

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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SC Court of Appeals

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in finding that the restrictive covenant contained in the parties' employment agreement was unenforceable as it was not necessary for the protection of the legitimate interest of the employer and was unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood?

STATEMENT OF THE CASE

The Respondent, Dr. Gregory A. May, commenced this civil action against the Appellants, Advanced Cardiology Consultants, P.C., Dr. Lew A. Rowe, and Theresa Rowe, on March 20, 2019 by filing his Summons and Complaint in the Florence County Court of Common Pleas. (*See* Complaint filed March 20, 2019). Respondent's Complaint alleged 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 *et seq.* (*See generally id.*). Respondent's claim for a declaratory judgment sought an order declaring, in part, that the restrictive covenant contained in the employment agreement between the parties is an unenforceable contract at law. (Complaint p. 11). Appellants filed their Answer to the Complaint of Respondent on April 23, 2019, denying many of the allegations made by Respondent and positing numerous defenses, as well as asserting a counterclaim for breach of contract. (Answer pp. 9-11).

After the parties conducted expedited discovery as ordered by the trial court, Respondent filed his Motion for Summary Judgment on September 16, 2019. (*See* Resp't Mot. Summ. J. p. 1). In this Motion, Respondent moved for summary judgment on his fourth cause of action for a declaratory judgment, seeking an order from the trial court declaring that the employment agreement between the parties, in particular those portions of the contract which seek to restrict the Respondent's ability to practice interventional cardiology within the restricted area, is unenforceable. (*Id.*). The Respondent also moved the trial court for summary judgment in the

alternative on the grounds that the Appellants breached the underlying employment agreement, rendering the restrictive covenant null and unenforceable. (*Id.*). On September 26, 2019, the Appellants filed an opposing Motion for Summary Judgment with the trial court. (Appellants' Mot. Summ. J. p. 1). In their Motion, Appellants sought a judgment from the trial court that the restrictive covenant contained in the employment agreement was enforceable against the Respondent and that Appellants had not waived the restrictive covenant or otherwise breached the employment agreement. (*See id.* p. 1, Appellants' Memo. in Supp. Mot. Summ. J. pp. 12-13).

The trial court held a hearing and heard oral arguments on the parties' respective motions for summary judgment on October 2, 2019, with the Honorable Michael G. Nettles presiding. (Transcript of Oct. 2 Proceeding p.1 ("Transcript" hereinafter)). After hearing oral arguments from parties' counsel and considering proposed orders submitted by both parties, the trial court on October 21, 2019 issued its order granting Respondent's Motion for Summary Judgment on the declaratory judgment cause of action and finding the restrictive covenant to be unenforceable. (Order p.5). The trial court in its order denied both the Respondent's and the Appellants' opposing summary judgment motions on the breach of contract issue, finding disputed issues of material fact existed for trial. (*Id.*). Appellants on October 30, 2019 filed a Motion for Reconsideration, requesting that the trial court reconsider its grant of summary judgment to the Respondent. (*See* Appellants' Mot. Recons. p.1, Appellants' Memo. in Supp. Mot. Recons. p. 8). The trial court denied this motion on November 20, 2019. (Order Den. Mot. Recons.). It is the trial court's grant of partial summary judgment to the Respondent finding the restrictive covenant to be unenforceable that is at issue in the current appeal. On December 19, 2019, Appellants served their Notice of Appeal.

STANDARD OF REVIEW

Declaratory judgment actions are neither legal nor equitable, therefore the standard of review “depends on the nature of the underlying issues.” *Nationwide Ins. Co. of Am. v. Knight*, 428 S.C. 451, 455, 835 S.E.2d 538, 540 (Ct. App. 2019) (citing *Goldston v. State Farm Mut. Auto. Ins. Co.*, 358 S.C. 157, 166, 594 S.E.2d 511, 516 (Ct. App. 2004)). Orders on declaratory judgments brought pursuant to S.C. Code Ann. § 15-53-10 *et seq.* “may be reviewed as other orders, judgments and decrees.” S.C. Code Ann. § 15-53-110 (1976). “Whether a contract is against public policy or is otherwise illegal or unenforceable is generally a question of law for the court.” *Milliken & Co. v. Morin*, 399 S.C. 23, 30, 731 S.E.2d 288, 291 (2012) (internal citation omitted). *See also Fay v. Total Quality Logistics, LLC*, 419 S.C. 622, 629, 799 S.E.2d 318, 322 (Ct. App. 2017). When a lower court grants summary judgment on a question of law, on appeal the ruling is reviewed *de novo*. *See Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). *See also Owens v. Crabtree*, 425 S.C. 513, 518, 823 S.E.2d 224, 227 (Ct. App. 2019). “[A]ppellate courts review questions of law *de novo*, with no deference to trial courts.” *Smalls v. State*, 422 S.C. 174, 181 n.2, 810 S.E.2d 836, 839 (2018).

“When reviewing a grant of summary judgment, an appellate court applies the same standard used by the trial court.” *Town of Summerville*, 378 S.C. at 109 (citing *Lanham v. Blue Cross and Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 536 S.E.2d 331, 333 (2002)). “Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011); *see also* Rule 56(c), SCRPC. “To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party.”

