

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case Number 2019-CP-21-00777

Dr. Gregory A. May,

Respondent,

v.

Advanced Cardiology Consultants, P.C.
Dr. Lew A. Rowe, and Theresa Rowe

Appellants.

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JAN 31 2020

SC Court of Appeals

APPELLANTS' RETURN IN OPPOSITION TO MOTION TO DISMISS

Appellants, Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe, by and through their undersigned counsel, hereby submits their Return in Opposition to the Respondent's Motion to Dismiss. Jurisdiction over this appeal lies with this Court under S.C. Code Ann. § 14-3-330 and the Appellants respectfully request the Court to deny Respondent's Motion.

Appellants noticed the appeal of the October 21, 2019 Order of the Honorable Michael G. Nettles which granted Summary Judgment against Appellants as to Respondent's claim for a declaratory judgment declaring the restrictive covenant at issue between the parties as unenforceable and the Order of November 20, 2019 denying Appellants' Motion for

Reconsideration of the grant of summary judgment. Respondent submitted the present Motion on the grounds that it is Respondent's position that the lower court's order does not confer jurisdiction on this Court as it is not the final order in the underlying action between the parties.

This action was originally commenced in Florence County by Respondent on March 20, 2019. In his Complaint, the Respondent brought causes of action for: 1) breach of contract; 2) tortious interference with contract; 3) promissory estoppel; and 4) a declaratory judgment pursuant to S.C. Code Ann. § 15-53-10 declaring that "the employment agreement between the parties, in particular anything contained therein applying to restriction of the Plaintiff's future employment, is an unenforceable contract at law and that the Defendants' conduct as alleged herein constitutes a breach of the agreement." (Complaint ¶ 80, attached hereto as Exhibit A). Both parties filed motions for summary judgment with the lower court. Appellants filed for summary judgment on all four of Respondent's claims.

The instant action arises out of the Respondent's employment as an interventional cardiologist at Advanced Cardiology Consultants, P.C. The central dispute in this matter is the issue of a restrictive covenant contained in an employment agreement entered into between the parties which by its terms prevents Respondent from engaging in the practice of cardiology within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years after termination of the agreement. (Appellants' Answer ¶ 67, attached hereto as Exhibit B). The Respondent filed a motion for summary judgment on his declaratory judgment claim, seeking an order declaring the restrictive covenant contained in the parties' employment agreement to be unenforceable and a declaration that the Defendants had breached the contract between the parties and was thus unenforceable. (Respondent's Mot. Sum. J., attached hereto as Exhibit C). The Court denied Appellants' Motion and granted Respondent's

Motion for declaratory judgment and issued its Order finding the restrictive covenant between the parties to be unenforceable. (Order, attached hereto as Exhibit D). The Appellants subsequently moved for reconsideration of the grant of summary judgment in favor of the Respondent, which the lower court denied. (Form 4 Order, attached hereto as Exhibit E). It is those portions of the lower court's orders that grant Respondent partial summary judgment on his declaratory judgment claim that Appellants appealed to this Court.

Generally, only final judgments are appealable. *Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004) (defining "Final judgment" as a term of art referring to the disposition of all the issues in the case.). A final judgment is one that ends the action and leaves the court with nothing to do but enforce the judgment by execution. *Good v. Hartford Acc. & Indem. Co.*, 201 S.C. 32, 41-42, 21 S.E.2d 209, 212 (1942). "Some exceptions to the final judgment rule are set forth in section 14-3-330 of the South Carolina Code (2017), which provides for the appealability of certain interlocutory orders." *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017). Section 14-3-330(1) "allows for the immediate appeal of orders 'involving the merits.'" *Id.* An order under this subsection "involves the merits" when it "finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense" *Id.* (citing *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). Under Section 14-3-330(2), an order may also be immediately appealed where it affects a "substantial right" and "strikes out" a pleading. *Id.*

Appellate courts in South Carolina have consistently stated that the grant of partial summary judgment is immediately appealable. *See Lucas v. Rawl Family Ltd. P'ship*, 2007 S.C. Unpub. LEXIS 3, at *4 (Sept. 24, 2007) ("An order granting a motion for partial summary judgment is immediately appealable."); *Nauful v. Milligan*, 258 S.C. 139, 143, 187 S.E.2d 511,

513 (1972); *Bushman v. Estate of Manning (In re Estate of Manning)*, 2019 S.C. App. Unpub. LEXIS 407, at *5 (Ct. App. Dec. 18, 2019); *Watson v. Underwood*, 407 S.C. 443, 459, 756 S.E.2d 155, 164 (Ct. App. 2014) (“[T]he granting of Respondents’ summary judgment motion is immediately appealable.”). An order which is otherwise immediately appealable is not rendered unappealable because it has not been certified under South Carolina Rule of Civil Procedure 54(b). *Link v. School District of Pickens County*, 302 S.C. 1, 4, 393 S.E.2d 176 (1990).

“Generally, orders granting partial summary judgment may be immediately appealable under either the ‘involving the merits’ or ‘substantial right’ categories of section 14-3-330(1) and [section] (2)(c).” *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011). An order “involves the merits” when it “finally determine[s] some substantial matter forming the whole or a part of some cause of action or defense” *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993) (citation omitted). “An order affects a substantial right and is immediately appealable when it ‘(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial[,] or (c) strikes out an answer or any part thereof or any pleading in any action.’” *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d at 709 (2005) (quoting Section 14-3-330(2)).

The October 21, 2019 Order which the Appellants appeal now satisfies the “involves the merits” requirement of Section 14-3-330(1) because the order constitutes a partial grant of summary judgment to the Respondent on his cause of action for a declaratory judgment seeking an order declaring the restrictive covenant to be unenforceable. (Order at 1, 5). The order makes a final determination on a substantial matter forming a part of Respondent’s claim for declaratory judgment by granting summary judgment on this cause of action and declaring the restrictive

covenant contained in the parties' employment agreement unenforceable as a matter of law. (Order at 5). There is no other action for the lower court, or the Respondent to take in the future regarding the enforceability of the restrictive covenant, as the lower court granted judgment for Respondent on this ground.

Further, the order granting summary judgment to Respondent on his claim for a declaratory judgment affects a "substantial right" under Section 14-3-330(2) because the court's grant of summary judgment has the effect of striking out a portion of the pleadings, namely those portions of the Appellants' Answer which seek a counterclaim against the Respondent for breach of contract based upon Respondent's violation of the terms of the restrictive covenant. (Answer ¶¶ 67-71). The Appellants sought monetary relief in the amount of \$500,000.00, the amount of liquidated damages the employment agreement specified for violation of the provisions of the agreement's restrictive covenant, on the basis that the Respondent had violated the restrictive covenant at issue, which is "a valid and enforceable as it is supported by valuable consideration, reasonable and necessary to protect Defendant's legitimate business interests, is not unduly harsh or burdensome on Plaintiff's ability to earn a livelihood, and is reasonably limited with respect to both duration and place." (*Id.* ¶ 68). The Appellants cannot now seek relief for violation of the restrictive covenant's provisions where the court has already declared that same restrictive covenant unenforceable as a matter of law.

The South Carolina Supreme Court has rejected the argument that Respondent's propose—that because the prior grant of summary judgment does not affect the merits of Respondent's claims for damages, such a prior order on the issue of liability only is not immediately appealable. *See Nauful*, 258 S.C. at 143 (holding prior grant of summary judgment on issue of liability only was immediately appealable). The order granting summary judgment

also in effect determines the outcome of other of the Respondent's causes of action, as the enforceability of the restrictive covenant also touches on the merits of the Respondent's claims for promissory estoppel and his claim for tortious interference with contract. The claim for promissory estoppel is based upon Appellants' purported promise to Respondent not to enforce the restrictive covenant. (Compl. ¶¶ 73-78). Similarly, Respondent's claim for tortious interference with contract is based upon Respondent's allegations that Dr. Lew Rowe made representations to the Respondent that the restrictive covenant would not be enforced against him and that Respondent sought out alternative employment based upon these representations. (Compl. ¶¶ 54-58).

For these reasons, the Appellants respectfully submit that the October 21, 2019 Order of the Honorable Michael G. Nettles which granted Summary Judgment against Appellants as to Respondent's claim for a declaratory judgment and the Order of November 20, 2019 denying Appellants' Motion for Reconsideration of the grant of summary judgment are immediately appealable under S.C. Code Ann. § 14-3-330. The Appellants therefore respectfully request that the Court deny Respondent's Motion to Dismiss this appeal.

All of which is respectfully submitted.

GIBBS & HOLMES

By:



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Reply To: Florence

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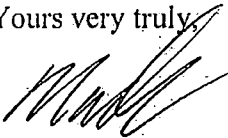
Re: Dr. Gregory A. May v. Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe and Theresa Rowe
Case No.: 2019-CP-21-00777
Our File No.: 16325.17418

Dear Allan:

Enclosed please find a Summons and Complaint which we have filed on behalf of Dr. May. I would appreciate it if you would let me know whether you can accept service on behalf of the Defendants. I note that Dr. Rowe is the Registered Agent for Advanced Cardiology Consultants, P.C.

Dr. May has instructed me to attempt to get this matter in front of a judge as quickly as possible. In that vein, I anticipate that I will be seeking an expedited hearing or a TRO.

If you cannot accept service, please let me know as soon as possible so that I can make alternative arrangements.

Yours very truly,


Mark W. Buyck, III
Email: mb3@willcoxlaw.com

MWB, III/tph
Enclosures
Cc: Dr. Gregory A. May

EXHIBIT
A

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS
) FOR THE TWELFTH JUDICIAL CIRCUIT
) C/A: 2019-CP-21-00777

COUNTY OF FLORENCE

Dr. Gregory A. May,

Plaintiff,

vs.

Advanced Cardiology Consultants, P.C.,
Dr. Lew A. Rowe, and Theresa Rowe,

Defendants.

ACCEPTANCE OF SERVICE

I, Allan R. Holmes, Esquire, am authorized to accept service of process of the following:

Summons and Complaint with attached Exhibit A

in the above captioned matter on behalf of Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe.

Therefore, I hereby ACCEPT SERVICE of the above listed pleadings on behalf of Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe.

Allan R. Holmes

Dated

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FLORENCE) FOR THE TWELFTH JUDICIAL CIRCUIT
C/A: 2019-CP-21-_____

Dr. Gregory A. May,)
)
Plaintiff,)

vs.)

Advanced Cardiology Consultants, P.C.,)
Dr. Lew A. Rowe, and Theresa Rowe,)
Defendants.)

**SUMMONS
(JURY TRIAL REQUESTED)**

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscribers at their offices: 248 West Evans Street, P O Box 1909, Florence, South Carolina 29503-1909, Tel. No. (843) 662-3258, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

DATED at Florence, S.C., this 20th day of March, 2019.

WILLCOX, BUYCK, & WILLIAMS, P.A.

By: s/Mark W. Buyck, III
Mark W. Buyck, III #011902
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ATTORNEYS FOR PLAINTIFF

8. The Plaintiff has been employed with Dr. Rowe and the Practice since April 22, 2008.

9. The Plaintiff's initial Employment contract was for a period of five (5) years. The parties renewed and executed a second contract for an additional 5-year term.

10. On or about March 30, 2018, Dr. Rowe and the Practice presented Dr. May with a 1-year contract commencing March 30, 2018 and ending on March 31, 2019. (See attached Exhibit "A").

11. The three contracts are identical in all respects other than the duration and include a restrictive covenant which purports to prevent Dr. May from being employed as a cardiologist for a period of two (2) years after termination within a 25 mile radius of McLeod Regional Medical Center, Florence, South Carolina.

12. While employed at the Practice, Dr. May and the other Employed Physicians would cover both McLeod Hospital and Carolinas Hospital in Florence.

13. Dr. May maintained privileges at both hospitals.

14. As of November 1, 2018, the Practice employed five (5) physicians (hereinafter the "Employed Physicians") in addition to the owner, Dr. Rowe.

15. In late October, early November 2018, Dr. Rowe informed the five (5) Employed Physicians of the Practice that he would no longer participate in the call schedule. At that time, the six physicians were covering call at both Carolinas Hospital in Florence as well as the McLeod Hospital in Florence.

16. As a consequence of Dr. Rowe refusing to take any further calls, the call schedule for the remaining Employed Physicians was increased and more frequent. Dr. Rowe stated that he did not plan on hiring another physician at that time.

17. Dr. May had a conversation with Dr. Rowe during which Dr. Rowe indicated that he was no longer interested in hospital practice and was interested in restricting himself to a non-hospital practice.

18. Other Employed Physicians other than Dr. May indicated they too would consider switching to an office practice only business model, thereby threatening Dr. May's future full-time interventional cardiology practice.

19. Dr. May discussed these concerns with Dr. Rowe who then informed him "You can do whatever you want to do; work in the hospital if you want."

20. Within days Dr. May then inquired of Dr. Rowe if he intended to enforce the restrictive covenant contained in the employment agreement in the event Dr. May sought employment at a local hospital. Dr. Rowe indicated that he would not enforce the restrictive covenant contained in the employment agreement.

21. With the assurances of Dr. Rowe, Dr. May initiated discussions with both local hospitals regarding hospital employment opportunities.

