THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 06-CP-32-0371

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S.C. Supreme Court

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

V.

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

RESPONDENT'S RETURN TO THE PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Petitioners are seeking a writ of certiorari for a case that was unanimously decided in favor of Respondents and for which rehearing by the Court of Appeals has been denied. Furthermore, Petitioners have failed to set forth any considerations that render this matter appropriate for review by this Court.

As set forth in Rule 242, SCACR, "a writ of certiorari is not a matter of right, but of sound judicial discretion and will only be granted where there are special an important reasons." The Rule also sets forth type of reasons that would support a grant of certiorari: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the Court of Appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; (5) where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR. In their Questions Presented, Petitioners merely asserted the Court of Appeals "erred" in its holdings. Petition for Writ of Cert., p. 4. Petitioners are simply attempting to reargue issues that have been unanimously rejected by the Court of Appeals and have failed to meet the standards of Rule 242.

STATEMENT OF FACTS

Respondent Columbia Heart Clinic ("Columbia Heart")is a professional medical practice association that provides comprehensive services for the prevention, diagnosis, and treatment of cardiovascular disease. R.p. 190:2-16. When this case was filed, Columbia Heart had offices in

Lexington County[1] and Richland County.[2] R.p. 1093:15-24. Petitioners J. Kevin Baugh, M.D., and Barry J. Feldman, M.D. are physicians specializing in cardiology. R.p. 690:3-11; 892:21-24. Baugh began employment with Columbia Heart in 1996 and Feldman in 1993.[3] R.pp. 692:4-18; 898:3-16. At the time of their departure, both Petitioners had been shareholders in Columbia Heart for over 5 years. Id.[4]

Columbia Heart opened a new office building in Lexington County in the year 2000, in part at the request of Petitioners.[5] R.p. 702:1-19. Columbia Heart spent hundreds of thousands of dollars to upfit the Lexington office. R.p. 852:9-12. Columbia Heart also employed sufficient staff to assist Baugh and Feldman at a significant cost. Id.

In 2004, Columbia Heart decided to build, and in fact did build, a new building in Richland County. R.pp. 842:8-843:8. To do so, Columbia Heart had to incur a significant debt.

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[2]As a result of the Petitioners' departure from the practice, the Defendant's Lexington office closed in 2006. R.pp. 712:11-713:2; 885:14-19.

[3]At the time, Columbia Heart had offices at Palmetto Richland and Providence Hospitals. Now, all of Columbia Heart's Richland County offices are located in a new office building at Palmetto Richland, and the Providence office has been closed. R.pp. 712:22-713:5.

[4]Dr. Feldman actually began his employment in 1993, which Columbia Cardiovascular Clinic and became a shareholder of that entity in 1996. R.pp. 692:13-693:1. Columbia Cardiovascular Clinic and Columbia Cardiology Consultants merged to become Columbia Heart Clinic. Id.

[5]Columbia Heart had an earlier office location in Lexington, but it was not the fully staffed office that was created in 2000. R.pp. 888:16-25; 1096:10-1097:7.

[6]CHC MOB owns the majority percentage of the shares of Palmetto Heart MOB, LLC, which owns the new medical building. R.pp. 313:23-314:14.

Id. A new LLC was created to own the building[6] and all shareholders in Columbia Heart, including Petitioners, were members and shareholders of the new LLC. R.pp. 1099:18 -1100:3. Columbia Heart leased space in the medical office building ("Richland Office") as soon as construction was complete. Construction occurred in 2004 and 2005, and Columbia Heart moved in to the new office building in late 2005. R.pp. 1119:19-1120:5. Columbia Heart originally leased space for $110,000 per month ,which later increased to $115,000.[7] R.pp. 1102:12-1102:7. Petitioners, as shareholders of Columbia Heart and members of CHC MOB, were at all times aware of the plans for the new building and the associated costs. R.p. 1102:14-22. In fact, the new Richland County building cost over $17 million to build. R.p. 1100:16-21. All of the twelve shareholder physicians at Columbia Heart Clinic (including the Petitioners) signed personal guaranties for the construction loan. R.p. 1101:8-11.

