THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

CASE NO. 2010-CP-16-0332

(Appeal Tracking Number 2011203391)

Pee Dee Health Care, P.A. ..... Appellant,

v.

Estate of Hugh S. Thompson ..... Respondent.

FINAL BRIEF OF RESPONDENT

John Jay James, II
PAULLING and JAMES, LLP
P. O. Box 507
Darlington, SC 29540
843-393-3881 (Telephone)
843-393-6089 (Fax)
pjlaw507@bellsouth.net (Email)

J. René Josey
TURNER, PADGET, GRAHAM & LANEY, P.A.
Post Office Box 5478
Florence, SC 29502-5478
843-656-4451 (Telephone)
843-413-5818 (Fax)
RJosey@TurnerPadget.com (Email)

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE

This is an action for damages by an employer (the Appellant) against the estate of a former employee (the Respondent). Appellant, Pee Dee Health Care, P.A. ("PDHC") operates a medical clinic and practice in Darlington, South Carolina, and Dr. Hugh S. Thompson, Jr., was a physician in practice with that clinic. Dr. Thompson died on November 5, 2009, as a resident of Darlington County. His Will dated June 26, 2008, was admitted to probate by the Darlington County Probate Court on November 11, 2009, and his children Louise T. Dailey and Hugh S. Thompson, III, were nominated by the Will as Personal Representatives and were duly appointed by the Court.

The Appellant's alleged damages relate to the overpayment of benefits by Medicare to PDHC occasioned by the failure of the physician employee (Thompson) to be properly credentialed with the United States Department of Health and Human Services. This action began when Appellant filed a Summons and Complaint in the Probate Court and petitioned for removal of the action to the Court of Common Pleas pursuant to S.C. Code Ann. §62-1-302(d)(2009). Respondent filed its Answer on June 17, 2010.

The Appellant filed a motion for summary judgment on December 9, 2010 ostensibly based upon admissions made by Respondent in its Answer.[1] The Respondent filed its counter motion for summary judgment on May 20, 2011. The motions were set for hearing on July 19, 2011 where the hearing proceeded without objection.

The Respondent's motion is based upon the Appellant's fault with regard to the matters raised by the complaint and the dispositive nature of that fault element with regard to all of Appellant's causes of action. While some other elements of Appellant's theories might be

[1] Appellant's motion for summary judgment was filed shortly after Defense counsel sought Appellant's consent to a proposed amended answer. R. pp. 198-199 (Motion to Amend Answer).

subject to factual dispute, the Respondent asserted, and the trial court agreed, that the dispositive issue of Appellant's fault had been resolved in an appropriate forum and was binding upon the Appellant in this litigation. Moreover the Respondent asserted, and the trial court found, that Appellant's dispositive fault under South Carolina common law was shown by the record here as well.

The trial court announced its decision to grant summary judgment by letter to the parties dated August 12, 2011 and mailed to the parties that same day. [2] This letter called for the preparation of a more detailed order but the letter itself expressed the general basis for the decision. Pursuant to SCACR 203(b)(1), no one contends that this letter triggered the time to file a notice of appeal. On the same date of this letter, the trial court issued a formal order denying the reconsideration of counsel's disqualification – the next business day (August 15, 2011) Appellant filed a notice of appeal from that formal order and immediately asserted that the trial court no longer had jurisdiction to issue its formal order of summary judgment.

The trial court's formal order of summary judgment against Appellant was dated August 29, 2011 and filed September 1, 2011; the order ended this litigation. The formal order of summary judgment first addressed the procedural status of the case and Appellant's claim that the trial court had lost all jurisdiction. The order specifically found that it did have jurisdiction to issue its formal order under Rules 205 and 241(a) of the SCACR – again an order that merely formalized the decision that had already been made.

The summary judgment order was acknowledged as received by Appellant's counsel, both Mr. Megna (disqualified by the trial court) and his partner Mr. Matthews (continuously qualified counsel of record in the trial court) on September 6, 2011. R. pp. 348-350 (Notice of

[2] R. pp. 584-585 (Judge Baxley Letter of August 12, 2011 Announcing Summary Judgment – Copied to Clerk of Court for file). This is the same day the trial court denied reconsideration of its previous order disqualifying counsel Megna as a witness. R. pp. 13-14 (August 12, 2011 Order).

Appeal and Cover Letter). The notice of appeal for this appeal was mailed to Respondent and filed with the Circuit Court on October 28, 2011. This notice of appeal was filed with the Court of Appeals on November 7, 2011.[3]

Without a valid Rule 59 motion to toll the time to appeal as allowed by SCACR 203(b)(1)(30 days), the notice of appeal served October 28, 2011 was too late. Because Respondent advocates that no valid Rule 59 motion was filed (the purported filing was dismissed *ab initio* by the trial court[4]), Respondent believes this appeal is untimely and the summary judgment ruling is now the law of the case and stands with finality.[5] Nevertheless, Respondent's motion seeking dismissal of the appeal on this basis was summarily denied by order of this Court dated January 9, 2012. Without waiving its position that the appeal of summary judgment was untimely,[6] this brief will address the merits of the summary judgment order.

Appellant's Brief makes two isolated suggestions (page 23 and 35) that Appellant should be granted judgment by this Court. Appeal from the denial of summary judgment is not appealable. See Olson v. Faculty House of Carolina, Inc., 354 S.C.161, 580 S.E.2d 440 (2003); Ballenger v. Bowen, 313 S.C. 476, 443 S.E.2d 379 (1994). Moreover, reviewing the Appellant's itemized list of issues presented and also reviewing the arguments briefed, the trial court's denial of the Appellant's motion for summary judgment is not appealed. Rather this appeal is only from the granting of the Respondent's counter motion for summary judgment.

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[3] This is the third of three appeals in this litigation pending in this Court – all brought by Appellant. The two previously filed appeals (Court of Appeals Tracking Numbers 2011185767 and 2011197671) involve interlocutory issues that are not dispositive of this litigation.

[4] R. pp. 35-36 (Order dated September 28, 2011 and filed October 4, 2011).

[5] Accord Estate of Ronnie Lee Brown v. Coe, 365 S.C. 137; 616 S.E.2d 705 (2005)(holding that notice of appeal by unauthorized practitioner may result in dismissal of appeal – although the Court allowed non-lawyer *pro se* advocate 30 days to secure counsel – leniency not needed here where prior disqualified advocate was an attorney and co-counsel of record was available), clarified by 365 S.C. 664; 620 S.E.2d 323 (2005).

[6] See *infra* footnote 20 (discussion of how such a jurisdictional flaw is not waivable).

STATEMENT OF FACTS

I. The Credentialing Error.

The Appellant and Thompson had an employment relationship from late 1998 to sometime in 2000. Prior to commencing employment with Appellant, Thompson's medical license had been suspended in 1994 by the South Carolina Board of Medical Examiners. As a regulatory consequence of this suspension,[7] Thompson was "debarred" by the Medicare Office of the Inspector General ("OIG"). Thompson regained his license to practice medicine in April 1998. Upon resuming the practice of medicine, Thompson was initially employed with Dr. Don H. Fowler in Marion, South Carolina. When he began with Fowler, Thompson applied for and was given a Medicare "provider" number by Palmetto Government Benefits Administrators ("Palmetto GBA"), the Medicare contractor for South Carolina.