22. Dr. May initially contacted McLeod Health regarding employment.

23. After discussing the covenant not to compete, individuals at McLeod Health informed Dr. May that they would not discuss employment opportunities with him unless they were assured in writing that the Practice did not object.

24. On November 15, 2018, Theresa Rowe sent an email to McLeod Health indicating that the Practice did not object to Dr. May pursuing employment opportunities at the hospital.

25. On or about December 26, 2018, the six physicians held a meeting to discuss call coverage. During this meeting, Dr. Rowe informed the Employed Physicians that he was not planning to hire an additional physician to replace him on the call schedule.

26. It was proposed that the Practice drop coverage of Carolinas Hospital, one of the reasons being that calls had become more frequent without Dr. Rowe's participation.

27. Dr. May opposed cancelling the Practice's coverage of Carolinas Hospital; however, Dr. Rowe indicated that he would abide by whatever vote the Employed Physicians made. The remaining Employed Physicians voted to discontinue the Carolinas coverage over Dr. May's objections.

28. Carolinas Hospital maintains a policy that M.D's must participate in call coverage to maintain hospital privileges.

29. Dr. May could not continue call coverage at Carolinas Hospital without the assistance of the fellow physicians of his Practice. He was forced to inform the hospital that he would no longer be able to take call and would therefore have to drop his privileges.

30. On January 14, 2019, Dr. Ng., one of the remaining Employed Physicians, abruptly departed the Practice after being offered a one (1) month renewal of his employment agreement. This left only four (4) physicians to cover call.

31. Dr. May has been practicing in the Florence area for nearly eleven (11) years. He is a Board Certified Cardiologist specializing in interventional cardiology. He has an established doctor-patient relationship with thousands of patients.

32. Many of Dr. May's patients prefer Carolinas Hospital to McLeod Health and he has provided services at both hospitals the entire time he has been with the Practice, until January 1, 2019.

33. The Practice's decision to discontinue call coverage at Carolinas Hospital has deprived patients of Dr. May's care at that facility. The decision also deprives Dr. May full access to his patients as well as limits his ability to perform his professional duties.

34. Based on the representations of Dr. Rowe, Dr. May discussed employment opportunities with Carolinas Hospital.

35. Carolinas Hospital has offered Dr. May a position practicing interventional cardiology conditioned on Dr. Rowe's reducing his promise not to enforce the restrictive covenant to writing.

36. Dr. May contacted Dr. Rowe and informed him of his negotiations with Carolinas Hospital and their indication that they would hire him if the Practice would provide a waiver of the non-compete. Dr. Rowe indicated to Dr. May that he would have the Practice's Office Manager prepare the waiver.

37. Several days later, Dr. May inquired of the hospital whether they had received the waiver. He was informed that they had not.

38. Dr. May then contacted the Practice's Office Manager regarding the status of the waiver and Mrs. Rowe informed Dr. May that the Practice would not provide a waiver.

39. Upon information and belief, Mrs. Rowe had a discussion with a representative of Carolinas Hospital regarding the restrictive covenant and informed them that the employment agreement had a \$500,000 buy-out and requested the hospital's offer.

40. Subsequent to this conversation, Dr. May has learned that the Practice has hired an attorney who has sent a Cease and Desist letter to Carolinas Hospital threatening litigation in the event of any further communications with Dr. May regarding employment.

41. Faced with the diminishment of practice opportunities and the Practice's refusal to honor its promise to release him from the restrictive covenant, Dr. May submitted a 30-day notice to terminate the agreement on March 19, 2019, twelve (12) days prior to the end of the contractual term, but in compliance with the terms of the agreement.

42. A third Employed Physician, Dr. Brady, has tendered his resignation from the Practice effective April 12, 2019.

43. The Practice has notified McLeod Health that it would no longer provide call coverage to that Hospital effective April 1, 2019. As a result of this action, the Practice will not be covering either hospital in Florence. Patients of the Practice will not be seen for either cardiac admission or cardiac consultation at either hospital by the Practice.

**FOR A FIRST CAUSE OF ACTION
(Breach of Contract)**

44. The Plaintiff realleges and reiterates Paragraphs 1 through 44 above as if fully set out herein.

45. Under the terms of the employment agreement, Dr. May's compensation is based on 50% of the collected fees generated by him.

46. In the employment agreement, the Practice promises to provide the physician "such facilities, equipment, and supplies as it deems necessary for physician's performance of his professional duties under this agreement, including... such other facilities and services as are suitable to his position and necessary to the adequate performance of his duties."

47. The employment agreement also requires the physician and the Practice to provide "equitable call coverage."

48. The Practice's decision to refuse call coverage at Carolinas Hospital impairs Dr. May's ability to provide care to his patients and fully practice his profession in the community, disrupting patients' continuity of care, and depriving the public of medical services.

49. The Practice's refusal to provide call coverage to Carolinas Hospital Systems has deprived and hindered Dr. May's ability to care for his patients who prefer Carolinas Hospital, disrupting the continuity of care in treating his patients in an office and hospital setting, and impairing his ability to fully practice his specialty.

50. The Defendants have breached the contract as adequate call coverage is not equitably distributed among the Physicians.

51. The Defendants have breached the contract in that they have not provided Dr. May access to continue his practice at Carolinas Hospital, thereby depriving his patients continuity of care and seriously impairing his earnings potential.

52. The actions described above have and will continue to cause monetary damage to Dr. May including a loss of earning capacity and a loss of income which will extend into the future.

53. Plaintiff seeks actual, consequential, and exemplary damages as a direct and proximate result of the Defendants' breach of the agreement.

**FOR A SECOND CAUSE OF ACTION
(Tortious Interference with Contract)**

54. The Plaintiff realleges and reiterates Paragraphs 1 through 54 above as if fully set out herein.

55. Based on Dr. Rowe's and the Practice's representations, Dr. May has sought alternative employment.

56. Dr. Rowe and the Practice were fully aware that Dr. May was pursuing employment opportunities in the Florence area and even encouraged him to do so.

57. After obtaining an offer from Carolinas Hospital to practice interventional cardiology at its Florence facility, Dr. Rowe informed Dr. May that he would provide the hospital written confirmation that he and the Practice would waive the covenant not to compete contained in the employment agreement.

58. Instead of waiving the provision of the contract, the Practice now demands that Dr. May "buy out his contract" for the sum of \$500,000.

59. The Office Manager of the Practice, the Defendant Theresa Rowe, has indicated to Dr. May that if he would prefer, he could get a loan and purchase the Practice.

60. The Practice, Dr. Rowe, and Theresa Rowe intentionally interfered with Dr. May's potential contractual relations for an improper purpose and by improper means attempting to secure monies from Dr. May. The Defendants' actions in interfering with Dr. May's contractual relationship with Carolinas Hospital has caused Dr. May immediate and irrevocable damages.

61. Dr. May is an 11-year employee of the Practice and has practiced interventional cardiology in the community the entire 11 years. He maintains a home in Florence and has children in elementary and high school.

62. Dr. May's current contract with the Practice and Dr. Rowe expires by its terms on March 31, 2019.

63. The Defendants are fully aware that Dr. May requires privileges at a hospital in order to practice his specialty, interventional cardiology.

64. The Defendants are also fully aware that the time required to obtain privileges at any hospital whether within or without the restrictive area is generally a period of 90 days, a period of time during which Dr. May would be unemployed and his patients would not have access to his services.

65. At the time Dr. May secured an employment offer from Carolinas Hospital, there was ample time for him to begin and complete the credentialing process prior to April 1, 2019.

66. As of the date of this Complaint, there is likely not ample time to receive credentialing at any hospital prior to April 1, 2019.

67. Dr. May will experience a period of unemployment or no fee generation while waiting for credentialing from any future employer. His patients will be deprived of his full range of services during this period.

68. The facts above are all known to the Defendants who are now using the threat of unemployment as essentially a tool to extort funds from Dr. May or Carolinas Hospital in order for the Defendants to release him from the covenant not to compete.

69. As a direct and proximate result of the tortious inference with Plaintiff's employment agreement with Carolinas Hospital, Plaintiff has sustained damages including a loss of earning capacity and a loss of income, which will extend into the future.

70. The Plaintiff has further suffered emotional distress and mental anguish as a result of Defendant's actions.

71. Plaintiff is entitled to an award of actual damages against the Defendants as well as punitive damages against the Defendants for their malicious and bad faith actions in harming Plaintiff, in amounts to be determined by a jury.

72. The Plaintiff is further entitled to an award of reasonable attorney's fees and costs for this action.

**FOR A THIRD CAUSE OF ACTION
(Promissory Estoppel)**

73. The Plaintiff realleges and reiterates Paragraphs 1 through 73 above as if fully set out herein.

74. The Defendants made an unambiguous promise to the Plaintiff that they would not enforce the covenant not to compete in the event the Plaintiff secured a job within the restrictive covenant area.

75. Dr. May reasonably relied on the Defendants' promise and searched and obtained alternative employment.

76. The Defendants made the unambiguous promise expecting that Mr. May would rely on the promise in securing alternative employment.

77. It was foreseeable to the Defendants that Dr. May would rely on the promise.

78. Dr. May has sustained injury in reliance on the promise in that the Defendants now demand \$500,000 from him or in the alternative that he experience a prolonged period of unemployment. Further Dr. May has or will suffer other monetary and non-monetary damages, including lost wages and attorney's fees and costs.

**FOR A FOURTH CAUSE OF ACTION
(Declaratory Judgment Under SC Code Anno. §§ 15-53-10 et seq.)**

79. The Plaintiff realleges and reiterates Paragraphs 1 through 79 above as if fully set out herein.

80. Based upon the foregoing, the Plaintiff requests that this court enter an Order declaring that the employment agreement between the parties, in particular anything contained therein applying to restriction of the Plaintiff's future employment, is an unenforceable contract at law and that the Defendants' conduct as alleged herein constitutes a breach of the agreement.

81. Further, the Plaintiff requests that he be awarded reasonable attorney's fees and costs in seeking this declaration by the court.

WHEREFORE, the Plaintiff seeks an entry of judgment against the Defendants for all the relief requested herein and to which the Plaintiff may otherwise be entitled, including without limitation:

- (1) Entering judgment in favor of the Plaintiff against the Defendants in the final order;
- (2) Enjoining the Defendants from interfering with the efforts of the Plaintiff to secure alternative employment as well as enjoining them from threatening potential employers with legal action in the event of Dr. May's employment;
- (3) An order declaring the Restrictive Covenants contained in the Parties' Employment Agreement as null and voided by virtue of the Defendants' breach of the Employment Agreement;
- (4) Actual, consequential, and exemplary damages as a direct and proximate result of the Defendants' breach of the Employment Agreement;
- (5) Actual and punitive damages against the Defendants for their malicious and bad faith actions in tortiously harming Plaintiff;

- (6) Any lost wages which the Plaintiff may suffer by virtue of the Defendants' tortious interference with Plaintiff's prospective employment opportunities; and
- (7) Plaintiff is further and entitled to an award of reasonable attorney's fees and costs in this action.

WILLCOX, BUYCK & WILLIAMS, P.A.

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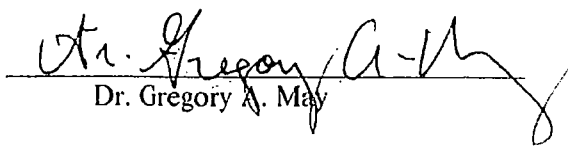
ATTORNEYS FOR PLAINTIFF

Florence, SC
March 20, 2019

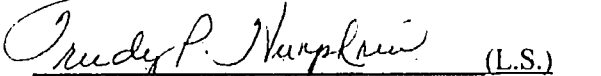
STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE) **VERIFICATION**

PERSONALLY APPEARED before me, Dr. Gregory A. May, who being first duly sworn, deposes and says:

1. That I am the Plaintiff in the attached lawsuit;
2. That I have read all of the statements contained in the attached legal pleadings;
3. All of the statement and facts alleged in the attached pleadings are true and correct based upon my personal knowledge, except those facts and statements alleged upon information and belief, and concerning those, vorily believe them to be true;
4. The attached pleadings were prepared by the law firm of Willcox, Buyck & Williams, P.A., at my request;
5. I have authorized the aforesaid attorneys to file the attached pleadings, to present them to the Court, and to serve the attached pleadings upon the Defendants named therein by whatever process if necessary, and to seek the relief requested in the attached pleadings.


Dr. Gregory A. May

SWORN to before me this
18th day of March, 2019.

 (L.S.)
Print: TROY P. HUMPHRIES
Notary Public in and for State of South Carolina
My Commission Expires: 9/22/2027

STATE OF SOUTH CAROLINA)
EMPLOYMENT AGREEMENT)
COUNTY OF FLORENCE)

THIS AGREEMENT is made this this day of March 30, 2018 by and between **ADVANCED CARDIOLOGY CONSULTANTS, PC**, a professional corporation organized and existing under the laws of the State of South Carolina ("Employer"), and Gregory May, **M.D.** ("Physician").

The parties hereto, intending to be legally bound hereby, agree upon the following terms of employment of Physician by Employer.

