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

(Appeal Tracking Number 2011197671)

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

v.

Estate of Hugh S. Thompson ..... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUE ON APPEAL

Did the trial court abuse its discretion[1] by ordering complete prospective disqualification for Appellant's counsel Tony R. Megna?

[1] Respondent suggests that the appropriate standard of review for the trial court's order of disqualification is limited to review for abuse of discretion or an absence of any evidentiary support. Accord Stone v. Reddix-Smalls, 295 S.C. 514, 369 S.E.2d 840 (1988)(reviewing trial court's contempt decision); Toal, Appellate Practice in South Carolina 2d ed., p. 196 ("As a general rule, appellate courts will be bound by the factual findings of a lower court made in response to motions preliminary to trial where there has been conflicting evidence or where the findings are supported by evidence and not clearly wrong or controlled by error of law.")(citing City of Chester v. Addison, 277 S.C. 179, 284 S.E. 2d 579 (1981); Askins v. Firedoor Corp. of Florida, 281 S.C. 611, 316 S.E.2d 713 (Ct. App. 1984)).

STATEMENT OF THE CASE

This Appeal is from the trial court's Order of April 15, 2011, which ordered "complete disqualification" of attorney Tony R. Megna ("Mr. Megna") because of his status as a witness regarding the facts at issue (R. pp. 4-12). This Appeal is the third appeal (all brought by Appellant) with respect to this case.[2]

The underlying action is one for alleged damages by an employer (the Appellant) against the estate of a deceased employee (the Respondent). Appellant Pee Dee Health Care, P.A. ("PDHC") operates a medical clinic and practice in Darlington, South Carolina, and Dr. Hugh S. Thompson, Jr., ("Dr. Thompson" or "Decedent") was, for a time during 1998-2000, a physician in practice with that clinic. Dr. Thompson died on November 5, 2009, as a resident of Darlington County. His Will dated June 26, 2008, was admitted to probate 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 Court.

Alleged damages in this matter relate to the overpayment of benefits by Medicare to PDHC occasioned by Dr. Thompson's failure to be properly credentialed with the United States Department of Health and Human Services. This action began when Appellant, represented by Matthews and Megna, LLC, filed a Summons and Complaint on May 20, 2010, in the Probate Court and petitioned for removal to the Court of Common Pleas pursuant to S.C. Code §62-1-

[2] An Appeal identified as COA Tracking Number 2011185767 is an appeal from the Darlington County Probate Court relating to bond requirements and attorneys fees and has been fully briefed and has now been stayed by order of this Court. An appeal identified as COA Tracking Number 2011203391 is from the trial court Order of Summary Judgment in favor of Respondent. The Initial Briefs and the Initial Reply Brief, along with Designations of Matter have been recently filed with this Court. The Respondent has asked that the summary judgment appeal be considered first for the sake of judicial economy and efficiency; the Respondent has no objection to this appeal also being stayed if necessary. Furthermore, Respondent has not suggested that any counsel disqualification is required in the appellate court.

302(d)(2009).[3] The Complaint alleged that Dr. Thompson had misrepresented, affirmatively or by failure to disclose, relevant information about his Medicare "debarment" status. Respondent filed its Answer on June 17, 2010.

On January 31, 2011, Respondent filed its Motion to Disqualify Mr. Megna as trial counsel (R. pp. 717-728). The Motion was based upon the Rules of Professional Conduct, 3.7, SCACR 407 and the supporting case law. The Motion alleged that Mr. Megna (who also serves as the Chief Executive Officer ("CEO") of the Appellant) was a fact witness and thus should not be allowed to serve as trial counsel. The trial court heard the matter on March 16, 2011. After considering the Motion, Appellant's Return to the Motion (R. pp. 200-247), and the arguments of counsel (including Mr. Megna), the trial court granted the Motion to Disqualify Mr. Megna. The court ruled that the disqualification was as to trial and pre-trial matters and was to begin immediately. The trial court signed the written Order on April 15, 2011, (R. p. 12, lines 1-4).

On May 2, 2011, Appellant (under Mr. Megna's signature) filed a Rule 59(e) Motion to Reconsider the Order of Disqualification. This Motion was heard by the trial court on July 19, 2011.[4] By Order dated August 12, 2011 (R. pp. 13-14), the trial court denied Appellant's Rule 59(e) Motion. On August 15, 2011, Appellant served its Notice of Appeal on Respondent (R. p. 329-330) and filed the said Notice of Appeal with this Court on August 29, 2011.[5]

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[3] Appellant's initial pleading and discovery requests were signed by Ben R. Matthews, law partner of the now disqualified Mr. Megna. Indeed, as of December 17, 2010, Matthews was signing various court filings for Appellant.

