RECEIVED
May 18 2022
SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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

CARY E. FECHTER, M.D.,

Appellant,

vs.

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

Respondents.

Record on Appeal
(*Volume III*)

Stephen P. Groves, Sr., Esquire
S.C. Bar No. 007854
BUTLER SNOW LLP
25 Calhoun Street, Suite 250
Charleston, South Carolina 29401
Telephone: 843.277.3704
Telecopier: 843.277.3701
E-Mail: Stephen.Groves@butlessnow.com

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

Michael E. Kozlarek, Esquire
S.C. Bar No. 69330
John M. Mosser, Esquire
S.C. Bar No.: 71929
KING KOZLAREK LAW, LLC
Post Office Box 565
Greenville, South Carolina 29602
Telephone: 864.527.5941
E-Mail: michael@kingkozlaw.com

Attorneys for the Respondents,
Gerald Rosenthal and Rosenthal,
Levy, Simon and Ryles, P.A.

Justin P. Novak, Esquire
S.C. Bar. No.: 79922
M. Dawes Cooke, Jr., Esquire
S.C. Bar No.: 1376
BARNWELL, WHALEY
PATTERSON & HELMS, LLC
Post Office Drawer H
Charleston, South Carolina 29402
Telephone: 843.577.7700
E-Mail: jnovak@barnwell-whaley.com

Attorneys for the Respondents,
Leon Martin Ortner and The
Ortner Law Firm, LLC

TABLE OF CONTENTS

VOLUME I

SCRCP Form 4 Order/Judgment issued by the Honorable J. Derham Cole, Circuit Court Judge, dated 29 March 2021, and filed 30 March 2021 1

Notice of Entry of Judgment/Order Pursuant to Rule 77, *SCRCP* from Julie J. Armstrong, Charleston County Clerk of Court to Michael E. Kozlarek, Esquire (undated) 3

Order Vacating Erroneously Filed Order issued by the Honorable J. Derham Cole, Circuit Court Judge, dated 21 August 2020, and filed on 24 August 2020 4

Order Dismissing Plaintiff's Complaint With Prejudice issued by the Honorable J. Derham Cole, Circuit Court Judge, dated and filed on 4 August 2020 6

Notice of Entry of Judgment/Order Pursuant to Rule 77, *SCRCP* from Julie J. Armstrong, Charleston County Clerk of Court to Michael E. Kozlarek, Esquire (undated) 16

Notice of Entry of Judgment/Order Pursuant to Rule 77, *SCRCP* from Julie J. Armstrong, Charleston County Clerk of Court to Michael E. Kozlarek, Esquire (undated) 16

Order Granting Gerald Rosenthal's and Rosenthal, Levy, Simon and Ryles' Joint Motion to Dismiss issued by the Honorable J. Derham Cole, Circuit Court Judge, dated 5 June 2020, and filed 8 June 2020 18

SCRCP Form 4 Order/Judgment issued by the Honorable J. Derham Cole, Circuit Court Judge, dated and filed on 5 February 2020 33

Order Denying Motion to Reconsider, Alter, or Amend Judgment issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 26 June 2019, and filed 28 June 2019 39

Order issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 4 April 2019, and filed 5 April 2019 41

SCRCP Form 4 Order/Judgment issued by the Honorable R. Roger Young, Circuit Court Judge, dated 23 May 2018, and filed on 24 May 2018 56

Order Granting Motion to Release Funds issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner, dated 26 January 2016 57

Order issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner, dated 10 December 2015 66

Initial Report of the South Carolina Workers' Compensation Commission Special Referee, H. Mills Gallivan, Esquire, dated 13 November 2015 69

Order issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner, dated 27 May 2015 73

Consent Order issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner, dated 22 July 2014 75

Summons and Complaint 17 August 2017, and filed on 25 August 2017 80

Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC dated 5 January 2018, and filed on 8 January 2018 87

A. Order issued by the Honorable Aisha Taylor, SCWCC Commissioner, dated 26 January 2016 (SCWCC File No. 0326995, *et. al*) 104

B. Consent Order dated 22 July 2014 (SCWCC File No. 0326995, *et. al*) 115

C. Initial Report of the SCWCC's Special Referee, H. Mills Gallivan, Esquire, dated 13 November 2015 (SCWCC File No. 0326995, *et. al*) 121

D. Order issued by the Honorable Aisha Taylor, SCWCC Commissioner, dated 10 December 2015 (SCWCC File No. 0326995, *et. al*) 126

E. Motion to Release Funds dated 18 November 2015 (SCWCC File No. 0326995, *et. al*) 130

A. Affidavit of Gerald Arthur Rosenthal sworn to on 17 November 2015 144

1. Letter from Rob Cluxton, CFO of Rosenthal & Levy, P.A. to Dr. Cary E. Fechter dated 28 October 2010 147

F. Reply of Leon Martin Ortner to Motion to Release Funds dated 30 November 2015, and filed 2 December 2015 (*SCWCC File No. 0326995*) 148

1. Deposition of Cary E. Fechter, M.D. sworn to on 2 November (designated pages) 154

G. Letter from C. Tex Davis, Jr. of the Supreme Court of South Carolina's Office of Disciplinary Counsel to Dr. Cary E. Fechter dated 2 March 2016 161

H. Agreement Approving Award of Special Referee dated 27 April 2017 (*SCWCC File No. 0326828*) 164

Affidavit of Service by Certified Mail sworn to by Melvin D. Bannister, Esquire on 8 January 2019 168

Affidavit of Service by Certified Mail sworn to by Melvin D. Bannister, Esquire on 8 January 2019 172

Affidavit of Cary E. Fechter, M.D. sworn to on 7 January 2019 (with attached exhibit); 174

Exhibit Typed Statement of Cary Fechter M.D.; 182

Certificate of Counsel (*Volume I*) 184A

VOLUME II

Memorandum in Opposition to Motion to Dismiss dated 8 January 2019, and filed 9 January 2019 185

Schedule A: USPS Tracking Report for Tracking No. 70032260000504408448 showing delivery of item on 7 December 2017 200

Schedule B: USPS Tracking Report for Tracking No. 70151730000142889532 indicating "Return to Sender" notification dated 10 November 2017 201

Schedule C: USPS Tracking Report for Tracking No. 70151730000142289398 showing delivery of item on 12 October 2017 202

Schedule D: USPS Return Receipt Card for Article 7015 1370 0001 4288 9388 postmarked 12 October 2017 203

Schedule E: Letter from Leon Martin Ortner, Esquire to Cary D. Fechter, M.D. dated 4 June 2003 204

Schedule F: Letter from J. Keith Roberts, Esquire of South Carolina Workers' Compensation Commission to Melvin D, Bannister, Esquire dated 2 January 2018 205

Gerald Rosenthal's and Rosenthal, Levy, Simon and Ryles' Joint Motion to Dismiss dated 13 May 2019, and filed on 14 May 2018 209

A. Charleston County Court of Common Pleas Docket Sheet (1 May 2019) 224

B. Affidavit of Cary E. Fechter, M.D. sworn to on 7 January 2019 226

C. Affidavits of Service by Certified Mail sworn to by Melvin D. Bannister, Esquire on 8 January 2019 235

D. Affidavit of Gerald Arthur Rosenthal sworn to on 10 May 2019 242

E. Affidavit of Jonathan Todd Levy sworn to on 6 May 2019 245

F. Affidavit of Ed Elder sworn to on 6 May 2019 249

G. USPS Return Receipt Card for Article 7015 1370 0001 4288 9388 postmarked 12 October 2017 252

Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC dated and filed on 19 December 2019 255

Attachment: Order Denying Motion to Dismiss issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 26 June 2019, and filed 28 June 2019 257

Affidavit of Default signed by Melvin D. Bannister, Esquire sworn to on 19 December 2019 273

Motion for Enlargement of Time on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm dated and filed 23 December 2019 275

Memorandum in Support of Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC dated and filed on 10 January 2020; 277

A. Consent Order dated 22 July 2014 286

B. Initial Report of the South Carolina Workers" Compensation Commission Special Referee, H. Mills Gallivan, Esquire, dated 13 November 2015 291

C. Order issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner, dated 10 December 2015 295

D. Affidavit of Cary E. Fechter, M.D. sworn to on 7 January 2019 298

E. Affidavit of Service by Certified Mail by Melvin D. Bannister, Esquire sworn to on 8 January 2019 306

F. Affidavit of Leon Martin Ortner sworn to on 10 January 2020 310

A. Envelope addressed to Leon M. Ortner, Esquire with USPS Return Receipt (unsigned and undated) 311

G. Affidavit of Ortner Law Firm, LLC sworn to on 10 January 2020 312

H. Affidavit of Karen Ortner sworn to on 10 January 2020 314

A. Envelope addressed to Leon M. Ortner, Esquire with USPS Return Receipt (unsigned and undated); 315

I. Memorandum in Opposition to Motion to Dismiss of Cary E. Fechter, M.D. dated 8 January 2020, and filed on 9 January 2020 317

