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**SC Court of Appeals**

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

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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***

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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.

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***INITIAL REPLY BRIEF OF THE APPELLANT,  
CARY E. FECHTER, M.D.  
(ROSENTHAL RESPONDENTS)***

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## **ARGUMENT AND CITATION OF AUTHORITY**

The Appellant, Cary E. Fechter, M.D. (“Dr. Fechter”), submits this Initial Reply Brief in response to the Initial Respondents Brief of the Respondents, Gerald Rosenthal and Rosenthal, Levy, Simon & Ryles, P.A. (the “Rosenthal Respondents”).

**A. THE SOUTH CAROLINA WORKERS’ COMPENSATION COMMISSION DID NOT HAVE ANY LEGAL AUTHORITY TO ADDRESS DR. FECHTER’S VARIOUS CLAIMS AGAINST THE ROSENTHAL RESPONDENTS.**

The Rosenthal Respondents moved to dismiss Dr. Fechter’s *Complaint*, in part, on the basis Dr. Fechter failed to properly serve his *Summons* and *Complaint* on both of them and, even if service of process had been made, Dr. Fechter did not accomplish service of process within the year statute of limitations. (*Rosenthal Order*, pp.8-12; *Rosenthal MTD*, pp.5-12). The Circuit Court agreed and dismissed Dr. Fechter’s claims with prejudice concluding that Dr. Fechter failed to effect proper service of process either of the Rosenthal Respondents and that, regardless, such service of process was done beyond the statute of limitations. (*Rosenthal Order*, pp.8-12). The Circuit Court also dismissed Dr. Fechter’s action on the basis that South Carolina Workers’ Compensation Commission (the “SCWCC”) was the proper forum and, in turn, the Circuit Court did not have subject matter jurisdiction to consider the matter. (*Rosenthal Order*, pp.12-14).<sup>1</sup> (*Rosenthal Order*, pp.12-14; *Ortner MTD*, pp.1, 5-13; *Rosenthal MTD*, pp.1-2, 11-12).

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<sup>1</sup> 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"). (*Rosenthal Order*, pp. 1-3; *Jefferson Order*, p.3; *SCWCC Consent Order*, p.1; *SCWCC Order Releasing Funds*, p.2). In or around October 2005, the Respondents, Leon Martin Ortner and Other Law Firm LLC (the “Ortner Respondents”), 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; 11.17.15 *Rosenthal Aff.*, para. 10;

The SCWCC did not have jurisdiction to “decide” Dr. Fechter’s claims the Rosenthal Respondents. The Circuit Court’s decision to the contrary must be reversed and the matter remanded for further proceedings.

1. **The SCWCC Ended Its Jurisdiction Over The Nevamar Claimants’ Worker’s Compensation Litigation Before Adjudicating Dr. Fechter’s Payment Claims.**

The SCWCC’s own actions terminated its jurisdiction to consider Dr. Fechter’s additional payment claims. (*SCWCC Order*, pp.1-3). The SCWCC dismissed, with prejudice, “[a]ll cases/claims included in the *Initial Special Referee’s Report* . . . with the exception of any claims involving death benefits.” (*SCWCC Order*, p.2, para. 4). Dr. Fechter’s additional fees claim did not involve any death benefits and, therefore, the workers’ compensation litigation ended on 10 December 2015.<sup>2</sup> None of the Nevamar Claimants’ workers’ compensation claims were pending when the SCWCC addressed Dr. Fechter’s claims. (*SCWCC Order*, p.2, para. 4).

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*Complaint*, 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; *Compliant*, para. 7). Dr. Fechter’s present claims arise from the failure of both the Ortner Respondents and the Rosenthal Respondents to pay Dr. Fechter for uninsured medical fees, costs, and expenses for medical treatment which Dr. Fechter provided to many of the Nevamar 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; *Complaint*, paras. 13-15).

**2** The *Special Referee’s Initial Report* addressed disposition of the \$500,000.00 held-back funds (*SCWCC Order*, p.2. para. 2). The SCWCC, in adopting that report, did not reserve the issue of the SCWCC’s need to direct the actual distribution of those funds. (*SCWCC Order*, pp.1-3).