[4] The trial court simultaneously heard the parties' cross-Motions for Summary Judgment. To avoid any prejudice, the trial court allowed Mr. Megna to brief and argue both Motions.

[5] Appellant further filed on August 24, 2011, a combined Motion to Consolidate, to Stay Appellate Proceedings, and to Disqualify one of the Respondent's counsel and to Vacate lower court proceedings. By Order dated October 6, 2011, this Court denied the Motion to Consolidate and declined to act on Appellant's Motion to Vacate and to Disqualify Counsel.

FACTS

In its arguments to the trial court and in its Brief, Appellant[6] asserts that there are insufficient facts to disqualify Mr. Megna, inter alia, (i) because Mr. Megna had no substantive discussions with Dr. Thompson concerning the issues at bar and (ii) because any testimony which Mr. Megna could give would not be "necessary."[7] The facts found in the Record on Appeal demonstrate Mr. Megna's knowledge of relevant facts and the need for Respondent to examine him.

MR. MEGNA'S STATUS AS CEO

In addition to serving as general counsel to PDHC, Mr. Megna has been its CEO since 1995. See Appellant's Brief at Page 2, Footnote 1. He thus has served PDHC as its CEO during the two critical periods involved in this litigation: when Thomson was hired and worked there (1998-2000), and when the Medicare administrative proceedings addressing the overpayment of benefits occurred (2007-2008). The Record on Appeal shows that Mr. Megna, while serving as CEO, claims to have had oral and written communications with Dr. Thompson about some of the facts at issue.

FACTS FOUND IN THE COMPLAINT AND APPELLANT'S EXHIBIT HH

In Paragraph 13 of its Complaint, PDHC 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..." (R. p. 167, lines 1-3). The Complaint purported to attach a copy of this alleged

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[6] Appellant's Brief has been signed by Mr. Megna.

[7] Appellant's Brief also argues that any disqualification should be as to trial only (and not to pre-trial matters) and that the Deadman's Statute, S.C. Code Ann. §19-11-20 (1976) would bar his testimony. These arguments will be addressed below.

letter as an exhibit; the Complaint as served and filed did not attach the alleged letter as an exhibit, and Appellant to date has not amended its Complaint to include this 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 (R. p. 401, lines 4-25, p. 402, lines 1-9). PDHC submitted a copy of the same letter as Exhibit HH of its Return to the Motion to Disqualify (Supp. R. p. 2).

The letter is addressed to "Tony." At Page 15 of its Return to the Motion to Disqualify, PDHC described this letter as the "cover letter Decedent addressed to the undersigned" (i.e., Mr. Megna) (R. p. 214, line 10). Thus, Mr. Megna is the alleged recipient of an alleged communication from Dr. Thompson in July 2007 – a communication identified as a key exhibit in PDHC's Complaint.[8]

In an affidavit filed with PDHC's Rule 59(e) Motion, PDHC employee Warren Mark Matthews, Sr. (brother of PDHC attorney Ben R. Matthews) stated that the document submitted by PDHC as Exhibit HH at the March 16 hearing was not the original document from the files of PDHC, and inconsistent with the motion response, he professed ignorance as to how PDHC came to possess the document it submitted as Exhibit HH. Attached to Mr. Matthews' affidavit was the same unsigned, undated letter as Exhibit HH, but without handwritten notations in the lower right-hand corner which seem to indicate a 1999 date[9] (R. p. 788 and p. 785 lines 14-16). Mr. Matthews' affidavit raises additional factual questions regarding the origin of this alleged key exhibit and the location of the purported original.

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[8] While Mr. Megna's receipt of the letter from Dr. Thompson in July 2007 is alleged by the Appellant, it cannot be confirmed by Respondent because the document is unsigned and undated. Thus, Respondent uses the adjective "alleged" as a precaution.

[9] No version of this letter makes the admissions of misconduct stated in the Complaint.

FACTS FOUND IN THE ANSWERS TO INTERROGATORIES

PDHC's Answers to Interrogatories propounded pursuant to SCRP 33 further establish Mr. Megna's status as a necessary witness.

