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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.

REPLY BRIEF OF THE APPELLANT, CARY E. FECHTER, M.D. (ORTNER RESPONDENTS)

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The Appellant, Cary E. Fechter, M.D. ("Dr. Fechter"), submits this Reply Brief in response to the Brief of the Respondents, Leon Martin Ortner and the Ortner Law Firm (the "Ortner Respondents).

A. THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION DID NOT HAVE ANY LEGAL AUTHORITY TO ADDRESS DR. FECHTER'S VARIOUS CLAIMS AGAINST THE ORTNER RESPONDENTS.

The Ortner Respondents moved to dismiss Dr. Fechter's *Complaint*, in part, on the basis the South Carolina Workers' Compensation Commission (the "SCWCC") had already "adjudicated" Dr. Fechter's alleged "claims" seeking additional payments for rendered medical services.**1** (App.25-29, 87, 90-91, 209-210, 219-220). The Circuit Court acknowledged the SCWCC had "ordered the release of the [$500,000.00] held in trust to satisfy[, among other things,] the expenses associated with the evaluation or treatment of the [Nevamar Claimants']." (App.7-8). Most importantly, the Circuit Court found the

1 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"). (App.18-20, 43, 57, 75). In or around October 2005, the Ortner Respondents retained Dr. Fechter to perform independent medical examinations ("IME") of and issue independent evaluation reports on the Nevamar Claimants. (App.7, 19, 43, 59; App.81-82, para. 5; App.131-132; App.145, para, 10, App.174, paras. 2-3). Dr. Fechter was to be paid $500.00 per Nevamar Claimant for the initial IME and 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; App.82, para. 7; App.174-175, para. 4). Dr. Fechter's present claims arise from the failure of the Ortner Respondents, as well as the Respondents, Gerald Rosenthal and Rosenthal, Levy, Simon, and Ryles, P.A. (the "Rosenthal Respondents"), to pay Dr,. Fechter for 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 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. 10-13; App.132; App.145, para. 13' App. 154, line 11 – App.155, line 23; App.158, lines 1-23).

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). In turn, the Circuit Court deduced it did not have subject matter "jurisdiction to hear and determine [the legitimacy of Dr. Fechter's] claims." (App.31).

The SCWCC did not have jurisdiction to "decide" Dr. Fechter's claims against both the Ortner Respondents and the Rosenthal Respondents. The Circuit Court's decision to the contrary must be reversed and the matter remanded for further proceedings.

1. The SCWCC Ended Its Jurisdiction Over The Germane Aspects Of The Nevamar Claimants' Worker's Compensation Litigation Before Adjudicating Dr. Fechter's Payment Claims.

The SCWCC's own actions terminated its jurisdiction to consider Dr. Fechter's additional payment claims. (App.66-68). The SCWCC dismissed, with prejudice, "[a]ll cases/claims included in the *Initial Special Referee's Report* . . . with the exception of any claims involving death benefits." (App.67, para. 4). Dr. Fechter's additional fees claim did not involve any death benefits and, therefore, the workers' compensation litigation ended on 10 December 2015.[2] The Nevamar Claimants' workers' compensation claims were not pending when the SCWCC addressed Dr. Fechter's claims. (App.67, para. 4).

The SCWCC's lack of jurisdiction to decide ancillary issues where no workers' compensation claim is pending in this type of situation is clear.[3] Consequently, the

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[2] The Special Referee's Initial Report addressed disposition of the $500,000.00 held-back funds (App.67). The SCWCC, in adopting that report, did not reserve the issue of the SCWCC's need to direct the actual distribution of those funds. (App.66-68).

[3] *See generally* Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 543-544, 397 S.E.2d 526, 528 (1990) (*citing cases).* See also generally 4 Arthur Larson and Lex K. Larson, Larson's Workers'

SCWCC's acts[, being] without jurisdiction[,] are without effect."[4] Therefore, the SCWCC's " 'proceedings . . . are a nullity, and its judgment without effect, either on the person or property.' "[5] The SCWCC did not have jurisdiction to consider Dr. Fechter's claims and, therefore, its actions and decisions were a nullity without any force and effect.

This Court of Appeals should reverse the Circuit Court's decision 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 The SCWCC Had Exceeded Its Subject Matter Jurisdiction.

Dr. Fechter's claims involved a breach of contract between the Ortner Respondents and the Rosenthal Respondents - as the Nevamar Claimants' attorneys - and Dr. Fechter, the medical expert those very same attorneys had retained to independently perform, among other things, IMEs on the Nevamar Claimants. Neither the Ortner Respondents nor the Rosenthal Respondents ever sought to include Dr. Fechter as a party to the workers' compensation litigation. In fact, the SCWCC's own rules provided that Dr. Fechter did not have any legal standing to participate in and/or object to any of those proceedings.[6]

Compensation Law, § 92.42 (West 1987)). *See also* S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc., 304 S.C. 210, 211-214, 403 S.E.2d 625, 628 (1991).

