THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Consolidated Cases for Trial

Case No. 2010-CP-28-00322
Case No. 2010-CP-28-00323
Appellate Case No. 2016-000626

Jamie Curley, ... Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski ..... Defendants,

And

Dr. Orville Dyce, ... Plaintiff,

v.

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

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

And

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

FINAL BRIEF OF RESPONDENTS/APPELLANTS JAMIE CURLEY AND DR. ORVILLE DYCE

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STATEMENT OF THE CASE

As stated in the Initial Brief on their Cross Appeal, Respondents/Appellants Dr. Dyce ("**Dr. Dyce**") and his wife Jamie Curley ("**Curley**" and with Dr. Dyce collectively, "**Plaintiffs below**")[1] agree entirely with the Honorable Judge Goodstein's Findings of Fact as set forth in her December 8, 2015 Order and which is supported by the record in these consolidated cases. Accordingly, the Statement of Facts section in their Initial Brief dated July 13, 2016[2] was a verbatim recitation of the facts taken from Judge Goodstein's December 8, 2015 Order. While reference should be made to this more complete summary of the relevant facts, repetition of a few of the trial court's factual findings is useful in responding to some of the arguments advanced by Appellants/Respondents SCENT Land Holdings, LLC, Amy Puchalski, Robert Puchalski and South Carolina ENT, Allergy & Sleep Medicine, P.A. ("**Defendants below**").

A. Judge Goodstein's Findings of Fact after Trial

After eleven days of trial resulting in a transcript totaling 2,135 pages and the consideration of 608 exhibits consisting of thousands of pages, Judge Goodstein found that:

1. "Dr. Puchalski formed South Carolina ENT, Allergy & Sleep Medicine, P.A. ("**SCENT**") in 2004 and elected for SCENT to be a Subchapter S corporation. Pursuant to its initial articles of incorporation dated October 28, 2004, SCENT was only authorized to issue a single class of shares. SCENT's amended articles of incorporation filed June 12, 2008, similarly prohibited SCENT from authorizing any securities which

[1] All terms not defined in this Brief shall have the meanings ascribed to them in the Initial Brief of Respondents/Appellants Jamie Curley and Dr. Orville Dyce in Respondents/Appellants' Cross Appeal (the "**Initial Brief**").
[2] See pages 7-18 of the Initial Brief.

would cause the corporation to have classes of stock that vary other than by voting rights."[3]

2. "In 2005, Dr. Dyce joined SCENT as an employee physician."[4]

3. "In March 2007, Drs. Puchalski and Dyce agreed Dr. Dyce had become a shareholder and would pay for his shares by having his profit distributions paid to Dr. Puchalski until Dr. Dyce's buy-in was complete. Dr. Puchalski's staff, under Dr. Puchalski's supervision, created a spreadsheet that kept a record of the distributions that would have been paid to Dr. Dyce as an equal shareholder, but which were instead paid to Dr. Puchalski (and/or Dr. Amy Puchalski) pursuant to the March 2007 agreement between Drs. Dyce and Puchalski, to fund Dr. Dyce's buy-in."[5]

4. "On or about August 31, 2007, Drs. Dyce and Puchalski executed (i) the August 31, 2007 Shareholders' Agreement; (ii) a Stock Purchase Agreement; and (iii) a Bill of Sale. The Bill of Sale provides, in part, that Dr. Puchalski 'hereby transfers and conveys unto Orville Dyce, MD. ... 50,000 shares of the capital stock in SCENT for $50,000.'"[6]

5. "At some point near the end of 2007 or the beginning of 2008, SCENT's outside accountant, Austin Sheheen, advised Dr. Puchalski that the mechanism by which Dr. Dyce was paying for his shareholder interest violated rules applicable to Subchapter S corporations. Those rules required that shareholders receive distributions exactly equal to their proportionate share of ownership in the corporation. As a result, Drs. Puchalski and Dyce orally agreed to undo their prior agreements and to postpone Dr. Dyce's admission

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[3] R. p. 6 (internal citations omitted).
[4] R. p. 7.
[5] R. p. 7 (internal citations omitted).
[6] R. p. 8 (internal citations omitted).

as a shareholder until Dr. Dyce completed his buy-in. Consistent with that approach, the monies recorded in Dr. Dyce's K-1 distribution account in 2007 were zeroed out and the distributions paid to Dr. Dyce in 2007 were reported to the IRS as employee income using a Form 1099."[7]

6. "The actions and testimony of SCENT's outside accountant, Austin Sheheen, confirm that Dr. Dyce had completed his buy-in and became a SCENT shareholder as of February 1, 2008."[8]

7. "SCENT's tax records establish that SCENT reported the profit distributions it paid to Dr. Dyce beginning February 1, 2008 as shareholder K-1 distributions, not employee wages."[9]

8. "SCENT'S general ledger reflects that between February 1, 2008 and December 31, 2008 SCENT distributed $872,992.16 more to Drs. Robert and Amy Puchalski than it distributed to Dr. Dyce."[10]

9. "Between January 1, 2009 and December 31, 2009, Drs. Robert and Amy Puchalski received $98,542.06 more than Dr. Dyce received."[11]

10. "Therefore, Dr. Puchalski received a total of $921,534.22 in excess distributions."[12]

11. "In February and early March 2010, Dr. Dyce submitted a number of requests for financial and other information to SCENT personnel. In response Dr. Puchalski placed various conditions upon allowing Dr. Dyce to take possession of copies

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[7] R. p. 8-9.
[8] R. p. 9.
[9] R. p. 9-10.
[10] R. p. 10 (internal citations omitted).
[11] R. p. 11.
[12] Id.

of SCENT's records. During this time period, mistrust between Drs. Dyce and Puchalski grew exponentially."[13]

12. "In early 2010, Dr. Puchalski wanted to have SCENT Land borrow the construction funding for the Lugoff building. Dr. Puchalski negotiated with First Palmetto Bank and obtained its agreement in February 2010 for SCENT Land to receive the loan without requiring Dr. Dyce to guarantee its repayment. The bank's approval of the construction loan to SCENT Land without requiring Dr. Dyce to personally guarantee the loan remained in effect until the loan was eventually closed in May 2010. Despite First Palmetto Bank having agreed to this request on February 17, 2010 in exchange for Dr. Puchalski's pledging additional collateral for the loan; on March 1, 2010 Dr. Puchalski's staff forwarded to Dr. Dyce copies of loan documents that were represented to be necessary for the loan closing. The forwarded documents included a personal guaranty from Dr. Dyce even though First Palmetto Bank had agreed that Dr. Dyce did not need to guarantee the loan. Dr. Puchalski followed up on March 2, 2010 with his email to Ms. Curley representing to her that a mechanic's lien had been filed against the project and that it was critical that she and Dr. Dyce sign the documents."[14]

13. "Dr. Puchalski's representation that a mechanic's lien had been filed against the project was incorrect. Dr. Puchalski's representation that Dr. Dyce needed to sign the personal guaranty was also false."[15]

14. "On March 10, 2010, Dr. Puchalski delivered the March 3 'consent' to Dr. Dyce, and declared Dr. Dyce's employment had been terminated without cause to be

[13] R. p. 12 (internal citations omitted).
[14] R. p. 13 (internal citations omitted).
[15] R. p. 14.

effective in sixty (60) days."[16]

15. "On March 30, 2010, Dr. Puchalski issued a 'management directive' that included a demand that Dr. Dyce 'comply with [his] obligations under this directive as well as the provisions of the [July 16, 2008] Shareholders' Agreement and [the June 1, 2008] Employment Agreement.' The 'management directive' ordered Dr. Dyce to cooperate in recruiting a new physician, not to disparage the Group, to refrain from soliciting patients and requested that Dr. Dyce advise where he intended to practice after May 9. Dr. Puchalski did not submit the 'management directive' for a vote to SCENT's shareholders."[17]

16. "There is no evidence Dr. Dyce solicited any patients prior to October 18, 2010. There is no evidence Dr. Dyce disparaged SCENT at any time."[18]

17. "On May 8, 2010, the day before Dr. Dyce's last day as a SCENT employee under the March 3 'consent' terminating Dr. Dyce ***without cause***, Dr. Puchalski issued the May 8 'consent' purporting to terminate Dr. Dyce for cause, citing as the sole reason, "'Dr. Dyce shared numerous pieces of information regarding a proposed contract to other non-shareholder physicians of SCENT to further his own personal position.' Dr. Puchalski did not submit the May 8 'consent' to a vote of SCENT's shareholders. All of these allegations revolved around the alleged communications between Dr. Dyce and Dr. Gunnlauggson which Dr. Puchalski alleges were held to conspire to the detriment of SCENT."[19]

18. "Dr. Dyce did not participate in Dr. Gunnlauggson's setting up or

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[16] Id.
[17] R. p. 14 (internal citations omitted).
[18] R. p. 15.
[19] R. pp. 14-15.

conducting of Dr. Gunnlauggson's medical practice upon his departure from his employment with SCENT."[20]

19. "Dr. Dyce did not practice medicine from the date he left SCENT on May 9, 2010 until October 18, 2010. There is no evidence Dr. Dyce solicited any patients prior to October 18, 2010. There is no evidence that Dr. Dyce maintained malpractice insurance during this time....Having not received payment for his stock in SCENT, on October 18, 2010, Dr. Dyce began working for Carolina Pines where he works today." [21]

20. "I find that there were a total of two shareholders in SCENT at the time of the end of Dr. Dyce's employment with SCENT. I further find that Dr. Dyce was terminated without cause on May 9, 2010."[22]

21. "Under Section 4.6.1 of the July 16, 2008 Shareholder Agreement, SCENT was obligated to commence purchasing Dr. Dyce's shares within sixty (60) days of the effective date of Dr. Dyce's termination, July 8, 2010. At no time has SCENT offered Dr. Dyce anything for his SCENT shares."[23]

22. "I further find that the purchase price that SCENT owed Dr. Dyce for his shares, as prescribed by Section 4.5 of the July 16, 2008 Shareholders' Agreement is $1,809,472 (One Million Eight Hundred Nine Thousand Four Hundred Seventy Two Dollars)."[24]

B. Facts Surrounding SCENT Land Subject to Judge Benjamin's Order

Defendants below are also appealing Judge Benjamin's August 2, 2012 Order –

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[20] R. p. 15.
[21] R. p. 15 (internal citations omitted).
[22] Id.
[23] Id.
[24] R. p. 24.

SCENT Land Case, granting Ms. Curley's summary judgment motion to dissolve SCENT Land.[25] The facts underlying that order are undisputed. SCENT Land was formed as a limited liability company under South Carolina law by the filing of articles of organization on September 15, 2008.[26] At approximately the same time, a proposed operating agreement for SCENT Land was prepared (the "**2008 Proposed SCENT Land Operating Agreement**").[27] SCENT Land's members were to be Amy Puchalski and Jamie Curley. The 2008 Proposed SCENT Land Operating Agreement included in Section 4.2 a provision authorizing mandatory capital contributions upon the vote of one hundred (100%) percent of all SCENT Land's members.[28] The 2008 Proposed SCENT Land Operating Agreement was never signed.