Schedule A USPS Tracking Report for Tracking No. 70032260000504408448 showing delivery of item on 7 December 2017 332

Schedule B USPS Tracking Report for Tracking No. 70151730000142889532 indicating "Return to Sender" notification dated 10 November 2017 333

Schedule C USPS Tracking Report for Tracking No. 70151730000142289398 showing delivery of item on 12 October 2017 334

Schedule D USPS Return Receipt Card for Article 7015 1370 0001 4288 9388 postmarked 12 October 2017 335

Schedule E Letter from Leon Martin Ortner, Esquire to Cary D. Fechter, M.D. dated 4 June 2003 336

Schedule F Letter from J. Keith Roberts, Esquire of South Carolina Workers' Compensation Commission to Melvin D. Bannister, Esquire dated 2 January 2018 337

Motion to Reconsider Order Granting Gerald Rosenthal's and Rosenthal Levy Simon & Ryles' Motion to Dismiss dated and filed 17 June 2020 341

A. Affidavit of Service by Certified Mail by Melvin D. Bannister, Esquire sworn to on 8 January 2019 361

Schedule C USPS Tracking Report for Tracking No. 70151730000142289398 showing delivery of item on 12 October 2017 363

Schedule D USPS Return Receipt Card for Article 7015 1370 0001 4288 9388 postmarked 12 October 2017 364

B. Affidavit of Service by Certified Mail by Melvin D. Bannister, Esquire sworn to on 8 January 2019 366

Schedule A USPS Tracking Report for Tracking No. 70032260000504408448 showing delivery of item on 7 December 2017; 368

Certificate of Counsel (*Volume II*) 368A

VOLUME III

C. Motion to Dismiss by the Ortner Defendants dated 5 January 2018, and filed on 8 January 2018 (with attached exhibits) 369

A. Order issued by the Honorable Aisha Taylor, South Carolina Workers' Compensation Commission Commissioner, dated 26 January 2016 (*SCWCC File No. 0326995, et. al*); 389

B. Consent Order dated 22 July 2014 (*SCWCC File No. 0326995, et. al*) 399

C. Initial Report of the SCWCC's Special Referee, H. Mills Gallivan, Esquire, dated 13 November 2015 (*SCWCC File No. 0326995, et. al*) 405

D. Order issued by the Honorable Aisha Taylor, SCWCC Commissioner, dated 10 December 2015 (*SCWCC File No. 0326995, et. al*) 408B

E. Motion to Release Funds dated 18 November 2015 (*SCWCC File No. 0326995, et. al*) 409

A. Affidavit of Gerald Arthur Rosenthal sworn to on 17 November 2015 423

1. Letter from Rob Cluxton, CFO of Rosenthal & Levy, P.A. to Dr. Cary E. Fechter dated 28 October 2010 426

F. Reply of Leon Martin Ortner to Motion to Release Funds dated 30 November 2015, and filed 2 December 2015 (*SCWCC File No. 0326995*) 427

1. Deposition of Cary E. Fechter, M.D. sworn to on 2 November (specific pages) 433

G. Letter from C. Tex Davis, Jr. of the Supreme Court of South Carolina's Office of Disciplinary Counsel to Dr. Cary E. Fechter dated 2 March 2016 440

H. Agreement Approving Award of Special Referee dated 27 April 2017 (*SCWCC File No. 0326828*) 443

D. Order Denying Motion to Dismiss issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 4 April 2019, and filed 5 April 2019 447

E. Motion to Reconsider, Alter, or Amend Order Denying Motion to Dismiss On Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm (Only pages 1 and 7) 463

F. Order Denying Defendants' Motion to Reconsider, Alter, or Amend Judgment issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 26 June 2019, and filed 28 June 2019 473

G. Notice of Appeal to the South Carolina Court of Appeals dated 22 July 2019, and filed 23 July 2019 476

H. Gerald Rosenthal's and Rosenthal, Levy, Simons and Ryles' Joint Motion to Dismiss dated 13 May 2019, and filed 14 May 2019 478

A. Charleston County Court of Common Pleas Docket Sheet (1 May 2019) 493A

B. Affidavit of Cary E. Fechter, M.D. sworn to on 7 January 2019 495

C. Affidavits (Melvin D. Bannister, Esquire) of Service by Certified Mail sworn to on 8 January 2019 (Service on Rosenthal Levy Simon & Ryles; Leon Melvin Ortner, and Ortner Law Firm) 504

D. Affidavit of Gerald Arthur Rosenthal sworn to on 10 May 2019 512

E. Affidavit of Jonathan Todd Levy sworn to on 6 May 2019 515

F. Affidavit of Ed Elder sworn to on 6 May 2019 519

G. USPS Return Receipt Card for Article 7015 1370 0001 4288 9388 postmarked 12 October 2017 522

I. Letter from Michael E. Kozlarek, Esquire to the Honorable Jenny Abbott Kitchings, Clerk of the South Carolina Court of Appeals dated 17 September 2019 527

J. Order Issued by the South Carolina Court of Appeals dated and filed 25 October 2019, and Remittitur from the South Carolina Court of Appeals to the Charleston County Court of Common Pleas dated 13 November 2019 529

Response to Motion to Reconsider Gerald Rosenthal's and Rosenthal, Levy, Simon and Ryle's Joint Motion to Dismiss dated and filed 29 June 2020 533

Motion to Reconsider Order Dismissing Plaintiff's Complaint With Prejudice dated and filed 13 August 2020 537

Certificate of Counsel (*Volume III*) 549A

VOLUME IV

A. Affidavit of Service by Certified Mail by Melvin D. Bannister, Esquire sworn to on 8 January 2019 550

Schedule A USPS Tracking Report for Tracking No. 70032260000504408448 showing delivery of item on 7 December 2017 552

B. Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm dated 5 January 2018, and filed on 8 January 2018 553

C. Transcript of Record for Hearing held on 9 January 2019, before the Honorable Deadra L. Jefferson, Circuit Court Judge 571

D. Order Denying Motion to Dismiss issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 26 June 2019, and filed 28 June 2019 612

E. Motion to Reconsider, Alter, or Amend Order Denying Motion to Dismiss On Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm (*Only pages 1 and 7*) 628

F. Order issued by the Honorable Deadra L. Jefferson, Circuit Court Judge, dated 4 April 2019, and filed 5 April 2019 636

G. Notice of Appeal to the South Carolina Court of Appeals dated 22 July 2019, and filed 23 July 2019 639

H. Order Issued by the South Carolina Court of Appeals dated and filed 25 October 2019, and Remittitur from the South Carolina Court of Appeals to the Charleston County Court of Common Pleas dated 13 November 2019 642

I. Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC dated and filed on 19 December 2019 646

J. Motion for Enlargement of Time on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC dated and filed 23 December 2020 649

K. Transcript of Record for Hearing held on 27 January 2020, before the Honorable J. Derham Cole, Circuit Court Judge 652

Return to Motion to Reconsider Order Dismissing Plaintiff's Complaint With Prejudice on Behalf of Leon Martin Ortner and The Ortner Law Firm, LLC dated and filed 21 August 2020 677

Notice of Appeal by Cary E. Fechter, M.D. to the South Carolina Court of Appeals, dated and filed 21 April 2021 683

Transcript of Record for Hearing held on 9 January 2019, before the Honorable Deadra L. Jefferson, Circuit Court Judge 684

Transcript of Record for Hearing held on 27 January 2020, before the Honorable J. Derham Cole, Circuit Court Judge 721

Certificate of Counsel (*Volume IV*) 743

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

EXHIBIT C

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., ☐ Plaintiffs v. Leon Martin Ortner, The Ortner Law Firm LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles, ☒ Defendants	IN THE COURT OF COMMON PLEAS NINTH JUDICIAL CIRCUIT CASE NO. 2017-CP-10-04371 MOTION AND ORDER INFORMATION FORM AND COVER SHEET

Plaintiff's Attorney: Melvin D. Bannister, Esquire 5115 Forest Dr., Suite G-1 Post Office Box 6833 Columbia, South Carolina 29260 Phone: (803) 782-8688 Email: sctriallawyer@bellsouth.net	Defendant's Attorney: M. Dawes Cooke, Jr., Esquire/ Justin P. Novak, Esquire (Bar No. 79922) Address: Barnwell Whaley Patterson & Helms, LLC P.O. Drawer H Charleston, South Carolina 29402 Phone: (843) 577-7700 E-mail: mdc@barnwell-whaley.com/jnovak@barnwell-whaley.com

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Dismiss
Estimated Time Needed: 20 minutes
Court Reporter Needed: ☒YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐Form Motion/Order

Signature of Attorney for ☐Plaintiff / ☒Defendants

January 5, 2018
Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT: $25.00
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	_____ JUDGE CODE: _____ Date: _____

CLERK'S VERIFICATION

Collected by: _____
Date Filed:
☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

SCCA/233 (11-03)

370

FILED
2018 JAN -8 PM 2:59
JULIE J. ARMSTRONG
CLERK OF COURT
BY

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

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.