- In its Response to Interrogatory 1, PDHC listed Mr. Megna as a person known to be a witness concerning the facts of the case (R. p. 824, lines 17-21).
- In its response to Interrogatory 2, PDHC stated it has "provided an undated letter sent to Tony Megna from Dr. Thompson as well as information sent to Mr. Megna by Dr. Thompson relating to the S.C. Board of Medical examiners." (R. p. 825, lines 27-29.)
- PDHC's response to Interrogatory 8 identified Mr. Megna as the only person at PDHC who had written or oral communication with Dr. Thompson about the Medicare determination for recoupment. "The only communication that occurred was a telephone call made to Tony Megna by Dr. Thompson on or about the time PDHC received the letter from Medicare" (R. p. 827, lines 30-32).
- PDHC answered Interrogatory 9 by stating that Tony Megna was the only person involved with PDHC's legal defense of the adverse Medicare determination (R. p. 827, line 35). The appeal of this determination resulted in the finding that PDHC was at fault for not ascertaining Dr. Thompson's Medicare status on the HHS website.[10]

FACTS FOUND IN THE APPELLANT'S BRIEF

In Footnote 4, at Page 10, of its Brief, Appellant alleges that "sometime in 2007, Dr. Thompson did contact the undersigned (i.e., Mr. Megna) to inform him that Decedent was

[10] The trial court, in granting Summary Judgment to Respondent, held that PDHC had no right to rely on any alleged misrepresentations of Thompson relating to his Medicare status and further held that the finding of fault by the Administrative Law Court precluded PDHC from re-litigating the issue of its fault. The Administrative Law Court had found PDHC breached a statutorily imposed duty to verify its employee's status on the HHS website before accepting an assignment of Medicare benefits.

providing 'some papers' to Appellant. The Decedent further informed the undersigned (i.e., Mr. Megna) he was represented by a 'lawyer in Columbia'." Footnote 4 further states that the "Decedent, however, did send the Appellant a few documents produced to the Defendant...."[11] Thus, even the Appellant's Brief identifies Mr. Megna as a factual witness – a PDHC officer who allegedly received relevant documents from Dr. Thompson.

DISAGREEMENTS WITH APPELLANT'S RECITATION OF CASE HISTORY AND FACTS

The Respondent disagrees with the following statements of fact made in Appellant's Brief as they relate to this[12] appeal.

- Appellant, in its Statement of the Case (Appellant's Initial Brief, pp. 3-4), violates SCACR 208(b)(1)(C) by setting forth contested matters as to damages.
- Appellant wrongly states that the date of the trial court's Order disqualifying Mr. Megna was July 21, 2011. Appellant's Initial Brief, p.4. The correct date was April 15, 2011.
- Appellant seemingly states that the trial court did not address the issue of Mr. Megna's disqualification in its August 12, 2011, Order denying Appellant's Rule 59(e) Motion. Appellant's Initial Brief, p.4 footnote 3. The trial court clearly addressed this issue. The trial court stated that "the findings of fact and conclusions of law in the Order

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[11] These documents apparently are Exhibit V to PDHC's Return to the Motion to Disqualify. (Supp. R. pp. 3-42).

[12] At Pages 7-23 of its Brief, Appellant sets forth its version of the facts which it urges warrant a reversal of the trial court's Order of Summary Judgment. In its Brief in the Summary Judgment appeal (Tracking #2011203391) Respondent indicated its disagreement with many of the facts stated by Appellant in that appeal, and where such mis-statements are repeated by Appellant herein, Respondent has the same disagreements but in the interest of brevity will not repeat them herein.

Disqualifying Counsel are replete. Thus the Court declines to offer additional reasoning for its decision to uphold that determination, without alteration" (R. p. 13, lines 20-22).

- The great majority of Appellant's Statement of the Case dwells on its efforts to disqualify one of Respondent's attorneys (which this Court declined to do in its October 6, 2011, Order). While irrelevant, Appellant's misstatements should not go unchallenged. Appellant's Initial Brief, page 5, states that the "trial court ordered the hearing to continue without further discussion of the conflict issue." This is not correct. After hearing from Mr. Megna on this issue, the trial court stated, "All right. Do you want to just note this for our record, Mr. Megna?" Mr. Megna responded, "Yes, sir" (R. p. 437, lines 11-13). At no time, then or later, did Appellant move the trial court to disqualify counsel for Respondent.[13]
- Appellant also mischaracterizes the trial court's allowance for its chosen attorney (Mr. Megna) to argue the cross Motions for Summary Judgment and the Rule 59(e) Motion on the Disqualification Order. Appellant states that the trial court "specifically held its previous Order in abeyance to allow Appellant's choice of counsel to continue until the Court made a decision to the contrary." Appellant's Initial Brief, p. 6. This is not correct. What the trial court did was allow Mr. Megna to argue the summary judgment motions, before reconsidering the disqualification, so as to allow PDHC , "the benefit of your institutional knowledge of this case." Appellant's counsel Megna told the trial court he had no objection to that plan (R. p. 434, lines 18-25 and p. 435, lines 1-6).

