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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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**Record on Appeal  
(Volume I)**

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# TABLE OF CONTENTS

## VOLUME I

<u>SCRPC Form 4 Order/Judgment</u> issued by the Honorable J. Derham Cole, Circuit Court Judge, dated 29 March 2021, and filed 30 March 2021 .....	1
<u>Notice of Entry of Judgment/Order Pursuant to Rule 77, SCRPC</u> from Julie J. Armstrong, Charleston County Clerk of Court to Michael E. Kozlarek, Esquire (undated) .....	3
<u>Order Vacating Erroneously Filed Order</u> issued by the Honorable J. Derham Cole, Circuit Court Judge, dated 21 August 2020, and filed on 24 August 2020 .....	4
<u>Order Dismissing Plaintiff's Complaint With Prejudice</u> issued by the Honorable J. Derham Cole, Circuit Court Judge, dated and filed on 4 August 2020 .....	6
<u>Notice of Entry of Judgment/Order Pursuant to Rule 77, SCRPC</u> from Julie J. Armstrong, Charleston County Clerk of Court to Michael E. Kozlarek, Esquire (undated) .....	16
<u>Notice of Entry of Judgment/Order Pursuant to Rule 77, SCRPC</u> from Julie J. Armstrong, Charleston County Clerk of Court to Michael E. Kozlarek, Esquire (undated) .....	16
<u>Order Granting Gerald Rosenthal's and Rosenthal, Levy, Simon and Ryles' Joint Motion to Dismiss</u> issued by the Honorable J. Derham Cole, Circuit Court Judge, dated 5 June 2020, and filed 8 June 2020 .....	18
<u>SCRPC Form 4 Order/Judgment</u> issued by the Honorable J. Derham Cole, Circuit Court Judge, dated and filed on 5 February 2020 .....	33
<u>Order Denying Motion to Reconsider, Alter, or Amend Judgment</u> issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 26 June 2019, and filed 28 June 2019 .....	39

<u>Order issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 4 April 2019, and filed 5 April 2019</u> .....	41
<u>SCRCP Form 4 Order/Judgment</u> issued by the Honorable R. Roger Young, Circuit Court Judge, dated 23 May 2018, and filed on 24 May 2018.....	56
<u>Order Granting Motion to Release Funds</u> issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner, dated 26 January 2016.....	57
<u>Order issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner, dated 10 December 2015</u> .....	66
<u>Initial Report of the South Carolina Workers' Compensation Commission Special Referee, H. Mills Gallivan, Esquire, dated 13 November 2015</u> .....	69
<u>Order issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner, dated 27 May 2015</u> .....	73
<u>Consent Order issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner, dated 22 July 2014</u> .....	75
<u>Summons and Complaint</u> 17 August 2017, and filed on 25 August 2017.....	80
<u>Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC</u> dated 5 January 2018, and filed on 8 January 2018.....	87
A. <u>Order issued by the Honorable Aisha Taylor, SCWCC Commissioner, dated 26 January 2016 (SCWCC File No. 0326995, et. al)</u> .....	104
B. <u>Consent Order</u> dated 22 July 2014 (SCWCC File No. 0326995, et. al).....	115

C.	<u>Initial Report of the SCWCC's Special Referee, H. Mills Gallivan, Esquire, dated 13 November 2015 (SCWCC File No. 0326995, et. al)</u> .....	121
D.	<u>Order issued by the Honorable Aisha Taylor, SCWCC Commissioner, dated 10 December 2015 (SCWCC File No. 0326995, et. al)</u> .....	126
E.	<u>Motion to Release Funds dated 18 November 2015 (SCWCC File No. 0326995, et. al)</u> .....	130
A.	<u>Affidavit of Gerald Arthur Rosenthal sworn to on 17 November 2015</u> .....	144
	1. <u>Letter from Rob Cluxton, CFO of Rosenthal &amp; Levy, P.A. to Dr. Cary E. Fechter dated 28 October 2010</u> .....	147
F.	<u>Reply of Leon Martin Ortner to Motion to Release Funds dated 30 November 2015, and filed 2 December 2015 (SCWCC File No. 0326995)</u> .....	148
	1. <u>Deposition of Cary E. Fechter, M.D. sworn to on 2 November (designated pages)</u> .....	154
G.	<u>Letter from C. Tex Davis, Jr. of the Supreme Court of South Carolina's Office of Disciplinary Counsel to Dr. Cary E. Fechter dated 2 March 2016</u> .....	161
H.	<u>Agreement Approving Award of Special Referee dated 27 April 2017 (SCWCC File No. 0326828)</u> .....	164
	<u>Affidavit of Service by Certified Mail sworn to by Melvin D. Bannister, Esquire on 8 January 2019</u> .....	168
	<u>Affidavit of Service by Certified Mail sworn to by Melvin D. Bannister, Esquire on 8 January 2019</u> .....	172
	<u>Affidavit of Cary E. Fechter, M.D. sworn to on 7 January 2019 (with attached exhibit);</u> .....	174
	Exhibit <u>Typed Statement of Cary Fechter M.D.;</u> .....	182
	<b>Certificate of Counsel (Volume I)</b> .....	<b>184A</b>

## VOLUME II

<u>Memorandum in Opposition to Motion to Dismiss</u> dated 8 January 2019, and filed 9 January 2019 .....	185
Schedule A: <u>USPS Tracking Report</u> for Tracking No. 70032260000504408448 showing delivery of item on 7 December 2017 .....	200
Schedule B: <u>USPS Tracking Report</u> for Tracking No. 70151730000142889532 indicating "Return to Sender" notification dated 10 November 2017 .....	201
Schedule C: <u>USPS Tracking Report</u> for Tracking No. 70151730000142289398 showing delivery of item on 12 October 2017 .....	202
Schedule D: <u>USPS Return Receipt Card</u> for Article 7015 1370 0001 4288 9388 postmarked 12 October 2017 .....	203
Schedule E: <u>Letter from Leon Martin Ortner, Esquire to Cary D. Fechter, M.D.</u> dated 4 June 2003 .....	204
Schedule F: <u>Letter from J. Keith Roberts, Esquire of South Carolina Workers' Compensation Commission to Melvin D. Bannister, Esquire</u> dated 2 January 2018 .....	205
<u>Gerald Rosenthal's and Rosenthal, Levy, Simon and Ryles' Joint Motion to Dismiss</u> dated 13 May 2019, and filed on 14 May 2018 .....	209
A. <u>Charleston County Court of Common Pleas Docket Sheet</u> (1 May 2019) .....	224
B. <u>Affidavit of Cary E. Fechter, M.D.</u> sworn to on 7 January 2019 .....	226
C. <u>Affidavits of Service by Certified Mail sworn to by Melvin D. Bannister, Esquire</u> on 8 January 2019 .....	235
D. <u>Affidavit of Gerald Arthur Rosenthal</u> sworn to on 10 May 2019 .....	242
E. <u>Affidavit of Jonathan Todd Levy</u> sworn to on 6 May 2019 .....	245

F.	<u>Affidavit of Ed Elder</u> sworn to on 6 May 2019 .....	249
G.	<u>USPS Return Receipt Card</u> for Article 7015 1370 0001 4288 9388 postmarked 12 October 2017.....	252
	<u>Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC</u> dated and filed on 19 December 2019 .....	255
Attachment:	<u>Order Denying Motion to Dismiss</u> issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 26 June 2019, and filed 28 June 2019 .....	257
	<u>Affidavit of Default</u> signed by Melvin D. Bannister, Esquire sworn to on 19 December 2019 .....	273
	<u>Motion for Enlargement of Time on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm</u> dated and filed 23 December 2019.....	275
	<u>Memorandum in Support of Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC</u> dated and filed on 10 January 2020; .....	277
A.	<u>Consent Order</u> dated 22 July 2014 .....	286
B.	<u>Initial Report of the South Carolina Workers’ Compensation Commission Special Referee, H. Mills Gallivan, Esquire,</u> dated 13 November 2015.....	291
C.	<u>Order issued by the Honorable Aisha Taylor, South Carolina Workers’ Compensation Commission Commissioner,</u> dated 10 December 2015.....	295
D.	<u>Affidavit of Cary E. Fechter, M.D.</u> sworn to on 7 January 2019 .....	298
E.	<u>Affidavit of Service by Certified Mail by Melvin D. Bannister, Esquire</u> sworn to on 8 January 2019.....	306

F.	<u>Affidavit of Leon Martin Ortner</u> sworn to on 10 January 2020 .....	310
	A. <u>Envelope addressed to Leon M. Ortner, Esquire</u> with USPS Return Receipt (unsigned and undated) .....	311
G.	<u>Affidavit of Ortner Law Firm, LLC</u> sworn to on 10 January 2020 .....	312
H.	<u>Affidavit of Karen Ortner</u> sworn to on 10 January 2020 .....	314
	A. <u>Envelope addressed to Leon M. Ortner, Esquire</u> with USPS Return Receipt (unsigned and undated); .....	315
I.	<u>Memorandum in Opposition to Motion to Dismiss of Cary E. Fechter, M.D.</u> dated 8 January 2020, and filed on 9 January 2020 .....	317
	Schedule A <u>USPS Tracking Report</u> for Tracking No. 70032260000504408448 showing delivery of item on 7 December 2017 .....	332
	Schedule B <u>USPS Tracking Report</u> for Tracking No. 70151730000142889532 indicating “Return to Sender” notification dated 10 November 2017 .....	333
	Schedule C <u>USPS Tracking Report</u> for Tracking No. 70151730000142289398 showing delivery of item on 12 October 2017 .....	334
	Schedule D <u>USPS Return Receipt Card</u> for Article 7015 1370 0001 4288 9388 postmarked 12 October 2017 .....	335
	Schedule E <u>Letter from Leon Martin Ortner, Esquire to Cary D. Fechter, M.D.</u> dated 4 June 2003 .....	336
	Schedule F <u>Letter from J. Keith Roberts, Esquire of South Carolina Workers’ Compensation Commission to Melvin D. Bannister, Esquire</u> dated 2 January 2018.....	337

<u>Motion to Reconsider Order Granting Gerald Rosenthal's and Rosenthal Levy Simon &amp; Ryles' Motion to Dismiss</u> dated and filed 17 June 2020 .....	341
A. <u>Affidavit of Service by Certified Mail by Melvin D. Bannister, Esquire</u> sworn to on 8 January 2019.....	361
Schedule C <u>USPS Tracking Report</u> for Tracking No. 70151730000142289398 showing delivery of item on 12 October 2017 .....	363
Schedule D <u>USPS Return Receipt Card</u> for Article 7015 1370 0001 4288 9388 postmarked 12 October 2017 .....	364
B. <u>Affidavit of Service by Certified Mail by Melvin D. Bannister, Esquire</u> sworn to on 8 January 2019.....	366
Schedule A <u>USPS Tracking Report</u> for Tracking No. 70032260000504408448 showing delivery of item on 7 December 2017; .....	368
<b>Certificate of Counsel (Volume II)</b> .....	<b>368A</b>

### VOLUME III

C. <u>Motion to Dismiss by the Ortner Defendants</u> dated 5 January 2018, and filed on 8 January 2018 (with attached exhibits).....	369
A. <u>Order issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner</u> , dated 26 January 2016 ( <i>SCWCC File No. 0326995, et. al</i> ); .....	389
B. <u>Consent Order</u> dated 22 July 2014 ( <i>SCWCC File No. 0326995, et. al</i> ).....	399
C. <u>Initial Report</u> of the SCWCC's Special Referee, H. Mills Gallivan, Esquire, dated 13 November 2015 ( <i>SCWCC File No. 0326995, et. al</i> ) .....	405

D.	<u>Order issued by the Honorable Aisha Taylor, SCWCC Commissioner, dated 10 December 2015 (SCWCC File No. 0326995, et. al)</u> .....	408B
E.	<u>Motion to Release Funds dated 18 November 2015 (SCWCC File No. 0326995, et. al)</u> .....	409
A.	<u>Affidavit of Gerald Arthur Rosenthal sworn to on 17 November 2015</u> .....	423
1.	<u>Letter from Rob Cluxton, CFO of Rosenthal &amp; Levy, P.A. to Dr. Cary E. Fechter dated 28 October 2010</u> .....	426
F.	<u>Reply of Leon Martin Ortner to Motion to Release Funds dated 30 November 2015, and filed 2 December 2015 (SCWCC File No. 0326995)</u> .....	427
1.	<u>Deposition of Cary E. Fechter, M.D. sworn to on 2 November (specific pages)</u> .....	433
G.	<u>Letter from C. Tex Davis, Jr. of the Supreme Court of South Carolina's Office of Disciplinary Counsel to Dr. Cary E. Fechter dated 2 March 2016</u> .....	440
H.	<u>Agreement Approving Award of Special Referee dated 27 April 2017 (SCWCC File No. 0326828)</u> .....	443
D.	<u>Order Denying Motion to Dismiss issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 4 April 2019, and filed 5 April 2019</u> .....	447
E.	<u>Motion to Reconsider, Alter, or Amend Order Denying Motion to Dismiss On Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm (Only pages 1 and 7)</u> .....	463

F.	<u>Order Denying Defendants' Motion to Reconsider, Alter, or Amend Judgment</u> issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 26 June 2019, and filed 28 June 2019.....	473
G.	<u>Notice of Appeal to the South Carolina Court of Appeals</u> dated 22 July 2019, and filed 23 July 2019.....	476
H.	<u>Gerald Rosenthal's and Rosenthal, Levy, Simons and Ryles' Joint Motion to Dismiss</u> dated 13 May 2019, and filed 14 May 2019.....	478
A.	<u>Charleston County Court of Common Pleas Docket Sheet</u> (1 May 2019).....	493A
B.	<u>Affidavit of Cary E. Fechter, M.D.</u> sworn to on 7 January 2019 .....	495
C.	<u>Affidavits (Melvin D. Bannister, Esquire) of Service by Certified Mail</u> sworn to on 8 January 2019 (Service on Rosenthal Levy Simon & Ryles; Leon Melvin Ortner, and Ortner Law Firm).....	504
D.	<u>Affidavit of Gerald Arthur Rosenthal</u> sworn to on 10 May 2019 .....	512
E.	<u>Affidavit of Jonathan Todd Levy</u> sworn to on 6 May 2019 .....	515
F.	<u>Affidavit of Ed Elder</u> sworn to on 6 May 2019.....	519
G.	<u>USPS Return Receipt Card</u> for Article 7015 1370 0001 4288 9388 postmarked 12 October 2017 .....	522
I.	<u>Letter from Michael E. Kozlarek, Esquire to the Honorable Jenny Abbott Kitchings, Clerk of the South Carolina Court of Appeals</u> dated 17 September 2019.....	527
J.	<u>Order Issued by the South Carolina Court of Appeals</u> dated and filed 25 October 2019, and <u>Remittitur from the South Carolina Court of Appeals to the Charleston County Court of Common Pleas</u> dated 13 November 2019.....	529

<u>Response to Motion to Reconsider Gerald Rosenthal's and Rosenthal, Levy, Simon and Ryle's Joint Motion to Dismiss dated and filed 29 June 2020</u> .....	533
<u>Motion to Reconsider Order Dismissing Plaintiff's Complaint With Prejudice dated and filed 13 August 2020</u> .....	537
<b>Certificate of Counsel (Volume III)</b> .....	<b>549A</b>

## VOLUME IV

A. <u>Affidavit of Service</u> by Certified Mail by Melvin D. Bannister, Esquire sworn to on 8 January 2019.....	550
Schedule A <u>USPS Tracking Report</u> for Tracking No. 70032260000504408448 showing delivery of item on 7 December 2017 .....	552
B. <u>Motion to Dismiss</u> on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm dated 5 January 2018, and filed on 8 January 2018 .....	553
C. <u>Transcript of Record for Hearing</u> held on 9 January 2019, before the Honorable Deadra L. Jefferson, Circuit Court Judge .....	571
D. <u>Order Denying Motion to Dismiss</u> issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 26 June 2019, and filed 28 June 2019 .....	612
E. <u>Motion to Reconsider, Alter, or Amend Order Denying Motion to Dismiss On Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm (Only pages 1 and 7)</u> .....	628
F. <u>Order</u> issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 4 April 2019, and filed 5 April 2019.....	636
G. <u>Notice of Appeal to the South Carolina Court of Appeals</u> dated 22 July 2019, and filed 23 July 2019 .....	639

H.	<u>Order Issued by the South Carolina Court of Appeals dated and filed 25 October 2019, and Remittitur from the South Carolina Court of Appeals to the Charleston County Court of Common Pleas dated 13 November 2019</u> .....	642
I.	<u>Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC dated and filed on 19 December 2019</u> .....	646
J.	<u>Motion for Enlargement of Time on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC dated and filed 23 December 2020</u> .....	649
K.	<u>Transcript of Record for Hearing held on 27 January 2020, before the Honorable J. Derham Cole, Circuit Court Judge</u> .....	652
	<u>Return to Motion to Reconsider Order Dismissing Plaintiff's Complaint With Prejudice on Behalf of Leon Martin Ortner and The Ortner Law Firm, LLC dated and filed 21 August 2020</u> .....	677
	<u>Notice of Appeal by Cary E. Fechter, M.D. to the South Carolina Court of Appeals, dated and filed 21 April 2021</u> .....	683
	<u>Transcript of Record for Hearing held on 9 January 2019, before the Honorable Deadra L. Jefferson, Circuit Court Judge</u> .....	684
	<u>Transcript of Record for Hearing held on 27 January 2020, before the Honorable J. Derham Cole, Circuit Court Judge</u> .....	721
	<b>Certificate of Counsel (Volume IV)</b> .....	<b>743</b>

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-10-04371

Cary E. FECHTER, MD,

Leon Martin ORTNER, The ORTNER LAW FIRM, LLC,  
Gerald ROSENTHAL, and ROSENTHAL, LEVY, SIMON,  
and RYLES, PA,

Plaintiff(s)

Defendant(s)

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other

IT IS ORDERED AND ADJUDGED:  formal order to follow;  **Statement of Judgment by the Court:**

This matter is before the Court on Plaintiff's Rule 59(e) motions to reconsider Orders filed 06/08/2020 (Rosenthal) and 08/04/2020 (Ortner) dismissing the complaint against all defendants, and on Defendants' (Rosenthal) Rule 59(e) motion to reconsider an 08/24/2020 Order vacating an 08/04/2020 Order granting the Rosenthal defendants' motion to dismiss.

This matter was initially before this court on the defendants' 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 the Court, upon realization of the filing error, filed a Form 4 Order vacating the identical "Rosenthal" Order filed on August 4, 2020 and providing that "[t]he original order granting the defendants' [Rosenthal] motion to dismiss which was filed for record on June 8, 2020 shall stand alone as the ruling of this Court on the defendants' motion to dismiss".

This Court has considered **PLAINTIFF'S** and **DEFENDANTS' MOTIONS** to **RECONSIDER** and the respective briefs and argument submitted in support and opposition to, and now find that; (1) Plaintiff's motions to reconsider the Court's 06/08/2020 Order dismissing the Rosenthal defendants and the Court's 8/04/2020 Order dismissing the Ortner defendants, and (2) the Rosenthal defendants' motion to reconsider the Court's 08/24/2020 Order vacating an 08/04/2020 Order dismissing the Rosenthal defendants should be and **ARE** therefore **DENIED**.

J. DERHAM COLE, PRESIDING JUDGE

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_ and a copy mailed first class this \_\_\_\_\_ day of \_\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

MELVIN D. BANNISTER, Esq.

JUSTIN P. NOVAK, Esq.  
MICHAEL E. KOZLAREK, Esq.

ATTORNEY(S) FOR PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

JULIE J. ARMSTRONG, CLERK OF COURT

001



Charleston Common Pleas

**Case Caption:** Cary E Fechter M D VS Leon Martin Ortner , defendant, et al  
**Case Number:** 2017CP1004371  
**Type:** Order/Form 4

IT IS SO ORDERED!

s/J. Derham Cole 2053

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002

**JULIE J. ARMSTRONG**  
CLERK OF COURT, C.P. & G.S.  
100 BROAD STREET, SUITE 106  
CHARLESTON, SC 29401-2258  
RETURN SERVICE REQUESTED



clerkofcourt.charlestoncounty.org



16



MICHAEL ENRICO KOZLAREK  
PO BOX 565  
GREENVILLE SC 29602-0565

**NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC**

**Order vacating identical erroneous order filed 8/4/20.**

**CASE NO: 2017CP1004371**

**Cary E Fechter M D VS Leon Martin Ortner , defendant, et al**

This judgment was entered on the 24th day of August, 2020, and notice mailed first class on Monday, August 24, 2020, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

003

FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-10-04371

Cary E. FECHTER, MD,

Leon Martin Ortner, The Ortner Law Firm, LLC,  
Gerald ROSENTHAL, and ROSENTHAL, Levy,  
Simon, and Ryles,

Plaintiff(s)

Defendant(s)

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  S. C. Code Ann. Section 56-36-100
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;
  - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other

IT IS ORDERED AND ADJUDGED:  formal order to follow;  **Statement of Judgment by the Court:**

This matter was before this court on the defendants' motion to dismiss this civil action. The motion was granted by the Court and a formal order explaining the ruling was filed for record on June 8, 2020. The identical order was inadvertently and erroneously filed a second time on August 4, 2020.

The identical erroneous **ORDER** filed on August 4, 2020 **IS** therefore hereby **VACATED** and has no force or effect. The original order granting the defendants' motion to dismiss which was filed for record on June 8, 2020 shall stand alone as the ruling of this Court on the defendants' motion to dismiss.

\_\_\_\_\_  
**J. DERHAM COLE, PRESIDING JUDGE**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_ and a copy mailed first class this \_\_\_\_\_ day of \_\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

**MELVIN D. BANNISTER, Pro Se**

**JUSTIN P. NOVAK, Esq.**  
**MICHAEL E. KOZLAREK, Esq.**

ATTORNEY(S) FOR PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

\_\_\_\_\_  
**JULIE J. ARMSTRONG, CLERK OF COURT**

004



Charleston Common Pleas

**Case Caption:** Cary E Fechter M D VS Leon Martin Ortner , defendant, et al  
**Case Number:** 2017CP1004371  
**Type:** Order/Form 4

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-08-21 15:06:44 page 2 of 2

005

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Cary E. Fechter, MD,

Plaintiff,

v.

Leon Martin Ortner, The Ortner Law Firm,  
LLC, Gerald Rosenthal, and Rosenthal, Levy,  
Simon, and Ryles,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2017-CP-10-04371

**ORDER DISMISSING  
PLAINTIFF'S COMPLAINT  
WITH PREJUDICE**

This matter came before the Court on January 27, 2020, upon the Motion for Enlargement of Time on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC filed on December 23, 2019, ("Ortner Motion for Enlargement of Time") and the Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC filed on December 19, 2019, ("Ortner Motion to Dismiss") and simultaneously with Gerald Rosenthal's and Rosenthal, Levy, Simon, and Ryle's Joint Motion to Dismiss filed on May 14, 2019 ("Rosenthal Motion to Dismiss"). Present at the hearing were Justin P. Novak, Esquire, as counsel Defendants Leon Martin Ortner and The Ortner Law Firm, LLC Inc. ("Ortner Defendants"), Leon Martin Ortner, Michael E. Kozlarek, Esquire, as counsel for Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles, PA ("Rosenthal Defendants"), Melvin D. Bannister as counsel for Plaintiff Cary E. Fechter, MD ("Plaintiff"), and Cary E. Fechter, MD. After consideration of the arguments of counsel, memoranda submitted, and the applicable statutory and case law, the Ortner Motion for Enlargement of Time and the Ortner Motion to Dismiss are hereby granted and Plaintiff's claims against the Ortner Defendants are dismissed with prejudice.

## FINDINGS<sup>1</sup>

Plaintiff is a medical doctor allegedly retained by Leon Martin Ortner and The Ortner Law Firm, LLC (“Ortner Defendants”) to perform certain medical examinations and issue medical reports for claimants involved in various workers’ compensation claims. Plaintiff also alleges that the Ortner Defendants agreed to compensate Plaintiff for any and all expenses incurred in treating the claimants that were not covered by insurance. Plaintiff alleges that the Ortner Defendants associated Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles, PA, (“Rosenthal Defendants”) as co-counsel in the prosecution of the workers’ compensation claims and that the Rosenthal Defendants affirmed and adopted Plaintiff’s compensation agreement. Plaintiff alleges that the agreement provided, *inter alia*, that the Rosenthal Defendants and Ortner Defendants would compensate Plaintiff for his work upon settlement of the claims.

On April 1, 2014, numerous such claimants collectively settled their workers’ compensation claims at mediation. Pursuant to the settlement agreement, the defendants to those claims deposited the settlement funds into a qualified fund to be administered by a special referee from which all attorneys’ fees and costs incurred in the prosecution of the claims were also to be distributed upon approval of the South Carolina Workers’ Compensation Commission (“Commission”). The parties to the settlement entered a consent order memorializing the settlements on July 22, 2014. Although Plaintiff at that time disputed the sufficiency of the compensation previously paid to him for work allegedly performed by him for claimants represented by the Rosenthal Defendants and the Ortner Defendants and asserted claims to an additional portion of the funds set aside by the special referee for attorneys’ fees and costs incurred in the prosecution of the claims, the Commission ordered the

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<sup>1</sup> This statement of findings is drawn from the pleadings and from matter outside the pleadings which the parties introduced in challenge to the circuit court’s jurisdiction. Baird v. Charleston County, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999).

release of the funds held in trust to satisfy the costs incurred in the prosecution of the claims, including the expenses associated with the evaluation or treatment of the claimants, on January 26, 2016.<sup>2</sup>

Plaintiff filed the instant Summons and Complaint in this Court on August 25, 2017.<sup>3</sup> In the Complaint, Plaintiff alleges causes of action against the Ortner Defendants for breach of contract, fraud, breach of contract with fraudulent intent, unfair trade practices, and pre-judgment interest in seeking compensation for any and all alleged additional medical examinations, resulting medical reports, and expenses incurred in treating claimants represented by the Rosenthal Defendants and Ortner Defendants. Although Plaintiff admits being compensated for the examination of and issuance of reports for fifty (50) claimants, Plaintiff alleges making initial examinations and reports for in excess of four hundred additional claimants. Plaintiff also alleges performing numerous subsequent examinations, preparing numerous additional reports, and incurring charges for treating claimants for which he was not compensated.

Plaintiff alleges the perfection of service of the Summons and Complaint upon the Ortner Defendants by certified mail at the Ortner Law Firm, LLC, located at 145 King Street, Ste. 211, Charleston, South Carolina, on December 7, 2017.<sup>4</sup> In support of this allegation, Plaintiff's counsel executed a supporting Affidavit of Service by Certified Mail on January 8, 2019, and filed the affidavit on January 9, 2019 ("Affidavit of Service"). The Affidavit of Service, however, does not include a copy of the return receipt or returned envelope showing whether the mailing was accepted, refused, or returned. Instead, the Affidavit of Service includes a document purporting to be printed

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<sup>2</sup> Plaintiff concedes that the applicable statute of limitations began to run regarding his claims at least by entry of the Order on January 26, 2016. (Compl. ¶ 17; Fechter Affidavit ¶¶ 15, 49.)

<sup>3</sup> One hundred twenty days from the date of the filing of the Summons and Complaint expired on December 23, 2017.

<sup>4</sup> Plaintiff does not allege any other successful attempt to effect service upon the Ortner Defendants.

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from the United States Postal Service website showing tracking information for an item delivered to the front desk, reception area, or mail room of an unidentified property in Charleston, SC, at 3:10 pm on December 7, 2017.

On January 5, 2019, the Ortner Defendants filed a motion to dismiss Plaintiff's Complaint pursuant to Rules 12(b)(1), (3), (5) and (6), SCRCPP, on numerous grounds, including that Plaintiff failed to properly effect service within the statute of limitations and insufficiency of service of process. The Honorable Deadra L. Jefferson denied the Ortner Defendants' Motion to Dismiss by the Order Denying Motion to Dismiss filed on April 5, 2019; however, Judge Jefferson deferred consideration of the Ortner Defendants' motion to dismiss on the grounds that Plaintiff failed to properly effect service within the statute of limitations so that the Ortner Defendants could raise the grounds at a later date.

On July 22, 2019, the Ortner Defendants appealed the April 5, 2019 Order by notice of appeal filed with the South Carolina Court of Appeals. That appeal was dismissed pursuant to an Order filed by the South Carolina Court of Appeals on October 25, 2019, and remitted to the Circuit Court on November 13, 2019.

On December 19, 2019, the Ortner Defendants filed a Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC, ("Ortner Motion to Dismiss") pursuant to Rule 12(b)(5), on the grounds that Plaintiff failed to effect service of process on either Leon Martin Ortner or Ortner Law Firm, LLC within the applicable statute of limitations citing the previously deferred consideration of the original motion to dismiss on those grounds. On December 23, 2019, the Ortner Defendants filed the Motion for Enlargement of Time, pursuant to Rule 6(b), SCRCPP, seeking to extend the time for the Ortner Defendants to serve and file the Ortner Motion to Dismiss to December 19, 2019, on the grounds that for good cause existed.

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## ORDER

An action upon a contract, obligation, or liability, express or implied, must be commenced within three years. S.C. Code § 15-3-530. “A civil action is commenced when the summons and complaint are filed with the clerk of court if: (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.” Rule 3(a), SCRCPP; see also S.C. Code § 15-3-20. “Copies of the original summons shall be served upon each defendant.” Rule 4(a), SCRCPP.

“The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give him notice of the action and an opportunity to appear and defend.” White Oak Manor, Inc. v. Lexington Insurance Company, 407 S.C. 1, 8-9, 753 S.E.2d 537, 541 (2014) (quoting State v. Sanders, 118 S.C. 498, 502–03, 110 S.E. 808, 810 (1920)). “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.” Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (quoting 32A Am.Jur.2d Federal Courts § 581 (2007)). “When a defendant is not properly served, ‘the Court has no jurisdiction of the defendant, and all proceedings based on the pretended service are void.’” Momani v. Van Surdam, 296 S.C. 409, 410, 373 S.E.2d 691, 692 (Ct. App. 1988) (quoting Wyman v. Hoover, 10 S.C. 135, 136 (1878)). “It is the plaintiff’s burden to show that the court has personal jurisdiction over the defendant.” Fassett v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841, 843 (Ct. App. 2005) (citing Jensen v. Doe, 292 S.C. 592, 594, 358 S.E.2d 148, 148 (Ct. App. 1987)).

An individual may be served “by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some

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person of suitable age and discretion residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.” Rule 4(d)(1), SCRPC. A corporation may be served “by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.” Rule 4(d)(3), SCRPC. “Service of a summons and complaint upon [an individual or corporation] may be made by . . . registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt.” Rule 4(d)(8), SCRPC; see also Langley v. Graham, 322 S.C. 428, 430-31, 472 S.E.2d 259, 260-61 (Ct. App. 1996) (holding service ineffective where the defendant did not sign the return receipt and delivery was not restricted to the addressee only). “The person serving the process shall make proof of service thereof promptly and deliver it to the officer or person who issued same.” Rule 4(g), SCRPC. “If service was by mail, the person serving process shall show in his proof of service the date and place of mailing, and attach a copy of the return receipt or returned envelope when received by him showing whether the mailing was accepted, refused, or otherwise returned.” Id. “The return along with the receipt or envelope and any other proof shall be promptly filed by the clerk with the pleadings and become part of the record.” Id.

**I. Plaintiff Failed to Effect Service Upon Leon Martin Ortner within the Applicable Statute of Limitations.**

Plaintiff alleges service of the Summons and Complaint by Leon Martin Ortner by certified mail at 145 King Street, Ste. 211, Charleston, South Carolina, on December 7, 2017. This was not Mr. Ortner’s dwelling house or usual place of abode. Although the certified envelope is addressed to Mr. Ortner personally, he did not accept service of or sign for the envelope. In addition, the

purported proof of service, which was not filed with the court until over a year after the mailing, does not include the return receipt or returned envelope showing whether the mailing was accepted, refused, or otherwise returned. As Plaintiff did not comply with Rules 4(a), (d), or (g), SCRCF, Plaintiff failed to serve Leon Martin Ortner with the Summons and Complaint on December 7, 2017. Plaintiff also argues without evidence that Leon Martin Ortner waived the service requirement. After a careful review of the record, this Court finds that Leon Martin Ortner did not waive the requirement of effective service. See SPUR at Williams Brice Owners Association, Inc. v. Lalla, 415 S.C. 72, 90, 781 S.E.2d 115, 125 (Ct. App. 2015). Accordingly, this Court lacks jurisdiction over Leon Martin Ortner with regard to Plaintiff's claims. As S.C. Code § 15-3-530 bars Plaintiff from commencing any action against Leon Martin Ortner for any of the claims arising from Plaintiff's Complaint, any and all such claims against Leon Martin Ortner are hereby dismissed with prejudice.

