(5)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

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

Consolidated Cases For Trial

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

Jamie Curley, Plaintiff,

v.

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

v.

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

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

And

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

SUPPLEMENTAL RECORD ON APPEAL VOL. I

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were arguing that earlier, and so I think that like many of these opinions that Professor McWilliams has formed, he knows what the law is, but this is based on -- these are factual questions that he's applied the standards in order to have the opinions that he's delivered.

THE COURT: So what you would say is that the opinion that you are eliciting is one that, based upon Professor McWilliams' review of the documents, he can't help that he has a bedrock knowledge of the law, but based upon his review of the documents, this is when he believes that I think at this point Dr. Dyce became a shareholder; yes?

MR. CLEVELAND: Exactly.

THE COURT: Got it. And I will take it as such, noting your exception for the record.

MR. SHEHEEN: Thank you, Your Honor.

Q. Professor McWilliams, do you have an opinion based on the documents that you reviewed as to when Dr. Dyce became a shareholder in SCENT?

A. Yes, and with all due respect, as a matter of fact it's my opinion that certainly no later than the summer of 2007 he may arguably have become a shareholder as early as February of 2007 because what I understand from the record is that he began to receive K-1 compensation as if he were a shareholder as early as February, maybe March of 2007. In the summer of 2007 it's pretty clear on the record there is an actual

me give you a hard copy.
A. This is an e-mail to Chuck Thompson dated December 28th, 2009 where I state, is that your fax number below, I will get the letter from home and copy and fax to your office tomorrow.
Q. Was there an attachment to this e-mail?
A. I'm uncertain.
Q. Keep on going.
A. Is this the attachment? Then yes, there is.
Q. Can you identify that, please?
A. This is a communication between myself and my attorney, Chuck Thompson, which has been referred to in the past as my manifesto, which simply outlines my reasons for wanting to obtain legal counsel regarding the situation in which I was in.
Q. There are references to various pieces of information regarding the practice in that document. Did Dr. Dyce provide you with any of that information?
A. No, he did not.
Q. To the extent that you were provided with information who provided it to you?
A. Dr. Puchalski and Theresa Williams at these meetings.
Q. Now, let's go to January 2010. At the time did you know that an amended shareholders agreement had been prepared?
A. I did not know that there was an amended shareholder

prudence.

MR. CLEVELAND: Let me know if I don't.

MR. SHEHEEN: Thank you, Your Honor.

MR. CLEVELAND: Thank you, Mr. Sheheen.

MR. SHEHEEN: Yes, sir.

THE COURT: He's worried about me going on with his math, I'm afraid.

MR. SHEHEEN: It might help me too.

MR. CLEVELAND: Your Honor, looking at 296.1, it's the plaintiff's contention that there are a number of dates on which Dr. Dyce might have been made a shareholder. Could have been in early '07 when he started buying in. Could have been in August of '07 when he had a bill of sale, a stock purchase agreement and a shareholders agreement. Could have been in the end of January '08 when he finished his buy-in, and it could have been in July of '08 when he signed another shareholder agreement and got a certificate. Lots of dates. It's the plaintiff's contention that the strongest case can be made that he was a shareholder at the end of January 2008 because he previously had a bill of sale from Dr. Puchalski that says, upon payment of $50,000 I convey to you this stock. That's what the bill of sale says, was in August '07. And so it's our contention that his buy-in was complete by the end of January, and this first bit of testimony is simply to take you through how the payments worked based on the

STATE OF SOUTH CAROLINA COUNTY OF KERSHAW	)	
Kershaw Ear, Nose & Throat and Facial Plastic Surgery, Inc.	)	
and	)	AGREEMENT
Orville Dyce, M.D.	)	

WHEREAS, Kershaw Ear, Nose & Throat and Facial Plastic Surgery, Inc. (hereinafter referred to as "Kershaw ENT") maintains a medical practice in the specialty of otolaryngology and facial plastic surgery in Kershaw County;

WHEREAS, Kershaw ENT desires to employ Orville Dyce, M.D. ("Physician") to work with them in their practice;

WHEREAS, the Physician agrees to perform such services for Kershaw ENT as an employee, upon the terms and conditions as set forth in this Agreement below;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained herein, the parties hereby agree as follows:

I. TERMS AND CONDITIONS

A. TERM. The term of this Agreement shall be for two years from the 1st day of March 2005.

B. SERVICES TO BE PERFORMED. The Physician shall engage in those activities ordinarily performed by a physician including, but not limited to: seeing patients during regular hours, performing surgery on patients of Kershaw ENT, assuming after hours call coverage for Kershaw ENT during the week and on weekends, seeing patients on routine rounds and seeing patients on call. The work schedule of the Physician shall be as agreed upon between the parties and is subject to change by mutual agreement in the event that a satellite office is established or

patient volume increases. The Physician shall use his best and reasonable efforts to diligently build his practice, promote Kershaw ENT in the community, and work professionally with patients, peers and staff.

C. QUALIFICATIONS. The Physician hereby represents to Kershaw ENT that he is qualified or will be qualified to be a physician in the State of South Carolina and will continue to maintain his license during the term of this Agreement. Further, the Physician covenants that during the term of this Agreement he shall comply with all applicable federal, state and municipal statutes or ordinances including all licensing requirements and other applicable rules and regulations of governmental agencies regulating the Physician's profession. The Physician shall make reasonable efforts, consistent with the clinical needs of an individual patient, to engage in clinical practices that are consistent with the standard of care of the American Board of Otolaryngology or a comparable organization, or as otherwise agreed to by Physician and Kershaw ENT. The Physician also agrees not to engage in any personal or professional conduct which in the reasonable determination of Kershaw ENT is not in the best interests of or may adversely affect Kershaw ENT. Upon the failure of the Physician to comply with any of the covenants contained in this Section, Kershaw ENT shall have the right to immediately terminate this Agreement and such termination shall be deemed termination for cause.

D. MEDICAL RECORDS. The Physician agrees to maintain medical records, including billing records, in accordance with Kershaw ENT's established policy and agrees that all records relating to patients seen by him during the term of this Agreement are the property of Kershaw ENT.

II. COMPENSATION.

A. SALARY. The Physician shall receive compensation as agreed upon by the parties as set forth on Schedule "A" attached hereto and incorporated herein by reference. The

hours to be worked by the Physician shall be agreed upon by he parties as set forth in Schedule "B".

B. BENEFITS. The Physician shall be an employee and therefore entitled to the health and retirement benefits offered to the Kershaw ENT's employees and subject to its personnel policies. Employee's health benefits shall take effect upon the commencement of Physician's employment with Kershaw ENT. In lieu of the vacation and sick leave allowance extended to the other employees of Kershaw ENT, the Physician will be granted three (3) weeks a year for vacation, and an additional week for continuing medical education and sick leave.

C. CONTINUING EDUCATION. The Physician shall be entitled to reimbursement of up to two thousand five hundred and no/100 ($2,500.00) dollars per calendar year for continuing medical education (CME) and travel expenses related to CME. The first calendar year will begin January 1, 2005. Reimbursement will be paid upon receipt of appropriate documentation supporting allowed expenditures.

D. MALPRACTICE INSURANCE. Kershaw ENT will furnish malpractice insurance for the Physician with limits of at least $1,000,000.00 per occurrence and 3,000,000.00 aggregate during the term of this Agreement unless the Physician has coverage in amounts equal to or greater than these limits from another source. Kershaw ENT and Physician shall split equally the costs of Physician's "tail" insurance, except that Physician shall pay the entire cost of his "tail" insurance if Kershaw ENT terminates Physician for cause (as described in Section III.C.)

III. TERMINATION OF THE AGREEMENT

A. CONTRACT TERM. As previously mentioned, this Agreement shall be for a period of two (2) years. At least three (3) months before the completion of the term of this Agreement, Kershaw ENT shall notify Physician, in writing, whether Physician shall become an

equal shareholder of Kershaw ENT effective the day after the completion of the term of this Agreement or sooner if agreed to by the parties. Kershaw ENT's notice to Physician shall include the cost and terms of Physician's purchase of shares of Kershaw ENT. The Physician shall be able to purchase the shares of stock of corporation at the fair market value of the underlying assets, accounts receivable and reimburse an equal portion of the expenses incurred for advertising by Kershaw ENT from March 1, 2005 until the Physician becomes a shareholder. The parties contemplate the Physician will be an equal shareholder of the corporation though Kershaw ENT currently employs one other physician with a similar contract. The parties have determined as of January 1, 2005, the un-depreciated value of the equipment of Kershaw ENT is approximately eight hundred thousand and no/100 ($800,000.00) dollars.

B. TERMINATION. Either party may terminate this Agreement without cause during the initial term or during any renewal term by giving the other party prior written notice of such termination at least sixty (60) days prior to the date of termination. If Kershaw ENT terminates this Agreement pursuant to this section, Kershaw ENT shall be liable for any and all costs related to Physician's exposure pursuant to the Physician Recruitment Agreement (the "Recruitment Agreement") executed by and between Physician and Hartsville HMA Inc., d/b/a Carolina Pines Regional Medical Center ("CPRMC").

C. TERMINATION FOR CAUSE. Either party may terminate this Agreement immediately for cause upon the failure of the breaching party to cure to the reasonable satisfaction of the nonbreaching party any material breach of a term or condition of this Agreement within thirty (30) days of receiving written notice of such breach. In addition, and notwithstanding the previous sentence, Kershaw ENT may terminate this Agreement immediately for cause (1) upon the loss, suspension or withdrawal of Physician's license to

practice medicine in the State of South Carolina, (2) upon the loss, suspension or withdrawal of Physician's license to dispense or prescribe narcotic drugs in the State of South Carolina, or (3) upon the loss, permanent suspension, or withdrawal of Physician's staff privileges at CPRMC or any other facility where Physician has privileges beginning on the date set forth in Section I. A., if any such breach is not remedied to the reasonable satisfaction of Kershaw ENT within ten (10) days of Physician receiving written notice from Kershaw ENT.

IV. CONFIDENTIALITY AND NON-REFERRAL OF PHYSICIAN'S PATIENTS.

A. PROTECTION. The Physician acknowledges that his position with Kershaw ENT will be one of the highest trust and confidence by reason of his position and access to the records, patient lists, trade secrets, and proprietary information of Kershaw ENT. Therefore agrees to use his best efforts to exercise the upmost diligence to safeguard this information. All files, records, documents, drawings, specifications, computer software, memoranda, notes or other documents relating to the business of Kershaw ENT, whether prepared by Physician or other sources, shall be the exclusive property of Kershaw ENT.

B. NON-REFERRAL. The Physician specifically agrees he shall not refer patients of Kershaw ENT to any other physician or provider practicing otolaryngology, facial plastic surgery, audiology, aesthetics, allergy or dermatology at any time during this Agreement without the written or verbal consent of Kershaw ENT, unless Physician believes that the patient should receive medical treatment at an academic medical center providing services not offered by Kershaw ENT. The parties recognize there is no adequate remedy at law for a breach of this provision and in the event of a breach, Kershaw ENT may pursue the issuance of an injunction in addition to the remedies set forth below.

C. FEES PROPERTY OF KERSHAW ENT. All fees generated by the Physician are the property of Kershaw ENT with the exception of those as specified on Schedule A.

Furthermore, the Physician shall not provide services to patrons of Kershaw ENT or other individuals unless all fees, if collected, are remitted to Kershaw ENT for such services. Kershaw ENT and Physician agree and understand that Kershaw ENT shall have the sole ability to set fees for the services provided at Kershaw ENT, except for those services Physician is required to provide to comply with EMTALA and other requirements of CPRMC or other facilities where Physician has privileges with regard to the treatment and follow-up treatment for uninsured and underinsured patients.

V. REMEDIES FOR BREACH OF CONTRACT

A. CONTINUING PROVISIONS OF THE AGREEMENT. The provision of this Agreement shall continue to be binding upon the parties notwithstanding the termination. In the event of violation of this Agreement by either party, the non-breaching party shall be entitled to specific performance, actual damages, costs and attorney's fees. The non-breaching party may exercise any or all remedies individually or in conjunction to protect their interests.