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

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

ARGUMENT SUMMARY

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

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

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

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

ALLEGATIONS, UNDISPUTED FACTS & PROCEDURAL HISTORY[1]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

An action upon a contract, obligation, or liability, express or implied, must be commenced within three years. S.C. Code § 15-3-530. "Pursuant to the discovery rule, a breach of contract action accrues not on the date of the breach, but rather on the date the aggrieved party either discovered the breach, or could or should have discovered the breach through the exercise of reasonable diligence." 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.

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

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

[9] The collective mediation and settlement occurred after trials and verdicts in thirteen cases, which commenced on March 12, 2012.

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

examination and continued treatment of four hundred fifty-eight claimants would have put Plaintiff on notice of the settlement and arising right to payment on or around the settlement of those claims at mediation. As a result, the applicable statute of limitations required Plaintiff to commence any action to recover any amounts owed on or about July 22, 2017. Nevertheless, Plaintiff delayed filing the Summons and Complaint until August 25, 2017—after the disbursal of the funds held in trust for the express purpose of satisfying legitimate claims for such costs—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), SCRCP, because service of process is insufficient and the statute of limitations precludes Plaintiff from asserting these claims.

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

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

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

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

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

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

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

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

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

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

CONCLUSION

For the foregoing reasons, this Court should dismiss with prejudice the Summons and Complaint pursuant to Rules 12(b)(1), (3), (5) & (6), 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

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

January 5, 2018

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

FILED
2018 JAN -8 PM 3:00
JULIE J. ARMSTRONG
CLERK OF COURT
BY

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.	**CERTIFICATE OF SERVICE**

I, the undersigned employee of Barnwell Whaley Patterson & Helms, LLC, hereby certify that I have served the foregoing ***Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC*** in the above-captioned case by electronic mail and by causing a copy of the same to be personally deposited in a United States Postal Service mail box, postage prepaid, with the return address clearly visible, addressed as indicated below:

Melvin D. Bannister, Esquire
5115 Forest Dr., Suite G-1
Post Office Box 6833
Columbia, South Carolina 29260
sctriallawyer@bellsouth.net

Justin P. Novak

January 5, 2018

388

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

Exhibit "A"

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

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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

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

PROCEDURAL STATUS AND AUTHORITY

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

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

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

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

FINDINGS OF FACT

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

A. Background of Claim

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Dr. Fechter is Not Entitled to Any Funds

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

1. Applicable Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) The Motion to Release Funds is GRANTED;

(2) The law firm of Rosenthal, Levy, Simon & Ryles is entitled to payment of the previously set aside funds of $500,000.00, in full, as approved costs;

(3) Dr. Cary E. Fechter has failed to establish any entitlement to recovery of any of the set aside funds;

(4) Dr. Cary E. Fechter shall not take any portion of the set aside funds or be entitled to recovery of any other funds from claimants' counsel or from claimants; and

(5) H. Mills Gallivan, as Special Referee, is directed to make the payment of the set aside funds, in the amount of $500,000, to Rosenthal, Levy, Simon & Ryles as soon as practicable following his receipt of a copy of this Order, but in no event later than ten (10) days following receipt thereof.

AND IT IS SO ORDERED!

S.C. WORKERS' COMPENSATION COMMISSION

Commissioner Aisha Taylor

CERTIFICATE OF SERVICE

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

January 26, 2016

By: Renee Smith, Administrative Assistant to Commissioner Taylor

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

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

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Sadie Adams, et al., Claimants, vs. International Paper Company and Nevamar Company, LLC, Employers, International Paper Company and Ace American Insurance Company Carriers/Defendants	**WCC File No.: 0326995** ***CERTIFICATE OF SERVICE***

CERTIFICATE OF SERVICE

I hereby certify that a copy of the ***Order Granting Motion to Release Funds*** was served upon the below on this 27th day of January, 2016 by mailing a copy of the same in U.S. Mail and Certified Mail-Return Receipt Requested, postage prepaid, addressed as follows:

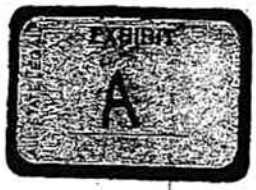
Dr. Cary E. Fechter
7786 Discovery Road
North Charleston, SC 29420

Randi M. Berlin

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

Exhibit "B"

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



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

400

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

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

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

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

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

401

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

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

402

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

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

403

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

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 Nevamar 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

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

Exhibit "C"

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

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

406

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

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.

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

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

408

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

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,

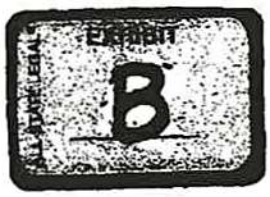
H. Mills Gallivan, Esquire
Special Referee
GALLIVAN, WHITE & BOYD, P.A.

10/23/19
Date

408A

Exhibit "D"

408B



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

409 C

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.

408D

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

403E

Exhibit "E"

408F

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Sadie Adams, *et al.*, Claimants, vs. International Paper Company and Nevamar Company, LLC, Employers, International Paper Company and Ace American Insurance Company, Carriers/Defendants.	**WCC File No.: 0326995 *et al.*** **MOTION TO RELEASE FUNDS**

Rosenthal, Levy, Simon & Ryles ("RLSR") hereby moves for the Commission to release the funds held on deposit pursuant to the April 1, 2014, Mediation Agreement in the captioned matter to RLSR for reimbursement of approved costs incurred on behalf of its clients. No other parties have a rightful claim to these funds. Specifically, any claims to the funds made by Dr. Cary Fechter should be denied. Therefore, the full amount of funds held by the Commission should be released to RLSR.

BACKGROUND

In October of 2005, Gerald Rosenthal, a partner in RLSR, was engaged to assist with the workers' compensation claims in the captioned matter. Each potential claimant had been exposed to toxic chemicals while working at the Nevamar plant in Hampton County, South Carolina. Mr. Rosenthal travelled to South Carolina to meet with more than 600 current and former Nevamar employees. After these initial meetings, RLSR proceeded with representing many of these employees in the captioned matter. [Aff. of G. Rosenthal ¶ 5, attached hereto as **Exhibit A**]

Retaining experts was one part of effectively presenting the claimants' claims to the Commission. RLSR retained Dr. Fechter to perform patient evaluations and submit a final

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

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

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

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

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

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

CASE STATUS

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

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

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

COSTS INCURRED BY ROSENTHAL, LEVY, SIMON & RYLES

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

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

CLAIM OF DR. CARY FECHTER

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

A. Applicable Law

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

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

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

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

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

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

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

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

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

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

[2] Dr. Fechter admits to receipt of this payment. [Fechter Depo. p. 9]

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

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

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

> Q. [Y]ou're retained to do essentially an independent medical exam of the patient. Is that right?
> A. Yes.
>
> [Fechter Depo. p. 39-40]

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

> Q. If you were doing an independent exam, would that normally involve -- it sounds like there were follow up visits?
> A. Yes, they always involve follow up, if they're sick.
> Q. With you as an expert or you as treating physician?
> A. As a treating physician.
> Q. So you became the treating physician of many of these patients?
> A. For many years. Some of them for many years.
>
> [Fechter Depo. p. 40]

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

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

> Q. And if you were treating them, I mean, there's a difference between doing an independent medical exam and then treating a patient, right?
> A. Absolutely. One is just looking and the other is getting involved.
>
> [Fechter Depo. p. 40]

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

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

> Q. You never did sign a contract with Mr. Ortner?
> A. No...
>
> [Fechter Depo. p. 8]
>
> Q. Did you ever sign any kind of contract or receive any kind of letter like that from Mr. Rosenthal?
> A. No...
>
> [Fechter Depo. p. 9]

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

> Q. You're saying you had a conversation with both Mr. Ortner and Mr. Rosenthal about?
> A. I almost never spoke to Gerald directly.
>
> [Fechter Depo. p. 46]

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

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

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

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

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

> A. I was asked to do independent medical examinations and Lee and Gerald fully understood that I was still medically managing it to determine permanency of injury.
> Q. How did they understand that?
> A. Because I told them I'm doing it. They said do it, go for it. We want our patients to know that they have a great doctor. And certainly, there are no complaints from the patients.
> Q. And that's for your continued treatment of those patients?
> A. Yes, which they are not responsible for those bills.
> Q. Who is not?
> A. The Ortner or Rosenthal firms.
>
> [Fechter Depo. p. 43-44]