**II. Plaintiff Failed to Effect Service of the Summons and Complaint Upon Ortner Law Firm, LLC within the Applicable Statute of Limitations.**

Plaintiff similarly alleges service of the Summons and Complaint upon Ortner Law Firm, LLC by certified mail at 145 King Street, Ste. 211, Charleston, South Carolina, on December 7, 2017. While this address is the principal place of business for Ortner Law Firm, LLC, the envelope containing the Summons and Complaint was not addressed to Ortner Law Firm, LLC. The envelope also was not delivered to any officer, managing or general agent, or any other agent authorized by appointment to receive service of process on behalf of Ortner Law Firm, LLC. In fact, there is no record of any signature for the envelope. In addition, the purported proof of service, which was not filed with the court until over a year after the mailing, does not include the return receipt or returned envelope showing whether the mailing was accepted, refused, or otherwise returned. As Plaintiff did

not comply with Rules 4(a), (d), or (g), SCRCPP, Plaintiff failed to serve Ortner Law Firm, LLC with the Summons and Complaint on December 7, 2017. Plaintiff also argues without evidence that Ortner Law Firm, LLC waived the service requirement. After a careful review of the record, this Court finds that Ortner Law Firm, LLC did not waive the requirement of effective service. See SPUR at Williams Brice Owners Association, Inc., 415 S.C. at 90, 781 S.E.2d at 125. Accordingly, this Court lacks jurisdiction over Ortner Law Firm, LLC with regard to Plaintiff's claims. As S.C. Code § 15-3-530 bars Plaintiff from commencing any action against Ortner Law Firm, LLC for any of the claims arising from Plaintiff's Complaint, any and all such claims against Ortner Law Firm, LLC are hereby dismissed with prejudice.

**III. Good Cause Exists to Enlarge the Time to File the Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC Until December 19, 2019.**

In general, upon the denial of a motion to dismiss, "the responsive pleading shall be served within 15 days after notice of the Court's action[.]" Rule 12, SCRCPP. However, the court for good cause shown may enlarge the time for serving the responsive pleading. Rule 6(b), SCRCPP. The South Carolina Court of Appeals remitted this action to the Circuit Court on November 13, 2019. On December 19, 2019, the Ortner Defendants filed the Renewed Motion to Dismiss pursuant to Rule 12(b)(5), on the grounds that Plaintiff failed to effect service of process on either Leon Martin Ortner or Ortner Law Firm, LLC within the applicable statute of limitations citing the previously deferred consideration of the original motion to dismiss on those grounds in accordance with Judge Jefferson's April 5, 2019 Order. On December 23, 2019, the Ortner Defendants filed the Motion for Enlargement of Time, pursuant to Rule 6(b), SCRCPP, seeking to extend the time for the Ortner Defendants to serve and file the Ortner Renewed Motion to Dismiss to December 19, 2019, on the grounds that for good cause exists. After a careful review of the record, this Court finds that good

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cause exists to enlarge the time for filing Renewed Motion to Dismiss until December 19, 2019. As a result, the Ortner Motion for Enlargement of Time is granted.

**THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that any and all of the claims against Leon Martin Ortner and Ortner Law Firm, LLC arising from Plaintiff's Complaint are hereby dismissed with prejudice.

**AND IT IS SO ORDERED.**

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The Honorable J. Derham Cole

July \_\_\_\_, 2020



Charleston Common Pleas

**Case Caption:** Cary E Fechter M D VS Leon Martin Ortner , defendant, et al  
**Case Number:** 2017CP1004371  
**Type:** Order/Dismissal

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-08-04 10:19:10 page 10 of 10

015

**JULIE J. ARMSTRONG**  
CLERK OF COURT, C.P. & G.S.  
100 BROAD STREET, SUITE 106  
CHARLESTON, SC 29401-2258  
**RETURN SERVICE REQUESTED**



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133



MICHAEL ENRICO KOZLAREK  
PO BOX 565  
GREENVILLE SC 29602-0565

**NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC**

**Order of Dismissal as to Gerald Rosenthal et al**

**CASE NO: 2017CP1004371**

**Cary E Fechter M D VS Leon Martin Ortner , defendant, et al**

This judgment was entered on the 04th day of August, 2020, and notice mailed first class on Tuesday, August 04, 2020, to all counsel of record and/or all parties entitled to receive notice.

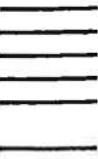
You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

016

**JULIE J. ARMSTRONG**  
CLERK OF COURT, C.P. & G.S.  
100 BROAD STREET, SUITE 106  
CHARLESTON, SC 29401-2258  
**RETURN SERVICE REQUESTED**



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Michael Enrico Kozlarek  
PO Box 565  
Greenville, SC 296020565

**NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC**

**Order of Dismissal as to Leon Ortner & Ortner Law Firm**

**CASE NO: 2017CP1004371**

**Cary E Fechter M D VS Leon Martin Ortner , defendant, et al**

This judgment was entered on the 04th day of August, 2020, and notice mailed first class on Tuesday, August 04, 2020, to all counsel of record and/or all parties entitled to receive notice.

You may view and download this document at <http://clerkofcourt.charlestoncounty.org> or obtain a copy in person at the Clerk of Court's Office during regular Charleston County business hours.

017

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
  
Cary E. Fechter, MD, )  
 )  
 ) Plaintiff, )  
 ) v. )  
 )  
Leon Martin Ortner, The Ortner Law )  
Firm, LLC, Gerald Rosenthal, and )  
Rosenthal, Levy, Simon, and Ryles, )  
 )  
 ) Defendants. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

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

**ORDER GRANTING  
GERALD ROSENTHAL’S AND  
ROSENTHAL, LEVY, SIMON, AND  
RYLE’S JOINT MOTION TO DISMISS**

This matter came before the Court on January 27, 2020, on named-Defendants Gerald Rosenthal’s (“Mr. Rosenthal”) and Rosenthal, Levy, Simon, and Ryles’s (“RLSR,” with Mr. Rosenthal, collectively, “Rosenthal Defendants”)<sup>1</sup> Joint Motion to Dismiss, filed May 14, 2019 (“Rosenthal Motion”), based on Rules 12(6)(1), (2), (4) and (5) of the South Carolina Rules of Civil Procedure (“SCRCP”), for an Order dismissing the causes of action asserted against Rosenthal Defendants in the Complaint filed August 25, 2017.

This matter was heard on January 27, 2020, simultaneously with Defendants Leon Martin Ortner’s and The Ortner Law Firm, LLC’s (collectively, “Ortner Defendants”) Motion for the Enlargement of Time and Renewed Motion to Dismiss. Present at the hearing were Melvin D. Bannister, Esq., as counsel for Plaintiff Cary E. Fechter, MD, Justin P. Novak, Esq., as counsel for Defendants Leon Martin Ortner and The Ortner Law Firm, LLC, Michael E. Kozlarek, Esq., as counsel for named-Defendants Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles. Also present at the hearing were Plaintiff Cary E. Fechter, MD, and Defendant Leon Martin Ortner, Esq.

<sup>1</sup> Rosenthal Motion’s asserts Plaintiff has incorrectly identified Rosenthal, Levy, Simon, and Ryles, PA as named-Defendant Rosenthal, Levy, Simon, and Ryles.

018

**PLAINTIFF'S COMPLAINT**

- A. In the Complaint, Plaintiff alleges causes of action against Ortner Defendants and Rosenthal Defendants for breach of contract, fraud, breach of contract with fraudulent intent, unfair trade practices, and pre-judgment interest arising from allegations that Plaintiff should be further compensated for the performance of certain medical examinations, the issuance of medical reports, and other expenses for any and all claimants represented by the Rosenthal Defendants and Ortner Defendants involved in one or more workers' compensation cases. *See generally*, Complaint.
- B. According to the Complaint, the Ortner Defendants retained Plaintiff to perform the medical examinations and provide the reports in 2002. Complaint at ¶ 5.
- C. The Complaint also alleges Rosenthal Defendants paid Plaintiff \$25,000 for the examinations and reports of fifty claimants. Complaint at ¶ 12.
- D. Plaintiff, however, alleges Plaintiff performed initial examinations and prepared reports for numerous claimants. Complaint at ¶ 13.
- E. The Complaint also alleges Ortner Defendants and Rosenthal Defendants agreed to pay for all medical treatment charges not covered by insurance and to make payment in full at settlement or verdict of the underlying workers' compensation case. Complaint at ¶¶ 15-16.
- F. Further, Plaintiff alleges that Plaintiff remitted "[a]ll bills and requests for payment [to] Defendants." Plaintiff's Affidavit at ¶ 37.<sup>2</sup>
- G. Further, Plaintiff alleges Rosenthal Defendants asserted "Plaintiff could not establish any contractual right to any further payment." Plaintiff's Affidavit at ¶ 46.
- H. Further, Plaintiff asserts Plaintiff has "continued to seek payment from the Defendants to no avail." Plaintiff's Affidavit at ¶ 49.

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<sup>2</sup> Filed simultaneously with Plaintiff's 1<sup>st</sup> MIO (defined below) is an affidavit from Plaintiff ("Plaintiff's Affidavit")

1. The Complaint alleges all workers' compensation cases underlying Plaintiff's causes of action against Rosenthal Defendants were resolved on January 26, 2016. Complaint at ¶ 17.

**PERTINENT PROCEDURAL HISTORY;  
FINDINGS OF FACT**

1. At all times relevant to this case, Mr. Rosenthal was a citizen and resident of the State of Florida.
2. At all times relevant to this case, RLSR was a Professional Association organized and operating under the laws of, and located in, the State of Florida. RLSR has never been registered as a foreign corporation in the State of South Carolina.
3. Plaintiff filed his Complaint on August 25, 2017, in the Charleston County Court of Common Pleas.
4. On October 5, 2017, Plaintiff deposited an envelope with the United States Postal Service, *see* Rosenthal Motion at Exhibit G (USPS Tracking Information, accessed May 1, 2019)<sup>3</sup>, addressed from:

Melvin D. Bannister  
Trial Lawyer  
Post Office Box 6833  
Columbia, South Carolina 29260[.]

and addressed to:

Gerald Rosenthal, Esq.  
1401 Forum Way, Sixth Floor  
West Palm Beach, FL 33401[.]

Plaintiff's Memorandum in Opposition to Motion to Dismiss, filed January 9, 2019 ("Plaintiff's 1<sup>st</sup> MIO"), in response to Ortner Defendants' Motion to Dismiss, filed January 8, 2019 ("Ortner MTD")) at Schedule D.

5. RLSR is not listed as an addressee. Plaintiff's 1<sup>st</sup> MIO at Schedule D.

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<sup>3</sup> Plaintiff does not dispute the accuracy of the USPS tracking information. Further, the information is consistent with Plaintiff's own admissions as contained in Plaintiff's 1<sup>st</sup> MIO at Schedule D.

6. No other identifying marks appear on the envelope. *Id.*
7. The envelope was sent certified mail, return receipt requested, restricted delivery, to Gerald Rosenthal at 1401 Forum Way, Sixth Floor, West Palm Beach, Florida. *Id.*
8. The envelope was received on October 12, 2017, at 1401 Forum Way, Sixth Floor, West Palm Beach, Florida. Plaintiff's 1<sup>st</sup> MIO at Schedule C and Plaintiff's Memorandum in Opposition to Renewed Motion to Dismiss, etc., dated January 23, 2020 (Plaintiff's 2<sup>nd</sup> MIO") at ¶ 2.
9. At all times relevant to this action, 1401 Forum Way, Sixth Floor, West Palm Beach, Florida, has been the address of RLSR's principal places of business.<sup>4</sup>
10. Mr. Rosenthal does not now nor has he ever resided at 1401 Forum Way, Sixth Floor, West Palm Beach, Florida.<sup>5</sup>
11. Mr. Rosenthal had retired from RLSR on December 31, 2015. Rosenthal Motion at ¶ 23, at Exhibit D, ¶ 7, and at Exhibit D, ¶ 10.
12. Ed Elder ("Elder") (not Gerald Rosenthal, the restricted delivery addressee) signed the "green card" for the envelope. Plaintiff's 1<sup>st</sup> MIO at Schedule D and Plaintiff's 2<sup>nd</sup> MIO at ¶¶ 2 and 11. Mr. Elder was serving at all relevant times as a rotating receptionist and file clerk for RLSR. Rosenthal Motion at ¶ 16(fn), at Exhibit F, ¶ 4, and at Exhibit E, ¶ 14.
13. At all relevant times, RLSR had approximately 42-43 employees and received a large stack of mail every day.
14. No individual working at RLSR has ever been authorized to accept service on Mr. Rosenthal's behalf. Rosenthal Motion at ¶ 13(fn), at Exhibit D, ¶ 9, and at Exhibit E, ¶ 12.
15. At the time of the envelope's delivery to the United States Postal Service (at or about 2:05 p.m. on October 5, 2017), Rosenthal was not serving as registered agent for RLSR and was not otherwise an officer, a managing or general agent, or otherwise an agent authorized by

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<sup>4</sup> Rosenthal Motion at ¶ 12 and at Exhibit E, ¶ 8. Plaintiff does not dispute the accuracy of this assertion.

<sup>5</sup> Rosenthal Motion at ¶ 11 and at Exhibit D, ¶ 8. Plaintiff does not dispute the accuracy of this assertion.

appointment or by law to receive service of process for RLSR. Rosenthal Motion at Exhibit G [United States Postal Service Tracking Information (last accessed May 1, 2019)], at Exhibit D, ¶ 11, and at Exhibit E, ¶ 10.

16. At all times relevant to this Motion, the registered agent of record for RLSR as maintained by the Florida Secretary of State was Jonathan Todd Levy (“Levy”) whose registered address is 6921 Finamore Circle, Lake Worth, Florida 33467. Rosenthal Motion at Exhibit E, ¶ 9.
17. RLSR’s registered agent’s address was last changed on January 4, 2016 (more than 21 months before Plaintiff mailed the envelope and more than 19 months before Plaintiff filed the Summons and Complaint). Rosenthal Motion at Exhibit E, ¶ 9.
18. RLSR’s registered agent’s address is readily available to the public by performing a free search at the Florida Secretary of State’s website.
19. Plaintiff has not asserted that he made any other attempt to serve either Rosenthal or RLSR with the Summons and Complaint.
20. Ortner Defendants filed their MTD asserting various grounds for dismissal of Plaintiff’s claims against Ortner Defendants.
21. Plaintiff filed his 1<sup>st</sup> MIO on January 9, 2019.
22. Filed simultaneously with Plaintiff’s 1<sup>st</sup> MIO is an affidavit from Plaintiff’s counsel in which Plaintiff’s counsel claims Plaintiff effected service of his Summons and Complaint by certified mail on RLSR on October 12, 2017. Plaintiff’s 1<sup>st</sup> MIO at Exhibit C, Schedule D.
23. Plaintiff’s counsel’s affidavit is dated and was filed approximately 15 months after purported service and approximately 17 months after Plaintiff filed his Summons and Complaint.
24. Plaintiff’s Affidavit alleges and acknowledges:

14. The Defendants promised to pay and protect the Plaintiff’s fees and that he would be paid in full **upon settlement or verdict in the cases.**

15. The Plaintiff is informed and believes the [underlying workers' compensations] cases/matters were **resolved on January 26, 2016.**

. . .

40. The Plaintiff was not informed of any settlement of the worker's compensation claims, report of the special referee, approval of the special referee's report by Commissioner Aisha Taylor, motion of Rosenthal Defendants to Commissioner Taylor **until January 26, 2016.**

. . .

49. **When informed** to the Order of Release Fund (thereby, disposing of all of the workers' compensation claimants [sic] cases **on or about January 26, 2016, the Plaintiff continued to seek payment from the Defendants to no avail.**

Plaintiff's Affidavit at ¶¶ 14-15, 40, and 49 (emphasis added).

25. On May 14, 2019, Rosenthal Defendants filed Rosenthal Motion.

26. In response, Plaintiff provided Plaintiff's 2<sup>nd</sup> MIO.

27. Plaintiff's 2<sup>nd</sup> MIO contained only allegations and arguments of counsel but no additional factual allegations.

28. As of the hearing of Rosenthal Motion, more than 885 days had passed since Plaintiff filed the Summons and Complaint.

29. As of the hearing of Rosenthal Motion, more than four years had passed since Plaintiff alleges his causes of action accrued.

### **ROSENTHAL DEFENDANTS' MOTION**

Rosenthal Defendants moved this Court for dismissal from the captioned matter on three grounds: (1) Plaintiff failed to serve his Summons and Complaint on either Mr. Rosenthal or RLSR within 120 days after Plaintiff filed the Summons and Complaint with the Clerk of Court, and, as a result, no action has been commenced against either Mr. Rosenthal or RLSR, as required by the applicable statute and the SCRCP; (2) Mr. Rosenthal and RLSR should be dismissed from this case pursuant to Rules 12(b)(1), (2), (4), and (5), SCRCP; and (3) more than three years have

passed since Plaintiff alleges he knew or should have known of each cause of action raised in Plaintiff's Complaint, and, therefore, Plaintiff is barred from refile/serving a summons and complaint.

### CONCLUSIONS OF LAW

#### I. Commencement of Action/Process/Personal Jurisdiction

##### A. Commencement of Action

South Carolina Code Annotated section 15-3-20 provides:

“(A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued . . . . (B) A civil action is commenced when the summons and complaint are filed with the clerk of court ***if*** actual service is accomplished within one hundred twenty days after filing”

(emphasis added). Rule 3, SCRPC, is the Supreme Court's embodiment of the statutory requirements of section 15-3-20. Rule 3 provides:

**(a) Commencement of civil action.** A civil action is commenced when the summons and complaint are filed with the clerk of court ***if***:

- (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or
- (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

(second emphasis added).

“[C]ourts must follow a statute's plain and unambiguous language, and when the language is clear, ‘the rules of statutory interpretation are not needed[,] and the court has no right to impose another meaning.’ [*Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (internal citation omitted)].” *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 8, 809 S.E.2d 223, 226 (2018).

Section 15-3-20(B) and Rule 3(a) make clear that a civil action is not commenced merely by filing a summons and complaint with a clerk of court but rather for an action to be commenced, service must be accomplished on or before the statute of limitations runs or within one hundred twenty days after filing, whichever is later.

B. Service as to RLSR

Rule 4(d)(3), SCRCF, provides that service on a corporate entity may be made “by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.” *See also Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 10, 615 S.E.2d 112, 114 (2005). Rule 4(d)(8), SCRCF, permits service under Rule 4(d)(3) to be accomplished by “registered or certified mail, return receipt requested and delivery restricted to the addressee.”

In analyzing whether service was effective against RLSR, this Court need not look any further than the face of the “green card” on which Plaintiff relies in his effort to establish service of his Summons and Complaint. The “green card” reflects the “restricted delivery” addressee as:

Gerald Rosenthal, Esq.  
1401 Forum Way, Sixth Floor  
West Palm Beach, FL 33401[.]

Nowhere on the face of the “green card” does it reflect the envelope was addressed to “Rosenthal, Levy, Simon, and Ryles,” the corporate entity on which Plaintiff purports to have served his Summons and Complaint. Rather, the “green card” reflects the envelope was addressed (restricted delivery) **solely to the individual Gerald Rosenthal, without any reference to “Rosenthal, Levy, Simon, and Ryles.”**

Even were this Court to ignore the obvious defect in Plaintiff’s attempt to serve RLSR, this Court would still conclude service on RLSR was ineffective. Rule 4(d)(3), SCRCF, is specific in its requirements as to whom is entitled to accept service for a non-natural person: “officer, a managing or general agent, or otherwise an agent authorized by appointment or by law to receive service of process.” Further, our Supreme Court has made it clear that Rule 4(d)(3) does not permit just “anyone who happens to pick up the mail” to bind a defendant for purposes of service of process. *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 297, 721 S.E.2d 430, 434 (2012).

As is made clear by both Elder's Affidavit (*see generally* Rosenthal Motion at Exhibit F) and Jonathan Todd Levy's ("Levy") Affidavit (*see generally* Rosenthal Motion at Exhibit E), the individual who signed the "green card" has never been an "officer, a managing or general agent, or otherwise an agent authorized by appointment or by law to receive service of process," but rather just works at a law firm that receives large quantities of mail every day, and signed for an envelope with unknown contents. Similarly, according to both Mr. Rosenthal's Affidavit (*see generally* Rosenthal Motion at Exhibit G) and Levy's Affidavit (*see generally* Rosenthal Motion at Exhibit E), on the date Plaintiff deposited the envelope with the United States Postal Service *and* at the date on which the "green card" was signed, the only authorized agent on whom Plaintiff could have served process was Levy, as RLSR's registered agent under Florida law (a position Levy held for over a year before Plaintiff mailed the envelope).

In the present case, this Court is faced with a situation in which Plaintiff mailed an envelope (a) unmarked as to the envelope's contents, (b) addressed to an individual who was not (i) employed by RLSR, (ii) authorized to accept service on behalf of RLSR, and (c) without even listing RLSR as the intended recipient, and fifteen months after mailing that envelope,<sup>6</sup> Plaintiff asserted, for the first time, that the envelope constituted effective service on RLSR.

Further, when serving process on a corporation outside of the forum state, Rule 4(c)(2)(C)(i) of the Federal Rules of Civil Procedure ("FRCP") (to which South Carolina courts regularly look for analogous concepts), provides that service of process is made according to the law of the state in which the corporation is located. Under Florida law, service of process on a corporate entity is governed by Florida Statute Annotated section 48.081, which provides a list of officers and agents (including the registered agent according to Florida Statute Annotated section 48.091), in order of preference, on whom service may be made and provides that service may be

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<sup>6</sup> Cf. Rule 4(g), SCRCF ("The return along with the receipt or envelope and any other proof shall be **promptly filed** by the clerk with the pleadings and become a part of the record." (emphasis added)).

effected by only a County Sheriff or the Sheriff's authorized process server. Plaintiff neither attempted to nor effected service by County Sheriff or Sheriff's authorized process service.

Under these facts, the Court concludes that service on RSLR was ineffective as a matter of law.<sup>7</sup>

C. Service as to Mr. Rosenthal

Rule 4(d)(1), SCRPC, provides for service on an individual. Rule 4(d)(1) requires "deliver[y of] a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process."

Rule 4(d)(1) permits a plaintiff three options for service on an individual: (a) delivering a copy of the summons and complaint directly to the named-defendant; (b) delivering the summons and complaint to an appropriate person at the named-defendant's dwelling house or usual place of abode; or (c) by delivering a copy of the summons and complaint to an agent authorized by law to accept the named-defendant's civil process.

Once again, on the face of the "green card," it is apparent that a copy of the Summons and Complaint were not delivered directly to Mr. Rosenthal, the named defendant. Neither were either of the other options for proper service utilized. Rather, Plaintiff had the postal carrier deliver an unmarked envelope to Rosenthal's attention (not by actual personal service) at Mr. Rosenthal's former place of business (not dwelling place or usual place of abode). Further, as set forth above with respect to RLSR, Elder is not nor has he ever been Mr. Rosenthal's "agent authorized by appointment or by law to receive service of process."

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<sup>7</sup> Plaintiff also argues, without any evidence, that RSLR waived the service requirement. After a careful review of the pleadings and affidavits presented, this Court finds nothing to show RSLR intended to waive the requirement of effective service. See *SPUR at Williams Brice Owners Assoc., Inc. v. Lalla*, 415 S.C. 72, 90, 781 S.E.2d 115, 125 (Ct. App. 2015).

Finally, Plaintiff has not even asserted that service of the Summons and Complaint has ever been effected against Rosenthal, and Plaintiff does not deny that no other attempt to serve Rosenthal has been made. As a result, there is no question that: Plaintiff has failed to serve Rosenthal as required by Rule 4(d)(1), SCRPC, and, as a result, has failed to commence an action against Rosenthal, as required by section 15-3-20(B) and Rule 3, SCRPC.<sup>8</sup>

#### D. Personal Jurisdiction

When a defendant challenges the court's personal jurisdiction under rule 12 (b)(2), SCRPC, the plaintiff has the burden of making a *prima facie* case showing that the trial court should exercise personal jurisdiction. *See, e.g., Yarborough & Co. v. Schoolfield Furniture Indus, Inc.*, 275 S.C. 151, 268 S.E.2d 43 (1980); *Berkeley PG Corp. v. Southbank Inv. Group, Inc.*, 291 S.C. 315, 353 S.E.2d 305 (Ct. App. 1987). In ruling on a motion to dismiss for lack of personal jurisdiction, this Court may consider evidence outside of the pleadings, such as affidavits and other evidentiary materials. *Graham v. Lloyd's of London*, 296 S.C. 249, 251 n. 1, 371 S.C.2d 801, 802 n.1 (Ct. App. 1988).

Not only is timely, proper service of process a statutory and procedural requirement, but proper service of process confers personal jurisdiction over a defendant to this Court: “[a] court generally obtains personal jurisdiction by the service of a summons.” *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). When a defendant is not properly served, then the trial court has no personal jurisdiction over that defendant, and all proceedings based on the inadequate service are void. *Momani v. Van Surdam*, 296 S.C. 409, 373 S.E.2d 691 (Ct. App. 1988). Here, because proper service of the Summons was never effected, Plaintiff cannot meet its burden to establish personal jurisdiction over Rosenthal Defendants.

## II. Statute of Limitations

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<sup>8</sup> Plaintiff also argues, without any evidence, that Rosenthal waived the service requirement. After a careful review of the pleadings and affidavits presented, this Court finds nothing to show Rosenthal intended to waive the requirement of effective service. *See id.*

The applicable statute of limitation for an action sounding in contract (express or implied) is three years. S.C. Code Ann. § 15-3-530(1). The statute begins to run on the date the aggrieved party either discovered the alleged breach or could or should have discovered it. *See, e.g., Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). The same statute applies to a cause of action for breach of contract accompanied by a fraudulent act. *See, e.g., Peebles v. Orkin Exterminating Co.*, 244 S.C. 173, 135 S.E.2d 845 (1964).

The applicable statute of limitation for an action sounding in fraud is three years. S.C. Code Ann. § 15-3-530(7). Similarly, any action based on the South Carolina Unfair Trade Practices Act, may not be brought “more than three years after discovery of the unlawful conduct which is the subject of the suit.” S.C. Code Ann. § 39-5-150.

The Plaintiff has admitted in its Complaint and its Affidavit in support of its MOI that

**When informed to the Order of Release Fund (thereby, disposing of all of the workers’ compensation claimants [sic] cases on or about January 26, 2016, the Plaintiff continued to seek payment from the Defendants to no avail.**

Plaintiff’s Affidavit at ¶¶ 14-15, 40, and 49 (emphasis added).

Accordingly, Plaintiff has admitted that he had **actually discovered** the alleged breach(es) and alleged “unfair” or deceptive acts on or before January 26, 2016. It is clear, then, that the statute of limitations on all the Plaintiff’s causes of action are now time-barred, and, therefore should be dismissed with prejudice. *See, e.g., Nunnery v. Brantley Constr. Co.*, 289 S.C. 205, 345 S.E.2d 740 (App. 1986) (dismissals on the merits of the case are with prejudice).

As a result, there is no question (a) Plaintiff (i) has failed to serve RLSR as required by Rules 4(d)(3) and 4(d)(8), SCRCF, (ii) has failed to commence an action against RLSR, as required by South Carolina Code Annotated section 15-3-20(B) and Rule 3, SCRCF, and (b) this Court lacks personal jurisdiction over RLSR as a result of Plaintiff’s failing to effect service of civil process.

### III. Subject Matter Jurisdiction

According to Plaintiff's Complaint, Plaintiff seeks to be further compensated for the performance of medical examinations and the issuance of medical reports for claimants involved in *Sadie Adams, et al. v. International Paper Company and Nevamar Company, LLC* (WCC File No. 0326995) ("Adams Matters"). The Adams Matters involved the settlement of workers' compensation claims asserted by numerous individuals alleging injuries from exposure to toxic chemicals while working at the Nevamar plant in Hampton County, South Carolina. On April 1, 2014, the Nevamar plaintiffs collectively settled their workers' compensation claims at mediation. *See* Ortner Motion at Exhibit A. The final order by the Workers' Compensation Commissioner was issued on January 26, 2016. *See* Ortner Motion at Exhibit C. The Plaintiff in the present case concedes that all claims in the Adams Matters were resolved no later than January 26, 2016. Complaint at ¶ 17 and Plaintiff's Affidavit at ¶¶ 14-15, 40, and 49.

A South Carolina Circuit Court "has original jurisdiction in civil and criminal cases, **except** those cases in which exclusive jurisdiction shall be given to inferior courts." S.C. Const. Art. V, § 11 (emphasis added). According to South Carolina Code Annotated section 42-3-180 and related authorities, the South Carolina Workers Compensation Commission ("Commission") is such an "inferior court," which has been given exclusive jurisdiction over "[a]ll questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, [all these questions] shall be determined by the commission, except as otherwise provided in this title."

As a result, "a Workers' Compensation action is the exclusive means to determine claims against an individuals' employer for work-related accidents and injuries." *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 223, 661 S.E.2d 395, 403 (Ct. App. 2008). As part of this original jurisdiction, the Commission has the authority to determine all questions relating to workers' compensation claims, including the approval and disbursement of costs incurred in the prosecution of those claims. S.C. Code Ann. § 42-3-180 (2001) ("All questions arising under this title, if not

settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission . . . .”); S.C. Code Regs. § 67-1206 (2001) (“[A]n attorney may request approval of the actual costs incurred in the prosecution of the claim [including] expenses associated with the evaluation or treatment of the client.”).

“Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong.” *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). “A court’s subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question.” *Allison v. W.L. Gore & Assoc.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). Lack of subject matter jurisdiction may not be waived and should be taken notice of by the court. *Amisub of South Carolina, Inc. v. Passmore*, 316 S.C. 1112, 114, 447 S.E.2d 207, 208 (1994).

As the Commission in this case properly exercised exclusive, original jurisdiction over the subject matter of the causes of action asserted in the Complaint, that is, the approval and disbursement of costs incurred in prosecuting workers’ compensation claims, specifically Plaintiff’s costs and fees, the Circuit Court has been divested of jurisdiction to hear and determine the claims asserted in the Complaint. As a result, the Court is compelled to dismiss the Complaint under Rule 12(b)(1), SCRCP. *See, e.g., Edens v. Bellini*, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 1994) (affirming the grant of a motion to dismiss for lack of subject matter jurisdiction pursuant to exclusivity provision of the South Carolina Workers’ Compensation Law).

#### **IV. Conclusion**

For the foregoing reasons, Plaintiff’s Complaint against Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles is dismissed with prejudice.

IT IS SO ORDERED.

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Hon. J. Derham Cole, Presiding Judge  
Ninth Judicial Circuit

May \_\_\_\_\_, 2020



Charleston Common Pleas

**Case Caption:** Cary E Fechter M D VS Leon Martin Ortner  
**Case Number:** 2017CP1004371  
**Type:** Order/Dismissal

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-06-05 10:18:17 page 15 of 15

ELECTRONICALLY FILED - 2020 Jun 08 9:57 AM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-10-04371

Cary E. FECHTER, MD,

Leon Martin ORTNER, et al.,

Plaintiff(s)

Defendant(s)

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other SCRPC 56.
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other .

IT IS ORDERED AND ADJUDGED:  formal order to follow;  statement of Judgment by the Court:

This matter came before this court on **MOTION** of the defendants, Leon Martin Ortner and the Ortner Law Firm (collectively "Ortner defendants"), for **ENLARGEMENT** of time pursuant to *Rule 6(b), SCRPC*, to file a renewed Motion to Dismiss.

This matter also came before this court on **MOTION** of the defendants, Leon Martin Ortner and the Ortner Law Firm, to **DISMISS** the causes of action asserted against them pursuant to *Rule 12(b)(5), SCRPC*.

This matter also came before this court on **MOTION** of the defendants, Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles (collectively "Rosenthal defendants"), to dismiss the causes of action against them pursuant to *Rules 12(b)(1), (2), (4), and (5)*.

After consideration of the argument of counsel, memoranda submitted, and the applicable statutory and case law, this Court finds that the defendants' **MOTIONS** should be and **ARE** therefore **GRANTED**.

Counsel for the defendants are requested to prepare and submit a proposed order for the court's consideration.

\_\_\_\_\_  
J. Derham Cole, Presiding Judge

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_ and a copy mailed first class this \_\_\_\_\_ day of \_\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

Melvin Dean Bannister, Esq.