VI. MISCELLANEOUS

A. CONTRACTS. The Physician shall not have the right or authority and expressly covenants not to enter into any contract in the name of Kershaw ENT without the express written consent of Kershaw ENT. The Physician shall notify Kershaw ENT of the particularities of any proposed contract with suppliers of health care products.

B. NOTICES. Any notice or communication required under the terms of this Agreement shall be in writing and shall be effective when delivered personally or by mail to the following addresses for the parties:

Kershaw ENT
Robert Puchalski, M.D., CEO
1165 Highway 1 South
Suite 300
Lugoff, South Carolina 29078

Orville Dyce, M.D.
173-6 Brookland Court
Winchester, Va. 22602

C. GOVERNING LAW. This Agreement shall be interpreted, construed and enforced pursuant to the laws of the State of South Carolina.

D. ENTIRE AGREEMENT. This Agreement shall constitute the entire agreement of the parties and may not be amended unless done in writing and signed by all parties hereto.

E. SEVERABILITY AND WAIVER. In the event any provision of this Agreement is held invalid or unenforceable for any reason, the remainder of the Agreement shall be unaffected and shall remain in full force and effect in accordance with its terms. No failure to enforce any term, condition or provision of this Agreement shall operate as a waiver of such term, condition or provision.

F. NON-ASSIGNMENT. Neither party shall assign this Agreement to any other party or parties without the prior written consent of the other party.

G. THE RECRUITMENT AGREEMENT. Pursuant to the Recruitment Agreement, Physician has made certain representations to CPRMC. Physician, as an Employee of Kershaw ENT, requires Kershaw ENT to assume certain requirements delineated in the Recruitment Agreement. Accordingly, Kershaw ENT shall fulfill certain requirements described in the Recruitment Agreement including, but not limited to, those described in Sections 4.06, 4.08, 4.10, 4.11, Section 5, Section 6, Section 7.03, Section 7.06, and Section 7.11. If Kershaw ENT fulfills these obligations and if Kershaw ENT then terminates this Agreement for cause as

described in Section III.C., Kershaw ENT shall have no financial obligation as of such termination date with regard to Sections 4.06, 5 and 6, though Kershaw ENT shall continue to fulfill its administrative obligations until both Physician and CPRMC have received the information each believes is necessary to complete the outstanding issues with respect to the Recruitment Agreement. A copy of the Recruitment Agreement is attached as Schedule "C".

H. COUNTERPARTS. This Agreement may be executed in one or more counterparts, each of which shall be an original but all of which shall be deemed to be one and the same instrument. This Agreement shall become binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of all the parties hereto. The execution of any number of counterparts shall have the same effect as if all parties hereto had signed the same document. All counterparts shall be construed together and shall constitute one agreement.

IN WITNESS WHEREOF, the parties hereto have set forth their hands and signature to this Agreement this 18th day of February, 2005.

Vicky Bair

KERSHAW EAR, NOSE & THROAT AND FACIAL PLASTIC SURGERY, INC.

BY: _____
Robert Pichalski, M.D.

ORVILLE DYCE, M.D.

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Plaintiffs' Ex 0002.008

SCHEDULE "A" SALARY

I. SALARY

As the physician has been recruited by CPRMC, no compensation needs to be paid in the first year of the Agreement by Kershaw ENT, unless the Physician's monthly gross receipts exceed fourteen thousand and no/100 ($14,000.00) dollar guaranteed income as set forth in the CPRMC recruitment contract. Any monthly gross collections over this amount will be paid to the Physician to a maximum of twenty thousand and no/100 ($20,000.00) dollars per month including any amount paid by CPRMC. Compensation for the second year of the contract shall be one hundred thirty thousand and no/100 ($130,000.00) dollars.

II. INCENTIVE BONUS

The Physician shall be entitled to an incentive bonus at the end of the Agreement which will be (40%) percent of all the Physician's gross collections in the second year over four hundred thousand and no/100 ($400,000.00) dollars or one hundred thousand and no/100($100,000.00), whichever sum is greater. The parties specifically acknowledge that shareholders and physician employees of the corporation also execute restrictive covenants with Kershaw ENT prohibiting shareholders from competing against the corporation during the term of their participation as a working shareholder and for a period of one year thereafter in the corporation's service area. The terms and conditions of the restrictive covenant are set forth in a separate agreement to be executed upon the transfer of shares of stock in the corporation. If the physician chooses not to become a shareholder or employee of Kershaw ENT at the end of this Agreement, he will still be paid the incentive bonus as stated above so long as he executes a restrictive covenant.

Gross collections shall be defined as any cash revenues actually received for the Physician's services regardless of the type of services or the location where the services are performed during the contract period. Gross collections shall include fees for services performed for the practice of medicine, speeches, locus tenens work or any other income actually derived from the practice of medicine. Any income derived by the Physician for his individual passive investment efforts shall not be considered part of his gross collections.

SCHEDULE "B"

Currently, the main office of Kershaw ENT is opened from the hours of 7:30 a.m. until the hours of 9:00 p.m. The parties contemplate they will adjust the schedule so that both the Physician and Employer are working full time to provide appropriate hours of coverage to cover the principle location located at the West Wateree Medical Office Building and services at the satellite locations in Hartsville and Northeast Columbia established by Kershaw ENT.

The parties also contemplate they will equally divide weekend call coverage between the physicians employed by Kershaw ENT.

Kershaw ENT shall pay for the initial and ongoing expenses of Physician's cell phone and pager.

SCHEDULE "C"

CPRMC Recruitment Agreement with Dr. Dyce (attached)

Nelson Mullins

Nelson Mullins Riley & Scarborough L.L.P.
Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.5506
www.nelsonmullins.com

Edward K. White
Tel: 803.255.9559
Fax: 803.255.5506
ed.white@nelsonmullins.com

March 17, 2010

Bruce D. Armon
Saul Ewing LLP
1500 Market Street, 38th Floor
Centre Square West
Philadelphia, PA 19102

RE: South Carolina ENT, Allergy & Sleep Medicine, P.A. (the "Company")
Our File No. 32174/09000

Dear Bruce:

This letter is to follow up on Dr. Puchalski's earlier suggestion that Dr. Dyce and the Company enter into mediation to try to resolve the current issues. Dr. Dyce recently indicated that he was open to the idea of mediation but that he still wanted access to certain financial information of the Company prior to proceeding with the mediation. As conveyed all along, the Company is willing to provide Dr. Dyce access to appropriate information, provided appropriate protections are in place to protect the confidential nature of the information. Dr. Dyce and the Company appear to be unable to agree upon a mechanism to protect the confidential information consistent with the Company's policy.

As you have been made aware, the Company has a stringent confidentiality policy that it consistently adheres to with respect to its financial (and other) information. This policy is reflected in Section 3.7 of the Company's Shareholders' Agreement and the Company's consistent practice of not divulging financial information to third parties.

Dr. Dyce's original request for financial information of the Company appeared to be reasonable in scope and to have a proper purpose, and the Company indicated it would comply with the request provided Dr. Dyce execute the same confidentiality agreement that Dr. Puchalski executed. Dr. Dyce did not execute the confidentiality agreement.

To allay any concerns Dr. Dyce may have about the financial records of the Company, Dr. Puchalski offered to split the cost of an audit of the Company by an independent accounting firm. Dr. Puchalski also offered to meet with Dr. Dyce and the Company's accountants to address any concerns Dr. Dyce may have with the financial records of the Company. Dr.

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Dyce has yet to respond to either of the alternatives. When asked why he wants the financial information or what concerns he may have about the records, Dr. Dyce's only response is that his attorney wants to review the information.

Dr. Dyce has also been invited on numerous occasions to ask specific questions about the Company's finances at provider meetings where the representative from the Company's accounting firm presented information about the Company's finances. Dr. Dyce has always declined.

Dr. Dyce's second request for financial information was much more expansive and intrusive into the Company records and encompassed financial information of the Company for years prior to Dr. Dyce's own admission as a shareholder. The Company has a legitimate concern as to Dr. Dyce's purpose for the second request and whether it is for a proper purpose as required under South Carolina law applicable to a shareholder's right to access information. Dr. Dyce has not indicated the purpose for the second request for financial information.

As an attempt to resolve the current issues, we would like to recommend that the Company and Dr. Dyce enter into nonbinding mediation (with a professional mediator agreed upon by the parties) and include in the mediation Dr. Dyce's request for the financial information. The scope of the financial information to be provided as well as the mechanism to protect the information could be submitted as a question for the mediator to help resolve this issue. The Company is also open to the idea of engaging an independent accounting firm to perform special procedure audits of Company information to address specific questions Dr. Dyce may have. The mediation could attempt to work out the appropriate agreements between Dr. Dyce and the Company, assuming that he desires to attempt to stay with the Company. In the event that he prefers to separate from the Company, then the mediator could assist in the agreements pertaining to his separation.

It is important that the Company and Dr. Dyce work together to resolve these outstanding issues prior to the effective date of his termination. We will be glad to send to you as soon as possible some names of proposed mediators. Please let us know how your client would like to proceed.

Sincerely,

Edward K. White

EKW:cks:jmh

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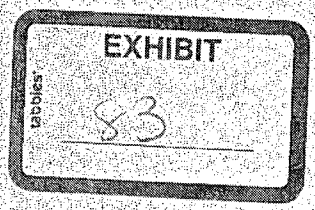

State of South Carolina)
) AFFIDAVIT
County of Kershaw)

Kieley Taylor, personally appeared before me, the undersigned officer duly authorized by the laws of South Carolina to administer oaths, and now on this 26 day of April, in the year of 2010, being by me first duly sworn on his/her oath/affirmation, deposes and says:

I was one of the last employees leaving clinic on a Wednesday afternoon in February. When I walked out the back door at the Lugoff office, I saw Dr. Gunnlaugsson and Dr. Dyce in the parking lot, having what appeared to be a confidential conversation. They both looked and me and paused their discussion until I entered my car. When I drove off, I saw them entering a vehicle together.

On April 1, Dr. Gunnlaugsson approached me to put in a vacation request for April 23 stating he needed a "last minute day off" because of an event. This request was followed up by an email which I have included with this affidavit. I thought this request was very out of character for Dr. Gunnlauggson, as he normally gives at least a few months notice before taking vacation days. He also elaborates on where he is going or why he needs time off, so I found the vagueness of this request to be a little odd. Dr. Dyce made a request on February 2 to take a vacation day on April 23.

In early April, Dr. Gunnlaugsson approached me to inquire about his original medical license. He wanted to know if the original was kept in a secure place, such as a bank vault. I told him original wallet cards for your medical license are no longer issued because you can now look up a licensee online. I did not provide him with the original medical license that was issued to him in the past.

