STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

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C. A. NO. 2006CP32-0371

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**J. Kevin Baugh, M.D. and Barry J. Feldman, M.D. ..... Petitioners,**

**v.**

**Columbia Heart Clinic, P.A. ..... Respondent.**

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# PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

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April 12, 2013

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**Cases**

## CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 13, 2013.

## QUESTIONS PRESENTED

(1) Did the Court of Appeals err in finding a non-competition clause enforceable even though the clause prohibited the physician/employees from being employed in any capacity in the field of cardiology? The clause prohibited doctors not just from practicing cardiology but also from "**assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise**) to engage in the [cardiology] . . .." The employer had no legitimate interest in restricting employees from being employed in roles that differed from the type of work they performed for the employer.

(2) Did the Court of Appeals err in failing to construe the language of the non-competition clause against the employer and did the court err in not deferring to the trial court's legal and factual determinations?

(3) Did the Court of Appeals err in finding the geographic restricted areas were overbroad because the practical effect of the restrictions on an interventional cardiologist makes are much larger than the 20 mile restriction in the Agreements?

(4) Did the Court of Appeals err in finding the non-competition restrictions were supported by consideration because the Plaintiffs never received any consideration for agreeing to the restrictions and never would receive any consideration at any future time?

(4) Did the Court of Appeal err in reversing the award of compensation that was forfeited?

## STATEMENT OF THE CASE

The Petitioners (Drs. Kevin Baugh and Barry Feldman) are two cardiologists who, until April 6, 2006, were employed by the Respondent (Columbia Heart Clinic (CHC)) at CHC's Lexington, South Carolina office. After that time, both Plaintiffs left CHC's employ and opened Lexington Heart Clinic (LHC). The Plaintiffs each had essentially identical Employment Agreements (Agreements) with CHC that contained non-competition provisions.

This action was brought by the Plaintiffs as a declaratory judgment action seeking a ruling that the non-competition provisions were invalid. CHC counterclaimed for breach of contract, breach of fiduciary duty, and breach of duty of loyalty and sought a preliminary injunction to prevent Plaintiffs from opening LHC. CHC's motion for a preliminary injunction was denied.

Plaintiffs subsequently added claims for breach of contract, violation of the South Carolina Wage Payment Act, and similar claims based on CHC's alleged failure to pay compensation due.

The circuit court, sitting non-jury, held a trial beginning May 12, 2009 and heard testimony and took evidence on the non-jury questions of the validity of the non-competition provisions of the Agreements and the Plaintiffs' claims to unpaid compensation under the South Carolina Wage Payment Act. The remaining claims, by consent of the parties, are to be heard after the resolution of these issues.

Judge William P. Keesley ultimately ruled that the non-competition provisions of the Agreements were unenforceable because they were overbroad. He found the provisions overbroad because they sought to prohibit the Plaintiffs from working, in any capacity, for a business engaged in the practice of medicine in the field of cardiology. The court held that a restriction that went beyond prohibiting the type of work Drs. Baugh and Feldman did for CHC (practice of medicine by a physician) was not enforceable under South Carolina caselaw. The court then awarded the Plaintiffs compensation due them under the Agreements. That compensation was being withheld by CHC only because of the unenforceable non-competition provisions.

## STATEMENT OF THE FACTS

Dr. Feldman joined the Columbia Cardiovascular Clinic (a predecessor to CHC) in 1993. Dr. Baugh joined that same entity in 1996. That entity later merged with another cardiology practice to form CHC. At the time of the merger, Dr. Feldman was an employee and shareholder of CHC (a corporation). Dr. Baugh became a shareholder of CHC in 1999.

Both Drs. Baugh and Feldman had employment agreements that preceded the 2004 Agreements that also contained non-competition provisions. *(R. p. 1280, 1412) (D. Ex. 2, D. Ex. 7).* Some elements of the preceding agreements were duplicated in the 2004 Agreements. The non-competition provisions in the preceding agreements stated:

> . . . in the event Physician continues or commences the active practice of medicine in the field of cardiology within Richland or Lexington Counties, South Carolina at any time during the twelve (12) month period immediately following the termination . . . of this Agreement, the Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5.

