

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

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.

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ARGUMENTS

I. SHAREHOLDER STATUS

A. The July 2008 Shareholders' Agreement

In his responsive brief, Dr. Dyce argues that evidence exists to support a finding that he became a shareholder in February 1, 2008 instead of July 16, 2008 when he signed his Shareholders' Agreement. This argument misses the point entirely and is consistent with Dr. Dyce's fishing expedition to claim any date, other than the actual date that the Shareholders' Agreement was signed and stock shares issued, to get more money. As pointed out in Appellant's Initial Brief, Dr. Dyce's own counsel represented to the trial court in his opening 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 his pleadings, and throughout this case, Dr. Dyce has admitted that the July 16, 2008 Shareholders' Agreement is the controlling agreement in this case and has attempted to enforce and construe it to his advantage. He deviates from that contention only when it benefits him in arguing that he is entitled to more money as a shareholder prior to that date. His argument falls flat.

Dr. Dyce first argues that the IRS Subchapter S status of SCENT somehow magically means that Dr. Dyce became a shareholder before he was issued stock and signed his Shareholders' Agreement. The argument is nonsensical.

Dr. Dyce next argues that the Court should not give credence to the Merger Clause contained in the July 16, 2008 Shareholders' Agreement. The defensiveness of the Respondent

on this argument points to its weakness. Because the parties had been in continuing negotiations and transactions relating to Dyce becoming a shareholder for number of years, the Merger Clause was much more than of boilerplate importance. The Merger Clause established the parties' intent to supersede the various and tortured negotiations, fits, and starts to create a path to becoming a shareholder. The Merger Clause clearly stated that all other agreements **"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 emphasis added). Both parties were represented by counsel, and both parties were fully informed as to its contents. (V. II., p. 39). The trial court's failure to address the merger clause and give it legal recognition was legal error at its plainest.

In a footnote, Dr. Dyce attempts to argue that the tax records of SCENT somehow support a finding that Dr. Dyce was retroactively entitled to distributions as a shareholder prior to signing the July 16, 2008 Shareholders' Agreement. This contention was flatly rejected by the corporate accountant and absolutely no evidence in the record supports a contrary conclusion.¹ In fact, the only testimony was that Dr. Puchalski had "a substantial balance in his previously taxed income account when Dr. Dyce came on board." (Vol. III, p. 282). The corporate accountant testified that Dr. Dyce's buy-in was never fully completed. "I'd call it an underfunded amount for the buy-in based on the formula . . . [t]o my knowledge Dr. Puchalski

¹ Austin Sheheen testified that Dr. Dyce came "into the practice as a shareholder during the year, consequently he was an employee nonshareholder for a portion of the year and an employee shareholder for the remainder of the year." (V. III, p 276). Austin Sheheen testified that he classified the additional income as a K-1 instead of a 1099 because it was a convenient way to report the income. (*Id.* at 278). Mr. Sheheen stated that "never in my furthest possible situation could I have imagined we would be arguing today about when somebody became a partner. Had I had that information back then, I would have elected not to put it all on the K-1. The net results would be for tax purposes that it was the same number that would have been arrived at regardless of how I got it there." (*Id.* at 279). Austin Sheheen's testimony was not contradicted.

made a decision to close the matter with some consideration give to Dr. Dyce." (*Id.* at 334, ll 15-21).

Austin Sheheen's testimony regarding the efforts to make Dr. Dyce a shareholder underscore the importance of the decision by the parties to enter into the July 16, 2008 Shareholders' Agreement to clean up past negotiations and make Dr. Dyce a shareholder at that time.

B. LACHES:

In his responsive brief, Dr. Dyce asserts laches should not apply because he acted "diligently in pursuing his rights as a shareholder and provided ample notice of his position that this status predated the July 16, 2008 Shareholder Agreement."² This assertion strains the truth.

Laches is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done. *DeLaine v. DeLaine*, 211 S.C. 223, 44 S.E.2d 442 (1947). To be charged with laches, a party must have knowledge of the facts upon which he bases his claim. *Arceneaux v. Arrington*, 284 S.C. 500, 327 S.E.2d 357 (Ct.App. 1985). Delay alone in the assertion of a right does not constitute laches. *Bonney v. Granger*, 292 S.C. 308, 356 S.E.2d 138 (Ct.App. 1987). Whether a plaintiff is barred by laches is to be determined in light of the circumstances of each particular case. *Rabon v. Mali*, 289 S.C. 37, 344 S.E.2d 608 (1986).

