THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

J. Derham Cole, Circuit Court Judge

Case No. 2017-CP-10-04371
APPELLATE CASE NO 2021-000446

Cary E. Fechter, MD Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS GERALD ROSENTHAL AND ROSENTHAL, LEVY, SIMON AND RYLES, PA

Michael E. Kozlarek, SC Bar No. 69330
John Marshall Mosser, SC Bar No. 71929
KING KOZLAREK LAW LLC
201 Riverplace, Suite 500 (29601)
Post Office Box 565
Greenville, South Carolina 29602-0565
O: 864.527.5941
M: 803.312.3199
F: 864.670.5246
michael@kingkozlaw.com
johnmarshall@kingkozlaw.com
Counsel for Respondents Gerald Rosenthal and Rosenthal, Levy, Simon and Ryles, PA

June 8, 2022

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

This case is about whether Appellant as an expert in a case before the South Carolina Workers' Compensation Commission ("SCWCC") may seek payment for a third time (in a third forum) after having been twice found not entitled to the relief sought.

The primary disputes between Appellant and Gerald Rosenthal, and Rosenthal, Levy, Simon and Ryles, PA ("Rosenthal Respondents") are (1) whether Rosenthal Respondents owe Appellant additional money in connection with services to clients connected with a workers' compensation case, and (2) whether South Carolina courts, other than the SCWCC, have both subject matter jurisdiction necessary to adjudicate these claims and personal jurisdiction over Rosenthal Respondents. This single substantive dispute has been thrice adjudicated by Appellant and Respondents since 2016 and, over the period of the past 8 years, the substantive dispute has also been overshadowed by multiple procedural disputes.

In 2016, the SCWCC, while holding a pool of settlement funds for costs and fees associated with the workers' compensation claims, evaluated the merits of Appellant's claims and found that Appellant was not entitled to any portion of these funds. Appellant filed grievances with the Supreme Court of South Carolina's Office of Disciplinary Counsel ("ODC") against Respondents, but after investigation, the ODC determined that Respondents had no obligation to pay Appellant.[1] Despite an adverse ruling by the SCWCC and dismissal by the ODC, Appellant subsequently sought to further litigate the same claim by filing the underlying civil case. The Circuit Court determined that it lacked subject matter jurisdiction over the dispute and that it lacked personal

[1] The ODC's letter of March 2, 2016 stated in part "[f]rom our investigation, this office had determined that there is no evidence of any such lawyer misconduct . . . and that further investigation would not likely reveal any such evidence." (R. p. 442).

jurisdiction over Rosenthal Respondents, repeatedly dismissing Appellant's claims against Rosenthal Respondents, with prejudice, in 2020.

In 2021, this appeal followed.

STATEMENT OF ISSUES ON APPEAL

I. **DOES THIS COURT LACK APPELLATE JURISDICTION TO ENTERTAIN THIS APPEAL DUE TO THE FAILURE OF APPELLANT TO TIMELY SERVE NOTICE OF APPEAL?**

II. **THE CIRCUIT COURT CORRECTLY DISMISSED THE APPELLANT'S COMPLAINT FOR LACK OF PERSONAL JURISDICTION OVER RESPONDENTS.**

III. **THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION PROPERLY EXERCISED EXCLUSIVE, ORIGINAL JURISDICTION OVER THE SUBJECT MATTER OF APPELLANT'S CLAIMS IN THE UNDERLYING CIVIL SUIT.**

IV. **THE CIRCUIT COURT CORRECTLY CONCLUDED THAT APPELLANT'S CLAIMS IN THE UNDERLYING CIVIL SUIT ARE NOW TIME BARRED.**

STATEMENT OF THE CASE

1. Timeliness of Appeal

On May 14, 2019, Rosenthal Respondents filed Gerald Rosenthal's and Rosenthal, Levy, Simon, and Ryles' Joint Motion to Dismiss ("Rosenthal Respondents MTD") (R. pp. 209-254). On June 8, 2020, the Circuit Court dismissed Appellant's case with prejudice ("June Dismissal Order"). (R. pp. 18-32). On June 17, Appellant filed the first motion to reconsider ("1st MTR"). (R. pp. 341-368). On June 29, Rosenthal Respondents filed a Response to Appellant's 1st MTR. (R. pp. 533-536). On August 4, the Circuit Court again dismissed Appellant's case with prejudice ("August Dismissal Order"). (R. pp. 18-32). On August 13, Appellant filed the second motion to reconsider ("2nd MTR"). (R. pp. 537-549). Appellant's 2nd MTR was substantively identical to the 1st MTR.

Appellant did not file a Rule 60, South Carolina Rules of Civil Procedure ("SCRCP"), motion in response to either the June Dismissal Order or the August Dismissal Order. On August 24, on its own motion, the Circuit Court issued a "Form 4" ("August 24 Order") in which the Circuit Court "VACATED" the August Dismissal Order. (R. pp. 4-5).

On April 21, 20**21**, Appellant filed his Notice of Appeal.

2. The SCWCC Ruling On The Merits Of Appellant's Claim

On November 18, 2015, Rosenthal Respondents requested that the SCWCC release $500,000.00 in held-back settlement funds, which were then held in trust by H. Mills Gallivan as Special Referee in the matter of *Sadie Adams, et. al. vs. International Paper Company, et, al.* WCC File No.: 0326995 ("*Adams*"). (R. p. 105; R. pp. 131-147). The SCWCC found that it had jurisdiction to decide the dispute, that Appellant was properly served, that Appellant was deposed

on November 2, 2015[2], that Appellant failed to "establish that he ha[d] a contractual right to such funds, as well as a calculable claim amount," concluding that Appellant had no claim to "any funds in addition to the previously paid retainer." (R. pp. 106-108). Further, the SCWCC found that the testimony of Appellant, the record, and evidence before the SCWCC established that (a) Appellant had no contractual agreement with Rosenthal Respondents, (b) unilaterally chose to provide medical services, other than those requested by Rosenthal Respondents, (c) had already been paid $25,000 by Rosenthal Respondents, and (d) the equities favored Rosenthal Respondents. (R. pp. 107-112).