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

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

> Q. [Y]ou're doing a report that you get to bill the insurance carrier and bill 500 dollars to the law firm?
> A. Correct.
>
> [Fechter Depo. p. 48-49]

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

> A. The question at hand is did I bill private insurance for testing, absolutely I did. Did I ever get 100 percent, absolutely you never asked that yes, I did...
>
> [Fechter Depo. p. 57]

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

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

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

> Q. [T]hat 20 percent that you're trying to bill, of that, that's an attempt to recoup the difference between your assumed insurance rate and your full rate for that task?
> A. Yes...
>
> [Fechter Depo. p. 224]

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

Attorney for Rosenthal, Levy, Simon & Ryles

November 18, 2015
Columbia, South Carolina

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

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

Parker Poe

Lawrence M. Hershon
Associate
Telephone: 803.253.8918
Direct Fax: 803.255.8017
lawrencehershon@parkerpoe.com

Charleston, SC
Charlotte, NC
Columbia, SC
Raleigh, NC
Spartanburg, SC

November 18, 2015

Via Hand Delivery

South Carolina Workers' Compensation
Commission
1333 Main Street, Suite 500
Columbia, SC 29201

Re: **Sadie Adams, et al. vs. International Paper Company, et al.**
S.C. Workers Compensation File No. 0326995

To Whom It May Concern:

Enclosed are an original and one copy of the Motion to Release Funds with regard to the above-referenced matter. I have also enclosed our firm check in the amount of $25.00 for the filing fee. Please file the original and return a file-stamped copy to me with our courier.

Thank you for your attention to this request.

Sincerely,

Lawrence M. Hershon

LMH:rmb
Enclosures

cc: Dr. Cary E. Fechter (via US Mail w/encls)
F. Drake Rogers, III, Esq. (via US Mail e/encls)
Joshua J. Metcalf, Esq. (via US Mail w/encls)
David T. Pearlman, Esq. (via US Mail w/encls)
Leon Martin Ortner, Esq. (via US Mail w/encls)

422

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

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Sadie Adams, *et al.*, Claimants, vs. International Paper Company and Nevamar Company, LLC, Employers, International Paper Company and Ace American Insurance Company, Carriers/Defendants.	**WCC File No.: 0326995 *et al.*** **AFFIDAVIT OF GERALD ARTHUR ROSENTHAL**

Personally appears before me Gerald Arthur Rosenthal, who, being duly sworn, deposes and says that:

1. I am over 18 years of age, have personal knowledge of the facts expressed in this Affidavit, and am competent to give the testimony herein.

2. I am a partner in the law firm Rosenthal, Levy, Simon & Ryles.

3. I have been a member in good standing of the Florida Bar since 1973.

4. I had the primary responsibility within the firm for representing Plaintiffs in the captioned action.

5. In October of 2005, I travelled to South Carolina to meet with more than 600 current and former Nevamar employees. After these initial meetings, my firm proceeded with representing many of these employees in the captioned matter.

6. This law firm devoted considerable attorney time to this matter and advanced significant expenses.

7. This law firm advanced expenses totaling no less than $1.2 million.

423

EXHIBIT "A"

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

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

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

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

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

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

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

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

FURTHER AFFIANT SAYETH NAUGHT.

This 17th day of November, 2015.

GERALD ARTHUR ROSENTHAL

SWORN to before me this
17th day of November, 2015.

Notary Public for Florida
My Commission Expires:

MARIA HERNANDEZ
MY COMMISSION # FF 071918
EXPIRES: December 19, 2017
Bonded Thru Budget Notary Services

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

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

October 28, 2010

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

RE: Billing/Payment Inquiry

Dear Dr. Fechter:

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

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

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

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

Yours truly,

ROSENTHAL & LEVY, P.A.

Rob Cluxton
Chief Financial Officer

426

EXHIBIT "1"

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

Exhibit "F"

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

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

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

SCWCC
DEC 02 2016
JUDICIAL

REPLY OF LEON MARTIN ORTNER TO MOTION TO RELEASE FUNDS

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

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

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

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

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

53

Q. When did you discuss with Ortner and Rosenthal, Hey, you guys are responsible for this 20 percent that I don't get paid from the carrier?
A. From the very beginning only with Lee Ortner.

54

Q. And it was just through conversation, correct?
I mean, there's no document that we can go to that says, Hey, here is the agreement that you guys were going to pay the 20 percent?
A. Well, Lee understood that normally they have to pay the 100 percent and that I don't even bill the insurance companies if I believe that in my heart of hearts that this is entirely for IME impairment ratings.
It was only with Lee, because my timeline estimates that in 2005/6, I meet Gerry Rosenthal, and then Gerry agrees with the same.
Q. And how does Rosenthal agree with that same arrangement?
A. In the same conference room.

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

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

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

22

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

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

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

Q. Because lawyers like to write extra words.

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

23

spreadsheet should cover all of these.

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

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

Q. Who is Elaine?

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

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

16 But she was Mr. Rosenthal's primary
17 billing individual who also correlated the reports
18 to the bills.
19 And those communications are very large
20 in number and very specific in request.
21 Q. So you believe there may be e-mails
22 between your former billing person for these files,
23 Sarah Andrews, and someone at the Rosenthal Law
24 Firm that may just show transmissions of billing
25 information?

24

1 A. Yes, and Sarah told me literally
2 yesterday -- last night -- Dr. Fechter, we also
3 sent hard copies to them by mail.
4 And I said, You did? Good.
5 Q. And what would an example of one of
6 these e-mails -- what would be attached to it?
7 What would be included in that? Or the mailed
8 billing record.
9 A. To the best of my knowledge -- and
10 that's all you can ask for -- is Elaine saying, We
11 don't see the reports on these six patients, or
12 whatever. We did receive their bills. Could you
13 please re-send those reports.
14 Or, we didn't see any reports on these
15 patients, you haven't billed us either, and our
16 response would be, You must have sent that patient
17 to another doctor, or the patient never saw me.

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

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

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

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

Respectfully submitted,
ORTNER LAW FIRM, LLC

LEON MARTIN ORTNER
CO-COUNSEL FOR CLAIMANTS

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

DATED THIS 30th DAY OF NOVEMBER, 2015,
AT CHARLESTON, SOUTH CAROLINA.

A. The patients.

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

A. Correct.

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

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

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

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

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

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

A. From the very beginning only with Lee Ortner.

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

Q. And it was just through conversation, correct?

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

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

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

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

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

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

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

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

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

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

Q. Well, as we have talked about before --

(Telephonic interruption.)

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

BY MR. HERSHON:

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

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

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

Q. Because lawyers like to write extra words.

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

435

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

spreadsheet should cover all of these.

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

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

Q. Who is Elaine?

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

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

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

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

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

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

And I said, You did? Good.

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

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

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

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

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

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

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

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

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

PROOF AND CERTIFICATE OF SERVICE

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

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

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

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

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

SCWCC
DEC 02 2015
JUDICIAL

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

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

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

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

ORTNER LAW FIRM, LLC

LEON MARTIN ORTNER

DATED: NOVEMBER 30th, 2015.

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

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

Exhibit "G"

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

The Supreme Court of South Carolina
OFFICE OF DISCIPLINARY COUNSEL

Lesley M. Coggiola
Disciplinary Counsel

C. Tex Davis Jr.
Senior Assistant Disciplinary Counsel

Post Office Box 12159
Columbia, South Carolina 29211

Telephone: (803) 734-2038
Fax: (803) 734-1964

March 2, 2016

PERSONAL & CONFIDENTIAL

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

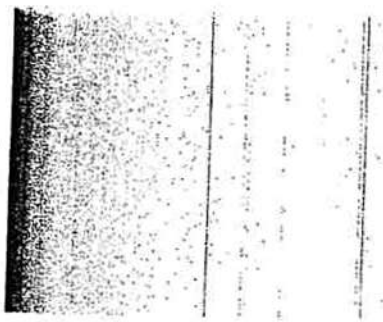
Re: Lawyer: Leon Martin Ortner, Esquire
Case Number: 15-DE-L-0660

Dear Dr. Fechter:

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

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

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



441

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

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

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

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

Sincerely,

C. Tex Davis Jr.

CTD/

cc: Leon Martin Ortner, Esquire

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

Exhibit "H"

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

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

[redacted],
Employee,
Claimant,

-vs-

INTERNATIONAL PAPER COMPANY,
Employer/Self-Insured,
Defendant.

AGREEMENT APPROVING AWARD OF SPECIAL REFEREE

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

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

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

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

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

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

444

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

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

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

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

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

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

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

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

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

DONE AND ENTERED INTO on this 27th day of April, 2017.

