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SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Charleston County
Honorable J. Durham Cole, Circuit Court Judge
Civil Action No.: 2017-CP-10-04371
Appellate Case No.: 2021-000446

CARY E. FECHTER, M.D.,

Appellant,

vs.

LEON MARTIN ORTNER; THE ORTNER
LAW FIRM, LLC; GERALD ROSENTHAL, and
ROSENTHAL, LEVY, SIMON and RYLES, P.A.,

Respondents.

***INITIAL BRIEF OF THE APPELLANT,
CARY E. FECHTER, M.D.***

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	v
I. STATEMENT OF THE ISSUES ON APPEAL	1
A. Whether The Circuit Court Incorrectly Concluded The South Carolina Workers' Compensation Commission Had Subject Matter Jurisdiction Over The Appellant's Claims Against The Ortner Respondents And The Rosenthal Respondents?	1
B. Whether The Circuit Court Incorrectly Granted The Ortner Respondents' Motion To Dismiss The Appellant's Complaint And Incorrectly Denied The Appellant's Motion For Reconsideration Of The Order Granting The Ortner Respondents' Motion To Dismiss The Appellant's Complaint?	1
C. Whether The Circuit Court Incorrectly Granted The Rosenthal Respondents' Motion To Dismiss The Appellant's Complaint And Incorrectly Denied The Appellant's Motion For Reconsideration Of The Order Granting The Rosenthal Respondents' Motion To Dismiss The Appellant's Complaint?	1
II. STATEMENT OF THE CASE	2
III. STATEMENT OF THE FACTS	5
A. Dr. Fechter Is Retained By The Respondents	5
B. The Scope Of Dr. Fechter's Retention	6
C. Dr. Fechter's Medical Services Billing Dispute	7
D. The South Carolina Workers' Compensation Commission Addresses Dr. Fechter's Medical Services Billing Dispute	9

IV.	ARGUMENT AND CITATION OF AUTHORITY	12
	STANDARD OF REVIEW.....	12
A.	THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID NOT HAVE SUBJECT MATTER JURISDICTION TO EITHER CONSIDER AND/OR TO ADJUDICATE THE LEGITIMACY AND VALIDITY OF DR. FECHTER'S VARIOUS COMMON LAW CLAIMS AGAINST THE ORTNER RESPONDENTS AND/OR THE ROSENTHAL RESPONDENTS.....	13
1.	When The SCWCC Considered And Adjudicated Dr. Fechter's Additional Fees Claims The SCWCC Had Already Relinquished Its Jurisdiction Over The Relevant Aspects Of The Nevamar Claimants' Worker's Compensation Litigation.....	14
2.	The SCWCC's Decisions Regarding Dr. Fechter's Claims Have No Preclusive Effect In The Circuit Court Litigation.....	17
3.	Dr. Fechter's Common Law Claims Did Not Affect The Nevamar Claimants' Right To Compensation.....	19
4.	Separate And Independent Common Law Claims Are Not Litigated Through The Statutory Workers' Compensation System.....	22
5.	The SCWCC Exceeded Its Jurisdiction By Addressing Dr. Fechter's Common Law Claims	27
B.	THE CIRCUIT COURT SHOULD HAVE DENIED THE ORTNER RESPONDENTS' RENEWED MOTION TO DISMISS DR. FECHTER'S CLAIMS OR, IN THE ALTERNATIVE, GRANTED DR. FECHTER'S MOTION FOR RECONSIDERATION OF THE ORDER OF DISMISSAL.....	30
1.	The Ortner Respondents Had Notice Of Dr. Fechter's Action.....	30

2.	The Ortner Respondents Had Notice Of Dr. Fechter’s Action Within The Applicable Statute Of Limitations	34
C.	THE CIRCUIT COURT SHOULD HAVE DENIED THE ROSENTHAL RESPONDENTS’ MOTION TO DISMISS DR. FECHTER’S CLAIMS OR, IN THE ALTERNATIVE, GRANTED DR. FECHTER’S MOTION FOR RECONSIDERATION OF THE ORDER OF DISMISSAL	37
1.	The Rosenthal Respondents Had Notice Of Dr. Fechter’s Action.....	38
2.	The Ortner Respondents Had Notice Of Dr. Fechter’s Action Within The Applicable Statute Of Limitations	40
D.	THE ORTNER RESPONDENTS AND THE ROSENTHAL RESPONDENTS HAD A CONTRACTUAL AND ETHICAL OBLIGATION TO PAY DR. FECHTER’S ADDITIONAL FEES CLAIMS	42
V.	CONCLUSION.....	46

TABLE OF AUTHORITIES

Case Decisions, Administrative Rulings, Etc.

<u>Aetna v. Workers' Comp Access, LLC v. Coliseum</u> <u>Med. Ctr.</u> , 322 Ga.App. 641, 746 S.E.2d 148 (2013)	26
<u>Ahn v. Inkwell Publ'g Solutions, Inc.</u> , 2013 WL 3055793 (S.D.N.Y. 19 June 2013)	34
<u>Baker Hospital v. Fireman's Fund Ins. Co.</u> , 314 S.C. 98, 441 S.E.2d 822 (1994).....	20, 21, 29
<u>BB&T v. Taylor</u> , 369 S.C.548, 633 S.E.2d 501 (2006)	31
<u>Beckham v. Durant</u> , 300 S.C. 329, 387 S.E.2d 701 (Ct.App. 1989).....	32, 35, 39-41
<u>Blue Cross & Blue Shield of S.C. v. South</u> <u>Carolina Indus. Comm'n</u> , 274 S.C. 204, 262 S.E.2d 35 (1980) (<i>per curiam</i>)	19, 20, 28
<u>Bondanelli v. Ocean Park SRL</u> , 2012 WL 12893008 (C.D.Cal., filed 19 Oct. 2012).....	34
<u>Bowman v. Weeks Marine, Inc.</u> , 936 F.Supp. 329 (D.S.C., filed 21 Aug. 1996).....	31
<u>Brannon v. Pike</u> , 112 Idaho 938, 737 P.2d 459 (1987)	24
<u>Broussard, Bolton, Halcomb & Vizzier v. Williams</u> , 796 So.2d 791 (La.App. 3 rd Cir. 2001)	25
<u>Burt v. Gahan</u> , 351 Mass. 340, 220 N.E.2d 817 (1966)	44, 45
<u>Carolina Park Associates, LLC v. Marino</u> , 400 S.C. 1, 732 S.E.2d 876 (2012).....	12

<u>C.C. Plumb Mixes, Inc. v. Stone</u> , 108 R.I. 75, 272 A.2d 152 (1971).....	45
<u>Charleston Harbor Resort & Marina v. Davis</u> , 2016 WL 640490 (S.C.App., filed 17 Feb. 2016) (<i>per curiam</i>).....	31
<u>Clark v. Gastonia Ice Cream Co.</u> , 261 N.C. 234, 134 S.E.2d 354 (1964)	15
<u>Companion Prop. & Cas. Ins. Co. v. Airborne Express, Inc.</u> , 369 S.C. 388, 631 S.E.2d 915 (Ct.App. 2006).....	12, 31
<u>Copp v. Breskin</u> , 56 Wash.App. 229, 782 P.2d 1104 (1989).....	44, 45
<u>Covington v. A–Able Roofing, Inc.</u> , 670 So.2d 611 (La.App. 3rd Cir. 1996).....	25
<u>Curry v. Ozarks Elec. Corp.</u> , 2000 WL 967930 (Mo.App., filed 14 July 2000), <i>affirmed</i> , 39 S.W.3d 494 (Mo. 2001) (<i>en banc</i>), <i>overruled on other grounds by Hampton v. Big Boy Steel Erection</i> , 121 S.W.3d 220 (Mo. 2003) (<i>en banc</i>)	23
<u>DeWitt v. S.C. Dept. of Highways & Pub. Trans.</u> , 274 S.C. 184, 262 S.E.2d 28 (1980).....	16
<u>Doe v. Marion</u> , 373 S.C. 390, 645 S.E.2d 245 (2007) (<i>per curiam</i>)	12
<u>Doyle v. U.S. Fidelity & Guar. Co.</u> , 316 S.C. 83, 447 S.E.2d 192 (1994)	22
<u>Eastern Elevator Co. v. Hedman</u> , 290 So.2d 56 (Fla. 1974).....	23, 24
<u>84 Lumber Co. v. Babineaux</u> , 886 So.2d 693 (La.App. 3 rd Cir. 2004).....	25
<u>El–Aheidab v. Citibank (S.D.), N.A.</u> , 2012 WL 506473 (N.D.Cal. 15 Feb. 2012)	34

<u>Ellender's Portable Bldgs., Inc. v. Cormier,</u> 787 So.2d 601 (La.App. 3rd Cir. 2001).....	24
<u>Empire Cmty. Dev. LLC v. Giambalvo-West,</u> 2020 WL 9823022 (E.D.N.Y., filed 6 Mar. 2020).....	34
<u>Estate of Knight v. Whitten, 5099369</u> (S.C.App., filed 19 Sept. 2019) (<i>per curiam</i>).....	31
<u>Estes v. Roper Tem. Services, Inc., 304 S.C. 12,</u> 403 S.E.2d 157 (Ct.App. 1991).....	12, 31
<u>Ex parte Harte, 186 S.C. 125, 195 S.E. 253 (1938)</u>	16
<u>Ex parte S.C. Prop. & Cas. Inc. Guar. Ass'n.,</u> 411 S.C. 501, 768 S.E.2d 670 (Ct.App. 2015).....	21
<u>Fassett v. Evans, 364 S.C. 42,</u> 610 S.E.2d 841 (Ct.App. 2005).....	31, 39
<u>Fleming v. Rose, 350 S.C. 488,</u> 567 S.E.2d 857 (2002)	12
<u>Figueroa v. C and S Ball Bearing,</u> 237 Conn. 1, 675 A.2d 845 (1996)	23
<u>Fireman's Fund Ins. Co. v. Crowder, 123 Ga.App. 469,</u> 181 S.E.2d 530 (1971)	16
<u>Gaines Reporting Services v. Mack,</u> 4 Ohio App.3d 234, 447 N.E.2d 1317 (1982)	45
<u>Gilbert v. Miller, 356 S.C. 25,</u> 586 S.E.2d 861 (Ct.App. 2003).....	12
<u>Gilbert v. Ossich Enters., LLC, 2021 WL 1754195</u> (D.S.C., filed 4 May 2021)	32
<u>Gualtieri v. Burleson, 84 N.C.App. 650,</u> 353 S.E.2d 652 (1987), <i>disc. rev. denied</i> , 320 N.C. 168, 358 S.E.2d 50 (1987)	44

<u>Hancock v. Halliday</u> , 65 Idaho 645, 150 P.2d 137 (1944), <i>superseded by statute</i> <i>recognized in</i> <u>Smith v. O/P Trans., Inc.</u> , 120 Idaho 123, 814 P.2d 23 (1991)	24
<u>Hancock v. Mid-South Mgmt. Co., Inc.</u> , 381 S.C. 326, 673 S.E.2d 801 (2009).....	12, 24
<u>Hutto v. County of Aiken</u> , 2004 WL 6248942 (S.C.App., filed 18 Feb. 2004)	39
<u>Ikon Office Solutions, Inc. v. Law Office of</u> <u>Craig Kuglar, LLC</u> , 2013 WL 5350852 (N.D.Ga., filed 23 Sept. 2013)	45
<u>Ingram v. Lupo</u> , 726 S.W.2d 791 (Mo.App. 1987)	45
<u>In re Fulton</u> , 343 S.C. 506, 541 S.E.2d 531 (2001) (<i>per curiam</i>)	43
<u>In re Johnson</u> , 385 S.C. 501, 685 S.E.2d 610 (2009) (<i>per curiam</i>)	43
<u>In re Longin</u> , 393 S.C. 368, 713 S.E.2d 297 (2011) (<i>per curiam</i>)	42, 43
<u>In re Okpalaeke</u> , 374 S.C. 186, 648 S.E.2d 593 (2007) (<i>per curiam</i>)	43
<u>In re Peagler</u> , 2001 WL 180 (D.S.C., filed 1 June 2001)	32
<u>James v. Anne's, Inc.</u> , 390 S.C. 188, 701 S.E.2d 730 (2010)	19
<u>Judd & Detweiler, Inc. v. Gittings</u> , 3 App. D.C. 304 (D.C.Cir. 1915)	45
<u>Labouseur v. Harleysville Mut. Ins. Co.</u> , 302 S.C. 540, 397 S.E.2d 526 (1990).....	15, 19, 21-22
<u>Limehouse v. Hulsey</u> , 404 S.C. 93, 744 S.E.2d 566 (2013)	16
<u>Martin v. Argonaut Ins. Co.</u> , 90 Idaho 107, 408 P.2d 475 (1965).....	24

<u>McCullough v. Johnson</u> , 307 Ark. 9, 816 S.W.2d 886 (1991)	45
<u>Matter of Abney</u> , 316 S.C. 182, 447 S.E.2d 848 (1994) (<i>per curiam</i>)	43
<u>Med. College of Penn. v. Workmen's Comp. Appeal Bd.</u> , 139 Pa.Cmwth. 632, 591 A.2d 338 (1991).....	23
<u>Molezzo Reporters v. Patt</u> , 94 Nev. 540, 579 P.2d 1243 (1978).....	45
<u>Moore v. Simpson</u> , 322 S.C. 518, 473 S.E.2d 64 (Ct.App. 199)	33, 35, 39, 41
<u>Mull v. Ridgeland Realty, LLC</u> , 387 S.C. 479, 693 S.E.2d 27 (Ct.App. 2010).....	31, 35, 40, 41
<u>Nat'l Union Ins. Co. v. Mills</u> , 99 Ga.App. 697, 99 S.E.2d 830 (1959)	16
<u>Nunez v. Loomis Fargo & Co.</u> , 807 So.2d 1063 (La.App. 4th Cir. 2002), <i>writ denied</i> , 816 So.2d 307 (La. 2002).....	24
<u>NYKCool, A.B. v. Pacific Int'l. Svs., Inc.</u> , 2013 WL 6799973 (S.D.N.Y., filed 20 Dec. 2013) <i>objections to report and recommendation sustained in part and overruled in part on other grounds by</i> 66 F.Supp.3d 385 (S.D.N.Y. 2014), <i>adhered to on reconsideration</i> , 2015 WL 998455 (S.D.N.Y., filed 5 Mar. 2015).....	34
<u>Oak Park Hospital v. Smuda</u> , 214 Ill.App.3d 1032, 574 N.E.2d 804 (1999)	24
<u>Okers Co. v. Clear Touch Interactive, Inc.</u> , 2021 WL 1827181 (D.S.C., filed 7 May 2021)	31
<u>Owners Ins. Co. v. Foxfield Commons POA, Inc. d/b/a Foxfield Commons</u> , 2021 WL 5086262 (D.S.C., filed 9 Nov. 2021).....	31

