THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

W. JEFFREY YOUNG, Circuit Court Judge

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Case No. 2011-CP-21-00841

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**Nettles Turbeville and Reddick, E. LeRoy Nettles, Sr., Elbert K. Turbeville, Larry G. Reddick, the McNair Law Firm, Celeste T. Jones,** Respondents,

v.

**Pee Dee Health Care, P.A. [PDHC], Tony R. Megna, Josiah S. Matthews, M.D., Alexander H. Cohen, M.D., HTR Management, LLC, MCHG, LLC [MCHG], Katie Noyes, Mark S. Callahan, Warren Mark Matthews, Sr., Benjamin R. Matthews, Eileen Segers, Mary C. Megna, Kim Weatherford, and Barbara Stokes, Kim Munn,** Appellants.

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NOTICE OF APPEAL

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Pee Dee Health Care, P.A., et al., appeals the order of the Honorable W. Jeffrey Young dated August 27, 2012. Appellant received written notice of entry of this order August 28, 2012.

September 26, 2012.

s/ Aimee J. Zmroczek
Aimee J. Zmroczek
1001 Washington Street, Ste 207
Columbia, South Carolina 29201
(803) 400-1918
*Attorney for Appellants*

Other Counsel of Record:
Cheryl D. Shoun
Nexsen Pruet
205 King Street, Suite 400
Charleston, SC 29401

Bradish Waring
Nexsen Pruet
205 King Street, Suite 400
Charleston, SC 29401

M. Craig Garner, Jr.
McNair Law Firm
1221 Main Street, Suite 1800
Columbia, SC 29201

Robert E. Stepp
Sowell, Gray, Stepp & Lafitte, LLC
1310 Gadsden Street
Columbia, SC 29201

William H. Jordan
Sowell, Gray, Stepp & Lafitte, LLC
1310 Gadsden Street
Columbia, SC 29201

Lawrence Orr
Orr, Elmore & Ervin, LLC
PO Box 2527
Florence, SC 29503

G. Murrell Smith, Jr.
Lee, Erter, Wilson, James, Holler & Smith, LLC
PO Box 580
Sumter, SC 29150

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PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the following counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on September 26, 2012, addressed as follows:

Cheryl D. Shoun
Nexsen Pruet
205 King Street, Suite 400
Charleston, SC 29401

Bradish Waring
Nexsen Pruet
205 King Street, Suite 400
Charleston, SC 29401

M. Craig Garner, Jr.
McNair Law Firm
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Columbia, SC 29201

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Sowell, Gray, Stepp & Lafitte, LLC
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William H. Jordan
Sowell, Gray, Stepp & Lafitte, LLC
1310 Gadsden Street
Columbia, SC 29201

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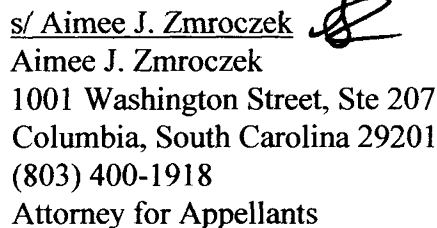
Lawrence Orr
Orr, Elmore & Ervin, LLC
PO Box 2527
Florence, SC 29503

G. Murrell Smith, Jr.
Lee, Erter, Wilson, James, Holler & Smith, LLC
PO Box 580
Sumter, SC 29150

September 26, 2012.



s/ Aimee J. Zmroczek
Aimee J. Zmroczek
1001 Washington Street, Ste 207
Columbia, South Carolina 29201
(803) 400-1918
Attorney for Appellants

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65679

# A. J. Z. Law Firm, LLC


1001 Washington Street, Suite 207
Columbia, South Carolina 29201
Phone: (803) 400-1918
Fax: (803) 403-8005

**Aimee J. Zmroczek, Attorney**
(803) 400-1918
ajzlawfirm@gmail.com

Christina Metze, paralegal
(803) 256-1268 then press 3
christina.ajzlawfirm@gmail.com


September 26, 2012

The Honorable Tanya A. Gee
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: RE: Pee Dee Health v. Nettles, et al
Case No.: 2011-CP-21-00841

Dear Ms. Gee:

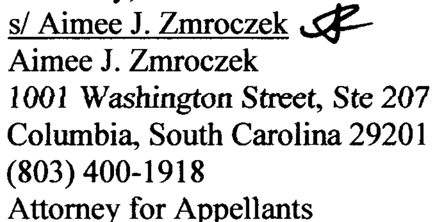
Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

(1) Proof of service of the notice of appeal on the respondents.

(2) A copy of the order which is to be challenged on appeal.

(3) A filing fee of $100.

Sincerely,




Aimee J. Zmroczek
*1001 Washington Street, Ste 207*
Columbia, South Carolina 29201
(803) 400-1918
Attorney for Appellants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A. J. Z. Law Firm, LLC

1001 Washington Street, Suite 207
Columbia, South Carolina 29201
Phone: (803) 400-1918
Fax: (803) 403-8005

**Aimee J. Zmroczek, Attorney**
(803) 400-1918
ajzlawfirm@gmail.com

Christina Metze, paralegal
(803) 256-1268 then press 3
christina.ajzlawfirm@gmail.com

cc: with attachments

Cheryl D. Shoun
Nexsen Pruet
205 King Street, Suite 400
Charleston, SC 29401

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Nexsen Pruet
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Robert E. Stepp
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1310 Gadsden Street
Columbia, SC 29201