On or about September 30, 2009, Amy Puchalski, Dr. Puchalski and Jamie Curley executed an operating agreement for SCENT Land (the "**2009 Executed SCENT Land Operating Agreement**").[29] Amy Puchalski and Curley each owned fifty (50%) percent of the voting interests in SCENT Land; Dr. Puchalski was the sole manager. Unlike the 2008 Proposed SCENT Land Operating Agreement, the 2009 Executed SCENT Land Operating Agreement did not include a provision authorizing subsequent mandatory capital contributions. Section 6.2 of the 2009 Executed SCENT Land Operating Agreement further provided that a member of SCENT Land became dissociated from that company in the event that the member's spouse was no longer a shareholder in or

[25] R. P. 2.
[26] See R. p. 2492.
[27] R. pp. 4484-4513.
[28] R. p. 4487; R. p. 4500.
[29] R. pp. 2451-2491.

employed by SCENT.[30]

On March 11, 2010, the day after Dr. Dyce was notified of his termination without cause, SCENT Land provided electronic notice of a meeting to be held the following day on March 12, 2010 to approve a proposed mandatory capital call.[31] On March 12, 2010, a meeting of SCENT Land's members was held. Curley objected to the calling of the meeting, but, nevertheless, voted against the proposed measure. Amy Puchalski contributed $170,000 pursuant to this alleged mandatory capital call to SCENT Land;[32] Curley did not. Amy Puchalski was repaid these funds on May 9, 2010.[33]

On or about August 30, 2010, Dr. Puchalski, Amy Puchalski and Macy Vidrine executed an Amended and Restated Operating Agreement for SCENT Land (the "**2010 Amended and Restated SCENT Land Operating Agreement**").[34] Section 2.4 of that agreement required members to make additional capital contributions "upon a majority vote of the Members."[35]

By order dated July 31, 2012 and filed on August 2, 2012, the Honorable Deandra Benjamin issued her Form 4 order granting summary judgment to Plaintiff Jamie Curley "solely on the grounds that the company failed to deliver her the purchase agreement as required by SC Code Ann. §33-44-702(c)."[36]

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[30] See R. p. 2465.
[31] See R. pp. 358-361 and R. p. 3232. The 2009 Executed SCENT Land Operating Agreement did not permit electronic notice.
[32] R. p. 3232. The email notice indicates that there was to be a second payment by each member, but this payment was never made.
[33] R. p. 1524, lines 274:20-25.
[34] See R. pp. 3080-3118.
[35] R. p. 3185.
[36] R. p. 2.

STANDARD OF REVIEW

In their Initial Brief, the Defendants below correctly state that:

> "[A]n appellate court must look to the main purpose of the proceeding in order to determine the standard of review to exact." Wheeler v. Estate of Green, 381 S.C. 548, 554, 673 S.E.2d 836, 839-40 (Ct.App. 2009). "The character of the action is generally ascertained from the body of the complaint, but when necessary, resort may also be had to the prayer for relief and any other facts and circumstances which throw light upon the main purpose of the action." Sloan v. Greenville County, 380 S.C. 528, 534, 670 S.E.2d 663, 666-67 (Ct.App. 2009).[37]

Defendants below go on to imply, however, that the "main purpose" of Dr. Dyce's action is equitable due to the claim for a constructive trust. As even a cursory review of the October 21, 2011 Amended Complaint – SCENT Case, the May 10, 2012 First Amended Complaint – SCENT Case and other salient materials in the record will demonstrate, this implication is unsound.

As would only be prudent, the Plaintiffs below alleged the full panoply of commercial litigation causes of action including breach of contract, breach of contract accompanied by a fraudulent act, breach of fiduciary duty and conversion together with a request for an accounting, imposition of a constructive trust and certain statutory relief.[38] Although a few of these claims sound in equity, it is abundantly clear that the heart of the SCENT Case is for breach of the July 16, 2008 Shareholder Agreement due to the failure of SCENT and Dr. Puchalski to pay (1) equal distributions as mandated by the Subchapter S election and (2) the buyout required by section 4.6.1. Thus, the "main

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[37] See Initial Brief of Appellants/Respondents at p. 13.

[38] As discussed below, Dyce's original complaint of March 15, 2010 only sought an accounting and access to corporate documents. The full range of issues was not joined until Dr. Puchalski moved to amend his Answer on October 5, 2010 to assert various legal and statutory counterclaims. Curiously, the Statement of the Case authored by the Defendants below ignores this history and implies that Dyce, not Puchalski, "fired the first shot" with his Amended Complaint filed nearly eighteen (18) months after the original complaint. See Initial Brief of Appellants/Respondents at p. 2.

purpose of the action" is to recover damages for these contractual breaches—an action at law.[39] See Ahrens v. State, 392 S.C. 340, 347-48, 709 S.E.2d 54, 58 (2011) ("An action seeking damages for breach of contract is an action at law.").

Therefore, the primary standard of review "on appeal of [this] case tried without a jury...extends only to the correction of errors of law. The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings." Consignment Sales, LLC v. Tucker Oil Co., 391 S.C. 266, 270-271, 705 S.E.2d 73, 76 (Ct.App. 2010), *quoting* Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct.App. 2004); see also Pope v. Gordon, 369 S.C. 469, 474, 633 S.E.2d 148, 151 (2006); Sherlock Holmes Pub, Inc. v. City of Columbia, 389 S.C. 77, 81, 697 S.E.2d 619, 621 (Ct.App. 2010). "An action seeking damages for breach of contract is...an action at law and the trial judge's findings of fact will be upheld unless without support." Kuznik v. Bees Ferry Assocs., 342 S.C. 579, 589, 538 S.E.2d 15, 20 (Ct. App. 2000). Similarly, "[a]n action to construe a contract is an action at law reviewable under an 'any evidence' standard." Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001).

Despite paying lip service to the limited nature of appellate review in contract

[39] Further evidence of the "legal" character of the action is found in the counterclaims of the Defendants below which assert causes of action for (1) breach of contract (2) breach of fiduciary duty; (3) civil conspiracy; (4) interference with contractual relationship; (5) violation of the South Carolina Unfair Trade Practices Act; (6) defamation; (7) payment of debt; (8) shareholder oppression; and (9) breach of contract accompanied by a fraudulent act. Each of these claims arises under the common law or statutes of this State. See R. pp. 299-312.

cases,[40] the brief of the Defendants below is replete with minor quibbles with the trial court's factual findings. For example, in discussing Dr. Dyce's alleged breach of fiduciary duty[41] and breach of contract by sharing information with another SCENT employee, Defendants below assert that:

> While Dr. Dyce admitted to discussing the proposed Shareholders' Agreement with Dr. Gunnlauggson, Dr. Dyce denied discussing the details of the Agreement. This testimony is not credible and any finding otherwise is not supported by the record. Moreover, Dr. Gunnlauggson's testimony that Dr. Puchalski informed him of the specific details in the proposed Shareholders' Agreement is nonsensical and is not credible.[42]

This criticism by the Defendants below of the trial court's assessment of the credibility of witnesses and their testimony is misplaced in this appeal and inconsistent with the proper standard of review.

As noted in Dr. Dyce's Initial Brief, the Plaintiffs below recognize that a "case with legal and equitable issues presents a divided scope of review." Kuznik, 342 S.C. at 589, 538 S.E.2d at 20. "When legal and equitable actions are maintained in one suit, each retains its own identity as legal or equitable for purposes of the applicable standard of review on appeal." Moore v. Benson, 390 S.C. 153, 160, 162 700 S.E.2d 273, 277 (Ct.App. 2010). Thus, although it constitutes a very small portion of her Order, Judge Goodstein's finding of a constructive trust should be reviewed based on the standard applicable to equitable claims. See Lollis v. Lollis, 291 S.C. 525, 530, 354 S.E.2d 559,

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[40] See Initial Brief of Appellants/Respondents at p. 14.

[41] "An action for breach of fiduciary duty is an action at law and the trial judge's findings of fact will be upheld unless without evidentiary support." Kuznik, 342 S.C. at 589, 538 S.E.2d at 20.

[42] See Initial Brief of Appellants/Respondents at p. 69 (internal citations omitted). In fact, the trial court's conclusions are amply supported by detailed and specific testimony. See, e.g., R. p. 974, line 8-p. 975, line 9; Supp. R. p 2, line 23 -25, R. p. 1062, line 1 - 24; R. p. 1066, line 16-p. 1068 line 8; and R. p. 1074, line 6-p. 1078, line 5.

561 (1987) (holding that an action to declare a constructive trust is in equity).[43]

"In an equitable action tried without a jury, the appellate court can correct errors of law and may find facts in accordance with its own view of the preponderance of the evidence." Blackmon v. Weaver, 366 S.C. 245, 248-49, 621 S.E.2d 42, 43-44 (Ct.App. 2005). However, this "equitable standard of review does not require this court to ignore the findings of the trial judge who heard the witnesses. Decisions relative to the veracity and credibility of witnesses can best be made by the trial judge who heard the witnesses and observed their demeanor." Church v. McGee, 391 S.C. 334, 342-343, 705 S.E.2d 481, 485-486 (Ct.App. 2011).

ARGUMENT

I. THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FACTUAL FINDING THAT DR. DYCE HAD COMPLETED HIS BUY-IN AND BECAME A SHAREHOLDER IN SCENT AS OF FEBRUARY 1, 2008.

Dr. Dyce's initial employment contract with SCENT in 2005 contemplated that he would become an equal shareholder two (2) years later.[44] Consistent with this plan, the trial court found that, "[i]n March 2007, Drs. Puchalski and Dyce agreed Dr. Dyce had become a shareholder and would pay for his shares by having his profit distributions paid

[43]As to the SCENT Land issues involving dissolution of the limited liability company, Plaintiffs below agree that a summary judgment order requires a different standard of review. Specifically, when reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56(c), SCRCP, which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). However, as discussed in Section VII below, the facts surrounding SCENT Land's dissolution and Judge Benjamin's order are undisputed.

[44] Supp. R. pp. 6 -7.

to Dr. Puchalski until Dr. Dyce's buy-in was complete."[45] As part of this understanding, the two physicians executed a series of contracts on August 31, 2007 including a Shareholder's Agreement, a Stock Purchase Agreement and a Bill of Sale.[46] Unfortunately, they failed to consult SCENT's accountant as to whether the proposed payment plan complied with regulations governing Subchapter S corporations and, several months later, discovered it was necessary to alter the tax treatment of the distributions to Dr. Dyce.[47] Barring this *ex post facto* adjustment made upon the advice of SCENT's accountant, Dr. Dyce would have been considered a shareholder in SCENT in 2007. See S.C. Code Ann. 33-1-400(27) (2008) ("'Shareholder' means the person in whose name shares are registered in the records of a corporation...). Thus, any criticism of Dr. Dyce's confusion as to the commencement of his shareholder status rings hollow.

In any event, Judge Goodstein specifically found that "Drs. Puchalski and Dyce orally agreed to undo their prior agreements and to postpone Dr. Dyce's admission as a shareholder until Dr. Dyce completed his buy-in."[48] Based on the testimony and other evidence, the trial court further found that, pursuant to the terms of this oral reformation, "Dr. Dyce had completed his buy-in and became a SCENT shareholder as of February 1,

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[45] R. p. 7.

[46] See R. p. 8. It is also worth noting that the Executed 2009 SCENT Land Operating Agreement required that the member or the member's spouse be a shareholder in SCENT. It further established that Curley became a member as of July 2007, which corresponded to the dates in the 2007 shareholder documents executed by her husband Dr. Dyce and SCENT. See R. p. 2463, section 5.5(F) and p. 2465, section 6.2(f). While Section 6.2(f) refers to both employees and shareholders of SCENT, Dr. Dyce's status as an employee did not change in July 2007. Obviously, the Executed 2009 SCENT Land Operating Agreement was executed after the July 16, 2008 Shareholder Agreement.

[47] See R. p. 8.

[48] Id.