It was this application in which Thompson erroneously certified to the Department of Health and Human Services (and *only* the Department of Health and Human Services) that he was in good standing to provide services to Medicare patients; in fact, he was not eligible because he had not yet sought reinstatement from the Medicare OIG – a needed additional step that he apparently realized in 2002 and completed at that time. Thompson did confirm his prior license suspension in this application to Medicare.

As part of its employment of Thompson, Appellant had Thompson sign a form re-assigning Medicare payments to Appellant for those Medicare patients served by Thompson while an employee at Appellant's practice. On this form, he made no certifications as to Medicare program eligibility. This enabled Appellant to directly receive Medicare payments arising out of Thompson's services to Medicare patients. After leaving the employment of

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[7] See 42 CFR § 1001.501 (a)(1997)(providing for permissive OIG exclusion upon suspension of a state license to practice). See also 42 U.S.C. § 1320a-7 (b)(4).

Appellant, Thompson was employed by First Choice Healthcare, a practice in Florence, South Carolina where he made a similar re-assignment of Medicare payments.

In June 2007, Appellant was notified by Medicare that it owed Medicare some $226,740.19 by reason of "overpayments" to Appellant made with respect to Thompson's services before he was reinstated by the Medicare OIG. First Choice Healthcare received a similar notice of "overpayments" related to Thompson's services rendered at that practice before he was reinstated by the Medicare OIG. Both Appellant and First Choice administratively appealed the alleged overpayments.

II. The Prior Adjudication of the Appellant's Fault.

Appellant opposed the Medicare overpayment claim through multiple levels of administrative appeals. Ultimately, Federal Administrative Law Judge Dean C. Metry found that Appellant "is reasonably expected to know and has an affirmative duty to know the exclusion status of its employees through due diligence prior to entering the employment relationship." Moreover, Judge Metry noted that Appellant "knew that Dr. Thompson's license was suspended indefinitely and that he received a conditional reinstatement after four years." Of course, this awareness only accentuated the Appellant's need to perform required due diligence. The Judge further found that Thompson's exclusion "could easily have been found by calling the Office of Inspector General or visiting their website which lists excluded individuals..." Accordingly, Judge Metry concluded that Appellant was "at fault regarding the overpayment." R. pp. 101-111 (Decision of Administrative Law Judge Dean Metry dated March 14, 2008).

The Medicare Appeals Council – the final level of administrative appeal – upheld the finding of Judge Metry stating that Appellant "failed to exercise due diligence in determining the physician's exclusion status during the hiring process and when completing federal application forms, including a review of excluded individuals listed on the website of the Office of Inspector

General (OIG)." R. pp. 282-286 (Medicare Appeals Council decision dated October 6, 2008). While judicial review of the Medicare Appeals Council may be sought in the United States District Court, 42 CFR § 1004.140(c)(2008)(providing for judicial review of final HHS administrative decisions); see also 42 U.S.C. § 405(g), no such review was sought rendering the administrative decision a final adjudication. In the end, Appellant had to repay Medicare for the overpayment.

III. The Claim Made Here.

On April 14, 2010, the Appellant filed a claim against the Respondent estate to recover for losses related to the Medicare overpayment.[8] The estate disallowed the claim on May 7, 2010. Subsequently Appellant filed an amended claim and Summons and Complaint in the Probate Court and petitioned for removal of this action to the Court of Common Pleas pursuant to S.C. Code Ann. §62-1-302(d)(2009). Respondent filed its Answer on June 17, 2010.

IV. Disagreements With Appellant's Recitation of Case History And Facts.

In determining whether a genuine issue of fact exists with a motion for summary judgment, the trial court must construe the evidence and all reasonable inferences drawn from it in the light most favorable to the nonmoving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). The trial court is not required, however, to misconstrue the facts and the trial court here refused to do so. Appellant's Brief contains numerous misstatements of fact.

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[8] While Appellant has perhaps pleaded and asserted damages in addition to the Medicare overpayment amount, such additional damages have been denied and were not determined by the trial court. Thus, Appellant's Statement of the Case should not include the statement that "Appellant sustained additional damages that exceed $500,000." (Appellant's Brief at 9). SCACR 208(b) (1)(C) provides that the Statement of the Case "shall not contain contested matters....".

A. The General Medicare Application Was Not A Representation To Appellant.

The Medicare form signed by Thompson on June 19, 1998 (that part of OMB Form No. 0938-0685 entitled "Medicare Health Care Provider/Supplier Enrollment Application – General Application") did contain an erroneous certification to the Medicare program of Medicare eligibility.[9] This certification was never, however, a statement made to Appellant and upon which Appellant relied during Thompson's employment. Repeated representations in Appellant's Brief[10] to this form as a statement by Thompson to both Medicare and Appellant *are wrong*. Because this certification was never made to Appellant, it was never actually relied upon by the Appellant. Of course, the trial court's summary judgment ruling is not dependent on this fact of actual non-reliance since the court determined there would be no right to rely anyway.

With regard to the General Medicare Application form, the Appellant acknowledged in the trial court that "This document was obtained during discovery from the Defendant. Plaintiff did not have this application in its possession at the time it employed Decedent." R. pp. 222 (Response to Disqualification Motion, page 23, ¶ 25). Thus, representation of this document by Appellant now as a statement made to Appellant contemporaneous with Thompson's employment is false by Appellant's own prior acknowledgement.

B. The Reassignment of Benefits Form Was Not A Representation To Appellant.

Another new OMB Form No. 0938-0685 was apparently signed by Thompson on November 4, 1998 (only that section entitled "Medicare Federal Health Care Provider/Supplier

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[9] See R. p. 504 (Exhibit A to Appellant's Response to Disqualification Motion).

[10] See Appellant's Brief pages 15 (false application to Appellant), 21 (false certification to Appellant), 23 (certification attesting truth to Appellant), 28 (repeatedly signed attestations), 29 (providing false information to Appellant).

Enrollment Application – Individual Reassignment of Benefits Application").[11] This new reassignment section of the form identified Pee Dee Health Care, Inc. of Darlington as the employer-assignee for Medicare payments at the time. The certification language found in the earlier segment of the form (again a certification to the Medicare program) was not executed. The OMB Form No. 0938-0685 signed in the summer of 1998 had contained a completed section entitled "Initial Group Member Enrollment Application" that identified Fowler Associates, P.A. of Marion as the employer-assignee for Medicare payments at the time.

C. The 2004 Factual Summary Was Not A Representation To Appellant.

Throughout Appellant's Brief, there are hyperbolic insinuations of alleged admissions by Thompson that he had always known of his unperfected Medicare status, always knew how to be re-admitted, and continually failed to share such information in order to deceive Appellant. Brief at page 26 ("his intentional failure to be honest."), page 28 ("However, Decedent continued to intentionally withhold information....."), page 29 ("The misconduct in this case...), page 34 ("The unvarnished truth is..."). Because Appellant chose to wait and bring this action after Thompson could no longer speak for himself, there are no such Thompson "admissions" (or denials), contemporaneous with this litigation, in the record.[12]

Respondent did, however, produce in discovery an unsigned summary of facts that is believed to have been prepared by Thompson on or about May 28, 2004 pursuant to a request from attorneys for First Choice. R. p. 628 (Exhibit II to Plaintiff's Response to Disqualification

[11] See R. pp. 588-589 (Exhibit B to Appellant's Response to Disqualification Motion).