[4] 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)).

[5] 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).

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

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.[7] The SCWCC did not have subject matter jurisdiction to hear, much less determine, the validity of Dr. Fechter's claims against the Ortner Respondents as those individuals and entities were non-parties to the Nevamar Claimants' workers' compensation litigation.[8]

The SCWCC stated in its final action in the Nevamar Claimants' workers' compensation litigation that its intent was solely to address the issue of whether the $500,000.00 held back funds were available and could appropriately be used to pay legitimate litigation costs and expenses. (App.57-58). The SCWCC, however, vastly exceeded its stated mandate and improperly proceeded to "conclusively" determine the validity of Dr. Fechter's common law breach of contract claims against the Ortner Respondents (and the Rosenthal Respondents). (App.57-65).[9] The SCWCC did not

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7 While 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 payable via the Workers' Compensation Act, but medical treatment and services for which the Ortner Respondents and the Rosenthal Respondents specifically contracted under the common law and, in turn, which was undeniably beyond the reach of the Workers' Compensation Act.

8 *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 (Ct.App. 1997), *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). Admittedly, Dr. Fechter's additional payments for medical services claims against the Ortner Respondents (and the Rosenthal Respondents) tangentially arose from and/or were tangentially related to the Nevamar Claimants' workers' compensation litigation.

9 Dr. Fechter, admittedly a non-party to Nevamar Claimants' workers' compensation litigation (App.57-65; App.176, para. 21), had neither standing nor the legal ability to conduct discovery into the Ortner Respondents' contentions that they did not owe him any additional payments for rendered medical and other services . *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, ostensibly acting on behalf their Nevamar Claimants clients,

have subject matter jurisdiction to address any common law claims, whether Dr. Fechter's breach of contract or otherwise, which did not directly relate to the compensation scheduled to be provided to of the Nevamar Claimants (*i.e.*; the injured employees).

The SCWCC's own rules and regulations arguably prohibited the SCWCC from addressing Dr. Fechter's common law claims against the Ortner Respondents.[10] The SCWCC admitted Dr. Fechter did not have a "claim [which] exist[ed] of record with the [SCWCC] . . . ." (App.108).[11] The Rosenthal Respondents and, by implication, the Ortner Respondents, were cleverly able to circumvent Dr. Fechter's claims by having the SCWCC, a specialized and inferior tribunal, "adjudicate" the issue before the dispute could reach the Circuit Court.

The Ortner Respondents knew Dr. Fechter's payment claims, albeit tangentially related to the Nevamar Claimants' workers' compensation litigation, arose solely from contractual agreements between Dr. Fechter and the Ortner Respondents. Dr. Fechter's claims were independent of the Nevamar Claimants' workers' compensation litigation. 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."

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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 to argue before a specialized commission (albeit one without legitimate jurisdiction) the merits of a common law claims involving alleged breaches of contract involving substantial monetary value and involving a nonparty is beyond obvious. The South Carolina Workers' Compensation Act seems not to have any procedure through which Dr. Fechter could intervene into the litigation in order to protect his economic interests.

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

[11] The Rosenthal Respondents challenged Dr. Fechter's claims while, at the same time, seeking to have the SCWCC release the Special Referee's $500,000.00 in held-back funds to them alone. (App.108, 131-143).

At best, the SCWCC's jurisdiction was limited to determining whether Dr. Fechter's claimed fees could be paid from $500,000.00 held back fees. The SCWCC had no place in determining whether the Ortner Respondents were actually responsible to pay Dr. Fechter for his claimed fees. The contracts were solely between Dr. Fechter and the Ortner Respondents/Rosenthal Respondents. They were never between Dr. Fechter and the individual Nevamar Claimants.

The SCWCC overstepped its jurisdiction and the Circuit Court compounded that error. The Circuit Court's orders must be reversed and the case remanded.

4. The Nevamar Claimants' Compensation Rights Were Never Affected By Dr. Fechter's Fee Claims.

The SCWCC is authorized to only address "disputes ancillary to an *employee's right to compensation* . . . ."[12] In fact, nowhere in the *S.C. Workers' Compensation Act* is there a provision to allow any party, other than the employee and the employer to participate . . . .[13] For example, 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.[14] As in this case, the "trial court [had]

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[12] 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).