Within a few days of the hearing on the Rule 59(e) Motion regarding the Disqualification Order, Appellant's counsel Mr. Megna issued discovery subpoenas to

[13] This lack of issue preservation was raised by Respondent in its Response to the Appellant's motion to disqualify made only in this Court.

Respondent's counsel and to other counsel involved in unrelated cases with Mr. Megna. Illustrative of his limited allowance, the trial court quashed these subpoenas and opined that "the Court does find that its decision to allow Plaintiff's counsel oral arguments 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 the Plaintiff and its counsel, are hereby quashed" (R. p. 13, lines 23-30). (Order of the Honorable J. Michael Baxley dated August 12, 2011.)

- Appellant states that the trial court entered an Order filed October 4, 2011, denying Appellant's Rule 59(e) Motion and quashing Appellant's subpoenas. Appellant's Initial Brief, p. 7. The Order referred to is actually the trial court's Order of August 12, 2011. The Order filed October 4, 2011 (and dated September 28, 2011) was the trial court's Order dismissing as void ab initio Appellant's Rule 59(e) Motion on Summary Judgment Order (R. pp. 35-36). The "void ab initio" ruling was made because of disqualified counsel Mr. Megna's sole signature on that Rule 59(e) Motion.

ARGUMENT

I. 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 is (1) uncontested, (2) relates to the nature or value of the legal services rendered, or (3) disqualification would work a substantial hardship on the attorney's client. Rule of Professional 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 Respondent in this case, 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.[14]

In its enumerated arguments, Appellant does not argue that any of the exceptions to Rule 3.7 apply. It argues (i) that Mr. Megna is not a witness, Appellant's Initial Brief, Argument III, Page 29-30; (ii) that Mr. Megna is not a "necessary witness" within the meaning of Rule 3.7, Appellant's Initial Brief, Argument IV, Pages 30-32; (iii) that the South Carolina Dead Man's statute, S.C. Code Ann. §19-11-20 (1976) would render Mr. Megna incompetent to testify, Appellant's Initial Brief, Argument II, Pages 27-29; and (iv) that any disqualification should apply only to advocacy at trial and not also to pre-

[14] As previously stated, Mr. Megna's law partner Ben R. Matthews signed the initial pleadings, discovery documents, and documents relating to probate issues from the inception of the case until December 8, 2010, other than Certificates of Service. Respondent believes that the Appellant's Summary Judgment Motion filed December 9, 2010, was the first document purportedly signed by Mr. Megna, with this document apparently signed for Mr. Megna by an unidentified third party. Respondent moved to disqualify Mr. Megna by filing its Motion to do so on January 31, 2011.

trial matters, Appellant's Initial Brief, Argument I, Pages 24-27. Appellant in its Summary alleges, without supporting argument, that it would be "unnecessarily burdensome, expensive, and cause the Appellant additional damage for the Appellant to change attorney," Appellant's Initial Brief at Pages 36-37. Finally at Pages 26, 31, and 35 of its Initial Brief, Appellant alludes to attorney-client privilege and work product but does not argue the applicability of either doctrine to the facts of this case.[15] All of these arguments will be addressed herein.

II. Mr. Megna Is a Witness and Is a Necessary Witness

Mr. Megna's position as CEO confirms his focal point as a witness in this case. As PDHC's CEO, he should have knowledge as to matters of credentialing, due diligence, records keeping, and file destruction.[16] He should further know about PDHC policies and procedures and their implementation.

From time to time, Mr. Megna, on behalf of PDHC and affiliated organizations, has signed "Medicare Enrollment Applications" for submission to the Center for Medicare and Medicaid Services (CMS) within the United States Department of Health and Human Services. By signing such forms, Mr. Megna "binds this provider to the laws, regulations, and program instructions of the Medicare program" (Supp. R. p. 72, lines 3-4

[15] By not arguing these doctrines, Respondent believes that these arguments are abandoned. Gold Kist, Inc. v. Citizens and Southern National Bank of South Carolina, 286 S.C. 272, 333 S. E. 2d 67 (Ct. App. 1985); see also Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989) (Reply Brief cannot be used to argue issues not argued in Appellant's Brief.) In any event, Respondent does not seek information from witness Mr. Megna that would implicate these doctrines.

