THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

W. JEFFREY YOUNG, Circuit Court Judge

Case No. 2011-CP-21-00841

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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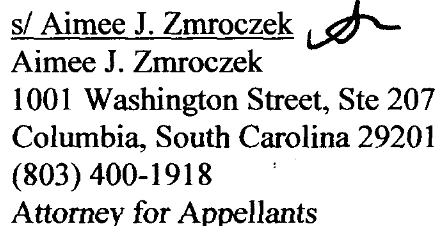
NOTICE OF APPEAL

Pee Dee Health Care, P.A., et al., appeals the order of the Honorable W. Jeffrey Young dated August 31, 2012. Appellant received written notice of entry of this order August 31, 2012.

September 26, 2012.



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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:

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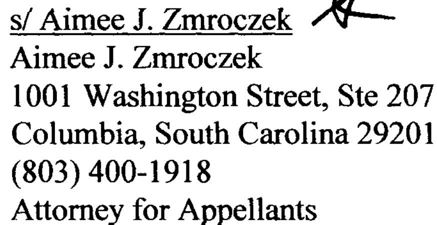

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September 26, 2012

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:

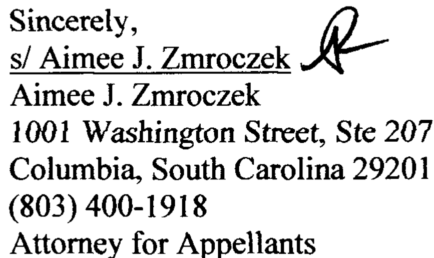
Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

(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,
s/ Aimee J. Zmroczek



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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	TWELFTH JUDICIAL CIRCUIT
COUNTY OF FLORENCE	)	
Pee Dee Health Care, P.A., *et al.*,	)	Civil Action No.: 2011-CP-21-841
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
Nettles Turbeville & Reddick, *et al.*,	)	
	)	
Defendants.	)	

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ORDER GRANTING McNAIR LAW FIRM P.A. AND CELESTE T. JONES' MOTION TO DISMISS SECOND AMENDED COMPLAINT

This matter is before the Court on McNair Law Firm, P.A. ("McNair"), and Celeste T. Jones' (collectively the "McNair 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 the captioned 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 the motion to dismiss filed by the McNair Defendants under advisement at that time, and granted counsel for the Plaintiffs ten days to report to the Court whether any appeal had been taken from an order in one of the previously filed cases that determined that McNair and Celeste Jones did not have an attorney-client relationship with certain of the Plaintiffs in this case. The importance of that order to the present motion is discussed in detail below. More than ten days have elapsed since the hearing, and the Court has received no information from Plaintiffs regarding any appeal.

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

Therefore, the motion to dismiss filed by the McNair Defendants is ripe for decision by the Court.

For the reasons set out below, the Court grants the McNair Defendants' motion to dismiss with prejudice all claims against them in the Second Amended Complaint.

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.

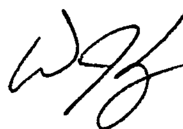
The Hospital District was created by Act No.. 1095, 1962 S.C. Acts 2683-90, as amended by Act No. 199 of 2005. The Hospital District operates the Lower Florence County Hospital in Lake City. The Lake City Community Hospital District Board (the "Hospital District Board") is the governing body of the Hospital 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 ("Megna"), Josiah S. Matthews, MD ("Dr. Matthews"), and Alexander H. Cohen, MD ("Cohen"). In late 2006 or early 2007, representatives of PDHC and the Hospital District 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. Megna, Dr. Matthews, Cohen, is comprised of PDHC, 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 ("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. Celeste Jones and McNair represented the physician plaintiffs and E. LeRoy Nettles and Nettles, Turbeville & Reddick, P.A. represented the Hospital District in that case. 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 District 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 Profit 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.

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 they allegedly had previously represented MCHG. This motion was denied by Judge James on February 23, 2009, and an order was entered confirming that there was no evidence that showed any attorney-client relationship between MCHG, Megna, or Matthews and either Jones or McNair, and therefore there were no grounds for disqualification.

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. One of the effects of this Agreement was to continue the substance of the TRO. 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, Megna, Dr. Matthews, MD, and Cohen 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, the court entered a consent order striking the five cases from the roster pursuant to Rule 40(j), SCRCP. 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 Court issued an order restoring the cases on April 23, 2012. At the time of the hearing on the present motions to dismiss, no activity had occurred in these cases since they were restored to the roster.

