THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

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

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.

APPELLANT'S FINAL REPLY TO THE BRIEF OF RESPONDENT VARSITY FAMILY CARE PARTNERS, LLC

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1. The facts support a reasonable conclusion that Varsity is liable for the damage caused by verbal representations of individuals acting under its direction and control.

Appellant and Respondent Varsity appear in agreement regarding the governing law pertinent to the issues of promissory estoppel, breach of contract, contract modification, and respondeat superior in this case. The disagreement lies in the application of the facts of this case to the relevant law. Specifically, whether there is evidence showing that when Watson, Dr. Lowder, and Dr. Katz made verbal promises of partnership they were acting on behalf of Varsity. Varsity argues that at every single point at issue, the individuals involved in this case acted exclusively in a capacity as a board member of Family Care Partners, and not in their capacities as officials of Varsity.[1] (See Varsity Brief). The facts in the record, however, provide sufficient evidence for a reasonable juror to find that Watson, Dr. Lowder, and Dr. Katz acted as, or at the clear direction of, Varsity officials when making enforceable[2] verbal promises of partnership to Dr. Pridgen.

Watson publicly identified himself as an employee of Varsity. Watson listed his employer on his public LinkedIn page as "Operating Partner / Special Advisor" for "Varsity Healthcare Partners." (R. pp. 3623-3624). In the same meeting that Watson promises partnership to Dr. Pridgen, Watson conveys *Varsity's* intentions as linked to Dr. Pridgen's partnership status. (Watson Recording) ("There's a formula that the Varsity guys have...," "Varsity won't exit until they've got somewhere between 3 to 5 times return on money."). Dr. Soto also describes Watson as a Varsity representative in his sworn testimony, "I can't remember if Tom Watson was still

[1] Varsity's Brief serves as a full-throated endorsement for the liability of the Family Care Partners entity and accordingly the lower court's grant of summary judgment is in error.

[2] Notably, Varsity does not contest the enforceability of such promises. Varsity has only argued that such promises did not originate from individuals acting in a Varsity capacity.

there, which was representing probably Varsity." (R. p. 2108, line 3-p. 2200, line 4). The facts show that not only is Watson a Varsity official, he held himself out as such to the public and to Dr. Pridgen.

Additionally, evidence abounds showing that in any instance, when promises of partnership where made, they were made at the clear direction of Varsity. Dave Alpern is a Varsity official and acted in such capacity. Alpern was on the Family Care Partners board and he was on the board as an appointee of Varsity. (Varsity Brief, p. 10). Alpern holds himself out as a Varsity employee, with an email address of DA@varsityhealthcarepartners.com. (R. pp. 3638-3698). Respondent asserts that this is not evidence of Alpern's connection to Varsity because "varistyhealthcarepartners" is not the name of Respondent "Varsity Family Care Partners, LLC. (Varsity Brief, p. 9). The only logical conclusion from this position is that Respondent must be arguing that these two are not the same entities and that Dave Alpern is somehow affiliated with a second company in the healthcare space named "Varsity," which they have already argued was not the properly named defendant.

Varsity's argument defies logic, common sense, and the record. Respondent agrees that Varsity Family Care Partners, LLC is the majority investor in Family Care Partners. (Varsity Brief, p. 4). Respondent also agrees that Dr. Katz is a board member of the same Family Care Partners entity. (Varsity Brief p. 5-6). The record contains a written offer of partnership in Family Care Partners to Dr. Katz, from Dave Alpern. (R. pp. 3098-3102). This offer of partnership is titled with "Varsity Healthcare Partners" and ends with "Varsity Management Company, LLC." (R. pp. 3098-3102). In this letter offering Dr. Katz partnership, "Varsity Healthcare Partners" a.k.a "Varsity Management Company, LLC" describes itself as follows "VHP's current and realized investment portfolio – consisting notably of … (ii) Family Care Partners, the largest independent primary care

practice in South Carolina." (R. pp. 3098-3102). Unless, in an absurd string of events, Alpern is involved with a separate healthcare investment company named "Varsity" dealing with a separate healthcare company named "Family Care Partners" in the State of South Carolina that has also just so happened to make Dr. Katz a partner at the time relevant to this case, it is clear that "Varsity Healthcare Partners" and "Varsity Management Company, LLC" are simply alternative names, or d/b/as, of Respondent entity "Varsity Family Care Partners, LLC." Varsity, doing business under the name "Varsity Healthcare Partners" publicly claimed Alpern as an employee. Varsity describes Alpern as a "Partner" and claims that he "helped found the Firm in October 2012." (R. p. 3095). Alpern is a Varsity official, and both he and Varsity held him out as such.

