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STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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

CARY E. FECHTER, M.D.,

Appellant,

vs.

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

Respondents.

Record on Appeal
(*Volume IV*)

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EXHIBIT A

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

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

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

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

Melvin D. Bannister

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

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

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EXHIBIT B

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

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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.)

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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.)

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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.)

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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.)

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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.").

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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.

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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.

SLR

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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.

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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)

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(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,

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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.)

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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.

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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.

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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

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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.)

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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.

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January 5, 2018

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EXHIBIT C

STATE OF SOUTH CAROLINA	
	Court of Common Pleas
COUNTY OF CHARLESTON	Case No. 2017-CP-10-4371
CARY E. FETCHER, MD	
Plaintiff,	
vs.	Transcript of Record
LEON MARTIN ORTNER, THE ORTNER LAW FIRM, LLC, GERALD ROSENTHAL and ROSENTHAL, LEVY, SIMON AND RYLES,	
Defendant.	DATE: January 9, 2019

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON

A P P E A R A N C E:

MELVIN DEAN BANNISTER
Attorney for the Plaintiff

M. DAWES COOKE JR. and JUSTIN PAUL NOVAK
Attorney for the Defendant

Original transcript ordered by:
Barnwell, Whaley, Patterson & Helms

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

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The COURT: This is Cary E. Fetcher, MD v. Leon Martin Ortner, the Ortner Law Firm, LLC, Gerald Rosenthal and Rosenthal, Levy, Simon and Ryles, 2017-CP-10-4371. This is before the Court on Defendants', Leon Martin Ortner and Ortner Law Firm, motion to dismiss filed on 1/8/18. I assume that was an add-on to the roster. And if it was filed on 1/8/18, let me look at my -- I'm stuck in 2018. I'm sorry. It was filed yesterday. I'm sorry. And it does have 1/8/18 on it. I'm sorry. Adjusting to the new year. All right.

This is objection to notice of deposition of Leon Martin Ortner and motion for protective order staying discovery and other proceedings. And that is dated 10/8/18. And I assume that will become moot based on the motion to dismiss.

MR. COOKE: Yes, Your Honor.

THE COURT: All right. Glad to hear your motion to dismiss.

MR. BANNISTER: If I may approach.

THE COURT: Counsel has just handed to the Court a memo in opposition to the motion to dismiss filed on today's date with some exhibits and an affidavit.

MR. BANNISTER: Two affidavits, Your Honor.

THE COURT: Two affidavits. I'm sorry. Oh, that is an affidavit. Okay. I referred to it as an exhibit, but same thing, affidavit. And then one that is actually

entitled affidavit.

And for my court reporter's sanity, who represents the plaintiff?

MR. BANNISTER: Melvin Bannister, Your Honor.

THE COURT: And who is appearing on behalf of each defendant?

MR. COOKE: I'm Dawes Cooke, and Justin Novak on behalf of the moving party, Mr. Ortner. And Mr. Ortner is here as well.

THE COURT: So there's no one here on behalf of Rosenthal, Levy, Simon and Ryles?

MR. COOKE: No, Your Honor.

THE COURT: Okay. All right. You may proceed.

MR. COOKE: Thank you, Your Honor. I was just handed a memorandum in opposition. And Mr. Bannister represents that there are affidavits. We, of course, would have to object to the affidavits. Haven't had a chance to review them. They weren't filed 48 hours in advance. But this is a motion --

THE COURT: I will give you an opportunity to respond if you need to.

MR. COOKE: Thank you, Your Honor. This is a motion to dismiss based on lack of subject-matter jurisdiction as well as under 12(b)(6) for failure to exhaust administrative remedies and res judicata and collateral estoppel. This is a

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claim -- my client is a practicing attorney. He represented a large group of workers' compensation claimants in an occupational disease set of cases. And back in 2003, he retained Dr. Fechter to do screenings for the potential clients to see if they qualified to bring the claim for an occupational disease.

In 2005, he associated Mr. Rosenthal, who is the other defendant. He's a Florida attorney. From that point forward, Mr. Rosenthal took responsibility for working with Dr. Fechter. He took responsibility for paying all expenses associated with the litigation.

But, Your Honor, this is a claim that Dr. Fechter is asserting for additional fees that he says he incurred in evaluating and/or in treating, in some cases, some of the claimants that were represented by Mr. Fechter -- by Mr. Ortner and Mr. Rosenthal in the workers' compensation proceeding.

So our motion to dismiss is several fold. First, this Court lacks jurisdiction because this matter is in the exclusive jurisdiction of the Workers' Compensation Commission. And I will cite in a few minutes the statutes and regulations that apply to that.

And, second, they were -- these claims were actually adjudicated by the Workers' Compensation Commission. And Dr. Fechter did not appeal, did not challenge the jurisdiction of

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the Workers' Compensation Commission.

THE COURT: When you say "all claims", tell me what claims that he's claiming were adjudicated by the Workers' Compensation.

MR. COOKE: His entitlement to reimburse for medical expenses beyond the $25,000 that he was paid previously.

THE COURT: Okay.

MR. COOKE: And I will get to that as well. That's an exhibit to our motion. And, Your Honor, by the way, we have included exhibits that go beyond the pleadings, because this isn't just a 12(b)(6) motion. This is a subject-matter jurisdiction. And the Court can consider the administrative record from the Workers' Compensation Commission in determining whether it has jurisdiction.

And we've also asserted, as part of the failure to exhaust administrative remedies, that is in failing to appeal, estoppel and waiver and laches. Because as part of the adjudication by the Workers' Compensation Commission, when the parties settled the workers' compensation claim, and it was for over a million dollars for many, many claimants, they set aside $500,000, with the approval of the Workers' Compensation Commission, to cover expenses. And there was an adjudication. There was a motion made by Mr. Rosenthal to release those funds. And the Workers' Compensation Commission adjudicated that the fee that Mr. Rosenthal's firm

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was to be reimbursed of the entire $500,000, that Dr. Fechter was not entitled to recovering. And so that money was disbursed. My client, Mr. Ortner, made no claim whatsoever to those funds that were held in abeyance or held in escrow.

And then I'm going to go through these documents with Your Honor so you will see exactly what was done. And so the Workers' Compensation Commission said that Mr. Rosenthal could have those funds. They were disbursed. And so, clearly, my client would be prejudiced by Dr. Fechter's failure to appeal, failure to assert his claim, failure to take any action before those funds were disbursed because that was the body of funds that would have been available to pay his fees if he was entitled to any beyond the 25,000.

So there's a suit. There's a claim for breach of contract, for fraud, for breach of contract with fraudulent intent, for unfair trade practices, and for pre-judgment interest.

The exhibits that we have attached to our motion include the fact that there was a consent order entered. And this is Exhibit B on July 22nd, 2014, in the Workers' Compensation matter. Consent order --

THE COURT: What happened to the set-aside funds?

MR. COOKE: The set-aside funds were held. And then Mr. Rosenthal made a motion to release those funds. That's

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Exhibit E. He made that motion on November 18, 2015. He served that motion on all the interested parties, including Dr. Fechter. And then Exhibit A is the order of the Workers' Compensation Commission granting his motion to release the funds.

THE COURT: What did he do with them?

MR. COOKE: He reimbursed his law firm for all of the expenses he had incurred. And he actually documented over a million dollars in expenses, but they reduced it to $500,000. And this was, obviously, a long-standing litigation. There were over 600 claimants. The claims began back in 2003 and were not settled until 2014. So you can imagine it was quite a lengthy process.

THE COURT: And no one objected or appeared when the motion or the matter was heard, or filed any pleadings in opposition to the release of the funds?

MR. COOKE: The only thing that was filed in response was Mr. Ortner, Exhibit F. On December 2nd, 2015, he filed that return which he said that he is not making any claim to the funds, that Dr. Fechter has asserted -- claims entitlement, and that he wished for the Workers' Compensation Commission to adjudicate the entitlement to fees, and that whatever is determined that belongs to Dr. Fechter could go to him, and whatever is determined to belong to Mr. Rosenthal would go to Mr. Rosenthal.

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THE COURT: Dr. Fechter did, in fact, file a claim for the set-aside funds?

MR. COOKE: He did not appeared before the Workers' Compensation Commission. And this is recited in the order, which is Exhibit A. It says he did not file a formal claim with the Workers' Compensation Commission, but he asserted a claim. And, Your Honor, this is where the statutory authority of the Commission comes into play.

THE COURT: So he asserted a claim, but he didn't appear to argue it?

MR. COOKE: Correct, he asserted a claim. That's exactly correct. And so Section 42-3-180 says that 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.

And there's actually a regulation, that's regulation Section 67-12-06, which says, an attorney may request approval of the actual cost incurred in the prosecution of the claim, including expenses associated with the evaluation or treatment of the client.

So this was well within the jurisdiction of the Workers' Compensation Commission. And in our brief, Your Honor, we've cited *Posey v. Proper Mold Engineering,* that says that the General Assembly has vested the South Carolina

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Workers' Compensation Commission with exclusive original jurisdiction over employee work-related injuries.

And as part of that exclusive jurisdiction includes, as I've just cited from the statute, from the regulation, all matters that affect the employee's claim.

Now, if this were just a private contractual dispute between two individuals other than the claimant, arguably, the suit could be brought in circuit court as a court of general jurisdiction. What makes this fall within the exclusive jurisdiction of the Workers' Compensation Commission is the fact that these were relevant to the claims made by the injured employees. And it was part of the award that was made to them to include the cost of the attorney's fees that they would be required to pay. And it's within the exclusive jurisdiction of the Workers' Compensation Commission to adjudicate who gets that. Because whatever Dr. Fechter doesn't get or the other people who provided services of attorneys, obviously, goes to the claimants.

So when this case was settled, that had to include what would go to the claimants, what would go to reimburse their medical bills, what would go to pay their attorneys, and what would go to pay the other expenses of litigation.

And, Your Honor, when you get a chance, if you look at Exhibit A --

THE COURT: I'm going to read everything. And I've

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already pretty much read the order from the Workers' Compensation.

MR. COOKE: Okay. And that sets out the facts. It says that the Plaintiff in this case was properly served, that he failed to establish entitlement to any funds in addition to those that he already received. He cannot establish any contractual arrangement that would entitle the Plaintiff to any additional funds. No agreement exists involving obligating either of the Defendants to pay for any additional services performed by the Plaintiff. And he's not been deprived of any payment due. And those were all the findings of the Workers' Compensation Commission that were never appealed.

Your Honor, we've cited in our brief *McCreery v. Covenant Presbyterian*. Says, where subject-matter jurisdiction depends on factual findings, a judicial degree determining such a fact does or does not exist, cannot be challenged on collateral attack.

So the place to attack the jurisdiction of the Workers' Compensation Commission would have been in the Workers' Compensation Commission. That's something that they can decide. It's subject to the appeal process. And, ultimately, of course, it would go to a circuit court or go to the -- all the way to the Supreme Court.

Edens v. Bellini we've cited. That case affirmed or

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granted a motion to dismiss for lack of subject-matter jurisdiction pursuant to the exclusivity provision.

And, Your Honor, the second prong of this is not only that the Workers' Compensation Commission have exclusive jurisdiction, but they actually adjudicated the findings. And under *Bennett v. South Carolina Department of Corrections*, under the doctrine of res judicata, collateral estoppel, the decision of administrative tribunal precludes the relitigation of the issues addressed by that tribunal and the collateral action.

So the parties are barred not just by Court of Common Pleas's decisions, but they are barred by administrative decisions as well, particularly if they don't avail themselves of the opportunity to appeal.

Crosby v. Prysmian Communications, 2012 Court of Appeals decision, 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.

Additionally, Your Honor, the failure to appeal the order constitutes failure to exhaust administrative remedy. And we've cited *Unisys Corporation v. The South Carolia Budget & Control Board*, affirming that failure to exhaust administrative remedies precludes original resort to courts.

Capital City Insurance v. BP Staff, a 2009 case,

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says, dismissal may be proper under Rule 12(6)(6), 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.

Your Honor, the Section 42-17-50 provides for appeal of a single commissioner's ruling to the full Commission.

And Section 42-17-60 provides for appeal of a review of the Commission's ruling. Neither of those procedures were followed.

Your Honor, we've cited in our brief that Dr. Fechter did file a complaint with the Office of Disciplinary Counsel. Disciplinary Counsel dismissed that matter saying that this was a private contractual issue.

Your Honor, I know I was speaking very fast. And I took down -- I saw that you were taking down notes. All of the cases we've cited are in the brief. And the exhibits we've cited are in the brief as well.

We also raised in our motion -- and I'm going to suggest that the Court defer this one. We raised the failure to service the summons and complaint properly within the statute of limitations under Rule 12(b)(5). On reflection, because the statute of limitations invokes the discovery rule, it would probably require some factual development to assess that defense. So we are not asking for the Court to grant that motion at this time. But we are not waiving the

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failure to properly effect service within the statute of limitations.

And then finally, Your Honor, just briefly, South Carolina Unfair Trade Practices Act claim under *Ardis v. Cox*, a deliberate or intentional breach of a valid contract without more does not constitute a violation of the South Carolina Unfair Trade Practices Act.

And under *deBondt v. Carlton Motorcars*, to be actionable under the Unfair Trade Practices Act, the unfair or deceptive act or practice must have an impact upon the public interest.

And the Court has said over and over again that Unfair Trade Practice Act is not a claim for a private dispute between individuals, which clearly is what this is.

So, Your Honor, that, in a nutshell, is our position. It's supported by the various exhibits that show that this was a workers' compensation case. It was actually -- numerous claimants were involved. They did reach a settlement. The settlement was approved by the Workers' Compensation Commission. The order approving the settlements specifically provided for the set-aside of $500,000 to cover additional expenses.

Mr. Fechter -- I mean, Mr. Ortner made no claim to those funds whatsoever, because Mr. Rosenthal's firm had agreed to be responsible for all of the expenses and had

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dealt with the various people who might have claims, including Dr. Fechter. And Mr. Ortner filed his response saying exactly that. Mr. Rosenthal filed his motion asking for Dr. Fechter's interest to be determined. They were determined. And no appeal was taken in that.

Thank you, Your Honor.

THE COURT: You're welcome. Would you like to respond?

MR. BANNISTER: Your Honor, he has pointed out, I believe, Dr. Fechter is not a party to the Workers' Compensation claims. He was a physician who was retained by the Defendants to do examinations and make independent medical examinations and reports. That was a contract between the doctor and the Defendants.

And we've attached to our memorandum a copy of one of these contracts signed by the Defendant Ortner. And we have similar contracts that were given, except for the names of the client of the Defendants being substituted, for each of those in excess of 400.

The Workers' Compensation Commission does not deal with contractual matters between the attorneys representing claimants and third-parties. The circuit courts deal with that. And we have cited in our memorandum the case of *Capital City Insurance v. BP Staff Incorporated*, and several other cases along those lines.

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THE COURT: Why didn't he show up at the Workers' Compensation hearing to contest the allocation of these excess funds?

MR. BANNISTER: First of all, there was no hearing. Second of all --

THE COURT: He could have filed documents. You know, it's all form-driven.

MR. BANNISTER: He did not receive notice of this motion filed by the Defendants with the Commission. He didn't receive it from the Defendants, nor did he receive it from the Commission. If he had received notice, he would have obviously submitted --

THE COURT: So how did he assert a claim?

MR. BANNISTER: Obviously, that was done by the Defendants making the Commission aware that the clients, patients, whatever you want to call them at this point in time, had been treated by Dr. Fechter. And all these reports that had been given to the Defendants, that was part of Dr. Fechter's clients. The initial claim, certainly, for the reports is a contract between the Defendants and Dr. Fechter, nothing to do with the medical treatment. The Defendants also contracted --

THE COURT: You are saying your client didn't provide medical services to these claimants? He didn't provide an alternate evaluation as opposed to the Workers'

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Compensation doctor?

MR. BANNISTER: He did provide additional treatment after the examinations and initial reports. He did provide additional treatment.

THE COURT: Doesn't that entitle him to be paid?

MR. BANNISTER: It does.

THE COURT: By the Workers' Compensation Commission, correct?

MR. BANNISTER: No. In this case, since it was a contract with the Defendants --

THE COURT: I understand that, but when you provide treatment under the Workers' Compensation schematic, you are entitled to be paid by them. That's the whole purpose we have the Workers' Compensation statute.

MR. BANNISTER: That is correct, Your Honor. However, Dr. Fechter did not submit any bills to the Workers' Compensation Commission nor any carrier. He submitted them to the Defendants, who were then responsible for submitting them to the carrier and Commission.

THE COURT: So he's saying they never presented those?

MR. BANNISTER: We have no evidence that those --

THE COURT: Was that not a part of the additional expenses that Rosenthal, Levy & Ryles -- I'm leaving out a name -- Rosenthal, Levy, Simon & Ryles provided or submitted.

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to the Workers' Compensation Commission?