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 McNair Defendants nor the other lawyer 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 McNair Defendant's Motion to Dismiss for the following reasons.

I. All Claims Based Upon An Express Or Implied Attorney-Client Relationship Between The McNair Defendants And Plaintiffs Are Dismissed With Prejudice.

The Second Amended Complaint alleges that the McNair Defendants had a conflict of interest in representing the physician plaintiffs in case No. 2008-CP-21-706 because, according to Plaintiffs, they had been engaged to represent the hospital and its management. For example,

in paragraphs 114 through 121, Plaintiffs allege that Jones and McNair were hired to represent the interests of MCHG in connection with agreements between MCHSD and the Physician Defendants. Plaintiffs' claims against the McNair Defendants are based upon this alleged attorney-client relationship. The Second Amended Complaint is replete with references to the alleged violations by the McNair Defendants of ethical and fiduciary duties to Plaintiffs. (*See, e.g.* Second Am. Compl. ¶ 268(a)-(d)). Again, these alleged ethical improprieties about which would result from the assumed existence of a prior attorney-client relationship between the McNair Defendants and MCHG and its management.

This alleged attorney-client relationship, and the putative conflict of interest allegedly arising therefrom, however, were the subject of a motion to disqualify the McNair Defendants made by MCHG in case No. 2008-CP-21-706. Judge James entered an order on that motion in which he unequivocally found that there was no evidence of any attorney-client relationship or conflict. That order recites as follows:

- The Defendants MCHG, through the Affidavits of its CEO, Tony Megna ("Megna"), and its members aver that they believed Ms. Jones and the McNair Law Firm were being retained to represent MCHG. *These claims are not supported by anything other than these statements*. Neither Megna, nor any MCHG member ever met, spoke to, communicated with, consulted, retained, nor paid fees to Jones or McNair.

- Defendants Tony Megna and Benjamin Matthews are both attorneys. In that capacity, they are charged with knowledge of the elements of an attorney-client relationship. The fact that they cannot identify any objective fact or document that establishes an attorney-client relationship with Ms. Jones and/or McNair demonstrates that they never established such a relationship with Ms. Jones and/or McNair on behalf of themselves or MCHG.

- It is undisputed that there was no established attorney-client relationship with MCHG at the time this lawsuit was filed. Despite the dramatic nature of the allegations contained in Defendants' motion, no one alleges Ms. Jones and/or McNair ever opened a file, signed an engagement letter, has been paid fees, or performed any other act customary in the course of legal representation. Ms. Jones and/or McNair could not have gained any confidential information from past representation of MCHG *because it is undisputed that neither Ms. Jones nor McNair ever represented MCHG.*

(Order Denying Defs.' Mot. to Disqualify, filed Feb. 25, 2009 ¶¶ 4-6 (internal citations omitted) (emphasis added)). A copy of this Order is attached hereto as **Exhibit A,** and the Court takes judicial notice of it.

At the hearing on the present motion to dismiss, counsel for Plaintiffs requested and was granted ten days to investigate whether any appeal had been taken from this order. More than ten days have elapsed since the date of the hearing, and no evidence of any appeal has been called to the attention of the Court, and the Court is not otherwise aware of any appeal from this order. This order therefore conclusively establishes that the McNair Defendants did not represent MCHG, Megna, or Matthews, and therefore had no conflict of interest stemming from such alleged representation. Accordingly, any claim in the present case that is based upon such an alleged conflict, or upon any alleged representation by the McNair Defendants of MCHG, Megna or Matthews, is dismissed with prejudice.

II. 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 McNair Defendants are based on the South Carolina Rules of Professional Conduct. For example, 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." (Second Am. Compl. ¶ 231.) In their Sixth Cause of Action for aiding and abetting breaches of fiduciary duties, seventh cause of action for aiding and abetting breaches of contracts and leases, and Eighth 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 for legal malpractice, 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 [sic] 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, eighth, 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, seventh, eighth, tenth and eleventh causes of action must be dismissed as to the McNair Defendants.

III. The Doctrine Of Attorney Immunity Bars Plaintiffs' Claims Against The McNair 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 is directly applicable to the claims made against the McNair Defendants in the present case. The claims against the McNair Defendants are claims made as a result of zealous advocacy by the McNair Defendants against disgruntled opposing parties. As noted above, no Plaintiff was in privity with the McNair Defendants. No independent duty was owed by the McNair Defendants to any of the Plaintiffs in this case, and the claims against the McNair Defendants fail as a result.

