

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Civil Action No. 2018-CP-40-02545
Appellate Case No. 2020-000067

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SC Court of Appeals

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 RESPONDENT VARSITY FAMILY CARE PARTNERS, LLC

June 17, 2020

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE LOWER COURT ERRED IN DISMISSING ALL CLAIMS AGAINST VARSITY FAMILY CARE PARTNERS, LLC?¹

STATEMENT OF THE CASE

On May 9, 2018,² Appellant filed this civil action in the Richland County Court of Common Pleas, asserting the following claims against Respondent Varsity Family Care Partners, LLC (“Varsity”): (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, and (v) promissory estoppel. (Complaint).³ 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 Respondents’ motion, the case was transferred to the South Carolina Business Court. The complaint was amended on March 14, 2019.⁴ (Am. Compl).

After almost a year of extensive discovery, Respondents 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

¹ With regard to Appellant’s second issue on appeal, Varsity incorporates and adopts the arguments contained in the 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.

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

³ Appellant asserted additional claims against other Respondents.

⁴ 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.

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). These claims are also not properly asserted against Varsity for the reasons outlined in that motion. On August 30, 2019, Varsity filed a separate motion for summary judgment, seeking dismissal of all claims Appellant filed against it. (See Varsity Motion August 30, 2019.) Varsity's motion asserted that there was no evidence that it exercised any of the requisite control over Appellant's employment or partnership and produced substantial evidence that it was simply an investor entity. (See *id.*) Following a hearing on December 5, 2019, the lower court granted Varsity's motion and Colonial Respondents' motion on December 20, 2019. (December 5, 2019 Transcript; Order on Appeal).

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), SCRPC." *Bluestein v. Town of Sullivan's Island*, 429 S.C. 458, 462, 839 S.E.2d 879, 881 (S.C. 2020) (quoting *Turner v. Milliman*, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (S.C. 2011)). "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." *Id.* (quoting *Turner*, 392 S.C. at 122, 708 S.E.2d at 769). "When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Id.*

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, 423 529 S.E.2d 710, 713 (S.C. 2000) (quoting *Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996)). The party opposing summary judgment can also

not rely on mere speculation and conjecture. *McKnight v. S.C. Dep't of Corrs.*, 385 S.C. 380, 390, 684 S.E.2d 566, 571 (Ct. App. 2009). “[I]dle speculation, which has no basis in the record, is clearly insufficient to overcome” summary judgment, and a party “cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another.” *Richland-Lexington Airport Dist. v. Atlas Properties, Inc.*, 854 F. Supp. 400, 424 (D.S.C. 1994). Finally, a court cannot properly deny a motion for summary judgment “after only finding that a genuine issue of material fact exists as to one element of the plaintiff’s claim; rather, ... the 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 (S.C. 2007).

STATEMENT OF FACTS

The lower court correctly stated the facts of this case as they relate to Varsity. Appellant’s Initial Brief makes the same misstatements of fact related to Varsity that were made to the lower court. The lower court properly rejected Appellant’s misstatements of fact, ruled that they were not supported by the undisputed evidence in the record, and/or properly ruled that these alleged facts were not sufficient to overcome summary judgment. Appellant’s misstatements of fact related to Varsity include the following:

1. Appellant does not properly cite the corporate and legal status of Varsity and its limited relationship to the case solely as an investor entity.

Appellant alleges that Varsity is a legal entity legally affiliated and/or legally related to Colonial. (Appellant’s Initial Brief p. 2.) Appellant alleges that Colonial merged with Varsity. (*Id.* p. 6.) Appellant alleges that Varsity controlled the operation. (*Id.* at 7) Appellant’s claims against Varsity are based on a complete misunderstanding of the actual corporate structure.

