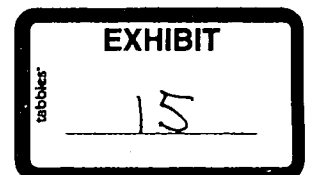
East Cooper Community Hospital, Inc.
and Tenet HealthSystem Medical, Inc.

Respondents.

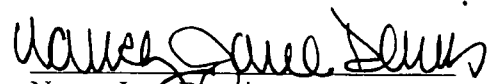
AFFIDAVIT OF NANCY JANE DENNIS

The Affiant, Nancy Jane Dennis, having been duly sworn, testifies as follows:

1. I am over eighteen years of age and competent to make this affidavit. I have been employed as a paralegal for over 36 years and with Pratt-Thomas Walker, P.A., for over 34 years.
2. Prior to his departure from Pratt-Thomas, Walker, P.A., in September of 2014, I provided paralegal assistance to Daniel "Chip" McQueeney, Esq. I am informed and believe that prior to his departure Mr. McQueeney, along with Lindsay K. Smith-Yancey, Esq., and E. Douglas Pratt-Thomas, Esq., represented Respondents in this matter.

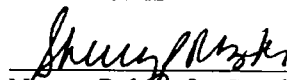


3. Since Mr. McQueeney's departure, I have processed all mail, communications and documents directed to him and received at the address of Pratt-Thomas Walker, P.A.
4. I have recently been made aware of a notice of appeal filed in this matter by Charles Goldberg, Esq. I have no knowledge or record of having ever received this notice on behalf of Mr. McQueeney or otherwise.


Nancy Jane Dennis

Sworn to and subscribed before me:

On this 4 day of March, 2015


Notary Public for South Carolina
Commission Expires: Aug. 21, 2016

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2010-CP-10-3410

C. Holmes, M.D.

Petitioner,

v.

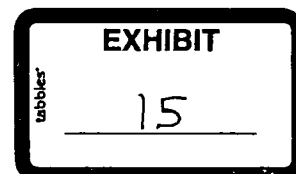
East Cooper Community Hospital, Inc.
and Tenet HealthSystem Medical, Inc.

Respondents.

AFFIDAVIT OF DOLORES M. CATAPANO

The Affiant, Dolores M. Catapano, having been duly sworn, testifies as follows:

1. I am over eighteen years of age and competent to make this affidavit. I have been employed as a paralegal for over 22 years. I am currently employed by Pratt-Thomas Walker, P.A., as paralegal to Lindsay K. Smith-Yancey, Esq., and E. Douglas Pratt-Thomas, Esq.
2. As part of my job responsibilities I open and process all business mail, facsimile transmissions, and hand delivered documents directed to the attention of Ms. Smith-Yancey and Mr. Pratt-Thomas. Also, I am the paralegal assigned to the case herein and



have provided paralegal support thereon for approximately one and a half years. As paralegal for this case, I scan and save all mail, filings, pleadings, and documents received in this case to an electronic directory.

3. I have recently been made aware of a notice of appeal filed by Charles Goldberg, Esq., in this matter. I have no knowledge or record of having ever received this notice on behalf of Ms. Smith-Yancey, Mr. Pratt-Thomas, Daniel "Chip" McQueeney, Esq., or otherwise.

Dolores M. Catapano
Dolores M. Catapano

Sworn to and subscribed before me:

On this 4th day of March, 2015

Yvette Y. Egge
Notary Public for South Carolina
Commission Expires: 3/12/17



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 03, 2015

Mr. Charles S. Goldberg, Esquire
61 Broad St.
Charleston SC 29401

Re: Dr. Cynthia Holmes v. East Cooper
Appellate Case No. 2015-000187

Dear Counsel:

Upon reviewing your notice of appeal, the following deficiency has been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter or this appeal will be dismissed:

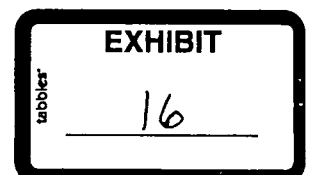
- The notice of appeal fails to include a statement of when you received written notice of entry of the order.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Erskine Douglas Pratt-Thomas, Esquire
Lindsay K Smith-Yancey, Esquire





The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1015 SUMTER STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

February 03, 2015

Mr. Charles S. Goldberg, Esquire
61 Broad St.
Charleston SC 29401

Re: Dr. Cynthia Holmes v. East Cooper
Appellate Case No. 2015-000187

Dear Counsel:

Upon reviewing your transcript request, the following deficiencies have been noted under the South Carolina Appellate Court Rules (SCACR), and any deficiency must be corrected within ten (10) days of the date of this letter:

- The document does not show that a copy of this correspondence was provided to the opposing counsel.
- The document is not signed.

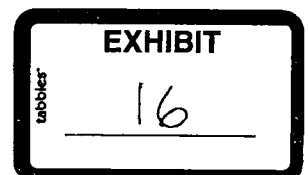
Very truly yours,

V. Claire Allen, Deputy

CLERK

cc:

Erskine Douglas Pratt-Thomas, Esquire
Lindsay K Smith-Yancey, Esquire



74992

DAVID T. PEARLMAN
J. KEVIN HOLMES
THOMAS M. WHITE
DALE E. VAN SLAMBROOK
MALCOLM M. CROSLAND, JR.
STEVEN E. GOLDBERG
KEVIN B. SMITH
MICHAEL J. JORDAN
BENJAMIN AKERY
CHARLES S. GOLDBERG, LLC, OF COUNSEL
HUGO M. SPITZ (RETIRED)
IRVING STEINBERG (1902-1980)

THE STEINBERG
LAW FIRM
LLP

61 Broad Street, P.O. Box 9
Charleston, South Carolina 29402-0009
Telephone (843) 720-2800
Fax (843) 722-1190
www.steinberglawfirm.com

NORTH AREA OFFICE
118 GOOSE CREEK BLVD., SOUTH
P.O. BOX 1028
GOOSE CREEK, SC 29445
TELEPHONE (843) 572-0700
FAX (843) 572-1871
DOWNTOWN ANNEX
111 CHURCH STREET
P.O. BOX 9
CHARLESTON, SC 29402-0009
TELEPHONE (843) 720-2800
DIRECT DIAL (843) 266-1701
FAX (843) 266-1700
SUMMERVILLE OFFICE
1520 OLD TROLLEY RD., SUITE B
SUMMERVILLE, SC 29485
TELEPHONE (843) 871-6522
FAX (843) 871-8565

February 6, 2015

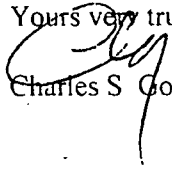
The South Carolina Court of Appeals
attn: ELLA
PO Box 11629
Columbia, SC 29211

Re: Dr. Cynthia Holmes v. East Cooper
Appellate Case No. 2015-000187

Dear Ella:

I am enclosing my check for \$2.25 for copies you are going to fax to me per our conversation of this morning. I appreciate your courtesies and understanding.

I indicated to you that Dr. Holmes has been able to communicate with her attorney who will be undertaking the appellate process. You should receive correspondence from him before the 13th. Dr. Holmes is aware that I will not be processing this appeal.

Yours very truly,

Charles S. Goldberg

CSG:ms
enclosure

RECEIVED

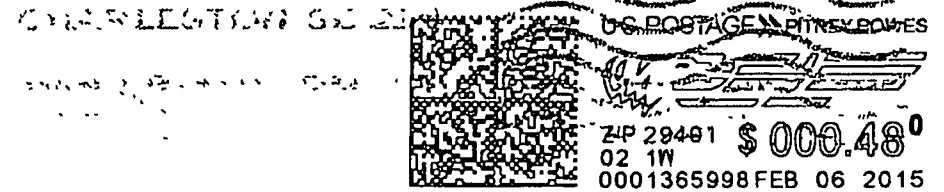
FEB 09 2015

SC Court of Appeals

EXHIBIT
17



61 Broad Street | PO Box 9 | Charleston | SC | 29402



RECEIVED

FEB 09 2015

SC Court of Appeals

The South Carolina Court of Appeals
attn: ELLA
PO Box 11629
Columbia, SC 29211

29211+1629



Lindsay Smith-Yancey

From: Charles Goldberg <cgoldberg@steinberglawfirm.com>
Sent: Thursday, February 12, 2015 10:46 AM
To: Lindsay Smith-Yancey
Subject: RE: Message from "RNP002673790D1E"

Believe me when I say I know nothing about this case and am in the dark on appellate work. I suggest you contact Chalmers with questions about the case. If there is a procedural question, I suggest you contact Kevin Holmes.

-----Original Message-----

From: Lindsay Smith-Yancey [mailto:lsy@p-tw.com]
Sent: Thursday, February 12, 2015 10:00 AM
To: cgoldberg@steinberglawfirm.com
Cc: Dolores Catapano
Subject: FW: Message from "RNP002673790D1E"

Thank you Charles. I have a couple of questions.

Our firm has no record of receiving anything from your office on this matter prior to your email today. Will you please confirm that the attached is the only correspondence your office has sent our firm on this matter?

The only Notice of Appeal we've received in this case is the one Dr. Holmes attempted to file pro se. Did you or anyone from your firm file another one on her behalf or re-file her original Notice after co-signing it?

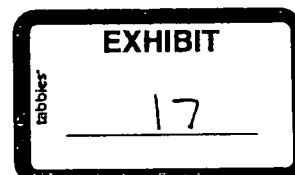
There is a letter requesting the transcript of the record on appeal among the documents attached to your email. The letter is signed by Dr. Holmes and not dated. While the letter purports to be cc'ed to me, Douglas Pratt-Thomas and Chip McQueeney, we have no record of ever receiving a copy of this letter.

I see there has been a Substitution of Counsel substituting Mr. Johnson for you moving forward, but it is not dated. Would you please let me know the effective date of this purported substitution? I say "purported" because Mr. Johnson has represented Dr. Holmes throughout this matter. Was there ever a Substitution of Counsel filed allowing you or your firm to substitute for Mr. Johnson?

Any assistance you can give to help me piece this together would be gratefully appreciated.

Lindsay

Lindsay K. Smith-Yancey
Pratt-Thomas Walker, P.A.
16 Charlotte St.
P.O. Drawer 22247 (29413)
Charleston, SC 29403
Main: (843) 727-2200
Direct: (843) 727-2211
Fax: (843) 727-2231
Email: lsy@p-tw.com



THE INFORMATION CONTAINED IN THIS COMMUNICATION IS ATTORNEY / CLIENT PRIVILEGED, ATTORNEY WORK-PRODUCT AND CONFIDENTIAL INFORMATION INTENDED ONLY FOR THE USE OF THE INDIVIDUAL OR ENTITY NAMED ABOVE. IF THE READER OF THIS MESSAGE IS NOT THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPY OF THIS COMMUNICATION IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY CALL, COLLECT IF NECESSARY, (843) 727-2200. THANK YOU.

-----Original Message-----

From: Charles Goldberg [mailto:cgoldberg@steinberglawfirm.com]
Sent: Thursday, February 12, 2015 9:33 AM
To: Lindsay Smith-Yancey
Subject: FW: Message from "RNP002673790D1E"

-----Original Message-----

From: Kevin Holmes [mailto:kholmes@steinberglawfirm.com]
Sent: Thursday, February 12, 2015 9:30 AM
To: Charles Goldberg
Subject: Message from "RNP002673790D1E"

This E-mail was sent from "RNP002673790D1E" (MP C5503).

Scan Date: 02.12.2015 09:29:45 (-0500)
Queries to: lsidbury@steinberglawfirm.com

STATE OF SOUTH CAROLINA } Before the Commission on
COUNTY OF RICHLAND } Lawyer Conduct

#5

In the Matter of: } Transcript of Record
Cynthia E. Collie, } Case Number 12-CLC-007
Respondent. }

COPY

A Hearing before a Hearing Panel of the Commission on Lawyer Conduct, Pursuant to the Rules for Lawyer Disciplinary Enforcement of the South Carolina Supreme Court, was held in the Court of Appeals Court Room of the Calhoun Building, 1015 Sumter Street, Columbia, South Carolina, beginning at 10:00 a.m. on Tuesday, August the 13th, 2013, and concluding on Wednesday, August 14th, 2013.

Said Panel consisted of the Honorable Donald C. Coggins, Esquire, Chairman; the Honorable Gary Hudson Smith, Esquire; the Honorable G. William Thomason, Esquire; and the Honorable M. Elaine Mitchum.

The Office of Disciplinary Counsel was represented by Barbara M. Seymour, Esquire.

The Office of Commission Counsel was represented by Deborah S. McKeown, Esquire.

The Respondent appeared *pro se*.

MS. K.A. SNELLING, CVR-M
Supreme Court, State of South Carolina
Office of Commission Counsel
1015 Sumter Street, Suite 305, Columbia, South Carolina 29201

A: I believe its \$64,000 after entry of her sanctions order.

Q: Would you say that you were familiar with that case?

A: Yes.

Q: Before it was filed? I mean, you were familiar with the facts, it wasn't a brand-new or shall we say -- isn't it true that you had previous pleadings that were similar to what was filed in the 2010 case?

A: Yes and no. I mean, this was in my mind the same things that we had been litigating since 1999 but with some, an attempt to phrase them differently under different causes of action.

Q: And isn't it true that the 2010 complaint relates to termination which had never occurred before?

A: Termination?

Q: Termination of privileges as opposed to failure to advance?

A: If memory serves me correctly your 2010 case involved your 2006 and 2008 reappointments, is that correct?

Q: Yes.

A: And I don't recall when your medical staff privileges were terminated and whether that was part of the suit or not. I was thinking that happened in 2010.

MS. K. A. SNELLING, CVR-M

Supreme Court, State of South Carolina
Office of Commission Counsel

1015 Sumter Street, Suite 305, Columbia, South Carolina 29201

Q: In any case, that lawsuit does involve a claim for wrongful termination, doesn't it, which is different than the previous claims?

A: I honestly don't remember.

Q: And isn't it true it includes a claim for failure to provide fair hearing rights, which would possibly have prevented any necessity to file a suit?

MS. SEYMOUR: Objection, relevance.

MS. COLLIE: It's relevant to mitigation and possible decrease in what she testified to as far as incurred fees at this point.

CHAIRMAN COGGINS: All right. Can you restate the question? What is it you're wanting to ask her?

MS. COLLIE: I am trying to ask her, isn't it true that part of the 2010 suit included a claim for failure to provide a fair hearing right, which had a fair hearing right been granted might have prevented any filing of lawsuits?

CHAIRMAN COGGINS: Okay. And is there an objection?

MS. SEYMOUR: Relevance.

CHAIRMAN COGGINS: Sustained.

Q: Isn't it true that fair hearing rights are designed to -- that there's an exhaustion requirement designed to reduce having to use the courts?