The "monies payable" in Section 4.5 was an amount of money determined by a formula. The amount was calculated by using the accounts receivable balance that existed on the date of the termination of the Agreement times the physician's percentage ownership of CHC. There were no other penalties or forfeitures provided in these preceding agreements. The purported consideration for these agreements was a compensation system that was attached, as exhibit A, to the agreements.

One of the main reasons CHC sought new employment Agreements in 2004 was because the CHC shareholders were constructing a new office building at the Richland Hospital campus of Palmetto Health.[1] The building was owned by Palmetto Heart MOB LLC ("the MOB"). The MOB was a separate and independent entity from CHC. The MOB was formed in 2003 and its operating agreement was signed in October 2003. *(R. p. 1439)(D. Ex. 11).* The MOB operating agreement was drafted independently of the Agreements at issue in this case and contains no reference to CHC or to the shareholder's employment with CHC. The same shareholders of CHC owned a majority share of the building through the MOB although there were other shareholders in the building. CHC was going to be the anchor tenant of the new building. (The MOB eventually repurchased Drs. Baugh and Feldman's shares in the building).

Partially out of concern to insure there was sufficient revenue to pay rent in the new building, the CHC shareholders sought to bind all the physicians more tightly to CHC. *(R. p. 842-843) (Tr. pp. 234-235).* The mechanism CHC settled on to do this was to create a new and stronger non-competition covenant to the employment agreements. Discussions (which did not include the Petitioners) about such a new provision occurred

[1] "Palmetto Health" is an umbrella organization under which several hospitals in the Midlands of South Carolina operate.

in 2004. As late as July 2004, CHC was still weighing how to draft the new employment agreements. *(R. p. 1020-1022) (Tr. pp. 412-414).* The Agreements are dated July 15, 2004.

No consideration was paid to any physician to sign the Agreement. Instead, the Agreement purported to provide new consideration for the new non-competition provisions as follows:

> Physician shall be paid Five Thousand and No/100 Dollars ($5,000.00) per month for each of the twelve (12) months following termination, so long as the Physician is not in violation of Article V of this Agreement. In the event Physician violates Article V, no amount shall be paid pursuant to this section . . .

*(R. p. 1288)(P. Ex. 1 Article 4.5(l) page 9).*

The new non-competition provision states:

> Physician, in the event of termination or expiration of this Agreement for any reason, during the twelve (12) month period immediately following the date of termination or expiration of this Agreement, shall not Compete (defined in section 5.1 below) with Medical Group.

*(R. p. 1289) (P. Ex. 1 Article 5.1(b) page 10).*

> "Compete" is defined as follows:
>
> "Compete" means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of the Medical Group and on behalf of Medical Group: (A) organizing or owning any interest in a business which engages in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; or **(C) assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise) to engage in the Business in the Territory.**

*(R. p. 1289) (P. Ex. 1 Article 5.2 page 10) (emphasis added).*

"The Business" is defined as ". . . the practice of medicine in the field of cardiology." *(Id. at § 5.1(a)).* The "Territory" is defined as "the area within a twenty (20) mile radius of any Medical Group office at which Physician routinely provided

services during the year prior to the date of termination or expiration of this Agreement." *(Id. at § 5.2(iii))*. "Person" is defined as "any entity, including, without limitation, any natural person, company, partnership, corporation, trust, association, organization, or government unit." (R. 1289) (*Id.* at *§ 5.2(ii))* (emphasis added).

As in the preceding agreements, Article 4 of the new Agreement gives the Physician a right to a large accounts receivable based payment determined by a formula. As explained above, that formula is based on the physician's CHC shareholder ownership percentage times the accounts receivable balance on their termination date.[2] Termination of the Agreement can occur in several ways. The type of termination that occurred in this case was termination "without cause" and the Agreement required Drs. Baugh and Feldman to give ninety days' notice (which they did).