Colonial is a medical practice that employed Appellant starting in approximately May 2013. (*See* Lowder Affidavit at ¶ 3.) In December of 2015, Colonial sold its practice as part of a complex business transaction (the “Transaction”). (Alpern Affidavit at ¶ 3.) Varsity is a Special Purpose Vehicle (“SPV”) that was created to house the investment in Family Care Partners Holdings (“FCPH”), which itself owned Respondent FCPM. (*Id.*) As part of the Transaction, FCPM entered into a Management Services Agreement (“MSA”) with Colonial. (*Id.*)

After the Transaction was completed, Varsity was the majority investor in FCPH, and FCPH itself owned FCPM, which entered into a Management Services Agreement with Colonial. (*Id.*)

The evidence shows that Varsity at all times acted solely as an investor entity. (*Id.* at ¶ 4.) As part of the Transaction, FCPH was formed, and it established an Operating Agreement. (*Id.* at ¶ 5.) The Operating Agreement established a Board of Directors of FCPH. (*Id.*) The Operating Agreement provided that the Board of Directors managed FCPH and had full, exclusive, and complete discretion to manage and control the business and affairs of FCPH. (*Id.*) The FCPH Board of Directors could consist of up to seven directors who were designated as follows: (i) up to four directors designated by Varsity (the “Preferred Directors”); (ii) Dr. Lowder; (iii) one Director which may be designated by the Preferred Directors so long as such Director is an “Independent Director”; and (iv) the Chief Executive Officer of FCPH. (Katz Dep., Bates 001029.)

After the Transaction, Partnership was only available in FCPH. (Alpern Affidavit at ¶ 6.) The Board of FCPH had the exclusive authority to vote on partnership issues. (*Id.*) After the Transaction, Appellant was informed that partnership opportunities would only be through FCPH. (Pl. Dep. p. 290.)

The indisputable evidence establishes a corporate and management structure that did not include Varsity having control over Appellant's employment or partnership decisions.

2. None of the witnesses, not even Appellant, testified to Varsity being in control of Appellant's employment or partnership.

Appellant falsely states that every deponent who testified in this case testified as to Varsity's control. (Appellant's Initial Brief p. 7-8.) Appellant continues to completely misrepresent the record on this issue and conveniently fails to cite relevant portions of the testimony. The lower court properly recognized and rejected these misrepresentations. Appellant cites the testimony of Dr. Soto and his use of the word "Varsity" as her evidence on this issue. (*Id.*) This is a complete misrepresentation of the testimony in this case. Dr. Soto's deposition actually confirms that Varsity had no involvement.

According to Dr. Soto, Varsity was the initial purchaser in the Transaction and after the Transaction, FCPH was created to manage the organization. (Soto Dep. 108.) Dr. Soto admitted that the Transaction structure was complicated and that he often referred to separate entities such as Family Care Partners Holdings as "Varsity" solely for ease of reference. (*Id.* 108-109.) He confirmed that Tom Watson and Dr. Katz acted on behalf of FCPH, not Varsity. (*Id.* 109-110.) Communications from these individuals was not on behalf of Varsity. (*Id.* at 110.) He confirmed that the FCPH Board was the only entity authorized to decide partnership issues and that no Varsity representative ever interfered with any partnership decision. (*Id.* 110-113.) He confirmed that when he referred to Varsity, he was really referring to Family Care Partners Holdings. (*Id.* 112-113.) Clearly, Appellant's attempt to misuse and mislead this Court and the lower court related to Dr. Soto's testimony is improper and should be rejected.

In addition, and contrary to Appellant's Statement of Facts, every other deponent actually testified consistent with the fact that Varsity did not engage in any actions related to Appellant or her request for partnership:

- a. Dr. Gary Katz. Dr. Katz has provided sworn testimony that the Family Care Partners Board of Directors ("FCPH Board") was the only entity authorized to decide partnership issues and that no FCPH Board member acted outside the scope of their capacity as FCPH Board members. (Katz Affidavit – Exhibit 8 to Motion.)
- b. Dr. Clay Lowder. Dr. Lowder has provided sworn testimony that the FCPH Board was the only entity authorized to decide partnership issues and that no FCPH Board member acted outside the scope of their capacity as FCPH Board members. (Lowder Dep. 191-193 – Exhibit 3 to Motion.) He confirmed that Dave Alpern only acted through his role as the Chairman of the FCPH Board. (*Id.*)
- c. Tom Watson. Mr. Watson has provided sworn testimony that FCPH Board was the only entity authorized to decide partnership issues and that no FCPH Board member acted outside the scope of their capacity as FCPH Board members. (Watson Dep. 251-252.) Mr. Watson also confirmed that he and others referred to the FCPH Board as Varsity for ease of reference only. (Watson Dep. 246-247.) He confirmed that Varsity was a separate legal entity and was treated as such. (*Id.*) Mr. Watson was an officer of FCPH, not Varsity. (*Id.* at 248.)

Mr. Watson confirmed that the FCPH Board had full, exclusive and complete discretion to manage and control the business and affairs of the company, not Varsity. (*Id.* at 248-249.) He confirmed that no FCPH Board member ever acted outside their authority or their capacity as FCPH Board members. Tom Watson confirmed that Dave Alpern only acted in his capacity as the FCPH Board Chairman of the Board. (*Id.* at 249-250.) Varsity had no authority to act as it related to FCPH Board decisions. This was totally controlled by the FCPH Operating Agreement which gave full control to the FCPH Board. (*Id.* at 250.)

There is no evidence in this case that any FCPH official acted outside the scope of their authority as officers or board members in the control of FCPH and in the control over partnership in FCPH. (Pl. Dep. at p. 305-310; Lowder Dep. at p. 192-194; Alpern Affidavit; Katz Affidavit.) Multiple witnesses have confirmed that no FCPH official or representative acted outside the scope of their official authority. (*Id.*) While the individuals Varsity designated on the FCPH Board may have had majority control over issues that did not require a unanimous decision, there was “NEVER” a contested FCPH Board vote. (Watson Dep. p. 251.) There is no evidence that any individual acted in an official capacity for Varsity as it related to Appellant.

Appellant herself admits that when she heard the reference to “Varsity”, she did not know what specific business entity was being referenced. (Pl. Dep. at p. 282-284.) Appellant cannot herself contest Varsity’s position in this case because she admits that she has never had any conversations with any Varsity representative about her alleged contract, employment or potential partnership. (Pl. Dep. at 306-310.) Appellant admits that she does not know which legal entities were involved in decisions related to her partnership. (*Id.* at 282.) Further, Appellant did not

depose *any* Varsity representative in this case. No other witnesses have contested Varsity's position that it is not a proper party and that it has not exerted control or been involved in any decisions related to Appellant.

3. Varsity was not responsible for Appellant's contract.

Appellant states that Varsity became responsible for Appellant's existing employment contract solely based on the references to "Continuing Employees" in the Acquisition Agreement. (Appellant's Initial Brief p. 9.) Appellant again completely misstates the record and misuses the clear definition of "Continuing Employees" to attempt to support her claims. The lower court properly recognized and rejected this attempt.

As part of the December 2015 Transaction, an Acquisition Agreement was entered into between Colonial, Varsity and FCPH. (Colonial 00477-00533.) Section 8.1.4 of this Acquisition Agreement reads as follows:

Buyer shall be responsible for the payments and benefits to be provided to Continuing Employees in accordance with Section 8.2, and continuation coverage for Continuing Employees in accordance with Section 8.2, as well as any other potential liability relating to any discontinuation of the employment of any Continuing Employee on or after the Closing.

(Id.)

Paragraph 8.1.2 of the same Acquisition Agreement defines "Continuing Employees" as "Non-Practitioner Employees", and Section 8.1 defines "Non-Practitioner Employees" as employees who are not Healthcare Providers. (*Id.* at 004439.) It is not disputed that Appellant was a healthcare provider and, therefore, was not considered a "Continuing Employee." (Pridgen 170:16.) Appellant is also not included in Schedule 8.1 of this Acquisition Agreement, which lists all of the "Continuing Employees" to whom Section 8.1.4 applies. (Schedule 8.1 of Acquisition

Agreement.) Therefore, Appellant's reliance on Section 8.1.4 of the Acquisition is simply misplaced.

