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STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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

CARY E. FECHTER, M.D.,

Appellant,

vs.

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

Respondents.

Record on Appeal
(*Volume II*)

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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-CP-10-4371

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

FILED
2019 JAN -9 AM 10:24
JULIE J. ARMSTRONG
CLERK OF COURT
BY
2017-CP-10-4371

1. 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.

2. The Defendant Ortner at all times mentioned herein was acting individually and as an agent of the Defendant Ortner Law Firm LLC.

3. 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.

4. 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.

5. In 2006 the Ortner Defendants associated the Defendant Rosenthal and his law firm Rosenthal, Levy, Simon, and Ryles (RLS&R).

6. The Defendant Rosenthal at all times mentioned herein was acting individually and as an agent of the Defendant RLS&R).

7. The Defendants Rosenthal and his law firm affirmed the contract with the Plaintiff and agreed to pay the Plaintiff for his services rendered.

8. Under the Workers' Compensation Act fees for an independent medical examination (IME) are a matter of contract between the employee, attorney for the employee, employer, or insurance carrier, and the physician.

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.

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 Plaintiff is informed and believes that the Defendants failed to report to the WCC the fees for tests and treatment of the numerous clients; therefore, the Defendants did not ask the WCC to approve the payment of the medical fees to the Plaintiff.

21. 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.

22. Further, the Plaintiff was not a party in any cases before the Commission, in which the Defendants represented the numerous clients before the Commission.

23. 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. See attached sample copy of contract of fee agreement, as shown as Schedule E.

24. 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.

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, to make reports concerning the Defendants' clients, and to continue to treat the clients of the Defendants.

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. An actual and/or implied contract existed between the Plaintiff and the Defendants.

31. That the Defendants by and through its 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.

32. That said breach was accompanied by a fraudulent act and was the direct and proximate cause of damages to the Plaintiff.

33. 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.

34. The actions and inactions of the Defendants are capable of being performed on other parties.

35. 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.

36. 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.

37. 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.

38. 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.

39. The Defendants had the duty to forward the bills for treatment and tests to the Commission and the insurance carrier of the Defendants' clients.

40. 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.

41. 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, nor the motion of the Rosenthal Defendants to Commissioner Taylor until after January 26, 2016.

42. 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.

43. 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.

44. The Defendants fraudulently withheld the Plaintiff's requests for payment from the Workers' Compensation Commission.

45. 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.

46. The Plaintiff is further informed and believes that the said $500,000 was not distributed to the workers' compensation claimants.

47. 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 Ortner Defendants were aware of the written agreements to compensate the Plaintiff upon the conclusion of all the workers' compensation claimants.

48. The Defendants, nor the Workers' Compensation Commission, failed to notify the Plaintiff of any right to claim any of the $500,000, which was set aside for the payment of approved costs.

49. The payment of the $500,000 to the Defendants would not be an approved cost, for additional attorneys' fees nor for any other reason.

50. Attached as Schedule F hereto is a is a letter from J. Keith Roberts, legal counsel for the WCC, which explains contractual rights and medical fees.

51. 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.

52. The Complaint against the Defendants was filed on August 25, 2017, and which was in the three year time limit of filing the Complaint.

ARGUMENT

I. The South Carolina Workers' Compensation Commission did not have exclusive jurisdiction over the subject matter in this action; the Plaintiff did not have to exhaust available administrative remedies.

53. The South Carolina Workers' Compensation Commission does not have jurisdiction to control contracts between attorneys representing claimants and independent third parties, including physicians.

54. The State Courts of South Carolina have jurisdiction to deal with issues concerning the existence and enforcement of contracts. *Capital City Insurance v. BP Staff, Inc.*, 382 S.C. 92, 674 S.E.2d 524 (S.C. App. 2009). The Court held: "In the present case, 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. 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. Thus, the trial court had subject matter jurisdiction to hear these types of claims and erred in dismissing Capital City's complaint pursuant to Rule 12(b)(1), SCRCP."

55. The Court in *Capital City Ins. Co.* further held: "Next, Capital City asserts the trial court erred in dismissing the complaint pursuant to Rule 12(b)(6), SCRCP, based upon exhaustion principles because the complaint sets forth sufficient facts to support claims for breach of contract and for fraud, which are not subject to the requirement of exhaustion of administrative remedies. We agree. 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. *See Unisys Corp. v. S.C. Budget & Control*

Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (stating that exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute). Thus, we must determine whether exhaustion of administrative remedies was required as a matter of law; if not, we next determine whether the court abused its discretion in dismissing the case until exhaustion of the administrative process is complete in order to assist in the disposition of the circuit court proceeding. *See Stanton v. Town of Pawley's Island,* 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) ("[T]he question of whether to require the plaintiff to exhaust administrative remedies was a matter within the sound discretion of the trial judge," which will not be disturbed absent an abuse of discretion).[4] Initially, we note "[a] party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville,* 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) (citing *Ward,* 343 S.C. 14, 538 S.E.2d 245). For example, in *Thomas Sand Co. v. Colonial Pipeline Co.,* 349 S.C. 402, 563 S.E.2d 109 (Ct.App.2002), respondent Colonial argued appellant Sand's failure to exhaust administrative remedies precluded a tort action against third parties. *Id.* at 412, 563 S.E.2d at 114-15. This court disagreed and held the following:

> If this were an appeal from the denial of the permit through the administrative process in which [the agency] was the appropriate fact finder, Thomas Sand would clearly be required to exhaust its administrative remedies prior to bringing suit. . . . However, in a tort action against a third

party, no such exhaustion requirement exists. The question is not whether the permit would have been granted but whether Thomas Sand was damaged. . . . [The agency] is not the appropriate fact finder to answer this question. The jury is.

56. Further, the Court in *Capital City Ins. Co.,* held the basic purpose of the exhaustion requirement, to allow the agency to render a final decision and set forth its reasons for the permit denial, would not assist the court in this instance. The alleged wrong is not one which the administrative process was designed to redress. "The doctrine of exhaustion of administrative remedies only 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." A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered."

57. The Court further held in *Capital City Ins. Co.,* although Capital City was a party to an administrative proceeding related to the case at bar at the time of Judge Breeden's first order, its breach of contract and fraud claims are not based on a statute for which the legislature mandates the pursuit of an administrative remedy; in short, Capital City's claims alleging breach of contract and fraud are not wrongs for which the administrative scheme was designed to redress.[5] Accordingly, as in *Thomas Sand,* Capital City was not required, as a matter of law, to exhaust the administrative process regarding the modifier before filing the current action in circuit court for breach of contract and fraud. As previously indicated, as to the breach of contract and fraud claims, Capital City was not

required to exhaust administrative remedies as a matter of law. This case is merely impacted by another administrative proceeding, not one itself requiring the exhaustion of the administrative process. Since the complaint adequately sets forth facts supporting the claims in this case, and since the court erred in its disposition of the exhaustion issue, dismissal under Rule 12(b)(6), SCRCP, was likewise improper.

ARGUMENT

The Ortner Defendants were properly served. The law firm of Rosenthal, Levey, Simon, and Ryles was also properly served.

58. The Summons and Complaint were filed in paper form with the Charleston County Clerk of Court on August 25, 2017.

59. After some delay the pleadings were returned to Plaintiff's counsel and copies were forwarded to the Defendants by certified mail.

60. The Ortner Defendants received the Summons and Complaint on December 7, 2017, as is evidenced by the USPS Tracking form, attached hereto and shown as Schedule A. An attempt was previously made to serve the Ortner Defendants in October 2017 to no avail, as is evidenced by the USPS Tracking form, attached hereto and shown as Schedule B.

61. The Defendant law firm of Rosenthal, Levy, Simon, and Ryles was served on October 12, 2017, as is evidenced by the USPS Tracking form, attached hereto and shown as Schedule C. A copy of the receipt is attached hereto and shown as schedule D.

62. A Motion to Dismiss on behalf of the Ortner Defendants was filed on January 8, 2018. The Motion raises numerous defenses to the Complaint, including defenses to the different causes of action enumerated in the Complaint.

63. It is clear and undisputed that counsel for the Ortner Defendants had a copy of the Plaintiff's Complaint in order to create the Motion to Dismiss.

64. It is submitted that even if proper service of process had not been completed, the Ortner Defendants waived the service requirement.

ARGUMENT

The Plaintiff's Complaint alleges unfair treatment of the Plaintiff by the Defendants, which can be used further in violation of the South Carolina Unfair Trade Practices Act.

65. The Defendants promised to pay the Plaintiff for services rendered as an Independent Medical Examiner and as a treating physician for the Defendants' workers' compensation clients. The number of Defendants' clients was in excess of 400 individuals.

66. The Plaintiff is informed and believes that attorneys for workers' compensation clients and clients who have compensable physical injuries will obtain the services of an Independent Medical Examiner.

67. The Plaintiff is further informed and believes that the Defendants have used Independent Medical Examiners, both prior to contracting with the Plaintiff and subsequently to contracting with the Plaintiff.

68. As stated herein above, the Defendants informed the Plaintiff in writing of the Defendants' intentions to pay to the Plaintiff all the sums due to him upon the disposition of all issues concerning all of the Defendants' workers' compensation clients. A sample copy of the written contract is attached hereto and shown as Schedule E.

69. "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000) (citing *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105 (Ct. App. 1989).

70. A deceptive practice is one which has a tendency to deceive. *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105 (Ct. App. 1989).

71. The Plaintiff has alleged that the Defendants' actions and procedures show the Defendants' procedures create a potential for repetition of the unfair and deceptive acts. *Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21 (1998) In the present case the Defendants' deceptive acts occurred more than 400 times.

72. To allow the deceptive practices to continue and not to redress the wrongs will have a substantial public interest. In example, attorneys representing workers' compensation clients would no longer be able to obtain the services of Independent Medical Examiners, because the IMEs could not be assured payment of their fees. If IMEs are not used, then the claimants (public) would suffer.

ARGUMENT

The South Carolina Supreme Court has disciplined attorneys, who have failed to pay expert witness fees, court reporter fees, and third party fees.

73. The Defendants included with their Motion to Dismiss, a copy of a letter from the Office of Disciplinary Counsel to the Plaintiff. The Office of Disciplinary Counsel works for the South Carolina Supreme Court. The letter indicated that from their investigation, the Commission did not find evidence of lawyer misconduct. However, the letter to the Plaintiff did say: "This office is not authorized to give advice concerning a legal dispute or dealings with a lawyer (i.e., breach of contract, failure to pay); 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."

74. After receipt of the letter from the Office of Disciplinary Counsel, the Plaintiff sought advice concerning the legal disputes and, subsequently, filed the Complaint against the Defendants.

75. The South Carolina Supreme Court has found it to be inappropriate to fail to pay expert witness fees, court reporter fees, and third party fees. *In Re Houston,* 415 S.C. 594, 784 S.E.2d 238 (2016); *In Re Smith,* 296 S.C. 86, 370 S.E.2d 876 (1988); *In Re Conway,* 374 S.C. 75, 647 S.E.2d 235 (2007); *In Re Houston,* 314 S.C. 94, 442 S.E.2d 175 (1994).

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Columbia, SC 29260
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sctriallawyer@bellsouth.net
Attorney for the Plaintiff

January 8, 2019

USPS Tracking®

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

SCHEDULE A

Track Another Package +

Tracking Number: 70032260000505408448

Remove ×

Your item was delivered to the front desk, reception area, or mail room at 3:10 pm on December 7, 2017 in CHARLESTON, SC 29401.

Delivered

December 7, 2017 at 3:10 pm
Delivered, Front Desk/Reception/Mail Room
CHARLESTON, SC 29401

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)

200

USPS Tracking®

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

Track Another Package +

SCHEDULE B

Tracking Number: 70151730000142889534

Remove ×

Your item was returned to the sender on November 10, 2017 at 12:48 pm in CHARLESTON, SC 29407 because of an incorrect address.

Alert

November 10, 2017 at 12:48 pm
No Such Number
CHARLESTON, SC 29407

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)

201

USPS Tracking®

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

SCHEDULE C

Track Another Package +

Tracking Number: 70151730000142889398

Remove ×

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)

202

SCHEDULE D

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

2. Article Number *(Transfer from service label)*

7015 1730 0001 4288 9368

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☐ Agent
☐ Address

B. Received by *(Printed Name)*

C. Date of Deliv

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

RESTRICTED DELIVERY

3. Service Type

- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☐ Certified Mail®
- ☑ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restri Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmatio
- ☐ Signature Confirmatio Restricted Delivery

PS Form 3811, April 2015 PSN 7530-02-000-9053 Domestic Return Recei

UNITED STATES POSTAL SERVICE

BL 334

12 OCT 15

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

203

[redacted]

ORTNER LAW FIRM

SCHEDULE E

June 4th, 2003

Gary E. Fechter, M.D.
2070 Ashley Crossing Drive, Suite 160
Charleston, South Carolina 29414

RE: [redacted]

Dear Dr. Fechter

Please be advised that this Law Firm represents the above-named individual(s) for injuries sustained on or about the above-referenced date. You will find below a Medical Authorization signed by our client and we would appreciate you forwarding your medical report and bill in this matter at your earliest possible convenience.

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.

With kind regards, I remain

Sincerely,
ORTNER LAW FIRM, LLC

LEON MARTIN ORTNER

MEDICAL AUTHORIZATION

You are hereby authorized to furnish and release to my attorneys, THE ORTNER LAW FIRM, LLC, all information and records they request concerning findings, treatmen rendered and opinions as to my condition. Please do not disclose information to insurance adjusters or other persons without written authority from me. (Pursuant to confidential an privileged communications laws). All prior authorizations are hereby canceled and I wai any privilege I may have to my said attorneys. The foregoing authority shall continue in full until revoked by me in writing.

Sincerely,

[redacted]

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SCHEDULE F

State of South Carolina

J. Keith Roberts
General Counsel
1333 Main Street, 5th Floor
P.O. Box 1715
Columbia, S.C. 29202-1715

TEL: (803) 737-5701
FAX: (803) 737-5764
KeRoberts@wcc.sc.gov

Workers' Compensation Commission

January 2nd, 2018

Melvin D. Bannister, Esquire
PO Box 6833
Columbia, SC 29260

Re: Fees for Independent Medical Evaluations under the Workers' Compensation Act

Dear Melvin:

Please allow this letter to serve as a follow-up to our telephone conversation regarding the fees that a physician may charge for an independent medical evaluation (IME) of an injured worker under the Workers' Compensation Act. As we discussed, fees for an IME are a matter of contract between the employee, employer, or insurance carrier, and the physician.

Generally, physicians' fees for services performed in relation to a workers' compensation claim are governed by the South Carolina Workers' Compensation Act, Title 42, South Carolina Code of Laws. The Act provides

> Attorney fees, physician fees, and hospital charges for services under this title are subject to the approval of the commission, but a physician or hospital may not collect a fee from an employer or insurance carrier until the physician or hospital has made the reports required by the commission in connection with the case.

S.C. Code Ann. § 42-15-90(A) (1976, as amended)

This section goes on to provide

> A person may not receive a fee, gratuity, or other consideration for a service rendered pursuant to this title unless the fee, gratuity, or other consideration is approved by the commission or a court of competent jurisdiction . . . . A violation of this section constitutes a misdemeanor and, upon conviction, each offense is subject to a fine of not more than five hundred dollars, imprisonment for not more than one year, or both.

S.C. Code Ann. § 42-15-90(B) (Emphasis added).

Rather than holding a hearing to approve the fees in each individual case, the Commission sets physicians' fees by promulgating regulations in accordance with § 42-3-30 and § 42-3-185.

The Regulations of the Commission provide "[t]he Commission shall establish maximum allowable payments for medical services provided by medical practitioners based on a relative value scale and a conversion factor set by the Commission." S.C. Code Regs. Ann. 67-1302(A) (2018 Supp.) The Commission annually publishes a Medical Services Provider Manual, which is based on the Resource-Based Relative Value Scale published by the American Medical Association.

For independent medical evaluations, the Medical Services Provider Manual provides

> An Independent Medical Evaluation is an objective medical or chiropractic evaluation of the injured employee's medical condition and work status which is requested by the insurance carrier, self-insured employer, an attorney, or a Workers' Compensation Commissioner.

2018 S.C. Workers' Compensation Medical Services Provider Manual, eff. April 1, 2018, p. 33.

The Medical Services Provider Manual states "[p]ayment for [an independent medical evaluation] varies and is based on individual consideration (IC) or negotiation between the carrier and provider. Id. For billing purposes, payment is coded using CPT code 99456. CPT Code 99456 lists under 'description' "[w]ork related medical or disability examination by other than the treating physician . . . " and under 'Maximum Allowable Payment' "IC", which stands for "individual consideration". Id. at p. 50.

I have enclosed copies of the above-cited pages of the Medical Services Provider Manual for your convenience.

If there is anything else you need from me at this time, please do not hesitate to ask.