<u>Patriot Rail Corp. v. Sierra Railroad Co.</u> , 2016 WL 704456 (E.D.Cal., filed 23 Feb. 2016)	28
<u>Peeples v. Ramspacher</u> , 29 F.Supp. 632 (E.D.S.C. 1939)	32
<u>Pitt v. Workmen’s Comp. Appeal Bd. (McEachin)</u> , 161 Pa.Cmwlth. 60, 636 A.2d 235, 237 (1993)	26
<u>Polite v. Westvaco Corp.</u> , 2010 WL 10079468 (S.C.App., filed 1 Mar. 2020)	21
<u>Price v. Peachtree Elec. Svs., Inc.</u> , 396 S.C.403, 721 S.E.2d 461 (Ct.App. 2011) <i>reh’g denied</i> (27 Jan. 2021), <i>cert. granted</i> (8 May 2012), <i>affirming as modified on</i> <i>other grounds</i> , 405 S.C. 455, 748 S.E.2d 229 (2013)	19, 21, 27
<u>Rayburn v. Dysart</u> , 2019 WL 2613469 (S.C.App., filed 29 June 2019) (<i>per curiam</i>)	31
<u>Rebich v. Burdine’s & Liberty Mut. Ins. Co.</u> , 417 So.2d 284 (Fla. 4 th DCA 1982)	24
<u>Richardson v. P.V., Inc.</u> , 383 S.C. 610, 682 S.E.2d 263 (2009)	31
<u>Roberts, Walsh & Co. v. Trugman</u> , 109 N.J.Super. 594, 264 A.2d 237 (1970)	45
<u>Roche v. Young Bros., Inc. of Florence</u> , 318 S.C. 207, 456 S.E.2d 897 (1995).....	31, 35, 40, 41
<u>Rockmore Inv. Master Fund Ltd. v. Power 3 Med.</u> <u>Prods, Inc.</u> , 30 Misc.3d 1206(A), 958 N.Y.S.2d 648 (Table), 2010 WL 5491131 (Sup.Ct.N.Y.Co., filed 23 Dec. 2010).....	34
<u>Roper Hospital v. Clemons</u> , 326 S.C. 534, 484 S.E.2d 598 (Ct.App. 1997).....	19, 22, 27

<u>Ross v. Richland County</u> , 270 S.C. 100, 240 S.E.2d 649 (1978)	16
<u>Seabrooks v. Aiken County</u> , 2016 WL 4394275 (D.S.C., filed 18 Aug. 2016).....	39
<u>Short v. Demopolis</u> , 103 Wash.2d 52, 691 P.2d 163 (1984).....	45
<u>Sloat Chiropractic Clinic v. Datsun</u> , 17 Ark.App. 161, 706 S.W.2d 181 (1986).....	23
<u>Smith v. Williams</u> , 333 Ga.App. 167, 775 S.E.2d 639 (2015)	24, 26
<u>S.C. Nat'l Bank v. Silks</u> , 295 S.C. 107, 367 S.E.2d 421 (Ct.App. 1988).....	2
<u>S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Insured Fund</u> , 303 S.C. 368, 401 S.E.2d 144 (1991)	16
<u>S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.</u> , 304 S.C. 210, 403 S.E.2d 625 (1991)	15, 16
<u>State v. Funderburk</u> , 259 S.C. 256, 191 S.E.2d 520 (1972)	16
<u>State Compensation Ins. Fund v. Industrial Accident Comm'n</u> , 20 Cal.2d 264, 125 P.2d 42 (1942).....	15
<u>Theuerkauf v. Sutton</u> , 102 Wis.2d 176, 306 N.W.2d 651 (1981)	45
<u>Thompson v. Liberty Nat'l. Ins. Co.</u> , 78 Idaho 381, 304 P.2d 910 (1956), <i>superseded by statute recognized in Smith v. O/P Trans., Inc.</i> , 120 Idaho 123, 814 P.2d 23 (1991)	24
<u>TIG Ins. Co. v. La. Workers' Comp. Corp.</u> , 917 So.2d 26 La.App. 1 st Cir. 2005)	24

<u>Travelers Ins. Co. v. Panama-Williams, Inc.</u> , 424 F.Supp. 1156 (N.D.Okla. 1976)	37
<u>Turner v. Milliman</u> , 392 S.C. 116, 708 S.E.2d 766 (2011)	12
<u>Unisun Ins. Co. v. Hawkins</u> , 342 S.C.537, 537 S.E.2d 559 (Ct.App. 2000).....	37
<u>U.S. States Bank N.A. v. Burr</u> , 2015 WL 793051 (S.C.App., filed 25 Feb. 2015)	11
<u>Wells v. Goodyear Tire & Rubber Co.</u> , 14 Neb.App. 384, 707 N.W.2d 438 (2005)	26
<u>White Oak Manor, Inc. v. Lexington Ins. Co.</u> , 407 S.C. 1, 753 S.E.2d 537 (2014).....	31
<u>Woodson v. DLI Properties, LLC</u> , 406 S.C. 517, 753 S.E.2d 428 (2014)	2
<u>White v. Microsoft Corp.</u> , 454 F.Supp.2d 1118 (S.D.Ala. 2006).....	34
<u>Zurich Amer. Ins. Co. v. Tolbert</u> , 387 S.C. 280, 692 S.E.2d 523 (2010)	12, 31

Statutes, Court Rules, Administrative Regulations, Etc.

<u>La. Rev. Stat. 23:1310.3(E)</u> (West Group 2000)	25
<u>N.C. Rule of Professional Responsibility, 5.3</u>	44
<u>S. C. Code Ann. § 15-3-20(B)</u> (Thomson Reuters West 2015).....	41
<u>S. C. Code Ann. § 15-3-530</u> (Thomson Reuters West 2015).....	35, 40
<u>S. C. Code Ann. §§ 39-5-10, et seq.</u> (Thomson Reuters West 2020).....	2
<u>S. C. Code Ann. § 42-3-180</u> (Thomson Reuters West 2015).....	13, 19, 27

<u>S.C. Code Ann. Regs. § 67-215</u> (Thomson Reuters West 2016).....	18, 28, 29
<u>S.C. Code Ann. Regs. § 67-1206</u> (Thomson Reuters West 2001).....	13
Rule 407, <u>SCACR</u> (Rule 5.3(b), <u>RPC</u>).....	42
Rule 407, <u>SCACR</u> (Rule 5.3(b), <u>RPC</u>) (Cmt. 2).....	41
Rule 3, <u>SCRCivP</u>	41
Rule 4, <u>SCRCivP</u>	31
Rule 4(d)(3), <u>SCRCivP</u>	41
Rule 4(d)(8), <u>SCRCivP</u>	41
Rule 4(g), <u>SCRCivP</u>	32, 35, 39, 41
Rule 5(d), <u>SCRCivP</u>	32, 35, 39, 41
Rule 12(a), <u>SCRCivP</u>	36
Rule 12(b)(1), <u>SCRCivP</u>	3
Rule 12(b)(3), <u>SCRCivP</u>	3
Rule 12(b)(4), <u>SCRCivP</u>	3
Rule 12(b)(5), <u>SCRCivP</u>	3, 4
Rule 12(b)(6), <u>SCRCivP</u>	3
Rule 56, <u>SCRCivP</u>	11
Rule 56(c), <u>SCRCivP</u>	11, 12

Books, Treatises, Legal Periodicals, Etc.

Robert Rossi, <i>Attorney’s Personal Liability For Expenses, Attorneys’ Fees 3rd</i> , § 1.26 (Thomson Reuters West 2021 update).....	45
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Anno., <i>Attorney's Personal Liability for Expenses Incurred in Relation to Services for Client</i> , 66 <u>A.L.R.</u> 4th 256 (1988)	43
Anno., 15 <u>A.L.R.</u> 3d 527 (1966).....	44
32A Am.Jur.2d, <u>Federal Courts</u> , § 581 (Thomson Reuters West 2007).....	16
5A Charles Alan Wright & Arthur R. Miller, <u>Federal Practice and Procedure Civil 2d</u> , § 1353 (West 1990).....	37
4 Arthur Larson and Lex K. Larson, <u>Larson's Workers' Compensation Law</u> , § 94.42 (West Group 1987)	15, 18-19
5 Arthur Larson and Lex K. Larson, <u>Larson's Workers' Compensation Law</u> , § 94.02[11] (West Group 1999)	18-19
24 <u>S.C. Juris.</u> , <i>Rules of Civil Procedure</i> § 5.2 (Thomson Reuters West 2021 update).....	32

I. STATEMENT OF THE ISSUES ON APPEAL

- A. Whether The Circuit Court Incorrectly Concluded The South Carolina Workers' Compensation Commission Had Subject Matter Jurisdiction Over The Appellant's Claims Against Both The Ortnier Respondents And The Rosenthal Respondents?

- B. Whether The Circuit Court Incorrectly Granted The Ortnier Respondents' Motion To Dismiss The Appellant's Complaint And Incorrectly Denied The Appellant's Motion For Reconsideration Of The Order Granting The Ortnier Respondents' Motion To Dismiss The Appellant's Complaint?

- C. Whether The Circuit Court Incorrectly Granted The Rosenthal Respondents' Motion To Dismiss The Appellant's Complaint And Incorrectly Denied The Appellant's Motion For Reconsideration Of The Order Granting The Rosenthal Respondents' Motion To Dismiss The Appellant's Complaint?

II. STATEMENT OF THE CASE

On 25 August 2017 (*Ortner Order*, p.3; *Rosenthal Order*, p.3), the Appellant, Cary E. Fechter, M.D. (“Dr. Fechter”), sued both the Respondents, Leon Martin Ortner and The Ortner Law Firm LLC (the “Ortner Respondents”), as well as the Respondents, Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles (the “Rosenthal Respondents”). Dr. Fechter asserted claims for breach of contract (*Ortner Order*, p.3; *Rosenthal Order*, p.2; *Comp.*, paras. 3-21; *Dr. Fechter Aff.*, paras. 2, 8, 11-18), fraud (*Ortner Order*, p.3; *Rosenthal Order*, p.2; *Comp.*, paras. 3-17, 22-30; *Dr. Fechter Aff.*, paras. 22-28), breach of contract with fraudulent intent (*Ortner Order*, p.3; *Rosenthal Order*, p.2; *Comp.*, paras. 3-17, 32-34; *Dr. Fechter Aff.*, paras. 29-31), violation of the South Carolina Unfair Trade Practices Act¹ (*Ortner Order*, p.3; *Rosenthal Order*, p.2; *Comp.*, paras. 3-17, 36-38; *Dr. Fechter Aff.*, paras. 32-34), and pre-judgment interest. (*Ortner Order*, p.3; *Rosenthal Order*, p.2; *Comp.*, paras. 3-17, 40; *Dr. Fechter Aff.*, para. 35).

Dr. Fechter served the Ortner Respondents with the pleadings through the U.S. Postal Service (certified mail, return receipt requested) and by “leaving . . . copies of the [pleadings] with [the Ortner Respondents] at 145 King Street, S[uite] 211, Charleston, S[outh] C[arolina]. (*Ortner Order*, pp.3, 6-7; *MDB 01.02.19 Ortner Affidavit*, p.1; *USPS Tracking Sheet Ortner*, p.1).² Similarly, Dr. Fechter served the Rosenthal Respondents with the pleadings, also through the U.S. Postal Service (certified mail, restricted

¹ See S.C. Code Ann. §§ 39-5-10 *et seq.* (Thomson Reuters West 2020). See generally Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014); S.C. Nat’l Bank v. Silks, 295 S.C.107, 367 S.E.2d 421 (Ct.App. 1988).

² This is the address which the Ortner Respondents use on their website. See <https://www.ortnerlawfirm.com/>. (Last viewed on 17 November 2021).

delivery), “leaving . . . copies of the [pleadings] with [the Rosenthal Respondents] at 1401 Forum Way, Sixth Floor, West Palm Beach, Florida. (*Rosenthal Order*, pp.2, 5; *MDB 01.08.19 Rosenthal Affidavit*, p.1).³

Instead of filing an *Answer*, the Ortner Respondents moved to dismiss Dr. Fechter’s action (*Ortner Order*, p.4)⁴ arguing as follows: (a) the Circuit Court did not have subject matter jurisdiction (*Ortner MTD*, pp.5-7), (b) Dr. Fechter failed to exhaust his administrative remedies (*Ortner MTD*, pp.7-9), (c) the claims were barred by waiver, collateral estoppel, laches, *res judicata*, etc. (*Ortner MTD*, pp.9-13), (d) there was insufficient service of process (*Ortner Order*, p.4; *Ortner MTD*, pp.14-15), and (e) that the SCUPTA claim failed to allege facts sufficient to constitute a cause of action. (*Ortner MTD*, pp.15-17). Dr. Fechter responded in opposition. (*MDB Affidavits of Service, USPS Tracking Forms, USPS Return Receipts*). By order dated 5 April 2019, the Hon. Deadra L. Jefferson, denied the Ortner Respondents’ motion. (*Ortner Order*, p.4; *Jefferson Order*, pp.1-15), as well as their reconsideration motion. (*Jefferson Order II*, pp.1-2).⁵

On 14 May 2019, the Rosenthal Respondents, also declining to file an *Answer*, similarly moved to dismiss Dr. Fechter’s Complaint. (*Rosenthal Order*, p.1; *Rosenthal MTD*, pp.1-15).⁶ The Rosenthal Respondents argued that (a) Dr. Fechter had failed to

³ This is the address which the Rosenthal Respondents use on their website. See <https://www.rosenthallevy.com/>. (Last viewed on 17 November 2021). The Rosenthal Respondents are now known as Rosenthal, Levy, Simon & Sosa.

⁴ See Rules 12(b)(1), (3), (5)-(6), SCRCivP. (*Ortner Order*, p.4).

⁵ The Ortner Respondents appealed Judge Jefferson’s decision to this Court of Appeals on 22 July 2019. (*Ortner Order*, p.4). This Court of Appeals, by order dated 25 October 2019, ultimately dismissed the appeal as involving an issue which was not immediately appealable. (*Ortner Order*, p.4).

⁶ See Rules 12(b)(1)-(2), (4)-(5), SCRCivP. (*Rosenthal Order*, pp.1, 6).

properly serve either of the Rosenthal Respondents (*Rosenthal Order*, p.6; *Rosenthal MTD*, pp.7-11, 13) and (b) the Circuit Court did not have subject matter jurisdiction to consider Dr. Fechter's claims. (*Rosenthal Order*, pp.6-7; *Rosenthal MTD*, pp.11-13). In concert, on 19 December 2019, the Ortner Respondents renewed their previously denied Motion to Dismiss, arguing that Dr. Fechter "failed to effect service of the Summons and Complaint within the statute of limitations."⁷ (*Ortner Order*, pp.4, 8; *Ortner MTD II*, p.1). Dr. Fechter again opposed each motion. (*MDB Affidavits of Service, USPS Tracking Forms, USPS Return Receipts*).

The Hon. J. Derham Cole held a hearing on 27 January 2020, to consider both the Ortner Respondents' and the Rosenthal Respondents' respective pending motions. (*Ortner Order*, p.1; *Rosenthal Order*, p.1; *01.27.20 Hearing Trans.*, pp.1-23). Judge Cole took the matters under advisement (*01.27.20 Hearing Trans.*, p.21) and, by form order dated 5 February 2020, granted both. (*Form 4 Order I*, p.1).⁸

By written order filed 8 June 2020, Judge Cole granted the Rosenthal Respondents' dismissal motion. (*Rosenthal Order I*, pp.1-15). By written order filed 4 August 2020, Judge Cole correspondingly granted the Ortner Respondents' dismissal motion. (*Ortner Order*, pp.1-11). Dr. Fechter sought reconsideration of both dismissal orders. (*Rosenthal Reconsideration*, pp.1-20; *Ortner Reconsideration*, pp.1-13). The Circuit Court, by Form 4 order dated 30 March 2021, denied reconsideration in both cases. (*Form 4 Order II*, p.1). This appeal followed.

