the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction. *S.C. Dep't of Social Services v. Basnight*, Opinion # 3282 (Filed January 8, 2001)(Shearouse Adv. Sh. #2). "Under the doctrine of res judicata, a final judgment on the merits rendered by a court of competent jurisdiction, without fraud or collusion, is conclusive as to the rights of the parties and their privies." *Id.* (*citing Griggs v. Griggs*, 214 S.C. 177, 51 S.E.2d 622 (1949)).

The defendants assert that the very issue the plaintiff seeks to litigate in this case was litigated before Judge Duffy. However, the plaintiff denies that any identity between the parties or subject matter exists between this case and the prior federal action. The plaintiff notes that the individual doctors were not parties to the federal action. "Where one is not a party to the prior action, the only way he can be precluded from relitigating an issue is if he is in privity with a party to the prior action against whom an adverse finding was made." *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994)(*citing Richburg v. Baughman*, 290 S.C. 431, 351 S.E.2d 164 (1986). In terms of res judicata, the term 'privy' "means one so identified in interest with another that he represents the same legal right. One in privity is one whose legal interests were litigated in the former proceeding." *Id.* (*citing H.G. Hall Construction Co., Inc. v. J.E. P. Enterprises*, 283 S.C. 196, 321 S.E.2d 267 (Ct. App. 1984).

Roberts involved an automobile accident where Lovern, the driver, and his passenger, Roberts, were injured after being hit by Smith, who was either hit by Worrell before or after he collided with the plaintiffs' vehicle. The plaintiffs brought

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suit against Smith, his employer and Worrell in separate actions. After a period of consolidated discovery, the parties proceeded trial on plaintiff Lovern's case first. At the completion of the trial, the jury returned a verdict in favor of Lovern in the amount of $10,000 against Smith and found in favor of the remaining defendants. Next, the employer moved for summary judgment on the issue of liability to Roberts based upon the jury verdict in Lovern's case. On appeal the Court of Appeals ruled that Roberts was not in privity with Lovern and stated that:

> "[p]rivity is not established from the mere fact that persons may happen to be interested in the same question or in proving or disproving the same state of facts or because the question litigated was one which might affect such other person's liability as a judicial precedent in a subsequent action. One whose interest is almost identical with that of a party, but who does not claim through him, is not in privity with him."

In the present case, the named parties in the federal action were J. Doe, M.D., the plaintiff; Tenet HealthSystem Medical, Inc., and East Cooper Community Hospital, Inc., as the defendants. The plaintiff asserts that because she has added Doctors Yantis and Grady, members of the Credentials Committee, as well as, William Cone, the Chief Operating Officer of the hospital, there is no identity of the parties. The plaintiff's assertion is not persuasive because the defendants have identical interests in this matter as privies. The individual doctor defendants were involved in the decision making process which led to the termination of plaintiff's staff privileges.[1]

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[1] Although the plaintiff's anti-trust allegations are directed towards all defendants, it is unclear from the complaint what role Cone played in the alleged anti-competitive behavior. In fact, the only factual allegation regarding Cone involves his comments to an established patient of the plaintiff. Complaint ¶ 40.

Their actions were dictated by the medical staff bylaws, rules and regulations which are ultimately approved by the hospital's Board of Directors. Therefore, this court finds sufficient identity of the current defendants with the defendants in the prior federal action.

Next, the plaintiff asserts that the subject matter of this claim is not identical because Judge Duffy dismissed the federal action under the intra-enterprise doctrine, which in her eyes was inappropriate. The plaintiff's arguments appear to confuse the concepts of civil conspiracy with the anti-trust implications of the intra-enterprise doctrine. Although the Court of Appeals has recognized that "agents of a corporation are legally capable of conspiring among themselves or with third parties," *Lee v. Chesterfield Gen. Hosp., Inc.*, 289 S.C. 6, 344 S.E.2d 379 (Ct. App. 1986), in an anti-trust context agents and employees are considered as one entity which is incapable of conspiring with itself. *State ex rel. Callison v. National Linen Service Corp.*, 225 S.C. 232, 81 S.E.2d 342 (1954). *See also, Monsanto co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, (1984); *Oksanen v. Page Memorial Hosp.*, 945 F.2d 696 (4th Cir. 1991)(en banc).[2] Therefore, this court finds sufficient identity of subject matter between the pending cause of action and those dismissed in the federal action.