Justin Paul Novak, Esq.  
Michael Enrico Kozlarek, Jr., Esq.

ATTORNEY(S) FOR PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

\_\_\_\_\_  
Julie J. Armstrong, CLERK OF COURT

*OH*



Charleston Common Pleas

**Case Caption:** Cary E Fechter M D VS Leon Martin Ortner  
**Case Number:** 2017CP1004371  
**Type:** Order/Form 4

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-02-05 14:34:37 page 3 of 3

035

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-10-04371

Cary E. FECHTER, MD,

Leon Martin ORTNER, et al.,

Plaintiff(s)

Defendant(s)

CHECK ONE:

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other SCRPC 56.
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other

**IT IS ORDERED AND ADJUDGED:**  formal order to follow;  statement of Judgment by the Court:

This matter came before this court on **MOTION** of the defendants, Leon Martin Ortner and the Ortner Law Firm (collectively "Ortner defendants"), for **ENLARGEMENT** of time pursuant to *Rule 6(b), SCRPC*, to file a renewed Motion to Dismiss.

This matter also came before this court on **MOTION** of the defendants, Leon Martin Ortner and the Ortner Law Firm, to **DISMISS** the causes of action asserted against them pursuant to *Rule 12(b)(5), SCRPC*.

This matter also came before this court on **MOTION** of the defendants, Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles (collectively "Rosenthal defendants"), to dismiss the causes of action against them pursuant to *Rules 12(b)(1), (2), (4), and (5)*.

After consideration of the argument of counsel, memoranda submitted, and the applicable statutory and case law, this Court finds that the defendants' **MOTIONS** should be and **ARE** therefore **GRANTED**.

Counsel for the defendants are requested to prepare and submit a proposed order for the court's consideration.

\_\_\_\_\_  
**J. Derham Cole, Presiding Judge**

This judgment was entered on the \_\_\_\_\_ day of \_\_\_\_\_ and a copy mailed first class this \_\_\_\_\_ day of \_\_\_\_\_ to attorneys of record or to parties (when appearing pro se) as follows:

**Melvin Dean Bannister, Esq.**

**Justin Paul Novak, Esq.**  
**Michael Enrico Kozlarek, Jr., Esq.**

ATTORNEY(S) FOR PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

\_\_\_\_\_  
**Julie J. Armstrong, CLERK OF COURT**

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Charleston Common Pleas

**Case Caption:** Cary E Fechter M D VS Leon Martin Ortner  
**Case Number:** 2017CP1004371  
**Type:** Order/Form 4

IT IS SO ORDERED!

s/J. Derham Cole 2053

Electronically signed on 2020-02-05 14:34:37 page 3 of 3

038

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

Cary E. Fechter, MD,

Plaintiff,

vs.

Leon Martin Ortner, The Ortner Law Firm,  
LLC, Gerald Rosenthal, and Rosenthal, Levy,  
Simon, and Ryles,

Defendants.

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
Civil Action No. 2017-CP-10-04371

**ORDER DENYING DEFENDANTS  
MOTION TO RECONSIDER, ALTER, OR  
AMEND JUDGMENT**

FILED  
2019 JUN 28 AM 9:50  
JULIE J. ARMSTRONG  
CLERK OF COURT

Presiding Judge:	Hon. Deadra L. Jefferson
Plaintiff's Attorney:	Melvin Bannister, Esq.
Defendants' Attorneys:	Justin P. Novak, Esq. M. Dawes Cooke, Jr., Esq.
Date of Hearing:	January 9, 2019
Court Reporter:	Karen Andersen

THIS MATTER comes before this Court by way of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC's ("Defendants") Motion to Reconsider, Alter, or Amend, filed April 18, 2019, asking this Court to alter or amend its Order Denying Defendants' Motion to Dismiss, filed January 8, 2018. Defendants served their Motion to Reconsider, Alter, or Amend (hereinafter "Motion to Reconsider") on April 18, 2019. The Plaintiff served its response in opposition to the Motion on April 30, 2019.<sup>1</sup> Having considered the Defendants' Motion, as well as the various interests balanced by the Court at the time of the ruling, the Defendants' Motion to Reconsider is hereby denied.<sup>2</sup>

<sup>1</sup> Plaintiff's Counsel forwarded an e-mail to this office acknowledging receipt of the Defendants' Motion and opposing the same relying on his previous filings and memorandum filed with the Court.


<sup>2</sup> This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).

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[Signature]

“The purpose of Rule 59(e), SCRCPP, to alter or amend the judgment is to request the trial judge to reconsider matters properly encompassed in a decision on the merits.” Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992). “A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) (emphasis in original). “A party cannot use a motion to reconsider to present an issue he could have raised prior to judgment but did not.” Anderson Memorial Hosp., Inc. v. Hagen, 313 S.C. 497, 498, 443 S.E. 2d 399, 400 (Ct. App. 1994) (citing C.A.H. v. L.H., 315 S.C. 389, 434 S.E. 2d 268 (1993)); See also Arnold v. State, 309 S.C. 157, 172–73, 420 S.E.2d 834, 842 (1992).

The Defendants' motion seeks to reargue the issue on the same basis previously presented, presents no novel facts, arguments, or theories in support of the Motion to Reconsider. The Defendants have not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on. Accordingly, the Motion to Reconsider is hereby DENIED.

IT IS SO ORDERED.

  
\_\_\_\_\_  
Hon. Deadra L. Jefferson  
Presiding Judge  
Ninth Judicial Circuit

26<sup>th</sup> day of June, 2019  
Charleston, South Carolina

040<sup>2</sup> 2012  


STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Cary E. Fechter, MD,

Plaintiff,

v.

Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles,

Defendants.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2017-CP-10-04371

**ORDER DENYING MOTION TO DISMISS**

Presiding Judge:  
Plaintiff's Attorney:  
Defendants' Attorneys:

Hon. Deadra L. Jefferson  
Melvin Bannister, Esq.  
Justin P. Novak, Esq.  
M. Dawes Cooke, Jr., Esq.  
January 9, 2019  
Karen Andersen

Date of Hearing:  
Court Reporter:

2019 APR -5 AM 11:51  
JULIE J. ARMSTRONG  
CLERK OF COURT

**FILED**

This matter came before the Court on January 9, 2019, upon Defendants Leon Martin Ortner and The Ortner Law Firm, LLC's Motion to Dismiss, filed January 8, 2018. Present at the hearing were M. Dawes Cooke, Jr., Esquire and Justin P. Novak, Esquire, as counsel for Defendants Leon Martin Ortner and The Ortner Law Firm, LLC Inc., and Melvin D. Bannister, Esquire as counsel for Plaintiff Cary E. Fechter, MD.

**ALLEGATIONS**

In the Complaint, filed August 25, 2017, Plaintiff alleges causes of action against Defendants Leon Martin Ortner and The Ortner Law Firm, LLC Inc. ("Ortner Defendants") and Defendants Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles ("Rosenthal Defendants") for breach of contract, fraud, breach of contract with fraudulent intent, unfair trade practices, and pre-judgment interest arising from allegations that Plaintiff should be further compensated for the

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performance of certain medical examinations and the issuance of medical reports for claimants involved in a workers' compensation case. (See Compl.) According to the Complaint, the Ortner Defendants retained Plaintiff to perform the medical examinations and provide the reports in 2002. (Compl. ¶ 5.) The Complaint also alleges that the Rosenthal Defendants paid Plaintiff the sum of Twenty-Five Thousand (\$25,000) Dollars for the examinations and reports of fifty claimants. (Compl. ¶ 12.) Plaintiff, however, alleges making initial examinations and reports for approximately 458 claimants. (Compl. ¶ 13.) The Complaint also alleges that the Ortner Defendants and Rosenthal Defendants agreed to pay for all medical treatment charges not covered by insurance and to make payment in full upon settlement or verdict. (Compl. ¶ 15-16.)

The Ortner Defendants move to dismiss Plaintiff's Complaint on the grounds that the Circuit Court has been divested of jurisdiction to hear and determine these claims because the South Carolina Workers' Compensation Commission ("Commission") previously exercised exclusive original jurisdiction over the claims asserted in the Complaint. The Ortner Defendants also move to dismiss Plaintiff's Complaint on the grounds that Plaintiff's failure to seek review of the Commission's determination constitutes a bar to further litigation of the claims, and that Plaintiff is barred from re-litigating the claims because the Commission actually and necessarily directly determined the material facts and issues of law sought to be litigated. Finally, the Ortner Defendants move to dismiss Plaintiff's Complaint on the basis of insufficient service of process because Plaintiff failed to serve the Summons and Complaint within the statute of limitations<sup>1</sup>, and that the Complaint fails to plead facts sufficient to constitute the Unfair Trade Practices cause of action.

<sup>1</sup> At the call of the motion, Defense Counsel informed the Court that it was withdrawing the motion to dismiss the case based on insufficient service of process grounds. However, by doing so was not waiving the right to raise it at a later date.

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While awaiting the hearing of the Motion to Dismiss, on October 3, 2018, counsel for Plaintiff served a Notice of Deposition for Leon Martin Ortner.<sup>2</sup> In response, counsel for the Ortner Defendants served and filed the Objection to Notice of Deposition of Leon Martin Ortner and Motion for Protective Order Staying Discovery and Other Proceedings, in which the Ortner Defendants move to stay all discovery and other proceedings and strike the action from the jury trial roster until disposition of the pending Motion to Dismiss.<sup>3</sup>

#### FACTUAL BACKGROUND<sup>4</sup>

The Ortner Defendants were retained to represent claimants (“Nevamar Claimants”) in a worker’s compensation action – Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC (WCC File No. 0326995) – against employer International Paper Company and Nevamar Company, LLC (“Nevamar Defendants”). On or about October 2005, Plaintiff was retained by the Rosenthal Defendants to perform independent medical examinations and make independent reports on the Nevamar Claimants. The parties agreed that the Plaintiff was to be paid the sum of Five Hundred (\$500.00) Dollars for the initial medical examination and report for each of the Nevamar Claimants, and additional sums for subsequent examinations and reports. The Plaintiff also contends that the Ortner and Rosenthal Defendants agreed to pay the Plaintiff for pulmonary function tests, stress tests, sleep study examinations, and for medical treatment provided that was not covered by the Nevamar Claimants health insurance policies. In 2006, the Ortner Defendants associated with the Rosenthal Defendants, and the latter affirmed the contract with the Plaintiff agreeing to pay for the services rendered. The parties dispute the number of

<sup>2</sup> Although the document sent to opposing counsel is captioned as an “Acceptance of Service”, the document appears, in fact, to be an effort to notice the deposition of Leon Martin Ortner.

<sup>3</sup> A Form 4 Order was filed on January 16, 2019 disposing of the Motion for Protective Order as Moot as the Court’s ruling on the Motion to Dismiss is dispositive.

<sup>4</sup> This statement of the procedural history is drawn from the pleadings and from matters outside the pleadings which the parties introduced in challenge to the circuit court’s jurisdiction.

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Nevamar Claimants the Plaintiff was retained to evaluate. The Plaintiff contends that he met with more than 600 current and former Nevamar employees, and made initial examinations and reports to approximately 458 Nevamar Claimants. Conversely, the Rosenthal Defendants assert that they hired him to evaluate up to fifty (50) Nevamar Claimants, and that the Plaintiff unilaterally and voluntarily chose to continue treating Nevamar Claimants as regular patients separately from the worker's compensation litigation. In 2010, the Plaintiff invoiced the Rosenthal Defendants seeking payment of funds in addition to the Twenty-Five Thousand (\$25,000.00) Dollar retainer amount. The parties do not dispute the Twenty-Five Thousand (\$25,000.00) Dollars paid to the Plaintiff for 50 of the Nevamar Claimants. However, there are conflicting accounts among the parties as to whether a written contract existed between the parties. The Rosenthal Defendants assert that the only document that reflects an agreement between it and the Plaintiff is a 2010 letter from the Rosenthal Defendants to Dr. Fechter sent in response to the Plaintiff's aforementioned invoice that confirms a \$25,000 retainer was paid for up to fifty evaluations. The Plaintiff asserts that after he would forward an invoice for his fees, he would receive a letter signed by Leon Martin Ortner that stated, in part, as follows: "Please be advised that this Law Firm represents the above-named individual(s) for injuries sustained on or about the above referenced date...Please be advised that your fee will be protected in this matter and that you will be paid in full upon settlement or verdict in this case." The Plaintiff asserted a right to further compensation arising from his evaluation and treatment of the Nevamar Claimants in his deposition testimony taken in the Nevamar action on November 2, 2015. (WCC File No. 0326995 Or. Granting Mot. to Release Funds 6-7, Jan. 26, 2016; WCC File No. 0326995 Reply to Mot. to Release Funds, Dec. 2, 2015).

On April 1, 2014, the Nevamar Claimants in Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC (WCC File No. 0326995) collectively settled their

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workers' compensation claims at mediation. (WCC File No. 0326995 Consent Order ¶ 5, July 22, 2014.) Pursuant to the settlement agreement, the Nevamar Defendants deposited the settlement funds into a qualified fund to be administered by a special referee from which all attorneys' fees and costs were also to be distributed upon approval of the South Carolina Workers' Compensation Commission ("Commission"). (Id.)

On November 13, 2015, the special referee reported holding in trust Five Hundred Thousand Dollars in approved costs pending instructions from the claimants' attorneys regarding final disbursement or an order from the Commission. (WCC File No. 0326995 Initial Report of the Special Referee ¶ 1(b), Nov. 13, 2015.) On December 10, 2015, Commissioner Aisha Taylor approved the special referee's decisions regarding the settlement proceeds. (WCC File No. 0326995 Order ¶¶ 2-3, Dec. 10, 2015.)

On November 18, 2015, the Rosenthal Defendants submitted to Commissioner Taylor a motion to release the funds held on deposit for the reimbursement of approved costs incurred on behalf of the Nevamar Claimants. (WCC File No. 0326995 Mot. to Release Funds, Nov. 18, 2015.) The Rosenthal Defendants properly served Plaintiff with the motion. (WCC File No. 0326995 Or. Granting Mot. to Release Funds 3, Jan. 26, 2016.) In the motion, the Rosenthal Defendants sought the release of all of the funds held in trust to the Rosenthal Defendants. (Id. at 1.) The motion specifically asserted that Commissioner Taylor should deny any claims to the funds made by Plaintiff on the grounds that Plaintiff cannot establish any contractual right to any further payment. (Id.)

On November 30, 2015, the Ortnier Defendants submitted a reply to the motion, similarly serving Plaintiff. (WCC File No. 0326995 Reply to Mot. to Release Funds, Dec. 2, 2015; WCC File No. 0326995 Or. Granting Mot. to Release Funds 3, Jan. 26, 2016). In the reply, the Ortnier

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Defendants requested that Commissioner Taylor inquire into Plaintiff's claims to additional payment and issue an order determining the rights of all concerned parties to the funds being held in trust. (Id. at ¶ 1.) The Ortner Defendants made no claim to the funds. (Id.) The Ortner Defendants instead sought complete adjudication of the rights and responsibilities of all parties to any monies which may be owed to Plaintiff. (Id. at ¶ 6.)

Plaintiff did not respond to the motion or to Ortner's reply. (WCC File No. 0326995 Or. Granting Mot. to Release Funds 3, Jan. 26, 2016.) On January 26, 2016, Commissioner Taylor ordered the release of the totality of the funds held in trust to the Rosenthal Defendants. (Id.) In the order, Commissioner Taylor specifically found that: (1) Plaintiff was properly served with the Motion to Release Funds and the Reply of Leon Martin Ortner to the Motion to Release Funds and failed to respond, (2) Plaintiff failed to establish entitlement to any funds in addition to those previously received, (3) Plaintiff cannot establish any contractual arrangement that would entitle Plaintiff to any additional funds, (4) no agreement exists obligating the Ortner Defendants or Rosenthal Defendants to pay for any of the additional services performed by Plaintiff, and (5) Plaintiff is not being deprived of any payment due. (Id. at 3, 5, 6-7.) Plaintiff was served with the Order Granting Motion to Release Funds on January 27, 2016. (Id. at 10.) Plaintiff did not appeal the order. Instead, Plaintiff filed the subject Summons and Complaint in this Court on August 25, 2017. Defendants Leon Martin Ortner and The Ortner Law Firm, LLC filed the subject Motion to Dismiss on January 8, 2018.

**CONCLUSIONS OF LAW**

**I. Lack of Subject Matter Jurisdiction**

"Jurisdiction is generally defined as 'the authority to decide a given case one way or the other.'" Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (quoting 32A

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Am.Jur.2d Federal Courts § 581 (2007)). “Specifically, ‘Jurisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court’s power to render the particular judgment requested.’” Id. (quoting Indep. Sch. Dist. No. 1 of Okla. County v. Scott, 15 P.3d 1244, 1248 (Okla. Civ. App. 2000)). “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.” Id. (quoting 32A Am.Jur.2d Federal Courts § 581 (2007)). The Constitution of the State of South Carolina provides that “[t]he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts[.]” S.C. CONST Art. V, § 11. Accordingly, “[w]hile the circuit court has subject matter jurisdiction over [general classes of] claims, certain cases may be taken from the circuit court’s original jurisdiction by the General Assembly.” Poch v. Bayshore Concrete Products/South Carolina, Inc., 386 S.C. 13, 22, 686 S.E.2d 689, 694 (Ct. App. 2009). For example, “[t]he General Assembly has vested the South Carolina Workers’ Compensation Commission with exclusive original jurisdiction over employees work-related injuries.” Posey, 378 S.C. at 223, 661 S.E.2d at 402 (citing Sabb v. S.C. State Univ., 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002)). As a result, “a Workers’ Compensation action is the exclusive means to determine claims against an individual’s employer for work-related accidents and injuries.” Id. at 224, 661 S.E.2d at 403.

As part of this exclusive original jurisdiction, the Commission has the authority to determine all questions relating to workers’ compensation claims, including the approval and disbursement of costs incurred in the prosecution of a claim. S.C Code Ann. § 42-3-180 (2001) (“All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission, except as otherwise provided in this

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title.”); S.C. Code Ann. Regs. § 67-1206 (2001) (“[A]n attorney may request approval of the actual costs incurred in the prosecution of a claim [including] expenses associated with the evaluation or treatment of the client.”). The Ortner Defendants cite Labouseur to support their claim that the Commission has the power to decide questions that are ancillary to the determination of the employee’s right to compensation. Compare Labouseur v. Harleysville Mutual Insurance Company, 302 S.C. 540, 543, 397 S.E.2d 526, 528 (1990) with Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 101, 674 S.E.2d 524, 529 (Ct. App. 2009) (reversing the trial court’s dismissal of Capital City’s complaint on the grounds that a simultaneous administrative hearing regarding a modifier did not divest the circuit court of its power to hear claims of breach of contract and fraud) and Roper Hosp. v. Clemons, 326 S.C. 534, 484 S.E.2d 598 (Ct. App. 1997) (affirming the circuit court’s refusal to reopen a settled Workers’ Compensation case because the health care provider lacked standing under the Workers’ Compensation Act).

In Labouseur, the employer – Labouseur – sued its workers’ compensation insurance carrier and agent for wrongful cancellation of its 1985-86 policy. Labouseur, 302 S.C. at 541, 397 S.E.2d at 527. During the aforementioned policy year, an employee of Labouseur was injured on the job in June of 1986. Id. Thereafter, Labouseur was forced to hire counsel and defend his employee’s claims due to the contested cancellation. Id. Prior to the Commission determining whether the employee’s claims were compensable, Labouseur brought suit in circuit court against the insurance carrier and agent. Id. The Supreme Court held 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 Workers’ Compensation Commission. [Likewise], when there exists no pending employee claim

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for compensation, the Commission lacks the jurisdiction to decide such questions.” Id. at 543, 397 S.E.2d at 528.

Conversely, in Capital City, BP Staff sought workers’ compensation coverage and the case was assigned to Capital City through the South Carolina Department of Insurance Workers Compensation Assigned Risk Insurance Plan. Capital City Ins. Co., 382 S.C. at 96, 674 S.E.2d at 526. BP Staff was assigned an “experience modifier” that BP Staff appealed from September of 2002 to August of 2006, which ultimately culminated in the modifier being affirmed by the Administrative Law Court (“ALC”). Id. Prior to the modifier being affirmed by the ALC, Capital City commenced breach of contract and fraud claims against BP Staff that were later dismissed by the trial court on the grounds that the “modifier dispute was the linchpin regarding any and all disputes between the parties,” and the ALC was the proper forum. Id. at 98, 674 S.E.2d at 527. The Court of Appeals held that “Capital City’s breach of contract and fraud claims are part of the general class of cases which the court of common pleas has jurisdiction to hear[,] and the mere fact that Capital City was also engaged in an administrative proceeding regarding the modifier did not divest the circuit court of its power to hear and determine the claims of breach of contract and fraud.” Id. at 101, 674 S.E.2d at 529.

Similarly, in Clemons, Roper Hospital treated Wesley Clemons from November 1991 to January 1992 for back injuries he allegedly sustained while employed with John Weiland Homes. Roper Hosp. v. Clemons, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct. App. 1997). Zurich Insurance (“Respondent”) asserted that Mr. Clemons medical expenses in the amount \$83,172.05 were not related to a compensable injury and denied coverage. Id. Mr. Clemons and Respondent entered a lump sum settlement agreement, which was approved by the Commission, and Roper Hospital moved to reopen the case, claiming it was entitled to payment for Mr. Clemons’ medical

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bills. Id. The Court of Appeals affirmed the decision of the single commissioner that Roper Hospital was not entitled to relief or standing, and held that “[n]owhere in the [Workers’ Compensation] Act is there a provision to allow any party, *other than the employee and the employer* to participate in the Commission’s proceedings...[and] Appellant clearly has a cause of action against the patient/employee for services rendered based on common law.” Id. at 539, 484 S.E.2d at 600 (emphasis added).

The Court does not find the decision in Labouseur to be controlling in the present case. Here, the dispute is not one that arises under the Workers’ Compensation Act (“the Act”). On the contrary, this action arises out of an alleged contract between two non-parties to the underlying workers’ compensation action, which ultimately falls under South Carolina’s common law and within the purview of this Court. Though the Commission has the authority to determine the disbursement of costs incurred in prosecuting a workers compensation claim (including expenses associated with the evaluation or treatment of the client/claimant), the Commission is not empowered with exclusive jurisdiction to determine claims that do not affect the employee’s right to compensation. See Labouseur, 302 S.C. at 543, 397 S.E.2d at 528 (asserting that the Commission could not adjudicate the claims between the insured and its carrier and agent in a meaningful way absent the pending employee claim for compensation); See also Price v. Peachtree Elec. Servs., Inc., 396 S.C. 403, 721 S.E.2d 461 (Ct. App. 2011), aff’d as modified, 405 S.C. 455, 748 S.E.2d 229 (2013) (“Claims not affecting the employee’s right to compensation are within the purview of the circuit court, not of the Commission.”).

Like the Appellant in Capital City Ins. Co., the Plaintiff has asserted claims for breach of contract and fraud, which the Court of Appeals determined were in the general class of cases this Court is empowered to hear. The dispute between the Plaintiff and the Ortner Defendants here is,

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principally, not one arising under the Act, since the Act's sole purpose is to establish the rights of an employer and employee. Though the single commissioner, in her Order Granting the Motion to Release Funds, found that the Plaintiff lacked any rightful claim to the funds being held in trust, the Court finds this Order has no preclusive effect as the Plaintiff and Defendants were not parties to the underlying Workers' Compensation action and thereby, have retained their rights to pursue any claims pursuant to common law principles Contract or otherwise. The findings by the single commissioner comport with the commission's authority to determine the disbursement of costs including reasonable expenses associated with the evaluation and treatment of the claimants. However, the facts as alleged in this case contend that a separate contract for payment was entered into by and between the parties of which the commissioner would have had no jurisdiction to adjudicate. For the foregoing reasons, this Court does not lack subject matter jurisdiction and the Ortner Defendant's Motion to Dismiss pursuant to Rule 12(b)(1), SCRCP is hereby denied.

## II. Exhaustion of Administrative Remedies

"The South Carolina Supreme Court has indicated that dismissal may be proper under Rule (12)(b)(6), SCRCP, for failure to state a claim where the opposing party is required to exhaust its administrative remedies as a matter of law, but failed to do so." Capital City Ins. Co., 382 S.C. at 102, 674 S.E.2d at 529. The doctrine of exhaustion of administrative remedies is applicable "when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." Id. (citing Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 413, 563 S.E.2d 109, 115 (Ct. App. 2002)). Accordingly, litigants are required to exhaust the available administrative remedies prescribed in the Act prior to seeking review of a commissioner's determination. See Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (affirming that a

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failure to exhaust administrative remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute). However, “[a] party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body.” Capital City Ins. Co., 382 S.C. at 102, 674 S.E.2d at 529 (citing Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006)).

As stated above, the Plaintiff’s causes of action in the present case did not affect the Nevamar Claimants’ – the employees in the underlying workers’ compensation case – right to compensation, and, thus, the Plaintiff had no meaningful ability to exhaust his claims before the Commission. By virtue of the funds held in trust specifically for the Nevamar Claimants, the Ortner Defendants have failed to show how the Plaintiff’s claims effected the right of the employees to recover from the Nevamar Defendants. Pursuant to an approved settlement agreement, the Nevamar Claimants’ injuries were clearly found to be compensable under the Act. In fact, the Special Referee, in his initial report, indicated that One Million Five Hundred Thousand (\$1,500,000.00) Dollars would be held in trust for the 304 Nevamar Claimants. Therefore, the Plaintiff’s claims for breach of contract, fraud, breach of contract with fraudulent intent, unfair trade practices, and pre-judgment interest against the Ortner Defendants in no way affected the ultimate issue determined by the Commission – the Nevamar Claimant’s right to compensation. Since the claims asserted by the Plaintiff are not of the type that can be adjudicated by the Commission, but are of the class of cases reserved for the circuit court, the Ortner Defendants Motion to Dismiss pursuant to 12(b)(3) and 12(b)(6) is hereby denied.

### III. Relitigation of Plaintiff’s Claims

“Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action.” Crosby v. Prysmian

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Communications Cables and Systems USA, LLC, 397 S.C. 101, 108, 723 S.E.2d 813, 816-17 (Ct. App. 2012). Accordingly, “under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action.” Bennett v. S.C. Dep’t. of Corr., 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991). In addition, “[e]quitable estoppel precludes a party from asserting rights ‘he otherwise would have had against another’ when his own conduct renders assertion of those rights contrary to equity.” Pearson v. Hilton Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012) (quoting Long v. Silver, 248 F.3d 309, 316 (4th Cir. 2001)). Lastly, a party may also voluntarily and intentionally relinquish or abandon a known right. Strickland v. Strickland, 375 S.C. 76, 83-86, 650 S.E.2d 465, 469-71 (2007) (discussing the doctrine of waiver and laches). “Laches is an equitable doctrine defined as ‘neglect for an unreasonable and unexplainable length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.’” Id. at 83, 650 S.E.2d at 469 (quoting Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). “In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant.” Id. “The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the ‘voluntary and intentional relinquishment or abandonment of a known right[.]’” Id. at 85, 650 S.E.2d at 470.

Here, the Plaintiff had no meaningful opportunity to adjudicate his common law claims before the Commission. Moreover, the Plaintiff was not a party with standing before the Commission as the Act establishes the rights of an employer and employee dispute. As stated above, the Plaintiff had no duty to exhaust administrative remedies that were tenable at best, because the causes of action set forth in his Complaint are in the original purview and jurisdiction

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of this Court. The Commissioner was empowered to determine the actual costs incurred in the prosecution of the claims and necessarily determined those costs in ordering the disbursement of the settlement funds. However, the Commissioner could not and did not actually and necessarily determine the material facts and issues of law underlying the Plaintiff's claims for breach of contract, fraud, breach of contract with fraudulent intent, unfair trade practices, and pre-judgment interests. Therefore, the Ortner Defendants' Motion to Dismiss pursuant to Rules 12(b)(3) and 12(b)(6), SCRCF is hereby denied.

**IV. Failure to State a Claim under South Carolina Unfair Trade Practices Act**

"A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and we must presume all well-pled facts to be true." Gressette v. South Carolina Elec. and Gas Co., 370 S.C. 377, 378-79, 635 S.E.2d 538, 538 (2006). "The circuit court, in a civil action, may dismiss a claim when the *defendant* demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. The motion cannot be granted if the facts set forth in the complaint and the inferences reasonably drawn therefrom would entitle the plaintiff to any relief on any theory of the case." Sloan Constr. Co., Inc. v. Southco Grassing, Inc., 368 S.C. 523, 525-26, 629 S.E.2d 372, 373 (Ct. App. 2006) (emphasis added). This remedy is considered "drastic" and the pleadings should be "construed liberally" so that "substantial justice is done between the parties." Overcash v. SCE&G, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). In the light most favorable to the Plaintiff based solely on the allegations set forth on the face of the complaint with every doubt resolved in his favor the Motion to Dismiss for failure to state a claim under the South Carolina Unfair Trade Practices Act is heard and respectfully denied.

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IT IS SO ORDERED!



HON. DEADRA L. JEFFERSON  
Presiding Judge  
Ninth Judicial Circuit

~~4th~~ day of April, 2019  
Charleston, South Carolina

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Cary E. Fechter, MD

PLAINTIFF

Leon Ortner, et al.

DEFENDANT

Submitted by: COURT

Attorney for :  Plaintiff  Defendant  
or  
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

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CLERK OF COURT

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order (formal order to follow)  Statement of Judgment by the Court: **Defendant's Motion to Dismiss came before this Court on 4/19/2018. Plaintiff's counsel failed to appear, and thus it was orally ruled that Defendant's Motion to Dismiss was granted. However, Plaintiff's counsel subsequently provided adequate excuse, and, therefore, this Court's oral granting of Defendant's Motion to Dismiss is overruled. Defendant's Motion to Dismiss is hereby CONTINUED until the next available motions term. Plaintiff also filed a Motion for New Trial based on the dismissal of his claims, and this Order hereby moots Plaintiff's Motion for New Trial.**

This order  ends  does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount to be Enrolled (List amount(s) below)

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Judge

2134

Circuit Judge Number

5/23/2018

Date

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**BEFORE THE SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION**

Sadie Adams, <i>et al.</i> ,	)	WCC File No.: 0326995 <i>et al.</i>
	)	
Claimants,	)	
	)	
vs.	)	
	)	
International Paper Company and Nevamar Company, LLC,	)	<b>ORDER GRANTING MOTION TO RELEASE FUNDS</b>
	)	
Employers,	)	
	)	
International Paper Company and Ace American Insurance Company,	)	
	)	
Carriers/Defendants.	)	

This matter came before the Commission by way of Motion to Release Funds filed by Rosenthal, Levy, Simon & Ryles ("RLSR"), attorneys for the Claimants, on November 18, 2015. Attorney Leon Ortner submitted a Reply in support of the Motion, dated November 30, 2015. No other persons made any submissions. For the reasons set forth herein, the Motion is GRANTED. As further detailed herein, RLSR shall be remitted the full \$500,000.00 balance of set aside funds for reimbursement of approved costs incurred on behalf of its clients.

**PROCEDURAL STATUS AND AUTHORITY**

The captioned action was settled pursuant to agreements to settle the individual claims for the Nevamar facility. Pursuant to the Initial Report of the Special Referee who was appointed to manage the distribution of settlement proceeds, the Special Referee is currently holding in trust Five Hundred Thousand Dollars (\$500,000.00) in approved costs pending a decision regarding final disbursement of those funds. The undersigned Commissioner entered a Consent Order on July 22, 2014, to allow for the appointment of a special referee to assist with final disbursements of funds. On May 27, 2015, the undersigned appointed H. Mills Gallivan as Special Referee, providing him with authority to complete the proper distribution of the settlement funds. With the approved costs remaining undistributed, the undersigned

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Commissioner has the authority to make a determination concerning final distribution of these set aside funds.

The Commission has the statutory and regulatory authority and jurisdiction to dispense with all matters relating to workers' compensation claims, including the disbursement of costs. See S.C. CODE ANN. §§ 42-3-140, 42-3-180 ("All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission..."); S.C. CODE ANN. REGS. §§ 67-215 (authority to hear motions), 67-1206 (Commission's authority to approve costs); *Williams v. S.C. Dep't of Juvenile Justice*, 2011 WL 8005008, at \*4, WCC Nos: 0808819 and 9404048 (WCC June 7, 2011) (Commission asserting jurisdiction over attorneys' fees and costs pursuant to S.C. CODE ANN. REGS. § 67-215).