After the December 2015 Transaction, Appellant and other physician-employees remained employees of Colonial. (Lowder Dep. at 191-192.) It is not disputed that Appellant was at all times relevant to this case employed by Colonial.

4. Varsity did not have any employees.

Appellant states that Varsity employs a variety of people, each using Varsity email addresses including Alpern. (Appellant's Initial Brief p. 10.) Appellant also states that several FCPH Board members have e-mail addresses that contain the word Varsity, and that former FCPH CEO Tom Watson self-identified as a Varsity employee on his professional LinkedIn profile page. (*Id.* p. 10-11.) This statement is in spite of the fact that the common e-mail domain Appellant cites is "varsityhealthcarepartners" and not the name of Respondent Varsity Family Care Partners, LLC. Watson also admitted in his deposition that he was employed by FCPH and not Varsity, despite the legally incorrect reference on his LinkedIn page. (Watson Dep. p. 248) Again, Varsity is an SPV investment entity that employs no individuals. (Alpern Affidavit ¶ 8.) Appellant's only alleged evidence to dispute any of these facts is the general reference to the word Varsity (which the witnesses confirmed was solely for ease of reference), rather than the correct legal entities.

5. Varsity was not involved in the partnership offers to Baker and Katz.

Appellant states that Alpern gave specific instructions for action to be taken in regard to granting Dr. Baker an opportunity to purchase partnership. (Appellant's Initial Brief p. 10.) Appellant also states that Alpern made an offer of partnership to Katz. (*Id.* p. 14.) The clear and indisputable evidence is that Alpern was acting solely as the Chairman of the Board of FCPH and with the authority of the Board.

The initial management structure of FCPH was as follows: Thomas Watson, Chief Executive Officer (CEO); Dr. Lowder, Chief Medical Officer (CMO); Paul Miller, Chief Financial Officer (CFO). (*Id.*) David Alpern (“Alpern”) served as the Chairman of the FCPH Board of Directors from approximately December 2015 until approximately November of 2017. (Alpern Affidavit ¶ 5.) In his role as Chairman of the Board of FCPH, he communicated with FCPH and Colonial officials about management and FCPH partnership issues. (*Id.* at ¶ 6.) Alpern’s role as Chairman of the Board of FCPH was the only role in which he communicated with FCPH and Colonial officials after the December 2015 Transaction, and neither he nor any Varsity representatives acted outside their official capacity as FCPH Board members in participating in any decision related to the management of FCPH or Colonial. (*Id.*) The FCPH Board of Directors met on a regular basis to discuss issues related to the management of the organization. (Lowder Dep. at 191-192.) There is no evidence that Alpern was acting in any capacity as an employee of Varsity as it had no employees, rather than as the Chairman of the Board of FCPH.

6. Varsity did not maintain records related to Appellant’s employment.

Appellant cites the fact that Varsity was in possession of two documents with her name on them as evidence that it maintained her personnel file. (Appellant’s Initial Brief p. 10). The first document cited (Varsity 00029) is a billing matrix that has billing information for multiple providers that includes Appellant. The second document cited (Varsity 00033) is a list of chart signings by each healthcare provider, which included Appellant in the list. This chart was not even addressed to anyone at Varsity. (See Varsity 000032-33.) The fact that Varsity eventually had possession of this e-mail and produced it in the litigation has no relevance to the issue of control prior to the litigation. The fact that Appellant could only cite these two irrelevant documents shows the opposite of Appellant’s argument, that Varsity was not involved in the management of

FCPH.

Appellant also cites to “recruitment and acquisition” documents of other doctors, not Appellant. (Appellant’s Initial Brief p. 6.) However, growth and investment documents are normal documents made available to an owner and investor. This does not show the requisite control over Appellant’s employment that she must prove in this case.