Finally, the parties acknowledge that the federal court had jurisdiction to hear

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[2] Although plaintiff raises numerous objections to the application of *Oksanen* in the present case, the ruling of the court clearly enunciates that members of the board of directors and the medical staff of a hospital are capable of conspiring with one another outside of the Sherman Act, even if their unity of interest precludes it in an anti-trust consideration.

the plaintiff's claims and made a decision in favor of the defendants.[3] Therefore, this court finds that the doctrine of res judicata bars the plaintiff's arrangements lessening competition cause of action. Furthermore, should the doctrine of res judicata not apply, this court finds that summary judgment is warranted because agents cannot be deemed to conspire with one another for anti-trust purposes. Accordingly, this court grants summary judgment as to the plaintiff's arrangements lessening competition cause of action.

b. Wrongful Termination of Hospital Privileges/Breach of Contract[4]

The defendant asserts that the court should grant summary judgment on plaintiff's wrongful termination cause of action because the process was a function of the private hospital's peer review system, which is not subject to judicial review. To the contrary, plaintiff asserts that the termination of her admitting privileges violates the procedural safeguards provided for in the bylaws. The parties agree that private hospitals are "free to adopt reasonable regulations for the conduct of its affairs." *Gowan v. St. Francis Community Hospital*, 275 S.C. 203, 268 S.E.2d 580 (1980). However, the plaintiff's allegations do not contest the reasonableness of the bylaws, rules and regulations, but the hospital's failure to comply with the procedural

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[3] In her brief, the plaintiff acknowledges the federal court's grant of summary judgment and details her efforts to appeal that decision.

[4] Although the complaint lists Wrongful Termination and Breach of Contract as separate causes of action, it appears the plaintiff's allegations are that Defendants' Tenet and East Cooper wrongfully terminated her hospital privileges by breaching the contract created by the hospital's bylaws, rules and regulations. Therefore, these causes of action will be considered one and the same for purposes of this summary judgment motion.

requirements outlined in the same.

To make out a claim for breach of contract the plaintiff must establish: 1) the existence of a valid contract; 2) that the defendants breached the contract; and 3) damages. In the present case, the plaintiff asserts that the bylaws constituted a contract between the parties and the hospital's failure to follow the protocols and procedures outlined within the bylaws was a breach of that contract. Plaintiff further asserts that this failure of the hospital to abide by the bylaws has injured her ability to practice because she no longer has admitting privileges to treat acute ophthalmology issues which arise in her practice. Based on the plaintiff's claim that the peer review procedures used in this case do not track those required by the bylaws, this court finds that a review of the relevant bylaw provisions is necessary to resolve this motion for summary judgment.

The 1989 bylaws, which were in effect at the time plaintiff first sought appointment, outlines the structure of a new member of the medical staff's provisional status.[5] Article 3, Section 5. Subsection A, entitled FOR ALL INITIAL APPOINTMENTS provides that:

> "[a]ll initial appointments to any category of the medical staff shall serve a provisional term for a maximum of twelve (12) months. Each provisional appointee shall be assigned to a department where his performance shall be observed and reviewed by the chief of the department, or such chief's designee, to determine the eligibility of such provisional staff member for regular staff membership in the staff category to which he was provisionally appointed and for exercising the clinical privileges provisionally granted. An initial appointee

[5] The 1995 bylaws, which were adopted in May of 1995, has identical language for these same provisions.

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shall remain provisional until he has furnished to the Medical Executive Committee:

1) a statement signed by the chief of the department to which he is assigned that the appointee meets all of the qualifications, has discharged all of the responsibilities, and has not exceeded or abused the prerogatives of the staff category to which he was appointed; and
2) a statement signed by the chief of the other departments in which the appointee will exercise clinical privileges that he has satisfactorily demonstrated his ability to exercise the clinical privileges initially granted to him." 1989 Bylaws Art. III, Section 5A.