#### **FINDINGS OF FACT**

The following facts are established by the documents submitted in support of the Motion, the Reply to said Motion, including affidavits, documents, and the deposition testimony of Dr. Cary E. Fechter.

##### **A. Background of Claim**

In October of 2005, Gerald Rosenthal, a partner in RLSR, was engaged to assist with the workers' compensation claims in the captioned matter. Each potential claimant may have been exposed to toxic chemicals while working at the Nevamar plant in Hampton County, South Carolina. Mr. Rosenthal travelled to South Carolina to meet with more than 600 current and former Nevamar employees. After these initial meetings, RLSR proceeded with representing many of these employees in the captioned matter.

Retaining experts was one part of presenting the claimants' claims to the Commission. Prior to Gerald Rosenthal's involvement in this action, claimants' counsel Leon Ortner sent a letter of protection for each claimant to Dr. Fechter stating, among other things, that Dr.

Fechter's fee will be protected in this matter and he will be paid in full upon settlement or verdict. When Gerald Rosenthal entered this action on or about 2005, all financial arrangements relative to Dr. Fechter from that time forward were made between Dr. Fechter and RLSR.

RLSR retained Dr. Fechter to perform patient evaluations and submit a final pulmonary report and impairment evaluation. RLSR agreed to pay Dr. Fechter \$500 per evaluation for fifty clients that Mr. Rosenthal selected from hundreds of potential claimants. In January of 2006, Mr. Rosenthal provided Dr. Fechter with a \$25,000 retainer. The record establishes that this payment was sufficient to cover the fees associated with the requested patient evaluations and reports. Ultimately, prior to Dr. Fechter's completion of the fifty reports, Mr. Rosenthal informed Dr. Fechter that RLSR needed only 39 evaluations.

In 2010, well after the completion of any work performed pursuant to the referenced agreement between Dr. Fechter and RLSR, Dr. Fechter invoiced RLSR for patient evaluations and reports seeking the payment of funds in addition to the retainer amount. Dr. Fechter also sent various statements requesting payment for copayments and deductibles for unrequested medical treatment performed for individual patients. In response, RLSR sent a letter to Dr. Fechter denying any agreement for payment in excess of \$25,000. There is no record of Dr. Fechter ever responding to this letter.

Dr. Fechter was properly served with the Motion and Reply to the Motion. He has failed to file any response to the Motion or Reply, and also failed to produce any written agreement, or any other verifiable evidence, to establish that he is entitled to any funds in addition to the previously paid retainer.

B. Costs Incurred by Rosenthal, Levy, Simon & Ryles

RLSR incurred several categories of costs on behalf of its clients in the captioned matter pursuant to its Co-Counsel Agreement, along with the Leopold-Kuvin firm, to pay the expenses

necessary to litigate this action. As set forth in the affidavit of Gerald Rosenthal, these costs exceeded \$1.2 million, yet reimbursement for these costs totals only \$250,000.

No other attorneys involved in this matter have asserted any claim to these funds. Mr. Rosenthal's co-counsel, Leon Ortner, responded to the Motion by stating, "Ortner is seeking a complete adjudication as to the rights and responsibilities of all parties as to any monies which may be owed to Fechter; stated differently, if the Commission determines that Fechter is not owed any monies for costs, then said decision should be binding as to Ortner. On the other hand, if the Commission determines that Fechter is owed monies for costs, then said decision should be binding as to Ortner and said monies should come from those funds held in escrow."

With proof of these expenses established, in excess of the amount held on behalf of the Commission, the full amount of funds shall be released to RLSR.

C. Dr. Fechter is Not Entitled to Any Funds

While no claim by Dr. Fechter exists of record with the Commission, RLSR's Motion indicates that Dr. Fechter, a physician hired by RLSR, has made claims to the firm that he is due additional payment for services performed in the captioned matter. A deposition of Dr. Fechter took place on November 2, 2015, and portions of that deposition have been made a part of the record. Despite being served with the Motion and Reply to said Motion, he has filed no response or otherwise made any submission to the Commission in opposition to the Motion and/or said Reply.

1. Applicable Law

In order to prove his claim for an interest in the set-aside funds, Dr. Fechter is required to establish that he has a contractual right to such funds, as well as a calculable claim amount. He has failed to meet his legal burden.

The elements required for formation of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166

(2003). In order for a contract to arise, there must be a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

In addition, as a third-party to this matter attempting to assert a claim, the burden of proof lies with Dr. Fechter to prove that he is entitled to recovery from these funds, and not on any other person to establish that he is not entitled to these funds. See *Sunshine v. Furtick*, 114 S.C. 32, 102 S.E. 784, 785 (1920) (holding that a counterclaiming defendant carries the burden of proof as to his counterclaim).

The record before the Commission clearly provides that Dr. Fechter cannot establish that any contractual arrangement exists between Dr. Fechter and counsel for the claimants for either (1) evaluations the performance of which were never agreed to by claimants' counsel or (2) continued treatment of clients of counsel following the initial evaluation.

## 2. Dr. Fechter Lacks Any Rightful Claim to the Funds

Following Mr. Rosenthal's meetings in South Carolina with current and former employees of Nevamar in October 2005, the record establishes that RLSR hired Dr. Fechter to perform patient evaluations and final pulmonary reports. RLSR agreed to pay Dr. Fechter \$500 per evaluation.

In January of 2006, RLSR provided Dr. Fechter with a \$25,000 retainer. Ultimately, prior to Dr. Fechter's completion of the 50 reports that Mr. Rosenthal selected from hundreds of potential claimants, Mr. Rosenthal informed Dr. Fechter that RLSR needed only 39 evaluations. Dr. Fechter's burden is to establish an agreement with claimants' counsel to pay him additional fees in order for Dr. Fechter to make any recovery from the set-aside funds. In other words,

RLSR can only be responsible for payment based on an agreement between Dr. Fechter and claimants' counsel.

The testimony of Dr. Fechter establishes that claimants' counsel did not contract for Dr. Fechter to provide continued treatment across multiple visits, for the hundreds of patients involved in this matter. The letters of protection provided to Dr. Fechter prior to RSLR's involvement did not warrant payment to Dr. Fechter for the continued treatment of claimants or for any further services that were not authorized. Claimants' counsel neither contracted for nor authorized Dr. Fechter to perform any services after the initial evaluation and reports. Dr. Fechter's testimony further establishes that he made the decision to create and maintain continued doctor-patient relationships with the claimants.

There is no record or evidence to support that claimants' counsel asked for Dr. Fechter to perform additional services for these patients.

Dr. Fechter readily admits that he never signed a contract for the services he was to perform. The Commission finds that there is no agreement for claimants' counsel to pay for those additional services Dr. Fechter performed; therefore, there can be no liability for such payment.

The only document between Dr. Fechter and RLSR that reflects the existence of an agreement between Dr. Fechter and RLSR is a letter from 2010 from RLSR to Dr. Fechter that confirms that a \$25,000 retainer was paid for up to fifty evaluations. Notably, the record establishes that Dr. Fechter never responded to this letter.

In order to provide Dr. Fechter with more than a fair opportunity to make available evidence and testimony on his behalf in support of his claim, RLSR served him with a subpoena for the production of documents and for his deposition. In response, the record shows that he did not produce a single document that established a contractual relationship. He also failed to

produce a single document that indicated any terms of the alleged agreement to pay for continued treatment of these patients.

The record also clearly establishes that Dr. Fechter is not being deprived of any payment due him. The record establishes that Dr. Fechter received payments well in addition to \$25,000 from his patients, insurance companies, Medicare, and other third party sources. Because Dr. Fechter set up arrangements to be paid by insurers, to seek recovery from claimants' counsel would allow Dr. Fechter to either obtain a double recovery or to make up for shortfalls due to the discounted rates negotiated with the insurers. The remaining payment responsibility, if any, is not with claimants' counsel.

Dr. Fechter has already been paid a \$25,000 retainer for these evaluations. He admits receiving these funds.

D. A Balancing of the Equities Weighs in Favor of RLSR

Forfeitures or penalties are not favored in the law or equity. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011). Equity aids the vigilant and diligent. *Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989).

In addition to the reasons set forth above, a balancing of the equities weighs in favor of a release of the funds to RLSR. As provided in Dr. Fechter's testimony, in most of his cases he received 80% of the fees associated with his testing from payments through insurers. RLSR, on the other hand, has already greatly reduced the amount of reimbursement for costs it will recover from the captioned matter. At present, the recovery of costs has been limited to 21% of the total costs it incurred on behalf of its clients. Even with the awarding of the full \$500,000 to RLSR, this percentage will only increase to 62%. RLSR has already endured a greater decrease in the recovery of its expenses than Dr. Fechter. This Commission finds that a balancing of these percentages establishes that greater reimbursement should be provided to the party that has been

more greatly injured. In addition, RLSR should not be required to any forfeiture of reimbursement of costs that rightfully belongs to it.

Furthermore, RLSR has expended additional efforts to bring this matter in front of the Commission. Dr. Fechter has made no claim to the Commission, but RLSR has made the Commission aware of the alleged claim, and has given Dr. Fechter the ability to testify on his own behalf. Yet Dr. Fechter has never filed a claim with the Commission, any response to the instant Motion, or any lawsuit for breach of contract. As the vigilant and diligent party, from an equitable perspective, the Commission holds that RLSR is entitled to an award of the full sum of funds set aside and that Dr. Fechter is entitled to no compensation from claimants' counsel beyond what he has already been paid.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

- (1) The Motion to Release Funds is GRANTED;
- (2) The law firm of Rosenthal, Levy, Simon & Ryles is entitled to payment of the previously set aside funds of \$500,000.00, in full, as approved costs;
- (3) Dr. Cary E. Fechter has failed to establish any entitlement to recovery of any of the set aside funds;
- (4) Dr. Cary E. Fechter shall not take any portion of the set aside funds or be entitled to recovery of any other funds from claimants' counsel or from claimants; and
- (5) H. Mills Gallivan, as Special Referee, is directed to make the payment of the set aside funds, in the amount of \$500,000, to Rosenthal, Levy, Simon & Ryles as soon as practicable following his receipt of a copy of this Order, but in no event later than ten (10) days following receipt thereof.

AND IT IS SO ORDERED!

064

S.C. WORKERS' COMPENSATION COMMISSION



\_\_\_\_\_  
Commissioner Aisha Taylor

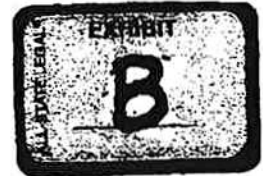
CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

January 26, 2016

By: Renee Smith, Administrative Assistant to Commissioner Taylor

Obv



BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 0326995 *et al.*

SADIE ADAMS, et al.,  
Employees/Claimants,  
vs.  
INTERNATIONAL PAPER COMPANY  
AND NEVAMAR COMPANY, LLC,  
Employers,  
and  
INTERNATIONAL PAPER COMPANY  
AND ACE AMERICAN INSURANCE  
CO., CARRIER FOR NEVAMAR,  
Carriers/  
Defendants.

ORDER

The Initial Report of the Special Referee, dated November 13, 2015 is before the South Carolina Workers' Compensation Commission for approval. The undersigned Commissioner has reviewed the Initial Report of the Special Referee, H. Mills Gallivan, Esquire and finds it to be in accordance with the terms and provisions of the Consent Order dated July 22, 2014, and the Order of the Commission dated May 27, 2015. The findings and decisions of the Special Referee are accepted by the South Carolina Workers' Compensation Commission;

FINDINGS OF FACT:

1. The Special Referee is hereby authorized to distribute the One Million Three Hundred Sixty-Two Thousand Seven Hundred Twenty-Eight and 77/100 (\$1,362,728.77) Dollars of the allocated amounts listed in the Special Referee's Initial Report; "Exhibit A - Allocation of Qualified Settlement Funds". Those checks shall be issued to each individual claimant and forwarded to Drake Rogers, Esquire, as attorney

066

for the defendants. Mr. Rogers shall coordinate with Leon Ortner, Esquire to deliver the checks, Clinchers/Final Releases and Form 19's for each and every one of these claims in Exhibit A.

2. The Initial Report of the Special Referee dated November 13, 2015 and the findings contained therein, are fully adopted by the South Carolina Workers' Compensation Commission and are the law of the case for each claim enumerated in Exhibit A of the Special Referee's Report.

3. The South Carolina Workers' Compensation Commission hereby approves the decisions made by the Special Referee with regard to the proceeds of settlement, including those Zero (\$0.00) Dollar allocations contained in Exhibit A.

4. All 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. The remaining death claims will be dismissed upon a subsequent finding by the Special Referee as to the appropriate dependents. Once the Special Referee issues his Final Report, and the checks are issued to the dependents, then the remaining death claims will be dismissed with prejudice and this matter shall be concluded.

5. The Judicial Department of the South Carolina Workers' Compensation Commission is hereby instructed to file a copy of the Initial Report of the Special Referee in each of the claims enumerated in Exhibit A, along with a copy of this Order.

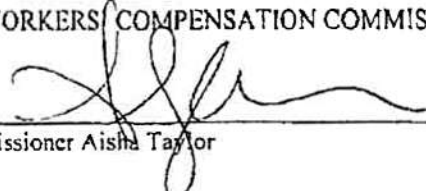
6. The undersigned Commissioner further finds this process to be fair and equitable to all parties involved and commends the Special Referee for the process used to evaluate and allocate the settlement funds.

NOW, THEREFORE, IT IS ORDERED that:

- 1) The Initial Report of the Special Referee is adopted and is hereby approved by the South Carolina Workers' Compensation Commission:
- 2) H. Mills Gallivan, Esquire, Special Referee shall issue checks totaling One Million Three Hundred Sixty-Two Thousand Seven Hundred Twenty-Eight and 77/100 (\$1,362,728.77) Dollars from the qualified settlement fund, to each claimant receiving funds and deliver the checks to Drake Rogers, Esquire as attorney for the defendants, who will deliver them to Leon Ortner, Esquire;
- 3) Leon Ortner, Esquire shall coordinate with Drake Rogers, Esquire to provide the Clinchers/Final Releases and Form 19's in all cases except the remaining death claims.
- 4) The South Carolina Workers' Compensation Commission will await the Final Report of the Special Referee with dependency findings as to deceased claimants

IT IS SO ORDERED,

S.C. WORKERS' COMPENSATION COMMISSION

  
\_\_\_\_\_  
Commissioner Aisha Taylor

12/10/2015  
Date

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By rgsmith on December 10, 2015

BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 0326995 *et al.*

SADIE ADAMS, et al.,  
Employees/Claimants,

vs.

INTERNATIONAL PAPER COMPANY  
AND NEVAMAR COMPANY, LLC,  
Employers,

and

INTERNATIONAL PAPER COMPANY  
AND ACE AMERICAN INSURANCE  
CO., CARRIER FOR NEVAMAR,  
Carriers/  
Defendants.

**INITIAL REPORT  
OF THE  
SPECIAL REFEREE**

Pursuant to the Consent Order of the Commission in this matter dated July 22, 2014. (See also Order dated May 27, 2015 appointing H. Mills Gallivan, Esquire as Special Referee) the following constitutes the Initial Report of the Special Referee.

1. Subsequent to the appointment of the Special Referee, the defendants paid to the Special Referee's trust account the sum of Three Million (\$3,000,000.00) Dollars. This money was deposited in the trust account of Gallivan White & Boyd, P.A. on May 5, 2015.

a. Thereafter on May 20, 2015, pursuant to an approved Form 61, the Special Referee disbursed a fee of One Million (\$1,000,000.00) Dollars in attorney's fees to David Pearlman, Leon Orner, Gerald Rosenthal, Malcolm Crosland, Ted Leopold, Ed Ricci, Spencer Kavin.

b. The Special Referee is currently holding in trust Five Hundred Thousand (\$500,000.00) Dollars in approved costs (See Form 61) pending instructions from

the claimant's attorneys regarding final disbursement of those funds or an order from the South Carolina Workers' Compensation Commission.

c. The Special Referee is currently holding in trust, qualified settlement funds of One Million Five Hundred Thousand (\$1,500,000.00) Dollars to be allocated amongst the three hundred and four (304) claimants who are participating in this qualified settlement fund process.

2. The Special Referee has received from both the claimant's attorneys and the defendant's attorneys, summaries of each individual claim, expert opinions, and death certificates. In addition, the Special Referee was contacted by several claimants who were inquiring about the settlement process. The Special Referee did not discuss the merits of their cases, but only advised of the timeline for the final allocation of settlement proceeds. Also, some claimants provided to the Special Referee additional information regarding their claims and this was duly noted.

All submitted materials were reviewed in depth by the Special Referee using the following double blind process.

a. The summaries and submissions from the claimants' attorneys were reviewed and each claim was categorized;

b. The submissions from the defendants' attorneys were reviewed and each claim was categorized;

c. The submitted expert opinions and medical reports were reviewed and factored into the categorizations in (a) and (b) above;

d. In claims where the claimant had died, the death certificate was reviewed and appropriate information was noted with regard to the cause of death.

e. A comparison of the initial categorizations in subparagraphs (a), (b), (c), and (d) was conducted in a side-by-side review and a combined value was established for each claim.

f. Thereafter, the Special Referee has conducted multiple reviews of all cases and valuations to conform and categorize each claim with regard to its relative value; and,

g. The individual allocations of qualified settlement fund proceeds were then prorated to come within the total One Million Five Hundred Thousand (\$1,500,000.00) qualified settlement fund being held in trust.

3. The final allocations and findings of the Special Referee are attached hereto and are incorporated herein and made a part of this report. "Exhibit A - Allocation of Qualified Settlement Funds", contains the final decision of the Special Referee for each claimant and the allocations of the qualified settlement funds which total an amount of One Million Five Hundred Thousand (\$1,500,000.00) Dollars.

a. These allocations of proceeds from the qualified settlement fund are net of any attorneys' fees and expenses. The approved attorneys' fees have already been disbursed from the Three Million (\$3,000,000.00) Dollars initially received and the approved costs of Five Hundred Thousand (\$500,000.00) Dollars will be distributed to the claimants' attorneys upon receipt of further instructions or an order from the South Carolina Workers' Compensation Commission.

4. The Special Referee is now ready to distribute qualified settlement fund proceeds in all cases except death cases, in the amount of One Million Three Hundred Sixty-Two Thousand Seven Hundred Twenty-Eight and 77/100 (\$1,362,728.77) Dollars. The

Special Referee will issue a check to each individual claimant in the amount specified in Exhibit A -- Allocation of Qualified Settlement Funds. These checks will be forwarded to Drake Rogers, Esquire as attorney for the defendants, who will deliver them to Lee Ortner, Esquire. Mr. Ortner shall coordinate disbursement of the checks with Drake Rogers, Esquire and provide to the defendants a signed Clincher Agreement and Form 19 for each and every claim enumerated in Exhibit A. The remaining qualified settlement funds for distribution in the amount of One Hundred Thirty-Seven Thousand Two Hundred Seventy-One and 23/100 (\$137,271.23) Dollars are allocated death benefits. Checks for the death benefits will be distributed to the appropriate beneficiaries upon the issuance of the Special Referee's Final Report with dependency findings.

NOW, THEREFORE, H. Mills Gallivan, Esquire as Special Referee in the above-captioned matter, specifically requests an Order from the Commission approving this Initial Special Referee's Report and authorizing the disbursement of One Million Three Hundred Sixty-Two Thousand Seven Hundred Twenty-Eight and 77/100 (\$1,362,728.77) Dollars in settlement proceeds to those claimants who have received an allocation of settlement funds. The remaining One Hundred Thirty-Seven Thousand Two Hundred Seventy-One and 23/100 (\$137,271.23) Dollars will be held and distributed to the appropriate beneficiaries upon issuance of the Final Special Referee Report with dependency findings.

Respectfully submitted,



H. Mills Gallivan, Esquire  
Special Referee  
GALLIVAN, WHITE & BOYD, P.A.

11/13/15  
Date

BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 0326995 *et al.*

SADIE ADAMS, et al.,  
Employees/Claimants,

vs.

INTERNATIONAL PAPER COMPANY  
AND NEVAMAR COMPANY, LLC,  
Employers,

and

INTERNATIONAL PAPER COMPANY  
AND ACE AMERICAN INSURANCE  
CO., CARRIER FOR NEVAMAR,  
Carriers/  
Defendants.

**O R D E R**

In accordance with the Mediation Agreement executed by the parties on April 1, 2014, and with the Consent Order approved by Commissioner Aisha Taylor on July 22, 2014, these matters are before the undersigned at the request of the parties to have a special referee appointed to make the determinations as to values on each claim and proper distribution of settlement funds. I hereby order and appoint Attorney H. Mills Gallivan, with the law firm of Gallivan, White & Boyd, P.A., to serve as the special referee in these matters, which were previously outlined in the settlement agreement. H. Mills Gallivan will have the authority from the Workers' Compensation Commission to make the decisions regarding settlement values and make findings on dependency/proper dependents in any claims where necessary.

AND IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION



\_\_\_\_\_  
Commissioner Aisha Taylor

**073**

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

May 27, 2015

By: Renee Smith, Administrative Assistant to Commissioner Taylor



BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NUMBER 0326995 *et al*

Sadie Adams, *et al*, )  
 )  
 Claimants, )  
 )  
 vs. )  
 )  
 International Paper Company and )  
 Nevamar Company, LLC, )  
 )  
 Employers, )  
 )  
 International Paper Company and Acc )  
 American Insurance Company, )  
 )  
 Carriers/ )  
 Defendants. )

CONSENT ORDER

These matters come before the Commission pursuant to an agreement between counsel for the parties involved. The parties, International Paper Company and Nevamar Company, LLC (Defendants) and Claimants, through their counsel (Rosenthal, Levy, Simon & Ryles; The Steinberg Law Firm, LLP; Spencer T. Kuvin, Esquire; and Leon Martin Ortner, Esquire), have entered into a consent agreement to resolve all pending claims against Defendants arising from the Hampton, South Carolina, facility and have agreed as follows:

1. The resolution of these claims and this specific agreement covers all matters in which International Paper and/or Nevamar have been named, and all such matters will be dismissed in their entirety. This agreement specifically does not apply to those matters where Westinghouse is the sole named defendant/employer.

2. Claimants' counsel agree to withdraw from representation of any remaining claims wherein the Claimants have refused to execute the Agreement to Submit

075

Workers' Compensation Claim to Binding Review Process. It is the understanding among the parties that those claims involve Latresa Doctor, Charles Hill, Tommy Jarrell, Stacy Orr, and Elliott E. Smith. Claimants' counsel will immediately file orders of withdrawal on these five matters.

3. Claimants' counsel further agree that this consent agreement applies to their entire inventory of claims against Defendants International Paper/Nevamar only, that they do not intend to seek additional claims against Defendants, that they will not assist any other counsel in pursuing claims from this facility against Defendants, and that they do not intend to file any further claims against Defendants arising from the Hampton, South Carolina, facility.

4. Any and all remaining claims currently pending on appeal to the Full Commission of the South Carolina Workers' Compensation Commission, which are currently stayed, will be dismissed with prejudice in their entirety as to all Defendants, including Westinghouse, as they will be included in the claims to be reviewed and decided by the Special Master referenced below.

5. The Defendants will deposit the sum specified in the April 1, 2014, Mediation Agreement into a qualified settlement fund to be administered by a Special Master (Judge Thomas Cooper or another attorney by mutual agreement of the parties). These claims will be presented to the Special Master for a determination of whether any benefits are due to each Individual Claimant and, if so, in what amounts. When attorneys' fees and costs are approved by the South Carolina Workers' Compensation Commission from the total gross settled amount, such amounts will be paid to Claimants' counsel from the qualified settlement fund from the total gross settled amount.

6. All interest accrued from the qualified settlement fund will be used to cover the costs, fees, and expenses incurred by the Special Master. The Defendants shall cover the costs, fees, and expenses of the Special Master that are in excess of the interest generated from the principal of the qualified settlement fund. The parties agree that the Defendants may negotiate the fee with the Special Master.

7. Counsel will contact Judge Thomas Cooper to secure his involvement in this process and to schedule a meeting as soon as feasibly possible with attorneys for both Defendants and Claimants.

8. After the meeting with the Special Master is concluded, the parties, based upon the recommendations and requests of the Special Master, will compile all relevant information for submission to the Special Master to assist him with making decisions as to settlement amounts, if any, appropriate for Individual Claimants.

9. The determinations of the Special Master regarding the benefits due, if any, to an Individual Claimant will be final and unappealable.

10. Once the Special Master has made his decision regarding individual claims, individual clinchers to include allocation language if necessary shall be executed on a doubtful and disputed basis on behalf of each Claimant and then filed with the Workers' Compensation Commission, thereby closing each individual claim. By signing the Agreement to Submit Workers' Compensation Claim to Binding Review Process, the Individual Claimants have expressly authorized their counsel to execute these clinchers on their behalf without the need for further action by any Individual Claimant.

11. Defendants shall cover the costs of determining and establishing any necessary Medicare Set-Asides and satisfy all Medicare or other governmental and conditional


liens, as well as the costs of negotiating the amounts of Medicare Set-Asides and liens with the Center of Medicare Services.

12. The Defendants will perform dependency investigations on any death claims where benefits are deemed to be due in accordance with the determination of the Special Master. The parties consent as well that the Special Master shall have the authority to approve any such dependents that are determined through the dependency investigations and that the South Carolina Workers' Compensation Commission will approve the same.

13. The total amount of the settlement, as well as the amount of any payment to an Individual Claimant, shall be confidential, with the exception of conversations of counsel between Claimants, their families, and/or financial advisors. All parties to this settlement agreement are hereby specifically bound by the confidentiality agreement.

The undersigned has reviewed this Consent Order, which has been agreed to by the parties, and finds this process to be fair and equitable to all parties involved. The South Carolina Workers' Compensation Commission will thereby approve any and all decisions made by the Special Master with regard to the proceeds of the settlement, if any, that are to be due to Individual Claimants under this consent agreement.

S.C. WORKERS' COMPENSATION COMMISSION

By:   
Aisha Taylor  
Commissioner

CERTIFICATE OF SERVICE


This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Renee Smith on July 22, 2014

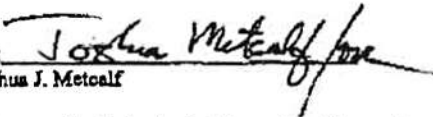
Columbia, South Carolina

WE SO CONSENT:

YOUNG CLEMENT RIVERS, LLP


By:   
F. Drake Rogers III

FORMAN PERRY WATKINS KRUTZ & TARDY, LLP

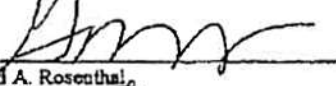
By:   
Joshua J. Metcalf

Attorneys for Defendants International Paper Company and Neenah Company, LLC

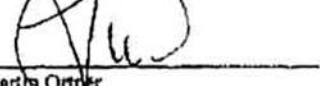
THE STEINBERG LAW FIRM, LLP

By:   
David T. Pearlman

ROSENTHAL, LEVY, SIMON & RYLES

By:   
Gerrit A. Rosenthal

ORTNER LAW FIRM, LLC

By:   
Leon Martha Ortner

COHEN & KUVIN, LLC

By: \_\_\_\_\_  
Spencer T. Kurvin

Attorneys for the Claimants

079

STATE OF SOUTH CAROLINA )

COUNTY OF CHARLESTON )

CARY E. FECHTER, M.D., )

PLAINTIFF, )

VS )

LEON MARTIN ORTNER, THE )  
ORTNER LAW FIRM LLC, GERALD )  
ROSENTHAL, AND ROSENTHAL, )  
LEVY, SIMON, AND RYLES,, )

DEFENDANT. )

IN THE COURT OF COMMON COURT

(JURY)

2017-CP-10-4371

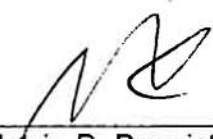
SUMMONS

JULIE A. ARMSTRONG  
CLERK OF COURT

2017 AUG 25 PM 1:59

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your answer on the subscriber in his office, 5115 Forest Dr., Suite G-1, Post Office Box 6833, Columbia, South Carolina, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint.

  
\_\_\_\_\_  
Melvin D. Bannister  
5115 Forest Dr., Suite G-1  
Post Office Box 6833  
Columbia, South Carolina 29260  
(803) 782-8688  
Attorney for the Plaintiff

17 day of August, 2017.

090

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 CARY E. FECHTER, M.D., )  
 )  
 PLAINTIFF, )  
 )  
 VS )  
 )  
 LEON MARTIN ORTNER, THE )  
 ORTNER LAW FIRM LLC, GERALD )  
 ROSENTHAL, AND ROSENTHAL, )  
 LEVY, SIMON, AND RYLES, )  
 )  
 DEFENDANTS. )

IN THE COURT OF COMMON PLEAS

(JURY)  
 2017-CR-10-4371

COMPLAINT

BY \_\_\_\_\_  
 JULIE J. ARPSTON  
 CLERK OF COURT  
 2017 AUG 25 PM 2:00

FILED

The Plaintiff would respectfully show unto the Court the following:

1. The Plaintiff is a resident of Charleston County, South Carolina;
2. The Defendant, Ortner, is, on information and belief is a resident of Charleston County, South Carolina; the Ortner Law Firm, is a limited liability corporation duly organized and existing under the laws of the State South Carolina, and is licensed to do business in South Carolina; the Defendant Rosenthal is a resident of the state of Florida; the Defendant, Rosenthal, Levy, Simon, and Ryles (hereinafter referred to as RLS&R) is a law firm/partnership practicing in the state of Florida.
3. The Plaintiff is a medical doctor.
4. The Defendant Ortner is an attorney and is the owner of the Defendant Ortner Law Firm.
5. In 2002 the Defendants Ortner and Ortner Law Firm retained the Plaintiff, for valuable consideration herein after discussed, to perform medical

031

examinations and make reports to the Defendants of the Defendants' clients in a Workers' Compensation case.

6. The Defendant Ortner at all times mentioned herein was acting individually and as an agent of the Defendant Ortner Law Firm LLC.
7. The parties agree to that the Plaintiff was to be paid the sum of Five Hundred (\$500) Dollars for the initial medical examination and report for each of the Defendants' clients. The Plaintiff was to be paid the sum of One Hundred Fifty (\$150) Dollars for subsequent/second examinations and reports and the Plaintiff was to be paid the sum of One Hundred (\$100) Dollars for a subsequent/third examination and report.
8. The parties also agreed that the Plaintiff was to be paid by the Defendants Ortner and the Ortner Law Firm for Pulmonary Function Tests, Stress Tests, and Sleep Study examinations, which were necessary for many of the impairment reports.
9. IN 2006 the Ortner Defendants associated the Defendant Rosenthal and his law firm RLS&R.
10. The Defendant Rosenthal at all times mentioned herein was acting individually and as an agent of the Defendant RLS&R.
11. The Defendants Rosenthal and his law firm affirmed the contract with the Plaintiff and agreed to pay the Plaintiff for his services rendered.
12. The Defendants Rosenthal and Defendant RLS&R paid to the Plaintiff the sum of Twenty-five Thousand (\$25,000) Dollars for the first Fifty (50) clients of the Defendants, which the Plaintiff examined and made reports.

082

13. The Plaintiff made initial examinations and initial reports of approximately Four Hundred Fifty-eight (458) clients of the Defendants.
14. The Plaintiff has made numerous subsequent examinations and reports on patients of the Defendants.
15. The Defendants further agreed to pay to the Plaintiff for all medical treatment charges, which were not covered by the client's health insurance coverage, including the payment of the deductibles from the said coverages.
16. The Defendants promised to pay and protect the Plaintiff's fees and that he would be paid in full upon settlement or verdict in the cases.
17. The Plaintiff is informed and believes the cases/matters were resolved on January 26, 2016.

**FOR A FIRST CAUSE OF ACTION**

(Breach of Contract)

18. The Defendants have failed to pay the Plaintiff the sums owed to him in breach of the contract between the parties.
19. The Plaintiff has fulfilled all of his obligations under this contract.
20. The Plaintiff has made demands for the payment of his fees upon the Defendants, to no avail.
21. That, as a direct and proximate result of said breach of contract, the Plaintiff has suffered damages.

**FOR A SECOND CAUSE OF ACTION**

(Fraud)

22. That each and every paragraph stated above is incorporated herein, as if fully restated herein verbatim.
23. That the Defendants have made or caused to be made fraudulent misrepresentations about the payment of the Plaintiff's fees.
24. That all such representations were false and misleading to the Plaintiff, who was not paid any fees after the payment for the initial Fifty (50) clients of the Defendants.
25. That all such representations that the Plaintiff was to be paid for his services were material to the Plaintiff in his decision to continue to perform additional examinations and make reports concerning the Defendants' clients.
26. That the Defendants, at all material times, intended that the representations concerning their payment of fees to the Plaintiff, would be relied upon.
27. That the Plaintiff was ignorant of the falsity of the Defendants' representations concerning the said payment of fees.
28. That the Plaintiff relied upon the representations of the Defendants.
29. That the Plaintiff had a right to rely upon the representations of the Defendants.
30. That due to said reliance, the Plaintiff has suffered damages.