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William H. Jordan
Sowell, Gray, Stepp & Lafitte, LLC
1310 Gadsden Street
Columbia, SC 29201

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PO Box 2527
Florence, SC 29503

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G. Murrell Smith, Jr.
Lee, Erter, Wilson, James, Holler & Smith, LLC
PO Box 580
Sumter, SC 29150

FORM4

FILED 2012 AUG 27 AM 11: 18 CONNIE REEL-SHEARIN CCCP & GS FLORENCE COUNTY, SC

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

**JUDGMENT IN A CIVIL CASE**
**CASE NUMBER 2011CP2100841**

| | | | |
|---|---|---|---|
| **Warren Mark Matthews Sr** | **Pee Dee Health Care PA** | **Nettles Turbeville And Reddick** | **E Leroy Nettles Sr** |
| **Pdhc** | **Tony R Megna** | **Elbert K Turbeville** | **Larry G Reddick** |
| **Josiah S Matthews** | **Alexander H Cohen** | **Mcnair Law Firm** | **Celeste T Jones** |
| **Htr Management Llc** | **Mchg Llc** | **Lower Florence Hospital District** | **Scott W Askins** |
| **Mchg** | | **James H Clarke** | |
| | **PLAINTIFF(S)** | | **DEFENDANT(S)** |

| | |
|---|---|
| **Submitted by:** | **Attorney for:** ☐ Plaintiff ☐ Defendant ☐ 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.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: ____________

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: ____________

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: ____________

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:** ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

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**ORDER INFORMATION**

**This order** ☐ ends ☐ does not end the case.

Additional Information for the Clerk:

____________

____________

CERTIFIED: A TRUE COPY
Connie Reel Shearin
CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.

CPFORM4M
SCCA SCRCP Form 4C (Revised 12/2011)

| INFORMATION FOR THE JUDGMENT INDEX<br>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)** |
| | | |
| | | |

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.**

8/27/2012

**Circuit Court Judge** **Judge Code** **Date**

## For Clerk of Court Office Use Only

This judgment was entered on **August 24, 2012**, and a copy mailed first class or placed in the appropriate attorney's box on **August 27, 2012**, to attorneys of record or to parties (when appearing pro se) as follows:

**Warren Mark Matthews Sr**
201 Cashua Street, Darlington, SC 29532
**Aimee Jendrzejewski Zmroczek**
1001 Washington Street, Suite 207, Columbia, SC 29201

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**Robert E. Stepp**
PO Box 11449, Columbia, SC 29211
**Lawrence B. Orr**
PO Box 2527, Florence, SC 29503
**Bradish J. Waring**
PO Box 486, Charleston, SC 29402
**Matthew Brunson Roberts**
PO Drawer 2426, Columbia, SC 29202
**Sabrina G Obrien**
2225 Black Oak Ct., Mount Pleasant, SC 29466
**Kathy Price Elmore**
PO Box 2527, Florence, SC 29503
**G. Murrell Smith Jr.**
PO Box 580, Sumter, SC 29151

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Connie Reel-Shearin

**Connie Reel-Shearin - Clerk of Court**

FILED

2012 AUG 24 AM 9: 55

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT
CASE NO.: 2011-CP-21-841

Pee Dee Health Care, P.A., et al.,

Plaintiffs,

vs.

Nettles, Turbeville & Reddick, et al.,

Defendants.

**ORDER GRANTING MOTION OF NETTLES, TURBEVILLE AND REDDECK, E. LEROY NETTLES, SR., ELBERT K. TURBEVILLE AND LARRY G. REDDECK TO DISMISS SECOND AMENDED COMPLAINT**

This matter is before the Court on Nettles, Turbeville and Reddeck, E. Leroy Nettles, Sr., Elbert K. Turbeville and Larry G. Reddeck's (herein after "Nettles Defendants") motion to dismiss the Second Amended Complaint in the captioned action. A hearing on this motion, as well as the motions to dismiss filed by the remaining defendants, was held on July 11, 2012, and was attended by counsel for all parties. At the hearing, the Court heard arguments from all parties on their respective motions to dismiss. At the conclusion of the hearing, the Court stayed this action as to the non- lawyer Defendants pending resolution of previously filed litigation to which those Defendants and some or all of the Plaintiffs in the present case are parties. The Court took under advisement the motion to dismiss filed by the Nettles Defendants. For the reasons set forth below the motion of the Nettles Defendants to dismiss the Second Amended Complaint was granted with prejudice.

CERTIFIED: A TRUE COPY

CLERK OF COURT C.P & G.S
FLORENCE COUNTY, S.C.

## Facts and Procedural History

There is a long procedural history of other litigation involving some or all of the parties to the present case. The Court takes judicial notice of all public records regarding that prior litigation. A brief summary of the earlier cases based upon the public records relating thereto is instructive with respect to the issues that are presented in the present motion to dismiss.

### A. The Prior Actions.

The Hospital District was created by Act No. 1095, 1962 S.C. Acts 2683-90, as amended by Act No. 199 of 2005. The Hospital District operates the Lower Florence County Hospital in Lake City. The Lake City Community Hospital District Board (the "Hospital District Board") is the governing body of the Hospital District.

Pee Dee Healthcare, PA ("PDHC") is a medical practice with facilities located in Darlington and Olanta, South Carolina. The principals of that entity are Tony R. Megna, Josiah S. Matthews, MD, and Alexander H. Cohen, MD. In late 2006 or early 2007, representatives of PDHC and the Hospital District Board held discussions about PDHC taking over the operation of the Lake City Community Hospital. On March 23, 2007, MidCarolina Hospital Group, LLC ("MCHG"), a for-profit LLC, was formed. MCHG's membership is comprised of PDHC's principals, and some staff physicians of the Lake City Hospital.