Next, the 1995 bylaws outlines the proper procedures for reappointment under Article 6, Section 5. Subsection A, in part, provides that "[t]he Hospital President shall prior to expiration of the present staff appointment of each medical staff member, provide such staff member with an information form for use in considering his reappointment. Each staff member who desires reappointment shall, at least sixty (60) days prior to the final scheduled meeting of the Board in the current reappointment year, send his reappointment information form to the Hospital President."

Under the bylaws, it appears that the plaintiff's initial appointment period ended either in July or November when a letter of qualification was placed in the plaintiff's file, in accordance with the bylaws. In fact, Paul Yantis, the Chairman of the Credentials Committee, testified at the Medical Review Committee hearing that the plaintiff's provisional year ended in July of 1995, even though she changed from associate active to courtesy in November of 1994. (Yantis Transcript of June 8, 1998 at 19). Yantis further testified that it was common practice at the hospital to automatically appoint provisional staff at the completion of their provisional year to the category for which they fit and for which they request, but that it was simply a

"conversion at the end of one year," "not a reapplication type time." (Id. at 17 & 18). However, the bylaws required reappointment paperwork to be filed sixty (60) days prior to the final scheduled meeting of the Board in the reappointment year. Therefore, because the amendment to the courtesy staff qualifications requiring active privileges at one local hospital did not occur until July of 1995[6], it appears the plaintiff should have been reappointed with Courtesy staff privileges as it existed in May of 1995. Based upon the review of the facts above, this court finds there exist material questions of fact and the corresponding application of law to those facts such that the defendant's motion for summary judgment as to the plaintiff's breach of contract / wrongful termination cause of action.[7]

c. Breach of Contract Accompanied by a Fraudulent Act

The defendants assert that no evidence exists to support a finding of either a breach of contract or any fraudulent act. The plaintiff disagrees with the defendants' assertions and argues that several misrepresentations were made to her with respect to the bylaws throughout the reappointment hearing processes and with respect to her lease agreement. To recover for breach of contract accompanied by a fraudulent act, the plaintiff must prove three elements: 1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and 3) a

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[6] (Pl. Mem. Opp. Summ. J. at Ex. 8).

[7] Because it appears from the plaintiff's brief that the wrongful termination of hospital privileges cause of action and the breach of contract are identical, this court has consolidated the allegations of the complaint into one cause of action.

fraudulent act accompanying the breach. *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 494 S.E.2d 449 (Ct.App. 1997)(citations omitted). Fraudulent intent is normally proved by circumstances surrounding the breach. *Id.* The fraudulent act may be prior to, contemporaneous with, or subsequent to the breach of contract, but it must be connected with the breach itself and cannot be too remote in either time or character. *Id.* Based upon the court's earlier denial of summary judgment on the plaintiff's breach of contract cause of action, if the court finds any evidence from which a jury might infer fraudulent intent, summary judgment would be inappropriate.

The plaintiff argues that numerous potentially fraudulent actions occurred during the reappointment process and in conjunction with her office lease. "In an action for breach of contract accompanied by a fraudulent act, the fraudulent act element is met by any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. *Perry v. Green*, 313 S.C. 250, 437 S.E.2d 150 (Ct.App. 1993)(*citing Harper v. Ethridge*, 290 S.C. 112, 348 S.E.2d 374 (Ct.App.1986)). With regard to the reappointment process, the plaintiff suggests that a statement made by Doctor Grady that the loss of admitting privileges would not do harm to the plaintiff's practice, which was made in order to persuade the Credentials Committee to deny her reappointment, was fraudulent. (Pl. Aff. June 26, 2001 at ¶ 2). Next, the plaintiff asserts that allowing Doctor Grady, a competing ophthalmologist, to sit on the credentialing committee charged with evaluating her qualification for reappointment was inherently unfair. *Id.* Finally, statements made by the hospital's agents that the plaintiff only wished to practice 'part-time' and took no

initiative to familiarize herself with the facilities illustrates a design to get her reappointment denied. *Id.* at ¶ 16. Additionally, the plaintiff asserts that the defendants acted fraudulently when they sought to increase her office rent and the administrative charges associated with her lease at Durst Family Medical. (Pl. Aff. June 8, 1998 at ¶¶ 28 - 32 & 69). Based on these allegations and their supporting affidavits, this court finds that sufficient questions of fact exist whether the defendants acted fraudulently in conjunction with the alleged breach of contract and summary judgment is not appropriate at this time.