Kieley D. Taylor
(signature of affiant)

Kieley D. Taylor
(printed name of affiant)

Sworn/affirmed to and subscribed before me
On this 26 day of April, 2010

Tammy Szymanski
My Commission expires May 5, 2015

TAMMY SZYMANSKI NOTARY PUBLIC SOUTH CAROLINA

SCENT Land Holdings

11/16/2010 3:40 PM

Register: SCENT Land Holdings
From 01/01/2010 through 11/16/2010
Sorted by: Date, Type, Number/Ref

Date	Number	Payee	Account	Memo	Payment	C	Deposit	Balance
01/05/2010	1029	City of Hartsville	N/R SC ENT Allergy ...	9475	162.36	X		7,488.56
01/08/2010			Income Management Fee	Deposit		X	17,326.60	24,815.16
01/08/2010		First Palmetto Bank	-split-		6,745.00	X		18,070.16
01/08/2010		First Palmetto Bank	-split-		5,000.00	X		13,070.16
01/08/2010		First Palmetto Bank	-split-		1,000.00	X		12,070.16
01/08/2010		First Palmetto Bank	-split-		1,000.00	X		11,070.16
01/11/2010	1030	Shaw Lawn Mainten...	N/R SC ENT Allergy ...	December	240.00	X		10,830.16
01/11/2010	1031	Terminix	N/R SC ENT Allergy ...	Quarterly pest s...	75.00	X		10,755.16
02/08/2010			Income Management Fee	Deposit		X	17,326.60	28,081.76
02/08/2010		First Palmetto Bank	-split-		6,745.00	X		21,336.76
02/08/2010		First Palmetto Bank	-split-		5,000.00	X		16,336.76
02/08/2010		First Palmetto Bank	-split-		1,000.00	X		15,336.76
02/08/2010		First Palmetto Bank	-split-		1,000.00	X		14,336.76
03/03/2010	1032	First Palmetto Bank	Professional Fees	VOID: Lugoff ...		X		14,336.76
03/08/2010			Income Management Fee	Deposit		X	17,326.60	31,663.36
03/08/2010		First Palmetto Bank	-split-		1,000.00	X		30,663.36
03/08/2010	1008	First Palmetto Bank	-split-		6,745.00	X		23,918.36
03/08/2010	1009	First Palmetto Bank	-split-		5,000.00	X		18,918.36
03/08/2010	1010	First Palmetto Bank	-split-		1,000.00	X		17,918.36
03/16/2010	1033	First Palmetto Bank	Lugoff Building	Appraisal for L...	4,300.00	X		13,618.36
03/16/2010	1034	Nelson Mullins	Professional Fees:Lega...	35862-00001	5,694.00	X		7,924.36
03/23/2010	1035	Lucas Construction	Lugoff Building		170,000.00	X		-162,075.64
03/24/2010			K-1 Distribution - A P...	Deposit		X	170,000.00	7,924.36
03/24/2010		First Palmetto Bank	Bank Service Charges		12.00	X		7,912.36
04/06/2010			N/R SC ENT Allergy ...	Deposit		X	10,697.11	18,609.47
04/09/2010			Income Management Fee	Deposit		X	17,326.60	35,936.07
04/09/2010		First Palmetto Bank	-split-		6,745.00	X		29,191.07
04/09/2010		First Palmetto Bank	-split-		5,000.00	X		24,191.07
04/09/2010		First Palmetto Bank	-split-		1,000.00	X		23,191.07
04/09/2010		First Palmetto Bank	-split-		1,000.00	X		22,191.07
05/05/2010	Cert	Savage Law Firm	Lugoff Building	Closing on Lug...	2,087.75	X		20,103.32
05/05/2010	1037	Wateree Abstract Co...	Lugoff Building	Owners Title P...	1,017.88	X		19,085.44
05/08/2010			Income Management Fee	Deposit		X	17,326.60	36,412.04
05/08/2010			Income Management Fee	VOID:		X		36,412.04
05/08/2010		First Palmetto Bank	-split-		6,745.00	X		29,667.04
05/08/2010		First Palmetto Bank	-split-		5,000.00	X		24,667.04
05/08/2010		First Palmetto Bank	N/P Richland County	VOID:		X		24,667.04
05/08/2010		First Palmetto Bank	N/P Lugoff Parcel #2	VOID:		X		24,667.04
05/08/2010	1038	Amy Puchalski	K-1 Distribution - A P...		170,000.00	X		-145,332.96
05/10/2010		First Palmetto Bank	N/P Lugoff Lot		1,000.00	X		-146,332.96

SCENT 1130

Supp. R. 18

SCENT DEF Exhibit 158

CONFIDENTIALITY AGREEMENT

THIS CONFIDENTIALITY AGREEMENT (this "Agreement") dated February __, 2010, is between South Carolina ENT, Allergy & Sleep Medicine, P.A., a South Carolina corporation (the "Company"), and Robert Puchalski and Orville Dyce (collectively, the "Shareholders" and each a "Shareholder").

1. Nondisclosure Obligation. The undersigned Shareholders acknowledge that as an exception to the general policy of the Company not to disclose confidential financial information to anyone other than the Shareholders and officers of the Company or to remove financial information from the Company's business office, that the Shareholders are receiving copies of confidential financial and business information of the Company ("Information"). The Shareholders shall keep all Information strictly confidential and shall not, directly or indirectly, disclose any Information to any person other than their personal accountant and attorney for review (collectively, "Representatives") who are actively and directly participating in the evaluation of the information (the "Evaluation") and who reasonably need to know such Information in connection with the Evaluation. Each such Representative shall be informed by the Shareholders of the confidential nature of the Information and shall be provided with a copy of this Agreement. The Information shall be used by the Shareholders and their Representatives solely for purposes of the Evaluation, and shall not be otherwise used for the Shareholders' own benefit, or for any purpose detrimental to the Company or its respective business or prospects. Except for a Shareholder duplicating the Information to give to its Representative, neither the Shareholders nor their Representatives shall copy, duplicate or recreate any Information provided by the Company hereunder. Neither the Shareholders nor their Representatives shall disseminate or share the Information with anyone other than the Representatives, including, without limitation, other employees of the Company, including physician employees. The Shareholders shall be responsible for any actions by any of their Representatives which are not in accordance with the terms and conditions hereof.

2. Compliance with Legal Process. In the event that the Shareholders, their Representatives or anyone else with whom the Shareholders or their Representatives communicate, receives a request or demand (a "Request") to disclose any Information, the Shareholders agree (a) to immediately notify the Company of the existence, terms and circumstances surrounding such Request, (b) to consult with the Company on the advisability of taking legally available steps to resist or narrow such Request and (c) to cooperate with any action by the Company to obtain an appropriate protective order or other reliable assurance that confidential treatment will be accorded to such portion of the disclosed Information which the Company so designates.

3. Ownership; Return of Information. No license to the Shareholders or any other person is either granted or implied hereunder. All Information shall remain the property of the Company. The Shareholders agree that, upon the earlier of the Company's written request or completion of the Evaluation, the Information shall be promptly returned to the Company and any materials prepared by the Shareholders or at their direction containing or otherwise reflecting any Information shall be destroyed (or deleted, if stored in a computer or electronic information retrieval system). Upon such destruction or deletion, the Shareholders agree to represent and warrant that all such Information has been returned, destroyed or deleted.

4. Governing Law; Venue. This Agreement shall be governed by the laws of the State of South Carolina, without regard to principles of choice of laws thereof.

IN WITNESS WHEREOF, the parties have executed and delivered this Confidentiality Agreement effective as of the date first written above.

SOUTH CAROLINA ENT, ALLERGY & SLEEP MEDICINE, P.A.

By: _____
Robert Puchalski
Its: President and CEO

The undersigned, being all of the Shareholders of the Company, acknowledge that this Agreement constitutes an exception to the general policy of the Company not to disclose certain financial information to anyone other that the officers of the Company.

SHAREHOLDERS:

_____
Robert Puchalski

_____
Orville Dyce

~Doc# 6151263.1~

Supp. R. 20

SCENT DEF Exhibit 161

Dyce Service Item Summary With Extended Amt & Transactions at HMA

From 10/1/2010 to 8/31/2011

11/13/13 6:00 PM - Report Server

	Count
Totals for 11000	72
Totals for 11001	0
Totals for 30140	39
Totals for 31231	662
Totals for 31233	5
Totals for 31235	2
Totals for 31237	29
Totals for 31238	28
Totals for 31575	363
Totals for 42820	63
Totals for 42826	5
Totals for 42830	71
Totals for 69145	3
Totals for 69200	31
Totals for 69205	8
Totals for 69210	104
Totals for 69433	10
Totals for 69436	145
Totals for 69540	2
Totals for 69610	12
Totals for 92504	61
Totals for 95004	11,489
Totals for 95115	47
Totals for 95117	383
Totals for 95165	2,230
Totals for 99201	2
Totals for 99202	28
Totals for 99203	242
Totals for 99204	563
Totals for 99205	18
Totals for 99211	10
Totals for 99212	159
Totals for 99213	1,030
Totals for 99214	651
Totals for 99215	9
Totals for 99242	2
Totals for 99243	115
Totals for 99244	560
Totals for 99245	16
TOTALS	19,269

Supp. R. 21

South Carolina ENT Allergy & Sleep Medicine
Balance Sheet

As of May 9, 2010

	Total
ASSETS	
Current Assets	
Bank Accounts	
Carolina Cosmetics Insti	46,353.88
Carolina Hearing Inst	38,406.98
SC ENT Equipment, LLC	33,037.60
SC ENT, Allergy & Sleep Medicine	377,370.22
Wachovia	-20.06
xxxCarolina Cosmetics	0.00
xxxClarity	0.00
xxxOld SCENT - Checking	0.00
Total Bank Accounts	**$495,148.62**
Other current assets	
Employee Loan	0.00
Inventory Asset	4,461.00
N/R - Dr. Puchalski	2,686.00
N/R - SCENT Land Holdings II LLC	728,318.20
Transfers	0.00
Total Other current assets	**$735,465.20**
Total Current Assets	**$1,230,613.82**
Fixed Assets	
Accumulated Depreciation	-1,326,691.75
Equipment	0.00
Equipment-Cola DT	4,658.00
Equipment-Hartsville	449,477.51
Equipment-Lugoff	726,079.34
Equipment-PNE	351,728.34
Equipment-Sleep Lab	13,056.67
Hartsville Bldg.	0.00
Leasehold Improvement	0.00
Leasehold Improvement-Lugoff	10,965.41
Medical & Office Equipment	0.00
Richland Lot	0.00
Vehicles	0.00
Total Fixed Assets	**$229,273.52**
Other Assets	
Carolina Pines Stock	505,416.00
CSV - Life Insurance	39,640.09
N/R - Doctors Mid State	140,000.00
Prepaid Almeds Support	187,875.50
Total Other Assets	**$872,931.59**
TOTAL ASSETS	**$2,332,818.93**

SCENT Def Exhibit 229

	Total
LIABILITIES AND EQUITY	
Liabilities	
Current Liabilities	
Accounts Payable	
Accounts Payable	0.00
Total Accounts Payable	**$0.00**
Other Current Liabilities	
401K Deduction	0.00
Child Support Deduction	0.00
Dental Ins Deduction	0.00
Fed WH Tax Liability	0.00
FICA SS - Liability	0.00
Health Ins Deduction	0.00
N/P - 1st Pal - Allmeds 1707.37	0.00
N/P - 1st Pal LOC	247,272.12
N/P - 1st Pal Server Upgrade	0.00
N/P - Amy Puchalski	0.00
N/P - Insurance Carriers	42,000.00
N/P - Jamie Dyce	0.00
N/P - KershawHealth	100,000.00
N/P - Medicaid	5,859.49
N/P - Tygris Vendor Finance	0.00
N/P SCENT Land Holdings	0.00
N/P software loan 3700	0.00
N/P Somnus	-13,016.57
N/P VGM Financial	25,719.47
N/P-Puchalski-Hosp syn	480,595.74
Other PR Deductions	0.00
Payroll Liabilities	0.00
Profit Sharing Contribution Lia	0.00
Sales tax payable	
SC WH Tax Liability	0.00
Uniform Deduction	0.00
Total Other Current Liabilities	**$888,430.25**
Total Current Liabilities	**$888,430.25**
Long-Term Liabilities	
N/P - CT Scanner	0.00
N/P - First Pal Euipment	0.00
N/P - Richland Lot	0.00
N/P - US Express - Software	0.00
N/P Allmeds 735-7 SP14	161,187.06
N/P CT 736-5 SP14	497,580.39
N/P Hypothocation Agreement	0.00
Total Long-Term Liabilities	**$658,767.45**
Total Liabilities	**$1,547,197.70**
Equity	
AAA	380,660.66
Additional Paid in Capital	156,069.73

	Total
K-1 Distribution - Dr Dyce	-30,000.00
Dr Dyce - Med Ins	0.00
Dr. Dyce - Hartsville Bldg.	0.00
Dr. Dyce - Richland Lot	0.00
Total K-1 Distribution - Dr Dyce	**-30,000.00**
K-1 Distribution - Dr Puch	-27,027.38
Dr Puch - Bonus	0.00
Dr Puch - Federal Tax	0.00
Dr Puch - Lake Lot	0.00
Dr Puch - Med Ins	0.00
Dr Puch - Richland Lot	0.00
Dr Puch - SC Tax	0.00
Dr Puch - Social Dues	0.00
Dr Puch-Political Contribution	0.00
Dr. Puch - Hartsville Bldg	0.00
Total K-1 Distribution - Dr Puch	**-27,027.38**
Opening Bal Equity	0.00
Retained Earnings	33,298.27
Net Income	272,619.95
Total Equity	**$785,621.23**
TOTAL LIABILITIES AND EQUITY	**$2,332,818.93**

Thursday, Nov 14, 2013 02:45:59 PM PST GMT-5 - Cash Basis

STATE OF SOUTH CAROLINA COUNTY OF KERSHAW	)	IN THE COURT OF COMMON PLEAS
Dr. Chad Gunnlaugsson, Plaintiff, vs. South Carolina ENT, Allergy & Sleep Medicine, P.A. and Dr. Robert Puchalski Defendants.	)	2010-CP-28-00475 ORDER GRANTING PLAINTIFF'S MOTION TO AMEND AND CORRECT AND DENYING PLAINTIFF'S MOTION TO RECONSIDER

This matter is before the court on the Plaintiff's Motion to Amend and Correct and to Reconsider in response to this court's August 3, 2012 order denying Plaintiff's Motion for Partial Summary Judgment. This case was originally filed in May 2010. Dr. Gunnlaugsson brought a lawsuit against SCENT and sought a temporary injunction to bar enforcement of the covenant not to compete. SCENT filed its own motion to enforce the covenant. Dr. Gunnlaugsson subsequently withdrew his motion.

