THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge
Diane S. Goodstein, Circuit Court Judge

Consolidated Cases For Trial

Case No.: 2010-CP-28-322
Case No. 2010-CP-28-323

Jamie Curley, Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski, Defendants and Dr. Orville Dyce, Plaintiff,

v.

South Carolina ENT, Allergy & Sleep Medicine, P.A., Amy Puchalski, and Robert Puchalski, Defendants

Of Whom Jamie Curley, and Dr. Orville Dyce are the Respondents/Appellants,

And

SCENT Land Holdings, LLC, Amy Puchalski and Robert Puchalski, South Carolina ENT, Allergy & Sleep Medicine, P.A. are the Appellants/Respondents.

INITIAL BRIEF OF APPELLANTS/RESPONDENTS

Vincent A. Sheheen, Esquire
Michael D. Wright, Esquire
Savage, Royall & Sheheen, LLP
Attorneys for Appellants/Respondents
Post Office Drawer 10
Camden, SC 29021
803-432-4391

Morris Ellison, Esquire
Jana B. Baker, Esquire
Will Cleveland, Esquire
Attorneys for Respondents/Appellants
Womble Carlyle Sandridge & Rice, PLLC
PO Box 999
Charleston, SC 29402
843-720-4617

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page Number

Cases

Statutes

Rules

Treatise

STATEMENT OF ISSUE ON APPEAL

I. Did the circuit court err in refusing to enforce the July 16, 2008 Shareholders' Agreement where the parties contracted for Dr. Dyce to become a Shareholder in the practice?

II. Did the circuit Court err in ruling that the Shareholders' Agreement did not incorporate the Employment Agreement between the parties when it was specifically referenced?

III. Did the circuit court err in overturning SCENT's decision to terminate Dr. Dyce's employment for cause?

IV. Did the circuit court err in refusing to enforce the covenant not to compete when Dr. Dyce took steps to establish and began practicing in competition with SCENT in the excluded time period and territory taking hundreds of patients?

V. Did the circuit court err in awarding Dr. Dyce a monetary amount under the buyout provision of the Shareholders' Agreement when he materially breached the agreement, and repudiated and violated the covenant not to compete, causing tremendous damages to SCENT?

VI. Did the circuit court err in finding Dr. Robert Puchalski personally liable for a corporate obligation when making good faith decisions on behalf of the practice in his capacity as an officer of the practice?

VII. Did the circuit court err in finding Dr. Amy Puchalski personally liable for $25,596.87 when these funds were appropriately charged against Dr. Robert Puchalski's portion of the shareholders' draw from SCENT?

VIII. Did the circuit court err in refusing to enforce the provisions of the SCENT Land Operating Agreement regarding expulsion of Members for failure to make a capital call?

a. Alternatively, did the circuit court err in finding Jamie Curley a 50% owner as of November 2015 when she has not been a member since 2010?

IX. Did the circuit court err in dismissing SCENT's counter-claims against Dr. Dyce where he breached his contracts, abused his position of trust, and conspired with another SCENT employee to cause harm to the company?

STATEMENT OF CASE

On October 17, 2011, Plaintiff Orville Dyce ("Dyce") filed an amended summons and complaint in the Court of Common Pleas for Kershaw County against South Carolina ENT Allergy and Sleep Medicine, PA ("SCENT") and Robert Puchalski, MD alleging various causes of action including breach of contract, accounting, and conversion. ("The Dyce case"). Defendants denied the allegations and filed counterclaims for among other things, breach of contract and violation of a covenant not to compete. On May 12, 2012, Plaintiff filed another Amended Complaint, this time asserting claims against an additional Defendant, Amy Puchalski. On June 4, 2012 Defendants filed an Answer and asserted counterclaims, including claims for breach of contract, breach of a covenant not to compete, shareholder oppression, and other causes of action.

In 2012, Dyce filed for Summary Judgment on Defendant's counterclaims including SCENT's claim for breach of covenant not to compete. The Honorable DeAndrea G. Benjamin, Circuit Judge, entered a Form-4 Order on July 31, 2012 denying Plaintiff's motion, rejecting his arguments that the covenant not to compete was overbroad.[1]

[1] Along with the Dyce and Curley cases, another physician from SCENT, Dr. Gunnlauggson filed litigation against SCENT. The Dyce and Gunnlauggson cases involved many of the same allegations, claims, witnesses, counterclaims, and defenses. Hearings on the cases were sometimes held at the same time. Although Judge Benjamin issued a Form 4 order in the Dyce case, she issued a more lengthy opinion in the companion Gunnlauggson case finding as a

On October 17, 2011, Plaintiff Jamie Curley ("Curley") filed an amended summons and complaint in the Court of Common Pleas for Kershaw County against SCENT Land Holdings, LLC ("SCENT Land" or "Company"), Amy Puchalski ("Puchalski"), and Robert Puchalski, M.D. ("Dr. Puchalski") (collectively, "Defendants") seeking a judicial dissolution of SCENT Land and judicial supervision of the winding up of SCENT Land. Am. Sum. & Comp. P. 3, 4. ("The Curley case"). On November 8, 2011, Defendants timely filed an answer to the amended summons and complaint and asserted several counterclaims alleging breach of fiduciary duty, conspiracy, interference with a contractual relationship, and violation of the South Carolina Unfair Trade Practices Act.

Curley filed a motion for summary judgment on her cause of action seeking judicial dissolution of SCENT Land and a motion for summary judgment as to the counterclaims asserted by the Defendants on February 23, 2012. (Pl. Motions for S.J.) On April 11, 2012, Defendants filed a combined memorandum opposing Plaintiff's motions. (Memorandum in Opposition). Following oral argument by counsel on April 16, 2012 on the motions for summary judgment, the Honorable DeAndrea G. Benjamin, Circuit Judge, entered a Form-4 Order on July 31, 2012 granting "Plaintiff's Motion for Summary Judgment against SCENT Land seeking dissolution of the company . . . solely on the grounds that the company failed to deliver her the purchase agreement as required by S.C. Code Ann. § 33-44-702c." (Order, P. 1.) Defendants timely filed a Rule 59(e), SCRCP, Motion to Alter or Amend the circuit court's judgment on August 13, 2012. The circuit court issued a Form-4 Order on January 28, 2013

---

matter of law that the identical covenant not to compete was legally valid and enforceable. (Order of Judge Benjamin dated 9/28/2012). The hearing in these two cases was held on April 16, 2012. This identical Covenant was later found legally valid and enforceable by Judge Cooper. (P's Ex. 141).

denying Defendant's motion for reconsideration. Defendants timely served and filed a Notice of Appeal on February 21, 2013.

After filing the appeal, the parties agreed that the matters in the Curley case were interlocutory and that the issues would be preserved for appeal after the proceedings in the trial court were completed. (See Agreement to Dismiss Without Prejudice dated 7/23/13.) On August 21, 2013, the Honorable John Cannon Few entered an Order dismissing the appeal without prejudice and finding the Curley matters were interlocutory and would be reviewable after a final judgment was entered in the case. (See Order of the Honorable John Cannon Few).

After numerous motions, hearings, and orders before various judges regarding discovery and pretrial matters, the two cases finally came to trial before the Honorable Dianne Goodstein on Nov. 10 -Nov. 26, 2013; March 31-April 2, 2014; and Nov. 24- Nov. 25, 2014. The two cases were consolidated for trial. After many witnesses and voluminous exhibits were admitted, the trial court took the matter under advisement. On November 25, 2015, the trial court issued its order. The trial court ruled against the Defendants on all of their counterclaims. The trial court found in favor of the Plaintiff Dyce on his claims for breach of contract, accounting, constructive trust, and conversion in the amount of $436,496.08 allegedly to have occurred in 2008, jointly and severally against SCENT and Dr. Puchalski. The trial court found in favor of Plaintiff Dyce on his claims against Amy Puchalski for constructive trust and conversion in the amount of $25,596.87 stemming from these 2008 claims. The court further found for Dr. Dyce in the amount of $24,271.03 against Dr. Puchalski and SCENT on his allegations for breach of contract, accounting, constructive trust, and conversion in 2009.

Judge Goodstein further found for Dr. Dyce against SCENT and Dr. Puchalski jointly and severally in the amount of $1,809,472 for his alleged entitlement to redemption of his shares from SCENT. Judge Goodstein awarded pre-judgment interest on all these awards.

The trial court further awarded judicial winding up of SCENT Land Holdings and appointed a receiver to oversee the winding up. The trial court stated that Jaime Curley was entitled to an equal share of distributions even though she had not been a member since 2010. Defendants filed a motion to reconsider on December 17, 2015 setting forth numerous grounds for which the trial court had erred. (Motion to Reconsider). Also on December 17, 2015, Defendants filed a motion objecting to an appointment of receiver and winding down of SCENT Land. (Motion Objecting). Plaintiff Dyce also filed a motion to reconsider on December 10, 2015. The trial court denied both motions in an order dated February 24, 2016.

Appellants filed a notice of appeal March 24, 2016, and Respondents filed a notice of cross appeal dated March 29, 2016.

STATEMENT OF THE FACTS

South Carolina Ear, Nose, Throat, Allergy, & Sleep Medicine, P.A. (hereinafter, "SCENT") is a medical practice, founded by Dr. Robert Puchalski, that provides a broad spectrum of medical services, including ear, nose, and throat care as well as surgeries, sleep medicine, allergy, cosmetic medicine, and other related services. With the financial help of his parents, Dr. Puchalski opened the practice in 2002. (V. II p. 6-7). Dr. Puchalski hired Dr. Dyce as a physician employee in 2005. Dr. Dyce became a Shareholder on July 16, 2008 when he signed his Shareholder Agreement and was issued 50,000 shares. (Tr. V. II, p. 37; P's Ex. 7; D's Ex. 13). Current shareholders of the practice are Dr. Macy Vidrine and Dr. Robert Puchalski.

In late 2009 and into 2010, Dr. Dyce became disgruntled as the parties negotiated new shareholder contracts and began to build a new office building in Lugoff, South Carolina. (Vol II, p. 141-143; D's ex. 24, 29, 34, 39, 51, 56, 88). To gain leverage in the negotiations, Dr. Dyce and his wife Jamie Curley began to stymie the practice by refusing to execute vendor contracts, close loans, and follow policies necessary to conduct business. (V. II, p. 148-149, 167, 187; D's Ex 42, 57, 58, 60, 115). Dr. Dyce conspired with another physician employee, Dr. Chad Gunnlaugsson ("Gunnlauggson") to disrupt the practice and alleged that Dr. Gunnlaugsson had become a shareholder.[2] (Vol. I p. 29; D's Ex. 71). Dr. Dyce began to secretly tape record meetings and phone calls with his fellow shareholder, SCENT employees, corporate counsel, and the corporate accountant. (V. I p. 330; D ex. 207). Dr. Dyce even snuck confidential and proprietary insurance agreements out of the practice "on the down low" for his own use and not for the benefit of SCENT. (V. III p 242-43; V. II p 61-62). Dr. Dyce continually excused his sabotage by stating he wanted information from the practice. However, in one of his secretly recorded conversations[3], Dyce admitted that SCENT had sent his attorney "probably even more than he'd asked for." (V I p. 422; Def. Ex. 207) Dr. Dyce's many actions to harm the practice violated his Shareholder and Employment Agreements. (See P's Ex. 7, 10). Therefore, Dr. Dyce was ultimately expelled from the practice on May 8, 2010 to save it from imploding when bills could not be paid and construction on the new building had ground to a halt. (V. II p. 154, 169- 170; P. Ex. 20; D's Ex. 49, 60, 68, 127, 163.) Shortly after

[2] Litigation with Gunnlauggson subsequently ensued and was settled, which resulted in Gunnlauggson paying money to SCENT, along with an apology and a recognition of his theft of confidential information, violation of his Covenant, and admission that he had never been a shareholder of the practice. (D's Ex. 141, 190, 232,).

[3] The trial Court ignored the secretly tape-recorded conversations by Dr. Dyce. Additionally, the trial court did not address the fact that Dr. Dyce failed to turn over or disclose the existence of the secretly tape recorded conversations until a year and a half after discovery requests covering them were originally sent by attorneys for SCENT.

leaving his employment, Dr. Dyce blatantly violated his Covenant Not to Compete by repudiating it, taking steps to open a new practice, and opening a practice in Hartsville and Cheraw, effectively destroying SCENT's practice in these already established markets. (Ex. 12, 129, 231, 233).

Background

Dr. Puchalski opened SCENT and saw his first patient in August of 2002. He gradually expanded, opening locations in, Hartsville, Columbia, and Cheraw, South Carolina. The Plaintiff, Dr. Orville Dyce (hereinafter, "Dyce") was one of Dr. Puchalski's best friends from residency and SCENT hired him as an employee beginning in February 2005 before he eventually became a fifty-percent (50%) shareholder on July 16, 2008. From 2005 until July of 2008, the parties discussed various approaches to making Dr. Dyce a Shareholder and created and signed numerous and various documents in those attempts and negotiations. These previous discussions and agreements were never implemented because Dr. Dyce did not want to pay a lump sum to become a shareholder, but instead wanted to find a way to become a shareholder over time by deferring income toward Dr. Puchalski. Although the parties had been negotiating Dyce's shareholder status for many years, it was not until July 16 of 2008 that they issued him shares to become a shareholder. Furthermore, they signed a Shareholders' Agreement, which explicitly stated that Dr. Dyce became a Shareholder on July 16, 2008 and "contains the entire agreement of the parties with respect to the matter" and that "all other agreements dated prior to the date of this Agreement are hereby superseded in their entirety." (P's ex. 7 Sections 8.8 & 8.1). Furthermore, it was not until July of 2008 that Dr. Dyce signed onto the debt of SCENT Land with First Palmetto, was listed as an owner of workers

compensation policy and was announced as an owner to the practice. (V. II p. 203; D's Ex. 126).

At all times, Dr. Puchalski was tasked with managing the business operations of SCENT as well as managing its employees. Dr. Dyce never asked to assist in managing the business nor was he inclined to do so because he just wanted to be a doctor. (V. I p. 368). Dr. Dyce went from making $150,000 a year at his previous practice in Virginia to more than $1,000,000 at SCENT after Dr. Puchalski brought him in. (Def. Ex. 108; V. I p. 367, 437).

During 2008 and 2009, Dr. Puchalski and Dr. Dyce engaged in discussions relating to the construction of a new building for SCENT's Camden/Lugoff practice. SCENT and SCENT Landholdings, LLC (hereinafter "SCENT Land") approved construction of the new building. (V. II p148-59, 167; Aff. Dr. Puchalski, P. 2). A new building had previously been built in Hartsville where Dr. Dyce had primary responsibility. (V. II p. 138-39).

SCENT Land, a limited liability company organized under the Limited Liability Company Act pursuant to section 33-44-101, *et. seq.* of the South Carolina Code, is a sister company of SCENT, owning and leasing the physical premises that SCENT uses for the medical practice. The company was created by Amy Puchalski contributing $110,000 in land. (D. Ex 115). Dr. Puchalski and Dr. Dyce were named as managers. (P's ex. 17; SCENT Land Oper. Agreement, P. 39). On September 30, 2009, Dr. Dyce's wife, Jamie Curley (hereinafter, "Curley"), became a member of SCENT Land without being required to contribute any capital to the company. (D. Ex. 115). During this time, Dr. Dyce and Dr. Puchalski continued in negotiations about a new shareholder agreement. Negotiations stalled, and, as previously mentioned, Dr. Dyce began to stymie normal business operations, ultimately causing the breakup of the shareholders and the demise of the practice.