⁷ See Rule 12(b)(5), SCRCivP. (*Ortner Order*, p.4).

⁸ Judge Cole noted that "[c]ounsel for the Defendants [we]re requested to prepare and submit a proposed order for the [Circuit] [C]ourt's consideration." (*02.05.20 Form 4 Order*, p.1).

III. STATEMENT OF THE FACTS

A. Dr. Fechter Is Retained by The Respondents

Sometime in 2005, a number of individual employee claimants retained the Ortner Respondents to represent them (the "Nevamar Claimants") in a worker's compensation action against their employers - International Paper Company ("IPC") and Nevamar Company, LLC ("Nevamar").⁹ (*Rosenthal Order*, pp. 13; *Jefferson Order*, p.3; *SCWCC Consent Order*, p.1; *SCWCC Order Releasing Funds*, p.2). The Nevamar Claimants asserted they "may have been exposed to toxic chemicals while working at the Nevamar plant in Hampton County, South Carolina."¹⁰ (*Rosenthal Order*, pp. 13; *Motion to Release Funds*, p.1; *SCWCC Order Releasing Funds*, p.2). Sometime in or around October 2005, the Ortner Respondents¹¹ retained Dr. Fechter to perform independent medical examinations ("IME") of and issue independent evaluation reports on the Nevamar Claimants. (*Ortner Order*, p.2; *Rosenthal Order*, p.2; *Jefferson Order*, p.3; *Dr. Fechter Aff.*, paras. 2-3; *Motion to Release Funds*, pp.1-2; *SCWCC Order Releasing Funds*, p.3;

⁹ In addition to IPC and Nevamar, both IPC and Ace American Ins., Co. were also named in the workers' compensation action as the insurers for IPC (apparently self-insured) and Nevamar. These parties will collectively be referred to herein as "Nevamar". "Nevamar is the brand name for durable, high performance, high pressure laminates [which] is the surface solution of choice for high-use applications on surfaces in hospitals, stores, hotels, offices, lobbies, restaurants, and educational institutions." See <https://distributorserviceinc.com/DSI-Nevamar-Laminates.html> (last viewed on 10 November 2021). Nevamar is a member of Panolam Surface Systems. See <https://panolam.com/nevamar/> (last viewed on 17 November 2021).

¹⁰ Nevamar previously operated a production facility in Hampton, South Carolina, but it was closed due to Nevamar's decision to consolidate production in another facility elsewhere. See generally <https://www.wtoc.com/story/26341332/nevamar-to-close-plant-in-hampton-county/> (last viewed on 17 November 2021).

¹¹ The Ortner Respondents later associated the Rosenthal Respondents in 2006 to assist in representing the Nevamar Claimants. (*Ortner Order*, p.2; *Rosenthal Order*, p.13; *Jefferson Order*, p.3; *Dr. Fechter Aff.*, para. 6; *Motion to Release Funds*, p.1; *11.17.15 Rosenthal Aff.*, paras. 5-6).

11.17.15 *Rosenthal Aff.*, para. 10; *Comp.*, para. 5). Dr. Fechter was to be paid \$500.00 per Nevamar Claimant for the initial IME and report (*SCWCC Order Releasing Funds*, p.3; *Motion to Release Funds*, p.2; 11.17.15 *Rosenthal Aff.*, para. 10; *Complaint*, para. 7), as well as additional sums for subsequent medical examinations and/or evaluation reports. (*Ortner Order*, p.2; *Rosenthal Order*, p.2; *Jefferson Order*, p.3; *Dr. Fechter Aff.*, para. 4; *Comp.*, para. 7).¹²

B. The Scope Of Dr. Fechter's Retention

In addition to the initial (and potentially subsequent) IMEs of the Nevamar Claimants, Dr. Fechter asserted that both the Ortner Respondents and the Rosenthal Respondents also agreed to pay him for, among other medical procedures, pulmonary function tests, stress tests, sleep study examinations, as well as for medical treatment not included within the Nevamar Claimants' health insurance coverage. (*Ortner Order*, p.2; *Rosenthal Order*, p.2; *Jefferson Order*, p.3; *Dr. Fechter Aff.*, paras. 5, 12-13; 11.02.15 *Dr. Fechter Depo.*, p.53, line 2 – p.54, line 23; *Comp.*, para. 8; *SCWCC Ortner Reply*, pp.2-4). The Rosenthal Respondents affirmed the Ortner Respondents' agreement with Dr. Fechter to pay him for all rendered medical services associated with the Nevamar Claimants. (*Ortner Order*, p.2; *Jefferson Order*, p.3; *Dr. Fechter Aff.*, para. 8; 11.17.25 *Rosenthal Aff.*, para. 10; 11.02.15 *Dr. Fechter Depo.*, p.54, lines 1-23; *Comp.*, para. 11; *SCWCC Ortner Reply*, pp.2-4). In fact, the Rosenthal Respondents paid Dr. Fechter an initial \$25,000.00 retainer for the first 50 Nevamar Claimants chosen from the pool of potentially many hundreds of possible claimants. (*Rosenthal Order*, p.2; *Jefferson Order*,

¹² Dr. Fechter was supposed to be paid \$150.00 for performing a second IME and report and \$100.00 for a third IME and report. (*Dr. Fechter Aff.*, para. 4; *Comp.*, para. 5; *SCWCC Motion to Release Funds*, p.5 fn.1).

p.4; *SCWCC Motion to Release Funds*, pp.2, 5, 11; *SCWCC Order Releasing Funds*, p. 3; *Dr. Fechter Aff.*, para. 9; *11.17.15 Rosenthal Aff.*, para. 11; *Comp.*, para. 12).¹³ It is undisputed that when Dr. Fechter submitted his invoices for payment of the IMEs, evaluation reports, etc. (*Rosenthal Order*, p.2) he would, in return, receive a standard response letter from the Ortner Respondents (to which the Rosenthal Respondents later acquiesced) advising to Dr. Fechter that he should “[p]lease be advised that [his medical] fee w[ould] be protected in this matter and that [he] w[ould] be paid in full upon settlement or verdict in th[e] [Nevamar Claimants’ workers’ compensation litigation].” (*Jefferson Order*, p.4; *SCWCC Order Releasing Funds*, pp.2-3; *Ortner Letter*, p.1; *Comp.*, para. 16; *Dr. Fechter Aff.*, para. 14). The Ortner Respondents and/or the Rosenthal Respondents provided Dr. Fechter with a copy of the standard fee protection letter for each of he Nevamar Claimants he treated. (*Dr. Fechter Aff.*, para. 36).

C. Dr. Fechter’s Medical Services Billing Dispute

In 2010, Dr. Fechter invoiced the Rosenthal Respondents for the extensive medical services he had performed on a significant number of the Nevamar Claimants which medical fees and expenses were well in excess of the original \$25,000.00 retainer paid to him by the Rosenthal Respondents. (*Rosenthal Order*, p.2; *SCWCC Order Releasing Funds*, p.3; *Dr. Fechter Aff.*, paras. 11-18; *SCWCC Motion to Release Funds*, p.2; *11.17.25 Rosenthal Aff.*, para. 13). This included uninsured medical fees, costs, and expenses for medical treatment which Dr. Fechter provided to many of the Nevamar

¹³ Once the Ortner Respondents associated the Rosenthal Respondents into the workers’ compensation litigation, the latter group assumed the full responsibility of seeing that Dr. Fechter was paid for the medical and other services he provided to the Nevamar Claimants. (*SCWCC Order Releasing Funds*, p.3; *Comp.*, paras. 9-10; *SCWCC Ortner Reply*, p.4).

Claimants, as well as for “initial examinations [performed] and initial reports [prepared for] approximately [458] of the [Nevamar Claimants, together with] numerous subsequent examinations and reports on [many of] the [same Nevamar Claimants].” (*Dr. Fechter Aff.*, paras. 10-13; *11.02.15 Dr. Fechter Depo.*, p.22, line 11 – p.24, line 23; p.54, lines 1-23; *SCWCC Motion to Release Funds*, p.2; *11.17.15 Rosenthal Aff.*, para. 13; *Comp.*, paras. 13-15). The Rosenthal Respondents disputed any payment responsibility to Dr. Fechter. (*Comp.*, para. 18; *SCWCC Motion to Release Funds*, pp.5-11).¹⁴

In specific response, the Rosenthal Respondents sent Dr. Fechter a letter dated 28 October 2010, challenging the validity of his medical services invoicing (*SCWCC Motion to Release Funds*, p.2) and asserting (a) one of the designated/lister patients was not a client of the Rosenthal Respondents, (b) Dr. Fechter, in fact, owed the Rosenthal Respondents some \$5,150.00,¹⁵ and (c) the Rosenthal Respondents never had any agreement to pay for uninsured medical procedures, co-pays, deductibles, etc. (*SCWCC Order Releasing Funds*, pp.4-7; *10.28.19 Rosenthal Letter*, p.1; *11.17.25 Rosenthal Aff.*, para. 13).

¹⁴ The Ortner Respondents did not take a position as to the validity of Dr. Fechter’s demand for any additional medical fee payments. (*SCWCC Ortner Reply*, pp.1-2, 4). Once the Rosenthal Respondents entered the Nevamar Claimants’ workers’ compensation litigation they agreed to be responsible for the payment of all litigation expenses. (*SCWCC Ortner Reply*, pp.1-2, 4).

¹⁵ Dr. Fechter’s alleged “debt” to the Rosenthal Respondents was based on the Rosenthal Respondents’ assertion that Dr. Fechter had treated only 39 of the chosen 50 test Nevamar Claimants. (*SCWCC Order Releasing Funds*, p.3; *SCWCC Motion to Release Funds*, pp.2; 5-6; *11.17.2015 Rosenthal Aff.*, paras. 10-12). At \$500.00 per patient for 39 patients equaled \$19,500.00, thereby “justifying” the Rosenthal Respondents’ claims for reimbursement.

D. The South Carolina Workers' Compensation Commission Addresses Dr. Fechter's Medical Services Billing Dispute

On 1 April 2014,¹⁶ the Nevamar Claimants globally settled their collective workers' compensation claims against Nevamar. (*Ortner Order*, p.2; *SCWCC Consent Order*, pp.1-5; *SCWCC Order to Release Funds*, p.1; *SCWCC Motion to Release Funds*, p.3).¹⁷ As part of the settlement, Nevamar deposited the total amount of the agreed-upon settlement funds into a special financial account administered by a court-appointed special referee (*SCWCC Order Releasing Funds*, p.1; *Special Referee Rpt.*, p.1; *SCWCC Consent Order*, para. 5),¹⁸ to include allocation of attorney's fees and costs. (*Ortner Order*, p.2; *SCWCC Consent Order*, para. 5).¹⁹ Ultimately, the Special Referee held back \$500,000.00 of the settlement funds for the possible payment of approved litigation costs associated with the SCWCC litigation. (*SCWCC Order Releasing Funds*, p.1; *Special Referee Rpt.*, paras. 1.b., 3.a.).²⁰ The SCWCC, however, had to approve distribution of those funds. (*SCWCC Order Releasing Funds*, p.2; *Special Referee Rpt.*, para. 3.a.).

16 By 26 January 2016, "all workers' compensation cases underlying [Dr. Fechter's] causes of action against [the] Rosenthal [Respondents and the Ortner Respondents had been] resolved . . ." (*Rosenthal Order*, pp.3, 6; *Comp.*, para. 17). As of that date all of the necessary settlement documents had been executed and all of the settlement funds had been distributed. (*Ortner Order*, p.3; *Comp.*, para. 17; *Fechter Aff.*, para. 15).

17 In 2014 Dr. Fechter reiterated his additional funds claim once the Nevamar Claimants had globally settled their claims. (*Ortner Order*, pp.2-3; *SCWCC Motion to Release Funds*, p.2).

18 The Special Referee determined if an individual Nevamar Claimant was entitled to workers' compensation benefits and, if so, in what amount. (*SCWCC Consent Order*, para. 5).

19 The SCWCC had to and did approve the Special Referee's proposed distribution of the attorney's fees and costs. (*SCWCC Consent Order*, para. 5; *12.10.15 SCWCC Order*, pp.1-3; *SCWCC Order Releasing Funds*, p.1).

20 The Special Referee was tasked with reviewing, among other things, the parties' "submitted expert opinions and medical reports . . ." (*Special Referee Rpt.*, paras. 2.a.-2.c.). Such documentation would necessarily have included Dr. Fechter's expert opinions and medical reports.

On 18 November 2015, the Rosenthal Respondents requested the SCWCC to release the remaining \$500,000.00 in held-back settlement funds. (*SCWCC Order to Release Funds*, p.1; *SCWCC Motion to Release Funds*, pp.1-13). The Rosenthal Respondents argued that (a) the SCWCC had jurisdiction to decide the dispute, (b) Dr. Fechter had no legal claim to additional funds as he had (i) no contractual agreement with the Rosenthal Respondents, (ii) unilaterally chosen to provide other medical services to many of the Nevamar Claimants, and (iii) already been paid for the medical service rendered, and (c) the equities favored the Rosenthal Respondents. (*SCWCC Order to Release Funds*, pp.2, 4-8; *SCWCC Motion for Release of Funds*, pp.3-12). In concert, the Ortner Respondents joined in and with the Rosenthal Respondents' motion (*SCWCC Order To Release Funds*, p.1; *SCWCC Ortner Reply*, pp.1-5), however only to the extent that the SCWCC was being asked "to inquire into Dr. Fechter's . . . entitlement to payment for professional services rendered [and] determin[e] the right of all concerned parties [and] direct[] the disbursement of funds [still] being held in trust." (*SCWCC Ortner Reply*, p.1).²¹

The SCWCC concluded that it had proper jurisdiction to address the appropriate disbursement of the remaining \$500,000.00 in held-back settlement funds and, more importantly, had subject matter jurisdiction to determine the validity and legitimacy of Dr. Fechter's payments claim for additional medical and other services to the Nevamar

²¹ The SCWCC noted that "[n]o other persons made any submissions [relating to the \$500,000.00 in held-back funds]." (*SCWCC Order to Release Funds*, p.1). While the SCWCC was correct that Dr. Fechter did not make any submission, the SCWCC ignored its own rules in intimating that Dr. Fechter's submission failure was somehow material to its decision. Dr. Fechter, not being a party to the matter, was not authorized to participate in the litigation. *See generally S.C. Code Ann. Regs.* 67-215 (Thomson Reuters West 2016) (Authorizing only a party to file motions).

Claimants. (*Ortner Order*, pp.2-3; *SCWCC Order Releasing Funds*, pp.1-2, 4-7).²² The SCWCC concluded Dr. Fechter had failed to demonstrate both a contractual right to additional payments, as well as the actual amount of requested additional sums. (*SCWCC Order Releasing Funds*, p.4). Furthermore, the SCWCC found Dr. Fechter had no documentation to support his contractual claims other than the various letters of protection from the Ortner Respondents promising to protect payment of his incurred fees (*Ortner Letter*, p.1) and that those letters were insufficient to support his claim for payment of additional fees. (*SCWCC Order Releasing Funds*, p.6). Moreover, the SCWCC found that Dr. Fechter had “received payments [for provided medical services] from his [Nevamar Claimant] patients’ insurance companies, Medicare, and other third-party sources and, therefore , [any] remaining payment responsibility, if any, [wa]s not with [the Rosenthal Respondents].” (*SCWCC Order Releasing Funds*, p.7). The SCWCC ultimately released the entire \$500,000.00 to the Rosenthal Respondents without any allocation whatsoever of funds to Dr. Fechter. (*SCWCC Order Releasing Funds*, p.8).

