

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DARLINGTON COUNTY
Circuit Court

J. Michael Baxley and Paul M. Burch, Circuit Court Judges
Case No. 10-CP-16-0332
Appellate Case No. 2014-001275

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SC Court of Appeals

Pee Dee Health Care, P.A.....Appellant-Respondent.

v.

Estate of Hugh S. Thompson, III.....Respondent-Appellant.

RECORD ON APPEAL
VOLUME ONE
(pp. 1 - 494)

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STATE OF SOUTH CAROLINA,
COUNTY OF DARLINGTON.

IN THE COURT OF COMMON PLEAS
2010-CP-16-0332

Pee Dee Health Care, P.A.,

Plaintiff,

vs.

Estate of Hugh S. Thompson,

Defendant.

ORDER DISQUALIFYING
PLAINTIFF'S COUNSEL TONY R. MEGNA

FILED
2011 APR 15 PM 2:11
SCOTT SUGGS
CLERK OF COURT/EO.D.
DARLINGTON COUNTY, S.C.

 This is an action originally filed in the Probate Court wherein the Plaintiff is attempting to recover reimbursement from the Defendant estate for losses in Medicare reimbursements allegedly occasioned by the actions of Dr. Hugh S. Thompson during his period of practice with Plaintiff. Counsel for the Defendant has now moved this Court for an Order disqualifying Plaintiff's counsel Tony R. Megna.. This motion is based upon the Rules of Professional Conduct, as found in SCACR 407, and supporting case law. Plaintiff filed a response to the motion on March 11, 2011, and the matter was heard by the Court on March 16, 2011. After consideration of all the pleadings, motions, exhibits, and the arguments of counsel, the Court finds that Attorney Megna should be disqualified from further representation of the Plaintiff in this matter. This determination is based upon the following findings of fact and conclusions of law.

FINDINGS OF FACT

(1) Counsel Tony R. Megna has identified himself as the Chief Executive Officer ("CEO") of Plaintiff Pee Dee Health Care, P.A. ("PDHC"). In addition to such identification made to the Court at the March 16th hearing, the response of PDHC to the pending motion to

disqualify states that Mr. Megna "has been the CEO and General Counsel to the Plaintiff since 1995." Plaintiff's Return (see footnote 1 below).

(2) Mr. Megna's admitted position as the CEO for PDHC confirms his focal point as a witness in this matter. By his signature in Section 15 of a "Medicare Enrollment Application" submitted to the Centers for Medicare and Medicaid Services (CMS) within the United States Department of Health and Human Services (Exhibit B to the Motion), "completed for" PDHC, Mr. Megna "binds this provider to the laws, regulations, and program instructions of the Medicare program."¹ Accordingly, Mr. Megna is positioned to be a person with knowledge at PDHC about the efforts of that organization to comply with Medicare "laws, regulations, and program instructions." PDHC's adjudicated non-compliance led to the adverse Medicare decision at the heart of this case. Thus, Mr. Megna is a necessary witness to matters raised in this case.

Jan 2 (3) PDHC has answered interrogatories propounded pursuant to Rule 33 of the South Carolina Rules of Civil Procedure (responses dated July 28, 2010 attached as Exhibit C to the Motion). In response to interrogatory 1, which calls for the identification of witnesses, PDHC lists Tony R. Megna.² In addition, the response to Interrogatory 8 identifies Tony Megna as the only person known to PDHC with whom Hugh S. Thompson (the "decedent") communicated about the adverse Medicare determination for recoupment. While the motion response of PDHC now seeks to minimize Attorney Megna's communications with Dr. Thompson, the

¹ At the close of argument, PDHC suggested that this document is not supportive of Megna's CEO status - a status now admitted by PDHC. While the application cover letter indicates that it generally relates to Lower Florence County Hospital, the letter specifically provides that sections 6 and 15 relate to PDHC of Darlington. These sections identify Megna as an owner of PDHC, a managing employee of PDHC, and as a "Director/Officer" of PDHC - all uncontested at this point according to PDHC positions at the hearing. In the PDHC written response to the Motion to Disqualify, Megna is specifically confirmed to have an interest in the outcome of this lawsuit. Response page 30.

² PDHC's interrogatory answer asserts that "Mr. Megna is not likely to testify...." This anticipatory disclaimer does not alter Defendant's right to discover information from witness Megna and this alone requires disqualification whether called at trial as a witness, by either party, or not.

communications described in these initial interrogatory answers and in the complaint³ make Mr. Megna a witness to relevant issues in this matter.

(4) The appeal of the adverse PDHC Medicare determination is relevant in this matter. While PDHC asserts that the Defendant should be estopped, even by the decedent's alleged silence, from denying liability for the indemnification of Plaintiff's Medicare overpayment, there would have been no liability to Medicare at all if the PDHC appeal had been successful like the appeal of decedent's other employer, Firstchoice Healthcare, which arose over the same issue. The claim to equitable indemnification referenced by PDHC in argument at this motion hearing requires a finding that the proposed indemnitee (PDHC) was without fault or liability for the damages. See Fowler v. Hunter, 388 S.C. 355, 697 S.E.2d 531 (2010). Thus, PDHC's fault is at issue in this case and the decision of federal Administrative Law Judge Metry (Exhibit A to the Motion) speaks to that issue directly and decisively. The appeal of Judge Metry's Order, if any, would be relevant in this matter on the preclusive finding that PDHC was at fault and therefore could not be indemnified.⁴

Mr. Megna is identified in PDHC's answer to interrogatory 9 as the person involved with the defense of the adverse Medicare determination. He has firsthand knowledge regarding the status and results of any administrative appeals.

³ In its complaint (¶ 13), PDHC alleges that the decedent Thompson made "contact" with PDHC by sending a letter to the Plaintiff in which he is alleged to have "admitted" not providing "accurate information to Plaintiff upon and during his employment with the Plaintiff...." The unsigned letter was submitted at the hearing, without objection, as Defense Hearing Exhibit 1, and is directed to "Tony"—current counsel for PDHC. The complaint purports to attach a copy of the alleged letter as an exhibit. The same document is submitted in the motion response of PDHC as Exhibit HH.

PDHC's answer to Interrogatory 2 identifies the same alleged letter from decedent Thompson to Tony Megna as a document that relates to a claim or defense in the case. That interrogatory answer also references other "information sent to Tony Megna by Dr. Thompson relating to the SC Board of Medical Examiners." Thus, by the Plaintiff's own responses, Mr. Megna is the alleged recipient of documents and information relevant to claims and defenses in the case. Questions regarding the authenticity of this letter, the circumstances of its alleged receipt, and its alleged contextual meaning are all fairly directed to Mr. Megna.

⁴ Judge Metry's finding of fault was based upon the affirmative duty of employers to perform due diligence by investigating the program exclusion status of prospective employees lest they face liability for exclusion facts they "should know." See 42 U.S.C. § 1320a-7a(a)(6); 42 CFR 1003.102(a)(2).

(5) Even if PDHC were not at fault, communications between PDHC and Thompson about the Medicare claim and appeals process are relevant to the issues raised in this case. At least in part, PDHC's claim to equitable indemnification also depends upon showing that Dr. Thompson was provided timely notification and an opportunity to participate and help defend the claim Medicare made against PDHC. This is because one who seeks equity must do equity.⁵

(6) Disqualification of Mr. Megna will not work a substantial hardship. This matter is early in the discovery phase. No depositions have been taken. Thus, there is minimal extra expense or loss of time, if any. Both Mr. Megna and attorney Benjamin Matthews have made appearances on behalf of PDHC in this action; indeed, it is Mr. Matthews who executed the complaint in this Court. Further, Mr. Megna represented to the Court that the Plaintiff has 75-80 employees; the Court finds that Plaintiff has the resources to add additional counsel if needed.

CONCLUSIONS OF LAW

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4 (A) In South Carolina, an attorney cannot "act as an advocate at a trial in which the lawyer is likely to be a necessary witness," unless the issue about which the attorney will testify (1) is uncontested, (2) relates to the nature or the value of the legal services rendered, or (3) disqualification would work a substantial hardship on the attorney's client. Rule of Prof. Conduct 3.7, SCACR 407. Rule 3.7 is absolute; only when one of the three delineated exceptions applies may a witness also serve as an advocate. 1 S. C. Juris. *Attorney and Client* § 53; ROBERT M. WILCOX, South Carolina Legal Ethics § 9.1.1. An adversary, such as the Estate of Dr. Thompson, has an obligation to immediately move for disqualification when there is an issue of the opposing advocate's position as a witness. Comment (I), RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108.

⁵ Accord *Olis Elevator, Inc. v. Hardin Constr. Co. Group*, 316 S.C. 292, 296-97 450 S.E.2d 41, 44 (1994) (allowing indemnification where "indemnitee gave the indemnitor notice and an opportunity to participate in the litigation....").

(B) The first two exceptions allowed by Rule of Professional Conduct 3.7, SCACR 407, are not applicable here. Mr. Megna's testimony relates, in part, to contested communications with the decedent at the heart of the claims and defenses in this case. In addition, Mr. Megna's testimony relates to contested administrative issues of Medicare compliance (such as employee screening, due diligence, and record keeping) and the contested issue of Plaintiff's alleged damages. Mr. Megna's testimony does not relate to "legal services rendered" in this Court of Common Pleas matter.

(C) The hardship exception of Rule 3.7 provides no relief here. A South Carolina District Court has noted that the hardship exception to Rule 3.7 should be construed very narrowly. Brown v. Daniel, 180 F.R.D. 298, 302 (D.S.C. 1998). Simple extra expense or the loss of time that is inherent in any disqualification is not a substantial hardship. To find substantial hardship, "courts have required something beyond the normal incidents of changing counsel, such as the loss of extensive knowledge of a case based upon a long-term relationship between the client and counsel and substantial discovery conducted in the actual litigation." Id. Here, the normal incidents of changing counsel are not even present as Rule 3.7(b) will allow for Mr. Megna's non-witness partner Mr. Matthews to continue in his existing representation of PDHC.

(D) The Dead Man Statute⁶ does not change Mr. Megna's status as a fact witness in this case under Rule 3.7 of the Rules of Professional Conduct – regardless of how it might apply in the ultimate trial of this matter. Moreover, the Dead Man Statute has no effect upon the discoverability of information allegedly known by Megna as a fact witness.⁷

⁶ The Dead Man Statute, codified in South Carolina at S.C. Code § 19-11-20, is an evidentiary rule that relates to the competency of a witness to testify about certain matters. The statute exists to prevent interested parties from offering self-serving, incontrovertible testimony that may be unreliable. Harris v. Berry, 231 S.C. 201, 98 S.E.2d 251 (1957); Trimmer v. Thomson, 41 S.C. 125, 19 S.E. 291 (1894). Specifically, a competency objection may be raised by the decedent's representatives to prohibit a person or party with an interest in the matter from testifying about communications or transactions with another person who is deceased at the time of such testimony. See, e.g., Estate of Revis by Revis v. Revis, 326 S.C. 470, 484 S.E.2d 112 (Cl. App. 1997) ("The 'dead man's' statute is an exception to the general rule of witness competency. It is to be read restrictively, and the party requesting its use bears the burden of establishing its applicability.").

⁷ While the competency objection may be waived by the decedent's representatives at trial, the Court of Appeals has previously held that a discovery deposition regarding the communications between a decedent and an interested person or party does not "open the door" or waive the availability of the objection at trial. Thomas v. Taylor, 300 S.C. 127, 386 S.E.2d 630 (Cl. App. 1989) (Sanders, Chief Judge) (Relying, in part, on SCRPC 32(d)(3)(A) which provides that "Objections to the competency of a witness ... are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time."). Obviously, Dr. Thompson's death cannot be removed or obviated "before or during" any Megna deposition so waiver is not possible at a deposition. PDHC's assertion that the statute acts as a complete bar to any examination is belied, however, by the statute's own provision for "opening the door" to otherwise incompetent testimony. See, e.g., Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997).

(E) Mr. Megna's role as general counsel to PDHC does not change Mr. Megna's status as a fact witness in this case under Rule 3.7 of the Rules of Professional Conduct – regardless of how this status might trigger evidentiary privileges. While PDHC asserts that privileges attach to anything and everything that Mr. Megna might say, thereby freeing him to act only as counsel, this Court concludes that the potential application of attorney-client privilege⁸ does not preclude anything and everything that Mr. Megna might say as a witness.

PDHC's complaint is that decedent Thompson did not disclose information to PDHC or gave wrong information to PDHC – in part through its CEO Tony Megna. Under the guise of privilege, Mr. Megna cannot avoid examination on the disclosures and communications made to him that he now claims were tortious.⁹

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In further support of the court's decision, focusing narrowly on PDHC's exhibit HH submitted in response to the motion to disqualify, there is nothing in that alleged Thompson letter to Mr. Megna that indicates that Thompson is seeking legal advice. Furthermore, that communication has already been divulged by PDHC as part of its complaint – so even if it arguably related to legal advice needed by PDHC at the time, that privilege has clearly been

⁸ South Carolina has long recognized the attorney-client privilege against the disclosure of confidential communications by a client to his attorney. *State v. Love*, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980). The privilege applies only to "confidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 186 (1980). The burden is on the proponent of the privilege to demonstrate its applicability. *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). The party asserting the attorney-client privilege must establish not only that the attorney-client relationship existed, but also that the particular communication at issue is privileged and that the privilege was not waived. *Cameron v. Gen. Motors Corp.*, 158 F.R.D. 581, 584 (D.S.C. 1994), vacated by, in part *In re Gen. Motors Corp.*, No. 94-2435, 1995 U.S. App. LEXIS 41270 (4th Cir. 1995).

⁹ The precise boundaries of any applicable privilege are not before the court in this motion. As noted by the Defendant, however, PDHC may have implicitly waived any possible remaining or existing privilege by placing the subject of communications and disclosures between the decedent and Mr. Megna (on behalf of PDHC) into controversy. See *Duplan Corp. v. Deering Milliken, Inc.*, 397 F.Supp. 1146, 1161 (D.S.C. 1975). See also *In re Long Point Road Ltd. P'ship*, No. 93-72769-JW, 1997 Bank. LEXIS 2403, at *9-10 (Bankr. D.S.C. Sept. 8, 1997); see also *Heam v. Rhay*, 68 F.R.D. 574, 580 (E.D. Wash. 1975). Fairness is the underlying touchstone for implicit waiver; the rationale is that privileged materials ought not be used as both a shield and sword. See *In re: United Supermarkets, Inc.*, 36 S.W.3d 619, 621 (Tex. Ct. App. 2000) ("a party who is seeking affirmative relief should not be permitted to maintain an action, and at the same time, maintain evidentiary privileges that protect from discovery outcome determinative information not otherwise available to the other party."); see also *Hangards, Inc. v. Johnson & Johnson*, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("a party may not insist on the protection of the attorney-client privilege for damaging communications while disclosing other selected communications because they are self-serving.").

waived by its disclosure. Thus, Mr. Megna is now subject to examination as to details of that document.

More broadly, the privilege would only extend to Mr. Megna's communications where the medical practice of PDHC is seeking legal advice. The privilege would not extend to Mr. Megna when acting in the capacity of CEO of the medical practice; for example, Mr. Megna's communications with third parties such as government regulators, insurers, and Medicare program administrators is clearly not privileged and would be relevant to issues in this case. Likewise, questions directed to the CEO's knowledge of business operations, finances, and damages would not infringe upon privileged communications. Further, the existence of other persons who may also have knowledge in these areas does not remove Mr. Megna from the witness list prohibited by Rule 3.7.

Jab
(F) The work-product privilege also does not preclude anything and everything that Mr. Megna might say as a witness. The work-product doctrine seeks to protect things or information "prepared in anticipation of litigation or for the trial ..." SCRCP 26(b)(3). Specifically, the rule protects "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." The work-product doctrine does not, however, extend to anything and everything an attorney might have done – particularly when acting in the capacity of a CEO of a medical practice.¹⁰

¹⁰ The work-product privilege applies only to "attorneys' or legal representatives' mental impressions, conclusions, opinions, or legal theories authored in anticipation of litigation." Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 668 (10th Cir. 2006). Fact work product is not absolutely privileged and discovery of fact or non-opinion work product may be compelled in some circumstances. In re Qwest Communications Int'l, Inc., 450 F.3d 1179, 1186 (10th Cir. 2006). "Work product which is primarily factual in nature is not absolutely immune from discovery under the rule. At best, it receives a qualified protection which is overcome if the opposing party shows substantial need of the material and inability to obtain it elsewhere without undue hardship." Transit Authority of River City v. Vinson, 703 S.W.2d 482, 486 (Ky. App. 1985); see also Duffy v. Wilson, 289 S.W.3d 555, 559 (Ky. 2009).

While the Court can address specific assertions of privilege if and when they arise, the Defendant correctly points out that the work-product doctrine is limited to protecting such things in the context of the litigation to which the information relates – *not other litigation*. Accord Kirschbaum v. WRGSB Assocs., No. 97-5532, 1998 U.S. Dist. LEXIS 8860, at *3 (E.D. Pa. June 18, 1998). In this case, the Defendant is not interested in Mr. Megna's thoughts about the present litigation with the Estate; rather, its interest is in the litigation with Medicare. The litigation with Medicare is now concluded and the work product protection, if applicable at all, would only apply in the context of that litigation – protecting against disclosure to Medicare.

Even where applicable, Rule 26(b)(3) provides for an exception when a party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means." Absent some audio recording, the only means to get the substantial equivalent of Dr. Thompson's alleged conversations with the CEO of PDHC is to ask the surviving party to those conversations.

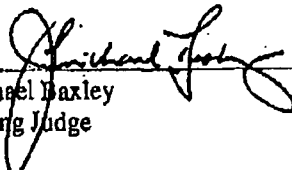
CONCLUSION

Jan 8
This is the type of factual scenario for which Rule 3.7 was written. Mr. Megna is the CEO of the Plaintiff organization and is an owner with a financial stake in the outcome of this litigation. By his position alone, Mr. Megna is central to the issues involved in this case. In addition, Mr. Megna was intimately involved in the relationship between Plaintiff and the Decedent Hugh S. Thompson, and was responsible for many decisions that were made regarding the employment relationship between the two parties. Mr. Megna's knowledge of these important facts assure that his testimony will be necessary in this case.

The Court is not persuaded by the Plaintiff's assertions of various privileges. Even if applicable in some limited context, the applicability of any particular privilege does not change

Mr. Megna's obvious status as a witness. In discovery or at trial or both, Mr. Megna may be called upon to testify regarding facts at issue in the present action, and thus, Mr. Megna cannot proceed as an advocate for the Plaintiff in this proceeding. The Court orders complete disqualification effective with the execution of this Order.¹¹

IT IS SO ORDERED.


J. Michael Haxley
Presiding Judge

April 15, 2011
Hartsville, South Carolina

FILED
2011 APR 19 PM 2:11
SCOTT B. SUEGS
CLERK OF COURT/R.O.
DARLINGTON COUNTY, S.C.

¹¹ The Court concludes that it is not feasible for Mr. Megna to remain involved as counsel of record even before trial. The potential for problems would exist with depositions and other pre-trial functions. The immediate availability of Mr. Megna's partner eliminates any hardship or difficulty associated with this effective date.

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS
2010-CP-16-0332

Pee Dee Health Care, P.A.,

Plaintiff,

v

Estate of Hugh S. Thompson,

Defendant.

ORDER DENYING PLAINTIFF'S 59(E)
MOTION FOR RECONSIDERATION OF
ORDER DISQUALIFYING COUNSEL AND
QUASHING ALL MOTIONS, SUBPOENAS,
AND FILINGS SIGNED ONLY BY
DISQUALIFIED COUNSEL TONY R.
MEGNA AND ISSUED AFTER JUNE 17, 2011

This matter is before the Court on Plaintiff's SCRPC 59(e) Motion for Reconsideration of an Order dated April 15, 2011, which disqualified Plaintiff's counsel from representing Plaintiff in this matter. Plaintiff filed the present motion to reconsider on May 2, 2011. On May 20, 2011, Defendant filed a Motion to Dismiss Plaintiff's Rule 59(e) motion and Memorandum in Opposition to Plaintiff's Motion. Plaintiff then filed a Reply to Defendant's Motion in Opposition on May 26, 2011. All these filings have been considered by the Court in reaching this decision.

On July 19, 2011, the Court conducted a hearing on this matter as well as cross motions for Summary Judgment filed by both parties. Prior to this hearing, in its Notice of Hearing dated June 17, 2011, and to avoid any prejudice to Plaintiff, the Court permitted Plaintiff's disqualified counsel to argue the outstanding Summary Judgment Motions before it would render a decision on Plaintiff's 59(e) Motion. The Court took all three Motions under advisement. The Cross-Motions for Summary Judgment remain under advisement as of the date of this Order.

After careful consideration of the extensive record submitted by both parties, as well as the arguments heard on July 19, Plaintiff's Motion for Reconsideration under SCRPC 59(e) is **DENIED**.

The findings of fact and conclusions of law in the Order Disqualifying Counsel are replete. Thus, the Court declines to offer additional reasoning for its decision to uphold that determination, without alteration.

However, the Court does find that its decision to allow Plaintiff's counsel oral argument on previously-filed Summary Judgment Motions did not attenuate its Order of Disqualification. The Court granted Plaintiff's counsel a limited appearance only. Therefore, all motions, subpoenas, and filings signed only by disqualified-counsel, Tony R. Megna, and made subsequent to the Notice of Hearing dated June 17, 2011 in which the Court formally announced the parameters of its accommodation to Plaintiff and its counsel, are hereby **QUASHED**.

Plaintiff's remaining counsel is Ordered to personally serve a copy of this Order on all parties affected by the Court's decision herein, including counsel for Defendant, within 5 days of service from the Clerk of Court.

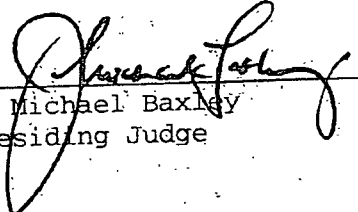
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DARLINGTON COUNTY, S.C.

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2011 JUL 15 AM 10:41
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

IT IS SO ORDERED.

Hartsville, South Carolina
August 12, 2011

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J. Michael Baxley
Presiding Judge

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DARLINGTON COUNTY, S.C.

2011 AUG 15 AM 10:14

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STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A # 2010-CP-16-032

TRUE CERTIFIED COPY.
Scott B. Jagger
CLERK OF COURT/IMC
DARLINGTON COUNTY, S.C.

ORDER OF SUMMARY JUDGMENT IN
FAVOR OF DEFENDANT
(Ending Case)

2011 SEP - 1 AM 11:50
SCOTT B. JAGGER
CLERK OF COURT/IMC
DARLINGTON COUNTY, S.C.

FILED

J. This matter is before the Court on cross-motions of the parties for summary judgment. The Plaintiff filed its motion for summary judgment on December 9, 2010, based upon admissions made by Defendant in its Answer. The Defendant filed its counter motion for summary judgment on May 20, 2011. The Defendant's motion is based upon the Plaintiff's alleged fault in causing the debt sued upon by the complaint and the alleged dispositive nature of that fault with regard to all of Plaintiff's causes of action. While some factual issues not pertinent to this decision might remain in dispute, the Defendant asserts that dispositive adjudication of fault by the Plaintiff has been resolved in an appropriate forum and is binding upon the Plaintiff here as to the entire case.

Both motions have been extensively briefed by the parties, in memoranda filed with the Court, and in letters - also filed with the Court or made part of the record by attachment to other filed memoranda. After this extensive briefing, the matter was set for hearing in Darlington on July 19, 2011. At this hearing, the Court allowed the Plaintiff's preferred counsel to argue the motions for summary judgment despite his general disqualification as counsel ordered by the

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Court earlier in the matter¹; this was done to eliminate any alleged prejudice or disadvantage with regard to the summary judgment motion presentation.

After consideration of all of the record including: the pleadings, motions, exhibits, filed letters, and argument, the Court finds that summary judgment for the Defendant is appropriate. This determination is based upon the findings of fact and conclusions of law as outlined below.

PROCEDURAL STATUS OF CASE

Feb 2
Because the Plaintiff has raised an objection to the Court's present jurisdiction to enter this Order, a brief review of the history of this matter is instructive. This matter, before this Court upon removal from the Probate Court of Darlington County, has been hotly contested, and the parties have been before this Court on multiple issues. As stated above, upon motion of Defendant after full argument and briefing, this Court issued an Order dated April 15, 2011 disqualifying Plaintiff's counsel Tony R. Megna. Attorney Megna then moved to reconsider this decision, taking the position, *inter alia*, that the Plaintiff would be unduly prejudiced by attorney Megna not being allowed to argue the summary judgment motions that were pending. The Court took this reconsideration motion under advisement and stayed its Order disqualifying counsel, and then permitted counsel to argue the reconsideration motion on July 19, 2011, the same day that the summary judgment motions were argued, so that Plaintiff would have the benefit of Mr. Megna's representation at summary judgment arguments. At the end of the hearings, the Court then took all matters under advisement.

By Order dated August 12, 2011, this Court denied Plaintiff's motion to reconsider the Order disqualifying counsel. On that same date, the Court issued a letter addressed to counsel advising that the Court was persuaded that Summary judgment was appropriate in this case on

¹ Plaintiff's initial counsel Tony R. Megna also serves as CEO of Plaintiff and this Court has found him to be a necessary witness in the matter.

behalf of the Defendants, and directing defense counsel to prepare a proposed order to that effect.

On August 15, 2011, Plaintiff filed a notice of Intent to Appeal the final decision disqualifying counsel. Plaintiff's counsel further argues that this appeal operates as a Stay for all proceedings in the case. This Court disagrees. Both Rules 205 and 241(a), SCRAP, provide that the trial court has continuing jurisdiction of case issues not affected by the pending appeal. Clearly, the disqualification of counsel issue does not impact the merits of the case addressed by summary judgment. Moreover, this Court believes that considerations of appellate judicial economy are best served by the rendering of this decision at the present time.

FINDINGS OF FACT

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(1) Hugh S. Thompson, Jr. (Decedent) died on November 5, 2009, as a resident of Darlington County. His Will dated June 26, 2008, was admitted to probate by the Darlington County Probate Court on November 11, 2009, and his children Louise T. Dailey and Hugh S. Thompson, III, were nominated by the Will as Personal Representatives and were duly appointed by the Probate Court.

(2) On April 14, 2010, Pee Dee Health Care, P.A. (PDHC) filed a claim against the estate to recover reimbursement for losses allegedly occasioned by the actions of the Decedent (a medical doctor) during his period of practice with PDHC during the years 1998-2000. The estate disallowed the claim on May 7, 2010. Subsequently PDHC filed an amended claim and Summons and Complaint in the Probate Court and petitioned for removal of this action to the Court of Common Pleas pursuant to S.C. Code Ann. §62-1-302(d)(2009). Respondent filed an Answer and the case is now before the Circuit Court on cross-motions for summary judgment.

(3) Prior to commencing employment as a physician with PDHC, Decedent's medical license had been suspended in 1994 by the South Carolina Board of Medical Examiners. As a consequence of this action, Decedent was "debarred" by the Medicare Office of the Inspector General. While Decedent regained his license to practice medicine in April 1998, he did not seek reinstatement from the Medicare Office of Inspector General until 2002.²

(4) Decedent was employed by PDHC for approximately two years, from late 1998 to sometime in 2000. Prior to employing Decedent, PDHC had Decedent sign a Medicare form re-assigning to PDHC Medicare payments arising out of Decedent's service to Medicare patients as an employee-physician.³ After leaving the employment of PDHC, Decedent was employed by First Choice Healthcare, a medical practice in Florence, South Carolina.

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(5) In June 2007, PDHC was notified by Medicare that it owed Medicare more than \$200,000.00 by reason of "overpayments" to PDHC made with respect to Decedent's services before he was reinstated by the Medicare Office of Inspector General.⁴ PDHC opposed this Medicare overpayment claim through multiple levels of administrative appeals.

(6) In a matter fully litigated by PDHC, Federal Administrative Law Judge Dean C. Metry found that PDHC "is reasonably expected to know and has an affirmative duty to know the exclusion status of its employees through due diligence prior to entering the employment relationship." Moreover, Judge Metry found that PDHC "knew that Dr. Thompson's license was suspended indefinitely and that he received a conditional reinstatement after four years." The

² Upon resuming the practice of medicine, Decedent was given a Medicare "provider" number by PGBA, the Medicare contractor for South Carolina. He did not seek reinstatement with the Medicare OIG until 2002, and therefore was not on the Medicare-approved list of providers (even though he had been given a provider number).

³ Thus, PDHC was able to receive from Medicare payments arising out of Decedent's services on behalf of Medicare patients.

⁴ First Choice Healthcare received a similar notice and independently of PDHC litigated a completely favorable outcome within the Medicare administrative appeals system.

Judge further noted that PDHC's applications for Medicare payments for Dr. Thompson's services "inquired about any exclusions or sanctions" and that Dr. Thompson's exclusion "could easily have been found by calling the Office of Inspector General or visiting their website which lists excluded individuals..." Accordingly, Judge Metry concluded that PDHC was "at fault regarding the overpayment."⁵ On October 6, 2008, the Medicare Appeals Council upheld the finding of Judge Metry that PDHC "failed to exercise due diligence in determining the physician's exclusion status during the hiring process and when completing federal application forms, including a review of excluded individuals listed on the website of the Office of Inspector General (OIG)."

js (7) Eighteen months after the final decision of the Medicare Appeals Council, and after the death of Defendant Dr. Thompson, who would have been a pivotal witness as to what representations passed between the parties as to Dr. Thompson's Medicare provider eligibility, this claim was brought in the Probate Court.

CONCLUSIONS OF LAW

(A) Summary Judgment Standard.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Summary Judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001);

⁵ Decision of Administrative Law Judge Dean Metry dated March 14, 2008.

Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991).

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). While the court must view the evidence in the light most favorable to the nonmoving party, the Plaintiff cannot defeat Summary Judgment by relying on mere allegations in its Complaint. Rule 56(e), SCRCP; Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994).

Instead, the Plaintiff must set forth specific facts showing there is a genuine issue of material fact. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994). The trial judge is not required to single out some small piece of evidence and attach to it a great significance when that evidence is introduced solely to create an issue of fact that is not genuine. Engert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984) (Court is not "required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine."). In other words, the Plaintiff must present more than a mere scintilla of evidence to overcome a Defendant's Motion for Summary Judgment. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994).

Where a defendant establishes an entitlement to judgment as a matter of law, the court must grant Summary Judgment. Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991); Dyer v. Moss, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). The purpose of Summary Judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fahri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

(B) The Legal Nature of Plaintiff's Claims.

The crux of the PDHC complaint is that Decedent did not disclose information to PDHC or gave wrong information to PDHC. While PDHC asserted multiple causes of action in its Complaint,⁶ all claims derive from a core set of factual claims. While some tangential facts may yet be disputed, sufficient core facts have been legally determined and they are dispositive.

(C) The Plaintiff Must Be Without Fault.

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Embodied within all of PDHC's causes of action is the requirement that PDHC be without fault. In this State, there is no right to rely in an arm's length relationship between mature, educated people and our courts have found "this is especially true when one should have utilized precaution and protection to safeguard his interests." Ardis v. Cox, 314 S.C. 512, 431 S.E.2d 267 (1993) (sale of underground gasoline tanks) (citing Poco-Grande Investments v. C & S Family Credit, Inc., 301 S.C. 322, 391 S.E.2d 735 (Ct. App. 1990); See also Jones v. Cooper, 234 S.C. 477, 109 S.E.2d 5 (1959) (sale of hotdog cooking machine); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (no negligence, no fiduciary duty, no conversion of pledged assets where guarantor fails to read/understand guaranty obligations to bank). "One cannot rely on the misstatement of fact if the truth is easily within his reach." Jones v. Cooper, 234 S.C. at 488, 109 S.E.2d at 11 (citing Mobley v. Quantelbaum, 101 S.C. 221, 85 S.E. 585 (1915); Whitman v. Seaboard Airline Ry Co., 107 S.C. 200, 92 S.E. 861 (1917); Flowers v. Price 190 S.C. 392, 3 S.E.2d 38 (1939). Indeed, there can be no liability for "matters which Plaintiff could ascertain on his own in the exercise of due diligence." Quail Hill, LLC v.

⁶ In all there were twenty causes of action: (i) breach of fiduciary duty; (ii) negligent misrepresentation; (iii) breach of duty of loyalty to employer; (iv) negligence; (v) breach of contract; (vi) breach of contract accompanied by a fraudulent act; (vii) interference with contractual relations; (viii) fraud and misrepresentation; (ix) failure to disclose; (x) deliberate concealment; (xi) professional malpractice accompanied by fraud, misrepresentation, and negligence; (xii) money had and received; (xiii) promissory estoppel; (xiv) quantum meruit; (xv) constructive fraud and constructive trust; (xvi) constructive fraud without scienter; (xvii) equitable indemnity; (xviii) conversion; (xix) equitable restitution; and (xx) civil conspiracy.

County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010) (citing AMA Mgt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled." Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432, 446 (quoting Southern Development Land & Golf Co., v. South Carolina Public Service Authority, 311 S.C. 29, 426 S.E.2d 748, 751 (1993)).

As noted in the case law cited above, direct claims of negligence and other breaches of duty found in Causes of Action 1, 2, 3, 4, and 11 require PDHC to show its justifiable reliance on the Decedent's representations or omissions.⁷ Claims of fraud, found in Causes of Action 8, 9, 10, 15, and 16 require PDHC to show a right to rely on the representation or omission allegedly made by Decedent.⁸ PDHC's Cause of Action 13, promissory estoppel, also requires reasonable reliance.⁹ Powers Construction Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984).

Claims governed by equity, found in Causes of Action 12, 14, 17, and 19, require PDHC to have clean hands or its own lack of fault.¹⁰ "The 'unclean hands' doctrine closes the door of a court of equity to one tainted with inequitableness or bad faith in relation to the matter in which

⁷ Of course, multiple causes of action based on the same theory of liability are fairly treated as subsumed into a single cause of action. Accord Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010). ("Although pled separately, we find Quail Hill's claim for negligence is essentially subsumed in the negligent misrepresentation cause of action.")

⁸ The absence of the justifiable reliance element above is enough to defeat the claim of fraud. O'Shield v. Southern Fountains Mobile Homes, Inc., 262 S.C. 276, 204 S.E.2d (50) (1974).

⁹ Moreover, promissory estoppel must be based on unambiguous promise—not silence or an omission. Woods v. State, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993).

¹⁰ Both the action for Money Had and Received and Quantum Merit are governed by equitable principles although they are actions at law. See Myrtle Beach Hosp. v. City of Myrtle Beach, 341 S.C. 1, 532 S.E.2d 868 (2000); Reynoldsville v. Bladen, 226 S.C. 214, 845 S.E.2d 554 (1954); McDonald's Corp. v. Moore, 237 F. Supp. 874 (D.S.C. 1965). These claims are, of course, inconsistent with PDHC's contract based claims.

he seeks relief, however improper may have been the behavior of the Defendant." ABF Freight System, Inc. v. NLRB, 510 U.S. 317 1994 (quoting Precision Instruments Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814 (1945); see also National Bank of Savannah v. All, 260 F. 370 (4th Cir. 1919) (applying South Carolina law) (Plaintiff is equally guilty with Defendant and comes into Court with unclean hands; under the circumstances a court of equity will not permit Plaintiff to take advantage of her own wrong.). The case of Fowler v. Hunter, 388 S.C. 355, 697 S.E.2d 531 (2010), holds that an equitable indemnitee (as PDHC proposes itself to be) must demonstrate that it was without fault or liability for the damages it seeks.

(D) The Previous Fault Adjudication Blinds Plaintiff in This Case.

As noted above, all of Plaintiff's claims derive from a core set of factual claims – and preclusive facts have been adjudicated with finality by federal administrative decisions. These adjudications have determined that PDHC's losses were its own fault, arising out of its own failure to undertake the basic due diligence required of all medical practices planning to accept Medicare payments. Stated differently, PDHC was not entitled to rely on any misstatements or omissions of Decedent with regard to his Medicare status.¹¹

In this case, PDHC has already unsuccessfully litigated to finality the issue of its causative fault through the federal administrative appeals process. The conclusions of Judge Metry and the Medicare Appeals Council are binding upon PDHC in this matter pursuant to the doctrine of non-mutual offensive collateral estoppel.

The doctrine of non-mutual offensive collateral estoppel was initially adopted in this state by the Court of Appeals in Beall v. Doe, 281 S.C. 363, 313 S.E.2d 186 (Ct. App. 1984).

¹¹ Indeed, had PDHC checked the Medicare OIG website or called the OIG office, Decedent's status could have been determined. At that point, he could have been reinstated (as he easily was in 2002) or employment could have been denied. In either case, PDHC would not have suffered any loss.

Subsequently, the Supreme Court of South Carolina confirmed non-mutual offensive collateral estoppel as the law of this state, in Prop. and Cas. Ins. Guar. Assn. v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991). Pursuant to this doctrine, a party is barred from re-litigating issues determined in a prior action so long as it had a full and fair opportunity to litigate the issues in the first action and nothing justifies an opportunity to retry the issues. Beall v. Doe, *supra*; Roberts v. Recovery Bur., Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994) (citing McPherson v. South Carolina Department of Highways and Pub. Transp., 297 S.C. 303, 376 S.E.2d 780 (Ct. App. 1989)).

Here, PDHC had a full and fair opportunity to litigate the issue of its fault and there is no reason to allow it to be re-litigated in this collateral action. See also Middleborough v. Montedison USA, Inc., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995) (affirming Trial Court's partial Summary Judgment against PVC manufacturer on issues of agency and defectiveness where those issues had been previously litigated by manufacturer in Minnesota). PDHC's argument that collateral estoppel should not apply because a different litigant (First Choice) achieved a different result in presumably similar litigation is unpersuasive; it is the full and fair litigation opportunity of PDHC that controls their legal position now - not the opportunity and result of a third party. There is no exception to the doctrine of collateral estoppel for cases where a different result was achieved in similar litigation by a third party.¹²

PDHC also suggests that summary judgment is not appropriate because of the lack of additional discovery in the case. Additional discovery is not needed in this case, however, to

¹² Plaintiff has suggested the existence of a duty of the Decedent to keep the Plaintiff informed of legal steps and procedures taken by a third party (First Choice) in litigation where the Plaintiff was not a party. This alleged duty is not the basis of any pleaded claim in the plaintiff's complaint and the Plaintiff offers no legal authority supporting the existence of such a duty. This Court finds no reason to imply or impose such a duty - particularly with a sophisticated employer like the Plaintiff. Moreover, the record made by Plaintiff confirms that it made contact directly with that third-party and its counsel - confirming that these professional medical practice administrators did not need the Decedent to attempt voluntary collaboration with other parties similarly situated.

determine the preclusive effect of the Plaintiff's prior litigation. Plaintiff has failed to identify any discovery that might alter the applicability of the Medicare administrative determination. Plaintiff suggest that it would like to depose the Decedent's children perhaps to expose additional facts relevant to the Decedent's alleged misrepresentations or omissions - but such discovery would not alter the finding that the Plaintiff had a statutory duty of due diligence such that it could not rely upon the Decedent, regardless of any misrepresentation or omission. Thus, the Court is convinced that additional discovery is not needed, and would be unjust to permit.

(E) South Carolina Common Law Precludes Plaintiff's Reliance on Decedent.

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This case is indistinguishable from last year's South Carolina Supreme Court decision in Quall Hill. In that case, the Supreme Court reversed the Court of Appeals decision and affirmed the Trial Court's Order of Summary Judgment against a property purchaser's claims of estoppel and misrepresentation arising from the County's employee's issuance of erroneous zoning information where the property's true zoning classification could have been determined by due diligence in reviewing public records. Just as the information was publicly available in Quall Hill, the OIG exclusion status of Decedent was only a phone call or mouse click away. Moreover, in Quall Hill, the purchaser could not blame the County despite affirmative misstatements by County employees. The case at bar is even less supportive of liability since PDHC cannot point to any affirmative misstatements made to it by Decedent.

(F) There Is No Fiduciary Duty Involved In This Case.

In order to avoid the consequences of its own causative fault, PDHC has also sought to impose an affirmative duty of disclosure on the Decedent by alleging that his status as a physician-employee made him into a fiduciary with respect to PDHC. PDHC has cited no

authority in support of this notion and the Court rejects it.¹³ There is no evidence to support a conclusion that Decedent's relationship with PDHC was anything other than a normal employer-employee relationship.

Decedent's special duties as a physician, if any, were to his patients—not to a sophisticated medical employer with at least seventy-five employees, including other credentialed employees. Despite PDHC's unilateral efforts to assert a fiduciary relationship now, "as a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed in him." Regions Bank v. Schmauch, *supra*. (No fiduciary relationship between a bank and its customer exists when the bank is unaware of any special trust imposed in it.) Here, there is no evidence that PDHC placed any special trust in Decedent with regard to credentialing or that he was aware of any special trust beyond his duties as a physician-employee.

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Finally, as this Court has also concluded, regardless of the level of duty owed by Decedent Thompson to PDHC, the Decedent's duty of disclosure or prudence (if any) cannot be relied upon to support any of Plaintiffs claims when federal law imposes an unequivocal duty of diligence and discovery upon PDHC and provides unfettered independent access to the true facts. As a matter of law, Plaintiff has been found to have such an unequivocal duty and found to have such unfettered independent access to the truth.

(G) Contract Claims Involve The Same Duties & Same Reliance Requirement.

PDHC's breach of contract claims, Causes of Action 5 and 6, depend upon the alleged breach of implied employment duties (good faith, honesty, loyalty, and fair dealing)—they are

¹³ PDHC cited the case of State v. Parra, 353 S.C. 582, 578 S.E.2d 736 (Cl. App. 2003) for the proposition that all employer-employee relationships have been deemed fiduciary in all contexts as a matter of law. This case was overruled on appeal, 363 S.C. 477, 611 S.E.2d 501 (2005) and the case did not involve an employer-employee relationship at all.

not based upon any expressed contractual provision. Thus, in the context of this case, these implied employment duties are the same as the tort duties. Accordingly, these claims also require justified reliance. Indeed, in its sixth cause of action (breach of contract accompanied by a fraudulent act), PDHC alleges a right to rely. Having concluded, as a matter of law, that there is no right of PDHC to rely upon Decedent Thompson, these claims must also fail.

(H) Employment Contract Claims Also Untimely and Not Causative.

Despite the context, PDHC seems to suggest that justifiable reliance or clean hands are not elements of an employment contract cause of action. As Defendant noted at the hearing on these matters, even if a presumed failure of the Decedent to disclose his Medicare status in 1998 constituted a breach of contract, PDHC is still charged with knowledge of that breach back in 1998 -- as a matter of adjudicated law -- when they should have determined Decedent's status in 1998 by checking with Medicare OIG. As such, PDHC's contract claim would be barred by the three-year statute of limitations for contract actions, S.C. Code Ann. §15-3-530. Moreover, even if a breach of contract claim were somehow timely, this breach would not have been the proximate cause of PDHC's damages when it had adjudicated knowledge (i.e., it should have known) that would have allowed these damages to have been completely mitigated.

(I) Contractual Interference, Conversion, And Conspiracy Do Not Apply.

Plaintiff has also asserted causes of action for contractual interference (7th), conversion (18th), and conspiracy (20th). None of these causes of action are applicable to the facts of this case. In its contractual interference claims, PDHC alleges that it has a contractual relationship with Medicare. Assuming this to be the case, there is no evidence that PDHC's relationship with Medicare has been disrupted and breach of contract is an "essential element" of a tortious interference claim. BCD, LLC v. BMW Mfg. Co., LLC, 2008 WL 304878 (D.S.C. 2008) (J.

Ross Anderson, Jr.) citing Eldeco, Inc. v. Charleston Sch. Dist., 372 S.C. 470, 642 S.E.2d 726, 732 (S.C. 2007). To the contrary, it was PDHC's ongoing relationship with Medicare that allowed the offset of unauthorized Medicare payments against on-going Medicare payments.

In its conversion cause of action (18th), PDHC alleges that "Decedent converted the medical services provided to Plaintiff's Medicare patients by falsely failing [sic] claims for services provided to such patients...." Conversion is unauthorized assumption and exercise of the right of ownership over the goods or personal chattel of another. Lane v. Citicorp National Services, Inc., 313 S.C. 70, 437 S.E. 2d 50 (1953). This tort does not fit the undisputed facts of this case. "Services" are not goods or personal chattel capable of conversion. Moreover, it was PDHC that filed the unauthorized Medicare claims pursuant to an assignment of benefits and it was PDHC that assumed control over payments received from Medicare.

9/14 In its civil conspiracy cause of action (20th), PDHC alleges that "Decedent in combination with his estate and the Personal Representatives thereof" has caused it injury... "to-wit, the continuing loss of use of its money...." Again, PDHC's effort to create another cause of action lacks merit, and this tort does not fit the facts of this case. First, on its face, the Decedent could not conspire with his estate, which was not a separate entity capable of such combination during Decedent's life. Moreover, the Personal Representatives are the estate's agents—they are not separate legal entities conspiring with the estate. The decision of the Personal Representatives, on behalf of the estate, to deny PDHC's claim does not constitute a combination or agreement between two separate legal entities to injure PDHC. Accord McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 626 S.E.2d 884 (2006) (There can be no conspiracy when acts arise in context of principal-agent relationship because acts in that context do not involve separate entities.).

(J) The "Prevention Defense" Raised By Plaintiff Is Not Applicable.

In letters to the Court, made part of the record and considered as such, the Plaintiff portrays the Defendant's motion for summary judgment as predicated upon the concept of a "prevention" defense. The cases cited by Plaintiff are Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984) and The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 617 S.E.2d 125 (2005). Both Huffines and Champion involved real estate brokers suing the sellers of real estate for sales commissions where a condition precedent to the commission was the sale of the property. The brokers in each case asserted that the sellers prevented the satisfaction of the conditions precedent; therefore, the brokers argued that the sellers could not hide behind the failure of those conditions to avoid payment of the commissions.

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The case at bar is not one of contract with conditions precedent.¹⁴ Moreover, nothing the Decedent Thompson did or failed to do prevented the Plaintiff from fulfilling its statutory obligation of due diligence with the Medicare OIG. Both the existence of that obligation and the failure to satisfy that statutory obligation of due diligence have already been litigated by Plaintiff with a sustained finding by an Administrative Law Judge. These litigated findings bar any right of the Plaintiff to rely upon what the Decedent did or did not do. And as discussed extensively in Conclusion of Law (C) above, South Carolina common law also imposes a duty upon a party with access to true information -- a duty not to rely on the misinformation or lack of information provided by others. See Ouail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010) (availability of county records prevented reliance even upon county employee's misstatement); Regions Bank v. Schmauch, 354 S.C. 648, 675, 582 S.E. 2d 432, 446

¹⁴ Plaintiff has not pleaded any such specific, express contract provision as a basis for its claims. To the extent that Plaintiff now argues that the claim is primarily one of employment contract with some credentialing condition precedent, that is addressed in Conclusion of Law (H).

(Cl. App. 2003)("One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been mis[led].").

The Defendant's motion is predicated upon the Plaintiff's burden to prove a right to rely -- as an element of its claims. Proof of that element is legally precluded by the offensive application of collateral estoppel. This has nothing to do with the existence or non-existence of a "prevention" defense.

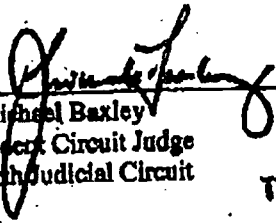
CONCLUSION

The Court finds, as a matter of law and fact, that PDHC cannot prove an absence of fault in causing the existence of the debt being sued upon. PDHC's fault has been adjudicated with finality in federal administrative proceedings and PDHC is collaterally estopped from asserting that it is not at fault. Furthermore, under South Carolina substantive law as set forth in cases such as Regions Bank v. Schmauch, supra, and Quall Hill, LLC v. County of Richland, supra, PDHC is now barred from asserting this claim—it could have easily discovered the truth of matters and it had a non-delegable duty imposed by federal law to do so.

Accordingly, the Motion for Summary Judgment by Plaintiff PDHC is denied and the Motion for Summary Judgment of the Defendant Estate of Hugh S. Thompson is granted.

IT IS SO ORDERED.

August 29, 2011


J. Michael Baxley
Resident Circuit Judge
Fourth Judicial Circuit

FILED
2011 SEP - 1 AM 11:50
SCOTT B. JUGGS
CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

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DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

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IN THE COURT OF COMMON PLEAS
C/A # 2010-CP-16-0332

ORDER DISMISSING PLAINTIFF'S
MOTION TO RECONSIDER THE ORDER
GRANTING SUMMARY JUDGMENT
(Ending Case)

FILED
JUL 16 2011
CLERK OF COURT
J. SCOTT B. SUGGS
JUNIOR COURT, S.C.

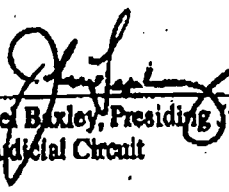
This matter is before the Court on Plaintiff's putative SCRCP 59(e) Motion for Reconsideration of an Order dated September 1, 2011, which granted summary judgment in favor of Defendant. Plaintiff filed the present Motion to Reconsider on September 13, 2011. On September 19, 2011, Defendant filed a Response to Plaintiff's Motion for Reconsideration. Plaintiff then filed a Reply to Defendant's Response on September 20, 2011. All of these filings, as well as previous Orders issued in this case, have been considered by the Court in reaching its decision. As will be explained below, attorney Megna was not authorized to file the present motion on Plaintiff's behalf. Therefore, Plaintiff's Motion for Reconsideration under SCRCP 59(e) is **DISMISSED AS IMPROPER**.

On April 15, 2011, this Court issued an Order disqualifying Plaintiff's counsel, Tony R. Megna, from representing Plaintiff in this matter because Mr. Megna is a necessary witness in the case. Subsequently, in response to Plaintiff's motion to reconsider that ruling, the Court modified this disqualification to avoid any prejudice to Plaintiff, and permitted attorney Megna to argue the then outstanding Summary Judgment Motions. The Court made it clear that this was a limited appearance only, further stating in an Order dated August 12, 2011, that "all motions, subpoenas, and filings signed only by disqualified-counsel, Tony R. Megna, and made subsequent to... June 17, 2011... are hereby **QUASHED**."

By filing and signing the present putative Motion for Reconsideration, Plaintiff's counsel disregarded the Court's previous Orders disqualifying him from representing Plaintiff and then granting him a limited appearance for the sole purpose of arguing an outstanding Motion for Summary Judgment. Plaintiff has other counsel of record (Benjamin R. Matthews, Esq.) that could have, but did not, execute the present Motion for Reconsideration. Rule 11(a) of the SCRCP requires that every pleading, motion, or other paper filed by a party represented by counsel must be executed by an attorney of record for that party. Plaintiff continues to be represented by Mr. Matthews, not by Mr. Megna. Accordingly, Mr. Megna's motion is unauthorized under the Rules of South Carolina Civil Procedure and is therefore **DISMISSED AS VOID ab initio**.

IT IS SO ORDERED.

Dated at Hartsville, South Carolina, this 28th day of September, 2011


J. Michael Baxley, Presiding Judge
Fourth Judicial Circuit

FILED
2011 OCT -4 PM 2:19
SCOTT B. SMITH
CLERK OF COURT
DARLINGTON COUNTY, S.C.

This judgment was entered on the ____ day of September 2011, and a copy mailed first class this ____ day of September, 2011 to attorneys of record or to parties as follows:

Attorney for Plaintiff

Benjamin R. Matthews, Esquire
3400 West Avenue
Columbia, SC 29203

Attorneys for Defendants

J. Rene Josey, Esquire
1831 West Evans, Street
Florence, SC 29501

John Jay James, II, Esquire
Post Office Box 507
Darlington, SC 29540

CLERK OF COURT

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010 CP-16-0332

Pee Dee Health Care, PA

Estate of Hugh S. Thompson

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Desa A. Ballard, Esquire	Tony R. Megna	\$17,388.75
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order.

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge
SCRPC Form 4C (12/2011)

2121
Judge Code

2-11-13
Date

Page 1

For Clerk of Court Office Use Only

This judgment was entered on the day of , 20 and a copy mailed first class or
placed in the appropriate attorney's box on this day of , 20 to attorneys of record or
to parties (when appearing pro se) as follows:

Benjamin R. Matthews, Esquire

3400 West Avenue

Columbia, SC 29203

Jon Rene Josey, Esquire

Post Office Box 5478

Florence, SC 29502

John J. James, II, Esquire

Post Office Box 507

Darlington, SC 29540

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE
(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.
9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS
Case No. 2010-CP-16-0332

Ex Parte:

Desa Ballard

In re:

Pee Dee Health Care P.A.,

Plaintiff,

Vs.

Estate of Hugh S. Thompson

Defendant.

**ORDER FOR SANCTIONS
AGAINST TONY R. MEGNA**

Non-party Desa Ballard moved for sanctions, pursuant to Rule 11(a), SCRPC, in connection with a subpoena for records served on her on or about July 30, 2011, ostensibly issued by the plaintiff in this action. The motion is granted.

As will be discussed in more detail below, in order to reach a decision in this case, this Court also was assigned jurisdiction in a Richland County case, *James A. Anasti v. Lance Wilson, Willis Goodwin, Gina L. Lee, Richland County Clerk of Court*, Case No. 2007-CP-40-0576. Stated succinctly, the reason that this Court had to consolidate sanctions motions hearings in two separate and unrelated cases pending in two different circuits is because of Megna's actions that this Court finds to be gross civility and professionalism violations. Having been disqualified as counsel because he was a material witness in *Thompson*, Megna continued to serve discovery under his signature in that case in violation of this Court's Order, which this Court had to quash; thereafter, Megna again served similar and additional discovery, this time under the auspices of the *Anasti* case in Richland, a case that had nothing to do with the

TRUE CERTIFIED COPY

CLERK OF COURT/AMC
DARLINGTON COUNTY, S.C.

discovery requests, and which by that time was concluded as to his client. Moreover, the discovery was not meritorious as to any case-related issues, but propounded solely to vex the recipients.

In granting the sanctions motion in this case, the Court makes the following:

FINDINGS OF FACT¹

- 
1. This action was originally filed in the Darlington County Probate Court by the plaintiff corporation seeking to recover damages from the defendant. The plaintiff corporation was represented by attorney Tony R. Megna (Megna). The matter was removed to the Circuit Court in Darlington County.
 2. After removal to this Court, defense counsel made a motion to disqualify attorney Megna from representing the corporate plaintiff, alleging Megna was a necessary witness in that he was, and had been since 1995, the Chief Executive Officer of the plaintiff corporation.
 3. By order dated April 15, 2011, this Court made detailed findings of fact concluding that Megna was, in fact, a material witness as to core facts in this action and was disqualified from acting as counsel for the corporate plaintiff. The final sentence of that order stated "The Court orders complete disqualification effective with the execution of this Order. (footnote omitted)."
 4. The Court thereafter permitted Megna, at his request, to remain counsel for the plaintiff for the sole and limited purposes of arguing his motion for reconsideration of the disqualification Order and for arguing summary judgment motions. The motion to reconsider was eventually denied, and the issue of Megna's disqualification as

¹ The findings of fact are made from this Court's detailed review of the Clerk of Court's files in both the Richland County case and the instant case, the submissions of counsel, and the oral argument held in these consolidated matters in Darlington County on March 15, 2012.

counsel is on appeal to the South Carolina Court of Appeals as of this writing. As well, Defendant was subsequently granted summary judgment. An appeal from that Order is also pending. No stays were issued by the appellate court. Megna's disqualification to act as counsel in this matter is currently in effect.

5. When Megna was disqualified as counsel in this case, there was separate and unrelated litigation involving different parties pending in the Richland County Court of Common Pleas in a matter entitled *James A. Anasti v. Lance Wilson, Willis Goodwin, Gina L. Lee, Richland County Clerk of Court*, Case No. 2007-CP-40-0576 (the Richland case). Megna represented defendant Gina L. Lee in the Richland County case.
6. Other than Megna being counsel for a party in each case, the two cases are completely unrelated to one another. Megna is the only common denominator.
7. As more fully detailed in an Order issued this date in the Richland case, there have been numerous state court appellate proceedings, all initiated by Megna on behalf of his client Gina Lee, as well as bankruptcy proceedings involving Lee as the debtor in the United States Bankruptcy Court for the District of South Carolina.
8. In the Richland case, the plaintiff James Anasti was represented by attorney Douglas N. Truslow (Truslow). Truslow continued to represent Anasti throughout the several state appeals initiated by Megna on behalf of Lee, all of which appeals were subsequently dismissed based on procedural grounds; the merits of the appeals could not be reached because of Megna's repeated failures to comply with various deadlines.

9. In attempts to escape the consequences of his failure to comply with the rules, Megna made false statements to the circuit court and the appellate court, as more fully described by Judge L. Casey Manning in Orders dated April 8, 2008 and April 1, 2009 in the Richland case, where he found Megna's explanations for his delay to be false and intentionally manipulative.
10. According to Truslow, because of appellate and ethical issues he encountered in dealing with Megna in the Richland case, Truslow associated and consulted with Ballard, who has experience in both fields. In September, 2011, in connection with one of the appeals filed by Megna (on behalf of Gina Lee) at the South Carolina Court of Appeals, Ballard executed an affidavit which Truslow submitted to the Court of Appeals addressing the insufficiency of an appellate documents filed by Megna.
11. On or about July 30, 2011, Ballard was served with a subpoena signed by Megna as counsel for the plaintiff, bearing the caption in this case, seeking production of certain materials, including copies related to her communications with several attorneys, including Truslow, several of the lawyers involved in this case, and other lawyers which apparently have no relation to this case or the Richland case.
12. Ballard was not counsel for nor otherwise involved in the instant case in any way. The subpoena sought information related to the assistance she provided to Truslow in the Richland County case, and sought to discover if any evidence existed of her communications with a list of attorneys whom Megna apparently believed to be his adversaries in this or other cases. The subpoena sought nothing relevant to this case. The subpoena purported to be issued from Darlington County, although Ballard's

office is in Lexington County. The subpoena to Ballard did not comply with the SCRPC.

13. Ballard had no knowledge of the instant case, but when she received the subpoena, she located information to identify some of the attorneys involved. She obtained a copy of this Court's Order dated April 15, 2011, in which Megna was disqualified as counsel for the corporate plaintiff in this case.

14. Ballard filed and served an Objection to the subpoena. Since Megna had been disqualified in this case as counsel for the plaintiff, she served her objection on attorney Benjamin R. Matthews, who was listed on the Darlington County Clerk's website as Megna's law partner and also counsel for the plaintiff in the instant case.

15. She also filed and served a Motion for Sanctions on August 4, 2011, which argued that Megna had attempted to subpoena her records for an improper purpose, and in violation of this Court's order disqualifying him as counsel.

16. Truslow also filed a motion for sanctions in the Richland County case dated March 9, 2012. Ballard's motion for sanctions in this case was consolidated with Truslow's motion for hearing before this Court.

17. Prior to the hearing in this matter, Megna provided the Court and counsel with a document, bearing the caption in both cases, entitled "Synopsis." This document contained a rambling diatribe of challenges of unethical behavior against Truslow, Ballard, and others. As best the Court can understand Megna's allegations against Ballard; they arise from a contact to her office by Megna in which he sought to associate her on a potential unrelated case on behalf of Pee Dee Health Care. Ballard's associate responded that Ballard would consider looking at the matter if she

was paid hourly and she never heard back from Megna. She was never asked to represent Megna and no confidential information concerning Megna or his client was provided to her². Neither Megna nor his client contacted Ballard again until the subpoena was issued in this case.

18. In order to understand why Megna's efforts to subpoena information from Ballard were improper, a brief history of the litigation in the Richland case is necessary. By Order issued this same date in that case, that history is set forth in detail, and to the extent necessary, the findings in that Order are incorporated herein by reference.

19. By way of summary, the subpoena to Ballard was part of an improper and impermissible attempt by Megna to engage in discovery for purposes of defending himself (not his client) against motions for sanctions that were pending against him in the Richland County case. In addition, it appears that the subpoena was served on Ballard in an effort to punish her for consulting with Truslow in the Richland County case, and to deter her from continuing to assist him.

20. At the time Megna served the subpoena on Ballard, all discovery in the Richland County case had been concluded, Megna's client was no longer an active party to the Richland case, and the only remaining issues in that case in which Megna had any interest concerned the Richland Plaintiff's motions (via Truslow) for sanctions against Megna.

21. The subpoena issued to Ballard sought, among other things, her records of communications with Mr. Truslow in the Richland County case. This Court

² Even if the information provided by Megna to Ballard concerning Pee Dee Health Care was considered confidential information under Rule 1.6, and even if Ballard received and reviewed the material, this court finds she would not have been disqualified from continuing to assist Truslow in the Richland case. As stated earlier, the two cases are unrelated, the only common denominator again being Mr. Megna (representing two separate and unrelated clients in the two cases).

specifically finds there could be no other purpose for the discovery sought but to use the information to defend Truslow's claim for sanctions against Megna in the Richland case.

22. The subpoena to Ballard was issued in violation of this Court's order disqualifying Megna as counsel, sought privileged information regarding the advice she had given to Truslow, and constituted a fishing expedition into what other discussions she or others may have had with Truslow, all apparently for the purpose, *inter alia*, of seeking to deflect sanctions against himself in the Richland case.

23. Between his conduct in this case and in the Richland case, Megna has shown little regard for the Orders of this Court or for the legal limitations imposed upon him in his representative capacity as counsel for his client.

24. The inevitable conclusion is that Megna has, under the auspices of this case, attempted to subpoena Ballard, as well as her legally protected files, even though he has been disqualified, and that his intentions were fully improper. The Court has no choice but to conclude that he did so, at least in part, as a pretext to harass her and apparently to dissuade her from providing legal advice to Truslow in the Richland case.

25. Megna has willfully, deliberately, and unapologetically attempted to misuse the legal process through both this case and the Richland case and he is in willful violation of this Court's orders, specifically including the Order disqualifying him as counsel for the plaintiff. He has engaged in such misconduct for ulterior purposes in seeking to defend his own personal interests in the Richland County case.

26. Megna's conduct is willful, deliberate and unapologetic. In both his "Synopsis" (captioned with both cases) and the memorandum he submitted to the Court in connection with the hearing in this matter, Megna continued to hurl fabricated allegations of misconduct upon Ballard, Truslow, and others who he considers to be adverse to him.

27. Perhaps the most egregious part of Megna's conduct is his uncompromised assertion that everyone else is wrong, everyone else is unethical, and he is blameless. This Court would be faced with an entirely different scenario if Megna had admitted his misconduct and shown remorse in any degree, or had he apologized for his continuous affronts upon the Court and his colleagues.

28. The lack of respect Megna has shown for this Court, the legal process, and the purposes of these legal proceedings is unprecedented for this Court.

29. Even viewed separately from Megna's conduct in the Richland case, Megna's conduct is ill-conceived, vitriolic, and abusive. When viewed in conjunction with the lengthy period during which he has engaged in similar conduct in the Richland case (as more thoroughly discussed in an Order issued this date), Megna's conduct is alarming and disturbing. He has engaged in a concerted effort to abuse the legal process in both cases for his own purposes, abusing this Court and his colleagues in the process.

30. Ballard has requested an award of sanctions pursuant to Rule 11(a), SCRCP, for her time in having to respond to the subpoena served upon her by Megna. I find that sanctions under Rule 11(a) are warranted. *Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996).

31. Ballard's original affidavit of fees includes time she has spent in responding to two (2) grievances filed against her with the Office of Disciplinary Counsel which contain similar allegations as those asserted against her in these proceedings by Megna. Those two grievances (which were dismissed) were filed by Mark Matthews, who appears (from the Court's review of filings by Megna in this case) to be an employee and agent of either Megna or Pee Dee Health Care.

32. Although the Court perceives it is highly likely that Megna participated in or facilitated the filings of these grievances against Ballard, this Court concludes that her time spent in defending against these grievances is not within the scope of sanctions which this Court can award under Rule 11(a) or otherwise. At the Court's request, Ballard has submitted an amended affidavit of attorney fees which does not include the time spent in responding to the grievances. She has also included her time spent in attending the hearing on May 15, 2012 and her work since then, including the preparation of a proposed order for the Court, all of which are appropriate.

33. The Court's review of this affidavit finds that the time Ballard spent in responding to the subpoena, appearing before this Court, and preparing the draft order requested by this Court are reasonable.

34. Ballard's hourly rate is her regular hourly rate charged to her clients, and in light of her standing in the legal community and her expertise in these areas, is immensely reasonable. Ballard is a recognized expert in the field of attorney conduct (and misconduct), she has an AV rating with Martindale Hubbell, and she has earned the respect of her peers and of the Courts of this state for her professionalism as a member of the Bar. Her experience and insight in the areas in which Truslow was

attempting to defend against Megna in the Richland case made her an appropriate choice for assistance to Truslow. Her agreement to assist Truslow in the Richland case made her a target of Megna's wrath, and she should be compensated by way of sanctions against Megna for the time she spent in responding to his improper discovery against her. The costs set forth in her affidavit, which consist of filing fees, copying costs and postage, are reasonable and were necessarily incurred in connection with the subpoena served upon her and the subsequent sanctions motion against Megna.

35. Pursuant to Rule 11(a), SCRPC, this Court awards sanction in favor of Ballard against Megna in the amount of seventeen thousand, three hundred and eighty-eight dollars and seventy-five cents (\$17,388.75), which constitutes reimbursement for the time and expenses set forth in Ms. Ballard's amended affidavit dated August 8, 2012. These sanctions are not punitive but are compensatory, and are required to be paid notwithstanding any penalties imposed herein. *Cannon v. Georgia Attorney General's Office*, 397 S.C. 541, 725 S.E.2d 698 (2012).

36. The award of fees and costs herein are a sanction (and hence considered to be non-dischargeable except by payment), as well as a civil money judgment so as to carry interest at the legal judgment rate. The Clerk is directed to enroll this sum as a civil judgment in favor of Ballard against Megna.

37. In making this award, the Court is aware of the sanctions also being awarded to Truslow against Megna in the Richland County case. The sanctions awarded to Ballard are not duplicative of the sanctions awarded to Truslow, and the Court finds that both awards are compensatory in nature and are warranted, reasonable, and

supported by the evidence. The sanctions are awarded to pay the reasonable attorneys fees and costs incurred by the moving party. *Ex Parte: Bon Secours and St. Francis Xavier Hospital Inc.*, 393 S.C. 590, 713 S.E.2d 624 (2011).

Criminal Contempt Citation Against Mr. Megna, sua sponte

In presiding over these matters, this Court has undertaken a full review of the pleadings, discovery, previous Court Orders, correspondence, memoranda, and emails from Attorney Megna in both cases, together with review of applicable attorney oaths and disciplinary rules, as well as an analysis of prevailing law and Supreme Court decisions involving attorney conduct. As indicated in the language of this Order, this Court is concerned that the conduct of Attorney Megna reveals a continuous pattern of violations of the civility and professionalism requirements of South Carolina's attorney oath with respect to members of the Bar, consistently uses language that is accusatory and demeaning directed at opposing counsel, includes inappropriate references to the judiciary, and contains unwarranted criticisms of other professionals, parties, and witnesses. Moreover, this Court finds that Attorney Megna's actions have resulted in the tremendous unnecessary consumption of attorney time, excessive and unnecessary costs to litigants, and the significant waste of judicial resources and public funds required to operate the Court system.

Because of the willful misconduct set forth throughout the body of the factual findings herein and the factual findings in the Richland County case set forth by Order issued this same date, the Court has determined to conduct a hearing to require Megna to show cause why he should not be held in criminal contempt of this Court for intentionally and willfully violating a Court Order. Megna is hereby advised that he has the right to counsel during such hearing, and shall be given an opportunity to present arguments to the Court. Megna is hereby specifically

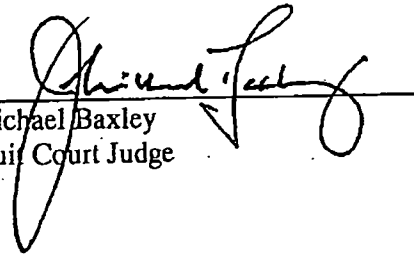
advised that a finding of criminal contempt by this Court may subject him up to six (6) months' imprisonment therefor, in addition to other sanctions. This Show Cause and Sanctions hearing is hereby set for March 18, 2013, beginning at 2:00 p.m., after the call of the regular non-jury roster for that day, in the fifth floor courtroom of the Darlington County Courthouse. Service of this Order upon Attorney Megna and his counsel shall constitute service of the Notice of Contempt hearing upon Megna.

Because of the numerous occasions on which Megna has denied receipt of service of an order or other papers (in the Richland case), Ballard shall make arrangements for personal service of a copy of this Order and the Richland County order issued this date upon Megna, unless Megna personally (not through counsel) consents to accept service in some other fashion and executes a written acceptance of service to that effect.

THEREFORE IT IS ORDERED:

- 
1. Ms. Ballard's motion for sanctions is granted.
 2. Mr. Megna is ordered to pay Ms. Ballard the sum of seventeen thousand, three hundred and eighty-eight dollars and seventy-five cents (\$17,388.75) within thirty (30) days of the date of this Order. The Clerk shall enroll a civil judgment for this sum.
 3. Mr. Megna shall be required to show cause why he should not be held in criminal contempt of this Court for the actions outlined in this Order, and shall appear on March 18, 2013, at 2:00 p.m. in the fifth floor courtroom of the Darlington County courthouse for such hearing.

IT IS SO ORDERED.

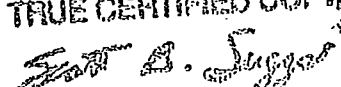

J. Michael Baxley
Circuit Court Judge

February 11, 2013

FILED

2013 FEB 13 PM 2:47

SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY

CLERK OF COURT/RMC
DARLINGTON COUNTY SC

The South Carolina Court of Appeals

Pee Dee Health Care, P.A., Appellant,

v.

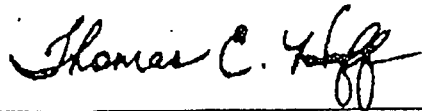
Hugh S. Thompson, III, and Louise T. Dailey, as
Personal Representatives of the Estate of Hugh S.
Thompson, Respondent.

Appellate Case No. 2011-185767

ORDER

After review of Pee Dee Health Care, P.A.'s ("PDHC") motion to vacate the circuit court's order of summary judgment, we find the motion raises the same issues as PDHC's appeal. In as much as this Court has issued an opinion dismissing PDHC's appeal of the circuit court's order entering summary judgment in favor of the Estate, we find it appropriate to dismiss the motion.

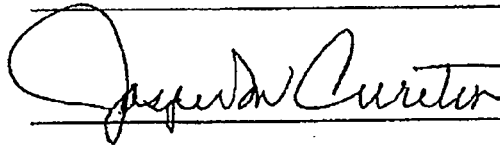
It is hereby ordered.



J. Huff



J. Williams



A.J. Cureton

Columbia, South Carolina

cc:

Benjamin Rushton Matthews

Tony Ray Megna

John J. James, II

Jon Rene Josey

FILED

July 3, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF DARLINGTON)
)
IN THE MATTER OF TONY R. MEGNA,)
ESQ.,)
)
DEFENDANT.)

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

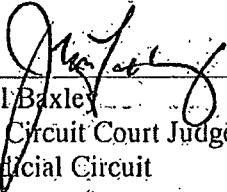
C/A NOS. 2010-CP-16-332;
2010-CP-16-633

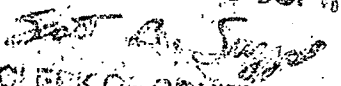
ORDER DISMISSING CRIMINAL
CONTEMPT PROCEEDINGS

This Court previously proposed, *sua sponte*, criminal contempt proceedings against attorney Tony R. Megna following numerous instances of alleged professional misconduct while involved in *Pee Dee Health Care, P.A. v. Estate of Thompson*, 2010-CP-16-332; 2010-CP-16-633, a matter pending before this Court. Counsel for Megna, in a letter to the Court that has also been provided to interested parties, has argued that the Court should transfer this criminal contempt matter to another judge, citing case law that stands for the proposition that in indirect criminal contempt proceedings, the judge who initiates such proceedings should transfer the matter to a disinterested judge to avoid the appearance of impropriety. Stated simply, the Court should not be both the accuser and presiding officer. The Court agrees with counsel's reasoning, but instead of transferring this matter to another judge, the Court will dismiss the criminal contempt proceedings against the Defendant. The Court is cognizant of the press of schedules for all circuit judges in South Carolina, and rather than entangle another circuit judge in this involved and lengthy proceeding, for reasons of judicial economy, the Court dismisses the criminal contempt proceedings currently pending.

IT IS SO ORDERED.

March 27, 2014
Hartsville, South Carolina


J. Michael Baxley
Presiding Circuit Court Judge
Fourth Judicial Circuit

TRUE CERTIFIED COPY

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

The South Carolina Court of Appeals

Pee Dee Health Care, P.A., Appellant,

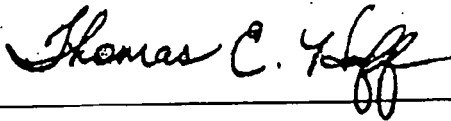
v.

Estate of Hugh S. Thompson, and Hugh S. Thompson,
III, Louise T. Dailey as Personal Representatives of the
Estate of Hugh S. Thompson, Respondents.

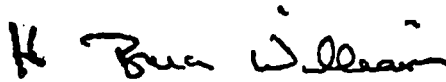
Appellate Case Nos. 2011-185767, 2011-197671, 2011-
203391

ORDER

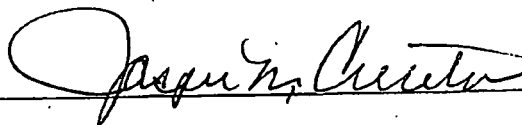
Pursuant to Rule 222(a) and (b) of the South Carolina Appellate Court Rules, the motions for costs and attorney's fees filed by Respondents are granted in the amount of \$3,507.20 against Appellant Pee Dee Health Care. The lower court or tribunal is directed to add this award of costs and attorney's fees to the remittitur.



J.



J.



A.J.

Columbia, South Carolina

cc:

Tony Ray Megna, Esquire
John J. James, II, Esquire
Jon Rene Josey, Esquire
Ariail Elizabeth King, Esquire
James Mixon Griffin, Esquire
Scott B. Suggs
Benjamin Rushton Matthews, Esquire

FILED

March 28, 2014

The South Carolina Court of Appeals

Pee Dee Health Care, P.A., Appellant,

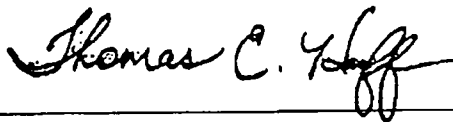
v.

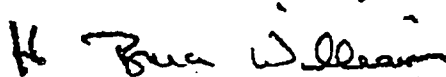
Estate of Hugh S. Thompson, and Hugh S. Thompson,
III, Louise T. Dailey as Personal Representatives of the
Estate of Hugh S. Thompson, Respondents.

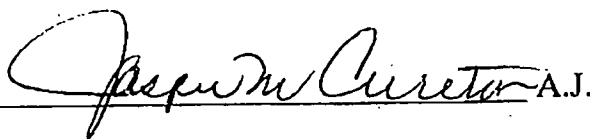
Appellate Case Nos. 2011-185767, 2011-197671, 2011-
203391

ORDER

Respondents filed a motion for appellate court sanctions pursuant to Rule 269 of the South Carolina Appellate Court Rules against Appellant Pee Dee Health Care and Appellant's counsel on the grounds that Appellant engaged in improper conduct during the course of this appeal. This Court held the ruling on Respondents' motion in abeyance pending the Supreme Court's ruling on Appellant's writ of certiorari to the South Carolina Supreme Court. The Supreme Court denied Appellant's writ of certiorari, and the underlying appeals have been remitted for entry of judgment to the lower court. After careful consideration and review of Respondents' motion, Appellant's return, and Respondents' reply, it is hereby ordered that Respondents' motion for sanctions be denied.


_____ J.


_____ J.


_____ A.J.

Columbia, South Carolina

cc:

Tony Ray Megna, Esquire

John J. James, II, Esquire

Jon Rene Josey, Esquire

Ariail Elizabeth King, Esquire

James Mixon Griffin, Esquire

Scott B. Suggs

Benjamin Rushton Matthews, Esquire

FILED

March 28, 2014

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-16-0332; 2010-CP-16-0633

Pee Dee Health Care, P.A.

Estate of Hugh S. Thompson, III

2014 APR 21 PM 12:59

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court. Defendant's Motion for Sanctions is GRANTED under Rule 11, SCRPC, against Plaintiff, Tony R. Megna, Esq., and Matthews & Megna, LLC, and any successors or assignees of these persons and entities.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Estate of Hugh S. Thompson, III	Pee Dee Health Care, P.A., Tony R. Megna, Esq., and Matthews & Megna, LLC, and any successors or assignees of these persons and entities.	\$34,150.00

If applicable, describe the property, including tax map information and address, as set forth in the order.

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

54

2121
Judge Code

4/18/14
Date

For Clerk of Court Office Use Only

This judgment was entered on the 21 day of Apr., 20 14 and a copy mailed first class or placed in the appropriate attorney's box on this 23 day of Apr., 20 14 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

James M. Griffin, Esq.
Lewis, Babcock & Griffin, LLP
Post Office Box 11208
Columbia, South Carolina 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

J. Rene Josey, Esq.
Turner, Padgett, Graham & Laney, P.A.
Post Office Box 5478
Florence, South Carolina 29502

John J. James, II, Esq.
Paulling & James, LLP
112 Cashua Street
Post Office Box 507
Darlington, South Carolina 29540

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

Circuit Court Judge

2121

Judge Code:

04/15/14
Date

FILED
2014 APR 21 PM 12:59
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

Scott B. Suggs
CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF DARLINGTON

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson, III,

Defendant.

FILED

APR 21 PM 12:59

SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

C/A NOS. 2010-CP-16-0332;
2010-CP-16-0633

ORDER GRANTING RULE 11
SANCTIONS AGAINST PLAINTIFF,
TONY R. MEGNA, ESQ., MATTHEWS
& MEGNA, LLC, AND ANY
SUCCESSORS OR ASSIGNEES

This matter comes before the Court on the Defendant's Motion for Sanctions against the Plaintiff, Pee Dee Health Care, P.A. ("PDHC"), prior counsel for Plaintiff, Tony R. Megna, Esq. and Benjamin R. Matthews, Esq., their law firm, Matthews & Megna, LLC, and any successors or assignees of these persons and entities. The motion is brought pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act ("FCPSA") and Rule 11 of the South Carolina Rules of Civil Procedure. In response to Defendant's motion, counsel for Plaintiff has filed a Motion to Strike Defendant's Motion for Sanctions under the FCPSA, arguing that this motion is untimely, and consequently, that this Court lacks subject matter jurisdiction to consider Defendant's motion for sanctions under the FCPSA. The Court convened a hearing on both motions on Thursday, March 27, 2014 in Marlboro County, South Carolina. Present and participating at the hearing were James M. Griffin, Esq., appearing on behalf of Plaintiff PDHC, Mr. Megna, Mr. Matthews, and Matthews & Megna, LLC; J. René Josey, Esq. and John J. James, II, Esq., appeared for Defendant. At the conclusion of the hearing, the Court ruled that it would grant sanctions against Plaintiff PDHC, Mr. Megna, and Matthews & Megna, LLC under Rule 11, SCRPC. However, the Court noted that it would only grant sanctions for the time spent by Defendant's counsel in three distinct, segregated areas of the procedural history of this

TRUE CERTIFIED COPY.

SCOTT B. SUGGS
CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

lawsuit: (1) Mr. Megna's continuing failure to accept this Court's ruling regarding his disqualification at the circuit court level following this Court's Order Disqualifying Plaintiff's Counsel Tony R. Megna, signed April 15, 2011;¹ (2) responding to various subpoenas sent out to uninvolved attorneys across the state by Mr. Megna; and (3) pursuing this present motion for sanctions. To that end, the Court asked counsel for Defendant to submit to the Court an amended affidavit specifying the amount of time they spent on these three areas mentioned above. On April 1, 2014, counsel for Defendant submitted a Supplemental Affidavit Segregating Fee Components Sought in Sanctions Request, totaling in the aggregate \$60,300. Counsel for Plaintiff has reviewed this supplemental affidavit and has submitted a response, arguing that the amended affidavit exceeds the scope of the Court's ruling on March 27, 2014. The Court has reviewed both the supplemental affidavit and Plaintiff's response, and hereby grants sanctions against Plaintiff PDHC, Tony R. Megna, Esq., Matthews & Megna, LLC, and any successors or assignees of these persons and entities in the following way:

1. Six thousand nine hundred and ten dollars (\$6,910.00) for the time spent by Defendant's counsel regarding reconsideration of Mr. Megna's disqualification. Supp. Affidavit, ¶ 2;
2. Nine thousand and seventy dollars (\$9,070.00) for the time spent by Defendant's counsel relating to inappropriate discovery requests issued by Mr. Megna and the follow-up thereto. Supp. Affidavit, ¶ 4; and
3. Eighteen thousand one hundred and seventy dollars (\$18,170.00) for the time spent by Defendant's counsel in preparing and arguing its Motion for Sanctions as well as submission of the supplemental affidavit. Supp. Affidavit, ¶¶ 5, 7, and 8. (The Court does not include the \$11,170.00 requested by Defendant's counsel for the time spent responding to Plaintiff's Motion to Strike because the Court limited the award to Rule 11 sanctions, in essence, ruling in favor of Plaintiff on its Motion to Strike as that motion only addressed Defendant's request for sanctions under the FCPSA. See Supp. Affidavit, ¶ 6.)

TRUE CERTIFIED COPY.

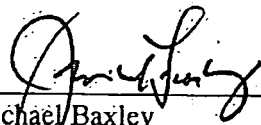
¹ The Court disqualified Mr. Megna from serving as counsel for Plaintiff in this case due to his role as Chief Executive Officer for Plaintiff PDHC. See 3.7 of the Rules of Professional Conduct, SCACR 401.