Ultimately, Dr. Dyce, along with his wife, Curley, and SCENT employee physician Dr. Gunnlaugsson brought the business's normal operations to a halt in an attempt to gain leverage over the negotiations of the new Shareholders' Agreement. Specifically, Dr. Dyce refused to allow SCENT to change its malpractice carrier to a lower cost provider, failed to approve new capital expenditures for the company, refused to attend five (5) separate closings for the new office building as a manager of SCENT Land, and ultimately refused to regularly return phone calls, electronic mail, or other communications despite the fact that he was a shareholder of SCENT and, consequently, owed a fiduciary duty to ensure he took actions in the best interests of the company and his fellow shareholder. (V. II. p. 148-49, 154, 169-70; D. ex. 49, 60, 127). In March of 2010, SCENT and SCENT Land had reached a crisis point. Construction of the new facility had ground to a halt because Dr. Dyce and Curley refused to sign the necessary loans documents as required by the bank. (Vol. II p 104, 110, 210, 217, 220-221, 265). Curley refused to provide funds to cover the shortfall in SCENT Land, although a vote of the members had called for capital to be invested in the company as allowed under the Operating Agreement. (P ex. 16 section 6.9; P Ex. 154, 155, 156, 157; Aff. Dr. Puchalski, P. 2). During the course of this crisis, Dr. Dyce requested numerous and ever changing data and financial information from SCENT. On numerous occasions, Dr. Puchalski and the employees of SCENT made the requested documentation available to Dr. Dyce at the practice site. (V. III p 313-315). SCENT even offered to allow an audit of the records, and offered to allow Dyce's attorney and accountant to come on the premises to review any and all records. (V. II p. 157).

Because of the actions of Dr. Dyce and Curley, the general contractor and sub-contractors went unpaid and the building went unfinished. (V. II p. 170; D. ex. 49, 60, 127). Due to Curley's refusal to finance the building and Dr. Dyce's refusal to execute the required

paperwork to close on the building, the general contractor threatened a mechanics lien and the subcontractors went unpaid. (Aff. Dr. Puchalski, P. 2). The partially constructed building was vandalized and SCENT began having to loan money to SCENT Land to meet obligations. (Aff. Dr. Puchalski, P. 2). Moreover, SCENT's current site lease was running out. (V II p 154). Dr. Puchalski, as managing shareholder, sent an email to Dr. Dyce on March 1, 2010 literally begging Dr. Dyce to put aside whatever differences he had with Dr. Puchalski and approve the closing so SCENT's loan could be paid back and the contractors could be paid. (D. ex. 43, 44). Dr. Dyce and Curley refused to allow the loan to close. Additionally, SCENT Land validly issued a two-stage capital call pursuant to section 6.9c of its Operating Agreement to raise the necessary funds to complete the new building. Although Amy Puchalski contributed $170,000 to cover costs needed for the new medical building, Jamie Curley failed to do so. (Aff. Dr. Puchalski, P. 3, Oper. Agree., P. 16; V. II p. 184; D. Ex. 158). To stop the destruction of SCENT and SCENT Land, Dr. Puchalski, founding shareholder of SCENT, reluctantly exercised Section 3.3.2(iv) of the Shareholders' Agreement and Section 2.3(a) of Dr. Dyce's Employment Agreement to terminate Dr. Dyce's employment and shareholder status with SCENT on March 10, 2010. (P ex. 19, 289, D. ex. 50). Dr. Dyce continued to work for sixty (60) days, and the parties attempted to work through the issues so as to keep the practice together. Dr. Puchalski continued to offer Dr. Dyce employment at approximately One Million Dollars a year as they worked out their differences if he would cooperate in the operations of SCENT, but Dr. Dyce refused. (V. II p. 89-90; D. Ex 73). On April 19, 2010, SCENT Land expelled Curley for her failure to meet the mandatory capital call under the Operating Agreement. (D ex. 157).

Prior to departing the practice, Dr. Dyce continued to breach both his Shareholders' Agreement and Employment Agreement with SCENT and further breached them upon departure. Dr. Dyce's termination was changed to a "for cause" basis on May 8, 2010 pursuant to Section 2.3(a) of his Employment Agreement based upon these actions and his failure to comply with the Management Directives issued pursuant to section 2.2c of Dr. Dyce's Employment Agreement and transition time line set out by SCENT. (Def. Ex. 68, 8, 163).

Shortly after leaving the practice, Dr. Dyce began violating the non-compete provision of his Employment Agreement. First, his attorney sent a letter to SCENT stating that Dyce was going to treat patients in Hartsville and explicitly stating that Dr. Dyce would not acknowledge the validity of the Covenant. (Def. Ex. 129). As Dr. Puchalski testified, the letter from Dr. Dyce's legal counsel told SCENT "that Dr. Dyce and his attorneys had- were repudiating the covenant and were breaching their contract." (Vol. II, P. 65). Dr. Dyce further breached the Covenant by working with Carolina Pines to purchase equipment for an ENT office[4], by approaching Carolina Pines for employment, by sharing SCENT's confidential information, and by opening two offices only yards away from existing SCENT practice sites. (Def. Ex. 231, Vol. I, P. 564-565, Vol. I, P. 578, Vol. II, P. 132; Vol. IV, P. 77-78).

On June 6, 2010, Dr. Dyce negotiated a call coverage contract with Carolina Pines Regional Medical Center and began contacting vendors. Moreover, Dr. Dyce created Dyce

[4] Even a cursory review of Defendants' Exhibit 231 shows that Dr. Dyce was involved in requesting this quote as the quote was sent to his attention at Carolina Pines where he competed against the practice in violation of the Covenant. Moreover, it is apparent that the equipment is not for an operating room as Dr. Dyce suggested in his testimony, but is indeed for an ear, nose, and throat office. The quote contains waiting room chairs, decorations, pictures, and end tables, as well as equipment that would be used in an ENT office and not in an operating room. (Def. Ex. 231). Dr. Dyce's testimony that he was unaware of this quote and that this equipment was used for an operating room is not credible. (Vol. I, P. 327-329).

Medical Enterprises, LLC, which was incorporated in August 2010. (D ex. 231, Vol II p 72-75, V. IV p 85). Dr. Dyce's employer began taking steps to set up his practice. (Vol. II p 67-71). The pro forma established with Carolina Pines specifically referenced confidential "payor mix" information of SCENT. (D. ex. 99, V. II p 13, V. IV p 75-76). These actions were a direct violation of both the Shareholders' and Employment Agreements and entitle SCENT to the liquidated damages provision outlined in Section 3.11 of Dr. Dyce's Employment Agreement. (P. ex. 8). On September 15, 2010, Dr. Dyce signed his employment agreement with Carolina Pines Regional Medical Center and began practicing on October 25, 2010. (D's Ex. 109).

Dr. Dyce advertised in Cheraw, Hartsville, and Camden—all existing markets for SCENT—and generated immediate revenue at SCENT's expense. (V. IV p 82, Def. Ex. 123, 124, 130). He began seeing existing patients of SCENT whom he had previously treated as a SCENT employee. (D. ex. 117, 211, 212, 213, 220). The result was catastrophic and SCENT has lost at least Four Hundred Eighty-Six (486) patients that it is aware of based upon patient transfer requests SCENT received. (V. II p.11-116, 236, V. IV p.80; D. ex. 117, 144). Dr. Dyce's violation of his agreements, his breach of his fiduciary duty, and his conspiracy to ground the practice to a halt resulted in the shuttering of the Hartsville and Cheraw offices, and the loss of a conservative estimate of One Million Four Hundred Thousand Dollars ($1,400,000) based solely upon those patient transfers. (V. II p236, D. ex. 218).

As a result of Dr. Dyce's actions, SCENT has been left with a huge debt load, lost its entire Cheraw and Hartsville Practice—the entire eastern half of SCENT's practice, and saw significantly diminished earnings. On the other hand, Dr. Dyce has little debt associated with

his medical practice, is making more than a million dollars a year,[5] and has completely taken SCENT's medical practice in Hartsville. Yet Dr. Dyce has asked for more from his litigation.

STANDARD OF REVIEW

"[A]n appellate court must look to the main purpose of the proceeding in order to determine the standard of review to exact." *Wheeler v. Estate of Green,* 381 S.C. 548, 554, 673 S.E.2d 836, 839–40 (Ct.App. 2009). "The character of the action is generally ascertained from the body of the complaint, but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." *Sloan v. Greenville Cnty.,* 380 S.C. 528, 534, 670 S.E.2d 663, 666–67 (Ct. App. 2009)."

In the Dyce case, the Plaintiff requested and the trial court imposed a constructive trust on all the causes of action and the monetary judgment it awarded. (Order of Goodstein dated 11/25/2015 pp. 46-47). An action to declare a constructive trust is an equitable matter, and an appellate court may find facts according to its own view of the evidence. *Lollis v. Lollis,* 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987).

The Curley case was one for corporate dissolution. "A corporate dissolution is an action in equity." *Jordan v. Holt,* 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). "In actions in equity, the appellate court may view the evidence to determine the facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee." *Florence Cnty. Sch. Dist. # 2 v. Interkal, Inc.,* 348 S.C. 446, 450, 559 S.E.2d 866, 868 (Ct.App. 2002); *see also First Union Nat'l Bank of S.C. v. Soden,* 333 S.C. 554, 567, 511 S.E.2d 372, 379 (Ct.App. 1998) ("[W]e are not required to disregard the

[5] Within a short time of taking SCENT"s Hartsville patients, Dr. Dyce was earning in excess of one million dollars, money which would have been earned by SCENT but for his breaching of the Covenant not to Compete. (D.'s ex. 217).

findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility."). Therefore, in both the Dyce case and the Curley case the court should review the factual findings by a de novo standard and may find facts in accordance with its own view of the evidence. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 715 S.E.2d 348 (Ct. App. 2011).

In the Dyce case, the Plaintiff also asserted several causes of action sounding in law. In an action at law tried without a jury, the trial court's findings are conclusive on appeal if supported by competent evidence. *Id.* Accordingly, the standard of review includes correcting errors of law and determining whether the trial court's findings are supported by competent evidence. *Baugh v. Columbia Heart Clinic, P.A.,* 402 S.C. 1, 28, 738 S.E.2d 480, 495 (Ct. App. 2013). When legal and equitable actions are maintained in one suit, the court is presented with a divided scope of review, and each action retains its own identity as legal or equitable for purposes of review on appeal." *Wright v. Craft,* 372 S.C. 1, 17, 640 S.E.2d 486, 495 (Ct.App. 2006). "The proper analysis is to view the actions separately for the purpose of determining the appropriate standard of review." *Id.* at 17–18, 640 S.E.2d at 495.

ARGUMENT

I. The trial court erred in failing to enforce the July 16, 2008 Shareholders' Agreement which stated when Dr. Dyce became a Shareholder and nullified any previous negotiations or agreements.

On July 16, 2008, SCENT issued 50,000 shares of stock to Dr. Dyce and he signed a Shareholders' Agreement stating that he had become a shareholder on that date. (P. ex. 7, 8, 9). The Shareholders' Agreement stated in part that "[a]ll other agreements dated prior to the date of this agreement are hereby superseded in their entirety by the terms and conditions of this agreement." (P's Ex. 7 section 8.1). Both parties were represented by counsel, and both parties were fully informed as to its contents. (V II. p. 39). In its own Order, the trial court stated

"The July 16, 2008 Shareholders' Agreement is a binding agreement." (Order, P. 13). However, the trial court inexplicably ignored this binding agreement and found that Dr. Dyce became a Shareholder on a previous date unrelated to any documents signed by the parties. This failure to enforce the plain language of the contract was legal error and must be reversed.

South Carolina law provides that "[a] merger clause expresses the intention of the parties to treat the writing as a complete integration of their agreement." *Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct.App. 1984); *see also* 11 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 33:21 (4th ed.1999) (same); *Black's Law Dictionary* 880 (9th ed. 2009) (defining an integration clause, also termed a merger clause, as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and agreements relating to the subject matter of the contract"). By virtue of its express terms, the Shareholders' Agreement at issue superseded any prior agreements between the parties except those incorporated within such as the Employment Agreement. Therefore, the Shareholder Agreement stated clearly and unambiguously on its face, that it set aside all prior discussions, agreements, and negotiations, and Dr. Dyce agreed to the terms of the Shareholders' Agreement, including the provision that he became a shareholder on July 16, 2008.

The parties had discussed making Dr. Dyce a shareholder since his employment started. They performed various calculations, signed different documents, and discussed myriad approaches. (P ex. 3, 4, 118, 119, 120, 121, 125, 153; D. ex 2, 12, 169, 246, 255). However, Dr. Dyce did not want to make a large lump sum payment to buy in. (T. V. II p. 41, 42). So the negotiations and attempts went on until sufficient earnings of SCENT were assigned to Dr. Puchalski as to allow the parties to enter into the binding July 16 Shareholders Agreement and stock was issued.

Dr. Dyce has been inconsistent in alleging when he became a shareholder. Dr. Dyce took the position that there were a number of dates when he *may* have become a shareholder, but that he was asserting January of 2008 at trial. Counsel for Plaintiff represented to the Court in his opening argument that:

> "[t]here are a number of dates on which Dr. Dyce might have been made a shareholder. Could have been early '07 when he started buying in. Could have been August of '07 when he had a bill of sale, a stock purchase agreement and a shareholders' agreement. Could have been in the end of January '08 when he finished his buy-in, and it could have been in July of '08 when he signed another shareholder agreement and got a certificate." (Vol. I, P. 8).

In addition, Dr. Dyce's expert witness testified that it was his opinion "that certainly no later than the summer of 2007 [Dr. Dyce] may arguably have become a shareholder as early as February 2007." (Vol. I, P. 79). Dr. Dyce himself stated in his deposition that he did not know when he became a shareholder and said he could not talk about it. (Def. Ex. 179, P. 59-60). Moreover, in the initial complaint filed by Dr. Dyce on March 12, 2010, Dr. Dyce did not allege that he became a shareholder prior to July 16, 2008. Additionally, in Dr. Dyce's First Amended Complaint filed on May 10, 2012, Dr. Dyce pled that he entered into a shareholders' agreement on July 16, 2008, and that pursuant to the terms of the agreement, "all other agreements dated prior to the date of this Agreement are hereby superseded in their entirety by the terms and conditions of this Agreement." Dr. Dyce, in his own pleadings, admits to becoming a shareholder on July 16, 2008 and trial court ignored this fact.

Although there are many dates asserted by Plaintiff as to when he became a shareholder, the parties themselves explicitly agreed that Dr. Dyce became a shareholder on July 16, 2008. On that day, Dr. Dyce and Dr. Puchalski signed a Shareholders' Agreement. (Pl. Ex. 7.005). The agreement memorializing Dr. Dyce's shareholder status also stated that it "contains the entire agreement of the parties with respect to its subject matter." (Pl. Ex. 7.023,

§8.8). Moreover, the Shareholders' Agreement further stated that all "other agreements dated prior to the date of this Agreement are hereby superseded in their entirety." (Pl. Ex. 7.022, §8.1). In addition, Dr. Dyce received his stock certificate for 50,000 shares in SCENT on July 16, 2008. (Def. Ex. 13). By its very terms, the July 16, 2008 Shareholders' Agreement supersedes any prior negotiations or agreements that the parties had regarding shareholder status, and the trial court committed legal error in failing to enforce it.

Ignoring the undisputed binding agreement, the trial court improperly ruled that the "actions and testimony of SCENT's outside accountant, Austin Sheheen, confirm that Dr. Dyce had completed his buy-in and became a SCENT shareholder as of February 1, 2008." (Order, P. 5). This ruling is a legal error and not supported by any evidence. A review of the record shows that this was not Mr. Austin Sheheen's testimony at all. Mr. Austin Sheheen testified that Dr. Dyce became a shareholder in the summer of 2008 as evinced by the 2007 and 2008 tax returns that Dr. Dyce executed. (Vol. III, P. 276-277; P. 280; Def. Ex. 3; Def. Ex. 14). As Mr. Austin Sheheen aptly stated, "[Dr. Dyce] was a shareholder at the end of '08. He had received compensation before he was a shareholder and after. I needed a vehicle to make sure he reported his correct income. I could have issued another 1099. I chose not to. I put it all on his K-1. The net effect was if he'd paid tax on what he got, would have been the same as if I'd issued a 1099 and a K-1." (Vol. III, P. 419:4-10). Mr. Austin Sheheen used the K-1 to accurately reflect his income to the federal government; this was not used to indicate Dr. Dyce was a shareholder on February 1, 2008.

The trial court improperly ruled that the issuance to Dr. Dyce of a 1099 in 2007 to correct an improper K-1 distribution designation and his receiving a K-1 in 2008 somehow legally made him a shareholder. This ruling is without legal foundation and is error. As explained by Mr. Austin Sheheen, the accounting firm placed all of Dyce's income on the K-1

in 2008 instead of splitting it between a K-1 and a 1099. This tax choice does not legally make Dr. Dyce a shareholder on February 1, 2008 and the trial court's ruling was in error.