²² The SCWCC concluded that while Dr. Fechter had been “served with the Motion [for Release of Funds] and [the Ortner] Reply . . . , he h[ad] filed no response or otherwise made any submission to the [SCWCC] in opposition” (*SCWCC Order Releasing Funds*, p.4). The SCWCC did not, however, cite to any submitted documentation which demonstrated or even inferred that Dr. Fechter had been afforded the opportunity to oppose the Rosenthal Respondents’ request for release of the held-back sums.

IV. ARGUMENT AND CITATION OF AUTHORITY

Standard Of Review

“In reviewing a motion to dismiss, [our courts] appl[y] the same standard of review as the trial court.”²³ “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to [Dr. Fechter], would entitle [him] to relief on any theory,’ dismissal is improper.”²⁴ “When[, however,] the trial court considers matters outside the pleadings, the motion to dismiss is converted to one for summary judgment” and disposed of via Rule 56, SCRCivP.²⁵ “Summary judgment is appropriate [only] when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue as to any material fact such that [the moving party] must prevail as a matter of law.”²⁶ The “ ‘standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of [Dr. Fechter] and give [him] the benefit of all favorable inferences that might reasonably be drawn therefrom.’ ”²⁷ “Summary judgment should be denied where [the non-movant has] submit[ted] a mere scintilla of evidence.”²⁸

²³ Carolina Park Associates, LLC v. Marino, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012) (citing Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)) (*per curiam*).

²⁴ Carolina Park Associates, LLC v. Marino, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (citing Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247).

²⁵ U.S. Bank Nat’l Ass’n v. Burr, 2015 WL 793051, *1 (S.C.App., filed 25 Feb. 2015) (citing Gilbert v. Miller, 356 S.C. 25, 27, 586 S.E.2d 861, 862 (Ct.App. 2003)).

²⁶ Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) (citing Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted in original); Rule 56(c), SCRCivP).

²⁷ Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C., 388, 390-391, 631 S.E.2d 915, 916 (Ct.App. 2006) (quoting Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct.App. 1991)).

²⁸ Zurich Amer. Ins. Co. v. Tolbert, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010) (citing Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009)).

A. **THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID NOT HAVE SUBJECT MATTER JURISDICTION TO CONSIDER AND/OR ADJUDICATE THE LEGITIMACY OR VALIDITY OF DR. FECHTER'S VARIOUS COMMON LAW CLAIMS AGAINST THE ORTNER RESPONDENTS AND/OR THE ROSENTHAL RESPONDENTS**

Both the Ortner Respondents and the Rosenthal Respondents moved to dismiss Dr. Fechter's Complaint, in part, on the contention that the SCWCC had already addressed and adjudicated Dr. Fechter's claims for additional payments for rendered medical services. (*Rosenthal Order*, pp.12-14; *Ortner MTD*, pp.1, 5-13; *Rosenthal MTD*, pp.1-2, 11-12). In fact, the Circuit Court found that the SCWCC had already "ordered the release of the [\$500,000.00] held in trust to satisfy the costs incurred in the prosecution of the [Nevamar Claimants'] claims, including the expenses associated with the evaluation or treatment of th[ose] [litigants]." (*Ortner Order*, pp.2-3).²⁹ Moreover, the Circuit Court concluded the SCWCC had "properly exercised, exclusive, original jurisdiction over the subject matter of the causes of action asserted in [Dr. Fechter's] Complaint [involving] the approval and disbursement of costs incurred in prosecuting workers' compensation claims" (*Rosenthal Order*, p.14). Consequently, in light of the SCWCC's actions, the Circuit Court concluded that it "ha[d] been divested of [subject matter] jurisdiction to hear and determine the claims [for additional payments] asserted] by Dr. Fechter] in [his] Complaint." (*Rosenthal Order*, p.14).

²⁹ The Circuit Court further noted that the SCWCC had "the authority to determine all questions relating to workers' compensation claim, including the approval and disbursement of costs incurred in the prosecution of those claims." (*Rosenthal Order*, pp.13-14) (*quoting S.C. Code Ann.* § 42-3-180 (Thomson Reuters West 2001); *S.C. Code Ann. Regs.* § 67-1206 (Thomson Reuters West 2001)).

Unfortunately for the SCWCC, the Ortner Respondents, and the Rosenthal Respondents, the SCWCC was incorrect as the SCWCC ***lacked*** subject matter jurisdiction or any jurisdiction whatsoever, to adjudicate Dr. Fechter's additional payment claims against the Ortner Respondents and the Rosenthal Respondents. Any conclusion of such must be reversed in all respects and this matter remanded to the Circuit Court for further proceedings.

1. **When The SCWCC Considered And Adjudicated Dr. Fechter's Additional Fees Claims The SCWCC Had Already Relinquished Its Jurisdiction Over The Relevant Aspects Of The Nevamar Claimants' Worker's Compensation Litigation.**

The SCWCC did not have any subject matter jurisdiction whatsoever to address Dr. Fechter's additional payment claims as a result of the SCWCC's very own actions. (SCWCC Order, pp.1-3). On 10 December 2015, the SCWCC issued an order directing that "[a]ll cases/claims included in the *Initial Special Referee's Report* dated November 13, 2015 are ***hereby dismissed with prejudice***, with the exception of any claims involving death benefits." (SCWCC Order, p.2, para. 4) (Emphasis added). The *Special Referee's Initial Report*, dated 13 November 2015, stated that the "Special Referee [wa]s [then] holding in trust [\$500,000.00] in approved costs . . . pending instructions from the claimants' attorneys final disbursement of those funds or an order from the [SCWCC]." (*Special Referee's Rpt.*, pp.1-2, para. 1.b.). There has been no evidence presented to show that any of Dr. Fechter's additional fees claim involved any death benefits and, therefore, as far as Dr. Fechter's claims were concerned the litigation had ended as of 10 December 2015. Even though the SCWCC's decision on that date specifically adopted the *Special Referee's Initial Report*, which clearly addressed disposition of the \$500,000.00 in held-back funds (SCWCC Order, p.2. para. 2), the SCWCC's order ***did***

not reserve nor otherwise carve out the issue of the SCWCC later having the need to address the proper dispersal and distribution of those same \$500,000.00 in held-back funds. (SCWCC Order, pp.1-3). On 26 January 2016, when the SCWCC ultimately addressed Dr. Fechter's claim for additional medical fees, there were no workers' compensation claims of any of the Nevamar Claimants' then still pending before the SCWCC. All of those claims, other than death benefit claim not relevant here, had been dismissed with prejudice over six weeks before. (SCWCC Order, p.2, para. 4).

In this type of situation, the South Carolina Supreme Court stated in Labouseur v. Harleysville Mut. Ins. Co., as follows:

we adopt the approach of other jurisdictions and hold that, when there is a pending employee claim for compensation, the exclusive jurisdiction for the determination of questions concerning cancellation, coverage, construction of insurance contracts, and the like, is in the [South Carolina] Workers' Compensation Commission. On the other hand, **when there exists no pending employee claim for compensation, the [SCWCC] lacks the jurisdiction to decide such questions.**³⁰

Furthermore, in South Carolina Prop. & Cas. Ins. Guaranty Ass'n v. Wal-Mart Stores, Inc., the Supreme Court declined to find that the SCWCC had exclusive jurisdiction to address certain insurance coverage issues involving an insolvent workers' compensation insurance carrier.³¹ The Supreme Court recognized that "the claims for thirteen [of the 36 involved] employees have been determined by the [SCWCC] and benefits have been

³⁰ Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 543-544, 397 S.E.2d 526, 528 (1990) (citing Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964); State Compensation Ins. Fund v. Industrial Accident Comm'n, 20 Cal.2d 264, 125 P.2d 42 (1942); Thompson v. Liberty Nat. Ins. Co., 78 Idaho 381, 304 P.2d 910 (1956); 4 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, § 92.42 (West 1987)) (Emphasis added).

³¹ S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 211-214, 403 S.E.2d 625, 626-627 (1991).

paid [and those] claims are therefore no longer pending.”³² Consequently, the Supreme Court concluded that “the issues raised by Guaranty {Association} [we]re not ancillary to any matter currently being decided by the [SCWCC] and therefore the issues [we]re not within the [SCWCC’s] exclusive jurisdiction”³³

In Limehouse v. Hulsey, the Supreme Court acknowledged that:

Jurisdiction is generally defined as ‘the authority to decide a given case one way or the other. Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause.’³⁴

Axiomatically, “[t]he acts of a court without jurisdiction are without effect.”³⁵ Consequently, as the Supreme Court recognized in Ross v. Richland County, “ [i]t is a universal principle as old as the law, that the proceedings of a Court without jurisdiction are a nullity, and its judgment without effect, either on the person or property.’ ”³⁶

³² S.C. Prop. & Cas. Ins. Guar. Ass’n v. Wal-Mart Stores, Inc., 304 S.C. 210, 21, 403 S.E.2d 625, 628.

³³ S.C. Prop. & Cas. Ins. Guar. Ass’n v. Wal-Mart Stores, Inc., 304 S.C. 210, 21, 403 S.E.2d 625, 628 (Emphasis added). See also S.C. Prop. & Cas. Ins. Guar. Ass’n v. Carolinas Roofing & Sheet Metal Contractors Self-Insured Fund, 303 S.C. 368, 371-372, 401 S.E.2d 144, 145-146 (1991) (Settlement “agreement approved by the [SCWCC] was intended to settle [the employee’s] claim in its entirety and[, therefore,] the [SCWCC] lack[ed] jurisdiction in this matter [to order the Guaranty Association to pay sums owed by the insolvent workers’ compensation carrier]”). See also generally Nat’l Union Ins. Co. v. Mills, 99 Ga.App. 697, 109 S.E.2d 830 (1959); Fireman’s Fund Ins. Co. v. Crowder, 123 Ga.App. 469, 471, 181 S.E.2d 530 (1971).

³⁴ Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (quoting 32A Am.Jur.2d, Federal Courts, § 581 (Thomson Reuters West 2007) (Footnotes omitted in original)).

³⁵ DeWitt v. S.C. Dept. of Highways & Pub. Trans., 274 S.C. 184, 187, 262 S.E.2d 28, 30 (1980) (citing State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972); Ross v. Richland County, 270 S.C. 100, 240 S.E.2d 649 (1978); Ex parte Harte, 186 S.C. 125, 195 S.E. 253 (1938)).

³⁶ Ross v. Richland County, 270 S.C. 100, 103, 240 S.E.2d 649, 651 (1978) (quoting Ex parte Harte, 186 S.C. 125, 133, 195 S.E. 253, 256).

The SCWCC had relinquished its subject matter jurisdiction over the Nevamar Claimants' workers' compensation litigation when the SCWCC issued its 10 December 2015 Order dismissing those claims with prejudice, albeit with the exception of death claims not relevant here. The SCWCC did not have any open workers' compensation claims before it on 26 January 2016, when the SCWCC "adjudicated" Dr. Fechter's claims. The SCWCC had not jurisdiction at that time and, therefore, its actions and decisions were a nullity without any force and effect.

This Court of Appeals should reverse the Circuit Court's faulty reliance on the SCWCC's alleged jurisdiction vis-a-vis Dr. Fechter's claims and remand this matter for a jury trial.

2. The SCWCC's Decisions Regarding Dr. Fechter's Claims Have No Preclusive Effect In The Circuit Court Litigation

As previously noted, Dr. Fechter asserted claims against the Ortner Respondents and the Rosenthal Respondents for breach of contract (*Ortner Order*, p.3; *Rosenthal Order*, p.2; *Comp.*, paras. 3-21; *Dr. Fechter Aff.*, paras. 2, 8, 11-18), fraud (*Ortner Order*, p.3; *Rosenthal Order*, p.2; *Comp.*, paras. 3-17, 22-30; *Dr. Fechter Aff.*, paras. 22-28), breach of contract with fraudulent intent (*Ortner Order*, p.3; *Rosenthal Order*, p.2; *Comp.*, paras. 3-17, 32-34; *Dr. Fechter Aff.*, paras. 29-31), violations of the SCUTPA (*Ortner Order*, p.3; *Rosenthal Order*, p.2; *Comp.*, paras. 3-17, 36-38; *Dr. Fechter Aff.*, paras. 32-34), and pre-judgment interest. (*Ortner Order*, p.3; *Rosenthal Order*, p.2; *Comp.*, paras. 3-17, 40; *Dr. Fechter Aff.*, para. 35).

Notwithstanding what the SCWCC, or the Ortner Respondents, or the Rosenthal Respondents have asserted, these various causes of action arose exclusively from allegations which involved the alleged breaches of contractual agreements between, on

the one hand, the Ortner Respondents and the Rosenthal Respondents in their respective capacities as attorneys representing the Nevamar Claimants in those individuals' workers' compensation claims and, on the other hand, Dr. Fechter, a medical expert independently and unilaterally retained by those very same attorneys to perform, among other things, IMEs on the Nevamar Claimants. Nevertheless, it is undisputed that Dr. Fechter was never made a party to nor had any standing to participate in and/or object to any of the proceedings within the workers' compensation litigation.³⁷

The SCWCC's subject matter jurisdiction, assuming *arguendo* there was any in legitimate and proper operation, was limited to determining whether Dr. Fechter's claimed additional professional fees could and/or should be paid out of the \$500,000.00 held back by the Special Referee – not whether the fees should be paid at all. The SCWCC did not have the authority to determine whether either or both the Ortner Respondents and/or the Rosenthal Respondents were ultimately responsible at common law to pay Dr. Fechter for his claimed additional professional services. This is especially true since Dr. Fechter's claims related to contractual agreements between him and both the Ortner Respondents and the Rosenthal Respondents concerning medical expertise which Dr. Fechter provided to those very same attorneys for their use in representing the Nevamar Claimants. There were never any contractual agreements regarding payment of provided medical and other services directly between Dr. Fechter and the individual Nevamar Claimants – just between Dr. Fechter and their attorneys.

³⁷ See generally S.C. Code Ann. Regs. § 67-215.

3. Dr. Fechter’s Common Law Claims Did Not Affect The Nevamar Claimants’ Right To Compensation

South Carolina law “confers a general grant of authority on the [SCWCC] to decide all questions arising under the *Workers’ Compensation Act*. ‘All questions arising under [the *Act*], if not settled by agreement of the parties interested therein with the approval of the [SCWCC], shall be determined by the [SCWCC], except as otherwise provided by the [Act]’ ”**38** Consequently, “only disputes ancillary to an employee’s right to compensation arise under the [*Workers’ Compensation*] Act.”**39**

The South Carolina Supreme Court, in *Blue Cross & Blue Shield v. S.C. Indus. Commission*, addressed a medical insurer’s declaratory judgment claim that, *inter alia*, it had a right “to participate in proceedings before the [SCWCC] when the employee-claimant h[eld] one of its policies”**40** The Supreme Court disagreed, holding that

The *Act* contains a thorough procedure for the procurement of Workmen’s Compensation benefits. Settlements are specifically authorized between an employer and an employee. The rights of the employee and employer are established by the *Act*. Nowhere in the *Act* is there a provision to allow any party, other than the employee and the employer to participate**41**

38 *James v. Anne’s, Inc.*, 390 S.C. 188, 197, 701 S.E.2d 730, 734 (2010) (*quoting* S.C. Code Ann. § 42-3-180 (Thomson Reuters West 2015)) (Emphasis in original).