A hearing on SCENT's motion was held on April 2, 2010 before the Honorable James Barber on a request for preliminary injunction by Defendant SCENT on enforcement of Plaintiff's employment contract. Judge Barber granted the motion in part and denied in part. He granted an injunction prohibiting Dr. Gunnlaugsson from soliciting patients and staff of SCENT and barred him from using confidential information. Judge Barber did not reach the merits of the issues involved, leaving them for trial. Plaintiff then filed a Motion for Partial Summary Judgment that was heard on April 16, 2012 and was denied. Subsequently, Plaintiff filed a Rule 59(e) Motion to Amend and to Correct and to Reconsider.

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STANDARD OF REVIEW

Summary judgment is only appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56c, SCRCP; Mosteller v. County of Lexington, 336 S.C. 360, 362, 520 S.E.2d 620, 621 (1999). "Since it is a *drastic remedy*, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (emphasis added). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts." Tupper v. Dorchester County, 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence *must be viewed in the light most favorable to the nonmoving party*. Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (S.C. 1994). A "nonmoving party need only present a scintilla of evidence to withstand a motion for summary judgment." Hancock v. Mid-S. Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009)

FACTUAL BACKGROUND

Defendant SCENT is a medical practice that provides ear, nose, and throat care as well as sleep, hair, and cosmetic medicine and related services. The practice currently consists of three physicians with offices in Richland and Kershaw Counties, with former offices in Hartsville and Cheraw. The Plaintiff, Dr. Gunnlaugsson, was recruited by SCENT from Florida. He was employed as a physician with SCENT beginning in 2006, and he left the practice in 2010.

Dr. Gunnlaugsson had an employment contract (the Agreement) with SCENT dated June 1, 2008. The Agreement incorporated an attached covenant not to compete, which provided in relevant part:

> For a period of 18 whole calendar months form the date of termination of the Employment Agreement, Physician shall not directly or indirectly practice medicine or provide medical services within a 20 mile radius of any practice site maintained by the Group. Physician further covenants and agrees that during the 18 whole calendar month period immediately after termination of the Employment Agreement, Physician shall not . . . call upon, solicit, accept business from, or provide healthcare or related services to, any Patient, except for a Patient who delivers to the group a valid consent to release their medical record to Physician.

In 2009 and 2010, disagreements arose between Dr. Gunnlaugsson and SCENT's managing shareholder (Dr. Robert Puchalski) primarily over the issuance of shares of ownership in SCENT to Dr. Gunnlaugsson. In that same time period, disagreements also arose between another shareholder of SCENT (Dr. Orville Dyce) and Dr. Puchalski that resulted in Dr. Dyce being terminated from employment. These disagreements apparently prompted Dr. Gunnlaugsson to inform SCENT, on April 23, 2010, that he was resigning his employment. Upon leaving, Dr. Gunnlaugsson set up a similar practice in the same building as SCENT. The Defendants allege that Dr. Gunnlaugsson took many SCENT patients to his practice, costing SCENT a loss in revenue.

CONCLUSIONS OF LAW

The issue presented is whether restricting the Plaintiff from the practice of medicine within a 20 mile radius of any SCENT practice site for 18 months is unreasonable and therefore unenforceable. In general, covenants not to compete contained in employment contracts are disfavored and will be strictly construed against the employer. Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 41-42, 455 S.E.2d 707, 708 (Ct. App. 1995). A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer. Almers v. South Carolina

Nat'l Bank, 265 S.C. 48, 217 S.E.2d 135 (1975). Generally, courts will uphold a covenant not to compete when it is:

> (1) necessary for the protection of the legitimate interest of the employer;
> (2) reasonably limited in its operation with respect to time and place;
> (3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
> (4) reasonable from the standpoint of sound public policy; and
> (5) supported by valuable consideration.

See, e.g., Faces Boutique, Ltd. 318 S.C. at 42, 455 S.E.2d at 708 (holding a covenant not to compete was unduly harsh and oppressive and therefore unreasonable); Stringer v. Herron, 309 S.C. 529, 532, 424 S.E.2d 547, 548 (Ct. App. 1992) (holding a covenant not to compete's territorial restriction was overbroad and therefore invalid); Rental Unif. Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 675-76, 301 S.E.2d 142, 143 (1983) (holding a covenant not to compete with a three year time restriction was reasonable); Collins Music Co. v. Parent, 288 S.C. 91, 340 S.E.2d 794 (Ct.App.1986) (holding a covenant not to compete's restriction on customer solicitation valid); Sermons v. Caine & Estes Insurance Agency, Inc., 275 S.C. 506, 273 S.E.2d 338 (1980) (holding a covenant not to compete's limitation on the activities of the former employee was unreasonable). Additionally, "each case concerned with the enforceability of covenants not to compete contained in employment contracts must be decided on its own facts." Faces Boutique, Ltd. at 42, 455 S.E.2d at 709.

In this case, Plaintiff argues the covenant not to compete is unreasonable simply because it prohibits him from practicing **"any medicine"**. Plaintiff urges the court to find the covenant unreasonable on that basis alone. (Pl.'s Motion to Amend, Correct, Reconsider 6). However, the reasonableness of the covenant cannot be determined from one word or phrase. Reasonableness must be determined by examining the covenant as a whole.. See, e.g., Team IA, Inc. v. Lucas, 395 S.C. 237, 245, 717 S.E.2d 103, 107 (Ct. App. 2011) (Agreements not to compete ... will be

upheld as enforceable if such agreement is reasonable as to territorial extent of the restraint **and** the period for which the said restraint is imposed.) (emphasis added).

Additionally, Plaintiff has misconstrued the language of the covenant. "Where the language of a contract is plain and capable of legal construction, that language alone determines the instrument's force and effect." Jordan v. Sec. Group, Inc., 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). Plaintiff argues the covenant prohibits him from practicing "**any medicine**" and is therefore unreasonable. However, the language of the covenant clearly states that Plaintiff is prohibited from "practic[ing] medicine . . . within a twenty mile radius of any practice site" for eighteen months. Contrary to Plaintiff's assertions, the reasonableness of the word "medicine" in the covenant cannot be determined in isolation. Rather, as previously discussed, the reasonableness of the term "medicine" must be determined by reading the covenant as a whole and considering the context and subject matter of the covenant.

I. THE COVENANT IS NECESSARY TO PROTECT LEGITIMATE INTERESTS.

The court finds the covenant not to compete protects legitimate business interests of the Defendant's practice. The Defendant presented evidence that the covenant not to compete was needed to protect the patient base, trade secrets, and business goodwill. In his Employment Agreement, Plaintiff *expressly acknowledged* that "during the course of his employment," he would "become privy to and knowledgeable about the patients, services, rates, fees, systems, business customs and practices, and other information and trade secrets concerning [SCENT's] business which would be injurious and damaging to [SCENT] if divulged, used or made known to a competitor." (Agreement). The South Carolina Supreme Court has stated that reasonable restrictions on competition are permitted under South Carolina law to protect employers against the "precipitous raiding of clients, [and for the] protection of goodwill, and security of trade

secrets," and that "[t]he Court will enjoin the invasion of those rights." *Almers v. S.C. Na'l. Bank of Charleston*, 265 S.C. 48, 58, 217 S.E.2d 135, 140 (1975).

Plaintiff acknowledged that SCENT's "business is highly competitive and that [SCENT] has a need to protect the anticipated value created by [Plaintiff's] exclusive practice for [SCENT]," which is also a legitimate, protectable interest. See 54A Am. Jur. 2d Monopolies and Restraints of Trade § 925 (2010) ("The continued success of a medical practice, which is dependent on patient referrals, is a legitimate interest worthy of protection [by covenants not to compete].") (citation omitted); see also Cent. Ind. Podiatry P.C. v. Krueger, 859 N.E.2d 686 (Ind. Ct. App. 2007) (Podiatry clinic had a legitimate interest in its goodwill that could be protected by a covenant not to compete covenant in its physician employment contracts where the clinic marketed its offices, and where its business growth involved all offices contributing to the success of the whole), *rev'd in part on other grounds*, 882 N.E.2d 723, 727 (2008).

Additionally, SCENT spent a significant amount of money to recruit Plaintiff to South Carolina. It took SCENT eleven months to identify and recruit Plaintiff from Florida to replace his predecessor. As a result, SCENT and Plaintiff negotiated the termination and covenant provisions of the Agreement to provide SCENT with adequate time to protect its legitimate interests.

II. THE RESTRICTIVE COVENANT IS REASONABLY LIMITED IN ITS OPERATION WITH RESPECT TO TIME AND PLACE.

South Carolina courts have enforced covenants not to compete with terms greater than the eighteen month provision at issue in this case. See generally, e.g., Dudley, 278 S.C. at 676, 301 S.E.2d at 143 (enforcing three year covenant against a delivery truck driver for an industrial laundry operation) (citing Sermons., 275 S.C. at 506, 273 S.E.2d at 338); Delmar Studios of the Carolinas v. Kinsey, 233 S.C. 313, 104 S.E.2d 338 (1958) (finding two year restraint

reasonable). See also, Saxton v. Coastal Dialysis & Med. Clinic, Inc., 470 S.E.2d 252 (Ga. Ct. App. 1996) (rejecting argument that two-year duration of a covenant not to compete provision in physician's contract was unreasonable). The Covenant here is limited to eighteen calendar months – a significantly shorter period than the three year covenant upheld in Dudley. Therefore, the covenant is reasonably limited with respect to time under South Carolina law.

In addition, "[a] geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee **was able**, during the term of his employment, to establish contact with his employer's customers." Dudley, 278 S.C. at 676, 301 S.E.2d at 143 (citation omitted) (emphasis added). Thus, covenants have been enforced where the employee was "restricted only in the area in which [the employee] worked **or to which he was assigned at any time during his employment**." Id. (emphasis added) (internal quotations and citations omitted). Although Plaintiff may not have physically worked in SCENT's Hartsville or Cheraw offices, he was able to establish substantial contacts with SCENT patients and hospital clients in Hartsville and Cheraw through a variety of activities, including but not limited to:

1) Examining and treating patients from Cheraw and Hartsville for cosmetic procedures that were referred to him by other SCENT physicians;

2) Performing weekend rounds at Carolina Pines Regional Medical Center on behalf of SCENT;

3) Attending open house events for SCENT's new building in Hartsville and new office suite in Cheraw;

4) Signing two separate pay for call contracts with Health Management Associates, which operates the Carolina Pines Regional Medical Center in Hartsville;

5) Receiving sensitive SCENT financial information, including information regarding SCENT's Cheraw and Hartsville locations and regarding referring physicians in those markets;

6) Having his business cards available to market his services at all four SCENT sites, including Hartsville and Cheraw;

7) Having his photograph and biography available on the website for Carolina Pines Regional Medical Center.