The SCWCC concluded that it had exclusive original jurisdiction to address the appropriate disbursement of the remaining $500,000.00 in held-back settlement funds and subject matter jurisdiction to determine the validity and legitimacy of Appellant's payments claim for additional medical and other services to the workers' compensation claimants. (R. pp. 105-106; R. pp. 108-111). The SCWCC specifically found that Appellant had no documentation to support his contractual claims against Rosenthal Respondents whatsoever. (R. pp. 110-111). Appellant's sole documentation to support his contractual claims were letters from Leon Martin Ortner or The Ortner Law Firm, LLC ("Ortner Respondents"), and the SCWCC found those letters were insufficient to support Appellant's claim for payment of additional fees. (R. p. 110). Moreover, the SCWCC found that Appellant was "not being deprived of any payment due him" and had also "received payments from his patients' insurance companies, Medicare, and other third-party

[2] Appellant was deposed in *Adams* on November 2, 2015, ("Appellant Depo.") pursuant to subpoena of Respondent Gerald Rosenthal. The deposition subpoena required that Appellant produce any and all documents related to, or supporting, Appellants claim for payment for services rendered in or relating to [*Adams*]. (R. p. 62; R. p. 138). At the deposition Appellant was represented by counsel, who also subsequently represented Appellant in the underlying civil matter.

sources and, therefore, remaining payment responsibility, if any, [wa]s not with [Rosenthal Respondents].” (R. p. 111).

After considering Appellant’s claim, the SCWCC ultimately released the entire $500,000.00 to Rosenthal Respondents, finding that Appellant was entitled to none of the funds set aside “for reimbursement of approved costs incurred on behalf of [Respondent RLSR’s] clients”. (R. p. 105).

3. Service On Rosenthal Respondents

On August 25, 2017, Appellant filed a summons and complaint with the Clerk of Court of Charleston County. (R. p. 225). To date, Appellant has never served Rosenthal Respondents with the 2017 Summons and Complaint. (R. pp. 25-28). On May 14, 2019, Respondents filed Rosenthal Respondents MTD pursuant to SCRCP Rules 12(b) (2), (4), and (5), based on: (1) failure to effect proper service; (2) the expiration of the three-year statute of limitations; and (3) under SCRCP Rule 12(b)(1), the previous exercise of exclusive jurisdiction over the case by the SCWCC. (R. p. 209). On June 8, 2020, the Honorable J. Derham Cole granted Rosenthal Respondents’ motion and dismissed Appellant’s case with prejudice. (R. pp. 18-32). On August 4, the Circuit Court again dismissed Appellant’s case with prejudice (R. pp. 6-15).

STATEMENT OF FACTS

I. PROCEDURAL HISTORY OF UNDERLYING CIVIL ACTION

At all times relevant to this action, Gerald Rosenthal ("Respondent Rosenthal") was a citizen and resident of the State of Florida and Rosenthal, Levy, Simon and Ryles, PA ("Respondent RLSR") was a Professional Association organized and operating under the laws of the State of Florida and headquartered therein and was not registered as a foreign corporation in the State of South Carolina. (R. p. 20).

Appellant filed a Summons and Complaint in this captioned matter with the Clerk of Court of Charleston County ("Clerk") on August 25, 2017. (R. p. 494). Appellant's Complaint and Appellant's sworn affidavit, which was filed with the Clerk on January 9, 2019, aver that the underlying workers' compensation cases that form the basis of Appellants claims against all Respondents "were resolved on January 26, 2016." (R. p. 176, lines 4-5).

Via counsel, Appellant filed an affidavit with the Clerk on January 9, 2019, which claims Appellant effected service of Appellant's Summons and Complaint by certified mail on Respondent RLSR on October 12, 2017. (R. pp. 168-171; R. p. 22). This certified mailing was insufficient to effectuate service on Rosenthal Respondents, and Appellant did not make any other attempt to serve either Respondent Rosenthal or Respondent RLSR with the Summons and Complaint. (R. p. 22).

Respondent Rosenthal does not now and has never resided at 1401 Forum Way, Sixth Floor, West Palm Beach, Florida. (R. pp. 243-344; R. p. 21). 1401 Forum Way, Sixth Floor, West Palm Beach, Florida, is and has been the address of Respondent RLSR's principal places of

business. (R. pp. 246-248; R. p. 21). No individual working at Respondent RLSR has ever been authorized to accept service on Respondent Rosenthal's behalf. (R. pp. 243-244; R. p. 21).