CLERK OF COURT/AMC
DARLINGTON COUNTY, SC

This Court does not take the imposition of sanctions under Rule 11 lightly, but finds it appropriate here due to Mr. Megna's conduct in this case – specifically, his refusal to accept this Court's Order disqualifying him as counsel and his unwarranted and meritless attempts to entangle uninvolved third-party attorneys in this case through inappropriate discovery requests. Although the moving party here was a party to this civil action, Mr. Megna's conduct has caused that party to incur substantial and unnecessary legal bills, which have diminished the size of the estate, not to mention the inordinate delay in closing the estate. This conduct has also required the Court to spend significant time addressing these matters through hearings and phone conferences.

Therefore, the Court grants Defendant's Motion for Sanctions under Rule 11, SCRPC in the amount of Thirty-Four Thousand One Hundred and Fifty Dollars (\$34,150.00) against Pee Dee Health Care, P.A., Tony R. Megna, Esq., Matthews & Megna, LLC, and any successors or assignees of these persons and entities.

IT IS SO ORDERED.


J. Michael Baxley
Presiding Circuit Court Judge
Fourth Judicial Circuit

April 15, 2014

Hartsville, South Carolina

TRUE CERTIFIED COPY,


CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

FILED
2014 APR 21 PM 1:00
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, SC.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-16-0332; 2010-CP-16-0633

Pee Dee Health Care, P.A.

Estate of Hugh S. Thompson, III

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: James M. Griffin, Esq.

Attorney for: ☒ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☒ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm; vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court: Motion to Alter or Amend is DENIED. See Page 2.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$ TRUE CERTIFIED COPY
		\$ <i>John B. Suggs</i>

If applicable, describe the property, including tax map information and address, referenced in the order.

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

James M. Griffin
Circuit Court Judge

2048
Judge Code

May 1, 2014
Date

For Clerk of Court Office Use Only

This judgment was entered on the 14 day of May, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 14 day of May, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

James M. Griffin, Esq.
Lewis, Babcock & Griffin, LLP
Post Office Box 11208
Columbia, South Carolina 29211

ATTORNEY(S) FOR THE DEFENDANT(S)

J. Rene Josey, Esq.
Turner, Padgett, Graham & Laney, P.A.
Post Office Box 5478
Florence, South Carolina 29502

John J. James, II, Esq.
Paulling & James, LLP
112 Cashua Street
Post Office Box 507
Darlington, South Carolina 29540


CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

On April 15, 2014, following a hearing on March 27, 2014, the Court issued an Order granting sanctions under Rule 11, SCRPC against Plaintiff Pee Dee Health Care, P.A. ("PDHC"), prior counsel for Plaintiff, Tony R. Megna, Esq., the law firm of Matthews & Megna, LLC, and any successors or assignees of these persons or entities. Plaintiff, Mr. Megna, and Matthews & Megna, LLC have now made a motion to alter or amend the Court's Order pursuant to Rule 59(e), SCRPC. Since the issuance of the Order granting sanctions, the ruling judge, the Honorable J. Michael Baxley, has retired from the Circuit Court bench. Consequently, the Honorable Paul M. Burch, as Chief Administrative Judge for the Fourth Judicial Circuit, has undertaken review of this matter, and because the matter has been thoroughly litigated, the Court has determined to issue an Order without a hearing.

In their motion, the moving parties ask the Court to reverse its Order granting sanctions under Rule 11 for several reasons. First, the Defendant's motion for sanctions under Rule 11 was untimely and the Court lacked the jurisdiction to consider the motion. Second, due to defense counsel's prior representation of Plaintiff in a worker's compensation matter, continued representation of Defendant in the case at bar violates Rule 1.7 of the South Carolina Rules of Professional Conduct and the common law duty of loyalty, constituting inequitable conduct which should bar equitable relief such as Rule 11 sanctions here. Third, the Court should not have granted sanctions for the time spent by defense counsel in responding to Plaintiff's Motion for Reconsideration of this Court's Order disqualifying Mr. Megna under Rule 3.7 of the South Carolina Rules of Professional Conduct because Rule 3.7 allows an attorney who is likely to be a witness at trial to participate as an advocate in pre-trial matters. The moving parties note that the

Court's Order disqualifying Mr. Megna affected a substantial right, requiring an immediate appeal and a motion to reconsider as a prerequisite to that appeal. Fourth, the Court erred in awarding \$9,070.00 for the time spent by defense counsel responding to Mr. Megna's inappropriate discovery requests to third parties because defense counsel failed to provide the Court with sufficient documentation to support thirty (30) hours of time spent in responding to such discovery requests. Fifth, the Court should reduce the amount awarded for the time spent by defense counsel in preparing and arguing the sanctions motion as well as submission of the post-hearing supplemental affidavit because Defendant did not prevail on all of the claims it pursued, specifically sanctions under the South Carolina Frivolous Civil Proceedings Sanctions Act. Lastly, Plaintiff's counsel claims the Court awarded an amount greater than that requested by defense counsel for the time spent in preparing and arguing the sanctions motion and the submission of the post-hearing supplemental affidavit.

After consideration of the above-mentioned arguments, the Court DENIES the moving parties' Motion to Alter or Amend pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.

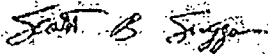
AND IT IS SO ORDERED.


Circuit Court Judge

2048
Judge Code

May 12, 2014
Date

FILED
2014 MAY 14 AM 11:17
SCOTT B. SUESS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

CLERK OF COURT/RMC
DARLINGTON COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

COMPLAINT
JURY TRIAL DEMANDED

THE PARTIES

1. The Plaintiff, Pee Dee Health Care, P.A. is a professional medical association doing business in Darlington, SC.
2. The Defendant is the Estate of Hugh S. Thompson, M.D. Dr. Thompson died on December 5, 2009. His estate is being probated in the Darlington County Probate Court, Case number 2009-ES-16--424.

VENUE AND JURISDICTION

3. This court has jurisdiction pursuant to S.C. Code Ann. § 62-3-803 et. seq., and in particular §62-3-804.
4. Venue is proper in Darlington County.

NATURE OF ACTION

5. The action brought by Plaintiff is primarily legal in nature, and the Plaintiff respectfully requests a trial by jury.

FILED
JUDGE OF PROBATE
DARLINGTON COUNTY, SC

2010 MAY 20 PM 3:05

FILED

THE FACTS

6. On or about October 26, 1998, the decedent entered into an 'at-will' employment contract with Plaintiff's medical practice as a physician.

7. The decedent's medical employment continued until on or about December 10, 2001, when the decedent left the employ of Plaintiff's medical practice.

8. As part of the employment process and relationship, the Defendant provided information to Plaintiff representing that Defendant was fully and completely authorized under state and federal law to provide medical services to Plaintiff's patients who were Medicare beneficiaries. To this end, the decedent completed a Medicare provider application (known as a HCFA 855) and an "assignment of benefits" application to allow Plaintiff to employ Defendant and to provide the Defendant permission to treat Plaintiff's Medicare beneficiaries. The Medicare applications were provided to Palmetto GBA (a private contractor who contracted with the Centers for Medicare and Medicaid Services [CMS]). Decedent certified the information he was providing to Medicare and to Plaintiff was true and correct while decedent actually knew this certification was false.

9. Unbeknownst to the Plaintiff, the decedent provided false and misleading information to Plaintiff and on the applications submitted to Palmetto GBA. Specifically, Dr. Thompson failed to provide the information that he had had been previously suspended from treating Medicare patients as he had been suspended by the Medicare Office of Inspector General from the Medicare program effective on or about May 31, 1994. Dr. Thompson's failure to provide the required information concerning his suspension resulted in the continuation of his suspension as a Medicare provider of healthcare service. Dr. Thompson had been notified in writing by the Office of Inspector General in on March 31, 1996:

Page 2 of 20

Complaint – Pee Dee Health Care, P.A. v. Estate of Thompson

- a. That he was suspended and excluded as a provider from the Medicare program as well as all other federal health care programs, and
- b. That he could not be reinstated in the federal Medicaid program until he requested such in writing and was approved in writing.

11. After the SC Board of Medical examiners reinstated Dr. Thompson's medical license in 1998 [his medical license had been suspended on or about May 31, 1994], Dr. Thompson failed to seek reinstatement to the Medicare program through the Office of Inspector General as he was required to do but instead filed a false application with Palmetto GBA, GBA (the Medicare contractor who administers Medicare in South Carolina on behalf of the federal government through the agency known as the Centers for Medicare and Medicaid Services [CMS]). However, decedent omitted any reference in regard to this suspension from the Medicare program. Nor did decedent inform Plaintiff of this suspension from the Medicare program. Decedent certified the information he was providing to Medicare and to Plaintiff was true and correct while decedent actually knew this certification was false.

10. As a result of the false information provided by decedent on the application to Palmetto GBA, and to Plaintiff, decedent (a) was assigned a Medicare provider number (D993211724 - effective October 26, 1998, see Exhibit A) by Palmetto and (b) was employed by Plaintiff to provide medical services to Plaintiff's patients, including Medicare patients. Even though the provider numbers were issued, they were in violation of 42 CFR 1001.1901(1) which provides that Dr. Thompson's suspension from the Medicare program continued until the suspension was lifted by the Medicare Office of Inspector General. Dr. Thompson failed to do this, failed to notify Plaintiff, and continued to provide false information to the Plaintiff during the remainder of his employment with Plaintiff.

Page 3 of 20

Complaint - Pee Dee Health Care, P.A. v. Estate of Thompson

11. On or about August 9, 2002, Dr. Thompson's filed a subsequent Medicare enrollment application for reenrollment in the Medicare program. In this application, Dr. Thompson admitted he had been previously suspended as a Medicare health care. On or about this same date, Dr. Thompson was reinstated as a provider of Medicare healthcare services by the Medicare Office of Inspector General.

12. On or about June 7, 2007, Plaintiff received a letter dated May 30, 2007 from Palmetto GBA in regard to medical services provided by decedent on behalf of Medicare beneficiaries for the dates of October 26, 1998 to December 10, 2001. The letter stated, among other matters:

- a. That the decedent had been suspended (sanctioned) from participation in the Medicare program during the time periods March 31, 1996 to June 20, 2002.
- b. That during the sanction period as stated in (a), Medicare payments were paid to Plaintiff for services decedent provided to Medicare beneficiaries because the decedent had completed an 'assignment of benefits' to Plaintiff. However, decedent omitted any reference in regard to this suspension from the Medicare program.
- c. That Plaintiff was liable for the funds paid regardless of the fact that Plaintiff had no knowledge of the matter and that Dr. Thompson had provided both Plaintiff and Medicare with false information.
- d. That the estimated overpayment made by Medicare for patients provided by decedent during the time he was suspended from the Medicare program was \$208,821.03 plus interest at 12.375%.

13. Plaintiff was contacted by decedent shortly after Plaintiff received the letter received by Plaintiff in June, 2007 as decedent had received the same information. A copy of the letter sent

by decedent is attached hereto as Exhibit. At this time, Decedent admitted that he had not provided accurate information to Plaintiff upon and during his employment with Plaintiff or to Medicare [Palmetto GBA] on his provider and 'assignment of benefits' applications to Medicare.

14. Following due On May 1, 2008, Plaintiff paid to Medicare the sum of \$226,740.19.

15. On or about April 13, 2010, Plaintiff filed a claim with decedent's estate. A copy of that claim is attached hereto as Exhibit B.

16. On or about May 19, 2010, Plaintiff filed an amended claim with decedent's estate. A copy of that claim is attached hereto as Exhibit C.

17. On May 10, 2010, the personal representative of the decedent's denied the Plaintiff's claim.

FOR A FIRST CAUSE OF ACTION
(BREACH OF FIDUCIARY DUTY)

18. All foregoing allegations are incorporated herein by reference as if set forth herein verbatim.

19. The Plaintiff placed special confidence in the truthfulness of decedent so that the decedent in good conscience and equity as bound to act in good faith and with due regard to the interests of the Plaintiff.

20. The decedent violated his duty of ordinary care by his knowing failure to make full disclosure of material facts of his suspension from the Medicare program.

21. Decedent's failure to make full disclosure of material facts of his suspension from the Medicare program was intentional, willful, wanton, and/or in reckless disregard of his duty to Plaintiff and of Plaintiff's rightful expectation of decedent to be truthful and honest in his dealings with Plaintiff, as decedent's employer.

22. The decedent's conduct was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

23. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A SECOND CAUSE OF ACTION
(NEGLIGENT MISREPRESENTATION
BASED ON DEFENDANT'S PECUNIARY INTEREST)

17. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

18. The decedent made a false representation to Plaintiff as more fully described herein.

19. The decedent had a pecuniary interest in making the statement.

20. The decedent owed a duty to care to Plaintiff, independent of the Plaintiff's employment contract with decedent due to decedent's ethical obligations a physician, decedent's legal duty to be truthful on his applications to Medicare, decedent's affirmations and certifications on his Medicare applications that he was truthful on his applications, decedent's legal obligations under federal law to be a Medicare-certified provider, and decedent's special relationship with Plaintiff as a physician and employee to see that the decedent communicated truthful information to the Plaintiff.

21. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

22. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A THIRD CAUSE OF ACTION
(BREACH OF DUTY OF LOYALTY TO EMPLOYER)

23. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

24. The decedent made a false representation to Plaintiff as more fully described herein.

25. Decedent's duties to Plaintiff, as his employer, included the duty of loyalty. Decedent's was duty-bound to refrain from behaving in a manner that would be contrary to his employer's interests, an obligation often given the shorthand name "duty of loyalty."

26. The degree of decedent's duty of loyalty is related to the degree of responsibility and trust that Plaintiff provided decedent. In this case, as a physician, decedent had an extensive independent responsibility and access to confidential information that he alone knew. As a result, decedent's duty of loyalty to Plaintiff was much higher, and was obligated to handle Plaintiff's matters with the highest degree of integrity and fidelity and to deal fairly, openly, and totally for the Plaintiff's benefit, which defendant intentional, recklessly or with deliberate indifference, failed to do.

27. The decedent used his relationship with Plaintiff relationship to help with his own personal interests without the knowledge and consent of Plaintiff.

28. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

29. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A FOURTH CAUSE OF ACTION
(NEGLIGENCE)

30. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

31. The decedent owed a duty to care to Plaintiff, independent of the Plaintiff's employment contract with decedent due to:

- a. decedent's ethical obligations to Plaintiff as a physician,
- b. decedent's legal duty to be truthful on his applications to Medicare,
- c. decedent's affirmations and certifications on his Medicare applications that he was truthful on his applications,
- d. decedent's legal obligations under federal law to be a Medicare-certified provider, and decedent's special relationship with Plaintiff as a physician and employee to see that the decedent communicated truthful information to the Plaintiff, and
- e. decedent's creation of risk to Plaintiff directly caused by decedent's untruthful certification to both Medicare and to Plaintiff.

32. Decedent breached his duty to Plaintiff:

- a. By act of certifying to Plaintiff personally and on his Medicare applications that he was that he was truthful
- b. By omission failing to inform Plaintiff of the falsity of his affirmations and certifications that he barred from medically treating Plaintiff's Medicare patients

33. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

34. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

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FOR A FIFTH CAUSE OF ACTION
(BREACH OF CONTRACT)

35. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

36. The parties entered into a binding at-will employment agreement as more fully described hereinabove.

37. The decedent unjustifiably breached that contract, and in particular, those provisions of the contract relating to fair dealing, good faith honesty, and treating Plaintiff's Medicare patients when decedent actually knew he was not entitled to do so,

38. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

39. As a result of the foregoing, Plaintiff is entitled to its actual damages.

FOR A SIXTH CAUSE OF ACTION
(BREACH OF CONTRACT ACCOMPANIED BY A FRAUDULENT ACT)

40. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

41. The decedent unjustifiably breached that contract, and in particular, those provisions of the contract relating to fair dealing, good faith honesty, and treating Plaintiff's Medicare patients when decedent actually knew he was not entitled to do so,

42. The decedent :

- a. made false representations to Plaintiff, to wit, that he was certified to treat Medicare beneficiaries,
- b. the decedent made the foregoing false misrepresentation with actual knowledge of its falsity and/or with reckless disregard of the truth or falsity of the matter as demonstrated by the decedent's filing of false applications with Medicare,

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- c. the decedent intended that the Plaintiff act upon the falsity of his misrepresentations,
 - d. the Plaintiff had no knowledge of the falsity of the misrepresentations made by decedent,
 - e. the Plaintiff relied upon, and had a right to rely upon, the truthfulness of the representations made by decedent, and
 - f. the Plaintiff suffered actual and proximate injury as a direct result of the false representations made by decedent.
43. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.
44. As a result of the foregoing, Plaintiff is entitled to its actual damages as well as an award of punitive damages.

FOR A SEVENTH CAUSE OF ACTION
(INTERFERENCE WITH CONTRACTUAL RELATIONS)

45. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.
46. The Plaintiff has a contractual relationship with Medicare.
47. The decedent knew that Plaintiff had a contractual relationship with Medicare.
48. The decedent, by his knowingly false statements and certifications on his Medicare applications, and to Plaintiff, intentionally and knowingly procured the breach of that contract,
49. There was no justification for the decedent's unlawful behavior other than his own selfish pecuniary gain.
50. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.
51. As a result of the foregoing, Plaintiff is entitled to its actual damages as well as an award of punitive damages.

FOR A EIGHTH CAUSE OF ACTION
(FRAUD AND MISREPRESENTATION)

52. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

53. The decedent :

- g. the decedent made a false misrepresentation to Plaintiff, to wit, that he was certified to treat Medicare beneficiaries,
- h. the decedent made the foregoing false misrepresentation with actual knowledge of its falsity and/or with reckless disregard of the truth or falsity of the matter as demonstrated by the decedent's filing of false applications with Medicare,
- i. the decedent intended that the Plaintiff act upon the falsity of his misrepresentations,
- j. the Plaintiff had no knowledge of the falsity of the misrepresentations made by decedent,
- k. the Plaintiff relied upon, and had a right to rely upon, the truthfulness of the representations made by decedent, and
- l. the Plaintiff suffered actual and proximate injury as a direct result of the false representations made by decedent.

54. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

55. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A NINTH CAUSE OF ACTION
(FAILURE TO DISCLOSE)

56. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

57. The decedent had a duty to disclose the truth of his legal inability to treat Medicare patients of the Plaintiff including but not limited to the special relation of employer-employee

between Plaintiff and decedent, decedent's legal and ethical obligations as a physician under state and federal law, and decedent's duty of fair dealing that required the disclosure of the truth to Plaintiff,

58. The decedent was aware of the misrepresentations that could not be reasonably determined by Plaintiff,

59. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

60. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A TENTH CAUSE OF ACTION
(DELIBERATE CONCEALMENT)

61. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

62. The decedent deliberately, recklessly, intentionally and/or with deliberate indifference to the rights of Plaintiff concealed the truth of his inability to legally treat Plaintiff's Medicare patients.

63. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

64. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR AN ELEVENTH CAUSE OF ACTION
PROFESSIONAL MALPRACTICE
(FRAUD, MISREPRESENTATION AND NEGLIGENCE)

65. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

66. The decedent deliberately, recklessly, intentionally and/or with deliberate indifference to the rights of Plaintiff concealed the truth of his inability to legally treat Plaintiff's Medicare patients in contravention of his professional and ethical responsibilities under state and federal law as a physician.

67. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

68. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A TWELTH CAUSE OF ACTION
(MONEY HAD AND RECEIVED)

69. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

70. The Defendant holds money that, in good conscience, belongs to the Plaintiff due to decedent's knowing wrongdoing.

71. The Defendant, in equity and good conscience should be required to pay the money wrongfully held over to the Plaintiff,

72. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

73. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A THIRTEENTH CAUSE OF ACTION
(PROMISSORY ESTOPPEL)

74. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

75. The decedent deliberately, recklessly, intentionally and/or with deliberate indifference to the rights of Plaintiff concealed the truth of his inability to legally treat Plaintiff's Medicare patients in contravention of his professional and ethical responsibilities under state and federal law as a physician.

76. The decedent's promise to Plaintiff on his application and certifications to Medicare were unambiguous in their terms.

77. Plaintiff reasonably relied upon the false promises and certifications of decedent,

78. Plaintiff's reliance upon the false promises and certifications of decedent was expected and foreseeable by decedent.

79. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

80. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A FOURTEENTH CAUSE OF ACTION
(QUANTUM MERUIT)

81. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

82. The Plaintiff conferred a substantial professional and financial benefit upon decedent by employing decedent, and paying decedent substantial sums of money as well as providing decedent clinical and administrative support.

83. Without regard to the employment contract between the parties, the decedent realized the benefit conferred upon him by Plaintiff and substantially and indubitably benefited thereby,

84. The decedent retained the benefits conferred upon him by Plaintiff under conditions that make it unjust for decedent's estate to retain such benefits without paying their value

85. The decedent deliberately, recklessly, intentionally and/or with deliberate indifference to the rights of Plaintiff concealed the truth of his inability to legally treat Plaintiff's Medicare patients in contravention of his professional and ethical responsibilities under state and federal law as a physician.

86. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

87. As a result of the foregoing, Plaintiff is entitled to its actual damages, and an award of punitive damages.

FOR A FIFTEENTH CAUSE OF ACTION
(CONSTRUCTIVE FRAUD AND
CONSTRUCTIVE TRUST)

88. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

89. The decedent:

- a. made false representations to Plaintiff,
- b. knew of the false representations made to Plaintiff,
- c. the false representations were material to the legal ability of the decedent to medically treat Plaintiff's Medicare patients,
- d. The false representation was made with the intent that they be acted upon by Plaintiff.

- e. knew the Plaintiff had no knowledge of the falsity of decedent's misrepresentations, .
- f. knew the Plaintiff innocently relied upon decedent's false representations,
- g. knew the Plaintiff had a right to rely upon the representations of decedent,

90. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

91. As a result of the foregoing, Plaintiff is entitled to its actual damages as a constructive trust imposed by this Court to benefit Plaintiff, who has been wrongfully deprived of its rights due to decedent and decedent's estate holding legal right to property which they should not possess due to decedent's unjust enrichment, negligence, deliberate indifference, fraud and interference with the rights of Plaintiff.

92. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

93. As a result of the foregoing, Plaintiff is entitled to its actual damages, the imposition of a constructive trust, and an award of punitive damages.

FOR AN SIXTEENTH CAUSE OF ACTION
(CONSTRUCTIVE FRAUD WITHOUT SCIENTER)

94. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

95. The decedent:

- a. made false representations to Plaintiff;
- b. the false representations were material to the legal ability of the decedent to medically treat Plaintiff's Medicare patients,

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- c. The false representation was made with the intent that they be acted upon by Plaintiff.
 - d. knew the Plaintiff had no knowledge of the falsity of decedent's misrepresentations,
 - e. knew the Plaintiff innocently relied upon decedent's false representations,
 - f. knew the Plaintiff had a right to rely upon the representations of decedent,
96. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.
97. As a result of the foregoing, Plaintiff is entitled to its actual damages as a constructive trust imposed by this Court to benefit Plaintiff, who has been wrongfully deprived of its rights due to decedent and decedent's estate holding legal right to property which they should not possess due to decedent's unjust enrichment, negligence, deliberate indifference, fraud and interference with the rights of Plaintiff.
98. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.
99. As a result of the foregoing, Plaintiff is entitled to its actual damages, the imposition of a constructive trust, and an award of punitive damages.

FOR AN SEVENTEENTH CAUSE OF ACTION
(EQUITABLE INDEMNITY)

100. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.
101. Plaintiff is entitled to indemnity from decedent for the loss or damage the decedent caused to Plaintiff.

102. The Plaintiff's right to equitable indemnity arises by contract, by express contract, implied contract, and by operation of law as a matter of equity between the parties.

103. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

104. As a result of the foregoing, Plaintiff is entitled to its actual damages.

FOR AN EIGHTEENTH CAUSE OF ACTION
(CONVERSION)

105. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

106. The Plaintiff:

- a. Had a pecuniary interest in the funds created by the medical services provided to Medicare patients by decedent,
- b. The decedent converted the medical services provided to Plaintiff's Medicare patients by falsely filing claims for the services provided to such patients,

107. The use of the proceeds of the funds received by decedent were without the permission or consent of Plaintiff,

108. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

109. As a result of the foregoing, Plaintiff is entitled to its actual damages, the imposition of a constructive trust, and an award of punitive damages.

FOR AN NINETEENTH CAUSE OF ACTION
(EQUITABLE RESTITUTION)

110. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

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111. Plaintiff is entitled to equitable restitution from decedent for the purpose of restoring to the Plaintiff the funds or property loss or damage the decedent caused Plaintiff.

112. The Plaintiff's right to equitable restitution arises by contract, by express contract, implied contract, and by operation of law as a matter of equity between the parties.

113. The decedent's conduct as stated herein was the direct and proximate cause of the Plaintiff's damages, which are more fully set forth hereinafter.

114. As a result of the foregoing, Plaintiff is entitled to its actual damages.

FOR A TWENTIETH CAUSE OF ACTION
(CIVIL CONSPIRACY)

115. All foregoing factual and jurisdiction allegations are incorporated herein by reference as if set forth herein verbatim.

116. The decedent, in combination with his estate, and the personal representative thereof, together for the purpose of injuring Plaintiff, have caused the Plaintiff special damages, to wit, the continuing loss of use of its money to hire additional providers which has cost Plaintiff in excess of \$35,000.00 *net* per month beginning June 1, 2008 to date plus prejudgment interest thereon.

DAMAGES INCURRED BY PLAINTIFF

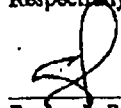
Based on the foregoing allegations, Plaintiff has suffered the following damages:

1. The Plaintiff has paid to Medicare on behalf of the decedent the amount of \$226,740.19
2. The Plaintiff is entitled to prejudgment statutory interest at the rate of 8.75% beginning May 1, 2008 forward,

3. The Plaintiff has incurred the loss of use of its money to hire additional providers which has cost Plaintiff in excess of \$35,000.00 *net* per month beginning June 1, 2008 to date plus prejudgment interest thereon.
4. The funds paid to decedent as an employee of decedent and in support of decedent which are in excess of \$500,000.00
5. Punitive damages in an amount to be determined by a jury.
6. Such further and other relief as this Court deems just and proper.

WHEREFORE, the Plaintiff respectfully request this Court to inquire into these matters and to provide the Plaintiff awards of actual and punitive damages based on the cause of actions as more fully stated hereinabove, as well as such further relief as this Court deems just and proper.

Respectfully submitted,



Benjamin R. Matthews
Attorney-at-Law
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Columbia, SC 29203
803.799.1700
Email: matthews@pdhc.com

May 19, 2010.

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF DARLINGTON	)	
PEE DEE HEALTH CARE, P.A.	)	MARCH 16, 2011
PLAINTIFF,	)	
	)	MOTION HEARING
VERSUS	)	
THE ESTATE OF HUGH S. THOMPSON	)	2010-CP-16-00332
DEFENDANT.	)	

BEFORE

THE HONORABLE J. MICHAEL BAXLEY

APPEARANCES

Tony R. Megna, Esquire
Attorney for Pee Dee Mental Health

Jon Rene Josey, Esquire
John Jay James, Esquire
Attorneys for the Estate

Pamela Ozment-Cartee
Circuit Court Reporter

Motion To Disqualify

Page 03

Ruling of the Court

Page 36

Certificate of Reporter

Page 41

DEFENDANT'S EXHIBIT

NUMBER	DESCRIPTION	PAGE
1	Letter - Dear Tony	12

1 (Whereupon, this hearing began 1:40 p.m.
2 on Wednesday, March 16, 2011.)

3 THE COURT: All right. Then the next matter
4 we have is Pee Dee Health Care versus The Estate of
5 Thompson.

6 Please be seated, and let me begin with a bit
7 of introduction, and then we will come across and let
8 everyone introduce themselves, and tell us who you have
9 with you, that is your client, so that we can make sure
10 that our record reflects that.

11 This case was set especially today for the
12 hearing of certain motions. The Court began to discuss
13 back in February with counsel about the outstanding
14 motions that are still pending in this case.

15 Back in mid February, we made the decision
16 that we would go ahead and hear certain motions in
17 March. Mr. Megna had a conflict with the month of
18 March, but was able to rearrange his schedule so that we
19 could be here today. There are certain motions pending,
20 but the first motion we all agree that we would hear,
21 because it may be dispositive as to Mr. Megna's role in
22 this case, which is the motion by The Thompson Estate to
23 disqualify Mr. Megna as counsel.

24 Now, that is where we will start today. There
25 are other matters as well that I know are pending. But,

1 let's come across and let everyone introduce themselves.
2 And we will start with the plaintiff, Pee Dee Health
3 Care. Mr. Megna, please introduce yourself and anyone
4 you have with you.

5 MR. MEGNA: My name is Tony Megna. I am
6 general counsel for Pee Dee Health Care, and this is Mr.
7 Mark Matthews, he is Vice President of Operations for
8 Pee Dee Health Care.

9 THE COURT: Welcome.

10 MR. MEGNA: Thank you.

11 THE COURT: And, now to the other side.

12 MR. JOSEY: Judge, I am Renee Josey. I
13 represent the estate of Dr. Thompson. Of course J.
14 James also represents the estate. And here with us
15 today are the two personal representatives of the
16 estate, which are Dr. Thompson's children, Louis
17 Thompson Dailey, and Hugh Thompson, III.

18 THE COURT: Thank you. And welcome to the
19 courtroom.

20 All right. I believe that we are in agreement
21 that the first matter is the question of the
22 disqualification of Mr. Megna. I have received Briefs
23 or Memoranda on both sides of that, including
24 substantial exhibits. I have had the opportunity to
25 review those. You are the moving party, Mr. Josey, or

1 Mr. James. I will be glad to hear from you.

2 MR. JOSEY: Thank you, Judge. And Mr. James
3 and I have kind of divided up our presentation. I don't
4 know if you are under a time constraint with the jury
5 coming back, or?

6 THE COURT: No, I have next Monday, I've got
7 to be in court. So, we are okay.

8 MR. JOSEY: All right. We will try to meet
9 that.

10 THE COURT: All right. Very good.

11 MR. JOSEY: I thought, Judge, I know that
12 you have heard of or that they made an appeal from
13 Probate Court, but I am not sure that we have ever
14 briefed you on any kind of the background of the case.

15 THE COURT: Yes, please do.

16 MR. JOSEY: I thought that I would tell you
17 a little bit about the background of the case, to put
18 our motion in context.

19 This case involves determining who should be
20 responsible, after a decade of the events, and after the
21 death of Dr. Thompson for an error in not confirming his
22 Medicare credentials, back when he worked at Pee Dee
23 Health Care over a decade ago.

24 Because the Medicare are contractors in this
25 case, and you may have heard of Palmetto GBA, they are a

1 contractor for Medicare. They issued Dr. Thompson a new
2 Medicare Provider Number after he had been suspended for
3 a while. He was suspended by the South Carolina Medical
4 Board from 1994 until 1998. But after that suspension,
5 he reapplied through a new employer, not Pee Dee Health
6 Care, for a new Medicare Provider Number, and was issued
7 a new Medicare Provider Number. And that new employer
8 started billing Medicare, and Medicare started paying.
9 And then he moved to Pee Dee Health Care. And he
10 actually went on to a third employer, First Choice in
11 Florence. So he worked for three different employers,
12 all of whom were assigned Medicare benefits, and all of
13 whom collected Medicare benefits after his suspension,
14 because he had a new Medicare Provider Number issued to
15 him.

16 THE COURT: And I believe when he was first
17 reinstated, he was required by the Medical Board to
18 practice with Dr. Fowler. Am I correct in that?

19 MR. JOSEY: That's right.

20 THE COURT: All right. I am familiar.

21 MR. JOSEY: Okay. And, it was only after a
22 period of time when he was actually with his third
23 employer that someone at Medicare realized that he
24 hadn't --- a second hoop hadn't been jumped through.
25 That even though he had been issued a new Medicare

1 Provider Number, he had not been reinstated by the
2 Medicare Inspector General, which is a different hoop
3 that you are supposed to jump through. Two of Dr.
4 Thompson's three employers managed to avoid liability to
5 Medicare. Either through well done appeals, or through
6 statute of limitation and not being pursued. But two of
7 them managed to avoid liability Medicare. Pee Dee
8 Health Care was not so lucky. They were assessed by
9 Medicare. A little over \$200,000.00 dollars that
10 Medicare wanted to be paid back, and because Dr.
11 Thompson was not fully credentialed through his period
12 of his employment with them, and during the period he
13 assigned benefits to them. Pee Dee Health Care, which
14 was held liable by Judge Metry, in an order that we
15 attached as Exhibit A to our Motion, primarily because
16 Judge Metry found that there was an affirmative duty on
17 any contracting employer to check out the credentials,
18 and to make sure that the credentials were in place
19 before they accepted assignment of benefits and started
20 billing Medicare. And Judge, just so you know, I have a
21 bulletin from Medicare that kind of reaffirms that. I
22 know we are not arguing the merits today, but I just
23 thought that I would --

24 MR. MEGNA: Excuse me, Your Honor. I think
25 at this point in time, Mr. Josey has been here for a

1 while. I sent them an email on Sunday night asking to
2 please give me any information they have. And I object
3 to them giving you any information at the last minute
4 like this. That is an unexpected surprise. I don't
5 care what it says. It is inappropriate. He knows it is
6 inappropriate. And I would ask the Court to not take
7 judicial notice of it. He should have had the good ---
8 just the good manners to have provided this to me before
9 he hands it to you. I have nothing to do this. We gave
10 them our information five days ago, and it is just bad
11 manners. And I think this court, within its discretion,
12 could say, no, thank you.

13 THE COURT: Do you want to reply to that Mr.
14 Josey?

15 MR. JOSEY: Just to say Judge, that Judge
16 Metry's order was based on the fact that found an
17 affirmative duty. This is basically to promulgate the
18 statute and the regulations you abide by.

19 MR. MEGNA: I objection, Your Honor. Again,
20 because I haven't had the chance to respond to it. And
21 I specifically sent Mr. Josey a email on Sunday night,
22 and asked them to please provide me any information.
23 And I think it is inappropriate for him to do so now.
24 And I think this court should take judicial notice of
25 the fact that they totally ignored it. And that under

1 the Rules of Professional Responsibility --- And I know
2 that is what I'm being accused of, I think they have
3 absolute responsibility to be fair to the Court, and
4 fair to opposing counsel, and fair to the opposing
5 party, and this is not fair under any sort of
6 circumstances.

7 **THE COURT:** Very good. I'll sustain his
8 objection, and will not accept the documents, Mr. Josey.
9 Go ahead with your argument, sir.

10 **MR. JOSEY:** I understand, Judge. That's
11 fine. And like I say we are not arguing merits, I just,
12 kind of wanted to give you some background.

13 Judge Metry's Order is attached to our motion
14 as Exhibit A, and of course this litigation was brought
15 after Dr. Thompson could no longer speak for himself,
16 and died. And we are being asked to defend things that
17 Dr. Thompson was involved with over a decade ago. Now,
18 the basis of our Motion, of course, is that we think Mr.
19 Megna is a central witness in this case. And he should
20 not be allowed to wear two hats in the presentation of
21 this case.

22 Mr. James is going to tell you why we think he
23 is a key witness. And I am going to address the law
24 about that.

25 **THE COURT:** All right. Go ahead, Mr. James.

1 **MR. JAMES:** May it please, The Court? A
2 couple of preliminary matters.

3 We have not accused Mr. Megna of professional
4 misconduct. We are here today to avoid any possibility
5 that there could be misconduct with him possibly serving
6 at the trial as counsel and as a witness. He can't be a
7 fact witness and an advocate.

8 In Mr. Megna's cover letter with his various
9 returns to motions that he sent last Friday, he said
10 that we had refused to allow the personal
11 representatives to be deposed.

12 In January, Mr. Megna noticed their
13 deposition. We notified Mr. Megna's law partner that we
14 thought the depositions would better be postponed until
15 after various motions had been heard. And Mr. Megna, by
16 letter addressed to me on February the 3rd, said my
17 suggestion is that we agree to suspend all depositions
18 and other pending motions until the Motion to Disqualify
19 has been heard. We have not refused to let our clients
20 be deposed. In Mr. Megna's statement in his cover
21 letter to the Court is in error.

22 Getting to the merits of whether Mr. Megna
23 would be a necessary witness. Mr. Megna is the Chief
24 Executive Officer, as well as General Counsel to Pee Dee
25 Health Care. When we filed our Motion to Disqualify, we

1 believed that to be the case, but we were not absolutely
2 certain. We did find a record in Florence County,
3 certain documents and other litigation that he had filed
4 documents with Medicare claiming --- holding himself out
5 to be the Chief Executive Officer of Pee Dee Health
6 Care. Our purpose in attaching those Medicare
7 application documents was not to interject the Lake City
8 litigation into this litigation. In no way can our
9 including documents that Mr. Megna himself filled out
10 and submitted to the government be construed as an
11 attempt by us to accuse Mr. Megna of being dishonest and
12 untrustworthy as he said in his return to our motion.
13 Nothing of the sort. He has now in his return admitted
14 that he is the CEO of Pee Dee Health Care.

15 This status creates the probability that in a
16 case of this nature, he will be a necessary witness.
17 And in the discovery and in the pleadings, he has
18 admitted certain things, and has alleged certain things
19 that make it very plain that he is a necessary witness.

20 In his Complaint, he refers to an unsigned,
21 undated letter that he said was given to him by Mr.
22 Megna. I believe it is Exhibit HH, in the plaintiff's
23 return. He says that this letter was given to him
24 presumably around June 1, 2007, by Mr. Megna. And in
25 the Complaint, this letter was said to be an exhibit.

1 It was not attached to the Complaint. In fact, there
2 were three things that were said to be exhibits to the
3 complaint, and none of them were attached; none of them
4 were filed. But we understand that this undated,
5 unsigned letter supposedly given by Dr. Thompson to Mr.
6 Megna, is the exhibit referred to in the Complaint.

7 And in the Complaint, the plaintiff alleges
8 that this unsigned, undated letter constitutes an
9 admission by Dr. Thompson that he has not provided
10 accurate information to the plaintiff upon and during
11 his employment with plaintiff, or to Medicare, or to his
12 provider, an assignment of benefit applications to
13 Medicare. So, this supposedly is the smoking gun. This
14 is the document that shows that the now deceased Dr.
15 Thompson admitted that he had given bad information to
16 Pee Dee Health Care.

17 The letter in question --

18 THE COURT: I have it. It is attached to
19 your Brief. I have it.

20 MR. JAMES: It is attached to their brief.

21 THE COURT: All right. Very good.

22 MR. JAMES: It is Exhibit HH.

23 THE COURT: Do you want to make it an
24 exhibit to this hearing today?

25 MR. JAMES: We can, Your Honor.

1 THE COURT: Any objection?

2 MR. MEGNA: No objection, Your Honor.

3 THE COURT: Let's just take a moment and
4 make that what would be Defendant's 1.

5 WHEREUPON, DEFENDANTS EXHIBIT
6 NUMBER 1 IS MARKED AND ADMITTED
7 INTO EVIDENCE WITHOUT
8 OBJECTION.

9 THE COURT: Go ahead.

10 MR. JAMES: The letter in question is
11 addressed, Dear Tony. Presumably, Tony Megna, but don't
12 know for sure. If the Court would look in the lower
13 right hand corner of the letter, it will see a notation
14 that did not completely copy out. That our pending
15 Motions to Compel, we have asked for a copy of this
16 letter that would show completely the notation in the
17 bottom right hand corner. But they have resisted that
18 motion, and they say that everything that we have asked
19 for is attorney client privilege, or attorney work
20 product. Assuming that this letter came from Dr.
21 Thompson, and we certainly do not admit that. Assuming
22 that it came from him, it appears that this refers to
23 facts that were going on in 1999 when Dr. Thompson's
24 medical licenses were briefly suspended, because of his
25 failure to take a urine sample. And the notation in the

1 lower right hand corner appears to substantiate that
2 this had the date of December the something 1999. But
3 without being able to see the full thing, we don't know.
4 But we think this was probably generated in 1999, not in
5 2007. But in any event it does not constitute the
6 smoking gun admission that the complainant in this case
7 alleges. We believe that Mr. Megna would be a necessary
8 witness in discovery, and possibly at trial for us to
9 find out the circumstances of this letter.

10 On page 14 of the plaintiff's return, and at
11 several other places in the plaintiff's return, Mr.
12 Megna expresses himself with great indignation that we
13 have indicated that he should be a witness on this. He
14 says that we are referring to --- that he doesn't need
15 to be a witness, because the document in question came
16 from us. Well, he is referring to a 2004, two page
17 memoranda that Dr. Thompson prepared I think, for his
18 employer First Choice, and he met with them about his
19 Medicare eligibility. And we provided that document to
20 the plaintiff in discovery. That is not the document
21 that we want to examine Mr. Megna on. Mr. Megna has
22 even said that we are engaged in virtual misconduct in
23 connection with wanting to ask him about well, their own
24 document. We want to ask him about Exhibit HH, Your
25 Honor, which is his exhibit in his complaint.

1 And in answers to the Plaintiff's
2 Interrogatories, which we have listed relevant
3 information in Exhibit C to our Motion, Mr. Megna or Mr.
4 Matthews has indicated that Mr. Megna is a party with an
5 economic interest in the outcome of this. That he
6 attempts to disqualify himself as being a fact witness
7 because of the Dead Man Statute. We will address that
8 in more detail later.

9 He indicates further that Dr. Thompson
10 communicated to him by telephone, in addition to this
11 letter, concerning the adverse Medicare determination in
12 the late spring or early summer of 2007.

13 And finally, in the Answers to the
14 Interrogatories, Mr. Megna says that he was the only
15 person involved at Pee Dee Health Care with the
16 Administrative Appeals of the Medicare determination,
17 which unfortunately turned out unsuccessful for Pee Dee
18 Health Care, but turned out successfully for First
19 Choice.

20 The Chief Executive Officer of an organization
21 such as Pee Dee Health Care would also be a witness in a
22 host of other ways, which are clearly elaborated in our
23 Motion. And many of those would not involve the Dead
24 Man Statute, or other issue of privilege.

25 There would be issues about administrative

1 policies and procedures, including employment
2 applications, employment contracts. There would be
3 issues about records keeping. For example, in this
4 case, we have been advised that any personnel records of
5 Dr. Thompson were destroyed pursuant to, personnel
6 instruction policies of Pee Dee Health Care. We have
7 asked for certain documents such as, job application,
8 employment contracts, employee evaluations to be
9 provided to us, and they say they are not available to
10 be provided to us. We would have questions about
11 employee screening, employee credentialing. What
12 questions do you ask an employee to find out, does he
13 have a valid, and in force medical licenses? Does he
14 have all of his credentials up to date with Medicare,
15 Medicaid. What about due diligence procedures to see
16 that they do everything that they should do? We would
17 want to know what happened with their Medicare appeal,
18 and why. We have been trying to get information from
19 them including their filings with the various levels.
20 There are four levels. They claim to have gone to all
21 four levels. We still do not have the Medicare Appeals
22 Council decision, which is the fourth. They say that is
23 Exhibit S of their return. Exhibit S instead, is the
24 key to Administrator's decision. That is step number 2.
25 We have previously been provided that. But we need to

1 ask questions about that. We want to know what they
2 argued and why they lost. We want to know about their
3 alleged damages. They are saying in their Complaint
4 that there are huge consequential damages. That because
5 they have had to pay Medicare back somewhat more than
6 \$200,000.00 dollars, that their organization has been
7 crippled, Your Honor. That they have not been able to
8 afford to hire additional doctors that they need. We
9 have asked further to show what their income is, such as
10 income tax returns for the years in question. Again, we
11 have been told that we are asking for attorney work
12 product, or attorney client privilege information. But
13 we need to know what is the basis for the damages, and
14 the CEO of the organization would be the best person to
15 get us that information.

16 We are entitled, Your Honor, to depose and
17 discover these facts from any witness. Not just the
18 witnesses that they want to provide to us. They say oh,
19 Mr. So-and-so, or Mrs. So-and-so can tell you this, or
20 can tell you that. Well, they are not entitled to pick
21 and choose the witnesses that we want to find out the
22 facts from. We think the CEO, who is the chief accuser
23 in this case, should be subject to deposition. We
24 should be able to find out what we need to find out, so
25 that we can advise our clients properly. And so we can

1 discharge our obligations to our clients, and to this
2 court, and to our justice system.

3 We think that Mr. Megna's credibility on
4 various issues will be important in this case, Your
5 Honor. They have accused Dr. Thompson, a dead man, of
6 fraudulent, deceitful, dishonest conduct. We are
7 entitled to see what the credibility of the accusers
8 are, and show that to a court, and to a jury.

9 At the time that Mr. Megna alleges that Dr.
10 Thompson had a conversation with him in the late spring
11 of 07, about the Medicare determination matter. He says
12 on page 6 of his return, that at that time the
13 undersigned, being Mr. Megna, closed any further
14 discussions with the decedent, and advised the decedent,
15 the undersigned, to not discuss the matter with him, and
16 that was the length of the conversation. Well, we need
17 to find out more about those kinds of alleged contacts.
18 At that same time, Mr. Megna now says that the decedent
19 gave to him miscellaneous records, which I believe are
20 Exhibit D of his return. At an earlier time Mr. Megna
21 gave those to me last July. He said that these were
22 records that Dr. Thompson apparently delivered to them,
23 at some point in time, but not indicated that they were
24 delivered at a very important time, and presumably being
25 met by Dr. Thompson to be helpful in this matter. The

1 records in concern have nothing to do with this matter.
2 One of them is a personal real estate contract on
3 property in 1999. Others are copies of the diplomas,
4 and certificates, professional certificates and that
5 sort of thing. None of them have anything to do with
6 the Medicare determination. We need to ask Mr. Megna
7 about those documents, to see where they came from.

8 The response of Pee Dee Health Care to our
9 Motion to Disqualify Mr. Megna, confirms in other ways
10 that he is a witness. Exhibits P and U, are served to
11 constitute agreements by Dr. Thompson and First Choice,
12 but they undertook an affirmative duty to keep Pee Dee
13 Health Care advised of the progress of their Medicare
14 appeals.

15 Well, if you look at Exhibits P and U, each is
16 an email. Exhibit P is an email from Mark Matthews, an
17 employee of Pee Dee Health Care to Tony Megna. Exhibit
18 U, is an email from Tony Megna to Dean Banks, who is the
19 Chief Executive Officer of First Choice. Neither email
20 is supportive of the contention that they constitute
21 agreements by Dr. Thompson and/or First Choice to Pee
22 Dee Health Care advised. Mr. Megna --

23 THE COURT: We need to take just a little
24 break here for our court reporter.

25 (PAUSE.)

1 **THE COURT:** Thank you, Mr. James. Go ahead.

2 **MR. JAMES:** Mr. Megna is the presumed receipt
3 of one of those emails. And he is the apparent sender
4 of the other email. Both of these are said to
5 constitute important pieces of evidence by Pee Dee
6 Health Care. We think we are entitled to ask
7 appropriate questions of Mr. Megna as to the content of
8 these emails, the contexts of the emails, etcetera.

9 Your Honor, that concludes my portion of this
10 presentation. And I will turn it back over to my co-
11 counsel, Renee Josey.

12 Thank you, Your Honor.

13 **THE COURT:** Thank you. Mr. Josey, do you
14 want to speak on the law?

15 **MR. JOSEY:** Yes, sir. I do have one more
16 factual addition to add. In Mr. Megna's response, he
17 mentions that --- in a footnote, I think. It is
18 footnote six, that my firm had been admonished for some
19 discovery abuses somewhere. He doesn't identify what
20 litigation he is talking about. I kind of polled my
21 office by email, and nobody knows what he is talking
22 about.

23 **THE COURT:** Okay.

24 **MR. JOSEY:** But, if the Court wants to hear
25 any consideration of that, I will be glad to address it.

1 Let me address the law, Judge. Again, we
2 haven't accused Mr. Megna, of anything unethical. We
3 are trying to prevent something unethical from
4 happening. Rule 3.7, of The Rules of Professional
5 Conduct, which I am sure you have had a chance to look
6 at, indicates that a lawyer can not be both an advocate
7 and a witness in a matter. And it does give three
8 exceptions. The first exception being, if it is an
9 uncontested issue. Well, as you heard from Mr. James,
10 the things that we want to depose Mr. Megna about, and
11 examine Mr. Megna about, are definitely contested.

12 Number two is, if it has to do with the nature
13 or value of legal services rendered. That is not what
14 this is about either. We are not interested in legal
15 services, and the value thereof, like in Family Court
16 cases when we are trying to collect fees or something
17 like that.

18 Or number three, if there is a substantial
19 hardship. We don't believe there is a hardship here,
20 because early on in this case, early that summer before
21 I was even associated with the case, Mr. James raised
22 this concern with Mr. Megna, and with Mr. Matthews, who
23 is Mr. Megna's partner. And as you will see in our
24 Motion, we don't claim that Mr. Matthews is
25 disqualified. Because, Mr. Matthews, as far as we can

1 tell, wasn't critically involved in these communications
2 with Dr. Thompson. So, Mr. Matthews would not be
3 disqualified. Mr. Matthews has been involved in this
4 case. He, in fact, signed the Complaint originally.
5 So, he is familiar with these matters, and copied with
6 these things, and it will not be a hardship for Mr.
7 Matthews to assume the fore-role, [sic] if you will,
8 instead of just a shared role representing Pee Dee
9 Health Care.

10 Mr. Megna's response does raise the suggestion
11 that maybe the Court can split hairs and say that he
12 couldn't be the lawyer at trial, but maybe could be the
13 lawyer for some pretrial functions. And, Judge, that
14 may be possible. Let me tell you what our concerns are.

15 Our concerns are two fold. First of all, we
16 don't want Mr. Megna wearing two hats in front of a
17 jury. And I think that is clearly covered by the rules.
18 But, we don't want that to occur, whether it is at a
19 trial, or whether it is in a deposition. Whether it is
20 in Mr. Megna's deposition, or the deposition of other
21 witnesses. Because, we don't know now what deposition
22 testimony might be used, or might be needed at the trial
23 in front of the jury in this case. So, that is a
24 concern. We don't want Mr. Megna to wear two hats in
25 front of a jury. And we think that is what the rule is

1 meant to address.

2 Our other concern is that we don't want the
3 plaintiff, Pee Dee Health Care to use Mr. Megna as a
4 sword when they want to by saying, he received critical
5 communication from your client, Dr. Thompson, and he is
6 the one that these affirmative duties were manifested
7 to, but. So, we are going to use him as a sword, but we
8 are going to use him as a shield. If you want to depose
9 him, if you want to make him a witness, it is all
10 privileged, it is all work-product, and you can't ask
11 him about it. And they can't have it both ways, Judge.
12 That is why it was somewhat preempted, but we went ahead
13 and Briefed that in our Motion. And we are not asking
14 him about litigation strategies in this case. We are
15 not going to ask him about confidential matters. We
16 want to ask him what happened on the public record. We
17 want to ask him what happened to that fourth level of
18 appeal. Because, if they have succeeded at that fourth
19 level of appeal, we wouldn't be here. We want to ask
20 him about his communications with our client before
21 employment; during the employment application process.
22 All of the things that Mr. James told you about. The
23 employment application. What are your procedural steps
24 in your policy manual, what do they say about
25 credentialing? Because, we know what Medicare

1 regulations says, and the statute says. We want to know
2 what they did to comply with the Medicare regulations
3 and statute. And those are all things that don't call
4 for privileged information. We also went ahead and
5 addressed the Dead Man Statute, to the extent that we
6 are asking him about Medicare compliance, and Medicare
7 credentialing. That doesn't involve any dead man
8 testimony. And, as I think we made clear in our
9 Briefing, the Dead Man Statute is an evidentiary
10 objection that these clients can raise if they want to
11 at trial. It is not a tool for the plaintiff, who has a
12 financial interest to use. It is a tool that we, our
13 clients can use. It is somebody with a financial
14 interest in the matter is going to claim that the dead
15 man said something in front of a jury. It doesn't mean
16 that those people are insulated from discovery. In
17 fact, as I indicated in the Brief, we don't know how
18 extensive the Dead Man's Statute might apply until we
19 take depositions to see what communications did you have
20 with a dead man, and who had them? Until we do that,
21 we don't know exactly what we might have the option of
22 raising the Dead Man Statute too.

23 And there is a case --- Judge Sanders authored
24 an opinion about discovery not being hindered by the
25 Dead Man's Statute, because it is the type of objection

1 that is reserved for trial, and it is not raised in
2 discovery. But, again, I think Pee Dee Health Care is
3 trying to use it as a shield to hide any weaknesses that
4 might exist in their case, while at the same time
5 asserting that Mr. Megna is a sword that can't be
6 discovered or inquired into.

7 So, Judge, that is why we are here. We
8 haven't accused anybody of anything wrong yet. But, we
9 don't think Mr. Megna needs to wear two hats.

10 THE COURT: All right. Thank you. And in
11 reply, Mr. Megna?

12 MR. MEGNA: Your Honor, I certainly feel
13 accused. It certainly came across to me as accused. I
14 certainly think the tone is accusatory, first of all.
15 Second of all, the letter that they refer to is ---
16 excuse me. Is a letter that my office received in the
17 mail from Dr. Thompson. I fully disclosed it to them.
18 Fully and completely. I, at the time we were doing
19 this, yes I am the CEO and General Counsel of Pee Dee
20 Health Care. We had well in excess of a hundred
21 employees. I have a business manager who handles --- a
22 Vice President of Operations. And quite frankly I
23 handle none of that, and I don't know of many CEOs that
24 do. I don't know how they can. I just don't understand
25 it. I never did it. I don't do it. Period, end of

1 discussion. The only thing that I have done here today
2 is, since day one fully and completely disclosed to
3 these folks what I have. Dr. Thompson did in fact call
4 me. I fully disclosed it. As soon as he told me that
5 he an attorney representing him, or he told me --- I
6 said, I can't talk to you. I'm not going to talk to
7 you. I'm not going to do it. He sent some documents in
8 the mail to my office. I fully disclosed them. They
9 know anything and everything about those documents that
10 I know. I know nothing. As far as critical testimony
11 goes, they have not described one thing here today that
12 can possibly be considered critical information;
13 nothing. They have this one letter that Dr. Thompson
14 voluntarily sent to my office that ended up on my desk.
15 When I received it, I put in a file that I kept, and
16 that I disclosed it to them when they asked for it.
17 That was all there was to it.

18 As far as Medicare goes, and I think this is a
19 critical distinction. Medicare did not sue Dr.
20 Thompson. Medicare sued Pee Dee Health Care. I
21 defended Pee Dee Health Care. I was general counsel to
22 Pee Dee Health Care. Anything that I did in that role,
23 speaking with my partners or my employees, is absolutely
24 privileged information. Now, do they have access to the
25 --- Can they have access to the orders? Your Honor, I

1 honestly don't know how this QIC exhibit got in there,
2 and I apologize for that. If we have that document, we
3 are happy to give it to them. As a matter of fact, my
4 recollection is, I have provided that document to them
5 during discovery. That was the decision. But, as far
6 as my personal work product goes, I think it is just
7 outlandish that they would sit here and say that they
8 can look at my personal work product that I discussed
9 with the principals of Pee Dee Health Care, and because
10 it is critical information regarding what they consider
11 the fact that I didn't do my job, and that is what they
12 eluded to in here. I didn't do my job. That they would
13 somehow say that that gives them the right to then cross
14 examine me. Well, that is not true. That is not true
15 at all. The Supreme Court has made it absolutely plain
16 that attorney work product is privileged. Now, the
17 results of that, they want to go get the documents from
18 Medicare, I don't care. As a matter of fact, I know
19 that I gave them that. But, if I have it again, I will
20 provide it to them. And I apologize to the Court that
21 somehow another this QIC document got in here. I have
22 no problem with them having the decision. The other
23 documents that they refer to was because it evidences
24 that Mark Matthews, exactly who he said, had everything
25 to do with this, not me. He dealt with Dean Banks. He

1 dealt with Dr. Thompson, not me. And they promised, and
2 he will testify that --- He is welcome to do it today,
3 because his Affidavit is in there. He testified that he
4 put in his Affidavit that they promised to provide him
5 information. And the irony is that the decision that
6 they got, that was in favor really of First Health, and
7 Dr. Thompson by proxy was disclose --- they didn't
8 disclose to you was provided several weeks prior ---
9 several months, several weeks prior to a decision being
10 issued in our case. If we had had that, it would have
11 probably been collateral estoppel, res judicata, I can
12 come up with something. There is no doubt about it. I
13 could have provided that opinion to the LLC, who was a
14 different judge, who came up with a different opinion.
15 That is the whole thing in a nutshell. But we are not
16 suing Dr. Thompson over that. We know what the Medicare
17 Statutes require of us. And, yes, they said that by
18 proxy we basically have --- I guess you would call it
19 some type of complete liability in the case, regardless
20 of the fact that Dr. Thompson --- and I hate this --- He
21 lied. Dr. Thompson did not tell the truth. We were
22 provided exhibit after exhibit. Mr. --

23 MR. JAMES: James.

24 MR. MEGNA: James, excuse me. He said in his
25 answer repeatedly the duty of loyalty that Dr. Thompson

1 had to us. We provided three letters from Medicare
2 prior to him coming to work for us that I had never
3 seen. That I had no knowledge of. Where Medicare had
4 asked them for information, and he came to our office
5 and never provided them to us. The Dead Man Statute,
6 the Dead Man Statute does not say what they say it says.
7 It says, it bars examination. It doesn't say
8 examination at trial. It doesn't say examination at
9 depositions. It says it bars examination. It seems to
10 me very, very simple. The case that he has cited did
11 not say that they could take a deposition. It recited
12 deposition testimony. I don't know, and neither do
13 they, whether or not any objections were made to that
14 deposition. But, our Supreme Court has done everything
15 they could to restrict what the Dead Man's Statute says,
16 and it doesn't apply to documents. No problem. But it
17 applies to examinations. They can't have it both ways.
18 There is nothing that says that it is shield used for
19 their purposes. It is a shield period. The Supreme
20 Court has said, if you are going to apply it in one
21 direction, you apply it in both directions. It is not
22 so that they can go take depositions Willie-Nellie.
23 That they can go take depositions of whoever they want
24 to take, so they can decide whether or not they can use
25 information against us in some manner. The Dead Man's

1 Statute says, that if a party has an interest in the
2 outcome of the judgment, he cannot be examined. I
3 Admitted that I had an interest in the outcome of the
4 judgment. I cannot be examined as a matter of law. It
5 is not a question of --- It is a question of
6 admissibility. What could they possibly gain from
7 taking my examination, when it is not admissible. And
8 on top of that, it doesn't bar the admissibility of it,
9 it bars the examination of it. I cannot be examined. I
10 didn't make that law up. The legislature did. This
11 court, respectfully, is bound by it. As am I, as are
12 the defendants. On top of that the Pee Dee Health Care
13 is complaining about, is not the fact that we had to pay
14 Medicare back per se, but the fact that Dr. Thompson
15 admittedly owed us a duty of loyalty to tell us the
16 truth. We are not suing Medicare. We are suing them --
17 - him unfortunately for not telling the truth. We did
18 wait until he passed away, and we did that on purpose.
19 I would be the first to admit that I did that on
20 purpose. And the reason I did it on purpose was because
21 I didn't want to cause him further agony, and
22 humiliation, and damage, knowing what I knew. And I
23 knew that he was not going to live. It was an act of
24 mercy, and it was an act of calmness. It is
25 inappropriate, and it is wrong for them to now say ---

1 and I understand that it was the only string that they
2 had available. Well, Pee Dee Health Care didn't deal
3 with Medicare, so sorry. It is Pee Dee Health Care's
4 fault. We are suing him for indemnification. Where is
5 the Complaint please? Several, but mainly
6 indemnification. The inability of --- his lack of
7 ability of telling us the truth. Whether or not he
8 forgot or not, there is a duty of loyalty to us. A duty
9 of truthfulness. They have admitted in their Answer,
10 which I put in my Return. This is a case that is right
11 for Summary Judgment. They had no discernable defense.
12 And they know they had no discernable defense. So the
13 only thing that they could do was to come up with
14 reasons to bar. Reasons to tell this Court well, Mr.
15 Megna knows this. Mr. Megna knows that. Mr. Megna is a
16 necessary witness. What one piece of evidence have they
17 produced? Evidence that they produced that I am a
18 necessary witness? None. Because, there is none. Like
19 I said, I have not given them a decision. Well, if I
20 have it, and I know I have, I will give it to them
21 again. There is no evidence before this court, none.
22 And, yes, sir. I apologize if I sound a little outraged,
23 because I am. Because, you had better believe this is
24 an issue of character assignation. This is an issue of
25 honor. And yes, sir, you had better believe the Lake

1 City litigation plays into it, because what they didn't
2 tell you is they also asked me questions on the
3 interrogatories, please explain to us what the claims
4 were that were filed by Lake City on behalf of Dr.
5 Thompson. Lake City did not get evolve until seven
6 years after Dr. Thompson left our practice. If you
7 think for a second --- if this Court thinks for a second
8 that their issues are not insidious, it is just wrong.
9 They are. And it would cause undue hurt to our
10 organization. We are not financially able to bring
11 somebody else up to date. And, yes, Mr. Matthews and I
12 do practice together, because my partner saw fit to let
13 me do something to assist somebody else. That he would
14 have to bring himself up to date, not knowing a thing
15 about this case. Just on accusations, and inappropriate
16 accusations.

17 THE COURT: Well, the disqualification would
18 go to the entire firm; would it not?

19 MR. JOSEY: No, sir. And we addressed that.
20 As I said earlier, it would not disqualify Mr. Matthews.

21 MR. MEGNA: Talk about splitting hairs.

22 MR. JOSEY: It is in our Motion.

23 THE COURT: Thank you.

24 MR. MEGNA: In other words they want to have
25 it both ways. But they have to show some evidence, some

1 evidence that I am a necessary witness. All the cases
2 that I have cited indicated that every Court --- just
3 about every Court that has considered this issue, has
4 said a Court needs to view this issue with great
5 suspicion, because it is a litigation tactic, and an
6 inappropriate litigation tactic. And it is used to do
7 exactly what they are trying to do, undermine our
8 efforts to be indemnified for the wrongs that were
9 committed against Pee Dee Health Care. I had a Director
10 of Business Operations, who can testify as to damages.
11 I don't know about the damages. I didn't do that. I'm
12 the CEO of the organization. I admit that I am the CEO
13 of the organization. But, I am also the general counsel
14 to the organization. I have a right to bend over to
15 defend my client. And Pee Dee Health Care is my client.
16 If they had a fact that would show this court, or
17 demonstrate to this court that this court could hang its
18 hat on, that I was a necessary witness, which the cases
19 have said you can't get it from some place else, that
20 may be one thing. But the truth of the matter is, they
21 don't have a defense. We have fifteen to sixteen
22 different causes of action. But they all basically come
23 down to the same thing. He didn't tell the truth. Now,
24 I understand that he says that he forgot. That is what
25 the documents show. We have given this court over five

1 hundred pages of documents, or seven hundred pages of
2 documents that were produced during discovery. One of
3 them is a letter that Mr. James referred to. We didn't
4 see until it was produced to us during discovery from
5 First Health and by Mr. James, where Mr. James produced
6 it to us as an admission against Dr. Thompson and what
7 he said. Yeah, I didn't do it. I forgot. This case is
8 right for Summary Judgment, which is why we made the
9 Summary Judgment Motion. This case should never go any
10 further. However, I understand them wanting to take
11 depositions on the issue of damages. I have no problem
12 with that. I don't know what I could offer as a fact
13 witness, if this court ordered me to. But, I can tell
14 the Court right now that I would claim attorney client
15 privilege. Because, my only contacts were with Dr.
16 Matthews and Dr. Cohen. Now, I may have had other
17 discussions with Mr. Matthews, but I guarantee you I
18 would claim attorney client privilege. And Mr. Matthews
19 would tell you that he handled everything, not me. I am
20 happy to tell them, I am happy to put him on the stand
21 right now, if the Court would like. I had nothing to do
22 with this. Dr. Thompson called me. I disclosed that.
23 They have now turned it around and said somehow or
24 other, and go on to say that I have done nothing
25 improper yet. The accusations are of impropriety. They

1 are wrong. He sent documents to our office that came to
2 my desk, that I have fully produced to them. Does it
3 have any relevance? I looked at them, and I didn't ---
4 they appeared to be when Mr. James was discussing it.
5 Bets me? That is what he sent me. I put them in here.
6 That is what he sent me. The rest of the information is
7 information that we sent out subpoenas for. We provided
8 it to them during discovery. They sent out Freedom of
9 Information Request. They provided to us during
10 discovery. Mr. James' answer reads like the Court
11 should just give Summary Judgment per se. They admitted
12 to the issue of loyalty. They admitted several factors,
13 which I have named in this --- in my Return. And,
14 again, I apologize, because I am inflamed about this.
15 And I do feel attacked. And I do hope that this court
16 at least understands why I would feel attacked.

17 THE COURT: All right. Let me ask you
18 counsel, how many employees does your company have now?

19 MR. MEGNA: Seventy-five or eighty at least.

20 THE COURT: Well, let's do this. I don't
21 think it is necessary --- Is there anything further in
22 your argument?

23 MR. MEGNA: No, sir.

24 THE COURT: I don't think it is necessary to
25 take a reply.

1 What I am going to do is, I am going to stand
2 down and consider this for a few moments. I will be
3 back and tell you whether I need to take it under
4 advisement, or whether I am prepared to rule.

5 We will be at ease now for approximately ten
6 minutes.

7 MR. MEGNA: Thank you, Your Honor.

8 MR. JOSEY: Thank you, Your Honor.

9 THE COURT: Thank you.

10 (Whereupon, a recess was taken from
11 2:32 p.m. until 2:45 p.m..)

12 RULING OF THE COURT

13 THE COURT: All right. I have had an
14 opportunity to review this. Thank you for your patience
15 while I was doing so. And the Court is prepared to rule
16 at this time. It is not necessary to take this matter
17 under advisement.

18 Mr. Megna, respectfully, sir, Rule 3.7 is
19 clear in its terms. It says that a lawyer shall not act
20 as an advocate in a trial in which he is likely to be a
21 necessary witness.

22 While you dispute the fact, that there are
23 certain issues, questions that need to be asked of you
24 because there is an exclusion by either the Dead Man's
25 Rule, or perhaps other evidentiary policies; the Court

1 is not persuaded by that. The Court cannot require one
2 party, who happens to be the defendant here, that is
3 the party being sued, to somehow limit whom they may
4 call as a witness, or what they may ask of those
5 witnesses. I think that Document HH alone, and the
6 circumstances that surround that letter, tell me that
7 you may be a witness, and for that reason, the Court is
8 going to grant the Motion to Disqualify you.

9 I am persuaded by the argument that Rule 1.7
10 and 1.9 under the Professional Conduct Rules, which have
11 to do with conflict, would not prevent your partner from
12 representing the plaintiff in this case. But, I do find
13 that you are likely to be a necessary witness.

14 Also, I asked you during this prior argument
15 what the size of your company was. I simply don't find
16 that it is too great of a hardship upon your company to
17 have other counsel, which of course could be your law
18 partner. This case is early in its process, although it
19 has been pending for while. And thus, I don't find that
20 there is any disadvantage to your party that cannot be
21 overcome. It appears to me, Mr. Matthews, from my
22 review of the file, as well as the probate proceedings
23 downstairs has been involved in this, if not directly,
24 certainly tangentially from early on.

25 So, for all of these reasons, the Court grants

1 the Motion to Disqualify you as counsel.

2 MR. MEGNA: Is the Court granting the Motion
3 Your Honor, just for at trial, as the rule says, or just
4 period?

5 THE COURT: No, sir. Period. It begins
6 now. And that was the next point that I wanted to
7 raise.

8 I don't know whether we want to go forward
9 with any other hearings today, or just by switching out
10 and let Mr. Matthews --

11 MR. MEGNA: This is the wrong Mr. Matthews.

12 THE COURT: Is the other Mr. Matthews in the
13 courthouse?

14 MR. MEGNA: No, sir. We would probably,
15 respectfully, Your Honor, ask two things.

16 Number one. We would request if the Court
17 took into consideration the exhibit that they attached
18 to their Motion, that there is nothing in there --- it
19 is about a different organization completely. And the
20 second thing is, we would ask the Court not to take up
21 anything further, because the Supreme Court has said
22 that this is an immediately appealable issue. And that
23 I would need to talk with my partners whether or not we
24 are going to appeal the issue.

25 THE COURT: Well, I think it is a better

1 course regardless of what response you may make to this,
2 is to not go forward today any further, because you are
3 not able to argue it. And Mr. Ben Matthews is not here.
4 They were not able --

5 MR. MEGNA: Right. I agree with that, Your
6 Honor.

7 THE COURT: All right. Very good. Then I
8 am going to conclude this matter.

9 Now, let's do this though. In case there is
10 an appeal, which is certainly your right and your
11 prerogative --

12 MR. MEGNA: Yes, sir.

13 THE COURT: I am going to ask that the
14 prevailing party here prepare an Order, which basically
15 will memorialize what I just said.

16 Mr. Josey, if you would prepare an Order
17 within ten days of today's date. Forward it to me
18 electronically at jbaxley1c@sccourts.org. That will
19 come to Ms. O'Neal, my law clerk. Please put it in Word
20 format, that is the only one they give us. And we will
21 of course, review it, make any changes we believe are
22 necessary. Please give Mr. Megna the courtesy of
23 looking at it in advance. And, of course, this decision
24 will not be final until the formal Order is served on
25 you, thus there is no beginning of an appellate period -

1 -- appeal period today for you.

2 MR. MEGNA: Right.

3 THE COURT: It will be when the formal order
4 is --

5 MR. MEGNA: -- Yes, sir. Until the Order
6 itself is signed.

7 THE COURT: And served on you.

8 MR. MEGNA: And served on me.

9 THE COURT: Yes, sir.

10 MR. MEGNA: Right.

11 THE COURT: All right. Very good. That
12 concludes this matter.

13 Have a good day.

14 MR. JOSEY: Thank you, Your Honor.

15 MR. JAMES: Thank you, Your Honor.

16 MR. MEGNA: Thank you, Your Honor.

17 (Whereupon, this hearing was
18 concluded at 2:53 p.m. on Wednesday, March 16, 2011.)

19 -- END OF TRANSCRIPT --

CERTIFICATE OF REPORTER

41

I, the undersigned, Pamela Ozment-Cartee, official Court Reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the hearing of the above captioned case, relative to appeal, in The Court of Common Pleas in Darlington County, South Carolina, on the 16th day of March 2011.

I do further certify that am neither, of kin, counsel, nor interest of any party hereto.

July 5, 2011

A handwritten signature in cursive script, appearing to read 'Pamela Ozment-Cartee', is written over a horizontal line.

Pamela Ozment-Cartee
Circuit Court Reporter

State of South Carolina)
County of Richland)

In The Court of Common Pleas
Fifth Judicial Circuit
2007-CP-40-576

James A. Anastasi,
Plaintiff,

vs.

Transcript of Record

Gina L. Anastasi Lee, Lance
Wilson, Willis Goodwin, and
Richland County Clerk of
Court,

Defendants.

January 18, 2012
Columbia, South Carolina

B E F O R E:

The Honorable James R. Barber, III, Judge

A P P E A R A N C E S:

Douglas N. Truslow, Esquire
Attorney for the Plaintiff

Thomas G. Earle, Esquire
Attorney for Defendants Wilson and Goodwin

Tony R. Megna, Esquire
Benjamin R. Matthews, Esquire
Attorneys for Defendant Lee

Elizabeth B. Harris, CVR-M
Circuit Court Reporter

I N D E X

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E X H I B I T S

<u>No.</u>	<u>Description</u>	<u>I.D.</u>	<u>Ev.</u>

No Exhibits Introduced.

1 THE COURT: All right, this is the case of Anasti vs.
2 Anasti, et al. Mr. Truslow requested a status conference
3 apparently, and apparently my law clerk got him to get
4 everybody together, and we're all here this morning. So,
5 if y'all would tell everybody who you are for the court
6 reporter so Ms. Harris will know exactly who is speaking
7 when you speak.

8 MR. TRUSLOW: Your Honor, thank you for accommodating
9 us. I'm Doug Truslow; I represent the plaintiff in this
10 action. Mr. Tom Earle is here; he represents Wilson and
11 Goodwin. They are defendants. There is ---

12 THE COURT: Mr. Megna.

13 MR. TRUSLOW: Mr. Megna and Mr. Matthews, they
14 represent Ms. Lee, and I think ---

15 THE COURT: Does somebody represent the clerk of
16 court?

17 MR. TRUSLOW: They were only involved as a
18 stakeholder. They're not necessary at this point in time.
19 This has all been resolved.

20 THE COURT: All right. So ---

21 MR. TRUSLOW: Your Honor, Your Honor.

22 THE COURT: Y'all have Ms. Lee?

23 MR. MATTHEWS: Yes, sir.

24 MR. MEGNA: Yes, Your Honor, Tony Megna and Ben
25 Matthews.

1 THE COURT: All right, who has Lance Wilson? Mr.
2 Earle, you do?

3 MR. EARLE: Yes, Your Honor.

4 THE COURT: And who has Willis Goodwin?

5 MR. EARLE: I do.

6 THE COURT: Oh, you got both of them? Okay, good.

7 All right, tell me what we need to talk about here,
8 Mr. Truslow.

9 MR. TRUSLOW: Your Honor, we're requesting a status
10 conference. We've asked that this be considered to be on-
11 the record because I wasn't sure what claims were going to
12 be made, and whether an assertion would be made in case the
13 matter shouldn't go forward at this time. There are two
14 basic issues: setting of a damages hearing, and setting of
15 a Rule 11 sanctions hearing.

16 THE COURT: All right, is there already a judgment in
17 this case?

18 MR. TRUSLOW: Yes, sir. By way of history, this was a
19 real-estate matter. It went up on appeal. It's got a
20 tortured history of coming back for, for certain factual
21 findings that are, that are in large part the basis for
22 Rule 11 sanctions:

23 From that point in time, after the lower court ruled
24 in my client's favor, there was -- ultimately an appeal was
25 commenced, but there was a filing of bankruptcy by Ms. Lee

1 which stayed proceedings until the stay was lifted. The
2 Court of Appeals ruled in my client's favor. There was a
3 petition for writ of certiorari; that was also resolved in
4 my client's favor. An argument was made that the matter
5 was stayed because of appeals by Ms. Lee in a bankruptcy
6 court. That was rejected by the bankruptcy court on least
7 two occasions, by the federal district court on at least
8 two occasions, and by the Fourth Circuit Court of Appeals
9 most recently.

10 We -- quite frankly, the plaintiff didn't think that
11 anything that was going on in appeal in the Fourth Circuit
12 had anything to do with the case since the, since the
13 Supreme Court of the State of South Carolina had ruled it
14 in view of comity. But be that as it may, we waited until
15 that was resolved. I thought that was going to be
16 inevitable that she was going to lose. She did.

17 So, the matter is now ripe for two things. For a
18 damages hearing, and that will involve -- it won't involve
19 Ms. Lee because she's filed for bankruptcy and has some
20 limited protection. Your Honor, we could, we could
21 potentially go beyond that, but there's no need. We're
22 going to be dealing with -- in the, in the damages hearing
23 would be my friend and Mr. Goodwin and Mr. Wilson. I don't
24 believe Ms. Lee would be even involved in that because
25 we're not seeking dollars from her, and especially given

1 her bankruptcy.

2 So, the damages hearing will be, will involve just
3 myself, Mr. Earle, and our respective clients. We think
4 that that probably ought to be resolved first because that
5 goes almost ---

6 THE COURT: All right, let me ask you. How do you --
7 I mean, is that a normal damages hearing, fifteen minutes
8 or so? Is it going to be, going to be protracted because
9 if I'm going to need ---

10 MR. TRUSLOW: I would think that it would take no more
11 than two hours. We're talking about rentals for -- since
12 2007 or so. So, we're, you know, we're going to have a lot
13 of money at stake.

14 Mr. Earle has had some -- he's one of the nicest -- I
15 know Your Honor knows, but he's one of the nicest, nicest,
16 most conscientious professionals I've ever had the pleasure
17 to deal with. He's had some recent health problems, and as
18 you would expect, I would certainly accommodate whatever,
19 whatever his needs are, and my client would. But we're
20 probably going to need two hours for that.

21 THE COURT: All right. So, you're requesting a
22 damages hearing with respect to Mr. Wilson and Mr. Goodwin
23 only. You think it will take two hours?

24 MR. TRUSLOW: Yes, sir.

25 THE COURT: Y'all agree Ms. Lee is not, would not be

1 involved in that?

2 MR. MEGNA: Yes, sir, Your Honor.

3 THE COURT: All right, and then after that, you're
4 going to request, assuming damages are awarded, you're
5 going to ask the court to set a Rule 11 hearing on
6 sanctions against all of them or?

7 MR. TRUSLOW: No. That would be only against Mr.
8 Megna and/or Mr. Matthews. It's them and the order is
9 without -- I'm not here to argue the case, Your Honor. I'm
10 just trying to get this thing scheduled.

11 THE COURT: Well, I'm just trying to figure out.

12 All right, Mr. Earle, what are you -- tell me about
13 your clients or you and when y'all will be available.

14 MR. EARLE: Your Honor, I've been diagnosed with MG,
15 and it's sort of doubtful how speedily I'll recover. I can
16 speak today; tomorrow I may not be able to speak. So, I
17 would ask for protection until the end of March to see if
18 I'm going to improve, or if not, I'll need to get
19 substitute counsel for that damages hearing. It's very
20 doubtful at the moment whether or not I will be able to
21 handle it.

22 THE COURT: All right, do you concur is that it's
23 probably a two hour hearing?

24 MR. EARLE: Yes, Your Honor.

25 THE COURT: All right. Well, I'll look and see what

1 kind of damages hearing we can -- how long if, in fact,
2 somebody is substituted, Mr. Earle, how long would it take
3 them to get up to stuff?

4 MR. EARLE: I think it would take them about two
5 weeks.

6 THE COURT: All right. So, you will be able to make a
7 decision by March 1st, and we could have a hearing some
8 time after March 15th?

9 MR. EARLE: Yes, Your Honor. Yes, Your Honor.

10 THE COURT: Any problems with that, Mr. Truslow?

11 MR. TRUSLOW: No, Your Honor.

12 THE COURT: All right. Well, I'll have to find out
13 what nonjury court we have and when it is, and I'll see
14 about trying to schedule some hearing.

15 I guess y'all don't care since you're not involved in
16 that process.

17 MR. MEGNA: No, Your Honor.

18 THE COURT: Although we'll give y'all notice so if you
19 want to appear for whatever reason, you're certainly able
20 to do so.

21 All right, well, I'll -- let me ask you this. I don't
22 know whether your clients have any ability to respond to a
23 judgement, Mr. Earle. Your position may be that they got
24 nothing anyway. So, whatever anybody got against them,
25 it's just a piece of paper. But is there any chance that

1 -- do your clients have any ability to respond to a
2 judgement?

3 MR. EARLE: I would say very little. I would say very
4 little. The -- I'm trying to surmise. I would guess, and
5 this is just my guess, that the damages hearing primarily
6 would relate somewhere to the Rule 11 sanctions. I'm not
7 sure, but I would think.

8 THE COURT: I was just curious as to whether y'all
9 might be able to resolve it before we tie up two hours of
10 court, and then something happens and it falls off.

11 I assume your primary purpose, Mr. Truslow, is to
12 collect money for your client. So, you know, if in fact
13 some way y'all can resolve -- a little bit of something is
14 worth a lot more than a whole lot of nothing. But I'll try
15 to get you something scheduled after March 15th for two
16 hours.

17 MR. TRUSLOW: And if we can work it out, I'll let you
18 know just as soon as possible.

19 THE COURT: Yes. I mean, even if it's a week before
20 because we can plug in stuff all the time if I got two
21 hours. That basically will ruin a morning if we don't go
22 forward.

23 MR. TRUSLOW: All right. Your Honor, in that regard,
24 one, one request I'm going to have. Since it's nonjury, I
25 don't think it would be a problem. My client lives in

1 Mexico at this point in time, and I assume since it's
2 nonjury, we'll have a date certain.

3 THE COURT: Well, as much as a day certain -- you
4 know, there may be three cases set at 9:00.

5 MR. TRUSLOW: That day certain?

6 THE COURT: Yeah, you'll have a day. You'll know what
7 day the hearing is.

8 MR. TRUSLOW: Yes, sir. Thank you.

9 THE COURT: And you'll know. I don't know. Sometimes
10 they'll set them up. They'll give each one of them fifteen
11 minutes, thirty minutes, whatever time they claim they
12 need. And sometimes they'll, as you know, put four of them
13 at 9:00; and three of them will drop off. But yeah, y'all
14 know the time frame, and the roster should be out several
15 weeks ahead. I don't know how much time you need to get
16 your client here.

17 MR. TRUSLOW: All right.

18 THE COURT: Matter of fact, it will probably be on the
19 Internet thirty days ahead of time.

20 MR. TRUSLOW: Yes, sir.

21 THE COURT: All right, anything y'all want to say?

22 MR. MEGNA: Yes, Your Honor. Only that the -- number
23 one, that Mr. Truslow made this same motion before the
24 Court of Appeals, motion for sanctions, and that we, since
25 we're on the record, we would like -- appreciate having the

1 opportunity to have this filed with the record. And the
2 Court of Appeals unanimously denied it on May 29, 2011.
3 And he did not appeal that order to the South Carolina
4 Supreme Court, and the case law is very plain. That
5 becomes the law of the case, right or wrong.

6 In addition to that, we would apparently all agree he
7 wrote me a letter on January 9, 2012, saying that the
8 underlying motions, there are some underlying motions from
9 his side and our side to compel discovery and other motions
10 similar to that, and that they are moot as a practical
11 matter.

12 The federal court actions have nothing to do with the
13 state court actions, and that our position is very simple.
14 And I believe the court has the authority to deal with this
15 now. That the Court of Appeals has ruled on this. It's
16 ruled unanimously on this. He has no -- he has nothing,
17 and rightly or wrongly, he didn't appeal that and it
18 becomes the law of the case. And if for no other reason --
19 may I approach the bench and file this?