McLaughlin v. Williams, 379 S.C. 451, 455-56, 665 S.E.2d 667, 670 (Ct. App. 2008). *See also Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 563, 564 S.E.2d 94, 96 (2002) (“On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.”). To survive a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party must only submit a mere scintilla of evidence. *See Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case . . . the nonmoving party must come forward with specific facts showing there is a genuine issue for trial.” *Miller v. Blumenthal Mills, Inc.*, 365 S.C. 204, 220, 616 S.E.2d 722, 730 (Ct. App. 2005) (internal citation omitted). “Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 379, 534 S.E.2d 688, 692 (2000). Similarly, “[s]ummary judgment should not be granted even when there is no dispute as to evidentiary facts if there is dispute as to the conclusion to be drawn from those facts.” *Id.*

STATEMENT OF FACTS

Advanced Cardiology Consultants, P.C. (“ACC” or “the Practice”) is a private medical group practice located in Florence, South Carolina that specializes in diagnosing and treating cardiovascular diseases and provides comprehensive cardiology services. (*See* Appellants’ Memo. in Supp. Mot. Summ. J. p. 2; Answer p.2). The Appellant Dr. Lew A. Rowe is the President and sole shareholder of ACC and the Appellant Theresa Rowe is his spouse who is employed as ACC’s Practice Administrator. (*See* Appellants’ Memo. in Supp. Mot. Summ. J. p. 2; Transcript p. 3:10-

14, 10:24-11:9). The Respondent, Dr. Gregory A. May is an interventional cardiologist¹ who was employed by ACC from May 1, 2007 until his resignation from the Practice effective on March 19, 2019. (*See id.* 4:7-10, Complaint p.6; Answer p. 2). During the entirety of his employment by the Practice, Respondent operated under a series of physician employment agreements with ACC that were all substantially similar in their terms but varied in their duration. (Complaint pp. 1-2). Respondent's most recent employment agreement with ACC was a one-year contract commencing from March 20, 2018 until March 31, 2019. (Employment Agreement, Exhibit A to Complaint).

Contained in each of the employment agreements entered into by the Respondent was a restrictive covenant provision which, by its terms, would restrain Respondent from engaging in the practice of cardiology within a twenty-five mile radius of McLeod Regional Medical Center in Florence, South Carolina, for a period of two years after the termination of the agreement. (*Id.* pp. 3-4). The restrictive covenant in its entirety provides:

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

¹ Interventional cardiology is a "subspecialty of general cardiology focusing on certain invasive procedures such as the implantation of medical balloons and stents to unblock arteries. Usually interventional cardiology must be performed in a hospital with capability to perform open-heart surgery in case complications arise from interventional procedures." *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 8, 738 S.E.2d 480, 484 (Ct. App. 2013).

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.

(Id.).

The dispute in this appeal centers around that portion of the "non-compete" restrictive covenant which states Respondent "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." *(Id.)*. The restrictive covenant provides that liquidated damages in the amount of \$500,000 shall be awarded to the Practice in the event that Respondent breaches this covenant. *(Id.)*. Also contained in the agreement was an acknowledgement by the contracting parties that the restrictive covenant and liquidated damages provision "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." *(Id.)*.

The Practice has used the same basic employment agreement containing this restrictive covenant for all of its employed physicians over the years. (Deposition of Dr. Lew A. Rowe p. 20:1-4, Exhibit A to Appellants' Memo. in Supp. Mot. Summ. J., "Rowe Depo."). Under this employment agreement, Respondent's compensation was set as 50% of his collections generated

the preceding month, not as a guaranteed annual or monthly income. (Employment Agreement p. 1).

Since the founding of the Practice in 1994, the physicians at ACC have maintained their own individual privileges to practice cardiology at various regional hospitals, located both inside and out of Florence, South Carolina. Those hospitals included McLeod Regional Medical Center (“McLeod Hospital”), Hartsville, Williamsburg Regional Hospital, Lake City Community Hospital, and Carolinas Hospital. (See Rowe Depo., p. 16:24-17:16, 26:19-27:5, 41:21-25). The hospital privileges maintained by each of ACC’s physicians that allow the physician to provide call coverage to that hospital are maintained between each individual physician and the respective hospital, not between the Practice and the hospital. The Practice does not “drop privileges” to a hospital on behalf of a physician. (See Deposition of Theresa Rowe p. 11:23, Exhibit B to Appellants’ Memo. in Supp. Mot. Summ. J.). During the time that Respondent was employed by ACC, he and the other physicians at the Practice maintained privileges at two hospitals in Florence, South Carolina, McLeod Hospital and Carolinas Hospital.² (Transcript p. 4:7-24).

Both of these Florence-area hospitals have facilities, including a cardiac catheterization lab (“cath lab,”) that Respondent has contended are necessary for the practice of his specialty, interventional cardiology, and that he contends are not present in an office-based cardiology practice. (Plaintiff Depo., pp. 84:22-85:8, Exhibit C to Appellants’ Mot. Summ. J.). There are several hospitals that have cath lab facilities where Respondent could practice his specialty located outside of the twenty-five-mile radius of the restrictive covenant, including in the Grand Strand,

² Carolinas Hospital has since been purchased by the Medical University of South Carolina (“MUSC”) and is now MUSC Health Florence Medical Center. (See Transcript pp. 13:24 -14:4).

Columbia, and Loris, South Carolina. (*See* Rowe Depo., 65:10-20, Deposition of Marie Saleeby, p. 6:9-16, Exhibit D to Appellants' Memo. in Supp. Mot. Summ. J.).