The trial court also made legal error in not considering other important testimony and evidence conclusively establishing Dr. Dyce's admission as a shareholder on July 16, 2008 and not on February 1, 2008. Dr. Dyce did not guarantee the debt of SCENT or sign onto any lines of credit with financial institutions until July 16, 2008. (Vol. II, P. 203). In addition, Dr. Dyce was not listed as an owner for Workers' Compensation purposes until after July 16, 2008. (Vol. II, P. 203). Dr. Dyce was welcomed as SCENT's newest owner in the summer of 2008, purchased a new home on Daniel Island after he became a partner in the summer of 2008, and even played on the owners' team against employees in a golf tournament that summer after he became a shareholder. (Vol. IV, P. 47-49).

In fact, evidence in the record indicates that up until June of 2008, the parties were still in discussion regarding the "buy-in' and subsequent tax implications prior to Dr. Dyce being admitted as a shareholder. (Def. Ex. 11; Def. Ex. 12). Moreover, the trial court failed to address the total lack of a factual underpinning in the testimony of the Plaintiff's expert witness, Richard Livingston. While Mr. Livingston opined that Dr. Dyce became a shareholder in February of 2008, he provides no factual underpinnings for his calculations. Instead, Mr. Livingston assumes a $750,000 figure as a purchase price and then performs various calculations to back into a date of February 2008 as a date that Dyce became a shareholder. Moreover, it is important to note that Mr. Livingston failed to include any value for the accounts receivable for the "buy-in" as was clearly contemplated and outlined by Mr. Sheheen's correspondence to counsel for both Dr. Dyce and Dr. Puchalski. (Def. Ex. 255; Vol.

III, P. 329-331).[6] Additionally, Mr. Livingston did not account for the cash that existed in the bank as agreed upon by the parties. (Vol. III, P. 332). As the testimony from Mr. Sheheen reveals, Dr. Dyce was still short of his "buy-in" as of February 1, 2008 and therefore could not be a shareholder at that point until the parties agreed otherwise in the form of the Shareholders' Agreement on July 16, 2008. (Def. Ex. 246).

The trial court also failed to consider, as an additional sustaining ground, the Defendants' affirmative defense of laches to Dr. Dyce's claims that he became a shareholder prior to July 16, 2008. This is reversible error in itself. As this Court is aware, laches is the negligent failure to act for an unreasonable period of time. *Gibbs v. Kimbrell,* 311 S.C. 261, 428 S.E.2d 725 (Ct.App. 1993). Laches is an equitable ground and the appellate court's view of the evidence is de novo. Under the doctrine of laches, if a party, knowing his rights, does not reasonably assert them, but by unreasonable delay suffers his adversary to incur expenses or otherwise detrimentally change his position, then equity will ordinarily refuse to enforce these rights. *Id.* 428 S.E.2d at 730.

Because of the various dates alleged by Dyce in his numerous complaints and deposition testimony, Defendants in this case were unaware that Plaintiff was taking the position that he was a shareholder prior to July 16, 2008 and certainly could not be aware of the specific date that Dr. Dyce alleges he became a shareholder as Dr. Dyce, his accountant, his expert witness, and his attorney all contend it was a different date (Vol. I, P. 8). In fact, Dr.

---

[6] The trial court placed great weight and analysis on the accounts receivables for the "buy-out" as addressed in Section 4.5 of the Shareholders' Agreement, but failed to consider the accounts receivables for the "buy-in" to the practice. The accounts receivable must be contemplated on both sides of the equation. If the trial court found that $1.8 million was an acceptable figure to utilize as the accounts receivable for the "buy-out," then that figure must be used for the "buy-in" as well. This is further evidence that Dr. Dyce was not a shareholder on February 1, 2008 because Dr. Dyce would have never provided enough "sweat equity" as of February 1, 2008 to satisfy such a large account receivable.

Dyce refused to answer questions in his deposition on January 28, 2012 about when he became a shareholder. (Def. Ex. 179, P. 59). Dyce had actual or inquiry notice as to this alleged position before trial, has failed to timely assert this known right, and allowing the Plaintiff to assert such a position at this stage materially prejudices the Defendant. *See Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478-79, 451 S.E.2d 924, 929 (Ct. App. 1994).

Regardless of the additional cumulative reasons why Dyce was not a shareholder in February 1, 2008, the trial court erred in failing to give legal recognition to the Shareholders' Agreement dated July 16, 2008 that set aside all prior discussions, agreements, negotiations and agreed to the terms of being joint shareholders as of the date the agreement was executed. It was not the trial court's place to go behind and alter the agreement that the parties entered into. *See Ellis v. Taylor,* 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994) ("The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully.").

The trial court misapplied the relevant facts and made errors of law when reaching its findings of fact and conclusions of law, and Appellant's request this Court to overturn the trial court's legal errors.

II. The Trial Court Erred in Finding the Shareholders' and Employment Agreements were not executed in concert.

In a footnote, the trial court concludes that the June 1, 2008 Employment Agreement is not valid because it is superseded by the July 16, 2008 Shareholders' Agreement and that the Employment Agreement was not incorporated into the clear terms of the Shareholders' Agreement. This is an incorrect conclusion of law and the associated factual finding is completed unsupported by any evidence in the record.

The Employment Agreement references the Shareholders' Agreement no less than thirty (30) times and contemplates that the Employment Agreement and Shareholders' Agreement should be read in concert. (Def. Ex. 8). Additionally, the Shareholders' Agreement references an Employment Agreement no less than forty-five (45) times and specifically states that the Shareholders' Agreement "shall not be deemed to supersede the terms and conditions of the Employment Agreements executed simultaneously with this Agreement." (Pl. Ex. 7). The Agreements themselves contemplate that they would be executed together and would reference one another. The fact that the Employment Agreement references a Shareholders' Agreement and is contemplated to be executed in conjunction creates a requirement to look outside the document, or at the very least an ambiguity to allow parol evidence. Accordingly, parole evidence must be admitted to supply the deficiency and establish the true intent of the parties. *Columbia East Assocs. V. Bi-Lo, Inc.*, 299 S.C. 515, 519, 386 S.E.2d 259 (Ct. App. 1989)("Where a contract is silent as to a particular matter, and ambiguity thereby arises, parol evidence may be admitted to supply the deficiency and establish the true intent.)

The only evidence in the record establishes that the Employment Agreement was executed the same day as the Shareholders' Agreement, but was mistakenly dated a different day. As Dr. Puchalski testified at trial, he was on an anniversary trip out of the country with his wife on the date the Employment agreement was mistakenly dated. (Def. Ex. 237; Vol. II, P. 47-55). *See Wilbur Smith Associates v. National Bank of South Carolina*, 274 S.C. 296, 299, 263 S.E.2d 643, 645 (1980) ("[W]here the instruments have not been executed simultaneously but relate to the same subject matter and have been entered into by the same parties, the transaction comprising the contract will be considered as a whole. This is true even though the transaction consumed more than one day; the date of the writings constituting such transaction

is immaterial. Construing contemporaneous instruments together means simply that if there are any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect between the parties so that the whole agreement as actually made may be effectuated."). Accordingly, this Court should reverse the lower court's finding that the Employment Agreement is superseded by the July 16, 2008 Shareholders' Agreement, where it was specifically incorporated and where parol evidence clarified the misdating of the document.

III. The Trial Court Erred in Substituting its Own Judgment as to Whether Dr. Dyce was Properly Terminated For Cause.

The trial court found that Dr. Dyce was terminated without cause. (Order, P. 7). This Court should reverse that ruling.

Dr. Dyce was initially terminated without cause according to the March 3, 2010 consent and was validly issued a Management Directive, outlining the expectations of the parties over the course of the next sixty (60) days that Dr. Dyce would work for the practice. (Def. Ex. 67, 163). SCENT notified Dr. Dyce that failure to abide by the Management Directives would result in immediate termination as required by Section 2.2(c) of the Employment Agreement. (Def. Ex. 8; Def. Ex. 163). On May 8, 2010, SCENT issued an immediate termination of Dr. Dyce's employment for violating the Management Directive as called for under Section 2.2(c) of the Employment Agreement. (Def. Ex. 68; Vol. II, P. 87-90, 300-302). In the termination, SCENT stated that Dr. Dyce was being terminated because he had violated the management directives and confidentiality provisions. (Def. Ex. 68). Section 2.2(c) of the Employment Agreement does not require any period of notice for termination.

The trial court overlooked and did not properly consider the numerous "bad acts" committed by Dr. Dyce against the practice to substantiate Dr. Dyce's termination for cause.

Following the initial notice of termination, SCENT had discovered multiple breaches of confidentiality by Dr. Dyce. SCENT had learned of Dr. Dyce's secret theft of insurance contracts and his admonition to a staffer to "keep it on the down low." (Vol. I, P. 390, 398; Vol. II, P. 61-62; Vol. III, P. 242). SCENT also learned of the affidavit for Dr. Dyce prepared by Dr. Gunnlauggson containing confidential information and the long telephone conversations Dr. Dyce and Dr. Gunnlauggson had on the day the affidavit was sent. (Def. Ex. 71; Vol. I, P. 518; Vol. II, P. 78-79, 179). SCENT also discovered on its computer server documents authored by Dr. Gunnlauggson, including his manifesto,[7] which contained further confidential information that came from his voluminous communications with Dr. Dyce. (Def. Ex. 72; Vol. II, P. 78-79). SCENT further learned that Dr. Dyce and Dr. Gunnlauggson had been exchanging scores of texts and cell phone calls on SCENT issued cell phones, often times interspersed with calls to Dr. Gunnlauggson's attorney. (Def. Ex. 86; Def. Ex. 133; Def. Ex. 134; Def. Ex. 135; Vol. 1., P. 379). The call and text message logs make it clear that Dr. Dyce and Dr. Gunnlauggson were in extremely close communications during the critical times when events were unfolding. (Def. Ex. 86; Def. Ex. 133; Def. Ex. 134; Def. Ex. 135; Vol. 1., P. 379). Although Dr. Dyce denied that his lawyers were coordinating with the attorneys of Dr. Gunnlauggson, an email between Dr. Gunnlauggson and his attorney clearly shows that Dr. Dyce and Gunnlauggson were having their attorneys contact each other (Def. Ex. 86).

[7] Only Dr. Dyce could have disclosed much of the information contained within Dr. Gunnlauggson's manifesto (Def. Ex. 72). For example, only Dr. Dyce could have identified what was in the draft shareholders' agreement that the shareholders were in the process of negotiating; only Dr. Dyce would have told Dr. Gunnlauggson that Dr. Dyce had retained an attorney because of shareholder disputes; only Dyce could have told Dr. Gunnlauggson about individual expenditures of SCENT; and only Dr. Dyce knew that SCENT had previously covered his legal expenses on contract negotiations. All of the detailed, confidential information in Dr. Gunnlauggson's affidavit portrays Dr. Puchalski and SCENT in a negative light. Accordingly, Dr. Gunnlauggson's testimony that Dr. Puchalski informed him of this confidential information is not credible.

Ironically, Dr. Dyce denied to Dr. Puchalski that his attorney was working with Dr. Gunnlauggson's attorney, and that denial was captured on one of Dr. Dyce's secretly taped recorded conversations. (Def. Ex. 207; Vol. I, P. 423-424). Finally, when served with Dr. Gunnlauggson's lawsuit, the practice had further proof that Dr. Dyce shared confidential information with Dr. Gunnlauggson contained in his verified complaint. (Def. Ex. 167).

The Affidavit, Manifesto, and Complaint authored by Dr. Gunnlauggson all contain confidential information that Dr. Dyce shared with Dr. Gunnlauggson. Professor John Freeman opined that there was a considerable exchange of proprietary information between Dr. Dyce and Dr. Gunnlauggson. (Vol. I, P. 675-676). In the affidavit, Dr. Gunnlauggson had detailed information about the existence and negotiations of a new shareholders' agreement. (Def. Ex. 71). The affidavit further referenced records of SCENT and Dr. Dyce's access to them as a shareholder. (Def. Ex. 71). In the Manifesto, Dr. Gunnlauggson discussed with great specificity Dr. Dyce's purchase of 50,000 shares in the practice, identified certain sections of the proposed Shareholders' Agreement by provision number (i.e. Section 3.9 of the Shareholders' Agreement), had knowledge about the individual expenditures of the practice, and knew about the expense of legal fees for negotiations between shareholders. (Def. Ex. 72). All of this information in the Manifesto was obtained by Dr. Gunnlauggson after conversations with Dr. Dyce. In Dr. Gunnlauggson's verified complaint, he details information in paragraphs 24 and 25 that he should not have had access to, namely the additional compensation provision and the management structure of the proposed shareholders' agreement. (Def. Ex. 167).

The trial court blatantly overlooked information that Dr. Gunnlauggson gained from Dr. Dyce, but to which he should not have had access. The Affidavit was shared with Dr. Dyce, and he failed to disclose it to SCENT in violation of his duty of loyalty. Dr. Dyce also failed to

disclose that Dr. Gunnlauggson was preparing for litigation with SCENT. After learning of these multiple breaches of the Management Directive and his agreements, SCENT terminated Dr. Dyce's employment under Section 2.2(c). The trial court failed to find voluminous, confidential information was provided by Dr. Dyce to Dr. Gunnlauggson for use against SCENT in violation of the applicable provisions of the Shareholders' and Employment Agreement. Moreover, the trial court failed to find that Dr. Dyce violated the confidentiality provisions of the agreements by taking the insurance contracts for his own personal use and subsequently sharing the insurance contracts with a competitor. (Vol. II, P. 61-62; Vol. III, P. 85; Vol. IV, P. 75, Def. Ex. 99; Vol. II, P. 130-131, Vol. IV, P. 75-76).

This Court should remand the matter with instructions to the trial court to find that Dr. Dyce was properly terminated for cause, thereby offsetting the value awarded to Dr. Dyce pursuant to the buyout formula discussed *infra* in Section V.

IV. The Trial Court Erred in Failing to Enforce a Valid, Enforceable Covenant Not to Compete.

This Court should reverse the lower court trial because the circuit court's order is controlled by an incorrect view of the law. The language contained in Dr. Dyce's Covenant Not to Compete ("covenant") has been upheld by two different trial judges in a related case. (D. ex. 141, Order of Judge Benjamin dated 9/28/2012). Furthermore, the language is almost identical to that upheld in *Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M. D.,* (upheld by the S.C. Supreme Court in Memorandum Opinion No. 2012-MO-029). Awarding Dr. Dyce a buyout and nullifying his Covenant results in a grave injustice to SCENT and would be a misstatement of our jurisprudence.

It is undisputed that Dr. Dyce breached the Covenant. Dr. Dyce repudiated it almost immediately upon leaving. (D. Ex 129; V. II, p. 65). Dr. Dyce further breached the Covenant

by working with Carolina Pines to purchase equipment for an ENT office, by approaching Carolina Pines for employment, by sharing SCENT's confidential information, and by opening two offices only yards away from existing SCENT practice sites. (Def. Ex. 231, Vol. I, P. 564-565, Vol. I, P. 578, Vol. II, P. 132; Vol. IV, P. 77-78). Dr. Dyce advertised his services in the locations where SCENT practiced. (P Ex. 123, 124)

Following his departure, Dr. Dyce breached the Covenant in two separate geographic areas by opening two offices in SCENT's territory. Dr. Dyce initially opened an office in Hartsville, resulting in the loss of over 400 patients and the conservative estimate of more than $1.4 million in damages. (Def. ex. 117, 122, 130, 144, 211, 212, 213, 218, 220, 228, P ex. 67, 68 Vol. II, P. 111). After destroying SCENT's patient base in Hartsville, Dr. Dyce opened an office in Cheraw also in violation of the Covenant. As a result, SCENT eventually closed both its Hartsville and Cheraw locations. These two separate breaches caused SCENT separate damages, entitling SCENT to recover the full amount in the liquidated damages provision for each breach, resulting in liquidated damages of $1.5 million in favor of SCENT (Def. Ex. 122; Def. Ex. 233).