[16] As explained to the trial court at the July 19, 2011, hearing, PDHC was asked to produce all applications for employment by Thompson (on which credentialing questions could be expected). PDHC replied that such records were destroyed in the normal course of business after a period of time (R.p. 485, lines 14-20). While Mr. Megna may protest that he is without knowledge of relevant facts, that ignorance itself may be relevant.

and 17-18). Accordingly, Mr. Megna is positioned to be a person at PDHC with knowledge about the efforts of PDHC to comply with Medicare laws, regulations, and program instructions. PDHC's adjudicated non-compliance with some of these rules led to the adverse Medicare decision which is at the heart of this case. Mr. Megna's knowledge, or lack of knowledge, of these rules and the efforts of PDHC to comply with them makes him a necessary witness.

Finally Mr. Megna's position puts him in a position to testify as to alleged damages suffered by PDHC (which in Mr. Megna's opinion apparently exceed $726,000.00, Appellant's Initial Brief at Pages 3-4).[17]

Moving beyond Mr. Megna's position as CEO, Appellant's Complaint and Exhibit HH, its Answers to Interrogatories, and its Initial Brief all thrust Mr. Megna forward as a necessary witness to the fact of this case.

The Complaint alleges the delivery by Dr. Thompson of a "smoking gun" letter in 2007 admitting misrepresentations to Appellant about Dr. Thompson's Medicare re-enrollment process. This letter addressed to "Tony", in the record as Defense Hearing Exhibit 1 at the March 16, 2011, Hearing, was also submitted into the record by Appellant as Exhibit HH of its Return to the Motion to Disqualify. It makes no admissions of fault about the facts at issue in this case. Respondent's Exhibit 1 and Appellant's Exhibit HH both have handwritten notations in the lower right hand corner "HH" which seemingly indicate a 1999 timeframe, not 2007 (Supp. R. p. 2). As the person to whom this letter was addressed, Mr. Megna is a vital witness as to its date of

[17] As stated previously, such statements should not be a part of the Statement of Case since they are contested.

delivery, its circumstances of delivery, its authenticity, its authorship, its context, its safekeeping since receipt, and the handwritten notation and the meaning of same. The affidavit of Warren Mark Matthews, Sr., submitting a "clean" version of this letter—one without the handwritten notation—raises additional questions, not only for Mr. Matthews but also for Mr. Megna.

Appellant's Answers to Interrogatories 1, 2, 8, and 9 further establish Mr. Megna's status as a necessary witness. The Answer to Interrogatory 1 first affirms Mr. Megna's status as a witness and then disclaims the likelihood of his being called (by Appellant presumably) to testify with the statement that "Mr. Megna is not likely to testify as he did not participate in the decedent's Medicare enrollment process" (R. p 824, lines 17-18). This anticipatory disclaimer does not alter Respondent's right to discover information from Mr. Megna nor call him as an adverse witness. The Answer to Interrogatory 2 again implicates Mr. Megna as the recipient of the alleged unsigned letter from Dr. Thompson to him and documents relating to the S. C. Board of Medical Examiners.

Mr. Megna is identified in PDHC's Answer to Interrogatory 9 as the only person at PDHC involved with the defense of the Medicare adverse determination. As the trial court held, the appeal of the adverse PDHC Medicare determination is relevant to this matter. PDHC has claimed the right of equitable indemnification against Decedent and its fault or lack of fault is relevant to this determination. See Fowler v. Hunter, 388 S.C. 355, 697 S.E.2d 531 (2010). Further relevant would be the content of any conversations had between Mr. Megna and the decedent, particularly as to issues of notice and opportunity to participate in the binding administrative determination. See Otis Elevator, Inc., v.

Hardin Const. Co. Group, 316 S.C. 292, 296-97, 450 S.E.2d 41, 44 (1994). Mr. Megna has firsthand knowledge regarding the status and results of PDHC's administrative appeal and is according to the answer to Interrogatory 8 the only person at PDHC to talk with Decedent about the Medicare determination for recoupment. The Appellant's Brief also thrusts Mr. Megna forward as a necessary witness with allegations of a 2007 conversation between Mr. Megna and the Decedent and the delivery by Decedent of documents to Mr. Megna, all apparently and allegedly related to PDHC's Medicare administrative proceedings.

In its Brief, page 26, Appellant asserts that "the only substantive reason Defendants maintain the undersigned (i.e., Mr. Megna) must be examined is the content of the documents sent to the undersigned (i.e., Mr. Megna) by the Decedent that Defendant admittedly has in its possession."[18] General examination with regard to such documents is indeed one area of inquiry, but examination of Mr. Megna would likely yield other information and documents relevant to this case as suggested above – everything from credentialing policies and procedures to alleged damages due in this case. Aside from the contradiction inherent in these two statements and reserving to a later section of this Brief the claim of work product, Mr. Megna is clearly in possession

[18] Elsewhere in its Brief, page 35, Appellant suggest that a different singular purpose for Respondent's desired discovery – claiming that Respondent only wishes to obtain information that is "the work product of Appellant's counsel (presumably Mr. Megna) actually prepared during the course of litigation on behalf of PDHC while Dr. Thompson was independently represented by counsel from another law firm."

