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STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON Carolina Neurosurgery & Orthopedics, Inc., Plaintiff, vs. Michael A. Maucher, Esq. and DeLuca & Maucher, LLP, Defendants.	IN THE COURT OF COMMON PLEAS IN THE NINTH UDICIAL CIRCUIT CASE NO.: 2021-CP-10-03379 **ORDER ON DEFENDANTS' MOTION TO DISMISS**

THIS MATTER comes before the Court on Defendants' Michael A Maucher, Esq. ("Maucher") and Deluca & Maucher, LLP's ("D&M") (collectively, "Defendants") Motion to Dismiss Plaintiff's Complaint, filed October 22, 2021. The Court heard oral argument on Defendants' Motion on March 3, 2022. Thomas A. Pendarvis, Esq., appeared for Plaintiff, and Michael C. Masciale, Esq. appeared for Defendants. After carefully considering the Complaint filed in this action, memoranda filed by the parties, arguments of counsel, and the applicable law, Defendants' Motion is respectfully GRANTED in part and DENIED in part. In support of this Order, the Court finds and concludes as follows:

FINDINGS OF FACT

1. Plaintiff Carolina Neurosurgery & Orthopedics, Inc. ("Plaintiff") is a citizen and resident of Charleston County, South Carolina licensed to practice medicine in South Carolina.

2. Jason M. Highsmith, M.D. ("Highsmith") is Plaintiff's primary surgeon.

3. Maucher is a citizen and resident of Charleston County, South Carolina, and he is an attorney licensed to practice law in South Carolina.

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4. D&M is a South Carolina Limited Liability Partnership operating as a law practice with offices in Charleston County and Berkeley County, South Carolina.

5. On December 14, 2018, Defendants' client ("Client") was injured in a motor vehicle collision. Shortly thereafter, he retained Defendants to pursue claims against the at-fault driver.

6. As Client was a prior surgery patient of Plaintiff and Highsmith, he selected Plaintiff for surgical treatment of his injuries arising from the accident. Highsmith performed the procedures.

7. On December 20, 2018, at Client's request, D&M sent Plaintiff a letter of protection ("December 20, 2018 LOP"), in which D&M agreed to protect any claim by Plaintiff for the cost of Client's treatment out of any settlement proceeds arising from the accident. The December 20, 2018 LOP is attached to Plaintiff's Complaint as Exhibit 1 and is incorporated herein by reference.

8. On January 3, 2019, Client executed Plaintiff's Financial Policy ("Financial Policy"), which is attached to Plaintiff's Complaint as Exhibit 2 and is incorporated herein by reference.

9. The Financial Policy provides that Plaintiff will submit claims for payment under a patient's primary health insurance.

10. On January 16, 2019, Kiara Goodwine ("Goodwine"), an employee in Plaintiff's office, contacted D&M to request information regarding the at-fault driver's liability policy limits. On January 21, Tina Bennett, a paralegal with D&M ("Bennett") responded that the at-fault carrier was from North Carolina and would not disclose policy limits without a medical

authorization from Client. However, Bennett informed Goodwine that Client carried a total of $1,100,000 in accident coverage under two additional insurance policies.

11. On the same day, Bennett also emailed Goodwine and informed her that based upon the severity of Client's injury and his pre-existing injuries, all of his treatment would need to be filed with his private health insurance and should not proceed under a letter of protection.

12. Goodwine acknowledged receipt of the email and Bennett's instructions. The foregoing emails are attached to Plaintiff's Complaint as Exhibits 4-5 and are incorporated herein by reference.

13. Accordingly, as of January 21, 2019, Plaintiff was aware of the need to file claims for payment with Client's private health insurance.

14. On March 7, 2019, D&M sent a revised letter of protection to Plaintiff ("March 7, 2019 LOP"), stating that D&M would protect whatever amounts Client's private health insurance did not pay out of the proceeds of any settlement of Client's personal injury claim.