According to the Agreement, if a departing physician breaches the non-competition provision, there are three significant consequences. First, Article 5.4(a) provides that a physician who practices in violation of the non-competition provisions must pay CHC an amount equal to the average W-2 income of all the physicians in the practice for the preceding year. Payment of this penalty "will entitle Physician to practice in breach of the provisions contained in Section 5.1 without further liability to Medical group for such breach." *(R. p. 1290) (P. Ex. 1, Article 5.4(a))*. The parties agreed at trial that this amount is $591,710. Second, as indicated above, the physician does not receive the consideration provided for in Article 4.5(l). Finally, the physician forfeits his claim to the A/R-based monetary amount provided for in Article 4. With regard to the forfeiture of the A/R-based monetary amount, the definition of improper

[2] Contrary to CHC's assertions, this payment is not based on the physicians' billings or the accounts receivable he generated. It is a bonus that uses the accounts receivable balance on the date of departure times the physician's percent of the stock he owns in CHC.

competition is different. It retains essentially the same non-competition language from Article 4(h) of the predecessor agreement that is quoted above. However, the new Agreement ties the A/R-based monetary amount forfeiture at Article 4 to the new non-competition provisions of Article 5 in at least two ways. First, Article 4.5 states that the forfeiture of the A/R-based monetary amount, "together" with the $591,710, is restitution to CHC for damages it will suffer as a result of competition. Second, Article 5.4(a) similarly states that the forfeiture of the A/R-based monetary amount, "along with" the $591,710, is required for the physician to practice in breach of the new non-competition provisions at 5.1.

The forfeiture of A/R-based monetary amount was valued by Plaintiffs' expert at approximately $172,070 for Dr. Baugh and $171,460 for Dr. Feldman.[3] *(R. p. 1322) (P. Ex. 4).* CHC claimed that Drs. Baugh and Feldman owed it $24,888 (Dr. Baugh) and $55,273 (Dr. Feldman). Drs. Baugh and Feldman counterclaimed under the South Carolina Wage Payment Act for two weeks' pay that was never paid by CHC which amounts to $8,095.17 (Dr. Baugh) and $8,063.00 (Dr. Feldman) and their A/R-based monetary amount payment under the Agreements. Dr. Feldman also claims unpaid Director fees in the amount of approximately $4,500. *(R. p. 1322)(P. Ex. 4).* None of these amounts appears to have been disputed by the parties.

CHC argued that Drs. Baugh and Feldman acted cavalierly toward CHC by leaving when they did in close proximity to the time the new building was constructed.

[3] During discovery, CHC was unable to provide an accounts receivable balance for the last day Drs. Baugh and Feldman worked. This amount is therefore estimated from the Plaintiffs' personal receipts after they left. Plaintiffs' expert also compared this number to the most recent available Accounts Receivable balances and determined that, if the most recent numbers were used, the amount would even be higher. Furthermore, Defendant's expert witness provided a report showing the A/R-based monetary amount that Drs. Baugh and Feldman might have gotten to be $191,130. *(D. Ex. 22).*

This allegation is irrelevant to the legal questions before the court. However, CHC has conveniently omitted the uncontested evidence that Dr. Feldman decided to leave CHC after some of the CHC physicians falsely accused his wife (who was also a physician/employee of CHC) of lacking competence and because CHC denied her admission to the partnership. CHC's own witnesses admitted that the accusations were shocking and they agreed with Dr. Feldman's decision to leave. *(R. pp. 693-695, 844, 854, 867-872) (Tr. pp. 85-87, 236, 256, 259-264).* Dr. Baugh decided to leave with Dr. Feldman because of their close relationship and because it would have been very difficult to continue practicing in Lexington by himself. *(R. pp. 900-902) (Tr. pp. 292-294).*

## ARGUMENT

**The Panel Erred in distinguishing the "any capacity" restriction in this case from those previously found unenforceable by this Court and the Court of Appeals.**

The Columbia Heart non-compete "any capacity" restriction (in relevant part) reads as follows:

> "Compete" means **directly or indirectly**, on his own behalf or on behalf of any other Person, other than at the direction of the Medical Group and on behalf of Medical Group: (A) organizing or owning any interest in a business which engages in the Business in the Territory; (B) engaging in the Business in the Territory; or (C) **assisting any Person (as director, officer, employee, agent, consultant, lender, lessor or otherwise)** to engage in the Business in the Territory.

*(R. p. 1289) (P. Ex. 1 Article 5.2 page 10)* (emphasis added).

"The **Business"** is defined as ". . . the practice of medicine in the field of cardiology." *(Id. at § 5.1(a))* (emphasis added).

"**Person** means any entity, including, without limitation, any natural person, company, partnership, corporation, trust, association, organization, or government unit." (R. 1289) (*Id.* at *§ 5.2(ii))* (emphasis added).

