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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS
THE HONORABLE ROGER M. YOUNG, SR.

Appellate Case No.: 2020-000232

Charleston Laboratories, Inc.,

Appellant,

vs.

Womble, Carlyle, Sandridge & Rice, LLP,

Respondent.

APPELANT'S INITIAL REPLY BRIEF

On June 2, 2020, Appellant filed its Motion to Strike from the Respondent's Initial Brief its additional sustaining grounds upon which it urges the Court that the underlying grant of summary judgment should be upheld. Appellant moved to strike the additional sustaining grounds arguments as all of the arguments now advanced by the Respondent were first made to the underlying trial court and were denied by the trial court as grounds for summary judgment. As a result, the sole basis upon which the trial court granted summary judgment was the trial court's reversal of itself and ultimate finding that the statute of limitations had expired. On July 29, 2020, the Appellant's Motion to Strike was denied.

As the issues surrounding the statute of limitations were thoroughly briefed in its Initial Brief, the Appellant offers the following brief Reply to the arguments surrounding the statute of

limitations issues raised by the Respondent, and further offers this Reply to address the additional sustaining grounds raised in the Respondent's Initial Brief.

ARGUMENT

1. Statute of Limitations.

Respondent's misconception of the statute of limitations in the context of legal malpractice seems to be rooted in a skewed view of the issue through which the Respondent argues at every opportunity that it is entitled to an interpretation of the facts in its favor such that any notice of any foul begins the clock running against the Appellant, notwithstanding the context in which the Respondent continued to represent the Appellant and continued to reassure the Appellant that no error was committed and that no action should be taken:

- "Sit tight" (**Record on Appeal p.__**);
- "Ignore Ray" (**Record on Appeal p.__**);
- "Leave this issue alone" (**Record on Appeal p.__**);
- Cap Table revised to show "420,000 [shares] Repurchased by the Corporation." (**Record on Appeal p.__**).

How is a reasonable client who is reasonably relying on the advice of its counsel to infer from these and other communications that its attorneys had committed malpractice? This is especially true given the undisputed facts that the client did precisely what its counsel advised and "sat tight" until Dr. Takigiku ("Dr. T") ultimately resurfaced with a claim of ownership. No reasonable person would conclude that its trusted counsel had committed malpractice. Alternatively, and minimally, whether it was reasonable or not to believe that malpractice had been committed is a disputed issue of fact, just as the trial court correctly found the first time it visited this issue. In addition to this overarching error in the Respondent's analysis of the issues before

the Court, the Respondent's Initial Brief includes other arguments regarding the statute of limitations which are erroneous and/or not supported by the record.

a. Actual v. Speculative Injury

Respondent incorrectly argues that the Appellant seeks improperly to raise for the first time the distinction between actual and speculative injury. Appellant has advanced throughout the litigation that it was harmed in that it was forced to file and prosecute expensive litigation in order to make clear its ownership of Dr. T's shares after the Respondent's negligent attempts to recapture the shares. For example, in its Reply Brief to Defendant's Motion for Judgment on the Pleadings, the Appellant argued that the harm it suffered was the expense of filing litigation to make clear the ownership of the stock after the Respondent created uncertainty:

> Womble's negligence in the preparation of the corporate control documents created a cloud on the "title" to the stock. Womble's negligence in drafting the "title" documents was compounded by its imprecise advice surrounding Charleston Labs' execution of its rights to regain possession of the stock. A dispute between the parties ensued which was nothing more than a suit to quiet title to the contested shares. Charleston Labs was forced to incur legal expenses to defend its title to the contested shares and the expense of having done so is recoverable in malpractice. Reply Brief to Defendant's Motion for Judgment on the Pleadings, p. 9.