Presumably the reference is to the litigation involving Firstchoice Healthcare, Decedent's other employer. Just as Decedent was not a party to PDHC's litigation, he was not a party to the Firstchoice litigation. Respondent has no interest in work product underlying a now concluded and binding administrative litigation matter.

of knowledge about many facets of this case that are unique to him. As such, he is a necessary witness within the meaning of Rule 3.7.

III. The Dead Man's Statute

Appellant claims that Mr. Megna, as a person with a claimed economic interest in the outcome of this litigation, is barred from testifying by S.C. Code Ann. §19-11-20 (1976), the "Dead Man's Statute." The mere fact that Mr. Megna may have a legal or equitable interest which may be affected by this action is not determinative. By its express language, §19-11-20 contemplates that representatives of a decedent's estate may offer testimony as to communications of the decedent with an interested person in which event "all other persons not otherwise rendered incompetent shall be made competent witnesses in relation to such transactions or communications on said trial or hearing." In other words, the competency objection created by the statute belongs to the representatives of the decedent and not the other interested person.

Therefore, while Respondent can invoke the Dead Man's Statute to bar the testimony of Mr. Megna (if he in fact has an interest which would be affected by the outcome of this case)[19] as to communications which he had with decedent, the Respondent can also waive that trial competency objection and present such testimony through the adverse witness Megna. In sum, the prohibition of offering the testimony of an interested person or party applies only where the testimony is offered against a party then prosecuting or defending the action as executor, administrator, etc.[20] Moreover,

[19] While it is believed that Appellant is a professional corporation in which non-medical professionals would be prohibited from any ownership interest under S.C. Code §33-19-200, discovery had not proceeded to the point of Respondent learning the nature of Mr. Megna's economic interest.

such testimony can be obtained and assessed in the discovery phase of litigation prior to determining whether to exercise the competency objection at trial. This Court has allowed discovery depositions of such an interested person and has 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).[21] Thus, Mr. Megna can be deposed about his communications with the Decedent to enable Respondent to learn the basis of the allegations against it and such a deposition would not bar Respondent from objecting to his testimony at trial.

Finally, much of what Mr. Megna would potentially be examined on would not be related at all to communications with decedent. He could be examined on written

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[20] See Norris v. Clinkscales, 47 S.C. 488, 25 SE 797 (1896), which though old, offers a cogent and still valid (and currently cited) analysis of the complexities of the Dead Man's Statute. The testimony of a witness is potentially barred when he is (i) a party to the action; (ii) a person having an interest which may be affected by the event of the trial; (iii) a person who has had such an interest, but which has been in any manner transferred to, or has in any manner, come to a party to the action or proceedings; or (iv) an assignor of anything in controversy. If a person falls into any of these four categories, his testimony is barred if it possesses all of the following three characteristics: (a) in regard to any transaction or communication between the witness and a person deceased; (b) against a party prosecuting or defending the action as executor; and (c) when the present or previous interest of the witness may in any manner be affected by the testimony or the event of the trial. While Mr. Megna possibly would fall into one of the four categories of persons identified in (i), (ii), (iii), and (iv) above, his testimony, if proffered by Respondent, would not possess all of the characteristics identified in (a), (b), and (c) above. See also Hanahan v. Simpson, 326 S.C. 140, 485 S.E. 2d 903 (1997) (the "benefit of the statute may be waived where the party asserting the statute 'opens the door' by offering testimony otherwise excludible") and First State Sav. And Loan Ass'n v. Nodine, 291 S.C. 445, 354 S.E. 2d 51 (Ct. App. 1987) (emphasizing that the statute's prohibition is applicable only if the testimony by a witness about communications with a person decreased at the time of such examination is against a party then prosecuting or defending the action as executor, etc.)

[21] This holding relied, in part, on SCRCP 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 other deposition, unless the ground of the objection is one which might have been deviated or renounced if presented at that time.

documents, communications with third parties, policies and procedures of PDHC, his knowledge of applicable Medicare laws and regulations, damages, etc. The Dead Man's Statute does not bar Respondent's right to examine Mr. Megna by deposition, requests to admit, or examination at trial.