The SCWCC's lack of jurisdiction to decide ancillary issues where no workers' compensation claim is pending in this type of situation is clear.<sup>3</sup> Consequently, the SCWCC's acts[, being] without jurisdiction[,] are without effect."<sup>4</sup> Therefore, the SCWCC's " 'proceedings . . . [we]re a nullity, and its judgment without effect, either on the person or property.' "<sup>5</sup> The SCWCC did not have jurisdiction to consider Dr. Fechter's claims and, therefore, its actions and decisions were a nullity without any force and effect.

This Court of Appeals should reverse the Circuit Court's decision 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 The SCWCC Exceeded Its Subject Matter Jurisdiction**

Dr. Fechter's claims involve a breach of the contracts between the Ortner Respondents and the Rosenthal Respondents - as attorneys for the Nevamar Claimants - and Dr. Fechter, the medical expert those very same attorneys independently retained to perform, *inter alia*, independent medical examinations on the Nevamar Claimants. Neither the Ortner Respondents nor the Rosenthal Respondents ever sought to include Dr. Fechter as a party to the workers' compensation litigation. In fact, Dr. Fechter did not have any standing to participate in and/or object to any of those proceedings.<sup>6</sup>

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<sup>3</sup> See generally Laboureur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 543-544, 397 S.E.2d 526, 528 (1990) (*citing cases*). See also generally 4 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, § 92.42 (West 1987)). See also S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 211-214, 403 S.E.2d 625, 628 (1991).

<sup>4</sup> 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)).

<sup>5</sup> 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).

<sup>6</sup> See generally S.C. Code Ann. Regs. § 67-215.

The SCWCC's jurisdiction was 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.<sup>7</sup> The SCWCC did not have subject matter jurisdiction to hear, much less determine, the validity of Dr. Fechter's claims against the Rosenthal Respondents as those individuals and entities were non-parties to the Nevamar Claimants' litigation.<sup>8</sup>

The SCWCC stated its final action in the Nevamar Claimants' litigation was solely to address whether the \$500,000.00 held back funds were available to pay legitimate litigations costs and expenses. (*SCWCC Order Releasing Funds*, pp.1-2). The SCWCC, however, vastly exceeded its stated mandate and improperly proceeded to "conclusively" determine the validity of Dr. Fechter's common law breach of contract claims against the Rosenthal Respondents. (*SCWCC Order Releasing Funds*, pp.1-8).<sup>9</sup> The SCWCC did

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<sup>7</sup> While 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 payable via the Workers' Compensation Act, but medical treatment and services for which the Rosenthal Respondents (and the Ortner Respondents) specifically contracted under the common law and, in turn, beyond the reach of the Workers' Compensation Act.

<sup>8</sup> 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 (Ct.App. 1997), *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). Admittedly, Dr. Fechter's claims tangentially arose from and/or were tangentially related to that workers' compensation litigation.

<sup>9</sup> Dr. Fechter, admittedly a non-party to Nevamar Claimants' workers' compensation litigation (*SCWCC Order Releasing Funds*, pp.1-9; Fechter Aff., para. 21), had neither standing nor the legal ability to conduct discovery into the Rosenthal Respondents' 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 Rosenthal Respondents, ostensibly acting on behalf their Nevamar Claimants clients, were able to conduct discovery from Dr. Fechter. Importantly, 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 Rosenthal Respondents to argue before a specialized commission (albeit

not have subject matter jurisdiction to address any common law claims, whether Dr. Fechter's breach of contract or otherwise, which did not directly relate to the compensation scheduled to be provided to of the Nevamar Claimants (*i.e.*; the injured employees).

The SCWCC's own rules and regulations arguably prohibited the SCWCC from addressing Dr. Fechter's common law claims against the Ortner Respondents.<sup>10</sup> The SCWCC admitted Dr. Fechter did not have a "claim [which] exist[ed] of record with the [SCWCC] . . . ." (*SCWCC Order to Release Funds*, p.4).<sup>11</sup> The Rosenthal Respondents (and impliedly, the Ortner Respondents) were cleverly able to circumvent Dr. Fechter's claims by having the SCWCC, a specialized and inferior tribunal, "adjudicate" the issue before the dispute could reach the Circuit Court.

The Rosenthal Respondents knew Dr. Fechter's payment claims, albeit tangentially related to the Nevamar Claimants' workers' compensation litigation, arose solely from contractual agreements between Dr. Fechter and both the Rosenthal Respondents and the Ortner Respondents. Dr. Fechter's claims were independent of and distinct from the Nevamar Claimants' workers' compensation litigation. 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."