Dr. Dyce never asserted the true date of when he alleged he was a shareholder in SCENT and the allegations throughout the course of the pleadings, discovery, and even trial continued to change. The representation that Dr. Dyce stated he became a shareholder in March 2007 is without merit. Although Dr. Dyce's counsel began the trial with opening arguments alleging the various times in which he could have become a shareholder, counsel for Plaintiff

² Initial Brief of Respondents/Appellants at p. 18.

later waived the position that Dr. Dyce became a shareholder in 2007 when addressing Dr. Puchalski's motion for directed verdict. (Vol. I, P. 592-594). Additionally, Dr. Dyce refused to answer questions in his deposition on January 28, 2012 about when he became a shareholder. (Def. Ex. 179, P. 59). Dr. Dyce knew his rights, but did not reasonably assert them. Instead, Dr. Dyce continually changed his position throughout the litigation and eventually the trial of this case. This delay prejudiced Dr. Puchalski and SCENT by incurring expenses in defending conflicting and ever-changing positions and causing this contentious lawsuit.

Dr. Dyce did not do what he should have done and assert a position before trial. Allowing Dr. Dyce to litigate a matter without ever—even throughout the course of the trial—settling on an exact date on when he alleges to have become a shareholder materially prejudices SCENT and Dr. Puchalski. *See Provident Life & Acc. Ins. Co. v. Driver*, 317 S.C. 471, 478-79, 451 S.E.2d 924, 929 (Ct. App. 1994).

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

Dr. Dyce's arguments with respect to the Merger clause, the Shareholders' Agreement, and the Employment Agreement are simply nonsensical. Dr. Dyce's framing of the issue only serves to confuse a very straight forward matter in which the trial court reached an incorrect conclusion of law.

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 parole 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, parole 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.”).

The trial court, as Dr. Dyce concedes in his brief, accepted the parol evidence presented by Dr. Puchalski in the form of his passport.³ The trial court erred, however, in concluding that the document was signed on June 1, 2008 and finding that there was no evidence to support the fact that the shareholders' agreement and employment agreement were executed in concert on July 16, 2008. Dr. Puchalski specifically testified that the two agreements were executed simultaneously and that it was the intent of the parties for the agreements to work in concert.⁴ As evinced by the passport, Dr. Puchalski was out of the country on June 1, 2008 and there is no way this document could have been signed by the parties on that date. It is evident that the documents were executed simultaneously on July 16, 2008 and that the dating on the employment agreement was a scrivener's error.

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. Dr. Dyce's Factual Assertions are Without Support in the Record and Irrelevant: Dr. Dyce was Properly Terminated For Cause.

³ Initial Brief of Respondents/Appellants, P. 20

⁴ "Q. Dr. Puchalski, we've been talking about the shareholders agreement and the employment agreement. Were these two documents supposed to work together?"

A. Yes. That was the intent of the parties and that was what we contemplated."

Q. Actually let me ask you this way, was there an employment agreement executed simultaneously with the shareholder agreement?"

A. Yes, there were two.

Q. All right. And is one of them the employment agreement of Orville Dyce we just looked at?"

A. Yes." (Vol. II, P. 56-57).

In his brief, Dr. Dyce makes numerous factual assertions that are not supported by the evidence in the record. The Court should not be persuaded by these claims and the lower court's finding that Dr. Dyce was not terminated for cause. See *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 28, 738 S.E.2d 480, 495 (Ct. App. 2013) (holding the standard of review includes correcting errors of law and determining whether the trial court's findings are supported by competent evidence).

Respectfully, the trial court's findings are not supported by competent evidence. 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,⁵ which contained further confidential information that came from his voluminous communications with Dr. Dyce. (Def. Ex. 72; Vol. II, P. 78-79). SCENT further

⁵ 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.

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). 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).