Furthermore, the record also shows that Alpern, was giving directions to Dr. Lowder, Watson, and Dr. Katz regarding partnership decisions. Alpern exchanged emails with Dr. Lowder, Watson, and Dr. Katz in which Alpern gave specific instructions for the action to be taken by the medical practice to grant Dr. Baker an opportunity to purchase partnership. (R. pp. 2568-2590); (R. pp. 3722-3799). Alpern, made specific statements to Dr. Lowder, Watson, and Dr. Katz about who Varsity would and would not permit to purchase partnership, including the statement "equity is reserved for our key players who are both productive in dollar collections and 'influencers.'" (R. p. 3726). Alpern also stated that the issue of whether or not an M.D. would be granted an opportunity to purchase partnership was a problem that "we [Varsity] can solve." (R. p. 3728). Watson told Dr. Pridgen that when she requested partnership, Alpern was the person Watson went to in order to ask for more information. (Watson Recording at 25:30). When Dr. Pridgen asked about the amount she would be allowed to invest, Watson responded, "There's a formula that the Varsity guys have... that Alpern has..." "to determine how that applies here." (Watson Recording at 22:18).

Most tellingly, the record further shows that when Alpern was engaged in directing partnership decisions, he was doing so in a Varsity capacity. Varsity was in control of partnership decisions. Respondent agrees that Varsity controlled the majority vote of the Family Care Partners Board, which, on paper, held the power to grant partnership. (Varsity Brief, p. 4). Watson testified that:

> A. I was on the board, but I didn't have the controlling voting rights. I could have said whatever I wanted, it wouldn't have mattered.
>
> Q. And who do you consider to have the controlling voting rights?
>
> A. **Varsity had controlling voting rights on the board.**

(R. p. 1668, line 18-p. 1669, line 2). Dr Soto testified that:

> Q. And describe for me the meetings that you're referring to in that last response.
>
> A. The meetings were whatever they had a -- meetings for us to come and find out what was happening with the practice.
>
> Q. Who is the "they" that you're referring to in your testimony?
>
> A. I guess whoever was in charge of Family Care Partners at the moment.
>
> Q. **Who do you believe was in charge of Family Care Partners** at the time of those meetings?
>
> Varsity Objection
>
> A. **The Varsity people** and Clay Lowder.

(R. p. 2198, line 3-p. 2200, line 4). Dr. Soto went on to explain that Varsity bought and controlled the medical practice. (R. p. 2200, lines 24-35; p. 2205, lines 1-2; p. 2215, lines 12-19).

As referenced above, Dr. Katz's formal offer of partnership came on Varsity letterhead. (R. pp. 3098-3102). It states, "On behalf of **Varsity Healthcare Partners**... and Family Care Partners Holdings LLC... I [David Alpern] am pleased to extend you this offer to join the FCP Board of Directors." (R. pp. 3098-3102). In the email accompanying the formal offer of

partnership from Varsity attached, Alpern states, "On behalf of the Company and VHP [Varsity], please know how excited we are at the prospect of adding you to Family Care Partners Holdings' Board of Directors." (R. pp. 3098-3102).

The evidence is more than enough for a reasonable juror to hold Respondent liable for the promises of partnership made by Watson, Dr. Lowder, and Dr. Katz to Dr. Pridgen. Watson made these statements while he was a Varsity official. Further, each of these individuals made these representations having received directions regarding partnership from Alpern. The evidence shows Alpern to be a Varsity official, and to have been acting in his capacity as a Varsity official while giving those directions. Varsity should not be permitted to get away with having full control over the partnership decisions in the medical practice, and yet taking zero responsibility when promises for partnership are made under their direction. The lower court's ruling in this case is a misapplication of the clear record in this case to law of promissory estoppel and contract modification. Dr. Pridgen respectfully requests the Court reverse the prior orders and remand these issues to trial.

2. Varsity is liable for violations of Title VII and the Equal Pay Act because of the control Varsity exercised over the medical practice pursuant as a Joint or Integrated Employer of Dr. Pridgen[3].

The corporate entities acted jointly in their control over Dr. Pridgen. As previously argued by Appellant, the decision to deny Dr. Pridgen partnership is the underlying straightforward issue in this case, but the denial of partnership is a complex legal dilemma.

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[3] Respondent has not briefed, the issues of whether Dr. Pridgen was discriminated against under Title VII and the Equal Pay Act. The evidence in this case sufficiently demonstrates that Dr. Pridgen was discriminated against such that this case should be put before a jury. Those issues are presently pending before the lower court. The Respondents filed a whole new series of motions for summary judgment the day after the prior summary judgment hearing before the lower court. Here, the key issue as it relates to Varsity is whether it can be held liable as Dr. Pridgen's employer.

