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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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

Appellate Case No.: 2021-000446

CARY E. FECHTER, M.D.,

Appellant,

vs.

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

Respondents.

BRIEF OF THE APPELLANT, CARY E. FECHTER, M.D.

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II. STATEMENT OF THE CASE

On 25 August 2017, the Appellant, Cary E. Fechter, M.D. ("Dr. Fechter"), sued both the Respondents, Leon Martin Ortner and The Ortner Law Firm LLC (the "Ortner Respondents"), as well as the Respondents, Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles (the "Rosenthal Respondents"). (App.8, 20, 87; App.210, para. 3; App.255). Dr. Fechter asserted claims for *breach of contract* (App.8, 19; App.81-83, paras. 3-21; App.174-176, paras. 2, 8, 11-18), *fraud* (App.8, 19, App.84, paras. 22-30; App.176-177, paras. 22-28), *breach of contract with fraudulent intent* (App.8, 19; App.81-83, 85 paras. 3-17, 32-34; App.178, paras. 29-31), *unfair trade practice violations*[1] (App. 8, 19; App.81-83, 85 paras. 3-17, 36-38; App.178, paras. 32-34), and *pre-judgment interest*. (App.8, 19; App.81-83, 85, paras. 3-17, 40; App.178, para. 35).

Dr. Fechter served the Ortner Respondents through the U.S. Postal Service (certified mail, return receipt requested) and by "leaving . . copies of the [pleadings] with [the Ortner Respondents] at 145 King Street, Ste. 211, Charleston, S[outh] C[arolina]. (App.8, 11-12; App.172; App.173).[2] Similarly, Dr. Fechter served the Rosenthal Respondents, also via the U.S. Postal Service (certified mail, restricted delivery), by "leaving . . . copies of the [pleadings] with [the Rosenthal Respondents] at 1401 Forum Way, Sixth Floor, West Palm Beach, Florida. (App.20-22; App. 168-171; App.253-254).[3]

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[1] *See* South Carolina Unfair Trade Practices Act as codified in S.C. Code Ann. §§ 39-5-10 *et seq.* (Thomson Reuters West 2020). *See generally* Woodson v. DLI Properties, LLC, 406 S.C. 517, 753 S.E.2d 428 (2014); S.C. Nal't Bank v. Silks, 295 S.C.107, 367 S.E.2d 421 (Ct.App. 1988).

[2] This is the address which the Ortner Respondents use on their website. *See https://www.ortnerlawfirm.com/*. (Last viewed on 23 May 2022).

[3] This is the address which the Rosenthal Respondents use on their website. *See https://www.rosenthallevy.com/*. (Last viewed on 23 May 2022). The Rosenthal Respondents are now known as Rosenthal, Levy, Simon & Sosa.

Instead of filing an *Answer*, the Ortner Respondents moved to dismiss Dr. Fechter's action (App.9)[4] arguing as follows: (a) the Circuit Court did not have subject matter jurisdiction (App.91-93), (b) Dr. Fechter failed to exhaust his administrative remedies (App.93-95), (c) the claims were barred by waiver. collateral estoppel, laches, *res judicata*, *etc.* (App.95-99), (d) there was insufficient service of process (App.90, 100-101), and (e) that the SCUPTA claim failed to allege facts sufficient to constitute a cause of action. (App.101-103). Dr. Fechter responded in opposition. (App.172-173, App.174-184). By order dated 5 April 2019, the Hon. Deadra L. Jefferson, denied the Ortner Respondents' motion (App.9, App.41-55), and the reconsideration motion. (App.39-40).[5]

On 14 May 2019, the Rosenthal Respondents, also declining to file an *Answer*, similarly moved to dismiss Dr. Fechter's Complaint. (App.18; App.209-223).[6] The Rosenthal Respondents argued that (a) Dr. Fechter had failed to properly serve either of the Rosenthal Respondents (App.23; App.215-219, 221) and (b) the Circuit Court did not have subject matter jurisdiction to consider Dr. Fechter's claims. (App.214-215, 219-221). In concert, on 19 December 2019, the Ortner Respondents renewed their previously denied *Motion to Dismiss*, arguing that Dr. Fechter "failed to effect service of the Summons and Complaint within the statute of limitations."[7] (App.9, 13; App.255). Dr. Fechter again opposed each motion. (App.168-171).

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[4] *See* Rules 12(b)(1), (3), (5)-(6), SCRCivP. (App. 9).

[5] The Ortner Respondents appealed Judge Jefferson's decision to this Court of Appeals on 22 July 2019. (App. 9). This Court of Appeals, by order dated 25 October 2019, ultimately dismissed the appeal as involving an issue which was not immediately appealable. (App. 9).

[6] *See* Rules 12(b)(1)-(2), (4)-(5), SCRCivP. (App. 209, 214).

[7] *See* Rule 12(b)(5), SCRCivP. (App. 9).

The Hon. J. Derham Cole held a hearing on 27 January 2020, to consider both the Ortner Respondents' and the Rosenthal Respondents' respective pending motions. (App.6, 18; App.721-742). Judge Cole took the matters under advisement (App.741) and, by form order dated 5 February 2020, granted both. (App.36-38).[8]

By written order filed 8 June 2020, Judge Cole granted the Rosenthal Respondents' dismissal motion. (App.18-32). By written order filed 4 August 2020, Judge Cole correspondingly granted the Ortner Respondents' dismissal motion. (App.6-15). Dr. Fechter sought reconsideration of both dismissal orders. (App.341-360; App.537-549). The Circuit Court, by Form 4 order dated 30 March 2021, denied reconsideration in both cases. (App.1). This appeal followed. (App.683).

III. STATEMENT OF THE FACTS

A. Dr. Fechter Is Retained by The Respondents

Sometime in 2005, a number of individual employee claimants (the "Nevamar Claimants") retained the Ortner Respondents to represent them in a worker's compensation action against their employers - International Paper Company ("IPC") and Nevamar Company, LLC ("Nevamar").[9] (App.30, 43, 58, 75, 286, 390). The Nevamar Claimants asserted they "may have been exposed to toxic chemicals while working at the

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[8] Judge Cole noted that "[c]ounsel for the Defendants [we]re requested to prepare and submit a proposed order for the [Circuit] [C]ourt's consideration." (App.36).

[9] In addition to IPC and Nevamar, both IPC and Ace American Ins., Co. were also named in the workers' compensation action as the insurers for IPC (apparently self-insured) and Nevamar. These parties will collectively be referred to as "Nevamar". "Nevamar is the brand name for durable, high performance, high pressure laminates [which] is the surface solution of choice for high-use applications on surfaces in hospitals, stores, hotels, offices, lobbies, restaurants, and educational institutions." *See generally* *https://distributorserviceinc.com/DSI-Nevamar-Laminates.html* (last viewed on 24 May 2022). Nevamar is a member of Panolam Surface Systems. *See generally* https://panolam.com/nevamar/ (last viewed on 24 May 2022).

Nevamar plant in Hampton County, South Carolina."[10] (App.30, 58, 131). Sometime around October 2005, the Ortner Respondents[11] retained Dr. Fechter to perform independent medical examinations ("IME") of and issue independent medical evaluation reports on the various Nevamar Claimants. (App.7, 19, 43, 59; App.81-82, para. 5; App.131-132; App.145, para. 10; App.175, paras. 2-3). Dr. Fechter was to be paid $500.00 per Nevamar Claimant for the initial IME and evaluation report (App.59; App.82, para. 7; App.132; App.145, para. 10), as well as additional sums for subsequent medical examinations and/or evaluation reports. (App.7, 19, 43, 59; App.82, para. 7; App.174-175, para. 4).[12]

B. The Scope Of Dr. Fechter's Retention

In addition to the initial (and potentially subsequent) IMEs of the Nevamar Claimants, Dr. Fechter asserted the Ortner Respondents and the Rosenthal Respondents also agreed to pay him for, among other medical procedures, pulmonary function tests, stress tests, sleep study examinations, as well as for medical treatment not included within the Nevamar Claimants' health insurance coverage. (App.7, 19, 43, 59; App.82, para. 8; App.150-152; App.157, line 2 – App.158, line 23; App.175, paras. 5, 12-13) The Rosenthal Respondents affirmed the Ortner Respondents' agreement with Dr. Fechter to pay him for all rendered medical services associated with the Nevamar Claimants.

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[10] Nevamar previously operated a production facility in Hampton, South Carolina, but it was closed due to Nevamar's decision to consolidate production in another facility elsewhere. *See generally* https://www.wtoc.com/story/26341332/nevamar-to-close-plant-in-hampton-county/ (last viewed on 28 May 2022).

[11] The Ortner Respondents later associated the Rosenthal Respondents in 2006 to assist in representing the Nevamar Claimants. (App.7, 30, 43, 131; App.144,, paras. 5-6; App. 175, para. 6).

[12] Dr. Fechter was supposed to be paid $150.00 for performing a second IME and report and $100.00 for a third IME and report. (App.81-82, para. 5; App.135 fn.1; App.174-175, para. 4).

(App.7, 43; App.82, para. 11; App.145, para. 10; App.150-152; App.158, lines 1-23). In fact, the Rosenthal Respondents paid Dr. Fechter an initial $25,000.00 retainer for the first 50 Nevamar Claimants chosen from the pool of potentially several hundred possible claimants. (App.19, 44, 59; App.82, para. 12; App.107, 132, 135, 141; App.145, para. 11; App.175, para. 9).[13] When Dr. Fechter submitted his invoices for payment of the IMEs, evaluation reports, *etc*. (App.19) he would, in return, receive a standard response letter from the Ortner Respondents (to which the Rosenthal Respondents later acquiesced) advising Dr. Fechter that he should "[p]lease be advised that [his medical] fee w[ould] be protected in this matter and that [he] w[ould] be paid in full upon settlement or verdict in th[e] [Nevamar Claimants' workers' compensation litigation]." (App.44; 58-59; App.83, para. 16; App. 106-107; App.176, para. 14; App.204). The Ortner Respondents or the Rosenthal Respondents sent Dr. Fechter a copy of the standard fee protection letter for each Nevamar Claimants he treated. (App.178, para. 36; App.204).

C. Dr. Fechter's Medical Services Billing Dispute

In 2010, Dr. Fechter invoiced the Rosenthal Respondents for the extensive medical services he had performed on a significant number of the Nevamar Claimants - which medical fees and expenses were well in excess of the original $25,000.00 retainer paid to him by the Rosenthal Respondents. (App.19, 59, 107, 132; App.145, para. 13; App.175-176, paras. 11-18; App.410; App.424, para. 13). This included uninsured medical fees, costs, and expenses for medical treatment which Dr. Fechter provided to many of the Nevamar Claimants, as well as for "initial examinations [performed] and initial

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[13] Once the Ortner Respondents associated the Rosenthal Respondents into the workers' compensation litigation, the latter group assumed the full responsibility of seeing that Dr. Fechter was paid for the medical and other services he provided to the Nevamar Claimants. (App.59; App.92, paras. 9-10; App.107, 152).

reports [prepared for] approximately [458] of the [Nevamar Claimants, together with] numerous subsequent examinations and reports on [many of] the [same Nevamar Claimants]." (App.83, paras., 13-15; App.132; App.145, para. 13; App.154, line 11 – App.158, lines 1-23; App.175, paras. 10-13). The Rosenthal Respondents disputed any payment responsibility to Dr. Fechter. (App.83, para. 18; App.135-141).[14]

In specific response, the Rosenthal Respondents sent Dr. Fechter a letter dated 28 October 2010, challenging the validity of his medical services invoicing (App.132) and asserting (a) one of the designated/lister patients was not a Rosenthal Respondents' client, (b) Dr. Fechter, in fact, owed the Rosenthal Respondents some $5,150.00,[15] and (c) the Rosenthal Respondents never had any agreement to pay for uninsured medical procedures, co-pays, deductibles, *etc*. (App.61-64; App.145, para. 13; App.147).