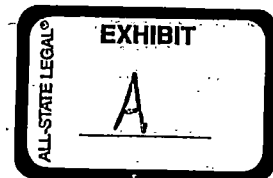
1. **Term.** Physician is hereby employed by Employer for a term of one (1) year commencing March 30, 2018 and ending at midnight March 31, 2019, unless sooner terminated in accordance with the provisions of Paragraph 7. It is contemplated that Physician's employment may be extended beyond March 31, 2019, such extension must be in writing and on such terms as the parties may then agree.

2. **Duties.** The Physician shall perform such professional duties for Employer as may be requested of him by the practice president in keeping with his professional status as a Board Certified cardiologist. The Physician shall do all things reasonably necessary to maintain and improve his professional skills during the term of this Agreement. He shall foster the professional practice of Employer to the best of his professional ethics.

3. **Extent of services.** Physician shall devote his full time and best efforts to the performance of his duties hereunder, including equitable call coverage and shall not engage in any business or perform any services in any capacity other for Employer without the prior written consent of Employer. However, nothing in this Agreement shall prevent the physician from engaging in activities such as investing in stocks, bonds, securities, commodities, real estate and other forms of investment as will not require any services on the part of the physician in the operation of the affairs of the companies in which such investments are made.

Compensation. For all duties to be performed by Physician hereunder, Physician shall be entitled to compensation based solely upon the physician's own collections. Compensation shall generally be payable monthly based upon the preceding month's collections at 50% of the physician's collected fees generated by the physician, subject to applicable federal and state with-holding. The physician receive a bonus, the amount of which shall be proportionate to the total sum collected by the Physician. Such bonus, if any, maybe payable as the employer may determine, but if paid, it shall be paid at least annually.

(a) **Continuing Medical Education.** Employer will reimburse Physician for tuition expenses, up to \$2,000.00, relating to one (1) meeting or seminar each year during the term of his Agreement, attended by Physician for the purposes of continuing medical education (CME). Physician may attend such meeting or seminar upon the prior approval of Employer, which approval shall not unreasonably be withheld. All other expenses relating to such CME shall be Physician's responsibility. It is contemplated that Physician's attendance at such



CME shall not exceed two (2) weeks during the term hereof.

(b) Sick Pay. Inasmuch as Physician's compensation is based upon the preceding month's collections as provided in Paragraph 4, no separate or distinct sick pay will be available to Physician in the event he becomes unable to perform his services hereunder by reason of illness or accident.

(c) Vacation. Physician shall be entitled to 10 working days, regular vacation during the term hereof. This vacation shall be non-cumulative; such vacation shall not interfere with the practice schedules, his commitments to his patients, and obligations to Employer. The time or times during which the vacation is to be taken shall first be approved by the Employer, which approval shall not reasonably be withheld.

(d) Facilities and Services. The Employer shall provide such facilities, equipment and supplies as it deems necessary for physician's performance of his professional duties under this Agreement, including technical and stenographic help and such other facilities and services as are suitable to his position and necessary to the adequate performance of his duties. Physician shall have, maintain and use, when appropriate, an automobile, home telephone, and other facilities needed in connection with his employment under this Agreement, all of which shall be at the physician's expense, unless reimbursement by Employer is approved in advance. Physician shall also, at his expense, carry automobile liability insurance protecting himself and Employer against claims arising out of the use of an automobile in the course of his employment by Employer.

(e) Malpractice Insurance. As of the commencement date of employment, employer agrees to provide Physician with professional liability insurance, commonly called "malpractice insurance" on an "occurrence" basis, with such limits, terms and conditions as is otherwise commonly provided by Employer to or for the benefit of its other professionally licensed employees and physicians; provided, however, that such amounts shall be at least in maximum amounts as are offered by the Joint Underwriters Association and the South Carolina Patient's Compensation Fund, or, if with another insurance company licensed in the State of South Carolina, coverage of at least \$200,000.00 / \$600,000.00 aggregate.

5. Disclosure of Information. During or any time after termination of employment hereunder, The Physician will not, without authorization of Employer, disclose to or use for the benefit of any person, corporation or other entity, or himself, any files or other confidential information concerning the business, methods, operation, financing, services, or Employer "Confidential information" as used herein shall mean information particular to Employer, that is disclosed to employee or known by him as a consequence of his employment by Employer, whether or not pursuant to this Agreement. Confidential information shall include, but not limited to, all information designated by Employer as confidential, or in the future so designated, including financial information, books, records, financial statements, business plans, prices, and credit terms, and contract terms or other business arrangements. The Physician shall keep and maintain appropriate charts, files, and records of all professional services rendered by him under this Agreement, and he shall prepare in connection with these services all reports and correspondence necessary or appropriate in the

circumstance All of these records, reports, claims and correspondence shall belong to the Employer.

6. **Surrender of Books and Records.** Physician acknowledges that all files, patient records and charts, lists, books, records, literature, products, and other materials owned by Employer or used by it in connection with the conduct of its business shall at all times remain the property of Employer, and that upon termination of employment hereunder, irrespective of the time, manner or cause of said termination, physician will surrender to Employer all such files, patient records and charts, lists, books, records, literature, products, and other materials. Employer agrees that, upon any patient's request, copies of patient medical records and charts shall be provided to the patient.

7. **Termination.** Either party may terminate this Agreement with or without cause upon thirty (30) day written notice to the other. Cause shall be deemed to be any one of the following:

- (a) Revocation or suspension of physician's license to practice medicine in the state of South Carolina.
- (b) Dishonesty detrimental to the best interests of Employer.
- (c) Continuing inattention to, or neglect of, the duties to be performed by Physician.
- (d) The death of Physician.
- (e) Participation by Physician in any fraud.
- (f) Imparting any confidential information in violation of this Agreement.

Employer's Authority: The physician agrees to observe and comply with the rules and regulations of the Employer either orally or in writing, respecting performance of his duties and to carry out and to perform orders, directions and policies stated by Employer to him, from time to time, either orally or in writing. Physician specifically understands that Employer shall have final authority over acceptance or refusal of any patient for professional services.

8. **Compensation Upon Termination.** Upon termination of this Agreement for any event described in Subparagraphs (b), (e), or (f) of Paragraph 7, Physician shall not be entitled to receive such compensation beyond the termination date even for services rendered through the date of termination. Any compensation the Physician maybe entitled shall be paid within sixty (60) days, of termination, allowing for collection of fees.

9. **Restrictive Covenant: Liquidated Damages.** In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two

years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the foregoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

10. **Severability.** If any provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect. If any provision is held invalid or unenforceable with respect to any particular circumstances, it shall nevertheless remain in full force and effect in all other circumstances.

11. **Benefits.** This Agreement shall inure to and shall be binding upon the parties hereto, the successors and assigns of Employer, and the heirs and assigns of the Physician; provided, however, that this Agreement may not be assigned without prior written consent of both parties.

12. **Notice.** All notices required to be given under the terms of this Agreement shall be in writing, shall be effective upon receipt, and shall be delivered to the addressee in person or mailed by certified mail, return receipt requested, as follows:

If to Employer, address to:

ADVANCED CARDIOLOGY CONSULTANTS, P.C.
1706 Second Loop Road
Florence, S.C. 29501

If to Physician, address to:

Gregory May, M.D.
2494 Parsons Gate
Florence, S.C. 29501

or such other address as either party shall have designed for notices to be given to him or it in accordance with this Paragraph.

13. **Waiver.** The waiver by either party of any breach or violation of any provision of this Agreement shall not operate or be construed as a waiver of any

subsequent breach or violation hereof.

14. **Governing Law.** This Agreement has been negotiated and executed in the State of South Carolina, and the laws of the State of South Carolina shall govern its construction and validity; and jurisdiction and venue of any action to enforce the proceedings hereof or for damages shall lie in the City of Florence, Florence County, South Carolina.

15. **Entire Agreement.** This Agreement constitutes the entire Agreement between the parties hereto and supersedes any and all prior agreements, understandings, and representations with respect to the subject matter hereof. No change, addition, or amendment shall be made except by written agreement signed by the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

WITNESSES: ADVANCED CARDIOLOGY CONSULTANTS, PC

Melissa H Byrd
Dora C. Robison
As to Employer
Melissa H Byrd
Dora C. Robison
As to Employee

BY: L.A. Rowe
Its: President - Lew A. Rowe, M.D.
Gregory May
Gregory May, M.D.

of Paragraph 1, and therefore, denies the same.

5. The Defendants admit only so much of Paragraph 2 as alleges that Advanced Cardiology Consultants is a South Carolina corporation. Further answering the Complaint, the Defendants aver that the Defendant Advanced Cardiology Consultants' name as registered with the State of South Carolina is Advanced Cardiology Consultants, P.C.

6. The Defendants admit the allegations in Paragraph 3.

7. The Defendants admit the allegations contained in Paragraph 4 as allege that Dr. Lew A. Rowe is the President and sole shareholder of Advanced Cardiology Consultants, P.C. ("ACC").

8. The Defendants admit the allegations in Paragraph 5 as allege that Theresa Rowe is the spouse of Dr. Lew A. Rowe. Further answering the Verified Complaint, Defendants aver that Theresa Rowe is the Practice Administrator of ACC.

9. The Defendants admit the allegations in Paragraph 6.

10. The allegations in Paragraph 7 of the Verified Complaint constitute conclusions of law which require no answer from these Defendants.

11. The Defendants deny the allegations in Paragraph 8. Further answering the Verified Complaint, Defendants aver that Plaintiff has been employed with ACC since May 1, 2007.

12. The Defendants admit only as much of the allegations in Paragraph 9 as allege that Plaintiff's initial employment agreement was for a period of five years. Defendants deny the remainder of said paragraph. Further answering the Verified Complaint, Defendants aver that subsequent to this initial contract, the parties executed a second and a third contract, each for a

term of two years.

13. The Defendants admit the allegations in Paragraph 10.

14. The Defendants admit only the allegations in Paragraph 11 as allege that the agreement contains a restrictive covenant that requires the Plaintiff to pay damages to the Defendant if Plaintiff chooses to become employed as a cardiologist for a period of two years after termination within a 25 mile radius of McLeod Regional Medical Center, Florence, South Carolina.

15. The Defendants admit the allegations in Paragraphs 12, 13, 14, and 15.

16. The Defendants deny the allegations in Paragraphs 16, 17, 18, 19, and 20. Further answering the Verified Complaint, at no time did Dr. Rowe ever inform Plaintiff that the restrictive covenant would not be enforced against him if violated.

17. The Defendants deny the allegations in Paragraph 21. Further answering the Verified Complaint, Defendants aver that Dr. Rowe never made any assurances to Plaintiff that the restrictive covenant would not be enforced.

18. The Defendants admit the allegations in Paragraph 22.

19. The Defendants lack sufficient knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph 23 of the Verified Complaint and therefore deny them.

20. The Defendants deny the allegations in Paragraph 24.

21. The Defendants admit only as much of the allegations in Paragraph 25 as allege that on or about December 26, 2018, a meeting was held among six physicians employed by the Practice. The remainder of said paragraph is denied.

22. The Defendants admit only so much of the allegations of Paragraph 26 as alleged that at this meeting, it was proposed the Practice drop coverage of Carolinas Hospital. The Defendants deny the remainder of said paragraph.

23. The Defendants admit only so much of the allegations in Paragraph 27 as allege that the physicians voted to discontinue the coverage of Carolinas Hospital and that Dr. Rowe would respect any decision regarding coverage the physicians made among themselves.

24. The Defendants lack information sufficient to either admit or deny the allegations of Paragraph 28, and therefore, denies the same.

25. The Defendants deny the allegations in Paragraph 29.

26. The Defendants admit the allegations in Paragraph 30.

27. The Defendants admit only so much of the allegations in Paragraph 31 as allege that Plaintiff is a Board Certified Cardiologist specializing in interventional cardiology that has been practicing in the Florence area for almost eleven years. Defendants are without information sufficient to either admit or deny the remainder of the allegations of said paragraph, and therefore, deny the same.

28. The Defendants are without information sufficient to either admit or deny the allegations of Paragraph 32 and therefore, denies the same.

29. The Defendants deny the allegations in Paragraphs 33 and 34.

30. The Defendants are without information sufficient to either admit or deny the allegations of Paragraph 35 and therefore, denies the same. Further answering the Verified Complaint, Defendants aver that Dr. Rowe never promised Plaintiff not to enforce the restrictive covenant contained in the employment agreement.

31. The Defendants deny the allegations in Paragraph 36.

32. The Defendants are without information sufficient to either admit or deny the allegations of Paragraph 37 and therefore, denies the same.

33. The Defendants deny the allegations in Paragraph 38. Further answering the Verified Complaint, Defendants received a letter from Plaintiff's counsel dated January 18, 2019, (Exhibit A) threatening litigation against the Defendants if Defendants did not agree to execute an attached "Release from Non-Compete Agreement" in exchange for ten dollars (\$10.00) within one week. The Defendants had never made any representation that the non-compete restrictive covenant would not be enforced and declined to execute this waiver.

34. The Defendants admit only so much of Paragraph 39 as alleges that Theresa Rowe had a conversation with an individual from Carolinas Hospital regarding the restrictive covenant. Further answering the Verified Complaint, Defendants aver that this individual told Ms. Rowe to "make him an offer" on the amount of money required to waive the restrictive covenant. Ms. Rowe informed the individual that the employment agreement contained a liquidated damages provision, requiring the amount of \$500,000 to be paid to ACC in the event of a violation of the restrictive covenant.