In his brief, Dr. Dyce states that the lower court rejected SCENT and Dr. Puchalski's arguments that Dr. Dyce provided confidential information to Dr. Gunnlauggson and therefore this court should ignore the reason Appellants/Respondents contend Dr. Dyce was properly terminated for cause. This assertion is not only a blatant misstatement of the law, it defies the very standard of determining whether the trial court's decision is supported by competent evidence. In this matter, the lower court based the determination that Dr. Dyce should not have been terminated with cause on the testimony of an individual who was about to perjure himself. Throughout the course of the trial, Dr. Dyce took the position that Dr. Gunnlauggson was a shareholder in SCENT despite Dr. Gunnlauggson having testified, under oath, in a separate

proceeding against SCENT that “he is not and never was a shareholder of South Carolina ENT, Allergy and Sleep Medicine, PA (SCENT) or any of its subsidiaries or affiliates and consents to a finding of the Court to this effect.” (Def. Ex. 141). In this matter, under oath, Dr. Gunnlauggson continued to “walk the line” that he was a shareholder in the practice. (Vol. I., P. 278, 476, 503-504). Although Judge Goodstein granted SCENT’s motion in limine⁶ with respect to the contention that Dr. Gunnlauggson was a shareholder on the grounds of judicial estoppel, she inconsistently and without explanation gave credence to Dr. Gunnlauggson’s testimony that he did not receive any confidential information or conspire to injure the practice with Dr. Dyce. This ruling is directly contradicted by her ruling on judicial estoppel and is not supported by any competent evidence and a finding of fact based upon testimony of someone who was willing to perjure himself strains credibility.⁷

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

A. Dr. Dyce's Breach was not Excused

Citing *William v. Riedman*, Dr. Dyce attempts to argue that his breach of the Covenant was excused because of alleged prior breaches by SCENT. SCENT has set forth in its initial brief why the practice did not breach the Shareholders’ Agreement. Regardless, Dr. Dyce’s breaches are not excused.

⁶ Vol. I., P. 59-62.

⁷ Moreover, the trial court never addressed Dr. Dyce filing his 2009 tax return as only a one-third shareholder as opposed to the reality of him being a fifty-fifty shareholder in SCENT. In filing this 2009 tax return, Dr. Dyce asserted that he, Dr. Puchalski, and Dr. Gunnlauggson were all shareholders. As a result of Dr. Dyce’s actions, not only is there unreported income that has not been taxed, but it is evident that Dr. Dyce was conspiring with Dr. Gunnlauggson to devalue Dr. Puchalski’s shares in the practice. Moreover, the 2009 filed tax return is completely contradictory to Dr. Gunnlauggson’s sworn testimony.

In his brief, Dr. Dyce neglects to mention the core of the *Williams* court's analysis- "equitable principles primarily the 'clean hands' doctrine." *Williams v. Riedman*, 529 S.E.2d 28, 41 (S.C. Ct. App. 2000). Dr. Dyce's theft of the Hartsville and Cheraw markets from SCENT is in direct violation of his Covenant and took the very revenue stream that would have paid Dr. Dyce's buyout. Dyce's patient theft cost SCENT over \$1,400,000 based solely upon patient transfers, not to mention future patient loss. (V. II p. 236, D. ex. 218).

Furthermore, Dr. Dyce took confidential information from SCENT and gave it to his new employer in the summer of 2010, which was reflected in his pro forma with Carolina Pines. The equities in this case overwhelmingly support enforcing the Covenant because to do otherwise would be to let Dr. Dyce steal SCENT's patients and revenue and then allow him a significant buyout that does not take into account a reduction for breaching the Covenant.

In the current case, the equities clearly favor enforcement. Upon leaving SCENT, Dr. Dyce almost immediately let it be known that he was repudiating the Covenant not to Compete. 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)⁸. 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 office⁹, by approaching

⁸ In his brief, Dr. Dyce argues that he did not breach the Covenant until the Fall of 2010 when he began seeing patients. This argument is a red herring because Dr. Dyce repudiated the Covenant upon leaving SCENT and took substantial steps to set up a practice, thus violating the Covenant and competing against SCENT.

⁹ 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

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 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'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. The equities do not favor allowing Dr. Dyce to double dip: get a buyout and take SCENT's patients and revenues.

B. The Covenant is appropriate in Scope

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).

