THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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SC Court of Appeals

Case No. 2018-CP-40-02545

Dr. Kaoru Pridgen, ... Appellant,

v.

Colonial Family Practice, LLC; Varsity Family Care Partners, LLC; Family Care Partners d/b/a Family Care Partners Management, LLC; Dr. Clay Lowder; Thomas W. Watson; and Dr. Gary R. Katz, ... Respondents.

INITIAL BRIEF OF RESPONDENTS COLONIAL FAMILY PRACTICE, LLC, FAMILY CARE PARTNERS D/B/A FAMILY CARE PARTNERS MANAGEMENT, LLC, DR. CLAY LOWDER, AND THOMAS W. WATSON

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STATEMENT OF ISSUE ON APPEAL

WHETHER THE LOWER COURT ERRED IN DISMISSING APPELLANT'S CLAIMS FOR BREACH OF WRITTEN AND/OR ALLEGED VERBAL AGREEMENT(S).

STATEMENT OF THE CASE

On May 9, 2018,[1] Appellant filed this civil action in the Richland County Court of Common Pleas, asserting claims including: (i) gender discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"); (ii) violation of the Equal Pay Act of 1963, 29 U.S.C. §§ 206, *et seq.* ("EPA"), (iii) breach of contract, (iv) breach of contract accompanied by a fraudulent act, (v) negligent misrepresentation, (vi) promissory estoppel, and (vii) civil conspiracy. (Complaint). Appellant alleges she was denied an ownership interest in a medical practice based on her gender and in violation of a written contract and alleged verbal promises. Upon Defendants' motion, the case was transferred to the South Carolina Business Court. The complaint was amended on March 14, 2019.[2] (Am. Compl).

After almost a year of extensive discovery, Colonial Family Practice, LLC ("Colonial"), Family Care Partners d/b/a Family Care Partners Management, LLC ("Family Care Partners"), Dr. Clay Lowder ("Lowder"), and Thomas W. Watson ("Watson") (collectively the "Colonial Respondents") filed a motion for partial summary judgment seeking dismissal of Appellant's claims for breach of contract, breach of contract accompanied by a fraudulent act, negligent misrepresentation, and promissory estoppel. (Motion for Partial Summary Judgment, filed July 16, 2019). Respondents asserted Appellant has no enforceable written or verbal agreements guaranteeing her any ownership interest in Colonial. (*See id.*). Following a hearing on December

[1] Appellant's Initial Brief contains a typographical error stating the date of filing was May 9, 2019. (Appellant's Initial Brief at p. 2).

[2] The only change was the substitution of Varsity Family Care Partners, LLC for previously named defendants Varsity Healthcare Partners d/b/a Varsity Healthcare Partners UGP II, LLC, Varsity Healthcare Partners GP II, LP, Varsity Healthcare Partners II, LP, Varsity Healthcare Partners, II-A, LP.

5, 2019, the lower court granted the Colonial Respondents' motion on December 20, 2019. (December 5, 2019 Transcript; Order on Appeal).

During the December 5, 2019 hearing, the lower court also heard argument on a motion for summary judgment filed by Varsity Family Care Partners, LLC ("Varsity") and a motion to dismiss and motion for summary judgment filed by Dr. Gary R. Katz ("Katz"). (December 5, 2019 Transcript). The lower court granted Varsity's motion for summary judgment on December 20, 2019, (Orders on Appeal), and granted Dr. Katz's motion for summary judgment on February 25, 2020. Appellant timely appealed the December 20, 2019 orders granting summary judgment to the Colonial Respondents and Varsity. (Notice of Appeal). Appellant did not appeal the order granting summary judgment to Dr. Katz.[3]

STANDARD OF REVIEW

"When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 839 S.E.2d 879 (2020) (quoting *Turner v. Milliman*, 393 S.C. 116, 121-22, 708 S.E.2d 766, 769 (2011)). Summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that . . . no genuine issue [exists] as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP.

[3] Currently pending before the lower court are motions for summary judgment as to Appellant's remaining claims for gender discrimination in violation of Title VII and the EPA as well as her cause of action for civil conspiracy. The Colonial Respondents are unsure why Appellant has included briefing related to the Colonial Respondents' pending dispositive motions in the Record on Appeal, as these motions have not been considered or ruled upon by the lower court. It is also unclear why Appellant included briefing related to her Motion to Stay, which was denied by order dated June 8, 2020. *See* Rule 209, SCACR ("A party shall not include any matter in his Designation which is not relevant to the appeal."); Rule 210(c), SCACR ("The Record shall not ... include matter which was not presented to the lower court or tribunal.").

In considering a motion for summary judgment, a court "must determine that a genuine issue of material fact exists for each essential element of the plaintiff's claim." *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 358, 650 S.E.2d 68, 71 (2007). When determining whether genuine issues of material fact exist as to all elements of a claim, the court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002). However, "a court cannot ignore facts unfavorable to [the nonmovant], and it must determine whether a verdict for that party would be reasonably possible under the facts." *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000).

ARGUMENTS

I. THE LOWER COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S CONTRACT CLAIMS.

Appellant asserts claims for breach of contract and breach of contract accompanied by a fraudulent act. (Am. Compl. ¶¶ 81-86 (alleging all Respondents breached "a binding contract" by "unjustifiably fail[ing] to perform the contract by refusing to grant and pay [Appellant] in accordance with the terms of the contract.")). In dismissing these claims, the lower court correctly held: (i) Appellant's Employment Agreement is not enforceable against any Respondent other than Colonial, (ii) based on the clear and unambiguous language of Paragraph 15 of the Employment Agreement, Appellant is not contractually entitled to an ownership interest in Colonial; and (iii) even if the parties agreed to make Appellant an owner in the future, essential terms were left for future negotiation, rendering the agreement unenforceable. (Order on Appeal, pp. 3-6). The order should be affirmed.

A. The Employment Agreement does not entitle Appellant to an ownership interest.

Appellant is a family medicine doctor and, prior to May 2013, she worked as a sole practitioner with an entity she created and controlled, Kaoru Joan Pridgen, MD, PA. (Motion for Partial Summary Judgment, Exhibit 2, at 20:9-13). Appellant joined Colonial as an employee-physician on May 31, 2013, at which time she signed an Employment Agreement. (*Id.* at Exhibit 1-A). During negotiations, Appellant specifically asked Colonial to make her an owner. (Mem. In Opp. to Motion for Partial Summary Judgment, Pridgen (ppd) 606 ("Please talk to Dr. Lowder again about partnership versus employment. I truly believe I have much more to bring to the table.... I know together we could have a great partnership.")). Instead of joining the practice as an owner, the Employment Agreement provides that after a period of thirty-six months of employment, "consideration will be given to permitting [Appellant] to purchase a membership interest in Colonial[.]" (Motion for Partial Summary Judgment, Exhibit 1-A, ¶ 15).

Appellant characterizes Paragraph 15 of the Employment Agreement as providing her with a "contractual right to ownership," "a right to become partner of the practice," or a "guaranteed . . . opportunity to purchase" an ownership interest. (Appellant's Initial Brief, pp. 16-17; *see also* Transcript 44:20-45:2). However, the plain and unambiguous language of the Employment Agreement does not promise or guarantee that Appellant will become an owner. Rather, the Employment Agreement states only that "consideration will be given . . . to permit[] [Appellant] to purchase a membership interest" at some undefined time in the future. (Motion for Partial Summary Judgment, Exhibit 1-A, ¶ 15). The lower court's interpretation of the contract as giving Appellant a right to be considered for a future ownership interest, but not a right to *become* an owner, should be affirmed.

When interpreting a contract, a court must ascertain and give effect to the intention of the parties. *Chan v. Thompson*, 302 S.C. 285, 289, 395 S.E.2d 731, 734 (Ct. App. 1990). To determine the intention of the parties, the court "must first look at the language of the contract . . . ." *C.A.N. Enters., Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 377, 373 S.E.2d 584, 586 (1988). When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court. *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997). "Interpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it." *Laser Supply & Servs. v. Orchard Park Assocs.*, 382 S.C. 326, 334, 676 S.E.2d 139, 143 (Ct. App. 2008) (citation omitted).