At the time the new building was planned, all shareholder physicians entered into new Employment Agreements that contained provisions regarding the termination of their employment with Columbia Heart.[8] R.p. 1105:2-14. The Employment Agreement restricted shareholder physicians from employment with any other provider of cardiology services for one year within a 20-mile radius of any Columbia Heart office at which the physician routinely provided services. R.pp. 1280; 1301. In the alternative, the exiting physician could pay a contractually agreed upon price to compete:

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[7]Petitioners are no longer members of CHC MOB, and each Respondent was paid $200,000 for his shares. R.pp. 1146:15-1147:13.

[8]The rent may increase even further in the future. R.pp. 1102:12-1102:7.

[9]The previous employment agreements also contained covenants not to compete with regard to accounts receivable payments. R.pp. 1390; 1420.

> In the event that Physician, at his or her option, desires to practice in violation of the provisions contained in Section 5.1, Physician shall pay Medical Group liquidated damages in advance of practicing in violation of that Section in an amount equal to One Hundred Percent (100%) of Physician's Income (defined below). Medical Group may offset any amounts owed to Physician against amounts owed by Physician to Medical Group hereunder. For purposes of this Agreement, "Physician's Income" shall mean the average W-2 compensation of the Physician shareholders of Medical Group in the calendar year prior to the date of termination or expiration of this Agreement.

R.pp. 1290; 1311. The parties agreed that, using this contractual formula, the amount for each Respondent totaled $591,710. R.pp. 1212:13-1213:21.

All shareholder physicians approved the language of the contracts. In fact, there was a provision in the Employment Agreement in which the shareholder physicians specifically acknowledged the reasonableness of that section:

> Acknowledgment of Reasonableness. Physician has carefully read and considered the provisions of this Agreement and agrees that the restrictions set forth herein, particularly those in Sections 5.1, 5.2, 5.3, and 5.4 (together with the remedy set forth in Article 4), are fair and reasonably required for the protection of Medical Group.

R.pp. 1291; 1312.[9]

Another provision of the Employment Agreement granted a departing physician the right to a percentage of the accounts receivable, as determined by a certain formula, provided that the departing physician did not start a competing practice. R.pp. 1286; 1306. Again, the Petitioners contractually agreed to reasonableness of that provision:

> Acknowledgment of Reasonableness. Physician acknowledges that the forfeiture described in Section 4.5(i) is intended as partial restitution for the damages which Medical Group will suffer as a result of competition by Physician with Medical Group. Physician further acknowledges that such forfeiture, together with the

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[10]There is another provision acknowledging the reasonableness of provisions involving accounts receivable which is discussed, *infra.*

> remedies set forth in Article 5 below, is fair and reasonably required for the protection of Medical Group.

R.pp. 1288; 1309.

The Employment Agreement also specifically provided that if a court found the provisions of the Employment Agreement to be inappropriate as to time period, scope of activity, or geographical location, a court could revise the Employment Agreement as to appropriate time period, scope of activity of geographical location. R.pp. 1291; 1312.

Prior to the construction of the new facility and the execution of the new agreements, Columbia Heart's then-existing employment contracts contained some restrictive language. R.pp. 1390; 1420. For example, the prior Employment Agreement stated:

> Notwithstanding any other provision of the Agreement 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 termination (for any reason, whether with or without Cause) of this Agreement, then Physician shall forfeit any monies payable to Physician....

R.p. 1420.[10] However, in light of the major investment being undertaken in constructing the new building, the Columbia Heart physicians decided to strengthen and clarify the covenants. R.p. 889:1-11. Because of the size of the investment and importance of the covenants, Columbia Heart retained a lawyer, David Summer of Parker Poe Adams & Bernstein, LLP, to draft the new Employment Agreements. R.pp. 1007:17-18; 1013:5-17. Both Summer and his firm have expertise in the field of employment law and are well-respected in the community. R.pp. 1010:25-1011:5.

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[11]Feldman's 1997 Employment Agreement contained an identical provision. R.p. 1390.