39 *Price v. Peachtree Elec. Services, Inc.*, 396 S.C. 403, 409, 721 S.E.2d 461, 464 (Ct.App. 2011) (*citing* *Labouseur v. Harleysville Mut. Ins. Co.*, 302 S.C. 540, 544, 397 S.E.2d 526, 529 (1990) (“When the employee’s rights are not involved, an employer/insured must present all such issues to the circuit court”); *Roper Hosp. v. Clemons*, 326 S.C. 534, 539, 484 S.E.2d 598, 600 (Ct.App. 1997) (medical provider’s common law claims for payment of employee’s medical bills did not fall within the purview of the *Workers’ Compensation Act* and such claims would properly be litigated in circuit court)), *reh’g denied* (27 Jan. 2021), *cert. granted* (8 May 2012), *affirming as modified on other grounds*, 405 S.C. 455, 748 S.E.2d 229 (2013) (Emphasis in original).

40 *Blue Cross & Blue Shield of S.C. v. S.C. Indus. Comm’n*, 274 S.C. 204, 205, 262 S.E.2d 35, 36 (1980) (*per curiam*).

41 *Blue Cross & Blue Shield v. S.C. Indus. Comm’n*, 274 S.C. 204, 206, 262 S.E.2d 35, 37.

In Baker Hosp. v. Fireman's Fund Ins. Co., the Supreme Court addressed the hospital's "action in [C]ircuit [C]ourt alleging breach of contract, negligence, misrepresentation, and promissory estoppel" arising from the insurer's coverage confirmation for an injured employee.⁴² "The trial court [had] granted [the insurer's] motion for dismissal for lack of subject matter jurisdiction [concluding the SCWCC had] the exclusive jurisdiction for determining th[e] [hospital's] claim"⁴³ On appeal, the Supreme Court reversed, recognizing that "it is clear the Hospital [wa]s a party with no standing to seek redress [for the incurred medical expenses] before the [SCWCC]"⁴⁴ and that, it could not reasonably be disputed that the "Hospital's claims [for the unpaid medical expenses] all ar[o]se from the common law, not the workers' compensation laws".⁴⁵ The Supreme Court concluded:

[The] Hospital alleged facts, which taken in a light most favorable to the [Hospital], support the allegations of breach of contract, negligence, misrepresentation, and promissory estoppel. The allegations contained in the complaint indicate that [the insurer] 'guaranteed' the payment of [the injured employee's] hospital expenses. [The] Hospital's complaint contains sufficient facts to establish claims in contract [against the insurer] regardless of any other party's claims under workers' compensation law.⁴⁶

⁴² Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 100, 441 S.E.2d 822, 823 (1994).

⁴³ Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 100, 441 S.E.2d 822, 823.

⁴⁴ Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (*citing* Blue Cross & Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 262 S.E.2d 35).

⁴⁵ Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823.

⁴⁶ Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823.

The Supreme Court ultimately determined that:

Regardless of any workers' compensation payment to [the injured employee, the] Hospital ha[d] performed a service for [the injured employee] based on the representations allegedly made [to the Hospital] by the [insurer]. [T]he question of coverage under workers' compensation law is irrelevant to any representations made by [the insurer to the Hospital] as to [the insurer's] responsibility for payment of medical expenses.⁴⁷

This Court of Appeals, in Price v. Peachtree Elec. Services, Inc., addressed the first employer's claim for reimbursement from the second employer for injuries sustained by an employee who had worked consecutively for both.⁴⁸ This Court of Appeals concluded that “[c]laims not affecting the employee's right to compensation are within the purview of the [C]ircuit [C]ourt, not of the [SCWCC and, therefore, the SCWCC does not have subject matter jurisdiction to address an] equitable claim for reimbursement made by [one employer] against . . . another employer.”⁴⁹ This Court of Appeals found that “[t]he matter directly in contention d[id] not affect [the employee's] right to compensation [and] [h]e ha[d] been completely compensated for the 2002 accident [and, therefore,] any future benefits for which [the second employer] may be liable are a separate and distinct matter from any benefits [the first employer] may have paid previously”⁵⁰

⁴⁷ Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823. *See also Polite v. Westvaco Corp.*, 2010 WL 10079468, *1 (S.C.App., filed 1 Mar. 2010) (*per curiam*) (“[T]he real party in interest in this appeal is Blue Cross who, as the claimant's private health insurance carrier, lacks standing in front of the [SCWCC].”). *See also generally Ex parte South Carolina Prop. & Cas. Ins. Guar. Ass'n*, 411 S.C. 501, 768 S.E.2d 670 (Ct.App. 2015).

⁴⁸ Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 405-407, 721 S.E.2d 461, 462-462, *affirmed as modified on other grounds*, 405 S.C. 455, 748 S.E.2d 229.

⁴⁹ Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 409, 721 S.E.2d 461, 464.

⁵⁰ Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 410, 721 S.E.2d 461, 464. *See also Laboureur v. Harleysville Mut. Ins. Co.*, 302 S.C. 540, 542-543, 397 S.E.2d 526, 528 (The SCWCC “is not empowered to adjudicate [any] dispute in a meaningful way” when and if the “dispute does not

Finally, in Roper Hosp. v. Clemons, this Court of Appeals addressed a hospital's attempt to have a closed worker's compensation case reopened for payment of the hospital's incurred medical fees.⁵¹ This Court of Appeals found that the hospital "clearly ha[d] a cause of action against the patient/employee for services rendered based on common law[, as well as] a claim against the insurance carrier . . . assuming the hospital [actually had] verified coverage"⁵² Furthermore, the hospital had "not [been and was not] precluded from seeking payment for [the employee's] medical expenses through other proceedings [and, in any case,] the question of [insurance] coverage for [those] medical expenses [had already been] settled through the [clincher] agreement"⁵³ Given that "there [wa]s nothing further for the [SCWCC] to decide" this Court of Appeals ultimately determined that the hospital did "not have standing to seek redress before the [SCWCC]."⁵⁴

4. Separate And Independent Common Law Claims Are Not Litigated Through The Statutory Workers' Compensation System

This proposition that "a health care provider may not *independently* assert a claim in the [workers'] compensation system for services provided an employee" is the situation in many jurisdictions operating under workers' compensation acts with the same or similar

include any contention by [either the employer] or by the [insurer] about the merits or lack thereof of the employee's claim for compensation." See generally Doyle v. U.S. Fid. & Guar. Co., 316 S.C. 83, 85-86, 447 S.E.2d 192, 193-194 (1994) (SCWCC did not have jurisdiction to determine spouse's portion of [workers' compensation] settlement proceeds based on his loss of consortium claim.").

⁵¹ Roper Hosp. v. Clemons, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct.App. 1997).

⁵² Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600.

⁵³ Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600.

⁵⁴ Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600.

statutory language.⁵⁵ For example, in Curry v. Ozarks Elec. Corp., the Missouri Court of Appeals considered a hospital's request to the Missouri Industrial Relations Commission for a direct payment of hospital medical expenses.⁵⁶ The Missouri appellate court opined that the [1994 amendments to the *Workers' Compensation Act*] statutory scheme admittedly "gave [MIRC administrative law judges] discretionary authority to make direct payments to medical care providers from the 'proceeds of any [workers' compensation] settlement or award[.]" [the amendments, however,] did not . . . expressly give medical care providers standing to assert a separate claim in the compensation system independent of an employee's claim."⁵⁷ The appellate court concluded that the Missouri "legislature did not intend [the 1994 amendments] as authorization for splitting an employee's workers' compensation claim into component parts."⁵⁸

In a similar fashion, the Florida Supreme Court, in Eastern Elevator Co. v. Hedman, addressed a physician's unilateral direct claim to the Florida Industrial Relations Commission for payment of an injured employee's incurred medical expenses and stated that "[a]t no time has this Court ruled that a hospital or physician ha[d] standing to file

⁵⁵ Curry v. Ozarks Elec. Corp., 2000 WL 967930, *3 (Mo.App., filed 14 July 2000), *affirmed*, 39 S.W.3d 494 (Mo. 2001) (*en banc*), *overruled on other grounds by* Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003) (*en banc*) (Emphasis in original). *See also generally* Figueroa v. C and S Ball Bearing, 237 Conn. 1, 675 A.2d 845, 849 (1996); Med. College of Penn. v. Workmen's Compensation Appeal Bd., 139 Pa.Cmwlth. 632, 591 A.2d 338, 340 (1991); Sloat Chiropractic Clinic v. Datsun, 17 Ark.App. 161, 706 S.W.2d 181, 182-184 (1986). *See also* 5 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law § 94.02[11] (West 1999) ("The physician has no independent standing to make claims within the compensation system, unless this right has been expressly created by statute.").

⁵⁶ Curry v. Ozarks Elec. Corp., 2000 WL 967930, *1.

⁵⁷ Curry v. Ozarks Elec. Corp., 2000 WL 967930, *3 (Emphasis in original).

⁵⁸ Curry v. Ozarks Elec. Corp., 2000 WL 967930, *4.

independently a workmen's compensation claim for services.”⁵⁹ The Florida appellate court found that Florida law “specifically ma[de] the employer liable to his employee for payment of the recoverable medical expenses and any payment must be on the employee's behalf[and, therefore, the applicable statute] d[id] not provide the physician with a right of action against the employer directly [for unpaid medical expenses].”⁶⁰

Furthermore, in Brannon v. Pike the Idaho Supreme Court concluded the Idaho Industrial Commission had jurisdiction to decide a dispute between an employee-claimant and his attorney regarding the attorney’s amount of agreed-upon legal fees since “[b]oth the employee and his attorney [we]re from the outset subjected to the jurisdiction of the [IIC].”⁶¹ Nevertheless, the Idaho Supreme Court acknowledged that the IIC did not have jurisdiction to address “unrelated claims as between the client-claimant and his attorney [or claims] requiring adjudication of claims involving third parties [or involving the] determination of insurance coverage at least in a declaratory judgment context.”⁶²

⁵⁹ Eastern Elevator Co. v. Hedman, 290 So.2d 56, 58 (Fla. 1974). *See also* Oak Park Hosp. v. Smuda, 214 Ill.App.3d 1032, 1034, 574 N.E.2d 804, 805-806 (1999) (“Although the Industrial Commission has the power to determine the reasonableness and fix the amount of any fee charged by a hospital for any service performed in connection with the [Workers’ Compensation] Act, the statute does not state that the hospital shall be restricted in its avenues of collection from the recipient of medical services” and, therefore, the Circuit Court had jurisdiction to address the hospital’s claim.”).

⁶⁰ Eastern Elevator Co. v. Hedman, 290 So.2d 56, 58. *See also* Rebich v. Burdine’s and Liberty Mut. Ins. Co., 417 So.2d 284, 285 (Fla. 4th DCA 1982) (Statutes authorized physician’s breach of contract claim filed with FIRC, but four year statute of limitations applied as tern “physician” not included in revised two-year statute of limitations provisions).

⁶¹ Brannon v. Pike, 112 Idaho 938, 938-939, 737 P.2d 459, 459-460 (1987).

⁶² Brannon v. Pike, 112 Idaho 938, 940, 737 P.2d 459, 461 (*citing* Martin v. Argonaut Ins. Co., 90 Idaho 107, 408 P.2d 475 (1965); Thompson v. Liberty Nat’l Ins. Co., 78 Idaho 381, 304 P.2d 910 (1956); Hancock v. Halliday, 65 Idaho 645, 150 P.2d 137 (1944)). Both Martin and Thompson were later superseded by statute. *See generally* Smith v. O/P Transp., Inc., 120 Idaho 123, 814 P.2d 23 (1991).

In addition, the Court of Appeals of Louisiana, in Broussard, Bolton, Halcomb & Vizzier v. Williams, recognized that the even though the Louisiana Office of Workers' Compensation had statutory general jurisdiction to address all claims and disputes arising from the *Worker's Compensation Act*,⁶³ the appellate court "ha[d] drawn a distinction between those matters which " 'ar[ose] out of the *Worker's Compensation Act*, rather than merely relate[d] to worker's compensation in general.' "⁶⁴ The Louisiana appellate court concluded that "[i]f the issue to be considered ar[ose] out of the [*Workers' Compensation Act*, jurisdiction [wa]s [then] vested in the [Office of Workers' Compensation]; if it merely relate[d] to the workers' compensation claim, the [Office of Workers' Compensation] d[id] not have subject matter jurisdiction."⁶⁵ The appellate court noted that since the dispute "involve[d] a fee dispute between two attorneys, [it] relate[d] to a workers' compensation claim only peripherally in that the claim provided the basis for the payment of the fee[and] simply d[id] not 'arise out of the *Worker's Compensation Act*.' "⁶⁶

In Smith v. Williams, the Court of Appeals of Georgia addressed one attorney's breach of contract claim against a former partner who had left the firm and sought the "division of attorney's fees earned from certain worker's compensation cases where the

⁶³ Broussard, Bolton, Halcomb & Vizzier v. Williams, 796 So.2d 791, 794 (La.App. 3rd Cir. 2001) (quoting La. Rev. Stat. 23:1310.3(E)).

⁶⁴ Broussard, Bolton, Halcomb & Vizzier v. Williams, 796 So.2d 791, 794- 795 (quoting Ellender's Portable Buildings, Inc. v. Cormier, 787 So.2d 601, 603 (La.App. 3rd Cir. 2001) (quoting Covington v. A–Able Roofing, Inc., 670 So.2d 611, 613 (La.App. 3rd Cir. 1996)).

⁶⁵ Broussard, Bolton, Halcomb & Vizzier v. Williams, 796 So.2d 791, 795 (citing Covington v. A–Able Roofing, Inc., 670 So.2d 611, 613). See also generally TIG Ins. Co. v. La. Workers' Compensation Corp., 917 So.2d 26 La.App. 1st Cir. 2005); 84 Lumber Co. v. Babineaux, 886 So.2d 693, 695 (La.App. 3rd Cir. 2004) (citing Nunez v. Loomis Fargo & Co., 807 So.2d 1063 (La.App. 4th Cir. 2002), writ denied, 816 So.2d 307 (La. 2002)).

⁶⁶ Broussard, Bolton, Halcomb & Vizzier v. Williams, 796 So.2d 791, 795.

clients elected to retain [the departing lawyer] as their counsel”⁶⁷ The appellate court concluded that “[w]hile it [wa]s true that specific claimants [we]re referenced . . . , neither party point[ed] to any claimant ‘whose claim of benefits would be affected by [the] resolution of [Williams'] claim against [Smith] [and] [a]ccordingly, . . these allegations [did not] implicate the benefits to be paid to any individual injured employee [under the *Workers’ Compensation Act*].’ ”⁶⁸ In *Aetna v. Workers’ Comp Access, LLC*, the same appellate court, discussed the State Board of Workers’ Compensation’s jurisdictional issues involving that six hospital’s claims against Aetna for medical fees incurred in providing medical services to injured employees in workers’ compensation cases.⁶⁹ The Georgia court found that “no specific employee claimant or claim [wa]s referenced [in the hospitals’ claims], and neither Aetna nor the [hospitals] point[ed] to any employee whose claim of benefits would be affected by resolution of the . . claim[s],” therefore, the SBWB had no jurisdiction”⁷⁰

⁶⁷ *Smith v. Williams*, 333 Ga.App. 167, 167, 775 S.E.2d 639, 641 (2015).