In its opposition to summary judgment, the Appellant also argued the distinction between speculative injury and actual harm and clearly articulated the argument that no injury was suffered until such time as Dr. T resurfaced on September 22, 2015 demanding his rights as a shareholder:

> Furthermore, while Charleston Labs complains that it was harmed in the sense that it was lost in a sea of uncertainty and that it was exposed to contingent liabilities following the botched Dr. T redemption, uncertainty and contingent liabilities are not legally cognizable damages. Charleston Labs was first damaged when Womble refused to assist it in responding to Dr. T when he resurfaced with legal counsel of his own on September 22, 2015. As a result, Charleston Labs was forced to engage other counsel to respond to Dr. T's position and it was through other counsel that the decision was made to undertake the declaratory judgment action. This was the first time that Charleston Labs suffered legally cognizable harm such that all elements of the cause of action for legal malpractice were present AND Charleston Labs knew or should have known of the errors as they were made clear to

> Charleston Labs through its successor counsel. Plaintiff's Memorandum in Opposition to Summary Judgment, p. 34-35.[1]

It is understandable why the Respondent seeks to avoid this issue as it is axiomatic that a cause of action does not accrue until all elements of the claim are present, including importantly, damages. In an effort to cover the contingency that this Court may not accept its argument that the issue of actual vs. speculative damages was not raised, the Respondent misapplies *Binkley v. Burry*, 352 S.C. 286, 573 S.E.2d 838 (Ct. App. 2002) as dispositive of the case. *Binkley* involved a claim of legal malpractice following a real estate closing in which the buyers complained that their attorney did not advise them of the consequences of a watershed easement (there appears to be no dispute that the clients were advised of the existence of the easement). Binkley held that because the client knew about the easement at the time of the closing, and resultingly knew that their rights in the property had been invaded, the statute of limitations clock began to run at the time of closing. Because the Appellant argues in the present case that it was left in a sense with a "cloud on the title" to its stock, the Respondent analogizes through *Binkley* that the easement represented a cloud on title as well. Therefore, if the *Binkley* cloud was good enough to start the clock running, so too should the Charleston Labs cloud. Not all clouds are the same, however.

Binkley involved an easement of record. An easement by definition is an established property right. More importantly, "[t]he generally approved definition of an easement is that it is a liberty, privilege or advantage without profit, which the owner of one parcel of land may have in the lands of another; or to state it from the opposite point of view, it is a service which one estate owes to another, or a right or privilege in one man's estate for the advantage or convenience of the owner of another estate." *Forest Land Co. v. Black*, 216 S.C. 255, 261, 57 S.E.2d 420, 423 (1950), citing *Brasington v. Williams*, 143 S.C. 223, 141 S.E. 375; 28 C.J.S., Easements, § 1, Page 619.

[1] The same argument is repeated in Appellant's Statute of Limitations Brief, p. 10.

Not only did the Plaintiffs in *Binkley* have actual knowledge of the easement, they had actual knowledge of an existing right that limited or qualified their ownership of the land as a matter of law. As such, it was easy for the Court of Appeals to "reject the Binkleys' argument that knowledge of the existence of the easement was insufficient to provide them with notice that they may have sustained damages" as "[a]n easement by its very nature involves the right to encroach upon another's property." *Binkley*, at 845.

By contrast, Dr. T had no established rights in the disputed stock. As it relates to the disputed stock, Dr. T had no claim of public record. Dr. T had nothing more than the threat that he may reappear someday in the future and claim that he owned something that he did not – a claim which should have been extinguished through a proper redemption of his shares by the Respondent – a claim which Charleston Labs was advised by their legal counsel to "sit tight", "ignore" and "leave … alone". The established and adverse property right of the plaintiff in Brinkley is not analogous at all to Dr. T's assertion that he may have rights. This is especially true when Charleston Labs' counsel never told its client that Dr. T may have rights because of its errors. Charleston Labs followed its attorneys' advice and did not suffer harm until it was forced to expend money in litigation that was brought in order to make clear the rights in the disputed shares which should have been made clear by its attorneys at the time of the redemption.

b. Appellant Did Not Incur Damages in 2010 or 2011.