On March 26, 2007, the Hospital District Board and MCHG entered into a lease-purchase agreement, which leased facilities of the hospital and sold its remaining assets to MCHG. On January 1, 2008, new directors took office on the Hospital District Board. That board executed a second lease-purchase agreement dated November 25, 2008, which voided the March 2007 lease-purchase agreement.

Doctors Albert D. Mims, Ernest M. Atkinson, Benjamin Wade Lamb, and David W. Moon (collectively, the "Physicians") are members of the Lake City Community Hospital medical staff. In November or December 2007, the Physicians entered into Physician-Employment Agreements with MCHG under which the Physicians became employees of MCHG and were to provide medical services to the hospital. The Physicians also executed Ownership and Profit-Sharing Agreements under which they became part-owners of MCHG and were to share in its profits.

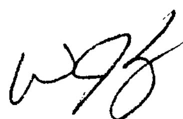
Tony Megna and Ben Matthews operated the hospital from March, 2007 to April 4, 2008, with Megna serving as the hospital's CEO and Matthews as its general counsel. On April 4, 2008, the Hospital District and the Physicians filed suit against MCHG, Megna and Matthews in the Court of Common Pleas for Florence County, Calendar No. 2008-CP-21-706. In that action, the Hospital District sought a declaration that the 2007 and 2008 lease-purchase agreements were null and void because, while the agreements purported to transfer property and assets of the Hospital District to MCHG, a statutorily required referendum to approve the transfer had not occurred. The hospital further contended that the required South Carolina Department of Health and Environmental Control Certificate of Need for the transfer had not been obtained. The Physicians sought a declaration that the Physician-Employment Agreements and the Ownership and Profitship Sharing Agreements were null and void to the extent that they involved MCHG. The complaint set forth additional causes of action for rescission and reformation of the various agreements. The complaint also sought an injunction and a temporary restraining order restraining MCHG, Megna and Matthews from exercising possession and control over the Hospital District's assets and property and from participating in the operation of the hospital.

The Honorable Thomas B. Russo issued a TRO, which was served on April 4, 2008, removing MCHG from the operation of the hospital.

In that action, Leroy Nettles represented the Hospital District, and Celeste T. Jones and McNair Law Firm ("the McNair Defendants") represented the Physicians. MCHG, Megna and Matthews moved to dismiss or stay the action on the basis that all of the agreements contained arbitration provisions. They also filed a motion to disqualify the McNair Defendants from representing the Physicians, claiming a conflict of interest because of prior representation of MCHG. This motion was denied on February 23, 2009, on the basis that no evidence showed an attorney-client relationship between MCHG and either Jones or McNair Law Firm, and there were no grounds for disqualification. No appeal was taken from the order denying that motion.

On May 1, 2008, the Hospital District and MCHG entered into a Preliminary Separation and Unwinding Agreement to provide for the unwinding of the lease-purchase agreements. On May 6, 2008, Chief Justice Toal entered an order assigning the Honorable George C. James, Jr. as chief administrative judge for the administration of that case and for preparing it for trial.

On July 22, 2008, Judge James entered an order granting in part the motion to compel arbitration. Judge James held that the Physicians' claims relating to the Physician-Employment Agreements and the Ownership and Profit-Sharing Agreements contained binding arbitration provisions. Judge James refused to compel arbitration of the Hospital District's claims pertaining to the lease-purchase agreements since they did not contain binding arbitration provisions. Judge James stayed the arbitration of the Physicians' claims pending the resolution of the Hospital District's claims.



On August 21, 2008, the Hospital District and the Physicians filed an Amended Summons and Complaint asserting the same causes of actions as set forth in the original complaint plus a cause of action for an accounting of the financial operations of the hospital and a disgorgement of any funds that were improperly paid out. On September 22, 2008, MCHG, Megna and Matthews filed their answer and counterclaims. MCHG counterclaimed for breach of contract on the part of the Hospital District in obtaining the temporary restraining order and interfering with MCHG's rights to operate the hospital. It also asserted a counterclaim for breach of contract accompanied by fraudulent act, the alleged fraudulent act being associated with obtaining the TRO.

On October 13, 2008, four additional suits were filed. The first was brought by Mary Megna against the Hospital District, C.A. No. 2008-CP-21-1965. In that action, Mrs. Megna sued to recover $100,000 that she contended was loaned to the Lake City Community Hospital.

The second action was filed by HTR Management, LLC against Lake City Physicians Land Holding, LLC and Mims, Atkinson, Lamb, and Moon, C.A. No. 2008-CP-21-1966. The action asserted claims for fraud, negligent misrepresentation, and rescission of a deed to property located in Kingstree, South Carolina.

The third action was filed by Pee Dee Health Care, Tony R. Megna, Josiah S. Matthews, MD, and Alexander H. Cohen, MD against Mims, Atkinson, Lamb, Moon, and Kristopher R. Crawford, MD, C.A. No.: 2008-CP-21-1967, alleging that actions by those physicians prompted or assisted the Hospital District in suing to terminate its lease-purchase agreement.

The fourth suit was brought by Pee Dee Health Care, P.A. against the Hospital District, C.A. No. 2008-CP-21-1968. In that suit, PDHC alleged causes of action for breach of contract related to the operation of rural health care centers in Olanta and Darlington owned by PDHC, and rural health care centers in Johnsonville and Lake City owned by the Hospital District.

