

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE CHARLESTON COUNTY  
COURT OF COMMON PLEAS

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Kristi Lea Harrington, Circuit Court Judge

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Appellate Case No. 2017-000197

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Kyle Kibler,

Appellant,

v.

Basil C. Peyton and Origin Point Brands, LLC,

Respondents.

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**BRIEF OF APPELLANT REGARDING APPEALABLE NATURE OF ORDER**

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FEB 21 2017

SC Court of Appeals

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**STATEMENT OF ISSUES**

1. Is the trial court's January 6, 2017 order immediately appealable?

## STATEMENT OF FACTS

On September 1, 2016, Kyle Kibler (“Appellant”) filed his Complaint against Origin Point Brands, LLC and Basil C. Peyton (collectively “Respondents”). The Complaint consists of only two counts – Defamation and Intentional Infliction of Emotional Distress. The Complaint and Civil Coversheet both requested a trial by jury. In fact, the Complaint requests a trial by jury on page one in the “style” of the action and on page four within the “WHEREFORE” or relief requested portion. A copy of the Complaint is attached hereto as Exhibit “1.”

The Respondents did not file an Answer to the Complaint. Instead, the Respondents filed a “Motion to Dismiss and to Compel Arbitration” (the “Motion”). The only attachment to the Motion was a prior employment agreement between Appellant and the Respondents. Neither Appellant nor the Respondents submitted any other evidence or affidavits to the trial court.

The Motion asserted the matter was subject to arbitration due to the aforementioned prior employment agreement between Appellant and the Respondents. Thus, the Motion also asserted that both of the counts from the Complaint should be sent to arbitration.

Appellant opposed the Motion. Appellant’s opposition to the Motion was based upon the fact that (1) the two causes of action were for intentional torts which occurred after Appellant’s employment with the Respondents ended; and (2) the intentional, post-termination torts, were not related to nor contained a significant aspect or relationship to Appellant’s employment with the Respondents.

Oral argument was heard on January 4, 2017.

On January 6, 2017, the trial court judge entered an order granting the Motion (the “Order”). Specifically, the Order provides the Respondents’ “Motion to Dismiss and Compel Arbitration is granted to the extent that the action should be stayed and arbitration is compelled.”

Despite the language within the Order which suggests some part of the Complaint remains with the trial court, both of the counts within the Complaint have been compelled to arbitration by the trial court. Therefore, no part of the Complaint remains at the trial court and there is nothing further for the trial court to complete with regard to the Complaint or the Motion.

Interestingly, again without any affidavits or other sworn testimony, the Order includes within the "Factual Background" section the statement that "[the Respondents'] memorandum in support of [the Motion] states termination was based on [the Respondents'] opinion that [Appellant] failed to effectively perform his duties as President and Chief Operation Officer." See Order at p. 1. Presumably, the trial court included this self-serving, unverified and unsworn statement to later support the holding "[the Respondents] have demonstrated the claims in [Appellant's] Complaint relate to [Appellant's] employment and the character of [Appellant] as an employee." See Order at p. 2.

Fundamentally, there is a problem with this finding by the trial court. The Respondents' did not file an answer to the Complaint. Thus, to date, the Respondents have not even "admitted" or "denied" if the intentional torts alleged within the Complaint even occurred. The Respondents' did not provide any affidavits, deposition transcripts or other sworn statements to the trial court. Nevertheless, with a single pleading before it (the Complaint) and nothing but argument of counsel, the trial court determined the Respondents "demonstrated" facts relevant to the merits of the entire action. This anomaly coupled with the other issues discussed herein begs for review by this Court.

On February 6, 2017, Appellant timely filed his Notice of Appeal with this Court regarding the Order. On February 7, 2017, this Court requested Appellant and the Respondents submit briefs regarding the appealable nature of the Order.

## ARGUMENT

### 1. **The Order is immediately appealable.**

This Court has the discretion to review the Order. As this Court pointed out quite recently, “the question of whether an order is immediately appealable is determined on a case-by-case basis.” Dorn v. Cohen, 418 S.C. 126 (S.C. App. 2016). In conducting the case-by-case analysis, “an appellate court should look to the effect” of the order to determine its appealability. Id. at 138.