IV. Analysis of the Causes of Action Against the McNair Defendants.

These legal principles are more than sufficient to justify dismissal of all claims alleged in the Second Amended Complaint against the McNair Defendants. It requires but brief consideration of each of the causes of action asserted against the McNair Defendants to understand why.

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 as breach of fiduciary duty; aiding and abetting a breach of contract; interference with contractual relations; fraud and misrepresentation; and conspiracy (nos. 3, 4, 5, 6, 7, 8, 9, and 11) are pleaded against the McNair Defendants. The foregoing legal principles and others require dismissal of each of these claims.

A. Estoppel.

The Third Cause of Action is styled "estoppel by silence and equitable estoppel," and is pleaded against the McNair Defendants and all other defendants. Paragraph 214 alleges that the McNair Defendants were under a duty to Plaintiffs that included "[t]he special duties and responsibilities of the attorney-client relationship between Plaintiff and Defendant attorneys." That paragraph also cites ethical duties owed by attorneys to their clients, and fiduciary duties allegedly owed by the McNair Defendants to Plaintiffs. In the absence of an attorney-client relationship between the McNair Defendants and Plaintiffs, however, no relationship between Plaintiffs and the McNair Defendants is alleged that imposes on the McNair Defendants a duty to speak. *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432, 445 (Ct.App. 2003) (holding that the duty to speak may be reduced to three distinct classes: (1) where it arises from a preexisting definite fiduciary relation between the parties; (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each

other, such a trust and confidence in the particular case is necessarily implied; (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties). Therefore no estoppel based upon silence can arise as a matter of law.

Further, 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). This cause of action is therefore dismissed with prejudice as to the McNair Defendants.

B. Breach of Contract.

The Fourth Cause of Action is labeled "breach of contract as to all contracts and agreements between the plaintiffs and the defendants." With respect to the McNair Defendants, Plaintiffs allege that Jones was hired "on behalf of MCGH and all of its members." (*See* Second Am. Compl. ¶¶ 116-122.) No other purported contract is mentioned. Because no attorney-client relationship has been found to exist, however, there was no contract between the McNair Defendants and any of the Plaintiffs, and no other contracts are identified to which the McNair Defendants are alleged to be parties. The Fourth Cause of Action is dismissed as to the McNair Defendants with prejudice.

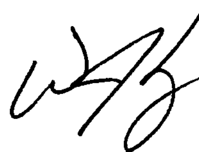
C. Breach of Fiduciary Duties.

The Fifth Cause of Action is for breach of fiduciary duties and is alleged as to all Defendants. 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.*

Plaintiffs generally allege that a fiduciary duty existed based on certain factors. The factors that are or may be applicable to the McNair Defendants are,

> 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.
>
> * * * *



h. The actions undertaken by Defendants to act for and on behalf of Plaintiffs which give rise to a relationship of trust and confidence.

* * * *

j. The Defendants' willful blinding of themselves to the fact that they, individually and collectively, had individual, contractual, and professional fiduciary duties and responsibilities to the Plaintiffs.

(Second Am. Compl. ¶ 230.) With respect to the McNair Defendants, the only basis for such a claim is the putative attorney-client relationship that has already been held not to have existed.

The McNair Defendants did not owe Plaintiffs any fiduciary duties that arose as a result of an attorney-client relationship as a matter of fact. As a matter of law, none of the other alleged bases for the creation of a fiduciary relationship applies to the McNair Defendants, or gives rise to a fiduciary relationship involving the McNair Defendants. The Fifth Cause of Action is therefore dismissed as to the McNair Defendants with prejudice.

D. <u>Aiding and Abetting Breaches of Fiduciary Duties.</u>

The Sixth Cause of Action is for aiding and abetting in breaches of fiduciary duties. 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. ¶ 239.) 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.*)

In paragraphs 236 through 238, Plaintiffs allege that the attorney defendants, including the McNair Defendants, aided in the breach of alleged fiduciary duties owed by non-lawyer

defendants to the Plaintiffs. Paragraph 238 also makes specific reference to the ethical duties of the lawyer defendants as a basis of the claim. As previously discussed, however, there was no relationship involving the McNair Defendants that gave rise to professional fiduciary duties and responsibilities and no contractual relationship between the McNair Defendants and any Plaintiff. It appears that the gravamen of this claim against the McNair Defendants is the manner in which McNair represented its clients in the prior action, for which the McNair Defendants are immune from liability to third parties. The Sixth Cause of Action is therefore dismissed as to the McNair Defendants with prejudice.