20 THE COURT: Well, I'm not here to -- this is a status
21 conference, not a motions hearing. It wasn't noticed as
22 anything like that. You know, if y'all can't agree and
23 there is a motion, it will probably be scheduled for a
24 hearing, and then you can make your argument at that time.

25 MR. MEGNA: Right. Your Honor, as long as it's a

1 status conference, may I have the opportunity also? It's
2 kind of hard to do a motion to dismiss the motion for
3 sanctions. But the plaintiff would like to have an
4 opportunity after they finish whatever they're finishing --
5 or the defendant Ms. Lee would, to file a response and file
6 a counter motion to whatever he has filed with the court as
7 a part of the status conference. And we'll have -- just
8 need a few weeks, thirty days, fifteen days.

9 THE COURT: All right, tell me that again now. You
10 want to file something, a motion? You want to file your
11 own motion for sanctions under Rule ---

12 MR. MEGNA: Well, I don't know if I want to file for
13 sanctions. I want to respond to -- if we file any response
14 to what ---

15 THE COURT: We can go ahead and do that.

16 MR. MEGNA: Well, I could if you wanted me to. I just
17 thought if you'd wait until this damages hearing was over.

18 THE COURT: Well, I don't know. I mean, his motion is
19 pending. I don't know. See, I don't know what this has to
20 do with motions for sanctions.

21 MR. MEGNA: Right.

22 THE COURT: I mean, I'm just trying to accommodate
23 y'all.

24 MR. MEGNA: Yes, sir. I understand, but I'm happy to
25 file in the next few weeks anyway. That's fine.

1 THE COURT: I wasn't planning on setting the Rule 11
2 hearing until after the 15th, so it may be the term after
3 that. But again, I just turn it over to the scheduling
4 clerk, and he does all that stuff, and so you would
5 probably have -- I mean, what is today? You got two months
6 before the earliest that his hearing would be held.

7 MR. MEGNA: Okay. That will be fine.

8 THE COURT: So, I mean, you can just keep that in
9 mind.

10 MR. MEGNA: I will. Thank you.

11 THE COURT: I would tell you even if it comes up
12 short, whatever you want to file, file it.

13 MR. MEGNA: Okay. Thank you, Your Honor.

14 THE COURT: Even the day before the hearing,
15 understanding that if you send it to the clerk, the judge
16 won't get it because it will languish in the clerk's office
17 for two months before it gets in a file. So, make sure
18 that whoever hears it gets a copy of whatever you file.

19 MR. MEGNA: I will. Thank you. May I file this today
20 since it's on the record now?

21 THE COURT: Sure.

22 MR. MEGNA: Thank you.

23 THE COURT: Well, you'll just have to take it to the
24 clerk.

25 MR. MEGNA: Sir?

1 THE COURT: You'll have to take it to the clerk to
2 file.

3 MR. MEGNA: Okay.

4 THE COURT: We don't -- you can't file them in here.
5 Just take it in there and give it to Randy or Athena.

6 All right, I thank y'all, and you will be noticed.

7 MR. TRUSLOW: It sounds like we don't, we don't even
8 need to deal with the setting of the Rule 11 hearing at
9 this point.

10 THE COURT: Well, didn't you tell me you wanted -- I
11 can set the Rule 11 hearing right now. I mean, the next
12 term that I can get, I think we're scheduled up through the
13 end of this month on nonjury, but there's probably a
14 nonjury term some time in February I can put the Rule 11
15 on.

16 MR. TRUSLOW: I was thinking that the Rule 11 probably
17 ought to go after. I think both sides ---

18 THE COURT: Well, based on what Mr. Earle told me, I
19 assumed that was the case.

20 MR. TRUSLOW: Yes, sir.

21 THE COURT: So.

22 MR. TRUSLOW: We would just ask that it be some time
23 after March 15th. Give the -- Ms. Lee's counsel time to be
24 adequately prepared, and if they have concerns, they can
25 let me know or they can file whatever motions they deem

1 appropriate.

2 THE COURT: How long is the Rule 11 going to take?

3 MR. TRUSLOW: Your Honor, I'm guessing -- I've started
4 to list who I thought the witnesses were going to be. I'm
5 guessing nonjury, regrettably at least a day. And I can
6 tell you some of the witnesses, I would expect -- here are
7 some of them.

8 THE COURT: Well, I don't need to know that.

9 MR. TRUSLOW: Yes, sir. All right.

10 THE COURT: But that's going to be, that's going to be
11 difficult finding a day, and that won't be a -- that will
12 probably go on a nonjury trial week. And it would be --
13 you'll have a roster meeting, and you'll just have to show
14 up because we don't, we don't have days we can ---

15 MR. TRUSLOW: I realize. It's a, it's a very serious
16 matter and ---

17 MR. MEGNA: Could we ask Your Honor ---

18 MR. MEGNA: --- they're entitled to their day in
19 court.

20 MR. MEGNA: Could we ask Your Honor for a list? This
21 is the first we've heard of this. Could we also request
22 for a list of all the witnesses? And that's my concern.
23 We have no notice of what he's going to do at this point in
24 time so we can address it.

25 THE COURT: Well, you want to tell him who your

1 witnesses are?

2 MR. TRUSLOW: I don't have any problem at all with
3 that. This is a preliminary list that would be here would
4 be Desa Ballard, possibly Mr. Earle, depending on where
5 this goes. Curtis Dowling, Rene Josey, Celeste Jones,
6 Steve Blacatto.

7 THE COURT: And all these people are going to come in
8 and testify as to some ---

9 MR. MEGNA: Nothing related to this case.

10 THE COURT: Well, I don't know. I mean, they're all
11 going to -- this is not all cumulative, is it?

12 MR. TRUSLOW: I think each one stands separately.

13 THE COURT: Well, I know they're all well respected
14 attorneys, but we're not going to hear five or six lawyers
15 coming in to say the same thing: that these are bad
16 fellows. If that's what you're going to say, I mean, two
17 people can say that.

18 MR. TRUSLOW: It could be, it could be Ms. Ballard and
19 myself. I think he has lot of the documentation because
20 we've provided it before, but if he needs something ---

21 THE COURT: Well, I would tell you to write him and
22 tell him who -- what prospective witnesses you might have.
23 Now, I can't promise you you're going to hear -- we're
24 going to hear seven or eight lawyers come in and say
25 basically the same thing.

1 MR. TRUSLOW: It's on different cases with Mr. Megna.

2 THE COURT: Well, I don't know about that.

3 MR. TRUSLOW: May relate, maybe not. We're not
4 arguing that right now.

5 THE COURT: Well, I'm arguing it because I've got to
6 schedule time.

7 MR. TRUSLOW: Oh, yes.

8 THE COURT: Y'all understand that.

9 MR. MEGNA: I would ask the court to please consider
10 that other cases have no bearing on ---

11 THE COURT: Well, that will be up to the hearing
12 judge. I can't rule at this point in time.

13 MR. MEGNA: Well, if I ---

14 THE COURT: Let me tell y'all something. There's very
15 little benefit to being the administrative judge in the
16 Fifth Circuit of Richland County, but there is one: you
17 don't hear nonjury. So, I probably will not be involved in
18 this because of that prohibition. But you'll have to take
19 that up with whoever the hearing judge is.

20 MR. TRUSLOW: Thank you, Your Honor.

21 MR. MEGNA: Well, can I ask just one more thing, Your
22 Honor?

23 THE COURT: Sure.

24 MR. MEGNA: Since this is a status conference. If
25 we're going to do this, and obviously that's the -- your

1 court's -- Mr. Truslow's decision, it would seem only fair
2 that we have an understanding that he detail what his
3 issues are so that we can be prepared to counter them.
4 Otherwise, we aren't prepared to counter them.

5 THE COURT: Well, I don't know how that would work.
6 But, I mean, y'all, y'all need to have some conversation
7 about it.

8 Doug, I'm probably not going to schedule this for more
9 than a half a day. You're just going to have to fit it in
10 in a half a day.

11 MR. TRUSLOW: All right, sir.

12 THE COURT: And I may just go ahead and schedule it on
13 a motions thing because -- I mean, I don't want to tie
14 lawyers up sitting around for days at a time waiting to see
15 whether a case comes for trial.

16 But, you know, tell them what your complaints are
17 against -- is it against the clients or the lawyers?

18 MR. TRUSLOW: Lawyer. You can look at the record and
19 you can see the orders of Judge Manning and draw your own
20 conclusions, and you can look at the summary judgement
21 order and the transcript and probably ---

22 MR. MEGNA: And the Court of Appeals has already
23 denied all those motions.

24 THE COURT: Well, that may, that may free up that
25 judge quickly, whoever it is.

1 MR. MEGNA: As long as we understand exactly what he's
2 dealing with and that we can respond. That's all we ask.

3 THE COURT: Well, I can't -- I don't know anything
4 about the case, Mr. Megna, so I cannot speak to ---

5 MR. MEGNA: No, sir, I'm not ---

6 THE COURT: --- any of the allegations in the ---

7 MR. MEGNA: I'm not asking you to.

8 THE COURT: --- in the motion.

9 MR. MEGNA: I just would like for him to ---

10 THE COURT: Well, talk, talk to Mr. Truslow. Y'all
11 have some conversations.

12 All right, y'all will get a notice as to a hearing.

13 MR. TRUSLOW: Thank you.

14 MR. MEGNA: Thank you, Your Honor.

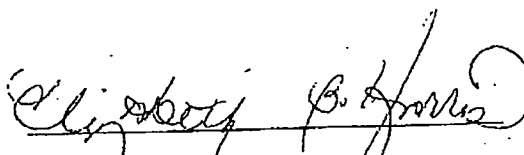
15 THE COURT: Y'all have a nice day.

16 --- END OF TRANSCRIPT OF RECORD ---

CERTIFICATE

I, THE UNDERSIGNED ELIZABETH B. HARRIS, CERTIFIED
VERBATIM OFFICIAL COURT REPORTER FOR THE FIFTH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO
HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE
AND COMPLETE TRANSCRIPT OF RECORD OF ALL THE
PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING
OF THE CAPTIONED CAUSE, RELATIVE TO APPEAL, IN THE
CIRCUIT COURT FOR RICHLAND COUNTY, SOUTH CAROLINA, ON
THE 18TH DAY OF JANUARY, 2012.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST IN ANY PARTY HERETO.


ELIZABETH B. HARRIS, CVR-M

COLUMBIA, SOUTH CAROLINA

MARCH 28TH, 2012

STATE OF SOUTH CAROLINA)
COUNTY OF DARLINGTON }

COURT OF COMMON PLEAS

PEE DEE HEALTH CARE, P.A.)

PLAINTIFF,)

v.)

ESTATE OF HUGH THOMPSON,)

DEFENDANT.)

TRANSCRIPT OF RECORD

10-CP-16-332

10-CP-16-333

March 27, 2014
Bennettsville, South Carolina

B E F O R E :

THE HONORABLE J. MICHAEL BAXLEY, JUDGE

A P P E A R A N C E S:

JAMES M. GRIFFIN, ESQ.
Attorney for the Plaintiff

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Circuit Court Reporter

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(There were no exhibits submitted.)

1 THE COURT: All right, we're now here -- I
2 see everyone is present in the matter of Pee Dee
3 Health Care versus Thompson, and this is actually a
4 Darlington County case which is 2010-CP-16-332, as
5 well as 633. Let's come across and let everyone
6 introduce themselves so our record will be clear.
7 Let's begin with the movant today.

8 So Mr. Josey, go ahead, sir.

9 MR. JOSEY: Yes, sir. Rene Josey of
10 Turner Padget, I'm here for the defendant. And I'm
11 accompanied by Jay James of Darlington.

12 THE COURT: All right, thank you. And now
13 let's switch ---

14 MR. JAMES: We have one of our clients
15 Louise Thompson is here and Hugh Thompson, Junior
16 couldn't make it.

17 THE COURT: Welcome, Mr. Thompson. Now
18 let's switch to what was initially the plaintiff's
19 side of the case. Counsel, please introduce
20 yourselves.

21 MR. GRIFFIN: Good afternoon, Your Honor,
22 Jim Griffin here on behalf of Pee Dee Health Care,
23 PA, as well as Tony Megna, Ben Matthews, and the law
24 firm of Matthews and Megna, LLC.

25 THE COURT: Very good. Mr. Megna,

1 welcome.

2 And gentlemen, the first thing I wish to
3 do is issue an order that we advised you by email
4 the Court was going to issue which is to dismiss the
5 criminal contempt proceedings that were pending
6 against Mr. Megna. The reason for that being is
7 that this Court has announced its retirement from
8 the judiciary effective April 15th. We are
9 convinced by the arguments of Mr. Griffin that this
10 Court should not be the sitting decider of a case
11 that really was initiated by the Court; but then to
12 assign this to another judge and then leave the
13 judiciary, the Court felt was inappropriate as well.
14 So for reasons of judicial economy, the steep
15 learning curve involved for any other judge who
16 would come into this matter, the Court has just
17 simply made the decision to dismiss the criminal
18 contempt proceeding.

19 I have a, actually two copies of the
20 formal written order; and Mr. Griffin, I'm gonna
21 give those to you, sir, and ask if you would please
22 take responsibility to file those. I give you two
23 because it may be that it needs to be filed in both
24 the Richland and the Darlington cases.

25 MR. GRIFFIN: Yes, sir.

1 THE COURT: And therefore, those are for
2 you, sir.

3 MR. GRIFFIN: Thank you.

4 THE COURT: All right. Now we're here
5 today on Mr. Rene Josey's motion for sanctions
6 against Mr. Megna and perhaps the Pee Dee Health
7 Care as well; but we'll be glad to hear from you,
8 you're the moving party.

9 MR. JOSEY: Thank you, Judge. And I'm
10 glad that you have squeezed this in before your
11 retirement.

12 THE COURT: Glad to do so.

13 MR. JOSEY: As you know, we have lived
14 with this case for quite a while. We are not here
15 because of hurt feelings on my part or hurt feelings
16 on Mr. James' part or uncivil conduct. We deal with
17 that, we can deal with that, that's not why we're
18 here, Judge. We're here because this motion was
19 made and I've never made a motion like this before,
20 but it was made in this case -- and I don't think
21 Mr. James has either -- because of a pattern of
22 manipulative conduct from the beginning of the
23 litigation up through the very end. And that
24 manipulative conduct has undermined the perceived
25 integrity of this court. It hasn't undermined the

1 actual integrity of the court, but it has undermined
2 the perception of integrity of this court and the
3 perception of integrity of the legal profession.
4 And at the same time it has done that damage it has
5 cost the estate and ultimately the heirs of this
6 exorbitant legal cost.

7 Mr. Griffin in his response this week --
8 and Your Honor may or may not have had a chance to
9 read it -- suggests that, well, let's let bygones be
10 bygones, let's just let this matter be resolved by
11 the Office of Disciplinary Counsel. Judge -- and
12 let the matter end. We've been wanting this matter
13 to end for three-and-a-half years now. You did
14 order an ODC report to be made in the other
15 sanctions half of this case. Mr. James and I were
16 not advocates in that case. We weren't the moving
17 parties in that case. I haven't seen what report
18 was made; but I assume that report related to the
19 basis for those sanctions motions, which was none of
20 the conduct that we bring to you today. We haven't
21 sought to use ODC, the Office of Disciplinary
22 Counsel, as some kind of tool in our litigation
23 leverage. I don't think that's appropriate, and we
24 haven't done that. And the bottom line is that the
25 Office of Disciplinary Counsel cannot rectify the

1 damage that's been done to this defendant, to this
2 party, and really can't fully rectify the damage
3 that's been done to the perception of integrity of
4 the court and the legal process.

5 That having been said, Judge, the motion
6 itself outlines a whole list of issues that we feel
7 give rise to the basis for the sanctions. Our
8 motion, of course, is based on three legal
9 authorities. The first being the frivolous civil
10 proceedings act which I understand you had a case
11 with that this morning so, and that's the statutory
12 basis. But in addition to the statutory basis and
13 independent from the statutory basis, we've made
14 this motion based on Rule 11. That is important to
15 note because, as you know, there's been a motion
16 made to strike our request for sanctions as
17 untimely; and I don't know if you want me to go into
18 that now or wait or ---

19 THE COURT: Go ahead if you wish.

20 MR. JOSEY: But our Supreme Court has
21 recognized, and in fact, has applied, or the Court
22 of Appeals has applied, a different deadline for
23 statutory sanctions versus Rule 11 sanctions. And
24 so for that reason I think the motion to strike
25 could be denied based on Rule 11 basis alone. In

1 addition, we have a third body of authority that we
2 think support sanctions, and that's the inherent
3 power of the court to protect itself under Article
4 3, to protect its integrity. And I cited in our
5 response to the motion to strike a US Supreme Court
6 case, Nasco, in which the court emphasize - I first
7 cited a Fourth Circuit case in the original motion.
8 This Nasco case recognizes the fact that courts have
9 an inherent ability to control manipulative conduct
10 and to sanction manipulative conduct that undermines
11 the integrity of the legal process; and it's, in
12 fact, broader potentially than Rule 11 or the
13 Frivolous Civil Proceedings Act.

14 To turn for a moment to the timeliness
15 issue which has been raised, as you know this is a
16 unique case. I guess every case is unique, but this
17 one is particularly unique. And when this case was
18 nearing its conclusion in your court, Mr. James and
19 I were dealing with how can we best serve our client
20 by minimizing what has already been a very expensive
21 process trying to get to the ultimate resolution of
22 the process before the then Court of Appeals without
23 stirring up more litigative gyrations, if you will,
24 than was warranted, were warranted. That is why we
25 did not file a motion for sanctions after the

1 probate appeal which is case number 633. We could
2 have filed a motion for sanctions theoretically in
3 the ten days that followed that decision. We didn't
4 file because these companion cases for all intents
5 and purposes have been consolidated; they were
6 consolidated by the Court of Appeals. And the
7 ultimate decision, the final disposition of the case
8 was not ripe at that point.

9 In the ten days after you decided to grant
10 summary judgment which you issued that ruling
11 essentially by letter, you sent a letter saying,
12 here's what I'm going to rule, here's why I'm going
13 to rule it, and then you called on the preparation
14 of a formal order. But as soon as you wrote that
15 letter the plaintiff took a second appeal and -- I
16 guess it's the first one that was interlocutory
17 because I guess the probate appeal wasn't
18 interlocutory although it was related. But he
19 took -- plaintiff took a second appeal from your
20 order of disqualification which you addressed at the
21 same time. You had disqualified Mr. Megna. They
22 moved to reconsider the disqualification of
23 Mr. Megna. You decided to deny the reconsideration
24 of that disqualification and grant summary judgment
25 essentially at the same time. But rather than wait

1 on a formal order, they went ahead and rushed to
2 file an appeal from the disqualification and then
3 argue to Your Honor that you had no further
4 jurisdiction. Of course, if you had no further
5 jurisdiction it wouldn't have done us any good to
6 file a motion for sanctions at that time, but all
7 these balls were in the air at the same time.

8 And if you look at the cases, Judge, they
9 all say that a sanctions motion must be filed at a
10 time when the trial court has general jurisdiction.
11 In most of the cases that arises within the first
12 ten days after a dispositive ruling or a dispositive
13 verdict and the post-trial period; and certainly you
14 would have had, you did have, general jurisdiction
15 in those ten days. Although the plaintiff argued
16 you didn't have jurisdiction then because they said
17 that disqualification was such a central key right
18 that it stayed your jurisdiction to do anything
19 else, and they cited a case -- I can't remember. I
20 want to say it involves the Citadel but. Anyway,
21 they cited a case for that proposition. The Court
22 of Appeals ultimately disagreed with them on that,
23 but they argued you did not have jurisdiction to do
24 anything.

25 So if you look at the cases though, even

1 though they all generally arise in a non-appealed
2 situation, so if you look, for example, at the
3 Pitman case which is the first case to say you got
4 this ten day window of general jurisdiction to file
5 a statutory sanctions motion. Pitman didn't say
6 squat about a Rule 11 sanctions motion. It didn't
7 say squat about a general power of the court
8 sanction motion. It only addressed the South
9 Carolina frivolous civil proceeding sanction
10 statutory, and Pitman says those motions must be
11 filed within a period of ten days following a
12 disposition because that's when you have general
13 jurisdiction.

14 Now, no case has yet addressed the
15 jurisdiction that you regain upon a remittitur after
16 an appeal. At least no cases addressed that in a
17 sanctions situation. But there are cases. -- I cited
18 the Muller case and several other cases -- where the
19 Court did approve appellate courts, the Supreme
20 Court, approved of a trial court granting attorneys
21 fees after a remittitur came down and the court
22 regained general jurisdiction to enforce whatever is
23 consistent with the appellate court order. And
24 that's what we urge to you, Judge, is that you have
25 general jurisdiction once again to impose statutory

1 sanctions because the remittitur brings the case
2 back to you and you can do anything that's
3 consistent with the rule. Of course, the ruling was
4 that you were right in granting summary judgment.
5 But even if you are troubled by statutory sanctions,
6 you can grant sanctions under Rule 11 without having
7 to worry about whether Pitman creates a second
8 window or whether there's a second window of time or
9 not because the Beard (ph) case which followed
10 Pitman and said there's a ten day window for
11 statutory sanctions, the Beard case allowed argument
12 on the merits of a Rule 11 motion that was 363 days
13 after the disposition of the case and after it, it
14 didn't go up on appeal as I recall, the summary
15 judgment. So there is a -- there's authority that
16 says you got Rule 11 jurisdiction up to 363 days
17 after you conclude a matter or it's concluded by the
18 Court of Appeals so. Even if you're troubled by
19 statutory sanctions, we think you've got
20 jurisdiction for Rule 11 sanctions, and I think
21 you've got jurisdiction for general power of the
22 court sanctions is to protect the court's integrity.
23 So that's our general response on the motion to
24 dismiss or strike our motion for sanctions.
25 If you look at the evolving opinions in

1 Pitman, of course the statute that was in place of
2 Pitman has been replaced. It's been replaced by
3 somewhat similar sanctions act. And they both said,
4 they both have a triggering event and the triggering
5 event is at the conclusion of a trial. And Justice
6 Hearn -- she was then on the Court of Appeals --
7 said, well, at the conclusion of trial really didn't
8 make sense because if it's truly a frivolous case
9 there's not going to be a trial; and if you have a
10 trial it probably wasn't a frivolous case. So she
11 said that really is sort of a misnomer but we're
12 gonna rule that that means ten days following
13 disposition 'cause that's when you have general
14 jurisdiction. They weren't faced with a case where
15 you had interlocutory appeal followed by probate
16 appeal followed by a summary judgment appeal. So
17 this situation had not been addressed. I guess an
18 argument could be made that maybe it would have been
19 more efficient to do it then, but we believe an
20 argument could be made that it was more efficient to
21 do it now after the dust had settled on all these
22 merits and all and they're set in concrete so to
23 speak.

24 The Muller case involved a mechanics lien
25 statute. It has slightly different language than

1 the statute, the frivolous proceeding statute. The
2 frivolous civil proceeding statute says at the
3 conclusion of the trial the mechanic's lien statute
4 says upon the prevailing party. There's another
5 case that involves the department, not -- social
6 services, and it says you've got a 30 day window.
7 It actually puts a 30 day deadline after the
8 triggering event. The triggering event language in
9 it is final disposition so you got these different
10 statutes. One says after the trial, one says upon
11 prevailing, one says upon final disposition. I
12 would suggest that they are all trying to say the
13 same thing; and that is, you don't want to bring a
14 sanctions motion prematurely. And the sanctions act
15 and mechanic's liens act, in fact, don't put a
16 deadline on after that triggering event prevailing
17 final disposition. They don't say how long you
18 have. It probably is limited by laches, -- I mean,
19 I wouldn't want to wait ten years -- but there is no
20 deadline if you have regained sufficient general
21 jurisdiction which we believe you have.

22 THE COURT: All right. Let's talk about
23 the merits of your request.

24 MR. JOSEY: Okay. Turning to the merits,
25 Judge, as I mentioned it's -- we didn't bring this

1 motion lightly because we knew it would cost money,
2 cost our time. We haven't prevailed but it would
3 cost time and money to deal with, and we don't like
4 practicing law this way; but there comes a point
5 where manipulative patterns of conduct need to be
6 addressed.

7 First of all, the claim in this case, the
8 underlying claim involving the medicare overpayment
9 for a uncredentialed employee, was frivolous from
10 the very beginning and the plaintiffs knew it was
11 frivolous from the very beginning. They knew it was
12 frivolous from the very beginning because they had,
13 in fact, litigated that case in another forum as you
14 noted in your summary judgment, and lost. They had
15 tried to shift blame in that forum and they had
16 failed.

17 Now I know you heard this morning about a
18 case that came out yesterday, the Holmes case. The
19 Holmes case, in fact, involves a similar situation
20 where the trial judge granted summary judgment
21 because of collateral estoppel. And if you look at
22 the pattern of cases where sanctions had been
23 awarded and approved they involve a pattern of
24 conduct often where somebody has litigated something
25 and then re-litigates it and then re-litigates it

1 again or spins it a little bit differently. And I
2 would point you to the Holmes case which it was a
3 doctor who didn't like her credentials at East
4 Cooper Hospital, and I think the sanctions were her
5 fourth shot at the apple. In fact, the opinion
6 talks about she said, I want another bite at the
7 apple. Well, there comes a point where the court
8 shouldn't have to explain what collateral estoppel
9 is about.

10 The other case that points to this
11 repetitive pattern is the Hamer case, and we
12 submitted with our response to the motion to strike
13 a recent last week supreme court approved sanctions
14 fifty some odd thousand dollars, 53,000-dollars,
15 that Judge Buck James had awarded against Howard
16 Hamer in some domestic litigation with his wife
17 where he had brought multiple actions to try to
18 obfuscate the real merits of any issue. In the
19 Hamer case Judge James pointed out also that Rule 11
20 sanctions have a different deadline than statutory
21 sanctions. The reason why it was important in the
22 Hamer case is there was a delay in serving the
23 motion for sanctions. But he pointed out it really
24 doesn't matter as long as the Rule 11 is timely and
25 probably makes the whole issue of timeliness under

1 the statute moot. And we sent you a copy of the,
2 Judge James' opinion, or his order. It's attached
3 to our response to the motion to strike. But you
4 got Holmes where you have a repetitive pattern of
5 litigation and collateral estoppel. You got Hamer
6 where there's multiple litigation. The other case I
7 point to is the Rutland case where there were
8 multiple actions that triggered the court sanctions.

9 And if you look at the US Supreme Court
10 case that I cite, the Nasco case, it involves a
11 pattern of related litigation brought in different
12 forums to try to frustrate the judicial process. So
13 we have a case that was brought, that was
14 collaterally estopped from the day it was filed; but
15 not only that, Judge, once it was filed we suspected
16 that the underlying administrative record would be
17 relevant, might tell us something, so we sent
18 discovery requests for that. And we get back
19 correspondence, Mr. Matthews sent a letter to
20 Mr. James and it's May 24th -- June 24th, 2010 --
21 where Mr. Matthews said, listen, the reason why we
22 lost in front of the administrative law judge, the
23 reason why we lost medicare is not because it was
24 Pee Dee Health Care's fault, it's because it was
25 Doctor Matthews' fault -- I mean, Doctor Thompson's

1 fault, and that fault was imputed to us solely as
2 the employer. And he says in his letter to
3 Mr. James, they found Doctor Thompson had made
4 misstatements to us. Well, we kept asking, give us
5 a copy of that order, give us a copy of that order,
6 and they stalled and they stalled until we sent a
7 Freedom of Information Act request to Medicare and
8 then we got the order. Then I sent a Freedom of
9 Information Act request to the Medicare appeals
10 counsel in Washington and I got their decision. And
11 as you know from your summary judgment orders those
12 decisions say, we're not judging Doctor Thompson,
13 the fault here is Pee Dee Health Care because they
14 have a non-delegable duty.

15 Now in his response this week Mr. Griffin
16 says a couple of things. One of the things he says
17 is that this collateral estoppel is a first
18 impression, that your summary judgment was a first
19 impression and therefore, you know, it shouldn't be
20 sanctionable to take up something that's first
21 impression. It's not first impression. It's not
22 even close to first impression, Judge. The case
23 that he cites is the same case that we've cited
24 moving to summary judgment, the same case that you
25 relied on in granting summary judgment is that Prez

1 Nayan (ph) case. And Prez Nayan says if you've got
2 these elements for collateral estoppel it applies.
3 Now Judge Few in dicta says there may be some
4 situations where an administrative body doesn't
5 qualify with these three factors, but it wasn't the
6 Prez Nayan case and it wasn't your case. Those
7 three factors, identity of the party during the
8 litigation, full chance to litigate, and same issue.
9 You went through all that when you decided to grant
10 summary judgment. They knew all that when they
11 filed this complaint on day one. They knew that
12 when they didn't want to give us a copy of the
13 Medicare decisions. And that's not new law. That's
14 what Holmes says. Collateral estoppel is a
15 situation that shouldn't happen because they should
16 know better than to bring this case. And Holmes,
17 they approved the sanctions yesterday.

18 Now, in addition, Mr -- in addition to the
19 collateral estoppel suggesting that it's somehow
20 unique, Mr. Griffin also in his responses says that
21 the facts that were found in that Medicare
22 litigation weren't really ones relevant or weren't
23 ones needed in this case. Well, of course they
24 were. What the Medicare, what the Medicare
25 litigation found was that there was a non-delegable.

1 duty upon Pee Dee Health Care to check the
2 credentials of its employees. That's what they
3 found, plain and simple. That's exactly what you
4 relied on in saying, Pee Dee Health Care, if you've
5 got a non-delegable duty to check the credentials of
6 your employees you can't blame somebody else. You
7 can't rely on somebody else to do that because it's
8 non-delegable, it's been litigated, you lost, it's
9 over. All that was before this case was filed.

10 Now in addition to that underlying
11 Medicare case itself being frivolous, the probate
12 appeal which is case number 633 that was brought
13 from Judge Lawson to you, was frivolous. Now that
14 issue, if you might remember really centered on
15 whether or not Judge Lawson was gonna require a bond
16 to protect these claimants, Pee Dee Health care, as
17 a claimant to the estate, in an amount that exceeded
18 the value of the estate. We convinced Judge Lawson
19 that makes no sense. They couldn't recover more
20 than the value of the estate even if they won. So
21 we agreed, Judge Lawson agreed, basically to freeze
22 the estate; and he said because I'm freezing the
23 estate, there doesn't need to be a bond. They
24 didn't like that. They said that didn't offer them
25 adequate protection so they appealed it to you. And

1 Mr. Griffin suggests in his response this week that
2 that didn't give them adequate protection. Well, I
3 still -- but he didn't say how. I mean, that
4 protected them to the full extent, to the full dollar
5 value of the estate they're protected. They
6 couldn't get more than that anyway. Now some
7 pieces -- and then he says, well, we cooperated.
8 Yeah, they did cooperate after that with a sale of
9 some pieces of property. The reason why they
10 cooperated is because we agreed to lock up that
11 money with Judge Lawson. So a couple of pieces of
12 property were sold; that money's been frozen too.
13 That's why Mr. James and I have not been paid.
14 That's why our client is worried about this big
15 legal bill that is facing them.

16 THE COURT: And counsel, are you awaiting
17 the outcome of the appeal before that, the
18 distribution of those funds can be determined?

19 MR. JOSEY: We were. We were. And appeal
20 is over now. Judge Lawson has signed an order two
21 weeks ago saying that the estate can be liquidated
22 now. This as an aside, most of the estate is not
23 liquid assets. Most of it is real estate and so.
24 But there is some liquid and that will pay -- we, in
25 fact, got paid some last week, or week before last a

1 little bit.

2 THE COURT: Thank you.

3 MR. JOSEY: So we have a probate appeal.

4 The reason why it's frivolous is because, one, they
5 were protected; two, they did not follow the statute
6 as you ruled. They didn't file it within the 45
7 days; they didn't file their grounds for appeal in
8 the right place. And you ruled that that was
9 dispositive of the appeal. Well, they should have
10 known that; they had the statute available to them.
11 That's just yet another reason why the probate court
12 appeal was frivolous itself.

13 Now the third ground, the third thing that
14 we suggest should have never taken so much of this
15 Court's time is the disqualification itself. Now
16 Mr. Griffin's response, to his credit this week, he
17 doesn't debate that. It was debated up until this
18 week. It was debated in the Court of Appeals. And
19 the Court of Appeals -- and it was debated before
20 this Court both with the original disqualification
21 motion and the reconsideration of the motion; and
22 the appeal which they said deprived jurisdiction,
23 but it's settled now that there were -- your decision
24 was sound. There were plenty of grounds that
25 Mr. Megna should have been disqualified. And the

1 important thing for today is he should have known
2 that. He did know it because Mr. James emailed him
3 from the getgo saying, I think you're gonna have to
4 be a witness in this case. And in response
5 Mr. James gets emails back saying, well, I'll be the
6 judge of that and you need to tell your clients to
7 change their tune because they don't have a defense
8 to this case. All these emails are in that packet
9 we filed with the Court. But they basically scolded
10 Mr. James and said, you know, we'll deal with that
11 and I wasn't really that involved so I'm not really
12 a witness. Well, the complaint has got attached to
13 it a letter addressed to Tony, which they distance
14 themselves from later or tried to, but it's obvious
15 from day one that he was a witness. He knew he was
16 a witness and yet he made us go through motion and
17 argument and appeal that cost literally or threatens
18 to cost hundreds of thousands of dollars worth of
19 time.

20 Now in addition to all that -- and I
21 apologize if I'm taking too long, Judge -- I kind of
22 lose track of time, it's lengthy. In addition to
23 those frivolous things that happen should have been
24 known or were known to be frivolous from the getgo,
25 there has been conduct in the course of the

1 litigation that has been manipulative or
2 misrepresented. I mentioned already the letter to
3 Mr. James by Mr. Matthews where he said, oh, the
4 attorney, or the administrative law court really
5 found Doctor Thompson at fault and we were just
6 vicariously liable and that's why y'all should
7 settle this case. And that was a total
8 misrepresentation. It's in your packet.

9 Then they mischaracterize the exhibit
10 HH -- it's had several different names, but it's
11 this typed unsigned summary supposedly of Doctor
12 Thompson that talks about him acknowledging he'd
13 been suspended from medical prac -- it is not the
14 smoking gun admission that they have held it out to
15 this court to be. It doesn't admit anything other
16 than he says, you know, I'm checking on my licensure
17 stuff. It doesn't say the word Medicare anywhere in
18 it. And then it got further mischaracterized about
19 where it came from and there was a version printed
20 that had one date, a handwritten date in the corner
21 that was different from the version that was
22 submitted in the complaint. Judge, there are so
23 many things it almost gets confusing even for us.

24 THE COURT: Well, Mr. Josey, let me ask
25 you to do this because as you will remember, I'm

1 well familiar with this litigation.

2 MR. JOSEY: Yes, sir.

3 THE COURT: And have been emersed in it.
4 quite some time myself.

5 MR. JOSEY: Yes, sir.

6 THE COURT: So tell me, let's move forward
7 to your remedy and how you justify the amount you
8 request and specifically what it is you request and
9 against what party.

10 MR. JOSEY: Well, Judge, in our motion we
11 make the motion and we suggest that the remedy
12 should, could, come from the party Pee Dee Health
13 Care, the lawyers who unlike the Holmes case where
14 you might have noticed Judge Pleicones, Justice
15 Pleicones dissented because he wasn't sure whether
16 the lawyer should be sanctioned versus parties being
17 sanction. Here the lawyer is the party, or the
18 party is -- I mean, Mr. Megna had two hats on until
19 you forced him to take one hat off, and he appealed
20 that of course but. Here you've got the same
21 identical. We've asked for sanctions. We do ask
22 for sanctions against all of the above. And because
23 the conduct, we've got Mr. Matthews engaging in
24 fraudulent conduct, sending that letter to Mr.
25 James, and it misrepresents the record in an attempt

1 to extort a settlement. We've got Mr. Megna
2 fighting issues that he should not have fought,
3 bringing a case that should not have been brought.
4 Actually, Mr. Matthews signed the complaint. So the
5 two of them, their law firm, the Pee Dee Health Care
6 as a party. And we've got the doctors down there
7 submitting affidavits saying that they've been
8 horribly harmed by -- as you might recall my firm
9 had an unfortunate conflict of interest with an open
10 workers comp file that was represented to me as
11 essentially being over and it wasn't over. But it
12 got clarified to the satisfaction of ODC. It got
13 clarified to the satisfaction of the workers comp
14 commission. It got clarified to the satisfaction of
15 Professor Crystal who we made out ten thousand
16 dollars or so to consult with our law firm to make
17 sure we did it right.

18 But despite all that, you have an
19 affidavit in his file from Doctor Cohen saying we
20 have been harmed by Turner Padget because they now
21 have gotten secret information through this workers
22 comp case which involved a womans prick of her
23 finger. They might have gotten secret information
24 from our office that hurt us in the Thompson
25 litigation. That is absurd. They know it's absurd.

1 That finger prick case didn't have a dum thing to
2 do with this case. They knew that and yet they kept
3 plucking that thing. So that's why we want
4 sanctions from all of the above, Judge.

5 Now the relief we want are attorneys fees.
6 And the attorneys fees, we didn't put a dollar
7 amount, we gave you hours. And we have given you
8 fee affidavits this week that show hourly rates that
9 we have a contractual agreement with our client for
10 set at the beginning of this case.

11 THE COURT: And are you asking that all of
12 your hours be paid? How can you differentiate
13 between what's a valid point in controversy and what
14 is an appropriate or misrepresented point in
15 controversy?

16 MR. JOSEY: Yes, sir. Well, this
17 litigation, again, we think was invalid from the
18 getgo. This complaint never should have been filed.
19 It had been litigated; fault had been set. There
20 was no reason for this claim to ever have been filed
21 so anything that flows we think should be
22 recoverable. Now Judge, I will make clear
23 especially since Mr. Griffin raises it in his
24 response, we're not trying to get our time before
25 the Court of Appeals from you. We filed a separate

1 motion. I gave you the be-- or gave the Court the
2 benefit of it. Just so, you know, we don't want
3 them thinking we're trying to double dip. We don't
4 want you thinking we're trying to double dip.

5 THE COURT: And do you have a hearing set
6 on that motion?

7 MR. JOSEY: Have not had a hearing set on
8 that motion. It was stayed for a long time, and I
9 think they issued a formal order while a petition
10 for cert was pending. Cert's been denied. That's
11 when you got the remittitur that re-establishes your
12 general jurisdiction, and it's just sitting there.

13 THE COURT: Okay.

14 MR. JOSEY: But I did write the Court of
15 Appeals this week. I don't know if I copied you --
16 I copied counsel, just to tell them there's a
17 hearing in your case this week so that y'all can
18 stay informed of kind of the progress.

19 THE COURT: All right.

20 MR. JOSEY: When we submitted our
21 affidavit and our motion for hours we went through
22 the process of segregating the time in this court
23 from the time of the Court of Appeals so we're not
24 trying to get Court of Appeals time. Mr. Griffin
25 also raises the point he doesn't want us trying to

1 get probate court time, and I think we made that
2 segregation, but we're gonna go back and double
3 check. We -- if you think probate court time needs
4 to come from Judge Lawson we'll go to Judge Lawson;
5 that's fine. Although I think the probate claim
6 itself was removed to you and that litigation to you
7 and the hearing that was held in probate court was
8 about a bond issue to protect the litigation in
9 front of you so I think it's related. I think you
10 would have jurisdiction to deal with that. And
11 certainly if you would award fees, all the fees, we
12 won't go to Judge Lawson and try to double dip of
13 course.

14 But we're asking for a reasonable fee for
15 all of our time because we don't think this family
16 should have to bear the brunt of complaints that
17 shouldn't have been filed, emails that manipulated
18 the truth, disqualification that should have never
19 been fought over, probate appeals that weren't taken
20 in accordance with the statute. That's all cost
21 them hundreds of hours in attorneys fees, and it
22 just shouldn't be their burden to bear.

23 THE COURT: All right, thank you, Mr.
24 Josey.

25 And now in response?

1 MR. GRIFFIN: Yes, Your Honor, thank you.
2 Your Honor, we did file a separate motion to strike
3 the sanctions request that proceeding under the
4 frivolous proceedings act and that was motion was
5 filed March 13th, 2014, and we just filed it on
6 behalf of Pee Dee Health Care at the time and then I
7 notified the Court that the general motion it
8 appeared to us that it was only served upon Pee Dee
9 Health Care 'cause that was the responding party.
10 Mr. Josey had written a letter to the Court
11 clarifying or reminding the Court that he was
12 seeking sanctions against all parties; and so,
13 although the motion to strike is technically only on
14 behalf of Pee Dee Health Care, in the response that
15 I filed earlier this week on behalf of what I would
16 call the respondents Mr. Megna, Mr. Matthews, and
17 their law firm, and we do raise the same grounds and
18 incorporate those. And so first I do want to
19 address, frankly, the jurisdictional issue under the
20 frivolous proceedings act and it's -- Your Honor,
21 it's clear as anything can be in this, under the
22 frivolous proceedings act, that in Pitman versus
23 Public Leasing clearly rule that if you file a, if
24 you're gonna seek relief under the frivolous
25 proceeding act you have to do it within ten days

1 from the date the court issues a final judgment.
2 Now the defense lawyers think that the statute was
3 written incorrectly because it says after a jury
4 verdict, or something like that. And what defense
5 lawyers don't understand is the frivolous
6 proceedings act is available for the plaintiffs when
7 a defendant interposes a frivolous defense and the
8 only way you can merit that out is after a trial.

9 But Judge Hearn clarified that the
10 language isn't just limited to jury verdicts and the
11 motion has to be filed within ten days. That was
12 followed up by in re: Beard, Alec Beard who's a
13 former client, trying to get sanctions against a
14 lawyer I'm good friends with, do a lot of work with.
15 He waited 363 days apparently to file the motion,
16 and the -- and Judge Manning said you have to do it
17 within ten days, and you didn't do it, and that went
18 up to the South Carolina Supreme Court I believe and
19 they affirmed that. And Mr. Josey is correct that
20 Judge Manning heard the Rule 11 sanction, denied
21 those. And the court, the Supreme Court, addressed
22 the denial, didn't address whether the time limits
23 of the same time limits apply to Rule 11 motions as
24 they do the frivolous proceedings act.

25 Now the defendant argues that the fact

1 that there was an appeal taken during the interim
2 before the court before ten days had lapsed, that
3 that somehow changes the dynamics, calculation, and
4 it doesn't. I cited a case in our brief, Hudson v.
5 Hudson that says that appeal that is filed within
6 the ten day window after judgment has been entered
7 does not deprive the court of jurisdiction near time
8 of filing post-trial motion. That's Hudson v.
9 Hudson; we cited that in our brief.

10 The cases that are relied upon by the
11 defendant, the McDowell case involves statutory
12 attorneys fees award against the State if the State
13 sues or tries to collect and loses or you have to
14 sue the State and it's determined that you're the
15 prevailing party. And it says after the disposition
16 of the case which the courts have held that's
17 something, that's thin once it's backed upon down
18 from remittitur and so that's a different language.
19 The other case he talks about is a statutory
20 attorneys fees available in a mechanic's lien
21 situation. I mean, those are different case, type
22 cases.

23 What we're talking about here is the
24 frivolous proceedings act, and the statute's been
25 changed significantly in 2005 and I'll address those

1 very briefly but. But it is instituting litigation
2 that's frivolous, and so, and then it gets thrown
3 out of court; or from the plaintiff's perspective,
4 the defense gets hammered or loses the case because
5 of the defense was frivolous. And at that point in
6 time under the Frivolous Proceedings Act once
7 judgment has been entered, it's incumbent upon the
8 party who wants to seek relief under the act to move
9 so within ten days. The courts have not altered
10 from that. The defendant in a recent response cites
11 to a couple of cases that clearly hold the same.
12 One was a Judge Manning case, Your Honor. I think
13 it's called Rutland. I have it up here. And in
14 there Judge Manning, he issued -- it is Rutland v.
15 Holler, Dennis Punky Holler's firm. And in that
16 case what happened was Judge Manning had issued from
17 the Bench that he was gonna rule in favor of the
18 defendants that the lawyers who were being sued from
19 their former client; but he said, I'm gonna issue a
20 formal written order subsequent to this. And then
21 after Judge Manning issued the formal written order
22 subsequent to the Form 4 that was entered at the
23 time he conducted court that day, the law firm moved
24 for sanctions under Frivolous Proceedings Act. The
25 client, former client, said it was too late. What

1 the court said is that it wasn't too late because
2 Judge Manning specifically indicated that he
3 intended to file a formal order, thus, Judge Manning
4 retained jurisdiction until the time for post-trial
5 motions elapsed after the issuance of his formal
6 order on December 7th. Accordingly, the motion
7 was timely filed. And then they cite Cheapo's Truck
8 Stop knowing that a formal order is not a final
9 order if the circuit court specifies a formal order
10 will be filed.

11 That's not the situation here, Your Honor.
12 When Your Honor granted summary judgment for the
13 defendant, the Estate of Hugh Thomas, Thompson, it
14 was a final order. Under the Frivolous Proceedings
15 act they were required within ten days to seek
16 relief; they didn't do it.

17 They've also sought relief now under Rule
18 11, and we believe that the same limitation applied
19 under Rule 11. That's an open question. I will
20 acknowledge -- we cited the same case they cited,
21 Russell versus Wachovia. That's the fight over the
22 estate of former Judge Russell, and there there was
23 a question of whether the Frivolous Proceedings Act
24 motion was filed within ten days, and it was filed
25 at the same time Rule 11 motion was filed. The

1 circuit court judge ruled that it was beyond the ten
2 day limit. It goes up on appeal. Appellate court
3 says no, it wasn't beyond the ten day limit because
4 you have to go from the triggering date of the final
5 form 4 that was filed after the written order was
6 issued so they had a different triggering date. It
7 was -- and but what the Russell case said was that
8 if you're gonna seek sanctions you have to file
9 within ten days. Then there's a footnote in Russell
10 which I frankly overlooked till I got Mr. Josey's
11 brief, that says as to Rule 11 we never exactly
12 addressed this issue. It's an open issue; we're not
13 gonna rule today. If you got to do it within ten
14 days. So we do raise it that today. It is our
15 position that under rule 11 when it's a final order
16 ending a case that they have, that they have to file
17 a motion under within the ten day period and they
18 didn't do it so they have waived that. That's to
19 the merits, Your Honor.

20 First, I want to talk -- there's two, a
21 couple of significant differences between Rule 11
22 and the Frivolous Proceedings Act. Back before 2005
23 the Frivolous Proceedings Act covered essentially
24 anyone who participated in the litigation. Rule 11
25 only applies to the lawyer or party who signs a

1 pleading or document in violation of the rule. It's
2 not anybody who participates. So the scope of who
3 is sanctioned under Rule 11 is much, much tighter
4 than under Frivolous Proceedings Act. That was pre
5 2005. The Frivolous Proceedings Act was amended in
6 2005, completely rewritten, and it's our view that
7 it tightened it up as well and it sort of tracks
8 along Rule 11. And so under the current version of
9 the Frivolous Proceedings Act, it has to be -- when
10 you're seeking to sanction a lawyer it has to be the
11 lawyer who filed the document in violation of the
12 act or the rule, or -- and not just anybody who in
13 the firm or anybody who knew about it. Now, lawyers
14 in the world of sanctions under Rule 11 under the
15 Frivolous Proceedings Act can bind their clients so
16 it's the client or the offending lawyer. It's not
17 everybody who participated. And as Your Honor
18 correctly pointed out in your question with Mr.
19 Josey, you have to look at what the conduct is
20 that's violative of the rule, whether it's Rule 11 or
21 the Frivolous Proceedings Act.

22 And then -- and then there's another
23 significant difference between the frivolous
24 proceedings act and Rule 11. Today, after 2005, the
25 Frivolous Proceedings Act has an objective

1 reasonable attorney standard. Rule 11, today, as it
2 has always been in South Carolina, is a subjective
3 test so when the question is if someone filed a
4 document for purposes of delay, it's not whether a
5 reasonable attorney would believe that it's purposes
6 of delay, it's whether these lawyers intended it to
7 be solely for purposes of delay and so that
8 reasonable attorney standard doesn't apply to --
9 under Rule 11; it does under Frivolous Proceedings
10 Act. That was a major change and we pointed that
11 out in our brief.

12 Now if you look at -- this lawsuit was
13 frivolous from the getgo. Well, and they want to
14 seek sanctions against everybody who was involved in
15 it. He did acknowledge that Mr. Matthews, Ben
16 Matthews, signed the complaint. Now the complaint
17 was not frivolous and I'll explain why and, but you
18 can't paint with such a broad brush that hold
19 Mr. Megna responsible until Rule 11 for Mr. Matthews
20 signing a complaint or any document. It is the
21 offending lawyer who violates the act so -- and I'm
22 not throwing Mr. Matthews under the bus here. It's
23 just how the rules operated and you have to be
24 guided by what -- what are they attacking these
25 lawyers for, or their client for? What conduct was

1 done that was, violated the act, and then what's the
2 scope of the remedy. Now I strongly disagree that
3 this lawsuit was frivolous from the getgo. And I
4 got to tell you, Your Honor, if a client — these
5 guys, brought that case to my office with the two
6 orders that I've not seen, orders from the
7 administrative law judge, I would have no hesitation
8 filing that lawsuit, and this is why. The decision
9 by the administrative law court clearly found, one
10 administrative law judge, clearly found that the Pee
11 Dee Health Care had a non-delegable duty; that they
12 could discharge that duty by relying upon Doctor
13 Thompson, and therefore, they cannot escape
14 liability from repaying the funds. And it's like
15 this, it is if someone assigns me a note that a
16 third person owes on and I go collect against a
17 third person for that money and it -- and I seize
18 their property or somehow, it turns out that note
19 was bogus, that the assignment, you know, and I have
20 to give the money back, that doesn't relieve any
21 obligation between me and the person who gave me the
22 bogus note, the bogus assignment on the note. And
23 so, that is -- that's what the administrative court
24 in the one case -- there were two administrative
25 appeals, but in the one case that's what the judge

1 determined, there's a non-delegable duty. Now Your
2 Honor was, found that the factual findings in that
3 decision precluded Pee Dee Health Care from going
4 forward on any of the claims against the defendant.

5 Now and Mr. Josey is a little confused
6 about what my argument is in the record. Under
7 collateral estoppel it has to be the same party. It
8 has to be finally determined. And the facts that
9 you're trying to preclude the re-litigation on, have
10 to be necessary for the finding in that form, in the
11 administrative form. Not in this court, we know
12 that your finding are necessary in this court. And
13 so if as I'm looking at it today I think it's a
14 close call as to whether the fact that Pee Dee
15 Health Care could have looked on the website and
16 found that Doctor Thompson was, did not, was not
17 Medicare qualified like he told him, that they share
18 blame in that, and that doesn't excuse them from
19 re-payment when they have a non-delegable duty. I
20 mean, was that finding necessary to a decision of
21 whether there was a non-delegable duty. And so, you
22 know, Your Honor obviously found that it was.

23 Now, judges make decisions all the time on
24 cases that weren't clear. I mean, that's what
25 courts do. But to say that this was frivolous from

1 the outset because if there was a, that there was a
2 decision from an administrative judge on an appeal
3 from CMS audit, if you will, that precludes a
4 claim -- the relief essentially indemnification,
5 multiple different alternative theories were pled,
6 but that was the relief that Pee Dee Health Care had
7 to pay this money back so they're looking for the
8 doctor who they pay and there was, as I understand
9 it, from the file there was, there was a percentage
10 of collections was the compensation, fifty percent
11 of collections.

12 And so it's not in our view black and
13 white. I understand the Court's ruling and not here
14 to argue against it. But what I'm saying is, and I
15 argue strenuously, it's just not frivolous from the
16 outset that you know you don't have a case. I would
17 have taken that case, Your Honor, I would have. And
18 what's interesting is Doctor Thompson went to work
19 for another health care provider. They had got the
20 same letter. They appealed. They got a different
21 administrative law judge who ruled the complete
22 opposite of the administrative law judge that ruled
23 in Pee Dee Health Care. Now that, and that goes to
24 the point in our brief where I'm citing Judge Few,
25 and Judge Few does identify under the employment

1 security commission there is no collateral estoppel
2 for findings under the Employment Security
3 Commission in wrongful discharge cases. As Your
4 Honor I'm sure knows, if someone gets fired and they
5 seek unemployment benefits they'll get -- the
6 employer will get notice, employer can object,
7 employee goes down, there's some sort of hearing
8 that goes on and the employer or employee wins or
9 loses those. Well those decisions, even though
10 they're final determinations and they're made for,
11 you know, necessary facts, they're not binding in
12 courts. Our courts have said that Employment
13 Security Commission hearings are not sufficient to
14 provide for collateral estoppel. That's what I
15 meant by this is a case of first impression that I'm
16 not aware -- there's certainly none in South
17 Carolina -- where CMS appeals hearing officer
18 decision binds a health care provider from seeking
19 indemnification from its employee, not aware of
20 anyone.

21 And Your Honor, a little factual
22 predicate, these aren't trials. There's no
23 testimony. There's a telephone conference. Well
24 first, you get a letter saying pay all the money
25 back. Then Pee Dee Health Care sends documentation

1 to the intermediary, and then they make a decision.
2 You don't like the decision you can appeal it. It
3 goes to a hearing officer. This hearing officer is
4 somewhere down in Florida. They have a telephone
5 conference. Judge, they have a telephone
6 conference. And then they issue this decision which
7 is completely at odds with the same factual
8 scenario. And so my point is, it's not at all
9 clear. It wasn't frivolous from the getgo.

10 They have a legitimate factual beef that
11 they had a doctor that came to work for them that
12 got a percentage of collections; and based on an
13 assignment that they billed Medicare so they can
14 collect and the doctor wasn't Medicare qualified. I
15 mean, we can talk about sympathies to the estate,
16 Judge; but the fact of the matter is, I mean, there
17 was some wrongful conduct done by Doctor Thompson.
18 I mean, there's no doubt about it. Now what
19 happened here is Doctor Thompson's estate was
20 excused from that wrongful conduct because of a
21 hearing officer down in Florida issuing a decision
22 and Your Honor's ruling, and I respect it
23 tremendously and I'm not arguing against it but it
24 doesn't mean it was frivolous from the getgo.

25 And I'd also point out, this is another

1 reason, a lawyer who represents himself has a fool
2 for a client. The -- this collateral estoppel is an
3 affirmative defense. Now I've checked the
4 pleadings. They plead a general estoppel but they
5 don't plead collateral estoppel on the theory that
6 what Your Honor ruled upon. And Your Honor, if I
7 was, if I was proceeding I would have argued they
8 they waived that defense, but it is an affirmative
9 defense. And again, so what they're asking is it's
10 frivolous to anticipate affirmative defenses and by
11 not doing so. I would point out they didn't file a
12 motion to dismiss. They could have filed a motion
13 to dismiss; they didn't. The case proceeded on to a
14 summary judgment stage. Your Honor granted summary
15 judgment. And so, and again, it was on a complaint
16 that was pursued on behalf of the client and only
17 Mr. Matthews signed it.

18 Now the other issues that they raise
19 frankly, Your Honor, the -- well let me, if you
20 don't mind, the other point about the lawsuit is Mr.
21 -- from the getgo Mr. Megna knew he was gonna be a
22 witness so how could you file that lawsuit and
23 therefore we're entitled to all of our attorneys
24 fees. But as I read the file and I've read the
25 transcripts, there's never been any question or any

1 accusation that Mr. Matthews could proceed even
2 though they're in the same firm, there was no
3 imputed disqualification here. And so what we're
4 hearing, what we're hearing here some of the
5 complaints, well first, Mr. Matthews filed the
6 complaint, all right, and he's not disqualified. No
7 one has ever taken the position that Mr. Matthews
8 has been disqualified. And so you -- they don't get
9 it all based on this disqualifying issue because
10 Mr. Megna didn't file the complaint. He was CEO of
11 the company that was a party only, and so he has an
12 interest in the litigation as -- and he's wearing
13 two hats, I agree. And so it doesn't mean Mr. Megna
14 is totally removed from the case, I mean, he's the
15 client as well, and that's probably why, you know,
16 he -- he shouldn't have been in from the getgo and
17 Your Honor correctly ruled that he was gonna be a
18 witness. But you can't say the lawsuit was no good
19 from the getgo because Mr. Megna knew he was gonna
20 be a witness. Mr. Megna didn't sign the complaint.
21 Most every document I've seen that they're
22 complaining about was signed by Mr. Matthews. I,
23 Mr. Matthews didn't do anything wrong, but the, this
24 disqualification issue doesn't get them where they
25 want to go. And Your Honor, I'll address that issue

1 on disqualification.

2 Mr. Megna is a witness. Your Honor ruled
3 that he was disqualified from participating from the
4 case during pretrial, and the Court of Appeals
5 affirmed that ruling. I'll tell you, Your Honor,
6 the -- my -- we get lawyers as witnesses in the
7 criminal arena all the time. The last one I had was
8 with US attorney who sat in on an interview of a
9 client or of a witness; and it's always been our
10 working knowledge, our working practice is a lawyer
11 disqualified at trial at the hearing, at the trial,
12 and Your Honor ruled that pretrial disqualified.
13 The Court of Appeals affirmed that, and so that's
14 the ruling. But I've got to say, Your Honor, with
15 all due respect, I think that's the first time the
16 Court of Appeals or that I'm aware of any court has
17 ruled disqualified pretrial and not at the trial of
18 hearing. But the language of the statute, I mean of
19 the rule, talks about at trial and how you deal with
20 that and I've had to grapple with that a lot in
21 criminal cases. It comes up a lot in criminal cases
22 because criminal defense lawyers and prosecutors are
23 sitting on in interviews and then you have a
24 situation where someone is going to testify, a
25 former client or something, and it happens. And so

1 I just, with all honesty, I've always thought until
2 this case that it was, you know, you disqualified at
3 the trial and not pretrial.

4 Mr. Megna, he did some things he shouldn't
5 have done. One is he signed a subpoena to, in this
6 case to Ms. Ballard, asking for her records after he
7 was disqualified. He shouldn't have done that.
8 Your Honor has ruled on that in another matter and
9 that's -- and I don't think they're complaining
10 about this. Another thing Mr. Megna did then he
11 shouldn't have done is he filed a motion to
12 reconsider the court's denial, I mean, grant of
13 summary judgment after he'd been disqualified but,
14 and that issue was raised. He was, though,
15 permitted with agreement of the parties after he'd
16 been disqualified to argue the motion for summary
17 judgment. Your Honor, he wrote -- when it was
18 brought to his attention that that was a no-no, he
19 wrote the court a letter and apologized and the
20 court wrote back and accepted his apology. And Your
21 Honor, the letter that he writes to the Court is
22 October 10, 2011. And he says that, I generally
23 apologize for any misunderstanding. Says, as a
24 gesture of good faith and deference to the court
25 I'll request Ben represent the plaintiff in all

1 future proceedings before the circuit court pending
2 the determination of appeals. Mr. Megna had taken
3 the position he shouldn't have, he should have been
4 more deferential that while it was on appeal he
5 could still file the motion. Your Honor writes back
6 October 27th. Thank you for your letter of October
7 10 stating your intention to refer any further
8 circuit proceedings in this matter to your partner
9 Ben Matthews. This act of good faith and deference
10 to my decision is appreciated. I look forward to
11 working with you on other matters in the future..

12 And so Your Honor, I mean that, that was
13 in our view a no harm no foul because, frankly, by
14 signing the motion to reconsider what ultimately
15 happened was that allowed the defendant to go up
16 when the case went up on appeal to say that appeal
17 was untimely because the motion to reconsider was
18 invalid, and so the Court of Appeals didn't address
19 the merits of this collateral estoppel issue. What
20 the Court of Appeals did was they dismissed the
21 appeal because there was no valid motion to
22 reconsider under Rule 59 because it had been signed
23 by a lawyer who'd been disqualified. And so the
24 harm there was -- and it doesn't really get to the
25 merits -- it's another, it's another mistake in the

1 procedure just like they did not correctly appeal
2 the probate court orders correctly. I mean, I've
3 tried to do it. I don't know that I can do it
4 correctly. You got to file one in the circuit
5 court, one in probate court. You got to state your
6 grounds. And so they didn't, they didn't follow the
7 procedural hoops correctly. It doesn't make the
8 claims frivolous. It doesn't make them in bad
9 faith. It means they made a mistake, and their
10 client got punished for their mistakes by having
11 appeal dismissed and from the probate court. And so
12 Your Honor, that's not -- again, I don't think that
13 violates the rule when the lawyer messes up. The
14 rule gets violated when the lawyer makes a frivolous
15 argument, takes a position that he knows is not
16 founded, and then but not when a lawyer messes up
17 and doesn't follow the rules correctly.

18 THE COURT: All right, Mr. Griffin, I'm
19 gonna ask you if you could go ahead and wrap it up
20 at this time 'cause I have a pretty good
21 understanding of what's happened here so is there
22 anything in your conclusion?

23 MR. GRIFFIN: Well, and Your Honor, and --
24 lastly what -- well, a couple of points I want to
25 make at the end is, they have -- they've attached a

1 lot of emails and correspondence and whatnot, and
2 Mr. Josey says this is a pattern of manipulation in
3 that they rely upon the correspondence and things in
4 their attachments. None of it is verified. We've
5 got no sworn testimony from Mr. Josey or anybody
6 about how Mr. Megna or Mr. Matthews conducted
7 themselves. I mean, the pleadings on record are
8 fair game; but for him to get up and attach a bunch
9 of documents that's just unverified, that aren't
10 being verified and argued from them, and say that
11 there's, that somehow this court, the integrity of
12 this court had been tarnished, that the perception
13 of the integrity of this Court has been tarnished,
14 and we object. There's no factual basis for that.
15 We've got to stick to the rules. They got punished
16 for not sticking to the rules. They have to stick
17 to the rules.

18 And then, talking about this affidavit of
19 Doctor Cohen, that they, that they argued about.
20 There's no dispute that Turner Padget had an
21 irreconcilable conflict, no dispute whatsoever, and
22 that Turner Padget was representing Pee Dee Health
23 Care at the same time they're representing Doctor
24 Thompson, that Pee Dee Health Care was suing Doctor
25 Thompson. And you can't do that. That is --

1 there's certain black and white rules of the Rules
2 of Evidence; that's one of them. And so the way
3 they get around that is they abandon their client
4 Pee Dee Health Care, and Pee Dee Health Care gets
5 upset about it. Doctor Cohen is upset about it.
6 Mr. Megna is upset about it. And you know, so they
7 went and got an expert opinion to say now that
8 they've abandoned Pee Dee Health Care everything is
9 okay. And I would point out, Your Honor, that there
10 was a motion to disqualify, Mr. Josey, it was never
11 ruled upon. And they had grounds to argue about
12 Mr. Josey's participation because there was a
13 irreconcilable conflict.

14 Lastly, I would point out that, Your
15 Honor, I mean, you can't -- this is the American
16 rule. It's not a turn-- Rule 11 and a frivolous
17 proceeding act, not fee shifting statutes. The
18 inherent power of this court is not fee shifting
19 statutes. I mean, we are American rule where
20 lawyer, I mean, clients responsible for their own
21 attorneys fees except if there's a statute or
22 there's something that you can hang your hat on that
23 there was this misconduct and this resulted from it,
24 and they haven't shown that. And so we object to
25 this general blanket we have 93,000-dollars worth of

1 time in circuit court. It's not tied to any alleged
2 violation. Your Honor, I don't think there are any
3 violations. Clearly the whole lawsuit was not
4 frivolous from the getgo, the things that they're
5 claiming, the probate court matter. I mean, as a
6 creditor they were seeking to stand on their rights
7 in probate court.

8 We also argue in our brief that Rule 11
9 doesn't apply in probate court. This is a claims
10 administration process, and I've set forth why. So
11 Your Honor, we would respectfully request that you
12 deny the relief sought by the defendant.

13 THE COURT: Thank you. Ladies and
14 gentlemen, I'm gonna take this under advisement for
15 a moment or two and step back in the back and come
16 back to tell you whether I'm prepared to rule or
17 whether I need to take these under advisement so
18 we'll be in recess approximately five minutes.

19 (WHEREUPON, a recess was taken from the
20 proceedings.)

21 THE COURT: All right, ladies and
22 gentlemen, the Court is prepared to rule after
23 reviewing this matter. I've had the benefit of this
24 matter being fully briefed and well argued by
25 counsel. The Court also has the benefit of being

1 involved from almost day one here, and thus, the
2 independent recollection of what's happened in this
3 case.

4 Mr. Josey, what you ask the Court to do in
5 finding sanctions for all of the attorneys' fees
6 that were earned or that were received by your
7 client in the defense of this entire action the
8 Court finds is, goes beyond the scope of what the
9 Court believes is appropriate. I do find, however,
10 that under Rule 11 the persistence of Pee Dee Health
11 Care as a party in fighting at the circuit level --
12 not at the appeal, but what they did at the appeal
13 you can take up with the appellate court fighting at
14 the circuit level after disqualifying. After the
15 disqualification was entered by this Court that the
16 actions taken by Mr. Megna, it caused attorney fees
17 to your client on the issue of disqualification. I
18 find that those actions were taken without good
19 grounds to support them, that they were interposed
20 for delay of this process and vexatious; and the
21 vexatious position, again, not warranted by fact or
22 law. And I'm going to ask you to within five days
23 of today provide to this Court a restructured
24 attorneys' fee that involves just that segment of
25 your representation. The Court will grant those

1 attorneys' fees in favor of your party against the
2 party of Pee Dee Health Care so that it will be
3 entered as a judgment, one party against the other
4 party, not names of counsel involved but party to
5 party. And the Court finds that that is a timely --
6 your motion is timely under Rule 11 and, thus, your
7 remedy is ordered under Rule 11.

8 Now I ask you at the same time you provide
9 this affidavit for both your time and Mr. James'
10 time to the Court to jbaxley1c@sccourts.org which is
11 to Mr. Scruggs. Please provide Mr. Griffin that
12 same information so that he would at least be aware
13 of it. And whether or not the Court believes a
14 response is needed for Mr. Griffin, we will advise
15 him at that time. Failing to hear from us, though,
16 it will be the Court's position a further response
17 is not necessary, Mr. Griffin, and we will make that
18 determination when we see what is forwarded to us
19 from counsel. All right?

20 Now are there questions about this ruling?

21 MR. JOSEY: Would you like a proposed
22 written order together with that?

23 THE COURT: I would, please, so that we
24 can just simply accept the affidavit, provide it be
25 correct, and issue the order. Any further questions

1 from the moving party?

2 MR. JAMES: Your Honor, to be sure I
3 understand, the time period that you're looking for
4 would begin when you denied the motion for
5 reconsideration of the disqualification, or would it
6 begin at an earlier time?

7 THE COURT: All right, just a moment.

8 MR. JOSEY: Judge, I don't know if this
9 helps you, but the transcript from the March 16th
10 hearing is in the package we sent you.

11 THE COURT: Okay.

12 MR. JOSEY: And that's -- at the
13 conclusion of that hearing is when you said it
14 begins now, for what that's worth.

15 THE COURT: Tell me that last statement
16 again.

17 MR. JOSEY: You announced your decision at
18 the conclusion of that March 16th hearing. You used
19 the words it begins now as Mr. Megna asked for
20 clarification of when the disqualification began.

21 THE COURT: Well, what I'm really looking
22 in the rule to see is what right does someone have
23 to move for a reconsideration, that is, a rule 59(e)
24 motion with regard to that particular decision
25 within a case. It was not a final decision. It was

1 not a judgment. And thus, I'm not certain in my own
2 mind whether the resisting and the reconsideration
3 and then the appeal, maybe the statute permits it;
4 but I'm not certain of it right here at this moment
5 in time. I'll need to review that further, but I
6 would simply ask you to do this. I would ask that
7 the billing begin at that moment in the transcript
8 and come forward. I also would ask for you to
9 provide your position on whether or not the 59(e) is
10 a cognizable motion at that juncture in this case
11 and whether or not, thus, time spent on that should
12 or should not be granted. And then depending on
13 what decision I make, we'll give Mr. Griffin an
14 opportunity to respond if necessary. We won't make
15 a decision that will strip you of the right to
16 defend it. Let's just first see what their response
17 is and then we'll be back to you. But I ask you
18 that within five days, again, because my window is
19 closing in order to be able to resolve this issue
20 and close this case and move on.

21 MR. GRIFFIN: Your Honor, may I ask just
22 for clarification. And I understand that the scope
23 of work is not, is limited to the responding to
24 Mr. Megna's resistance to the Court's order
25 disqualifying him; but after that date, I mean, he

1 was permitted to argue summary judgment and things
2 And so I understand the Court's ruling. That
3 he's -- they're not being sanctioned for the
4 underlying merits and litigating summary judgment
5 issue; it's only the matter of disqualification
6 after the Court ruled?

7 THE COURT: That's right. And of course,
8 you will remember we had an issue that dealt with
9 some discovery served on other parties to which it
10 would have created some attorney fees over here as
11 well and some other interactions all necessitated by
12 Mr. Megna; but really, on behalf of his party Pee
13 Dee Health Care's resistance to an unwillingness,
14 absolute unwillingness to accept the Court's
15 position.

16 MR. GRIFFIN: Yes, sir.

17 THE COURT: I think it's unfair though --
18 I just simply say this -- entire case is frivolous,
19 we're gonna sanction for everything, we don't have a
20 loser/pay system here in the United States. The
21 Court really -- you asked for some sanctions for
22 what you believe was a false or fraudulent, and your
23 term email and other misinformation, well, that's a
24 matter for ODC and other matters that should be
25 taken up in that venue. I just simply am imposing

1 what I believe, what I can discern, to have been
2 inappropriate conduct under Rule 11 which has a
3 finite beginning and a finite end that the Court
4 will grant attorneys fees for. All right? That's
5 the decision.

6 Anything further now from the moving
7 party? Now let me just say, your time also in
8 parsing your bill for this purpose is included in
9 this sanctions bill.

10 MR. JOSEY: Okay. Having ruled in the
11 other sanctions motions that those discovery
12 subpoenas and so forth were inappropriate, our time
13 that relates to that, would that not also be
14 covered?

15 THE COURT: Yes, sir, I said -- I thought
16 I said that.

17 MR. JOSEY: Okay.

18 THE COURT: That those subpoenas that went
19 out on those other cases that you were involved and
20 had to respond to, if there's time in your time
21 sheets for that that is compensable, okay. All
22 right. Then we'll just wait to receive that
23 information within five days; and whether or not a
24 response is necessary, we'll handle this
25 electronically from here out so that a

1 communications record is preserved in the event
2 there is an appeal of this decision as well. All
3 right.

4 MR. JAMES: Your Honor, can I maybe ask a
5 question. I'm not sure that Pee Dee Health Care is
6 a viable entity anymore. These gentlemen would
7 know; but they now do business as Genesis Health
8 Care which is a nonprofit corporation, a federally
9 qualified health center, and so this may be holler
10 relief.

11 THE COURT: Well, if that is true I'm
12 unaware of that. That's not before me. That's not
13 in the record before me. If that is true then I
14 will order that relief also against Mr. Megna, but I
15 am unaware of that, Mr. James, so.

16 MR. JAMES: We put in our motion that we
17 were seeking sanctions against the parties and the
18 attorneys and their successors and assigns because I
19 just don't know what the corporate structure down
20 there now is.

21 THE COURT: All right, just a moment
22 please.

23 (Pause.)

24 THE COURT: All right, based on that
25 information then, I'm gonna amend my ruling to

1 include this sanction. In favor of your party, we
2 know your party is still extant and existing which
3 are the heirs of the estate -- the estate itself, is
4 it still open?

5 MR. JAMES: Yeah, the estate is still
6 open, Your Honor.

7 THE COURT: Very good. Then the estate
8 will be the receiving party and the sanctioned party
9 will be Pee Dee Health Care and their assigns or
10 successors, Mr. Megna, and his law firm. Those are
11 the ---

12 MR. JAMES: Thank you, Your Honor.

13 THE COURT: Those are the sanctioned
14 parties.

15 Now, anything further from the plaintiff
16 here, the nonmoving party?

17 MR. GRIFFIN: Your Honor, just to preserve
18 the record, I'm not sure who the assigns or
19 successors might be and I'm not here representing
20 them today; but I would interpose an objection to
21 any party who didn't get notice of this hearing and
22 not have an opportunity to participate being bound
23 by any order of the court. That's all.

24 THE COURT: Very good. Well, we --
25 that -- we note that for the record; and

1 unfortunately, I'm not in a position to entertain a
2 response to that at this time. This is the first
3 I've heard of this while even we're making this
4 decision, and the Court will address that in its
5 final order. All right? Very good. Ladies and
6 gentlemen, thank you for staying with us beyond an
7 hour today and our typical closing hour. We
8 appreciate your willingness to remain, and this case
9 is now concluded.

10
11 * * * END OF REQUESTED TRANSCRIPT OR RECORD * * *
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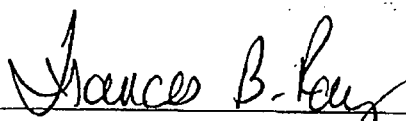
CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF FLORENCE }

I, FRANCES BAKIS-RAY, Registered Professional Reporter (RPR), court reporter for the State of South Carolina, Twelfth Judicial Circuit, do hereby certify that the foregoing proceeding is a stenographic report and was transcribed through computer-aided transcription; that the foregoing transcript contains a true record of the proceedings.

I further certify that I am neither counsel for, nor related to nor employed by any of the parties connected to the action, nor am I financially interested in the action.

Witness my hand at Florence, South Carolina, this 6th day of July, 2014.


FRANCES BAKIS-RAY, RPR

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

PEE DEE HEALTH CARE, P.A.

☐ Plaintiff

v.

ESTATE OF HUGH S. THOMPSON

☒ Defendant.

Check box above indicating submitting party

IN THE COURT OF COMMON PLEAS
CASE NO. 10-CP-16-0332

MOTION INFORMATION FORM
AND COVER SHEET

Plaintiff's Attorney: Bar No. Address: Phone: 803-799-1700 email: ben@pdhc.com	Benjamin R. Matthews 3332 3400 West Avenue Columbia, SC 29203 Fax: 803-254-3678 Other:	Defendant's Attorney: Bar No. Address: Phone: 843-393-3881 e-mail:	John Jay James, II 2949 P. O. Box 507 Darlington, S.C. 29540 Fax: 843-393-6089 Other:
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Motion to Disqualify Plaintiff's Counsel Estimated Time Needed: One (1) Hour Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion Type ☒ Written motion attached ☐ Form Motion -- I hereby move for relief or action by the Court as set forth in the attached proposed Order. Signature of Attorney for ☐ Plaintiff / ☒ Defendant Date Submitted: January 28, 2011			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: ☐ (check reason) ☐ ☐ ☐ ☐ ☐ ☐ ☐ Rule to Show Cause in Child or Spousal Support Domestic Abuse or Abuse or Neglect Indigent Status ☐ State Agency v. Indigent Party Sexually Violent Predator Act ☐ Post-Conviction Release Motion for Stay in Bankruptcy Motion for Publication ☐ Motion for Execution (Rule 39, SCRP) Proposed order submitted at request of Court, or reduced to writing from motion made in open Court per Judge's instruction. Name of Court Reporter: ☐ Other: ☐			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		CODE: _____ Date: _____	
CLERK'S VERIFICATION Date Filed: _____ Collected by: _____ ☐ MOTION FEE COLLECTED: ☐ CONTESTED - AMOUNT DUE: _____			

STATE OF SOUTH CAROLINA,
COUNTY OF DARLINGTON.

IN THE COURT OF COMMON PLEAS
2010-CP-16-0332

Pee Dee Health Care, P.A.,

Plaintiff,

vs.

Estate of Hugh S. Thompson, ✓

Defendant.

DEFENDANT'S MOTION TO
DISQUALIFY PLAINTIFF'S COUNSEL

The Defendant, Estate of Hugh S. Thompson, hereby moves for an Order disqualifying Plaintiff's counsel, Tony R. Megna from the present action. This motion is based upon the Rules of Professional Conduct, as found in SCACR 407, and the supporting case law.

NATURE OF THE CASE

This claim arises from the Pee Dee Health Care, P.A.'s (hereinafter "PDHC") negligent failure to perform required due diligence before collecting Medicare benefits for work performed by its employee, Dr. Hugh S. Thompson (Defendant's decedent). As the assignee of Medicare program benefits, PDHC failed to confirm the program eligibility of Dr. Thompson who was excluded from the program for a period of time. As a result of this failure, the Medicare program subsequently sought and obtained repayment of the ineligible benefits from PDHC. Now, years later, PDHC seeks to ignore the affirmative duty placed upon it by the Medicare program and instead seeks to shift blame for its lapse to the deceased.¹

¹ This issue of fault, however, has already been unsuccessfully litigated to finality by the claimant PDHC. Specifically, in a matter fully litigated by PDHC, a federal Administrative Law Judge (Dean C. Metry) found that PDHC "is reasonably expected to know and has an affirmative duty to know the exclusion status of its employees through due diligence prior to entering the employment relationship." (Decision of March 14, 2008 attached hereto as Exhibit A).

FACTS: COUNSEL MEGNA IS A WITNESS

Counsel Tony Megna has, and at various times and to various agencies, identified himself as the Chief Executive Officer of PDHC. For example, on behalf of PDHC, Megna has executed a "Medicare Enrollment Application" submitted to the Centers for Medicare and Medicaid Services (CMS) within the United States Department of Health and Human Services. (Attached as Exhibit B). By his signature, Megna "binds this provider to the laws, regulations, and program instructions of the Medicare program." (Form CMS-855A, Section 15). In the same application, Megna discloses himself as an owner of PDHC, a managing employee of PDHC, and as a "Director/Officer" of PDHC. Accordingly, Megna is positioned to be a person with knowledge at PDHC about the efforts of that organization to comply with Medicare "laws, regulations, and program instructions." And it is PDHC's adjudicated non-compliance that led to the adverse Medicare decision at the heart of this case.

But it is not only Megna's position as the Chief Executive that confirms his focal point as a witness in this matter. In its complaint, PDHC alleges that the decedent made "contact" with PDHC by sending an unsigned letter to the Plaintiff in which he is alleged to have "admitted" not providing "accurate information to Plaintiff upon and during his employment with the

Moreover, the Judge found that PDHC "knew that Dr. Thompson's license was suspended indefinitely and that he received a conditional reinstatement after four years." The Judge noted that PDHC's applications for Medicare payment of Dr. Thompson's services "inquired about any exclusions or sanctions" and that Dr. Thompson's exclusion "could have easily been found by calling the Office of Inspector General or visiting their web-site which lists excluded individuals....." *Accordingly, Judge Metry concluded that PDHC was at "fault regarding the overpayment."*

With unclean hands from its own adjudicated causative fault (lack of diligence to an affirmative regulatory duty), PDHC makes claim against the estate here under a smattering of legal theories including fraud, negligence, and equitable indemnification – which, if applicable to the alleged facts at all, require that PDHC have clean hands so as to have a right to rely on alleged misrepresentations, and so as not to have its own causative lack of diligence. Thus, the Estate fully expects this claim to be dismissed by the Circuit Court.

Plaintiff....” The complaint purports to attach a copy of the alleged letter as an exhibit. The alleged letter is directed to “Tony” – current counsel for PDHC.

In addition to the allegations of the Complaint, PDHC has also answered Interrogatories propounded pursuant to Rule 33 of the South Carolina Rules of Civil Procedure (responses dated July 28, 2010 attached as Exhibit C). PDHC’s answer to Interrogatory 2 identifies the same alleged letter from decedent to Tony Megna as a document that relates to a claim or defense in the case. That interrogatory answer also references other “information sent to Tony Megna by Dr. Thompson relating to the SC Board of Medical Examiners.” Thus, by the Plaintiff’s own responses, Megna is the alleged recipient of documents and information relevant to claims and defenses in the case.

Obviously, questions regarding the authenticity of this letter, the circumstances of its alleged receipt, and its alleged contextual meaning are all fairly directed to Mr. Megna. Indeed, the Defendant Estate anticipates deposing Tony R. Megna, together with all the health professionals at PDHC, pursuant to Rule 30 of the South Carolina Rules of Civil Procedure.

Even assuming its authenticity and admissibility, both contested at this point, the Thompson Estate denies that the letter contains any adverse admission or any misrepresentation. Nevertheless, the communications between the decedent and PDHC have been made an issue by the Plaintiff in this case. Clearly the Estate will need to investigate alleged facts bearing on issues raised by the Complaint in this case.

In response to the standard interrogatory 1, which calls for the identification of witnesses, PDHC lists Tony R. Megna. Apparently anticipating disqualification, PDHC’s interrogatory answer asserts that “Mr. Megna is not likely to testify....” This anticipatory disclaimer does not

alter Defendant's right to discover information from witness Megna and this alone requires disqualification whether called at trial as a witness, by either party, or not.

In addition, the response to Interrogatory 8 identifies Tony Megna as the only person with whom decedent communicated, known to PDHC, about the adverse Medicare determination for recoupment. In response to PDHC's claim to equitable indemnification, the Estate has asserted that PDHC failed to timely communicate with decedent regarding the adverse Medicare determination such that decedent might participate or offer assistance with the continuing administrative and judicial appeal options available to contest that determination. Thus, these Megna communications are relevant to a claim or defense in this matter and need to be explored by the Estate.

Finally, Mr. Megna is identified in the answer to Interrogatory 9 as the person involved with the defense of the adverse Medicare determination. The defense of that adverse determination is at the heart of PDHC's current claims. A professionally competent defense of that adverse Medicare determination is essential to any alleged causative chain between alleged acts of the decedent and plaintiff's alleged damages; in other words, the failure to effectively pursue the appeal of that determination would represent an intervening negligent act. Moreover, any inequitable position related to PDHC's defensive efforts against Medicare, such as not notifying and including the decedent, *inter alia*, would act to defeat any claim it now asserts in equity against the decedent.