As discussed further herein, the effect of the Order “finally determines” the rights of Appellant for two reasons. First, it “finally determines” the rights of Appellant because the Order is the equivalent of a dismissal. The two causes of action brought in the Complaint were both compelled to arbitration. Even though the Order says “the action should be stayed,” there is nothing left to stay. Both claims were sent to arbitration. No other claims or issues remain before the trial court.

Second, the Order “finally determines” the rights of Appellant because the Order strips Appellant of his constitutional right to a trial by jury. Appellant properly requested a trial by jury in the Complaint. The Order improperly divests Appellant of his constitutional jury trial right. Without review by this Court, Appellant’s constitutional right will have been stripped by a single judge without any oversight by this Court. Simply put – this is not the bedrock of jurisprudence upon which our constitutional rights are founded.

**A. South Carolina law with regard to the appeal of arbitration related orders.**

This case presents an opportunity for this Court to provide clarification on the law. In light of the growing favoritism for arbitration, laws have been established which support the cause, including laws regulating the appeal of trial courts on issues related to arbitration. The law in South Carolina is no exception.

In the past thirteen years, this Court and the Supreme Court of South Carolina have framed the issue of the appealable nature of orders entered by a trial court with regard to arbitration. Based upon two decisions, one by the Supreme Court of South Carolina and one by this Court, two ends of a legal spectrum have been established. Carolina Care Plan v. United Healthcare Services, Inc., 361 S.C. 544 (2004); Widener v. Fort Mill Ford, 381 S.C. 522 ( S.C. App. 2009).

On the one hand, in the 2004 Carolina Care opinion, the Supreme Court of South Carolina held an order granting a motion to compel arbitration and staying the *remaining causes of action* was not immediately appealable pursuant to S.C. Code Ann. § 15-48-200(a). 361 S.C. at 558. On the other hand, in the 2009 Widener opinion, this Court distinguished Carolina Care because the trial court dismissed the complaint, which “finally determined” the rights of the parties. 381 S.C. at 524. Accordingly, this Court determined an appeal could be taken pursuant to S.C. Code Ann. § 14-3-330. Id.

While the present matter touches upon aspects of both Carolina Care and Widener, this matter is more closely aligned with the sound reasoning and holding in Widener. On the one end, like Carolina Care, the trial court did not dismiss Appellant’s Complaint. Yet, on the other end, like Widener, the trial court entered the Order which “finally determined” the rights of Appellant. The trial judge “finally determined” the rights of Appellant because it sent all parts of

the Complaint and causes of action therein to arbitration. Appellant only brought two causes of action and both causes of action were sent to arbitration. This “in effect” finally determined the action and is the equivalent of a dismissal because, among other things, there is nothing left for the trial court. Dorn supra.

Now this Court has an opportunity to clarify South Carolina law on the issue of a trial court’s order sending an entire complaint to arbitration even though the trial court does not technically dismiss the action. Without such a clarification, the law right now permits trial courts to send all claims to arbitration over the objection of a party, yet very carefully draft an order which improperly strips a party of constitutional rights, including the right to trial by jury, without any right to the review of such a holding. Based upon the reasoning within Widener and sound policy, under such a circumstance a plaintiff (like Appellant) should not be stripped of constitutional rights without any recourse for appeal or review.

**B. Carolina Care and Widener – two ends of the spectrum.**

As mentioned above, on one end of the spectrum, in Carolina Care, the trial court entered an order compelling arbitration of some of the claims and staying the remaining claims. 361 S.C. at 558. The Supreme Court of South Carolina looked only to S.C. Code Ann. § 15-48-200(a) when addressing the issue of the appealable nature of the trial court’s order sending some of the claims to arbitration. In doing so, the Court determined S.C. Code Ann. § 15-48-200(a) did not expressly permit an appeal from an order granting an application to compel arbitration or from an order to stay claims pending arbitration. Id. Thereby establishing the rule of law that compelling *some, but not all*, claims to arbitration is not immediately appealable.

