THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

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

CIVIL ACTION NO: 2010-CP-16-0332
TRACKING NO: 2011197671

Pee Dee Health Care, P.A.,

Appellant,

v.

Estate of Hugh S. Thompson,

Respondent.

FINAL BRIEF OF APPELLANT

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

The appeal in this Court originated as an appeal from the probate to the circuit court. The case at bar involves only questions of statutory interpretation, which this Court is empowered to determine *de novo*. Statutory interpretation is a question of law subject to de novo review. Town of Summerville v. City of N. Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

STATEMENT OF ISSUES ON APPEAL

1. Whether the circuit court erred in its' finding that the attorney for Appellant was disqualified under Rule 407, Rule 3.7., SCACR, from participating in both the pre-trial and the trial itself in the case on appeal?

2. Whether the circuit erred in its' application of Rule 407, Rule 3.7., SCACR, in reference to an attorney not being able to act as an advocate *at trial*?

3. Whether the circuit court erred in applying the Dead Man's Statute to the underlying facts of this case?

4. Whether the Dead Man's Statute affects the discoverability of information allegedly known by Mr. Megna as a fact witness?

5. Whether the trial court erred in finding that Mr. Megna waived any privilege he may have had regarding conversations he had with Dr. Thompson?

6. Whether the trial court erred in ruling that Mr. Megna was a necessary witness in this case, despite the fact that the only evidence of record demonstrates Mr. Megna had no conversations with the deceased Dr. Thompson which involved facts essential to the issues in this case?

STATEMENT OF THE CASE

I

APELLANT

The Appellant, Pee Dee Health Care, P.A. is a professional medical association doing business in Darlington, SC, Olanta, SC, and Columbia, SC.[1]

II

RESPONDENT

The Respondent is the Estate of Hugh S. Thompson, M.D. Dr. Thompson died on November 5, 2009. The Personal Representatives of the Decedent's estate [Defendant] are trustees of the estate, and the sole successors as defined by S.C. Code Ann. Section 62-1-201(42) to the assets of the estate – other than the claim of the Appellant.[2]

III

THE ACTION

A

The action commenced on May 20, 2010. Appellant requested a trial by jury. While asserting a number of different causes of action, the essence of the Appellant's complaint is that the decedent knowingly misrepresented to Appellant that he was a qualified Medicare provider authorized as a physician to treat Medicare beneficiaries. As a result of that misrepresentation, the Appellant has sustained substantial damages including $226,740.19 that Appellant paid to Medicare on Decedent's behalf, as well as other damages that exceed

[1] The undersigned has been General Counsel and CEO to Appellant since 1995.

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

$500,000.00. Respondent denied Appellant's claim first presented in probate court on the grounds that Appellant had access to information indicating Decedent had been disbarred by Medicare in 1996. There are no documents of record to support this claim.

B

The current matter came before the circuit court on January 31, 2011 on the motion of Respondent to disqualify counsel of Appellant from representing Appellant in the case. Counsel for Respondent specifically stated they were not making accusations of misconduct against counsel for Appellant (R. pp. 390-430). Instead, counsel for Respondent argued counsel for Appellant was a necessary witness as defined by Rule 407, Rule 3.3, SCACRT. (R. pp. 390-430). The circuit court issued its' order at the hearing dated July 21, 2011 (R. p. 431) disqualifying Appellant's counsel from representing Appellant.

C

On May 2, 2011, Appellant timely filed a motion for reconsideration with the circuit court. On July 21, 2011, the circuit court held a hearing on the motion for reconsideration.[3] Immediately prior to the hearing held by the circuit court, Appellant received a letter from counsel for Respondent that Respondent was concurrently representing Appellant on another matter. (R. pp. 545-547). The letter indicated that Turner Padgett [the same law firm representing Respondent in the case at bar] was concurrently representing Appellant in the defense of a claim brought by an employee of Appellant, and had been doing so since 2003.

[3] The trial court was also hearing the Appellant's Rule 59(e) motion, the denial of which by an un-signed written order dated August 12, 2011[a signed copy of which was received by Appellant on Monday, August 15, 2011] is the subject of the Appellant's underlying appeal together with the trial court's order quashing subpoenas served by Appellant pursuant to Rule 45, S.C.R.Civ.P. (including other documents presented to the Court since June 17, 2011). The Appellant does not understand the significance of the date of June 17, 2011 as the trial court entered the order without providing Appellant a hearing on the matter. Nevertheless, the trial court did not address the issue of disqualification of Appellant's choice of counsel.

After the letter was received by Appellant on July 21, the Appellant learned the additional claims being asserted against Appellant in the other matter in which counsel for Respondent was concurrently representing Appellant exceeded $250,000.00 (R. pp. 550-551). This amount is in addition to the claims previously made against Appellant, the total sum of which the Appellant has not yet ascertained. Further, the claim against Appellant that Turner Padgett has been defending on behalf of Appellant since 2003, has been and continues to this day to be, both significant and materially adverse to the interests of Pee Dee Health Care.

D

Upon receipt of the letter from Turner Padgett on July 21, 2011, Appellant immediately informed counsel for the Respondent of the matter.. Mr. Josey informed the Court that Turner Padgett was not actively representing the Appellant in any matter. The trial court ordered the hearing to continue without further discussion of the conflict issue. The trial court heard oral arguments on the parties' cross-motions for summary judgment, and a motion for reconsideration that had been previously filed by the Appellant in regard to the current matter before this Court. At the conclusion of the hearing, the trial court took all matters under advisement.