It is clear that Varsity as an investor entity had an entitlement to access to financial related information about its investment. It is absurd to argue that an investor exercises improper control because it had financial information about its investment. There is no evidence in the record to suggest that Varsity maintained any type of personnel file related to Appellant because it did not.

7. Appellant’s improper reliance on the New York meeting.

Appellant argues that Varsity exerted some type of improper control over her partnership because a FCPH Board Meeting was cancelled and officials related to Varsity attended a financial planning session in New York instead. (Appellant’s Initial Brief p. 14.) The record proves that on February 20, 2017, the CFO of FCPH (Paul Miller) surprised Tom Watson and members of the FCPH board of directors with a cash forecast showing significant negative cash for the end of that week (2/24/2017). (Alpern Affidavit ¶ 8.) At that time, there were significant concerns about late and inaccurate reporting by the CFO of FCPH and a search began to hire a new CFO. (*Id.*) The cash flow issues and concerns continued into April of 2017. (*Id.*) As Chairman of the Board of FCPH, Alpern decided to cancel a FCPH board meeting scheduled for May 9, 2017. (*Id.*) The reason he decided to cancel this meeting was the significant financial concerns of the organization. (*Id.*) FCPH was experiencing a stressed cash position and there needed to be remediation plans implemented. (*Id.*) Appellant has not presented any evidence to dispute this reason for cancelling the FCPH Board Meeting. (Varsity Order December 20, 2019 p. 5.) Alpern decided to convene a

working session in New York City with several FCPH board members and investors to analyze the significant financial issues of the organization. (Alpern Affidavit ¶ 8.) There is no evidence to suggest that Appellant's partnership was discussed at this meeting. (Varsity Order December 20, 2019 p. 6.)

The May 2017 FCPH board meeting was not cancelled to avoid voting on any new partners in FCPH. (*Id.* at ¶9.) Alpern was not aware that any specific physician was going to be recommended for partnership at that meeting. (*Id.*) Rather, the organization was in financial crisis and steps were being taken to quickly address this crisis. (*Id.*) It would not have been appropriate to consider Appellant or any physician for partnership in May of 2017 given the financial crisis of FCPH at that time. (*Id.*) Appellant admits that had she been offered partnership at any point, she would have asked about the expected return on her investment. (Pl. Dep. at p. 296.)

An investor has certain rights to information related to the finances of its investment. This does not mean it is exercising control. Control over FCPH was always with the FCPH Board.

8. Appellant's improper reliance on the use of the term "bias."

Appellant states as fact of discrimination that Watson used the term "bias" in an e-mail related to partnership. The term bias does not imply an admission of gender bias. (*Id.*) There was no mention of gender bias in the e-mail and that is clearly not the only type of bias that exists. Rather, the bias referenced was clearly related to sticking to a financial model for partnership that was based on 550 patients, which for Appellant should have equated to over \$1,000,000 in revenue. The bias was in favor of revenue and profitability, not gender. FCPH properly had a bias toward favorable revenue and profitability in considering partners. This is not evidence of discrimination. Also, there is no connection between this e-mail and Varsity for the reasons outlined above.

ARGUMENTS

I. VARSITY DID NOT HAVE A CONTRACT WITH APPELLANT, AND IT IS NOT LIABLE FOR ALLEGEDLY FRAUDULENT ACTS OR VERBAL REPRESENTATIONS OF INDIVIDUAL RESPONDENTS.

A. VARSITY WAS NOT IN PRIVACY OF CONTRACT WITH APPELLANT.

Appellant argues that Varsity is in privity of contract related to the 2013 Employment Agreement. Appellant solely relies on Section 8.1.4 of the Acquisition Agreement and its reference to Continuing Employees. As outlined in Section 3 of the Statement of Facts, this portion of Acquisition Agreement does not apply to Appellant because she was a healthcare provider.

The lower court correctly ruled that Appellant had not established any evidence that Varsity was obligated under or in privity to the contract.