With warmest regards,

Sincerely,

J. Keith Roberts, Esquire
S.C. Workers' Compensation Commission

See the South Carolina Workers' Compensation Commission (SCWCC) web site for the current travel reimbursement amount. See **http://www.wcc.sc.gov/welcomeandoverview/compensationrates/Pages/default.aspx**

Supplies and Materials (CPT 99070)

Supplies and materials provided by the physician over and above those usually included with the office visit may be paid. Use the appropriate code from Section 9. HCPCS Level II, to report the supply. In the event that a supply cannot be identified using the codes listed in Section 9, use CPT code 99070 and price the item at actual cost plus 20 percent. (See "Supplies" in Chapter III. Billing Policy and Chapter IV. Payment Policy for complete details.)

Impairment Ratings

When a treating physician determines that the injured worker has reached maximum medical improvement (MMI), where the injured worker's condition is not likely to be improved by further treatment, the treating physician must rate the level of permanent impairment sustained by the injured worker. The results of the impairment rating must be forwarded to both the Commission and the insurance carrier or self-insured employer. The impairment rating may be indicated in the office notes and need not be a separate report.

If an E/M service is necessary in determining an impairment rating it may be billed using CPT code 99455 or the E/M code that best represents the level of service rendered.

Independent Medical Evaluation (IME)

An Independent Medical Evaluation is an objective medical or chiropractic evaluation of the injured employee's medical condition and work status which is requested by the insurance carrier, self-insured employer, an attorney, or a Workers' Compensation Commissioner. An IME includes the review of available records and test reports, examination of the patient, and a written report regarding the medical condition and work status of the injured worker.

The employer or carrier may schedule an IME with a medical provider of its choice to assist in determining the status of an injured employee's condition. Acceptable reasons for conducting an IME include, but are not limited to:

1. Instances when the authorized treating physician has not provided current medical reports;
2. Determining whether a change in medical provider is necessary;
3. Determining whether treatment is necessary or the employee appears not to be making appropriate progress in recuperation;
4. Determining whether over-utilization by a medical provider has occurred.

The medical provider performing the IME may not be the medical provider selected to provide the treatment or follow-up care, unless the carrier or self-insurer and the employee agree to this, or unless an emergency exists.

Before performing an IME, a physician must have a written request from the Commission, the employer/insurance carrier, the injured worker or his/her attorney, or other appropriate third party. To report an IME, use CPT code 99456. Payment for this service varies and is based on individual consideration (IC) or negotiation between the carrier and provider.

Alternating Physicians

When physicians of similar skills alternate in the care of a patient, e.g., partners or group practice members covering for a physician on weekends and vacations, each physician must bill individually for the services he/she personally rendered.

Follow-up Days

When a service listed in the *Medical Services Provider Manual* is assigned a number of follow-up days, no payment will be made for office or hospital visits provided by the surgeon or his/her representative during the follow-up period. The charges for the follow-up office and hospital visits were included in the value of the original procedure. Physicians may, however, charge for supplies furnished by the office. If the length of follow-up care goes beyond the number of follow-up days indicated, the physician is allowed to charge for office/hospital visits. Emergency department visits, consultations, and further treatment referrals for care to another provider are not part of the follow-up days and should be separately paid.

Modifiers

The following modifiers are used when reporting evaluation and management services. See *CPT 2018* Appendix A for a full list of CPT modifiers.

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EVALUATION AND MANAGEMENT (E/M) 99201–99499

Medical Fee Schedule Effective April 1, 2018

	CODE	DESCRIPTION	MAP NON FAC	MAP FAC	FUD	ASST
	99456	Work related or medical disability examination by other than the treating physician that includes: Completion of a medical history commensurate with the patient's condition; Performance of an examination commensurate with the patient's condition; Formulation of a diagnosis, assessment of capabilities and stability, and calculation of impairment; Development of future medical treatment plan; and Completion of necessary documentation/certificates and report.	IC	IC	XXX	0
	99460	Initial hospital or birthing center care, per day, for evaluation and management of normal newborn infant	130.00	130.00	XXX	0
	99461	Initial care, per day, for evaluation and management of normal newborn infant seen in other than hospital or birthing center	121.50	85.50	XXX	0
	99462	Subsequent hospital care, per day, for evaluation and management of normal newborn	56.50	56.50	XXX	0
	99463	Initial hospital or birthing center care, per day, for evaluation and management of normal newborn infant admitted and discharged on the same date	150.00	150.00	XXX	0
	99464	Attendance at delivery (when requested by the delivering physician or other qualified health care professional) and initial stabilization of newborn	101.50	101.50	XXX	0
	99465	Delivery/birthing room resuscitation, provision of positive pressure ventilation and/or chest compressions in the presence of acute inadequate ventilation and/or cardiac output	198.00	198.00	XXX	0
	99466	Critical care face-to-face services, during an interfacility transport of critically ill or critically injured pediatric patient, 24 months of age or younger; first 30-74 minutes of hands-on care during transport	324.00	324.00	XXX	0
+	99467	each additional 30 minutes (List separately in addition to code for primary service)	162.00	162.00	ZZZ	0
	99468	Initial inpatient neonatal critical care, per day, for the evaluation and management of a critically ill neonate, 28 days of age or younger	1247.50	1247.50	XXX	0
	99469	Subsequent inpatient neonatal critical care, per day, for the evaluation and management of a critically ill neonate, 28 days of age or younger	540.00	540.00	XXX	0
	99471	Initial inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 29 days through 24 months of age	1080.00	1080.00	XXX	0
	99472	Subsequent inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 29 days through 24 months of age	554.50	554.50	XXX	0
	99475	Initial inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 2 through 5 years of age	760.00	760.00	XXX	0
	99476	Subsequent inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 2 through 5 years of age	466.00	466.00	XXX	0
	99477	Initial hospital care, per day, for the evaluation and management of the neonate, 28 days of age or younger, who requires intensive observation, frequent interventions, and other intensive care services	473.50	473.50	XXX	0
	99478	Subsequent intensive care, per day, for the evaluation and management of the recovering very low birth weight infant (present body weight less than 1500 grams)	186.00	186.00	XXX	0
	99479	Subsequent intensive care, per day, for the evaluation and management of the recovering low birth weight infant (present body weight of 1500-2500 grams)	168.50	168.50	XXX	0
	99480	Subsequent intensive care, per day, for the evaluation and management of the recovering infant (present body weight of 2501-5000 grams)	162.50	162.50	XXX	0

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Cary E. Fechter, MD,	)	Civil Action No.: 2017-CP-10-04371
Plaintiff,	)	**GERALD ROSENTHAL'S AND ROSENTHAL, LEVY, SIMON, AND RYLE'S JOINT MOTION TO DISMISS**
v.	)	
Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles,	)	
Defendants.	)	

FILED
2019 MAY 14 PM 12:01
JULIE J. ARMSTRONG
CLERK OF COURT
BY

Named-Defendant Gerald Rosenthal ("Rosenthal") and Named-Defendant Rosenthal, Levy, Simon, and Ryles, PA (incorrectly identified in the caption as Rosenthal, Levy, Simon, and Ryles) ("RLSR") respectfully move this Court to dismiss both Rosenthal and RLSR from the captioned matter because Plaintiff has failed to serve Plaintiff's summons and complaint on either Rosenthal or RLSR as required by applicable law. More than 120 days have elapsed since Plaintiff filed (August 25, 2017) the summons and complaint with the Clerk of Court ("Clerk").

As a result, this action has not been commenced against either Rosenthal or RLSR as required by Rule 3(a) of the South Carolina Rules of Civil Procedure ("SCRCP") and the Court lacks personal jurisdiction over Rosenthal and RLSR.

The Court should dismiss Rosenthal and RLSR pursuant to Rules 12(b)(2), (4), and (5), SCRCP. Dismissing Rosenthal and RLSR should be with prejudice because Plaintiff alleges that more than three years have passed since Plaintiff's asserted causes of action against Rosenthal and RLSR accrued (January 26, 2019).

Dismissing Rosenthal and RLSR should be with prejudice pursuant to Rule 12(b)(1), SCRCP, because the South Carolina Workers' Compensation Commission ("SCWCC") previously exercised exclusive, original jurisdiction over the subject matter of the causes of action Plaintiff

asserted in the complaint. Plaintiff had a full and fair opportunity to participate before the SCWCC, and the Circuit Court has been divested of jurisdiction to hear and determine Plaintiff's claims; and Plaintiff failed to seek review of the prior administrative determinations of the material facts and legal issues at issue in this captioned matter re-litigation of Plaintiff's claims. Plaintiff is further barred from re-litigating the claims because the SCWCC necessarily determined the material facts and issues of law Plaintiff now seeks to re-litigate.

FACTUAL BACKGROUND

1. At all times relevant to this action, Rosenthal was a citizen and resident of the State of Florida.
2. At all times relevant to this action, RLSR was a Professional Association organized and operating under the laws of the State of Florida and headquartered therein and was not registered as a foreign corporation in the State of South Carolina.
3. According to the Court's docket, Plaintiff filed a summons and complaint in this captioned matter with the Clerk of Court of Charleston County ("Clerk") on August 25, 2017. *See* Exhibit A [Docket Sheet (May 1, 2019)].
4. Plaintiff's Complaint alleges, supported by Plaintiff's sworn affidavit, which was filed with the Clerk on January 9, 2019, averring the underlying workers compensation cases that form the basis of Plaintiff's claims against all Defendants "were resolved on January 26, 2016." *See* Exhibit B [Fechter's Affidavit] at ¶ 15 and Complaint at ¶ 17.
5. Plaintiff, through his counsel, filed an affidavit with the Clerk on January 9, 2019, which claims Plaintiff effected service of Plaintiff's summons and complaint by certified mail on RLSR on October 12, 2017. *See generally* Exhibit C [Bannister's Affidavit].
6. Bannister's Affidavit is dated and was filed approximately 15 months after purported service and approximately 17 months after Plaintiff filed the summons and complaint. *See id.*

7. Bannister's Affidavit asserts the summons and complaint were delivered, by certified mail, restricted delivery, return receipt requested, as follows: "Gerald Rosenthal, at 1401 Forum Way, Sixth Floor, West Palm Beach, Florida." *See* Exhibit C at Schedule C and Schedule D.
8. Bannister's Affidavit asserts service of the summons and complaint was perfected against RLSR even though the return receipt ("Green Card") clearly shows the restricted delivery was to "Gerald Rosenthal, " and nowhere reflects RLSR as an addressee. *See generally* Exhibit C at Schedule C and Schedule D.
9. Plaintiff has not asserted that Plaintiff made any other attempt to serve either Rosenthal or RLSR with the summons and complaint.
10. Based on information and belief, Plaintiff's only attempt to serve the summons and complaint on either Rosenthal or RLSR was by the certified mail referenced in Bannister's Affidavit.
11. Rosenthal does not now and has never resided at 1401 Forum Way, Sixth Floor, West Palm Beach, Florida. *See* Exhibit D [Affidavit of Gerald Rosenthal] at ¶ 8.
12. 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.
13. No individual working at RLSR has ever been authorized to accept service on Rosenthal's behalf. *See* Exhibit D at ¶ 9 and Exhibit E [Affidavit of Jonathan Todd Levy] at ¶ 12.
14. Ed Elder ("Elder") signed the Green Card. *See* Exhibit F [Affidavit of Ed Elder] at ¶ 10.
15. Elder is not now, nor has he ever been, designated by, or authorized to accept service on behalf of, Rosenthal. *See* Exhibit D at ¶ 9 and Exhibit F at ¶ 7.
16. At all times relevant to this Motion, Elder served as a rotating receptionist and file clerk for RLSR. *See* Exhibit F at ¶ 4 and Exhibit E at ¶ 14.
17. In Elder's limited capacity as a rotating receptionist and file clerk, Elder is occasionally

stationed at the reception desk to greet clients and receive phone calls and perform other clerical tasks like organizing files, making copies and scanning documents. *See* Exhibit F ¶ 5 and Exhibit E at ¶ 14.

18. Elder is not, nor has he ever been, an officer, a managing or general agent, or otherwise an agent authorized by appointment or by law to serve as a statutory agent for RLSR. *See* Exhibit F at ¶ 6 and Exhibit E at ¶ 15.

19. At the time and date on which Elder signed the return receipt card, he was at the reception desk by happenstance and received all the mail delivered to RLSR's office by the mail carrier. *See* Exhibit F ¶ 9-10.

20. At all times relevant to this Motion, RLSR had approximately 42-43 employees and receives a large stack of mail every day. *See* Exhibit E at ¶ 16.

21. Any mail addressed to Rosenthal, including the envelope to which the Green Card was affixed, was delivered with a stack of other mail addressed to RLSR. *See* Exhibit F at ¶ 10.

22. The envelope to which the Green Card was affixed did not contain any indication whatsoever as to what was contained in the envelope. *See* Exhibit F at ¶ 10.

23. Rosenthal retired from RLSR on December 31, 2015. *See* Exhibit D at ¶ 7 and Exhibit E at ¶ 10.

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

25. 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. *See* Exhibit E at ¶ 9.

26. 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). *See* Exhibit E at ¶ 9.

27. 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: http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail?inquirytype=OfficerRegisteredAgentName&directionType=PreviousList&searchNameOrder=LEVYJONATHANTODD%20H399270&aggregateId=domp-h39927-45562dcd-b18d-4eaa-a838-cbb6e9955cd8&searchTerm=levy%20jonathon&listNameOrder=LEVYJONATHANP%20P020000633071 (last accessed May 1, 2019). *See* Exhibit E at ¶ 9.

28. As of the filing of this Motion, more than 600 days have passed since Plaintiff filed the summons and complaint, and, to date, Plaintiff has failed to serve either Rosenthal or RLSR. *See* Exhibit D at ¶ 10 and Exhibit E at ¶ 13.

29. As of the filing of this Motion, more than three years have passed since Plaintiff asserts Plaintiff's causes of action arose.[1]

30. Plaintiff's claims have necessarily been resolved by prior order of the SCWCC. *See* Ortner Defendants' Motion to Dismiss, Allegations, Undisputed Facts, and Procedural History, filed with the Clerk on January 8, 2018 ("Ortner's Motion).

DISCUSSION – SERVICE/PERSONAL JURISDICTION

[1]Exhibit B at ¶ 15 and Complaint at ¶ 17.

31. Commencement of an action in South Carolina is governed by Rule 3(a), SCRCP.

32. 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)

33. Rule 3(a) is the Supreme Court's embodiment of South Carolina Code Annotated section 15-3-20, which 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).

34. 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).

35. The applicable statute of limitation for an action sounding in fraud is three years. S.C. Code Ann. § 15-3-530(7).

36. 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.

37. Rule 3(a) and section 15-3-20(B) 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, actual, technical service must be accomplished on or before the statute of limitations runs or within one hundred twenty days after filing.

38. "[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).

39. Not only is timely, proper service of process a statutory and procedural requirement in its own right, but proper service of process confers personal jurisdiction over a defendant to the court. *Richardson v. P.V., Inc.*, 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009). Absent proper service, the court lacks personal jurisdiction over a defendant. *Id.*

A. Service as to Rosenthal

40. Rule 4(d)(1), SCRCP, provides for service on an individual of at least 14 years of age. 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."

41. 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.

42. Plaintiff failed to comply with Rule 4(d)(1), SCRCP, by having the postal carrier deliver an unmarked envelope to Rosenthal's attention (not by actual personal service) at Rosenthal's former place of business (not dwelling place or usual place of abode). Further, Elder is not nor has he ever been Rosenthal's "agent authorized by appointment or by law to receive service of process."

43. Plaintiff has not asserted service of the summons and complaint has ever been effected against Rosenthal, and, to the best of Rosenthal's knowledge, no other attempt to serve Rosenthal has been made. *See* Exhibit D at ¶ 10.

44. As a result, there is no question (a) Plaintiff (i) has failed to serve Rosenthal as required by Rule 4(d)(1), SCRCP, (ii) has failed to commence an action against Rosenthal, as required by section 15-3-20(B) and Rule 3, SCRCP, and (b) this Court lacks personal jurisdiction over Rosenthal as a result of Plaintiff's failing to effect service of civil process.

B. Service as to RLSR

45. Rule 4(d)(3), SCRCP, provides that service on a corporation 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).

46. Bannister's Affidavit asserts service on RLSR was effective. *See* Exhibit C.

47. However, on its face, Bannister's Affidavit fails to make even a *prima facie* showing that Plaintiff effected service against RLSR.

48. The Green Card (restricted delivery) was addressed ***individually*** to Gerald Rosenthal, ***without***

any reference to RLSR. The Green Card was neither signed for nor accepted by Rosenthal. Moreover, regardless of whether Elder or some other person sitting at the reception desk at the moment when the mail arrived signed the Green Card, that signature might be something the Court could review in determining whether the envelope was received by ***the actual addressee*** (restricted delivery) but it could never serve as evidence of acceptance by an entity whose name is not even reflected on the return receipt. For this Court to permit otherwise would eviscerate the nature of the proper address requirements for general mail delivery and the concept of "restricted delivery" to the addressee as embodied in Rule 4(d)(8), SCRCP, thereby permitting anyone to accept service on behalf of a corporation even when the corporation is not even listed as the addressee.