Dr. Dyce ignores the rulings by multiple lower courts on SCENT's upholding the covenant in the companion case of Dr. Gunlauggson. This case was joined with Dr. Dyce's case for hearings on the Covenant issue as mentioned in Appellants' Initial Brief, and Dyce's motion for Summary Judgment on the issue was denied in the same hearing as Dr. Gunlauggson by Judge Benjamin.¹⁰

Appellants have spent considerable time addressing each and every precedent in South Carolina relating to Covenants in their initial brief and will not repeat the arguments herein, craving reference to the Initial Brief. SCENT has met its legal burden of showing that the Covenant was reasonable in geography and time, was supported by valuable consideration, did not unduly restrict the employee from earning a living, and was not violative of public policy. The fact that SCENT was run out of the Hartsville area by Dr. Dyce's theft of its patient base is conclusive proof that its Covenant was necessary.

V. Dr. Dyce is Not Owed any Money under Section 4.5 of the Shareholders' Agreement ("Buyout").

Dr. Dyce mistakenly asserts that simply because certain factual findings were adverse to Dr. Puchalski and SCENT in the lower court, that this Court should ignore the unsupported findings made by Judge Goodstein. As referenced above, Dr. Dyce's position is a misstatement of the applicable law.

If this Court reviews the matter under a standard of a constructive trust on all the causes of action as Dr. Dyce requested, this Court may find facts in accordance with its own view of the evidence. *Lollis v. Lollis*, 291 S.C. 525, 530, 354 S.E.2d 559, 561 (1987). Alternatively, if the Court reviews this specific issue as one sounding in law, this Court must still review to

¹⁰ Furthermore, Dr. Dyce also refuses to discuss the iron clad logic of Judge Jefferson upholding an almost identical covenant in the *Budev* case as discussed in the Appellants' Initial Brief.

correct errors of law and determine if there is competent evidence to support the lower court's findings. *Baugh*, 402 S.C. at 28, 738 S.E.2d at 495. Regardless of the standard, a review of the factual determinations made by the lower court with respect to the Buyout is appropriate.

a. Dr. Dyce's Fundamental Breaches

As discussed more fully in the initial brief, Dr. Dyce did commit numerous, fundamental, and substantial breaches of his contract with SCENT and Dr. Puchalski. These breaches excused any further performance that SCENT had under the existing agreements. *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); *see also Gibbs*, 311 S.C. at 105, 417 S.E.2d at 702.

With respect to the trial court's findings, the only evidence indicating that Dr. Dyce was uninformed about the business dealings of the practice was Dr. Dyce's own self-serving testimony. 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).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'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.

Additionally, even if Dr. Dyce was not working as a physician performing surgeries during the summer of 2010, the trial court ignored the fact that Dr. Dyce was in the process of setting up a competing practice in violation of his covenant not to compete. Dr. Dyce received a medical equipment quote on June 21, 2010 to his address at Carolina Pines—well before the time in which SCENT was supposed to provide the alleged Buyout—that provided a price list for items to setup a medical office. (Def. Ex. 231, Vol. I, P. 564-565, Vol. I, P. 578, Vol. II, P. 132; Vol. IV, P. 77-78). Dr. Dyce also worked with Carolina Pines to prepare a Pro Forma for his employment with that hospital. (Def. Ex. 99). Significantly, the Pro Forma prepared by Carolina Pines included details about SCENT's payer mix, which is highly confidential and proprietary information that could have only been obtained if Dr. Dyce provided the information. (Def. Ex. 99; Vol. II, P. 76). Knowing SCENT's payer mix from his time at the practice and the insurance contracts he took on the “down low” allowed Dr. Dyce to be competitive and provide the same services for cheaper, which ultimately helped him obtain a large sign-on bonus from Carolina Pines and ramp up his practice from Day 1. (Vol. II, P. 80). These omissions by the trial court in its findings of fact are inexcusable. 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.

b. Accounts Receivable

In his brief, Dr. Dyce attempts to further confuse the relevant issues by conflating arguments with respect to the integration clause with that of the accounts receivable. In addition to expounding a nonsensical argument, Dr. Dyce's position is a red herring.