[12] As explained to the trial court at the summary judgment hearing, PDHC was asked to produce all applications for employment by Dr. Thompson (on which credentialing questions could be expected) and PDHC replied that such records were destroyed in the normal course of business after a period of time. See R. p. 485 lines 14-20 (Transcript of July 19, 2011). Thus, either PDHC never made a written inquiry of Dr. Thompson as to his Medicare credentials or, if it did so in a written form, the records corresponding to such inquiry have been destroyed.

Motion). It is this 2004 summary that is cited by Appellant as the basis for its repeated insinuations.

While it is not reasonable to construe this summary as the kind of admission described by Appellant (discussed in subsection D below), even if it were reasonable, this unsigned summary was provided by Respondent in the course of discovery in this case and was not something known to or relied upon by Appellant during the time of Thompson's employment. (Appellant's Brief, page 13).[13] Even if the statement admitted a 1998 fraudulent misrepresentation to the Appellant – which it did not – the trial court found that there was no right to rely on any representations by Thompson anyway.

D. The 2004 Summary Did Not Admit Any Knowing Misrepresentation.

Contrary to the insinuations of full credentialing awareness as of 1998, the May 2004 statement suggests that Thompson "had completely forgotten [the 1996 OIG reinstatement instruction letter] by the spring of 1998" and that Thompson simply misunderstood and did not appreciate the need for both reissuance of a Medicare number by Palmetto GBA and reinstatement by the OIG. The statement advises that Thompson "relied on office personnel who I had reason to believe were conversant with Medicare regulations .... I further concede my ignorance of such details..... I have never had reason to think those persons assisting me had any reason to deliberately misrepresent anything...." Thus, the trial court, which had the 2004 Summary before it, rejected Appellant's mischaracterizations (also used repeatedly in that court) and noted that the instant case lacked "any affirmative misstatements" made by Thompson. R. p. 28 (Summary Judgment Order at page 11).

[13] While not relevant to any asserted claim, Appellant's Brief states that the 2004 Summary was written "to Medicare". (Brief at page 16). There is nothing in the record that indicates that this summary was written or sent to Medicare – not that it would make any difference in the analysis here.

The statement confirms that Thompson did come to an understanding and appreciation of the need for some additional reinstatement steps sometime in 2002 (after he had left employment with Appellant) and completed additional forms in that year. His employer at the time, First Choice, retained counsel "to assure satisfactory compliance...." R. p. 628 (Exhibit II to Plaintiff's Response to Disqualification Motion).

E. Admissions In Respondent's Answer Are Limited.

As noted above, Appellant filed its summary judgment motion before the Respondent's counter motion.[14] This motion sought to impose liability on the Respondent based upon a series of admissions found in the Respondent's Answer. This same litany of admissions is repeated in Appellants Brief (pages 16-19) with the same ultimate suggestion that they entitle Appellant to summary judgment on the issue of liability (page 23). In the argument, Respondent will demonstrate that these admissions do not create liability. In this section, Respondent only seeks to accurately portray the admissions and their limits.

Appellant's Brief (pages 16-19), like its motion for summary judgment, seeks to create an implication of deceit by stringing Respondent's admissions together in manipulative fashion leaving out important facts. Even if such an implication were true, Appellant would still bear the burden to prove justifiable reliance. Nevertheless, Respondent thinks the Court should know the precise scope of its admissions and the context provided by the entire record.

The following admissions have been made:

1) Thompson was debarred by Medicare,

[14] Appellant's motion was apparently not signed by an attorney but signed by a staff person who initialed the signature after signing counsel's name. In addition, the certificate of mailing attached to the filed copy of the motion served facially misrepresents the date of mailing as the date prior to the date of filing stamped upon the mailed copy. R. pp. 196-197 (Plaintiff's Motion for Summary Judgment, stamped cover page, signature page and Certificate of Mailing).

2) that debarment continued in effect throughout Thompson's employment with Appellant,

3) Thompson failed during his employment with PDHC to seek reinstatement from the Medicare office of Inspector General,

4) Thompson was paid during his employment with Appellant, and

5) Thompson owed any employee's duty of loyalty, good faith, and honesty. [15]

These admissions are completely consistent with the Thompson 2004 summary and with Respondent's position – that Thompson simply misunderstood and did not appreciate the need for both reissuance of a Medicare number by Palmetto GBA (accomplished prior to PDHC employment) and reinstatement by the OIG (not accomplished prior to PDHC employment).[16] Of course, Appellant's claim to liability depends upon Thompson having an affirmative duty to disclose his Medicare disbarment status whether he understood it at the time or not; it also depends upon Appellant's justifiable reliance upon Thompson. The flawed elements of Appellant's claims will be addressed in the Argument below.

F. Appellant's Internal Communications Mischaracterized As External Promises.

At page 31 of its Brief, Appellant implies that certain trial court exhibits constitute or confirm promises allegedly made by Thompson or his subsequent employer, First Choice Healthcare ("First Choice"), to keep Appellant apprised of the administrative appeal efforts of First Choice. Exhibit P is an e-mail between PDHC CEO (and general counsel and witness)

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[15] Amidst these admissions, what Appellant's motion for summary judgment did not discuss was the justifiable reliance element of the numerous causes of action (discussed in the Argument below). Respondent's Answer had specifically denied any right of the Appellant to rely upon representations made by Thompson. See, e.g., R. p. 189 (Answer ¶ 46 (denying ¶ 53 of the complaint among others)).

[16] While Appellant has suggested that decedent had a financial incentive to misrepresent or conceal his credential status, there is no evidence that decedent could not have been immediately removed from the OIG exclusion list upon a proper request -- as he was on the first request belatedly made.

Megna and PDHC employee Mark Matthews. R. p. 523. Exhibit U is an e-mail from Megna to First Choice administrator Dean Banks. R. p. 524 Neither exhibit even purports to be a communication from Thompson or First Choice; thus, neither is a promise from Thompson or from First Choice. Again, even if these were promises as misrepresented, such promises would have no impact on the Court's analysis of justifiable reliance discussed below.

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ARGUMENT

I. The Unrelated Interlocutory Appeal Did Not Deprive Trial Court Of Jurisdiction To Rule On The Summary Judgment Motion.

A. Interlocutory Appeals Only Stay Decided Matters -- Jurisdiction Continues.

SCACR 205 provides in the last sentence: "Nothing in these Rules shall prohibit the lower court, commission or tribunal from proceeding with matters not affected by the appeal." Likewise, Rule 241(a) provides, "The lower court or administrative tribunal retains jurisdiction over matters *not affected by the appeal* including the authority to enforce any matters not stayed by the appeal." (emphasis added). See also South Carolina National Bank v. Devine Blossom, 321 S.C. 110, 467 S.E.2d 767 (Ct. App. 1996).

These provisions are consistent with the automatic stay provision found in Rule 241(a) of the SCACR which states that "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters *decided in the order*...." (emphasis added). The primary limitation of this rule is found in the language of the rule itself: the stay only applies to "matters decided in the order" and not those matters unrelated to the scope or effect of the appealed order. Again, this is completely consistent with the continuing jurisdiction provisions of Rules 205 and 241(a).