2.1. Varsity's control over the medical practice makes it an integrated employer of Dr. Pridgen.

The Fourth Circuit adopted the integrated employer doctrine in *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir. 1999). "Under the 'integrated employer' test, several companies may be considered so interrelated that they constitute a single employer." *Hukill v. Auto Care, Inc.*, 192 F.3d 437, 442 (4th Cir. 1999). In *Hukill,* the Fourth Circuit laid down the following four factor test for this doctrine:

> (1) common management
>
> (2) interrelation between operations
>
> (3) centralized control of labor relations
>
> and (4) degree of common ownership/financial control.

Id. The Fourth Circuit made clear, however, that no single factor is conclusive, and the most critical factor of this test is control. *Id., citing Schweitzer v. Advanced Telemarketing Corp.*, 104 F.3d 761, 764 (5th Cir. 1997).

Respondent is correct that the most recent application of the integrated employer doctrine in this jurisdiction is *Taylor v. Fluor Corp.*, No. CV 6:17-1875-BHH, 2019 WL 4727464, at *4 (D.S.C. Sept. 27, 2019). As Respondent notes, the court in *Taylor* found four factors key in holding Fluor Corporation and Fluor Government Group International, Inc. as an integrated employers of the plaintiff:

> (1) the policies at issue are Fluor Corporation's corporate policies;
>
> (2) the employee reporting hotline is operated by Fluor Corporation;
>
> (3) employees of the Fluor parent entity seamlessly transition between subsidiary entities;
>
> and (4) there are interlocking corporate directors shared by Fluor Corporation and Fluor Government Group International, Inc.

Id. These were the factors relevant in *Taylor but* are not the dispositive factors to be evaluated in every integrated employer analysis. *Id.* The dispositive factors are those laid down in *Hukill. Hukill,* 192 F.3d at 442.

There are similarities between this case and *Taylor. Taylor,* No. CV 6:17-1875-BHH, 2019 WL 4727464, at *4. For example, officials of the parent entity, Varsity, transition seamlessly to the subsidiary entity, Family Care Partners. This is in contrast to Respondent's argument that when making partnership-related decisions, Alpern acted only in a Family Care Partner capacity. (Varsity Brief, p. 10). The record in this case demonstrates that when offering partnership to Dr. Katz, Alpern referenced both entities simultaneously. (R. pp. 3098-3102) ("On behalf of the Company [Family Care Partners] and VHP [Varsity], please know how excited we are at the prospect of adding you to Family Care Partners Holdings' Board of Directors." While allegedly only performing as a Family Care Partners member, Alpern was deploying his messages under a Varsity branded e-mail. (Varsity Brief, p. 9); (R. pp. 3638-3698). Alpern's existence as making control decisions for Varsity, and for Family Care Partners, is evidence of the same interlocking corporate directors recognized in *Taylor. Taylor,* No. CV 6:17-1875-BHH, 2019 WL 4727464, at *4.

Looking more broadly at the determinative principals laid out in *Hukill,* the validity of the application of the integrated employer doctrine in this case only becomes clearer. The record in this case is full of e-mails between individuals from every entity, working collaboratively to manage the singular medical practice they jointly own and manage throughout the time pertinent to this lawsuit. (R. pp. 3638-3698). Most notably, in these e-mails, it is typically Alpern, acting on behalf of Varsity, giving the instructions. This includes even the day to day management of the practice's physicians and other employees. (R. p. 3726; p. 3728; p. 3732; p. 3766; p. 3769; p.

3789). Most notably, in these e-mails it is typically Alpern, acting on behalf of Varsity, giving the instructions. (R. pp. 3638-3698); (R. p. 3726; p. 3728; p. 3732; p. 3766; p. 3769; p. 3789).

Respondent admits, when it comes to the issue of control, Varsity was in charge. (Varsity Brief, p. 16) ("it [Varsity] did own the majority of FCPH which itself owned FCPM, FCPM only had a Management Services Agreement with Colonial."). The Management Services Agreement, which Respondent quickly ignores, is a document which, on its face, turns over control of the medical practice to Family Care Partners, which is in turn only an intermediary entity through which Varsity exercises control over Colonial. (R. pp. 3082-3092).

This conclusion, of Varsity having sufficient control to be liable for the denial of partnership to Dr. Pridgen, is consistent with the testimony of the deponents in this case. For example, Dr. Soto, who is one of the partners, testified as follows:

> A. **When Varsity bought us, we had no say** or at least I felt like we had no say, so no.
>
> Q. Have you personally ever sought to take action towards Dr. Pridgen becoming a partner?
>
> A. It wasn't my place to do anything. I couldn't make decisions on anything. I don't think it mattered if I would have done anything.
>
> ...
>
> Q: If you're not the decision marker, who do you attribute the decision maker to be with regard to Dr. Pridgen becoming partner?
>
> *Objections from Defense Counsel
>
> A: The decision makers, I guess at that moment, I can't remember if Tom Watson was still there, which was representing probably Varsity, And -- and the CEO for the Family Care Partners at that time, I would think that he would probably would be the one to make decisions. Honestly, I don't even know who would make decisions. Dave Alpern? I don't know if Dave Alpern had anything to do with it. I don't really honestly don't know. All I -- when we went to the -- to meetings with them, it was informative, it was never to ask me questions, what did I think or, you know, what to do.