The indisputable evidence establishes that Colonial continued to employ Appellant even after the December 2015 Transaction, and Appellant's contract was never assigned to Varsity. (Lowder Dep. at 191-192.) In fact, the contract required the written consent to any assignment and Appellant never provided any written consent for any assignment. (Lowder Affidavit, Ex. 1-A ¶ 11; Appellant Dep. at p. 302.) For these reasons, Varsity was in no way ever financially obligated to execute Appellant's original Employment Agreement with Colonial, much less in privity with Appellant with respect to that or any other contract.

B. VARSITY IS NOT LIABLE FOR THE ALLEGEDLY FRAUDULENT ACTS OR VERBAL REPRESENTATIONS OF THE INDIVIDUAL RESPONDENTS.

In support of her breach of contract accompanied by a fraudulent act claim, Appellant attempts to connect the allegedly fraudulent acts of Dr. Lowder and Watson to Varsity by claiming "each acted as representative mouthpieces for Varsity throughout Varsity's time as a majority investor in the medical practice." (Appellant Initial Appellate Brief p. 21.) Appellant further claims that FCPH Board Chair David Alpern, who Appellant refers to as a "Varsity employee",

“directed communication from Dr. Lowder and Watson about doctors seeking partnership”. (*Id.*) Appellant also claims that e-mails show Dr. Lowder and Watson were “executing the direction and commands of Varsity in operating the medical practice.” (*Id.*) Finally, Appellant points to Watson identifying himself as a Varsity employee on LinkedIn as proof that he was under the control of Varsity. (*Id.*)

As outlined in Section 2 of the Statement of Facts above, there is absolutely no evidence to suggest that any individual acted on behalf of Varsity or that any individual acted outside of the scope of their authority as Colonial or FCPH officials. Appellant cannot dispute the testimony of Alpern, Lowder, Katz, and Watson, who all confirmed that they were not acting at the direction of Varsity. (Statement of Facts, Section 2.) Rather, the indisputable evidence is that partnership decisions and key management decisions were made exclusively by the FCPH Board.

Moreover, Appellant herself has admitted that she never relied on any statement that Watson was acting on behalf of Varsity because she admitted that she never spoke to one Varsity representative and did not know who was acting in what capacity. (Pl. Dep. at p. 282, 306-310.) For these reasons, the lower court correctly ruled that Appellant failed to establish a contract that involved Varsity or evidence that Varsity was liable for the allegedly fraudulent acts or representations of the individual Respondents.

II. VARSITY IS NOT LIABLE FOR PROMISSORY ESTOPPEL BECAUSE VARSITY NEVER MADE A PROMISE TO APPELLANT.

The lower court also correctly ruled that because Appellant admits that she never communicated with a Varsity official, she cannot establish any promise that was made by Varsity. (*Id.*; Varsity Order December 20, 2019 p. 13.) And for the same reasons Varsity cannot be held liable for the fraudulent acts or verbal representations of individual Respondents, Varsity cannot be held liable for any promises allegedly made by those Respondents or relied upon by Appellant.

There is absolutely no evidence to suggest that any individual spoke on behalf of Varsity or that any individual acted outside of the scope of their authority as Colonial or FCPH officials. (Statement of Facts, Section 2.) Appellant cannot dispute the testimony of Alpern, Lowder, Katz, and Watson, who all confirmed that they did not act at the direction of Varsity. (*Id.*) For these reasons, Appellant has not established that Varsity can be held liable for promissory estoppel.

III. VARSITY DID NOT VIOLATE TITLE VII OR THE EQUAL PAY ACT.

A. VARSITY WAS NOT A JOINT OR INTEGRATED EMPLOYER OF APPELLANT.

The lower court correctly ruled that Varsity was not Appellant's joint or integrated employer. As discussed in the Statement of Facts, Appellant has not established any facts that show Varsity exercised control over her employment or partnership.