D. The South Carolina Workers' Compensation Commission Addresses Dr. Fechter's Medical Services Billing Dispute

On 1 April 2014,[16] the Nevamar Claimants globally settled their collective workers' compensation claims against Nevamar. (App.7, 75-79;133).[17] As part of the settlement,

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[14] The Ortner Respondents did not take a position as to the validity of Dr. Fechter's demand for any additional medical fee payments. (App.149-150, 152). Once the Rosenthal Respondents entered the Nevamar Claimants' workers' compensation litigation they agreed to be responsible for the payment of all litigation expenses. (App.149-150, 152).

[15] Dr. Fechter's alleged "debt" to the Rosenthal Respondents was based on the Rosenthal Respondents' assertion that Dr. Fechter had treated only 39 of the chosen 50 test Nevamar Claimants. (App.59, 132, 135-136; App.145, paras. 10-12). At $500.00 per patient for 39 patients equaled $19,500.00, thereby "justifying" the Rosenthal Respondents' claims for reimbursement.

[16] By 26 January 2016, "all workers' compensation cases underlying [Dr. Fechter's] causes of action against [the] Rosenthal [Respondents and the Ortner Respondents had been] resolved . . . ." (App.20, 23; App.83, para. 17). As of that date the necessary settlement documents had been executed and he settlement funds had been distributed. (App.20, 23; App.83, para. 17; App.176, para. 15).

[17] In 2014 Dr. Fechter reiterated his additional funds claim once the Nevamar Claimants had globally settled their claims. (App.7-7, 132).

Nevamar deposited the total amount of the agreed-upon settlement funds into a special financial account administered by a court-appointed special referee (App.57, 69; App.76, para. 5),[18] to include allocation of attorney's fees and costs. (App.7; App.76, para. 5).[19] Ultimately, the Special Referee held back $500,000.00 of the settlement funds for the possible payment of approved litigation costs associated with the SCWCC litigation. (App.58; App.69-70, para. 1.b.; App.71, para 3.a.).[20] The SCWCC, however, had to approve distribution of those funds. (App.58; App.71, para. 3.a.).

On 18 November 2015, the Rosenthal Respondents requested the SCWCC to release the Special Referee's mandated remaining $500,000.00 held-back settlement funds. (App.58, 131-143). The Rosenthal Respondents argued: (a) the SCWCC had jurisdiction to decide Dr. Fechter's dispute additional payment claims, (b) Dr. Fechter had no legitimate and/or legal claim to any additional payments as he had - (i) no contractual agreement with the Rosenthal Respondents, (ii) unilaterally chosen to provide other types of medical services to many of the Nevamar Claimants, and (iii) already been paid for the medical service rendered, and, in any case, (c) the equities favored the Rosenthal Respondents. (App.58, 60-64, 106, 108-112, 133-142). In concert, the Ortner Respondents joined in and/or with the Rosenthal Respondents' release of funds motion (App.57, 149-153), albeit only to the extent that the SCWCC was being asked "to inquire

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[18] The Special Referee determined if an individual Nevamar Claimant was entitled to workers' compensation benefits and, if so, in what amount. (App.76, para. 5).

[19] The SCWCC had to and did approve the Special Referee's proposed distribution of the attorney's fees and costs. (App.57, 66-68; App.76, para. 5).

[20] The Special Referee was tasked with reviewing, among other things, the parties' "submitted expert opinions and medical reports . . . ." (App.70, paras. 2.a.-2.c.). Such documentation would necessarily have included Dr. Fechter's expert opinions and medical reports.

into Dr. Fechter's . . . entitlement to payment for professional services rendered [and] determin[e] the right of all concerned parties [and to ultimately] direct[ ] the disbursement of funds [still] being held in trust." (App.149).[21]

The SCWCC concluded that it had proper jurisdiction to address the appropriate disbursement of the remaining $500,000.00 in held-back settlement funds. (App.7-8, 57-58, 60-64, 106-107, 108-112). More importantly, the SCWCC concluded it had subject matter jurisdiction to determine the validity and legitimacy of Dr. Fechter's payments claim for additional medical and other services to the Nevamar Claimants. (App.7-8, 57-58, 60-64, 106-107, 108-112).[22] The SCWCC found Dr. Fechter had failed to demonstrate both a contractual right to any additional payments, as well as to specify the actual amount of requested additional sums. (App.60, 108). Furthermore, the SCWCC found Dr. Fechter had no documentation to support his contractual claims other than the various letters of protection from the Ortner Respondents promising to protect payment of his incurred fees (App.204) and that those letters were insufficient to support his claim for payment of additional fees. (App.62, 110). Moreover, the SCWCC found that Dr. Fechter had "received payments [for provided medical services] from his [Nevamar Claimant] patients'

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21 The SCWCC noted that "[n]o other persons made any submissions [relating to the $500,000.00 in held-back funds]." (App.57). While the SCWCC was correct that Dr. Fechter did not make any submission, the SCWCC ignored its own rules in intimating that Dr. Fechter's submission failure was somehow material to its decision. Dr. Fechter, not being a party to the matter, was not authorized to participate in the litigation. *See generally* S.C. Code Ann. Regs. 67-215 (Thomson Reuters West 2016) (Authorizing only a party to file motions).

22 The SCWCC concluded that while Dr. Fechter had been "served with the Motion [for Release of Funds] and [the Ortner] Reply . . ., he h[ad] filed no response or otherwise made any submission to the [SCWCC] in opposition . . . ." (App.60, 108). The SCWCC did not, however, cite to any submitted documentation which demonstrated or even inferred that Dr. Fechter had been afforded the opportunity to oppose the Rosenthal Respondents' request for release of the held-back sums.

insurance companies, Medicare, and other third-party sources and, therefore, [any] remaining payment responsibility, if any, [wa]s not with [the Rosenthal Respondents]." (App.63, 111). The SCWCC ultimately released the entire $500,000.00 to the Rosenthal Respondents without any payment allocation of funds whatsoever to Dr. Fechter. (App.64, 112).

IV. ARGUMENT AND CITATION OF AUTHORITY

Standard Of Review

"In reviewing a motion to dismiss, [our courts] appl[y] the same standard of review as the trial court."[23] " 'If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to [Dr. Fechter], would entitle [him] to relief on any theory,' dismissal is improper."[24] "When[, however,] the trial court considers matters outside the pleadings, the motion to dismiss is converted to one for summary judgment" and disposed of via Rule 56, *SCRCivP*.[25] "Summary judgment is appropriate [only] when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue as to any material fact such that [the Ortner Respondents and the Rosenthal Respondents] must prevail as a matter of law."[26] The " 'standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of [Dr. Fechter]

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[23] Carolina Park Associates, LLC v. Marino, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012) (*citing* Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)) (*per curiam*).

[24] Carolina Park Associates, LLC v. Marino, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (*citing* Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247).

[25] U.S. Bank Nat'l Ass'n v. Burr, 2015 WL 793051, *1 (S.C.App., filed 25 Feb. 2015) (*citing* Gilbert v. Miller, 356 S.C. 25, 27, 586 S.E.2d 861, 862 (Ct.App. 2003)).

[26] Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) (*citing* Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002) (citation omitted in original); Rule 56(c), SCRCivP).

and give [him] the benefit of all favorable inferences that might reasonably be drawn therefrom.' "[27] "Summary judgment should be denied where[, as here, Dr. Fechter has] submit[ted] a mere scintilla of evidence."[28]

A. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID NOT HAVE SUBJECT MATTER JURISDICTION TO CONSIDER AND/OR ADJUDICATE THE LEGITIMACY AND/OR VALIDITY OF DR. FECHTER'S VARIOUS COMMON LAW CLAIMS AGAINST THE ORTNER RESPONDENTS AND/OR THE ROSENTHAL RESPONDENTS.

Both the Ortner Respondents and the Rosenthal Respondents moved to dismiss Dr. Fechter's Complaint, in part, based on the contention that the SCWCC had already addressed and adjudicated Dr. Fechter's claims that he was entitled to additional payments for rendered medical services. (App.29-31, 87, 91-99, 209, 219-220). In fact, the Circuit Court found that the SCWCC had already "ordered the release of the [$500,000.00] held in trust to satisfy the costs incurred in the prosecution of the [Nevamar Claimants'] claims, including the expenses associated with the evaluation or treatment of th[ose] [litigants]." (App.7-8).[29] Moreover, the Circuit Court concluded the SCWCC had "properly exercised, exclusive, original jurisdiction over the subject matter of the causes of action asserted in [Dr. Fechter's] Complaint [involving] the approval and disbursement of costs incurred in prosecuting workers' compensation claims . . . ." (App.31).

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[27] Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C., 388, 390-391, 631 S.E.2d 915, 916 (Ct.App. 2006) (*quoting* Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct.App. 1991)).

[28] Zurich Amer. Ins. Co. v. Tolbert, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010) (*citing* Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801 (2009)).

[29] The Circuit Court further noted that the SCWCC had "the authority to determine all questions relating to workers' compensation claim, including the approval and disbursement of costs incurred in the prosecution of those claims." (App.30-31) (*quoting* S.C. Code Ann. § 42-3-180 (Thomson Reuters West 2001); S.C. Code Ann. Regs. § 67-1206 (Thomson Reuters West 2001)).

Consequently, in light of the SCWCC's actions, the Circuit Court concluded that it "ha[d] been divested of [subject matter] jurisdiction to hear and determine the claims [for additional payments] asserted] by Dr. Fechter] in [his] Complaint." (App.31).

Unfortunately for the SCWCC, the Ortner Respondents, and the Rosenthal Respondents, the SCWCC was incorrect as the SCWCC ***lacked*** subject matter jurisdiction or any jurisdiction whatsoever, to adjudicate Dr. Fechter's additional payment claims against the Ortner Respondents and the Rosenthal Respondents. Any conclusion of such must be reversed in all respects and this matter remanded to the Circuit Court for further proceedings.

1. When The SCWCC Considered And Adjudicated Dr. Fechter's Additional Fees Claims The SCWCC Had Already Relinquished Its Jurisdiction Over The Relevant Aspects Of The Nevamar Claimants' Worker's Compensation Litigation.