Ed Elder ("Elder") signed the U.S. Postal Service hardcopy return receipt, Form PS 3811 ("Green Card") for Tracking Number 70151730000142889398. (R. pp. 250-251; R. p. 21). Elder is not now, nor has he ever been, designated by, or authorized to accept service on behalf of, Rosenthal. (R. pp. 250-251; R. pp. 243-244; R. p. 21). At all times relevant to this matter, Elder served as a rotating receptionist and file clerk for Respondent RLSR. (R. pp. 250-251; R. pp. 246-248; R. p. 21). Elder is not, nor has he ever been, an officer, a managing or general agent, or otherwise an agent authorized by appointment or by law to serve as a statutory agent for Respondent RLSR. (R. pp. 250-251; R. pp. 246-248; R. p. 21). At the time and date on which Elder signed the return receipt card, he was at the reception desk by happenstance and received all the mail delivered to RLSR's office by the mail carrier. (R. pp. 250-251; R. pp. 246-248; R. p. 22). During the relevant time, RLSR had approximately 42-43 employees and received a large stack of mail every day. (R. pp. 246-248; R. p. 21). Any mail addressed to Rosenthal, including the envelope to which the Green Card was affixed, was delivered with a stack of other mail addressed to Respondent RLSR. (R. pp. 250-251; R. p. 21). The envelope to which the Green Card was affixed did not contain any indication whatsoever as to what was contained in the envelope. (R. pp. 250-251; R. p. 21).

Respondent Rosenthal retired from Respondent RLSR on December 31, 2015. (R. pp. 243-244; R. pp. 246-248; R. p. 21). At the time of the envelope's delivery to the United States Postal Service (at or about 2:05 p.m. on October 5, 2017), Respondent Rosenthal was not serving as registered agent for Respondent RLSR and was not otherwise an officer, a managing or general agent, or otherwise an agent authorized by appointment or by law to receive service of process for

Respondent RLSR. (R. pp. 243-244; R. pp. 246-248; R. pp. 21-22). At all times relevant to this matter, the registered agent of record for Respondent RLSR as maintained by the Florida Secretary of State was Jonathan Todd Levy ("Levy") whose registered address is 6921 Finamore Circle, Lake Worth, Florida 33467. (R. pp. 246-248; R. p. 22). Respondent RLSR's registered agent's address was last changed on January 4, 2016 (more than 21 months before Appellant mailed the envelope and more than 19 months before Appellant filed the summons and complaint). (R. pp. 246-248; R. p. 22). Respondent RLSR's registered agent's address is and was readily available to the public by performing a free search at the Florida Secretary of State's website. (R. pp. 246-248; R. p. 22).

As of the date of the hearing of Rosenthal Respondents' Motion to Dismiss, more than 885 days had passed since Appellant filed the summons and complaint, and Appellant had failed to serve either Rosenthal Respondent. (R. p. 23). As of the hearing of Rosenthal Respondents' Motion to Dismiss, more than four years had passed since Appellant asserts Appellant's causes of action arose. (R. p. 23).

On June 8, 2020, the Circuit Court entered the June Dismissal Order, granting Rosenthal Respondents' Motion to Dismiss. (R. pp. 18-32). On June 17, Appellant filed the first motion to reconsider the June Dismissal Order ("Appellant's 1st MTR") (R. pp. 341-368). On June 29, Rosenthal Respondents filed a Response to Appellant's 1st MTR. ("Rosenthal Respondents' Response to MTR") (R. pp. 533-536). On August 4, the Circuit Court entered the August Dismissal Order, again purporting to grant Rosenthal Respondents' Motion to Dismiss, via order that was substantively identical to the June Dismissal Order. On August 13, Appellant filed the second motion to reconsider ("Appellant's 2nd MTR") (R. pp. 537-549), purporting to seek reconsideration of the August Dismissal Order. However, Appellant's 2nd MTR did not raise

anything that was not already raised during the January 27 hearing or on which the Circuit Court had not already ruled in the June Dismissal Order. Appellant's 2nd MTR was substantively identical to Appellant's 1st MTR. The changes between the two motions appear to be: (a) addition of paragraphs 1-6 (non-substantive, introductory references to the June Dismissal Order and August Dismissal Order), (b) paragraph 52, which references a procedural history of the underlying dispute, and (c) paragraphs 73-76, which provide arguments based on the Rosenthal Respondents MTD, which had been argued during the January 27 hearing and on which the Circuit Court had already ruled in the June Dismissal Order and the August Dismissal Order.

In response to the June Dismissal Order, Appellant did not file a Rule 60, SCRCP, motion. In response to the August Dismissal Order, Appellant did not file a Rule 60, SCRCP, motion.[3] Instead, on August 24, on its own motion, the Circuit Court issued a "Form 4" ("August 24 Order") in which the Circuit Court "VACATED" the August Dismissal Order as being "identical" to the June Dismissal Order. (R. pp. 4-5).

On April 21, 2021, Appellant filed the Notice of Appeal.

STANDARD OF REVIEW

A. Rule 12(b)(1) Motion to Dismiss.

"The question of subject matter jurisdiction is a question of law." *Porter v. Labor Depot*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007). "This Court reviews all questions of law de novo." *Fesmire v. Digh*, 385 S.C. 296, 302, 683 S.E.2d 803, 807 (Ct. App. 2009); *see also*

[3] Appellant's 2nd MTR references Rule 60(b), SCRCP, but the motion argues only grounds consistent with Rules 52(b) and 59(e), SCRCP. However, were this Court to consider Appellant's 2nd MTR to include an argument under Rule 60(b), SCRCP, the result would be identical.

Harrell v. Pineland Plantation, Ltd., 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999) ("[T]his Court has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence."). "[A]ffidavits and other evidence outside the pleadings may, in certain circumstances, be considered in support of a motion to dismiss based on lack of jurisdiction." *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). The de novo standard of review applies to the Circuit Court's ruling that the SCWCC had already exercised exclusive, original jurisdiction over Appellant's claims, and thus, the Circuit Court had no subject matter jurisdiction over those claims. The SCWCC correctly held that it had exclusive statutory and regulatory authority and jurisdiction to dispense with all matters relating to workers' compensation claims, including costs and attorneys' costs and fees. (R. p. 58). Consequently, the Circuit Court correctly held that such exercise of jurisdiction by the SCWCC divested the Circuit Court of subject matter jurisdiction over Appellant's claim. (R. pp. 30-31).