(Puchalski Aff).

Moreover, patients were referred to Plaintiff from Hartsville and Cheraw for any cosmetic needs or procedures they required. (Id.) Plaintiff was also routinely provided with financial information about the practice, and his compensation was based in part on procedures that were performed in SCENTS's Hartsville and Cheraw offices. (Id.) Plaintiff's Employment Agreement also required him to practice at any location requested by SCENT's managing shareholder. (Employment Agreement). Therefore, Plaintiff's contacts were substantial enough to make the geographical limitation in the covenant not to compete reasonable.

III. THE COVENANT IS NOT UNDULY HARSH AND OPPRESSIVE IN CURTAILING THE EMPLOYEE'S LEGITIMATE EFFORTS TO EARN A LIVELIHOOD.

The covenant not to compete prevents Plaintiff from practicing medicine only to the minimum extent necessary to protect SCENT from unexpected and unfair competition from its former employee. Plaintiff is only prohibited from practicing within a twenty mile radius of SCENT's offices and from directly soliciting SCENT patients for eighteen months. Plaintiff can still practice anywhere in the Midlands or Pee Dee regions, or any other region of the state, outside of the geographic area covered by the covenant not to compete. Upon expiration of the eighteen months, Plaintiff is free to set up his practice without any geographic limitations. Additionally, the covenant not to compete does not prevent Plaintiff from acquiring new patients from within the twenty mile radius of a SCENT practice, but rather only prohibits Plaintiff from *practicing medicine* in a location within twenty miles of a SCENT practice. While Plaintiff may not solicit patients from

the SCENT practice, he is not restricted from soliciting new patients from the population at large in those areas. Furthermore, the covenant not to compete allows Plaintiff to continue seeing those SCENT patients who fill out a valid consent form. Therefore, the covenant not to compete does not unreasonably interfere with the Plaintiff's ability to earn a livelihood.

IV. THE RESTRICTION IS REASONABLE FROM THE STANDPOINT OF SOUND PUBLIC POLICY.

It is generally agreed that physicians can agree not to compete in a geographic area. "Generally, postemployment anticompetitive covenants are enforceable against physicians where they are reasonable." 54A Am. Jur. 2d Monopolies and Restraints of Trade § 925 (2010). South Carolina is in accord with this view. See, e.g., Cane & Estes Ins. Agency, Inc. v. Watts, 278 S.C. 207, 210, 293 S.E.2d 859, 861 (1982) (rejecting appellant's argument "that parties cannot enter a non-competing or forfeiture agreement in a field of business licensed and regulated by the State of South Carolina"); Moore v. Rural Health Servs., Inc., No.: 1:04-376-RBH, 2007 WL 666796 (D.S.C. Feb. 27, 2007) (permitting a claim against a physician for breach of a covenant not to compete to be decided by the jury); Michael R. Sullivan, Note, Covenant Not to Compete and Liquidated Damages Clauses: Diagnosis and Treatment for Physicians, 46 S.C. L. Rev. 505, 522 (1995) (stating that "it appears that the overwhelming majority of jurisdictions would enforce restrictive covenants among physicians . . . [and] . . . [a]lthough a South Carolina appellate court never has considered the application of covenants not to compete . . . in the medical field, such provisions presumably would be subject to the same scrutiny as other such agreements"). [1]

[1] The South Carolina Supreme Court's recent unpublished decision in Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M. D., was brought to the court's attention by the parties in this action. While not relying on that case, the court does rely on the cases sited within it, as cited above. Ophthalmology Associates of Charleston, P.A., v. Millin C. Budev, M. D. Appellate Case No. 2011-187386 Memorandum Opinion No. 2012-MO-029 Heard June 6, 2012 – Filed July 18, 2012.

V. THE COVENANT IS SUPPORTED BY VALUABLE CONSIDERATION.

Under the Agreement, Plaintiff was paid a salary and received bonuses and benefits. Accordingly, the court finds the covenant not to compete was supported by valuable consideration and thus is enforceable.

CONCLUSION

After considering the covenant as a whole and given the foregoing findings of fact and conclusions of law, the court concludes that the covenant not to compete was reasonable and enforceable. Therefore, Plaintiff's Motion for Partial Summary Judgment is respectfully denied.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiff's Motion for Summary Judgment is hereby denied and Plaintiff's Motion to Reconsider is also denied.

IT IS SO ORDERED.

DeAndrea Gist Benjamin
Presiding Judge, Fifth Judicial Circuit

Columbia, South Carolina

9-28, 2012

Rosenthal File

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON OPHTHALMOLOGY ASSOCIATES OF CHARLESTON, P.A., Plaintiff, v. MILLIN C. BUDEV, M.D., Defendant.	IN THE COURT OF COMMON PLEAS FOR THE NINTH JUDICIAL CIRCUIT CASE NO. 07-CP-10-3681 **ORDER**

CHARLIE J. ... CLERK OF COURT

Date of hearing:	August 12-13, 2010
Court Reporters:	Brenda Cooley
Plaintiff's counsel:	Marvin Oberman, Esq., Harold Oberman, Esq.
Defendant's counsel:	Joseph D. Thompson, III, Esq.

PROCEDURAL BACKGROUND

Ophthalmology Associates of Charleston, P.A. ("Plaintiff") filed suit on August 21, 2007 against Dr. Millin C. Budev, M.D. ("Defendant"). Plaintiff's Complaint alleged a cause of action for declaratory judgment, injunction, and breach of contract. Defendant filed an Answer on September 21, 2007 asserting a general denial and the defenses failure to state a claim, waiver, estoppel, latches, and public policy. Defendant filed a Motion for Summary Judgment on May 5, 2009. The Motion for Summary Judgment was heard on September 10, 2009 by Judge Nicholson and was granted as to injunctive relief on October 8, 2009. The terms of this Order were based on the fact that the three-year period of non-competition expired on or about July 2, 2009. The Defendant's request for a finding that the covenant not to compete is enforceable was denied.

This matter came before the Court for a non-jury trial on the merits on the above dates. The Plaintiff was present and represented by Harold Oberman, Esq. and Marvin Oberman, Esq.

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The Defendant was present and represented by Joseph D. Thompson, III, Esq. At trial, Plaintiff presented five witnesses including Dr. Millin Budev, Dr. David Vroman, Steve Johnson, Nancy Hayes and Dr. Sidney Seltzer. The Defendant did not call any witnesses. At the close of Plaintiff's case, no motions were made by either party and are, therefore, waived. Having heard the testimony of the witnesses and having duly considered the admitted evidence, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

THE PRACTICE

1. Dr. Sidney Seltzer, M.D. ("Dr. Seltzer") entered into private ophthalmology practice in 1970. His office was initially located on Calhoun Street in Charleston across from Roper Hospital. In 1981, he moved his practice to Medical Plaza Drive in North Charleston across from North Trident Hospital. Dr. Seltzer's practice was known as Ophthalmology Associates of Charleston, P.A. of which he was the sole shareholder.

2. Dr. Seltzer practiced without any other physicians from 1970 to 2003. Dr. Seltzer to secure patients, relied on, among other things, patient referrals and the referrals of other optometrists ("OD's"). His patients came from the entire tri-county area and beyond. They specifically came from Charleston, Mt. Pleasant, Summerville, Ladson, North Charleston, Goose Creek, Ridgeville, and the small towns in-between. They came from as far away as Hilton Head, Orangeburg, Myrtle Beach, and Columbia.

THE EMPLOYMENT CONTRACT

3. Dr. Seltzer and the Defendant began discussions of the Defendant coming to work for the Plaintiff in late 2002. On June 5, 2003, the Plaintiff and the Defendant entered into an

employment contract, the terms of which are contained in the parties' Employment Agreement. (Pl.'s Ex. 15.)

4. Both parties freely and voluntarily entered into the Employment Agreement and understood and accepted the express terms of the contract.

5. At the time of contracting in 2003, Plaintiff had one office located at 9304 Medical Plaza Drive, Suite D, North Charleston, South Carolina 29406.

6. At the time of contracting in 2003, Plaintiff had never employed an ophthalmologist other than Dr. Sidney Seltzer, the sole shareholder and owner of the Plaintiff. Accordingly, Dr. Seltzer had never used an employment contract with a non-compete clause prior to the Employment Agreement with Defendant. Dr. Seltzer used the services of an accountant/health care consultant who provided him with the skeleton of the contract he presented to Defendant. Dr. Seltzer was not represented by legal counsel. Defendant was represented by a health care and hospital attorney in drafting and negotiating the provisions of the Employment Agreement, and he negotiated specific changes in the Agreement. The focus of these changes was the land area radius to be excluded from the area the Defendant could practice if he severed his employment.

7. At the time of contracting in 2003, Defendant was a resident in ophthalmology and had never been employed in private practice. He was represented by counsel at the time of contracting.

8. Under the Employment Agreement, the Defendant received "one hundred twenty thousand ($120,000) dollars per year, payable in monthly installments . . . ." Additionally, "[a]t the end of each quarterly calendar period . . . a bonus will be issued . . . if the [Defendant] has generated a positive cumulative net income." (Pl.'s Ex. 15 at ¶ 8.)

9. The Employment Agreement contains a covenant not to compete which states that

Defendant "shall not undertake the practice of medicine within a twenty-five (25) mile radius of any office of Practice [Plaintiff], excepting that territory lying both west of the Ashley River and south of Bees Ferry Road, for a period of three (3) years from the date of such termination." (Pl.'s Ex. 15 at ¶ 15.)

10. The Defendant believed that the geographical area and three year time limitation were reasonable. The Defendant discussed the contract, including the "carve-out" area, with his attorney while in negotiations with the Plaintiff. Maps noting the carve-out area were used during the negotiations. The Defendant specifically negotiated this particular carve-out area. He testified that at the time he believed it was a reasonable geographical restriction.

11. Steven Johnson's testimony was offered and accepted as a professional expert in the area of land surveying. Mr. Johnson estimated that forty percent (40%) of the carve-out be within the Francis Marion Forest.[1]

12. The covenant not to compete also prohibits the Defendant from directly or indirectly soliciting any patient (or member of a patient's immediate family), employee, or vendor of the Plaintiff. (Pl.'s Ex. 15 at ¶ 15.)

13. The covenant not to compete also contains a liquidated damages clause in the amount of One Hundred Twenty Thousand Dollars ($120,000.00) enforceable by the Plaintiff in the event of the Defendant's breach. (Pl.'s Ex. 15 at ¶ 15.) The Defendant agrees that the Plaintiff has the right to pursue this amount if the covenant not to compete was violated.

14. The Employment Contract provides that the Practice will "furnish adequate facilities for the practice of Ophthalmology, including building, equipment, supplies, medical library,

[1] Mr. Johnson was admitted as an expert without objection in the area of professional land surveying. At the end of Mr. Johnson's testimony, the Defendant made a Motion to Strike the witness's testimony as an expert which the Court respectfully denied.

computer services and administrative and auxiliary personnel." (Pl.'s Ex. 15 at ¶ 9.) The Employment Contract is void of any clause in regards to use of surgical facilities.

15. The Defendant terminated his employment with Plaintiff effective July 3, 2006.

16. The expiration of the three-year period of non-competition occurred on or about July 2, 2009.

POST TERMINATION

17. Immediately following his employment with Plaintiff, Defendant opened an office for the practice of ophthalmology in the West Ashley area of Charleston. Budev Eyecare and Surgery is located at 2093 Henry Tecklenburg Drive, Suite 313 East, Charleston, South Carolina. This area was within a carve-out zone of the geographic restraint in the Employment Agreement's covenant not to compete. The West Ashley practice area was specifically negotiated and left available to Defendant so that he could practice medicine, within his chosen field, in a prime location adjacent to a medical center while remaining in the Charleston area. He successfully practiced there, and continues to successfully practice there. The Defendant testified that practicing in the West Ashley area did not impede on his ability to see or treat patients.