MR. BANNISTER: We don't know what they submitted. We know that Dr. Fechter hasn't been paid any of that.

THE COURT: Has he made any request for payment?

MR. BANNISTER: Yes, to the Defendants.

THE COURT: And what has been the response?

MR. BANNISTER: No response, except to the extent that each time that Dr. Fechter sent a report or bill to the Defendants, he received a contract signed by Mr. Ortner back from them that he would be paid when all of the Workers' Compensation cases have been disposed.

THE COURT: Let me ask what might seem like an overly simplistic question. Have you not gotten the documents from the hearing -- well, from the determination by the Workers' Compensation Commission allocating this additional half million dollars?

MR. BANNISTER: No.

THE PLAINTIFF: Yes, I did.

THE COURT: If he has it, he needs to give it to you to look at.

MR. BANNISTER: I haven't seen where that half million dollars was going other than the order that says it was going to be delivered to --

THE COURT: Yeah, but I'm interested -- they would have had to have given some detailed accounting to the

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Workers' Compensation. They are not just going to give them a half million dollars. You have to account for it.

So my question becomes, is your client's bills accounted in that? Is it sitting in a trust account somewhere that has not been given to him? And I think that's a germane question. And it seems to me that would be one of my first inquiries, because I would like to know if my client's money is sitting somewhere. How else would they have amassed all of these expenses?

MR. BANNISTER: Well, assuming that this case is not dismissed, we will then do discovery to find out where that $500,000 is.

THE COURT: I understand that, but your client says he already has a detailed listing of what they've submitted. So I'm sort of curious why you haven't seen it. And on the same token, what did that listing account for? And did it account for any of Dr. Fechter's fees? And if it did, why hasn't he been paid?

MR. COOKE: In Mr. Rosenthal's motion for the release of funds, he recited that he had paid back in 2006, $25,000. And he contended that that is all he owed. And so that's what --

THE COURT: In 2006?

MR. COOKE: Yes.

THE COURT: And the claims were settled in --

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MR. COOKE: 2014.

THE COURT: -- 2014.

MR. COOKE: Right.

THE COURT: So he's asserting that services that this doctor provided all the way up through when this case was settled to patients was covered by $25,000?

MR. COOKE: He contended that his responsibility was for the evaluations that he had done. And those were all done back then.

THE COURT: So how else was the doctor going to be paid for medical services? I mean, was this a miscommunication about who the bills need to be submitted to? Because Workers' Compensation Commission pays for medical expenses. So I'm trying to figure out, like -- or was the settlement a part of what their medical bills were going to be? I guess I'm trying to figure out -- I'm a little confused.

MR. COOKE: It would have been incumbent for Dr. Fechter to document, to send bills. And that was part of Mr. Rosenthal's complaint, was that he didn't start getting any bills from Dr. Fechter until 2010. And, of course, you can't -- if it's a Medicare patient, if it's covered by insurance, you have to bill them first. And Mr --

THE COURT: Did you bill them first as a workers' compensation? Because then Medicaid is going to want to be

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subrogated because they don't say it's not our responsibility, it's the lawyer's responsibility.

MR. COOKE: Right, but I believe still -- you still have to bill them first, yes.

THE COURT: I haven't done workers' compensation in a long time, in over 20 years, but I don't remember ever submitting a bill to my client's insurer.

MR. COOKE: Dr. Fechter did do that. And we've got --

THE COURT: So then there are amounts that were not covered, and they are still the responsibility of the patient?

MR. COOKE: That would have been -- that would have been what should have been submitted out -- to be paid out of this fund that was being held back.

THE COURT: And you are saying that Medicaid would not have wanted to be reimbursed, or Medicare, whatever? I always get the two confused. And why would you be on Medicaid if you are employed by somebody? That's also not making sense to me.

MR. COOKE: Mr. Ortner tells me that those additional liens would have been included in the settlement of the total case, yes.

THE COURT: Okay. And so -- I always get the two confused. I'm sorry. Why don't we just say insurance?

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Insurance would have been reimbursed for whatever they paid for the care. And that would have been a part of the settlement. And then it would have been the patient's responsibility for what was not covered?

MR. COOKE: Well, there is no -- you can't bill for Medicare --

THE COURT: That's correct.

MR. COOKE: You can't bill the patient for anything --

THE COURT: It's a full settlement, yeah. But I'm trying to figure out, if I was employed with a company, why am I on Medicaid? Because wasn't that before the Affordable Care Act? I lost track when it was passed.

MR. COOKE: You are over my head with that question. But some of these were probably former employees anyway, I would imagine.

THE COURT: But it's still their care. I guess, theoretically, under the circumstances, they wouldn't have gotten --

MR. COOKE: If they are still employed, they probably would have been covered by some group insurance --

THE COURT: Group plan, but still unemployed, may have been covered by Medicaid, uh-huh.

MR. COOKE: These are all great questions. And these are the questions that probably could have been argued

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if Dr. Fechter had appeared in the Workers' Compensation matter. Now --

THE COURT: Well, I don't know. I mean, did he really have an obligation to, if he had a separate contract with y'all?

MR. COOKE: Yes. And that's where --

THE COURT: Where is his obligation created to show up?

MR. COOKE: Well, that's where Regulation 67-1206 comes into play, because it specifically says, in addition to an attorney's contingent fee, an attorney may request approval of the actual costs incurred in the prosecution of a claim by attaching a statement of costs to the Form 61.

Costs include witness fees, expenses associated with the deposition of a witness, service costs, or expenses associated with the evaluation or treatment of a client.

And, Your Honor --

THE COURT: But the money was dispensed in 2015. He says he started getting bills in 2010. So I'm trying to figure out if he got bills in 2010, which would have put him on notice that the 25,000 he says he paid in 2006 was not sufficient. So where did the communication gap -- where was that created?

MR. COOKE: Well, we were not -- Mr. Ortner was not privy to that.

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THE COURT: Because the other firm was handling it?

MR. COOKE: Certainly beyond this, but there were many communications between. And this is covered in Dr. Fechter's deposition. And he was deposed in the workers' compensation case, by the way.

THE COURT: But Mr. Ortner did sign these liens -- not liens. What is it called?

MR. COOKE: Protection letters.

THE COURT: Yeah, protection letters.

MR. COOKE: This is back in 2002. And according -- or 2003, excuse me. Mr. Rosenthal was associated in 2005. He agreed to take over responsibility for all the expenses. And Dr. Fechter admitted in his deposition that all of his communications and billings were with Rosenthal's office after Mr. Rosenthal took over. And that's why Mr. Ortner did not make any claim to that $500,000 that was set aside to pay expenses.

THE COURT: Have you all -- how much money is Dr. Fechter saying he's owed?

MR. BANNISTER: Little over a million dollars, Your Honor.

THE COURT: That's probably a stretch. If he submitted anything to Medicaid, you can't claim anything above and beyond --

MR. BANNISTER: That's not including any -- that's

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only included for --

THE COURT: And if patients were --

MR. BANNISTER: -- medical bills that were not covered by insurance, in addition to the contracts for doing reports.

DR. FECHTER: Your Honor, I am not --

THE COURT: No, sir. You can't speak. How many people are we talking about that was in this class of folk that settled?

MR. COOKE: Around 400. There were originally almost 600 people that were going to be screened, but there were about 400-plus in this settlement.

THE COURT: And I assume when they went to the doctor's office and they got treatment, they signed a form saying whatever isn't covered by insurance, I'm going to pay it, or did they not?

MR. COOKE: We haven't gotten that far, but I know they have to do that. Of course, as you said with Medicare --

THE COURT: Well, you still sign that form. It's like, for example -- I can only use myself as an example. There are certain things that insurance pays for. And, basically, by virtue of doing business with the State insurer, you agree that whatever it costs, this is all we are going to pay, and you are not going to send our insured a

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bill.

MR. COOKE: Right, right.

THE COURT: Everybody has those kinds of agreements about certain kinds of care. But you still -- when I go to the doctor's office, I still have to sign the form. Like, when I go to the eye doctor, there's certain tests they just don't cover. But for my health and for my eyesight, since this is partially where I make my living, I want to make sure my eyes are okay. So I'm going to pay the extra $60 whatever to have that extra test, even though my State insurance says you can't charge her for any additional things. But they are going to charge me anyway. So I sign that form that says whatever is not covered, you are going to send me a bill for it, and I'm responsible for it.

So my question becomes, were there any -- I assume part of their settlement was for previous care, current care, and prospective care. If they had any diagnosis that covered some condition that, you know, was going to be continuing, whether it's pain management, whether it's -- you know, I will just use a disk as an issue, where people have to get periodic shots, things like that, I would assume these individuals received some money.

MR. COOKE: Right. And that's what a workers' compensation claim is. It's your loss of income and your medical expenses.

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THE COURT: Exactly. You know, if you have lost use of a member, your finger, your toe, your leg, you know, they give you a lump sum for that stuff. Sometimes you've got ongoing payments. Again, my knowledge of workers' compensation is rusty. And since I don't handle workers' compensation appeals anymore, I have lost some of my dexterity on the subject.

But my question becomes then, were any bills ever sent to these individuals for them to pay for these expenses? Apparently, there would have been, presumably, a part of a calculation of their settlement to reimburse their doctor.

MR. COOKE: Yeah. I can't answer that question on the record that we have as to whether bills were sent to patients. But the whole reason that you asked that question demonstrates why this is for the Workers' Compensation Commission and not for us to be arguing about after the fact.

THE COURT: Well, but the problem is, you signed a contract where you guaranteed payments. And you sort of then took it outside the parameter. Because Workers' Compensation occurs that covered individual and their expenses. And so, really, when they got their lump sum settlement, the attorneys probably should have been more proactive and say, you owe this doctor money, and you need to pay him, because I don't want him coming back against me.

But then you signed -- it's no different than in an

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automobile accident when your client, which doctors require an order of protection, even though they are going to bill your client's insurance, because they know clients can be less than consistent, and sometimes when they get money, they get happy, they spend it, and it's gone. So you have to then guarantee -- basically, you become a guarantor, which is a separate contract to some extent. And I'm not sure -- I have to do a little research and read what y'all submitted to me.

MR. COOKE: And there's one other case. Let me give you two facts, first of all. I think that's exactly why --

THE COURT: Mr. Bannister, I didn't mean to eclipse your argument. I'm going to let you finish. I got curious.

MR. BANNISTER: I understand. Thank you, Your Honor.

THE COURT: I need to ask these questions because I will forget later.

MR. COOKE: That's why on Exhibit A, which is the -- I'm sorry, it's Exhibit E, which is the motion to release funds that was made by Lawrence Hershon, who is an attorney with Parker Poe, who represents Mr. Rosenthal and his firm, he filed the motion on November 18, 2015, spelled out in great detail why he didn't think that he owed Dr. Fechter any more money. And he served Dr. Fechter. You can see a cc about two-thirds of the way through that exhibit. There's the cover letter from Mr. Hershon where he's filing a motion.

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And he shows a copy to Dr. Fechter. Dr. Fechter was also served with the final order. But there's a case that we didn't cite in our brief that I would like Your Honor to consider.

THE COURT: Sure.

MR. COOKE: It's called *Labouseur v. Harleysville Mutual Insurance Company*. And it's a Supreme Court, 1990, 302 S.C. 540, 397 S.E. 2nd 526. And that case kind of explains the difference between a private contractual matter that could be brought in circuit court and one that has to be brought in the -- before the Workers' Compensation Commission. And that case had to do with cancellation of an insurance policy. And the Court said there that that was within the exclusive jurisdiction of the Workers' Compensation Commission because it was inextricably intertwined in the claimants' claim. It wasn't just a fight between two insurance companies. It wasn't a fight between two individuals. It involved the injured employee.

And so to did Dr. Fechter's claim. His claim was, to the extent that he would be paid, that would have to come out of the proceeds that otherwise would go to the injured employees. And that's exactly why the Workers' Compensation Commission takes exclusive jurisdiction. Thank you.

THE COURT: You're welcome. Mr. Bannister, anything else you want to share with me?

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MR. BANNISTER: Your Honor, it's clear that the Plaintiff, Dr. Fechter, had contracts with the Defendants as evidenced by them sending a promise to pay his expenses and fees for each client.

Mr. Rosenthal, in the affidavit that was part of his motion, said he paid my client $25,000 to cover the first 50 reports. And he actually only got 39. Well, now we find out that they had over 400 clients, which my client has already confirmed that he has seen over 400 claimants and made reports on these 400-plus claimants, forwarded them to the Defendants, who then turned around and said, you will get paid upon the completion --

THE COURT: But then he received the 25,000.

MR. BANNISTER: He did.

THE COURT: How much was it contemplated that the cost to generate each report would be to each claimant?

MR. BANNISTER: Yes.

THE COURT: How much was it?

MR. BANNISTER: He was supposed to get $500 for each initial report.

THE COURT: For each?

MR. BANNISTER: 150 for a second report and $100 for a third report.

DR. FECHTER: That's inaccurate.

MR. BANNISTER: He was supposed to be paid some

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additional funds for second and third reports. And that's alleged in the complaint and in his affidavit. So, clearly, Your Honor, is --

THE COURT: Did he receive a copy of the items that Mr. Cooke has indicated were submitted to the Workers' Compensation Commission at the time that the Rosenthal firm sought to distribute these additional funds?

MR. BANNISTER: I have --

THE COURT: Because they said they copied him on all of it.

MR. BANNISTER: I had recently received from the Workers' Compensation Commission a copy of the order dated November 13 of 2015, which shows over 300 clients that were dealt with. I have not received any document that says that any money out of this $500,000 was supposed to be paid to Dr. Fechter or anyone else.

THE COURT: Well, the claim that was submitted to the Workers' Compensation Commission, according to Mr. Cooke, says that their basic representation to the Commission is that they owed your client nothing else, that they had already compensated him.

MR. BANNISTER: $25,000.

THE COURT: Yeah. But they are saying they sent those documents to him and he had the ability to be heard and he didn't show up.

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MR. BANNISTER: He never received them.

THE COURT: But he got that detail information somewhere. Where did he get that from, that he said he had to know what the allocation of the funds that Rosenthal presented to the commission, where did he get that from if he didn't receive the documents and you haven't done discovery yet?

MR. BANNISTER: Your Honor, I am not aware that -- I was not aware until this morning that he may have received something. I don't know how he received it or when he received it at this point in time.

THE COURT: Anything further, Mr. Bannister?

MR. BANNISTER: Your Honor, I think it's clear that the majority of my client's costs for fees that he is owed is from doing the reports for these workers' compensation clients that were forwarded to the Defendants.

THE COURT: Have you all made any attempts or thoughts about mediating this at all? I'm just curious.

MR. COOKE: We've had numerous discussions over the past several years about trying to resolve it, but the numbers are just too far out there. Your Honor, may I reply to a couple points here?

THE COURT: Sure.

MR. COOKE: One is, I'm being shown that there were actually some payments to Dr. Fechter's practice included in

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the order approving attorney's fees from the Workers' Compensation Commission.

THE COURT: How much?

MR. COOKE: I can't tell. It's very fine print.

THE COURT: I understand. My eyes are waning on me too.

MR. COOKE: They will have to add it up.

THE COURT: So you are talking about in the order from 11/18/15?

MR. COOKE: It's actually in Exhibit 5. We can hand it up to, Your Honor.

THE COURT: I'm just curious. Is it attached to what you already submitted to me?

MR. COOKE: I don't think it is. But we happen to have it here. But, Your Honor, to the point of --

THE COURT: Just a round figure, I'm curious, can you sort of round it off without -- doesn't have to be an exact figure.

MR. COOKE: There's expert professional services, doesn't say specifically Dr. Fechter, but that was $814,092.23.

THE COURT: But they concede that the amount they say they have in expenses exceeds the 500,000, right?

MR. COOKE: Yeah, that the law firm had. His total, Mr. Rosenthal's total claim for expenses was $1,203,072, for

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which he accepted 500,000.

THE COURT: So you said that some portion of that was paid to Dr. Fechter, correct, or did I misunderstand?

MR. COOKE: Yes, I think that's exactly correct.

THE COURT: And so what I was asking is, can you estimate for me what portion of that was paid to Dr. Fechter?

MR. COOKE: Yeah, besides the 25,000 that he paid, it would be less than $1,000 for medical records and so forth.

THE COURT: Okay.

MR. COOKE: And, Your Honor, I think my closing point would be, evidently, Dr. Fechter is suggesting that he didn't get copies of the documents, but he was deposed. He knew that this process was going on. He had a lawyer, different lawyer.

THE COURT: He was deposed when?

MR. COOKE: He was deposed immediately before the motion to release funds. So it would have been in November.

THE COURT: For what purpose was he being deposed?

MR. COOKE: To determine what he was owed or whether he was owed anything.

THE COURT: Who deposed him?

MR. COOKE: Mr. Hershon. And, let's see, November 2nd, 2015, was the date of that deposition.