⁶⁸ *Smith v. Williams*, 333 Ga.App. 167, 167, 775 S.E.2d 639, 641 (*quoting Aetna v. Workers' Comp Access, LLC v. Coliseum Med. Ctr.*, 322 Ga.App. 641, 644(1), 746 S.E.2d 148 (2013)) (Fifth, sixth, and seventh alterations in original). *See also generally Wells v. Goodyear Tire & Rubber Co.*, 14 Neb.App. 384, 707 N.W.2d 438 (2005); *Pitt v. W.C.A.B. (McEachin)*, 161 Pa.Cmwlth. 60, 62-62, 636 A.2d 235, 237 (1993) (Pennsylvania Workmen’s Compensation Appeal Boards did not have jurisdiction to address an attorney “litigating on his own behalf a cause of action which was a common-law claim for breach of contract, a claim on principles of quantum meruit, or an equitable claim for damages under a theory of unjust enrichment.”).

⁶⁹ *Aetna v. Workers' Comp Access, LLC v. Coliseum Med. Ctr.*, 322 Ga.App. 641, 661, 746 S.E.2d 148, 149-150.

⁷⁰ *Aetna v. Workers' Comp Access, LLC v. Coliseum Med. Ctr.*, 322 Ga.App. 641, 661, 746 S.E.2d 148, 149-150.

5. The SCWCC Exceeded Its Jurisdiction By Addressing Dr. Fechter's Common Law Claims

The SCWCC, as an inferior court, is accorded jurisdiction over “[a]ll question under [the *Workers’ Compensation Act*] if not settled by agreement **of the parties** interested therein with the approval of the [SCWCC].”⁷¹ The SCWCC’s jurisdiction is specifically limited to questions related to the “parties”. Dr. Fechter was not and never has been a party to the Nevamar Claimants’ workers’ compensation claims. Moreover, Dr. Fechter was neither a claimant, nor an employee, nor an employer, nor a workers’ compensation insurance carrier, nor a treating physician. Even though Dr. Fechter provided medical treatment and other services to many of the Nevamar Claimants such medical treatment and such other services were not the type to have been paid for through operation of the *Workers’ Compensation Act*, but treatment and services contracted for by the Ortner Respondents and the Rosenthal Respondents under the common law and beyond the reach of the *Workers’ Compensation Act*. Simply stated, the SCWCC did not have subject matter jurisdiction to hear Dr. Fechter’s claims against the Ortner Respondents and the Rosenthal Respondents as those individuals and entities were non-parties to the Nevamar Claimants’ litigation even though Dr. Fechter’s claims may have arisen from and/or were tangentially related to that workers’ compensation litigation.⁷²

The SCWCC stated that the purpose of the final exercise of its jurisdiction in this matter was solely to address the remaining \$500,000.00 being held by the Special Referee as funds available for the payment of legitimate litigations costs and expenses.

⁷¹ See S.C. Code Ann. § 42-3-180 (Thomson Reuters West 2015) (Emphasis added).

⁷² See generally e.g.; Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 409, 721 S.E.2d 461, 464; Laboureur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 544, 397 S.E.2d 526, 529; Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600.

(*SCWCC Order Releasing Funds*, pp.1-2). The SCWCC, instead of simply disbursing the held back funds, exceeded its very own stated mandate by proceeding to “conclusively” determine the validity of Dr. Fechter’s separate and independent common law contractual claims against the Ortner Respondents and the Rosenthal Respondents. (*SCWCC Order Releasing Funds*, pp.1-8).⁷³ This action was improper as the SCWCC did not have subject matter jurisdiction to address common law claims, whether breach of contract or otherwise, which did not directly relate to the compensation scheduled to be provided to of the injured employees (*i.e.*; Nevamar Claimants).

The SCWCC’s own rules and regulations arguably prohibited the SCWCC from even addressing Dr. Fechter’s various separate and independent common law claims against the Ortner Respondents and the Rosenthal Respondents. The regulations authorize a party or his/her/its attorneys to file a motion with the SCWCC regarding a number of issues including a motion “[r]elating to a claim [which is then] pending

⁷³ The SCWCC’s final hearing came about as a result (*SCWCC Order Releasing Funds*, p.1) of the Rosenthal Respondents filing their Motion for Release of Funds (*SCWCC Motion for Release of Funds*, pp.1-13) to which the Ortner Respondents joined. (*SCWCC Reply to Motion for Release of Funds*, pp.1-5). Dr. Fechter, admittedly a non-party to Nevamar Claimants’ workers’ compensation litigation (*SCWCC Order Releasing Funds*, pp.1-9; *Fechter Aff.*, para. 21), did not have either standing and/or the legal ability to conduct discovery into the Ortner Respondents’ and the Rosenthal Respondents’ respective contentions that they did not owe him any additional payments for rendered medical and other services . See S.C. Code Ann. Regs. § 67-215. See generally Patriot Rail Corp., Sierra Railroad Co., 2016 WL 704456, * 4 (E.D.Cal., filed 23 Feb. 2016). See also Blue Cross & Blue Shield of S.C. v. S.C. Indus. Comm’n, 274 S.C. 204, 205, 262 S.E.2d 35, 36. Conversely, the Ortner Respondents and the Rosenthal Respondents, ostensibly acting on behalf their Nevamar Claimants clients, were able to conduct discovery from Dr. Fechter. Consequently, Dr. Fechter did not have the right to a jury trial or to any of the other protections afforded parties in civil litigation. The unfairness of permitting the Ortner Respondents and the Rosenthal Respondents to argue before a specialized commission (albeit one without legitimate jurisdiction over the case) the merits of a common law claims involving alleged breaches of contract involving substantial monetary value and involving a nonparty is beyond obvious. Additionally, it does not appear that the South Carolina Workers’ Compensation Act has any type of procedure through which a non-party individual, such as Dr. Fechter, would be able to intervene into the litigation in order to protect his economic interests.

[SCWCC] review”⁷⁴ Dr. Fechter, by the SCWCC’s own admission, did not have a “claim [which] exist[ed] of record with the [SCWCC]” (*SCWCC Order to Release Funds*, p.4). The Rosenthal Respondents, *sua sponte*, brought up the issue while seeking, solely for their own unquestioned economic benefit, to have the SCWCC release the Special Referee’s \$500,000.00 in held-back funds. (*SCWCC Order to Release Funds*, p.4; *SCWCC Rosenthal Motion to Release Funds*, pp.1-12). The Rosenthal Respondents and, by implication, the Ortner Respondents, sought to circumvent Dr. Fechter’s claims by having the SCWCC, a specialized and inferior tribunal, “adjudicate” the matter before the dispute could reach Circuit Court.

The Rosenthal Respondents and the Ortner Respondents knew that Dr. Fechter’s payment claims against them, while tangentially related to the Nevamar Claimants’ global workers’ compensation litigation, nevertheless, arose solely out of certain transactions between Dr. Fechter and both the Ortner Respondents and the Rosenthal Respondents. Dr. Fechter’s claims were distinctly separate and independent of the Nevamar Claimants’ workers’ compensation litigation and, in turn, Dr. Fechter’s “claims [for the unpaid medical and other services he provided clearly] all ar[o]se from the common law, not the workers’ compensation laws.”⁷⁵

The SCWCC should never have considered, much less concluded, it was empowered to exercise subject matter jurisdiction over and to adjudicate Dr. Fechter’s common law claims. The decision to have done so, as well as the Circuit Court’s reliance thereon, must be reversed in all respects and the matter remanded for a trial by jury.

⁷⁴ See *S.C. Code Ann. Regs.* § 67-215.

⁷⁵ *Baker Hosp. v. Fireman’s Fund Ins. Co.*, 314 S.C. 98, 101, 441 S.E.2d 822, 823.

B. THE CIRCUIT COURT SHOULD HAVE DENIED THE ORTNER RESPONDENTS' RENEWED MOTION TO DISMISS DR. FECHTER'S CLAIMS OR, IN THE ALTERNATIVE GRANTED DR. FECHTER'S MOTION FOR RECONSIDERATION MOTION OF THE DISMISSAL.

The Ortner Respondents moved to dismiss Dr. Fechter's *Complaint*, in part, on the basis that Dr. Fechter had failed to properly serve his *Summons and Complaint* on them. (*Ortner Order*, pp.4, 6-8; *Ortner MTD*, pp.1, 14-15; *Ortner MTD II*, p.1). Moreover, even if Dr. Fechter had properly accomplished/effectuated service of process, such service had not been achieved within the applicable three-year statute of limitations. (*Ortner Order*, pp.4, 6-8; *Ortner MTD*, pp.1, 14-15; *Ortner MTD II*, p.1). The Circuit Court agreed with the Ortner Respondents misguided position and dismissed Dr. Fechter's claims with prejudice. (*Ortner Order*, pp.7-9). The Circuit Court concluded that Dr. Fechter "failed to serve [the Ortner Respondents] with the [pleadings] on December 7, 2017" and that, in any case, such service, if actually made, was done beyond the statute of limitations. (*Ortner Order*, pp.7-9).

1. The Ortner Respondents Had Notice Of Dr. Fechter's Action

Dr. Fechter filed his *Summons and Complaint* on 25 August 2017 (*Rosenthal Order*, p.3; *Ortner Order*, p.3; *Jefferson Order*, p.1; *Comp.* p.1) and served the Ortner Respondents on 7 December 2017, "by delivering to them, by certified mail, US Postal Service . . . in Charleston, South Carolina and leaving with them copies of the [pleadings] at 145 King Street, Ste. 211, Charleston, [South Carolina]." (*Ortner Order*, p.3; *MDB 01.09.19 Ortner Aff.*, p.1; *Ortner USPS Tracking Sheet*, p.1). While the Ortner Respondents disputed the validity of this service (*Ortner Order*, pp.4, 6, 7, 8; *Ortner MTD*,

pp.1, 14-15; *Ortner MTD II*, p.1) and the Circuit Court bought the argument (*Ortner Order*, pp.5-8), that does not mean the service was actually faulty and, in light of South Carolina law, that the Circuit Court's decision was patently incorrect.⁷⁶

It is well-established that “ ‘Rule 4, SCRCivP, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action.’ ”⁷⁷ Nevertheless, “[e]xacting compliance with the rules is not required to effect service of process.”⁷⁸ “ ‘Rather, [the court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.’ ”⁷⁹

⁷⁶ Since the Ortner Respondents' Motion to Dismiss was, in effect, transformed into a Motion for Summary Judgment, Dr. Fechter is entitled to “ ‘the benefit of all favorable inferences that might reasonably be drawn [from the evidence].’ ” Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C., 388, 390-391, 631 S.E.2d 915, 916 (*quoting* Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158. Moreover, “[s]ummary judgment should [have been] denied [since Dr. Fechter, at a minimum,] submit[ted] a mere scintilla of evidence.” Zurich Amer. Ins. Co. v. Tolbert, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (*citing* Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801).

⁷⁷ BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) (*quoting* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995)). *See also generally* Okers Co. v. Clear Touch Interactive, Inc., 2021 WL 1827181, * 2 (D.S.C., filed 7 May 2021); Estate of Knight v. Whitten, 5099369, *1 (S.C.App., filed 19 Sept. 2019) (*per curiam*); Fassett v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct.App. 2005); Owners Ins. Co. v. Foxfield Commons POA, Inc. d/b/a Foxfield Commons, 2021 WL 5086262, *5 (D.S.C., filed 9 Nov. 2021); Bowman v. Weeks Marine, Inc., 936 F.Supp. 329, 342-434 (D.S.C., filed 21 Aug. 1996).

⁷⁸ Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct.App. 2010) (*citing* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209-210, 456 S.E.2d 897, 899). *See also generally* Charleston Harbor Resort & Marina v. Davis, 2016 WL 640490, *1 (S.C.App., filed 17 Feb. 2016) (*per curiam*); Rayburn v. Dysart, 2019 WL 2613469, *1 (S.C.App., filed 29 June 2019) (*per curiam*); Richardson v. P.V., Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009); White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 10, 753 S.E.2d 537, 542 (2014).

⁷⁹ Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct.App. 2010) (*quoting* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 210, 456 S.E.2d 897, 899) (Alteration in original).

The Circuit Court seized on the fact Dr. Fechter’s “purported proof of service . . . was not filed with the [Circuit] [C]ourt until over a year after the mailing [of the pleadings to the Ortner Respondents].” (*Ortner Order*, p.7). The Circuit Court, however, ignored South Carolina law which provides that “[n]owhere does [Rule 5(d), SCRCivP,] provide failure to file proof of service within the ten day period nullifies the service or extends the period of time for a defendant to answer.”⁸⁰ In fact, “Rule 5(d)[, SCRCivP,] only provides for dismissal of an action for failure to serve the summons and complaint.”⁸¹ Moreover, “Rule 4(g), SCRCivP, specifically states [that], ‘[f]ailure to make proof of service does not affect the validity of the service’ ”⁸² Consequently, Dr. Fechter’s “failure to make proof of service within a ten day period of service, likewise [does not and, contrary to the Circuit Court’s decision, did not] affect the validity of service [of process on the Ortner Respondents].”⁸³

More importantly, the Circuit Court overlooked the evidence that the Ortner Respondents were not directly challenging the fact service of process had actually been accomplished on 7 December 2017, as Dr. Fechter asserted, but merely contending that the service of process had occurred outside of the statute of limitations. (*Ortner MTD*, pp.14-15; *Ortner MTD II*, pp.1-2). Karen Ortner and Leon Ortner both conceded that the

⁸⁰ Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (Ct.App. 1989).

⁸¹ Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (*quoting* Rule 5(d), SCRCivP). *See also generally* 24 S.C. Juris Rules of Civil Procedure, § 5.2 (Thomson Reuters West 2021 Update)

⁸² Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (*quoting* Rule 4(g), SCRCivP). *See also generally* Gilbert v. Ossich Enterprises, LLC, 2021 WL 1754195, *3 (D.S.C., filed 4 May 2021); Peeples v. Ramspacher, 29 F.Supp. 632, 636 (E.D.S.C. 1939); In re Peagler, 2001 WL 180, *5 (D.S.C., filed 1 June 2001).

⁸³ Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

Ortner Respondents had actually received the pleadings contained in the envelope attached to their respective affidavits. (*K.Ortner Aff.*, para. 7; *L.Ortner Aff.*, para. 7).⁸⁴ Whether or not the green USPS return receipt card was “officially” signed is effectively immaterial in light of the fact the Ortner Respondents actually had the pleadings in their possession on 7 December 2017. (*K.Ortner Aff.*, para. 7). The intent of the service of process rules is to, among other things, provide the defendant notice of the proceedings.⁸⁵ The Ortner Respondents had notice of and possession of the pleadings on 7 December 2017. (*K.Ortner Aff.*, para. 7; *L.Ortner Aff.*, para. 7).⁸⁶

Furthermore, a number of courts across this county have concluded that even though a plaintiff, like Dr. Fechter, attempts service of process via the U.S. Mail with a return receipt requested, the fact that the “green card” is either not returned or returned unsigned is not fatal to demonstrating actual service. As long as the plaintiff was able to produce documentation from and/or a web-access address to either the U.S. Postal Service or to UPS, DHL, FedEx, *etc.* (when a private courier service was used) then the

⁸⁴ Leon Ortner is the sole member of the Ortner Law Firm, LLC and its registered agent for service of process. (*L.Ortner Aff.*, paras. 2-4). He admitted he was aware of the pleadings in this matter on or about 7 December 2017, when Karen Ortner “happened to pick up mail delivered to 145 King Street, Suite 211, Charleston, South Carolina, including the envelope [sent to the Ortner Respondents by Dr. Fechter’s trial counsel – Melvin D. Bannister, Esquire – and which contained the Summons and Complaint in this matter].” (*K.Ortner Aff.*, para. 7). Notwithstanding their less than convincing arguments to the contrary, it can hardly be reasonably disputed that the Ortner Respondents had proper and timely notice of Dr. Fechter’s action.

