THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM RICHLAND COUNTY
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

Op. No. 5243 (S.C. Ct. App. filed June 30, 2014)

Kerry Levi ..... Respondent,

v.

Northern Anderson County EMS
and Berkshire Hathaway
Homestate Insurance Company ..... Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Kerry Levi proposes the following re-statements of the questions presented:

I. Did the Court of Appeals err when it held that an order which denies a motion to dismiss is not immediately appealable?

(This encompasses the petitioners' questions 1, 2, 3, and 5)

II. Did the Court of Appeals err when it declined to address the petitioners' argument that Kerry Levi has (supposedly) deprived the commission of "subject matter jurisdiction" — which is the power to hear and decide *all* workers' compensation cases generally?

(This is the petitioners' question 4)

III. Should this Court grant certiorari because the decision of the Court of Appeals cited an unpublished case from North Carolina?

(The petitioners' question 6)

COUNTER-STATEMENT OF FACTS

This workers' compensation case involves the question whether an order that denies a motion to dismiss is immediately appealable. The case is set in the unusual scenario where someone who has been injured while working is allowed to pursue *both* a tort suit against the wrongdoer *and* a workers' compensation claim.

The statute that authorizes this procedure is section 42-1-560 of the South Carolina Code (1985). These are commonly called "third party" cases because the defendant in the civil suit is a "third party" who caused the claimant's injury.

Kerry Levi is a paramedic who had two (2) work-related accidents in the Spring of 2011. The first occurred while she was moving a patient. The second occurred when she was rear-ended in a car crash caused by a third party.

The certiorari petition correctly describes how the present dispute began at the commission. Ms. Levi filed workers' compensation claims for both of these injuries, and when the petitioners discovered that Ms. Levi had previously accepted $550 from the at-fault driver in the car wreck, they filed a Form 21, which is an employer's request for a hearing, and a motion asking the commission to dismiss both of Ms. Levi's claims. (R.pp.27-29).

The basis of this motion was the petitioners' contention that Ms. Levi had elected to pursue a civil case *instead* of a workers' compensation case because she had unilaterally settled her claim against the at-fault driver. The motion also alleged that this settlement had damaged the petitioners' rights to seek reimbursement from the at-fault driver. (R.pp.28-29).

Both of these assertions are demonstrably false.

First, the current version of the third party statute directs that it is impossible for a claimant to impact an employer's right to seek reimbursement in this scenario. *Even if* Ms. Levi fully and finally settled with the at-fault driver, subsection (f) of section 42-1-560 specifically recognizes that this settlement would be invalid against Ms. Levi's employer.

Second, the only evidence is that both Ms. Levi's boss and a representative of an insurance company advised her to take the money. See (R.p.96). This was before Ms. Levi ever filed her workers' compensation claims. The petitioners *had* notice of this payment.[1]

In January of 2012, a single commissioner issued an order that denied the motion to dismiss. (R.pp.1-5). The commissioner found that the $550 was for Ms. Levi's pain and

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[1]The car crash occurred March 29, 2011. (R.p.82). The at-fault driver's insurance company issued the $550 check to Ms. Levi on April 12, 2011. (R.p.84). Ms. Levi's affidavit indicates that she discussed the check with her supervisor and a representative of the employer's insurance company before she received the check and before she cashed it. (R.p.96). Ms. Levi filed her workers' compensation claims on April 27, 2011. (R.pp.25-26).

suffering only, and the commissioner also ordered a hearing for the purpose of determining whether Ms. Levi had reached the point of maximum medical improvement and whether she required any additional medical treatment. (R.p.5).

The petitioners asked the full commission to review the denial of the motion to dismiss. (R.p.87). After conducting a hearing in May of 2012, an appellate panel reversed and held that Ms Levi *had* settled with the third party, that she had not notified her employer, and that in accepting the $550, Ms. Levi deprived the commission of "subject matter jurisdiction" over the claims. See (R.pp.6-23) (the panel's decision).

Ms Levi initiated a timely appeal to the Court of Appeals, and after oral argument which the court conducted on May 6, 2014, the court issued a unanimous decision that vacated the panel's decision. The central holding of the court's decision is that an order that denies a motion to dismiss is not immediately appealable. See (App.p.11) (the "conclusion" in the decision); also at (Shearouse Adv. Sh. No. 26 at 102, 111).