The lower court held the language of Paragraph 15 was unambiguous, finding the Employment Agreement "entitles [Appellant] only to consideration for partnership," (Order on Appeal at p. 6), not a guarantee that she will attain such status. The court's ruling was based in part on application of the plain and ordinary meaning of the term "consideration." (*Id.*). "[C]onsider" is defined by Merriam-Webster as "to think about carefully: such as . . . to think of especially with regard to taking some action." "Consider," MERRIAM-WEBSTER DICTIONARY ONLINE, http://www.merriam-webster.com/dictionary/consider (last visited June 1, 2020);[4] *see also* "consideration," MERRIAM-WEBSTER DICTIONARY ONLINE, http://www.merriam-webster.com/dictionary/consideration (last visited June 1, 2020) (1. "continuous and careful

[4] This is the same meaning frequently used by this Court in instructing lower courts on the law and in reviewing lower court actions. *See e.g., Smith v. Smith*, 386 S.C. 251, 266, 687 S.E.2d 720, 729 (Ct. App. 2009) (recognizing statutory requirement on the family court "to consider all of the twelve factors enumerated in that section when determining alimony"); *State v. Adkins*, 353 S.C. 312, 318, 577 S.E.2d 460, 463 (Ct. App. 2003) ("In reviewing jury charges for error, *we must consider* the court's jury charge as a whole in light of the evidence and issues presented at trial.") (citation omitted) (emphasis added).

thought"; 2.a. "a matter weighed or taken into account when formulating an opinion or plan"; 2.b. "a taking into account").

The plain and ordinary meaning of "consideration" as to "think about carefully . . . especially with regard to taking some action," is consistent with the remaining language in Paragraph 15 of the Employment Agreement, providing: "*If* [after consideration,] Employee desires to become a member of Employer *and* the member(s) of Employer agree(s), Employee will *then* acquire a membership interest" in Colonial. (Motion for Partial Summary Judgment, Exhibit 1-A, ¶ 15 (emphasis added)). The lower court's interpretation of Paragraph 15 should be affirmed, as it puts the meaning of "consideration" within the context of the whole document. Interpreting "consideration" as affording a contractual right or guarantee to become an owner, as Appellant argues, would render the remaining language of Paragraph 15 meaningless. Contracts must "be interpreted so as to give effect to all of their provisions, if practical." *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 212, 494 S.E.2d 465, 468 (Ct. App. 1997) (citation omitted).

At the December 5, 2019 hearing, Appellant conceded the Employment Agreement was unambiguous. (Transcript, 36:17-24 ("[Colonial's counsel] said that we assert that the contract is ambiguous. Quite to the contrary[.]... 'The ... terms of plaintiff's contract unambiguously entitle her to an ownership interest in the practice."); *see also* Order on Appeal, p. 5, note 6). She argued "the plain meaning of that contract . . . is that [Appellant] would be made partner." (Transcript, 19:16-19). Appellant should be estopped from now taking the opposite position and asserting the term "consideration" in Paragraph 15 is ambiguous. (Appellant's Initial Brief at p. 16 (arguing that because the term "consideration" is not defined and the parties have ascribed different meanings to it, ambiguity exists which must be construed against Colonial as the

drafter.)). *Zimmerman v. Central Union Bank*, 194 S.C. 518, 8 S.E.2d 359, 365 (1940) ("[W]here a party assumes a certain position in a legal proceeding … he may not thereafter, simply because his interests have changed, assume a contrary position.") (quotation omitted).

Even if she is not estopped, Appellant's argument is legally flawed and should be rejected. First, a contractual provision is "not ambiguous merely because [a] term[] is undefined[.]" *Bardsley v. Government Employees Ins. Co.*, 405 S.C. 68, 76, 747 S.E.2d 436, 440 (2013). Rather, "[i]t is a well-settled principle of contract interpretation that absent a contractual definition to the contrary, contract language is given its ordinary and plain meaning." *Id.* at 76, 747 S.E.2d at 440 (citing *Dean v. Am. Fire & Cas. Co.*, 249 S.C. 39, 41, 152 S.E.2d 247, 248 (1967)). Otherwise, a contract "would need to contain definitions for every word in order to avoid ambiguity, a requirement which would be absurd. To say that any word that is not defined is ambiguous is to ignore the utility of human language." *Id.* at 76, 747 S.E.2d at 440.

Second, a contractual ambiguity exists only where the terms "are *reasonably* susceptible of more than one interpretation." *S.C. Dept. of Natural Resources v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001) (emphasis added); *Jordan v. Security Group, Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993) ("A contract is ambiguous only when it may *fairly and reasonably* be understood in more than one way.") (citing *Farr v. Duke Power Co.*, 265 S.C. 356, 218 S.E.2d 431 (1975)) (emphasis added). This test requires an objective interpretation of contractual language, not simply a finding that the parties disagree as to a contractual term's meaning. "Resort to construction by a party is only done when the contract is ambiguous or there is doubt as to its intended meaning." *Jordan*, 311 S.C. at 230, 428 S.E.2d at 707 (citation omitted); *see also SAS Institute, Inc. v. World Programming Limited*, 874 F. 3d

370, 380 (4th Cir. 2017) ("courts do not find ambiguity in contractual language simply because the parties dispute its meaning") (applying North Carolina law).

"A contract is ambiguous [only] when it is capable of more than one meaning or when its meaning is unclear." *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 94, 594 S.E.2d 485, 494 (Ct. App. 2004). "An ambiguous contract is one capable of being understood in more senses than one, an agreement obscure in meaning, through indefiniteness of expression, or having a double meaning." *Bruce v. Blalock*, 241 S.C. 155, 160, 127 S.E.2d 439, 441 (1962). "[W]hen a court makes a finding of ambiguity, it must set forth either how a provision is capable of more than one meaning or is obscure in meaning. A finding of ambiguity, absent any reasoning, is insufficient." *Bardsley*, 405 S.C. at 75, 747 S.E.2d at 440. Appellant fails to articulate how the term "consideration" is ambiguous and provides no basis on which this Court could conclude "consideration" could reasonably be interpreted as furnishing a contractual right or guarantee. The Court is not permitted to rewrite the contract for Appellant "midstream because [s]he is unhappy with the contract [s]he executed" or failed to fully understand the agreement's terms. *Silver v. Aabstract Pools & Spas, Inc.*, 376 S.C. 585, 593, 658 S.E.2d 539, 543 (Ct. App. 2008) (citations omitted).

Because the Employment Agreement does not guarantee or entitle Appellant to ownership in Colonial, but only provides her with a contractual right to be considered for such status in the future, Appellant's claims for breach of contract and breach of contract accompanied by a fraudulent act fail as a matter of law and were properly dismissed. There is no evidence in the record to suggest Appellant's contractual rights were breached.[5] (*See* Appellant's

[5] Appellant contends she "observed comparable male doctors … receive partnership with the practice without having to meet additional standards or other criteria after a three-year tenure with the medical practice." (Appellant's Initial Brief at p. 6). She also asserts she "is paid less than male partners." (*Id.*).

Depo. Trans. at 389:22-390:12). The lower court's order granting partial summary judgment to the Colonial Respondents on Appellant's contract claims should be affirmed.

B. Any agreement regarding a future ownership interest is too indefinite to be enforceable.

Even if the Employment Agreement gave Appellant a contractual right to an ownership interest in Colonial in the future, the parties failed to reach a meeting of the minds as to all essential terms, which makes the agreement unenforceable. The lower court's order should be affirmed on this basis as well. (Order on Appeal at pp. 8-9). Paragraph 15 of the Employment Agreement states: "The purchase price, percentage amount and remaining terms of such buy-in and the method of payment shall be determined at the time of buy-in." (Motion for Partial Summary Judgment, Exhibit 1-A, ¶ 15). Because the Employment Agreement leaves these essential terms to negotiation in the future, there is no reasonably definite agreement to enforce.

A valid and enforceable contract requires a meeting of the minds between the parties with regard to all essential and material terms of the agreement. *Patricia Grand Hotel, LLC v. MacGuire Enters*, 372 S.C. 634, 638, 643 S.E.2d 692, 694 (Ct. App. 2007). "[R]egardless of intent, an agreement which leaves open material terms is unenforceable." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 579, 762 S.E.2d 696, 701 (2014). In addition, for a contract to be binding, material terms cannot be left for future agreement. *Aperm of S.C. v. Roof*, 290 S.C. 442, 447, 351 S.E.2d 171, 173 (Ct. App. 1986). An agreement to agree in the future is not enforceable in South Carolina. *Stevens & Wilkinson*, 409 S.C. at 579, 762 S.E.2d at 701.

In *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989), the Supreme Court held "essential terms" of a lease agreement "include a definite agreement as to the extent and boundary of the property to be leased, the term of the lease, the rental as well as the time and

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These allegations are not relevant to any of the four causes of action at issue in this appeal and are therefore not addressed in this brief.

manner of payment." *Id.* at 105, 382 S.E.2d at 893-94. Although the contract at issue involves a future purchase of an ownership stake in a business, the Court should consider similar terms to be "essential" to the parties' agreement. Here, the parties failed to agree upon (i) when the ownership interest would be conveyed, (ii) how the company was to be configured, (iii) what percentage of ownership Appellant would receive, (iv) the structure of the transaction, and (v) price, among other essential buy-in terms.