Ironically, Dr. Dyce's repudiation and violation of the Covenant defeated the very source of revenue that SCENT would have utilized to pay any legitimate buy-out claim from Dr. Dyce. By repudiating and violating the Covenant, Dr. Dyce took for himself the millions of dollars in SCENT revenue that he is now claiming. In essence, Dr. Dyce is trying to double dip: get a buyout and take SCENT's patients and revenues.

In the current case, the trial court incorrectly concluded that the Covenant is overly broad in its scope. (Order, P. 28). The court incorrectly ruled it was overly broad, but did not address the five part test to determine a Covenant's validity. *See Team 1A v. Lucas,* 295 S.C.

237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011). A review of the pertinent facts and applicable law regarding covenants not to compete establishes the Covenant as a valid, enforceable agreement. Accordingly, the trial court should be reversed.

a. The Language of the Covenant.

The Covenant is not overly broad. Exhibit A to the Employment Agreement provides, "for a period of eighteen (18) whole calendar months from the date of termination of the Employment Agreement, Physician shall not directly or indirectly practice medicine or provide medical services within a twenty (20) mile radius of any practice site maintained by the Group." (Def. Ex. 233). The exact language of the Covenant in Dr. Dyce's employment agreement was found enforceable on previous occasions in litigation with Dr. Gunnlauggson. The hearing on these covenants held in front of Judge Benjamin was held together. (D. ex. 141, Order of Judge Benjamin dated 9/28/2012). Importantly, Judge Benjamin denied summary judgment requested by Dr. Dyce on the issue of the Covenant based on the same legal arguments put forth at trial. (Def. Ex. 141).

Recent South Carolina rulings have enforced similar covenants not to compete in the field of medicine. An extremely similar covenant in the physician setting was upheld recently by South Carolina Courts. In *Budev*, Judge Jefferson concluded the broad language preventing the defendant from "[undertaking] the practice of medicine within a twenty-five (25) mile radius of any office of the Practice . . ." was perfectly acceptable to protect the legitimate business interests of the practice.

The language of the Covenant in the *Budev* case is almost identical to the current one. The *Budev* Covenant prohibited the "practice of medicine" within an ophthalmologist medical practice. The physicians in *Budev* were licensed in a specialty, ophthalmology. In the instant

matter, Dr. Dyce is licensed in otolaryngology and related services. The trial court in *Budev* accurately stated that given the type of medical practice in the case "the intent of the agreement was to restrict the non-compete to the practice of ophthalmology." *Budev* Order, P. 11. "It is the substance of the agreement, not the form, which must control the construction." *Id.* The court acknowledged that "the practice of medicine is included in the practice of ophthalmology . . . and to read 'the practice of medicine' in any other way would be absurd."

Just as in *Budev*, this court's role is to enforce the meaning of the contract, and the testimony made clear that the restrictions on the practice of medicine in the Covenant applied to otolaryngology and related services as allowed under SCENT's Articles of Incorporation and the intent of the parties. (Ex. 108; T. V. 4 p 45, 46; V. II p100, 101, 105-108). The practice of medicine is included in the practice of otolaryngology and other related services and to read the practice of medicine in any other way would be absurd. Under SCENT's Articles of Incorporation, the "corporation's purpose [was] limited to rendering services in connection with the practice of otolaryngology medical services and all other services ancillary to such services which are permitted or authorized by the licensing authority of South Carolina applicable to the medical profession." (Pl. Ex. 108.001).

The trial court in the current case mistakenly asserted that the *Baugh* decision supported the position of Dr. Dyce. *Baugh,* 402 S.C. at 16, 738 S.E.2d at 488. Actually, the opposite is true. In *Baugh*, the court enforced a similar covenant and specifically found that "patients stay with and follow their doctors." *Id.* Here, as in *Budev* and *Baugh*, the parties intended to keep physicians from practicing in the fields of medicine that would compete against SCENT, and they understood that patients follow a physician if a physician departs. (V. IV p 45-46, V. II p 100, 101, 105-108).

SCENT's practice was broad and included many ancillary services to the full extent the physicians were licensed to practice, including allergy and sleep medicine. (Pl. Ex. 108). The testimony presented throughout the trial through both Dr. Puchalski and Dr. Vidrine was that the Covenant was meant to restrict a departing physician from competing against SCENT in the areas of medicine in which they practiced—otolaryngology and other related services. (Vol. I, P. 623; Vol. II, P. 45, 107, 108; Vol. IV, P. 45). Moreover, the job description in Dr. Dyce's employment agreement—the same agreement that contains the Covenant—states that the "Physician shall render a full range of professional services typically provided by a licensed physician practicing in the area of Otolaryngology at such of the Group's practice sites as requested by the Managing Shareholder." (Def. Ex. 8, Section 3.1). In addition, the Employment Agreement references the field of practice of otolaryngology on four separate occasions. In ruling that the language of the Covenant is overly broad, the trial court ignored the remaining language of the Employment Agreement, the testimony in the record, and the clear intention of the parties. The trial court's finding is a legal error.

Furthermore, the trial court failed to apply and analyze the required factors set forth by our state's jurisprudence to determine reasonableness, as discussed below, in evaluating the Covenant and therefore committed legal error.

b. The Agreement is Valid, Enforceable, and Not Contrary to Public Policy.

The restrictions contained in the Covenant are reasonable. As mentioned above, South Carolina courts uphold covenants not to compete between physicians. The public interests must not be offended by the restrictions contained in a covenant not to compete. *Almers v. S.C. Nat'l. Bank of Charleston*, 265 S.C. 48, 52, 217 S.E.2d 135, 137 (1975). One of the determining factors of public interests is the economic consequences suffered by the employee, particularly

the employee's opportunity to earn a livelihood. *Id.* at 52-53, 217 S.E.2d at 137. As discussed more fully herein, the restrictions did not hinder Dr. Dyce from practicing medicine or from earning a living in his chosen field.

SCENT provided otolaryngology and related services care to patients in the Hartsville and Cheraw area prior to Dr. Dyce's departure from the practice. SCENT continued to provide these services until the competition from Dr. Dyce caused the practice to close the two locations. Restricting Dr. Dyce from practicing in this market would not have resulted in inadequate medical protection for the public.

c. The Covenant was necessary to protect SCENT's legitimate interests.

The necessity and reasonableness of the covenant is exemplified by Dr. Dyce's actions. Dr. Dyce opened up a competing practice with SCENT, established his offices near SCENT's office, practiced with the hospital that controls much of the area's market, and has significant ties with referring physicians. (V. II p100, 101, 105-10). To date, SCENT is aware of at least Four Hundred Eighty-Six patient transfers to Dr. Dyce based upon formal requests of the practice. (Def. Ex. 117; Vol. IV, P. 80). This does not include the loss of future patients from referrals that went to Dr. Dyce instead of SCENT. A current employee of Dr. Dyce, who formerly worked for SCENT, testified that Dr. Dyce currently sees many of SCENT's former patients. (Vol. I, P. 559). Lance Jones, the former CEO of Carolina Pines, stated that Dr. Dyce's relationships from the Hartsville area benefited his practice. (Vol. I, P. 573; Def. Ex. 178).

When Dr. Dyce opened his practice, his incredibly high patient volume was solely contingent on SCENT's decrease in volume. (Def. Ex. 211, 117; Vol. I, P. 559; Vol. IV, P. 82). And Dr. Dyce's monthly revenue gain was contingent on SCENT's loss of monthly revenue.

(Def. Ex. 212). In fact, a conservative estimate of SCENT's losses is in excess of One Million Four Hundred Thousand Dollars ($1,400,000) based solely upon those patient transfers. (Def. Ex. 218; Def. Ex. 122; Vol. II, P. 236). A review of the procedures performed by Dr. Dyce from October 1, 2010 to August 31, 2011 demonstrates that his practice was fully operational and lucrative from the first day, having completed over *19,269* different procedures in such a short period of time. (Def. Ex. 97; Def. Ex. 98; Def. Ex. 219). These were procedures that SCENT would have completed had Dr. Dyce not violated his Covenant. The reasonableness and necessity of the covenant provision has been fully established by the damage done to SCENT.

Furthermore, the Covenant was needed to protect legitimate and protectable interests of SCENT including patient base, trade secrets, and business goodwill. (Def. Ex. 233; Vol. II, P. 111). In his Employment Agreement, Plaintiff ***expressly acknowledged*** that "during the course of his employment," he would "become privy to and knowledgeable about the patients, services, rates, fees, systems, business customs and practices, and other information and trade secrets concerning [SCENT's] business which would be injurious and damaging to [SCENT] if divulged, used or made known to a competitor." (Def. Ex. 233).

The South Carolina Supreme Court has allowed reasonable restrictions on competition to protect employers against the "*precipitous raiding of clients*, [and for the] protection of goodwill, and security of trade secrets," and that "[t]he Court will enjoin the invasion of those rights." *Almers,* 265 S.C. at 58, 217 S.E.2d at 140 (emphasis added). Dr. Dyce raided not only the good will of the practice, but also SCENT's patients.

Dr. Dyce acknowledged that SCENT's "business is highly competitive and that [SCENT] has a need to protect the anticipated value created by [Plaintiff's] exclusive practice

for [SCENT]," which is also a legitimate, protectable interest. *See* 54A Am. Jur. 2d *Monopolies and Restraints of Trade* § 925 (2010) ("The continued success of a medical practice, which is dependent on patient referrals, is a legitimate interest worthy of protection [by covenants not to compete]."). As a Shareholder, Dr. Dyce was in a special position of authority over the acceptable nature of his own employment agreement and that of other employees. Accordingly, the covenant was necessary to protect SCENT's legitimate business interests.

d. The Covenant is Reasonably Limited in its Operation with Respect to Time and Place.

i. Time Limitation

Dr. Dyce did not contest the time period in the Covenant. Dr. Puchalski and Dr. Vidrine stated the eighteen month provision in the Covenant was reasonable. (Vol. II, P. 103; Vol. IV, P. 44-45). Moreover, Dr. Vidrine testified that non-competes were common among doctors and that the length of the covenant at SCENT was designed to protect the practice because of the risk of hiring doctors, expense in recruitment, investment in support staff for the physicians, and the time spent introducing the physicians to doctors. (Def. Exs. 25, 26, 27; Vol. I, P. 558, Vol. IV, P. 44).

South Carolina courts have enforced covenants longer than the eighteen month provision in question here. *See Rental Unif. Svc. v. Dudley,* 278 S.C. 674, 676, 301 S.E.2d 142, 143 (1983)(enforcing three year covenant against a delivery truck driver for an industrial laundry operation) (*citing Sermons v. Caine & Estes Ins. Agency, Inc.,* 275 S.C. 506, 273 S.E.2d 338 (1980)). Accordingly, the Covenant is reasonably limited under South Carolina law.

ii. Geographical Area

Dr. Dyce did not contest the geographical area of the Covenant at trial. "[I]n order to be reasonable, [the geographical restraint] must be necessary in its full extent for the protection of some legitimate business interest of the employer." *Standard Register Co. v. Kerrigan,* 283 S.C. 54, 66, 119 S.E.2d 533, 539 (1961). "A geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee ***was able***, during the term of his employment, to establish contact with his employer's customers." *Dudley*, 278 S.C. at 676, 301 S.E.2d at 143 (citation omitted) (emphasis added). *Dudley* does not require that the employee actually worked in every portion of the covenant's geographic area. Instead, the Covenant should only cover the geographic areas where the employee was able to establish contact with customers. *Id.* Thus, covenants have been enforced where the employee was "restricted only in the area in which [the employee] worked ***or to which he was assigned at any time during his employment***." *Id.* (internal quotations and citations omitted) (emphasis added).

In the present case, the geographical restriction was a twenty (20) mile radius of any practice site maintained by SCENT. (Def. Ex. 233). In addition to practicing in SCENT's Hartsville, Cheraw, and Lugoff offices, Dr. Dyce was introduced to referring physicians, advertised, and built a significant patient base in each of these locations. (Vol. II, P. 100-101). Dr. Dyce also saw patients in Richland and patients from all areas were referred to him for his specialty. (Vol. II., P. 105-106). The patients of SCENT do not have an exclusive relationship with any one specific SCENT physician and instead may see several SCENT physicians. (Vol. II., P. 105). Dr. Dyce's services were marketed at all of SCENT's locations. (Vol. II., P. 100-101). Dr. Dyce also performed surgical work in Columbia, had a clinic in Kershaw County, and helped conduct open house meetings in the various offices. (Vol. II., P. 105). Dr. Dyce's

compensation was based, in part, on the revenues generated by other physicians and professionals at all of SCENT's offices. (Vol. II., P. 105-106). Furthermore, Dr. Dyce had intimate knowledge of all business practices, strategies, and plans for each geographic area of SCENT. (Def. Ex. 149; Vol. II., P. 106).

All of these activities enabled Dr. Dyce to establish contact with SCENT's patients in all areas, which is evident by the more than Four Hundred patient transfers to Dr. Dyce once he left SCENT. Finally, approximately 86% percent of SCENT's patients resided within a twenty mile radius of at least one of its office locations. (Def. Ex. 143; Vol. II., P. 103). Based on Dr. Dyce's contact with patients at SCENT's locations, the narrowly tailored geographic area covered by the restriction, and the percentage and density of SCENT's patients, the Covenant's geographic restrictions are no broader than necessary to protect SCENT's interests. *See Dudley*, 278 S.C. at 676, 301 S.E.2d at 143; *see also South Carolina Finance Corp. v. West Side Finance Co.,* 236 S.C. 109,, 119 113 S.E.2d 329, 334 (1960)("A covenant not to compete is enforceable if it . . . is reasonably limited as to time and territory."). Accordingly, geographic restraint in the covenant is reasonable and enforceable.

e. The Covenant is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood.

The scope of the restriction in the Covenant is also reasonable. The narrowly drawn covenant does not prevent Dr. Dyce from practicing medicine except to the minimum necessary to protect SCENT from unfair competition from its former employee. *See e.g. Budev* (construing a physician covenant not to compete to restrict the practice of medicine in the fields that were competitive to the practice).

In *Dudley*, our supreme court upheld a covenant against a delivery driver that prevented him from engaging "in the industrial laundry business . . . ***in any capacity whatsoever***" for three

years following his termination. *Dudley*, 278 S.C. at 675, 301 S.E.2d at 143 (omission in original)(emphasis added). The trial court found the covenant unreasonably broad and denied the employer's request for injunctive relief, but the supreme court reversed that decision and found the covenant was reasonable where it was limited to three years and only covered the area where the employee had access to customers. *Id.* at 676, 301 S.E.2d at 143. The supreme court held that as long as a restrictive covenant is reasonable in time and place, then an employee may be restricted from *any aspect* of the employer's field of business. *Id.*

The trial court found that there was no geographic limitation in the Covenant regarding Dr. Dyce calling upon or accepting business from SCENT patients if he worked for any kind of entity in which he has an economic interest. This is not accurate. As in *Dudley*, SCENT's restricted area is only where Dyce had access to patients. Moreover, the eighteen month period of the covenant is significantly shorter than the three year limitation that was upheld in *Dudley*. Because the covenant in question is reasonable as to time and place, it must be enforced.

Importantly, Dr. Dyce could have practiced anywhere in the Midlands or the Pee Dee regions (or any other region of the state) outside of the geographic area covered by the Agreement. The covenant did not prevent Dr. Dyce from practicing in Florence, Sumter, or Lancaster. (Vol. II, P. 104-105). Moreover, Dr. Dyce currently travels to the Dorn VA Medical Center in Columbia, to practice medicine, which is a greater distance than Dr. Dyce would have had to travel to any of the above-referenced locations from his home. (Vol. II, P. 104-105). Dr. Dyce was not restricted from practicing medicine in any of these areas, and he could have continued to earn a living in his chosen field without violating the Covenant. Additionally, upon expiration of the eighteen month duration of the Covenant, Plaintiff would have been free to set up his practice without any geographic limitation. The narrow prohibitions in the

Covenant do not go beyond the protection of SCENT's legitimate business interests, nor do they prevent Dr. Dyce from earning a livelihood. As the *Budev* case and the *Baugh* case show, South Carolina recognizes a real need for covenants not to compete in the physician setting. Accordingly, the Covenant is not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood.

f. The Covenant is Supported by Valuable Consideration.