d. Slander

Next, the defendants assert summary judgment should be granted on the plaintiff's slander cause of action. The defendants argue that the statements made by William Cone ("Cone") to Allen Powers ("Powers") were truthful and privileged communications because of their shared business interest. The plaintiff objects to the defendants' characterization of the statements as true and disagrees that the statements are protected by a privilege. In order to make out a cause of action for slander, which is spoken defamation, the plaintiff must establish: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault on the part of the publisher; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Fleming v. Rose*, 338 S.C. 524, 526 S.E.2d 732 (Ct.App. 2000). "Defamation need not be accomplished in a direct manner. A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain."

Eubanks v. Smith, 292 S.C. 57, 63, 354 S.E.2d 898, 901 (1987).

The plaintiff alleges that Cone told Powers that the plaintiff's education was bought. In his deposition, Powers corroborates that Cone told him, " [y]ou know that her family bought her education for her," while discussing the plaintiff. (Def. Mem. Supp. Summ. J. at Ex. 25 p. 74). Powers also testified that Cone made a second statement several years later when he requested recommendations for a good ophthalmologist, to which Cone responded that he knew "who not to see," indicating the plaintiff. *Id.* at p. 79. Powers explained that he came to Cone on general business and sought his advice because he knew the good doctors. *Id.* at p. 83. However, Cone denies he ever said such a thing. (Def. Mem. Supp. Summ. J. at Ex. 26 p. 10). However, taking the facts in the light most favorable to the plaintiff, that the statement was made and that its plain meaning was that the plaintiff's medical aptitude was in doubt because she did not have to earn her medical degree, one could easily infer the maliciousness of Cone's statement. Additionally, the defendants do not deny that if the statement was made it was published to a third party, but they do assert that it was a privileged communication.

Under South Carolina law, communications between servants, business associates, officers, or agents of the same corporation enjoy a qualified privilege. *Bell v. Evening Post Pub. Co.*, 318 S.C. 558, 459 S.E.2d 315 (Ct.App. 1995)(citing Prentiss v. Nationwide Mut. Ins. Co., 256 S.C. 141, 181 S.E.2d 325 (1971); and Rodgers v. Wise, 193 S.C. 5, 7 S.E.2d 517 (1940)). In order to establish that a communication is protected by this qualified privilege the defendants must show:

1)good faith; 2) an interest to be upheld; 3) a statement limited in its scope to this purpose; 4) a proper occasion; and 5) publication in a proper manner and to proper parties only. Id. Based on a review of these facts, this court finds that the qualified privilege for business associates does not protect Cone's conversations with Powers. Although powers indicated that he sought out Cone for general business purposes, the conversations neither appear to be in good faith nor with an interest upheld. Cone testified that he had nothing to do with the credentialing process. *Id.* at pp. 18-19. Therefore, he had no business interest in discussing the plaintiff's background. Even if there existed a valid business interest for a hospital administrator to discuss the plaintiff's medical qualifications with an office manager of a hospital owned facility where the plaintiff practices, Cone's comments arguably do not illustrate a good faith discussion on the plaintiff's qualifications. Accordingly, this court finds that several issues of material fact exist surrounding the plaintiff's slander cause of action such that the defendant's motion for summary judgment is properly denied.

e. Civil Conspiracy

The defendants seek summary judgment as to the plaintiff's civil conspiracy cause of action. Defendants argue that "the plaintiff cannot satisfy the burden of proving that the defendants' purpose was to injure her or that their object was to ruin or damage her business." (Def. Mem. Supp. Summ. J. at 27). Defendants also assert that the plaintiff's civil conspiracy cause of action does nothing more than incorporate her prior allegations of breach of contract and include allegations of conspiracy. The plaintiff asserts that the defendants conspired to drive her out of business by revoking

her admitting privileges and modifying her administrative services contract.