35. The Defendants deny the allegations of Paragraph 40. Further answering the Verified Complaint, Defendants aver that on February 20, 2019, counsel for Defendants sent to Carolinas Hospital a letter (Exhibit B) notifying Carolinas that Defendants had been made aware that a number of physicians employed by ACC had been approached by a representative of Carolinas Hospital for discussions of future employment at Carolinas. This letter further notified Carolinas that these physicians were employed under agreements which contained post-

employment obligations, including provisions which prohibited the physician from being engaged in the practice of cardiology for a period of two-years post-termination within a twenty-five mile radius of McLeod Regional Medical Center unless the physician paid damages pursuant to the terms of the covenant. Defendants' counsel notified the Carolinas Hospital of its legal obligation not to knowingly procure breaches of these valid restrictive covenants by seeking to employ the physicians.

36. The Defendants admit only so much of the allegations of Paragraph 41 as allege that Plaintiff submitted a notice to terminate his employment on March 19, 2019. The remainder of said paragraph is denied.

37. The Defendants admit the allegations in Paragraphs 42 and 43.

38. Paragraph 44 of the Verified Complaint realleges and reiterates the previous paragraphs and in response, the Defendants incorporate the previous paragraphs of this Answer and reiterate the responses contained therein.

39. The Defendants admit the allegations contained in Paragraph 45.

40. The Defendants admit the allegations contained in Paragraph 46. Further answering the Verified Complaint, Defendants aver that the Defendants have not breached this obligation to the Plaintiff at any time.

41. The Defendants admit the allegations contained in Paragraph 47.

42. The Defendants deny the allegations contained in Paragraphs 48, 49, 50, 51, 52, and 53 and further deny that the Plaintiff is entitled to any relief whatsoever from these Defendants.

43. Paragraph 54 of the Verified Complaint realleges and reiterates the previous

paragraphs and in response, the Defendants incorporate the previous paragraphs of this Answer and reiterate the responses contained therein.

44. The Defendants deny the allegations contained in Paragraphs 55, 56, 57, 58, 59, and 60.

45. The Defendants admit only so much of the allegations contained in Paragraph 61 as allege that Plaintiff was an eleven-year employee of the practice and practiced interventional cardiology in the community during that time. Defendants are without information sufficient to either admit or deny the remainder of the allegations of Paragraph 61 and therefore, denies the same.

46. The Defendants admit the allegations in Paragraph 62.

47. The Defendants deny the allegations in Paragraphs 63, 64, 65, 66, 67, 68, 69, 70, 71, and 72 and further deny that the Plaintiff is entitled to any relief whatsoever from these Defendants.

48. Paragraph 73 of the Verified Complaint realleges and reiterates the previous paragraphs and in response, the Defendants incorporate the previous paragraphs of this Answer and reiterate the responses contained therein.

49. The Defendants deny the allegations in Paragraphs 74, 75, 76, 77, and 78 and further deny that the Plaintiff is entitled to any relief whatsoever from these Defendants.

50. Paragraph 79 of the Verified Complaint realleges and reiterates the previous paragraphs and in response, the Defendants incorporate the previous paragraphs of this Answer and reiterate the responses contained therein.

51. The Defendants deny the allegations in Paragraphs 80 and 81 and further deny that

the Plaintiff is entitled to any relief from these Defendants or from this Court.

FOR A THIRD AND AFFIRMATIVE DEFENSE

52. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

53. Plaintiff's claims are subject to their duty to mitigate his damages, and to the extent that he has failed to do so, Plaintiff's damages are so limited.

FOR A FOURTH AND AFFIRMATIVE DEFENSE

54. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

55. Some or all of the Plaintiff's claims are barred by the doctrines of waiver, accord, satisfaction, release, estoppel, fair use, unclean hands, equitable estoppel, *in pari delicto*, consent, and mistake.

FOR A FIFTH AND AFFIRMATIVE DEFENSE

56. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

57. The imposition of punitive or trebled damages on the basis of the acts or omissions of the Defendants would represent the deprivation of liberty and property without due process of law, the imposition of cruel and unusual punishment, and excessive fines and deny the equal protection of laws, in violation of the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States and pertinent provisions of the Constitution of the State of South Carolina.

FOR A SIXTH AND AFFIRMATIVE DEFENSE

58. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

59. Plaintiffs' claims for punitive or trebled damages are barred because the acts and omissions of the Defendants complained of by the Plaintiffs fail to rise to the level required to sustain such an award of punitive damages. Defendants did not engage in any malicious, reckless,

wrongful, or intentional conduct upon which an award of punitive damages would be based.

FOR A SEVENTH AND AFFIRMATIVE DEFENSE

60. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

61. Some or all of the Plaintiff's claims are barred by the applicable statute of limitations, laches, or repose.

FOR AN EIGHTH AND AFFIRMATIVE DEFENSE
(South Carolina Frivolous Civil Proceedings Sanctions Act)

62. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

63. The Plaintiff's action is in violation of the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 *et seq.* and South Carolina Rule of Civil Procedure 11. The Defendants are therefore entitled to attorney's fees and costs associated with the defending of this suit.

FOR A NINTH AND AFFIRMATIVE DEFENSE
(Reservation of Rights)

64. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

65. Defendants hereby give notice that they intend to rely upon such other affirmative defenses as may become available or apparent during the course of discovery, and thus reserve the right to amend this Answer to assert any such defenses.

FOR A FIRST COUNTERCLAIM
(Breach of Contract)

66. The Defendants incorporate all prior and subsequent paragraphs of this Answer.

67. The parties entered into a valid and binding employment agreement between them. The Plaintiff willfully entered into this agreement, which includes the following provision relating to

Plaintiff's post-employment obligations:

9. **Restrictive Covenant; Liquidated Damages.** In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the forgoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

68. This provision in the agreement is a valid and enforceable as it is supported by valuable consideration, reasonable and necessary to protect Defendant's legitimate business interests, is not unduly harsh or burdensome on Plaintiff's ability to earn a livelihood, and is reasonably

limited with respect to both duration and place. Plaintiff was paid considerably more than Five Hundred Thousand Dollars (\$500,000) per year under the terms of his employment agreement.

69. Upon information and belief, Plaintiff is in violation of the restrictive covenant and has breached the terms of the employment agreement, as Defendants believe he has entered into an agreement to engage in the practice of cardiology with Carolinas Hospital, in violation of both the time and place requirements. Two years have not passed since the termination of his employment and Carolina Hospitals is within twenty-five miles of McLeod Regional Medical Center, Florence, South Carolina.

70. This breach of the employment agreement by Plaintiff has proximately caused damages to the Defendants, for which they are entitled to an award of liquidated damages in the amount of \$500,000, as the agreement itself provides that the Defendants shall be entitled to in the case of any such breach of this provision. By willfully entering into this Agreement, Plaintiff agreed that this sum shall be paid to the Defendant, as a reasonable estimate of the damages likely to be suffered by the employer should Plaintiff violate this restrictive covenant.

71. The Defendants are therefore entitled to recover compensatory damages in the amount of \$500,000 for the breach of this contract.

WHEREFORE, having fully replied to Plaintiffs' Verified Complaint, Defendants Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe respectfully request that the Court grant them the relief sought below:

1. Dismiss the Plaintiff's claims contained in the Verified Complaint in their entirety with prejudice;

2. Order Plaintiff to pay Defendants' costs, expenses and attorneys' fees reasonably incurred in the defense of this action pursuant to the South Carolina Frivolous Civil Proceedings Sanctions Act and South Carolina Rule of Civil Procedure 11;
3. An award of compensatory damages in an amount equal to \$500,000 for Plaintiff's breach of the restrictive covenant; and
4. Render to Defendants any additional relief that this Court deems just and proper.

All of which is respectfully submitted.

GIBBS & HOLMES

/s/ Allan R. Holmes
Allan R. Holmes, SC Bar # 2576
Rebecca J. Wolfe, SC Bar # 102867
Post Office Box 938
171 Church Street, Suite 110
Charleston, South Carolina 29401
(843) 722-0033 (telephone)
(843) 722-0114 (facsimile)

ATTORNEYS FOR THE DEFENDANTS

April 23, 2019
Charleston, South Carolina

EXHIBIT A

Mark W. Bycek, Jr.
Hugh I. Wilcox, Jr.
Wm. Reynolds Williams ♦
Mark W. Bycek, III
E. Lloyd Wilcox, II
John H. Muech ♦ GA & KY
Tracy L. Wright
J. Scott Kozacki
Walker H. Wilcox
Paula A. Sartor
Katherine M. Ryan ♦ AL

♦ Additionally Licensed
♦ Certified Mediator

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2050 Corporate Centre Dr
Suite 230
Myrtle Beach, SC 29577
Telephone (843) 650-6777
Fax (843) 650-6767

Reply To: Florence

January 18, 2019

DR LEW A. ROWE
ADVANCED CARDIOLOGY CONSULTANTS
1706 SECOND LOOP RD
FLORENCE SC 29505

Dear Lew:

We represent Dr. Greg May in connection with his employment with your practice. He has advised us of the changes that are occurring at Advanced Cardiology Consultants and we believe these are in violation of the terms of the employment agreement.

Your decision to remove yourself from call coverage has created a situation where the practice no longer has equitable call coverage. Dr. Ng's departure has further added to the call inequality. Since the practice has decided not to provide full services to Carolinas Hospital, you have further impaired Dr. May's ability to provide care to his patients and fully practice his profession in the community. Many of Dr. May's patients prefer Carolinas Hospital and the practice's decision regarding its relationship with Carolinas disrupts patient's continuity of care and potentially deprives the public of medical services. It also deprives Dr. May of full access to his patients as well as limits his ability to perform his professional duties and maximize his income potential. These actions are a direct breach of the practice's obligations under the employment agreement to provide facilities and services suitable to Dr. May's positions as a Board Certified cardiologist.

We understand that you advised him that while you believe you could enforce the non-compete covenant, that you would not do so given the restructuring at the practice. In reliance on this representation, he has pursued additional practice opportunities with local employers. We believe you would be legally estopped from now attempting to enforce the non-compete. Moreover, we understand some of the changes that have occurred since Dr. May entered into his employment agreement and we believe that these substantially change the nature of the practice and his ability to maintain his current income potential. Your actions in urging Dr. May to secure alternative employment and then renege on your pledge also constitutes a tortious interference with his employment opportunities at both Carolinas and Medco.

Dr. Lew A. Rowe
January 18, 2019
Page 2

Dr. May would like to have a cordial disassociation from Advanced Cardiology Consultants, and he is willing to discuss his departure in good faith. If we are not able to promptly resolve the matter, we are prepared to initiate legal proceedings. There are other legal matters we would pursue in litigation which we believe would not be in the best interest of the stockholders of Advanced Cardiology Consultants. In particular, it will be necessary for us to pursue the financial status of the practice as well as the accuracy of the financial records. Please consider this matter and let me know if you are willing to allow Dr. May to withdraw from the practice and seek another association in the Florence area.

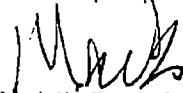
We are enclosing an agreement releasing Dr. May from the non-compete provisions of his employment agreement. We will expect a response by the end of business on January 25th. If we have not heard from you by then, we will proceed accordingly.

We would advise the practice to preserve all data of any type relating to these matters. This includes any written materials such as employment contracts, time records, insurance policies, all e-mails between Dr. May and Dr. Rowe, all e-mails between Dr. May and Mrs. Rowe, records of any discussions or communications regarding the employment agreement between Dr. May and the PC, and all records of wage and salary payments to Dr. May from his initial hiring to the present. Wage and salary information includes all documents, billing records, spreadsheets, expenses, and any calculations used to determine any wage payments to Dr. May and records of all collected fees of the practice from work performed by Dr. May.

Failure to preserve this material will result in a request for a spoliation instruction at any trial in this matter as well as any other legal remedies which Dr. May would be entitled to. Please be advised to not dispose of any of this material as I expect that it will be both discoverable and admissible in any litigation that may arise out of this matter.

With kind regards,

Yours very truly,



Mark W. Buyck, Jr.

Email: mwbuyck@WillcoxLaw.com

MWB/rgk
Enclosure

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE) RELEASE FROM
) NON-COMPETE AGREEMENT

FOR AND IN CONSIDERATION OF TEN DOLLARS (\$10.00) and mutual agreement by and between Advanced Cardiology Consultants, P.C., Employer, and Gregory A. May, M.D., Physician, I. Lew A. Rowe, President of Advanced Cardiology Consultants, P.C., agree that the non-compete provisions of any employment agreement between the parties hereto specifically the agreement dated March 30, 2018, are hereby released and Gregory A. May, M.D. is free to engage in any cardiology related practice at any location he desires without further obligation to the practice. The geographic restriction of a twenty-five-mile radius from McLeod Regional Medical Center of Florence, South Carolina, and a time restriction of two years are hereby abolished and terminated.

This constitutes the entire agreement between the parties hereto and supercedes any and all other agreements, understandings and representations with respect to the subject matter herein.

IN WITNESS WHEREOF, the parties hereto have executed this Release from the Non-Compete provisions of the agreement on the ____ day of January, 2019.

WITNESSES: ADVANCED CARDIOLOGY CONSULTANTS, P.C.

By: _____
Lew A. Rowe, President and Stockholder

Gregory A. May, M.D.

