

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2011-CP-24-01470
Appellate Case No. 2012-212863

Janice Clinkscales, Lucy Townsend, William Outz,
Tammie Holmes, William Haynes, Michelle Barksdale,
Lavonia Haynes, individuals on behalf of themselves
and all other similarly situated and Relief Plaintiffs 1-93, ... Respondents,

v.

Greenwood County Hospital Board, Self Regional
Memorial Board, Self Regional Memorial Hospital,
Self Regional Healthcare, Self Medical Group, The
Outpatient Surgery Center, Self Memorial Regional Health
Services, Self Regional Physician Services, Greenwood
Medical Company, Self Regional Healthcare Auxiliary,
Self Regional Healthcare Foundation, John Does 1-10, ... Defendants,

of whom Greenwood County Hospital Board, Self Regional
Memorial Board, Self Regional Memorial Hospital,
Self Regional Healthcare, are the Appellants.

**APPELLANTS' MEMORANDUM ADDRESSING RIGHT TO
INTERLOCUTORY APPEAL AND RESPONSE TO MOTION TO DISMISS**

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SC Court of Appeals

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PROCEDURAL STATEMENT OF RESPONSE

Appellants Greenwood County Hospital Board a/k/a Self Regional Memorial Board, a/k/a Self Regional Memorial Hospital and a/k/a Self Regional Healthcare (collectively "Self Regional hospital"), file this memorandum at the request of the Appellate Court pursuant to their letter dated September 13, 2012. It is also filed in response to Respondents' Motion to Dismiss the appeal dated September 14, 2012. Pursuant to the Court's instruction, detailed arguments regarding the applicability of common law prosecutorial and judicial immunity to the facts, as alleged in the Amended Complaint, have been reserved for full briefing during the appeal.

QUESTION PRESENTED

SHOULD THE COURT OF APPEALS TAKE IMMEDIATE REVIEW OF A CIRCUIT COURT'S DECISION ON A MOTION TO DISMISS THAT DENIES ABSOLUTE IMMUNITY UNDER THE SOUTH CAROLINA COMMON LAW JUDICIAL AND PROSECUTORIAL IMMUNITY?

STATEMENT OF CASE

I. Summary of Argument

The Setoff Debt Collection Act ("SDCA"), S.C. Code § 12-56-10 *et seq.*, established a judicial process wherein governmental/quasi-governmental entities have an alternative method to collect delinquent debt other than through a civil action. The process, as established by the legislature, involves the decision to initiate the SDCA process in the same manner a prosecutor initiates a criminal action, and involves a Hearing Officer who is charged with making a judicial determination on the merits of the

case. The action that initiates the SDCA process is prosecutorial in nature. All decisions made by the Hearing Officer are judicial in nature.

South Carolina common law provides for absolute immunity for acts that are judicial/quasi-judicial in nature and for acts that are prosecutorial/quasi-prosecutorial in nature. The immunity provided is immunity from suit. It is absolute. The policy considerations supporting early resolutions of absolute immunity cases are clear. Absolute immunity is a substantial right. The denial of absolute immunity is a final and conclusive determination of a defendant's claim of a right not to stand trial. If this Court finds no right to immediate review, all judicial and prosecutorial entities in South Carolina will suffer the expense and burden of litigation barred by the common law. In essence, if the denial of the Motion to Dismiss is not immediately appealable, then judicial and prosecutorial immunity is not, in fact, absolute, which makes the doctrine meaningless.

Because it is the nature of the claim which properly determines the right to review prior to final judgment, this Court must find immediate review of the common law prosecutorial and judicial immunity raised by way of a motion to dismiss, as such review is compelled by the nature of the immunity and the societal costs at stake. The common law judicial and prosecutorial immunity issue was clearly raised and ruled upon by the Circuit Court. The denial of said immunity is a final adjudication of the merits of the immunity claims and impacts a substantial right under S.C. Code § 14-3-330 and, therefore, must be immediately reviewed by the Appellate Court.

II. Legislative and Procedural History

A. The Setoff Debt Collection Act

In 1988,¹ the South Carolina legislature enacted legislation commonly known as the Setoff Debt Collection Act, S.C. Code § 12-56-10, *et seq.* The purpose of the SDCA is to allow governmental and quasi-governmental entities of the state a vehicle to collect delinquent debt other than through a civil action. These entities are known as “claimant agencies” under the SDCA. S.C. Code § 12-56-20(1).²

The SDCA sets forth a judicial process where a claimant agency decides that a debt should be collected and details the procedures, including a hearing on the merits, that must thereafter be followed. The procedure includes:

- 1) Determining that the debt is subject to collections under the SDCA. S.C. Code §§ 12-56-30(B) and 12-456-40;
- 2) Sending a notice to the debtor of the claimant agency’s intent to setoff a state tax return for payment of the debt. S.C. Code §§ 12-56-60 and 12-56-62;
- 3) Appointing a Hearing Officer to adjudicate issues related to indebtedness if challenged by the debtor. S.C. Code § 12-56-65;
- 4) Holding a protest hearing upon request of a debtor. S.C. Code §§ 12-56-63 and 12-56-65(B); and
- 5) Making a determination through a Hearing Officer of the debt owed when requested. S.C. Code § 12-56-65.

¹ The SDCA was amended in 1999.

² In 1998, the SDCA was challenged in a state wide class action. *See Gardner v. S.C. Dep’t of Revenue*, 353 S.C. 1, 577 S.E.2d 190 (2003). Self Memorial Hospital was a defendant in that action and considered to be a “claimant agency” by the Court.

In South Carolina, a claimant agency has jurisdiction to determine the collectability of debt under the SDCA and to hold the mandatory protest hearings that must be held in order for a plaintiff to appeal a SDCA debt. *See* S.C. Code §§ 12-56-65(B)-(C). Pursuant to the SDCA, claimant agencies must hold protest hearings when requested. During a protest hearing, a determination involving the adjudication of whether the debt is owed within the confines of the law is made. *See* S.C. Code § 12-56-65(B). The Hearing Officer makes the determination on the merits of the case. *See Gardner v. S.C. Dep't of Revenue*, 353 S.C. 1, 23-24, 577 S.E.2d 190 201-202 (2003) (Supreme Court remanded case back to Hearing Officer at each claimant agency to determine if plaintiffs prejudiced by improper notice of intent to collect debt under SDCA). The protest hearing is considered to be a final adjudication. *See Hom v. SCESC*, 00-ALJ-30-0100-CC (Admin. L. Ct. July 6, 2000) Exhibit A, attachment p. 22. There is an appeal process to an ALJ for a review of a protest hearing after a final determination is made by the Hearing Officer. *Id.* The appeal is limited to whether or not the debt is owed and whether or not the claimant agency can collect the debt. This is an individual determination based on the debt owed by each debtor. *See Gardner*, 353 S.C. 1, 577 S.E.2d 190 (2003). An independent review by the Circuit Court is only allowed if “a right to jury trial already exists.” S.C. Code § 12-56-67. To the extent Plaintiffs are attacking either the determination to initially collect under the SDCA or the final determination by the Hearing Officer that the debt was collectable, the Hospital is entitled to absolute immunity because it was acting in the capacity as either prosecutor or judge pursuant to statutory authority.

B. Plaintiffs Incurred Hospital Debt

Each of the seven (7) Named Plaintiffs admit that on various occasions they received services from Self Regional hospital. Each Plaintiff also admits that those services were not paid for and that each owes a debt to Self Regional.³

C. Setoff Debt Collection Act Applied to Delinquent Debt

Self Regional determined that the delinquent debt of each Plaintiff was subject to potential collection under the SDCA and initiated the judicial collection proceeding under the alternative legal procedures set forth in the SDCA. Self Regional hospital sent each Plaintiff a notice of intent to setoff their debt as prescribed in the SDCA. The decision and the sending of each initial notice on an account began the SDCA process. Upon receipt of each notice, each Plaintiff had the right to request a protest hearing before a Hearing Officer (who is an employee of the hospital) pursuant to the SDCA statute.

In 2011, upon receipt of the 2012 tax year SDCA letters, the Named Plaintiffs protested their individual debts. Pursuant to SDCA prescribed procedures, a protest hearing was held. The Hearing Officer determined the debts were due and owing. Plaintiffs did not appeal the Hearing Officer's determination to the administrative law court, as prescribed by the statute. To the extent a Named Plaintiff claimed a state tax

³ "Plaintiffs and Defendants are debtors and creditors which have engaged in a series of transactions formulating an 'accounts stated' wherein all prior transactions are not in dispute totaling a total amount agreed upon from the underlying transactions excepting the amounts which should be discounted for self pay individuals as are discounted for other patients." See Exhibit B, Amended Complaint, p. 11 ¶ 27, attachment p. 38.

refund, and another governmental agency did not have priority, the claimed state refunds were paid to Self Regional hospital.⁴

D. Plaintiffs File Suit in Circuit Court

Instead of filing suit before the ALJ as prescribed by the statute, the Named Plaintiffs thereafter filed this lawsuit in the Circuit Court in Greenwood County alleging abuse of process and requesting declaratory relief against Self Regional Healthcare, a/k/a Greenwood County Hospital Board or Self Memorial Hospital. The Defendant filed an answer and motion to dismiss.

E. Named Plaintiffs File an Amended Complaint

Prior to the hearing on the original Motion to Dismiss, Named Plaintiffs filed an Amended Complaint. Exhibit B. The Amended Complaint added ninety-three (93) additional unnamed plaintiffs as to Count IX (which was dismissed) and as potential class members, seven (7) additional named corporate defendants and ten (10) additional unnamed "John Doe" defendants. Additionally, the Amended Complaint added seven (7) new causes of action. Self Regional hospital⁵ filed a Motion to Dismiss the Amended Complaint under SCRCR Rules 12(b)(1), 12(b)(6) and 12(f). The Motion to Dismiss the Amended Complaint challenged each individual cause of action and raised jurisdictional arguments and immunity arguments, including specific arguments related to the common

⁴ The Amended Complaint makes no reference to the protest hearings in which the Plaintiffs chose not to participate prior to 2011 or the protest hearings in which the Named Plaintiffs did each participate in 2011.

⁵ The Motion to Dismiss the Amended Complaint and this appeal are filed on behalf of Self Regional Healthcare a/k/a Greenwood County Hospital Board a/k/a Self Memorial Hospital a/k/a Self Memorial Hospital Board. Exhibit C, n. 1, attachment p. 49. Each additional corporate defendant also filed a separate standalone Motion for Summary Judgment that incorporated all arguments made in the Self Regional hospital Motion to Dismiss and supporting memorandum in the alternative. Said motions by the additional corporate defendants have not yet been ruled upon by the Circuit Court.

law judicial and prosecutorial immunity. Motion, Exhibit C, attachment p. 49 and Memorandum in Support, Exhibit D, attachment p. 56; Hearing Transcript (not yet available). The Circuit Court held oral arguments on the Motion to Dismiss the Amended Complaint on July 25, 2012. On August 20, 2012, the Circuit Court granted Self Regional hospital's Motion to Dismiss the ninth (9th) cause of action. All other arguments, including absolute immunity under the common law for prosecutorial and judicial acts were denied. This appeal follows from the denial of absolute immunity under the common law prosecutorial and judicial immunity doctrine.

III. Argument

An appellate court may determine the question of appealability of a decision from a lower court as a matter of law. S.C. Code Ann. § 14-3-330 (1976 & Supp. 2011) (creating appellate jurisdiction in law cases); S.C. Code Ann. § 14-8-200(a) (Supp. 2011) (setting forth the appellate jurisdiction of the Court of Appeals). Under South Carolina law, an issue is only appealable when it is final or when a substantial right and/or the merits of the case are impacted. S.C. Code §§ 14-3-330(1) and (2). Self Regional hospital has raised prosecutorial and judicial immunity under the common law as a defense to this action. Because the common law judicial and prosecutorial immunity is absolute, it provides for immunity from the defense of litigation and suit. The right to not be obligated to defend a lawsuit and/or participate in costly, unnecessary discovery or stand trial is a substantial right. Once discovery and the defense of the action occurs, it is too late for the party to seek to correct any errors in the order during or after trial and, therefore, cannot be later vindicated on appeal after the entire case is over. In addition, if a case is allowed to proceed, the Court has, in fact, made a final and conclusive

determination on a defendant's claim of a right not to stand trial. *See Mitchell v. Forsyth*, 472 U.S. 511, 527 (U.S. 1985). As such, a denial of the common law prosecutorial and judicial immunity is immediately appealable.

A. Prosecutorial and/or Judicial Immunity Is Absolute

There is no question that prosecutorial and judicial common law immunity is truly absolute. *Williams v. Condon*, 347 S.C. 227, 237, 553 S.E.2d 496, 502 (Ct. App. 2001) ("The [prosecutorial] immunity is absolute, and is grounded on principles of public policy.") (quoting *Yaselli v. Goff*, 12 F.2d 396 (1926)); *O'Laughlin v. Windham*, 330 S.C. 379, 385, 498 S.E.2d 689, 692 (Ct. App. 1998) ("Judicial immunity is an absolute bar in the sense that it absolutely bars litigation against the judicial officer"); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) (absolute immunity applies to a state prosecutor, acting within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case, despite allegations that he knowingly used perjured testimony, deliberately withheld exculpatory information, and failed to make full disclosure of all facts casting doubt upon the state's testimony); *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994) (absolute immunity applies when a prosecutor is alleged to have withheld exculpatory evidence and conspired to present false testimony during trial); *Green v. Murdaugh*, No. 5:12-1086-RMG-KDW, 2012 U.S. Dist. LEXIS 77165, 7-8 (D.S.C. May 4, 2012), adopted by No. 5:12-1086-RMG, 2012 U.S. Dist. LEXIS 77256 (D.S.C. June 4, 2012) (Exhibit E, attachment p. 127) (complaint held to be subject to dismissal because it seeks monetary relief from Defendant Murdaugh, the former Solicitor of the Fourteenth Judicial Circuit, who is immune from such relief because prosecutors have absolute immunity for activities performed as "an officer of the court" when the conduct at issue was closely associated with the judicial

phase of the criminal process. This includes the application of absolute immunity when a prosecutor “prepares to initiate a judicial proceeding.”); *Kinloch v. DeBusk*, No. 4:12-361-DCN-BM, 2012 U.S. Dist. LEXIS 58973 (D.S.C. Mar. 21, 2012) (Exhibit F, attachment p. 135) (plaintiff’s claim against the defendant for monetary damages under Section 1983 is subject to summary dismissal because it is barred by the defendant’s absolute prosecutorial immunity); *Garrett v. McMaster*, No. 7:07-2952-HFF-WMC, 2008 U.S. Dist. LEXIS 61858, 2008 WL 3411673 (D.S.C. Aug. 11, 2008) (Exhibit G, attachment p. 142) (finding that the Attorney General and a former Assistant Attorney General had prosecutorial immunity for conduct related to presenting the State’s case); *Wilder v. Brooks*, C/A No. 3:08-3089-MBS, 2009 U.S. Dist. LEXIS 8213, 2009 WL 291065, at *4 (D.S.C. Feb. 4, 2009), *appeal dismissed*, 332 Fed. App’x 899, 2009 WL 2606914 (4th Cir. 2009) (Exhibit H, attachment p. 145) (a prosecutor’s “protected activities include, but are not limited to, prosecutorial actions and decisions related to ancillary civil proceedings such as PCR actions.”); *Lester v. Ratigan*, No. 4:12-00016-TLM-TER, 2012 U.S. Dist. LEXIS 41577 (D.S.C. March 9, 2012) (Exhibit I, attachment p. 151) (plaintiff’s claim for damages in the complaint *sub judice* is barred by the doctrine of prosecutorial immunity); *Lee v. Singleton*, No. 8:11-2983-JMC-KFM, 2012 U.S. Dist. LEXIS 72463 (D.S.C. Jan. 9, 2012) (Exhibit J, attachment p. 157) (plaintiff’s official capacity and individual capacity claims against Solicitor Adams and Assistant Solicitor Simmons are barred by defendants’ absolute prosecutorial immunity); *Kelly v. Williams*, No. 4:11-2975-CMC-BHH, 2011 U.S. Dist. LEXIS 151011 (D.S.C. Dec. 8, 2011) (Exhibit K, attachment p. 180) (absolute immunity applies to attorneys who

represent the State in PCR actions and those attorneys serve as prosecutors because they urge the PCR judge to uphold the criminal sentence under attack).

B. The South Carolina Tort Claims Act Did Not Alter or Amend the Underlying Common Law Immunities that It Adopted as Exceptions to the Waiver of Sovereign Immunity

The common law prosecutorial and judicial immunity that has been raised in defense to this action is distinct from the immunities provided by the South Carolina Tort Claims Act, which only provides immunity from liability as an affirmative defense and is not appealable at this stage of the litigation.⁶ It is clear from the case law that the common law prosecutorial and judicial immunity was not impacted and no “displac[ment of] the protections guaranteed” by the immunity were compromised by the adoption of the Tort Claims Act. *See Williams*, 347 S.C. at 247, 553 S.E.2d at 507 (“Prosecutorial immunity, like judicial immunity, is a common law principle. . . . [T]he Tort Claims Act should not be interpreted as displacing the protections guaranteed by the prosecutorial immunity doctrine.”).

In addition to the case law on this point, the Tort Claims Act itself expressly preserves all existing common law immunities. The Act was adopted to ensure “that the State, and its political subdivisions are only liable for torts within the limitations of this chapter and in accordance with the principles established herein.” S.C. Code Ann. § 15-78-20(a) (Supp. 1997). The Act states:

The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. **All other**

⁶ The defenses available under the S.C. Tort Claims Act to this Defendant have also been raised in the underlying action. The S.C. Tort Claims Act and common law immunities were raised as separate and independent grounds for dismissal in the Motion to Dismiss.

immunities applicable to a governmental entity, its employees, and agents are expressly preserved.

S.C. Code Ann. § 15-78-20(b) (Supp.1997) (emphasis added). *See also O'Laughlin*, 330 S.C. at 384, 498 S.E.2d at 691 (“[The South Carolina Tort Claims] Act itself expressly preserves common law judicial immunity.”). Therefore, the Act itself expressly preserves common law judicial immunity.

A strong presumption also exists that the General Assembly does not intend to supplant common law principles when enacting legislation. *Hoogenboom v. City of Beaufort*, 315 S.C. 306, 318 n. 5, 433 S.E.2d 875, 884 n. 5 (Ct. App. 1992) (“The Legislature is presumed to enact legislation with reference to existing law, and there is a strong presumption that it does not intend by statute to change common law rules. A statute is not to be construed as in derogation of common law rights if another interpretation is reasonable. Statutes in derogation of common law are to be construed strictly to preserve vested rights.”) (citations omitted); *Columbia Real Estate & Trust Co. v. Royal Exchange Assurance*, 132 S.C. 427, 128 S.E. 865 (1925); *Crowder v. Carroll*, 251 S.C. 192, 161 S.E.2d 235 (1968); *see also Frost v. Geernaert*, 200 Cal. App. 3d 1104, 246 Cal. Rptr. 440, 442 (1988) (holding that common law judicial immunity survived the adoption of the California Tort Claims Act, stating, “statutes should not be interpreted to alter the common law unless it is expressly provided they should do so; there is a presumption that a statute, does not, by implication, repeal the common law.”).

Based on the statutory language of the Tort Claims Act, the presumption of legislative intent to preserve common law principles, policy considerations, and the Supreme Court’s prior holdings, it is clear that absolute judicial and prosecutorial immunity, survived the adoption of the Tort Claims Act.

C. Self Regional Hospital is Immune for the Acts of its Agents When Those Agents Themselves have Immunity Based on the Same Acts

In this case, the Plaintiffs have sued the agency (Self Regional hospital) for the acts of its agents based on the choice to initiate the SDCA procedure against each Plaintiff and for the determination made by the Hearing Officer, with which they disagree. Because the acts of the agents are immune from suit as the prosecutor and judge under the SDCA, the claimant agency (Self Regional hospital) is also immune from suit for those acts. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (explaining that the prosecutor's office is an entity and the promises of an individual attorney are attributed to the government).

In the case of *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) absolute prosecutorial immunity was held to include district attorneys whose poor supervision of subordinates may result in wrongful convictions. Goldstein's case was unusual because the plaintiff did not sue the prosecutor who convicted him, but John Van de Camp, the district attorney who supervised that prosecutor.

Likewise, cases in South Carolina District Court have been brought wherein the Office of the Solicitor, as well as the actual Solicitor, have been sued. In these cases, the Office, as well as the individual, has been held to be subject to the prosecutorial immunity. *See Copeland v. Spartanburg Judicial Center, Judgments, County Court house; Spartanburg Public Defender Office, Person in Charge; Spartanburg Solicitor Office, Person in Charge; County of Spartanburg, Referring to the state, county or the living person in charge*, No. 2:11-0751-JMC-BHH, 2011 U.S. Dist. LEXIS 155240 (D.S.C. Apr. 4, 2011) (Exhibit L, attachment p. 186) (the Office of the Solicitor and the Head Solicitor are subject to summary dismissal because of prosecutorial immunity); *see*

also *Plyer v. Burns, (et al.)*, 373 S.C. 637, 647 S.E. 2d 188 (S.C. 2001) (appeal of Horry County Probate Court's motion to dismiss based on judicial immunity upheld when action of conservator attributed to Probate Court and defense raised under common law immunity and Tort Claims Act).

This does not mean the decision made on the merits of the collectability of the debt under the SDCA cannot be appealed or subsequently reviewed. The SDCA specifically provides for a viable remedy for correcting prosecutorial or judicial error under the SDCA. The statute specifically provides for an appeal to the ALJ. S.C. Code § 12-56-65(C). It does not, however, allow the claimant agency to be sued because the debtor does not like the decision to utilize the SDCA to collect the debt or because the debtor disagrees with the final adjudication on the merits rendered by the Hearing Officer or the decision to initiate the judicial process created by the SDCA.

D. A Final Determination has been made and a Substantial Right is Impacted Because the Denial of Absolute Immunity Eradicates the Very Purpose for which Absolute Immunity Exists

The order of the Circuit Court, from which this appeal is taken, is a final determination on the right to not stand trial and impacts a substantial right in terms of the common law immunity raised. The denial of a motion to dismiss undermines and wholly eradicates the very principles behind absolute immunity. Absolute immunity absolves a defendant from having to endure costly discovery in a case. It is the right of the defendant to not stand for trial on the plaintiff's allegations. To deny the right to not stand trial is, by default, a final determination of that issue. *Mitchell v. Forsyth*, 472 U.S. 511, 512 (U.S. 1985) ("Qualified immunity, similar to absolute immunity, is an entitlement not to stand trial under certain circumstances. Such entitlement is an immunity from suit rather than a mere defense to liability; and like absolute immunity, it is effectively lost if a case

is erroneously permitted to go to trial. Accordingly, the reasoning that underlies the immediate appealability of the denial of absolute immunity indicates that the denial of qualified immunity should be similarly appealable under the ‘collateral order’ doctrine; in each case, the district court’s decision is effectively unreviewable on appeal from a final judgment. The denial of qualified immunity also meets the additional criteria for an appealable interlocutory order: it conclusively determines the disputed question, and it involves a claim of rights separable from, and collateral to, rights asserted in the action”).

No case in South Carolina exists that raises the issue of the immediate appeal of a denial of prosecutorial and/or judicial immunity under the common law. Case law in South Carolina does support the proposition that a substantial right is impacted where the right at issue cannot be later vindicated on appeal after the entire case is over. As one example, orders concerning the mode of trial affect a substantial right, cannot be vindicated after final judgment, and are thus immediately appealable. *Salmonsens v. CGD, Inc.*, 377 S.C. 442, 661 S.E.2d 81 (2008) (order revising class action from opt-out to opt-in class immediately appealable as an order affecting the mode of trial); *Hagood v. Sommerville*, 362 S.C. 191, 607 S.E.2d 707 (2005) (order granting a motion to disqualify an attorney affects the mode of trial and is immediately appealable).

The federal courts have addressed this issue in cases involving the defense of absolute prosecutorial and judicial immunity and qualified immunity under 42 U.S.C. § 1983. The courts have systematically recognized the importance of adjudicating the immunity issue early in the case. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (parties entitled to assert qualified immunity defense should not be subjected to the burden of discovery until such time as their qualified immunity defense is ruled upon by the court);

Ashcroft v. Iqbal, 556 U.S. 662 (2009) (the basic thrust of the qualified immunity doctrine is to free officials from the concerns of litigation, including “avoidance of disruptive discovery”). In 2009, the U.S. Supreme Court addressed this exact issue and determined that a supervisory prosecutor was immune from liability for acts of a subordinate prosecutor. Based on the denial of prosecutorial immunity arguments raised in a motion to dismiss, the immunity arguments were heard by the Ninth Circuit on interlocutory appeal and subsequently heard by the Supreme Court. *Van de Kamp v. Goldstein*, 555 U.S. 335 (2009) (on interlocutory appeal Court ruled prosecutorial immunity is absolute and applies when a prosecutor prepares to initiate a judicial proceeding).

The federal courts and the South Carolina state courts have systematically accepted the position that judicial immunity is a common law concept derived from judicial decisions. It originated to discourage persons from attacking a court decision by suing the judge (or the Court in general). Losing parties are required instead to take their complaints to an appellate court. The idea of protecting judges (and judicial departments) from civil damages serves to solidify the independence of the judiciary. Judicial immunity was first recognized by the U.S. Supreme Court in *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 19 L. Ed. 285 (1868). In *Randall* the Court held that an attorney who had been banned from the practice of law by a judge could not sue the judge over the disbarment.

Since 1868, the U.S. Supreme Court has continued to consistently uphold absolute immunity from suit for judges performing judicial acts. *O’Laughlin v. Windham*, 330 S.C. 379, 498 S.E. 2d 689 (Ct. App. 1998) (citing *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct.

1099, 55 L. Ed. 2d 331 (1978)). In *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978), the Court held that an Indiana state judge, who ordered the sterilization of a female minor without observing due process, could not be sued for damages under the federal Civil Rights statute (42 U.S.C.A. Section 1983). In 1971, Judge Sparkman, of the Circuit Court of DeKalb County, Indiana, acted on a petition filed by Ora McFarlin, the mother of fifteen-year-old Linda Spitler. McFarlin sought to have her daughter sterilized on the ground she was a "somewhat retarded" minor who had been staying out overnight with older men. Judge Sparkman approved and signed the petition, but the petition had not been filed with the court clerk and the judge had not opened a formal case file. The judge failed to appoint a Guardian Ad Litem for Spitler, and he did not hold a hearing on the matter before authorizing a tubal ligation. Spitler, who did not know what the operation was for, discovered she had been sterilized only after she was married. Spitler, whose married name was Stump, then sued Sparkman. The Supreme Court ruled that Sparkman was absolutely immune because what he did was "a function normally performed by a judge," and he performed the act in his "judicial capacity." Although he may have violated state laws and procedures, he performed judicial functions that have historically been absolutely immune to civil lawsuits.

Similarly, "[t]he function of a prosecutor that most often invites a [lawsuit] is his decision to initiate a prosecution." *Imbler v. Pachtman*, 424 U.S. 409, 421, 96 S. Ct. 984, 990, 47 L. Ed. 2d 128 (1976). Federal and state courts alike have determined that prosecutors also enjoy absolute immunity.

If a prosecutor had only a qualified immunity, the threat of suit . . . would undermine performance of his duties no less than would the threat of common-law suits for malicious prosecution. A prosecutor is duty bound to exercise his best

judgment . . . in deciding which suits to bring Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law.

Williams v. Condon, 347 S.C. 227, 241, 553 S.E. 2d 496, 504 (Ct. App. 2001) (quoting *Imbler*, 424 U.S. at 424-25).

Absolute judicial and prosecutorial immunity benefits the public. The legitimacy of U.S. courts and our judicial system rests on the public's belief that judges and prosecutors have the freedom to act independently, without fear of the consequences. Absolute immunity provides the buffer needed for a judge or prosecutor to act.

In the adversarial process, one party wins, and the other party loses. Losing parties are inevitably disappointed, and some seek ways of venting their frustration at the legal system. Some file complaints with lawyer discipline boards, alleging ethical misconduct by the opposing party's attorney or their own attorney. Some file complaints with a judicial conduct board, claiming that the trial judge violated a canon of judicial conduct. Though these types of complaints do not result in the relitigation of a lawsuit, they do illustrate the vexatious litigation that faces attorneys and judges. Allowing parties to sue a prosecutor, a judge, the office of solicitor, or the Court system for a judicial or prosecutorial act would invite a torrent of meritless suits that would impede the judicial system.

Self Regional has alleged it is entitled to absolute common law judicial and prosecutorial immunity, which is immunity from suit. There is a strong policy reason for

maintaining absolute judicial and prosecutorial immunity, in situations where it applies. Judicial and prosecutorial immunity is one of the basic common law tenets upon which the modern system of justice was built. Simply stated, the absolute immunity afforded by common law judicial and prosecutorial immunity is vital for the continuation of an independent judiciary and for the preservation of judicial integrity. *See McEachern v. Black*, 329 S.C. 642, 496 S.E.2d 659 (Ct. App. 1998); *see also Fleming v. Asbill*, 326 S.C. 49, 483 S.E.2d 751 (1997). Requiring the defendant to participate in discovery runs afoul of the defendant's prosecutorial and judicial sovereign immunities. The legislature established a judicial process wherein Self Regional determines if the process should be utilized and makes a determination on the merits of the case. Therefore, if the prosecutorial and judicial immunity is in fact absolute then the denial of a motion to dismiss is a final order and impacts a substantial right under S.C. Code §§ 14-3-330(1) and (2).

IV. Conclusion

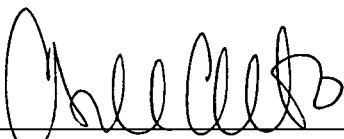
There is no question that the Defendant has raised absolute judicial and prosecutorial immunity in this case that was denied by the Circuit Court. The Plaintiffs have alleged that the Defendant improperly utilized the SDCA. This allegation is based on two actions:

- 1) The decision to place an account into the SDCA judicial process, and
- 2) The decision by the Hearing Officer that the debt was delinquent.

In South Carolina, a claimant agency has jurisdiction to start the judicial process under the SDCA and determine the collectability of debt under the SDCA through the mandatory protest hearings that must be held in order for a plaintiff to appeal a SDCA

debt. *See* S.C. Code § 12-56-10 *et. seq.* Pursuant to the SDCA, claimant agencies must hold protest hearings when requested. During these protest hearings, a determination involving the adjudication of whether the debt is owed within the confines of the law are made. *See* S.C. Code § 12-56-10 *et. seq.* The protest hearings are considered to be final adjudications. To the extent Plaintiffs are attacking a determination made through the proceedings outlined in the SDCA, Self Regional hospital has alleged absolute immunity because it was acting in the capacity as either prosecutor or judge pursuant to statutory authority. The denial of this immunity is a final determination of the substantial right to not stand trial if absolute immunity exists. As such, the denial is appealable on an interlocutory basis.

