THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stillwell, Circuit Court Judge

RECEIVED
SEP 30 2019
SC Court of Appeals

Appellate Case No. 2019-001415

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

v.

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

RESPONDENT'S REPLY IN SUPPORT OF MOTION TO DISMISS APPEAL AND FOR COSTS

Respondent W. Clark Jernigan ("Respondent") files this Reply in support of his Motion to Dismiss the appeal of Appellant St. Francis Physician Services, Inc. ("Appellant"). Appellant's Return fails to offer any compelling reason why the logic of this Court's decision in *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 698 S.E.2d 856 (Ct. App. 2010), which dictated that appeal be dismissed, should not apply here.

Sidestepping entirely the preliminary – and fundamental – question of whether the trial court's order is final and not subject to future revision, Appellant instead directs this Court to S.C. Code § 14-3-330, which provides the statutory basis for appellate jurisdiction, and to cases like *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990), which

considered only whether a litigant had lost his right to appeal an uncertified order granting partial summary judgment when he had waited to file his appeal until ***after*** entry of final judgment.

What Appellant fails to acknowledge, however, is that § 14-3-330, *Link*, and similar cases were all acknowledged, reviewed, and addressed by this Court in *Ashenfelder*, and this Court determined it was "***one step removed*** from the question of whether section 14-3-330 is controlling . . . because we do not yet have a decision that dons a veil of appealability." *Ashenfelder*, 389 S.C. at 575-76, 698 S.E.2d at 860. Only after the Court is "assured that the possibility of revision no longer exists," is it appropriate to "proceed to analyze whether a decision is appropriate for appeal under *Link* and section 14-3-330." *Id.* at 578, 698 S.E.2d at 862. The same result should hold here.

ANALYSIS

1. Appellant Could Have Sought Certification Pursuant to Rule 54(b) But Chose Not to Do So.

Appellant could have sought to certify the Order now on appeal pursuant to Rule 54(b) – which addresses "judgment upon multiple claims" and allows a court to "direct the entry of final judgment as to one or more but fewer than all the claims" – but elected not to do so. Appellant's unsupported suggestions that Rule 54(b) does not apply to the Order because it does not "adjudicate any 'claim' on which judgment could be entered," Return at 8, and that the Order only "decided two dispositive *issues*," Return at 7, misconstrue the procedural posture of this matter and are an apparent attempt to pull this case outside the control of *Ashenfelder*.

As an initial matter, this Court has provided guidance in *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 351 S.C. 459, 570 S.E.2d 197 (Ct. App. 2002), for what constitutes "multiple claims" for purposes of Rule 54(b), each of which is subject to certification when independently adjudicated. Looking to federal precedent, this Court explained

that the term "multiple claims" as used in Rule 54(b) means "separate claims" in which a "separate recovery is possible" and cautioned that there should not be "substantial factual overlap between the claim adjudged and the remaining claims." 351 S.C. at 466-67, 570 S.E.2d at 200.

Review of the Respondent's Complaint, *see* Exhibit 1, and the Order shows that the Court fully adjudicated a distinct and separate claim in this action, and that Appellant could therefore have sought certification. As Respondent laid out in his Motion to Dismiss, one of his central claims is that Appellant impermissibly applied certain payment modifiers to reduce the compensation owed to him. *See* Complaint ¶¶ 17-27. Based on this claim, Respondent sought declaratory relief in one of his causes of action that his employment agreement "does not permit [Appellant] to unilaterally reduce [Respondent's] . . . compensation by applying payment modifiers." The trial court granted the requested relief on this claim, stating:

> [T]his Court grants the motion for partial summary judgment . . . and declares and holds that [Respondent's] employment agreement does not permit [Appellant] to apply payment modifiers . . .

Order at 12. In doing so, the trial court also carefully examined each of Respondent's defenses applicable to this claim, and rejected them. *See* Order at 7-11. The trial court's declaration thus fully adjudicated this claim, making it subject to certification. Further, this claim is factually distinct and narrow,[1] with the distinct relief requested – a declaratory judgment – having been granted. *See Griffin Plumbing & Heating*, 351 S.C. at 466-67, 570 S.E.2d at 200. The only

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[1] The fact that Respondent also sought declaratory relief as to other "claims" included in the third cause of action that are entirely separate from the claim on which the trial court granted full relief did not prevent Appellant from seeking certification on the claim as to which full relief was granted by the court's declaration.

factual overlap this claim has with others in the Complaint is that it, like all the other claims in the action, addresses the employment relationship between Appellant and Respondent.