IV. The Trial Court Correctly Applied Rule 3.7 to Prospectively Disqualify Mr. Megna Both at Trial and in Pre-Trial Matters

The trial court, in ordering Mr. Megna's immediate and complete disqualification, noted that "in discovery or at trial or both, Mr. Megna may be called upon to testify regarding facts at issue in the present action..." The Court stated "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."[22] (R. p. 12 fn. 11, lines 1-3).

While it is true that the proscription of Rule 3.7 is that a lawyer shall not act as an advocate at a trial in which he is likely to be a necessary witness, a major purpose of the rule "is to avoid the possible confusion which might result from the jury observing a lawyer act in dual capacities—as witness and as advocate. The jury is usually not privy to pretrial proceedings, however, so the rule does not normally disqualify the lawyer from performing pretrial activities; the one exception is when the pretrial activity includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual role." (Emphasis added) Droste v. Julien, 477 F.3d 1030 (8th Circuit 2007) quoting World Youth Day, Inc., vs. Famous Artists Merch. Exchange, Inc., 866 F. Supp. 1297, 1303, (D.

[22] Ben R. Matthews, as noted above, already had extensive participation in this case prior to the disqualification.

Colo.1994). As the District Court said in World Youth Day, "depositions are routinely utilized at trial for impeachment, and to present testimony in lieu of live testimony when the witness is unavailable. The skill of deposing counsel on direct and cross-examination is necessarily woven into the fabric of the trial itself. Videotaped depositions present an even greater concern." 866 F. Supp. at Page 1304.

Similarly, the United States Sixth Circuit Court of Appeals in General Mills Supply Company, et al vs. SCA Services, Inc., et al ,697 F.2d 704 (6th Cir. 1982), in affirming the disqualification of counsel from pretrial discovery as well as from trial advocacy, opined "the ultimate 'trial' is connected as a seamless web to the ascertainment of issues at the pretrial proceedings, and particularly to the discovery depositions. Not even the possible confusion of the jury would be averted by exclusion from the 'trial' only." 697 F.2d. at Page 716.

While the trial court's disqualification of Mr. Megna was "complete" and immediate, the trial court allowed Mr. Megna to file a Rule 59(e) Motion on the Disqualification Order and allowed him to brief and argue the Motion. The Court further allowed Mr. Megna to brief and argue the cross-motions for Summary Judgment. Thus, Mr. Megna's disqualification has not prejudiced Appellant.

At the time of Mr. Megna's disqualification, discovery had barely begun. Appellant, through its co-counsel Ben R. Matthews, responded to Respondent's First Request for Admissions. Appellant had noticed the depositions of the Personal Representatives and Respondent had indicated its plans to depose a number of persons,

including Mr. Megna.[23] The complete disqualification was well within the appropriate discretion of the trial court and was supported by undenied facts and substantial evidence. The wisdom of this ruling has been demonstrated by Mr. Megna's inappropriate issuance of discovery subpoenas to the undersigned as well as three other South Carolina attorneys involved in unrelated cases with Mr. Megna and/or Appellant, which the trial court quashed (R. p. 13, lines 27-31).

V. The Trial Court Correctly Found That Disqualification of Mr. Megna Would Not Work a Substantial Hardship on Appellant

Rule 3.7 provides three exceptions to the general rule that a lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness. In Part D of its Summary (Pages 36-37 of Appellant's Initial Brief) Appellant makes the claim, without supporting explanation or facts, that "it would be unnecessarily burdensome, expensive and cause the Appellant additional damages for the Appellant to change attorneys."

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. As noted above,

[23] By agreement of counsel, all depositions were postponed until the trial court could decide the Motion to Disqualify Mr. Megna.

discovery in this case is in its incipient stages. Moreover, Rule 3.7(b) allows for Mr. Megna's non-witness partner Ben R. Matthews to continue in his existing and already extensive representation of Appellant.

The trial court correctly ruled that the substantial hardship exception did not apply here.

VI. The Trial Court Correctly Found That the Doctrines of Attorney Client Privilege and Work Product Do Not Change Mr. Megna's Status as a Necessary Witness

In its Answer to Interrogatory 9, Appellant 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" (R. p. 828, lines 1-3). Assuming arguendo that Appellant has sufficiently preserved and presented these issues to this Court for consideration, the trial court correctly ruled that the potential applicability of these doctrines to some matters does not preclude Mr. Megna's testimony on any and all matters within the purview of his knowledge as a witness.