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THE COURT: You said '15?

MR. COOKE: Yes. And so he was deposed on November 2nd. Mr. Rosenthal's motion to release funds was filed and served on November 18, 2015.

But, Your Honor, again, the proper venue to raise lack of service would be with the Workers' Compensation Commission, because I'm sure that they have processes also that if somebody was left out or didn't get noticed, there would be a process to pursue that. But it's clearly within the jurisdiction of the Workers' Compensation Commission.

THE COURT: I'm going to take the matter under advisement, because I need to -- Mr. Bannister just gave me his materials, and I need to read them. And sometimes I'm better at reading than listening, but I really want to be attentive and hear what y'all were saying to me. So I have not had the opportunity to read what he submitted. And I need to do that.

But in the meantime, and I need to do a little research, sort of clear my mind a little bit. Because I have to be honest, I'm inclined -- you know, the whole purpose of the Workers' Compensation schematic is to deal with everything related to it, not to piecemeal it. And I need to determine if there's some validity to Mr. Bannister's argument that there was some separate contract that somehow would exempt them from the Workers' Compensation schematic.

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I need to research that.

But if y'all could provide for me proposed orders within 10 days to djeffersonsc@sccourts.org, and make any appropriate findings of fact and conclusions of law regarding the motion to dismiss. And if you could copy one another on it, that would be helpful. And if you could tell your staff to please send it to that address, because I have a method in my office to make sure nothing falls through the cracks. You know Chanda runs everything. So it goes to her first so she can keep a record and keep me on track.

And then in the meantime, because I am of the perception, and y'all can correct me if I'm wrong, that the protection order really becomes moot either way. If I find there's no subject-matter jurisdiction, then it's resolved. And if I find there is, then y'all will proceed with discovery. And I don't know if that's immediately appealable, interlocutory. I don't know. Either way, I think it becomes moot. And I'm going to do a Form 4 to that extent.

Is there any exception to me handling the motion for protective order in that way?

MR. BANNISTER: No, Your Honor.

THE COURT: If y'all can submit those to me. Ten days would be good because they will still be fresh in my mind and hopefully nothing else will have taken up my brain

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matter and I won't have to re-learn it again. But I will start working on it this afternoon.

Thank you. Y'all have a great new year.

(Whereupon, proceedings are adjourned.)

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CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter, Certified Realtime Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate and complete Transcript of Record of the proceedings.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

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EXHIBIT D

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

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

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

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

ALLEGATIONS

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

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

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

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

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

FACTUAL BACKGROUND[4]

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

[2] Although the document sent to opposing counsel is captioned as an "Acceptance of Service", the document appears, in fact, to be an effort to notice the deposition of Leon Martin Ortner.

[3] A Form 4 Order was filed on January 16, 2019 disposing of the Motion for Protective Order as Moot as the Court's ruling on the Motion to Dismiss is dispositive.

[4] This statement of the procedural history is drawn from the pleadings and from matters outside the pleadings which the parties introduced in challenge to the circuit court's jurisdiction.

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

I. Lack of Subject Matter Jurisdiction

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

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Am.Jur.2d Federal Courts § 581 (2007)). "Specifically, 'Jurisdiction is composed of three elements: (1) personal jurisdiction; (2) subject matter jurisdiction; and (3) the court's power to render the particular judgment requested.'" Id. (quoting Indep. Sch. Dist. No. 1 of Okla. County v. Scott, 15 P.3d 1244, 1248 (Okla. Civ. App. 2000)). "Without jurisdiction, a court cannot proceed at all in any cause; jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to a court is that of announcing the fact and dismissing the cause." Id. (quoting 32A Am.Jur.2d Federal Courts § 581 (2007)). The Constitution of the State of South Carolina provides that "[t]he Circuit Court shall be a general trial court with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction shall be given to inferior courts[.]" S.C. CONST Art. V, § 11. Accordingly, "[w]hile the circuit court has subject matter jurisdiction over [general classes of] claims, certain cases may be taken from the circuit court's original jurisdiction by the General Assembly." Poch v. Bayshore Concrete Products/South Carolina, Inc., 386 S.C. 13, 22, 686 S.E.2d 689, 694 (Ct. App. 2009). For example, "[t]he General Assembly has vested the South Carolina Workers' Compensation Commission with exclusive original jurisdiction over employees work-related injuries." Posey, 378 S.C. at 223, 661 S.E.2d at 402 (citing Sabb v. S.C. State Univ., 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002)). As a result, "a Workers' Compensation action is the exclusive means to determine claims against an individual's employer for work-related accidents and injuries." Id. at 224, 661 S.E.2d at 403.

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

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

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

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

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

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

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

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

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

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

II. Exhaustion of Administrative Remedies

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

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

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

III. Relitigation of Plaintiff's Claims

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

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

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

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

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

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

IT IS SO ORDERED!

D L Jefferson

HON. DEADRA L. JEFFERSON
Presiding Judge
Ninth Judicial Circuit

4th day of April, 2019
Charleston, South Carolina

627 15 15 & 15

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

EXHIBIT E

ELECTRONICALLY FILED - 2020 Aug 13 5:01 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
JULIE 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 Aug 13 5:01 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 Aug 13 5:01 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

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> 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

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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.)

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

BARNWELL WHALEY PATTERSON & HELMS, LLC

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

April 18, 2018

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

EXHIBIT F

ELECTRONICALLY FILED - 2020 Aug 13 5:01 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 **ORDER DENYING DEFENDANTS' MOTION TO RECONSIDER, ALTER, OR AMEND JUDGMENT**

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

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

THIS MATTER comes before this Court by way of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC's ("Defendants") Motion to Reconsider, Alter, or Amend, filed April 18, 2019, asking this Court to alter or amend its Order Denying Defendants' Motion to Dismiss, filed January 8, 2018. Defendants served their Motion to Reconsider, Alter, or Amend (hereinafter "Motion to Reconsider") on April 18, 2019. The Plaintiff served its response in opposition to the Motion on April 30, 2019.[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).

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ELECTRONICALLY FILED - 2020 Aug 13 5:01 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

638 2 of 2

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

EXHIBIT G

ELECTRONICALLY FILED - 2020 Aug 13 5:01 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
JULIE J. ARMSTRONG
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.

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

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

July 22, 2019

Other Counsel of Record:

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

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

EXHIBIT H

ELECTRONICALLY FILED - 2020 Aug 13 5:01 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
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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

643

2017-CP-10-4371

The South Carolina Court of Appeals

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

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

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

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

EXHIBIT I

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371
ELECTRONICALLY FILED - 2019 Dec 19 4:03 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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

PLEASE TAKE NOTICE that Defendants Leon Martin Ortner and The Ortner Law Firm, LLC ("Ortner Defendants"), by and through the undersigned counsel and specifically reserving the right to answer fully the allegations of the Complaint, will move this Court before pleading on the tenth (10th) day after service hereof or at such time and place as is convenient to the Court and counsel pursuant to Rule 12(b)(5), SCRCP, for an Order dismissing the causes of action asserted against the Ortner Defendants in the Complaint filed on August 25, 2017 ("Complaint").[1] The Ortner Defendants now move to dismiss Plaintiff's Complaint on the grounds that Plaintiff failed to effect service of the Summons and Complaint within the statute of limitations. As a result, this Court should dismiss the entire Complaint against the Ortner Defendants with prejudice pursuant to Rule 12(b)(5), SCRCP.

[1] Although the Honorable Deadra L. Jefferson denied the Ortner Defendants' original Motion to Dismiss by the Order Denying Motion to Dismiss filed on April 5, 2019, the court deferred consideration of the Ortner Defendants' motion to dismiss on the grounds that Plaintiff failed to properly effect service within the statute of limitations so that the Ortner Defendants could raise the grounds at a later date. (Or. Denying Mot. Dismiss 1n.1, April 5, 2019, attached Exhibit A) ("At the call of the motion, Defense Counsel informed the Court that it was withdrawing the motion to dismiss the case based on insufficient service of process grounds. However, by doing so was not waiving the right to raise it at a later date.")

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371
ELECTRONICALLY FILED - 2019 Dec 19 4:03 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

This motion is further based upon the pleadings, the exhibits to this motion, applicable South Carolina jurisprudence, any affidavits and memoranda as may be submitted, and any other such matter as may be acceptable to the Court.

BARNWELL WHALEY PATTERSON & HELMS, LLC

s/ Justin P. Novak
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Attorneys for Defendants Leon Martin Ortner & The Ortner Law Firm, LLC

December 19, 2019

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

EXHIBIT J

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371
ELECTRONICALLY FILED - 2019 Dec 23 10:19 AM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

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

PLEASE TAKE NOTICE that Defendants Leon Martin Ortner and The Ortner Law Firm, LLC ("Ortner Defendants"), by and through the undersigned counsel and specifically reserving the right to answer fully the allegations of the Complaint, will move this Court before pleading on the tenth (10th) day after service hereof or at such time and place as is convenient to the Court and counsel pursuant to Rule 6(b), SCRCP, for an Order extending the time for the Ortner Defendants to serve and file the Renewed Motion to Dismiss on Behalf of Defendants Leon Martin Ortner and The Ortner Law Firm, LLC, to December 19, 2019, on the grounds that for good cause exits. This motion is further based upon the pleadings, the exhibits to this motion, applicable South Carolina jurisprudence, any affidavits and memoranda as may be submitted, and any other such matter as may be acceptable to the Court.

650

ELECTRONICALLY FILED - 2020 Aug 13 5:01 PM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371
ELECTRONICALLY FILED - 2019 Dec 23 10:19 AM - CHARLESTON - COMMON PLEAS - CASE#2017CP1004371

BARNWELL WHALEY PATTERSON & HELMS, LLC

s/ Justin P. Novak
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Attorneys for Defendants Leon Martin Ortner & The Ortner Law Firm, LLC

December 23, 2019

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

EXHIBIT K

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

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

----------x

CARY E. FECHTER, M.D.)
)
Plaintiff,)
)
vs.) Transcript of Record
) 2017-CP-10-04371
LEON MARTIN ORTNER,)
)
Defendant.)

----------x

January 27, 2020

B E F O R E:

The Honorable J. Derham Cole, Presiding Judge

A P P E A R A N C E S:

Melvin Dean Bannister, Esq.
Attorney for the Plaintiff

Michael Enrico Kozlarek, Esq.
Justin Paul Novak, Esq.
Attorney for the Defendant

Transcribed by Bobbi Fisher, RPR, CET, for DCRP,

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(None.)

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P R O C E E D I N G S

(Whereupon, the following proceedings started at 2:53 p.m.)

MR. NOVAK: Your Honor, Justin Novak on behalf of Leon Ortner, who is with me today, and Ortner Law Firm, LLC. We have two motions pending before you. The first is a motion for enlargement of time to file a renewed motion to dismiss pursuant to Rule 12 -- or Rule 6(b). The second motion is the renewed motion to dismiss under Rule 12(b)(5). And I'll tell you a little bit about why it's a renewed motion to dismiss as I go through kind of a short history of this case, which I think will show that a pattern of failure to perfect claims and to pursue those claims and to attempt to circumvent the court rules in order to file those claims in different venues.

So this is a case in which Dr. Fechter, who is the plaintiff, is a medical doctor. All the way back in 2002, Dr. Fechter was retained to examine and provide the courts for a potential claim in a series of workers' compensation claims that were being adjudicated and considered by my client and his law firm.

The Rosenthal firm, who is also represented here today, was later associated into that around 2005. The plaintiff essentially alleges that the firms -- that these firms promised to pay him for those evaluations and reports upon settlement or verdict through a letter of protection.

So Dr. Fechter -- it's not contested that Dr. Fechter

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received about $25,000 for performing 50 initial reports and evaluations in workers' compensation claims. Those claims were eventually settled back on April 1st, 2014, at mediation. The settlement was later memorialized in an order in the workers' -- before the Workers' Compensation Commission that was entered on July 22nd, 2014.

Now, according to that settlement agreement, $500,000 of the potential claims -- of the funds and settlement proceeds were set aside for approved -- dispersal and approval by the Workers' Compensation Commission. At that time, Dr. Fechter disputed that the $25,000 that he had already been paid was sufficient to cover expenses that he had incurred -- you know, these are all on prosecution of the claims -- in treating and evaluating what he contends was 458 or so potential claimants.

So, as a result, Dr. Fechter was sent and replied to a subpoena regarding these claims. He also provided deposition testimony regarding the substance of his claims to these funds. Afterward -- after all of that, the Rosenthal firm eventually filed a motion before the Workers' Compensation Commission asking for the release of those funds in accordance with the special referees' determinations in that matter of how those costs and fees should be allocated. My client -- that motion was served on Dr. Fechter. Although he was not a party to the workers' compensation action, it was served on him. He had been deposed and replied to the subpoena. My

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client filed a response to that motion to release these funds, not claiming any of the funds for them set for his firm, but just seeking specifically an adjudication of the claims that Dr. Fechter was making to the additional funds.

The commissioner found that he was not entitled to anything additionally and other further compensation, and Dr. Fechter did not appeal that in the Workers' Compensation Commission. Instead, he filed a summons and complaint in the circuit court. And so he filed that summons and complaint on August 25th, 2017, more than three years after the settlement itself and the entry of the order in the workers' compensation claim memorializing that settlement.

Now, nevertheless, he filed it in August 25th, 2017. Dr. Fechter delayed in attempting to serve that complaint on my client until December 7th, 2017. No other attempts have been made, so Dr. Fechter essentially argues that he notified my clients of the claims and perfected jurisdiction of this court on December 7, 2017.

The -- and he's never -- there's never been any other attempt to serve. He's never asked us to accept service or to do anything like that, even after we filed our first motion to dismiss on January 8th, 2018, in which we challenged jurisdiction on the grounds that the matter belonged in the Workers' Compensation Commission and that his failure to pursue the claims and administrative remedies in that court

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essentially barred him from coming in front of the circuit court.

Now, that motion also challenged jurisdiction under Rule 12(b)(5) on the grounds that Dr. Fechter had notice of the settlement and didn't bring the claim within three years and also that Dr. Fechter failed to effect service on that December 7th, 2017, date.

Now, the -- I would point out that Dr. Fechter's response to our motion, which appears -- which I think was memorialized in his memo recently filed with the Court, essentially, I think, basically, like I said, we waived the service requirement by appearing and by arguing the motion to dismiss, which is clearly not the case from the posture of the case. He points to something where we said that we were provided with a copy of the summons and complaint, which is not sufficient -- sufficient to provide notice of the claims but not, under South Carolina law, sufficient to perfect jurisdiction in accordance with the rules.

Now, I'd also note in our original motion to dismiss, we state that, by restating allegations that were made in the complaint, we're not endorsing the veracity. We're just saying that that's what they say and that we want to hold them -- reserve the right to hold them to the proof of each allegation.

Now, while Judge Jefferson denied our motion to dismiss

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on the former grounds, she did not address our motion under the 12(b)(5) grounds. And the reason she didn't do that, in essence, we reserved our -- reserved those grounds because of recognition of the Court that we're going to have to look at affidavits and other matters -- maybe documents -- in order to address the statute of limitations grounds. So, in her order, she notes that we reserve the right to go ahead and address that at a later date.

Now, the original order was appealed, and that appeal was denied. The case was remanded back some time around November 13th, 2019, to the circuit court. My client filed this renewed motion to dismiss on December 19th, 2019. The Rosenthal's firm also had a pending motion to dismiss that was filed back, I think, in May 13th, 2019, so it had been pending for a long time. The reason my client filed the motion for enlargement of time to file the renewed motion to dismiss until the date until which they filed it was that Dr. Fechter filed an affidavit of default. After we filed that motion, he filed an affidavit of default on December 20th, basically saying that we hadn't responded.

We believe that good -- if -- that good cause exists for an extension if it's necessary for the several days or under, I guess, his theory, that we may not have asserted that in time. Also based on, because of the posture of the case, the reservation of this particular motion pursuant to Judge

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Jefferson, which we think holds, and the lack of prejudice to any of the parties.

Now, we also believe that Dr. Fechter failed to obtain jurisdiction over my clients, which are an individual attorney and the law firm sued separately. Now -- by failing to effect service within the statute of limitations.

Now, as the Court knows, the purpose of the summons is twofold: First, to acquire jurisdiction over defendant. Secondly, it's to give notice of the action and opportunity to appear and defend.

Now, Dr. Fechter's position is that "Well, we knew about the claim and we filed the motion to dismiss; therefore, we waived the service requirement." South Carolina law, I think, is pretty clear that that's not sufficient to constitute a waiver.

Now, he does not, however, address our argument that he didn't actually perfect service, other than to allege that service was perfected jointly to my clients by a certified mailing that was sent on or about December 7th, 2017.

Now, as the Court knows, under Rule (4)(d)(1), an individual can be served by delivery, personally, of the summons and complaint to him or by leaving this dwelling house with somebody of a certain age or by delivery to an agent who is authorized by appointment or law to receive service of process.