BY: _____

LEON MARTIN ORTNER
ON BEHALF OF ATTORNEYS FOR EMPLOYEE

INTERNATIONAL PAPER COMPANY
EMPLOYER/SELF-INSURED

BY: _____

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

EXHIBIT D

ELECTRONICALLY FILED - 2020 Jun 17 5:16 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

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

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.

449 2 2of15

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

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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,

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

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

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

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

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

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

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

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.

IT IS SO ORDERED!

HON. DEADRA L. JEFFERSON
Presiding Judge
Ninth Judicial Circuit

4th day of April, 2019
Charleston, South Carolina

462 15 15 4 15

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

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

EXHIBIT E

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	)	
	)	
Cary E. Fetcher, M.D. ☐ Plaintiff	)	CASE NO. 2017-CP-10-04371
	)	
v.	)	MOTION AND ORDER INFORMATION FORM AND COVER SHEET
	)	
Leon Martin Ortner, The Ortner Law Firm, Llc, Gerald Rosenthal, And Rosenthal, Levy, Simon And Ryles, ☒ Defendant.	)	

Plaintiff's Attorney:	Defendant's Attorney:
Melvin D. Bannister, Bar No. 505 Address: P.O. Box 6833, Columbia, SC 29260 phone: 803-782-8688 fax: e-mail: sctriallawyer@bellsouth.net other:	Justin P. Novak, Bar No. 79922 Address: PO Drawer H Charleston SC 9402 phone: 843.577.7700 fax: 843.577.7708 e-mail: jnovak@barnwell-whaley.com other:

☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

Nature of Motion: Motion to Reconsider, Alter or Amend Order Denying Motion to Dismiss
Estimated Time Needed: 30 minutes Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

Signature of Attorney for ☐ Plaintiff / ☒ Defendant — April 18, 2019 Date submitted

SECTION III: Motion Fee

☒ PAID – AMOUNT:
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP)
☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other: Filing fee not required for requests for protection from court appearance

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

_____
JUDGE

CODE: _____ Date: _____

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

464

SCCA/233 (11-03)

☐ MOTION FEE COLLECTED: _____
☐ CONTESTED – AMOUNT DUE: _____

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

ELECTRONICALLY FILED - 2020 Jun 17 5:16 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 **MOTION TO RECONSIDER, ALTER, OR AMEND ORDER DENYING MOTION TO DISMISS ON BEHALF OF DEFENDANTS LEON MARTIN ORTNER AND THE ORTNER LAW FIRM, LLC**

FILED
2019 APR 18 PM 3:53
J. ARMSTRONG
CLERK OF COURT

PLEASE TAKE NOTICE that Defendants Leon Martin Ortner and The Ortner Law Firm, LLC ("Ortner Defendants"), by and through the undersigned counsel and specifically reserving the right to answer fully the allegations of the Complaint, will move this Court before pleading on the tenth (10th) day after service hereof or at such time and place as is convenient to the Court and counsel pursuant to Rules 52(b), 59(e) and 60(b), SCRCP, for an Order Altering or Amending The Honorable Deadra L. Jefferson's Order Denying Defendants Leon Martin Ortner and The Ortner Law Firm, LLC's Motion to Dismiss filed on April 5, 2019. The Ortner Defendants received written notice of the entry of the order on April 8, 2019.

ARGUMENT

The Ortner Defendants move this Court to alter or amend the Order Denying Defendants Leon Martin Ortner and The Ortner Law Firm, LLC's Motion to Dismiss on the ground that the evidence before the Court is sufficient to establish that the claims are barred by the doctrines of collateral estoppel, equitable estoppel, estoppel by record, laches, and waiver. Specifically, though Plaintiff was timely served with notice of the prior Workers' Compensation Commission proceedings, including the consideration and disbursement of expense reimbursement funds, and

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

was represented by counsel, Plaintiff made no objection to the proposed disbursement of the $500,000.00 in funds set aside from the settlement for the payment of expenses associated with the evaluation or treatment of the claimants. Although fully aware of the proceedings, Plaintiff did not pursue any claim to the funds, did not object to the funds being disbursed entirely to the Rosenthal Defendants—which had taken responsibility for paying all costs in the case—and did not contest the Commissioner's order governing disbursal. As a result, Plaintiff should now be estopped, as a matter of law, from claiming additional payment from the Ortner Defendants, who made no claim to the funds, requested a full adjudication of all claims to the funds, and relied in good faith upon the cost-approval process of the Workers Compensation Commission and this Court should dismiss the instant action pursuant to Rule 12(b)(1) and (6), SCRCP.

"Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." Carolina Renewal, Inc. v. South Carolina Department of Transportation, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (citing Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)). "The doctrine of collateral estoppel prevents litigation of *issues*, not claims, necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits are the same." Id. at 556, 684 S.E.2d at 783 (emphasis in original). "The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." Id. (citing Beall v. Doe, 281 S.C. 363, 369 n. 1, 315 S.E.2d 186, 189–90 n. 1 (Ct. App. 1984)). "[A party's] absence from the previous [action] does not insulate it from issue preclusion." Id. "[T]he identity of the parties, and their relationships to one another, is simply not a concern when deciding whether to apply the doctrine of collateral estoppel." Id.; see also Snavely v. AMISUB of South Carolina, 379 S.C. 386, 398, 665 S.E.2d 222, 227 (Ct. App.

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

2008); Patel v. Garrett Law Firm, PC, No. 2011-186586, 2013 WL 8538731, at *1 (S.C. Ct. App. June 26, 2013).

In Carolina Renewal, Inc. v. South Carolina Department of Transportation, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009), the South Carolina Court of Appeals affirmed a trial court's holding that a non-party was collaterally estopped from asserting a breach of contract claim after a party with aligned interests had a full and fair opportunity to litigate the issue of damages under the contract in a prior action for slander. In Carolina Renewal, Inc., the owner of a company brought an action for slander against the South Carolina Department of Transportation ("SCDOT") alleging that an SCDOT employee made slanderous statements about him which caused his company's employees to quit so that his company could no longer perform the contract. Id. at 553, 684 S.E.2d at 781. The Court of Appeals found that the company had a full and fair opportunity to litigate the issues, if not the claims, in the prior action even though it was not a party because of the aligned interests of its owner. Id. at 555-56, 684 S.E.2d at 782-83. Accordingly, the Court of Appeals determined that the company was estopped from asserting its breach of contract claim. Id. at 558, 684 S.E.2d at 784.

Similarly, equitable 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)). "For example, one who delays unreasonably could be said to be estopped from asserting a claim if another has relied on that delay to his detriment." Id.

> The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of

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

> the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped.

Strickland v. Strickland, 375 S.C. 76, 84-85, 650 S.E.2d 465, 470 (2007) (citing Boyd v. Bellsouth Tel. Tel. Co., Inc., 369 S.C. 410, 422, 633 S.E.2d 136, 142 (2006)). A party is also precluded pursuant to the doctrine of estoppel by record "to deny the truth of matters set forth in a record, whether judicial or legislative, and also to deny the facts adjudicated by a court of competent jurisdiction." Watson v. Goldsmith, 205 S. C. 215, 215, 31 S. E. 2d 317, 320 (1944).

A party may also voluntarily and intentionally relinquish or abandon a known right. Strickland, at 83-86, 650 S.E.2d at 469-71. "Laches is an equitable doctrine defined as 'neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.'" Id. at 83, 650 S.E.2d at 469 (quoting Hallums v. Hallums, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988)). "The equitable doctrine of laches is equivalent to the legal doctrine of waiver, which is the 'voluntary and intentional relinquishment or abandonment of a known right[.]'" Id. at 85, 650 S.E.2d at 470 (quoting Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). "Acts that are inconsistent with the continued assertion of a right may also give rise to a waiver." Provident Life & Accident Ins. Co. v. Driver, 317 S.C. 471, 478-79, 451 S.E.2d 924, 929 (Ct. App. 1994).

In Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC (WCC File No. 0326995), the settlement agreement entered by the parties on April 1, 2014, provided that a portion of the settlement funds would be deposited into a qualified fund from which all attorneys' fees and costs would be distributed upon approval of the South Carolina Workers' Compensation Commission ("Commission"). (Consent Order ¶ 5, July 22, 2014.) As a result, the Commission undertook the responsibility of adjudicating the claims of all parties having any pecuniary interest in

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

the funds set aside for the costs incurred in the prosecution of the claims, including those associated with the evaluation and treatment of the claimants. (See Or. Granting Mot. to Release Funds, Jan. 26, 2016.)

As part of that process, the attorneys for the claimants issued a subpoena to Plaintiff requesting any documents supporting his claims to those funds. (Id. at 6-7.) Plaintiff responded to the subpoena and provided deposition testimony on November 2, 2015, during which he was represented by his current counsel, regarding any right to further compensation prior to the Commission's determination. (Id.) Plaintiff, however, failed to produce a single document that established a contractual relationship or entitled him to further compensation and testified that he never signed a contract entitling him to payment for any additional services.[1] (Id.)