15. Bennett's email containing the March 7, 2019 LOP stated that "[t]his LOP covers whatever is NOT paid by private health insurance." Bennett's email and the March 7, 2019 LOP are attached to Plaintiff's Complaint as Exhibit 6 and are incorporated herein by reference.

16. As of March 7, 2019, Plaintiff was aware of the need to file claims for payment with Client's private health insurance first before seeking payment under the March 7, 2019 LOP.

17. Despite D&M's prior instructions and the express language of the March 7, 2019 LOP, Plaintiff never attempted to confirm its network status with Client's private health insurance carrier prior to rendering surgical services, or to file claims for payment with Client's private health insurance, as is required under Plaintiff's Financial Policy.

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

18. Highsmith performed Client's first surgery—a C6-7 ACDF surgery—on March 15, 2019 ("First Surgery") at a cost of $62,451.87.

19. As Client's personal injury case developed, it was determined that: (1) the at-fault driver did not have sufficient insurance coverage to fully cover Client's medical treatment; (2) one of Client's other additional policies was inapplicable; and (3) the other additional policy was subject to subrogation and only applicable after Client's primary private health insurance had been exhausted.

20. On April 29, 2019, D&M notified Plaintiff via email of the foregoing issues, stating:

> "Because the at-fault party only had $30,000.00 and [Client's] Underinsured Motorist Coverage does not apply, ALL of the treatment [Client] has received (and will continue to receive) must be filed under his private health insurance. We cannot honor anymore treatment under a Letter of Protection. Please note [Client's] file accordingly."

21. On May 2, 2019, Highsmith performed additional surgery on Client at an approximate cost of $65,000.00 ("Second Surgery").

22. Despite receiving explicit instructions regarding claim submission and payment on several occasions prior to both surgeries, Plaintiff never attempted to file claims for Client's surgical services with Client's private health insurance.

23. Instead, Plaintiff waited until around November 2, 2020—almost one year after the completion of Client's treatment—to send Client a bill for surgical services in the amount of $125,409.28. Plaintiff's bill is attached to Plaintiff's Complaint as Exhibit 3 and is incorporated herein by reference.

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

24. Client has made no payments to Plaintiff for the medical and surgical services provided, and Defendants have not disbursed any funds from the $30,000.00 settlement proceeds recovered for Client.

25. Plaintiff filed this action on July 22, 2021, asserting causes of action against Defendants for: (1) Breach of Contract; (2) Breach of Contract Accompanied by a Fraudulent Act; (3) Violation of the South Carolina Unfair Trade Practices Act; (4) Fraud; (5) Constructive Fraud; (6) Unjust Enrichment; and (7) Negligence.

26. Defendants were served with process on September 24, 2021.

27. Defendants filed their Motion to Dismiss Plaintiff's Complaint on October 22, 2021.

PROCEDURAL STANDARD

When ruling on a Motion to Dismiss pursuant to Rule 12(b)(6), SCRCP, "[t]he circuit court may dismiss a claim when the defendant demonstrates the plaintiff's 'failure to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." *Hambrick v. GMAC Mortg. Corp.*, 370 S.C. 118, 121, 634 S.E.2d 5, 7 (Ct. App. 2006) (*citing FOC Lawshe Ltd. P'ship v. Int' l Paper Co.*, 352 S.C. 408, 412, 574 S.E.2d 228, 230 (Ct.App.2002)). If, in viewing the complaint in the light most favorable to the plaintiff, the court determines the facts in the complaint are insufficient to entitle the plaintiff to the relief it seeks, the court should grant the motion. *Baird v. Charleston Co.*, 333 S.C. 519, 527, 511 S.E.2d, 69, 73 (1999).

CONCLUSIONS OF LAW

Based upon the foregoing, the Court makes the following Conclusions of Law:

28. The Court has jurisdiction over the subject matter of this case and the parties hereto.

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

29. Venue is proper in Charleston County, South Carolina.

I. Plaintiff's Negligence Claim

30. Plaintiff's Complaint fails to allege facts sufficient to support a cause of action for Negligence against Defendants because, as a matter of law, Defendants owed no duty of care to Plaintiff.