ARGUMENT

This case does not involve a novel issue. There was no disagreement among the members of the panel at the Court of Appeals, the holding of the Court of Appeals does not conflict with prior decisions of this Court, and this case does not involve a constitutional question. See Rule 242, SCACR (describing some of the considerations that this Court may deem relevant in deciding a request for a writ of certiorari). This case involves an order that denies a motion to dismiss, and the Court of Appeals correctly held that an order denying a motion to dismiss is not immediately appealable.

I. The Court of Appeals correctly held that an order denying a motion to dismiss is not immediately appealable.

An order that denies a motion to dismiss is not immediately appealable. This is because an order that denies a motion to dismiss does not finally decide anything. Like the denial of a motion for summary judgment, the denial of a motion to dismiss "does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings." *McLendon v. South Carolina Dep't of Highways and Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994).

The petitioners seem to disagree with this principle. Even though the text of their motion seems plain, the petitioners claim that the motion was *not* a motion to dismiss, that the usual appealability rule about motions to dismiss does not apply, and that the hearing commissioner's order actually *did* finally decide something; even though it appears to be well-established that an order denying a motion to dismiss does not finally decide anything. The Court should reject each of these arguments. All of them are wrong.

First, the petitioners' motion *was* a motion to dismiss. The motion appears on pages 28 and 29 of the record on appeal, it is not lengthy, and it (pointedly) asks the commission to dismiss Ms. Levi's claims. The Court of Appeals did not conjure a label for this motion out of thin air. The single commissioner who denied the motion said that it was a motion to dismiss, see (R.p.3) (noting that "Defendants filed a Motion to Dismiss"), and the appellate panel's order followed suit. See (R.p.7) (reciting that the petitioners filed a motion to dismiss and a Form 21 and that the single commissioner's order was directed to the motion only). The petitioners' current argument did not appear *anywhere* in the brief that they filed

at the Court of Appeals. The petition for rehearing was the first time they argued that a motion which seeks to dismiss two claims is somehow not a "motion to dismiss."

Second, the motion's label does not matter. Regardless of whether the filing was labeled a "Form 21," a "motion to dismiss," or a "motion for partial summary judgment," the effect of the petitioners' request was the same. This motion sought a summary adjudication of Ms. Levi's claims, a single commissioner denied that request, and because that denial is not an "award," the single commissioner's order was not properly appealable to the appellate panel. In the same way that appealability in civil cases is governed by statute (via section 14-3-330 of the South Carolina Code), so too does a statute govern appealability inside the commission. The relevant statute requires that there be an "award" before a hearing commissioner's decision is appealable to an appellate panel. See S.C. Code Ann. § 42-17-50 (Supp. 2013). The petitioners never explain how an order that refuses to dismiss a claim constitutes an "award." If their position was correct, *every* order that a hearing commissioner issues would always be immediately appealable. The statute is not written that way.

Third (and finally), Ms. Levi continues to be at a loss to understand the argument that the single commissioner's decision conclusively establishes that the petitioners' lien to recover money from the at-fault driver is limited to seeking reimbursement for Ms. Levi's medical treatment. During the oral argument at the Court of Appeals, Ms. Levi conceded that the petitioners' lien is broader. The third party statute gives the petitioners a lien in the amount of everything that they have already paid on the car-wreck claim and everything that they will pay on the claim in the future. This part in the single commissioner's order was wrong, but the error does not matter because an order that denies a motion to dismiss does

not *finally* decide anything. This issue could be re-raised at any time, and when it is re-raised to the commission, Ms. Levi will have to concede (again) that this particular language was not correct. The petitioners' lien arises by statute, and the scope of that lien is set by statute.

Ms. Levi cannot explain why the commission entertained a motion to dismiss even though the commission's regulations say that the commission will not accept such a motion. Perhaps the best Ms. Levi can say is that the present case is not an outlier — the commission has considered such motions before. See, e.g., *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 187, 714 S.E.2d 547, 549 (2011) (observing that the full commission denied a motion to dismiss and that the denial of a motion to dismiss is not immediately appealable).

But the oddities of this case cannot change the fact that the petitioners are attempting to take something that is simple and turn it into something that is complicated. This case is *not* complicated. The petitioners asked a single commissioner to dismiss Ms. Levi's claims. The commissioner denied that request, and the Court of Appeals correctly held that such a denial was not immediately appealable. It seems obvious that the single commissioner's order is "interlocutory." It has to be. It cannot have decided anything with finality, and it does not adjudicate the entire case. This issue can be argued again, and the petitioners are free to raise it on appeal after the commission has issued an award. The motion's label is not a reason to grant certiorari. Respectfully, the petitioners' thesis is wrong.