Respondent agrees that the choice of counsel is an important right which might warrant an interlocutory appeal; however, this importance does not translate into a complete loss of jurisdiction contrary to the rule provisions and does not translate into a stay of *all* continuing matters.

B. The Merits Were Not Affected By Counsel Disqualification.

1. Disqualification Order Did Not Impact Any Element of Any Alleged Theory of Recovery.

In this case, two interlocutory appeals were pending at the time the formal order of summary judgment was signed.[17] As described earlier in the Statement of The Case, these two appeals involved non-dispositive matters. The first appeal (tracking number 2011185767) is a second level appeal from an order of the Probate Court denying a request for bond and dealing with other interim matters of estate administration; this appeal does not involve the merits of the claims asserted here[18] and Appellant's Brief does not contend that this appeal deprived the trial court of continuing jurisdiction.

The second non-dispositive interlocutory appeal (tracking number 2011197671) is from the trial court's order disqualifying Appellant's CEO (a witness) from further service as trial counsel. While certainly affecting the person allowed to continue trial court advocacy, the disqualification order does not decide or impact any element of the twenty causes of action pleaded by the Appellant.

As the trial court observed in its order granting summary judgment, "*Both Rules 205 and 241(a), SCRAP, provide that the trial court has continuing jurisdiction of case issues not affected*

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[17] The trial court actually decided to grant summary judgment on the same date (August 12, 2011) that it determined to dismiss the motion seeking reconsideration of counsel's disqualification. On that date, the court wrote all counsel announcing his summary judgment decision and the reasons therefore; he also requested the preparation of a follow-up formal order. R. pp. 584-585 (Judge Baxley Letter of August 12, 2011 Announcing Summary Judgment – Copied to Clerk of Court for file). Thus, before appellant filed its notice of appeal on August 15, 2011, the trial court had announced its ruling on summary judgment.

[18] In all there were twenty causes of action: (i) breach of fiduciary duty; (ii) negligent misrepresentation; (iii) breach of duty of loyalty to employer; (iv) negligence; (v) breach of contract; (vi) breach of contract accompanied by a fraudulent act; (vii) interference with contractual relations; (viii) fraud and misrepresentation; (ix) failure to disclose; (x) deliberate concealment; (xi) professional malpractice accompanied by fraud, misrepresentation, and negligence; (xii) money had and received; (xiii) promissory estoppel; (xiv) quantum merit; (xv) constructive fraud and constructive trust; (xvi) constructive fraud without scienter; (xvii) equitable indemnity; (xviii) conversion; (xix) equitable restitution; and (xx) civil conspiracy.

by the pending appeal. Clearly, the disqualification of counsel issue does not impact the merits of the case addressed by summary judgment." R. p. 20 (Summary Judgment Order at page 3 (emphasis added)). Even if the automatic stay were triggered, it would only apply to the disqualification order – preventing trial court enforcement of the disqualification; continuing jurisdiction of the merits of summary judgment would be unaffected.

The unpublished Estate of Connor opinion, 2009-UP-502 (Ct. App. October 29, 2009), cited by Appellant's Brief, footnote 4, is very different from the case at bar. In that case, an appeal questioning the appointment of the estate administrator *did affect* the ongoing authority of the purported administrator to continue estate administration. Hence, the trial court's refusal to dismiss a petition by the uncertain administrator to approve the subsequent selling of real estate was reversed because such an act of estate administration would alter the estate itself and thereby impact the potential claims of litigants. Thus, it was held that the automatic stay provisions of Rule 241, SCACR, prohibited further acts of estate administration. Here, nothing about the disqualification of counsel altered the corporate Appellant or its claims against Respondent.

Even if it were applicable (again, only to prevent enforcement of the disqualification), the automatic stay provision of Rule 241(a) also is subject to an express list of exceptions. In this case, the exception found in SCACR 241(b)(8) is precisely on point. This exception provides that restraining orders and injunctions are not subject to an automatic stay – lest those orders be rendered meaningless. Here, the disqualification order enjoins and restrains disqualified counsel from further trial court participation. Clearly an order regarding the continued involvement of disqualified counsel in trial court proceedings is a matter that is not stayed – otherwise, the trial court's initial determination would be meaningless and the trial court's control over proceedings before it would be lost.

Unable to point to any impact upon any element of any cause of action such that continued jurisdiction of a summary judgment would be stayed, Appellant apparently suggests that basic notions of fairness and due process would require the trial court to stay consideration of summary judgment so as to allow "sufficient time to determine if it intends to appeal the order of this Court disqualifying the undersigned...." Appellant's Brief at 34-35. This nonsensical statement suggests that an appeal should stay the trial court so that a decision can be made on whether to appeal.[19]

[19] Appellant's Brief (page 35) also suggests a stay was alternatively needed to "adequately prepare its case for trial after completion of discovery." While unclear, perhaps Appellant is suggesting that the dispositive motions were not ripe for consideration. Perhaps sensing the inevitability of summary judgment against it, this suggestion was also made in the trial court by Appellant, R. pp. 530-540 (Plaintiff's filed letter to trial court of July 8, 2011) although it was Appellant who filed the first dispositive motion. The trial court quickly observed that Appellant should not have first asked for summary judgment if it were not ready. R. p. 290 (Defendant's Reply in Support of Summary Judgment, footnote 4) (referencing trial court letter of June 23, 2011). Respondent offered to consent to a withdrawal of Appellant's motion if not ripe, R. p. 457 (Transcript of July 19, 2011 at page 27, lines 7-19); a similar trial court invitation to object to the hearing on the motion was declined. See R. p. 433 lines 3-24 (Transcript of July 19, 2011).

Along this same theme, another section of Appellant's Brief (page 9) states "The circuit court would not allow depositions to be taken by Appellant even though the Appellant raised the issue on several occasions." ***This is not true.*** The parties agreed to delay depositions pending the trial court's determination of pending motions. Appellant's counsel advised the trial court in his letter of February 4, 2011 that "the parties have agreed to suspend further discovery pending the decisions of the Court on the various motions that are now pending" R. p. 300 (Exhibit B, Defendant's Reply in Support of Summary Judgment). Moreover, as the trial court noted in its order of summary judgment, "Additional discovery is not needed in this case ... to determine the preclusive effect of the Plaintiff's prior litigation. Plaintiff has failed to identify any discovery that might alter the applicability of the Medicare administrative determination." R. p. 27-28 (summary judgment order at page 11). As noted in the Respondent's trial court presentation, the Appellant never re-noticed (through either of its two attorneys) any depositions after the February 4th representation to the Court. R. p. 457 lines 12-14 (Transcript of July 19, 2011).