E

Following the conclusion of the July 21 hearing, and upon further investigation, Appellant discovered that Turner Padgett was, in fact, actively representing Appellant, and had been doing so since 2003 – several years prior to undertaking the representation of the Respondent in the case at bar. Appellant immediately notified the trial court and counsel for the Respondent (R. pp. 552-553 and R. p. 548-549) of the confirmation of the actual conflict of interest, the inaccurate statements made by Mr. Josey at the July 21 hearing, and

Appellant's refusal to waive the conflicts. See emails to Mr. Josey and Mr. James dated Tuesday, July 26, 2011 (R. pp. 554-556) and the trial court dated Tuesday, July 25, 2011 (R. p. 552-553). Appellant requested that Turner Padgett be disqualified from further representation of the Respondent.

The circuit court issued an order (a signed copy of which was received by Appellant on August 15, 2011) which did not address the concurrent representation of both Appellant and Respondent by Turner Padget. Instead, the circuit court denied the Appellant's Rule 59(e) order and quashing subpoenas served by Appellant as of June 17, 2011. However, as noted on the transcript of record from the July 21 hearing, the circuit court specifically held its' previous order in abeyance to allow Appellant's choice of counsel to continue until the Court made a decision to the contrary. In fact, the circuit court specifically allowed Appellant's counsel to argue the cross-motions for summary judgment, as well as the Rule 59(e) motion pending as the time of the July 21, 2011 hearing.

F

Following confirmation by Appellant that Turner Padgett was indeed representing clients with interests adverse to the interests of Appellant, Mr. Hylton, with neither notice to nor the knowledge of Appellant, and directly in conflict with Appellant's refusal to waive any and all conflicts of interest, unilaterally drafted a consent order (R. pp. 581-583) on behalf of Appellant, itself and another law firm. Mr. Hylton submitted the unauthorized order to the Worker's Compensation Commissioner, to terminate Turner Padgett's representation of Appellant in the case it had been representing Appellant since 2003.

Appellant notified the trial court of the aforegoing on July 27, 2011 (again providing copies to Mr. Hylton, Mr. Josey and Mr. James) (R. pp. 557-580), and included that

Appellant had issued subpoenas for records from several parties to gather evidence concerning the concurrent representation and the contacts among Turner Padget and others in regard to matters adversely affecting the Appellant. Counsel for the Respondent next filed a Motion for a Protective Order. (R. pp. 304-310) Appellant replied to the Motion for Protective Order requesting enforcement of the subpoenas and other relief, including the immediate disqualification of counsel for Respondent. (R. pp. 311-328) The trial court, without holding further hearings, entered an order on August 12, 2011, 2011 (R. p. 13) denying Appellant's Rule 59(e) motion and quashing the Appellant's subpoenas. That order is the subject of the underlying appeal.

The Notice of Appeal to this Court was filed with the Court of Appeals on August 24, 2011. (R. p. 329).

STATEMENT OF FACTS

I

ADMISSIONS BY DECEDENT OBTAINED DURING DISCOVERY

A

In early 1998, Decedent was employed by the medical offices of Don Fowler in Marion, SC. The Appellant never had any contact with Dr. Fowler, or his staff. While employed by Dr. Fowler, the Decedent filed an application with Medicare to be approved as an eligible physician to treat Medicare beneficiaries. (R. pp. 491). On June 12, 1998, prior to Appellant having any contact with Decedent, and while Decedent was employed by Dr. Fowler, Medicare sent a request to Decedent at Dr. Fowler's address, Medical Offices of Dr. Don Fowler, PO Box 875, Marion, SC 29571. (R. p. 505). The letter stated Decedent's application was incomplete because, as noted on page 2 of letter number 1, he had not

provided Medicare with a copy of his reinstatement letter from the Medicare OIG.

On September 14, 1998, prior to the deceased's employment with Appellant, Medicare sent another letter to Decedent that again stated that the Decedent's original application filed while he was employed by Dr. Fowler was incomplete. (R. p. 509). Page two of that letter again requested that Decedent provide Medicare with a copy of his reinstatement letter from the Medicare OIG. The letter was again sent to Decedent at the work address of his employer at the time, Medical Offices of Dr. Don Fowler, PO Box 875, Marion, SC 29571.

The Decedent did not respond to any of the requests from Medicare. Neither did Decedent nor the Medical Offices of Dr. Don Fowler nor anyone else provide any of the above information to Appellant until several years after Decedent left Appellant's employ.

B

In the fall of 1998, the Decedent left the employ of Dr. Fowler and was employed by Appellant. When the Decedent began his employment with Appellant, he completed and signed what Medicare refers to as a "Reassignment of benefits." (R. p. 507). The Reassignment of Benefits is a required document for Medicare as funds paid for services performed by a Medicare provider are the responsibility of that provider. Dr. Thompson assigned to Appellant the reimbursement he received from seeing patients in Appellant's offices, and, in return was an employee of Appellant and received a substantial salary.

Medicare sent the Appellant a letter approving the Decedent's request that his Reassignment of benefits be assigned to Appellant's offices. (R. p. 508). During this time, as noted by the affidavits attached hereto, (R. pp. 381-389), Decedent nor Medicare nor anyone else informed Appellant of issues concerning Decedent's ability to see and treat

Medicare beneficiaries. Decedent continued to work for Appellant until he left and went to work for FirstChoice [a medical practice in Florence, SC] in December, 2000.