A review of the record indicates that the trial court specifically ordered the parties to provide the accounts receivable of the practice. SCENT provided the only testimony explaining the normal accounting methods of the corporation through the testimony of Mark Quigley. While Dr. Dyce does not agree with or like the conclusion that under a "cash basis" method of accounting the accounts receivable of the practice are booked at a value of zero, any other conclusion is pure speculation. (Vol. IV, P. 139, P. 142). In fact, the trial court's finding on this issue was just that: pure speculation and conjecture. 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). 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. Regardless, an analysis premised upon this assumption when there are no facts to support said finding of fact is improper—particularly when the only testimony in the record as to the value of the accounts receivable is from an individual 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 and under a "cash basis" method of accounting, the accounts receivable of the practice are booked at a value of zero. The trial court erred in failing to follow the only evidence in the record.

c. Cash Equivalents

Dr. Dyce takes the position that the life insurance policy is a cash equivalent because of a hypothetical question asked of SCENT's expert witness, Mr. Austin Sheheen. As Mr. Sheheen testified to extensively, however, the life insurance policy could not be converted to cash because the surrender value of the policy exceeded the cash value of \$33,000. (Vol.III, P. 337-338.). 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). Though rather simplistic, it is a relatively straightforward concept that something cannot be an equivalent to cash if there is no actual cash value to that something. The life insurance policy could not be "readily convertible to a known amount of cash" because the surrender value of the policy in 2010 was greater than the cash value of \$33,000. Accordingly, the court's conclusion that the life insurance policy is a cash equivalent is an error.

With respect to the loan from SCENT to SCENT Land, the only testimony in the record, supported by treatises defining cash equivalents, is that the loan from SCENT to SCENT Land is not a cash equivalent. Mr. Quigley presented testimony and referenced auditing guidelines for healthcare industries that 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. Moreover, there is no maturity date for the loan between the parties. This loan fails to satisfy the two prongs necessary and as discussed above to be defined as a cash equivalent. Dr. Dyce likes to argue

that it is evident that the loan was a cash equivalent because the loan was repaid shortly after his termination. This argument fails to mention the most crucial detail: the only reason SCENT Land had the necessary funds to pay back the loan was because Dr. Dyce was terminated and Dr. Puchalski was then allowed to sign on behalf of SCENT Land to obtain the construction loan from the bank.

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.

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

A. Business Judgment Rule

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.”

Dr. Dyce argues the business judgment rule should not apply because Dr. Puchalski’s actions showed a “lack of good faith, fraud, self-dealing, or unconscionable conduct.”¹¹ As an initial matter, the trial court did not provide an analysis in either its initial Order or its Order

¹¹ Initial Brief of Respondents/Appellants, P. 41.

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 . . .”).

At all times throughout the course of this litigation, but especially in the Spring of 2010, Dr. Puchalski managed SCENT without corrupt motives and in good faith. At the critical times when these decisions were being made, Dr. Puchalski, as CEO and Chairman, was observing the following: (i) Dr. Dyce refusing to allow SCENT to change its malpractice carrier to a lower cost provider; (ii) Dr. Dyce failing to approve expenditures for Respironics and AllMeds; (iii) Dr. Dyce’s refusal to close the construction loan resulting in halted construction and collection requests by the contractor; (iv) Dr. Dyce’s refusal to execute loan documents as a manager of SCENT Land despite knowing the current lease was expiring on the Lugoff location, jeopardizing the entire practice; and (v) Dr. Dyce’s refusal to regularly return phone calls, electronic mail, or other communications. With these inactions by Dr. Dyce and Dr. Puchalski’s understanding from First Palmetto¹² that Dr. Dyce had to be present to sign as

¹² As discussed more fully in Appellants/Respondents’ Initial Brief, 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

manager for SCENT Land, Dr. Puchalski's actions on behalf of the company were solely motivated to save the company itself.

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. 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 to preserve a company from a shareholder who consistently breached his fiduciary duty. *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.").

B. Constructive Trust and Conversion

Dr. Dyce argues that the Business Judgment Rule does not apply because the trial court found that Dr. Puchalski was liable under theories of Conversion and Constructive Trust. This argument would gut any meaning behind the Business Judgment Rule because a litigant would always frame his claims as such. However, the argument exposes the claims for Constructive Trust and Conversion as proxies for the real claim- a breach of contract against SCENT for allegedly failing to pay the buy-out. The claims for constructive trust and conversion are not legally supported and are error.