49. Further, under Rule 4(d)(8), SCRCP, even if a plaintiff has made a *prima facie* showing of effective service (which, in this case, Plaintiff has not) a defendant is entitled to refute a plaintiff's assertion that the service of process was effective, *Roche v. Young Brothers, Inc.*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1994), by showing "that the return receipt was signed by an unauthorized person." *Graham Law Firm, P.A.*, 396 S.C. at 297, 721 S.E.2d at 434; *see also* Rule 4(d)(8), SCRCP.

50. Rule 4(d)(3), SCRCP, is very 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."

51. 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).

52. As is made clear by both Elder's Affidavit and Levy's Affidavit, Elder 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."

53. Similarly, according to both Rosenthal's Affidavit and Levy's Affidavit, on the date Plaintiff deposited the envelope with the United State 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 over a year before Plaintiff mailed the envelope).

54. Despite these realities, Plaintiff sent an envelope (a) unmarked as to the contents (that is, nothing on the outside of the envelope revealed it contained a summons and complaint), (b) addressed to an individual who was not (i) employed by RLSR, (ii) authorized to accept service, and (c) without even listing RLSR on the outside of the envelope as the intended recipient, and fifteen months after mailing that envelope, Plaintiff asserts, for the first time, the envelope constituted effective service on RLSR.

55. This is not effective service under Rule 4(d)(3).

56. Moreover, the "delivery" of the unmarked envelope without a proper addressee or address and to someone who was not authorized to accept service does not comport with notions of fundamental fairness or due process, which "include notice, an opportunity to be heard in a meaningful way, and judicial review." *Harbit v. City of Charleston*, 382 S.C. 383, 393, 675 S.E.2d 776, 781 (Ct. App. 2009); *see also* S.C. Const. Art. I, § 3; U.S. Const. amend. V.

57. 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 our 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.

58. In Florida, service of process on a corporation 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 effected by ***only*** a County Sheriff or the Sheriff's authorized process server.

59. Whether the Court looks to Rule 4(d)(3), SCRCP, Rule 4(c)(2)(C)(i), FRCP, or applicable Florida law, Plaintiff failed to comply.

60. Other than the single envelope addressed to Rosenthal, to the best of RLSR's knowledge, no other attempt to serve RLSR has been made. *See* Exhibit E at ¶ 13.

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

DISCUSSION – SUBJECT MATTER JURISDICTION

62. 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*").

63. The procedural history of the *Adams Matters* has been summarized to this Court in Ortner's Motion.[2]

64. A South Carolina Circuit Court "has original jurisdiction in civil and criminal cases, **except**

[2]Rosenthal and RLSR reserve the right to amend and expand on the *Adams Matters* procedural history as well as the arguments contained in the Ortner Motion as may be appropriate in any hearing before the Court and any future filings in this captioned matter.

those cases in which exclusive jurisdiction shall be given to inferior courts." S.C. Const. Art. V, § 11 (emphasis added).

65. According to South Carolina Code Annotated section 42-3-180 and the related authorities cited in the Ortner Motion, the SCWCC is such a 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."

66. Rosenthal and RLSR concur with Ortner Defendants and adopt (subject to expansion and amplification) the arguments contained in the Ortner Motion that the Circuit Court is divested of subject matter jurisdiction and that exclusive subject matter jurisdiction to determine Plaintiff's claims for compensation resided with the SCWCC.[3]

67. Similarly, Rosenthal and RLSR concur with Ortner Defendants and adopt (subject to expansion and amplification) the arguments contained in the Ortner Motion that the principles of res judicata and collateral estoppel provide that "once the Commission approves a compensation agreement, the factual issue of liability under the Act is finally adjudicated and cannot be retried on collateral attack." *McCreery v. Covenant Presbyterian Church*, 303 S.C. 271, 273, 400 S.E.2d 130, 131 (1990).

PRAYER FOR RELIEF

Based on the foregoing, Rosenthal and RLSR seek an order from this Court:

[3]As the Ortner Defendants also described in extensive detail in the Ortner Motion, in addition to Plaintiff's opportunity to litigate this matter before the SCWCC, Plaintiff previously sought to litigate the same issues that are the subject of this captioned matter by filing grievances with the Supreme Court of South Carolina's Office of Disciplinary Counsel ("ODC") alleging that Lee Ortner and Rosenthal failed to provide payment for the services rendered in the *Adams Matters*. After an investigation, the ODC determined that there was no evidence of any misconduct by either Ortner or Rosenthal because there was no obligation to pay Plaintiff for any work Plaintiff allegedly performed. Having had two authorities already reject Plaintiff's clams, this captioned matter is Plaintiff's third attempt to bite the same apple.

a. finding Plaintiff has failed to serve the summons and complaint on Rosenthal as required by Rule 4(d)(1), SCRCP;

b. finding Plaintiff has failed to serve the summons and complaint on RLSR as required by Rule 4(d)(3), SCRCP;

c. finding Plaintiff has failed to commence the captioned matter against either Rosenthal or RLSR as required by Rule 3, SCRCP;

d. finding this Court lacks personal jurisdiction over Rosenthal because of Plaintiff's failing to serve Rosenthal as required by Rule 4(d)(1), SCRCP;

e. finding this Court lacks personal jurisdiction over RLSR because of Plaintiff's failing to serve RLSR as required by Rule 4(d)(3), SCRCP;

f. finding that this Court lacks subject matter jurisdiction because the SCWCC possessed exclusive jurisdiction over the subject matter of this captioned matter;

g. dismissing the captioned matter against Rosenthal and RLSR with prejudice; and

h. granting all other legal and equitable relief as may be available to Rosenthal and RLSR, as this Court deems just and proper.

[SIGNATURE PAGE FOLLOWS]
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KOZLAREK LAW LLC

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Attorney for:
Named-Defendant Gerald Rosenthal,
Named-Defendant Rosenthal, Levy, Simon, and Ryles, PA

Greenville, South Carolina
May 13, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Cary E. Fechter, MD,	)	Civil Action No.: 2017-CP-10-04371
Plaintiff,	)	
v.	)	**CERTIFICATE OF SERVICE**
Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles,	)	
Defendants.	)	

FILED
2019 MAY 14 PM 12:04
JULIE J. ARMSTRONG
CLERK OF COURT
BY

I certify that a copy of the foregoing **GERALD ROSENTHAL'S AND ROSENTHAL, LEVY, SIMON, AND RYLE'S JOINT MOTION TO DISMISS** with seven Exhibits has been served on the following counsel of record on May 13, 2019, by delivering the same by Federal Express, delivery charges prepaid, addressed as follows:

Counsel for Plaintiff
Melvin D. Bannister, Esq.
Post Office Box 6833
Columbia, South Carolina 29260

and by e-mailing same to sctriallawyer@bellsouth.net and facsimile to 803.782.8677

Counsel for Defendant
Barnwell Whaley Patterson & Helms, LLC
M. Dawes Cooke, Jr., Esq.
Justin P. Novak, Esq.
288 Meeting Street
Suite 200
Charleston, South Carolina 29401

and by e-mailing same to mdc@barnwell-whaley.com and jnovak@barnwell-whaley.com

Michael E. Kozlarek

EXHIBIT A



Julie J. Armstrong
Charleston County Clerk of Court

Charleston County
Circuit Court Case Details
Public Index

Cary F Fechter M D VS Leon Martin Ortner

Case Number:	Court Agency:	Filed Date:
Case Type:	Case Sub Type:	File Type:
Status:	Assigned Judge:	
Disposition:	Disposition Date:	Disposition Judge:
Original Source Doc:	Original Case #:	
Judgment Number:	Court Roster:	

Case Parties **Judgments** **Tax Map Information** **Associated Cases** **Actions** **Financials**

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Ortner, Leon Martin	Motion/Motion Filing Fee	Filing		04/18/2019-15:54		
Novak, Justin Paul	Defnt Motion/Reconsider Alter and/or Amend Order & Crt/Srv	Motion		04/18/2019-10:07		
	Order Denying Motion to Dismiss	Order		04/05/2019-10:59		
Bannister, Melvin Dean	3/25/2019_JRY_Roster /Notice of Case Roster Publication Sent	Action		03/19/2019-08:35		
Novak, Justin Paul	3/25/2019_JRY_Roster /Notice of Case Roster Publication Sent	Action		03/19/2019-08:35		
Novak, Justin Paul	1/28/2019_JRY_Roster /Notice of Case Roster Publication Sent	Action		01/22/2019-09:25		
Bannister, Melvin Dean	1/28/2019_JRY_Roster /Notice of Case Roster Publication Sent	Action		01/22/2019-09:25		
	Order: Defendant Motion for Protective Order now Moot	Order		01/16/2019-11:24		
Fechter, Cary E M D	Memo in Opposition to Motion to Dismiss	Filing		01/09/2019-11:50		
Fechter, Cary E M D	Affidavit	Filing		01/09/2019-11:48		
	Affidavit Of Service by certified mail (2)	Filing		01/09/2019-11:46		
Bannister, Melvin Dean	1/7/2019_MOTION_Roster /Notice of Motions Roster Publication	Action		12/05/2018-10:28		
Novak, Justin Paul	1/7/2019_MOTION_Roster /Notice of Motions Roster Publication	Action		12/05/2018-10:28		
Ortner, Leon Martin	Motion/Motion Filing Fee	Filing		10/08/2018-11:42		
Novak, Justin Paul	Defnt Motion for Protective Order & Crt/Srv	Motion		10/08/2018-11:37	01/09/2019-11:37	
Fechter, Cary E M D	ADR/Notice of ADR	Action		06/20/2018-15:33		
	Order-defnt's motion to dismiss is continued	Order		05/24/2018-16:33		
Bannister, Melvin Dean	4/16/2018_MOTION_Roster /Notice of Motions Roster Publication	Action		03/28/2018-10:51		
Novak, Justin Paul	4/16/2018_MOTION_Roster	Action		03/28/2018-10:51		

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EXHIBIT B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	(JURY)
CARY E. FECHTER, M.D.,	)	
PLAINTIFF,	)	AFFIDAVIT
VS	)	2017-CP-10-4371
LEON MARTIN ORTNER, THE ORTNER LAW FIRM LLC, GERALD ROSENTHAL, AND ROSENTHAL, LEVY, SIMON, AND RYLES,	)	
DEFENDANTS.	)	

FILED
2019 JAN -9 AM 10:26
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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.

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 Ortner 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

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

REBECCA J ALLEN
Notary Public-State of South Carolina
My Commission Expires
December 30, 2023

Notary Public for South Carolina

My commission expires: December 30, 2023

EXHIBIT C

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 OF SERVICE BY CERTIFIED MAIL 2017-CP-10-4371

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

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

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

SCHEDULE C

Track Another Package +

Tracking Number: 70151730000142889398

Remove ×

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)

237

SCHEDULE D

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

2. Article Number (Transfer from service label)

7015 1730 0001 4288 9368

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☐ Agent
☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

RESTRICTED DELIVERY

3. Service Type

- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☐ Certified Mail®
- ☑ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, April 2015 PSN 7530-02-000-9053 Domestic Return Receipt

UNITED STATES POSTAL SERVICE

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
BY

238

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:

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

9590 9403 0705 5196 2927 53

2. Article Number *(Transfer from service label)*

7015 1730 0001 4288 9368

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☐ Agent
☐ Addressee

B. Received by *(Printed Name)*

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

RESTRICTED DELIVERY

3. Service Type

- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☐ Certified Mail®
- ☑ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
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- ☐ Registered Mail Restricted Delivery
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- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, April 2015 PSN 7530-02-000-9053 Domestic Return Receipt

FILED
2019 JAN -9 AM 10:00
JULIE J. ARMSTRONG
CLERK OF COURT
BY

239

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	(JURY)
	)	
CARY E. FECHTER, M.D.,	)	
	)	AFFIDAVIT OF SERVICE BY CERTIFIED
PLAINTIFF,	)	MAIL
	)	
VS	)	
	)	
LEON MARTIN ORTNER, THE ORTNER LAW FIRM LLC, GERALD ROSENTHAL, AND ROSENTHAL, LEVY, SIMON, AND RYLES,	)	2017-CP-10-4371
	)	
DEFENDANTS.	)	

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

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: 1/8/28

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SCHEDULE A

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Delivered

December 7, 2017 at 3:10 pm
Delivered, Front Desk/Reception/Mail Room
CHARLESTON, SC 29401

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EXHIBIT D

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Cary E. Fechter, MD,	)	Civil Action No.: 2017-CP-10-04371
Plaintiff,	)	
v.	)	
Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles,	)	
Defendants.	)	

AFFIDAVIT OF GERALD ROSENTHAL

Personally appeared before the undersigned officer duly authorized to administer oaths, Gerald Rosenthal, who after being duly sworn, deposes and says as follows:

1. I, Gerald Rosenthal, affirm that I am over eighteen years of age and competent to make this Affidavit.

2. I make this Affidavit based on my personal knowledge.

3. I submit this Affidavit for use in support of the Motion to Dismiss of Defendant Rosenthal, Levy, Simon, and Ryles, PA ("RLSR") and Defendant Gerald Rosenthal ("Rosenthal") in the captioned matter.

4. I am a Florida resident, and, to the best of my recollection, I have not been present in or, if ever, transacted business in South Carolina since no later December 31, 2009.

5. I do not own real estate or reside for any part of the year in South Carolina.

6. I am an attorney formerly employed by RLSR.

7. I retired from RLSR in December 2015.

8. Since I retired from RLSR, I do not maintain an office or receive mail at Rosenthal, Levy, Simon, and Ryles, PA, 1401 Forum Way, Sixth Floor, West Palm Beach, Florida 33401 ("Firm

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Office"), nor have I ever resided at that address.

9. I have not designated or appointed any individual to serve as my statutory agent or otherwise an agent to accept service of process on my behalf.

10. At no point did I accept service of process or acknowledge receipt of service of process in the captioned matter on behalf of myself, individually, or RLSR.

11. Subsequent to my retirement from RLSR in 2015, I did not serve as registered agent for RLSR and was not otherwise an officer, a managing or general agent, or otherwise an agent authorized by appointment or by law to receive service of process for RLSR.

12. Service of process in the state of Florida may only be effected by a Sheriff or Sheriff's designated agent for service of process and may not be effected by mailing.

FURTHER THE AFFIANT SAYETH NOT.

Gerald Rosenthal

P253-281-46-264-0
exp! 07/24/2020

Sworn to and subscribed before
me this 10 day of MAY, 2019.

Notary Public for State of Florida
My Commission Expires: 03/05/2022

Notary Public State of Florida
Gregg V Gullo
My Commission GG 181960
Expires 03/05/2022

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EXHIBIT E

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Cary E. Fechter, MD,	)	Civil Action No.: 2017-CP-10-04371
Plaintiff,	)	
v.	)	
Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles,	)	
Defendants.	)	

AFFIDAVIT OF JONATHAN TODD LEVY

Personally appeared before the undersigned officer duly authorized to administer oaths, Jonathan Todd Levy, who after being duly sworn, deposes and says as follows:

1. I, Jonathan Todd Levy, affirm that I am over eighteen years of age and competent to make this Affidavit.

2. I make this Affidavit based on my personal knowledge.

3. I submit this Affidavit for use in support of the Motion to Dismiss of Defendant Rosenthal, Levy, Simon, and Ryles, PA ("RLSR") and Defendant Gerald Rosenthal ("Rosenthal") in the captioned matter.

4. I am an attorney presently employed by RLSR in the position of President, and was employed by RLSR in the same role in 2017.

5. RLSR has authorized me to make this Affidavit on its behalf.

6. RLSR is a professional association organized and operating under the laws of the State of Florida and does not have offices in South Carolina.

7. RLSR does not, and is not required to, maintain a registered agent for service of process in South Carolina.

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8. RLSR's main office is located at Rosenthal, Levy, Simon, and Ryles, PA, 1401 Forum Way, Sixth Floor, West Palm Beach, Florida 33401 ("Principal Office").

9. I am the registered agent for service of process on RLSR in Florida, and my address as registered with, and published by, the Florida Secretary of State since January 4, 2016 is as follows: Johnathan Todd Levy, 6921 Finamore Cir., Lake Worth, FL 33467.

10. Rosenthal is a former employee of RLSR who retired from the practice of law in December 2015, and subsequent to his retirement, he did not serve as registered agent for RLSR and was not otherwise an officer, a managing or general agent, or otherwise an agent authorized by appointment or by law to receive service of process for RLSR.

11. Rosenthal does not now, and did not in 2017, work or maintain an office at RLSR's Principal Office.

12. Neither I nor any other employee of RLSR have been designated or otherwise authorized to accept service on behalf of Rosenthal.

13. At no point did I accept service of process or acknowledge receipt of service of process in the captioned matter on behalf of Rosenthal, individually, or RLSR.