Appellant clearly could have sought certification here, but for whatever reason did not. Instead, Appellant rushed to file this piecemeal appeal of an order the trial court may yet revisit.

2. In the Absence of Certification, the Trial Court May Revisit and Revise the Interlocutory Order Now on Appeal; That Fact Precedes the Question of Whether Section 14-3-330 Allows an Appeal.

The central insight of this Court in *Ashenfelder* is that a preliminary inquiry as to whether an order is final or remains subject to revision ***must precede*** an evaluation of whether there is a statutory right to appeal pursuant to S.C. Code Ann. § 14-3-330. In *Ashenfelder* this Court confronted directed verdicts dismissing certain claims and a declaration of a mistrial on others. Like the Order on appeal here, the directed verdicts had not been certified under Rule 54(b).[2] Rejecting the proposition it should look directly to the appealability of the directed verdicts under some portion of § 14-3-330, this Court instead explained that because the directed verdicts were "subject to revision," the Court "need not yet reach whether the decisions are immediately appealable under section 14-3-330." *Id.* at 575, 698 S.E.2d at 860. "Appellate courts," this Court held, "should not delve into the realm of reviewing decisions that may be altered by the trial judge." *Id.* at 576, 698 S.E.2d at 860.

This Court's reasoning in *Ashenfelder* is entirely consistent with and implicitly premised upon the bedrock principle that a trial judge may, at any time prior to entry of final judgment,

[2] It is important to note that had this matter proceeded to trial without the interim grant of partial summary judgment now on appeal, Respondent certainly could have sought a directed verdict upon the same claim as to which it was granted partial summary judgment. That fact renders immaterial for purposes of this motion the distinction that *Ashenfelder* involved an order granting directed verdicts and this appeal involves an order granting partial summary judgment. The crucial issue that does matter is that, absent certification, the order in *Ashenfelder* and the order on appeal here could be revisited and revised, making both unsuitable for appellate review.

revisit and revise any orders whatsoever. Recognizing this principle, this Court has explained that "[a] trial judge, until final judgment, controls the trial of the case before him, and as a general rule may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree." *PPG Indus. Inc. v. Orangeburg Paint & Decorating Ctr., Inc.*, 297 S.C. 176, 183, 375 S.E.2d 331, 334 (Ct. App. 1988); *see also id.* at 183-84, 375 S.E.2d at 335 (noting that "many . . . illustrations could be given of a trial judge's right to reconsider decisions he has made during the course of a trial and before final judgment is entered" and holding that a trial court may reconsider a motion for summary judgment previously denied).

This principle is similarly acknowledged in the very language of Rule 54(b), SCRCP, which recognizes a trial court may, in the absence of certification, revise "***any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties*** . . . at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." (emphasis added).

In directing this Court's focus to S.C. Code § 14-3-330, Appellant leapfrogs entirely the preliminary questions of finality and the potential for revision. *Ashenfelder* does not allow such a logical leap. Only after an appellate court is "assured that the possibility of revision no longer exists" is it appropriate to "proceed to analyze whether a decision is appropriate for appeal under . . . section 14-3-330." *Ashenfelder*, 389 S.C. at 578, 698 S.E.2d at 862.

3. *Ashenfelder* is Controlling, Not the *Link* or *Lebovitz* Decisions.

Beyond ignoring the preliminary questions of whether the Order is final or remains subject to revision, Appellant attempts to force the facts of this appeal into the mold of two much earlier decisions, *Lebovitz v. Mudd*, 289 S.C. 476, 347 S.E.2d 94 (1986), and *Link v. School

District of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990). Neither decision is controlling here.