STATE OF SOUTH CAROLINA}
EMPLOYMENT AGREEMENT}
COUNTY OF FLORENCE}

THIS AGREEMENT is made this this day of March 30, 2018 by and between **ADVANCED CARDIOLOGY CONSULTANTS, PC**, a professional corporation organized and existing under the laws of the State of South Carolina ("Employer"), and Gregory May, **M.D.** ("Physician").

The parties hereto, intending to be legally bound hereby, agree upon the following terms of employment of Physician by Employer.

1. **Term.** Physician is hereby employed by Employer for a term of one (1) year commencing March 30, 2018 and ending at midnight March 31, 2019, unless sooner terminated in accordance with the provisions of Paragraph 7. It is contemplated that Physician's employment may be extended beyond March 31, 2019, such extension must be in writing and on such terms as the parties may then agree.

2. **Duties.** The Physician shall perform such professional duties for Employer as may be requested of him by the practice president in keeping with his professional status as a Board Certified cardiologist. The Physician shall do all things reasonably necessary to maintain and improve his professional skills during the term of this Agreement. He shall foster the professional practice of Employer to the best of his professional ethics.

3. **Extent of services.** Physician shall devote his full time and best efforts to the performance of his duties hereunder, including equitable call coverage and shall not engage in any business or perform any services in any capacity other for Employer without the prior written consent of Employer. However, nothing in this Agreement shall prevent the physician from engaging in activities such as investing in stocks, bonds, securities, commodities, real estate and other forms of investment as will not require any services on the part of the physician in the operation of the affairs of the companies in which such investments are made.

Compensation. For all duties to be performed by Physician hereunder, Physician shall be entitled to compensation based solely upon the physician's own collections. Compensation shall generally be payable monthly based upon the preceding month's collections at 50% of the physician's collected fees generated by the physician, subject to applicable federal and state with-holding. The physician receive a bonus, the amount of which shall be proportionate to the total sum collected by the Physician. Such bonus, if any, maybe payable as the employer may determine, but if paid, it shall be paid at least annually.

(a) **Continuing Medical Education.** Employer will reimburse Physician for tuition expenses, up to \$2,000.00, relating to one (1) meeting or seminar each year during the term of his Agreement, attended by Physician for the purposes of continuing medical education (CME). Physician may attend such meeting or seminar upon the prior approval of Employer, which approval shall not unreasonably be withheld. All other expenses relating to such CME shall be Physician's responsibility. It is contemplated that Physician's attendance at such

CME shall not exceed two (2) weeks during the term hereof.

(b) Sick Pay. Inasmuch as Physician's compensation is based upon the preceding month's collections as provided in Paragraph 4, no separate or distinct sick pay will be available to Physician in the event he becomes unable to perform his services hereunder by reason of illness or accident.

(c) Vacation. Physician shall be entitled to 10 working days, regular vacation during the term hereof. This vacation shall be non-cumulative; such vacation shall not interfere with the practice schedules, his commitments to his patients, and obligations to Employer. The time or times during which the vacation is to be taken shall first be approved by the Employer, which approval shall not reasonably be withheld.

(d) Facilities and Services. The Employer shall provide such facilities, equipment and supplies as it deems necessary for physician's performance of his professional duties under this Agreement, including technical and stenographic help and such other facilities and services as are suitable to his position and necessary to the adequate performance of his duties. Physician shall have, maintain and use, when appropriate, an automobile, home telephone, and other facilities needed in connection with his employment under this Agreement, all of which shall be at the physician's expense, unless reimbursement by Employer is approved in advance. Physician shall also, at his expense, carry automobile liability insurance protecting himself and Employer against claims arising out of the use of an automobile in the course of his employment by Employer.

(e) Malpractice Insurance. As of the commencement date of employment, employer agrees to provide Physician with professional liability insurance, commonly called "malpractice insurance" on an "occurrence" basis, with such limits, terms and conditions as is otherwise commonly provided by Employer to or for the benefit of its other professionally licensed employees and physicians; provided, however, that such amounts shall be at least in maximum amounts as are offered by the Joint Underwriters Association and the South Carolina Patient's Compensation Fund, or, if with another insurance company licensed in the State of South Carolina, coverage of at least \$200,000.00 / \$600,000.00 aggregate.

5. Disclosure of Information. During or any time after termination of employment hereunder, The Physician will not, without authorization of Employer, disclose to or use for the benefit of any person, corporation or other entity, or himself, any files or other confidential information concerning the business, methods, operation, financing, services, or Employer "Confidential information" as used herein shall mean information particular to Employer, that is disclosed to employee or known by him as a consequence of his employment by Employer, whether or not pursuant to this Agreement. Confidential information shall include, but not limited to, all information designated by Employer as confidential, or in the future so designated, including financial information, books, records, financial statements, business plans, prices, and credit terms, and contract terms or other business arrangements. The Physician shall keep and maintain appropriate charts, files, and records of all professional services rendered by him under this Agreement, and he shall prepare in connection with these services all reports and correspondence necessary or appropriate in the

circumstances. All of these records, reports, claims and correspondence shall belong to the Employer.

6. **Surrender of Books and Records.** Physician acknowledges that all files, patient records and charts, lists, books, records, literature, products, and other materials owned by Employer or used by it in connection with the conduct of its business shall at all times remain the property of Employer, and that upon termination of employment hereunder, irrespective of the time, manner or cause of said termination, physician will surrender to Employer all such files, patient records and charts, lists, books, records, literature, products, and other materials. Employer agrees that, upon any patient's request, copies of patient medical records and charts shall be provided to the patient.

7. **Termination.** Either party may terminate this Agreement with or without cause upon thirty (30) day written notice to the other. Cause shall be deemed to be any one of the following:

- (a) Revocation or suspension of physician's license to practice medicine in the state of South Carolina.
- (b) Dishonesty detrimental to the best interests of Employer.
- (c) Continuing inattention to, or neglect of, the duties to be performed by Physician.
- (d) The death of Physician.
- (e) Participation by Physician in any fraud.
- (f) Imparting any confidential information in violation of this Agreement.

Employer's Authority: The physician agrees to observe and comply with the rules and regulations of the Employer either orally or in writing, respecting performance of his duties and to carry out and to perform orders, directions and policies stated by Employer to him, from time to time, either orally or in writing. Physician specifically understands that Employer shall have final authority over acceptance or refusal of any patient for professional services.

8. **Compensation Upon Termination.** Upon termination of this Agreement for any event described in Subparagraphs (b), (e), or (f) of Paragraph 7, Physician shall not be entitled to receive such compensation beyond the termination date even for services rendered through the date of termination. Any compensation the Physician maybe entitled shall be paid within sixty (60) days, of termination, allowing for collection of fees.

9: **Restrictive Covenant; Liquidated Damages.** In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two

years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the forgoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

10. **Severability.** If any provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect. If any provision is held invalid or unenforceable with respect to any particular circumstances, it shall nevertheless remain in full force and effect in all other circumstances.

11. **Benefits.** This Agreement shall inure to and shall be binding upon the parties hereto, the successors and assigns of Employer, and the heirs and assigns of the Physician; provided, however, that this Agreement may not be assigned without prior written consent of both parties.

12. **Notice.** All notices required to be given under the terms of this Agreement shall be in writing, shall be effective upon receipt, and shall be delivered to the addressee in person or mailed by certified mail, return receipt requested, as follows:

If to Employer, address to:

ADVANCED CARDIOLOGY CONSULTANTS,P.C.
1706 Second Loop Road
Florence, S.C. 29501

If to Physician, address to:

Gregory May, M.D.
2494 Parsons Gate
Florence, S.C. 29501

or such other address as either party shall have designed for notices to be given to him or it in accordance with this Paragraph.

13. **Waiver.** The waiver by either party of any breach or violation of any provision of this Agreement shall not operate or be construed as a waiver of any

subsequent breach or violation hereof.

14. **Governing Law.** This Agreement has been negotiated and executed in the State of South Carolina, and the laws of the State of South Carolina shall govern its construction and validity; and jurisdiction and venue of any action to enforce the proceedings hereof or for damages shall lie in the City of Florence, Florence County, South Carolina.

15. **Entire Agreement.** This Agreement constitutes the entire Agreement between the parties hereto and supersedes any and all prior agreements, understandings, and representations with respect to the subject matter hereof. No change, addition, or amendment shall be made except by written agreement signed by the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

WITNESSES: ADVANCED CARDIOLOGY CONSULTANTS,PC

Michelle H Byrd
Dina C. Robins
As to Employer
Michelle H Byrd
Dina C. Robins
As to Employee

BY: L. A. Rowe
Its: President - Lew A. Rowe, M.D.

Gregory May
Gregory May, M.D.

EXHIBIT B

LAW OFFICES
GIBBS & HOLMES
171 CHURCH STREET, SUITE 110
POST OFFICE BOX 938
CHARLESTON, SOUTH CAROLINA 29402-0938

ALLAN R. HOLMES
PARTNER
CERTIFIED SPECIALIST IN LABOR
AND EMPLOYMENT LAW

TELEPHONE (843) 722-0033
TELECOPIER (843) 722-0114
E-MAIL
aholmes@gibbs-holmes.com

February 20, 2019

PERSONAL AND CONFIDENTIAL
VIA EMAIL [rseif@carolinashospital.com]
Mr. Randy W. Seif
Director of Business Development
Carolinas Hospital
805 Pamplico Hwy. Medical Mall B Suite 330
Florence, SC 29505

Re: Advanced Cardiology Consultants, P.C.

Dear Mr. Seif:

We have been retained by Advanced Cardiology Consultants, P.C. We are advised that you and the hospital at which you are employed have approached physicians who have been employed by our client. Our understanding is that these approaches have included discussions of future employment.

Please be advised that the relevant employment agreements between our client and these contain the following post-employment obligations:

9. Restrictive Covenant; Liquidated Damages. In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the forgoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

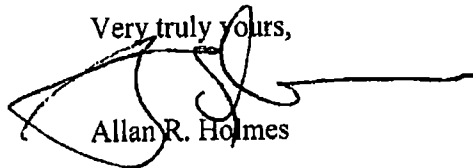
I am in possession of a February 11, 2019, from you to Ms. Theresa Rowe. In that email, you state that the liquidated damages due for a violation of the above-referenced covenant would have "nothing to do with Carolinas Hospital System." In our judgment, your hospital has a legal obligation not to procure a breach of a valid covenant, and a knowing violation of this obligation could subject the hospital to a claim for damages. To establish a cause of action for tortious interference with contractual relations, a plaintiff need only show: 1) the existence of a contract; 2) knowledge of the contract; 3) intentional procurement of its breach; 4) the absence of justification; and 5) resulting damages. *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993).

We caution you to review this issue with legal counsel. Because we understand that your hospital is now owned by the Medical University of South Carolina, I am copying its General Counsel on the chance that she may soon be undertaking representation of your hospital. If you are currently represented by MUSC's counsel or some other lawyer with regard to this matter, please do not reply to this letter, but forward it to your lawyer. I have regular dealings with MUSC and its counsel in matters involving physicians' restrictive covenants and liquidated damages. It is my experience that MUSC intends these covenants to be honored, and I am certain it would not approve of tortious interference with my clients' employment agreements.

Please confirm within five (5) days that your hospital will not be procuring any breaches of the valid restrictive covenants contained in my client's employment agreements.

With kind regards, I am

Very truly yours,



Allan R. Holmes

Cc: Annette R. Drachman, Esq.

STATE OF SOUTH CAROLINA)
)
 COUNTY OF FLORENCE)
)
 Dr. Gregory A. May,)
)
 Plaintiff,)
)
 v.)
)
 Advanced Cardiology Consultants, P.C.,)
 Dr. Lew A. Rowe, and Theresa Rowe,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FOR THE TWELFTH JUDICIAL CIRCUIT

Case No.: 2019-CP-21-00777

**PLAINTIFF'S MOTION
 FOR SUMMARY JUDGMENT**

The Plaintiff hereby moves for summary judgment as to Plaintiff's fourth cause of action brought pursuant to the South Carolina Declaratory Judgment Act, S.C. Code Ann. §15-53-10 et. seq. The Plaintiff requests that the Court enter an order declaring that the employment agreement between the parties, in particular those portions of the contract which seek to restrict the Plaintiff's ability to practice interventional cardiology within the restricted area is unenforceable and does not subject the Plaintiff to the payment of liquidated damages to the Defendant, Advanced Cardiology Consultants, P.C. The Plaintiff also requests as an alternative that the court find that the Defendants have breached the underlying employment agreement thereby nullifying the restrictive covenant contained therein. The Plaintiff relies on the previously filed pleadings in this case including the previously filed affidavits. The Plaintiff also relies on the Memorandum of Law accompanying this Motion.



WILLCOX, BUYCK & WILLIAMS, P.A.

By: s/Mark W. Buyck, III
Mark W. Buyck, III #011902
248 West Evans Street
P.O. Box 1909 (29503-1909)
Florence, South Carolina 29501
Telephone: (843) 662-3258
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Email: mb3@willcoxlaw.com
ATTORNEYS FOR PLAINTIFF

Florence, SC
September 16, 2019

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physicians continued their privileges when Bruce Hospital and Florence General merged and became Carolinas Hospital System. (See Dr. Rowe Depo., pg. 16). Dr. Rowe and members of the Practice provided call at both McLeod and Carolinas Hospital System until relinquishing privileges in 2019. (Dr. Rowe Depo., pg. 17).