14. Ed Elder ("Elder") is now, and was in 2017, employed by RLSR in the role of rotating receptionist and file clerk, and in this role, Elder is occasionally stationed at the reception desk to greet clients and receive phone calls and perform other clerical tasks, such as organizing files, making copies and scanning documents.

15. Elder is not now nor has never been an officer, general agent, or an agent authorized by appointment or by law to serve as a statutory agent or registered agent for service of process for RLSR.

16. Including attorneys and all staff members, RLSR currently employs 42 and in 2017 had

approximately 43 employees and receives a large stack of mail every day.

17. Service of process in the state of Florida may only be effected by a Sheriff or Sheriff's designated agent for service of process and may not be effected by mailing.

FURTHER THE AFFIANT SAYETH NOT.

Jonathan Todd Levy

Sworn to and subscribed before
me this 04 day of May, 2019.

Notary Public for State of Florida
My Commission Expires:

ELWANDA T. LEONARD
MY COMMISSION # GG 017765
EXPIRES: August 9, 2020
Bonded Thru Notary Public Underwriters

EXHIBIT F

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
Cary E. Fechter, MD,	)	Civil Action No.: 2017-CP-10-04371
Plaintiff,	)	
v.	)	
Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles,	)	
Defendants.	)	

AFFIDAVIT OF ED ELDER

Personally appeared before the undersigned officer duly authorized to administer oaths, Ed Elder, who after being duly sworn, deposes and says as follows:

1. I, Ed Elder, affirm that I am over eighteen years of age and competent to make this Affidavit.

2. I make this Affidavit based on my personal knowledge.

3. I submit this Affidavit for use in support of the Motion to Dismiss of Defendant Rosenthal, Levy, Simon, and Ryles, PA ("RLSR") and Defendant Gerald Rosenthal ("Rosenthal") in the captioned matter.

4. I am presently employed by RLSR in the position of a rotating receptionist and file clerk, and was employed by RLSR in the same role in 2017.

5. I have the responsibility for answering telephones and office clerical tasks. On occasion, I receive mail delivered to RLSR, if I happen to be sitting at the reception desk when mail is delivered.

6. I am not now, have never been, and have never held myself out to be, an officer, general agent, or an agent authorized by appointment or by law to serve as a statutory agent or registered

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agent for service of process for RLSR.

7. I am not now, have never been, and have never held myself out to be a general agent or an agent authorized by appointment or by law to serve as a statutory agent for service of process for Rosenthal, individually.

8. I do not now reside, nor have I ever resided, at the Rosenthal home and was not present in his home at any point in October 2017.

9. On or about October 12, 2017, I was present at the reception desk of RLSR when the mail was delivered.

10. On or about October 12, 2017, I signed the return receipt "green cards" for several pieces of certified mail, and none of these mail pieces contained any notations or markings on the exterior of the envelopes to indicate that they contained anything other than certified letters.

11. At no point did I accept service of process or acknowledge receipt of service of process in the captioned matter on behalf of Rosenthal, individually, or RLSR.

FURTHER THE AFFIANT SAYETH NOT.

Ed Elder

Sworn to and subscribed before
me this 10th day of May, 2019.

Notary Public for State of Florida
My Commission Expires:

ELWANDA T. LEONARD
MY COMMISSION # GG 017765
EXPIRES: August 9, 2020
Bonded Thru Notary Public Underwriters

EXHIBIT G

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Remove ×

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

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

October 12, 2017
In Transit to Next Facility

October 11, 2017, 10:13 am
Departed USPS Regional Destination Facility
WEST PALM BEACH FL DISTRIBUTION CENTER

October 10, 2017, 11:41 am
Arrived at USPS Regional Destination Facility

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WEST PALM BEACH FL DISTRIBUTION CENTER

October 8, 2017, 3:44 am
Departed USPS Regional Facility
SACRAMENTO CA DISTRIBUTION CENTER

October 7, 2017, 4:53 pm
Arrived at USPS Regional Facility
SACRAMENTO CA DISTRIBUTION CENTER

October 5, 2017, 5:40 pm
Departed Post Office
COLUMBIA, SC 29206

October 5, 2017, 2:05 pm
USPS in possession of item
COLUMBIA, SC 29206

Feedback

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ELECTRONICALLY FILED - 2019 Dec 19 4:03 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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 **RENEWED 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 Rule 12(b)(5), SCRCP, for an Order dismissing the causes of action asserted against the Ortner Defendants in the Complaint filed on August 25, 2017 ("Complaint").[1] The Ortner Defendants now move to dismiss Plaintiff's Complaint on the grounds that Plaintiff failed to effect service of the Summons and Complaint within the statute of limitations. As a result, this Court should dismiss the entire Complaint against the Ortner Defendants with prejudice pursuant to Rule 12(b)(5), SCRCP.

[1] Although the Honorable Deadra L. Jefferson denied the Ortner Defendants' original Motion to Dismiss by the Order Denying Motion to Dismiss filed on April 5, 2019, the court 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. (Or. Denying Mot. Dismiss 1n.1, April 5, 2019, attached Exhibit A) ("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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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

s/ Justin P. Novak
M. Dawes Cooke, Jr., Esquire
Justin P. Novak, Esquire
P.O. Drawer H
Charleston, South Carolina 29402
Phone: (843) 577-7700
Fax: (843) 577-7708
mdc@barnwell-whaley.com
jnovak@barnwell-whaley.com

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

December 19, 2019

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EXHIBIT A

ELECTRONICALLY FILED - 2019 Dec 19 4:03 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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**

FILED
2019 APR -5 AM 11:51
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 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[1], and that the Complaint fails to plead facts sufficient to constitute the Unfair Trade Practices cause of action.

[1] 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.[2] 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.[3]

FACTUAL BACKGROUND[4]

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

[2] 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.
[3] 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.
[4] 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 Ortner 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 Ortner

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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), SCRCP 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!

DL Jefferson

HON. DEADRA L. JEFFERSON
Presiding Judge
Ninth Judicial Circuit

4th day of April, 2019
Charleston, South Carolina

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ELECTRONICALLY FILED - 2019 Dec 20 6:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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 OF DEFAULT 2017-CP-10-4371

Personally appeared before me Melvin D. Bannister, who being duly sworn, deposes and says:

That he is the attorney for the Plaintiff in the above entitled action; that the Summons and Complaint were served upon the Defendants, Leon Martin Ortner and The Ortner Law Firm, LLC, according to law, as appears by the Affidavit of Service by Certified Mail on December 7, 2017; a Motion to Dismiss the Plaintiff's Complaint was denied, Defendant's appeal to the South Carolina Court of Appeals was dismissed, and the Remittitur was issued by the South Carolina Court of Appeals on November 13, 2019; that more than thirty (30) days, exclusive of the day of service, have elapsed since the service of said Summons and Complaint and the Remittitur being filed by the South Carolina Court of Appeals and that no Answer or other responsive pleading has been served by or on behalf of the said Defendants and that the Defendants are now in default; that the Defendant is not a member of the Armed Services.

Melvin D. Bannister
Attorney for the Plaintiff

SWORN TO before me this 19th
day of December, 2019.

Notary Public for South Carolina
My Commission Expires: May 6, 2026

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ELECTRONICALLY FILED - 2019 Dec 23 10:19 AM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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 **MOTION FOR ENLARGEMENT OF TIME 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 Rule 6(b), SCRCP, for an Order extending the time for the Ortner Defendants to serve and file the Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC, to December 19, 2019, on the grounds that for good cause exits. 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.

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BARNWELL WHALEY PATTERSON & HELMS, LLC

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

December 23, 2019

ELECTRONICALLY FILED - 2020 Jan 10 3:26 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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 **MEMORANDUM IN SUPPORT OF RENEWED MOTION TO DISMISS ON BEHALF OF DEFENDANTS LEON MARTIN ORTNER AND ORTNER LAW FIRM, LLC**

PLEASE TAKE NOTICE that Defendants Leon Martin Ortner and 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, submit this Memorandum in Support of the Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC filed on December filed on December 19, 2019, in which the Ortner Defendants move this Court pursuant to Rule 12(b)(5), SCRCP, for an Order dismissing the causes of action asserted against the Ortner Defendants in the Complaint filed on August 25, 2017 ("Complaint").[1]

ARGUMENT SUMMARY

The Ortner Defendants now move to dismiss Plaintiff's Complaint on the grounds that Plaintiff failed to effect service of the Summons and Complaint within the statute of limitations on the grounds that (1) Plaintiff failed to effect service of process on either Leon Martin Ortner or Ortner Law Firm, LLC, (2) even if Plaintiff effected service of process as alleged, Plaintiff failed to

[1] Although the Honorable Deadra L. Jefferson denied the Ortner Defendants' original Motion to Dismiss by the Order Denying Motion to Dismiss filed on April 5, 2019, the court 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. (Or. Denying Mot. Dismiss 1n.1, April 5, 2019) ("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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serve Leon Martin Ortner or Ortner Law Firm, LLC within the applicable statute of limitations because Plaintiff knew or should have known of any claim arising from the alleged right to payment upon entry of the consent order memorializing the settlement of the underlying action on July 22, 2014. As a result, this Court should dismiss the entire Complaint against the Ortner Defendants with prejudice.

ALLEGATIONS, UNDISPUTED FACTS & PROCEDURAL HISTORY[2]

Plaintiff filed the Summons and Complaint in this Court on August 25, 2017.[3] 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 a settled workers' compensation action.[4] According to the Complaint, the Ortner Defendants retained Plaintiff to perform the medical examinations and provide the reports in 2002. (Compl. ¶ 5.) Plaintiff, however, alleges making initial examinations and 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 and to make payment in full upon settlement or verdict. (Compl. ¶ 15-16.)

On April 1, 2014, the Nevamar claimants collectively settled their workers' compensation claims at mediation. (Consent Order ¶ 5, July 22, 2014, attached as Exhibit A.) Pursuant to the

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[2] By restating allegations taken from the Complaint and other filings, 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.

[3] One hundred twenty days from the date of the filing of the Summons and Complaint expired on December 23, 2017.

[4] Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC (WCC File No. 0326995) 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.

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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 B.) 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 C.) On January 26, 2016, Commissioner Taylor ordered the release of the totality of the funds held in trust to the Rosenthal Defendants. (Id.) Plaintiff concedes that the claims were resolved by January 26, 2016. (Compl. ¶ 17; Fechter Affidavit ¶¶ 15, 49, attached as Exhibit D.) Plaintiff alleges receipt of the Summons and Complaint by 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. (See Affidavit of Service by Certified Mail, attached Exhibit E.) Plaintiff's counsel executed the supporting Affidavit of Service by Certified Mail on January 8, 2019, and filed the affidavit on January 9, 2019. The filed Affidavit of Service by Certified Mail does not include a copy of the return receipt or returned envelope showing whether the mailing was accepted, refused, or returned.

ARGUMENT

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

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limitations, actual service must be accomplished not later than one hundred twenty days after filing." Rule 3(a), SCRCP; see also S.C. Code § 15-3-20. "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." Maher 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.

"Copies of the original summons shall be served upon each defendant." Rule 4(a), SCRCP. "'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). 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 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), SCRCP. 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), SCRCP.

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"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), SCRCP; 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), SCRCP. "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.

"When the rules are followed, it is presumed that service was proper." Roberson v. Southern Finance. of South Carolina, 365 S.C. 6, 10, 615 S.E.2d 112, 114–15 (2005) (citing Roche v. Young Bros., Inc., 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995). However, "[i]t 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)).

I. Plaintiff Failed to Serve Leon Martin Ortner

Plaintiff alleges receipt 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. (See Affidavit of

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Service by Certified Mail[5], attached Exhibit E.) This is not Mr. Ortner's dwelling house or usual place of abode. (Leon Martin Ortner Affidavit ¶¶ 2-3, attached Exhibit F.) Although the certified envelope is addressed to Mr. Ortner personally, he did not accept service of or sign for the envelope. (Id. at ¶¶ 5-6.) 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. (Affidavit of Service by Certified Mail, attached Exhibit E.) As Plaintiff did not comply with Rules 4(a), (d), or (g), SCRCP, Plaintiff failed to serve Leon Martin Ortner within the applicable statute of limitations. As a result, this Court should dismiss the Complaint against Leon Martin Ortner with prejudice.

II. Plaintiff Failed to Serve Ortner Law Firm, LLC

Plaintiff also alleges receipt of the Summons and Complaint by Ortner Law Firm, LLC by certified mail at 145 King Street, Ste. 211, Charleston, South Carolina, on December 7, 2017. (See Affidavit of Service by Certified Mail, attached Exhibit E.) While this address is the principal place of business for Ortner Law Firm, LLC, the subject envelope is not addressed to Ortner Law Firm, LLC. The envelope was also 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. (Ortner Law Firm Affidavit ¶¶ 2-11, attached Exhibit G; Karen Ortner Affidavit ¶¶ 2-7, attached Exhibit H.) 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. (Affidavit of Service by Certified Mail, attached Exhibit E.) As Plaintiff did

[5] Despite the declarations in the Affidavit of Service by Certified Mail, the appended USPS Tracking Form provides only that an item was 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.

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not comply with Rules 4(a), (d), or (g), SCRCP, Plaintiff failed to serve the Ortner Law Firm, LLC within the applicable statute of limitations. As a result, this Court should dismiss the Complaint against The Ortner Law Firm, LLC with prejudice.

III. Even If Plaintiff Effected Service on December 7, 2017, Plaintiff Failed to Serve Leon Martin Ortner and Ortner Law Firm, LLC Within the Applicable Statute of Limitations

The Complaint alleges that the Ortner Defendants agreed to pay Plaintiff upon settlement or verdict of the underlying workers' compensation action. (Compl. ¶ 15-16.) The claimants collectively settled their workers' compensation claims at mediation on April 1, 2014. (Consent Order ¶ 5, July 22, 2014, attached as Exhibit A.) A consent order memorializing the settlement was entered on July 22, 2014. (Id.)

The exercise of reasonable diligence by a sophisticated medical doctor experienced in litigation and claiming a pecuniary interest in fees owed for the examination and continued treatment of four hundred fifty-eight claimants in an workers' compensation action would have put Plaintiff on notice of the settlement and arising right to payment on or around the settlement of those claims at mediation on April 1, 2014, or at least by the entry of the consent order memorializing that settlement on July 22, 2014. 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. As a result, this Court should dismiss the instant action pursuant to Rule 12(b)(5), SCRCP, because the statute of limitations precludes Plaintiff from asserting these claims.

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IV. The Ortner Defendants Did Not Waive the Service Requirement

"Waiver is a voluntary and intentional abandonment or relinquishment of a known right." SPUR at Williams Brice Owners Association, Inc. v. Lalla, 415 S.C. 72, 90, 781 S.E.2d 115, 125 (Ct. App. 2015). "The party asserting waiver has the burden of proof." Id.

Plaintiff admits that proper service of process may not have been completed upon the Ortner Defendants. (See Affidavit of Service by Certified Mail, attached Exhibit E; Memo. Opp. Mot. Dismiss ¶ 58-64, attached Exhibit I.) Plaintiff instead argues that the Ortner Defendants waived the service requirement in the event that proper service of process had not been completed. (Id.) Plaintiff, however, does not assert any grounds for such a waiver. (See id.)

The Ortner Defendants have not waived the requirement of effective service. The Ortner Defendants filed a Motion to Dismiss on January 8, 2018, in which the defendants specifically challenged the sufficiency of service of process under Rule 12(b)(5), SCRCP, on the grounds that (1) Plaintiff should have through the exercise of reasonable diligence had notice of the settlement and arising right to payment at least by the entry of the consent order memorializing the settlement on July 22, 2014, and (2) Plaintiff failed to effect service upon the Ortner Defendants as alleged on December 7, 2017. In fact, the Ortner Defendants have consistently and diligently maintained this position in each appearance before this Court in accordance with Rule 12(b)(5), SCRCP. As a result, this Court should determine that the Ortner Defendants did not waive the requirement of effective service and dismiss the Complaint against Ortner Law Firm, LLC with prejudice.

CONCLUSION

For the foregoing reasons, this Court should dismiss with prejudice the Summons and Complaint pursuant to Rule 12(b)(5), SCRCP. 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

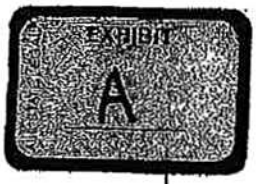
s/ Justin P. Novak
M. Dawes Cooke, Jr., Esquire
Justin P. Novak, Esquire
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Phone: (843) 577-7700
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mdc@barnwell-whaley.com
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Attorneys for Defendants Leon Martin Ortner & Ortner Law Firm, LLC

January 10, 2020

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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 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



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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.

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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

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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

Columbia, South Carolina

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

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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 Newsmar Company, LLC

THE STEINBERG LAW FIRM, LLP

By:
David T. Pearlman

ROSENTHAL, LEVY, SIMON & RYLES

By:
Gerald A. Rosenthal

ORTNER LAW FIRM, LLC

By:
Leon Martin Ortner

COHEN & KUVIN, LLC

By:
Spencer T. Kuvin

Attorneys for the Claimants

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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

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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.