The SCWCC did not have any subject matter jurisdiction whatsoever to address Dr. Fechter's additional payment claims as a result of the SCWCC's very own actions. (App.66-68). On 10 December 2015, the SCWCC issued an order directing that "[a]ll cases/claims included in the *Initial Special Referee's Report* dated November 13, 2015 are ***hereby dismissed with prejudice***, with the exception of any claims involving death benefits." (App.67, p.2, para. 4) (Emphasis added). The *Special Referee's Initial Report*, dated 13 November 2015, stated that the "Special Referee [wa]s [then] holding in trust [$500,000.00] in approved costs . . .pending instructions from the claimants' attorneys final disbursement of those funds or an order from the [SCWCC]." (App.69-70, para. 1.b.). There has been no evidence presented to show that any of Dr. Fechter's additional fees claim involved any death benefits and, therefore, as far as Dr. Fechter's claims were

concerned the litigation had ended as of 10 December 2015. Even though the SCWCC's decision on that date specifically adopted the *Special Referee's Initial Report*, which clearly addressed disposition of the $500,000.00 in held-back funds (App.67, para. 2), the SCWCC's order ***did not reserve nor otherwise carve out*** the issue of the SCWCC later having the need to address the proper dispersal and distribution of those same $500,000.00 in held-back funds. (App.66-68). On 26 January 2016, when the SCWCC ultimately addressed Dr. Fechter's claim for additional medical fees, there were no workers' compensation claims of any of the Nevamar Claimants' then still pending before the SCWCC. All of those claims, other than death benefit claim not relevant here, had been dismissed with prejudice over six weeks before. (App.67, para. 4).

In this type of situation, the South Carolina Supreme Court stated in *Labouseur v. Harleysville Mut. Ins. Co.*, as follows:

> we adopt the approach of other jurisdictions and hold 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 [South Carolina] Workers' Compensation Commission. On the other hand, ***when there exists no pending employee claim for compensation, the [SCWCC] lacks the jurisdiction to decide such questions***.[30]

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[30] Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 543-544, 397 S.E.2d 526, 528 (1990) (*citing* Clark v. Gastonia Ice Cream Co., 261 N.C. 234, 134 S.E.2d 354 (1964); State Compensation Ins. Fund v. Industrial Accident Comm'n, 20 Cal.2d 264, 125 P.2d 42 (1942); Thompson v. Liberty Nat. Ins. Co., 78 Idaho 381, 304 P.2d 910 (1956); 4 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law, § 92.42 (West 1987)) (Emphasis added).

Furthermore, in *South Carolina Prop. & Cas. Ins. Guaranty Ass'n v. Wal-Mart Stores, Inc.*, the Supreme Court declined to find that the SCWCC had exclusive jurisdiction to address certain insurance coverage issues involving an insolvent workers' compensation insurance carrier.[31] The Supreme Court recognized that "the claims for thirteen [of the 36 involved] employees have been determined by the [SCWCC] and benefits have been paid [and those] claims are therefore no longer pending."[32] Consequently, the Supreme Court concluded that "the issues raised by Guaranty {Association] [we]re not ancillary to any matter ***currently being decided*** by the [SCWCC] and therefore the issues [we]re not within the [SCWCC's] exclusive jurisdiction . . . ."[33]

In *Limehouse v. Hulsey*, the Supreme Court acknowledged that:

> Jurisdiction is generally defined as 'the authority to decide a given case one way or the other. 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.'[34]

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[31] S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 211-214, 403 S.E.2d 625, 626-627 (1991).

[32] S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 21, 403 S.E.2d 625, 628.

[33] S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 21, 403 S.E.2d 625, 628 (Emphasis added). *See also* S.C. Prop. & Cas. Ins. Guar. Ass'n v. Carolinas Roofing & Sheet Metal Contractors Self-Insured Fund, 303 S.C. 368, 371-372, 401 S.E.2d 144, 145-146 (1991) (Settlement "agreement approved by the [SCWCC] was intended to settle [the employee's] claim in its entirety and[, therefore,] the [SCWCC] lack[ed] jurisdiction in this matter [to order the Guaranty Association to pay sums owed by the insolvent workers' compensation carrier]"). *See also generally* Nat'l Union Ins. Co. v. Mills, 99 Ga.App. 697, 109 S.E.2d 830 (1959); Fireman's Fund Ins. Co. v. Crowder, 123 Ga.App. 469, 471, 181 S.E.2d 530 (1971).

[34] Limehouse v. Hulsey, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013) (*quoting* 32A Am.Jur.2d, Federal Courts, § 581 (Thomson Reuters West 2007) (Footnotes omitted in original)).

Axiomatically, "[t]he acts of a court without jurisdiction are without effect."[35] Consequently, as the Supreme Court recognized in *Ross v. Richland County*, " '[i]t is a universal principle as old as the law, that the proceedings of a Court without jurisdiction are a nullity, and its judgment without effect, either on the person or property.' "[36]

The SCWCC had relinquished its subject matter jurisdiction over the Nevamar Claimants' workers' compensation litigation when the SCWCC issued its 10 December 2015 Order dismissing those claims with prejudice, albeit with the exception of death claims not relevant here. The SCWCC did not have any open workers' compensation claims before it on 26 January 2016, when the SCWCC "adjudicated" Dr. Fechter's claims. The SCWCC had not jurisdiction at that time and, therefore, its actions and decisions were a nullity without any force and effect.

This Court of Appeals should reverse the Circuit Court's faulty reliance on the SCWCC's alleged jurisdiction vis-a-vis Dr. Fechter's claims and remand this matter for a jury trial.

2. The SCWCC's Decisions Regarding Dr. Fechter's Claims Have No Preclusive Effect In The Circuit Court Litigation.

As previously noted, Dr. Fechter asserted claims against the Ortner Respondents and the Rosenthal Respondents for claims for breach of contract (App.8, 19; App.81-83, paras. 3-21; App.174-176, paras. 2, 8, 11-18), fraud (App.8, 19, App.84, paras. 22-30; App.176-177, paras. 22-28), breach of contract with fraudulent intent (App.8, 19; App.81-

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35 DeWitt v. S.C. Dept. of Highways & Pub. Trans., 274 S.C. 184, 187, 262 S.E.2d 28, 30 (1980) (*citing* State v. Funderburk, 259 S.C. 256, 191 S.E.2d 520 (1972); Ross v. Richland County, 270 S.C. 100, 240 S.E.2d 649 (1978); *Ex parte* Harte, 186 S.C. 125, 195 S.E. 253 (1938)).

36 Ross v. Richland County, 270 S.C. 100, 103, 240 S.E.2d 649, 651 (1978) (*quoting Ex parte* Harte, 186 S.C. 125, 133, 195 S.E. 253, 256).

83, 85 paras. 3-17, 32-34; App.178, paras. 29-31), violation of the *SCUTPA* (App. 8, 19; App.81-83, 85 paras. 3-17, 36-38; App.178, paras. 32-34), and pre-judgment interest. (App.8, 19; App.81-83, 85, paras. 3-17, 40; App.178, para. 35).

Notwithstanding what the SCWCC, or the Ortner Respondents, or the Rosenthal Respondents have asserted, these various causes of action arose exclusively from allegations which involved the alleged breaches of contractual agreements between, on the one hand, the Ortner Respondents and the Rosenthal Respondents in their respective capacities as attorneys representing the Nevamar Claimants in those individuals' workers' compensation claims and, on the other hand, Dr. Fechter, a medical expert independently and unilaterally retained by those very same attorneys to perform, among other things, IMEs on the Nevamar Claimants. (App.204). Nevertheless, it is undisputed that Dr. Fechter was never made a party to nor had any standing to participate in and/or object to any of the proceedings within the workers' compensation litigation.[37]

The SCWCC's subject matter jurisdiction, assuming *arguendo* there was any in legitimate and proper operation, was limited to determining whether Dr. Fechter's claimed additional professional fees could and/or should be paid out of the $500,000.00 held back by the Special Referee – not whether the fees should be paid at all. The SCWCC did not have the authority to determine whether either or both the Ortner Respondents and/or the Rosenthal Respondents were ultimately responsible at common law to pay Dr. Fechter for his claimed additional professional services. This is especially true since Dr. Fechter's claims related to contractual agreements between him and both the Ortner Respondents and the Rosenthal Respondents concerning medical expertise which Dr. Fechter

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[37] *See generally* S.C. Code Ann. Regs. § 67-215.

provided to those very same attorneys for their use in representing the Nevamar Claimants. There were never any contractual agreements regarding payment of provided medical and other services directly between Dr. Fechter and the individual Nevamar Claimants – just between Dr. Fechter and their attorneys.

3. Dr. Fechter's Common Law Claims Did Not Affect The Nevamar Claimants' Right To Compensation.

South Carolina law "confers a general grant of authority on the [SCWCC] to decide all questions arising under the *Workers' Compensation Act*: '*All questions* arising under [the *Act*], if not settled by agreement of the parties interested therein with the approval of the [SCWCC], *shall be determined by the [SCWCC],* except as otherwise provided by the [*Act*]' "[38] Consequently, "only disputes ancillary to an *employee's right to compensation* arise under the *[Workers' Compensation] Act*."[39]

The South Carolina Supreme Court, in *Blue Cross & Blue Shield v. S.C. Indus. Commission*, addressed a medical insurer's declaratory judgment claim that, *inter alia*, it had a right "to participate in proceedings before the [SCWCC] when the employee-claimant h[eld] one of its policies . . . ."[40] The Supreme Court disagreed, holding that:

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[38] James v. Anne's, Inc., 390 S.C. 188, 197, 701 S.E.2d 730, 734 (2010) (*quoting* S.C. Code Ann. § 42-3-180 (Thomson Reuters West 2015)) (Emphasis in original).

[39] Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 409, 721 S.E.2d 461, 464 (Ct.App. 2011) (*citing* Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 544, 397 S.E.2d 526, 529 (1990) ("When the employee's rights are not involved, an employer/insured must present all such issues to the circuit court"); Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600 (Ct.App. 1997) (medical provider's common law claims for payment of employee's medical bills did not fall within the purview of the Workers' Compensation Act and such claims would properly be litigated in circuit court)), *reh'g denied* (27 Jan. 2021), *cert. granted* (8 May 2012), *affirming as modified on other grounds*, 405 S.C. 455, 748 S.E.2d 229 (2013) (Emphasis in original).

[40] Blue Cross & Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 205, 262 S.E.2d 35, 36 (1980) (*per curiam*).

> The *Act* contains a thorough procedure for the procurement of Workmen's Compensation benefits. Settlements are specifically authorized between an employer and an employee. The rights of the employee and employer are established by the *Act*. ***Nowhere in the Act is there a provision to allow any party, other than the employee and the employer to participate*** . . . .[41]

In *Baker Hosp. v. Fireman's Fund Ins. Co.*, the Supreme Court addressed the hospital's "action in [C]ircuit [C]ourt alleging breach of contract, negligence, misrepresentation, and promissory estoppel" arising from the insurer's coverage confirmation for an injured employee.[42] "The trial court [had] granted [the insurer's] motion for dismissal for lack of subject matter jurisdiction [concluding the SCWCC had] the exclusive jurisdiction for determining th[e] [hospital's] claim . . . ."[43] On appeal, the Supreme Court reversed, recognizing that "it is clear the ***Hospital [wa]s a party with no standing to seek redress [for the incurred medical expenses] before the [SCWCC]***"[44] and that, it could not reasonably be disputed that the "***Hospital's claims [for the unpaid medical expenses] all ar[o]se from the common law, not the workers' compensation laws***".[45] The Supreme Court concluded:

> [The] Hospital alleged facts, which taken in a light most favorable to the [Hospital], support the allegations of breach of contract, negligence, misrepresentation, and promissory estoppel. The allegations contained in the complaint indicate

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[41] Blue Cross & Blue Shield v. S.C. Indus. Comm'n, 274 S.C. 204, 206, 262 S.E.2d 35, 37 (Emphasis added).

[42] Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 100, 441 S.E.2d 822, 823 (1994).