Respondent argues in part that the fees paid to the Respondent constitute damages which would support a triggering of the statute of limitations. The Respondent's argument that the fees paid by the Appellant to the Respondent could have been the subject of a claim of disgorgement if in fact the fees were paid for legal services rendered below the standard of care, ignores the fact that the Appellant was ignorant at the time that the services were rendered below the standard of care. If

anything, the fact that the Respondent invoiced its client for services and the invoices were paid demonstrates the ignorance and reliance of the client, as one would reasonably expect a client who believed it was harmed by malpractice to refuse payment – not make payment. Not only did Charleston Labs pay the invoices, it continued to use the services of its trusted counsel. These facts do not suggest that the statute of limitations began to run. Instead, these facts show that Charleston Labs did not know that its attorneys committed malpractice. Moreover, the Respondent certainly did not self-report malpractice to its client.

On April 17, 2018, the American Bar Association issued its Formal Opinion #481 which addresses a lawyer's duty to inform a current or former client of the lawyer's material error. The Opinion explores in part the role of Model Rule 1.4 and the obligation of counsel to consult with their clients so as to permit clients to make informed decisions and to be kept reasonably informed about their legal representation in concluding:

> - The Model Rules require a lawyer to inform a current client in the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that its is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer must so inform the client promptly under the circumstances. Whether notification is prompt is a case- and fact – specific inquiry. Formal Opinion, #481, p. 8.

Not only did the Respondent fail to advise its client of any errors committed in the redemption of Dr. T's shares, it continues to maintain to this day that it did everything properly.[2] If learned counsel with the obligation to self-report errors to its lay client insists that no error was

[2] Please see Respondent's Initial Brief at page 17: "Moreover, Womble was not negligent in its representation, did not breach any duty, or cause any damage to Appellant."

committed, how can one conclude as a matter of law that the lay client should have determined otherwise on its own?

In its Initial Brief, the Respondent argues that the role of Mitchell Ryan in the present case is that the payment to Ryan for legal services related to the stock issue represents legally cognizable damages suffered by Charleston Labs in 2010. As a result, the Respondent contends that all elements of the claim were present and the statute of limitations began to run. Curiously, however, the Respondent does not cite to any legal invoices, checks or other evidences of payment. To the contrary, George Scott testified that for whatever limited services Ryan provided, no payment was made:

> Q: Did Charleston Labs pay Mitchell Ryan fees in order for Ryan & Ryan to assist in these legal matters?
>
> A: I don't believe it actually did. Deposition of George Scott, p.103, ll. 16-19.

Beyond payment to itself, the Respondent overstates and mischaracterizes the role of attorney Mitchell Ryan and the alleged payments to Ryan as a source of damage in malpractice. In its Rule 30(b)(6) deposition, designee George Scott testified as to the limited role of Mitchell Ryan:

> Q: Okay. At this point in time was Mr. Ryan engaged to assist Charleston Labs on legal matters?
>
> A: To assist us on a very narrow aspect of making sure our books, specifically our corporate books, were clean for our valuation.
>
> Q: And part of that making sure they were clean would include making sure the company understood the outstanding shares of stock in the ownership of the company; is that correct?
>
> A: Well, not make sure the company understood it. Making sure it was accurately reflected in our stock ledger and everything else. Deposition of George Scott, p. 96, ll. 6 – 17

***

Q: Did Charleston Labs ever seek from Ryan & Ryan an opinion as to whether or not Charleston Labs had effectively repurchased Dr. T's shares in March of 2010?

A: Charleston engaged Ryan & Ryan to make sure our books -- our stock ledger, our books and records, were clean and up to date for our valuation.

Q: Okay. And I appreciate that. My question is: Did Charleston Labs ever seek an opinion from Mitchell & Mitchell about whether or not it had effectively repurchased Ray's shares under the SRA and SHA?

A: So I'm sorry. No.

Q: Okay.

A: We engaged him to clean our book and records. Whatever that entails, go forth and do. Deposition of George Scott, p. 99, ll. 4-20.

