

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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Appellate Case No. 2019-001415  
Case No. 2018-CP-23-05985

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**RECEIVED**  
SFP 23 2019  
SC Court of Appeals

W. Clark Jernigan, M.D. ....Respondent,

v.

St. Francis Physician Services, Inc. ....Appellant.

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**APPELLANT'S RETURN TO RESPONDENT'S  
MOTION TO DISMISS APPEAL**

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Pursuant to Rule 240(e), SCACR, Appellant St. Francis Physician Services, Inc. ("St. Francis"), by and through undersigned counsel, respectfully files this Return to the Motion to Dismiss Appeal and for Costs ("Motion") filed by Respondent W. Clark Jernigan, M.D. ("Dr. Jernigan").

**INTRODUCTION**

S.C. Code § 14-3-330 permits an immediate appeal of an "intermediate" order that "involv[es] the merits" or that "affects a substantial right" by "strick[ing] out an answer or any part thereof." S.C. Code Ann. § 14-3-330(1), (2)(c). The circuit court's order granting partial summary judgment to Dr. Jernigan (the "Order," Exhibit A) is

appealable on both grounds. The Order involves the merits because it determines issues—in particular, the dispositive meaning of certain provisions of Dr. Jernigan’s employment contract (the “Employment Agreement”)—of central importance to Dr. Jernigan’s claims and St. Francis’s defenses. And, the Order affects St. Francis’s substantial rights because it has the effect of striking parts of St. Francis’s answer.

Dr. Jernigan does not challenge St. Francis’s statutory right to appeal—the Motion does not even cite § 14-3-330. Rather, Dr. Jernigan contends that the Order is not appealable because the circuit court did not certify it as a partial final judgment pursuant to Rule 54(b), SCRPC. (Motion, at 3-4.) “Lack of Rule 54(b) certification, however, does not preclude immediate appeal of an order which is directly appealable under S.C. Code Ann. § 14-3-330.” *Lebovitz v. Mudd*, 289 S.C. 476, 478, 347 S.E.2d 94, 95-96 (1986). The case on which the Motion depends, *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010), is not to the contrary.

#### PROCEDURAL HISTORY

Dr. Jernigan, an orthopedic surgeon, is employed by St. Francis pursuant to terms set forth in the Employment Agreement, executed in 2006. As explained more fully in the circuit court’s Order, the Employment Agreement provides that Dr. Jernigan will receive base pay plus monthly “Productivity Compensation.” Productivity Compensation is calculated by multiplying the number of work relative value units (“wRVUs”) associated with Dr. Jernigan’s provision of personally performed medical services by a conversion factor expressed in dollars, then subtracting his base pay. (Complaint, ¶ 17; *see* Order, at 3-4.)

Dr. Jernigan filed this lawsuit in November 2018, primarily alleging that beginning in 2016, St. Francis failed to pay Productivity Compensation owed him, thereby (1) breaching the Employment Agreement; (2) violating the South Carolina Payment of Wages Act, S.C. Code Ann. §§ 41-10-10, *et seq.* (“Wage Payment Act”); and (3) entitling him to a declaratory judgment.<sup>1</sup> (Complaint, ¶¶ 33-54.) These claims all rest on a single underlying contention: that the Employment Agreement does not permit St. Francis to “reduce” Dr. Jernigan’s Productivity Compensation by making a policy change, effective September 1, 2016, to provide for application of payment modifiers to wRVUs attributable to physicians’ services (the “Modifier Policy”). (Complaint, ¶ 24(a); *see* Order, at 5 & n.2.)

In April 2019, Dr. Jernigan moved for partial summary judgment on the grounds that (1) the Employment Agreement does not permit St. Francis to apply payment modifiers to “reduce” wRVUs; (2) that all compensation due under the Employment Agreement, including Productivity Compensation, is “wages” under the Wage Payment Act; and (3) that St. Francis owes Dr. Jernigan any compensation he did not receive because of application of the Modifier Policy. As Dr. Jernigan explained in another filing, “Even though Dr. Jernigan seeks only partial summary judgment, resolution of the motion will resolve the most serious issues in the case.” (Pl.’s Opp. to Def.’s Mot. for Continuance, at 3 (Exhibit C).)

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<sup>1</sup> Dr. Jernigan also alleges that St. Francis failed to pay him bonus compensation and “flow-through” compensation as required by the Employment Agreement. (Complaint, ¶¶ 28-32.)

Following briefing and a hearing, the circuit court entered its written Order on July 15, 2019, granting summary judgment as to grounds (1) and (2). The court held that the Employment Agreement does not permit St. Francis to apply payment modifiers to Dr. Jernigan's wRVUs and that any compensation owed Dr. Jernigan under the Employment Agreement constitutes "wages" for purposes of the Wage Payment Act. (Order, at 12.) The court denied summary judgment as to ground (3).

St. Francis moved for reconsideration on July 25, 2019. The circuit court entered a written order denying reconsideration on August 7, 2019. (**Exhibit B**.) St. Francis thereafter filed a timely notice of appeal.