2008."[49] These factual findings are entirely consistent with South Carolina corporate law which recognizes that "[w]hen the corporation receives the consideration for which the board of directors authorized the issuance of shares, the shares issued therefor are fully paid and nonassessable." S.C. Code Ann. 33-6-210(d) (2008).[50]

A. Significance of Subchapter S Election

Defendants' cavalier characterization of SCENT's recognition (both before and after execution of the July 16, 2008 Shareholders' Agreement) of the satisfaction of Dyce's buy-in requirement in February 2008 as a meaningless "tax choice" is singularly unpersuasive.[51] Even if representations in tax returns could generally be disregarded in other contexts,[52] it is clear that SCENT's subchapter S election (and, therefore, the observance of all formalities necessary thereto) was of fundamental importance to SCENT.

In order to avail himself of the significant advantages of this structure,[53] Dr.

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[49] R. p. 9.

[50] Although this provision is included in the Business Corporation Act, S.C. Code Ann. 33-18-102(a) (2008) confirms that "Chapters 1 through 17 of this title apply to statutory close corporations to the extent not inconsistent with the provisions of this chapter." As a statutory close corporation, SCENT chose to eliminate any need for a board of directors in its amended Articles of Incorporation. See S.C. Code Ann. 33-18-210 (2008). In such cases, "the business and affairs of the corporation [are] managed under the direction of the shareholders." Id.

[51] See Initial Brief of Appellants/Respondents at p. 18.

[52] Contrary to their argument in this Court, the Defendants below vigorously cross-examined Dr. Dyce at trial as to the implications of his failure to file as a shareholder in 2007. Dr. Dyce testified that he left it up to Austin Sheheen to determine the appropriate way in which to classify his income. See R. p. 984, lines 11 – 23.

[53] The "S" election status presents many critical advantages to shareholders for various reasons, particularly avoiding "double" taxation on income at both the entity and individual levels. "[U]nlike a traditional C corporation, S corporations themselves generally do not pay taxes." Maloof v. C.I.R., 456 F.3d 645, 647 (6th Cir. 2006) (quoting Gitlitz v. Comm'r, 531 U.S. 206, 214 n. 6, 121 S.Ct. 701, 148 L.Ed.2d 613 (2001) ("The very purpose of Subchapter S is to tax at the shareholder level, not the corporate level.

Puchalski chose for SCENT to be a Subchapter S corporation from its very formation. Consequently, SCENT's initial articles of incorporation dated October 28, 2004 prohibited the issuance of more than a single class of shares as required by law.[54] SCENT's amended articles of incorporation filed June 12, 2008 include a similar provision and expressly state that "[a]ny such...authorization of a different class of stock...shall be void ab initio...."[55] These restrictions are repeated in Section 5.2 of the July 16, 2008 Shareholders' Agreement which sets forth significant consequences for "the commission or omission of [any act] which would cause the termination of the Subchapter S election of the Corporation."[56] Thus, compliance with the restrictions on S corporations, including limiting K-1 distributions to shareholders, was an essential part of SCENT's corporate governance.[57] If not, there would have been no need to "undo" the 2007 Shareholders' Agreement.[58]

B. Proper Interpretation of Merger Clause

The Defendants below also devote considerable attention to the merger clause in the July 16, 2008 Shareholders' Agreement which provides that it supersedes all prior agreements. Dr. Dyce concedes that this document is a binding agreement which

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Income is determined at the S corporation level ... not in order to tax the corporation ... but solely to pass through to the S corporation's shareholders the corporation's income."). "Each shareholder of an S corporation thus pays taxes at individual rates on the pro rata share of the corporation's income (if there is any) and receives the pro rata tax benefits (e.g., losses, deductions and credits) of the corporation." Id. (citing 26 U.S.C. § 1366(a)(1)). In other words, the S election allows for only one level of taxation, at the shareholder level, rather than two levels of taxation, at both the corporate and shareholder levels.

[54] See 26 U.S.C. § 1361(b)(1)(D).

[55] R. p. 2975, para. 10(a).

[56] R. p. 2330.

[57] See R. p. 746, line 14-p. 748, line 3.

[58] See R. p. 1959, lines 1-16.

defined the rights and obligations of the parties from July 16, 2008 forward. The July 16, 2008 Shareholders' Agreement did not, however, abrogate the pre-existing status of both Drs. Puchalski and Dyce as shareholders.[59]

This conclusion is clear from the very first page of the document which states that:

> As of the Effective Date of this Agreement, the Corporation has issued and [sic] outstanding One Hundred Thousand (100,000) shares of Common Stock in the amounts and to the Shareholders identified on Schedule A....[60]

Schedule A is entitled "SHAREHOLDERS AND NUMBER OF SHARES" and identifies Robert Puchalski and Orville Dyce as equal shareholders possessing 50,000 shares. If one accepts Dr. Puchalski's interpretation of the merger clause, then neither he nor Dr. Dyce were shareholders of SCENT prior to July 16, 2008. Given this nonsensical result, the July 16, 2008 Shareholders' Agreement cannot reasonably be construed as establishing the date of shareholder status. Rather, it is entirely consistent with this agreement to consider both Puchalski and Dyce as existing shareholders who redefined their rights and responsibilities as shareholders in the July 16, 2008 Shareholder Agreement.[61]

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[59] As noted previously, the trial court found that "SCENT's tax records establish that SCENT reported the profit distributions it paid to Dr. Dyce beginning February 1, 2008 as shareholder K-1 distributions, not employee wages." R. pp. 9-10. Obviously, these records for the 2008 tax year were prepared **after** the July 16, 2008 Shareholders' Agreement. Accordingly, SCENT's actual application of this agreement in preparing SCENT's 2008 tax return in 2009 is inconsistent with their current argument.

[60] R. p. 2316.

[61] The execution of the July 16, 2008 Shareholders' Agreement was actually authorized by a "Written Consent" signed by Drs. Dyce and Puchalski. See R. pp. 3186-3187. This corporate document, which necessarily predated the execution of the Shareholders' Agreement, describes the signators as "being all of the Shareholders of the Corporation". Id. If Dr. Puchalski had been the sole shareholder prior to the execution of the July 16, 2008 Shareholders' Agreement, there would have been no reason for Dyce to sign this Consent.

In this regard, the phrase "As of the Effective Date of this Agreement" could obviously mean that these shares had been issued prior to said date. In fact, the draft 2010 Shareholders' Agreement included the very same recital and a merger clause.[62] Accepting the Defendants' construction of the July 16, 2008 Shareholder Agreement, the execution of this draft agreement would have abrogated the shareholder status of both Drs. Puchalski and Dyce prior to 2010.

C. Inapplicability of Laches

The Defendants below also assert that laches bar Dyce's claim because they "were unaware that the Plaintiff was taking the position that he was a shareholder prior to July 16, 2008."[63] This contention stretches credulity given that both the October 21, 2011 Amended Complaint and the May 10, 2012 First Amended Complaint specifically allege that Dyce became a shareholder on March 1, 2007.[64] Given the confusion resulting from the machinations necessary to preserve Subchapter S status, prudence required Dyce to give notice in his pleadings of the earliest possible date of shareholder status.[65]

As explained in All Saints Parish v. Protestant Episcopal Church, 358 S.C. 209,

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[62] See R. p. 2404 and 2427.

[63] Initial Brief of Appellants/Respondents at p. 19.

[64] See R. p. 178, para. 6; R. p. 253, para. 7. As noted above, this was the date contemplated by Dyce's original Employment Agreement. Furthermore, Judge Goodstein found that, "[i]n March 2007, Drs. Puchalski and Dyce agreed Dr. Dyce had become a shareholder". R. p. 3.

[65] Resort to laches is particularly inappropriate in this case given the breach by the Defendants below of their obligations to Dr. Dyce as a co-owner of SCENT. See Archambault v. Sprouse, 218 S.C. 500, 509, 63 S.E. 2d 459, 463 (1951) ("a party [who] openly defies known rights, in the absence of anything to mislead him...is not in a position to urge as a bar [his adversary's] failure to take the most instant conceivable resort to the courts.").

595 S.E.2d 253 (Ct.App. 2004):

> Laches is an equitable doctrine, which "arises upon the failure to assert a known right." Ex parte Stokes, 256 S.C. 260, 267, 182 S.E.2d 306, 309 (1971); see Byars v. Cherokee County, 237 S.C. 548, 559, 118 S.E.2d 324, 330 (1961) ("Laches is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, or neglecting or omitting to do what in law should have been done for an unreasonable and unexplained length of time and in circumstances which afforded opportunity for diligence.").

Id. at 267-68.

"In addition, 'the circumstances must . . . [be] such as to import that the complainant had abandoned or surrendered the claim or right which he now asserts.'" Id., *citing* Byars, 237 S.C. at 559, 118 S.E.2d at 330.

"The party asserting laches has the burden of showing negligence, the opportunity to act sooner, and material prejudice." Mazloom v. Mazloom, 382 S.C. 307, 319, 675 S.E.2d 746, 753 (Ct.App. 2009) (*quoting* Richey v. Dickinson, 359 S.C. 609, 612, 598 S.E.2d 307, 309 (Ct.App. 2004)). "The question of whether the elements of laches have been established is one of fact and its determination rests largely within the discretion of the court. Each case must depend upon the particular circumstances present, taking into consideration among other things whether the delay has worked injury, prejudice or disadvantage to one of the parties." Grossman v. Grossman, 130 S.E.2d 850, 855, 242 S.C. 298, 309 (1963); see also Eldridge v. Eldridge, 398 S.C. 113, 119, 728 S.E.2d 24, 27 (2012) ("Determination of laches rests within the sound discretion of the trial court."), *quoting* Gibbs v. Kimbrell, 311 S.C. 261, 269, 428 S.E.2d 725, 730 (Ct.App. 1993).

In this case, Dr. Dyce acted diligently in pursuing his rights as a shareholder and provided ample notice of his position that this status predated the July 16, 2008 Shareholder Agreement. Likewise, there was nothing unreasonable about Dr. Dyce's

conduct given the circumstances surrounding the reformation of the August 31, 2007 Shareholder Agreement. Furthermore, the Defendants below sustained no conceivable injury or prejudice due to the Plaintiffs' eventual adoption of a more conservative theory of recovery.[66] Therefore, there is no basis for invading the discretion of the trial court by applying the principle of laches to effect a forfeiture in this matter.

II. BASED ON ITS FINDINGS OF FACT, THE TRIAL COURT PROPERLY APPLIED THE MERGER CLAUSE TO MATTERS WITHIN THE SCOPE OF THE JULY 16, 2008 SHAREHOLDERS' AGREEMENT.

Pursuant to the clear, express and unambiguous terms of the June 1, 2008 Employment Agreement, its effective date was June 1, 2008. Therefore, the merger clause contained in the July 16, 2008 Shareholder Agreement did operate to supersede and nullify inconsistent terms of the June 1, 2008 Employment Agreement.