The shareholder physicians needed to ensure that all other shareholder physicians would continue work for, and not against, Columbia Heart, or that, in the alternative, the physician would pay Columbia Heart compensation to compensate for the loss to practice (which would also ensure the necessary income stream for Columbia Heart to cover the burden of the new building). R.pp. 904:20-905:11. The shareholder physicians had meetings in which drafts of the Employment Agreements were discussed. R.pp. 743:22-744:16; 904:20-905:11. At one such meeting, the changes to the former employment agreement proposed by Summer were presented as a PowerPoint presentation by one of the shareholder physicians. Id. As additional consideration for the covenants, the Employment Agreements provided that any physician who left and did not compete with Columbia Heart would receive $5,000 per month for one year, a portion of his accounts receivable, and any accrued, but unpaid, salary. R.pp. 1288; 1309.

The Petitioners signed the new Employment Agreements on July 15, 2004. R.pp. 1280; 1301. The new Richland County facility was opened in December 2005, just weeks prior to the Petitoiners' announcement in January 2006 that they were leaving Columbia Heart. R.pp. 1411; 1438. Around the same time, Petitioners began taking steps to open a practice in Lexington County.[11] In addition, through the efforts of Dr. Feldman's wife, Dr. Jennifer Feldman, Petitioners recruited and hired most of the staff from Columbia Heart's Lexington office. R.pp. 676:3-680:15. In fact, at least 12 employees of Baugh and Feldman's new practice had been employed by Columbia Heart just prior to Petitioners' departure. Id.

The Petitioners tendered their resignations on January 22, 2006, providing Columbia

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[12]Baugh and Feldman had already decided to open the competing practice, Lexington Heart Clinic, LLC, prior to their resignation. and they also began scouting locations, meeting with banks regarding financing, and making other plans. R.p. 1407.

Heart with 90 days notice. R.pp. 1411; 1438. Petitioners continued to work for Columbia Heart after providing notice of their resignations. R.pp. 691:20-25; 954:14-352:3. [12] The Petitioners' resignation with Columbia Heart was effective on April 21, 2006, and both Petitioners ceased all work for Columbia Heart at that time. R.pp. 737:6-8; 902:17-19.

After tendering their resignations but while they continued to work at Columbia Heart, the Petitioners filed a lawsuit for declaratory judgment and Respondent counterclaimed for breach of contract. R.p. 40. The lawsuit was still pending when the new medical practice formed by Baugh and Feldman (Lexington Heart Clinic, LLC) opened to patients on May 1, 2006. R.pp. 659:13-15; 691:17-19.

I. The Court of Appeals correctly held that the restriction prohibiting Petitioners from assisting in the practice of cardiology was reasonable.

The Court of Appeals correctly acknowledged Respondent's need to prevent Petitioners from engaging indirectly in activities they were prohibited from engaging in directly in order to protect a legitimate interest of Columbia Heart. The covenant in this case prohibited a departing physician from competing in a twenty mile radius for one year, and it defined "compete" as follows:

> "Compete" means directly or indirectly, on his own behalf or on behalf of any other Person, other than at the direction of 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 a director, officer, employee, agent, consultant, lender, lessor, or other wise) to engage in the Business in the Territory.

R.p. 1289. The covenant only prohibits the active practice of medicine in the field of

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[13]Dr. Baugh did take vacation from April 10-21, 2009, but was still technically employed by Columbia Heart.

cardiology, or assisting the active practice of medicine in the field or cardiology. It does not prohibit the practice of medicine in another field, or assisting others in practicing medicine in another field. The Court of Appeals' opinion recognized that Columbia Heart's patients and referrals would be at risk if Petitioners were allowed to assist others in the practice of cardiology.

The Court of Appeals addressed both of the cases upon which Petitioners rely, *Preferred Research, Inc. v. Reeve*, 292 S.C. 545, 357 S.E.2d 489 (Ct. App. 1987) and *Faces Boutique, Ltd. v. Gibbs*, 318 S.C. 39, 455 S.E.2d 707 (Ct. App. 1995), and properly found that those cases did not control. The "any capacity" prohibitions in those cases were broader than the restriction here, which only prohibited Petitioners from:

> assisting any Person...*to engage in* [the practice of medicine in the field of cardiology] so long as they do not assist a person to engage in the practice of cardiology. Assuming Petitioners do not violate the other restrictions, they could work for a business that practices medicine in the field of cardiology so long as they do not assist a person to engage in the practice of cardiology.