The tort of civil conspiracy contains three elements: (1) a combination of two or more persons; (2) for the purpose of injuring the plaintiff; (3) causing plaintiff special damage. *Kuznik v. Bees Ferry Associates*, 342 S.C. 579, 538 S.E.2d 15 (Ct.App. 2000). Allegation of an unlawful act is not required to state a cause of action for civil conspiracy, although a civil conspiracy may be furthered by an unlawful act. "An action for civil conspiracy may exist even though defendants committed no unlawful act and no unlawful means were used. Thus, lawful acts may become actionable as a civil conspiracy when the 'object is to ruin or damage the business of another'." *Swinton Creek Nursery v. Edisto Farm Credit, ACA*, 326 S.C. 426, 483 S.E.2d 789 (Ct.App. 1997); (*citing LaMotte v. Punch Line of Columbia, Inc.*, 296 S.C. 66, 70, 370 S.E.2d 711, 713 (1988)). Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators and other circumstances. *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 358 S.E.2d 150 (Ct.App. 1987)(*citing Nottingham v. Wrigley*, 221 Ga. 386, 144 S.E.2d 749 (1965)). However, "[w]here the particular acts charged as a conspiracy are the same as those relied on as the tortious act or actionable wrong, plaintiff cannot recover damages for such act or wrong, and recover likewise on the conspiracy to do the act or wrong." *Todd v. South Carolina Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 278 S.E.2d 607 (1981).

The defendants first assert that the plaintiff cannot satisfy the burden of proving that the defendants' purpose was to injure the plaintiff or ruin her practice. The

plaintiff asserts that the continued action by the defendants to revoke her admitting privileges and their efforts to terminate and otherwise alter the administrative services contract exhibit inferential evidence that the defendants are involved in the joint purpose of driving her out of the market. (Pl. Aff. June 8,1998 at ¶ 69); see also (Pl. Aff. June 26,2001 at ¶¶ 13, 18-19); Plaintiff also asserts that the defendants have consistently diverted patients away from her to their employee-doctors at Durst Family Practice. *Id*. at ¶ 21. It appears that the plaintiff's position is that the defendants have conspired not only to revoke her admitting privileges, the subject of her breach of contract cause of action, but also to drive her out of the medical market as a whole. Therefore, this court finds questions of fact exist whether the defendants were engaged in a common pursuit to injure the plaintiff such that summary judgment is properly denied. In addition, this court finds that the civil conspiracy cause of action may be more expansive than the plaintiff's breach of contract causes of action.

f. Unfair Trade Practices Act

The defendants move for summary judgment on the plaintiff's unfair trade practices act by contending that the plaintiff has provided the court with no evidence that the defendants committed unfair trade practices. The defendants assert that their actions in raising their administrative services rate was necessary to comport with the Anti-Kickback and Stark statutes. To the contrary, the plaintiff asserts that, after the defendants Tenet and East Cooper purchased the assets of Durst Family Medical, the plaintiff's phone services and advertising were interfered with and that patients were diverted to the defendants' employee-doctors at the facility.

In order to establish a violation of the Unfair Trade Practices Act under Section 39-5-20(a), the plaintiff must show: 1) unfair or deceptive acts or practices; 2) in the conduct of any trade or commerce; and 3) which affects the public interest. S.C. CODE ANN. §39-5-20(a) (Law. Co-op. 1985). A "deceptive practice" under the Unfair Trade Practices Act (UTPA) is one which has a tendency to deceive. *deBondt v. Carlton Motorcars, Inc.*, 2000 WL 1048589 (Ct.App. 2000)(*citing* S.C. CODE ANN. § 39-5-10 et seq. (Law. Co-op. 1976)).

The plaintiff contends that the defendants canceled the plaintiff's call service and excluded her name from Durst Family Medical's yellow pages advertisement. *Id.* ¶¶ 28 - 31. Finally, plaintiff contends that she was forced to obtain new insurance billing services when the defendants switched billing systems and refused to continue providing the service to her. *Id.* 32. The defendants assert that the difficulties with the calling service and the yellow pages advertisements were merely mistakes made either within Durst Family Medical's office or by a third party. In fact, the defendants assert that the local telephone company caused the plaintiff's advertisements to be excluded from the yellow pages, not them.