While the Respondent is incorrect in its view of the role of Mitchell Ryan, clearly its argument that payment to Ryan in 2010 represents the accrual of the cause of action for malpractice is flawed without any record evidence of such a payment. The Respondent accurately cites Appellant's concession during the hearing that "a client's injury [in a legal malpractice action] may be the expense of retaining another lawyer" (Respondent's Initial Brief). However, the concession is not with regard to attorney Ryan, but instead is a reference to Bridgette Berry and the Greenberg Traurig law firm, to whom the Appellant incurred nearly two million dollars in legal expense. Again, this is the harm occasioned by the malpractice.

2. Womble Breached its Duties.

Despite its best efforts to recharacterize and sensationalize the Appellant's argument as seeking a requirement of lawyers to prepare "litigation proof" documents, the malpractice and breach of duty here very straight forward. First, the Respondent prepared two documents (the SRA and SHA) that address the same set of rights, but which are inherently inconsistent with each other and

which do not make reference to one another. In its arguments below, the Appellant has consistently maintained that the drafting of two inconsistent documents in and of itself is not malpractice, but it planted the seeds of the malpractice to follow. Appellant has referred to the mere existence of the two documents prior to the attempted redemption as a "victimless crime."

The existence of two inconsistent documents which addressed the same rights became very important when it was time to exercise rights under one or both. At the time of Dr. T departure from the company, the client gave the directive to recover **ALL OF DR. T's SHARES**[3]. Only the exercise of rights under the SHA could have yielded the desired result at that time. The Respondent had a duty to use precision in the exercise of the right to redeem, which duty was heightened by the confusion it manufactured by drafting two inconsistent documents that did not cross reference one another. The reasonable inference to be derived from the evidence is that David Baddour chose the wrong agreement and attempted to go forward with the redemption under the SRA.

The affidavit and deposition testimony of Plaintiff's expert, Dr. Greg Adams, lists the many particulars of negligence committed by Respondent in both the drafting of the SRA and SHA and in the subsequent attempt to exercise rights under either instrument in order to redeem the shares of Dr. T. (**Record on Appeal p.__**). Through Respondent's experts, all of Dr. Adams' opinions are contested, creating material issues of fact in dispute. Although this should dispose of the subject matter as to whether there is a material issue of fact in dispute with regard to the

[3] On March 16, 2010 Bosse called Baddour to ask for legal assistance in terminating Dr. T and reacquiring Dr. T's shares. Following the conversation, Baddour emailed his boss, Dean Rutley, and relayed the conversation. In part, Baddour reported to Rutley: "They need to get rid of Ray T, their COO, but they want to **take all of his stock back (vested and unvested)**." Emphasis supplied and see Email, Baddour to Rutley, March 16, 2010, attached hereto as **Record on Appeal p.__**.

Respondent's discharge of its duties, the Respondent advances a number of red herring arguments on the standard of care which require a brief rebuttal.

a. Hindsight.

First, Womble cites *Harris Teeter v. Moore & Van Allen*, 390 S.C. 275, 701 S.E.2d 742 (2016) for the proposition that a "bad result" cannot be the basis of a malpractice suit and that looking in "hindsight," every case can be tried better. In *Harris Teeter*, the client criticized trial counsel's strategy in defending a commercial claim after the client lost a sizable arbitration award. Specifically, the client questioned why the attorney failed to address certain factors of the *Kiriakides* test regarding the materiality of a tenant's breach of a lease so as to justify the landlord's decision to terminate. Respondent did not litigate any matter for Charleston Labs. Appellant does not complain about a "bad result" obtained through litigation by its trial counsel. To the contrary, Appellant received an amazing result in litigation that was handled by Greenberg Traurig, which litigation was made necessary by the negligence of the Respondent. Respondent is not being criticized through the lens of hindsight. It is being criticized for deviating from the standard of care in both the drafting of the SHA and SRA, and more importantly, in the advice surrounding the exercise of rights to redeem Dr. T's ownership. Moreover, there is no evidence in the record and no argument has been made that David Baddour exercised judgment at all in selecting the SRA instead of the SHA in order to reclaim the shares and/or that his judgment in doing so was not unreasonable as a matter of law. If *Harris Teeter* affords some level of protection for the exercise of professional judgment, as a threshold matter it would be incumbent upon the Respondent to demonstrate that judgment was exercised. *Harris Teeter* is misapplied and inapplicable here.

b. Litigation Proof Documents.