1. Plaintiff's Constructive Trust Claim Fails

"A constructive trust results from fraud, bad faith, abuse of confidence, or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." *Lollis*, 291 S.C. at 530, 354 S.E.2d at 561-62. The burden for establishing a constructive trust is high, and the

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). Any conclusion to the contrary is clear error.

plaintiff must prove it by evidence that is “clear, definite, and unequivocal.” *Id.* An action to declare a constructive trust is in equity and the appellate court should find facts in accordance with its own view of the evidence. *Id.*

Importantly, “[f]raud is an essential element, although it need not be actual fraud.” *Id.*; *McNair v. Rainsford*, 330 S.C. 332, 357, 499 S.E.2d 488, 500-01 (Ct. App. 1988)(refusing to impose constructive trust because there was no existence of fraud); *Baptist Foundation v. Baptist College*, 282 S.C. 53, 59-60, 317 S.E.2d 453, 458 (Ct App. 1984)(refusing to impose constructive trust because there was no evidence of fraud); *Dye v. Gainey*, 320 S.C. 65, 463 S.E.2d 97 (Ct. App. 1995)(requiring fraud as an essential element for a constructive trust).

In the current case, the trial court made absolutely no factual findings that would support a finding of fraud. Furthermore, the standard of review allows this Court to make its own determination of the facts. The evidence, including the testimony of Austin Sheheen, shows that no fraud occurred in this case. To the contrary, Dr. Puchalski's decisions relating to a buyout and when Dr. Dyce became a shareholder were fully supported by the corporate accountant's advice and opinions. Dr. Dyce's claims for a buyout and allegations that he became a shareholder before July 16, 2008 sound in breach of contract claims against SCENT, and not constructive trust claims against Dr. Puchalski. The elements necessary for a Constructive Trust simply do not exist in this case, or else they will exist in every breach of contract case.

2. Plaintiff's Conversion Claim Fails

Similarly, allegations for Conversion are unsupported by any evidence and the trial court's finding was legal error. Although Dr. Dyce dressed his claims up in an attempt to hold

Dr. Puchalski personally liable, his claims are clearly based in allegations against SCENT for breaches of contract.

“There can be no conversion of money *unless there is an obligation* on the defendant to deliver a *specific, identifiable* fund to the plaintiff.” *Richardson v. NBSC*, 304 S.C. 289, 294, 403 S.E.2d 669, 672 (Ct. App. 1991)(emphasis supplied); *Mullis v. Trident*, 351 S.C. 503, 507, 570 S.E.2d 549, 551 (Ct. App 2003); *Dawkins v. Nat. Liberty Life*, 263 F.Supp. 119 (D.S.C. 1967). The tort of conversion supposes that the plaintiff had possession or ownership of something, which was then taken by the defendant. *See Castell v. Stephenson Finance Co.*, 244 S.C. 45, 51, 136 S.E.2d 311, 313 (1964). Conversion is to be contrasted with breach of contract, wherein a plaintiff claims he was owed or entitled to something he did not receive. *Owens v. Andrews Bank & Trust*, 265 S.C. 490, 497, 220 S.E.2d 116, 119 (1975)(holding there is no conversion where there is a mere obligation to pay a debt.”)

Furthermore, conversion is an intentional tort. *See The South Carolina Law of Torts*, 4th Ed. pp. 437, 485 (2011). As such, the Plaintiff must prove some intentional wrongdoing. *Id.* at 438. Finally, “money may be the subject of conversion if it can be identified *but not if the money is not held as a separate item and is commingled with other sums.*” *Id.* at 487 (emphasis added).

At its core Dr. Dyce’s claims are against SCENT, not Dr. Puchalski. The Plaintiff alleges that he was not paid what he was owed prior to signing a Shareholders’ Agreement on July 16, 2008 and that he is owed money from a buy-out. Dr. Dyce never once possessed the money he now claims he was entitled to. Furthermore, even in his initial complaint, Dr. Dyce did not allege that he became a shareholder prior to July 16, 2008 when he signed his Shareholders’ Agreement. At best, Dr. Dyce’s claims are based on a disputed contractual

obligation by SCENT to pay money for his buy-out and for money he claims he should have received prior to him signing the July 16, 2008 Shareholders' Agreement. These claims sound in contract, not in conversion.