#### ARGUMENT

South Carolina law is clear: "The right of appeal arises from and is controlled by statutory law." *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005) (emphasis added). The Supreme Court and this Court have repeatedly recognized that appealability of an interlocutory order "is determined by [S.C. Code Ann.] § 14-3-330," unless a specialized statute applies. *Neeltec Enters., Inc. v. Long*, 397 S.C. 563, 566, 725 S.E.2d 926, 928 (2012);<sup>2</sup> *see Thornton v. SCE&G*, 391 S.C. 297, 300, 705 S.E.2d 475, 477 (Ct. App. 2011) ("An interlocutory order not governed by a specialized appealability statute

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<sup>2</sup>In addition to the cases cited in the text, the following are just a few of the cases in which our Supreme Court has recognized that § 14-3-330 governs the appealability of interlocutory orders: *Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015); *Kriti Ripley, LLC v. Emerald Investments, LLC*, 404 S.C. 367, 378, 746 S.E.2d 26, 32 (2013); *Edwards v. SunCom*, 369 S.C. 91, 93, 631 S.E.2d 529, 530 (2006); *Ex parte Capital U-Drive-It, Inc.*, 369 S.C. 1, 6, 630 S.E.2d 464, 467 (2006); *Baldwin Const. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004).

is not immediately appealable unless it fits into one of the categories listed in section 14-3-330.”<sup>3</sup>

It is equally clear that Rule 54(b) does not override § 14-3-330: “Our jurisprudence confirms that jurisdictional appealability issues are governed by statute, and not by the rules of civil procedure.” *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91, 94, 668 S.E.2d 795, 796-97 (2008); see *Lebovitz*, 289 S.C. at 478, 347 S.E.2d at 95-96 (“Lack of Rule 54(b) certification ... does not preclude immediate appeal of an order which is directly appealable under ... § 14-3-330.”). Accord Rule 82(a), SCRPC (“These rules shall not be construed to extend or limit the jurisdiction of any court of this State.”). Of particular relevance here, in *Link v. School District of Pickens County*, 302 S.C. 1, 4, 393 S.E.2d 176, 177-78 (1990), the Supreme Court applied this rule in the specific context of an order granting partial summary judgment, holding that appealability of such an order is “determined by § 14-3-330;” not by Rule 54(b).

**A. The Motion Misstates the Law.**

Disregarding this wealth of authority, Dr. Jernigan contends that the Order is not immediately appealable because it was not certified pursuant to Rule 54(b), SCRPC. (Motion, at 3-4.) The argument for dismissal depends almost entirely on *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010). According to the Motion,

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<sup>3</sup> This Court has recognized this principle in numerous cases besides *Thornton*. See, e.g., *Tillman v. Tillman*, 420 S.C. 246, 249, 801 S.E.2d 757, 759 (Ct. App. 2017); *Dorn v. Cohen*, 418 S.C. 126, 137, 791 S.E.2d 313, 319 (Ct. App. 2016), *aff'd as modified*, 421 S.C. 517, 809 S.E.2d 53 (2017); *Watson v. Underwood*, 407 S.C. 443, 457-58, 756 S.E.2d 155, 163 (Ct. App. 2014); *Olson v. Faculty House of Carolina, Inc.*, 344 S.C. 194, 212, 544 S.E.2d 38, 48 (Ct. App. 2001), *aff'd*, 354 S.C. 161, 580 S.E.2d 440 (2003).

*Ashenfelder* holds that an order granting partial summary judgment that has not been certified pursuant to Rule 54(b) remains subject to revision and is not immediately appealable. (Motion, at 4-5.) This is a serious misreading of *Ashenfelder*, which addressed a different—and far narrower—question: “[T]he effect of a *mistrial* on appealability in a case with multiple claims and multiple defendants where the court *directs a verdict* as to some, but not all, claims *prior to the mistrial*.” *Id.* at 571, 698 S.E.2d at 858 (emphasis added).

*Ashenfelder* alleged numerous tort claims against the City of Georgetown based on its removal of the plaintiff’s unlicensed billboard. The case proceeded to trial, and at the conclusion of *Ashenfelder*’s case-in-chief, the City moved for a directed verdict on all causes of action. The trial court orally granted the motion as to some claims and denied it as to others. The surviving claims were submitted to the jury. When the jury was unable to reach a verdict, the trial court declared a mistrial. Consequently, the court’s oral directed verdict order was never memorialized in a final judgment under Rule 58(a)(2), SCRCP, or in any other writing.

This Court dismissed *Ashenfelder*’s appeal, holding that the partial directed verdict was not immediately appealable because it had not been certified pursuant to Rule 54(b).<sup>4</sup> In its jurisdictional analysis, the Court observed that “[a] mistrial is the equivalent of no trial .... It leaves the parties as though no trial had taken place” and is not immediately appealable. *Id.* at 572, 698 S.E.2d at 858 (citations & internal quotation marks omitted). In contrast, if the jury had reached a verdict, the mid-trial partial directed

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<sup>4</sup> The Court also dismissed the City’s cross-appeal of the *denial* of its renewed motion for a directed verdict, made before the surviving claims were submitted to the jury.

verdict would have been memorialized in the final judgment, and would have been appealable under the final judgment rule. *See id.* at 577, 698 S.E.2d at 861 (citing Rule 58(a)(2), SCRCF).

Given *Ashenfelder's* procedural context, it is not surprising that the Court's jurisdictional analysis focused on Rule 54(b), concerning appealability of partial *final judgments*, rather than on § 14-3-330, concerning appealability of *interlocutory orders*. In *Ashenfelder*, the trial court adjudicated some claims by granting a directed verdict, but the claims submitted to the jury were not adjudicated because the jury could not reach a verdict. As this Court noted, Rule 54(b) explicitly addresses situations where "fewer than all claims have been adjudicated," and provides that until "entry of a judgment adjudicating *all* the claims," any partial adjudication remains subject to revision. *Ashenfelder*, 389 S.C. at 575-76, 698 S.E.2d at 860. *Accord Serowski v. Serowski*, 381 S.C. 306, 315, 672 S.E.2d 589, 594 (Ct. App. 2009) ("Until written and entered, a court has discretion to modify or amend a ruling."). Rule 54(b) "affords the trial court an opportunity to exercise its discretion to make sure there will be no need to revise a directed verdict" due to subsequent developments in the case. *Ashenfelder*, 389 S.C. at 578, 698 S.E.2d at 861. Since there was no certification, the directed verdict order would be subject to revision until the remaining claims were adjudicated through a second trial.