THE APPLICABLE RULE

In South Carolina, an attorney cannot "act as an advocate at a trial in which the lawyer is likely to be a necessary witness," unless the issue about which the attorney will testify (1) is uncontested, (2) relates to the nature or the value of the legal services rendered, or (3)

disqualification would work a substantial hardship on the attorney's client. Rule of Prof. Conduct 3.7, SCACR 407. Rule 3.7 is absolute; only when one of the three delineated exceptions applies may an advocate also serve as a witness. 1 S. C. Juris. *Attorney and Client* § 53; ROBERT M. WILCOX, South Carolina Legal Ethics § 9.1.1. An adversary, such as the Estate of Dr. Thompson, has an obligation to immediately move for disqualification when there is an issue of the opposing advocate's position as a witness. Comment (1), RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 108.

Unlike some other jurisdictions, the South Carolina rule does not differentiate between litigants calling an attorney as a witness. There is no difference in South Carolina law between a "friendly" testifying attorney and a "harmful" testifying attorney called to the stand by the client's opponent. *See, e.g., Taylor v. Grogan*, 900 P.2d 60, 62 (Colo. 1995) (outlining the steps in jurisdictions with different requirements that must be taken by an attorney wishing to call the opposing attorney to testify in a way that is harmful to that opposing counsel's client). Thus, it makes no difference in the present action if Megna is a witness for the Plaintiff or a witness for the Defendant or both.

As outlined above, Megna's testimony relates to communications with the decedent at the heart of the claims and defenses in this case as well as administrative issues of Medicare compliance and damages. Megna's testimony does not relate to "legal services rendered." And everything about these areas of inquiry is contested. Accordingly, PDHC may argue that a disqualification will work a substantial hardship. Our courts have noted that this exception to Rule 3.7 should be construed very narrowly. *Brown v. Daniel*, 180 F.R.D. 298, 302 (D.S.C. 1998).

Simple extra expense or the loss of time that is inherent in any disqualification is *not enough* to qualify as a substantial hardship. To find substantial hardship, "courts have required something beyond the normal incidents of changing counsel, such as the loss of extensive knowledge of a case based upon a long-term relationship between the client and counsel and

substantial discovery conducted in the actual litigation.” *Id.* In this case, discovery is just getting started; no depositions have been taken; thus, there is minimal extra expense or loss of time if any. Moreover, because Rule 3.7(b) will allow for Megna’s non-witness partner Ben Matthews to continue in his existing representation of PDHC,² no hardship is present.

A RED HERRING: THE DEAD MAN STATUTE

In an effort to avoid Megna’s clear position as a witness in this matter, PDHC may assert that the Dead Man Statute prevents the possibility of Megna testifying even though he is a fact witness. This assertion, made in various discovery responses already,³ is a red herring and does not change the discoverability of information allegedly known by Megna as a fact witness.⁴

The Dead Man Statute, codified in South Carolina at S.C. Code § 19-11-20, is an evidentiary rule that relates to the competency of a witness to testify about certain matters. The statute exists to prevent interested parties from offering self-serving, incontrovertible testimony that may be unreliable. Harris v Berry, 231 S.C. 201, 98 S.E.2d 251 (1957); Trimmier v Thomson, 41 S.C. 125, 19 S.E. 291(1894). Specifically, a competency objection may be raised by the decedent’s representatives to prohibit a person or party with an interest in the matter from testifying about communications or transactions with another person who is deceased at the time of such testimony.

² Both Megna and Matthews have made appearances on behalf of PDHC in this action and related probate court proceedings.

³ For example, PDHC’s response to interrogatory 9 dated July 28, 2010. Curiously, this response suggests that it is the Defendant that has “objected” to Megna testimony based upon the Dead man Statute; after discovery, the Defendant may raise such an objection at the appropriate time before the trier of fact but has not “objected” yet in any forum to any testimony.

⁴ PDHC may also raise privilege as the basis to protect Megna from testifying. In PDHC’s response to interrogatory 9 dated July 28, 2010, it is asserted that “all communications of Mr. Megna with employees of Plaintiff are privileged under both the attorney-client privilege and the attorney-work product doctrine.”

12

Our courts have a history of strict construction of the Dead Man Statute.⁵ Thus, a discovery deposition is essential to determine the potential scope of applicability in a matter such as the case *sub judice*. While the competency objection may be waived by the decedent's representatives, our Court of Appeals has previously held that a discovery deposition regarding the communications between a decedent and an interested person or party does not "open the door" or waive the availability of the objection at trial. Thomas v. Taylor, 300 S.C. 127, 386 S.E.2d 630 (Ct. App. 1989)(Sanders, Chief Judge). The court in Taylor relied, in part, on Rule 32(d)(3)(A) of the South Carolina Rules of Civil Procedure which provides that "Objections to the competency of a witness ... are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." Obviously, Dr. Thompson's death cannot be removed or obviated "before or during" the anticipated Megna deposition so waiver is not possible at a deposition.

OTHER RED HERRINGS: PRIVILEGE AND WORK PRODUCT

PDHC has also asserted that Megna's communications with regard to the Medicare appeal efforts are protected by either the work-product doctrine or by attorney-client privilege. PDHC may raise these issues as reasons to prohibit Megna from testifying. In PDHC's response to interrogatory 9 dated July 28, 2010, it is asserted that "all communications of Mr. Megna with employees of Plaintiff are privileged under both the attorney-client privilege and the attorney-work product doctrine."

⁵ See Estate of Revis by Revis v. Revis, 326 S.C. 470, 484 S.E.2d 112 (Ct. App. 1997) ("The 'dead man's' statute is an exception to the general rule of witness competency. It is to be read restrictively, and the party requesting its use bears the burden of establishing its applicability.").

A. The Work Product Doctrine

The work-product doctrine seeks to protect things or information "prepared in anticipation of litigation or for the trial ..." Specifically, Rule 26(b)(3) of the South Carolina Rules of Civil Procedure protects "against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." The work-product doctrine does not, however, extend to anything and everything an attorney might have done – particularly when acting in the capacity of a CEO of a medical practice. Even where applicable, Rule 26(b)(3) provides for an exception when a party is "unable without undue hardship to obtain the substantial equivalent of the materials by other means."

The work-product privilege applies only to "attorneys' or legal representatives mental impressions, conclusions, opinions, or legal theories authored in anticipation of litigation." Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 668 (10th Cir.2006). Fact work product is not absolutely privileged and discovery of fact or non-opinion work product may be compelled in some circumstances. In re Qwest Communications Int'l. Inc., 450 F.3d 1179, 1186 (10th Cir.2006). "Work product which is primarily factual in nature is not absolutely immune from discovery under the rule. At best, it receives a qualified protection which is overcome if the opposing party shows substantial need of the material and inability to obtain it elsewhere without undue hardship." Transit Authority of River City v. Vinson, 703 S.W.2d 482, 486 (Ky.App.1985); see also Duffy v. Wilson, 289 S.W.3d 555, 559 (Ky.2009). Absent some audio recording, the only means to get the substantial equivalent of Dr. Thompson's alleged conversations with the CEO of PDHC is to ask the surviving party to those conversations.

In addition, the work product doctrine is limited to protecting such things in the context of the litigation to which the information relates – *not other litigation*. Accord Kirschbaum v. WRGSB Assocs., No. 97-5532, 1998 U.S. Dist. LEXIS 8860, at *3 (E.D. Pa. June 18, 1998). In this case, the Defendants are not interested in communications Megna may have had about the litigation *sub judice*; rather, the Defendant's inquiry, to the extent it involves litigation at all,⁶ would be about the litigation with Medicare – *not* the present litigation with the Estate. The litigation with Medicare is over and the protection, if applicable at all, would only apply in the context of that litigation – protecting Megna's thoughts about the Medicare litigation from disclosure to Medicare; it does not apply here.

B. Attorney-Client Privilege

South Carolina has long recognized the attorney-client privilege against the disclosure of confidential communications by a client to his attorney. State v. Love, 275 S.C. 55, 59, 271 S.E.2d 110, 112 (1980). The privilege applies only to "confidential disclosures by a client to an attorney made in order to obtain legal assistance." Fisher v. United States, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 186 (1980). The burden is on the proponent of the privilege to demonstrate its applicability. United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982). The party asserting the attorney-client privilege must establish not only that the attorney-client relationship existed, but also that the particular communication at issue is privileged and that the privilege was not waived. Cameron v. Gen. Motors Corp., 158 F.R.D. 581, 584 (D.S.C. 1994), vacated by, in part In re Gen. Motors Corp., No. 94-2435, 1995 U.S. App. LEXIS 41270 (4th Cir. 1995).

⁶ Much of the inquiry would not involve any litigation. Defendant wants to make inquiry into things such as the authenticity of the alleged Thompson letter, the circumstances of the alleged receipt of the Thompson letter, and the alleged contextual meaning of such letter. Such inquiries clearly do not touch upon any attorney's work-product.

Turning to the specifics of this case, the privilege would not extend to Megna's general communications when acting in the capacity of a CEO of a medical practice except for the limited circumstances where the medical practice is seeking legal advice. For example, Megna's communications with third parties such as government regulators, insurers, and Medicare program administrators is clearly not for the purpose of PDHC obtaining legal advice from those parties. Even routine communications of a CEO with employees about compliance with policies and procedures is not for the purpose of PDHC obtaining legal advice.

Further, there is nothing in the alleged Thompson letter to Megna, attached to the complaint, that indicates that Thompson is seeking legal advice. Moreover, *that communication has already been divulged by PDHC as part of its complaint* -- so even if it arguably related to legal advice needed by PDHC at the time, that privilege has clearly been waived by its disclosure. Clearly Megna is now subject to examination as to details of a document that was so important that it was identified as an attachment to a publicly filed complaint.

Moreover, by placing the subject of communications and disclosures between the decedent and Megna (on behalf of PDHC) into controversy, PDHC has implicitly waived any possible remaining or existing privilege. Implicit waiver arises when the client places otherwise privileged matters in controversy as part of a claim or defense. Duplan Corp. v. Deering Milliken, Inc., 397 F.Supp. 1146, 1161 (D.S.C. 1975). See also In re Long Point Road Ltd. P'ship, No. 93-72769-JW, 1997 Bank. LEXIS 2403, at *9-10 (Bankr. D.S.C. Sept. 8, 1997); see also Hearn v. Rhay, 68 F.R.D. 574, 580 (E.D. Wash. 1975).

Fairness is the underlying touchstone for implicit waiver; *the rationale is that privileged materials ought not be used as both a shield and sword*. See In re: United Supermarkets, Inc., 36 S.W.3d 619, 621 (Tex. Ct. App. 2000) ("a party who is seeking affirmative relief should not

be permitted to maintain an action, and at the same time, maintain evidentiary privileges that protect from discovery outcome determinative information not otherwise available to the other party."); see also Hangards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) ("a party may not insist on the protection of the attorney-client privilege for damaging communications while disclosing other selected communications because they are self-serving.").

In the case *sub judice*, the crux of the PDHC complaint is that decedent Thompson did not disclose information to PDHC or gave wrong information to PDHC -- in part through its CEO Tony Megna. Under the guise of privilege, Megna cannot now avoid examination on the disclosures and communications made to him that he now claims were tortious.

CONCLUSION

Defendant's counsel, Megna, should be disqualified here, as he will be a necessary witness. Megna is the CEO of the Plaintiff organization and is an owner with a financial stake in the outcome of this litigation. By his position alone, Megna is central to the issues involved in this case. In addition, Megna was intimately involved in the relationship between Plaintiff and the Decedent Hugh S. Thompson, and was responsible for many decisions that were made regarding the employment between the two parties. Megna's knowledge of these important facts proves that his testimony will be necessary in this case. In discovery or at trial or both, Megna will be called upon to testify regarding facts at issue in the present action, and thus, Megna cannot proceed as an advocate for the Plaintiff in this proceeding.

This is the exact factual scenario for which Rule 3.7 was designed. Megna clearly has a personal interest in the case that he is advocating. Because Megna is a witness regarding

questions of fact in the present action, the disqualification of Defendant's counsel Megna must be ordered.

January 28th, 2011

PAULLING & JAMES


John Jay James, II

SC Bar #2949

Paulling & James

112 Cashua Street

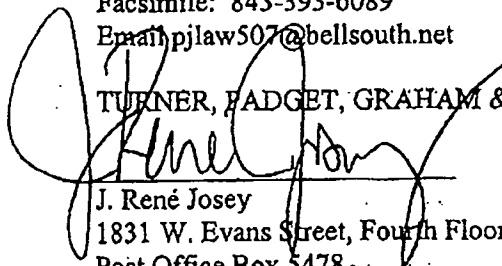
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E-mail: RJosey@TurnerPadget.com

ATTORNEYS FOR RESPONDENTS

STATE OF SOUTH CAROLINA,

COUNTY OF DARLINGTON

Pee Dee Health Care, P.A.,

Plaintiff,

vs.

Estate of Hugh S. Thompson,

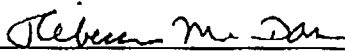
Defendant.

IN THE COURT OF COMMON PLEAS
DOCKET NO.: 10-CP-16-0332

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of January, 2011 a copy of the above and foregoing Defendant's Motion to Disqualify Plaintiff's Counsel, has been mailed to all counsel of record, postage prepaid and properly addressed as follows:

Benjamin R. Matthews, Esquire
Tony Ray Megna, Esquire
Matthews & Megna, LLC
3400 West Avenue
Columbia, SC 29203


Secretary to J. René Josey

2011 JAN 31 AM 11:51
SCOTT & SUGGS
CLERK OF COURT
DARLINGTON COUNTY, SC.

FILED

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

10-CP-16-0332

2011 MAY -2 AM 11:12
SCOTT B. SURGES
CLERK OF COURT, C.O.D.
DARLINGTON COUNTY, S.C.

FILED

PLAINTIFF'S MOTION TO RECONSIDER

Pursuant to Rule 59(e), SCRCF, the Plaintiff, Pee Dee Health Care, P.A. [PDHC], respectfully requests this to Court to reconsider its order [dated April 15, 2011, filed April 19, 2011, and received by mail by Plaintiff on April 21, 2011] disqualifying the undersigned from representing Plaintiff on the following grounds:

1. The Plaintiff incorporates herein its response to the Defendant's Motion to Disqualify previously filed with this Court.
2. As indicated by the attached affidavit of Mark Matthews, the document [Exhibit HH] that this Court primarily relied upon to disqualify the undersigned was obtained during the course of discovery in this case between the parties.¹ The document in Plaintiff's files is attached to his affidavit. The Court's reliance on Exhibit HH to Disqualify the undersigned is error.
3. The Court overlooked the Plaintiff's request that the Court should recuse itself from hearing matters concerning the Plaintiff and the undersigned due to the litigation now pending in Florence County where this Court often sits by designation.
4. The Court overlooked that the Medicare 855 attached to the Defendant's Motion to

¹ The document was either provided by the Defendant or was a documents obtained by subpoena or requests under the FOIA.

Disqualify the undersigned has no bearing whatsoever on the case at bar and only indicates that the undersigned was an interested party in Mid-Carolina Hospital Group (MCHG).

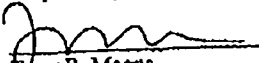
5. The Court further overlooked that the 'Medicare 855 document' it relied upon was not created until eight years after the deceased left the employ of Plaintiff.

6. The Court overlooked the fact that the actual, plain wording of Rule 3.7, SCACR, 401 [and all the case law interpreting the plain wording of Rule 3.7] states that disqualification, if appropriate in the first instance, which the Plaintiff denies, is limited to disqualification at trial as opposed to total disqualification as this Court so provided. Respectfully, disregarding the plain wording of Rule 3.7 sets a troubling precedent for litigants, attorneys and this Court. As noted in the attached affidavits of Josiah Matthews, M.D., Alexander H. Cohen, M.D., James D. McInnis, M.D., Mark Matthews and Katie Noyes, there is no reasonable basis for this court to expect or to anticipate that the undersigned will be a fact witness at all, much less a necessary fact witness as required by Rule 3.7 for disqualification.

7. The Court made conclusions of fact that are incorrect in regard to the nature of the undersigned's relationship with the Plaintiff as well as Dr. Thompson as more fully set forth in the affidavits attached hereto.

8. The Plaintiff respectfully requests this Court to withdraw its order disqualifying the undersigned from representing Plaintiff, and to provide the Plaintiff the relief previously requested.

Respectfully submitted,


Tony R. Megna
Attorney-at-Law
3400 West Avenue
Columbia, SC 29203
803.799.1700

FILED
2011 MAY -2 AM 11:12
SCOTT B. SWEETS
CLERK OF COURT/P.D.
CARLISLE COUNTY, S.C.

May 2, 2011.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

CERTIFICATE OF SERVICE

10-CP-16-0332

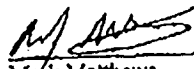
The undersigned hereby certifies, on the date indicated below, copies of the following documents in the above-captioned matter were served upon the following:

Plaintiff's Motion to Reconsider

The Honorable J. Michael Baxley
531 East Carolina Avenue
Hartsville, SC 29550-4311
[By United States Mail, first class, postage
prepaid.]

John Jay James, Esquire
PO Box 507
Darlington, SC 29540
[By United States Mail, first class, postage
prepaid.]

Renee Josey
1851 W. Evans Street, 4th Floor
Florence, SC 29501
[By United States Mail, first class, postage
prepaid.]


Mark Matthews

May 2, 2011.

TRUE CERTIFIED COPY,
Scott B. Suggs
CLERK OF COURT/PMC
DARLINGTON COUNTY, S.C.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

10-CP-16-0332

FILED
2011 MAR 11 AM 10:45
SCOTT B. SUGGS
CLERK OF COURT, S.C.
DARLINGTON COUNTY, S.C.

**RETURN OF PEE DEE HEALTH CARE, P.A. TO
DEFENDANT'S MOTION TO DISQUALIFY**

INTRODUCTION

PART I

The Plaintiff, Pee Dee Health Care, P.A. is a professional medical association with clinical offices in Darlington, SC and Olanta, SC. The Defendant is the Estate of Hugh S. Thompson, M.D. Dr. Thompson died on November 5, 2009.¹ This action is a proceeding pursuant to S.C. Code Ann. Section 62-1-201(32). The Plaintiff is a claimant of the estate S.C. Code Ann. Section 62-1-201(4). The Personal Representatives of the Decedent's estate [the Decedent's grown children] are the sole successors as defined by S.C. Code Ann. Section 62-1-201(42) to the assets of the estate other than the claim of the Plaintiff², and trustees to the estate as defined by S.C. Code Ann. Section 62-1-201(45) with corollary fiduciary duties to the estate.

¹ The undersigned has been the CEO and General Counsel to Plaintiff since 1995. The undersigned had no conversations with the Decedent in regard to any of the matters contained in this lawsuit. However, the Decedent initiated a telephone call indicating he was sending unspecified documents to the Plaintiff. Those documents have been provided to the Defendant during discovery. During discovery, the Defendant was notified of the employees of the Plaintiff who did, in fact, have actual contact with the Decedent.

² There is another claim against the estate that is being defended by the Decedent's professional malpractice carrier.

Both the Plaintiff and the Personal Representatives of the Estate are "Interested Persons" as defined by S.C. Code Ann. Section 62-1-201(20). Apparently, Mr. James and Mr. Josey are representing both the Defendant estate and the Personal Representatives³ of the Estate as defined by S.C. Code Ann. Section 62-1-201(30). This is problematic as the Personal Representatives are fiduciaries to the estate, and must exclude all selfish interest in its dealings with others who make claim to the assets of the estate. *Carlee v. Lesley*, 290 S.C. 333, 350 S.E. (2d) 388 (1986). "Consequently, it is generally undesirable for one of the beneficiaries of a trust to act as trustee, since he is thereby put in a position to favor himself at the expense of the other beneficiaries." *Yates v. Yates*, 255 Ill. 66, 99 N.E. 360 (1912); *Selleck v. Hawley*, 331 Mo. 1038, 56 S.W. (2d) 387 (1932). A "fiduciary" includes a personal representative under § 62-1-201(13) (1987).

In evaluating an attorney's duties to third parties under the probate code, the Supreme Court stated, in *In Douglas ex rel. Louthian v. Boyce*, 542 S.E. 2d 715 (2001),

"...[W]e emphasize that attorneys must conduct themselves ethically in all matters. The fact the legislature has seen fit to limit an attorney's responsibility to third parties when representing a fiduciary does not diminish this overriding ethical obligation.

PART II

The Plaintiff submits that the purpose of the Motion to Disqualify, as noted herein, violates, among other rules, Rule 407, Rule 4.4(a) of the SCACR in that the motion serves no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person. Comment 1 to Rule 4.4 states:

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may

³ It is unclear whether Mr. James and Mr. Josey are representing the Personal Representatives of the Estate in their individual capacities as well. If so, this implicates at least Rule 407, Rules 1.7, 1.8(g), and 2.3. If not, then Rule 407, Rules 1.18 and 4.3 are implicated as well as the application [or lack thereof] of the attorney-client privilege.

disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client lawyer relationship.

PART III

The Decedent, Dr. Hugh Thompson, was disbarred⁴ as a physician from the Medicare program effective March 31, 1996. The Defendant admitted this fact on page 2, ¶ 10 of Defendants Answer filed June 17, 2010]. The Decedent admitted this fact in a statement he made dated May 28, 2004 [Exhibit E]⁵, and the letter from the Medicare OIG evidencing Decedent's disbarment is attached as Exhibit F. For the Court's convenience, the exhibits⁶ Plaintiff refers to herein have been bound in a separate volume; and are incorporated hereinto by reference.

In early 1998, Decedent was employed by the medical offices of Don Fowler in Marion, SC. While working in Dr. Fowler's medical offices, the Decedent filed an application with Medicare to be approved as an eligible physician to see those patients enrolled in the Medicare program. That application is attached as Exhibit A, and is discussed in more depth below. On June 12, 1998, Medicare sent Dr. Thompson a request that stated his original application was

⁴ Disbarment of a physician such as Decedent from the Medicare program excludes the offending physician from participation in the Medicare and State health care programs so that no payment is made for any items or services (other than an emergency item or service) furnished, ordered or prescribed by you under the above-mentioned programs. The foregoing explanation excludes possible criminal implications to disbarment which are not present in the instant case.

⁵ The two-page document [Exhibit E] was provided to the Plaintiff by Mr. James by letter dated July 9, 2010 (a copy of Mr. James' letter is attached hereto as Exhibit GG, see item 2).

⁶ In its various Motions, the Defendant has referred to several of the exhibits Plaintiff has provided this Court. The Defendant, however, reserved objections to their admissibility. Most, if not all, of the documents were obtained by both Plaintiff and Defendant from public sources, government offices or businesses that retained the documents in the ordinary course of their business. Regardless, there is little doubt the documents are admissible under the SC rules of evidence, including but not limited to Rules 803, 804, 901, 1003, 1004, 1005, 1007, 1008, and 1101.

incomplete. Page 2 of that letter requested that he provide Medicare with a copy of his reinstatement letter from the Medicare OIG. The letter was sent to Decedent at the work address of his then employer, Medical Offices of Dr. Don Fowler, PO Box 875, Marion, SC 29571. [Exhibit FF]. On September 14, 1998, Medicare sent Dr. Thompson a second request that stated his original application was incomplete. Page 2 of that letter again requested that he provide Medicare with a copy of his reinstatement letter from the Medicare OIG. The letter was again sent to Decedent at the work address of his then employer, Medical Offices of Dr. Don Fowler, PO Box 875, Marion, SC 29571. [Exhibit O]. The Decedent never provided this reinstatement letter nor did the Decedent otherwise respond to either the June 12, 1998 nor the September 14, 1998 letters from Medicare.⁷

PART IV

In the Fall of 1998, the Decedent left the employ of Dr. Fowler and was employed by Plaintiff. When the Decedent began his employment with Plaintiff, he completed and signed what Medicare refers to as a "Reassignment of Benefits." See Exhibit B. This document, the Reassignment of Benefits, is a required document for Medicare as funds paid for services performed by a Medicare provider are the responsibility of that provider. Dr. Thompson assigned to Plaintiff the reimbursement he received from seeing patients in Plaintiff's offices, and, in return was an employee of Plaintiff and received a substantial salary.

Medicare sent the Plaintiff a letter approving the Decedent's request that his

⁷ As noted in its Answer filed with this Court on June 17, 2010, the Defendant has admitted that the relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." [Page 4, 21 of Defendants Answer filed June 17, 2010]. The relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff. Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." [Page 5, 26 of Defendants Answer filed June 17, 2010].

Reassignment of Benefits be assigned to Plaintiff's offices. See Exhibit C. Neither the Decedent nor Medicare nor the offices of Dr. Fowler informed the Plaintiff of the June 12, 1998 letter from Medicare or the September 14, 1998 letters from Medicare, all requesting the Decedent provide Medicare the Decedent's reinstatement letter from the OIG's disbarment of Decedent in 1996. Decedent continued to work for Plaintiff without providing the Plaintiff any information as to his disbarment from the Medicare program. He left the employ of Plaintiff and went to work for FirstChoice [a medical practice in Florence, SC] in December, 2000. Apparently, sometime in 2002, the Decedent and FirstChoice was advised by Medicare the Decedent was a disbarred physician with the Medicare program. Once again, neither the Decedent nor FirstChoice nor anyone else informed the Plaintiff the Decedent had been and remained disbarred from the Medicare program.⁸

In the early summer of 2007, the Plaintiff was first notified by Medicare that Dr. Thompson had been disbarred as a physician in the Medicare program during the time period he was employed by Plaintiff. A disbarred physician, such as Decedent, is not entitled to treat Medicare patients during the time of his disbarment. Likewise, a medical practice, such as Plaintiff, is not entitled to receive funds from Medicare that are assigned to it by a disbarred

⁸ "Estoppel by silence arises where a person *owing another a duty to speak* refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts." *Id.* (emphasis added). A duty to speak or disclose may be found in three distinct scenarios:

- (1) where it arises from a preexisting definite fiduciary relation between the parties;
- (2) where one party expressly reposes a trust and confidence in the other with reference to the particular transaction in question, or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is necessarily implied; and
- (3) where the very contract or transaction itself, in its essential nature, is intrinsically fiduciary and necessarily calls for perfect good faith and full disclosure without regard to any particular intention of the parties. *Jacobson v. Yaschik*, 249 S.C. 577, 155 S.E.2d 601 (1967); *Kiriakides v. Atlas Food Sys. & Serv. Inc.*, 338 S.C. 572, 527 S.E.2d 362*362, 371 (Ct.App.2000), *affirmed as modified and remanded*, 343 S.C. 587, 541 S.E.2d 257 (2001).

physician during the time period of the physician's disbarment. Once the Plaintiff was notified by Medicare of Decedent's disbarment in 2007, Mr. Mark Matthews contacted both the Decedent and his current employer, FirstChoice Health Care of Florence, SC to determine the facts of the matter. Mr. Matthews's affidavit is attached as Exhibit Z.

The undersigned represented Plaintiff during the Medicare proceedings against Pee Dee Health Care, P.A. As noted herein, the Decedent had separate counsel – Wes Jackson of Nexsen Pruet. Exhibit Q. The undersigned had no conversations with the Decedent in regard to any of the matters contained in this lawsuit. The Defendant's correctly assert the undersigned never represented the Decedent. However, the Decedent initiated a telephone call indicating he was sending unspecified documents to the Plaintiff. Those documents have been provided to the Defendant during discovery. At this time, the undersigned closed any further discussions with Decedent and advised Decedent the undersigned could not discuss the matter with him. That was the end of the conversation. During discovery, the Defendant was notified of the employees of the Plaintiff who did, in fact, have actual contact with the Decedent.

Mr. Dean Banks, the owner of FirstChoice [the Decedent's then-current employer] informed Mr. Mark Matthews that Medicare had made a similar demand of FirstChoice and FirstChoice had secured the services of a law firm in Columbia, SC, [Nexsen Pruet] to represent both, FirstChoice and Dr. Thompson, the Decedent. Mr. Banks sent Plaintiff a letter from Nexsen Pruet [Exhibit Q] contesting Medicare's determination to 'recoup' funds from FirstChoice for funds FirstChoice received during the time period Decedent worked for FirstChoice that was prior to his reinstatement to the Medicare program in 2004. The letter from Nexsen Pruet [Exhibit Q] stated in part as follows:

The excluded provider designation was imposed as a result of the suspension

of Dr. Thompson's license to practice medicine after Dr. Thompson refused to pay a fine owed to the South Carolina Board of Medical Examiners. Dr. Thompson paid this fine and his license was reinstated in 1998. Unfortunately, Dr. Thompson was unaware that he was required to file any additional paperwork and thus failed to complete the appropriate paperwork to remove his name from the OIG's excluded provider list. Thus, while he had satisfied all the necessary criteria to obtain reimbursement from Medicare and obtained the appropriate permission to do so, he was still erroneously listed as an excluded provider. Dr. Thompson and FirstChoice first became aware of Dr. Thompson's presence on the OIG's excluded provider list in 2002 when Dr. Thompson referred a Medicare patient for physical therapy in North Carolina. The practice manager of the physical therapy practice called FirstChoice and indicated that she received a letter from HCFA that Dr. Thompson was excluded from Medicare effective March 31, 1996. Up and until the point the physical therapy practice manager notified FirstChoice of Dr. Thompson's excluded provider status, Dr. Thompson and FirstChoice had no knowledge of any such designation. In response to the practice manager's discovery, FirstChoice called Palmetto GBA and spoke to Tina Houser (803.786.1034, ext. 34620), who informed FirstChoice that Dr. Thompson was in good standing with Medicare and that FirstChoice could bill and be reimbursed in South Carolina. Dr. Thompson had further conversations with the OIG and HCFA and was sent a reinstatement form in February 2002, which indicated that FirstChoice could not participate in Medicare or Medicaid until the reinstatement was completed. FirstChoice again called Palmetto GBA and was told that Dr. Thompson's Medicare number was active and that FirstChoice could bill Medicare for Dr. Thompson's services.

The administrative appeals initiated by Nexsen Pruetz's on behalf of Decedent and FirstChoice resulted in the decision of the Medicare Administrative Law Court, known herein as the [the 'ALJ Joe' order dated January 22, 2008] [Exhibit M], on behalf of Dr. Thompson and FirstChoice Health Care of Florence. The 'ALJ Joe' decision overturned the initial decision of Medicare to 'recoup' funds from FirstChoice during the time of the Decedent's disbarment from Medicare. Neither FirstChoice nor Dr. Thompson provided a copy of the 'ALJ Joe' order dated

January 22, 2008⁹ to Plaintiff, even though they had agreed to provide such information to Plaintiff. [See Exhibit U - email dated July 11, 2007 from the undersigned to Mr. Banks enclosing a copy of Plaintiff's response to Medicare]. *In their memorandum to this Court [page 4], counsel for the Defendants assert that the Plaintiff's failure to communicate with the Decedent interfered with the Decedent's right to protect his own interest. In point of fact, and as demonstrated by the foregoing, just the opposite is true. The Medicare ALJ 'Joe decision' that was favorable to the Decedent and FirstChoice was dated January 22, 2008, and was never provided to the Plaintiff. If it had been, the outcome of the Medicare recoupment from Plaintiff would likely have been different. For this reason, the Defendant is equitably estopped from asserting any defense against Plaintiff do to the Decedent's own silence.*

The Plaintiff received no further communications from the Decedent or Mr. Banks even though such communications had been promised. [See Exhibit P]. Nor was the Plaintiff aware of the favorable Medicare ALJ 'Joe' decision obtained by the Decedent and FirstChoice until the 'Joe' decision was produced during discovery in this case because neither FirstChoice nor the Decedent provided the information to Plaintiff. On March 14, 2008, the Plaintiff received an order [Exhibit N] from the Medicare ALJ that required Plaintiff to pay Medicare the funds it received from Medicare during the time the Decedent was disbarred from Medicare. Because of the Decedent's failure [as well as FirstChoice to provide the 'ALJ order to Plaintiff], PDHC did not have the opportunity to present the favorable 'ALJ Joe determination' as a defense to the

⁹ Sometime in 2007, Dr. Thompson did contact the undersigned to inform him that the Decedent was providing 'some papers' to Plaintiff. The Decedent further informed the undersigned he was represented by a 'lawyer in Columbia.' The undersigned and the Decedent had no substantive communications concerning these matters whatsoever at any time. The Decedent, however, did send the Plaintiff a few documents which have been produced to the Defendant. [Exhibit V], and as noted herein below, the Defendant has obtained from other sources. All other conversions between Plaintiff and Decedent in regard to these matters, both prior to and following 2007, took place with Mr. Mark Matthews and other employees of Plaintiff. [See Exhibit Z].

claims made by Medicare against PDHC and Dr. Thompson, the Medicare Independent Review Board [QIC], the Medicare ALJ, or to the Medicare Appeals Council; and the Defendant is collaterally estopped [as well as equitably estopped due to his own silence] from re-litigating the matter in any manner whatsoever.¹⁰

PART V

Regardless of all of the Defendant's claims, the Defendant, while blaming the Plaintiff's for Decedent's woes, has never identified the source of any legal duty of the Plaintiff to act to protect the interests of the Decedent in any instance. The Decedent had not been employed by Plaintiff for over seven years, had never informed Plaintiff of any of the issues relating his disbarment in 1996, nor his reinstatement in 2002. In addition, in his statement dated May 28, 2004, he admits his own negligence. [See Exhibit E]. Regardless, and in all instances in which Plaintiff was involved in opposing Medicare's attempts to recoup funds obtained by Plaintiff during Decedent's disbarment from Medicare, Medicare was making demands of the Plaintiff in regard to payments received by Plaintiff under the terms of the Reassignment of Benefits executed by the Decedent on November 4, 1998 [Exhibit B]. And the Decedent actually [and constructively] knew of the matter as demonstrated by the email between Mr. Banks and Mr. Mark Matthews. [Exhibit Q]. As noted herein in more detail,

- a. Decedent was represented by independent counsel of his own choosing beginning

¹⁰ See for instance *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 324 n.4, 99 S.Ct. 645, 649 n.4, 58 L.Ed.2d 552, 559 n.4 (1979) (approving use of offensive collateral when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully even in an action with another party. SC law provides the same. See *n Graham v. State Farm Fire and Casualty Ins. Co.*, 277 S.C. 389, 391, 287 S.E. (2d) 495, 496 (1982), the Supreme Court held that a lack of privity would not prevent the application of the defense of collateral estoppel where "the party adversely affected had a full and fair opportunity to litigate the relevant issue effectively in the prior action." See also *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E. (2d) 317 (1944); *Jenkins v. Atlantic Coast Line R. Co.*, 89 S.C. 408, 71 S.E. 1010 (1910).

in 2002 and during the proceedings that led to the adverse decision requiring the recoupment of funds of the Decedent that had been assigned to the Plaintiff,

- b. Decedent and FirstChoice, regardless of the reason, failed to provide the Plaintiff the very information [the 'ALJ Joe' order dated January 22, 2008] [Exhibit M]] that would have negated the Decedent's liability in the first instance.
- c. Decedent and FirstChoice failed to communicate with Plaintiff even though they both agreed to do so. As a result of the foregoing, the Defendant, as a matter of law, is estopped from asserting any claim defense against Plaintiff because, in South Carolina, negligence takes the place of the intent to deceive when there is a duty to disclose. *Id*; 3 Pomeroy's Equity Jurisprudence §809 at 218 (5th 1941).
- d. Decedent and FirstChoice failed to notify Plaintiff for over five years of the difficulties of the Decedent in regard to his disbarment status.¹¹

Following the foregoing, the Plaintiff learned the Decedent had been diagnosed with terminal brain cancer. Under the circumstances, the Plaintiff decided not to initiate litigation. Following the Decedent's death, the Plaintiff filed a claim [Exhibit J] with the Decedent's estate. The Defendant denied the Plaintiff's claim. This litigation followed.

PART VI

FACTS ADMITTED IN THE DEFENDANT'S ANSWER FILED WITH THIS COURT ON JUNE 17, 2010

Following the denial of the Plaintiff's probate claim, this litigation was initiated. In response, the Defendant filed an Answer to the Plaintiff's complaint on June 17, 2010 in which

¹¹ Defendant is subject to, and Plaintiff hereby claims that the doctrines of laches, estoppel, waiver, abandonment, acquiescence, and stale demand [and the other defenses asserted by Plaintiff] all prevent the Defendant from asserting any and all defenses to the claims of Plaintiff.

the Defendant made numerous admissions of fact and law.

The admissions in the Defendant's answer are as follows:

1. The Decedent's medical license was suspended by the SC Board of Medical Examiners on or about May 31, 1994 and that his license to practice medicine was reinstated on or about April 14, 1998. [Page 2, ¶ 11 of Defendants Answer filed June 17, 2010].
2. On or about March 31, 1996, the Decedent was disbarred from the Medicare program by the Office of Inspector General who oversees physician participation in the Medicare program. [Page 2, ¶ 10 of Defendants Answer filed June 17, 2010].
3. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." [Page 3, ¶ 12 of Defendants Answer filed June 17, 2010]. [Page 8, ¶¶ 61 and 62 of Defendants Answer filed June 17, 2010].
4. In 1998, the Decedent failed to seek reinstatement to the Medicare program by the Medicare Office of Inspector General. [Page 2, ¶ 11, Answer filed June 17, 2010].
5. Following the Decedent's disbarment from Medicare, by the Medicare Office of Inspector General, "provisions of federal law provide that a suspension of Medicare privileges [i.e., the Decedent's disbarment from the Medicare program in 1996] continues until [the Decedent was] reinstated by the Office of Inspector General [of the Medicare program]." [Page 3, ¶ 12 of Defendants Answer filed June 17, 2010].
6. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." [Page 3, ¶ 12 of Defendants Answer filed June 17, 2010].
7. The relationship of Decedent with Plaintiff was such that Decedent had a pecuniary

interest since he was paid by Plaintiff as a physician to provide medical services. [Page 5, ¶25 of Defendants Answer filed June 17, 2010].

8. The relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." [Page 4, ¶ 21 of Defendants Answer filed June 17, 2010].

9. The relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff. Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." [Page 5, ¶ 26 of Defendants Answer filed June 17, 2010].

10. Defendant admits a Medicare provider application and an 'reassignment of benefits [application] were prepared [with Decedent's signature on the certifications affixed by Decedent – see Exhibits A and B attached hereto and incorporated herein by reference] so as to permit Decedent to treat Medicare patients and for Plaintiff to receive payments therefore." [Page 2, ¶ 9 of Defendants Answer filed June 17, 2010].

11. "Defendant admits that Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Plaintiff." [Page 6, ¶ 34 of Defendants Answer filed June 17, 2010].

12. "Defendant admits so much of ¶10 of the Complaint as alleges that Palmetto GBA [the Medicare representative that oversees the payment of claims for the Medicare program in South Carolina] issued to Decedent Medicare provider number D993211724..." See Exhibit C attached hereto. [Page 3, ¶ 12 of Defendants Answer filed June 17, 2010].

13. On or about June 17, 2007, the Plaintiff received a demand letter from Medicare that "would have had a content similar to that set forth in paragraph 12 of the Complaint." [Page 3, ¶

14 of Defendants Answer filed June 17, 2010]. Paragraph 12 of the Plaintiff's Complaint

stated as follows:

On or about June 7, 2007, Plaintiff received a letter dated May 30, 2007 from Palmetto GBA in regard to medical services provided by Decedent on behalf of Medicare beneficiaries for the dates of October 26, 1998 to December 10, 2001.

The letter stated, among other matters:

- a. That the Decedent had been suspended (sanctioned) from participation in the Medicare program during the time periods March 31, 1996 to June 20, 2002.
- b. That during the sanction period as stated in (a), Medicare payments were paid to Plaintiff for services Decedent provided to Medicare beneficiaries because the Decedent had completed an 'assignment of benefits' to Plaintiff. However, Decedent omitted any reference in regard to this suspension from the Medicare program.
- c. That Plaintiff was liable for the funds paid regardless of the fact that Plaintiff had no knowledge of the matter and that Dr. Thompson had provided both Plaintiff and Medicare with false information.
- d. That the estimated overpayment made by Medicare for patients provided by Decedent during the time he was suspended from the Medicare program was \$208,821.03 plus interest at 12.375%.

The letter of June 17, 2010 is attached hereto as Exhibit X.

14. On May 10, 2010, the personal representative of the Decedent's denied the Plaintiff's claim. [Page 4, ¶ 18 of Defendants Answer filed June 17, 2010].

15. Defendants have no knowledge of "any.... Representations made by Decedent to Plaintiff..." [Page 2, ¶ 10 of Defendants Answer filed June 17, 2010].

16. To the extent that Decedent was an employee of Plaintiff, Decedent admits that a duty of loyalty to Plaintiff was owed." [Page 6, ¶ 30 of Defendants Answer filed June 17, 2010].

17. "Decedent ... erroneously believed that filing a provider application to Palmetto GBA (a Medicare contractor) was sufficient to reinstate Decedent's status as a Medicare provider." [top

of Page 3, ¶ 11 of Defendants Answer filed June 17, 2010 and Exhibit E).

18. On or about April 13, 2010, Plaintiff filed a claim with Decedent's estate. On or about May 19, 2010, Plaintiff filed an amended claim with Decedent's estate which was denied by the personal representative of the Decedent's estate, i.e., the Defendants. [Page 4, ¶¶ 17 and 18 of Defendants Answer filed June 17, 2010].

19. Defendants have no information in their possession in regard to the allegations of ¶32 of the Plaintiff's Complaint, and therefore deny same.

20. Paragraph 32 of the Plaintiff's Complaint states:

Decedent breached his duty to Plaintiff:

- a. By act of certifying to Plaintiff personally and on his Medicare applications that he was truthful
- b. By omission failing to inform Plaintiff of the falsity of his affirmations and certifications that he was barred from medically treating Plaintiff's Medicare patients

Respectfully, the Defendant has many documents in its possession which are direct evidence of the allegations made in paragraph 32. Please see documents A, B, E, F, O, FF, Y, Z, AA, BB, CC, DD and EE.

PART VII

FACTS ADMITTED BY THE DECEDENT IN THE WRITTEN STATEMENT OF THE DECEDENT DATED MAY 28, 2004 [EXHIBIT E]

In its Motion to Disqualify the undersigned from representing Plaintiff, the Defendant argues that the undersigned is a necessary witness because the Defendant needs to determine questions surrounding a statement dated May 28, 2004 written by the Decedent and documents obtained by the undersigned from the SC Board of Medical Examiners. The Defendant knows the undersigned's testimony is neither necessary nor proper in any instance. First, Mr. James

produced the same documents to the Plaintiff after he received them from the SC Board of Medical Examiners pursuant to requests he made. [See Exhibits GG evidencing Mr. James requests and his production of those documents to Plaintiff], And the Plaintiff produced the document to the Defendant pursuant to documents it received from the Board of Medical Examiners pursuant to subpoena. [See Exhibit NN]. Second, the May 28, 2004 two-page letter prepared by the Decedent [Exhibit E] is the same two-page document that was produced to Plaintiff by Mr. James by letter dated July 9, 2010. The two-page letter dated May 28, 2004 [Exhibit E] is a summary of events prepared by the Decedent in regard to matters surrounding his disbarment from Medicare. A copy of Mr. James' letter is included as Exhibit GG (see item 2). The cover letter Decedent addressed to undersigned is Exhibit HH. Exhibit V is the remaining documents provided by Decedent. The undersigned had no conversations with the Decedent concerning any of the documents Decedent provided as the Decedent informed the undersigned he was being represented by "an attorney in Columbia." The Defendant's arguments it uses to request this Court to Disqualify the undersigned from representing the Plaintiff are not simply 'red herrings,' they are contrived.

21. On his statement dated May 28, 2004 [Exhibit E], the Decedent avowed, among matters:

- a. I concede that in 1996 I received from US Health and Human Services, or the Office of the US Inspector General, a letter informing me of my status as a Medicare provider. [See Exhibit F]. The document addressed procedures for reinstating such status, I concede, as well, that I do not have this document, and that I have completely forgotten it by the Spring of 1998, when I was in the process of resuming medical practice.

22. As noted above, the Decedent has admitted to his own disbarment, and his own failure to rectify the matter – regardless of the reason. Moreover, it is undisputable that Plaintiff had no

knowledge of the matter while Decedent had repeated actual knowledge of the matter, but, again, for whatever reason, ignored the matter.

23. Respectfully, the statements made in the Motion to Disqualify are misleading and inappropriate. The only reasonable inference is that the Defendant, and its counsel, has provided information to this court in the Motion to Disqualify that, in its best possible light, is misleading. See Rule 407, Rule 3.3, [Comment 2] SCRAP, which states "... although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false. As noted in Comment 3 to Rule 3.3, "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."¹² The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. It is undisputed that Mr. James, by letter dated July 9, 2010, provided the Decedent's statement as part of the documents held by the Defendant. Plaintiff obtained the same two-page version of the document from FirstChoice and provided to the Defendant on July 30, 2010 [See Exhibit MM]. Moreover, the Defendant had ALL of the documents the Plaintiff has now presented to this Court *prior to* filing its Motion to Disqualify. For instance, and just to demonstrate a few of the matters *actually known* to the Defendant and its counsel *that are in addition to the admissions made by the Defendant and its counsel in its Answer filed with this Court on June 17, 2010*, and in addition to the additional matters stated herein:

¹² Comment 8 to Rule 3.3 provides" ... A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(g). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

- a. On August 31, 1998, Medicare sent a letter to Decedent's then employer, Dr. Don Fowler, reassigning Decedent's Medicare billings to Dr. Fowler's office. [Exhibit W].
The letter from Medicare was sent to Decedent at the work address of his then employer, Dr. Don Fowler, PO Box 875, Marion, SC 29571. It was signed by Ms. Gina Kelly of Medicare.
- b. On September 14, 1998, Medicare sent Dr. Thompson a request that specifically requested on page 2 that he provide Medicare with a copy of his reinstatement from the Medicare OIG. This request was again signed by Ms. Kelly of Medicare. The letter was again sent to Decedent at the work address of his then employer, Dr. Don Fowler, PO Box 875, Marion, SC 29571. [Exhibit O]. As noted previously, and unknown to Plaintiff, *this was the third letter the Decedent had received from Medicare in regard to his disbarment as a provide from Medicare, the first being dated March 11, 1996 [Exhibit F] and the second being dated June 12, 1998 [Exhibit FF].*
- c. In late September or early October, 1998, just days after receiving the September 14, 1998 letter from Medicare], the Decedent requested he be employed by Plaintiff. [See affidavit of Mark Matthews].
- d. At no time prior to or during his employment with Plaintiff did Decedent inform Plaintiff nor anyone employed by Plaintiff that he had been disbarred by Medicare in 1996 [Exhibit F] nor that he had received two additional letter from Medicare dated June 12 and September 14, 1998 [Exhibit FF and O] requesting Decedent provide a copy of Decedent's re-instatement from the Medicare OIG.

PART VIII

PREDJUCIAL USE OF UNRELATED, INAPPROPRIATE INFORMATION, AND DEFAMATORY LITIGATION STRATEGY

The undersigned submits that not only do the Personal Representatives of the Estate of the Decedent have conflicts of interest in the case at bar, and not only have they made mis-statements of material facts by co-mission and omission, but that they have also resorted to an inappropriate and demeaning litigation strategy in the case at bar that is, in its best light, dishonorable. The Defendant has produced absolutely no evidence whatsoever that the undersigned had any contact with the Decedent other than the Decedent providing limited documents to the Plaintiff that have been disclosed to the Defendant during discovery. Mr. Josey and Mr. James also know they obtained these same documents from the SC Board of Medical Examiners, see Mr. James letter dated June 2, 2010 [See Exhibit KK]. It is not much of a leap to conclude that there was and is no reasonable basis to file the Motion to Disqualify in the first instance.¹³

The Motion to Disqualify is replete with implied [and not so implied] offensive and unjustified personal and professional attacks on the integrity of the undersigned. It is no secret that the Plaintiff and the undersigned are involved in litigation now pending in Florence County that is completely unrelated to the case at bar. Nor is it a secret that the undersigned was the CEO of MCHG, LLC, the holding company that is at the center of the Lake City litigation. Mr. Josey's and Mr. James' attaching a copy of the Medicare 855 to the Motion to Disqualify noting that fact is for no legitimate reason other than to inflame the passions of this Court. The undersigned is extremely aware that Mr. Josey and Mr. James are attempting to convey to the

¹³ Mr. Josey's law firm has been previously admonished for discovery misconduct. The Plaintiff remains astounded that Mr. James' has participated in such matters.

Court the misleading, insulting and not so subtle message to this Court that the undersigned is somehow "dishonest, untrustworthy"; etc. They can phrase the issue however they wish. But the truth is they have underestimated the undersigned's absolute unwillingness to bend to such baseless, self-serving, dishonorable actions. The undersigned's association with MCHG and the "Lake City" litigation issues occurred no less than seven [7] years *AFTER* the Decedent left the employ of the Plaintiff. Moreover, the Decedent *has actually admitted his own wrongdoing*. [See Exhibit E]. Mr. Josey, Mr. James, and the Personal Representatives of the Estate of the Decedent have seriously miscalculated the determination of the Plaintiff, and the undersigned, to remedy the wrong that has occurred in the case at bar – as well as in the Lake City matters.

The undersigned has no qualms in informing this Court that the 'Lake City litigation' involves significant allegations of unethical and unprofessional conduct by lawyers of one of the largest law firms in this state, allegations of unethical and unprofessional conduct by lawyers in an influential firm in the Pee Dee, allegations of unethical and unprofessional conduct by relatives of a judge in Florence County, allegations of unethical and unprofessional conduct by physicians with medical practices in Lake City, SC, and allegations of conspiracy, fraud and unprofessional conduct by many others. Neither is it a secret that the 'Lake City litigation' began with the foregoing lawyers and physicians providing *ex parte* information to a Florence County judge¹⁴ that led to the issuance of an *ex parte* restraining order against the undersigned and others. Nor is it secret that the *ex parte* order, as intended by the unethical conduct of many, destroyed a business venture in which the Plaintiff, the undersigned and others were partners.

While the undersigned is perhaps prohibited from discussing the precise nature of the

¹⁴ The undersigned was the Chief Executive Officer of the venture. That is no secret and the undersigned has never denied it. However, the undersigned's position as CEO of that venture, that was initiated in 2007-08 has nothing to do with the current proceedings before this Court.

pending investigations surrounding the matters, the undersigned can attest to the fact, that nearly three years after the initial events, no allegations of wrongdoing against the Plaintiff nor the undersigned have been proven true for the simple reason that there was no wrongdoing by the Plaintiff nor the undersigned in the first instance.

In sum, the Plaintiff and the undersigned, as well as many others, were victimized by many in the Pee Dee area in regard to the Lake City matters. Neither the Plaintiff nor the undersigned has asked for nor expect compassion, empathy, or even understanding from anyone. Additional litigation against those involved in the events leading up to and including the obtaining of the fraudulently obtained *ex parte* order is forthcoming. The Plaintiff provides the foregoing information to this Court for one simple reason. Counsel for the Defendants have unnecessarily, maliciously, and unethically interjected the 'Lake City litigation' into this lawsuit by their personal attacks and insinuations of improper conduct by the undersigned; and have attached a Lake City document to their Motion to Disqualify for the sole realistic reason of prejudicing these proceedings. The Motion to Disqualify crosses the line from advocacy to obstructionism. See the foregoing discussion in relation to Rule 401, Rules 3.3 and 3.4.

The false and unprincipled personal accusations and innuendos being made by Mr. James and Mr. Josey against the undersigned have placed this Court in the unfair and unenviable position of determining whether or not Mr. James and Mr. Josey's accusations [implied and explicit] have prejudiced these proceedings to the extent this Court should *sua sponte* recuse itself from hearing and determining these matters. In the Lake City litigation, the Chief Justice of the SC Supreme Court specifically assigned the proceedings to a jurist outside of the immediate Pee Dee area because of concerns of actual and perceived conflicts of interest as well as the appearance of such conflicts. Mr. James' and Mr. Josey's unprincipled attacks on the

undersigned and the Plaintiff have placed this Court in a similar position considering the distasteful circumstances we collectively find ourselves discussing.

Regardless of the Court's determination of the foregoing, the Plaintiff responds to the Defendant's Motion as follows with the foregoing and the following.

PART IX

1. The basic dispute between the parties revolves about funds repaid to Medicare by Plaintiff on Decedent's behalf during a time period [1999-2000] when, unknown to Plaintiff, Decedent was admittedly disbarred as a provider of medical services under the Medicare program. As noted herein,

- a. Decedent admitted in May, 2004 that, in March 1996 [the first letter], he received a letter from the Medicare OIG stating he had been disbarred as a provider in the Medicare program. [See Exhibit F].
- b. The Defendant's issue as to the undersigned's 'necessary' testimony concerning the document and the authenticity of this document in the first instance has been obviously, purposely and patently intended to mislead this Court because:
 - 1) As noted previously, Mr. Jay James, by letter dated July 9, 2010 (a copy of which is attached hereto as Exhibit GG) actually provided both pages 1 and 2 of the document to the Plaintiff. As noted, Mr. James specifically entitled the document "Summary of events and observations believed to have been prepared by Hugh S. Thompson, Jr. May 28, 2004.
 - 2) A two-page version of this document was produced and provided to Plaintiff during discovery in this case from FirstChoice Health. The two page version of the document is attached hereto as Exhibit II. This same document (as all documents provided by FirstChoice) was provided to the Defendant by Plaintiff on July 30, 2010. A copy of the email evidencing the documents produced from First Choice to Defendant's counsel, Jay James, is attached hereto as Exhibit MM.

The Plaintiff's answers to interrogatories have been updated to reflect the complete document was obtained by Plaintiff as noted above even though the Defendant's received the document from Plaintiff months prior to the filing of their Motion and provided the Plaintiff the document.

THE SECOND MEDICARE LETTER TO THE DECEDENT
DATED JUNE 12, 1998

Unknown to Plaintiff, Decedent received a second letter from Medicare dated June 12, 1998, advising him that Medicare needed additional documentation proving that he had been reinstated to the Medicare program by the OIG. See Exhibit FF. The first letter from Medicare to Decedent was the March, 1996 letter of disbarment from the Medicare OIG. This document was provided to the Defendant months ago but the Defendants have failed to note it in any of their declarations to this Court. As noted on the affidavits provided by Plaintiff, the Decedent never informed anyone at PDHC that he had been disbarred from Medicare [see Exhibits Y, Z, AA, BB, CC, DD, and EE], *and*, as noted above, he received written notices from Medicare concerning the matter at least three times prior to his employment with Plaintiff. [See Exhibits F, O, and FF].

THE THIRD MEDICARE LETTER TO THE DECEDENT
DATED SEPTEMBER 14, 1998

Also unknown to Plaintiff, Decedent received a third letter from Medicare in September, 1998, [just a few weeks before Plaintiff hired Decedent as an employee] advising him that Medicare needed additional documentation that he had been readmitted to the Medicare program by the OIG. See Exhibit O. Decedent did not provide the additional documentation to Medicare nor to Plaintiff. See affidavit of Mark Matthews – Exhibit Z. This document was provided to the Defendant months ago but the Defendants have failed to note it in any of their declarations to this Court. As noted on the affidavits provided by Plaintiff, the Decedent never informed anyone at PDHC that he had been disbarred from Medicare [see Exhibits Y, Z, AA, BB, CC, DD, and EE], *and*, as noted above, he received written notices from Medicare concerning the matter at least three times prior to his employment with Plaintiff. [See Exhibits F, O and FF].

Decedent continued a pattern of misrepresenting his disbarment from Medicare on other applications. For instance, see the answer to question in regard to a uniform insurance application from Cigna. [See Exhibit JJ, pg 7].

To question #9: Has your participation in Medicare, Medicaid, or any other government program ever been limited, curtailed or have you voluntarily excluded yourself from any of these programs.

I left the practice of medicine for several years in the mid 1990s. Since I did not bill Medicare for 4 consecutive months my Medicare number was suspended and made inactive per Medicare policy. I had to reapply for a new number when I returned to Medicine. My participation with Medicare and Medicaid is active and without restrictions currently.

24. As noted by the affidavit of Mr. Mark Matthews, he was the employee of PDHC who handled all matters with Dr. Thompson in the first instance. See Exhibit Z. Moreover, as noted on the other affidavits provided by employees of the Plaintiff, the Decedent never informed anyone at PDHC of his disbarment from Medicare. [See Exhibits Y, AA, BB, CC, DD, and EE].
25. Decedent's original application for Medicare privileges [a Medicare form 855] dated June 19, 1998, was completed by Decedent prior to Decedent's employment with Plaintiff. [Exhibit A]. This document was obtained during discovery from the Defendant. Plaintiff did not have this application in its possession at the time it employed Decedent. The certification signed by Decedent on the original Medicare application he completed and signed for him to treat and bill for services provided to Medicare patient states as follows:

I, the undersigned, [the Decedent] certify the following:

* * * *

3. I am familiar with and agree to abide by the Medicare laws and regulations that apply to my provider/supplier type (the Medicare laws and regulations are available through the Medicare contractor).

4. Neither the individual practitioner, the company, or the owner, director, officer, employee of the company, or any contractor retained by the company or

any of the aforementioned persons, currently is subject to sanction under the Medicare/Medicaid program, or debarment, suspension, or exclusion under any federal agency or program, or otherwise is prohibited from providing services to Medicare beneficiaries.

5. I agree that any existing or future overpayment to me by the Medicare program may be recouped by Medicare through withholding future payments.

[signed by Hugh S. Thompson, M.D. on June 19, 1998]

26. Plaintiff did NOT complete the foregoing application with, for, or, on behalf of Decedent. It was completed while the Decedent worked at the medical office of Don Fowler in Marion, SC. In fact, until this litigation began, the Plaintiff never saw a copy of the Decedent's original Medicare application.

27. When Plaintiff employed Decedent, the Decedent completed a Medicare reassignment of benefits so that Plaintiff could bill for Decedent's medical services to its Medicare patients.

[Exhibit B]. The certification signed by Decedent on the reassignment of benefits application states:

By signing this reassignment of benefits statement, you [Decedent] are authorizing the entity identified in section 1 [Plaintiff] to receive Medicare payments on your behalf.

I understand that, under the terms of my contract, Pee Dee Health Care, P.A., is entitled to claim or receive any fees or charges for my services.

[signed by Hugh S. Thompson, M.D.]

PART X

ADDITIONAL FACTS OBTAINED THROUGH DISCOVERY [AND AFFIDAVITS OF EMPLOYEES PROVIDED BY PLAINTIFF]

28. The Decedent's medical employment with PDHC continued until on or about December 10, 2000, when the Decedent left the employ of Plaintiff's medical practice of his own volition.

29. As part of the initial employment process and relationship, the Defendant provided information to Plaintiff representing that Defendant was fully and completely authorized under state and federal law to provide medical services to Plaintiff's patients who were Medicare beneficiaries. To this end, the Decedent completed a Medicare provider application (known as a HCFA 855) and a "reassignment of benefits" application to allow Plaintiff to employ Defendant and to provide the Defendant permission to treat Plaintiff's Medicare beneficiaries. [These documents are attached as Exhibits A and B]. The Medicare applications were provided to Palmetto GBA (a private contractor who contracted with the Centers for Medicare and Medicaid Services [CMS]).

30. Decedent certified the information he was providing to Medicare and to Plaintiff was true and correct while Decedent actually knew this certification was false. [See Exhibits A and B attached hereto.]

31. Unbeknownst to the Plaintiff, the Decedent provided false and misleading information to Plaintiff and on the applications submitted to Palmetto GBA – even though the Defendant admitted in their Answer filed with this Court that Decedent had been associated with medical practices prior to this employment with Plaintiff. [Page 3, ¶ 11 of Defendants' Answer filed with this Court on June 17, 2010].

32. Specifically, Decedent failed to provide the information that he had had been previously suspended from treating Medicare patients as he had been suspended by the Medicare Office of Inspector General from the Medicare program in 1996. Dr. Thompson's failure to provide the required information concerning his suspension resulted in the continuation of his suspension as a Medicare provider of healthcare service. Dr. Thompson had been notified in writing by the Office of Inspector General on or about March 31, 1996: [See Exhibit F]

- a. That he was suspended and excluded as a provider from the Medicare program as well as all other federal health care programs, and
- b. That he could not be reinstated in the federal Medicaid program until he requested such in writing and was approved in writing.

33. After the SC Board of Medical examiners reinstated Dr. Thompson's medical license in 1998 [his medical license had been suspended on or about May 31, 1994] [See Exhibit G], Dr. Thompson failed to seek reinstatement to the Medicare program through the Office of Inspector General as he was required to do, but instead filed a false application with Palmetto GBA [the Medicare contractor who administers Medicare in South Carolina on behalf of the federal government through the agency known as the Centers for Medicare and Medicaid Services [CMS]. Decedent thus certified the information he was providing to Medicare and to Plaintiff was true and correct while Decedent actually knew this certification was false.

34. Decedent failed to inform Plaintiff of this suspension from the Medicare program. [See affidavit of Mark Matthews, Exhibit Z]. See also affidavits of other employees of Plaintiff stating the same. [Exhibits Y, AA, BB, CC, DD and EE].

35. As a result of the false information provided by Decedent on the application to Palmetto GBA [the Medicare contractor], and to Plaintiff, Decedent:

- a. was assigned a Medicare provider number (D993211724 - effective October 26, 1998, see Exhibit C by Palmetto GBA, and
- b. was employed by Plaintiff to provide medical services to Plaintiff's patients, including Medicare patients.

36. Even though the Medicare provider numbers were issued, the Defendants admitted they were in violation of 42 CFR 1001.1901(1) which provides that Dr. Thompson's suspension from

the Medicare program continued until the suspension was lifted by the Medicare Office of Inspector General. Defendant also admitted in its Answer that the Decedent's Medicare disbarment continued until [the Decedent was] reinstated by the Office of Inspector General [of the Medicare program]." [Page 3, ¶ 12 of Defendants Answer filed June 17, 2010]. Dr. Thompson failed to do this, failed to notify Plaintiff, and continued to provide false information to the Plaintiff during the remainder of his employment with Plaintiff.

37. On or about August 9, 2002, Dr. Thompson's filed a subsequent Medicare enrollment application for reenrollment in the Medicare program. [See Exhibit H] In this application, Dr. Thompson admitted he had been previously suspended as a Medicare health care provider. On or about this same date, Dr. Thompson was reinstated as a provider of Medicare healthcare services by the Medicare Office of Inspector General. [See Exhibit I].

38. On or about June 7, 2007, Plaintiff received a letter dated May 30, 2007 from Palmetto GBA [See Exhibit X] in regard to medical services provided by Decedent on behalf of Medicare beneficiaries for the dates of October 26, 1998 to December 10, 2001.

39. On or about July 11, 2007, Plaintiff received information from the Decedent's then-current employer, FirstChoice Health Care indicating Decedent's attorneys [Wes Jackson of Nexsen Pruet] had filed a request for reconsideration request to Medicare. A copy of the letter from Mr. Jackson is attached hereto as Exhibit Q.

40. Plaintiff appealed the requests for recoupment of the funds noted above. The appeals were not successful. The Decedent was aware of the appeals being conducted by Plaintiff, and provided the Plaintiff limited documents to assist in the appeal. [See Exhibit V].

41. The Plaintiff did not receive further documents or information from Decedent or his employer even though such information was promised. [See Exhibit P and U]

42. Regardless, Plaintiff appealed Medicare's adverse determinations concerning Dr. Thompson. [See Exhibits R and T].

43. The administrative appeals ended in decisions of both the Medicare Administrative Law Court and the Medicare Appeals Council denial of the appeals. [See Exhibits N and S]. In this regard, the Decedent and his representatives and agents obtained an order, known as the [the 'ALJ Joe' order dated January 22, 2008] [Exhibit M] on behalf of Dr. Thompson and his then-current employer, FirstChoice Health Care of Florence, that was favorable to his position, and would have been favorable to Plaintiff. However, the Decedent, his agents and representatives failed to provide the 'ALJ Joe determination' even though they had promised to keep Plaintiff apprised of such matters. As a result, PDHC did not have the opportunity to present the favorable 'ALJ Joe determination' as a defense to the claims made by Medicare against PDHC and Dr. Thompson or to the Independent Review entity for Medicare or to the Medicare Appeals Council. This is very important as the ALJ determination made on behalf of PDHC and Dr. Thompson was dated March 14, 2008 [Exhibit N] while the 'ALJ Joe order,' as noted above was filed January 22, 2008.

44. Following the denial of all administrative appeals, and on or about May 1, 2008, Plaintiff paid to Medicare the sum of \$226,740.19.

45. On or about April 13, 2010, Plaintiff filed a claim with Decedent's estate. A copy of that claim is attached hereto as Exhibit J.

46. On or about May 19, 2010, Plaintiff filed an amended claim with Decedent's estate. A copy of that claim is attached hereto as Exhibit K.

47. On May 10, 2010, the personal representative of the Decedent's denied Plaintiff's claim.

PART XI

THE LAW

Rule 3.7, SCACR, 401 is the guidance for when a lawyer should be disqualified, states as follows:

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where:

- (1) The testimony relates to an uncontested issue;
- (2) The testimony relates to the nature and value of legal services rendered in the case; or
- (3) Disqualification of the lawyer would work substantial hardship on the client.

Our Supreme Court has held that choice of one's attorney in any action is substantial right of a party. In *Hagood v Summerville*, 607 S.E. 2d (SCSC 2005), the Court stated:

An order granting a motion to disqualify a party's attorney in a civil case affects a substantial right and may be immediately appealed under Section 14-3-330(2). Further, such an order must be immediately appealed or any later objection in a subsequent appeal will be waived. See *Whiteside v. Cherokee County School Dist. No. One*, 311 S.C. 335, 428 S.E.2d 886 (1993).

As in South Carolina, most courts have concluded that the right to one's chosen counsel is a substantial right, and that "[m]otions to disqualify opposing counsel are viewed with disfavor ... because they are 'often interposed for tactical reasons and result in unnecessary delay.'" *Bennett Silvershein Assocs. v. Furman*, 776 F.Supp. 800, 802 (S.D.N.Y. 1991). For instance, the Second Circuit has "been loathe to separate a client from his chosen attorney." *Bohack Corp. v. Gulf & Western Indus., Inc.*, 607 F.2d 258, 263 (2d Cir.1979), noting that "[t]he delay and additional expense created by substitution of counsel is a factor to which [it has] attached considerable significance...." *Id.* (citing *Lefrak v. Arabian Am. Oil Co.*, 527 F.2d 1136, 1138-40 (2d Cir.1975).

PART XII
ARGUMENTS

A

**The undersigned cannot be a witness due to the application of the
South Carolina Dead man's statute**

The South Carolina "Dead man Statute" provides:

[N]o party to an action or proceeding, no person who has a legal or equitable interest which may be affected by the event of the action or proceeding, no person who, previous to such examination, has had such an interest, however the same may have been transferred or come to the party to the action or proceeding, ... shall be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased, insane or lunatic as a witness against a party then prosecuting or defending the action as executor, administrator, heir-at-law, next of kin, assignee, legatee, devisee or survivor of such deceased person ... when such examination or any judgment or determination in such action or proceeding can in any manner affect the interest of such witness....[emphasis added]

S.C. Code Ann. § 19-11-20 (1985).

Section 19-11-20 of the South Carolina Code (1976) bars the "examination" of a person with an interest from testifying regarding a conversation with a deceased individual, however that interest may have arisen. The Plaintiff admits that Josiah S. Matthews, III, M.D., Alexander H. Cohen, M.D., and Tony R. Megna have an interest in the outcome of the lawsuit; and further agree that they cannot "...be examined in regard to any transaction or communication between such witness and a person at the time of such examination deceased." There is nothing in the statute that allows the Defendant, the Plaintiff or this Court to waive the statutory requirement of barring the "examination" of any person who examination is prohibited by the statute.

In *Osterneck v. Osterneck*, 6749 S.E. 2d 127 (COA 2007), our court of Appeals, specifically held that "Section 19-11-20 of the South Carolina Code (1976), the "Deadman's" statute bars the testimony of a person with an interest from testifying regarding a conversation

with a deceased individual." The *Osterneck* opinion does not discriminate between pre-trial testimony of a witness before trial and examination of a witness at trial. In fact, Rule 30 is entitled "Depositions upon Oral Examination." Similarly, our Supreme Court has used the words "examination" and deposition interchangeably – and always in the context of testimony provided under oath. See, for instance, *Cooke v. Douglas*, 240 S.C. 373, 126 S.E. 2d 20 (1962).

The Defendant has argued that the Deadman statute is intended to protect the Decedent. However, the Supreme court, in *Hanahan v. Simpson*, 485 SE 2d 903 (1997) stated:

Professor McCormick calls it a "blind and brainless" technique which, in seeking to avoid injustice on one side, ignores the equal possibility of creating injustice to the other. 1 *McCormick on Evidence* § 65 (4th Ed.1992).

In the current case, the Plaintiff admits the undersigned has an interest in the outcome of the litigation, and the actual language of the statute, as well our Supreme Court's interpretation of the statute, bars the examination of the undersigned in any context as to any dealings he had with the Decedent.¹⁵

If a statute's language is unambiguous and clear, there is no need to employ the rules of statutory construction and this Court has no right to look for or impose another meaning. *Tilley v. Pacesetter Corp.*, 355 S.C. 361, 373, 585 S.E.2d 292, 298 (2003); *Paschal v. State Election Comm'n*, 317 S.C. 434, 436, 454 S.E.2d 890, 892 (1995); see also *City of Camden v. Brassell*, 326 S.C. 556, 561, 486 S.E.2d 492, 495 (Ct.App.1997) ("Where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it which are not in the legislature's language."). What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. *Bayle*, 344 S.C. at 122, 542 S.E.2d

¹⁵ This statement is not intended and does not mean, implicitly or otherwise, that the undersigned had any contact with the Decedent other than the contact initiated by the Decedent informing the undersigned that Decedent was sending documents to the undersigned [which have all been produced to the Defendant] as stated herein.

at 740 (Ct.App. 2001). The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction. *Durham v. United Cos. Fin. Corp.*, 331 S.C. 600, 604, 503 S.E.2d 465, 468 (1998); *Adkins v. Comcar Indus., Inc.*, 323 S.C. 409, 411, 475 S.E.2d 762, 763 (1996); *Worsley Cos. v. S.C. Dep't of Health & Envtl. Control*, 351 S.C. 97, 102, 567 S.E.2d 907, 910 (Ct.App.2002); see also *Timmons v. S.C. Tricentennial Comm'n.*, 254 S.C. 378, 402, 175 S.E.2d 805, 817 (1970) (observing that where the language of the statute is clear and explicit, the court cannot rewrite the statute and inject matters into it that are not in the legislature's language). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000); *Bayle*, 344 S.C. at 122, 542 S.E.2d at 739.

B

EVEN IF Rule 3.7 applies in the case at bar (which the Plaintiff denies), it only applies when an attorney, such as the undersigned, actually serves as an advocate at trial; thus the undersigned is not disqualified from acting as an advocate in regard to pre-trial matters

In a recently published case, the United States District Court for Pennsylvania, in *Townsend v. M & T Mortgage Corporation*, ____ F. 3d ____ (Case No. 3:09cv1866 USDC PA. February 8, 2010) stated:

Courts have found that "Rule 3.7 pertains only to the lawyer-witness's representation of her client at trial; a lawyer that may be a witness at trial is able to represent her client in pretrial matters." *Evans v. Chichester Sch. Dist.*, 533 F.2d 523, 538 (E.D. Pa. 2008); see also, *Foster v. JLG Indus.*, 372 F. Supp. 2d 792, 798 (M.D. Pa. 2005) (finding that "The rule states that an attorney is prohibited from acting as an advocate at trial; however, there is no indication that an attorney is prohibited from acting as an advocate during pre-trial proceedings." (emphasis added)).

Disqualification under subsection (a) is triggered only when the attorney actually serves as an advocate before the jury. See Murray v. Met. Life Ins. Co., 583 F.3d 173, 179 (2d Cir. 2009); see also *Ramey*, 378 F.3d at 282 ("The advocate-witness rule applies, first and foremost, where the attorney representing

the client before a jury seeks to serve as a fact witness *in that very proceeding.*" (emphasis added).

Similarly, the *Hagood* Court (*Hagood v. Summerville*, supra) also referred to Rule 3.7 in the context of "jury confusion." The Court stated:

Jurors are not likely to be confused by a lawyer's employee testifying as a witness for a client while the lawyer serves as the client's advocate. Jurors should readily perceive the distinction, particularly since the opposing party may emphasize the fact of the witness's employment.

See also *Evans v. Chichester Sch. Dist.*, 533 F.2d 523, 538 (E.D. Pa. 2008); see also, *Foster v. JLG Indus.*, 372 F. Supp. 2d 792, 798 (M.D. Pa. 2005) (finding that "The rule states that an attorney is prohibited from acting as an advocate *at trial*; however, there is no indication that an attorney is prohibited from acting as an advocate during pre-trial proceedings.") (emphasis in original).

Similarly, in *Culebras v. Rivera-Ros*, 846 F.2d 94 (First Cir. 1988)

That Rule 3.7 is limited to situations where the lawyer-witness acts as trial counsel is underscored by the purposes most often cited as being served by the general advocate-witness rule: Three of these are 1) the possibility that, in addressing the jury, the lawyer will appear to vouch for his own credibility; 2) the unfair and difficult situation which arises when an opposing counsel has to cross-examine a lawyer-adversary and seek to impeach his credibility; and 3) the appearance of impropriety created, *i.e.*, the likely implication that the testifying lawyer may well be distorting the truth for the sake of his client. *Bottaro v. Hatton Associates*, 680 F.2d at 897; *International Electronics v. Flanzer*, 527 F.2d at 1294; *MacArthur v. Bank of New York*, 524 F.Supp. 1205, 1208-09 (S.D.N.Y. 1981); see 6 J. Wigmore, *Evidence* § 1911 (Chadbourn rev. 1976). ABA background materials to Rule 3.7 conclude that the "most cogent rationale" for the rule is 1) the interest in protecting the integrity of the advocate's professional role by eliminating the opportunity of mixing law and fact, and 2) preventing a lawyer from injecting his or her personal belief as to the cause into the lawyer's argument to the jury. *Annotated Model Rules of Professional Conduct*, ABA, Rule 3.7, Legal Background, at 251-52. See A. Enker, *The Rationale of the Rule that Forbids a Lawyer to be Advocate and Witness in the Same Case*, 1977 Am.B. Found. Research J. 455.

The above concerns are absent or, at least, greatly reduced, when the lawyer-witness does not act as trial counsel, even if he performs behind-the-scenes work for the client in the same case. One who is not trial counsel will be unable to vouch for his own credibility, *Duncan v. Poythress*, 777 F.2d 1508, 1515 n. 21 (11th Cir.1985), *cert. denied*, 475 U.S. 1129, 106 S.Ct. 1659, 90 L.Ed.2d 201 (1986); *Flanzer*, 527 F.2d at 1294, and he will be unable to mix the law and the facts in the presence of court and jury. Opposing counsel, when cross-examining, will not have to cope with the lawyer-witness's enhanced status as trial counsel. And the appearance to jurors and others that the lawyer-witness may be distorting the truth will at least be diminished so long as he is not also seen to perform in the high visibility position of trial counsel.

See *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d at 717. Finally there is no danger that the lawyer-witness might inject his or her personal belief into the advocate's argument to the jury. Even under DR 5-101(B) some courts have allowed a lawyer-witness to continue as counsel in pretrial matters, though disqualified at the trial. *Moyer v. 1330 Nineteenth Street Corp.*, 597 F.Supp. 14, 17 (D.D.C.1984); *Brotherhood of Railway Carmen v. Delpro Co.*, 549 F.Supp. 780, 789 (D.Del.1982); *Norman Norell, Inc. v. Federated Department Stores, Inc.*, 450 F.Supp. 127, 130-31 (S.D.N.Y.1978). See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1503 (1983). See also "[A] lawyer who is likely to be a necessary witness may still represent a client in the pretrial stage." *DiMartino v. Eighth Jud. Dist. Ct.*, 119 Nev. 119, 66 P.3d 945, 946 (2003)(citing *Culebras Enters. Corp. v. Rivera-Rios*, 846 F.2d 94 (1st Cir.1988); *United States v. Castellano*, 610 F.Supp. 1151, 1167 (S.D.N.Y.1985); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1529 (1989); and State Bar of Mich. Comm. on Professional and Judicial Ethics, RI-299 (Dec. 18, 1997)); see also *World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc.*, 866 F.Supp. 1297, 1303 (D.Colo.1994) ("Rule 3.7 applies only to an attorney acting as an

advocate at trial. Thus, with the informed consent of the client, a lawyer who is likely to be a necessary witness may accept employment and continue to represent the client in all litigation roles short of trial advocacy." (internal quotations omitted)); *Cerillo v. Highley*, 797 So.2d 1288, 1289 (Fla. Dist. Ct. App. 2001) (concluding trial court erred in disqualifying counsel who would be witness at trial from participating in pretrial depositions); *In re Bahn*, 13 S.W.3d 865, 873 (Tex. App. 2000) ("[A]n attorney who is disqualified from representation at trial can continue to participate in the client's case until trial commences.").

In addition to the foregoing, there is a substantial line of case that hold "[D]isqualification is considered a drastic measure which courts should hesitate to impose except when absolutely necessary." *Wyeth v. Abbott Labs.*, 692 F. Supp. 2d 453, 457 (D.N.J. 2010) (quoting *Carlyle Towers Condo. Ass'n, Inc. v. Crossland Sav. FSB*, 944 F. Supp. 341, 345 (D.N.J. 1996)). "[M]otions to disqualify opposing counsel are disfavored . . . not only because disqualification robs one's adversary of her counsel of choice, but also because of the risk . . . that one could subvert the ethical rules in an attempt to use them as a procedural weapon." *Wolf, Block, Schorr & Solis-Cohen LLP*, Civ. A. No. 05-6038, 2006 WL 680915, at *1 (E.D. Pa. Mar. 9, 2006) (citing *Cohen v. Oasin*, 844 F. Supp. 1065, 1067 (E.D. Pa. 1994), *Commonwealth Ins. Co. v. Graphix Hotline, Inc.*, 808 F. Supp. 1200, 1203 (E.D. Pa. 1992), *Hamilton v. Merrill Lynch*, 645 F. Supp. 60, 61 (E.D. Pa. 1986), and Pa. Rules of Professional Conduct, Preamble and Scope ¶ 19 ("[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.")); see also *Caracciolo v. Ballard*, 687 F. Supp. 159, 160-61 (E.D. Pa. 1988) ("The Code of Professional Responsibility is applied to deter professional misconduct, and to preserve the profession's standing in the community-it was not

intended as an addition to the depressingly formidable array of dilatory strategies already part of the litigator's arsenal.").

The Defendants have not produced one scintilla of evidence that the undersigned has any knowledge whatsoever of any document provided by the Decedent for one reason – the undersigned knows nothing other than the documents which exist and have been produced to the Defendant. The Defendants proclaim the undersigned is a witness due to the litigation involving the Plaintiff with Medicare over the purported need of the Defendant to determine the Plaintiff's dealings with the undersigned during the Plaintiff's administrative appeals of the adverse decisions made by Medicare against Plaintiff. Other than the obvious attorney-client and work-product privilege issues related to this issue between Plaintiff and the undersigned, the primary answer to this demand by the Defendant is:

a. The issue in the Medicare administrative proceedings were Medicare's decision to hold Plaintiff liable as the assignee of the Decedent's billings to Medicare. See Exhibits N and S.

b. The Decedent and his representatives and agents obtained an order, known as the [the 'ALJ Joe' order dated January 22, 2008] [Exhibit M] on behalf of Dr. Thompson and his then-current employer, FirstChoice Health Care of Florence, that was favorable to his position, and would have been favorable to Plaintiff. However, the Decedent, his agents and representatives failed to provide the 'ALJ Joe determination' even though they had promised to keep Plaintiff apprised of such matters. [See affidavit of Mark Matthews, Exhibit Z, and Exhibit P] As a result of the failure of the Decedent to provide the 'ALJ Joe Order', the Plaintiff did not have the opportunity to present the favorable 'ALJ Joe determination' as a defense to the claims made by Medicare against PDHC and Dr. Thompson or to the Independent Review entity for Medicare or to the Medicare Appeals Council. The importance of the issue is demonstrated by the fact that the ALJ determination made on behalf of PDHC and Dr. Thompson was dated March 14, 2008 [Exhibit N] while the 'ALJ Joe order,' as noted above was filed January 22, 2008. Once again, the failure of the Decedent and his agents, i.e., their own negligence, caused avoidable damage. As a result, the Defendant is estopped from asserting any action against the Plaintiff in light of his duty to disclose the 'Joe' order to the Plaintiff in the first instance.

Our Supreme Court has held:

... Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. *Ridgill v. Clarendon County*, 192 S.C. 321, 6 S.E.2d 766 (1939). Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel. *Welch v. Edisto Realty Co.*, 170 S.C. 31, 169 S.E. 667 (1933). There is no requirement that the person whose silence misleads another have actual knowledge of the true facts if circumstances are such that knowledge is necessarily imputed to him. *Accord Alwes v. Hartford Life & Accident Ins. Co.*, 372 N.W.2d 376 (Minn.Ct.App.1985). Negligence will take the place of the intent to deceive when there is a duty to disclose. *Id.*; see also 3 *Pomeroy's Equity Jurisprudence* § 809 at 218 (5th ed. 1941).

Southern Dev. Land and Golf Co. v. South Carolina Pub. Serv. Auth., 426 S.E.2d 748 (1993), *aff'g in part and rev'g in part* 305 S.C. 507, 409 S.E.2d 428 (Ct.App.1991).

See also *Macaulay v. Howard*, 230 S.C. 140, 94 S.E. (2d) 393. In *Hubbard v. Beverly*, 197 S.C. 476, 15 S.E. (2d) 740, 135 A.L.R. 1206, we held that the doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury.