[13] Blue Cross & Blue Shield v. S.C. Indus. Comm'n, 274 S.C. 204, 206, 262 S.E.2d 35, 37 (1980) (*per curiam*).

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

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 . . . ."[15] The Supreme Court reversed, stating "it is clear the Hospital [wa]s a party with no standing to seek redress [for the incurred medical expenses] before the [SCWCC]"[16] 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".[17] The Supreme Court concluded:

> 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.[18]

The Circuit Court incorrectly concluded that the SCWCC was "authorized" to determine the validity of Dr. Fechter's claims. This was a breach of contract which did not have any effect on the Nevamar Claimants' entitlement to benefits under the workers' compensation system. The Circuit Court's decisions must be reversed in all respects and this matter remanded for further proceedings.

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

[16] 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).

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

[18] Baker Hosp. v. Fireman's Fund Ins. Co., 314 S.C. 98, 101, 441 S.E.2d 822, 823. *See also* Polite v. Westvaco Corp., 2010 WL 10079468, *1 (S.C.App., filed 1 Mar. 2010) (*per curiam*) *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); 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; Labouseur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 542-543, 397 S.E.2d 526, 528; Doyle v. U.S. Fid. & Guar. Co., 316 S.C. 83, 85-86, 447 S.E.2d 192, 193-194 (1994); Roper Hosp. v. Clemons, 326 S.C. 534, 536, 484 S.E.2d 598, 599.

B. THE CIRCUIT COURT IMPROPERLY DENIED DR. FECHTER'S RECONSIDERATION MOTION REGARDING DISMISSAL OF DR. FECHTER'S CLAIMS AGAINST THE ORTNER RESPONDENTS.

The Circuit Court dismissed Dr. Fechter's claims against the Ortner Respondents, in part, finding Dr. Fechter had failed to properly serve them with his *Summons and Complaint*. (App.9, 11-13, 87, 92-94, 255). Moreover, the Ortner Respondents argued, even if Dr. Fechter had properly done so, such service had not been accomplished within the applicable three-year statute of limitations. (App.9, 11-13, 87, 92-94, 255).

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

Dr. Fechter 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). Karen Ortner and Leon Ortner admitted the Ortner Respondents received the pleadings for Dr. Fechter contained in the envelope attached to their respective affidavits. (App.310, paras. 6-11; App.314, para. 7).[19] Since one the principal intents of " 'Rule 4, *SCRCivP*, [is to] assure[] the defendant of reasonable notice of the [pending] action' ",[20] that was clearly done in this case. Moreover, "[e]xacting

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[19] 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).

[20] 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* Estate of Knight v. Whitten, 2010 WL 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).

compliance with the rules is not required to effect service of process."[21] " '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.' "[22] Consequently, 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).[23]

The Ortner Respondents cannot and should not be allowed to assert they were not served with Dr. Fechter's *Summons and Complaint*.

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21 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).

22 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).

23 Many court have concluded that if the claimant is 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) showing service, 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. S*ee 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); El–Aheidab v. Citibank (S.D.), N.A., 2012 WL 506473,*4 n.3 (N.D.Cal., filed 15 Feb. 2012); White v. Microsoft Corp., 454 F.Supp.2d 1118, 1124 & n. 7, 1131 (S.D.Ala. 2006); 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), *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).

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

The SCWCC's final decision to release the $500,000.00 of held-back funds to the Rosenthal Respondents was filed on 26 January 2016. (App.8 fn.2; App.83, para. 17; App.176, para. 15; App.180, para. 49). Dr. Fechter filed this action on 25 August 2017 (App.8, 20, 81, 87; App.180, para. 50; App.210, para. 3; App.255) and served the Ortner Respondents on 7 December 2017 (App.8, 20, 81, 87; App.180, para. 50; App.210, para. 3; App.255),[24] well within the status of limitations.[25]

The Ortner Respondents filed their joint *Motion to Dismiss* on 8 January 2018 (App.87), while *asserting* "insufficiency of process" in both the original[26] and in the renewed versions of their dismissal motion, simply asserted Dr. Fechter served his pleadings upon them beyond the running of the statute of limitations. (App.100-101, 255).

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[24] 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).

[25] *See* S. C. Code Ann. § 15-3-530 (Thomson Reuters West 2017). 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.' " Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (Ct.App. 1989) (*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. 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." 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).

[26] "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).