A: Medical staff bylaws allow administrative

MS. K. A. SNELLING, CVR-M

Supreme Court, State of South Carolina

Office of Commission Counsel

1015 Sumter Street, Suite 305, Columbia, South Carolina 29201

#6

***John C. Shershow, M.D.
240 Central Park South
Suite #2H
New York, NY 10019
(800) 388-9299
Fax: (516) 706-0671
JShershow@GMail.com***

July 5, 2011

STATE OF NEW YORK)

COUNTY OF New York)

AFFIDAVIT

Personally came and appeared before me, Notary Public, John Shershow, M.D.,
who upon being duly sworn did depose and say the following:

- 1) I am over the age of eighteen (18) years and am competent to state the matters herein.
- 2) My Curriculum Vitae is attached and documents my experience in all aspects of hospital administration, staffing, and quality of care as well as *JOINT COMMISSION* accreditation, hospital care standards, medical staff affairs, physician credentialing and privileging, and medical quality assessment and review.

- 3) I have been certified as an expert in state courts on these matters.
- 4) In providing this affidavit, I affirm that, to the best of my knowledge, I am not related to any party to this action. I am informed and believe that I do not know any of the parties to this action.
- 5) My expert opinion follows and in rendering this opinion, I have relied on a large number of documents supplied to me by Dr. Holmes, consisting of the East Cooper Community Hospital (ECCH) Medical Staff Bylaws, as well as a large number of credentialing and privileging documents of Dr. Holmes, from approximately 1994 to 2009.
- 6) The *Joint Commission* is an organization which accredits hospitals based on national quality of care standards. My understanding is that at all times pertinent to the matter herein, ECCH is and has been accredited by the *Joint Commission*.
- 7) As part of those standards, the *Joint Commission* requires hospitals to have bylaws and, as part of those bylaws, to provide fair hearing rights to physicians. Those standards are national and local standards.
- 8) Based on review of Dr. Holmes' credentialing file, the reappointment applications, the ECCH Medical Staff Bylaws, and a letter from Janie Sinacore-Jaberg to Dr. Holmes on December 19, 2008, it is my expert opinion that Dr. Holme's 2008 application for re-appointment and change in medical staff status in was not properly responded to by ECCH.

Article VI, Section 5, of the ECCH Medical Staff Bylaws ("Change in

Membership, Privileges or Staff Category”), states:

A staff member may, at any time, request a change of staff category (from consulting staff to associate or other staff category as in this case) by submitting a written notification to the Medical Staff Office. The Medical Staff Office will issue a letter requiring the physician to read and sign the letter stating the requirements of the provisional change in status. The request will be forwarded to the Department Chairman, then to the Credentials Committee. The Credentials Committee will recommend to the MEC the request, and the MEC will forward their recommendation to the Board of Directors for final approval. After final approval, the medical staff office will notify the physician of the final decision. The Medical Staff Office will track the provisional change for one (1) year and the Credentials Committee will evaluate the physician at that time to determine if he meets the necessary requirements set forth by the requested status change. (Emphasis supplied.)

Article V, Section 3, of the ECCH Medical Staff Bylaws (“Reappointment Process”) lays out 12 requirements for reappointment to the medical staff. Notably in this section it is stated:

[The application for reappointment will be delivered to the applicant and] must be completed and returned within 30 days to the Medical Staff Office for review. A late fee will be charged for the continued processing of the application past the 30 day deadline.

Article IV, Section 3, of the ECCH Medical Staff Bylaws (“Associate”) lays out

the qualifications for the Associate status: *[the candidate must meet all the criteria for active staff membership] except the minimum required number of admissions, procedures, or patient contact per year or preceding 12-month period.*" (emphasis added)

9) Pursuant to the ECCH Medical Staff bylaw provisions quoted above, and on the attached *Joint Commission* flow sheet, it is my opinion that Dr. Holmes requests for change in staff category would and should have been granted. This is based upon (1) Dr. Holmes clearly submitted "a written notification to the Medical Staff Office," (see attached Medical Staff Reappointment Application); (1) Dr. Holmes provided information relevant to the requirements of licensure, training, education, and health status. In addition, Dr. Holmes received the highest ratings from peers for skill, competence, and quality of care; (3) Dr. Holmes maintains that she submitted the reappointment application within the required time frame; however even if she did not, the Bylaws impose only a "late fee," not a denial of privileges; (4) If Dr. Holmes application for change in status to Associate had been approved, the Bylaws are clear that she is exempt from "required number of admissions, procedures, or patient contact per year or preceding 12-month period."

10) Both the ECCH Medical Staff Bylaws, and *Joint Commission* Standards mandate a fair hearing process when adverse credentialing decisions are made by the medical staff and hospital Governing Board. Based upon my review of Dr. Holmes' credentialing files, and the ECCH Medical Staff Bylaws, it is my opinion that Dr. Holmes was denied fair hearing rights as explicitly required by these bylaws and by the *Joint Commission* standards.

Under Article VIII, Section 2B, of the ECCH Medical Staff Bylaws the grounds

for fair hearing are specified as follows:

B. Grounds for Hearing:

Except as otherwise provided in these Bylaws, the taking or recommending of any one or more of the following actions when based on the member's professional conduct or competence, unless taken in compliance with a policy decision of the hospital (e.g., closing a department or service or physical plant changes), shall constitute grounds for a hearing pursuant to this Article:

1. *denial of initial appointment to the medical staff;*
2. ***denial of staff reappointment;***
3. *reduction or suspension of staff membership or clinical privileges for more than 30 days;*
4. *termination, revocation, or reduction of staff category;*
5. *denial or termination of clinical privileges;*
6. *summary suspension of clinical privileges for more than thirty (30) days;*
7. *significant consultation or co-admitting requirements other than in compliance with the Medical Staff Bylaws, Rules and Regulations or departmental rules and regulations;*
8. ***denial of requested advancement in staff category;***
9. *denial of requested service affiliation.*

(emphasis added)

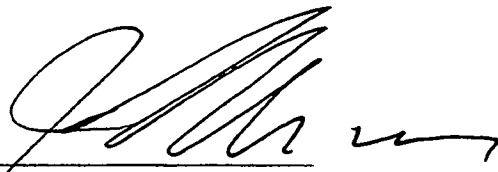
11) Privileges have value to a physician. A denial of privileges may lead to loss of income and/or adverse effects on professional standing and reputation.

12) In view of Dr. Holmes request for change in staff category not being processed properly and fairly by ECCH in terms of the applicable ECCH Medical Staff Bylaw provisions, Dr. Holmes was denied the opportunity for a change in status. Denial of access to the process under the plain language of the bylaws for requesting change in

staff category and denial of the right to participate in that process causes harm to any physician's practice, reputation, and ability to earn a livelihood.

13) Further, by denying Dr. Holmes fair hearing rights, per the applicable provisions of the ECCH Medical Staff Bylaw, ECCH prevented Dr. Holmes from her due process rights, mandated by both the Joint Commission, and the ECCG Medical Staff Bylaws.

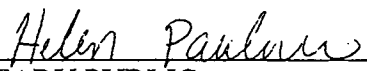
FURTHER THE AFFIANT SAITH NOT.


John Shershow, M.D.

Subscribed and sworn to before me,

Notary Public, this 5 day

of July, 2011.


NOTARY PUBLIC

My commission expires: April 18 2015

SEALED

HELEN PAULINO
Notary Public - State of New York
No. 01PA6239073
Qualified in Queens County
My Commission Expires April 18, 2015

Process for Privileging and Reprivileging

Does the organization have or plan to have the resources necessary to support the privilege?

Has the credential verification process established that the applicant has the licensure, training, education, and ability to perform the privilege?

Does the applicant currently perform the privilege sought at the organization?

Does data collected through the ongoing professional practice evaluation validate competency?

Grant privilege with focused practice evaluation..

Initiate focused professional practice evaluation.

Privilege is not granted

Privilege is restricted

Privilege is granted

John C. Shershow, M.D.

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CURRICULUM VITAE

JOHN C. SHERSHOW, M.D.

Professional Experience:

- *JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS (JCAHO)* (1989-2003)
Surveyor and Senior Teaching Faculty, for the preeminent hospital and ambulatory care accreditation organization in the United States
- *PERFORMANCE IMPROVEMENT COMPANY, INC* (1996 – present)
Founder and President of this national hospital and healthcare consulting firm. Primary activities are consulting, lecturing, and providing educational courses to hospitals, ambulatory centers, and other healthcare organizations, on healthcare quality, peer review, performance measurement, medical staff credentialing, and preparation for JCAHO and other regulatory inspections. In addition, provides expert testimony on medical litigation.
- *PRIVATE PRACTICE, JOHN C. SHERSHOW, MD, PC* (2010 – present)
Private medical practice in Manhattan, New York City
- *PRESIDENT, URGENT CARE OF WYOMING, INC* (2003 – present)
Owner of an urgent care clinic in Wyoming
- *THE JOURNAL OF URGENT CARE MEDICINE* (2006 – 2008)
On the editorial board of this medical journal
- *CHECKUPS, USA, INC* (2006 – 2007)

Chief Operating Officer and Medical Director of a company developing primary cares clinics for retail environments.

- *URGENT CARE ASSOCIATION OF AMERICA* (2005-06)
Director of Accreditation of the national urgent care organization
- *NORTHWEST COVENANT MEDICAL CENTER* (1995-1996)
Medical Director of a major New Jersey hospital
- *DOWNSTATE MEDICAL CENTER* (1992-1995)
Associate Dean and Associate Provost of New York State's largest medical school
- *KINGS COUNTY HOSPITAL CENTER* (1992-1995)
Medical Director of one of the largest hospitals in the United States
- *JOHN C. SHERSHOW, M.D. AND ASSOCIATES, INC.* (1977-1989)
Founder and President of one of the largest private medical groups in Massachusetts
- *ARBOUR HOSPITAL* (1978-1989)
Attending staff at one of Boston's leading private hospitals; President of the Medical Staff 1985-1989.
- *HARVARD MEDICAL SCHOOL* (1970-2000)
On the teaching faculty in numerous capacities
- *MASSACHUSETTS GENERAL HOSPITAL* (1970-2000)
Served in various capacities, including Inpatient Director (1973-77) and on the teaching faculty (1970-2000) for this internationally known hospital
- *US ARMY RESEARCH INSTITUTE OF ENVIRONMENTAL MEDICINE* (1970-1973)
A senior medical corps officer at one of the nation's largest military environmental research organizations

Academic Appointments:

- Clinical Instructor, *Harvard Medical School* (1970-2000)
- Assistant Professor, *Downstate Medical School* (1992-1995)

Education:

- Residency, *Yale University* (1969-1970)
- Residency, *University of Southern California* (1967-1969)
- Rotating Internship, *Los Angeles County Hospital* (1966-1967)
- M.D. *University of Southern California* (1966)
- B.A. (Magna cum Laude), *Harvard College* (1962)

Certification and Licensure:

- *National Board of Medical Examiners* (1967)
- Board Certified, *American Board of Psychiatry and Neurology* (1972)
- Past Licensure: California, Massachusetts, New Hampshire
- Current Licensure: New York, New Jersey

Memberships:

- Distinguished Fellow, *American Psychiatric Association*

Publications:

- 2 Books and numerous articles (detailed list available upon request)

1cc
D. Pratt-Thomas

#7

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON)

J. Doe, M.D.,)

Civil Action No.: 00-CP-10-1888

Plaintiff,)

vs.)

ORDER

Tenet HealthSystem Medical, Inc.;)
East Cooper Community Hospital, Inc.;)
John Grady, M.D.; Paul Yantis, M.D.;)
and William Cone)

Defendants.)

BY

JULIA A. HARRIS, CLERK OF COURT

2001 SEP 13 PM 2:37

FILED

This matter is before the court on the defendants' motion for summary judgment as to each of the plaintiff's causes of action. This case involves the termination of plaintiff's hospital staff privileges at East Cooper Community Hospital ("East Cooper") and allegations of a conspiracy to drive the plaintiff out of the specialty ophthalmology market in the area. For the following reasons, this court grants in part and denies in part the defendants' motion for summary judgment.

I. Background

Plaintiff is a licensed medical doctor in ophthalmology with a practice on Sullivan's Island, South Carolina. In early 1994, the plaintiff began the privileging process at East Cooper because it was the closest hospital to her practice and residence. On July 25, 1994, the plaintiff was notified that she had been appointed to the associate active medical staff. (Def. Mem. Supp. Summ. J. at Ex. 7). Under

1/33 *[Signature]*

the bylaws, this appointment was for a provisional or initial period of one year. *Id.* at Ex. 3. In order to qualify for reappointment, the plaintiff had to supply the Medical Executive Committee with a statement of qualification from the chief of the department to which she was assigned and a statement of ability from the chief of any other departments in which she would exercise clinical privileges. *Id.* The plaintiff's appointment to the provisional staff could be renewed in six month increments for up to one (1) year. *Id.*

Before the plaintiff completed her year as an associate active staff member, she submitted a request to be converted to the courtesy staff by letter dated November 30, 1994. (Def. Mem. Supp. Summ. J. at Ex. 8). It is not clear from the record how this transfer affected the plaintiff's provisional year or her reappointment status. In May of 1995, the medical staff bylaws were amended and the courtesy staff qualifications changed to require staff privileges at another local hospital. (Def. Mem. Supp. Summ. J. at Ex. 3). Subsequent to the bylaws amendment, a letter of qualification from the plaintiff's department chief was submitted to the medical executive committee and placed in her credentials file, either in July or November of 1995. (Def. Mem. Supp. Summ. J. at Ex. 10).

The next correspondence of record was a request for the plaintiff to submit an application for reappointment on April 12, 1996, by Kara Melin ("Melin"), the hospital's medical staff coordinator. (Def. Mem. Supp. Summ. J. at Ex. 11). Following this request, the plaintiff submitted an application for reappointment on April 18, 1996. (Def. Mem. Supp. Summ. J. at Ex. 12). In response to the plaintiff's

application for reappointment to the courtesy staff, Melin notified the plaintiff by letter dated April 22, 1996, which stated that in order to receive courtesy privileges the plaintiff had to have staff privileges at another local hospital. (Def. Mem. Supp. Summ. J. at Ex. 13). Following a debate over the courtesy staff requirements and a question about notice to the plaintiff of the bylaw amendments, in a letter dated June 11, 1996, East Cooper agreed to allow the plaintiff to apply for "Associate Active privileges for a one year provision." (Def. Mem. Supp. Summ. J. at Ex. 15). The letter also indicated that the plaintiff would be required to attend fifty percent (50%) of quarterly medical staff and department meetings and have twenty-four (24) patient contacts in that year in order to remain in good standing. *Id.* East Cooper then requested the plaintiff to agree to be reclassified as associate staff by signing the bottom of the letter and returning it to Kara Melin. *Id.*

Initially, the plaintiff sought to reduce the patient contact requirement to twelve (12) patients per year by written amendment to the letter, but the amendment was not agreed to by East Cooper. (Def. Mem. Supp. Summ. J. at Ex. 16). On August 5, 1996, Paul Yantis, the credentials committee chairperson, contacted the plaintiff by phone to discuss the patient contact issue and explained to the plaintiff that the credentials committee could not agree to the change because the twenty-four (24) patient requirement was mandated in the bylaws. (Yantis Depo. at 28). Following that conversation, the President of East Cooper, John Holland ("Holland"), sent a letter to the plaintiff to notify her that the "Governing Body, on the recommendation of the Medical Staff, has approved your reappointment to the Associate Active Medical Staff

for the next year." (Def. Mem. Supp. Summ. J. at Ex. 18). Holland also stated that the plaintiff's "privileges have been delineated by the Credentials Committee as you recently requested and are on file in the Medical Staff Services Office." *Id.* Additionally, the letter reiterated the fifty percent (50%) attendance and the twenty-four (24) patient contact requirements, which the plaintiff had to meet in order to remain in good standing. *Id.*

The volley of correspondence continued between plaintiff and the hospital when the plaintiff responded to Holland's August 19, 1996 letter by reasserting that she had only agreed to a twelve (12) patient contact requirement and sought further advice. (Def. Mem. Supp. Summ. J. at Ex. 17). Melin responded to the plaintiff on September 3, 1996, and reiterated the terms of her reappointment and explained that the plaintiff would be evaluated in August of 1997 to be sure she met the Associate Active staff requirements. *Id.* The plaintiff then appealed the hospital's decision denying her request to obtain staff privileges with only a twelve (12) patient contact requirement by a letter dated September 17, 1996. (Def. Mem. Supp. Summ. J. at Ex. 19). Following the plaintiff's written notice of appeal, the hospital took the position that the plaintiff was not entitled to a fair hearing pursuant to the bylaws because no adverse action was taken against her. *Id.* In the same letter, Holland suggested that if the plaintiff were requesting a change in the bylaws she should submit that request to the Medical Executive Committee. *Id.* The plaintiff followed Holland's suggestion and submitted an amendment to the bylaws requiring general ophthalmologists to have at least twelve (12) patient contacts in a year, which was ultimately defeated.