The employment agreement at issue does not require the Practice to guarantee the maintenance of hospital privileges with any particular hospital facility, nor does it provide the Respondent with any sort of guarantee of specific call coverage terms with a hospital or access to a cath lab. The employment agreement does provides under Section 3(d)'s "Facilities and Services," that the Practice "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 other such facilities and services as are suitable to his position and necessary to the adequate performance of his duties." (Employment Agreement p.2). Respondent was employed by the Practice, according to the terms of the employment agreement, as a "Board Certified cardiologist," and the agreement did not guarantee Respondent employment as an "interventional cardiologist." (*Id.* at 1).

In September of 2018, Dr. Lew Rowe informed the employed physicians at ACC that he intended to resign his privileges at McLeod Hospital and Carolinas Hospital and wanted to shift the focus of his own practice to seeing patients in an office-based setting. (Rowe Depo. pp. 17:23-18:9, 43:22-44:4). As there were five other practicing physicians who would still be providing call coverage at the two hospitals, the impact on the other physicians' call coverage and schedules was expected to be minimal, and the Respondent himself testified that Dr. Rowe resigning his privileges was "probably not going to be a major deal." (*See id.* pp. 42:3-44:23; Deposition of Dr. Gregory A. May p. 30:23-24, Exhibit C to Appellants' Memo. in Supp. Mot. Summ. J., "Resp't Depo."). Respondent apparently became concerned, however, that Dr. Rowe's decision to resign his privileges at the two Florence Hospitals would cause the other employed physicians to not

sufficiently pull their weight with Dr. Rowe out of the call schedule and Respondent thereafter began seeking out alternate employment in Florence within the twenty-five mile radius of the restrictive covenant.³ (*See Id.* pp. 30:3-31:13; Complaint p. 3).

Respondent took steps to seek out employment as an interventional cardiologist at both local Florence hospitals, McLeod and Carolinas. (Complaint pp. 3-5; Transcript pp. 21:18-22:8). Respondent initially contacted McLeod Hospital in Florence regarding employment, although he was not formally offered a position at McLeod. (Transcript pp. 21:18-23; Complaint p. 3-5). On or around December 26, 2018, the employed physicians at a staff meeting voted amongst themselves to resign their privileges at Carolinas Hospital, but to keep privileges at McLeod. (Rowe Depo. pp. 46:3-48:24; Complaint p. 4). While the remaining physicians voted unanimously to drop their privileges at Carolinas Hospital, both Dr. Rowe and Dr. May ended up abstaining from the final vote, although Respondent argued for maintaining privileges at Carolinas. (Rowe Depo. pp. 46:3-48:24; Complaint p. 4).

The other physicians' decision to drop privileges at Carolinas also caused the Respondent to drop his privileges at that hospital because the Practice would have been unable to obtain malpractice coverage for Respondent alone providing call coverage to Carolinas Hospital. (*See* Complaint p. 4; Transcript pp. 12:20-13:3). Respondent's privileges at McLeod Hospital were not affected by this vote and Respondent continued to provide call coverage to McLeod and continued

³ Dr. Rowe testified that Respondent had continually expressed a desire to him to leave the Practice at various times over the years of his employment. (Rowe Depo. pp. 68:10-69:9). The parties dispute whether the Practice waived the right to enforce the restrictive covenant through a series of verbal representations Respondent alleges Dr. Rowe made to Respondent about not enforcing the non-compete. The parties similarly dispute whether the Appellants otherwise breached Section 3(d), the "Facilities and Services" provision of the employment agreement, by relinquishing privileges at Carolinas Hospital and cutting the revenue stream of the Practice. (*See* Resp't Memo. in Supp. Mot. Summ. J. p. 13-15). Neither of these disputes are at issue in the current appeal, however, as the trial court denied the parties' opposing motions for summary judgment on the waiver and breach of contract issues. (Order p. 5).

to actively practice interventional cardiology until the end of his employment on March 19, 2019. (See Transcript p. 13:4-7; Complaint p. 6). Respondent was not offered a position with McLeod Hospital. Dr. May ultimately sought a job opportunity with Carolinas Hospital while still employed by the Practice, contacting the recruiter at Carolinas, who reached out to Theresa Rowe to inquire about the possibility of Carolinas Hospital employing Dr. May. (See Depo. of Theresa Rowe pp. 32:1-35:14; Complaint p.5). Carolinas Hospital offered Dr. May a position practicing interventional cardiology conditioned on Dr. May obtaining a written promise not to enforce the restrictive covenant from Dr. Rowe. (Complaint p.5). Respondent alleged in his Complaint that Dr. Rowe had already made representations to him that Dr. Rowe would have Ms. Rowe prepare a written waiver of the non-compete to send to Carolinas. (*Id.*). Appellants dispute that Dr. Rowe ever made a representation to the Respondent that the restrictive covenant would not be enforced against him or would be waived in any way. (See Rowe Depo. pp. 99:16-100:14, 130:14-18).

The Practice's remaining physicians resigned their privileges at McLeod Hospital effective April 1, 2019—after the term of Respondent's employment agreement had expired and after Respondent's March 19, 2019 resignation from the Practice. (See Complaint p. 6). Respondent sought a waiver of the restrictive covenant from the Practice through a letter from his counsel on January 18, 2019 in exchange for \$10 in consideration and threatening litigation. (See Letter from Counsel pp. 1-3, Exhibit A to Answer). The Practice declined to waive the non-compete in response to this letter and the Respondent thereafter filed suit on March 20, 2019, seeking, in part, a declaration that the restrictive covenant was unenforceable. (Complaint pp. 10-11).

ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THE RESTRICTIVE COVENANT OVERBROAD AND UNENFORCEABLE.