Appellant's argument that the Employment Agreement contains an agreement as to "the item to be purchased" and the "time of purchase" (Appellant's Initial Brief at p. 17) overstates the facts. While the time for "*consideration*" is "after thirty-six months," the "time of buy-in" is undefined. (Motion for Partial Summary Judgment, Exhibit 1-A, ¶ 15). Even though an ownership interest was contemplated, the contract explicitly leaves the details of Appellant's future potential ownership interest to "determin[ation] at the time of buy-in." (*Id.*). "[T]he terms and conditions [of the parties' agreement] must be stated with reasonable certainty." *Walker v. Preacher*, 188 S.C. 431, 435, 199 S.E. 675, 677 (1938); *Smith v. McClam*, 289 S.C. 452, 457, 346 S.E.2d 720, 723 (1986) (same) (citing Rest. 2d *Contracts* § 131). "Otherwise there is no complete agreement." *Id.* Here, no reasonable certainty exists as to the open contract terms; therefore, any agreement to make Appellant an owner in the future is unenforceable.

In an April 2016 memorandum, Appellant admitted the terms of her buy-in were to be negotiated and agreed-upon at some point in the future: "Before I [joined the practice], I was promised by Dr. Lowder that at the end of three years, I would be able to become a partner *on terms to be negotiated*[.]" (Motion for Partial Summary Judgment, Exhibit 4 (emphasis added)). Appellant testified she never agreed upon the buy-in terms with any party or even discussed such terms with anyone. (*Id.* at 67:19-69:21, 78:16-80:14; 88:17-89:7; 89:19-25). Dr. Lowder

confirmed the buy-in terms "would be negotiated later." (*Id.* at Exhibit 2, 69:10-16; 63:4-10). Moreover, Appellant's counsel conceded at the December 5, 2019 hearing that Paragraph 15 of the Employment Agreement "contemplates . . . there will be further negotiations to finalize [Appellant's] partnership and ownership." (Transcript, 23:24-24:1).

In a line of cases from Georgia, alleged agreements regarding the purchase of an ownership interest in an entity were held unenforceable where the parties failed to agree on essential buy-in terms. *See Massih v. Mulling*, 610 S.E.2d 657 (Ga. App. 2005) (promise of 20 percent ownership interest in company held unenforceable where parties had not agreed on when interest would be conveyed or how company was to be structured); *Key v. Naylor, Inc.*, 602 S.E.2d 192 (Ga. App. 2004) (same); *Burns v. Dees*, 557 S.E.2d 32 (Ga. App. 2001) (oral agreement giving party 1/3 interest in profits and ultimate sale of business venture unenforceable because it lacked terms concerning allocation of costs and losses, frequency of payments, manner of calculating proceeds, and time of distribution); *Aukerman v. Witmer*, 568 S.E.2d 123 (Ga. App. 2002) (oral agreement that one party would buy another's stock for $1 million held unenforceable, where it did not provide for structure of transaction, pricing structure, or resolution of tax issues and evidence showed parties continued to negotiate many of these terms and discuss alternative terms after entering into agreement).

Open contract terms regarding Appellant's potential future ownership interest would be difficult, if not impossible, for the Court to enforce and administer, especially in determining Appellant's damages. "[R]egardless of intent, an agreement which leaves open material terms is unenforceable." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 568, 579, 762 S.E.2d 696, 701 (2014). *See also* 1 *Corbin on Contracts* § 2.8 (Rev. ed. 1993) ("Even if an intention to be bound is manifested by both parties, too much indefiniteness may invalidate the

agreement, because of the difficulty of administering the agreement."); 1 *Corbin on Contracts* § 4.1 ("A court cannot enforce a contract unless it can determine what it is. It is not enough that the parties think that they have a contract. They must have expressed their intentions in a manner that is capable of being understood."). The lower court appropriately concluded the Employment Agreement does not guarantee Appellant an ownership interest in Colonial and, even if it did, such an agreement is not reasonably definite to be enforced due to its open terms and contemplation of negotiating these terms in the future.

C. Alleged verbal modifications to the Employment Agreement are not enforceable.

Appellant contends the Employment Agreement was verbally modified such that later promises by Respondents "guarantee[d] [a] right to purchase a partnership interest" and "promise[d]" to move her "opportunity to purchase an ownership interest . . . up in time and occur at eighteen months of employment" instead of thirty-six months, as stated in Paragraph 15 of the Employment Agreement. (Appellant's Initial Brief at pp. 5, 22). "The burden of establishing the existence of an oral contract and its terms . . . rests upon [Appellant]." *LandBank Fund VII, LLC v. Dickerson*, 369 S.C. 621, 628, 632 S.E.2d 882, 886 (Ct. App. 2006) (citing *Jackson v. Frier*, 146 S.C. 322, 329, 144 S.E. 66, 68 (1928) ("The burden is on a party pleading a fact to prove it.")). The lower court correctly held the verbal discussions alleged by Appellant are not enforceable and do not modify the Employment Agreement. (Order on Appeal at pp. 6-8).

Appellant contends Dr. Lowder and Lissa Lara, Colonial's former Chief Executive Officer, "promised that [her] opportunity to purchase an ownership interest would be moved up in time and occur at eighteen months of employment." (Appellant's Initial Brief at p. 5). However, the testimony fails to substantiate the existence of any enforceable "promise[]" or agreement. Appellant testified: "There was discussion . . . that they were considering – or at least [Dr. Lowder] was

considering – making me partner before the 36-month term." (Supp. Memo. In Support of Motion for Partial Summary Judgment, Exhibit 1, 389:22-390:12). Appellant also testified Lara told her "she was willing to negotiate a shorter term." (*Id.* at 17:1-3). "[Lara] said that she had been talking to Dr. Lowder and that 18 months came up." (*Id.* at 17:12-13).

Lara's statements to Appellant that Dr. Lowder was "considering" making Appellant partner before the thirty-six month period stated in Paragraph 15 of the Employment Agreement are insufficient to create an enforceable verbal agreement modifying the parties' contract. First, Appellant admitted Lara did not have authority to bind Colonial to any such agreement. (Supp. Memo. In Support of Motion for Partial Summary Judgment, Exhibit 1, 17:15-16).[6] Second, Appellant admitted she never discussed the purported abbreviated consideration period with Dr. Lowder. (Supp. Memo. In Support of Motion for Partial Summary Judgment, Exhibit 1, 17:17-18). Third, Appellant conceded no agreement was ever reached. (*Id.* at 17:20-18:15, 26:21-28:18, 393:14-395:10 (confirming there were no further negotiations, discussions, or agreements on a shorter period of time for ownership consideration)). The lower court correctly held the alleged discussions between Lara and Appellant are not enforceable verbal agreements modifying the terms of the Employment Agreement because the parties did not come to a meeting of the minds. (Order on Appeal at p. 7).

Further, the lower court correctly held that such alleged discussions did not create any enforceable agreement because of the absence of separate and adequate consideration. (Order on Appeal at pp. 7-8 (citing *Player v. Chandler*, 299 S.C. at 104-05, 382 S.E.2d at 893; *First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 70, 451 S.E.2d 907, 912 (Ct. App. 1994); *Evatt v.*

[6] Ms. Lara confirmed she did not have authority to modify Colonial's written agreements. (Mem. In Opp to Motion for Summary Judgment, Lara Depo. at 14:24-16:4 ("I negotiated and [Dr. Lowder] would sign the agreement. I really didn't have the authority to sign the agreements for them."); *id.* at 76:10-77:13 ("I never signed an agreement. I would have never done that … without [Dr. Lowder's] permission.")).

Campbell, 234 S.C. 1, 5, 106 S.E.2d 447, 449-50 (1959)). Appellant's suggestion that she gave consideration by "agre[ing] to continue her employment beyond the single year required by the contract" and "allow[ing] [Colonial] to continue to use her personally owned medical equipment" is illusory and unsupported by any evidence. (Appellant's Initial Brief at p. 25). The Employment Agreement required *Colonial* to "employ [Appellant] on a fulltime basis . . . for one (1) year" and gave Appellant the right to terminate her employment with Colonial at any time. (Motion for Partial Summary Judgment, Exhibit 1-A, ¶¶ 2, 13(a)). Appellant tortures the language of her contract by arguing she "could have chosen to exercise her legal right to terminate her contract of employment" (Appellant's Initial Brief at p. 25) but gave up her right to do so because of the alleged verbal agreement.