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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

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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.

11/13/19
Date

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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

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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.

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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

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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	(JURY)
CARY E. FECHTER, M.D.,	AFFIDAVIT
PLAINTIFF,	
VS	2017-CP-10-4371
LEON MARTIN ORTNER, THE ORTNER LAW FIRM LLC, GERALD ROSENTHAL, AND ROSENTHAL, LEVY, SIMON, AND RYLES,	
DEFENDANTS.	

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JULIE J. ARMSTRONG
CLERK OF COURT
BY

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

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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.

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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

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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.

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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.

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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 Ortner Defendants were aware of the written agreements to compensate the Plaintiff upon the conclusion of all the workers' compensation claimants.

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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

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

REBECCA J ALLEN
Notary Public-State of South Carolina
My Commission Expires
December 30, 2023

Notary Public for South Carolina

My commission expires: December 30, 2023

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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 OF SERVICE BY CERTIFIED MAIL 2017-CP-10-4371

FILED
2019 JAN -9 AM 9:56
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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: 11/28

306

EXHIBIT
tabbies
E

USPS Tracking®

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

SCHEDULE A

Track Another Package +

Tracking Number: 70032260000505408448 Remove X

Your item was delivered to the front desk, reception area, or mail room at 3:10 pm on December 7, 2017 in CHARLESTON, SC 29401.

Delivered

December 7, 2017 at 3:10 pm
Delivered, Front Desk/Reception/Mail Room
CHARLESTON, SC 29401

Tracking History ⌄

Product Information ⌄

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

307

ELECTRONICALLY FILED - 2020 Jan 10 3:26 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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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 OF SERVICE BY CERTIFIED MAIL 2017-CP-10-4371

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

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: 11/28

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See Less ^

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

309

ELECTRONICALLY FILED - 2020 Jan 10 3:26 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

ELECTRONICALLY FILED - 2020 Jan 10 3:26 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	CIVIL ACTION NO.: 2017-CP-10-04371
Cary E. Fechter, MD, Plaintiff, v. Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles, Defendants.	**AFFIDAVIT OF LEON MARTIN ORTNER**

Personally appeared before me, Leon Martin Ortner, who, being first duly sworn, deposes and states as follows:

1. My name is Leon Martin Ortner and I am over the age of eighteen (18) years and am competent to make this Affidavit.

2. My dwelling house and/or usual place of abode is not located at 145 King Street, Ste. 211, Charleston, South Carolina.

3. My dwelling house and/or usual place of abode has never been located at 145 King Street, Ste. 211, Charleston, South Carolina.

4. Copies of the summons and complaint in the above-captioned matter have not been delivered to me personally or left at my dwelling house or usual place of abode.

5. At no point have I accepted service of process or acknowledged receipt of service of process of the summons and complaint in the above-captioned matter.

6. I did not sign any return receipt for the envelope a copy of which is attached as Exhibit A to this Affidavit.

7. I have not designated, appointed, or otherwise authorized any person to receive service of process on my behalf.

FURTHER THE AFFIANT SAYETH NOT

Leon Martin Ortner

SWORN TO before me this
10th day of January, 2020
Notary Public for South Carolina
My commission expires: 3/30/21

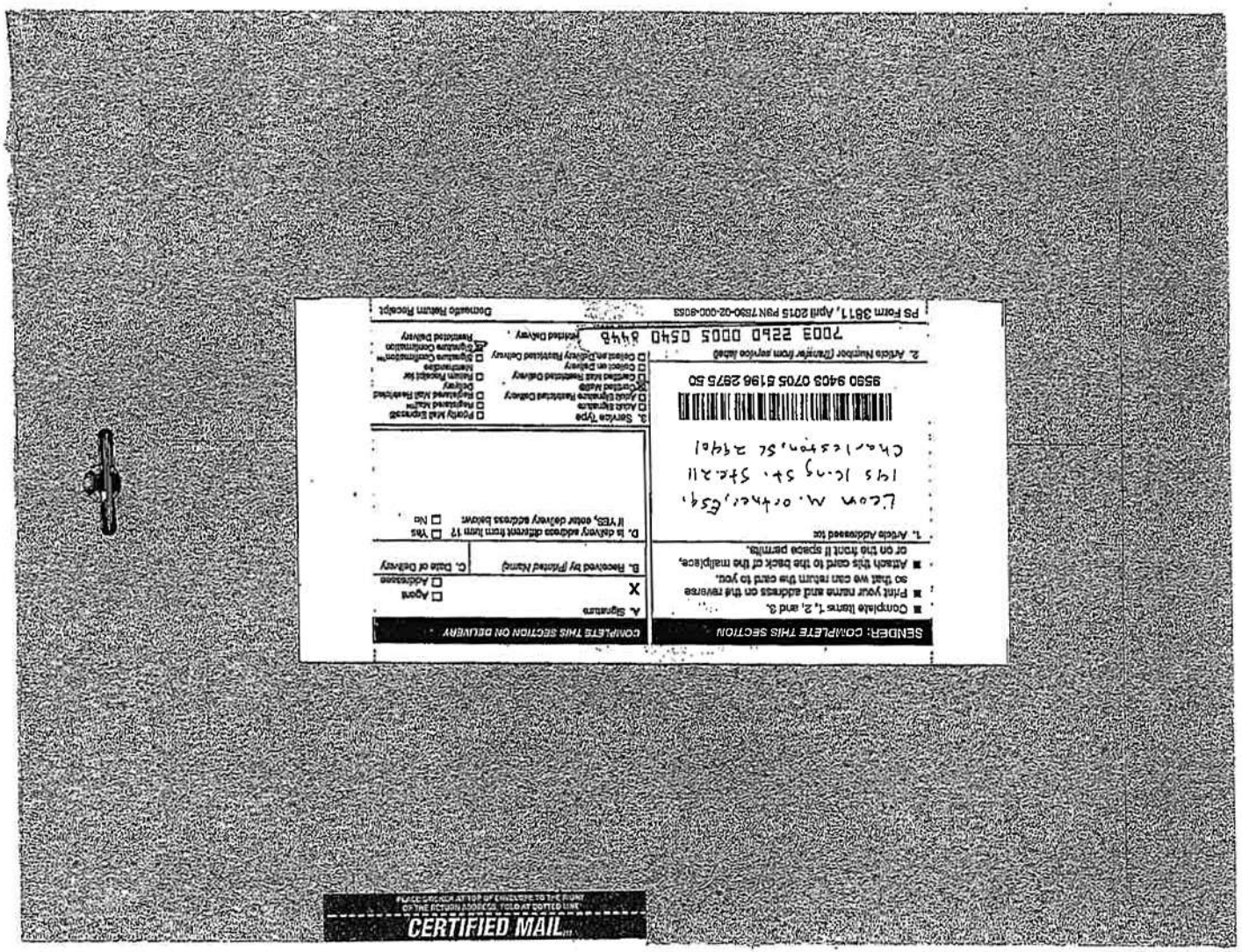
310

{00955980.DOCX.1 }

EXHIBIT
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F

EXHIBIT A

311


CERTIFIED MAIL
SENDER: COMPLETE THIS SECTION
COMPLETE THIS SECTION ON DELIVERY
9590 9403 0705 5196 2875 50
7003 2260 0005 0540 8448
PS Form 3811, April 2015 PSN 7530-02-000-9053
Domestic Return Receipt

ELECTRONICALLY FILED - 2020 Jan 10 3:26 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	CIVIL ACTION NO.: 2017-CP-10-04371
Cary E. Fechter, MD, Plaintiff, v. Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles, Defendants.	**AFFIDAVIT OF ORTNER LAW FIRM, LLC**

Personally appeared before me, Leon Martin Ortner, who, being first duly sworn, deposes and states as follows:

1. My name is Leon Martin Ortner, I am over the age of eighteen (18) years and am competent to make this Affidavit.

2. I am a member of Ortner Law Firm, LLC, and its registered agent for service of process.

3. I have been registered with the South Carolina Secretary of State as the sole agent for service of process for Ortner Law Firm, LLC since September 5, 1996.

4. Ortner Law Firm, LLC does not have any other members, officers, or managing or general agents other than Leon Martin Ortner.

5. Ortner Law Firm, LLC has not designated, appointed, or otherwise authorized any person other than Leon Martin Ortner to receive service of process on its behalf.

6. Ortner Law Firm, LLC's principal place of business is located at 145 King Street, Ste. 211, Charleston, South Carolina.

7. At no point has Ortner Law Firm, LLC accepted service of process or acknowledged receipt of service of process of the summons and complaint in the above-captioned matter.

8. Karen Ortner is an employee of Ortner Law Firm, LLC.

9. Karen Ortner is not a member, officer, or managing or general agent of Ortner Law Firm, LLC.

10. Karen Ortner is not authorized by appointment to receive service of process on behalf of Ortner Law Firm, LLC.

11. Karen Ortner is not a receptionist, does not sit at a reception desk, and her office is not within view of the reception area of Ortner Law Firm, LLC's offices.

312

EXHIBIT
tabbies G

FURTHER THE AFFIANT SAYETH NOT

By:_____
On Behalf of Ortner Law Firm, LLC

SWORN TO before me this
10th day of January, 2020
_____
Notary Public for South Carolina
My commission expires: 3/30/21

ELECTRONICALLY FILED - 2020 Jan 10 3:26 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

ELECTRONICALLY FILED - 2020 Jan 10 3:26 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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 **AFFIDAVIT OF KAREN ORTNER**

Personally appeared before me, Karen Ortner, who, being first duly sworn, deposes and states as follows:

1. My name is Karen Ortner and I am over the age of eighteen (18) years and am competent to make this Affidavit.

2. I am employed by Ortner Law Firm, LLC for which I primarily perform bookkeeping services.

3. I am not a member, officer, or managing or general agent of Ortner Law Firm, LLC.

4. I am not employed as a receptionist, do not sit at a reception desk, and my office is not within view of the reception area of Ortner Law Firm, LLC's offices.

5. I have never been designated, appointed, or otherwise authorized by Ortner Law Firm, LLC to accept or receive service of process on its behalf.

6. I have never held myself out to be designated, appointed, or otherwise authorized to accept or receive service of process on behalf of Ortner Law Firm, LLC.

7. On December 7, 2017, I happened to pick up mail delivered to 145 King Street, Ste. 211, Charleston, South Carolina, including the envelope a copy of which is attached as Exhibit A to this Affidavit.

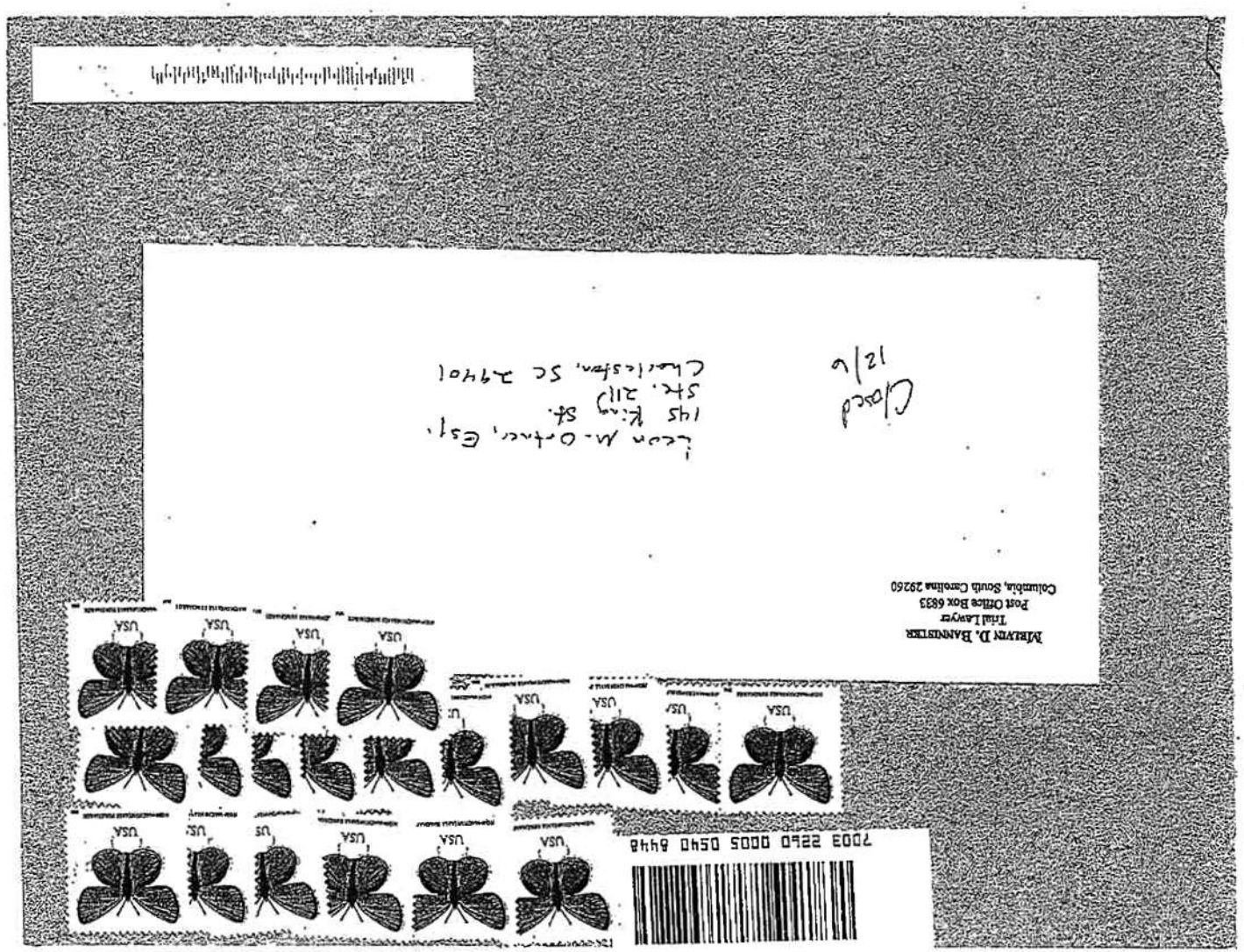
FURTHER THE AFFIANT SAYETH NOT

Karen Ortner
Karen Ortner

SWORN TO before me this
10th day of January, 2020
Notary Public for South Carolina
My commission expires: 3/30/21

EXHIBIT
H

EXHIBIT A



315

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:

Leon M. Orthel, Esq.
145 Ice.ng St. Ste.211
Charleston, SC 29401

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X
☐ Agent
☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☐ Adult Signature
☐ Adult Signature Restricted Delivery
☐ Certified Mail®
☐ Certified Mail Restricted Delivery
☐ Collect on Delivery
☐ Collect on Delivery Restricted Delivery
☐ Insured Mail
☐ Insured Mail Restricted Delivery (over $500)

☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restricted Delivery
☐ Return Receipt for Merchandise
☐ Signature Confirmation™
☐ Signature Confirmation Restricted Delivery

9590 9403 0705 5196 2975 50

2. Article Number (Transfer from service label)

7003 2260 0005 0540 8448

PS Form 3811, April 2015 PSN 7530-02-000-9053

Domestic Return Receipt

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS. FOLD AT DOTTED LINE.

CERTIFIED MAIL™

316

ELECTRONICALLY FILED - 2020 Jan 10 3:26 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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-CP-10-4371

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

FILED
2019 JAN -9 AM 10:2
JULIE J. ARMSTRONG
CLERK OF COURT
BY
2017-CP-10-4371

1. 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.
2. The Defendant Ortner at all times mentioned herein was acting individually and as an agent of the Defendant Ortner Law Firm LLC.
3. 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.

EXHIBIT
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4. 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.

5. In 2006 the Ortner Defendants associated the Defendant Rosenthal and his law firm Rosenthal, Levy, Simon, and Ryles (RLS&R).

6. The Defendant Rosenthal at all times mentioned herein was acting individually and as an agent of the Defendant RLS&R).

7. The Defendants Rosenthal and his law firm affirmed the contract with the Plaintiff and agreed to pay the Plaintiff for his services rendered.

8. Under the Workers' Compensation Act fees for an independent medical examination (IME) are a matter of contract between the employee, attorney for the employee, employer, or insurance carrier, and the physician.

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.

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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 Plaintiff is informed and believes that the Defendants failed to report to the WCC the fees for tests and treatment of the numerous clients; therefore, the Defendants did not ask the WCC to approve the payment of the medical fees to the Plaintiff.

21. 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.

22. Further, the Plaintiff was not a party in any cases before the Commission, in which the Defendants represented the numerous clients before the Commission.

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23. 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. See attached sample copy of contract of fee agreement, as shown as Schedule E.

24. 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.

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, to make reports concerning the Defendants' clients, and to continue to treat the clients of the Defendants.

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. An actual and/or implied contract existed between the Plaintiff and the Defendants.