E. Aiding and Abetting Breaches of Contracts.

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.) The Second Amended Complaint also incorporates by reference "[t]he Defendant attorneys' ethical responsibilities and the breaches thereof, as stated herein..." (Id., ¶ 245) 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 must dismiss 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 McNair 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. This cause of action is therefore dismissed with prejudice as to the McNair Defendants.

G. Fraud and Deceit.

The Ninth Cause of Action is merely a recitation of the elements of fraud and deceit, without any factual underpinnings within the cause of action itself. 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 the McNair 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, as noted above, "[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. As established above, at no time did a fiduciary relationship ever exist

between the McNair Defendants and Plaintiffs. 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"). Furthermore, a review of the voluminous complaint does not reveal any allegations of any such statements made by the McNair Defendants to Plaintiff under any circumstances that would give rise to a claim of fraud and deceit, and the Court therefore dismisses this claim with prejudice.

H. Civil Conspiracy.

The Eleventh Cause of Action, the final one pleaded against the McNair Defendants, is for civil conspiracy. The allegations of this claim with respect to the McNair Defendants exclusively relate to the manner in which McNair represented its clients in obtaining the TRO and other relief in one 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 McNair Defendants were entitled to take such actions as they regarded as necessary, proper, and appropriate. For example, Plaintiffs complain that the McNair 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 McNair 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 McNair 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

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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).

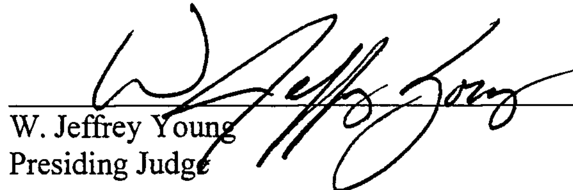
In the present case, Plaintiffs have failed to allege any separate acts that are the basis of the conspiracy claim. Nor have Plaintiffs alleged any special damages that resulted from the alleged conspiracy. Indeed, some of the damages alleged do not appear to be recoverable under any theory of law—*e.g.*, 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 McNair Defendants with prejudice.

Conclusion

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



W. Jeffrey Young
Presiding Judge

Sumter, S.C.
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EXHIBIT A

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STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

IN THE COURT OF COMMON PLEAS
FOR THE TWELFTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 08-CP-21-706

Lower Florence County Hospital District)
d/b/a Lake City Community Hospital,)
Lower Florence County Hospital District)
d/b/a Lake City Community Hospital)
Board,)
Albert D. Mims, M.D.,)
Ernest M. Atkinson, M.D.,)
Benjamin Wade Lamb, M.D., and)
David W. Moon, M.D.,)
)
Plaintiffs,)
)
vs.)
)
Mid-Carolina Hospital Group, LLC,)
Tony R. Megna, and)
Benjamin R. Matthews,)
)
Defendants.)

ORDER DENYING DEFENDANTS' MOTION TO DISQUALIFY

2009 FEB 25 AM 9:45
CONNIE REEL-SHEARIN
CCCP & GS
FLORENCE COUNTY, SC

The Defendants' Motion to Disqualify Attorney Celeste Jones, ("Ms. Jones") and the McNair Law Firm ("McNair") from representing the physicians in this action is denied[1]. The Motion to Disqualify came before the Court on May 8, 2008. The Court orally denied the Motion at that time and enters this Order confirming its oral ruling.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Court enters the following findings of fact and conclusions of law.

2. Celeste Jones and the McNair Law Firm were retained by the Plaintiff physicians in this action in late February, 2008.

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

[1] The Motion to Disqualify was filed by Mid-Carolina Hospital Group, LLC (MCHG) as the sole moving party in this motion. However, Defendants Megna and Matthews each filed affidavits in support of the Motion to Disqualify.

3. Dr. Kristopher Crawford, a non-party to this action, first contacted Ms. Jones in February of 2008 on behalf of himself and the Plaintiff Physicians. (Crawford Aff ¶ 25; Jones Aff ¶ 4; Mims Aff ¶ 16) Dr. Crawford had been a client of Ms. Jones prior to this matter and had an existing relationship with her and the McNair Law Firm. Ms. Jones held an initial meeting with the Plaintiff Physicians and Dr. Crawford on February 27, 2008 wherein Ms. Jones and McNair were retained by each individual Plaintiff Physician to review the contracts (whether proposed or executed) between the Physicians and Mid-Carolina Hospital Group ("MCHG"). (Crawford Aff ¶ 25; Jones Aff ¶ 5, Mims Aff ¶ 16) This began Ms. Jones' and McNair's attorney/client relationship. Thereafter, the complaint in this matter was filed on April 4, 2008.