Q. And describe for me the meetings that you're referring to in that last response.

A. The meetings were whatever they had a -- meetings for us to come and find out what was happening with the practice.

Q. Who is the "they" that you're referring to in your testimony?

A. I guess whoever was in charge of Family Care Partners at the moment.

Q. **Who do you believe was in charge of Family Care Partners** at the time of those meetings?

Varsity Objection

A. **The Varsity people** and Clay Lowder.

(R. p. 3198, line 3-p. 2200, line 4). Dr. Soto described that the practice was "sold to Varsity" and that Varsity controlled the business. (R. p. 2200, lines 24-35; p. 2205, lines 1-2; p. 2215, lines 12-19). When asked how he found about that Dr. Baker, a male physician comparator to Dr. Pridgen, was becoming a partner, Dr. Soto answered "That was during the time of Varsity so I guess **Varsity announced that they were going to allow him to become a partner**, but that's probably all I can tell you." (R. p. 2226, lines 22-25). Dr. Lowder's testimony similarly evidences that intertwined nature of these entities for the decision of whether Dr. Pridgen became a partner. (See R. p. 1781, line 14 - p. 1792, line 23; p. 1825, line 9 - p.1829, line 19; p. 1841, line 11 - p. 1842, line 24; p. 1844, line 5 - p. 1846, line 18). Dr. Lowder described it as follows:

Q. From the transaction with Varsity, what benefit did the partners of Colonial receive?

A. What do you mean "benefit"?

Q. Financial in nature?

A. Yeah. Well, they kind of purchased part of our practice and like **-- they purchased like 61 percent of our practice**. I'm sorry, they purchased the whole practice, and then we rolled back 39 percent. I'm a doctor so I don't know financial, but they ended up owning 61 percent and we owned 39 percent, the partners did.

(R. p. 1845, lines 15-25).

At all the relevant times, Varsity was the party at the top of this hierarchy of entities managing the practice where Dr. Pridgen worked. Ultimately, this analysis boils down to the question of who was in control. Time and time again, whether it be the written contractual structure of these entities, the evidence of the day to day operations of the individuals in the medical practice, or the testimony of the deponents in this litigation, the same conclusion is shown: there is interlocking control over the denial of partnership to Dr. Pridgen. Under the laws of this jurisdiction, as an integrated employer, Varsity should be responsible for the discrimination Dr. Pridgen has suffered. The lower court's decision to the contrary is in opposition to the law and facts of this case, thus its ruling should be reversed, and this matter remanded.

2.2. Varsity's control over the medical practice makes it a joint employer of Dr. Pridgen.

The joint employer doctrine is substantially similar to the integrated employer doctrine. Respondent agrees with Dr. Pridgen's discussion of the nine-factor test laid out by this Court in *Butler v. Drive Auto Indus. Of Am.,* 793 F.3d 404, 414 (4th Cir. 2015). (Varsity Brief, p. 16). Respondent correctly identifies that control is the critical, central factor to be evaluated in a joint employer analysis. (Varsity Brief, p. 17 citing *Butler,* 793 F.3d at 414).

The same extensive set of facts identified as evidencing Varsity's control over the medical practice in the context of Dr. Pridgen's integrated employer argument apply equally in the context of this joint employment analysis. The facts are clear, regardless of the confusing corporate structure setup by Respondents as a legal fiction to shield themselves from legal and financial liability, Varsity had control over Dr. Pridgen. As the entity in charge, according to the joint employment doctrine of this jurisdiction, Varsity is liable for the discrimination Dr. Pridgen has

suffered. Thus, the lower court's decision to the contrary is opposition to the law and facts of this case, and its ruling should be reversed, and this matter remanded.

3. **Varsity is liable for the breach of Dr. Pridgen's contract because of the control Varsity exercised over the medical practice pursuant to the amalgamation doctrine and single enterprise theory.**

Dr. Pridgen has fully briefed this issue in her Appellant Brief and her Reply to the 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 and Brief of Respondent Dr. Gary R. Katz. Dr. Pridgen fully incorporates all arguments previously made on this issue herein. To wit, under the well-recognized amalgamation doctrine, also known as single enterprise theory, Varsity's extensive and well-evidenced control over the medical practice renders it liable for the breach of Dr. Pridgen's contract.

CONCLUSION

Appellant Dr. Kaoru Pridgen respectfully asks this Honorable Court to Reverse the holdings of the Circuit Court issued in the December 20, 2019 Orders and Remand this case for the reasons discussed above in the record before the Court.

Respectfully Submitted,

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