September 24, 2012



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas

RECEIVED
SEP 24, 2012

Eugene C. Griffith, Jr., Circuit Court Judge

SC Court of Appeals

Case No. 2011-CP-24-01470
Appellate Case No. 2012-212863

Janice Clinkscales, Lucy Townsend, William Outz,
Tammie Holmes, William Haynes, Michelle Barksdale,
Lavonia Haynes, individuals on behalf of themselves
and all other similarly situated and Relief Plaintiffs 1-93, ... Respondents,

v.

Greenwood County Hospital Board, Self Regional
Memorial Board, Self Regional Memorial Hospital,
Self Regional Healthcare, Self Medical Group, The
Outpatient Surgery Center, Self Memorial Regional Health
Services, Self Regional Physician Services, Greenwood
Medical Company, Self Regional Healthcare Auxiliary,
Self Regional Healthcare Foundation, John Does 1-10, ... Defendants,

of whom Greenwood County Hospital Board, Self Regional
Memorial Board, Self Regional Memorial Hospital,
Self Regional Healthcare, are the Appellants.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Respondents Janice Clinkscales, Lucy Townsend, William Outz, Tammie Holmes, William Haynes, Michelle Barksdale, Lavonia Haynes, individuals on behalf of themselves and all other similarly situated and Relief Plaintiffs 1-93, by sending to their attorney of record a copy of the same via first class mail, properly addressed, postage prepaid at the following address:

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Attorney for Respondents

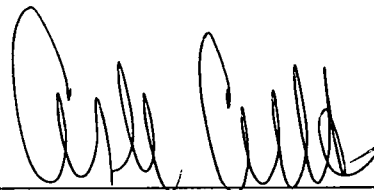
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Physician Services, Greenwood Medical
Company, Self Regional Healthcare
Auxiliary, Self Regional Healthcare
Foundation, John Does 1-10*

September 24, 2012



Ashley P. Cuttino (S.C. Bar No. 70354)

13223501.4

Exhibit A
Hom v. SCESC

SC Administrative Law Court Decisions

CAPTION:

Gary G. Hom vs. SCESE

AGENCY:

South Carolina Employment Security Commission

PARTIES:

Petitioners:

Gary G. Hom

Respondents:

South Carolina Employment Security Commission

DOCKET NUMBER:

00-ALJ-30-0100-CC

APPEARANCES:

For the Petitioner: Gary G. Hom, Pro Se

For the Respondent: H. W. Funderburk, Jr., Esquire, General Counsel

ORDERS:**FINAL ORDER AND DECISION****STATEMENT OF THE CASE**

This matter came before me upon request by Gary G. Hom ("Petitioner") for a contested case hearing pursuant to the provisions of S.C. Code Ann. § 12-56-65(C) (Supp. 1999). In Commission Decision Number 98-C-350 dated April 14, 1998, the South Carolina Employment Security Commission ("Respondent") concluded that (1) Petitioner received from Respondent an overpayment in the total amount of \$1,769.00 for unemployment benefits between November 15, 1997, and January 17, 1998, and (2) Petitioner provided no excusable reason for failing to timely appeal the claims adjudicator's determination.

After notice, the parties appeared before me on May 8, 2000, for a hearing at the offices of the Administrative Law Judge Division ("Division") in Columbia, South Carolina.

Upon review of the relevant evidence and applicable law, the Respondent's determination that there was a debt and that the balance of the debt was still owed is affirmed.

FINDING OF FACTS

After consideration and review of all the evidence and testimony, by a preponderance of the evidence, I make the following findings of fact:

1. This court has jurisdiction.
2. Notice of the date, time, and place of the hearing before this court was timely given to the parties.
3. Petitioner sought unemployment benefits from Respondent for certain periods of unemployment during the years 1997 and 1998.
4. Between November 15, 1997, and January 17, 1998, Respondent paid Petitioner total unemployment benefits in the amount of \$1,769.00.
5. By letter dated February 5, 1998, Respondent mailed to Petitioner's address of record determinations by its claims adjudicators indicating that (1) Petitioner was indefinitely disqualified from benefits effective January 11, 1998, (2) Petitioner was ineligible for benefits for the period November 15, 1997, through January 17, 1998, and (3) Respondent considered the benefits paid during that period in the amounts of \$1,540.00 and \$229.00 as overpayments.
6. Petitioner filed an appeal of the adjudicator's determinations with the Appeal Tribunal on February 20, 1998. The tribunal, in its Appeal Tribunal Decision Number 98-A-1689, dismissed Petitioner's appeal as untimely filed.
7. Respondent, acting as a Board of Review, thereafter reviewed the record and affirmed the decision of the Appeal Tribunal in its Order dated April 14, 1998.
8. Respondent recovered from Petitioner the sum of \$1,184.00 with a balance owed on the overpayment of \$585.00.
9. Respondent thereafter sought to collect the balance owed of \$585.00 as a setoff of income tax refunds due Petitioner through the South Carolina Department of Revenue pursuant to the provisions of the Setoff Debt Collection Act.
10. After the setoff action began, Petitioner requested an informal hearing. On December 13, 1999, Ronnie H. Hoover, Director of Appeals for Respondent, issued a sworn certification that he conducted a hearing and ruled in favor of Respondent.
11. On December 22, 1999, Respondent received a letter from Petitioner questioning the determination made by Mr. Hoover. Respondent treated the letter as a request by Petitioner for a review of Mr. Hoover's decision and sent it to the Division.
12. On May 8, 2000, this court held a contested case hearing. Petitioner was present as well as a representative of Respondent. Petitioner argued at the hearing that he never owed the \$1,769.00 overpayment and that Respondent owes him the \$1,184.00 that Petitioner has already paid.
13. Respondent seeks affirmance of the balance allegedly due on the overpayment in the amount of \$585.00.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, I conclude, as a matter of law, the following:

1. S.C. Code Ann. § 1-23-600 (Supp. 1999) grants jurisdiction to the Administrative Law Judge

Division to hear contested cases under the Administrative Procedures Act.

2. S.C. Code Ann. § 41-35-720 (1986) provides that the manner in which appealed claims shall be presented shall be in accordance with regulations prescribed by Respondent.

3. S.C. Code Ann. § 41-29-130 (1986) provides that regulations may be adopted, amended, or rescinded by Respondent. Regulations adopted by Respondent which address the payment of unemployment benefits and the time for filing claims are outlined in 24 S.C. Code Ann. Regs. §§ 47-10 to 47-49 (1992).

4. According to 24 S.C. Code Ann. Regs. §§ 47-51 to 47-57 (1992), an interested party who wants to appeal the Respondent's decision must file an appeal with the Appeal Tribunal. After a de novo hearing, the Appeal Tribunal shall issue its decision in writing, setting forth its findings of fact, its decision, and its reasons therefor, with respect to matters or issues addressed in the notice of appeal. The interested party may appeal the decision of the Appeal Tribunal to Respondent as a Board of Review within ten days after the date of notification or mailing of the decision of the Appeal Tribunal. See S.C. Code Ann. §§ 41-35-700, 41-35-710 (1986).

5. Pursuant to 24 S.C. Code Ann. Regs. § 47-57 (1992), an interested party may appeal final decisions of Respondent by filing a petition, within ten days after the decision of Respondent has become final, with the court of common pleas for the county in which the employee resides or the county in which he was last employed. See S.C. Code Ann. § 41-35-750 (1986); see also S.C. Code Ann. § 1-23-380 (Supp. 1999).

6. S.C. Code Ann. § 41-35-660 (1986), entitled "Appeals," provides that an interested party, appealing an initial determination, redetermination, or subsequent determination of Respondent must file an appeal no later than ten days after the determination was mailed to the party's last known address, or otherwise delivered to the party.

7. Petitioner followed the steps of appealing both to the Appeal Tribunal and to Respondent. The Appeal Tribunal found that Petitioner, however, did not appeal the initial determination by the claims examiner within ten days. Respondent, as a Board of Review, affirmed this decision.

9. When Petitioner did not appeal Respondent's Decision Number 98-C-350, dated April 14, 1998, to the court of common pleas, the determination of an overpayment of unemployment benefits and the amount owed to Respondent of \$1,769.00 was final.

10. Subsequent to the final agency decision, Respondent attempted to collect the amount owed. Prior to Respondent's initiation of the setoff action, it had collected from Petitioner the sum of \$1,184.00, resulting in a balance owed of \$585.00.

11. In 1995 the legislature passed Act No. 76, § 5, which created Chapter 56 of Title 12 entitled Setoff Debt Collection Act ("Act"). The provisions of the act are effective for taxable years beginning after 1995.

12. The Act generally provides that state agencies, boards, committees, commissions, public institutions of higher learning, political subdivisions, housing authorities, the Internal Revenue Service, and the United States Department of Education may collect debts owed to them by submitting claims to the South Carolina Department of Revenue ("Department").

13. Pursuant to S.C. Code Ann. § 12-56-60 (Supp. 1999), a claimant agency seeking to collect a delinquent debt through setoff must notify the Department in writing and must notify the debtor of the intent to seek a debtor's refund as a setoff of the debt owed.

14. S.C. Code Ann. § 12-56-63 (Supp. 1999) provides a protest procedure whereby the debtor may contest the setoff. If the debtor protests the setoff, then the claimant agency must appoint a hearing officer to hear the protest. The hearing officer must conduct an informal hearing at which the debtor may present evidence, documents, and testimony to dispute the debt. At the conclusion of the hearing, the hearing officer shall render his decision. If the hearing officer rules in favor of the claimant agency, then he must issue a sworn certificate that he held the informal hearing and that he ruled in favor of the agency. S.C. Code Ann. § 12-56-65 (Supp. 1999).

15. A debtor may seek relief from the hearing officer's determination by requesting a contested case hearing before the Administrative Law Judge Division. S.C. Code Ann. § 12-56-65(C) (Supp. 1999).

16. The statutory procedure for filing the setoff claim by Respondent was properly followed as was the protest filing and the conduction of the informal hearing. In this case, the hearing officer determined that Respondent had a valid claim/debt. Petitioner appealed the hearing officer's decision.

17. Based on the evidence presented, this court must conclude that Respondent properly followed all procedures and the determination that Petitioner owed Respondent the amount of \$1,769.00 was a final judgement. Petitioner did not appeal the Respondent's decision. The decision, therefore, constitutes a final agency action. Accordingly, I conclude that the relief sought by Petitioner is denied.

ORDER

Based upon the above Findings of Fact, Conclusions of Law, and a complete review of the record, it is hereby:

ORDERED that the Final Administrative Order issued by the South Carolina Employment Security Commission dated April 14, 1998, is final as to the amount owed by Petitioner to Respondent.

IT IS FURTHER ORDERED that the relief sought by Petitioner is denied.

AND IT IS SO ORDERED.

Marvin F. Kittrell

Chief Administrative Law Judge

July 6, 2000

Columbia, South Carolina

Exhibit B
Amended Complaint

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

COURT OF COMMON PLEAS
EIGHTH JUDICIAL CIRCUIT

Case No.: 2011-CP-24-1470

Janice Clinkscales, Lucy Townsend,)
William Ouzts, Tammie Holmes,)
William Haynes, Michelle Barksdale)
Lavonia Haynes, individuals on)
behalf of themselves and all others)
similarly situated and Relief Plaintiffs)
1-93,)
Plaintiffs,)

v.)
Greenwood County Hospital Board,)
Self Memorial Hospital Board, Self)
Memorial Hospital, Self Regional)
Healthcare, Self Medical Group, The)
Outpatient Surgery Center, Self)
Memorial Regional Health Services,)
Self Regional Physician Services,)
Greenwood Medical Company, Self)
Regional Healthcare Auxiliary, Self)
Regional Healthcare Foundation,)
John Does 1-10)
Defendants.)

FIRST AMENDED
CLASS ACTION COMPLAINT
(Jury Trial Requested)

FILED COMMON PLEAS
8TH JUDICIAL CIRCUIT
GREENWOOD, SC
2012 JUN 5 PM 11 24

Plaintiffs, by and through their attorneys of record, on behalf of themselves and all others similarly situated, alleges the following on personal knowledge as to themselves, and as to all other matters based upon their attorneys' Investigation which included among other things, a review of public filings, analysis of publicly available articles and reports, press releases and other matters of public record for the Defendant Self Regional Healthcare ("Self").

Plaintiffs allege the following upon information and belief, except as to those

allegations concerning Lead Plaintiffs which are alleged upon personal knowledge. Plaintiffs' information and belief is based upon, among other things, their investigation, conducted by and through their attorneys, into the facts and circumstances alleged herein. Plaintiffs and all other persons names, dates of birth and social security numbers of persons who made contact with the Plaintiffs' attorney indicating each qualified for inclusion in this matter. Each executed HIPPA compliant medical releases and a general release to substantiate their claims.

Plaintiffs believe that further substantial evidentiary support will exist for the allegations in this First Amended Class Action Complaint (the "Complaint") after a reasonable opportunity for discovery. Many of the facts supporting the allegations contained herein are known only to the Defendants or are exclusively within their custody and/or control.

NATURE OF THE ACTION

1. This matter involves the erroneously and illegally seized and collected tax refunds by Self Regional Healthcare and its aliases set forth in the caption through its collection of monies pursuant to the Setoff Debt Collection Act, 12-56-10.

2. The South Carolina legislature enacted legislation in 1988 commonly known as the Setoff Debt Collection Act, Section 12-56-10, et seq., (the "Act") which among its provisions allowed "claimant agencies" to collect "delinquent debts" by making application to the South Carolina Department of Revenue which in turn deducted the alleged certified debt from the state income tax refund on the individual return or

joint return of the alleged debtor and his or her spouse. The Act was amended for the 1999 tax year (the "1999 Act").

3. Since the enactment of the Act, letters have been mailed to the Plaintiffs and their class, which is believed composed of thousands of citizens of South Carolina, by these "claimant agencies" and other "claimant agencies," advising the Plaintiffs and their class that the Defendants would avail themselves of the Act. These "claimant agencies" then requested that the South Carolina Department of Revenue withhold the debt and administrative fee from the individual and joint income tax returns of the Plaintiffs and their class.

4. The Plaintiffs and their class received notification that all or part of the alleged debts owed by Plaintiffs and their class to the "claimant agencies" was deducted from the state income tax refunds of Plaintiffs and their class.

5. The Plaintiffs are informed and believe that the Defendant Self has erroneously and illegally seized the refunds from the state income tax returns of thousands of citizens of the State of South Carolina, which were thereafter paid to "Self" ostensibly acting pursuant to the Act.

6. The Defendants and/or its respective entities Self Regional Healthcare, Greenwood County Hospital Board, Self Memorial Hospital Board, Self Regional County Hospital Board Self Memorial Hospital Board, Self Memorial Hospital, Self Medical Group, The Surgery Center, Self Memorial Regional Health Services, Self Regional Physician Services, Greenwood Medical Company, Self

Regional Healthcare Auxiliary, Self Regional Healthcare Foundation, The Surgery Center at Self Memorial Hospital, are registered not for profit healthcare entities, hold themselves out as charitable non-profit entities or are for profit entities controlled, owned or sending funds to such non-profit entities. In exchange for the entities operating as a charitable non-profit entities, not engaging in business directly or indirectly for the benefit of private interests, Defendants and their entities receive millions of dollars each year in Federal, State and local tax exemptions.

7. While Defendants and their entities by its statutory creation are to provide care to citizens of Greenwood County at a reasonable cost, they have continuously engaged in practices and patterns of charging exuberant, inflated medical cost to its uninsured patients; who have little or no means in which to pay for such services. As self proclaimed charity facilities, Defendants and its entities also pursue aggressive collection techniques which often result in judgments, taking of state tax refunds and garnishments against its uninsured patients.

8. Upon information and belief, Defendants and their entities are affiliated with for-profit companies and physicians that are formed and subsidized by the tax free organization and are therefore violating the federal and state prohibition of profiteering and/or self-referral of or to private interests. Enormous property holdings and revenue streams have thus been isolated from taxation.

9. Defendants and their entities provide substantial discounts for non-charitable private insurers in violation of 501(c)(3)'s directions of operating directly or indirectly for a non-charitable purpose.

10. Upon information and belief, Defendants provide its services by contract

to private entities representing patients at substantial discounts off total charges for the entities which are owned or controlled by the Defendants. Further, Board members are granted insider information and hired (or companies that are owned by or employer's of Board Members) by the Defendants for services for, *inter alia*, construction of new buildings and investment of cash and/or securities.

11. Upon information and belief, Defendants allow its non-charitable profit entities such as physician groups to enjoy Defendant's tax exempt status to derive profits in furtherance of the 501(c)(3) violations.

12. Defendants have violated S.C. Const. Art. X, § 11 which provides in pertinent part: "Neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation."

13. Defendants have acted outside the scope of the powers of a political subdivision and violated Greenwood County Ordinances by, *inter alia*, changing its name, violating its own leases, failing to gain proper approval of its Board appointees, exceeding the bounds of its geographical limits, gaining ownership in for profit corporation and operating for the benefit of management and Board Members, and operating in direct opposition to the reason why it was created and through these acts evidences that Defendants and its entities are not political subdivisions of the State of South Carolina and have operated in a completely ultra vires manner since as early as 1984.

14. As such, Defendants and their entities have illegally utilized the Setoff Debt Collection Act.

15. Defendant and their entities require execution of "form contracts" with the

Plaintiffs and the Class upon their admission for services to Defendant. See collective Exhibit "A" attached hereto. Defendant requires through these "form contracts" that the Plaintiffs and the Class agree to pay unspecified and undocumented charges for medical care set by Defendant in its sole discretion. Imputed in these "form contracts" is the express and/or implied contractual obligation by Defendant that it will charge no more than a fair and reasonable charge for medical care to the Plaintiffs and the Class. By accepting and admitting the Plaintiffs and the Class into its hospital, Defendant undertakes an express and/or implied contractual obligation to charge fairly and reasonably. Defendant breached its contractual obligations under these "form contracts" by charging the Plaintiffs and the Class significantly higher, full, undiscounted cost for medical care. These charges are discriminatory, unreasonable, and bear no relation to the actual cost of providing such medical services.

16. Defendant is essentially a "for-profit" healthcare system camouflaged and cloaked in the cover of charitable, tax-exempt status. Defendant feigns nonprofit, charitable and tax-exempt status. This tax-exempt status is counterfeit. Defendant functions as a "for-profit" business. While in effect garnishing the wages of its uninsured consumers, upon information and belief, it compensates/contributes excessive "six figure" incomes to many of its executives. Upon information and belief, Defendant compensated and contributed to its President/CEO at least \$930,000 for the fiscal year ending 2007. Inappropriate "economic benefits" inure to others. On information and belief, Defendant's net assets exceed Three Hundred Sixty Million Dollars (\$360,000,000.00). See Exhibit "B." Defendant has profited by these millions of dollars via its tax-free status. During the period of September 2010 to September 2011, the assets

of the Defendant increased approximately 54 million or 15.6% to 414 million net of all liabilities.

17. The Defendant's operations exceeded and continue to exceed the powers granted to it by the legislature and are or were ultra vires to include, *inter alia*, changing its name, failure to properly have Board members approved for appointment, and exceeding the bounds of its geographical statutory limitations. Through Defendant's ultra vires acts, Defendant converted its non-profit entity (or political subdivision) into a for profit corporation. Defendants violated and continues to violate the ordinance that created the hospital.

18. Defendant has violated Act 1554 of 1968.

PARTIES

19. Plaintiffs Janice Clinkscales, Lucy Townsend, William Ouzts, Tammie Holmes, William Haynes, Michelle Barksdale and Lavonia Haynes are citizens and residents of Greenwood County, South Carolina.

20. Plaintiffs bring this action individually and, pursuant to SCRCF 23(a), (b)(2), and (c), on behalf of all others similarly situated as a class action and on behalf of Relief Plaintiffs 1-93, who upon information and belief, are members of the class.

21. Defendants Self Regional Healthcare, Greenwood County Hospital Board, Self Memorial Hospital Board, Self Memorial Hospital, Self Medical Group, The Outpatient Surgery Center, Self Memorial Regional Health Services, Self Regional Physician Services, Greenwood Medical Company, Self Regional Healthcare Auxiliary, Self Regional Healthcare Foundation, (hereinafter collectively "Defendants")

are located in Greenwood County and conduct business in Greenwood County. The various Defendants designated as John Does 1-10, are, based upon information and belief, certain unknown and unnamed persons and/or entities who may be liable for the claims asserted herein, who include but are not limited to, agents, servants, employees, representatives, affiliates, parents, subsidiaries, joint tortfeasors, tortfeasors, contractors, co-conspirators, joint adventurers, partners, stockholders, or any other person or entitled of the named Defendants and/or any other named persons who may be liable to the named Plaintiffs and the potential class for the claims asserted herein.

CLASS ACTION ALLEGATIONS

22. Plaintiffs bring these allegations as class claims pursuant to Rule 23 of the South Carolina Rules of Civil Procedure, for themselves individually and on behalf of a similarly situated class of South Carolinians, all of whom have either had funds collected and seized from their South Carolina income tax returns erroneously and illegally.

23. The members of the class are so numerous that joinder of all members is impractical because the number of class members is likely to be in the thousands.

24. There are numerous questions of law and fact which are common to the class and predominate over any other miscellaneous or individual questions including the following:

a. Whether the "claimant agencies" violate South Carolina law wherein they collected monies through the Setoff Debt Collection Act and applied the intercepted monies to debt accounts which violate the applicable statute of limitations?

b. Whether the Plaintiffs and the Class entitled to the return of funds withheld from their respective individual and joint South Carolina state income tax

refunds, together with interest and the refund of administrative fees and costs?

c. Whether the Plaintiffs and the Class entitled to the return of the administrative fee provided by statute, which has been charged and collected from their refunds and said refund set off against alleged debts which are not legally collectible?

d. Whether Defendants charged Plaintiffs and the Class members the full undiscounted cost of medical care in violation of its charitable, non-profit, tax exempt status?

e. Whether Defendants charged Plaintiffs and the Class members higher amounts for medical care than its insured patients in violation of its charitable, non-profit, tax exempt status?

f. Whether Defendants profited by charging Plaintiffs and the Class members the higher, unreasonable costs for medical care?

g. Whether Defendants charged the Plaintiffs and Class members unreasonable charges?

h. Whether Defendants should have utilized its sizable financial resources to provide a greater amount of mutually affordable medical care to the Plaintiffs and the Class members in accordance with its charitable, non-profit, tax exempt status and public obligation?

i. Whether Defendants failed to operate "exclusively" for charitable purposes in accordance with 501(c)(3)?

j. Whether Defendant violated the anti-inurement provision of 501(c)(3) by providing substantial discounts to its other entities as well as the persons on its board?

k. Whether Defendants violated 501(c)(3) by failing to act "exclusively" for a charitable purpose by allowing non-charitable for profit entities to obtain profits from its use of Defendant's tax exempt status?

l. Whether Defendants exceeded the powers granted to it by the legislature and acted beyond the scope of county ordinances and geographical boundaries?

m. Whether Defendants violated S.C. Const. Art. X, § 11 which provides in pertinent part: "Neither the State nor any of its political subdivisions shall become a joint owner of or stockholder in any company, association, or corporation[?]"

n. Whether Defendants have erroneously and illegally seized the refunds from the state income tax returns of Plaintiffs and Class members?

25. The members of the class have the same or similar damages as the Class Representatives.

26. Named Plaintiffs and their counsel will fairly and adequately protect the interests of the Plaintiff class. The interest of the Class Representatives is coincident with and not antagonistic toward those of the class. Plaintiffs' counsels are experienced in class actions, civil litigation and will adequately represent the class.

GENERAL ALLEGATIONS TO ALL MEMBERS OF CLASS ...

27. Plaintiffs and Defendants are debtors and creditors which have engaged in a series of transactions formulating an "accounts stated" wherein all prior transactions are not in dispute totaling a total amount agreed upon from the underlying transactions excepting the amounts which should be discounted for self pay individuals as are discounted for other patients.

28. The accounts stated are subject to South Carolina's three-year statute of limitations for the collection of the debt(s).

29. Plaintiffs received form letters from the Defendant as notice the Defendant, for itself and/or affiliated entities would intercept the respective Plaintiffs' individual and/or joint state income tax refunds and use the monies on deficient accounts which were barred for collection by the statute of limitations.

30. Plaintiffs will fully and adequately represent and protect the interests of the entire Class because of the common injuries and interests of the Class members and the singular conduct of Defendant applicable to all Class members. Plaintiffs have retained counsel competent and experienced in the prosecution of class action litigation and have no interests that are contrary to or in conflict with those of the Class sought to be represented.

31. Defendant has acted and refused to act on grounds generally applicable to the entire Class thereby making it appropriate for this Court to grant final injunctive and declaratory relief with respect to the Class as a whole.

32. A class action is superior to all other available methods for fair and efficient adjudication of this controversy. Plaintiffs know of no difficulty to be encountered in the management of this action that would preclude its maintenance as a class action.

33. The prosecution of separate actions by individual Class members would create a risk of inconsistent and varying adjudications concerning the subject of this action, which adjudications could establish incompatible standards of conduct for Defendant under the laws alleged herein.

FIRST CAUSE OF ACTION (Declaratory Relief)

34. Plaintiffs incorporate by reference all previous paragraphs *in toto*.

35. Plaintiffs respectfully request that the court exercise its jurisdiction under South Carolina's Declaratory Judgments Act, and provide answers to the following questions on an expedited basis:

(a) Does the 3-year statute of limitations apply to the Setoff Debt Collection Act?

(b) Does the seizure of tax refunds due to Plaintiffs and other class members by the Defendants and sums being applied to debts more than 3-years old violate South Carolina law?

(c) Does the seizure of tax refunds due to Plaintiffs and other class members by the Defendants and sums being applied to debts more than 3-years old violate the Defendants' own collection policies?

(d) Is SC Code Ann. Section 12-56-60(b), *i.e.*, "A person has no property right or property interest in a refund until all amounts due the State and Claimant agencies are paid . . .," unconstitutional as a taking of property without due process?

SECOND CAUSE OF ACTION (Unjust Enrichment/Conversion)

As a result of the conduct described above, Defendant has been and will be unjustly enriched at the expense of Plaintiffs and members of the Class. Specifically, Defendant's unfair and illegal actions as described above have enabled Defendants to set off the debts against the Plaintiffs individual and joint income tax refunds and be credited to an illegal debt, constituting a conversion and/or unjustly enriching Defendants at an amount to be proven at trial.

36. Defendant should be required to disgorge this unjust enrichment and/or funds converted.

37. Plaintiffs and Class members are entitled to declaratory relief establishing that Defendant is engaging in unfair and deceptive practices, and that their conduct constitutes negligent misrepresentation and concealment, and that Defendant was thereby unjustly enriched and/or committed conversion of Plaintiffs' assets.

38. Plaintiffs and Class members are entitled to an injunction forcing Defendant to permanently halt its interception of individual and joint income tax refunds though the Setoff Debt Collection Act, and remedying such past conversions though refunding all monies illegally collected through the Act.

THIRD CAUSE OF ACTION (Abuse of Process)

39. Plaintiffs incorporate by reference all previous paragraphs *in toto*.

40. Defendants have abused the process of law in this state in a wrongful manner. The defendant made an improper and illegal use of the Setoff Debt Collection Act, which was not warranted nor authorized by law in the taking of the individual and joint state refunds and applied to a debt which was not reduced to judgment or no voluntary monies paid beyond the expiration of the three year statute of limitations.

41. Defendant has misused or misapplied the legal procedure in a manner not contemplated by law.

42. Plaintiff contends that the defendant utilized the legal process to intimidate, harass and coerce the plaintiffs in order to obtain a collateral advantage to collect an otherwise uncollectable debt.

43. Defendant invoked the legal process of the Setoff Debt Collection Act to intercept state income tax refunds illegally to compel the Plaintiff to reduce an alleged debt which Plaintiffs could not otherwise legally be compelled to do.

44. Defendant failed to certify the debt in accordance with its own procedures and do its own due diligence and implement procedures to avoid the interception of refunds on debts which are not legally collectible.

45. Defendant had an ulterior purpose in intercepting refunds and acted illegally and willfully in the use of the Setoff Debt Collection Act.

46. Defendant obtained a collateral advantage over the Plaintiff in the misuse of the Setoff Debt Collection Act by intercepting refunds and applying the monies to debts outside of the statute of limitations and in violation of its own procedures.

47. Plaintiffs and Class members are entitled to damages and refunds of past interceptions of individual and joint income tax refunds though the Setoff Debt Collection Act, which were applied to accounts not legally collectible.

48. Upon information and belief, Plaintiffs and each class member has or will be damaged in excess of \$100.00.

FOURTH CAUSE OF ACTION (Demand of Refund)

49. Plaintiffs incorporate by reference all previous paragraphs *in toto*.

50. Plaintiffs individually and on behalf of all others similarly situated demand refund of their 2010 and 2011 seized income tax refunds pursuant to S.C. Code Ann. § 12-56-65(H) which were seized within one year of the date of this filing.

51. Plaintiffs individually and on behalf of all others similarly situated demand interest as provided in Section 12-54-20.

52. Upon information and belief, Plaintiffs and each class member has or will be damaged in excess of \$100.00.

53. Plaintiffs and Class members are entitled to damages and refunds of past interceptions of individual and joint income tax refunds.

FIFTH CAUSE OF ACTION (Breach of Contract)

54. Plaintiffs incorporate by reference all previous paragraphs *in toto*.

55. Upon admission to Defendant, its entities, the Plaintiffs and the Class entered into express "form contracts" with Defendant and its entities whereby the Plaintiffs and the Class were required to agree to pay unspecified and undocumented charges for medical care the costs of which were set by Defendants or its Board in its/their sole discretion. Further, Defendants and their entities charged "regular" rates pursuant to the contract which were not reasonable further violation of Act 1554. The express and/or implied contractual obligation by Defendant that it would charge the Plaintiffs and the Class no more than a fair and reasonable charge for such medical care was breached.

56. Similarly, by accepting and admitting the Plaintiffs and the Class into its healthcare system for medical care, Defendant undertook an express and/or implied contractual obligation to charge the Plaintiffs and the Class no more than a fair and reasonable charge for such medical care.