While the Circuit Court noted "the Ortner [Respondents had moved to] dismiss [Dr. Fechter's] Complaint [asserting] insufficiency of service of process" (App.9), the Circuit Court failed to state how Dr. Fechter's service of process was insufficient (App.11-13).[27]

The Circuit Court failure to indicate how Dr. Fechter's service of process was deficient was fatal to its subsequent decision since the Circuit Court's " 'objection[s] to insufficiency of process or its service should [have] point[ed] out specifically [how Dr. Fechter] ha[d] failed to satisfy the requirements of the service provision he utilized.' "[28] This is particularly true given that the Ortner Respondents were undisputedly aware of Dr. Fechter's action against them on 7 December 2017, even if a signed "green return receipt card" was not submitted.

The Circuit Court's decision to grant the Ortner Respondents' *Motion to Dismiss* and not grant Dr. Fechter's *Motion for Reconsideration* must be reversed in all respects.

C. DR. FECHTER APPEALED THE ORDER GRANTING THE ORTNER RESPONDENTS' MOTION TO DISMISS AND THE ORDER DENYING DR. FECHTER'S MOTION FOR RECONSIDERATION.

The Ortner Respondents assert this Court of Appeals does not have jurisdiction to consider this appeal as Dr. Fechter did not comply with Rule 203(d)(1)(B)(ii), *SCACR*. They assert that Dr. Fechter failed to "file and serve with the Notice of Appeal the [*SCRCivP*] *Form 4 Order* dismissing the action filed on February 5, 2020, or the *Order*

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[27] The Circuit Court used only the empty justification that Dr. Fechter's proof of service had not been timely filed with the court. (App.11-12). Additionally, the Circuit Court ignored the evidence showing the Ortner Respondents had both notice and knowledge of Dr. Fechter's action on 7 December 2017, a date sufficient for them to have timely sought dismissal 30 days later.

[28] 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).

Dismissing Plaintiff's Complaint with Prejudice as to the Ortner Respondents filed on August 4, 2020." (*Ortner Respondents' Brief*, p.38). Admittedly, the Ortner Respondents correctly note that the only order attached to the Notice of Appeal was the Circuit Court's Form 4 Order filed on 30 March 2021. (App.1). Nevertheless, the Ortner Respondents ignore the very language of that Form 4 Order which specifically stated:

> This matter is before th[is] [Circuit] Court on [Dr. Fechter's] Rule 59(e)[, *SCRCivP*,] motions to reconsider Orders filed 06/08/2020 (Rosenthal) and 08/04/2020 (Ortner) dismissing the complaint against all defendants, and on [Respondents'] (Rosenthal) Rule 59(e)[, *SCRCivP*,] motion to reconsider an 08/24/2020 Order vacating an 08/04/2020 Order granting the Rosenthal [Respondents'] motion to dismiss.
>
> This matter was initially before this court on the [Ortner Respondents' and the Rosenthal Respondents' respective] motions to dismiss this civil action. The motions were granted as reflected in a Form 4 Order filed 02/05/2020. Formal orders were filed 06/08/2020 (Rosenthal Order) and 08/04/2020 (Ortner Order) explaining the rulings of the Court. The identical 06/08/2020 (Rosenthal) Order was inadvertently and erroneously filed a second time on 08/04/2020. On 08/24/2020 th[is] [Circuit] Court, upon realization of the filing error, filed a Form 4 Order vacating the identical "Rosenthal" Order filed on August 4, 2020 and providing that '[t]he original order granting the [Respondents'] [Rosenthal] motion to dismiss which was filed for record on June 8, 2020 shall stand alone as the ruling of this [Circuit] Court on the [Rosenthal Respondents'] motion to dismiss'.
>
> This [Circuit] Court has considered **[DR. FECHTER'S]** and [the **ROSENTHAL RESPONDENTS'**] **MOTIONS** to **RECONSIDER** and the respective briefs and argument submitted in support and opposition to, and now find that; (1) [Dr. Fechter's] motions to reconsider the Court's 06/08/2020 Order dismissing the Rosenthal [Respondents'] and th[is] [Circuit] Court's 8/04/2020 Order dismissing the Ortner [Respondents'], and (2) the Rosenthal [Respondents'] motion to reconsider th[is] [Circuit] Court's 08/24/2020 Order vacating an 08/04/2020 Order dismissing the Rosenthal [Respondents'] should be and **ARE** therefore **DENIED**.

(App.1) (Emphasis in original).

A reasonable reading and interpretation of the Circuit Court's 30 March 2021, Form 4 Order clearly shows that the Circuit Court, while denying Dr. Fechter's reconsideration motions, specifically mentioned and addressed the earlier two orders – which dismissed Dr. Fechter's claims against both the Ortner Respondents and the Rosenthal Respondents. There can be no doubt that the Ortner Respondents knew that Dr. Fechter was appealing both the Circuit Court's order denying his Rule 59(e), *SCRCivP*, motion, as well as the Circuit Court's order dismissing Dr. Fechter's claims against the Ortner Respondents.