The Covenant is supported by valuable consideration. When Dr. Dyce signed his Employment and Shareholders' Agreements and became a shareholder on July 16, 2008, he received a pay increase, additional bonuses, increased benefits, and certain protection provisions. (Vol. II, P. 98-99). Moreover, the parties specifically agreed that there was valuable consideration and mutual promises for the execution of the agreement. (Def. Ex. 233). Finally, a review of the average compensation for otolaryngologists reveals that Dr. Dyce's compensation was overly generous by industry standards despite Dr. Dyce's contention that doctors do not get paid enough. (Def. Ex. 74).

The Covenant is appropriate, fair, and was fully agreed upon by the parties. The liquidated damages provision of the Covenant was intended by the parties as the predetermined measure of compensation for actual damages for Dr. Dyce's breach of the agreement. *See Tate v. Lemaster,* 231 S.C. 429, 441, 99 S.E.2d 39, 46 (1957)(finding that if the sum stipulated is reasonably intended by the parties as the predetermined measure of compensation for actual damages for breach, the stipulation is for liquidated damages). As the evidence presented at trial demonstrates, the $750,000 amount for each breach of the Employment Agreement is actually less than the actual damages suffered from Dr. Dyce's breach. In fact, by breaching the Covenant on two separate occasions after he left SCENT, Dr. Dyce obtained the very

revenue that SCENT would have likely used to buy out his shares under the Shareholders' Agreement. Further, Dr. Dyce has neither contended nor offered proof that the $750,000 provision of the Covenant is a penalty rather than liquidated damages.

The trial court misapplied the relevant facts and applicable law when reaching its findings of fact and conclusions of law and should be reversed. Dr. Dyce violated the valid, enforceable Covenant and SCENT is entitled to liquidated damages in the amount of One Million Five Hundred Thousand Dollars ($1,500,000) as specified in the contract for the multiple breaches of the covenant covering two of SCENT's markets.

V. The Trial Court Misapplied the Law and Evidence in Ruling that SCENT Owed Dr. Dyce under Section 4.5 of the Shareholders' Agreement.

As a matter of law, Dr. Dyce is not owed any money under the purchase price calculation ("Buyout") due to his numerous, fundamental, and substantial breaches of his contract with SCENT. Dr. Dyce stole insurance contracts from the practice for his own personal benefit, shared confidential, proprietary information with his future employer, competed against SCENT in violation of the Covenant, failed to follow the Management Directives, chose a public lawsuit over arbitration, and conspired with his wife and another physician to ruin the practice. Dr. Dyce's breaches were so substantial and fundamental that they nullified the obligations of SCENT, which were based on the premise that Dr. Dyce would abide by his obligations. *See Ackerman v. McMillan*, 314 S.C. 268, 271, 442 S.E.2d 618, 620 (Ct. App. 1994)(finding a "fundamental and substantial" breach of contract by a party relieves the other party from performance because it defeats the purpose of the contract); s*ee also Gibbs*, 311 S.C. at 105, 417 S.E.2d at 702.

The trial court misapplied the contractual Buyout and determined that Dr. Dyce was owed money. The trial court's enforcement of the Buyout given Dr. Dyce's fundamental and

substantial breaches of contract is against the well-settled law of our state and public policy and, accordingly, this Court should reverse that ruling. Moreover, the trial court's application of the Buyout was an error as Dr. Dyce would owe SCENT money according to the formula contained in Section 4.5 of the Shareholders' Agreement. (Def. Ex. 286, 287).

a. Subsection B of the Buyout

In determining whether any amount is owed to a departing shareholder, Part B of Section 4.5 of the Buyout provides "one-third of the sum of the accounts receivable of the Corporation, booked in accordance with the Corporation's normal accounting methods, and the cash (to include cash equivalents and marketable securities) of the Corporation, divided by the number of Shareholders of the Corporation including the Departing Shareholder." While the parties agreed that the cash in the practice amounted to $472,227.00, the parties disagreed about the cash equivalents and accounts receivables. The trial court erred in concluding the accounts receivables are $1,868,707. Moreover, the Court erred in determining that the life insurance policy and the SCENT Land Loan in the instant matter are cash equivalents under the facts of this case and the applicable law.

1. Accounts Receivable

As the language of the Agreement dictates, the departing shareholder would be entitled to one-third of the "accounts receivable of the Corporation, booked in accordance with the Corporation's normal accounting methods." It is evident that the words "booked in accordance with the Corporation's normal accounting methods" have some meaning that modify the words "accounts receivable."

During a recess in trial, the trial court ordered the parties to provide the accounts receivables of the practice. SCENT spent an extensive amount of time and expense in providing an accurate accounts receivable for the Court which was subsequently ignored.

Indeed, the *only* testimony received explaining the "normal accounting methods of the corporation" came from Mark Quigley. Mr. Quigley works for the corporate accountant's office, Sheheen, Hancock, and Godwin, LLP. Mr. Quigley was qualified as an expert in accounting and auditing and testified that the normal accounting methods of SCENT are a "cash basis" method. (Def. Ex. 229; Vol. IV, P. 73; Vol. IV, P. 131, 133). This accounting method is reflected on the corporate books, which include the ledger, the profit and loss statements, tax returns, and the practice's balance sheet. (Def. Ex. 229; Vol. IV, P. 138; Vol. IV, P. 242). According to the testimony presented, under a "cash basis" method of accounting, the accounts receivable of the practice are booked at a value of zero. (Vol. IV, P. 139, P. 142). This is apparent upon an examination of the ledger, profit and loss statements, tax returns, and balance sheets. (Def. Ex. 6; Def. Ex. 241; Def. Ex. 244). A company is allowed to change its method of accounting, and SCENT could very well have changed its accounting method to a modified cash basis or to an accrual method resulting in a different analysis. However, at the time of Dyce's departure the practice's normal accounting method was a "cash basis" method, which booked accounts receivable at zero value. (Vol. IV, P. 142-143).

The accounts receivable for SCENT "booked in accordance with the Corporation's normal accounting methods" has ***zero*** value. In its Order, the trial court concluded that Mr. Quigley could not point to any authority to demonstrate that "booked" meant to record in the general ledger. (Order, P. 15). This legal error ignores the fact that Mr. Quigley was qualified as an expert witness in accounting, auditing, financial analysis, has practiced for twenty years, and specifically stated that, as an accountant, the books of a practice are the general ledger. (Vol. IV, P. 142:7-9). While Mr. Quigley may not have had a legal definition as to the word "booked," his experience and expertise as an accountant, auditor, and financial analyst qualifies

him to render opinions as to what constitutes booked. In this particular matter, Mr. Quigley concluded that booked meant to record in the general ledger. Importantly, there was *no other evidence* presented at trial as to what the accounts receivable "booked in accordance with the Corporation's normal accounting methods." The trial court erred in failing to follow the only evidence in the record.

Additionally, the Court erred in concluding that the accounts receivable of the practice were $1.8 million when evidence was presented as to what the actual accounts receivable of the practice were are the time of Dr. Dyce's departure. Mr. Quigley presented evidence of the painstaking process his firm engaged in to determine the accounts receivables are $826,681.52. According to Generally Accepted Accounting Principles ("GAAP"), account receivables for healthcare services are the net realizable value—that is the amount of cash that a practice expects to realize from their charges and services. (Def. Ex. 282; Def. Ex. 283; Vol. IV, P. 145, P. 151-152). The accounts receivable include payments due from patients, third-party payors, and employers for provided healthcare services minus the contractual adjustments, discounts, and allowances for uncollectable amounts. (Vol. IV, P. 145). According to Mr. Quigley, the best indication of accounts receivable are what the practice actually received in hindsight. (Vol. IV, P. 159).

In order to determine the accounts receivables of the practice, Mr. Quigley conducted an analysis using two separate methodologies. (Def. Ex. 281). Mr. Quigley used GAAP to determine the accounts receivable, including uncontested, published guidance set forth in Defendant's Exhibits 282 and 283. (Vol. IV P. 150-153, 159). The methodologies of Mr. Quigley's analysis pulled data from the medical records company for SCENT for all charges. (Vol. IV, P. 150-153). Mr. Quigley analyzed 150,000 lines of data to arrive at his calculations.

(Vol. IV, P. 161). Mr. Quigley tested the data and used two different methods of analysis to ensure accuracy. (Vol. IV, P. 160-166). Mr. Quigley analyzed the data in a second method to ensure accuracy. The results under each analysis were extremely close and thus he averaged the two to reach a final opinion. (Vol. IV, P. 165-166). Mr. Quigley's analysis revealed that an accurate accounts receivable at the time of Dr. Dyce's departure was $826,681. (Vol. IV, P. 166).

In its Order, the trial court found that the parties made an "allowance for the prospect that some of the accounts receivable may not ultimately be paid by providing in the July 16, 2008 Shareholders' Agreement that only one-third (1/3) of the accounts receivable would be included as an element in the buy-out formula for Dr. Dyce's shares." (Order, P. 16). This is pure speculation and conjecture and there is absolutely no evidence in the record to support this finding. No one testified as to the intent of including this language in the Shareholders' Agreement; it could have been drafted in this manner because there were six providers in the practice and the two shareholders (Dr. Dyce and Dr. Puchalski) made up one-third of the providers. Regardless, an analysis premised upon this assumption when there are no facts to support said finding of fact is improper.[8] Accordingly, the trial court erred in concluding the accounts receivables are $1,868,707.

2. Cash Equivalents

Part B of the Buyout also includes the value of any cash equivalents at the time the shareholder departs. The trial court erroneously concluded that a loan to SCENT Land from SCENT should be considered a cash equivalent and included in the Buyout. Additionally, the

[8] The trial court provides citations to exhibits and transcript references throughout its Order when identifying support for its findings of fact and conclusions of law. Notably, there is absolutely no reference to this particular finding as there is no support in the record for the trial court to arrive at this conclusion.

Court found that a specific life insurance policy should be considered a cash equivalent. Respectfully, the evidence in the record and the applicable law conclusively determine that neither can be considered a cash equivalent for purposes of the purchase price calculation.

According to the evidence presented, the accounting, audit, and corporate standards classify a cash equivalent as a "short term, highly liquid investment that have both of the following characteristics: One, it's readily convertible to a known amount of cash. Two, it's so near their maturity that they present insignificant risks of change in value because of the changes in the interest rate." (Def. Ex. 284; Def. Ex. 285; Vol. IV, P. 178).

The trial court erred in concluding Dr. Dyce's insurance policy was a cash equivalent. The *only* testimony presented was that the insurance policy had a penalty greater than the cash surrender value of the policy. (Vol. III, P. 337, P. 495; Vol. IV, P. 180). Mr. Sheheen further testified that while the cash value of life insurance is cash, if you cannot get the cash because the penalty is greater, then it is not an equivalent. (Vol.III, P. 337-338.) Mr. Sheheen specifically testified that he reviewed the respective insurance policy and that the penalty clause was greater than the cash value. (Vol. III, P. 338:3-5). Moreover, the life insurance policy was not readily convertible to known amounts of cash as provided by the accounting standards and regulations. (Def. Ex. 284; Def. Ex. 285). Additionally, the original maturity date of the policy is greater than three months, and the accounting guidelines state that a cash equivalent should be near their maturity date. (Def. Ex. 284; Def. Ex. 285). The trial court's finding that the insurance policy was a cash equivalent is an error of law and must be reversed.

Additionally, the loan from SCENT to SCENT Land is not a cash equivalent for purposes of the Buyout, but instead is a loan between the two companies. As an initial matter, there is no documentation referencing a maturity date related to the loan. (Vol. III, P. 338; Vol.

IV, P. 182). Moreover, Mr. Quigley testified the auditing guidelines for healthcare industries provide that intercompany loans between parent companies and subsidiary companies are not cash equivalents, but are considered to be loans. (Def. Ex. 284; Vol. IV, P. 182-183). SCENT and SCENT Land are related parties, and the loan from SCENT to SCENT Land is an intercompany loan and not a cash equivalent. The fact that the trial court notes the interrelated nature of the two companies supports the proposition that this is an intercompany loan and not a cash equivalent. (Order, P. 19). Mr. Quigley testified extensively about and referenced the applicable healthcare guidelines introduced into evidence unequivocally state that an intercompany loan is still a loan and is not to be considered a cash equivalent. (Def. Ex. 284). Accordingly, the $726,000 note from SCENT to SCENT Land should not be considered a cash equivalent and therefore not included in the redemption formula.

Neither the life insurance policy nor the SCENT Loan satisfies the definition of a cash equivalent as testified to by Mr. Austin Sheheen, Mr. Marc Quigley, or as identified in the treatises entered into evidence at Defendant's exhibits 284 and 285. Ironically, the trial court opines that a "look back" approach when addressing the accounts receivable calculation is not acceptable, but finds this method perfectly acceptable when addressing the loan from SCENT to SCENT Land. However, the trial court uses this "look back" approach to conclude that SCENT Land had readily available proceeds to pay back SCENT. The Court fails to note that the only reason SCENT Land had the necessary funds was because Dr. Dyce was terminated and Dr. Puchalski could then sign on behalf of SCENT Land to obtain the construction loan from the bank. This is an inconsistent treatment of important legal issues and valuations in the Buyout. The Court should reverse the finding of the value of the accounts receivable and the cash equivalents since the legal standards and evidence in the record do not support that

conclusion. As a matter of law, the Court should find the accounts receivable have a value of zero and there are no cash equivalents in the Buyout.

b. Subsection C of the Buyout

In addition to erring by finding that the accounts receivables of the practice were $1.8 million and by including the life insurance policy and the loan from SCENT to SCENT Land were cash equivalents, the trial court erred in finalizing the calculation of the Buyout by not reducing the purchase price calculation for Dr. Dyce's termination for cause and by failing to set-off moneys Dr. Dyce owed to SCENT.

Pursuant to subsection 4.5(C)(iii), the sum from subsections A and B should be reduced in half because Dr. Dyce was terminated for cause. As discussed *supra* in Section III, the trial court failed to find Dr. Dyce was immediately terminated for cause despite his blatant violation of the Management Directive as allowed by his Employment Agreement. Because Dr. Dyce was terminated under Section 2.2(c) of the Employment Agreement, the sum of Sections A and B of the Purchase Price Calculation in the Shareholders' Agreement must be reduced by fifty percent.

Additionally, according to subsection C, any moneys *owed to* the departing shareholder are also set-off by moneys *owed by* the departing shareholder. Dr. Dyce owes substantial amounts of money to SCENT under Section 4.6.4 of the Shareholders' Agreement for his significant breaches. As more fully discussed, *supra*, Dr. Dyce breached the Shareholders' and Employment Agreements. (Def. Ex. 8; Def. Ex. 233). The breaches were substantial and resulted in over $1.4 million in losses from patient transfers that the practice is aware of and the loss of over 400 patients and many referring physicians. (Def. Ex. 228). Dr. Dyce breached the Covenant in two separate geographic areas: Hartsville and later Cheraw. Each of these practice

sites competed against SCENT and resulted in the practice closing both of its locations. Losses were incurred in both Cheraw and Hartsville, totaling $7,000,000 in lost revenue since the end of the period of Dr. Dyce's covenant in November 2011. (Def. Ex. 218). The parties included a liquidated damages provision in section 3.11 and Exhibit A to the Employment Agreement for breaches of the Covenant. The liquated damages provision equals $750,000 for each breach and Dr. Dyce breached it in two locations thus equaling $1.5 million dollars.

Dr. Dyce also breached section 3.1(b) of the Employment Agreement by taking many actions that negatively impacted the practice. Among these, Dr. Dyce failed to disclose to SCENT that Dr. Gunnlauggson was adverse to the practice, resulting in severe damage to the members and practice. Dr. Dyce stymied the success of the practice by refusing to allow normal operations to proceed. Dr. Dyce took confidential insurance contracts and instructed an employee to "keep it on the down low." Dr. Dyce secretly recorded conversations with group members and employees and allowed his wife to misrepresent that conversations were not being recorded. Because Dr. Dyce violated section 3.1(b) of the Employment Agreement, Dr. Dyce was not entitled to receive full Pay for Call Stipend or Base Salary. (Def. Ex. 8, §4.2(d)). Instead that amount must be reduced by 30% for each category, $99,424.99 in reduction in wages and $48,000 reduction in call pay resulting in $147,424.99 owed to SCENT. (D's Ex. 287).