034

**FOR A THIRD CAUSE OF ACTION**

(Breach of Contract with Fraudulent Intent)

31. That each and every paragraph stated above is incorporated herein, as if fully restated herein verbatim.
32. An actual and/or implied contract existed between the Plaintiff and the Defendants.
33. That the Defendants by and through it's agents, servants, and employees, acting within the course of employment and with fraudulent intent, relation to the breach of said contract and not merely it's making, did breach the same.
34. That said breach was accompanied by a fraudulent act and was the direct and proximate cause of damages to the Plaintiff.

**FOR A FOURTH CAUSE OF ACTION**

(Unfair Trade Practices)

35. The Plaintiff reiterates and re-alleges all of the allegations of the previous causes of action, as if repeated verbatim herein.
36. The Plaintiff has suffered an ascertainable loss of money as a result of the use or employment of an unfair trade practice by the Defendants or their agents in violation of section 39-5-20 of the 1976 South Carolina Code of Laws, as amended.
37. The actions and inactions of the Defendants are capable of being performed on other parties.
38. Pursuant to Section 39-5-40 of the said Code of Laws, the Plaintiff is entitled to attorney's fees, and costs of this action.

085


**FOR A FIFTH CAUSE OF ACTION**

(Pre-judgment Interest)

39. The Plaintiff reiterates and re-alleges all of the allegations of the previous causes of action, as if repeated verbatim herein.
40. The Plaintiff is informed and believes he is entitled to pre-judgment interest for each examination, test, study, and report completed by the Plaintiff from the date of each of the said examinations/tests/studies/reports.

WHEREFORE, the Plaintiff prays that the Court inquire into the matters herein and issue its judgment against the Defendant for actual damages, including past and future damages, in a reasonable amount; for appropriate punitive damages, for attorney's fees and costs, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

17 day of August, 2017.

  
\_\_\_\_\_  
Melvin D. Bannister  
Post Office Box 6833  
Columbia, South Carolina 29260  
(803) 782-8688  
Attorney for the Plaintiff

JURY TRIAL DEMANDED

086

FILED

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

2018 JAN -8 PM 2:59

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO.: 2017-CP-10-04371

JULIE J. ARMSTRONG  
CLERK OF COURT

Cary E. Fechter, MD,

BY \_\_\_\_\_

Plaintiff,

v.

Leon Martin Ortner, The Ortner Law Firm,  
LLC, Gerald Rosenthal, and Rosenthal, Levy,  
Simon, and Ryles,

Defendants.

**MOTION TO DISMISS  
ON BEHALF OF DEFENDANTS  
LEON MARTIN ORTNER AND  
THE ORTNER LAW FIRM, LLC**

PLEASE TAKE NOTICE that Defendants Leon Martin Ortner and The Ortner Law Firm, LLC ("Ortner Defendants"), by and through the undersigned counsel and specifically reserving the right to answer fully the allegations of the Complaint, will move this Court before pleading on the tenth (10th) day after service hereof or at such time and place as is convenient to the Court and counsel pursuant to Rules 12(b)(1), (3), (5) & (6), SCRCF, for an Order dismissing the causes of action asserted against the Ortner Defendants in the Complaint filed on August 25, 2017 ("Complaint").

**ARGUMENT SUMMARY**

The Ortner Defendants first move to dismiss Plaintiff's Complaint on the grounds that the South Carolina Workers' Compensation Commission previously exercised exclusive original jurisdiction over the subject matter of the causes of action asserted in the Complaint. As a result, the Circuit Court has been divested of jurisdiction to hear and determine the claims. Moreover, Plaintiff's failure to seek review of the prior administrative determinations of the material facts and legal issues in question constitute a bar to further litigation of the claims. Plaintiff is further barred from re-litigating the claims because the South Carolina Workers' Compensation Commission

actually and necessarily directly determined the material facts and issues of law sought to be litigated. In addition, Plaintiff failed to assert the claims in a timely manner and failed to plead facts sufficient to constitute the causes of action asserted. As a result, this Court should dismiss the entire Complaint with prejudice.

#### **ALLEGATIONS, UNDISPUTED FACTS & PROCEDURAL HISTORY<sup>1</sup>**

In the Complaint, Plaintiff alleges causes of action for breach of contract, fraud, breach of contract with fraudulent intent, unfair trade practices, and pre-judgment interest arising from allegations that Plaintiff should be further compensated for the performance of medical examinations and the issuance of medical reports for claimants involved in Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC (WCC File No. 0326995).<sup>2</sup> According to the Complaint, the Ortner Defendants retained Plaintiff to perform the medical examinations and provide the reports in 2002. (Compl. ¶ 5.) The Complaint also alleges that the Rosenthal Defendants paid Plaintiff the sum of Twenty-Five Thousand Dollars (\$25,000) for the examinations and reports of fifty claimants. (Compl. ¶ 12.) Plaintiff, however, alleges making initial examinations and reports for approximately four hundred fifty-eight claimants.<sup>3</sup> (Compl. ¶ 13.) The Complaint also alleges that the Ortner Defendants and the Rosenthal Defendants agreed to pay for all medical treatment

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<sup>1</sup> By restating allegations taken from the Complaint, the Ortner Defendants do not endorse their veracity. In fact, these defendants specifically reserve the right to require Plaintiff to meet his burden of proving each allegation.

<sup>2</sup> Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC involved the settlement of workers' compensation claims asserted by numerous individuals alleging injuries from exposure to toxic chemicals while working at the Nevamar plant in Hampton County, South Carolina. (See Or. Granting Mot. to Release Funds 2, Jan. 26, 2016, attached Exhibit A.)

<sup>3</sup> Plaintiff has previously been paid \$25,000 for the evaluations and reports. (Or. Granting Mot. to Release Funds 7, Jan. 26, 2016, attached Exhibit A.)

charges not covered by insurance and to make payment in full upon settlement or verdict.<sup>4</sup> (Compl. ¶ 15-16.) The Complaint does not allege the existence of any written agreement.<sup>5</sup> (*See* Compl.)

On April 1, 2014, the Nevamar claimants collectively settled their workers' compensation claims at mediation. (Consent Order ¶ 5, July 22, 2014, attached as Exhibit B.) Pursuant to the settlement agreement, the Nevamar defendants deposited the settlement funds into a qualified fund to be administered by a special referee from which all attorneys' fees and costs were also to be distributed upon approval of the South Carolina Workers' Compensation Commission ("Commission"). *Id.* On November 13, 2015, the special referee reported holding in trust Five Hundred Thousand Dollars in approved costs pending instructions from the claimants' attorneys regarding final disbursement or an order from the Commission. (Initial Report of the Special Referee ¶ 1(b), Nov. 13, 2015, attached as Exhibit C.) On December 10, 2015, Commissioner Aisha Taylor approved the special referee's decisions regarding the settlement proceeds. (Order ¶¶ 2-3, Dec. 10, 2015, attached as Exhibit D.)

In accordance with the Initial Report of the Special Referee ("Initial Report"), on November 18, 2015, the Rosenthal Defendants submitted to Commissioner Taylor a motion to release the funds held on deposit for the reimbursement of approved costs incurred on behalf of the Nevamar claimants. (Mot. to Release Funds, Nov. 18, 2015, attached as Exhibit E.) The Rosenthal Defendants properly served Plaintiff with the motion. (Or. Granting Mot. to Release Funds 3, Jan. 26, 2016, attached as Exhibit A.) In the motion, the Rosenthal Defendants sought the release of all of the funds held in trust to the Rosenthal Defendants. (*Id.* at 1.) The motion specifically asserted

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<sup>4</sup> For providing continuing treatment of claimants, Plaintiff has also "received payments well in addition to \$25,000 from his patients, insurance companies, Medicare, and other third party sources." (Or. Granting Mot. to Release Funds 7, Jan. 26, 2016, attached Exhibit A.)

<sup>5</sup> In fact, Plaintiff has previously testified that no written agreement exists. (Or. Granting Mot. to Release Funds 6, Jan. 26, 2016, attached Exhibit A.)

that Commissioner Taylor should deny any claims to the funds made by Plaintiff on the grounds that Plaintiff cannot establish any contractual right to any further payment. (Id.)

On November 30, 2015, the Ortner Defendants submitted a reply to the motion, similarly serving Plaintiff. (Reply to Mot. to Release Funds, Dec. 2, 2015, attached as Exhibit F; Or. Granting Mot. to Release Funds 3, Jan. 26, 2016, attached as Exhibit A.) In the reply, the Ortner Defendants requested that Commissioner Taylor inquire into Plaintiff's claims to additional payment and issue an order determining the rights of all concerned parties to the funds being held in trust. (Id. at ¶ 1.) The Ortner Defendants made no claim to the funds. (Id.) The Ortner Defendants simply sought complete adjudication of the rights and responsibilities of all parties to any monies which may be owed to Plaintiff. (Id. at ¶ 6.)

Plaintiff did not respond to the motion or reply. (Or. Granting Mot. to Release Funds 3, Jan. 26, 2016, attached as Exhibit A.) After Plaintiff failed to take the opportunity to litigate his contractual claims for further payment and claims to the funds held in trust, on January 26, 2016, Commissioner Taylor ordered the release of the totality of the funds held in trust to the Rosenthal Defendants. (Id.) In the order, Commissioner Taylor specifically found that: (1) Plaintiff was properly served with the Motion to Release Funds and the Reply of Leon Martin Ortner to Motion to Release Funds and failed to respond, (2) Plaintiff failed to establish entitlement to any funds in addition to those previously received, (3) Plaintiff cannot establish any contractual arrangement that would entitle Plaintiff to any additional funds, (4) no agreement exists obligating the Ortner Defendants or Rosenthal Defendants to pay for any of the additional services performed by Plaintiff, and (5) Plaintiff is not being deprived of any payment due. (Id. at 3, 5, 6-7.) Plaintiff was served with the Order Granting Motion to Release Funds on January 27, 2016. (Id. at 10.)

Plaintiff did not appeal the order. Instead, Plaintiff filed the Summons and Complaint in this Court on August 25, 2017.<sup>6</sup> Plaintiff provided a copy of the Summons and Complaint to the Ortner Defendants on or about December 7, 2017.

## ARGUMENT

### **I. The South Carolina Workers' Compensation Commission Previously Exercised Exclusive Original Jurisdiction Over the Subject Matter**

The Ortner Defendants first move to dismiss Plaintiff's Complaint on the grounds that this court lacks jurisdiction over the subject matter of the Complaint pursuant to Rule 12(b)(1), SCRCF, because the South Carolina Workers' Compensation Commission ("Commission") previously exercised exclusive original jurisdiction over the subject matter of the causes of action and divested the Circuit Court of jurisdiction to hear and determine the claims. (See Or. Granting Mot. to Release Funds, Jan. 26, 2016, attached as Exhibit A); see also Posey v. Proper Mold & Engineering, Inc., 378 S.C. 210, 222-25, 661 S.E.2d 395, 402-03 (Ct. App. 2008) (citing S.C. Code Ann. § 42-1-540); Allison v. W.L. Gore & Associates, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011); McGreery v. Covenant Presbyterian Church, 303 S.C. 271, 274, 400 S.E.2d 130, 131 (1990)). As a result, this Court lacks jurisdiction over the subject matter of Plaintiff's claims and should dismiss this action pursuant to Rule 12(b)(1), SCRCF.

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." Dove v. Gold Kist, Inc., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). "A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question." Allison, 394 S.C. at 188, 714 S.E.2d at 549. "A court

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<sup>6</sup> Plaintiff also filed a complaint with the Supreme Court of South Carolina's Office of Disciplinary Counsel alleging that Leon Martin Ortner failed to provide payment for the services rendered in Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC. (Letter from ODC to Dr. Cary E. Fechter (Mar. 2, 2016), attached as Exhibit G.) After an investigation, the ODC determined that there is no evidence of any misconduct on the part of Mr. Ortner. (Id.)

lacking subject matter jurisdiction . . . has no authority to act[.]” Dove, 314 S.C. at 238, 442 S.E.2d at 600. “This same principle applies to administrative agencies.” Allison, 394 S.C. at 188, 714 S.E.2d at 549.

“While the circuit court has subject matter jurisdiction over [general classes of] claims, certain cases may be taken from the circuit court’s original jurisdiction by the General Assembly.” Poch v. Bayshore Concrete Products/South Carolina, Inc., 386 S.C. 13, 22, 686 S.E.2d 689, 694 (Ct. App. 2009). For example, “[t]he General Assembly has vested the South Carolina Workers’ Compensation Commission with exclusive original jurisdiction over employees work-related injuries.” Posey, 378 S.C. at 223, 661 S.E.2d at 402 (citing Sabb v. S.C. State Univ., 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002)). Accordingly, “a Workers’ Compensation action is the exclusive means to determine claims against an individual’s employer for work-related accidents and injuries.” Id. at 224, 661 S.E.2d at 403.

As a part of this exclusive original jurisdiction, the Commission has the authority to determine all questions relating to workers’ compensation claims, including the disbursement of costs. S.C. Code § 42-3-180 (“All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission, except as otherwise provided in this title.”); S.C. Code Regs. § 67-1206 (“[A]n attorney may request approval of the actual costs incurred in the prosecution of a claim [including] expenses associated with the evaluation or treatment of the client.”). A party’s failure to raise to the Commission the factual issue of jurisdiction constitutes waiver. McGreery, 303 S.C. at 274, 400 S.E.2d at 131 (“Where subject matter jurisdiction depends upon a factual finding, a judicial decree determining such a fact does or does not exist cannot be challenged on collateral attack.”).

As the Commission properly exercised exclusive original jurisdiction over the subject matter of the causes of action asserted in the Complaint and Plaintiff failed to raise the factual issue of jurisdiction, the Circuit Court has been divested of jurisdiction to hear and determine the claims asserted in the Complaint. As a result, this Court should dismiss the Complaint pursuant to Rule 12(b)(1), SCRPC. (See Edens v. Bellini, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 2004) (affirming the grant of a motion to dismiss for lack of subject matter jurisdiction pursuant to exclusivity provision of the South Carolina Workers' Compensation Law).

**II. Plaintiff Failed to Exhaust All Available Administrative Remedies by Failing to Appeal the Order Granting Motion to Release Funds**

The Ortner Defendants also move to dismiss Plaintiff's Complaint on the grounds that Plaintiff's failure to appeal the Order Granting Motion to Release Funds precludes the instant action because Plaintiff failed to exhaust the administrative remedies provided for in the South Carolina Workers' Compensation Law. S.C. Code § 42-17-50 (providing a mandatory process for review of a single commissioner's ruling); S.C. Code § 42-17-60 (providing a mandatory process for review of the Commission's ruling); see also Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (affirming that failure to exhaust administrative remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute); Allison, 394 S.C. 185, 187-89, 714 S.E.2d 547, 548-50 (holding that the Commission lacked jurisdiction to hear an untimely appeal of a single commissioner's ruling). As a result, this Court should dismiss the instant action pursuant to Rules 12(b)(3) and (6), SCRPC.

The doctrine of exhaustion of administrative remedies comes into play "when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." Capital City Ins.

Co. v. BP Staff, Inc., 382 S.C. 92, 102, 674 S.E.2d 524, 530 (2009) (quoting Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 413, 563 S.E.2d 109, 115 (Ct. App. 2002)). “[D]ismissal may be proper under Rule 12(b)(6), SCRCP, for failure to state a claim where the opposing party is required to exhaust its administrative remedies as a matter of law, but failed to do so.” Id. at 101, 674 S.E.2d at 529 (citing Unisys Corp., 346 S.C. at 176, 551 S.E.2d at 273).

“The General Assembly has vested the South Carolina Workers’ Compensation Commission with exclusive original jurisdiction over employees work-related injuries.” Posey, 378 S.C. at 223, 661 S.E.2d at 402 (citing Sabb, 350 S.C. at 423, 567 S.E.2d at 234). As a part of this exclusive original jurisdiction, the Commission has the authority to determine all questions relating to workers’ compensation claims, including the disbursement of costs. S.C. Code § 42-3-180; S.C. Code Regs. § 67-1206.

The General Assembly prescribed mandatory rules for the administrative review of Commission determinations. See S.C. Code § 42-17-50; S.C. Code § 42-17-60; Allison, 394 S.C. 185, 187-89, 714 S.E.2d 547, 548-50. The South Carolina Workers’ Compensation Law (“SCWCL”) expressly provides that a party seeking review of a single commissioner’s ruling must seek review from the Commission within fourteen days of notice of the determination. S.C. Code § 42-17-50. The SCWCL also provides that a party must appeal a determination of the Commission by serving and filing a notice of appeal with the South Carolina Court of Appeals within thirty days of the determination. S.C. Code § 42-17-60. If not reviewed in due time, a determination “is conclusive and binding as to all questions of fact.” Id. The South Carolina Supreme Court has held that the Commission lacks jurisdiction over a single commissioner’s determination where not timely appealed. Allison, 394 S.C. at 188-89, 714 S.E.2d at 549-50.

In this matter, the Commission properly exercised exclusive original jurisdiction over the approval and disbursement of attorney's fees and costs, which required an adjudication of the claims asserted in the Complaint. Although properly served with the Motion to Release Funds, Reply of Leon Martin Ortner to Motion to Release Funds, and Order Granting Motion to Release Funds, Plaintiff failed to pursue his claims before the Commission prior to the disbursal of the funds held in trust. Plaintiff also failed to pursue the statutorily prescribed remedies to review Commissioner Taylor's determination that neither the Ortner Defendants nor the Rosenthal Defendants have failed to pay Plaintiff any sums owed to him. Plaintiff did not seek review by the Commission within fourteen days of service of the order. Plaintiff did not serve and file notice of appeal with the Court of Appeals within thirty days of service of the order. As a result, Plaintiff is precluded from now invoking the original jurisdiction of the circuit court to adjudicate these claims and this Court should dismiss the instant action pursuant to Rules 12(b)(3) and (6), SCRPC.

**III. The South Carolina Workers' Compensation Commission Actually and Necessarily Directly Determined Plaintiff's Claims**

The Ortner Defendants also move to dismiss Plaintiff's Complaint on the grounds that Plaintiff's claims are barred by the doctrines of collateral estoppel, estoppel by record, laches, waiver, equitable estoppel, and res judicata because Plaintiff's claims have been actually and necessarily litigated and directly determined in an action in which Plaintiff had a full and fair opportunity to litigate the claims. (See Or. Granting Mot. to Release Funds, Jan. 26, 2016, attached as Exhibit A.) As a result, Plaintiff is precluded from re-litigating these claims in the instant action.

“Collateral estoppel prevents a party from re-litigating an issue in a subsequent suit which was actually and necessarily litigated and determined in a prior action.” Crosby v. Prysmian Communications Cables and Systems USA, LLC, 397 S.C. 101, 108, 723 S.E.2d 813, 816-17 (Ct.

App. 2012) (affirming that a trial court properly gave preclusive effect to a factual finding of the Workers' Compensation Commission (quoting Aaron v. Mahl, 381 S.C. 585, 592, 674 S.E.2d 482, 486 (2009))). Accordingly, "under the doctrines of res judicata and collateral estoppel, the decision of an administrative tribunal precludes the relitigation of the issues addressed by that tribunal in a collateral action." Bennett v. S.C. Dep't of Corr., 305 S.C. 310, 312, 408 S.E.2d 230, 231 (1991); see also Grausz v. Englander, 321 F.3d 467 (4th Cir. 2003) (precluding a non-party with a pecuniary interest in the outcome of a fee application proceeding from asserting a later claim).

"A party precluded from relitigating an issue with an opposing party . . . is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue." Beall v. Doc, 281 S.C. 363, 315 S.E.2d 186 (1984) (quoting Restatement (Second) of Judgments § 29 at 291-92 (1982)). "[T]he primary concern of our courts in applying collateral estoppel is not whether the parties satisfy the mutuality requirement, but whether a potentially precluded party had a full and fair opportunity to litigate the issues in a prior action." Snavely v. AMISUB of South Carolina, 379 S.C. 386, 398, 665 S.E.2d 222, 227 (Ct. App. 2008); see also Patel v. Garrett Law Firm, PC, No. 2011-186586, 2013 WL 8538731, at \*1 (S.C. Ct. App. June 26, 2013) (affirming the preclusion of a non-party from relitigating proximate cause). A party is also precluded pursuant to the doctrine of estoppel by record "to deny the truth of matters set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction." Watson v. Goldsmith, 205 S. C. 215, 215, 31 S. E. 2d 317, 320 (1944).

In addition, "[e]quitable estoppel precludes a party from asserting rights 'he otherwise would have had against another' when his own conduct renders assertion of those rights contrary to equity." Pearson v. Hilton Head Hosp., 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App. 2012)

(quoting Long v. Silver, 248 F.3d 309, 316 (4th Cir. 2001)). “[E]quitable estoppel focuses on a party’s detrimental reliance on another party’s conduct[.]” Strickland v. Strickland, 375 S.C. 76, 85, 650 S.E.2d 465, 471 (2007). “For example, one who delays unreasonably could be said to be estopped from asserting a claim if another has relied on that delay to his detriment.” Id.

A party may also voluntarily and intentionally relinquish or abandon a known right. Strickland, 375 S.C. at 83-86, 650 S.E.2d at 469-71 (discussing the doctrines of waiver and laches). “Laches is an equitable doctrine defined as ‘neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.’” Id. at 83, 650 S.E.2d at 469 (quoting Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). “In order to establish laches as a defense, a defendant must show that the complaining party unreasonably delayed its assertion of a right, resulting in prejudice to the defendant.” Id. (citing Kelley v. Kelley, 368 S.C. 602, 606, 629 S.E.2d 388, 391 (Ct. App. 2006)).

“The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the ‘voluntary and intentional relinquishment or abandonment of a known right[.]’” Id. at 85, 650 S.E.2d at 470 (quoting Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). Waiver “may be implied from circumstances indicating an intent to waive.” Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 478-79, 451 S.E.2d 924, 929 (Ct. App. 1994). “Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver.” Id.

In the Complaint, Plaintiff asserts claims for further compensation for the performance of medical examinations, the issuance of medical reports, and continuing treatment rendered for claimants involved in Sadie Adams, et al., v. International Paper Company and Nevamar Company,

LLC.<sup>7</sup> (See Compl.) In that action, the Commission properly exercised exclusive original jurisdiction over the approval and disbursement of attorney's fees and costs. (Or. Granting Mot. to Release Funds 2, Jan. 26, 2016, attached as Exhibit A.) In the adjudication of those matters, Commissioner Taylor actually and necessarily directly determined the material facts and issues of law underlying Plaintiff's claims, including any rights to payment of fees and the rights of all concerned parties to the funds being held in trust from which all attorney's fees and costs were to be distributed. (Id. at 1-7.) Commissioner Taylor also properly considered and adjudicated the claims of all parties having any pecuniary interest in the funds. (Id.) As a result of that litigation, Commissioner Taylor specifically determined that Plaintiff cannot establish contractual entitlement to any of the funds held in trust and that neither the Ortner Defendants nor the Rosenthal Defendants have any obligation to pay Plaintiff any additional sums. (Id. at 4-7.)

Plaintiff had the full and fair opportunity to litigate his claims for further payment in involved in Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC. In fact, Plaintiff responded to a subpoena for any documents supporting his claims and provided deposition testimony regarding any right to additional compensation.<sup>8</sup> (Id. at 6-7.) After Plaintiff failed to respond to the motion and reply, Commissioner Taylor issued a detailed order specifically addressing the claims now asserted in the instant action. (Id. at 1-7.) Plaintiff similarly failed to contest the order.

Instead, Plaintiff filed a complaint with the Supreme Court of South Carolina's Office of Disciplinary Counsel ("ODC") alleging that the Ortner Defendants failed to provide payment for

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<sup>7</sup> Plaintiff has previously been paid \$25,000 for the evaluations and reports. (Or. Granting Mot. to Release Funds 7, Jan. 26, 2016, attached Exhibit A.) In addition, Plaintiff has "received payments well in addition to \$25,000 from his patients, insurance companies, Medicare, and other third party sources." (Id.)

<sup>8</sup> Plaintiff failed to produce a single document that established a contractual relationship or entitling him to further compensation and testified that he never signed a contract entitling him to payment for any additional services. (Or. Granting Mot. to Release Funds 6-7, Jan. 26, 2016, attached as Exhibit A.)

services rendered in Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC. (Letter from ODC to Dr. Cary E. Fechter (Mar. 2, 2016), attached as Exhibit G.) After conducting an investigation, the ODC determined that there was no evidence of lawyer misconduct on the part of the Ortner Defendants. (Id.) Plaintiff similarly failed to seek review of the ODC's determination. As the South Carolina Rules of Professional Conduct specifically address an attorney's duties where a third party asserts claims to disputed funds in the attorney's possession, see Moore v. Weinberg, 373 S.C. 209, 223-26, 644 S.E.2d 740, 747-48 (Ct. App. 2007), the ODC actually and necessarily directly determined that the Ortner Defendants did not violate a duty to disburse any funds to Plaintiff. (See Letter from ODC to Dr. Cary E. Fechter (Mar. 2, 2016), attached as Exhibit G.) As a result, Plaintiff is precluded from now alleging that the Ortner Defendants violated any duty owed to Plaintiff by failing to disburse to Plaintiff any of the funds held in trust.

After failing to exercise diligence by taking the full and fair opportunities provided to litigate his rights to further payment prior to the disbursal of the funds held in trust, Plaintiff cannot now re-litigate his claims to trust funds already disbursed or to additional payment from the defendants, particularly where the Nevamar parties, attorneys, and others participating in the action relied upon the finality of the prior adjudication. By failing to pursue these claims before Commissioner Taylor, the Commission, the Court of Appeals, and the ODC, Plaintiff voluntarily and intentionally relinquished and abandoned his right to assert the claims. As a result, Plaintiff is precluded from re-litigating these claims in the instant action after unreasonable and unexplained delay in seeking to protect his previously adjudicated rights and this Court should dismiss the instant action pursuant to Rule 12(b)(6), SCRPC.

#### IV. The Service of Process is Insufficient Because Plaintiff Failed to Serve the Summons and Complaint Within the Statute of Limitations

An action upon a contract, obligation, or liability, express or implied, must be commenced within three years. S.C. Code § 15-3-530. “Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence.” Maheer v. Tietex Corp., 331 S.C. 371, 376-77, 500 S.E.2d 204, 207 (Ct. App. 1998). “A cause of action should have been discovered through exercise of reasonable diligence when the facts and circumstances would have put a person of common knowledge and experience on notice that some right had been invaded or a claim against another party might exist.” Id. at 377, 500 S.E.2d at 207.

In the Complaint, Plaintiff alleges that the Ortner Defendants retained Plaintiff to perform medical examinations and make reports in a workers’ compensation case in 2002. (Compl. ¶ 5.) The Complaint further alleges that the defendants promised to pay and protect Plaintiff’s fees with payment due in full upon settlement or verdict. (Compl. ¶ 16.) Plaintiff alleges making initial examinations and initial reports for approximately four hundred fifty-eight claimants. (Compl. ¶ 13.) The Complaint also alleges that the Ortner Defendants and the Rosenthal Defendants agreed to pay for all medical treatment charges not covered by insurance. (Compl. ¶ 15-16.) The Complaint does not allege the existence of any written agreement. (See Compl.)

The Nevamar claimants collectively settled their workers’ compensation claims at mediation on April 1, 2014.<sup>9</sup> (Consent Order ¶ 5, July 22, 2014, attached as Exhibit B.) The exercise of reasonable diligence by a sophisticated party claiming a pecuniary interest in fees owed for the

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<sup>9</sup> The collective mediation and settlement occurred after trials and verdicts in thirteen cases, which commenced on March 12, 2012.

examination and continued treatment of four hundred fifty-eight claimants would have put Plaintiff on notice of the settlement and arising right to payment on or around the settlement of those claims at mediation. As a result, the applicable statute of limitations required Plaintiff to commence any action to recover any amounts owed on or about July 22, 2017. Nevertheless, Plaintiff delayed filing the Summons and Complaint until August 25, 2017—after the disbursement of the funds held in trust for the express purpose of satisfying legitimate claims for such costs—and did not provide the Ortnier Defendants with a copy until on or about December 7, 2017. As a result, this Court should dismiss the instant action pursuant to Rule 12(b)(5), SCRCP, because service of process is insufficient and the statute of limitations precludes Plaintiff from asserting these claims.

**V. The Complaint Fails to State Facts Sufficient to Constitute a Cause of Action for Violations of the South Carolina Unfair Trade Practices Act**

The South Carolina Unfair Trade Practices Act (“SCUTPA”) declares unlawful “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” S.C. Code § 39-5-10(a). “An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive.” deBonds v. Carlton Motorcars, Inc., 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000) (citing Young v. Century Lincoln-Mercury, Inc., 302 S.C. 320, 396 S.E.2d 105 (Ct. App. 1989)). “A deceptive practice is one which has a tendency to deceive.” Id.

“To be actionable under the [SC]UTPA, the unfair or deceptive act or practice must have an impact upon the public interest.” Id. at 270, 536 S.E.2d at 407 (citing Haley Nursery Co. v. Forrest, 298 S.C. 520, 381 S.E.2d 906 (1989)). “An unfair or deceptive act or practice has an impact upon the public interest if the act or practice has the potential for repetition.” Id. “There are two general ways to demonstrate the potential for repetition: (1) by showing the same kind of actions occurred in the

past, thus making it likely the actions will continue absent some deterrence, or (2) by showing the company's procedures create a potential for repetition of the unfair and deceptive acts. Id. (citing Crary v. Djebelli, 329 S.C. 385, 496 S.E.2d 21 (1998)).

The SCUTPA declares various specific acts to be unfair trade practices, including pyramid clubs, requiring certain insurance coverage, misrepresenting geographic origin, deceptive or misleading advertisements of live musical performances, false, deceptive, or misleading attorney advertising, price gouging during an emergency, charitable solicitation during emergencies, and certain practices by vehicle glass repair businesses. S.C. Code §§ 39-5-30, 35, 37, 38(B), 39, 145, 147, 170. In determining whether an act or practice violates SCUTPA, South Carolina courts also "will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to § 5(a) (1) of the Federal Trade Commission Act (15 U.S.C.45(a)(1)), as from time to time amended." S.C. Code § 39-5-10(b).

"The SCUTPA is unavailable to redress private wrongs if the public interest is unaffected." Ardis v. Cox, 314 S.C. 512, 518, 431 S.E.2d 267, 271 (Ct. App. 1993) (citing LaMotte v. The Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988); Noack Enterprises, Inc. v. Country Corner Interiors, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986)). "A deliberate or intentional breach of a valid contract, without more, does not constitute a violation of the SCUTPA." Id. at 519, 431 S.E.2d at 271 (citing The Key Co., Inc. v. Fameco Distributors, Inc., 292 S.C. 524, 357 S.E.2d 476 (Ct. App. 1987)).

In the Complaint, Plaintiff fails to allege anything more than a deliberate breach of a contract. (See Compl.) The Complaint does not allege that any action by the Ortner Defendants had an impact upon the public interest. (See id.) In fact, the Complaint merely alleges that "[t]he actions and inactions of the Defendants are capable of being performed on other parties." (Compl. ¶ 37.)

Accordingly, the allegations contained in the Complaint fail to allege facts sufficient to constitute a cause of action for violation of the South Carolina Unfair Trade Practices Act. As a result, this Court should dismiss the Unfair Trade Practices cause of action pursuant to Rule 12(b)(6), SCRPC.

**CONCLUSION**

For the foregoing reasons, this Court should dismiss with prejudice the Summons and Complaint pursuant to Rules 12(b)(1), (3), (5) & (6), SCRPC. This motion is further based upon the pleadings, the exhibits to this motion, applicable South Carolina jurisprudence, any affidavits and memoranda as may be submitted, and any other such matter as may be acceptable to the Court.