The trial court, relying upon *Faces Boutique v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995), found the restrictive covenant at issue overbroad and unenforceable in granting Respondent summary judgment. (Order pp. 3-5). In particular, the trial court found that the covenant not to compete could not be upheld as it was “unnecessary for the protection of the legitimate interest of the employer to prevent Dr. May from seeking any type of employment with the two hospitals,” and “[l]ikewise the restriction against competition is unduly harsh and oppressive in curtailing the legitimate interests of Dr. May to earn a livelihood.” (*Id.* p.3). In particular, the trial court found that the covenant constituted a “blanket prohibition for the physician becoming ‘employed by or associated in (with) ... another business entity, engaged in the practice of cardiology,’” which was similar to the covenant that had been struck down in *Faces Boutique*.⁴ (*Id.*). The trial court found that the terms of the covenant would prohibit Respondent from being employed “in a myriad of jobs at either hospital [in Florence] which are wholly unconnected to the practice of cardiology,” since the hospitals themselves own cardiology groups that engage in the practice of cardiology. (*Id.* at 2-3).

The Respondent himself throughout this litigation has never expressed any intention to perform any service at either Florence hospital that was unrelated to the practice of cardiology. His purpose in bringing this action against the Appellants was to free himself of the restrictive covenant so that he could immediately practice interventional cardiology, the service he provided

⁴ The covenant in *Faces Boutique* prohibited the employee from being connected “in any manner” with “any business in direct competition with the type of business conducted by [Faces].” (*Id.*) (citing *Faces Boutique*, 318 S.C. at 39 – 41).

for the practice while he was employed, within the covenant's twenty-five mile radius as a physician employed by Carolinas Hospital. (*See generally* Complaint). The Respondent and the Appellants understood the covenant to prohibit Dr. May from being employed *as a cardiologist*, not from being employed in a wholly unrelated field at an entity engaging in the practice of cardiology. (*See* Appellants' Memo. in Supp. Mot. Summ. J. pp. 17-19). It was the parties' intent to restrain Respondent from engaging in the practice of cardiology only, as the plain language of the agreement and the Respondent's own testimony shows. (Resp't Depo. 22:11-24:14; Transcript pp. 28:24-30:5). The Respondent's interpretation of the covenant as an unenforceable restraint under *Faces Boutique* that the trial court adopted is one that counsel for Respondent at oral argument acknowledged was a "technical argument." (Transcript p. 16:5-8). Even so, this "technical argument" that renders the restrictive covenant unenforceable and contravenes the contracting parties' intent is not supported by South Carolina law or the language of the covenant itself.

1. The Restrictive Covenant is Valid and Enforceable.

Sound public policy generally requires the enforcement of contracts freely entered into by the parties. *Wolf v. Colonial Life & Accident Ins. Co.*, 309 S.C. 100, 109, 420 S.E.2d 217, 221 (Ct. App. 1992). "While recognizing the legitimate interest of a business in protecting its clientele and goodwill, we are equally concerned with the right of a person to use his talents to earn a living." *Sermons v. Caine & Estes Ins. Agency, Inc.*, 275 S.C. 506, 509, 273 S.E.2d 338, 338 (1980). Restrictive covenants not to compete are therefore generally disfavored and will be strictly construed against the employer. *Rental Uniform Serv. v. Dudley*, 278 S.C. 674, 675, 301 S.E.2d 142, 143 (1983).

In South Carolina, a restrictive covenant that arises out of an employment relationship between the contracting parties will be upheld if it:

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

Id. at 675-76. Only the first and third prongs of the test from *Dudley* are at issue in this current appeal, as the trial court found the covenant not to compete deficient in these two respects.⁵ (Order p. 3). “In South Carolina, ‘contracts against competition are held to be unenforceable unless they meet certain criteria . . . [because] they constitute a restraint upon trade[,] which is against public policy.’” *Fay*, 419 S.C. at 630 (quoting *Standard Register Co. v. Kerrigan*, 238 S.C. 54, 71, 119 S.E.2d 533, 542 (1961)). “Despite the general disposition against such agreements, South Carolina courts have upheld non-compete agreements if they comport with the above requirements.” *Hagemeyer N. Am., Inc. v. Thompson*, 2006 U.S. Dist. LEXIS 19468, at *11 (D.S.C. March 1, 2006).

“[C]ases concerned with the enforceability of covenants not to compete contained in employment contracts must be decided on their own facts.” *Stringer v. Herron*, 309 S.C. 529, 531, 424 S.E.2d 547, 548 (Ct. App. 1992) (internal citation omitted). The South Carolina Supreme

⁵ The Parties do not dispute whether the other requirements from *Dudley* are met. The Respondent did not move for summary judgment in the lower court on the issue of whether the covenant was reasonably limited in its operation with respect to time and place, supported by valuable consideration, or otherwise reasonable from the standpoint of sound public policy. (See Resp’t Memo. in Supp. Mot. Summ. J. p. 10).

Court has held that the restrictions in a non-compete clause cannot be rewritten by a court or limited by the parties' agreement, but must stand or fall on their own terms. *See Team IA, Inc. v. Lucas*, 395 S.C. 237, 245-246, 717 S.E.2d 103, 107 (Ct. App. 2011) (citing *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010)). South Carolina courts may not "blue pencil" the restrictions contained in a non-competition provision "by inserting or subtracting terms not agreed to by the parties in order to make it valid and enforceable."⁶ *Id.* at 246.