Finally, Dr. Dyce breached his duties of loyalty and confidentiality under the Shareholders' and Employment Agreements as discussed more fully above. Specifically, Dr. Dyce failed to notify SCENT that Dr. Gunnlauggson was adverse to the company. Furthermore, Dr. Dyce provided Dr. Gunnlauggson and Carolina Pines with confidential information. The testimony of Dr. Puchalski, CEO of SCENT, is that if he had known Dr. Gunnlauggson was

taking steps adverse to SCENT he would have fired Dr. Gunnlauggson in February of 2010. (Vol. II, P. 242). The resulting salary payments to an adverse employee, Dr. Gunnlauggson, should not have been made, therefore resulting in $391,741.03 in payments that SCENT lost because of Dr. Dyce's disloyalty and breaches. In total, according to the Buyout, Dr. Dyce owes SCENT $1,282,336.17.[9]

As more fully stated herein, the Court should reverse the findings on Dr. Dyce's termination for cause and his multiple breaches of the covenant not to compete since the evidence in the record does not support the trial court's conclusion. Accordingly, the Court should make its own findings on these issues with respect to the Buyout and conclude Dr. Dyce owes SCENT $1,282,336.17.

VI. Dr. Robert Puchalski is Not Personally Liable for a Corporate Obligation

The trial court erred in finding Dr. Robert Puchalski personally liable for a corporate obligation when the overwhelming evidence in the record is that he made good faith decisions on behalf of SCENT in his capacity as an officer of the practice and is thus protected under the business judgment rule and statutory law. It is well settled that the "business judgment rule" immunizes management from liability in corporate transactions undertaken where there is a reasonable basis to indicate the transaction was made in good faith. *See Kiriakides v. Atlas Food Sys. & Servs., Inc.*, 343 S.C. 587, 541 S.E.2d 257 (2001). Moreover, section 33-8-300(a) of the South Carolina Code provides:

> "[a] director shall discharge his duties as a director, including his duties as a member of a committee: 1) in good faith; 2) with the care an ordinary prudent person in a like position would exercise under similar circumstances; and 3) in a manner he reasonably believes to be in the best interests of the corporation or its shareholders."

[9] Plus interest as provided under section 3.11 of the Shareholders' Agreement.

As an initial matter, the trial court did not provide an analysis in either its initial Order or its Order Denying Reconsideration as to why Dr. Puchalski was found jointly and severally liable. Instead, the trial court summarily concluded that Dr. Puchalski was responsible for the entire money judgment and a review of the facts in evidence and the applicable law indicates the actions Dr. Puchalski took as CEO and Chairman of the practice were in the best interests of the practice and were made in good faith. Therefore, the trial court's ruling should be reversed. *See Golden Strip Motors, Inc. v. Pennsylvania Nat. Mut. Cas. Ins. Co.*, 288 S.C. 548, 551 343 S.E.2d 659, 661 (Ct. App. 1986) ("However, the trial court failed to rule on the issue of indemnification and we hold this was error. Thus, we remand solely for determination of the indemnification issue . . .").

It is important to note that the trial court—in a footnote—ruled that all the testimony of Professor John Freeman regarding corporate governance is inadmissible and improper evidence. A review of the record indicates that Plaintiff's counsel rarely objected to Professor Freeman's testimony, which must be considered by the court. Professor Freeman testified and gave expert opinions in the field of corporate governance, including business entity management, opinions as to Dr. Dyce's conduct, and fiduciary duties owed to the parties. This Court even acknowledged that these would be appropriate fields for Professor Freeman to testify, stating, "What I would do then in those regards is just hold those because discussions regarding fiduciary duties are certainly an area I think that can be testified to as an expert." (Vol. I, P. 610:1-4). Additionally, the Court noted that testimony regarding corporate governance would be appropriate. (Vol. I., P. 610:8-10). Accordingly, this Court should find that the trial court erred as a matter of law in uniformly excluding all of the testimony of

Professor John Freeman—including the portions of his testimony which did not address questions of law.

Dr. Puchalski should not be individually liable for the actions of SCENT and his actions in managing SCENT. Dr. Puchalski acted as the Chairman and CEO of SCENT and his actions within that role are protected by the business judgment rule and South Carolina statute. *See* S.C. Code Ann. 33-8-300(d)("[a] director is not liable for any action taken as a director, or any failure to take any action, if he performed the duties of his office in compliance with this section."). The trial court did not find, and there is no evidence in the record to support, the contrary. Moreover, and as is more fully discussed *supra*, Dr. Puchalski did not receive any money he was not entitled to as a shareholder of the practice.

The Articles of Incorporation for SCENT provide, in pertinent part, that "Robert Puchalski, Managing Shareholder, shall be completely vested with all authority to transact business of any kind, including but not limited to signing leases, contracts, tax returns, purchasing orders, bills of sale, and any and all other documents incident to the operation of the business on a day to day business." (Pl. Ex. 108.003-108.004). The Articles of Incorporation further provide that "the shareholders of the corporation may, from time to time delegate to the Managing Shareholder of the corporation some or all of the powers, duties and rights that would otherwise customarily belong to a board of directors." (Pl. Ex. 108.001). Additionally, the July 16, 2008 Shareholders' Agreement stated that Dr. Puchalski served as the managing shareholder of SCENT, supervising and controlling the daily business and affairs of the company. (Pl. Ex. 7.009). Dr. Puchalski determined staffing levels and assigned work for employees, presided over meetings of the shareholders, and handled the everyday affairs.

Professor Freeman testified that Dr. Puchalski's actions through this tumultuous period were exercised in compliance with "sound business judgment" and that Dr. Puchalski made appropriate business judgments based on the facts that were presented to him. (Vol. I, P. 690, 692-693). Professor Freeman testified that Dr. Puchalski "navigat[ed] this practice into tough and through a tough economic year and with the possibility of Obama Care" and did so with "proper behavior, reasonable behavior, and that he made what you would call in business governance area sound business judgments or reasonable business judgments." (Vol. I, P. 690). Moreover, Professor Freeman elaborated that Dr. Puchalski, in making the difficult decision to terminate Dr. Dyce, remained in his role as Managing Shareholder and functioned on behalf of SCENT—not himself—when making these decisions. (Vol. I, P. 692). Dr. Vidrine, employee physician during the breakup and a current SCENT shareholder, further testified that Dr. Puchalski has always acted in the best interest of SCENT. (Vol. IV, P. 87). Finally, Austin Sheheen, who has been an accountant for fifty-six years and has advised a number of similar medical practices, testified that Dr. Puchalski has always acted in SCENT's best interests. (Vol. III, P. 272).

Professor Freeman also testified that the provisions sought by the parties in the revisions to the 2008 Shareholders' Agreement were not in bad faith. (Vol. I, P. 690). Specifically, Professor Freeman opined that Dr. Puchalski acted in "compete good faith" when negotiating a new shareholders' agreement and testified that "dreaming big or asking for some very nice perks is not the same thing as being able to say [Dr. Puchalski] stole money or has acted as a thief or something." (Vol. I, P. 690).

The trial court erroneously found that Dr. Puchalski received money he was not entitled to and was improperly reimbursed for personal expenses that were incorrectly classified as

business expenses. This finding is completely without merit. SCENT's accounting firm went through every expense of the practice and categorized expenses as personal or business expenses. (Vol. I, P. 547). SCENT's former bookkeeper, Tammy Szymanksi, testified that she and Dr. Puchalski did whatever the accounting firm said was appropriate in expense categorization. (Vol. I, P. 547, P. 550-551). The firm's accountant, Austin Sheheen, echoed the testimony of SCENT's bookkeeper, stating Dr. Puchalski complied with "whatever we suggested had to be done." (Vol. III, P. 362). Moreover, Austin Sheheen testified that Dr. Robert Puchalski never received any excess distributions or funds that he was not previously entitled to due to the build-up of his capital account.

Based upon the legal standards and the overwhelming evidence, Dr. Puchalski's actions were taken in his capacity as President and Managing Shareholder of SCENT. Additionally, the only evidence is that Dr. Robert Puchalski acted within his authority and his actions were without corrupt motive and in good faith. *See Dockside Ass'n, Inc. v. Detyens*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (1987)("Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith."). The trial court never ruled upon or provided an analysis as to Dr. Robert Puchalski's individual liability. There is no evidence in the record that Dr. Puchalski did not act in good faith in handling the affairs of SCENT and the testimony presented by John Freeman, Tammy Szymanksi, Kimberly Koumas, Austin Sheheen, and Dr. Macy Vidrine all indicate that Dr. Robert Puchalski acted without corrupt motive and in the best interests of the practice. For all of these reasons, this Court should reverse the trial court's erroneous finding of Dr. Puchalski's joint and several liability. The Court should find that Dr.

Puchalski used sound business judgment in his management of SCENT and is not individually liable for the good faith actions he took on behalf of the company.

VII. Dr. Amy Puchalski is Not Personally Liable for $25,596.87

The trial court erred in finding Dr. Amy Puchalski personally liable for $25,596.87 as these were reimbursements for legitimate corporate expenses and there is no evidence in the record stating otherwise.

The trial court found Amy Puchalski personally liable to Dr. Dyce for $25,596.87 based on Defendants Exhibit 250. (Order of Goodstein, p. 35). The trial court improperly ruled that disbursals of $15,000, $4,250, $7,500, and $24,443.74 were wrongful conversions to Amy Puchalski. However, this legal ruling ignores the only evidence in the record regarding these four transactions. When asked on examination, SCENT's accountant stated that the disbursements should not have been "charged as disbursements for Amy Puchalski because all of those that were not expensed were charged to Dr. Puchalski's capital account." (V. III, p. 352). Austin Sheheen further testified that these disbursements were appropriately charged to Dr. Puchalski's draw and that he was entitled to the moneys. (V. III, p. 355, 356). Mr. Sheheen stated that "it was charged as a distribution against [Dr. Puchalski's] capital account" and as income to him. (V. III, p 355). Austin Sheheen further stated that Dr. Puchalski was entitled to these moneys as his share of the proceeds of SCENT. (V., III p. 357).

In other words, the funds were assigned by the accountant to the portion of moneys owed to Dr. Puchalski by SCENT and there was no loss to Dr. Dyce. Furthermore, the moneys were charged to Dr. Puchalski's draw and not to Amy Puchalski. Not only was there no interest in these particular moneys by Plaintiff, but there was no evidence at all of "illegal use or misuse" of the funds by Amy Puchalski. *See e.g. Owens v. Andrews Bank & Trust*, 265 S.C.

490, 496, 220 S.E.2d 116, 119 (1975). Therefore, the trial court erred in its legal ruling that a conversion occurred and should be reversed.

VIII. Because Jamie Curley was properly expelled from the company pursuant to the Operating Agreement, the circuit court erred in granting Summary Judgment on the ground SCENT Land failed to deliver Jamie Curley a Purchase Agreement.

In the Curley matter, Judge Benjamin granted summary judgment in favor of Jamie Curley. As this Court well knows, when reviewing the grant of summary judgment, the appellate court applies the same standard that governs the trial court under Rule 56, SCRCP. *Pittman v. Grand Strand Entm't Inc.*, 363 S.C. 531, 536, 611 S.E.2d 922, 925 (2005) (citing *S.C. Elec. Gas Co. v. Town of Awendaw*, 359 S.C. 29, 34, 596 S.E.2d 482, 485 (2004) and *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)). On appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the nonmoving party. *Pittman*, 363 S.C. at 536, 611 S.E.2d at 925.

Additionally, "[a] corporate dissolution is an action in equity." *Jordan v. Holt,* 362 S.C. 201, 205, 608 S.E.2d 129, 131 (2005). "In actions in equity, the appellate court may view the evidence to determine the facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee." *Florence Cnty. Sch. Dist. # 2 v. Interkal, Inc.,* 348 S.C. 446, 450, 559 S.E.2d 866, 868 (Ct. App. 2002).

a. Summary Judgment

The trial court granted Curley's Motion for Summary Judgment against SCENT Land seeking dissolution of the company solely on the grounds that the company failed to deliver her the purchase agreement as required by section 33-44-702(c) of the South Carolina Code. The lower court's decision is an error of law. The Operating Agreement that served as the contract governing the Company provided that a member may be expelled for failing to make a

mandatory capital contribution to the Company, and Curley was properly expelled for breaching this provision.

In granting summary judgment to Curley, the circuit court erred as a matter of law in holding the Company "failed to deliver [Curley] the purchase agreement as required by S.C. Code Ann. § 33-44-702(c)." (Benjamin Order, P. 1). Although unclear from the Order, implicit in the circuit court's holding is the finding that Curley was dissociated from the Company despite not providing a date or a basis of Plaintiff's dissociation. (Benjamin Order, P. 1). Curley was not disassociated from the Company on May 9, 2010 when Dr. Dyce was no longer employed by SCENT. (Pl. Mot. S.J. 3; Transcript, P. 28, L. 11). On the contrary, Curley was expelled from the Company following a special meeting on April 21, 2010 for breach of contract after Curley failed to make the required contribution pursuant to section 6.9 of the operating agreement. (Def. Memo in Opposition, P. 2-3). Accordingly, the circuit court failed to properly analyze the SCENT Land Operating Agreement and apply the law. *See Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001) ("Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it.")

Section 33-44-103(a) of the South Carolina Code (2006) states:

> except as otherwise provided in subsection (b), all members of a limited liability company may enter into an operating agreement, which need not be in writing, to regulate the affairs of the company and the conduct of its business, and to govern relations among the members, managers, and company. *To the extent the operating agreement does not otherwise provide, this chapter governs relations among the members, managers, and company.*

(emphasis added). Furthermore, the official Comments to this code section provides, "[t]he operating agreement is the essential contract that governs the affairs of a limited liability company. §33-44-103(a), cmt. 1. "The operating agreement of [an LLC] is a binding contract

that governs the relations among the members, managers, and the company." *Clary v. Borrell,* 398 S.C. 287, 297, 727 S.E.2d 773, 778 (Ct. App. 2012). "Generally, operating agreements are superior to statutory authority where they are in place and address a matter, inasmuch as it is only when an operating agreement is silent as to some matter that statutory law will apply." *Clary*, 398 S.C. at 297, 727 S.E.2d at 778. Moreover, a court reviewing a written contract must discern:

> [T]he intention of the parties and the meaning[, which] are gathered primarily from the contents of the writing itself, or, as otherwise stated, from the four corners of the instrument, and when such contract is clear and unequivocal, its meaning must be determined by its contents alone; and a meaning cannot be given it other than that expressed. Hence words cannot be read into a contract which import an intent wholly unexpressed when the contract was executed.

McPherson v. J.E. Sirrine & Co., 206 S.C. 183, 204, 33 S.E.2d 501, 509 (1945). In short, the operating agreement agreed to by the parties, not statutory law governs the affairs of the Company; only if the operating agreement fails to address a matter or if the operating agreement conflicts with a provision detailed in subsection (b) of section 33-44-103 does the South Carolina Limited Liability Company Act control.

In the instant case, the SCENT Land operating agreement signed by all members of the Company, including Curley, serves as the contract governing the actions and obligations of the Company. *See* 51 Am.Jur.2d *Limited Liability Companies* § 4 (2011) ("The operating agreement governs: (1) relations among the members as members and between the members and the limited liability company; (2) the rights and duties of a person in the capacity of manager; (3) the activities of the company and the conduct of those activities; and (4) the means and conditions for amending the operating agreement.) (Oper. Agr., P. 39). The SCENT Land Operating Agreement is not silent, but instead explicitly details the various member dissociations, including expulsion and dissociation. (Oper. Agr., P. 14-16).

Specifically, section 6.9 of the Operating Agreement, EXPULSION OF A MEMBER, provides, in pertinent part, that:

> A Member may only be expelled by the Company and forced to accept a buy-out of his or her interest as valued in Section 5 herein if the Member . . . fails to make a mandatory capital contribution to the Company within six (6) weeks of written notice given thereof, for a project that is approved by the Membership for such contribution to be made.