As the foregoing analysis shows, Dr. Jernigan's reliance on *Ashenfelder* is entirely misplaced. The Order in this case, unlike the directed verdicts in *Ashenfelder*, did not adjudicate any *cause of action*. Rather, the Order decided two dispositive *issues*—the meaning of the Employment Agreement and the applicability of the Wage Payment Act—

that are foundational to, but not coterminous with, the causes of action alleged in the complaint. Because the Order does not adjudicate any “claim” on which judgment could be entered, it is not subject to certification under Rule 54(b). But even if it were, a lack of certification has no bearing on this Court’s jurisdiction under § 14-3-330. *See Lebovitz, supra; Dorn v. Cohen*, 418 S.C. 126, 137, 791 S.E.2d 313, 319 (Ct. App. 2016), *aff’d as modified*, 421 S.C. 517, 809 S.E.2d 53 (2017).

**B. The Order Is Immediately Appealable.**

Since Rule 54(b) has no bearing on the appealability of the Order, the only question this Court need consider, for jurisdictional purposes, is whether the Order falls within one or more of the categories of immediately appealable orders under § 14-3-330. *See Link*, 302 S.C. at 6, 393 S.E.2d at 178-79 (holding that categories of appealable orders in § 14-3-330 are not mutually exclusive).

“Generally, orders granting partial summary judgment may be immediately appealable under either the ‘involving the merits’ or ‘substantial right’ categories of section 14-3-330(1) and (2)(c).” *Thornton*, 391 S.C. at 306, 705 S.E.2d at 480; *see Link*, 302 S.C. at 6, 393 S.E.2d at 179 (recognizing that order granting partial summary judgment may be appealable both under § 14-3-330(2)(c) because it has the effect of striking out a pleading, and under § 14-3-330(1) as involving the merits). Nevertheless, appealability must be determined on a case-by-case basis. *See Morrow v. Fundamental Long-Term Care Holdings, LLC*, 412 S.C. 534, 537-38, 773 S.E.2d 144, 146 (2015).

**1. The Order Is Appealable Under § 14-3-330(1) Because It Involves the Merits.**

Section 14-3-330(1) permits appeals of “[a]ny intermediate judgment, order or decree in a law case involving the merits.” An interlocutory order “involving the merits” is one that “finally determines some substantial matter forming the whole or part of a cause of action or defense.” *Stone v. Thompson*, 426 S.C. 291, 294-95, 826 S.E.2d 868, 870 (2019). The Supreme Court has indicated that this standard is satisfied by, *inter alia*, a determination that “is binding with regard to the remainder of the litigation.” *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 300-01, 721 S.E.2d 430, 436 (2012).

Notably, § 14-3-330(1) authorizes appeals of interlocutory orders that resolve issues without fully adjudicating claims. In *Stone*, for example, one of the parties to a divorce action appealed the lower court’s finding that the couple was married at common law. Although the lower court’s order did not resolve any of the claims in the case, the Supreme Court nevertheless held that its finding as to the existence of the marriage involved the merits and was appealable under § 14-3-300(1). *Stone*, 426 S.C. at 295, 826 S.E.2d at 870. The Supreme Court reasoned that the order involved the merits because the lower court could not adjudicate the claims for divorce and equitable distribution without first determining that the parties were married. *See also Babb v. Estate of Watson*, No. 2006-MO-030, 2006 WL 7353457, at \*2 (S.C. Oct. 9, 2006) (order that plaintiff had relinquished her interest in company involved the merits because it had the effect of foreclosing her claim for breach of fiduciary duty).

The Order in this case, like the orders in *Stone* and *Babb*, does not adjudicate any claims but instead resolves an issue of central importance to the causes of action alleged by Dr. Jernigan, namely, whether the terms of the Employment Agreement permit St.

Francis to apply the Modifier Policy when calculating Dr. Jernigan's Productivity Compensation. The answer to this question determines whether Dr. Jernigan's claims for breach of contract, payment of wages, and declaratory judgment can go forward.<sup>5</sup> Thus, while the Order is not dispositive of Dr. Jernigan's claims or St. Francis's defenses, it certainly is of "central importance" to both. As such, it is immediately appealable under § 14-3-330(1).

## 2. The Order Is Appealable Under § 14-3-330(2).

The Order is also appealable under § 14-3-330(2)(c) because it "affect[s] a substantial right" by "strick[ing] out an answer or [a] part thereof." This Court has held that in determining appealability under § 14-3-330(2)(c), "an appellate court should look to the effect of an interlocutory order." *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479. "An order affects a substantial right by striking a pleading if the order *removes a material issue from the case.*" *Id.* (emphasis added). In *Graham Law Firm*, for example, the Supreme Court held an order finding that a party was not properly served was immediately appealable under § 14-3-330(2)(c) because its effect was to deprive the plaintiff of the ability to dispute a statute-of-limitations defense. *Graham Law Firm*, 396 S.C. at 300-01, 721 S.E.2d at 436.

The Order affects St. Francis's substantial rights by removing two issues from the case: (1) the meaning of the Productivity Compensation terms of the Employment

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<sup>5</sup> Similarly, the circuit court's determination that all compensation under the Employment Agreement is "wages" is a necessary predicate to Dr. Jernigan's claim under the Wage Payment Act.

Agreement, and (2) whether all compensation under the Agreement is wages. Indeed, removing issues from the litigation was the avowed purpose of Dr. Jernigan's motion for partial summary judgment. (Mot. for Partial S.J., at 2 ("Granting the motion will resolve significant issues in dispute here.")) The Order in this case has the same kind of deleterious effect as the order found appealable in *Graham Law Firm*: it renders St. Francis unable to dispute Dr. Jernigan's claim that it was not permitted to apply payment modifiers to wRVUs attributable to services performed by Dr. Jernigan.<sup>6</sup> The Order thus has the effect of striking a portion of St. Francis's answer, because it deprives St. Francis of a central defense to Dr. Jernigan's claims. Consequently, the Order is also appealable under § 14-3-330(2)(c). Cf. *Morrow*, 412 S.C. at 539, 773 S.E.2d at 146-47 (order bifurcating claims against different defendants was immediately appealable under § 14-3-330(2)(c) because it precluded the plaintiffs from being the architects of their own complaint).