On April 9, 2008, Judge James issued a joint scheduling order in all five pending cases. On December 4, 2009, pursuant to Rule 40(j), SCRCP, the court entered a consent order striking the five cases from the roster. That order provides that all orders, agreements, consents, and appointments previously issued should remain in full force and effect, and that Judge James would retain continuing jurisdiction over any matters related to those cases.

On December 2, 2010, a motion was made to restore all five cases to the active roster. The order restoring the cases was issued on April 23, 2012.

**B. The Present Action.**

Plaintiffs filed the instant action on April 1, 2011. The original Complaint was not served on any of the Defendants. On June 29, 2011, Plaintiffs filed an Amended Summons and Complaint and subsequently served all Defendants. Plaintiffs filed a Second Amended Summons and Complaint on May 30, 2012. Although neither the Nettles Defendants nor the other McNair Defendants named in the present case were parties to any of the five suits, the prior actions included claims against their clients challenging the manner in which the suit filed by the Physicians and the Hospital District was conducted.

**Legal Standard**

A motion to dismiss a claim pursuant to Rule 12(b)(6), SCRCP must be based "solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). A court may also consider, however, any extrinsic materials of which it can take judicial notice. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (holding a court may "consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular . . . matters of which a court may take judicial notice."). A motion to dismiss should be granted if the facts and inferences therefrom would not entitle a plaintiff to "any relief on any theory of the case." *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 603 (1995). "'The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.'" *Doe*, 373 S.C. at 395, 645 S.E.2d at 247-48 (quoting *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)).

In applying this standard to the allegations of the Second Amended Complaint, as well as other materials that are properly before the Court, the Court grants the Nettles Defendants' Motion to Dismiss for the following reasons.

**I. To the extent any cause of action set forth in Plaintiffs' Second Amended Complaint is based on the Rules of Professional Conduct, those causes of action must be dismissed because the Rules of Professional Conduct do not, as a matter of law, create any private rights of action.**

Several of Plaintiffs' causes of action against the Nettles Defendants are based on the South Carolina Rules of Professional Conduct. For example, in their second cause of action for rescission, Plaintiffs contend that at the time of the execution of the January 2008 lease agreement, the Nettles Defendants were also closing several real estate purchases for certain

Plaintiffs in violation of an alleged "duty of loyalty as required by Rule 407, Rule 1.7, SCACR." (Second Am. Compl. ¶ 210(a), (b).) In their fifth cause of action for alleged breach of fiduciary duties, Plaintiffs allege that Defendants "violated their legal, contractual and ethical obligations of undivided and collective loyalty as well as their fiduciary duties to Plaintiffs." (*Id.* ¶ 231.) In their sixth cause of action for aiding and abetting breaches of fiduciary duties and seventh cause of action for alleged interference with contractual relations, Plaintiffs incorporate "[t]he Defendant attorneys' ethical responsibilities and the breaches thereof . . . ." (*Id.* ¶¶ 238, 245, 251.) In their tenth cause of action, Plaintiffs recite a number of rules the Defendants allegedly breached. (*Id.* ¶ 268(a)-(d)). Finally, in their eleventh cause of action for civil conspiracy, Plaintiffs specifically reference the Rules of Professional Conduct and allege the following against Defendants Nettles and Jones:

> That the foregoing evidences Nettles and Jones conspired to take, actually took and continue to take, actions that were purposely designed to provide the court with less than the information required under Rule 407, Rules 1.17 and Rule 407, Rule 3.3, to deliberately deceive the court, and to violate their fiduciary duties to Plaintiffs because of (a) the heightened legal responsibilities of Rule 3.3 and (b) the attorney-client relationship Plaintiffs had with the Nettles Law Firm. In any and all events, Defendants Nettles and Jones knowingly failed to provide information to the court and the Plaintiffs as detailed hereinabove in violation of their ethical responsibilities and the breaches thereof, as stated hereinabove that are incorporated herein by reference.

(*Id.* ¶ 277(f).)

The South Carolina Rules of Professional Conduct "are not designed to be a basis for civil liability." Rule 407, scope ¶ 7. The fact that the Rules of Professional Conduct may be a basis "for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule." *Id.* Thus, to the extent that Plaintiff's fifth, sixth, seventh, tenth and

eleventh causes of action seek relief based on alleged violations of the Rules of Professional Conduct, they each fail to state a claim upon which relief may be granted. The Rules of Professional Conduct do not as a matter of law form the basis of a private right of action and Plaintiffs lack standing to sue under the Rules. Accordingly, Plaintiffs' fifth, sixth, tenth and eleventh causes of action must be dismissed.

**II. There is no basis for a contention that there was a conflict of interest or breach of fiduciary duty on the part of the Nettles Defendants.**

In the Second Amended Complaint the Plaintiffs allege conflict of interest and breach of fiduciary duties on the part of the Nettles Defendants. This arises out of the handling of real estate transactions involving HTR Management, LLC (HTR). HTR acquired two parcels of land in Kingstree. A partner in the Nettles firm handled the closing of the first of those parcels in December, 2007. (Second Amended Complaint, Exhibit B). Then in March, 2008, a deed was prepared by the partner in which HTR conveyed that parcel, along with another to Lake City Physicians Land Holding, LLC for a consideration of five dollars. (Second Amended Complaint, Exhibit O) There is no contention of an ongoing attorney client relationship between the Nettles Defendants and HTR nor a basis to assume that the real estate transactions were handled in anything other than a professional manner.