Baugh v. Columbia Heart Clinic, P.A., Op. No. 5074 (Shearouse Adv. Sh. No. 3, Jan. 16, 2013) at 76.[13]

In other words, the Court of Appeals determined that Petitioners could work in other speciality fields (rather than cardiology) for a hospital that performs cardiology services, as long as Petitioners did not assist the hospital in those cardiology services. In such circumstances, the Petitioners would not be actively performing cardiology services or assisting a person or entity in

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[13]Furthermore, as Respondent noted in their briefs to the Court of Appeals, many courts have upheld covenants with language substantially similar to that used here in cases involving the medical field. *See, e.g., Lovelace Clinic v. Murphy*, 417 P.2d 450, 451 (N.M. 1966); *Mohanty v. St. John Heart Clinic*, 832 N.E.2d 940 (Ill. App. 2005); *Mohanty v. St. John Heart Clinic*, 832 N.E.2d 940 (Ill. App. 2005); *Prairie Eye Ctr., Ltd. v. Butler*, 713 N.E.2d 610, 612 (Ill. App. Ct. 1999).

performing cardiology services. Thus, the "any capacity" restriction here is not as broad as the restrictions in *Faces Boutique*, in which the employer attempted to prohibit a facialist from working for any business that providing facials, spa services, cosmetic application or selling cosmetics even if the employee did not actually perform facials or assist in performing facials. Because the "any capacity" language in *Faces Boutiuqe* prevented the employee from selling cosmetics and multiple other services, the court found the covenant exceeded protection of "any legitimate business interest[.]"

Similarly, the covenant in *Preferred Research* is much broader than the one at issue here because of the definition of both the "any capacity" language and the breadth of the definition of "business." In that case, the employee could not "engage directly or indirectly as a principal or employee, alone or in association with others in a similar business, in any capacity" in the "fields of courthouse records research and verification, title searches, title insurance commitments and policies, loan closings, real estate appraising, credit investigations, examination of records affecting title to real estate and personal property and related services." *Preferred Research*, 292 S.C. at 547, 548.

Here, however, there is only one service being restricted -- the practice of medicine in the field of cardiology. In other words, Petitioners are only prohibited from providing cardiology services to a competitor, whether it be by actively practicing cardiology or by assisting another person or entity to practice medicine in the field of cardiology.[14] The Court of Appeals found

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[14]The term "practice of medicine" is statutorily defined, and includes offering or undertaking to do any of the following: prescribe drugs or medicine, prevent or to diagnose, correct or treat illness or wound, or perform any surgical operation upon a person. R.p. 1055:12-14; S.C. Code § 40-47-20(36).

that the covenant would properly protect Columbia Heart's legitimate interest in maintaining its patient base and referral resources, while still allowing Petitioners to work in the medical profession in another field. Of course, Petitioners could also continue to work in the field of cardiology by either working outside the 20 mile geographical restriction or by paying the amount set forth in the covenant.

II. The Court of Appeals was not required to construe the agreement against Columbia Heart because Petitioners were not just mere employees, but shareholders.

Petitioners argue that the Court of Appeals' holding that Petitioners could work in a medical business as long as they did not assist in the practice of cardiology required the Court to twist the covenant in favor of the employer. Petitioners argue that this "twisted" construction was an error because non-compete agreements must be strictly construed against the employer. In many circumstances, Petitioners would be correct. However, as Petitioners concede in Footnote 3, non-compete restrictions against former owners do not get the benefit of the disfavor of provisions drafted by an employer. As shareholders in a professional association, Petitioners are akin to owners. Multiple courts ruled that covenants between shareholders are not viewed as strictly as employer/employee contracts. *See, e.g. Fairfield County Bariatrics & Surgical Associates, P.C. v. Ehrlich*, 2010 WL 1375397 (Conn. Super. Ct. Mar. 8, 2010)(" Considering that all three equal shareholders signed the same employment agreement exchanging the same restricting covenant, there was more involved here than mere employment."); *Pittman v. Harbin Clinic Prof'l Ass'n*, 437 S.E.2d 619, 622 (Ga. App. 1993)(court found that employment contracts of doctors who were also shareholders were viewed less strictly than regular employment agreements as they not only committed themselves to the restrictions but also derived a benefit by exacting the same

restrictions from the approximately 35 other physician shareholders who executed identical contracts); *Physician Specialists in Anesthesia, P.C. v. MacNeill*, 539 S.E.2d 216, 221 (Ga. App. 2000)(where covenants are in professional contracts where the parties are considered as having equal bargaining power, a lower level of scrutiny is applied).