18. On November 8, 2006, the Defendant formed Mombasa Development, LLC with his partner Dr. David T. Vroman. Shortly after the Defendant terminated his employment with the Plaintiff, he and Dr. Vroman went looking for property for a new office location in or about West Ashley, Mount Pleasant, and North Charleston. Defendant subsequently bought land on Gateway Drive, Ladson, South Carolina on November 20, 2006 under a contract for Four Hundred Twenty-Five Thousand Dollars ($425,000.00) and secured a construction loan for Two Million Five Hundred Thousand Dollars ($2,500,000.00) on February 21, 2007. Both doctors were represented by counsel in this purchase. Dr. Vroman testified that he knew of the non-

compete but felt it was the Defendant's issue, not his. The Defendant testified he told Dr. Vroman the non-compete was his issue, and he would deal with it.

19. In late April 2008, the Defendant opened an office for the practice of ophthalmology at 137 Gateway Drive, Ladson, South Carolina 29456. The office was located two to three miles from Plaintiff's office and was within the restricted zone of the covenant not to compete. In August 2007, the Defendant placed his first advertisement directly above Dr. Seltzer's ad in the yellow pages of the phone book. The office was opened with the Defendant's knowledge that it was in violation of the covenant not to compete.

20. During his employment with Plaintiff, Defendant performed surgical procedures at the Trident Eye Surgery Center located across the street from Plaintiff's office location. Following his separation from Plaintiff, Defendant continued to operate in the Trident Eye Surgery Center with the knowledge and consent of Dr. Seltzer. This fact is un-contradicted by the parties. As a part-owner of the surgery center, Dr. Seltzer received a financial benefit from Defendant's practice of ophthalmology at the Trident Eye Surgery Center, as did the Defendant from Dr. Seltzer's practice of ophthalmology at the Trident Eye Surgery Center. Each, along with other physicians, had a percentage based ownership interest in the center. It is uncontradicted that all members benefitted equally based on the number of surgeries performed. The more procedures each conducted the more money each earned based on the percentage of their ownership interest. The Defendant testified that the Trident Eye Surgery Center is not the only center at which he could operate. Dr. Seltzer does not consider Defendant's continued use of the Trident Eye Surgery Center a violation of the covenant not to compete. Likewise, at the time, the Defendant did not consider use of the Surgery Center a violation of the covenant not to compete.

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21. In the fall of 2006, the Defendant began seeing patients in Orangeburg, South Carolina. In 2008, the Plaintiff opened an office in Orangeburg, under the same name. The parties' offices were located within a twenty-five mile (25) radius of one another.

22. The parties testified, and the Court finds, they only intended the Employment Agreement and covenant not to compete to apply to Dr. Seltzer's practice on Medical Plaza Drive in North Charleston. There was no intent of either party to compete in Orangeburg at the time the contract was entered into. The Court finds consistent with the parties' clear intentions that the covenant not to compete does not apply to Orangeburg.

23. In October 2009, Dr. Seltzer sold his practice to Carolina Eyecare Physicians but continues to work for them on a percentage basis.[2]

PLAINTIFF'S BUSINESS INTEREST

24. Dr. Seltzer testified that the purpose of the covenant not to compete was to protect his specific business interests in the North Charleston location of his practice. This is reflected in paragraph 15 of the parties' contract.

25. Plaintiff contends that Defendant was intimately acquainted with both Dr. Seltzer's practice and patients in such a way that he could unfairly compete with Dr. Seltzer if allowed to do so without restriction.

26. Plaintiff has many patients in the restricted areas. Plaintiff's office administrator, Nancy Hayes, conducted a census as to patient origin which showed that the Plaintiff had Five Hundred Twenty-Seven (527) patient addresses in a Mt. Pleasant zip code; Two Hundred Eighty-Four (284) addresses in Ravenel, Hollywood, Meggett, and Johns Island zip codes; and over One

[2] The sale to Carolina Eyecare Physicians occurred after this suit was filed and after Defendant's non-compete provision expired in July 2009. The Defendant never raised any defenses concerning this sale in his pleadings, nor did he file a motion or attempt to join Caroline Eyecare Physicians as a party. Therefore, any potential defenses are waived. The Defendant presented no evidence that Dr. Seltzer relinquished any rights to this cause-of-action as a part of that sale.

Thousand (1000) patient addresses in additional Mt. Pleasant, James Island, and Johns Island zip codes. The Court notes that no formal survey or research was conducted to determine the breakdown of patient location at the time the contract was entered into in 2003.[3]

27. In his deposition testimony, taken May 2009, Dr. Seltzer denied any legitimate business interest in preventing the Defendant from the practice of ophthalmology in areas covered by the geographic restraint including areas such as Mount Pleasant, James Island, Johns Island, Ravenel, Hollywood, and Meggett. After reviewing the deposition and providing the corrections to his attorneys, Dr. Seltzer corrected his testimony on this issue through the use of an errata sheet. He testified that he misspoke in the deposition due to the fact that he had undergone several hours of questioning from Defendant's counsel and was tired. Dr. Seltzer testified that he reserved his right to correct any mistakes made in his deposition. He further testified that he completed, signed and notarized errata sheets for approximately twenty-three (23) corrections in order to correct areas where he misspoke during his deposition. The Court notes that the errata sheet is dispositive.

28. Dr. Seltzer relied on consultants as to the temporal and geographical restrictions. He believed that three (3) years was the industry standard for a practice to recover. There was no objection ever raised by the Defendant. The Defendant and his attorney agreed to and specifically negotiated the three (3) year restriction and the geographical parameters of the twenty-five (25) mile restriction with the "carve-out."

[3] The parties stipulate to the population of Charleston, Berkeley, and Dorchester Counties for the year 2000. The parties stipulate that Charleston County had a population of 309, 969 people, Berkeley County had 142, 651 people, and Dorchester County had 96, 413 people.

CONCLUSIONS OF LAW

Because the issue of injunctive relief was previously granted in the Defendant's favor by Judge Nicholson, the main cause of action remaining is the declaratory action as to whether the covenant not to compete contained within the Employment Agreement between the parties is valid and enforceable. Additionally, the Plaintiff did not present evidence of actual damages except for the liquidated damages as provided for in the contract. Thus, the Court must also determine the enforceability of the liquidated damages clause.

I. ENFORCEABILITY OF THE COVENANT NOT TO COMPETE

It is well established that covenants not to compete in employment contracts are generally disfavored, will be critically examined, and will be strictly construed against the employer. Milliken v. Morin, 386 S.C.1, 10, 685 S.E.2d 828, 833 (Ct. App. 2009) (citing Rental Uniform Serv. of Florence, Inc. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983)); Faces Boutique, Ltd. v. Gibbs, 318 S.C. 39, 41, 455 S.E.2d 707, 708 (Ct. App. 1995); Stringer v. Herron, 309 S.C. 529, 424 S.E.2d 547 (Ct. App. 1992). A restriction against competition must be narrowly drawn to protect the legitimate interests of the employer. Faces, 318 S.C. at 42, 455 S.E.2d at 707 (citing Almers v. South Carolina Nat'l Bank, 265 S.C. 48, 217 S.E.2d 135 (1975); Stringer, 309 S.C. 529, 424 S.E.2d 547)). In order to be enforceable, a plaintiff has the burden of proving that a covenant not to compete is:

(1) necessary for the protection of the legitimate interest of the employer;

(2) reasonably limited in its operation with respect to time and place;

(3) not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;

(4) reasonable from the standpoint of sound public policy; and

(5) supported by a valuable consideration.

Milliken, 386 S.C. at 10, 685 S.E.2d at 833 (citing Dudley, 278 S.C. at 675, 301 S.E.2d at 143). "If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved." Faces, 318 S.C. at 42, 455 S.E.2d at 709 (citing E. Bus. Forms, Inc. v. Kistler, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (The court "cannot make a new agreement for the parties into which they did not voluntarily enter. We must uphold the covenant as written or not at all. it must stand or fall integrally."); Somerset v. Reyner, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) ("[I]f . . . the territorial scope of the restraint is unreasonable . . . no inquiry need be made as to the presence or absence of the other necessary requirements.")). However, each case concerned with the enforceability of covenants not to compete contained in employment contracts must be decided on its own facts. Faces, 318 S.C. at 42, 455 S.E.2d at 709 (citing Stringer, 309 S.C. 529, 424 S.E.2d 547); Wolf v. Colonial Life & Accident Ins. Co., 309 S.C. 100, 111, 420 S.E.2d 217, 223 (Ct. App. 1992).

A. THE COVENANT IS NECESSARY FOR THE PROTECTION OF THE LEGITIMATE INTEREST OF THE PLAINTIFF

As outlined in the facts, the Plaintiff's practice has a legitimate business interest that the covenant not to compete protects.[4] The Defendant came directly after graduation to work in Dr. Seltzer's practice, learned everything about Dr. Seltzer's practice, learned how Dr. Seltzer recruited and dealt with OD's, learned who those OD's and other connections were, and cultivated those connections. The Defendant had full knowledge of both the Plaintiff's practice and its patients. Though he could not solicit patients, the patients of the practice could come to him on their own accord.

[4] The parties concede at paragraph 15 of the agreement that the covenant is necessary to protect the legitimate business interests of the Practice.

Dr. Seltzer had patients in all the restricted areas. It is important to note that the covenant did not prevent the Defendant from acquiring patients from within the radius, but rather only from practicing medicine in a location within a twenty-five (25) mile radius of Dr. Seltzer's practice. The Defendant was free to solicit, advertise, and draw on the entire population of the Charleston area with the only restriction being that he would not directly or indirectly solicit the patients of the Plaintiff's practice.[5]

The Defendant argues that the express language of the covenant is broader than necessary to protect any legitimate business interest of the Plaintiff's practice. Although the Defendant was employed as an ophthalmologist, the covenant not to compete in his Employment Agreement restricted him from "the practice of medicine" within the specified geographic and temporal restrictions. The Defendant contends that the Plaintiff had no legitimate business interest in prohibiting the Defendant from the broader "practice of medicine." Dr. Seltzer conceded that the express language of the covenant was broader than that for which the Defendant was employed, but the intent of the agreement was to restrict the non-compete to the practice of ophthalmology. To interpret this language in any other way would defeat the clear intentions of the parties. In interpreting contracts, you must determine the intention of the parties and put those intentions into effect. Ingram v. Kasey's Assocs., 340 S.C. 98, 110–11, 531 S.E.2d 287, 293–94 (2000); Midlands Mut. Life Ins. Co. v. Harrell, 331 S.C. 394, 396, 503 S.E.2d 189, 190 (Ct. App. 1998). Contracts should be liberally construed to carry out the intentions of the parties. It is the substance of the agreement, not the form, which must control the construction of the contract. When interpreting a contract, the court is not limited to the literal meaning of any

[5] "[L]imitation is not unreasonable where restriction seeks only to protect existing customers without imposing a blanket prohibition against competition . . . ." Woll, 309 S.C. at 112–13, 420 S.E. at 224 (citing Almers, 265 S.C. 48, 217 S.E.2d 135). As drafted, the contract, which was fully negotiated and signed by the Defendant, allows Defendant to compete taking into consideration the scope of his competition and the consequences thereof.

term if the literal meaning would defeat the parties' true intentions. The contract is to be interpreted by looking at its subject matter, nature, and purpose.