Any attorney-client relationship or fiduciary relationship between the Nettles Defendants and HTR ended with the execution of the deed in March, 2008. The closing of a real estate transaction does not entail the imparting of confidential information to the closing attorney. But even if it is assumed HTR conveyed confidential information, that does not give rise to a conflict of interest. HTR was not a party to the April, 2008 action by the Hospital District and Physicians or the issuance of the TRO. The Nettles Defendants representation of the Hospital District in that litigation could not constitute a breach of fiduciary duty to HTR or present a conflict of interest.

## III. The doctrine of attorney immunity bars Plaintiffs' claims against the Nettles Defendants.

In South Carolina, an attorney owes a duty of care only to his client. *Am. Fed. Bank FSB v. No. One Main Joint Venture*, 321 S.C. 169, 174, 467 S.E.2d 439, 442 (1996). Absent an independent duty to a non-client, "'an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.'" *Pye v. Estate of Dorothy T. Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006) (quoting *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986)); *Douglass, ex rel. Louthian v. Boyce*, 344 S.C. 5, 10, 542 S.E.2d 715, 717 (2001) (observing that "an attorney is immune from liability to third persons arising from the attorney's professional activities on behalf of and with the knowledge of the client, absent an *independent* duty to the third party"). (Emphasis in original).

The purpose of the doctrine of attorney immunity is "to encourage zealous representation of clients without fear of lawsuits by disgruntled opposing parties." *Hunt v. Mortgage Elec. Registration*, 522 F. Supp. 2d 749, 758 (D.S.C. 2007) (citing *Gaar*, 339 S.E.2d at 889-90). As the court of appeals observed, an attorney acting in a professional capacity is only liable, if at all, to the client and those in privity with the client:

> The attorney normally conducts the litigation solely in his professional capacity. He has no personal interest in the suit. In his professional capacity, the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities.

*Gaar*, 287 S.C. at 529, 339 S.E.2d at 889. *See also Pye*, 369 S.C. at 564, 633 S.E.2d at 509-510 (same); *Douglass v. Boyce*, 344 S.C. 5, 10, 542 S.E.2d 715, 717 (2001) (same); *Stiles v. Onorato*, 318 S.C. 297, 298-99, 457 S.E.2d 601, 602 (1995) (same); *Hunt*, 522 F. Supp. 2d at 758

(granting law firm's motion to dismiss pursuant to principles announced in *Gaar* and *Onorato*); *Fleming v. Asbil*, 42 F.3d 886, 890 (4th Cir. 1994).

This unambiguous principle of law bars the claims sought to be asserted by Plaintiffs in this case. The action about which the Plaintiffs complain all arise out of the Nettles Defendants' conduct in the representation of their client the Hospital District. This conduct was the performance of professional duties in the representation of a client and violated no independent duty to any Plaintiff.

**IV. Plaintiffs' specific causes of action**

The Plaintiffs' causes of actions in the present action are:

1. Demands for arbitration;
2. Request for rescission;
3. Estoppel by silence and equitable estoppel;
4. Breach of contract as to all contracts and agreements between Plaintiffs and Defendants;
5. Breach of fiduciary duties;
6. Aiding and abetting in breaches of fiduciary duties;
7. Aiding and abetting in breaches of contracts and leases;
8. Interference with contractual relations;
9. Fraud and misrepresentation;
10. Legal malpractice;
11. Civil conspiracy; and
12. Attorneys' fees and costs against the Hospital and the Lower County District Board.

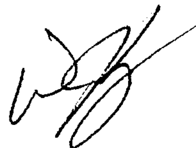
Of these causes of action, only those for estoppel by silence and equitable estoppel; breach of contract; breach of fiduciary duty; aiding and abetting a breach of fiduciary duty; aiding and abetting a breach of contract; interference with contractual relations; fraud and misrepresentation; legal malpractice; and conspiracy (nos. 3, 4, 5, 6, 7, 8, 9, 10 and 11) are pleaded against the Nettles Defendants. The foregoing legal principles and others require dismissal of each of these claims.

**A. Estoppel**

In their third cause of action styled, "estoppel by silence and equitable estoppel," Plaintiffs allege that Defendants are "equitably estopped from asserting any defense to the complaints of the Plaintiffs" due to Defendants' alleged "deceitful and fraudulent behaviors, acts and omissions." (Second Am. Compl. ¶ 223.)

It is axiomatic that estoppel is protective only; it cannot be invoked as a shield nor can it be an offensive weapon. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 345, 415 S.E.2d 384, 388 (1992). While the doctrine of equitable estoppel "may be invoked as [an] affirmative defense[] to counterclaims, [it] may *not* be asserted in a complaint as [an] offensive weapon[]." *Id.* (Emphasis added). There is no basis upon which estoppel could be used offensively to preclude the Nettles Defendants from even asserting a defense. This cause of action is dismissed as to the Nettles Defendants.

**B. Breach of Contract**



In the fourth cause of action for breach of contract, Plaintiffs allege contractual relationships with Defendants; a breach of those contracts; and damages. (Second Am. Compl. ¶¶ 225-228.)

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *Branche Builders, Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). "'The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach.'" *Branche Builders*, 386 S.C. at 48, 686 S.E.2d at 202 (quoting Fuller, 240 S.C. at 89, 124 S.E.2d at 610).

The Plaintiff's set forth no contract with the Nettles Defendants and the fourth cause of action is dismissed as to the Nettles Defendants.