On the other end of the spectrum, in Widener, the plaintiff’s complaint was met with a motion to dismiss or to stay the proceedings and to compel arbitration. 381 S.C. at 523. The

trial court granted the motion and dismissed the action, holding the claims brought by the plaintiff were subject to arbitration. Id. On appeal, the defendant argued the matter was controlled by the earlier decision in Carolina Care and, thus, the order was not immediately appealable. Id. at 523-524. This Court did not agree Carolina Care controlled, and found the order was immediately appealable.

Despite the earlier holding in Carolina Care, this Court acknowledged the fact “South Carolina courts have not specifically addressed the issue of whether an order dismissing an action without prejudice and allowing the parties to pursue arbitration is immediately appealable.” Id. at 524. For guidance, this Court reviewed the United States Supreme Court holding in Green Tree Financial Corp.-Alabama v. Randolph, 531 U.S. 79 (2000).

In Green Tree, the Court analyzed the appeal rights found within 9 U.S.C. § 16, which is the federal equivalent of S.C. Code Ann. § 15-48-200(a). 531 U.S. at 85-86. The question turned on the Court’s determination of the language “final decision” within 9 U.S.C. § 16. Id. In other words, if the trial court made a “final decision,” then there was a right for an immediate appeal. The Court highlighted the fact that the order disposed of the entire case and “left no part of [the case] pending before the [trial court].” Id. at 86. The Court also noted the fact that even though the Federal Arbitration Act permits parties to seek a judgment on an arbitration award once arbitration is concluded “does not vitiate the finality of the [trial court’s] resolution of the claims.” Id.

The Widener Court, with guidance from Green Tree in hand and recognition the case was not controlled by Carolina Care, held the plaintiff’s rights had been “finally determined.” 381 S.C. at 524. Consequently, the appeal rights of the plaintiff were not limited to S.C. Code Ann. §

15-48-200(a). Id. Instead, the plaintiff had an immediate right to appeal pursuant to S.C. Code Ann. § 14-3-330. Id.

The instant case is closely aligned with Widener. The instant case also provides an opportunity for this Court to further elaborate on the 2009 clarification in Widener. More specifically, when *all claims* are sent to arbitration, which “finally determines” the rights of the parties, a right to appeal follows immediately regardless of the presence of a technical dismissal. Again, a case-by-case determination of the “effect” of the order being reviewed. Dorn supra.

**C. Clarification is needed.**

Without question, the South Carolina Constitution provides parties the right to trial by jury in legal actions. As this Court has routinely recognized and held, orders which eliminate a jury trial involve the mode of trial and, therefore, affect the substantial rights of the parties. E.g. Bateman v. Rouse, 358 S.C. 667 (Ct. App. 2004); Lester v. Dawson, 327 S.C. 263 (1997). In fact, “[t]he failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues.” Bateman supra at 675 (citing Lester supra).

In the instant matter, Appellant’s constitutional right to a trial by jury was single handedly stripped by the trial court. In doing so, the trial court reviewed no affidavits or other sworn statements. In fact, the Respondents did not even file an answer to the Complaint. Again, as mentioned above, the trial court also inexplicably and improperly made a finding regarding the merits of the claims that the Respondents had “demonstrated” facts to the trial court without an answer, an affidavit, deposition transcripts or any other evidence whatsoever related to the merits of the claims. To state it rhetorically, if the trial court were instructed by this Court to provide a citation to evidence for the holding the Respondents have “demonstrated” facts relevant to the merits, then the trial court would be unable to do so. Without an appeal, the

ultimate outcome of this case will be that Appellant was summarily stripped of his constitutional rights by a single judge, who reviewed no sworn evidence, yet Appellant is left with no recourse for appeal or review. Plainly, this does not comport with any level of the fundamental fairness and jurisprudence upon which our justice system is constructed.

Without the application of Widener to this case, Appellant will be summarily divested of his constitutional right without an opportunity for appeal or further review. The importance of such review is founded squarely within the rule of law that “the failure to immediately appeal an order affecting the mode of trial constitutes a waiver of the right to appeal these issues.” Bateman supra.