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one without legitimate jurisdiction) the merits of a common law claims involving alleged breaches of contract involving substantial monetary value and involving a nonparty is beyond obvious. The South Carolina Workers' Compensation Act seems not to have any procedure through which Dr. Fechter could intervene into the litigation in order to protect his economic interests.

<sup>10</sup> See S.C. Code Ann. Regs. § 67-215.

<sup>11</sup> The Rosenthal Respondents challenged Dr. Fechter's claims while, at the same time, seeking to have the SCWCC release the Special Referee's \$500,000.00 in held-back funds to them alone. (SCWCC Order to Release Funds, p.4; SCWCC Rosenthal Motion to Release Funds, pp.1-12).

At best, the SCWCC's jurisdiction was limited to determining whether Dr. Fechter's claimed fees could be paid from \$500,000.00 held back fees. The SCWCC had no place in determining whether the Rosenthal Respondents (or the Ortner Respondents) were actually responsible to pay Dr. Fechter for his claimed fees. The contracts were solely between Dr. Fechter and the Ortner Respondents/Rosenthal Respondents. They were never between Dr. Fechter and the individual Nevamar Claimants.

The SCWCC overstepped its jurisdiction and the Circuit Court compounded that error. The Circuit Court's orders must be reversed and the case remanded.

**4. The Nevamar Claimants' Compensation Rights Were Never Affected By Dr. Fechter's Fee Claims.**

The SCWCC is authorized to only address "disputes ancillary to an employee's right to compensation . . . ."<sup>12</sup> In fact, nowhere in the S.C. Workers' Compensation Act is there a provision to allow any party, other than the employee and the employer to participate . . . .<sup>13</sup> For example, 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.<sup>14</sup> As in this case, the "trial court [had]

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<sup>12</sup> Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 409, 721 S.E.2d 461, 464 (Ct.App. 2011) (*citing* Laboureur 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).

<sup>13</sup> Blue Cross & Blue Shield v. S.C. Indus. Comm'n, 274 S.C. 204, 206, 262 S.E.2d 35, 37 (1980) (*per curiam*).

<sup>14</sup> Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 100, 441 S.E.2d 822, 823 (1994).

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 . . . .”<sup>15</sup> The Supreme Court reversed, stating “it is clear the Hospital [wa]s a party with no standing to seek redress [for the incurred medical expenses] before the [SCWCC]”<sup>16</sup> 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”.<sup>17</sup> The Supreme Court concluded:

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.<sup>18</sup>

The Circuit Court incorrectly concluded that the SCWCC was “authorized” to determine the validity of Dr. Fechter’s claims. This was a breach of contract which did not have any effect on the Nevamar Claimants’ entitlement to benefits under the workers’ compensation system. The Circuit Court’s decisions must be reversed in all respects and this matter remanded for further proceedings.

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<sup>15</sup> Baker Hosp. v. Fireman’s Fund Ins. Co., 314 S.C. 98, 100, 441 S.E.2d 822, 823.

<sup>16</sup> 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).

<sup>17</sup> Baker Hosp. v. Fireman’s Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823.

<sup>18</sup> 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*) *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); 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; Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 542-543, 397 S.E.2d 526, 528; Doyle v. U.S. Fid. & Guar. Co., 316 S.C. 83, 85-86, 447 S.E.2d 192, 193-194 (1994); Roper Hosp. v. Clemons, 326 S.C. 534, 536, 484 S.E.2d 598, 599.

**B. THE CIRCUIT COURT IMPROPERLY DENIED DR. FECHTER'S RECONSIDERATION MOTION REGARDING DISMISSAL OF DR. FECHTER'S CLAIMS AGAINST THE ROSENTHAL RESPONDENTS.**

The Circuit Court dismissed Dr. Fechter's claims against the Rosenthal Respondents, in part, finding Dr. Fechter had failed to properly serve them with his *Summons and Complaint*. (*Rosenthal Order*, pp.8-12; *Rosenthal MTD*, pp.5-12). Moreover, even if Dr. Fechter had properly done so, such service had not been accomplished within the statute of limitations. (*Rosenthal Order*, pp.8-12; *Rosenthal MTD*, pp.5-12).

**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.<sup>19</sup> (*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).<sup>20</sup> 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).

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<sup>19</sup> 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).

<sup>20</sup> 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".