As to Appellant's alleged "forbearance" in allowing Colonial to use her personal property (Appellant's Initial Brief, p. 15), Appellant testified all of the personal property was an "investment" in the practice and that she "did not want Colonial to purchase it." (Mem. In Opp. to Motion for Partial Summary Judgment, Appellant Depo., 43:16-44:1; *id.* at 44:2-5 ("[W]e just merged everything together.")). Appellant always understood those assets "belonged to [her]." (*Id.* at 44:6-8). If she wanted those assets back, she could obtain them at any time. (*See id.*). Indeed, she exchanged emails with Dr. Katz about obtaining her personal property in 2017. (*Id.* at 45:8-10; 360:25-361:21). Appellant can point to nothing that changed with respect to her personal property as a result of the alleged verbal agreements, which are therefore unsupported by adequate consideration.

Finally, the South Carolina Statute of Frauds, S.C. Code Ann. § 32-3-10(5), prevents the alleged verbal agreements from being enforceable, either on their own or as modifications of the written Employment Agreement. First, "a contract required to be in writing by the Statute of

Frauds . . . cannot be orally modified." *Windham v. Honeycutt*, 279 S.C. 109, 302 S.E. 2d 856 (1983). Because the Employment Agreement obligated Colonial to consider Appellant for partnership after thirty-six months, it is governed by the Statute of Frauds and cannot be modified by subsequent verbal agreement. *See id.* In addition, the Employment Agreement contains a contractual requirement that "any waiver, change, modification, extension, or discharge" be contained in "an agreement in writing and signed by the party against whom enforcement . . . is sought." (Motion for Partial Summary Judgment, Exhibit 1-A, ¶ 22).

Second, the alleged verbal agreements are unenforceable because the agreements were "not to be performed within one year" and therefore "must be in writing and signed by the party against whom it is seeking to be enforced." *Player v. Chandler*, 299 S.C. at 105, 382 S.E.2d at 894 (citing S.C. Code Ann. § 32-3-10). "Failure to put such a contract in writing renders it void." *Id.* (citation omitted). Appellant claims "none of the modifications were impossible to perform within one year." (Appellant's Initial Brief at p. 27). However, this position is illogical considering Appellant's testimony that Colonial agreed to "consider [her for ownership] *after* eighteen months." (Supp. Memo. In Support of Motion for Partial Summary Judgment, Exhibit 1, 393:14-395:10 (emphasis added)). Respondents are unable to conceive of how an agreement to do something "*after* eighteen months" could possibly occur within a twelve-month span of time.

Appellant argues other verbal promises of partnership could have occurred within twelve months. For example, Appellant claims that Watson verbally represented to her that the practice was "definitely targeting [July 1, 2017]" or "the end of the year [2016]" for partnership. (Appellant's Initial Brief at p. 27). These alleged representations are not sufficiently definite to be enforceable as stated above, because the parties failed to come to a meeting of the minds as to all essential buy-in terms of Appellant's potential future ownership. *Supra*, Section I(B).

D. Appellant lacks contractual privity with Family Care Partners, Varsity, Dr. Lowder, Watson, and Dr. Katz.

Only if the Court finds the lower court erred in granting summary judgment to Colonial on Appellant's claims for breach of contract and breach of contract accompanied by a fraudulent act should the Court consider whether any other Respondent is liable for Colonial's alleged contractual breaches. It is undisputed that the only written contract is the Employment Agreement between Appellant and Colonial. (Motion for Partial Summary Judgment, Exhibit 1-A; Mem. In Opp to Motion for Partial Summary Judgment, Appellant Depo., 29:22-30:15 (admitting no other written contract exists)). "Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of contract between the defendant and a third party is not, as such, recoverable by the plaintiff." *Clark v. Bodolosky*, 383 S.C. 418, 429-30, 679 S.E.2d 527, 533 (Ct. App. 2009) (quoting *Windsor Green Owner's Ass'n v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (citing *Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994))). The lower court held Appellant lacked contractual privity with any other party, (Order on Appeal at p. 4), and the court's ruling should be affirmed.

1. No other contract obligates Family Care Partners or Varsity for Colonial's contractual commitments in the Employment Agreement.

In December 2015, Colonial entered into a series of complex transactions (collectively, the "2015 Transaction"). As part of the 2015 Transaction, Varsity contributed a significant amount of capital to the practice, for which it received an indirect ownership interest in the practice through Family Care Partners Holdings, LLC ("FCP Holdings"), which is not a party to this case. (Mem. In Opp. to Motion for Partial Summary Judgment, Acquisition Agreement (Colonial004402-004483); Motion for Partial Summary Judgment, Exhibit 2 at 24:14-22; 40:20-

41:11; 83:15-84:4); *id.* at Exhibit 1 ¶¶ 5-6; Varsity Motion for Summary Judgment, Aff. of Michael Jablon, ¶¶ 3-4). Both Family Care Partners and FCP Holdings were created as part of the 2015 Transaction. (*Id.*). After the 2015 Transaction, Dr. Lowder was Colonial's sole member, and his membership interest in Colonial was governed by a Membership Control Agreement which restricted his ability to transfer his interest in Colonial and limited Colonial's ability to offer membership interests to any third party. (*Id.*). Following the 2015 Transaction, FCP Holdings was the only entity in which ownership was available to physicians, such as Appellant, and the FCP Holdings' Board of Directors was the only entity authorized to make ownership decisions. (Mem. In Opp. to Motion for Partial Summary Judgment, Watson Depo., 251:20-252:13).

Appellant asserts Section 8.1.4 of the Acquisition Agreement signed as part of the 2015 Transaction evidences "Varsity and Family Care Partners took on all contractual obligations owed from Colonial to Colonial employees, physician and non-physician employees[,]" including Appellant's "right to purchase an ownership interest in the practice." (Appellant's Initial Brief at p. 20). A plain reading of the Acquisition Agreement reveals that Appellant's assertion is baseless. Section 8.1.4 of the Acquisition Agreement states: "[Varsity] shall be responsible for the payments and benefits to be provided to Continuing Employees." (Mem. In Opp. to Motion for Partial Summary Judgment, Acquisition Agreement (Colonial004402-004483), at § 8.1.4).

Appellant ignores that Section 8.1.2 defines "Continuing Employees" as "Non-Practitioner Employees" and Section 8.1 defines "Non-Practitioner Employees" as employees

who are not "Healthcare Providers."[7] (*Id.* at § 8.1). Appellant is undisputedly a Healthcare Provider; therefore, the referenced section of the Acquisition Agreement on which Appellant relies for her claim of privity cannot reasonably be interpreted as applying to her. Moreover, Schedule 8.1, which lists and identifies all "Continuing Employees" to whom this section applies (only "Non-Practitioner Employees"), does not include Appellant. (*Id.* at Schedule 8.1).

Appellant also asserts a Management Services Agreement and Membership Interest Control Agreement, signed as part of the 2015 Transaction, render Varsity and Family Care Partners responsible for Colonial's obligations under the Employment Agreement. (Appellant's Initial Brief at p. 20). However, Appellant fails to cite any language in either agreement to support her position. Upon careful review of both contracts, no provision in either document makes Varsity or Family Care Partners liable for performance of the Employment Agreement. (*Id.*). The Membership Interest Control Agreement, to which Dr. Lowder, Colonial, and Family Care Partners are parties, effectively restricts Dr. Lowder, as the sole member of Colonial after the 2015 Transaction, from transferring his membership interest to any other person or entity. (Mem. In Opp. to Motion for Partial Summary Judgment, Membership Interest Control Agreement (Colonial004484-004494)). The Management Services Agreement between Colonial and Family Care Partners enables Family Care Partners to provide "management, consulting, administrative, and other support services" to Colonial. (Mem. In Opp. to Motion for Partial Summary Judgment, Management Services Agreement (Colonial00644-00902), p. 1).

There is no evidence that Appellant's Employment Agreement was ever acquired or assigned to Varsity, Family Care Partners, or any other person or entity. Appellant testified she was never employed by any person or entity other than Colonial. (Mem. In Opp. to Motion for

[7] "Healthcare Provider" is defined in the Acquisition Agreement as a "physician, pharmacist and professional licensed clinical practitioner." (Mem. In Opp. to Motion for Partial Summary Judgment, Acquisition Agreement (Colonial004402-004483), at Appendix A and Section 5.15.1).