Similarly, where an employer later expresses at trial an intention to enforce the covenant in a way that narrows the scope of the written agreement, the covenant cannot be upheld. *See Faces Boutique*, 318 S.C. at 43-44. However, "[c]onstruing the terms of a contract is not the same as changing the terms of a contract by reformation." *Herring v. Lapolla Indus.*, 2013 U.S. Dist. LEXIS 195826, at *4 (D.S.C. Nov. 26, 2013) (applying South Carolina law to determine enforceability of non-compete agreement). "Blue penciling" does not refer to "a cannon of contract construction but a directive to . . . explicitly rewrite the terms of a contract." *Id.* at *5. "The cardinal rule of contract interpretation is to ascertain and give legal effect to the parties' intentions as determined by the contract language." *Palmetto Mortuary Transp., Inc. v. Knight Sys.*, 424 S.C. 444, 460, 818 S.E.2d 724, 733 (2018) (citing *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003)).

⁶ While courts in South Carolina generally have declined to "blue pencil" non-competition provisions, "South Carolina has not outright rejected the 'blue pencil test.'" *Fournil v. Turbeville Ins. Agency, Inc.*, 2008 U.S. Dist. LEXIS 116469, at *16 (D.S.C. Dec. 29, 2008) (discussing South Carolina courts' treatment of the "blue pencil test"). Where the restrictive covenant's excessive restraint is severable in terms, it may be disregarded and the remaining part of the contract enforced, but an indivisible covenant may not be enforced even to a reasonable extent. *See id.* *See also Rockford Mfg. v. Bennet*, 296 F. Supp. 2d 681, 687 (D.S.C. 2003) (citing *Eastern Business Forms, Inc. v. Kistler*, 258 S.C. 429, 189 S.E.2d 22 (1972)).

The restrictive covenant at issue meets the requirements for enforceability as articulated in *Dudley* and the trial court erred in finding otherwise. It is both necessary for the protection of the legitimate interest of the employer and not unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood practicing cardiology.

A. The Restrictive Covenant is Necessary for the Protection of the Legitimate Interest of the Practice.

The noncompetition provision which restrains Respondent from being “employed by or associated (with) ... another business entity[] engaged in the practice of cardiology,” or “otherwise engag[ing] directly or indirectly in the practice of cardiology” is necessary for the protection of the legitimate interests of the Practice and it is an interest that courts have repeatedly recognized. *See Baugh*, 402 S.C. at 16 (recognizing medical practice’s interests in upholding covenant against former physicians). *See also Intermountain Eye & Laser Ctrs., P.L.L.C. v. Miller*, 127 P.3d 121, 128 (2005) (discussing medical practice’s protectable interests in its proprietary information, its referral sources, and patient relationships “established and/or nurtured” by employed physician during his employment with the practice).

In *Baugh v. Columbia Heart Clinic, P.A.*, this Court upheld a restrictive covenant very similar to the one at issue here that purported to prevent physicians from engaging or “assisting any [p]erson to engage” in the practice of cardiology for a period of one year within a twenty-mile radius of the defendant’s offices. 402 S.C. 1, 15, 738 S.E.2d 480, 488 (Ct. App. 2013). The factual background and restrictive covenant at issue in *Baugh* are, in fact, strikingly similar to the instant case. In *Baugh*, the defendant Columbia Heart was a comprehensive cardiology practice similar in many ways to ACC. *Id.* at 1. The plaintiffs in *Baugh* were interventional cardiologists who departed the practice and sought to practice cardiology within the radius of a restrictive covenant,

like the Respondent. *Id.* at 2-6. The cardiologists in *Baugh* were subject to the following restrictive covenant:

Physician, in the event of termination or expiration of this agreement for any reason, during the twelve (12) month period immediately following the date of termination or expiration of this Agreement, shall not Compete . . . with Columbia Heart . . .

“Compete” means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of Columbia Heart and on behalf of Columbia Heart: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; and (C) assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory.

“Business” is defined as “the practice of medicine in the field of cardiology.”
“Territory” is defined as “the area within a twenty (20) mile radius of any Columbia Heart office at which Physician routinely provided services during the year prior to the date of termination or expiration of this Agreement.”

Id. at 4-5 (emphasis added). The lower court in *Baugh* found the activity restriction which prohibited the cardiologists from “assisting any person . . . to engage in the [practice of medicine in the field of cardiology]” was overbroad and unenforceable under *Faces Boutique Ltd. v. Gibbs*. *Id.* at 7-8. The trial court similarly found that this restriction was not necessary to protect a legitimate interest of Columbia Heart, as it “goes beyond restricting [Respondents] from doing what they did for” Columbia Heart and would bar them from assisting any cardiology practice “in any capacity.” *Id.* at 8.

This Court disagreed with the lower court, finding the activity restriction to be reasonable and necessary to protect Columbia Heart’s legitimate interests. *Baugh*, 402 S.C. at 16-17. In recognizing the legitimate interest that Columbia Heart had in imposing this restriction, the court reasoned:

Here, the record evidences that Columbia Heart's patients, referral sources, and other goodwill would be at risk if Respondents were able to assist others to engage in the practice of cardiology. Patients stay with and follow their doctors, and general practitioners refer patients to cardiologists based upon both the reputation of the

doctor and the doctor's practice, current and past. If the Agreements did not prohibit Respondents from assisting another person to engage in the practice of medicine in the field of cardiology, Respondents could treat Columbia Heart's patients and use Columbia Heart's referral sources and goodwill simply by staying one step from the medical services provided. Therefore, the restriction is necessary to protect a legitimate interest of Columbia Heart.