[43] Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 100, 441 S.E.2d 822, 823.

[44] Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (*citing* Blue Cross & Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 262 S.E.2d 35) (Emphasis added).

[45] Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (Emphasis added).

> that [the insurer] 'guaranteed' the payment of [the injured employee's] hospital expenses. [The] ***Hospital's complaint contains sufficient facts to establish claims in contract [against the insurer] regardless of any other party's claims under workers' compensation law***.[46]

The Supreme Court ultimately determined that:

> Regardless of any workers' compensation payment to [the injured employee, the] Hospital ha[d] performed a service for [the injured employee] based on the representations allegedly made [to the Hospital] by the [insurer]. ***[T]he question of coverage under workers' compensation law is irrelevant to any representations made by [the insurer to the Hospital] as to [the insurer's] responsibility for payment of medical expenses***.[47]

This Court of Appeals, in *Price v. Peachtree Elec. Services, Inc.*, addressed the first employer's claim for reimbursement from the second employer for injuries sustained by an employee who had worked consecutively for both.[48] This Court of Appeals concluded that "***[c]laims not affecting the employee's right to compensation are within the purview of the [C]ircuit [C]ourt, not of the [SCWCC*** and, therefore, the SCWCC does not have subject matter jurisdiction to address an] equitable claim for reimbursement made by [one employer] against . . another employer."[49] This Court of

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[46] Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (Emphasis added).

[47] Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823 (Emphasis added). *See also* Polite v. Westvaco Corp., 2010 WL 10079468, *1 (S.C.App., filed 1 Mar. 2010) (*per curiam*) ("[T]he real party in interest in this appeal is Blue Cross who, as the claimant's private health insurance carrier, lacks standing in front of the [SCWCC]."). *See also generally* *Ex parte* South Carolina Prop. & Cas. Ins. Guar. Ass'n, 411 S.C. 501, 768 S.E.2d 670 (Ct.App. 2015).

[48] Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 405-407, 721 S.E.2d 461, 462-462, *affirmed as modified on other grounds*, 405 S.C. 455, 748 S.E.2d 229.

[49] Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 409, 721 S.E.2d 461, 464 (Emphasis added).

Appeals found that "[t]he matter directly in contention d[id] not affect [the employee's] right to compensation [and] [h]e ha[d] been completely compensated for the 2002 accident [and, therefore,] any future benefits for which [the second employer] may be liable are a separate and distinct matter from any benefits [the first employer] may have paid previously . . . ."[50]

Finally, in *Roper Hosp. v. Clemmons*, this Court of Appeals addressed a hospital's attempt to have a closed worker's compensation case reopened for payment of the hospital's incurred medical fees.[51] This Court of Appeals found the hospital "clearly ha[d] a cause of action against the patient/employee for services rendered based on common law[, as well as] a claim against the insurance carrier . . . assuming the hospital [had] verified coverage . . . ."[52] Furthermore, the hospital had "not [been and was not] precluded from seeking payment for [the employee's] medical expenses through other proceedings [and, in any case,] the question of [insurance] coverage for [those] medical expenses [had already been] settled through the [clincher] agreement . . . ."[53] Since "there [wa]s nothing further for the [SCWCC] to decide" this Court of Appeals determined that the hospital did "not have standing to seek redress before the [SCWCC]."[54]

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[50] Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 410, 721 S.E.2d 461, 464. *See also* Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 542-543, 397 S.E.2d 526, 528 (The SCWCC "is not empowered to adjudicate [any] dispute in a meaningful way" when and if the "dispute does not include any contention by [either the employer] or by the [insurer] about the merits or lack thereof of the employee's claim for compensation."). *See generally* Doyle v. U.S. Fid. & Guar. Co., 316 S.C. 83, 85-86, 447 S.E.2d 192, 193-194 (1994) (SCWCC did not have jurisdiction to determine spouse's portion of [workers' compensation] settlement proceeds based on his loss of consortium claim.").

[51] Roper Hosp. v. Clemons, 326 S.C. 534, 536, 484 S.E.2d 598, 599 (Ct.App. 1997).

[52] Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600.

[53] Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600.

[54] Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600.

4. Separate And Independent Common Law Claims Are Not Litigated Through The Statutory Workers' Compensation System.

This proposition that "a health care provider may not ***independently*** assert a claim in the [workers'] compensation system for services provided an employee" is the situation in many jurisdictions operating under workers' compensation acts with the same and/or similar statutory language as that in this State.**55** For example, in *Curry v. Ozarks Elec. Corp.*, the Missouri Court of Appeals considered a hospital's request to the Missouri Industrial Relations Commission for a direct payment of hospital medical expenses.**56** The Missouri appellate court opined that the [1994 amendments to the *Workers' Compensation Act*] statutory scheme admittedly "gave [MIRC administrative law judges] discretionary authority to make direct payments to medical care providers from the 'proceeds of any [workers' compensation] settlement or award[,]' [the amendments, however,] did not . . ***expressly*** give medical care providers standing to assert a ***separate claim*** in the compensation system ***independent*** of an employee's claim.' "**57** The Missouri Court of Appeals concluded that the Missouri "legislature did not intend [the 1994 amendments] as authorization for splitting an employee's workers' compensation claim into component parts."**58**

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55 Curry v. Ozarks Elec. Corp., 2000 WL 967930, *3 (Mo.App., filed 14 July 2000), *affirmed*, 39 S.W.3d 494 (Mo. 2001) (*en banc*), *overruled on other grounds by* Hampton v. Big Boy Steel Erection, 121 S.W.3d 220 (Mo. 2003) (*en banc*) (Emphasis in original). *See* Figueroa v. C and S Ball Bearing, 237 Conn. 1, 675 A.2d 845, 849 (1996); Med. College of Penn. v. Workmen's Comp. Appeal Bd., 139 Pa.Cmwlth. 632, 591 A.2d 338, 340 (1991); Sloat Chiropractic Clinic v. Datsun, 17 Ark.App. 161, 706 S.W.2d 181, 182-184 (1986). *See also* 5 Arthur Larson and Lex K. Larson, Larson's Workers' Compensation Law § 94.02[11] (West 1999) ("The physician has no independent standing to make claims within the compensation system, unless this right has been expressly created by statute.").

56 Curry v. Ozarks Elec. Corp., 2000 WL 967930, *1.

57 Curry v. Ozarks Elec. Corp., 2000 WL 967930, *3 (Emphasis in original).

58 Curry v. Ozarks Elec. Corp., 2000 WL 967930, *4.

In similar fashion, the Florida Supreme Court, in *Eastern Elevator Co. v. Hedman*, addressed a physician's unilateral direct claim to the Florida Industrial Relations Commission for payment of an injured employee's incurred medical expenses.[59] The Florida court stated that "[a]t no time has this Court ruled that a hospital or physician ha[d] standing to file independently a workmen's compensation claim for services."[60] The Florida appellate court determined Florida law "specifically ma[de] the employer liable to his employee for payment of the recoverable medical expenses and any payment must be on the employee's behalf[and, therefore, the applicable statute] d[id] not provide the physician with a right of action against the employer directly [for unpaid medical expenses]."[61]

Furthermore, in *Brannon v. Pike* the Idaho Supreme Court concluded the Idaho Industrial Commission had jurisdiction to decide a dispute between an employee-claimant and his attorney regarding the attorney's amount of agreed-upon legal fees.[62] The Idaho appellate court reached this determination since "[b]oth the employee and his attorney [we]re from the outset subjected to the jurisdiction of the [IIC]."[63] Nevertheless, the Idaho

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59 Eastern Elevator Co. v. Hedman, 290 So.2d 56, 58 (Fla. 1974).

60 Eastern Elevator Co. v. Hedman, 290 So.2d 56, 58. *See also* Oak Park Hosp. v. Smuda, 214 Ill.App.3d 1032, 1034, 574 N.E.2d 804, 805-806 (1999) ("Although the Industrial Commission has the power to determine the reasonableness and fix the amount of any fee charged by a hospital for any service performed in connection with the [Workers' Compensation] Act, the statute does not state that the hospital shall be restricted in its avenues of collection from the recipient of medical services" and, therefore, the Circuit Court had jurisdiction to address the hospital's claim.").

61 Eastern Elevator Co. v. Hedman, 290 So.2d 56, 58. *See also* Rebich v. Burdine's and Liberty Mut. Ins. Co., 417 So.2d 284, 285 (Fla. 4th DCA 1982) (Statutes authorized physician's breach of contract claim filed with FIRC, but four year statute of limitations applied as tern "physician" not included in revised two-year statute of limitations provisions).

62 Brannon v. Pike, 112 Idaho 938, 938, 737 P.2d 459, 459 (1987).

63 Brannon v. Pike, 112 Idaho 938, 938-939, 737 P.2d 459, 459-460.

Supreme Court acknowledged that the IIC did not have jurisdiction to address "unrelated claims as between the client-claimant and his attorney [or claims] requiring adjudication of claims involving third parties [or involving the] determination of insurance coverage at least in a declaratory judgment context."**64**

In addition, the Court of Appeals of Louisiana, in *Broussard, Bolton, Halcomb & Vizzier v. Williams*, recognized that the Louisiana Office of Workers' Compensation had statutory general jurisdiction to address all claims and disputes arising from the *Worker's Compensation Act*.**65** Nevertheless, the Louisiana the appellate court "dr[ew] a distinction between those matters which " 'ar[o]se out of the *Worker's Compensation Act*, rather than merely relate[d] to worker's compensation in general.' "**66** The appellate court concluded that "[i]f the issue to be considered ar[ose] out of the *[Workers' Compensation] Act*, jurisdiction [wa]s [then] vested in the [Office of Workers' Compensation, but, on the other hand]; if it merely relate[d] to the workers' compensation claim, the [Office of Workers' Compensation] d[id] not have subject matter jurisdiction."**67** The appellate court noted

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64 Brannon v. Pike, 112 Idaho 938, 940, 737 P.2d 459, 461 (*citing* Martin v. Argonaut Ins. Co., 90 Idaho 107, 408 P.2d 475 (1965); Thompson v. Liberty Nat'l Ins. Co., 78 Idaho 381, 304 P.2d 910 (1956); Hancock v. Halliday, 65 Idaho 645, 150 P.2d 137 (1944)). Both Martin and Thompson were later superseded by statute. *See generally* Smith v. O/P Transp., Inc., 120 Idaho 123, 814 P.2d 23 (1991).

65 Broussard, Bolton, Halcomb & Vizzier v. Williams, 796 So.2d 791, 794 (La.App. 3rd Cir. 2001) (*quoting* La. Rev. Stat. 23:1310.3(E)).

66 Broussard, Bolton, Halcomb & Vizzier v. Williams, 796 So.2d 791, 794- 795 (*quoting* Ellender's Portable Buildings, Inc. v. Cormier, 787 So.2d 601, 603 (La.App. 3rd Cir. 2001) (*quoting* Covington v. A–Able Roofing, Inc., 670 So.2d 611, 613 (La.App. 3rd Cir. 1996)).