In regard to the similar issue addressed in Section I(B) above, Defendants below devote several pages of argument to the proposition that the July 16, 2008 Shareholder Agreement's merger clause should entirely nullify Dr. Puchalski's and Dr. Dyce's past actions, as well as later actions, such as the later preparation of SCENT's 2008 tax returns. They then apparently abandon this position and assert that the consideration of

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[66] Rule 8(e)(2), SCRCP, expressly countenances factual inconsistencies in litigation pleadings. See J.Flanagan, South Carolina Civil Procedure 70 (3rd ed. 2010). In discussing the federal counterpart to this Rule, Wright & Miller observe "that frequently a party, after a reasonable inquiry and for proper purposes, must assert contradictory statements when he or she legitimately is in doubt about the factual background of the case or the legal bases that underline affirmative recovery or defense." 5 Wright & Miller, Federal Practice and Procedure: Civil 3d § 1283 (3d ed. 2004). In addition, though the initial allegations regarding the commencement of shareholder status were not formally amended, the contention that this status arose upon completion of the buy-in was certainly evident at trial and the issue was tried with the express or implied consent of the parties. Therefore, "it must be treated in all respects as if raised in the pleadings." Rule 15(b), SCRCP.

parole evidence mandates the application of a prior agreement to the **future** relationship between the shareholders. Unlike the issue of pre-existing shareholder status, the rules governing the management of SCENT after July 16, 2008 are clearly matters addressed by the July 16, 2008 Shareholders' Agreement. Therefore, since the June 1, 2008 Employment Agreement is also concerned with such matters, it falls squarely within the scope of prior agreements superseded by the merger clause.

Additionally, Judge Goodstein noted the parole evidence proffered by Dr. Puchalski, but concluded that the "record is unclear when Dr. Dyce actually signed the June 1, 2008 Employment Agreement and Covenant."[67] Furthermore, the trial court observed that the June 1, 2008 Employment Agreement referenced its date of execution and effective date in multiple locations rendering its terms unambiguous on this point and precluding resort to parole evidence. Given the considerable range between the dates of the June 1, 2008 Employment Agreement and the July 16, 2008 Shareholders' Agreement, they simply cannot be considered "simultaneous" or "contemporaneous" as contended by the Defendants below.

III. THE RECORD SUPPORTS THE TRIAL COURT'S DETERMINATION THAT DR. DYCE WAS TERMINATED WITHOUT CAUSE, NOT WITH CAUSE.

A. Underlying Facts Do Not Establish a Legitimate Cause for Termination

In the section of their Brief raising this issue, the Defendants below mount numerous challenges to specific factual findings of the trial court. As noted above, these "findings of fact will not be disturbed upon appeal unless found to be without evidence

[67]R. p. 25, fn. 52. The trial court further noted that "Dr. Puchalski testified that the June 1, 2008 date was of significance and it was the parties' intent that the document be effective as of June 1, 2008." See id.

which reasonably supports the judge's findings." Consignment Sales, LLC v. Tucker Oil Co., 391 S.C. 266, 270-271, 705 S.E.2d 73, 76 (Ct.App. 2010) (*quoting* Electro Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc., 357 S.C. 363, 367, 593 S.E.2d 170, 172 (Ct.App. 2004)). After weighing the testimony contained in 2,135 pages of transcript and considering the documentary evidence of thousands of pages of the 608 exhibits, Judge Goodstein rejected the selfsame factual arguments advanced by the Defendants below in this section of their appellate brief. Thus, any criticism of her decision at this stage is unfounded.

For example, two full pages of the Appellants/Respondents' brief repeat allegations that Dr. Dyce provided Dr. Gunnlauggson with information relating to the draft 2010 Shareholder Agreement.[68] As noted in the trial court's Order, however, Dr. Dyce testified that he did not provide his colleague with "confidential information such as the 2010 draft shareholders agreement and/or employment agreement"[69] and "Dr. Gunnlauggson testified that he obtained copies of an unsigned 2010 shareholders' agreement from Dr. Puchalski."[70] Based on her "extensive opportunity to observe and listen to the witnesses and judge their credibility regarding all of the issues raised in the summons and complaint and the counterclaims,"[71] Judge Goodstein expressly found that "Dr. Puchalski shared this information with Dr. Gunnlauggson—not Dr. Dyce."[72] This factual finding was certainly within her province as the finder of facts.

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[68] See Initial Brief of Appellants/Respondents at p. 23-24. Significantly, this allegation was the only reason cited for Puchalski's attempted termination by fiat of Dyce "for cause." See R. p. 29, quoting R. p. 3223.
[69] R. p. 36; see also R. p. 974, line 8-p. 975, line 9.
[70] R. pp. 41-42; see also Supp. R. p. 2, line 23- 25, R. p. 1062, line 1 - 24; R. p. 1066, line 16-p. 1068, line 8; R. p. 1074, line 6-p. 1078, line 5.
[71] R. p. 43.
[72] R. p. 37, fn 67.

Even if Dr. Dyce was the source of his colleague's information, the trial court further found that:

> Dr. Dyce, a fifty percent (50%) shareholder in SCENT, was confronted with his co-shareholder's actions directed towards securing to himself control of the corporation and arrogate largely to himself effectively all meaningful decision making authority and accomplish this before admitting Dr. Gunnlauggson as a shareholder. Under SCENT's written confidentiality policy, Dr. Dyce was within his rights to discuss information relating to the practice, particularly with Dr. Gunnlauggson, an employee, who was on a shareholder track.[73]

Accordingly, "[i]f Dr. Dyce discussed with Dr. Gunnlauggson the proposed changes in governance sought to be implemented by Dr. Puchalski, such discussion did not violate Dr. Dyce's obligations under either the July 16, 2008 Shareholders' Agreement or his June 1, 2008 Employment Agreement"[74] and could not serve as the predicate for his termination from SCENT with cause.

In considering whether there was evidence to support the trial court's findings, it is also significant that another factfinder reached the same conclusion. In the summer of 2010, having not received the required buy-out offer or payments from SCENT, Dr. Dyce sought unemployment benefits and began interviewing for a new job.[75] Dr. Puchalski opposed Dr. Dyce's receipt of unemployment benefits and contended Dr. Dyce had been terminated for cause.[76] Despite this opposition, an administrative law panel ruled in August 2010 that Dr. Dyce was entitled to benefits. To wit, the South Carolina Department of Employment and Workforce Appeal Tribunal found that "[t]here is no clear evidence that [Dyce] did anything wrong or failed to do something he was obligated

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[73] R. p. 30. In this context, Section 3.7 of the July 16, 2008 Shareholders' Agreement expressly allows the disclosure of confidential information to "employees of the Corporation."
[74] Id.
[75] See R. p. 922, line 11-p. 923, line 24.
[76] See id.

to do in bringing about his discharge. The initial determination is correct and should be affirmed, as [Dyce] was discharged without cause."[77] Indeed, as South Carolina courts have also "repeatedly held that under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action." Bennett v. S.C. Dep't of Corr., 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991), *citing* Earle v. Aycock, 276 S.C. 471, 279 S.E.2d 614 (1981). The Commission's conclusion should be deemed final and binding.

B. Legal Deficiencies of Purported Termination

The Defendants below close this section of their brief with a request that this Court "remand the matter with instructions to the trial court to find that Dr. Dyce was properly terminated for cause."[78] They completely fail, however, to address the trial court's ruling that "the 'management directive' and the subsequent May 8 'Consent' terminating Dr. Dyce for cause are invalid and unenforceable."[79] Since this conclusion is inescapable due to the applicable provisions of the contracts and the governing law, the contested findings of fact are, in the final analysis, of no import.

Additionally, Dr. Puchalski and SCENT neglected specific mandates of corporate governance in attempting to terminate Dr. Dyce for cause on May 8, 2010. As found below:

> the voting requirements for terminating Dr. Dyce would fall under the default rule in section 3.3 and only a majority vote of the shareholders is required to terminate a shareholder for cause at a properly noticed meeting. However, there was never

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[77] R. p. 3234. Notably, Dr. Puchalski and his attorney were present at this hearing. See R. p. 922, lines 16-20.
[78] Initial Brief of Appellants/Respondents at p. 25.
[79] R. p. 25.

a meeting of the shareholders nor any attempt to convene such a meeting.[80]

Consequently, the purported unilateral corporate edicts from Dr. Puchalski were "issued without the necessity authority and the alleged termination for cause is invalid and unenforceable."[81]

IV. THE TRIAL COURT PROPERLY CONCLUDED THAT SCENT BREACHED ITS CONTRACTUAL OBLIGATION TO PURCHASE DR. DYCE'S INTEREST IN THE CORPORATION.

A. SCENT's Performance Was Not Excused by Any Fundamental Breach

Defendants below claim that:

> As a matter of law, Dr. Dyce is not owed any money under the purchase price calculation ("Buyout") due to his numerous, fundamental, and substantial breaches of his contract with SCENT. Dr. Dyce stole insurance contracts from the practice for his own personal benefit, shared confidential, proprietary information with his future employer, competed against SCENT in violation of the Covenant, failed to follow the Management Directives, chose a public lawsuit over arbitration, and conspired with his wife and another physician to ruin the practice.[82]

Despite SCENT's assertion that this is a "matter of law," these are clearly factual issues which were decided adversely to the Defendants below by the trial court based on the totality of the evidence. To wit, the trial court found that:

> 1) "There is no evidence Dr. Dyce solicited any patients prior to October 18, 2010."[83]
>
> 2) "It is unreasonable that Dr. Dyce, a 50% shareholder, should be uninformed about any information regarding the entity of which he is an equal

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[80] R. p. 28; see also S.C. Code Ann. 33-7-105 (2008) ("A corporation shall notify shareholders of the date, time, and place of each annual and special shareholders' meeting no fewer than ten nor more than sixty days before the meeting date... Notice of a special meeting must include a description of the purpose for which the meeting is called.").

[81] R. p. 28.

[82] See Initial Brief of Appellants/Respondents at p. 37.

[83] R. p. 15.

owner."[84]

3) "Defendants claim that Dr. Dyce breached the June 1, 2008 Employment Contract by violating the Covenant. As stated above, the Covenant is unenforceable."[85]

4) Dr. Dyce "did not work as a physician in any capacity from the time [his] employment ended with SCENT through the middle of August."[86]

5) "Even if the March 30, 2010 'management directive' had been validly issued, Dr. Dyce did not violate it."[87]

6) "The Court finds that there is no credible evidence that Dr. Dyce conspired with Dr. Gunnlauggson or anyone else to injure or damage SCENT or Dr. Puchalski."[88]

As these findings were not clearly erroneous, the Defendants' claim of a "fundamental and substantial" breach of contract by Dr. Dyce must fail.

Furthermore, much of the conduct complained of above occurred after SCENT breached its obligation to redeem Dr. Dyce's shares. As observed by Judge Goodstein:

> Under Section 4.6.1 of the July 16, 2008 Shareholder Agreement, SCENT was obligated to commence purchasing Dr. Dyce's shares within sixty (60) days of the effective date of Dr. Dyce's termination, July 8, 2010. At no time has SCENT offered Dr. Dyce anything for his SCENT shares.[89]

Therefore, it is totally incongruous to contend that SCENT's performance due on July 8, 2010 is somehow retroactively excused by alleged acts which had yet to take place.

B. Value of Accounts Receivables

The Defendants below further take issue with the trial court's factual findings as to the value of purchase price components prescribed by Section 4.5 of the July 16, 2008

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[84] R. p. 42. As noted above, the trial court found Dr. Dyce's compliance with the Covenant excused by SCENT's breach of its contractual obligations prior to his accepting employment in October 2010.
[85] R. p. 37.
[86] R. pp. at p. 36-37.
[87] R. p. 29.
[88] R. p. 44.
[89] R. p. 15.