SCRCP 26(b)(3) 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, as here, when the attorney is acting as a CEO of a medical practice. The work product doctrine is limited to protecting an attorney's mental impressions, etc., 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, Respondents are not interested in Mr. Megna's impressions, conclusions, opinions, or legal theories (or communications with his client) about this litigation; rather the Respondent's inquiry, to the extent it would involve litigation at all, would be about Appellant's administrative litigation with Medicare.[24] The litigation with Medicare is over and the protection, if applicable at all, would only apply in the context of that litigation—protecting Mr. Megna's thoughts about the Medicare litigation from disclosure to Medicare.[25]

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 State 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 is not waived. Cameron v. Gen. Motors Corp., 1587 F.R.D. 581, 584 (D.S.C 1994), vacated in part by In Re General Motors Corp., No. 94-2435, 1995 U.S. App. Lexis 41270 (4th Cir. 1995).

[24] Much of any inquiry of Mr. Megna would not involve any litigation. For example, Respondent would want to inquire into things such as the authenticity of the alleged Thompson letter, the circumstances of the alleged receipt of that letter and the alleged contextual meaning of the letter. Such inquiries clearly do not impugn Mr. Megna's work product. Respondent would further inquire into policies and procedures of PDHC, which should be within Mr. Megna's knowledge.

[25] While wholly unnecessary given the finality of the administrative litigation, the trial court here could enter a protective order preventing disclosure outside of the present litigation.

In the case at bar, the privilege would not extend to Mr. Megna's general communications in his capacity as CEO except for the limited circumstance where the medical practice sought legal advice. For example, Mr. Megna's communications with third parties such as government regulators, insurers, and Medicare program administrators are clearly not privileged and obviously not made for the purpose of PDHC obtaining legal advice from those parties. Routine communications of Mr. Megna as CEO of PDHC with employees about compliance with policies and procedures would also not be for the purpose of PDHC obtaining legal advice.

In its Statement of Issues on Appeal, Appellant states as its fifth issue the question of whether the trial court erred in finding that Mr. Megna waived any privilege he may have had regarding conversations he had with Dr. Thompson. Appellant's Brief at Page 2.[26] There is nothing in the alleged Thompson letter to Mr. Megna (the letter identified by Appellant as Exhibit HH and by Respondent as Defense Hearing Exhibit 1 at the March 16 hearing) that indicates that Dr. Thompson is seeking legal advice from Mr. Megna. Moreover, the alleged letter was divulged by PDHC as a part of its Complaint and other filings; thus any possible privilege has been waived. Clearly Mr. Megna is now subject to examination as to details of a document deemed so important as to be attached as an exhibit to the Complaint in this matter.

Moreover, by placing the subject of communications and disclosures between Dr. Thompson and Mr. Megna (on behalf of PDHC) into controversy, Appellant has implicitly waived any possible remaining or existing privilege. Implicit waiver arises

[26] While superficially mentioned, this "issue" is nowhere argued in the Brief and may be considered abandoned. Gold Kist, Inc. v. Citizens and Southern National Bank of South Carolina, supra.

when the client places otherwise privileged matters in controversy as a 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. Partnership, 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 to be used as both a sword and a shield. 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 Appellant's complaint is that Dr. Thompson did not disclose information to PDHC or gave wrong information to PDHC—in part through its CEO, Mr. Megna. Under the guise of privilege, Mr. Megna cannot now avoid examination on the disclosures and communications made to him that he now claims were actionable.

CONCLUSION

The Record on Appeal is replete with evidence that Mr. Megna is a necessary witness in this case and that the trial court correctly disqualified him from trial and pre-trial matters. The decision of the trial court should be affirmed.

February 1, 2013

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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

(Appeal Tracking Number 2011197671)

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

v.

Estate of Hugh S. Thompson.... Respondent

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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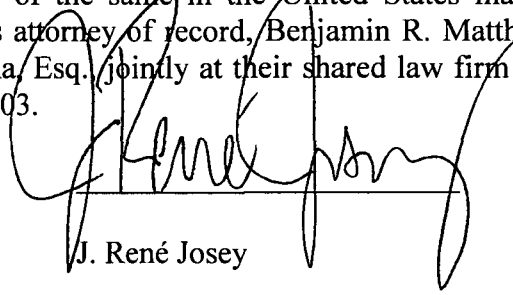
CERTIFICATE OF SERVICE

As required by SCACR 2011 (a)(1), I certify that I have served Respondent's Final Brief by depositing two copies of the same in the United States mail, postage prepaid, on February 1, 2013, to its attorney of record, Benjamin R. Matthews, Esq., and its former attorney Tony R. Megna, Esq. jointly at their shared law firm address of 3400 West Avenue, Columbia, SC 29203.



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