2. The Trial Court Did Not "Stay" the Disqualification Order; It Allowed A Limited Exception.

Appellant's Brief (page 9) incorrectly claims that the trial court itself "stayed" its order of disqualification. Of course, a stay as imagined by the Appellant would allow continued trial participation by disqualified counsel without limitation. The trial court, however, made clear in reaffirming its disqualification that it did not stay its order of disqualification – it simply allowed disqualified counsel the privilege of a limited appearance to argue dispositive motions. R. p. 13 (August 12, 2011 Order at page 1). Thus, the trial court did not deny the Rule 59(e) motion to reconsider summary judgment but dismissed it *ab initio.* R. p. 35 (September 28 Order, page 1). Similarly, the court had previously dismissed other unauthorized activity by disqualified counsel – "The Court granted Plaintiff's counsel [Megna] a limited appearance only. Therefore, all motions, subpoenas, and filings signed only by disqualified counsel, Tony R. Megna ... are hereby QUASHED. "[20] R. p. 13 (August 12, 2011 Order at page 1).

Of course, the trial court's original disqualification had been clear. That Order had provided:

> The Court orders complete disqualification effective with the execution of this order. The Court concludes that it is not feasible for Mr. Megna to remain involved as counsel of record even before trial. The potential for problems would exist even with depositions and other pre-trial functions. The immediate availability of Mr. Megna's partner eliminates any hardship or difficulty associated with this effective date.

[20] While Respondent will not reargue its motion to dismiss here, an invalid Rule 59(e) motion would not toll the time to appeal from the order of summary judgment thereby rendering the notice of appeal in this very appeal untimely. Of course, the absence of a timely notice of appeal deprives the appellate court of jurisdiction. Mears v. Mears, 287 S.C. 168, 337 S.E.2d 206(1985); Conner v. City of Forest Acres, 348 S.C. 454, 560 S.E.2d 606(2002). Of course, by not re-arguing its motion to dismiss the appeal here, Respondent does not waive any flaw in the Court's subject-matter jurisdiction. Amisub of South Carolina, Inc. v. Passmore, 316 S.C.112, 447 S.E.2d 207 (1994) (noting that appellate courts have a duty to raise any lack of jurisdiction on their own).

R. p. 12 (Disqualification of Counsel Order, dated April 15, 2011, page 9 (incorporating footnote 11)). The Order reinforced the directive given by the Court directly to counsel in the Courtroom on March 16, 2011, "***It begins now.***" R. p. 427 (Transcript at Page 38, lines 5-6 (emphasis added)).

3. Appellant Not Prejudiced As Chosen Counsel Allowed To Argue Summary Judgment.

Despite its general disqualification of counsel earlier in the matter, the trial court allowed disqualified counsel (Appellant's preferred counsel) to argue both the motions for summary judgment and the motion to reconsider disqualification. As noted in the Summary Judgment Order, "this was done to eliminate any alleged prejudice or disadvantage with regard to the motion presentation." R. p. 19 (Summary Judgment Order at 2).

Indeed, all of the Appellant's legal memoranda and motions *considered by the trial court* after the order of disqualification were submitted by disqualified counsel. Thus, even if the automatic stay were to apply to the disqualification of counsel such that his continued participation at trial could not be prohibited pending appeal, nothing different would have occurred in this matter. Thus, no harm or prejudice has occurred in this case. Moreover, the participation of chosen counsel confirms that Appellant's present suggestions of unfairness or ineffective counsel (Brief pages 34-35) are contrived.

II. The Trial Court's Order of Summary Judgment Was Not In Error.

A. Lack of Justifiable Reliance Is Fatal To All Viable Claims.

As noted earlier, the Appellant's complaint asserts a potpourri of legal theories including fraud, negligence, and equitable indemnification. The trial court held that all viable theories of the Appellant require a right to rely on alleged representations and/or omissions, and require that Appellant not have its own unclean hands or causative lack of diligence. As the trial court

summed up, "*The Plaintiff Must Be Without Fault.*" R. p. 24 (Summary Judgment Order, Conclusion of Law C, page 7 (emphasis added)). This holding is unchallenged by Appellant's Brief.

In fact, Appellant's Brief does not deny the affirmative requirement that justifiable reliance be shown; rather, the Brief simply argues (pages 25-26) that the trial court reached the wrong conclusion – the conclusion that no right to rely on Thompson's alleged misrepresentations could be shown. Appellant's Brief accurately quotes the holding of McLaughlin v. Williams, 379 S.C. 451, 458, 665 S.E.2d 667, 671 (Ct. App. 2008), where summary judgment was deemed appropriate where the party asserting justifiable reliance had "knowledge of the truth of the matter...." In McLaughlin , summary judgment for a home seller was affirmed against the complaint of a buyer that the disclosure form was inaccurate because the buyer had access to "red flag" information from a home inspection report that advised of the water damage that was undisclosed. This case is no different.

Appellant's Brief (page 25) also cites the case of West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334,337 (Ct. App. 2000), for the proposition that justifiable reliance be determined from the totality of the circumstances including the positions and relations of the parties. This is true as well. In West, summary judgment for a seller was also affirmed against a buyer's counterclaim of misrepresentation in the sale of stock. Summary judgment was appropriate because the seller produced un-refuted evidence that the buyer had extensive access to corporate officers and corporate financial records – more information than seller had – prior to the purchase. Again, the case at bar is no different.

With regard to Appellant's equitable claims, Appellant again does not dispute the need for clean hands to proceed in equity; indeed Appellant's Brief (page 29) accurately cites four cases to this effect. Relying upon the same misconstruction of facts, however, Appellant's Brief

seeks to focus on the inequity of Respondent's "falsification of information" while suggesting that the charge of lack of due diligence against it with regard to credentialing was "speculative." Appellant's Brief, page 30. This actual lack of due diligence and the circumstances surrounding it will be discussed below.

Because the Appellant was so clearly precluded from proving the clean hands necessary for equitable remedies, the trial court did not devote time to the other factors and elements required for these remedies. In its Brief (pages 32-33), the Appellant focuses on its claim to quantum meruit or restitution. Appellant suggests the trial court erred in failing to provide relief to Appellant based upon quantum meruit or restitution. As the trial court identified, quantum meruit is actually an action at law that is governed by equitable principles. R. p. 25 (Summary Judgment Order, page 8 footnote 10).

Again, with regard to these two theories of recovery, the trial court ruled that the Appellant lacked the clean hands needed. As noted above, Appellant's Brief does not deny the requirement of clean hands but rather seeks to paint a sense of inequity around the Appellant's repayment obligation by myopically focusing only on its financial costs and not its legal responsibilities. Even if Appellant had clean hands, however, these theories are inapplicable to the facts as pleaded by the Appellant.

These theories seek to correct some unjust enrichment or inequitable windfall to one party at the expense of the other; thus, they might apply if Thompson got paid for services not performed or somehow got paid twice for the same services. Nothing like that happened.

Thompson did perform services for his salary and those services triggered direct payments by Medicare to the Appellant (not Thompson) as provided for in the "Individual Reassignment of Benefits Application" signed for Appellant; correspondingly, it was Appellant who was notified and obligated to repay Medicare for overpayments due to Appellant's un-

credentialed employee. R. p. 166 (Complaint ¶ 12). There is no proof that Thompson received any unexpected or unearned benefit for his actual work beyond the salary to which Appellant agreed. There is no evidence that Thompson was paid for work he did not perform and there is no evidence that he was paid twice for the same work. Thus, Thompson was not unjustly enriched.