C

There is no testimony to be given by Mr. Megna as he did not have discussions with the Decedent concerning the issues in dispute

The Defendants have provided no evidence of any substantive discussions between Mr. Megna and Dr. Thompson for the simple reason that there were none. While it is also true that Mr. Megna performed the legal work on behalf of PDHC in regard to the claim made against PDHC by Medicare, *the decedent had his own independent counsel representing both him and his current employer, FirstChoice Health Care. See Exhibit Q.*

Moreover, as evidenced by the attached affidavits of Mark Matthews, he worked with Dr. Thompson in all matters related to the completion of applications and other matters in the case at bar. As Mr. Matthews notes, at no time was he aware of any discussions between Dr. Thompson and Mr. Megna. Moreover, the undersigned has attached his affidavit that he had no

conversations with Dr. Thompson other than Dr. Thompson indicating he was being represented by independent counsel in Columbia who had been secured by his then-current employer, FirstChoice Health Care of Florence. See Exhibit Q. With all due respect, the Defendant's arguments that Mr. Megna is disqualified from representing Plaintiff in these matters are inappropriate, and, at best, intended for reasons of tactics and harassment.

Finally, as the Second Circuit has stated, "[t]he delay and additional expense created by substitution of counsel is a factor to which [it has] attached considerable significance...." Mr. Megna has been handling this litigation for several years, his testimony at trial is not necessary and the Defendant's suggestions to the contrary are untrue.

D

Even if there is any testimony that is to be given by counsel for Plaintiff at trial (which Plaintiff denies) any such testimony by counsel for Plaintiff is not "necessary"

The Plaintiff respectfully directs the Court's attention to the recent case of *Jones v. Omaha Housing Authority*, ___ F.3d ___ (Case No. 3:09cv1866 USDC Nebraska) February 18, 2010) in which the Court stated and held that:

[T]he extreme measure of disqualifying a party's counsel of choice should be imposed only when absolutely necessary." *Macheca Transp. Co. v. Philadelphia Indem. Co.*, 463 F.3d 827, 833 (8th Cir. 2006). Further, "[b]ecause of the potential for abuse by opposing counsel, [motions to disqualify counsel] should be subjected to particular scrutiny." *Id.* (internal quotations omitted); see *Droste v. Julien*, 477 F.3d 1030, 1035 (8th Cir. 2007). Pursuant to the Nebraska Rules of Professional Conduct, Rule 3.7: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness..." Neb. Ct. R. of Prof. Cond. § 3-503.7 (also providing exceptions to the rule that are not relevant here).

"A court cannot order disqualification simply upon the moving party's representation that the lawyer it seeks to disqualify is a necessary witness; the key is the evidence showing that the lawyer is a necessary witness." *Beller v. Crow*, 742 N.W.2d 230, 235 (Neb. 2007). The movant may show counsel is a necessary witness when "(1) the proposed testimony is material and relevant to the determination of the issues being litigated and (2) the evidence is unobtainable

elsewhere." *Id.* In any event, "[i]n most jurisdictions, a lawyer who is likely to be a necessary witness may still represent a client in the pretrial stage." *Droste*, 477 F.3d at 1035 (quotation omitted) (citing cases). (emphasis added).

...[D]isqualification is warranted only where the testimony given by counsel is "necessary." *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994) (internal quotation marks and citation omitted); see also *Capponi v. Murphy*, No. 08 Civ. 4449 (VM), 2009 WL 2957804, at *10 (S.D.N.Y. Sept. 11, 2009) ("Courts have interpreted [the witness-advocate rule] to require disqualification where the attorney's testimony is necessary." (internal quotation marks omitted)). When considering the necessity of testimony, "[a] court should examine factors such as the significance of the matters, weight of the testimony, and availability of other evidence." *Kubin v. Miller*, 801 F. Supp. 1101, 1113 (S.D.N.Y. 1992) (internal quotation marks and citation omitted). Furthermore, to the extent that the attorney would not be providing testimony on his client's behalf, the party seeking to disqualify the attorney must show that there is a substantial likelihood that the testimony would be prejudicial to the witness-advocate's client. *Murray v. Met. Life Ins. Co.*, 583 F.3d 173, 178 (2d Cir. 2009) ("The movant, therefore, 'bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring [to the witness-advocate's client] is substantial.'" (quoting *Lamborn v. Dittmer*, 873 F.2d 522, 531 (2d Cir. 1989) (alteration in original))). Prejudice exists where the testimony would be "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony." *Lamborn*, 873 F.2d at 531 (citation omitted).

It is certainly beyond any reasonable dispute at this time that the additional information which the Defendants wish to obtain from the Plaintiff are the work product of Plaintiff's counsel actually prepared during the course of litigation on behalf of PDHC while Dr. Thompson was independently represented by counsel from another law firm. [See Exhibits Q and LL].

"The movant, ... bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring [to the witness-advocate's client] is substantial." (quoting *Lamborn v. Dittmer*, 873 F.2d 522, 531 (2d Cir. 1989) (alteration in original))).

Murray v. Met. Life Ins. Co., 583 F.3d 173, 179 (2d Cir. 2009)

"For a lawyer to be a necessary witness, his testimony must be relevant, material, and unobtainable elsewhere." *Rothberg v. Cincinnati Insurance Co.*, 2008 WL 2401190 (E.D. Tenn. June 11, 2008). Thus, an attorney is a "necessary witness" only if "there are things to which he will be the only one available to testify."

Droste v. Julien, 477 F.3d 1030, 1035 n. 7 (8th Cir. 2007)).

Prejudice exists where the testimony would be "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony. See *Lamborn v. Dittmer*, 873 F.2d 522, 531 (2nd Cir. 1989). Similarly, many courts have held that "an attorney is a "necessary witness" only if "there are things to which he will be the only one available to testify." *State ex rel. Wallace v. Munton*, 989 S.W.2d 641, 646 (Mo.Ct. App.1999) (citing *State v. Werneke*, 958 S.W.2d 314, 321 (Mo.Ct.App.1997); *State v. Mason*, 862 S.W.2d 519, 521 (Mo.Ct.App. 1993)).

In any event, the issue is academic as South Carolina, the Deadman statute, prohibits the undersigned's examination under oath as well as that of Drs. Cohen and Matthews under any circumstances.

PART XIII

SUMMARY

A

The Plaintiff's action against the Defendant is based on the Decedent's responsibilities of honesty and corresponding duties to the Plaintiff – as the Defendant admitted he was duty-bound to do in regard to his employment position with Plaintiff. (Decedent had a pecuniary interest since he was paid by Plaintiff as a physician to provide medical services.) [Page 5, ¶ 25 of Defendants Answer filed June 17, 2010, "the relationship of Decedent with Plaintiff was such

that Decedent 'was bound to act in good faith and with due regard to Plaintiffs' interest." [Page 4, ¶ 21 of Defendants Answer filed June 17, 2010, the relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff." Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." [Page 5, ¶ 26 of Defendants Answer filed June 17, 2010], and, "Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Plaintiff." [Page 6, ¶ 34 of Defendants Answer filed June 17, 2010].

It is undisputed that the Decedent received three letters from Medicare regarding his disbarment from Medicare. The first letter was dated March 11, 1996, [Exhibit F], the second letter was dated June 12, 1998, the third letter was dated September 14, 1998. For his own reasons, the Decedent failed to provide the information requested by Medicare and failed to inform Plaintiff. Affidavits of employees of Plaintiff - Exhibits Y, Z, AA, BB, CC, DD, and EE.

It is undisputed that the Plaintiff paid Medicare \$226,740.19 to settle the liability of Plaintiff to Medicare based on the assignment of the Defendant's billings from treating Medicare patients to Plaintiff. See Exhibit B in which the Decedent assigned his Medicare billings to Plaintiff and simultaneously certified he was an eligible Medicare provider. See also the letter of September 14, 2008 from Medicare to Decedent. The sad, undeniable truth is that that the Decedent was untruthful to Medicare and to Plaintiff as well as others.

The Defendant has identified no legal duty owed to the Decedent by Plaintiff to assure the Decedent was not deceitful in the first instance. There is no legal duty owed by the Plaintiff under such circumstances. Even so, the Plaintiff undertook to protect its own interests, and appealed the administrative decisions of Medicare to recoup the funds. During this time, the Decedent was represented by independent counsel, obtained a favorable decision in a separate

proceeding concerning similar circumstances, *and failed to advise the Plaintiff*. As the favorable 'ALJ Joe' decision preceded the adverse determination made against the Plaintiff, and the Decedent and his agents and counsel, failed to inform Plaintiff, the Decedent, once again, was silent in the fact of his obligation to be truthful. He and his agents were silent to their own detriment. As a result, their own concealment of material information estops them from making any claim or defense against the Plaintiff.

B

The right to counsel of one's choosing is, our Supreme Court has noted, a substantial right that no Court should interfere short of extraordinary circumstances. The Defendants have not demonstrated any fact whatsoever to which Mr. Megna will or could testify to in the first instance as a necessary witness.

C

Rule 3.7 specifically provides only that chosen counsel of a party may only be barred from representing his client (if he is disqualified at all) only at trial – not pretrial matters. Courts considering the matters, as noted above, have specifically excluded pre-trial matters from the reach of Rule 3.7. In any and all events, the case law interpreting Rule 3.7, as noted above, specifically holds that the strictures of Rule 3.7, even if applicable, which the Plaintiff denies, only applies at a trial before a jury.

D

As noted on the attached affidavits, the conversations in regard to the matters that form the basis of the lawsuit between the parties primarily involved Mr. Mark Matthews, James D. McInnis, M.D., and Decedent. It is admittedly true that Decedent had conversations with both Drs. Matthews and McInnis, the conversations centered about the Decedent informing them he

could treat any patient as long as he worked under the supervision of physicians who were approved by the state Board of Medical Examiners. It is also true that the decedent never told Drs. Matthews or Cohen, or any other person in the employ of PDHC, that he had ever been disbarred by Medicare in the first instance. [See Exhibits Y, Z, AA, BB, CC, DD, and EE]. The Decedent never informed any employee of Plaintiff he had been disbarred by Medicare, nor provided them any other information that would have placed them on notice to believe Dr. Thompson was not telling them the truth on his applications to Medicare. Their collective statements are that the Decedent, knowing of his disbarment from Medicare, failed to advise Plaintiff, failed to advise them individually, failed to advise Medicare. Moreover, the Decedent did not simply forget to provide the Plaintiff and others of the original March, 1996 letter from Medicare disbaring him from the Medicare program [See Exhibit F], the Decedent 'forgot' a second letter from Medicare dated June 12, 1998, [Exhibit FF], and a third letter from Medicare dated September 14, 2008 from Medicare [Exhibit O], just weeks before he was employed by Plaintiff. It defies all reason that the Decedent 'forgot' all three letters from Medicare. And it defies all reasonableness of the Personal Representatives of the Decedent's estate, in their roles as fiduciaries, to place any blame whatsoever on the Plaintiff when they know:

- a. The Decedent was represented by independent counsel during the time in question,
- b. The Decedent as well as his independent counsel have actually admitted Decedent's malfeasance,
- c. The Decedent nor his independent counsel nor his then-employer, FirstChoice disclosed to Plaintiff the favorable 'Medicare ALC Joe' decision that the Plaintiff could have used to the Decedent's as well as the Plaintiff's benefit if

the Medicare ALC Joe' had been disclosed in the first instance as the Decedent promised to do,

- d. They have neither produced nor know [because none exists] of a scintilla of evidence to demonstrate the undersigned has any conflict of interest in these matters.

Regardless of the reasons, decedent breached his fiduciary duties to Plaintiff to be truthful as he did to his then current employer, FirstChoice. The only evidence available to this Court demonstrates the Decedent, in particular:

- a. concealed information he was lawfully obliged to provide Plaintiff,
- b. provided facially and factually fraudulent applications to Medicare and others,
- c. ignored and did not provide to Plaintiff the three letters from Medicare informing him of his disbarment from Medicare [see Exhibits F, O and PF] even though the Defendant has admitted in its Answer filed with this Court on June 17, 2010 that Decedent had a fiduciary duty to do so,
- d. negligently, purposely, and/or with deliberate indifference caused Plaintiff substantial damage.

E

The undersigned has been CEO and General Counsel to Plaintiff for fifteen (15) years. and has been handling the litigation involved in these proceedings since 2007. Not only is there wrongdoing involved in such matters, but the Defendant has not demonstrated one matter which the undersigned could testify other than matters of pure and complete speculation with no foundation in fact or reality. It would be unnecessarily burdensome, expensive and cause the Plaintiff additional damage for the Plaintiff to change attorneys. It is not reasonable for the

Motion to Disqualify to be interpreted as anything other than an inappropriate litigation tactic by the Defendant as well as their attorneys. — in spite of their ethical and fiduciary responsibilities to the contrary.

As noted by the Second Circuit Court of Appeals in *Murray v. Metropolitan Ins. Co.*, 583 F.2d 173 (2009):

Rule [3.7] lends itself to opportunistic abuse. "Because courts must guard against the tactical use of motions to disqualify counsel, they are subject to fairly strict scrutiny, particularly motions" under the witness-advocate rule. *Lamborn v. Dittmer*, 873 F.2d 522, 531 (2d Cir.1989). The movant, therefore, "bears the burden of demonstrating specifically how and as to what issues in the case the prejudice may occur and that the likelihood of prejudice occurring [to the witness-advocate's client] is substantial." *Id.* "Prejudice" in this context means testimony that is "sufficiently adverse to the factual assertions or account of events offered on behalf of the client, such that the bar or the client might have an interest in the lawyer's independence in discrediting that testimony."

Respectfully, the Defendant's Motion to Disqualify the undersigned is nothing more than "opportunistic abuse" of the litigation process.

F

As noted above, the behaviors of counsel for the Defendant's in these matters, in their best light, have crossed the line from advocacy on behalf of the Defendant, to a dishonest manipulation of the facts and attempts to smear the professional integrity of the undersigned with mistruths and untruths. Not only has the undersigned never represented the interests of the Decedent, the Decedent obtained independent counsel in regard to these matters, and the undersigned has consistently represented the interest of Plaintiff. The Defendant has not produced one scintilla of evidence that the undersigned ever discussed or had knowledge of any of the events surrounding the Decedent's continuing misconduct.

The Plaintiff, however, has demonstrated that the Decedent repeatedly failed to be forthcoming and truthful about his disbarment from Medicare in the face of his admitted duty to disclose all facts pertinent to his ability to treat and bill Medicare in the first instance. ... Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. *Ridgill v. Clarendon County*, 192 S.C. 321, 6 S.E.2d 766 (1939). There is no requirement that the person whose silence misleads another have actual knowledge of the true facts if circumstances are such that knowledge is necessarily imputed to him. *Accord Alwes v. Hartford Life & Accident Ins. Co.*, 372 N.W.2d 376 (Minn.Ct.App.1985). Negligence takes the place of the intent to deceive when there is a duty to disclose. *Id*; see also 3 *Pomeroy's Equity Jurisprudence* § 809 at 218 (5th ed. 1941). *Southern Dev. Land and Golf Co. v. South Carolina Pub. Serv. Auth.*, 426 S.E.2d 748 (1993), *aff'g in part and rev'g in part* 305 S.C. 507, 409 S.E.2d 428 (Ct.App.1991).

G

The undersigned has an admitted interest in the outcome in the litigation, and the South Carolina "Dead Man " statute, by its plain language, bars "the examination" of the undersigned in any and all events. The wording of the statute is plain on its face. It is not simply a defense available to the Defendant or the Plaintiff. It is what it is – a legislative determination and mandate that the undersigned [as well as Drs. Cohen and Matthews] cannot be 'examined' in regard to any such matters. As a result, undersigned counsel is unable, in any circumstances and as a matter of law, to provide testimony under oath in any venue, including but not limited to the trial of this matter.

H

While the Motion to Disqualify the undersigned [and the disparagement of the personal and professional character of the undersigned] is distasteful, the Defendant's attempts to prejudice this Court with regard to matters related to the 'Lake City litigation' is contemptuous. At the last hearing before this Court, Mr. Josey stated he would use every arrow in his quiver to defeat the claims of the Plaintiff against Defendant. A false arrow, however, will neither fly straight nor will it find its true mark. Hence Mr. Josey's metaphor of "firing arrows" is specious in form and in content. True arrows are those which are formed in evidentiary truth and achieve their mark in justice. The Motion to Disqualify the undersigned has no merit, no weight, and no validity in law or fact – and cannot be reasonably said to be filed for any purpose other than to embarrass, hinder, and delay these proceedings. As offered by Mr. James and Mr. Josey, the Motion to Disqualify violates their basic obligations and duties of candor and honesty to this Court, and fairness to opposing council, [Rule 401, Rules 3.3 and 3.4, SCACR] as well as Rule 4.4.¹⁶ In any and all events, the undersigned has never represented the Decedent in any matter, nor has the undersigned had any conversations with the undersigned in regard to these matters excepting the one conversation that Decedent initiated to provide the Plaintiff with limited documents that were disclosed to the Defendant during discovery. The Decedent obtained independent counsel in regard to these matters, and the undersigned has consistently represented the interest of Plaintiff. The Defendant has not produced one scintilla of evidence that the undersigned ever discussed or had knowledge of any of the events surrounding the Decedent's disbarment from Medicare for the simple reason no such evidence exists in the first instance.

¹⁶ Earlier this week, our Supreme Court issued its decision in *In re: White*, ___ S.C. ___. [Opinion No. 26939 March 7, 2011]. The Court's discussions of duties of counsel to opposing parties, to third parties, to this Court, and to opposing counsel should provide, at the minimum, pause for thought.

The Plaintiff respectfully requests the Motion to Disqualify filed by Defendant be denied, and for this Court to provide such other and further relief as is just and appropriate, including reasonable attorney's fees and costs for the defense of the matter.

Respectfully submitted,



Tony R. McGna
Attorney-at-Law
3400 West Avenue
Columbia, SC 29203
803.799.1700

March 11, 2011.

**STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS**

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

CERTIFICATE OF SERVICE

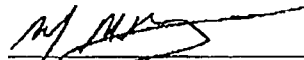
10-CP-16-0332

The undersigned hereby certifies, on the date indicated below, copies of the following documents in the above-captioned matter were served upon the Defendant Counsel for Defendant:

John Jay James, Esquire
PO Box 507
Darlington, SC 29540
[hand-delivery]

Renee Josey
1851 W. Evans Street, 4th Floor
Florence, SC 29501
[hand-delivery]

1. Plaintiff's Memorandum in support of its Motion for Summary Judgment
2. Plaintiff's Return to Defendant's Motion to Compel
3. Plaintiff's Return to Defendant's Motion to Amend its Answer
4. Plaintiff's Return to Defendant's Motion to Disqualify Counsel
5. Plaintiff's documents and affidavits in support of its Returns, Motions and request for a pretrial conference.


Mark Matthews

March 11, 2010.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A # 2010-CP-16-0332

MOTION FOR PROTECTIVE ORDER

Non-party attorneys Celeste Jones, Kenneth Woodington, Desa Ballard, and others have been served with purported subpoenas in this matter. Pursuant to Rules 45 and 26 of the South Carolina Rules of Civil Procedure, the Defendant hereby moves for a protective order with regard to these purported subpoenas.¹

The Defendant objects to these subpoenas and their accompanying requests for production, and moves to protect all non-party persons from these subpoenas. Not only are these subpoenas objectionable to the persons in receipt of same, they are objectionable to this Defendant in that they represent an irrelevant hijacking of this litigation to embark upon a fishing expedition for wholly unrelated matters – increasing the litigation costs and expense of this defendant.

¹ Among those other non-parties that have been served with purported subpoenas in this case are both defense attorneys (Jay James and J. Rene' Josey), attorney J. Brandon Hylton, and the law firm of Turner Padgett Graham & Laney P.A. These non-parties have served their own objections to the purported subpoenas and those objections are attached hereto for the Court's information. These objections were served on Plaintiff's remaining counsel of record, Benjamin R. Matthews.

Specifically, these subpoenas are objectionable on the following grounds:

1. The subpoenas are invalid – they are not signed by an attorney of record in this case;²
2. The subpoenaed requests for documents are unduly burdensome and overly broad. They are wholly irrelevant to the current litigation which is solely about Medicare credentialing of a physician employee;
3. The requests for documentation are not reasonably calculated to lead to the discovery of admissible or relevant evidence;
4. The requests seek information which may be subject to the work-product doctrine and attorney-client privilege;³
5. For other defects in the form, substance, and service of the subpoenas and the corresponding command for production of documentation.

² While defense counsel chose not to object to the limited role of former counsel Megna in arguing summary judgment motions and a motion to reconsider, Mr. Megna is, in fact, disqualified in this litigation. It has been defendant's consistent position that Mr. Megna should not be involved in discovery or trial as counsel given his status as a witness. Thus, Defendant objects to any further involvement by Mr. Megna.

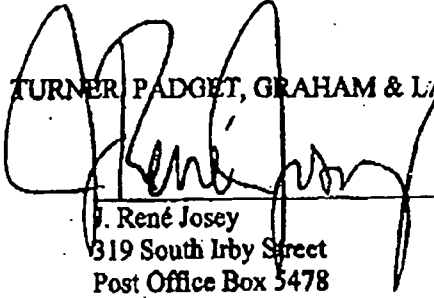
Defense counsel is well aware that Mr. Megna has also continued to correspond with the Court subsequent to the motion hearing, and defense counsel believes it best not to respond to non-pleadings; this does not, of course, signify any agreement or acquiescence to the content of the Megna correspondence. Moreover, these non-pleadings provide no basis for the Court to delay determination of the merits of Defendant's pending motion for summary judgment – which is based upon the preclusive effect of an existing federal judicial determination regarding the Plaintiff's credentialing failures – a basis immune from anything sought in the subject subpoenas or raised in the Megna correspondence.

³ Turner Padgett Graham & Laney P.A. and the Defendant are cognizant that information withheld pursuant to a claim of privilege or work product protection "shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim." SCRCP 45(d)(2). Item 2 of Exhibit A attached to the subpoena request production of communications between counsel and other persons, including co-counsel in this case. While undersigned counsel has not communicated with most of the persons listed, he has clearly communicated with co-counsel in confidential preparation for the issues of this case. Undersigned counsel also believes communications with other attorneys in preparation for the issues of this case are protected work product.

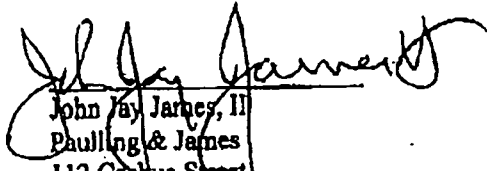
WHEREFORE, the Defendant moves for protection from the purported subpoenas and ask for the fees and costs associated with filing and pursuing this motion. Pursuant to Rule 11(a) of the South Carolina Rules of Civil Procedure, counsel for the Defendant certifies their opinion that further consultation with the Plaintiff would serve no useful purpose in the resolution of these matters.

August 1st, 2011

TURNER PADGET, GRAHAM & LANEY, P.A.


J. René Josey
319 South Irby Street
Post Office Box 5478
Florence, SC 29502-5478
Telephone: 843-656-4451
Facsimile: 843-413-5818
E-mail: RJosey@TurnerPadget.com

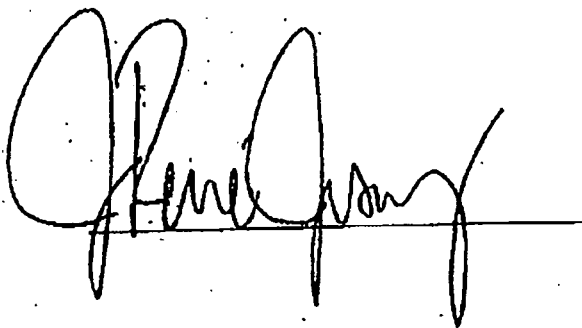
PAULLING & JAMES


John Jay James, II
Paulling & James
112 Calhoun Street
P. O. Box 507
Darlington, SC 29540
Telephone: 843-393-3881
Facsimile: 843-393-6089
Email: pjlaw507@bellsouth.net

CERTIFICATE OF SERVICE

I hereby certify that this 9th day of August 2011, a copy of the Objections to Plaintiff's Subpoenas has been served upon other counsel of record, by mailing same, postage prepaid in the United States Mail, addressed to the following:

Benjamin R. Mathews, Esquire
Mathews & Megna, LLC
3400 West Avenue
Columbia, SC 29203

A handwritten signature in black ink, appearing to read "Benjamin R. Mathews", written over a horizontal line.

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

Pee Dee Health Care, P.A.

vs.

Estate of Hugh S. Thompson

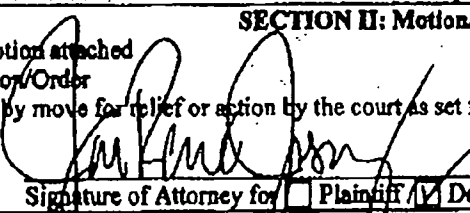
Plaintiff,

Defendant.

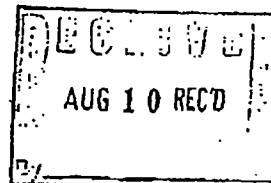
IN THE COURT OF COMMON PLEAS
FOURTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-16-0332

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

<u>name, S.C. Bar no. and address of plaintiff's attorney</u> Plaintiff's Attorney: Ben R. Matthews, Bar No. Address: 3400 West Avenue, Columbia, SC 29203 Phone: Fax E-mail: Other:		<u>name, S.C. Bar no. and address of defendant's attorney</u> Defendant's Attorney: J. Rene Josey, Bar No. 03230 Address: Post Office Box 5478, Florence, SC 29502 Phone: (843) 662-9008 Fax (843) 667-0828 E-mail: rjosey@turnerpadget.com Other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Motion for Protective Order Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES ☐ NO			
SECTION II: Motion/Order Type ☐ Written motion attached ☒ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for ☐ Plaintiff ☒ Defendant Date submitted <u>9/9/2011</u>			
SECTION III: Motion Fee ☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SOCA 233 (11/2003)



FILED

Matthews and Megna, LLC

Attorneys and Counselors at Law

2011 AUG 11 PM 4:00
SC03100 West Avenue
CLERK OF COURT, SC 29203
DARWIN COURT 803-799-1700
E-mail: tmegna@gmail.com

August 10, 2011

The Honorable J. Michael Baxley
531 East Carolina Avenue
Hartsville, SC 29550-4311
[Via email to JBaxleyLC@sccourts.org and first class mail]

Re: Estate of Hugh S. Thompson, Case No: 10-CP-16-0332

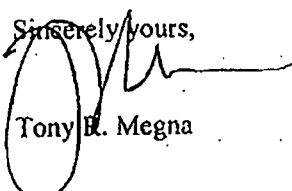
Dear Judge Baxley:

Please find enclosed the Plaintiff's response to the Defendant's Request for a Protective Order. We have ordered a copy of the transcript of the July 19th hearing in which you held your previous order my representation of the Plaintiff in abeyance pending your final rulings on the motions before the Court.

Considering the serious nature of the issues raised in the subpoenas, and the Plaintiff's filings and correspondence with the Court (as detailed with more specificity in Plaintiff's attached response), the continuing refusal by counsel for the Defendant to disqualify themselves in the case at bar, Turner Padgett's signing of a motion to substitute counsel in direct opposition to PDHC's directive not to do so in another matter in which they have been representing the interests of the Plaintiff for years, the inability of the Plaintiff to determine the extent of breaches of the attorney-client relationship by attorneys who have fiduciary relationships with PDHC without access to the subpoenaed information, and the disquieting emergence of evidence indicating a common scheme among several individuals (all who are opposing the subpoenas), including counsel for the Defendant in the case at bar, to cause harm to the Plaintiff, PDHC requests the Court schedule a hearing on the matters as soon as the July 19th transcript has been prepared and it is practicable for the Court to hear the matter.

With kind regards, I remain

Sincerely yours,


Tony B. Megna

The Honorable J. Michael Baxley
531 East Carolina Avenue
Hartsville, SC 29550-4311
August 8, 2011
Page 2 of 2

Cc:

Mr. Jay James
P.O. Box 507
Darlington, SC 29540
[Via email to
pilaw507@bellsouth.net and
first class mail]

Mr. Renee Josey
Mr. Brandon Hylton
1831 W. Evans Street
Florence, SC 29501
[Via email to
RJosey@turnerpadget.com,
bhlton@turnerpadget.com
and first class mail]

The Honorable Scott B. Suggs
Clerk Of Court,
Darlington County
1 Public Square, Room B-4
Darlington, South Carolina 29532
[hand-delivered]

STATE OF SOUTH CAROLINA)

COUNTY OF DARLINGTON)

Pee Dee Health Care, P.A.,)

Plaintiff,)

vs.)

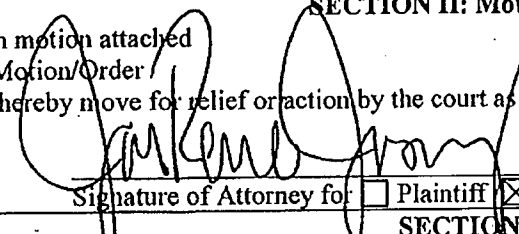
Estate of Hugh S. Thompson)

Defendant.)

IN THE COURT OF COMMON PLEAS
TWELFTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-16-0332 (Probate Claim)
CASE NO.: 2010-CP-16-0633 (Probate Appeal)

MOTION AND ORDER INFORMATION
FORM AND COVERSHEET

<u>name, S.C. Bar no. and address of plaintiff's attorney</u> Plaintiff's Attorney: Benjamin R. Matthews & Others Address: 3400 West Avenue, Columbia, SC 29203 Phone: (803) 799-1700 - Fax E-mail: Other:		<u>name, S.C. Bar no. and address of defendant's attorney</u> Defendant's Attorney: J. René Josey, Esq. Bar No. 03230 Address: P.O. Box 5478, Florence, SC 29502 Phone: (843) 662-9008 Fax: (843) 667-0828 E-mail: rjosey@turnerpadget.com Other:	
☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: For Circuit Court Sanctions Estimated Time Needed: 1 Hour Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.  Signature of Attorney for: ☐ Plaintiff ☒ Defendant Date submitted: 1/16/2014			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$25.00 ☐ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION			
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS
FOR THE FOURTH JUDICIAL CIRCUIT

DOCKET NO. 10-CP-16-0332 (Probate Claim)
DOCKET NO. 10-CP-16-0633 (Probate Appeal)

Pee Dee Health Care, P.A.,

Plaintiff,

vs.

Estate of Hugh S. Thompson ,

Defendant.

**DEFENDANT'S MOTION FOR CIRCUIT
COURT SANCTIONS**

I. MOTION AND GENERAL INTRODUCTION.

A. This Motion.

Pursuant to S.C. Code Ann. §15-36-10 (part of the South Carolina Frivolous Civil Proceedings Sanctions Act, hereinafter "FCPSA"), Rule 11 SCRCF, and the inherent powers of this Court, the Defendant Thompson Estate hereby moves this Court for sanctions in these two related actions (referenced above by civil action numbers).¹ These are cases where claims have been asserted by Pee Dee Health Care P.A. ("PDHC"), pleadings have been filed by PDHC, motions made by PDHC, arguments made by PDHC, and letters, e-mails, and other papers sent or presented by PDHC -- that were without merit and without reasonable grounds of support.

Plaintiff's allegations and causes of action were terminated in favor of Defendant by way of an Order granting judgment as a matter of law on August 29, 2011. Appeals from these

¹ Two separate but related matters involving the same parties have been considered in this Court and treated on a consolidated basis -- a disputed probate claim (Civil Action 10-CP-16-0332) and an appeal from a ruling of the Probate Court (Civil Action 10-CP-16-0633). In this motion, Defendant may refer to these two related actions as singular -- part of a single matter.

matters were addressed by the Court of Appeals in a consolidated opinion dated July 3, 2013 which affirmed this Court's summary disposition. Subsequent appellate petitions for rehearing and for certiorari have been denied. Remittitur was issued by the Court of Appeals on January 7, 2013 and this motion is filed as a timely² response thereto.

As this Court is aware, this entire matter arose out of a probate claim asserted by the Plaintiff against the Defendant Estate for damages related to a Medicare credentialing oversight. The thrust of Plaintiff's claims was that Dr. Hugh Thompson, former employee of the Plaintiff, is legally responsible for the Medicare overpayment to the Plaintiff occasioned by the failure to secure all the proper credentials for Dr. Thompson prior to his treatment of Medicare patients with the Plaintiff clinic.

² Although the Supreme Court has noted that there may be different time limits for a motion made under Rule 11 and one made pursuant to S.C. Code § 15-36-10, see Russell v. Wachovia, 370 S.C. 5, 633 S.E.2d 722 (2006) (discussion at footnote 11) (case involved a dispute over the Estate of the late Judge Donald Russell), the Defendant here is timely under any standard.

While FCPSA sanctions must be sought within the time that a trial court retains jurisdiction, Ex parte Beard, 359 S.C. 351, 358, 597 S.E.2d 835, 838 (Ct. App. 2004) (pursuant to general rule limitations, FCPSA motion too late when filed 363 days after the attempted claim was denied – but parallel Rule 11 motion treated timely with merits addressed), the final disposition of a case that has been appealed does not occur until the remittitur is returned by the appellate court and filed with the lower court. Mcdowell V. South Carolina Department Of Social Services, 300 S.C. 24; 386 S.E.2d 280 (Ct. App. 1989) (holding that statutory time within which to petition for attorney's fees began to run following remittitur – the “final disposition”). Once the remittitur is returned to the trial court, that trial court reacquires jurisdiction to enforce the judgment as affirmed and take any further action consistent with that appellate ruling. Muller v. Myrtle Beach Golf & Yacht Club, 313 S.C. 412, 438 S.E.2d 248 (1993)(following remittitur Circuit Court was vested with jurisdiction to award statutory attorney's fees in mechanic's lien foreclosure).

In this case, two appeals were already pending at the time the Court issued its Order of summary judgment; thus, there was no final disposition with regard to all trial court issues even when Summary Judgment was determined. Final disposition of all issues litigated in this Court did not occur until the issuance of the remittitur. Here, the remittitur was issued less than 10 days ago and the relief now sought is consistent with the judgment as now affirmed by the appellate courts of this state.

This motion is based upon the nature of the litigation itself – without merit and needless – and it is also based upon the pattern of abusive conduct in the course of this litigation. The Thompson Estate requests such sanctions be imposed upon the Plaintiff business entity, PDHC, each of Plaintiff's trial counsel (Mr. Matthews and Mr. Megna), counsel's law firm (Matthews & Megna LLC), and any successors or assignees, as the Court deems appropriate. In accordance with SCRCP 11(a), the undersigned certify that the nature of this motion precludes consultation from serving any useful purpose.

In support of this motion, Defendant will show that the initiation and continuation of this lawsuit was done in bad faith and with no reasonable cause, and that a reasonable attorney would believe that the proceedings were frivolous. In particular, Plaintiff filed a non-meritorious lawsuit, including numerous causes of action for which Plaintiff possessed no factual or evidentiary support and which a reasonable attorney would believe were frivolous. Plaintiff additionally appealed numerous interlocutory matters, including orders regarding Probate Court rulings and counsel disqualification. Plaintiff has submitted numerous motions, letters, e-mails, affidavits, and memoranda accusing Defendant and defense counsel of all manner of inappropriate and abusive conduct, each of which has been dismissed and discounted by the Court and all of which were submitted without reasonable basis.

This Motion will be based on the pleadings, discovery, and the entirety of the record developed in these cases. Defendant seeks attorney's fees and costs of this proceeding and fees and costs with respect to the entire proceeding below, including Plaintiff's numerous frivolous appeals,³ and further move for such other relief as shall appear just and proper to this Court.

³ A similar motion is now pending in the South Carolina Court of Appeals; the Thompson estate does not seek double recovery but it does seek a full measure of sanctions for conduct confronted

The pending motion is anything but routine. Defendant's counsel does not relish seeking sanctions in this or any matter, but counsel has determined it would be a disservice to the heirs of the Defendant Estate not to recommend and pursue such a course given the overwhelming financial and emotional burden placed upon them and their father's limited estate by this litigation. While Dr. Thompson certainly did not die as a pauper, his Estate is limited and the defensive legal fees represented by this litigation (both trial and appellate court) represent more than the liquid value of the Estate as reported on the Probate Court inventory and represent approximately one-third of the overall estimated value of the net Probate Estate. The Heirs should not see their intended inheritance diminished by the costs of needless litigation and aggressive bullying⁴ tactics. The detailed review undertaken by Defendant in this Motion for Sanctions reveals that, like this motion itself, the conduct in this case is also anything but routine.

B. Law Applicable To This Motion.

1) The Court's General Power To Impose Sanctions.

"Due to the very nature of the court as an institution, it must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This

at every stage of the litigation – some of it continuing and some of it unique to one forum or the other. A copy of the Court of Appeals motion is attached as Exhibit A so these factors may be considered. (Hard copy provided is without Exhibits to reduce volume, complete e-copy will be provided on CD-ROM).

⁴ Defense counsel is mindful that they too have duties of civility even while advocating for these sanctions. Accordingly, counsel has made every effort to avoid unnecessary hyperbole in describing the history of this litigation. Defense counsel does not seek to judge the character of Plaintiff's officers or its counsel – only identify conduct for this Court's consideration.

In this case, the term bullying is justifiably descriptive. As this motion will identify, and as the Court likely already is aware from the history of this case, Plaintiff and its counsel have engaged in conduct characterized by continued and persistent threats, stated and implied, against the Defendant estate and its limited value, against defense counsel, and even against the Court itself for non-existent recusal concerns.

power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers.” United States v. Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993). Indeed, “[a]ny abusive litigation practice is sanctionable against a lawyer or client.” Hon. G. Ross Anderson, Jr., Discovery Sanctions, 6 S.C. Lawyer 14 (1995). This is especially true when a lawyer’s conduct rises above zealous representation to the level of manipulation of the legal system in an effort to inflict harm on an opposing party. See Shaffer Equip. Co. at 458 (stating that *a lawyer’s duty to “advocate vigorously [is] trumped ultimately by a duty to guard against the corruption that justice will be dispensed on an act of deceit.”*)(emphasis added).

2) Rule 11, South Carolina Rules Of Civil Procedure.

In relevant part, Rule 11(a) SCRCPP provides: “Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar.” The Rule further provides that by his signature, the submitting attorney is certifying that “he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.” Rule 11(a) SCRCPP.

Under Rule 11, parties and attorneys involved in litigation are required to read their pleadings and other papers before filing or transmitting the same to the Court and/or counsel, and the parties and their attorneys must certify that to the best of their knowledge, information and belief, there are good grounds to support the positions therein. In preparing a motion, pleading, or other litigation related paper, “an attorney has a duty of acting in good faith, and may be disciplined for violation of the duty.” Johnson v. Dailey, 318 S.C. 318, 323, 457 S.E.2d 613, 616 (1995). Pursuant to Rule 11, an attorney who knowingly makes a frivolous argument or fails to make an adequate investigation into the facts before filing or transmitting a pleading or other

paper violates the Rule. Kilcawley v. Kilcawley, 312 S.C. 425, 427, 440 S.E.2d 892, 893 (Ct. App. 1994); see also, Link v. Sch. Dist. of Pickens County, 302 S.C. 1, 7, 393 S.E.2d 176, 179 (1990) ("A party may be sanctioned under Rule 11, SCRCF, for making frivolous arguments."); Wade v. State, 348 S.C. 255, 263, 559 S.E.2d 843, 847 (2002). In discussing Rule 11 of the Federal Rules of Civil Procedure, the South Carolina District Court has held:

Rule 11 requires that an attorney conduct a reasonable investigation of the factual and legal basis for the claim before filing. The prefiling factual investigation must uncover some information to support the allegations in the complaint and some basis in law to support the claims in the complaint. An attorney violates Rule 11 if the complaint has absolutely no chance of success under the existing precedent. Rule 11 no longer requires a showing of bad faith. Rather, the relevant inquiry is whether a specific filing was, if not successful, at least well founded at the time of filing.

Gibbes v. Rose Hill Plantation Dev. Co., 794 F. Supp. 1327, 1340 (D.S.C.1992) (internal citations and quotations omitted) (quoting Brubaker v. City of Richmond, 943 F.2d 1363, 1373 (4th Cir. 1991)).

Rule 11 expressly provides for sanctions in the case of violations, stating "If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee." Pursuant to Rule 11, *"the Court may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred*

because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee." Russell v. Wachovia Bank, N.A., 370 S.C. 5, 19, 633 S.E.2d 722, 729 (2006) (emphasis added) (upholding imposition of sanctions where statements in affidavit were contradicted by affiant's deposition testimony).

3) South Carolina Frivolous Civil Proceedings Act.

The South Carolina FCPSA provides in part: "(A)(4) An attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for: (a) filing a frivolous pleading, motion, or document...." See S.C. Code § 15-36-10. In addition, an attorney or party may be sanctioned under the Act for "(b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or (c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law."

Separate and apart from offending pleadings or arguments, sanctions may be imposed under § 15-36-10 following summary judgment disposition of a frivolous claim. Id. at (C) (1). Sanctions under the Act may include: "(G)(1) an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party under a motion pursuant to this section."

Even when meritorious, litigation can be time-consuming and expensive. This litigation has been particularly time-consuming, tedious, and expensive -- despite this Court's prompt summary judgment order of August 29, 2011. The emotional and financial cost of defending this matter were excessively high even at that point -- in the summer of 2011; now, the family has been defending the Estate from these frivolous claims for over three years. The recent remittitur

(issued January 7, 2014) represents the most-welcomed possibility of finality for the Thompson family, but an award of sanctions is needed to rectify what has been an unjust burden on this family and an undeserved black-eye to our judicial system.

II. LITIGATION KNOWINGLY WITHOUT MERIT FROM THE START.

Of course, both this Court's dispositive Orders and the Court of Appeals opinion of July 2013 found this litigation to be without merit. But this motion will further address the lack of colorable virtue of the litigation from its onset.

With regard to the probate appeal to this Court, that appeal was not only unnecessary because it was without merit – as explained in the arguments below, the appeal was also unnecessary because the Plaintiff's interests were otherwise protected. Likewise, the effort to contest Mr. Megna's disqualification was both without merit and unnecessary. As discussed below, it was unnecessary because Mr. Matthews – also a counsel of record in this Court – was never disqualified and Mr. Megna's disqualification was always manifest. Of course, first and foremost, PDHC and its counsel knew the effort to shift blame for their Medicare overpayment was without merit because PDHC had a non-delegable duty to confirm employee credentials and PDHC had been reminded of this duty by a federal administrative law judge and the Medicare Appeals Council.

A. Probate Claim Itself Known By PDHC/Counsel To Be Without Merit.

1) Blame-Shifting Theory For Medicare Overpayment Had Been Litigated To Finality Without Success.

While not the only basis for the trial court's order of summary judgment, one basis for the decision was the preclusive effect of offensive collateral estoppel. A federal judge (Decision of March 14, 2008) and administrative appellate body (Medicare Appeals Council decision dated October 6, 2008) found that Plaintiff was at fault as the employer with its own non-delegable

duty to confirm employee credentials *before* accepting Medicare payments for the employee's services. That finding of fault became final when Plaintiff did not pursue further appeals and that finding served as the basis for Medicare's recoupment of funds paid to Plaintiff.

2) PDHC/Counsel Ignored Judicial Finding Of Non-Delegable Duty.

Plaintiff knew the issue of fault had been litigated to finality in the federal forum in 2008 before it sought in this 2010 action to shift that fault to the unsuspecting Estate of the muted⁵ decedent. Accordingly, Plaintiff and its counsel knew before even signing and filing the complaint that the federal holdings could be used against them through the doctrine of non-mutual collateral estoppel. Plaintiff and its counsel knew fault had been determined but they brought their inconsistent claim anyway and hoped a fee-frozen Estate⁶ could not defend itself and/or would settle based upon a misrepresented Medicare record (discussed in the following section of this motion).

3) Counsel Misrepresented Prior Judicial Holdings To Estate Counsel.

Initially, Plaintiff's counsel failed to provide the actual administrative orders from the adverse Medicare adjudication which served as the basis for this estoppel. *Instead, Mr. Matthews chose to completely misrepresent those orders while he attempted to negotiate for PDHC.*

Specifically, discovery requests seeking the administrative records were acknowledged by Mr. Matthews in a letter dated June 24, 2010 (Exhibit C attached). Without providing the

⁵ As this Court noted in its Order of Summary Judgment, Finding of Fact 7: "Eighteen months after the final decision of the Medicare Appeals Council, and after the death of Defendant Dr. Thompson, *who would have been a pivotal witness as to what representations passed between the parties* as to Dr. Thompson's Medicare provider eligibility, this claim was brought in the Probate Court." Order (Attached as Exhibit B) (emphasis added).

⁶ Discussed below in Section II (B) (1).

records, Mr. Matthew's acknowledgement letter misrepresented the administrative holding— and based upon these misrepresentations, the letter proposed settlement discussions. *Mr. Matthews wrote that "All administrative decisions were determined adversely to Dr. Thompson....."* Notably, Dr. Thompson was not even a party to those proceedings. *Mr. Matthews further claimed that Medicare had "imputed the false statement made by Dr. Thompson to PDHC...."*

While there obviously was a credentialing oversight, there was no federal finding of a "false statement." Moreover, the liability of PDHC was direct, not imputed, and was based upon the fault of PDHC in failing to meet its non-delegable credentialing oversight duties.

Contrary to a further misrepresentation in Matthew's letter, Medicare did not state that Dr. Thompson "should have informed PDHC of his disbarment from Medicare." Rather, the federal judge held that PDHC should have investigated and found the disbarment itself. *After falsely representing the federal adjudication (not yet known to Defendants), Mr. Matthews goes on to describe the decedent's conduct as "intentionally deceptive" and a "betrayal of [PDHC] trust" from a "friend and colleague of many years" employed by PDHC at a time "when no others would" employ decedent.*

Later, after Defendant's discovery requests were directed to the administrative officials themselves, the Estate obtained the records of the federal administrative law judge and the Medicare Appeals Counsel. These records confirmed that the Plaintiff, *through Mr. Megna – its Chief Executive Officer and General Counsel*, had already litigated the fault issue of Dr. Thompson's credentialing error and lost.⁷

⁷ Defendant sought to advise this Court of this previous litigation outcome as soon as possible after it was confirmed. When it was presented as background information at the disqualification hearing on March 16, 2011, Plaintiff's counsel interrupted the presentation to object to the introduction of this dispositive history (partial transcript attached in hard copy as Exhibit D – an entirety of all transcripts and other exhibits hereto will be submitted on CD-ROM) (Page 7 line

B. Probate Appeal To Circuit Court Was Without Merit.

Although Plaintiff's claim against the Defendant Estate was itself removed to Circuit Court for disposition, the Plaintiff filed a motion in Probate Court seeking to block the Estate's payment of legal fees to counsel (which potentially could have eviscerated the Estate's ability to defend itself⁸) and seeking to have the Defendant Estate purchase a commercial bond for Plaintiff's claims in an amount equal to the damages asserted by Plaintiff through counsel – even though the requested bond amount would have exceeded the actual value of the Estate itself.

1) Not needed -- Estate's Assets Were Protected Without Appeal.

In response to this excessive effort, the Defendant Estate offered to subject the Estate assets to Court oversight such that no disposal of assets would occur without Probate Court approval; this proposal was accepted by the Probate Court.⁹ Thus, the Probate Court order fully protected Plaintiff to the extent it could recover from the Defendant Estate – but Plaintiff appealed the Probate Court order anyway because it did not provide the potential (but unjustified) bounty of a bond in excess of the Estate value.

24 – Page 9 line 12); while this Court safely sustained the objection at that time, this dispositive history was later successfully introduced as part of the Defendant's motion for summary judgment.

⁸ This purpose of evisceration is demonstrated in Mr. Megna's letter of February 16, 2011 which not only predicts litigation "over the next few years as these and related matters are determined by the courts"; it confirms PDHC/Megna's belief and intent that the personal representatives of the Estate "remain restrained from exercising any powers of the office....." (Exhibit E attached). Plaintiff's counsel Mr. Matthews made a similar prediction of "years" of litigation in a letter to the Estate's counsel dated June 24, 2010 (Copy Attached as Exhibit C). The misrepresentations found in Exhibit C are further discussed in Section II (A) (iii) above.

⁹ Defendant Estate made this offer to accommodate the Probate Court and in anticipation of a prompt resolution of the matter upon summary judgment. Unfortunately, *through no fault of the courts*, the ultimate resolution has not been prompt.

As noted above, the appeal also related to the Court's allowance for payment of partial attorney's fees from the proceeds of the sale of the decedent's house. As a result of the appeal (and the automatic stay), all estate funds from the sale of the house have remained in a court-protected account *and Defendant's counsel have not been paid for their three years of successful efforts.*

2) Appeal Procedurally Flawed Despite Clear, Codified Requirements.

The appeal taken from the Probate Court to the Circuit Court was procedurally flawed and was dismissed by this Court as such. The Court of Appeals' affirming opinion likewise found that the Plaintiff failed to satisfy the statutory requirements of S.C. Code § 62-1-308(a) in two respects and these failures – particularly the failure to meet the 45 day deadline¹⁰ – warranted the trial court dismissal. These procedural requirements were not new and were not hidden. They are clearly spelled out for any litigant and any attorney in the statute. Moreover, South Carolina case law relied upon by the Circuit Court has previously confirmed the dispositive nature of failing to satisfy the statutory requirements.¹¹

Despite the clarity of the statute and despite the guidance provided by existing precedents, a fatally flawed appeal was made from the Probate Court to this Court anyway. Thus, this meritless and unnecessary appeal of the probate court issue only served to drive up Defendant's legal fees as well as delay and complicate the ultimate disposition of these matters. The deterrence of such improper motives and effects are expressly addressed by both Rule 11 and S.C. Code Ann. §15-36-10.

¹⁰ The other failure was the filing of the grounds of appeal in the wrong court.

¹¹ In Re Estate of Charles H. Cretzmeyer, 365 S. C. 12, 615 S. E. 2d 116 (2005); Gallagher vs. Evert, 353 S. C. 59, 577 S. E. 2d 217 (Ct. App. 2002); Witzig vs. Witzig, 325 S. C. 363, 479 S. E. 2d, 297 (Ct. App. 1996).

3) Adverse Facts Ignored/Denied In Appellate Process.

Not only did the Plaintiff fail to comply with the clear statutory requirements, the Plaintiff actually ignored the facts and asserted to this Court several times that the appeal *was timely* and that the only issue related to the consequences of filing in the wrong place. (Transcript of January 2011, page 11 lines 9-11 and page 13 lines 1-3) (partial hard copy attached as Exhibit F). Despite repeatedly asserting that the appeal was timely, Plaintiff's CEO¹ and General Counsel Mr. Megna ultimately confessed that this was his position although "I have not verified that." See Exhibit F at page 18 lines 12-22. Such verification is precisely what Rule 11 and the Frivolous Civil Proceedings Act require. Among other goals, this motion seeks to discourage such resource-wasting factual mischaracterizations in the future.

C. The Disqualification of Mr. Megna Should Not Have Been Contested.

1) Co-counsel Was Continuously Involved and Available.

There is case law from our appellate courts suggesting that the failure to immediately appeal an order of disqualification might waive the right to a party's counsel of choice; in that sense, the *interlocutory* appeal of this issue might generally be considered necessary. However, the availability and involvement of Plaintiff's co-counsel (Mr. Matthews) – an experienced litigator who did not have the disqualifying history of being a fact witness to underlying matters – militates against the supposed necessity for the disqualified counsel, Mr. Megna, to remain involved. After all, it was co-counsel Matthews that signed the initial complaint – presumably in compliance with Rule 11 SCRCF requiring personal responsibility for that signature. And when this mitigating factor is considered together with the overwhelming merit of the disqualification discussed below, it is obvious that the disqualification should not have been contested and only wasted the time and resources of the Court and of the Defendant.

2) Disqualification Grounds Undeniable & Protests Disingenuous.

As important as the right to counsel of choice is, that right does not remove the ethical grounds for disqualification clearly present and repeatedly ignored in this case. Indeed, both this court (twice)¹² and the Court of Appeals (Opinion at 4, attached hereto as Exhibit I) have itemized the areas in which Mr. Megna's undenied role as CEO of the Plaintiff renders him a necessary witness for relevant and needed factual inquiry. By ignoring this role, these facts, or the applicability of Rule 3.7 of the Rules of Professional Conduct, the Plaintiff and Mr. Megna do a disservice to themselves but more importantly do a disservice to the Courts, the profession, and the Defendant. This disservice warrants the sanctions sought herein.

Review of one simple document, incorporated into this case from the very beginning, confirms the frivolity of Plaintiff's insistence that Mr. Megna was not disqualified. In its complaint (§ 13)(Exhibit J attached – only partial hard copy provided), PDHC alleges that the decedent Thompson made “contact” with PDHC by sending a letter to the Plaintiff in which he is alleged to have “admitted” not providing “accurate information to Plaintiff upon and during his employment with the Plaintiff....”

The unsigned letter was submitted at the hearing on the Motion to Disqualify, without objection. The letter was addressed to “Tony.” (See Exhibit K attached). The same document was submitted as Exhibit HH to the PDHC response to the Motion to Disqualify.

At Page 15 (line 10) of its Return to the Motion to Disqualify (referenced page attached as Exhibit L), PDHC described this letter as the “cover letter Decedent addressed to the undersigned” (i.e., Mr. Megna). Thus, Mr. Megna was the alleged recipient of an alleged

¹² The original Disqualification Order is attached as Exhibit G and the Order Denying Reconsideration of Disqualification is attached as Exhibit H.

communication from Dr. Thompson in July 2007 – a communication identified as a key exhibit in PDHC’s Complaint.

PDHC’s discovery response to Request for Production number 2 identifies the same alleged letter from decedent Thompson to Tony Megna as a document that relates to a claim or defense in the case. That discovery response also references other “information sent to Tony Megna by Dr. Thompson relating to the SC Board of Medical Examiners.” (Production Response attached as Exhibit M).

Despite its own interrogatory responses, and its own reference to this exhibit in the Complaint, Plaintiff nevertheless insisted to this Court that Mr. Megna was not a witness. Mr. Megna was the claimed recipient of documents and information relevant to claims and defenses in the case. Questions regarding the authenticity of this letter, the circumstances of its alleged receipt, and its alleged contextual meaning were all fairly directed to Mr. Megna. Carrying its lack of candor one strange step further, the Plaintiff argued to this Court that these communications between Dr. Thompson and Mr. Megna -- *used in the Complaint itself* -- were protected by attorney-client privilege thereby precluding Mr. Megna’s availability as a witness.

The protests of Mr. Megna and the Plaintiff to his disqualification also failed to ring true when the involvement of experienced co-counsel from the very beginning is noted. While Mr. Megna has recently suggested that Mr. Matthew’s involvement was merely “ministerial”¹³, the

¹³ This description was used by Mr. Megna oral argument at the Court of Appeals when responding to a question from Judge Williams at seeking to confirm lawyer Matthews’s involvement in the matter. When asked why Mr. Matthews didn’t just sign the Rule 59(e) Motion on Summary Judgment, Mr. Megna suggested that Mr. Matthews didn’t really know anything about the case. In response, Judge Williams pointed out fact that Mr. Matthews had signed the Complaint (in addition to other documents not raised by Judge Williams); Judge Williams’ response prompted the “ministerial” characterization.

Defendant suggests that the requirements of SCRCP 11 do not allow involvement of record counsel to be so limited.

Moreover, the records of counsel reflect that Mr. Megna's most visible involvement in the case (such as signing pleadings, discovery requests and responses, etc.) didn't begin until eight months after the case started and then only after the grounds for the Probate Court appeal were filed late by Mr. Matthews. (Grounds for the Probate Court appeal as filed in both Circuit Court and Probate Court attached hereto as Exhibit N).

3) Counsel's Disqualification Raised Even Before The Motion.

In April of 2010, over nine months before Defendant resorted to a Motion to Disqualify, Mr. James, counsel for the Defendant, had corresponded with Mr. Megna and advised him, both in writing and by telephone, that he (Mr. Megna) was probably a witness.¹⁴ Initially, Mr. Megna acknowledged as much by reply email.¹⁵ Mr. Megna thus knew that Defendant's counsel would

Notably, immediately after oral argument, it was Mr. Matthews who was knowledgeable enough to file a bizarre post-argument Motion to Vacate. Mr. Matthews also wrote the Court of Appeals in response to the Defendant's Reply to that post-argument motion. A recording of the oral arguments has been purchased by Defendant and will be made available to this Court as part of the CD-ROM submitted with full copies of all exhibits hereto. Any of the other appellate record can be provided if needed.

¹⁴ The concern with Mr. Megna's potential dual role as witness and counsel has been raised early and often. On April 13, 2010, Defendant's counsel e-mailed Mr. Megna as follows: "Are you counsel of record for PDHC? If not, who is? I suspect that if the matter is controverted, it will be necessary for you to be a witness." (Copy Attached as Exhibit O).

¹⁵ In reply to the concern as raised by Defendant's counsel (see footnote 12 above), Mr. Megna replied that same day, "If the PR decides to dispute the claim, & I am a witness, we will go from there." (Also part of Exhibit O attached).

challenge his serving as counsel, which they did within about seven weeks of his first official appearance in the case.¹⁶

III. TRIAL COURT CONDUCT OF PDHC/COUNSEL HAS CONSISTENTLY BEEN ABUSIVE/MANIPULATIVE/DISRESPECTFUL.

A. Disrespectful/Abusive of Court Rules, Procedures, Protocols.

Having been reported by the Plaintiff's employee and counsel Matthew's brother to the Office of Disciplinary Counsel ("ODC"),¹⁷ Defendant and its counsel are well aware that it is the responsibility of the ODC to regulate attorney conduct but this is not in conflict with a trial court's inherent ability to control and direct the advocacy of counsel appearing before it. As noted earlier in this motion, the court "must and does have an inherent power to impose order, respect, decorum, silence, and compliance with lawful mandates. This power is organic, without need of a statute or rule for its definition, and it is necessary to the exercise of all other powers." United States v. Shaffer Equip. Co., 11 F.3d 450, 461 (4th Cir. 1993). *Moreover, Rule 11 expressly reaches every "other paper" signed and/or electronically sent by counsel in connection with litigation before the Court.*

¹⁶ The Estate filed its motion to disqualify Mr. Megna in the trial court on January 31, 2011 which followed Megna's execution of a Motion for Summary Judgment filed in the case on December 9, 2010.

¹⁷ These complaints were promptly dismissed.

1) Misrepresenting Content Of Supporting Documents.

a. Matthews Letter Misrepresenting Administrative Record.

Section II (A) (3) above.

b. Mischaracterization of Exhibit HH.

As noted in the discussion of disqualification above, Paragraph 13 of Plaintiff's Complaint alleged that Dr. Thompson contacted it in July 2007 by letter in which Dr. Thompson is alleged to have "admitted that he had not provided accurate information to Plaintiff upon and during his employment with Plaintiff or to Medicare..." (Exhibit J attached). The Complaint purported to attach a copy of this alleged letter as an exhibit; the Complaint as served and filed did not attach the alleged letter as an exhibit. In discovery, PDHC provided Respondent with a copy of the purported letter, which was submitted without objection as Defense Hearing Exhibit 1 at the March 16, 2011, hearing. PDHC submitted a copy of the same letter as Exhibit HH of its Return to the Motion to Disqualify. Again, a copy is attached as Exhibit K hereto.

Although this Court found that there was no right to rely on any claimed representations by Thompson anyway, it was not reasonable for Plaintiff to argue that this summary was some kind of dispositive admission. The one paragraph letter describes documents relating to Dr. Thompson's previous discipline by the South Carolina Medical Board. The letter also apologizes for not yet locating all the needed documents; it does not describe or identify those needed documents. There is no mention of Medicare and of course, Dr. Thompson's Medicare status was fully discoverable by "Tony" from federal government websites and telephone services. Thus, this Court fairly rejected Appellant's repeatedly used mischaracterizations and noted that the instant case lacked "any affirmative misstatements" made by Thompson. (Summary Judgment Order, Exhibit B, at page 11).

Seeking to breathe new life into its quest to keep Mr. Megna as counsel in this matter, PDHC Vice-President of Operations¹⁸ Warren Mark Matthews, Sr. ("Mark") (brother of PDHC attorney Ben R. Matthews) submitted an affidavit on May 2nd stating that the document *submitted by PDHC* as Exhibit HH at the March 16 hearing was not the original document from the files of PDHC.¹⁹ Inconsistent with PDHC's prior positions, Mark Matthews professed ignorance as to how PDHC came to possess the document *it submitted* as Exhibit HH – as if the letter addressed to "Tony" may not have been given to "Tony" despite PDHC's previous interrogatory response to the contrary and cover-letter characterization in its own previous Reply to the Motion to Disqualify.²⁰ These inconsistent positions represent yet another attempted manipulation thrust upon this Court by Plaintiff.

c. Mischaracterization of Admissions in Answer.

Plaintiff's failed motion for summary judgment mischaracterized the undisputed facts admitted in the Defendant's answer in an attempt to shift the burden of proving Plaintiff's claims to a burden on Defendant to disprove Plaintiff's unfounded implication of deceit.

¹⁸ Mr. Megna introduced Mark Matthews to the Court providing his officer's position. Exhibit D, page 4 lines 5-8.

¹⁹ Attached to Mark Matthews' 59(e) affidavit was the same unsigned, undated letter previously seen as Exhibit HH -- *but without handwritten notations in the lower right-hand corner which seem to indicate a 1999 date.* (Affidavit and its Attachment – attached hereto as Exhibit P). Of course, even this new version of the statement fails to make the admissions of misconduct represented to this Court in the Complaint.

²⁰ In argument to this Court, Mr. Megna suddenly distances himself from this key communication relying upon the affidavit of Plaintiff's Vice-President of Operations. (partial transcript of July hearing attached hereto as Exhibit Q attached hereto) (See page 46 line 20 – page 49 line 1). In its Motion to Reconsider the Disqualification ¶ 2, PDHC boldly states "The Court's reliance on Exhibit HH to Disqualify the undersigned is error." (See Exhibit V).

The Plaintiff sought to imply such deceit by stringing Defendant's admissions together in manipulative fashion. The Plaintiff's lengthy and repetitive recitation and manipulation of the Defendant's admissions, however, did not render any of those admissions dispositive.

The following admissions were made:

- 1) the decedent was disbarred by Medicare,
- 2) that disbarment continued in effect throughout decedent's employment with Plaintiff,
- 3) the decedent failed during his employment with PDHC to seek reinstatement from the Medicare office of Inspector General,
- 4) the decedent was paid during his employment with Plaintiff, and
- 5) the Defendant admits that decedent owed an employee's duty of loyalty, good faith, and honesty.

Amidst these candid admissions, what Plaintiff's mischaracterization and manipulation ignored was the essential "right to rely" element and the previous federal adjudication of fault. In this case, PDHC had no right to rely on Dr. Thompson as a matter of federal law. And not only did that federal law directly prohibit the reliance Plaintiff asserted, the previous judicial determination of that right to rely also foreclosed its *reasonable* assertion here.

The point made here, however, is that Plaintiff also lacked a reasonable basis to string the Defendant's limited admissions into some kind of burden-shifting implication. Defendant always denied and still denies any affirmative misrepresentation by Dr. Thompson to Plaintiff. Defendant has also always denied and still denies the breach of any duty owed by Dr. Thompson to the Plaintiff.

2) Misrepresenting The Procedural Status Of The Probate Appeal To Circuit Court.

See Section II (B)(3) above.

3) Misrepresenting Agreed Stay In Discovery As Defensive Delay.

In opposing summary judgment in this Court, PDHC suggested that summary judgment was not appropriate because of the lack of needed discovery. Plaintiff's counsel not only falsely suggested that it needed to depose the Decedent's *uninvolved* children (Plaintiff's filed letter to trial court of July 8, 2011)(Exhibit R attached), he falsely suggested in this Court that such depositions had been blocked by the Defendant.²¹ (See Affidavit of PDHC President Alexander Cohen, also part of Exhibit R, at ¶ 1(a) – swearing that Defendants refused depositions until Mr. Megna was disqualified).

Of course, this Court properly determined in its order of summary judgment, "Plaintiff has failed to identify any discovery that might alter the applicability of the Medicare administrative determination." (Exhibit B at page 10). Moreover, this Court quickly observed that Plaintiff should not have first asked for summary judgment if it were not ready. (This Court's letter of June 23, 2011, copy attached as Exhibit T).²²

As for the representation that Defendant had blocked depositions, Plaintiff's counsel knew that the parties agreed to delay depositions pending the trial court's determination of pending motions because he had written this Court on February 4, 2011 advising that "the parties

²¹ *In the Court of Appeals, PDHC's Brief blamed this trial court stating "The circuit court would not allow depositions to be taken by Plaintiff even though the Plaintiff raised the issue on several occasions."* Plaintiff's Brief (only page 9 attached as Exhibit S).

²² Defendant offered to consent to a withdrawal of Plaintiff's summary judgment motion if not ripe, p. 27 lines 7-19 (Exhibit Q); a similar trial court invitation to object to the hearing on the motion was declined. See p. 3 lines 3-24 (Exhibit Q).

have agreed to suspend further discovery pending the decisions of the Court on the various motions that are now pending.” (Letter attached as Exhibit U). As noted in the Defendant’s July presentation to this Court, the Plaintiff never re-noticed (through either of its two attorneys) any depositions after the February 4th letter representation to the Court. (Exhibit Q at p. 27, lines 12-14).

4) **Suggesting Possible Court Recusal (Groundless) Without Making A Motion.**

In his March 11, 2011 response to the Motion to Disqualify him (selected pages in hard copy attached as Exhibit L attached), Mr. Megna accused Defendant and its counsel of “defamatory litigation [sic] strategy.” This bizarre response contains the first unsupported bald assertion of this Court’s need to recuse itself. Specifically, Mr. Megna alleged, *inter alia*:

The false and unprincipled personal accusations and innuendos being made by Mr. James and Mr. Josey against the undersigned have placed this Court in the unfair and unenviable position of determining whether or not Mr. James and Mr. Josey's accusations [implied and explicit] have prejudiced these proceedings to the extent this Court should sua sponte recuse itself Mr. James' and Mr. Josey's unprincipled attacks on the undersigned and the Plaintiff have placed this Court in a similar position considering the distasteful circumstances we collectively find ourselves discussing.

Plaintiff also suggested that the trial judge recuse himself in a subsequent letter filed July 8, 2011 (Exhibit R). Suggestions of recusal are also found in other trial court Pleadings including the Motion to Reconsider Disqualification filed May 2, 2011 (p.1 item 3)(attached as Exhibit V), and the March 2011 Return to Defendant’s Motion to Disqualify (p. 20)(Exhibit L). *Of course, Plaintiff also implied to the Court of Appeals that this Court should have recused itself.* (Motion to Stay, Vacate & Disqualify, filed with the Court of Appeals August 24, 2011, partial copy attached as Exhibit W; footnote 10 and related text). Despite these repeated suggestions, which threaten to harm the perception of this Court’s integrity, Mr. Megna advised this Court at

the July 19, 2011 hearing that he did not intend to pursue disqualification of the trial judge.

Exhibit Q, page 55 line 21- page 57 line 9.

5) Making Wild Claims Of Systemic Impropriety Without Any Support.

In his March 11, 2011 accusation of "defamatory litigation [sic] strategy," Mr. Megna also rants of a supposed Pee Dee area conspiracy of legal and medical professionals. He states, *inter alia*:

The Motion to Disqualify is replete with implied [and not so implied] offensive and unjustified personal and professional attacks on the integrity of the undersigned. ... The undersigned is extremely aware that Mr. Josey and Mr. James are attempting to convey to the Court the misleading, insulting and not so subtle message to this Court that the undersigned is somehow "dishonest, untrustworthy", etc. ... Mr. Josey, Mr. James, and the Personal Representatives of the Estate of the Decedent have seriously miscalculated the determination of the Plaintiff, and the undersigned, to remedy the wrong that has occurred in the case at bar - as well as in the Lake City matters.

The undersigned has no qualms in informing this Court that *the 'Lake City litigation' involves significant allegations of unethical and unprofessional conduct by lawyers of one of the largest law firms in this state, allegations of unethical and unprofessional conduct by lawyers in an influential firm in the Pee Dee, allegations of unethical and unprofessional conduct by relatives of a judge in Florence County, allegations of unethical and unprofessional conduct by physicians with medical practices in Lake City, SC, and allegations of conspiracy, fraud and unprofessional conduct by many others.* ... In sum, the Plaintiff and the undersigned, as well as many others, were victimized by many in the Pee Dee area in regard to the Lake City matters.

Additional litigation against those involved ... is forthcoming. Counsel for the Defendants have unnecessarily, maliciously, and unethically interjected the 'Lake City litigation' into this lawsuit by their personal attacks and insinuations of improper conduct by the undersigned; and have attached a Lake City document to their Motion to Disqualify for the sole realistic reason of prejudicing these proceedings. *The Motion to Disqualify crosses the line from advocacy to obstructionism.* See the foregoing discussion in relation to Rule 401, Rules 3.3 and 3.4.

(See Exhibit L attached). Overall, the conduct of Plaintiff's counsel in this Court exhibited a bizarre pattern of mixing unwarranted threats/warnings with a simulated courtesy.²³ In addition,

²³ While professing to be "astounded" by Mr. James' participation in a "dishonorable" and "inappropriate and demeaning litigation strategy", Mr. Megna accuses both Josey and James of

Plaintiff's counsel has continually attempted to direct all courts away from the actual merit of issues at bar and toward some suggested red herring.

6) **Making Legal Arguments And Staking Out Legal Positions By Letter, Not By Proper Pleading.**

Rule 7(b)(1) of the SCRPC provides that "An application to the court for an order *shall be by motion*, which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefore, and shall set forth the relief or order sought." (emphasis added). Rather than filing motions to disqualify TPGL and disqualify this Court, however, Plaintiff's counsel – himself disqualified – instead chose to send a series of letters and e-mails to Defendant's counsel and the trial court. These communications often made hyperbolic suggestions of severe consequences, but they never complied with the simplicity of Rule 7(b)(1) which provides for procedural due process.

One example is the July 27th letter of Mr. Megna to this Court sent by e-mail with copy to Defendant's counsel (attached as Exhibit Z). In that letter, Mr. Megna offers the following (emphasis added):

At this point, both Mr. James as well as Mr. Josey are likely necessary witnesses, *if not Defendants*, in adverse litigation that involves the Plaintiff Moreover, their silence concerning their knowledge of and involvement in the 'Lake City litigation' matters is of *grave concern* to the Plaintiff *with far-reaching implications*. I fail to understand how it is not reasonable to conclude *their silence has been intended to misdirect or deceive* both the Plaintiff and the Court. the Plaintiff has had very little time to evaluate and organize matters and documents to provide the Court a more complete picture of the extent of the *legal and ethical*

"false and unprincipled personal accusations." Exhibit L attached. These accusations were followed by Mr. Megna's e-mail of July 26, 2011 advising "you and Jay are likely witnesses, if not possible Defendants... for multiple reasons including but not limited to aiding and abetting and breach of fiduciary duties to an existing client." (Exhibit X attached). In contrast, an e-mail of January 17, 2013 thanks Mr. James for his always helpful communications but still notes his objection to "obvious" ethical violations. (Exhibit Y attached).

concerns. However, the seriousness of the matter required your *immediate* notification.

7) **Blatant And Needless Disregard Of Disqualification Order.**

The Plaintiff's hyperbolic pleadings and letters to this Court also feigned shock or surprise that this Court actually did what it said it was going to do – both disqualify Mr. Megna and consider the merits of summary judgment after allowing him to argue the issue. This shock or surprise also lacks candor because counsel knew that his authorization to file subsequent pleadings had been questioned.

Both this Court²⁴ and Defendant²⁵ had raised the issue of such authority in advance of the due date for the motion for reconsideration of summary judgment. In addition, the trial court's original disqualification order had been clear.²⁶ Thus, both attorneys of record for Plaintiff in

²⁴ Specifically, in reaffirming the disqualification, the court dismissed other activity by disqualified counsel as unauthorized – “The Court granted Plaintiff's counsel [Megna] a limited appearance only. Therefore, all motions, subpoenas, and filings signed only by disqualified counsel, Tony R. Megna ... are hereby QUASHED.” (August 12, 2011 Order at page 1, attached as Exhibit H). The order was sent by the Court to Mr. Matthews as “Plaintiff's remaining counsel” with instructions for Matthews to serve the order upon all parties. The trial court's summary judgment letter of the same date was also sent to attorney Matthews alone as counsel for PDHC. (Exhibit AA attached).

²⁵ Counsel for the Estate first raised concerns regarding Mr. Megna's authority to continue participation in a letter to the trial court on May 20, 2011 (Exhibit BB attached). This letter was attached to the Estate's Return to the Petition for Rehearing filed with this Court. The Estate also raised the issue specifically in its 6 page Response to Motion for Reconsideration of Summary Judgment filed on September 20, 2011 (Exhibit CC attached). Even before the September 20, 2011 trial court response raising this issue of counsel's authorization, it was raised in a counter-motion submitted in the Court of Appeals on September 6, 2011 (pages 4-6 of that counter-motion only attached in hard copy as Exhibit DD).

²⁶ That Order had provided:

The Court orders complete disqualification effective with the execution of this order. The Court concludes that it is not feasible for Mr. Megna to remain involved as counsel of record even before trial. The potential for problems would exist even with depositions and other pre-trial functions.

this Court (Mr. Matthews and Mr. Megna) *knew* that Mr. Matthews needed to execute any needed pleadings.

As the Court of Appeals affirmation provided, "the circuit court provided clear and unequivocal notice to PDHC that Mr. Megna was only allowed to orally argue the motions for summary judgment and was disqualified from all other appearances and activities following his disqualification." Exhibit I at p. 2. Of course, Mr. Matthews could have executed any motion to reconsider, but when Mr. Megna executed the motion, it not only rendered that motion unauthorized, it ultimately rendered the summary judgment appeal procedurally frivolous as untimely, not just substantively without merit (a point also raised in the motion for appellate sanctions). Plaintiff is a victim of its own officer's disregard of multiple warnings.

8) Groundless Suggestion That Trial Court Had Lost All Jurisdiction.

Attempted jurisdictional manipulation of this Court began when Plaintiff filed an opportunistic notice of appeal from the August 2011 ruling denying reconsideration of Mr. Megna's disqualification. Despite receiving *simultaneous notice* of the trial court's indication that it would sign a formal order granting the Defendant summary judgment, the Plaintiff chose not to pursue appeals of these issues simultaneously but instead sought to use an immediate appeal on the disqualification issue to argue to this Court that the disqualification appeal deprived the trial court of authority to finalize its previously announced (and explained) decision of summary judgment.

The immediate availability of Mr. Megna's partner eliminates any hardship or difficulty associated with this effective date.

(Disqualification of Counsel Order, dated April 15, 2011, Exhibit G attached, page 9 (incorporating footnote 11)). Of course, the trial court's written order reinforced the directive given even earlier by the Court directly to counsel in the Courtroom on March 16, 2011, "It begins *now*." Exhibit D at Page 38, lines 5-6 (emphasis added)).

Relatedly, Plaintiff repeatedly sought, unsuccessfully, to have the Court of Appeals vacate or revoke adverse this Court's rulings, painstakingly considered, under the guise of jurisdictional or stay issues. This strategic effort to piece-meal the appellate court's review of matters has wasted the resources of both Courts and has cost the Defendant in time and fees.

9) Non-Lawyer's Signing Pleadings To Court.

PDHC's motion for summary judgment was filed shortly after Defense counsel sought Plaintiff's consent to a proposed amended complaint. The motion was apparently not signed by an attorney but signed by a staff person who initialed the signature after signing counsel's name.

In addition, the certificate of mailing attached to the filed *date-stamped* copy of the motion -- *as served upon Defendant's counsel* -- facially misrepresents the date of mailing as the day prior to the date of filing stamped upon the mailed copy. Perhaps this wrong date was simply an error and not an attempt to pre-empt the Defendant's motion to amend the Answer, but that is not what the circumstances suggest. Although the proposed amendments to the Answer did not alter any previous admissions of the original Answer, Plaintiff's counsel sought to portray the Amendment as a belated fix to avoid a prior Plaintiff's effort to seek summary judgment. See Exhibit Q page 28 line 18 – page 31 line 6; see also page 43 lines 11-15 (Mr. Megna's explanation that others on his staff file documents for him as he is located in Atlanta and Columbia).

10) Misuse/Abuse of Court Process and Procedures.

As this Court is well aware, counsel disqualified in this case has, among other things, sent out multiple subpoena's to numerous uninvolved attorneys across the state including Desa Ballard, Celeste Jones of the McNair Firm, and Kenneth P. Woodington of Davidson & Lindemann, PA. He also sent parallel subpoenas to the law firms representing Defendant in this

matter. These subpoenas provoked a series of filed objections, motions for protection, and a motion for sanctions – actual compliance with the subpoenas was rendered moot by the Court's *sua sponte* quashing of such material.

While the purpose of these quashed subpoenas is not entirely clear, they echoed discovery sent out in other litigation seeking to solicit the communications of various members of the bar, including the undersigned, who were all involved in unrelated litigation matters with attorney Megna. As undersigned counsel explained at the March hearing on the motion to disqualify Mr. Megna, a public document in the so-called "Lake City litigation" was attached to the motion to disqualify solely to demonstrate that Mr. Megna was CEO of PDHC and therefore likely to be a witness.²⁷ Transcript of March 2011, Exhibit D, page 11 lines 2-14. Attorneys in the "Lake City litigation" helped undersigned counsel locate those public documents. Undersigned counsel is not involved in the "Lake City litigation" but understand it involves the ownership/control of the Lake City hospital.

As the Court has already determined, this use of process by Mr. Megna was inappropriate and unauthorized as he had already been disqualified from serving as counsel in this matter. This abuse of process is but one part of many such infractions – which disrespect this Court and its processes. Moreover, as discussed below, this abuse had consequences to the Defendant here.

²⁷ Because Mr. Megna was a witness in the matter at bar, Defendant's counsel sought to monitor the proceedings of Richland County litigation where court findings would have been relevant to Mr. Megna's credibility. See Anasti v. Wilson, unpublished opinion 2011-UP-187 (filed April 28, 2011)(dismissing appeal from trial court order which found Mr. Megna "was not credible as to any contested issue").

11) Providing Less Than Candid Responses To Request To Admit.

Once the Defendant had secured the administrative record in the underlying case where Plaintiff had unsuccessfully litigated fault for the Medicare overpayment, Defendant served Plaintiff's counsel with Request to Admit seeking to narrow the issues before this Court and avoid unnecessary delays in this litigation. Defendant sought to have Plaintiff admit this prior litigation, admit its outcome, and admit its finality (Requests 1 and 2). Defendant also sought to have Plaintiff admit its certification of eligibility found in Medicare forms (Request 4) and admit its failure to conduct credentialing due diligence. (Request 5). Astoundingly, Plaintiff denied all the narrowly drawn requests (See Exhibit EE attached – sent by e-mail therefore without handwritten signatures) thereby delaying the disposition of this matter (as the Court now knows, these issues were dispositive). This contrived delay imposed upon this Court the need to point out what was obvious and should have been admitted.

B. Disrespectful/Abusive Toward Adverse Counsel/Litigants.

1) Suggesting US Attorney Based Disqualification Without Basis.

As soon as probate counsel for the Defendant, Mr. James, associated co-counsel Mr. Josey for litigation assistance, Mr. Megna began a push back effort seeking to inhibit this avenue of support. Initially, Mr. Megna suggested that something in Mr. Josey's former federal service disqualified him from working on this Medicare-related case;²⁸ when challenged for specifics, however, they never materialized.²⁹

²⁸ This was raised in e-mails from Mr. Matthews to Mr. James dated August 13, 2010 and August 24, 2010 (Copies attached as Exhibit FF). This non-existent conflict was also asserted in the Grounds for Appeal from the Probate Court (Exhibit N).

²⁹ See Exhibit GG attached (Josey letter seeking specifics for follow-up).

2) Fraudulently Misrepresenting Prior Litigation Outcomes.

Again, See Section II(A)(3) above.

3) Groundless Threats To Litigate Against Adverse Counsel.

In a letter of February 4, 2011 to this Court (Exhibit U), Mr. Megna suggested there would be other parties added to the lawsuit. As a follow-up, Mr. Megna prepared a motion to strike the Defendant's Answer which was presented to Defendant's counsel (e-mailed on February 17, 2011) with reference to a law review article purporting to support the liability of counsel for "aiding and abetting" a client for wrongfully denying an estate claim or liability of counsel for "aiding and abetting" a breach of fiduciary duty by the personal representatives of the Estate (who do not owe a fiduciary duty to a disputed creditor of the Estate).³⁰

Another example, noted above, is Mr. Megna's suggestion that counsel might somehow be facing additional litigation along with those alleged to be in a Pee Dee area conspiracy enveloping the family of a circuit judge, and several law firms. Exhibit L pages 18-21. Also noted above, and a typical example of this conduct as well, is the July 27th letter of Mr. Megna to this Court sent by e-mail with copy to Defendant's counsel (See quoted provision in Section III (A) (6) above).

4) Promises To Tie Up The Estate For Years

As noted above, in his letter of February 16, 2011, Mr. Megna predicted litigation "over the next few years as these and related matters are determined by the courts" and confirmed PDHC/Megna's belief and intent that the personal representatives of the Estate "remain restrained from exercising any powers of the office....." (Exhibit E attached). Plaintiff's

³⁰ Pages 17-18 of this motion are attached hereto as Exhibit HH. Without any grounds, and apparently without really reading the proposed amendments to the Answer, footnote 1 of this motion and the accompanying text suggest that Defense counsel's effort to amend minor aspects of the Answer constituted such "aiding and abetting."

counsel Mr. Matthews made a similar prediction of “years” of litigation in his misleading letter to the Estate’s counsel dated June 24, 2010 – also discussed previously (in Section II (A) (3) above). (Exhibit C attached).

5) Excessive, Inconsistent, and Unsupported Use Of The Worker’s Compensation Conflict.

As part of the Motion for Reconsideration of Summary Judgment (Exhibit II attached), the Plaintiff referenced its motion then pending in the Court of Appeals (later denied) to disqualify the firm of Turner Padgett Graham & Laney P.A. in this matter based upon a conflict of interest involving a largely dormant workers compensation claim. Defendant’s counsel conceded that initial concerns with this conflict issue required legitimate investigation. Defendant’s counsel regrets the situation. The relevance to this motion is that Plaintiff and its counsel have used this issue as time-consuming fodder before this Court when they knew it had no merit.

a. Demanding Corrective Action, Then Complaining Of Demanded Correction.