Partial Summary Judgment, Appellant Depo., 30:16-32:5). Dr. Lowder testified that at all times, including after the 2015 Transaction, all physicians, including Appellant, were employed by Colonial. (Motion for Partial Summary Judgment, Exhibit 1, ¶ 6).[8] Appellant's argument that Varsity and Family Care Partners are liable for Colonial's performance of the Employment Agreement by virtue of any transactional document arising from the 2015 Transaction should be rejected as lacking any evidentiary support.

2. Varsity and Family Care Partners should not be held liable under the equitable doctrine of amalgamation or single business enterprise theory.

Appellant contends all Respondents are liable for alleged breaches of Paragraph 15 of the Employment Agreement by virtue of their alleged intertwined operations,[9] fraudulent activity, and conspiracy to deprive her of an ownership interest.[10] (Appellant's Initial Brief, pp. 11, 19-22). The cases relied on by Appellant, including *Pertuis v. Front Roe Rests., Inc.*, 423 S.C. 640, 817 S.E.2d 273 (2018), and *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 668 S.E.2d 798 (2008), are inapposite. *Pertuis* deals with amalgamation, also known as the "single enterprise theory," on which a court may hold more than one entity liable for another's wrongdoing. *Drury* involves the equitable remedy of piercing the corporate veil, through which a court may hold shareholders of an entity liable for the entity's wrongdoing.

The amalgamation of interests theory was first recognized by this Court in *Kincaid v. Landing Development Corp.*, 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). *Kincaid* involved

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[8] Only non-licensed employees ("Non-Practitioner Employees," as defined by the Acquisition Agreement) became employed by Family Care Partners after the 2015 Transaction. (Motion for Partial Summary Judgment, Exhibit 1, ¶ 6).

[9] Also characterized by Appellant as an "affiliat[ion]," "legal[] relation[ship]," (Appellant's Initial Brief at p. 2), and "merge[r] [of] legal and financial interests." (*Id.* at pp. 6-7).

[10] Appellant mentions in passing that the Respondents "had begun to develop a scheme designed to create shifting … requirements to block [her] opportunity to purchase partnership, requirements which have never been imposed on male potential partners," (Appellant's Initial Brief at p. 11). Although Respondents deny this allegation and submit that it is not supported by the evidence adduced in the case, issues related to alleged discrimination are not presently before this Court.

three related companies (a development corporation, a management corporation, and a construction corporation) each of which were sued for negligent construction and breach of warranty. *Id.* at 91-92, 344 S.E.2d at 871. In addition to sharing owners and corporate officers, the three companies shared a location, were all overseen by the management company, and the letterhead of the management company identified itself as "A Development, Construction, Sales, and Property Management Company." *Id.* at 96, 344 S.E.2d at 874. Based on such evidence, the corporations were considered a single business entity, which was held responsible for the alleged wrongdoing. This Court held there was a strong presence of "an amalgamation of corporate interest, entities, and activities so as to blur the legal distinction between the corporations and their activities." *Id.* at 96, 344 S.E.2d at 874 (quoting trial court order).

In *Mid-South Management Co. v. Sherwood Development Corp.*, 374 S.C. 588, 649 S.E.2d 135 (Ct. App. 2007), this Court held: "An alter-ego theory requires a showing of total domination and control of one entity by another and inequitable consequences caused thereby." *Id.* at 603, 649 S.E.2d at 143 (quoting *Colleton County Taxpayers v. Sch. Dist. Of Colleton County*, 371 S.C. 224, 237, 638 S.E.2d 685, 692 (2006)). "[C]ontrol, in and of itself, is not sufficient to find that a subservient corporation is the alter-ego of the dominant one." *Id.* In deciding not to impute liability to multiple defendants, the Court relied on the lack of any evidence of "misuse[] [of] control . . . to promote fraud." *Id.* at 604, 649 S.E.2d at 144.

In *Pertuis*, 423 S.C. 640, 817 S.E.2d 273, the Supreme Court took the opportunity to address amalgamation in more detail. The Court held amalgamation requires evidence of "multiple corporations hav[ing] unified . . . business operations and resources to achieve a common business purpose and where adherence to the fiction of separate corporate identities would defeat justice[.]" *Id.* at 652-53, 817 S.E.2d at 279. The Court was careful to note:

> [C]orporations are often formed for the purpose of shielding shareholders from individual liability; there is nothing remotely nefarious in doing that. For this reason, the single business enterprise theory requires a showing of more than the various entities' operations are intertwined. Combining multiple corporate entities into a single business enterprise requires further evidence of bad faith, abuse, fraud, wrongdoing, or injustice resulting from the blurring of the entities' legal distinctions.

Id. at 655, 817 S.E.2d at 281.

The Court held amalgamation was appropriate where the three defendant entities "had the same shareholders and the same managing partner (Pertuis) who oversaw all three restaurants." *Pertuis*, 423 S.C. at 656, 817 S.E.2d at 281. Moreover, evidence established "there had been considerable movement of corporate funds between the three corporate [d]efendants, for which [d]efendants did not produce any documentation in the record of this case[.]" *Id.* "[T]he parties had disregarded corporate formalities, including shareholder and board of director meetings, in addition to the conveyance of a boat . . . to Pertuis 'without any corporate formality . . . to avoid liability and high insurance premiums." *Id.* (quoting trial court order).

In this case, there is no evidence that Colonial, Family Care Partners, or Varsity have "combined . . . into a single enterprise" for the purpose of "bad faith, abuse, fraud, wrongdoing, or injustice." *Pertuis*, 423 S.C. at 655, 817 S.E.2d at 281. Significantly, there is also no evidence of undocumented "movement of corporate funds," or "disregard[ing] of corporate formalities." *Id.* The fact that the legal arrangement between Colonial, Family Care Partners, FCP Holdings, and Varsity was complex and governed by a series of contractual arrangements that Appellant does not fully understand is not evidence of amalgamation, nor does it create a legal presumption that these entities should be treated as a single enterprise.

Appellant contends Varsity controlled the management of Colonial and Family Care Partners, including directing communications of Dr. Lowder, Dr. Katz, and/or Watson and the

practice's operations. (Appellant's Initial Brief at pp. 6-7, 21, 38-39). She references all of Varsity's document production (Varsity00001-00061) as evidencing Varsity's purported control over decisions "materially impacting" Appellant's employment, presumably including her right to an ownership interest in the practice. (Appellant's Initial Brief at p. 38). But she fails to articulate how any of these documents demonstrate "bad faith, abuse, fraud, wrongdoing, or injustice" by any Respondent. *Pertuis*, 423 S.C. at 655, 817 S.E.2d at 281. Appellant admitted she never had any conversations with any Varsity representative about her Employment Agreement or future ownership interest in the practice. (Mem. In Opp. to Motion for Partial Summary Judgment, Appellant Depo., 306-310). She further admitted she does not know which legal entities were involved in decisions related to her partnership. (*Id.* at 282). All of the testimony adduced in discovery establishes that the FCP Holdings' Board of Directors decided all ownership questions after the 2015 Transaction. (*Id.* at Watson Depo., 251:20-252:13; Dr. Katz Depo., 21:16-9; Dr. Lowder Depo., 23:14-24:13).

Appellant misrepresents testimony in the record by asserting "every deponent . . . has testified that the entities are intertwined[.]" (Appellant's Initial Brief at pp. 6-9, 40 (citing the depositions of Dr. Carlos Soto, Dr. Lowder, and Watson)). Dr. Soto, a partner-physician of the practice, testified the 2015 Transaction was "[a] very complicated . . . structure," and that he frequently referred to the managing entity as Varsity, simply "because it was easier." (Mem. In Opp. to Motion for Partial Summary Judgment, Soto Depo., 108:21-109:3; *id.* at 112:19-22 ("I think we all used Varsity as a – as a generalized ... term.")). Dr. Soto testified: "it [wa]s complicated. There were so many . . . so many people up there in management, I couldn't tell you." (*Id.* at 111:7-14). As to partnership decisions specifically, Dr. Soto testified: "I really couldn't tell you because I wasn't part of any of those conversations." (*Id.* at 112:1-6).

Appellant also misconstrues Dr. Lowder and Watson's testimony regarding Varsity's involvement in decisions as to ownership interests. (Appellant's Initial Brief at pp. 7, 41-42). She focuses on Dr. Lowder and Watson conflating "Varsity" with the other entities with management authority. (*Id.*). But she ignores Dr. Lowder's testimony that FCP Holdings was the only entity authorized to make offers of partnership after the 2015 Transaction. (Mem. In Opp. to Motion for Partial Summary Judgment, Lowder Depo., 191:20-194:15). He further testified that no member of the FCP Holdings Board acted outside of their capacity. (*Id.*). Appellant also ignores Watson's testimony that Varsity is "a separate legal entity" with "partners [who] happen to participate on a board like they participate on a lot of companies that they own[][,] . . . but the [entities] are not the same." (Mem. In Opp. to Motion for Partial Summary Judgment, Watson Depo., 246:21-247:17; *see also id.* at 248:12-252:13).