C

In 2007, the Appellant was notified by Medicare that Dr. Thompson had been disbarred as a physician in the Medicare program during the time period he was employed by Appellant. A disbarred physician, such as Decedent, is not entitled to treat Medicare patients during the time of his disbarment. Likewise, a medical practice, such as Appellant, is not entitled to receive funds from Medicare that are assigned to it by a disbarred physician during the time period of the physician's disbarment. Once the Appellant was notified by Medicare of Decedent's disbarment in 2007, Mr. Mark Matthews contacted both the Decedent and his current employer, FirstChoice Health Care of Florence, SC. Mr. Matthews's affidavit is attached as (R. p. 382). Dr. Dean Banks, the owner of FirstChoice informed Mr. Matthews that Medicare had made a similar demand of FirstChoice, and FirstChoice had secured the services of a law firm in Columbia, SC, [Nexsen Pruett] to represent both FirstChoice and Dr. Thompson, the Decedent. Mr. Banks sent Mark Matthews a letter from Nexsen Pruett to Medicare from Nexsen Pruett (R. p. 519) contesting, in the Medicare Administrative Law Court, Medicare's determination to 'recoup' funds from FirstChoice for funds FirstChoice received during the time period Decedent worked for FirstChoice and during which the Decedent was disbarred as a physician approved to see patients in the Medicare program.

D

The administrative appeals initiated by Nexsen Pruett's representation of the Decedent ended in the decision of the Medicare Administrative Law Court issuing an order, known as the ['ALJ Joe' order dated January 22, 2008] (R. pp. 89-100) on behalf of

Dr. Thompson and FirstChoice Health Care of Florence, that overturned the initial decision of Medicare to 'recoup' funds from FirstChoice during the time of the Decedent's disbarment from Medicare. Neither FirstChoice nor Dr. Thompson provided a copy of the 'ALJ Joe' order dated January 22, 2008[4] to the Appellant. Appellant, however, provided its information with FirstChoice (R. pp. 524-525) - email dated July 11, 2007 from the undersigned to Mr. Banks enclosing a copy of Appellant's response to Medicare]. The Medicare ALC 'Joe decision' was favorable to the Decedent and FirstChoice (dated January 22, 2008), and it was never provided to the Appellant. As a result, on March 14, 2008, the Appellant received an order (R. p. 101) from the Medicare ALC that required Appellant to pay Medicare the funds it received from Medicare during the time the Decedent was disbarred from Medicare. The Appellant received no further communications from the Decedent nor Mr. Banks even though such communications had been promised. (R. p. 523). The Appellant was not aware of the favorable Medicare ALC 'Joe' decision obtained by the Decedent and FirstChoice until the 'Joe' decision was produced during discovery in this case because neither FirstChoice nor the Decedent provided the information to Appellant. As a result, PDHC did not have the opportunity to present the favorable 'ALJ Joe determination' as a defense to the claims made by Medicare against PDHC and Dr. Thompson, the Medicare Independent Review Board, the Medicare ALJ, or to the Medicare Appeals Council.

---

[4] Sometime in 2007, Dr. Thompson did contact the undersigned to inform him that the Decedent was providing 'some papers' to Appellant. The Decedent further informed the undersigned he was represented by a 'lawyer in Columbia.' The undersigned and the Decedent had no substantive communications concerning these matters whatsoever at any time. The Decedent, however, did send the Appellant a few documents which were produced to the Defendant, and as noted herein below, the Defendant has obtained from other sources. The only evidence of record is that all other conversions regarding Decedent's disbarment from Medicare occurred between Appellant and Decedent, both prior to and following 2007, and took place with Mr. Mark Matthews and other employees of Appellant. (R. p. 382)

Following the foregoing, the Appellant learned the Decedent had been diagnosed with terminal brain cancer, and did not initiate litigation. Following the Decedent's death, the Appellant filed a claim (R. p. 112) with the Decedent's estate. The Defendant denied the Appellant's claim. This litigation followed.

E

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

The Defendant filed an Answer to the Appellant's complaint on June 17, 2010 in which the Defendant made numerous admissions of fact and law.

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

1. The Decedent's medical license was suspended by the SC Board of Medical Examiners on or about May 31, 1994 and that his license to practice medicine was reinstated on or about April 14, 1998. (R. p. 184 Paragraph 11).[5]

2. On or about March 31, 1996, the Decedent was disbarred from the Medicare program by the Office of Inspector General who oversees physician participation in the Medicare program. (R. p. 184 Paragraph 10).

3. On or about October 26, 1998, the "Decedent entered into a relationship with Appellant to provide medical services to its patients, including Medicare patients." (R. p. 185). (R. p. 190 Paragraphs 61 and 62).

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

[5] In exchanging documents, the Respondent provided Appellant a statement to Medicare written by Decedent in May, 2004 admitting that he had, in fact, received a letter from Medicare in 1996 informing him that he had been disbarred as a provider in the Medicare program. By 2004, Decedent had left the employ of Appellant, and was represented by independent counsel, Nexsen Pruett of Columbia, SC.

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

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

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

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

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

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

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

12. "Defendant admits so much of Paragraph 10 of the Complaint as alleges that Palmetto GBA [the Medicare representative that oversees the payment of claims for the Medicare program in South Carolina] issued to Decedent Medicare provider number D993211724..." (R. p. 185 Paragraph 12).

13. On or about June 17, 2007, the Appellant received a demand letter from Medicare that "would have had a content similar to that set forth in paragraph 12 of the Complaint." (R. p. 185 Paragraph 14). Paragraph 12 of the Appellant's Complaint stated as follows:

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

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

15. Defendants have no knowledge of "any.... Representations made by Decedent to Appellant..." (R. p. 184 Paragraph 10).

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

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

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

19. Defendants have no information in their possession which denies the allegations of paragraph 32 of the Appellant's Complaint. Paragraph 32 of the Appellant's Complaint states:

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

F

FACTS ADMITTED BY THE DECEDENT IN HIS WRITTEN STATEMENT DATED MAY 28, 2004

i

In its' Motion to Disqualify the undersigned from representing Appellant in the circuit court, the Defendant argues that the undersigned is a necessary witness because the Defendant needed to determine questions surrounding a statement written by the Decedent.