57. Defendant breached its contractual obligations under these "form contracts" by charging the Plaintiffs and the Class a significantly higher and full, undiscounted cost for medical care. These charges are unreasonable and bear no relation to the actual cost of providing such services.

58. Defendants have charged Plaintiffs and the Class at the highest rates for medical services without disclosing the rates until after the services have been provided.

59. Defendants sets its charges for medical services at highly inflated rates that bear no connection to the actual cost of the services.

60. Uninsured patients are charged rates for medical services which are excessively more inflated than the amounts which are charged to insured patients.

61. The unreasonable rates that far exceed the charges of insured patients are not disclosed at the time the uninsured patient is admitted into the hospital. Instead, the "consent" to such unreasonable rates are obtained from patients who are in pain, ill or under duress.

62. The aforesaid breaches of contract have proximately caused the Plaintiffs and the Class substantial economic injury and other damages.

SIXTH CAUSE OF ACTION (Breach of Duty of Good Faith and Fair Dealing)

63. Plaintiffs incorporate by reference all previous paragraphs *in toto*.

64. Defendants' conduct as alleged above constitutes a breach of duty of good faith and fair dealing.

65. Plaintiffs and the Class entered into express and/or implied contractual agreements with the Defendants wherein the Plaintiffs and the Class for the purpose of receiving medical care.

66. Defendants breached the duty of good faith and fair dealing by charging the Plaintiffs and the Class the highest and undiscounted charges for medical care. Further, Defendants breach entailed charging the Plaintiffs and Class a higher amount for medical services than it charged its insured patients for the same services.

67. Defendants further breached the duty of good faith and fair dealing by charging the Plaintiffs and the Class unreasonable charges for medical care and subjecting them to harassing collection practices as outlined above.

68. Defendants further breached the duty of good faith and fair dealing by providing substantial discounts to its respective board members and/or employees and by

allowing non-charitable for profit corporations/entities derive a profit from use of its tax exempt status.

69. Defendants further breached the duty of good faith and fair dealing by failing to provide emergency room medical care without regard of their ability to pay by forcing the Plaintiffs and the Class to execute agreements to pay unspecified, unreasonable, undiscounted costs for the medical care. Defendants would not treat the Plaintiffs and the Class members until the form contracts were signed guaranteeing the payment for the medical care.

70. Such unfair and bad faith conduct by Defendant proximately caused economic injury and other damages to the Plaintiffs and Class of healthcare consumers.

SEVENTH CAUSE OF ACTION (Breach of Charitable Trust)

71. Plaintiffs incorporate by reference all previous paragraphs *in toto*.

72. By accepting federal, state and local tax exemptions pursuant to 501(c)(3), Defendants created and entered into a public charitable trust to provide mutually affordable medical care to its uninsured patients.

73. The Plaintiffs and Class are intended beneficiaries to the charitable trust created by Defendants acceptance of the federal, state and local tax exemptions.

74. Defendants have breached the charitable trust by charging the Plaintiffs and the Class unreasonable charges for medical care and subjecting them to harassing collection practices as outlined above; by providing substantial discounts to its respective board members and by allowing non-charitable for profit corporations/entities derive a profit from use of its tax exempt status.

75. The aforementioned breaches of charitable trust have caused the Plaintiffs and Class extensive economic and damages.

EIGHTH CAUSE OF ACTION (Violation of Unfair Trade Practices Act)

76. Plaintiffs incorporate by reference all previous paragraphs *in toto*.

77. The Defendants have violated S.C. Code Ann. § 35-9-10, *et. seq.*, (SCUTPA), by collecting debts beyond the applicable South Carolina statute of limitations.

78. Such collections affect the public interest and, as set forth in detail hereinabove, are capable of repetition and have, in fact, been repeated, upon information and belief, thousands of times.

79. The application of the concept embodied in the limitation of actions as set forth in the South Carolina law serves and important public interest in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs.

80. The Defendant conduct in charging the Plaintiffs and the Class full, undiscounted costs for medical care and the Defendant charging its uninsured patients excessively more than its insured patients for the same medical services and procedures, despite its charitable, non-profit, tax exempt status, is in violation of SCUTPA.

81. The billing practices are unfair, discriminatory, unconscionable, unethical, immoral and oppressive. Such acts are against public policy and has caused economic damages to the Plaintiffs and the Class. The Defendant has willfully engaged in the trade practices knowing them to be deceptive.

82. The fraudulent acts outlined above are capable of repetition and have been consistently repeated entitling Plaintiffs to actual damages, treble damages, attorney fees, costs and punitive damages.

NINTH CAUSE OF ACTION (Violation of S.C. Code Ann. § 44-7-325(B)(1))

83. Plaintiffs incorporate by reference all previous paragraphs *in toto*.

84. Relief Plaintiffs 1-93 hand delivered HIPPA compliant medical releases for the release of their respective medical bills to the Defendant's counsel of record.

85. Pursuant to S.C. Code Ann. § 44-7-325(B)(1), a hospital must comply with a request for copies of a medical record no later than 45 days after the patient is discharged or 45 days after the request is received, whichever is later.

86. The 45 day time limit has well expired and Defendants have failed and refused and continue to refuse to produce the Relief Plaintiff's medical bills in violation of the statute.

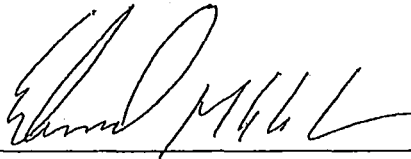
87. Relief Plaintiffs respectfully request the Court to report the Defendants to the 8th Circuit Solicitor's Office for violation of the statute and pursue action as directed in S.C. Code Ann. § 44-7-340.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray that this case be certified and maintained as a class action, for a trial by jury and for judgment against the Defendant as follows:

1. For economic, treble, compensatory, and general damages on behalf of all members of the Class;

2. For disgorgement of illegally obtained funds as set forth herein;
3. For punitive damages, as applicable;
4. For declaratory and injunctive relief as set forth herein;
5. For reasonable attorneys' fees and reimbursement of all costs for the prosecution of this action, based upon the creation of a common fund recovery and under the consumer protection act, and based upon other theories and statutory bases.
6. For the Court to report the Defendant to the 8th Circuit Solicitor for violation of S.C. Code Ann. § 44-7-325(B)(1).
7. For such other and further relief as this Court deems just and appropriate



Edward S. McCallum, III
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P.O. Box 148
Greenwood, SC 29648
(864)223-8546
Fax (864)223-8015

and

Eugene C. Covington Jr.
Covington Patrick Hagins Stern & Lewis, P.A.
211 Pettigru St.
Greenville, SC 29601
Direct Dial: 864.240.5502
Direct Fax: 864.240.5533

Greenwood, SC
May ____, 2012

Exhibit C
Motion to Dismiss

IN THE STATE OF SOUTH CAROLINA

COUNTY OF GREENWOOD

Janice Clinkscales, Lucy Townsend, William
Outzs, Tammie Holmes, William Haynes,
Michelle Barksdale, Lavonia Haynes,
individuals on behalf of themselves and all
others similarly situated and Relief Plaintiffs 1-
93,

Plaintiffs,

v.

Greenwood County Hospital Board, Self
Memorial Hospital Board, Self Memorial
Hospital, Self Regional Healthcare, Self
Medical Group, The Outpatient Surgery Center,
Self Memorial Regional Health Services, Self
Regional Physician Services, Greenwood
Medical Company, Self Regional Healthcare
Auxiliary, Self Regional Healthcare
Foundation, John Does 1-10,

Defendants.

IN THE COURT OF COMMON PLEAS

FOR THE 8TH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2011-CP-2401470

**NOTICE OF MOTION AND MOTION
TO DISMISS AND TO STRIKE ON
BEHALF OF DEFENDANT SELF
REGIONAL HEALTH CARE A/K/A
SELF MEMORIAL HOSPITAL A/K/A
SELF MEMORIAL HOSPITAL
BOARD AND A/K/A GREENWOOD
COUNTY HOSPITAL BOARD**

(SCRCP 12(B)(1) AND (6) AND 12(F))

TO: PLAINTIFFS AND THEIR ATTORNEYS, EDWARD S. McCALLUM, III, ESQ., AND
EUGENE C. COVINGTON, JR., ESQ.

YOU WILL PLEASE TAKE NOTICE that Defendant Self Regional Healthcare, a/k/a
Self Memorial Hospital a/k/a Self Memorial Hospital Board (to the extent said entity existed)
and a/k/a Greenwood County Hospital Board¹ (hereinafter "Self Regional" or "Defendant"),
responding to the Amended Complaint in this action, will, ten (10) days from the date of service

¹This response is made on behalf of Self Regional Healthcare a/k/a Self Memorial Hospital a/k/a Self Memorial Hospital Board (to the extent said entity existed) and a/k/a Greenwood County Hospital Board. To the extent Plaintiffs allege Self Memorial Hospital is a stand-alone entity that treated these Plaintiffs, said Motion and Memorandum is also made on its behalf. The other 7 Defendants (named) have only recently been served and have not answered the Amended Complaint. To the extent any of these 7 other entities are intended by Plaintiffs to be treated as alter egos of Self Regional and as being alleged to have committed the same conduct, those Defendants join this motion and seek dismissal pursuant the arguments contained herein. This, along with Plaintiffs' attempt to name 10 John Doe defendants, is a problematic theme throughout Plaintiffs' amended pleading. Nowhere does Plaintiffs' Amended Complaint attempt to explain who is being sued for what and by whom.

of this motion or at such time as the Court may determine, move the Court for an order pursuant to South Carolina Rules of Civil Procedure 12(b)(1) and 12(b)(6) dismissing the Amended Complaint in this action and all claims asserted therein. Defendant further moves, pursuant to SCRCF 12(f), to strike certain portions of the Amended Complaint which contain redundant, impertinent, immaterial and scandalous matter. This motion is based on the grounds that:

1. Plaintiffs purport to attempt to assert a challenge to Defendant's status as a political subdivision, which challenge forms the foundation for Plaintiffs' First through Eighth Causes of Action. Political subdivision status can only be conferred or revoked by legislative act or by public referendum. Plaintiffs do not have standing to challenge or seek revocation of Defendant's status in the courts, and the judiciary is without jurisdiction to entertain any such action. Plaintiffs' First through Eighth Causes of Action should therefore be dismissed insofar as they are premised upon the purported challenge to Defendant's political character. Additionally, all allegations concerning Defendant's alleged conduct in non-conformity with its status as a political subdivision should be stricken as redundant, impertinent, immaterial and scandalous pursuant to SCRCF 12(f).
2. Plaintiffs purport to challenge the legality of Defendant's conduct in relation to its tax exempt status under Section 501(c)(3) of the Internal Revenue Code. Plaintiffs have no standing to challenge Defendant's status or to seek to enforce any obligation or duty thereof under Section 501(c)(3), and this Court is without jurisdiction to hear any such challenge or claim for enforcement. Plaintiffs' First through Eighth Causes of Action are premised in whole or in part on Plaintiffs' allegations concerning Defendant's alleged obligations under Section 501(c)(3), and should therefore be dismissed. Additionally, all allegations concerning Defendant's status under Section 501(c)(3) and the conformity of its conduct therewith should be stricken as redundant, impertinent, immaterial and scandalous pursuant to SCRCF 12(f).
3. That portion of Plaintiffs' Second Cause of Action which purports to allege a claim for the tort of conversion and Plaintiffs' Third Cause of Action which purports to allege a claim for the tort of abuse of process should be dismissed because Defendant is immune from suit for the same under the South Carolina Tort Claims Act.
4. Plaintiffs' First through Eighth Causes of Action should be dismissed because Defendant is immune from suit for the same under the common law doctrines of judicial and prosecutorial immunity.

5. Plaintiffs' First through Eighth Causes of Action should be dismissed because Plaintiffs have failed to exhaust statutorily imposed administrative remedies, and as a result, this Court does not have jurisdiction to hear those claims.
6. Plaintiffs lack standing to assert the claims alleged in the First through Eighth Causes of Action by operation of S.C. Code § 12-56-60(B), and therefore, those claims should be dismissed.
7. Plaintiffs' First through Eighth Causes of Action are premised in whole or in part upon the assertion that Defendant prosecuted collection claims against them, pursuant to the Setoff Debt Collection Act ("SDCA"), S.C. Code Ann. § 12-56-10 *et seq.*, outside of the allegedly applicable statute of limitations. No statute of limitations applies to the assertion of claims under the SDCA, and therefore, insofar as Plaintiffs' claims are premised upon a theory that Defendant wrongfully prosecuted untimely claims, the First through Eighth Causes of Action should be dismissed. In the alternative, if the statute of limitations is an applicable defense it is as an affirmative defense; and as such, it was waived when Plaintiffs failed to raise it in a protest under the act.
8. Plaintiffs' First through Eighth Causes of Action are premised in whole or in part upon the assertion that Defendant prosecuted collection claims against them, pursuant to the SDCA outside of the allegedly applicable statute of limitations. The failure to contest owing the debt in a proceeding that leads to a final adjudication creates an admission of the debt, sufficient to restart the statute of limitations. The Plaintiffs admit that they have received notice of the collection efforts of Self Regional for the delinquent debt in question through the SDCA for years. No protest or challenge to the debt was raised in these preceding years, including issues related to the statute of limitations. In addition, the true age of the debt in question cannot be determined because it has not been plead by the Plaintiffs. Therefore, all causes of action relating to the age of the debt and the statute of limitations must be dismissed.
9. Plaintiffs First through Eighth Causes of Action assert matters that were or should have been properly raised as affirmative defenses within the administrative process under the SDCA. To the extent that they were raised unsuccessfully, they are barred under the doctrines of claim preclusion and issue preclusion. Otherwise, they are waived. Those Causes of Action should therefore be dismissed.
10. The First Cause of Action for Declaratory Judgment fails to state facts sufficient to constitute a cause of action because the inquiries presented do not present justiciable controversies but are rather in the form of requests for advisory opinions, which are not permitted under the Declaratory Judgment Act, S.C. Code Ann. § 15-53-10, *et seq.*
11. That portion of the Second Cause of Action which purports to assert a claim for the tort of conversion fails to state facts sufficient to constitute a cause of action.

because, as a matter of law, a claim for conversion cannot arise from (1) the exercise of a legal right over property or (2) from a creditor/debtor relationship.

12. That portion of the Second Cause of Action which purports to assert a claim for the equitable remedy of unjust enrichment fails to state facts sufficient to constitute a cause of action because, as a matter of law, there can be no unjust enrichment (1) for the collection of debt from monies owed; (2) where a contract speaks to the underlying debt; or (3) where a legal remedy exists.
13. The Third Cause of Action for Abuse of Process fails to state facts sufficient to constitute a cause of action because (1) such a cause of action cannot arise where a statutory remedy is carried to its authorized conclusion; and (2) Plaintiffs fail to properly allege an ulterior purpose in forwarding the alleged process.
14. The Fourth Cause of Action for Demand of Refund fails to state facts sufficient to constitute a cause of action because the claim is barred for Plaintiffs' failure to exhaust administrative remedies and to otherwise comply with procedural prerequisites to asserting a civil action pursuant to the SDCA.
15. The Fifth Cause of Action for Breach of Contract fails to state facts sufficient to constitute a cause of action because (1) no express provision of the alleged contract is asserted to have been breached; (2) Plaintiffs do not, and cannot, allege performance on their parts under the alleged contract; (3) Plaintiffs fail to state any facts in support of their conclusory allegation of breach of an implied contract term; and (4) the implied term which Plaintiffs' purport to allege fails as a matter of law.
16. The Sixth Cause of Action for Breach of Duty of Good Faith and Fair Dealing fails to state facts sufficient to constitute a cause of action for the same reasons asserted in paragraph 15, above, and because (1) as a matter of law, there can be no breach of an implied contract term based on conduct performed under an express contract right; and (2) Plaintiffs' specious attempt to allege a claim for violation of 42 U.S.C. § 1395dd is facially invalid.
17. The Seventh Cause of Action for Breach of Charitable Trust fails to state facts sufficient to constitute a cause of action because (1) there is no private right of action (and this Court has no jurisdiction to entertain claims) arising out of Section 501(c)(3) of the Internal Revenue Code; (2) Section 501(c)(3), as a matter of law, does not give rise to a public charitable trust; and (3) even if such a trust exists, Plaintiffs do not have standing to enforce it.
18. The Eighth Cause of Action for Violation of the Unfair Trade Practices Act ("UTPA") fails to state facts sufficient to constitute a cause of action because (1) the claim is precluded as a matter of law under the statutory authority exemption to the UTPA, S.C. Code Ann. § 39-5-40(a); and (2) Plaintiffs are without standing

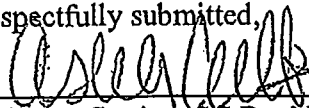
under the UTPA as they cannot allege loss of property in which they had a legal right or interest as a result of the alleged unfair trade practice.

19. In the alternative, should any of the First through Eighth Causes of Action survive, Plaintiffs are limited to prosecuting only so much of those claims as remain viable in light of the one year statute of repose under the SDCA, and so much of Plaintiffs' claims as are untimely thereunder should be dismissed.
20. The Ninth Cause of Action for Violation of S.C. Code Ann. § 44-7-325(B)(1) fails to state facts sufficient to constitute a cause of action because (1) it is moot; (2) § 44-7-325(B)(1) concerns a criminal penalty and no civil cause of action can be alleged thereunder; and (3) the relief sought violates the Constitutional doctrine of separation of powers.

This motion is further based on the pleadings in this case, the affidavits and memoranda filed or to be filed, and the common and statutory law of the State of South Carolina.

Dated this 26th day of June 2012.

Respectfully submitted,



Ashley P. Cutting, SC Bar No. 70354
Michael M. Shetterly, SC Bar No. 12059
W. Kyle Dillard, SC Bar No. 69408

Attorneys for Defendant Self Regional
Healthcare, a/k/a Self Memorial Hospital
a/k/a Self Memorial Hospital Board and
a/k/a Greenwood County Hospital Board

OGLETREE, DEAKINS, NASH, SMOAK &
STEWART, P.C.
The Ogletree Building
300 North Main Street, Suite 500 (29601)
Post Office Box 2757
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Phone: 864.271.1300
Facsimile: 864.235.8806

IN THE STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

Janice Clinkscales, Lucy Townsend, William
Outz, Tammie Holmes, William Haynes,
Michelle Barksdale, Lavonia Haynes,
individuals on behalf of themselves and all
other similarly situated and Relief Plaintiffs
1-93,

Plaintiffs,

v.

Greenwood County Hospital Board, Self
Memorial Hospital Board, Self Memorial
Hospital, Self Regional Healthcare, Self
Medical Group, The Outpatient Surgery Center,
Self Memorial Regional Health Services, Self
Regional Physician Services, Greenwood
Medical Company, Self Regional Healthcare
Auxiliary, Self Regional Healthcare
Foundation, John Does 1-10

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE 8TH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2011-CP-24-01470

CERTIFICATE OF SERVICE

2012 JUN 26 PM 12:12
8TH JUDICIAL CIRCUIT
GREENWOOD, SC

I do hereby certify that on this 26th day of June 2012, the foregoing Notice of Motion and Motion to Dismiss and to Strike on behalf of Defendant Self Regional Health Care a/k/a Self Memorial Hospital a/k/a Self Memorial Hospital Board and a/k/a Greenwood County Hospital Board has been served upon the following persons by depositing same in the United States Mail, with sufficient postage affixed thereto, addressed as follows:

Edward S. McCallum, III
PO Box 148
Greenwood SC 29649

Eugene C. Covington, Jr.
Covington Patrick Hagins Stern & Lewis, P.A.
211 Pettigru Street
Greenville SC 29601

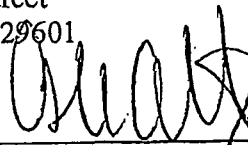


Exhibit D
Memorandum in Support (excluding exhibits)

IN THE STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

Janice Clinkscales, Lucy Townsend, William
Outz, Tammie Holmes, William Haynes,
Michelle Barksdale, Lavonia Haynes,
individuals on behalf of themselves and all
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1-93,

Plaintiffs,

v.

Greenwood County Hospital Board, Self
Memorial Hospital Board, Self Memorial
Hospital, Self Regional Healthcare, Self
Medical Group, The Outpatient Surgery Center,
Self Memorial Regional Health Services, Self
Regional Physician Services, Greenwood
Medical Company, Self Regional Healthcare
Auxiliary, Self Regional Healthcare
Foundation, John Does 1-10

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE 8TH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2011-CP-24-01470

2012 JUN 26 PM 3:00
8TH JUDICIAL CIRCUIT
GREENWOOD, SOUTH CAROLINA

**DEFENDANT SELF REGIONAL
HEALTH CARE A/K/A SELF
MEMORIAL HOSPITAL A/K/A SELF
MEMORIAL HOSPITAL BOARD
AND A/K/A GREENWOOD COUNTY
HOSPITAL BOARD'S
MEMORANDUM IN SUPPORT OF
ITS MOTION TO DISMISS AND TO
STRIKE**

COMES NOW the Defendant Self Regional Healthcare, a/k/a Greenwood County Hospital Board a/k/a Self Memorial Hospital a/k/a Self Memorial Hospital Board¹ (hereinafter "Defendant" or "Self Regional"), by and through its counsel, and submits this Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6), SCRCF. Defendant further moves, pursuant to SCRCF 12(f), to strike certain portions of the Amended Complaint (Exhibit A) which contain redundant, impertinent, immaterial and scandalous matter.

¹ This response is made on behalf of Self Regional Healthcare a/k/a Self Memorial Hospital a/k/a Self Memorial Hospital Board (to the extent said entity existed) and a/k/a Greenwood County Hospital Board. To the extent Plaintiffs allege Self Memorial Hospital is a stand-alone entity that treated these Plaintiffs, said Motion and Memorandum is also made on its behalf. The other 7 Defendants (named) have only recently been served and have not answered the Amended Complaint. To the extent any of these 7 other entities are intended by Plaintiffs to be treated as alter egos of Self Regional and as being alleged to have committed the same conduct, those Defendants join this motion and seek dismissal pursuant the arguments contained herein. This, along with Plaintiffs' attempt to name 10 John Doe defendants, is a problematic theme throughout Plaintiffs' amended pleading. Nowhere does Plaintiffs' Amended Complaint attempt to explain who is being sued for what and by whom.

I: PROCEDURAL HISTORY OF THE CASE

This action, as amended, is based on (1) alleged wrongful collections under the South Carolina Setoff Debt Collection Act ("SDCA") (S.C. Code § 12-56-10 *et seq.*), and (2) alleged overcharging of patients. Self Regional vigorously disputes the allegations, factually and legally. However, the Court need not resolve any of the factual disputes because a review of Plaintiffs' Amended Complaint reveals this Court has no subject matter jurisdiction to hear the disputes and/or Plaintiffs have failed to state facts sufficient to constitute a cause of action.

According to the Amended Complaint, at various times, the named Plaintiffs sought medical treatment at Self Regional. Plaintiffs then failed to pay for said treatment. Plaintiffs' Amended Complaint admits both of these salient facts.

Self Regional ultimately sent Plaintiffs notices of intent to setoff under the SDCA. To the extent Plaintiffs claimed state tax refunds, and another governmental agency did not have priority, the claimed state refunds were paid to Self Regional. This happened year after year without protest or contest. Again, Plaintiffs admit Self Regional has been collecting on these accounts for years under the SDCA.

Then, in 2011, upon receipt of the 2011 tax year SDCA letters, the Named Plaintiffs, for the first time, protested their individual debts. Pursuant to SDCA prescribed procedures, a protest hearing was held. The Hearing Officer determined the debts were due and owing. Plaintiffs did not appeal the Hearing Officer's determination to the administrative law court, as prescribed by the statute. Instead, Plaintiffs thereafter filed this lawsuit in Circuit Court in Greenwood County alleging abuse of process and requesting declaratory relief.

Defendant answered and asserted affirmative defenses. Defendant filed a Motion to Dismiss. Less than one (1) week prior to the hearing on the Motion to Dismiss, Plaintiffs filed a

Motion to Amend the Complaint. The Amended Complaint adds ninety-three (93) additional unnamed plaintiffs as potential class members and for cause of action nine, seven (7) additional named defendants and ten (10) additional unnamed "John Doe" defendants. Additionally, the Amended Complaint adds seven (7) additional causes of action, four (4) of which contend Self Regional (as a 501(c)(3) charity) overcharged Plaintiffs for services rendered. The Amended Complaint also alleges that Self Regional should lose its status as a 501(c)(3), and that this desired loss in status should also cause Self Regional to lose its status as a political subdivision.

This Motion to Dismiss pursuant to Rules 12(b)(1), 12(b)(6) and to Strike pursuant to 12(f) then followed.

II. EXECUTIVE SUMMARY OF ARGUMENTS

This section is an executive summary of the fully briefed arguments below. The executive summary makes reference to the fully briefed sections for the Court's convenience. This brief is, obviously, very dense. The allegations raised by the Plaintiffs, however, simply do not survive a legal analysis. There are no facts in dispute raised in the memorandum. The Plaintiffs are attempting to have this Court hear a case over which it does not have jurisdiction. Further, the Plaintiffs have raised ten (10) causes of action – none of which can survive on their own merit. The brief is broken down based on the following analysis:

- **Section IV, A:** Addresses the Defendant's political subdivision status and its authority to utilize the SDCA and the Tort Claims Act.
- **Section IV, B:** Addresses jurisdictional issues with the Circuit Court hearing this case and the Plaintiffs' standing.
- **Section IV, C:** Addresses the legal problems with Plaintiffs' statute of limitations argument generally.
- **Section IV, D:** Addresses the failures of each stand-alone cause of action.
- **Section IV, E:** Limits any portion of the case that may survive this motion to one (1) year based on the statute of repose.

- **Section V: Requests alternative relief in the form of a Motion to Strike.**

A. Causes of Action Which Concern Self Regional's Collection of Indebtedness under the SDCA.

Self Regional is a political subdivision and has the right to collect indebtedness owed to it using the Setoff Debt Collection Act (SDCA). S.C. Code § 12-56-10 *et seq.* The SDCA is a state statute that allows a governmental entity to collect debts owed to it through an individual's state income tax return. It is available to political subdivisions, as well as other types of governmental entities, to assist them in collecting debts owed by South Carolina citizens.

The seven (7) named Plaintiffs² claim Self Regional should not be able to use the SDCA to collect the remaining debts they owe to the hospital under two legal theories: (1) Self Regional has somehow lost its political subdivision status because it allegedly committed ultra vires acts unrelated to the SDCA; or (2) Self Regional should not be able to utilize the SDCA to collect where the services rendered to the patient were more than three (3) years ago.

Plaintiffs' first legal theory (that Self Regional has lost its political subdivision status because of ultra vires acts) has absolutely no merit. There is no question that the Defendant is a political subdivision and governmental entity. It was created by an Act of the Legislature in 1968. (Exhibit B.) Plaintiffs admit as much in the Amended Complaint. The Amended Complaint then implies that a political subdivision can waive or alter its status by committing sundry ultra vires acts.³ This is simply a red herring for which this Court should not take the bait. To follow Plaintiffs would lead to nothing but legally irrelevant corners and jurisdictional dead ends. (*See* Section IV, A, p. 13, below.)

² Potentially the 93 unnamed plaintiffs do as well, but this is not clear in the Amended Complaint. Presumably, too, Plaintiffs will seek to have a class certified. Defendant does not believe any class should be certified, but Defendant's arguments against class certification are not ripe for discussion.

³ Notably, Plaintiffs assert the alleged ultra vires acts in ¶¶ 13 and 17 of the Amended Complaint. None of the alleged ultra vires acts have anything to do with the collection of debts under the SDCA or otherwise. The alleged acts concern completely different subject matters, different transactions, different occurrences.

By way of example, the bulk of the alleged ultra vires acts to which Plaintiffs cite concern Self Regional's status as a 501(c)(3) entity under the United States Tax Code. Without addressing the flaws in Plaintiffs' factual contentions here, it bears noting that Self Regional does not need to be a 501(c)(3) entity in the eyes of the federal government to be a political subdivision in the eyes of the state government. Self Regional can only lose its 501(c)(3) status in an action brought by the Internal Revenue Service in a proceeding before the United States Tax Court, pursuant to 26 U.S.C. § 7428. It is not a determination this Court can make. But even assuming this Court could, which it cannot, this loss of status would have no impact on Self Regional's status as a political subdivision. Self Regional was not required to have 501(c)(3) status under its enabling legislation. Its loss of status, therefore, would not be an ultra vires act vis-à-vis its existence as a political subdivision.

But the Court need not address the underlying factual contentions of ultra vires acts because a necessary stepping-stone to Plaintiffs' factual contention that Self Regional committed ultra vires acts is Plaintiffs' legal premise that random, unrelated ultra vires acts operate to destroy a political subdivision's status as a political subdivision. Plaintiffs' legal premise is nonsensical. It has zero support in the law. An ultra vires act does not in any way alter an entity's status. South Carolina law is clear. A political subdivision cannot be unmade except through legislative action and referendum. *See* S.C. Code § 6-11-2020. Case law drives home the point that the existence of a legislative act creating an entity is the final word on its political subdivision/governmental status. Case law also makes clear that the result of a governmental entity's ultra vires act, to the extent the doctrine is even still recognized in jurisprudence, is, at most, the invalidation of the act alleged. Again, the ultra vires acts alleged do not concern collection under the SDCA or rates charged patients, the two (2) issues challenged in this

lawsuit. As such, it is clear based on the language of the statutes that Self Regional can avail itself of both the Tort Claims Act and the SDCA.