Appellant improperly relies on the unpublished S.C. District Court case of *Taylor v. Fluor Corp.* for the proposition that the issue of joint or integrated employment could be applied to Varsity. 2019 WL 4727464, at *4 (D.S.C. 2019). Appellant also cites to wide swaths of the record without providing a specific cite supporting this proposition. (Appellant Initial Brief p. 34.) However, *Taylor* is substantially distinguishable from the instant case. In *Taylor*, the court noted four factors that could create genuine issues of material fact as to the Fluor Corporation's control of the plaintiff, including (1) the policies at issue being Fluor Corporation's policies; (2) the employee hotline being operated by Fluor Corporation; (3) employees of the Fluor parent entity seamlessly transitioning between subsidiary entities; and (4) interlocking corporate directors shared by Fluor Corporation and Fluor Government Group International, Inc. *Taylor*, 2019 WL 4727464, at *4.

Here, unlike in *Taylor*, Varsity is not the corporate parent entity of a subsidiary employing Appellant. Rather, Varsity is an SPV investment entity with no employees of its own. (Alpern

Affidavit ¶ 3.) While it did own the majority of FCPH which itself owned FCPM, FCPM only had a Management Services Agreement with Colonial. (*Id.*) Neither Varsity nor FCPH or FCPM owned Colonial, who was Appellant's only employer. (*Id.* at ¶ 6.) Further, Varsity never dictated Colonial's policies or operated any employee hotline. And since it was an SPV investment entity with no employees, it could not have had employees "seamlessly transitioning" between subsidiaries. (*Id.* at ¶ 3.) Nor could it have corporate directors shared by it and any of the other Respondent entities. (*Id.*) At most, Varsity as the primary investor was authorized to appoint some of the FCPH Board of Directors, and it has already been confirmed that they did not act outside the scope of their duties as members of the Board. (Pl. Dep. at p. 305-310; Lowder Dep. at p. 192-194; Alpern Affidavit; Katz Affidavit.) *Taylor* is simply not comparable here.

An entity can be held liable under Title VII if it (1) fits within the "employer" definition of Title VII and (2) exercises substantial control over significant aspects of the compensation, terms, conditions, or privileges of plaintiff's employment. *Williams v. Grimes Aero. Co.*, 988 F. Supp. 925, 934 (D.S.C. 1997). Appellant correctly cites the nine-factor *Butler v. Drive Auto Indus. of Am* hybrid test for determining employer status in the Fourth Circuit:

- (1) authority to hire and fire the individual;
- (2) day-to-day supervision of the individual, including employee discipline;
- (3) whether the putative employer furnishes the equipment used and the place of work;
- (4) possession of and responsibility over the individual's employment records, including payroll, insurance, and taxes;
- (5) the length of time during which the individual has worked for the putative employer;
- (6) whether the putative employer provides the individual with formal or informal training;
- (7) whether the individual's duties are akin to a regular employee's duties;
- (8) whether the individual is assigned solely to the putative employer; and
- (9) whether the individual and putative employer intended to enter in an employment relationship.

793 F.3d 404, 414 (4th Cir. 2015). In *Butler*, the Fourth Circuit notes that “none of these factors are dispositive” and that the common element of control is the most important factor.

The lower court correctly ruled that Appellant has not established any evidence of these elements. Her allegations of Varsity control are simply incorrect and based on misstatements of the record evidence. Varsity had absolutely no control over Appellant’s employment. Varsity had no authority to hire or fire Appellant, supervise her from day-to-day, or provide her with formal or informal training. Appellant was already trained as a practitioner when she began her employment with Colonial, and Appellant furnished her own equipment when she began working with Colonial. Varsity never had an intention to enter into an employment relationship with Appellant or any doctor working for Colonial as part of the December 2015 transaction, and Appellant has offered nothing to show otherwise. To the extent Varsity maintained any records with Appellant’s name on them, these documents related solely to financial information which Varsity was entitled to view as part of its investment. (Varsity 00029, 00033, and 00039-00059.) And to the extent any FCPH Board Member directed the affairs of FCPH, it was solely within the scope of their duties as FCPH Board members. (Pl. Dep. at p. 305-310; Lowder Dep. at p. 192-194; Alpern Affidavit; Katz Affidavit.) Varsity simply was not a joint or integrated employer⁵ of Appellant for the purposes of Title VII.