However, counsel for Respondent produced a two-page document written by Decedent. (R. p. 628) written to Medicare stating:

> I concede that in 1996 I received from US Health and Human Services, or the Office of the US Inspector General, a letter informing me of my status as a Medicare provider. (ROA 36). The document addressed procedures for reinstating such status, I concede, as well, that I do not have this document, and that I have completely forgotten it in by the Spring of 1998, when I was in the process of resuming medical practice.

ii

On August 31, 1998, Medicare sent a letter to Decedent's then employer, Dr. Don Fowler, reassigning Decedent's Medicare billings to Dr. Fowler's office. (R. p. 508). The letter from Medicare was sent to Decedent at the work address of his then employer, Dr. Don Fowler, PO Box 875, Marion, SC 29571. It was signed by Ms. Gina Kelly of Medicare. On September 14, 1998, Medicare sent Dr. Thompson a request that specifically requested on page 2 that he provide Medicare with a copy of his reinstatement from the Medicare OIG. This request was again signed by Ms. Kelly of Medicare. The letter was again sent to Decedent at the work address of his then employer, Dr. Don Fowler, PO Box 875, Marion, SC 29571. (R. p. 505).

In late September or early October, 1998, just days after receiving the September 14, 1998 letter from Medicare], the Decedent requested he be employed by Appellant. (R. p. 382). At no time prior to nor during his employment with Appellant did Decedent inform Appellant, nor anyone employed by Appellant, that he had been disbarred by Medicare in 1996 (R. p. 628), nor that he had received a letter from Medicare dated September 14, 1998 (R. p. 509) requesting Decedent be provided with a copy of Decedent's reinstatement from the Medicare OIG.

iii

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

Unknown to Appellant, Decedent received a second letter from Medicare dated June 12, 1998, advising him that Medicare needed additional documentation proving that he had been reinstated to the Medicare program by the OIG. (R. p. 505). The first letter from Medicare to Decedent was the March, 1996 letter of disbarment from the Medicare OIG. This document was provided to the Defendant months prior, but the Defendants have failed to note it in any of their declarations to this Court. As noted on the affidavits provided by Appellant, the Decedent never informed anyone at PDHC that he had been disbarred from Medicare (R. pp. 381-389), *and*, as noted above, that he received written notices from Medicare concerning the matter at least three times prior to his employment with Appellant. (R. p. 628, R. p. 505, and R. p. 641).

iv

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

Unknown to Appellant, Decedent received a third letter from Medicare in September, 1998, [just a few weeks before Appellant hired Decedent as an employee] advising him that Medicare needed additional documentation that he had been readmitted to the Medicare program by the OIG. (R. p. R. p. 509). Decedent did not provide the additional documentation to Medicare nor to Appellant. (R. p. 382). As noted on the affidavits of record provided by Appellant, the Decedent never informed anyone at PDHC that he had been disbarred from Medicare (R. p. 381-389), and, as noted above, he received written notices from Medicare concerning the matter at least three prior to his employment with

Appellant. (R. p. 628, R. p. 505, and R. p. 641).

Decedent continued this pattern of misrepresenting his disbarment from Medicare on other applications. For instance, see the answer to question in regard to a uniform insurance application for Cigna Healthcare.

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

As noted by the affidavit of Mr. Mark Matthews, he was the employee of PDHC who handled all matters with Dr. Thompson in the first instance. (R. p. 382). Moreover, as noted on the other affidavits provided by employees of the Appellant, the Decedent never informed anyone at PDHC of is disbarment from Medicare. (R. p. 381-389).

Decedent's original application for Medicare privileges [a Medicare form 855] dated June 19, 1998, was completed by Decedent *prior to* Decedent's employment with Appellant. (R. p. 491). This document was obtained during discovery from the Defendant. Appellant did not have this application in its possession at the time it employed Decedent. The certification signed by Decedent on the original Medicare application he completed and signed was for him to treat and bill for services provided to Medicare patient states as follows:

> I, the undersigned, [the Decedent] certify the following:
>
> * * * *
>
> 3. I am familiar with and agree to abide by the Medicare laws and regulations that apply to my provider/supplier type (the Medicare laws and regulations are available though the Medicare contractor).
>
> 4. Neither the individual practitioner, the company, or the owner,

director, officer, employee of the company, or any contractor retained by the company or any of the aforementioned persons, currently is subject to sanction under the Medicare/Medicaid program, or debarment, suspension, or exclusion under any federal agency or program, or otherwise is prohibited from providing services to Medicare beneficiaries.

5. I agree that any existing or future overpayment to me by the Medicare program may be recouped by Medicare through withholding future payments.

[signed by Hugh S. Thompson, M.D. on June 19, 1998]

Appellant did not complete the foregoing application with, for, or, on behalf of Decedent. It was completed while the Decedent worked at the medical office of Don Fowler in Marion, SC. In fact, until this litigation began, the Appellant never saw a copy of the Decedent's original Medicare application. When Pee Dee Health Care, PA employed Decedent, and the Decedent completed a Medicare reassignment of benefits so that Pee Dee Health Care, PA could bill for Decedent's medical services to its' Medicare patients. (R. p. 588-589). The certification signed by Decedent on the reassignment of benefits application states:

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

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

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

v

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

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

As part of the initial employment process and relationship, the Defendant provided information to Appellant representing that Defendant was fully and completely authorized under state and federal law to provide medical services to Appellant's patients who were Medicare beneficiaries. To this end, the Decedent completed a Medicare provider application [known as a HCFA 855] and a "reassignment of benefits" application to allow Appellant to employ Defendant and to provide the Defendant permission to treat Appellant's Medicare beneficiaries. (R. p. 518 and R. p. 588). The Medicare applications were provided to Palmetto GBA (a private contractor who contracted with the Centers for Medicare and Medicaid Services [CMS]). Decedent certified the information he was providing to Medicare and to Appellant was true and correct while Decedent actually knew this certification was false. (R. p. 518 and R. p. 588).