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Now, none of that is alleged in this case. Instead, he proceeds under Rule 4(d)(8), which service may also be effected by certified mail, return receipt requested, delivery restricted, to the addressee. Service is effected under that rule on the date of delivery as shown on the return receipt.

Separately, an entity, such as a law firm, an LLC, a limited liability corporation, can be served by delivery to a managing or general agent or any other agent authorized by appointment of law to receive service of process. But it can also -- if you choose not to do that -- and that's not alleged in this case -- it's all by certified mailing on December 7th, 2017.

If the service is made by mail, the return with the receipt or the envelope and any other proof of service shall be promptly filed by the clerk of court with the pleadings. That also didn't happen in this case, in which I'll talk about.

And I'd like to cite one case, which is cited in our brief, which is the *Langley v. Graham* case, which I think is pretty effective for us in this. It says, "Service is ineffective where the defendant did not sign the return receipt and delivery was not restricted to the addressee only." And I have copies of that case if the Court would like to see that. But it's -- and it's also the plaintiff's burden to show that service -- personal jurisdiction over the

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defendant has been established.

Now, to Lee Ortner individually, because each of the -- he and the entity, as the Court knows, required individual analysis. Plaintiff only attempted to serve Mr. Ortner and the law firm pursuant to what's filed as Exhibit E to my motion, which is in your notebook, and that's this affidavit of service that is executed by Dr. Fechter's attorney, Mr. Bannister. That mailing, as the Court will notice, was sent to 145 King Street, Suite 211. It's not contested that this is not Mr. Ortner's dwelling house or his usual place of abode. There are affidavits in the record that are -- that substantiate these statements, both from Mr. Ortner himself individually, from his law firm, and from Karen Ortner, who is an employee of the law firm.

Although the envelope is addressed to him personally, as the Court will note, he did not accept service of it or sign for the envelope as required by the rule. So there's no question that this certified mailing, which was sent, was not -- was addressed to Mr. Ortner but that's sent to his dwelling house and he didn't sign for it. So that's, on its face, insufficient.

As you'll note, in the record is a copy of the actual green card, which was not filed by Dr. Fechter but was filed by my firm and my client, which shows that it's unexecuted. It's an unexecuted green card in an envelope. So that's not

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sufficient to perfect service on Mr. Ortner.

As to the law firm, while the address is the principal place of business for the firm, the envelope does not show any indication that is addressed to the firm. It doesn't have any indication on the outside of the envelope, and a copy is in the record, Your Honor, that it was directed to the law firm, to the law firm's registered agent, to any -- or indicated that there is service of process inside of it. It was also not delivered to an officer, managing or general agent, or any agent authorized by appointment to receive service of process on behalf of the firm. It happened, instead, to be picked up by Karen Ortner, who works at the firm. She is not a receptionist, as you'll see from the affidavit. She's essentially a bookkeeper, firm administrative type who sits in the back office. She just happened to pick up the mail that day.

So, moreover, in addition to all of this, there's no record of any signature on the envelope or the green card in this case. And, secondly, Dr. Fechter failed to file the receipt and the envelope with the Court in accordance with Rule 4(g). In fact, we filed it eventually. He only filed his own lawyer's affidavit over a year after the alleged service. Now, I think we can all agree that that is not timely, Your Honor, to comply with the Rule 4(g).

So it's very straightforward here, Your Honor. There has

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been no perfection of service or jurisdiction on either my client, the individual, or Ortner Law Firm, LLC. We would, therefore, ask that the complaint be dismissed. Thank you, Your Honor.

THE COURT: Mr. Bannister?

MR. BANNISTER: Yes, sir. Do you wish to hear from me now or do you want to hear Mr. Kozlarek's motion first?

THE COURT: Do I have yours too?

MR. KOZLAREK: Yes, Your Honor, you do.

THE COURT: Okay. Go ahead. We'll do yours.

MR. KOZLAREK: Thank you, Your Honor. If I may, I'm going to hand you a single sheet of paper. This is a copy of the green card. That was attached to a reply that was filed by Dr. Fechter's attorney in response to the Ortners' original motion to dismiss. Excuse me; I'm getting over a little bit of a sinus infection.

It is also attached to my motion to dismiss as part of Exhibit B, so it is the same document. You have already heard a fairly good recitation of the facts in this case and also a good recitation of the law, and so I will keep this again even more brief than Mr. Ortner's attorney was able to do.

As with Mr. Ortner, there are two potential defendants that I represent: Mr. Rosenthal individually, who is an attorney, who resides and practices in Florida, and the law firm of which he was formerly a member, Rosenthal Levy Simon &

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Riley.

As with Mr. Ortner and the Ortner Law Firm, Mr. Rosenthal -- excuse me, Dr. Fechter attempted to perfect service on Mr. Rosenthal and apparently the law firm by sending a certified letter, return receipt requested. First, I'm going to add one thing to this that's slightly different than Ortner's motion and that is that those are both -- both of my putative defendants are Florida residents. They are not South Carolina residents. As a result, my first argument is that they should have been served according to Florida law, not South Carolina law, because they are not defendants in this state. And this is, of course, cited in our memo in support.

Under Florida law, they are required to be served personally by either a sheriff or a process server that is designated by the sheriff. Again, there is nothing before the Court that even alleges that that was attempted. The only alleged attempt to serve process was through the certified mail. A copy of the green card, Your Honor, is seated in front of you.

So let's look at the green card. As with Mr. Ortner, the only indication on the green card is it's addressed individually to Jared Rosenthal, Esquire. There is no mention, whatsoever, of the law firm itself.

So, on the face of the green card, this is simply

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insufficient service of process against the entity who is the other putative defendant in the case. We can stop with the analysis at that point. It doesn't even say it's addressed to the law firm. It is simply addressed to an individual. Period.

As to the individual defendant, Mr. Rosenthal, again, it is uncontested that the address to which this was sent is not Mr. Rosenthal's dwelling place or usual place of abode. It is, in fact, the law firm address. So what it appears to have happened -- and I'm speculating, but what appears to have happened is that Dr. Fechter attempted to effect service on both of them at the same time by sending one service of process that was effective against neither of them.

Who signed for this letter? Mr. Ed Elder. Note that it is restricted delivery, as required by the rule, but the person who signed for it is not the person to whom it was addressed. So the plaintiff bears the burden of proving that the person who signed for it was, in fact, the personal agent -- remember, this is addressed to the individual -- must prove that it was the personal agent of Mr. Rosenthal.

There are two affidavits attached to our motion -- one for Mr. Rosenthal and one for Mr. Elder -- that unequivocally established that, at no point, has Mr. Elder ever served as an agent of any kind for the individual, Mr. Rosenthal. Again, leaving aside the law firm, because it's not even addressed to

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the law firm, this is even a simpler motion to dismiss on simply the service of process, as Mr. Ortner's attorney's pointed out, which, in fact, then, turns into a problem of jurisdiction. Because there's no effective service, this Court does not have personal jurisdiction over either of those defendants, and the case has to be dismissed.

I'm going to go one step further. In our motion, we note that this dismissal should not only be a dismissal, but it should be a dismissal with prejudice. And why is that? As Mr. Ortner's attorney pointed out, the claims at most were known to Dr. Fechter at a point that was more than three years from today's date. In fact, if you look -- and I apologize; I do not have a copy of this but it is attached as part of an exhibit as part of our motion -- there was an affidavit filed by Dr. Fechter, again, as part of the response to the Ortner's original motion to dismiss. And in that affidavit, in paragraphs 14, 15, 40, and 49, "Dr. Fechter swears under oath the defendant's promise to pay and protect the plaintiff's fees" -- excuse me -- "and that he would be paid in full upon settlement or verdict in the cases, the plaintiff is informed and believes the case matters were resolved on January 26, 2016," four years and a day ago today. That's 14 and 15.

And on paragraph 40, "The plaintiff was not informed of any settlement of workers' compensation claims before the special referee approval or the special referees report by

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Commissioner Iasha Taylor, motion of the Rosenthal defendants to Commissioner Taylor, until January 26, 2016."

And then paragraph 49, "When informed to the order to release funds thereby disposing of all of the workers' compensation claimant's cases on or about January 26, 2016, the plaintiff continued to seek payment from the defendants to no avail."

At the latest, Dr. Fechter knew that he has a cause of action, complains that he has a cause of action four years and a day from today. There is no way that under any of the claims that he has in this case -- he has more than a three-year statute of limitations, the case law is clear, the statutes are clear. As a result, when the Court dismisses this action, it should be a final dismissal so this can be over.

I'm happy to respond to any questions the Court has, and, obviously, I'd like the opportunity to respond to anything that Dr. Fechter may present.

THE COURT: Mr. Bannister?

MR. BANNISTER: Your Honor, as counsel for the Rosenthal defendants has just stated, Mr. Fechter was informed on January the 26th of 2016 that the cases which the attorneys were representing the work -- before the workers' comp were finally disposed of. So the pleadings were served by certified mail to the Ortner firm on December the 7th of 2017,

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well within the three-year statute of limitations from January the 26th of 2016. And in particular, I call to the Court's attention, in the original motion filed by Mr. Novak on behalf of the Ortner defendants, it says, "Did not provide the Ortner defendants with a copy until on or about December 7th, 2017."

So the attorney for the Ortner defendants recognizes that his clients have received a copy of the pleadings on December 7th of 2017. As Mr. Novak pointed out, this motion was filed with this Court on January the 8th, 2018. From that, the Ortner defendants filed a motion to dismiss, and the attorney for the defendants argued that it should be dismissed not only based upon the three-year statute of limitations but also upon the other grounds that they argued that it should be dismissed because it should be held before the Workers' Compensation Commission, having exhausted remedies and different defenses to the complaint. Judge Jefferson denied their motion to dismiss. They filed a motion for reconsideration, which Judge Jefferson denied on that. And then the Ortner defendants filed an appeal with the Court of Appeals.

After the defendants -- Ortner defendants filed their appeal with the Court of Appeals, the Rosenthal defendants informed the Court, which I attached a copy of the letter to my memorandum in opposition, to their motion to dismiss where, basically, the Rosenthal defendants agreed that the original motion by the Ortner defendants should have been granted by

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Judge Jefferson and, basically, they then voluntarily appeared in this matter, and because they voluntarily appeared, they should be held responsible also on this complaint.

There are a couple of cases that I would call the Court's attention to. One is Hawkins vs. The State of South Carolina. Oh, I'm sorry. It's *Unisom vs. Hawkins*, 537 S.E.2d 559. That was a South Carolina Court of Appeals in 2000 where the Court held that substantial justice should be done for both plaintiff and defendant, and also deals with the waiver by the defendants of failing to object at the appropriate time of the service and also, basically, waived their rights to then claim the process wasn't sufficient. The other case that I would cite to you, *Stearns Bank National Association vs. Glenwood Falls*, 644 S.E.2d 793, a Court of Appeals decision in 2007. And that deals with the voluntary appearance by the defendants in actions. Based upon these cases, we should be allowed to proceed with a trial in this matter.

The defendants have argued that, basically, rules -- civil rules 4 and 5 deal with service -- and they certainly do -- but the reason for those rules is to make sure the defendants receive a copy of the pleadings. And they have appeared and argued against the complaint, so we feel they certainly have had service and, in addition to that, obviously, they have filed affidavits, and at the time that I filed the memorandum, I also filed a motion to compel

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discovery so that depositions could be taken of the individuals who have signed affidavits in support of the defendant's motions. I would request that this Court keep the record open until I can depose those affiants. Thank you, Your Honor.

THE COURT: Mr. Novak?

MR. NOVAK: Just briefly, Your Honor. I would just point the Court's attention to a case called *White Oak Manor, Inc., v. Lexington Insurance Company*, 407 S.C. 1, 753 S.C.2d 537, which is a 2014 Supreme Court case. The purposes of this summons is twofold: One of those is to give notice of the action and opportunity to defend -- appear and defend; the other is to acquire jurisdiction. I would point the Court's attention to that. Thank you, Your Honor.

THE COURT: Mr. Kozlarek?

MR. KOZLAREK: Thank you, Your Honor.

Very, very quickly. In reference to the letter that I sent to the Court of Appeals, in reference to the first sentence -- and I don't have it in front of me but I wrote it -- the first sentence specifically says, "We are not defendants in the underlying action. We have a motion pending to dismiss." So anything after that, I'm not sure why Dr. Fechter thinks that's particularly material, because it was clear that our position was we don't belong here at all, but we certainly support the idea because we would be

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defendants if we ended up not having our motion to dismiss granted, and therefore, we think the case should have been heard by the Court of Appeals and ultimately dismissed, Judge Jefferson having been reversed.

If appearing in a case is waiver of service of process, then there are at least two Rules of Civil Procedure that are superfluous, because, otherwise, why have them? The point is, we can appear, we can object and ask the Court to rule on the issue of insufficiency of the process itself and the insufficiency of the service of that process and the underlying personal jurisdiction that is lacking because either/or both of them. That is simply what we have done.

All four of the putative defendants have raised those issues as are permitted. That cannot be a waiver of the service of the process or the personal jurisdiction under this Court.

And the last thing I'm going to suggest to the Court is, if the Court is inclined to permit depositions to move forward, particularly with out-of-state defendants, then I'm going to ask the Court to allow us to depose Mr. Bannister because Mr. Bannister is the only person for the plaintiff who is sworn to any of the information that relates to the service as far as the plaintiff's prima facie case goes. So I will certainly have some questions for him as the person who has signed an affidavit on behalf of the plaintiff as opposed to

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the plaintiff himself because that appears to be the argument that Mr. Banner wants to put forward -- Mr. Bannister wants to put forward, is that, somehow, there's something nefarious going on behind any of the affidavits that have been executed by either of our defense of the putative defendants. And I simply don't think that, in a case like this where the Court can look at the face of the document that purports to effect service in this case as it relates to my putative defendants, the green card, and it is not addressed to the law firm and it is not addressed to the individual to whom it is addressed at a place of normal dwelling or abode. There is simply nothing to look behind. There is no nefarious activity going on. The plaintiff simply didn't serve process in the proper manner, and the statute of limitations has run. Thank you.

THE COURT: I'll review it and issue an order.

MR. BANNISTER: Thank you, Your Honor.

MR. NOVAK: Thank you, Your Honor.

DR. FECHTER: Sir, am I not allowed to correct some of the things they said? Or is that at a later date?

THE COURT: Sir?

DR. FECHTER: If their facts are not correct and dates, times, fees, how do I approach that, when they told you things that are not accurate?

THE COURT: Your lawyer will have to address that.

DR. FECHTER: So we could still respond to you at a later

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date about what they just said?

THE COURT: Well, no. Now would be the time to respond.

DR. FECHTER: Well, am I -- I know my own case extremely well.

THE COURT: I understand that.

DR. FECHTER: I can do it in four minutes. Am I allowed to --

THE COURT: But you have a lawyer. You're not permitted to represent yourself when you have a lawyer. We don't have hybrid representation here.

DR. FECHTER: Well, can he just say this one paragraph?

THE COURT: Do you need to talk to him about that? Y'all can discuss it.

DR. FECHTER: Just stress this one. Say it again.

MR. BANNISTER: I did. I showed him that.

DR. FECHTER: Say it again. Just say it. Because it -- you want substantial justice.

MR. BANNISTER: Yes.

DR. FECHTER: Say that.

MR. BANNISTER: We do want substantial justice, Your Honor.

DR. FECHTER: Under the *Unisom vs. Haskins* --

MR. BANNISTER: Hawkins.

DR. FECHTER: Hawkins.

THE COURT: He addressed that.

DR. FECHTER: Okay. Because justice should be part of this proceeding.

THE COURT: Oh, I understand.

DR. FECHTER: Okay.

THE COURT: That's why we have rules.

DR. FECHTER: Thank you very much.

THE COURT: All right.

MR. NOVAK: Thank you, Your Honor.

MR. KOZLAREK: Thank you, Your Honor.

(The above proceeding concluded at 3:30 p.m.)

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CERTIFICATE OF TRANSCRIBER

CASE/NO.: Cary Fechter v. Leon Ortner, et al.
2017-CP-10-04371

DATE OF PROCEEDING: January 27, 2020

I, Bobbi J. Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.

Bobbi Fisher

_____

Bobbi J. Fisher, RPR, CET
NCRA Registered Professional Reporter (RPR)
AAERT Certified Electronic Transcriber No. CET-1148
Prepared: June 8, 2020

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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 **RETURN TO MOTION TO RECONSIDER ORDER DISMISSING PLAINTIFF'S COMPLAINT WITH PREJUDICE ON BEHALF OF LEON MARTIN ORTNER AND THE ORTNER LAW FIRM, LLC**

Defendants Leon Martin Ortner and The Ortner Law Firm, LLC (collectively "Ortner Defendants"), by and through the undersigned counsel, submit this Return to Motion to Reconsider Order Dismissing Plaintiff's Complaint with Prejudice filed on August 13, 2020, in which Plaintiff requests an order altering or amending this Court's Order Dismissing Plaintiff's Complaint with Prejudice filed on August 4, 2020 ("Order Dismissing the Complaint"). This Court should deny Plaintiff's Motion to Reconsider Order Dismissing Plaintiff's Complaint with Prejudice ("Motion for Reconsideration") because Plaintiff's motion fails to identify any issue or argument raised but not ruled upon or which this Court has misunderstood or failed to fully consider, the Order is supported by the record, and Plaintiff has failed to identify any other grounds sufficient for setting aside the Order.