B. Lack of Personal Jurisdiction

The decision whether to grant a motion to dismiss pursuant to Rule 12(b)(2), SCRCP, for lack of personal jurisdiction, must be resolved upon the facts of each particular case. *Engineered Prod. v. Cleveland Crane & Eng'g* 262 S.C. 1, 4, 201 S.E.2d 921, 922 (1974). A finding of personal jurisdiction by the trial court is binding unless unsupported by the evidence or controlled by an error of law. *Nucor Corp. v. Faneuil Constr. Inc.,* 264 S.C. 458, 462, 215 S.E.2d 634, 635 (1975). In addition, "[q]uestions of fact arising on a motion to quash service of process for lack of jurisdiction over the defendant are to be determined by the court." *Brown v. Carolina Emergency Physicians, P.A*., 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001); *accord*, *Lawson v. Jeter*, 243 S.C. 103, 106, 132 S.E.2d 276, 277 (1963); *Moore v. Simpson*, 322 S.C. 518, 524, 473 S.E.2d 64, 67 (Ct. App. 1996). The findings of the circuit court on such issues are binding on this

court, unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law. *Id.*

Although our courts have not specifically addressed the required standard of review for Rules 12(b)(4) or (5), SCRCP; Rules 12(b)(4)-(5), SCRCP are substantially similar to their federal counterparts. In the absence of prior state law on the issue in question, federal cases interpreting the rule are persuasive. *See Roberts v. Peterson*, 292 S.C. 149, 355 S.E.2d 280 (Ct. App. 1987) (noting that where the state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive).

In *Martin v. Big Apple Deli, LLC*, 671 F. App'x. 48 (4th Cir. 2016), the Court briefly addressed the standard of review under Rule 12(b)(5), Federal Rules of Civil Procedure which is substantially similar to its South Carolina counterpart. In that case, James C. Martin appealed from the district court's order granting Respondents' motion to dismiss his civil action pursuant to Rule 12(b)(5), Federal Rules of Civil Procedure for insufficient service of process. On appeal, the Fourth Circuit reviewed the record for abuse of discretion in the district court's decision to dismiss the complaint, found no abuse of discretion, and affirmed the district court's dismissal as modified. *See Cardenas v. City of Chicago*, 646 F.3d 1001, 1005 (7th Cir. 2011) (holding that the standard of review is abuse of discretion).

ARGUMENT

A. General

Rosenthal Respondents moved the Circuit Court for dismissal on four grounds: (i) Appellant failed to serve his Summons and Complaint on either Rosenthal Respondent within 120 days after Appellant filed the Summons and Complaint with the Clerk of Court, and, as a result,

no action was commenced against either Respondent Rosenthal or Respondent RLSR, as required by the applicable statute and Rules 3 and 4, SCRCP; (ii) Rosenthal Respondents should be dismissed pursuant to Rules 12(b)(1), (2), (4), and (5), SCRCP; (iii) more than three years passed since Appellant alleges he knew or should have known of each cause of action raised in Appellant's Complaint; and (iv) the Circuit Court lacked subject matter jurisdiction because the SCWCC possessed exclusive jurisdiction. (R. pp. 209-223). Once Appellant's Complaint was dismissed, Appellant would be permanently barred from commencing a new suit on these causes of action. (R. pp. 23-24). The Circuit Court granted Rosenthal Respondents' Motion on all four grounds. (R. pp. 23-31).

B. Commencement of Action/Process/Personal Jurisdiction

1. Commencement of Action

South Carolina Code Annotated § 15-3-20 provides: "(A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued . . . . (B) A civil action is commenced when the summons and complaint are filed with the clerk of court ***if*** actual service is accomplished within one hundred twenty days after filing" (emphasis added). Rule 3, SCRCP, is the Supreme Court's embodiment of the statutory requirements of § 15-3-20. Rule 3, SCRCP provides: **(a) Commencement of civil action**. A civil action is commenced when the summons and complaint are filed with the clerk of court ***if***: (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing. (second emphasis added).

"[C]ourts must follow a statute's plain and unambiguous language, and when the language is clear, 'the rules of statutory interpretation are not needed[,] and the court has no right to impose

another meaning.'" *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (internal citation omitted)." *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 8, 809 S.E.2d 223, 226 (2018).

S.C. Code Ann. § 15-3-20(B) and Rule 3(a), SCRCP make clear that a civil action is not commenced merely by filing a summons and complaint with a clerk of court but rather for an action to be commenced, service must be accomplished on or before the statute of limitations runs or within one hundred twenty days after filing, whichever is later. The record of the Circuit Court is clear that the underlying action was *filed*; however, the record is equally clear that Appellant never properly served Rosenthal Respondents at all. Thus, Rosenthal Respondents were, necessarily, not served within the time period required by § 15-3-20(B) and Rule 3(a), SCRCP.

2. Service as to Respondent RLSR

Rule 4(d)(3), SCRCP, provides that service on a corporate entity must be made "by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process." *See also Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 10, 615 S.E.2d 112, 114 (2005). Rule 4(d)(8), SCRCP, permits service under Rule 4(d)(3) to be accomplished by "registered or certified mail, return receipt requested and delivery restricted to the addressee."

In analyzing whether service was effective against Respondent RLSR, the Court need not look any further than the face of the Green Card on which Appellant relied in an effort to establish service of the Summons and Complaint. The Green Card reflects the "restricted delivery" addressee as:

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

(R. p. 238; R. p. 25).