Unbeknownst to the Appellant, the Decedent provided false and misleading information to Appellant and on the applications submitted to Palmetto GBA – even though the Defendant admitted in their Answer filed with this Court that Decedent had been associated with medical practices prior to this employment with Appellant. (R. p. 185 paragraph 11). Specifically, Decedent failed to provide the information that he had had been previously suspended from treating Medicare patients as he had been suspended by the Medicare Office of Inspector General from the Medicare program in 1996. Dr. Thompson's failure to provide the required information concerning his suspension resulted in the continuation of his suspension as a Medicare provider of healthcare service. Dr. Thompson had been notified in writing by the Office of Inspector General on or about March 31, 1996: (R. p. 489)

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

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

After the SC Board of Medical examiners reinstated Dr. Thompson's medical license in 1998 [his medical license had been suspended on or about May 31, 1994] (R. p. 490), Dr. Thompson failed to seek reinstatement to the Medicare program through the Office of Inspector General as he was required to do but instead filed a false application with Palmetto GBA [the Medicare contractor who administers Medicare in South Carolina on behalf of the federal government through the agency known as the Centers for Medicare and Medicaid Services [CMS]. Decedent thus certified the information he was providing to Medicare and to Appellant was true and correct while Decedent actually knew this certification was false. Decedent failed to inform Appellant of this suspension from the Medicare program. (R. p. 382). See also affidavits of other employees of Appellant stating the same.

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

a. was assigned a Medicare provider number (D993211724 - effective October 26, 1998, (R. p. 508) by Palmetto GBA, and

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

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

Medicare Office of Inspector General. Defendant also admitted in its Answer that the Decedent's Medicare disbarment continues until [the Decedent was] reinstated by the Office of Inspector General [of the Medicare program]. (R. p. 185 Paragraph 12). Dr. Thompson failed to do this, failed to notify Appellant, and continued to provide false information to the Appellant during the remainder of his employment with Appellant.

On or about August 9, 2002, Dr. Thompson's filed a subsequent Medicare enrollment application for reenrollment in the Medicare program. In this application, Dr. Thompson admitted he had been previously suspended as a Medicare health care provider. On or about this same date, Dr. Thompson was reinstated as a provider of Medicare healthcare services by the Medicare Office of Inspector General. (R. p. 512)

On or about June 7, 2007, Appellant received a letter dated May 30, 2007 from Palmetto GBA (R. pp. 516-518) in regard to medical services provided by Decedent on behalf of Medicare beneficiaries for the dates of October 26, 1998 to December 10, 2001. On or about July 11, 2007, Appellant received a letter from the Decedent's then-current employer, FirstChoice Care, (R. p. 519) indicating Decedent's attorneys [Wes Jackson of Nexsen Pruett] had filed a request for reconsideration to Medicare.

Appellant appealed the requests for recoupment of the funds noted above. This appeal was only between Appellant and Medicare. The appeals were not successful. The Decedent was aware of the appeals being conducted by Appellant, and provided the Appellant limited documents to assist in the appeal. Appellant did not receive further documents or information from Decedent or his employer even though such information was promised. (R. p. 523). Regardless, Appellant appealed Medicare's adverse determinations concerning Dr. Thompson. The administrative appeals ended in decisions by both the

Medicare Administrative Law Court and the Medicare Appeals Council denial of the appeals. In this regard, the Decedent and his representatives and agents obtained an order, known as the [the 'ALJ Joe' order dated January 22, 2008] (R. p. 89) on behalf of Dr. Thompson and his then-current employer, FirstChoice Health Care of Florence, that was favorable to his position, and would have been favorable to Appellant. However, the Decedent, his agents and representatives failed to provide the 'ALJ Joe determination' even though they had promised to keep Appellant apprised of such matters. As a result, PDHC did not have the opportunity to present the favorable 'ALJ Joe determination' as a defense to the claims made by Medicare against PDHC, and Dr. Thompson or to the Independent Review entity for Medicare or to the Medicare Appeals Council. This is very important as the ALJ determination made on behalf of PDHC and Dr. Thompson was dated March 14, 2008 (R. p. 101) while the 'ALJ Joe order,' as noted above was filed January 22, 2008.

Following the denial of all administrative appeals, and on or about May 1, 2008, Appellant paid to Medicare the sum of $226,740.19. On or about April 13, 2010, Appellant filed a claim with Decedent's estate. A copy of that claim is attached hereto as (R. p. 112). On or about May 19, 2010, Appellant filed an amended claim with Decedent's estate. A copy of that claim is attached hereto as (R. p. 163) . On May 10, 2010, the personal representative of the Decedent's denied Appellant's claim. This litigation currently before the Court followed.

ARGUMENT

I. The Trial Court Erred in Applying Rule 3.7, SCACR, 401

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

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

(1) The testimony relates to an uncontested issue;

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

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

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

> An order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2). Further, such an order must be immediately appealed or any later objection in a subsequent appeal will be waived. See Whiteside v. Cherokee County School Dist. No. One, 311 S.C. 335, 428 S.E.2d 886 (1993).