**C. <u>Breach of Fiduciary Duties</u>**

The fifth cause of action is for breach of fiduciary duties and is asserted against all Defendants.

With respect to the Nettles Defendants, individually and as a law firm (collectively referred to herein as "attorneys"), Plaintiffs allege that a fiduciary duty existed between attorneys and Plaintiffs based on certain factors including,

> a. The contracts between and among the parties;
>
> b. The legal responsibilities based on the business relationships between the parties, including mutual ownership interests in MCHG;
>
> * * * *
>
> d. The special confidences the law places on attorney-client relationships . . .

* * * *

> f. The special confidence Plaintiffs placed in their legal and equitable relationships with Defendants, so that the latter, in equity and good conscience, are bound to act in good faith and with due regard to the interest of the one imposing the confidence.

* * * *

(Second Am. Compl. ¶ 230.)

As provided by Section 874 of the Restatement Second of Torts, "[o]ne standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation. Restatement (2nd) of Torts § 874 (1979). A confidential or fiduciary relationship "is founded on trust and confidence reposed by one person in the integrity and fidelity of another." *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1993). A fiduciary relationship exists "when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one imposing the confidence." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 476, 581 S.E.2d 496, 505 (Ct. App. 2003). Importantly, a fiduciary relationship "cannot be established by the unilateral action of one party." *Steele*, 295 S.C. at 295, 368 S.E.2d at 94. Rather, "[t]he other party must have actually accepted or induced the confidence placed in him." *Id.*

The only well founded allegations of an attorney-client relationship between any Plaintiff and the Nettles Defendants is that in December, 2007, a deed was prepared when HTR Management, LLC bought property in Kingstree (Second Am. Compl. Exh. B) and a second deed was prepared in March, 2008, when HTR conveyed that property and another parcel to

Lake City Physicians Land Holding, LLC for consideration of $5.00 (Second Am. Compl. Exh. O). There are no well plead facts which would support even an inference of the communication of confidential information which would relate to the institution of the suit by the Hospital District against PDHC. Accordingly, the fifth cause of action for breach of fiduciary duty fails as a matter of law, as to the Nettles Defendants.

**D. Aiding and Abetting Breach of Fiduciary Duties**

In their sixth cause of action for aiding and abetting a breach of fiduciary duty, Plaintiffs allege that "[a]ll Defendants, knowingly, actively, passively, intentionally aided and abetted the breach of fiduciary duties owed to Plaintiffs by the Lower Florence County Hospital District d/b/a Lake City Community Hospital, Mims, Watkins, Lamb, Moon and Atkinson, O'Brien, and others . . . ." (Second Am. Compl. ¶ 238.) Plaintiffs allege that "[a]lternatively, the Defendants willfully blinded themselves to the fact that they, individually and collectively, had individual, contractual and professional fiduciary duties and responsibilities to the Plaintiffs." (Id.)

To state a cause of action for aiding and abetting a breach of fiduciary duty, a plaintiff must allege and show: "(1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages." *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 449 (Ct. App. 2008).

The thrust of this cause of action as it relates to the Nettles Defendants is that by serving as an attorney for the Hospital District and filing the April, 2008 suit it aided and abetted other Defendants in breaching their fiduciary duties. As discussed above, the Nettles Defendants are immune from liability to third parties for the representation of the Hospital District. The sixth cause of action is dismissed with prejudice as to the Nettles Defendants.

**E. Aiding and Abetting Breach of Contract**

In their seventh cause of action styled, "aiding and abetting in breaches of contracts and leases," Plaintiffs contend that they "had contractual relationships with . . . Lower Florence County Hospital District d/b/a Lake City Community Hospital, Mims, Watkins, Lamb, Moon and Atkinson, O'Brien, and others . . ." and that "[t]he Defendants, by and between themselves, one to the other, all jointly and severally, aided and abetted the breach of the contracts of Lower Florence County Hospital District d/b/a Lake City Community Hospital, Mims, Watkins, Lamb, Moon and Atkinson, O'Brien, and others . . ." (Second Am. Compl. ¶¶ 243-244.)

Even assuming the truth of these allegations, South Carolina does not recognize a cause of action for aiding and abetting in breaches of contracts and leases. Accordingly, this Court dismisses the Plaintiffs' seventh cause of action as a matter of law with prejudice.

**F. Interference with Contractual Relations**

The Eighth Cause of Action is for alleged interference with contractual relations. To state a cause of action for intentional interference with a contractual relationship, a plaintiff must allege and prove: "'(1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages.'" *Collins Entm't Corp. v. Coats & Coats Rental Amusement*, 355 S.C. 125, 132, 584 S.E.2d 120, 124 (Ct. App. 2004) (quoting *Camp v. Springs Mortg. Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993)); *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). "If the complaint lacks any one of these elements, the demurrer must be sustained." *DeBerry v. McCain*, 275 S.C. 569, 574, 274 S.E.2d 293, 296 (1981).

As with the Seventh Cause of Action, the only reference to the Nettles Defendants is the incorporation of prior allegations regarding their "ethical responsibilities." (Second Am. Compl. ¶ 251) As noted above, no cause of action exists in South Carolina for alleged breaches of the

Rules of Professional Conduct. Furthermore the complained of activity was no more than the Nettles Defendants representing the Hospital District in the April, 2008 litigation, for which there is immunity. This cause of action is therefore dismissed with prejudice as to the Nettles Defendants.

### G. Fraud and Deceit

Fraud is "an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to her or to surrender a legal right." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 444 (Ct. App. 2003) (citing Black's Law Dictionary, 660 (6th ed. 1990)).