⁸⁵ *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct.App. 1996).

⁸⁶ It would be, at best, extremely disingenuous to believe that on 7 December 2017, the Ortner Respondents (themselves attorneys), having in their possession an envelope addressed to them (as attorneys) and clearing indicating that the documents had been sent by an attorney, simply set the envelope aside and did not open the envelope to determine its contents.

applicable court was lawfully and properly permitted to take judicial notice of the documentation and/or web information which indicated that the service of process delivery had actually been accomplished.⁸⁷

2. The Ortner Respondents Had Notice Of Dr. Fechter's Action Within The Applicable Statute Of Limitations

The Circuit Court concluded that Dr. Fechter failed to serve the Ortner Respondents with the pleadings in this action within the statute of limitations and dismissed Dr. Fechter's action. (*Ortner Order*, pp.6-8). The Circuit Court's decision was incorrect and must be reversed in all respects.

The SCWCC's final decision in the Nevamar Claimants' workers' compensation litigation was filed on 26 January 2016. (*Ortner Order*, p.3 fn.2; *Comp.*, para. 17; *Dr. Fechter Aff.*, paras. 15, 49). This action consisted of the SCWCC's decision to release the \$500,000.00 of held-back funds to the Rosenthal Respondents as payment for their ostensibly "incurred" litigation costs and expenses. (*SCWCC Order To Release Funds*, pp.1-8). Dr. Fechter filed this action on 25 August 2017, some 18+ months later. (*Ortner*

⁸⁷ See generally *NYKCool, A.B. v. Pacific Int'l Services, Inc.*, 2013 WL 6799973, *6 fn.8 (S.D.N.Y., filed 20 Dec. 2013) (*citing* *Ahn v. Inkwel Publg Solutions, Inc.*, 2013 WL 3055793, *4 (S.D.N.Y., filed 19 June 2013) (taking judicial notice of information available on U.S. Postal Service website in analyzing service of process); *El-Aheidab v. Citibank (S.D.), N.A.*, 2012 WL 506473, *4 n.3 (N.D.Cal., filed 15 Feb. 2012) ("[T]he Court notes that the postal service's website indicates that each of Plaintiff's mailings were in fact delivered. The Court takes judicial notice thereof." (*citing* U.S. Postal Service, Track & Confirm, <https://tools.usps.com/go/TrackConfirmAction>)); *White v. Microsoft Corp.*, 454 F.Supp.2d 1118, 1124 & n. 7, 1131 (S.D.Ala. 2006) (delivery proved by "DHL records" including "a DHL tracking record"); *Rockmore Inv. Master Fund Ltd. v. Power 3 Med. Prods., Inc.*, 30 Misc.3d 1206(A), 958 N.Y.S.2d 648 (Table), 2010 WL 5491131, ** 1, 3 (Sup.Ct.N.Y.Co., filed 23 Dec. 2010) (delivery proved by information from "the FedEx proof of delivery tracking system"), *objections to report and recommendation sustained in part and overruled in part on other grounds* by 66 F.Supp.3d 385 (S.D.N.Y. 2014), *adhered to on reconsideration*, 2015 WL 998455, **3 & n.18 (S.D.N.Y., filed 5 Mar. 2015). See also *Empire Community Development, LLC v. Giambalvo-West*, 2020 WL 9823022, *5 fn.6 (E.D.N.Y., filed 6 Mar. 2020); *Bondanelli v. Ocean Park SRL*, 2012 WL 12893008 (C.D.Cal., filed 19 Oct. 2012).

Order, p.3; *Comp.*, p.1; *Dr. Fechter Aff.*, para. 50). Dr. Fechter then served the Ortner Respondents, by their own admission (*K.Ortner Aff.*, para. 7; *L.Ortner Aff.*, para. 7),⁸⁸ on 7 December 2017. (*Ortner Order*, p.3). This was well within the three year statute of limitations for this type of action.⁸⁹

As has been mentioned previously, one of the principal objectives of the service of process rules is to ensure that the defendant has received notice of the plaintiff's action.⁹⁰ Notwithstanding the Ortner Respondents' arguments and the Circuit Court's incorrect conclusion to the contrary (*Ortner Order*, pp.6-8; *Ortner MTD II*, pp.1-2), the Ortner Respondents had notice of Dr. Fechter's action well within the applicable three-year statute of limitations. The fact Dr. Fechter did not file the proof of service with the Circuit Court is merely a "red herring" given that "Rule 4(g), SCRCivP, specifically states [that], '[f]ailure to make proof of service **does not affect the validity of the service.**'"⁹¹ Dr. Fechter's failure to "timely" file the proof of service did not negatively affect the validity of service on the Ortner Respondents as "[e]xacting compliance with the rules is not required to effect service of process."⁹²

⁸⁸ Leon Ortner, sole member of the Ortner Law Firm, LLC and its registered agent for service of process (*L.Ortner Aff.*, paras. 2-4) admitted he was aware of the pleadings in this matter on or about 7 December 2017 (*L.Ortner Aff.*, para. 6), when Karen Ortner picked up the envelope sent to the Ortner Respondents by Dr. Fechter's trial counsel – Melvin D. Bannister, Esquire – and which contained the Summons and Complaint in this matter. (*K.Ortner Aff.*, para. 7).

⁸⁹ See S. C. Code Ann. § 15-3-530 (Thomson Reuters West 2017).

⁹⁰ Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66.

⁹¹ Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (*quoting* Rule 4(g), SCRCivP). In addition "[n]owhere does [Rule 5(d), SCRCivP,] provide failure to file proof of service within the ten day period nullifies the service . . ." Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

⁹² Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (*citing* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209-210, 456 S.E.2d 897, 899).

The Ortner Respondents filed their joint *Motion to Dismiss* on 8 January 2018 (*Ortner MTD*, p.1), the 30th day after service.⁹³ The Ortner Respondents, while asserting “insufficiency of process” in both the original⁹⁴ and in the renewed versions of their dismissal motion, nevertheless merely alleged that Dr. Fechter served his pleadings upon them beyond the running of the statute of limitations. (*Ortner MTD*, pp.14-15; *Order MTD II*, p.1). Similarly, the Circuit Court noted “the Ortner [Respondents] filed a motion to dismiss [Dr. Fechter’s] Complaint [asserting he] failed to properly effect service within the statute of limitations and insufficiency of service of process.” (*Ortner Order*, p.4). The Circuit Court, however, failed to specify how Dr. Fechter’s service of process was insufficient (*Ortner Order*, pp.6-8), merely using the empty justification that Dr. Fechter’s proof of service had not been timely filed with the court. (*Ortner Order*, pp. 6, 7). Furthermore, the Circuit Court failed to consider the evidence which clearly demonstrated the Ortner Respondents had both notice and knowledge of Dr. Fechter’s action on or about 7 December 2017, sufficient to have timely filed their *Motion to Dismiss*.

The failure of both the Ortner Respondents and the Circuit to point out how Dr. Fechter’s service of process was deficient was fatal to their respective positions since their respective “ ‘objection[s] to insufficiency of process or its service should [have] point[ed] out specifically in what manner [Dr. Fechter] ha[d] failed to satisfy the

⁹³ This time period is curiously similar to the applicable time period for a defendant to either file a response directly to a Complaint or to otherwise move for one of several types of relief (*i.e.*; Motion to Dismiss, *etc.*). See generally Rule 12(a), SCRCivP.

⁹⁴ “At the call of [the Ortner Respondents’] motion [they] informed [Judge Jefferson] that [they] were withdrawing [that part of] the [M]otion to [D]ismiss the case based on insufficient service of process grounds[, but] by doing so w[ere] not waiving the right to raise [that defense] at a later date.” (Jefferson Order, p.2 fn.1).

requirements of the service provision he utilized.’ ”⁹⁵ This is particularly true given that the Ortner Respondents were clearly aware of Dr. Fechter’s action against them around 7 December 2017, notwithstanding the absence of a signed “green return receipt card”.

The Circuit Court’s faulty decision to grant the Ortner Respondents’ *Motion to Dismiss* was later compounded by the Circuit Court’s failure to grant Dr. Fechter’s *Motion for Reconsideration*. Both of those decisions must be reversed in all respects and this matter remanded to the Circuit Court for a jury trial.

C. THE CIRCUIT COURT SHOULD HAVE DENIED THE ROSENTHAL RESPONDENTS’ MOTION TO DISMISS DR. FECHTER’S CLAIMS OR, IN THE ALTERNATIVE, GRANTED DR. FECHTER’S MOTION RECONSIDERATION MOTION OF THE DISMISSAL.

The Rosenthal Respondents, much like to Ortner Respondents, moved to dismiss Dr. Fechter’s *Complaint*, in part, on the basis that Dr. Fechter had failed to properly serve his *Summons* and *Complaint* on both of them and, even if service of process had been accomplished, Dr. Fechter did not perform the service of process within the applicable three year statute of limitations. (*Rosenthal Order*, pp.8-12; *Rosenthal MTD*, pp.5-12). The Circuit Court agreed with the Rosenthal Respondents and dismissed Dr. Fechter’s claims with prejudice concluding that Dr. Fechter clearly failed to effect proper service of process either of the Rosenthal Respondents with his *Summons* and *Complaint* and that, in any case, such service of process, if actually made, was done beyond the statute of limitations. (*Rosenthal Order*, pp.8-12). Furthermore, the Circuit Court also dismissed Dr. Fechter’s action on the basis that the SCWCC was the proper forum and, in turn, the

⁹⁵ *Unisun Ins. Co. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 562 (Ct.App. 2000) (citing 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure Civil 2d*, § 1353 (West 1990) (quoting *Travelers Ins. Co. v. Panama-Williams, Inc*, 424 F.Supp. 1156 (N.D.Okla.1976)) (Emphasis added).

Circuit Court did not have subject matter jurisdiction to consider the matter. (*Rosenthal Order*, pp.12-14). Both of the Circuit Court's decisions were incorrect and must be reversed in all respects.

1. The Rosenthal Respondents Had Notice Of Dr. Fechter's Action

Dr. Fechter filed his *Summons* and *Complaint* on 25 August 2017 (*Rosenthal Order*, pp.1, 3; *Rosenthal MTD*, para. 3), and served the Rosenthal Respondents on 12 October 2017.⁹⁶ (*Rosenthal Order*, pp.4, 5; *MDB Rosenthal Aff.*, p.1; *Rosenthal USPS Tracking*, p.1; *Rosenthal Green Card*, p.1; *Rosenthal MTD*, paras. 5, 7-8).⁹⁷ By the Rosenthal Respondents' own admission they acknowledged receipt of envelope containing Dr. Fechter's pleadings on 12 October 2017. (*Rosenthal Order*, p.4; *Rosenthal MTD*, p.3; *Elder Aff.*, paras. 9-10).

In fact, Ed Elder's affidavit specifically admitted that on 12 October 2017, he was employed by the Rosenthal Respondents as a "rotating receptionist and file clerk." (*Elder Aff.*, para. 4). He further admitted that "[o]n or about October 12, 2017, [while sitting at the Rosenthal Respondents' office reception desk he] signed the return receipt 'green cards' for several pieces of certified mail[, including the envelope directed to the Rosenthal Respondents from Dr. Fechter's trial counsel and which contained the

⁹⁶ The envelope Dr. Fechter's trial counsel sent to the Rosenthal Respondents and which contained copies of Dr. Fechter's pleadings in this action was apparently deposited with the United State Postal Service on 5 October 2017. (*Rosenthal Order*, p.3, para. 4).

⁹⁷ Again, it would be, at best, extremely disingenuous to believe that on or shortly after 12 October 2017, the Rosenthal Respondents (themselves attorneys), having in their possession an envelope addressed to them (as attorneys) and clearing indicating that the documents had been sent by an attorney, simply set the envelope aside and did not open the envelope to determine its contents that day or soon thereafter. It would have only been appropriate for the Rosenthal Respondents to have discovered on 12 October 2017, that Dr. Fechter's pleadings were contained within the envelope as that date commemorates one of the greatest discoveries in history – Columbus' ostensible discovery of the "New World".

pleadings in this action].” (*Elder Aff.*, paras. 9-10). Interestingly, albeit somewhat inexplicably, there is little, if any, information as to what the Rosenthal Respondents did with the envelope containing Dr. Fechter’s pleadings from 12 October 2017, onward. This is especially true given the fact the Rosenthal Respondents did not file their Motion to Dismiss (containing, among other things, the Elder Affidavit) until 14 May 2019, **over 19 months after they were served on 12 October 2017.** (*Rosenthal MTD*, p.1).⁹⁸

As noted, one of the principal objectives of rules governing service of process is to ensure that defendants, such as the Rosenthal Respondents, actually received notice of a claimant’s, such as Dr. Fechter, action.⁹⁹ Notwithstanding the Rosenthal Respondents’ arguments and the Circuit Court’s incorrect conclusion to the contrary (*Rosenthal Order*, pp.8-12; *Rosenthal MTD*, pp.5-12), the Rosenthal Respondents clearly had actual notice of Dr. Fechter’s action well within the applicable three-year statute of limitations. The fact Dr. Fechter did not file the proof of service with the Circuit Court is, as noted before, merely a “red herring” given that “Rule 4(g), SCRCivP, specifically states [that], ‘[f]ailure to make proof of service **does not affect the validity of the service.**’ ”¹⁰⁰ Dr. Fechter’s

⁹⁸ Apparently, the Rosenthal Respondents were awaiting Judge Jefferson’s decision regarding the Ortner Respondents’ initial Motion to Dismiss before joining the fray. Judge Jefferson conducted a hearing on the Ortner Respondent’s Motion to Dismiss on 9 January 2019 (Jefferson Tr., p.1, line 10). No one appeared representing the Rosenthal Respondents. (Jefferson Tr., p.3, lines 2-12). Judge Jefferson ultimately denied the Ortner Respondents’ motion, by written order issued on 4 April and filed on 5 April 2019 (Jefferson Order, pp.1-15).

⁹⁹ Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66. *See also generally* Fassett v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct.App. 2005); Hutto v. County of Aiken, 2004 WL 6248942, *2 (S.C.App., filed 18 Feb. 2004); Seabrooks v. Aiken County, 2016 WL 4394275, *4 fn. 4 (D.S.C., filed 18 Aug. 2016).

¹⁰⁰ Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (*quoting* Rule 4(g), SCRCivP). In addition “[n]owhere does [Rule 5(d), SCRCivP,] provide failure to file proof of service within the ten day period nullifies the service” Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

“failure to make proof of service within a ten day period of service, likewise [does not and did not] affect the validity of service [of process upon the Rosenthal Respondents]”¹⁰¹ as “[e]xacting compliance with the rules is not required to effect service of process.”¹⁰²

2. The Rosenthal Respondents Had Notice Of Dr. Fechter’s Action Within The Applicable Statute Of Limitations

The Circuit Court found that Dr. Fechter failed to serve the Rosenthal Respondents within the statute of limitations and dismissed Dr. Fechter’s action. (*Rosenthal Order*, pp.11-12). The Circuit Court’s decision was incorrect and must be reversed in total.