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

The United States District Court for Pennsylvania, in Townsend v. M & T Mortgage Corporation, (Case No. 3:09cv1866 USDC PA. February 8, 2010) stated:

> Courts have found that "***Rule 3.7 pertains only to the lawyer-witness's representation of her client at trial***; a lawyer that may be a witness at trial is able to represent her client in pretrial matters." Evans v. Chichester Sch. Dist., 533 F.2d 523, 538 (E.D. Pa. 2008); see also Foster v. JLG Indus., 372 F. Supp. 2d. 792, 798 (M.D. Pa. 2005) (finding that "The rule states that an attorney is prohibited from acting as an advocate *at* trial; however, ***there is no indication that an attorney is prohibited from acting as an advocate during pre-trial proceedings.")*** (emphasis added]).

> ***Disqualification under subsection (a) is triggered only when the attorney actually serves as an advocate before the jury.*** See Murray v. Met. Life Ins. Co., 583 F.3d 173, 179 (2d Cir. 2009); ("The advocate-witness rule applies, first and foremost, where the attorney representing the client before a jury seeks to serve as a fact witness in that very proceeding." (emphasis added)).

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

Similarly, in Culebras v. Rivera-Ros, 846 F.2d 94 (1st Cir. 1988) the court stated:

> ... Rule 3.7 is limited to situations where the lawyer-witness acts as trial counsel is underscored by the purposes most often cited as being served by the general advocate-witness rule: Three of these are 1) the possibility that, in addressing the jury, the lawyer will appear to vouch for his own credibility; 2) the unfair and difficult situation which arises when an opposing counsel has to cross-examine a lawyer-adversary and seek to impeach his credibility; and 3) the appearance of impropriety created, *i.e.*, the likely implication that the testifying lawyer may well be distorting the truth for the sake of his client. Bottaro v. Hatton Associates, 680 F.2d at 897; International Electronics v. Flanzer, 527 F.2d at 1294; MacArthur v. Bank of New York, 524 F.Supp. 1205, 1208-09 (S.D.N.Y.1981); *see* 6 J. Wigmore, *Evidence* § 1911 (Chadbourn rev. 1976). ABA background materials to Rule 3.7 conclude that the "most cogent rationale" for the rule is 1) the interest in protecting the integrity of the advocate's professional role by eliminating the opportunity of mixing law and fact, and 2) preventing a lawyer from injecting his or her personal belief as to the cause into the lawyer's argument to the jury. Annotated Model Rules of Professional Conduct, ABA, Rule 3.7, Legal Background, at 251-52. See A. Enker, The Rationale of the Rule that Forbids a Lawyer to be Advocate and Witness in the Same Case, 1977 Am.B. Found. Research J. 455.
>
> The above concerns are absent or, at least, greatly reduced, when the lawyer-witness does not act as trial counsel, even if he performs behind-the-scenes work for the client in the same case. One who is not trial counsel will be

> unable to vouch for his own credibility, Duncan v. Poythress, 777 F.2d 1508, 1515 n. 21 (11th Cir.1985), *cert. denied,* 475 U.S. 1129, 106 S. Ct. 1659, 90 L.Ed.2d 201 (1986); International Electronics v. Flanzer, 527 F.2d at 1294, and he will be unable to mix the law and the facts in the presence of court and jury. Opposing counsel, when cross-examining, will not have to cope with the lawyer-witness's enhanced status as trial counsel. And the appearance to jurors and others that the lawyer-witness may be distorting the truth will at least be diminished so long as he is not also seen to perform in the high visibility position of trial counsel. See General Mill Supply Co. v. SCA Services, Inc., 697 F.2d at 717. Finally there is no danger that the lawyer-witness might inject his or her personal belief into the advocate's argument to the jury. Even under DR 5-101(B) some courts have allowed a lawyer-witness to continue as counsel in pretrial matters, though disqualified at the trial. Moyer v. 1330 Nineteenth Street Corp., 597 F.Supp. 14, 17 (D.D.C.1984); See also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1503 (1983).

The only substantive reason Defendants maintain the undersigned must be examined is the content of the documents sent to the undersigned by the Decedent that Defendant admittedly has in it possession. There are no documents of record nor is there one scintilla of evidence to support such a claim. Moreover, the affidavits provided by Appellant clearly demonstrate the contrary. (R. p. 381-389).

The Respondents also claim the undersigned is a witness in that the litigation involving the Appellant with Medicare over the purported need of the Defendant to determine the Appellant's dealings with the undersigned during the Appellant's administrative appeals of the adverse decisions made by Medicare against Appellant. Other than the obvious attorney-client and work-product privilege issues related to this issue, the primary answer to this demand by the Defendant is:

a. The issue in the Medicare administrative proceedings was Medicare's decision to hold *Appellant* liable as the assignee of the Decedent's billings to Medicare. There was no determination made, nor could there have been, as to the Decedent's breach of his state common-law and state statutory duties to Appellant.

b. The Decedent and his representatives and agents obtained an order, known as

the [the 'ALJ Joe' order dated January 22, 2008] (R. p. 89) on behalf of Dr. Thompson and his then-current employer, FirstChoice Health Care of Florence, that was favorable to his position, and would have been favorable to Appellant. However, the Decedent, his agents and representatives failed to provide the 'ALJ Joe determination' even though they had promised to keep Appellant apprised of such matters. As a result of the failure of the Decedent to provide the 'ALJ Joe Order', the Appellant did not have the opportunity to present the favorable 'ALJ Joe determination' as a defense to the claims made by Medicare against PDHC and Dr. Thompson or to the Independent Review entity for Medicare or to the Medicare Appeals Council. The importance of the issue is demonstrated by the fact that the ALJ determination made on behalf of PDHC and Dr. Thompson was dated March 14, 2008 while the 'ALJ Joe order,' as noted above was filed January 22, 2008. Once again, the failure of the Decedent and his agents, i.e., their own negligence, caused avoidable damage. As a result, the Defendant is estopped from asserting any action against the Appellant in light of his duty to disclose the 'Joe' order to the Appellant in the first instance.