Id. at 16. The *Baugh* court found that “the covenant’s prohibition against assisting the practice of medicine in the field of cardiology is necessary to prevent Respondents from indirectly engaging in activities they clearly could not participate in directly.” *Id.* The practice employer retained these legitimate interests, even though the practice’s office location at issue in Lexington, South Carolina had closed just months after the plaintiff cardiologists had left the practice. *See id.* at 5-6. In coming to this conclusion, the *Baugh* court noted that the restrictive covenant, like the one between Dr. May and the Practice, does not contain the “any capacity restrictions” prohibiting the physician from being associated “*in any capacity*” that the court in *Faces Boutqiué* had found was overbroad. *Id.* at 19-20.

Stretched to its broadest possible meaning, the restraint found enforceable in *Baugh* against “indirectly . . . assisting” another person as an agent or employee “to engage in the practice of . . . cardiology” could conceivably prohibit a wide range of activities that take place in a medical practice or in hospital facilities that the interventional cardiologists in *Baugh* did not perform. With this interpretation, an office administrator who assists the physician with billing, scheduling, compensation, and secures the facilities for a medical practice “indirectly assists” in the practice of cardiology. Similarly, a cardiac nurse who assists the physician during a diagnostic procedure could be deemed to “indirectly assist” the practice of cardiology. The *Baugh* court did not construe the restrictive covenant in the broadest possible sense in finding that the restraint against “assisting any Person . . . to engage in [the practice of medicine in the field of cardiology]” was not as broad as the “in any capacity” prohibitions found overbroad by South Carolina courts. *Id.* (citing *Faces*

Boutique, 318 S.C. at 41; *Preferred Research, Inc. v. Reeve*, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987)). “Although Respondents do not contest that they breached the restrictions here, whether a shareholder-physician has actually assisted someone to engage in the practice of medicine in the field of cardiology could be a question of fact in other cases.” *Baugh*, 402 S.C. at 19-20.

The restrictive covenant at issue here which restrains Respondent from being “employed by or associated (with) ... another business entity[] engaged in the practice of cardiology,” or “otherwise engag[ing] directly or indirectly in the practice of cardiology” is necessary to protect the Practice’s legitimate business interests. The restraint is necessary to protect “the goodwill in the Florence medical community that [ACC] has spent building up since 1994, as well as protecting its patient base from being unfairly encroached upon by a former physician practicing his same specialty in the same geographic area almost immediately after his employment with the Practice ended.” (See Appellants’ Memo. in Supp. Mot. Summ. J. p. 14). Dr. Rowe has testified that the Plaintiff’s practice of cardiology in Florence at Carolinas Hospital would have the enormously negative impact of “cannibalizing” the Practice’s business. (Rowe Depo. p. 79:6-25). Dr. Rowe further testified:

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16 Q. Do you think Dr. May working at
17 Carolinas Hospital right now would have an adverse
18 impact on Advanced Cardiology since the practice
19 doesn't intend to do any work there?

20 A. It would.

21 Q. How is that? How so?

22 A. Because he would be working at, say,
23 Carolinas, and he would be doing cardiology. Now,
24 a very small part of our daily work is actually
25 doing interventional cardiology. The vast majority

82

1 in this area, and this is not everywhere but it's

2 in this area, it's seeing patients, interpreting

3 stress tests, echoes, that sort of thing that don't
4 involve interventional cardiology whatsoever. So
5 it would have a huge impact on us.
6 Q. So you're thinking that the patients
7 that he currently sees would see him at Carolinas
8 rather than come to your office?
9 A. It's possible that some might.
10 Q. So that's your fear?
11 A. I wouldn't say it's a fear. I think
12 it's a pretty good estimate of what would happen.

(*Id.* at 81:16-82:12).

Like the restrictive covenant in *Baugh* that prevented the physician from “assisting any Person . . . to engage in . . . the practice of . . . cardiology,” the language here against Respondent being “employed by” another entity “engaged in the practice of cardiology . . . *nor will he otherwise engage directly or indirectly in the practice of cardiology*” prevents Respondent “from indirectly engaging in activities [he] clearly could not participate in directly.” *See Baugh*, 402 S.C. at 16. Like the departing cardiologists in *Baugh*, Respondent does not dispute his practice of cardiology within the geographical limit of the covenant would violate the agreement. This Court in *Baugh* made clear that a medical practice has a legitimate, protectible interest in restraining a formerly employed physician from continuing to practice his medical specialty within the geographic bounds of a noncompetition agreement. The restrictive covenant is necessary to prevent Respondent from continuing to practice cardiology in Florence, South Carolina and therefore should be deemed enforceable by the Court.

B. The Covenant is not Unduly harsh and Oppressive in Curtailing the Legitimate Efforts of Respondent to Earn a Livelihood.

The trial court also erred in its finding that the restrictive covenant was “unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood.” (Order p. 3). In coming to this conclusion, the trial court relied on *Faces Boutique v. Gibbs*, 318 S.C. 39, 455

S.E.2d 707 (Ct. App. 1995). In *Faces Boutique*, a facial spa brought suit to enjoin the defendant from being employed at a competing business. *Id.* at 41. The noncompetition agreement in *Faces Boutique* provided:

For a period of three (3) years after the termination of this agreement, the Employee will not, WITHIN THE TOWN OF HILTON HEAD ISLAND, SC, directly or indirectly, own, manage, operate, control, be employed by, participate in, *or be connected in any manner* with the ownership, management, operation, advertisement or control of any business in direct competition with the type of business conducted by [Faces].