The restriction applied within a 20 mile radius of Columbia Heart's Lexington Medical Center, Providence Hospital and Palmetto Health/Richland Hospital offices for a period of one year following termination of employment.

The South Carolina Court of Appeals previously found the following "any capacity" restriction to be overly-broad and unenforceable:

> Licensee shall not thereafter engage either **directly or indirectly** as **principal or employee, alone or in association with others**, in a similar business, **in any capacity**, to that licensed and established hereunder within an airline radius of twenty-five (25) miles of any of Licensee's places of business established under this Agreement and within the Territory described in Exhibit "B" attached hereto and by reference incorporated herein, for a period of twelve (12) months.

*Preferred Research, Inc. v. Reeve*, 357 S.E.2d 489, 490 (S.C. Ct. App. 1987) (emphasis added). The two restrictions are indistinguishable in their effect. If anything, the Columbia Heart restriction is broader. Both improperly prohibit the employee from working for a competitor (or in this case any entity engaged in cardiology) in any capacity.

The Court of Appeals panel did correctly acknowledge well-established precedent that a non-compete may not bar an employee from working in "any capacity" for a competitor. In other words, a former employee may not be barred from working for a competitor in "an area . . . not involved" directly in the business of the employer. *Faces*

*Boutique v. Gibbs*, 455 S.E.2d 707 (S.C. Ct. App. 1995);[4] *Preferred Research v. Reeve*, 357 S.E.2d 489 (S.C. Ct. App. 1987).[5]

However, the panel improperly distinguished the Columbia Heart non-compete by holding that it allows a Columbia Heart employee to work for a cardiology practice "as an employee" provided he does not assist "a person" to practice cardiology. (slip op. at 11). This is not what the plain language of the Columbia Heart non-compete states. The panel effectively deleted the language that explicitly defines "assist" as being a **"director, officer, employee, agent, consultant, lender, lessor or otherwise."** Notably, this definition is a non-exclusive list of examples of ways that employees might improperly assist. The panel also ignored the language that prohibits **"or indirectly"** assisting. In addition, the panel mistakenly interpreted "person" to mean an actual person practicing cardiology. However, the agreement actually uses the defined term "Person" which is specifically defined to include not just an individual doctor practicing cardiology but any type of entity (*e.g.*, a teaching hospital or Veterans Administration Hospital) that practices cardiology as a component of its business or operation. Once this omitted language is considered, it is clear that the Columbia Heart restriction attempts to prohibit employee-doctors from working in any capacity for any person or entity that provides cardiology services. It explicitly states that working as an "employee" "or otherwise" or even being a lender, etc., is expressly prohibited. This restriction is an improper "any capacity" restriction just like the restrictions in *Preferred Research* and *Faces Boutique*. In fact, it is even broader than those restrictions because it also prohibits the provision of services ("lessor" "landlord") to an entity that provides cardiology services.

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[4] (an employee involved in cosmetics sales for the employer could not be barred from working in non-cosmetic department of a competitor).

[5] (an attorney performing title work cannot be barred from working for a competitor in "any capacity.").

The panel, therefore, erred in reversing Judge Keesley's conclusion that:

> The Agreement goes beyond restricting the Plaintiffs from doing what they did for CHC and seeks to expand restrictions into areas wholly unrelated to the Plaintiffs' CHC employment. The Agreements are, therefore, not narrowly drawn to protect legitimate interests of the employer as South Carolina courts require.

(slip op. at 22, internal quotations and citations removed).

The panel is, therefore, simply not correct that former employees of Columbia Heart can work for a cardiology practice in any capacity. The plain language of the agreement prohibits this and goes on to prohibit working for, or providing services to, any entity that provides cardiology services in its mix of services.