A claim to an *entitlement* of money because of an agreement is not a claim for conversion; it is a claim for a breach of contract. *Id.* at 485. Furthermore, "there can be no conversion of money unless there is an obligation on the defendant to deliver a specific, identifiable fund to the plaintiff," which is not present here. *Richardson*, 304 S.C. at 294, 403 S.E.2d at 672. Finally, a claim for conversion must include a showing of "unauthorized detention after demand." *Moore v. Weinberg*, 373 S.C. 209, 227, 644 S.E.2d 740, 749 (Ct. App. 2007); *Mackela v. Bentley*, 365 S.C. 44, 614 S.E.2d 648 (Ct. App. 2005) ("plaintiff claiming conversion may prevail based upon a showing of unauthorized detention of property, after demand.").

In this matter, there was no evidence presented, and the trial court did not find, that Dr. Puchalski owed an obligation to deliver a *specific, identifiable* fund to Dr. Dyce. Instead, Dr. Dyce's claims and the evidence presented demonstrate that the money claimed stemmed from a contractual dispute with SCENT. Furthermore, Dr. Dyce never made a demand for these funds and did not even claim an entitlement to them in his initial complaint. Money is only subject to a claim for conversion if it is held in discrete and separate fund upon which demand is made. *See Moore, supra*. In this case, no separate and discrete funds were ever claimed by Dr. Dyce.

Finally, Dr. Dyce never took ownership or possession of the funds he now claims, and therefore they could not have been "converted" by anyone. Dyce's strained attempts to personally reach Dr. Puchalski must fail. It is evident, as the circuit court found, that Dr. Dyce's alleged claims sound in contract against SCENT; not in conversion.

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

The Respondent did not put forth meaningful argument in response to Appellants' arguments on this section, and therefore Appellants crave reference to the Initial Brief.

VIII. SCENT LAND

In his Responsive Brief, Dr. Dyce argues that there was no authority in SCENT Land's Operating Agreement to require a mandatory capital call. This contention is objectively false. In the Operating Agreement, the parties explicitly agreed that a member could be expelled if she "fails to make a mandatory capital contribution to the Company. ..." (Def. Ex. 115, p. 16). Any position contrary to the plain language of the Operating Agreement is patently wrong.

Following a written notice calling for a special meeting of the members of SCENT Land, the Members approved a two-stage capital call on March 12, 2010 requiring all members of the company to contribute 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. (Def. Ex. 115 p16; 224, 75).¹³

Because Curley was properly expelled—and not disassociated—from the Company due to her breach of the Operating Agreement, Appellants were not required to deliver an offer to her to purchase her distributional interest in the Company. Instead, the Operating Agreement provides that Plaintiff may be "forced to accept a buy-out of her interest as valued in Section 5"

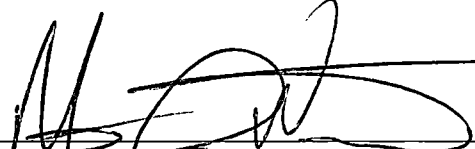
¹³ In her brief, Curley attempts to argue that the capital call was not validly issued because she was not notified in writing mailed to her address in the Operating Agreement, but was only notified via electronic mail. Curley has waived this argument as she actively participated in the conference call where the capital call was issued by SCENT Land.

of the Operating Agreement. (Def. Ex. 115 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.

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,



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September 26, 2016

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

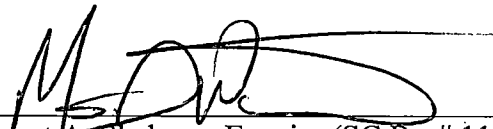
PROOF OF SERVICE

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

Appellants/Respondents by mailing a copy of the same by United States Mail with first class postage prepaid to the following address:

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September 26, 2016

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SC Court of Appeals

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 an original and one (1) copy of the Initial Reply Brief of Appellants/Respondents. I have also enclosed a proof of service of the same 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.