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 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, well after they were served on 12 October 2017. (*Rosenthal MTD*, p.1).<sup>21</sup>

Since one the principal intents of “ ‘Rule 4, *SCRCivP*, [is to] assure[] the defendant of reasonable notice of the [pending] action’ ”,<sup>22</sup> that was clearly done in this case. Moreover, in any case, “[e]xacting compliance with the rules is not required to effect service of process.”<sup>23</sup> “ ‘Rather, [the court must] inquire whether the plaintiff has

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<sup>21</sup> The Rosenthal Respondents appeared to be waiting for 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’ motion on 9 January 2019 (*Jefferson Tr.*, p.1, line 10) and no one appeared for the Rosenthal Respondents. (*Jefferson Tr.*, p.3, lines 2-12). Judge Jefferson denied that motion by written order filed on 5 April 2019 (*Jefferson Order*, pp.1-15).

<sup>22</sup> *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 *Estate of Knight v. Whitten*, 2010 WL 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).

<sup>23</sup> *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*);

sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.’ ”**24** Consequently, whether or not the green USPS return receipt card was “officially” signed is effectively immaterial in light of the fact the Rosenthal Respondents actually had the pleadings in their possession on 12 October 2017. (*Elder Aff.*, paras. 4, 9-10).**25**

The Ortner Respondents cannot and should not be allowed to assert they were not served with Dr. Fechter’s *Summons and Complaint*.

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

The SCWCC’s final decision to release the \$500,000.00 of held-back funds to the Rosenthal Respondents was filed on 26 January 2016. (*Ortner Order*, p.3 fn.2; *SCWCC Order To Release Funds*, pp.1-8; *Comp.*, para. 17; *Dr. Fechter Aff.*, paras. 15, 49). Dr. Fechter filed this action on 25 August 2017, some 18+ months later. (*Rosenthal Order*,

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*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).

**24** *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).

**25** Many court have concluded that if the claimant is 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) showing service, then the 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. *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. Inkwell Publ’g Solutions, Inc.*, 2013 WL 3055793, \*4 (S.D.N.Y., filed 19 June 2013); *El-Aheidab v. Citibank (S.D.), N.A.*, 2012 WL 506473,\*4 n.3 (N.D.Cal., filed 15 Feb. 2012); *White v. Microsoft Corp.*, 454 F.Supp.2d 1118, 1124 & n. 7, 1131 (S.D.Ala. 2006); *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), *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).

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.**26**

The Circuit Court incorrectly found “there [wa]s no question (a) [Dr. Fechter] (i) failed to serve [the Rosenthal Respondents] as required by Rules 4(d)(3)[,] (8), SCRC[iv]P, (ii) . . . failed to commence an action against [the Rosenthal Respondents], as required by [S.C. Code Ann. § 15-3-20(B) and Rule 3, SCRC[iv]P, 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*, p.12). The Circuit Court, while somewhat attempting to specify how Dr. Fechter’s service of process was insufficient (*Rosenthal Order*, pp.8-11), relied on the faulty premise 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.

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**26** See S.C. Code Ann. § 15-3-530 (Thomson Reuters West 2017). 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.”” Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (Ct.App. 1989) (*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. 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.” 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 Circuit Court failure to indicate how Dr. Fechter’s service of process was deficient was fatal to its subsequent decision since the Circuit Court’s “ ‘objection[s] to insufficiency of process or its service should [have] point[ed] out specifically [how Dr. Fechter] ha[d] failed to satisfy the requirements of the service provision he utilized.’ ”<sup>27</sup> This is particularly true given that the Ortner Respondents were undisputedly aware of Dr. Fechter’s action against them on 7 December 2017, even if a signed “green return receipt card” was not submitted.

The Circuit Court’s decision to grant the Rosenthal Respondents’ *Motion to Dismiss* and not grant Dr. Fechter’s resultant *Motion for Reconsideration* must be reversed in all respects.

### C. DR. FECHTER APPEAL WAS TIMELY ASSERTED.

The Rosenthal Respondents, albeit incorrectly, assert this Court of Appeals does not have jurisdiction to consider this appeal as Dr. Fechter did not file his *Notice of Appeal* “within thirty (30) days after receipt of written notice of entry of the order or judgment [under appeal].”<sup>28</sup> On 8 June 2020, the Circuit Court issued its first order dismissing Dr. Fechter’s claims against the Rosenthal Defendants. (*Rosenthal Order*, pp.1-15). Dr. Fechter filed his reconsideration motion of 17 June 2020. (*Rosenthal Reconsideration*, pp.1-17). On 4 August 2020, the Circuit Court, albeit inadvertently, reissued the very same order dismissing Dr. Fechter’s claims against the Rosenthal Respondents.