**The Panel Should Have Construed the Non-Compete Against Columbia Heart and Should Have Applied the Appropriate Standard of Strict Scrutiny**

The panel's finding that the non-compete allows Drs. Baugh and Feldman to work for a cardiology practice or business in a capacity that does not assist a doctor/cardiologist is contrary to the plain language. However, even if the language were capable of another interpretation, doing this would require interpreting the Columbia Heart non-compete heavily in favor of the employer. The non-compete prohibits **"directly or indirectly . . . assisting any Person [i.e. any entity providing cardiology services] (as director, officer, employee, agent, consultant, lender, lessor or otherwise)."** Finding that this would still allow employment within an entity engaged in cardiology requires twisting the language to Columbia Heart's favor. Such an exercise is contrary to long-standing precedent recognizing that non-competes are a special breed of agreement. Unlike any other contractual agreement, they are **"strictly construed <u>against the employer</u>."** *See, e.g., Rental Uniform Service Dudley*, 301 S.E.2d 142 (S.C. 1983)

(emphasis added); *Sermons v. Caine & Estes Insur.*, 273 S.E.2d 338 (S.C. 1980) (emphasis added). Other contracts are merely construed against the drafter, and then, not strictly. In South Carolina, non-competes are also regarded with **"high disfavor."** *Carolina Chemical Equipment v. Muckenfuss*, 471 S.E.2d 721 (S.C. 1996) (emphasis added). In other words, they are **"greatly disfavored"** by the Courts. *Moser v. Gosnell,* 334 S.C. 425, 513 S.E.2d 123 (1999) (emphasis added). There are, therefore, strict rules under which the validity of such provisions must be considered. If a covenant not to compete is defective in any way, the covenant is totally defective and cannot be saved. *Faces Boutique, Ltd. v. Gibbs,* 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995) [citations omitted].

In perhaps only one non-compete case[6] in the last fifty years has a South Carolina appellate court upheld a non-compete whose restrictions went beyond protecting existing customers with whom the employee had contact.[7] They are held in that much disfavor.

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[6] That case was *Rental Uniform Service v. Dudley*, 301 S.E.2d 142 (S.C. 1983). Even so, the plaintiff's lawyer in *Dudley* failed to argue that the non-compete was unenforceable because it barred the plaintiff from working in any capacity in the rental uniform business. If he had, the Rental Uniform Service non-compete would have been found unenforceable as well. Excluded from this count are non-compete cases dealing with restrictions against former owners. Because owners are not usually employees, they do not get the benefit of the disfavor placed on provisions drafted by an employer. *See, e.g., Sermons v. Caine & Estes Insur.*, 273 S.E.2d 338 (S.C. 1980).

[7] *Eastern Business Forms v. Kistler*, 189 S.E.2d 22 (S.C. 1972); *Sermons v. Caine & Estes Insur.*, 273 S.E.2d 338 (S.C. 1980); *Almers v. S. Carolina Nat. Bank of Charleston.*, 217 S.E.2d 135 (S.C. 1975); *Stringer v. Herron*, 424 S.E.2d 547 (S.C. Ct. App. 1992); *Oxman v. Sherman*, 122 S.E.2d 559 (S.C. 1961); *Standard Register Co. v. Kerrigan*, 119 S.E.2d 533 (S.C. 1961); *Faces Boutique v. Gibbs*, 455 S.E.2d 707 (S.C. Ct. App. 1995); *Preferred Research v. Reeves*, 357 S.E.2d 489 (S.C. Ct. App. 1987); *Team IA, Inc. v. Lucas*, 717 S.E.2d 103 (S.C. Ct. App. 2011); *Stonhard, Inc. v. Carolina Flooring Specialists, Inc.*, 621 S.E.2d 352 (S.C. 2005); *Carolina Chem. Equip. Co., Inc. v. Muckenfuss*, 471 S.E.2d 721 (S.C. Ct. App. 1996); *Caine & Estes Ins. Agency, Inc. v. Watts*, 293 S.E.2d 859, 860 (S.C. 1982); *Wolf v. Colonial Life & Acc. Ins. Co.*, 420 S.E.2d 217 (S.C. Ct. App. 1992); *Collins Music Co., Inc. v. Parent*, 340 S.E.2d 794, 796 (S.C. Ct. App. 1986); *Rental Uniform Service Dudley*, 301 S.E.2d 142 (S.C. 1983); *Oxman v. Profitt*, 126 S.E.2d 852 (S.C. 1962).

In interpreting the language greatly in favor of Columbia Heart, the panel failed to apply the required level of scrutiny.

**The Panel Overlooked the Evidence and Factual Findings of Judge Keesely that made Clear the Non-Compete is Overly Broad and, Therefore, Failed to Properly Defer to Judge Keesley's Factual Findings**

The panel also overlooked the evidence and factual findings that Judge Keesley made on the meaning of the non-compete after he heard a week of testimony and evidence.