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31. That the Defendants by and through its 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.

32. That said breach was accompanied by a fraudulent act and was the direct and proximate cause of damages to the Plaintiff.

33. 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.

34. The actions and inactions of the Defendants are capable of being performed on other parties.

35. 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.

36. 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.

37. 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.

38. 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.

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39. The Defendants had the duty to forward the bills for treatment and tests to the Commission and the insurance carrier of the Defendants' clients.

40. 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.

41. 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, nor the motion of the Rosenthal Defendants to Commissioner Taylor until after January 26, 2016.

42. 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.

43. 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.

44. The Defendants fraudulently withheld the Plaintiff's requests for payment from the Workers' Compensation Commission.

45. 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.

46. The Plaintiff is further informed and believes that the said $500,000 was not distributed to the workers' compensation claimants.

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47. 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 Ortner Defendants were aware of the written agreements to compensate the Plaintiff upon the conclusion of all the workers' compensation claimants.

48. The Defendants, nor the Workers' Compensation Commission, failed to notify the Plaintiff of any right to claim any of the $500,000, which was set aside for the payment of approved costs.

49. The payment of the $500,000 to the Defendants would not be an approved cost, for additional attorneys' fees nor for any other reason.

50. Attached as Schedule F hereto is a is a letter from J. Keith Roberts, legal counsel for the WCC, which explains contractual rights and medical fees.

51. 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.

52. The Complaint against the Defendants was filed on August 25, 2017, and which was in the three year time limit of filing the Complaint.

ARGUMENT

I. **The South Carolina Workers' Compensation Commission did not have exclusive jurisdiction over the subject matter in this action; the Plaintiff did not have to exhaust available administrative remedies.**

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53. The South Carolina Workers' Compensation Commission does not have jurisdiction to control contracts between attorneys representing claimants and independent third parties, including physicians.

54. The State Courts of South Carolina have jurisdiction to deal with issues concerning the existence and enforcement of contracts. *Capital City Insurance v. BP Staff, Inc.,* 382 S.C. 92, 674 S.E.2d 524 (S.C. App. 2009). The Court held: "In the present case, 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. 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. Thus, the trial court had subject matter jurisdiction to hear these types of claims and erred in dismissing Capital City's complaint pursuant to Rule 12(b)(1), SCRCP."

55. The Court in *Capital City Ins. Co.* further held: "Next, Capital City asserts the trial court erred in dismissing the complaint pursuant to Rule 12(b)(6), SCRCP, based upon exhaustion principles because the complaint sets forth sufficient facts to support claims for breach of contract and for fraud, which are not subject to the requirement of exhaustion of administrative remedies. We agree. 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. *See Unisys Corp. v. S.C. Budget & Control*

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Bd., 346 S.C. 158, 176, 551 S.E.2d 263, 273 (2001) (stating that exhaustion of remedies precludes original resort to courts where an administrative agency is granted exclusive jurisdiction by the express terms of a statute). Thus, we must determine whether exhaustion of administrative remedies was required as a matter of law; if not, we next determine whether the court abused its discretion in dismissing the case until exhaustion of the administrative process is complete in order to assist in the disposition of the circuit court proceeding. *See Stanton v. Town of Pawley's Island*, 309 S.C. 126, 128, 420 S.E.2d 502, 503 (1992) ("[T]he question of whether to require the plaintiff to exhaust administrative remedies was a matter within the sound discretion of the trial judge," which will not be disturbed absent an abuse of discretion).[4] Initially, we note "[a] party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by the administrative body." *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville,* 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) (citing *Ward,* 343 S.C. 14, 538 S.E.2d 245). For example, in *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 563 S.E.2d 109 (Ct.App.2002), respondent Colonial argued appellant Sand's failure to exhaust administrative remedies precluded a tort action against third parties. *Id.* at 412, 563 S.E.2d at 114-15. This court disagreed and held the following:

> If this were an appeal from the denial of the permit through the administrative process in which [the agency] was the appropriate fact finder, Thomas Sand would clearly be required to exhaust its administrative remedies prior to bringing suit. . . . However, in a tort action against a third

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> party, no such exhaustion requirement exists. The question is not whether the permit would have been granted but whether Thomas Sand was damaged. . . . [The agency] is not the appropriate fact finder to answer this question. The jury is.

56. Further, the Court in *Capital City Ins. Co.,* held the basic purpose of the exhaustion requirement, to allow the agency to render a final decision, and set forth its reasons for the permit denial, would not assist the court in this instance. The alleged wrong is not one which the administrative process was designed to redress. "The doctrine of exhaustion of administrative remedies only 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." A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered."

57. The Court further held in *Capital City Ins. Co.,* although Capital City was a party to an administrative proceeding related to the case at bar at the time of Judge Breeden's first order, its breach of contract and fraud claims are not based on a statute for which the legislature mandates the pursuit of an administrative remedy; in short, Capital City's claims alleging breach of contract and fraud are not wrongs for which the administrative scheme was designed to redress.[5] Accordingly, as in *Thomas Sand,* Capital City was not required, as a matter of law, to exhaust the administrative process regarding the modifier before filing the current action in circuit court for breach of contract and fraud. As previously indicated, as to the breach of contract and fraud claims, Capital City was not

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required to exhaust administrative remedies as a matter of law. This case is merely impacted by another administrative proceeding, not one itself requiring the exhaustion of the administrative process. Since the complaint adequately sets forth facts supporting the claims in this case, and since the court erred in its disposition of the exhaustion issue, dismissal under Rule 12(b)(6), SCRCP, was likewise improper.

ARGUMENT

The Ortner Defendants were properly served. The law firm of Rosenthal, Levey, Simon, and Ryles was also properly served.

58. The Summons and Complaint were filed in paper form with the Charleston County Clerk of Court on August 25, 2017.

59. After some delay the pleadings were returned to Plaintiff's counsel and copies were forwarded to the Defendants by certified mail.

60. The Ortner Defendants received the Summons and Complaint on December 7, 2017, as is evidenced by the USPS Tracking form, attached hereto and shown as Schedule A. An attempt was previously made to serve the Ortner Defendants in October 2017 to no avail, as is evidenced by the USPS Tracking form, attached hereto and shown as Schedule B.

61. The Defendant law firm of Rosenthal, Levy, Simon, and Ryles was served on October 12, 2017, as is evidenced by the USPS Tracking form, attached hereto and shown as Schedule C. A copy of the receipt is attached hereto and shown as schedule D.

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62. A Motion to Dismiss on behalf of the Ortner Defendants was filed on January 8, 2018. The Motion raises numerous defenses to the Complaint, including defenses to the different causes of action enumerated in the Complaint.

63. It is clear and undisputed that counsel for the Ortner Defendants had a copy of the Plaintiff's Complaint in order to create the Motion to Dismiss.

64. It is submitted that even if proper service of process had not been completed, the Ortner Defendants waived the service requirement.

ARGUMENT

The Plaintiff's Complaint alleges unfair treatment of the Plaintiff by the Defendants, which can be used further in violation of the South Carolina Unfair Trade Practices Act.

65. The Defendants promised to pay the Plaintiff for services rendered as an Independent Medical Examiner and as a treating physician for the Defendants' workers' compensation clients. The number of Defendants' clients was in excess of 400 individuals.

66. The Plaintiff is informed and believes that attorneys for workers' compensation clients and clients who have compensable physical injuries will obtain the services of an Independent Medical Examiner.

67. The Plaintiff is further informed and believes that the Defendants have used Independent Medical Examiners, both prior to contracting with the Plaintiff and subsequently to contracting with the Plaintiff.

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68. As stated herein above, the Defendants informed the Plaintiff in writing of the Defendants' intentions to pay to the Plaintiff all the sums due to him upon the disposition of all issues concerning all of the Defendants' workers' compensation clients. A sample copy of the written contract is attached hereto and shown as Schedule E.

69. "An unfair trade practice has been defined as a practice which is offensive to public policy or which is immoral, unethical, or oppressive." *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000) (citing *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105 (Ct. App. 1989).

70. A deceptive practice is one which has a tendency to deceive. *Young v. Century Lincoln-Mercury, Inc.*, 302 S.C. 320, 396 S.E.2d 105 (Ct. App. 1989).

71. The Plaintiff has alleged that the Defendants' actions and procedures show the Defendants' procedures create a potential for repetition of the unfair and deceptive acts. *Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21 (1998) In the present case the Defendants' deceptive acts occurred more than 400 times.

72. To allow the deceptive practices to continue and not to redress the wrongs will have a substantial public interest. In example, attorneys representing workers' compensation clients would no longer be able to obtain the services of Independent Medical Examiners, because the IMEs could not be assured payment of their fees. If IMEs are not used, then the claimants (public) would suffer.

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ARGUMENT

The South Carolina Supreme Court has disciplined attorneys, who have failed to pay expert witness fees, court reporter fees, and third party fees.

73. The Defendants included with their Motion to Dismiss, a copy of a letter from the Office of Disciplinary Counsel to the Plaintiff. The Office of Disciplinary Counsel works for the South Carolina Supreme Court. The letter indicated that from their investigation, the Commission did not find evidence of lawyer misconduct. However, the letter to the Plaintiff did say: "This office is not authorized to give advice concerning a legal dispute or dealings with a lawyer (i.e., breach of contract, failure to pay); 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."

74. After receipt of the letter from the Office of Disciplinary Counsel, the Plaintiff sought advice concerning the legal disputes and, subsequently, filed the Complaint against the Defendants.

75. The South Carolina Supreme Court has found it to be inappropriate to fail to pay expert witness fees, court reporter fees, and third party fees. *In Re Houston,* 415 S.C. 594, 784 S.E.2d 238 (2016); *In Re Smith,* 296 S.C. 86, 370 S.E.2d 876 (1988); *In Re Conway,* 374 S.C. 75, 647 S.E.2d 235 (2007); *In Re Houston,* 314 S.C. 94, 442 S.E.2d 175 (1994).

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Columbia, SC 29260
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sctriallawyer@bellsouth.net
Attorney for the Plaintiff

January 8, 2019

USPS Tracking®

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

SCHEDULE A

Track Another Package +

Tracking Number: 70032260000505408448 Remove X

Your item was delivered to the front desk, reception area, or mail room at 3:10 pm on December 7, 2017 in CHARLESTON, SC 29401.

Delivered

December 7, 2017 at 3:10 pm
Delivered, Front Desk/Reception/Mail Room
CHARLESTON, SC 29401

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)

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Feedback

USPS Tracking®

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

Track Another Package +

SCHEDULE B

Tracking Number: 70151730000142889534

Remove X

Your item was returned to the sender on November 10, 2017 at 12:48 pm in CHARLESTON, SC 29407 because of an incorrect address.

Alert

November 10, 2017 at 12:48 pm
No Such Number
CHARLESTON, SC 29407

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)

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Feedback

USPS Tracking®

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

SCHEDULE C

Track Another Package +

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

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)

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Feedback

SCHEDULE D

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

2. Article Number (Transfer from service label)

7015 1730 0001 4288 9368

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

☐ Agent
☐ Addressee

B. Received by (Printed Name)

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

RESTRICTED DELIVERY

3. Service Type

- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☐ Certified Mail®
- ☑ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, April 2015 PSN 7530-02-000-9053 Domestic Return Receipt

UNITED STATES POSTAL SERVICE

FL 334
12 OCT '17

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

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ORTNER LAW FIRM

SCHEDULE E

June 4, 2003

Gary F. Pechter, M.D.
2971 Ashley Crossing Drive, Suite 100
Charleston, South Carolina 29414

RE: [redacted]

Dear Dr. Pechter

Please be advised that this Law Firm represents the above-named individual(s) for injuries sustained on or about the above-referenced date. You will find below a Medical Authorization signed by our client and we would appreciate you forwarding your medical report and bill in this matter at your earliest possible convenience.

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.

With kind regards, I remain

Sincerely,
ORTNER LAW FIRM, LLC

LEON MARTIN ORTNER

MEDICAL AUTHORIZATION

You are hereby authorized to furnish and release to my attorneys, THE ORTNER LAW FIRM, LLC, all information and records they request concerning findings, treatmen rendered and opinions as to my condition. Please do not disclose information to insurance adjusters or other persons without written authority from me. (Pursuant to confidential an privileged communications laws). All prior authorizations are hereby canceled and I waiv any privilege I may have to my said attorneys. The foregoing authority shall continue in full until revoked by me in writing.

Sincerely,

[redacted]

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SCHEDULE F

State of South Carolina

J. Keith Roberts
General Counsel
1333 Main Street, 5th Floor
P.O. Box 1715
Columbia, S.C. 29202-1715

TEL: (803) 737-5701
FAX: (803) 737-5764
KeRoberts@wcc.sc.gov

Workers' Compensation Commission

January 2nd, 2018

Melvin D. Bannister, Esquire
PO Box 6833
Columbia, SC 29260

Re: Fees for Independent Medical Evaluations under the Workers' Compensation Act

Dear Melvin:

Please allow this letter to serve as a follow-up to our telephone conversation regarding the fees that a physician may charge for an independent medical evaluation (IME) of an injured worker under the Workers' Compensation Act. As we discussed, fees for an IME are a matter of contract between the employee, employer, or insurance carrier, and the physician.

Generally, physicians' fees for services performed in relation to a workers' compensation claim are governed by the South Carolina Workers' Compensation Act, Title 42, South Carolina Code of Laws. The Act provides

> Attorney fees, physician fees, and hospital charges for services under this title are subject to the approval of the commission, but a physician or hospital may not collect a fee from an employer or insurance carrier until the physician or hospital has made the reports required by the commission in connection with the case.

S.C. Code Ann. § 42-15-90(A) (1976, as amended)

This section goes on to provide

> A person may not receive a fee, gratuity, or other consideration for a service rendered pursuant to this title unless the fee, gratuity, or other consideration is approved by the commission or a court of competent jurisdiction . . . . A violation of this section constitutes a misdemeanor and, upon conviction, each offense is subject to a fine of not more than five hundred dollars, imprisonment for not more than one year, or both.

S.C. Code Ann. § 42-15-90(B) (Emphasis added).

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Rather than holding a hearing to approve the fees in each individual case, the Commission sets physicians' fees by promulgating regulations in accordance with § 42-3-30 and § 42-3-185.

The Regulations of the Commission provide "[t]he Commission shall establish maximum allowable payments for medical services provided by medical practitioners based on a relative value scale and a conversion factor set by the Commission." S.C. Code Regs. Ann. 67-1302(A) (2018 Supp.) The Commission annually publishes a Medical Services Provider Manual, which is based on the Resource-Based Relative Value Scale published by the American Medical Association.

For independent medical evaluations, the Medical Services Provider Manual provides

> An Independent Medical Evaluation is an objective medical or chiropractic evaluation of the injured employee's medical condition and work status which is requested by the insurance carrier, self-insured employer, an attorney, or a Workers' Compensation Commissioner.

2018 S.C. Workers' Compensation Medical Services Provider Manual, eff. April 1, 2018, p. 33.

The Medical Services Provider Manual states "[p]ayment for [an independent medical evaluation] varies and is based on individual consideration (IC) or negotiation between the carrier and provider. Id. For billing purposes, payment is coded using CPT code 99456. CPT Code 99456 lists under 'description' "[w]ork related medical or disability examination by other than the treating physician . . . " and under 'Maximum Allowable Payment' "IC", which stands for "individual consideration". Id. at p. 50.

I have enclosed copies of the above-cited pages of the Medical Services Provider Manual for your convenience.

If there is anything else you need from me at this time, please do not hesitate to ask.

With warmest regards,

Sincerely,

J. Keith Roberts, Esquire
S.C. Workers' Compensation Commission

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See the South Carolina Workers' Compensation Commission (SCWCC) web site for the current travel reimbursement amount. See **http://www.wcc.sc.gov/welcomeandoverview/compensationrates/Pages/default.aspx**

Supplies and Materials (CPT 99070)

Supplies and materials provided by the physician over and above those usually included with the office visit may be paid. Use the appropriate code from Section 9, HCPCS Level II, to report the supply. In the event that a supply cannot be identified using the codes listed in Section 9, use CPT code 99070 and price the item at actual cost plus 20 percent. (See "Supplies" in Chapter III. Billing Policy and Chapter IV. Payment Policy for complete details.)

Impairment Ratings

When a treating physician determines that the injured worker has reached maximum medical improvement (MMI), where the injured worker's condition is not likely to be improved by further treatment, the treating physician must rate the level of permanent impairment sustained by the injured worker. The results of the impairment rating must be forwarded to both the Commission and the insurance carrier or self-insured employer. The impairment rating may be indicated in the office notes and need not be a separate report.

If an E/M service is necessary in determining an impairment rating it may be billed using CPT code 99455 or the E/M code that best represents the level of service rendered.

Independent Medical Evaluation (IME)

An Independent Medical Evaluation is an objective medical or chiropractic evaluation of the injured employee's medical condition and work status which is requested by the insurance carrier, self-insured employer, an attorney, or a Workers' Compensation Commissioner. An IME includes the review of available records and test reports, examination of the patient, and a written report regarding the medical condition and work status of the injured worker.