STANDARD OF REVIEW[1]

Under Rule 52(b), SCRCP, a party may move the trial court to amend its findings, make additional findings, or question of the sufficiency of the evidence to support the findings. Under

[1] Although the prefatory paragraph of the Motion to Reconsider Order Dismissing Plaintiff's Complaint with Prejudice references Rules 52(b), 59(e), and Rule 60(b), SCRCP, the motion argues under only Rule 52(b) and 59(e), SCRCP. The motion does not identify any other grounds sufficient for setting aside the Order pursuant to Rule 60(b), SCRCP.

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Rule 59(e), SCRCP, a party may move the trial court to alter or amend a judgment. South Carolina's Rules of Civil Procedure "contemplate two basic situations in which a party should consider filing a Rule 59(e) motion." Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). "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." Id. "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." Id. "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." Hickman v. Hickman, 301 S.C. 455, 456-57, 392 S.E.2d 481, 482 (Ct. App. 1990).

ARGUMENT

Plaintiff asks this Court to reconsider the Order Dismissing the Complaint on the grounds that this Court erred in determining that the Ortner Defendants did not waive the requirement of effective service and in even addressing the Renewed Motion to Dismiss on Behalf of the Ortner Defendants pursuant to Rule 12(b)(5), SCRCP ("Motion to Dismiss"). Plaintiff also asks this Court to amend its finding that good cause existed in support of the granting of the Motion for Enlargement of Time on Behalf of the Ortner Defendants to file the Motion to Dismiss.

Plaintiff's motion, however, fails to identify any issue or argument raised but not ruled upon or which this Court has misunderstood or failed to fully consider. Plaintiff, instead, merely seeks to revisit the previously raised arguments that this Court should ignore South Carolina law by determining that the Ortner Defendants waived the requirements of effective service by filing and arguing a motion to dismiss pursuant to Rule 12(b), SCRCP. Plaintiff also for the first time erroneously argues that the motion pursuant to Rule 12(b)(5), SCRCP, should have been before The Honorable Deadra L. Jefferson pursuant to Rule 59(e), SCRCP, even though the Court clearly deferred consideration of this defense without prejudice to the Ortner Defendants. Moreover, the

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record supports the finding that good cause existed to enlarge the time for the Ortner Defendants to file the Motion to Dismiss.

A. The Record Supports the Court's Finding that the Ortner Defendants Did Not Waive the Requirement of Effective Service.

In previously considering this argument, this Court properly determined that Plaintiff failed to effect service upon the Ortner Defendants in accordance with the South Carolina Rules of Civil Procedure and that the Ortner Defendants did not waive the requirement of effective service. Plaintiff now asks this Court to reconsider this argument without identifying anything the Court has misunderstood, failed to fully consider, or perhaps failed to rule on. In fact, the Ortner Defendants specifically challenged the sufficiency of service of process under Rule 12(b)(5), SCRCP, in the Motion to Dismiss filed on January 8, 2018, on the grounds, inter alia, that Plaintiff failed to effect service upon the Ortner Defendants as alleged "because [the] service of process is insufficient and the statute of limitations precludes Plaintiff from asserting these claims." (Ortner Mot. Dismiss, p. 15.) The Ortner Defendants have consistently and diligently maintained this position in each appearance before this Court in accordance with Rule 12(b)(5), SCRCP, including in its pleadings, motions, memoranda, and oral arguments. As a result, this Court should deny Plaintiff's Motion for Reconsideration on this ground.

B. This Court Properly Considered the Ortner Defendants' Motion to Dismiss Pursuant to Rule 12(b)(5), SCRCP.

For the first time, Plaintiff's Motion for Reconsideration argues that the Ortner Defendants' Renewed Motion to Dismiss pursuant to Rule 12(b)(5), SCRCP, should have been considered by The Honorable Deadra L. Jefferson pursuant to Rule 59(e), SCRCP. This Court should deny this ground for reconsideration because Plaintiff failed to assert this argument prior to the hearing of the Renewed Motion to Dismiss on January 27, 2020, prior to issuance of the Form 4 Order dismissing Plaintiff's Complaint with prejudice on February 5, 2020, prior to the issuance of the formal Order

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Dismissing Plaintiff's Complaint with Prejudice on August 4, 2020, or at any time prior to Plaintiff's Motion for Reconsideration. Hickman v. Hickman, 301 S.C. 455, 456-57, 392 S.E.2d 481, 482 (Ct. App. 1990) ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not.").

Moreover, this Court properly considered the Ortner Defendants' Renewed Motion to Dismiss because Judge Jefferson deferred consideration of this defense without prejudice to the Ortner Defendants at the hearing of the Ortner Defendant's Motion to Dismiss on January 9, 2019,[2] and in the Order Denying Motion to Dismiss filed on April 5, 2019. In fact, Plaintiff's Motion for Reconsideration concedes that "the Ortner Defendants did not orally argue this issue before the Honorable Deadra L. Jefferson[.]" (Mot. for Recons. ¶10.) Moreover, Judge Jefferson's Order Denying Motion to Dismiss filed on April 5, 2019, does not rule on this ground but, instead, provides that "[a]t 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." (Or. Denying Mot. Dismiss 1n.1, April 5, 2019). As a result, this Court should deny Plaintiff's Motion for Reconsideration on this ground.

C. The Record Supports the Court's Finding that Good Cause Existed to Enlarge the Time for the Ortner Defendants to File the Motion to Dismiss.

"When by these rules or by notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time . . . the court for cause shown may at any time in its

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[2] Although Plaintiff erroneously asserts that "nor did the Ortner Defendant's request for Judge Jefferson to defer consideration of this issue", (Mot. for Recons. ¶ 10), the transcript of the hearing clearly shows that the Ortner Defendants suggested the Court defer consideration of whether Plaintiff failed to serve the summons and complaint properly within the statute of limitations under Rule 12(b)(5). (Hr'g. Tr. Jan. 9, 2019, p. 12, l. 18 – p.13, l. 2 ("We also raised in our motion – and I'm going to suggest that the Court defer this one. We raise the failure to service the summons and complaint properly within the statute of limitations under Rule 12(b)(5). On reflection, because the statute of limitations invokes the discovery rule, it would probably require some factual development to assess that defense. So we are not asking for the Court to grant that motion at this time. But we are not waiving the failure to properly effect service within the statute of limitations.").)

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discretion (1) with or without written motion or notice order the period enlarged if request therefor is made before the expiration of the period as originally prescribed or extended or (2) upon motion made after the expiration of the specified period, for good cause shown, permit the act to be done." Rule 6(b), SCRCP. "The decision of whether to allow a reply to be made after the time allowed by the rules is one committed to the sound discretion of the trial court upon a showing of good cause." Mauro v. Clabaugh, 299 S. C. 184, 191, 383 S. E. 2d 244, 249 (Ct. App. 1989) (citing Rule 6(b)(2), SCRCP). "Its decision granting or denying the motion will not be disturbed, unless there is a clear showing of an abuse of discretion." Id.

In this case, the record supports this Court's determination that good cause existed to enlarge the time for filing the Renewed Motion to Dismiss until December 19, 2019. The Ortner Defendants first asserted that Plaintiff's Summons and Complaint should be dismissed, inter alia, pursuant to Rule 12(b)(5), SCRCP, on the grounds that Plaintiff failed to properly effect service within the statute of limitations and insufficiency of service of process on January 5, 2019, consistently and diligently maintained this position in each appearance before this Court, and merely sought to reassert the pending motion after this Court's deferral of consideration of the motion without prejudice to the Ortner Defendants. Any technical failure to reassert this motion within 15 days of the remittitur of the action to this Court from the Court of Appeals did not affect the Ortner Defendants right to reassert the motion or prejudice Plaintiff. Moreover, this Court's determination that Plaintiff failed to effect service upon the Ortner Defendants and, therefore lacks jurisdiction over the Ortner Defendants voids all proceedings based upon the pretended service. Momani v. Van Surdam, 296 S.C. 409, 410, 373 S.E.2d 691, 692 (Ct. App. 1988) ("When a defendant is not properly served, 'the Court has no jurisdiction of the defendant, and all proceedings based on the pretended service are void.'"). As a result, this Court should deny Plaintiff's Motion for Reconsideration on this ground.

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CONCLUSION

For the foregoing reasons, this Court should deny Plaintiff's Motion to Reconsider Order Dismissing Plaintiff's Complaint with Prejudice. This memorandum is further based upon the pleadings, applicable South Carolina jurisprudence, and any other matter as may be acceptable to the Court.

Respectfully submitted,

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August 21, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Circuit Court

J. Derham Cole, CircuitCourt Judge

Case No. 2017CP1004371

Cary E. Fechter, M.D. — Appellant

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

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Notice of Appeal

Cary E. Fechter, M.D. appeals the judgment of the Honorable J. Derham Cole dated March 30, 2021. Appellant received electronic notice of entry of this judgment on March 30, 2021.

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STATE OF SOUTH CAROLINA)	
)	Court of Common Pleas
COUNTY OF CHARLESTON)	Case No. 2017-CP-10-4371
)	
CARY E. FETCHER, MD)	
)	
Plaintiff,)	
)	
vs.)	Transcript of Record
)	
LEON MARTIN ORTNER, THE)	
ORTNER LAW FIRM, LLC,)	
GERALD ROSENTHAL and)	
ROSENTHAL, LEVY, SIMON)	
AND RYLES,)	
)	
Defendant.)	DATE: January 9, 2019

B E F O R E:

THE HONORABLE DEADRA L. JEFFERSON

A P P E A R A N C E:

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M. DAWES COOKE JR. and JUSTIN PAUL NOVAK
Attorney for the Defendant

Original transcript ordered by:
Barnwell, Whaley, Patterson & Helms

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

The COURT: This is Cary E. Fetcher, MD v. Leon Martin Ortner, the Ortner Law Firm, LLC, Gerald Rosenthal and Rosenthal, Levy, Simon and Ryles, 2017-CP-10-4371. This is before the Court on Defendants', Leon Martin Ortner and Ortner Law Firm, motion to dismiss filed on 1/8/18. I assume that was an add-on to the roster. And if it was filed on 1/8/18, let me look at my -- I'm stuck in 2018. I'm sorry. It was filed yesterday. I'm sorry. And it does have 1/8/18 on it. I'm sorry. Adjusting to the new year. All right.

This is objection to notice of deposition of Leon Martin Ortner and motion for protective order staying discovery and other proceedings. And that is dated 10/8/18. And I assume that will become moot based on the motion to dismiss.

MR. COOKE: Yes, Your Honor.

THE COURT: All right. Glad to hear your motion to dismiss.

MR. BANNISTER: If I may approach.

THE COURT: Counsel has just handed to the Court a memo in opposition to the motion to dismiss filed on today's date with some exhibits and an affidavit.

MR. BANNISTER: Two affidavits, Your Honor.

THE COURT: Two affidavits. I'm sorry. Oh, that is an affidavit. Okay. I referred to it as an exhibit, but same thing, affidavit. And then one that is actually

entitled affidavit.

And for my court reporter's sanity, who represents the plaintiff?

MR. BANNISTER: Melvin Bannister, Your Honor.

THE COURT: And who is appearing on behalf of each defendant?

MR. COOKE: I'm Dawes Cooke, and Justin Novak on behalf of the moving party, Mr. Ortner. And Mr. Ortner is here as well.

THE COURT: So there's no one here on behalf of Rosenthal, Levy, Simon and Ryles?

MR. COOKE: No, Your Honor.

THE COURT: Okay. All right. You may proceed.

MR. COOKE: Thank you, Your Honor. I was just handed a memorandum in opposition. And Mr. Bannister represents that there are affidavits. We, of course, would have to object to the affidavits. Haven't had a chance to review them. They weren't filed 48 hours in advance. But this is a motion --

THE COURT: I will give you an opportunity to respond if you need to.

MR. COOKE: Thank you, Your Honor. This is a motion to dismiss based on lack of subject-matter jurisdiction as well as under 12(b)(6) for failure to exhaust administrative remedies and res judicata and collateral estoppel. This is a

claim -- my client is a practicing attorney. He represented a large group of workers' compensation claimants in an occupational disease set of cases. And back in 2003, he retained Dr. Fechter to do screenings for the potential clients to see if they qualified to bring the claim for an occupational disease.

In 2005, he associated Mr. Rosenthal, who is the other defendant. He's a Florida attorney. From that point forward, Mr. Rosenthal took responsibility for working with Dr. Fechter. He took responsibility for paying all expenses associated with the litigation.

But, Your Honor, this is a claim that Dr. Fechter is asserting for additional fees that he says he incurred in evaluating and/or in treating, in some cases, some of the claimants that were represented by Mr. Fechter -- by Mr. Ortner and Mr. Rosenthal in the workers' compensation proceeding.

So our motion to dismiss is several fold. First, this Court lacks jurisdiction because this matter is in the exclusive jurisdiction of the Workers' Compensation Commission. And I will cite in a few minutes the statutes and regulations that apply to that.

And, second, they were -- these claims were actually adjudicated by the Workers' Compensation Commission. And Dr. Fechter did not appeal, did not challenge the jurisdiction of

the Workers' Compensation Commission.

THE COURT: When you say "all claims", tell me what claims that he's claiming were adjudicated by the Workers' Compensation.

MR. COOKE: His entitlement to reimburse for medical expenses beyond the $25,000 that he was paid previously.

THE COURT: Okay.

MR. COOKE: And I will get to that as well. That's an exhibit to our motion. And, Your Honor, by the way, we have included exhibits that go beyond the pleadings, because this isn't just a 12(b)(6) motion. This is a subject-matter jurisdiction. And the Court can consider the administrative record from the Workers' Compensation Commission in determining whether it has jurisdiction.

And we've also asserted, as part of the failure to exhaust administrative remedies, that is in failing to appeal, estoppel and waiver and laches. Because as part of the adjudication by the Workers' Compensation Commission, when the parties settled the workers' compensation claim, and it was for over a million dollars for many, many claimants, they set aside $500,000, with the approval of the Workers' Compensation Commission, to cover expenses. And there was an adjudication. There was a motion made by Mr. Rosenthal to release those funds. And the Workers' Compensation Commission adjudicated that the fee that Mr. Rosenthal's firm

was to be reimbursed of the entire $500,000, that Dr. Fechter was not entitled to recovering. And so that money was disbursed. My client, Mr. Ortner, made no claim whatsoever to those funds that were held in abeyance or held in escrow.

And then I'm going to go through these documents with Your Honor so you will see exactly what was done. And so the Workers' Compensation Commission said that Mr. Rosenthal could have those funds. They were disbursed. And so, clearly, my client would be prejudiced by Dr. Fechter's failure to appeal, failure to assert his claim, failure to take any action before those funds were disbursed because that was the body of funds that would have been available to pay his fees if he was entitled to any beyond the 25,000.

So there's a suit. There's a claim for breach of contract, for fraud, for breach of contract with fraudulent intent, for unfair trade practices, and for pre-judgment interest.

The exhibits that we have attached to our motion include the fact that there was a consent order entered. And this is Exhibit B on July 22nd, 2014, in the Workers' Compensation matter. Consent order --

THE COURT: What happened to the set-aside funds?

MR. COOKE: The set-aside funds were held. And then Mr. Rosenthal made a motion to release those funds. That's

Exhibit E. He made that motion on November 18, 2015. He served that motion on all the interested parties, including Dr. Fechter. And then Exhibit A is the order of the Workers' Compensation Commission granting his motion to release the funds.

THE COURT: What did he do with them?

MR. COOKE: He reimbursed his law firm for all of the expenses he had incurred. And he actually documented over a million dollars in expenses, but they reduced it to $500,000. And this was, obviously, a long-standing litigation. There were over 600 claimants. The claims began back in 2003 and were not settled until 2014. So you can imagine it was quite a lengthy process.

THE COURT: And no one objected or appeared when the motion or the matter was heard, or filed any pleadings in opposition to the release of the funds?

MR. COOKE: The only thing that was filed in response was Mr. Ortner, Exhibit F. On December 2nd, 2015, he filed that return which he said that he is not making any claim to the funds, that Dr. Fechter has asserted -- claims entitlement, and that he wished for the Workers' Compensation Commission to adjudicate the entitlement to fees, and that whatever is determined that belongs to Dr. Fechter could go to him, and whatever is determined to belong to Mr. Rosenthal would go to Mr. Rosenthal.