4. The Defendants MCHG, through the Affidavits of its CEO, Tony Megna ("Megna"), and its members aver that they believed Ms. Jones and the McNair Law Firm were being retained to represent MCHG. (Megna Aff ¶s 19 through 22; Cohen Aff ¶ 8; Welch Aff ¶ 7) These claims are not supported by anything other than these statements. Neither Megna, nor any MCGH member ever met, spoke to, communicated with, consulted, retained, nor paid any fees to Jones or McNair. (Jones Aff ¶s 18 through 23)

5. Defendants Tony Megna and Benjamin Matthews are both attorneys. In that capacity, they are charged with knowledge of the elements of an attorney-client relationship. The fact that they cannot identify any objective fact or document that establishes an attorney-client relationship with Ms. Jones and/or McNair demonstrates that they never established such a relationship with Ms. Jones and/or McNair on behalf of themselves or MCHG.

6. It is undisputed that there was no established attorney-client relationship with MCHG at the time this law suit was filed. Despite the dramatic nature of the allegations contained in Defendants' motion, no one alleges Ms. Jones and/or McNair ever opened a file, signed an engagement letter, has been paid fees, or performed any other act customary in the course of legal representation. Ms. Jones and/or McNair could not have gained any confidential information from past representation of MCHG because it is undisputed that neither Ms. Jones nor McNair ever represented MCHG.

7. Model Rule of Professional Conduct Rule 1.18, Duties to Prospective Clients, sets forth the standard for determining whether Ms. Jones and McNair should be disqualified in this matter. It states as follows:

> Duties to Prospective Client
>
> (a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.
>
> (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).
>
> (d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
>
> (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
>
> (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than

was reasonably necessary to determine whether to represent the prospective client; and

> (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> (ii) written notice is promptly given to the prospective client.

8. The threshold issue is whether or not a representative of MCHG discussed with Ms. Jones or McNair the possibility of forming a client-lawyer relationship. Defendants' allegation that Dr. Crawford had a discussion with Ms. Jones on behalf of MCHG is without merit for the reasons discussed below.

9. Dr. Crawford, through Crawford Medical, LLC, is an independent contractor at the Lake City Community Hospital. Crawford Aff. ¶ 6. Dr. Crawford has no agreement with Defendants. Dr. Crawford is not currently and has not ever been a member of MCHG. Dr. Crawford has not ever had an ownership interest in MCHG. Crawford Aff ¶ 5.

10. Dr. Crawford met with and engaged Ms. Jones in his individual capacity and not on behalf of MCHG. Jones Aff ¶s 4 and 5. Crawford Aff ¶ 13. Furthermore, Mims, Crawford and Jones agree that Dr. Crawford contacted Ms. Jones and McNair on behalf of the individual physicians who have a community of legal interest with respect to the contracts. Mims Aff ¶ 20. A close review of the Affidavits and the February 23, 2008 Minutes demonstrates inescapably that Dr. Crawford met with Ms. Jones individually; therefore, there is no prospective attorney-client relationship with MCHG, no conflict, and no grounds for disqualification.

11. The February 23, 2008 Minutes do not reflect that the committee "authorized" Dr. Crawford to take any action as alleged by Megna. Rather, the

February 23, 2008 Minutes state that Dr. Crawford informed the rest of the committee that the Plaintiff Physicians had hired Ms. Jones to represent them individually. The Minutes state:

> Mr. Megna asked Dr. Crawford to provide an update on issues that the Compensation committee would be addressing. Before proceeding with any issues the Committee may undertake, Dr. Crawford wanted to finalize the physician contracts. **As previously agreed, the physicians would seek outside counsel to review their contracts to ensure that the contracts were legal, in the best interest of the physicians and within the guidelines of all State and Federal law.** This was a stipulation required by the physicians prior to signing and/or finalizing the contracts. **Dr. Crawford announced that the physicians has secured the services of Ms. Celeste Jones of the McNair Law Firm**, Columbia, South Carolina.

Emphasis added.