After a ten (10) month lull in the letter writing campaigns, the plaintiff was notified, by a letter dated September 16, 1997, that she did not meet the requirements of either the active or courtesy staff so she could only be reappointed to the consulting staff. (Def. Mem. Supp. Summ. J. at 19). The plaintiff had only five (5) patient contacts from August of 1996 to August of 1997. (Yantis Depo. at 37). The consulting staff appointment notice also included a statement that the action of the Medical Executive Committee was deemed an adverse action and that the plaintiff had a right to appeal within ten (10) days. *Id.* Consulting staff does not have admitting or surgical privileges. (Pl. Aff. June 8, 1998 at ¶ 4). The plaintiff appealed the Medical Executive Committee's decision on September 18, 1997. Following the appeal process and a hearing before the Medical Review Committee, the Medical Executive Committee's decision to change the plaintiff's medical staff category to consulting staff was affirmed.

After the administrative proceedings were completed, the plaintiff brought suit against many of the defendants in the Federal District of South Carolina, Charleston Division captioned, J.Doe, M.D. v. Tenet HealthSystem Medical, Inc. and East Cooper Community Hospital, Inc., C.A. No. 2:99-0833-23. The complaint alleged federal anti-trust violations under the Sherman Act. Following full briefing and review of the record, the Honorable P. Michael Duffy granted summary judgment on behalf of the defendants finding that the plaintiff failed to establish any concerted action which resulted in a cognizable injury to competition or that the defendants acted with monopolistic intent.

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Concomitant to the privileges dispute, the plaintiff experienced difficulties with certain administrative matters supplied under her office lease. In the summer of 1994, the parent corporation of East Cooper purchased the assets of the medical association from whom she was leasing office space. The association provided administrative services to the plaintiff, which included scheduling, filing, phone answering, billing and advertising in the yellow pages. (Pl. Aff. June 8, 1998 at ¶¶ 20 & 21). In May of 1996, the association's yellow pages advertisement was published with the plaintiff's name omitted. Id. at 7. Next, in June of 1997, Tenet sought an increase in the administrative services fee and persuaded the landlord to increase the rent to fair market value based on the hospital's offer to lease the same space. Id at 13.

Following the dismissal of the plaintiff's federal claims, the plaintiff brought suit against the defendants with numerous causes of action including: Arrangements Lessening Competition statutory provisions; Wrongful Termination of Hospital Privileges; Breach of Contract; Breach of Contract Accompanied by Fraudulent Intent; Slander; Civil Conspiracy; Unfair Trade Practices; Interference with Existing Contractual Relations; Interference with Prospective Contractual Relations; Promissory Estoppel; and Violation of South Carolina "Provider Self-Referral Act." Following discovery, the defendants moved for summary judgment on each cause of action.

The court scheduled a hearing on the defendant's motion for summary judgment and entertained arguments from the parties on July 2, 2001. Following oral arguments the court took this matter under advisement.

II. Analysis

This court has reviewed the pleadings, the accompanying briefs, affidavits, and the arguments made by the parties. The defendants assert that summary judgment should be granted because there are no genuine issues of material fact for any cause of action promoted by the plaintiff. However, in her memorandum in opposition to the defendant's motion, the plaintiff asserts that the motion ignores critical facts and fails to take all the evidence in the light most favorable to the plaintiff. The plaintiff further asserts that the termination of her privileges had nothing to do with her professional competence.

Summary judgment is proper when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC. Summary judgment should be granted when plain, palpable, and undisputable facts exist on which reasonable minds cannot differ. *McNaughton-McKay Elec. Co. of N.C., Inc. v. Andrich*, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1996); *Trico Surveying, Inc. v. Godley Auction Co.*, 314 S.C. 542, 431 S.E.2d 565 (1993). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *McNaughton-McKay Elec. Co. of N.C., Inc. v. Andrich*, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1996); *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 443 S.E.2d 392 (1994); *Eagle Construction Co. v. Richland Construction Company, Inc.*, 264 S.C. 71, 212 S.E.2d 580 (1975).

A motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See SCRCP 56(c) (1989). *McNaughton-McKay Elec. Co. of N.C., Inc. v. Andrich*, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1996); *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 370 S.E.2d 711 (1988). *Crescent Company of Spartanburg, Inc. v. Insurance Company of North America*, 266 S.C. 598, 225 S.E.2d 656 (1976). The grant of summary judgment is appropriate only if it is clear that no genuine issue of material fact exists, that inquiry into the facts is not desirable to clarify the application of the law, and that the movant is entitled to judgment as a matter of law. *McNaughton-McKay Elec. Co. of N.C., Inc. v. Andrich*, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1996); A party seeking summary judgment has the burden of clearly establishing by the record properly before the Court the absence of a triable issue of fact. See *Tom Jenkins Realty, Inc. v. Hilton*, 278 S.C. 624, 300 S.E.2d 594 (1983). A party who fails to show the absence of a genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials. *McNaughton-McKay Elec. Co. of N.C., Inc. v. Andrich*, 324 S.C. 275, 482 S.E.2d 564 (Ct. App. 1996); *Title Insurance Co. of Minnesota v. Christian*, 267 S.C. 71, 226 S.E.2d 240 (1976).

In the present case, the defendants have moved for summary judgment on each of the plaintiff's causes of action. Therefore, the defendants must establish that no genuine issue of material fact exists as to each cause of action.

a. Arrangements Lessening Competition

Section 39-3-10 prohibits "[a]ll arrangements, contracts, agreements, trusts or combinations (a) between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this State or in the manufacture or sale of articles of domestic growth or of domestic raw material, (b) between persons or corporations designed or which tend to advance, reduce or control the price or the cost to the producer or consumer of any such product or article and (c) between two or more persons as individuals, firms, corporations, syndicates or associations that may lessen or affect in any manner the full and free competition in any tariff, rates, tolls, premium or prices in any branch of trade, business or commerce." S.C. CODE ANN. § 39-3-10 (Law Co-op. 1985). South Carolina adheres to a policy of interpreting the state trade regulations consistent with federal precedents. *In re Wiring Device Antitrust Litigation*, 498 F.Supp. 79 (E.D.N.Y. 1980)(citing *State v. Virginia-Carolina Chemical Co.*, 71 S.C. 544, 51 S.E. 455 (1905); *South Carolina Cotton Growers' Co-Op Ass'n v. English*, 135 S.C. 19, 133 S.E. 542 (1926). See also, *Drs. Steuer and Latham, P.A. v. Nat'l Medical Enterprises, Inc.*, 672 F.Supp. 1489 (D.S.C. 1987), *aff'd* 846 F.2d 70 (4th Cir. 1988).

The defendants assert that summary judgment is appropriate on this cause of action because the doctrine of res judicata bars this claim. To bar a claim under the doctrine of res judicata, the following elements must be shown: (1) the identities of the parties are the same as the prior litigation; (2) the subject matter is the same as

the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. *S.C. Dep't of Social Services v. Basnight*, Opinion # 3282 (Filed January 8, 2001)(Shearouse Adv. Sh. #2). "Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction, without fraud or collusion, is conclusive as to the rights of the parties and their privies." *Id.* (citing *Griggs v. Griggs*, 214 S.C. 177, 51 S.E.2d 622 (1949)).

The defendants assert that the very issue the plaintiff seeks to litigate in this case was litigated before Judge Duffy. However, the plaintiff denies that any identity between the parties or subject matter exists between this case and the prior federal action. The plaintiff notes that the individual doctors were not parties to the federal action. "Where one is not a party to the prior action, the only way he can be precluded from relitigating an issue is if he is in privity with a party to the prior action against whom an adverse finding was made." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994)(citing *Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986). In terms of res judicata, the term 'privity' "means one so identified in interest with another that he represents the same legal right. One in privity is one whose legal interests were litigated in the former proceeding." *Id.* (citing *H.G. Hall Construction Co., Inc. v. J.E. P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1984).

Roberts involved an automobile accident where Lovern, the driver, and his passenger, Roberts, were injured after being hit by Smith, who was either hit by Worrell before or after he collided with the plaintiffs' vehicle. The plaintiffs brought

suit against Smith, his employer and Worrell in separate actions. After a period of consolidated discovery, the parties proceeded trial on plaintiff Lovern's case first. At the completion of the trial, the jury returned a verdict in favor of Lovern in the amount of \$10,000 against Smith and found in favor of the remaining defendants. Next, the employer moved for summary judgment on the issue of liability to Roberts based upon the jury verdict in Lovern's case. On appeal the Court of Appeals ruled that Roberts was not in privity with Lovern and stated that:

"[p]rivacy is not established from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action. One whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him."

In the present case, the named parties in the federal action were J. Doe, M.D., the plaintiff; Tenet HealthSystem Medical, Inc., and East Cooper Community Hospital, Inc., as the defendants. The plaintiff asserts that because she has added Doctors Yantis and Grady, members of the Credentials Committee, as well as, William Cone, the Chief Operating Officer of the hospital, there is no identity of the parties. The plaintiff's assertion is not persuasive because the defendants have identical interests in this matter as privies. The individual doctor defendants were involved in the decision making process which led to the termination of plaintiff's staff privileges.¹

¹ Although the plaintiff's anti-trust allegations are directed towards all defendants, it is unclear from the complaint what role Cone played in the alleged anti-competitive behavior. In fact, the only factual allegation regarding Cone involves his comments to an established patient of the plaintiff. Complaint ¶ 40.

Their actions were dictated by the medical staff bylaws, rules and regulations which are ultimately approved by the hospital's Board of Directors. Therefore, this court finds sufficient identity of the current defendants with the defendants in the prior federal action.

Next, the plaintiff asserts that the subject matter of this claim is not identical because Judge Duffy dismissed the federal action under the intra-enterprise doctrine, which in her eyes was inappropriate. The plaintiff's arguments appear to confuse the concepts of civil conspiracy with the anti-trust implications of the intra-enterprise doctrine. Although the Court of Appeals has recognized that "agents of a corporation are legally capable of conspiring among themselves or with third parties," *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986), in an anti-trust context agents and employees are considered as one entity which is incapable of conspiring with itself. *State ex rel. Callison v. National Linen Service Corp.*, 225 S.C. 232, 81 S.E.2d 342 (1954). See also, *Monsanto co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, (1984); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991)(en banc).² Therefore, this court finds sufficient identity of subject matter between the pending cause of action and those dismissed in the federal action.

Finally, the parties acknowledge that the federal court had jurisdiction to hear

² Although plaintiff raises numerous objections to the application of *Oksanen* in the present case, the ruling of the court clearly enunciates that members of the board of directors and the medical staff of a hospital are capable of conspiring with one another outside of the Sherman Act, even if their unity of interest precludes it in an anti-trust consideration.

the plaintiff's claims and made a decision in favor of the defendants.³ Therefore, this court finds that the doctrine of res judicata bars the plaintiff's arrangements lessening competition cause of action. Furthermore, should the doctrine of res judicata not apply, this court finds that summary judgment is warranted because agents cannot be deemed to conspire with one another for anti-trust purposes. Accordingly, this court grants summary judgment as to the plaintiff's arrangements lessening competition cause of action.

b. Wrongful Termination of Hospital Privileges/Breach of Contract⁴

The defendant asserts that the court should grant summary judgment on plaintiff's wrongful termination cause of action because the process was a function of the private hospital's peer review system, which is not subject to judicial review. To the contrary, plaintiff asserts that the termination of her admitting privileges violates the procedural safeguards provided for in the bylaws. The parties agree that private hospitals are "free to adopt reasonable regulations for the conduct of its affairs." *Gowan v. St. Francis Community Hospital*, 275 S.C. 203, 268 S.E.2d 580 (1980). However, the plaintiff's allegations do not contest the reasonableness of the bylaws, rules and regulations, but the hospital's failure to comply with the procedural

³ In her brief, the plaintiff acknowledges the federal court's grant of summary judgment and details her efforts to appeal that decision.

⁴ Although the complaint lists Wrongful Termination and Breach of Contract as separate causes of action, it appears the plaintiff's allegations are that Defendants' Tenet and East Cooper wrongfully terminated her hospital privileges by breaching the contract created by the hospital's bylaws, rules and regulations. Therefore, these causes of action will be considered one and the same for purposes of this summary judgment motion.

requirements outlined in the same.

To make out a claim for breach of contract the plaintiff must establish: 1) the existence of a valid contract; 2) that the defendants breached the contract; and 3) damages. In the present case, the plaintiff asserts that the bylaws constituted a contract between the parties and the hospital's failure to follow the protocols and procedures outlined within the bylaws was a breach of that contract. Plaintiff further asserts that this failure of the hospital to abide by the bylaws has injured her ability to practice because she no longer has admitting privileges to treat acute ophthalmology issues which arise in her practice. Based on the plaintiff's claim that the peer review procedures used in this case do not track those required by the bylaws, this court finds that a review of the relevant bylaw provisions is necessary to resolve this motion for summary judgment.