The employer or carrier may schedule an IME with a medical provider of its choice to assist in determining the status of an injured employee's condition. Acceptable reasons for conducting an IME include, but are not limited to:

1. Instances when the authorized treating physician has not provided current medical reports;
2. Determining whether a change in medical provider is necessary;
3. Determining whether treatment is necessary or the employee appears not to be making appropriate progress in recuperation;
4. Determining whether over-utilization by a medical provider has occurred.

The medical provider performing the IME may not be the medical provider selected to provide the treatment or follow-up care, unless the carrier or self-insurer and the employee agree to this, or unless an emergency exists.

Before performing an IME, a physician must have a written request from the Commission, the employer/insurance carrier, the injured worker or his/her attorney, or other appropriate third party. To report an IME, use CPT code 99456. Payment for this service varies and is based on individual consideration (IC) or negotiation between the carrier and provider.

Alternating Physicians

When physicians of similar skills alternate in the care of a patient, e.g., partners or group practice members covering for a physician on weekends and vacations, each physician must bill individually for the services he/she personally rendered.

Follow-up Days

When a service listed in the *Medical Services Provider Manual* is assigned a number of follow-up days, no payment will be made for office or hospital visits provided by the surgeon or his/her representative during the follow-up period. The charges for the follow-up office and hospital visits were included in the value of the original procedure. Physicians may, however, charge for supplies furnished by the office. If the length of follow-up care goes beyond the number of follow-up days indicated, the physician is allowed to charge for office/hospital visits. Emergency department visits, consultations, and further treatment referrals for care to another provider are not part of the follow-up days and should be separately paid.

Modifiers

The following modifiers are used when reporting evaluation and management services. See *CPT 2018* Appendix A for a full list of CPT modifiers.

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EVALUATION AND MANAGEMENT (E/M) 99201–99499

Medical Fee Schedule **Effective April 1, 2018**

	CODE	DESCRIPTION	MAP NON FAC	MAP FAC	FUD	ASST
	99456	Work related or medical disability examination by other than the treating physician that includes: Completion of a medical history commensurate with the patient's condition; Performance of an examination commensurate with the patient's condition; Formulation of a diagnosis, assessment of capabilities and stability, and calculation of impairment; Development of future medical treatment plan; and Completion of necessary documentation/certificates and report.	IC	IC	XXX	0
	99460	Initial hospital or birthing center care, per day, for evaluation and management of normal newborn infant	130.00	130.00	XXX	0
	99461	Initial care, per day, for evaluation and management of normal newborn infant seen in other than hospital or birthing center	121.50	85.50	XXX	0
	99462	Subsequent hospital care, per day, for evaluation and management of normal newborn	56.50	56.50	XXX	0
	99463	Initial hospital or birthing center care, per day, for evaluation and management of normal newborn infant admitted and discharged on the same date	150.00	150.00	XXX	0
	99464	Attendance at delivery (when requested by the delivering physician or other qualified health care professional) and initial stabilization of newborn	101.50	101.50	XXX	0
	99465	Delivery/birthing room resuscitation, provision of positive pressure ventilation and/or chest compressions in the presence of acute inadequate ventilation and/or cardiac output	198.00	198.00	XXX	0
	99466	Critical care face-to-face services, during an interfacility transport of critically ill or critically injured pediatric patient, 24 months of age or younger; first 30-74 minutes of hands-on care during transport	324.00	324.00	XXX	0
+	99467	each additional 30 minutes (List separately in addition to code for primary service)	162.00	162.00	ZZZ	0
	99468	Initial inpatient neonatal critical care, per day, for the evaluation and management of a critically ill neonate, 28 days of age or younger	1247.50	1247.50	XXX	0
	99469	Subsequent inpatient neonatal critical care, per day, for the evaluation and management of a critically ill neonate, 28 days of age or younger	540.00	540.00	XXX	0
	99471	Initial inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 29 days through 24 months of age	1080.00	1080.00	XXX	0
	99472	Subsequent inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 29 days through 24 months of age	554.50	554.50	XXX	0
	99475	Initial inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 2 through 5 years of age	760.00	760.00	XXX	0
	99476	Subsequent inpatient pediatric critical care, per day, for the evaluation and management of a critically ill infant or young child, 2 through 5 years of age	466.00	466.00	XXX	0
	99477	Initial hospital care, per day, for the evaluation and management of the neonate, 28 days of age or younger, who requires intensive observation, frequent interventions, and other intensive care services	473.50	473.50	XXX	0
	99478	Subsequent intensive care, per day, for the evaluation and management of the recovering very low birth weight infant (present body weight less than 1500 grams)	186.00	186.00	XXX	0
	99479	Subsequent intensive care, per day, for the evaluation and management of the recovering low birth weight infant (present body weight of 1500-2500 grams)	168.50	168.50	XXX	0
	99480	Subsequent intensive care, per day, for the evaluation and management of the recovering infant (present body weight of 2501-5000 grams)	162.50	162.50	XXX	0

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ELECTRONICALLY FILED - 2020 Jun 17 5:16 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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-CP-10-4371 MOTION TO RECONSIDER ORDER GRANTING GERALD ROSENTHAL'S AND ROSENTHAL, LEVY, SIMON AND RYLE'S JOINT MOTION TO DISMISS

PLEASE TAKE NOTICE that the Plaintiff, Cary E. Fechter, MD, by and through the undersigned counsel will move this Court before 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 52(b), 59(e_ and 60(b), SCRCP, for an Order Altering or Amending The Honorable J. Derham Cole's Order Granting Gerald Rosenthal's and Rosenthal, Levy, Simon, and Ryle's Joint Motion to Dismiss (the Complaint of the Plaintiff).

ARGUMENT

In support of the Plaintiff's Motion to Reconsider the Court's Orders Dismissing the Plaintiff's Complaint, the Plaintiff would show the following:

1. Plaintiff requests that the court reconsider, alter, and amend parts I and II of its Order of June 8, 2020
2. On August 25, 2017, a Summons and Complaint were filed with the Charleston County Clerk of Court commencing this action.

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3. On October 12, 2017, the Rosenthal Defendants were served with a copy of the pleadings by certified mail; on October 12, 2017 Ed Felder, an employee of the Rosenthal Defendants signed a green, certified mail, receipt card. Mr. Elder was acting on behalf of the Rosenthal Defendants. **(Exhibit A)**

4. On December 7, 2017, the Ortner Defendants were served with a copy of the pleadings by certified mail. **(Exhibit B)**

5. On January 8, 2018 counsel representing Leon Martin Ortner and the Ortner Law Firm, LLC, filed a Motion to Dismiss the Complaint of the Plaintiff. **(Exhibit C)** In the Motion to Dismiss, counsel for the Ortner Defendants argued against all causes of action in the Complaint. A certain defense that the Service of Process is Insufficient Because Plaintiff Failed to Serve Summons and Complaint Within the Statute of Limitations. **In the said Motion the counsel for the Ortner Defendants states "did not provide the Ortner Defendants with a copy until on or about December 7, 2017." (page 15, lines 6, 7) (Emphasis added) (Exhibit C)**

6. **Counsel for the Ortner Defendants, therefore, has stipulated that the Ortner Defendants received a copy of the pleadings on or about December 7, 2017. (Emphasis added) (Exhibit C)**

7. **If the Ortner Defendants had not received a copy of the Plaintiff's pleadings, how would the Ortner Defendants have known to file the Motion to Dismiss the Complaint of the Plaintiff. (Emphasis added)**

8. The Ortner Defendants Motion to Dismiss requested that the Plaintiff's complaint be dismissed under Rule 12 (b) (1), (3), (5), & (6). **(Exhibit C)**

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9. In its Motion to Dismiss **(Exhibit C)** Ortner Defendants allege: "An action upon a contract, obligation, or liability, express or implied, must be commenced within three years…and did not provide the Ortner 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)…"

10. The South Carolina Court of Appeals held in ***Unisum v. Hawkins, 537 S.E.2d 559 (S.C. App. 2000)*** held the language "Plaintiffs have failed to serve defendant Bruce Hawkins within the three year statute of limitations." Unisum argues the trial court erred in finding this argument properly raised the insufficiency of service of process. **We agree. (Emphasis added)** Rule 8(e)(1), SCRCP states that "each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required." Moreover, "all pleadings shall be so construed as to do **substantial justice to all parties." Rule 8(f), SCRCP. (Emphasis added)**

11. The South Carolina Court of Appeals held in ***Unisum v. Hawkins, 537 S.E.2d 559 (S.C. App. 2000)*** the averment that Unisum "failed to serve Bruce Hawkins within the three-year statute of limitations" is insufficient, standing alone, to raise defense of insufficiency of service of process. Here, Bruce failed to identify that he was moving to challenge service of process pursuant to Rule 12 and failed to specify any defects in the service of process. Having failed to allege process with even a minimal amount of specificity in his responsive pleading, Bruce may not now bootstrap the defense to his statute

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of limitations argument, a separate affirmative defense likewise subject to waiver. See Rule 8(c), SCRCP.

12. The South Carolina Court of Appeals also held in ***Unisum v. Hawkins, 537 S.E.2d 559 (S.C. App. 2000)*** that we also reject Bruce's assertion that insufficiency of service of process is a "lesser included offense" of the total failure to serve, such that proper pleading of the defense of non-service requires less specificity than the defensed of service of process. As noted above, Rule 12(b) (5) is the proper vehicle for challenging both "the mode of delivery or the lack of delivery of the summons and complaint"]." Having failed to properly plead the defense of insufficiency of service of process either by motion or in his answer, **Bruce has waived the defense. (Emphasis added) Because Bruce failed to challenge the service of process properly, he has also waived his statute of limitations defense. Accordingly, we reverse the trial court's grant of summary judgment to Bruce and remand the case for trial. (Emphasis added)**

13. On January 9, 2019 a hearing on the Ortner Defendants' Motion to Dismiss was heard before the Honorable Deadra L. Jefferson. Counsel for the Ortner Defendants waived arguments on the service of process under Rule 12 (b) (5). **The Ortner Defendants did not refute receiving a copy of Plaintiff's Complaint on December 7, 2017. (Emphasis added)**

14. On April 5, 2019 the Honorable Deadra L. Jefferson issued an Order Denying Motion to Dismiss by the Ortner Defendants. **(Exhibit D)**

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15. On April 18, 2019 the Ortner Defendants filed a Motion to Reconsider by Judge Jefferson. **(Exhibit E)**

16. On June 28, 2019 Judge Jefferson issued an Order Denying Motion to Reconsider, Alter or Amend Judgment. **(Exhibit F)**

17. On July 23, 2019 the Ortner Defendants filed an appeal to the South Carolina Court of Appeals, in which the Ortner Defendants appealed Judge Jefferson's Denial of the Ortner Motion to Dismiss. **(Exhibit G)**

18. On November 15, 2019 the South Carolina Court of Appeals issued an Order, in which the Court of Appeals dismissed the appeal of the Ortner Defendants. **(Exhibits G, J)**

19. On October 12, 2017 Ed Felder, an employee of the Rosenthal Defendants signed a green, certified mail, receipt card. Mr. Elder was acting on behalf of the Rosenthal Defendants. **(Exhibit A)**

20. It is apparent that the Rosenthal Defendants received a copy of the pleadings as is shown by two documents: (1) Gerald Rosenthal's and Rosenthal, Levy, Simon, and Ryle's Joint Motion to Dismiss filed on their behalf by their counsel, Michael E. Kozlarek, on May 14, 2019 **(Exhibits A, H)**; (2) Letter to The Honorable Jenny Abbot Kitchens, Clerk, South Carolina Court of Appeals, dated September 17, 2019, in which the Rosenthal Defendants supported the Ortner Defendants' appeal of Judge Jefferson's Order Denying the Motion to Dismiss. **(Exhibits A, I)**

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21. **It is apparent that the Rosenthal Defendants had received the initial pleadings, in order to support the Motion to Dismiss by the Ortner Defendants. (emphasis added) (Exhibits A, C, I)**

22. On May 14, 2019 Michael E. Kozlarek, counsel for the Rosenthal Defendants filed a Joint Motion to Dismiss. **(Exhibit H)**

23. **If the Rosenthal Defendants had not received a copy of the Summons and Complaint, then the Rosenthal Defendants would not have knowledge of the Plaintiff's pleadings, and, therefore, would not have been able to file a Motion to Dismiss. (Exhibits A, H) (Emphasis added)**

24. As stated herein above, on September 17, 2019 counsel for the Rosenthal Defendants in a letter to the Court of Appeals argued on behalf of (all of) the Defendants that the Motion to Dismiss by the Ortner Defendants should have been granted due to the arguments made before Judge Jefferson. Further the Court of Appeals should reverse the trial court's denial of Ortner Defendants' Motion to Dismiss. Counsel for the Rosenthal Defendants submitted the Rosenthal Defendants to the trial Court's jurisdiction by making an appearance before the South Carolina Court of Appeals. **(Exhibit I)**

25. In the Joint Motion to Dismiss the Rosenthal Defendants filed Affidavits from Ed Elder and Jonathan Todd Levy. Each Affidavit states that Mr. Elder acted as an employee of RLSR and received certified mail, signed the "green (receipt) cards". It is apparent that Mr. Elder's job duties would include delivering the certified mail to the appropriate parties.

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26. **Again, it is recognized that Michael E. Kozlarek, as counsel for all of the Rosenthal Defendants has argued against all issues of the Plaintiff's pleadings on behalf of all of the Rosenthal Defendants, before the South Carolina Court of Appeals and this Court and before this trial court on their Joint Motion to Dismiss. (Exhibit I) (Emphasis added)**

27. It is clear that all Defendants have received a copy of the pleadings in this case, since counsel for each of the Defendants have responded to all of the allegations made by the Plaintiff's pleadings in both this Court and the South Carolina Court of Appeals.

28. **It is submitted the Defendants have waived the personal service requirement. (Emphasis added)**

29. In **Stearns Bank Nat. Ass'n v. Glenwood Falls, 664 S.E.2d 793, 373 S.C. 331 (S.C. App. 2007)** the South Carolina Court of Appeals held the term "appearance" is used particularly to signify or designate the overt act by which one against whom suit has been commenced submits himself to the court's jurisdiction. An appearance may be expressly made by formal written or oral declaration, or record entry, or it may be implied form sone act done with the intention of appearing and submitting to the court's jurisdiction. No specific act constitutes an appearance, as "a defendant may choose to come into court with trumpets, or quietly by the back door. *Stephens v. Ringling,* 102 S.C. 333, 86 S.E. 683, (1915) Accordingly, courts decide on a case by case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction.

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30. In **Stearns Bank Nat. Ass'n v. Glenwood Falls, 664 S.E.2d 793, 373 S.C. 331 (S.C. App. 2007)** the Court of Appeals further held the trial court found service was proper and, **even if service was improper, the defendant made a voluntary appearance. (Emphasis added)**

31. In ***Petty v. Weyerhaeuser Company, 272 S.C. 282, 251 S.E.2d 735 (1979)*** the Supreme Court held that **a letter from one attorney to another may constitute a voluntary appearance. (Emphasis added)** In *Petty* the trial court found service was proper and, even if service were improper, the defendant made a voluntary appearance. **The Supreme Court found service was improper, but nevertheless held the defendant made a voluntary appearance. (Emphasis added)**

32. In ***Wellin v. Wellin, 427 S.C. 15, 828 S.E.2d 767 (S.C. App. 2019)*** the court held "Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance." *Ex parte Cannon* , 385 S.C. 643, 658, 685 S.E.2d 814, 822 (Ct. App. 2009) (quoting *Steams Bank Nat'l Ass'n v. Glenwood Falls, L.P.* , 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007)). "A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case." *Id* . (quoting *State v. Dudley* , 354 S.C. 514, 542, 581 S.E.2d 171, 186 (Ct. App. 2003)).

33. In *Ex parte Cannon* , Cannon argued the circuit court lacked personal jurisdiction over him because he had only appeared in the case in his

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capacity as a personal representative, not a trustee. *Id* . at 657-58, 685 S.E.2d at 822. However, this court concluded "[b]y appearing and arguing the merits of the action multiple times before the circuit court, ... Cannon consented to the circuit court's personal jurisdiction and waived any defense of lack of personal jurisdiction." *Id* . at 660, 685 S.E.2d at 823.