### CONCLUSION

The Motion to Dismiss presents an argument that is not supported by the decision it relies on, fails to cite (much less discuss) the controlling statute, and is flatly contrary to longstanding, settled precedent from this Court and the Supreme Court. St. Francis respectfully asks the Court to deny the motion.

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<sup>6</sup> Additionally, the Order's finding that all compensation under the Employment Agreement is "wages" deprives St. Francis of its ability to defend against the Wage Payment Act claim.

Respectfully submitted,

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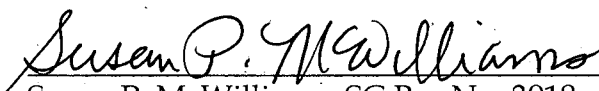
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**PROOF OF SERVICE**

I hereby certify that a copy of the foregoing *Appellant's Return to Respondent's Motion to Dismiss Appeal* is being served upon the Respondent's counsel pursuant to Rule 262(b), SCACR, by hand delivery on this the 23rd day of September, 2019, to the address as shown below:

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# Exhibit A

*Order of July 15, 2019  
Granting Partial Summary Judgment*

<b>STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE</b>	<b>IN THE COURT OF COMMON PLEAS</b>
<i>W. Clark Jernigan, M.D.,</i>  Plaintiff,	Case No. 2018-CP-23-5985
v.	<b>ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT</b>
<i>St. Francis Physician Services, Inc.,</i>  Defendant.	

Plaintiff, Dr. Clark Jernigan, moved for partial summary judgment in this action. Both Dr. Jernigan and defendant, St. Francis Physician Services, Inc. ("St. Francis"), have submitted memoranda with supporting documents as well as oral arguments regarding the motion. In his motion for partial summary judgment, Dr. Jernigan asked the Court to declare three things:

1. That his employment agreement with St. Francis does not permit St. Francis to reduce the number of his Work Relative Value Units ("WRVUs") for purposes of calculating his compensation by applying payment modifiers;
2. That the compensation due Dr. Jernigan from St. Francis under his employment agreement is considered "wages" for purposes of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq.*; and
3. That St. Francis owes Dr. Jernigan any compensation that he would have otherwise received had St. Francis not applied payment modifiers to

reduce his WRVUs.

After consideration of the parties' submissions and oral argument, for the reasons set forth more fully below, the court grants Dr. Jernigan's motion and makes the requested declarations with respect to items one and two but declines to grant it with respect to item three.

### STANDARD OF REVIEW

South Carolina Rule 56 allows a plaintiff to bring a motion for partial summary judgment to streamline the issues in a case. S.C. R. Civ. P. 56(d). "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Watson v. Underwood*, 407 S.C. 443, 453, 756 S.E.2d 155, 160 (Ct. App. 2014). "Summary judgment is appropriate when there is no genuine issue of any material fact such that the moving party is entitled to judgment as a matter of law." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002).

Summary judgment is a particularly appropriate tool when it comes to contract cases because "the construction of a contract is a question of law for the court." *HK New Plan Exchange Property Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007). "Summary judgment is proper and a trial unnecessary where the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself." *Id.*; see also *Environmental Solutions International, Inc. v. J.C. Const., Inc.*, 2008 WL 9841725, at \*6 (S.C. Ct. App. June 2, 2008). In addition, "[b]ecause the ambiguity of contracts and statutes are questions

of law, [this Court does] not view the evidence in any particular light.” *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018).

### UNDISPUTED FACTS

Plaintiff Dr. Clark Jernigan is an orthopedic surgeon. He has been employed by St. Francis since September 1, 2006 under an employment agreement that became effective on that date and remains in effect until September 1, 2020, with slight modifications. Dr. Jernigan’s agreement is set forth in Exhibit A<sup>1</sup> to the affidavit he submitted in support of his motion for partial summary judgment.

#### **The terms of Dr. Jernigan’s Employment Agreement**

Dr. Jernigan’s employment agreement with St. Francis lays out, in clear language, a compensation model that entitles Dr. Jernigan to three types of compensation: base pay, productivity pay, and potential bonus. *Id.* at 23–25. He is first guaranteed an established base rate of pay. But through the productivity pay and bonus pay, he can earn more than the base rate of compensation.

The contract provides that Dr. Jernigan’s productivity pay, and to some extent his bonus pay, are determined by looking to the number of WRVUs Dr. Jernigan performs in a given period of time. *Id.* at 23-24. Those WRVU values are assigned by the federal agency known as the Centers for Medicare and Medicaid Services (“CMS”). The agreement explicitly dictates that the WRVUs used to determine Dr. Jernigan’s compensation will correspond to the WRVU “schedule published each year

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<sup>1</sup> Unless specifically stated otherwise, all exhibit references are to the exhibits to the Jernigan Affidavit previously filed with his motion for partial summary judgment.

by CMS in the Federal Register.” Exhibit A at 26. The schedule has a column of WRVU values clearly labeled Work RVU’s that provides the WRVUs assigned for each procedure. See Exhibits C and D.

The contract also makes clear how St. Francis must use WRVUs to calculate Dr. Jernigan’s performance compensation. It states, “Any Productivity Compensation Physician receives shall be calculated ... on the basis of actual Work Relative Value Units (WRVU’s) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician.” Exhibit A at 23. The conversion factor is stated in dollars. *Id.* at 32. The contract then says, “The remainder, if positive, is the amount of Productivity Compensation to be paid for such month.” *Id.* at 23. The contract also details how the WRVUs affect Dr. Jernigan’s bonus pay. Exhibit A at 24–25.