**BARNWELL WHALEY PATTERSON &  
HELMS, LLC**



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*Attorneys for Defendants Leon Martin Ortner  
& The Ortner Law Firm, LLC*

January 5, 2018

# Exhibit "A"

**BEFORE THE SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION**

Sadie Adams, <i>et al.</i> ,	)	WCC File No.: 0326995 <i>et al.</i>
Claimants,	)	
vs.	)	
International Paper Company and Nevamar Company, LLC,	)	<b>ORDER GRANTING MOTION TO RELEASE FUNDS</b>
Employers,	)	
International Paper Company and Ace American Insurance Company,	)	
Carriers/Defendants.	)	

This matter came before the Commission by way of Motion to Release Funds filed by Rosenthal, Levy, Simon & Ryles ("RLSR"), attorneys for the Claimants, on November 18, 2015. Attorney Leon Ortner submitted a Reply in support of the Motion, dated November 30, 2015. No other persons made any submissions. For the reasons set forth herein, the Motion is GRANTED. As further detailed herein, RLSR shall be remitted the full \$500,000.00 balance of set aside funds for reimbursement of approved costs incurred on behalf of its clients.

**PROCEDURAL STATUS AND AUTHORITY**

The captioned action was settled pursuant to agreements to settle the individual claims for the Nevamar facility. Pursuant to the Initial Report of the Special Referee who was appointed to manage the distribution of settlement proceeds, the Special Referee is currently holding in trust Five Hundred Thousand Dollars (\$500,000.00) in approved costs pending a decision regarding final disbursement of those funds. The undersigned Commissioner entered a Consent Order on July 22, 2014, to allow for the appointment of a special referee to assist with final disbursements of funds. On May 27, 2015, the undersigned appointed H. Mills Gallivan as Special Referee, providing him with authority to complete the proper distribution of the settlement funds. With the approved costs remaining undistributed, the undersigned

Commissioner has the authority to make a determination concerning final distribution of these set aside funds.

The Commission has the statutory and regulatory authority and jurisdiction to dispense with all matters relating to workers' compensation claims, including the disbursement of costs. See S.C. CODE ANN. §§ 42-3-140, 42-3-180 ("All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission..."); S.C. CODE ANN. REGS. §§ 67-215 (authority to hear motions), 67-1206 (Commission's authority to approve costs); *Williams v. S.C. Dep't of Juvenile Justice*, 2011 WL 8005008, at \*4, WCC Nos: 0808819 and 9404048 (WCC June 7, 2011) (Commission asserting jurisdiction over attorneys' fees and costs pursuant to S.C. CODE ANN. REGS. § 67-215).

#### **FINDINGS OF FACT**

The following facts are established by the documents submitted in support of the Motion, the Reply to said Motion, including affidavits, documents, and the deposition testimony of Dr. Cary E. Fechter.

##### **A. Background of Claim**

In October of 2005, Gerald Rosenthal, a partner in RLSR, was engaged to assist with the workers' compensation claims in the captioned matter. Each potential claimant may have been exposed to toxic chemicals while working at the Nevamar plant in Hampton County, South Carolina. Mr. Rosenthal travelled to South Carolina to meet with more than 600 current and former Nevamar employees. After these initial meetings, RLSR proceeded with representing many of these employees in the captioned matter.

Retaining experts was one part of presenting the claimants' claims to the Commission. Prior to Gerald Rosenthal's involvement in this action, claimants' counsel Leon Ortner sent a letter of protection for each claimant to Dr. Fechter stating, among other things, that Dr.

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Fechter's fee will be protected in this matter and he will be paid in full upon settlement or verdict. When Gerald Rosenthal entered this action on or about 2005, all financial arrangements relative to Dr. Fechter from that time forward were made between Dr. Fechter and RLSR.

RLSR retained Dr. Fechter to perform patient evaluations and submit a final pulmonary report and impairment evaluation. RLSR agreed to pay Dr. Fechter \$500 per evaluation for fifty clients that Mr. Rosenthal selected from hundreds of potential claimants. In January of 2006, Mr. Rosenthal provided Dr. Fechter with a \$25,000 retainer. The record establishes that this payment was sufficient to cover the fees associated with the requested patient evaluations and reports. Ultimately, prior to Dr. Fechter's completion of the fifty reports, Mr. Rosenthal informed Dr. Fechter that RLSR needed only 39 evaluations.

In 2010, well after the completion of any work performed pursuant to the referenced agreement between Dr. Fechter and RLSR, Dr. Fechter invoiced RLSR for patient evaluations and reports seeking the payment of funds in addition to the retainer amount. Dr. Fechter also sent various statements requesting payment for copayments and deductibles for unrequested medical treatment performed for individual patients. In response, RLSR sent a letter to Dr. Fechter denying any agreement for payment in excess of \$25,000. There is no record of Dr. Fechter ever responding to this letter.

Dr. Fechter was properly served with the Motion and Reply to the Motion. He has failed to file any response to the Motion or Reply, and also failed to produce any written agreement, or any other verifiable evidence, to establish that he is entitled to any funds in addition to the previously paid retainer.

B. Costs Incurred by Rosenthal, Levy, Simon & Ryles

RLSR incurred several categories of costs on behalf of its clients in the captioned matter pursuant to its Co-Counsel Agreement, along with the Leopold-Kuvin firm, to pay the expenses

necessary to litigate this action. As set forth in the affidavit of Gerald Rosenthal, these costs exceeded \$1.2 million, yet reimbursement for these costs totals only \$250,000.

No other attorneys involved in this matter have asserted any claim to these funds. Mr. Rosenthal's co-counsel, Leon Ortner, responded to the Motion by stating, "Ortner is seeking a complete adjudication as to the rights and responsibilities of all parties as to any monies which may be owed to Fechter; stated differently, if the Commission determines that Fechter is not owed any monies for costs, then said decision should be binding as to Ortner. On the other hand, if the Commission determines that Fechter is owed monies for costs, then said decision should be binding as to Ortner and said monies should come from those funds held in escrow."

With proof of these expenses established, in excess of the amount held on behalf of the Commission, the full amount of funds shall be released to RLSR.

C. Dr. Fechter is Not Entitled to Any Funds

While no claim by Dr. Fechter exists of record with the Commission, RLSR's Motion indicates that Dr. Fechter, a physician hired by RLSR, has made claims to the firm that he is due additional payment for services performed in the captioned matter. A deposition of Dr. Fechter took place on November 2, 2015, and portions of that deposition have been made a part of the record. Despite being served with the Motion and Reply to said Motion, he has filed no response or otherwise made any submission to the Commission in opposition to the Motion and/or said Reply.

I. Applicable Law

In order to prove his claim for an interest in the set-aside funds, Dr. Fechter is required to establish that he has a contractual right to such funds, as well as a calculable claim amount. He has failed to meet his legal burden.

The elements required for formation of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166

(2003). In order for a contract to arise, there must be a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

In addition, as a third-party to this matter attempting to assert a claim, the burden of proof lies with Dr. Fechter to prove that he is entitled to recovery from these funds, and not on any other person to establish that he is not entitled to these funds. See *Sunshine v. Furtlick*, 114 S.C. 32, 102 S.E. 784, 785 (1920) (holding that a counterclaiming defendant carries the burden of proof as to his counterclaim).

The record before the Commission clearly provides that Dr. Fechter cannot establish that any contractual arrangement exists between Dr. Fechter and counsel for the claimants for either (1) evaluations the performance of which were never agreed to by claimants' counsel or (2) continued treatment of clients of counsel following the initial evaluation.

## 2. Dr. Fechter Lacks Any Rightful Claim to the Funds

Following Mr. Rosenthal's meetings in South Carolina with current and former employees of Nevamar in October 2005, the record establishes that RLSR hired Dr. Fechter to perform patient evaluations and final pulmonary reports. RLSR agreed to pay Dr. Fechter \$500 per evaluation.

In January of 2006, RLSR provided Dr. Fechter with a \$25,000 retainer. Ultimately, prior to Dr. Fechter's completion of the 50 reports that Mr. Rosenthal selected from hundreds of potential claimants, Mr. Rosenthal informed Dr. Fechter that RLSR needed only 39 evaluations. Dr. Fechter's burden is to establish an agreement with claimants' counsel to pay him additional fees in order for Dr. Fechter to make any recovery from the set-aside funds. In other words,

RLSR can only be responsible for payment based on an agreement between Dr. Fechter and claimants' counsel.

The testimony of Dr. Fechter establishes that claimants' counsel did not contract for Dr. Fechter to provide continued treatment across multiple visits, for the hundreds of patients involved in this matter. The letters of protection provided to Dr. Fechter prior to RSLR's involvement did not warrant payment to Dr. Fechter for the continued treatment of claimants or for any further services that were not authorized. Claimants' counsel neither contracted for nor authorized Dr. Fechter to perform any services after the initial evaluation and reports. Dr. Fechter's testimony further establishes that he made the decision to create and maintain continued doctor-patient relationships with the claimants.

There is no record or evidence to support that claimants' counsel asked for Dr. Fechter to perform additional services for these patients.

Dr. Fechter readily admits that he never signed a contract for the services he was to perform. The Commission finds that there is no agreement for claimants' counsel to pay for those additional services Dr. Fechter performed; therefore, there can be no liability for such payment.

The only document between Dr. Fechter and RLSR that reflects the existence of an agreement between Dr. Fechter and RLSR is a letter from 2010 from RLSR to Dr. Fechter that confirms that a \$25,000 retainer was paid for up to fifty evaluations. Notably, the record establishes that Dr. Fechter never responded to this letter.

In order to provide Dr. Fechter with more than a fair opportunity to make available evidence and testimony on his behalf in support of his claim, RLSR served him with a subpoena for the production of documents and for his deposition. In response, the record shows that he did not produce a single document that established a contractual relationship. He also failed to

produce a single document that indicated any terms of the alleged agreement to pay for continued treatment of these patients.

The record also clearly establishes that Dr. Fechter is not being deprived of any payment due him. The record establishes that Dr. Fechter received payments well in addition to \$25,000 from his patients, insurance companies, Medicare, and other third party sources. Because Dr. Fechter set up arrangements to be paid by insurers, to seek recovery from claimants' counsel would allow Dr. Fechter to either obtain a double recovery or to make up for shortfalls due to the discounted rates negotiated with the insurers. The remaining payment responsibility, if any, is not with claimants' counsel.

Dr. Fechter has already been paid a \$25,000 retainer for these evaluations. He admits receiving these funds.

D. A Balancing of the Equities Weighs in Favor of RLSR

Forfeitures or penalties are not favored in the law or equity. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011). Equity aids the vigilant and diligent. *Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989).

In addition to the reasons set forth above, a balancing of the equities weighs in favor of a release of the funds to RLSR. As provided in Dr. Fechter's testimony, in most of his cases he received 80% of the fees associated with his testing from payments through insurers. RLSR, on the other hand, has already greatly reduced the amount of reimbursement for costs it will recover from the captioned matter. At present, the recovery of costs has been limited to 21% of the total costs it incurred on behalf of its clients. Even with the awarding of the full \$500,000 to RLSR, this percentage will only increase to 62%. RLSR has already endured a greater decrease in the recovery of its expenses than Dr. Fechter. This Commission finds that a balancing of these percentages establishes that greater reimbursement should be provided to the party that has been

more greatly injured. In addition, RLSR should not be required to any forfeiture of reimbursement of costs that rightfully belongs to it.

Furthermore, RLSR has expended additional efforts to bring this matter in front of the Commission. Dr. Fechter has made no claim to the Commission, but RLSR has made the Commission aware of the alleged claim, and has given Dr. Fechter the ability to testify on his own behalf. Yet Dr. Fechter has never filed a claim with the Commission, any response to the instant Motion, or any lawsuit for breach of contract. As the vigilant and diligent party, from an equitable perspective, the Commission holds that RLSR is entitled to an award of the full sum of funds set aside and that Dr. Fechter is entitled to no compensation from claimants' counsel beyond what he has already been paid.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

- (1) The Motion to Release Funds is GRANTED;
- (2) The law firm of Rosenthal, Levy, Simon & Ryles is entitled to payment of the previously set aside funds of \$500,000.00, in full, as approved costs;
- (3) Dr. Cary E. Fechter has failed to establish any entitlement to recovery of any of the set aside funds;
- (4) Dr. Cary E. Fechter shall not take any portion of the set aside funds or be entitled to recovery of any other funds from claimants' counsel or from claimants; and
- (5) H. Mills Gallivan, as Special Referee, is directed to make the payment of the set aside funds, in the amount of \$500,000, to Rosenthal, Levy, Simon & Ryles as soon as practicable following his receipt of a copy of this Order, but in no event later than ten (10) days following receipt thereof.

AND IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION



\_\_\_\_\_  
Commissioner Aisha Taylor

CERTIFICATE OF SERVICE

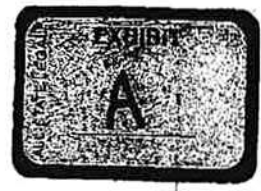
This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid, in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

January 26, 2016

By: Renee Smith, Administrative Assistant to Commissioner Taylor



# Exhibit "B"



BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NUMBER 0326995 *et al*

Sadie Adams, *et al*, )  
 )  
 Claimants, )  
 )  
 vs. )  
 )  
 International Paper Company and )  
 Nevamar Company, LLC, )  
 )  
 Employers, )  
 )  
 International Paper Company and Ace )  
 American Insurance Company, )  
 )  
 Carriers/ )  
 Defendants. )

CONSENT ORDER

These matters come before the Commission pursuant to an agreement between counsel for the parties involved. The parties, International Paper Company and Nevamar Company, LLC (Defendants) and Claimants, through their counsel (Rosenthal, Levy, Simon & Ryles; The Steinberg Law Firm, LLP; Spencer T. Kuvin, Esquire; and Leon Martin Ortnor, Esquire), have entered into a consent agreement to resolve all pending claims against Defendants arising from the Hampton, South Carolina, facility and have agreed as follows:

1. The resolution of these claims and this specific agreement covers all matters in which International Paper and/or Nevamar have been named, and all such matters will be dismissed in their entirety. This agreement specifically does not apply to those matters where Westinghouse is the sole named defendant/employer.
2. Claimants' counsel agree to withdraw from representation of any remaining claims wherein the Claimants have refused to execute the Agreement to Submit

116

Workers' Compensation Claim to Binding Review Process. It is the understanding among the parties that those claims involve Latresa Doctor, Charles Hill, Tommy Jurrell, Stacy Orr, and Elliott E. Smith. Claimants' counsel will immediately file orders of withdrawal on these five matters.

3. Claimants' counsel further agree that this consent agreement applies to their entire inventory of claims against Defendants International Paper/Nevamar only, that they do not intend to seek additional claims against Defendants, that they will not assist any other counsel in pursuing claims from this facility against Defendants, and that they do not intend to file any further claims against Defendants arising from the Hampton, South Carolina, facility.

4. Any and all remaining claims currently pending on appeal to the Full Commission of the South Carolina Workers' Compensation Commission, which are currently stayed, will be dismissed with prejudice in their entirety as to all Defendants, including Westinghouse, as they will be included in the claims to be reviewed and decided by the Special Master referenced below.

5. The Defendants will deposit the sum specified in the April 1, 2014, Mediation Agreement into a qualified settlement fund to be administered by a Special Master (Judge Thomas Cooper or another attorney by mutual agreement of the parties). These claims will be presented to the Special Master for a determination of whether any benefits are due to each Individual Claimant and, if so, in what amounts. When attorneys' fees and costs are approved by the South Carolina Workers' Compensation Commission from the total gross settled amount, such amounts will be paid to Claimants' counsel from the qualified settlement fund from the total gross settled amount.

6. All interest accrued from the qualified settlement fund will be used to cover the costs, fees, and expenses incurred by the Special Master. The Defendants shall cover the costs, fees, and expenses of the Special Master that are in excess of the interest generated from the principal of the qualified settlement fund. The parties agree that the Defendants may negotiate the fee with the Special Master.

7. Counsel will contact Judge Thomas Cooper to secure his involvement in this process and to schedule a meeting as soon as feasibly possible with attorneys for both Defendants and Claimants.

8. After the meeting with the Special Master is concluded, the parties, based upon the recommendations and requests of the Special Master, will compile all relevant information for submission to the Special Master to assist him with making decisions as to settlement amounts, if any, appropriate for Individual Claimants.

9. The determinations of the Special Master regarding the benefits due, if any, to an Individual Claimant will be final and unappealable.

10. Once the Special Master has made his decision regarding individual claims, individual clinchers to include allocation language if necessary shall be executed on a doubtful and disputed basis on behalf of each Claimant and then filed with the Workers' Compensation Commission, thereby closing each individual claim. By signing the Agreement to Submit Workers' Compensation Claim to Binding Review Process, the Individual Claimants have expressly authorized their counsel to execute these clinchers on their behalf without the need for further action by any Individual Claimant.

11. Defendants shall cover the costs of determining and establishing any necessary Medicare Set-Asides and satisfy all Medicare or other governmental and conditional


liens, as well as the costs of negotiating the amounts of Medicare Set-Asides and liens with the Center of Medicare Services.

12. The Defendants will perform dependency investigations on any death claims where benefits are deemed to be due in accordance with the determination of the Special Master. The parties consent as well that the Special Master shall have the authority to approve any such dependents that are determined through the dependency investigations and that the South Carolina Workers' Compensation Commission will approve the same.

13. The total amount of the settlement, as well as the amount of any payment to an Individual Claimant, shall be confidential, with the exception of conversations of counsel between Claimants, their families, and/or financial advisors. All parties to this settlement agreement are hereby specifically bound by the confidentiality agreement.

The undersigned has reviewed this Consent Order, which has been agreed to by the parties, and finds this process to be fair and equitable to all parties involved. The South Carolina Workers' Compensation Commission will thereby approve any and all decisions made by the Special Master with regard to the proceeds of the settlement, if any, that are to be due to Individual Claimants under this consent agreement.

S.C. WORKERS' COMPENSATION COMMISSION

By:   
Aisha Taylor  
Commissioner

CERTIFICATE OF SERVICE


This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By Renee Smith on July 22, 2014


Columbia, South Carolina

WE SO CONSENT:

YOUNG CLEMENT RIVERS, LLP


By:   
F. Drake Rogers III

FORMAN PERRY WATKINS KRUTZ & TARDY, LLP

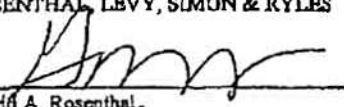
By:   
Joshua J. Metcalf

Attorneys for Defendants International Paper Company and Nevenmar Company, LLC

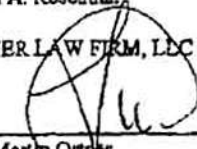
THE STEINBERG LAW FIRM, LLP

By:   
David T. Pearhnan

ROSENTHAL, LEVY, SIMON & RYLES

By:   
Gerald A. Rosenthal

ORTNER LAW FIRM, LLC

By:   
Leon Martha Ortner

COHEN & KUVIN, LLC

By: \_\_\_\_\_  
Spencer T. Kavin

Attorneys for the Claimants

# Exhibit "C"

BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 0326995 *et al.*

SADIE ADAMS, et al.,  
Employees/Claimants,

vs.

INTERNATIONAL PAPER COMPANY  
AND NEVAMAR COMPANY, LLC,  
Employers,

and

INTERNATIONAL PAPER COMPANY  
AND ACE AMERICAN INSURANCE  
CO., CARRIER FOR NEVAMAR,  
Carriers/  
Defendants.

**INITIAL REPORT  
OF THE  
SPECIAL REFEREE**

Pursuant to the Consent Order of the Commission in this matter dated July 22, 2014. (See also Order dated May 27, 2015 appointing H. Mills Gallivan, Esquire as Special Referee) the following constitutes the Initial Report of the Special Referee.

1. Subsequent to the appointment of the Special Referee, the defendants paid to the Special Referee's trust account the sum of Three Million (\$3,000,000.00) Dollars. This money was deposited in the trust account of Gallivan White & Boyd, P.A. on May 5, 2015.

a. Thereafter on May 20, 2015, pursuant to an approved Form 61, the Special Referee disbursed a fee of One Million (\$1,000,000.00) Dollars in attorney's fees to David Pearlman, Leon Ortner, Gerald Rosenthal, Malcolm Crosland, Ted Leopold, Ed Ricci, Spencer Kuvin.

b. The Special Referee is currently holding in trust Five Hundred Thousand (\$500,000.00) Dollars in approved costs (See Form 61) pending instructions from

the claimant's attorneys regarding final disbursement of those funds or an order from the South Carolina Workers' Compensation Commission.

c. The Special Referee is currently holding in trust, qualified settlement funds of One Million Five Hundred Thousand (\$1,500,000.00) Dollars to be allocated amongst the three hundred and four (304) claimants who are participating in this qualified settlement fund process.

2. The Special Referee has received from both the claimant's attorneys and the defendant's attorneys, summaries of each individual claim, expert opinions, and death certificates. In addition, the Special Referee was contacted by several claimants who were inquiring about the settlement process. The Special Referee did not discuss the merits of their cases, but only advised of the timeline for the final allocation of settlement proceeds. Also, some claimants provided to the Special Referee additional information regarding their claims and this was duly noted.

All submitted materials were reviewed in depth by the Special Referee using the following double blind process.

a. The summaries and submissions from the claimants' attorneys were reviewed and each claim was categorized;

b. The submissions from the defendants' attorneys were reviewed and each claim was categorized;

c. The submitted expert opinions and medical reports were reviewed and factored into the categorizations in (a) and (b) above;

d. In claims where the claimant had died, the death certificate was reviewed and appropriate information was noted with regard to the cause of death.

e. A comparison of the initial categorizations in subparagraphs (a), (b), (c), and (d) was conducted in a side-by-side review and a combined value was established for each claim.

f. Thereafter, the Special Referee has conducted multiple reviews of all cases and valuations to conform and categorize each claim with regard to its relative value; and,

g. The individual allocations of qualified settlement fund proceeds were then prorated to come within the total One Million Five Hundred Thousand (\$1,500,000.00) qualified settlement fund being held in trust.

3. The final allocations and findings of the Special Referee are attached hereto and are incorporated herein and made a part of this report. "Exhibit A - Allocation of Qualified Settlement Funds", contains the final decision of the Special Referee for each claimant and the allocations of the qualified settlement funds which total an amount of One Million Five Hundred Thousand (\$1,500,000.00) Dollars.


a. These allocations of proceeds from the qualified settlement fund are net of any attorneys' fees and expenses. The approved attorneys' fees have already been disbursed from the Three Million (\$3,000,000.00) Dollars initially received and the approved costs of Five Hundred Thousand (\$500,000.00) Dollars will be distributed to the claimants' attorneys upon receipt of further instructions or an order from the South Carolina Workers' Compensation Commission.

4. The Special Referee is now ready to distribute qualified settlement fund proceeds in all cases except death cases, in the amount of One Million Three Hundred Sixty-Two Thousand Seven Hundred Twenty-Eight and 77/100 (\$1,362,728.77) Dollars. The

Special Referee will issue a check to each individual claimant in the amount specified in Exhibit A – Allocation of Qualified Settlement Funds. These checks will be forwarded to Drake Rogers, Esquire as attorney for the defendants, who will deliver them to Lee Orner, Esquire. Mr. Orner shall coordinate disbursement of the checks with Drake Rogers, Esquire and provide to the defendants a signed Clincher Agreement and Form 19 for each and every claim enumerated in Exhibit A. The remaining qualified settlement funds for distribution in the amount of One Hundred Thirty-Seven Thousand Two Hundred Seventy-One and 23/100 (\$137,271.23) Dollars are allocated death benefits. Checks for the death benefits will be distributed to the appropriate beneficiaries upon the issuance of the Special Referee's Final Report with dependency findings.

NOW, THEREFORE, H. Mills Gallivan, Esquire as Special Referee in the above-captioned matter, specifically requests an Order from the Commission approving this Initial Special Referee's Report and authorizing the disbursement of One Million Three Hundred Sixty-Two Thousand Seven Hundred Twenty-Eight and 77/100 (\$1,362,728.77) Dollars in settlement proceeds to those claimants who have received an allocation of settlement funds. The remaining One Hundred Thirty-Seven Thousand Two Hundred Seventy-One and 23/100 (\$137,271.23) Dollars will be held and distributed to the appropriate beneficiaries upon issuance of the Final Special Referee Report with dependency findings.

Respectfully submitted,



H. Mills Gallivan, Esquire  
Special Referee  
GALLIVAN, WHITE & BOYD, P.A.

11/13/15  
Date

# Exhibit "D"



BEFORE THE  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NO. 0326995 *et al.*

SADIE ADAMS, et al.,  
Employees/Claimants,  
vs.  
INTERNATIONAL PAPER COMPANY  
AND NEVAMAR COMPANY, LLC,  
Employers,  
and  
INTERNATIONAL PAPER COMPANY  
AND ACE AMERICAN INSURANCE  
CO., CARRIER FOR NEVAMAR,  
Carriers/  
Defendants.

**ORDER**

The Initial Report of the Special Referee, dated November 13, 2015 is before the South Carolina Workers' Compensation Commission for approval. The undersigned Commissioner has reviewed the Initial Report of the Special Referee, H. Mills Gallivan, Esquire and finds it to be in accordance with the terms and provisions of the Consent Order dated July 22, 2014, and the Order of the Commission dated May 27, 2015. The findings and decisions of the Special Referee are accepted by the South Carolina Workers' Compensation Commission;

FINDINGS OF FACT:

1. The Special Referee is hereby authorized to distribute the One Million Three Hundred Sixty-Two Thousand Seven Hundred Twenty-Eight and 77/100 (\$1,362,728.77) Dollars of the allocated amounts listed in the Special Referee's Initial Report; "Exhibit A - Allocation of Qualified Settlement Funds". Those checks shall be issued to each individual claimant and forwarded to Drake Rogers, Esquire, as attorney

for the defendants. Mr. Rogers shall coordinate with Leon Ortner, Esquire to deliver the checks, Clinchers/Final Releases and Form 19's for each and every one of these claims in Exhibit A.

2. The Initial Report of the Special Referee dated November 13, 2015 and the findings contained therein, are fully adopted by the South Carolina Workers' Compensation Commission and are the law of the case for each claim enumerated in Exhibit A of the Special Referee's Report.

3. The South Carolina Workers' Compensation Commission hereby approves the decisions made by the Special Referee with regard to the proceeds of settlement, including those Zero (\$0.00) Dollar allocations contained in Exhibit A.

4. All 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. The remaining death claims will be dismissed upon a subsequent finding by the Special Referee as to the appropriate dependents. Once the Special Referee issues his Final Report, and the checks are issued to the dependents, then the remaining death claims will be dismissed with prejudice and this matter shall be concluded.

5. The Judicial Department of the South Carolina Workers' Compensation Commission is hereby instructed to file a copy of the Initial Report of the Special Referee in each of the claims enumerated in Exhibit A, along with a copy of this Order.

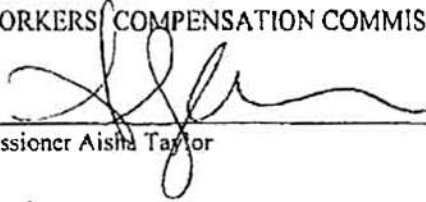
6. The undersigned Commissioner further finds this process to be fair and equitable to all parties involved and commends the Special Referee for the process used to evaluate and allocate the settlement funds.

NOW, THEREFORE, IT IS ORDERED that:

- 1) The Initial Report of the Special Referee is adopted and is hereby approved by the South Carolina Workers' Compensation Commission;
- 2) H. Mills Gallivan, Esquire, Special Referee shall issue checks totaling One Million Three Hundred Sixty-Two Thousand Seven Hundred Twenty-Eight and 77/100 (\$1,362,728.77) Dollars from the qualified settlement fund, to each claimant receiving funds and deliver the checks to Drake Rogers, Esquire as attorney for the defendants, who will deliver them to Leon Ortner, Esquire;
- 3) Leon Ortner, Esquire shall coordinate with Drake Rogers, Esquire to provide the Clinchers/Final Releases and Form 19's in all cases except the remaining death claims.
- 4) The South Carolina Workers' Compensation Commission will await the Final Report of the Special Referee with dependency findings as to deceased claimants

IT IS SO ORDERED,

S.C. WORKERS' COMPENSATION COMMISSION

  
\_\_\_\_\_  
Commissioner Aisha Taylor

12/10/2015  
Date

CERTIFICATE OF SERVICE

This is to certify that the undersigned has on this date served a copy of this order in the above entitled action upon all parties to this case by sending an electronic copy hereof by electronic mail addressed to the attorneys for said parties; or if there is an unrepresented party(ies), by depositing a copy hereof, postage paid in the United States mail, first class, addressed to the unrepresented party(ies) and to the attorney(s) for the represented party(ies).

By *rgsmith* on December 10, 2015

# Exhibit "E"



pulmonary report and impairment evaluation for up to fifty clients that Mr. Rosenthal selected from hundreds of potential claimants. [*Id.* ¶ 10] RLSR agreed to pay Dr. Fechter \$500 per evaluation for these fifty clients. The case strategy involved pursuing forty to fifty cases with full reports concerning their impairment; if these claims were successful, the results of these cases would be translated to the general population of claimants. [*Id.* ¶ 12] In January of 2006, Mr. Rosenthal provided Dr. Fechter with a \$25,000 retainer, which was sufficient to cover the fees associated with the requested patient evaluations and reports. [*Id.* ¶ 11] Ultimately, prior to Dr. Fechter's completion of the fifty reports, Mr. Rosenthal informed Dr. Fechter that RLSR needed only 39 evaluations. [*Id.* ¶ 12]

In 2010, well after the completion of any work performed pursuant to the referenced agreement between Dr. Fechter and RLSR, Dr. Fechter invoiced RLSR for patient evaluations and reports well in excess of the agreed upon fifty reports, seeking the payment of funds in addition to the retainer amount. [Aff. of E. Cueto ¶ 5, attached hereto as **Exhibit B**] Dr. Fechter also sent various statements requesting payment for copayments and deductibles for unrequested medical treatment performed for individual patients. In response, RLSR sent a letter to Dr. Fechter denying any agreement for payment in excess of \$25,000. [Aff. G. Rosenthal ¶ 13] Dr. Fechter never responded to this letter. [*Id.*]

It was not until 2014 that Dr. Fechter attempted to reassert a claim to additional fees. Dr. Fechter cannot produce any written agreement, or any other verifiable evidence, that he is entitled to any funds in addition to the previously paid retainer.

Pursuant to the settlement documents and orders of record in this matter, and supported by the information set forth herein, all funds held by the Commission should rightfully be released to RLSR.

### CASE STATUS

The captioned action was settled pursuant to agreements to settle the individual claims for the Nevamar facility. Pursuant to the Initial Report of the Special Referee who was appointed to manage the distribution of settlement proceeds, the special referee is currently holding in trust Five Hundred Thousand Dollars (\$500,000.00) in approved costs pending a decision regarding final disbursement of those funds. Aisha Taylor, as a Commissioner of the South Carolina Workers' Compensation Commission, entered a Consent Order on July 22, 2014, to allow for the appointment of a special referee to assist with final disbursements of funds. On May 27, 2015, Ms. Taylor appointed H. Mills Gallivan as special referee, providing him with authority to complete the proper distribution of the settlement funds. With the approved costs remaining undistributed, the Commissioner has the authority to make a determination concerning final distribution of these set-aside funds. The disbursement of funds relating to costs is the final item to be completed concerning the Nevamar claims.

The Commission has the statutory and regulatory authority and jurisdiction to dispense with all matters relating to a workers' compensation claims, including the disbursement of costs. See S.C. CODE ANN. §§ 42-3-140, 42-3-180 ("All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission..."); S.C. CODE ANN. REGS. §§ 67-215 (authority to hear motions), 67-1206 (Commission's authority to approve costs); *Williams v. S.C. Dep't of Juvenile Justice*, 2011 WL 8005008, at \*4, WCC Nos: 0808819 and 9404048 (WCC June 7, 2011) (Commission asserting jurisdiction over attorneys' fees and costs pursuant to S.C. CODE ANN. REGS. § 67-215).

**COSTS INCURRED BY ROSENTHAL, LEVY, SIMON & RYLES**

RLSR incurred several categories of costs on behalf of its clients in the captioned matter. These costs exceeded \$1.2 million [Aff. G. Rosenthal ¶ 7], yet reimbursement for these costs totals only \$250,000, less than 21% of the total costs and expenses incurred. [Id. ¶ 8] A summary of the costs incurred by RLFR on behalf of its clients in the captioned matter is attached hereto as Exhibit C.

Each of these costs was incurred by the firm in the prosecution of the claims in this matter, and, as noted in the special referee's report, have already been approved. As a part of the settlement of these cases, RLSR is only being reimbursed a small portion of its overall costs. [Aff. G. Rosenthal ¶ 8] Upon information and belief, no other attorneys involved in this matter assert any claim to these funds. With proof of these expenses established, in excess of the amount held by the Commission, the full amount of funds set aside should be released to RLSR.

