

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2017-CP-10-4371  
Appellate Case No. 2019-001230

**RECEIVED**

AUG 21 2019

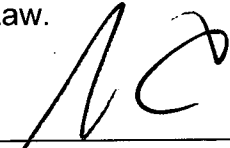
SC Court of Appeals

Care E. Fechter, M.D.....Respondent

Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and  
Rosenthal, Levy, Simon, and Ryles, LLC, of which Leon Ortner and The  
Ortner Law Firm, LLC, are .....Appellants

MOTION TO DISMISS APPEAL

The Respondent hereby moves to Dismiss the Appeal of the Appellants due to the South Carolina Court of Appeals not having the jurisdiction to entertain an appeal from an interlocutory decision of the Circuit Court. This Motion is supported by the attached Memorandum of Law.

  
Melvin D. Bannister  
Post Office Box 6833  
Columbia, South Carolina 29260  
(803) 782-8688; (803) 782-8677-fax  
Attorney for the Respondent

August 20, 2019

Other counsel of record:

M. Dawes Cooke, Jr., Esquire  
Justin P. Novak, Esquire  
Barnwell Whaley Patterson & Helms, LLC  
PO Drawer H  
Charleston, SC 29402  
Phone: (843) 577-7700  
[mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com)  
[jnovak@barnwell-whaley.com](mailto:jnovak@barnwell-whaley.com)

Attorneys for Leon Martin Ortner  
& The Ortner Law Firm, LLC

Michael E. Kozlarek, Esquire  
Kozlarek Law, LLC  
14 South Main Street, Suite 130 (29601)  
PO Box 565  
Greenville, South Carolina 29602-0565  
Phone: (864) 729-1931  
[michael@kozlarelaw.com](mailto:michael@kozlarelaw.com)

Attorney for Gerald Rosenthal and  
Rosenthal, Levy, Simon, and Ryles, PA

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2017-CP-10-4371  
Appellate Case No. 2019-001230

**RECEIVED**  
AUG 21 2019  
SC Court of Appeals

Care E. Fechter, M.D.....Respondent

Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and  
Rosenthal, Levy, Simon, and Ryles, LLC, of which Leon Ortner and The  
Ortner Law Firm, LLC, are .....Appellants

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS APPEAL

In support of the Motion to Dismiss Appeal of Appellants, the Respondent would show the following:

The Respondent commenced the action in the Charleston County Court of Common Pleas by the filing the Summons and Complaint on August 25, 2017. The Appellants filed a Motion to Dismiss based on Rule 12(b), SCRPC. The Honorable Deadra L. Jefferson issued an Order Denying Motion to Dismiss on April 5, 2019. Appellants filed a Motion to Reconsider on April 18, 2019. The Honorable Deadra L. Jefferson filed an Order Denying Defendants' Motion to

Reconsider, Alter, or Amend Judgment on June 28, 2019. On July 22, 2019 Appellants filed a Notice of Appeal.

In *Burkley v. Noce, et al*, 398 S.C. 35, 726 S.E.2d 229 (Ct. App. 2012) the Court of Appeals found that an appeal from a denial of a motion to dismiss was not immediately appealable. In *Burkley* the Plaintiff/Respondent filed a Complaint alleging breach of contract, fraudulent breach of contract accompanied by fraudulent act, and other causes of action. Appellants filed a motion to dismiss under multiple Rule 12(b), SCRPC, grounds. Further in *Burkley* the Court held an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right. *Id.* While no South Carolina case law concerns the immediate appealability of a denial of dismissal based specifically on forum non conveniens, our courts have ruled on the appealability of other denials of motions to dismiss. Generally, the denial of a motion to dismiss under Rule 12(b)(6), SCRPC, is not immediately appealable. *Huntley v. Young*, 319 S.C. 559, 560, 462 S.E.2d 860, 861 (1995). “[T]he denial of a motion to dismiss [based on statute of limitations] is not directly appealable....” *McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n. 2, 443 S.E.2d 539, 540 n. 2 (1994). An order denying a motion to dismiss for lack of subject matter jurisdiction is also not directly appealable. *Allison v. W.L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011).

The Supreme Court in *Woodard v. Westvaco Corporation*, 319 S.C. 240, 460 S.E.2d 392 (1995), held the Court of Appeals incorrectly concluded that an order denying a Rule 12(b) (1) motion to dismiss was immediately appealable.

Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C.Code Ann. § 14-3-330 (1976 & Supp.1994). Because an order denying a Rule 12(b)(1) motion to dismiss does not fall into any of these categories, we hold that such orders are not [319 S.C. 243] immediately appealable. To the extent *Carter v. Florentine Corp.*, 310 S.C. 228, 423 S.E.2d 112 (1992), *Botany Bay Marina, Inc. v. Townsend*, 296 S.C. 330, 372 S.E.2d 584 (1988), and *Simms v. Phillips*, 46 S.C. 149, 24 S.E. 97 (1896) hold otherwise, they are overruled. Accordingly, this appeal is dismissed, and the opinion of the Court of Appeals is vacated.

The Court of Appeals held in *Levi v. Northern Anderson County EMS*, 409 S.C. 374, 762 S.E.2d 44 (App. Ct. 2014), an appellate court may determine the question of appealability of a decision from a lower court as a matter of law.” *Ashenfelder v. City of Georgetown*, 389 S.C. 568, 571, 698 S.E.2d 856, 858 (Ct.App.2010) (citing S.C.Code Ann. § 14-3-330 (1976 & Supp.2009) (creating appellate jurisdiction in law cases); S.C.Code Ann. § 14-8-200(a) (Supp.2009) (setting forth the appellate jurisdiction of the court of appeals)). “Even if not raised by the parties, this court may address the issue of appealability *ex mero motu*.” *Id.*; see also *St. Francis Xavier Hosp. v. Ruscon/Abco*, 285 S.C. 584, 586, 330 S.E.2d 548, 549 (Ct.App.1985) (providing this court can raise the issue of appealability *ex mero motu* even when no party raises any question concerning the appealability of an order). The right to appeal is a jurisdictional matter and,

even if the parties do not raise the issue of appealability, we must dismiss the appeal on our own motion if we conclude we do not have jurisdiction.

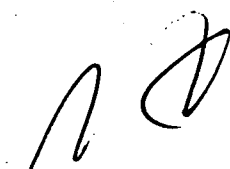
In *Brown v. County of Berkley, et al*, 366 S.C. 354, 622 S.E.2d 533 (2005) Chief Justice Toal opined it is well settled that an interlocutory order is not immediately appealable unless it involves the merits of the case or affects a substantial right. S.C.Code Ann. § 14-3-330 (Supp.2003); *Woodard v. Westvaco Corp.*, 319 S.C. 240, 243, 460 S.E.2d 392, 394 (1995); *Mid-State Distributors, Inc. v. Century Importers*, 310 S.C. 330, 334-35, 426 S.E.2d 777, 780 (1993); *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). To involve the merits of a case, the order must "finally determine some substantial matter forming the whole or a part of some cause of action or defense." *Woodard*, 319 S.C. at 243, 460 S.E.2d at 394. To affect a substantial right, the order must "determine the action and prevent a judgment from which an appeal might be taken or discontinue the action." *Id.*

In *McLendon v. South Carolina Department of Highways and Public Transportation*, 313 S.C. 525, 443 S.E.2d 539 (1994) the Supreme Court held a motion to dismiss has the effect of asserting that respondent has failed to state a cause of action. The denial of such a motion is not immediately appealable under S.C.Code Ann. § 14-3-330 (1976 & Supp.1993). *Moyd v. Johnson*, 289 S.C. 482, 347 S.E.2d 97 (1986).

In *Mid-state Distributors, Inc., v. Century Importers, Inc. et al*, 310 S.C. 330, 426 S.E.2d 777 (1993) in a case that arose from a denial of a pre-trial motion, under Rule 12(b) (2), SCRCP, to dismiss for lack of personal jurisdiction, the Supreme

Court dismissed the appeal as interlocutory. South Carolina case law is settled that "at the pre-trial stage of the proceedings, the plaintiff need only make a prima facie showing by pleadings and affidavits." *Hammond v. Butler, Means, Evins & Brown*, 300 S.C. 458, 462, 388 S.E.2d 796, 798 (1990), cert. denied sub nom. *Kramer v. Hammond*, 498 U.S. 952, 111 S.Ct. 373, 112 L.Ed.2d 335 (1990); see *White v. Stephens*, 300 S.C. 241, 387 S.E.2d 260 (1990); *Askins v. Firedoor Corp. of Florida*, 281 S.C. 611, 316 S.E.2d 713 (Ct.App.1984). There is no "other evidence" requirement for personal jurisdiction where the complaint itself demonstrates jurisdiction. *Springmasters, Inc. v. D & M Mfg.*, 303 S.C. 528, 402 S.E.2d 192 (Ct.App.1991).