Moreover, quantum meruit is an extra-contractual remedy applicable when a benefit is conveyed without compensation; it isn't applicable in a contractual situation where the compensation for a particular service or benefit is spelled out by contract. Swanson v. Stratos , 350 S.C. 116, 564 S.E.2d 117 (Ct. App. 2002)(quoting from 66 Am. Jur. 2d Restitution and Implied Contracts § 81 (2001)("It is a defense to an action in quantum meruit that there is an express contract covering the issue of compensation for services or materials furnished.")). Again, here Thompson was compensated for services actually provided pursuant to a contractual relationship (employment). R. p. 164 (Plaintiff's Complaint ¶ 6 ("the decedent entered into an 'at-will' employment contract with Plaintiff's medical practice as a physician.")).[21]

In Section VIII of its Brief (pages 33-34), the Appellant confuses the justifiable reliance requirement of its affirmative claims with the defense of prevention. As it did in letters to the trial court, made part of the record and considered as such, R. pp. 293-298, 530-540 (Megna letter of May 27, 2011 (Exhibit A to Defendant's Reply in Support of Summary Judgment) and Megna letter of July 8, 2011 filed the same date)), the Appellant cites the cases of Champion v. Whaley, 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984) and The Huffines Co., LLC v. Lockhart, 365 S.C. 178, 617 S.E.2d 125 (2005). Champion and Huffines involved real estate brokers suing the sellers of real estate for sales commissions where a condition precedent to the

[21] While Appellant had pleaded a breach of contract cause of action, it is not addressed by Appellant's Brief and is therefore abandoned. Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989) (Reply Brief cannot be used to argue issues not argued in Appellant's Brief). Of course, there is no evidence that Thompson failed to perform the patient services for which he was paid.

commission was the sale of the property. The brokers in each case asserted that the sellers "prevented" the satisfaction of the conditions precedent; therefore, the brokers argued that the sellers could not hide behind the contrived failure of those conditions to avoid payment of the commissions.

Respondent argued and the trial court found that Appellant could have prevented the credentialing failure here through its own due diligence and that it had no right to rely upon anything Respondent did or did not do. This is not a case where Respondent manufactured some failure of a condition precedent in order to avoid a contractual obligation. The case at bar is not one of contract with conditions precedent. Moreover, nothing the Decedent Thompson did or did not do prevented the Appellant from fulfilling its own obligation of due diligence with the Medicare OIG. This case has nothing to do with the existence or non-existence of a "prevention" defense.

B. South Carolina Common Law Precludes Appellant's Justifiable Reliance

Just as noted in Appellant's Brief (page 25), under South Carolina common law, the right to rely upon the acts or omissions of another depends upon the totality of facts and circumstances including: (1) the availability and access to accurate information; (2) the position and experience of the parties with regard to the subject matter; and (3) the duties imposed upon the parties by operation of law. Each of these factors supports the trial court's finding in this case precluding any justifiable reliance by Appellant.

With regard to the first item, the trial court noted that the information needed by Appellant was publicly available just like the information in Quail Hill, LLC v. County of Richland, 387 S.C. 223, 692 S.E.2d 499 (2010) (availability of county records prevented reliance

even upon county employee's misstatement). [22] R. p. 28 (Summary Judgment Order, p.11). Appellant suggests, however, that there can be no finding of fault by Appellant in this litigation because there has been no evidence offered in this matter that Appellant had access to publicly available Medicare OIG information (such as a debarment list on a web site). Appellant's Brief at pages 22, 23, 26, and 30.

Respondent has not independently offered evidence as to what was publicly available in 1998 because of the applicable efficiency of the doctrine of collateral estoppel; the doctrine eliminates the need to re-litigate issues or disputed facts that are already determined. Thus, if the doctrine applies, there is no need for litigants to burden the court with a new presentation of old evidence and there is no need for a tribunal to reconsider settled matters. Cited by Appellant's Brief (pages 24-25), the very recent case of Crosby v. Prysmian Communications Cables and Systems USA, LLC, 2012 S.C. App. LEXIS 47 (Opinion No. 4876)(Ct. App. February 6, 2012)("we find the circuit court properly gave preclusive effect to the factual finding of the [administrative body]"), demonstrates this point well. This decision and collateral estoppel will be discussed in greater detail below.

In addition to the preclusive effect of Judge Metry's finding of publicly available information, a review of legal authorities applicable at the time confirms the availability of such

[22] Prior to reaching this conclusion, the trial court lists a progeny of cases prior to the Quail Hill decision – cases that preclude reliance in circumstances where the parties have similar knowledge or access to needed information. R. pp. 24-25 (Summary Judgment Order at pages 7-8). This progeny included the following: Ardis v. Cox, 314 S.C. 512, 431 S.E.2d 267 (1993) (no right to rely "when one should have utilized precaution and protection to safeguard his interests")(sale of underground gasoline tanks); Jones v. Cooper, 234 S.C. 477, 109 S.E.2d 5 (1959) ("One cannot rely on the misstatement of fact if the truth is easily within his reach.") (sale of hotdog cooking machine); Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) ("One with knowledge of the truth or the means by which with reasonable diligence he could acquire knowledge cannot claim to have been misled.") (no negligence, no fiduciary duty, no conversion of pledged assets where guarantor fails to read/understand guaranty obligations to bank)(quoting Southern Development Land & Golf Co. v. South Carolina Public Service Authority, 311 S.C. 29, 426 S.E.2d 748, 751 (1993).

information.[23] See 42 CFR § 1001.2006(a) (1997)(providing that notice of excluded HHS providers will be provided to the public by OIG); see also 48 CFR § 9.404 (providing that the General Services Administration shall maintain a list of all parties debarred by any federal agency). Moreover, the directions on how to access the GSA database 24 hours a day, 7 days a week are also codified in the 1997 regulation. 48 CFR § 9.404 (d) (2).[24]

With regard to the second factor -- the position and experience of the parties with regard to the subject matter, this factor too supports the trial court's conclusion. While Thompson was a physician, it was Appellant that had a staff of health care administrators including an attorney as Chief Executive Officer. Indeed, the 2004 factual summary relied upon by Appellant for its admissions, states that Thompson relied on his employers and their administrators for their Medicare experience and expertise. As the trial court found, Appellant is a "sophisticated medical employer with at least seventy-five employees, including other credentialed employees." R. p. 29 (Summary Judgment order at page 12). Again, the cases confirm that there is no right to rely in an arm's length relationship between mature, educated people --"[t]his is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." Ardis v. Cox, 314 S.C. 512, 431 S.E. 2d 267 (1993)(sale of underground gas tanks)(citing Poco-Grande Investments v. C&S Family Credit, Inc. , 301 S.C. 322, 391 S.E. 2d 735 (Ct. App. 1990); see also Jones v. Cooper, 234 S.C.477, 109 S.E.2d 5 (1959)(sale of hot dog cooking machines).

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[23] As the trial court concluded, if PDHC had checked these public sources, the problem could have been avoided. Either Dr. Thompson's credentialing deficiency could have been addressed and corrected before he saw Medicare patients on behalf of PDHC, or PDHC would have refused employment to Dr. Thompson. Thus, PDHC's failure was the direct cause of the financial loss of which it now complains. R. p. 26 (Summary Judgment Order, page 9 footnote 11).

[24] The 1997 Code of Federal Regulations remained in effect until October 1, 1998. All of the historical versions of the Code of Federal Regulation are available through the web site of the Government Printing Office found at www.GPO.gov.