67 Broussard, Bolton, Halcomb & Vizzier v. Williams, 796 So.2d 791, 795 (*citing* Covington v. A–Able Roofing, Inc., 670 So.2d 611, 613). *See also generally* TIG Ins. Co. v. La. Workers' Compensation Corp., 917 So.2d 26 La.App. 1st Cir. 2005); 84 Lumber Co. v. Babineaux, 886 So.2d 693, 695 (La.App. 3rd Cir. 2004) (*citing* Nunez v. Loomis Fargo & Co., 807 So.2d 1063 (La.App. 4th Cir. 2002), *writ denied*, 816 So.2d 307 (La. 2002)).

that since the competing claims "involve[d] a fee dispute between two attorneys, [it] relate[d] to a workers' compensation claim only peripherally in that the claim provided the basis for the payment of the fee[, but] simply d[id] not 'arise out of the *Worker's Compensation Act*.' "[68]

In *Smith v. Williams*, the Court of Appeals of Georgia addressed one attorney's breach of contract claim against a former partner who had left the firm and sought the "division of attorney's fees earned from certain worker's compensation cases where the clients elected to retain [the departing lawyer] as their [legal] counsel . . . ."[69] The Georgia appellate court concluded that "[w]hile it [wa]s true that specific claimants [we]re referenced . . . , neither party point[ed] to any claimant 'whose claim of benefits would be affected by [the] resolution of [Williams'] claim against [Smith] [and] [a]ccordingly, . . . these allegations [did not] implicate the benefits to be paid to any individual injured employee [under the *Workers' Compensation Act*].' "[70] In *Aetna v. Workers' Comp Access, LLC*, the same Georgia appellate court, discussed the State Board of Workers' Compensation's jurisdictional issues involving six separate hospital's various claims against Aetna for medical fees incurred in providing medical services to injured

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[68] Broussard, Bolton, Halcomb & Vizzier v. Williams, 796 So.2d 791, 795.

[69] Smith v. Williams, 333 Ga.App. 167, 167, 775 S.E.2d 639, 641 (2015).

[70] Smith v. Williams, 333 Ga.App. 167, 167, 775 S.E.2d 639, 641 (*quoting* Aetna v. Workers' Comp Access, LLC v. Coliseum Med. Ctr., 322 Ga.App. 641, 644(1), 746 S.E.2d 148 (2013)) (Fifth, sixth, and seventh alterations in original). *See also generally* Wells v. Goodyear Tire & Rubber Co., 14 Neb.App. 384, 707 N.W.2d 438 (2005); Pitt v. W.C.A.B. (McEachin), 161 Pa.Cmwlth. 60, 62-62, 636 A.2d 235, 237 (1993) (Pennsylvania Workmen's Compensation Appeal Boards did not have jurisdiction to address an attorney "litigating on his own behalf a cause of action which was a common-law claim for breach of contract, a claim on principles of quantum meruit, or an equitable claim for damages under a theory of unjust enrichment.").

employees in workers' compensation cases.[71] The Georgia court found that "no specific employee claimant or claim [wa]s referenced [in the hospitals' claims], and neither Aetna nor the [hospitals] point[ed] to any employee whose claim of benefits would be affected by resolution of the . . claim[s]," therefore, the SBWB had no jurisdiction . . . ."[72]

5. The SCWCC Exceeded Its Jurisdiction By Addressing Dr. Fechter's Common Law Claims

The SCWCC, as an inferior court, is accorded jurisdiction over "[a]ll question under [the *Workers' Compensation Act*] if not settled by agreement ***of the parties*** interested therein with the approval of the [SCWCC]."[73] The SCWCC's jurisdiction is specifically limited to questions related to the "parties". Dr. Fechter was not and never has been a party to the Nevamar Claimants' workers' compensation claims. Moreover, Dr. Fechter was neither a claimant, nor an employee, nor an employer, nor a workers' compensation insurance carrier, nor a treating physician.

Even though Dr. Fechter provided medical treatment and other services to many of the Nevamar Claimants such medical treatment and such other services were not the type to have been paid for through operation of the *Workers' Compensation Act*, but treatment and services contracted for by the Ortner Respondents and the Rosenthal Respondents under the common law and beyond the reach of the *Workers' Compensation Act*. Simply stated, the SCWCC did not have subject matter jurisdiction to hear, much less determine the validity of, Dr. Fechter's claims against the Ortner

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[71] Aetna v. Workers' Comp Access, LLC v. Coliseum Med. Ctr., 322 Ga.App. 641, 661, 746 S.E.2d 148, 149-150.

[72] Aetna v. Workers' Comp Access, LLC v. Coliseum Med. Ctr., 322 Ga.App. 641, 661, 746 S.E.2d 148, 149-150.

[73] *See* S.C. Code Ann. § 42-3-180 (Thomson Reuters West 2015) (Emphasis added).

Respondents and the Rosenthal Respondents as those individuals and entities were non-parties to the Nevamar Claimants' litigation even though Dr. Fechter's claims may have arisen from and/or were tangentially related to that workers' compensation litigation.[74]

The SCWCC stated that the purpose of the final exercise of its jurisdiction in this matter was solely to address the remaining $500,000.00 being held by the Special Referee as funds available for the payment of legitimate litigations costs and expenses. (App.57). The SCWCC, instead of simply disbursing the $500,000.00 in held back funds, exceeded its very own stated mandate by proceeding to then "conclusively" determine the validity of Dr. Fechter's separate and independent common law contractual claims against both the Ortner Respondents and the Rosenthal Respondents. (App.57-65).[75] This action was entirely improper as the SCWCC did not have subject matter jurisdiction

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[74] *See generally e.g.*; Price v. Peachtree Elec. Services, Inc., 396 S.C. 403, 409, 721 S.E.2d 461, 464; Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 544, 397 S.E.2d 526, 529; Roper Hosp. v. Clemons, 326 S.C. 534, 539, 484 S.E.2d 598, 600.

[75] The SCWCC's final hearing came about as a result (App.57) of the Rosenthal Respondents filing their Motion for Release of Funds (App.131-143) to which the Ortner Respondents joined. (App.149-153). Dr. Fechter, admittedly a non-party to Nevamar Claimants' workers' compensation litigation (App.57-65; App.176, para. 21), did not have either standing and/or the legal ability to conduct discovery into the Ortner Respondents' and the Rosenthal Respondents' respective contentions that they did not owe him any additional payments for documents medical and other services Dr. Fechter had rendered to many, many of the Nevamar Claimants. *See* S.C. Code Ann. Regs. § 67-215. *See generally* Patriot Rail Corp., Sierra Railroad Co., 2016 WL 704456, * 4 (E.D.Cal., filed 23 Feb. 2016). *See also* Blue Cross & Blue Shield of S.C. v. S.C. Indus. Comm'n, 274 S.C. 204, 205, 262 S.E.2d 35, 36. Conversely, the Ortner Respondents and the Rosenthal Respondents, ostensibly acting on behalf of their Nevamar Claimants clients, were able to conduct discovery ***from*** Dr. Fechter. Consequently, Dr. Fechter did not have the right to a jury trial or to any of the other protections afforded parties in civil litigation. The unfairness of permitting the Ortner Respondents and the Rosenthal Respondents to argue before a specialized commission (albeit one without legitimate jurisdiction over the case) the merits of a common law claims involving alleged breaches of contract involving substantial monetary value and involving a nonparty is beyond obvious. Additionally, it does not appear that the South Carolina Workers' Compensation Act has any type of procedure through which a non-party individual, such as Dr. Fechter, would be able to intervene into the litigation in order to protect his economic interests, much less to conduct reasonable discovery.

to address common law claims, whether breach of contract or otherwise, which did not directly relate to the compensation scheduled to be provided to of the injured employees (*i.e.*; Nevamar Claimants).

The SCWCC's own rules and regulations arguably prohibited the SCWCC from even addressing Dr. Fechter's various separate and independent common law claims against the Ortner Respondents and the Rosenthal Respondents. The regulations authorize a party or his/her/its attorneys to file a motion with the SCWCC regarding a number of issues including a motion "[r]elating to a claim [which is then] pending [SCWCC] review . . . ."[76] Dr. Fechter, by the SCWCC's own admission, did not have a "claim [which] exist[ed] of record with the [SCWCC] . . ." (App.60). The Rosenthal Respondents, *sua sponte*, brought up the issue while seeking, solely for their own unquestioned economic benefit, to have the SCWCC release the Special Referee's $500,000.00 in held-back funds. (App.60, 131-143). The Rosenthal Respondents and, by implication, the Ortner Respondents, simply sought to circumvent Dr. Fechter's claims by having the SCWCC, a specialized and inferior tribunal (again, without any legitimate jurisdiction over the claims) "adjudicate" the matter before the dispute could reach Circuit Court.

The Rosenthal Respondents and the Ortner Respondents knew that Dr. Fechter's payment claims against them, while tangentially related to the Nevamar Claimants' global workers' compensation litigation, nevertheless, arose solely out of certain contractual transactions between Dr. Fechter and both the Ortner Respondents and the Rosenthal Respondents. Dr. Fechter's claims were distinctly separate and independent of the

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[76] *See* S.C. Code Ann. Regs. § 67-215.

Nevamar Claimants' workers' compensation litigation and, in turn, Dr. Fechter's "claims [for the unpaid medical and other services he provided, clearly] all ar[o]se from the common law, not the workers' compensation laws."[11]

The SCWCC should never have considered, much less concluded, it was empowered to exercise subject matter jurisdiction over and to adjudicate Dr. Fechter's common law claims. The decision to have done so, as well as the Circuit Court's reliance thereon, must be reversed in all respects and the matter remanded for a trial by jury.

B. THE CIRCUIT COURT SHOULD HAVE DENIED THE ORTNER RESPONDENTS' RENEWED MOTION TO DISMISS DR. FECHTER'S CLAIMS OR, IN THE ALTERNATIVE GRANTED DR. FECHTER'S MOTION FOR RECONSIDERATION MOTION OF THE DISMISSAL.

The Ortner Respondents moved to dismiss Dr. Fechter's *Complaint*, in part, on the basis that Dr. Fechter had failed to properly serve his *Summons and Complaint* on them. (App.9, 11-13, 87, 92-94, 255). Moreover, the Ortner Respondents asserted, even if Dr. Fechter had properly accomplished/effected service of process, such service had not been achieved within the applicable three-year statute of limitations. (App.9, 11-13, 87, 92-94, 255). The Circuit Court agreed with the Ortner Respondents position, albeit entirely misguided, and dismissed Dr. Fechter's claims with prejudice. (App.12-14). The Circuit Court concluded that Dr. Fechter "failed to serve [the Orther Respondents] with the [pleadings] on December 7, 2017" and that, in any case, such service, if actually made, was done beyond the statute of limitations. (App.12-14).

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[11] Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823.