More succinctly, the number of WRVUs Dr. Jernigan performs in a month is multiplied by the amount of the conversion factor. If the result exceeds Dr. Jernigan’s base pay for the month, then Dr. Jernigan is entitled to the difference as productivity compensation. For example, if the conversion factor were \$75 and if Dr. Jernigan performed 200 WRVUs in a particular month, his productivity pay would be \$15,000 (200 multiplied by \$75). If his base pay were \$10,000 a month, he would be entitled to \$5,000 in productivity pay (\$15,000 less \$10,000).

**St. Francis’s Decision to Apply Payment Modifiers to reduce Dr.**

**Jernigan’s WRVUs**

For the first ten years of Dr. Jernigan's employment, St. Francis calculated his WRVU's without applying payment modifiers<sup>2</sup> to reduce them. Then, St. Francis made a unilateral decision that as of September 1, 2016, it would begin applying payment modifiers to reduce Dr. Jernigan's WRVUs.<sup>3</sup> St. Francis's new modifier policy "require[d] all wRVUs to be modifier-adjusted inside of all ... physician compensation plans." Exhibit E.

Even though Dr. Jernigan's employment agreement makes no reference to payment modifiers, St. Francis applied its new policy to him. Beginning September 1, 2016, St. Francis applied these modifiers to reduce Dr. Jernigan's WRVUs for purposes of calculating his compensation.

### CONCLUSIONS OF LAW

#### Does the agreement permit St. Francis to apply payment modifiers to reduce Dr. Jernigan's WRVUS?

Dr. Jernigan's motion seeks a declaration that his agreement does not permit St. Francis to apply payment modifiers to reduce his WRVU's for purposes of determining his productivity and bonus compensation. The Court finds that there are

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<sup>2</sup> Payment modifiers were established in 1991. *See Final Rule Medicare Program; Fee Schedule for Physicians' Services*, 56 FR 59502-01, 1991 WL 245153 (F.R.) (issued Nov. 25, 1991) (hereinafter "CMS Fee Schedule 1991"). Since 1992, payment modifiers have been a part of how the federal government determines how much to pay providers like St. Francis for medical services under the Medicare and Medicaid programs. *Id.* ("These regulations apply to services furnished beginning January 1, 1992."). They were affecting the reimbursement St. Francis receives from the federal government before and after St. Francis employed Dr. Jernigan. These modifiers can reflect "team surgery, bilateral surgery, etc." Exhibit B at 1. Importantly, the modifiers apply to the final price the government is willing to pay. But modifiers do not affect the underlying WRVUs. Modifiers and WRVUs are separate concepts. CMS always determines the WRVUs separately from the modifiers. *See* Exhibit D.

<sup>3</sup> Gay Aff. ¶¶ 4 and 5, submitted by St. Francis in opposition to summary judgment.

no material facts in dispute regarding this issue and grants this portion of the motion for partial summary judgment. As noted above, "Summary judgment is proper and a trial unnecessary where," as in Dr. Jernigan's case, "the intention of the parties as to the legal effect of the contract may be gathered from the four corners of the instrument itself." *HK New Plan Exchange Property Owner I, LLC v. Coker*, 375 S.C. 18, 23, 649 S.E.2d 181, 184 (Ct. App. 2007); *see also Environmental Solutions International, Inc. v. J.C. Const., Inc.*, 2008 WL 9841725, at \*6 (S.C. Ct. App. June 2, 2008). "Where an agreement is clear on its face and unambiguous, the court's only function is to interpret its lawful meaning and the intent of the parties as found within the agreement." *Miles v. Miles*, 393 S.C. 111, 117, 711 S.E.2d 880, 883 (2011) (quotation omitted). Here the four corners of Dr. Jernigan's agreement make clear that payment modifiers are not part of the formula for determining his compensation. The contract's language is plain: "Any Productivity Compensation Physician receives shall be calculated ... on the basis of actual Work Relative Value Units (WRVU's) attributable to services personally performed by Physician each month multiplied by the appropriate conversion factor and subtracting from the product thereof the monthly Base Compensation paid to Physician." Exhibit A at 23. There is a similarly specific description of how bonus compensation must be calculated using actual WRVUs.

The contract's specific compensation formula does not include the application of payment modifiers. It does not use the term "payment modifiers." *See* Exhibit A at 23-26. The formula for his productivity compensation does not include payment

modifiers. It is as follows:

$$\text{Monthly (WRVU's x Conversion Factor) - Monthly Base Compensation} \\ = \text{Productivity Compensation, if positive}$$

Ex. A at 23.

Nor does the formula for calculation of his bonus compensation refer to payment modifiers. It is as follows:

$$(\text{Physician WRUV's / Total WRVUs of Medical Practice}) \times \text{Bonus}$$

Compensation Pool.

Ex A at 24.

St. Francis makes a number of arguments in support of its decision to apply payment modifiers but none of them overcome the clear and specific terms of Dr. Jernigan's employment agreement or show that St. Francis was entitled to apply payment modifiers to reduce Dr. Jernigan's WRVUs for purposes of determining his compensation.

St. Francis insists that the agreement gives it unlimited discretion to revise Dr. Jernigan's compensation formula based on its internal "policies." St. Francis' Memorandum in Opposition ("Opp'n") at 12-13. In support of this position, St. Francis refers to a number of provisions in the agreement that reference St. Francis policies. This argument distorts and confuses different provisions in the agreement. None of the provisions of the agreement cited by St. Francis have anything to do with Dr. Jernigan's compensation.<sup>4</sup> The agreement requires St. Francis to

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<sup>4</sup> Exhibit A, § 2.8 pertains only to "services" to be provided by Dr. Jernigan; § 2.5 pertains only to charges, fees, and billing for his services; § 2.9 only to the requirement that his services comply with certain standards; § 1.2.6 requires that

compensate Dr. Jernigan according to the formula provided in the agreement. St. Francis is not free to adjust this formula whenever it chooses based on its own “policies.” “One party to a contract may not unilaterally alter its terms without the assent of the other party.” Am. Jur. 2d Contracts § 496. This is especially so when dealing with material terms in a contract, such as compensation. *W.E. Gilbert & Assocs. v. S.C. Nat. Bank*, 285 S.C. 421, 423, 330 S.E.2d 307, 309 (Ct. App. 1985) (“In a contract for services two essential terms are the scope of the work to be performed and the amount of compensation.”). Allowing unilateral modification would upend contract law and create vast uncertainties for employees and employers alike.