The final decision in the Nevamar Claimants’ workers’ compensation litigation was filed on 26 January 2016 (*Rosenthal Order*, pp.3, 12; *Comp.*, para. 17; *Dr. Fechter Aff.*, paras. 15, 49), and consisted of the SCWCC’s decision to release to the Rosenthal Respondents the \$500,000.00 held-back by the Special Referee from the total settlement funds for payment of litigation expenses and costs. (*SCWCC Order To Release Funds*, pp.1-8). Dr. Fechter filed this action on 25 August 2017, some 18+ months later. (*Rosenthal Order*, pp.1, 3; *Comp.*, p.1; *Dr. Fechter Aff.*, para. 50). Dr. Fechter then served the Rosenthal Respondents, by their own admission (*Elder Aff.*, paras. 9-10), on 12 October 2017. (*Rosenthal Order*, pp.3, 5; *MDB Rosenthal Aff.*, p.1). This was well within the three year status of limitations for this type of action.¹⁰³

¹⁰¹ Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

¹⁰² Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (*citing Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209-210, 456 S.E.2d 897, 899).

¹⁰³ *See S. C. Code Ann.* § 15-3-530.

As has been mentioned previously, one of the principal objectives of the service of process rules is to ensure that the defendant has received notice of the plaintiff's action.¹⁰⁴ Notwithstanding the Rosenthal Respondents' arguments and the Circuit Court's incorrect conclusion to the contrary (*Rosenthal Order*, pp.8-11; *Rosenthal MTD*, pp.7-11), the Rosenthal Respondents had notice of Dr. Fechter's action well within the applicable three-year statute of limitations. The fact Dr. Fechter did not file the proof of service with the Circuit Court is merely a "red herring" given that "Rule 4(g), SCRCivP, specifically states [that], '[f]ailure to make proof of service ***does not affect the validity of the service.***'"¹⁰⁵ Dr. Fechter's "failure to make proof of service within a ten day period of service, likewise [does not and did not] affect the validity of service [of process on the Ortner Respondents]"¹⁰⁶ as "[e]xacting compliance with the rules is not required to effect service of process."¹⁰⁷

The Circuit Court concluded, albeit incorrectly, that "there [wa]s no question (a) [Dr. Fechter] (i) failed to serve [the Rosenthal Respondents] as required by Rules 4(d)(3)[,] (8), SCRCivP, (ii) . . . failed to commence an action against [the Rosenthal Respondents], as required by [S.C. Code Ann. §] 15-3-20(B) and Rule 3, SCRCivP, and (b) this [Circuit] Court lack[ed] personal jurisdiction over [the Rosenthal Respondents] as a result of [Dr. Fechter's] fail[ure] to effect service of civil process. . . ." (*Rosenthal Order*,

¹⁰⁴ Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66.

¹⁰⁵ Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (*quoting* Rule 4(g), SCRCivP). In addition "[n]owhere does [Rule 5(d), SCRCivP,] provide failure to file proof of service within the ten day period nullifies the service . . ." Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

¹⁰⁶ Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

¹⁰⁷ Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (*citing* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209-210, 456 S.E.2d 897, 899).

p.12). The Circuit Court, while somewhat attempting to specify how Dr. Fechter's service of process was insufficient (*Rosenthal Order*, pp.8-11), still fell back on the oft-stated empty justification that Dr. Fechter's proof of service had not been timely filed with the court. (*Rosenthal Order*, pp.5, 6-7, 9). Furthermore, the Circuit Court failed to properly consider and/or value the evidence which demonstrated the Rosenthal Respondents, on or about 12 October 2017, had both notice and knowledge of Dr. Fechter's action.

The Circuit Court's faulty decision to grant the Rosenthal Respondents' *Motion to Dismiss* was later compounded by the Circuit Court's failure to grant Dr. Fechter's *Motion for Reconsideration*. Both of those decision must be reversed in all respects and this matter remanded to the Circuit Court for a jury trial.

D. THE ORTNER RESPONDENTS AND THE ROSENTHAL RESPONDENTS HAD A CONTRACTUAL AND ETHICAL OBLIGATION TO PAY DR. FECHTER'S ADDITIONAL FEES CLAIMS.

The South Carolina version of the *Rules of Professional Conduct* provide, in pertinent part that "a lawyer having direct supervisory authority over the nonlawyer . . . shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."¹⁰⁸ The *Rules* further note that "[l]awyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals[and] [s]uch assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services."¹⁰⁹ Additionally, as the Supreme Court acknowledged in *In re Longin*:

¹⁰⁸ Rule 407, SCACR (Rule 5.3(b), RPC).

¹⁰⁹ Rule 407, SCACR (Rule 5.3, RPC, Comment 2).

Rule 8.4(a)[, RPC,] provides ‘[i]t is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.’ Moreover, Rule 7(a)(5) of the Rules for Lawyer Disciplinary Enforcement states ‘[i]t shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law.’¹¹⁰

The Supreme Court continued, stating that it “ha[d]s relied on these provisions in past disciplinary proceedings to find misconduct where a lawyer has failed to pay case-related expenses to a third-party.”¹¹¹ In Matter of Abney, the Supreme Court disbarred an attorney who, among other things, had referred many of his personal injury clients to various medical providers for examinations and evaluations.¹¹² Then, after the medical providers performed their requested services, the attorney consistently failed and/or refused to pay the medical providers for their services.¹¹³

In Gualtieri v. Burleson, the North Carolina Court of Appeals addressed a North Carolina physician’s claims against a District of Columbia attorney who had retained the doctor to examine and evaluate one of the attorney’s personal injury clients.”¹¹⁴ After the

¹¹⁰ In re Longin, 393 S.C. 368, 378, 713 S.E.2d 297, 302 (2011) (*per curiam*).

¹¹¹ In re Longin, 393 S.C. 368, 378, 713 S.E.2d 297, 302 (*citing In re Johnson*, 385 S.C. 501, 685 S.E.2d 610 (2009) (disciplining an attorney for failing to pay an expert witness); In re Okpalaeke, 374 S.C. 186, 648 S.E.2d 593 (2007) (disciplining an attorney for failing to pay a copy bill to a court reporter); In re Fulton, 343 S.C. 506, 541 S.E.2d 531 (2001) (disciplining an attorney for failing to pay a physician's court appearance fee).

¹¹² Matter of Abney, 316 S.C. 182, 183-184, 447 S.E.2d 848, 848-849 (1994) (*per curiam*).

¹¹³ Matter of Abney, 316 S.C. 182, 183-184, 447 S.E.2d 848, 848-849.

¹¹⁴ Gualtieri v. Burleson, 84 N.C.App. 650, 651-653, 353 S.E.2d 652, 653-655 (1987), *disc. rev. denied*, 320 N.C. 168, 358 S.E.2d 50 (1987). See generally Annot., *Attorney's Personal Liability for Expenses Incurred in Relation to Services for Client*, 66 A.L.R.4th 256 (1988).

physician had twice traveled to D.C. to examine and evaluate the attorney's client, prepared an evaluation report, and testified via a deposition, the attorney refused to pay the medical provider's fees.¹¹⁵ The North Carolina court effectively summed up the situation between attorneys and their expert medical providers stating:

Trial lawyers are always making contracts with court reporters, investigators, and experts of various kinds and the evidence clearly indicates [the] defendant [attorney] so contracted in this instance. Contrary to [his] argument, there is no inhibition in the law against a lawyer contracting to pay for services needed in a case he is handling. Rule 5.3[RPC,] of The North Carolina State Bar authorizes a lawyer to advance or guarantee litigation expenses for his clients, provided the client remains ultimately liable to him for such expenses. This proviso was adopted, no doubt, because litigation is usually conducted, managed[,] and prepared by lawyers, not clients; knowing when court reporters, investigators[,] and expert witnesses are needed and obtaining them is part of a trial lawyer's job; and lawyers, not clients, usually select, contact, negotiate with, engage[,] and pay such persons. Whether payment is made with the lawyer's money or the client's, or whether the client has agreed to reimburse the lawyer, is of no concern to the recipient; but **rare, indeed, is the expert, medical or otherwise, who helps in the preparation or trial of a lawsuit without being assured by someone apparently capable of paying that he will be paid.** All these things are known by trial lawyers, which is why they **usually assure experts vital to their cases that they will be paid** and make the best arrangements they can with the clients to repay them.¹¹⁶

The Court of Appeals of Washington, Division 1, concluded, in Copp v. Breskin, that an attorney owes an expert or other litigation service provider an express disclaimer of responsibility if the attorney intends not to be bound by a contract for litigation

¹¹⁵ Gualtieri v. Burleson, 84 N.C.App. 650, 652-653, 353 S.E.2d 652, 654-655.

¹¹⁶ Gualtieri v. Burleson, 84 N.C.App. 650, 653-654, 353 S.E.2d 652, 655 (Emphasis added).

services.”¹¹⁷ The Washington court recognized that “[t]his [proposition] reflect[ed] the modern trend, which is to hold the attorney liable in the absence of an express disclaimer or other clear indication not to be bound.”¹¹⁸ The appellate court reasoned that by “[p]utting the burden on the attorney promote[d] public trust and confidence in the legal profession, the supervision of which [was and] is the exclusive province and responsibility of the courts.”¹¹⁹ Finally, the United States District Court for the Northern District of Georgia, in Ikon Office Solutions, Inc. v. Law Office of Craig Kuglar, LLC, acknowledged that “[s]everal courts [from various jurisdictions across this country] have held that attorneys are responsible for contracts entered into by the attorneys on behalf of their clients in the course of litigation.”¹²⁰

¹¹⁷ Copp v. Breskin, 56 Wash.App. 229, 235, 782 P.2d 1104, 1107 (1989). See also generally Robert Rossi, *Attorney’s Personal Liability For Expenses*, Attorneys’ Fees 3rd, § 1.26 (Thomson Reuters West 2021 update).

¹¹⁸ Copp v. Breskin, 56 Wash.App. 229, 235, 782 P.2d 1104, 1107. See also generally Ingram v. Lupo, 726 S.W.2d 791 (Mo.App. 1987); Gaines Reporting Serv. v. Mack, 4 Ohio App.3d 234, 447 N.E.2d 1317 (1982); Theuerkauf v. Sutton, 102 Wis.2d 176, 306 N.W.2d 651 (1981); Molezzo Reporters v. Patt, 94 Nev. 540, 579 P.2d 1243 (1978); C.C. Plumb Mixes, Inc. v. Stone, 108 R.I. 75, 272 A.2d 152 (1971); Roberts, Walsh & Co. v. Trugman, 109 N.J.Super. 594, 264 A.2d 237 (1970); Burt v. Gahan, 351 Mass. 340, 220 N.E.2d 817 (1966), 15 A.L.R.3d 527 (1966).

¹¹⁹ Copp v. Breskin, 56 Wash.App. 229, 235, 782 P.2d 1104, 1107 (citing Short v. Demopolis, 103 Wash.2d 52, 62, 691 P.2d 163 (1984)).

¹²⁰ Ikon Office Solutions, Inc. v. Law Office of Craig Kuglar, LLC, 2013 WL 5350852, *4 fn. 5 (N.D.Ga., filed 23 Sept. 2013) (citing Judd & Detweiler, Inc. v. Gittings, 43 App. D.C. 304, 310–11 (D.C.Cir. 1915); McCullough v. Johnson, 307 Ark. 9, 12, 816 S.W.2d 886 (1991); Burt v. Gahan, 351 Mass. 340, 220 N.E.2d 817; Ingram v. Lupo, 726 S.W.2d 791; Molezzo Reporters v. Patt, 94 Nev. 540, 579 P.2d 1243; Roberts, Walsh & Co. v. Trugman, 109 N.J.Super. 594, 264 A.2d 237; Gualtieri v. Burleson, 84 N.C.App. 650, 353 S.E.2d 652; Gaines Reporting Serv. v. Mack, 4 Ohio App.3d 234, 447 N.E.2d 1317; C.C. Plumb Mixes, Inc. v. Stone, 108 R.I. 75, 272 A.2d 152; Copp v. Breskin, 56 Wash.App. 229, 782 P.2d 1104, 1107). See also generally Jay Zitter, *Attorney’s Personal Liability for Expenses Incurred in Relation to Services for Client*, 66 A.L.R.4th 256.

The Ortner Respondents and the Rosenthal Respondents had an obligation to pay Dr. Fechter for the medical and other valuable services he provided to the Nevamar Claimants. The Ortner Respondents and the Rosenthal Respondents reneged on their agreement and this Court of Appeals should reverse both the Trial Courts dismissal orders, as well as its order denying Dr. Fechter's reconsideration motions and remand this matter back for a jury trial.

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Appellant, Cary E. Fechter, M.D., respectfully requests that this Court of Appeals reverse the Circuit Court decisions in all respects and remand this matter back for a jury trial.

Respectfully submitted:

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Charleston, South Carolina

19 November 2021

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SC Court of Appeals

**STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS**

Appeal from the Court of Common Pleas
For Charleston County
Honorable J. Durham Cole, Circuit Court Judge
Civil Action No.: 2017-CP-10-04371
Appellate Case No.: 2021-000446

CARY E. FECHTER, M.D.,

Appellant,

vs.

LEON MARTIN ORTNER; THE ORTNER
LAW FIRM, LLC; GERALD ROSENTHAL, and
ROSENTHAL, LEVY, SIMON and RYLES, P.A.,

Respondents.

***PROOF OF SERVICE FOR THE APPELLANT'S
INITIAL BRIEF AND DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL***

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I, Stephen P. Groves, Sr., Esquire, hereby certify that on **19 November 2021**, I served a copy of the **INITIAL APPELLANT'S BRIEF**, as well as a copy of the **DESIGNATION OF MATTERS TO BE INCLUDED IN THE RECORD ON APPEAL** submitted on behalf of the Appellant, Cary E. Fechter, M.D., via e-mail and, in addition, also on **19 November 2021**, via electronic mail to the e-mail addresses noted below:

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Charleston, South Carolina

19 November 2021
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Nov 19 2021

SC Court of Appeals

19 November 2021

Via E-Mail: ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk of Court
SOUTH CAROLINA COURT OF APPEALS
Post Office Box 11629
Columbia, South Carolina 29211

Re: Cary E. Fechter, M.D. v. Leon Martin Ortner; The Ortner Law Firm, LLC; Gerald Rosenthal; and Rosenthal, Levy, Simon and Ryles, P.A.

Appeal for the Charleston County Court of Common Pleas

Civil Action No.: 2017-CP-10-04371

Appellate Case No.: 2021-000446

B/S File No.: 056705-224343

Dear Clerk Kitchings:

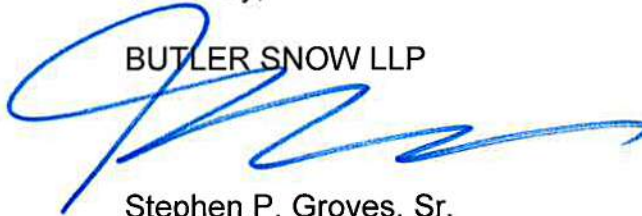
Please find attached the Initial Brief of the Appellant, the Designation of Matters to be Included in the Record on Appeal, and Proof of Service in the above-referenced matter. These are being filed on behalf of the Appellant, Cary E. Fechter, M.D. Should the Court of Appeals need hard copies of these documents, please let me know and I will be glad to provide the same.

In any case, please feel free to contact me if you need anything else or if I otherwise may be of any service to you, your office, or the Court of Appeals.

With kindest regards, I remain

Sincerely,

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