At her deposition, Deborah Lynn Watts ("Watts"), an agent of the local phone company, testified that in August of 1996, Durst Family Medical began utilizing the National Yellow Pages for advertising in future telephone books. (Def. Mem. Supp. Summ. J. at Ex. 29 p. 36). Watts also testified that it was the local phone company's policy to "line out" all items connected with a particular phone number and send that information to the National Yellow Pages office to be handled from then on. *Id.* at p.

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37 - 38. In addition, Powers testified that Durst Family Medical originally added the plaintiff to their yellow pages advertisement, even though the lease arrangement did not contemplate such service, simply to make the practice look bigger. (Def. Mem. Supp. Summ. J. at Ex. 25 pp. 47-48). Powers also testified that the plaintiff was never promised that she would be placed in the advertisement, nor did she pay anything toward the cost of the add. *Id.* at p. 49. Although the court agrees that these facts suggest that an honest mistake was made, they do not exclude the possibility that the defendants intentionally removed the plaintiff's own advertising because they controlled any listings at that phone number. Nor does it exclude the possibility that the defendants continued to accept the plaintiff's payment for advertising while it knew that she was no longer receiving the benefit of those services. These are questions of fact which a jury must decide.

Similarly, the Lease and Administrative Services Agreement does not clearly resolve the plaintiff's claims. The defendants assert that they increased the plaintiff's fees in order to avoid Anti-Kickback and Stark violations; however, this does not explain why the plaintiff was excluded from the insurance billing services which are provided for in the administrative services agreement. The administrative services provision states:

> "The lessor agrees to provide the lessee with administrative services including general medical supplies but not specialized supplies required for the Lessee's Ophthalmology medical practice, patient scheduling, patient reception, patient file maintenance, secretarial, computing, basic bookkeeping, and patient billing

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and collection for a service fee equal to ten (10%) per cent of the Lessee's gross revenues less insurance adjustments." Lease and Administrative Services Agreement. (Def. Mem. Supp. Summ. J. at Ex. 27).

The administrative services agreement further provides that, "[t]he administrative services fee shall be subject to review and renegotiation between the parties at six (6) month intervals throughout the term of this Agreement . . ." *Id.* Although the lease portion of the Agreement indicates the term is for one year, there is no term recited for the administrative services agreement. Therefore, a question exists in the court's mind as to the applicability of the contract and whether the defendants' complete refusal to provide insurance billing services as provided for under the administrative services agreement. In light of the questions concerning the yellow pages listings and the insurance billing services, this court finds that summary judgment should be denied.

g. Interference with Existing and Prospective Contractual Relations

The defendants also seek summary judgment on the plaintiff's interference with existing and prospective contractual relationships causes of action. The defendants argue that they did not interfere with any of the plaintiff's contractual relationships, but that they were fulfilling administrative requirements to be sure patients received insurance benefits. The elements of the tort of wrongful interference with an existing contractual relationship are as follows: 1) a contract, 2) knowledge of the contract by the wrongdoer, 3) an intentional procurement of the contract's breach, 4) the absence of justification, and 5) damages resulting therefrom. *Todd v. S.C. Farm Bureau Mut.*

Ins. Co., 287 S.C. 190, 336 S.E.2d 472 (1985). Similarly, to establish the tort of wrongful interference with prospective contractual relationships the plaintiff must establish that the defendants: 1) intentionally interfered with the plaintiff's prospective contractual relations; 2) for improper purpose or by improper method; and 3) which resulted in injury to the plaintiff. *Southern Contracting, Inc. v. H.C. Brown Const. Co., Inc.*, 317 S.C. 95, 450 S.E.2d 602 (Ct.App. 1994).

The defendants assert that summary judgment is appropriate for these causes of action because their interference in the plaintiff's contractual relationships, if any occurred, only occurred for a legitimate purpose and were carried out in a proper manner. The defendants explain that managed health care providers developed the concept of a gatekeeper, where a general practitioner must see a patient and verify their need for a specialist before a referral is made, Durst Family Medical had to alter its referral policy to insure the patient's insurance was not waived by a procedural flaw. Defendants further assert that as the general practitioners were able to treat certain issues like conjunctivitis, rather than referring the patient to a specialist. The defendants' arguments are supported by the testimony of Allen Powers.