In reliance upon Plaintiff's representations in these proceedings, on November 18, 2015, the Rosenthal Defendants, which had taken responsibility for paying all costs in the case, submitted to the Commission a motion to release the funds, which was served upon the Ortner Defendants and Plaintiff. (Or. Granting Mot. to Release Funds 3, Jan. 26, 2016.) The Ortner Defendants submitted a reply to the motion in which they did not make any claim to the funds but merely sought a full adjudication of all claims to the funds. (Id.) The Ortner reply was also served upon Plaintiff. (Id.) Plaintiff did not respond to the motion or reply and the Commission ordered the distribution of the funds in accordance with its findings. (Id.) In the order, the Commission specifically found that Plaintiff did not establish entitlement to any funds in addition to those previously received from counsel for the claimants. (Id. at 3, 5, 6-7.) Plaintiff was served with the order but did not contest it's findings or the Commission's jurisdiction and failed to further pursue any claims to payment from the deposited funds. (Id. at 10.) Instead, Plaintiff waited over a year and a half—until August 25,

[1] In this action, Plaintiff's Complaint also does not allege the existence of any written agreement. (See Compl.)

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

2017—after approval of the disbursement plan to assert any claim to payment from the already disbursed funds.

After being afforded the opportunity to further pursue his claims prior to the disbursal of the funds and failing to do so, Plaintiff only now seeks to litigate his claims to funds long ago disbursed to those who diligently pursued their claims. Plaintiff's undue delay in bringing this action at this time violates the principles of equity, as a matter of law, after the claimants, their counsel, and others who fully participated in the action relied upon Plaintiff's representations before the Commission and the finality of the Commission's determination. By failing to pursue the claims to their conclusion before the Commission, Plaintiff voluntarily and intentionally relinquished and abandoned his right to pursue those claims and should be estopped from asserting them in a new action.

CONCLUSION

For the foregoing reasons, this Court should alter or amend the Order Denying Defendants Leon Martin Ortner and The Ortner Law Firm, LLC's Motion to Dismiss to dismiss the instant action pursuant to Rules 12(b)(1) and (6), SCRCP, on the grounds that the evidence before the Court is sufficient to establish that the claims are barred by the doctrines of collateral estoppel, equitable estoppel, estoppel by record, laches, and waiver. This motion is further based upon the pleadings, the previously filed motions and exhibits, applicable South Carolina jurisprudence, any affidavits and memoranda as may be submitted, and any other such matter as may be acceptable to the Court.

[Separate Signature Page Follows]

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

BARNWELL WHALEY PATTERSON & HELMS, LLC

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

April 18, 2018

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

EXHIBIT F

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

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Cary E. Fechter, MD,

Plaintiff,

vs.

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

Defendants.

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

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

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

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

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

[1] Plaintiff's Counsel forwarded an e-mail to this office acknowledging receipt of the Defendants' Motion and opposing the same relying on his previous filings and memorandum filed with the Court.
[2] This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(f), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 401-402, 444 S.E.2d 534, 536 (Ct. App. 1994).

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

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

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

IT IS SO ORDERED.

Hon. Deadra L. Jefferson
Presiding Judge
Ninth Judicial Circuit

26th day of June, 2019
Charleston, South Carolina

475 2 of 2

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

EXHIBIT G

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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No. 2017-CP-10-04371

Cary E. Fechter, MD,

Respondent,

v.

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

Leon Martin Ortner and The Ortner Law Firm, LLC, Gerald Rosenthal are

Appellants.

FILED
2019 JUL 23 PM 2:25
CLERK OF COURT
BY DR

NOTICE OF APPEAL

Leon Martin Ortner and The Ortner Law Firm, LLC, appeals the enclosed Orders of the Honorable Deadra L. Jefferson Denying Defendants' Motion to Dismiss dated April 4, 2019, and Denying Defendants' Motion to Reconsider, Alter, or Amend Judgment dated June 26, 2019. Appellants received written notice of entry of the Order Denying Defendants' Motion to Dismiss on April 8, 2019, and of the Order Denying Defendants' Motion to Reconsider, Alter, or Amend Judgment on July 2, 2019.

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

M. Dawes Cooke, Jr., Esquire
Justin P. Novak, Esquire
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, South Carolina 29402
Phone: (843) 577-7700
mdc@barnwell-whaley.com
jnovak@barnwell-whaley.com

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

July 22, 2019

Other Counsel of Record:

Melvin D. Bannister
5115 Forest Dr., Suite G-1
Post Office Box 6833
Columbia, South Carolina 29260
Phone: (803) 782-8688
sctriallawyer@bellsouth.net

Attorney for Cary E. Fechter, MD

Michael E. Kozlarek
Kozlarek Law, LLC
14 South Main Street, Suite 130 (29601)
Post Office Box 565
Greenville, South Carolina 29602-0565
Phone: (864) 729-1931
michael@kozlareklaw.com

Attorney for Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles, PA

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

EXHIBIT H

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

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 12:05
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

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

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.*

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

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

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

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.

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

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.

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

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.

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

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

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

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***

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

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

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

"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.

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

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.

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

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.

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

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]
[REMAINDER OF PAGE INTENTIONALLY BLANK]

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

KOZLAREK LAW LLC

Michael E. Kozlarek (SC Bar #69330)
michael@kozlareklaw.com
14 South Main Street, Suite 130 (29601)
Post Office Box 565
Greenville, South Carolina 29602-0565
O: 864-729-1931
M: 803.312.3199
F: 864.670.5246

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

Greenville, South Carolina
May 13, 2019

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

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

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

EXHIBIT A

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



Julie J. Armstrong
Charleston County Clerk of Court

Charleston County
Circuit Court Case Details
Public Index

Cary E 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		

CMSWeb 6.1 © 2013 South Carolina Judicial Department • All rights reserved

494

EXHIBIT B

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

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.,	)	
	)	AFFIDAVIT
PLAINTIFF,	)	
	)	
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

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

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.

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

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

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

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.

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

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.

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

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.

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

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

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

EXHIBIT C

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

2017-CP-10-4371

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 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

506

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

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)

507

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

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 [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) [illegible] 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

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

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

508

2017-CP-10-4371

SENDER: COMPLETE THIS SECTION

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

1. Article Addressed to:

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

9590 9403 0705 5196 2927 53

2. Article Number (Transfer from service label)

7015 1730 0001 4288 9388

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

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

509

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

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 9:58
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: 11/28

510

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

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)

511

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

EXHIBIT D

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

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

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

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

 513

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

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

R253-281-46-264-0
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

EXHIBIT E

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

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

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

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.

 516

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

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 6th 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

518

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

EXHIBIT F

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

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

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

520

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

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 16th 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

521

EXHIBIT G

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

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

USPS Tracking®

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

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

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

523

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

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

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)

524

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

The easiest tracking number is the one you don't have to know.

With Informed Delivery®, you never have to type in another tracking number. Sign up to:

- See images* of incoming mail.
- Automatically track the packages you're expecting.
- Set up email and text alerts so you don't need to enter tracking numbers.
- Enter USPS Delivery Instructions™ for your mail carrier.

Feedback

Sign Up (https://reg.usps.com

/entreg

*NOTE: Black and white (grayscale) images show the outside, front of letter-sized envelopes and mailpieces that are processed through USPS automated equipment.

/RegistrationAction_input?app=UspsTools&

525

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

KOZLAREK LAW LLC

MICHAEL E. KOZLAREK SCCED
Admitted: SC, GA, NC, VA
Mobile: 803.312.3199
SC: 864.729.1931
GA: 470.333.2245

May 13, 2019

BY FEDERAL EXPRESS (7751 4295 3760)

The Honorable Julie J. Armstrong
Charleston County Clerk of Court
100 Broad Street
Suite 106
Charleston, South Carolina 29401-2258

Re: *Cary E. Fechter, M.D., v. Leon Martin Ortner, The Ortner Law Firm LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles*
Civil Action No. 2017-CP-10-04371
Kozlarek Law Matter No. RO001-10001

Dear Ms. Armstrong:

Enclosed for filing in the referenced matter are an original and a copy of ***Gerald Rosenthal's and Rosenthal, Levy, Simon, and Ryles's Motion to Dismiss*** with seven exhibits.

Please file the original and return the clocked-in copy in the enclosed shipping cost prepaid, federal express envelope provided. Also enclosed is a check for the $25.00 motion filing fee. As always, thank you for your assistance in this matter.

Please do not hesitate to contact me if you have any questions.

Sincerely,

Michael E. Kozlarek

Enclosure: stated

By copy of this correspondence with enclosures, I am serving all counsel of record with a copy of the same.