1. The Ortner Respondents Had Notice Of Dr. Fechter's Action

Dr. Fechter filed his *Summons* and *Complaint* on 25 August 2017 (App.8, 20, 41, 81; App.195, para. 58; App.277-278, 385) and served the Ortner Respondents on 7 December 2017 (App.195, para. 60; App.200, 385), "by delivering to them, by certified mail, US Postal Service . . . in Charleston, South Carolina and leaving with them copies of the [pleadings] at 145 King Street, Ste. 211, Charleston, [South Carolina]." (App.8, 172-173; App.195, para. 60; App.200, 281-282, 306, 307). While the Ortner Respondents disputed the validity of this service (App.9, 11-13, 87, 100-101, 255, 282-283, 384-385) and the Circuit Court "bought into" the argument (App.10-13), that does not mean the service of process was actually faulty and, in light of well-established South Carolina law, that the Circuit Court's decision was patently incorrect.[78]

It is well-established that " 'Rule 4, *SCRCivP*, serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action.' "[79] Nevertheless, "[e]xacting compliance with the rules is not required to

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[78] Since the Ortner Respondents' Motion to Dismiss was, in effect, transformed into a Motion for Summary Judgment, Dr. Fechter is entitled to " 'the benefit of all favorable inferences that might reasonably be drawn [from the evidence].' " Companion Prop. & Cas. Ins. Co. v. Airborne Exp., Inc., 369 S.C., 388, 390-391, 631 S.E.2d 915, 916 (*quoting* Estes v. Roper Temp. Servs., Inc., 304 S.C. 120, 121, 403 S.E.2d 157, 158. Moreover, "[s]ummary judgment should [have been] denied [since Dr. Fechter, at a minimum,] submit[ted] a mere scintilla of evidence." Zurich Amer. Ins. Co. v. Tolbert, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (*citing* Hancock v. Mid–South Mgmt. Co., Inc., 381 S.C. 326, 673 S.E.2d 801).

[79] BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006) (*quoting* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995)). *See also generally* Okers Co. v. Clear Touch Interactive, Inc., 2021 WL 1827181, * 2 (D.S.C., filed 7 May 2021); Estate of Knight v. Whitten, 5099369, *1 (S.C.App., filed 19 Sept. 2019) (*per curiam*); Fassett v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct.App. 2005); Owners Ins. Co. v. Foxfield Commons POA, Inc. d/b/a Foxfield Commons, 2021 WL 5086262, *5 (D.S.C., filed 9 Nov. 2021); Bowman v. Weeks Marine, Inc., 936 F.Supp. 329, 342-434 (D.S.C., filed 21 Aug. 1996).

effect service of process."[80] " 'Rather, [the court must] inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.' "[81]

The Circuit Court seized upon the fact that Dr. Fechter's "purported proof of service . . . was not filed with the [Circuit] [C]ourt until over a year after the mailing [of the pleadings to the Ortner Respondents]." (App.12). The Circuit Court, however, mistakenly ignored South Carolina law which states that "[n]owhere does [Rule 5(d), *SCRCivP*,] provide [that a litigant's] failure to file proof of service within the ten day period nullifies the service or extends the period of time for a defendant to answer."[82] In fact, "Rule 5(d)[, *SCRCivP*,] only provides for dismissal of an action for failure to serve the summons and complaint."[83] Moreover, "Rule 4(g), *SCRCivP*, specifically states [that], '[f]ailure to make proof of service does not affect the validity of the service' "[84] Consequently, Dr. Fechter's purported "failure to make proof of service [of the pleadings on the Ortner Respondents]

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[80] Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct.App. 2010) (*citing* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209-210, 456 S.E.2d 897, 899). *See also generally* Charleston Harbor Resort & Marina v. Davis, 2016 WL 640490, *1 (S.C.App., filed 17 Feb. 2016) (*per curiam*); Rayburn v. Dysart, 2019 WL 2613469, *1 (S.C.App., filed 29 June 2019) (*per curiam*); Richardson v. P.V., Inc., 383 S.C. 610, 615, 682 S.E.2d 263, 265 (2009): White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 10 , 753 S.E.2d 537, 542 (2014).

[81] Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct.App. 2010) (*quoting* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 210, 456 S.E.2d 897, 899) (Alteration in original).

[82] Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (Ct.App. 1989).

[83] Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (*quoting* Rule 5(d), SCRCivP). *See also generally* 24 S.C. Juris Rules of Civil Procedure, § 5.2 (Thomson Reuters West 2021 Update)

[84] Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (*quoting* Rule 4(g), SCRCivP). *See also generally* Gilbert v. Ossich Enterprises, LLC, 2021 WL 1754195, *3 (D.S.C., filed 4 May 2021); Peeples v. Ramspacher, 29 F.Supp. 632, 636 (E.D.S.C. 1939); *In re* Peagler, 2001 WL 180, *5 (D.S.C., filed 1 June 2001).

within a [specified] ten day period of service, likewise [does not and, contrary to the Circuit Court's decision, did not] affect the validity of service [of process on the Ortner Respondents]."**85**

More importantly, the Circuit Court overlooked the evidence that the Ortner Respondents were *not directly challenging* the fact service of process had actually been accomplished on 7 December 2017, as Dr. Fechter asserted, but merely contending that the service of process had occurred outside of the statute of limitations. (App.100-101, 255-256). Karen Ortner and Leon Ortner both conceded that the Ortner Respondents had actually received the pleadings contained in the envelope attached to their respective affidavits. (App.310, paras. 6-11; App.314, para. 7).**86** Whether or not the green USPS return receipt card was "officially" signed is effectively immaterial in light of the fact the Ortner Respondents actually had the pleadings in their possession on 7 December 2017. (App.314, para. 7). The intent of the service of process rules is to, among other things, provide the defendant notice of the proceedings.**87** The Ortner Respondents had notice of and possession of the pleadings on 7 December 2017. (App.310, paras. 6-11; App.314, para. 7).**88**

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85 Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

86 Leon Ortner is the sole member of the Ortner Law Firm, LLC and its registered agent for service of process. (App.312, paras. 2-4). He admitted he was aware of the pleadings in this matter on or about 7 December 2017, when Karen Ortner "happened to pick up mail delivered to 145 King Street, Suite 211, Charleston, South Carolina, including the envelope [sent to the Ortner Respondents by Dr. Fechter's trial counsel – Melvin D. Bannister, Esquire – and which contained the Summons and Complaint in this matter]." (App.314, para. 7). Notwithstanding their less than convincing arguments to the contrary, it can hardly be reasonably disputed that the Ortner Respondents had proper and timely notice of Dr. Fechter's action.

87 Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct.App. 1996).

88 It would be, at best, extremely disingenuous to believe that on 7 December 2017, the Ortner Respondents (themselves attorneys), having in their possession an envelope addressed to them

Furthermore, a number of courts across this county have concluded that even though a plaintiff, like Dr. Fechter, attempts service of process via the U.S. Mail with a return receipt requested, the fact that the "green card" is either not returned or returned unsigned is not fatal to demonstrating actual service.[89] As long at the plaintiff was able to produce documentation from and/or a web-access address to either the U.S. Postal Service or to UPS, DHL, FedEx, *etc.* (when a private courier service was used) then the applicable court was lawfully and properly permitted to take judicial notice of the documentation and/or web information which indicated that the service of process delivery had actually been accomplished.[90]

(as attorneys) and clearing indicating that the documents had been sent by an attorney, simply set the envelope aside and did not open the envelope to determine its contents.

[89] *See generally* NYKCool, A.B. v. Pacific Int'l Services, Inc., 2013 WL 6799973, *6 fn.8 (S.D.N.Y, filed 20 Dec. 2013) (*citing* Ahn v. Inkwell Publ'g Solutions, Inc., 2013 WL 3055793, *4 (S.D.N.Y., filed 19 June 2013) (taking judicial notice of information available on U.S. Postal Service website in analyzing service of process); El–Aheidab v. Citibank (S.D.), N.A., 2012 WL 506473,*4 n.3 (N.D.Cal., filed 15 Feb. 2012) ("[T]he Court notes that the postal service's website indicates that each of Plaintiff's mailings were in fact delivered. The Court takes judicial notice thereof." (*citing* U.S. Postal Service, Track & Confirm, *https://tools.usps.com/go/TrackConfirmAction*)); White v. Microsoft Corp., 454 F.Supp.2d 1118, 1124 & n. 7, 1131 (S.D.Ala. 2006) (delivery proved by "DHL records" including "a DHL tracking record"); Rockmore Inv. Master Fund Ltd. v. Power 3 Med. Prods., Inc., 30 Misc.3d 1206(A), 958 N.Y.S.2d 648 (Table), 2010 WL 5491131, ** 1, 3 (Sup.Ct.N.Y.Co., filed 23 Dec. 2010) (delivery proved by information from "the FedEx proof of delivery tracking system")), *objections to report and recommendation sustained in part and overruled in part on other grounds by* 66 F.Supp.3d 385 (S.D.N.Y. 2014), *adhered to on reconsideration*, 2015 WL 998455, **3 & n.18 (S.D.N.Y., filed 5 Mar. 2015). *See also* Empire Community Development, LLC v. Giambalvo-West, 2020 WL 9823022, *5 fn.6 (E.D.N.Y., filed 6 Mar. 2020); Bondanelli v. Ocean Park SRL, 2012 WL 12893008 (C.D.Cal., filed 19 Oct. 2012).

[90] *See* NYKCool, A.B. v. Pacific Int'l Services, Inc., 2013 WL 6799973, *6 fn.8 (*citing* Ahn v. Inkwell Publ'g Solutions, Inc., 2013 WL 3055793, *4; El–Aheidab v. Citibank (S.D.), N.A., 2012 WL 506473,*4 n.3; White v. Microsoft Corp., 454 F.Supp.2d 1118, 1124 & n. 7, 1131; Rockmore Inv. Master Fund Ltd. v. Power 3 Med. Prods., Inc., 30 Misc.3d 1206(A), 958 N.Y.S.2d 648 (Table), 2010 WL 5491131, ** 1, 3, *objections to report and recommendation sustained in part and overruled in part on other grounds by* 66 F.Supp.3d 385, *adhered to on reconsideration*, 2015 WL 998455, **3 & n.18. *See also generally* Empire Community Development, LLC v. Giambalvo-West, 2020 WL 9823022, *5 fn.6; Bondanelli v. Ocean Park SRL, 2012 WL 12893008.

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

The Circuit Court concluded that Dr. Fechter failed to serve the Ortner Respondents with the pleadings in this action within the statute of limitations and dismissed Dr. Fechter's action. (App.11-12). The Circuit Court's decision was incorrect and must be reversed in all respects.

The SCWCC's final decision in the Nevamar Claimants' workers' compensation litigation was filed on 26 January 2016. (App.8 fn.2; App.83, para. 17; App.176, para. 15; App.180, para. 49). This action consisted of the SCWCC's decision to release the $500,000.00 of held-back funds to the Rosenthal Respondents as payment for their ostensibly "incurred" litigation costs and expenses. (App.57-64). Dr. Fechter filed this action on 25 August 2017, some 18+ months later. (App.8, 20, 81, 87; App.180, para. 50; App.210, para. 3; App.255). Dr. Fechter then served the Ortner Respondents, by their own admission (App.310, paras. 6-11; App.314, para. 7),**91** on 7 December 2017. (App.8). This was well within the three year status of limitations for this type of action.**92**

As has been mentioned previously, one of the principal objectives of the service of process rules is to ensure that the defendant has received notice of the plaintiff's action.**93** Notwithstanding the Ortner Respondents' arguments and the Circuit Court's incorrect conclusion to the contrary (App.11-13, 255-256), the Ortner Respondents had notice of

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91 Leon Ortner, sole member of the Ortner Law Firm, LLC and its registered agent for service of process (App.310, paras. 2-4) admitted he was aware of the pleadings in this matter on or about 7 December 2017 (App.310, para. 6), when Karen Ortner picked up the envelope sent to the Ortner Respondents by Dr. Fechter's trial counsel – Melvin D. Bannister, Esquire – and which contained the Summons and Complaint in this matter. (App.314, para. 7).

92 *See* S. C. Code Ann. § 15-3-530 (Thomson Reuters West 2017).

93 Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66.