**CLAIM OF DR. CARY FECHTER**

Upon information and belief, no other attorneys, including the attorneys for the Defendants and the Claimants, are making a claim to the funds set aside in this matter. The only other party that may claim an interest in such funds, upon information and belief, is Dr. Cary Fechter, a physician hired by RLSR to evaluate a certain subset of claimants and provide reports concerning those evaluations.

A. Applicable Law

In order to prove his claim for an interest in the set-aside funds, Dr. Fechter must establish that he has a contractual right to such funds, and must establish a calculable claim amount. He cannot do so.

The elements required for formation of a contract are an offer, acceptance, and valuable consideration. *Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 406, 581 S.E.2d 161, 166

(2003). In order for a contract to arise, there must be a meeting of the minds of the parties involved with regard to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 893 (1989). The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).

In addition, as a third-party to this matter attempting to assert a claim, the burden of proof lies on Dr. Fechter to prove that he is entitled to recovery from these funds, and not on any other person to establish that he is not entitled to these funds. See *Sunshine v. Furtick*, 114 S.C. 32, 102 S.E. 784, 785 (1920) (holding that a counterclaiming defendant carries the burden of proof as to his counterclaim).

Dr. Fechter cannot establish that any contractual arrangement exists for either (1) evaluations the performance of which were never agreed to by RLSR or (2) continued treatment of clients of RLSR following the evaluation.

B. Dr. Fechter Lacks Any Rightful Claim to the Funds

Following Mr. Rosenthal's meetings in South Carolina with current and former employees of Nevamar in October 2005, RLSR hired Dr. Fechter to perform patient evaluations and final pulmonary reports for up to fifty clients selected by Mr. Rosenthal from hundreds of potential claimants. RLSR agreed to pay Dr. Fechter \$500 per evaluation.<sup>1</sup>

In January of 2006, RLSR provided Dr. Fechter with a \$25,000 retainer,<sup>2</sup> which was sufficient to cover the fees associated with the patient evaluations and requested reports. Ultimately, prior to Dr. Fechter's completion of the 50 reports, Mr. Rosenthal informed Dr.

<sup>1</sup> Dr. Fechter agrees that the fee per evaluation was \$500. However, Dr. Fechter alleges that any update to a report would have a fee of \$150 or \$100. Dr. Fechter admits that communications concerning these additional charges never took place with Mr. Rosenthal. [Deposition of Cary Fechter, November 2, 2015, p. 143] [Cited excerpts from Dr. Fechter's deposition are attached hereto as Exhibit E.

<sup>2</sup> Dr. Fechter admits to receipt of this payment. [Fechter Depo. p. 9]

Fechter that RLSR needed only 39 evaluations. The initial lead local attorney was Leon Ortner. Dr. Fechter admits that Mr. Ortner and Mr. Rosenthal are attorneys from different firms. [Fechter Depo. p. 9-10] As a simple rule of contract formation, Mr. Ortner ordinarily cannot bind Mr. Rosenthal for any agreement he may have had with Dr. Fechter. There is no evidence of any agency or other exception to this rule in this matter. Upon information and belief, the other attorneys agree that the set-aside funds rightfully belong to RLSR. Therefore, Dr. Fechter must establish an agreement by RLSR to pay him additional fees in order for Dr. Fechter to make any recovery from the set-aside funds. In other words, RLSR can only be responsible for payment based on an agreement between Dr. Fechter and the firm.

The Firm contracted with Dr. Fechter to perform one-time evaluations:

Q. [Y]ou're retained to do essentially an independent medical exam of the patient. Is that right?

A. Yes.

[Fechter Depo. p. 39-40]

It did not contract for Dr. Fechter to provide treatment, let alone continued treatment across multiple visits, for the hundreds of patients involved in this matter. RLSR neither contracted for nor authorized Dr. Fechter to perform any services after the initial evaluation and reports. [Aff. of G. Rosenthal ¶ 14; Aff. E. Cueto ¶ 5] Dr. Fechter made the decision to establish continued doctor-patient relationships with the claimants (as opposed to one-time independent examinations, as we agreed to by RLSR).

Q. If you were doing an independent exam, would that normally involve -- it sounds like there were follow up visits?

A. Yes, they always involve follow up, if they're sick.

Q. With you as an expert or you as treating physician?

A. As a treating physician.

Q. So you became the treating physician of many of these patients?

A. For many years. Some of them for many years.

[Fechter Depo. p. 40]

Dr. Fechter admits that there is a clear distinction between performing an evaluation and treating a patient:

Q. And if you were treating them, I mean, there's a difference between doing an independent medical exam and then treating a patient, right?

A. Absolutely. One is just looking and the other is getting involved.

[Fechter Depo. p. 40]

There is no record or evidence to support that RLSR asked for Dr. Fechter to "get involved" with these patients. The record only supports that a limited number of evaluations were required. Where there is no agreement for RLSR to pay for such services, there can be no liability for such payment.

Dr. Fechter readily admits that he never signed a contract for the services he was to perform:

Q. You never did sign a contract with Mr. Ortner?

A. No...

[Fechter Depo. p. 8]

Q. Did you ever sign any kind of contract or receive any kind of letter like that from Mr. Rosenthal?

A. No...

[Fechter Depo. p. 9]

In fact, he rarely even talked with Mr. Rosenthal:

Q. You're saying you had a conversation with both Mr. Ortner and Mr. Rosenthal about?

A. I almost never spoke to Gerald directly.

[Fechter Depo. p. 46]

The only document that reflects an agreement between Dr. Fechter and RLSR is a letter from 2010 from RLSR to Dr. Fechter that confirms that a \$25,000 retainer was paid for up to fifty evaluations. [Ex. 1 to Aff. of G. Rosenthal] Dr. Fechter's office never responded to this letter.

In order to provide Dr. Fechter with a fair opportunity to make available evidence and testimony on his behalf in support of his claim, he was served with a subpoena for the production of documents and for his deposition. [Subpoena and amended subpoenas are attached hereto as Exhibit D] In response, he did not produce a single document that established a contractual relationship between he and RLSR. He also failed to produce a single document that indicates any terms of the alleged agreement to pay for continued treatment of these patients.

Rather than there being an agreement for RLSR to pay Dr. Fechter for more than \$25,000, one of two scenarios likely exists: (1) Dr. Fechter was acting as a treating physician and voluntarily chose to continue treating his patients, some of whom may have been referred to Dr. Fechter as part of litigation, or (2) Dr. Fechter sought to perform services as an expert witness without the Firm's authorization. Either way, RLSR does not owe Dr. Fechter for the additional services performed.

If Dr. Fechter treated the referred clients as patients after Dr. Fechter completed the initial evaluation and reports, then RLSR is not responsible for paying for the patients' treatment. In fact, Dr. Fechter admits that RLSR is not responsible for the continued treatment of these patients:

A. I was asked to do independent medical examinations and Lee and Gerald fully understood that I was still medically managing it to determine permanency of injury.

Q. How did they understand that?

A. Because I told them I'm doing it. They said do it, go for it. We want our patients to know that they have a great doctor. And certainly, there are no complaints from the patients.

Q. And that's for your continued treatment of those patients?

A. Yes, which they are not responsible for those bills.

Q. Who is not?

A. The Ortner or Rosenthal firms.

[Fechter Depo. p. 43-44]

Because the patients chose to continue treatment with Dr. Fechter, the patients, insurance companies, Medicare, or other third party sources are responsible for paying Dr. Fechter. In fact, the documents provided by Dr. Fechter, and his testimony, establish that he submitted claims to insurers, Medicare, and the patients for payment, and, in fact, received payment.<sup>3</sup> Because Dr. Fechter set up arrangements to be paid by insurers, he cannot also seek recovery from RLSR, whether this is for a double recovery or to make up for shortfalls due to the discounted rates negotiated with the insurers. And, the reports that were billed to insurers and the alleged reports allegedly billed to RLSR are based on the very same data for which Dr. Fechter has already recovered payment from the insurer:

Q. [Y]ou're doing a report that you get to bill the insurance carrier and bill 500 dollars to the law firm?

A. Correct.

[Fechter Depo. p. 48-49]

Apparently, Dr. Fechter now seeks to, at worst, recover twice for his services, or at best seek recovery of the difference between what he was paid and what he thought he should have been paid for performing certain tests, but for the existence of negotiated rates. While such a system amounts to a double billing of the insurance companies and the attorneys, in addition such an arrangement was never agreed upon between RLSR and Dr. Fechter. [See Fechter Depo. pp. 53, 66] In fact, Dr. Fechter even admits that full collection, prior to seeking payment from RLSR, occurred:

A. The question at hand is did I bill private insurance for testing, absolutely I did. Did I ever get 100 percent, absolutely you never asked that yes, I did...

[Fechter Depo. p. 57]

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<sup>3</sup> Dr. Fechter admits that it is in many instances his patients that have failed to pay their bills: "So there are a lot of medical bills which many of the patients didn't pay. You should see the write-offs I took." [Fechter Depo. p. 42]

Dr. Fechter, apparently unhappy with his collections from the insurers, seeks to recover the portion of bills that were unpaid by the insurers from RLSR:

Q. [T]hat 20 percent that you're trying to bill, of that, that's an attempt to recoup the difference between your assumed insurance rate and your full rate for that task?

A. Yes...

[Fechter Depo. p. 224]

In his deposition, despite his admissions concerning the clearly defined lines between and evaluation and treatment, Dr. Fechter attempted to create a contradictory position that RLSR was responsible for certain testing procedures, even though such continued tests were part of day-to-day care, and were paid by insurance. [See Fechter Depo. p. 44] Dr. Fechter also claims that a bill for \$500 was generated for each patient, for the initial medical examination, and that this bill was delivered to RLSR. [Id. p. 46] Yet, Dr. Fechter produced no records of transmissions of such bills, and the employees of RLSR to whom such bills would have been sent, as testified o by Dr. Fechter, deny receipt of such bills. [Affidavit of E. Cueto ¶ 6] In fact, because Dr. Fechter was not involved in his office's billing procedures, he has no personal knowledge of whether such bills were delivered. [Fechter Dep. p. 131]

Not only did Dr. Fechter act in a doctor-patient relationship with his patients, Dr. Fechter also billed the patients at a cost contracted for with each patient and each patient's insurance company. The insurance forms and bills forwarded by Dr. Fechter to RLSR clearly reflect payments made by insurers and the patients themselves. The claim documents also seek recovery for fees for patients that were never the clients of RLSR. Dr. Fechter is doing nothing less than attempting to get paid twice for the same services. He readily admits that he has submitted claims to the insurance providers for his patients for the tests he performed, and that the insurers have paid the negotiated rates for this work. As he is unhappy with the payments

from the insurers, and failed in many instances to seek recovery from the patients, he seeks recovery from RLSR.

The records establish that there is no doubt that Dr. Fechter was acting in a doctor-patient relationship, and any remaining payment responsibility is with these patients and other third party payors, and not RLSR.

Dr. Fechter has already been paid for the contractually agreed upon services: up to fifty evaluations, and reports from each of those evaluations. There is no agreement establishing that Dr. Fechter would be paid out of the recovery from the award or settlement in this matter (as one might more regularly see in a personal injury case).

There is no doubt that Dr. Fechter was paid for his services. He was paid a \$25,000 retainer for the evaluations of up to 50 patients. He admits receiving these funds. For any patients he had that worked at the Nevamar facility, he established patient-doctor relationships and was paid based on his contracts with insurers, Medicare, or the patients themselves. He now seeks to make additional recoveries, beyond the standard payments that a treating physician would normally receive, from five to thirteen years after he performed evaluations of patients, most of which were never authorized by RLSR. He cannot establish any evidence to support any additional payments. Simply put, Dr. Fechter is not entitled to any additional recovery from the funds set aside in this matter. Therefore, the full amount of \$500,000 should be released to RLSR, and this matter should be closed.

C. A Balancing of the Equities Weighs in Favor of RLSR

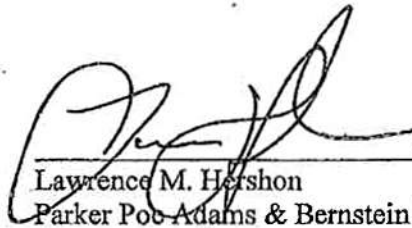
Forfeitures or penalties are not favored in the law or equity. *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 256, 715 S.E.2d 348, 356 (Ct. App. 2011). Equity aids the vigilant and diligent. *Collins v. Sigmon*, 299 S.C. 464, 468, 385 S.E.2d 835, 837 (1989).

In addition to the reasons set forth in the section above, a balancing of the equities weighs in favor of a release of the funds to RLSR. As admitted by Dr. Fechter, in most of his cases he received 80% of the fees associated with his testing from payments through insurers. [Fechter Depo. p. 204-05] RLSR, on the other hand, has already greatly reduced the amount of reimbursement for costs it will recover from the captioned matter. At present, the recovery of costs has been limited to 21% of the total costs it incurred on behalf of its clients. Even with the awarding of the full \$500,000 to RLSR, this percentage will only increase to 62%. RLSR has already endured a greater decrease in the recovery of its expenses than Dr. Fechter. A balancing of these percentages leaves that greater reimbursement should be provided to the party that has been more greatly injured. In addition, RLSR should not be required to any forfeiture of reimbursement of costs that rightfully belongs to it.

Furthermore, RLSR has expended additional efforts to bring this matter in front of the Commission. Dr. Fechter has made no claim to the Commission, but RLSR has made the Commission aware of the alleged claim, and has given Dr. Fechter the ability to testify on his own behalf. Yet Dr. Fechter has never filed a claim with the Commission, nor filed any lawsuit for breach of contract. As the vigilant and diligent party, from an equitable perspective, RLSR should be awarded the full sum of funds set aside.

#### CONCLUSION

As has been established by the record as set forth herein and in any hearing on this matter, RLSR is entitled to recovery of all of the funds set aside in this matter, in the amount of \$500,000, as reimbursement for costs incurred on its clients' behalf. Dr. Fechter cannot establish entitlement to any of the set aside funds. Therefore, RLSR requests that the Commissioner issue an order finding (1) that all funds set aside in the captioned matter be paid to RLSR and (2) that Dr. Fechter is not entitled to any payment in addition to his retainer.



Lawrence M. Hershon  
Parker Poe Adams & Bernstein LLP  
1201 Main Street, Suite 1450  
Post Office Box 1509  
Columbia, South Carolina 29202-1509  
Telephone: 803-255-8000  
Facsimile: 803-255-8017  
lawrencehershon@parkerpoe.com

*Attorney for Rosenthal, Levy, Simon & Ryles*

November 18, 2015  
Columbia, South Carolina



8. In the captioned case, reimbursement for costs incurred by my firm total only \$25,000, or 21% of the total costs and expenses incurred.

9. As agreed between the law firms representing the claimants in the captioned matter, this firm was responsible for advancing all expenses.

10. The firm agreed to hire Dr. Fechter to perform an evaluation and draft a report on up to fifty of the firm's clients, at a rate of \$500 per client evaluation and report.

11. The firm provided Dr. Fechter with a \$25,000.00 retainer in February 2006.

12. Thereafter, I determined that only thirty-nine evaluations and reports were required from Dr. Fechter, and I provided this information to Dr. Fechter. Evaluation of the entire population was not required; instead, the legal strategy involved asserting the claims of a subset of 40 to 50 claimants, and, if successful, applying the results to the general population.

13. Following the firm's receipt of various billing statements from Dr. Fechter in 2010 that included unauthorized charges, the firm, through its chief financial officer, sent a letter to Dr. Fechter denying his claim. A true and accurate copy of the letter is attached hereto as **Exhibit 1**. Dr. Fechter never responded to the letter.

14. There was never any agreement between Dr. Fechter and me (or the firm) (a) to perform in excess of fifty evaluations or (b) that Dr. Fechter would be compensated for continued medical treatment of the clients.

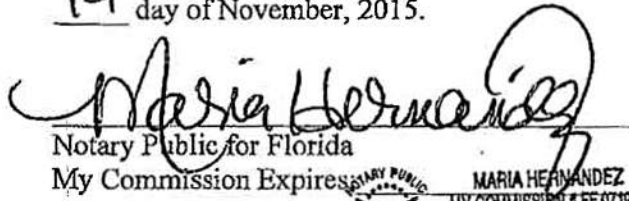
FURTHER AFFIANT SAYETH NAUGHT.

This 17<sup>th</sup> day of November, 2015.



GERALD ARTHUR ROSENTHAL

SWORN to before me this 17<sup>th</sup> day of November, 2015.



Notary Public for Florida  
My Commission Expires

 \*  
\* MARIA HERNANDEZ  
MY COMMISSION # FF 071918  
EXPIRES: December 18, 2017  
Bonded Thru Budget-Notary Services

466

October 28, 2010

Dr. Cary E. Fechter  
Palmetto Pulmonary Physicians of Charleston, PA  
105 Wappoo Creek Drive, Suite 3A  
Charleston, SC 29415

RE: Billing/Payment Inquiry

Dear Dr. Fechter:

I am in receipt of your detailing of the fees earned for those patients sent to you by my office for evaluation and preparation of requested reports. After careful review by me and my staff, we have come to the following conclusions:

- Ronald Koon is not a client represented by this firm and was not sent to your office by any of our staff. Therefore, the \$500 charge should be removed from this billing thereby reducing the total to \$19,850.00
- Retainer payment of \$25,000.00 was remitted to you in February of 2006. The difference between the retainer amount and the fees earned noted in my first bullet point is \$5,150.00. This represents an unused portion of the retainer that should be returned to my office immediately.
- Furthermore, we have received various statements, for individual patients, representing unpaid copayments/deductibles due after insurance payments were posted (totaling \$3,361.51). My firm neither had an agreement with your office nor an obligation to pay these copayments.

Please review your records and remit the unused portion of our retainer at your earliest convenience.

If you have any questions, please feel free to call me at 561.478.2500.

Yours truly,

**ROSENTHAL & LEVY, P.A.**

Rob Cluxton  
Chief Financial Officer

147

EXHIBIT "1"

# Exhibit "F"

BEFORE THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION  
W.C.C. FILE NO.: 0326995

SADIE ADAMS, *et al.*, )  
 )  
 Claimants, )  
 )  
 -vs- )  
 )  
 INTERNATIONAL PAPER COMPANY )  
 and NEVAMAR COMPANY, LLC, )  
 )  
 Employers, )  
 )  
 INTERNATIONAL PAPER COMPANY )  
 and ACE AMERICAN INSURANCE )  
 COMPANY, )  
 )  
 Carriers/Defendants. )

sewec  
DEC 02 2016  
JUDICIAL

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REPLY OF LEON MARTIN ORTNER TO MOTION TO RELEASE FUNDS

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TO: LAWRENCE M. HERSHON, ATTORNEY FOR GERALD ARTHUR ROSENTHAL, ESQUIRE AND ROSENTHAL, LEVY, SIMON & RYLES; DR. CARY E. FECHTER; F. DRAKE ROGERS, III, ATTORNEY FOR INTERNATIONAL PAPER; JOSHUA A. METCALF, ATTORNEY FOR INTERNATIONAL PAPER; THEODORE LEOPOLD, ESQUIRE; DAVID PEARLMAN, ESQUIRE; and EDWARD M. RICCI, ESQUIRE

COMES NOW, LEON MARTIN ORTNER, responding to the Motion to Release Funds, and states as follows:

**FIRST:** Leon Martin Ortner (hereinafter Ortner) is co-counsel for the Claimants in the above-captioned action. Ortner joins in the pending Motion to Release Funds to the extent that he asks the Commission to inquire into Dr. Fechter's (hereinafter Fechter) entitlement to payment for professional services rendered and enter an order determining the rights of all concerned parties and directing the disbursement of the funds being held in trust. Ortner makes no claim to these funds because the funds are intended to reimburse attorneys Leopold-Kuvin (hereinafter L-K) and Rosenthal, Levy & Simon (hereinafter RLS) for litigation expenses, for which they agreed to be responsible.

**SECOND:** As part and parcel of the Co-Counsel Agreement duly executed by all co-counsel, in counterparts, it was agreed that L-K and RLS shall each pay one-half of any expenses necessary to litigate the within action.

**THIRD:** Fechter testified during his deposition of November 2, 2015 that Gerry Rosenthal (hereinafter Rosenthal) agreed to be responsible for costs during a conversation with Fechter, Rosenthal and Ortner that took place in the conference room of Ortner's law offices on or about 2005/2006.

53

21 Q. When did you discuss with Ortner and  
22 Rosenthal, Hey, you guys are responsible for this  
23 20 percent that I don't get paid from the carrier?

24 A. From the very beginning only with Lee  
25 Ortner.

54

1 Q. And it was just through conversation,  
2 correct?

3 I mean, there's no document that we can  
4 go to that says, Hey, here is the agreement that  
5 you guys were going to pay the 20 percent?

6 A. Well, Lee understood that normally they  
7 have to pay the 100 percent and that I don't even  
8 bill the insurance companies if I believe that in  
9 my heart of hearts that this is entirely for IME  
10 impairment ratings.

11 It was only with Lee, because my  
12 timeline estimates that in 2005/6, I meet Gerry  
13 Rosenthal, and then Gerry agrees with the same.

14 Q. And how does Rosenthal agree with that  
15 same arrangement?

16 A. In the same conference room.

**FOURTH:** Fechter further testified during his deposition that he had regular communication with Elaine Cueto in Rosenthal's office relative to bills.

22

11 Q. As we have discussed before prior to  
12 you having representation, and then after you had  
13 representation with the permission of your  
14 attorney, is that we are requesting any documents  
15 that relate to your billing records for these  
16 patients and your claim for payment within this  
17 Workers' Comp case or against Dr. Rosenthal.

18 That's the extent of what this all  
19 breaks down to.

20 A. Why is it listed into eight different  
21 groups that all sound like the same thing?

22 Q. Because lawyers like to write extra  
23 words.

24 A. Is that the truth, because it looks  
25 like the total amount of all bills plus the

23

1 spreadsheet should cover all of these.

2 What it doesn't cover is any mailings  
3 of bills that Sarah Andrews will either give an  
4 affidavit or be deposed about that she was sending  
5 them.

6 And, unfortunately, her e-mail people  
7 cannot get into her e-mail as yet, but she said,  
8 Dr. Fechter, I have many e-mails back and forth  
9 between Elaine and myself about each of the bills  
10 and the absolute necessity that they see the report  
11 before they acknowledge a bill.

12 Q. Who is Elaine?

13 A. Elaine -- I'm going to mispronounce her  
14 Spanish last name. I think it's spelled C-u-e-t-o,  
15 like Cueto.

16 But she was Mr. Rosenthal's primary  
17 billing individual who also correlated the reports  
18 to the bills.

19 And those communications are very large  
20 in number and very specific in request.

21 Q. So you believe there may be e-mails  
22 between your former billing person for these files,  
23 Sarah Andrews, and someone at the Rosenthal Law  
24 Firm that may just show transmissions of billing  
25 information?

24

1 A. Yes, and Sarah told me literally  
2 yesterday -- last night -- Dr. Fechter, we also  
3 sent hard copies to them by mail.

4 And I said, You did? Good.

5 Q. And what would an example of one of  
6 these e-mails -- what would be attached to it?  
7 What would be included in that? Or the mailed  
8 billing record.

9 A. To the best of my knowledge -- and  
10 that's all you can ask for -- is Elaine saying, We  
11 don't see the reports on these six patients, or  
12 whatever. We did receive their bills. Could you  
13 please re-send those reports.

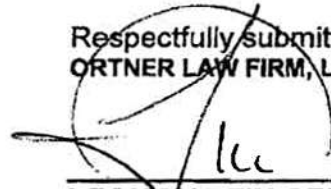
14 Or, we didn't see any reports on these  
15 patients, you haven't billed us either, and our  
16 response would be, You must have sent that patient  
17 to another doctor, or the patient never saw me.

**FIFTH:** When Rosenthal entered this action on or about 2005, all financial arrangements relative to Fechter from that time forward were made between Fechter and Rosenthal.

**SIXTH:** Ortner is seeking a complete adjudication as to the rights and responsibilities of all parties as to any monies which may be owed to Fechter; stated differently, if the Commission determines that Fechter is not owed any monies for costs, then said decision should be binding as to all concerned parties. On the other hand, if the Commission determines that Fechter is owed monies for professional services, then said decision should be binding as to all concerned parties and said monies should come from those funds held in escrow. Ortner makes no claim to these funds because, by agreement of all concerned parties, he was not responsible for payment of litigation expenses.

**SEVENTH:** The additional grounds for the within Reply shall be any other evidence to be presented at the hearing on said Motion along with the applicable law and statutes of the State of South Carolina, and such other grounds and evidence as may be apparent at the hearing or this matter.

Respectfully submitted,  
ORTNER LAW FIRM, LLC



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**LEON MARTIN ORTNER**  
CO-COUNSEL FOR CLAIMANTS

145 KING STREET, SUITE 211  
CHARLESTON, SOUTH CAROLINA 29401  
TELEPHONE [843] 723-2944  
FACSIMILE [843] 556-5755  
EMAIL LEE@ORTNERLAWFIRM.COM

DATED THIS 30<sup>th</sup> DAY OF NOVEMBER, 2015,  
AT CHARLESTON, SOUTH CAROLINA.

1                   And I meant to ask you before this  
2 deposition, what exactly is the difference between  
3 what you're asking for and what I just gave you?

4                   Because I want to supplement this  
5 deposition with the right documents.

6                   Q. Well, as we have talked about before --  
7                   (Telephonic interruption.)

8                   THE WITNESS: I'm sorry, this should be  
9 on vibrate.

10 BY MR. HERSHON:

11                  Q. As we have discussed before prior to  
12 you having representation, and then after you had  
13 representation with the permission of your  
14 attorney, is that we are requesting any documents  
15 that relate to your billing records for these  
16 patients and your claim for payment within this  
17 Workers' Comp case or against Dr. Rosenthal.

18                  That's the extent of what this all  
19 breaks down to.

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21 groups that all sound like the same thing?

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1 spreadsheet should cover all of these.

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18 to the bills.

19 And those communications are very large  
20 in number and very specific in request.

21 Q. So you believe there may be e-mails  
22 between your former billing person for these files,  
23 Sarah Andrews, and someone at the Rosenthal Law  
24 Firm that may just show transmissions of billing  
25 information?

1           A.    Yes, and Sarah told me literally  
2 yesterday -- last night -- Dr. Fechter, we also  
3 sent hard copies to them by mail.

4                    And I said, You did? Good.

5           Q.    And what would an example of one of  
6 these e-mails -- what would be attached to it?  
7 What would be included in that? Or the mailed  
8 billing record.

9           A.    To the best of my knowledge -- and  
10 that's all you can ask for -- is Elaine saying, We  
11 don't see the reports on these six patients, or  
12 whatever. We did receive their bills. Could you  
13 please re-send those reports.

14                   Or, we didn't see any reports on these  
15 patients, you haven't billed us either, and our  
16 response would be, You must have sent that patient  
17 to another doctor, or the patient never saw me.

18                   There were many cases where -- when I  
19 say many, I would say under 50, but a significant  
20 number of people -- who never saw me. Maybe -- I  
21 don't like to be conjectural -- but maybe because  
22 they didn't think they had a good case. So those  
23 communications went back and forth.

24                   In the same since that you just asked  
25 me to be deposed, if this is necessary, I will

1 A. The patients.

2 Q. The patients would tell you that they  
3 didn't have to pay for the testing; is that  
4 correct?

5 A. Correct.

6 Q. I'm just trying to repeat you so I  
7 understand.

8 A. They don't have to pay out of pocket  
9 for this test.

10 Many of them would say, I'm not even  
11 going to give you my insurance information. So  
12 those are the ones that have \$1500 bills and such.

13 But most of them said, I agree this is  
14 medical management, I'm short of breath, bill  
15 Medicare.

16 So, Lawrence, if you look through the  
17 flow sheets, you'll see the total calculations in  
18 columns of total cost of PFTs, 20 percent -- which  
19 is my estimate, non paid -- was the bill that I  
20 charged to Gerry and Lee.

21 Q. When did you discuss with Ortner and  
22 Rosenthal, Hey, you guys are responsible for this  
23 20 percent that I don't get paid from the carrier?

24 A. From the very beginning only with Lee  
25 Ortner.

1 Q. And it was just through conversation,  
2 correct?

3 I mean, there's no document that we can  
4 go to that says, Hey, here is the agreement that  
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6 A. Well, Lee understood that normally they  
7 have to pay the 100 percent and that I don't even  
8 bill the insurance companies if I believe that in  
9 my heart of hearts that this is entirely for IME  
10 impairment ratings.

11 It was only with Lee, because my  
12 timeline estimates that in 2005/6, I meet Gerry  
13 Rosenthal, and then Gerry agrees with the same.

14 Q. And how does Rosenthal agree with that  
15 same arrangement?

16 A. In the same conference room. And,  
17 meanwhile, he was looking at the seven example test  
18 cases, and he said, Y'all really did well.

19 And I said, I would ask the number, but  
20 I don't know how well we did, but I certainly need  
21 to be compensated for these tests, but, currently,  
22 I am billing insurance whenever possible because  
23 they have medical conditions.

24 If I can use that same information for  
25 an IME impairment rating, then you just got off on

BEFORE THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION  
W.C.C. FILE NO.: 0326995 *et al.*

SADIE ADAMS, *et al.*, )  
 )  
 Claimants, )  
 )  
 -vs- )  
 )  
 INTERNATIONAL PAPER COMPANY )  
 and NEVAMAR COMPANY, LLC, )  
 )  
 Employers, )  
 )  
 INTERNATIONAL PAPER COMPANY )  
 and ACE AMERICAN INSURANCE )  
 COMPANY, )  
 )  
 Carriers/Defendants. )

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PROOF AND CERTIFICATE OF SERVICE

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I do hereby certify that I have caused the **Reply of Leon Martin Ortner to Motion to Release Funds** and **exhibits** thereto to be filed with the South Carolina Workers' Compensation Commission and served upon the hereinbelow-described parties by causing the same to be placed in the United States Mail, with proper postage affixed thereto, on this 30<sup>th</sup> day of November, 2015, addressed to the following:

South Carolina Workers' Compensation Commission ✓  
P.O. Box 1715  
Columbia, South Carolina 29202-1715

Lawrence M. Hershon, Esquire  
Parker Poe Adams & Bernstein, LLP  
1201 Main Street, Suite 1450  
Columbia, South Carolina 29201

Dr. Cary E. Fechter  
7786 Discovery Road  
North Charleston, South Carolina 29401

F. Drake Rogers, III, Esquire  
Young Clement Rivers, LLP  
25 Calhoun Street, Suite 400  
Charleston, South Carolina 29401

SCWCC  
DEC 02 2015  
JUDICIAL

Joshua A. Metcalf, Esquire  
Forman Perry Watkins Krutz & Tardy, LLP  
City Centre, Suite 100  
200 South Lamar Street  
Jackson, Mississippi 39201-4099

Theodore Leopold, Esquire  
Cohen Milstein Sellers & Toll PLLC  
2925 PGA Boulevard, Suite 200  
Palm Beach Gardens, Florida 33410

David Pearlman, Esquire  
The Steinberg Law Firm, LLP  
61 Broad Street  
Charleston, South Carolina 29401

Edward M. Ricci, Esquire  
6650 W. Indiantown Road, Suite 200  
Jupiter, Florida 33458

  
ORTNER LAW FIRM, LLC

LEON MARTIN ORTNER

DATED: NOVEMBER 30<sup>th</sup>, 2015.

# Exhibit "G"



**The Supreme Court of South Carolina**  
**OFFICE OF DISCIPLINARY COUNSEL**

Lesley M. Coggioia  
Disciplinary Counsel

C. Tax Davis Jr.  
Senior Assistant Disciplinary Counsel

Post Office Box 12159  
Columbia, South Carolina 29211

Telephone: (803) 734-2038  
Fax: (803) 734-1864

March 2, 2016

PERSONAL & CONFIDENTIAL

Dr. Cary E. Fechter  
7786 Discovery Road  
N. Charleston, SC 29420

Re: Lawyer: Leon Martin Ortner, Esquire  
Case Number: 15-DE-L-0860

Dear Dr. Fechter:

This office has conducted an investigation concerning the allegations of lawyer misconduct raised in the complaint you filed in connection with the above-referenced matter. This investigation focused on those grounds for misconduct set out in the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR, adopted by the Supreme Court of South Carolina.