The panel should have deferred to Judge Keesley's factual determinations.[8] Even if *de novo* review is appropriate (Petitioners assert it is not) the panel incorrectly failed to review the factual evidence that made clear the non-compete was overly broad.

The panel correctly noted that when a judge tries an action in equity, his findings are reviewed *de novo*. However, "a suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." *Felts v. Richland County*, 400 S.E.2d 781, 782 (S.C. 1991). Where "the action [is] one to construe [an] employment contract [it is] at law [not equity]. *Id.* (citing *Hofer v. St. Clair*, 381 S.E.2d 736 (S.C. 1987). Accordingly, the panel should have applied the "any evidence" standard of review. That is, any "findings of fact should not be disturbed on appeal unless found to be without evidentiary support or against the clear preponderance of the evidence." *Townes Associates, Ltd. v. City of Greenville*, 221 S.E.2d 773, 775-76 (S.C. 1976). The construction of a contract such as the one at issue in this lawsuit presents a question of law for the trial judge to determine when the contract is plain and

[8] Columbia Heart did not argue to the panel that the panel should review the facts de novo and the parties had no prior notice that the court would do so. Therefore, the panel's slip opinion was the first notice that the court would apply a de novo standard of review.

unambiguous. When it is ambiguous, such that the parties' intent must be considered through the admission of evidence, the construction of those ambiguities in the contract becomes a question of fact. *Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership*, 503 S.E.2d 184 (S.C. Ct. App.1998).

Judge Keesley found, based on the evidence and testimony, that the provisions would preclude Drs. Baugh or Feldman from serving as "a consultant, director of a hospital's cardiology department, as a marketer of cardiology services, as a manager of a business or practice in the cardiology field nor even provide services such as renting property to a medical practice engaged in the field of cardiology." (*slip op* at 20, R. 20). These are factual findings based on evidence. For example, CHS's witness Mr. Summer, who drafted the non-compete, admitted that the provision would prohibit Drs. Baugh and Feldman from working, for example, in a teaching hospital. (R. p. 1057-1058) (Trial Tr. pp. 449-450). He also testified:

> If you're in any way affiliating with a cardiology practice in the marketplace, that is probably prohibitive [sic] conduct under the language . . . ."

(*Id.* at 1056, 1061) (emphasis added). He further admitted it would violate the prohibitions to loan money or be a landlord to a cardiology practice. (*Id.* at 1056-1057, 1063). Obviously, none of these activities would be competitive with CHC. The use of these examples makes clear that Drs. Baugh and Feldman could not work for, or be involved with, in any capacity, a practice or entity engaged in cardiology. Contrary to the panel's determination, they clearly could not be employed in any manner in the cardiology field. The Columbia Heart non-compete is, therefore, an "any capacity" restriction which is unenforceable under South Carolina law.

The panel should have deferred to Judge Keesley's factual determinations and, even barring this, should have considered the clear factual evidence that Columbia Heart intended the non-compete to be read in an impermissibly broad manner.

**The Panel Improperly Failed to Take into Account that the Geographic Restriction Was Much Greater than 20 miles**

The Petitioners also argued that the effective scope of the geographical restrictions was overbroad because it would force them to relocate at least 55 miles in order to practice their specialty. The panel and the circuit court incorrectly held that the restriction was not unreasonable because the Petitioners still had places in the state where they could practice and they could have dropped some services they provided in order to avoid the greater restrictions.

In practical reality, the geographical restriction is much broader than twenty miles provided for in the Columbia Heart non-compete. In order to practice their medical specialty, "interventional" cardiologists like Drs. Baugh and Feldman require frequent access to a medical facility authorized to perform elective invasive procedures like stenting and angioplasty. *(R. pp 834-836, 1188-1189) (pp. 238-240, 592-593).* In addition, they must live within thirty minutes of the medical facility at which they take call. Although the panel noted that interventional procedures form a small percentage of the procedures performed by the doctors, this ignores the importance of the ability to practice this sub-specialty. All of Columbia Heart's offices are located on hospital campuses. (Providence, Richland and Lexington). There is a reason for this. CHC's own witnesses admitted the ability to perform interventional procedures was an important medical distinction and valuable to their individual practices. Dr. Shulze agreed it

required a big effort to become an interventional cardiologist (as opposed to a cardiologist who did not do interventional procedures) and he became offended when it was inferred in questioning that he was not certified. *(R. p. 839) (Tr. p. 243).* Dr. Baugh explained that, although a small component time-wise, the ability to do invasive procedures was critical to an interventional cardiologist's practice. *(R. p. 881-886) (Tr. pp. 285-290).*