Our Supreme Court has held:

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

II. The Undersigned cannot be a Witness due to the Application of the South Carolina Dead Man's Statute

The South Carolina "Dead man Statute" provides:

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

S.C. Code Ann. § 19-11-20 (1985).

Section 19-11-20 of the South Carolina Code (1976) bars the *"examination"* of a person with an interest from testifying regarding a conversation with a deceased individual, however that interest may have arisen. The Appellant admits that Josiah S. Matthews, III, M.D., Alexander H. Cohen, M.D., and Tony R. Megna have an interest in the outcome of the lawsuit; and further agree that they cannot "be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased." In Osterneck v. Osterneck, 649 S.E. 2d 127 (2007), our Court of Appeals, specifically held that "Section 19-11-20 of the South Carolina Code (1976), the 'Deadman's statute' **bars the testimony** of a person with an interest from testifying regarding a conversation with a deceased individual." The Osterneck opinion does not discriminate between pre-trial testimony of a witness and examination of a witness at trial. Similarly, our Supreme Court has used the words "examination" and deposition interchangeably – and always in the context of testimony provided under oath. See, for example, Cooke v. Douglas,

240 S.C. 373, 126 S.E. 2d 20 (1962).

In the current case, the Appellant admission of interest in the outcome of the litigation, the actual language of the statute, and our Supreme Court's interpretation of the statute bars the examination of the undersigned in any context as to any dealings he had with the Decedent. If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. Tilley v. Pacesetter Corp., 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); Paschal v. State Election Comm'n, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); see also City of Camden v. Brassell, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct. App. 1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. Durham v. United Cos. Fin. Corp., 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); Adkins v. Comcar Indus., Inc., 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); Worsley Cos. v. S.C. Dep't of Health & Envtl. Control, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct. App. 2002); see also Timmons v. S.C. Tricentennial Comm'n, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). Therefore, applying the South Carolina Dead Man's Statute, Plaintiff cannot be required to testify as a witness in this case.

III. There is no testimony to be given by Mr. Megna as to the facts in the case because, as the record on appeal indicates, he had no substantive discussions with the decedent concerning the issues at bar.

The Defendants have provided no evidence of any substantive discussions between Mr. Megna and Dr. Thompson for the simple reason that there were none. While it is also true that Mr. Megna performed the legal work on behalf of PDHC in regard to the claim made against PDHC by Medicare, the decedent had his own independent counsel representing both him and his current employer, FirstChoice Health Care. (R. p. 519 and R. p. 526).

Moreover, as evidenced by the attached affidavits, Mark Matthews worked with Dr. Thompson in all matters related to the completion of applications and other matters in the case at bar. As Mr. Matthews notes, at no time was he aware of any discussions between Dr. Thompson and Mr. Megna. (R. p. 382). As the Second Circuit has stated, "[t]he delay and additional expense created by substitution of counsel is a factor to which [it has] attached considerable significance...." Mr. Megna has been handling this litigation for several years, his testimony at trail is not necessary, and the Defendant's suggestions to the contrary are untrue.

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

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

> "A court cannot order disqualification simply upon the moving party's representation that the lawyer it seeks to disqualify is a necessary witness; the

key is the evidence showing that the lawyer is a necessary witness." Beller v. Crow, 742 N.W.2d 230, 235 (Neb. 2007). The movant may show counsel is a necessary witness when "(1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable elsewhere." Id. In any event, "[i]n most jurisdictions, a lawyer who is likely to be a necessary witness may still represent a client in the pretrial stage." Droste v. Julien 477 F.3d at 1035 (quotation omitted) (citing cases). (emphasis added).

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

The additional information which Defendants wish to obtain from the Appellant are the work product of Appellant's counsel actually prepared during the course of litigation on behalf of PDHC while Dr. Thompson was independently represented by counsel from another law firm.

"The movant, ... bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring [to the witness-advocate's client] is substantial.'"

(quoting Lamborn v. Dittmer, 873 F.2d 522, 531 (2d Cir. 1989) (alteration in original))).

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

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

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

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

SUMMARY

A

The Appellant's action against the Defendant is based on the Decedent's responsibilities of honesty and corresponding duties to the Appellant – as the Defendant admitted they are duty-bound to do in regard to his employment position with Appellant. Decedent had a pecuniary interest since he was paid by Appellant as a physician to provide medical services. (R. p. 187 Paragraph 25). The relationship of Decedent with Appellant

was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." (R. p. 186 Paragraph 21), the relationship of Decedent with Appellant was such that Decedent "was obligated to communicate truthfully with Appellant. Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Appellant..." (R. p. 187 Paragraph 26), and Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Appellant." (R. p. 188 Paragraph 34).

It is undisputed that the Decedent received three letters from Medicare regarding his disbarment from Medicare. The first letter was dated March 11, 1996, (R. p. 489), the second letter was dated June 12, 1996, (R. p. 505) the third letter was dated September 14, 1998. (R. p. 509). For his own reasons, the Decedent failed to provide the information requested by Medicare and failed to inform Appellant. See affidavits of employees of Appellant at ROA 19-25).