The Defendant also expressed concern with regard to his treatment of patients, who may have been obtained through his West Ashley practice, but who may have presented to hospitals for emergent care within the geographical restriction. At trial a hypothetical example was offered of a scenario whereby a patient of the Defendant's presented to the Trident Hospital Emergency Room with an emergent ophthalmological condition during a time the Defendant would have been on call. Pursuant to the express terms of the covenant, Defendant contends that he could not undertake the treatment of his own patient at the Trident Hospital Emergency Room as it would require him to undertake the practice of ophthalmology within the restricted area of the covenant. The same would hold true should that same patient present to an emergency room in downtown Charleston or Mount Pleasant, all of which are located in the geographically prohibited zone. It is alleged that by the express terms of the covenant, the Defendant would not be able to undertake the ophthalmologic care of his own patient in one of these emergency rooms during a time when the patient needed him the most. Dr. Seltzer testified he assumed it was his decision to enforce the non-compete, and he did not think the Defendant performing surgery at the Trident Eye Center or local hospital was in direct competition with his practice. When presented with the emergency room scenario, Dr. Seltzer testified that he would not seek to enforce the covenant, because the best interests of the patient are paramount. He further testified that the only time he would be in an emergency room to see a patient would be if he were on-call. Dr. Seltzer conceded that performing ophthalmologic care in an emergency room at a hospital within the twenty-five (25) mile radius would be within the restrictive zone, but he reiterated that the Defendant would be allowed to see the patient and did not believe this was the

parties' intentions in executing the covenant. He further testified that it would be rare if ever that an ophthalmologic patient would present to an emergency room for care as presented in the scenario.

The defense argues Dr. Seltzer's position runs afoul of clear South Carolina precedent strictly construing the express terms of a non-compete against the employer. See, e.g., Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 588, 694 S.E.2d 15, 16 (2010) ("[T]he restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms."); Kistler, 258 S.C. at 434, 189 S.E.2d at 24 ("We must uphold the covenant as written or not at all, it must stand or fall integrally.").

While this Court does not disagree with the contentions made by the defense, it points to "the foremost rule [] that the court must give effect to the intentions of the parties by looking to the language of the contract." Moser v. Gosnell, 334 S.C. 425, 429, 513 S.E.2d 123, 125 (Ct. App. 1999) (citing Conner v. Alvarez, 285 S.C. 97, 101, 328 S.E.2d 334, 336 (1985)). In interpreting contracts, the Court must determine the intention of the parties and put those intentions into effect. D.A. Davis Constr. Co. v. Palmetto Props., Inc., 281 S.C. 415, 418, 315 S.E.2d 370, 372 (1984). In doing this, the Court must consider only the outward expressions of the parties. The court cannot consider any undisclosed or secret intentions of the parties. Midlands, 331 S.C. at 396, 503 S.E.2d at 190. It is the substance of the agreement, not the form, which must control the construction of the contract. When interpreting a contract, the Court is not limited to the literal meaning of any term of the contract. If the Court decides that the literal meaning would defeat the parties' true intentions, the contract is to be considered by looking at its subject matter, nature, and purpose. The Court must determine the purpose of the contract

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and then examine the language of the contract in light of its purpose. See Mishoe v. Gen. Motors Acceptance Corp., 234 S.C. 182, 188–89, 107 S.E.2d 43, 47 (1958). When the contract is in writing, as in the present case, the intent of the parties must be determined from the entire agreement and not from any particular clause or provision. Parker v. Byrd, 309 S.C. 189, 191, 420 S.E.2d 850, 852 (1992). When the written contract is clear, its meaning must be determined by the contents of the document alone. White v. White, 210 S.C. 336, 342, 42 S.E.2d 537, 539 (1947). If the circumstances warrant, terms which do not contradict the written language of the contract may be implied in order to carry out the intentions of the parties. Commercial Credit Corp. v. Nelson Motors, Inc., 247 S.C. 360, 367–68, 147 S.E.2d 481, 484 (1966).

Here, the Defendant is a licensed ophthalmologist and is only licensed to practice medicine in the area of ophthalmology. This Court acknowledges that the practice of medicine is included in the practice of ophthalmology as ophthalmology is a sub-specialty, and to read "the practice of medicine" in any other way would be absurd. The plain language of the contract reflects the parties' intentions, when entering into the contract, that the purpose of the covenant not to compete was to protect the Plaintiff's ophthalmology practice at its North Charleston address. It is clear the parties did not contemplate other office locations of the Plaintiff, surgical centers, or emergency room scenarios. The Defendant testified that he did not know the non-compete had anything to do with whether he could perform surgery at the Trident Eye Surgery Center. Further, Dr. Seltzer testified that he has no control over whether a patient is admitted to the hospital. Further, he testified that he would never seek to obstruct such an admission because the health and well-being of the patient is the paramount concern, and the contract and intention of the parties never contemplated enforcement under these circumstances. He testified that the only time the Defendant would need to see a patient at a hospital would be if he were the on-call

ophthalmologist. This was a mere scenario presented at trial by the defense. The scenario was speculative in nature. There is no evidence that such a scenario has, or will actually occur in the future. This Court declines to rule based on rare or speculative circumstances that do not go to the parties' true intentions.

Based on the language of the contract, the Court finds that it was the parties' intentions, at the time of contract, for the covenant not to compete to restrict the Defendant from opening a practice within a twenty-five (25) mile radius, with the exception of the carve-out as negotiated by the Defendant, and from soliciting patients directly or indirectly from the Plaintiff. This Court finds that the Plaintiff had clients in all the restricted areas. This Court further finds that the Plaintiff taught the Defendant how to run a private practice and introduced the Defendant to other OD's as a source of referrals. Dr. Seltzer testified that in July 2006, his practice had around twenty-five (25) referring OD's. After July 2006, the practice saw a gradual decline in referring OD's, and in August 2010, it had one (1) referring OD. Dr. Seltzer also testified that as time went on, the number of surgical procedures decreased. Dr. Seltzer noticed a shift in where cataract patients came from. In the past they came from referring OD's, but from 2006–2009 they came from the practice. Accordingly, this Court finds that the covenant not to compete was necessary to protect a legitimate business interest of the Plaintiff.

B. THE RESTRICTIVE COVENANT IS REASONABLY LIMITED IN ITS OPERATION WITH RESPECT TO TIME AND PLACE.

1. Geographical Area

"[I]n order to be reasonable, [the geographical restraint] must be necessary in its full extent for the protection of some legitimate business interest of the employer." Standard Register Co. v. Kerrigan, 238 S.C. 54, 66, 119 S.E.2d 533, 539 (1961).

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> [I]n order for a covenant not to compete to be enforceable, the covenant must be reasonable and consistent with the public interests. Inevitably the determination of reasonableness depends on the competing needs of the parties. The employer is entitled to protect himself from instant pirating of his old customers as well as the good will of his business. At the same time the prior clientele is not to be forever insulated from competition. Therefore, some time and geographic limitation must be incorporated into the covenant. Likewise, the public interest, an elusive concept, must not be offended. A determinative factor in this regard is the economic consequences suffered by the employee. The covenant is incompatible with the public interest if it is 'unduly harsh and oppressive' tending 'to deprive the employee the opportunity of supporting himself and his family.'

Almers, 265 S.C. at 52–53, 217 S.E.2d at 137 (citing Standard Register, 238 S.C. at 67, 119 S.E.2d at 540; see also Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625 (1960) and a multitude of cases collected in two encyclopedia annotations, 41 A.L.R.2d 15; 43 A.L.R.2d 94). Our courts further found in Milliken that "a geographic restriction is generally reasonable if the area covered by the restraint is limited to the territory in which the employee was able, during the term of his employment, to establish contact with his employer's customers." 386 S.C. at 12, 685 S.E.2d at 834 (citing Dudley, 278 S.C. at 676, 301 S.E.2d at 143).

In the present case, the geographical restraint was a twenty-five (25) mile radius with the exception of the territory lying both west of the Ashley River and South of Bees Ferry Road. The Supreme Court of South Carolina has upheld a twenty-five (25) mile radius in a non-compete provision. In South Carolina Finance Corp. v. West Side Finance Co., 236 S.C. 109, 113 S.E.2d 329 (1960), the court found a three (3) year, twenty-five (25) mile radius from the town of Anderson, South Carolina reasonable in time and distance, where the customers of the loan business came from within and outside the twenty-five (25) mile radius. The court of appeals affirmed a trial judge's decision in Rite-Aid of South Carolina, Inc. v. Cantrell, 287 S.C.

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119, 119-120, 336 S.E.2d 726, 726-727 (Ct. App. 1985), to construe the term "within three miles" as "the distance measured by the most direct road route from the former location." It is important to note that with the advent of interstate highways and the construction of expressways in the Charleston Area, twenty-five (25) miles is not a daunting distance for a patient to travel, and often such a distance can be traveled in less than thirty (30) minutes if an office is appropriately located. See South Carolina Finance, 236 S.C. 109, 113 S.E.2d 329 (upholding twenty-five mile radius); Café Assocs., Ltd. v. Gerngross, 305 S.C. 6, 406 S.E.2d 162 (1991) (upholding five mile, five year restriction); Wolf, 309 S.C. 100, 420 S.E.2d 217 (holding that prohibitions against contracting with existing customers is a valid substitute for a geographic limitation); Milliken, 386 S.C. 1, 685 S.E.2d 828 (holding an inventions assignment provision containing an unlimited territory enforceable, because it was limited to the employer's competitors which is necessary to protect the employer's interests).[6]

Dr. Seltzer testified that the twenty-five (25) mile radius was a part of a skeleton contract provided by his consultants at Elliot Davis. Nonetheless, he further testified that he had clients in the areas of Charleston, West Ashley, North Charleston, Goose Creek, Summerville, Orangeburg, Johns Island, James Island, Ravennel, Hollywood, Meggett, and as far north as Myrtle Beach, as far south as Hilton Head, and as far west as Columbia. As in South Carolina Finance, the Plaintiff has clients within and outside of the twenty-five mile radius.

Moreover, the Defendant specifically negotiated with the assistance of counsel the geographical restriction with the "carve-out." The carve-out was the Defendant's idea, and the Plaintiff agreed to it. During negotiations the Defendant was represented by an attorney and was

[6] The courts' analysis may have varied based on different factual circumstances. However, this is not a case where the terms of the covenant were arbitrarily applied such as in an adhesion type contract or a take it or leave it type of situation. This covenant was fully negotiated by the parties utilizing maps and legal counsel for the "carve out," reduced to writing, and signed. This case demonstrates a classic example of hindsight where the Defendant decided he no longer desired the deal he negotiated and simply decided unilaterally to disregard his contractual obligation. In the most basic terms, the Defendant merely decided he no longer liked his bargain.

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very active in discussing the geographical restriction and parameters of the carve-out with that attorney and the Plaintiff. The Court finds that these facts go to the Defendant's intentions for the covenant not to compete to include the geographical restriction with the carve-out as stated in the Employment Agreement. Further, there was ample testimony that the area of the twenty-five (25) mile radius was reduced by forty (40) percent because of the ocean, lakes, and the Francis Marion National Forest, and the Court finds as such. This makes the area restricted even more reasonable, especially in that Defendant negotiated for the carve-out. This Court finds that the geographic restraint in the covenant not to compete is reasonable and enforceable.

2. Time Limitation

The Defendant testified at trial he thought the time limitation was reasonable. Moreover, the South Carolina Supreme Court has found a three (3) year restriction reasonable. See Rental Uniform Servs. v. Dudley, 278 S.C. 674, 301 S.E.2d 142 (1983); Sermons v. Caine & Estes Ins. Agency, Inc., 275 S.C. 506, 509, 273 S.E.2d 338, 339 (1980) (conceding that a time limitation of two to three years may not be obnoxious). As Dr. Seltzer testified, three (3) years gives the practice a reasonable amount of time to recover from the loss of a doctor and gives it enough leeway to deal with the competition that will come from someone intimately knowledgeable about the practice methods, referrals, and patients. Accordingly, the Court finds the time limitation of the covenant not to compete reasonable and enforceable.[7]

C. THE COVENANT NOT TO COMPETE IS NOT UNDULY HARSH AND OPPRESSIVE IN CURTAILING THE LEGITIMATE EFFORTS OF THE EMPLOYEE TO EARN A LIVELIHOOD.

The Court finds the scope of the restriction reasonable. The non-compete did not prevent the Defendant from practicing medicine or ophthalmology within the Charleston area. The best

[7] The parties concede at paragraph 15 of the agreement that the restriction is for a reasonable period of time.