THE COURT: Dr. Fechter did, in fact, file a claim for the set-aside funds?

MR. COOKE: He did not appeared before the Workers' Compensation Commission. And this is recited in the order, which is Exhibit A. It says he did not file a formal claim with the Workers' Compensation Commission, but he asserted a claim. And, Your Honor, this is where the statutory authority of the Commission comes into play.

THE COURT: So he asserted a claim, but he didn't appear to argue it?

MR. COOKE: Correct, he asserted a claim. That's exactly correct. And so Section 42-3-180 says that 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.

And there's actually a regulation, that's regulation Section 67-12-06, which says, an attorney may request approval of the actual cost incurred in the prosecution of the claim, including expenses associated with the evaluation or treatment of the client.

So this was well within the jurisdiction of the Workers' Compensation Commission. And in our brief, Your Honor, we've cited *Posey v. Proper Mold Engineering,* that says that the General Assembly has vested the South Carolina

Workers' Compensation Commission with exclusive original jurisdiction over employee work-related injuries.

And as part of that exclusive jurisdiction includes, as I've just cited from the statute, from the regulation, all matters that affect the employee's claim.

Now, if this were just a private contractual dispute between two individuals other than the claimant, arguably, the suit could be brought in circuit court as a court of general jurisdiction. What makes this fall within the exclusive jurisdiction of the Workers' Compensation Commission is the fact that these were relevant to the claims made by the injured employees. And it was part of the award that was made to them to include the cost of the attorney's fees that they would be required to pay. And it's within the exclusive jurisdiction of the Workers' Compensation Commission to adjudicate who gets that. Because whatever Dr. Fechter doesn't get or the other people who provided services of attorneys, obviously, goes to the claimants.

So when this case was settled, that had to include what would go to the claimants, what would go to reimburse their medical bills, what would go to pay their attorneys, and what would go to pay the other expenses of litigation.

And, Your Honor, when you get a chance, if you look at Exhibit A --

THE COURT: I'm going to read everything. And I've

already pretty much read the order from the Workers' Compensation.

MR. COOKE: Okay. And that sets out the facts. It says that the Plaintiff in this case was properly served, that he failed to establish entitlement to any funds in addition to those that he already received. He cannot establish any contractual arrangement that would entitle the Plaintiff to any additional funds. No agreement exists involving obligating either of the Defendants to pay for any additional services performed by the Plaintiff. And he's not been deprived of any payment due. And those were all the findings of the Workers' Compensation Commission that were never appealed.

Your Honor, we've cited in our brief *McCreery v. Covenant Presbyterian*. Says, where subject-matter jurisdiction depends on factual findings, a judicial degree determining such a fact does or does not exist, cannot be challenged on collateral attack.

So the place to attack the jurisdiction of the Workers' Compensation Commission would have been in the Workers' Compensation Commission. That's something that they can decide. It's subject to the appeal process. And, ultimately, of course, it would go to a circuit court or go to the -- all the way to the Supreme Court.

Edens v. Bellini we've cited. That case affirmed or

granted a motion to dismiss for lack of subject-matter jurisdiction pursuant to the exclusivity provision.

And, Your Honor, the second prong of this is not only that the Workers' Compensation Commission have exclusive jurisdiction, but they actually adjudicated the findings. And under *Bennett v. South Carolina Department of Corrections*, under the doctrine of res judicata, collateral estoppel, the decision of administrative tribunal precludes the relitigation of the issues addressed by that tribunal and the collateral action.

So the parties are barred not just by Court of Common Pleas's decisions, but they are barred by administrative decisions as well, particularly if they don't avail themselves of the opportunity to appeal.

Crosby v. Prysmian Communications, 2012 Court of Appeals decision, 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.

Additionally, Your Honor, the failure to appeal the order constitutes failure to exhaust administrative remedy. And we've cited *Unisys Corporation v. The South Carolia Budget & Control Board*, affirming that failure to exhaust administrative remedies precludes original resort to courts.

Capital City Insurance v. BP Staff, a 2009 case,

says, dismissal may be proper under Rule 12(6)(6), 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.

Your Honor, the Section 42-17-50 provides for appeal of a single commissioner's ruling to the full Commission.

And Section 42-17-60 provides for appeal of a review of the Commission's ruling. Neither of those procedures were followed.

Your Honor, we've cited in our brief that Dr. Fechter did file a complaint with the Office of Disciplinary Counsel. Disciplinary Counsel dismissed that matter saying that this was a private contractual issue.

Your Honor, I know I was speaking very fast. And I took down -- I saw that you were taking down notes. All of the cases we've cited are in the brief. And the exhibits we've cited are in the brief as well.

We also raised in our motion -- and I'm going to suggest that the Court defer this one. We raised the failure to service the summons and complaint properly within the statute of limitations under Rule 12(b)(5). On reflection, because the statute of limitations invokes the discovery rule, it would probably require some factual development to assess that defense. So we are not asking for the Court to grant that motion at this time. But we are not waiving the

failure to properly effect service within the statute of limitations.

And then finally, Your Honor, just briefly, South Carolina Unfair Trade Practices Act claim under *Ardis v. Cox*, a deliberate or intentional breach of a valid contract without more does not constitute a violation of the South Carolina Unfair Trade Practices Act.

And under *deBondt v. Carlton Motorcars*, to be actionable under the Unfair Trade Practices Act, the unfair or deceptive act or practice must have an impact upon the public interest.

And the Court has said over and over again that Unfair Trade Practice Act is not a claim for a private dispute between individuals, which clearly is what this is.

So, Your Honor, that, in a nutshell, is our position. It's supported by the various exhibits that show that this was a workers' compensation case. It was actually -- numerous claimants were involved. They did reach a settlement. The settlement was approved by the Workers' Compensation Commission. The order approving the settlements specifically provided for the set-aside of $500,000 to cover additional expenses.

Mr. Fechter -- I mean, Mr. Ortner made no claim to those funds whatsoever, because Mr. Rosenthal's firm had agreed to be responsible for all of the expenses and had

dealt with the various people who might have claims, including Dr. Fechter. And Mr. Ortner filed his response saying exactly that. Mr. Rosenthal filed his motion asking for Dr. Fechter's interest to be determined. They were determined. And no appeal was taken in that.

Thank you, Your Honor.

THE COURT: You're welcome. Would you like to respond?

MR. BANNISTER: Your Honor, he has pointed out, I believe, Dr. Fechter is not a party to the Workers' Compensation claims. He was a physician who was retained by the Defendants to do examinations and make independent medical examinations and reports. That was a contract between the doctor and the Defendants.

And we've attached to our memorandum a copy of one of these contracts signed by the Defendant Ortner. And we have similar contracts that were given, except for the names of the client of the Defendants being substituted, for each of those in excess of 400.

The Workers' Compensation Commission does not deal with contractual matters between the attorneys representing claimants and third-parties. The circuit courts deal with that. And we have cited in our memorandum the case of *Capital City Insurance v. BP Staff Incorporated*, and several other cases along those lines.

THE COURT: Why didn't he show up at the Workers' Compensation hearing to contest the allocation of these excess funds?

MR. BANNISTER: First of all, there was no hearing. Second of all --

THE COURT: He could have filed documents. You know, it's all form-driven.

MR. BANNISTER: He did not receive notice of this motion filed by the Defendants with the Commission. He didn't receive it from the Defendants, nor did he receive it from the Commission. If he had received notice, he would have obviously submitted --

THE COURT: So how did he assert a claim?

MR. BANNISTER: Obviously, that was done by the Defendants making the Commission aware that the clients, patients, whatever you want to call them at this point in time, had been treated by Dr. Fechter. And all these reports that had been given to the Defendants, that was part of Dr. Fechter's clients. The initial claim, certainly, for the reports is a contract between the Defendants and Dr. Fechter, nothing to do with the medical treatment. The Defendants also contracted --

THE COURT: You are saying your client didn't provide medical services to these claimants? He didn't provide an alternate evaluation as opposed to the Workers'

Compensation doctor?

MR. BANNISTER: He did provide additional treatment after the examinations and initial reports. He did provide additional treatment.

THE COURT: Doesn't that entitle him to be paid?

MR. BANNISTER: It does.

THE COURT: By the Workers' Compensation Commission, correct?

MR. BANNISTER: No. In this case, since it was a contract with the Defendants --

THE COURT: I understand that, but when you provide treatment under the Workers' Compensation schematic, you are entitled to be paid by them. That's the whole purpose we have the Workers' Compensation statute.

MR. BANNISTER: That is correct, Your Honor. However, Dr. Fechter did not submit any bills to the Workers' Compensation Commission nor any carrier. He submitted them to the Defendants, who were then responsible for submitting them to the carrier and Commission.

THE COURT: So he's saying they never presented those?

MR. BANNISTER: We have no evidence that those --

THE COURT: Was that not a part of the additional expenses that Rosenthal, Levy & Ryles -- I'm leaving out a name -- Rosenthal, Levy, Simon & Ryles provided or submitted

to the Workers' Compensation Commission?

MR. BANNISTER: We don't know what they submitted. We know that Dr. Fechter hasn't been paid any of that.

THE COURT: Has he made any request for payment?

MR. BANNISTER: Yes, to the Defendants.

THE COURT: And what has been the response?

MR. BANNISTER: No response, except to the extent that each time that Dr. Fechter sent a report or bill to the Defendants, he received a contract signed by Mr. Ortner back from them that he would be paid when all of the Workers' Compensation cases have been disposed.

THE COURT: Let me ask what might seem like an overly simplistic question. Have you not gotten the documents from the hearing -- well, from the determination by the Workers' Compensation Commission allocating this additional half million dollars?

MR. BANNISTER: No.

THE PLAINTIFF: Yes, I did.

THE COURT: If he has it, he needs to give it to you to look at.

MR. BANNISTER: I haven't seen where that half million dollars was going other than the order that says it was going to be delivered to --

THE COURT: Yeah, but I'm interested -- they would have had to have given some detailed accounting to the

Workers' Compensation. They are not just going to give them a half million dollars. You have to account for it.

So my question becomes, is your client's bills accounted in that? Is it sitting in a trust account somewhere that has not been given to him? And I think that's a germane question. And it seems to me that would be one of my first inquiries, because I would like to know if my client's money is sitting somewhere. How else would they have amassed all of these expenses?

MR. BANNISTER: Well, assuming that this case is not dismissed, we will then do discovery to find out where that $500,000 is.

THE COURT: I understand that, but your client says he already has a detailed listing of what they've submitted. So I'm sort of curious why you haven't seen it. And on the same token, what did that listing account for? And did it account for any of Dr. Fechter's fees? And if it did, why hasn't he been paid?

MR. COOKE: In Mr. Rosenthal's motion for the release of funds, he recited that he had paid back in 2006, $25,000. And he contended that that is all he owed. And so that's what --

THE COURT: In 2006?

MR. COOKE: Yes.

THE COURT: And the claims were settled in --

MR. COOKE: 2014.

THE COURT: -- 2014.

MR. COOKE: Right.

THE COURT: So he's asserting that services that this doctor provided all the way up through when this case was settled to patients was covered by $25,000?

MR. COOKE: He contended that his responsibility was for the evaluations that he had done. And those were all done back then.

THE COURT: So how else was the doctor going to be paid for medical services? I mean, was this a miscommunication about who the bills need to be submitted to? Because Workers' Compensation Commission pays for medical expenses. So I'm trying to figure out, like -- or was the settlement a part of what their medical bills were going to be? I guess I'm trying to figure out -- I'm a little confused.

MR. COOKE: It would have been incumbent for Dr. Fechter to document, to send bills. And that was part of Mr. Rosenthal's complaint, was that he didn't start getting any bills from Dr. Fechter until 2010. And, of course, you can't -- if it's a Medicare patient, if it's covered by insurance, you have to bill them first. And Mr --

THE COURT: Did you bill them first as a workers' compensation? Because then Medicaid is going to want to be

subrogated because they don't say it's not our responsibility, it's the lawyer's responsibility.

MR. COOKE: Right, but I believe still -- you still have to bill them first, yes.

THE COURT: I haven't done workers' compensation in a long time, in over 20 years, but I don't remember ever submitting a bill to my client's insurer.

MR. COOKE: Dr. Fechter did do that. And we've got --

THE COURT: So then there are amounts that were not covered, and they are still the responsibility of the patient?

MR. COOKE: That would have been -- that would have been what should have been submitted out -- to be paid out of this fund that was being held back.

THE COURT: And you are saying that Medicaid would not have wanted to be reimbursed, or Medicare, whatever? I always get the two confused. And why would you be on Medicaid if you are employed by somebody? That's also not making sense to me.

MR. COOKE: Mr. Ortner tells me that those additional liens would have been included in the settlement of the total case, yes.

THE COURT: Okay. And so -- I always get the two confused. I'm sorry. Why don't we just say insurance?

Insurance would have been reimbursed for whatever they paid for the care. And that would have been a part of the settlement. And then it would have been the patient's responsibility for what was not covered?

MR. COOKE: Well, there is no -- you can't bill for Medicare --

THE COURT: That's correct.

MR. COOKE: You can't bill the patient for anything --

THE COURT: It's a full settlement, yeah. But I'm trying to figure out, if I was employed with a company, why am I on Medicaid? Because wasn't that before the Affordable Care Act? I lost track when it was passed.

MR. COOKE: You are over my head with that question. But some of these were probably former employees anyway, I would imagine.

THE COURT: But it's still their care. I guess, theoretically, under the circumstances, they wouldn't have gotten --

MR. COOKE: If they are still employed, they probably would have been covered by some group insurance --

THE COURT: Group plan, but still unemployed, may have been covered by Medicaid, uh-huh.

MR. COOKE: These are all great questions. And these are the questions that probably could have been argued

if Dr. Fechter had appeared in the Workers' Compensation matter. Now --

THE COURT: Well, I don't know. I mean, did he really have an obligation to, if he had a separate contract with y'all?

MR. COOKE: Yes. And that's where --

THE COURT: Where is his obligation created to show up?

MR. COOKE: Well, that's where Regulation 67-1206 comes into play, because it specifically says, in addition to an attorney's contingent fee, an attorney may request approval of the actual costs incurred in the prosecution of a claim by attaching a statement of costs to the Form 61.

Costs include witness fees, expenses associated with the deposition of a witness, service costs, or expenses associated with the evaluation or treatment of a client.

And, Your Honor --

THE COURT: But the money was dispensed in 2015. He says he started getting bills in 2010. So I'm trying to figure out if he got bills in 2010, which would have put him on notice that the 25,000 he says he paid in 2006 was not sufficient. So where did the communication gap -- where was that created?

MR. COOKE: Well, we were not -- Mr. Ortner was not privy to that.

THE COURT: Because the other firm was handling it?

MR. COOKE: Certainly beyond this, but there were many communications between. And this is covered in Dr. Fechter's deposition. And he was deposed in the workers' compensation case, by the way.

THE COURT: But Mr. Ortner did sign these liens -- not liens. What is it called?

MR. COOKE: Protection letters.

THE COURT: Yeah, protection letters.

MR. COOKE: This is back in 2002. And according -- or 2003, excuse me. Mr. Rosenthal was associated in 2005. He agreed to take over responsibility for all the expenses. And Dr. Fechter admitted in his deposition that all of his communications and billings were with Rosenthal's office after Mr. Rosenthal took over. And that's why Mr. Ortner did not make any claim to that $500,000 that was set aside to pay expenses.

THE COURT: Have you all -- how much money is Dr. Fechter saying he's owed?

MR. BANNISTER: Little over a million dollars, Your Honor.

THE COURT: That's probably a stretch. If he submitted anything to Medicaid, you can't claim anything above and beyond --

MR. BANNISTER: That's not including any -- that's

only included for --

THE COURT: And if patients were --

MR. BANNISTER: -- medical bills that were not covered by insurance, in addition to the contracts for doing reports.

DR. FECHTER: Your Honor, I am not --

THE COURT: No, sir. You can't speak. How many people are we talking about that was in this class of folk that settled?

MR. COOKE: Around 400. There were originally almost 600 people that were going to be screened, but there were about 400-plus in this settlement.

THE COURT: And I assume when they went to the doctor's office and they got treatment, they signed a form saying whatever isn't covered by insurance, I'm going to pay it, or did they not?

MR. COOKE: We haven't gotten that far, but I know they have to do that. Of course, as you said with Medicare --

THE COURT: Well, you still sign that form. It's like, for example -- I can only use myself as an example. There are certain things that insurance pays for. And, basically, by virtue of doing business with the State insurer, you agree that whatever it costs, this is all we are going to pay, and you are not going to send our insured a

bill.

MR. COOKE: Right, right.