(Oper. Agr., P. 16). Following a written notice calling for a special meeting of the members of the Company, the Members approved a two-stage capital call on March 12, 2010 of all the members of the company to raise the necessary funds to fulfill its existing financial obligations for the construction of a new practice building. (Ex. 3 to Def. Memo. in Opposition). Although Curley was provided written notice of the Company's decision to require a mandatory two-stage capital call on March 17, 2010, she failed to make the contribution within the required six weeks under the SCENT Land operating agreement and she was subsequently expelled from the Company. (Oper. Agr., P. 16, Aff. Dr. Puchalski, P. 3, Ex. 3 to Def. Memo. in Opposition). By entering into this Operating Agreement on September 30, 2009, Curley became bound by the terms of the agreement to regulate the affairs of the company—including being subject to expulsion from SCENT Land for failure to make a mandatory capital call. Moreover, nothing in subsection (b) of 33-44-103 of the South Carolina Code prevents the parties from contracting how to expel a member from a limited liability company for the member's failure to fulfill the obligations of a company as detailed in their respective operating agreement.

Because Curley was properly expelled—and not disassociated—from the Company due to her breach of the Operating Agreement, Appellants are not required to deliver an offer to her to purchase her distributional interest in the Company. (Oper. Agr., P. 16). Instead, the Operating Agreement provides that Plaintiff may be "forced to accept a buy-out of her interest

as valued in Section 5" of the Operating Agreement. (Oper. Agr., P. 11-12, 16). Therefore, section 33-44-701, *et. seq.* of the South Carolina Code (2006) is not applicable because that statute only applies to dissociated members when a business is not wound up. Accordingly, the circuit court's order granting Curley's motion for summary judgment is an error of law and must be reversed.

b. Dissolution of SCENT Land

Even if this Court affirms Judge Benjamin's order granting summary judgment on the dissolution of SCENT Land, the Court must reverse Judge Goodstein's erroneous ruling that Curley and Amy Puchalski are "50/50 owners of SCENT Land and therefore are entitled to equal distributions." (Order of Goodstein, P. 46). Moreover, the trial court did not address the failure of Jamie Curley to meet her capital call, determine amounts that Amy Puchalski and Jamie Curley are owed from SCENT Land, rule upon the effective date from which the owners are entitled to distributions, rule upon the ownership interest of the other owners of SCENT Land, or address the amounts that SCENT Land has paid on the respective notes since the date Jamie Curley was expelled by SCENT Land. The trial court's ruling is in error and this Court should either make its own findings on these issues to determine the appropriate amounts owed to the owners or should remand the matter for proceedings consistent with this Court's rulings.

The trial court failed to determine the amount Jamie Curley would be entitled to at the time of her expulsion from SCENT Land on April 21, 2010. Importantly, the trial court erroneously failed to rule on whether Jamie Curley failed to make the capital call issued by SCENT Land, nor did the court address whether SCENT Land could obtain financing from First Palmetto Bank despite Dr. Dyce's refusal to sign as a manager of SCENT Land. (Vol. III, P. 104, P. 110, P. 210, P. 217, P. 220-221). A review of the record reveals that both Jaime Curley and Dr. Dyce refused to sign necessary documents, including closing documents, and

five scheduled closings fell through. (Vol. II, P. 265). SCENT Land subsequently expelled Jaime Curley from membership in the company per section 6.9 of the Operating Agreement for failing to make a capital contribution. (Def. Ex. 115, §6.9). Additionally, the trial court did not specifically rule what Jamie Curley's value in SCENT Land was at the time of her departure, instead only determining that they are 50/50 owners of SCENT Land and entitled to equal distributions. This is error and the Court should make its own findings on the issue of value at the time of departure. This Court has three ways to determine the appropriate amounts owed to the owners of SCENT Land.

1. No distribution to Disassociated Members.

Section 6.4 of the SCENT Land Operating Agreement states "[a] members dissociation shall not entitle the Member to receive any distribution of Company profits or other assets or to receive any payment for the Member's Company interest, unless said profits, assets or payment for the Member's interest are owed to the Member from the date which precedes the Member's date of dissociation." (Def. Ex. 115, § 6.4). In the current case, no profit, asset, or other payment was owed to members prior to the date that Jaime Curley was expelled. Therefore, Curley is not entitled to any payment. (Vol. II, P. 190). Furthermore, a disassociation occurs whenever a member's spouse is no longer employed by SCENT. (Def. Ex. 115, §6.2F). Since Dr. Dyce's employment was terminated by SCENT, Ms. Curley was no longer a member and not entitled to any payment under Section 6.4. Accordingly, under the plain language of the Operating Agreement of SCENT Land, Jamie Curley is owed nothing.

2. Dissociation Value based on Real Estate Costs and Debt.

Alternatively, the Operating Agreement states that if a member leaves prior to five (5) years of membership, that value is calculated based on the actual costs expended on buying and building the real estate assets minus the debt. (Def. Ex. 115, §5.5B). Based upon the only

evidence in the record, the total costs for the Hartsville building as of May 1, 2010 were $1,058,705.02 and the debt was $1,044,048.96. (Def. Ex. 138; Def. Ex. 218). The costs of the Lugoff building and land were $1,127,906.60 with a debt equaling that amount. (Def. Ex. 139; Def. Ex. 218). The costs of the Park Central Land were $416,000 with a debt of $387,359.69. Under section 5.5(B) of the SCENT Land operating agreement, the debt on the buildings must be deducted from the costs of the buildings. Accordingly, that figure is $43,296.37.

At the time of expulsion, Jaime Curley owed SCENT Land $170,000 to meet her obligations under the capital call. Therefore, based on the costs of the assets, the associated debt, and the outstanding obligations of Curley, Curley would owe $148,351.81 to SCENT Land.

3. Liquidation of SCENT Land.

The Operating Agreement of SCENT Land set forth the order for liquidation of the company, yet the trial court ignored the contractual agreement between the parties. (Def. Ex. 115, §16.9.) At the time of Curley's expulsion, the members of SCENT Land owned three properties. Based upon the values of the properties provided by SCENT Land and the testimony established, SCENT Land's Hartsville building was worth $1,350,000 with outstanding debt of $1,044,048.96. (Def. Ex. 218). The Lugoff building was not completed and no appraisal was performed on the half completed building.[10] Using the cost of construction

[10] An appraisal arranged by Curley was done on the completed building much later, but this appraisal would not reflect the actual value of the building at the time of Curley's departure since it was only half finished at that time. The trial Court failed to address the Plaintiffs' discovery abuse regarding these appraisals. As stated during trial, Jamie Curley obtained appraisals of the value of SCENT Land properties. Curley failed to disclose these appraisals during discovery. (Def. Ex. 136). Defendant issued a subpoena directly to the appraiser, which Curley attempted to block by filing a motion to quash. In response to Defendants' Request for Production, Curley states on August 15, 2012 "that there are currently no written appraisals in her possession pertaining to real property owned by SCENT Land." An inspection of the information from the appraiser, C.S. McCall & Co., LLC indicates that the appraisals were

expended and cost of land purchase to arrive at the most accurate figure under this analysis, would equal $1,127,906.60 minus outstanding debt of $957,907.60.[11] (Def. Ex. 218). Finally, the appraised value of the Park Central property was $380,000 and the outstanding debt was $387,359.69. (Def. Ex. 218).

If the property were liquidated, a broker's real estate commission would have to be paid. Utilizing a six-percent (6%) brokerage fee would result in total likely sale value of $2,686,432.20. (Def. Ex. 218). After paying off associated debt as required under the Operating Agreement, net proceeds after creditors would equal $297,116.95. The Operating Agreement then provides that the liquidating company must distribute assets to any Members in return for their contributions. (Def. Ex. 115, §16.9). Amy Puchalski made the only contribution to the company in an amount of $110,000 which must be returned leaving $187,116.95. (Def. Ex. 115, Ex. A; Vol. II, P. 198-199). This would leave $93,558.48 cents owed to the two shareholders. However, the $170,000 that Jaime Curley refused to contribute must be calculated to offset the amount that Amy Puchalski did contribute. This would then leave a balance owed to SCENT Land by Jamie Curley in the amount of $76,441.52. (Def. Ex. 218; Vol. II, P. 191-200).

Additionally, the trial court erroneously refused to rule upon a date that Curley was expelled from SCENT Land. Appellants contend Curley was expelled from SCENT Land on

---

completed on April 30, 2012 and an invoice was sent to counsel for Curley on the same date (Def. Ex. 137). The information further reveals that the invoice was not paid until August 13, 2012 when counsel for Curley submitted a check paying for the invoice. It is evident that Jamie Curley was not forthright with opposing party when representing that she did not have copies of the written appraisals when in actuality they were completed four months prior to the discovery responses.

[11] $957,907.60 is the debt outstanding after taking into account the $170,000 that Amy Puchalski contributed to the company for the capital call. Without considering Amy Puchalski's capital contribution, the debt would be $1,127,907.60.

April 21, 2010 when she failed to make her capital call. (Def. Ex. 115, §6.9; Def. Ex. 154, Def. Ex. 155; Def. Ex. 156; Def. Ex. 157). The Court must rule upon the date in which Curley was no longer a member of SCENT Land to properly determine the effective date from which the owners are entitled to distributions. In addition, the trial court failed to adequately address the ownership interests of other members of SCENT Land. While Amy Puchalski and Jamie Curley were 50/50 owners in 2010 when Jamie Curley was expelled from the limited liability company, another member has since joined SCENT Land. The inclusion of this new member will alter the amounts allegedly owed to Jamie Curley. The trial court's failure to address the ownership interest of all members of SCENT Land is error.

The trial court also failed to address the amount of debt SCENT Land has paid down on the respective mortgages since Curley was expelled on April 21, 2010. If the trial court's order is affirmed, Curley would receive equal distributions to the current date. This result would be inequitable as Curley would benefit from debt that was paid off by SCENT Land when she did not contribute as a Member since she was expelled. *See Jordan*, 362 S.C. at 205, 608 S.E.2d at 131 ("In actions in equity, the appellate court may view the evidence to determine the facts in accordance with its own view of the preponderance of the evidence, though it is not required to disregard the findings of the special referee.")

The trial court's ruling with respect to the ownership interest in SCENT Land of Puchalski and Curley, without addressing the other issues contained herein, is in error and this Court should either make its own findings on these issues to determine the appropriate dissolution or should remand the matter for proceedings consistent with this Court's rulings. *See Golden Strip Motors,* 288 S.C. at 551, 343 S.E.2d at 661 ("However, the trial court failed to rule on the issue of indemnification and we hold this was error. Thus, we remand solely for determination of the indemnification issue . . .").

IX. The Circuit Court erred in unilaterally dismissing Appellants' Counterclaims against Dr. Dyce

The trial court erred in unilaterally dismissing Appellants' counterclaims against Dr. Dyce by misapplying the facts in evidence and applicable law of Defendants' causes of action.

a. Breach of Arbitration Provision

The trial court did not rule upon Dr. Dyce's breach of the Agreement to arbitrate the Shareholders' Agreement and its failure to rule is an error. As a provision of the Shareholders' Agreement, the parties committed they would arbitrate disputes instead of filing a public lawsuit. (Pl. Ex. 7.023). As explained by Professor Freeman, there is real value to professional parties in an agreement to arbitrate. (Vol. I, P. 639, 640). Primarily, arbitration avoids public disclosure of disputes that damage a professional practice, especially in a small town. As Dr. Puchalski testified, the allegations of mismanagement and oppression quickly spread throughout the community. (Vol. II, P. 60). Dr. Dyce breached his agreement to arbitrate causing the practice's internal disputes or "dirty laundry" to become public. This damage would have been avoided if Dr. Dyce had honored his agreement. Appellants pled the arbitration provision of the agreement as an affirmative defense, but the trial court failed to rule on this matter and its failure to rule is an error of law. *See Golden Strip Motors*, 288 S.C. at 551, 343 S.E.2d at 661.

b. Dr. Dyce's Breach of his Fiduciary Duty to SCENT, SCENT Land, and Dr. Puchalski

The trial court improperly applied the relevant facts and applicable law in failing to determine that Dr. Dyce breached his fiduciary duty to SCENT, SCENT Land, and to Dr. Puchalski. Dr. Dyce repeatedly breached his fiduciary duties owed as an officer and shareholder of SCENT and as a manager of SCENT Land.

"A claim of breach of fiduciary duty is an action at law . . . ." *Jordan,* 362 S.C. at 205, 608 S.E.2d at 131. "In an action at law, the appellate court will correct any error of law, but it must affirm the special referee's factual findings unless there is no evidence that reasonably supports those findings." *Linda Mc Co. v. Shore,* 390 S.C. 543, 555, 703 S.E.2d 499, 505 (2010) (citation omitted). There is no evidence to support the trial court's findings with respect to Dr. Dyce's breach of his fiduciary duties.

As an officer, shareholder, and an employee entrusted with confidential knowledge, Dr. Dyce owed SCENT a fiduciary duty. Dr. Dyce was made aware of the fiduciary duties he owed to the practice by corporate counsel before he began his path of destruction. (Def. Ex. 51). South Carolina courts have consistently found that officers and board members have fiduciary obligations. *See e.g. Talbot v. James*, 259 S.C. 73, 80, 190 S.E.2d 759, 764 (1972)(finding that officers and directors of a corporation stand in a fiduciary relationship to the individual stockholders which prevents them from using their fiduciary position to their own advantage and to the detriment of the corporation); *Gilbert v. McLeod Infirmary*, 219 S.C. 174, 185, 64 S.E.2d 524, 528-529 (1951)(holding officers of a corporation owe a fiduciary relation to the corporation and its shareholders). Moreover, the South Carolina General Assembly codified the fiduciary obligations that officers and board members owe. *See* S.C. Code Ann. § 33-8-420 *et seq*. The trial court erred in failing to find Dr. Dyce breached his fiduciary duties to SCENT and SCENT Land in numerous ways.

i. Dr. Dyce Stymied the Operations of SCENT and SCENT Land.

Dr. Dyce consistently hindered the business operations of both SCENT as an officer and SCENT Land as a manager. (Def. Ex. 209; Def. Ex. 226; Vol. I, P. 356, P. 361, P. 544; Vol. II, P. 147-148). Dr. Dyce made it impossible for SCENT to function normally, almost grinding it to a halt and pushing the practice to the brink of economic collapse. For example, Dr. Dyce

refused to allow SCENT to change its malpractice carrier to a lower cost provider, failed to approve expenditures for Respironics and AllMeds, and refused to attend five separate closings for the new office building. (Vol. II., P. 148-149). Dr. Dyce's refusals to close the construction loan resulted in halted construction, collection requests by the contractor, and concerns from the bank. (Def. Ex. 47; Def. Ex. 49; 60; Def. Ex. 93; Def. Ex. 127; Def. Ex. 209; Def. Ex. 226; Def. Ex. 240). Dr. Dyce refused to execute loan documents as a manager of SCENT Land despite knowing the lease was expiring on the Lugoff location, jeopardizing the entire practice. (Vol. I, P. 361; Vol. III, P. 63-64, P. 246). Importantly, Dr. Dyce had no objections to signing the loan documents to construct a building in Hartsville where he primarily practiced, but that he refused to sign the necessary documents for the new Lugoff building. (Def. Ex. 16; Def. Ex. 151). Dr. Dyce also refused to regularly return phone calls, electronic mail, or other communications despite being a shareholder of SCENT and owing fiduciary duties to further the practice. (Vol. I, P. 339). The trial court failed to rule upon Dr. Dyce's actions and the manner in which they stymied the practice. Moreover, the trial court incorrectly concluded that Dr. Puchalski could close the construction loan without Dr. Dyce. As discussed more fully *supra*, Dr. Dyce had to be present to sign as a manager for SCENT Land because he was listed as a manager on SCENT Land's Articles of Incorporation filed with the bank and on the signature card with the bank. The bank's representative explicitly testified that they refused to close the loan without Dr. Dyce's authorization as long as he was a required party. (Def. Ex. 279; Vol. II, P. 257; Vol. III, P. 104, P. 210, P. 217, P. 220-221).