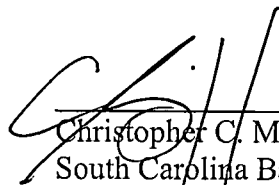
Such a holding is reasonable and comports with sound policy. If Appellant is not permitted to appeal, then the message sent to the bench and bar is that so long as the defendant can point to a prior arbitration agreement and convince a single judge on one occasion that the dispute is governed by any arbitration clause (over the strong objection of the plaintiff), no matter how tenuous or inapplicable, then the plaintiff is divested of his constitutional right to trial by jury and there is no recourse. Certainly, this result will create a rash of motions to compel arbitration by defendants, no matter how tenuous the motion to compel arbitration.

This case presents a much needed opportunity for this Court to complete the framework and fill in the gaps established by Carolina Care and Widener. The holdings in Carolina Care, Widener, Green Tree, Bateman and Dorn provide this Court with the tools, policy and sound reasoning necessary to provide this guidance. The completed framework should be, if all claims or counts within a complaint are sent to arbitration by a trial court, then the “effect” of such action triggers an immediate right to appeal. This is true because the rights of the parties have been “finally determined.” Among other things, the rights have been finally determined because

a party has lost a constitutional right to trial by jury. You cannot put the toothpaste back in the tube. Once the matter is tried at arbitration or tried to the bench, it is too late to then seek appellate review of an earlier order affecting the mode of trial.

**CONCLUSION**

Based upon the foregoing, this Court should respectfully determine the Order is immediately appealable.



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February 17, 2017  
Charleston, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
KYLE J. KIBLER, )  
 ) Plaintiff, )  
 )  
vs. )  
 )  
BASIL C. PEYTON and )  
ORIGIN POINT BRANDS, LLC, )  
 )  
Defendants. )

IN THE COURT OF COMMON PLEAS  
FOR THE NINTH JUDICIAL CIRCUIT

CIVIL ACTION #

COMPLAINT

(Jury Trial Requested)

FILED  
2019 SEP - 1 PM 2:58  
JULIE J. ARMSTRONG  
CLERK OF COURT

Plaintiff Kyle J. Kibler ("Plaintiff" or "Kibler"), for his complaint against Defendants Basil C. Peyton ("Peyton") and Origin Point Brands, LLC ("Origin Point")(collectively "Defendants"), hereby states as follows:

**PARTIES**

1. Plaintiff is a resident of South Carolina and is a former employee of Defendant Origin Point.
2. Defendant Peyton is a resident of Georgia and is, and at all relevant times has been, an employee and executive officer of Defendant Origin Point.
3. Defendant Origin Point is a Delaware limited liability company and has its principal place of business located at 2453 King Street Extension, Charleston, South Carolina 29405. Origin Point is in the business of manufacturing, fabricating and distributing steel, aluminum and other finished goods.

**JURISDICTION AND VENUE**

4. Jurisdiction is appropriate in this court in that the amount in controversy exceeds the minimum jurisdictional amount, the Defendants are residents of or employed in this State and the acts giving rise to this cause occurred in the judicial circuit in which this Court is located.

EXHIBIT

tabbles

5. Venue is appropriate in that the Defendant Origin Point has its home office in, and the acts giving rise to this cause occurred in, the judicial circuit in which this Court is located.

**FACTS**

6. Kibler was employed by Defendant Origin Point from June 2012 until early January 2015.

7. Before and during the period he was employed at Defendant Origin Point, Kibler maintained a good reputation with regards to his business ethics, morals and business acumen.

8. Upon information and belief, on multiple occasions in 2015 and continuing in 2016 Defendant Peyton made defamatory comments regarding Kibler's business ethics and abilities and fitness for his business and profession. Specifically, Peyton made statements to the effect that Kibler was a "criminal" and "should be in prison." Such statements were not true, and Kibler has not engaged in any criminal conduct as suggested by Defendants.

9. Defendants' statements were made to third persons and were not protected by any absolute or qualified privilege.

10. Defendant Peyton made the defamatory statements while an executive officer of, and in the course and scope of his employment with, Defendant Origin Point. Upon information and belief, Peyton made the defamatory statements knowing they were false and with the intent to harm Kibler's reputation both within and outside of Origin Point.

11. As a result of Defendants' defamatory statements, Kibler has suffered, and continues to suffer, injury to his business reputation and has suffered, and continues to suffer, economic loss. Kibler has also suffered, and continues to suffer, emotional damages as a result of Defendants' wrongful acts.