Id. (emphasis added). The defendant was employed by Faces Boutique as an esthetician. *Id.* The defendant in *Faces Boutique* had demonstrated legitimate efforts to earn a livelihood providing services not related to her former job as an aesthetician with Faces Boutique. After she left employment at the facial spa, the defendant went to work in a different profession as a manicurist⁷ in a Hilton Head beauty salon. *Id.* Faces Boutique brought suit seeking to enjoin the former employee from providing services as a manicurist, because the defendant's new employer derived part of its revenue from performing facials. *Id.*

The court in *Faces Boutique* held the covenant restricted the defendant's employment opportunities beyond what was necessary for the protection of the spa's legitimate business interests and was unduly harsh and oppressive in curtailing the legitimate efforts of the employee to earn a livelihood. *Id.* at 43-44. The court relied on the fact that the owner of Faces Boutique admitted at trial that the covenant prohibited the defendant from being employed "at any place of business engaged in the selling of cosmetics or giving facials, even if [the defendant] herself did not participate in these activities" and "even though, in such a situation, [Faces'] business would

⁷ An esthetician is a licensed skin care professional, while a manicurist is licensed to practice manicuring or pedicuring the nails or similar work. *See id.* at 41 n. 1-2.

not be threatened.” *Id.* The trial court erred in finding *Baugh* distinguishable but *Faces Boutique* controlling in granting summary judgment to the Respondent. (Order p. 3-5).

An evaluation of both the language and the circumstances dictates a conclusion that *Baugh*, not *Faces* is controlling and the covenant should be upheld on these grounds. There are several factors which distinguish this case from *Faces Boutique*. The most important distinction between the two restrictive covenants is that the restrictive covenant here does not contain the “in any capacity/manner” language that is present in the covenant in *Faces Boutique*. See *Faces Boutique*, 318 S.C. at 41. The *Baugh* court upheld the agreement at issue there because the covenant did not contain the sweeping “in any capacity/manner” language that the courts in *Faces Boutique* and *Preferred Research* court found so objectionable. *Baugh*, 402 S.C. at 19-20. The restrictive covenant between the Practice and Respondent does not contain this language that would so clearly demonstrate an intent to prevent the Respondent from being employed or connected *in any manner* with an entity engaged in the practice of cardiology.

Additionally, unlike the Respondent, the defendant in *Faces Boutique* made legitimate efforts and sought employment in a different profession than she had provided for her previous employer. See *Faces Boutique*, 318 S.C. at 41. The trial court found the restrictive covenant to be “unduly harsh and oppressive in curtailing the legitimate efforts of Dr. May to earn a livelihood” because it would restrain him from performing “a myriad of jobs at either hospital which are wholly unconnected to the practice of cardiology”--jobs which it is undisputed that the Respondent has no intention of seeking. (Order p. 3). The Respondent has made clear that he intends to practice interventional cardiology if he is not bound by this covenant. Respondent does not appear to contend that the covenant is unduly oppressive in curtailing his legitimate efforts to earn a livelihood as a cardiologist. Rather, the covenant threatens his efforts to earn a livelihood in a

variety of unrelated and hypothetical professions that he has expressed no interest in pursuing and would not even perform if hired by one of the local hospitals. (*See* Resp't Depo. pp. 23:14-17; Transcript pp. 13:11-16:8). Respondent has not articulated interest in or expended *any* legitimate effort in earning a livelihood in one of these theoretical jobs "wholly unconnected to the practice of cardiology." (Order p.3). Respondent filed suit against these Appellants for the very purpose of freeing himself from the restrictive covenant that he agreed to so that he could practice the same medical specialty in Florence within the bounds of the covenant. (*See generally* Complaint). A sense of reality must always influence the interpretation of contract language. Noncompetition agreements entered into with board certified cardiologists are created to restrain them from providing services related to their practice of cardiology—not services provided by employees holding positions board certified cardiologists would consider entirely unsuitable. Respondent acknowledged that he would not be "seeking employment as a bottle washer or dishwasher" because he is a cardiologist. (Resp't Depo. p. 23:14-16).

The *Faces Boutique* court relied upon critical testimony from the employer's owner regarding the construction of the restrictive covenant that is not present here from Dr. Rowe. The owner of Faces Boutique had conceded at trial that:

Gibbs would be in violation of the covenant not to compete if Gibbs became employed at any place of business engaged in the selling of cosmetics or giving facials, even if Gibbs herself did not participate in these activities. Owens also admitted the covenant would have this effect even though, in such a situation, her business would not be threatened. Thus, by Owens's own admission, the terms of the covenant restrict Gibbs's employment opportunities beyond what is necessary for the protection of [Faces] legitimate business interests.

Faces Boutique, 318 S.C. at 43. In fact, the defendant Gibbs was apparently performing work as a manicurist that was unrelated to her services as an esthetician when Faces Boutique brought suit against her. *See id.* at 41.