The causes of action related to the SDCA should be dismissed for the following reasons, which are explained in more detail below, in the Legal Argument section:

- **Sovereign Immunity and the SC Tort Claims Act.** The SDCA is a judicial or quasi-judicial proceeding. The SDCA creates a procedure whereby notice is given to the debtor/taxpayer, the taxpayer may protest the indebtedness or collection of the debt, a hearing with a hearing officer, and an appeal procedure to the Administrative Law Courts. South Carolina did not waive sovereign immunity for judicial or quasi-judicial acts. The Tort Claims Act also protects acts that are the lawful implementation of any process; adoption, enforcement, or compliance with any law; and the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee. S.C. Code §§ 15-78-60(1) - (5). As such, any tort claim premised upon Self Regional's use of the SDCA is barred by the doctrine of sovereign immunity, as confirmed by the SC Tort Claims Act. As such, the abuse of process claim and the Conversion claim, at a minimum, must be dismissed. (See Section IV, B, 2, p. 19 below.)
- **Common Law Judicial and Prosecutorial Immunity.** Common law recognizes absolute immunity for judicial and prosecutorial acts. It is not limited to torts. The SDCA is a judicial or quasi-judicial proceeding, complete with notice, a hearing, and appeal right. Plaintiffs received notice. They had a hearing. They lost. They did not appeal pursuant to the procedures under the SDCA. Therefore, the ruling constituted a final adjudication on Plaintiffs' indebtedness and Self Regional's right to collect the debt using the SDCA. There exists no legal theory where any entity may be sued to unwind a final adjudication on the merits. To the extent Plaintiffs are not attacking the final adjudication, but rather Defendant's initiation of a claim under the SDCA, then Plaintiffs' claims run squarely into a brick wall of prosecutorial immunity. (See Section IV, B, 2, p. 23 below.)
- **Plaintiffs Failed to Exhaust their Administrative Remedies.** Plaintiffs do not allege that they followed any of the mandatory administrative process set forth in the SDCA.⁴ They will not plead that they did because they did not. Self Regional sent notices. The seven (7) named Plaintiffs filed protests in 2011 only. A hearing was held on those seven. The seven lost. None appealed to the Administrative Law Court, as prescribed by statute. All issues that would have allowed the Plaintiffs to challenge that they "do not owe the money," including

⁴ The named Plaintiffs received debt set off notices for many years. No Plaintiff ever requested a protest hearing or requested a return until the 2011 (2012) tax year. In 2011 (2012) the named Plaintiffs did request a protest hearing. The named Plaintiffs did not file an appeal with the ALJ. Instead they chose to file suit before the Circuit Court.

issues related to the rates charged, are issues of indebtedness that must be resolved by the Hearing Officer, and subsequently the Administrative Law Courts. See S.C. Code § 12-56-65(c). Failure to appeal to the ALJ is fatal to Plaintiffs' claims. S.C. Code §§ 12-56-63, -65, & -67. (See Section IV, B, 3, p. 25 below.)

- **Res Judicata Prevents Review.** To the extent the named Plaintiffs raised their arguments before the Hearing Officer, and those arguments were unsuccessful, and Plaintiffs failed to appeal pursuant to the SDCA, then a determination has been made on the merits, and Plaintiffs are barred from raising them here under the doctrines of claim preclusion and issue preclusion. To the extent a defense was applicable and it was not raised, it has been waived. (See Section IV, B, 4, p. 27 below.)
- **The Plaintiffs Do Not Have Standing under the SDCA.** S.C. Code Ann. § 12-56-60(B) makes clear that there is no property right or property interest in a refund until all amounts due the State and claimant agencies are paid. As stated in the Amended Complaint, Plaintiffs admit to the delinquent debts. The Plaintiffs, therefore, do not have standing to bring claims for their tax returns. Furthermore, the statute states, "this section does not create a right to jury trial where one does not already exist." S.C. Code § 12-57-67. Therefore, the use of the SDCA does not create a private right of action to citizens. They must appeal through the procedures contained within the Act itself. (See Section IV, B, 5, p. 28 below.)
- **The Statute of Limitations Is Not Applicable to Collections under the SDCA.** Statutes of limitations are applicable only to civil actions. A civil action is commenced when a summons and complaint are filed. The SDCA does not require the filing of a civil action, therefore, there are no statutes of limitations applicable to the SDCA. (See Section IV, C, 1, p. 29 below.)
- **Waiver of Affirmative Defenses.** In the alternative, if the statute of limitations is an applicable defense, it is as an affirmative defense; as such, it was waived when Plaintiffs failed to raise it in a protest under the Act.⁵ (See Section IV, C, 3, p. 32 below.)
- **Plaintiffs Admitted the Debt.** The failure to contest owing the debt in a proceeding that leads to a final adjudication creates an admission of the debt, sufficient to restart the statute of limitations. The Plaintiffs admit that they have received notices of the collection efforts of Self Regional for the delinquent debt in question through the SDCA for years. (Ex. A, ¶¶3-4). As stated above, no protest or challenge to the debt was raised in these preceding years. That includes raising issues related to the statute of limitations.⁶ In addition, the true age of the

⁵ Again, Self Regional has been collecting under this Act for years, even as to the seven (7) named Plaintiffs. No protests were made until the 2011 tax year; by then, Plaintiffs had silently assented to the collection of the debt.

⁶ As stated in the footnote above, while not pled, the named Plaintiffs did request a protest hearing in 2011(2012) wherein the statute of limitations argument and allegations regarding the price and rate structure were raised.

debt in question cannot be determined because it has not been pled by the Plaintiffs. We do not know from the Amended Complaint how old the debt was when collections began under the SDCA. Therefore, all causes of action relating to the age of the debt and the statute of limitations must be dismissed. (See Section IV, C, 3, p. 32 below.)

- **The Abuse of Process Claim Must Fail.** – There is simply no liability where a statutorily-prescribed process has been carried out to its authorized conclusions. Further, an abuse of process requires an ulterior purpose. The SDCA was used by Self Regional for the collection of delinquent debt – the very purpose for which the SDCA was created. (See Section IV, D, 1, p. 36 below.)
- **The Conversion Action Is Not Allowed.** South Carolina case law is clear that a cause of action for conversion cannot arise from a defendant's exercise of a legal right over property or from a relationship between a creditor and a debtor. (See Section IV, D, 2(a), p. 38 below.)
- **There Is No Unjust Enrichment for a Wrongdoer.** Under an equitable argument there can be no unjust enrichment for the collection of debt from monies owed. There can also not be an unjust enrichment claim when a contract exists that speaks to the underlying debt (Ex. A, ¶¶ 55-62) and/or an alternative remedy exists as does here, by exhausting the administrative remedies and appeals as proscribed by the SDCA. (See Section IV, D, 2(b), p. 39 below.)
- **A Declaratory Judgment Is Not Proper.** There is no stand alone right to a jury trial under the declaratory judgment Action because the Amended Complaint raises no justiciable controversy in this case. If Plaintiffs are merely seeking an "advisory opinion" regarding the interpretation of the SDCA, their cause of action must also be dismissed. (See Section IV, D, 4, p. 41 below.)
- **A Claim for Refund is Barred.** The claim for refund must be made to the ALJ, not the Circuit Court unless a separate, stand-alone right to jury trial exists – which it does not. (See Section IV, D, p. 41 below.) In the alternative, all claims for refunds are limited to one (1) year from the date of service of the Amended Complaint. (See Section IV, E, p. 68 below.)
- **There is No Claim for Unfair Trade Practices for Regulated Conduct.** Plaintiffs' UTPA claim arising from the application of the SDCA fails because (1) it is precluded under the "statutory authority" exemption to the UTPA; and (2) it erroneously seeks to assert a UTPA claim for loss of assets in which Plaintiffs had no legal right or interest at the time of the alleged collection. (See Section IV, D, 8, p. 53 below.)

B. Causes of Action which Concern Self Regional's Pricing to Patients.

In addition, Plaintiffs allege that because of Self Regional's status as a 501(c)(3) non-profit organization, the hospital should not have charged the insured and uninsured different rates and that in doing so the Defendant: (1) should no longer be a political subdivision; (2) breached a contract requiring "regular" rates be paid; (3) created a charitable trust that was breached; and (4) committed unfair trade practices under the SC UTPA. Plaintiffs use the allegations regarding the rate structure as a basis for not having to pay their full medical bills, again tying its relevance back to collection under the SDCA. As stated above, this allegation was raised before the Hearing Officer who made a final determination on the merits. Res judicata precludes this Court from re-hearing that issue. In the alternative, the four (4) causes of action related to the pricing/rate structure should be dismissed for the following reasons, which are explained in more detail below in the Legal Argument section:

- **Plaintiffs Have Failed to Allege a Breach of Contract.** Plaintiffs do not allege performance on their part of any express term of the contract. Further, Plaintiffs have failed to allege a breach on the part of Defendant. It is important to note that the Plaintiffs do not allege that Self Regional charged them rates higher than the contracted for "regular rates and terms of the Hospital," which is what the Consent to Treat states. (See Section IV, D, 5, p. 42 below.)
- **Plaintiffs Cannot Prevail on a Claim for Breach of an Implied Covenant of Good Faith and Fair Dealing.** There is also no breach of an implied term purportedly requiring Defendant to charge Plaintiffs "no more than a fair and reasonable charge."⁷ Plaintiffs' theory has been squarely addressed and flatly rejected as a matter of law by other jurisdictions facing identical allegations. Additionally, the cause of action for breach of the duty of good faith and fair dealing fails because there can be no claim for breach of an *implied* contractual provision based on conduct performed under an *express* contractual right. (See Section IV, D, 6, p. 46 below.)
- **No Charitable Trust is Created by Virtue of a 501(c)(3) Status.** Plaintiffs' contention that Self Regional "entered into a public charitable trust to provide mutually affordable medical care to its uninsured patients" by virtue of its tax

⁷ See Amended Complaint at ¶ 55.

exempt status under 26 U.S.C. § 501(c)(3). This legal theory is not novel and it has never been successful. In the middle portion of the last decade, literally dozens of lawsuits were filed by similarly described groups of plaintiffs throughout the country. The cases addressing the claim uniformly, unanimously, and consistently reject it on the grounds that the claim is fundamentally invalid because (1) 501(c)(3) does not create a private right of action; (2) 501(c)(3) does not give rise to a charitable trust; and (3) even if a charitable trust arose, Plaintiffs would have no standing to enforce it. (See Section IV, D, 7, p. 48 below.)

- **There is No Claim for Unfair Trade Practices for Regulated Conduct.** Plaintiffs assertion that Self Regional committed an unfair trade practice by charging them "full, undiscounted costs for medical care" and "charging its uninsured patients excessively more than its insured patients . . . despite its charitable, non-profit, tax exempt status . . ." is precluded under the statutory authority exemption for at least three (3) reasons. Those are: (1) the Enabling Statute establishing the Greenwood County Hospital Board vests in Defendant authority to set rates (Ex. B); (2) the provision of affordable healthcare is the subject of a broad combination of statutory schemes, and the Legislature has expressly considered and declined to impose price equalization as between insured and non-insured patients as a mandate of law; and (3) the essential gravamen of the claim arises under and is governed by the United States Tax Code. (See Section IV, D, 8, p. 53 below.)

C. Cause of Action which Concerns Self Regional's Production of Patient Billing Records.

Finally, Plaintiffs allege a violation of S.C. Code § 44-7-325(B)(1) quite literally seeking to have the Court order the Executive Branch to prosecute Defendant. This Section provides patients the ability to ask for and receive their medical records. Plaintiffs' Amended Complaint alleges they asked for their medical billing records and did not receive them within the time period prescribed by the statute. This cause of action should be dismissed for the following reasons, which are explained in more detail below in the Legal Argument section:

- **The issue is moot.** Self Regional has produced to all Plaintiffs the medical records requested and authorized through a HIPAA release. They were produced before the Amended Complaint was ever filed.
- **The statute provides for no civil cause of action.** This, coupled with the fact that the Plaintiffs received their records, is perhaps why Plaintiffs' requested relief is to have the court order the County Prosecutor to bring criminal charges against Self Regional for not producing the records within the statutory time period.

- **Plaintiffs requested relief violates the constitutional separation of powers clause.** The Judicial Branch cannot order the Executive Branch to bring charges against an entity. That deprives the solicitor of his or her discretionary powers. (See Section IV, D, 9, p. 66 below.)

It is clear that the Amended Complaint must be dismissed. The Plaintiffs have failed to exhaust their administrative remedies, jurisdiction is not proper in front of this Court, and there is no viable cause of action on which the Plaintiffs can proceed. If, however, this Court does not dismiss the case in its entirety, Self Regional does request the appropriate limitations be placed on this case based on the one (1) year statute of repose contained in the SDCA. (See Section IV, E, p. 68 below.)

III. LEGAL STANDARD

The Plaintiffs have made allegations that do not meet the standards required to survive a motion to dismiss under Rule 12(b). This Motion is made under Rules 12(b)(1) and 12(b)(6). The 12(b)(1) motion asserts forum and immunity issues that preclude this Court from proper jurisdiction. Subject matter jurisdiction is defined as “the power [of a court] to hear and determine cases of the general class to which the proceedings in question belong.” Issues related to subject matter jurisdiction may be raised at any time. The lack of subject matter jurisdiction may not be waived, even by consent of the parties, and should be taken notice of by this Court.” *Hamilton v. Fulgham (In re November 4, 2008, Bluffton Town Council Election)*, 385 S.C. 632, 636, 686 S.E.2d 683, 686 (2009) (citation omitted).

Defendant also moves pursuant to 12(b)(6) because Plaintiffs’ Amended Complaint is a hodgepodge of conclusory accusations which do not give rise to a legal claim. In South Carolina, the Court is to construe the complaint in a light most favorable to the non-movant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. If the facts alleged and inferences

deducible therefrom would not entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is proper. *Sloan Constr. Co. v. Southco Grassing, Inc.*, 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008). Plaintiffs' Amended Complaint is replete with "labels and conclusions" and "formalistic recitation of elements" that fail to state a claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009). See, e.g., *Hunt v. Mortgage Elec. Registration*, 522 F. Supp. 2d 749, 752 (D.S.C. 2007) (granting defendants' motion to dismiss where the plaintiff's complaint was full of conclusory statements with insufficient factual allegations).

To state a claim, a complaint must plead "enough facts to state a claim for relief that is plausible on its face," provide "fair notice" of the factual "grounds on which the claim rests," and "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 1965, 1974. The Amended Complaint does not meet this standard. "[W]hen the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." *Cuvillier v. Sullivan*, 503 F.3d 397, 401 (5th Cir. 2007) (quoting *Twombly*, 550 U.S. at 558). See, e.g., *Hunt v. Mortgage Elec. Registration*, 522 F. Supp. 2d 749, 752 (D.S.C. 2007) (granting defendants' motion to dismiss where the plaintiff's complaint was full of conclusory statements with insufficient factual allegations). To state a claim, a complaint must plead "enough facts to state a claim for relief that is plausible on its face," provide "fair notice" of the factual "grounds on which the claim rests," and "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 1965, 1974. The Amended Complaint does not meet this standard. This is precisely the type of pleading for which *Twombly* and *Iqbal* were intended.

IV. LEGAL ARGUMENT

The gravamen of Plaintiffs' first four (4) causes of action is two-fold. One, that the Defendant did not have the authority to use the SDCA because it acted in an ultra vires capacity and two, that Defendant utilized the SDCA to collect indebtedness that was more than three years old. In addition, the Plaintiffs have also raised the next four (4) causes of action in an attempt to challenge their indebtedness and the amount of debt allegedly owed to the Defendant. They are the "I do not really owe this amount of debt" defenses. Presumably, winning one (1) of the second four (4) claims would be a precursor to winning one (1) of the first four (4) claims. One must determine how much debt is owed to determine if the correct amount of debt was collected. In either case, all eight (8) of these causes of action in some way touch upon Defendant's legal right to use of the SDCA. All eight (8) of these causes of action suffer from fundamental legal defects that make them ripe for dismissal at this early stage. As is explained below, Plaintiffs have no right or basis to now challenge the debt they owe Defendant and Defendant's use of the SDCA is proper.

A. All Parties Admit and Agree that the Defendant is a Political Subdivision

The SDCA is a state statute that allows a governmental entity to collect debts owed to it through an individual's state income tax return. S.C. Code § 12-56-10 *et seq.* It is available to political subdivisions (expressly stated in the statute), as well as other types of governmental entities, to assist them in collecting debts owed by South Carolina citizens.

The Defendant is a political subdivision, established through enabling legislation. (Ex. B). The fact that enabling legislation exists that established the Defendant is conclusive proof that Defendant is a political subdivision. See *Mullins Hospital v. Squires*, 223 S.C. 186, 104 S.E. 2d 161 (1958); *Sloan v. Greenville Hospital Sys.*, 388 S.C. 152, 694 S.E.2d 532 (2010). The Supreme Court of South Carolina has even acknowledged Self Regional's political subdivision

status. The Court applied the S.C. Tort Claims Act to Self Memorial Hospital in *Vines v. Self Memorial Hospital*, 314 S.C. 305; 443 S.E.2d 909 (S.C. 1994).

The Plaintiffs do not disagree with the Defendant's assertion that it is a political subdivision. (Ex. A, ¶¶ 12, 13 and 17). Instead, Plaintiffs admit political subdivision status, but then argue that Self Regional has acted ultra vires to its enabling legislation, and thus, Self Regional's political subdivision status has been waived or altered. Plaintiffs' argument suffers from a legal flaw. Ultra vires acts cannot destroy or erode a political subdivision's status as such.

1. Political Subdivision and/or Governmental Status cannot be Waived or Altered.

The Amended Complaint does not allege that the Defendant acted ultra vires in its collection of delinquent debt under the SDCA. The Amended Complaint only alleges that other, unrelated alleged ultra vires acts altered or destroyed the governmental and/or political subdivision status of the Defendant. (Ex. A, ¶¶ 12, 13 and 17).

A governmental entity or political subdivision's status simply cannot be waived or undermined.⁸ Political subdivisions can only be dissolved by the General Assembly pursuant to dissolution referendum. See S.C. Code § 6-11-2020; *Hagley Home Owners Assoc. v. Hagley Water, Sewer & Fire Auth.*, 326 S.C. 67, 485 S.E.2d 92, n.2 (1997); *Michelin Tire Corp. v. Spartanburg Cnty. Treasurer*, 281 S.C. 31, 314 S.E. 2d 8 (1984) (The existence of special purpose districts is protected, even under home rule, until they are dissolved by the South Carolina General Assembly after a successful referendum).⁹

⁸ Even the counties associated with a special purpose district do not have the authority to abolish said district. S.C. Code Ann. § 6-11-420 (1976) authorizes counties to enlarge, diminish, or consolidate existing special purpose districts but does not allow them to abolish the districts.

⁹ S.C. Code Ann. §§ 6-11-410(a), 6-11-810(d) (1976) each define a "special purpose district" as any district created by act of the General Assembly prior to March 7, 1973, and to which is committed prior to March 7, 1973, any local

Plaintiffs do not allege any legislative Act or referendum abolishing or altering Self Regional's status.

2. Ultra Vires Acts, to the Extent the Doctrine is Even Recognized, cannot Alter an Entity's Status.

Regardless of this fact, Plaintiffs' claim that Defendant altered or destroyed its governmental status through various and random ultra vires acts of (1) changing its name;¹⁰ 2) violating its own lease;¹¹ 3) failing to gain proper approval of Board appointees;¹² 4) exceeding the bounds of its geographical limits;¹³ 5) gaining ownership in a for profit corporation and operating for the benefit of management and Board Members;¹⁴ 6) operating in direct opposition to the reason why it was created;¹⁵ and 7) by converting its 501(c)(3) non-profit entity (or political subdivision) status into a for profit corporation. (Ex. A, ¶¶ 13 and 17).¹⁶ As explained

governmental function. This includes political subdivisions such as Greenwood County Hospital Board a/k/a Self Regional.

¹⁰ Plaintiffs have not pled why a name change or which name change is unlawful.

¹¹ Plaintiffs have not stated what lease was allegedly violated or how, or why that would be ultra vires.

¹² Plaintiffs have failed to plead which Board Members were not properly approved.

¹³ Plaintiffs have failed to explain how exceeding geographical bounds is improper in the face of statutory authority that directly allows such expansion (S.C. Code § 6-11-101 allows "[a]ny hospital district created by the General Assembly...to own, operate, convey, sell or lease hospital facilities located outside the current limits of the hospital district.").

¹⁴ Plaintiffs have not stated what for profit corporation the Defendant allegedly has an ownership interest in or how this alleged ownership interest benefits the management or Board Members.

¹⁵ Plaintiffs have failed to define how Defendant is operating in direct opposition to the reason why it was created, which is to provide quality healthcare to the residents of Greenwood County – which it has always and continues to do.

¹⁶ For example, after reading Plaintiffs' Amended Complaint, one is left with the distinct impression that Plaintiffs believe that Self Regional is operating at a surplus, as opposed to a deficit, and this somehow destroys Self Regional's 501(c)(3) status. This shows a fundamental misunderstanding of what is required to be a 501(c)(3) entity under the federal tax code, and it also drives home the point of why: (1) individuals do not have standing to challenge an entity's tax status under the federal tax code, and (2) even if they did, only one court (the United States Tax Court) has jurisdiction to decide these matters. As a general matter, members of the public lack standing to challenge how the federal government spends tax revenue. See *Frothingham v. Mellon*, 262 U.S. 447 (1923). Furthermore, courts have held that members of the public lack standing to challenge a nonprofit organization's federal tax-exempt status under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended ("Code"). See *Allen v. Wright*, 468 U.S. 737 (1984) and *In Re United States Catholic Conference*, 885 F.2d 1020 (2d Cir. 1989). Code Section 7428 permits declaratory judgments related to an organization's tax-exempt status under Code § 501(c)(3); however, Code § 7428(b)(1) limits the right to file such a pleading only to the organization the status of

in the preceding footnotes, the allegations in paragraphs 13 and 17 of the Amended Complaint are conclusory. Plaintiffs fail to allege how any of them would be ultra vires acts, let alone that they factually occurred, or when they occurred.¹⁷

Before even addressing the factual issues of the alleged ultra vires acts, which Self Regional contests it has done anything ultra vires, a court would have to accept Plaintiffs' legal premise that ultra vires acts are legally relevant to determining Self Regional's political subdivision status. They are not. Plaintiffs' legal premise is flawed. Ultra vires acts cannot alter or destroy a political subdivision's status as such.

An ultra vires act is one performed without any authority to act on the subject. Blacks Law Dictionary, Ultra Vires, p. 1522 (6th Ed. 1990) A plaintiff that argues an act is ultra vires is challenging the specific action in an attempt to stop or undo that specific act which is alleged to be ultra vires. The allegation or even a determination of ultra vires action does not alter the governmental and/or political subdivision status of the entity. See *City of North Charleston v. North Charleston District*, 289 S.C. 438; 346 S.E.2d 712 (1986) (because city knew that public

which is at issue. Finally, under Code § 7428(a), a pleading under Code § 7428 may be filed only in the United States Tax Court, the United States Claims Court, or the District Court of the United States for the District of Columbia.

So Plaintiffs are the wrong person, in the wrong court, to raise these issues. Moreover, however, Plaintiffs are challenging Self Regional's ability to collect under the SDCA. The power to collect under the SDCA stems from Self Regional's status as political subdivision, not from its status as a 501(c)(3) entity. Plaintiffs fail to show how losing its 501(c)(3) status in any way affects its political subdivision status. No law says Defendant even needed to register as a 501(c)(3) in the first place. Nothing in Self Regional's enabling legislation mandates that it be a 501(c)(3) entity. The loss of that status, therefore, which again cannot be determined by this Court, is immaterial to Self Regional's use of the SDCA. The SDCA requires only that Self Regional be a governmental entity or quasi-governmental entity, of which a political subdivision is specifically included.

¹⁷ Because the Amended Complaint does not allege any specifics supporting these conclusory allegations of ultra vires acts, there is no way for the Defendant to infer when the alleged ultra vires acts occurred, other than by reliance of the one date referenced in paragraph 13, which is 1984. There is no challenge to an alleged ultra vires act that is still valid and alive under a statute of limitations for acts that occurred twenty-eight (28) years ago. Therefore, even if an ultra vires act occurred, as currently alleged, Plaintiffs may not challenge said acts based on the statute of limitations. Under the logic of Plaintiffs, the mere fact that allegations have been raised that Self Regional contends would violate the statute of limitations is an abuse of process on behalf of the Plaintiffs.

service district had no authority to set millage rates, contract between the parties that called for district to pay city based on a certain millage rate was ultra vires on part of district and unenforceable by city – government status of entity not impacted.); *Barringer v. City Council of Florence*, 41 S.C. 501; 19 S.E. 745 (S.C. 1894) (action by city council to require liquor licenses unlawful because no authority granted in city council to issue said license – government status of entity not impacted). **Defendant has conducted a thorough search of cases where ultra vires acts have been raised. Defendant has not found a single case where one or more ultra vires acts led to the altering or destruction of political sub-division status.**

When the judiciary handles an allegation of an ultra vires act, and actually finds one or more to exist, the remedies available and exercised by the courts are consistently one (1) of three (3) options, none of which are to destroy the status of the entity the engaged in the acts/actions. Courts either: (1) declare the ultra vires act as unlawful, unwinding the specific act;¹⁸ (2) determine whether the corporate or political body ratified the act after the fact, thus removing the ultra vires nature of the act;¹⁹ or (3) determine that the public interest is best served by

¹⁸ See, e.g., *Cent. Transp. Co. v. Pullman's Palace Car Co.*, 139 U.S. 24, 59-60 (1891) (holding a corporate or governmental entity cannot ratify an ultra vires act that the entity did not have the original power or authority to create or enter into); *South Tacoma Way LLC v. Washington*, 169 Wash.2d 118, 130-31 (2010); *Fallor's Pharmacy v. Dep't of Soc. & Health Serv.*, 125 Wash.2d 488, 499 (1994) (noting that if statutory procedure permitting authority to act is undermined, the action is fully void); *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 99 Wash.2d 772, 797 (1983) (recognizing ultra vires acts committed by governmental entities are simply void and cannot be validated by later events); *Komanetsky v. Missouri State Med. Ass'n*, 516 S.W.2d 545 (Mo. Ct. App. 1974) (finding where estoppel is not applicable, stockholder ratification will not validate an ultra vires act that exceeds the express or implied powers of a corporation).

¹⁹ See, e.g., *Harbor Fin. Partners v. Hutzenga*, 751 A.2d 879 (Del.Ch. 1999) (holding that if a corporate transaction may be considered wasteful, the waste vestige doctrine applies and a unanimous vote of the corporate shareholders can ratify the questionable transaction even if ultra vires); see also *Saxe v. Brady*, 184 A.2d 602, 610 (Del.Ch. 1962) (holding that in order for a court to determine that the ultra vires transaction committed by the corporate officer would be wasteful, it must be shown that no person of ordinary sound business judgment could view the benefits received as a "fair exchange"); *Kaufman v. Shoenberg*, 91 A.2d 786, 791 (Del.Ch. 1952); but see R.F. Balotti and J.A. Finkelstein, 1 *The Delaware Law of Corporations & Business Organizations* § 4.35, at 4-234 (3rd ed. 1997) (suggesting some jurisdictions question the continued utility of the "equitable safety valve" inherent within the waste vestige doctrine").

recognizing the ultra vires act as lawful in a particular instance.²⁰ Altering the nature or character of an entity because of an ultra vires act is not an option courts consider, and it is certainly not an option courts select.

2. The Defendant is a Political Subdivision and, as such, is covered by the Tort Claims Act and is a "Claimant Agency" under the Setoff Debt Collection Act

Because Self Regional is a political subdivision, it has the authority to use the SDCA and is covered by the S.C. Tort Claims Act. *See Vines v. Self Memorial Hospital*, 314 S.C. 305; 443 S.E.2d 909 (S.C. 1994) (applying S.C. Tort Claims Act to Self Memorial Hospital); S.C. Code Ann. § 12-56-20(1) (under the SDCA "'Claimant agency' means a . . . political subdivision"); § 15-78-30(d) (under the SC Tort Claims Act "'Governmental entity' means the State and its political subdivisions"); § 15-78-30(h) ("'Political subdivision' means . . . special purpose districts of the State and any agency, governmental health care facility, department, or subdivision thereof").

The Defendant, therefore, requests that this Court affirmatively determine that it is a political subdivision subject to the Tort Claims Act and that it is a claimant agency under the SDCA.

²⁰ See, e.g., *American Express Co. v. Citizens' State Bank*, 181 Wis. 172, 194 N.W. 427 (Wis. 1923) (holding that when contracts have been fully executed on both sides, especially after a significant lapse in time, a corporation cannot avail itself of the defense that the actions exceeded the scope of their corporate charter nor should such claims prevail in the face of manifest injustice); *McCormick v. Market Bank*, 165 U. S. 538, 549-50 (1897) (noting that while an action cannot be maintained on the unlawful contract, the corporation may be compelled to pay back what it illegitimately received); *Citizens' Nat'l Bank v. Appleton*, 216 U. S. 196 (1910); *Eastman v. Parkinson*, 133 Wis. 375, 381(1907) (holding that ultra vires contracts which are no longer executory, not tainted by fraud, clearly prohibited by statute, and not condemned by public policy cannot be impeached by the corporation through an ultra vires defense); *Whatcom County Water Dist. No. 4 v. Century Holdings, Ltd.*, 627 P.2d 1010, 1013 (Wash. App. 1981) (concluding that if a municipality contracts for a public improvement, the agency providing the improvement is entitled to recover its losses even if the contract is ultra vires; *Edwards v. Renton*, 67 Wash.2d 598, 604 (1965) *Handelsman v. Chicago Fuel Co.*, 6 F.2d 163 (D. Ill. 1925) (suggesting that courts, while refusing to maintain action upon the unlawful contract, will still strive to do justice between the parties by permitting property or money parted with to be paid back or compensated).

IV. LEGAL ARGUMENT

B. The Court Does Not Have Proper Jurisdiction to Hear Causes of Action 1-8 and the Plaintiffs Do Not Have Standing for All Causes of Action/Claims Asserted.

1. The Plaintiffs Do Not Have Standing to Make Any Challenge to the 501(c)(3) Status of the Defendant and this Court Does Not Have Jurisdiction to Determine a 501(c)(3) Issue.

As was explained in detail in footnote 16 above, the Plaintiffs cannot challenge Self Regional's 501(c)(3) status and, even if they could, this Court does not have jurisdiction to make a determination on Self Regional's 501(c)(3) status. Therefore, any and all acts or actions related to Self Regional's 501(c)(3) status is going to lead to a dead end for the Plaintiffs and is a subject matter jurisdiction trap for this Court.

2. Subject Matter Jurisdiction Does Not Exist Because the Defendant is Entitled to Immunity Pursuant to the S.C. Tort Claims Act (Abuse of Process and Conversion Claims) and under the Common Law Judicial and Prosecutorial Immunity (All Claims other than the Ninth Cause of Action).

a. As a Political Subdivision, Defendant is Subject to the Protection Awarded by the South Carolina Tort Claims Act for the Abuse of Process and Conversion Claims

The Amended Complaint challenges the Defendant's use of the SDCA under the tort actions for conversion (Ex. A, ¶¶ 36-38) and abuse of process (Ex. A, ¶¶ 39-48). In essence, Plaintiffs are suing to unwind a final adjudication on the merits of the debt owed. Neither the South Carolina Tort Claims Act nor the common law permit this.