THE PRACTICE

Dr. May described his perception of the Practice as follows:

A. So when I first started with the practice in 2008, everybody in the group, including Dr. Rowe, was taking fairly equal call. At that time when I started, we were going to both Carolinas Hospital and McLeod Hospital. I was absolutely as busy as I possibly could be. Going to both hospitals, we saw consults in the hospital, we saw our own patients who came to the emergency rooms in both hospitals. I performed heart cath and did cardiac intervention, which includes stents and whatnot, at both hospitals.

Now, I don't know if you're aware but in the town of Florence some people prefer McLeod Hospital and some people prefer Carolina Hospital. So we had a fairly large number of patients at both places. In addition, we had a fairly -- actually, a very busy office practice. I had never seen that many patients in one day during an office practice in Orlando, and I thought I was very busy in Orlando. So we were extremely busy. I felt like my production was as good as it could get. Everything was fine and good.

Over the years, we did acquire some new partners which had some different ways of looking at work. So that was one of the issues that came up. In addition to that, Ms. Rowe frequently would give me indications that she was uncertain about the future of the practice, if we were going to be able to compete as a private-practice group with the hospitals for contracts. That was one of the things that I kept hearing over and over, louder and louder, as the years went by. So I was concerned about that.

But, you know, things went along pretty good even despite the cuts that we had, reimbursement. Things were acceptable and we had a good group. We were -- we had good comradery. We had a good thing with the way things were handled during the day. You know, the doctors were in the office, didn't have to run back and forth to the hospitals. We didn't have to -- I thought it was about as stress-free as you could get for a busy practice.

May Depo., pg. 24, l. 21 -- pg. 26, l. 13.

In the Fall of 2018, Dr. Rowe determines that he will surrender his privileges and become an office-based cardiologist.

A. That's correct. September, October 2018.

Theresa Rowe had indicated to me that Dr. Rowe might not want to take call anymore. I told her I didn't think that was going to be very good for the group's health and that it had always been that way and how was that going to work out. I had a concern that the other physicians in the group would be reluctant to want to take more call because they're already not wanting to take call and taking a lot of time off. A big problem in the group was doctors taking time off, several weeks a year time off. Not myself, but other physicians in the group took advantage of Theresa's open policy to get whatever time off they requested. It caused problems.

So in late September, early October, I finally approached Dr. Rowe. And I said, you know, "What's this I hear about you not wanting to take call anymore? And what do you think about the practice, the health of the practice, and all this Theresa is talking about?"

He goes, "Yeah." He goes, "I'm really not sure what's going to happen. Billing, everything is up in the air. We have to see what happens. But I have decided that I am no longer going to take call."

Q. Did he say he was going to resign his privileges as well?

A. He did. He said he was going to resign his privileges at both McLeod and Conway (*sic*) Hospital at the 1st of the year. That would be 1/1/19.¹

May Depo., pg. 26, l. 17 – pg. 27, l. 23.

Dr. Rowe's indication that he intended to resign his hospital privileges caused Dr. May great concern about the health of the practice as well as his personal financial well-being. He began discussing his options with Dr. Rowe.

A. So Dr. - - so Dr. Rowe has decided he's going to drop his privileges at both hospitals and no longer take call. So we were standing right out in front of his office between the nursing area and his office when he told me

¹ Dr. Rowe testified that he resigned his privileges at both McLeod and Carolinas Hospital on January 1, 2019. (Rowe Depo., pg. ____).

this. So that was the first time that I had actually heard that from his mouth.

So, you know, he said, "I've been thinking about this for a while, and that's what I've decided to do. I want to just be an office-based physician."

And I said, "Well, where does that leave the rest of us?"

And he looked at me and he said, "You can do whatever you want to do."

And I said, "What does that mean?"

He says, "You can go to work for one of the hospitals in town. You can" - - "You know, you can do whatever you want to do."

So I was kind of set back, to be honest. I was surprised at his not wanting to take call. And I was happy to hear him say that I could stay in town. And to be honest, you know, I had been a very productive employee for the group. I had made a lot of money for Dr. Rowe, probably \$5 million or \$6 million over the time that I was there, I made for him. So I felt like that was the gentlemanly thing to do would be to make the comment that he made. So I was not shocked that he said that. I felt like that's what I would have done if I was in his position.

May Depo., pg. 29, l. 12 - pg. 30, l. 17.

A. So probably two days after Dr. Rowe had told me that he was no longer going to take call, I approached him and said, "You said I could go to work for one of the local hospitals, but I have a restrictive covenant. What about that?"

And he said, "You know, I don't want to make any enemies." These are almost his exact words. "I don't want to make any enemies. And I could invoke the restrictive covenant, but in your case I will not enforce the restrictive covenant."

So I said, "All right." Well, I said, "I'll keep you abreast of everything that I have planned. And I think I'm going to go talk to McLeod about a job."

And he said, "That'd be fine."

So I contacted Ms. Saleeby, Marie Saleeby, at McLeod. And I asked her - - I asked to meet with her. And when I met with her, she said, you know, "What's going on?"

I said, "I'm really not sure. The group's kind of" - - "The group's kind of on shaky ground. And Dr. Rowe's not going to take call, and he's told me that I can look for local employment, that I have no restrictive covenant."

And she said, "Well, we'd love to have you over here, but I'm going to need something in writing from the Rowes saying that that's" - - "that that's the case."

So I went back to Dr. Rowe and I said, you know, "They're going to need something in writing."

So, he said "No problem."

So we both walked back to Theresa, and she typed this e-mail to Marie Saleeby. Shortly after that, when I confirmed - - I got a copy of the e-mail. And I believe you'll see a copy was also sent to Dr. Rowe stating that I could talk about employment there.

May Depo., pg. 31, l. 9 - pg. 32, l. 21. (See also Exhibit "A" - November 15, 2018 e-mail from Theresa Rowe to Marie Saleeby).

Dr. May was not offered a position with McLeod. He then approached the physician recruiter at Carolinas Hospital, Randy Seif.

A. So at that point, since I had already had these conversations with Dr. Rowe about him being okay with me working in town and no restrictive covenant, I went ahead and spoke with - - I made an appointment to speak with Randy Seif. I spoke with Mr. Seif about employment. It was the same feeling that I had from Ms. Saleeby, they would be glad to have me. We could - - you know, we discussed some details about salary and RVU basis at work. We discussed some details like that. And I said, "It sound good to me. Let's do it."

And he said, "Well, our legal department says that you need to get an actual letter of release from the restrictive covenant from Dr. Rowe before we can negotiate your - - before we can actually, you know, finish up your contract." And he said, "By the way, it's going to take three months for us to credential you, so time is of the essence."

May Depo., pg. 34, l. 11 – pg. 35, l. 5.

A. So I believe that these conversations were sometime in January with Mr. Seif or it could have been December, I'm not sure.

May Depo., pg. 35, ll. 10-12.

A. So the very day that I decided, I talked to my wife, and I said, "You know, this is kind of a scary moment, but I don't want to have to move from Florence with our kids in school. They have friends. We're settled there. I don't want to have to move, and Rowe said I didn't have to and he wouldn't enforce it, so I'm going to do this. I don't like the idea of working for the hospital, but at least I know I really have no other good options."

So I went, I told Dr. Rowe, I said, "Can I talk to you in my office?" He came into my office. I said, "You know, I've talked to Carolinas, and I've decided I'm going to do that."

And I think he was surprised, but he ultimately said, you know, "Congratulations." I told him what I needed. I told him I needed a letter of release from the restrictive covenant. He said, "No problem. I'll have Theresa do that, make that letter."

So I waited to get my letter. And it was about two days later, and I went into Theresa's office because I knew she was the one that was going to do the letter. And I asked her, "Did you send the letter, or did you make up the letter that I need?"

And she became extremely nasty about the whole situation. She told me that she would handle that, and I had no business even asking her about that. And she was extremely rude to me, you know, for me being a professional. She said this was above my pay grade, that she would handle that, and just who did I talk to over there at Carolinas.

And I said, "I talked to Randy Seif."

And she - - her words were, "Oh, little Randy. You talked to little Randy? Well, why don't you have little Randy call me."

So I had little Randy call Theresa. And Theresa informed him that - - she was basically trying to get him to buy out my contract after Dr. Rowe said that he wasn't going to enforce the restrictive covenant.

May Depo., pg. 35, l. 19 – pg. 37, l. 10. See also, Seif Affidavit.

WITHDRAWAL FROM CAROLINAS HOSPITAL

In December 2018, after Dr. Rowe had informed the physicians that he intended to drop all his hospital privileges effective January 1, 2019, the physicians met with Dr. and Mrs. Rowe to discuss the Practice's relationship with Carolinas Hospital. A discussion ensued whereby the employed physicians indicated that they no longer wished to provide call coverage to Carolinas thus resulting in the necessity of the entire Practice withdrawing from the hospital. Dr. Rowe testified that he essentially took a passive role in the discussions regarding the withdrawal from Carolinas Hospital. (Dr. Rowe Depo., pg. 48, l. 20 – pg. 49, l. 14). This despite the fact that he testified that when he gave up his hospital privileges, he was giving up "a huge revenue stream that's no longer coming to me." Dr. Rowe Depo., pg. 43, ll. 8-11). He also testified that he anticipated that the Practice would not be forgoing a revenue stream since his personal revenue stream would be divided among the remaining employed physicians. (Dr. Rowe Depo., pg. 43, ll. 11-16). Dr. Rowe also testified that at the time of the meeting, 30% to 40% of the Practice's in-patient business was at Carolinas. (Dr. Rowe Depo., pg. 107, l. 22 – pg. 108, l. 8). Dr. May testified that Mrs. Rowe indicated to him that the financial impact to him would be between \$100,000 and \$150,000 a year. (May Depo. , pg. 45, ll. 1- 18). Mrs. Rowe did not recall that conversation; however, she did testify

A. I was taken completely off guard and shocked by the behavior of these five physicians.

Q. What five physicians are you referring to?

A. Dr. May, Dr. Ng, Dr. Brady, Dr. Wolery, and Dr. Debsikdar.

Q. All five of them shocked you?

A. Absolutely. I thought they would have continued to do the work at two hospitals, not given up anything because they would have made more money.

Q. At two hospitals?

A. Going - - they would have made more money with Dr. Rowe dropping his privileges.

Theresa Rowe Depo., pg. 10, l. 12 – pg. 11, l. 1.

She also testified:

Q. Did you on your own make the point that you just made very vocally with me that by doing so it was going to hurt the practice, at least the revenue for the practice?

A. It would hurt the revenues of the practice, if that's what you're asking, yes.

Q. Did you express that at the meeting in December?

A. I think I said something to the effect of, "Do you guys really want to give up this hospital?"

Theresa Rowe Depo., pg. 12, ll. 15 – 25.

After the employed physicians voted to discontinue call coverage at Carolinas Hospitals, Dr. May approached Mrs. Rowe regarding the possibility of his remaining on the call schedule at Carolinas, albeit without Practice call coverage. Mrs. Rowe testified that she contacted the Practice's malpractice carrier,

A. I believe what was said was that I think the malpractice carrier would have a hard time, because I'd actually called the malpractice carrier, and they said that they didn't feel like the practice should allow that.

Q. That the practice should not allow what?

A. Him to cover patients for the other practice.

Theresa Rowe Depo., pg. 17, ll. 8 – 15.

THE CONTRACT

Dr. and Mrs. Rowe testified that the employment agreement between the Practice and Dr. May was essentially the same agreement which the Practice has used since opening in 1994.

Paragraph 2 of the contract reads as follows:

Duties. The physician shall perform such professional duties for employer as may be requested of him by the practice president in keeping with his professional status as a Board-Certified Cardiologist. The physician shall do all things reasonably necessary to maintain and improve his professional skills during the term of this agreement.

Paragraph 3 reads:

Extent of Services. Physician shall devote his full time and best efforts to the performance of his duties hereunder, including equitable call coverage ...

Paragraph 4 reads:

Compensation. For all duties to be performed by physician hereunder, physician shall be entitled to compensation based solely upon the physician's own collections. Compensation shall generally be payable monthly based upon the preceding month's collections at 50% of the physician's collected fees generated by the physician ...

Paragraph 4 contains subsection (d).

Facilities and Services. The employer shall provide such facilities, equipment and supplies as it deems necessary for physician's performance in his professional duties under this agreement, including technical and stenographic help **and such other facilities and services as are suitable for his position and necessary to the adequate performance of his duties.**

Paragraph 9 contains the restrictive covenant:

Restrictive Covenant; Liquidated Damages. In the event this agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a 25 mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination. Employer and the physician

acknowledge that in the event the physician violates the provisions of this Paragraph 9, the damages suffered by the employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), (See attached Exhibit "B").

DISCUSSION

Covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer. *Rental Uniform Services of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983); see also *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (S.C. App. 1992); see also *Faces Boutiques v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App. 1995). A restriction against competition must be narrowly drawn to protect the legitimate interest of the employer. *Almers v. South Carolina National Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975). A covenant not to compete will be upheld only if it is:

- (1) Necessary for the protection of the legitimate interest of the employer;
- (2) Reasonably limited in its operation with respect to time and place;
- (3) Not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (4) Reasonable from the standpoint of sound public policy; and
- (5) Supported by valuable consideration.