Dr. Fechter's action well within the applicable three-year statute of limitations. The fact Dr. Fechter did not file the proof of service with the Circuit Court is merely a "red herring" given that "Rule 4(g), SCRCivP, specifically states [that], '[f]ailure to make proof of service ***does not affect the validity of the service***.' "[94] Dr. Fechter's failure to "timely" file the proof of service did not negatively affect the validity of service on the Ortner Respondents as "[e]xacting compliance with the rules is not required to effect service of process."[95]

The Ortner Respondents filed their joint *Motion to Dismiss* on 8 January 2018 (App.87), the 30th day after service.[96] The Ortner Respondents, while *asserting* "insufficiency of process" in both the original[97] and in the renewed versions of their dismissal motion, nevertheless merely alleged that Dr. Fechter served his pleadings upon them beyond the running of the statute of limitations. (App.100-101, 255). Similarly, the Circuit Court noted "the Ortner [Respondents] filed a motion to dismiss [Dr. Fechter's] Complaint [asserting he] failed to properly effect service within the statute of limitations and insufficiency of service of process." (App.9). The Circuit Court, however, failed to specify how Dr. Fechter's service of process was insufficient (App.11-13), merely using

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94 Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (*quoting* Rule 4(g), SCRCivP). In addition "[n]owhere does [Rule 5(d), SCRCivP,] provide failure to file proof of service within the ten day period nullifies the service . . . ." Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

95 Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (*citing* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209-210, 456 S.E.2d 897, 899).

96 This time period is curiously similar to the applicable time period for a defendant to either file a response directly to a Complaint or to otherwise move for one of several types of relief (*i.e.*; Motion to Dismiss, *etc.*). *See generally* Rule 12(a), SCRCivP.

97 "At the call of [the Ortner Respondents'] motion [they] informed [Judge Jefferson] that [they] were withdrawing [that part of] the [M]otion to [D]ismiss the case based on insufficient service of process grounds[, but] by doing so w[ere] not waiving the right to raise [that defense] at a later date." (App.42 fn.1).

the empty justification that Dr. Fechter's proof of service had not been timely filed with the court. (App.11-12). Furthermore, the Circuit Court failed to consider the evidence which clearly demonstrated the Ortner Respondents had ***both*** notice and knowledge of Dr. Fechter's action on or about 7 December 2017, sufficient to have timely filed their *Motion to Dismiss*.

The failure of both the Ortner Respondents and the Circuit to point out how Dr. Fechter's service of process was deficient was fatal to their respective positions since their respective " 'objection[s] to insufficiency of process or its service ***should [have] point[ed] out specifically*** in what manner [Dr. Fechter] ha[d] failed to satisfy the requirements of the service provision he utilized.' "**98** This is particularly true given that the Ortner Respondents were clearly aware of Dr. Fechter's action against them around 7 December 2017, notwithstanding the absence of a signed "green return receipt card".

The Circuit Court's faulty decision to grant the Ortner Respondents' *Motion to Dismiss* was later compounded by the Circuit Court's failure to grant Dr. Fechter's *Motion for Reconsideration*. Both of those decisions must be reversed in all respects and this matter remanded to the Circuit Court for a jury trial.

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98 Unisun Ins. Co. v. Hawkins, 342 S.C. 537, 542, 537 S.E.2d 559, 562 (Ct.App. 2000) (*citing* 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil 2d, § 1353 (West 1990) (*quoting*. Travelers Ins. Co. v. Panama–Williams, Inc, 424 F.Supp. 1156 (N.D.Okla.1976)) (Emphasis added).

C. THE CIRCUIT COURT SHOULD HAVE DENIED THE ROSENTHAL RESPONDENTS' MOTION TO DISMISS DR. FECHTER'S CLAIMS OR, IN THE ALTERNATIVE, GRANTED DR. FECHTER'S MOTION RECONSIDERATION MOTION OF THE DISMISSAL.

The Rosenthal Respondents, much like to Ortner Respondents, moved to dismiss Dr. Fechter's *Complaint*, in part, on the basis that Dr. Fechter had failed to properly serve his *Summons* and *Complaint* on both of them and, even if service of process had been accomplished, Dr. Fechter did not perform the service of process within the applicable three year statute of limitations. (App.25-29, 213-220). The Circuit Court agreed with the Rosenthal Respondents and dismissed Dr. Fechter's claims with prejudice (App.18-32), concluding that Dr. Fechter clearly failed to effect proper service of process either of the Rosenthal Respondents with his Summons and Complaint and that, in any case, such service of process, if actually made, was done beyond the statute of limitations. (App.25-29). Furthermore, the Circuit Court also dismissed Dr. Fechter's action on the basis that the SCWCC was the proper forum and, in turn, the Circuit Court did not have subject matter jurisdiction to consider the matter. (App.29-31). Both of the Circuit Court's decisions were incorrect and must be reversed in all respects.

1. The Rosenthal Respondents Had Notice Of Dr. Fechter's Action

Dr. Fechter filed his *Summons* and *Complaint* on 25 August 2017 (App.8, 20, 87; App.210, para. 3; App.255), and served the Rosenthal Respondents on 12 October 2017.[99] (App.21-22, 168-171; App.210-211, paras.5, 7-8; App.236-239).[100] By the

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[99] The envelope Dr. Fechter's trial counsel sent to the Rosenthal Respondents and which contained copies of Dr. Fechter's pleadings in this action was apparently deposited with the United State Postal Service on 5 October 2017. (App.20, para. 4).

[100] Again, it would be, at best, extremely disingenuous to believe that on or shortly after 12 October 2017, the Rosenthal Respondents (themselves attorneys), having in their possession an envelope addressed to them (as attorneys) and clearing indicating that the documents had been sent

Rosenthal Respondents' own admission they acknowledged receipt of envelope containing Dr. Fechter's pleadings on 12 October 2017. (App.21, paras.7-9; App.211; App.251, paras. 9-10).

In fact, Ed Elder's affidavit specifically admitted that on 12 October 2017, he was employed by the Rosenthal Respondents as a "rotating receptionist and file clerk." (App.250, para. 4). He further admitted that "[o]n or about October 12, 2017, [while sitting at the Rosenthal Respondents' office reception desk he] signed the return receipt 'green cards' for several pieces of certified mail[, including the envelope directed to the Rosenthal Respondents from Dr. Fechter's trial counsel and which contained the pleadings in this action]." (App.251, paras. 9-10). Interestingly, albeit somewhat inexplicably, there is little, if any, information as to what the Rosenthal Respondents did with the envelope containing Dr. Fechter's pleadings from 12 October 2017, onward. (App.210-213, paras. 1-37; App.250-251, paras. 4-11). This is especially true given the fact the Rosenthal Respondents did not file their *Motion to Dismiss* (containing, among other things, the *Elder Affidavit*) until 14 May 2019, ***over 19 months after they were served on 12 October 2017***. (App.209).[101]

by an attorney, simply set the envelope aside and did not open the envelope to determine its contents that day or soon thereafter. It would have only been appropriate for the Rosenthal Respondents to have discovered on 12 October 2017, that Dr. Fechter's pleadings were contained within the envelope as that date commemorates one of the greatest discoveries in history – Columbus' ostensible discovery of the "New World".

[101] Apparently, the Rosenthal Respondents were awaiting Judge Jefferson's decision regarding the Ortner Respondents' initial Motion to Dismiss before joining the fray. Judge Jefferson conducted a hearing on the Ortner Respondent's Motion to Dismiss on 9 January 2019 (App.684, line 10). No one appeared representing the Rosenthal Respondents. (App.686, lines 2-12). Judge Jefferson ultimately denied the Ortner Respondents' motion, by written order issued on 4 April and filed on 5 April 2019 (App.41-55).

As noted, one of the principal objectives of rules governing service of process is to ensure that defendants, such as the Rosenthal Respondents, actually received notice of a claimant's, such as Dr. Fechter, action.[102] Notwithstanding the Rosenthal Respondents' arguments and the Circuit Court's incorrect conclusion to the contrary (App.25-29, 213-221), the Rosenthal Respondents clearly had actual notice of Dr. Fechter's action well within the applicable three-year statute of limitations. The fact Dr. Fechter did not file the proof of service with the Circuit Court is, as noted before, merely a "red herring" given that "Rule 4(g), *SCRCivP*, specifically states [that], '[f]ailure to make proof of service ***does not affect the validity of the service***.' "[103] Dr. Fechter's "failure to make proof of service within a ten day period of service, likewise [does not and did not] affect the validity of service [of process upon the Rosenthal Respondents]"[104] as "[e]xacting compliance with the rules is not required to effect service of process."[105]

2. The Rosenthal Respondents Had Notice Of Dr. Fechter's Action Within The Applicable Statute Of Limitations

The Circuit Court found that Dr. Fechter failed to serve the Rosenthal Respondents within the statute of limitations and dismissed Dr. Fechter's action. (App.28-29). The Circuit Court's decision was incorrect and must be reversed in total.

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102 Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66. *See also generally* Fassett v. Evans, 364 S.C. 42, 47, 610 S.E.2d 841, 844 (Ct.App. 2005); Hutto v. County of Aiken, 2004 WL 6248942, *2 (S.C.App., filed 18 Feb. 2004); Seabrooks v. Aiken County, 2016 WL 4394275, *4 fn. 4 (D.S.C., filed 18 Aug. 2016).

103 Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (*quoting* Rule 4(g), SCRCivP). In addition "[n]owhere does [Rule 5(d), SCRCivP,] provide failure to file proof of service within the ten day period nullifies the service . . . ." Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

104 Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

105 Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (*citing* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209-210, 456 S.E.2d 897, 899).

The final decision in the Nevamar Claimants' workers' compensation litigation was filed on 26 January 2016 (App.20, 29; App.83, para. 17; pp.176, para. 15; App.180, para. 49), and consisted of the SCWCC's decision to release to the Rosenthal Respondents the $500,000.00 held-back by the Special Referee from the total settlement funds for payment of litigation expenses and costs. (App.57-65). Dr. Fechter filed this action on 25 August 2017, some 18+ months later. (App.8, 20, 87; App.210, para. 3; App.255). Dr. Fechter then served the Rosenthal Respondents, by their own admission (App.251, paras. 9-10), on 12 October 2017. (App.20, 22, 168-171). This was well within the three year status of limitations for this type of action.**106**

Again, one of the principal objectives of the service of process rules is to ensure that the defendant has received notice of the plaintiff's action.**107** Notwithstanding the Rosenthal Respondents' arguments and the Circuit Court's incorrect conclusion to the contrary (App.25-28, 215-219), the Rosenthal Respondents had notice of Dr. Fechter's action well within the applicable three-year statute of limitations. The fact Dr. Fechter did not file the proof of service with the Circuit Court is merely a "red herring" given that "Rule 4(g), *SCRCivP*, specifically states [that], '[f]ailure to make proof of service ***does not affect the validity of the service***.' "**108** Dr. Fechter's "failure to make proof of service within a ten day period of service, likewise [does not and did not] affect the validity of service [of

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106 *See* S. C. Code Ann. § 15-3-530.

107 Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66.