At the time Drs. Baugh and Feldman left Columbia Heart, the Palmetto Health/Richland, and Providence Hospitals were the only medical facilities in the Midlands authorized to perform elective invasive procedures. Even CHC's physicians agree that, to avoid violating the Agreement, the next nearest locations Drs. Baugh and Feldman would have to move their practices include Aiken, Anderson, Greenville, Florence, Spartanburg and Charleston. *(R. p. 835) (Tr. 239).* The effective restriction therefore is at least 55 miles to the Aiken Regional Medical Center. This is far beyond what was reasonably necessary to protect CHC.

At least one court has recognized the practical effect of such provisions regarding physicians and has struck down a provision whose practical effect was much larger than what was stated in the contract. *Cardiovascular Surgical Specialists v. Mammana,* is remarkably similar to the facts of this case. 61 P.3d 210 (Ok. 2003). In that case, surgeons were subject to a geographical non-compete within a twenty mile radius of CSS offices that prohibited them from engaging in the practice of cardiovascular surgery. However, like Drs. Baugh and Feldman, in order to practice his specialty, Dr. Mammana needed access to a hospital at which such surgeries could be performed. The nearest of these were approximately 100 miles away. This, the court noted, was far beyond the area

where CSS drew patients and was therefore unreasonable. CSS argued that Dr. Mammana could simply drop cardiovascular surgeries and continue to perform other types of surgeries he was qualified to perform. This is the same argument CHC makes when it argues Drs. Baugh and Feldman could simply stop doing interventional procedures (even though they are interventional cardiologists). The *Mammana* court rejected this possibility as an unreasonable alternative for such specialists and so should this court.

**The Panel Improperly Found the Non-Compete Was Supported by Consideration**

The panel ruled that the consideration provided by Columbia Heart to the doctors in exchange for the new non-competes was valid. However, the practical effect is that Drs. Baugh and Feldman are held to a non-compete pushing them 55 miles away from their practice areas, they forfeit $240,000 each in accounts receivable-based payouts, must pay a penalty of $591,710 each, and must pay Columbia Heart's attorney fees for enforcing the non-compete. In exchange for this, they receive----nothing.

The Agreements purport, in section 4.5(l), to provide consideration by offering $60,000 to be paid after termination of the Agreement—but only if the physician obeys the terms of non-competition clause.

Such a promise is illusory, and therefore insufficient, because any physician who chooses to compete and incur the substantial penalties in the Agreement does not receive the $60,000 and, therefore, has incurred obligations without receiving anything in return.

The panel held that the consideration was not illusory but merely contingent on Drs. Baugh and Feldman performing their part of the bargain. This is incorrect. Because of the way section 4.5(l) is worded, Dr. Baugh and Dr. Feldman did not receive and will

never receive any additional compensation for signing the 2004 Employment Agreement that included the non-competition provision. Drs. Baugh and Feldman received only a conditional promise of future compensation subject to a complete forfeiture if the restrictive covenants were violated. The South Carolina Supreme Court's decision in *Poole* requires the payment of additional, valuable consideration. CHC's decision not to provide additional, valuable consideration to Drs. Baugh and Feldman is fatal to CHC's attempt to enforce the restrictive covenants. *Poole v. Incentives Unlimited*, 525 S.E.2d 898 (S.C. 1999).

The North Carolina Court of Appeals' decision in *Moses Cone Memorial Health Service Corp. v. Triplett*, 605 S.E.2d 492 (N.C. Ct. App. 2004) is instructive. In *Triplett*, a non-compete case involving a physician and her former employer, the North Carolina Court of Appeals held that the amount of money ($53,340.16) paid to the physician as consideration for her agreement to the non-competition provision was not a proper element of damages in a non-compete case, and could not be recovered by the former employer as damages. The court of appeals in *Triplett* recognized that the $53,340.16 was the consideration paid by the employer to Dr. Triplett in exchange for her agreement to the covenant not to compete, and therefore could not be retained by the employer because of a violation of the non-compete. The same logic applies here. There must be consideration that is paid for the obligations incurred by Drs. Baugh and Feldman.