Shareholders' Agreement. In pertinent part, Section 4.5 states that:

> The Corporation...shall pay the Departing Shareholder a purchase price ("Purchase Price") for the Shares in an amount equal to (a) one-fourth of the total collected revenue of the group for the 12 whole calendar months preceding the Departure Event divided by the number of Shareholders of the Corporation including the Departing Shareholder plus (b) one-third of the sum of the accounts receivable of the Corporation, booked in accordance with Corporation's normal accounting methods, and the cash (to include cash equivalents and marketable securities) of the Corporation divided by the number of Shareholders of the Corporation including the Departing Shareholder, and minus (c) any amount, if any, owed by the Departing Shareholder as of the effective date of the Termination of Employment under Section 4.6.4 of this Agreement.[90]

The Defendants below contest the trial court's factual findings relating to subsections b and c of this provision.

As to the former, the Defendants below assert that "[i]t is evident that the words 'booked in accordance with the Corporation's normal accounting methods' have some meaning that modify the words 'accounts receivable.'"[91] Since this phrase is undefined in the July 16, 2008 Shareholders' Agreement, the contention of the Defendants below appears to concede that the contractual language is ambiguous thereby further undermining their argument regarding the integration clause.[92] See S.C. Dep't of Nat. Res. v. Town of McClellanville, 345 S.C 617, 623, 550 S.E.2d 299, 302 (2001) ("A contract is ambiguous when the terms of the contract are reasonably susceptible to more than one interpretation."). Thus, it was permissible for the trial court to consider extrinsic evidence and to make findings of fact regarding the parties' intent. See id. at 303 ("Once the court decides the language is ambiguous, evidence may be admitted to show the

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[90] R. p. 2327.

[91] See discussion in Section II.

[92] See Initial Brief of Appellants/Respondents at p. 38. The Defendants below also offered extrinsic evidence as to the meaning of this term, i.e. testimony as to the "practice of the practice" relative thereto. See R. p. 2142, lines 4-23. At the same time, Defendants below claim that the Court should only look at the July 16, 2008 Shareholder Agreement to determine Dr. Dyce's status as a shareholder. See Section IB. above.

intent of the parties....The determination of the parties' intent is then a question of fact."). Judge Goodstein noted that the meaning of this term was "hotly contested"[93] and considered documentary and testamentary evidence from both sides.

An accountant who came to work for Austin Sheheen (SCENT's corporate accountant) in 2012 opined on the final day of trial that the value of the receivables should be zero as they were not included in the general ledger. This position directly contradicted both SCENT's interrogatory responses[94] and the prior sworn testimony of SCENT's actual corporate accountant.[95] The Defendants below contend that the trial court erred in not accepting this "undisputed" testimony. It is clear, however, that a "trier of fact [is] free to accept or reject any or all of a witness's testimony, including that of an expert witness." S.C. DOT v. M & T Enters. of Mt. Pleasant, LLC, 379 S.C. 645, 668 n. 12, 667 S.E.2d 7, 20 n. 12 (Ct.App. 2008); See also State v. Douglas, 380 S.C. 499, 503, 671 S.E.2d 606, 609 (2009) ("As with any witness, the jury is free to accept or reject the testimony of an expert witness."). As explained in Black v. Hodge, 306 S.C. 196, 198, 410 S.E.2d 595, 596 (Ct.App. 1991):

> the question is simply this: must a trier of fact always believe uncontradicted testimony? The answer to the question is, plainly, no. The fact that testimony is not contradicted directly does not render it undisputed. There remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation.[96]

Id. at 17-18. In this context, it is interesting that a component based on SCENT's accounts receivable was not included in either the stock valuation or buyout formulas

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[93] R. p. 19.
[94] See R. p. 2200, lines 2-18; R. pp. 4688-4691.
[95] See R. p. 1840, lines 1-4.
[96] Id.; See also Sauers v. Poulin Bros. Homes, 328 S.C. 601, 605-606, 493 S.E.2d 503, 505 (Ct. App. 1997).

established by the 2007 Shareholder's Agreement.[97] This is further evidence that the parties intended to add something other than a nullity by the inclusion of receivables in the new formula.

Ultimately, the trial court rejected the factual presentation of the Defendants below. Judge Goodstein found that they had failed to prove an accepted definition of the term "booked"[98] and that it "would be nonsensical for the formula to include a value for accounts receivable if the very definition of accounts receivable would dictate a value of zero."[99] Instead, as it was "uncontested that SCENT kept meticulous track of its accounts receivable in its books,"[100] the trial court looked to this documentary evidence to determine the amount due to Dr. Dyce. Thus, she found that "[u]tilizing the records of account receivables closest to the operative date of May 9, 2010, the accounts receivable for SCENT on that date is $1,868,707...."[101]

In reaching this conclusion, the trial court specifically rejected the factual argument advanced by the Defendants below that "net realizable value" was intended to be used to determine the worth of these receivables. While the Defendants below concede that this is a concept utilized under Generally Accepted Accounting Principles ("GAAP"),[102] the trial court found that "SCENT keeps its books on a cash basis which is not GAAP [and] there is no requirement under the July 16, 2008 Shareholders'

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[97] See R. p. 2299 and p. 2303.
[98] R. p. 19; see also R. p. 2205, line 23-p. 2206, line 17.
[99] R. pp. 21-22.
[100] R. p. 20.
[101] R. p. 22. This calculation was based on records which SCENT's corporate accountant admitted to be the most reliable evidence presented by the parties. See R. p. 21, fn 47.
[102] See Initial Brief of Appellants/Respondents at p. 40.

Agreement that the accounting methods be GAAP."[103] Thus, instead of rewriting the buyout formula as suggested by the Defendants below to require a methodology premised on net realizable value or other "look back" concepts,[104] the trial court enforced the agreement of the parties that this "formula should utilize only one-third (1/3) of SCENT's accounts receivable, implicitly recognizing that not all of the accounts receivables on SCENT's books would be collected."[105]

The July 16, 2008 Shareholder Agreement calls for a calculation of a payment to a departing shareholder within sixty (60) days of departure. Obviously, the calculation must be made with the information that existed, not "look back" values that were unknowable at that time.

C. Value of Cash Equivalents

Defendants below further contest the trial court's valuation of "cash equivalents" pursuant to subsection 4.5(b) of the July 16, 2008 Shareholders' Agreement regarding two of SCENT's assets. First, a key man insurance policy with a cash value of $33,000 was included. SCENT claims that this "cash value" was not a "cash equivalent" because the surrender of the policy would result in a penalty of indeterminate amount. As SCENT's corporate accountant conceded on cross-examination, however, if the redemption price formula called for the value of cash equivalents to be used, rather than

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[103] R. p. 21; see also R. p. 2156, lines 9-19.

[104] In other words, the Defendants below requested the Court to review the actual collection of receivables from a vantage point more than three years after Dr. Dyce's termination. Not only is this method not called for in the July 16, 2008 Shareholders' Agreement, it is inconsistent with the mandated determination of the Purchase Price no later than 60 days following termination. See R. p. 990, lines 4-7 and R. p. 2256, lines 3-14.

[105] R. p. 22. Despite the Defendants' protestations, this inference seems eminently reasonable.

for cash equivalents to be converted into cash, this criticism of its inclusion is misplaced.[106]

The reasoning of the Defendants below relative to the other asset recognized as a cash equivalent, a $726,000 note from SCENT Land to SCENT repaid the day after the Dr. Dyce's termination, is even less convincing. Specifically, they assert that cash equivalents must be "so near their maturity that they present insignificant risks of change in value because of the changes in the interest rate."[107] This line of reasoning is continued with the statement that "[t]here is no documentation referencing a maturity date related to the loan."[108] Thus, they ask one to conclude that, since the loan documents do not express a definite maturity date, potential interest rate fluctuations pose a significant risk of change in value.

In fact, the trial court found that this loan from SCENT Land "was going to be repaid from the proceeds of a previously approved construction loan from First Palmetto Bank"[109] and that "Dr. Puchalski could have closed this [construction] loan in February 2010."[110] For their own personal reasons, the Puchalskis deferred this closing until May 5, 2010.[111] Even with this self-imposed delay, the loan proceeds were available to repay the SCENT Land loan for several days prior to the date of Dr. Dyce's termination and were actually transferred the day following that date.[112] Therefore, any alleged interest rate risks or repayment uncertainties are a complete smokescreen designed to deny Dr.

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[106] See R. p. 2017, lines 2-21.
[107] Initial Brief of Appellants/Respondents at p. 42.
[108] See id.
[109] R. p. 23.
[110] R. p. 45.
[111] R. p. 23.
[112] See R. p. 2016, lines 3-23.

Dyce the agreed upon value of his interest in SCENT pursuant to the buyout formula.

D. Inapplicability of Setoff Provision

Finally, the Defendants below again rehash their factual allegations of contractual breaches by Dr. Dyce to assert that nothing was owed to him under subsection c of Section 4.5's buyout formula.[113] As discussed elsewhere, the trial court specifically rejected all of these factual allegations. Furthermore, only amounts "owed by the Departing Shareholder as of the effective date of the Termination of Employment," i.e. May 9, 2010, were to be deducted from the purchase price. Accordingly, it is ludicrous to assert that Dr. Dyce owed SCENT at that time for claimed damages which were not incurred until some distant future date.[114] Therefore, Judge Goodstein correctly concluded that "Dr. Dyce is entitled to the amount due him for the redemption of his shares as set forth above...without offset."[115]

V. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE COVENANT CONTAINED IN DR. DYCE'S EMPLOYMENT AGREEMENT WAS UNENFORCEABLE.

A. Any Breach of the Covenant Was Excused by the Prior Breaches of Contract by the Employer

Significantly, the Defendants below completely ignore the trial court's ruling that "SCENT and Dr. Puchalski's breaches of their contractual obligations excuse Dr. Dyce

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[113] In addition to an offset under section 4.5(c), they also contend that the purchase price should be reduced by 50% due to Dyce's termination for cause. As discussed in Section III above, this purported termination was unwarranted and invalid.

[114] For example, the Defendants below argue that they were "owed" for "$1.4 million in losses from patient transfers that the practice is aware of and the loss of over 400 patients and many referring physicians." Initial Brief of Appellants/Respondents at p. 44. Obviously, none of these losses could have occurred before Dyce began his practice at Carolina Pines in October 2010, more than three months after the date specified for payment to Dr. Dyce by SCENT in the buyout formula.

[115] R. p. 27.

from having to comply with the Covenant."[116] Specifically, Judge Goodstein found that:

> there were a number of ways in which Dr. Puchalski and SCENT breached their obligations to Dr. Dyce **before Dr. Dyce accepted employment with Carolina Pines**. These include, among other things, (i) Dr. Puchalski's causing SCENT to pay himself more than SCENT paid Dr. Dyce between February 1, 2008 and December 31, 2009; (ii) Dr. Puchalski and SCENT failing to redeem Dr. Dyce's shares and begin paying the redemption price that was due commencing July 9, 2010; and (iii) Dr. Puchalski and SCENT breaching the July 16, 2008 Shareholders' Agreement and the June 1, 2008 Employment Agreement by attempting to terminate Dr. Dyce with cause.[117]

Hence, regardless of the merit of the legal arguments raised by the Defendants below, the factual findings of prior breach by these Defendants preclude enforcement of the Covenant.[118]

Under South Carolina law, where an employer materially breaches its contract with its employee, the employer may not thereafter enforce a non-competition agreement against the employee. Williams v. Riedman, 339 S.C. 251, 529 S.E.2d 28 (Ct.App. 2000). In *Williams*, a former employee sued her former employer for breach of contract, breach of the covenant of good faith and fair dealing and conspiracy. The former employer counterclaimed for breach of a non-piracy agreement which prohibited the former employee from soliciting the former employer's clients. The jury returned a verdict for the employee.