In this case, the record indicates that the covenants were to benefit all shareholders, who all signed personal guaranties for a multi-million dollar construction loan for a new building. R.p. 1101:8-11. The shareholder physicians needed to ensure that all other shareholder physicians would continue work for, and not against, Columbia Heart, or that, in the alternative, the physician would pay Columbia Heart compensation to provide the necessary income stream for Columbia Heart to cover the burden of the new building and the loss to the practice. R.pp. 904:20-905:11. The covenants were discussed at board meetings and Petitioners could have consulted with their own attorneys. R.pp. 743:22-744:16; 904:20-905:11. Thus, there is was no unequal bargaining power, and Petitioners also derived the benefit of binding the other shareholders to the covenant. Since the Petitioners were shareholders in the association, they are "former owners" and should not be able to claim the benefit of disfavor of provisions drafted by an "employer."

Moreover, the Court of Appeals did not "twist the covenant" in Columbia Heart's favor; instead, it interpreted the actual language which prohibited Petitioners from " assisting any Person (as a director, officer, employee, agent, consultant, lender, lessor, or other wise) to engage in the Business in the Territory." R.p. 1289.[15] The Court of Appeals correctly concluded that the

[15]In addition, as Respondent noted in the briefs in this case, the agreements at issue contained two separate reasonableness provisions in which Petitioners acknowledged the reasonableness of both the covenant in Section 5 and the one in Section 4 (providing a right to a percentage of the accounts receivable, provided that the departing physician did not start a competing practice. R.p 1291, 1288. As one court succinctly stated, "there is no good reason

covenant only prohibited the active practice of medicine in the field of cardiology, or the assisting the active practice of medicine in the field or cardiology, not the practice of medicine in another field, or assisting others in practicing medicine in another field. Thus, the Court of Appeals' decision is completely logical and comports with the language of the covenant, as well as the evidence at trial.

III. The Court of Appeals applied the correct standard of review and did not ignore the facts of the case.

Petitioners argue that a de novo standard of review was improper, first claiming that Respondent had not asked that such standard be applied. However, regardless of whether any party sought a particular standard, an appellate court itself must determine the standard, using its own discretion:

> The line between questions of law and those of fact is not always an easy one to draw, and there is a fairly wide "shadow area" in which the two types of questions coalesce, the issue being whether the evidence is so strong or so weak on an issue that a decision one way or the other is required as matter of law, and since the determination as to whether the issue is in fact one of law or one of fact clearly presents an issue of law for appellate decision, **it is apparent that the reviewing court has considerable discretion in classifying a particular matter as one of fact or law,** and consequently in determining whether it is or is not reviewable under the rule in question.

Curtis G. Shaw, Appellate Scope of Review in Civil Cases, S.C. Law., JANUARY/FEBRUARY 1994, at 38, 41 (citing 5 Am.Jur.2d Appeal & Error, § 829) (emphasis added).

Applying its discretion, the Court of Appeals did consider the nature of the Declaratory Judgment and found that Petitioners sought a determination that the agreements were unreasonable

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why these acknowledgments...ought not to be considered by the court." *Fairfield County Bariatrics & Surgical Associates, P.C. v. Ehrlich*, 2010 WL 1375397 (Conn. Super. Ct. Mar. 8, 2010).

and sought an injunction. The Court of Appeals found that:

> [Petitioners'] declaratory judgment claim seeks a determination that he Agreements' non-competition provisions are unreasonable and an injunction. An injunction is an equitable remedy, and the interpretation of an unambiguous contract is a question of law, as is the question of whether a non-competition is reasonable. Thus, we interpret the Agreements and address necessary factual questions involving the declaratory judgment action de novo.