St. Francis also contends that the reference to the CMS schedule of WRVU values in note 1 on page 26 of the agreement suggests that St. Francis had discretion to reduce Dr. Jernigan’s WRVU’s by applying payment modifiers. But, in fact, the reference to the CMS annual WRVU schedule actually supports summary judgment. The language in note 1 about a CMS schedule refers clearly and specifically to WRVU’s and requires that St. Francis update the WRVU values each year as they are revised by CMS.<sup>5</sup> It shows that WRVU values, not payment modifiers, determine Dr. Jernigan’s compensation. It makes no reference to payment modifiers.

St. Francis asserts that the agreement’s lack of any reference to payment

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he abide by applicable codes of conduct; and § 2.13 pertains only to his performance of administrative services.

<sup>5</sup> Note 1, page 26 of Exhibit A states “(WRVU’s) are updated ... each year according to the schedule published each year by CMS.”

modifiers, i.e. its “silence” as to payment modifiers, creates ambiguity as to whether they may be applied. But, as noted above, the compensation formula is clear as to how Dr. Jernigan’s compensation is to be determined. Its “silence” regarding payment modifiers does not create ambiguity but makes clear that they are not part of the formula.<sup>6</sup>

St. Francis asserts that its affirmative waiver defense prevents summary judgment. Opp’n at 16-17. This argument fails for two reasons. First, the affirmative waiver defense has no relevance to the meaning of the employment agreement and whether it permitted St. Francis to apply modifiers. Dr. Jernigan would be entitled to summary judgment on that point even if St. Francis’s waiver argument were valid. Second, the Agreement includes a non-waiver provision that forecloses St. Francis’s argument. Ex. A, Section 7.11, page 19 (Failure ... to demand strict performance ... on any of the terms ... shall not be construed as a ... waiver or relinquishment of any rights under this Agreement, and each party may at any time demand strict and complete performance by the other party ... of this Agreement.”). Such unambiguous, non-waiver provisions are enforceable as a matter of law, *see Nw. Nat. Ins. Co. v. R.S. Armstrong & Bros. Co.*, 627 F. Supp. 951, 954 (D.S.C. 1985), and the

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<sup>6</sup> The one case cited by St. Francis, at Opp’n at 14, regarding “ambiguity” is distinguishable on this basis. In *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 243, 672 S.E.2d 799, 803 (Ct. App. 2009), summary judgment was not appropriate because the contractual term at issue – “landlord/tenant claims” – was not defined and was not a term of art. Here, on the other hand, the Agreement specifically defines the compensation formula and defines WRVU.

cases cited by St. Francis (Opp'n at 16) are distinguishable because the application of a non-waiver provision was not involved.

Dr. Jernigan was not required to stop seeing patients or work for no pay in order to preserve his claim to his full compensation.

Finally, St. Francis seeks to delay summary judgment contending that the motion is premature and that additional discovery is needed. But, again, the clear and specific language of the agreement defeats this argument. The Court need not look any further to resolve the motion. Any parol evidence offered for the purpose of interpreting the terms of the contract<sup>7</sup> as to the calculation of Dr. Jernigan's pay would be inadmissible. *See Columbia*, 299 S.C. at 519, 386 S.E.2d at 261 ("If a writing, on its face, appears to express the whole agreement between the parties, parol evidence cannot be admitted to add another term thereto."). Thus, it is impossible for St. Francis to meet its burden of "demonstrat[ing] a likelihood that further discovery [will] uncover additional evidence relevant to the issue" at hand. *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994).<sup>8</sup> There is

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<sup>7</sup> St. Francis also asserts a need for further discovery on its affirmative waiver defense, whether it provided the notice required under the Wages Act, and whether a bona fide dispute exists under the Wages Act. Opp'n at 9. But none of those of those issues are material to Dr. Jernigan's motion for partial summary judgment. As noted above, the affirmative waiver defense is irrelevant to the contract interpretation issue and, furthermore, is barred by the specific language of the agreement. Additionally, Dr. Jernigan is not seeking summary judgment regarding any notice issue or question about a bona fide dispute under the Wages Act.

<sup>8</sup> St. Francis's argument to the contrary is curious because even St. Francis seems to recognize that the evidence it seeks is inadmissible for purposes of Dr. Jernigan's motion. Opp'n at 15 ("While parole evidence may be allowed for the

no reason for further discovery on this issue of contract interpretation. Dr. Jernigan is entitled to partial summary judgment in his favor as to his contention that his employment agreement does not permit St. Francis to reduce his WRVUs by the application of payment modifiers.

**Is the compensation due Dr. Jernigan under his contract “wages” for purposes of the South Carolina Payment of Wages Act?**

St. Francis asserts that its affirmative waiver defense prevents summary judgment. Opp’n at 16-17. This argument fails for two reasons. First, the affirmative waiver defense has no relevance to the meaning of the employment. The Act defines wages as “all amounts at which labor rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or commission basis, or other method of calculating the amount.” S.C. Code Ann. § 41-10-10(2). This broad definition covers the pay at issue here.