In support of her contention that Varsity and Family Care Partners controlled Colonial, Appellant asserts Watson "met with [unspecified] others, in an official capacity, in a multi-day New York City meeting [in 2017] to give instruction to Colonial . . . and Family Care Partners on issues such as: billing, collections, M.D. communication, acquisitions, financing plans, auditing and more." (Appellant's Initial Brief, pp. 14, 38-39). Despite the absence of any evidence, Appellant takes the position that the attendees at this meeting "discussed and made decisions that materially impacted [Appellant]'s employment with the practice." (*Id.* at note 14; *id.* at p. 39).[11] Appellant leaps to the conclusion that because the agenda for the meeting referenced "billing, collections, and M.D. communication" generally, the discussion necessarily "concerned [Appellant] because [she] is an M.D. who deals with billing and collections in her everyday practice of medicine." (*Id.* at p. 40). Appellant's unsupported, speculative assumptions

[11] Appellant asserts a "[f]actual dispute[] remain[s] over the semantics of what this meeting of Board members amounts to" (*id.* at note 14); however, there is no evidence whatsoever to create such a dispute.

that her employment and potential future ownership interest was discussed at this 2017 meeting is insufficient to create a genuine issue of material fact for trial.

Moreover, the testimony of record directly refutes Appellant's speculative assumptions as to the nature of the meeting and what was discussed. She contends the meeting was a meeting of the Board of FCP Holdings. However, Dr. Lowder, a board member, was not invited to attend. (Mem. In Opp. to Motion for Partial Summary Judgment, Lowder Depo., 160:2-25). Another board member, Dr. Katz, testified "[t]here was no board meeting on that date. So I think it's incorrect to reflect that as a board meeting." (*Id.* at Katz Depo., 47:3-5; *id.* at 55:11-12; *id.* at 47:11-12 ("I was specifically told it was not a board meeting.")). Instead, Dr. Katz testified he was told the board meeting was cancelled "for the purpose of focusing on other topics[,] . . . including the financials of the organization." (*Id.* at 48:2-7). When asked why a meeting took place at all if it were not a meeting of the board, Dr. Katz testified: "There was concern over the financial health of the organization and . . . the chair of the board felt it would be prudent to have key members of the management team and some of the Varsity investors there to discuss those financials[.]" (*Id.* at 136:8-17).

Watson, who attended the meeting as Chief Executive Officer of the practice, testified it was not a board meeting and that no board meeting took place during 2017. (Mem. In Opp. to Motion for Partial Summary Judgment, Watson Depo., 193:4-6; 256:25-257:7). Instead, a working group was gathered "to establish what was going on with the business and [how to] deal with the concerns we had about the receivables." (*Id.* at 193:23-25). Watson testified that physician buy-in recommendations were not discussed. (*Id.* at 191:4-20). When asked specifically if Appellant was discussed at the meeting, Watson testified: "I highly doubt it, given the intensity of where we were. I don't think talking about doc[tor]s was on the schedule, at least

not from an equity or ownership perspective." (*Id.* at 196:14-19). Indeed, the practice became insolvent shortly after the meeting, and Watson testified it would have been imprudent to discuss any physician's potential buy-in at that time. (*See id.* at 150:23-151:3; 236:17-237:6; 226:5-16; 228:18-229:15).

Even if Appellant's assertions regarding Family Care Partners' or Varsity's purported "control" or "intertwined operations" with Colonial had evidentiary support, which they do not, there is not sufficient proof to hold either entity liable for Colonial's contractual obligations under an amalgamation or single business enterprise theory. As recognized by this Court in *Mid-South Management*, "[a]n alter-ego theory requires a showing of total domination and control of one entity by another and inequitable consequences caused thereby." *Id.* at 603, 649 S.E.2d at 143 (quotation omitted). "[C]ontrol, in and of itself, is not sufficient to find that a subservient corporation is the alter-ego of the dominant one." *Id.* Even if "officers [of one company] also h[o]ld positions in the parent companies," so long as the parent company "maintain[s] separate corporate records," the alter-ego theory is inapplicable. *Id.* at 604, 649 S.E.2d at 144 (also finding that one company's "transfer of money to its parent companies to repay a debt" is not inappropriate). Here, there is no evidence that Family Care Partners or Varsity had "total dominion and control" over Colonial or misused such control to promote fraud as to Appellant's potential future ownership in the practice.

3. None of the individual Respondents should be held liable under the equitable doctrine of piercing the corporate veil.

Appellant asserts the individual Respondents, Dr. Lowder, Dr. Katz, and Watson, should also be liable for Colonial's purported breach of contract. (Appellant's Initial Brief, pp. 19-20). The lower court correctly rejected Appellant's argument. (Order on Appeal, pp. 4-5). Pursuant to the South Carolina Uniform Limited Liability Company Act, members and managers of a limited

liability company are "not personally liable for a debt, obligation, or liability of the company solely by reason of being or acting as a member or manager." S.C. Code Ann. § 33-44-303(a). "An agent . . . is not liable to a third party for breach of a third party contract by his principal." *Holder v. Haskett*, 283 S.C. 247, 251, 321 S.E.2d 192, 194 (Ct. App. 1984) (citing *Skinner v. Ruddock, Inc. v. London Guarantee & Accident Co.*, 239 S.C. 614, 124 S.E.2d 178 (1962)).

Appellant contends the individual Respondents are liable for Colonial's purported breaches of contract pursuant to the equitable theory of piercing the corporate veil.[12] (Appellant's Initial Brief at p. 19 (citing *Drury Dev. Corp. v. Found. Ins. Co.*, 380 S.C. 97, 101, 668 S.E.2d 798, 800 (2008)). However, "[i]t is settled authority that the doctrine of piercing the corporate veil is not to be applied without substantial reflection." *Sturkie v. Sifly*, 280 S.C. 453, 457, 313 S.E.2d 316, 318 (Ct. App. 1984) (citation omitted). "The party seeking to have the corporate identity disregarded has the burden of proving that the doctrine should be applied." *Id.* (citation omitted). In this case, Appellant has failed to meet her high burden of proof, and the lower court's order should be affirmed.

In determining whether a corporation's identity should be disregarded, courts apply a two-pronged test. *Sturkie*, 280 S.C. at 457, 313 S.E.2d at 318. First, the Court must apply an eight-factor analysis which considers the observance of corporate formalities by the dominant shareholders. *Id.* The second part of the test requires the presence of "an element of injustice or fundamental unfairness if the acts of the corporation be not regarded as the acts of the individual." *Id.* Appellant has failed to adduce evidence sufficient to meet either part of the test.

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[12] Appellant muddles her theory of recovery and the parties' relationships by asserting all three individual Respondents could be held liable for Colonial's breach of contract under a veil piercing theory. After the 2015 Transaction, only Dr. Lowder was a member of Colonial. (Motion for Partial Summary Judgment, Exhibit 2 at 24:14-22; 40:20-41:11; 83:15-84:4; *id.* at Exhibit 1 ¶¶ 5-6). To hold Watson or Dr. Katz liable under a veil piercing theory, the Court would have to amalgamate the entities, including FCP Holdings, a non-party, and then pierce the veil. Dr. Katz and Watson were minority owners of FCP Holdings and were never owners of Colonial, Family Care Partners, or Varsity.

In *Sturkie*, this Court recognized "the general rule . . . of proving fundamental unfairness requires that the plaintiff establish: (1) the defendant was aware of plaintiff's claim against the corporation, and (2) thereafter, the defendant acted in a self-serving manner with regard to the property of the corporation and in disregard of the plaintiff's claim in the property." *Id.* at 459, 313 S.E.2d at 319 (citation omitted). "The essence of the fairness test is simply that an individual . . . cannot be allowed to hide from the normal consequences of carefree entrepreneuring by doing so through a corporate shell." *Drury*, 380 S.C. at 102, 668 S.E.2d at 801 (quoting *Dumas v. InfoSafe Corp.*, 320 S.C. 188, 192-193, 463 S.E.2d 641, 644 (Ct. App. 1995)).