The *Lebovitiz* court, for example, dealt with whether an order granting a ***motion to dismiss*** a fraudulent conveyance claim and ***cancelling notices of lis pendens*** covering ten parcels of property was immediately appealable. The Court's specific holding addressed only the appealability of these orders and was in part premised upon precedent recognizing that an order that "strikes out part of a pleading" or that "dissolve[es] an attachment" is directly appealable under § 14-3-330. *Lebovitz*, 289 S.C. at 479, 347 S.E.2d at 96. Here, of course, the Order in question does not implicate an attachment, placing the dispensation of real property at risk, or strike out a pleading; instead, the Order granted declaratory relief as to one claim for relief, leaving other claims for future resolution.

The *Link* case is similarly unavailing. The procedural posture of that case is particularly noteworthy. The Court confronted the question of whether a litigant had abandoned his right to appeal an uncertified order granting partial summary judgment when he had waited to file his appeal until ***after entry of final judgment***. Relying on *Lebovitz*, the *Link* court did observe in dicta that "an order which is immediately appealable by statute is not rendered unappealable because it has not been certified under Rule 54(b)," *Link*, 302 S.C. at 4, 393 S.E.2d at 177, and determined that the appellant was entitled pursuant to S.C. Code Ann. § 14-3-330(1) to wait until final judgment was entered to appeal the grant of partial summary judgment. *Id.* at 6, 393 S.E.2d 179.

But two facts about the *Link* decision are key: first, final judgment ***had been entered*** in that case, meaning the intermediate order granting summary judgment was not subject to further review and revision, and second, the *Link* court specifically noted that all the implications of (the

then relatively new) Rule 54(b) it had not yet been addressed. *See Link*, 302 S.C. at 5 n.3, 393 S.E.2d at 178 n.3 (noting the Court "not had occasion to address the effect of granting a Rule 54(b) certification on appealability," that "Rule 54(b) certification purports to alter the definition of 'final judgment' by allowing a final judgment to be entered on certain claim before disposition of the entire case," and that "[u]ntil this Court determines whether granting certification mandates an immediate appeal, the safer course is to immediately appeal any order certified under Rule 54(b)").

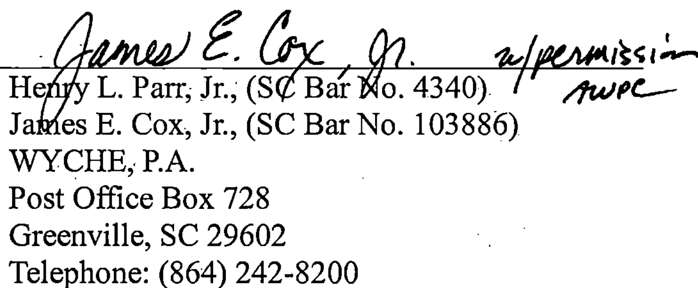
These facts proved dispositive to this Court in *Ashenfelder*, which held that case "presented an additional concern under Rule 54(b) **that was not addressed in *Link***" – the fact that the order on appeal was "subject to revision under Rule 54(b) in the absence of certification." 389 S.C. at 575, 698 S.E.2d at 860 (emphasis added). "In essence," this Court explained in *Ashenfelder*, "we are one step removed from the question of whether section 14-3-330 is controlling, as noted in *Link*, because we do not yet have a decision that dons a veil of appealability due to the potential for revision." *Id.* at 575-76, 698 S.E.2d at 860.

"Rule 54(b)," this Court then summarized, "without conflicting with *Link*, affords the trial court an opportunity to exercise its discretion to make sure there will be no need to revise a directed verdict ***or any other decision***." *Id.* at 578, 698 S.E.2d at 861 (emphasis added). "Once we are assured that the possibility of revision no longer exists, then we may proceed to analyze whether a decision is appropriate for appeal under *Link* and section 14-3-330." *Id.* at 578, 698 S.E.2d at 863; *see also* Jean H. Toal et al., APPELLATE PRACTICE IN SOUTH CAROLINA at 161 (3d ed. 2016) (quoting same).

CONCLUSION

Neither litigants nor courts benefit from piecemeal appellate litigation. This Court should reaffirm its decision in *Ashenfelder* and not engage in a guessing game of whether the Order will stand for the length of this litigation below, as numerous other claims are tried and the trial court retains discretion to revisit and amend its prior rulings, including the Order. This appeal should be dismissed.