In conclusion based upon the foregoing statutory and case law cited herein and the case law cited by the Honorable Deadra Jefferson in her Order Denying Motion to Dismiss and in her Order Denying Defendants' Motion to Reconsider, Alter, or Amend Judgment, it is submitted the appeal of the said Orders be dismissed.



---

Melvin D. Bannister  
Post Office Box 6833  
Columbia, South Carolina 29260  
(803) 782-8688; (803) 782-8677-fax  
sctriallawyer@bellsouth.net  
Attorney for the Respondent

August 20, 2019

Other counsel of record:

M. Dawes Cooke, Jr., Esquire  
Justin P. Novak, Esquire  
Barnwell Whaley Patterson & Helms, LLC  
PO Drawer H  
Charleston, SC 29402  
Phone: (843) 577-7700  
[mdc@barnwell-whaley.com](mailto:mdc@barnwell-whaley.com)  
[jnovak@barnwell-whaley.com](mailto:jnovak@barnwell-whaley.com)

Attorneys for Leon Martin Ortner  
& The Ortner Law Firm, LLC

Michael E. Kozlarek, Esquire  
Kozlarek Law, LLC  
14 South Main Street, Suite 130 (29601)  
PO Box 565  
Greenville, South Carolina 29602-0565  
Phone: (864) 729-1931  
[michael@kozlareklaw.com](mailto:michael@kozlareklaw.com)

Attorney for Gerald Rosenthal and  
Rosenthal, Levy, Simon, and Ryles, PA

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Case No. 2017-CP-10-4371  
Appellate Case No. 2019-001230

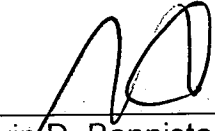
**RECEIVED**  
AUG 21 2019  
SC Court of Appeals

Care E. Fechter, M.D.....Respondent

Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and  
Rosenthal, Levy, Simon, and Ryles, LLC, of which Leon Ortner and The  
Ortner Law Firm, LLC, are .....Appellants

PROOF OF SERVICE

I certify that I have served the Motion to Dismiss Appeal and  
Memorandum in Support of Motion to Dismiss Appeal, by depositing in the  
United States Mail, postage prepaid, on August 21, 2019, addressed to the  
attorneys of record, M. Dawes Cooke, Esq., and Justin P. Novak, Esq., located at  
Barnwell Whaley Patterson \$ Helms, LLC, PO Drawer H, Charleston, SC 29402  
and to Michael E. Kozlarek, Esq., at Kozlarek Law, LLC, PO Box 565, Greenville,  
SC 29602-0565.

  
\_\_\_\_\_  
Melvin D. Bannister  
Post Office Box 6833  
Columbia, South Carolina 29260  
(803) 782-8688; (803) 782-8677-fax  
Attorney for the Respondent

August 21, 2019

**MELVIN D. BANNISTER**

Trial Lawyer  
5115 Forest Drive, Suite G-1  
Columbia, South Carolina 29206  
Telephone: (803) 782-8688  
Fax: (803) 782-8677  
Email: sctriallawyer@bellsouth.net

Mailing Address:  
Post Office Box 6833  
Columbia, SC 29260

HAND DELIVERED

August 21, 2019

**RECEIVED**

AUG 21 2019

SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk of the South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

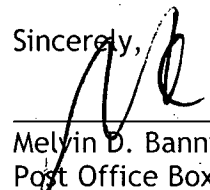
Re: Fechter v. Ortner, et al  
Case No. 2017-CP-10-4371  
Appellate Case No. 2019-001230

Dear Ms. Kitchings:

Enclosed for filing is:

- a. An original and 7 copies of Motion to Dismiss Appeal and Memorandum in Support of Motion to Dismiss Appeal;
- b. Proof of service of the Motion and Memorandum on the Appellants and other counsel of record;;
- c. A filing fee of \$50.00.

Sincerely,

  
\_\_\_\_\_  
Melvin D. Bannister  
Post Office Box 6833  
Columbia, South Carolina 29260  
(803) 782-8688  
Attorney for the Respondent

cc: M. Dawes Cooke, Esq.  
Justin P. Novak, Esq.  
Michael E. Kozlarek, Esq.