Baugh v. Columbia Heart Clinic, P.A., Op. No. 5074 (Shearouse Adv. Sh. No. 3, Jan. 16, 2013) at 70 (internal citations omitted). Since the issue in this case was whether the covenants were enforceable and whether Columbia Heart should be enjoined from enforcing them, the Court of Appeals properly applied the de novo standard of review.

Petitioners then claim that even if the de novo standard is proper, the Court of Appeals failed to review the factual evidence indicating that the non-compete was too broad. Pet. for Rh'g, p. 8. However, in interpreting the covenant as a matter of law, the lower court found that the provision was unenforceable because it would prohibit Petitioners from serving as "a consultant, director of 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." The Court of Appeals' decision disagreed with this legal finding by the lower court and found the covenant enforceable. The Court of Appeals' decision was within the scope of review. Furthermore, the lower court finding can be reconciled with the Court of Appeals' decision. All of the activities listed by the lower court involve assisting the active practice of medicine in the field or cardiology, not the practice of medicine in another field. Thus, the Court of Appeals did not ignore the facts in the record, it merely determined the lower court had misinterpreted, as a matter of law, the scope of the

noncompete.

IV. The geographic limitation was properly considered and found to be reasonable.

Petitioners reassert their previous arguments that the 20 mile limitation was overbroad because it would force Petitioners to locate at least 55 miles in order to practice their speciality of interventional cardiology, which must be performed in a hospital. The Court of Appeals clearly considered this exact argument and rejected the same.

The Court of Appeals' opinion first noted that the geographical restriction was limited to areas where Columbia Heart's patients were primarily located. The Court of Appeals also addressed Petitioners' arguments that the restriction would make it more difficult to practice their subspeciality or that the effect was unduly oppressive in curtailing Petitioners' efforts to make a living. The Court of Appeals rejected both of these arguments, as well as the case that Petitioners relied on (and which is again cited in the Petition to this Court), *Cardiosvascular v. Mammana*, 61 P.3d 210 (Okla. 2002).

In the *Mammana* case, a cardiovascular and thoracic surgeon was subject to a covenant not to compete for two years within twenty-miles of his previous employer. Mammana argued that the radius was actually 100 miles because the closest hospitals were 100 miles away. There was also evidence that Mammana would not be able to practice his speciality, cardiovascular and thoracic surgery at all, unless he moved 100 miles away. The Court of Appeals properly recognized that this case differed from *Mammana* and should not be affected by that case's holding:

> ...Columbia Heart is a full-service cardiology practice and [Petitioners] specialized in general cardiology with a subspeciality in interventional cardiology. While the Restriction in *Mammana* prevented the physician from practicing in his field far beyond the technical terms of the provision, here [Petitioners] can continue to practice in their field -- offering cardiology services not involving interventional

> cardiology-- outside the 20-mile radius. Moreover, [Petitioners] have not established their inability to perform interventional procedures would prevent them from having a viable practice after the one year period.

Baugh v. Columbia Heart Clinic, P.A., Op. No. 5074 (Shearouse Adv. Sh. No. 3, Jan. 16, 2013) at 79. Indeed, the evidence at trial was that interventional procedures only comprised a very small percentage of the work performed by Petitioners. R.p. 847:15-848:1 (interventional procedures only comprised around 5%). Petitioners could perform all other cardiology services, including heart catheretizations, stress testing, echo, and EKGs[16] without the need for a hospital and not be forced to locate 55 miles away. In fact, Petitioners could have practiced non-interventional cardiology in Camden, Sumter, Newberry, or Orangeburg. Because board certification in interventional cardiology lasts for ten years,[17] there was no evidence that Petitioners would be deprived of the ability to earn a living when the time period was over, unlike the restriction in *Mammana*.[18] Thus, the 25 mile radius in the covenant was a reasonable and appropriate geographical limitation.

V. The non-compete was supported by sufficient consideration.

As stated in the Court of Appeals opinion, mutual promises constitute good consideration. *Carolina Chemical Equipment Co., Inc. v. Muckenfuss*, 322 S.C. 289, 471 S.E.2d 721 (1997)("[c]learly, under contract law, mutual promises afford sufficient legal consideration for the

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[16]R.p. 1150:4-6; 1150:23.