Faces Boutiques, 455 S.E.2d at 708.

The restrictive covenant here, just as the covenant in *Faces Boutiques*, violates the requirements that a covenant must be "necessary for the protection for the legitimate interest of the employer", and "not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood." The Advanced Cardiology Consultant agreement specifically

states that in the event of its termination, physician will not become employed by or associated with an entity, “engaged in the practice of cardiology ... within a 25 mile radius of McLeod Regional Medical Center, ... for a period of two years from the date of such termination.” The plain construction of the covenant not to compete prevents Dr. May from working in any capacity with the largest and third largest employers in Florence County, South Carolina. The covenant as written is not necessary for the protection of the legitimate interests of Advanced Cardiology Consultants, P.C. It is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood within the field of medicine. The Defendants can not possibly articulate a legitimate reason to prohibit Dr. May from pursuing employment with either hospital in an administrative capacity. There is no legitimate argument that can be made that Advanced Cardiology Consultants would be harmed in any way if Dr. May chooses to pursue employment at the hospitals, for example, as a physician assistant or hospitalist.

The terms of the restrictive covenant are too broad and unenforceable. “If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved.” *Faces Boutiques* at 709, see also *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (The court “cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally.” *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) (if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements.”)

The Defendants, verbally and in writing, encouraged Dr. May to seek employment within the 25-mile geographic range. Dr. Rowe encouraged this with the knowledge that if Dr. May was seeking an interventional cardiology position, the nearest hospitals offering these services

outside the 25 mile radius are in Murrells Inlet and Columbia.² (Dr. Rowe Depo., pg. 65). Dr. Rowe testified that with regards to his discussions with Dr. May “consistently I and Theresa told him, “Look around. Go to other places. Interview.” (Dr. Rowe Depo., pg. 68, ll. 21-23). Dr. Rowe testified:

Q. Did he discuss with you employment options at two local hospitals?

A. Yes.

Q. And what was your response to that?

A. Okay. I had no response. Okay.

Dr. Rowe Depo., pg. 70, ll. 13 - 17.

Q. Dr. May specifically told you or asked you if you would have any objection to him going to work for McLeod?

A. And I probably said, “Do whatever you want.” I would have said that multiple times. This was not one conversation. This was a series of hall, parking lot, grabbing sort of things. And I would have said, “Do whatever you want.” Absolutely.

Dr. Rowe Depo., pg. 72, ll. 9 - 18.

Dr. Rowe acknowledges that he was aware that Dr. May was looking for alternative employment.

Q. Now did Dr. May ask you – or, excuse me, did he tell you that he was having conversations with Marie Saleeby about employment opportunities at McLeod?

A. I can’t recall if he mentioned Marie Saleeby. But he definitely mentioned that one of the places he was looking at was McLeod.

Q. What other places did he say he was looking at?

A. Locums, Carolinas, the beach. It varied from time to time.

² Marie Saleeby testified that there was a cath lab at the Loris Hospital. (Saleeby Depo. pg. ____, l. ____)

Dr. Rowe Depo., pg. 76, l. 17 – pg. 77, l. 2.

Q. Did you ever tell Dr. May that you were not opposed to him seeking employment or accepting employment at either one of the local hospitals?

A. I told him that he needs to explore his options.

Q. Alright. But did you tell him –

A. I never told Dr. May that he should work at McLeod Hospital or at Carolinas Hospital. I would never prohibit him from discussing employment options with either or those entities, however.

Dr. Rowe Depo., pg. 77, l. 22 – pg. 78, 7.

When asked about Carolinas Hospital, Dr. Rowe testified:

Q. And did you have any problems with him having discussions with Carolinas Hospital regarding employment?

A. No, I wouldn't have a problem with it. In fact, I told him, "Look at all your options," many times.

Q. Did you ever tell him to look at all of his options, including the hospitals here in Florence?

A. I said, "Look at everywhere," is what I told him. "Don't limit yourself."

Dr. Rowe Depo., pg. 102, ll. 6 - 16.

**THE PRACTICE HAS BREACHED THE EMPLOYMENT AGREEMENT AND IT
WOULD BE INEQUITABLE TO ALLOW IT TO ENFORCE THE RESTRICTIVE
COVENANT**

When Dr. May was hired in 2008, Advanced Cardiology Consultants was a much different practice than exists today. The physicians provided call coverage to two hospitals. Dr. May testified that he was as busy as he wanted to be. From 2008 to 2018, Dr. May was able to do all things reasonably necessary to maintain and improve his professional skills as outlined in paragraph 2 of the employment agreement. When Dr. Rowe announced that he was surrendering

his privileges in favor of an office-based practice, this caused Dr. May great concern.³ Dr. May was also concerned that Dr. Rowe's decision to drop call coverage would prompt the other physicians to seek a similar arrangement. This is exactly what happened when those physicians voted to cease practicing at Carolinas Hospital. While Dr. Rowe seems to have taken a passive attitude towards this decision, Mrs. Rowe's reaction was anything but, testifying that she was "taken completely off guard and shocked". (Theresa Rowe Depo., pg. 10). She was convinced that the Practice was abandoning revenues in refusing to provide call coverage.

Paragraph 3(d) of the employment agreement provides that ACC shall provide such facilities ... for physician's performance of his professional duties under this agreement, including ... such other facilities and services as are suitable to his position and necessary for the adequate performance of his duties. As of August 1, 2019, Advanced Cardiology Consultants does not have any employed physician with privileges at a hospital providing interventional cardiology services. Dr. Rowe testified that he has no intention of ever pursuing his subspecialty of interventional cardiology. Dr. May was adamant in his testimony that he intends to continue practicing interventional cardiology for at least ten (10) years if given the opportunity. Mrs. Rowe confirms that she and Dr. May discussed the possibility of his providing solo call coverage to Carolinas; however, that opportunity was not pursued at the insistence of the Practice's malpractice carrier.

The compensation arrangement for the Practice is a classic "eat what you kill." Dr. Rowe's acquiescence in the decision to abandon 30% to 40% of the Practice's revenue was in direct breach of the employment agreement's paragraph 3(d). Given that the Defendants have

³ Dr. Rowe testified that his time devoted to his cardiology practice is approximately 50% less since dropping call coverage. (Dr. Rowe Depo., pg. 19).

breached the employment agreement, it would be inequitable to allow them to enforce the restrictive covenant and/or request liquidated damages under the facts of this case.

WILLCOX, BUYCK & WILLIAMS, P.A.

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ATTORNEYS FOR PLAINTIFF

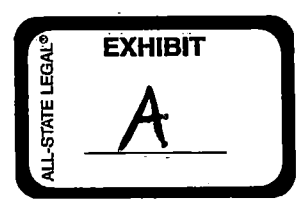
Florence, SC
September 16, 2019

From: Theresa Rowe <TRowe@accheart.net>
Date: November 16, 2018 at 10:35:16 AM EST
To: "Greg May, M.D. (greg.may55@yahoo.com)" <greg.may55@yahoo.com>
Subject: Fw: Dr. Greg May

From: Theresa Rowe
Sent: Thursday, November 15, 2018 6:24 PM
To: Marie Saleeby
Cc: lew_rowe
Subject: Dr. Greg May

Hi Marie,

Dr. May has expressed that he would like to explore an employment opportunity with McLeod Health. We do not object to him interviewing with McLeod Health.



STATE OF SOUTH CAROLINA)
EMPLOYMENT AGREEMENT)
COUNTY OF FLORENCE)

THIS AGREEMENT is made this this day of March 30, 2018 by and between **ADVANCED CARDIOLOGY CONSULTANTS, PC**, a professional corporation organized and existing under the laws of the State of South Carolina ("Employer"), and Gregory May, M.D. ("Physician").

The parties hereto, intending to be legally bound hereby, agree upon the following terms of employment of Physician by Employer.

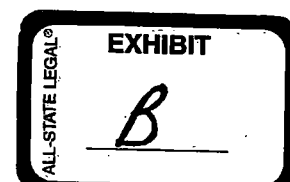
1. **Term.** Physician is hereby employed by Employer for a term of one (1) year commencing March 30, 2018 and ending at midnight March 31, 2019, unless sooner terminated in accordance with the provisions of Paragraph 7. It is contemplated that Physician's employment may be extended beyond March 31, 2019, such extension must be in writing and on such terms as the parties may then agree.

2. **Duties.** The Physician shall perform such professional duties for Employer as may be requested of him by the practice president in keeping with his professional status as a Board Certified cardiologist. The Physician shall do all things reasonably necessary to maintain and improve his professional skills during the term of this Agreement. He shall foster the professional practice of Employer to the best of his professional ethics.

3. **Extent of services.** Physician shall devote his full time and best efforts to the performance of his duties hereunder, including equitable call coverage and shall not engage in any business or perform any services in any capacity other for Employer without the prior written consent of Employer. However, nothing in this Agreement shall prevent the physician from engaging in activities such as investing in stocks, bonds, securities, commodities, real estate and other forms of investment as will not require any services on the part of the physician in the operation of the affairs of the companies in which such investments are made.

Compensation. For all duties to be performed by Physician hereunder, Physician shall be entitled to compensation based solely upon the physician's own collections. Compensation shall generally be payable monthly based upon the preceding month's collections at 50% of the physician's collected fees generated by the physician, subject to applicable federal and state with-holding. The physician receive a bonus, the amount of which shall be proportionate to the total sum collected by the Physician. Such bonus, if any, maybe payable as the employer may determine, but if paid, it shall be paid at least annually.

(a) **Continuing Medical Education.** Employer will reimburse Physician for tuition expenses, up to \$2,000.00, relating to one (1) meeting or seminar each year during the term of his Agreement, attended by Physician for the purposes of continuing medical education (CME). Physician may attend such meeting or seminar upon the prior approval of Employer, which approval shall not unreasonably be withheld. All other expenses relating to such CME shall be Physician's responsibility. It is contemplated that Physician's attendance at such



CME shall receive two (2) weeks during the term hereof.

(b) Sick Pay. Inasmuch as Physician's compensation is based upon the preceding month's collections as provided in Paragraph 4, no separate or distinct sick pay will be available to Physician in the event he becomes unable to perform his services hereunder by reason of illness or accident.

(c) Vacation. Physician shall be entitled to 10 working days, regular vacation during the term hereof. This vacation shall be non-cumulative; such vacation shall not interfere with the practice schedules, his commitments to his patients, and obligations to Employer. The time or times during which the vacation is to be taken shall first be approved by the Employer, which approval shall not reasonably be withheld.

(d) Facilities and Services. The Employer shall provide such facilities, equipment and supplies as it deems necessary for physician's performance of his professional duties under this Agreement, including technical and stenographic help and such other facilities and services as are suitable to his position and necessary to the adequate performance of his duties. Physician shall have, maintain and use, when appropriate, an automobile, home telephone, and other facilities needed in connection with his employment under this Agreement, all of which shall be at the physician's expense, unless reimbursement by Employer is approved in advance. Physician shall also, at his expense, carry automobile liability insurance protecting himself and Employer against claims arising out of the use of an automobile in the course of his employment by Employer.

(e) Malpractice Insurance. As of the commencement date of employment, employer agrees to provide Physician with professional liability insurance, commonly called "malpractice insurance" on an "occurrence" basis, with such limits, terms and conditions as is otherwise commonly provided by Employer to or for the benefit of its other professionally licensed employees and physicians; provided, however, that such amounts shall be at least in maximum amounts as are offered by the Joint Underwriters Association and the South Carolina Patient's Compensation Fund, or, if with another insurance company licensed in the State of South Carolina, coverage of at least \$200,000.00 / \$600,000.00 aggregate.

5. Disclosure of Information. During or any time after termination of employment hereunder, The Physician will not, without authorization of Employer, disclose to or use for the benefit of any person, corporation or other entity, or himself, any files or other confidential information concerning the business, methods, operation, financing, services, or Employer "Confidential information" as used herein shall mean information particular to Employer, that is disclosed to employee or known by him as a consequence of his employment by Employer, whether or not pursuant to this Agreement. Confidential information shall include, but not limited to, all information designated by Employer as confidential, or in the future so designated, including financial information, books, records, financial statements, business plans, prices, and credit terms, and contract terms or other business arrangements. The Physician shall keep and maintain appropriate charts, files, and records of all professional services rendered by him under this Agreement, and he shall prepare in connection with these services all reports and correspondence necessary or appropriate in the

circumstances all of these records, reports, claims and correspondence shall belong to the Employer.

6. **Surrender of Books and Records.** Physician acknowledges that all files, patient records and charts, lists, books, records, literature, products, and other materials owned by Employer or used by it in connection with the conduct of its business shall at all times remain the property of Employer, and that upon termination of employment hereunder, irrespective of the time, manner or cause of said termination, physician will surrender to Employer all such files, patient records and charts, lists, books, records, literature, products, and other materials. Employer agrees that, upon any patient's request, copies of patient medical records and charts shall be provided to the patient.