"'[T]o establish a cause of action for fraud, the following elements must be proven by clear, cogent, and convincing evidence: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury.'" *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010), reh'g denied (April 21, 2010) (quoting *Schnellmann v. Roettger*, 373 S.C. 379, 382, 645 S.E.2d 239, 241 (2007)). "The '[f]ailure to prove any element of fraud is fatal to the action.'" *Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 338 S.C. 572, 586, 527 S.E.2d 371, 378 (Ct. App. 2000), aff'd 343 S.S. 587, 541 S.E.2d 257 (2001) (quoting *Sorin Equip. Co. v. The Firm*, 323 S.C. 359, 366, 474 S.E.2d 819, 823 (Ct. App. 1996)). Thus, "[i]t is essential the nine elements of fraud be reasonably inferable from the allegations of the pleading to state a good cause of action." *Mut. Sav. & Loan Ass'n v. McKinzie*, 274 S.C. 630, 634, 266 S.E.2d 423, 425 (1980).

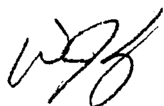
Rule 9(b) of the South Carolina Rules of Civil Procedure requires a plaintiff to set forth "the circumstances constituting fraud . . . with particularity." S.C.R.Civ.P. 9(b). Plaintiffs fail to meet this requirement because Plaintiffs fail to identify what representations, if any, were made by Defendants, how they were material, how they were false, how Plaintiffs relied, and how the falsity of the representations caused Plaintiffs to be damaged.

Moreover, "[t]he right to rely is a necessary element that must be proved in a fraud action." *Florentine Corp., Inc. v. PEDA I, Inc.*, 287 S.C. 382, 387, 339 S.E.2d 112, 114 (1985) (citing *Shockley v. Wickliffe*, 150 S.C. 476, 148 S.E. 476 (1929)). But "where there is no confidential or fiduciary relationship . . . there is no right to rely." *Florentine Corp.*, 287 S.C. at 386, 339 S.E.2d at 114. The only fiduciary relationship between the Nettles Defendants and any Plaintiffs was with HTR, solely associated with real estate transactions. That limited relationship cannot be a basis to support a contention that Plaintiffs had a right to rely upon any representations by the Nettles Defendants. Accordingly, this Court must dismiss Plaintiffs' ninth cause of action as a matter of law. *See id.* (noting that the absence of the reliance element alone "is enough to defeat the claim of fraud").

**H. <u>Legal Malpractice</u>**

In the tenth cause of action, Plaintiffs HTR Management, L.L.C. and Tony R. Megna, Josiah S. Matthews, M.D. and Alexander H. Cohen, M.D., in their individual capacities, have asserted a cause of action for legal malpractice against the Nettles Defendants. Within its cause of action for legal malpractice, Plaintiffs allege various violations of the South Carolina Rules of Professional Conduct to establish Defendants' negligence. (See Second Am. Compl. ¶ 268(a)-(d)). Plaintiffs have failed to comply with the South Carolina statutory requirement in asserting a legal malpractice cause of action by failing to provide an affidavit from an expert that establishes



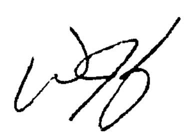


Defendants' negligence. Therefore, the tenth cause of action for legal malpractice is insufficient and must be dismissed.

In an action for damages alleging professional negligence against a professional who is licensed by, or registered with, the state of South Carolina, a plaintiff must file as part of the complaint, an affidavit of an expert witness. S.C. Code Ann. § 15-36-100(B) (Supp. 2011). The affidavit must specify at least one negligent act or omission claimed to exist and the factual basis for each claim based on the available evidence at the time of the filing of the affidavit. *Id.* An exception to the affidavit requirement exists in a narrow circumstance. The contemporaneous filing requirement of subsection (B) of the statute does not apply to any case in which the period of limitation will expire, or there is a good faith basis to believe it will expire on a claim stated in the complaint, within ten days of the date of filing. *Id.* A plaintiff must allege that because of the time frame an affidavit could not be prepared. *Id.* In such case, the plaintiff has forty-five days after the filing of the complaint to supplement the pleadings with the affidavit. Id. In this case, Plaintiffs have failed to comply with the requirements of the statute. No expert affidavit was filed with the Complaint filed April 1, 2011, nor did the Plaintiffs file an expert affidavit with the Amended Complaint or eleven months later when they filed the Second Amended Complaint.

In an attempt to establish negligence, Plaintiffs have relied upon several alleged violations of the South Carolina Rules of Professional Conduct. Without an affidavit from an expert, these assertions do not establish negligence per se. "The failure of an attorney to comply with a Rule of Professional Conduct is not evidence of negligence per se." *McNair v. Rainsford,* 330 S.C. 332, 343, 499 S.E.2d 488, 494 (Ct. App. 1998). "It is merely a circumstance that, along





with other facts and circumstances, may be considered in determining whether the attorney acted with reasonable care in fulfilling his legal duties to a client." *Id.*

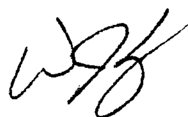
The face of the Second Amended Complaint is insufficient to establish a cause of action for legal malpractice against Nettles Defendants. The matters about which the Plaintiffs complain are not within the common knowledge of a layman. Accordingly, this Court must dismiss the tenth cause of action for failure to comply with the affidavit requirements of the code.