12. Dr. Crawford and the Plaintiff Physicians took the action of retaining their own counsel consistent with the directive in the May analysis and June analysis (appended as Exhibit 3 to Megna's Affidavit and Exhibit 1 to his Supplemental Affidavit). Ms. Jones and McNair did not learn anything from the documents supplied by Dr. Crawford and the Plaintiff Physicians that any other attorney retained by Dr. Crawford and the Plaintiff Physicians would not have learned. Dr. Crawford and the Plaintiff Physicians have every right to share the documents with counsel of their choosing and were even instructed to do so by plain language of the documents at issue. Information contained in the documents is information that Ms. Jones and McNair obtained from Dr. Crawford and the Plaintiff Physicians, not from MCHG.

13. The South Carolina Supreme Court has made abundantly clear that the right to counsel of one's own choosing is a "substantial" right. See *Hagood v.*

Sommerville, 362 S.C. 191, 607 S.E.2d 707 (S.C. 2005). The right is so substantial, in fact, that an Order disqualifying counsel is immediately appealable. Id.

Accordingly, courts are reluctant to disqualify the counsel of a party's choosing and have held that a moving party bears a heavy burden of demonstrating that disqualification is appropriate. In *Rocchigiani v. World Boxing Counsel*, 82 F. Supp. 2d 182 (SD NY 2000), the court held that:

> disqualification is appropriate in only two kinds of cases: (1) where an attorney's conflict of interest undermines the Court's confidence in the vigor of the attorney's representation of his client, or, more commonly, (2) where the attorney is at least potentially in a position to use privileged information concerning the other side through prior representation. In either of these circumstances, an attorney's conduct would "taint the underlying trial" and disqualification is "necessary to preserve the integrity of the adversary process."
>
> In situations outside of these two scenarios, however, the Second Circuit has "shown considerable reluctance to disqualify attorneys despite misgivings about the attorney's conduct." This reluctance stems from the problems inherent in disqualification, including separation of a client from his chosen counsel, the delay in the proceedings invariably created by such motions, and because they are often interposed merely for tactical reasons. Thus, the moving party initially bears a heavy burden of demonstrating that disqualification is appropriate.

Rocchigiani at 186-187 citing *Board of Educ. of the City of New York v. Nyquist*, 590 F2d 1241, 1246 (2nd Cir. 1979) (other internal citations omitted). Similarly, as stated by the Seventh Circuit in addressing a motion to disqualify counsel, the court must exercise its duty:

> to safeguard the sacrosanct privacy of the attorney-client relationship . . . In doing so, a court helps to maintain public confidence in the legal profession and assists in protecting the integrity of the judicial proceedings. . . . On the other hand, ... disqualification . . . is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing.

Freeman v. Chi. Musical Instrument Co., 689 F.2d 715, 721 (7th Cir. 1982).

14. Furthermore, disqualification would work an extreme and prejudicial hardship on Plaintiff Physicians. Our Supreme Court has held that:

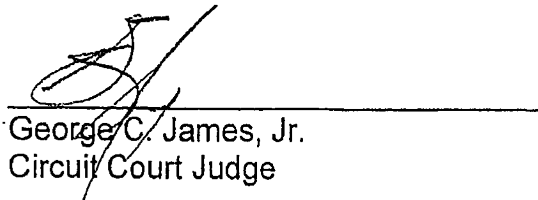
> The right to be represented by an attorney of one's choosing is one of those rare orders, which in effect, could determine the action and prevent a judgment from which an appeal might be taken, or could discontinue an action due to the potential impact on the attorney-client relationship and the overall litigation and trial of the case. Moreover, the right to be represented by one's preferred attorney is closely related to the right to a particular mode of trial, a well-established substantial right.
>
> Deprivation of the right of one's preferred attorney would affect the attorney-client relationship, which is extremely important in our adversarial system.

Hagood v. Sommerville, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (S.C. 2005).

15. Here, the only information received by Ms. Jones and McNair was delivered by Dr. Crawford and the Plaintiff Physicians. No confidential information or documents of any of the Defendants were used by Ms. Jones or McNair.

16. Finally, the relationship between the McNair firm and Dr. Crawford pre-dated any of the Plaintiffs' relationships with any of the Defendants. The Defendants have failed to establish they had any relationship with Ms. Jones or the McNair firm and the Motion to Disqualify is denied.

IT IS SO ORDERED.



George C. James, Jr.
Circuit Court Judge

Dated: 2/23/09

Sumter, South Carolina

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