The SDCA is a quasi-judicial proceeding, or in the alternative, it is an administrative action of a quasi-judicial nature. The SDCA specifically prescribes a procedure for notice, protest hearing, appeal and post-collection appeal. The requirement to protest the collection of delinquent debt with the claimant agency is jurisdictional. S.C. Code § 12-56-63(A). The protest procedure established by the SDCA is considered a final adjudication by the courts. *See Hom v. SCESC*, 00-ALJ-30-0100-CC (Admin. L. Ct. July 6, 2000). (Ex. C.) There exists no

legal theory where any entity may be sued to unwind a final adjudication on the merits. The only process for undoing a final adjudication would be to appeal it through the procedures of that judicial proceeding or to make a motion pursuant to Rules 59 or 60, SCRCP.

Even if there were some legal theory that would allow Plaintiffs to reverse a final adjudication, which there is not, Plaintiffs certainly cannot do so against the State. Pursuant to S.C. Code § 15-78-20, it is the “public policy of the State of South Carolina that the State, and its political subdivisions, are only liable for torts within the limitations of [the Tort Claims Act].” (emphasis added). Sovereign immunity, therefore, is an affirmative defense to any tort action brought against a political subdivision, unless the action is specifically permitted under the South Carolina Tort Claims Act.

South Carolina Code § 15-78-60 details the different types of actions for which sovereign immunity has not been waived. Pursuant to S.C. Code § 15-78-60(1) - (5), the State is not liable for:

- (1) . . . judicial or quasi-judicial action or inaction;
- (2) administrative action or inaction of a . . . judicial, or quasi-judicial nature;
- (3) . . . lawful implementation of any process;
- (4) adoption, enforcement, or compliance with any law or the failure to enforce or adopt an law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies;
- (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee.²¹

²¹ By listing these enumerated exceptions, the Defendant is not conceding these are the only exceptions that apply to this case.

Pursuant to S.C. Code § 15-78-60(1) and (2), a political subdivision is not liable for a loss resulting from: (a) judicial or quasi-judicial action or inaction or (b) administrative action or inaction of a judicial or quasi-judicial nature.

If Plaintiffs cannot make a claim against Defendant to unwind the final adjudication, then their claim against Defendant must be based upon Defendant's act of initiating the legal action, or some act Defendant did or did not do within the legal action. At most, the Amended Complaint alleges an improper motive or purpose based on the allegation that the Defendant attempted to pursue a debt outside of the statute of limitations.²² Again, these matters would be barred by the doctrine of sovereign immunity and the Tort Claims Act. *See* S.C. Code § 15-78-60(5).

Sovereign immunity under the South Carolina Tort Claims Act for judicial, quasi-judicial, and/or administrative proceedings involving a judicial/quasi-judicial act is clear. There is no waiver of sovereign immunity for the collection of debt by a claimant agency under the SDCA. In addition, the collection of debt under the SDCA was a lawful implementation in which the SDCA was enforced or complied with within the discretion and judgment of Self Regional. The Defendant hereby requests dismissal under Rule 12(b)(1), SCRPC because there is no subject matter jurisdiction for this Court because Self Regional's sovereign immunity has not been waived. In the alternative, the Defendant requests the Motion to Dismiss pursuant to Rule 12(b)(6) be granted based on the immunities provided in the Tort Claims Act.

²² Again, Defendant denies the allegation that the debts were in some way barred from collection by the statute of limitations. As argued more fully below, the statute of limitations is an affirmative defense that must be asserted or it is waived.

b. The Defendant is Entitled to Immunity under the Tort Claims Act for Causes of Action related to Conversion

Plaintiffs also allege that through the execution of the SDCA the Defendant has committed the common law tort of conversion. This claim is the exact type of claim the Tort Claims Act was designed to address. In passing the SDCA, the General Assembly chose to give "claimant agencies" an avenue to collect debts. In order to place the burden on the appropriate party to stop debtors from escaping their debts, the legislature enacted the SDCA. The SDCA is a process that has been deemed lawful by its legislative creation and by the South Carolina Supreme Court. *See Gardner v. S.C. Dept. of Revenue*, 353 S.C. 1; 577 S.E.2d 190 (S.C. 2003). Defendant did nothing more than exercise its rights under the statute. The Defendant in this case followed the procedural process outlined in the SDCA to collect debts admittedly owed to it. There is no allegation otherwise. Now, the Plaintiffs want to hold the Defendant liable for following rights granted by the General Assembly. Undoubtedly, this case is the type of action the General Assembly wanted to preclude when it enacted the Tort Claims Act. S.C. Code § 15-78-60(1)-(5)²³ (enumerated above).²⁴ All of these arguments have been fully argued above and are incorporated fully herein.

²³ Enumerating exceptions to waiver of immunity, including losses resulting from (1) legislative, judicial or quasi-judicial action or inaction; (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature; (3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process; (4) adoption, enforcement, or compliance with any law or the failure to enforce or adopt an law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies; (5) the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee

²⁴ By listing these enumerated exceptions, the Defendant is not conceding these are the only exceptions that apply to this case.

c. **The Defendant is Also Immune from Suit for All Causes of Action Related to the SDCA under the Common Law Judicial and Prosecutorial Immunity.**

The courts in South Carolina have expressly held that the adoption of the S.C. Tort Claims Act did not have any impact on existing common law immunities, including the prosecutorial and judicial immunity. The Tort Claims Act expressly preserved all existing common law immunities under S.C. Code § 15-78-20(b); *See also O'Laughlin v. Windham*, 330 S.C. 379; 498 S.E.2d 689 (1998) (common law judicial immunity survives the tort claims act as a complete defense). The Court made clear in *Windham* that:

Judicial immunity affords absolute immunity from suit. *Stump v. Sparkman*, 435 U.S. 349, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978). In other words, judicial immunity, if applicable, acts as a bar to suit, not just as an ultimate bar to relief. Therefore, a finding of judicial immunity renders a complaint alleging judicial misconduct meritless.

Id. at 691 (internal citations included). *See also Plyler v. Burns*, 373 S.C. 637 (S.C. 2007).

Any exercise of discretion or judgment related to enforcement or execution of the SDCA is also covered by immunity. In considering cases that involve judicial immunity, the State's highest court has held that "when a court undertakes any adjudicative act within its jurisdiction, regardless of allegations of malicious or corruptive motive, the act is considered a judicial function for which the court will have **absolute immunity**." *See Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007) (emphasis added). In South Carolina, a claimant agency has jurisdiction to determine the collectability of debt under the SDCA and to hold the mandatory protest hearings that must be held in order for a plaintiff to appeal a SDCA debt. *See* S.C. Code § 12-56-10 *et. seq.* Pursuant to the SDCA, claimant agencies must hold protest hearings when requested. During these protest hearings, a determination involving the adjudication of whether the debt is owed within the confines of the law are made. *See* S.C. Code § 12-56-10 *et. seq.* The

protest hearings are considered to be final adjudications. *See Hom v. SCESC*, 00-ALJ-30-0100-CC (Admin. L. Ct. July 6, 2000) (Ex. C.) There is an appeal process to an ALJ for a review of the protest hearing after final determinations are made by the Hearing Officer. *Id.* The appeal is limited to whether or not the debt is owed, which Plaintiffs admit, and whether or not the claimant agency can collect the debt. This is an individual determination based on the debt owed by each debtor. *See Gardner v. S.C. Dept. of Rev.*, 353 S.C. 1, 577 S.E.2d 190 (2003). To the extent Plaintiffs are attacking a determination made through the proceedings outlined in the SDCA, Self Regional is entitled to absolute immunity.

Quasi-judicial immunity is granted to those persons who have discretion in determining how or whether an act shall be done or the course pursued. *See Wilson v. Preston*, 378 S.C. 348, 662 S.E.2d 580 (2008) (county administrator's duty to deliver documents to a council member is a quasi-judicial duty which requires the exercise of the administrator's discretion in determining how the act of delivering the document shall be done). This includes whether or not to use the SDCA. This decision, in many ways, is akin to a prosecutor determining whether or not to bring charges against a party. Once the charges are brought, the defendant has the right to an assortment of defenses and the court then determines which, if any, have merit. That decision to prosecute the claim, however, is immune from suit under judicial and quasi-judicial immunity. *See Williams v. Condon*, 347 S.C. 227, 553 S.E. 2d. 496 (Ct. App. 2001) (prosecutor could not be sued when his actions were of a "judicial" or "quasi-judicial" nature regardless of the prosecutor's "motivation").

As argued above and is fully incorporated herein, the Defendant made all decisions to collect debt under the SDCA. The Defendant clearly qualifies as a "claimant agency" under the SDCA. All decisions made in the protest hearings, to the extent they occurred, were by a

Hearing Officer who had full power of the judiciary to determine all issues regarding the delinquent debt. Therefore, any action taken by the Defendant to collect delinquent debt through the process known as the SDCA cannot be the basis of a lawsuit, and the Defendant is immune from suit from said claim. The common law immunity, however, is not limited to tort actions and is applicable to all causes of action alleged in which there is a challenge to the SDCA process and the debt collected there under. There is also immunity for the lawful implementation of a process, compliance with a law and for the exercising of discretion that accompanies that compliance.

3. Self Regional Moves for Dismissal Based upon the Failure of the Plaintiffs to Exhaust their Administrative Remedies.

There is no allegation in the Amended Complaint that any Plaintiff followed any of the mandatory administrative processes set forth in the SDCA.²⁵ Pursuant to the procedures outlined in the SDCA, a notice is sent to delinquent debtors. The notice describes the protest procedure. To challenge the collection of debt under the SDCA one must file a protest within thirty (30) days of receipt of the notice. A protest hearing is then held. If unsatisfied with the protest hearing determination, a debtor can appeal to an ALJ. A debtor may also make a request for refund within one (1) year of having their tax return applied to the delinquent debt in the same manner they would appeal from the Hearing Officer (to the ALJ unless a stand-alone right to jury trial exists). All of these procedural avenues, had they been explored, would have allowed the Plaintiffs to challenge that they "do not owe the money." Any person who disputes

²⁵ The named Plaintiffs received setoff debt notices for many years. (Ex. A, ¶¶ 3-4.) No Plaintiff ever requested a protest hearing or requested a return until the 2011 (2012 tax year). In 2011 (2012), the named Plaintiffs did request a protest hearing. The named Plaintiffs did not file an appeal with the ALJ. Instead, they chose to file suit before the Circuit Court. To the extent the Amended Complaint is read to include the 93 Relief Plaintiffs as part of all causes of action, not just the ninth cause of action, and as potential class members as stated in the Amended Complaint (¶¶ 20 & 84), no other person requested a protest hearing in the 2011 (2012) tax year, so the 93 unnamed Plaintiffs have never protested the debt pursuant to the SDCA.

they owe money being collected under the SDCA should protest and make their case to the Hearing Officer. If dissatisfied, an appeal of that determination should be to the Administrative Law Courts. *See* S.C. Code § 12-56-65(c).

Plaintiffs have not pled they exhausted these procedural avenues. They cannot. They did not exhaust them. The Defendant is compelled, therefore, to raise the issue of failure to exhaust administrative remedies for any debt collected under the SDCA in the negative. The named Plaintiffs failed to allege they protested the collection of debt, even though the Act specifically provides for a mandatory procedure to utilize to dispute the debt. The exhaustion of administrative relief available to a party is necessary before the party can seek redress in the courts. S.C. Code §§ 12-56-63, -65, & -67; *see also Good v. Kennedy*, 291 S.C. 204, 207, 352 S.e.2d 708, 7111 (Ct. App. 1987) (stating a statutory condition precedent is jurisdictional). Because the process and procedure established by the SDCA were not followed by Plaintiffs, they are jurisdictionally barred from bringing this action.

Plaintiffs' Amended Complaint is simply not an action or appeal contemplated by the SDCA. It is not a procedural step in the chain of due process prescribed by the Act. In the Amended Complaint, the Plaintiffs admit that the debt was owed and the "transactions are not in dispute." (Ex. A, ¶ 27.) All issues that would have allowed the Plaintiffs to challenge that they "do not owe the money" are an issue of indebtedness that must be resolved by the Hearing Officer. An appeal of that action should have been to the Administrative Law Courts. *See* S.C. Code § 12-56-65(c).

The SDCA does envision circumstances wherein a patient may have a stand alone cause of action against a collecting agency unrelated to the collection of the bad debt. For example, if

one of the Plaintiffs had a malpractice action²⁶ against Self Regional, they would not have to advance that malpractice action against Self Regional before the Hearing Officer. They could continue to pursue their claim in state court in front of a jury. A plaintiff is allowed to bypass the ALJ, however, only if a right to a jury trial already exists. The SDCA does not create its own right to a jury trial. *See* S.C. Code § 12-56-67. No such cause of action has been raised in causes of action 1-8. All issues raised by the Plaintiffs in these causes of action are directly targeted at why they should not pay the money that they owe to the Self Regional through the SDCA and are directly related to issues of indebtedness. Based on the admission in the Amended Complaint that the debt was owed and the "transactions are not in dispute" (Ex. A, ¶ 27), the debtors (Plaintiffs) are not "otherwise entitled to have a jury determine the issue of indebtedness" which is specifically preserved by the SDCA. *See* S.C. Code § 12-56-67. Therefore, this Court does not have jurisdiction to hear these claims 1-8.

The exhaustion of administrative relief available to a party is necessary before the party can seek redress in the courts. S.C. Code §§ 12-56-63, -65, & -67. *See also Good v. Kennedy*, 291 S.C. 204, 207, 352 S.e.2d 708, 7111 (Ct. App. 1987) (stating a statutory condition precedent is jurisdictional). Because the process and procedure established by the SDCA were not followed by Plaintiffs, they are jurisdictionally barred from bringing this action.

4. Res Judicata Prevents Review.

To the extent the named Plaintiffs raised their arguments before the Hearing Officer, then a determination has been made on the merits, and Plaintiffs are barred from raising them here under the doctrines of claim preclusion and issue preclusion. If the Plaintiffs did not agree with the Hearing Officer's determination, they could have appealed to the ALJ. They chose not to do

²⁶ Just to be clear, there is absolutely no hint of that here, and this is an illustrative example only.

so at their own peril. To the extent a defense was applicable and it was not raised, it has been waived. The Plaintiffs raised the statute of limitations and pricing issues before the Hearing Officer. As such, the Amended Complaint raises no new issues not already decided by the Hearing Officer. *See Earle v. Aycock*, 276 S.C. 471, 475; 279 S.E.2d 613, 616 (1981) (administrative decision can have preclusive effect in collateral litigation). As such, the Court is precluded from re-hearing those issues.

5. Plaintiffs Have No Standing.

Defendant also moves for dismissal based on lack of standing. S.C. Code Ann. § 12-56-60(B) specifically states a taxpayer has no property right or property interest in a refund until all amounts due the State and claimant agencies are paid. As stated in the Amended Complaint, Plaintiffs admit Self Regional has not been fully paid. (Ex. A, ¶ 14.) Because, as stated in the statute, "all amounts due" to Self Regional have not been paid, the Plaintiffs have no property right or interest in their refunds, and Plaintiffs have no standing to bring an action for disgorgement of said refunds. As such, the Plaintiffs have no standing to bring a claim for tax refunds in which they have no property right.

Based on the Plaintiffs' failure to establish the required jurisdiction of this Court and based on the Plaintiffs' failure to assert proper standing, the Amended Complaint must be dismissed under Rule 12(b) or, in the alternative, 12(b)(6).

IV. LEGAL ARGUMENT

C. In the Alternative, Plaintiffs' Claim that Debt Cannot be Collected for Services Rendered More than Three Years Ago Fail.

If Plaintiffs attacks on Self Regional's general ability to utilize the SDCA fail, their fallback position is to attack the timing of Self Regional's use of the SDCA. That is, Plaintiffs contend that Self Regional cannot utilize the SDCA to collect any debts that were incurred more than three (3) years before Self Regional initiated the collection process by mailing a notice to the Plaintiffs of its intent to setoff the debt. So, in effect, years after multiple collections utilizing the SDCA, outside the context of the judicial process contemplated by the SDCA to resolve such issues, and after a final adjudication of indebtedness has been made within the SDCA, Plaintiffs now sue using the statute of limitations (an affirmative defense) as a sword to attack and unwind: (1) the final adjudication made under the SDCA (explained above); and (2) the years they silently assented to owing the debt and allowed collections under the SDCA.

For the reasons explained below, the statute of limitations is not applicable to collections under the SDCA. Even if it is: (1) the statute of limitations is an affirmative defense which must be affirmatively asserted, and it was not; or (2) every time a collection occurred under the SDCA without Plaintiffs' protest, an admission occurred, tolling the statute.²⁷

1. The Statute of Limitations is Not Applicable to Collections under the SDCA

A civil action is commenced when a summons and complaint are filed. Statutes of limitations are applicable only to civil actions. S.C. Code § 15-3-20 *et seq.* applies as a defense to "actions." As is set forth specifically in the South Carolina Code:

²⁷ To the extent applicable, Defendant does not concede that Plaintiffs' allegation that the 3 year contract statute of limitation is the appropriate statute of limitation to be applied to an SDCA. This argument is not, however, subject to a motion to dismiss.

SECTION 15-3-20. General rule as to time for commencement.

(A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.

(B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.

S.C. Code Ann. § 15-3-20.

The periods for the commencement of actions other than for the recovery of real property shall be as prescribed in the following sections.

Id. § 15-3-510.

Within three years:

- (1) an action upon a contract, obligation, or liability, express or implied, excepting those provided for in Section 15-3-520;

Id. § 15-3-530.

The SDCA does not require the filing of a civil action, therefore, there are no statutes of limitations applicable to the SDCA. If the matter is not an "action" or "civil action," then the statute of limitations is inapplicable, and any claim premised upon it must fail.

2. The Plain Reading of the Setoff Debt Collection Act Evidences that a Statute of Limitations Defense is Not a Bar to Setoff of State Income Tax Returns under the Act.

The SDCA states all "delinquent debts" are collectable. Nothing in the language of the statute suggests that the age of the debt is relevant. The SDCA specifically states that it is a "collection remedy . . . in addition to any other remedy available by law." S.C. Code §12-56-30(A) (emphasis added). "Claimant agencies may submit for collection under the procedure established by this chapter all delinquent debts which they are owed." S.C. Code §12-56-

30(B) (emphasis added). Further, the term debtor is defined to mean "a person having a delinquent debt or account with a claimant agency which has not been adjusted, satisfied, or set aside by court order, or discharged in bankruptcy." S.C. Code §12-56-10(3) (emphasis added). The indebtedness being too old is not one of the listed exceptions to the "delinquent debt or account" which makes someone a debtor under the Act.

In defining "delinquent debts," the Act specifically enumerates which debts are and are not collectable under the Act. The SDCA defines "delinquent debt" as:

(4) "Delinquent debt" means a sum due and owing a claimant agency, including collection costs, court costs, fines, penalties, and interest which have accrued through contract, subrogation, tort, operation of law, or other legal theory regardless of whether there is an outstanding judgment for that sum which is legally collectible and for which a collection effort has been or is being made. It does not include sums owed to county hospitals when the hospital and the debtor have entered into a written payment agreement and the debtor is current in meeting the obligations of the agreement. "Delinquent debt" also includes any fine, penalty, cost, fee, assessment, surcharge, service charge, restitution, or other amount imposed by a court or as a direct consequence of a final court order which is received by or payable to the clerk of the appropriate court or treasurer of the entity where the court is located.

S.C. Code §12-56-10(4) (emphasis added)

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citation omitted). The text of a statute as drafted by the legislature is considered the best evidence of the legislative intent or will. *See id.* "If a statute's language is plain, unambiguous, and conveys a clear meaning, then the rules of statutory interpretation are not needed and a court has no right to impose another meaning." *Strickland v. Strickland*, 375 S.C. 76, 88, 650 S.E.2d 465, 472 (2007) (citation omitted). "The Court will give words their plain and ordinary meaning, and will not

resort to a subtle or forced construction that would limit or expand the statute's operation." *Harris v. Anderson Cnty. Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) (citation omitted).

The SDCA defines "delinquent debt" to mean a sum due and owing a claimant agency regardless of whether there is an outstanding judgment for that sum which is legally collectable²⁸ and for which a collection effort has been made. Those allegedly barred by the statute of limitations are not excluded from the definition of a delinquent debt. In addition, the SDCA specifically describes the act that can be used by claimant agencies in addition to any other remedy, including collection by civil action, and is available for the collection of "all delinquent debts which they are owed." S.C. Code §12-56-30(B) (emphasis added). There is no limitation set forth in the SDCA based on the age of the debt. There is also no limitation on the number of years the SDCA can be used to collect delinquent debt. Therefore, there is no applicable statute of limitations argument to be made for debt owed. The SDCA was clearly intended by the legislature to be a means by which state entities can recover for debts owed.

3. The Statute of Limitations is an Affirmative Defense; As Such, It was Waived when Plaintiffs Failed to Raise It in a Protest under the Act; or Alternatively, the Failure to Contest Owing the Debt in a Proceeding that Leads to a Final Adjudication Creates an Admission of the Debt, Sufficient to Restart the Statute of Limitations.

Even assuming *arguendo*, if the statute of limitations were applicable to SDCA proceedings, which Self Regional denies, the statute of limitations must be raised as an affirmative defense during the protest hearings or it is waived. Pursuant to the SDCA:

²⁸ The common usage of the term "legally collectable" are those elements of damages that a contract calls for or provides, or which the tort or statutory claim allow. See e.g., *Byes v. Telecheck Recovery Servs.*, 173 F.R.D. 421 (E.D. La. 1997) ("Whether this fee was legally collectable depends on an individual factual determination of whether the collection of the fee was authorized by agreement creating the debt or by law."); see also *Munson S.S. Line v. Horace Turner & Co.*, 202 Ala. 574 (Ala. 1919) (We are of the opinion that the amount of recovery should not exceed what would be legally collectable under the policy of insurance, and that interest on such amount is properly allowed.").

(A) A debtor who protests the debt shall file a written protest with the claimant agency at the address provided in the claimant agency's notification of intention to set off. The protest must be filed within thirty days of the date of the notice of intention to set off and must contain the debtor's name, address, and tax identification number, identify the type of debt in dispute, **and give a detailed statement of all the reasons that support the protest.** The requirements of this section are jurisdictional.

S.C. Code Ann. § 12-56-63 (emphasis added). As stated above, the protest procedure established by the SDCA is considered a final adjudication by the courts. *See Hom v. SCESC*, 00-ALJ-30-0100-CC (Admin. L. Ct. July 6, 2000) (Ex. D.).

There is no question that the statute of limitations is an affirmative defense. Rule 8(c), SCRCP. Failure to plead an affirmative defense is a waiver of the right to assert it. *See, e.g., Adams v. B & D, Inc.*, 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989). The statute of limitations is a shield. It is not a sword.

A plaintiff is not barred from bringing a claim because it is outside the statute of limitations. A defendant has the burden of asserting it in defense to an untimely claim. "The fact that the applicability of the statute of limitations is apparent on the face of the petition or complaint does not prevent the petition or complaint from stating a cause of action if defendant does not take advantage of limitations by his pleadings." 54 CJS *Limitations of Actions* § 269 (citing *Burch v. Wofford-Terrell Co.*, 184 S.E. 419 (Ga. Ct. App. 1936)).

Despite the requirement to do so, the seven (7) named Plaintiffs in this case never contested or protested any collection under the SDCA (under a statute of limitations argument or otherwise) until the 2011 (2012 tax year) set off. (Ex. A, ¶¶ 3-5). Therefore, they did not raise the affirmative defense of a statute of limitations for any other years in which the SDCA was used to collect the delinquent debt at issue.

Now, years later, and after silently assenting to the debt year after year, the Plaintiffs want to assert that the Defendant's attempt to collect a debt allegedly outside of the statute of limitations is an abuse of process.²⁹ Plaintiffs' premise is completely wrong. They cannot sleep on their rights year after year and then suddenly claim the statute of limitations as a sword. In those years Plaintiffs slept on their rights (to the extent the statute of limitations is a defense), Plaintiffs were admitting the debt in what it obviously believes is a judicial or quasi-judicial setting. Because the proceedings of the SDCA operate as a final adjudication, each year the Plaintiffs acquiesced to the setoff of their tax returns, they were admitting the debt. Admitting the debt resets the statute of limitations. 51 Am. Jur. 2d *Limitation of Actions* §§ 291 & 292. There can be no more clear and certain admission than one made pursuant to a judicial proceeding that has the force and effect of a final adjudication. *Id.* § 292 at n.18.

In fact, the SDCA suggests the same interpretation of Plaintiffs' silence or acquiescence. The SDCA reads that the due process notification and contested hearing need only be given once to a debtor. **Once a determination is made that the debt is due and owing, the claimant agency may set-off the state tax return in successive years until the debt is fully paid.** S. C. Code Ann. § 15-3-510 (the debtor is notified of the claimant agency's intent to submit the debt to the Department of Revenue to be set off against an individual's tax refunds "until the debt is paid in full"). That is consistent with an interpretation that Plaintiffs' conduct is an admission of the

²⁹ According to the Plaintiffs' theory, every time a plaintiff brings a claim allegedly outside of the statute of limitations, the defendant should assert an affirmative defense and a counter-claim for abuse of process for bringing the claim in the first place. In essence, what the Plaintiffs are attempting to do in this case is to switch the burden of proof on the affirmative defense because they did not raise it at a protest hearing in prior years. See *Leventis v. South Carolina Dep't of Health & Envtl. Control*, 340 S.C. 118, 133 (Ct. App. 2000) (quoting 2 Am. Jur. 2d *Administrative Law* § 360 (1994) ("Generally, the burden of proof is on the party asserting the affirmative issue in an adjudicatory administrative proceeding."); 73A C.J.S. *Public Administrative Law and Procedure* § 128 (1983) ("In administrative proceedings, the general rule is that an applicant for relief, benefits, or a privilege has the burden of proof, and the burden of proof rests upon one who files a claim with an administrative agency to establish that required conditions of eligibility have been met. It is also a fundamental principle of administrative proceedings that the burden of proof is on the proponent of a rule or order, or on the party asserting the affirmative of an issue.")). Plaintiffs have a fanciful view of the legal system.

debt, as well as Defendant's assertion that procedures under the SDCA result in a final adjudication.

To accept any other interpretation of the SDCA requires this Court to determine that the legislature intended less than full collection on delinquent debt. It is the rare case for a hospital bill to be paid off in three (3) or less tax refund payments. The burden of raising defenses to collection was on each Plaintiff at the time of the first possible protest hearing. Each chose not to do so at his/her peril. As such, all claims for the collection of debt—in alleged violation of the statute of limitations—must be dismissed, as Plaintiffs did not raise the affirmative defense during the protest hearings for any year other than 2011 (2012 tax year), and by the time they did so then, it was too late.

It is clear, therefore, that all claims based on an alleged statute of limitations issue based on the age of the debt collected by Self Regional should be dismissed.

IV. LEGAL ARGUMENT

D. In the alternative, each Cause of Action Alleged Fails to Meet the Standard Set Forth in Rule 12(b)(6) in its Own Capacity.

1. The Abuse of Process Claim Fails Because There is no "Action" or "Process" that is not Immune from Suit.

a. No "Action"

As stated above, if the SDCA creates a judicial, quasi-judicial, or administrative action of a judicial or quasi-judicial nature, then Defendant is entitled to absolute immunity under the Tort Claims Act and the common law. If the SDCA does not create a judicial or quasi-judicial action, then there is no "action" and no "process." As such, Plaintiffs cannot maintain an action premised upon an abuse of "process" theory or rely upon a statute of limitations theory that is premised upon a defense to an "action."

To sustain a claim for abuse of process, a "judicial process must in some manner be involved." *Food Lion, Inc. v. United Food & Commercial Workers Int'l.*, 351 S.C. 65, 567 S.E.2d 251, 253 (Ct. App. 2002). This is axiomatic. To say much more belabors the point. If there is no action, then there was no process. If no process, Plaintiffs cannot sustain an action for abuse of process.³⁰

The essential elements of abuse of process are: (1) an ulterior motive and (2) a willful act in the use of the process not proper in the conduct of proceedings. *Huggins v. Winn-Dixie, Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967). There is no liability where a statutorily-prescribed process has been carried out to its authorized conclusions. *Id.*; *Rycroft v. Gaddy*, 281 S.C. 119, 314 S.E.2d 39 (Ct. App. 1984) (holding no ulterior purpose was shown where

³⁰ As explained above, Plaintiffs' abuse of process cause of action contends that Defendant should be liable because it brought an "action" despite knowing that Plaintiffs had a foreseeable affirmative defense (the statute of limitations). Interestingly, this is exactly what Plaintiffs have done here—they brought a cause of action for abuse of process, even though Defendant has a foreseeable affirmative defense of sovereign immunity that would be a complete bar to the claim. If this legal theory is correct, Plaintiffs have engaged in abuse of process.

defendant's use of subpoena to obtain bank records was for the "entirely legitimate purpose" of gathering evidence). Further, an abuse of process requires "the employment of [a] legal process for some purpose other than that which it was intended by the law to effect . . . the improper use of a regularly issued process." *Food Lion, Inc.*, 351 S.C. at 69–70, 567 S.E.2d at 253 (quoting *Huggins*, 249 S.C. at 210, 153 S.E.2d at 695). As explained by the Court of Appeals:

[T]he essence of abuse of process centers on events **outside** of the process, namely: "The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or a club. There is, in other words, a form of extortion . . ."

Swicegood v. Lott, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008) (first emphasis added) (quoting *Huggins*, 249 S.C. at 209, 153 S.E.2d at 694).

There is no allegation in the Amended Complaint that Defendant used any "process" to obtain a collateral advantage that is based on anything other than baseless allegations and conjecture. Defendant used the SDCA, and is alleged to have used it, for the precise purpose for which it was intended — to collect all or a portion of the money Plaintiffs never paid. Plaintiffs' allegation Defendant obtained a collateral advantage appears to be based on their allegation that debt was collected from joint tax refunds (specifically allowed by S.C. Code § 12-56-62) beyond the alleged statute of limitations (argued fully below). (Ex. A, ¶ 40.) In conclusory fashion, Plaintiffs claim "defendant utilized the legal process to intimidate, harass and coerce the plaintiffs in order to obtain a collateral advantage." (Ex. A, ¶ 42). This is opinion pleading, and further, a close reading establishes that that no collateral advantage has been pled. No collateral advantage is mentioned, only that Plaintiffs believe Defendant had one or hoped to achieve one.

Further, this statement in the Amended Complaint is belied by the other sections of the Amended Complaint, which make clear that Defendant utilized the SDCA to collect the debt.