108 Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (*quoting* Rule 4(g), SCRCivP). In addition "[n]owhere does [Rule 5(d), SCRCivP,] provide failure to file proof of service within the ten day period nullifies the service . . . ." Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

process on the Ortner Respondents]"[109] as "[e]xacting compliance with the rules is not required to effect service of process."[110]

The Circuit Court concluded, albeit incorrectly, that "there [wa]s no question (a) [Dr. Fechter] (i) failed to serve [the Rosenthal Respondents] as required by Rules 4(d)(3)[,] (8), *SCRC[iv]P*, (ii) . . . failed to commence an action against [the Rosenthal Respondents], as required by [*S.C. Code Ann.* §] 15-3-20(B) and Rule 3, *SCRC[iv]P*, and (b) this [Circuit] Court lack[ed] personal jurisdiction over [the Rosenthal Respondents] as a result of [Dr. Fechter's] fail[ure] to effect service of civil process.. . . ." (App.29). The Circuit Court, while somewhat attempting to specify how Dr. Fechter's service of process was insufficient (App.25-28), still fell back on the oft-stated empty justification that Dr. Fechter's proof of service had not been timely filed with the court. (App.22, 23-24, 26). Furthermore, the Circuit Court failed to properly consider and/or value the evidence which demonstrated the Rosenthal Respondents, on or about 12 October 2017, had both notice and knowledge of Dr. Fechter's action.

The Circuit Court's faulty decision to grant the Rosenthal Respondents' *Motion to Dismiss* was later compounded by the Circuit Court's failure to grant Dr. Fechter's *Motion for Reconsideration*. Both of those decision must be reversed in all respects and this matter remanded to the Circuit Court for a jury trial.

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[109] Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703.

[110] Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (*citing* Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209-210, 456 S.E.2d 897, 899).

D. THE ORTNER RESPONDENTS AND THE ROSENTHAL RESPONDENTS HAD A CONTRACTUAL AND ETHICAL OBLIGATION TO PAY DR. FECHTER'S ADDITIONAL FEES CLAIMS.

The South Carolina version of the *Rules of Professional Conduct* provide, in pertinent part that "a lawyer having direct supervisory authority over the nonlawyer . . . shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[111] The *Rules* further note that "[l]awyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals[and] [s]uch assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services."[112] Additionally, as the Supreme Court acknowledged in *In re Longin*:

> Rule 8.4(a)[, *RPC*,] provides '[i]t is professional misconduct for a lawyer to violate or attempt to violate the *Rules of Professional Conduct*, knowingly assist or induce another to do so, or do so through the acts of another.' Moreover, Rule 7(a)(5) of the *Rules for Lawyer Disciplinary Enforcement* states '[i]t shall be a ground for discipline for a lawyer to engage in conduct tending to pollute the administration of justice or to bring the courts or the legal profession into disrepute or conduct demonstrating an unfitness to practice law.'[113]

The Supreme Court continued, stating that it "ha[d]s relied on these provisions in past disciplinary proceedings to find misconduct where a lawyer has failed to pay case-related expenses to a third-party."[114] In *Matter of Abney*, the Supreme Court disbarred an

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[111] Rule 407, SCACR (Rule 5.3(b), RPC).

[112] Rule 407, SCACR (Rule 5.3, RPC, *Comment 2*).

[113] *In re* Longin, 393 S.C. 368, 378, 713 S.E.2d 297, 302 (2011) (*per curiam*).

[114] *In re* Longin, 393 S.C. 368, 378, 713 S.E.2d 297, 302 (*citing In re* Johnson, 385 S.C. 501, 685 S.E.2d 610 (2009) (disciplining an attorney for failing to pay an expert witness); *In re* Okpalaeke, 374 S.C. 186, 648 S.E.2d 593 (2007) (disciplining an attorney for failing to pay a copy bill to a court

attorney who, among other things, had referred many of his personal injury clients to various medical providers for examinations and evaluations.[115] Then, after the medical providers performed their requested services, the attorney consistently failed and/or refused to pay the medical providers for their services.[116]

In *Gualtieri v. Burleson*, the North Carolina Court of Appeals addressed a North Carolina physician's claims against a District of Columbia attorney who had retained the doctor to examine and evaluate one of the attorney's personal injury clients."[117] After the physician had twice traveled to D.C. to examine and evaluate the attorney's client, prepared an evaluation report, and testified via a deposition, the attorney refused to pay the medical provider's fees.[118] The North Carolina court effectively summed up the situation between attorneys and their expert medical providers stating:

> Trial lawyers are always making contracts with court reporters, investigators, and experts of various kinds and the evidence clearly indicates [the] defendant [attorney] so contracted in this instance. Contrary to [his] argument, there is no inhibition in the law against a lawyer contracting to pay for services needed in a case he is handling. Rule 5.3[, *RPC*,] of The North Carolina State Bar authorizes a lawyer to advance or guarantee litigation expenses for his clients, provided the client remains ultimately liable to him for such expenses. This proviso was adopted, no doubt, because litigation is usually conducted, managed[,] and prepared by lawyers, not clients; knowing when court reporters, investigators[,] and expert witnesses are needed and

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reporter); *In re* Fulton, 343 S.C. 506, 541 S.E.2d 531 (2001) (disciplining an attorney for failing to pay a physician's court appearance fee).

[115] Matter of Abney, 316 S.C. 182, 183-184, 447 S.E.2d 848, 848-849 (1994) (*per curiam*).

[116] Matter of Abney, 316 S.C. 182, 183-184, 447 S.E.2d 848, 848-849.

[117] Gualtieri v. Burleson, 84 N.C.App. 650, 651-653, 353 S.E.2d 652, 653-655 (1987), *disc. rev. denied*, 320 N.C. 168, 358 S.E.2d 50 (1987). *See generally* Annot., *Attorney's Personal Liability for Expenses Incurred in Relation to Services for Client*, 66 A.L.R.4th 256 (1988).

[118] Gualtieri v. Burleson, 84 N.C.App. 650, 652-653, 353 S.E.2d 652, 654-655.

> obtaining them is part of a trial lawyer's job; and lawyers, not clients, usually select, contact, negotiate with, engage[,] and pay such persons. Whether payment is made with the lawyer's money or the client's, or whether the client has agreed to reimburse the lawyer, is of no concern to the recipient; but ***rare, indeed, is the expert, medical or otherwise, who helps in the preparation or trial of a lawsuit without being assured by someone apparently capable of paying that he will be paid***. All these things are known by trial lawyers, which is why they ***usually assure experts vital to their cases that they will be paid*** and make the best arrangements they can with the clients to repay them.**119**

The Court of Appeals of Washington, Division 1, concluded, in *Copp v. Breskin*, that an attorney owes an expert or other litigation service provider an express disclaimer of responsibility if the attorney intends not to be bound by a contract for litigation services."**120** The Washington court recognized that "[t]his [proposition] reflect[ed] the modern trend, which is to hold the attorney liable in the absence of an express disclaimer or other clear indication not to be bound."**121** The appellate court reasoned that by "[p]utting the burden on the attorney promote[d] public trust and confidence in the legal profession, the supervision of which [was and] is the exclusive province and responsibility

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119 Gualtieri v. Burleson, 84 N.C.App. 650, 653-654, 353 S.E.2d 652, 655 (Emphasis added).

120 Copp v. Breskin, 56 Wash.App. 229, 235, 782 P.2d 1104, 1107 (1989). *See also generally* Robert Rossi, *Attorney's Personal Liability For Expenses*, Attorneys' Fees 3rd, § 1.26 (Thomson Reuters West 2021 update).

121 Copp v. Breskin, 56 Wash.App. 229, 235, 782 P.2d 1104, 1107. *See also generally* Ingram v. Lupo, 726 S.W.2d 791 (Mo.App. 1987); Gaines Reporting Serv. v. Mack, 4 Ohio App.3d 234, 447 N.E.2d 1317 (1982); Theuerkauf v. Sutton, 102 Wis.2d 176, 306 N.W.2d 651 (1981); Molezzo Reporters v. Patt, 94 Nev. 540, 579 P.2d 1243 (1978); C.C. Plumb Mixes, Inc. v. Stone, 108 R.I. 75, 272 A.2d 152 (1971); Roberts, Walsh & Co. v. Trugman, 109 N.J.Super. 594, 264 A.2d 237 (1970); Burt v. Gahan, 351 Mass. 340, 220 N.E.2d 817 (1966), 15 A.L.R.3d 527 (1966).

of the courts."[122] Finally, the United States District Court for the Northern District of Georgia, in *Ikon Office Solutions, Inc. v. Law Office of Craig Kuglar, LLC*, acknowledged that "[s]everal courts [from various jurisdictions across this country] have held that attorneys are responsible for contracts entered into by the attorneys on behalf of their clients in the course of litigation."[123]

The Ortner Respondents and the Rosenthal Respondents had an obligation to pay Dr. Fechter for the medical and other valuable services he provided to the Nevamar Claimants. The Ortner Respondents and the Rosenthal Respondents reneged on their agreement and this Court of Appeals should reverse both the Trial Courts dismissal orders, as well as its order denying Dr. Fechter's reconsideration motions and remand this matter back for a jury trial.

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[122] Copp v. Breskin, 56 Wash.App. 229, 235, 782 P.2d 1104, 1107 (*citing* Short v. Demopolis, 103 Wash.2d 52, 62, 691 P.2d 163 (1984)).

[123] Ikon Office Solutions, Inc. v. Law Office of Craig Kuglar, LLC, 2013 WL 5350852, *4 fn. 5 (N.D.Ga., filed 23 Sept. 2013) (*citing* Judd & Detweiler, Inc. v. Gittings,43 App. D.C. 304, 310–11 (D.C.Cir. 1915); McCullough v. Johnson, 307 Ark. 9, 12, 816 S.W.2d 886 (1991); Burt v. Gahan, 351 Mass. 340, 220 N.E.2d 817; Ingram v. Lupo, 726 S.W.2d 791; Molezzo Reporters v. Patt, 94 Nev. 540, 579 P.2d 1243; Roberts, Walsh & Co. v. Trugman, 109 N.J.Super. 594, 264 A.2d 237; Gualtieri v. Burleson, 84 N.C.App. 650, 353 S.E.2d 652; Gaines Reporting Serv. v. Mack, 4 Ohio App.3d 234, 447 N.E.2d 1317; C.C. Plumb Mixes, Inc. v. Stone, 108 R.I. 75, 272 A.2d 152; Copp v. Breskin, 56 Wash.App. 229, 782 P.2d 1104, 1107). *See also generally* Jay Zitter, *Attorney's Personal Liability for Expenses Incurred in Relation to Services for Client*, 66 A.L.R.4th 256.

V. CONCLUSION

Based upon the foregoing arguments and citation of authority, the Appellant, Cary E. Fechter, M.D., respectfully requests that this Court of Appeals reverse the Circuit Court decisions in all respects and remand this matter back for a jury trial.

Respectfully submitted:

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6 June 2022

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SC Court of Appeals

STATE OF SOUTH CAROLINA
IN THE
COURT OF APPEALS

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

CARY E. FECHTER, M.D.,

Appellant,

vs.

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

Respondents.

RULE 211, *SCACR*, CERTIFICATION FOR THE BRIEF OF THE APPELLANT, CARY E. FECHTER, M.D.

I, Stephen P. Groves, Sr., Esquire, hereby certifies and attests that the ***Appellant's Brief*** **(Final)** of the Appellant, Cary E. Fechter, M.D., complies with the requirements of Rule 211(b), SCACR.

Signed: ***/s/ Stephen P. Groves, Sr.***
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Charleston, South Carolina
6 June 2022

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