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<sup>27</sup> 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).

<sup>28</sup> Rule 203(B)(1), SCACR.

(*Rosenthal Order II*, pp.1-5).<sup>29</sup> Out of an abundance of caution, on 13 August 2020, Dr. Fechter filed essentially the very same reconsideration motion directed towards the Circuit Court's duplicate Rosenthal Respondents dismissal order filing. (*Rosenthal Reconsideration II*, pp.1-17). On 24 August 2020, the Circuit Court, *sua sponte*, issued its own order vacating the inadvertent second filing. (*SCRCivP Form 4 Order II*, pp.1-2).<sup>30</sup> Consequently, Dr. Fechter's original and subsequent reconsideration motion morphed into one which the Circuit Court did not address until its final order issued on 30 March 2021. (*SCRCivP Form 4 Order III*, pp.1-2). Dr. Fechter filed his *Notice of Appeal* timely. This proposition is born out by the very language of the final order:

This matter is before th[is] [Circuit] Court on [Dr. Fechter's] Rule 59(e)[, SCRCivP,] motions to reconsider Orders filed 06/08/2020 (*Rosenthal*) and 08/04/2020 (*Ortner*) dismissing the complaint against all defendants, and on [Respondents'] (*Rosenthal*) Rule 59(e)[, SCRCivP,] motion to reconsider an 08/24/2020 Order vacating an 08/04/2020 Order granting the *Rosenthal* [Respondents'] motion to dismiss.

This matter was initially before this court on the [Ortner Respondents' and the Rosenthal Respondents' respective] motions to dismiss this civil action. The motions were granted as reflected in a Form 4 Order filed 02/05/2020. Formal orders were filed 06/08/2020 (*Rosenthal Order*) and 08/04/2020 (*Ortner Order*) explaining the rulings of the Court. The identical 06/08/2020 (*Rosenthal*) Order was inadvertently and erroneously filed a second time on 08/04/2020. On 08/24/2020 th[is] [Circuit] Court, upon realization of the filing error, filed a Form 4 Order vacating the identical "*Rosenthal*"

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<sup>29</sup> The Circuit Court, at the same time, also finally filed its formal written order dismissing Dr. Fechter's claims against the Ortner Respondents. (*Ortner Order*, pp.1-10). On 5 February 2020, when the Circuit Court originally decided to dismiss Dr. Fechter's claims against both the Ortner Respondents and the Rosenthal Respondents, the Circuit Court issued a SCRCivP Form 4 Order indicating formal written orders were to follow. (*SCRCivP Form 4 Order I*, pp.1-3).

<sup>30</sup> The Rosenthal Respondents moved to consider the Circuit Court's order vacating the redundant filing attempting to trap Dr. Fechter in a "successive" reconsideration motion quagmire. The Circuit Court ultimately denied the reconsideration motion. (*SCRCivP Form 4 Order III*, pp.1-2).

Order filed on August 4, 2020 and providing that '[t]he original order granting the [Respondents'] [Rosenthal] motion to dismiss which was filed for record on June 8, 2020 shall stand alone as the ruling of this [Circuit] Court on the [Rosenthal Respondents'] motion to dismiss'.

This [Circuit] Court has considered **[DR. FECHTER'S]** and **[THE ORTNER RESPONDENTS'** and the **ROSENTHAL RESPONDENTS'] MOTIONS** to **RECONSIDER** and the respective briefs and argument submitted in support and opposition to, and now find that; (1) [Dr. Fechter's] motions to reconsider the Court's 06/08/2020 Order dismissing the Rosenthal [Respondents'] and th[is] [Circuit] Court's 8/04/2020 Order dismissing the Ortner [Respondents'], and (2) the Rosenthal [Respondents'] motion to reconsider th[is] [Circuit] Court's 08/24/2020 Order vacating an 08/04/2020 Order dismissing the Rosenthal [Respondents'] should be and **ARE** therefore **DENIED**.

*(Form 4 Order II, p.1)* (Eleventh alteration and emphasis in original).

Dr. Fechter properly and timely filed and served his Notice of Appeal as respects dismissal of his claims against the Rosenthal Respondents. This Court of Appeals should consider the merits of this appeal.

## **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's various decisions in all respects and remand this matter back for a jury trial.

Respectfully submitted:

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21 April 2022

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