7. **Termination.** Either party may terminate this Agreement with or without cause upon thirty (30) day written notice to the other. Cause shall be deemed to be any one of the following:

- (a) Revocation or suspension of physician's license to practice medicine in the state of South Carolina.
- (b) Dishonesty detrimental to the best interests of Employer.
- (c) Continuing inattention to, or neglect of, the duties to be performed by Physician.
- (d) The death of Physician.
- (e) Participation by Physician in any fraud.
- (f) Imparting any confidential information in violation of this Agreement.

Employer's Authority: The physician agrees to observe and comply with the rules and regulations of the Employer either orally or in writing, respecting performance of his duties and to carry out and to perform orders, directions and policies stated by Employer to him, from time to time, either orally or in writing. Physician specifically understands that Employer shall have final authority over acceptance or refusal of any patient for professional services.

8. **Compensation Upon Termination.** Upon termination of this Agreement for any event described in Subparagraphs (b), (e), or (f) of Paragraph 7, Physician shall not be entitled to receive such compensation beyond the termination date even for services rendered through the date of termination. Any compensation the Physician maybe entitled shall be paid within sixty (60) days, of termination, allowing for collection of fees.

9. **Restrictive Covenant: Liquidated Damages.** In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two

years from the date of such termination. Physician also agrees that during the term of this Agreement and for a period of two years thereafter, he will not employ, offer to employ or solicit the employment of any employee of the Employer.

The Employer and Physician acknowledge that in the event the Physician violates the provision of this Paragraph 9, the damages suffered by the Employer would be very difficult, if not impossible, to ascertain. The parties therefore agree that a reasonable estimate of such damages is \$500,000.00 (the "Liquidated Damages"), and the Liquidated Damages shall be due and payable in full to Employer in the event that Physician shall breach the provisions of this Paragraph 9. Employer acknowledges that the payment of the Liquidated Damages by the Physician to the Employer shall be Employer's sole remedy available at law or in equity for Physician's breach of the provisions of this Paragraph 9. Without limiting the generality of the foregoing, the Employer shall have no right to obtain injunctive relief for the Physician's breach of this Paragraph 9. Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

10. **Severability.** If any provision of this Agreement shall be held invalid or unenforceable, the remainder of this Agreement shall nevertheless remain in full force and effect. If any provision is held invalid or unenforceable with respect to any particular circumstances, it shall nevertheless remain in full force and effect in all other circumstances.

11. **Benefits.** This Agreement shall inure to and shall be binding upon the parties hereto, the successors and assigns of Employer, and the heirs and assigns of the Physician; provided, however, that this Agreement may not be assigned without prior written consent of both parties.

12. **Notice.** All notices required to be given under the terms of this Agreement shall be in writing, shall be effective upon receipt, and shall be delivered to the addressee in person or mailed by certified mail, return receipt requested, as follows:

If to Employer, address to:

ADVANCED CARDIOLOGY CONSULTANTS, P.C.
1706 Second Loop Road
Florence, S.C. 29501

If to Physician, address to:

Gregory May, M.D.
2494 Parsons Gate
Florence, S.C. 29501

or such other address as either party shall have designed for notices to be given to him or it in accordance with this Paragraph.

13. **Waiver.** The waiver by either party of any breach or violation of any provision of this Agreement shall not operate or be construed as a waiver of any

subsequent breach or violation hereof.

14. **Governing Law.** This Agreement has been negotiated and executed in the State of South Carolina, and the laws of the State of South Carolina shall govern its construction and validity; and jurisdiction and venue of any action to enforce the proceedings hereof or for damages shall lie in the City of Florence, Florence County, South Carolina.

15. **Entire Agreement.** This Agreement constitutes the entire Agreement between the parties hereto and supersedes any and all prior agreements, understandings, and representations with respect to the subject matter hereof. No change, addition, or amendment shall be made except by written agreement signed by the parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year first above written.

WITNESSES: ADVANCED CARDIOLOGY CONSULTANTS, PC

<u>Melissa H. Byrd</u>	BY: <u>L.A. Rowe</u>
<u>Dona C. Robins</u>	Its: President - Lew A. Rowe, M.D.
As to Employer	
<u>Melissa H. Byrd</u>	<u>Gregory May</u>
<u>Dona C. Robins</u>	Gregory May, M.D.
As to Employee	

occasions, most recently on March 30, 2018; and the terms of the restrictive covenant remained constant throughout the Plaintiff's employment with the Defendant.

The restrictive covenant reads as follows:

In the event this Agreement is terminated, whether by lapse of time, completion of term, pursuant to notice, or otherwise, Physician covenants and agrees that he will not become employed by or associated in the capacity of an officer, partner, stockholder, member, director, consultant, independent contractor, advisor or employee of another business entity, engaged in the practice of cardiology, nor will he otherwise engage directly or indirectly in the practice of cardiology, within a twenty-five mile radius of McLeod Regional Medical Center, Florence, South Carolina, for a period of two years from the date of such termination.

Dr. Rowe, the sole owner of Advanced Cardiology Consultants and the founder and practice president, testified that his physician contracts had contained this exact restriction since his founding of the business in 1994. This is noteworthy because in the last five years both of the primary care hospitals which service the Florence market and which ACC provided services have purchased private cardiology practices. Both McLeod Regional Medical Center in Florence and Carolinas Hospital System (now MUSC) are now "engaged in the practice of cardiology." Dr. Rowe further testified that until approximately five years ago all of the cardiologists in Florence were engaged in private practice and not employees of the hospitals. At the current time, ACC is the only private cardiology practice in the Florence area.

Covenants not to compete contained in employment contracts are generally disfavored and will be strictly construed against the employer. *Rental Uniform Services of Florence, Inc. v. Dudley*, 278 S.C. 674, 301 S.E.2d 142 (1983); see also *Stringer v. Herron*, 309 S.C. 529, 424 S.E.2d 547 (S.C. App. 1992); see also *Faces Boutiques v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (S.C. App. 1995). A restriction against competition must be narrowly drawn to protect the

legitimate interest of the employer, *Almers v. South Carolina National Bank*, 265 S.C. 48, 217 S.E.2d 135 (1975). A covenant not to compete will be upheld only if it is:

- (1) Necessary for the protection of the legitimate interest of the employer;
- (2) Reasonably limited in its operation with respect to time and place;
- (3) Not unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood;
- (4) Reasonable from the standpoint of sound public policy; and
- (5) Supported by valuable consideration.

Faces Boutiques, 455 S.E.2d at 708.

“If a covenant not to compete is defective in one of the above referenced areas, the covenant is totally defective and cannot be saved.” *Faces Boutiques* at 709, see also *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972). The court “cannot make a new agreement for the parties in which they did not voluntarily enter. We must uphold the covenant as written or not at all, it must stand or fall integrally.” *Somerset v. Reyner*, 233 S.C. 324, 330, 104 S.E.2d 344, 346 (1958) (“if ... the restraint is unreasonable ... no inquiry need be made as to the presence or absence of the other necessary requirements.”)

Dr. May is trained and practiced in the medical field for over 30 years. He is more than qualified to perform a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology. In this respect, the covenant not to compete cannot be upheld since it is not necessary for the protection of the legitimate interest of the employer to prevent Dr. May from seeking any type of employment with the two hospitals. Likewise, the restriction against competition is unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood.

The Defendants cite the case of *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480 (Ct. App. 2013) as an example of South Carolina Appellate Courts upholding a similar covenant not to compete. This Court finds that the two covenants are clearly distinguishable. In *Baugh*, the sole prohibition was the physician continuing or commencing the active practice of medicine “in the field of cardiology”. The covenant at issue here involves a blanket prohibition for the physician becoming “employed by or associated in (with) ... another business entity, engaged in the practice of cardiology.” The restrictive covenant at issue here is similar to that found in *Faces Boutiques* which prohibited the employee from being connected “in any manner” with “any business in direct competition with the type of business conducted by [Faces].” *Faces Boutiques v. Gibbs*, 318 S.C. 39 - 41, 455 S.E.2d 707, 708 (S.C. App. 1995).

The Defendants also argue that Dr. May has essentially acquiesced in the Defendants’ interpretation of the covenant. The interpretation of the agreement is a legal matter and “[I]n South Carolina, [**325] the restrictions in a [noncompete] clause cannot be rewritten by a court or limited by the parties’ agreement, but must stand or fall on their own terms.”); *Stonhard*, 366 S.C. at 160, 621 S.E.2d at 354 (“The agreement fails to limit the covenant to a particular geographical area. To add and enforce such a term requires this [c]ourt to bind these parties to a term that does not reflect the parties’ original intention. Therefore, we hold that the covenant, despite any reformation, is void and unenforceable as a matter of public policy.”). *Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 633, 799 S.E.2d 318, 324-325, 2017 S.C. App. LEXIS 25, *16, 2017 WL 798496.

NOW THEREFORE,

(1) The Court finds that the restrictive covenant between the parties is unenforceable; and

(2) The Court denies both the Plaintiff and Defendants' motions regarding breach of contract insofar as both of those motions involve disputed issues of material fact.

AND IT IS SO ORDERED.

MICHAEL G. NETTLES
CHIEF ADMINISTRATIVE JUDGE

_____, 2019

Florence, South Carolina



Florence Common Pleas

Case Caption: Gregory A May VS Advanced Cardiology Consultants , defendant,
et al
Case Number: 2019CP2100777
Type: Order/Summary Judgment

So Ordered

s/ The Honorable Michael G. Nettles #2140

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP2100777

Gregory A May
PLAINTIFF(S)

Advanced Cardiology Consultants et al
DEFENDANT(S)

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
- STAYED DUE TO BANKRUPTCY**
- 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 Reconsideration and Memorandum in Support of Motion for Reconsideration is Denied.

ORDER INFORMATION

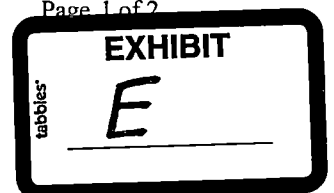
This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 11/20/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL



ELECTRONICALLY FILED - 2019 Nov 20 12:55 PM - FLORENCE - COMMON PLEAS - CASE#2019CP2100777

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Florence Common Pleas

Case Caption: Gregory A May VS Advanced Cardiology Consultants , defendant,
et al
Case Number: 2019CP2100777
Type: Order/Electronic Form 4

So Ordered

s/ The Honorable Michael G. Nettles #2140

Electronically signed on 2019-11-20 11:55:40 page 3 of 3

ELECTRONICALLY FILED - 2019 Nov 20 12:55 PM - FLORENCE - COMMON PLEAS - CASE#2019CP2100777

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **APPELLANTS' RETURN IN OPPOSITION TO MOTION TO DISMISS** has been served upon the following counsel of record by placing a copy of the same via US Mail to the following address as shown below this 30th day of January 2020.

Mark W. Buyck, III, Esq.
248 West Evans Street
Florence, SC 29501
843-662-3258

ATTORNEY FOR RESPONDENT



Rebecca J. Wolfe

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JAN 31 2020

SC Court of Appeals

LAW OFFICES
GIBBS & HOLMES
171 CHURCH STREET, SUITE 110
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REBECCA J. WOLFE
ASSOCIATE ATTORNEY

TELEPHONE (843) 722-0033
TELECOPIER (843) 722-0114
E-MAIL
rwolfe@gibbs-holmes.com

January 30, 2020

The Honorable Jenny Abbott Kitchings, Clerk of Court
South Carolina Court of Appeals
1220 Senate St.
Columbia, SC 29201

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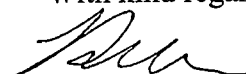
RE: *Dr. Gregory May v. Advanced Cardiology*
Appellate Case No. 2019-002114

Dear Ms. Kitchings,

Enclosed for filing in the above-referenced matter, please find an original and six copies of the Appellants' Return in Opposition to Respondent's Motion to dismiss and a self-addressed stamped envelope for the return of the file stamped copy.

By a copy of this letter, we are serving a copy of the above on counsel for Respondent, Mark W. Buyck, III.

With kind regards, I am



Rebecca J. Wolfe

Cc: Mark W. Buyck, III, Esq.

ORIGIN ID:RBWA (843) 722-0033
REBECCA J. WOLFE
GIBBS & HOLMES
171 CHURCH STREET
SUITE 110
CHARLESTON, SC 29401
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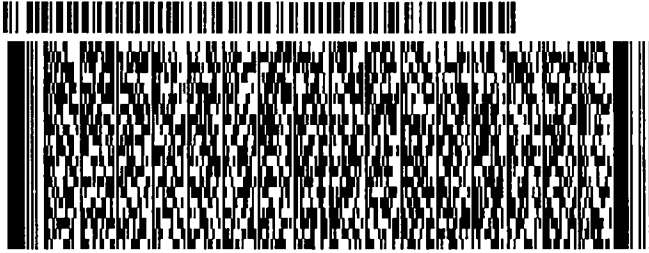
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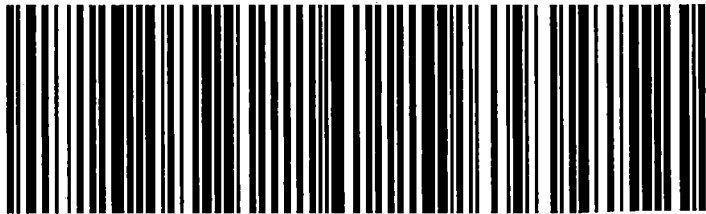
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