Finally, with regard to the third factor -- the duties imposed upon the parties by operation of law, it is not only the common law cited above that imposes a duty of due diligence upon the Appellant to investigate publicly available credential information, it is express federal law as well. As the trial court noted, both federal statute, 42 U.S.C. § 1320a-7a (a) (6), and federal regulation, 42 CFR 1003.102(a) (2), impose liability upon employers who "should know" of the program exclusion of their employees. Thus, the Appellant was imposed with a non-delegable duty under federal law. Certainly this factor cannot support any right to rely under South Carolina law.

C. Appellant's Fault Was Fully Determined With Finality.

In addition to being clear from the record in this case, and clear from the codified notice of debarments, the issue of Appellant's fault has already been determined with finality. Specifically, in a matter fully litigated by PDHC, a federal Administrative Law Judge found that PDHC "is reasonably expected to know and has an affirmative duty to know the exclusion status of its employees through due diligence prior to entering the employment relationship." R. p. 110 (Metry Decision of March 14, 2008).

As with the law requiring justifiable reliance, Appellant's Brief does not deny the doctrine of non-mutual offensive collateral estoppel; rather, Appellant seeks to avoid its application by suggesting that it did not have "a full and fair opportunity to litigate" the issue of fault. The Brief suggests (page 24) that the liability under "federal regulatory law" differs from the state law concept of fault that might control Appellant's claims. Appellant's Brief even suggests (page 9) that the Administrative Law Judge in the underlying Medicare overpayment claim applied "strict liability".

First, Judge Metry clearly states that he is basing his decision upon a finding of fault by PDHC -- strict liability is not even discussed. Additionally, a review of Judge Metry's order

itself confirms that his finding of "fault" is exactly like the state common-law concept of fault found in McLaughlin and West cited by the Appellant as well as the other cases relied upon by the trial court in this matter.

In his order, Judge Metry found the *un-denied* red flag that PDHC "knew that Dr. Thompson's license was suspended indefinitely and that he received a conditional reinstatement after four years."[25] The Judge noted that PDHC's applications for Medicare payment of Dr. Thompson's services "inquired about any exclusions or sanctions." Precisely like Quail Hill which found that the purchaser could have determined property's true zoning classification by due diligence in reviewing public records, Judge Metry found that Thompson's exclusion "could have easily been found by calling the Office of Inspector General or visiting their web-site which lists excluded individuals....." Therefore, Judge Metry concluded that PDHC was at "fault regarding the overpayment." Nothing unique about this fact driven conclusion makes it limited to "federal regulatory" matters or equates to strict liability theory.

Appellant's argument that collateral estoppel should not apply because a different litigant (First Choice) achieved a different result in presumably similar litigation is equally unpersuasive; it is the full and fair litigation opportunity of Appellant that controls their legal position now – not the litigation opportunity and result of a third party. There is no exception to the doctrine of

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[25] This finding by Judge Metry is also confirmed in the record of this case. Appellant submitted the affidavit of former PDHC President and physician James McInnis which confirmed his contemporaneous knowledge of Thompson's "troubles" with the state medical licensing board. R. pp. 384-385 (Exhibit Y to Plaintiff's Response to Disqualification Motion dated March 11, 2011).

Appellant's Brief affirmatively states "The Appellant had no knowledge of the matter." (page 11) (references omitted). For purposes of the summary judgment motion made against Appellant, it is certainly appropriate to presume that Appellant did not *actually* know of Thompson's debarment. Appellant takes its denial one step further, however, by also denying that it had any reason to know of Thompson's debarment. Brief page 30 ("Neither Appellant or its representatives knew or had reason to know...."). Obviously, this is disingenuous given their admitted knowledge of his prior state licensure trouble. Of course, Appellant's obligation to use due care in its own credentialing research of public information was not dependent upon any pre-existing level of knowledge; that prior knowledge only heightened Appellant's need to use that care.

collateral estoppel for cases where a different result was achieved in similar litigation by a third party.[26]

Appellant also suggests that collateral estoppel is not appropriate because it did not have the 2004 summary when litigating before Judge Metry, but nothing in that statement alters the factual basis for Judge Metry's finding of a lack of due diligence. Without meeting its own statutory and common law duty of due diligence, the Appellant could not rely upon any 2004 factual summary from Thompson no matter what admissions or omissions it might contain. Moreover, while discovery is limited in the administrative process, it does exist. See 42 CFR § 1005.7(1997). More importantly, the Appellant had the opportunity to seek judicial review of Medicare Appeals Council's decision in the district court where Appellant could pursue full discovery of any statements or summaries that it had not already obtained. 42 CFR § 1004.140(g)(1997) (providing for judicial review of final HHS administrative decisions) ; see also 42 U.S.C. § 405(g). Appellant chose to abandon that opportunity and live with the findings of the Medicare Appeals Council. Any regret over that abandonment does not change the applicable doctrine of collateral estoppel.

Any implication that Appellant is not bound by the factual findings in the administrative adjudication because it was not judicial is not an accurate implication. The decision of Appellant to accept the decision of the Medicare Appeals Council without seeking any further review does not render the adjudicated holdings of that forum any less final, any less fair, or any less binding.

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[26] Appellant has suggested the existence of a duty of the Decedent to keep the Appellant informed of legal steps and procedures taken by a third party (First Choice) in litigation where the Appellant was not a party. This alleged duty is not the basis of any pleaded claim in the Appellant's complaint and the Appellant offers no legal authority supporting the existence of such a duty. The trial court found no reason to imply or impose such a duty – particularly with a sophisticated employer like the Appellant. Moreover, the record made by Appellant confirms that it made contact directly with that third-party and its counsel – confirming that these professional medical practice administrators did not need Thompson to attempt voluntary collaboration with other parties similarly situated. R. pp. 523-524 (Exhibits P and U to Plaintiff's Response to Disqualification Motion dated March 11, 2011).

Whether those holdings became the binding law of the case through more exhaustive judicial review or through abandonment of further review is of no moment. Moreover, even administrative findings of fact can serve as the basis for issue preclusion.

In Crosby v. Prysmian Communications Cables and Systems USA, LLC, 2012 S.C. App. LEXIS 47 (Opinion No. 4876)(Ct. App. February 6, 2012), this Court held that the factual finding of an on-the-job injury in an administrative worker's compensation proceeding precluded the employer from re-litigating that finding as part of its defenses in a circuit court action for retaliatory discharge. As a result of this issue preclusion, the worker was entitled to summary judgment with regard to affirmative defenses of the employer that were based on its claim that the worker's compensation claim was fraudulent. Crosby noted that the South Carolina Supreme Court had "repeatedly held that, under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action." Id. quoting Bennett v. S.C. Dep't of Corr., 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991) (citation omitted).

Crosby did acknowledge that some administrative findings might not be entitled to preclusive effect – such as a finding of the Employment Security Commission on the issue of wrongful discharge. Id. citing Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 254, 481 S.E.2d 706, 709 (1997). In Shelton, the countervailing consideration that warranted re-litigation of the wrongful discharge issue was differing nature of Employment Security Commission proceedings where the both the policy and procedure promote low-stakes expedited determinations often without party participation and without counsel. Shelton, 325 S.C. at 252-54, 481 S.E.2d at 708-09.