Respectfully submitted,



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Dated: September 30, 2019
Greenville, South Carolina

ELECTRONICALLY FILED - 2018 Nov 28 10:09 AM - GREENVILLE - COMMON PLEAS - CASE#2018CP2305985

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS
W. CLARK JERNIGAN, M.D., PLAINTIFF,	CASE NO. 2018-CP-23-___________
vs.	**COMPLAINT**
ST. FRANCIS PHYSICIAN SERVICES, INC. DEFENDANT.	

The Plaintiff, W. Clark Jernigan , M.D. ("Plaintiff" or "Dr. Jernigan"), complaining of the Defendant, would respectfully show unto the Court as follows:

PARTIES AND JURISDICTION

1. Dr. Jernigan is a physician residing in Greenville County, South Carolina.

2. Defendant St. Francis Physician Services, Inc. ("Physician Services") is a corporation organized and existing under the laws of the State of South Carolina with a principal place of business in Greenville County, South Carolina.

3. This Court has jurisdiction over the parties to and subject matter of this action.

GENERAL ALLEGATIONS

4. Dr. Jernigan brings this action for breach of contract and violation of the South Carolina Payment of Wages Act, S.C. Code § 41-10-10 *et seq*. (the "Act") because Physician Services has failed and refused to pay Dr. Jernigan the compensation that it agreed to pay him and that is required by the July 09, 2006 Employment Agreement, as amended, between Dr. Jernigan and Physician Services ("the Employment Agreement"). The Employment Agreement is attached hereto

as Exhibit A, which is filed under seal due to the confidentiality provision imposed in the agreement by Physician Services.

5. Physician Services is affiliated with St. Francis Hospital, Inc. and the Bon Secours Eastside and Downtown Hospitals in Greenville, South Carolina.

6. Physician Services operates medical practices and employs physicians to provide medical care to patients. One of its medical practices is the orthopedic practice Piedmont Orthopedics, in which Dr. Jernigan and other orthopedic surgeons provide orthopedic care to their patients (the "Piedmont Orthopedics Medical Practice").

7. Dr. Jernigan is an outstanding physician, specializing in treatment of disorders of the shoulder.

8. As an employed physician of Physician Services since September 1, 2006, through the present, Dr. Jernigan has provided outstanding medical care to the patients he has treated.

9. Dr. Jernigan is board certified by the American Board of Orthopedic Surgery. He is also proficient in subspecialty areas of complex foot and ankle care and has over ten years experience as an in house orthopedic traumatologist at a level I trauma center.

10. The Employment Agreement by its terms, remains in effect through August 31, 2020, has not been terminated by either party, and continues to be in effect.

<u>INDUCEMENT OF DR. JERNIGAN TO BECOME EMPLOYED AND CONTINUE TO BE EMPLOYED BY PHYSICIAN SERVICES</u>

11. Prior to September 2006, Piedmont Orthopedics Medical Practice was independent of Physician Services and functioned as Piedmont Orthopedics, P.A. ("POA"). Dr. Jernigan was one of the physician owners of POA.

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12. POA enjoyed an outstanding reputation as a leading orthopedics practice that has provided excellent services to patients for over 70 years.

13. In 2006, Physician Services desired that Dr. Jernigan and the other physicians associated with POA discontinue their independent practice, become employed physicians of Physician Services, and continue to practice orthopedics as a part of the Physician Services system.

14. Physician Services presented a proposal to Dr. Jernigan and his colleagues (the "2006 Proposal") that offered a number of benefits, including what Physician Services touted as a "market competitive physician compensation model."

15. The "compensation model" in the 2006 Proposal was ultimately included in the Employment Agreement and required Physician Services to pay Dr. Jernigan the following three types of compensation:

a. **Annual Base Compensation** in a specified amount payable in 26 payments during each year, with a specified amount representing payment for call coverage of the patients of the Medical Practice.

b. **Monthly Productivity Compensation** payable no later than the first day of the month following the month in which it was earned, based on a formula specified in the Employment Agreement; and

c. **Bonus Compensation** based on a formula specified in the Employment Agreement.