The 1989 bylaws, which were in effect at the time plaintiff first sought appointment, outlines the structure of a new member of the medical staff's provisional status.⁵ Article 3, Section 5. Subsection A, entitled FOR ALL INITIAL APPOINTMENTS provides that:

"[a]ll initial appointments to any category of the medical staff shall serve a provisional term for a maximum of twelve (12) months. Each provisional appointee shall be assigned to a department where his performance shall be observed and reviewed by the chief of the department, or such chief's designee, to determine the eligibility of such provisional staff member for regular staff membership in the staff category to which he was provisionally appointed and for exercising the clinical privileges provisionally granted. An initial appointee

⁵ The 1995 bylaws, which were adopted in May of 1995, has identical language for these same provisions.

shall remain provisional until he has furnished to the Medical Executive Committee:

- 1) a statement signed by the chief of the department to which he is assigned that the appointee meets all of the qualifications, has discharged all of the responsibilities, and has not exceeded or abused the prerogatives of the staff category to which he was appointed; and
- 2) a statement signed by the chief of the other departments in which the appointee will exercise clinical privileges that he has satisfactorily demonstrated his ability to exercise the clinical privileges initially granted to him." 1989 Bylaws Art. III, Section 5A.

Next, the 1995 bylaws outlines the proper procedures for reappointment under Article 6, Section 5. Subsection A, in part, provides that "[t]he Hospital President shall prior to expiration of the present staff appointment of each medical staff member, provide such staff member with an information form for use in considering his reappointment. Each staff member who desires reappointment shall, at least sixty (60) days prior to the final scheduled meeting of the Board in the current reappointment year, send his reappointment information form to the Hospital President."

Under the bylaws, it appears that the plaintiff's initial appointment period ended either in July or November when a letter of qualification was placed in the plaintiff's file, in accordance with the bylaws. In fact, Paul Yantis, the Chairman of the Credentials Committee, testified at the Medical Review Committee hearing that the plaintiff's provisional year ended in July of 1995, even though she changed from associate active to courtesy in November of 1994. (Yantis Transcript of June 8, 1998 at 19). Yantis further testified that it was common practice at the hospital to automatically appoint provisional staff at the completion of their provisional year to the category for which they fit and for which they request, but that it was simply a

"conversion at the end of one year," "not a reapplication type time." (Id. at 17 & 18). However, the bylaws required reappointment paperwork to be filed sixty (60) days prior to the final scheduled meeting of the Board in the reappointment year. Therefore, because the amendment to the courtesy staff qualifications requiring active privileges at one local hospital did not occur until July of 1995⁶, it appears the plaintiff should have been reappointed with Courtesy staff privileges as it existed in May of 1995. Based upon the review of the facts above, this court finds there exist material questions of fact and the corresponding application of law to those facts such that the defendant's motion for summary judgment as to the plaintiff's breach of contract / wrongful termination cause of action.⁷

c. Breach of Contract Accompanied by a Fraudulent Act

The defendants assert that no evidence exists to support a finding of either a breach of contract or any fraudulent act. The plaintiff disagrees with the defendants' assertions and argues that several misrepresentations were made to her with respect to the bylaws throughout the reappointment hearing processes and with respect to her lease agreement. To recover for breach of contract accompanied by a fraudulent act, the plaintiff must prove three elements: 1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and 3) a

⁶ (Pl. Mem. Opp. Summ. J. at Ex. 8).

⁷ Because it appears from the plaintiff's brief that the wrongful termination of hospital privileges cause of action and the breach of contract are identical, this court has consolidated the allegations of the complaint into one cause of action.

fraudulent act accompanying the breach. *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct.App. 1997)(citations omitted). Fraudulent intent is normally proved by circumstances surrounding the breach. *Id.* The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character. *Id.* Based upon the court's earlier denial of summary judgment on the plaintiff's breach of contract cause of action, if the court finds any evidence from which a jury might infer fraudulent intent, summary judgment would be inappropriate.

The plaintiff argues that numerous potentially fraudulent actions occurred during the reappointment process and in conjunction with her office lease. "In an action for breach of contract accompanied by a fraudulent act, the fraudulent act element is met by any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. *Perry v. Green*, 313 S.C. 250, 437 S.E.2d 150 (Ct.App. 1993)(citing *Harper v. Ethridge*, 290 S.C. 112, 348 S.E.2d 374 (Ct.App.1986)). With regard to the reappointment process, the plaintiff suggests that a statement made by Doctor Grady that the loss of admitting privileges would not do harm to the plaintiff's practice, which was made in order to persuade the Credentials Committee to deny her reappointment, was fraudulent. (Pl. Aff. June 26, 2001 at ¶ 2). Next, the plaintiff asserts that allowing Doctor Grady, a competing ophthalmologist, to sit on the credentialing committee charged with evaluating her qualification for reappointment was inherently unfair. *Id.* Finally, statements made by the hospital's agents that the plaintiff only wished to practice 'part-time' and took no

initiative to familiarize herself with the facilities illustrates a design to get her reappointment denied. *Id.* at ¶ 16. Additionally, the plaintiff asserts that the defendants acted fraudulently when they sought to increase her office rent and the administrative charges associated with her lease at Durst Family Medical. (Pl. Aff. June 8, 1998 at ¶¶ 28 - 32 & 69). Based on these allegations and their supporting affidavits, this court finds that sufficient questions of fact exist whether the defendants acted fraudulently in conjunction with the alleged breach of contract and summary judgment is not appropriate at this time.

d. Slander

Next, the defendants assert summary judgment should be granted on the plaintiff's slander cause of action. The defendants argue that the statements made by William Cone ("Cone") to Allen Powers ("Powers") were truthful and privileged communications because of their shared business interest. The plaintiff objects to the defendants' characterization of the statements as true and disagrees that the statements are protected by a privilege. In order to make out a cause of action for slander, which is spoken defamation, the plaintiff must establish: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Fleming v. Rose*, 338 S.C. 524, 526 S.E.2d 732 (Ct.App. 2000). "Defamation need not be accomplished in a direct manner. A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain."

Eubanks v. Smith, 292 S.C. 57, 63, 354 S.E.2d 898, 901 (1987).

The plaintiff alleges that Cone told Powers that the plaintiff's education was bought. In his deposition, Powers corroborates that Cone told him, "[y]ou know that her family bought her education for her," while discussing the plaintiff. (Def. Mem. Supp. Summ. J. at Ex. 25 p. 74). Powers also testified that Cone made a second statement several years later when he requested recommendations for a good ophthalmologist, to which Cone responded that he knew "who not to see," indicating the plaintiff. *Id.* at p. 79. Powers explained that he came to Cone on general business and sought his advice because he knew the good doctors. *Id.* at p. 83. However, Cone denies he ever said such a thing. (Def. Mem. Supp. Summ. J. at Ex. 26 p. 10). However, taking the facts in the light most favorable to the plaintiff, that the statement was made and that its plain meaning was that the plaintiff's medical aptitude was in doubt because she did not have to earn her medical degree, one could easily infer the maliciousness of Cone's statement. Additionally, the defendants do not deny that if the statement was made it was published to a third party, but they do assert that it was a privileged communication.

Under South Carolina law, communications between servants, business associates, officers, or agents of the same corporation enjoy a qualified privilege. *Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 459 S.E.2d 315 (Ct.App. 1995)(citing *Prentiss v. Nationwide Mut. Ins. Co.*, 256 S.C. 141, 181 S.E.2d 325 (1971); and *Rodgers v. Wise*, 193 S.C. 5, 7 S.E.2d 517 (1940)). In order to establish that a communication is protected by this qualified privilege the defendants must show:

1) good faith; 2) an interest to be upheld; 3) a statement limited in its scope to this purpose; 4) a proper occasion; and 5) publication in a proper manner and to proper parties only. *Id.* Based on a review of these facts, this court finds that the qualified privilege for business associates does not protect Cone's conversations with Powers. Although powers indicated that he sought out Cone for general business purposes, the conversations neither appear to be in good faith nor with an interest upheld. Cone testified that he had nothing to do with the credentialing process. *Id.* at pp. 18-19. Therefore, he had no business interest in discussing the plaintiff's background. Even if there existed a valid business interest for a hospital administrator to discuss the plaintiff's medical qualifications with an office manager of a hospital owned facility where the plaintiff practices, Cone's comments arguably do not illustrate a good faith discussion on the plaintiff's qualifications. Accordingly, this court finds that several issues of material fact exist surrounding the plaintiff's slander cause of action such that the defendant's motion for summary judgment is properly denied.

e. Civil Conspiracy

The defendants seek summary judgment as to the plaintiff's civil conspiracy cause of action. Defendants argue that "the plaintiff cannot satisfy the burden of proving that the defendants' purpose was to injure her or that their object was to ruin or damage her business." (Def. Mem. Supp. Summ. J. at 27). Defendants also assert that the plaintiff's civil conspiracy cause of action does nothing more than incorporate her prior allegations of breach of contract and include allegations of conspiracy. The plaintiff asserts that the defendants conspired to drive her out of business by revoking

her admitting privileges and modifying her administrative services contract.

The tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damage. *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 538 S.E.2d 15 (Ct.App. 2000). Allegation of an unlawful act is not required to state a cause of action for civil conspiracy, although a civil conspiracy may be furthered by an unlawful act. "An action for civil conspiracy may exist even though defendants committed no unlawful act and no unlawful means were used. Thus, lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another'." *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 326 S.C. 426, 483 S.E.2d 789 (Ct.App. 1997); (citing *LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988)). 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, 358 S.E.2d 150 (Ct.App. 1987)(citing *Nottingham v. Wrigley*, 221 Ga. 386, 144 S.E.2d 749 (1965)). However, "[w]here the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong." *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981).

The defendants first assert that the plaintiff cannot satisfy the burden of proving that the defendants' purpose was to injure the plaintiff or ruin her practice. The

plaintiff asserts that the continued action by the defendants to revoke her admitting privileges and their efforts to terminate and otherwise alter the administrative services contract exhibit inferential evidence that the defendants are involved in the joint purpose of driving her out of the market. (Pl. Aff. June 8, 1998 at ¶ 69); see also (Pl. Aff. June 26, 2001 at ¶¶ 13, 18-19); Plaintiff also asserts that the defendants have consistently diverted patients away from her to their employee-doctors at Durst Family Practice. *Id.* at ¶ 21. It appears that the plaintiff's position is that the defendants have conspired not only to revoke her admitting privileges, the subject of her breach of contract cause of action, but also to drive her out of the medical market as a whole. Therefore, this court finds questions of fact exist whether the defendants were engaged in a common pursuit to injure the plaintiff such that summary judgment is properly denied. In addition, this court finds that the civil conspiracy cause of action may be more expansive than the plaintiff's breach of contract causes of action.

f. Unfair Trade Practices Act

The defendants move for summary judgment on the plaintiff's unfair trade practices act by contending that the plaintiff has provided the court with no evidence that the defendants committed unfair trade practices. The defendants assert that their actions in raising their administrative services rate was necessary to comport with the Anti-Kickback and Stark statutes. To the contrary, the plaintiff asserts that, after the defendants Tenet and East Cooper purchased the assets of Durst Family Medical, the plaintiff's phone services and advertising were interfered with and that patients were diverted to the defendants' employee-doctors at the facility.

In order to establish a violation of the Unfair Trade Practices Act under Section 39-5-20(a), the plaintiff must show: 1) unfair or deceptive acts or practices; 2) in the conduct of any trade or commerce; and 3) which affects the public interest. S.C. CODE ANN. §39-5-20(a) (Law. Co-op. 1985). A "deceptive practice" under the Unfair Trade Practices Act (UTPA) is one which has a tendency to deceive. *deBondt v. Carlton Motorcars, Inc.*, 2000 WL 1048589 (Ct.App. 2000)(citing S.C. CODE ANN. § 39-5-10 et seq. (Law. Co-op. 1976)).

The plaintiff contends that the defendants canceled the plaintiff's call service and excluded her name from Durst Family Medical's yellow pages advertisement. *Id.* ¶¶ 28 - 31. Finally, plaintiff contends that she was forced to obtain new insurance billing services when the defendants switched billing systems and refused to continue providing the service to her. *Id.* 32. The defendants assert that the difficulties with the calling service and the yellow pages advertisements were merely mistakes made either within Durst Family Medical's office or by a third party. In fact, the defendants assert that the local telephone company caused the plaintiff's advertisements to be excluded from the yellow pages, not them.

At her deposition, Deborah Lynn Watts ("Watts"), an agent of the local phone company, testified that in August of 1996, Durst Family Medical began utilizing the National Yellow Pages for advertising in future telephone books. (Def. Mem. Supp. Summ. J. at Ex. 29 p. 36). Watts also testified that it was the local phone company's policy to "line out" all items connected with a particular phone number and send that information to the National Yellow Pages office to be handled from then on. *Id.* at p.

37 - 38. In addition, Powers testified that Durst Family Medical originally added the plaintiff to their yellow pages advertisement, even though the lease arrangement did not contemplate such service, simply to make the practice look bigger. (Def. Mem. Supp. Summ. J. at Ex. 25 pp. 47-48). Powers also testified that the plaintiff was never promised that she would be placed in the advertisement, nor did she pay anything toward the cost of the add. *Id.* at p. 49. Although the court agrees that these facts suggest that an honest mistake was made, they do not exclude the possibility that the defendants intentionally removed the plaintiff's own advertising because they controlled any listings at that phone number. Nor does it exclude the possibility that the defendants continued to accept the plaintiff's payment for advertising while it knew that she was no longer receiving the benefit of those services. These are questions of fact which a jury must decide.

Similarly, the Lease and Administrative Services Agreement does not clearly resolve the plaintiff's claims. The defendants assert that they increased the plaintiff's fees in order to avoid Anti-Kickback and Stark violations; however, this does not explain why the plaintiff was excluded from the insurance billing services which are provided for in the administrative services agreement. The administrative services provision states:

"The lessor agrees to provide the lessee with administrative services including general medical supplies but not specialized supplies required for the Lessee's Ophthalmology medical practice, patient scheduling, patient reception, patient file maintenance, secretarial, computing, basic bookkeeping, and patient billing

and collection for a service fee equal to ten (10%) per cent of the Lessee's gross revenues less insurance adjustments." Lease and Administrative Services Agreement. (Def. Mem. Supp. Summ. J. at Ex. 27).

The administrative services agreement further provides that, "[t]he administrative services fee shall be subject to review and renegotiation between the parties at six (6) month intervals throughout the term of this Agreement" *Id.* Although the lease portion of the Agreement indicates the term is for one year, there is no term recited for the administrative services agreement. Therefore, a question exists in the court's mind as to the applicability of the contract and whether the defendants' complete refusal to provide insurance billing services as provided for under the administrative services agreement. In light of the questions concerning the yellow pages listings and the insurance billing services, this court finds that summary judgment should be denied.

g. Interference with Existing and Prospective Contractual Relations

The defendants also seek summary judgment on the plaintiff's interference with existing and prospective contractual relationships causes of action. The defendants argue that they did not interfere with any of the plaintiff's contractual relationships, but that they were fulfilling administrative requirements to be sure patients received insurance benefits. The elements of the tort of wrongful interference with an existing contractual relationship are as follows: 1) a contract, 2) knowledge of the contract by the wrongdoer, 3) an intentional procurement of the contract's breach, 4) the absence of justification, and 5) damages resulting therefrom. *Todd v. S.C. Farm Bureau Mut.*

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Ins. Co., 287 S.C. 190, 336 S.E.2d 472 (1985). Similarly, to establish the tort of wrongful interference with prospective contractual relationships the plaintiff must establish that the defendants: 1) intentionally interfered with the plaintiff's prospective contractual relations; 2) for improper purpose or by improper method; and 3) which resulted in injury to the plaintiff. *Southern Contracting, Inc. v. H.C. Brown Const. Co., Inc.*, 317 S.C. 95, 450 S.E.2d 602 (Ct.App. 1994).