Clearly, the administrative decision relied upon by the trial court here to preclude re-litigation of the Appellant's fault met the procedural requirements of collateral estoppel in this

state. The three primary requirements are that the precluded issue was "(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Appellant's Brief at 25; Crosby quoting Carolina Renewal, Inc. v. S.C. Dept of Transportation, 385 S.C.550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). Here, the issue of Appellant's fault in this credentialing failure was actually litigated and it was directly determined by the Administrative Law Judge. Finally, that determination of fault was necessary to support the decision that PDHC had received a Medicare overpayment.

Appellant's Brief does not articulate how the Medicare determination failed to meet these requirements or exemplified a case of countervailing consideration. But the Medicare determination here is quite distinguishable from the typical Employment Security Commission finding described in Shelton. Here, the Medicare process followed is codified in federal regulations and it is not expedited. Moreover, the process is not one where the stakes are low and parties often decline to participate. Finally, the Appellant here actually did participate with the CEO himself advocating through multiple levels of the administrative process before ultimately throwing in the towel rather than pursuing judicial review.

Interestingly, while Appellant denies the applicability of collateral estoppel to show its fault and preclude its proof of justifiable reliance, Appellant offers nothing to satisfy its affirmative burden of proof to show justifiable reliance – particularly in light of the Metry findings. Despite repeated references to the various affidavits filed by Appellant, Appellant's Brief at 22, 30, 31, 33, there is no affidavit suggesting that Appellant did perform due diligence by checking the debarment list – that is, Appellant does not claim that it looked at the list and Thompson was not there.

D. Remaining Appealed Claim Not Viable – Thompson Owed No Fiduciary Duty.[27]

Appellant's Brief attempts to parlay Respondent's admission that Thompson owed a duty not to lie to his employer together with Thompson's status as a physician into a special fiduciary relationship. Appellant then argues that silence by a fiduciary may constitute fraud. Appellant's Brief at 27-29. Just as in the trial court, Appellant cites no authority in support of the notion that all physician employees are fiduciaries to their sophisticated employers. The trial court rejected this notion. There is no evidence to support a conclusion that Decedent's relationship with Appellant was anything other than a normal employer-employee relationship.

Moreover, in this case, the same common-law factors that preclude any justifiable reliance by the sophisticated Appellant on the clinician Thompson are precisely the factors that also prohibit the creation of a relationship of special confidence and trust.[28] Decedent's special duties as a physician, if any, were to his patients—not to a sophisticated medical employer with at least seventy-five employees, including other credentialed employees.

Despite Appellant's unilateral efforts to assert a fiduciary relationship now, "as a general rule, a fiduciary relationship cannot be established by the unilateral action of one party. The other party must have actually accepted or induced the confidence placed in him." Regions Bank

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[27] Appellant also asserted causes of action for contractual interference (7th), conversion (18th), and conspiracy (20th). None of these causes of action are applicable to the facts of this case. These theories which the trial court foreclosed are not advocated in Appellant's Brief and are therefore abandoned. Appellant's Brief does cite one case regarding Civil Conspiracy without explanation, on page 28, in the middle of the fiduciary duty argument. See Bochette v. Bochette, 300 S.C. 109, 386 S.E.2d 475 (Ct. App. 1989) (Reply Brief cannot be used to argue issues not argued in Appellant's Brief). Accord Fields v. Melrose Ltd. Partnership, 312 S.C. 102, 439 S.E.2d 283 (Ct. App. 1993) (issue may be deemed abandoned where conclusory argument provides no supporting authority).

[28] Appellant's Brief (page 28) suggests the corollary applies here: that the existence of the fiduciary relationship between the parties created a right to rely. While Respondent's agree that there may sometimes be such a corollary for fiduciary relationships, it certainly isn't applicable to these facts. The dated case of Thomas V. The American Workmen, 197 S.C. 178; 14 S.E.2d 886 (1941), partially quoted in the Appellant's Brief (page 26), described the relationship in similar fashion: "The right to rely upon representation is inseparably connected with the correlative problem of the duty of a representee to use diligence in ascertaining the truth with respect to the representations made to him." Without finding a fiduciary relationship, Thomas found that inexperienced, illiterate consumers had a right to rely upon the coverage representation of the sales agent of a health insurer. Of course, this is not a consumer transaction and the Appellant is not inexperienced or illiterate; rather Appellant is staffed by experienced professionals including a licensed member of the bar as CEO.

v. Schmauch, supra. (No fiduciary relationship between a bank and its customer exists when the bank is unaware of any special trust imposed in it.) Here, there is no evidence that Appellant placed any special trust in Decedent with regard to credentialing or that he was aware of any special trust beyond his duties as a physician-employee.

Finally, Thompson cannot be relied upon as a fiduciary when federal law imposes an unequivocal duty of diligence and discovery upon Appellant and provides unfettered independent access to the true facts. As a matter of law, Appellant has been found to have such an unequivocal duty and found to have such unfettered independent access to the truth.

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CONCLUSION

Certain core facts in this matter are both uncontroverted and previously litigated such that Appellant is barred from re-litigating those issues. Based upon these facts, the trial court correctly held that the Appellant cannot prove an absence of fault in causing the existence of the alleged damages being sued upon. Accordingly, the trial courts order of summary judgment should be affirmed.

Florence, South Carolina
April 30th, 2012

PAULLING AND JAMES, LLP

By: _____

John Jay James, II, Esquire
P. O. Box 507
Darlington, SC 29540
843-393-3881 (Telephone)
843-393-6089 (Fax)
Email: pjlaw507@bellsouth.net

TURNER, PADGET, GRAHAM & LANEY, P. A.

By: _____

J. René Josey, Esquire
319 S. Irby Street
Post Office Box 5478 (29502)
Florence, South Carolina 29501
(843) 662-9008
(843) 667-0828 fax
Email: rjosey@turnerpadget.com

ATTORNEYS FOR THE RESPONDENT

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2010-CP-16-0332

(Appeal Tracking Number 2011203391)

Pee Dee Health Care, P.A., ... Appellant,

v.

Estate of Hugh S. Thompson, ... Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.

Florence, South Carolina

May 1, 2012

TURNER, PADGET, GRAHAM & LANEY, P. A.

By: _____

J. René Josey, Esquire
319 S. Irby Street
Post Office Box 5478 (29502)
Florence, South Carolina 29501
(843) 662-9008
(843) 667-0828 fax
Email: rjosey@turnerpadget.com

ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
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Estate of Hugh S. Thompson..... Respondent

PROOF OF SERVICE

I certify that I have served Respondent's Final Brief on Pee Dee Health Care, P.A., by depositing copies of the same in the United States mail, postage prepaid, on May 1, 2012, to its attorney of record, Benjamin R. Matthews, Esquire and its former trial attorney of record Tony R. Megna, Esquire, 3400 West Avenue, Columbia, SC 29203.

J. René Josey
TURNER, PADGET, GRAHAM & LANEY, P.A.
Post Office Box 5478
Florence, SC 29502-5478
843-656-4451 (Telephone)
843-413-5818 (Fax)
RJosey@TurnerPadget.com (Email)
ATTORNEYS FOR RESPONDENT