When TPGL’s conflicting representation was raised on July 19, 2011, and subsequently confirmed, Plaintiff made it clear that it would not consent to continued representation as could be allowed under Rule 1.7 (b) of the Rules of Professional Conduct. Plaintiff’s general counsel Megna specifically demanded that Defendant’s counsel “resolve the matter.”³¹ Accordingly, TPGL took steps to withdraw from Plaintiff’s representation as required – in coordination with the insurance carrier – the real party in interest with the contractual right to engage counsel for

³¹ Exhibit Q page 5 lines 19-22 and page 7 line 18. See also Megna letter to J. René Josey of July 20, 2011 (“To reiterate, Pee Dee Health Care, P.A. has not waived and does not waive the conflict of interest. I request you and Jay resolve the matter immediately so that the legal and financial interests of Pee Dee Health Care, P.A. in both matters are absolutely protected.”)(Exhibit JJ attached).

its insured. New worker's compensation counsel was quickly secured by the carrier and a substitution approved by the Worker's Compensation Commissioner.

Having withdrawn as required from the worker's compensation matter, the remaining issue for TPGL was whether the firm could and should continue in representation of the Defendant who knowingly consented to, requested, and authorized such continued representation. This issue was considered internally by TPGL in consultation with Ethics Professor Nathan M. Crystal. The firm and Professor Crystal determined it was ethical to continue in Defendant's representation.³²

Upon learning that TPGL was to continue its representation of Defendant here, PDHC and Mr. Megna suddenly sought to stop or reverse the substitution of counsel in the workers compensation matter -- after having demanded that any conflict be resolved. In support of this about face, counsel Megna for PDHC requested (Exhibit KK attached) a follow-up hearing with the Worker's Compensation Commissioner T. Scott Beck which was accommodated by conference call. In that conference call Commissioner Beck denied any relief from the order of substitution despite Mr. Megna's suggestion that the Commissioner had approved the consent substitution order "*ex parte*." PDHC also requested Commissioner Beck stay the worker's compensation case, *in which it had no financial risks or interests*, and hold a hearing on the previously approved consent substitution of counsel. That request was refused.

³² Mandatory withdrawal from representation of the Defendant's is not required by the Rules of Professional Conduct where the representation of PDHC has ended, consent of the Defendant has been provided, and ongoing representation of the Defendant is untainted by anything learned in the worker's compensation matter. See Affidavit of Nathan M. Crystal (Exhibit LL attached) submitted to the Court of Appeals -- and then this Court -- in response to Plaintiff's efforts in both Courts (and also the ODC complaint of Mark Matthews). TPGL having done what was ethically required, and what was demanded, PDHC still sought a different outcome -- one where TPGL could not help represent Defendant.

b. Representing It To Be Harmful When It Clearly Was Not.

PDHC was never without counsel and moreover, nothing procedurally significant occurred in the worker's compensation case between the time of the 2008 settlement and the time of counsel substitution in 2011. *Plaintiff knew this; in fact, so slight, dated, and minimal was the contact between TPGL and PDHC regarding the workers compensation matter that Mr. Megna admitted to the trial court that he had forgotten the worker's compensation representation.* See Exhibit Q (July transcript) page 7 line 16. These facts, however, did not stand in the way of Plaintiff presenting this Court, through the motion to reconsider summary judgment, unsupported and unspecified assertions of harm. Although TPGL provided PDHC an entire copy of its file in the worker's compensation matter, however, PDHC could not point to anything therein as prejudicial.

Plaintiff's manufactured outrage over an inadvertent, superficial, and inconsequential conflict of interest³³ was presented to this Court and others³⁴ in sworn form. Among other submissions is the affidavit of PDHC physician Alexander H. Cohen (Exhibit MM attached), which is typical of the others.

³³ This is not to suggest at all that undersigned counsel does not take the ethical obligation to avoid conflicts seriously. This description of the conflicts at hand only reflects the reality of the circumstances presented here.

³⁴ As noted above, these issues were also raised in the Court of Appeals. Moreover, they were raised in a complaint filed against both counsel for Defendants by Mark Matthews (Plaintiff's Vice-President of Operations and brother of Counsel Ben Matthews) with the Office of Disciplinary Counsel. Most notably, Defendant's counsel John Jay James, II, was never involved in the worker's compensation matter. The Office of Disciplinary Counsel dismissed the complaint as to both counsel for the Defendants.

Paragraph 2 of that affidavit reads as follows (emphasis added):

As a physician, I can't believe that the legal profession would allow the attorneys at Turner Padgett to represent Dr. Thompson's estate in the Darlington court, and in this appeal, while knowing that Turner Padgett has represented my company since 2003. *I have no idea what they have learned about PDHC in the last eight years, but they have had access to our employees, files, and other company information. I understand that they must have information that they would only have had because they represented us and were our attorneys.* We provided the information because they were our attorneys, and it never occurred to me that one day they would be representing someone else against my company while they representing me. Moreover, I am personally stunned Jay James would participate in such a matter. I have known Jay for years and I don't think he would ever knowingly do anything like this.

These allegations obviously had no merit³⁵ and had no relevance to the reconsideration of summary judgment – a motion itself filed by disqualified counsel. These allegations were only intended to divert and delay Court attention from clearly dispositive issues. In addition, a review of the trial court's order granting summary judgment confirms that it was not based upon anything gleaned in an unrelated worker's compensation matter.

³⁵ Certainly, if Plaintiff had any actual evidence that confidential information learned by TPGL in the worker's compensation matter was being used against PDHC in the instant Medicare credentialing matter, then Plaintiff would identify the information that had been so used.

Notably, although not occurring in this Court, at the oral argument before the Court of Appeals, Mr. Megna opined about his pride in the legal profession and corresponding dismay with the Court's alleged failure to protect the system's integrity; when pressed for specific supporting authority and issue preservation, however, details were not forthcoming.

IV. CONSEQUENCES OF THE OFFENDING CONDUCT.

A. Harm To The Judicial System.

1) Needless Waste of Precious Judicial Resources.

The Judicial Resources of this State are precious. As Chief Justice Toal noted in her 2013 State of the Judiciary address to the Legislature on February 20, 2013,³⁶ South Carolina ranks last out of the 50 states in number of judges per filings and per population. Thus, in her address, the Chief Justice thanked the Legislature for their recent creation of 9 new Judgeships and promised “we will use them wisely and well.” The frivolity thrown at this Court undermines the Chief Justice’s commitment – again, through no fault of the Court.

2) Public Tarnish To The Judicial Process.

In the concluding slide of her power point presentation to the 2013 Annual Judicial Conference on August 22, 2013,³⁷ Chief Justice Toal noted that it was the Judiciary’s strong work ethic that “encourages public trust and confidence in the rule of law and South Carolina’s Judicial Branch.” This Court has worked hard in this matter to reach a just adjudication.

The work of this Court is threatened with tarnish, however, when unprofessional conduct and frivolous pleadings, motions, letters, e-mails, and papers persistently seek to distract a proper and efficient adjudication.

3) Needless Involvement And Distraction Of Witnesses/Others.

As this Court is well aware, third parties subjected to unauthorized discovery attempts from the disqualified Mr. Megna filed their own motions for protection and also for sanctions – motions requiring more of this Court’s time – and also requiring the attendance of the

³⁶ See www.sccourts.org/whatsnew/SOJtext2013.pdf.

³⁷ See www.sccourts.org/whatsnew/2013JudicialConference.pdf.

undersigned as counsel of record in the case. Sanctions have been granted with respect to other non-parties to this case, but those motions did not address the costs to these Defendants consequential to those unauthorized discovery efforts. Such costs are addressed in the following section of this motion.

B. Harm To The Adverse Litigants.

1) High Costs.

As noted above, early in this litigation, both Mr. Megna and Mr. Matthews wrote to Defendant's counsel and predicted that they would tie up the Defendant Estate for years -- that threat has proven true. As the supporting records of Defendant's counsel will demonstrate, the Defendant's legal fees and costs have proven astronomical. By their signatures below, Counsel represents that detailed time records demonstrate that over 370 hours of counsel's time³⁸ have been spent on Circuit Court work in this matter and the Defendant Estate has been or will be billed at least \$96,580 for that Circuit Court related time.³⁹ In addition to the 370 reported here, 45 more hours (only through January 14, 2014 with more certainly anticipated) can be attributed

³⁸ Notably, the fees billed to Defendant do not include time spent by counsel dealing with the workers compensation conflict issue and responding to the ODC complaint filed by the PDHC Vice-President of Operations. Those complaints were dismissed but not without considerable time invested by defense counsel. These hours were tracked, recorded, and can be produced although defense counsel has determined it not appropriate to bill the Defendant for this time.

Because of the overlapping periods of both appellate court jurisdiction and trial court jurisdiction, 15.6 hours of time were mixed in dealing with matters in both courts. For these hours, counsel has only included half here so as to avoid any duplicate recovery from the Court of Appeals.

³⁹ These records have not been submitted simultaneously herewith because of privacy and privilege concerns and because of Plaintiff's use of such records obtained in other matters. Counsel is prepared to submit such records, however, pursuant to such protective terms, if any, and conditions this Court would like to direct. Although some time entries are related to both trial and appellate tasks, counsel believes these totals to be under-inclusive in that anything not clear was omitted and all ODC-related time was not included.

exclusively to the preparation of this motion for sanctions and the extensive record review and analysis needed to summarize years of conduct. Defense counsel asks that these hours also be compensated as part of the requested sanctions in this case.

Consideration of the Defendant's costs and fees is relevant and indicative of the abusive strategies and tactics employed in this matter. As outlined at the beginning of this motion, both the South Carolina Frivolous Civil Proceedings Act and Rule 11 provide for the award of an adverse party's costs and fees as one form of available sanctions.

2) Delay In Estate Closure

But for this meritless litigation and the years of multi-staged appeals therefrom, the Defendant Estate could have been settled and its remaining assets distributed to Dr. Thompson's heirs – and used for any number of time sensitive opportunities – including the education of a granddaughter who began her college studies a year ago. In addition, because of restrictions on the Estate, Defendant's counsel has represented this Estate without immediate compensation.

3) Needless/Abusive Emotional Yo-Yo

This claim was not asserted while Dr. Thompson was alive and available to explain or comment upon his interaction with his sophisticated clinical employer; rather, it was delayed until he was not available. Perhaps this delay was out of empathy for his illness as Mr. Megna has occasionally suggested in Court, but perhaps it was to take advantage of the Estate's inability to directly contradict alleged conduct or representations by PDHC. Regardless of the reason for the delay, it has imposed a burden on the Thompson children that was not necessary given the futility of the claim after Medicare's finding of employer fault.

In addition, the Plaintiff's insistence upon appealing everything separately, rehearing everything, and seeking to vacate everything, has meant that the family has had to endure every

procedural hoop and deadline on their way to desired finality. Through the Plaintiff's and its counsel's manipulations, this Court has been forced into piecemeal consideration of completely frivolous matters which would be appropriately described by the Thompson family as "death by a thousand cuts."⁴⁰

Moreover, they have repeatedly heard their father referenced in oral arguments and pleadings as alternately a fraudster or a sympathetic dying colleague. These inconsistent approaches only served to magnify their frustration with the legal system and increase their cynical view of our profession.

V. CONCLUSION.

The type of unfortunate litigation conduct and strategies seen in this case have already been rebuked by the trial courts of this State – both in this matter and other matters. In this matter, the interlocutory appeals of probate issues and disqualification issues led Defendant to delay the pursuit of trial court sanctions until the matter was again consolidated and finalized.

In this case, the Defendant Estate has been subjected to an expensive and toilsome journey – all for a fault-based claim when that fault had already been litigated by Plaintiff to finality. Not only was the primary litigation frivolous, however, most of the spin-off issues of dispute have been frivolous as well including the appeal of the Probate Court rulings and the fully-warranted disqualification of Mr. Megna. Such frivolous pursuits are sanctionable in and of themselves, but in this case, they have been accompanied by deliberate efforts to mislead, manipulate, and intimidate.⁴¹ But for the willingness of the undersigned counsel to continue

⁴⁰ By way of example from this Court, see Exhibit Q page 21 lines 7-10 and page 24 lines 18-23.

⁴¹ As one final example of the disrespect shown to valid positions and concerns, the Defendant points this Court to the May 21, 2010 e-mail of Mr. Megna to Mr. James (Exhibit NN attached)

their advocacy without compensation, the Thompson heirs might have succumbed to these efforts. Now, through no fault of their own, and without any liability of their father's Estate, the heirs of the Defendant have incurred substantial legal fees far beyond anything they anticipated or could afford. These heirs have already borne the emotional hardship of uncertainty and delay; they should not have to bear these costs as well.

Abusive practices like those pursued by the Plaintiff and its lawyers in this Court are not only harmful to the other litigants in this case and the disposition of justice in this case – but to the public trust in the entire judicial system and the rule of law. Only sanctions will address these abuses and deter others inclined to employ such tactics. Only sanctions can help restore the Defendant to an equitable position and only sanctions can restore the erosion of trust brought about in this case.

[SIGNATURE PAGE TO FOLLOW]

wherein Mr. Megna continues to deny sufficient involvement for disqualification ("Think as you please" and "Ben's involvement is out of an abundance of caution"), continues to suggest a non-existent confession by the decedent ("He did not tell the truth"), and suggest "the estate has no reasonable defense to PDHC's claims & we intend to pursue every option available to recapture the total losses sustained – which are considerably more than the amount PDHC had to pay Medicare." The e-mail also suggests that PDHC had no choice but to litigate as much as the PDHC officials "did not wish to go this route...." The e-mail concludes with "I suggest you reconsider your email to Ben." Mr. James prior email to Ben Matthews had acknowledged service and suggested "At this stage of things I consider Tony to be a fact witness as well as the chief executive officer of the adverse party. I simply should not be communicating with him." Mr. James was right and Plaintiff's counsel knew or should have known it.

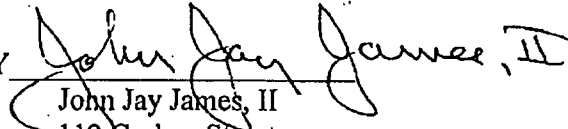
Florence, South Carolina

January ____, 2014

Respectfully Submitted,

PAULLING & JAMES, LLP

BY



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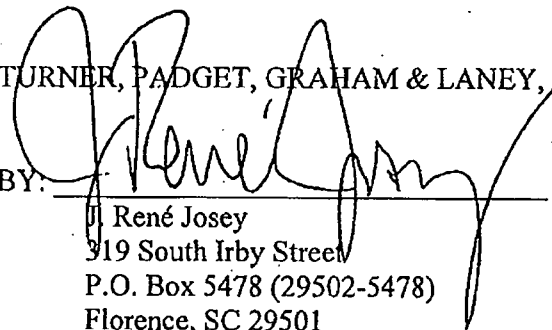
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January 16th, 2014

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September 6, 2013

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Pee Dee Health Care, P.A. v. Estate of Hugh S. Thompson*
Case No.: 2010-CP-16-0332
Tracking No.: 2011-185767 (1st appeal), 2011-197671 (2nd appeal), and
2011203391 (3rd appeal)
TPGL File No.: 10667.101

Dear Ms. Kitchings:

Enclosed you will find an original and six copies of the following documents for filing with your Court:

- 1) Respondent's Motion for Appellate Court Sanctions in these consolidated appeals,
- 2) and Proof of Service.

I have enclosed one extra copy of these documents so that a filed copy can be returned for my records in the self-addressed envelope provided. Also enclosed is this firm's check in payment of the filing fee for this motion.

By copy of this letter to all counsel as indicated below, we are serving them as indicated in the corresponding proof of service. Thank you for your assistance in this matter.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ:vlb

Enclosures

Cc: Jay James, II, Esq. (w/enclosures via email only)
Benjamin R. Matthews, Esq. and Tony R. Megna, Esq. (w/enclosures)
James M. Griffin, Esq. and Arial E. King, Esq. (w/enclsoures)

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332

CONSOLIDATED APPEALS

(Tracking number 2011185767)(1st Appeal)
(Tracking Number 2011203391) (3rd Appeal)
(Tracking Number 2011197671)(2nd Appeal)

Pee Dee Health Care, P.A. Appellant,
v.
Estate of Hugh S. Thompson Respondent.

RESPONDENT'S MOTION FOR APPELLATE COURT SANCTIONS

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ATTORNEYS FOR RESPONDENT

INTRODUCTION

Rule 269 of the South Carolina Appellate Court Rules provides, in part, “Where an appeal, petition, motion or return is frivolous or taken solely for the purposes of delay, or is not in compliance with these Rules, the appellate court may upon its own motion or that of a party, after ten (10) days’ notice, impose upon offending attorneys or parties such sanctions as the circumstances of the case and discouragement of like conduct in the future may require.” (emphasis added). Unfortunately, this is such a case. Accordingly, the Respondent Estate hereby moves this Court for sanctions in these consolidated¹ appeals. Respondent requests such sanctions be imposed upon Appellant Pee Dee Health Care (“PDHC”) and Appellant’s counsel as the Court deems appropriate.

Even when meritorious, litigation can be time-consuming and expensive. This litigation has been particularly time-consuming, tedious, and expensive; thus, this Court’s prompt opinion of July 3, 2013 represented the most-welcomed possibility of finality for the Thompson family which has been defending the Estate from Appellant’s claim for over three years.

This motion is based upon the nature of the appeals themselves – without merit and needless – and it is also based upon the pattern of abusive conduct in the course of these appeals. The sanctions sought here are purposefully limited for conduct in the appellate court.

In accordance with SCRCP 11(a), the undersigned certify that the nature of this motion precludes consultation from serving any useful purpose.

¹ These three appeals were not initially consolidated but were consolidated for oral argument and the opinion that followed. The first appeal is tracking number 2011185767 (also referred to as the “probate appeal”). The second appeal is tracking number 2011197671 (also referred to as the “disqualification appeal”). The third appeal is tracking number 2011203391 (also referred to as the “summary judgment appeal”).

I. These Appeals Were Both Without Merit and Unnecessary.

Of course, this Court's opinion of early July found all three appeals to be without merit but this motion will further address the lack of colorable virtue of each appeal. With regard to the lack of necessity, in this context, Respondent does not mean that the appeals were simply unnecessary because they were without merit – as explained in the arguments below, the first two appeals were unnecessary because the Appellant's interests were otherwise protected. Thus, the delay, complications, and costs added by the first two appeals are most offensive.

a. The Probate Court Appeal

i. Not needed -- Estate's Assets Were Protected Without Appeal.

As this Court is aware, this entire matter arises out of a probate claim asserted by the Appellant against the Respondent Estate for damages related to a Medicare credentialing oversight. Although the claim itself was removed to Circuit Court for disposition, the Appellant filed a motion in Probate Court seeking to block the Estate's payment of legal fees to counsel (which would have eviscerated the Estate's ability to defend itself²) and seeking to have the Respondent Estate purchase a commercial bond for Appellant's claims in an amount equal to the damages asserted by Appellant through counsel – even though the requested bond amount would have exceeded the actual value of the Estate itself.

In response to this excessive effort, the Respondent Estate offered to subject the Estate assets to Court oversight such that no disposal of those assets would occur without Probate Court

² This purpose of evisceration is demonstrated in Mr. Megna's letter of February 16, 2011 which not only predicts litigation "over the next few years as these and related matters are determined by the courts"; it confirms PDHC/Megna's belief and intent that the personal representatives of the Estate "remain restrained from exercising any powers of the office....." (Copy Attached as Exhibit A). Appellant's counsel Mr. Matthews made a similar prediction of "years" of litigation in a letter to the Estate's counsel dated June 24, 2010 (Copy Attached as Exhibit B). The misrepresentations found in Exhibit B are further discussed in Section I (c) (i) below.

approval; this proposal was accepted by the Probate Court.³ Thus, the Probate Court order fully protected Appellant to the extent it could recover from the Respondent Estate – but Appellant appealed the Probate Court order anyway because it did not provide the potential (but unjustified) bounty of a bond in excess of the Estate value.

As noted above, the appeal also related to the Court's allowance for payment of attorney's fees from the proceeds of the sale of the decedent's house. As a result of the appeal (and the automatic stay), all estate funds from the sale of the house have remained in a court-protected account and Respondent's counsel have not been paid for their three years of successful efforts.

ii. Appeal Procedurally Flawed Despite Clear, Codified Requirements.

The appeal taken from the Probate Court to the Circuit Court was procedurally flawed and was dismissed by the trial court as such. This Court's July 3rd opinion likewise found that the Appellant failed to satisfy the statutory requirements of S.C. Code § 62-1-308(a) in two respects and these failures – particularly the failure to meet the 45 day deadline⁴ – warranted the trial court dismissal. These procedural requirements were not new and were not hidden. They are clearly spelled out for any litigant and any attorney in the statute. Moreover, South Carolina case law relied upon by the Circuit Court has previously confirmed the dispositive nature of failing to satisfy the statutory requirements.⁵

Despite the clarity of the statute and despite the guidance provided by existing precedents, the first appeal was brought from the Circuit Court to this Court. Thus, this meritless

³ Respondent Estate made this offer to accommodate the Probate Court and in anticipation of a prompt resolution of the matter upon summary judgment. Unfortunately, the ultimate resolution has not been prompt.

⁴ The other failure was the filing of the grounds of appeal in the wrong court.

⁵ In Re Estate of Charles H. Cretzmeyer, 365 S. C. 12, 615 S. E. 2d 116 (2005); Gallagher vs. Evert, 353 S. C. 59, 577 S. E. 2d 217 (Ct. App. 2002); Witzig vs. Witzig, 325 S. C. 363, 479 S. E. 2d, 297 (Ct. App. 1996).

and unnecessary appeal of the probate court issue only served to drive up Respondent's legal fees as well as delay and complicate the ultimate disposition of these matters. The deterrence of such improper motives and effects are expressly addressed by SCACR 269.

iii. Adverse Facts Ignored/Denied In Appellate Process.

Not only did the Appellant fail to comply with the clear statutory requirements, the Appellant actually ignored the facts and argued to this Court (as it had in the trial court) that the appeal *was timely* and that the only issue related to the consequences of filing in the wrong place. The Initial Brief asserted several times (pages 8, 9, 10, and 11), that it was "without dispute" that the appeal had been filed on time. Only in the Reply Brief did Appellant argue for the first time that the consequences of an untimely appeal should not be dismissal. Reply Brief, pages 1-2.⁶ This motion seeks to discourage such factual mischaracterizations in the future.

b. The Disqualification Appeal

i. Not needed -- Co-counsel Was Continuously Involved and Available.

Admittedly, there is case law from our appellate courts suggesting that the failure to immediately appeal an order of disqualification might waive the right to a party's counsel of choice; in that sense, the *interlocutory* appeal of this issue might be considered necessary. However, the availability and involvement of Appellant's co-counsel (Mr. Matthews) – an experienced litigator who did not and does not have the disqualifying history of being a fact witness to underlying matters – militates against the supposed necessity for the disqualified counsel, Mr. Megna, to remain involved. After all, it was co-counsel Matthews that signed the

⁶ At oral argument, Appellant resurrected its claim to timeliness but for the first time suggested reliance upon the 5 day mailing rule found in SCRCP 6(e) – an argument not made in its briefs or in the trial court. R.pp 35-37 (record in the first appeal). This Court implicitly rejected this argument. At oral argument, Respondent suggested that the scope of the SCRCP was not so expansive as to modify codified deadlines.

initial complaint (R.p. 182)⁷ – presumably in compliance with Rule 11 SCRPC requiring personal responsibility for that signature.⁸ And when this mitigating factor is considered together with the lack of merit discussed below, the true manipulative and abusive purpose of this *interlocutory* appeal is revealed.

ii. Grounds For Disqualification Undeniable, Protests Disingenuous.

As important as the right to counsel of choice is, that right does not remove the ethical grounds for disqualification clearly present and repeatedly ignored in this case. Indeed, both the trial court (twice)⁹ and this court (Opinion at 4) have itemized the areas in which Mr. Megna's undenied role as CEO of the Appellant renders him a necessary witness for relevant and needed factual inquiry. By ignoring this role, these facts, or the applicability of Rule 3.7, the Appellant and Mr. Megna do a disservice to themselves but more importantly do a disservice to the Courts, the profession, and the Respondent. This disservice warrants the sanctions sought herein.

The protests of Mr. Megna and the Appellant to his repeated disqualification (and the affirmation of that disqualification) also fail to ring true when the involvement of experienced co-counsel from the very beginning is noted. While Mr. Megna has recently suggested that Mr. Matthew's involvement was merely "ministerial"¹⁰, the Respondent suggests that the

⁷ Unless otherwise noted, references to the Record on Appeal herein will be to the Record in the disqualification or second appeal (since that record is the most inclusive of materials cited herein).

⁸ Rule 11 provides, in part, that:

Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record who is an active member of the South Carolina Bar..... The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

⁹ R.pp. 4-12 (original disqualification order) and R.pp.13-14 (denying reconsideration of disqualification).

¹⁰ This description was used by Mr. Megna in response to a question from Judge Williams at oral argument seeking to confirm lawyer Matthews's involvement in the matter. When asked why Mr. Matthews didn't just sign the Rule

requirements of SCRCF 11 and SCACR 269 do not allow involvement of record counsel to be so limited.

Moreover, the records of counsel reflect that Mr. Megna's most visible involvement in the case (such as signing pleadings, discovery requests and responses, etc.) didn't begin until eight months after the case started and then only after the grounds for the Probate Court appeal were filed by Mr. Matthews. R.pp. 12-20, 24-32 (record in probate appeal). Prior to that time, counsel for the Respondent had corresponded with Mr. Megna and advised him, both in writing and by telephone, that he was probably a witness.¹¹ Initially, Mr. Megna acknowledged as much by reply email.¹² Mr. Megna thus knew that Respondent's counsel would challenge his serving as counsel, which they did within about seven weeks of his first official appearance in the case.¹³

c. The Summary Judgment Appeal

i. Appellant Knew It Had Already Litigated To Finality.

While not the only basis for the trial court's order of summary judgment, one basis for the decision was the preclusive effect of offensive collateral estoppel. Initially, Appellant's counsel failed to provide the actual administrative orders from the adverse Medicare adjudication

59(e) Motion on Summary Judgment, Mr. Megna suggested that Mr. Matthews didn't really know anything about the case. Judge Williams, of course, brought up the fact that Mr. Matthews had signed the Complaint (in addition to other documents not raised by Judge Williams). Notably, immediately after oral argument, it was Mr. Matthews who was knowledgeable enough to file the bizarre post-argument Motion to Vacate. Mr. Matthews also wrote this Court in response to the Respondent's Reply to that post-argument motion.

¹¹ As noted elsewhere in this motion, the concern with Mr. Megna's potential dual role as witness and counsel has been raised early and often. On April 13, 2010, Respondent's counsel e-mailed Mr. Megna as follows: "Are you counsel of record for PDHC? If not, who is? I suspect that if the matter is controverted, it will be necessary for you to be a witness." (Copy Attached as Exhibit C).

¹² In reply to the concern as raised by Respondent's counsel (see footnote 11 above), Mr. Megna replied that same day, "If the PR decides to dispute the claim, & I am a witness, we will go from there." (Copy Attached as Exhibit D -additional e-mail dialogue with an orgulous Mr. Megna from May 21, 2010 is also included).

¹³ The Estate filed its motion to disqualify Mr. Megna in the trial court on January 31, 2011 (R.p.717) which followed Megna's execution of a Motion for Summary Judgment filed in the case on December 9, 2010. (R.p.196).

which served as the basis for this estoppel; instead, Mr. Matthews chose to completely misrepresent those orders while he attempted to negotiate for PDHC.¹⁴ Later, after discovery requests were directed to the administrative officials themselves, the Estate obtained the records of the federal administrative law judge and the Medicare Appeals Counsel. These records confirmed that the Appellant, through Mr. Megna, had already litigated the fault issue of Dr. Thompson's credentialing error and lost.

The federal judge and administrative appellate body found that Appellant was at fault as the employer with its own non-delegable duty to confirm employee credentials *before* accepting Medicare payments for the employee's services. That finding of fault became final when Appellant did not pursue further appeals and that finding served as the basis for Medicare's recoupment of funds paid to Appellant.

Appellant knew the issue of fault had been litigated to finality in the federal forum before it sought to shift that fault to the unsuspecting Estate of the muted¹⁵ decedent. Accordingly, Appellant and its counsel knew before even signing and filing the complaint that the federal

¹⁴ Discovery requests seeking these records were acknowledged by Mr. Matthews in a letter dated June 24, 2010 (Copy Attached as Exhibit B). Without providing the records, Mr. Matthew's letter misrepresented the administrative holding— and based upon these misrepresentations, the letter proposed settlement discussions.

Mr. Matthews wrote that "All administrative decisions were determined adversely to Dr. Thompson....." Notably, Dr. Thompson was not even a party to those proceedings. Mr. Matthews further claimed that Medicare had "imputed the false statement made by Dr. Thompson to PDHC...." While there obviously was a credentialing oversight, there was no federal finding of a "false statement". Moreover, the liability of PDHC was direct, not imputed, and was based upon the fault of PDHC in failing to meet its non-delegable credentialing oversight duties. Contrary to the representation in Matthew's letter, Medicare did not state that Dr. Thompson "should have informed PDHC of his disbarment from Medicare." Rather, the federal judge held that PDHC should have investigated and found the disbarment itself. After falsely representing the federal adjudication (not yet known to Respondents), Mr. Matthews goes on to describe the decedent's conduct as "intentionally deceptive" and a "betrayal of [PDHC] trust" from a "friend and colleague of many years" employed by PDHC at a time "when no others would" employ decedent.

¹⁵ As Judge Baxley noted in his Order of Summary Judgment, Finding of Fact 7: "Eighteen months after the final decision of the Medicare Appeals Council, and after the death of Defendant Dr. Thompson, *who would have been a pivotal witness as to what representations passed between the parties* as to Dr. Thompson's Medicare provider eligibility, this claim was brought in the Probate Court." R.p. 22 (emphasis added).

holdings could be used against them through the doctrine of non-mutual collateral estoppel.

Appellant and its counsel knew fault had been determined but they brought their inconsistent claim anyway and hoped a fee-frozen Estate could not defend itself and/or would settle based upon a misrepresented Medicare record.

ii. Counsel's Authorization Was Questioned Even Before This Appeal.

As much as the Appellant's hyperbolic pleadings, even in this Court, feign some shock or surprise that the trial court actually did what it said it was going to do – both disqualify Mr. Megna and consider summary judgment after allowing him to argue the issue -- it was not a surprise that counsel's authorization to file subsequent pleadings would be questioned and disallowed.

Both the trial court¹⁶ and Respondent¹⁷ had raised the issue of such authority in advance of the due date for the motion for reconsideration of summary judgment. In addition, the trial court's original disqualification order had been clear.¹⁸ Thus, both attorneys of record for

¹⁶ Specifically, in reaffirming the disqualification, the court dismissed other activity by disqualified counsel as unauthorized – “The Court granted Plaintiff's counsel [Megna] a limited appearance only. Therefore, all motions, subpoenas, and filings signed only by disqualified counsel, Tony R. Megna ... are hereby QUASHED.” R. p. 13 (August 12, 2011 Order at page 1). The order was sent by the Court to Mr. Matthews as “Plaintiff's remaining counsel” with instructions for Matthews to serve the order upon all parties. The trial court's summary judgment letter of the same date was also sent to attorney Matthews alone as counsel for PDHC. R.pp. 584-585.

¹⁷ Counsel for the Estate first raised concerns regarding Mr. Megna's authority to continue participation in a letter to the trial court on May 20, 2011. This letter was attached as Exhibit B to the Estate's Return to the Petition for Rehearing filed with this Court. The Estate also raised the issue specifically in its 6 page Response to Motion for Reconsideration of Summary Judgment (This response was filed as Exhibit A to the affidavit of Estate's counsel submitted in August 2013 to this Court) filed in the trial court on September 20, 2011. Even before the September 20, 2011 trial court response raising this issue of counsel's authorization, it was raised in a counter-motion submitted in this Court on September 6, 2011 (see pages 4-6 of that counter-motion).

¹⁸ That Order had provided:

The Court orders complete disqualification effective with the execution of this order. The Court concludes that it is not feasible for Mr. Megna to remain involved as counsel of record even before trial. The potential for problems would exist even with depositions and other pre-trial functions. The immediate availability of Mr. Megna's partner eliminates any hardship or difficulty associated with this effective date.

Appellant in the trial court (Mr. Matthews and Mr. Megna) *knew* that Mr. Matthews needed to execute any needed pleadings.

As this Court's July 3, 2013 Opinion provided, "Accordingly, the circuit court provided clear and unequivocal notice to PDHC that Mr. Megna was only allowed to orally argue the motions for summary judgment and was disqualified from all other appearances and activities following his disqualification." Opinion at p. 2. Mr. Matthews could have executed any motion to reconsider – or proceeded to execute a notice of appeal to this Court since the motion to reconsider was probably not needed. Of course, any appeal of the summary judgment issue – even by Mr. Matthews – would still lack substantive merit; but when Mr. Megna executed the motion for reconsideration, it rendered the summary judgment appeal procedurally frivolous as untimely, not just substantively without merit. Appellant is a victim of its own officer's failing to heed multiple warnings.

Even since the Court's July opinion, Appellant's new counsel denied the documented history of concern.¹⁹ Perhaps new counsel relied upon erroneous information from Mr. Megna, Mr. Matthews, or others, but new counsel's representation was clearly not a true reflection of the record.

R. p. 12 (Disqualification of Counsel Order, dated April 15, 2011, page 9 (incorporating footnote 11)). Of course, the trial court's written order reinforced the directive given even earlier by the Court directly to counsel in the Courtroom on March 16, 2011, "It begins now." R. p. 427 (Transcript at Page 38, lines 5-6 (emphasis added)).

¹⁹ Reply in Support of Petition for Rehearing, page 3. In this Reply, Appellant's new counsel falsely states, "Respondent did not challenge Mr. Megna's filing of the motion for reconsideration on summary judgment in the trial court..." In response, Respondent's counsel filed an affidavit in August 2013 with this Court attaching a copy of the 6 page Response To Motion For Reconsideration of Summary Judgment (EXHIBIT A to the Affidavit)(without attachments to reduce size), filed by Respondents in the trial court on September 20, 2011.

II. Counsel's Appellate Court Conduct Continued An Abusive Pattern.

Unfortunately, the conduct of Appellant's counsel in this Court continued a bizarre pattern established in the trial – a pattern of court of mixing unwarranted threats/warnings²⁰ with a simulated courtesies.²¹ In addition, Appellant's counsel has continually attempted to direct all courts away from the actual merit of issues at bar and toward some suggested red herring.

a. Examples from This Court.

To illustrate its point, the Respondent will identify some specific examples of such conduct seen in this appellate court.

i. Repeated, Groundless Litigation Threats Directed Toward Counsel.

Immediately before the summary judgment motion was considered, Mr. Megna raised a facially legitimate concern regarding Turner Padget Graham & Laney P.A.'s conflicting representation of Appellant (albeit in name only), through a fully liable worker's compensation insurer -- fully responsible for claim defense. This conflicting representation was in a previously settled, dormant matter that was believed to be concluded. The issue was reasonably raised and

²⁰ Perhaps the most bizarre example is found in Mr. Megna's response to the trial court motion to disqualify him as a witness. While professing to be "astounded" by Mr. James' participation in a "dishonorable" and "inappropriate and demeaning litigation strategy", Mr. Megna accuses both Josey and James of "false and unprincipled personal accusations." R.pp. 217-220.

Because a document obtained from a Florence County case was used in the motion to disqualify to confirm Mr. Megna's role as CEO of PDHC, Mr. Megna's motion response vents his concerns with that Florence litigation (not involving Josey and James) and the *ex parte* restraining order obtained in that Florence county case. Mr. Megna's response suggests an elaborate conspiracy involving the family of a circuit judge and several law firms. Mr. Megna further advises, "Additional litigation against those involved in the events leading up to and including the obtaining of the fraudulently obtained *ex parte* order is forthcoming." R.p. 219. These accusations were followed by Mr. Megna's e-mail of July 26, 2011 advising "you and Jay are likely witnesses, if not possible Defendants... for multiple reasons including but not limited to aiding and abetting and breach of fiduciary duties to an existing client." R. pp. 554-555.

²¹ For example, in an e-mail of November 1, 2012, addressing on-going record on appeal issues, Mr. Megna tells Mr. James, "I sincerely appreciate your efforts and goodwill in completing this matter." (The reference to Mr. James' efforts is not clear as Mr. James did not complete the record as it was not Respondent's responsibility). In the same e-mail, Mr. Megna also advises Mr. James, "Do not confuse our cooperation with the objections to your assistance to Turner Padget in the continuing violation of Rule 1.7, etc." Likewise, in an e-mail of January 17, 2013, Mr. Megna thanks Mr. James for his always helpful communications but still notes his objection to "obvious" ethical violations. These e-mails are part of Exhibit E attached hereto.

investigated without the filing or making of a motion to disqualify – but when the adverse ruling on summary judgment was rendered and the superficial conflict resolved (to the satisfaction of the trial court, the Workers' Compensation Commissioner, and the Office of Disciplinary Counsel), Appellant nonetheless exaggerated the appearance of this corrected and completely harmless conflict to ask this Court vacate everything adverse done in the trial court. Moreover, Appellant has repeatedly implied threats regarding this resolved conflict in an apparent attempt to gain litigation advantage.

The Respondent can point to numerous communications related to appellate practice in this court where Mr. Megna continued to assert an ongoing ethical violation and related harm: these include his letter of May 3, 2012, e-mail of April 5, 2012, e-mail of November 1, 2012, e-mail of November 3, 2012, and e-mail of January 17, 2013. (All attached hereto as Exhibit E). Typical is the April 5th e-mail in which Mr. Megna advises Josey and James, "The Plaintiff/Appellant Request that you and your law firms take immediate action to discontinue your adverse representation ... and mitigate the continuing damages.....that respect your legal and ethical duties of loyalty and fealty"

The Appellant's Briefs even continued to raise the alleged conflict even after this Court refused to act on the related motion filed by Appellant. See, e.g., Appellant's Brief (disqualification appeal), pp. 4-7. Even at the oral argument before this court, Mr. Megna opined about his pride in the legal profession and corresponding dismay with the Court's continued failure to protect the system's integrity threatened by this harmless matter; when pressed for specific supporting authority and issue preservation, however, details were not forthcoming.

It is regrettable that this conflict issue provided Appellant and its counsel with even a brief moment's fodder for their litigation tactics, but the tactics had begun in the trial court long

before the dormant harmless conflict came to light. For example, as soon as local counsel for the Respondents, Mr. James, associated co-counsel Mr. Josey for litigation assistance, Mr. Megna began a push back effort seeking to inhibit this avenue of support. Initially, Mr. Megna suggested that something in Mr. Josey's former federal service disqualified him from working on this Medicare-related case; when challenged for specifics, however, they never materialized.²²

In another example, Mr. Megna prepared a motion to strike the Defendant's Answer in the trial court (never filed) which was presented to Respondent's counsel with reference to a law review article purporting to support the liability of counsel for "aiding and abetting" a client for wrongfully denying an estate claim.²³ Another example, noted in footnote 20 above, is Mr. Megna's suggestion that counsel might somehow be facing additional litigation along with those alleged to be in a conspiracy enveloping the family of a circuit judge, and several law firms. R.pp. 217-220.

ii. Repeated Failure to Timely Prepare Proper Record

As Appellant in all three appeals, the burden fell on PDHC and its counsel to prepare the Record on Appeal needed for each appeal. As this Court knows, the rules provide that the Record on Appeal shall include information presented to the trial court and designated as necessary and relevant by each of the respective parties. Ideally, the Record on Appeal includes *all* the material referenced by each party in their briefs *and nothing else*.

The Record on Appeal in the first appeal was prepared without incident. The problems began with the second appeal. The record prepared by Appellant's counsel initially left out material designated by Respondent while at the same time including materials not cited by any party in their Briefs, and not relevant to the appeals. Working through these errors – to secure a

²² These communications are attached hereto as Exhibit F.

²³ This presented motion is attached hereto as Exhibit G.

supplemental record for omitted designations – and to read through and identify unreferenced material – significantly increased the burden on Respondent’s counsel and the Respondent’s corresponding attorney fees in this Court. Most likely it inconvenienced the Court’s review as well. The following are the specifics.

1. Leaving Material Out.

In the second (disqualification) appeal, the Respondent’s Initial Brief and Designation were timely filed and served on April 11, 2012 -- triggering a May 11th due date for the Record on Appeal pursuant to Rule 210(a) of the SCACR. The Appellant, however, failed to file and serve a Record on Appeal in this particular appeal by May 11th. Thus, Respondent was unable to prepare and file its final brief.

Appellant had filed a Motion to Consolidate the record in the second appeal with the record in the third appeal on March 16, 2012. Before the Court ruled on that motion, however, Appellant filed (April 13, 2012) the Record on Appeal with respect to the third appeal (Tracking Number 2011203391). While Respondent did not oppose the concept of a consolidated record if approved by the Court, the record filed April 13th could not alone serve as a consolidated record for both appeals because it did not include materials designated by Respondent in its Designation of Matter for the second/disqualification appeal (timely filed and served on April 11, 2012). Respondent still consented to a consolidated record, however, if the April 13th record were supplemented as needed to include all designated materials.

Despite the lack of approval for a consolidated record, Appellant filed its final brief in the second appeal on May 3, 2012 without the filing of a corresponding record for that appeal. In his cover letter to counsel for the final brief in the second appeal (letter previously submitted as Exhibit A to Respondent’s Motion to Dismiss for Noncompliance with SCACR 210), counsel

for Respondent suggested that the April 13th record was a consolidated record – although this Court had not authorized a consolidated record and although the April 13th record was missing materials designated by Respondent on April 11th.²⁴

On May 10, 2012 -- one day before the due date for the disqualification appeal record, knowing that no consolidated record had been authorized or prepared, Appellant filed its Motion to Extend the time for filing the record in the second appeal.²⁵ The Estate consented to the motion to extend “[s]o long as the dispositive appeal (2011203391) is not delayed in any way, Respondent does not object to an extension for the preparation of the Record on Appeal in the present matter (2011197671) or even a stay of this matter.” An extension was granted by order of Acting Judge Cureton dated September 25, 2012 which allowed Appellant twenty days to file and serve the Record on Appeal in this matter (triggering a new due date of October 15, 2012).²⁶

A purported Record on Appeal (2 bound volumes) for the second (disqualification) appeal was finally filed and served on October 12, 2012 and received by counsel within days. Unfortunately, however, even this much awaited Record on Appeal did not comply with SCACR 210 in that it still failed to include all the material designated by the Respondent pursuant to Rule

²⁴ Appellant’s Final Brief in the second (disqualification) appeal apparently incorporated record citations to the bound and filed record for the third (summary judgment) appeal. This was possible for Appellant (but only Appellant) because the summary judgment record was made to include everything Appellant designated in both of the last two appeals.

²⁵ Appellant’s Motion to Extend suggests Appellant never received Respondent’s designation filed and served on April 11th; however, Appellant never wrote the Respondent and never filed anything with the Court addressing this alleged non-receipt. When staff of Appellant’s counsel called on May 10th suggesting this same alleged non-receipt, Respondent’s counsel emailed, faxed, and re-mailed the previously filed and served material that same day. For an earlier and more thorough description of the Appellant’s alleged non-receipt of the designation and Respondent’s response, see footnote 2 of Respondent’s response to the motion to extend.

²⁶ In the interim time before an extension was granted and no progress was being made to finalize the Record on Appeal, the Respondent Estate filed a Motion to Dismiss the Appeal for failure to prosecute. That motion was denied.

209 SCACR.²⁷ Of course, the failure to include all the material designated by the Estate pursuant to Rule 209 (and referenced in the Estate Brief) rendered preparation of a final brief impossible.²⁸

As the Respondent Estate explained in its subsequent Motion to Dismiss the Appeal for non-compliance with SCACR 210, “Respondent has no objection to the submission of these omitted materials in the form of a supplemental record prepared by Appellant at Appellant’s expense – but the delay caused by this error is simply the latest iteration of a compendium of errors exponentially raising the cost of litigation to the parties and the Court.” Ultimately a third, supplemental volume was prepared for the Record on Appeal but not until the entire process had been further delayed at great costs to the Respondent Estate. This delay, whether intended or careless, is also well within the corrective scope of SCACR 269 sanctions.

2. Putting Too Much Material In.

The lengthy, multi-volume materials submitted by the Appellant in the latter two appeals illustrate this problem. Although Respondent was willing to consent to some consolidated record if sufficiently inclusive and approved by the Court, the Appellant failed to secure the appropriate court approval. As an apparent result, much of the record is duplicated in the different appeals although much of it is not relevant to the separate appeal in which it was duplicated. *Moreover, hundreds of pages not needed or relevant to any of the appeals were included in both of the latter two appeal records.*

²⁷ There were other areas of non-compliance as well -- such as the inclusion of duplicates, the failure to follow the presentation order outlined in SCACR 210(c), and the inclusion of unreferenced material. For example, the Appellant’s Return to the Disqualification Motion is included twice (both times without attachments), once beginning at page 200 and another beginning at page 730. In addition, the Record on Appeal filed October 12, 2012 includes Diplomas and Certifications of Dr. Hugh Thompson beginning on page 590 that are not referenced in Appellant’s Brief and represent undisputed evidence not relevant to any of the issues in the case.

²⁸ This was not a case of the Respondent deciding that it wanted to supplement the record under Rule 212 with something not previously designated; this was a case of the Appellant simply failing to include everything listed by the Respondent’s in its designation.

The Record on Appeal in the disqualification matter is 923 pages spread over 3 volumes. Of these 923 pages, Appellant cites less than 267 pages (267 is the count assuming all citations are to separate and distinct pages without repeats – thus, even though the first two citations are to the same 40 pages, they were counted conservatively as 80 separate pages). Respondent's brief in the same matter cites no more than 95 pages of the record (again assuming no duplicates). The combined total (again assuming no duplicates) of 362 represents slightly over 39% of the total record.

To further illustrate, the Record on Appeal in the disqualification matter included hundreds of pages not relevant to that matter such as: trial court pleadings related to the summary judgment issue (pp. 18, 35, 196, 249, 279, 289, 349), communications related to the worker's compensation matter raised as a conflict (pp. 545, 548, 550, 552, 581), materials relating to disallowed third-party subpoenas (pp. 304, 311, 554, 557), and appellate court pleadings on file with this Court already (pp. 356, 365, 370, 375).

The Record on Appeal for the summary judgment matter is 715 pages long spread over 2 volumes – and there are less than 177 pages cited by Appellants (177 is the number assuming all citations are to different pages) in their primary Brief. Respondent's Brief in that same matter cites to 102 pages of the record or less (again, 102 assumes every citation is to a new and different page). Adding the combined maximum number of pages actually cited, the total of 279 is only 39% of the entire record.

To further illustrate, the Record on Appeal in the summary judgment matter included hundreds of pages not relevant to that matter such as: trial court pleadings related to the disqualification issue (pp. 4, 13, 200, 329), communications related to the worker's compensation matter raised as a conflict (pp. 545, 548, 550, 552, 581), materials relating to

disallowed third-party subpoenas (pp. 304, 311, 554, 557), and appellate court pleadings on file with this Court already (pp. 37, 349, 356, 365, 370, 375, 586).

In State v. Harris, 278 S.C. 46, 292 S.E.2d 40 (1982), the Court admonished lawyers for inclusion of over 70% irrelevant material although actual sanctions were reserved. Here, the excessive pages made the work of preparing final briefs for Respondent far more time consuming because of the need to sift through poorly indexed, unnecessary pages to make the proper record citations.

3. Misrepresenting Record Consolidation and Completeness.

As noted above, in his May 3, 2012 cover letter (to counsel, but notably not to the Court) for the final brief in the second (disqualification) appeal,²⁹ Mr. Megna suggested that the April 13th record was a consolidated record – although this Court had not authorized a consolidated record and although the April 13th record was missing materials designated by Respondent. This misrepresentation triggered an immediate concern with the Estate's counsel that the Estate's final brief in the summary judgment matter might subsequently be suggested untimely (because it still could not be completed based upon the lack of a full record for that appeal). Because of this concern, Respondent immediately reached out to the Clerk of this Court seeking guidance and Appellant subsequently filed its last day request for an extension to finalize the summary judgment record. Through this motion for sanctions, Respondent Estate seeks to address this needless, time-consuming, and expensive run-around.

iii. Seeking To Use This Court To Manipulate Trial Court Jurisdiction.

Appellant has repeatedly sought to have this Court vacate or revoke adverse rulings, painstakingly considered by the trial court, under the guise of jurisdictional or stay issues. This

²⁹ This letter was previously submitted as Exhibit A to Respondent's Motion to Dismiss for Noncompliance with SCACR 210.

manipulation began when Appellant filed an opportunistic notice of appeal from the August 2011 ruling denying reconsideration of Mr. Megna's disqualification. Despite receiving simultaneous notice of the trial court's indication that it would sign a formal order granting the Respondent summary judgment, the Appellant chose not to pursue appeals of these issues simultaneously but instead sought to use an immediate appeal on the disqualification issue to argue that this Court deprived the trial court of authority to finalize its previously announced (and explained) decision of summary judgment. This strategic effort to piece-meal the appellate court's review of matters has wasted the resources of this Court and has cost the Respondent in time and fees.

b. Pattern of Conduct Recognized And Sanctioned In The Trial Court

The unfortunate litigation conduct and strategies of Mr. Matthews and Mr. Megna have already been rebuked by the trial courts of this State – both in this matter and other matters. In this matter, the interlocutory appeals of probate issues and disqualification issues led Respondent to delay the pursuit of trial court sanctions until the matter was again consolidated and finalized.

In the meantime, however, third parties subjected to unauthorized discovery attempts from the disqualified Mr. Megna have filed motions for sanctions and those motions have been granted. The trial court has even proposed to jail Mr. Megna for criminal contempt and plans a specific Rule to Show Cause hearing on that subject. (Judge Baxley's Contempt Order of February 2013 attached hereto as Exhibit H). The trial court's order of civil contempt has been appealed by Mr. Megna. (Tracking No. 2013001461).

In an unrelated matter, but illustrative of similar conduct, Mr. Megna has been recognized by the Circuit Court in Richland County for demonstrating a lack of candor with the Court. Because Mr. Megna is a witness in the matter at bar, Estate counsel sought to monitor the

proceedings of Richland County litigation where court findings might be relevant to Mr. Megna's credibility. See Anasti v. Wilson, unpublished opinion 2011-UP-187 of this Court (filed April 28, 2011) (dismissing appeal from trial court order which found Mr. Megna "was not credible as to any contested issue").

III. Counsel's Abusive and Meritless Appellate Practice Has Harmed Respondent.

a. Driven Up Costs Exponentially

Years ago, early in this litigation, both Mr. Megna (Exhibit A hereto) and Mr. Matthews (Exhibit B hereto) wrote to Respondent's counsel and predicted that they would tie up the Respondent Estate for years -- that threat has proven true. As the supporting records of Respondent's counsel will demonstrate, the Respondent's legal fees and costs have proven astronomical. By their signatures below, Counsel represents that detailed time records demonstrate that over 295 hours of counsel's time have been spent on appeal-related work in this matter and the Respondent Estate has been or will be billed \$79,380 for that appeal-related time.³⁰

There is no applicable fee-shifting provision in the Rules or Probate Code; however, the Respondent does think consideration of its fees is relevant and indicative of the abusive strategies and tactics employed in this matter.³¹ The fees billed to Respondent do not even include the tens of thousands of dollars spent by counsel in response to the ODC complaint filed

³⁰ These records have not been submitted simultaneously herewith because of privacy and privilege concerns and because of Appellant's use of such records obtained in other matters. Counsel is prepared to submit such records, however, pursuant to such protective terms, if any, and conditions this Court would like to direct. Although some time entries are related to both trial and appellate tasks, counsel believes these totals to be underinclusive in that anything not clear was omitted and all ODC-related time was not included.

³¹ The Respondent would rely on the South Carolina Frivolous Civil Proceedings Act, which applies to any pleading filed in a civil action, S.C. Code § 15-36-10(A)(1), or any frivolous "document", § 15-36-10(A)(4)(b). The Act further provides that it does not alter the South Carolina Appellate Court Rules (such as SCACR 269). *Id.* at § 15-36-10(G) (1). Of course, Respondent's reliance on the statute is completely consistent with SCACR 269 anyway. The Act further provides that "reasonable costs and attorney's fees of the prevailing party" may be used as one measure of appropriate sanctions in a case. *Id.* at § 15-36-10(G) (1).

by PDHC staff subordinate to Mr. Megna (specifically, Mark Matthews, brother of PDHC counsel Ben Matthews); those complaints were promptly dismissed.

b. Delayed Closure of The Estate And Tied Up Assets Thereby.

But for this meritless litigation and the years of multi-staged appeals therefrom, the Respondent Estate could have been settled and its remaining assets distributed to Dr. Thompson's heirs – and used for any number of time sensitive opportunities – including the education of a granddaughter who began her college studies a year ago. In addition, because of restrictions on the Estate, Respondent's counsel have represented this Estate without immediate compensation.

c. Subjected Decedent's Survivors To A Needless Emotional Yo-Yo

As Mr. Megna referenced in his oral arguments, the decedent Dr. Thompson died from a brain tumor – while this fact is not relevant to the merits of the matter, it is part of the background behind the delay asserting the underlying claim. This claim was not asserted while Dr. Thompson was alive and available to explain or comment upon his interaction with his sophisticated clinical employer; rather, it was delayed until he was not available. Perhaps this delay was out of empathy for his illness as Mr. Megna has occasionally suggested in Court, but perhaps it was to take advantage of the Estate's inability to directly contradict alleged conduct or representations by PDHC. Regardless of the reason for the delay, it has imposed a burden on the Thompson children that was not necessary given the futility of the claim after Medicare's finding of employer fault.

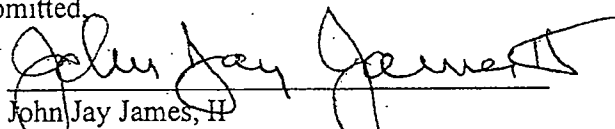
In addition, the Appellant's insistence upon appealing everything separately, rehearing everything, and seeking to vacate everything, has meant that the family has had to endure every procedural hoop and deadline on their way to desired finality. Moreover, they have repeatedly

heard their father referenced in oral arguments and Briefs as alternately a fraudster or a sympathetic dying colleague.³² These inconsistent approaches only served to magnify their frustration with the legal system and increase their cynical view of our profession.

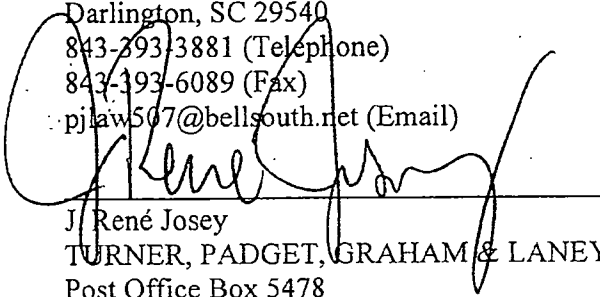
CONCLUSION

Abusive practices like those pursued by the Appellant and its lawyers in this Court are not only harmful to the other litigants in this case and the disposition of justice in this case – but to the public trust in the entire judicial system and the rule of law. Only sanctions will address these abuses and deter others inclined to employ such tactics. Only sanctions can help restore the Respondent to an equitable position and only sanctions can restore the erosion of trust brought about in this case. Respectfully submitted,

September 6, 2013



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843-393-3881 (Telephone)
843-193-6089 (Fax)
pjlaw507@bellsouth.net (Email)



J. René Josey
TURNER, PADGET, GRAHAM & LANEY, P.A.
Post Office Box 5478
Florence, SC 29502-5478
843-656-4451 (Telephone)
843-413-5818 (Fax)
RJosey@TurnerPadget.com (Email)

ATTORNEYS FOR RESPONDENT

³² By way of example from this Court, the Appellant's Brief (disqualification appeal), p. 11, suggest that this litigation was delayed because of the terminal brain cancer of the estate's decedent – out of respect – a suggestion repeated by Mr. Megna at oral argument. Nevertheless, the same Brief (and voluminous other pleadings and documents) claims the decedent affirmatively provided Appellant with false information, pp. 19-21, which has not been established; actually, the surviving documentary evidence suggest simple oversight by the decedent with regard to his credentialing – an oversight not discovered because of Appellant's failure to satisfy its non-delegable codified duty of reviewing employee credentials prior to submitting a Medicare benefit reassignment. See also Exhibit B hereto (Mr. Matthews' letter – although not at the appellate stage).

EXHIBIT

A

Matthews and Megna, LLC

Attorneys and Counselors at Law

3409 West Avenue

Columbia, SC 29203

TELEPHONE: 803-799-1700

E-mail: tmegna@gmail.com

February 16, 2011

COPY
Jay Megna, Esquire
PO Box 507
Darlington, SC 29540

FILED
2011 FEB 16 AM 10:34
SCOTT B. SUGGS
CLERK OF COURT
DARLINGTON COUNTY, S.C.

Re: Estate of Hugh S. Thompson, Case No:
Notice of Appeal - 2010-CP-16-633

Gentlemen:

Please find enclosed the Notice of Appeal of PDHC from the order of the Honorable J. Michael Baxley dated January 18, 2011. During the pendency of this particular appeal, we recognize the personal representatives remain restrained from exercising any powers of their office except as necessary to preserve the estate or to pay the person or creditor demanding bond. We remain amenable to considering any matter that may arise over the next few years as these and the related matters are determined by the courts.

Sincerely yours,

Tony R. Megna

Cc: Renee Joscy
1831 W. Evans Street
Florence, SC 29501

The Honorable Scott B. Suggs
Clerk Of Court, Darlington County
1 Public Square, Room B-4
Darlington, South Carolina 29532

EXHIBIT B

Jay James

From: "Benjamin R. Matthews" <ben@pdhc.com>
To: "pjlaw507" <pjlaw507@bellsouth.net>
Cc: <tmegna@gmail.com>
Sent: Friday, June 25, 2010 9:34 PM
Attach: request for transfer of jurisdiction.pdf; Jay letter 062210.pdf
Subject: PDHC v Estate of Thompson

Jay,

Please find enclosed information relating to the above matter. It is self-explanatory and an opportunity for resolution. Please contact Tony at tmegna@gmail.com or call him so we can get together if you decide to go forward.

Thanks, Ben

Please send all written correspondence to:

Benjamin R. Matthews, Esquire
3400 West Avenue
Columbia, SC 29203
ben@pdhc.com
Office telephone: 803.799.1700

This message is intended for the use of the person or entity to which it is addressed and may contain information, including legal and/or health information, that is privileged, confidential, and the disclosure of which is governed by applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this information is **STRICTLY PROHIBITED**. If you have received this in error, please notify us immediately and destroy the related message. Thank you.

Matthews and Megan, LLC
Attorneys and Counselors at Law

3400 West Avenue
Columbia, Sc 29203
TELEPHONE: 803-799-1700

June 24, 2010

Jay James, Esquire
112 Casual Street
Darlington, SC 29540

Re: Estate of Hugh S. Thompson, Case No.: 2009-ES-16-424
Civil Action No: 10-CP-16-0332

Dear Jay:

I am in receipt of your answer and discovery requests as well as your denial of the amended claim of Pee Dee Health Care, PA. I received the documents on June 22, 2010 although your letter was dated June 17, 2010.

For informational purposes, PDHC did, in fact, appeal the claim through the Medicare administrative appeals process. All administrative decisions were determined adversely to Dr. Thompson, including many of the limitations periods and many of the other issues raised in your answer. The administrative appeals process held the limitations periods do not apply in cases where a provider has been disbarred from the Medicare program by the OIG, is not reinstated by the OIG, and/or false statements were made on the provider application. They imputed the false statement made by Dr. Thompson to PDHC as he was an employee of PDHC, and his work was billed under his personal provider number and the PDHC group billing number. They stated that PDHC was liable for repayment because Dr. Thompson, as an employee of PDHC, should have informed PDHC of his disbarment from Medicare. Tony and I are of the opinion that the legal work performed on behalf of PDHC in pursuing the Medicare administrative appeals is protected under the attorney-client privilege and the work product doctrine, which protects an attorney's thoughts, mental impressions, documents and other tangible and intangible items prepared in anticipation of litigation, even where litigation is not imminent, as long as the primary motivating purpose behind the creation of the documents is to aid in possible future litigation. Obviously, due to the circumstances, the litigation with Dr. Thompson was likely, foreseeable and, unfortunately, inevitable. PDHC is willing, however, to consider providing you the decision of the QIC [Medicare Qualified Independent Contractor] with the caveat that you obtain an order of the Court [Probate and Common Pleas since you have objected to the jurisdiction of the Circuit Court] in which your client agrees that the disclosure of any documents or information in regard to the administrative appeals does not waive any claims of privilege, however defined, that can or may be asserted by PDHC or Tony.

Mr. Jay James, Esquire
June 24, 2007
Page 2 of 3

Tony as well as Drs. Cohen or Matthews had hoped the matter would not get to this point as none of them wish to tarnish Hubie's memory. Hubble was a friend and colleague of many years who they employed when no others would, and who they trusted implicitly. It is sad and unfortunate that the trust they reposed in Hubble was breached – and in such a horribly reckless manner by Hubie. We all know that the kindest portrayal of Hubie conduct was reckless and intentionally deceptive. Joe, Alex and Tony are not willing to forego the substantial damages PDHC has sustained. But, on my suggestion (which was, at best, an uneasy conversation), they will consider allowing you to informally discuss the matter, if you desire, with those in the organization who know what occurred when Hubie came to work for PDHC. Tony and I will have to be present. This is not negotiable. They will only consider making such an offer after the estate responds to PDHC's discovery requests. The reasoning is simple. They expect the same transparency from the estate that they are willing to provide, i.e., who knew what, when, whether or not there are similar claims pending against the estate, what documents, if any, the estate has in its or its agent possession; when the documents were obtained, the information known by the heirs as to the matter, and when, etc.

Considering that PDHC took every possible action to mitigate its damages, your admission in paragraph 12 that federal law provides for a continuation of the suspension of Hubie's Medicare privileges until they were reinstated by the OIG in 2002, your admission that Hubie had a duty to be truthful on his Medicare application and to PDHC [paragraph 30 and 34 of your answer --- which obviously did not occur], and the other admissions made in the answer, it appears the only real issue in the case is the considerable damages that PDHC has sustained.

Under the circumstances, I suggest that you reconsider your approach to the litigation and talk to Tony. If you do not, matters will most likely, and unfortunately, become more difficult. At my request, he has indicated he may be willing to limit PDHC's allow the Court or an independent party to consider the damage issue alone if the estate admits liability and we agree to a suitable framework that protects everyone to some degree. I have been involved in the past in cases where a 'high' and a 'low' damage number are predetermined by the parties, and the case submitted on the issue of damages alone. If the damages awarded amount to less than the 'low' end of the agreement, the Plaintiff receives the agreed upon 'low' number. If the damages awarded exceed the 'high' number, the Plaintiff is limited to the amount of the predetermined maximum damage award. Parties are provided limited protection to limit their risk, litigation costs are minimized, and the matter is brought to finality without the attendant publicity and difficulties associated with full-blown litigation. Part of the agreement is a full exchange of information by both parties. This is just a suggestion that I have found can work in situations like the current. I honestly do not know if it will work in this case as PDHC's damages are so significant and, according to the schedules filed, the estate has the capacity to pay all damages PDHC has sustained. In addition, Tony has little faith that the heirs appreciate the depth of the estate's liability or your and his ability to agree to low and high end numbers that reflect PDHC's damages and

Mr. Jay James, Esquire
June 24, 2007
Page 3 of 3

the extent of what he, Alex and /Joe believe to be Hubie's betrayal of their trust – and perhaps more importantly, the risk at which PDHC was unknowingly placed. After considering the foregoing, if you and the heirs agree the concept is worth pursuing, I will discuss the matter further with Tony so he can discuss it with Joe and Alex. The initial agreement would have to include an agreement that no privileges are waived, all such proceedings are confidential [this is to protect Hubie's memory] and discussions cannot be used in any context outside of the agreement. While liability would have to be admitted by the estate, the 'high damage limitation' end of the agreement would protect the estate to a limited degree, and according to Tony, the 'not so low end would protect PDHC. I am simply providing a suggestion that could bring matters to an end instead with relative ease and speed instead of the years it could take to litigate the matter and close the estate. Even in light of all that has occurred, neither Tony, Alex or Joe have any interest in deriding Hubie's memory or extending the litigation unless they must.

In light of your objection to the jurisdiction of the Circuit court to hear PDHC's claims against Hubie, please find enclosed a motions filed in the probate court to remove the jurisdiction for the determination of the claims of PDHC to circuit court pursuant to 62-1-302(6)(d). I filed the motion in an abundance of caution; and even though 62-3-804(2) provides for jurisdiction of the circuit court for claims filed against the estate.

As stated previously, I would appreciate you sending all correspondence to me but directed to Tony's attention at 3400 West Avenue, Columbia, SC and by email to both ben@gmail.com and tmegna@gmail.com. I am trying to de-escalate matters. Joe, Alex, and Tony are intent on being made whole yet they are empathetic to the interests of the heirs. I would appreciate you letting me know if your clients are interested in the suggestions I have made, and realize the intensity of PDHC's determination. At the least, we can understand where we all stand. I look forward to hearing from you.

With kind regards, I remain

Sincerely yours,

Benjamin R. Matthews

EXHIBIT C

Jay James

On 04/13/2010, Jay James <pjlaw507@bellsouth.net> wrote:

> Tony,

>

> You may mail any legal documents pertaining to the claim of PDHC to me as
> attorney for the personal representatives of the estate of Hugh Thompson.

>

> Are you counsel of record for PDHC? If not, who is? I suspect that if the
> matter is controverted, it will be necessary for you to be a witness.

>

> Jay James

4/14/2010

EXHIBIT D

Jay James

From: "Tony R. Megna" <tmegna@gmail.com>
 To: "Jay James" <pjlaw507@bellsouth.net>
 Sent: Tuesday, April 13, 2010 4:46 PM
 Subject: Re: Thompson estate

I will represent PDHC for now. If the PR decides to dispute the claim, & I am a witness, we will go from there. I had hoped to keep this as simple as possible but will do as needed. In the meantime, please send all correspondence to me if you would please - preferably by email. I am working with Ben & will see that he is brought up to speed in case we are unable to resolve matters.

Also, I am out of the office & was informed a little while ago that a copy of the claim had been mailed to the PR & sent to Darlington for filing. I will make certain all further correspondence goes directly to you.

I was also told someone from First Health had called me at the Darlington office. I do not know if it is about this but they obviously have similar concerns. I am to contact them when I am in Darlington. I will let them know we have talked & will work with both of you to resolve the matters.

Thanks, Tony

On 04/13/2010, Jay James <pjlaw507@bellsouth.net> wrote:

> Tony,
 >
 > You may mail any legal documents pertaining to the claim of PDHC to me as
 > attorney for the personal representatives of the estate of Hugh Thompson.
 >
 > Are you counsel of record for PDHC? If not, who is? I suspect that if the
 > matter is controverted, it will be necessary for you to be a witness.
 >
 > Jay James
 > ----- Original Message -----
 > From: Tony R. Megna
 > To: pjlaw507
 > Sent: Tuesday, April 13, 2010 11:30 AM
 > Subject: Thompson estate
 >
 >
 > Jay-
 >
 >
 > Please forgive the additional e-mail. However, I meant to request in my
 > previous correspondence that all communications and correspondence in regard
 > to the claim of Pee Dee Health Care, P.A. be directed to me at the below
 > physical address and e-mail address. In the event that the PR determines to
 > disallow the claim of PDHC for any reason, I would appreciate being notified

4/14/2010

> by e-mail as well as regular mail as I do not want their to be any
> controversy surrounding the question of the receipt of information by any
> party, and/or issues relating to statutory time bars. Also, could you
> please confirm whether or not you wish me to mail a copy of the proof of
> claim to the PR directly or whether providing the claim to you as her
> attorney directly is sufficient? Let me know and I will do whatever you
> request.

>

> Thanks, Tony

>

> Please send all written correspondence to:

>

> Tony R. Megna, Esquire
> 3400 West Avenue
> Columbia, SC 29203
> tmegna@gmail.com
> Office telephone: 803.799.1700

>

> This message is intended for the use of the person or entity to which it
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>

>

--

Sent from my mobile device

Thanks, Tony

Please send all written correspondence to:

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
tmegna@gmail.com
Office telephone: 803.799.1700

This message is intended for the use of the person or entity to which
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error, please notify us immediately and destroy the related message.
Thank you.

4/14/2010

Jay James

From: "Tony R. Megna" <tmegna@gmail.com>
To: "Ben Matthews" <benrusmat@gmail.com>
Cc: <pjlaw507@bellsouth.net>
Sent: Friday, May 21, 2010 4:43 PM
Subject: Re: Thompson claim

Jay-

Think as you please. I am General Counsel to PDHC. Hubie did not tell the truth & others will testify as to those matters. My involvement was minimal other than Hubie's admission in 2007 to me that he did not tell the truth when he signed the original Medicare application. Ben's involvement is out of an abundance of caution. The estate has no reasonable defense to PDHC's claims & we intend to pursue every option available to recapture the total losses sustained - which are considerably more than the amount PDHC had to pay Medicare. As I told you originally, neither Alex, Joe nor I like any of this but the estate denied the initial claim (which was beyond reasonable) & forced PDHC to file the lawsuit.

As you speak to your clients, please let them we did not wish to go this route but that your denial of the claim left no reasonable alternative. And if you expect to resolve the matter short of trial, I suggest you reconsider your email to Ben.

Regards, Tony

On 05/21/2010, Ben Matthews <benrusmat@gmail.com> wrote:

> FYI

>

> ----- Forwarded message -----

> From: Jay James <pjlaw507@bellsouth.net>

> Date: Fri, May 21, 2010 at 3:13 PM

> Subject: Thompson claim

> To: benrusmat@gmail.com

>

>

> I hereby acknowledge that I received the summons and complaint, the amended
 > probate claim and the first set of interrogatories and first request for
 > production. I am confirming with my clients that I am authorized to accept
 > service and as soon as I get this authorization I will give you formal
 > notification of that.

>

> As you probably have seen, I also received an email from Tony Friday
 > morning. I recommend that all communications be between you and me. At
 > this stage of things I consider Tony to be a fact witness as well as the
 > chief executive officer of the adverse party. I simply should not be
 > communicating with him.

>

> Also please send to me the three exhibits referred to in the complaint.

5/24/2010

>
> I will be planning to file appropriate responsive pleadings to both the
> probate and common pleas courts.

>
> Jay James
>
>
>
>
> --

> Benjamin R. Matthews
> Matthews and Megna, LLC
> Attorneys and Counselors At Law
> 843-395-8431
> 877-253-7705
>

--
Sent from my mobile device

Thanks, Tony

Please send all written correspondence to:

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
trmegna@gmail.com
Office telephone: 803.799.1700

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5/24/2010

EXHIBIT E

Matthews and Megna, LLC

Attorneys and Counselors at Law

3400 West Avenue

Columbia, SC 29203

TELEPHONE: 803-799-1700

E-mail: benrusmat@gmail.com

tmegna@gmail.com

May 3, 2012

John Jay James, II
PAULLING and JAMES, LLP
PO Box 507
Darlington, SC 29540
843-393-3381 (Telephone)
843-393-6089 (Fax)
pjlaw507@bellsouth.net (Email)

J. Renee Josey
TURNER, PADGET, GRAHAM & LANEY, PA
PO Box 5478
Florence, SC 29502-5478
843-656-4451 (Telephone)
843-413-5818 (Fax)
RJosey@TurnerPadget.com (Email)

Re: Pee Dee Health Care, PA v. Estate of Hugh S. Thompson

Case No: 2010-CP-16-0332

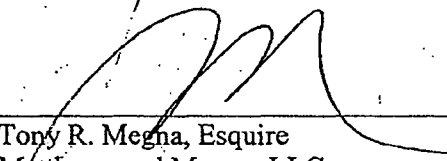
Tracking Nos: 2011203391 and 2011197671

Dear Mr. James and Mr. Josey:

Please find enclosed a stamped copy of Appellant's Final Brief for the above referenced appeals. Appellant filed a motion to consolidate the Record on Appeal on March 16, 2012. A copy of this motion was sent to both of you via mail. As such, Appellant has filed a copy of the Final Brief for each of the above referenced appeals. Also, Appellant would like to clarify that it does not waive the on-going conflicts of interest based on the dual representation of Turner Padget of clients with adverse interests. Furthermore, Appellant does not waive any attorney-client privilege, and the

attendant duties Attorneys for Respondent have to Pee Dee Health Care, P.A. In addition, we continue to request them to notify the courts of their adverse dual representation, and further that they take all actions to protect the interests of Pee Dee Health Care, P.A. in furtherance of the attorney-client relationship and their attendant duties of loyalty, candor, etc.

Sincerely,



Tony R. Megna, Esquire
Matthews and Megna, LLC
3400 West Avenue
Columbia, SC 29203
(803) 254-3676

Jay James

From: Tony R. Megna [tmegna@gmail.com]
Sent: Thursday, April 05, 2012 7:28 PM
To: pjlaw507; Josey, J. Rene
Cc: Matthew Dowtin
Subject: Part 1 - Proposed ROA PDHC v Thompson [Pages 1-250]
Gentlemen:

Please find attached pages 1-250 of the proposed ROA in the above-captioned matter. I will send you three additional emails that contain the remaining pages of the proposed ROA. Please let me know if you do not receive them. There will be four emails containing a total of 966 pages sent to you. Please let Wade Dowtin of my office know if there are additional documents you wish to be included in the ROA or if you have other issues in regard to the proposed ROA. Please email him at "Matthew Dowtin" waded@genesishqhc.org Please let him know by Tuesday, April 10, 2012 in order that we may get the ROA to the printers and filed with the Court.

Please note that the Plaintiff/Appellant continues to object to the representation of the Defendant/Respondent by either of you and/or anyone connected with your law firms because of matters including but not limited to the following:

- a. Mr. Josey's law firm actively represented the legal interests of the Plaintiff/Appellant both prior to and during his adverse legal representation of the Defendant/Respondent in this action without the consent of or consultation with the Plaintiff/Appellant.
- b. The ethical and legal issues associated with (a) Mr. Josey's law firm's abandonment of the Plaintiff in order to continue to represent the Defendant/Respondent in the above matter against the express wishes of the Plaintiff/Appellant, (b) the continuing misrepresentations to the court.
- d. The past and on-going damages to the Plaintiff/Appellant, and
- e. Mr. James' participation with Mr. Josey and others after he was made aware of the dual representation matters.

The Plaintiff/Appellant as well as its' officer, employees and agents request that you and your law firms take immediate action to discontinue your adverse representation of the Defendant/Respondent and mitigate the continuing damages to the Plaintiff/Appellant, its' officer, employees and agents, and that respect your legal and ethical duties of loyalty and fealty in all particulars and in all matters concerning the Plaintiff/Appellant, as well as its' officer, employees and agents.

Please forward the foregoing information to Companion Property and Casualty so that they are aware of the requests of the Plaintiff/Appellant as their insured.

Thank you for your attention to these matters.

Tony Megna

Please send all written correspondence to:

5/11/2012

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
tmegna@gmail.com
Office telephone: 803.799.1700

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5/11/2012

Jay James

From: Tony R. Megna [tmegna@gmail.com]
Sent: Saturday, November 03, 2012 10:43 AM
To: Josey, J. Rene
Cc: ben@pdhc.com; benrusmat@gmail.com; Harriet; Jay James
Subject: Re: Record on Appeal in Disqualification Appeal

Renee

I did not make any representations in the email other than I would do exactly as you wish. As you know, the documents you Requested all already in the record. They're just not in the format you wish. Just send the documents in the format that you desire. At this point, I truly do not want know how to proceed other than for you to provide what you want and how you want it.

As a continuing caveat, please do not confuse our cooperation with the objections ss to Turner Padget's continuing violation of Rule 1.7, etc. Our objections remain in all aspects. We believe your actions to date have and continue to taint the entire litigation and appellate process and is unlawful and unprofessional. Regardless, we intend to follow the process You have suggested and will do as you wish as a sign of respect for the court. So I ask again to please just send us exactly what you want exactly so we can be done with this part and the court can make a decision.

Again, I sincerely appreciate your efforts and goodwill in completing this matter. Thank you.

Best regards Tony

On Saturday, November 3, 2012, Josey, J. Rene wrote:

Gentlemen,

As you know, we have filed a motion seeking compliance with Rule 210 of the SCACR with regard to the appeal from the disqualification order. That motion itself suggested possible methods to satisfy the Rule's purpose without completely starting from scratch – however we cannot speak for the Court and without Court direction, our motion for compliance and/or dismissal remains before the court. Our letters subsequent to the motion did not withdraw the motion but only sought to clarify our concerns and suggestions. We do not assume any responsibility for the preparation of the Record on Appeal and do not agree to the responsibilities suggested by your email below. At this point, we will await your filed response to the motion and any directives from the Court.

From: Tony R. Megna [mailto:tmegna@gmail.com]
Sent: Thursday, November 01, 2012 9:55 PM
To: Jay James
Cc: Harriet; Josey, J. Rene
Subject: Re: Letter

Jay-

Please provide me copies of the precise exhibits you want, they way you want them ordered, and the way you want them named. Even though the exhibits are already in the record, I have every intention of doing exactly as you wish. And I appreciate your efforts. I will be out of town tomorrow so I would appreciate you

11/5/2012

sending the documents and information by email in pdf format to Harriet Hobbs in my office. Her email address is included in this communication. All you have to do is reply to all. Once the documents are prepared, I will have her send them to you for final approval.

As a continuing caveat, please do not confuse our cooperation with the objections to your assistance to Turner Padgett in the continuing violation of Rule 1.7, etc. Our objections remain in all aspects.

Again, I sincerely appreciate your efforts and goodwill in completing this matter. Thank you.

With best regards, Tony

Thanks, Tony

Please send all written correspondence to:

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
tmegna@gmail.com
Office telephone: 803.799.1700

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On Thu, Nov 1, 2012 at 4:57 PM, Jay James <pjlaw507@bellsouth.net> wrote:

Tony and Ben:

The enclosed letter is being mailed to you today.

Jay

.....

CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any transaction, arrangement, or other matter.

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CIRCULAR 230 DISCLOSURE: To comply with Treasury Department regulations, we inform you that, unless otherwise expressly indicated, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties that may be imposed under the Internal Revenue Code or any other applicable tax law, or (ii) promoting, marketing or recommending to another party any transaction, arrangement, or other matter.
/..

CONFIDENTIAL & PRIVILEGED:

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--
Thanks, Tony

Please send all written correspondence to:

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
tmegna@gmail.com
Office telephone: 803.799.1700

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11/5/2012

EXHIBIT F

Josey, J. Rene

From: Jay James <pjlaw507@bellsouth.net>
Sent: Monday, August 16, 2010 9:16 AM
To: Josey, J. Rene
Subject: Fw: PDHC v Thompson

I am forwarding email received today from Ben Matthews. Please call me after you have read.

Jay

----- Original Message -----

From: Benjamin R. Matthews
To: pjlaw507
Sent: Friday, August 13, 2010 11:16 PM
Subject: PDHC v Thompson

Jay-

I have confirmed Renee was US Attorney from 1996-2001, the same time period the matters in involving Hubie's disbarment from Medicare was being investigated and apparently negotiated by the office of the US Attorney without the knowledge of PDHC. Obviously, there is a conflict of interest. Again, I suggest you review the documents from First Choice and that you join with me in obtaining the documents from the US Attorney's office so we can all be clear of exactly what occurred and when - and who was involved. As you said early on, we all need to know the facts. Please advise Renee of the matter. I imagine he will agree he cannot proceed to represent anyone under the circumstances.

Also, I am unsure of who the PR is in the estate. Is it one or both of the heirs? I would appreciate you identifying the PR. Please let me know. I suggest you prepare a consent order on regard to the sale of the property but that you agree that no estate funds will be expended [other than for preservation of estate property] pending further order of the court. We need to sort this out and I would prefer to do it with you and Tony directly as opposed to a drawn out and possibly unnecessary hearing in the probate court. If we cannot agree, then we can present the matters on which we disagree to the Court as we haven't all had sufficient time to examine and understand the facts. In addition, we would appreciate a complete accounting be filed immediately with the Court as to all expenses paid by the estate so we can review it as required by the probate code. We do not agree that all the expenses you named can be paid by the estate without Court approval. Finally, I have only completed preliminary research but it appears the surety required of the PR on request of a creditor is not an estate expense especially in a situation where there is only one creditor estate is the beneficiaries.

I look forward to hearing from you as to when we can all meet. To keep your travel to a minimum, we are willing to meet in our office in Darlington. Please provide some dates. The week after next would be best.

Thanks, Ben

Please send all written correspondence to:

Benjamin R. Matthews, Esquire
3400 West Avenue
Columbia, SC 29203
ben@pdhc.com
Office telephone: 803.799.1700

This message is intended for the use of the person or entity to which it is addressed and may contain

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

J. RENÉ JOSEY

REPLY TO: FLORENCE OFFICE
E-MAIL: RJOSEY@TURNERPADGET.COM
WRITER'S DIRECT DIAL: (843) 656-4451
WRITER'S DIRECT FAX: (843) 413-5818

August 20, 2010

Benjamin R. Matthews, Esquire
3400 W. Avenue
Columbia, SC 29203

Re: Estate of Hugh S. Thompson
Our File No.: 10667.101

Dear Ben:

Jay James of Darlington has shared with me your e-mail of August 13, 2010 at 11:16 p.m. Rather than further respond with an e-mail, I wanted to formally write and respond to your suggestion that I have a conflict of interest in representing the Estate of Dr. Thompson.