Nowhere on the face of the Green Card does it reflect the envelope was addressed to "Rosenthal, Levy, Simon, and Ryles," the corporate entity on which Appellant purports to have served his Summons and Complaint. (R. p. 238; R. p. 23). Rather, the Green Card reflects the envelope was addressed (restricted delivery) **solely to the individual Gerald Rosenthal, without any reference to "Rosenthal, Levy, Simon, and Ryles."** (R. p. 238; R. p. 23).

Even were this Court to ignore the obvious defect in Appellant's attempt to serve RLSR, the Court should still conclude that service on RLSR was ineffective. Rule 4(d)(3), SCRCP, is specific in its requirements as to whom is entitled to accept service for a non-natural person: "officer, a managing or general agent, or otherwise an agent authorized by appointment or by law to receive service of process." Further, our Supreme Court has made it clear that Rule 4(d)(3) does not permit just "anyone who happens to pick up the mail" to bind a Respondent for purposes of service of process. *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 297, 721 S.E.2d 430, 434 (2012).

As is made clear by both Elder's Affidavit and Levy's Affidavit, the individual who signed the Green Card in October 2017 has never been an "officer, a managing or general agent, or otherwise an agent authorized by appointment or by law to receive service of process," but rather just works at a law firm that receives large quantities of mail every day and signed for an envelope with unknown contents. (R. pp. 250-251; R. pp. 246-248). Additionally, according to Levy's Affidavit, on the date Appellant deposited the envelope with the United States Postal Service ***and*** at the date on which the Green Card was signed, the only authorized agent on whom Appellant could have served process was Levy, as Respondent RLSR's registered agent under Florida law (a position Levy held for over a year before Appellant mailed the envelope). (R. pp. 246-248). Further, according to Respondent Rosenthal's Affidavit, Respondent Rosenthal retired from

Respondent RLSR approximately two years earlier, December 2015, and was neither an employee nor serving as registered agent in October 2017. (R. pp. 243-244).

Appellant mailed an envelope (a) unmarked as to the envelope's contents, (b) addressed to an individual who was not (i) employed by Respondent RLSR, (ii) authorized to accept service on behalf of Respondent RLSR, and (c) without even listing Respondent RLSR as the intended recipient, and fifteen months after mailing that envelope, Appellant asserted, for the first time, that the envelope constituted effective service on the Respondent RLSR. (R. p. 26; R. p. 210).

Further, when serving process on a corporation outside of the forum state, Rule 4(c)(2)(C)(i) of the Federal Rules of Civil Procedure ("FRCP") (to which South Carolina courts regularly look for analogous concepts), provides that service of process is made according to the law of the state in which the corporation is located. Under Florida law, service of process on a corporate entity is governed by Florida Statute Annotated § 48.081, which provides a list of officers and agents (including the registered agent according to Florida Statute Annotated § 48.091[4]), in order of preference, on whom service may be made and provides that service may be effected by ***only*** a County Sheriff or the Sheriff's authorized process server.[5] (R. pp. 26-27; R. p. 219). Appellant neither attempted nor effected service according to Florida law by using a County Sheriff or Sheriff's authorized process service. (R. pp. 26-27; R. p. 219).

Appellant also, contradictorily, argues that Rosenthal Respondents filing of a motion to dismiss "**over 19 months after . . . October 2017**" somehow demonstrates Respondents' actual

[4] Fla. Stat. Ann. § 48.081(3)(a) (LexisNexis, Lexis Advance through the 2021 Regular and First and Second Extraordinary Sessions and Ch. 10 of the 2022 Regular Session).

[5] Fla. Stat. Ann. § 48.021 (LexisNexis, Lexis Advance through the 2021 Regular and First and Second Extraordinary Sessions and Ch. 10 of the 2022 Regular Session).

knowledge of the putative service, over a year and a half prior. (Appellant's Initial Brief, p. 39, emphasis in original). In addition to defying common sense, this contention is all the more bizarre, given that Appellant's preceding phrase concedes that, more than 4 years later, there is no evidence in the record and Appellant has no information whatsoever as to what became of "the envelope containing Dr. Fechter's pleadings from 12 October 2017, onward." (Appellant's Initial Brief, p.38).

Once Rosenthal Respondents challenged the court's personal jurisdiction under Rule 12(b)(2), SCRCP, Appellant bore the burden of making a *prima facie* case, showing that the trial court should exercise personal jurisdiction. (R. p. 28). Appellant does not include citation to any case or statute in support of the position that service on Respondent RLSR was ever effected. (Appellant's Initial Brief, pp.37-39). Appellant has thus not met its burden of making a *prima facie* case, showing that the Circuit Court should have exercised personal jurisdiction over Respondent RLSR.

Under these facts, the Circuit Court was correct in determining that service on Respondent RSLR was ineffective as a matter of law. This defect, standing alone, is fatal to Appellant's case against Respondent RLSR.

3. Service as to Respondent Rosenthal

Rule 4(d)(1), SCRCP, provides for service on an individual. Rule 4(d)(1) requires "deliver[y of] a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process."

Rule 4(d)(1) permitted Appellant three options for service on an individual: (a) delivering a copy of the summons and complaint directly to the Respondent Rosenthal; (b) delivering the summons and complaint to an appropriate person at Respondent Rosenthal's dwelling house or usual place of abode; or (c) by delivering a copy of the summons and complaint to an agent authorized by law to accept Respondent Rosenthal's civil process.