The defendants assert that summary judgment is appropriate for these causes of action because their interference in the plaintiff's contractual relationships, if any occurred, only occurred for a legitimate purpose and were carried out in a proper manner. The defendants explain that managed health care providers developed the concept of a gatekeeper, where a general practitioner must see a patient and verify their need for a specialist before a referral is made, Durst Family Medical had to alter its referral policy to insure the patient's insurance was not waived by a procedural flaw. Defendants further assert that as the general practitioners were able to treat certain issues like conjunctivitis, rather than referring the patient to a specialist. The defendants' arguments are supported by the testimony of Allen Powers.

Powers testified in his deposition that most of the plaintiff's patients were referrals from Durst Family Medical. (Def. Mem. Supp. Summ. J. at Ex. 25 p. 63). Powers also testified that the doctors at Durst Family Medical were particular about having patients come in for referrals before sending them to specialists, when required by insurance. *Id.* at pp. 64-65. Powers explained that the doctors did not implement this policy to hurt the plaintiff, but that it was "just their philosophy." *Id.* at p. 65.

Powers further explained that "the front office was told this is the way it was going to be. They didn't do it for any reason against Dr. Holmes." *Id.* Neither the plaintiff's argument at the motion hearing nor her brief in opposition of summary judgment outlines the facts which support this cause of action. After reviewing the facts presented, this court finds that the plaintiff has failed to establish any facts suggesting that the defendants actions were prompted by an improper purpose or were performed in an improper procedure or without justification. In fact, the evidence before the court clearly shows without dispute that the procedure was adopted to insure that patients had the benefit of insurance coverage for any medical assistance sought. Therefore, the defendants' motion for summary judgment as to the plaintiff's causes of action for interference with existing or prospective contractual rights is granted.

h. Promissory Estoppel

The defendants next move for summary judgment on the plaintiff's promissory estoppel claim. "In South Carolina, the elements of promissory estoppel are: 1) the presence of a promise unambiguous on its terms; 2) reasonable reliance upon the promise by the party to whom the promise is made; 3) the reliance is expected and foreseeable by the party who makes the promise; and 4) the party to whom the promise is made must sustain injury in reliance on the promise." *Prescott v. Farmers Telephone Co-op., Inc.*, 328 S.C. 379, 491 S.E.2d 698, (Ct.App. 1997)(citing *Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct.App.1993).

The defendants assert that the plaintiff has not shown how she suffered injury

State to provide health care services." S.C. Code Ann. § 44-113-30 (Law. Co-op. Supp 1999). This section also defines a 'health care facility' through reference to Section 44-7-130 as:

"acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, methadone treatment facilities, tuberculosis hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, habilitation centers for mentally retarded persons or persons with related conditions, and any other facility for which Certificate of Need review is required by federal law."

S.C. Code Ann. § 44-7-130 (Law. Co-op. Supp. 1999). Therefore, the statute clearly prohibits a physician from referring patients to a hospital or other treatment facility in which the physician has an investment interest. The plaintiff's allegations are that the twenty-four (24) patient contacts requirement in the bylaws violates this act, even though the plaintiff has no investment interest in East Cooper demonstrated by the record. Therefore, this court finds that the plaintiff has failed to state a claim upon which a remedy could be granted and dismisses the plaintiff's Provider Self-Referral Act cause of action.

j. Immunity

The defendants also assert that summary judgment is appropriate on each of the plaintiff's causes of action under several statutory provisions which provide immunity for the actions of which the plaintiff complains. First, the defendants claim that members of certain professional committees are exempted from tort liability under Section 40-71-10. Under this section:

"There is no monetary liability on the part of, and no cause of action for damages arises against . . . an appointed member of a committee of a medical

staff of a licensed hospital, provided the medical staff operates pursuant to written bylaws that have been approved by the governing board of the hospital . . . for any act or proceeding undertaken or performed within the scope of the functions of the committee if the committee member acts without malice, has made a reasonable effort to obtain the facts relating to the matter under consideration, and acts in the belief that the action taken by him is warranted by the facts known to him."

However, this court does not believe this immunity is properly granted at this time. The statute specifically requires that operation pursuant to the written bylaws is necessary before immunity may be granted. Based upon this court's earlier finding that a question of material fact exists as to whether East Cooper's Bylaws were complied with in this case, this court further finds that the issue of immunity should be denied at this time.

The defendants also seek immunity under the provisions of the Health Care Quality Improvement Act ("HCQIA") of 1986. The HCQIA provides a "professional review body"⁹ with immunity from damages whenever a "professional review action"¹⁰ is taken:

(1) in the reasonable belief that the action was in the furtherance of quality health care,

⁹ "The term 'professional review body' means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity." 42 U.S.C. § 11151(11).

¹⁰ The HCQIA provides that: The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the *competence or professional conduct* of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action (emphasis added). 42 U.S.C. § 11151(9).

- (2) after a reasonable effort to obtain the facts of the matter,
- (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
- (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence. 42 U.S.C. § 11112(a). However, in the present case it does not appear that such an analysis is necessary because the action at issue was not a professional review action.

Section 11151(9) provides for immunity only for actions based on the competence or professional conduct of an individual physician. The plaintiff asserts that HCQIA is inapplicable because the "termination of her privileges did not involve quality patient care concerns." In her affidavit, the plaintiff states that the revocation of her privileges does not involve any question of professional competence or conduct. (Pl. Aff. September 1, 1999 at ¶ 5). Additionally, the plaintiff stated that she has never received a complaint about her patient care, either from a patient or medical agency. *Id.* These allegations are supported by a letter dated November 20, 1997, from Delinda Terry which states that the Medical Executive Committee's recommendation to reduce her privileges from associate active to consulting "does not relate to professional competence or conduct." (Pl. Mem. Opp. Summ. J. at Ex. 2). After reviewing the facts, this court finds that the defendants' actions, although conducted under the auspices of "peer review" actions, were not based upon a

question of competence or professional conduct.¹¹ Although the patient contact requirement was adopted to assure sufficient information to make peer review decisions on competence and professional conduct, the simple decision that the plaintiff had not met the patient contact requirement was a ministerial act rather than a discretionary decision for which the HCQIA affords immunity. Therefore, this court finds that the issue of immunity under the HCQIA is properly denied at this time.

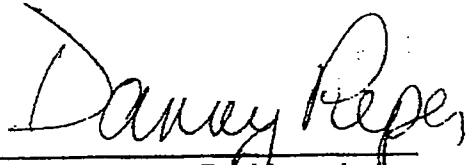
III. Conclusion

For all of the foregoing reasons, this court grants summary judgment as to the plaintiff's Arrangements Lessening Competition; Interference with Existing and Prospective Contractual Rights; and the Provider Self-Referral Violation causes of action. As to the remaining causes of action, this court finds either the existence of material questions of fact or that further development of the record is necessary to clarify the application of the law to the facts; accordingly, the court denies summary judgment as to those causes of action.

IT IS FURTHER ORDERED that since the plaintiff has not obtained counsel within the time period specified at the last status conference, the Clerk of Court is directed to list the plaintiff as proceeding pro se.

¹¹ This finding is supported by Judge Duffy's finding that "[i]t is undisputed, and actually admitted with the Hospital's correspondence, that the actions taken in regard to Dr. Holmes' privileges did not in any way implicate professional competence or patient care."

IT IS SO ORDERED.



Daniel F. Pieper, Resident Judge
Ninth Judicial Circuit

September 13, 2001

Attorney for Plaintiff - Pro Se

Attorney for Defendant - E. Douglas Pratt-Thomas

Court Reporter - Holly Hiott

#8

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

App. Case No. 2015 - 000187

C. Holmes, M.D.

Appellant,

v.

East Cooper Community Hospital, Inc.; and
Tenet HealthSystem Medical, Inc.,

Respondents.

**APPELLANT'S RESPONSE TO
RESPONDENT'S MOTION TO DISMISS**

Respondent has filed a motion to dismiss this appeal. Appellant hereby responds.

Appellant respectfully requests that this Court deny Respondents' motion and uphold the Appellate Court Clerk's determination of compliance with the South Carolina Appellate Court Rules routinely made prior to filing and docketing appeals. "The clerk of the appellate court shall insure compliance with this Rule before accepting any papers for filing." Rule 267, SCACR. In compliance with the SCACR and Form 8, Appendix C, SCACR, the following items were forwarded for filing:

- 1) notice of appeal and a copy,
- 2) proof of service and a copy,
- 3) the filing fee of \$100.00 (check #2489),
- 4) copy of transcript request, and
- 5) copy of the orders filed December 9, 2014, and November 3, 2014.

As to item number 1 above, the notice of appeal, respondents admit in their memorandum that the notice of appeal, which was timely served by mail, was received by respondents on January 20, 2015. See page 4 of respondents' memorandum: "On January 20, 2015, Appellant served Respondents with notice of appeal." To the extent respondents are requesting amended notice of appeal, please find attached amended notice of appeal and proof of service.

As to item number 2 above, proof of service does not have to be signed by the attorney. The suggestion that appellant's proof of service is uncorroborated is inconsistent with the acknowledgment of service in respondents' memorandum at page 4, which states, "On January 20, 2015, Appellant served Respondents with notice of appeal."

As to item number 3 above, check #2489 was negotiated and applied to the filing fee.

As to item number 4 above, a copy of the transcript request was included. Notice of receipt of the transcript was served on respondents by mail on March 5, 2015. The record reflects the paralegal's proof of service on behalf of the appellant's attorney which certifies that the "correspondence (*requesting the transcript*) with cc" was served on respondents (emphasis supplied). In any case, notice of receipt of transcript has already been served on respondents, corroborating the transcript request. Mr. McQueeney had been representing Respondents, but apparently has left the firm, thus some early documents were served in his name. Ms. Smith-Yancey, who is in the same law firm, has since contacted counsel for the Appellant and notified him that Mr. McQueeney is no longer with the firm. It does not appear that this has had any prejudicial effect on either party.

As to item number 5 above, copies of the orders on appeal were included with the filing.

Respondents have raised an argument, without any factual basis, that the undersigned is, in violation of Rule 11, signing off on documents without having read them as a "Hybrid attorney," something that has apparently been recognized in certain criminal cases where defendants are writing their own legal arguments and attorneys are signing off on them without really making the document "their own work." Just as a matter of civility and collegiality, attorneys should not be making unsupported claims like this against one another, and especially not in motions like this. It's defamatory at the very least and should simply be beneath us as officers of the Court. It is very difficult to see how the undersigned could be accused of this, since the documents he has submitted in this case to date consist of a motion to substitute him as counsel and a notice of receipt of transcript.

The Respondents also seem to have taken a stance that an attorney cannot file a notice of appeal with the Appellate Court where there was another attorney representing that client in the Circuit court, without an Order from the Circuit Court recognizing a substitution of counsel. They are asking this Court to reject the notice of appeal and dismiss this appeal on those grounds. This is simply not a defensible position. It is a very common thing for a litigant to have a separate appeal attorney from the counsel who had represented him or her in Circuit Court. There is an appellate court rule which applies to the withdrawal of counsel of record.

RULE 264 SUBSTITUTION OF ATTORNEYS OR GUARDIANS

- (a) **Continued Representation.** The attorneys and/or guardians *ad litem* of the respective parties in the court below shall be deemed the attorneys and guardians of the same parties in the appellate court until withdrawal is approved and notice is given as provided in this Rule.
- (b) **Withdrawal.** An attorney of record in a matter pending before an appellate court may not withdraw from **representation** of his client without justifiable cause, or the consent of his client;

and then only after proper written notice to his client, on petition to and by written order of the appellate court, and with notice to the adverse party.

Respondent seems to be arguing that this rule means that nobody other than the undersigned could rightfully file a notice of appeal for the Appellant. That simply does not follow from the rule. Mr. Goldberg signed a notice of appeal for the Appellant. Mr. Johnson then gave notice of substitution, and Mr. Goldberg asked for leave to withdraw, with consent of the Appellant. This was granted by the Court because it complied with Rule 264(b). There is no restriction in this rule on how many attorneys can be representing a party. A party can have many attorneys as counsel of record. Rule 264 only applies when subtracting attorneys, not adding them.

Respondents claim that the appeal is untimely, but acknowledge receipt of service thereof by in their memorandum at page 4, which states, "On January 20, 2015, Appellant served Respondents with notice of appeal." This is within 30 days of the December 3rd Form 4 order rejecting Appellant's request for reconsideration of the 11-13-14 Order. Rule 59(f), SCACR - Time for Appeal. *SCDOT v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999) (when there is a final judgment, and a party timely files its notice of intent to appeal from that judgment, the appellate court may review any intermediate order necessarily affecting the judgment not earlier appealed); *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990) (an order dismissing some but not all of the claims in a case is immediately appealable); *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992). See Toal *et al*, *Appellate Practice in South Carolina* (2002), pp. 86-88, 98, 143. If the Respondents received a notice of appeal of the December 3rd order, which was denying a motion for reconsideration of the November 3rd, Order, then the notice received on January 20th, would have encompassed both orders.

With respect to section II, the Order issued by Judge Dennis gives, as a ground for denial, "due to the status of this case as closed." Whether the case was properly closed or not and whether

Respondent had the right to engage in a "choice of remedies" which denied the Appellant a jury trial is the basis of this appeal, the initial brief to which will be filed soon. If Respondent's stance is that the Clerk of Court should have rejected the filing based on the 2009 motion, and it failed to do so, that objection should have been raised in the lower court, if Respondents intended to make it an issue on appeal. The denial of the motion to alter or amend and the underlying order are the subject of this appeal.

Similarly, as to section III, respondents' characterization of that 2009 order is in error. Although it authorizes clerks to reject filings from Appellant, it does not preclude Appellant from signing a document stating that she has served a document on opposing counsel. "Of course, *serving* and *filing* are two separate acts, which are defined by Rule 233." Toal *et al*, *Appellate Practice in South Carolina* (2002), p. 116. Former Rule 233, SCACR, is currently Rule 262, SCACR:

(b) Service. Whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the appellate court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this Rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

Service requires delivery to the person to be served. The person who certifies mailing or delivery frequently is not an attorney, but a paralegal or other support staff. Rule 262(b), SCACR. In fact, respondents' own proof of service in this matter is not signed by an attorney. No one would seriously contend that the paralegal who signed respondents' proof of service was engaging in the unauthorized practice of law or the filing of an appeal simply by signing proof of service. Such a

stance would lead to absurd results.