[17]The testimony indicated that this one year absence from interventional procedures would not affect a doctor's board certification. R.p. 1152:20-1153:6.

[18]The duration of the covenant in *Mammana* was also twice as long, so the doctor there would be prevented from practicing at all for two years. The covenant in that case is drastically different than the one at issue here.

support of each other"). Petitioners misinterpret the mutual promises at issue here, arguing that Columbia Heart's promise is illusory since the covenant required Petitioners to pay $591,710 to compete, yet Petitioners received nothing for incurring that obligation. However, the mutual promise is as follows: Petitioners promised not to compete in the future and Columbia Heart promised to pay $60,000 upon performance of that promise. As the Court of Appeals stated, "a promise is not illusory merely because its enforceability depends upon the performance of a reciprocal promise." *Baugh v. Columbia Heart Clinic, P.A.*, Op. No. 5074 (Shearouse Adv. Sh. No. 3, Jan. 16, 2013) at 77. A promise is only illusory if it is: so vague that no one is sure what is promised; conditioned on the promisor's whim (i.e., "I promise to perform if I want to."); or if it may be canceled any time, for any or no reason, and without notice, in which case nothing really is promised. Val D. Ricks, In Defense of Mutuality of Obligation: Why "Both Should Be Bound, or Neither", 78 Neb. L. Rev. 491, 496-98 (1999).[19] Here, the promise is definite and binding on both parties;[20] it cannot be canceled. This mutual promises constitutes valid consideration.[21]

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[19]*See also, e.g.*, *Centerville Builders, Inc. v. Wynne*, 683 A.2d 1340, 1341 (R.I. 1996)(Promises in an offer-to-purchase agreement were illusory since each party reserved the unfettered discretion to thwart the purchase and sale by rejecting any purchase-and-sale agreement as "unsatisfactory.")

[20]At trial, there was testimony that another shareholder physician who left the practice and who did not compete against Columbia Heart received this $60,000. R.pp. 1154:24-1155:9.

[21]Petitioners also confuse the concepts of an executory contract and executory consideration. An executory contract is "[a] contract that remains wholly unperformed or for which there remains something still be done on both sides, often as a component of a larger transaction..." Blacks Law Dic. (9th Ed.). "Executory consideration" is "[a] consideration that is to be given only after formation of the contract; present or future consideration as opposed to past consideration." Id. Here, the employment agreements were not "wholly unperformed" -- prior to resigning from Columbia Heart, Petitioners provided cardiology services and received generous compensation for their services.

The case upon which Petitioners rely, *Moses H. Cone Mem'l Health Services Corp. v. Triplett*, 167 N.C. App. 267, 605 S.E.2d 492 (N.C. App. 2004), does not apply. In that case, the departing physician had been paid over $50,000 as covenant payments. She left employment and then violated the covenant. The hospital wanted the $50,000 payment back. The court found the proper measure of damages in breach of covenant cases was lost profits, instead of the repayment, because the hospital would not be entitled to that money if the contract had been performed. However, whether a payment was sufficient consideration and whether the return of that payment should be included as a measure of damages are separate things and cannot be compared. Here, the consideration is the mutual promise and it does not matter that one promise "depends upon the performance of a reciprocal promise." *Baugh v. Columbia Heart Clinic, P.A.*, 402 S.C. 1, 738 S.E.2d 480, 490 (Ct. App. 2013), reh'g denied (Mar. 13, 2013).

In addition, severance pay to be paid at the end of a employment has been found to be sufficient consideration, even if not actually received by the employee. *Aon Consulting, Inc. v. Midlands Fin. Benefits, Inc.* ,748 N.W.2d 626 (Neb. 2008). In *Aon*, after the employee had worked for the employer for some time, he signed a covenant not to compete. Later, the covenant was challenged, including the argument that the employee had not received a bonus or compensation for signing the covenant, and that continued employment alone was not sufficient consideration. The court held that it did not have to decide if continued employment constituted sufficient consideration because the agreement also provided that the employer would provide severance pay at the termination of employment. The court held that:

> [t]his undertaking constituted a benefit of [employee] and a detriment to [employer] which would not have otherwise existed in their employment relationship. The fact that [employee] claims not to have received a severance payment following

termination does not alter the fact that [employer's] agreement to make such payment constituted valid consideration for the nonsolicitation agreement.