31. To establish a cause of action for negligence, a plaintiff must show: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached that duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. *Roddey v. Wal-Mart Stores East, LP*, 415 S.C. 580, 589, 784 S.E.2d 670, 675 (2016).

32. The existence of a legal duty is an indispensable element of Negligence. See, e.g., S.C. Elec. & Gas Co. v. Utilities Const. Co., 244 S.C. 79, 88, 135 S.E.2d 613, 617 (1964) ("The breach of a legal duty is essential to negligence…Without a violation of such a legal duty, there is no negligence.").

33. For a duty to arise in the context of an attorney's professional activity, an attorney-client relationship must generally exist between the attorney and the party asserting a claim for Negligence. *See Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000) (stating that in a legal malpractice and negligence action, a plaintiff must establish, among other elements, "the existence of an attorney-client relationship.").

34. "Generally, "an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.' " *Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions*, 388 S.C. 394,

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

400, 697 S.E.2d 551, 554 (2010) (*citing Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006).

35. Where a plaintiff in a negligence action against an attorney is not the attorney's client, no duty of care exists. *See Argoe*, 388 S.C. at 400, 697 S.E.2d at 554 (holding that the appellant "was not owed a duty of care" because she "was not Respondent's client.").

36. Plaintiff has never been Defendants' client with regard to this matter, nor does its Complaint allege an attorney-client relationship existed between Plaintiff and Defendants. As the Complaint makes clear, Plaintiff is merely a third-party medical services provider that provided surgical treatment for Defendants' Client in the past and that provided additional surgical treatment during Defendants' representation of their Client following his December 14, 2018 accident.

37. Defendants' communications with Plaintiff and its staff were in the course and scope of their representation of Client and pursuit of his personal injury claim against the at-fault driver. *See, e.g.,* December 20, 2018 LOP and March 7, 2019 LOP (identifying Defendants' Client, setting forth the date of Client's accident, and addressing protection of claims Plaintiff may have "out of any settlement proceeds we may receive arising out of [Client's accident]"); Pltf.'s Compl. at Ex. 4, Jan. 21, 2019 email from Tina Bennett to Kiara Goodwine ("[Client] has advised our office that he will require surgery. Based upon the serious nature of his injury, and his pre-existing injuries, we would respectfully request that all of his treatment be filed with his private health insurance company.").

38. Plaintiff's Complaint fails to allege any facts to indicate any of Defendants' alleged statements were made outside the course and scope of Defendants' representation of Client.

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

39. Therefore, because at all relevant times herein Plaintiff was not Defendants' client, and Defendants' statements to Plaintiff were made in the course and scope of their professional activities on behalf of Client and with his knowledge, Defendants did not owe Plaintiff a duty of care as a matter of law.

40. Accordingly, Plaintiff's cause of action for Negligence is dismissed with prejudice.

II. Plaintiff's Fraud and Constructive Fraud Claims

41. Plaintiff's claims for Fraud and Constructive Fraud are subject to dismissal because Plaintiff failed to allege facts sufficient to establish it had a right to rely on the truth of any representations made to it in connection with this matter.

42. "To establish a cause of action for fraud, the following elements must be proven by clear, cogent, and convincing evidence: (1) a representation of fact; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent or proximate injury." *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 50, 691 S.E.2d 135, 149 (2010).

43. Further, pursuant to Rule 9(b), SCRCP, "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." "A complaint is fatally defective if it fails to allege all nine elements of fraud." *Ardis v. Cox*, 314 S.C. 512, 515, 431 S.E.2d 267, 269 (Ct. App. 1993). Where the complaint omits allegations on any element of fraud, the trial court should grant the defendant's motion to dismiss the claim. *Id.*

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

a. Availability of Insurance Coverage

44. Plaintiff alleges Defendants knowingly or recklessly made false representations of fact as to: (1) "the amount of insurance coverage available to pay for medical/surgical services [Plaintiff] planned to provide to [Client];" and (2) "[Defendants'] intent to pay [Plaintiff] from any recovery [Defendants] obtained on behalf of [Client]." *See* Pltf.'s Compl. at ¶¶ 47-53.