II. Ms. Levi lacks the ability to impact the commission's subject matter jurisdiction, which is the power to hear and decide all workers' compensation cases generally.

The petitioners argue that the appellate panel lacks "subject matter jurisdiction" to hear this case. See (Cert. Petition, pp.11-12). Here again, the petitioners are incorrect.

The term "subject matter jurisdiction" refers to a tribunal's power to hear and determine the general class of cases to which the proceedings in question belong. *Dove v. Gold Kist*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994). As a private citizen, Ms. Levi does not have the ability to impact the commission's statutory grant of authority. That grant of authority is found in the Workers' Compensation Act. See S.C. Code Ann. §§ 42-3-10 to -250. The petitioners' argument is manifestly inaccurate. They are right when they say that subject matter jurisdiction may be raised at any time, but they are quite plainly wrong when they suggest that there is some defect in subject matter jurisdiction here.

The reason the petitioners are making this argument is that they are relying on principles that have been overruled by subsequent changes in the law.

One of the first cases to explore the law in this area was *Stroy v. Millwood Drug Store*. See 235 S.C. 52, 109 S.E.2d 706 (1959). The year of the case is significant, because at the time the *Stroy* case was decided, the law did not give an injured worker the blanket ability to pursue *both* a civil claim against the third party *and* a workers' compensation claim. The injured worker had to pick. See 1952 Code of Laws §§ 72-122 to -126. In the event that the injured worker elected to pursue a workers' compensation claim, section 72-124 took the worker's right to sue the third party and gave that right to the employer so the employer could seek reimbursement. This right to reimbursement was the reason that a worker's settlement with the third party amounted to an election of remedy. *Stroy* correctly recognized that it was inequitable for the injured worker to seek money from the employer after the worker had extinguished the employer's right to reimbursement by releasing the third party from liability.

But an election of a remedy would not impact the commission's *subject matter* jurisdiction. The election of remedy would occur by operation of a statute, not by removing a general grant of authority from the commission, as the label implies. Moreover, the current version of the third party statute calls even this premise — the election of remedy premise — into question. Sections 42-1-560(b) and (f) recognize that nothing an injured worker does can have *any* impact on the carrier's reimbursement rights. The current statute is written in a way that would seem to make it impossible for an injured worker to damage his or her right to bring a workers' compensation claim. The employer's reimbursement rights are always going to be protected, and the employer will always have a lien against any funds that the injured worker receives from a settlement.

Candor requires Ms. Levi to concede that no court has ever made this holding, but this discussion of the current third party statute is only presented as background. The issue in question is whether the commission has "subject matter jurisdiction" over this case. The answer to that question is "yes."

III. The petitioners do not offer any authority for the argument that citing an unpublished case from North Carolina violates South Carolina's rules and warrants a grant of certiorari.

The petitioners' concluding argument for certiorari suggests that the Court should review this case because the decision of the Court of Appeals cited an unpublished opinion from the State of North Carolina. The petitioners say that this violates Rule 268 of the South Carolina Appellate Court Rules.

This argument seems to misunderstand the rule. Rule 268 governs the citation of South Carolina authority. It does not appear to govern authority from other jurisdictions.

CONCLUSION

Although the petitioners *say* that they are interested in protecting their right to seek reimbursement from the third-party who caused Ms. Levi's car wreck, we know from the record that this is not true. We know it is not true because if the petitioners *were truly* interested in seeking reimbursement, they would have sued the at-fault driver themselves, they would have asserted a lien against the $550 that they told Ms. Levi to take, or they would participate in Ms. Levi's suit against the at-fault driver — a suit that is pending. See (Brief of Appellant, p.9). They have never followed any of these courses of action. Instead, they have misrepresented the current state of the law while they have continuously tried to get both of Ms. Levi's workers' compensation claims dismissed. This case is about trying to get something for nothing. The petitioners are trying to use a $550 settlement to avoid paying two (2) valid claims. They could not care less about their right to reimbursement.

The Court of Appeals has reached the right result. An order that denies a motion to dismiss is not immediately appealable.

Respectfully submitted,

October 15, 2014

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PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondents with a copy of the *Return to Petition for Writ of Certiorari* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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October 15, 2014
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