Dr. Dyce's excuse for stymieing the practice and bringing a public lawsuit was his purported lack of access to information. The facts demonstrate this contention is without merit and his assertion is not a proper justification for grinding the practice to a halt. Dr. Dyce repeatedly and falsely complained of a lack of access to information, while simultaneously

refusing to sign a confidentiality agreement to take information off the premises. (Def. Ex. 54; Def. Ex. 64; Def. Ex. 161; Vol. II, P. 160). This is the same confidentiality agreement that Dr. Puchalski signed as a shareholder of the practice. (Def. Ex. 161). Dr. Dyce's contention that he was denied information is contrary to the overwhelming evidence in the record.

In fact, no evidence except Dr. Dyce's self serving testimony supports a lack of access to information. Any review of the evidence reveals a consistent dialogue and exchange of information between SCENT and Dr. Dyce, Jamie Curley, and their personal attorney, Bruce Armon. (Def. Exs. 24, 41, 44, 45, 46, 51, 52, 54, 55, 56, 59, 64, 88, 92, 93, 226). SCENT continuously provided closing documents, malpractice policies, financial documentation of the practice, and any other documents requested. Furthermore, Dr. Dyce admitted that SCENT offered to make all corporate documents available to him or his agent at SCENT's corporate headquarters. (Vol. I, P. 345). SCENT also offered to have an outside, neutral accountant review all documents that Dr. Dyce might request, but to no avail. (Def. Ex. 62). Moreover, Austin Sheheen testified that he would meet with Dr. Dyce to go over financial matters and discuss any information requested by Dr. Dyce. (Vol. III, P. 304, P. 312). Again, this Court failed to rule upon Dr. Dyce's lack of credibility and his purported lack of access to the information requested. The overwhelming amount of evidence presented at trial indicates that Dr. Dyce actively stymied the practice with no justification.

When asked at trial what documents he believed SCENT refused to provide him, Dr. Dyce only mentioned that he had not gotten all draft versions of shareholders negotiations and some credit card bills. (Vol. I, P. 356). Despite this statement, Dr. Dyce later admitted that he reviewed versions of shareholder contracts and other information SCENT provided with his attorney. (Vol. I, P. 425, P. 429-430). This admission is supported by exhibits proving Dr. Dyce was actively involved in the shareholder negotiations in December 2009 and later. (Def.

Ex. 24; Def. Ex. 29; Vol. I, P. 425). The trial court incorrectly drew a conclusion from facts not in evidence that Dr. Dyce was not involved in shareholder negotiations. The record is replete with examples of SCENT providing information to Dr. Dyce via electronic mail, despite Dr. Dyce conceding at trial that he "didn't always have the opportunity to check my e-mail." When asked in his deposition about information that he claimed he was owed, Dr. Dyce responded "I haven't thought about it, sir."(Vol. I, P. 339; Def. Ex. 179, P. 84). Additionally, the trial court did not address the hours of tape-recorded conversations[12] that Dr. Dyce took of SCENT's officers, employees, and advisors. A review of these tape-recorded conversations reveals that Dr. Dyce admitted that SCENT's attorney provided the requested documents to Dr. Dyce's attorney. On that recording, Dr. Dyce stated, "I think Ed sent Bruce Armon a bunch of stuff, probably even more than [Bruce] asked for, and he just started reviewing it last week, so I think that is—that all is tying into why he is taking so long." (Def. Ex. 207, P. 16; Vol. I., P. 422-423). The trial court's finding that Dr. Dyce did not receive adequate information to make appropriate decisions as a shareholder is simply not supported by the evidence in the record.

As Professor Freeman testified, Dr. Dyce sought an excessive amount of information, requesting "every scrap of paper that concerns every single outlay of any sort for this business from the time the articles are filed to today." (Vol. I, P. 668). Professor Freeman further testified that during his many years of experience in corporate governance he had never "seen such a broad request . . . as a condition precedent to closing a vitally needed, extremely important, crucial real estate loan." (Vol. I, P. 665-666). It is evident that Dr. Dyce was given numerous documents, including closing statements, financial records, and that the entire

[12] The trial Court did not address the tape-recorded conversations by Dr. Dyce. Additionally, the trial court did not address the fact that Dr. Dyce did not turn over the secretly tape recorded conversations until a year and a half after they were originally requested by attorneys for SCENT.

records of SCENT were available to him if he chose to review them on the premises or off premises by signing a Confidentiality Agreement.[13] Instead of reviewing whatever documents he desired on premises or signing a Confidentiality Agreement to remove them, Dr. Dyce continued to stymie the business, cast blame, and use a façade of lack of information to grind SCENT's business to a halt. The overwhelming amount of evidence presented at trial indicates Dr. Dyce breached his fiduciary duties to SCENT, SCENT Land, and Dr. Puchalski.

ii. Failing to Alert SCENT that Dr. Gunnlauggson was Adverse to the Practice.

As an officer and shareholder, Dr. Dyce owed a duty to alert the practice that a key employee, Dr. Gunnlauggson, was adverse and damaging to the company. As stated by Professor Freeman "Dr. Dyce and Dr. Gunnlauggson have an obligation to speak accurately and truthfully concerning their behavior at SCENT, SCENT deserves that." (Vol I., P. 675). The incontrovertible evidence proves that Dr. Dyce was well aware that Dr. Gunnlauggson was hostile and adverse toward SCENT, but failed to alert the practice. Moreover, Dr. Dyce facilitated the adverse actions of Dr. Gunnlauggson, which resulted in damages to SCENT.

The overwhelming amount of evidence presented at trial indicates Dr. Dyce knew that Dr. Gunnlauggson was adverse to SCENT and a failure to find otherwise is error. Dr. Dyce received a proposed Affidavit from Dr. Gunnlauggson drafted by Dr. Gunnlauggson and his attorney and captioned as "Chad Gunnlaugsson, Plaintiff v. South Carolina ENT, Allergy and Sleep Medicine PA and Dr. Robert Puchalski ... Defendants." (Def. Ex. 71). At trial, Dr. Dyce testified that he did not realize that the Affidavit was for a lawsuit or that it was adverse to the practice. (Vol. I, P. 370-371). This testimony is not credible. As more fully discussed herein,

[13] The trial court erroneously concludes that Dr. Dyce should have had access to this information without signing a Confidentiality Agreement. The Confidentially Agreement was required by the parties' contracts and was the same agreement that Dr. Puchalski signed to access the information.

the Affidavit contained assertions detrimental to SCENT, including that Dr. Gunnlauggson was a shareholder. (Def. Ex. 71). Dr. Dyce breached his fiduciary duty by failing to tell SCENT about an adverse employee who was going to file a lawsuit against the practice. Dr. Dyce breached his duty by concealing Dr. Gunnlauggson's subversion of SCENT.

The trial court also heard testimony and received evidence overwhelming evidence of extensive communications between Dr. Dyce and Dr. Gunnlauggson. Phone calls and text messages between Dr. Dyce and Dr. Gunnlauggson increased dramatically in late 2009 and into 2010 while Dr. Dyce attempted to stymie the practice. (Def. Ex. 133, Def. Ex. 134, Def. Ex. 135). The trial court erroneously found that the increase in calls and text messages was related to patient care. The Court failed to address, however, that as a result of these conversations, Dr. Dyce began requesting the same financial information that Dr. Gunnlaugsson's attorneys were requesting of the practice. (Vol. I, P. 35). The trial court's failure to find that Dr. Dyce and Dr. Gunnlauggson were adverse to the practice is an error of law.

c. Conspiracy

The trial court erred in failing to find that Dr. Dyce conspired with his wife, Curley, and Dr. Gunnlauggson to damage SCENT.

An action for civil conspiracy is normally an action at law. *McMillan v. Oconee Mem'l Hosp., Inc.,* 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). "However, the character of an action as legal or equitable depends on the relief sought. When equitable relief is sought in an action in tort [,] the action is one in equity." *Soden,* 333 S.C. at 574, 511 S.E.2d at 382. The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages." *Pye v. Estate of Fox,* 369 S.C. 555, 566–67, 633 S.E.2d 505, 511 (2006). "[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer

the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Id.* at 567, 633 S.E.2d at 511 (alteration by court) (internal quotation marks omitted). The trial court did not address Appellants' allegations that Dr. Dyce conspired with his wife and did not properly consider the special damages alleged by the party. *See Golden Strip Motors,* 288 S.C. at 551, 343 S.E.2d at 661 ("However, the trial court failed to rule on the issue of indemnification and we hold this was error. Thus, we remand solely for determination of the indemnification issue . . .").

A review of the evidence concludes that all elements of conspiracy have been met by a preponderance of the evidence and conclude Dr. Dyce conspired with his wife and Dr. Gunnlauggson, causing special damages to SCENT. By refusing to execute five different closings, Dr. Dyce and Curley were sabotaging SCENT's efforts to finish construction and open the new building. Dr. Dyce and Dr. Gunnlauggson were seen often meeting privately during these periods of time, and Dr. Gunnlauggson was in the process of secretly creating his own medical practice to compete against SCENT in the Richland County area. (Def. Ex. 65). Correspondence between Dr. Gunnlaugsson and the entity that he used to help secretly setup the practice even discussed Dr. Dyce coming on as a partner. (Def. Ex. 114; Def. Ex. 84; Def. Ex. 87; Vol. I, P. 521). This was the same period that Dr. Gunnlaugsson began showing up to SCENT's Business Office asking questions about insurance company claims, coding procedures, and the reimbursement process. (Vol. III, P. 244-245; Def. Ex. 166). Additionally, a former employee, Kieley Taylor, revealed that Dr. Gunnlauggson and Dr. Dyce engaged in a suspicious, confidential conversation during this time, and also that *both physicians* specifically requested off for April 23, 2010—*the day Dr. Gunnlauggson publicly sued SCENT.* (Def. Ex. 112). At the same time Dr. Dyce was stealing insurance contracts from the practice, Dr.

Gunnlauggson was also trying to learn the business side to setup a practice for both of them to compete against SCENT.

Dr. Dyce's breach of his fiduciary duty and duty of loyalty gives rise to civil conspiracy because of the nature of information shared, for the purpose of injuring SCENT, and the special damages resulting. While Dr. Dyce admitted to discussing the proposed Shareholders' Agreement with Dr. Gunnlauggson, Dr. Dyce denied discussing the details of the Agreement. (Vol. I, P. 376, 377, 388). This testimony is not credible and any finding otherwise is not supported by the record. Moreover, Dr. Gunnlauggson's testimony that Dr. Puchalski informed him of the specific details in the proposed Shareholders' Agreement is nonsensical and is not credible. (Vol. I, P. 493). The only plausible source of the confidential information leaked to Dr. Gunnlauggson came from Dr. Dyce.

The overwhelming weight of the evidence establishes that the parties conspired to injure SCENT. The actions of Dr. Dyce, Dr. Gunnlauggson, and Curley caused SCENT extreme and special damages. As part of this civil conspiracy, Curley and Dr. Dyce gave false reasons for blocking the loans on the building to bring SCENT Land and SCENT to a halt. Moreover, the confidential information Dr. Dyce shared with Dr. Gunnlauggson resulted in further stymieing of the practice and two public law suits. Additionally, in conjunction with his wife, Dr. Dyce ran up the debt of the company while maximizing his own distributions and giving assurances he would sign a new shareholders' agreement that addressed the debt of the practice. (Vol. II, P. 141-143). Moreover, the physicians conspired by improperly asserting that Dr. Gunnlauggson was a shareholder of the practice, which was an attempt to disenfranchise Dr. Puchalski and dilute the value of the shares he owned in the practice. (Def. Ex. 71). The special damages resulting from the conspiracy and fraud include the diminution of market value for remaining SCENT stockholders, diminution of value in SCENT Land, half of the debt of

SCENT at the time of Dr. Dyce's departure, loss of dividends, damage to business reputation, loss of corporate opportunities, damage to corporate good will, and lost revenue in the Hartsville and Cheraw locations since the expiration of the Covenant. (Vol. II, P. 82; Def. Ex. 218). In total, the special damages are $7,773,598.85. (Def. Ex. 218). These special damages are separate and apart from the damages the practice incurred as a result of Dr. Dyce's breach of his fiduciary duty and his breach of contract. The trial court failed to properly consider the special damages SCENT incurred from Dr. Dyce's conspiracy and this ruling should be reversed on appeal.

CONCLUSION

For the reasons stated herein, this Court should reverse the two lower court's orders and enter judgment against Dr. Dyce in the amount of $1,282,336.17 on SCENT's breach of contract claims and remand SCENT's claims for conspiracy and breach of fiduciary duty for a determination of the total losses suffered by SCENT. The Court should reverse the trial court's grant of summary judgment in the Curley matter, rule that Curley was properly expelled as allowed by the Operating Agreement, and enter judgment against Curley in the amount of $148,351.81.

Respectfully submitted,

Vincent A. Sheheen, Esquire (SC Bar# 11552)
Michael D. Wright, Esquire (SC Bar# 78401)
Savage, Royall & Sheheen, LLP
Post Office Drawer 10
Camden, SC 29021
803-432-4391
Attorneys for Appellants/Respondents

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge
Diane S. Goodstein, Circuit Court Judge

RECEIVED
JUL 14 2016
SC Court of Appeals

Consolidated Cases For Trial

Case No.: 2010-CP-28-322
Case No. 2010-CP-28-323

Jamie Curley, Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski, Defendants and Dr. Orville Dyce, Plaintiff,

v.

South Carolina ENT, Allergy & Sleep Medicine, P.A., Amy Puchalski, and Robert Puchalski, Defendants

Of Whom Jamie Curley, and Dr. Orville Dyce are the Respondents/Appellants,

And

SCENT Land Holdings, LLC, Amy Puchalski and Robert Puchalski, South Carolina ENT, Allergy & Sleep Medicine, P.A. are the Appellants/Respondents.

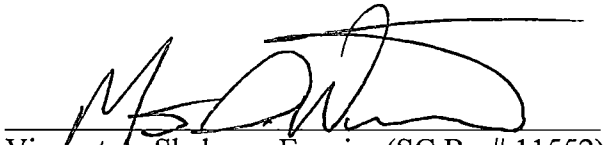
PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Respondents/Appellants with a copy of the Initial Brief of Appellants/Respondents and

Designation of Matter to be Included in the Record on Appeal by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

Morris A. Ellison, Esquire
Jana B. Baker, Esquire
Womble Carlyle Sandridge & Rice, PLLC
PO Box 999
Charleston SC 29402

Respectfully submitted,



Vincent A. Sheheen, Esquire (SC Bar# 11552)
Michael D. Wright, Esquire (SC Bar# 78401)
Savage, Royall & Sheheen, LLP
Post Office Drawer 10
Camden, SC 29021
803-432-4391

July 14, 2016

Attorneys for Appellants/Respondents

SAVAGE ROYALL & SHEHEEN L.L.P.
ATTORNEYS AND COUNSELORS AT LAW

EDWARD M. ROYALL
ROBERT J. SHEHEEN
MOULTRIE B. BURNS, JR.
WILLIAM B. COX, JR.
VINCENT A. SHEHEEN *
STEPHEN R. SMOAK
MICHAEL D. WRIGHT

HENRY SAVAGE, JR.
1903 - 1990
* CERTIFIED MEDIATOR & ARBITRATOR

1111 CHURCH STREET
CAMDEN, S.C. 29020

P.O. DRAWER 10
CAMDEN, S.C. 29021

TELEPHONE: (803) 432-4391
FACSIMILE: (803) 425-4816

July 14, 2016

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Jamie Curley vs. SCENT Allergy & Sleep Medicine, P.A.
Appellate Case No. 2016-0626

Dear Mrs. Kitchings:

I hope this correspondence finds you doing well.

Please find enclosed the conditionally filed original and one (1) copy of the Initial Brief of Appellants/Respondents and Designation of Matter to be Included in the Record on Appeal pending Appellants/Respondents' Motion to Exceed Page Limitations in the above-referenced matter. I have also enclosed a proof of service of this upon counsel for Respondents/Appellants.

I ask that you have someone from your office file the original and return the additional filed copy to me via our courier.

If you have any questions, please do not hesitate to contact me.

Very truly,

Michael D. Wright

Enclosures as Stated

cc: Morris Ellison, Esquire
Jana B. Baker, Esquire
Robert Puchalski, M.D.