Once again, on the face of the Green Card, it is apparent that a copy of the Summons and Complaint was not delivered directly to Respondent Rosenthal. (R. pp. 504-511; R. pp. 168-171; R. pp. 27-28). Neither were either of the other options for proper service utilized. (R. pp. 209-219; R. pp. 235-254; R. p. 27). Rather, Appellant had the postal carrier deliver an unmarked envelope to Respondent Rosenthal's attention (not by actual personal service) at Respondent Rosenthal's former place of business (not dwelling place or usual place of abode;). (R. pp. 235-241; R. p. 27). Further, as set forth above with respect to RLSR, Elder is not, nor has he ever been Mr. Rosenthal's "agent authorized by appointment or by law to receive service of process." (R. p. 216; R. p. 27).

Additionally, Appellant never asserted to the Circuit Court, and does not assert on appeal to this Court, that service of the Summons and Complaint has ever been effected against Respondent Rosenthal. (R. pp. 18-32; Appellant's Initial Brief). Appellant's silence on this point is deafening as to what it tells this Court. (Appellant's Initial Brief, pp.1-63). Instead, Appellant attempts to misdirect this Court into disregarding the findings of fact of the Circuit Court, supported by the weight of evidence in the record, by conflating the effectiveness of service as to Respondent RLSR and Respondent Rosenthal. (Appellant's Initial Brief, pp.37-40). Appellant also asserts that either (A) Respondent Rosenthal's later awareness of Appellant's action, as demonstrated by the Rosenthal Appellants' filing of a motion to dismiss in May 2019, *ipso facto* demonstrates that effective service was achieved at some unknown prior point in time,

notwithstanding the requirements of Rules 3 and 4, SCRCP and the plain language in Rules 12(b), SCRCP. (Appellant's Initial Brief, pp.38). Alternatively, (B) Appellant asserts that Respondent Rosenthal's status "(as [retired] attorney[])" somehow compels the conclusion that it would have been "appropriate" for Respondent Rosenthal to have anticipated that any correspondence mailed to him by an out-of-state attorney, wrongfully addressed to him personally at the address of his former firm, approximately 2 years after his retirement from the practice of law, necessarily was a piece of mail containing a lawsuit against him personally that had been commenced in another state, and that Respondent Rosenthal should have had a system in place that anticipated the possibility of Appellant's litany of errors. (Appellant's Initial Brief, p. 38, n. 97). Appellant's assertions appear to approximate the logic of Rube Goldberg machines, and the same contradictory logic as noted above, as to Respondent RLSR, equally applies to Respondent Rosenthal. Appellant does not include citation to any case or statute in support of the position that service on Respondent Rosenthal was ever effected. (Appellant's Initial Brief, pp.37-39).

Quite simply, Appellant has failed to serve Respondent Rosenthal as required by Rule 4(d)(1), SCRCP, and, as a result, has failed to commence an action against Respondent Rosenthal, as required by § 15-3-20(B) and Rule 3, SCRCP.[6] This defect, standing alone, is fatal to Appellant's case against Respondent Rosenthal.

C. Personal Jurisdiction

[6] Appellant also argued, without any evidence, that Respondent Rosenthal waived the requirements of service. The party asserting waiver has the burden of proof. *Provident Life & Accident Ins. Co. v. Driver*, 317 S.C. 471, 478, 451 S.E.2d 924, 929 (Ct. App. 1994). In order to establish waiver, Appellant was required to present evidence that Respondent Rosenthal voluntary and intentional abandoned or relinquished the right to be served in compliance with applicable rule and statute, either by expressly waiving the right or engaged in conduct which implied waiver. *See SPUR at Williams Brice Owners Assoc., Inc. v. Lalla*, 415 S.C. 72, 90, 781 S.E.2d 115, 125 (Ct. App. 2015). As there is no such evidence in the record, the Circuit Court correctly disregarded the argument that Respondent Rosenthal waived the requirement of effective service.

When a defendant challenges the court's personal jurisdiction under rule 12 (b)(2), SCRCP, the non-moving party has the burden of making a *prima facie* case, showing that the trial court should exercise personal jurisdiction. *See, e.g.*, *Yarborough & Co. v. Schoolfield Furniture Indus, Inc*., 275 S.C. 151, 268 S.E.2d 43 (1980); *Berkeley PG Corp. v. Southbank Inv. Group, Inc.,* 291 S.C. 315, 353 S.E.2d 305 (Ct. App. 1987). In ruling on a motion to dismiss for lack of personal jurisdiction, the court may consider evidence outside of the pleadings, such as affidavits and other evidentiary materials. *Graham v. Lloyd's of London*, 296 S.C. 249, 251 n. 1, 371 S.C.2d 801, 802 n.1 (Ct. App. 1988).

Not only is timely, proper service of process a statutory and procedural requirement, but proper service of process confers personal jurisdiction over a litigant: "[a] court generally obtains personal jurisdiction by the service of a summons." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). When a defendant is not properly served, then the trial court has no personal jurisdiction over that defendant, and all proceedings based on the inadequate service are void. *Momani v. Van Surdam*, 296 S.C. 409, 373 S.E.2d 691 (Ct. App. 1988). Here, because proper service of the Summons was never effected, Appellant cannot meet its burden to establish personal jurisdiction over Rosenthal Respondents. Thus, the Circuit Court properly determined that it did not have personal jurisdiction over Rosenthal Respondents. (R. p. 28).

D. Statute of Limitations

The applicable statute of limitations for an action sounding in contract (express or implied) is three years. S.C. Code Ann. § 15-3-530(1). The statute begins to run on the date the aggrieved party either discovered the alleged breach or could or should have discovered it. *See, e.g.*, *Dean v. Ruscon Corp.*, 321 S.C. 360, 468 S.E.2d 645 (1996). The same statute applies to a cause of action

for breach of contract accompanied by a fraudulent act. *See, e.g.*, *Peeples v. Orkin Exterminating Co*., 244 S.C. 173, 135 S.E.2d 845 (1964).