This Court of Appeals has routinely acknowledged that "a mere clerical error in a Notice of Appeal does not warrant dismissal of the appeal."**29** In this case, as in all similar cases, the Ortner Respondents' "demonstrates no prejudice as a result of the omission [of the dismissal order]."**30** While Dr. Fechter "did not 'technically' a[ttach] the [Circuit] [C]ourt's original order [dismissing his claims against the Ortner Respondents] by referring to it in the *Notice of Appeal*, [Dr. Fechter] did attach a copy of the [30 March 2021 Form 4] [O]rder to the *Notice* [*of Appeal* which specifically reference the dismissal order]."**31** Consequently, "[u]nder these circumstances, [this Court of Appeals should view Dr. Fechter's] omission [as] a clerical nature only and this Court [of Appeals should exercise its] jurisdiction to hear the appeal."**32**

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29 Weatherford v. Price, 340 S.C. 572, 577, 532 S.E.2d 310, 313 (Ct.App. 2000) (*citing* Charleston Lumber Co. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431 (Ct.App. 1995)). *See also* Mason v. Mason, 412 S. C. 28, 59-50, 770 S.E.2d 405, 421 (Ct.App. 2015) (" 'Clerical errors in a notice of appeal do not destroy the appeal.' ");

30 Weatherford v. Price, 340 S.C. 572, 578, 532 S.E.2d 310, 313.

31 Weatherford v. Price, 340 S.C. 572, 578, 532 S.E.2d 310, 313.

32 Weatherford v. Price, 340 S.C. 572, 578, 532 S.E.2d 310, 313.

In *In re Estate of Hinson*, the Supreme Court reversed this Court of Appeals' dismissal of an appeal.[33] The Supreme Court recognized that, much like the result the Ortner Respondents seek in this appeal, this Court of Appeals had:

> dismissed the appeal because petitioner failed to serve and file a *[N]otice of [A]ppeal* from the final order granting respondent's motion for summary judgment and instead served and filed a *[N]otice of [A]ppeal* from a subsequent order denying his Rule 59(e), *SCRC[iv]P*, motion, without any mention of the earlier order.[34]

Seemingly adopting this Court of Appeals' reasoning from both *Weatherford v. Price* and *Charleston Lumber Co. v. Miller Housing Corp.*, the Supreme Court "grant[ed] the petition for a writ of *certiorari*, . . . reverse[d] the order of dismissal, and remand[ed] this matter to th[is] Court of Appeals for consideration of petitioner's appeal."[35]

Finally, in *Paschal v. Price*, this Court of Appeals readily acknowledged that "[b]oth this Court [of Appeals] and the [S]upreme [C]ourt have held clerical errors in the notice of appeal do not destroy an appeal.".[36]

The Ortner Respondents have not been prejudiced and, in fact, do not assert that they have been so. This Court of Appeals should consider the merits of this appeal.

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[33] *In re* Estate of Hinson, 2011 WL 11748295, *1 (S.C., filed 19 Dec. 2011) (*per curiam*).

[34] *In re* Estate of Hinson, 2011 WL 11748295, *1.

[35] *In re* Estate of Hinson, 2011 WL 11748295, *1 (*citing* Weatherford v. Price, 340 S.C. 572, 577, 532 S.E.2d 310, 313; Charleston Lumber Co. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431). *See also generally* Babaee v. Moisture Warranty Corp., 2012 WL 10826255, *2 (S.C.App., filed 25 Jan. 2012) (*per curiam*); Carroll v. Anderson Bros. Bank, 2011 WL 11735964, *1 fn. 1 (S.C.App., filed 11 Oct. 2011) (*per curiam*).

[36] Paschal v. Price, 380 S.C. 419, 441, 670 S.E.2d 374, 386 (Ct.App. 2008) (*citing* State v. Scott, 351 S.C. 584, 587, 571 S.E.2d 700, 701 (2002); Weatherford v. Price, 340 S.C. 572, 577, 532 S.E.2d 310, 313; Charleston Lumber Co. v. Miller Housing Corp., 318 S.C. 471, 458 S.E.2d 431), *reversed on other grounds by* Wilkinson *ex. rel.* Wilkinson v. Palmetto State Trans. Co., 382 S.C. 295, 676 S.E.2d 700 (2009).

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's various 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 REPLY BRIEF OF THE APPELLLANT, CARY E. FECHTER, M.D. (*ORTNER RESPONDENTS*)

I, Stephen P. Groves, Sr., Esquire, hereby certifies and attests that the ***Reply Brief (Ortner Respondents)*** **(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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