16. In addition, the compensation model agreed to by Physician Services and Dr. Jernigan required that payments received by Physician Services for services provided by Dr. Jernigan but not listed on the schedule used to calculate the Productivity Compensation—services

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such as independent medical exams ("IME's"), depositions, expert witness services, and incentive payments from the U.S. Centers for Medicare and Medicaid Services ("CMS") intended by CMS to incent physicians in connection with certain CMS initiatives, (collectively "Flow Through Payments")—were to be paid in full to Dr. Jernigan. To the best of Dr. Jernigan's information, Physician Services paid him his Flow Through Payments as it had agreed to pay them until sometime after September 1, 2016 when it stopped these payments and began retaining his Flow Through Payments for itself without his consent.

PHYSICIAN SERVICES FAILS TO PAY THE PROPER AMOUNT OF PRODUCTIVITY COMPENSATION BEGINNING SEPTEMBER 1, 2016

Productivity Compensation Based on WRVU's

17. The Employment Agreement, consistent with the 2006 Proposal, specified that Dr. Jernigan's Productivity Compensation would be based on the amount of Work Relative Value Units ("WRVU's") attributable to services personally performed by Dr. Jernigan. His monthly Productivity Compensation is the amount, if positive, of the WRVU's multiplied by a rate expressed in dollars (the "Conversion Rate") specified in the Employment Agreement, less the amount of his Base Compensation. The applicable Conversion Rate in the Employment Agreement is stated in the agreement. Thus, Dr. Jernigan was and is entitled to receive Productivity Compensation to the extent that the dollar value of his services at Conversion Rate per WRVU is or was more than his Base Compensation each month.

18. The Employment Agreement makes clear that the number of WRVU's applicable to Dr. Jernigan's services are specified by the schedule published by CMS (the "WRVU Schedule"). The attached portion of the WRVU Schedule in effect when the Employment Agreement was

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entered provides examples of the WRVU's associated with various orthopedic procedures. (See Exhibit B).

19. WRVU's, as defined by CMS, are separate and distinct from Payment Modifiers that CMS uses to calculate the amounts that it will pay health care providers.

20. CMS has published an explanation of the WRVU Schedule, which is attached as Exhibit C. The explanation describes the "relative value units" separately from the "various payment policy indicators needed for payment adjustment (*i.e.*, payment for an assistant at surgery, team surgery, bilateral surgery, etc.)." It also provides specific and separate definitions for Payment Modifiers such as the "Multiplier Procedure (Modifier 51)," which states the rule for adjusting payment to providers for multiple procedures, as well as similar Payment Modifiers that adjust payments in instances of "Bilateral Surgery (Modifier 50)," where there are "Co-surgeons (Modifier 62)," and where there is a "Team Surgery (Modifier 66)." It separately defines a "Work RVU" as a "Relative Value Unit (RVU) for physician work in [a specific service] as published in the Federal Register Fee Schedule for Physician Services" for that calendar year. It also separately defines other types of RVU's that are not Work RVU's. For example a "Malpractice RVU" is the "RVU for malpractice expense for the service."

21. CMS uses the WRVU's along with other types of Relative Value Units ("RVU's") as part of the process of calculating the amounts it will pay for certain services. In some instances, after CMS determines the WRVU's applicable to a service, it will reduce the amount it pays a provider, such as a hospital, by a Payment Modifier. But, even in those instances when a Payment Modifier is applied, CMS determines the WRVU's attributable to the service according to its published schedule.

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22. Until September 1, 2016, to the best of Dr. Jernigan's knowledge and belief, Physician Services generally attempted in good faith to calculate Dr. Jernigan's Monthly Productivity Compensation by applying the Conversation Rate specified in the Employment Agreement to the WRVU's associated with Dr. Jernigan's services and to pay Dr. Jernigan the resulting Productivity Compensation without the application of any Payment Modifier, all as provided by the Employment Agreement.

23. Beginning September 1, 2016, however, Physician Services has failed and refused to pay Dr. Jernigan the full amount of the Productivity Compensation that he has earned and that Physician Services is obligated to pay him under the Employment Agreement.