On appeal, the former employer argued, inter alia, that the trial judge had erred in instructing the jury as follows:

> Now, in regard to the counter claim that has been brought by the defendant. If you should conclude that the Plaintiff is entitled to a verdict, then the counter claim would be of no concern to you.

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[116] R. p. 31.
[117] Id. (emphasis added).
[118] As discussed in Section II above, the trial court also ruled that the June 1, 2008 Covenant was superseded by the July 16, 2008 Shareholders' Agreement. See R. pp. 25-26, fn 52.

> But if you should conclude that the plaintiff is not entitled to a verdict, then you would proceed to consider the defendant's counterclaim.

Williams, 339 S.C. at 276, 529 S.E.2d at 40-41.

The South Carolina Court of Appeals found the instruction proper and relied on the reasoning of the United States District Court for the District of South Carolina in Associated Spring Corp. v. Roy F. Wilson and Avenet, Inc., 410 F. Supp. 967 (D.S.C. 1976). The *Associated Spring* case involved an employment contract which contained a restrictive covenant prohibiting Wilson, a former employee, from soliciting sales of Associated Spring's customers for two years after his employment ended. The former employee admitted violating the covenant, but contended that the provision was unenforceable because of the employer's own breach of the contract terms. Judge Hemphill agreed with the employee's argument, concluding that while there appeared to be no South Carolina decisions "which squarely hold that an employer who breaches his contract cannot later enforce against an ex-employee a restrictive covenant contained therein," in his opinion "such a principle is part of the law of South Carolina and that the South Carolina Supreme Court would so hold ...." Associated Spring, 410 F. Supp. at 977.

After reviewing Judge Hemphill's reasoning, the Court of Appeals in *Williams* held as follows:

> We adopt the analysis in Associated Spring for several reasons. First, the district court applied South Carolina law in reaching its decision. Second, the Court's holding is consistent with this state's contract law. See, e.g., Swinton Creek Nursery v. Edisto Farm Credit, ACA, 334 S.C. 469, 487, 514 S.E.2d 126, 135 (1999) ("'[O]ne who seeks to recover damages for breach of a contract, to which he was a party, must show that the contract has been performed on his part, or at least that he was, at the appropriate time, able, ready, and willing to perform it'"),

> (quoting Parks v. Lyons, 219 S.C. 40, 48, 64 S.E.2d 123, 126 (1951))). Finally, the Associated Spring decision is consistent with the majority rule established by other jurisdictions. Specifically, "[i]t has been generally held that a restrictive clause in an employment or business sale contract preventing future competition by the employee or seller, or preventing an employee from performing services for others during the existence of the employment relationship, may not be enforced by the employer or a purchaser where there has been a breach by the latter of his own obligations under the contract." See T.C. Williams, Annotation, "Restrictive Clause in Employment or Sales Contract to Prevent Future Competition or Performance of Services for Others as Affected by Breach by Party Seeking to Enforce It, of His Own Obligations Under the Contract," 155 A.L.R. 652, 654 (1945).

Williams, 339 S.C. at 277-78, 529 S.E.2d at 41-42.

Thus, given the trial court's factual findings of SCENT's breach of contract, SCENT's breach rendered the Covenant unenforceable.

B. The Covenant Is Overbroad in Scope

In blatant disregard of the Rules of this Court, Defendants below spend much of their argument on this issue discussing an unpublished Memorandum opinion in an unrelated matter[119] and an unpublished order in a case which did not involve Dr. Dyce.[120] Pursuant to Rule 268(d)(2), SCACR, "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Given their ineligibility as precedent, it would be inappropriate for Dr. Dyce to distinguish these rulings herein.

As to the legitimate authorities referenced by the Defendants below, they cite

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[119] In fact, the first page of this improperly cited Memorandum opinion bears the following bold print, ALLCAPS legend: "**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**" Obviously, the exception noted in this admonition does not apply.

[120] See Initial Brief of Appellants/Respondents at p. 25-28.

Team 1A v. Lucas, 295 S.C.237, 245, 717 S.E.2d 103, 107 (Ct.App. 2011), and contend that the trial court "did not address [its] five part test to determine a Covenant's validity."[121] In fact, Judge Goodstein recited the formulation of the five part test from this very same case.[122] Opposing counsel neglects to mention that "[i]f a covenant not to compete is defective in one of the above referenced areas [of the five part test], the covenant is totally defective and cannot be saved." Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 41-42, 455 S.E.2d 707, 708-09 (Ct.App. 1995).[123] Thus, once the trial court found the Covenant to be lacking in one respect, there was no error in ending its analysis of the issue at that point.[124] Even assuming no breach of contract by SCENT voiding the Covenant, Defendants below bear the burden of proving that the covenant satisfies each prong of the five (5) part test; Plaintiffs need only show that one was defective.[125]

Specifically, the trial court held:

> On its face, the covenant is overly broad. The restriction, as drafted, prohibits Dr. Dyce from (i) practicing any type of medicine; (ii) providing any type of medical services in the specified territorial area; or (iii) calling upon or accepting business from SCENT patients if he works for any kind of entity in which he has an economic interest.[126]

Courts from other jurisdictions have held that broad covenants prohibiting a physician from "practicing medicine" are overbroad if they encompass areas of medicine not

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[121] Id. at p. 26-27.
[122] R. p. 32.
[123] R. p. 33.
[124] In addition, "where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding." Noisette v Ismail, 304 S.C. 56, 58. 403 S.E. 2d 122,123-124 (1991).
[125] For example, in the recent Court of Appeals decision of Palmetto Mortuary Transp., Inc. v. Knight Sys., 786 S.E.2d 588, 592, 2016 S.C. App. LEXIS 46, *13 (Ct.App. 2016), it was held that "[i]n light of our finding that the Covenant's territorial restriction is unreasonable and void, we decline to address the remaining issues on appeal."
[126] R. pp. 33-34 (emphasis in original).

practiced by the employer. See, *e.g.*, Ellis v. McDaniel, 596 P.2d 222, 224 (Nev. 1979). This distinction is critical in comparing the covenant at issue in the case at bar with the one upheld in Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 738 S.E.2d 480 (Ct.App. 2013).

In Baugh, the departing physicians were subject to a penalty if they commenced "the active practice of medicine **in the field of cardiology**" within a defined "Territory." Id. at 402 S.C. 1, 8-9, 738 S.E.2d 480, 484-85 (emphasis added). These doctors were also prohibited from:

> (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; and (C) assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory.

Id.

In this context, "Business" was "defined as 'the practice of medicine in the field of cardiology.'" Id.

As indicated above, the non-compete in Baugh prohibited the doctors from practicing medicine only in the field of cardiology. The prohibitions contained in Dr. Dyce's Covenant do not contain such a limitation; rather, they provide, among other things, that he shall not (i) "practice medicine or provide medical services" within the territorial restriction or (ii) "call upon, solicit, accept any business from, or provide health care or related services to any Patient, except for any Patient who delivers to the Group a valid consent to release their medical records to Physician." The restrictions in the present case are, therefore, much broader than those in Baugh and are more akin to the invalid "in any capacity" restrictions at issue in two other decisions cited with approval by the Baugh Court, i.e. Preferred Research, Inc. v. Reeve, 292 S.C. 478, 357 S.E.2d 489

(Ct.App. 1987) (applying Georgia law) and Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 455 S.E.2d 707 (Ct.App. 1995).[127]

Thus, when one considers the language of the respective covenants, it is difficult to disagree with Judge Goodstein's conclusion that the Baugh decision "supports Dr. Dyce's position that the covenant is unenforceable."[128] In the words of the trial court:

> the non-compete in Baugh prohibited the doctors from practicing medicine only in the field of cardiology. The prohibitions contained in Dr. Dyce's covenant do not contain such a limitation; rather, they provide...that he shall not (i) "practice medicine or provide medical services" within the territorial restriction or (ii) have, call upon, solicit, accept any business from, any Patient on behalf of any type business in which Dr. Dyce has an economic interest. Baugh clearly demonstrates how easy it is to properly limit the scope of a non-compete to protect only the legitimate interest of the employer by limiting the breadth of the restriction.[129]

Furthermore, since these restrictions were overbroad, they "cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms." Poynter Invs. v. Century Builders of Piedmont, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010); see also Palmetto Mortuary Transp., Inc. v. Knight Sys., 2016 S.C. App. LEXIS 46, *12, 786 S.E.2d 588 (Ct.App. 2016) (longstanding South Carolina precedent prohibits

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[127] Judge Goodstein expressly observed that the language of the Gibbs decision was "directly applicable to the present case." R. p. 35. To wit:

> We agree with the trial court the covenant not to compete violates the requirements that a covenant be "necessary for the protection of the legitimate interest of the employer" and "not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood." Specifically, the trial court found "the covenant seeks to prevent [Gibbs] from being associated in any capacity with any business which gives facials, sells cosmetics, etc. Such a prohibition goes far beyond the protection of any legitimate business interest [Faces] may be able to articulate. This broad prohibition also prevents [Gibbs] from earning a livelihood through legitimate means."

Id., citing Faces Boutique v. Gibbs, 318 S.C. 39, 42-43, 455 S.E.2d 707, 709 (Ct.App. 1995).

[128] R. p. 35.

[129] R. pp. 35-36.

the use of a "blue pencil" to modify the terms of a covenant not to compete); Eastern Business Forms, Inc. v. Kistler, 258 S.C. 429, 434, 489 S.E.2d 22, 24 (1972) (The court "cannot make a new agreement for the parties into which they did not voluntary enter. We must uphold the covenant as written or not at all, in must stand or fall integrally.")

In addition, another provision of the Covenant states that Dyce

> shall not...for...any...corporation...or other entity by which Physician is compensated for performing medical services or in which Physician has an economic interest, call upon, solicit, accept business from, or provide health care or related services to, any Patient, except for any Patient who delivers to the Group a valid consent to release their medical records to Physician.[130]

Obviously, this restriction contains no geographic limitation. Such clauses have been found facially overbroad, see Team IA, Inc. v. Lucas, 395 S.C. 237, 246, 717 S.E.2d 103, 107 (Ct.App. 2011), and "it would violate public policy to allow a court to insert a geographical limitation where none existed." Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 587-88, 694 S.E.2d 15, 17 (2010).

C. Public Policy Considerations

In its brief, SCENT further suggests that its continued presence in Hartsville after the termination of Dr. Dyce sufficed to satisfy the public policy component of the five part test.[131] Although many courts have evaluated covenants not to compete in physician contracts from the strictly commercial perspective urged by the Defendants below, this neglects the very real public policy implications arising from the doctor/patient relationship. As noted by one commentator, this approach:

> is contrary to medical research that demonstrates that continuity in the doctor-patient relationship fosters the delivery of quality health care and that the involuntary termination of this relationship may have lasting, negative effects on patients.

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[130] R. p. 34, fn 62 (emphasis in original).
[131] See Initial Brief of Appellants/Respondents at p. 30.

> Long-term, continuous relationships between doctors and patients impact positively on many aspects of health care. Patients who have permanent relationships with primary care physicians are less likely to seek treatment in hospital emergency rooms than patients who have no such relationship. Additionally, the hospital and intensive care stays of patients who have ongoing relationships with physicians are considerably shorter than the stays of patients who lack a permanent relationship with a physician.
>
> A longstanding, trusting relationship between doctor and patient often improves a physician's diagnostic abilities and increases the likelihood that the patient will comply with prescribed therapy.[132]

In the instant case, SCENT asserts that 486 former patients have sought transfers to Dr. Dyce.[133] This underscores the importance attached by a significant number of South Carolinians to the continuation of their relationship with their doctor of choice. The interests of these patients should not be ignored in considering the public policy ramifications of the Covenant.