The applicable statute of limitations for an action sounding in fraud is three years. S.C. Code Ann. § 15-3-530(7). Similarly, any action based on the South Carolina Unfair Trade Practices Act, may not be brought "more than three years after discovery of the unlawful conduct which is the subject of the suit." S.C. Code Ann. § 39-5-150.

The Appellant has admitted in its Complaint and its Affidavit that

> **When informed** to the Order of Release Fund (thereby, disposing of all of the workers' compensation claimants [sic] cases **on or about January 26, 2016, the Appellant continued to seek payment from the Respondents to no avail**.

Appellant's Affidavit at paras. 14-15, 40, and 49 (emphasis added). (R. pp. 176; R. pp. 179-180).

Accordingly, Appellant has admitted that he had **actually discovered** the alleged breach(es) and alleged "unfair" or deceptive acts on or before January 26, 2016[7]. It is clear, then, that the statute of limitations on all Appellant's causes of action are now time-barred, and, therefore the Circuit Court correctly decided that the case should be dismissed with prejudice. *See, e.g.*, *Nunnery v. Brantley Constr. Co*., 289 S.C. 205, 345 S.E.2d 740 (App. 1986) (dismissals on the merits of the case are with prejudice).

As a result, there is no question (a) Appellant (i) has failed to serve RLSR as required by Rules 4(d)(3) and 4(d)(8), SCRCP, or by Fla. Stat. Ann. § 48.081 and Fla. Stat. Ann. §48.021. (ii) has failed to commence an action against RLSR, as required by South Carolina Code Annotated §

[7] Rosenthal Respondents contend that the statute of limitations began to run no later than October 31, 2010. On October 28, 2010, Rosenthal Respondents mailed Appellant a letter which both denied Appellant's request for payment of copayments/deductibles and required return of $5,150.00 of the initial $25,000.00 retainer. (R. p. 426). Ironically, Appellant denied that he received this letter. (*See* R. p. 132; R. p. 62).

15-3-20(B) and Rule 3, SCRCP, and (b) the Circuit Court lacked personal jurisdiction over RLSR as a result of Appellant's failing to effect service of civil process.

E. Subject Matter Jurisdiction

According to Appellant's Complaint, Appellant seeks to be further compensated for the performance of medical examinations and the issuance of medical reports for claimants involved in *Adams*. *Adams* involved workers' compensation claims asserted by numerous individuals alleging injuries from exposure to toxic chemicals while working at the Nevamar plant in Hampton County, South Carolina. On April 1, 2014, the Nevamar Appellants collectively settled their workers' compensation claims at mediation. (R. pp. 104-114). The SCWCC's order granting motion to release funds was served on January 26, 2016. (R. pp. 121-125). The Appellant in the present case concedes that all claims in *Adams* including Appellant's claim for funds were resolved no later than January 26, 2016. (Appellant's Affidavit at paras. 14-15, 40, and 49) (R. p. 83; R. p. 176; R. pp. 179-180).

A South Carolina Circuit Court "has original jurisdiction in civil and criminal cases, **except** those cases in which exclusive jurisdiction shall be given to inferior courts." S.C. Const. Art. V § 11 (emphasis added). According to South Carolina Code Annotated § 42-3-180, the SCWCC is such an "inferior court," which has been given exclusive jurisdiction over "[a]ll questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, [all these questions] shall be determined by the commission, except as otherwise provided in this title."

As a result, "a Workers' Compensation action is the exclusive means to determine claims against an individuals' employer for work-related accidents and injuries." *Posey v. Proper Mold & Eng'g, Inc*., 378 S.C. 210, 223, 661 S.E.2d 395, 403 (Ct. App. 2008). As part of this original

jurisdiction, the SCWCC has the authority to determine all questions relating to workers' compensation claims, including the approval and disbursement of costs incurred in the prosecution of those claims. S.C. Code Ann. § 42-3-180 (2001) ("All questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the commission, shall be determined by the commission . . . ."). The SCWCC's exclusive jurisdiction expressly includes costs associated with the medical evaluation or treatment of claimants. S.C. Code Regs. § 67-1206 (2001) ("[A]n attorney may request approval of the actual costs incurred in the prosecution of the claim [including] expenses associated with the evaluation or treatment of the client.").

"Subject matter jurisdiction is the power to hear and determine cases of the general class to which the proceedings in question belong." *Dove v. Gold Kist, Inc*., 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). "A court's subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question." *Allison v. W.L. Gore & Assoc.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011). Lack of subject matter jurisdiction may not be waived and should be taken notice of by the court. *Amisub of S.C., Inc. v. Passmore,* 316 S.C. 112, 114, 447 S.E.2d 207, 208 (1994).

As the SCWCC in this case properly exercised exclusive, original jurisdiction over the subject matter of the causes of action asserted in the Complaint, that is, the approval and disbursement of costs incurred in prosecuting workers' compensation claims, specifically Appellant's alleged costs and fees, the Circuit Court was divested of jurisdiction to hear and determine the claims asserted in the Complaint. As a result, the Circuit Court was compelled to dismiss the Complaint under Rule 12(b)(1), SCRCP. *See, e.g.*, *Edens v. Bellini*, 359 S.C. 433, 597 S.E.2d 863 (Ct. App. 1994) (affirming the grant of a motion to dismiss for lack of subject matter jurisdiction pursuant to exclusivity provision of the South Carolina Workers' Compensation Law).