Respondent maintains that the Appellant seeks a standard that requires attorneys to draft "litigation proof documents." Implicit in the argument is that Dr. T took a legal position that was without merit (i.e. a play on Judge Sol Wachtler's oft-cited saying that district attorneys can convince grand juries to "indict a ham sandwich"). Also implicit in the Respondent's argument is the contention that Charleston Labs expected or demanded litigation proof documents in the first place, such that when Charleston Labs received notice of its fired and disgruntled former employee taking a position after his separation that he still owned shares, Charleston Labs was therefore placed on notice that its lawyers committed malpractice.

No one suggests that Respondent had a duty to draft litigation proof documents. The Respondent's theory of notice only works here if the Court accepts its meritless position that Charleston Labs demanded of the Respondent that it produce litigation proof documents. However, the record is devoid of any evidence that Charleston Labs expected litigation proof documents. Moreover, the malpractice lies not in the fact that the documents were subject to judicial scrutiny. The malpractice truly exists in the fact that the client gave Respondent one clear directive: get back **ALL OF DR. T's SHARES**. At the time of the directive (and by virtue of earlier negligence), there existed two documents which addressed the ability to redeem shares – one document created the right to repurchase all shares (SHA) and one document created the right to repurchase only unvested shares (SRA). In drafting the letter to Dr. T by which the redemption was attempted, neither document was expressly identified. The redemption letter to Dr. T was accompanied by a proposed Settlement Agreement which referenced ONLY the SRA (i.e. the wrong document). The tender was rejected and uncertainty ensued over the ownership of the stock. Again, it's not that the documents should have been made "litigation proof", and it's that

Respondent did not understand its own documents and provided negligent advice in exercising rights under the two inconsistent documents it had prepared.

Again, the poor drafting of the SRA and SHA here were definitely negligent, but acted merely as the seeds of the ultimate malpractice. The malpractice itself ripened when it became time to exercise rights to recapture Dr. T's shares and Respondent (apparently confused by its own documents incorrectly focused only on the SRA) provided negligent advice which defeated or diminished Appellant's rights under the agreements. This is somewhat analogous to the recent expansion of duties recognized by our Court in *Fabian v. Lindsey*, 410 S.C. 475, 491, 765 S.E.2d 132, 141 (2014). Prior to *Fabian*, it had been the well-settled law of South Carolina for as long as there are reported decisions that the beneficiaries of a testamentary instrument have no standing to bring a claim of legal malpractice against the drafting attorney. The rule was changed by *Fabian:* "In sum, today we affirmatively recognize causes of action both in tort and in contract by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client's intent." *Id.,* at 141. By analogy here, it was the Respondent's negligent advice in how to exercise rights in order to redeem **ALL** of Dr. T's ownership which defeated or diminished Charleston Labs' intent, both at the time of its execution of the SRA and SHA and at the time of the exercise of its rights thereunder.

Charleston Labs urges the Court to reject the mischaracterization of its action by Respondent through which Respondent attempts to play the victim card as having been unfairly accused and judged by a nonexistent standard. Charleston Labs is the victim. The Respondent was negligent – not by a standard of perfection or hindsight - but rather by a standard of reasonable care.