Id. at 639. In other words, the promise of future payment in exchange for the promise not to compete was sufficient consideration.

VII. Petitioners are not entitled to an award under The Wage Payment Act, regardless of whether the non-compete is enforceable.

The Court of Appeals properly held that Plaintiffs were not entitled to any monies under the Wage Payment Act. Petitioners claim that the Court of Appeals improperly reversed the lower court's awards to Petitioners for the accounts receivable under Article 4. The Article 4 provision stated:

> Notwithstanding any other provision of this Agreement in the event at any time during the twelve (12) month period immediately following the expiration or termination (for any reasons whether with or without Cause) of this Agreement Physician continues or commences the active practice of medicine in the field of cardiology 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 expiration or termination of this Agreement, then Physician shall forfeit any monies payable to Physician pursuant to this Section 4.5. following Physician's continuation or commencement of the practice of medicine in violation of Section 4.5(i). The provisions of this Section 4.5(i) shall survive the expiration or termination of this Agreement for any reason.

R.pp. 1288; 1309. The Court of Appeals found that the forfeiture in Article 4 was enforceable and that since Petitioners had competed, they could not recover any portion of the accounts receivable.[22] Petitioners maintain that the Court of Appeals "reversed this award based solely on its determination that the payout was forfeited because the Columbia Heart [Article 5] non-

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[22]The Court of Appeals also found Respondent could not recover any unpaid draws or director's fees under the Wage Payment Act, a ruling that Respondent has not challenged in the Petition for Rehearing.

compete was valid and Petitioners violated it."[23] Pet. for Rehearing p. 15. The Court of Appeals specifically stated:

> We do not address the trial court's findings that Article 4 and Article 5's non-competition provisions were intended to operate together in all cases and were thus unenforceable because Article 5 contained an unreasonable activity provision. We find Article 5 enforceable. Therefore, the argument that Article 4 must fail because Article 5 fails does not apply to this case.

Baugh v. Columbia Heart Clinic, P.A., 402 S.C. 1, 738 S.E.2d 480 at Footnote 11 (Ct. App. 2013), reh'g denied (Mar. 13, 2013). Furthermore, earlier in the Opinion, the Court of Appeals noted that "[Petitioners] do not contest that they breached the restrictions here...." Likewise, no party contended that Article 4's activity restriction was unreasonable. *Baugh,* 738 S.E.2d 480 at 489.

Simply put, Petitioners did actively practice in medicine in the field of cardiology within the 20 mile restriction and the one year duration in violation of Article 4. Thus, regardless of Article 5, the Court of Appeals' decision as to the accounts receivable under Article 4 remains valid. The Court of Appeals did not find it was intertwined with Article 5 and Petitioners admitted both the reasonableness of Article 4 and the breach thereof.

CONCLUSION

As set forth herein, the Court of Appeals' opinion properly held the covenants were enforceable and had been supported by sufficient consideration. The Court of Appeals also correctly found Petitioners were not entitled to any account receivable under the Wage Payment Act. Thus, Respondent respectfully request that the Petition for Writ of Certiorari be denied.

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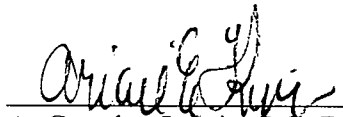
[23]The term "Article 5" covenant refers to noncompete provision discussed in Section I. herein.



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May 9, 2013

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

William P. Keesley, Circuit Court Judge

Case No. 06-CP-32-0371

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

v.

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

CERTIFICATE OF SERVICE

I, Connie W. Grugan, secretary to the law firm of Lewis, Babcock & Griffin, L.L.P., hereby certify that I have served Respondent's Return to the Petition for Writ of Certiorari upon opposing counsel by mailing a copy of same, postage prepaid and return address clearly indicated, to opposing counsel addressed as follows:

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This 9th day of May, 2013.