With respect to the EPA, the Fourth Circuit utilizes the joint employer analysis under the Fair Labor Standards Act (“FLSA”), which states that a joint employment relationship can exist in the following situations:

⁵ Appellant claims that she does not wish to brief a separate argument on the integrated employer test, but nonetheless proceeds to brief such an argument. (Appellant Initial Appellate Brief p. 35 n. 13.) For the same reasons outline above, Varsity clearly did not share common management with other Respondents nor did it have a degree of common ownership or control with other Respondents over financial or labor matters.

- (1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
- (2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
- (3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

Schultz v. Capital Int'l Sec., Inc., 466 F.3d 298, 306 (4th Cir. 2006) (quoting 29 C.F.R. § 791.2(b)).

The lower court properly ruled that Appellant has not established any of these elements. For reasons outlined extensively above, Varsity did not share any control over Appellant's employment, which was controlled by Colonial, and did not control any partnership decision, which was exclusively controlled by the FCPH Board of Directors.

Because Appellant failed to establish a material issue of fact related to the joint employment issue, there was no need to address the merits of Appellants claim and Varsity will not address her arguments on this issue in this brief, other than to state that for the reasons cited above, Plaintiff has not proven any action or inaction by Varsity or individuals discriminating against Appellant on behalf of Varsity. The alleged discrimination in this case solely relates to Appellant becoming a partner in FCPH and the indisputable evidence is that this decision was solely controlled by the FCPH Board, not Varsity.

B. VARSITY IS NOT LIABLE UNDER THE EQUITABLE DOCTRINE OF AMALGAMATION OR SINGLE ENTERPRISE THEORY.

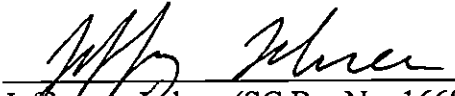
Varsity agrees with and incorporates the arguments made by the other Respondents in their Initial Brief related to Plaintiff's amalgamation and single enterprise theory.

CONCLUSION

For the reasons stated above, and in briefs in relation to Varsity's underlying Motion for Summary Judgment, this Court should affirm the Order of the lower court.

Respectfully submitted,

June 17, 2020


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Civil Action No. 2018-CP-40-02545
Appellate Case No. 2020-000067

RECEIVED
JUN 19 2020
SC Court of Appeals

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 OF INITIAL BRIEF OF RESPONDENT AND
DESIGNATION OF MATTER
VARSITY FAMILY CARE PARTNERS, LLC**


I certify that I have served the Initial Brief of Respondent and Designation of Matter by
placing a copy in the United States Mail, postage prepaid, addressed to:

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June 17, 2020

VIA UNITED STATES MAIL

The Honorable Jenny Abbott Kitchings
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South Carolina Court of Appeals
P.O. Box 11629
Columbia, South Carolina 29211

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SC Court of Appeals

Re: *Dr. Kaoru Pridgen v. Colonial Family Practice, LLC et al.*
Appellate Case No. 2020-000067

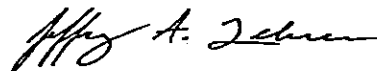
Dear Ms. Kitchings:

Please find enclosed, the original and one copy of Respondents' Initial Brief, along with the Proof of Service and Designation of Matter thereof. Please file the original and return a file-stamped copy to us in the self-addressed, stamped envelope enclosed for your convenience.

If you have any questions regarding Respondents' Brief, please do not hesitate to contact me.

With highest regards I remain,

Very truly yours,



JEFFREY A. LEHRER

JAL/hmr

cc: Lyndey Bryant, Esq.
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