**Does St. Francis owe Dr. Jernigan any compensation he would have otherwise received had St. Francis not applied payment modifiers to reduce his WRVUs?**

Dr. Jernigan also seeks a declaration as to this point. Although Dr. Jernigan has an argument that this ruling logically flows from the Court’s ruling regarding the application of payment modifiers, the Court declines to grant this part of the

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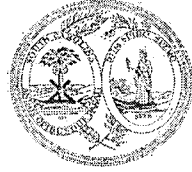
purpose of determining the intent of the parties and clearing up any ambiguity with respect to Definition/Note 1, consideration of such evidence is for the trier of fact, and is not appropriate at the summary judgment stage.”). In other words, the need for discovery cannot be a basis for denial of Dr. Jernigan’s motion. Rather, the only issue is whether the method for calculating Dr. Jernigan’s pay stated in the contract (and which St. Francis used for 10 years) is unambiguous as to payment modifiers. If it is (and it is), then no discovery can affect that conclusion.

motion at this time. It concludes that the potential for factual issues as to whether money is actually due and owing by St. Francis to Dr. Jernigan requires that, at least on the limited record before the Court at this time, this issue be left to the trier of fact.

### CONCLUSION

For the foregoing reasons, this Court grants the motion for partial summary judgment as to points one and two and declares and holds that Dr. Jernigan's employment agreement does not permit St. Francis to apply payment modifiers to his actual WRVUs and that any compensation due Dr. Jernigan under the agreement qualifies as "wages" for purposes of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq.* The Court denies summary judgment as to whether St. Francis owes Dr. Jernigan any compensation that Dr. Jernigan would have otherwise received had St. Francis not applied payment modifiers.

IT IS SO ORDERED.



Greenville Common Pleas

**Case Caption:** W Clark Jernigan vs. St Francis Physician Services Inc  
**Case Number:** 2018CP2305985  
**Type:** Order/Summary Judgment

So Ordered

s/ Robin B. Stilwell 2158

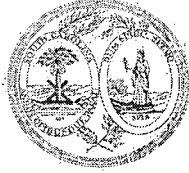
Electronically signed on 2019-07-15 12:04:30 page 13 of 13

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# Exhibit B

*Order of August 7, 2019  
Denying Motion for Reconsideration*





Greenville Common Pleas

**Case Caption:** W Clark Jernigan vs. St Francis Physician Services Inc  
**Case Number:** 2018CP2305985  
**Type:** Order/Other

So Ordered

s/ Robin B. Stilwell 2158

# Exhibit C

*Plaintiff's Opposition to Defendant's Motion for Continuance  
filed April 17, 2019*

<b>STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE</b>	<b>IN THE COURT OF COMMON PLEAS</b>
W. Clark Jernigan, M.D.,  Plaintiff,	Case No. 2018-CP-23-5985
v.	<b>PLAINTIFF'S OPPOSITION TO DE- FENDANT'S MOTION FOR CONTINUANCE OF HEARING ON MOTION FOR PARTIAL SUMMARY JUDGMENT</b>
St. Francis Physician Services, Inc.,  Defendant.	

Plaintiff Dr. Clark Jernigan submits this memorandum in opposition to Defendant St. Francis Physician Services, Inc.'s ("St. Francis") motion to continue the April 24, 2019 hearing for Dr. Jernigan's motion for partial summary judgment. Dr. Jernigan opposes the motion for continuance for the following reasons:

- 1. No further discovery is needed in connection with this motion. The motion is not premature.**

In order to prevent a hearing on Dr. Jernigan's summary judgment motion and prevail in its strategy of delay, St. Francis must "demonstrate a likelihood that further discovery [will] uncover additional evidence relevant to the" issues in dispute. *Thomas v. Waters*, 315 S.C. 524, 526, 445 S.E.2d 659, 660 (Ct. App. 1994). It has not, and cannot meet this burden. Tellingly, St. Francis does not even attempt to explain what facts it seeks to dispute through additional discovery.

Nor could it do so if it tried. The motion seeks partial summary judgment on two basic points, neither of which require any further discovery. They are (a) that Dr. Jernigan's employment agreement does not permit St. Francis to reduce his compensation by the application of "payment modifiers" and (b) that the compensation due Dr. Jernigan under his employment agreement qualifies as wages for purposes of the South Carolina Payment of Wages Act. The

first issue involves nothing more than the application of the straightforward terms of Dr. Jernigan's employment agreement. The second issue is purely an issue of law answered directly by existing case law.

As to the issue regarding the use of "payment modifiers" to reduce Dr. Jernigan's compensation, the court needs nothing more than the agreement itself. That agreement, which is an exhibit to his complaint and the affidavit he submitted in support of his motion for partial summary judgment, is a comprehensive agreement. Parol evidence is not admissible to vary the terms of the agreement. "If a writing, on its face, appears to express the whole agreement between the parties, parol evidence cannot be admitted to add another term thereto." *Columbia East Assoc. v. Bi-Lo, Inc.*, 299 S.C. 515, 519, 386 S.E.2d 259, 261 (Ct. App. 1989). The only evidence that is relevant and admissible on this issue is already before the Court. St. Francis has not provided any indication as to what additional information from discovery could possibly be needed for the court to consider Dr. Jernigan's request that it declare the plain meaning of the language of his employment agreement.

As to the application of the Wages Act to Dr. Jernigan's compensation, *Allen v. Pinnacle Healthcare Sys., LLC*, 394 S.C. 268, 272, 715 S.E.2d 362, 364 (Ct. App. 2011), which will be discussed more fully at the hearing, involved a dispute as to similar compensation to physician. There was no question as to whether that compensation was "wages" for purposes of the Wage Act. Dr. Jernigan moves for partial summary judgment because there are no issues of material fact regarding the meaning of the compensation provisions of his employment agreement. *See* S.C. R. Civ. P. 56(a), (d). Granting the motion will resolve the most significant issues in dispute here.

**2. There is no inconsistency between the Motion for Partial Summary Judgment and the Motion to Compel.**

St. Francis's motion does not provide any factual basis for its "inconsistency" argument. Dr. Jernigan has sought only partial summary judgment. Even if he obtains partial summary judgment, discovery will continue to be necessary as to issues such as the amount of compensation that St. Francis has wrongfully withheld and whether St. Francis had any good faith basis for reducing Dr. Jernigan's compensation that might affect his request for an award of treble damages and attorney's fees under § 41-10-80(C) of the Wage Act.<sup>1</sup>

Moreover, to the extent that granting partial summary judgment in Dr. Jernigan's favor eliminates the need for discovery, discovery can be narrowed. There is no inconsistency and no reason to penalize Dr. Jernigan by delaying payment of the wages St. Francis has owed him since September 2016.