34. In the present case, the Ortner Defendants filed a Motion to Dismiss based upon Rules 12(b)(1), (3), (5) & (6), SCRCP. **(Exhibit C)** The Rosenthal Defendants also filed a Motion to Dismiss based on Rule 12(b), SCRCP, which made the same arguments for dismissal as in the Ortner Motion. **(Exhibits C, H)**

35. The Ortner Defendants appeared for a hearing on their Motion and argued for the dismissal of the Complaint on all grounds. The Honorable Deadra Jefferson issued an Order, which denied the Ortner Defendants' request to dismiss. **(Exhibit D)**

36. In ***Grand Couloir Corporation and Seaway Hotel Corporation v. Consolidated Bank, N.A., 596 So.2d 697 (Fla. App. 1992)*** the court held Jurisdiction over a person or entity is ordinarily acquired by service of process on them or by their voluntary appearance and submission to the court. First Wisconsin National Bank of Milwaukee v. Donian, 343 So.2d 943 (Fla. 2d DCA 1977), cert. denied, 355 So.2d 513 (Fla.1978). Because there was no personal or constructive service on Seaway, we must determine whether it voluntarily submitted to the court's jurisdiction. Seaway "entered into" the stipulation which was filed in the court below. Seaway's name appears

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throughout the document and the document was signed by Seaway. The option agreement gave Seaway the option to purchase the subject property. This option to purchase was a benefit received by Seaway as a result of the stipulation and agreement. The option agreement is contained within the stipulation which was filed in the trial court. Under these circumstances, Seaway voluntarily submitted itself to the jurisdiction of the trial court. See Donian (receipt of material benefit sufficient to constitute a submission to court's jurisdiction). If Seaway did not want to submit to the jurisdiction of the court, it should have made the option agreement a separate document. Accordingly, we hold that the trial court had personal jurisdiction over Seaway with regard to issues concerning the option agreement.

37. In the present case, the Rosenthal Defendants would not have submitted the letter to the SC Court of Appeals if they did not intend to submit themselves to the jurisdiction of the trial court and to the appellate court. By submitting the said letter the Rosenthal Defendants voluntarily appeared before the trial court, even before the filing of the Motion to Dismiss.

38. "Jurisdiction over persons or entities is ordinarily acquired by service of process on them, or by their voluntary appearance and submission to the court." *See* ***Manufacturers National Bank of Detroit v. Moons,*** **659 So.2d 474, 475 (Fla. 4th DCA 1995).** Section 48.061, Florida Statutes, governing service on partnerships and limited partnerships, provides in pertinent part:

> (2) Process against a domestic limited partnership may be served on any general partner or on the agent for service of process specified in

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its certificate of limited partnership or in its certificate as amended or restated and is as valid as if served on each individual member of the partnership. After service on a general partner or the agent, the plaintiff may proceed to judgment and execution against the limited partnership and all of the general partners individually....

39. Under the common law rule, a partnership has no identity apart from its members. ***See Louis Benito Advertising, Inc. v. Brown,* 517 So.2d 775, 776 (Fla. 2d DCA 1988).** When the general partner of a limited partnership is a corporation, service is made on the corporation's officers or agents, pursuant to section 48.081, Florida Statutes. *See* ***Country Clubs, Etc. v. Zaun Equipment, Inc.,* 350 So.2d 539, 542 (Fla. 1st DCA 1977).** "Service of process on one partner gives a court jurisdiction over the partnership and authorizes it to render a judgment binding on the partner served and the partnership property." *See* ***Louis Benito Advertising v. Brown,* 517 So.2d at 776.**

40. In the present case, the Rosenthal Defendants received a copy of the Summons and Complaint as is evidenced by **Exhibits A and I** and by their Motion to Dismiss. **(Exhibit H)**

41. **Further the Rosenthal Defendants' Motion to Dismiss (Exhibit J) is filed on behalf of each of the Rosenthal Defendants. (Emphasis added) Further notice should be given to the fact that an Affidavit from one of the Rosenthal partners is made a part of their Motion to Dismiss. (Emphasis added)**

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42. ALL DEFENDANTS HAVE RECOGNIZED THE RECEIPT OF THE SUMMONS AND COMPLAINT BY FILING THEIR RESPECTIVE MOTIONS TO DISMISS. **(EXHIBITS C, H)** (EMPHASIS ADDED)

43. THE ORTNER DEFENDANTS STIPULATED IN THEIR MOTION TO DISMISS THAT PLAINTIFF "DID NOT PROVIDE THE ORTNER DEFENDANTS WITH A COPY UNTIL ON OR ABOUT DECEMBER 7, 2017." **(Exhibit C)** (EMPHASIS ADDED)

44. ALL DEFENDANTS HAVE WAIVED THE PERSONAL SERVICE REQUIREMENT. **Stearns Bank Nat. Ass'n v. Glenwood Falls, 664 S.E.2d 793, 373 S.C. 331 (S.C. App. 2007); *Unisum v. Hawkins, 537 S.E.2d 559 (S.C. App. 2000)*; (Exhibits C, H)** (EMPHASIS ADDED)

45. ALL DEFENDANTS HAVE MADE A VOLUNTARY APPEARANCE. **Stearns Bank Nat. Ass'n v. Glenwood Falls, 664 S.E.2d 793, 373 S.C. 331 (S.C. App. 2007); *Petty v. Weyerhaeuser Company, 272 S.C. 282, 251 S.E.2d 735 (1979)*; (Exhibits C, H, I)** (EMPHASIS ADDED)

46. Further, Rosenthal Defendants argue in its Motion to Dismiss that the Court of Common Pleas had no jurisdiction to make decisions on the contract issues between the Plaintiff and all of the Defendants because of the decision in the Workers Compensation case of ***Sadie Adams, et. Al. v. International Paper Company and Nevamar Company, LLC. (WCC File No. 0326995.*** This argument was made in the Ortners' Motion to Dismiss (Exhibit C) **It must be noted that the Plaintiff was not a party to the Workers Compensation case. (Emphasis added).**

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47. **Further, the Order of the Honorable Deadra Jefferson appropriately discussed the "exclusive jurisdiction" issue and properly ruled that the Complaint of the Plaintiff was based, primarily, on the contract issues between the parties. (Exhibit D) (Emphasis added)**

48. Plaintiff further requests that the court reconsider, alter, and amend part III of its Order of June 8, 2020, as to the conclusions relating to Subject Matter Jurisdiction of the South Carolina Workers' Compensation Commission ("the Commission")[1]. Plaintiff requests that the Order be reconsidered, altered, and amended to conclude that the Commission lacked subject matter jurisdiction over the causes of action asserted by Plaintiff in his Complaint. These causes of action arise exclusively from allegations of breaches of agreements between, on the one hand, defendants in their roles as attorneys representing claimants in workers' compensation claims, and, on the other plaintiff, who was a medical expert retained by defendants but was never a party and had no standing in the underlying claims. The Order of Commissioner Taylor of January 26, 2016 is entitled to no preclusive effect as to plaintiff's causes of action asserted herein.

49. Defendants have relied upon the January 26, 2016 ruling of Commissioner Aisha Taylor insofar as she purported to rule that plaintiff was not entitled to recover from defendants on his contract for services he rendered to defendants as attorneys for the claimants was issued without subject matter jurisdiction. Commissioner Taylor overstepped her jurisdiction by deciding a

[1] These conclusions commence with the heading "III. Subject Matter Jurisdiction" at the bottom of page 12 and conclude as the penultimate with paragraph of page 14 of the Order.

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general contractual dispute between plaintiff, who was not a party to the workers' compensation claims, and defendants. The Commissioner's jurisdiction was limited to whether or not plaintiff's professional fees should be paid from $500,000 being held by the Special Referee from claimants' recovery but it did not extend to the issue of whether defendants should be ultimately responsible at common law to pay plaintiff for his services.

50. Plaintiff's causes of action relate to contracts entered into between him and defendants. While purpose of the contracts was for plaintiff to provide expertise to defendants that they might ultimately use to represent their clients, there was never an agreement between plaintiff and defendants' clients.

51. The Commission, as an inferior court, is given exclusive jurisdiction over "[a]ll questions arising under this title [Title 42, South Carolina Code of Laws], if not settled by agreement **of the parties (emphasis added)** interested therein with the approval of the commission...." S.C. Code Ann. §42-3-180. (Emphasis supplied.) This jurisdiction is limited to questions relating to "parties." Plaintiff was not a party to the workers' compensation claims that were the subject matter of the various claims made by defendants' clients. Plaintiff was not a claimant, an employee, an employer, a workers' compensation insurance carrier, or a treating physician. Plaintiff did not provide medical treatment and other services to the claimants that were to be paid for through the workers' compensation act. Further, contractual claims of

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experts against attorneys who retain them do not arise under Title 42, South Carolina Code of Laws, but arise under the common law.

52. While the Commission is given authority as between the parties to determine questions relating to workers' compensation claims, including approval and disbursement of costs in the prosecution of the claims, this provision does not give the Commission jurisdiction to hear disputes relating to nonparties to the claims. Those are properly within the jurisdiction of the Circuit Court, given the amount in controversy.

53. That Commissioner Taylor exceeded her authority is obvious in her order of January 26, 2016, said order being in the record and entitled "Order Granting Motion to Release Funds." In her order, Commissioner Taylor stated that the purpose of her exercise of jurisdiction was related only to the funds being held by the special referee. Her order states a pp. 1 and 2,[2] as follows: "With the approved costs remaining undistributed, the undersigned Commissioner has the authority to make a determination concerning final distribution of these set aside funds." She exceeded her self-expressed limitation when she decided that plaintiff had no claim against defendants at common law.

54. Initially it should be noted that Commissioner Taylor's order of January 26, 2016 arose not from the filing of a proper complaint for declaratory relief but from defendants' the filing of a simple motion, directed against a plaintiff as a nonparty. Plaintiff, as a nonparty, lacked standing or the ability to conduct

[2] The Order of Commissioner Taylor has no pagination so counsel has counted the pages to indicate the number for citation.

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discovery to find out the basis of defendant's contention that they did not owe him the money. On the other hand, defendants, purporting to act for their clients (which they were not, as the costs had already been approved and the claimants had nothing to gain or lose), were able to take discovery from plaintiff and took his deposition.

55. Plaintiff had no such option as he was not a party to the case and lacked standing. He did not have the right to a jury trial or to any of the other protections afforded parties in civil actions. The unfairness of permitting the defendants from placing before a specialized commission the merits of a common law contract case involving hundreds of thousands of dollars against a nonparty is obvious.

56. In Commissioner Taylor's January 26, 2016 order, there is what purports to be a discussion of the common law of contract, and its applicability to the contractual relationship between plaintiff and defendants, and thereafter, an extensive discussion of the balancing of the equities. (See Parts C. and D. of the Order, pp. 4-6). While Commissioner Taylor had the authority to determine what attorneys' expenses fees should be paid for from the funds being held by the Special Referee, she did not have the jurisdiction to determine whether plaintiff had the right to recover from defendants based on the transactions between plaintiff and defendants.

57. The causes of action asserted by plaintiff herein arise out of the common law, and not out of the Workers' Compensation Act. These are not within the

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Commission's subject matter jurisdiction. Commissioner Taylor's order is entitled to no validity as the plaintiff's causes of action against defendants.

58. Related to this firm principle that common-law disputes are not within the jurisdiction of the Commission is the case of *Baker Hospital v. Firemans Fund Ins. Co.*, 314 S.C. 98, 441 S.E.2d 822 (1994). The *Baker Hospital* case arose out of a dispute between a medical provider hospital and a workers' compensation insurance carrier. An employee of the carrier's insured employer visited the hospital complaining of a work-related injury. Before providing treatment, the hospital telephoned the carrier to obtain proof of coverage and proof that the hospital charges would be paid by the carrier. The carrier's representative assured the hospital that the expenses would be covered, so, in reliance thereupon, the hospital treated the employee.

59. Thereafter, the carrier concluded that employee did not have a workers' compensation claim. The hospital sued the carrier in the circuit court, alleging that the carrier was liable for the medical treatment provided to the employee, given its inaccurate statement that there was coverage. The carrier moved to dismiss the action alleging that there was no subject matter jurisdiction but that the sole jurisdiction was with the South Carolina Workers' Compensation Commission. The circuit court agreed with the carrier and dismissed the action, holding that the sole subject matter jurisdiction was with the Commission. The hospital appealed.

60. The supreme court reversed the ruling of the circuit court and held that the hospital's claims arose from common law and were not within the subject

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jurisdiction of the Commission. The supreme court held that the hospital lacked standing to seek redress before the Commission and its remedy was properly only in the circuit court.

61. The case of *Roper Hospital v. Clemons*, 326 S.C. 534, 484 S.E.2d 598 (Ct. App. 1997), further illustrates the general proposition that such common law causes of action not arising under the Workers' Compensation Act, or directly related to the claims, are not within the jurisdiction of the Commission. In the *Roper Hospital* case, an employee of an insured employer received treatment at Roper Hospital. The carrier took the position that the expenses of the employee's treatment at Roper Hospital were not related to a compensable injury and denied coverage. Thereafter, the employee and the carrier entered into a clincher[3] agreement that was approved by the Workers' Compensation Commission. After the settlement, Roper Hospital attempted to intervene in the workers' compensation action to get its bills paid. The Commission denied the application of Roper Hospital and dismissed its case. Roper Hospital appealed.

62. The court of appeals affirmed the dismissal. It held that Roper Hospital lacked standing to participate in these proceedings under the Workers' Compensation Act. In upholding the dismissal, however, the court of appeals clearly stated that Roper Hospital had its rights at common law against the carrier. Although Roper Hospital asserted it did not have common-law claims, the court of appeals declared:

[3] A "clincher agreement" is an agreement that settles a workers' compensation claim with finality.

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> Appellant [Roper Hospital] distinguishes itself from the hospital in the Baker case, arguing its claims do not arise from common law. However, there is nothing to indicate, and Appellant does not assert, that it does not have a cause of action based on common-law. Appellant clearly has a cause of action against the patient/employee for services rendered on common-law. Appellant has a claim against the insurance carrier, as well, assuming the hospital verified coverage, as was the case in Baker. Failure to safeguard its own interest does not entitle it to standing to contest the issue of coverage provided under the Act. In the instant case, Appellant is not precluded from seeking payment for Clemons's [the employee's] medical expenses through other proceedings..

63. From this authority, it is clear that the Workers' Competition Commission lacks jurisdiction over common-law claims not related to the compensation of an employee.

64. . For the foregoing reasons, as well as for such reasons as may appear through argument or supplemental means, plaintiff requests that the Court's order of June 8, 2020, be reconsidered, amended, altered and otherwise changed to remove all conclusions that hold, or that can be interpreted to hold, that the Carolina Workers' Compensation Commission had any jurisdiction whatsoever with respect to the claims that plaintiff has asserted against defendants herein. The Order of Commissioner Taylor of January 26, 2016 is entitled to no preclusive effect as to plaintiff's causes of action asserted herein

65. The Ortner Defendants argued the same reasons to dismiss the Complaint of the Plaintiff as did the Rosenthal Defendants. **(Exhibits C, H)**

66. **The arguments for dismissal of the Plaintiff's Complaint were fully discussed in the Order Denying the Motion to Dismiss. The Motion to**

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Dismiss was denied by the Honorable Deadra Jefferson on April 5, 2019. (Exhibit D) (Emphasis added)

67. For the foregoing reasons, as well as for such reasons as may appear through argument or supplemental means, plaintiff requests that the Court's order of June 8, 2020, be reconsidered, amended, altered and otherwise changed to remove all conclusions that hold, or that can be interpreted to hold, that the Carolina Workers' Compensation Commission had any jurisdiction whatsoever with respect to the claims that plaintiff has asserted against defendants herein. The Order of Commissioner Taylor of January 26, 2016 is entitled to no preclusive effect as to plaintiff's causes of action asserted herein.

68. In conclusion, the Plaintiff respectfully submits that this court reconsider its Order Granting Dismissal of the Plaintiff's Complaint, deny the said motion to dismiss by the Rosenthal Defendants, and require the matter to be tried before the trial court.

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Attorney for the Plaintiff

June 17, 2020

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EXHIBIT A

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
)
DEFENDANTS.)

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

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

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9590 9403 0705 5196 2927 53

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A. Signature

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☐ Agent
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B. Received by (Printed Name)

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3. Service Type

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• 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

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2019 JAN -9 AM 10:00
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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2017-CP-10-4371

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2. Article Number *(Transfer from service label)*

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B. Received by *(Printed Name)* ED ELDER

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EXHIBIT B

ELECTRONICALLY FILED - 2020 Jun 17 5:16 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	(JURY)
CARY E. FECHTER, M.D., PLAINTIFF, VS	)	AFFIDAVIT OF SERVICE BY CERTIFIED MAIL
LEON MARTIN ORTNER, THE ORTNER LAW FIRM LLC, GERALD ROSENTHAL, AND ROSENTHAL, LEVY, SIMON, AND RYLES, DEFENDANTS.	)	2017-CP-10-4371

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

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.

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

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STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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

CARY E. FECHTER, M.D.,

Appellant,

vs.

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

Respondents.

Rule 210(g), *SCACR*, Certificate of Counsel (*Volume II*)

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Attorneys for the Appellant,
Cary E. Fechter, M.D.

I, Stephen P. Groves, Sr., Esquire, hereby certify, pursuant to Rule 210(g), *SCACR*, that this **Record on Appeal** (***Volume II***) 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

64363878.v1