The agreement at issue here does not prohibit Respondent from being employed “in any capacity” for an entity practicing cardiology, nor was it intended by the parties to have that meaning. The inclusion of the phrase “nor will he otherwise engage directly or indirectly in the practice of cardiology” immediately following the prohibition against Respondent being “employed by or associated (with) ... another business entity[] engaged in the practice of cardiology” makes the parties’ intent clear in this respect. (Employment Agreement p. 3). The parties to the agreement clearly contemplated and intended to restrict Respondent’s future employment as a cardiologist *only* and not in some other, unrelated field. (See Resp’t Depo. pp. 22:11-24:14). The trial court’s finding, insofar as it is inconsistent with this intent, fashions a new agreement between the parties that was never intended. See *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 366 S.C. 156, 160, 621 S.E.2d 352, 354 (2005) (declining to add geographical limitation to restrictive covenant because it would bind the parties to a “term that does not reflect the parties’ original intention.”). See also *E. Bus. Forms, Inc. v. Kistler*, 258 S.C. 429, 434, 189 S.E.2d 22, 24 (1972) (finding the court may not make a new agreement for the parties into which they did not voluntarily enter). The trial court erred in finding that construing the covenant consistent with the parties’ intent in this respect amounts to an impermissible re-writing or “blue penciling” of the agreement. (Order p. 4). “[C]onstruing the terms of a contract is not the same as changing the terms of a contract by reformation.” *Herring*, 2013 U.S. Dist. LEXIS 195826, at *4.

The restrictive covenant is not unduly oppressive in curtailing Respondent’s legitimate efforts to earn a livelihood as a practicing cardiologist. The effect of the restrictive covenant is to restrain Respondent from actively practicing cardiology at either of the two local Florence hospitals that he maintained privileges with while he was employed by the Practice in Florence so that the Practice may protect its patient and referral base and goodwill in the community that it has

been developing since 1994. (See Employment Agreement pp. 3-4). Respondent may practice cardiology anywhere outside of the twenty-five mile radius of the covenant and the fact that he is restrained from practicing cardiology within this very limited geographical area is not itself overly burdensome or oppressive.

The Respondent still has “ample opportunity to work within his industry,” and has not alleged or shown that he would have difficulty finding employment practicing interventional cardiology outside of the twenty-five-mile radius surrounding McLeod hospital. See *Vessel Med., Inc. v. Elliott*, 2015 U.S. Dist. LEXIS 122436 at *17 (D.S.C. Sept. 15, 2015) (applying South Carolina law to uphold eighteen month and twenty-mile non-solicitation restriction). See also *Pearl Ins. Grp., LLC v. Baker*, 2018 U.S. Dist. LEXIS 146849 at *13 (D.S.C. Aug. 29, 2018) (applying South Carolina law to uphold two-year non-solicitation provision). Respondent is not even necessarily shut out of practicing his specialty within the state itself if he were to abide by the restrictive covenant. Hospitals with the cath lab facilities Plaintiff contends he needs to practice interventional cardiology are located in the Grand Strand, Columbia, and Loris, South Carolina. (Rowe Depo., 65:10-20; Saleeby Depo. p. 6:9-16). The restriction at issue does not prevent Respondent from practicing in his field “far beyond the technical terms of the provision.” *Baugh*, 402 S.C. at 25. The Respondent can continue to work in his field of interventional cardiology—just not inside the twenty-five mile radius. The fact that Respondent is restrained from practicing cardiology within Florence does not render the restrictive covenant unduly harsh or oppressive. See *id.* Moreover, the fact that the parties’ employment agreement contains a provision explicitly ratifying that the terms of the restrictive covenant are “fair and reasonable”⁸ to the contracting

⁸ The restrictive covenant contains the following language:

Employer and Physician expressly acknowledge and ratify the provisions contained in this Paragraph 9 and further state that these provisions represent an integral part

parties is another practical consideration that weighs against the covenant being found unduly harsh or oppressive to the Respondent. *See Thompson*, 2006 U.S. Dist. LEXIS 19468 at *11 (noting the fact that defendant signed the noncompete which explicitly described its restrictions as reasonable weighed in favor of finding noncompete enforceable).


In finding that the covenant would prohibit the Respondent from being employed or associated in any manner with an entity engaged in the practice of cardiology, the trial court construed the language of the agreement to its broadest possible sense and far beyond what the parties intended. Just as the court in *Baugh* did not construe the restrictive covenant at issue in that case so broadly past its plain meaning, so should the Court decline to do so here. All the inferences and conclusions arising from the evidence submitted about the alleged burden placed upon the Respondent's efforts to earn a livelihood must be viewed by this Court in a light most favorable to the Appellants, the non-moving party in the trial court. *See Ferguson*, 349 S.C. at 563. When the this evidence is considered in the light most favorable to the Appellants, it is clear that the restrictive covenant is necessary for the protection of the legitimate interest of the Practice and is not unduly harsh and oppressive in curtailing the legitimate efforts of the Respondent to earn a livelihood practicing cardiology. For these reasons, the Court should reverse the trial court's finding granting summary judgment to the Respondent.

of their agreement, and that such provisions are fair and reasonable to the undersigned parties and each has a right to rely thereon.

(Employment Agreement p. 4) (emphasis added).

CONCLUSION

For the reasons set forth above, the trial court's ruling that the restrictive covenant is unenforceable and grant of summary judgment to the Respondent on these grounds should be reversed.

By 

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ATTORNEYS FOR THE APPELLANTS

Dated: April 29, 2020
Charleston, South Carolina

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.

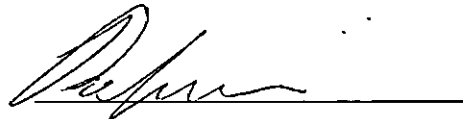
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SC Court of Appeals

PROOF OF SERVICE

This is to certify that a copy of the foregoing APPELLANTS' INITIAL BRIEF 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 29th day of April 2020.

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April 29, 2020

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

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SC Court of Appeals

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 Appellants' Initial Brief and Designation of Matter to be Included in the Record on Appeal.

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

With kind regards, I am



Rebecca J. Wolfe

Cc: Mark W. Buyck, III, Esq.



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