It is true that mutual promises can afford sufficient legal consideration for the support of each other. *See, e.g., Carolina Chemical Equipment Co., Inc. v. Muckenfuss* 471 S.E.2d 721, 728 (S.C. App.,1996); *Evatt v. Campbell,* 106 S.E.2d 447

(S.C. 1959).[9] However, here there was no mutual promise. According to CHC, Drs. Baugh and Feldman were required to pay $591,710 each if they competed in violation of the terms. In return for incurring this obligation, they received nothing—the $60,000 is not paid if the non-competition provisions are breached. And a breach occurs even if the penalty is paid. The agreement itself is an executory agreement (for which no consideration was paid) which is a concept separate from executory consideration. Courts do not enforce executory agreements without actual valuable consideration. *See, e.g., Black v. Gettys,* 119 S.E.2d 660, 669 (S.C.1961) ("Equity will never enforce an executory agreement unless there was an actual valuable consideration") (quoting *Kaiser v. Cobbey*, 79 N.E.2d 604, 607 (Ill. 1948)). In some instances, an executory agreement can be enforced if fully performed. An example would be if one party agrees to accept a future payment for an existing obligation. Until the payment is received and accepted, however, the executory agreement is voidable by either party. *See, e.g., McManus v. Little*, 163 S.E.2d 613, 615 (S.C. 1968) ("when the executory contract is fully performed, as agreed, there is an accord and satisfaction and the previous existing claim is discharged. The original liability is not discharged by an executory accord, and, as long as the accord is executory, it is revocable at will by either party."). However, the CHC 2004 Agreement is not even of that type because CHC does not promise to do anything if a physician departs, competes, and pays the $591,000 penalty.

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[9] "executory consideration is conceptually adequate to support enforceability of the contract." *See, e.g., Marshall Durbin Food Corp. v. Baker,* 909 So.2d 1267, 1276 (Miss.App.,2005); *Jim Murphy & Assoc., Inc. v. LeBleu,* 511 So.2d 886, 891 (Miss.1987).

Because no consideration was ever provided to support the new non-competition provisions, the panel should have found them unenforceable for lack of consideration.

**Petitioners' Award Under the Wage Payment Act Must Be Affirmed if the Non-Compete is Unenforceable**

The panel reversed the trial court's award of $155,277 to Dr. Baugh and $128,750 to Dr. Feldman. The trial court awarded these amounts based on the Accounts Receivable-based payout in Article 4 of the Agreements (after giving Columbia Heart a deduction for amounts they alleged the doctors owed the practice). The panel reversed this award based solely on its determination that the payout was forfeited because the Columbia Heart non-compete was valid and Petitioners violated it. If the panel's ruling on the non-compete is reversed, therefore, the trial court's award under the Wage Payment Act should be affirmed.

## CONCLUSION

Based on the above, the Petitioners therefore respectfully request the decision of the panel be reversed.

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April 12, 2013

**STATE OF SOUTH CAROLINA**
**In the Supreme Court**

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**APPEAL FROM LEXINGTON COUNTY**
**Court of Common Pleas**

William P. Keesley, Circuit Court Judge

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**C. A. NO. 2006CP32-0371**

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**J. Kevin Baugh, M.D. and Barry J. Feldman, M.D. ..... Petitioners,**

**v.**

**Columbia Heart Clinic, P.A. ..... Respondents.**

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## PROOF OF SERVICE

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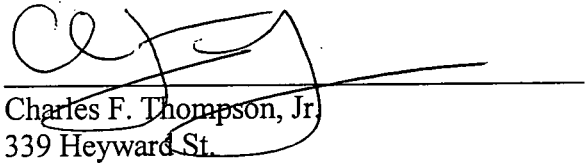
I certify that Petitioners Petition for Writ of Certiorari was served this day upon counsel for the Appellant, Keith Babcock, PO Box 11208, Columbia, SC 29211and filed with the South Carolina Court of Appeals



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