So, even if true that "defendant utilized the legal process to intimidate, harass and coerce the plaintiffs in order to obtain [an unmentioned] collateral advantage," Plaintiffs still have no claim for abuse of process. Under an abuse of process cause of action "[l]iability exists not because a party merely seeks to gain a collateral advantage by using some legal process, but because the collateral objective was its sole or paramount reason for acting." *Food Lion, Inc.*, 351 S.C. at 75, 567 S.E.2d at 256. Nowhere in the Amended Complaint is this pled.

2. The Second Cause of Action for Unjust Enrichment/Conversion Must Be Dismissed

a. No cause of action exists based on the Defendant's exercise of a legal right or from a relationship between a creditor and a debtor under a conversion action.

South Carolina case law is clear that a cause of action for conversion cannot arise from a defendant's exercise of a legal right over property, or from a relationship between a creditor and a debtor. *See Owens v. Zippy Mart of South Carolina, Inc.*, 268 S.C. 383 (S.C. 1977) (the court held that conversion was a wrongful act and could not arise from the exercise of a legal right. The court concluded that the relationship between the parties was one of creditor and debtor. An action based on conversion of the funds representing the debt was improper.)

In this case, the Plaintiffs have admitted the transactions occurred and they were indebted to Self Regional for the services they received. The Plaintiffs have also specifically admitted that "[p]laintiffs and Defendants are debtors and creditors." (Ex. A, ¶ 27.) The collection of the debt at issue occurred through the use of statutory authority, the SDCA. Conversion is a wrongful act and simply cannot arise from the exercise of a legal right. *Castell v. Stephenson Finance Co.*, 244 S.C. 45, 135 S.E. (2d) 311 (1964); *General Motors Acceptance Corp. v. Hanahan*, 146 S.C. 257, 143 S.E. 820 (1928). Thus, the Plaintiffs may not recover from the Defendant on their conversion claims if the Court finds that there is merely the relationship

of debtor and creditor between the Plaintiffs and the Defendant or if you find that the Plaintiffs' claims are based on the SDCA, which the Defendant had a right to utilize.

b. Plaintiffs have no legal right to the funds at issue and have other available avenues of relief which preclude a cause of action for unjust enrichment.

A fundamental element of any claim for unjust enrichment (or conversion) requires a plaintiff prove he has the legal right to possess the property. *Meehan v. Newton*, 2011 S.C. App. Unpub. LEXIS 395 (S.C. Ct. App. June 27, 2011) (citing *Moseley v. Oswald*, 376 S.C. 251, 254, 656 S.E.2d 380, 382 (2008)). Here, Plaintiffs' claim of unjust enrichment concerns Plaintiffs' state income tax return. Plaintiffs allege it is their property and Defendant took it.

The claim fails because Plaintiffs have no property interest in their income tax return. The SDCA specifically addresses and makes abundantly clear that a debtor has no property right or interest in debt. S.C. Code § 12-56-60(B).

In addition, under an equitable argument, a defendant has a right to demand a setoff and/or payment for all monies owed. There can be no unjust enrichment for the collection of debt from monies owed.

It is also axiomatic that equitable relief is only available where there is no adequate remedy at law. *See EllisDon Constr., Inc. v. Clemson Univ.*, 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011) (equity is available when a party does not have an adequate remedy at law); *see Key Corp. Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 61, 644 S.E.2d 675, 678 (2007) ("While equitable relief is generally available where there is no adequate remedy at law, an adequate legal remedy may be provided by statute."). To the extent Plaintiffs should be permitted to skirt their legal obligation to pay for services rendered, which Defendant denies, the law afforded them a forum to protest their indebtedness. The SDCA specifically details Plaintiffs'

“remedy” per the statute.³¹ Under the SDCA, the debtor has a right to protest, a right to a hearing, a right to an appeal, and a right to seek reconsideration: S.C. Code § 12-56-65. There is, therefore, an available remedy at law – as established by statute – that prohibits a cause of action for unjust enrichment for the collection of debt through the SDCA. A party failing to fulfill the requirements of its legal remedy cannot later come to the courts complaining of hardship, seeking an equitable remedy. *JASDIP Props. SC, LLC v. Estate of Richardson*, 395 S.C. 633, 643 (S.C. Ct. App. 2011).

Plaintiffs’ cause of action for unjust enrichment should also be dismissed on the additional ground that equitable relief is not available when the parties have entered into an express contract and/or have an alternative remedy available. The duty to make restitution arises when one party receives property or benefits unjustly at the expense of another. 66 Am. Jur. 2d, Restitution and Implied Contracts § 3 (1997). The theory of unjust enrichment, however, arises not out of express contractual obligations, but out of “quasi-contract, that is, a contract arising out of the law of natural immutable justice and equity.” *Ellis v. Smith Paving & Grading, Inc.*, 294 S.C. 470, 473, 366 S.E.2d 12, 14 (Ct. App. 1988) (internal quotations omitted). The court cannot impose implied obligations, however, where the parties had an express contractual agreement on the same subject matter. “[A]n express contract precludes the existence of a contract implied by law or a quasi-contract.” 66 Am Jur. 2d, Restitution and Implied Contracts § 6 (1997). Indeed, “no agreement can be implied where there is an express one existing.” *Id.* South Carolina courts agree: “on a complaint setting up an express contract there cannot be

³¹ Again, it feels awkward to even suggest Plaintiffs should be entitled to a remedy at law or equity. Plaintiffs failed and refused to pay for services they received. They then sat on their rights (to the extent they had any) and permitted setoffs to occur for years. Then, after still not paying, and forcing the hospital to spend years receiving a trickle of revenue for services long since rendered, Plaintiffs now affirmatively plead they need “relief” from having to pay their obligations. There is nothing “equitable” about the stunt Plaintiffs are trying to pull. Core principles of equity suggest this court should not aid them in accomplishing their objectives.

recovery on quantum meruit.” *Stanley Smith & Sons v. Limestone College*, 283 S.C. 430, 435, 322 S.E.2d 474, 478 (Ct. App. 1984) (citing *Fitzsimmons v. Guanahani Co.*, 16 S.C. 192 (1881)). The Plaintiffs themselves have pled that an express contractual agreement existed (fifth cause of action) regarding their obligation to pay the delinquent debt. Therefore, there can be no quasi-contractual liability. As such, the cause of action for the unjust enrichment causes should be dismissed.

3. The Fourth Cause of Action for Demand for Refund Must be Dismissed.

Plaintiffs’ fourth cause of action for demand for refund is based on the SDCA’s §12-56-65(H), which states “[a] debtor may make a claim for refund of an amount collected pursuant to this chapter within one year from the date the amount is collected, in the same manner as seeking relief from a hearing officer’s determination pursuant to Section 12-56-65.” As argued in Section IV, B, 3, p. 25 above, §12-56-65 requires an ALJ to hear all appeals of a denial of protest unless the “debtor otherwise is entitled to have a jury determine the issue of indebtedness.” SC Code § 12-56-67. If a cause of action for refund exists at all, therefore, it is one that jurisdictionally must be heard by the ALJ, unless the Plaintiffs’ claim already afforded them a right to a jury trial, which has not been established.³²

4. The Declaratory Judgment Cause of Action Must be Dismissed.

Plaintiffs’ first cause of action is one for a declaratory judgment. Plaintiffs misunderstand the purpose of a declaratory judgment. It is not available as a claim unless there is a justiciable controversy to be resolved. *See* S.C. Code Ann. § 15-53-30; *Graham v. State*

³² In the alternative, the Amended Complaint was filed on June 6, 2012. Therefore, all claims for refund are limited to those payments received by the claimant agency from the Department of Revenue on or after June 6, 2011 (the date of the filing of the Amended Complaint) and only if those debts were protested and heard by the Hearing Officer in the time period provided by the statute.

Farm Mut. Auto. Ins. Co., 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). In order for Plaintiffs to state a cause of action under the Declaratory Judgment Act, Plaintiffs must present "a concrete issue . . . a definite legal assertion of legal rights and a positive legal duty which is denied by the adverse party." *Graham*, 319 S.C. at 71, 459 S.E.2d at 845 (citing *Power v. McNair*, 255 S.C. 150, 177 S.E.2d 551 (1970)). In contrast, if Plaintiffs are merely seeking an "advisory opinion" regarding an interpretation of the SDCA, their cause of action must be dismissed. *Blue Ridge Elec. Co-op v. Combined Utility Sys. of City of Easley*, 279 S.C. 135, 139–40, 303 S.E.2d 91, 94. To the extent Plaintiffs' declaratory judgment action is seeking a ruling on conduct that has already happened, a declaratory judgment is not appropriate. To the extent Plaintiffs have brought a declaratory judgment to determine rights in future tax years, there has not been pled any allegation that suggests that the parties are at odds in future tax years (that Self Regional has indicated an intent to setoff again, or that Plaintiffs intend to continue their willful indifference to their indebtedness). There is no pending case or controversy for which the declaratory judgment can remedy.

5. Plaintiffs' Fifth Causes of Action for Breach of Contract Must be Dismissed Because the Plaintiffs Have Failed to Allege a Breach on the Part of Defendant or Performance on Their Parts³³

Plaintiffs' fifth cause of action purports to allege a claim for breach of contract. However, Plaintiffs fail to state a claim because they have failed to allege a breach on the part of Defendant; the Amended Complaint also fails to allege Plaintiffs have fully performed their parts. Plaintiffs allege that they entered into "express 'form contracts'" with Defendant. (Ex. A,

³³ Plaintiffs purport to allege claims for breach of contract, breach of duty of good faith and fair dealing, breach of charitable trust and unfair trade practices. It appears that these claims are simply a re-casting of the previously asserted claims arising out of the disputed collections under the SDCA. For reasons explained in detail above, except for so much of Plaintiffs' claims as may seek damages arising from collections made against Plaintiffs' tax returns for the 2011 (2012) tax year, all of Plaintiffs' claims are barred for failure to exhaust administrative remedies.

¶ 55.) Those "form contracts" are attached to the Amended Complaint as Exhibit A, and therefore, are properly considered as part of the pleadings for purposes of Rule 12(b)(6). (Ex. A, ¶ 15.)

The "form contracts" are documents entitled "Conditions of Admission or Treatment" (hereinafter "Consent to Treat") executed by the various Plaintiffs. The operative language of the Consent to Treat obligates the patient "to pay all Hospital accounts in accordance with the regular rates and terms of the Hospital." (Ex. A, Amended Complaint at Exhibit A.)

At the outset, Self Regional would note that Plaintiffs cannot, and for that matter have not even attempted to, allege performance on their part. Plaintiffs' plain and unambiguous obligation under the Consent to Treat is to pay for services. Plaintiffs make no allegation that they have done so. Moreover, the very gravamen of their lawsuit arises from collection efforts Defendant has been forced to pursue against Plaintiffs for their failure to pay for the health care services received. It is axiomatic that one who has failed to perform under a contract cannot recover against the other party for breach thereof.

The Amended Complaint does not even allege that Defendant breached the express terms of the Consent to Treat. Rather, Plaintiffs appear to allege breach of an implied term purportedly requiring Defendant to charge Plaintiffs "no more than a fair and reasonable charge." (Ex. A, ¶ 55.) Self Regional believes it did charge Plaintiffs fair, reasonable, and the prevailing rates for the services rendered, but this is immaterial because all Self Regional promised to charge were its "regular rates," which it most certainly and unequivocally did. Plaintiffs do not contest otherwise. Plaintiffs merely claim that Self Regional's "regular rates" were not "fair and reasonable" rates. In effect, Plaintiffs are trying to alter the words of the express contract they admit forms the basis of their relationship with the hospital. While South Carolina courts

recognize implied terms in an agreement, those implied terms must not contradict the wording of the express terms of the agreement. Here, Plaintiffs seek a wholesale substitution of terms.

A closer examination shows Plaintiffs do not even argue a disparity between the hospital's "regular rates," which it was contractually permitted to charge, and "fair and reasonable" rates which Plaintiffs claim should have been charged. Instead, Plaintiffs compare the "regular rates" with the rates Self Regional charged insured patients for the same procedure. (Ex. A, ¶ 57.) In other words, they do not allege that Defendant breached the contract by charging Plaintiffs more than they agreed to pay. Rather, it allegedly breached the contract by not discounting its fees to some undefined more "reasonable" rate.

Plaintiffs' theory has been squarely addressed and flatly rejected as a matter of law by other jurisdictions facing identical allegations. The plaintiffs in *Harrison v. Christus St. Patrick Hospital*, 430 F.Supp.2d 591 (W.D. La. 2006) made the same allegation concerning the exact same contract language. The court explained its rejection of plaintiffs' theory as follows:

... Likewise, the plaintiff's claims for breach of contract and a purported duty of good faith and fair dealing fails to state a claim. The terms of the contract are clear and unambiguous. The term "regular rates and terms of the hospital" does not create an open-ended contract. Thus, no analysis of whether the charges were "fair and reasonable" is required. Pure common sense demands the conclusion that it would be virtually impossible for a health care provider to provide a complete list of every possible service to be rendered an emergency patient prior to admission. Even were it possible, the sheer volume would render meaningless any "emergency" treatment. Such an interpretation of the contract would undermine any hospital's ability to provide emergency services, in a crucially timely fashion, to its patients.

Id. at 595-96.

The Georgia Court of Appeals likewise rejected plaintiffs' rationale in *Cox v. Athens Regional Medical Center, Inc.*, 631 S.E.2d 792 (Ga.App. 2006). That court premised its holding

on a generally accepted maxim – where the terms of a written contract are plain and unambiguous, the courts will not attempt to construe the contract to give it a different meaning. The contract language at issue in that case was “the rates and terms of the hospital” which the court held to be unambiguous and not subject to judicial construction as an open price term. *See also, Nygaard v. Sioux Valley Hosp. & Health Sys.*, 731 N.W.2d 184 (S.D. 2007) (interpreting the term “pre-set charges,” the court found that “because the contracts spoke to the issue of price, the law does not permit imputation of different, implied price terms for what patients later claimed were reasonable values of the services provided”).

In *DiCarlo v. St. Mary's Hosp.*, 530 F.3d 255 (3d Cir. 2008), the Third Circuit Court of Appeals offered a pragmatic rationale for rejecting similar claims. In that case, the payment agreement simply obligated the patient to pay “all charges and collection costs for services rendered.” In rejecting plaintiffs’ claims, the court asserted that:

The price term “all charges” is certainly less precise than price term of the ordinary contract for goods or services in that it does not specify an exact amount to be paid. It is, however, the only practical way in which the obligations of the patient to pay can be set forth, given the fact that nobody yet knows just what condition the patient has, and what treatments will be necessary to remedy what ails him or her. Besides handing the patient an inches-high stack of papers detailing the hospital's charges for each and every conceivable service, which he or she could not possibly read and understand before agreeing to treatment, the form contract employed by St. Mary's is the only way to communicate to a patient the nature of his or her financial obligations to the hospital. Furthermore, “it is incongruous to assert that [a hospital] breached the contract by fully performing its obligation to provide medical treatment to the plaintiff[] and then sending [him] [an] invoice[] for charges not covered by insurance.”

Id. at 264 (quoting, *Burton v. William Beaumont Hosp.*, 373 F.Supp.2d 707, 719 (E.D.Mich.2005)).

In sum, the fifth cause of action fails on its face because Plaintiffs fail to allege a breach of the express terms of the contract by Defendant. They also fail to allege performance on their part and actually admit their own breach. Plaintiffs attempt to allege breach of an implied term, but they fail to plead facts sufficient to support such an allegation in the first instance. Moreover, previous attempts to proffer this same argument have been squarely rejected as a matter of law in a variety of jurisdictions. Plaintiffs' claim, though perhaps creative, is meritless, and it should be dismissed.

6. The Breach of Duty of Good Faith and Fair Dealing Causes of Action Fail Because There can be no Claim for Breach of an *Implied* Contractual Provision based on Conduct Performed under an *Express* Contractual Right.

Plaintiffs' sixth cause of action purporting to assert a breach of duty of good faith and fair dealing is, in most respects, simply a reiteration of that portion of the fifth cause of action which relies upon the attempted allegation of breach of implied terms. This argument has been thoroughly addressed above, and the sixth cause of action should be dismissed for the same reasons.

Additionally, this cause of action fails because there can be no claim for breach of an *implied* contractual provision based on conduct performed under an *express* contractual right. As the South Carolina Supreme Court has stated:

There exists in every contract an implied covenant of good faith and fair dealing. *Tharpe v. G.E. Moore Co.*, 254 S.C. 196, 174 S.E.2d 397 (1970). However, there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do.

Adams v. G.J. Creel and Sons, Inc., 465 S.E.2d 84, 85 (S.C. 1995).

Plaintiffs accuse Defendant of breach by way of its charging them for services according to the "regular rates and terms of the Hospital" as opposed to offering them a discount. Plaintiffs are necessarily attempting to establish a breach of an implied duty arising from the Defendant's

exercising its express rights under the contract. This is clearly contrary to South Carolina law, and their alleged cause of action cannot stand on this basis.

Plaintiffs add one (1) additional component to their claim that must be separately addressed. Plaintiffs allege that:

Defendants [*sic*] further breached the duty of good faith and fair dealing by failing to provide emergency room medical care without regard to their ability to pay by forcing the Plaintiffs and the Class to execute agreements to pay unspecified, unreasonable, undiscounted costs for the medical care. Defendants [*sic*] would not treat the Plaintiffs and the Class members until the form contracts were signed guaranteeing the payment for medical care.

Ex. A, ¶ 69.

This assertion is untenable as pled. It is axiomatic that the duty of good faith and fair dealing arises from a contract, and where there is no contract, there is no such duty. The contract, as alleged by Plaintiffs, is the Consent to Treat. The allegation contained at paragraph 69 is that Defendant refused to render care to Plaintiffs until they executed the Consent to Treat. Based on Plaintiffs' allegations, the alleged act of breach preceded the existence of a contract.

The duty which Plaintiffs attempt to accuse Defendant of breaching is the purported duty "to provide emergency room medical care without regard to their ability to pay." The only way such a contractual duty could have arisen under the facts as pled would have been if a contract arose between Plaintiffs and Defendant solely by virtue of Plaintiffs having arrived at Defendant's facility and requested treatment. This notion is of course absurd, and no allegation to this effect is made.

The fact of the matter is that the only legal duty of the kind described at paragraph 69 of the Amended Complaint is a statutory duty under the Emergency Medical Treatment and Active Labor Act ("EMTALA"), 42 U.S.C. § 1395dd. Plaintiffs do not allege an EMTALA claim for

good reason, as they have no basis to do so.³⁴ Plaintiffs cannot allege a duty which arises exclusively by operation of statute while evading the pleading requirements thereunder by recasting the same claim under a nebulous and ill-conceived contract claim.

For all of these reasons, the sixth cause of action should be dismissed.

7. The Breach of Charitable Trust Fails Because No Charitable Trust is Created by Virtue of a 501(c)(3) Status.

The operative allegation of this claim appears at paragraph 72 of the Amended Complaint. There, Plaintiffs allege Defendant "entered into a public charitable trust to provide mutually affordable medical care to its uninsured patients" by virtue of its tax exempt status under 26 U.S.C. § 501(c)(3).

Plaintiffs' theory is not novel. In the mid 2000s, literally dozens of lawsuits were filed throughout the country attempting to recover against a panoply of hospitals for allegedly unfair pricing. The common thread among those suits was the allegation that the hospitals created charitable trusts by accepting 501(c)(3) status and breached that trust by allegedly over-charging (or more to the point, not providing discounts to) patients who were uninsured yet ineligible for Medicare or Medicaid. This is the same way Plaintiffs describe themselves and their claim against the hospital.

Uniformly, the courts rejected Plaintiffs' theory on one or more of the following grounds:

(1) § 501(c)(3) does not create a private right of action; (2) § 501(c)(3) does not give rise to a charitable trust; and (3) even if a charitable trust arose, Plaintiffs would have not standing to

³⁴ Among other reasons, EMTALA expressly allows hospitals to require registration prior to treatment and affords remedies only to persons who suffer personal injury as the result of delay in or denial of treatment, which is not alleged in this case. *See, e.g., Sabeta v. Baptist Hospital of Miami, Inc.*, 410 F.Supp.2d 1224 (S.D.Fla. 2005).

enforce it.³⁵ See, e.g., *Hutt v. Albert Einstein Med. Ctr.*, 2005 U.S. Dist. LEXIS 21548, at 15-19 (E.D. Pa. Sept. 28, 2005). (Ex. D.)

a. **No Private Right of Action (and Absence of Jurisdiction)**

Section 501(c)(3) does not create a private right of action for enforcement. "Private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). No private right of action exists unless a statute indicates Congress' intent to create one, and "the courts may not create a private cause of action when the statute

³⁵"Since June of 2004, attorneys all over the country have initiated lawsuits against not-for-profit hospitals, alleging that they have overcharged uninsured patients, violating their tax-exempt status. These suits have been filed in twenty-six states in both federal and state court. The cases allege that not-for-profit hospitals have failed in their duty to provide a charitable service to the community, which is required to maintain their favored tax status." 26 Quinnipiac L. Rev. 173, 203-04 (2007). "For cases dismissing federal claims, see *Grant v. Trinity Health-Mich.*, 390 F. Supp. 2d 643, 658 (E.D. Mich. 2005); *Hutt v. Albert Einstein Med. Ctr.*, No. 04-03440, 2005 U.S. Dist. LEXIS 21548, at 6; *Feliciano v. Thomas Jefferson Univ. Hosp.*, No. 04-CV-04177, 2005 U.S. Dist. LEXIS 21565, at 21 (E.D. Pa. Sept. 28, 2005); *McCoy v. E. Tex. Med. Ctr. Reg'l Healthcare Sys.*, No. 2:04-CV-223, 2005 U.S. Dist. LEXIS 19416, at 29-30 (E.D. Tex. Aug. 31, 2005); *Nash v. Lee Mem'l Health Sys.*, No. 204 CV369FTM29DNF, 2005 WL 2043642, at 8 (M.D. Fla. Aug. 25, 2005); *Kabeller v. Orlando Reg'l Healthcare Sys., Inc.*, No. 6:04-cv-1106-Orl-19DAB, 2005 U.S. Dist. LEXIS 20219, at 5 (M.D. Fla. Aug. 11, 2005); *Cygan v. Resurrection Med. Ctr.*, No. 04 C4168, 2005 U.S. Dist. LEXIS 19867, at 5 (N.D. Ill. July 27, 2005); *Gardner v. N. Miss. Health Servs.*, No. 1:04cv235, 2005 WL 1312753, at 5 (N.D. Miss. May 31, 2005); *Amato v. UPMC*, 371 F. Supp. 2d 752, 759 (W.D. Pa. 2005); *Ellis v. Phoebe Putney Health Sys., Inc.*, No. 1:04-CV-80(WLS), 2005 U.S. Dist. LEXIS 19935, at 15 (M.D. Ga. Apr. 8, 2005); *Corely v. John D. Archibold Mem'l Hosp., Inc.*, No. 1:04-CV-110(WLS), 2005 U.S. Dist. LEXIS 8057, at 20 (M.D. Ga. Mar. 31, 2005); *Watts v. Advocate Health Care Network*, No. 04 C4062, 2005 U.S. Dist. LEXIS 7418, at 14-15 (N.D. Ill. Mar. 30, 2005); *Valencia v. Miss. Baptist Med. Ctr., Inc.*, 363 F. Supp. 2d 867, 873-76 (S.D. Miss. 2005); *Fields v. Banner Health*, No. CIV-04-1297-PHX-SRB, 2005 U.S. Dist. LEXIS 13481, at 22-23 (D. Ariz. Mar. 23, 2005); *Jellison v. Fla. Hosp. Healthcare Sys., Inc.*, No. 6:04-cv-1021-Orl-28KRS, 2005 U.S. Dist. LEXIS 8036, at 26 (M.D. Fla. Mar. 15, 2005); *Quinn v. BJC Health Sys.*, 364 F. Supp. 2d 1046, 1057 (E.D. Mo. 2005); *Wright v. St. Dominic Health Servs., Inc.*, No. 3:04 CV521LN, 2005 U.S. Dist. LEXIS 8086, at 3 (S.D. Miss. Mar. 1, 2005); *Schmitt v. Protestant Mem'l Med. Ctr., Inc.*, No. 04-CV-00577-DRH, 2005 U.S. Dist. LEXIS 7449, at 28 (S.D. Ill. Feb. 23, 2005); *Sabeta v. Baptist Hosp. of Miami, Inc.*, No. 04-21437-CIV-JORDAN, 2005 U.S. Dist. LEXIS 6132, at 59 (S.D. Fla. Feb. 23, 2005); *Hagedorn v. St. Thomas Hosp., Inc.*, No. 3:04-0526, 2005 U.S. Dist. LEXIS 7259, at 8 (M.D. Tenn. Feb. 7, 2005); *Peterson v. Fairview Health Servs.*, Nos. 04-2973 ADM/AJB, 04-2974 ADM/AJB, 2005 U.S. Dist. LEXIS 1962, at 10 (D. Minn. Feb. 1, 2005); *Daly v. Baptist Health*, No. 4:04 CV789GH, 2005 U.S. Dist. LEXIS 6270, at 14 (E.D. Ark. Jan. 31, 2005); *Washington v. Med. Ctr. of Cent. Ga., Inc.*, No. 5:04-cv-185(CAR), 2005 U.S. Dist. LEXIS 2614, at 26 (M.D. Ga. Jan. 21, 2005); *Shriner v. ProMedica Health Sys., Inc.*, No. 3:04 CV7435, 2005 U.S. Dist. LEXIS 894, at 2 (N.D. Ohio Jan. 21, 2005); *Hudson v. Cent. Ga. Health Servs.*, No. 5:04CV301(DF), 2005 U.S. Dist. LEXIS 2613, at 28 (M.D. Ga. Jan. 13, 2005); *Lorens v. Catholic Health Care Partners*, 356 F. Supp. 2d 827, 835 (N.D. Ohio 2005); *Ferguson v. Centura Health Corp.*, 358 F. Supp. 2d 1014, 1021 (D. Colo. 2004); *Burton v. William Beaumont Hosp.*, 347 F. Supp. 2d 486, 501 (E.D. Mich. 2004) (dismissing all federal claims except for those based on the Emergency Medical Treatment Act and Active Labor Act); *Kizzire v. Baptist Health Sys., Inc.*, 343 F. Supp. 2d 1074, 1085 (N.D. Ala. 2004); *Darr v. Sutter Health*, No. C04-02624WHA, 2004 WL 2873068, at 6 (N.D. Cal. Nov. 30, 2004); see also *Burton v. William Beaumont Hosp.*, 373 F. Supp. 2d 707, 713-24 (E.D. Mich. 2005) (dismissing federal claims under the Emergency Medical Treatment Act and Active Labor Act and state law claims). List compiled in Cohen, *supra* note 61, at 128 n.209." 26 Quinnipiac L. Rev. 173, n. 196 (2007).

displays no such Congressional intent.” *Hutt*, 2005 U.S. Dist. LEXIS 21548, at 15-16. A plain reading of § 501(c)(3) reveals the absence of any language creating a private right of action and clearly demonstrates that there is no Congressional intent to do so expressed within the statute.

Additionally, as explained at Section IV, B, 1, p. 19 and footnote 16 of this brief, *supra*, matters of tax status and enforcement, including 501(c)(3) status, are the exclusive province of the IRS and the entity whose tax status is in question,³⁶ and only those courts upon which jurisdiction is expressly conferred by the tax code have jurisdiction to hear those claims – that would be the United States Tax Court in Washington, DC. For these reasons, Plaintiffs’ seventh cause of action should be dismissed because the claim they seek to allege does not exist as a private cause of action as a matter of law. Moreover, this court is without jurisdiction to hear the claim.

b. No Charitable Trust Arises Under § 501(c)(3)

Courts have already held that no charitable trust is created in the manner Plaintiffs describe. Plaintiffs describe the alleged charitable trust as one requiring Self Regional to provide “mutually affordable” healthcare. In *Ferguson v. Centura Health Corporation*, 358 F.Supp.2d 1014 (D. Colo. 2004), the plaintiffs alleged an obligation arising under § 501(c)(3) to provide “mutually affordable” healthcare. The court therein noted that the phrase “mutually affordable” does not appear in § 501(c)(3), nor in any Treasury regulation, and deduced that the phrase appeared to have been coined by plaintiffs’ counsel.

One of the principal tenants of law pertaining to trusts is that the instrument purporting to give rise to the trust must expressly convey the intent of the settlor to establish the trust. *Lorens v. Catholic Health Care Partners*, 356 F.Supp.2d 827 (N.D. Ohio 2005) (*citing* Rest.2d of Trusts

³⁶ See *Sabeta v. Baptist Hospital of Miami, Inc.*, 410 F.Supp.2d 1224, 1233 (S.D. Fla. 2005) (*citing* 26 U.S.C. §§ 7401, 7428). (“Moreover, the tax code clearly limits the parties in any § 501(c)(3) controversy to the IRS and the entity whose status is in issue.”)

§ 348-49); *see also*, *Amato v. UPMC*, 371 F.Supp.2d 752, 757 (*citing*, Rest. 2d of Trusts § 351) (“[a] charitable trust is created only if the settlor properly manifests an intention to create a charitable trust.”) Plaintiffs contend § 501(c)(3) is the genesis of the charitable trust, but the Amended Complaint does not allege that Congress intended to create a charitable trust in codifying § 501(c)(3). It would not matter if it did, as that is a question of law, and one which has already been decided. Courts have held repeatedly that Congress did not intend to do so. *See, e.g., Ferguson*, 358 F.Supp.2d at 1019; *Amato*, 371 F.Supp.2d at 757; *Lorens*, 356 F.Supp.2d at 834; *Cargile v. Baylor Health Care System*, 2005 U.S. Dist. LEXIS 22141, at 9, (N.D. Tex August 10, 2005) (“Charitable trusts require express language demonstrating a specific intent to create the trust. Section 501(c)(3) does not include such language. Therefore, there is no trust.”) (internal citations omitted). (Ex. E.)

Plaintiffs’ entire seventh cause of action is premised upon the existence of a legal construction, that being a public charitable trust arising from operation of § 501(c)(3), which simply does not exist. It is, therefore, axiomatic that Plaintiffs cannot state a claim for breach of trust that is non-existent as a matter of law, and the cause of action should be dismissed.

c. Plaintiffs Have No Standing to Enforce an Alleged Public Charitable Trust

Plaintiffs’ seventh cause of action is barred for lack of standing. As thoroughly explained by the United States District Court for the Eastern District of Pennsylvania in *Hutt, supra*:

[E]ven if . . . a public charitable trust had been established by section 501(c)(3), Plaintiffs lack standing to enforce their claim. The Restatement (Second) of Trusts provides in pertinent part: “[a] suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust.” Restatement (Second) of Trusts § 391. *See also* Restatement (Second) of Trusts § 391 comment (d) (“[t]he mere fact that . . . members of the public . . . benefit from enforcement of the trust is not a sufficient ground to entitle them to sue”); *Valley*

Forge Historical Soc'y v. Washington Mem'l Chapel, 493 Pa. 491, 426 A.2d 1123, 1127 (Pa.1981) (“[a] person whose only interest in compelling a charitable organization to perform a duty ... to the public is that interest held in common with other members of the public cannot compel the performance of a duty owed by the organization to the public”).