The mere fact that Dr. Thompson interacted with a Federal agency in an administrative capacity during my tenure as United States Attorney is not disqualifying.¹ Your e-mail suggests that Dr. Thompson's disbarment from Medicare was "negotiated by the Office of the United States Attorney" That is not consistent with the information we have and is certainly not remembered by me.

If you develop any information that suggests actual involvement by the U.S. Attorney's Office with Dr. Thompson during the period of time that I was U.S. Attorney, please let me know.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.

J. René Josey

JRJ/rmd

Cc: John J. James, II, Esquire

¹ Rule 1.11 of the Rules of Professional Conduct only prohibits my participation in matters in which I was "personally and substantially" a participant -- and even under those circumstances, the appropriate government agency can consent to my representation.

BUSINESS • LITIGATION • SOLUTIONS

BB&T Building • 4th Floor • 1831 West Evans Street (29501) • PO Box 5478 • Florence, SC 29502
Phone (843) 662-9008 • Fax (843) 667-0828 • turnerpadget.com

EXHIBIT G

Josey, J. Rene

From: Tony R. Megna <tmegna@gmail.com>
Sent: Thursday, February 17, 2011 11:06 AM
To: Josey, J. Rene; pjlaw507
Subject: PDHC v Thompson
Attachments: Finalized Motion to Strike 02172011.pdf

Jay and Renee-

I am in the process of responding to Renee's recent letter and preparing to file several documents, returns to motions, etc. with the Court. I will send them to you in the next few days.

One is a Motion to Strike that I have attached for your consideration as Rule 11 contemplates. I have not attached the documents that support the motion as they were exchanged during discovery and you have copies of them. When I file the other documents, I will however, provide them to you again for your convenience in a pdf file on a CD along with an index if you wish. If you are able to agree to the Motion to Strike, or need a particular document I have listed as an Exhibit, please let me know. I will send it you by email or hard-copy as you request.

Also, I have changed my March schedule so that I am available [other than the 8th to the 13th to attend an out of state CLE I attend every year] so we can go forward with a pretrial hearing in March if you so desire. It appears [as of today at least] the Court is not interested in scheduling anything this month as Renee requested. If you receive any information to the contrary, please let me know.

Thanks for your consideration.

Regards, Tony.

Please send all written correspondence to:

Tony R. Megna, Esquire
3400 West Avenue
Columbia, SC 29203
tmegna@gmail.com
Office telephone: 803.799.1700

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STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS

Pee Dee Health Care, P.A.,

Plaintiff,

v.

10-CP-16-0332

Estate of Hugh S. Thompson,

Defendant.

PLAINTIFF'S MOTION TO STRIKE

1. The Plaintiff, Pee Dee Health Care, P.A. is a professional medical association doing business in Darlington, SC.
2. The Defendant is the Estate of Hugh S. Thompson, M.D. Dr. Thompson died on November 5, 2009. His estate is being probated in the Darlington County Probate Court, Case number 2009-ES-16-424.
3. This court has jurisdiction pursuant to S.C. Code Ann. § 62-3-803 et. seq., and in particular §62-3-804. Venue is proper in Darlington County.

FACTS

4. The basic dispute between the parties revolves about funds repaid to Medicare by Plaintiff on Decedent's behalf during a time period when, unknown to Plaintiff, Decedent was admittedly disbarred as a provider of medical services under the Medicare program, to wit:
 - a. Decedent admitted in May, 2004 that, in 1996, he received a letter from Medicare stating he had been disbarred as a provider in the Medicare program. [Exhibit E].
 - b. Decedent also received *a second letter* from Medicare in September, 1998 advising him that Medicare needed additional documentation that he had been readmitted to the Medicare program by the OIG. Decedent did not provide the additional documentation. See Exhibit O.

As noted on the affidavits provided by Plaintiff, the Decedent never informed anyone at PDHC that he had been disbarred [see Exhibits Y, Z, AA, BB, CC, DD, and EE], *and*, as noted above, he received written notices from Medicare concerning the matter at least twice prior to his employment with Plaintiff. [See Exhibits E and O].

5. Plaintiff maintains the Defendant is responsible for the damages it suffered as a result as detailed in Plaintiff's Complaint.

6. Decedent's original application for Medicare privileges [a Medicare form 855] dated June 16, 1998, was completed by Decedent prior to his employment with Plaintiff. [Exhibit A]. This document was obtained during discovery from the Defendant. Plaintiff did not have this application in its possession at the time it employed Decedent. The certification signed by Decedent on the original application for him to treat and bill for services provided to Medicare patient states as follows:

I, the undersigned, certify the following:

* * * *

3. I am familiar with and agree to abide by the Medicare laws and regulations that apply to my provider/supplier type (the Medicare laws and regulations are available through the Medicare contractor).

4. Neither the individual practitioner, the company, or the owner, director, officer, employee of the company, or any contractor retained by the company or any of the aforementioned persons, currently is subject to sanction under the Medicare/Medicaid program, or debarment, suspension, or exclusion under any federal agency or program, or otherwise is prohibited from providing services to Medicare beneficiaries.

5. I agree that any existing or future overpayment to me by the Medicare program may be recouped by Medicare through withholding future payments.

[signed by Hugh S. Thompson, M.D. on June 19, 1998]

7. Plaintiff did **NOT** complete this application with, for, or, on behalf of Decedent.
8. When Plaintiff employed Decedent, the Decedent completed a Medicare reassignment of benefits so that Plaintiff could bill for Decedent's medical services to its Medicare patients. [See Exhibit B] The certification signed by Decedent on the reassignment of benefits application states:

By signing this reassignment of benefits statement, you [Decedent] are authorizing the entity identified in section 1 [Plaintiff] to receive Medicare payments on your behalf.

[signed by Hugh S. Thompson, M.D. on June 19, 1998]

As noted above and below in more detail, the decedent had received a second letter from Medicare in September, 1998 informing him a second time of his disbarment status as a Medicare provider and requesting he provide Medicare with his reenlistment letter from the Medicare OIG. Decedent failed to inform Plaintiff of either the March, 1996 letter [Exhibit E] or the September, 1998 letter [Exhibit O].

**ADMITTED STATEMENTS OF DECEDENT FROM HIS WRITTEN STATEMENT
DATED MAY 28, 2004 [EXHIBIT E]**

9. The Decedent stated in Exhibit E:
- a. I concede that in 1996 I received from US Health and Human Services, or the Office of the US Inspector General, a letter informing me of my status as a Medicare provider. [See Exhibit E]. The document addressed procedures for reinstating such status. [sic] I concede, as well, that I do not have this document, and that I had [sic] completely forgotten it in by the Spring of 1998, when I was in the process of resuming medical practice.
10. On August 31, 1998, Medicare sent a letter to Decedent's then employer, Dr. Don Fowler, reassigning Decedent's Medicare billings to Dr. Fowler's office. [Exhibit W]. The letter

from Medicare was signed by Ms. Gina Kelly.

11. On September 14, 1998, Medicare sent Dr. Thompson a request that specifically requested on page 2 that he provide Medicare with a copy of his reinstatement from the Medicare OIG. This request was signed by Ms. Kelly. The letter was sent to Decedent at the work address of his then employer, Dr. Don Fowler, PO Box 873, Marion, SC 29571. [Exhibit O].

12. In later September or early October, 1998, the Decedent approached Plaintiff requesting he be employed. [See affidavit of Mark Matthews].

13. At no time prior to or during his employment with Plaintiff did Decedent mention he had been disbarred by Medicare in March, 1996 [Exhibit E] nor that he had received a letter from Medicare dated September 14, 1998 [Exhibit O] requesting Decedent be provided with a copy of Decedent's reinstatement from the Medicare OIG.

**ADMITTED FACTS AS STATED IN ANSWER OF DEFENDANT FILED WITH THIS
COURT ON JUNE 17, 2010**

14. The Decedent's medical license was suspended by the SC Board of Medical Examiners on or about May 31, 1994 and that his license to practice medicine was reinstated on or about April 14, 1998. [Page 2, Paragraph 11 of Defendants Answer filed June 17, 2010].

15. On or about March 31, 1996, the Decedent was disbarred from the Medicare program by the Office of Inspector General who oversees physician participation in the Medicare program. [Page 2, Paragraph 10 of Defendants Answer filed June 17, 2010].

16. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." [Page 3, Paragraph 12 of Defendants Answer filed June 17, 2010]. [Page 8, Paragraphs 61 and 62 of Defendants Answer filed June 17, 2010].

17. In 1998, the Decedent failed to seek reinstatement to the Medicare program by the

Medicare Office of Inspector General. [Page 2, Paragraph 11, Answer filed June 17, 2010].

18. Following the Decedent's disbarment from Medicare, by the Medicare Office of Inspector General, "provisions of federal law provide that a suspension of Medicare privileges [i.e., the Decedent's disbarment from the Medicare program in 1996] continues until [the Decedent was] reinstated by the Office of Inspector General [of the Medicare program]." [Page 3, Paragraph 12 of Defendants Answer filed June 17, 2010].

19. On or about October 26, 1998, the "Decedent entered into a relationship with Plaintiff to provide medical services to its patients, including Medicare patients." [Page 3, Paragraph 12 of Defendants Answer filed June 17, 2010].

20. The relationship of Decedent with Plaintiff was such that Decedent had a pecuniary interest since he was paid by Plaintiff as a physician to provide medical services. [Page 5, Paragraph 25 of Defendants Answer filed June 17, 2010].

21. The relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." [Page 4, Paragraph 21 of Defendants Answer filed June 17, 2010].

22. The relationship of Decedent with Plaintiff was such that Decedent "was obligated to communicate truthfully with Plaintiff. Defendant would admit that the Decedent had not been reinstated by the Office of Inspector General at the time he worked for Plaintiff..." [Page 5, Paragraph 26 of Defendants Answer filed June 17, 2010].

23. Defendant admits a Medicare provider application and an "assignment of benefits [application] were prepared [with Decedent's signature on the certifications affixed by Decedent – see Exhibits A and B attached hereto and incorporated herein by reference] so as to permit Decedent to treat Medicare patient and for Plaintiff to receive payments therefore." [Page 2,

Paragraph 9 of Defendants Answer filed June 17, 2010].

24. "Defendant admits that Decedent had a duty to be truthful on any and all applications, certifications, and affirmations to Medicare and/or Plaintiff." [Page 6, Paragraph 34 of Defendants Answer filed June 17, 2010].

25. "Defendant admits so much of Paragraph 10 of the Complaint as alleges that Palmetto GBA [the Medicare representative that oversees the payment of claims for the Medicare program in South Carolina] issued to Decedent Medicare provider number D993211724..." See Exhibit C attached hereto. [Page 3, Paragraph 11 of Defendants Answer filed June 17, 2010].

26. On or about June 17, 2007, the Plaintiff received a demand letter from Medicare that "would have had a content similar to that set forth in paragraph 12 of the Complaint." [Page 3, Paragraph 14 of Defendants Answer filed June 17, 2010]. Paragraph 12 of the Plaintiff's Complaint stated as follows:

On or about June 7, 2007, Plaintiff received a letter dated May 30, 2007 from Palmetto GBA in regard to medical services provided by Decedent on behalf of Medicare beneficiaries for the dates of October 26, 1998 to December 10, 2001. The letter stated, among other matters:

- a. That the Decedent had been suspended (sanctioned) from participation in the Medicare program during the time periods March 31, 1996 to June 20, 2002.
- b. That during the sanction period as stated in (a), Medicare payments were paid to Plaintiff for services Decedent provided to Medicare beneficiaries because the Decedent had completed an 'assignment of benefits' to Plaintiff. However, Decedent omitted any reference in regard to this suspension from the Medicare program.
- c. That Plaintiff was liable for the funds paid regardless of the fact that Plaintiff had no knowledge of the matter and that Dr. Thompson had provided both Plaintiff and Medicare with false information.
- d. That the estimated overpayment made by Medicare for patients provided by Decedent during the time he was suspended from the Medicare program was \$208,821.03 plus interest at 12.375%.

The letter of June 17, 2010 is attached hereto as Exhibit X.

27. On May 10, 2010, the personal representative of the Decedent's denied the Plaintiff's claim. **[Page 4, Paragraph 18 of Defendants Answer filed June 17, 2010].**
28. Defendants have no knowledge of "any.... Representations made by Decedent to Plaintiff..." **[Page 2, Paragraph 10 of Defendants Answer filed June 17, 2010].**
29. To the extent that Decedent was an employee of Plaintiff, Decedent admits that a duty of loyalty to Plaintiff was owed." **[Page 6, Paragraph 30 of Defendants Answer filed June 17, 2010].**
30. "Decedent ... erroneously believed that filing a provider application to Palmetto GBA (a Medicare contractor) was sufficient to reinstate Decedent's status as a Medicare provider." **[top of Page 3, Paragraph 11 of Defendants Answer filed June 17, 2010 and Exhibit E].**
31. On or about April 13, 2010, Plaintiff filed a claim with Decedent's estate. On or about May 19, 2010, Plaintiff filed an amended claim with Decedent's estate which was denied by the personal representative of the Decedent's estate, i.e., the Defendants. **[Page 4, Paragraphs 17 and 18 of Defendants Answer filed June 17, 2010].**
32. Defendants have no information in their possession which denies the allegations of paragraph 32 of the Plaintiff's Complaint. Paragraph 32 of the Plaintiff's Complaint states:
- Decedent breached his duty to Plaintiff:
- a. By act of certifying to Plaintiff personally and on his Medicare applications that he was truthful
 - b. By omission failing to inform Plaintiff of the falsity of his affirmations and certifications that he was barred from medically treating Plaintiff's Medicare patients

ADDITIONAL FACTS OBTAINED THROUGH DISCOVERY
[AND AFFIDAVITS OF EMPLOYEES PROVIDED BY PLAINTIFF]

33. The Decedent's medical employment with PDHC continued until on or about December 10, 2001, when the Decedent left the employ of Plaintiff's medical practice of his own volition.

34. As part of the initial employment process and relationship, the Defendant provided information to Plaintiff representing that Defendant was fully and completely authorized under state and federal law to provide medical services to Plaintiff's patients who were Medicare beneficiaries. To this end, the Decedent completed a Medicare provider application (known as a HCFA 855) and an "assignment of benefits" application to allow Plaintiff to employ Defendant and to provide the Defendant permission to treat Plaintiff's Medicare beneficiaries. [These documents are attached as Exhibits A and B]. The Medicare applications were provided to Palmetto GBA (a private contractor who contracted with the Centers for Medicare and Medicaid Services [CMS]).

35. Decedent certified the information he was providing to Medicare and to Plaintiff was true and correct while Decedent actually knew this certification was false. [See Exhibits A and B attached hereto.]

36. Unbeknownst to the Plaintiff, the Decedent provided false and misleading information to Plaintiff and on the applications submitted to Palmetto GBA – even though the Defendant admitted in their Answer filed with this Court that Decedent had been associated with medical practices prior to this employment with Plaintiff. [Page 3, paragraph 11 of Defendants' Answer filed with this Court on June 17, 2010].

37. Specifically, Decedent failed to provide the information that he had been previously suspended from treating Medicare patients as he had been suspended by the Medicare Office of Inspector General from the Medicare program in 1996. Dr. Thompson's failure to provide the

required information concerning his suspension resulted in the continuation of his suspension as a Medicare provider of healthcare service. Dr. Thompson had been notified in writing by the Office of Inspector General on or about March 31, 1996: [See Exhibit F]

- a. That he was suspended and excluded as a provider from the Medicare program as well as all other federal health care programs, and
- b. That he could not be reinstated in the federal Medicaid program until he requested such in writing and was approved in writing.

38. After the SC Board of Medical examiners reinstated Dr. Thompson's medical license in 1998 [his medical license had been suspended on or about May 31, 1994] [See Exhibit G], Dr. Thompson failed to seek reinstatement to the Medicare program through the Office of Inspector General as he was required to do but instead filed a false application with Palmetto GBA [the Medicare contractor who administers Medicare in South Carolina on behalf of the federal government through the agency known as the Centers for Medicare and Medicaid Services [CMS]. Decedent thus certified the information he was providing to Medicare and to Plaintiff was true and correct while Decedent actually knew this certification was false.

39. Decedent failed to inform Plaintiff of this suspension from the Medicare program.

40. As a result of the false information provided by Decedent on the application to Palmetto GBA [the Medicare contractor], and to Plaintiff, Decedent:

- a. was assigned a Medicare provider number (D993211724 - effective October 26, 1998, see Exhibit C by Palmetto GBA, and
- b. was employed by Plaintiff to provide medical services to Plaintiff's patients, including Medicare patients.

41. Even though the Medicare provider numbers were issued, the Defendants admitted they

were in violation of 42 CFR 1001.1901(1) which provides that Dr. Thompson's suspension from the Medicare program continued until the suspension was lifted by the Medicare Office of Inspector General. Defendant also admitted in its Answer that the Decedent's Medicare disbarment continues until [the Decedent was] reinstated by the Office of Inspector General [of the Medicare program]." **[Page 3, Paragraph 12 of Defendants Answer filed June 17, 2010].**

Dr. Thompson failed to do this, failed to notify Plaintiff, and continued to provide false information to the Plaintiff during the remainder of his employment with Plaintiff.

42. On or about July 30, 2002, Dr. Thompson's filed a subsequent Medicare enrollment application for reenrollment in the Medicare program. [See Exhibit H] In this application, Dr. Thompson admitted he had been previously suspended as a Medicare health care. On or about this same date, Dr. Thompson was reinstated as a provider of Medicare healthcare services by the Medicare Office of Inspector General. [See Exhibit I]

43. On or about June 7, 2007, Plaintiff received a letter dated May 30, 2007 from Palmetto GBA [See Exhibit X] in regard to medical services provided by Decedent on behalf of Medicare beneficiaries for the dates of October 26, 1998 to December 10, 2001.

44. On or about July 11, 2007, Plaintiff received a letter from the Decedent's then-current employer, First Health Care, [See Exhibit U] indicating Decedent's attorneys [Wes Jackson of Nexsen Pruet] had filed a request for reconsideration request to Medicare. A copy of the letter from Mr. Jackson is attached hereto as Exhibit Q.

45. Plaintiff appealed the requests for recoupment of the funds noted above. The appeals were not successful. The Decedent was aware of the appeals being conducted by Plaintiff, and provided the Plaintiff limited documents to assist in the appeal. See Exhibit V.

46. The Plaintiff did not receive further documents or information from Decedent or his

employer even though such information was promised. See Exhibit P and U.

47. Regardless, Plaintiff appealed Medicare's adverse determinations concerning Dr.

Thompson. See Exhibits R and T.

48. The administrative appeals ended in decisions of both the Medicare Administrative Law Court and the Medicare Appeals Council denied the appeals. [See Exhibits N and S].

49. Following the denial of all administrative appeals, and on or about May 1, 2008, Plaintiff paid to Medicare the sum of \$226,740.19.

50. On or about April 13, 2010, Plaintiff filed a claim with Decedent's estate. A copy of that claim is attached hereto as Exhibit J.

51. On or about May 19, 2010, Plaintiff filed an amended claim with Decedent's estate. A copy of that claim is attached hereto as Exhibit K.

52. On May 10, 2010, the personal representative of the Decedent's denied the Plaintiff's claim.

The Law supporting Plaintiff's Motion

Pursuant to Rules 12(f) and 12(h)(3), the Plaintiff respectfully requests this Court to strike all defenses of the Defendants in its Answers [Exhibit L] that fail to state a legal defense to the claims of Plaintiff, including but not limited to those defense are legally and factually insufficient, redundant, and/or immaterial as a matter law, including but not limited to all of the Defendants defenses to the action brought by Plaintiff.

A

ESTOPPEL BY SILENCE

Negligence will take the place of the intent to deceive when there is a duty to disclose."

Southern Dev. Land and Golf Co, Id.

[See paragraphs 26 and 34 of their Answer filed with this Court on June 17, 2010]

Estoppel by silence arises when the estopped party owes a duty to speak to the other party but refrains from doing so, thereby leading the other party to believe in an erroneous state of facts, and that a "manifest intent" to mislead is not required for estoppel by silence. Estoppel by silence arises when the silence is intended *or* has the effect of misleading the other party. In addition, estoppel arises when the estopped party fails to act at the "first proper and opportune moment." *Metromont Materials Corp. v. Pennell*, 270 S.C. 9, 239 S.E.2d 753 (1977).

Our Supreme Court has held:

... Estoppel by silence arises where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts. *Ridgill v. Clarendon County*, 192 S.C. 321, 6 S.E.2d 766 (1939). Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel. *Welch v. Edisto Realty Co.*, 170 S.C. 31, 169 S.E. 667 (1933). There is no requirement that the person whose silence misleads another have actual knowledge of the true facts if circumstances are such that knowledge is necessarily imputed to him. *Accord Alwes v. Hartford Life & Accident Ins. Co.*, 372 N.W.2d 376 (Minn.Ct.App.1985). Negligence will take the place of the intent to deceive when there is a duty to disclose. *Id*; see also 3 *Pomeroy's Equity Jurisprudence* § 809 at 218 (5th ed. 1941).

Southern Dev. Land and Golf Co. v. South Carolina Pub. Serv. Auth., 426 S.E.2d 748 (1993), *aff'g in part and rev'g in part* 305 S.C. 507, 409 S.E.2d 428 (Ct.App.1991).

See also *Macaulay v. Howard*, 230 S.C. 140, 94 S.E. (2d) 393. In *Hubbard v. Beverly*, 197 S.C. 476, 15 S.E. (2d) 740, 135 A.L.R. 1206, we held that the doctrine of estoppel applies if a person, by his actions, conduct, words or silence which amounts to a representation, or a concealment of material facts, causes another to alter his position to his prejudice or injury.

As noted above, the Defendants have admitted facts supporting the application of the doctrine of estoppel by silence and concealing material facts from Plaintiff [as well as the doctrine of unclean hands] including but not limited to the following:

- a. The Decedent's license to practice medicine was revoked in 1994 (paragraph 11 of Answer),

- b. The Decedent was disbarred by Medicare Office of Inspector General on March 31, 2006,
- c. The Decedent's license to practice medicine was revoked in 1994 (**paragraph 10 of Answer**),
- d. The Decedent's failed to seek reinstatement to provide services to Medicare patients (**paragraph 11 of Answer**), and
- e. The Decedent's disbarment as a Medicare physician provider of medical services, under federal law, continued until he was reinstated by the federal Office of Inspector General which admittedly did not occur until 2002 (**see paragraph 12 of the Decedent's Answer**).
- f. The Decedent had a duty to be truthful on both the Medicare applications and all documents he certified and signed,
- g. The Decedent had a duty to be truthful in his dealings with the Plaintiff. See **paragraphs 26 and 34 of their Answer filed with this Court on June 17, 2010.**
- h. The relationship of Decedent with Plaintiff was such that Decedent "was bound to act in good faith and with due regard to Plaintiffs' interest." [**Page 4, Paragraph 21 of Defendants Answer filed June 17, 2010**].

In addition to the foregoing, the attached affidavits and documents (that have been provided to all parties during discovery) confirm that the only credible and reasonable evidence before this Court is that Dr. Thompson, having a an admitted duty to speak the truth to the Plaintiff and to protect Plaintiff's interests, did not do so, staying silent (negligently or otherwise) concerning his status as a disbarred physician from the Medicare program during his employ with Plaintiff.

Even if this Court finds that the Decedent did not intentionally mislead the Plaintiff (which Plaintiff respectfully asserts is not a reasonable conclusion based on the evidence before this Court), our Supreme Court has held that "...negligence will take the place of the intent to deceive when there is a duty to disclose." *Southern Dev. Land and Golf Co*, supra. *As stated in their Answer filed June 17, 2010 filed in this Court, and as noted above, the Defendants have admitted that the Decedent had a duty to be truthful on both the Medicare applications he signed, had a duty to be truthful in his dealings with the Plaintiff. See paragraphs 26 and 34 of their Answer filed with this Court on June 17, 2010.*

Based on the admissions of the Answer of the Defendants as more fully stated hereinabove, it can reasonably be inferred that, at best, the Defendant negligently failed to provide the truth of his status as disbarred physician from Medicare. As the Defendants have admitted in their Answer that the Decedent had a duty to disclose the truth of his disbarment from Medicare, (see paragraphs 26 and 34), the Defendant's admitted negligence is sufficient to take the place of the intent to deceive.

B

DOCTRINE OF UNCLEAN HANDS

In addition to the foregoing, none of the defenses asserted in the Defendants Answer are available to the Defendants due to the doctrine of 'unclean hands.' The doctrine of "unclean hands" precludes a party from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the other. *Arnold v. City of Spartanburg*, 201 S.C. 523, 532, 23 S.E.2d 735, 738 (1943); *First Union Nat'l Bank of S.C. v. Soden*, 333 S.C. 554, 568, 511 S.E.2d 372, 379 (Ct. App. 1998); *Robinson v. Estate of Harris*, ____ S.C. ____, (Opinion no. 26914 Filed January 24, 2011). ["See also the discussion in 4 A. L. R., 58, and the cases

cited in subsection (c) on that page, for authority for the proposition that the party to a suit complaining of a wrong must have been injured thereby in order to justify the application of the principle of "unclean hands" to the case of his opponent. See also the further discussion in 4 A. L. R. 106, sub section (b):"]

As evidenced by his signatures on the documents and certification signed by Decedent, the sad and un-debatable truth is that the Decedent knowingly misrepresented to Medicare, the Plaintiff, and others the truth surrounding his disbarment from the Medicare program. He did so repeatedly; and he did so after:

- a. Not responding to the requirements for readmission set forth in the original debarment letter of March, 1996,
- b. Not responding to a second letter from Medicare in September, 1998 [Exhibit O], and
- c. Not informing the Plaintiff of either the original debarment notification of March, 1996 nor the letter of September, 1998. [Exhibit F].
- d. Not providing the Plaintiff a copy of the 'ALJ Joe' order dated January 22, 2008] [Exhibit M] after obtaining independent counsel [Exhibit Q] and, and promising to provide Plaintiff all such information. [Exhibit P].

Knowledge is seldom susceptible of proof by direct evidence and may be proved by circumstances from which such knowledge may be inferred. See *State v. Atkins*, 205 S.C. 450, 32 S.E. (2d) 372; *State v. White*, 211 S.C. 276, 44 S.E. (2d) 741 (1947). Neither the Plaintiff nor its representatives knew nor had reason to know of the Decedent's disbarment from the Medicare program. [See exhibits attached hereto.] In fact, as demonstrated by Exhibit O, Decedent had actual notice of his disbarment from Medicare again in September, 1998. Moreover, as noted on

the attached affidavits [Exhibits Y, Z, AA, BB, CC, DD, EE] the Plaintiff specifically relied upon the Decedent's representations to both Plaintiff and Medicare that he was being truthful – which he was not. The Defendants have admitted in their Answer, they have no knowledge or information that would rebut the allegations of the Plaintiff and the supporting affidavits attached hereto. [Page 2, ¶ 10, second sentence, of Answer of Defendants filed June 17, 2010].

In reliance on the false statements and misrepresentations of the Decedent, the Plaintiff submitted claims to Medicare on behalf of Decedent that Decedent *actually knew were false*. ["[A]lthough the parties may vigorously assert their version of the facts, they may not misrepresent those facts in order to gain advantage in the process.... When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him." *Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472, 477 (1997). See *Ingram v. Kasey's Assocs.*, 340 S.C. 98, 107, 531 S.E.2d 287, 291 (2000) ("He who seeks equity must do equity.") (quoting *Norton v. Matthews*, 249 S.C. 71, 152 S.E.2d 680 (1967)).

The Plaintiff respectfully submits it is difficult to fathom a scenario as to how the Defendant could reasonably request this Court to deny the relief requested by Plaintiff considering:

- a. the facts admitted by the Decedent himself, and
- b. the facts admitted in the Defendants Answer, and
- c. the remaining documents and affidavits before this Court.

It is equally difficult to imagine how the Plaintiff could have acted more reasonably and equitably than it did in contesting the claim of Medicare when it was first advised of the matter in 2007 -- particularly in light of the Decedent's proven failure to advise of the 'ALC Joe order.'

In this regard, the Decedent and his representatives and agents obtained an order, known as the [the 'ALJ Joe' order dated January 22, 2008] [Exhibit M] on behalf of Dr. Thompson and his then-current employer, First Choice Health Care of Florence, that was favorable to his position, and would have been favorable to Plaintiff. However, the Decedent, his agents and representatives failed to provide the 'ALJ Joe determination' [Exhibit M] even though they had promised to keep Plaintiff apprised of such matters. [Exhibit P]. As a result, PDHC did not have the opportunity to present the favorable 'ALJ Joe determination' as a defense to the claims made by Medicare against PDHC and Dr. Thompson or to the Independent Review entity for Medicare or to the Medicare Appeals Council. This is particularly relevant as the ALJ determination made on behalf of PDHC and Dr. Thompson was dated March 14, 2008 [Exhibit N] while the 'ALJ Joe order,' as noted above was filed January 22, 2008.

These matters are further complicated by the fact that the Defendant probate estate is represented by the sole beneficiaries of the estate. The estate representatives, however, are bound to act in the best interests of the beneficiaries of the estate, of which Plaintiff is one. The inherent conflicts of interest for the Defendant and the probate estate, and their counsel, in the case at bar are particularly remarkable in light of:

1. The fact that the Defendant and the Personal Representatives of the probate estate are being represented by the same counsel as the representatives of the estate,
2. The admissions made by the Defendant in its original answer, the admissions of the Decedent, the documents available to all parties, and
3. The Motion to Amend the original answer in which the Defendant seeks to modify it answer to deny facts it has previously admitted and certified as true under the attestation

provisions of Rule 11, S.C.R.Civ.P.¹ This issue is addressed further in the Plaintiff's Return to the Defendant's Motion to Amend.

Either negligently or intentionally, the Decedent, as well as his agent and representatives, failed to provide the "Joe ALC order" to Plaintiff. In addition to issues of negligence, breach of fiduciary duties for duties voluntarily undertaken, and others, the Plaintiff respectfully submits, at the least, that in light of the admissions made by the Defendants in their Answer as well as the attached documentation and affidavits, the doctrines of 'unclean hands,' the doctrine of 'estoppel by silence,' and negligence, at the minimum, prevent the Defendants from asserting any defense to the claims of Plaintiff.

CONCLUSION

Based on the Decedent's own admissions, the Decedent's own certifications, the admissions as stated in Defendant's answer filed with this Court on June 17, 2010, and the additional reasons stated herein, Plaintiff requests pursuant to Rules 12(f) and 12(h)(3), S.C.R.Civ.P. that all defenses asserted by the Defendants in its Answer to the Plaintiff's Complaint be stricken as legally and factually insufficient, redundant, and/or immaterial as a matter of law due to Decedent's 'unclean hands.' In the alternative, and additionally, the Defendant is estopped from asserting any defense to the Plaintiff's claims due to the Decedent's intentional or negligent silence in the face of his admitted duty to speak the truth to Plaintiff in the first instance based on the March,

¹ *Aiding and Abetting a Client's Breach of Fiduciary Duty*, Katrina Lewinbuk, College of Law, Arizona State Law Journal, Vol. 40, No 1, 2008.

1996 debarment letter [Exhibit F], and in the second instance, based on the September, 1998 letter. [Exhibit O].

Respectfully submitted,

Tony R. Megna
Attorney-at-Law
3400 West Avenue
Columbia, SC 29203
803.799.1700

February ____, 2011.

**STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON
IN THE COURT OF COMMON PLEAS**

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

CERTIFICATE OF SERVICE

10-CP-16-0332

The undersigned hereby certifies, on the date indicated below, copies of the following documents in the above-captioned matter were served upon the Defendant's Counsel for Defendant:

John Jay James, Esquire
PO Box 507
Darlington, SC 29540
[hand-delivery]

Renee Josey
1851 W. Evans Street, 4th Floor
Florence, SC 29501

1. Plaintiff's Memorandum in support of its Motion for Summary Judgment
2. Plaintiff's Return to Defendant's Motion to Compel
3. Plaintiff's Return to Defendant's Motion to Amend its Answer
4. Plaintiff's Return to Defendant's Motion to Disqualify Counsel
5. Plaintiff's Motion to Strike together with its supporting Memorandum
6. Plaintiff's documents and affidavits in support of its Returns, Motions and request for a pretrial conference.

Mark Matthews

February _____, 2010.

EXHIBIT H

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

IN THE COURT OF COMMON PLEAS
Case No. 2010-CP-16-0332

Ex Parte:

Desa Ballard

In re:

Pee Dee Health Care P.A.,

Plaintiff,

Vs.

Estate of Hugh S. Thompson

Defendant.

**ORDER FOR SANCTIONS
AGAINST TONY R. MEGNA**

Non-party Desa Ballard moved for sanctions, pursuant to Rule 11(a), SCRCP, in connection with a subpoena for records served on her on or about July 30, 2011, ostensibly issued by the plaintiff in this action. The motion is granted.

As will be discussed in more detail below, in order to reach a decision in this case, this Court also was assigned jurisdiction in a Richland County case, *James A. Anastasi v. Lance Wilson, Willis Goodwin, Gina L. Lee, Richland County Clerk of Court*, Case No. 2007-CP-40-0576. Stated succinctly, the reason that this Court had to consolidate sanctions motions/hearings in two separate and unrelated cases pending in two different circuits is because of Megna's actions that this Court finds to be gross civility and professionalism violations. Having been disqualified as counsel because he was a material witness in *Thompson*, Megna continued to serve discovery under his signature in that case in violation of this Court's Order, which this Court had to quash; thereafter, Megna again served similar and additional discovery, this time under the auspices of the *Anastasi* case in Richland, a case that had nothing to do with the

TRUE CERTIFIED COPY,

CLERK OF COURT/RMC
DARLINGTON COUNTY, S.C.

discovery requests, and which by that time was concluded as to his client. Moreover, the discovery was not meritorious as to any case-related issues, but propounded solely to vex the recipients.

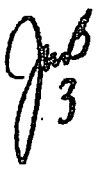
In granting the sanctions motion in this case, the Court makes the following:

FINDINGS OF FACT¹

- 
1. This action was originally filed in the Darlington County Probate Court by the plaintiff corporation seeking to recover damages from the defendant. The plaintiff corporation was represented by attorney Tony R. Megna (Megna). The matter was removed to the Circuit Court in Darlington County.
 2. After removal to this Court, defense counsel made a motion to disqualify attorney Megna from representing the corporate plaintiff, alleging Megna was a necessary witness in that he was, and had been since 1995, the Chief Executive Officer of the plaintiff corporation.
 3. By order dated April 15, 2011, this Court made detailed findings of fact concluding that Megna was, in fact, a material witness as to core facts in this action and was disqualified from acting as counsel for the corporate plaintiff. The final sentence of that order stated "The Court orders complete disqualification effective with the execution of this Order. (footnote omitted)."
 4. The Court thereafter permitted Megna, at his request, to remain counsel for the plaintiff for the sole and limited purposes of arguing his motion for reconsideration of the disqualification Order and for arguing summary judgment motions. The motion to reconsider was eventually denied, and the issue of Megna's disqualification as

¹ The findings of fact are made from this Court's detailed review of the Clerk of Court's files in both the Richland County case and the instant case, the submissions of counsel, and the oral argument held in these consolidated matters in Darlington County on March 15, 2012.

counsel is on appeal to the South Carolina Court of Appeals as of this writing. As well, Defendant was subsequently granted summary judgment. An appeal from that Order is also pending. No stays were issued by the appellate court. Megna's disqualification to act as counsel in this matter is currently in effect.

- 
5. When Megna was disqualified as counsel in this case, there was separate and unrelated litigation involving different parties pending in the Richland County Court of Common Pleas in a matter entitled *James A. Anastasi v. Lance Wilson, Willis Goodwin, Gina L. Lee, Richland County Clerk of Court*, Case No. 2007-CP-40-0576 (the Richland case). Megna represented defendant Gina L. Lee in the Richland County case.
 6. Other than Megna being counsel for a party in each case, the two cases are completely unrelated to one another. Megna is the only common denominator.
 7. As more fully detailed in an Order issued this date in the Richland case, there have been numerous state court appellate proceedings, all initiated by Megna on behalf of his client Gina Lee, as well as bankruptcy proceedings involving Lee as the debtor in the United States Bankruptcy Court for the District of South Carolina.
 8. In the Richland case, the plaintiff James Anastasi was represented by attorney Douglas N. Truslow (Truslow). Truslow continued to represent Anastasi throughout the several state appeals initiated by Megna on behalf of Lee, all of which appeals were subsequently dismissed based on procedural grounds; the merits of the appeals could not be reached because of Megna's repeated failures to comply with various deadlines.

9. In attempts to escape the consequences of his failure to comply with the rules, Megna made false statements to the circuit court and the appellate court, as more fully described by Judge L. Casey Manning in Orders dated April 8, 2008 and April 1, 2009 in the Richland case, where he found Megna's explanations for his delay to be false and intentionally manipulative.
10. According to Truslow, because of appellate and ethical issues he encountered in dealing with Megna in the Richland case, Truslow associated and consulted with Ballard, who has experience in both fields. In September, 2011, in connection with one of the appeals filed by Megna (on behalf of Gina Lee) at the South Carolina Court of Appeals, Ballard executed an affidavit which Truslow submitted to the Court of Appeals addressing the insufficiency of an appellate documents filed by Megna.
11. On or about July 30, 2011, Ballard was served with a subpoena signed by Megna as counsel for the plaintiff, bearing the caption in this case, seeking production of certain materials, including copies related to her communications with several attorneys, including Truslow, several of the lawyers involved in this case, and other lawyers which apparently have no relation to this case or the Richland case.
12. Ballard was not counsel for nor otherwise involved in the instant case in any way. The subpoena sought information related to the assistance she provided to Truslow in the Richland County case, and sought to discover if any evidence existed of her communications with a list of attorneys whom Megna apparently believed to be his adversaries in this or other cases. The subpoena sought nothing relevant to this case. The subpoena purported to be issued from Darlington County, although Ballard's

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office is in Lexington County. The subpoena to Ballard did not comply with the SCRCF.

13. Ballard had no knowledge of the instant case, but when she received the subpoena, she located information to identify some of the attorneys involved. She obtained a copy of this Court's Order dated April 15, 2011, in which Megna was disqualified as counsel for the corporate plaintiff in this case.
14. Ballard filed and served an Objection to the subpoena. Since Megna had been disqualified in this case as counsel for the plaintiff, she served her objection on attorney Benjamin R. Matthews, who was listed on the Darlington County Clerk's website as Megna's law partner and also counsel for the plaintiff in the instant case.
15. She also filed and served a Motion for Sanctions on August 4, 2011, which argued that Megna had attempted to subpoena her records for an improper purpose, and in violation of this Court's order disqualifying him as counsel.
16. Truslow also filed a motion for sanctions in the Richland County case dated March 9, 2012. Ballard's motion for sanctions in this case was consolidated with Truslow's motion for hearing before this Court.
17. Prior to the hearing in this matter, Megna provided the Court and counsel with a document, bearing the caption in both cases, entitled "Synopsis." This document contained a rambling diatribe of challenges of unethical behavior against Truslow, Ballard, and others. As best the Court can understand Megna's allegations against Ballard, they arise from a contact to her office by Megna in which he sought to associate her on a potential unrelated case on behalf of Pee Dee Health Care. Ballard's associate responded that Ballard would consider looking at the matter if she

was paid hourly and she never heard back from Megna. She was never asked to represent Megna and no confidential information concerning Megna or his client was provided to her². Neither Megna nor his client contacted Ballard again until the subpoena was issued in this case.

18. In order to understand why Megna's efforts to subpoena information from Ballard were improper, a brief history of the litigation in the Richland case is necessary. By Order issued this same date in that case, that history is set forth in detail, and to the extent necessary, the findings in that Order are incorporated herein by reference.

19. By way of summary, the subpoena to Ballard was part of an improper and impermissible attempt by Megna to engage in discovery for purposes of defending himself (not his client) against motions for sanctions that were pending against him in the Richland County case. In addition, it appears that the subpoena was served on Ballard in an effort to punish her for consulting with Truslow in the Richland County case, and to deter her from continuing to assist him.

20. At the time Megna served the subpoena on Ballard, all discovery in the Richland County case had been concluded, Megna's client was no longer an active party to the Richland case, and the only remaining issues in that case in which Megna had any interest concerned the Richland Plaintiff's motions (via Truslow) for sanctions against Megna.

21. The subpoena issued to Ballard sought, among other things, her records of communications with Mr. Truslow in the Richland County case. This Court

² Even if the information provided by Megna to Ballard concerning Pee Dee Health Care was considered confidential information under Rule 1.6, and even if Ballard received and reviewed the material, this court finds she would not have been disqualified from continuing to assist Truslow in the Richland case. As stated earlier, the two cases are unrelated, the only common denominator again being Mr. Megna (representing two separate and unrelated clients in the two cases).

specifically finds there could be no other purpose for the discovery sought but to use the information to defend Truslow's claim for sanctions against Megna in the Richland case.

22. The subpoena to Ballard was issued in violation of this Court's order disqualifying Megna as counsel, sought privileged information regarding the advice she had given to Truslow, and constituted a fishing expedition into what other discussions she or others may have had with Truslow, all apparently for the purpose, *inter alia*, of seeking to deflect sanctions against himself in the Richland case.

23. Between his conduct in this case and in the Richland case, Megna has shown little regard for the Orders of this Court or for the legal limitations imposed upon him in his representative capacity as counsel for his client.

24. The inevitable conclusion is that Megna has, under the auspices of this case, attempted to subpoena Ballard, as well as her legally protected files, even though he has been disqualified, and that his intentions were fully improper. The Court has no choice but to conclude that he did so, at least in part, as a pretext to harass her and apparently to dissuade her from providing legal advice to Truslow in the Richland case.

25. Megna has willfully, deliberately, and unapologetically attempted to misuse the legal process through both this case and the Richland case and he is in willful violation of this Court's orders, specifically including the Order disqualifying him as counsel for the plaintiff. He has engaged in such misconduct for ulterior purposes in seeking to defend his own personal interests in the Richland County case.

26. Megna's conduct is willful, deliberate and unapologetic. In both his "Synopsis" (captioned with both cases) and the memorandum he submitted to the Court in connection with the hearing in this matter, Megna continued to hurl fabricated allegations of misconduct upon Ballard, Truslow, and others who he considers to be adverse to him.

27. Perhaps the most egregious part of Megna's conduct is his uncompromised assertion that everyone else is wrong, everyone else is unethical, and he is blameless. This Court would be faced with an entirely different scenario if Megna had admitted his misconduct and shown remorse in any degree, or had he apologized for his continuous affronts upon the Court and his colleagues.

28. The lack of respect Megna has shown for this Court, the legal process, and the purposes of these legal proceedings is unprecedented for this Court.

29. Even viewed separately from Megna's conduct in the Richland case, Megna's conduct is ill-conceived, vitriolic, and abusive. When viewed in conjunction with the lengthy period during which he has engaged in similar conduct in the Richland case (as more thoroughly discussed in an Order issued this date), Megna's conduct is alarming and disturbing. He has engaged in a concerted effort to abuse the legal process in both cases for his own purposes, abusing this Court and his colleagues in the process.

30. Ballard has requested an award of sanctions pursuant to Rule 11(a), SCRCP, for her time in having to respond to the subpoena served upon her by Megna. I find that sanctions under Rule 11(a) are warranted. *Runyon v. Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996).

31. Ballard's original affidavit of fees includes time she has spent in responding to two (2) grievances filed against her with the Office of Disciplinary Counsel which contain similar allegations as those asserted against her in these proceedings by Megna. Those two grievances (which were dismissed) were filed by Mark Matthews, who appears (from the Court's review of filings by Megna in this case) to be an employee and agent of either Megna or Pee Dee Health Care.

32. Although the Court perceives it is highly likely that Megna participated in or facilitated the filings of these grievances against Ballard, this Court concludes that her time spent in defending against these grievances is not within the scope of sanctions which this Court can award under Rule 11(a) or otherwise. At the Court's request, Ballard has submitted an amended affidavit of attorney fees which does not include the time spent in responding to the grievances. She has also included her time spent in attending the hearing on May 15, 2012 and her work since then, including the preparation of a proposed order for the Court, all of which are appropriate.

33. The Court's review of this affidavit finds that the time Ballard spent in responding to the subpoena, appearing before this Court, and preparing the draft order requested by this Court are reasonable.

34. Ballard's hourly rate is her regular hourly rate charged to her clients, and in light of her standing in the legal community and her expertise in these areas, is immensely reasonable. Ballard is a recognized expert in the field of attorney conduct (and misconduct), she has an AV rating with Martindale Hubbell, and she has earned the respect of her peers and of the Courts of this state for her professionalism as a member of the Bar. Her experience and insight in the areas in which Truslow was

attempting to defend against Megna in the Richland case made her an appropriate choice for assistance to Truslow. Her agreement to assist Truslow in the Richland case made her a target of Megna's wrath, and she should be compensated by way of sanctions against Megna for the time she spent in responding to his improper discovery against her. The costs set forth in her affidavit, which consist of filing fees, copying costs and postage, are reasonable and were necessarily incurred in connection with the subpoena served upon her and the subsequent sanctions motion against Megna.

35. Pursuant to Rule 11(a), SCRPC, this Court awards sanction in favor of Ballard against Megna in the amount of seventeen thousand, three hundred and eighty-eight dollars and seventy-five cents (\$17,388.75), which constitutes reimbursement for the time and expenses set forth in Ms. Ballard's amended affidavit dated August 8, 2012. These sanctions are not punitive but are compensatory, and are required to be paid notwithstanding any penalties imposed herein. *Cannon v. Georgia Attorney General's Office*, 397 S.C. 541, 725 S.E.2d 698 (2012).

36. The award of fees and costs herein are a sanction (and hence considered to be non-dischargeable except by payment), as well as a civil money judgment so as to carry interest at the legal judgment rate. The Clerk is directed to enroll this sum as a civil judgment in favor of Ballard against Megna.

37. In making this award, the Court is aware of the sanctions also being awarded to Truslow against Megna in the Richland County case. The sanctions awarded to Ballard are not duplicative of the sanctions awarded to Truslow, and the Court finds that both awards are compensatory in nature and are warranted, reasonable, and

supported by the evidence. The sanctions are awarded to pay the reasonable attorneys fees and costs incurred by the moving party. *Ex Parte: Bon Secours and St. Francis Xavier Hospital Inc.*, 393 S.C. 590, 713 S.E.2d 624 (2011).

Criminal Contempt Citation Against Mr. Megna, sua sponte

JB
11

In presiding over these matters, this Court has undertaken a full review of the pleadings, discovery, previous Court Orders, correspondence, memoranda, and emails from Attorney Megna in both cases, together with review of applicable attorney oaths and disciplinary rules, as well as an analysis of prevailing law and Supreme Court decisions involving attorney conduct. As indicated in the language of this Order, this Court is concerned that the conduct of Attorney Megna reveals a continuous pattern of violations of the civility and professionalism requirements of South Carolina's attorney oath with respect to members of the Bar, consistently uses language that is accusatory and demeaning directed at opposing counsel, includes inappropriate references to the judiciary, and contains unwarranted criticisms of other professionals, parties, and witnesses. Moreover, this Court finds that Attorney Megna's actions have resulted in the tremendous unnecessary consumption of attorney time, excessive and unnecessary costs to litigants, and the significant waste of judicial resources and public funds required to operate the Court system.

Because of the willful misconduct set forth throughout the body of the factual findings herein and the factual findings in the Richland County case set forth by Order issued this same date, the Court has determined to conduct a hearing to require Megna to show cause why he should not be held in criminal contempt of this Court for intentionally and willfully violating a Court Order. Megna is hereby advised that he has the right to counsel during such hearing, and shall be given an opportunity to present arguments to the Court. Megna is hereby specifically

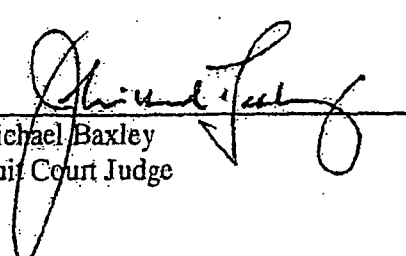
advised that a finding of criminal contempt by this Court may subject him up to six (6) months' imprisonment therefor, in addition to other sanctions. This Show Cause and Sanctions hearing is hereby set for March 18, 2013, beginning at 2:00 p.m., after the call of the regular non-jury roster for that day, in the fifth floor courtroom of the Darlington County Courthouse. Service of this Order upon Attorney Megna and his counsel shall constitute service of the Notice of Contempt hearing upon Megna.

Because of the numerous occasions on which Megna has denied receipt of service of an order or other papers (in the Richland case), Ballard shall make arrangements for personal service of a copy of this Order and the Richland County order issued this date upon Megna, unless Megna personally (not through counsel) consents to accept service in some other fashion and executes a written acceptance of service to that effect.

THEREFORE IT IS ORDERED:

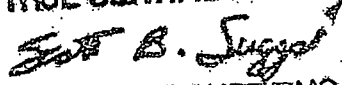
- 
1. Ms. Ballard's motion for sanctions is granted.
 2. Mr. Megna is ordered to pay Ms. Ballard the sum of seventeen thousand, three hundred and eighty-eight dollars and seventy-five cents (\$17,388.75) within thirty (30) days of the date of this Order. The Clerk shall enroll a civil judgment for this sum.
 3. Mr. Megna shall be required to show cause why he should not be held in criminal contempt of this Court for the actions outlined in this Order, and shall appear on March 18, 2013, at 2:00 p.m. in the fifth floor courtroom of the Darlington County courthouse for such hearing.

IT IS SO ORDERED.


J. Michael Baxley
Circuit Court Judge

February 11, 2013

FILED
2013 FEB 13 PM 2:47
SCOTT B. SUGGS
CLERK OF COURT/R.O.D.
DARLINGTON COUNTY, S.C.

TRUE CERTIFIED COPY,

CLERK OF COURT/RMC
DARLINGTON COUNTY S.C.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2007 CP-40-0576

James A. Anasti

Lance Wilson, et al

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order: ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
Douglas N. Truslow	Tony R. Megna	\$31,842.39
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

SCRPC Form 4C (12/2011)

2121

Judge Code

2-11-13

Date

Page 1

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

Douglas N. Truslow, Esquire

Post Office Box 1465

Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

FORM 4C INSTRUCTIONS—JUDGMENT IN A CIVIL CASE
(Instructions for Information Only-Not to be filed with Form 4C)

1. Form 4C-Judgment in a Civil Case has been modified to add order information and enrollment instructions for the clerk of court. The purpose of Form 4 has not changed with the exception that judgment information is provided when applicable.
2. Please note that the Form 4C must be attached to all orders that include information to enroll in the judgment index. The clerk will not be responsible for reading the order to determine enrollment information.

The attorney or prevailing party will prepare and attach the Form 4C when submitting the proposed order that includes judgment enrollment information for the judgment index. The judge will review and sign Form 4C when he or she signs an order that includes judgment enrollment information for the judgment index.

3. Form 4C is not required to be submitted to the Court with orders that do not include information to enroll in the judgment index. If the clerk receives such an order without Form 4C attached, the clerk should enter and process the order pursuant to Rule 58 and Rule 77(d), SC Rules of Civil Procedure (i.e., the clerk should serve notice of entry of the judgment by mail or provide the attorneys with copies of the signed order by other means).
4. The "Information for the Judgment Index" section should be completed when the judgment affects title to real or personal property or if any amount should be enrolled. In the "Judgment in Favor of" column, enter the name of the party to whom the judgment is awarded. In the "Judgment Against" column, enter the name of the person to whom the judgment is against. The judgment amount to be enrolled should be noted in the "Judgment Amount" column. As necessary, describe any property referenced in the order if it is to be enrolled in the judgment index. If there is no judgment information to enroll, indicate "N/A" in one of the boxes in this section of the form.
5. To enter information to accommodate multiple parties, additional Form 4Cs may be used as necessary. Additional space may be inserted on the form as necessary.
6. The section "For the Clerk of Court Office Use Only" should be completed by the clerk as it has been with the previous version of Form 4.
7. If the matter is on appeal to the Circuit Court, then the parties on the form should be changed from Plaintiff and Defendant to Appellant and Respondent.

8. If an arbitrator prepares an order after arbitration, the arbitrator should strike through "Circuit Court Judge" and indicate "Arbitrator" in the signature block.
9. If a Special Circuit Court Judge, Master in Equity, or Special Referee prepares an order after hearing a Circuit Court matter, then he or she should strike through the title "Circuit Court Judge" below the signature line and indicate the appropriate title.
10. When an Order of Foreclosure is filed, neither the parties or debt owed should be listed in the Information for the Judgment Index Section, unless the foreclosure order specifically requires entry of the full judgment amount before the foreclosure sale, pursuant to Section 29-3-650 of the SC Code.
11. If the deficiency judgment is waived in a Foreclosure action, indicate N/A in the "Judgment Amount To Be Enrolled" box.
12. Foreclosure actions should be ended by the Clerk of Court upon receipt of the Order of Foreclosure. Subsequent information, including deficiency judgments, can be added to the action after the case is ended. The Master in Equity should end the action in the MIE system upon the receipt of the Order of Foreclosure.
13. When judgment enrollment information is included in the Information for the Judgment Index Section (for example, when there is a deficiency judgment), only the parties who the judgment is for and against should be included in the Section. Subordinate parties and lienholders should not be included in the box if there is not a judgment amount specifically for or against them.
14. Form 4C is not required to be attached to Transcripts of Judgment and Confession of Judgment.

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

Ex Parte:)

Douglas N. Truslow,)

JAMES A. ANASTI,)
Plaintiff,)

vs.)

LANCE WILSON,)
WILLIS GOODWIN,)
GINA L. ANASTI LEE,)
and RICHLAND COUNTY)
CLERK OF COURT,)

Defendants.)

IN THE COURT OF COMMON PLEAS

Case No.: 2007-CP-40-0576

**ORDER FOR SANCTIONS
AGAINST TONY R. MEGNA**

 Plaintiff's counsel Douglas N. Truslow (Truslow) moves¹ for sanctions against Tony R. Megna (Megna), counsel for Defendant Gina L. Anast Lee (Lee), in connection with improper subpoenas and discovery served upon him and a member of his staff in this matter and in an unrelated civil action pending in Darlington County, *Pee Dee Health Care P.A. v. Estate of Hugh S. Thompson*, Case No. 2010-CP-16-0332 (the Darlington case)². The motion is granted based upon the findings of fact set forth below.

Stated succinctly, the reason that this Court had to consolidate sanctions motions hearings in two separate and unrelated cases pending in two different circuits is because of Megna's

¹ Truslow's motion is dated March 9, 2012.

² This Court had previously issued several orders in the Darlington action. The instant case was pending in Richland County; Chief Administrative Judge James R. Barber assigned this Court to hear both motions. Hearing was held in Darlington on May 15, 2012.

actions that this Court finds to be gross civility and professionalism violations. Having been disqualified as counsel because he was a material witness in *Thompson*, Megna continued to serve discovery under his signature in that case in violation of this Court's Order, which this Court had to quash; thereafter, Megna again served similar and additional discovery, this time under the auspices of the *Anasti* case in Richland, a case that had nothing to do with the discovery requests, and which by that time was concluded as to his client. Moreover, the discovery was not meritorious as to any case-related issues, but propounded solely to vex the recipients.

FINDINGS OF FACT³

- 
1. This Richland case was filed by Plaintiff James A. Anasti (Anasti), through his counsel Truslow, to declare Anasti's ownership of real property at 2325 Two Notch Road in Columbia, and for an accounting for money allegedly due to Anasti from Defendant Gina Anasti Lee (Lee) and other defendants. Megna appeared as counsel for Lee in this action.
 2. Summary judgment on the merits was granted to Anasti on October 26, 2007, with a damages hearing against Lee and others to follow. That damages hearing has yet to be held. Instead, Megna began a series of appeals that has lasted four (4) years (with two remands to the circuit court) in both the South Carolina Court of Appeals and Supreme Court. These appeals finally concluded with the Supreme Court's denial of Megna's petition for certiorari on October 28, 2011.

³ The findings of fact are made from this Court's detailed review of the Clerk of Court's files in both this case and the Darlington county case. Both files were made available to this Court prior to a motions hearing held in this matter on May 15, 2012.

3. Neither of the appellate courts addressed the merits of this action. The appeals were dismissed because of Megna's repeated failures to comply with deadlines set forth in both the South Carolina Rules of Civil Procedure (SCRCP) and the appellate court rules (SCACR).
4. Prior to Megna's first appeal, Truslow filed a Rule 11 sanctions motion against Lee and Megna on November 7, 2007. That motion has not been heard and is not addressed in this Order; however, the pendency of that additional sanctions motion is relevant, as discussed later herein.
5. By the time the appellate proceedings in this case concluded, Lee had been discharged in bankruptcy⁴ and, consequently, absolved from any risk of a money judgment in this suit. After that time, any and all pleadings filed or discovery served by Megna, ostensibly on Lee's behalf, were undertaken solely by Megna for his own benefit, to defend Truslow's pending Rule 11 sanctions motion.
6. During the appellate proceedings, the case was remanded by the Court of Appeals to Circuit Judge L. Casey Manning on two (2) occasions to determine whether Megna's representations regarding the timeliness of his filings and receipt of notice by him were credible and accurate.
7. On both remands, Judge Manning found that Megna's various explanations to the courts as to when he received documents and when he received notice were "not

In re: Gina Anasti Lee, Case No. 09-02854-jw (United States Bankruptcy Court, District of South Carolina). An order was issued by United States Bankruptcy Judge John Waites on November 9, 2009 for the purpose of lifting the stay to allow these state court proceedings to continue. Judge Waites' order was based, at least in part, on Anasti's representation that he would not seek any financial recovery against Lee. *Id.* (Docket No. 34 at page 6). Thus, it was clear as early as November 9, 2009 that the only issue which remained pending as to these parties was Anasti's November 7, 2007 motion for Rule 11 sanctions. Because of Lee's bankruptcy, Anasti's Motion for Rule 11 sanctions was pending only against Megna and not his client Lee. Lee was discharged in bankruptcy on April 16, 2010.

credible" and that he had made material misrepresentations of fact to the courts.

Order dated April 3, 2008." *Id.* at ¶ 13; Order date-stamped April 1, 2009.

8. Following the conclusion of the state court appellate proceedings, Truslow requested a status conference so that, *inter alia*, Anasti's Rule 11 motion against Megna could be scheduled. A status conference was held on the record on January 18, 2012. At the status conference, Megna acknowledged and confirmed that Lee's involvement in the case had ended and Rule 11 sanctions were being sought against him only⁵.

9. In February of 2012, under the caption of this case but indicating issuance from Darlington County, Megna served⁶ a subpoena on Truslow to take his deposition and that of attorney Steve Licata (who represented Anasti in the bankruptcy matters) as well as Truslow's assistant, Amanda Hilley. He also served discovery requests upon Truslow which asked for a broad range of materials related to Truslow's communication with a number of lawyers⁷ in the State, none of which have anything to do with this case.

10. Like the earlier subpoena served on attorney Desa Ballard (Ballard) in the Darlington county case (see separate sanctions order issued simultaneously in Darlington Case No. 2010-CP-16-0332 for additional sanctions arising from this conduct), the

⁵ On February 24, 2012, the Richland County Clerk of Court set Anasti's damages hearing against other defendants for March 12, 2012. That hearing was apparently not held, presumably because this sanctions motion was pending, although the two issues (damages against other defendants and sanctions against Megna) are unrelated.

⁶ "Service" was made by email to Mr. Truslow, with a mailed copy sent to Mr. Truslow at 944 Richland Street, Suite 4, Columbia, which is not now nor ever has been Mr. Truslow's address. It appears that throughout this litigation, in both the circuit and appellate courts, Mr. Megna has forwarded mail to Mr. Truslow at incorrect or non-existent addresses, causing great confusion in the progress of the case.

⁷ Jay James, J. René Josey, Kenneth Woodington, Steve Licata, Andy Savage, Caroline Streater, Celeste Jones, Ashley Stratton, any lawyers in the McNair Law Firm or their agents, any lawyers in Turner Padgett Law Firm or their agents, Thomas Earle, and Curtis Dowling.

discovery sought production of communications between Truslow and lawyers who Megna believed to be adverse to him in matters unrelated to this case.

11. Megna's former client in this case, Lee, has submitted an affidavit indicating she did not authorize the discovery by Megna, was not aware of it, and did not approve it. She indicated that Megna was no longer her lawyer at the time the discovery was served on Truslow.

12. By the time Megna served the subpoenas and propounded discovery to Truslow, the merits of this matter had been long decided (summary judgment had been granted to Anasti in October, 2007). Anasti had waived any damages or sanctions claims against Lee. All that remained to be adjudicated in this matter (as far as Megna was concerned) was Anasti's Rule 11 motion against Megna. As indicated above, Megna had also been disqualified as counsel in the Darlington case.

13. On March 9, 2012, Truslow filed the pending Motion to Quash and for other relief, including sanctions against Megna, in connection with the discovery.

14. Megna e-mailed this Court an unsolicited letter and 54-page "Synopsis" on March 19, 2012. The "Synopsis" contained the caption of this case, as well as the Darlington county case.

15. In the "Synopsis," Megna asserted that the Court of Appeals had previously and "unanimously denied" Truslow's March 9, 2012 motion. In addition, Megna leveled a number of claims of professional misconduct on the part of a number of attorneys, including Ballard, whose own motion for sanctions was pending in the Darlington action.

16. Truslow provided the Court with voluminous evidence refuting the allegations contained in Megna's "synopsis." This included Truslow's affidavit with detailed time records, the affidavit of former client Gina Lee, an affidavit of a legal assistant in Truslow's office, an affidavit of Ballard verifying that the fees sought by Truslow were reasonable in light of the issues raised by Megna, memoranda, and other documents.
17. Truslow asked that the Court take judicial notice of the Clerk of Court's files in the Thompson case in Darlington and relevant appeals; the "Florence cases" (Lake City Community Hospital, et al. v. Tony Megna, Benjamin R. Matthews, et al., 2008-CP-21-706); Matthews, Megna, et al. v. Celeste Jones, Leroy Nettles, et al., 2011-CP-21-841); the "companion" cases; and, Lee's bankruptcy case.
18. Megna neither objected, nor filed any counter-affidavits at the hearing on both motions, and his counsel handed up a memorandum with numerous attachments.
19. This Court has taken judicial notice of and considered the various records on file with the respective Clerks of Court, and has considered the other voluminous documentation referenced.
20. Much of the materials and argument asserted by Megna, to which Truslow necessarily responded and which this Court reviewed and considered, is completely irrelevant to the issues of the pending motion for sanctions. The Court has had to sift through mountains of materials as a result of Megna's efforts to dissuade this Court from looking at the merits of the issue actually presented. Unfortunately, the irrelevance could not be determined by the Court until all of the material was

reviewed. An immense amount of judicial time has been required to review these matters, only to discover that most of it was unnecessary.

21. The arguments in Megna's "Synopsis" are fragmented and illogical, but fervently presented; however, they are wholly without merit. The Court of Appeals has never considered sanctions with respect to Megna's service of discovery upon Truslow. Megna's other arguments can be summed up as follows: Megna does not like Truslow and/or Anasti and has hurled multiple accusations against them in an effort to deflect the Court from Megna's own misconduct. None of Megna's accusations have merit.
22. The Court notes that Megna has not heeded previous admonitions about his conduct. In his Orders on remand (April 3, 2008 and April 1, 2009) in this case, Judge Manning found that Megna had made "repeated and gross misrepresentations" to the Court, and he had made "unwarranted, unjustified and untrue attacks on opposing counsel." That has continued. This Court intends to stop it now.
23. Megna has willfully, deliberately, and unapologetically attempted to misuse the legal process through both this case and the Darlington case (as more specifically described in the order issued this date in *Thompson*). He has engaged in such misconduct for ulterior purposes in seeking to defend his own personal interests in this case.
24. Megna's conduct is willful and deliberate. In both his "Synopsis" and the memorandum, he continued to hurl fabricated allegations of misconduct upon Ballard, Truslow, and multiple others he considers to be adverse to him.
25. A substantial component of Megna's conduct is his uncompromised assertion that everyone else is wrong, everyone else is unethical, and he is blameless. This Court

would be faced with an entirely different scenario if Megna had at any time admitted his misconduct and shown remorse to any degree, or had he apologized for his continuous affronts upon the Court and his colleagues.

26. The lack of respect Megna has shown for this Court, the legal process, and the purposes of these legal proceedings is unprecedented for this Court.

27. Even viewed separately from Megna's conduct in the Darlington County case, Megna's conduct is ill-conceived, vitriolic, and abusive. When the evidence from both cases is viewed together, Megna's conduct is alarming and disturbing. He has engaged in a concerted effort to abuse the legal process in both cases for his own purposes, abusing this Court, his colleagues, and adverse parties in the process.

28. Megna's conduct in this case cannot be justified, nor condoned. The Court has both actual and inherent authority to address these matters, to preserve the integrity of the court system, to ensure respect for Court Orders and Court rules, and to protect litigants and counsel from further abusive conduct. Megna's conduct clearly violates the SCRPC, and Rule 11 provides ample authority for the Court to impose sanctions.

Ex Parte: Bon Secours and St. Francis Xavier Hospital Inc., 393 S.C. 590, 713 S.E.2d 624 (2011).

30. Truslow has requested, by way of Rule 11 sanctions, an award for the time and expenses he incurred in responding to Megna's efforts at improper discovery. I find and conclude that Truslow did in fact expend the amount of time set forth in his fee and cost affidavit. The hours of legal time expended were both reasonable and necessary under the circumstances, given Megna's conduct.

31. The matter before this Court was made exceedingly difficult and contentious by Megna. His claims were convoluted and, though without any merit, were serious and have been time-consuming to address. The time expended by Truslow, as well as the basis for its expenditure, was well documented and confirmed independently.

32. Truslow's requested fees are reasonable, designed merely to compensate, and are justified. No loadstar multiplier has been utilized by this Court. Truslow is entitled to an award of fees and costs against Megna in the amount of \$31,547.25, plus \$295.14 in costs (for a total of \$31,842.39), as set forth in his detailed affidavit and time sheets.

33. The award of fees and costs herein are a sanction (and hence considered to be non-dischargeable except by payment), as well as a civil money judgment so as to carry interest at the legal judgment rate. Thus, the Clerk of Court is instructed to enroll this sum as a civil judgment against Megna in favor of Truslow.

34. It is an unfortunate circumstance when the Court must induce someone to be civil, but it is an entirely different matter when a licensed professional such as Megna so seriously misuses the procedural processes and legal mechanisms of this Court in such an abusive manner, with an ulterior motive, and repeatedly in violation of previous Court Order(s).

CRIMINAL CONTEMPT CITATION AGAINST MR. MEGNA, SUA SPONTE

35. In presiding over these matters, this Court has undertaken a full review of the pleadings, discovery, previous Court Orders, correspondence, memoranda, and emails from Attorney Megna in both cases, together with review of applicable attorney oaths and disciplinary rules, as well as an analysis of prevailing law and Supreme Court decisions involving attorney

conduct. As indicated in the language of this Order, this Court is concerned that the conduct of Attorney Megna reveals a continuous pattern of violations of the civility and professionalism requirements of South Carolina's attorney oath with respect to members of the Bar, consistently uses language that is accusatory and demeaning directed at opposing counsel, includes inappropriate references to the judiciary, and contains unwarranted criticisms of other professionals, parties, and witnesses. Moreover, this Court finds that Attorney Megna's actions have resulted in the tremendous unnecessary consumption of attorney time, excessive and unnecessary costs to litigants, and the significant waste of judicial resources and public funds required to operate the Court system.

Jan 10
Because of the willful misconduct set forth throughout the body of the factual findings herein and the factual findings in the Darlington County case set forth by Order issued this same date, the Court has determined to conduct a hearing to require Mr. Megna to show cause why he should not be held in criminal contempt of this Court for intentionally and willfully violating a Court Order. Mr. Megna is hereby advised that he has the right to counsel during such hearing, and shall be given an opportunity to present arguments to the Court. Mr. Megna is hereby specifically advised that a finding of criminal contempt by this Court may subject him up to six (6) months' imprisonment therefor, in addition to other sanctions. This Show Cause and Sanctions hearing is hereby set for March 18, 2013, beginning at 2:00 p.m., after the call of the regular non-jury roster for that day, in the fifth floor courtroom of the Darlington County Courthouse. Service of this Order upon Attorney Megna and his counsel shall constitute service of the Notice of Contempt hearing upon Mr. Megna.

SERVICE OF ORDERS ON OFFICE OF DISCIPLINARY COUNSEL,

SUA SPONTE

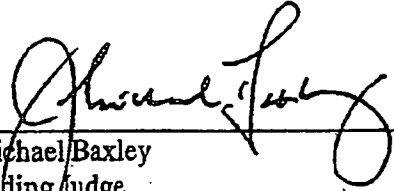
36. Under these circumstances, the reasons required for Megna to self-report this Order are self-evident. Megna is and shall be required to report (service by certified mail) this Order and the concomitant sanctions to Lesley M. Coggiola, Director of Office of Disciplinary Counsel (Post Office Box 12159, Columbia, South Carolina, 29211); together with an explanatory transmittal cover letter, within thirty (30) days of service of this Order upon him. Megna's report is to include at a minimum a copy of the Orders of the Honorable L. Casey Manning issued on April 3, 2008 and April 1, 2009, as well as the within Order. Megna shall enumerate in detail the documents being served/delivered, together with the signed return receipt or affidavit of service within the same time frame. Proof of service shall be required by Megna to be filed with the Richland County Clerk of Court in this matter and with the Darlington County Clerk of Court in Thompson.

 NOW, THEREFORE IT IS ORDERED:

1. Plaintiff's March 9, 2012 motion is granted.
2. This Order shall be filed in such a manner as to make clear to the respective Clerks of Court in Richland and Darlington Counties that the Court has issued a related Order in Thompson (10-CP-16-0332), as well as in this case.
3. Sanctions are imposed upon Tony Megna personally as outlined hereinabove to include:
 - a. Megna shall be and is required to pay Plaintiff's Counsel the sum of \$31,842.39 within thirty (30) days, and the Clerk shall issue a civil judgment therefor.

- b. Said sums shall be and are to be deemed a non-dischargeable, legal judgment, accruing interest at the legal judgment rate.
4. Megna shall self-report to the Office of Disciplinary Counsel.
- a. His report shall include this Order, as well as Judge Manning's orders dated April 3, 2008 and April 1, 2009.
 - b. Megna shall enumerate in detail the documents being submitted to ODC by certified mail, return receipt requested.
 - c. He shall then file same with the respective Clerks of Court in Richland and Darlington Counties.
 - d. Furthermore, he shall copy respective Counsel in his filings with the Clerks of Court.
 - e. Megna shall be and is required to take this action within thirty (30) days of service of the within Order.
 - f. Megna shall appear at a Criminal Contempt Show Cause Hearing at the Darlington County Courthouse on March 18, 2013.
5. Parallel sanctions are being imposed in Thompson (10-CP-16-0332) pending in Darlington County.
6. Because of the numerous occasions on which Megna has denied receipt of service of an Order or other papers, counsel shall make arrangements for personal service of a copy of this Order upon Megna, unless Megna personally (not through counsel) consents to accept service in some other fashion and executes a written acceptance of service to that effect.

IT IS SO ORDERED.



J. Michael Baxley
Presiding Judge
Fourth and Fifth Judicial Circuits

Hartsville, South Carolina
February 11, 2013

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332

CONSOLIDATED APPEALS

(Tracking number 2011185767)(1st Appeal)
(Tracking Number 2011203391) (3rd Appeal)
(Tracking Number 2011197671)(2nd Appeal)

Pee Dee Health Care, P.A. Appellant,
v.
Estate of Hugh S. Thompson Respondent.

PROOF OF SERVICE

I certify that I have served a copy of the Motion for Appellate Court Sanctions by depositing copies of the same in the United States mail, postage prepaid, on September 6, 2013, to all counsel of record at the following addresses:

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ATTORNEYS FOR RESPONDENT

STATE OF SOUTH CAROLINA
COUNTY OF DARLINGTON

Pee Dee Health Care, P.A.,

Plaintiff,

v.

Estate of Hugh S. Thompson,

Defendant.

IN THE COURT OF COMMON PLEAS
C/A # 2010-CP-16-0332

**ORDER OF SUMMARY JUDGMENT IN
FAVOR OF DEFENDANT**
(Ending Case)

Jas This matter is before the Court on cross-motions of the parties for summary judgment. The Plaintiff filed its motion for summary judgment on December 9, 2010, based upon admissions made by Defendant in its Answer. The Defendant filed its counter motion for summary judgment on May 20, 2011. The Defendant's motion is based upon the Plaintiff's alleged fault in causing the debt sued upon by the complaint and the alleged dispositive nature of that fault with regard to all of Plaintiff's causes of action. While some factual issues not pertinent to this decision might remain in dispute, the Defendant asserts that dispositive adjudication of fault by the Plaintiff has been resolved in an appropriate forum and is binding upon the Plaintiff here as to the entire case.

Both motions have been extensively briefed by the parties, in memoranda filed with the Court, and in letters – also filed with the Court or made part of the record by attachment to other filed memoranda. After this extensive briefing, the matter was set for hearing in Darlington on July 19, 2011. At this hearing, the Court allowed the Plaintiff's preferred counsel to argue the motions for summary judgment despite his general disqualification as counsel ordered by the

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Scott B. Suggs
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DARLINGTON COUNTY, S.C.

Court earlier in the matter¹; this was done to eliminate any alleged prejudice or disadvantage with regard to the summary judgment motion presentation.

After consideration of all of the record including: the pleadings, motions, exhibits, filed letters, and argument, the Court finds that summary judgment for the Defendant is appropriate. This determination is based upon the findings of fact and conclusions of law as outlined below.

PROCEDURAL STATUS OF CASE

Because the Plaintiff has raised an objection to the Court's present jurisdiction to enter this Order, a brief review of the history of this matter is instructive. This matter, before this Court upon removal from the Probate Court of Darlington County, has been hotly contested, and the parties have been before this Court on multiple issues. As stated above, upon motion of Defendant after full argument and briefing, this Court issued an Order dated April 15, 2011 disqualifying Plaintiff's counsel Tony R. Megna. Attorney Megna then moved to reconsider this decision, taking the position, *inter alia*, that the Plaintiff would be unduly prejudiced by attorney Megna not being allowed to argue the summary judgment motions that were pending. The Court took this reconsideration motion under advisement and stayed its Order disqualifying counsel, and then permitted counsel to argue the reconsideration motion on July 19, 2011, the same day that the summary judgment motions were argued, so that Plaintiff would have the benefit of Mr. Megna's representation at summary judgment arguments. At the end of the hearings, the Court then took all matters under advisement.

By Order dated August, 12, 2011, this Court denied Plaintiff's motion to reconsider the Order disqualifying counsel. On that same date, the Court issued a letter addressed to counsel advising that the Court was persuaded that Summary judgment was appropriate in this case on

¹ Plaintiff's initial counsel Tony R. Megna also serves as CEO of Plaintiff and this Court has found him to be a necessary witness in the matter.

behalf of the Defendants, and directing defense counsel to prepare a proposed order to that effect.

On August 15, 2011, Plaintiff filed a notice of Intent to Appeal the final decision disqualifying counsel. Plaintiff's counsel further argues that this appeal operates as a Stay for all proceedings in the case. This Court disagrees. Both Rules 205 and 241(a), SCRAP, provide that the trial court has continuing jurisdiction of case issues not affected by the pending appeal. Clearly, the disqualification of counsel issue does not impact the merits of the case addressed by summary judgment. Moreover, this Court believes that considerations of appellate judicial economy are best served by the rendering of this decision at the present time.

FINDINGS OF FACT

 (1) Hugh S. Thompson, Jr. (Decedent) died on November 5, 2009, as a resident of Darlington County. His Will dated June 26, 2008, was admitted to probate by the Darlington County Probate Court on November 11, 2009, and his children Louise T. Dailey and Hugh S. Thompson, III, were nominated by the Will as Personal Representatives and were duly appointed by the Probate Court.

(2) On April 14, 2010, Pee Dee Health Care, P.A. (PDHC) filed a claim against the estate to recover reimbursement for losses allegedly occasioned by the actions of the Decedent (a medical doctor) during his period of practice with PDHC during the years 1998-2000. The estate disallowed the claim on May 7, 2010. Subsequently PDHC filed an amended claim and Summons and Complaint in the Probate Court and petitioned for removal of this action to the Court of Common Pleas pursuant to S.C. Code Ann. §62-1-302(d)(2009). Respondent filed an Answer and the case is now before the Circuit Court on cross-motions for summary judgment.

(3) Prior to commencing employment as a physician with PDHC, Decedent's medical license had been suspended in 1994 by the South Carolina Board of Medical Examiners. As a consequence of this action, Decedent was "debarred" by the Medicare Office of the Inspector General. While Decedent regained his license to practice medicine in April 1998, he did not seek reinstatement from the Medicare Office of Inspector General until 2002.²

(4) Decedent was employed by PDHC for approximately two years, from late 1998 to sometime in 2000. Prior to employing Decedent, PDHC had Decedent sign a Medicare form re-assigning to PDHC Medicare payments arising out of Decedent's service to Medicare patients as an employee-physician.³ After leaving the employment of PDHC, Decedent was employed by First Choice Healthcare, a medical practice in Florence, South Carolina.

Job 4
(5) In June 2007, PDHC was notified by Medicare that it owed Medicare more than \$200,000.00 by reason of "overpayments" to PDHC made with respect to Decedent's services before he was reinstated by the Medicare Office of Inspector General.⁴ PDHC opposed this Medicare overpayment claim through multiple levels of administrative appeals.

(6) In a matter fully litigated by PDHC, Federal Administrative Law Judge Dean C. Metry found that PDHC "is reasonably expected to know and has an affirmative duty to know the exclusion status of its employees through due diligence prior to entering the employment relationship." Moreover, Judge Metry found that PDHC "knew that Dr. Thompson's license was suspended indefinitely and that he received a conditional reinstatement after four years." The

² Upon resuming the practice of medicine, Decedent was given a Medicare "provider" number by PGBA, the Medicare contractor for South Carolina. He did not seek reinstatement with the Medicare OIG until 2002, and therefore was not on the Medicare-approved list of providers (even though he had been given a provider number).

³ Thus, PDHC was able to receive from Medicare payments arising out of Decedent's services on behalf of Medicare patients.

⁴ First Choice Healthcare received a similar notice and independently of PDHC litigated a completely favorable outcome within the Medicare administrative appeals system.

Judge further noted that PDHC's applications for Medicare payments for Dr. Thompson's services "inquired about any exclusions or sanctions" and that Dr. Thompson's exclusion "could easily have been found by calling the Office of Inspector General or visiting their website which lists excluded individuals..." Accordingly, Judge Metry concluded that PDHC was "at fault regarding the overpayment."⁵ On October 6, 2008, the Medicare Appeals Council upheld the finding of Judge Metry that PDHC "failed to exercise due diligence in determining the physician's exclusion status during the hiring process and when completing federal application forms, including a review of excluded individuals listed on the website of the Office of Inspector General (OIG)."

(7) Eighteen months after the final decision of the Medicare Appeals Council, and after the death of Defendant Dr. Thompson, who would have been a pivotal witness as to what representations passed between the parties as to Dr. Thompson's Medicare provider eligibility, this claim was brought in the Probate Court.

CONCLUSIONS OF LAW

(A) Summary Judgment Standard.

Rule 56(c) of the South Carolina Rules of Civil Procedure provides: "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories; and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Summary Judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001);

⁵ Decision of Administrative Law Judge Dean Metry dated March 14, 2008.

Baughman v. American Telephone & Telegraph Co., 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991).

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). While the court must view the evidence in the light most favorable to the nonmoving party, the Plaintiff cannot defeat Summary Judgment by relying on mere allegations in its Complaint. Rule 56(e), SCRPC; Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994).

Instead, the Plaintiff must set forth specific facts showing there is a genuine issue of material fact. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994). The trial judge is not required to single out some small piece of evidence and attach to it a great significance when that evidence is introduced solely to create an issue of fact that is not genuine. Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)(Court is not "required to single out some one morsel of evidence . . . to create an issue of fact that is not genuine.")). In other words, the Plaintiff must present more than a mere scintilla of evidence to overcome a Defendant's Motion for Summary Judgment. Thomas v. Waters, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994).

Where a defendant establishes an entitlement to judgment as a matter of law, the court must grant Summary Judgment. Humana Hospital-Bayside v. Lightle, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991); Dyer v. Moss, 284 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985). The purpose of Summary Judgment is to expedite the disposition of cases not requiring the services of a fact finder. George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

(B) The Legal Nature of Plaintiff's Claims.

The crux of the PDHC complaint is that Decedent did not disclose information to PDHC or gave wrong information to PDHC. While PDHC asserted multiple causes of action in its Complaint,⁶ all claims derive from a core set of factual claims. While some tangential facts may yet be disputed, sufficient core facts have been legally determined and they are dispositive.

(C) The Plaintiff Must Be Without Fault.

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Embodied within all of PDHC's causes of action is the requirement that PDHC be without fault. In this State, there is no right to rely in an arm's length relationship between mature, educated people and our courts have found "this is especially true when one should have utilized precaution and protection to safeguard his interests." Ardis v. Cox, 314 S.C. 512, 431 S.E.2d 267 (1993) (sale of underground gasoline tanks) (citing Poco-Grande Investments v. C & S Family Credit, Inc., 301 S.C. 322, 391 S.E.2d 735 (Ct. App. 1990); See also Jones v. Cooper, 234 S.C. 477, 109 S.E.2d 5 (1959) (sale of hotdog cooking machine); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (no negligence, no fiduciary duty, no conversion of pledged assets where guarantor fails to read/understand guaranty obligations to bank). "One cannot rely on the misstatement of fact if the truth is easily within his reach." Jones v. Cooper, 234 S.C. at 488, 109 S.E.2d at 11 (citing Mobley v. Quattlebaum, 101 S.C. 221, 85 S.E. 585 (1915); Whitman v. Seaboard Airline Ry Co., 107 S.C. 200, 92 S.E. 861 (1917); Flowers v. Price 190 S.C. 392, 3 S.E.2d 38 (1939). Indeed, there can be no liability for "matters which Plaintiff could ascertain on his own in the exercise of due diligence." Quail Hill, LLC v.