Appellant alleges Dr. Lowder, Dr. Katz, and Watson perpetrated a "fraud" against her by "ma[king] repetitive promises . . . that she would receive the opportunity to purchase an ownership interest in the practice[.]" (Appellant's Initial Brief at p. 19). The record establishes that these individuals were discussing the practice's consideration of Appellant for a future ownership interest pursuant to the Employment Agreement and at all times were acting within the course and scope of their authority. Appellant alleges the individual Respondents "knew that these promises were false at the time in which they were made as evidenced by their tactics to delay and obstruct the fulfillment of these promises," but the referenced evidence (Watson's text messages to Appellant about partnership) fails to substantiate her allegation. Her argument that these individuals "knew [Appellant] was ignorant of their fraud," (Appellant's Initial Brief at p. 19) is likewise completely unsupported. She fails to explain how refusing to hold these individuals "liable for their promises would be to use the veil of the corporation as a shield for fraud." (*Id.*).

"A party may not create a genuine issue of material fact through speculation and guesswork." *In re Eleanor McCarthy Lenahan Trust under agreement dated July 12, 2001*, 428

S.C. 598, 605, 836 S.E.2d 793, 797 (Ct. App. 2019) (citing *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 390, 701 S.E.2d 776, 780 (Ct. App. 2010) (holding one may not create a genuine issue of material fact by speculation or an "inferential leap"). *See also Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) ("To survive summary judgment, the evidence presented [by the non-movant] must amount to more than mere speculation and conjecture.") (Hearn, J., concurring in part and dissenting in part) (citation omitted). "[I]dle speculation, which has no basis in the record, is clearly insufficient to overcome" summary judgment. *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400, 424 (D.S.C. 1994). A party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Id.* (citation omitted).

By failing to come forward with evidence to meet either factor of the test enunciated in *Sturkie*, Appellant has not met her high burden of proving any of the individual Respondents are liable for Colonial's contractual obligations under the theory of piercing the corporate veil. "This is especially true when [the Court] consider[s] the general reluctance of courts to disregard the integrity of the corporate entity." *Sturkie*, 280 S.C. at 459, 313 S.E.2d at 319. The lower court correctly refused to apply *Pertuis* and *Drury* to the facts of this case, and its order rejecting the claim of contractual privity between Appellant and any Respondent other than Colonial should be affirmed.

II. THE LOWER COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON APPELLANT'S PROMISSORY ESTOPPEL CLAIM.

Appellant asserts Respondents made verbal representations regarding her future ownership interest in the practice which create enforceable claims through the equitable doctrine of promissory estoppel, an "alternative to [Appellant's] breach of contract claims." (Appellant's Initial Brief, p. 29). The lower court held that such verbal promises and/or representations are not

enforceable under the theory of promissory estoppel because they were not reasonably definite in their terms. This Court should affirm.

Promissory estoppel was first recognized in *Higgins Constr. Co. v. S. Bell Tel. & Tel. Co.*, 276 S.C. 663, 665-66, 281 S.E.2d 469, 470 (1981). "Under the *Higgins* case and its progeny, the party asserting promissory estoppel must demonstrate: (1) a promise with unambiguous terms; (2) reasonable reliance upon the unambiguous promise; (3) foreseeability of the promisee's reliance; and (4) injury sustained in relying on the promise because of the promisor's inconsistent disposition." *Barnes v. Johnson*, 402 S.C. 458, 469, 742 S.E.2d 6, 11 (Ct. App. 2013). In *Barnes*, this Court recognized that "[a]lthough promissory estoppel is a flexible doctrine that aims to achieve equitable results, it, like all creatures of equity, has limitations." *Id.* To be enforceable, the promise "must be unambiguous with clearly articulated, defined terms[.]" 402 S.C. at 470, 742 S.E.2d at 11; *see also* 28 Am. Jur. 2d *Estoppel and Waiver* § 52 (2011) ("The promise must be clear and unambiguous and sufficiently specific so that the judiciary can understand the obligation assumed and enforce the promise according to its terms."). Here, there is no such unambiguous promise, clearly articulated by any Respondent, with reasonably definite and enforceable terms.

Appellant references a recorded meeting with Watson as proof of the "promises" made to her about partnership. (Appellant's Brief, pp. 12-13, 30-31.) As a preliminary matter, her surreptitious recording of the meeting with Watson is difficult, if not impossible, to hear and understand.[13] The quotes attributed to Watson in Appellant's Initial Brief derive from her own interpretation of the discussion and should therefore be skeptically viewed, if not wholly disregarded, by this Court, especially considering Watson contests the accuracy of the statements

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[13] Even the court reporter during Watson's deposition could not accurately transcribe the conversation of Appellant's recording. (Mem. In Opp. to Motion for Partial Summary Judgment, Watson Depo., 115:1-20; *id.* at 117-222 ("inaudible" noted by court reporter sixty times)).

Appellant attributes to him. (Mem. In Opp. to Motion for Partial Summary Judgment, Watson Depo., at 117-222.) Even if Appellant's transcription of the recorded conversation is assumed to be accurate, none of Watson's purported statements are unambiguous promises with definite terms that could be enforced by this Court. Watson allegedly stated: "we are going to offer you partnership," "[y]ou'll probably be under the deck before this happens," "you can [roughly] expect . . . somewhere between 3 to 5 times return on [your investment]," "we are definitely targeting [a buy-in] [on] July 1, 2017 . . . [but are considering] at the end of 2016," and "[s]hoot for like the end of the year." (*Id.*).

In *Rushing v. McKinney*, 370 S.C. 280, 295, 633 S.E.2d 917, 927 (Ct. App. 2006), this Court held that the absence of vital terms between the parties precluded recovery in promissory estoppel. In *Rushing*, the plaintiff "could not clearly articulate the terms of the alleged oral contract, including whether the money would be treated as a loan or capital contribution, how much money would ultimately be forwarded to [the defendant], or how [the parties] would 'settle up.'" *Id.* Similarly, in *Satcher v. Satcher*, 351 S.C. 477, 570 S.E.2d 535 (Ct. App. 2002), this Court held that "[a]lthough there was testimony that [the parties] had some arrangement regarding [the purchase of a piece of] farmland, we find insufficient evidence of a specific promise by Grandfather to leave [the plaintiff] the land he claims." *Id.* at 486, 570 S.E.2d at 540. "The witnesses described general references to 'it' or the farm, but none described Grandfather's promise in terms of the acreage [the plaintiff] actually farmed." *Id.* Even the plaintiff "was unclear as to the details of the promise." *Id.* at 487, 570 S.E.2d at 540.

Nothing in the recorded conversation between Appellant and Watson creates an unambiguous promise with clearly articulated and defined terms for this Court to enforce. Like the parties' written agreement to give Appellant an ownership interest in the practice at some

undefined time in the future, Watson's purported promises failed to include such essential terms as: (i) when the interest would be conveyed, (ii) how the company was to be configured, (iii) what percentage of ownership Appellant would receive, (iv) the structure of the transaction, or (v) price. *See supra*, Section I(B). Although "promissory estoppel has broad applicability to prevent injustice, [if] [the] promise is unclear" the doctrine will not be imposed. *Barnes*, 402 S.C. at 470, 742 S.E.2d at 12. The order dismissing Appellant's claim for promissory estoppel should be affirmed.

III. THE LOWER COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS TO PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM.

Appellant asserted a claim for negligent misrepresentation, alleging the individual Respondents made misrepresentations regarding her future ownership interest in Colonial. (Am. Compl. at ¶¶ 92-102). Appellant alleges Dr. Lowder "falsely represented that [an] opportunity to purchase partnership was a condition of the merger of [Appellant] and [Colonial's] practices." (Appellant's Initial Brief, pp. 5, 32). She also contends the "false representation" of her future ownership interest in the practice "was renewed on multiple occasions, including by Watson when he was the CEO" of Family Care Partners. (*Id.* at p. 32). The lower court appropriately granted summary judgment as to Appellant's negligent misrepresentation claim, finding: (1) Dr. Lowder's purportedly false representations prior to execution of the Employment Agreement merged into the Employment Agreement, and (2) later alleged misrepresentations by Dr. Lowder or Watson are not actionable because they are not representations of fact.

To maintain a claim for negligent misrepresentation, a plaintiff must show by a preponderance of the evidence:

> (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant

> breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation.

Redwend Ltd. P'ship v. Edwards, 354 S.C. 459, 473-74, 581 S.E.2d 496, 504 (Ct. App. 2003). "[N]egligent misrepresentation is predicated upon transmission of a negligently made false statement." *Armstrong v. Collins*, 366 S.C. 204, 219-20, 621 S.E.2d 368, 375-76 (Ct. App. 2005) (internal quotations and citations omitted).