In this case, Plaintiffs allege that the class they hope to represent contains “thousands of individuals and, therefore, is so numerous that joinder is impracticable.” Am. Compl. ¶ 80. Plaintiffs themselves have alleged that they share their breach of public charitable trust claim with so many other persons that they have no interest distinct from other members of the public. Consequently, Plaintiffs' claim fails because they lack standing to sue. *Amato*, 371 F.Supp.2d at 758.

Id. at 18-19.

Just as in *Hutt*, the Plaintiffs' herein allege that they are representatives of “thousands” of patients, none of whom have standing to enforce an alleged public charitable trust. (Ex. A, ¶ 5.) See also, *Lorens*, 356 F.Supp.2d at 834 (“[e]ven if 501(c)(3) did create a charitable trust, plaintiff would be without standing to sue for a breach of such a charitable trust. A member of the public who may benefit from a charitable trust does not have standing to sue on the trust. Rest.2d of Trusts § 391.”); *Ferguson*, 358 F.Supp.2d at 1019 (“the inescapable fact is that even if the hospital defendants are neglecting charitable activities that provide the basis for their exempt status under § 501(c)(3), these plaintiffs have no standing and no right to bring this suit under that statute. The standing requirement and the strict standards for finding an implied right of action are rooted in Constitutional limitations on judicial power. The plaintiffs seek to use this Court as a forum to reform the health care system. The plaintiffs' claims under § 501(c)(3) fail because formulating federal health care policy is not a proper function of an Article III court.”).

It is a well settled matter of federal law that private citizens, simply by way of having been treated at and having been charged for services by a tax exempt hospital, do not have standing to allege claims for breaches of purported public charitable trusts. Likewise, it is well

settled South Carolina law that in this state, "[t]he Attorney General is the proper party to protect the interests of the public at large in the matter of administering or enforcing charitable trusts." *Epworth Children's Home v. Estate of Johnson*, 616 S.E.2d 710, n. 3 (S.C. 2005) (citing, *Furman Univ. v. McLeod*, 120 S.E.2d 865 (S.C. 1961)).

Accordingly, even if a charitable trust existed, Plaintiffs would have no standing to enforce it. Rather, it would be within the authority and discretion of the South Carolina Attorney General to do so. For this reason, the seventh cause of action should be dismissed.

8. UTPA Claims are Barred when the Conduct Complained of is Regulated Conduct.

The Amended Complaint purports to allege violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, ("UTPA") premised on two (2) alleged acts. Those are (1) collecting debts under the SDCA that are more than three (3) years old and therefore untimely under an alleged applicable statute of limitations; and (2) fixing rates for medical services resulting in higher charges to uninsured patients than to insured patients. Both sets of claims are barred as will be explained in detail below.

Both of Plaintiffs' contentions fail to state a claim for which relief can be granted because they are precluded under the "statutory authority" exemption to the UTPA. Plaintiffs' first contention also fails because Plaintiffs erroneously seek to assert a UTPA claim for loss of assets in which they had no legal right or interest.

a. Plaintiffs' UTPA Claim Arising from Application of the SDCA is Barred and Should be Dismissed.

Plaintiffs' UTPA claim arising from the application of the SDCA fails to state a claim for which relief can be granted because (1) it is are precluded under the "statutory authority"

exemption to the UTPA; and (2) it erroneously seeks to assert a UTPA claim for loss of assets in which Plaintiffs had no legal right or interest at the time of the alleged collection.

i. The statutory authority exemption.

Section 39-5-40(a) of the UTPA provides in pertinent part as follows:

Nothing in this article shall apply to:

- (a) Actions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State Law.

This statute has been interpreted and consistently applied to bar UTPA claims arising out of conduct that occurs within the context of a regulatory or statutory scheme. *See, e.g., Trident Neuro-Imaging Laboratory v. Blue Cross and Blue Shield of South Carolina, Inc.*, 568 F.Supp. 1474 (D.S.C. 1983) (claim based upon allegedly wrongful denial of insurance coverage barred where exclusions relied upon by insurer had been approved by the Department of Insurance); *Unisys Corporation v. South Carolina Budget and Control Board*, 551 S.E.2d 263 (S.C. 2001) (transactions under the state Procurement Code are exempt from the UTPA); *Inmed Diagnostic Services, LLC, v. Medquest Associates, Inc.*, 594 S.E.2d 552 (S.C.App. 2005) (exemption precludes UTPA claim arising from allegations of falsity in certificate of need applications submitted to and approved by DHEC because it was up to DHEC, as part of the review process, to consider the truthfulness of the information provided); *South Carolina Dept. of Health and Environmental Control v. Armstrong*, 359 S.E.2d 302, 305 (S.C.App. 1987) (overruling trial court's intrusion upon regulatory process, and holding that "[t]he evaluation of the adequacy of a sewage disposal system is uniquely within the competency of DHEC, not the courts"); *Carr v. United Van Lines*, 345 S.E.2d 734 (S.C.App. 1986) (barring UTPA claim against common

carrier for allegedly unfair provisions in carriage contract where provisions were either required or permitted under tariff regulations of the Interstate Commerce Commission).

As stated above, Plaintiffs allege that Defendant has violated the UTPA by collecting debts under the SDCA that are more than three (3) years old and, therefore, untimely. This claim is untenable because it challenges conduct that is directly authorized and regulated by statutory procedures. In fact, the SDCA process involves multiple layers of governmental authority and review, any one of which is sufficient to remove a transaction involving the SDCA from coverage under the UTPA.

First and foremost, the act of which Plaintiffs complain – recouping money via the SDCA process – is an action expressly “permitted under . . . South Carolina State Law.” § 39-5-40(a). The propriety of a public hospital’s use of the SDCA to collect fees was recently endorsed as a critical component of a debtor hospital’s good faith and lawful plan for adjustment of debts in *In re: Bamberg County Memorial Hospital*, 2012 Bankr. LEXIS 2321 (D.S.C. May 23, 2012) (“[a] significant source of the recovery for creditors is expected to come from the Debtor’s continued participation in the Tax Setoff Program which is . . . administered through the South Carolina Department of Revenue”). (Ex. F.) Plaintiffs are accusing Defendant of committing an unfair trade practice by the very act of availing itself of a remedy provided by statute. Such a claim, on its face, is clearly barred under the express language of S.C. Code Ann. § 39-5-40(a).

Second, not only is the conduct authorized by statute, it is administered by an agency of the State, the South Carolina Department of Revenue (“SCDOR”). The plain language of the SDCA clearly establishes that (1) application for collections under the SDCA is made to SCDOR; and (2) the funds collected are property of SCDOR, not the debtor, and they are allocated and transmitted to the claimant pursuant to a statutory procedure and priority scheme,

under the auspices of SCDOR. Therefore, the claims process under the SDCA is an “[a]ction[] or transaction[] permitted under laws administered by [a] regulatory body,” the SCDOR. § 39-5-40(a).

Third, the SDCA provides a statutory procedure for protesting the claimed debt. Pursuant to S.C. Code Ann. § 12-56-65, each claimant agency is required to appoint a hearing officer to hear protests of debtors. “The hearing officer is vested with the authority to decide a protest in favor of either the debtor or the claimant agency.” § 12-56-65(A). The debtor is given a hearing which includes the opportunity to “present evidence, documents, and testimony to dispute the debt.” § 12-56-65(B). Only upon a finding by the Hearing Officer in the claimant’s favor may SCDOR setoff the delinquent debt. *Id.* An aggrieved debtor may appeal the hearing officer’s determination to an Administrative Law Judge. § 12-56-65(C).

The protest provision is critical to the analysis of this issue. By virtue of the protest phase and the Legislature’s “vesting” the Hearing Officer with authority to rule in favor of the claimant or the debtor, a claim made under the SDCA is indisputably an action that is “permitted under laws administered by any . . . officer acting under statutory authority of this State.” § 39-5-40(A).

This third layer of regulatory authority is also conceptually the most responsive to Plaintiffs’ assertions. Plaintiffs maintain that Defendant committed an unfair trade practice by bringing claims for debts that were time barred. Presumably, their argument for maintaining a UTPA claim is to argue that the types of debts being collected were not permitted under the statute because either: (1) the aged debts were not specifically authorized, or (2) through a

twisted reading of the statute, the aged debts were specifically barred from being collected.³⁷ This is precisely the type of claim that the statutory authority exemption is designed to preclude. Further examination of the court's reasoning in *Inmed Diagnostic Services, LLC, v. Medquest Associates, Inc.*, 594 S.E.2d 552 (S.C.App. 2005), *supra*, is particularly instructive on this point.

The *InMed* litigants were competing providers of medical diagnostic imaging services. Their acquisitions of MRI machines were subject to the State Certification of Need and Health Facility Licensure Act (referred to in the opinion as the "CON Act") which requires that a provider receive authorization from DHEC before purchasing an MRI machine.³⁸ The parties, *InMed* and *Medquest*, came into dispute over the submissions made to DHEC by one another for the purpose of obtaining NADs (non-applicability determination) under the CON Act. Plaintiff *InMed* sued Defendant *MedQuest* claiming, among other things, that it committed unfair trade practices by submitting false information to DHEC as part of its applications, thus making the submittal invalid, which thereby caused their actions to be outside the statute and regulations. That is exactly the same logic Plaintiffs are applying in this case.

Defendant *MedQuest* invoked the statutory authority exemption. Defendant *MedQuest* argued that the statutory authority exemption should apply because "the purchase of medical equipment is specifically regulated by DHEC." 594 S.E.2d at 554. The court of appeals, considering the language of § 39-5-40(a) and discussing the evolution of the doctrine, agreed. In reaching its determination, the court noted Plaintiff *InMed*'s objection to application of the doctrine. Plaintiff *InMed* argued that "the UTPA exemption should not apply to Defendant *MedQuest*'s actions because '[t]he CON Act does not allow the provision of deceptive

³⁷ As was explained above in Section IV, A, p. 13 and IV, C, 1-3, p. 29, neither of these are the case. Self Regional had every right to collect the debts for which Plaintiffs now complain.

³⁸ The authorizations are referred to in the opinion as "CONS" and "NADs".

information to DHEC in order to evade the requirements of the CON Act.” *Id.* at 555. The court, however, agreed with Defendant MedQuest’s position that InMed’s argument was “an unduly narrow application of the law.” *Id.* The court further explained that:

Whether MedQuest submitted accurate information in support of its NAD applications was necessarily for DHEC to determine as part of the administrative process in deciding whether or not to grant such applications.

Id.

The court went on to explain DHEC’s role as the state agency responsible for granting certificates of need and licensure of health care facilities and recognized that “the legislature has determined certain matters are appropriate for resolution by administrative agencies with particular expertise, rather than by the general jurisdiction of the trial court.” *Id.* The court instructed that “the specific transaction at issue in the present controversy is MedQuest’s application for a NAD, a process for which DHEC has formulated exacting procedural requirements. Whether or not MedQuest followed these procedures correctly is uniquely within the competency of DHEC” *Id.* Therefore, the court determined, it would undermine the intent of § 39-5-40(a) to allow a jury to second guess DHEC’s determination.

In the case presented to this Court, Plaintiffs contend Self Regional overreached in collection of debts (which, again, Plaintiffs do not contest were in fact owed) under the SDCA because they were too old. The SDCA statute contains its own built-in due process procedures. The claimant agency applies to the Department of Revenue for the set-off. Presumably, this is the first check. The Department may conclude no set-off is permitted. Even then, a debtor is provided notice and an opportunity for a contested hearing (where these matters could be decided). Barring satisfactory resolution at the protest hearing, the debtor has an appeal right to the Administrative Law Courts. According to the statute, the Department of Revenue, the

Hearing Officer, and the Administrative Law Courts (if an appeal is filed) are in the best position to evaluate the suitability of Self Regional's request for a setoff. As the court in *InMed* found, Plaintiffs cannot use the UTPA as a tool to permit the courts to second-guess those the General Assembly have decided are in the best position to evaluate the merits of a claimant agency's use of the UTPA. The Legislature established by statute the method for regulating the assertion and prosecution of SDCA claims, which again, are inherently creatures of statute in the first instance, and the UTPA is inapplicable to proceedings conducted within the statutory scheme.

But, if this were not enough, the SDCA provides yet another statutorily created check on the collection process, further proving a regulatory scheme. The statute provides a procedure and remedy for cases in which debts are collected through the SDCA "in error." § 12-56-65(E). If an aggrieved debtor is unsuccessful in his contested case before the ALJ, or even if he does not take advantage of that remedy, he may within one (1) year make a statutory "claim for refund" before the ALJ.³⁹ § 12-56-65(H). A prevailing debtor is entitled to reimbursement of the administrative fee assessed and interest on the amount erroneously withheld. §§ 12-56-65 (D), (E).

This remedy is also critical to the analysis. The essential gravamen of the Plaintiffs' claim is that Defendant brought untimely claims that were sustained in error. The statute specifically contemplates that erroneous withholdings will occur, and it establishes the means by which those errors will be corrected and remedied. By alleging a UTPA violation, the Plaintiffs are doing nothing less than asking the Court to extract their claims from an adjudication and enforcement procedure established by statute and allow them to superimpose a more lucrative

³⁹ The claim for refund may also be made before the Circuit Court if, and only if, a separate right to jury trial exists. See Section IV, B, 3, p. 25 above.

remedy over that which the Legislature has expressly provided. This is not the purpose of the UTPA.

ii. Absence of Property Interest in Collected Debts.

S.C. Code Ann. § 39-5-140(a), establishing the private right of action under the UTPA, defines a person who may bring such an action as one who “suffers any ascertainable loss of money or property” as the result of an unfair or deceptive trade practice. At S.C. Code Ann. § 12-56-60(B), the SDCA provides that “[a] person has no property right or property interest in a refund until all amounts due the State and claimant agencies are paid.” Plaintiffs’ claims are premised upon the allegation that money belonging to them was wrongfully “seized” by Defendant under the auspices of the SDCA. Pursuant to the plain and unequivocal language of the statute, the funds collected by Defendant under the SDCA were funds in which the Plaintiffs had **no right or interest** at the time the collection was made. It is axiomatic that a person cannot suffer a loss of money in which he has no right or interest. Therefore, no claim may be sustained under the UTPA because Plaintiffs cannot plead any ascertainable damages under the statute.

b. Plaintiffs’ UTPA Claim Alleged to Arise from Fixing Rates for Medical Services is Barred under the Statutory Authority Exemption and Should be Dismissed.

Plaintiffs assert that Defendant committed an unfair trade practice by charging them “full, undiscounted costs for medical care” and “charging its uninsured patients excessively more than its insured patients . . . despite its charitable, non-profit, tax exempt status” This claim is precluded under the statutory authority exemption for at least three (3) reasons. Those are: (1) the Enabling Statute establishing the Greenwood County Hospital Board vests in Defendant authority to set rates; (2) the provision of affordable healthcare is the subject of a broad combination of statutory schemes, and the Legislature has expressly considered and declined to

impose price equalization as between insured and non-insured patients as a mandate of law; and (3) the essential gravamen of the claim arises under and is governed by the United States Tax Code.

i. The Enabling Statute

A analogous claim to that of Plaintiffs was asserted in *Calcaterra v. City of Columbia*, 432 S.E.2d 498 (S.C.App. 1993). The plaintiffs in that case claimed that the City had committed an unfair trade practice by charging them, as non-residents, higher rates for water service than it charged those who lived in the city limits. In reaching the conclusion that the plaintiffs' UTPA claim could not be sustained, the court cited to several Constitutional and statutory provisions vesting the City with authority to distribute and sell water and to fix rates for the same in combination with the statutory authority exemption codified at § 39-5-40(A).

Like the City of Columbia in *Calcaterra*, Defendant is statutorily vested with the authority to fix rates for medical services. Defendant was established, originally as the Greenwood County Hospital Board, by enabling legislation codified as Local Law No. 1554 of 1968 ("the Enabling Statute"). Section 8 of the Enabling Statute enumerates the powers granted to the Defendant. Included amongst those enumerated powers, at subparagraphs 13 and 15, is the authority "[t]o establish and promulgate reasonable rates for the use of the services and facilities afforded by the Board" and "[t]o define eligibility requirements for patients for charity services"

Based on the plain language of the Enabling Statute, the Legislature has authorized Defendant to both fix rates for its services and to determine which patients qualify for charitable service. Therefore, any claim grounded upon the allegations that Defendant has acted wrongfully in establishing rates or defining eligibility for charitable services is necessarily a

claim directed to Defendant's engaging in "actions or transactions permitted by any other South Carolina State Law." § 39-5-40(A). The Legislature chose to grant Defendant the authority to make these decisions via the Enabling Act. It likewise chose to preclude litigants from using such decisions as the basis for claims under the UTPA. For this reason alone, Plaintiffs' UTPA claim should be barred under the statutory authority exemption.

ii. **Healthcare Legislation and the Repeal of the "Discount Statute"**

The pervasive body of federal and state regulation of virtually all aspects of the provision of medical services, particularly hospital medical services, leads to an indisputable conclusion that this field is so heavily regulated as to preclude attempts to super-impose the kind of *ad hoc* judicial review which Plaintiffs seek. It is likely well known to this Court, as it is to society at large, that the administration of health care costs is a terribly complex issue that has vexed state and federal legislatures and all manner of executive departments for decades. It is also well known that a labyrinthine system of statutes has been created as part of the effort to so administer this system. Prominent among those statutory schemes are the federal Medicare and Medicaid statutes codified at 42 U.S.C. §1395, *et seq.*, and 42 U.S.C. §1396, *et seq.*, and companion state statutes codified at S.C. Code Ann. § 43-7-10, *et seq.*, and § 44-6-5 *et seq.* Defendant does not argue that these statutes set forth in its entirety the structure upon which its, and that of the hospital healthcare industry in general, fee system is based. But it maintains that these statutes do have far reaching regulatory impact on the healthcare industry, particularly with respect to indigent care, which is at the crux of Plaintiffs' argument. Through these statutes, the federal and state governments have established the criteria by which patients are to be defined as medically indigent and the method of setting compensation to healthcare providers for the treatment of those persons and the elderly. It is through this system that our governments have

resolved to provide financial protection and assistance to those who are legally defined as in need of the same for purposes of securing and paying for healthcare services. If either Congress or the Legislature had deemed another class, for example those who are not eligible for governmental assistance but who are otherwise uninsured, to merit legislative protection in this arena, they could have provided such protection through statutory price controls, rather than leaving those persons to assert tenuous unfair trade practices claims in the Courts.

However, as explained by the South Carolina Supreme Court in *In re Hospital Pricing Litigation*, 659 S.E.2d 131 (S.C. 2008), the Legislature has already made a decidedly contrary decision. In that case, plaintiff patients had sued numerous hospitals for alleged violation of S.C. Code Ann. § 38-71-120, referred to by the Court therein as “the Discount Statute.” The plaintiffs claimed that the Discount Statute required defendants to give uninsured patients a discount for medical services equal to the greatest discount negotiated by a given defendant with a group insurance plan. In essence, they argued that the Discount Statute was a legislative mandate to equalize fees charged to the uninsured with those charged to the insured, thereby prohibiting precisely the conduct alleged by Plaintiffs in this case.

The Circuit Court found for the plaintiffs and concluded that the Discount Statute did as plaintiffs claimed. By the time the case reached the Supreme Court, the Legislature had repealed the Discount Statute, leaving the question before the Court to be one of retrospective application of that statute. The Supreme Court reversed the Circuit Court, holding that the Discount Statute was an archaic law that had application to a system of health insurance coverage that bore no relationship to that used in the contemporary healthcare system. Perhaps most importantly for this analysis, the court stated that:

The fact that the legislature repealed the Discount Statute immediately after the circuit court issued its order, in our view, also indicates that the legislature did not intend for the Discount Statute to apply to current health insurance contracts.

Id. at 136.

To underscore the point, *In re Hospital Pricing Litigation* concerned a claim by a group of plaintiffs alleging a statutory violation arising from precisely the same conduct of which the Plaintiffs complain in this case. The Circuit Court concluded that the conduct violated an existing statute and found in favor of the plaintiffs. The Legislature immediately repealed the statute. The Supreme Court then reversed the Circuit Court, found that the statute did not prohibit the conduct in question, and concluded that the Legislature's action was in response to the verdict of the Circuit Court and was an expression of its intent **not to** obligate healthcare providers to equalize pricing as between the insured and the uninsured. It would be anathema to both the decision of the Legislature in repealing the Discount Statute and the opinion of the Supreme Court in interpreting the Legislature's conduct for this Court to allow the Plaintiffs to presume to use a statute of general application to impose a penalty for conduct that has already been specifically addressed and which the Legislature has affirmatively acted to remove from judicial inquiry.⁴⁰

iii. 26 U.S.C. § 501(c)(3)

Finally, the claim is barred as a result of the statutory regulation of tax policy under federal law. To reiterate, Plaintiffs' claim is based on the assertion that Defendant committed an unfair trade practice by charging them "full, undiscounted costs for medical care" and "charging

⁴⁰ It should also be noted that the Supreme Court describes as customary the practice of hospitals billing their patients the same amount for the same procedures and then discounting rates depending on their contracts with various insurance carriers. The Supreme Court did not in any way question the legality of this practice. Though Plaintiffs allege their claim in terms of charging uninsured patients more, rather than in terms of offering discounts to insured patients and thereby charging them less, the alleged practice is substantively the same as that described by the Supreme Court without criticism.

its uninsured patients excessively more than its insured patients . . . despite its charitable, non-profit, tax exempt status . . .” (Ex. A, ¶ 80.) Such status is established and governed under 26 U.S.C. § 501(c)(3). The Amended Complaint is replete with references to Defendant’s 501(c)(3) status and allegations that it has acted inconsistently therewith, all of which references and allegations are expressly incorporated into the UTPA claim by reference. *Id.* at ¶ 76. There is no question, based on the plain language of the pleadings, that Plaintiffs’ UTPA claim is premised upon Defendant’s alleged treatment of uninsured patients in a manner inconsistent with its 501(c)(3) status.

As such, Plaintiffs are attempting, in the guise of a UTPA claim, to bring a claim against Defendant for somehow damaging them by violating 501(c)(3). Defendant’s tax exempt status arises under the federal tax code and the maintenance of that status is governed by the tax code as administered by the Internal Revenue Service. The question of whether Defendant has violated its “charitable, non-profit, tax exempt status” is governed by the tax code. If it has, the remedies for that violation and the identities of those parties that may have standing to seek redress under the same are defined by the tax code. And, as explained at Section IV, B, 1, p. 19 and ¶ 16, *supra*, it is indisputable that Congress has charged a federal agency, the IRS, with exclusive authority and responsibility for enforcing the tax code, to include compliance with 501(c)(3) status.

Plaintiffs attempt to allege that Defendant has committed an unfair trade practice by way of its setting of rates for services in opposition to its tax exempt status under § 501(c)(3). But the evaluation of Defendant’s conduct in comparison to its obligations as a tax-exempt entity is a question that can only be properly addressed in the context of federal tax law and regulation and would be the province of the IRS, not the courts of general jurisdiction. Accordingly, Plaintiffs

attempt to allege a UTPA claim against Defendant arising out of “[a]ctions or transactions permitted under laws administered by [a] regulatory body . . . acting under statutory authority of . . . the United States” and such claim is barred.

9. The Ninth Cause of Action Seeks a Cause of Action that Does Not Exist and if Survives Would Violate the Constitutional Doctrine of Separation of Powers.

Mr. McCallum made a request for the medical records of approximately ninety-three (93) persons pursuant to S.C. Code Ann. § 44-7-325(B)(1). The ninth cause of action alleges Self Regional did not timely respond.⁴¹

a. Dismissal of the Cause of Action

First and foremost, no cause of action exists that requires/requests the circuit court to report an alleged criminal violation to the solicitor and then demand that the court and/or solicitor “pursue [criminal] action”. Further, unidentified persons cannot have standing to make any allegations that can withstand the required specificity requirements of *Iqbal/Twombly*⁴². If the Relief Plaintiffs could have been identified in the Amended Complaint at the time of filing they should have been named. If they could not be named because the Plaintiffs’ attorney did not yet know if they had a valid claim, dismissal is required. Finally, the ninth cause of action seeks court action that is prohibited under the constitutional doctrine of separation of powers⁴³.

As such, the ninth cause of action should be dismissed.

⁴¹ Of note, Plaintiffs do not claim Self Regional failed to respond. They merely claim Self Regional failed to “timely” respond under the statute. That is because Self Regional did respond and provide records in accordance with the statute. As to timeliness, Self Regional can debate that, as it was constantly conferring with Plaintiffs counsel and believes it had an agreement on the timing of production, but that is neither here nor there at this stage. Suffice it only to say Plaintiffs’ claim is moot. They got the records.

⁴² *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009).

⁴³ The ninth cause of action seeks court action that is prohibited under the constitutional doctrine of separation of powers. A circuit judge is a member of the judicial department and cannot constitutionally exercise the function of a solicitor who is a member of the executive department. See S.C. Const. Art. 1, §8; *State v. Tootle*, 330 S.C. 512, 515; 500 S.E.2d 481, 482 (1998) (judiciary erred in substituting his discretion for that of the Attorney General).

b. Dismissal of the Relief Plaintiffs is Appropriate if the Ninth Cause of Action is Dismissed

The ninth cause of action is the only cause of action brought on behalf of the Relief Plaintiffs in their individual capacity. To the extent the ninth cause of action is dismissed, no further cause of action has been alleged that allows any Relief Plaintiffs to remain a stand alone party. Based on the language contained in paragraph 20 of the Amended Complaint, the **"Relief Plaintiffs 1-93, . . . are members of the [alleged] class, not named plaintiffs."** (Ex. A, ¶20, emphasis added). Therefore, the Relief Plaintiffs are not parties to this lawsuit until such time as the Court determines that a class action is appropriate, if ever. As such, the Relief Plaintiffs should be dismissed from this lawsuit.

IV. LEGAL ARGUMENT

E. To the Extent Any Claims Survive the Motions Above, the Claims Must be Limited Based on the Statute of Repose in the SDCA and/or the Statute of Limitations in the Tort Claims Act.

If the above motions are denied, Defendant also requests dismissal of any claims that involve delinquent debt collected more than one (1) year prior to the date of said action. S.C. Code § 12-56-65(G) makes clear that the SDCA contains a statute of repose and no debt collected more than a year following the collection may be challenged for any reason. Further, as raised above, debt may only be challenged within the one (1) year time period if all proper administrative remedies have first been exhausted, which has not occurred in this case. In the alternative, if the one (1) year statute of repose is not applicable, the S.C. Tort Claims Act limits claims to a two (2) year statute of limitations after the date of loss and said case should be limited to delinquent debt collected not more than two (2) years ago for the abuse of process and conversion causes of action.

**V. IN THE ALTERNATIVE, DEFENDANT REQUESTS
ALL IMPERTINENT, IMMATERIAL, AND ALLEGEDLY
SCANDALOUS STATEMENTS BE STRICKEN FROM
THE AMENDED COMPLAINT**

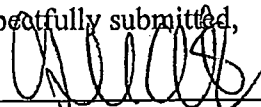
In the alternative, Defendant requests a Motion to Strike all allegations related to the Defendant's 501(c)(3) status. As stated above, this Court does not have jurisdiction to determine 501(c)(3) status. (*See* Section IV, B, 1, p. 19 and footnote 16.) Defendant also requests this Court strike all allegations of alleged ultra vires acts. As stated above (*see* Section IV, A, 1, p. 14), ultra vires acts cannot destroy political subdivision status. As such, the only purpose is to fill the Amended Complaint with impertinent, immaterial, and allegedly scandalous matters. As such, said parts of the Amended Complaint should be stricken.

VI. CONCLUSION

This case raises complex legal questions and defenses. However, regardless of its complexity it is clear that the Plaintiffs' Amended Complaint cannot survive this Motion to Dismiss. The Plaintiffs have not alleged proper jurisdiction for this Court to hear this action and do not have proper standing to bring the claims asserted. In addition, there is a clear immunity defenses under the Tort Claims Act and the common law that require absolute immunity from suit under the facts as pled. Finally, even if the Court allows the Plaintiffs successfully surpass those hurdles there is no statute of limitations violation that can be alleged by the Plaintiffs and no individual cause of action pled that can survive. Therefore, the Defendant requests the Motion to Dismiss be granted in its entirety.

Dated this 26th day of June 2012.

Respectfully submitted,



Ashley P. Cuttino, SC Bar No. 70354
Michael M. Shetterly, SC Bar No. 12059
W. Kyle Dillard, SC Bar No. 69408

Attorneys for Defendant Self Regional
Healthcare, a/k/a Self Memorial Hospital
a/k/a Self Memorial Hospital Board and
a/k/a Greenwood County Hospital Board

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IN THE STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

Janice Clinkscales, Lucy Townsend, William
Outz, Tammie Holmes, William Haynes,
Michelle Barksdale, Lavonia Haynes,
individuals on behalf of themselves and all
other similarly situated and Relief Plaintiffs
1-93,

Plaintiffs,

v.

Greenwood County Hospital Board, Self
Memorial Hospital Board, Self Memorial
Hospital, Self Regional Healthcare, Self
Medical Group, The Outpatient Surgery Center,
Self Memorial Regional Health Services, Self
Regional Physician Services, Greenwood
Medical Company, Self Regional Healthcare
Auxiliary, Self Regional Healthcare
Foundation, John Does 1-10

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE 8TH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2011-CP-24-01470

CERTIFICATE OF SERVICE

I do hereby certify that on this 26th day of June 2012, the foregoing Defendant Self
Regional Health Care a/k/a Self Memorial Hospital a/k/a Self Memorial Hospital Board and
a/k/a Greenwood County Hospital Board's Memorandum in Support of its Motion to Dismiss
and to Strike has been served upon the following persons by depositing same in the United States
Mail, with sufficient postage affixed thereto, addressed as follows:

Edward S. McCallum, III
PO Box 148
Greenwood SC 29649

Eugene C. Covington, Jr.
Covington Patrick Hagins Stern & Lewis, P.A.
211 Pettigru Street
Greenville SC 29601

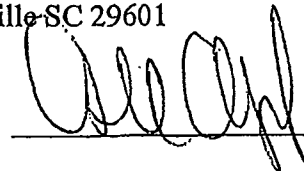


Exhibit E
Green v. Murdaugh

*2012 U.S. Dist. LEXIS 77165, **

Joel H. Green, Plaintiff, vs. Randolph Murdaugh, III; Walterboro Police Department, Defendants.