Powers testified in his deposition that most of the plaintiff's patients were referrals from Durst Family Medical. (Def. Mem. Supp. Summ. J. at Ex. 25 p. 63). Powers also testified that the doctors at Durst Family Medical were particular about having patients come in for referrals before sending them to specialists, when required by insurance. *Id.* at pp. 64-65. Powers explained that the doctors did not implement this policy to hurt the plaintiff, but that it was "just their philosophy." *Id.* at p. 65.

Powers further explained that "the front office was told this is the way it was going to be. They didn't do it for any reason against Dr. Holmes." *Id.* Neither the plaintiff's argument at the motion hearing nor her brief in opposition of summary judgment outlines the facts which support this cause of action. After reviewing the facts presented, this court finds that the plaintiff has failed to establish any facts suggesting that the defendants actions were prompted by an improper purpose or were performed in an improper procedure or without justification. In fact, the evidence before the court clearly shows without dispute that the procedure was adopted to insure that patients had the benefit of insurance coverage for any medical assistance sought. Therefore, the defendants' motion for summary judgment as to the plaintiff's causes of action for interference with existing or prospective contractual rights is granted.

h. Promissory Estoppel

The defendants next move for summary judgment on the plaintiff's promissory estoppel claim. "In South Carolina, the elements of promissory estoppel are: 1) the presence of a promise unambiguous on its terms; 2) reasonable reliance upon the promise by the party to whom the promise is made; 3) the reliance is expected and foreseeable by the party who makes the promise; and 4) the party to whom the promise is made must sustain injury in reliance on the promise." *Prescott v. Farmers Telephone Co-op., Inc.*, 328 S.C. 379, 491 S.E.2d 698, (Ct.App. 1997)(*citing Woods v. State*, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct.App.1993).

The defendants assert that the plaintiff has not shown how she suffered injury

from relying on a promise made by the defendants.[8] However, the plaintiff has alleged that she relied on a promise made by Melin that East Cooper would allow the plaintiff additional time to meet the patient contact requirement beyond one (1) year's time, but that her admitting privileges were summarily terminated at the conclusion of a year. (Pl. Aff. June 8, 1998 at ¶¶ 63, 64 & 66). The plaintiff asserts that without her admitting privileges she has lost, will lose and may be overlooked by patients in need of surgical attention. (Pl. Aff. September 1, 1999 at ¶¶ 7 - 12). Therefore, this court finds the plaintiff has proffered sufficient evidence to create a factual dispute over what injury the plaintiff has suffered, if any, by Melin's promise that the plaintiff would have a second year to meet the active staff requirements.

i. Violation of South Carolina Provider Self-Referral Act

The defendants move for summary judgment on the plaintiff's Provider Self-Referral Act by asserting that the act is inapplicable to the present case. The plaintiff's brief in opposition to the defendants' motion for summary judgment includes no discussion of the South Carolina Provider Self-Referral Act. Section 44-113-30 of that Act provides that "a health care provider may not refer a patient for the provision of designated health services to an entity in which the health care provider is an investor or has an investment interest." S.C. Code Ann. § 44-113-30 (Law. Co-op. Supp. 1999). Section 44-113-20 defines 'Health care provider', 'provider', or 'health care professional' as "a person licensed, certified, or registered under the laws of this

[8] This court will focus its attention on this narrow issue raised in the defendants' brief concerning the promissory estoppel claim.

State to provide health care services." S.C. Code Ann. § 44-113-30 (Law. Co-op. Supp 1999). This section also defines a 'health care facility' through reference to Section 44-7-130 as:

"acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, methadone treatment facilities, tuberculosis hospitals, nursing homes, ambulatory surgical facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, habilitation centers for mentally retarded persons or persons with related conditions, and any other facility for which Certificate of Need review is required by federal law."