THE COURT: Everybody has those kinds of agreements about certain kinds of care. But you still -- when I go to the doctor's office, I still have to sign the form. Like, when I go to the eye doctor, there's certain tests they just don't cover. But for my health and for my eyesight, since this is partially where I make my living, I want to make sure my eyes are okay. So I'm going to pay the extra $60 whatever to have that extra test, even though my State insurance says you can't charge her for any additional things. But they are going to charge me anyway. So I sign that form that says whatever is not covered, you are going to send me a bill for it, and I'm responsible for it.

So my question becomes, were there any -- I assume part of their settlement was for previous care, current care, and prospective care. If they had any diagnosis that covered some condition that, you know, was going to be continuing, whether it's pain management, whether it's -- you know, I will just use a disk as an issue, where people have to get periodic shots, things like that, I would assume these individuals received some money.

MR. COOKE: Right. And that's what a workers' compensation claim is. It's your loss of income and your medical expenses.

THE COURT: Exactly. You know, if you have lost use of a member, your finger, your toe, your leg, you know, they give you a lump sum for that stuff. Sometimes you've got ongoing payments. Again, my knowledge of workers' compensation is rusty. And since I don't handle workers' compensation appeals anymore, I have lost some of my dexterity on the subject.

But my question becomes then, were any bills ever sent to these individuals for them to pay for these expenses? Apparently, there would have been, presumably, a part of a calculation of their settlement to reimburse their doctor.

MR. COOKE: Yeah. I can't answer that question on the record that we have as to whether bills were sent to patients. But the whole reason that you asked that question demonstrates why this is for the Workers' Compensation Commission and not for us to be arguing about after the fact.

THE COURT: Well, but the problem is, you signed a contract where you guaranteed payments. And you sort of then took it outside the parameter. Because Workers' Compensation occurs that covered individual and their expenses. And so, really, when they got their lump sum settlement, the attorneys probably should have been more proactive and say, you owe this doctor money, and you need to pay him, because I don't want him coming back against me.

But then you signed -- it's no different than in an

automobile accident when your client, which doctors require an order of protection, even though they are going to bill your client's insurance, because they know clients can be less than consistent, and sometimes when they get money, they get happy, they spend it, and it's gone. So you have to then guarantee -- basically, you become a guarantor, which is a separate contract to some extent. And I'm not sure -- I have to do a little research and read what y'all submitted to me.

MR. COOKE: And there's one other case. Let me give you two facts, first of all. I think that's exactly why --

THE COURT: Mr. Bannister, I didn't mean to eclipse your argument. I'm going to let you finish. I got curious.

MR. BANNISTER: I understand. Thank you, Your Honor.

THE COURT: I need to ask these questions because I will forget later.

MR. COOKE: That's why on Exhibit A, which is the -- I'm sorry, it's Exhibit E, which is the motion to release funds that was made by Lawrence Hershon, who is an attorney with Parker Poe, who represents Mr. Rosenthal and his firm, he filed the motion on November 18, 2015, spelled out in great detail why he didn't think that he owed Dr. Fechter any more money. And he served Dr. Fechter. You can see a cc about two-thirds of the way through that exhibit. There's the cover letter from Mr. Hershon where he's filing a motion.

And he shows a copy to Dr. Fechter. Dr. Fechter was also served with the final order. But there's a case that we didn't cite in our brief that I would like Your Honor to consider.

THE COURT: Sure.

MR. COOKE: It's called *Labouseur v. Harleysville Mutual Insurance Company*. And it's a Supreme Court, 1990, 302 S.C. 540, 397 S.E. 2nd 526. And that case kind of explains the difference between a private contractual matter that could be brought in circuit court and one that has to be brought in the -- before the Workers' Compensation Commission. And that case had to do with cancellation of an insurance policy. And the Court said there that that was within the exclusive jurisdiction of the Workers' Compensation Commission because it was inextricably intertwined in the claimants' claim. It wasn't just a fight between two insurance companies. It wasn't a fight between two individuals. It involved the injured employee.

And so to did Dr. Fechter's claim. His claim was, to the extent that he would be paid, that would have to come out of the proceeds that otherwise would go to the injured employees. And that's exactly why the Workers' Compensation Commission takes exclusive jurisdiction. Thank you.

THE COURT: You're welcome. Mr. Bannister, anything else you want to share with me?

MR. BANNISTER: Your Honor, it's clear that the Plaintiff, Dr. Fechter, had contracts with the Defendants as evidenced by them sending a promise to pay his expenses and fees for each client.

Mr. Rosenthal, in the affidavit that was part of his motion, said he paid my client $25,000 to cover the first 50 reports. And he actually only got 39. Well, now we find out that they had over 400 clients, which my client has already confirmed that he has seen over 400 claimants and made reports on these 400-plus claimants, forwarded them to the Defendants, who then turned around and said, you will get paid upon the completion --

THE COURT: But then he received the 25,000.

MR. BANNISTER: He did.

THE COURT: How much was it contemplated that the cost to generate each report would be to each claimant?

MR. BANNISTER: Yes.

THE COURT: How much was it?

MR. BANNISTER: He was supposed to get $500 for each initial report.

THE COURT: For each?

MR. BANNISTER: 150 for a second report and $100 for a third report.

DR. FECHTER: That's inaccurate.

MR. BANNISTER: He was supposed to be paid some

additional funds for second and third reports. And that's alleged in the complaint and in his affidavit. So, clearly, Your Honor, is --

THE COURT: Did he receive a copy of the items that Mr. Cooke has indicated were submitted to the Workers' Compensation Commission at the time that the Rosenthal firm sought to distribute these additional funds?

MR. BANNISTER: I have --

THE COURT: Because they said they copied him on all of it.

MR. BANNISTER: I had recently received from the Workers' Compensation Commission a copy of the order dated November 13 of 2015, which shows over 300 clients that were dealt with. I have not received any document that says that any money out of this $500,000 was supposed to be paid to Dr. Fechter or anyone else.

THE COURT: Well, the claim that was submitted to the Workers' Compensation Commission, according to Mr. Cooke, says that their basic representation to the Commission is that they owed your client nothing else, that they had already compensated him.

MR. BANNISTER: $25,000.

THE COURT: Yeah. But they are saying they sent those documents to him and he had the ability to be heard and he didn't show up.

MR. BANNISTER: He never received them.

THE COURT: But he got that detail information somewhere. Where did he get that from, that he said he had to know what the allocation of the funds that Rosenthal presented to the commission, where did he get that from if he didn't receive the documents and you haven't done discovery yet?

MR. BANNISTER: Your Honor, I am not aware that -- I was not aware until this morning that he may have received something. I don't know how he received it or when he received it at this point in time.

THE COURT: Anything further, Mr. Bannister?

MR. BANNISTER: Your Honor, I think it's clear that the majority of my client's costs for fees that he is owed is from doing the reports for these workers' compensation clients that were forwarded to the Defendants.

THE COURT: Have you all made any attempts or thoughts about mediating this at all? I'm just curious.

MR. COOKE: We've had numerous discussions over the past several years about trying to resolve it, but the numbers are just too far out there. Your Honor, may I reply to a couple points here?

THE COURT: Sure.

MR. COOKE: One is, I'm being shown that there were actually some payments to Dr. Fechter's practice included in

the order approving attorney's fees from the Workers' Compensation Commission.

THE COURT: How much?

MR. COOKE: I can't tell. It's very fine print.

THE COURT: I understand. My eyes are waning on me too.

MR. COOKE: They will have to add it up.

THE COURT: So you are talking about in the order from 11/18/15?

MR. COOKE: It's actually in Exhibit 5. We can hand it up to, Your Honor.

THE COURT: I'm just curious. Is it attached to what you already submitted to me?

MR. COOKE: I don't think it is. But we happen to have it here. But, Your Honor, to the point of --

THE COURT: Just a round figure, I'm curious, can you sort of round it off without -- doesn't have to be an exact figure.

MR. COOKE: There's expert professional services, doesn't say specifically Dr. Fechter, but that was $814,092.23.

THE COURT: But they concede that the amount they say they have in expenses exceeds the 500,000, right?

MR. COOKE: Yeah, that the law firm had. His total, Mr. Rosenthal's total claim for expenses was $1,203,072, for

which he accepted 500,000.

THE COURT: So you said that some portion of that was paid to Dr. Fechter, correct, or did I misunderstand?

MR. COOKE: Yes, I think that's exactly correct.

THE COURT: And so what I was asking is, can you estimate for me what portion of that was paid to Dr. Fechter?

MR. COOKE: Yeah, besides the 25,000 that he paid, it would be less than $1,000 for medical records and so forth.

THE COURT: Okay.

MR. COOKE: And, Your Honor, I think my closing point would be, evidently, Dr. Fechter is suggesting that he didn't get copies of the documents, but he was deposed. He knew that this process was going on. He had a lawyer, different lawyer.

THE COURT: He was deposed when?

MR. COOKE: He was deposed immediately before the motion to release funds. So it would have been in November.

THE COURT: For what purpose was he being deposed?

MR. COOKE: To determine what he was owed or whether he was owed anything.

THE COURT: Who deposed him?

MR. COOKE: Mr. Hershon. And, let's see, November 2nd, 2015, was the date of that deposition.

THE COURT: You said '15?

MR. COOKE: Yes. And so he was deposed on November 2nd. Mr. Rosenthal's motion to release funds was filed and served on November 18, 2015.

But, Your Honor, again, the proper venue to raise lack of service would be with the Workers' Compensation Commission, because I'm sure that they have processes also that if somebody was left out or didn't get noticed, there would be a process to pursue that. But it's clearly within the jurisdiction of the Workers' Compensation Commission.

THE COURT: I'm going to take the matter under advisement, because I need to -- Mr. Bannister just gave me his materials, and I need to read them. And sometimes I'm better at reading than listening, but I really want to be attentive and hear what y'all were saying to me. So I have not had the opportunity to read what he submitted. And I need to do that.

But in the meantime, and I need to do a little research, sort of clear my mind a little bit. Because I have to be honest, I'm inclined -- you know, the whole purpose of the Workers' Compensation schematic is to deal with everything related to it, not to piecemeal it. And I need to determine if there's some validity to Mr. Bannister's argument that there was some separate contract that somehow would exempt them from the Workers' Compensation schematic.

I need to research that.

But if y'all could provide for me proposed orders within 10 days to djeffersonsc@sccourts.org, and make any appropriate findings of fact and conclusions of law regarding the motion to dismiss. And if you could copy one another on it, that would be helpful. And if you could tell your staff to please send it to that address, because I have a method in my office to make sure nothing falls through the cracks. You know Chanda runs everything. So it goes to her first so she can keep a record and keep me on track.

And then in the meantime, because I am of the perception, and y'all can correct me if I'm wrong, that the protection order really becomes moot either way. If I find there's no subject-matter jurisdiction, then it's resolved. And if I find there is, then y'all will proceed with discovery. And I don't know if that's immediately appealable, interlocutory. I don't know. Either way, I think it becomes moot. And I'm going to do a Form 4 to that extent.

Is there any exception to me handling the motion for protective order in that way?

MR. BANNISTER: No, Your Honor.

THE COURT: If y'all can submit those to me. Ten days would be good because they will still be fresh in my mind and hopefully nothing else will have taken up my brain

matter and I won't have to re-learn it again. But I will start working on it this afternoon.

Thank you. Y'all have a great new year.

(Whereupon, proceedings are adjourned.)

CERTIFICATE OF REPORTER

I, Karen V. Andersen, Registered Merit Reporter, Certified Realtime Reporter for the State of South Carolina at Large, do hereby certify that the foregoing transcript is a true, accurate and complete Transcript of Record of the proceedings.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

----------x

CARY E. FECHTER, M.D.

Plaintiff,

vs.

LEON MARTIN ORTNER,

Defendant.

----------x

Transcript of Record
2017-CP-10-04371

January 27, 2020

B E F O R E:

The Honorable J. Derham Cole, Presiding Judge

A P P E A R A N C E S:

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Attorney for the Plaintiff

Michael Enrico Kozlarek, Esq.
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Attorney for the Defendant

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Digital Courtroom Recorder Project

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E X H I B I T S

(None.)

P R O C E E D I N G S

(Whereupon, the following proceedings started at 2:53 p.m.)

MR. NOVAK: Your Honor, Justin Novak on behalf of Leon Ortner, who is with me today, and Ortner Law Firm, LLC. We have two motions pending before you. The first is a motion for enlargement of time to file a renewed motion to dismiss pursuant to Rule 12 -- or Rule 6(b). The second motion is the renewed motion to dismiss under Rule 12(b)(5). And I'll tell you a little bit about why it's a renewed motion to dismiss as I go through kind of a short history of this case, which I think will show that a pattern of failure to perfect claims and to pursue those claims and to attempt to circumvent the court rules in order to file those claims in different venues.

So this is a case in which Dr. Fechter, who is the plaintiff, is a medical doctor. All the way back in 2002, Dr. Fechter was retained to examine and provide the courts for a potential claim in a series of workers' compensation claims that were being adjudicated and considered by my client and his law firm.

The Rosenthal firm, who is also represented here today, was later associated into that around 2005. The plaintiff essentially alleges that the firms -- that these firms promised to pay him for those evaluations and reports upon settlement or verdict through a letter of protection.

So Dr. Fechter -- it's not contested that Dr. Fechter

received about $25,000 for performing 50 initial reports and evaluations in workers' compensation claims. Those claims were eventually settled back on April 1st, 2014, at mediation. The settlement was later memorialized in an order in the workers' -- before the Workers' Compensation Commission that was entered on July 22nd, 2014.

Now, according to that settlement agreement, $500,000 of the potential claims -- of the funds and settlement proceeds were set aside for approved -- dispersal and approval by the Workers' Compensation Commission. At that time, Dr. Fechter disputed that the $25,000 that he had already been paid was sufficient to cover expenses that he had incurred -- you know, these are all on prosecution of the claims -- in treating and evaluating what he contends was 458 or so potential claimants.

So, as a result, Dr. Fechter was sent and replied to a subpoena regarding these claims. He also provided deposition testimony regarding the substance of his claims to these funds. Afterward -- after all of that, the Rosenthal firm eventually filed a motion before the Workers' Compensation Commission asking for the release of those funds in accordance with the special referees' determinations in that matter of how those costs and fees should be allocated. My client -- that motion was served on Dr. Fechter. Although he was not a party to the workers' compensation action, it was served on him. He had been deposed and replied to the subpoena. My

client filed a response to that motion to release these funds, not claiming any of the funds for them set for his firm, but just seeking specifically an adjudication of the claims that Dr. Fechter was making to the additional funds.

The commissioner found that he was not entitled to anything additionally and other further compensation, and Dr. Fechter did not appeal that in the Workers' Compensation Commission. Instead, he filed a summons and complaint in the circuit court. And so he filed that summons and complaint on August 25th, 2017, more than three years after the settlement itself and the entry of the order in the workers' compensation claim memorializing that settlement.

Now, nevertheless, he filed it in August 25th, 2017. Dr. Fechter delayed in attempting to serve that complaint on my client until December 7th, 2017. No other attempts have been made, so Dr. Fechter essentially argues that he notified my clients of the claims and perfected jurisdiction of this court on December 7, 2017.

The -- and he's never -- there's never been any other attempt to serve. He's never asked us to accept service or to do anything like that, even after we filed our first motion to dismiss on January 8th, 2018, in which we challenged jurisdiction on the grounds that the matter belonged in the Workers' Compensation Commission and that his failure to pursue the claims and administrative remedies in that court

essentially barred him from coming in front of the circuit court.

Now, that motion also challenged jurisdiction under Rule 12(b)(5) on the grounds that Dr. Fechter had notice of the settlement and didn't bring the claim within three years and also that Dr. Fechter failed to effect service on that December 7th, 2017, date.

Now, the -- I would point out that Dr. Fechter's response to our motion, which appears -- which I think was memorialized in his memo recently filed with the Court, essentially, I think, basically, like I said, we waived the service requirement by appearing and by arguing the motion to dismiss, which is clearly not the case from the posture of the case. He points to something where we said that we were provided with a copy of the summons and complaint, which is not sufficient -- sufficient to provide notice of the claims but not, under South Carolina law, sufficient to perfect jurisdiction in accordance with the rules.

Now, I'd also note in our original motion to dismiss, we state that, by restating allegations that were made in the complaint, we're not endorsing the veracity. We're just saying that that's what they say and that we want to hold them -- reserve the right to hold them to the proof of each allegation.

Now, while Judge Jefferson denied our motion to dismiss

on the former grounds, she did not address our motion under the 12(b)(5) grounds. And the reason she didn't do that, in essence, we reserved our -- reserved those grounds because of recognition of the Court that we're going to have to look at affidavits and other matters -- maybe documents -- in order to address the statute of limitations grounds. So, in her order, she notes that we reserve the right to go ahead and address that at a later date.