The the record does not support respondents' statements denying receipt referenced in section III. The record reflects a paralegal's proof of service on behalf of the appellant's attorney which certifies that the "correspondence (*requesting the transcript*) with cc" was served on respondents (emphasis supplied). Perhaps respondents overlooked and/or mislaid the documents because respondents appear to have admitted receipt of other documents that accompanied the letter. A notice of receipt of transcript has already been served on respondents, corroborating the request for transcript. When the undersigned offered to share the transcript with Respondents' attorney, she confirmed that she already had a copy of the transcript. Whatever the cause of Respondents' belief that it did not receive a notice of the request for transcript, it appears that Respondent obtained a copy of the transcript anyway, well before the filing of the Appellant's initial brief, and before the notice of receipt of transcript filed by Mr. Johnson.

As to section IV, the record in fact refutes respondents' affidavits stating that its attorneys did not receive a notice of appeal. The affidavits are certainly inconsistent with respondents' acknowledgment of service in respondents' memorandum at page 4, which states, "On January 20, 2015, Appellant served Respondents with notice of appeal." Proof of service by mail is conclusive. Toal *et al*, *Appellate Practice in South Carolina* (2002), p. 143. "This presumption is not overcome by a denial (*of receipt*), even though sworn." *Scutieri v. Miller*, 584 So.2d 15 (Fla. App. 3 Dist., 1991) (internal citations omitted) (emphasis supplied). If the undersigned understands Respondent's argument, it appears that Respondents are trying to convince this Court to ignore Appellant's proof of service because Appellant signed it. The 2009 Order may say that Clerks are to reject filings signed by Appellant alone, but it does not say that the Court is to discount her word when she says she mailed a document.

With respect to section V, this Court should uphold the appellate court clerk's determination the appeal is timely. Rule 203(e)(1), SCACR, provides, in pertinent part, as follows:

In appeals from the lower courts, the appeal shall contain the following information:

(C) The date of the order, judgment, or sentence from which the appeal is taken; and if appropriate for the determination of the timeliness of the appeal, a statement of when the appealing party received notice of the order or judgment from which the appeal is taken.... Rule 203(e)(1c), SCACR.

The notice of appeal herein provides the date of the order from which the appeal is taken. As per Rule 6, SCRCR, the timeliness of the appeal is apparent on its face. Rule 6, SCRCR. *SCDOT v. Faulkenberry*, 337 S.C. 140, 522 S.E.2d 822 (Ct. App. 1999) (when there is a final judgment, and a party timely files its notice of intent to appeal from that judgment, the appellate court may review any intermediate order necessarily affecting the judgment not earlier appealed).

Turning to section VI, the notice of appeal clearly states that Mr. Goldberg is attorney for appellant. Rule 264 of the SCACR applies to the withdrawal of counsel, and how it should be accomplished, not the addition of counsel. Mr. Goldberg's entry into this case did not require any motion for withdrawal. Mr. Johnson did not object to Mr. Goldberg's signing as an attorney for the Appellant. Neither did Appellant. It does not seem like opposing counsel should have the standing to make any objection. Rule 264 certainly does not grant such a right.

As for VII, the false and unsupported claim of hybrid representation is disputed and citation to inapposite criminal cases is just not applicable here. The undersigned has entered into this case officially, and formally. He has been accepted by the court as the sole counsel of record for Appellant and Mr. Goldberg has been formally and properly allowed to withdraw. The

undersigned, after having received an Order from the Court recognizing his representation of Appellant, has filed a notice of receipt of transcript, and is now working on an initial brief. The undersigned has long ago ceased to take personally the incessant speculation and allegations from Attorney Smith-Yancey about what conversations occur between himself and his client as to the legal arguments to be advanced in Dr. Holmes' cases. Those conversations are attorney-client privileged, and, short of an order from the Court compelling the undersigned to disclose them, will not be discussed here or anywhere else except with the express permission of Dr. Holmes. If the Court believes that the undersigned is somehow in violation of Rule 11, the Court will take action to address it and the undersigned will cooperate and respond accordingly and respectfully. Without waiving or breaching attorney-client privilege, the undersigned assures the Court that his job in this appeal is to present a well thought out argument designed to assert and defend his client's position.

Respectfully submitted,

Dated

3-16-15



Chalmers C. Johnson
1029 Bay St., #7
Port Orchard, WA 98366
425.999.0900

#9

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Civil Action No. 2010-CP-10-3410
Appellate Case No.: 2015-000187

C. Holmes, M.D.

Appellant,

v.

East Cooper Community Hospital, Inc.
and Tenet HealthSystem Medical, Inc.

Respondents.

REPLY TO APPELLANT'S RESPONSE
TO RESPONDENTS' MOTION TO DISMISS

RECEIVED

MAR 23 2015

SC Court of Appeals

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Respondents East Cooper Community Hospital, Inc., and Tenet HealthSystem Medical, Inc. (collectively "Respondents"), by and through their undersigned counsel, hereby reply to Appellant's Response to Respondents' Motion to Dismiss this appeal. As set forth fully below, Appellant's Response fails to show that Appellant's appeal was timely served or filed.

I. Appellant's *pro se* motion to reconsider filed in the trial court did not stay the deadlines for serving and filing of her appeal.

Rule 203(b)(1) of the South Carolina Appellate Court Rules (ACR) states "a notice of appeal shall be served on all respondents within thirty (30) days after receipt of notice of entry of the order or judgment. When a timely motion...to alter or amend the judgment (Rule 52 and 59)...has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion."

Appellant's appeal arises from a post-remittitur motion filed in the trial court moving for withdrawal of her motion to dismiss Respondents' counterclaims filed before summary judgment dismissal and appellate affirmation in the case. **See Exhibit 7 to Respondent's Memorandum in Support of Motion to Dismiss Appeal.** Appellant's motion was heard and rejected by The Honorable R. Markley Dennis, Jr., who issued a Form 4 order dated October 29, 2014, and entered November 3, 2014. Appellant has failed to supply the Court of Appeals or Respondents with the date on which she received notice of this order. However, it is clear Appellant had notice of this order by at least November 15, 2014, as this is the date of her *pro se* motion to reconsider said order in the trial court. **See Exhibit 12 to Respondent's Memorandum in Support of Motion to Dismiss Appeal.** As fully

explained in Respondents' previously submitted Motion to Dismiss and supporting Memorandum of Law, Appellant's *pro se* motion to reconsider was in violation of the December 2009 order of the South Carolina Supreme Court because it was not signed by another attorney. **See Exhibit 1 to Respondent's Memorandum in Support of Motion to Dismiss Appeal.** Because Appellant's *pro se* motion for reconsideration is in violation of this Supreme Court order, it is defective and did not stay the time in which Appellant had to file her appeal of Judge Dennis' October 29, 2014 order. And because Appellant had notice of this order by November 15, 2014 she was required to serve Respondents with a compliant notice of appeal by December 15, 2014 and file it with the Court of Appeals and trial court by December 29, 2014. Appellant's notice of appeal filed in the Court of Appeals on January 30, 2015 is more than a month beyond this deadline, and should be dismissed for this reason.

II. Appellant's notice of appeal is untimely even outside the numerous procedural defects and deficiencies outlined above and in Respondents' previously submitted Motion to Dismiss and supporting Memorandum of Law.

In her Response, Appellant argues her notice of appeal was timely served on Respondents, relying on Respondents' admission that on January 20, 2015, they received Appellant's *pro se* notice of appeal dated January 14, 2015. Appellant further alleges Respondents' affidavits of non-service regarding an entirely different notice of appeal filed in the Court of Appeals by Charles Goldberg, Esq., on January 30, 2015 are contrary to the afore-mentioned admission. Appellant either misunderstands the sequence of the filings relating to this matter or is intentionally trying to cause further confusion to the procedural mess she has created with her prohibited *pro se* practice.

Yes, Respondents did receive Appellant's *pro se* notice dated January 14, 2015 on January 20, 2015; however, this is not the notice which initiated the instant appeal. The notice giving rise to the instant appeal is the notice signed by Mr. Goldberg and filed in the Court of Appeals on January 30, 2015. **See Appellant's Notice of Appeal received by Court of Appeals January 30, 2015.** While the notice filed by Mr. Goldberg was also dated January 14, 2015, it was not the same notice of appeal received by Respondents January 20, 2015, and contained different language as to the orders purporting to be appealed. *Id.*, as compared to **Exhibit 14 of Respondents' Memorandum of Law in Support of Motion to Dismiss.** As indicated in Respondents' Motion to Dismiss and supporting Memorandum of Law and affidavits, Respondents have never been served with notice of appeal signed by Mr. Goldberg, the very notice which is the subject of this appeal.

The above referenced filing requirements of the ACR indicate an Appellant must file with the Court of Appeals the same notice of appeal previously served on Respondents. **ACR Rule 203(d)1(B); Rule 203(d)1(B)(i-iii).** These rules do not reference or allow amendments to the notice in the ten (10) days between the time an Appellant is required to make service on Respondents and file the notice with the courts. Indeed, Appellant herein has never requested permission to file or proceed on an amended notice of appeal.

Regardless, even if Appellant's service of her *pro se* January 14, 2015 notice constitutes service of the different notice of appeal signed by Mr. Goldberg as contemplated by ACR Rule 203(d)1(B), the notice signed by Mr. Goldberg is still untimely filed. As fully shown in Respondents' Motion to Dismiss and supporting Memorandum of Law, the January 14, 2015 *pro se* notice of appeal is deficient and procedurally defective in a number of respects, including lack of filing with the trial court and the Court of Appeals, as well as

contrary to the December 2009 Order of the SC Supreme Court. **See Exhibit 1 to Respondent's Memorandum of Law in Support of Motion to Dismiss.** However, even if said deficiencies didn't exist, and viewing the timing of the various filings in the light most favorable to Appellant, the notice signed by Mr. Goldberg is still untimely.¹

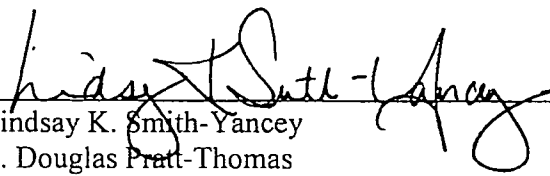
Both the *pro se* notice of appeal as well as the notice signed by Mr. Goldberg purport to appeal Judge Dennis' order dated December 3, 2014 and entered December 9, 2014, denying Appellant's *pro se* motion for reconsideration of his earlier order dated October 29, 2014, denying Appellant's post-remittitur motion. Notice of entry of Judge Dennis' December 3, 2014 order was served on the parties December 10, 2014 via first class mail. **Exhibit A.** As such, Appellant's thirty (30) day deadline to serve her notice of appeal on Respondents began to run December 15, 2014, requiring said service on or before January 15, 2014. **Rule 6 (a) South Carolina Rules of Civil Procedure (SCRCP); Rule 203 (b)(1) South Carolina Appellate Court Rules (ACR).** Appellant was next required *file* the notice of appeal in the trial court and Court of Appeals by January 25, 2014. **ACR Rule 203(d)1(B).** She was also required to *file* her proof of service, copies of the orders on appeal, and submit the filing fee to the Court of Appeals by January 25, 2015 as well. **ACR Rule 203(d)1(B)(i-iii).** This was not done. The notice of appeal signed by Mr. Goldberg and the required attending documents were not filed in the Court of Appeals until January 30, 2015, five (5) days after expiration of this deadline. **See Appellant's Notice of Appeal received by Court of Appeals January 30, 2015.** Therefore, the instant notice of appeal is untimely and should be dismissed.

¹ Respondents do not waive and specifically preserve all arguments set forth in this Reply as well as in their previously submitted Motion to Dismiss and supporting Memorandum of Law.

For the foregoing reasons, as well as those contained in Respondents' Motion to Dismiss and supporting Memorandum of Law, Appellant's notice of appeal should be dismissed.

Respectfully submitted,

March 20, 2015


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RETURN SERVICE REQUESTED



www3.charlestoncounty.org

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LINDSAY K SMITH-YANCEY
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NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC

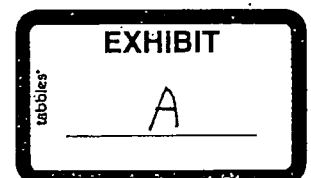
Order/plntff's mot filed on 11/19/14 is improper; Judge

CASE NO: 2010CP1003410

Cynthia Dr Md Holmes VS East Cooper Community Hospital Inc Etc , defendant, et al

This judgment was entered on the 09th day of December, 2014, and a copy mailed first class on Wednesday, December 10, 2014, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at www3.charlestoncounty.org.



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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-10-3410

Dr. Cynthia Holmes, M.D.

East Cooper Community Hospital, Inc. and Tenet
HealthSystem Medical, Inc.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ 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, TRIUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Plaintiff's Rule 59(e) Motion, filed on 11/19/2014, is improper; Judge Dennis declines any request for reconsideration of the order entered 11/3/2014 due to the status of this case as closed and in accordance with the Supreme Court's order dated 12/2/2009.

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)
N/A		\$
		\$
		\$

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

2060

Judge Code

12/3/2014

Date

76091

RECEIVED

MAY 26 2015

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

#10

App. Case No. 2015 - 000187

C. Holmes, M.D.

Appellant,

v.

East Cooper Community Hospital, Inc.; and
Tenet HealthSystem Medical, Inc.,

Respondents.

RULE 240(j), SCACR, MOTION

Pursuant to Rule 240(j), SCACR, Appellant timely files and serves this Motion. Any party aggrieved by an order of an individual justice or judge may seek review of that order by the appellate court. Rule 240(j), SCACR. *See Toal et al., Appellate Practice in South Carolina (2002)*, p. 259, regarding former Rule 224(j), SCACR, currently Rule 240(j), SCACR. Appellant respectfully seeks review of Judge Cureton's Order filed May 8, 2015. "The SCACR does not specify the procedure for this review. Custom provides that this review be sought by motion complying with rule 224 (*now 240*) SCACR. Wisdom recommends a review be sought within 15

days of the action by the single justice or Judge.”

The issue before the Court was Respondent’s motion to dismiss this appeal, based on its claim that the appeal was not properly filed. It was accompanied by a flood of affidavits from the offices of Respondents’ attorneys. Appellant filed a return, to which the Respondents replied. The Judge’s Order does not respond to the issues that were raised in the motion. Rather, the Judge has issued an order speaking to the merits of the issue on appeal. He has found that the entire controversy of this case, including the counterclaims which have never been dismissed, was ended with the dismissal of the Plaintiff’s case and remittitur after the Supreme Court upheld the dismissal, and that, therefore, there is no relief to be had. There are three grounds for Appellant’s request for review of this order. First, the Order exceeds the scope of the motion before the Court. Second, Judge Harrington dismissed Plaintiff’s claims for lack of jurisdiction, rather than on Summary Judgment. This is a mistake of fact in the Order. Third, the Plaintiff is requesting relief in the form of the right to a jury trial on the counterclaims which were brought against her.