Cc: Melvin D. Bannister, Esq. (by Federal Express (7751 4308 3293) - w/encls)
Justin P. Novak, Esq. (by Federal Express (7751 4314 5251) - w/encls)

526

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

EXHIBIT I

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

KOZLAREK LAW LLC

MICHAEL E. KOZLAREK SCCED
MICHAEL@KOZLAREKLAW.COM
Admitted: SC, GA, NC, VA
Mobile: 803.312.3199
SC: 864.729.1931
GA: 470.333.2245

September 17, 2019

Federal Express (7762 6240 1818)
The Honorable Jenny Abbot Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Cary E. Fechter, MD vs. Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles
Case Number 2017-CP-10-04371
Appellate Case Number 2019-001230

Dear Ms. Kitchings:

I represent (a) Gerald Rosenthal and (b) Rosenthal, Levy, Simon, and Ryles, PA (collectively, "Rosenthal Defendants"). Rosenthal Defendants are named (but not actual) defendants in the underlying civil action.[1] Rosenthal Defendants filed a Motion to Dismiss on May 14, 2019, in the Charleston County Court of Common Pleas. That motion remains pending a hearing.

Because Rosenthal Defendants are not technically part of the underlying civil action, Rosenthal Defendants cannot technically be parties to this Appeal. However, Rosenthal Defendants have been provided with copies of Leon Martin Ortner's and The Ortner Law Firm, LLC's (collectively, "Ortner Defendants") Notice of Appeal and Dr. Fecther's Motion to Dismiss Appeal, as well as Ortner Defendants' Return to Dr. Fechter's Motion. Rosenthal Defendants provide this informal letter regarding those documents in support of this Court's hearing Ortner Defendants' appeal.

Rosenthal Defendants concur with Dr. Fechter: a denial of a motion to dismiss is generally not appealable. Dr. Fechter also correctly concedes the exceptions to that general rule for matters affecting a substantial right (including a mode of trial) and an order involving the merits of the case. However, Dr. Fechter fails to refute why both exceptions do not apply in this Appeal. Further, as raised on page 12, footnote 3 of Rosenthal Defendant's Motion (attached), the Circuit Court is the *third* forum in which Dr. Fechter has raised his claims. Both prior forums recognized Dr. Fechter's claims were unfounded. This Court's reversal of the Circuit Court's order denying Ortner Defendants' Motion to Dismiss *should* (appropriately) make it the final forum.

Rosenthal Defendants are available to participate further as the Court deems appropriate.

Sincerely,

Michael E. Kozlarek

Cc: Melvin D. Bannister, Esq. (by Federal Express (7762 6232 3280 - w/encls)
Justin P. Novak, Esq. (by Federal Express (7762 6231 3131) - w/encls)

528

[1] A copy of Rosenthal Defendants' Motion to Dismiss is enclosed to clarify Rosenthal Defendants' procedural posture in the underlying case.

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

EXHIBIT J

2017-CP-10-4371

The South Carolina Court of Appeals

FILED
2019 NOV 15 PM 1:09
JULIE J. ARENDT
CLERK OF COURT

Cary E. Fechter, MD, Respondent,

v.

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

Of Which Leon Martin Ortner and The Ortner Law Firm, LLC are the Appellants.

Appellate Case No. 2019-001230

ORDER

Appellants have served and filed a notice of appeal from the circuit court's order denying Appellants' motion to dismiss and Appellants' motion to reconsider, alter or amend. Because the underlying orders are not immediately appealable, this appeal is dismissed. *See* S.C. Code Ann. § 14-3-330 (2017); *Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995) (stating generally the denial of a motion to dismiss is not immediately appealable); *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011) (providing an order denying a motion to dismiss for lack of subject matter jurisdiction is not directly appealable because, among other things, it does not affect the merits). The remittitur will be sent as provided in Rule 221, SCACR.

FOR THE COURT

Columbia, South Carolina

530

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

cc:
M. Dawes Cooke, Jr., Esquire
Justin Paul Novak, Esquire
Melvin Dean Bannister, Esquire

FILED
October 25, 2019

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

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

The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211

1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

November 13, 2019

The Honorable Julie J. Armstrong
100 Broad St Ste 106
Charleston SC 29401-2210

FILED
2019 NOV 15 PM 1:09
JULIE J. ARMSTRONG
CLERK OF COURT

REMITTITUR

Re: Cary E. Fechter v. Leon Martin Ortner
Lower Court Case No. 2017CP1004371
Appellate Case No. 2019-001230

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

Enclosure

cc: M. Dawes Cooke, Jr., Esquire
Justin Paul Novak, Esquire
Melvin Dean Bannister, Esquire

532

ELECTRONICALLY FILED - 2020 Jun 29 8:53 AM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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

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 provide this Response to Plaintiff's "Motion to Reconsider Gerald Rosenthal's and Rosenthal, Levy, Simon, and Ryle's Joint Motion to Dismiss," filed June 17, 2020 ("Plaintiff's Motion"). Reserving all rights to supplement further as the Court deems necessary or proper, as an initial response to Plaintiff's Motion, Rosenthal and RLSR incorporate by reference "Gerald Rosenthal's and Rosenthal, Levy, Simon, and Ryles' Joint Motion to Dismiss," filed May 14, 2019.

SERVICE OF PROCESS

Plaintiff's Motion (with attachments) is 194 pages. Approximately two-thirds of Plaintiff's 68 numbered paragraphs and half of Plaintiff's attachments relate to Plaintiff's arguments about service of process. Plaintiff's letter purporting to serve civil process was addressed solely to:

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

RLSR

Neither Plaintiff's Motion nor Plaintiff's prior efforts before this Court address a simple, basic, question regarding service on RLSR: how can service on a corporate defendant be proper when

ELECTRONICALLY FILED - 2020 Jun 29 8:53 AM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

the addressee to which the alleged process was sent was ***not referenced anywhere*** on the envelope? RLSR is not an addressee on the envelope that purported to serve the civil process. This does not constitute proper service.[1]

ROSENTHAL[2]

Plaintiff did not provide a copy of the summons and complaint to Rosenthal personally. Plaintiff does not dispute this. 1401 Forum Way, Sixth Floor, West Palm Beach, Florida, is not now, nor was it at the time Plaintiff mailed his letter (or at any other time), Rosenthal's dwelling house or usual place of abode. Plaintiff does not dispute this. The final option for service on an individual is "by delivering a copy to an agent authorized by appointment or by law to receive service of process." Rule 4(d)(1), SCRCP. Although it is implicit in Plaintiff's arguments, Plaintiff cannot be genuinely suggesting Rosenthal, as important an ***individual*** as he might be, had appointed a ***personal agent*** for the service of process. He did not have a personal agent for service, and there is nothing before this Court to suggest otherwise. Rather, the only evidence before this Court reflects Rosenthal had never appointed an agent for personal service. Similarly, Plaintiff has not suggested, and there is nothing before this Court to suggest otherwise, that Rosenthal had an agent for service of process appointed by operation of law. As a result, Plaintiff's mailing a letter to Rosenthal's former place of employment does not constitute proper service.

SUBJECT MATTER JURISDICTION

Plaintiff's Motion suggests service providers are never bound by the Commission's orders but instead retain the potential for independent claims under common law. In so arguing, Plaintiff

---

[1]Plaintiff also suggests RSLR waived the requirement for proper service. There is ***nothing*** before this Court to suggest RLSR intended any such waiver. The first RLSR took and the only action RLSR has taken in this proceeding was to file a motion to dismiss, raising (among other problems with Plaintiff's attempted lawsuit) the deficiency of proper service. Further, the letter RLSR's counsel sent to the Court of Appeals raises the exact same concern, specifically stating RSLR and Rosenthal are not actually defendants in this proceeding because they have never been served with process.

[2]Further, Plaintiff fails directly to claim service on Rosenthal was proper. Plaintiff's counsel's affidavit regarding service of process, for example, references only service on RSLR. Nonetheless, Plaintiff's Motion makes numerous references to "defendants" and other similar iterations, which suggest Plaintiff continues to maintain both RLSR and Rosenthal were served.

ELECTRONICALLY FILED - 2020 Jun 29 8:53 AM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

ignores, for example, South Carolina Code Annotated section 42-15-90, which provides, in part, "(A) Attorney fees, physician fees, and hospital charges for services under this title are subject to the approval of the commission . . . [,]" South Carolina of Regulations section 67-1206, providing "an 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[,]" and South Carolina Code Annotated section 42-3-180, which provides for "***[a]ll questions*** arising under this Title, if not settled by agreement of the parties ***interested*** therein . . . shall be determined by the Commission" (emphasis added).[3]

Plaintiff also fails to acknowledge his voluntary participation in his own deposition and his providing written discovery in the underlying workers compensation matters. For the sake of clarity, the deposition was ***not*** in any way related to a patient's medical condition, but instead was ***solely*** related to the Plaintiff's demand for payment for costs and fees.[4]

CONCLUSION

These are important issues to Rosenthal and RLSR. However, their resolution is not so complicated as Plaintiff's 194-page tome might suggest. The Court has already recognized: (a) bad service is bad service, plain and simple. (b) Plaintiff's claims arise out of and relate solely to Plaintiff's alleged service as an expert in one or more workers compensation matters, and the Commission adjudicated those claims after Plaintiff's voluntary participation in the process.