24. Rather than multiplying Dr. Jernigan's WRVU's by the Conversion Rate specified in his employment agreement and paying him Productivity Compensation to the extent that this produces an amount in excess of Dr. Jernigan's Base Compensation as required by the Employment Agreement, Physician Services has violated by the Employment Agreement and the Act by wrongfully reducing Dr. Jernigan's Productivity Compensation in at least the following ways:

a. Physician Services has refused to credit Dr. Jernigan with the full number of WRVU's attributable to services he personally performed. Instead, Physician Services has improperly insisted that it may reduce the number of WRVU's attributable to Dr. Jernigan by applying Payment Modifiers, even though such reductions are not permitted by or even mentioned in the Employment Agreement.

b. Physician Services has also, without Dr. Jernigan's consent and in spite of his objections, created and applied a limit on the amount of Productivity

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Compensation that it will pay Dr. Jernigan, without ever fully describing this limitation in writing to Dr. Jernigan and despite the fact that this limitation is not contained in or permitted by the Employment Agreement.

25. The Employment Agreement requires that Physician Services determine Dr. Jernigan's Productivity Compensation using his actual WRVU's as specified by the CMS schedule.

26. The Employment Agreement makes no reference to CMS Payment Modifiers.

27. Therefore, Physician Services improperly and wrongfully failed to pay Dr. Jernigan of the full Productivity Compensation due to him under the terms of the Employment Agreement,for the period beginning September 1, 2016 through the present.

PHYSICIAN SERVICES FAILS TO PAY THE PROPER AMOUNT OF BONUS COMPENSATION

28. The Employment Agreement requires that Physician Services pay Dr. Jernigan Bonus Compensation according to a formula specified in detail in the Employment Agreement.

29. Until the fiscal year ending August 31, 2017, to the best of Dr. Jernigan's knowledge and belief, Physician Services generally attempted in good faith to calculate Dr. Jernigan's Bonus Compensation as required by in the Employment Agreement and to pay Dr. Jernigan the resulting Bonus Compensation as required by the Employment Agreement.

30. For the fiscal years ending August 31, 2017 and 2018, however, Physician Services has failed to pay him the full amount of the bonus due him.

PHYSICIAN SERVICES FAILS TO PAY THE PROPER AMOUNT OF FLOW THROUGH PAYMENT COMPENSATION

31. At some time, unknown to Dr. Jernigan, Physician Services also stopped paying him the Flow Through Payments that he was due and retained those payments for itself.

32. Physician Services has wrongfully withheld an undetermined amount of Flow Through Payments from Dr. Jernigan.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

33. The foregoing allegations are incorporated herein by reference.

34. The Employment Agreement constitutes a valid contract between Physician Services and Dr. Jernigan, and Dr. Jernigan has performed all obligations of him required under the Employment Agreement.

35. Physician Services has breached the Employment Agreement by failing to pay Dr. Jernigan the Productivity Compensation and Bonus Compensation due him under the Employment Agreement as set forth above.

36. Physician Services has also breached its commitment to Dr. Jernigan by failing to pay him the Flow Through Payments due to him.

37. Dr. Jernigan has been injured as a result of the loss of the Productivity Compensation, Flow Through Payments and Bonus Compensation due him under the Employment Agreement.

38. Dr. Jernigan is entitled to judgment against Physician Services in the amount of the unpaid Productivity Compensation, Flow Through Payments and Bonus Compensation that Physician Services has failed to pay him.

FOR A SECOND CAUSE OF ACTION
(Violation of South Carolina Payment of Wages Payment Act, S.C. Code § 41-10-10 *et seq.*)

39. The foregoing allegations are incorporated herein by reference.

40. The Productivity Compensation, Flow Through Payments and Bonus Compensation due to Dr. Jernigan are Wages as defined in §41-10-10(2) of the Act.

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41. Section 41-10-40(A) of the Act required and requires that Physician Services pay Dr. Jernigan in full the Productivity Compensation, Flow Through Payments and Bonus Compensation due him.

42. Physician Services violated §§ 41-10-40(A) and(C) by failing to pay Dr. Jernigan his Productivity Compensation, Flow Through Payments and Bonus compensation.