**3. Resolving the partial summary judgment motion now might lead to an early settlement and minimize the cost and burdens of this litigation.**

Even though Dr. Jernigan seeks only partial summary judgment, resolution of the motion will resolve the most serious issues in the case. Resolving them now will facilitate an early settlement and enhance the prospects of minimizing the expense and burdens of this case to both parties.

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<sup>1</sup> See *Goodwyn v Shadowstone Media Inc.*, 408 S.C. 93, 98, 757 S.E. 2d 560, 563 (Ct. App. 2014) (entitlement to treble damages and attorney's fees under the Wage Act depends upon whether based on the facts, the employer disputed the amount of wages in "good faith."). Thus, contrary to St. Francis's suggestion in footnote 1 of its motion, Dr. Jernigan's effort to require St. Francis to provide discovery as to the reasons St. Francis chose to reduce his compensation by applying "payment modifiers," is not at all inconsistent with his motion for partial summary judgment. Rather, it is directly relevant to damages and Dr. Jernigan's request for attorney's fees.

**4. Delaying the hearing will prejudice Dr. Jernigan and his patients.**

If the hearing is delayed, Dr. Jernigan will be prejudiced in several ways. First, Dr. Jernigan is a busy physician with patients who depend on him. He has already planned to be at the scheduled hearing on April 24 and will be there then for the hearing on his motion to compel. If his partial summary judgment motion not heard at the same time, Dr. Jernigan will be forced to clear his schedule on yet another day prejudicing both him and his patients. Second, by delaying the resolution of this motion and, potentially, the early settlement of this matter, St. Francis will subject Dr. Jernigan to additional and unnecessary expenses. And, third, the delay may be substantial as we are about to enter a time when vacation schedules may make scheduling a challenge.

**5. St. Francis has not provided any good reason to prejudice Dr. Jernigan and his patients in this way.**

In addition to its bogus argument about the need for discovery, St. Francis asserts three additional reasons for a continuance: (a) the 2018 merger of the parent of St. Francis with Mercy Health, (b) the recent change in CEO of St. Francis' parent, Bon Secours Health System, and (c) the need for more time to prepare to address the motion. None of these three reasons provide any basis for continuance of the motion.

The merger, which involved St. Francis's parent Bon Secours Health System, became effective September 1, 2018. Dr. Jernigan began asserting his claim almost two years ago and more than a year before the merger. He filed this action November 28, 2018, about three months after the merger. St. Francis's outside and in house counsel have had more than a year to consider the issues that Dr. Jernigan raises in this motion. Most importantly, St. Francis provides no explanation why the merger or CEO change has any impact on the motion that involves no more

than a simple reading of Dr. Jernigan's employment agreement and application of the South Carolina Wage Payment Act.

Likewise, there is no substance to St. Francis's contention that it needs more time to respond to the motion. The motion was filed on April 10. The hearing is not until April 24, and involves only two basic issues: the interpretation of an employment agreement and the definition of "wages" under the Wage Act. It is not clear that any of the relevant facts will be disputed or that an opposition affidavit will be needed. St. Francis has not pointed to any potential affidavit that it intends to submit. In any event, a major firm like defense counsel's law firm should not have a problem responding in time for the scheduled hearing. In fact, when defense counsel contacted plaintiff's counsel regarding the motion, their request was that the motion be withdrawn to permit full discovery to proceed. There was no mention of any issues regarding having sufficient time to respond. The suggestion that St. Francis needs more time to respond is plainly an afterthought.

St. Francis's motion for continuance appears simply to be part of its overall strategy of delay which, as will be discussed more fully at the hearing on April 24, includes the following: (1) not seeking any discovery from Dr. Jernigan during the first four months after the case was filed, (2) at the last minute before a motion hearing, claiming a delay is needed for discovery but without explaining why discovery is needed or how it would affect the motion, (3) obtaining an extension to respond to Dr. Jernigan's discovery requests but not making a good faith effort to comply with the requests by the extended deadline, and (4) delaying without justification responses to issues regarding its production and privilege log. The requested continuance will serve no purpose other than supporting St. Francis's overall strategy of delay and will subject Dr. Jernigan to unnecessary costs and expenses.

For these reasons, Dr. Jernigan asks that the request for continuance be denied, or, in the alternative, delayed until the hearing on April 24<sup>th</sup> where the court can then consider on the record whether St. Francis has made the showing required to delay resolution of the motion.

Dated: April 17, 2019

Respectfully submitted,

WYCHE, P.A.

s/Henry L. Parr, Jr.  
Henry L. Parr, Jr. (SC Bar No. 4340)  
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hparr@wyche.com

*Attorney for Plaintiff*

Nikole Setzler Mergo  
Member  
Admitted in SC, NC

September 23, 2019

**RECEIVED**  
SFP 23 2019  
SC Court of Appeals

**VIA HAND DELIVERY**

The Honorable Jenny Abbott Kitchings  
The South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: *W. Clark Jernigan, M.D. v. St. Francis Physician Servs., Inc.*  
Appellate Case No. 2019-0014145

Dear Ms. Kitchings:

Please find enclosed for filing the original *Appellant's Return to Respondent's Motion to Dismiss Appeal* along with seven copies in the above-referenced matter. Please return the extra filed copy to our courier. By copy of this letter, I am providing counsel of record with copies of the same.

If you need anything else, please feel free to contact us.

Very truly yours,

*Nikole Setzler Mergo*  
Nikole Setzler Mergo (by SP19C)

NSM/fch  
Enclosures

cc: Henry L. Parr, Jr., Esquire  
James C. Cox, Jr., Esquire