45. However, while Plaintiff generally alleges it had a right to rely on such representations, *See id.* at ¶ 57, its Complaint fails to state with particularity any facts supporting such a right, as required by Rule 9(b), SCRCP and South Carolina case law.

46. "The right to rely must be determined in light of the plaintiff's duty to use reasonable prudence and diligence under the circumstances in identifying the truth with respect to the representations made to him." *Regions Bank v. Schmauch*, 354 S.C. 648, 672, 582 S.E.2d 432, 445 (Ct. App. 2003). "Moreover, there is no right to rely, as required to establish fraud, where there is no confidential or fiduciary relationship and there is an arm's length transaction between mature, educated people. This is especially true in circumstances where one should have utilized precaution and protection to safeguard his interests." *Id.*

47. Here, no confidential or fiduciary relationship existed between Plaintiff and Defendants, and Plaintiff's Complaint does not allege otherwise. Plaintiff was not Defendants' client; it was merely a third-party provider of medical services to Client.

48. Accordingly, Plaintiff was not entitled, by virtue of the parties' relationship to one another, to rely on Defendants' representations as to insurance coverage or intent to pay. Instead, Plaintiff was under an affirmative duty to use reasonable prudence and diligence to attempt to discover the truth of the representations.

49. Plaintiff alleges that by January 3, 2019—the date on which Client executed Plaintiff's Financial Policy—all parties involved knew Plaintiff and Highsmith were "out-of-network" healthcare providers under Client's private health insurance. Pltf.'s Compl. at ¶ 14.

50. While Bennett initially emailed Goodwine on January 21, 2019 and indicated "we are not concerned that there will be enough overall coverage to pay the claim," *id.* at Ex. 4, she followed up the same day and notified Goodwine that all of Client's surgical treatment was to be filed with his private health insurance company, and that treatment should not proceed under an assignment or letter of protection. *See id.*

51. Goodwine acknowledged receipt of Bennett's instructions and did not indicate there would be any issues with proceeding in the instructed manner. *See id.*

52. Accordingly, the Court finds that as of January 21, 2019—approximately two (2) months before Client's First Surgery—Plaintiff had actual notice that: (1) the December 20, 2018 LOP would no longer be honored; (2) Defendants did not intend to protect Plaintiff's claims out of any settlement proceeds from Client's personal injury claim; and (3) Plaintiff should file all claims for payment with Client's private health insurance company.

53. Further, Bennett's email to Goodwine did not indicate any claims could or should be filed with Client's underinsured motorist carrier or his occupational accident carrier. *See id.*

54. Assuming, as Plaintiff alleges, that it knew it was an "out-of-network" provider for which claims would not be paid under Client's private health insurance policy, it should have refused Bennett's instructions to file claims with Client's private health insurance company.

55. Further—as of January 21, 2019—because Plaintiff knew Defendants did not intend to protect its claims out of any settlement proceeds, and it allegedly knew there would be no coverage under Client's private health insurance policy, Plaintiff should have known the only

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

potential avenue for payment would have been through Client's underinsured motorist and/or occupational accident policies.

56. Plaintiff, in the exercise of reasonable diligence, could and should have taken steps to obtain written confirmations of coverage from the underinsured motorist and occupational accident carriers themselves before furnishing costly surgical and other medical services to Client.

57. In doing so, Plaintiff could have discovered the potential coverage issues and referred Client to an appropriate "in-network" surgeon for further treatment. However, Plaintiff apparently instead chose to rely solely on Bennett's first January 21, 2019 email to Goodwine—expressing only an opinion on available coverage—which, as discussed above, Plaintiff had no right to rely on.