⁶ In all there were twenty causes of action: (i) breach of fiduciary duty; (ii) negligent misrepresentation; (iii) breach of duty of loyalty to employer; (iv) negligence; (v) breach of contract; (vi) breach of contract accompanied by a fraudulent act; (vii) interference with contractual relations; (viii) fraud and misrepresentation; (ix) failure to disclose; (x) deliberate concealment; (xi) professional malpractice accompanied by fraud, misrepresentation, and negligence; (xii) money had and received; (xiii) promissory estoppel; (xiv) quantum merit; (xv) constructive fraud and constructive trust; (xvi) constructive fraud without scienter; (xvii) equitable indemnity; (xviii) conversion; (xix) equitable restitution; and (xx) civil conspiracy.

County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010) (citing AMA Mgt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). "One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled." Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432, 446 (quoting Southern Development Land & Golf Co., v. South Carolina Public Service Authority, 311 S.C. 29, 426 S.E.2d 748, 751 (1993).

As noted in the case law cited above, direct claims of negligence and other breaches of duty found in Causes of Action 1, 2, 3, 4, and 11 require PDHC to show its justifiable reliance on the Decedent's representations or omissions.⁷ Claims of fraud, found in Causes of Action 8, 9, 10, 15, and 16 require PDHC to show a right to rely on the representation or omission allegedly made by Decedent.⁸ PDHC's Cause of Action 13, promissory estoppel, also requires reasonable reliance.⁹ Powers Construction Co., Inc. v. Salem Carpets, Inc., 283 S.C. 302, 322 S.E.2d 30 (Ct. App. 1984).

Claims governed by equity, found in Causes of Action 12, 14, 17, and 19, require PDHC to have clean hands or its own lack of fault.¹⁰ "The 'unclean hands' doctrine closes the door of a court of equity to one tainted with inequity or bad faith in relation to the matter in which

⁷ Of course, multiple causes of action based on the same theory of liability are fairly treated as subsumed into a single cause of action. Accord Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010). ("Although pled separately, we find Quail Hill's claim for negligence is essentially subsumed in the negligent misrepresentation cause of action.")

⁸ The absence of the justifiable reliance element above is enough to defeat the claim of fraud. O'Shield v. Southern Fountain Mobile Homes, Inc., 262 S.C. 276, 204 S.E.2d (50) (1974).

⁹ Moreover, promissory estoppel must be based on unambiguous promise—not silence or an omission. Woods v. State, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993).

¹⁰ Both the action for Money Had and Received and Quantum Merit are governed by equitable principles although they are actions at law. See Myrtle Beach Hosp. v. City of Myrtle Beach, 341, S.C. 1, 532 S.E.2d 868 (2000); Bennettville v. Bledsoe, 226 S.C. 214, 845 S.E.2d 554 (1954); McDonald's Corp. v. Moore, 237 F. Supp. 874 (D.S.C. 1965). These claims are, of course, inconsistent with PDHC's contract based claims.

he seeks relief, however improper may have been the behavior of the Defendant." ABF Freight System, Inc. v. N.L.R.B., 510 U.S. 317 1994 (quoting Precision Instruments Mfg. Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814 (1945); see also National Bank of Savannah v. All, 260 F. 370 (4th Cir. 1919) (applying South Carolina law)(Plaintiff is equally guilty with Defendant and comes into Court with unclean hands; under the circumstances a court of equity will not permit Plaintiff to take advantage of her own wrong.). The case of Fowler v. Hunter, 388 S.C. 355, 697 S.E.2d 531 (2010), holds that an equitable indemnitee (as PDHC proposes itself to be) must demonstrate that it was without fault or liability for the damages it seeks.

(D) The Previous Fault Adjudication Binds Plaintiff in This Case.

As noted above, all of Plaintiff's claims derive from a core set of factual claims – and preclusive facts have been adjudicated with finality by federal administrative decisions. These adjudications have determined that PDHC's losses were its own fault, arising out of its own failure to undertake the basic due diligence required of all medical practices planning to accept Medicare payments. Stated differently, PDHC was not entitled to rely on any misstatements or omissions of Decedent with regard to his Medicare status.¹¹

In this case, PDHC has already unsuccessfully litigated to finality the issue of its causative fault through the federal administrative appeals process. The conclusions of Judge Metry and the Medicare Appeals Council are binding upon PDHC in this matter pursuant to the doctrine of non-mutual offensive collateral estoppel.

The doctrine of non-mutual offensive collateral estoppel was initially adopted in this state by the Court of Appeals in Beall v. Doe, 281 S.C. 363, 315 S.E.2d 186 (Ct. App. 1984).

¹¹ Indeed, had PDHC checked the Medicare OIG website or called the OIG office, Decedent's status could have been determined. At that point, he could have been reinstated (as he easily was in 2002) or employment could have been denied. In either case, PDHC would not have suffered any loss.

Subsequently, the Supreme Court of South Carolina confirmed non-mutual offensive collateral estoppel as the law of this state, in Prop. and Cas. Ins. Guar. Assn. v. Wal-Mart Stores, Inc., 304 S.C. 210, 403 S.E.2d 625 (1991). Pursuant to this doctrine, a party is barred from re-litigating issues determined in a prior action so long as it had a full and fair opportunity to litigate the issues in the first action and nothing justifies an opportunity to retry the issues. Beall v. Doe, *supra*; Roberts v. Recovery Bur., Inc., 316 S.C. 492, 450 S.E.2d 616 (Ct. App. 1994) (citing McPherson v. South Carolina Department of Highways and Pub. Transp., 297 S.C. 303, 376 S.E.2d 780 (Ct. App. 1989)).

Here, PDHC had a full and fair opportunity to litigate the issue of its fault and there is no reason to allow it to be re-litigated in this collateral action. See also Middleborough v. Montedison USA, Inc., 320 S.C. 470, 465 S.E.2d 765 (Ct. App. 1995) (affirming Trial Court's partial Summary Judgment against PVC manufacturer on issues of agency and defectiveness where those issues had been previously litigated by manufacturer in Minnesota). PDHC's argument that collateral estoppel should not apply because a different litigant (First Choice) achieved a different result in presumably similar litigation is unpersuasive; it is the full and fair litigation opportunity of PDHC that controls their legal position now – not the opportunity and result of a third party. There is no exception to the doctrine of collateral estoppel for cases where a different result was achieved in similar litigation by a third party.¹²

PDHC also suggests that summary judgment is not appropriate because of the lack of additional discovery in the case. Additional discovery is not needed in this case, however, to

¹² Plaintiff has suggested the existence of a duty of the Decedent to keep the Plaintiff informed of legal steps and procedures taken by a third party (First Choice) in litigation where the Plaintiff was not a party. This alleged duty is not the basis of any pleaded claim in the plaintiff's complaint and the Plaintiff offers no legal authority supporting the existence of such a duty. This Court finds no reason to imply or impose such a duty – particularly with a sophisticated employer like the Plaintiff. Moreover, the record made by Plaintiff confirms that it made contact directly with that third-party and its counsel – confirming that these professional medical practice administrators did not need the Decedent to attempt voluntary collaboration with other parties similarly situated.

determine the preclusive effect of the Plaintiff's prior litigation. Plaintiff has failed to identify any discovery that might alter the applicability of the Medicare administrative determination. Plaintiff suggest that it would like to depose the Decedent's children perhaps to expose additional facts relevant to the Decedent's alleged misrepresentations or omissions – but such discovery would not alter the finding that the Plaintiff had a statutory duty of due diligence such that it could not rely upon the Decedent, regardless of any misrepresentation or omission. Thus, the Court is convinced that additional discovery is not needed, and would be unjust to permit.

(E) South Carolina Common Law Precludes Plaintiff's Reliance on Decedent.

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This case is indistinguishable from last year's South Carolina Supreme Court decision in Quail Hill. In that case, the Supreme Court reversed the Court of Appeals decision and affirmed the Trial Court's Order of Summary Judgment against a property purchaser's claims of estoppel and misrepresentation arising from the County's employee's issuance of erroneous zoning information where the property's true zoning classification could have been determined by due diligence in reviewing public records. Just as the information was publicly available in Quail Hill, the OIG exclusion status of Decedent was only a phone call or mouse click away. Moreover, in Quail Hill, the purchaser could not blame the County despite affirmative misstatements by County employees. The case at bar is even less supportive of liability since PDHC cannot point to any affirmative misstatements made to it by Decedent.

(F) There Is No Fiduciary Duty Involved In This Case.

In order to avoid the consequences of its own causative fault, PDHC has also sought to impose an affirmative duty of disclosure on the Decedent by alleging that his status as a physician-employee made him into a fiduciary with respect to PDHC. PDHC has cited no

authority in support of this notion and the Court rejects it.¹³ There is no evidence to support a conclusion that Decedent's relationship with PDHC was anything other than a normal employer-employee relationship.

Decedent's special duties as a physician, if any, were to his patients—not to a sophisticated medical employer with at least seventy-five employees, including other credentialed employees. Despite PDHC's unilateral efforts to assert a fiduciary relationship now, "as a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed in him." Regions Bank v. Schmauch, *supra*. (No fiduciary relationship between a bank and its customer exists when the bank is unaware of any special trust imposed in it.) Here, there is no evidence that PDHC placed any special trust in Decedent with regard to credentialing or that he was aware of any special trust beyond his duties as a physician-employee.

JS
12 Finally, as this Court has also concluded, regardless of the level of duty owed by Decedent Thompson to PDHC, the Decedent's duty of disclosure or prudence (if any) cannot be relied upon to support any of Plaintiff's claims when federal law imposes an unequivocal duty of diligence and discovery upon PDHC and provides unfettered independent access to the true facts. As a matter of law, Plaintiff has been found to have such an unequivocal duty and found to have such unfettered independent access to the truth.

(G) Contract Claims Involve The Same Duties & Same Reliance Requirement.

PDHC's breach of contract claims, Causes of Action 5 and 6, depend upon the alleged breach of implied employment duties (good faith, honesty, loyalty, and fair dealing)—they are

¹³ PDHC cited the case of State v. Parris, 353 S.C. 582, 578 S.E.2d 736 (Ct. App. 2003) for the proposition that all employer-employee relationships have been deemed fiduciary in all contexts as a matter of law. This case was overruled on appeal, 363 S.C. 477, 611 S.E.2d 501 (2005) and the case did not involve an employer-employee relationship at all.

not based upon any expressed contractual provision. Thus, in the context of this case, these implied employment duties are the same as the tort duties. Accordingly, these claims also require justified reliance. Indeed, in its sixth cause of action (breach of contract accompanied by a fraudulent act), PDHC alleges a right to rely. Having concluded, as a matter of law, that there is no right of PDHC to rely upon Decedent Thompson, these claims must also fail.

(H) Employment Contract Claims Also Untimely and Not Causative.

Despite the context, PDHC seems to suggest that justifiable reliance or clean hands are not elements of an employment contract cause of action. As Defendant noted at the hearing on these matters, even if a presumed failure of the Decedent to disclose his Medicare status in 1998 constituted a breach of contract, PDHC is still charged with knowledge of that breach back in 1998 – as a matter of adjudicated law -- when they should have determined Decedent's status in 1998 by checking with Medicare OIG. As such, PDHC's contract claim would be barred by the three-year statute of limitations for contract actions, S.C. Code Ann. §15-3-530. Moreover, even if a breach of contract claim were somehow timely, this breach would not have been the proximate cause of PDHC's damages when it had adjudicated knowledge (i.e., it should have known) that would have allowed these damages to have been completely mitigated.

(I) Contractual Interference, Conversion, And Conspiracy Do Not Apply.

Plaintiff has also asserted causes of action for contractual interference (7th), conversion (18th), and conspiracy (20th). None of these causes of action are applicable to the facts of this case. In its contractual interference claims, PDHC alleges that it has a contractual relationship with Medicare. Assuming this to be the case, there is no evidence that PDHC's relationship with Medicare has been disrupted and breach of contract is an "essential element" of a tortious interference claim. BCD, LLC v. BMW Mfg. Co., LLC, 2008 WL 304878 (D.S.C. 2008) (J.

Ross Anderson, Jr.) citing Eldeco, Inc. v. Charleston Sch. Dist., 372 S.C. 470, 642 S.E.2d 726, 732 (S.C. 2007). To the contrary, it was PDHC's ongoing relationship with Medicare that allowed the offset of unauthorized Medicare payments against on-going Medicare payments.

In its conversion cause of action (18th), PDHC alleges that "Decedent converted the medical services provided to Plaintiff's Medicare patients by falsely failing [sic] claims for services provided to such patients...." Conversion is unauthorized assumption and exercise of the right of ownership over the goods or personal chattel of another. Lane v. Citicorp National Services, Inc., 313 S.C. 70, 437 S.E. 2d 50 (1953). This tort does not fit the undisputed facts of this case. "Services" are not goods or personal chattel capable of conversion. Moreover, it was PDHC that filed the unauthorized Medicare claims pursuant to an assignment of benefits and it was PDHC that assumed control over payments received from Medicare.

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In its civil conspiracy cause of action (20th), PDHC alleges that "Decedent in combination with his estate and the Personal Representatives thereof" has caused it injury... "to-wit, the continuing loss of use of its money...." Again, PDHC's effort to create another cause of action lacks merit, and this tort does not fit the facts of this case. First, on its face, the Decedent could not conspire with his estate, which was not a separate entity capable of such combination during Decedent's life. Moreover, the Personal Representatives are the estate's agents—they are not separate legal entities conspiring with the estate. The decision of the Personal Representatives, on behalf of the estate, to deny PDHC's claim does not constitute a combination or agreement between two separate legal entities to injure PDHC. Accord McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 626 S.E.2d 884 (2006) (There can be no conspiracy when acts arise in context of principal-agent relationship because acts in that context do not involve separate entities.).

(J) The "Prevention Defense" Raised By Plaintiff Is Not Applicable.

In letters to the Court, made part of the record and considered as such, the Plaintiff portrays the Defendant's motion for summary judgment as predicated upon the concept of a "prevention" defense. The cases cited by Plaintiff are Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984) and The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 617 S.E.2d 125 (2005). Both Huffines and Champion involved real estate brokers suing the sellers of real estate for sales commissions where a condition precedent to the commission was the sale of the property. The brokers in each case asserted that the sellers prevented the satisfaction of the conditions precedent; therefore, the brokers argued that the sellers could not hide behind the failure of those conditions to avoid payment of the commissions.

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The case at bar is not one of contract with conditions precedent.¹⁴ Moreover, nothing the Decedent Thompson did or failed to do prevented the Plaintiff from fulfilling its statutory obligation of due diligence with the Medicare OIG. Both the existence of that obligation and the failure to satisfy that statutory obligation of due diligence have already been litigated by Plaintiff with a sustained finding by an Administrative Law Judge. These litigated findings bar any right of the Plaintiff to rely upon what the Decedent did or did not do. And as discussed extensively in Conclusion of Law (C) above, South Carolina common law also imposes a duty upon a party with access to true information -- a duty not to rely on the misinformation or lack of information provided by others. See Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010)(availability of county records prevented reliance even upon county employee's misstatement); Regions Bank v. Schmauch, 354 S.C. 648, 675, 582 S.E. 2d 432, 446

¹⁴ Plaintiff has not pleaded any such specific, express contract provision as a basis for its claims. To the extent that Plaintiff now argues that the claim is primarily one of employment contract with some credentialing condition precedent, that is addressed in Conclusion of Law (H).



State of South Carolina
The Circuit Court of the Fourth Judicial Circuit

J. Michael Baxley
Judge

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August 29, 2011

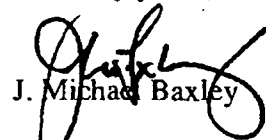
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Re: Pee Dee Health Care, PA v. Estate of Hugh S. Thompson
Case Number: 2010-CP-16-0332

Counsel:

Enclosed please find the original signed Order granting summary judgment in the above-entitled matter. **Please be aware that it is your responsibility to file this Order with the Clerk of Court and serve clocked copies on all parties.** Thank you for your attention to this matter.

Sincerely yours,



J. Michael Baxley

JMB/jlc
Enclosure

Jay James

From: "Benjamin R. Matthews" <ben@pdhc.com>
To: "pjlaw507" <pjlaw507@bellsouth.net>
Cc: <tmegna@gmail.com>
Sent: Friday, June 25, 2010 9:34 PM
Attach: request for transfer of jurisdiction.pdf; Jay letter 062210.pdf
Subject: PDHC v Estate of Thompson

Jay,

Please find enclosed information relating to the above matter. It is self-explanatory and an opportunity for resolution. Please contact Tony at tmegna@gmail.com or call him so we can get together if you decide to go forward.

Thanks, Ben

Please send all written correspondence to:

Benjamin R. Matthews, Esquire
3400 West Avenue
Columbia, SC 29203
ben@pdhc.com
Office telephone: 803.799.1700

This message is intended for the use of the person or entity to which it is addressed and may contain information, including legal and/or health information, that is privileged, confidential, and the disclosure of which is governed by applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this information is **STRICTLY PROHIBITED**. If you have received this in error, please notify us immediately and destroy the related message. Thank you.

Matthews and Megan, LLC
Attorneys and Counselors at Law

3400 West Avenue
Columbia, Sc 29203
TELEPHONE: 803-799-1700

June 24, 2010

Jay James, Esquire
112 Casual Street
Darlington, SC 29540

Re: Estate of Hugh S. Thompson, Case No.: 2009-ES-16-424
Civil Action No: 10-CP-16-0332

Dear Jay:

I am in receipt of your answer and discovery requests as well as your denial of the amended claim of Pee Dee Health Care, PA. I received the documents on June 22, 2010 although your letter was dated June 17, 2010.

For informational purposes, PDHC did, in fact, appeal the claim through the Medicare administrative appeals process. All administrative decisions were determined adversely to Dr. Thompson, including many of the limitations periods and many of the other issues raised in your answer. The administrative appeals process held the limitations periods do not apply in cases where a provider has been disbarred from the Medicare program by the OIG, is not reinstated by the OIG, and/or false statements were made on the provider application. They imputed the false statement made by Dr. Thompson to PDHC as he was an employee of PDHC, and his work was billed under his personal provider number and the PDHC group billing number. They stated that PDHC was liable for repayment because Dr. Thompson, as an employee of PDHC, should have informed PDHC of his disbarment from Medicare. Tony and I are of the opinion that the legal work performed on behalf of PDHC in pursuing the Medicare administrative appeals is protected under the attorney-client privilege and the work product doctrine, which protects an attorney's thoughts, mental impressions, documents and other tangible and intangible items prepared in anticipation of litigation, even where litigation is not imminent, as long as the primary motivating purpose behind the creation of the documents is to aid in possible future litigation. Obviously, due to the circumstances, the litigation with Dr. Thompson was likely, foreseeable and, unfortunately, inevitable. PDHC is willing, however, to consider providing you the decision of the QIC [Medicare Qualified Independent Contractor] with the caveat that you obtain an order of the Court [Probate and Common Pleas since you have objected to the jurisdiction of the Circuit Court] in which your client agrees that the disclosure of any documents or information in regard to the administrative appeals does not waive any claims of privilege, however defined, that can or may be asserted by PDHC or Tony.

Mr. Jay James, Esquire
June 24, 2007
Page 2 of 3

Tony as well as Drs. Cohen or Matthews had hoped the matter would not get to this point as none of them wish to tarnish Hubie's memory. Hubble was a friend and colleague of many years who they employed when no others would, and who they trusted implicitly. It is sad and unfortunate that the trust they reposed in Hubble was breached – and in such a horribly reckless manner by Hubie. We all know that the kindest portrayal of Hubie conduct was reckless and intentionally deceptive. Joe, Alex and Tony are not willing to forego the substantial damages PDHC has sustained. But, on my suggestion (which was, at best, an uneasy conversation); they will consider allowing you to informally discuss the matter, if you desire, with those in the organization who know what occurred when Hubie came to work for PDHC. Tony and I will have to be present. This is not negotiable. They will only consider making such an offer after the estate responds to PDHC's discovery requests. The reasoning is simple. They expect the same transparency from the estate that they are willing to provide, i.e., who knew what, when, whether or not there are similar claims pending against the estate, what documents, if any, the estate has in its or its agent possession; when the documents were obtained, the information known by the heirs as to the matter, and when, etc.

Considering that PDHC took every possible action to mitigate its damages, your admission in paragraph 12 that federal law provides for a continuation of the suspension of Hubie's Medicare privileges until they were reinstated by the OIG in 2002, your admission that Hubie had a duty to be truthful on his Medicare application and to PDHC [paragraph 30 and 34 of your answer --- which obviously did not occur], and the other admissions made in the answer, it appears the only real issue in the case is the considerable damages that PDHC has sustained.

Under the circumstances, I suggest that you reconsider your approach to the litigation and talk to Tony. If you do not, matters will most likely, and unfortunately, become more difficult. At my request, he has indicated he may be willing to limit PDHC's allow the Court or an independent party to consider the damage issue alone if the estate admits liability and we agree to a suitable framework that protects everyone to some degree. I have been involved in the past in cases where a 'high' and a 'low' damage number are predetermined by the parties, and the case submitted on the issue of damages alone. If the damages awarded amount to less than the 'low' end of the agreement, the Plaintiff receives the agreed upon 'low' number. If the damages awarded exceed the 'high' number, the Plaintiff is limited to the amount of the predetermined maximum damage award. Parties are provided limited protection to limit their risk, litigation costs are minimized, and the matter is brought to finality without the attendant publicity and difficulties associated with full-blown litigation. Part of the agreement is a full exchange of information by both parties. This is just a suggestion that I have found can work in situations like the current. I honestly do not know if it will work in this case as PDHC's damages are so significant and, according to the schedules filed, the estate has the capacity to pay all damages PDHC has sustained. In addition, Tony has little faith that the heirs appreciate the depth of the estate's liability or your and his ability to agree to low and high end numbers that reflect PDHC's damages and

Mr. Jay James, Esquire
June 24, 2007
Page 3 of 3

the extent of what he, Alex and Joe believe to be Hubie's betrayal of their trust – and perhaps more importantly, the risk at which PDHC was unknowingly placed. After considering the foregoing, if you and the heirs agree the concept is worth pursuing, I will discuss the matter further with Tony so he can discuss it with Joe and Alex. The initial agreement would have to include an agreement that no privileges are waived, all such proceedings are confidential [this is to protect Hubie's memory] and discussions cannot be used in any context outside of the agreement. While liability would have to be admitted by the estate, the 'high damage limitation' end of the agreement would protect the estate to a limited degree, and according to Tony, the 'not so low end would protect PDHC. I am simply providing a suggestion that could bring matters to an end instead with relative ease and speed instead of the years it could take to litigate the matter and close the estate. Even in light of all that has occurred, neither Tony, Alex or Joe have any interest in deriding Hubie's memory or extending the litigation unless they must.

In light of your objection to the jurisdiction of the Circuit court to hear PDHC's claims against Hubie, please find enclosed a motions filed in the probate court to remove the jurisdiction for the determination of the claims of PDHC to circuit court pursuant to 62-1-302(6)(d). I filed the motion in an abundance of caution; and even though 62-3-804(2) provides for jurisdiction of the circuit court for claims filed against the estate.

As stated previously, I would appreciate you sending all correspondence to me but directed to Tony's attention at 3400 West Avenue, Columbia, SC and by email to both ben@gmail.com and tmegna@gmail.com. I am trying to de-escalate matters. Joe, Alex, and Tony are intent on being made whole yet they are empathetic to the interests of the heirs. I would appreciate you letting me know if your clients are interested in the suggestions I have made, and realize the intensity of PDHC's determination. At the least, we can understand where we all stand. I look forward to hearing from you.

With kind regards, I remain

Sincerely yours,

Benjamin R. Matthews

Exhibit E

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DARLINGTON	)	
	)	
PEE DEE HEALTH CARE, P.A.	)	MARCH 16, 2011
	)	
PLAINTIFF,	)	
	)	
VERSUS	)	MOTION HEARING
	)	
THE ESTATE OF HUGH S. THOMPSON	)	2010-CP-16-00332
	)	
DEFENDANT.	)	

BEFORE

THE HONORABLE J. MICHAEL BAXLEY

APPEARANCES

Tony R. Megna, Esquire
Attorney for Pee Dee Mental Health

Jon Rene Josey, Esquire
John Jay James, Esquire
Attorneys for the Estate

Pamela Ozment-Cartee
Circuit Court Reporter

Motion To Disqualify

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Ruling of the Court

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Certificate of Reporter

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DEFENDANT' S EXHIBIT

NUMBER

DESCRIPTION

PAGE

1

Letter - Dear Tony

12

1 (Whereupon, this hearing began 1:40 p.m.
2 on Wednesday, March 16, 2011.)

3 **THE COURT:** All right. Then the next matter
4 we have is Pee Dee Health Care versus The Estate of
5 Thompson.

6 Please be seated, and let me begin with a bit
7 of introduction, and then we will come across and let
8 everyone introduce themselves, and tell us who you have
9 with you, that is your client, so that we can make sure
10 that our record reflects that.

11 This case was set especially today for the
12 hearing of certain motions. The Court began to discuss
13 back in February with counsel about the outstanding
14 motions that are still pending in this case.

15 Back in mid February, we made the decision
16 that we would go ahead and hear certain motions in
17 March. Mr. Megna had a conflict with the month of
18 March, but was able to rearrange his schedule so that we
19 could be here today. There are certain motions pending,
20 but the first motion we all agree that we would hear,
21 because it may be dispositive as to Mr. Megna's role in
22 this case, which is the motion by The Thompson Estate to
23 disqualify Mr. Megna as counsel.

24 Now, that is where we will start today. There
25 are other matters as well that I know are pending. But,

1 let's come across and let everyone introduce themselves.
2 And we will start with the plaintiff, Pee Dee Health
3 Care. Mr. Megna, please introduce yourself and anyone
4 you have with you.

5 **MR. MEGNA:** My name is Tony Megna. I am
6 general counsel for Pee Dee Health Care, and this is Mr.
7 Mark Matthews, he is Vice President of Operations for
8 Pee Dee Health Care.

9 **THE COURT:** Welcome.

10 **MR. MEGNA:** Thank you.

11 **THE COURT:** And, now to the other side.

12 **MR. JOSEY:** Judge, I am Renee Josey. I
13 represent the estate of Dr. Thompson. Of course J.
14 James also represents the estate. And here with us
15 today are the two personal representatives of the
16 estate, which are Dr. Thompson's children, Louis
17 Thompson Dailey, and Hugh Thompson, III.

18 **THE COURT:** Thank you. And welcome to the
19 courtroom.

20 All right. I believe that we are in agreement
21 that the first matter is the question of the
22 disqualification of Mr. Megna. I have received Briefs
23 or Memoranda on both sides of that, including
24 substantial exhibits. I have had the opportunity to
25 review those. You are the moving party, Mr. Josey, or

1 Mr. James. I will be glad to hear from you.

2 MR. JOSEY: Thank you, Judge. And Mr. James
3 and I have kind of divided up our presentation. I don't
4 know if you are under a time constraint with the jury
5 coming back, or?

6 THE COURT: No, I have next Monday, I've got
7 to be in court. So, we are okay.

8 MR. JOSEY: All right. We will try to meet
9 that.

10 THE COURT: All right. Very good.

11 MR. JOSEY: I thought, Judge, I know that
12 you have heard of or that they made an appeal from
13 Probate Court, but I am not sure that we have ever
14 briefed you on any kind of the background of the case.

15 THE COURT: Yes, please do.

16 MR. JOSEY: I thought that I would tell you
17 a little bit about the background of the case, to put
18 our motion in context.

19 This case involves determining who should be
20 responsible, after a decade of the events, and after the
21 death of Dr. Thompson for an error in not confirming his
22 Medicare credentials, back when he worked at Pee Dee
23 Health Care over a decade ago.

24 Because the Medicare are contractors in this
25 case, and you may have heard of Palmetto GBA, they are a

1 contractor for Medicare. They issued Dr. Thompson a new
2 Medicare Provider Number after he had been suspended for
3 a while. He was suspended by the South Carolina Medical
4 Board from 1994 until 1998. But after that suspension,
5 he reapplied through a new employer, not Pee Dee Health
6 Care, for a new Medicare Provider Number, and was issued
7 a new Medicare Provider Number. And that new employer
8 started billing Medicare, and Medicare started paying.
9 And then he moved to Pee Dee Health Care. And he
10 actually went on to a third employer, First Choice in
11 Florence. So he worked for three different employers,
12 all of whom were assigned Medicare benefits, and all of
13 whom collected Medicare benefits after his suspension,
14 because he had a new Medicare Provider Number issued to
15 him.

16 **THE COURT:** And I believe when he was first
17 reinstated, he was required by the Medical Board to
18 practice with Dr. Fowler. Am I correct in that?

19 **MR. JOSEY:** That's right.

20 **THE COURT:** All right. I am familiar.

21 **MR. JOSEY:** Okay. And, it was only after a
22 period of time when he was actually with his third
23 employer that someone at Medicare realized that he
24 hadn't --- a second hoop hadn't been jumped through.
25 That even though he had been issued a new Medicare

1 Provider Number, he had not been reinstated by the
2 Medicare Inspector General, which is a different hoop
3 that you are supposed to jump through. Two of Dr.
4 Thompson's three employers managed to avoid liability to
5 Medicare. Either through well done appeals, or through
6 statute of limitation and not being pursued. But two of
7 them managed to avoid liability Medicare. Pee Dee
8 Health Care was not so lucky. They were assessed by
9 Medicare. A little over \$200,000.00 dollars that
10 Medicare wanted to be paid back, and because Dr.
11 Thompson was not fully credentialed through his period
12 of his employment with them, and during the period he
13 assigned benefits to them. Pee Dee Health Care, which
14 was held liable by Judge Metry, in an order that we
15 attached as Exhibit A to our Motion, primarily because
16 Judge Metry found that there was an affirmative duty on
17 any contracting employer to check out the credentials,
18 and to make sure that the credentials were in place
19 before they accepted assignment of benefits and started
20 billing Medicare. And Judge, just so you know, I have a
21 bulletin from Medicare that kind of reaffirms that. I
22 know we are not arguing the merits today, but I just
23 thought that I would --

24 MR. MEGNA: Excuse me, Your Honor. I think
25 at this point in time, Mr. Josey has been here for a

1 while. I sent them an email on Sunday night asking to
2 please give me any information they have. And I object
3 to them giving you any information at the last minute
4 like this. That is an unexpected surprise. I don't
5 care what it says. It is inappropriate. He knows it is
6 inappropriate. And I would ask the Court to not take
7 judicial notice of it. He should have had the good ---
8 just the good manners to have provided this to me before
9 he hands it to you. I have nothing to do this. We gave
10 them our information five days ago, and it is just bad
11 manners. And I think this court, within its discretion,
12 could say, no, thank you.

13 **THE COURT:** Do you want to reply to that Mr.
14 Josey?

15 **MR. JOSEY:** Just to say Judge, that Judge
16 Metry's order was based on the fact that found an
17 affirmative duty. This is basically to promulgate the
18 statute and the regulations you abide by.

19 **MR. MEGNA:** I objection, Your Honor. Again,
20 because I haven't had the chance to respond to it. And
21 I specifically sent Mr. Josey a email on Sunday night,
22 and asked them to please provide me any information.
23 And I think it is inappropriate for him to do so now.
24 And I think this court should take judicial notice of
25 the fact that they totally ignored it. And that under

1 the Rules of Professional Responsibility --- And I know
2 that is what I'm being accused of, I think they have
3 absolute responsibility to be fair to the Court, and
4 fair to opposing counsel, and fair to the opposing
5 party, and this is not fair under any sort of
6 circumstances.

7 **THE COURT:** Very good. I'll sustain his
8 objection, and will not accept the documents, Mr. Josey.
9 Go ahead with your argument, sir.

10 **MR. JOSEY:** I understand, Judge. That's
11 fine. And like I say we are not arguing merits, I just,
12 kind of wanted to give you some background.

13 Judge Metry's Order is attached to our motion
14 as Exhibit A, and of course this litigation was brought
15 after Dr. Thompson could no longer speak for himself,
16 and died. And we are being asked to defend things that
17 Dr. Thompson was involved with over a decade ago. Now,
18 the basis of our Motion, of course, is that we think Mr.
19 Megna is a central witness in this case. And he should
20 not be allowed to wear two hats in the presentation of
21 this case.

22 Mr. James is going to tell you why we think he
23 is a key witness. And I am going to address the law
24 about that.

25 **THE COURT:** All right. Go ahead, Mr. James.

1 **MR. JAMES:** May it please, The Court? A
2 couple of preliminary matters.

3 We have not accused Mr. Megna of professional
4 misconduct. We are here today to avoid any possibility
5 that there could be misconduct with him possibly serving
6 at the trial as counsel and as a witness. He can't be a
7 fact witness and an advocate.

8 In Mr. Megna's cover letter with his various
9 returns to motions that he sent last Friday, he said
10 that we had refused to allow the personal
11 representatives to be deposed.

12 In January, Mr. Megna noticed their
13 deposition. We notified Mr. Megna's law partner that we
14 thought the depositions would better be postponed until
15 after various motions had been heard. And Mr. Megna, by
16 letter addressed to me on February the 3rd, said my
17 suggestion is that we agree to suspend all depositions
18 and other pending motions until the Motion to Disqualify
19 has been heard. We have not refused to let our clients
20 be deposed. In Mr. Megna's statement in his cover
21 letter to the Court is in error.

22 Getting to the merits of whether Mr. Megna
23 would be a necessary witness. Mr. Megna is the Chief
24 Executive Officer, as well as General Counsel to Pee Dee
25 Health Care. When we filed our Motion to Disqualify, we

1 believed that to be the case, but we were not absolutely
2 certain. We did find a record in Florence County,
3 certain documents and other litigation that he had filed
4 documents with Medicare claiming --- holding himself out
5 to be the Chief Executive Officer of Pee Dee Health
6 Care. Our purpose in attaching those Medicare
7 application documents was not to interject the Lake City
8 litigation into this litigation. In no way can our
9 including documents that Mr. Megna himself filled out
10 and submitted to the government be construed as an
11 attempt by us to accuse Mr. Megna of being dishonest and
12 untrustworthy as he said in his return to our motion.
13 Nothing of the sort. He has now in his return admitted
14 that he is the CEO of Pee Dee Health Care.

15 This status creates the probability that in a
16 case of this nature, he will be a necessary witness.
17 And in the discovery and in the pleadings, he has
18 admitted certain things, and has alleged certain things
19 that make it very plain that he is a necessary witness.

20 In his Complaint, he refers to an unsigned,
21 undated letter that he said was given to him by Mr.
22 Megna. I believe it is Exhibit HH, in the plaintiff's
23 return. He says that this letter was given to him
24 presumably around June 1, 2007, by Mr. Megna. And in
25 the Complaint, this letter was said to be an exhibit.

1 It was not attached to the Complaint. In fact, there
2 were three things that were said to be exhibits to the
3 complaint, and none of them were attached; none of them
4 were filed. But we understand that this undated,
5 unsigned letter supposedly given by Dr. Thompson to Mr.
6 Megna, is the exhibit referred to in the Complaint.

7 And in the Complaint, the plaintiff alleges
8 that this unsigned, undated letter constitutes an
9 admission by Dr. Thompson that he has not provided
10 accurate information to the plaintiff upon and during
11 his employment with plaintiff, or to Medicare, or to his
12 provider, an assignment of benefit applications to
13 Medicare. So, this supposedly is the smoking gun. This
14 is the document that shows that the now deceased Dr.
15 Thompson admitted that he had given bad information to
16 Pee Dee Health Care.

17 The letter in question --

18 **THE COURT:** I have it. It is attached to
19 your Brief. I have it.

20 **MR. JAMES:** It is attached to their brief.

21 **THE COURT:** All right. Very good.

22 **MR. JAMES:** It is Exhibit HH.

23 **THE COURT:** Do you want to make it an
24 exhibit to this hearing today?

25 **MR. JAMES:** We can, Your Honor.

1 **THE COURT:** Any objection?

2 **MR. MEGNA:** No objection, Your Honor.

3 **THE COURT:** Let's just take a moment and
4 make that what would be Defendant's 1.

5 **WHEREUPON, DEFENDANTS EXHIBIT**

6 **NUMBER 1 IS MARKED AND ADMITTED**

7 **INTO EVIDENCE WITHOUT**

8 **OBJECTION.**

9 **THE COURT:** Go ahead.

10 **MR. JAMES:** The letter in question is
11 addressed, Dear Tony. Presumably, Tony Megna, but don't
12 know for sure. If the Court would look in the lower
13 right hand corner of the letter, it will see a notation
14 that did not completely copy out. That our pending
15 Motions to Compel, we have asked for a copy of this
16 letter that would show completely the notation in the
17 bottom right hand corner. But they have resisted that
18 motion, and they say that everything that we have asked
19 for is attorney client privilege, or attorney work
20 product. Assuming that this letter came from Dr.
21 Thompson, and we certainly do not admit that. Assuming
22 that it came from him, it appears that this refers to
23 facts that were going on in 1999 when Dr. Thompson's
24 medical licenses were briefly suspended, because of his
25 failure to take a urine sample. And the notation in the

1 lower right hand corner appears to substantiate that
2 this had the date of December the something 1999. But
3 without being able to see the full thing, we don't know.
4 But we think this was probably generated in 1999, not in
5 2007. But in any event it does not constitute the
6 smoking gun admission that the complainant in this case
7 alleges. We believe that Mr. Megna would be a necessary
8 witness in discovery, and possibly at trial for us to
9 find out the circumstances of this letter.

10 On page 14 of the plaintiff's return, and at
11 several other places in the plaintiff's return, Mr.
12 Megna expresses himself with great indignation that we
13 have indicated that he should be a witness on this. He
14 says that we are referring to --- that he doesn't need
15 to be a witness, because the document in question came
16 from us. Well, he is referring to a 2004, two page
17 memoranda that Dr. Thompson prepared I think, for his
18 employer First Choice, and he met with them about his
19 Medicare eligibility. And we provided that document to
20 the plaintiff in discovery. That is not the document
21 that we want to examine Mr. Megna on. Mr. Megna has
22 even said that we are engaged in virtual misconduct in
23 connection with wanting to ask him about well, their own
24 document. We want to ask him about Exhibit HH, Your
25 Honor, which is his exhibit in his complaint.

1 And in answers to the Plaintiff's
2 Interrogatories, which we have listed relevant
3 information in Exhibit C to our Motion, Mr. Megna or Mr.
4 Matthews has indicated that Mr. Megna is a party with an
5 economic interest in the outcome of this. That he
6 attempts to disqualify himself as being a fact witness
7 because of the Dead Man Statute. We will address that
8 in more detail later.

9 He indicates further that Dr. Thompson
10 communicated to him by telephone, in addition to this
11 letter, concerning the adverse Medicare determination in
12 the late spring or early summer of 2007.

13 And finally, in the Answers to the
14 Interrogatories, Mr. Megna says that he was the only
15 person involved at Pee Dee Health Care with the
16 Administrative Appeals of the Medicare determination,
17 which unfortunately turned out unsuccessful for Pee Dee
18 Health Care, but turned out successfully for First
19 Choice.

20 The Chief Executive Officer of an organization
21 such as Pee Dee Health Care would also be a witness in a
22 host of other ways, which are clearly elaborated in our
23 Motion. And many of those would not involve the Dead
24 Man Statute, or other issue of privilege.

25 There would be issues about administrative

1 policies and procedures, including employment
2 applications, employment contracts. There would be
3 issues about records keeping. For example, in this
4 case, we have been advised that any personnel records of
5 Dr. Thompson were destroyed pursuant to, personnel
6 instruction policies of Pee Dee Health Care. We have
7 asked for certain documents such as, job application,
8 employment contracts, employee evaluations to be
9 provided to us, and they say they are not available to
10 be provided to us. We would have questions about
11 employee screening, employee credentialing. What
12 questions do you ask an employee to find out, does he
13 have a valid, and in force medical licenses? Does he
14 have all of his credentials up to date with Medicare,
15 Medicaid. What about due diligence procedures to see
16 that they do everything that they should do? We would
17 want to know what happened with their Medicare appeal,
18 and why. We have been trying to get information from
19 them including their filings with the various levels.
20 There are four levels. They claim to have gone to all
21 four levels. We still do not have the Medicare Appeals
22 Council decision, which is the fourth. They say that is
23 Exhibit S of their return. Exhibit S instead, is the
24 key to Administrator's decision. That is step number 2.
25 We have previously been provided that. But we need to

1 ask questions about that. We want to know what they
2 argued and why they lost. We want to know about their
3 alleged damages. They are saying in their Complaint
4 that there are huge consequential damages. That because
5 they have had to pay Medicare back somewhat more than
6 \$200,000.00 dollars, that their organization has been
7 crippled, Your Honor. That they have not been able to
8 afford to hire additional doctors that they need. We
9 have asked further to show what their income is, such as
10 income tax returns for the years in question. Again, we
11 have been told that we are asking for attorney work
12 product, or attorney client privilege information. But
13 we need to know what is the basis for the damages, and
14 the CEO of the organization would be the best person to
15 get us that information.

16 We are entitled, Your Honor, to depose and
17 discover these facts from any witness. Not just the
18 witnesses that they want to provide to us. They say oh,
19 Mr. So-and-so, or Mrs. So-and-so can tell you this, or
20 can tell you that. Well, they are not entitled to pick
21 and choose the witnesses that we want to find out the
22 facts from. We think the CEO, who is the chief accuser
23 in this case, should be subject to deposition. We
24 should be able to find out what we need to find out, so
25 that we can advise our clients properly. And so we can

1 discharge our obligations to our clients, and to this
2 court, and to our justice system.

3 We think that Mr. Megna's credibility on
4 various issues will be important in this case, Your
5 Honor. They have accused Dr. Thompson, a dead man, of
6 fraudulent, deceitful, dishonest conduct. We are
7 entitled to see what the credibility of the accusers
8 are, and show that to a court, and to a jury.

9 At the time that Mr. Megna alleges that Dr.
10 Thompson had a conversation with him in the late spring
11 of '07, about the Medicare determination matter. He says
12 on page 6 of his return, that at that time the
13 undersigned, being Mr. Megna, closed any further
14 discussions with the decedent, and advised the decedent,
15 the undersigned, to not discuss the matter with him, and
16 that was the length of the conversation. Well, we need
17 to find out more about those kinds of alleged contacts.
18 At that same time, Mr. Megna now says that the decedent
19 gave to him miscellaneous records, which I believe are
20 Exhibit D of his return. At an earlier time Mr. Megna
21 gave those to me last July. He said that these were
22 records that Dr. Thompson apparently delivered to them,
23 at some point in time, but not indicated that they were
24 delivered at a very important time, and presumably being
25 met by Dr. Thompson to be helpful in this matter. The

1 records in concern have nothing to do with this matter.
2 One of them is a personal real estate contract on
3 property in 1999. Others are copies of the diplomas,
4 and certificates, professional certificates and that
5 sort of thing. None of them have anything to do with
6 the Medicare determination. We need to ask Mr. Megna
7 about those documents, to see where they came from.

8 The response of Pee Dee Health Care to our
9 Motion to Disqualify Mr. Megna, confirms in other ways
10 that he is a witness. Exhibits P and U, are served to
11 constitute agreements by Dr. Thompson and First Choice,
12 but they undertook an affirmative duty to keep Pee Dee
13 Health Care advised of the progress of their Medicare
14 appeals.

15 Well, if you look at Exhibits P and U, each is
16 an email. Exhibit P is an email from Mark Matthews, an
17 employee of Pee Dee Health Care to Tony Megna. Exhibit
18 U, is an email from Tony Megna to Dean Banks, who is the
19 Chief Executive Officer of First Choice. Neither email
20 is supportive of the contention that they constitute
21 agreements by Dr. Thompson and/or First Choice to Pee
22 Dee Health Care advised. Mr. Megna --

23 **THE COURT:** We need to take just a little
24 break here for our court reporter.

25 **(PAUSE.)**

1 **THE COURT:** Thank you, Mr. James. Go ahead.

2 **MR. JAMES:** Mr. Megna is the presumed receipt
3 of one of those emails. And he is the apparent sender
4 of the other email. Both of these are said to
5 constitute important pieces of evidence by Pee Dee
6 Health Care. We think we are entitled to ask
7 appropriate questions of Mr. Megna as to the content of
8 these emails, the contexts of the emails, etcetera.

9 Your Honor, that concludes my portion of this
10 presentation. And I will turn it back over to my co-
11 counsel, Renee Josey.

12 Thank you, Your Honor.

13 **THE COURT:** Thank you. Mr. Josey, do you
14 want to speak on the law?

15 **MR. JOSEY:** Yes, sir. I do have one more
16 factual addition to add. In Mr. Megna's response, he
17 mentions that --- in a footnote, I think. It is
18 footnote six, that my firm had been admonished for some
19 discovery abuses somewhere. He doesn't identify what
20 litigation he is talking about. I kind of polled my
21 office by email, and nobody knows what he is talking
22 about.

23 **THE COURT:** Okay.

24 **MR. JOSEY:** But, if the Court wants to hear
25 any consideration of that, I will be glad to address it.

1 Let me address the law, Judge. Again, we
2 haven't accused Mr. Megna, of anything unethical. We
3 are trying to prevent something unethical from
4 happening. Rule 3.7, of The Rules of Professional
5 Conduct, which I am sure you have had a chance to look
6 at, indicates that a lawyer can not be both an advocate
7 and a witness in a matter. And it does give three
8 exceptions. The first exception being, if it is an
9 uncontested issue. Well, as you heard from Mr. James,
10 the things that we want to depose Mr. Megna about, and
11 examine Mr. Megna about, are definitely contested.

12 Number two is, if it has to do with the nature
13 or value of legal services rendered. That is not what
14 this is about either. We are not interested in legal
15 services, and the value thereof, like in Family Court
16 cases when we are trying to collect fees or something
17 like that.

18 Or number three, if there is a substantial
19 hardship. We don't believe there is a hardship here,
20 because early on in this case, early that summer before
21 I was even associated with the case, Mr. James raised
22 this concern with Mr. Megna, and with Mr. Matthews, who
23 is Mr. Megna's partner. And as you will see in our
24 Motion, we don't claim that Mr. Matthews is
25 disqualified. Because, Mr. Matthews, as far as we can

1 tell, wasn't critically involved in these communications
2 with Dr. Thompson. So, Mr. Matthews would not be
3 disqualified. Mr. Matthews has been involved in this
4 case. He, in fact, signed the Complaint originally.
5 So, he is familiar with these matters, and copied with
6 these things, and it will not be a hardship for Mr.
7 Matthews to assume the fore-role, [sic] if you will,
8 instead of just a shared role representing Pee Dee
9 Health Care.

10 Mr. Megna's response does raise the suggestion
11 that maybe the Court can split hairs and say that he
12 couldn't be the lawyer at trial, but maybe could be the
13 lawyer for some pretrial functions. And, Judge, that
14 may be possible. Let me tell you what our concerns are.

15 Our concerns are two fold. First of all, we
16 don't want Mr. Megna wearing two hats in front of a
17 jury. And I think that is clearly covered by the rules.
18 But, we don't want that to occur, whether it is at a
19 trial, or whether it is in a deposition. Whether it is
20 in Mr. Megna's deposition, or the deposition of other
21 witnesses. Because, we don't know now what deposition
22 testimony might be used, or might be needed at the trial
23 in front of the jury in this case. So, that is a
24 concern. We don't want Mr. Megna to wear two hats in
25 front of a jury. And we think that is what the rule is

1 meant to address.

2 Our other concern is that we don't want the
3 plaintiff, Pee Dee Health Care to use Mr. Megna as a
4 sword when they want to by saying, he received critical
5 communication from your client, Dr. Thompson, and he is
6 the one that these affirmative duties were manifested
7 to, but. So, we are going to use him as a sword, but we
8 are going to use him as a shield. If you want to depose
9 him, if you want to make him a witness, it is all
10 privileged, it is all work-product, and you can't ask
11 him about it. And they can't have it both ways, Judge.
12 That is why it was somewhat preempted, but we went ahead
13 and Briefed that in our Motion. And we are not asking
14 him about litigation strategies in this case. We are
15 not going to ask him about confidential matters. We
16 want to ask him what happened on the public record. We
17 want to ask him what happened to that fourth level of
18 appeal. Because, if they have succeeded at that fourth
19 level of appeal, we wouldn't be here. We want to ask
20 him about his communications with our client before
21 employment; during the employment application process.
22 All of the things that Mr. James told you about. The
23 employment application. What are your procedural steps
24 in your policy manual, what do they say about
25 credentialing? Because, we know what Medicare

1 regulations says, and the statute says. We want to know
2 what they did to comply with the Medicare regulations
3 and statute. And those are all things that don't call
4 for privileged information. We also went ahead and
5 addressed the Dead Man Statute, to the extent that we
6 are asking him about Medicare compliance, and Medicare
7 credentialing. That doesn't involve any dead man
8 testimony. And, as I think we made clear in our
9 Briefing, the Dead Man Statute is an evidentiary
10 objection that these clients can raise if they want to
11 at trial. It is not a tool for the plaintiff, who has a
12 financial interest to use. It is a tool that we, our
13 clients can use. It is somebody with a financial
14 interest in the matter is going to claim that the dead
15 man said something in front of a jury. It doesn't mean
16 that those people are insulated from discovery. In
17 fact, as I indicated in the Brief, we don't know how
18 extensive the Dead Man's Statute might apply until we
19 take depositions to see what communications did you have
20 with a dead man, and who had them? Until we do that,
21 we don't know exactly what we might have the option of
22 raising the Dead Man Statute too.

23 And there is a case --- Judge Sanders authored
24 an opinion about discovery not being hindered by the
25 Dead Man's Statute, because it is the type of objection

1 that is reserved for trial, and it is not raised in
2 discovery. But, again, I think Pee Dee Health Care is
3 trying to use it as a shield to hide any weaknesses that
4 might exist in their case, while at the same time
5 asserting that Mr. Megna is a sword that can't be
6 discovered or inquired into.

7 So, Judge, that is why we are here. We
8 haven't accused anybody of anything wrong yet. But, we
9 don't think Mr. Megna needs to wear two hats.

10 **THE COURT:** All right. Thank you. And in
11 reply, Mr. Megna?

12 **MR. MEGNA:** Your Honor, I certainly feel
13 accused. It certainly came across to me as accused. I
14 certainly think the tone is accusatory, first of all.
15 Second of all, the letter that they refer to is ---
16 excuse me. Is a letter that my office received in the
17 mail from Dr. Thompson. I fully disclosed it to them.
18 Fully and completely. I, at the time we were doing
19 this, yes I am the CEO and General Counsel of Pee Dee
20 Health Care. We had well in excess of a hundred
21 employees. I have a business manager who handles --- a
22 Vice President of Operations. And quite frankly I
23 handle none of that, and I don't know of many CEOs that
24 do. I don't know how they can. I just don't understand
25 it. I never did it. I don't do it. Period, end of

1 discussion. The only thing that I have done here today
2 is, since day one fully and completely disclosed to
3 these folks what I have. Dr. Thompson did in fact call
4 me. I fully disclosed it. As soon as he told me that
5 he an attorney representing him, or he told me --- I
6 said, I can't talk to you. I'm not going to talk to
7 you. I'm not going to do it. He sent some documents in
8 the mail to my office. I fully disclosed them. They
9 know anything and everything about those documents that
10 I know. I know nothing. As far as critical testimony
11 goes, they have not described one thing here today that
12 can possibly be considered critical information;
13 nothing. They have this one letter that Dr. Thompson
14 voluntarily sent to my office that ended up on my desk.
15 When I received it, I put in a file that I kept, and
16 that I disclosed it to them when they asked for it.
17 That was all there was to it.

18 As far as Medicare goes, and I think this is a
19 critical distinction. Medicare did not sue Dr.
20 Thompson. Medicare sued Pee Dee Health Care. I
21 defended Pee Dee Health Care. I was general counsel to
22 Pee Dee Health Care. Anything that I did in that role,
23 speaking with my partners or my employees, is absolutely
24 privileged information. Now, do they have access to the
25 --- Can they have access to the orders? Your Honor, I

1 honestly don't know how this QIC exhibit got in there,
2 and I apologize for that. If we have that document, we
3 are happy to give it to them. As a matter of fact, my
4 recollection is, I have provided that document to them
5 during discovery. That was the decision. But, as far
6 as my personal work product goes, I think it is just
7 outlandish that they would sit here and say that they
8 can look at my personal work product that I discussed
9 with the principals of Pee Dee Health Care, and because
10 it is critical information regarding what they consider
11 the fact that I didn't do my job, and that is what they
12 eluded to in here. I didn't do my job. That they would
13 somehow say that that gives them the right to then cross
14 examine me. Well, that is not true. That is not true
15 at all. The Supreme Court has made it absolutely plain
16 that attorney work product is privileged. Now, the
17 results of that, they want to go get the documents from
18 Medicare, I don't care. As a matter of fact, I know
19 that I gave them that. But, if I have it again, I will
20 provide it to them. And I apologize to the Court that
21 somehow another this QIC document got in here. I have
22 no problem with them having the decision. The other
23 documents that they refer to was because it evidences
24 that Mark Matthews, exactly who he said, had everything
25 to do with this, not me. He dealt with Dean Banks. He

1 dealt with Dr. Thompson, not me. And they promised, and
2 he will testify that --- He is welcome to do it today,
3 because his Affidavit is in there. He testified that he
4 put in his Affidavit that they promised to provide him
5 information. And the irony is that the decision that
6 they got, that was in favor really of First Health, and
7 Dr. Thompson by proxy was disclose --- they didn't
8 disclose to you was provided several weeks prior ---
9 several months, several weeks prior to a decision being
10 issued in our case. If we had had that, it would have
11 probably been collateral estoppel, res judicata, I can
12 come up with something. There is no doubt about it. I
13 could have provided that opinion to the LLC, who was a
14 different judge, who came up with a different opinion.
15 That is the whole thing in a nutshell. But we are not
16 suing Dr. Thompson over that. We know what the Medicare
17 Statutes require of us. And, yes, they said that by
18 proxy we basically have --- I guess you would call it
19 some type of complete liability in the case, regardless
20 of the fact that Dr. Thompson --- and I hate this --- He
21 lied. Dr. Thompson did not tell the truth. We were
22 provided exhibit after exhibit. Mr. --

23 **MR. JAMES:** James.

24 **MR. MEGNA:** James, excuse me. He said in his
25 answer repeatedly the duty of loyalty that Dr. Thompson

1 had to us. We provided three letters from Medicare
2 prior to him coming to work for us that I had never
3 seen. That I had no knowledge of. Where Medicare had
4 asked them for information, and he came to our office
5 and never provided them to us. The Dead Man Statute,
6 the Dead Man Statute does not say what they say it says.
7 It says, it bars examination. It doesn't say
8 examination at trial. It doesn't say examination at
9 depositions. It says it bars examination. It seems to
10 me very, very simple. The case that he has cited did
11 not say that they could take a deposition. It recited
12 deposition testimony. I don't know, and neither do
13 they, whether or not any objections were made to that
14 deposition. But, our Supreme Court has done everything
15 they could to restrict what the Dead Man's Statute says,
16 and it doesn't apply to documents. No problem. But it
17 applies to examinations. They can't have it both ways.
18 There is nothing that says that it is shield used for
19 their purposes. It is a shield period. The Supreme
20 Court has said, if you are going to apply it in one
21 direction, you apply it in both directions. It is not
22 so that they can go take depositions Willie-Nellie.
23 That they can go take depositions of whoever they want
24 to take, so they can decide whether or not they can use
25 information against us in some manner. The Dead Man's

1 Statute says, that if a party has an interest in the
2 outcome of the judgment, he cannot be examined. I
3 Admitted that I had an interest in the outcome of the
4 judgment. I cannot be examined as a matter of law. It
5 is not a question of --- It is a question of
6 admissibility. What could they possibly gain from
7 taking my examination, when it is not admissible. And
8 on top of that, it doesn't bar the admissibility of it,
9 it bars the examination of it. I cannot be examined. I
10 didn't make that law up. The legislature did. This
11 court, respectfully, is bound by it. As am I, as are
12 the defendants. On top of that the Pee Dee Health Care
13 is complaining about, is not the fact that we had to pay
14 Medicare back per se, but the fact that Dr. Thompson
15 admittedly owed us a duty of loyalty to tell us the
16 truth. We are not suing Medicare. We are suing them --
17 - him unfortunately for not telling the truth. We did
18 wait until he passed away, and we did that on purpose.
19 I would be the first to admit that I did that on
20 purpose. And the reason I did it on purpose was because
21 I didn't want to cause him further agony, and
22 humiliation, and damage, knowing what I knew. And I
23 knew that he was not going to live. It was an act of
24 mercy, and it was an act of calmness. It is
25 inappropriate, and it is wrong for them to now say ---

1 and I understand that it was the only string that they
2 had available. Well, Pee Dee Health Care didn't deal
3 with Medicare, so sorry. It is Pee Dee Health Care's
4 fault. We are suing him for indemnification. Where is
5 the Complaint please? Several, but mainly
6 indemnification. The inability of --- his lack of
7 ability of telling us the truth. Whether or not he
8 forgot or not, there is a duty of loyalty to us. A duty
9 of truthfulness. They have admitted in their Answer,
10 which I put in my Return. This is a case that is right
11 for Summary Judgment. They had no discernable defense.
12 And they know they had no discernable defense. So the
13 only thing that they could do was to come up with
14 reasons to bar. Reasons to tell this Court well, Mr.
15 Megna knows this. Mr. Megna knows that. Mr. Megna is a
16 necessary witness. What one piece of evidence have they
17 produced? Evidence that they produced that I am a
18 necessary witness? None. Because, there is none. Like
19 I said, I have not given them a decision. Well, if I
20 have it, and I know I have, I will give it to them
21 again. There is no evidence before this court, none.
22 And, yes, sir. I apologize if I sound a little outraged,
23 because I am. Because, you had better believe this is
24 an issue of character assignation. This is an issue of
25 honor. And yes, sir, you had better believe the Lake

1 City litigation plays into it, because what they didn't
2 tell you is they also asked me questions on the
3 interrogatories, please explain to us what the claims
4 were that were filed by Lake City on behalf of Dr.
5 Thompson. Lake City did not get evolve until seven
6 years after Dr. Thompson left our practice. If you
7 think for a second --- if this Court thinks for a second
8 that their issues are not insidious, it is just wrong.
9 They are. And it would cause undue hurt to our
10 organization. We are not financially able to bring
11 somebody else up to date. And, yes, Mr. Matthews and I
12 do practice together, because my partner saw fit to let
13 me do something to assist somebody else. That he would
14 have to bring himself up to date, not knowing a thing
15 about this case. Just on accusations, and inappropriate
16 accusations.

17 **THE COURT:** Well, the disqualification would
18 go to the entire firm; would it not?

19 **MR. JOSEY:** No, sir. And we addressed that.
20 As I said earlier, it would not disqualify Mr. Matthews.

21 **MR. MEGNA:** Talk about splitting hairs.

22 **MR. JOSEY:** It is in our Motion.

23 **THE COURT:** Thank you.

24 **MR. MEGNA:** In other words they want to have
25 it both ways. But they have to show some evidence, some

1 evidence that I am a necessary witness. All the cases
2 that I have cited indicated that every Court --- just
3 about every Court that has considered this issue, has
4 said a Court needs to view this issue with great
5 suspicion, because it is a litigation tactic, and an
6 inappropriate litigation tactic. And it is used to do
7 exactly what they are trying to do, undermine our
8 efforts to be indemnified for the wrongs that were
9 committed against Pee Dee Health Care.) I had a Director
10 of Business Operations, who can testify as to damages.
11 I don't know about the damages. I didn't do that. I'm
12 the CEO of the organization. I admit that I am the CEO
13 of the organization. But, I am also the general counsel
14 to the organization. I have a right to bend over to
15 defend my client. And Pee Dee Health Care is my client.
16 If they had a fact that would show this court, or
17 demonstrate to this court that this court could hang its
18 hat on, that I was a necessary witness, which the cases
19 have said you can't get it from some place else, that
20 may be one thing. But the truth of the matter is, they
21 don't have a defense. We have fifteen to sixteen
22 different causes of action. But they all basically come
23 down to the same thing. He didn't tell the truth. Now,
24 I understand that he says that he forgot. That is what
25 the documents show. We have given this court over five

1 hundred pages of documents, or seven hundred pages of
2 documents that were produced during discovery. One of
3 them is a letter that Mr. James referred to. We didn't
4 see until it was produced to us during discovery from
5 First Health and by Mr. James, where Mr. James produced
6 it to us as an admission against Dr. Thompson and what
7 he said. Yeah, I didn't do it. I forgot. This case is
8 right for Summary Judgment, which is why we made the
9 Summary Judgment Motion. This case should never go any
10 further. However, I understand them wanting to take
11 depositions on the issue of damages. I have no problem
12 with that. I don't know what I could offer as a fact
13 witness, if this court ordered me to. But, I can tell
14 the Court right now that I would claim attorney client
15 privilege. Because, my only contacts were with Dr.
16 Matthews and Dr. Cohen. Now, I may have had other
17 discussions with Mr. Matthews, but I guarantee you I
18 would claim attorney client privilege. And Mr. Matthews
19 would tell you that he handled everything, not me. I am
20 happy to tell them, I am happy to put him on the stand
21 right now, if the Court would like. I had nothing to do
22 with this. Dr. Thompson called me. I disclosed that.
23 They have now turned it around and said somehow or
24 other, and go on to say that I have done nothing
25 improper yet. The accusations are of impropriety. They

1 are wrong. He sent documents to our office that came to
2 my desk, that I have fully produced to them. Does it
3 have any relevance? I looked at them, and I didn't ---
4 they appeared to be when Mr. James was discussing it.
5 Bets me? That is what he sent me. I put them in here.
6 That is what he sent me. The rest of the information is
7 information that we sent out subpoenas for. We provided
8 it to them during discovery. They sent out Freedom of
9 Information Request. They provided to us during
10 discovery. Mr. James' answer reads like the Court
11 should just give Summary Judgment per se. They admitted
12 to the issue of loyalty. They admitted several factors,
13 which I have named in this --- in my Return. And,
14 again, I apologize, because I am inflamed about this.
15 And I do feel attacked. And I do hope that this court
16 at least understands why I would feel attacked.

17 **THE COURT:** All right. Let me ask you
18 counsel, how many employees does your company have now?

19 **MR. MEGNA:** Seventy-five or eighty at least.

20 **THE COURT:** Well, let's do this. I don't
21 think it is necessary --- Is there anything further in
22 your argument?

23 **MR. MEGNA:** No, sir.

24 **THE COURT:** I don't think it is necessary to
25 take a reply.

1 What I am going to do is, I am going to stand
2 down and consider this for a few moments. I will be
3 back and tell you whether I need to take it under
4 advisement, or whether I am prepared to rule.

5 We will be at ease now for approximately ten
6 minutes.

7 **MR. MEGNA:** Thank you, Your Honor.

8 **MR. JOSEY:** Thank you, Your Honor.

9 **THE COURT:** Thank you.

10 (Whereupon, a recess was taken from
11 2:32 p.m. until 2:45 p.m..)

12 **RULING OF THE COURT**

13 **THE COURT:** All right. I have had an
14 opportunity to review this. Thank you for your patience
15 while I was doing so. And the Court is prepared to rule
16 at this time. It is not necessary to take this matter
17 under advisement.

18 Mr. Megna, respectfully, sir, Rule 3.7 is
19 clear in its terms. It says that a lawyer shall not act
20 as an advocate in a trial in which he is likely to be a
21 necessary witness.

22 While you dispute the fact, that there are
23 certain issues, questions that need to be asked of you
24 because there is an exclusion by either the Dead Man's
25 Rule, or perhaps other evidentiary policies; the Court

1 is not persuaded by that. The Court cannot require one
2 party, who happens to be the defendant here, that is
3 the party being sued, to somehow limit whom they may
4 call as a witness, or what they may ask of those
5 witnesses. I think that Document HH alone, and the
6 circumstances that surround that letter, tell me that
7 you may be a witness, and for that reason, the Court is
8 going to grant the Motion to Disqualify you.

9 I am persuaded by the argument that Rule 1.7
10 and 1.9 under the Professional Conduct Rules, which have
11 to do with conflict, would not prevent your partner from
12 representing the plaintiff in this case. But, I do find
13 that you are likely to be a necessary witness.

14 Also, I asked you during this prior argument
15 what the size of your company was. I simply don't find
16 that it is too great of a hardship upon your company to
17 have other counsel, which of course could be your law
18 partner. This case is early in its process, although it
19 has been pending for while. And thus, I don't find that
20 there is any disadvantage to your party that cannot be
21 overcome. It appears to me, Mr. Matthews, from my
22 review of the file, as well as the probate proceedings
23 downstairs has been involved in this, if not directly,
24 certainly tangentially from early on.

25 So, for all of these reasons, the Court grants

1 the Motion to Disqualify you as counsel.

2 MR. MEGNA: Is the Court granting the Motion
3 Your Honor, just for at trial, as the rule says, or just
4 period?

5 THE COURT: No, sir. Period. It begins
6 now. And that was the next point that I wanted to
7 raise.

8 I don't know whether we want to go forward
9 with any other hearings today, or just by switching out
10 and let Mr. Matthews --

11 MR. MEGNA: This is the wrong Mr. Matthews.

12 THE COURT: Is the other Mr. Matthews in the
13 courthouse?

14 MR. MEGNA: No, sir. We would probably,
15 respectfully, Your Honor, ask two things.

16 Number one. We would request if the Court
17 took into consideration the exhibit that they attached
18 to their Motion, that there is nothing in there --- it
19 is about a different organization completely. And the
20 second thing is, we would ask the Court not to take up
21 anything further, because the Supreme Court has said
22 that this is an immediately appealable issue. And that
23 I would need to talk with my partners whether or not we
24 are going to appeal the issue.

25 THE COURT: Well, I think it is a better

1 course regardless of what response you may make to this,
2 is to not go forward today any further, because you are
3 not able to argue it. And Mr. Ben Matthews is not here.
4 They were not able --

5 MR. MEGNA: Right. I agree with that, Your
6 Honor.

7 THE COURT: All right. Very good. Then I
8 am going to conclude this matter.

9 Now, let's do this though. In case there is
10 an appeal, which is certainly your right and your
11 prerogative --

12 MR. MEGNA: Yes, sir.

13 THE COURT: I am going to ask that the
14 prevailing party here prepare an Order, which basically
15 will memorialize what I just said.

16 Mr. Josey, if you would prepare an Order
17 within ten days of today's date. Forward it to me
18 electronically at jbaxleylc@sccourts.org. That will
19 come to Ms. O'Neal, my law clerk. Please put it in Word
20 format, that is the only one they give us. And we will
21 of course, review it, make any changes we believe are
22 necessary. Please give Mr. Megna the courtesy of
23 looking at it in advance. And, of course, this decision
24 will not be final until the formal Order is served on
25 you, thus there is no beginning of an appellate period -

1 -- appeal period today for you.

2 MR. MEGNA: Right.

3 THE COURT: It will be when the formal order
4 is --

5 MR. MEGNA: -- Yes, sir. Until the Order
6 itself is signed.

7 THE COURT: And served on you.

8 MR. MEGNA: And served on me.

9 THE COURT: Yes, sir.

10 MR. MEGNA: Right.

11 THE COURT: All right. Very good. That
12 concludes this matter.

13 Have a good day.

14 MR. JOSEY: Thank you, Your Honor.

15 MR. JAMES: Thank you, Your Honor.

16 MR. MEGNA: Thank you, Your Honor.

17 (Whereupon, this hearing was
18 concluded at 2:53 p.m. on Wednesday, March 16, 2011.)

19 -- END OF TRANSCRIPT --

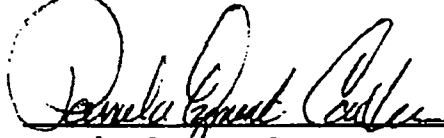
CERTIFICATE OF REPORTER

41

I, the undersigned, Pamela Ozment-Cartee, official Court Reporter for the Fourth Judicial Circuit of South Carolina, do hereby certify, that the foregoing is a true, accurate and complete Transcript of Record in the hearing of the above captioned case, relative to appeal, in The Court of Common Pleas in Darlington County, South Carolina, on the 16th day of March 2011.

I do further certify that am neither, of kin, counsel, nor interest of any party hereto.

July 5, 2011


Pamela Ozment-Cartee
Circuit Court Reporter

Matthews and Megna, LLC

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February 16, 2011

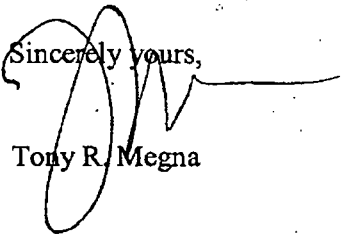
✓ Jay James, Esquire
PO Box 507
Darlington, SC 29540

Re: Estate of Hugh S. Thompson, Case No:
Notice of Appeal – 2010-CP-16-633

Gentlemen:

Please find enclosed the Notice of Appeal of PDHC from the order of the Honorable J. Michael Baxley dated January 18, 2011. During the pendency of this particular appeal, we recognize the personal representatives remain restrained from exercising any powers of their office except as necessary to preserve the estate or to pay the person or creditor demanding bond. We remain amenable to considering any matter that may arise over the next few years as these and the related matters are determined by the courts.

Sincerely yours,


Tony R. Megna

Cc: Renee Josey
1831 W. Evans Street
Florence, SC 29501

The Honorable Scott B. Suggs
Clerk Of Court, Darlington County
1 Public Square, Room B-4
Darlington, South Carolina 29532

THE STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF DARLINGTON	)	
	)	
PEE DEE HEALTH CARE	)	JANUARY 18, 2011
	)	
APPELLATE,	)	
	)	
VERSUS	)	
	)	
ESTATE OF HUGH S. THOMPSON	)	2007-CP-16-0614
	)	
RESPONDENT.	)	
_____	)	

BEFORE

THE HONORABLE J. MICHAEL BAXLEY

APPEARANCES

Tony R. Magna, Esquire
Attorney for Pee Dee Mental Health

Jon Rene Josey, Esquire
Attorneys for the Estate

Pamela Ozment-Cartee
Circuit Court Reporter

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THE ESTATE OF HUGH S. THOMPSON

3

1 (Whereupon, the hearing began at 10:00 a.m. on
2 Tuesday, January 18, 2011.)

3 **THE COURT:** All right. Madame Court Reporter, do
4 you have the caption?

5 **MADAME COURT REPORTER:** Yes, sir.

6 **THE COURT:** All right. Let's go on the record now
7 with Pee Dee Health Care versus Thompson. This is an
8 appeal from the Probate Court. Let's come across and let
9 everyone introduce themselves, and tell us whom you
10 represent, and we will be ready to go forward.

11 **MR. MEGNA:** Tony Megna, Your Honor, with Pee Dee
12 Health Care.

13 **MR. JOSEY:** Judge, I am Renee Josey, I represent
14 the Thompson Estate, and the Personal Representatives
15 together with Jay James, here in Darlington.

16 **THE COURT:** Very good. Welcome. And do you have
17 someone with you as well.

18 **MR. JAMES:** We have the personal representatives
19 Louise Dailey and Hugh Thompson, Jr.

20 **THE COURT:** Very good. Welcome to the courtroom,
21 ladies and gentlemen.

22 All right. Now, it appears to me that Pee Dee
23 Health Care is the Appellate. And there has been a
24 Motion to Dismiss from the other side. All right. Let
25 me ask, how do you wish for us to proceed on this. Mr.

1 Megna, do you want to go first? Do you want to respond
2 to the party that wants to dismiss your appeal first?

3 MR. MEGNA: Your Honor, I am happy for them to do
4 that. I will in the mean time just go ahead and share
5 the simple facts of the case.

6 THE COURT: Thank you.

7 MR. MEGNA: Judge, it was our understanding that
8 we were just here on the Motion to Dismiss today, and not
9 the merits of the appeal itself. But, --

10 THE COURT: Let me look at that.

11 MR. JOSEY: That is all that I am addressing, but
12 I am happy to have the Court enter judgment in favor of
13 my clients, of course.

14 THE COURT: Okay.

15 MR. JOSEY: That is all that has been Briefed,
16 Your Honor.

17 THE COURT: Defendant's Motion to Dismiss the
18 appeal. Very good. Let me say that I have received a
19 Memorandum from the respondents in advance of today's
20 hearing. I just received a return from Pee Dee Health
21 Care. Since this is your Motion, let's hear from you
22 then, Mr. Josey, or Mr. James, whoever is going to argue
23 that. And then we will just make a decision on the
24 Motion to Dismiss today.

25 MR. JOSEY: Thank you, judge. We are here on a

1 Motion to Dismiss this appeal from Probate Court. I
2 understand that you did get the copy of our Memorandum
3 that was filed on Thursday, or mailed in on Thursday; is
4 that correct?

5 THE COURT: Yes, sir, I have it.

6 MR. JOSEY: And to the extent that anything new is
7 raised in that reply, we might want some more time to
8 Brief it, if necessary.

9 Judge, of course, appeals from Probate Court are
10 governed by statute. They are not governed by the rules
11 of civil procedure. And they are not governed by the
12 South Carolina Appellate Court Rules. They are governed
13 by a specific statute within the Uniform Probate Code as
14 adopted by the South Carolina Legislature.

15 The Probate Code is specific in its requirements for
16 perfection of an appeal from the Probate Court to the
17 Circuit Court. Justice Hearn, when she was Chief Judge
18 of the Court of Appeals, wrote an opinion in Witzig,
19 which is cited in our Memorandum. And she specifically
20 said that --

21 THE COURT: -- Counsel, give us the cite for our
22 record here today.

23 MR. JOSEY: Yes, sir. Witzig --

24 MR. MEGNA: I actually have a copy of that Order,
25 Your Honor, if you would prefer it.

1 **THE COURT:** I have it.

2 **MR. JOSEY:** Is 325 S.C. 363. The Southeastern
3 Recorder cite is, 479 S.E.2d 297. That is a 1996 Court
4 of Appeals decision.

5 But in Witzig, which also involved an appeal from
6 the Probate Court to the Circuit Court, now Justice Hearn
7 says that the specific code provisions apply, and not
8 Rules of Civil Procedure, or Rules of Appellate Court.
9 And more specific, when a specific set of rules, or a
10 specific statute applies that governs over more general
11 sense of rules, or more general statutes.

12 So, we look to see what the specific statute says.
13 And if you look at §62-1-308. I see you are reaching, I
14 guess you are pulling it out.

15 **THE COURT:** I have it.

16 **MR. JOSEY:** Okay. §62-1-308 is the statutory
17 provision, the enactment by the legislature that governs
18 appeals from the Probate Court. And specifically, we are
19 looking at subsection (a).

20 **THE COURT:** All right.

21 **MR. JOSEY:** The introduction of subsection (a)
22 says, except for subsection (g) and subsection (g) deals
23 with consent appeals that goes directly to the Supreme
24 Court, which we don't have a consent appeal directly to
25 the Supreme Court here. Except for that it says quote,

1 "appeals from the Probate Court must be to the Circuit
2 Court and are governed by the following rules," unquote.
3 In there it provides three sentences within subsection
4 (a). The first sentence says. A person interested in a
5 final order, sentence, or decree of a Probate Court and
6 considering themselves injured by it may appeal to the
7 Circuit Court in the same county. So, that just says,
8 that you have a right to appeal. You may appeal.

9 The second sentence then reads, the notice of
10 intention to appeal to the Circuit Court must be filed in
11 the office of the Circuit Court and in the office of the,
12 Probate Court, and a copy served on all parties within
13 ten days after receipt of the written notice of the
14 appeal of order, sentence, or decree of the Probate
15 Court. In this case that requirement was met.

16 Then there is a third sentence. The third sentence
17 says, the grounds of appeal must be filed in the office
18 of the Probate Court, and a copy served on all parties
19 within forty-five days after receipt of the written
20 order, sentence for decree of Probate Court.

21 In this case that third sentence which imposes a
22 second jurisdictional requirement for a Probate Appeal
23 was not satisfied. The grounds of appeal were not filed
24 anywhere within forty-five days. And they were not filed
25 with the Probate Court where it was required to be done

1 until at least eighty-eight days after the order was
2 received, almost twice the allowable amount of time.

3 Not only does the statute use the word must, and
4 makes it clear, that the plain language of the statute
5 makes it clear that sentences two and sentences three are
6 mandatory; our courts have consistently held that
7 sentences two and three are jurisdictional requirements.
8 Not only the Witzig case, which I cited a moment ago, but
9 the Supreme Court in a decision called Cretzmeyer, and
10 Cretzmeyer citation for that is 365 S.C. 12, or 615
11 S.E.2d 116, that is a 2005 Supreme Court decision. And
12 there is also another Court of Appeal decision, the Evert
13 decision, it is Gallagher versus Evert. That citation is
14 353 S.C. 59, 577 S.E.2d 217. That is a 2002 Court of
15 Appeals decision.

16 The Court of Appeals in that last decision, Evert
17 made it clear that not only sentence two is jurisdiction,
18 but sentence three is jurisdictional as well, because it
19 is specifically noted. The Appellate in that case had
20 failed to meet both sentence two and sentence three, and
21 the Court said both of those failures result in a
22 jurisdictional fault. Circuit Court doesn't have
23 jurisdiction.

24 This court judge cannot change what the Legislature
25 has already said in clear, plain, ordinary language is a

1 mandatory requirement to perfect an appeal. Just as this
2 court can't change the word must, that the legislature
3 used to the word may; this court can't change the words
4 forty-five-days to read eighty-eight-days. Or this court
5 shouldn't change the words Probate Court to be Circuit
6 Court. The legislature put those specific clear words in
7 the statute for a reason.

8 Now, the Court of Appeals in South Carolina Farm
9 Bureau Mutual Insurance Company versus Mumford, and that
10 citation is 299 S.C. 14, 382 S.E.2nd 11, that is a 1999
11 Court of Appeals decision said. Once the legislature has
12 made a choice, there is no room for the courts to impose
13 a different judgment based on their own notions of public
14 policy. So, you know, it may seem like a harsh rule, a
15 lot of jurisdictional rules are. But that is a decision
16 that the legislature has made as a matter of policy, and
17 this court just needs to enforce it.

18 Judge, I would be happy to answer any questions. I
19 have also prepared a proposed order for your
20 consideration. I know that you are going to hear from
21 the appellate, but I will hand it up, and I will hand a
22 copy to counsel as well. And I have an extra one for
23 your law clerk.

24 **THE COURT:** Thank you. And Mr. Josey, tell me
25 again, you said it was eighty-eight-days before it was

1 filed in the Probate Court; where was it filed, and in
2 what time frame?

3 MR. JOSEY: It was filed --- Well the Notice of
4 Appeal, sentence two was complied with. Sentence three,
5 the basis of the appeal was filed five days late, if you
6 want to say that in the Circuit Court.

7 THE COURT: Right.

8 MR. JOSEY: But that is not when the statute says
9 it needs to be filed. And it was filed eighty-eight days
10 late in the Probate Court. We know that it was at least
11 received by the day he filed his Notice of Appeal,
12 because he attached it to his Notice of Appeal. So that
13 is the counting point that I am using. They may have
14 actually had it a few days before that.

15 THE COURT: And finally, just to help me get the
16 big picture. What happened below in this case that is
17 being appealed?

18 MR. JOSEY: I thought you might be curious.
19 Primarily, this involves Judge Lawson's decision not to
20 require a bond for the administration of this estate,
21 which is made primarily of real estate assets. And Judge
22 Lawson --- we convinced Judge Lawson, if and when it was
23 sold it could be put into a secured account that he
24 helped administer so that there was not any risk of
25 assets going anywhere, because the real estate had been

1 sold, and actually a couple of pieces have been sold.
2 One has been consummated, and one is on the way to be
3 consummated. The proceeds are being put into an account
4 that Judge Lawson is overseeing. And he decided that was
5 satisfactory under the Probate Code. That is the primary
6 issue.

7 **THE COURT:** All right. Very good. All right, Mr.
8 Megna, I will be glad to hear from you in response.

9 **MR. MEGNA:** Thank you, Your Honor. First of all
10 the grounds for appeal was filed timely. It was filed in
11 this court as opposed to the Probate Court. I agree with
12 them. It was filed on November 9th, and I have only one
13 copy of this, but it should be a part of this court's
14 record anyway of this year. And I will say that there is
15 no doubt that it was filed in this court, instead of the
16 Probate Court.

17 I would make a couple of arguments to that. First
18 of all, if you go look at the Witzig case that they have
19 cited, and that was cited by the Princit (phonetic)
20 Court, the Witzig case considered just the first sentence
21 or the second sentence. It is the Notice of Intention to
22 Appear. That is the jurisdictional issue. The Court of
23 Appeals has never held, never directed, never held that
24 the grounds for appeal is to set the component of a
25 jurisdictional issue. The Notice of Appeal, as they have

1 admitted was filed promptly.

2 In addition to that, the Court will note the matter
3 of Howard, and I have presented that case to the Court in
4 my Memo, and it is at 434 S.E.2d 254, indicates and
5 states that in an appeal from the Probate Court, this
6 court is obligated to apply the South Carolina Appellate
7 Court Rules. Appellate Court Rule 204 specifically says,
8 if a document is filed in the wrong court, the Court
9 shall apply it to the correct court. There is no
10 jurisdictional issue here whatsoever. The Appellate
11 Court Rules are very specific, and the Notice of Intent
12 to Appear, you would have to find outside that the third
13 sentence is also jurisdictional. And even if it is
14 jurisdictional, then the Court would have to find that
15 the Supreme Court, which specifically stated, no prior
16 decision expressly stated what standard of review the
17 Circuit Court must apply when it hears cases from other
18 court in its appellate jurisdiction. However, the
19 general standards set forth in decisions suggest that the
20 rules and cases involving an appeal to the Circuit Court,
21 if there is either a statute or rule of course expressly
22 prescribing a different standard of review, must apply
23 the same standard this court or the Court of Appeals
24 would apply.

25 The South Carolina Appellate Court Rules