**COUNT I**  
**(DEFAMATION)**

12. Plaintiff hereby incorporates paragraphs 1-11 of his complaint as if fully set forth herein.

13. Defendants made defamatory comments regarding Plaintiff's business reputation and business acumen, knowing that such statements were untrue and that they would cause harm to Plaintiff's reputation within the community.

14. Defendants' statements were untrue, published to third parties and were made knowingly and maliciously.

15. As a result of Defendants' defamatory statements, Plaintiff suffered loss to his business reputation and has otherwise suffered economic and emotional damages.

16. Based on Defendants' conduct, which constituted defamation *per se*, Plaintiff is entitled to recover actual, nominal and punitive damages.

**COUNT II**  
**(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)**

17. Plaintiff hereby incorporates paragraphs 1-16 of his complaint as if fully set forth herein.

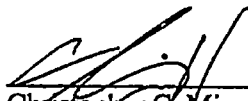
18. Defendants intentionally or recklessly inflicted severe emotional distress on Plaintiff with certainty or substantial certainty that such emotional distress would result.

19. Defendants' conduct was extreme and outrageous and exceeded the bounds of decency.

20. Defendants' conduct caused Plaintiff severe and foreseeable emotional distress for which Kibler is entitled to recover actual and punitive damages.

**WHEREFORE, Plaintiff respectfully demands as follows:**

1. Judgment against the Defendants jointly and severally in the amount sufficient to compensate him for injury resulting from Defendants' wrongful conduct;
2. Judgment for punitive damages based on Defendants' intentional, knowing, malicious and outrageous conduct;
3. Judgment awarding all costs and expenses, including reasonable attorneys' fees, incurred in bringing this action;
4. A trial by jury; and
5. Any and all other relief at law or at equity to which Plaintiff may be entitled.

  
\_\_\_\_\_  
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August 31, 2016

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM THE CHARLESTON COUNTY  
COURT OF COMMON PLEAS

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2017-000197

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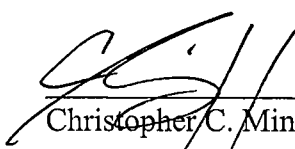
Respondents.

PROOF OF SERVICE

I, Christopher C. Mingledorff, Esq., certify that on February 17, 2017, I served the **BRIEF OF APPELLANT REGARDING APPEALABLE NATURE OF ORDER** on the Respondents by depositing a copy of the same in the United States Mail, addressed to their attorneys of record, by certified mail, postage prepaid at the address listed below:

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February 17, 2017

Via Certified Mail/RRR: 7016 0340 0000 4622 6476

Honorable Jenny Abbott Kitchings  
Clerk, South Carolina Court of Appeals  
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SC Court of Appeals

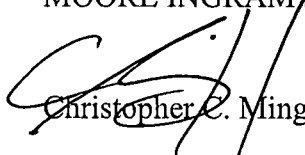
Re: **Kyle J. Kibler v. Basil C. Peyton and Origin Point Brands, LLC**  
**Appellate Case No. 2017-000197**

Dear Ms. Kitchings:

With regard to the above, please find enclosed the original and two (2) copies of the *Brief of Appellant Regarding Appealable Nature of Order* to be included in the Record on Appeal, along with Proof of Service. I am this date serving counsel for Appellants with a copy of the Final Brief.

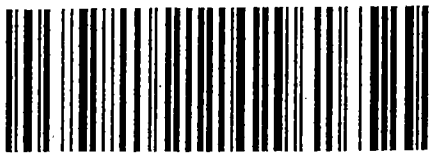
With kind regards, I am

Sincerely,  
MOORE INGRAM JOHNSON & STEELE, LLP

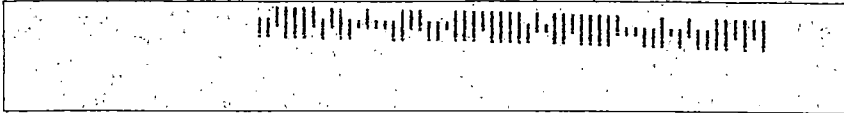
  
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CCM/jlr

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**6476**

Honorable Jenny Abbott Kitchings  
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