I. The Order exceeds the scope of the Motion before the Court.

The motion before the Court in this matter is a motion by Respondent to dismiss based on alleged improper filing of the notice of appeal. The Order does not address this, but instead dismisses this case for lack of a controversy and remedy. In *Wells Fargo Bank, NA, v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (S.C. App., 2012), the Court wrote "A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner*, 257 S.C. 544, 549–50, 186 S.E.2d 523, 526 (1972)....One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor. Ordinarily a court may not grant relief beyond the limits or scope of such notice. *Ford v.*

Calhoun, 53 S.C. 106, 30 S.E.2d 830; *Coogler v. California Ins. Co.*, 192 S.C. 54, 5 S.E.2d 459; *Wildhagen v. Ayers*, 225 S.C. 384, 82 S.E.2d 609." "For as former Chief Judge Alex Sanders famously wrote, '[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct.App.1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985)." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, fn. 4 (S.C., 2012). The Appellant recognizes, of course, that the Court has the authority to address issues not raised by the parties, by bringing its own motion. However, this process requires, as all motions do, notice and an opportunity to respond. Should the Court feel that the issues raised in its Order need to be addressed, the proper method of doing so would be through the filing of its own motion, giving the parties the opportunity to research, brief and argue the issues raised.

II. The Order is based on a mistake of fact. The case below was not dismissed on Summary Judgment. The Appellant's claim was dismissed for lack of jurisdiction.

The case below was actually dismissed on a motion to dismiss for lack of jurisdiction, rather than on Summary Judgment. The Plaintiff had produced an expert witness supporting her claim, her testimony in the form of an affidavit, and further evidence supporting her claim for breach of contract/bad faith. There was certainly more than a scintilla of evidence in the record to support the elements of her claim. Judge Harrington found that the Court did not have subject matter jurisdiction over the Plaintiff's claims. Materially, Rule 41(b), SCRCF, provides that "a dismissal under this subdivision and any dismissal not provided for in this rule, **other than a dismissal for lack of jurisdiction**, operates as an adjudication on the merits. Rule 41(b), SCRCF (emphasis supplied). That dismissal is in the nature of a discontinuance and is not an adjudication on the merits. *Davis v. Luncford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App.

1983). The Defendant's counterclaims were never addressed or dismissed by any order in the case below or in the Supreme Court. This is undisputed. The fact that the case was never actually adjudicated or even considered on the merits is important, and appears to have been misapprehended by the Court.

There have been other cases in which a remittitur has been handed down and the case was not ended in the circuit court. An order dismissing some but not all of the claims in a case is immediately appealable. *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990); *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992). See Toal *et al*, *Appellate Practice in South Carolina* (2002), pp. 86-88, 98, 143. In *Pond Place Partners, Inc. v. Poole*:

"the Respondents, *et. Al*, answered and counterclaimed, alleging causes of action for slander of title and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act. The trial court granted Pond Place's motion for summary judgment on Poole's declaratory judgment action. The court found the modification to the restrictive covenants was valid. We subsequently affirmed the trial court in our unpublished opinion *Poole, et. Al v. Pond Place Partners, Inc., et. Al*, Op. No. 1997-UP-129 (S.C. Sup.Ct.App. filed Feb. 12, 1997), *cert. denied* (Jan. 12, 1998). (*Remittitur was returned.*) Thereafter, the Pond Place group prosecuted their **actions for slander of title and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act (FPA)**. After a multi-day trial, the jury found only Poole liable for slander of title and awarded actual and punitive damages to Pond Place Partners and Edwin P. Collins. Poole appeals. We reverse." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (S.C. App., 2002) (emphasis supplied).

After remittitur in that case, the pending FPA and other claims were heard by the jury.

Accordingly, remittitur is not necessarily dispositive. In fact, the Pond case sets forth the framework under which this case should have, ultimately, been handled.

Moreover, material from another case such as the December 2, 2009, *Doe v. Duncan* order is objectionable as hearsay. In *Mizell v. Glover*, the South Carolina Supreme Court stated: “We find persuasive the jurisprudence developed by the Fourth Circuit and other federal courts which have recognized that judicial findings of fact from one trial constitute hearsay when offered for admission in the context of another trial. See *Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993); *U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275 (11th Cir. 2001); *U.S. v. Jones*, 29 F.3d 1549 (11th Cir. 1994); *Blue Cross and Blue Shield v. Philip Morris, Inc.*, 141 F.Supp.2d 320 (E.D.N.Y.2001).[8] In *Nipper*, the Fourth Circuit held that judicial findings constitute hearsay and do not fall within any of the exceptions to the hearsay rule, including the exception for public records, Rule 803(8), FRE. *Nipper*. The Fourth Circuit made clear that its holding was firmly rooted in the common law. Id. (Citing 5 John H. Wigmore, Wigmore on Evidence § 1671a (James H. Chadbourn rev.1974) (citations omitted)).” *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (S.C. 2002).

In addition, the Court appears to have mentioned, or possibly even be relying on an opinion which was cited in Order from a completely separate case. Appellant is referring to the *Doe v. Duncan* opinion, mentioned in Judge Cureton’s footnote to the May 8th Order. “The federal courts addressing this issue point to the great weight and obvious prejudicial effect that credibility assessments of witnesses by judges have on subsequent juries. See *Philip Morris*, 141 F.Supp.2d 320 (denying admission of a judge’s statement regarding credibility of expert witness for impeachment of that expert at a subsequent trial). Although *Philip Morris* involved the credibility assessment of a judge and not the assessment of a jury, the jury’s factual finding

introduced in this case is hearsay nonetheless, and we believe, is equally prejudicial. See *U.S. Steel v. Tieco* (finding appellants were prejudiced by the admission of a previous judge's factual opinion into a subsequent trial because appellees relied on the opinion throughout the trial and advised the jury during closing argument to use the opinion to make their own credibility determinations)." *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (S.C. 2002). It is not clear whether Judge Cureton was relying on this Opinion or just mentioning it as part of the history of the case. If he was relying on it, then doing so was in error.

III. The Appellant, in this case, is seeking relief, in the form of her right to a jury trial, one of the most, if not the most important right guaranteed to the citizens of this State and this Country.

The Court, in its Order, finds that there is no real remedy here for the Appellant. The remedy sought is the right to a jury trial on the merits of the counterclaims pending against her. A jury trial allows a person accused by allegation to be judged by her peers. Right to trial by jury is hardly academic and is certainly not valueless. Respondents have asserted, in this case (in a letter written to Judge Dennis) that Respondents **elected** to deprive the Appellant of the right to trial by jury. Appellant disputes there was any such election or that any such election would be proper, or even constitutional. Plaintiff's demand for jury trial on the counterclaims was timely made. She is entitled to a trial by jury, as the Plaintiff in the *Pond* case was. It is highly improper and fundamentally unfair with novel issues involving material revisions to a punitive statute and matters of public importance not to afford the benefit of a Record on Appeal with a decision on the merits. See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

Case law provides that inquiry will always be necessary on the part of the appellate court

considering an order, which is alleged to have deprived a party of a mode of trial to which he is entitled. See *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). Public policy and the State constitution mandate preservation of the right to trial by jury inviolate. *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C. 74, 533 S.E.2d 575 (2000). In *Shea*, this Court held that the trial court improperly granted summary judgment because the construction of a statute and its application to the parties was not clear, stating “[i]f the statute’s application is not absolutely clear as a matter of law, [the] question should not be decided without fully developing the (record).” *Shea v. Dept. of Mental Retardation*, 279 S.C. 604, 611, 310 S.E.2d 819, 822 (Ct.App. 1983) (emphasis supplied), overruled on other grounds by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

CONCLUSION

The Appellant requests a review, by the Appellate Court, and reversal of the Order of May 8, 2015 pursuant to Rule 240(j) SCACR.

Respectfully submitted,

Dated 5-22-15



Chalmers C. Johnson
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11

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

Appellate Case No.: 2015-000187

RECEIVED

JUL 24 2015

SC Court of Appeals

C. Holmes, M.D.

Appellant,

v.

East Cooper Community Hospital, Inc.
and Tenet HealthSystem Medical, Inc.

Respondents.

Respondents' Return to Petition for Rehearing

Appellant has petitioned for rehearing of this Court's dismissal of her notice of appeal. Rule 221 of the South Carolina Appellate Court Rules (hereinafter "SCACR") allows an aggrieved party to petition for rehearing only when the Court has overlooked or misapprehended the facts or law. (SCACR 221). Respondents East Cooper Community Hospital, Inc., and Tenet HealthSystem Medical, Inc., (hereinafter collectively referred to as "Respondents") submit that nothing has been overlooked or misapprehended by this Court. *See Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001). Based on the foregoing, and as further developed herein, Appellant's "Rule 240(j), SCACR, Motion" should be DENIED.

I. The Court's dismissal was based on and supported by evidence in the record of which Appellant had notice.

Appellant argues the Order of dismissal herein exceeds the scope of Respondents' motion to dismiss and, therefore, should be reversed. Her motion cites several cases she alleges to be supportive of this argument. Appellant either misunderstands these cases or is mischaracterizing them. For instance, in one of the cases cited, *Wells Fargo Bank, N.A., vs. Smith*, 398 S.C. 487, 730 S.E.2d 328 (Ct. App. 2012), the Court of Appeals reversed the decision of a Master because the decision was based on "findings of fact and conclusions of law based on documents and information not in evidence." *Id.* at 499. The Court stated "[t]he order...had the effect of granting judgment and making findings of fact based on information not admitted or decided by the pleadings. In short, the Master's order...makes findings of fact and rules that a cause of action is meritless without evidentiary support, constituting an abuse of discretion." *Id.*

The *Wells* holding is inapplicable to the instant controversy as the Order of dismissal herein is supported by findings of fact and evidence in the record. Appellant's notice of appeal was dismissed "because no actual controversy capable of specific relief exists." (May 8, 2015, Order at p. 2, citing *Sloan v. Greenville Cnty*, 380 S.C. 528, 535, 670 S.E.2d 663, 667 (Ct. App. 2009)). While Respondents' motion to dismiss concentrated on the many procedural deficiencies in Appellant's notice of appeal, it also contained information, evidence, filings, orders, and other documents outlining the procedural history of the case upon which the Court concluded there to be no pending controversy capable of specific relief. (See Respondents' Motion to Dismiss and Exhibits). The Order specifically references this evidence, stating "because summary judgment has been granted, affirmed on

appeal, and the remittitur sent down, there is no longer an existing controversy.” (May 8, 2015, Order at p. 2). Because the Order of dismissal is supported by findings of fact based on evidence in the record, it does not exceed the scope of the motion to dismiss and reversal is not warranted.

Likewise, Appellant also mistakenly cites *Skinner vs. Skinner*, 257 S.C. 544, 186 S.E.2d 523 (1972), in support of her argument that the Court exceeded the scope of Respondents’ motion to dismiss. In *Skinner*, the South Carolina Supreme Court reversed the trial court’s order vacating a prior order because the motion giving rise to the controversy did not request the relief granted. The Court stated “[o]ne of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefore. Ordinarily a court may not grant *relief* beyond the limits or scope of such notice. *Skinner* at 549 citing *Ford vs. Calhoun*, 53 S.C. 106, 30 S.E. 830 (1898); *Coogler v. California Ins. Co.*, 192 S.C. 54, 5 S.E.2d 459 (1939); *Wildhagen v. Avers*, 225 S.C. 384, 82 S.E.2d 609 (1954). (Emphasis added) Here, the relief requested in Respondents’ motion to dismiss was dismissal of Appellant’s notice of appeal. The Order of dismissal granted the relief requested and nothing more. Therefore, it cannot be said that Appellant did not have notice of the relief at stake or that the Court exceeded the scope of the motion.

Appellant also argues that *Langley v. Boyter*, 284 S.C. 162, 325 S.E.2d 550 (Ct. App. 1984) stands for the proposition that appellate courts “do not answer questions they are not asked.” (See Appellant’s “Rule 240(j) SCACR Motion” at p. 3). In *Langley*, the Court of Appeals analyzed contributory negligence as opposed to comparative negligence and discussed, in the context of the *stare decisis* doctrine, whether the Supreme Court had charged it with this responsibility, ultimately finding that it had. In the instant matter, the

question asked of the Court was whether Appellant's appeal was appropriate for dismissal. The Court answered this question in the affirmative with its Order of dismissal. Under these circumstances, it cannot be said that the Court took unilateral action, granted relief, or answered a question it was not asked.

After several pages of argument to the contrary, Appellant specifically admits in her motion that the Court "has the authority to address issues not raised by the parties...." (See Appellant's "Rule 240(j) SCACR Motion" at p. 3). She claims, however, that the proper method for doing so is for the Court to first make its own motion affording the parties notice of said issues. (Id). Appellant cites no legal authority for this proposition. Regardless, and as set forth above, Respondents' motion to dismiss did address and attach evidence, filings, orders, and other documents outlining the procedural history of the case, upon which the Court concluded "no actual controversy capable of specific relief exists." Indeed, the findings of fact stated in the Court's Order are the granting of summary judgment, the affirmation of same in the previous appeal of this very case, and the remitter having already been sent to the trial court. (May 8, 2015, Order at p. 2). The Appellant does not allege that she was unaware of these facts and issues upon which the dismissal was based. Therefore, no additional notice by way of motion by the Court or otherwise was required.

Under the aforementioned circumstances, it cannot be said that Appellant did not have notice or was not aware of the issues giving rise to the dismissal of her appeal, or that the Order of dismissal exceeded the scope of Respondents' motion to dismiss.

II. The Court did not misapprehend or overlook any fact or law regarding the trial court's dismissal of this case.

A. This case was dismissed by the trial court by way of summary judgment.

Appellant argues the Court misapprehended "the fact that the case was never actually adjudicated or considered on its merits." (See Appellant's "Rule 240(j), SCACR, Motion" at p. 3). She claims the case was dismissed "on a motion for lack of jurisdiction, rather than summary judgment." (See Appellant's "Rule 240(j) SCACR Motion" at p. 3). This is a blatant misstatement and one that has already been specifically rejected by the South Carolina Supreme Court in this very case.

The record shows that the trial court dismissed this case on motion for summary judgment by way of a "Summary Judgment Order." (See Exhibit 3 to Respondents' Motion to Dismiss, Summary Judgment Order of The Honorable Kristi Lee Harrington filed July 29, 2011). Contrary to Appellant's argument, the summary judgment dismissal was based on principles of res judicata and collateral estoppel, in addition to jurisdictional issues. (Id. at footnote to p. 7).

Further, the South Carolina Supreme Court has ruled that this case was dismissed by way of summary judgment. In its Opinion, the South Carolina Supreme Court found "Appellant lost at the summary judgment stage" and affirmed the Summary Judgment Order. (See Exhibit 6 to Respondents' Motion to Dismiss, South Carolina Supreme Court Opinion No. 27370 filed March 26, 2014, at p. 12) It further found Appellant's incessant reference to Respondents' motion for summary judgment as a motion to dismiss to be a mischaracterization; contradictory to the record; and a "veiled effort" to make the facts conform to law distinguishable from Appellant's case. (Id. at pp. 9-10). That Appellant's

case was dismissed in the trial court by way of summary judgment is the law of this case, established by the Supreme Court in the previous appeal of this matter. As such, there is no mistake or misapprehension of this issue by the Court.