It is undisputed that the Appellant paid Medicare $226,740.19 to settle the liability of Appellant to Medicare based on the assignment of the Defendant's billings from treating Medicare patients to Appellant. See (R. p. 511) in which the Decedent assigned his Medicare billings to Appellant and simultaneously certified he was an eligible Medicare provider. (R. p. 509). The unpleasant yet, undeniable truth is that that the Decedent was untruthful to Medicare and to Appellant, as well as others.

The essence of the Defendant's argument is that the Appellant had a duty to the Decedent to protect the Decedent from being deceitful to himself, Medicare, the Appellant, and the Defendant in the first instance. There is no such legal duty owed by the Appellant. Regardless, the Appellant undertook to protect its own interests, and appealed the

administrative decisions of Medicare to recoup the funds. During this time, the Decedent was represented by independent counsel, obtained a favorable decision in a separate proceeding concerning similar circumstances, but failed to inform the Appellant. Thus, because the favorable 'ALC Joe' decision *preceded* the adverse determination made against the Appellant, and because the Decedent, his agents, and counsel failed to inform Appellant, the Decedent, clearly, was silent in the fact of his obligation to be truthful. As a result, their own concealment of material information estops them from making any claim or defense against the Appellant.

B

The right to counsel of one's choosing is, our Supreme Court has noted, a substantial right that no Court should interfere with short of extraordinary circumstances. The Defendants have not demonstrated any fact whatsoever to which Mr. Megna will or could testify to in the first instance as a necessary witness. Rule 3.7 specifically provides only that one's counsel of choice, even if a necessary witness at trial, may be barred only from trial so as not to confuse the jury. Courts considering the matters, as noted above, have specifically excluded pre-trial matters from the reach of Rule 3.7.

C

As noted on the attached affidavits (R. pp. 381-389), the conversations in regard to the matters that form the basis of the lawsuit between the parties primarily involved Mr. Mark Matthews, James D. McInnis, M.D., and Decedent. It is admittedly true that Decedent had conversations with both Drs. Matthews and McInnis and that the conversations centered about the Decedent statement that he could treat any patient as long as he worked under the supervision of physicians who were approved by the state Board of Medical Examiners. It is

also true that the decedent never told Drs. Matthews or Cohen, or any other person in the employ of PDHC, that he had ever been disbarred by Medicare in the first instance. (R. pp. 381-389). The Decedent never informed any employ of Appellant that he had been disbarred by Medicare nor provided them any other information that would have placed them on notice to believe Dr. Thompson was not telling them the truth on his applications to Medicare. Their collective statements are that the Decedent, knowing of his disbarment from Medicare, failed to advise Appellant, failed to advise them individually, failed to advise Medicare. Moreover, the Decedent did not simply forget to provide the Appellant and others the original March, 1996 letter from Medicare disbarring him from the Medicare program (R. p. 489), the Decedent 'forgot' a second letter dated September 14, 1998 from Medicare (R. p. 509), just weeks before he was employed by Appellant. It defies all reasonableness that the Decedent forgot all letters from Medicare. Further, it defies all reasonableness for the Personal Representatives of the Decedent's estate, in their roles as fiduciaries, to place any blame whatsoever on the Appellant when they know:

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

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

c. The Decedent nor his independent counsel nor his then-employer, FirstChoice disclosed to Appellant the favorable 'Medicare ALC Joe' decision that the Appellant could have used to the Decedent's as well as the Appellant's benefit if the Medicare ALC Joe' had been disclosed in the first instance as the Decedent promised to do, and

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

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

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

b. provided facially fraudulent applications to Medicare and others,

c. ignored all letters from Medicare informing him of his disbarment from Medicare even though the Defendant has admitted in its Answer filed with this Court on June 17, 2010 that Decedent had a fiduciary duty to do so, and

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

D

The undersigned has been handling the litigation involved in these proceedings since 2007. It would be unnecessarily burdensome, expensive and cause the Appellant additional damage for the Appellant to change attorneys. As noted by the Second Circuit Court of Appeals in Murray v. Metropolitan Ins. Co., 583 F.2d 173 (2009):

> Rule [3.7] lends itself to opportunistic abuse. "Because courts must guard against the tactical use of motions to disqualify counsel, they are subject to fairly strict scrutiny, particularly motions under the witness-advocate rule." Lamborn v. Dittmer, 873 F.2d 522, 531 (2d Cir.1989). The movant, therefore, "bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice

> occurring [to the witness-advocate's client] is substantial." Id. "Prejudice" in this context means testimony that is "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony."

E

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

RELIEF REQUESTED BY APPELLANT

Appellant respectfully requests this Court to reverse the judgments and orders of the circuit court and to remand the case to the circuit court for determination of Appellant's appeal.

REQUEST FOR ORAL ARGUMENT

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

Respectfully submitted,

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ATTORNEYS FOR APPELLANT

May 3, 2012

CERTIFICATE OF COMPLIANCE WITH RULE 211(b)

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

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

Respectfully submitted,

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May 3, 2012

THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

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

CIVIL ACTION NO: 2010-CP-16-0332
TRACKING NO: 2011197671

Pee Dee Health Care, P.A.,

Appellant,

v.

Estate of Hugh S. Thompson,

Respondent.

CERTIFICATE OF SERVICE

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

Jay James, Esquire
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Renee Josey, Esquire
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The Honorable Jenny Abbott Kitchings
Clerk of Court, SC Court of Appeals
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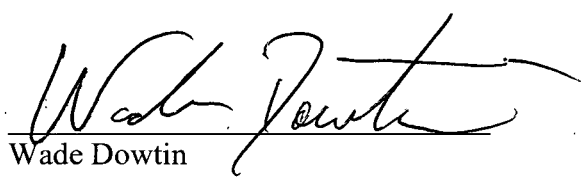

Wade Dowtin