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evidence of this is that Defendant did in fact successfully practice ophthalmology in the areas of West Ashley and Orangeburg after leaving Plaintiff's employment. No evidence was presented that patients did not travel from areas of Charleston other than West Ashley to the Defendant's ophthalmology practice. The Defendant's practice in West Ashley and Orangeburg was allowed by the Employment Agreement. He opened the West Ashley office immediately after leaving the Plaintiff and still has that office along with the new office located within two or three miles of the Plaintiff's office. The Plaintiff testified that he also began seeing patients in Orangeburg in the fall 2006. He was not restricted from practicing medicine because he did in fact practice medicine. He was able to earn a living in his chosen field, and he did so successfully.

D. THE RESTRICTION WAS REASONABLE FROM THE STANDPOINT OF SOUND PUBLIC POLICY.

The restrictions contained in the covenant not to compete are reasonable. The public interests must not be offended by the restrictions contained in a covenant not to compete. Almers, 265 S.C. at 52, 217 S.E.2d at 137.

> [I]n order for a covenant not to compete to be enforceable, the covenant must be reasonable and consistent with the public interests. Inevitably the determination of reasonableness depends on the competing needs of the parties. The employer is entitled to protect himself from instant pirating of his old customers as well as the good will of his business. At the same time the prior clientele is not to be forever insulated from competition.

Id. One of the determining factors of public interests is the economic consequences suffered by the employee, particularly the employee's opportunity to earn a livelihood. Id. at 52–53, 217 S.E.2d at 137. As discussed *supra*, the restrictions contained in the non-compete did not restrict the Plaintiff from practicing medicine or from earning a living in his chosen field.

Further, the American Medical Association ("AMA") guidelines on restrictive covenants parrot the common law standards that call for reasonableness, so there is no overriding public

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policy concern in the medical field. See AMA Council on Ethical and Judicial Affairs, Op. E-9.02 (1998). The AMA opines that restrictive covenants are unethical if they fail to make reasonable accommodation of patients' choice of physician. Id. Though the restrictive covenant between the parties restricts the Defendant from soliciting patients from the Plaintiff, it does not preclude the Plaintiff's patients from coming to the Defendant on their own accord. Therefore, the covenant does not impede on a patient's ability to continue treatment with a particular doctor if he or she so chooses.

Moreover, an interest of the public is having adequate medical protection. See Fernidad Tinio, Validity and Construction of Contractual Restrictions on Right of Medical Practitioner to Practice, Incident to Partnership Agreement, 62 A.L.R.3d 970 (1975). Here, the Defendant has not shown that the restriction caused any shortage of doctors in the Charleston area that would result in inadequate medical protection for the public. There are no South Carolina cases dealing with the issue of inadequate medical protection as a result of a restrictive covenant, so the Court must look to other jurisdictions for guidance. As pointed out in Rash v. Toccoa Clinic Medical Associates:

> If it be argued that the enforcement of this restrictive covenant would be contrary to public policy because it would limit the right of potential patients in the Demorest and Habersham County area to avail themselves of Dr. Rash's services, it can be argued with at least equal conviction that this would afford countless other people in other areas, both in and outside of the state, the opportunity to have a physician in their areas. There is no reason to conclude that the obstetrical and gynecological needs of persons within a 25-mile radius of Toccoa are any greater than in many other areas of this and other states, nor is there any reason to conclude that the need for the appellant's services, in the context of this case, is sufficient to outweigh the law's interest in upholding and protecting freedom to contract and to enforce contractual rights and obligations.

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253 Ga. 322, 326, 320 S.E.2d 170, 173–74 (Ga. 1984). Further, public policy is likely benefitted more from ophthalmologists' offices in diverse locations, rather than by two adjacent to one another.

The Defendant also proposed hypothetical emergency situations which the Plaintiff testified had never happened in his time of practice. This Court need not delve into every possibility or consequence to rule this restriction sound and not against public policy.

E. THE COVENANT IS SUPPORTED BY VALUABLE CONSIDERATION.

The issue of valuable consideration is not in dispute. Defendant was paid a generous salary and received significant bonuses. Particularly, under the Employment Agreement the Defendant received One Hundred Twenty Thousand Dollars ($120,000.00) per year as a base salary, in addition to a quarterly bonus based on the Defendant's generated positive cumulative net income. Dr. Seltzer testified that when he later consulted with a healthcare attorney he realized that the Defendant's compensation was "overly generous" by industry standards, as the Defendant's salary was close to bypassing his own. The Court finds the covenant not to compete was supported by valuable consideration and is, thus, enforceable.[8]

II. AFFIRMATIVE DEFENSES

The Defendant raised three affirmative defenses: waiver, estoppel, and laches. The Court finds that the Defendant failed to meet his burden of proof as to all three affirmative defenses.

The Defendant claims that, even if there was a breach of contract, the Plaintiff waived the right to enforce the covenant not to compete by allowing the Defendant to continue performing surgery at Trident Eye Surgery Center with his express permission and encouragement. "[A] party to a contract may lose its right to enjoin another party's breach by consenting either

[8] The parties concede at paragraph 15 of the contract that valuable consideration exists for the agreement.

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expressly or implicitly through words or acts inconsistent with an intention to enforce the contract's terms." Genesco, Inc. v. Palmetto Plaza Shopping Ctr., Inc., 274 S.C. 446, 448, 265 S.E.2d 34, 35 (1980). When a person waives a right it means that the person intentionally and voluntarily gives up that right with knowledge of all of the relevant facts. The Court finds, as discussed *supra*, that it was the intent of the parties that the covenant not to compete was to restrict the Defendant from soliciting patients from the Plaintiff and from opening an office within a twenty-five (25) mile radius of the Plaintiff's North Charleston practice with the exception of the carve-out. The Court also finds that the parties did not contemplate restricting surgical procedures performed at the Trident Eye Surgery Center at the time of contract. Accordingly, the Court does not find that the Plaintiff acted in a manner which made the Defendant believe that the Plaintiff gave up the right to prosecute the breach of contract. The Defendant failed to meet his burden of proof on the affirmative defense of waiver.

The Defendant also claims that the Plaintiff is estopped from claiming breach of contract. Estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment. Gibbs v. Kimbrell, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct. App. 1993). Under the doctrine of estoppel, the Plaintiff cannot recover for breach of contract that is caused by its own conduct. Carter & Co. v. Kaufman, 67 S.C. 456, 45 S.E. 1017, 1018 (1903). Because it was not the parties' intentions to restrict the performance of surgical procedures at Trident Eye Surgery Center, the Defendant's performance of surgery is not in violation of the covenant not to compete. In addition, the Defendant left the Plaintiff on July 3, 2006, and immediately upon leaving, he began looking to purchase property in or about West Ashley, Mount Pleasant, and North Charleston and ultimately purchased the property at Gateway Drive, Ladson, South Carolina on November 20, 2006. Accordingly, less than five months elapsed

from the time the Defendant left and when he purchased the property at Gateway Drive. Therefore, there could be no change in position by the Defendant. As such, the Defendant failed to meet his burden of proof in showing that the Defendant's breach was caused by the Plaintiff's own conduct.

Defendant lastly alleges the affirmative defense of laches. Laches is the negligent failure to act for an unreasonable period of time. Gibbs, 311 S.C. at 269, 428 S.E.2d at 730. Delay alone in the assertion of a right, without injury to the Defendant, does not constitute laches. Id. As discussed previously, Dr. Seltzer's actions in allowing the Defendant to continue to perform surgical procedures at Trident Eye Surgery Center is of no consequence, as these procedures were not contemplated at the time of contract. The Court finds it was not the intent of either party to restrict surgical procedures within the restricted geographical zone through the covenant not to compete. Therefore, there was no "right" for the Plaintiff to assert after the Defendant continued to perform surgical procedures at Trident Eye Surgery Center. The Court accordingly holds that the Defendant has failed to meet its burden of proof as to the defense of laches.

III. LIQUIDATED DAMAGES

"The question of whether a sum stipulated to be paid upon breach of a contract is liquidated damages or a penalty is one of construction and is generally determined by the intention of the parties." Moser v. Gosnell, 334 S.C. 425, 431, 513 S.E.2d 123, 126 (Ct. App. 1999) (quoting Tate v. LeMaster, 231 S.C. 429, 99 S.E.2d 39 (1957)); Rental Uniform Serv. of Greenville v. K & M Tool & Die, Inc., 292 S.C. 571, 573, 357 S.E. 2d 722, 724 (Ct. App. 1987). The test for determining whether a stipulation constitutes a penalty is whether the stipulated amount is disproportionate to any probable damage resulting from the breach of contract. Tate, 231 S.C. at 442, 99 S.E.2d at 46. If the sum stipulated is reasonably intended by

the parties as the predetermined measure of compensation for actual damages for breach, the stipulation is for liquidated damages, but where the stipulation is intended to provide punishment for breach of the contract, it is a penalty. Id. at 441, 99 S.E.2d at 45–46.

Here, the covenant not to compete contained a liquidated damages provision which stated, "The Practice shall have the right to pursue a claim for equitable relief (including, but not limited to, an injunction) and for legal damages in the liquidated amount of One Hundred and Twenty Thousand ($120,000.00) Dollars enforceable by the Practice in any court of competent jurisdiction." The liquidated damages amount equates to the Defendant's yearly salary under the Employment Agreement. The provision is part of the covenant not to compete the Defendant negotiated and agreed to. The Court finds that the amount listed in the provision is reasonable and proportionate to the probable damage resulting from the Defendant's breach. Further, the Defendant has neither contended nor offered proof that the One Hundred and Twenty Thousand ($120,000.00) Dollars is a penalty rather than liquidated damages. Therefore, the Court finds the Plaintiff is entitled to liquidated damages in the amount of the One Hundred and Twenty Thousand ($120,000.00) Dollars as specified in the contract.

IV. CONCLUSION

Given the foregoing Findings of Fact and Conclusions of Law, the Court concludes that the Plaintiff has met its burden of proof that the covenant not to compete is valid and enforceable. Furthermore, the contract provides for liquidated damages to compensate the Plaintiff from a breach of the covenant not to compete by the Defendant. Therefore, Plaintiff is entitled to judgment in its favor in the amount of One Hundred Twenty Thousand Dollars and 00/100 ($120,000.00). Accordingly, it is hereby

ORDERED, ADJUDGED AND DECREED that judgment be, and it hereby is, entered in

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favor of the Plaintiff Ophthalmology Associates of Charleston, P.A. in the amount of One Hundred Twenty Thousand Dollars and 00/100 ($120,000.00) as stated in the liquidated damages provision of the contract.

AND IT IS SO ORDERED.

D.L. Jefferson

The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

AT PART A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK OF COURT, C. & F.C.
BY: _____ DEPUTY CLERK

November 9, 2010
Charleston, South Carolina

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2007-CP-10-3681

Millin C. Budev, M.D... ..... Appellant.

v.

Ophthalmology Associates of Charleston, P.A., ... Respondent.

NOTICE OF APPEAL

Millin C. Budev, M.D. appeals the Order of the Honorable Deadra L. Jefferson, dated November 3, 2010, the subsequent Order Granting Plaintiff's Motion for Reconsideration, dated January 25, 2011, and the final Amended Order Granting Plaintiff's Motion for Reconsideration, dated February 16, 2011. Appellant received written notice of entry of the February 16, 2011 Amended Order Granting Plaintiff's Motion for Reconsideration on February 22, 2011.

March 10, 2011

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

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

Consolidated Cases For Trial

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

Jamie Curley, Plaintiff,

v.

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

v.

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

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

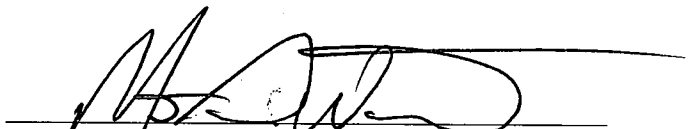
And

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Supplemental Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,



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November 15, 2016