58. Accordingly—because Plaintiff had no right to rely on Bennett's statement regarding the amount of insurance coverage available to pay for Client's medical and surgical expenses, and Plaintiff's Complaint fails to allege any other efforts undertaken by Plaintiff to protect its interests and discover the truth of the matter—Plaintiff's Fraud and Constructive Fraud claims fail as a matter of law and are hereby dismissed with prejudice.

b. The Letters of Protection

59. As an initial matter—to the extent Plaintiff asserts claims for Fraud and Constructive Fraud in connection with Defendants' December 20, 2018 LOP, Plaintiff had no right to rely on any statements contained therein because the letter was effectively revoked in Bennett's second January 21, 2019 email to Goodwine stating that treatment should not proceed under a letter of protection.

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

60. Assuming—for purposes of this Order only—that the March 7, 2019 LOP constitutes a contract by which D&M agreed to "protect any portion of [Plaintiff's] bill not paid by private health insurance out of any settlement proceeds we may receive," then by its terms, Plaintiff was required to seek payment from Client's private health insurance before making a claim to any settlement funds.

61. First, Plaintiff never attempted to submit claims for its services to Client's private health insurance carrier.

62. Second, Plaintiff has failed to allege with particularity any facts or circumstances indicating either that: (1) Defendants had no intention of paying Plaintiff under the March 7, 2019 LOP at the time they sent the letter to Plaintiff; or (2) the statements contained in the March 7, 2019 LOP were false at the time they were made. At most, such statements could possibly be construed as contractual promises of D&M.

63. Without more, Defendants' alleged failure to pay Plaintiff under the March 7, 2019 LOP is insufficient to state valid claims for Fraud or Constructive Fraud. *See Davis v. Upton*, 250 S.C. 288, 291, 157 S.E.2d 567, 568 (1967) ("The general rule is that fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events."). *See also, id.*, 250 S.C. 288 at 293, 157 S.E.2d at 569 (holding that "[t]he mere breach of a contract does not constitute fraud.").

64. Therefore, as Plaintiff's Fraud and Constructive Fraud claims relate to the March 7, 2019 LOP, they are also dismissed with prejudice.

III. Plaintiff's Unjust Enrichment Claim

65. The essential elements of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) realization of that benefit by the defendant; and (3) retention by

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

defendant of the benefit under conditions that make it inequitable for him to retain it without paying its value. *Ellis v. Smith Grading & Paving, Inc.*, 294 S.C. 470, 474, 366 S.E.2d 12, 15 (Ct. App. 1988).

66. Moreover, speculative claims of future increased value are not a sufficient benefit to support an unjust enrichment claim. *See Bouchard v. Price*, 694 A.2d 670, 673 (R.I. 1997) (holding insufficient "profits that plaintiffs anticipate defendant might obtain by selling the rights to his story at some unspecified time in the future.").

67. Here, Plaintiff alleges it provided surgical services to Client, Pltf.'s Compl. at ¶ 73, and that the provision of such services enhanced the settlement value of Client's claim. *Id.* at ¶74.

68. These allegations are insufficient to support a valid claim for Unjust Enrichment. First, as the Complaint itself admits, Plaintiff provided surgical and other medical services to Client, not to Defendants. Therefore, while Plaintiff clearly conferred a benefit on Client, it did not confer any benefit on Defendants.

69. Second, the potential enhancement in settlement value of Client's claim is too speculative to form the basis of a valid Unjust Enrichment claim. Plaintiff cannot rely on conjecture that as a result of its services, at some indeterminate point in the future, Client's claim may have been resolved for a larger amount, or that Defendants would somehow benefit therefrom.

70. Further, Plaintiff has not alleged any facts to show: (1) whether and how the surgical services rendered to Client affected settlement negotiations, if at all; or (2) whether and how Defendants have realized a benefit based on a purported enhancement in settlement value of Client's claim.

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

71. Accordingly, Plaintiff has failed to plead facts sufficient to show it has conferred any benefit on Defendants, or that Defendants have realized any valid, non-speculative benefit as a result of the surgical services performed for Client. Therefore, Plaintiff's Unjust Enrichment claim is dismissed with prejudice.