B. There are no pending claims to be adjudicated in this matter.

Appellant argues that Respondents' counterclaims filed in the trial court were never addressed and "[t]he fact that the case was never actually adjudicated or even considered on its merits is important, and appears to have been misapprehended by the trial court." Respondents would incorporate and reference their earlier arguments under Section II(A) of this Return as to dismissal of the case on its merits by way of summary judgment dismissal. As to Appellant's arguments regarding the counterclaims, the counterclaims were addressed, adjudicated, and rendered moot by proceedings in the trial court and Appellant's previous appeal.

Appellant's motion to dismiss the counterclaims was considered by the trial court at the same time as Respondents' motion for summary judgment. (See Exhibit 7 to Respondents' Motion to Dismiss, Plaintiff's Motion to Withdraw Plaintiff's Motions to Dismiss Defendant's Counterclaims, and Exhibit 8, Transcript of Record dated October 27, 2014). After being awarded summary judgment dismissal, Respondents then elected to pursue the relief sought in their counterclaims by way of a motion for sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act (hereinafter referred to as "the Act"). (Exhibit 4 to Respondents' Motion to Dismiss, Order Awarding Sanctions). Indeed, Respondents had previously pled Appellant's violation of the Act as a counterclaim. (Id.). In response to the motion for sanctions, the trial court issued an Order Awarding Sanctions

granting Respondents the same relief sought in their counterclaims, namely attorney's fees and costs. (Id). The Order Awarding Sanctions was then affirmed by the South Carolina Supreme Court and remittitur regarding same was sent to the trial court. (Exhibit 6 to Respondents' Motion to Dismiss, South Carolina Supreme Court Opinion No. 27370 and June 13, 2014 Remittitur). These proceedings in the trial and appellate courts rendered the counterclaims moot, Respondents having been awarded the relief sought thereunder.

Because the counterclaims have been rendered moot "no actual controversy capable of specific relief exists" as to the counterclaims and the remitter issued as a result of the first appeal ended this case. (May 8, 2015, Order at p. 2; Exhibit 6 to Respondents' Motion to Dismiss, Remittitur dated June 13, 2014). Significantly, Appellant does not even argue in her motion that the aforementioned remittitur did not end this case. Instead, she merely states "remittitur is not *necessarily* dispositive" citing to cases where counterclaims were specifically preserved following summary judgment dismissal. (See Appellant's "Rule 240(j) SCACR Motion" at p. 5). As indicated above, the counterclaims herein were not so preserved but, instead, adjudicated and rendered moot by way of the trial court's Order Awarding Sanctions, affirmation on appeal, and remittitur.

C. The Order of dismissal did not rely on hearsay.

Appellant's motion questions, but fails to state with particularity, that the Court mistakenly relied on the December 2, 2009, Order of the South Carolina Supreme Court in the case *Doe vs. Duncan, et al.*, (hereinafter referred to as "the *Doe* Order") in considering dismissal of Appellant's appeal. (See Appellant's "Rule 204(j), SCACR, Motion" and Exhibit 1 to Respondents' Motion to Dismiss). Appellant states the Court "appears to have

mentioned, or possibly even be relying on” the *Doe* Order, admits that said purported reliance is “unclear”, and claims any such reliance would be an “error.” (See Appellant’s “Rule 240(j) SCACR Motion” at pp. 5-6). In an effort to support this argument, Appellant cites case law standing for the proposition that judicial statements as to the credibility of witnesses are inadmissible hearsay as they can be prejudicial to juries. Appellant’s argument in this regard, as well as the cases cited in support thereof, have no application to the instant controversy.

Initially, Appellant’s argument that the Court may or may not have relied on the *Doe* Order is insufficient to establish grounds necessary for rehearing. Rule 221 of the SCACR states a petition for rehearing “shall state with particularity the points supposed to have been overlooked or misapprehended by the court.” (SCACR Rule 221). Appellant, however, has only voiced concern of a potential misapprehension while admitting said potential misapprehension to be “unclear.” (See Appellant’s “Rule 240(j) SCACR Motion” at p. 6). Appellant’s statements of concern do not constitute points of particularity of misapprehension by the court and, therefore, they are insufficient to meet the criteria required for a petition for rehearing. (SCACR Rule 221) Appellant’s argument in this regard only demonstrates her need to grasp at straws to find a misapprehension in the Court’s order of dismissal.

Even if the Court relied on the *Doe* Order in reaching its decision, the *Doe* Order is not inadmissible hearsay. “Hearsay” is defined as “a statement...offered in evidence to prove the truth of the matter asserted.” (Rule 801, South Carolina Rules of Evidence (SCRE)). The *Doe* Order does not qualify as hearsay under the circumstances herein, or within the meaning of the case law cited in Appellant’s motion. While containing certain

comments Appellant appears to believe derogatory and prejudicial regarding her litigation practices, the *Doe* Order also contains specific instructions to the Clerks of Court of this state to reject any pro se filings attempted by her relating to her medical staff privileges as East Cooper Hospital. (Exhibit 1, Respondents' Motion to Dismiss, December 2, 2009, Order). Here, Appellant attempted several pro se filings giving rise to this very appeal. (See Respondents' Memorandum of Law in Support of Motion to Dismiss Appeal at pp. 3-10). In their motion to dismiss, Respondents offered the *Doe* Order not as proof of or commentary on Appellant's litigious nature as addressed by the Supreme Court, but to show that she was in violation of the procedural instructions set forth therein which have a direct bearing on this appeal. Arguing that reference to the *Doe* Order is inadmissible hearsay would preclude any party from seeking enforcement of the very instructions outlined by the Supreme Court contained therein.

In addition, the *Doe* Order is a public record excluded from the hearsay rule. SCRE Rule 803(8) excludes from the hearsay rule "[r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report...." The *Doe* Order, issued by the Supreme Court, a public institution, gives specific instructions to the Clerks of Court of this state regarding their activities and duties regarding future filings attempted by Appellant. As such, the *Doe* Order is a public record and qualifies as an exception to the hearsay rule. (SCRE Rule 803(8)).

Lastly, there is no indication that the Court relied on the *Doe* Order to find Appellant's notice of appeal appropriate for dismissal. The Order clearly states that

dismissal was granted on the grounds of mootness. (May 8, 2015, Order at p. 2). The Order merely references the *Doe* Order in discussing the trial court's rejection of Appellant's pro se Rule 59(e) motion regarding one of the orders on appeal, and explains the pertinent language of said Order in a foot note. This reference is insufficient to establish that the Court relied on the *Doe* Order in arriving at its decision to dismiss this appeal, or that doing so was a misapprehension or mistake of law or fact as required by SCACR 221.

III. The Court did not overlook or misapprehend Appellant's alleged "remedy" for a jury trial on the merits of the counterclaims.

Appellant does not have the right to a jury trial on claims that have been adjudicated and rendered moot. As fully discussed in the preceding Section II(B) of this Return, Respondents' counterclaims were adjudicated and rendered moot by way of the Order Awarding Sanctions which granted the same relief sought by Respondents in their counterclaims. For purposes of judicial economy, Respondents reference and incorporate said arguments under the instant Section of this Return.

Appellant cites no statutory or legal authority granting the right to trial by jury on claims that have been adjudicated and rendered moot, and on which the filing party has already been granted relief. She only cites cases in which the parties specifically preserved their counterclaims pending appeal of other issues. Such was not the case in the instant matter. Following the trial court's granting of summary judgment, Appellants had the right to and elected to seek the same relief originally sought in their counterclaims by way of a Motion for Sanctions pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act. (S.C. Code Ann. Section 15-36-10) (hereinafter referred to as "the Act") Again, and as indicated above, Respondents had pled Appellant's violation of the the Act as a

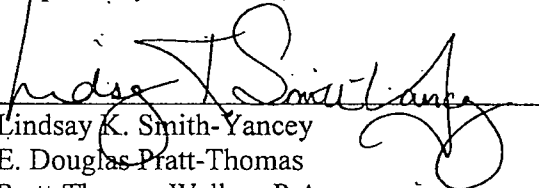
counterclaim. There is no right to jury trial under this Act. (Id.) Once the relief sought by Respondents was secured by way of the Order Awarding Sanctions, Appellant's counterclaims were rendered moot and were not preserved pending appeal of the trial court's summary judgment and sanctions orders.

Even in the event the counterclaims herein have not been rendered moot, which is expressly denied, the notion that a party has the right to a jury trial on claims adversarial to them which the filing party has abandoned for another mechanism of remedy, is without legal authority, precedent, or reason. There has been no misapprehension of a "remedy" to Appellant here. Appellant's arguments in this regard solely blatant and nonsensical efforts to keep this matter alive so that she may continue her agenda of litigation and harassment against these Respondents.

Conclusion

Appellant disagrees with the decision reached by this Court but has failed to demonstrate that the Court overlooked or misapprehended any of the issues relevant to the dismissal of her appeal. Consequently, Respondents respectfully request Appellant's "Rule 240(j), SCACR, Motion" seeking rehearing be DENIED.

Respectfully Submitted,



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#12

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FAX TO: S.C. Court of Appeals, Clerk of Court 803.734.1839

From: Chalmers Johnson

Date: July 30, 2015

Re: CHolmes v Tenet et al App. Case No. 2015-000187

Number of pages, including cover: 8

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JUL 30 2015

SC Court of Appeals

Message:

Please see attached Cover letter. Thank you.

Chalmers C. Johnson

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

App. Case No. 2015 - 000187

C. Holmes, M.D.

Appellant,

v.

East Cooper Community Hospital, Inc.; and
Tenet HealthSystem Medical, Inc.,

Respondents.

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JUL 30 2015

SC Court of Appeals

REPLY

Pursuant to Rule 240(j), SCACR, Appellant files and serves this Reply. Any party aggrieved by an order of an individual justice or judge may seek review of that order by the appellate court. Rule 240(j), SCACR. *See Toal et al., Appellate*

Practice in South Carolina (2002), p. 259, regarding former Rule 224(j), SCACR, currently Rule 240(j), SCACR. Appellant has sought a review of the individual order filed May 8, 2015. This was a motion, rather than a Petition for Rehearing. Respondent has failed to recognize this, and has therefore argued under the incorrect standard of review in its response.

The Appellant asks the Court to note that the Clerk of Court has made a determination as to the adequacy of the notice of appeal. Determination of compliance with the South Carolina Appellate Court Rules routinely made prior to filing and docketing all appeals. "The clerk of the appellate court shall insure compliance with this Rule before accepting any papers for filing." Rule 267, SCACR. Respondents have admitted timely notice of appeal in their memorandum stating: "On January 20, 2015, Appellant served Respondents with notice of appeal." To the extent respondents have requested amended notice of appeal, amended notice of appeal is filed and served. This Honorable Court should uphold the Clerk of Court's initial determination and deny Respondents' motion to dismiss.

There are currently three counterclaims pending for which Appellant has demanded trial by jury. Controlling precedent provides, "It has been decided by this Court too often to require citation of the cases that a plaintiff cannot, by framing his complaint so that his action would, under the old procedure, be one

cognizable only by a court of equity, select the forum in which the issue shall be tried, and thereby defeat a defendant's constitutional right of trial by jury."

Southern Ry v. Howell, 89 S.C. 391, 71 S.E. 972 (S.C., 1911). Appellant's main concern, in this appeal, spelled out in the Initial Brief of Appellant, which has already been filed, is addressing her right to a jury trial on counterclaims which were never actually dismissed by any Order of the Court in this case.

Respondents' assert they elected to deprive the Appellant of the right to trial by jury. There is no record of the Respondents ever actually making any such election. There is no Order in the record allowing such a thing. Appellant's demand for jury trial in the Circuit Court was timely made. The SCFCPSA does not specifically mention any such election. Appellant is unaware of any Judicial Opinion interpreting the statute as saying any such thing. If there is an issue of statutory construction and interpretation here, it is a novel one, and one that would be important to clarify for future litigants and judges in South Carolina.

Respondents, in their Reply, did not address the case of *Pond Place Partners*, which establishes controlling precedent recognizing trial by jury on the FPA counterclaim which Respondents themselves pled. "We subsequently affirmed the trial court in our unpublished opinion *Poole, et. al v. Pond Place Partners, Inc., et. al*, Op. No. 1997-UP-129 (S.C. Sup.Ct.App. filed Feb. 12, 1997), *cert. denied* (Jan. 12, 1998). (*Remittitur was sent down.*) Thereafter, the Pond Place group

prosecuted their actions for slander of title and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act (*FPA*). After a multi-day trial, the jury found only Poole liable for slander of title and awarded actual and punitive damages to Pond Place Partners and Edwin P. Collins. Poole appeals. We reverse." *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (S.C. App., 2002) (emphasis supplied). After remittitur in that case, the pending counterclaims (including the *FPA* counterclaim) were heard by the jury. Based on this fact pattern, it appears that there is some precedent for a party's right to a jury trial on counterclaims existing after a remittitur.

Respondents assert that Appellant's case was dismissed on Summary Judgment. Appellant points out that it was actually dismissed for lack of subject matter jurisdiction, under Rule 12(b). Although the case was dismissed "at the summary judgment stage" it was not actually a Rule 56 dismissal. Should this be an issue upon which the decision regarding a motion to dismiss may turn, the Record on Appeal, which would include the trial court's order of dismissal expressly explaining the dismissal for lack of subject matter jurisdiction, seems like something that should be reviewed before a decision is made. Case law directs substance over form. Rule 41(b), SCRCF, provides that "a dismissal under this subdivision and any dismissal not provided for in this rule, **other than a dismissal for lack of jurisdiction**, operates as an adjudication on the merits." Rule 41(b),

SCRCP (emphasis supplied). Dismissal is in the nature of a discontinuance and is not an adjudication on the merits. *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983). "If a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the court should treat the motion as if it were a Rule 12(B)(1) motion." *Chew v. Newsome Chevrolet, Inc.*, 315 S.C. 102, 104, 431 S.E.2d 631, 632 (Ct. App. 1993). Again, if this issue is deemed to be integral to the Court's decision on a motion to dismiss, at this point, a record on Appeal would be beneficial and the motion to dismiss should be denied.

CONCLUSION

The Appellant respectfully requests that the Court review the Order dismissing this case and reverse it or remand the issue so that the Plaintiff can be provided with an opportunity to be heard on the issues in the Order which were not raised in the Respondents' motion before the Court.

Respectfully submitted,

Dated 7-30-15



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#13

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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September 21, 2015

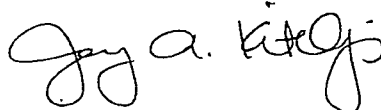
Mr. Chalmers Carey Johnson, Esquire
1029 Bay Street
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Port Orchard WA 98366

Re: Dr. Cynthia Holmes v. East Cooper
Appellate Case No. 2015-000187

Dear Counsel:

We received your second petition for rehearing received on September 17, 2015 in the above referenced appeal. Your petition for rehearing was denied on September 2, 2015. Accordingly, no further action will be taken on your second petition for rehearing, pursuant to Rule 221(c), SCACR.

Very truly yours,


CLERK

cc: Erskine Douglas Pratt-Thomas, Esquire
Lindsay K Smith-Yancey, Esquire
Daniel Simmons McQueeney, Jr., Esquire