Now, the original order was appealed, and that appeal was denied. The case was remanded back some time around November 13th, 2019, to the circuit court. My client filed this renewed motion to dismiss on December 19th, 2019. The Rosenthal's firm also had a pending motion to dismiss that was filed back, I think, in May 13th, 2019, so it had been pending for a long time. The reason my client filed the motion for enlargement of time to file the renewed motion to dismiss until the date until which they filed it was that Dr. Fechter filed an affidavit of default. After we filed that motion, he filed an affidavit of default on December 20th, basically saying that we hadn't responded.

We believe that good -- if -- that good cause exists for an extension if it's necessary for the several days or under, I guess, his theory, that we may not have asserted that in time. Also based on, because of the posture of the case, the reservation of this particular motion pursuant to Judge

Jefferson, which we think holds, and the lack of prejudice to any of the parties.

Now, we also believe that Dr. Fechter failed to obtain jurisdiction over my clients, which are an individual attorney and the law firm sued separately. Now -- by failing to effect service within the statute of limitations.

Now, as the Court knows, the purpose of the summons is twofold: First, to acquire jurisdiction over defendant. Secondly, it's to give notice of the action and opportunity to appear and defend.

Now, Dr. Fechter's position is that "Well, we knew about the claim and we filed the motion to dismiss; therefore, we waived the service requirement." South Carolina law, I think, is pretty clear that that's not sufficient to constitute a waiver.

Now, he does not, however, address our argument that he didn't actually perfect service, other than to allege that service was perfected jointly to my clients by a certified mailing that was sent on or about December 7th, 2017.

Now, as the Court knows, under Rule (4)(d)(1), an individual can be served by delivery, personally, of the summons and complaint to him or by leaving this dwelling house with somebody of a certain age or by delivery to an agent who is authorized by appointment or law to receive service of process.

Now, none of that is alleged in this case. Instead, he proceeds under Rule 4(d)(8), which service may also be effected by certified mail, return receipt requested, delivery restricted, to the addressee. Service is effected under that rule on the date of delivery as shown on the return receipt.

Separately, an entity, such as a law firm, an LLC, a limited liability corporation, can be served by delivery to a managing or general agent or any other agent authorized by appointment of law to receive service of process. But it can also -- if you choose not to do that -- and that's not alleged in this case -- it's all by certified mailing on December 7th, 2017.

If the service is made by mail, the return with the receipt or the envelope and any other proof of service shall be promptly filed by the clerk of court with the pleadings. That also didn't happen in this case, in which I'll talk about.

And I'd like to cite one case, which is cited in our brief, which is the *Langley* v. *Graham* case, which I think is pretty effective for us in this. It says, "Service is ineffective where the defendant did not sign the return receipt and delivery was not restricted to the addressee only." And I have copies of that case if the Court would like to see that. But it's -- and it's also the plaintiff's burden to show that service -- personal jurisdiction over the

defendant has been established.

Now, to Lee Ortner individually, because each of the -- he and the entity, as the Court knows, required individual analysis. Plaintiff only attempted to serve Mr. Ortner and the law firm pursuant to what's filed as Exhibit E to my motion, which is in your notebook, and that's this affidavit of service that is executed by Dr. Fechter's attorney, Mr. Bannister. That mailing, as the Court will notice, was sent to 145 King Street, Suite 211. It's not contested that this is not Mr. Ortner's dwelling house or his usual place of abode. There are affidavits in the record that are -- that substantiate these statements, both from Mr. Ortner himself individually, from his law firm, and from Karen Ortner, who is an employee of the law firm.

Although the envelope is addressed to him personally, as the Court will note, he did not accept service of it or sign for the envelope as required by the rule. So there's no question that this certified mailing, which was sent, was not -- was addressed to Mr. Ortner but that's sent to his dwelling house and he didn't sign for it. So that's, on its face, insufficient.

As you'll note, in the record is a copy of the actual green card, which was not filed by Dr. Fechter but was filed by my firm and my client, which shows that it's unexecuted. It's an unexecuted green card in an envelope. So that's not

sufficient to perfect service on Mr. Ortner.

As to the law firm, while the address is the principal place of business for the firm, the envelope does not show any indication that is addressed to the firm. It doesn't have any indication on the outside of the envelope, and a copy is in the record, Your Honor, that it was directed to the law firm, to the law firm's registered agent, to any -- or indicated that there is service of process inside of it. It was also not delivered to an officer, managing or general agent, or any agent authorized by appointment to receive service of process on behalf of the firm. It happened, instead, to be picked up by Karen Ortner, who works at the firm. She is not a receptionist, as you'll see from the affidavit. She's essentially a bookkeeper, firm administrative type who sits in the back office. She just happened to pick up the mail that day.

So, moreover, in addition to all of this, there's no record of any signature on the envelope or the green card in this case. And, secondly, Dr. Fechter failed to file the receipt and the envelope with the Court in accordance with Rule 4(g). In fact, we filed it eventually. He only filed his own lawyer's affidavit over a year after the alleged service. Now, I think we can all agree that that is not timely, Your Honor, to comply with the Rule 4(g).

So it's very straightforward here, Your Honor. There has

been no perfection of service or jurisdiction on either my client, the individual, or Ortner Law Firm, LLC. We would, therefore, ask that the complaint be dismissed. Thank you, Your Honor.

THE COURT: Mr. Bannister?

MR. BANNISTER: Yes, sir. Do you wish to hear from me now or do you want to hear Mr. Kozlarek's motion first?

THE COURT: Do I have yours too?

MR. KOZLAREK: Yes, Your Honor, you do.

THE COURT: Okay. Go ahead. We'll do yours.

MR. KOZLAREK: Thank you, Your Honor. If I may, I'm going to hand you a single sheet of paper. This is a copy of the green card. That was attached to a reply that was filed by Dr. Fechter's attorney in response to the Ortners' original motion to dismiss. Excuse me; I'm getting over a little bit of a sinus infection.

It is also attached to my motion to dismiss as part of Exhibit B, so it is the same document. You have already heard a fairly good recitation of the facts in this case and also a good recitation of the law, and so I will keep this again even more brief than Mr. Ortner's attorney was able to do.

As with Mr. Ortner, there are two potential defendants that I represent: Mr. Rosenthal individually, who is an attorney, who resides and practices in Florida, and the law firm of which he was formerly a member, Rosenthal Levy Simon &

Riley.

As with Mr. Ortner and the Ortner Law Firm, Mr. Rosenthal -- excuse me, Dr. Fechter attempted to perfect service on Mr. Rosenthal and apparently the law firm by sending a certified letter, return receipt requested. First, I'm going to add one thing to this that's slightly different than Ortner's motion and that is that those are both -- both of my putative defendants are Florida residents. They are not South Carolina residents. As a result, my first argument is that they should have been served according to Florida law, not South Carolina law, because they are not defendants in this state. And this is, of course, cited in our memo in support.

Under Florida law, they are required to be served personally by either a sheriff or a process server that is designated by the sheriff. Again, there is nothing before the Court that even alleges that that was attempted. The only alleged attempt to serve process was through the certified mail. A copy of the green card, Your Honor, is seated in front of you.

So let's look at the green card. As with Mr. Ortner, the only indication on the green card is it's addressed individually to Jared Rosenthal, Esquire. There is no mention, whatsoever, of the law firm itself.

So, on the face of the green card, this is simply

insufficient service of process against the entity who is the other putative defendant in the case. We can stop with the analysis at that point. It doesn't even say it's addressed to the law firm. It is simply addressed to an individual. Period.

As to the individual defendant, Mr. Rosenthal, again, it is uncontested that the address to which this was sent is not Mr. Rosenthal's dwelling place or usual place of abode. It is, in fact, the law firm address. So what it appears to have happened -- and I'm speculating, but what appears to have happened is that Dr. Fechter attempted to effect service on both of them at the same time by sending one service of process that was effective against neither of them.

Who signed for this letter? Mr. Ed Elder. Note that it is restricted delivery, as required by the rule, but the person who signed for it is not the person to whom it was addressed. So the plaintiff bears the burden of proving that the person who signed for it was, in fact, the personal agent -- remember, this is addressed to the individual -- must prove that it was the personal agent of Mr. Rosenthal.

There are two affidavits attached to our motion -- one for Mr. Rosenthal and one for Mr. Elder -- that unequivocally established that, at no point, has Mr. Elder ever served as an agent of any kind for the individual, Mr. Rosenthal. Again, leaving aside the law firm, because it's not even addressed to

the law firm, this is even a simpler motion to dismiss on simply the service of process, as Mr. Ortner's attorney's pointed out, which, in fact, then, turns into a problem of jurisdiction. Because there's no effective service, this Court does not have personal jurisdiction over either of those defendants, and the case has to be dismissed.

I'm going to go one step further. In our motion, we note that this dismissal should not only be a dismissal, but it should be a dismissal with prejudice. And why is that? As Mr. Ortner's attorney pointed out, the claims at most were known to Dr. Fechter at a point that was more than three years from today's date. In fact, if you look -- and I apologize; I do not have a copy of this but it is attached as part of an exhibit as part of our motion -- there was an affidavit filed by Dr. Fechter, again, as part of the response to the Ortner's original motion to dismiss. And in that affidavit, in paragraphs 14, 15, 40, and 49, "Dr. Fechter swears under oath the defendant's promise to pay and protect the plaintiff's fees" -- excuse me -- "and that he would be paid in full upon settlement or verdict in the cases, the plaintiff is informed and believes the case matters were resolved on January 26, 2016," four years and a day ago today. That's 14 and 15.

And on paragraph 40, "The plaintiff was not informed of any settlement of workers' compensation claims before the special referee approval or the special referees report by

Commissioner Iasha Taylor, motion of the Rosenthal defendants to Commissioner Taylor, until January 26, 2016."

And then paragraph 49, "When informed to the order to release funds thereby disposing of all of the workers' compensation claimant's cases on or about January 26, 2016, the plaintiff continued to seek payment from the defendants to no avail."

At the latest, Dr. Fechter knew that he has a cause of action, complains that he has a cause of action four years and a day from today. There is no way that under any of the claims that he has in this case -- he has more than a three-year statute of limitations, the case law is clear, the statutes are clear. As a result, when the Court dismisses this action, it should be a final dismissal so this can be over.

I'm happy to respond to any questions the Court has, and, obviously, I'd like the opportunity to respond to anything that Dr. Fechter may present.

THE COURT: Mr. Bannister?

MR. BANNISTER: Your Honor, as counsel for the Rosenthal defendants has just stated, Mr. Fechter was informed on January the 26th of 2016 that the cases which the attorneys were representing the work -- before the workers' comp were finally disposed of. So the pleadings were served by certified mail to the Ortner firm on December the 7th of 2017,

well within the three-year statute of limitations from January the 26th of 2016. And in particular, I call to the Court's attention, in the original motion filed by Mr. Novak on behalf of the Ortner defendants, it says, "Did not provide the Ortner defendants with a copy until on or about December 7th, 2017."

So the attorney for the Ortner defendants recognizes that his clients have received a copy of the pleadings on December 7th of 2017. As Mr. Novak pointed out, this motion was filed with this Court on January the 8th, 2018. From that, the Ortner defendants filed a motion to dismiss, and the attorney for the defendants argued that it should be dismissed not only based upon the three-year statute of limitations but also upon the other grounds that they argued that it should be dismissed because it should be held before the Workers' Compensation Commission, having exhausted remedies and different defenses to the complaint. Judge Jefferson denied their motion to dismiss. They filed a motion for reconsideration, which Judge Jefferson denied on that. And then the Ortner defendants filed an appeal with the Court of Appeals.

After the defendants -- Ortner defendants filed their appeal with the Court of Appeals, the Rosenthal defendants informed the Court, which I attached a copy of the letter to my memorandum in opposition, to their motion to dismiss where, basically, the Rosenthal defendants agreed that the original motion by the Ortner defendants should have been granted by

Judge Jefferson and, basically, they then voluntarily appeared in this matter, and because they voluntarily appeared, they should be held responsible also on this complaint.

There are a couple of cases that I would call the Court's attention to. One is Hawkins vs. The State of South Carolina. Oh, I'm sorry. It's *Unisom vs. Hawkins*, 537 S.E.2d 559. That was a South Carolina Court of Appeals in 2000 where the Court held that substantial justice should be done for both plaintiff and defendant, and also deals with the waiver by the defendants of failing to object at the appropriate time of the service and also, basically, waived their rights to then claim the process wasn't sufficient. The other case that I would cite to you, *Stearns Bank National Association vs. Glenwood Falls*, 644 S.E.2d 793, a Court of Appeals decision in 2007. And that deals with the voluntary appearance by the defendants in actions. Based upon these cases, we should be allowed to proceed with a trial in this matter.

The defendants have argued that, basically, rules -- civil rules 4 and 5 deal with service -- and they certainly do -- but the reason for those rules is to make sure the defendants receive a copy of the pleadings. And they have appeared and argued against the complaint, so we feel they certainly have had service and, in addition to that, obviously, they have filed affidavits, and at the time that I filed the memorandum, I also filed a motion to compel

discovery so that depositions could be taken of the individuals who have signed affidavits in support of the defendant's motions. I would request that this Court keep the record open until I can depose those affiants. Thank you, Your Honor.

THE COURT: Mr. Novak?

MR. NOVAK: Just briefly, Your Honor. I would just point the Court's attention to a case called *White Oak Manor, Inc., v. Lexington Insurance Company*, 407 S.C. 1, 753 S.C.2d 537, which is a 2014 Supreme Court case. The purposes of this summons is twofold: One of those is to give notice of the action and opportunity to defend -- appear and defend; the other is to acquire jurisdiction. I would point the Court's attention to that. Thank you, Your Honor.

THE COURT: Mr. Kozlarek?

MR. KOZLAREK: Thank you, Your Honor.

Very, very quickly. In reference to the letter that I sent to the Court of Appeals, in reference to the first sentence -- and I don't have it in front of me but I wrote it -- the first sentence specifically says, "We are not defendants in the underlying action. We have a motion pending to dismiss." So anything after that, I'm not sure why Dr. Fechter thinks that's particularly material, because it was clear that our position was we don't belong here at all, but we certainly support the idea because we would be

defendants if we ended up not having our motion to dismiss granted, and therefore, we think the case should have been heard by the Court of Appeals and ultimately dismissed, Judge Jefferson having been reversed.

If appearing in a case is waiver of service of process, then there are at least two Rules of Civil Procedure that are superfluous, because, otherwise, why have them? The point is, we can appear, we can object and ask the Court to rule on the issue of insufficiency of the process itself and the insufficiency of the service of that process and the underlying personal jurisdiction that is lacking because either/or both of them. That is simply what we have done.

All four of the putative defendants have raised those issues as are permitted. That cannot be a waiver of the service of the process or the personal jurisdiction under this Court.

And the last thing I'm going to suggest to the Court is, if the Court is inclined to permit depositions to move forward, particularly with out-of-state defendants, then I'm going to ask the Court to allow us to depose Mr. Bannister because Mr. Bannister is the only person for the plaintiff who is sworn to any of the information that relates to the service as far as the plaintiff's prima facie case goes. So I will certainly have some questions for him as the person who has signed an affidavit on behalf of the plaintiff as opposed to

the plaintiff himself because that appears to be the argument that Mr. Banner wants to put forward -- Mr. Bannister wants to put forward, is that, somehow, there's something nefarious going on behind any of the affidavits that have been executed by either of our defense of the putative defendants. And I simply don't think that, in a case like this where the Court can look at the face of the document that purports to effect service in this case as it relates to my putative defendants, the green card, and it is not addressed to the law firm and it is not addressed to the individual to whom it is addressed at a place of normal dwelling or abode. There is simply nothing to look behind. There is no nefarious activity going on. The plaintiff simply didn't serve process in the proper manner, and the statute of limitations has run. Thank you.

THE COURT: I'll review it and issue an order.

MR. BANNISTER: Thank you, Your Honor.

MR. NOVAK: Thank you, Your Honor.

DR. FECHTER: Sir, am I not allowed to correct some of the things they said? Or is that at a later date?

THE COURT: Sir?

DR. FECHTER: If their facts are not correct and dates, times, fees, how do I approach that, when they told you things that are not accurate?

THE COURT: Your lawyer will have to address that.

DR. FECHTER: So we could still respond to you at a later

DR. FECHTER: Okay. Because justice should be part of this proceeding.

THE COURT: Oh, I understand.

DR. FECHTER: Okay.

THE COURT: That's why we have rules.

DR. FECHTER: Thank you very much.

THE COURT: All right.

MR. NOVAK: Thank you, Your Honor.

MR. KOZLAREK: Thank you, Your Honor.

(The above proceeding concluded at 3:30 p.m.)

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 IV*)

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I, Stephen P. Groves, Sr., Esquire, hereby certify, pursuant to Rule 210(g), SCACR, that this **Record on Appeal** (***Volume IV***) contains all of the material and documentation proposed to be included by any of the parties and not any other material.

RECEIVED
May 18 2022
SC Court of Appeals

Signed: _____
Stephen P. Groves, Sr., Esquire

Charleston, South Carolina

18 May 2022

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