3. Collateral Estoppel Does Not Apply.

Through the related concepts of equitable and/or collateral estoppel, the Respondent likewise advances the position that the Appellant's claims in the present action are barred by matters litigated in the underlying case. Again, Respondent is incorrect. Central to its confusion over this issue, Respondent suggests to the Court that it is necessary for Charleston Labs to re-litigate matters which were already litigated in the underlying action and/or that Charleston Labs seeks such a re-litigation. Nothing could be further from the truth. Charleston Labs does not seek to contest any finding of the Court in the underlying matter, nor is such a contest necessary for Charleston Labs to prevail on its present claims. The present matter is not complicated:

a. Respondent drafted contemporaneous corporate documents addressing the same subject matter which did not cross reference one another;
b. The SRA and the SHA contained materially different rights, duties and obligations;
c. Respondent advised Charleston Labs on the language to use in separating Dr. T's ownership, and Charleston Labs relied on the advice;
d. After his separation, Dr. T took a legal position regarding his ownership rights;
e. After his separation, Charleston Labs took an opposing legal position with regard to Dr. T's rights;
f. A bona fide dispute arose;
g. Having relied on Respondent's advice, Charleston Labs was forced to file a declaratory judgment action to mitigate against the devastating consequences which would have occurred if Dr. T's interpretation of the SHA and SRA controlled; and,

h. Charleston Labs spent nearly $2,000,000.00 seeking to clarify that which the Respondent was paid to make clear.

These issues are not subject to re-litigation in the present action. The sole question presented in this action was whether the Respondent deviated from the accepted standard of care in its preparation of the corporate documents and/or in its advice surrounding the separation of Dr. T. This issue was not litigated in the underlying case. To contend that because Charleston Labs "won" the underlying action, it must now lose the present case, is to ignore Respondent's role in creating the circumstances that necessitated the underlying litigation in the first place. In point of fact, Respondent's negligence placed Charleston Labs in an untenable position: if Dr. T was correct, Charleston Labs faced a potentially devastating contingent liability for the money raised based on prospectuses reflecting an ownership structure that did not include Dr. T. Moreover, on a going forward basis, how was Charleston Labs to have certainty in its existing ownership structure? How was Charleston Labs to raise additional money? Etc., etc., etc. Not only does the declaratory judgment fail to provide Respondent cover in the present action, the declaratory judgment was necessitated as an effort to mitigate the ongoing harm that Charleston Labs was experiencing because of Respondent's malpractice. Collateral estoppel does not insulate Womble from its own negligence.

4. Judicial Estoppel Does Not Apply.

"The doctrine of judicial estoppel evolved to protect the truth-seeking function of the judicial process by punishing those who seek to misrepresent facts to gain advantage. *Hayne Fed. Credit Union v. Bailey,* 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997); *see also John S. Clark Co. v. Faggert & Frieden, P.C.,* 65 F.3d 26, 29 (4th Cir.1995) (stating the goal of judicial estoppel 'is to prevent a party from playing '**fast and loose**' with the courts, and to protect the essential integrity

of the process.'). As explicitly embraced by our supreme court, '[j]udicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.' *Hayne,* 327 S.C. at 251, 489 S.E.2d at 477. 'When a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.' *Id.* However, the *Hayne* court only adopted **the doctrine as it applies to facts, <u>not law</u>**. *Cothran v. Brown*, 350 S.C. 352, 357, 566 S.E.2d 548, 551 (2002) [Emphasis Added]. The doctrine does not apply here:

a. Any contention that Charleston Labs "misrepresented facts to gain an advantage" is completely without merit. Charleston Labs did not pay $2,000,000.00 in mitigation of Respondent's malpractice to clarify rights which should have been set forth clearly in the documents prepared by Respondent for the purpose of gaining an advantage over Womble or any other party;
b. Any contention that Charleston Labs is "playing fast and loose" with the judicial system is preposterous;
c. A declaratory judgment action by its very nature states that a bona fide dispute exists between the parties which requires the intervention of the court to rectify; and
d. Even if Charleston Labs took the position that the SRA controlled over the SHA in the underlying litigation and/or that the agreements were unambiguous, any such position was purely legal and not factual:
    i. The light was red is a factual allegation;
    ii. The Defendant was at fault in the accident is a legal argument.
    iii. The SRA provides for the redemption of shares is a factual allegation;
    iv. The SRA controls over the SHA is a legal argument.