Appellant's newly-raised contention in Appellant's Initial Brief that the SCWCC, by order of December 12, 2015, divested itself of jurisdiction over Appellant's claim by virtue of dismissing "[a]ll cases/claims included in the Initial Special Referee's Report dated November 13, 2015" (Appellant's Initial Brief, pp.14-15; R. p. 128) is both without merit and not preserved for review[8]. South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal. *See Butler v. Town of Edgefield*, 328 S.C. 238, 493 S.E.2d 838 (1997). "Preserving issues for appellate review is a fundamental component of appellate practice. South Carolina appellate courts do not recognize the plain error rule." *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532-33, 564 S.E.2d 322, 323 (2001).

As a matter of procedural history, the SCWCC was made aware and considered the merits of Appellant's claim by virtue of the Respondent RLSR' Motion to Release Funds ("MTR") (R. pp. 131-143), which motion was submitted to the SCWCC November 18, 2015, approximately 1 month prior to the December 2015 Order (R. pp. 66-68). The MTR requested that "any claims to the funds made by [Appellant] should be denied." (R. p. 131). The SCWCC acknowledged that it was "aware of the alleged claim [of Appellant] and has given [Appellant] the ability to testify on his own behalf." (R. p. 64, lines 4-5). The SCWCC further found that it retained jurisdiction of the matter by virtue of a May 2015 order. "On May 27, 2015, the undersigned appointed H. Mills Gallivan as Special Referee, providing him with authority to complete the proper distribution of the settlement funds. With the approved costs remaining undistributed, the undersigned

[8] The record contains several references to an "Order of May 27, 2015 appointing H. Mills Gallivan, Esquire as Special Referee" ("May 2015 Order"), including SCWCC Order Granting Motion to Release Funds, pp.1-2. (R. pp. 57-58). The May 2015 Order, presumably, would have described the Special Referee's authority as to the settlement funds and the SCWCC's continuing jurisdiction over the settlement funds, including the $500,000.00 in set aside funds. However, because Appellant did not raise this issue before the Circuit Court, the May 2015 Order is not part of the record, and this issue is not properly preserved for this Court's review.

Commissioner has the authority to make a determination concerning final distribution of these set aside funds." (R. pp. 57-58).

Additionally, although the SCWCC Order Granting Motion to Release Funds does, indeed, contain a certificate of service indicating that it was *served* electronically on all parties on January 26, 2016, and a separate certificate indicating that it was served via mail on Appellant on January 27, 2016, the SCWCC Order itself is undated. (R. p. 65). As noted above, there is nothing in the record which supports Appellant's assertion that he has cleverly located a loophole that was previously undeveloped at the trial level, and Appellant's Initial Brief cites to no supporting evidence on this point. In the absence of any factual support, the cases cited by Appellant to interpret this unsupported assertion are moot.

CONCLUSION

The only evidence in the record is that Rosenthal Respondents agreed to pay Appellant $25,000 for the evaluation of potential workers' compensation claimants, Rosenthal Respondents did so, and regretted it. The SCWCC, ODC, and Circuit Court each heard the substance of the claims of Appellant and found them to be without factual or legal support. Further, even if the merits of Appellant's claims were colorably in dispute, despite being denied on the merits in two prior fora, the inadequacy of the method used to attempt service upon the Rosenthal Respondents in the underlying lawsuit is not in factual dispute. Therefore, a lawsuit was never properly commenced against Rosenthal Respondents and the Circuit Court correctly concluded that it lacked jurisdiction to entertain Appellant's claims. Additionally, even if any of the foregoing could be colorably disputed, this Court lacks appellate jurisdiction because of a defect that Appellant cannot cure, Appellant's failure timely to serve the Notice of Appeal.

For the reasons stated, and by virtue of the authorities cited herein, the Circuit Court correctly and appropriately dismissed Appellant's Complaint against Rosenthal Respondents with prejudice, from which Appellant failed to timely appeal.

WHEREFORE, This Court should therefore either AFFIRM the decision of the Circuit Court or DISMISS this appeal with prejudice and remit the matter to the Circuit Court for proceedings consistent with the dismissal.

Respectfully submitted,

KING KOZLAREK LAW LLC

s/ Michael E. Kozlarek
Michael E. Kozlarek, SC Bar No. 69330
michael@kingkozlaw.com
John Marshall Mosser, SC Bar No. 71929
johnmarshall@kingkozlaw.com
201 Riverplace, Suite 500 (29601)
Post Office Box 565
Greenville, South Carolina 29602-0565
O: 864.527.5941
M: 803.312.3199
F: 864.670.5246
Counsel for Respondents Gerald Rosenthal and Rosenthal, Levy, Simon and Ryles, PA

June 8, 2022
Greenville, South Carolina

RECEIVED
Jun 08 2022
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

J. Derham Cole, Circuit Court Judge

Case No. 2017-CP-10-04371

APPELLATE CASE NO 2021-000446

Cary E. Fechter, MD……. Appellant,

v.

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

RULE 211 CERTIFICATION OF RESPONDENTS GERALD ROSENTHAL AND ROSENTHAL, LEVY, SIMON AND RYLES, PA

The undersigned hereby certifies that the **Final Brief of Respondents Gerald Rosenthal and Rosenthal, Levy, Simon and Ryles, PA** complies with Rule 211, SCACR.

s/Michael E. Kozlarek
Michael E. Kozlarek, SC Bar No. 69330
John Marshall Mosser, SC Bar No. 71929
KING KOZLAREK LAW LLC
Post Office Box 565
Greenville, South Carolina 29602-0565
O: 864.527.5941
M: 803.312.3199
F: 864.670.5246
michael@kingkozlaw.com
johnmarshall@kingkozlaw.com
Counsel for Respondents Gerald Rosenthal and Rosenthal, Levy, Simon and Ryles, PA

June 8, 2022