This office is not authorized to give advice concerning a legal dispute or dealings with a lawyer; nor is it empowered to intervene in a case. We cannot seek to cause things to be done by a lawyer on behalf of a complainant; nor can we seek to change the outcome of a case. Instead, this office deals solely with issues of misconduct or incapacity related to lawyers under these rules. We do so to preserve institutional values of the legal system in South Carolina for the benefit of the public as a whole, not to obtain individual benefit for a complainant.

The provisions of RLDE do not apply to legal matters related to whether or not the outcome of a dispute was fair or to errors of law or judgment that might have been made by a lawyer or judge. These are legal matters, which can only be addressed at trial or on appeal using appropriate procedures.

162

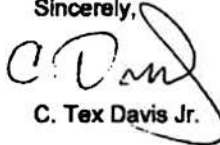
Cary E. Fechter  
March 2, 2016  
Page Two

In your letter of complaint, you allege that Leon Martin Ortner, Esquire failed to provide payment for services rendered in a worker's compensation matter. As a result of your letter, this office conducted an investigation to ascertain if Mr. Ortner's conduct violated the Rules of Professional Conduct and the RLDE.

From our investigation, this office has determined that there is no evidence of any such lawyer misconduct on the part of Mr. Ortner arising out of the events mentioned in your complaint and that further investigation would not likely reveal any such evidence.

Accordingly, you are hereby notified of the intent of this office to dismiss your complaint pursuant to the provisions of Rule 19(d)(1) of RLDE. You may seek a review of this decision by an investigative panel of the Commission on Lawyer Conduct by filing a written request, which must be received in this office no later than April 1, 2016. If you request a panel review, the lawyer will be given an opportunity to respond. Your request and the lawyer's response, if any, will be considered at the next investigative panel meeting. You will then be notified of the panel's decision. Feel free to contact me if you have any questions regarding this process.

Sincerely,



C. Tex Davis Jr.

CTD/

cc: Leon Martin Ortner, Esquire

163

# Exhibit "H"

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION  
WCC FILE NUMBER 0326828

[REDACTED] )  
Employee, )  
Claimant, )  
-vs- )  
INTERNATIONAL PAPER COMPANY, )  
Employer/Self-Insured, )  
Defendant. )

**AGREEMENT APPROVING AWARD OF SPECIAL REFEREE**

**FIRST:** In accordance with the "Agreement to Submit Workers' Compensation Claim to Binding Review Process," all claimants in the above-captioned action agreed to, among other things, submit net global proceeds into a qualified fund with said net proceeds to be allocated by a Special Referee to finally and completely resolve the claims of said claimants and that said allocation by the Special Referee is a final and binding decision and shall not be subject to further litigation or appeal (hereinafter referred to as the "process"); in addition, the claimants agreed to authorize their attorneys to execute any and all documents on their behalf;

**SECOND:** Defendants herein also agreed to participate in and be bound by said process;

**THIRD:** Said process was adopted and approved by the South Carolina Workers' Compensation Commission (hereinafter referred to as the "Commission") by Consent Order of Commissioner Aisha Taylor on July 22, 2014 (see attached hereto as Exhibit A);

**FOURTH:** Attorney H. Mills Gallivan was appointed as Special Referee and he made his final decisions as to each claimant and allocated said net proceeds in accordance therewith;

**FIFTH:** The Special Referee submitted his allocation of said net proceeds to the Commission which was adopted and approved by Order of Commissioner Aisha Taylor on December 10, 2015 (see attached hereto as Exhibit B);

**SIXTH:** Pursuant to the final decision and the aforementioned allocation made by the Special Referee and heretofore approved by the Commission, [REDACTED] is, and shall hereby be, entitled to an award in the amount of [REDACTED] full and final resolution of his/her claim;

165

**SEVENTH:** Pursuant to said process and the aforementioned Consent Order of Commissioner Taylor of July 22, 2014, Defendants herein shall cover the costs of determining and establishing any necessary Medicare Set-Asides and satisfy all Medicare or other governmental and conditional liens, as well as the costs of negotiating the amounts of Medicare Set-Asides and liens with the Center of Medicare Services;

Even though the claimant is currently eligible to receive Medicare benefits, the within claim does not fall within the current parameters of requiring formal Medicare approval as of the date of this settlement as the total settlement value is less than \$25,000.00. Pursuant to the April 25, 2006 Memorandum from the Centers for Medicare and Medicare Services, Medicare approval is only necessary at the current time if the claimant is Medicare eligible and the total settlement value exceeds \$25,000.00.

Under the terms and provisions of the Consent Order of Commissioner Aisha Taylor dated July 22, 2014 and the Order of Commissioner Aisha Taylor dated December 10, 2015, the defendants are required to resolve any Medicare liens and/or other governmental and conditional liens and/or any Medicare Set Aside issues that may pertain to any individual claimants who are receiving settlement funds. In this regard, the parties, by and through their undersigned attorneys, further acknowledge and agree that no one involved in the settlement has any control or can in any way predict any individual claimant's entitlement to future Social Security, Medicare or Medicaid benefits. Counsel for the claimants have incorporated Utica-Mohawk language into the settlement documents for the purpose of attempting to protect and preserve any individual claimant's future benefits in accordance with the applicable law and Social Security regulations and procedures.

Defendants have completely denied any and all such claims to date and have not paid any expenses or benefits in relation to the same. The settlement of this claim is NOT to be deemed an acknowledgement of liability, and in fact, Defendants continue to fully deny any and all liability for the within alleged injuries. However, in order to accommodate settlement of this contested claim, Defendants agree to investigate any traditional Medicare liens and reserve the right to appeal and/or contest the same to the fullest extent possible. Claimant assigns and authorizes the right to Defendant/employer to pursue an appeal of any Medicare lien and will sign any necessary consent form needed to proceed with such an appeal. In the event that Medicare would not waive the Medicare lien due to the denied and disputed nature of this claim, Defendants will be responsible to pay the Medicare lien above and beyond the within identified settlement amount.

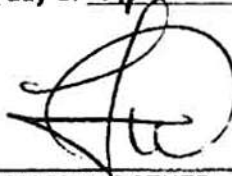
It is further understood and agreed that the claimant and claimant's counsel hereby agree as part of this Release to provide Defendants within thirty (30) days of their request any and all information required for compliance with the Medicare Mandatory Insurer Reporting requirement, 42 U.S.C. §1395y (b)(8);

**EIGHTH:** Said award in the amount of ██████████, in compromised settlement of disputed past and future disability compensation benefits shall be allocated for a period of 499.64 weeks representing the claimant's life expectancy of 9.61 years at a rate of \$8.33 per week, commencing on the date of approval of this agreement by the Commission, pursuant to the provisions of S.C. Code Ann. Section 19-1-150 (1976) and the decision of the South Carolina Supreme Court in the decision of James v. Anne's Inc., 390 SC 188, 701, S.E.2d 730 (2010); Utica-Mohawk Mills v. Orr, 227 SC 226, 8 S.E.2d 587 (1955), and Sciarotta v. Bowen, 837 F.2d 135 (3d Cir. 1988); and

**NINTH:** H. Mills Gallivan and the law firm of Gallivan, White & Boyd, PA shall be held harmless by all parties and the attorneys representing said parties and H. Mills Gallivan and the law firm of Gallivan, White & Boyd, PA shall have absolutely no liability whatsoever with regard to the decision in this matter.

DONE AND ENTERED INTO on this 27<sup>th</sup> day of April, 2017.

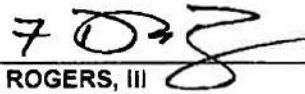
BY:



LEON MARTIN ORTNER  
ON BEHALF OF ATTORNEYS FOR EMPLOYEE

INTERNATIONAL PAPER COMPANY  
EMPLOYER/SELF-INSURED

BY:



F. DRAKE ROGERS, III  
ATTORNEY FOR THE EMPLOYER/SELF-INSURED

2017-CP-10-4371

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF CHARLESTON )

(JURY)

CARY E. FECHTER, M.D., )

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

PLAINTIFF, )

VS )

LEON MARTIN ORTNER, THE )  
ORTNER LAW FIRM LLC, GERALD )  
ROSENTHAL, AND ROSENTHAL, )  
LEVY, SIMON, AND RYLES, )

2017-CP-10-4371

BK

JULIE J. ARMSTRONG  
CLERK OF COURT

2019 JAN -9 AM 9:55

FILED

DEFENDANTS. )

PERSONALLY appeared before me the undersigned deponent, who being duly sworn, says that he served the Summons and Complaint in this action on the Defendant, Rosenthal, Levy, Simon, and Ryles:

by delivering to them, by certified mail, US Postal Service, on October 12, 2017 in West Palm Beach, Florida and leaving with them copies of the same at 1401 Forum Way, Sixth Floor, West Palm Beach, Florida.

  
\_\_\_\_\_  
Melvin D. Bannister

SWORN to before me this 8  
day of JANUARY, 2019.

Sarah Ricker  
Notary Public for South Carolina  
My Commission Expires: 1/8/28

165



FAQs > (<https://www.usps.com/faqs/uspstracking-faqs.htm>)

Track Another Package +

SCHEDULE C

Tracking Number: 70151730000142889398

Remove X

Your item was delivered to an individual at the address at 12:38 pm on October 12, 2017 in WEST PALM BEACH, FL 33401.

**Delivered**

October 12, 2017 at 12:38 pm  
Delivered, Left with Individual  
WEST PALM BEACH, FL 33401

Feedback

Tracking History



Product Information



See Less ^

### Can't find what you're looking for?

Go to our FAQs section to find answers to your tracking questions.

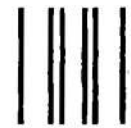
**FAQs** (<https://www.usps.com/faqs/uspstracking-faqs.htm>)

169

SCHEDULE D

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>	<p>A. Signature <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <input type="checkbox"/> C. Date of Delivery:</p>
<p>1. Article Addressed to:</p> <p>GERARD ROSENTHAL, ESQ. 1401 FORUM WAY, SIXTH FLOOR WEST PALM BEACH, FL 33401</p>	<p>D. Is Delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p> <p><b>RESTRICTED DELIVERY</b></p>
<p>9590 9403 0705 5196 2927 53</p>	<p>3. Service Type</p> <p><input type="checkbox"/> Adult Signature <input type="checkbox"/> Priority Mail Express®</p> <p><input type="checkbox"/> Adult Signature Restricted Delivery <input type="checkbox"/> Registered Mail™</p> <p><input type="checkbox"/> Certified Mail® <input type="checkbox"/> Registered Mail Restricted Delivery</p> <p><input checked="" type="checkbox"/> Certified Mail Restricted Delivery <input type="checkbox"/> Return Receipt for Merchandise</p> <p><input type="checkbox"/> Collect on Delivery <input type="checkbox"/> Signature Confirmation™</p> <p><input type="checkbox"/> Collect on Delivery Restricted Delivery <input type="checkbox"/> Signature Confirmation Restricted Delivery</p> <p><input type="checkbox"/> Insured Mail <input type="checkbox"/> Signature Confirmation Restricted Delivery (over \$500)</p>
<p>2. Article Number (Transfer from service label)</p> <p>7015 1730 0001 4288 9388</p>	<p>PS Form 3811, April 2015 PSN 7530-02-000-9053</p> <p>Domestic Return Receipt</p>

UNITED STATES POSTAL SERVICE  
FL 334  
12 OCT '19



First-Class Mail  
Postage & Fees Paid  
USPS  
Permit No. G-10

• Sender: Please print your name, address, and ZIP+4® in this box•

Melvin D. Bannister  
Trial Lawyer  
Post Office Box 6833  
Columbia, South Carolina 29260

USPS TRACKING#

9590 9403 0705 5196 2927 53



FILED

2019 JAN -9 AM 10:00

JULIE J. ARMSTRONG  
CLERK OF COURT

2017-CP-10-4371

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

GERALD ROSENTHAL, ESQ.  
1401 FORUM WAY, SIXTH FLOOR  
WEST PALM BEACH, FL 33401



9590 9403 0705 5196 2927 53

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- Signature Confirmation Restricted Delivery

Domestic Return Receipt

BY

JULIE J. ARMSTRONG  
CLERK OF COURT

2019 JAN -9 AM 10:00

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171

STATE OF SOUTH CAROLINA )  
COUNTY OF CHARLESTON )

IN THE COURT OF COMMON PLEAS  
(JURY)

CARY E. FECHTER, M.D., )  
PLAINTIFF, )

AFFIDAVIT OF SERVICE BY CERTIFIED  
MAIL

VS )

LEON MARTIN ORTNER, THE )  
ORTNER LAW FIRM LLC, GERALD )  
ROSENTHAL, AND ROSENTHAL, )  
LEVY, SIMON, AND RYLES, )

2017-CP-10-4371

2019 JAN -9 AM 9:55  
JULIE J. ARMSTRONG  
CLERK OF COURT

FILED

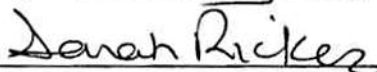
DEFENDANTS. )

PERSONALLY appeared before me the undersigned deponent, who being duly sworn, says that he served the Summons and Complaint in this action on the Defendants, Leon Martin Ortner and the Ortner Law Firm, LLC:

by delivering to them, by certified mail, US Postal Service on December 7, 2017 in Charleston, South Carolina and leaving with them copies of the same at 145 King Street, Ste. 211, Charleston, SC.

  
Melvin D. Bannister

SWORN to before me this 8  
day of JANUARY, 2019.

  
Notary Public for South Carolina  
My Commission Expires: 11/8/28



FAQs > (<https://www.usps.com/faqs/uspstracking-faqs.htm>)

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December 7, 2017 at 3:10 pm  
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CHARLESTON, SC 29401

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173

2017-CP-10-4371

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF CHARLESTON )  
 )  
 CARY E. FECHTER, M.D., )  
 )  
 PLAINTIFF, )  
 )  
 VS )  
 )  
 LEON MARTIN ORTNER, THE )  
 ORTNER LAW FIRM LLC, GERALD )  
 ROSENTHAL, AND ROSENTHAL, )  
 LEVY, SIMON, AND RYLES, )  
 )  
 DEFENDANTS. )

IN THE COURT OF COMMON PLEAS

(JURY)

AFFIDAVIT

2017-CP-10-4371  
 JULIE J. FINKELSTEIN  
 CLERK OF COURT  
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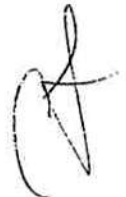
Being personally sworn the undersigned, who being duly sworn, deposes and says:

1. The undersigned is the Plaintiff in the above captioned action.
2. In 2002 the Defendants Ortner and Ortner Law Firm retained the Plaintiff, for valuable consideration herein after discussed, to perform independent medical examinations and make independent medical examination reports to the Defendants of the Defendants' clients in a Workers' Compensation case.
3. The Defendant Ortner at all times mentioned herein was acting individually and as an agent of the Defendant Ortner Law Firm LLC.
4. The parties agree to that the Plaintiff was to be paid the sum of Five Hundred (\$500) Dollars for the initial medical examination and report for each of the Defendants' clients. The Plaintiff was to be paid the sum of One Hundred Fifty (\$150) Dollars for subsequent/second examinations and reports and the

Plaintiff was to be paid the sum of One Hundred (\$100) Dollars for a subsequent/third examination and report.

5. The parties also agreed that the Plaintiff was to be paid by the Defendants Ortner and the Ortner Law Firm for Pulmonary Function Tests, Stress Tests, and Sleep Study examinations.
6. IN 2006 the Ortner Defendants associated the Defendant Rosenthal and his law firm Rosenthal, Levy, Simon, and Ryles (RLS&R).
7. The Defendant Rosenthal at all times mentioned herein was acting individually and as an agent of the Defendant RLS&R).
8. The Defendants Rosenthal and his law firm affirmed the contract with the Plaintiff and agreed to pay the Plaintiff for his services rendered.
9. The Defendants Rosenthal and Defendant RLS&R paid to the Plaintiff the sum of Twenty-five Thousand (\$25,000) Dollars for the first Fifty (50) clients of the Defendants, which the Plaintiff examined and made reports.
10. The Plaintiff made initial examinations and initial reports of approximately Four Hundred Fifty-eight (458) clients of the Defendants.
11. The Plaintiff has made numerous subsequent examinations and reports on patients of the Defendants.
12. The Plaintiff also provided medical treatment to the clients of the Defendants.
13. The Defendants further agreed to pay to the Plaintiff for all medical treatment charges, which were not covered by the client's health insurance coverage, including the payment of the deductibles from the said coverages.

175



14. The Defendants promised to pay and protect the Plaintiff's fees and that he would be paid in full upon settlement or verdict in the cases.
15. The Plaintiff is informed and believes the cases/matters were resolved on January 26, 2016.
16. The Defendants have failed to pay the Plaintiff the sums owed to him in breach of the contract between the parties.
17. The Plaintiff has fulfilled all of his obligations under this contract.
18. The Plaintiff has made demands for the payment of his fees upon the Defendants, to no avail.
19. The Defendants argue that the South Carolina Workers' Compensation Commission has exclusive jurisdiction over the subject matter of the causes of action in the Plaintiff's Complaint.
20. The Workers' Compensation Commission does not have jurisdiction to oversee nor to determine contracts between attorneys, who are representing clients before the Commission, and independent third parties, including the Plaintiff as an independent medical examiner and treating physician.
21. Further, the Plaintiff was not a party in any cases before the Commission, in which the Defendants represented the numerous clients before the Commission.
22. That the Defendants have made or caused to be made fraudulent misrepresentations about the payment of the Plaintiff's fees, including stating that the Plaintiff would be paid for his reports and services/treatment rendered



to the numerous clients of the Defendants upon the disposition of all the cases by the Workers' Compensation Commission.

23. That all such representations were false and misleading to the Plaintiff, who was not paid any fees after the payment for the initial independent medical reports of the first Fifty (50) clients of the Defendants.
24. That all such representations that the Plaintiff was to be paid for his services were material to the Plaintiff in his decision to continue to perform additional examinations, to make reports concerning the Defendants' clients, and to continue to treat the clients of the Defendants.
25. That the Defendants, at all material times, intended that the representations concerning their payment of fees to the Plaintiff, would be relied upon.
26. That the Plaintiff was ignorant of the falsity of the Defendants' representations concerning the said payment of fees.
27. That the Plaintiff relied upon the representations of the Defendants.
28. That the Plaintiff had a right to rely upon the representations of the Defendants.
29. An actual and/or implied contract existed between the Plaintiff and the Defendants.
30. That the Defendants by and through it's agents, servants, and employees, acting within the course of employment and with fraudulent intent, relation to the breach of said contract and not merely it's making, did breach the same.
31. That said breach was accompanied by a fraudulent act and was the direct and proximate cause of damages to the Plaintiff.



32. The Plaintiff has suffered an ascertainable loss of money as a result of the use or employment of an unfair trade practice by the Defendants or their agents in violation of section 39-5-20 of the 1976 South Carolina Code of Laws, as amended.
33. The actions and inactions of the Defendants are capable of being performed on other parties.
34. Pursuant to Section 39-5-40 of the said Code of Laws, the Plaintiff is entitled to attorney's fees, and costs of this action.
35. The Plaintiff is informed and believes he is entitled to pre-judgment interest for each examination, test, study, report, and treatment of the patient/client of the Defendants completed by the Plaintiff from the date of each of the said examinations/tests/studies/reports/treatments.
36. Attached hereto is a sample of the written agreement, signed by the Defendants, to pay the Plaintiff for the services rendered. The Plaintiff has a signed agreement for each of the clients of the Defendants.
37. No bills for treatment, examinations, reports, etc., were sent to the Workers' Compensation Commission by the Plaintiff. All bills and requests for payment were sent to the Defendants by the Plaintiff.
38. The Defendants had the duty to forward the bills for treatment and tests to the Commission and the insurance carrier of the Defendants' clients.
39. The Plaintiff is informed and believes that the Defendants failed to forward the requests for payment by the Plaintiff to the appropriate carrier and to the Commission.

40. The Plaintiff was not informed of any settlement of the workers' compensation claims, report of the special referee, approval of the special referee's report by Commissioner Aisha Taylor, motion of the Rosenthal Defendants to Commissioner Taylor until January 26, 2016.
41. It should be noted that \$500,000 was approved by the special referee for approved costs (i.e. examinations, tests, and treatments) to be submitted by the claimants' attorneys, the Defendants.
42. The Defendants were aware of all the Plaintiff's requests for payment for the costs, which were appropriate for examinations, tests, and treatments for the workers' compensation clients.
43. The Defendants fraudulently withheld the Plaintiff's requests for payment from the Workers' Compensation Commission.
44. The Plaintiff is informed and believes that no other treating physicians of the workers' compensation claimants were paid for any treatment and tests performed for the claimants.
45. The Plaintiff is further informed and believes that the said \$500,000 was not distributed to the workers' compensation claimants.
46. The Rosenthal Defendants in a motion asserted that the Plaintiff could not establish any contractual right to any further payment. The Rosenthal Defendants were aware of the written agreements to compensate the Plaintiff upon the conclusion of all the workers' compensation claimants. The Ortnier Defendants were aware of the written agreements to compensate the Plaintiff upon the conclusion of all the workers' compensation claimants.

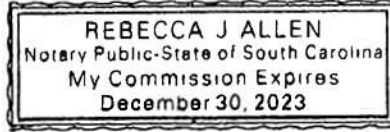
47. The Defendants, nor the Workers' Compensation Commission, did not notify the Plaintiff of any right to claim any of the \$500,000, which was set aside for the payment of approved costs.
48. The payment of the \$500,000 to the Defendants would not be an approved cost, for additional attorneys' fees nor for any other reason.
49. When informed to the Order to Release Funds (thereby, disposing of all of the workers' compensation claimants cases on or about January 26, 2016, the Plaintiff continued to seek payment from the Defendants to no avail.
50. The Complaint against the Defendants was filed on August 25, 2017, which was in the three year time limit of filing the Complaint.
51. The South Carolina Workers' Compensation Commission does not have jurisdiction to control contracts between attorneys representing claimants and independent third parties, including physicians.
52. The State Courts of South Carolina have jurisdiction to deal with issues concerning the existence and enforcement of contracts.
53. All of Plaintiff's bills for reports, tests, and treatment of the Defendants' clients, the workers' compensation clients, were forwarded to the Defendants by the Plaintiff.

Cary E. Fechter MD

Cary E. Fechter, MD

Sworn to before me this 7  
day of January, 2019.

Rebecca J. Allen  
Notary Public for South Carolina



My commission expires: December 30, 2023

Cary Fechter MD

January 9, 2019 submitted as an exhibit statement

Thank you your Honor for allowing my opportunity to clarify the underlying issues and their very pertinent history. This includes the broader Westinghouse cases, my recruitment, contracts and commitments originally made and very unfortunately, the evolution of a **true adversarial relationship among essentially co-counsel and their selected medical expert-me.**

**Background expertise-** for the first time in a quite successful 35 year career which was heavily engrained in **medico-legal pulmonary cases especially work-related and pneumoconioses.** I have successfully been on both on the plaintiff and defendant sides and an estimate would exceed 2500 pulmonary injury patients. Westinghouse essentially evolved into a class action case load.

**Ethical issue number One:**

I had to admit to opposing counsel at depositions that **I had not in fact been paid in advance for my expert opinions.**

In the presence of **Mr. Ortner at recorded depositions, he did not interject** with the defence or me when I had to disclose that my impartiality and assignment of impairment ratings will be beyond reproach because of the possibility of contingency payments (one may review the deposition transcripts).

I told the defence that **my numerical determinations will be strongly supported by actuarial data** and always "within a reasonable degree of medical certainty" that over determination would not occur. It did not.

Such a constraint oversight **actually required a higher burden of medical proof** since the rewarding of injury funds might imply either a greater recovery for me or at least a more guaranteed likelihood of full payment for services. **In my decades of medico-legal expert cases, I have never been placed in such a position.** I believe that the defendant attorneys accepted my impartiality. Of mandatory importance was Mr. Ortner's reassurance to the defence of my future payment in full regardless of Worker's Compensation rulings.

**Cases are typically settled after one year of "maximum medical benefit"** and then the patients are retested for level of breathing or exercise that are used to determine permanent impairment. That is, the degree of impairment.

However, two enlightenments were realized. **We experts use the AMA Guideline table** to find a just and consistent process. Always with extended time, continued improvements were seen and hence compensations for permanent lung injuries fell. In many cases of **exemplary patient compliance,** they returned to normal levels for their age, sex, etc. **This greatly reduced legal earnings,** but my oath is to medical care and the worker's Compensation Board **requires medical management before determining permanent lung injury.**

After a lengthy career, I have never seen such general **motivations to get healthier as in Hampton.** Non-smoking, use their respirators, and even leaving the inciting pulmonary toxins (the factory) when very injured showed very substantial improvements. **Many actually normalized.** Secondly, the longer we had to offer maximum medical benefits the greater the recovery. It is customary that aggressive medical management is defined to be over 6 months to one year, and then retesting would likely represent expected total recovery. But for several reasons, one of which was shared by the defence, was that **the plaintiff side was not pleased with the impairment compensations** being offered prior to the Worker's Compensation Board final recommendations. The reality, which I made very clear to my plaintiff counsel, was to accept the impairment recommendations sooner and stay far away from influencing my **EXPERT numerical percentage permanent injuries**

**Two obvious trends were happening.** Firstly, with additional time and aggressive treatment of the patient, then expect the eventual **settlements figures to further down-trend,** meaning to expect further improvements-which happened, somewhat dramatically.

Secondly, the law **just like politics has shifting opinions and the Worker's Compensation Board was lowering injury rewards across SC** for me and several pulmonary colleagues. That advice was not followed by my team of plaintiff attorneys. I am not allowed to know the financial returns for the cases, but it is my unofficial knowledge that a \$100,000 reward in 2004 had only a \$2000-\$4000 reward for similar injuries in 2016. By the way I also was never allowed to know the fiduciary relationship of my two employers/co-counsel the Ortner and Rosenthal groups and who was ultimately responsible for reimbursement and Expert Pulmonary IME submissions

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JULIE K. OF FIRM  
BY

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Further adversarial problems began early around **2006 to 8 where I felt pressured to increase the impairment ratings for patients particularly regarding sleep related injuries** and how that related to their work.

I was frequently giving a small percentage of the total body impairment because I felt the work environment had little to do with their sleep diseases. The Sleep diseases were documented and treated and the patients improved. The law firms were not billed for the non-paid sleep studies since the **WWC stopped compensating for sleep related disease** worsened by airway obstruction.

I'm afraid that the adversarial relationship was apparent to the defence attorneys for the factory.

**At each deposition included the statement that I have not been paid in full for the evaluations and that my payment was not contingent upon impairment ratings or even eventual outcome compensations from the Workers Compensation Board.** It forced me into being more conservative about impairment ratings and document almost every expert statement I gave with literature. **I had to show that I used state-of-the-art pulmonary testing equipment and fully certified respiratory therapists.** I was required to use the American Medical Association guideline to impairments and did so with exact precision.

Adversarial relationships then worsened as the delay in accepting mediation or other offers for settlements led to years of my non-payment and equal worker impatience. It was with great trepidation and warning that I did continued giving depositions without having already been paid. **The extension of time eventually became so long that I sought forced payment by reporting the unethical circumstances.**

When discussions with the two attorney groups for whom I did not know and did not have the right to know what their fiduciary relationships were did not lead to payments **then I sought ethical review from the office of disciplinary counsel in South Carolina and the Florida State Bar for non-payment of cases** which were extending far beyond the expected length of time for workers compensation determination and settlement

**Eventually a 9-hour deposition was done by me as to the exact nature of my bills and this was only three to four weeks prior to Judge Young's letter** from the Ortner Rosenthal group saying that there were no additional medical expenses. They apparently said that I had been paid by the insurance companies in part and apparently there should be no payment for the expert reports.

**I have been a traveling Critical Care pulmonary specialist since 2012 I had my phone number and the Ortner Rosenthal groups knew how to contact me at anytime.** Instead when the case came before Judge young (paper submissions-not a courtroom appearance), my adversaries/ co-counsel who had threatened non-payment after I had submitted a complaint to the respective disciplinary boards of both Florida and SC for not pursuing settlements in a remotely reasonable timeline.

So, my two firms had a significant "war chest" of funding, yet left me giving subsequent depositions **having not been paid in advance and leaving both groups exposed to potential ethical bias and potential excessive determination of individual impairment compensations.** They made no effort to contact me as to the request for my total medical expenses-maybe Judge Young would drop all claims for them (as she did). *Deviously, my co-counsel decided to hide those very numbers given to them in the recent 9 hour deposition-see next paragraph, and several other venues including when billing was presented to the office of disciplinary counsel, the daily submissions of all bills as they accrued, and the 48 hour visit to my Columbia practice where all charts and every billed expense was photocopied for them by my employees and their oversight.*

#### **THE 9 HOUR DEPOSITION OF ME REGARDING BILLING AND MY COMPLAINTS TO THE OFFICE OF DISCIPLINARY COUNSEL:**

Ortner and Rosenthal did not protect my fees even though they had just subjected me to a 9 hour grueling deposition to understand exactly how I calculated the medical expert services that also included, as per Daniel Collins, Esq. General Counsel Department of Consumer Affairs who said that SC precedent imposes at present an approximately 8% non-compounded interest from the date of services rendered (a considerable interest when considering that a state benchmark for settlement delay had defined reports unpaid since 2004 and most since 2006-8.

**Regarding the request to block any investigation into the history motivations and especially money distributions and contracts between co-counsel Ortnor and Rosenthal:**

**There are very important lingering questions:**

*Was the money for medical services divided with the workers if not, then the penalty of keepin the full amount within the law practices rise to the seriousness of having lied to to Judge Young about the non-existence of medical contracts, apparently a lie about my working entirely on retainer, the lie a and in fact was awarded medical fees being withheld and successfully convinced Judge Young, based on my lack of submission of medical bills to simply give the money back to the attorneys WITHOUT STIPULATION THAT IT BE EQUITABLY DIVIDED BETWEEN FACTORY WORKS AND THE ATTORNIES.*

*What is now fascinating while disappointing is that there is a new motion that there be no discovery. That is, no simple "follow the money" possibilities that may uncover another legal deviation.*

*It is crucial that we be allowed to follow the money and see where my \$500,000 from medical expenses eventually was deposited since the patients of Hampton do not know of any additional dispersion of fees to them. It is possible that the \$500,000 was given to the patient, but given past monetary issues, I doubt the factory workers received that reclaimed \$500,000.*

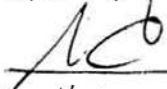
*However we ask for discovery and in particular to get subpoena power to question all pertinent lawyers as well as to get factual data from the workers who at this point have shown disdain about their cases from the outset. The factory workers felt entirely misled by the attorneys but they were extremely pleased with the medical care and the improvement in their conditions per my multiple years of expert Specialty Care*

Cary Fechter MD



Pulmonary and Critical Care Medicine

*SWORN TO BEFORE ME  
THIS 5<sup>th</sup> DAY OF JANUARY, 2019*



*Notary Public for South Carolina  
My Commission Expires: 12/1/21*

**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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**Rule 210(g), SCACR, Certificate of Counsel  
(Volume I)**

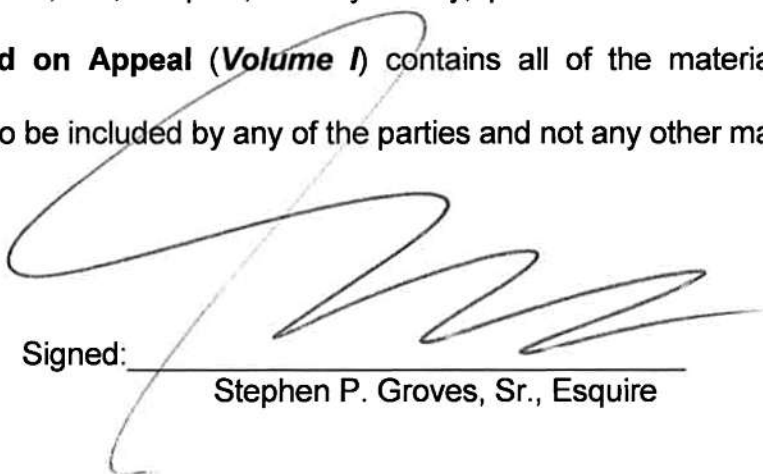
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E-Mail: [Stephen.Groves@butlersnow.com](mailto:Stephen.Groves@butlersnow.com)

*Attorneys for the Appellant,  
Cary E. Fechter, M.D.*

1841

I, Stephen P. Groves, Sr., Esquire, hereby certify, pursuant to Rule 210(g), SCACR, that this **Record on Appeal (Volume I)** contains all of the material and documentation proposed to be included by any of the parties and not any other material.



Signed: \_\_\_\_\_  
Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

18 May 2022

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