For the foregoing reasons, this Court should deny Plaintiff's Motion.

[SIGNATURE PAGE FOLLOWS]
[REMAINDER OF PAGE INTENTIONALLY BLANK]

[3]The modifier "interested" implies something beyond the literal parties to a workers compensation claim. Numerous other workers compensation-related statutes and rules refer solely to "parties," seemingly indicating, in those instances, the actual litigants but not other "interested" parties.

[4]Plaintiff also suggests this Court's ruling and the ruling by another circuit court judge contradict each other. Even were Rosenthal and RLSR to accept that reading of the two orders, the suggested contradiction would be addressed by the South Carolina Court of Appeals should Plaintiff ultimately elect to appeal this Court's ruling.

535

KOZLAREK LAW LLC

/s/ Michael E. Kozlarek
Michael E. Kozlarek (SC Bar #69330)
michael@kozlareklaw.com
330 South Main Street (29601)
Post Office Box 565
Greenville, South Carolina 29602-0565
O: 864.527-5941
M: 803.312.3199
F: 864.670.5246

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

Greenville, South Carolina
June 29, 2020

ELECTRONICALLY FILED - 2020 Jun 29 8:53 AM - 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 DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE

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 Dismissing Plaintiff's Complaint with Prejudice, dated August 4, 2020.

ARGUMENT

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

1. Plaintiff requests that the court reconsider, alter, and amend its Order of August 4, 2020
2. On August 25, 2017, a Summons and Complaint were filed with the Charleston County Clerk of Court commencing this action.

537

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

3. On December 7, 2017, the Ortner Defendants were served with a copy of the pleadings by certified mail, as stipulated by Ortner Defendants' counsel. **(Exhibits A; B, p. 15)**

4. 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 under Rules 12(b)(1), (3), (5) & (6). **(Exhibit B)** In the Motion to Dismiss, counsel for the Ortner Defendants argued against all causes of action in the Complaint. The Ortner Defendants argued a certain defense that the service of process is insufficient because Plaintiff failed to serve Summons and Complaint within the statute of limitations.

5. **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 B., p. 15)**

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 B, p. 15)**

7. **Further, 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 B)**

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

9. In its Motion to Dismiss 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. **(Exhibit B, p. 15)** As a result, this Court should dismiss the instant action pursuant to Rule 12(b) (5)…"

10. At the hearing on the Ortner Defendants' Motion to Dismiss the Ortner Defendants did not orally argue this issue before the Honorable Deadra L. Jefferson on January 9, 2019, nor did the Ortner Defendant's request for Judge Jefferson to defer consideration of this issue. See Transcript of Hearing, January 9, 2019. **(Exhibit C)**

11. 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)**

12. 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

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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

13. 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 defense 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)**

14. 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**

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

Complaint on December 7, 2017, as indicated in the Ortner Defendants' Motion to Dismiss. (Emphasis added) See transcript of hearing. **(Exhibits B, C)**

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

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

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

18. 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)**

19. 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 H)**

20. On January 10, 2020 Ortner Defendants filed a Renewed Motion to Dismiss on behalf of Defendants Leon Martin Ortner and Ortner Law Firm, LLC. **(Exhibit I)** The Renewed Motion to Dismiss was based on Rule 12(b)(5), which was made and argued in the Ortner Defendants' (original) Motion to Dismiss filed on January 8, 2018. **(Exhibit B)**

21. The Renewed Motion to Dismiss by the Ortner Defendants was not filed within 10 days of Judge Jefferson's Order Denying Motion to Reconsider,

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

Alter or Amend her previous order. Judge Jefferson's said Order denying reconsideration was filed on June 28, 2019.

22. The Ortner Defendants appealed to the Court of Appeals on Judge Jefferson's Orders denying the Ortner Defendants' Motion to Dismiss. The South Carolina Court of Appeals dismissed the appeal of the Ortner Defendants on November 15, 2019. **(Exhibit H)**

23. The Ortner Defendants filed a Motion for Enlargement of Time on December 23, 2019. This was more than 15 days after the Remittitur from the Court of Appeals; it was actually 38 days. **(Exhibit J)**

24. Without a ruling on the Motion for Enlargement of Time, the Ortner Defendants filed a Renewed Motion to Dismiss on January 10, 2020. This motion was filed approximately 6 ½ months after the issuance of Judge Jefferson's Order denying the Ortner Defendants' Motion for Reconsideration and the Renewed Motion to Dismiss was filed approximately 55 days after the Remittitur from the South Court of Appeals. **(Exhibit I)**

25. Pursuant to Rule 12(a) the Ortner Defendants' Renewed Motion to Dismiss Plaintiff's Complaint should have been filed within 15 days of the issuance of Judge Jefferson's Order Denying Motion to Reconsider, Alter or Amend Judgment, dated June 28, 2019.

26. **A hearing on the Renewed Motion to Dismiss Plaintiff's Complaint should have been scheduled and heard before the Honorable Deadra L. Jefferson, since she had ruled on the original Motion to Dismiss, based on Rule 12(b). (Emphasis added)**

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

27. The Motion for Enlargement of Time did not allege any good cause for the delay in filing the motion under Rule 6(b). Nor did the Ortner Defendants argue any reasons for good cause **(Exhibit J)**

28. The Ortner Defendants did not argue any good cause before this Court on January 27, 2020 for the failure to file the Renewed Motion to Dismiss in a timely manner. See transcript of hearing, January 27, 2020, before this Court. **(Exhibit K)**

29. The Ortner Defendants' Renewed Motion to Dismiss was filed only 17 days prior to the hearing on the said motion.

30. **As stated above, it is submitted the Defendants have waived the personal service requirement. (Emphasis added) (Exhibits A; B. p.15)**

31. 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.

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

32. 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)**

33. 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)**

34. 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 ***Stearns 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)).**

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

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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.

36. In the present case, the Ortner Defendants filed a Motion to Dismiss based upon Rules 12(b)(1), (3), (5) & (6), SCRCP. **(Exhibit B)**

37. 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 C)**

38. 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 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

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP100437

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.

39. "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 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....

40. 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**

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

(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.**

41. THE ORTNER DEFENDANTS HAVE RECOGNIZED THE RECEIPT OF THE SUMMONS AND COMPLAINT BY FILING THEIR RESPECTIVE MOTIONS TO DISMISS. **(EXHIBITS A, B, I)** (EMPHASIS ADDED)

42. 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 b, P. 15)** (EMPHASIS ADDED)

43. 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 B, C)** (EMPHASIS ADDED)

44. 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 A, B, E, G)** (EMPHASIS ADDED)

547

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

45. The Ortner Defendants argued the same reasons under Rule 12(b) to dismiss the Complaint of the Plaintiff in their Renewed Motion to Dismiss. (**Exhibits B, I)**

46. **The arguments for dismissal of the Plaintiff's Complaint were fully discussed in Judge Jefferson's Order Denying the Motion to Dismiss. The Motion to Dismiss was denied by the Honorable Deadra Jefferson on April 5, 2019. (Exhibit D) (Emphasis added)**

47. The undersigned can find no authority under any statute, rule, or case law, which would allow the Ortner Defendants to file a Renewed Motion to Dismiss, when the argument was made in the original Motion to Dismiss.

48. 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 August 4, 2020, be reconsidered, amended, altered and otherwise changed to remove all conclusions that hold, or that can be interpreted to hold, a reversal of the Honorable Deadra Jefferson"s Orders denying the dismissal of the Plaintiff's Complaint against the Ortner Defendants.

49. In conclusion, the Plaintiff respectfully submits that this court reconsider its Order Dismissing Plaintiff's Complaint, deny the said Renewed Motion to Dismiss by the Ortner Defendants, and require the matter to be tried before the trial court.

s/Melvin D. Bannister
Melvin D. Bannister, SC Bar 505
PO Box 811
Columbia, SC 29202
(803) 782-8688; (803) 782-8677-fax
sctriallawyer@bellsouth.net
Attorney for the Plaintiff

August 13, 2020

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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 III*)

Stephen P. Groves, Sr., Esquire
S.C. Bar No. 7854
BUTLER SNOW LLP
25 Calhoun Street, Suite 250
Charleston, South Carolina 29401
Telephone: 843.277.3704
Telecopier: 843.277.3701
E-Mail: Stephen.Groves@butlersnow.com

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 III***) 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