v. The "fact" alleged by Charleston Labs in the underlying action was the "fact" that it found itself in a bona fide dispute. As alleged in the present action, this fact represented a risk of significant harm to the company if not resolved through litigation.[4]

The test for the application of judicial estoppel is an equitable test that requires Womble to demonstrate to the satisfaction of the Court five (5) factors:

> (1) two inconsistent positions must be taken by the same party or parties in privity with each other;
>
> (2) the two inconsistent positions were both made pursuant to sworn statements;
>
> (3) the positions must be taken in the same or related proceedings involving the same parties in privity with each other;
>
> (4) the inconsistency must be part of an intentional effort to mislead the court; and,
>
> (5) the two positions must be totally inconsistent-that is, the truth of one position must necessarily preclude the veracity of the other position. *Quinn v. Sharon Corp*., 343 S.C. 411, 422, 540 S.E.2d 474, 480 (2000) [Citation omitted]

Charleston Labs denies that it has taken inconsistent factual positions between the underlying action and the present action. The position in the underlying case was clear – Charleston Labs was in a bona fide dispute over the ownership rights of its company. Even if there was an inconsistency (which Charleston Labs rejects), Respondent fails to point to any alleged inconsistency in sworn statements as required by the legal test. More importantly, absent the naked allegations of the Respondent, there is nothing in the record to support a finding that Charleston Labs has sought intentionally to mislead any Court. In the underlying case, Charleston Labs

[4] "If Takigiku was correct, then, among other negative consequences for Charleston, it had raised substantial working capital through offerings which misstated the corporate ownership structure." Complaint, para. 58.

simply urged the Court to accept its legal argument and its legal position as to why it exercised a proper redemption of Dr. T's shares. In the present action, Charleston Labs complains that with proper drafting and adherence to the standard of care, it would not have been necessary to undertake an expensive legal process to make clear that which should have been made clear through the representation of the Respondent.

Not only are the criteria of judicial estoppel lacking in the present case, the policy behind the rule is likewise not implicated. The purpose of judicial estoppel is to prevent the manipulation of the judicial system by the litigants. *Brown*, at 554, citing *Case of Canavan,* 432 Mass. 304, 733 N.E.2d 1042 (2000). To state it otherwise, the purpose of the doctrine is not to protect litigants from allegedly improper or deceitful conduct by their adversaries, but to protect the integrity of the judicial process and the courts. *Quinn v. Sharon Corp*., 343 S.C. 411, 414, 540 S.E.2d 474, 475 (2000) [Citation omitted]. "Deceit and dishonesty are anathema of justice… Judicial estoppel guarantees the protection of the judiciary from the perversion created by a party's inconsistent and untruthful averments." *Id*., at 423, 480. All efforts to knit-pick the complaint in the declaratory judgment action and the complaint for legal malpractice aside, there is nothing in the record before the Court to suggest that Charleston Labs used the underlying case in a deceitful, perverse or manipulative manner to deceive the Court and/or to gain an advantage over Respondent. Simply put, the doctrine of judicial estoppel does not apply.

CONCLUSION

For the foregoing reasons, this Court should reverse the grant of summary judgment to the Respondent and remand this matter for a trial on the merits.

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{SIGNATURE PAGE TO FOLLOW}

Charleston, South Carolina
August 5, 2020

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THE HONORABLE ROGER M. YOUNG, SR.

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PROOF OF SERVICE

I certify that I have served the Appellant's Initial Reply Brief and Supplemental Designation of Matter to be Included in the Record on Appeal on Respondent Womble, Carlyle, Sandridge & Rice, LLP, via email as provided for in the South Carolina Supreme Court Order dated March 20, 2020 regarding the operation of the Appellate Courts During the Corona Virus Emergency Respondent's attorneys of record Robert E. Stepp, Esquire, Benjamin R. Gooding, Esquire, and Jasmine D. Smith, Esquire to their respective AIS registered email addresses.

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