C/A No. 5:12-1086-RMG-KDW

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

2012 U.S. Dist. LEXIS 77165

May 4, 2012, Decided

May 7, 2012, Filed

SUBSEQUENT HISTORY: Adopted by, Complaint dismissed at, Without prejudice Green v. Murdaugh, 2012 U.S. Dist. LEXIS 77256 (D.S.C., June 4, 2012)

PRIOR HISTORY: Green v. Murdaugh, 2012 U.S. Dist. LEXIS 63534 (D.S.C., May 4, 2012)

CORE TERMS: recommendation, police departments, diversity, pro se, state law, subject to suit, pending charges, absolute immunity, written objections, prosecutor, liberally, immunity, armed robbery, grand larceny, kidnaping, paperwork, sentence, Detainers Act, civil action, legal malpractice, stringent standard, federal district, citizenship, recommended, cognizable, detainer, domicile, entity, color, detention center

COUNSEL: [*1] Joel H Green, Plaintiff, Pro se, Walterboro, SC.

JUDGES: Kaymani D. West, United States Magistrate Judge.

OPINION BY: Kaymani D. West

OPINION

REPORT AND RECOMMENDATION

This is a civil action filed pro se by a local detention center inmate. ¹

FOOTNOTES

¹ Pursuant to 28 U.S.C. §636(b)(1) and Local Civil Rule 73.02(B)(2)(e) (D.S.C.), this magistrate judge is authorized to review all pretrial matters in such pro se cases and to submit findings and recommendations to the district court. See 28 U.S.C. §§ 1915(e); 1915A (as soon as possible after docketing, district courts should review prisoner cases to determine whether they are subject to summary dismissal).

BACKGROUND INFORMATION

Plaintiff is confined at the Colleton County Detention Center, apparently on pending criminal charges that are unrelated to the subject matter of this case. In his Complaint, Plaintiff alleges Defendants violated the "Interstate Compact Agreement on Detainers" ² by failing to timely bring him from the Georgia Department of Corrections ("GDC") to Colleton County, South

Carolina, in order to try him on pending criminal charges of armed robbery, kidnaping, and grand larceny. Compl., ECF No. 1 at 3—4. Plaintiff alleges that, while he was incarcerated at the [*2] GDC in 2002, he completed paperwork to require South Carolina to bring him from Georgia to court in South Carolina on those pending charges within a certain time frame. *Id.* He alleges he sent the paperwork to Randolph Murdaugh III, who was the Solicitor for the Fourteenth Judicial Circuit at that time, and that Murdaugh's office received the paperwork. *Id.* Plaintiff alleges no one from South Carolina came to the GDC to bring him to court until February 18, 2004, when the Walterboro Police Department arrived. *Id.* That was the date on which he was paroled from the GDC. *Id.*

FOOTNOTES

² Presumably, Plaintiff relies on the Interstate Agreement on Detainers Act or the "IADA." See *United States v. Thomas*, 342 F. App'x 891 (4th Cir. 2009).

Plaintiff alleges upon his arrival in Colleton County, South Carolina, he was appointed an attorney who filed a motion to dismiss the pending charges of armed robbery, kidnaping, and grand larceny on the ground that the Interstate Agreement on Detainers Act had been violated. *Id.* Allegedly, the state court denied the motion to dismiss. *Id.* Further, Plaintiff alleges a probation violation charge pending in Charleston County was transferred to Colleton County, and on August [*3] 31, 2004, he received a ten-year sentence of imprisonment within the South Carolina Department of Corrections ("SCDC") for violating probation. *Id.* Plaintiff alleges that, throughout his now-completed ten-year sentence, the charges of armed robbery, kidnaping, and grand larceny, illegally remained pending in Colleton County, and those pending charges adversely affected his custody level within SCDC. *Id.* He alleges, the day before he was to be released from the ten-year sentence, the pending charges in Colleton County were "lifted out of the computer," or, liberally construed, the charges were dismissed and the detainer was deleted. *Id.*

Plaintiff seeks money damages against both Defendants. ECF No. 1 at 5. He alleges that they caused him pain and suffering and emotional distress. *Id.* Further, he alleges Defendants breached a contract and committed legal malpractice. *Id.*

INITIAL REVIEW

Under established local procedure in this judicial district, the court has carefully reviewed Plaintiff's pro se Complaint. This review has been conducted pursuant to the procedural provisions of 28 U.S.C. §§ 1915, 1915A, and the Prison Litigation Reform Act of 1996 ("PLRA"), and in light of the following [*4] precedents: *Denton v. Hernandez*, 504 U.S. 25, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995) (*en banc*); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983).

Pro se complaints are held to a less stringent standard than those drafted by attorneys, *Gordon v. Leeke*, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case. *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007). When a federal court is evaluating a pro se complaint, the plaintiff's allegations are assumed to be true. *De'Lonta v. Angelone*, 330 F. 3d 630, 630 n.1 (4th Cir. 2003). Even under this less stringent standard, the Complaint filed in this case is subject to summary dismissal under the provisions of 28 U.S.C. § 1915(e)(2)(B), which requires the court to dismiss a case in which a litigant seeks to proceed in forma pauperis at any time it determines the action fails to state a claim on which relief may be granted. See also *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990) [*5] (noting requirement of liberal construction does not

mean court can ignore a clear failure in the pleading to allege facts that set forth a claim cognizable in a federal district court).

DISCUSSION

This Complaint appears to be filed pursuant to 42 U.S.C. § 1983, which "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Albright v. Oliver*, 510 U.S. 266, 271, 114 S. Ct. 807, 127 L. Ed. 2d 114 (1994) (quoting *Baker v. McCollan*, 443 U.S. 137, 144 n.3, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979)). A civil action under § 1983 "creates a private right of action to vindicate violations of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Rehberg v. Paulk*, 132 S.Ct. 1497, 1501, 182 L. Ed. 2d 593 (2012). To state a claim under § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988).

Liberally construed, Plaintiff may be alleging a Fourth Amendment claim related to malicious prosecution or false arrest, a due process violation, and/or cruel [*6] and unusual punishment based on Defendants leaving the allegedly illegal Colleton County charges pending against him while he was at SCDC to cause him to suffer harsher conditions. However, such claims are not cognizable against Defendant Walterboro Police Department because it is not a person subject to suit under § 1983. It is well settled that only "persons" may act under color of state law, and, therefore, a defendant in a § 1983 action must qualify as a "person."

The Walterboro Police Department is a group of officers in a building and, as such, is not subject to suit under Section 1983. Buildings and correctional institutions, as well as sheriff's departments and police departments, are not usually considered legal entities subject to suit. See, e.g., *Martinez v. Winner*, 771 F.2d 424, 444 (10th Cir. 1985) (Denver Police Department not a separate suable entity) (vacated and remanded for consideration of mootness, *Tyler v. Martinez*, 475 U.S. 1138, 106 S. Ct. 1787, 90 L. Ed. 2d 333 (1986)); *Post v. City of Fort Lauderdale*, 750 F. Supp. 1131 (S.D. Fla.1990) (dismissing city police department as improper defendant in § 1983 action because not "person" under the statute); *Shelby v. City of Atlanta*, 578 F. Supp. 1368, 1370 (N.D. Ga. 1984) [*7] (dismissing police department as party defendant because it was merely vehicle through which city government fulfills policing functions). Accordingly, the Walterboro Police Department is not considered a person subject to suit under 42 U.S.C. § 1983, and Plaintiff has failed to state a claim on which relief may be granted against it.

Additionally, the Complaint is subject to dismissal because it seeks monetary relief from Defendant Murdaugh who is immune from such relief. See 28 U.S.C. § 1915(e)(2). In South Carolina, regional prosecutors are called Solicitors and Assistant Solicitors. Solicitors are elected by voters of a judicial circuit. See S.C. Const. art. V, § 24; S.C. Code Ann. § 1-7-310. Prosecutors, including Defendant Murdaugh, the former Solicitor of the Fourteenth Judicial Circuit, have absolute immunity for activities performed as "an officer of the court" when the conduct at issue was closely associated with the judicial phase of the criminal process. See *Van de Kamp v. Goldstein*, 555 U.S. 335, 341-45, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009). For example, when a prosecutor "prepares to initiate a judicial proceeding," "appears in court to present evidence in support of a search warrant application," or [*8] conducts a criminal trial, bond hearings, grand jury proceedings, and pre-trial "motions" hearings, absolute immunity applies. *Id.*; see also *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). Defendant Murdaugh's alleged wrongful conduct relates to his pursuing the criminal charges against Plaintiff in light of the IADA, and his apparent opposition to the motion to dismiss the charges. This alleged conduct was intricately related to the judicial process and to the pending prosecution of the State's case against Plaintiff, even though the charges ultimately were dismissed. Therefore, Defendant Murdaugh has absolute prosecutorial immunity from this suit. See *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985)

(absolute immunity "is an immunity from suit rather than a mere defense to liability").

Finally, to the extent Plaintiff may seek to pursue state law claims of legal malpractice and breach of contract against Defendants, this court lacks subject matter jurisdiction. A civil action for a plaintiff's state law claims may be filed in a federal court under the diversity statute, 28 U.S.C. § 1332, if that statute's requirements are satisfied. *See Cent. W. Va. Energy Co. v. Mountain State Carbon, LLC*, 636 F.3d 101, 103 (4th Cir. 2011). [*9] With the exception of certain class actions, the diversity statute requires complete diversity of parties and an amount in controversy in excess of seventy-five thousand dollars (\$75,000.00). *See id.*; 28 U.S.C. § 1332(a). Complete diversity of parties in a case means that the citizenship of every plaintiff must be different from the citizenship of every defendant. *Cent. W. Va. Energy Co.*, 636 F.3d at 103. Plaintiff's allegations imply that Plaintiff and Defendants are domiciled in South Carolina, or, stated differently, the Complaint does not allege that Plaintiff has a domicile different from the domicile of Defendants. Thus, complete diversity is lacking, and this court has no diversity jurisdiction over this action.

RECOMMENDATION

Accordingly, it is recommended that Plaintiff's Complaint be dismissed *without prejudice*. *See Denton v. Hernandez; Neitzke v. Williams; Haines v. Kerner; Brown v. Briscoe*, 998 F.2d 201, 202-04 (4th Cir. 1993); *see also* 28 U.S.C. § 1915(e)(2)(B); 28 U.S.C. § 1915A.

IT IS SO RECOMMENDED.

/s/ Kaymani D. West

Kaymani D. West

United States Magistrate Judge

May 4, 2012

Florence, South Carolina

**The parties are directed to note the important information in the attached
[*10] "Notice of Right to File Objections to Report and Recommendation."**

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); *see* Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk

United States District Court

Post Office Box 2317

Florence, South Carolina 29503

Failure to timely file specific [*11] written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

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2012 U.S. Dist. LEXIS 77256, *

Joel H. Green, Plaintiff, vs. Randolph Murdaugh, III; Walterboro Police Department, Defendants.

Civil Action No.: 5:12-1086-RMG

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

2012 U.S. Dist. LEXIS 77256

June 4, 2012, Decided

June 4, 2012, Filed

PRIOR HISTORY: Green v. Murdaugh, 2012 U.S. Dist. LEXIS 77165 (D.S.C., May 4, 2012)

COUNSEL: [*1] Joel H Green, Plaintiff, Pro se, Walterboro, SC.

JUDGES: Richard Mark Gergel, United States District Judge.

OPINION BY: Richard Mark Gergel

OPINION

ORDER

This matter is before the Court upon the recommendation of Magistrate Judge Kaymani West that Plaintiff Joel Green's action be dismissed without prejudice. Because this is a *pro se* complainant seeking relief pursuant to 42 U.S.C. § 1983, this case was automatically referred to the United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(d), D.S.C. Plaintiff seeks monetary damages against Defendants, alleging that they caused him pain and suffering by failing to comply with the "Interstate Compact Agreement on Detainers" and wrongfully imposing on him a longer period of incarceration than was justified. (Dkt. No. 12 at 2). Plaintiff further alleges that Defendants breached a contract and committed legal malpractice. *Id.*

This Court is charged with conducting a *de novo* review of any portion of the Magistrate Judge's report to which a specific objection is registered, and may accept, reject, or modify in whole or in part the recommendations contained in that report. 28 U.S.C. § 636(b)(1). [*2] However, absent prompt objection by a dissatisfied party, it appears Congress did not intend for the district court to review the factual and legal conclusions of the Magistrate Judge. *Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). Additionally, any party who fails to file timely, written objections to the Magistrate Judge's report pursuant to 28 U.S.C. § 636(b)(1) waives the right to raise those objections at the appellate court level. *United States v. Schronce*, 727 F.2d 91, 93-94 (4th Cir. 1984). No objections have been filed to the Magistrate Judge's Report and Recommendation.

A review of the record indicates that the Magistrate Judge's report accurately summarizes the case and the applicable law. This Court wholly adopts the Report and Recommendation of the Magistrate Judge. (Dkt. No. 12). For the reasons articulated by the Magistrate Judge, it is hereby **ORDERED** that Plaintiff's complaint be **DISMISSED** without prejudice for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction.

AND IT IS SO ORDERED.

/s/ Richard Mark Gergel

Richard Mark Gergel

United States District Judge

Charleston, South Carolina

June 4, 2012

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Exhibit F
Kinloch v. DeBusk

2012 U.S. Dist. LEXIS 58973, *

Aaron Perez Kinloch, Plaintiff, vs. Candy DeBusk, Director of 15th Circuit Drug Court,
Defendant.

C/A: 4:12-361-DCN-BM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

2012 U.S. Dist. LEXIS 58973

March 21, 2012, Decided

March 21, 2012, Filed

SUBSEQUENT HISTORY: Adopted by, Complaint dismissed at, Without prejudice Kinloch v. Debusk, 2012 U.S. Dist. LEXIS 53497 (D.S.C., Apr. 17, 2012)

CORE TERMS: prosecutor's, sentence, absolute immunity, recommendation, monetary damages, lab, pro se, judicial notice, drug test, habeas corpus, prosecutorial immunity, criminal case, written objections, prosecutorial, imprisonment, recommended, terminated, georgetown, burglary, immune, test result, alcohol, state prisoner, forma pauperis, judicial proceedings, presenting evidence, order to recover, direct appeal, warrant application, publicindex

COUNSEL: [*1] Aaron Perez Kinloch, Plaintiff, Pro se, Columbia, SC.

JUDGES: Bristow Marchant, United States Magistrate Judge.

OPINION BY: Bristow Marchant

OPINION

REPORT AND RECOMMENDATION

Plaintiff, Aaron Perez Kinloch ("Plaintiff"), is a state prisoner in the Broad River Correctional Institution of the South Carolina Department of Corrections ("SCDC") in Columbia, South Carolina. Plaintiff, who is proceeding *pro se* and *in forma pauperis* pursuant to 28 U.S.C. §§ 1915 and 1915A, brings this action under 42 U.S.C. § 1983, seeking compensatory damages and injunctive relief.

PRO SE AND IN FORMA PAUPERIS REVIEW

Under established local procedure in this judicial district, a careful review has been made of the *pro se* complaint pursuant to the procedural provisions of 28 U.S.C. § 1915; 28 U.S.C. § 1915A; the Prison Litigation Reform Act (PLRA), Pub. L. No. 104-134, 110 Stat. 1321 (1996); and in light of the following precedents: *Denton v. Hernandez*, 504 U.S. 25, 112 S. Ct. 1728, 118 L. Ed. 2d 340 (1992); *Neitzke v. Williams*, 490 U.S. 319, 324-25, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Haines v. Kerner*, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972); *Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951 (4th Cir. 1995); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983). Although this complaint has been filed pursuant to § 1915, which permits [*2] an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit, to protect against possible abuses of this

privilege the statute allows a district court to dismiss a case upon a finding that the action is "frivolous or malicious" or "fails to state a claim on which relief may be granted" or "seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B) (i), (ii), (iii). Further, a claim based on a meritless legal theory may be dismissed *sua sponte* under 28 U.S.C. § 1915(e)(2)(B). See *Neitzke v. Williams*, 490 U.S. 319, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); *Allison v. Kyle*, 66 F.3d 71 (5th Cir. 1995).

This court is also required to liberally construe *pro se* documents, *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007); *Estelle v. Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976), holding them to a less stringent standard than those drafted by attorneys, *Hughes v. Rowe*, 449 U.S. 5, 9, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980). However, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court. *Weller v. Dep't of Soc. Servs.*, 901 F.2d 387 (4th Cir. 1990). [*3] Such is the case here.

BACKGROUND

Plaintiff alleges that the Defendant and her staff recommended that he be terminated from participation in drug court on August 16, 2011, based on a positive alcohol test result, the accuracy of which Plaintiff contested. As a result, Plaintiff alleges that he was terminated from the program on August 30, 2011, by Judge Waldo Maring, and sentenced to ten (10) years in prison.¹

FOOTNOTES

¹ SCDC's Incarcerated Inmate Search Web site indicates that Plaintiff is serving a ten-year sentence for burglary 2nd degree/non-violent, having been committed to SCDC from Georgetown County, with an admission date of 09/01/2011, and a sentence start date of 06/22/2011. See <https://sword.doc.state.sc.us/scdc-public/> (last visited Mar. 9, 2012). The Georgetown County Fifteenth Judicial Circuit Public Index indicates that Plaintiff was arrested, on April 22, 2010, and charged with burglary first degree (case no. J537870, file date: 05/07/2010), and pled guilty, on March 3, 2011, to burglary 2nd degree (indictment no. 2010-GS-22-00938), and was sentenced to "10 yrs susp on successful completion of drug court." See <http://publicindex.sccourts.org/georgetown/publicindex/PISearch.aspx> [*4] (last visited Mar. 9, 2012). This court takes judicial notice of the online records of Plaintiff's state court proceedings and SCDC's factual information concerning Plaintiff's sentence and custody status. See *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) ("We note that 'the most frequent use of judicial notice is in noticing the content of court records.'"); *Williams v. Long*, 585 F. Supp. 2d 679, 685-89 (D. Md. 2008) (noting that some courts have found postings on government Web sites as inherently authentic or self-authenticating).

Plaintiff's allegations are somewhat confusing, but he appears to allege that, after he was released from the Palmetto Center on July 29, 2011, he was tested for alcohol and drugs in the drug court office on August 2, 2011. A drug court group counselor told Plaintiff that he had passed the test, but they wanted to send it to the lab, so Plaintiff "signed for it to be sent to the lab" and "after 2 wks, the test came back positive [and Plaintiff] knew it was a lie because [Plaintiff] was clean." ECF No. 1, p. 3. Plaintiff alleges that his friend tried to explain to Judge Maring that the test was positive for alcohol because she had cooked [*5] some bourbon-flavored barbeque chicken for Plaintiff, and that he also asked the Defendant numerous times to show him the test results on all of his tests and to "explain . . . how one test says [Plaintiff is] positive but the other says negative." *Id.* Plaintiff alleges the Defendant told him that, right or wrong, the test result was what the judge would go by, "so just accept the punishment." ECF No. 1, p. 4. Plaintiff alleges that his request for a second lab test was denied, and he is "quite sure that [his] rights w[ere] violated in some form or fashion and that's why [he is] filing this

lawsuit." *Id.*

Plaintiff alleges that the Drug Court treatment team "never liked [him] from the start" so they "fix[ed] it to make it look like [he] failed out." *Id.* Plaintiff alleges that an earlier drug test administered to another participant in the program, Eric, was positive, but Eric was "tested again with a more advance[d] drug test and that came up positive, so they sent it to the lab, and 2 wks later it came back negative." ECF No. 1, p. 5. Plaintiff alleges that he knew the drug court treatment team was showing favoritism to the other participant, and that the Defendant and her staff "w[ere] [*6] out to make sure [Plaintiff] got kicked out, and altering [Plaintiff's] urine sample was the only way, just like they altered Eric's urine to keep him in the program and that's not right." *Id.* Plaintiff alleges that he "was wrongfully accused of something [he] never did, and they know that[;] that's why they wouldn't show [Plaintiff his] so-called lab results." *Id.*

Plaintiff seeks monetary damages of \$15.6 million, and "also that [Plaintiff's] sentence be lifted because of their lack of presenting evidence, when asked, by the [P]laintiff." ECF No. 1, p. 6.

DISCUSSION

The United States Supreme Court has held that in order to recover damages for imprisonment in violation of the United States Constitution, the imprisonment must first be successfully challenged.

We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm whose unlawfulness would render a conviction or sentence invalid, . . . a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's [*7] issuance of a writ of habeas corpus, 28 U.S.C. § 2254.

Heck v. Humphrey, 512 U.S. 477, 486-87, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); see *Edwards v. Balisok*, 520 U.S. 641, 648, 117 S. Ct. 1584, 137 L. Ed. 2d 906 (1997) (the preclusive rule of *Heck* extended to § 1983 claims challenging procedural deficiencies which necessarily imply the invalidity of the judgment.). Plaintiff has not successfully challenged his state court conviction,² therefore, because he cannot allege the necessary element of the illegality of his state court conviction, he cannot show a constitutional injury and cannot state a cognizable § 1983 claim.

FOOTNOTES

² As noted above, the court takes judicial notice of Plaintiff's prior proceedings in state court. In addition, Plaintiff's complaint in the instant case indicates that he is an inmate in the Broad River Correctional Institution. See ECF No. 1, p. 2.

In addition, Plaintiff's claim against the Defendant for monetary damages is subject to summary dismissal because it is barred by the Defendant's absolute prosecutorial immunity³ under *Van de Kamp v. Goldstein*, 555 U.S. 335, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009); *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993); *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); [*8] *Dababnah v. Keller-Burnside*, 208 F.3d 467 (4th Cir. 2000); and *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994). The Defendant is immune from any suit seeking monetary damages under § 1983 because she was engaged in prosecutorial functions "intimately associated with the judicial phase of the criminal process" when she recommended that Plaintiff

be terminated from the drug court program because of a positive drug test. See *Imbler*, 424 U.S. at 430.

FOOTNOTES

³ *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (absolute immunity "is an immunity from suit rather than a mere defense to liability").

In South Carolina, regional prosecutors are called Solicitors and Assistant Solicitors. See S.C. Const., art. V, § 24; S.C. Code Ann, § 1-7-310. Solicitors are elected by voters of a judicial circuit and have absolute immunity for their prosecution-related activities in or connected with judicial proceedings, when acting as "an officer of the court" as opposed to when engaging in investigative or administrative tasks. See *Van de Kamp*, 555 U.S. at 342. Such protected activities include, but are not limited to, prosecutorial actions and decisions related to the Solicitor's participation in a criminal trial, bond hearings, [*9] grand jury proceedings, pre-trial motions hearings, and ancillary civil proceedings. See *Van de Kamp v. Goldstein*, 555 U.S. 335, 129 S. Ct. 855, 172 L. Ed. 2d 706 (2009) (absolute immunity applies when a prosecutor is involved in supervision or training of prosecutors or management of a trial-related information system); *Kalina v. Fletcher*, 522 U.S. 118, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (absolute immunity applies when a prosecutor appears in court to present evidence in support of a search warrant application, but not when a prosecutor acts as a complaining witness in support of a warrant application); *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993) (absolute immunity does not apply when a prosecutor fabricates evidence during the preliminary investigation of an unsolved crime or makes false statements to the press); *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed. 2d 547 (1991) (absolute immunity applies when a prosecutor prepares to initiate a judicial proceeding, but not when a prosecutor gives advice to police during a criminal investigation); *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976) (absolute immunity applies to a state prosecutor, acting within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state's case, despite allegations [*10] that he knowingly used perjured testimony, deliberately withheld exculpatory information, and failed to make full disclosure of all facts casting doubt upon the state's testimony); *Dababnah v. Keller-Burnside*, 208 F.3d 467 (4th Cir. 2000) (absolute immunity applies when a prosecutor seeks a defendant's extradition and requests a court order to secure the defendant's property); *Carter v. Burch*, 34 F.3d 257 (4th Cir. 1994) (absolute immunity applies when a prosecutor is alleged to have withheld exculpatory evidence and conspired to present false testimony during trial); *Hart v. Jefferson County*, Civil No. 94-655-FR, 1995 U.S. Dist. LEXIS 14743 (D. Ore. September 25, 1995) (allegations by plaintiff of malicious motives on the part of a prosecutor are insufficient to overcome absolute prosecutorial immunity for all of the acts done in his official capacity).

Of particular importance in this case is the fact that it is well settled in this Circuit that prosecutors and persons working under a prosecutor's direction are absolutely immune from liability for damages based on their decisions about "whether and when to prosecute," *Lyles v. Sparks*, 79 F. 3d 372, 377 (4th Cir. 1996), and whether or [*11] not to go forward with a prosecution. See *Springmen v. Williams*, 122 F. 3d 211, 212-13 (4th Cir. 1997). Here, the Defendant's decision to recommend Plaintiff's termination from the drug court program is equivalent to a decision to go forward with a prosecution. *Bernard v. County of Suffolk*, 356 F.3d 495, 502 (2d Cir. 2004) (Absolute immunity extends to "persons working under [a prosecutor's] direction, when they function as advocates for the state" and are clearly associated with the judicial process). It is clear that the allegations against the Defendant are based on her performance of prosecutorial activities as an advocate and officer of the court in Plaintiff's criminal case in drug court. Thus, it is also clear that absolute prosecutorial immunity applies and bars Plaintiff from bringing a claim for monetary damages against her.

Finally, to the extent Plaintiff requests that his "sentence be lifted because of their lack of

presenting evidence," such relief is typically sought through a direct appeal of the conviction and/or sentence in a defendant's criminal case, through a post-trial motion in the defendant's criminal case, through an application for post-conviction relief in [*12] state court, or through a petition for writ of habeas corpus in federal court. Plaintiff cannot seek relief that would challenge the validity of his state drug court conviction and sentence in the instant case. See *Heck v. Humphrey*, 512 U.S. 477, 481, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 93 S. Ct. 1827, 36 L. Ed. 2d 439 (1973)) (habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983). Pursuant to *Heck*, a prisoner who files suit in federal court may not seek monetary damages in a habeas action, and a state prisoner may challenge the legality of his or her conviction or sentence and the validity of his or her current confinement, only through a petition for writ of habeas corpus brought pursuant to 28 U.S.C. § 2254 or 28 U.S.C. § 2241.

RECOMMENDATION

Accordingly, it is recommended that the court dismiss the complaint in this case, without prejudice and without issuance and service of process. Plaintiff's attention is directed to the important notice on the next page.

/s/ Bristow Marchant

Bristow Marchant

United States Magistrate Judge

March 21, [*13] 2012
Charleston, South Carolina

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. **Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections.** "[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.'" *Diamond v. Colonial Life & Acc. Ins. Co.*, 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee's note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636 (b) (1); Fed. R. Civ. P. 72 (b); see Fed. R. Civ. P. 6 (a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk

United States District Court

Post Office Box 835

Charleston, South Carolina 29402

Failure to timely file specific written objections to this [*14] Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636 (b) (1); *Thomas v. Arn*,

474 U.S. 140, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *Wright v. Collins*, 766 F.2d 841 (4th Cir. 1985); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

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Exhibit G
Garrett v. McMaster

2008 U.S. Dist. LEXIS 61858, *

JOHN J. GARRETT, Plaintiff, vs. HENRY MCMASTER, as successor to Charles M. Condon, Attorney General for the State of South Carolina, DEAN CAMPBELL, individually, and in his official capacity, and PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY, Defendants.

CIVIL ACTION NO. 7:07-2952-HFF-WMC

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA, SPARTANBURG
DIVISION

2008 U.S. Dist. LEXIS 61858

August 11, 2008, Decided
August 11, 2008, Filed

PRIOR HISTORY: Garrett v. McMaster, 2008 U.S. Dist. LEXIS 19430 (D.S.C., Mar. 12, 2008)

COUNSEL: [*1] John J Garrett, Plaintiff, Pro se, Reidville, SC.

For Henry McMaster, as successor to Charles Condon The Attorney General for the State of South Carolina, Dean Campbell, Individually and in his official capacity, Defendants: Michael B Wren, William Henry Davidson, II, LEAD ATTORNEYS, Davidson Morrison and Lindemann, Columbia, SC.

For Provident Life and Accident Insurance Company, Defendant: Grady Leslie Patterson, III, Theodore Dubose Willard, Jr, LEAD ATTORNEYS, Montgomery Patterson Potts and Willard, Columbia, SC.

JUDGES: HENRY F. FLOYD, UNITED STATES DISTRICT JUDGE.

OPINION BY: HENRY F. FLOYD

OPINION

ORDER

This case was filed as a E.R.I.S.A. action. Plaintiff is proceeding pro se. The matter is before the Court for review of the Report and Recommendation (Report) of the United States Magistrate Judge suggesting that Defendant McMaster and Defendant Campbell's motion for summary judgment be granted and that Plaintiff's motion for summary judgment and declaratory judgment be denied. The Report was made in accordance with 28 U.S.C. § 636 and Local Civil Rule 73.02 for the District of South Carolina.

The Magistrate Judge makes only a recommendation to this Court. The recommendation has no presumptive weight. The responsibility [*2] to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270, 96 S. Ct. 549, 46 L. Ed. 2d 483 (1976). The Court is charged with making a de novo determination of those portions of the Report to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge or recommit the matter with instructions. 28 U.S.C. § 636(b)(1).

The Magistrate Judge filed the Report on July 3, 2008, and the Clerk of Court entered Plaintiff's

objections to the Report on August 8, 2008. The Court has made an exhaustive review of Plaintiff's voluminous submission, but finds the arguments to be without merit.

Thus, after a thorough review of the Report and the record in this case pursuant to the standard set forth above, the Court overrules Plaintiff's objections, adopts the Report, and incorporates it herein. Therefore, it is the judgment of this Court that Defendant McMaster and Defendant Campbell's motion for summary judgment be **GRANTED** and that Plaintiff's motion for summary judgment and declaratory judgment be **DENIED**.

To the extent that Plaintiff seeks to appeal to this Court the Magistrate Judge's ruling denying Plaintiff's motion for [*3] joinder of parties and claims and denying Plaintiff's motion to amend, for joinder, and to produce, the Magistrate Judge's ruling is **AFFIRMED**.

IT IS SO ORDERED.

Signed this 11th day of August, 2008, in Spartanburg, South Carolina.

/s/ Henry F. Floyd

HENRY F. FLOYD

UNITED STATES DISTRICT JUDGE

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