As to the alleged false representation made by Dr. Lowder before the Employment Agreement was executed, Appellant admits the "representation was memorialized in Term 15 of [the] Employment Agreement." (Appellant's Initial Brief, p. 32). To the extent Appellant contends Dr. Lowder "promised" her an ownership interest as the basis for her interpretation of the term "consideration" in Paragraph 15 of the Employment Agreement, such assertion should be rejected. *See Caper Corp. v. Wells Fargo Bank, N.A.*, 578 Fed. Appx 276, 283-284 (4th Cir. 2014) (holding claim for oral misrepresentation not reasonable or justifiable in light of the written contract which directly contradicted alleged representation).

Based on the lower court's interpretation of Paragraph 15 of the Employment Agreement, Appellant is entitled only to "consideration" of a future ownership interest in the practice, not a contractual right or guarantee of ownership. Appellant's negligent misrepresentation claim, based on an alleged verbal agreement made prior to execution of the Employment Agreement, has no legal or factual support. "The parol evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written agreement when the extrinsic evidence is to be used to contradict, vary, or explain the written instrument." *Redwend*, 354 S.C. at 471, 581 S.E.2d at 503 (citing *Estate of Holden v.*

Holden, 343 S.C. 267, 539 S.E.2d 703 (2000); *Crafton v. Brown*, 346 S.C. 347, 550 S.E.2d 904 (Ct. App. 2001)).

In addition, the Employment Agreement contains a merger clause providing: "This instrument contains the entire agreement of the parties and may not be changed orally[.]" (Motion for Partial Summary Judgment, Exhibit 1-A, ¶ 22). "A merger clause expresses the intentions of the parties to treat the writing as a complete integration of their agreement. *Wilson v. Landstrom*, 281 S.C. 260, 266, 315 S.E.2d 130, 134 (Ct. App. 1984); *see also Black's Law Dictionary* 880 (9th ed. 2009) (defining an integration clause, also termed a merger clause, as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all informal understandings and oral agreements relating to the subject matter of the contract."). Here, the parties' written contract is completely integrated. "The terms of a completely integrated agreement cannot be varied or contradicted by parol evidence of prior or contemporaneous agreements not included in the writing." *Wilson*, 281 S.C. at 266, 315 S.E.2d at 314. Evidence of an alleged verbal promise by Dr. Lowder that Appellant was guaranteed to become an owner of the practice before the Employment Agreement was signed is not admissible to vary the terms of the written contract.

In addition, the lower court correctly concluded all alleged misrepresentations of future ownership in the practice after the Employment Agreement was executed are not enforceable because they do not constitute false representations of fact. "To be actionable, the representation must relate to a present or pre-existing fact and be false when made." *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993) (citations omitted); *see also Winburn v. Ins. Co. of North Am.*, 287 S.C. 435, 439-440, 339 S.E.2d 142, 145 (Ct. App. 1985) (requiring the presence of a "false representation" of "fact as distinguished from the mere

expression of opinion" or "intention"). The alleged representations in this case—that Colonial would make Appellant an owner of the practice at some point in the future—do not relate to a "present or pre-existing fact," but rather constitute statements as to future events.

"[A] representation cannot ordinarily be based on unfulfilled promises or statements as to future events." *Fields*, 312 S.C. at 105, 439 S.E.2d at 285 (citations omitted). "[F]raud cannot be predicated on a statement that constitutes an expression of an intention." *Id.* at 440, 339 S.E.2d at 145 (citing 37 C.J.S. *Fraud* § 11 at 231 (1943); *Greer Bank & Trust Co. v. Waldrop*, 155 S.C. 47, 151 S.E. 920 (1930)); *see also Sauner v. Public Serv. Auth.*, 354 S.C. 397, 581 S.E.2d 161 (2003) (representations based on statements as to future events or unfulfilled promises are not usually actionable); *Turner v. Milliman*, 381 S.C. 101, 671 S.E.2d 636 (Ct. App. 2009) (since mere unfulfilled promises or statements as to future events are not actionable and because no evidence was presented to show statements were made only to induce plaintiffs into procuring insurance policy, trial judge properly granted summary judgment); *Fields*, 312 S.C. 102, 439 S.E.2d 283 (holding statements about future sales price of club memberships and planned improvements in development project represented defendant's intentions at time and were not false when made); *Winburn*, 287 S.C. 435, 339 S.E.2d 142 (statement by insurance adjustor that he would "make sure" marine mechanic repaired boat was mere broken promise, no more actionable in negligence than in fraud).

Appellant's assertion that Dr. Lowder and Watson "falsely represented" that she would become an owner in Colonial in the future is nothing more than an alleged unfulfilled promise or statement of intention to do something in the future, which is unenforceable as a matter of law. Appellant's argument that Respondents "knew the representations [were] false when repeated," because they "had begun to develop a scheme designed to create pretextual reason to deny [her]

the right to purchase partnership that was being guaranteed to her," is not only based on a circular false narrative, it is also unsupported by any evidence. Again, Appellant cannot create a question of fact "through speculation and guesswork," *In re Eleanor McCarthy Lenahan Trust*, 428 S.C. at 605, 836 S.E.2d at 797 (citation omitted) or "the building of one inference upon another." *Richland-Lexington Airport Dist.*, 854 F. Supp. at 424 (citation omitted).

The cases cited by Appellant, *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 692 S.E.2d 499 (2010), and *West v. Gladney*, 341 S.C. 127, 533 S.E.2d 334 (Ct. App. 2000), are not relevant to issues before the Court. In both cases, the appellate courts considered whether a plaintiff's reliance on a purported misrepresentation was "justified." In *Quail Hill*, the Supreme Court held the plaintiff could not have justifiably relied on the county's purported representation regarding zoning classification because the plaintiff could have reviewed a zoning map to ascertain the truth of the representation. *Id.* at 241, 692 S.E.2d at 509. In *West v. Gladney*, this Court held there was no evidence to refute that the plaintiff had "more access to the financial records" than the defendant, and thus the evidence failed to establish a genuine issue of material fact that his reliance on any alleged representation was justified. *Id.* at 135, 533 S.E.2d at 338. Appellant's reliance on Respondents' purported negligent misrepresentations, and whether such reliance was justified or not, is not at issue in the orders on appeal because the lower court found there were no enforceable misrepresentations to begin with.

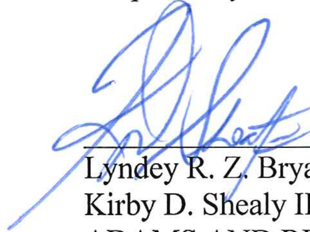
The lower court's order dismissing Appellant's claim for negligent misrepresentation should be affirmed.

CONCLUSION

The lower court properly applied the standard set forth in Rule 56(c), SCRCP, finding no genuine issues of material fact existed as to each essential element of Appellant's claims for

breach of contract, breach of contract accompanied by a fraudulent act, promissory estoppel, and negligent misrepresentation. Accordingly, the order granting partial summary judgment to the Colonial Respondents should be affirmed.

Respectfully submitted,



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June 17, 2020.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

RECEIVED
Jun 17 2020
SC Court of Appeals

Case No. 2018-CP-40-02545

Dr. Kaoru Pridgen, ... Appellant,

v.

Colonial Family Practice, LLC; Varsity Family Care Partners, LLC; Family Care Partners d/b/a Family Care Partners Management, LLC; Dr. Clay Lowder; Thomas W. Watson; and Dr. Gary R. Katz, ... Respondents.

CERTIFICATE OF SERVICE

I certify that I have served the **Initial Brief of Respondents** and **Designation of Matter to be Included in the Record on Appeal** on all counsel of record by e-mailing a copy of said documents on June 17, 2020 to counsel at the following e-mail addresses:

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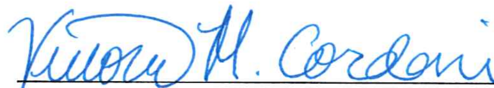

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June 17, 2020

RECEIVED
Jun 17 2020
SC Court of Appeals

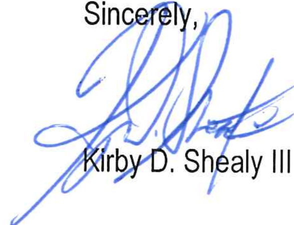
VIA E-FILING ONLY:
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *Dr. Kaoru Pridgen v. Colonial Family Practice, LLC, et. al.*
Case No. 2018-CP-40-02545
AR File No: 000020-004647

Dear Ms. Kitchings:

Enclosed for filing in the above-referenced matter are the original and one copy of the Initial Brief of Respondents and Designation of Matter to be Included in the Record on Appeal. By copy of this letter, I am serving all counsel of record with the brief and designation of matter as set forth in the enclosed Proof of Service. Please call me if you have questions.

Sincerely,



Kirby D. Shealy III

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Enclosures
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