IV. Breach of Contract Accompanied by a Fraudulent Act

72. In order to state a claim for Breach of Contract Accompanied by a Fraudulent Act, a plaintiff "must plead facts establishing three elements: (1) a breach of contract; (2) fraudulent intent relating to the breaching of the contract and not merely to its making; and (3) a fraudulent act accompanying the breach." *Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986). Plaintiff's claim fails for two primary reasons.

73. First—even assuming the March 7, 2019 LOP is a valid contract and that Defendants' alleged failure to pay Plaintiff constitutes a breach thereof—Plaintiff has failed to allege facts establishing fraudulent intent specifically relating to Defendants' alleged breach of the March 7, 2019 LOP.

74. Plaintiff alleges Defendants breached the March 7, 2019 LOP by refusing to pay it any portion of the $30,000.00 in settlement funds recovered for Client. *See* Pltf.'s Compl. at ¶¶ 35, 39, 40-44. Based on the allegations in Plaintiff's Complaint, it appears Defendants' alleged refusal to pay occurred either in late 2020 or early 2021, after Plaintiff sent Client an invoice for its services on or around November 2, 2020.

75. However, all of Plaintiff's allegations of fraud or fraudulent intent on the part of Defendants relate to Bennett's statements to Goodwine in January, 2019 regarding the availability of insurance coverage. Such statements were made approximately two months prior to the March 7, 2019 LOP.

76. As Plaintiff alleges, "[Defendants] and [Plaintiff] ***entered*** [into] the LOP, with all parties knowing the availability of liability or other insurance coverage was a material term…," *id.* at ¶ 39. Therefore, Plaintiff's allegations relate to the making of the March 7, 2019 LOP, not its alleged breach approximately two years later.

77. Second, Plaintiff has not alleged any fraudulent acts by Defendants accompanying their purported failure to pay Plaintiff under the March 7, 2019 LOP. "[A] fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design." *Harper*, 290 S.C. at 119, 348 S.E.2d at 378.

78. Plaintiff's Complaint contains no allegations of any such dishonest representations of fact, unfair dealing, or unlawful appropriation of property on the part of Defendants.

79. Indeed, as Plaintiff's Complaint admits, "[Defendants] have no explanation on why they have not paid [Plaintiff] the entire $30,000 from the recovery obtained for [Client]." Pltf.'s Compl. at ¶ 39.

80. At most, the matters alleged in Plaintiff's Complaint may constitute a breach of contract. However, for the foregoing reasons, they are insufficient to support a valid claim for Breach of Contract Accompanied by a Fraudulent Act.

81. Therefore, Plaintiff's claim for Breach of Contract Accompanied by a Fraudulent Act is dismissed with prejudice.

WHEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED that:

A. Defendants' Motion to Dismiss Plaintiff's Complaint is GRANTED as to Plaintiff's claims for: (1) Negligence; (2) Fraud; (3) Constructive Fraud; (4) Unjust Enrichment;

ELECTRONICALLY FILED - 2022 Jun 28 2:20 PM - CHARLESTON - COMMON PLEAS - CASE#2021CP1003379

and (5) Breach of Contract Accompanied by a Fraudulent Act, and such claims are hereby dismissed with prejudice; and

B. The Court finds Plaintiff has alleged sufficient facts to state a cause of action for: (1) Breach of Contract; and (2) Violation of the South Carolina Unfair Trade Practices Act. Therefore, Defendants' Motion to Dismiss is DENIED as to these claims.

SO ORDERED!

This_____ day of __________, 2022.

____
The Honorable Edgar W. Dickson
First Judicial Circuit

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Charleston Common Pleas

Case Caption: Carolina Neurosurgery & Orthopedics Inc VS Michael A Maucher , defendant, et al

Case Number: 2021CP1003379

Type: Order/Other

So Ordered

s/ Edgar W. Dickson #2153

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