S.C. Code Ann. § 44-7-130 (Law. Co-op. Supp. 1999). Therefore, the statute clearly prohibits a physician from referring patients to a hospital or other treatment facility in which the physician has an investment interest. The plaintiff's allegations are that the twenty-four (24) patient contacts requirement in the bylaws violates this act, even though the plaintiff has no investment interest in East Cooper demonstrated by the record. Therefore, this court finds that the plaintiff has failed to state a claim upon which a remedy could be granted and dismisses the plaintiff's Provider Self-Referral Act cause of action.

j. Immunity

The defendants also assert that summary judgment is appropriate on each of the plaintiff's causes of action under several statutory provisions which provide immunity for the actions of which the plaintiff complains. First, the defendants claim that members of certain professional committees are exempted from tort liability under Section 40-71-10. Under this section:

> "There is no monetary liability on the part of, and no cause of action for damages arises against . . . an appointed member of a committee of a medical

> staff of a licensed hospital, provided the medical staff operates pursuant to written bylaws that have been approved by the governing board of the hospital . . . for any act or proceeding undertaken or performed within the scope of the functions of the committee if the committee member acts without malice, has made a reasonable effort to obtain the facts relating to the matter under consideration, and acts in the belief that the action taken by him is warranted by the facts known to him."

However, this court does not believe this immunity is properly granted at this time. The statute specifically requires that operation pursuant to the written bylaws is necessary before immunity may be granted. Based upon this court's earlier finding that a question of material fact exists as to whether East Cooper's Bylaws were complied with in this case, this court further finds that the issue of immunity should be denied at this time.

The defendants also seek immunity under the provisions of the Health Care Quality Improvement Act ("HCQIA") of 1986. The HCQIA provides a "professional review body"[9] with immunity from damages whenever a "professional review action"[10] is taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,

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[9] "The term 'professional review body' means a health care entity and the governing body or any committee of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity." 42 U.S.C. § 11151(11).

[10] The HCQIA provides that: The term "professional review action" means an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the *competence or professional conduct* of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also includes professional review activities relating to a professional review action (emphasis added). 42 U.S.C. § 11151(9).

(2) after a reasonable effort to obtain the facts of the matter,
(3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and
(4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence. 42 U.S.C. § 11112(a). However, in the present case it does not appear that such an analysis is necessary because the action at issue was not a professional review action.

Section 11151(9) provides for immunity only for actions based on the competence or professional conduct of an individual physician. The plaintiff asserts that HCQIA is inapplicable because the "termination of her privileges did not involve quality patient care concerns." In her affidavit, the plaintiff states that the revocation of her privileges does not involve any question of professional competence or conduct. (Pl. Aff. September 1, 1999 at ¶ 5). Additionally, the plaintiff stated that she has never received a complaint about her patient care, either from a patient or medical agency. *Id.* These allegations are supported by a letter dated November 20, 1997, from Delinda Terry which states that the Medical Executive Committee's recommendation to reduce her privileges from associate active to consulting "does not relate to professional competence or conduct." (Pl. Mem. Opp. Summ. J. at Ex. 2). After reviewing the facts, this court finds that the defendants' actions, although conducted under the auspices of "peer review" actions, were not based upon a

question of competence or professional conduct.[11] Although the patient contact requirement was adopted to assure sufficient information to make peer review decisions on competence and professional conduct, the simple decision that the plaintiff had not met the patient contact requirement was a ministerial act rather than a discretionary decision for which the HCQIA affords immunity. Therefore, this court finds that the issue of immunity under the HCQIA is properly denied at this time.

III. Conclusion

For all of the foregoing reasons, this court grants summary judgment as to the plaintiff's Arrangements Lessening Competition; Interference with Existing and Prospective Contractual Rights; and the Provider Self-Referral Violation causes of action. As to the remaining causes of action, this court finds either the existence of material questions of fact or that further development of the record is necessary to clarify the application of the law to the facts; accordingly, the court denies summary judgment as to those causes of action.

IT IS **FURTHER ORDERED** that since the plaintiff has not obtained counsel within the time period specified at the last status conference, the Clerk of Court is directed to list the plaintiff as proceeding pro se.

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[11] This finding is supported by Judge Duffy's finding that "[i]t is undisputed, and actually admitted with the Hospital's correspondence, that the actions taken in regard to Dr. Holmes' privileges did not in any way implicate professional competence or patient care."