In this context, it should be noted that South Carolina has prohibited such restrictions regarding other professions—namely, the practice of law. See Rule 5.6(a), RPC, Rule 407, SCACR ("A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship"). The official comments to this rule note that "[a]n agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer." See id. at comm. 1 (emphasis added). One of the first cases to consider the parallel rule from the Model Code of Professional Responsibility, Dwyer v. Jung, 336 A.2d 498 (N.J. Super. Ct. Ch. Div. 1975), aff'd, 348

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[132] Paula Berg, Judicial Enforcement Of Covenants Not To Compete Between Physicians: Protecting Doctors' Interests At Patients' Expense, 45 Rutgers L. Rev. 1, 30 (Fall 1992) (citations omitted).

[133] See Initial Brief of Appellants/Respondents at p. 12.

A.2d 208 (N.J. Super. Ct. App. Div. 1975), persuasively expanded on this theme. In the words of the court:

> Commercial standards may not be used to evaluate the reasonableness of lawyer restrictive covenants. Strong public policy considerations preclude their applicability. In that sense lawyer restrictions are injurious to the public interest. A client is always entitled to be represented by counsel of his own choosing ... The attorney-client relationship is consensual, highly fiduciary on the part of counsel, and he may do nothing which restricts the right of the client to repose confidence in any counsel of his choice ... No concept of the practice of law is more deeply rooted.

Id. at 500; see also Jacob v. Norris, McLaughlin & Marcus, 607 A.2d 142, 147 (N.J. 1992) ("*Dwyer* makes clear that the practice of law must be carefully governed by ethical considerations rather than by economic concerns that guide strictly commercial enterprises.").

As it is self-evident that these same concerns impact the physician/patient relationship,[134] the impact on the public interest merits meaningful consideration in this instance.[135]

VI. THE TRIAL COURT CORRECTLY HELD DR. PUCHALSKI AND AMY PUCHALSKI PERSONALLY LIABLE.

Defendants below devote four and a half pages of their brief to the claimed protection afforded to Dr. Puchalski under the business judgment rule. To a significant

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[134]For its part, "the American Medical Association (AMA) strongly discourages noncompete clauses because they negatively impact health care and are not in the public interest. Such agreements 'restrict competition, disrupt continuity of care, and potentially deprive the public of medical services.'". Amsurg New Port Richey FL, Inc. v. Vangara, 159 So. 3d 260, 262 (Fla. 2d Dist. Ct. App. 2015), quoting AMA Code of Medical Ethics § E-9.02 (1998).

[135] In this regard, an August 25, 2016 article in Law360, entitled "More Restraints on Physician Noncompetes Ahead?", predicted that "patient issues," such as cost and access, will lead toward increased scrutiny of such contractual provisions. See Lisa A. Zaccardelli, Mark S. McCue and Kelly Hinkel, More Restraints on Physician Noncompetes Ahead?, Law360 (Aug. 25, 2016) at http://www.law360.com/articles/832244/print?section=employment.

degree, this lengthy argument is a red herring given the trial court's judgment against Dr. Puchalski on the conversion and constructive trust claims. Consequently, there can be no question that he is personally liable for the judgments rendered under these causes of action.

Regarding the buyout issue, it is difficult to comprehend how Dr. Puchalski can claim the benefit of the business judgment rule as to his decision to tender absolutely nothing to Dr. Dyce for the value of his shares. As found by the trial court:

> Under Section 4.6.1 of the July 16, 2008 Shareholder Agreement, SCENT was obligated to commence purchasing Dr. Dyce's shares within sixty (60) days of the effective date of Dr. Dyce's termination, July 8, 2010. At no time has SCENT offered Dr. Dyce anything for his SCENT shares.[136]

Thus, even if he valued accounts receivable and cash equivalents at zero and pressed the 50% reduction for the purported termination with cause, SCENT was still clearly obligated to commence paying Dyce based on the value of the undisputed components of the buyout formula within the time prescribed by the agreement.[137]

Under South Carolina statutory and case law, a director owes a fiduciary duty to shareholders as well as to the corporation. See S.C. Code Ann. 33-8-300 (2008 & Supp.2015), South Carolina Reporters' Comments ("As the foregoing authorities suggest, the underlying principle of shareholders being express beneficiaries of fiduciary duties predates the technical amendment made in 1963. South Carolina case law since Black v. Simpson, 94 S.C. 312, 77 S.E. 1023 (1913), has firmly embraced the notion that officers

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[136] R. p. 15.

[137] As discussed in the preceding section, Dyce had not started to compete with SCENT at this time and Puchalski cannot reasonably argue that the former owed SCENT anything as of May 9th. In this context, it is telling that, in an April 20, 2010 SCENT meeting, Dr. Puchalski discussed methods of funding a $1.5 million buyout of Dr. Dyce's shares. See R. p. 2100, line 13-p. 2101, line 23.

and directors owe duties to shareholders as well as the entity..."[138]; see also Clearwater Trust v. Bunting, 367 S.C. 340, 349, 626 S.E.2d 334, 338 (2006) ("That the General Assembly intended the South Carolina Business Corporation Act (Act) to codify the common law duties owed to shareholders by officers and directors is made clear by the South Carolina Reporters' Comments (Reporters' Comments."). SCENT is a statutory close corporation operating without a board of directors and, as such, managed by its shareholders. A shareholder in this situation has the same liability as a director regarding matters on which he is entitled to vote. See S.C. Code Ann. 33-18-210(c)(3) (2008).

The "business judgment rule precludes judicial review of actions taken by a corporate governing board absent a showing of a lack of good faith, fraud, selfdealing or unconscionable conduct." Dockside Assoc. v. Detyens, 294 S.C. 86, 87, 362 S.E.2d 874, 874 (1987). However, the business judgment rule does not protect acts taken by shareholders or directors that violate its own by-laws. Fisher v. Shipyard Village Council of Co-Owners, Inc., 415 S.C. 256, 781 S.E.2d 903 (2016). The "business judgment rule applies to *intra vires* acts of the corporation, but not to *ultra vires* acts.... "[T]he business judgment rule is not a cloak that protects a corporation from a violation of its own bylaws." Id.

The refusal to pay a valid corporate obligation when due, and the retention of these funds in the coffers of a statutory close corporation of which Dr. Puchalski was the sole remaining shareholder, is clearly self-dealing.[139] Further, as Puchalski's stonewalling

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[138] "In 1981, the Model Act's articulation of duties owed was adopted verbatim with the exception that the established principle that shareholders of South Carolina corporations are express statutory beneficiaries of duties owed was retained."

[139] See Kuznik, 342 S.C. at 613, 538 S.E.2d at 33 ("The business judgment rule will not apply if the partner has engaged in self-dealing, fraud, or other unconscionable conduct.

predictably resulted in SCENT's incurrence of litigation expenses, liability for interest accrual[140] and other potential legal exposure, it was definitely not in SCENT's best interests. Thus, Dr. Puchalski's acts and omissions concerning this key event do not fall within the protections of the business judgment doctrine.

Rather, the sequence of events reveal that this "corporate" decision was simply one of many acts demonstrating a corrupt motive on the part of Dr. Puchalski. Specifically, as found by the trial court, Dr. Puchalski presented Dr. Dyce with a proposed new shareholder agreement (the January 2010 Shareholders' Agreement), which the trial court charitably characterized as "consolidat[ing] much of the decision making authority in Dr. Puchalski."[141] The trial court found that after Dr. Dyce refused to sign the January 2010 Shareholders' Agreement and a guaranty of a SCENT Land loan which the lender was not requiring, Dr. Puchalski (i) falsely represented to the Plaintiffs that the lender was requiring a guaranty and that a mechanic's lien had been filed against SCENT Land's property (March 2); (ii) terminated Dr. Dyce without cause (March 10);[142] (iii) attempted to have SCENT Land make a mandatory capital call which was not authorized by SCENT Land's operating agreement (March 12); (iv) issued a "management directive" without requisite notice or consent (March 30); (v) finally closed the loan to SCENT Land which had been approved in February (May 5);[143] (vi) purported

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The action taken by the partners to stop payment on the note was in the interest of the capital call partners, but was to Hoffman's detriment. Partners are not to put their own interest above those of other partners. The decision made by the capital call partners is not protected by the business judgment rule.").

[140] R. p. 51.

[141] R. p. 12, fn 29.

[142] R. p. 14.

[143] R. p. 23.

to terminate Dr. Dyce with cause (May 8);[144] (vii) repaid the unauthorized capital call one day after Dr. Dyce left (May 10);[145] (viii) failed to pay Dr. Dyce his required buyout (July 9);[146] (ix) fought Dr. Dyce's claim for unemployment benefits by claiming before the Appeal Tribunal that Dyce had been terminated for cause (August 17);[147] and (x) filed his motion to amend seeking damages from Dr. Dyce for a variety of alleged misdeeds (October 5, 2010).[148] As should be obvious, many of these actions were taken with the premeditated intent of driving down the value of Dr. Dyce's buyout.

The breach of the June 16, 2008 Shareholder Agreement by failure to make equal distributions and the breach of the buyout provision are the source of SCENT's liability for all of the damages not also covered by the conversion and constructive trust causes of action. Dr. Puchalski's self-dealing and bad faith relating to these particular actions render him personally liable for these damages. Therefore, even if all of his other management actions taken prior to this decision enjoyed the protection of the business judgment rule, it would not be relevant to this conclusion.

For her part, Amy Puchalski nitpicks the trial court's assessment of the testimony and accounting records.[149] It is clear from the December 8, 2015 Order, however, that Judge Goodstein heard expert testimony on both sides of the issue and did not uncritically

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[144] R. pp. 14-15.
[145] R. p. 2285, lines 5-10.
[146] R. p. 31.
[147] See R. p. 3233.
[148] This rendition of the facts as found by the trial court omits the court's factual conclusion that Dr. Puchalski and Amy Puchalski had lined their pockets with more than $460,000 from Dr. Dyce in 2008 and 2009.
[149] The question of the extent of Amy Puchalski's personal liability for the unequal distributions made during 2008 and 2009 when Dr. Puchalski's checks from SCENT, were made payable to her is the subject of the cross-appeal of Plaintiffs below and their Initial Brief.

accept that proffered by either party. Rather, the trial court agreed with some of the criticisms leveled by Puchalski's expert and refused to consider some claimed payments as being properly attributable to her.[150] Thus, it cannot be said that her findings regarding these issues are fundamentally flawed or lacking in reasonable support.

VII. THE DISSOLUTION OF SCENT LAND WAS MANDATORY AND APPROPRIATE.

The crux of the argument of the Defendants below regarding Judge Benjamin's August 2, 2012 order dissolving SCENT Land rests on the erroneous contention that the 2009 Executed SCENT Land Operating Agreement authorized mandatory capital contributions on the basis of a majority vote of SCENT Land's members. However, the 2009 Executed SCENT Land Operating Agreement does not contain such a provision or any other provision authorizing mandatory capital contributions.