**I. <u>Civil Conspiracy</u>**

The Plaintiffs' eleventh cause of action is for Civil Conspiracy. Under South Carolina law, a civil conspiracy consists of a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing him special damage. *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 169, 628 S.E.2d 261, 262 (2006) (citing *Lawson v. South Carolina Dep't of Corr.*, 532 S.E.2d 259, 261 (2000)); *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006) (setting forth the elements of civil conspiracy). "It is essential that the plaintiff prove all of these elements in order to recover." *Pye*, 369 S.C. at 567, 633 S.E.2d at 511 (citing *Lyon v. Sinclair Refining Co.*, 189 S.C. 136, 200 S.E. 78 (1938)).

The allegations of this civil conspiracy claim with respect to the Nettles Defendants relate to the manner in which Nettles represented its client in obtaining the TRO and seeking other relief in the first of the prior cases. As discussed above, attorneys are immune for suit for actions taken on behalf of their clients. In representing their clients in the prior case, the Nettles Defendants were entitled to take such actions as they regarded as necessary, proper, and appropriate. For example, Plaintiffs complain that the Nettles Defendants obtained an ex parte TRO on behalf of their clients, as if this violated some right of the Plaintiffs. If any cause of





action exists with respect to the issuance of a TRO in that prior case, that cause of action would only exist in favor of the parties who were restrained by that TRO. The Rules of Civil Procedure expressly provide for the issuance of ex parte TRO's, however, and if the affected Plaintiffs thought it improper in the prior case, they could have raised that issue with that Court. If those Plaintiffs did so in that case, the fact that the TRO issued and was, in effect, continued by consent in connection with the Preliminary Separation and Unwinding Agreement mandates the conclusion that the law of that case is that the TRO was properly issued. If the Plaintiffs failed to attack the issuance of the TRO in that case, they are estopped from doing so here. In all events, Plaintiffs cannot use this case to attack a judicial order issued in another case.

Similarly, Plaintiffs complain that the Nettles Defendants did not provide the prior Court with certain information that Plaintiffs seem to feel was required to be presented. But even if that were true, Plaintiffs' remedy is by motion or appeal in the other case, and no right of action arises against the attorney in favor of the adverse party. Any conduct that Plaintiffs believe was outside of the rules or unjustified could have been brought to the attention of that Court in the prior case, and might have provided some basis for relief in that proceeding. No such claim can be made in the present case as a matter of law, however. Thus, the Nettles Defendants cannot as a matter of law be liable for civil conspiracy in representing their clients who had interests adverse to that of Plaintiffs in prior litigation.

The Eleventh Cause of Action also fails because Plaintiffs have not pleaded any legitimate special damages. "A plaintiff cannot recover damages for a particular act or wrong and likewise recover on a conspiracy to do the act or wrong." *Peoples Fed. Sav. & Loan Ass'n of South Carolina v. Res. Planning Corp.*, 358 S.C. 460, 476, 569 S.E.2d 51, 59 (2004). "Special damages are those elements of damages that are the natural, but not the necessary or usual,

consequences of the defendant's conduct." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 116, 682 S.E.2d 871, 875 (Ct. App. 2009) (citing *Loeb v. Mann*, 39 S.C. 465, 469, 18 S.E. 1, 2 (1893)). These damages "are not implied at law because they do not necessarily result from the wrong." *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875. Because the essence of a civil conspiracy claim "is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action." *Pye*, 369 S.C. at 568, 633 S.E.2d at 511; *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000) ("An action for civil conspiracy will not lie if a plaintiff has obtained relief through other avenues."). As the South Carolina Supreme Court has noted,

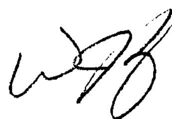
> '[w]here the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong.'

*Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) (quoting 15A C.J.S. *Conspiracy* § 33 (1967)), *quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (1985).

In the present case, Plaintiffs have failed to allege any separate acts that are the basis of the conspiracy claim. Nor have Plaintiffs alleged any special damages that resulted from the alleged conspiracy. Indeed, some of the damages alleged do not appear to be recoverable under any theory of law—*e.g.*, alleged loss of the value of an automobile and telephone; alleged loss in value of a mobile phone.

But to the extent that Plaintiffs can recover the alleged special damages under other causes of action, Plaintiffs' claim fails and the Eleventh Cause of Action must be dismissed. *See Todd*, 276 S.C. at 293, 278 S.E.2d at 611 (dismissing conspiracy count where plaintiff could recover "no additional damages" on the conspiracy count); *Vaught v. Waites*, 300 S.C. 201, 209,



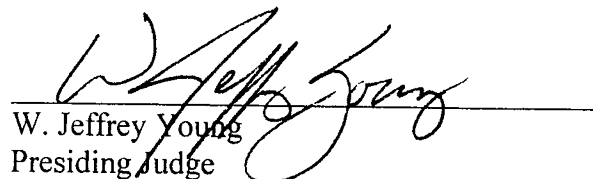


387 S.E.2d 91, 95 (Ct. App. 1989) (civil conspiracy claim dismissed where "[t]he damages sought in the conspiracy cause of action are the same as those sought in the breach of contract cause of action"); *Hackworth*, 385 S.C. at 117, 682 S.E.2d at 875 ("If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.")

The Eleventh Cause of Action is therefore dismissed as to the Nettles Defendants with prejudice.

**Conclusion**

For all the reasons set forth above, the Court hereby grants the Nettles Defendants' Motion to Dismiss the Second Amended Complaint with prejudice.



W. Jeffrey Young
Presiding Judge

Sumter, S.C.
Aug 20, 2012

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