43. Physician Services' failure to pay Dr. Jernigan's compensation was intentional, in bad faith, and in blatant violation of the express terms of the Employment Agreement and its other commitments to him.

44. Dr. Jernigan is entitled to recover from Physician Services the full amount of the Productivity Compensation, Flow Through Payments and Bonus Compensation that Physician Services has failed to pay him

45. Dr. Jernigan is also entitled, under § 41-10-80(C) of the Act, to recover three times the full amount of his unpaid wages, plus costs and his attorneys' fees.

FOR A THIRD CAUSE OF ACTION
(Declaratory Relief)

46. The foregoing allegations are incorporated herein by reference.

47. The Employment Agreement is a binding agreement between Dr. Jernigan and Physician Services and sets forth the amount of Base Compensation, Productivity Compensation, and Bonus Compensation due to Dr. Jernigan during the term of the agreement.

48. Physician Services and Dr. Jernigan dispute the construction and application of the compensation provisions of the Employment Agreement.

49. The Employment Agreement has not been terminated nor modified and remains in effect.

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50. While the Employment Agreement remains in effect, Physician Services is obligated to pay Dr. Jernigan Base Compensation, Flow Through Compensation, Productivity Compensation, and Bonus Compensation as provided in the Employment Agreement.

51. Therefore, Dr. Jernigan respectfully requests that the Court declare that Physician Services must compensate Dr. Jernigan as required by the Employment Agreement, unless and until the Employment Agreement is either modified or terminated in accordance with its terms.

52. Dr. Jernigan has the right to have these questions determined by the Court pursuant to S.C. Code Ann. § 15-53-30, S.C.R.C.P. 57, and other proper legal authority, and the Court has the power to make these determinations.

53. For the foregoing reasons, Dr. Jernigan respectfully requests the Court to declare that the Employment Agreement is a binding agreement between Dr. Jernigan and Physician Services and does not permit Physician Services to unilaterally reduce Dr. Jernigan's Base, Productivity or Bonus compensation by applying Payment Modifiers or any other device or limit not set forth in the Employment Agreement as long as the Employment Agreement as not been modified or terminated according to its terms. .

54. Additionally, Dr. Jernigan is entitled to an award of, and Physician Services is liable for, the reasonable costs and expenses of Dr. Jernigan, including reasonable attorney's fees and the expenses of this action.

WHEREFORE, Plaintiff, Dr. Jernigan prays for (a) relief as hereinabove set forth, including but not limited to (1) actual and treble damages as set forth above, plus pre-judgment interest to Plaintiff; and (2) Plaintiff's attorneys' fees, experts' fees, costs, and other litigation expenses, (b) a declaration that the Employment Agreement does not permit Physician Services unilaterally to

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reduce Dr. Jernigan's compensation by applying Payment Modifiers or any other device or limit not set forth in the Employment Agreement as long as the agreement has not been modified or terminated pursuant to section 3.4 and (c) an injunction enjoining Physician Services from failing to pay Productivity Compensation, Flow Through Compensation, or Bonus Compensation as required by the Employment Agreement as long as the agreement remains in effect and such other and further relief as to the Court may appear just, equitable, and proper.

Respectfully submitted:

WYCHE, P.A.

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November 28, 2018

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stillwell, Circuit Court Judge

Appellate Case No. 2019-001415

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v.

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within and foregoing **Respondent W. Clark Jernigan, M.D.'s Reply in Support of Motion to Dismiss Appeal and For Costs** has been served upon the Appellant's counsel pursuant to Rule 262(b), SCACR, by hand delivering a copy of the same, on this 30th day of September, 2019, to the following addresses:

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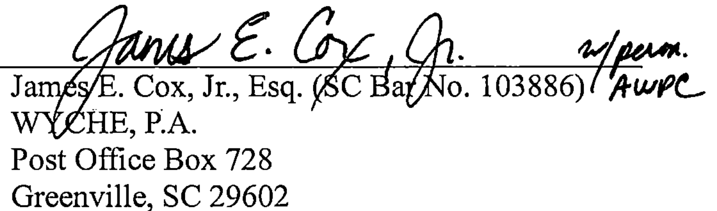

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