The rights and responsibilities of a limited liability company's members are governed by the company's operating agreement. To the extent the operating agreement does not address a particular issue, such as contributions to the company, the South Carolina Uniform Limited Liability Company Act (the "**Act**") governs relations among the members, managers and the company. S.C. Code Ann. 33-44-103 (2006); see also CJS Limited Liability Companies § 40 (A member's obligation to contribute to a limited liability company arises from contractual agreements). As made clear by the Official Comments to S.C. Code Ann. 33-44-401 (2008 & Supp.2015):

> An agreement to contribute to a company is controlled by the operating agreement and therefore **may not be created or modified without amending that agreement through the unanimous consent of all the members**, including the

[150] R. pp. 38-39.

member to be bound by the new contribution terms.[151]

While there are specific provisions authorizing mandatory capital contributions in both the 2008 Unexecuted SCENT Land Operating Agreement (100% vote required by Section 4.2)[152] and in the 2010 Executed SCENT Land Operating Agreement (majority vote per Section 2.4),[153] there are no such provisions in the 2009 Executed SCENT Land Operating Agreement. Under S.C. Code Ann. §33-44-401 and the 2009 Executed SCENT Land Operating Agreement in effect at the time, a unanimous vote would have been required in order for any capital contribution to have been required from Jamie Curley in March 2010.[154] The claim by Defendants below that Jamie Curley was "expelled" for failure to make unauthorized "mandatory" capital contribution clearly lacks any support in SCENT Land's governing documents, the Act and case law.[155]

Judge Benjamin's order is solidly supported by the Court of Appeals' decision in

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[151] Id. (emphasis added).

[152] See R. p. 4500.

[153] See R. pp. 3080-3118. The amendment to the same provision of the 2009 Executed SCENT Land Operating Agreement, namely, Section 2.4, shows a conscious decision by the current members of SCENT Land, Amy Puchalski and Macy Vidrine, to amend SCENT Land's operating agreement to authorize mandatory contributions upon a majority vote. If mandatory contributions had been permitted by the 2009 Executed SCENT Land Operating Agreement when Mrs. Curley was a member of SCENT Land, an amendment to the same provision in the 2009 Executed SCENT Land Operating Agreement would not have been necessary.

[154] The clear language of the Act and the absence of any provision authorizing mandatory capital contributions makes it unnecessary to address Dr. Puchalski's attempt to call a telephonic meeting by email notice the day prior to the scheduled meeting (one day after giving Dr. Dyce the March 3 Consent). The Act does not authorize either email notice or telephonic meetings. See S.C. Code Ann. 33-44-102 (2008). The only mention of email notice in the Executed 2009 SCENT Land Operating Agreement is a ten (10) business days period for' notice of a "business opportunity." See R. p. 2470, section §8.4(a). Rather, Section 20.8 expressly refers to giving notice at the "party's address." See R. p. 2488.

[155] Similarly, the claim by the Defendants below that Curley is personally liable for any shortfalls even if she had been "expelled" from SCENT falls flat since there is no such provision in the Executed 2009 SCENT Land Operating Agreement. See R. p. 2453, section 1.11; and S.C. Code Ann. 33-44-402 (2008).

Clary v. Borrell, 398 S.C. 287, 727 S.E.2d 773 (Ct. App. 2012). In that case, the court held that the limited liability company's operating agreement did not include a provision requiring a member to contribute to a "mandatory" capital call unless it was voted on by all of its the members. Similarly, any capital call made by SCENT Land in March 2010 must be considered voluntary since 100% of SCENT Land's members did not authorize this action.

Consequently, Jamie Curley became dissociated from SCENT Land on May 8, 2010 when her husband ceased to be an employee of SCENT. S.C. Code Ann. § 33-44-701 required SCENT Land to deliver an offer to Curley to purchase her interest in SCENT Land within thirty (30) days of her dissociation.[156] SCENT Land did not satisfy this statutory obligation. Judge Benjamin therefore properly ordered SCENT Land dissolved under the provisions of S.C. Code Ann. 33-44-702(c) (2008 & Supp. 2015).[157]

Judge Goodstein's December 5 Order implements Judge Benjamin's order. Given that more than six (6) years have passed since the effective date of SCENT Land's dissolution, Judge Goodstein left open the accounting from the sale of SCENT Land's assets until after SCENT Land's affairs have been wound up under the supervision of Marty Ouzts. If Amy Puchalski has an issue with Mr. Ouzts' accounting, that issue can be taken up at that time. The important conclusion for purposes of the instant appeal is that Judge Benjamin acted properly in ordering SCENT Land dissolved.

VIII. ADEQUATE EVIDENCE SUPPORTS THE DISMISSAL OF THE COUNTERCLAIMS OF DEFENDANTS BELOW?

In this section of their brief, the Defendants below seek yet again to relitigate the

[156] The 2009 Executed SCENT Land Operating Agreement is silent on these time periods. Consequently, the time periods are governed by the Act.
[157] R. p. 2.

trial court's factual findings which resulted in the dismissal of their claims at law despite the reasonable support underlying the trial court's findings. Many of their arguments simply repeat the factual claims raised in support of their contention that SCENT's contractual obligations were excused by Dyce's alleged "numerous, fundamental, and substantial breaches of his contract with SCENT."[158] Since these were addressed at length in Section V above, the Plaintiffs below will attempt to confine their response to new matter raised in this section.

A. Failure to Arbitrate

In this regard, Defendants below now flesh out their theory that they were somehow damaged by Dr. Dyce's failure to resort to arbitration. It appears that SCENT believes it was injured immediately upon the filing of Dyce's initial lawsuit on March 15, 2010 as this caused "the practice's internal disputes or 'dirty laundry' to become public."[159] The March 15, 2010 Complaint, however, only sought: (i) a declaratory judgment that Dr. Dyce was entitled to certain financial information from SCENT and Dr. Puchalski; and (ii) an accounting of all financial activities of SCENT.[160] As a review of this pleading will demonstrate, nothing incendiary or embarrassing is alleged therein.

Dr. Puchalski and SCENT did raise the arbitration provision as one of many affirmative defense in their Answers filed on April 20, 2010.[161] On the other hand, they did not move to compel arbitration. Rather, SCENT moved on October 5, 2010 to amend its Answer to add the following five counterclaims against Dr. Dyce: (1) Breach of

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[158] Initial Brief of Appellants/Respondents at p. 37.
[159] Id. at p. 61.
[160] See R. pp. 56-65. Again, it is instructive that the Defendants below totally fail to mention this pleading in their Statement of the Case.
[161] See R. pp. 78-85; R. pp. 66-77.

Contract; (2) Breach of Fiduciary Duty; (3) Conspiracy; (4) Interference with Contractual Relationship; and (5) Violation of the South Carolina Unfair Trade Practices Act. It was at this point that SCENT and Dr. Puchalski, not Dr. Dyce, chose to air their "dirty laundry."

Therefore, the injury complained of by the Defendants' below, if any, was due directly to their own litigation strategy and their failure to timely move to compel arbitration. See Hyload, Inc. v. Pre-Engineered Prods., 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct.App. 1992) ("Ordinarily...bringing a suit based on the contract instead of relying on the arbitration provision constitutes a waiver of the right to arbitrate.") Furthermore, their participation in extensive discovery and motion practice over several years waived any right to arbitrate by the time the matter was called for trial. See Evans v. Accent Manufactured Homes, 352 S.C. 544, 551, 575 S.E.2d 74, 77 (Ct.App. 2003) ("As the party seeking arbitration, Accent bore the onus to halt discovery by seeking the court's protection. Instead, Accent failed to seek court protection and continued to engage in discovery to its benefit."); Liberty Builders, Inc. v. Horton, 336 S.C. 658, 667, 521 S.E.2d 749, 754 (Ct.App. 1999) (party's "decision to file suit, participate in pretrial discovery, and engage in procedural maneuvering for two and one-half years is sufficient to support the trial court's finding of waiver."). Indeed, counsel for the Defendants below admitted in open court that "obviously we didn't move to enforce arbitration."[162] Consequently, this issue is yet another red herring thrown up by a disappointed litigant.

B. Financing of SCENT Land

Defendants below also return at length to the issues surrounding the financing of

[162] R. p. 1186, lines 16-17.

SCENT Land's Lugoff office as evidencing a breach of fiduciary duty by Dr. Dyce. In this regard, Judge Goodstein found that Dr. Dyce's action did not result from anything other than "his inability to receive financial information regarding SCENT and...the deteriorating relationship between Dr. Dyce and Dr. Puchalski."[163] Likewise she observed that:

> Dr. Puchalski could have closed the loan in February 2010 without Dr. Dyce as evidenced by the First Palmetto Bank Savings Bank, FSB Loan Approval Summary Memorandum dated February 10, 2010. [Plaintiffs' Ex. 0283.0176] Moreover, the closing did occur two (2) months later on May 5, 2010 based on the First Palmetto Bank Savings Bank, FSB Loan Approval Summary Memorandum dated February 10, 2010.[164]

Thus, SCENT was not "stymied" or otherwise damaged by Dr. Dyce's refusal to participate in this financial transaction.

Furthermore, the party with the primary fiduciary duty during these events was Dr. Puchalski and he was found to have conveyed misleading information to Dr. Dyce relative to this loan. To wit: "Dr. Puchalski's representation that a mechanic's lien had been filed against the project was incorrect. Dr. Puchalski's representation that Dr. Dyce needed to sign the personal guaranty was also false."[165] Clearly, such misrepresentations are inconsistent with his "an obligation to speak accurately and truthfully" to his co-

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[163] R. p. 45. The Defendants below contend that "no evidence except Dr. Dyce's self serving testimony supports a lack of access to information." Initial Brief of Appellants/Respondents at p. 64. Even if this were true, this testimony is very detailed and compelling and surely constitutes "some evidence" supporting the finding of the trial court. See R. p. 863, line 10-p. 864, line 4; R. p. 871, line 1-p. 872, line 16; and R. p. 885, line 4-p. 886, line 24. Furthermore, Judge Goodstein specifically referenced Dr. Dyce's March 5, 2010 email (i.e. two days after the aborted closing) to Dr. Puchalski detailing the requested documents which had not been provided at that time as germane to this issue. See R. p. 14; and R. pp. 4864-4865. Finally, the difficulty in prying accurate information loose from the Defendants below is manifest from the fact that they provided their own financial experts with incorrect and misleading evidence during this litigation. See R. p. 1990, line 15-p. 2013, line 4 and R. p. 2167, lines 3-9.

[164] R. p. 45.

[165] R. p. 14.

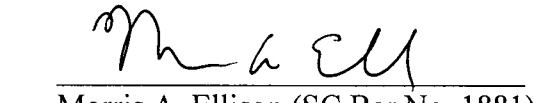
owner.[166]

CONCLUSION

In short, the brief of the Appellants/Respondents is simply a repackaging of the same factual arguments vigorously presented during a lengthy trial. Unfortunately for them, the trial court's factual findings undercutting the viability of these positions are fully supported by ample evidence in the very extensive record. Furthermore, the legal decisions in the Order are entirely consistent with controlling precedent and adequately state the basis for the Judgment. Therefore, the application of the proper standard of review, together with the required deference to the factfinder relative to the veracity and credibility of witnesses, mandates affirmance as to the issues on appeal.

[166] See Initial Brief of Appellants/Respondents at p. 66.

Respectfully submitted,



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November 14, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

The Honorable Diane Schafer Goodstein, Circuit Court Judge

Consolidated Cases for Trial

Case No. 2010-CP-28-00322
Case No. 2010-CP-28-00323

APPELLATE CASE NO. 2016-000626

Jamie Curley, ... Plaintiff,

v.

SCENT Land Holdings, LLC, Amy Puchalski, and Robert Puchalski ..... Defendants,

And

Dr. Orville Dyce,..... Plaintiff,

v.

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

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

And

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this FINAL BRIEF OF RESPONDENTS/APPELLANTS JAMIE CURLEY AND DR. ORVILLE DYCE complies with Rule 211(b), SCACR.

Respectfully submitted,

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