

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

The Honorable Deadra L. Jefferson, Circuit Court Judge

Case No. 2017-CP-10-4370

Appellate Case No. 2019-001230

**RECEIVED**  
SEP 16 2019  
SC Court of Appeals

Cary E. Fechter, M.D. .... Respondent

v.

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

Of whom Leon Martin Ortner and The Ortner Law Firm, LLC are  
the ..... Appellants

**RETURN TO MOTION TO DISMISS APPEAL**

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and The Ortner Law Firm, LLC*

AND NOW COME Appellants Leon Martin Ortner and The Ortner Law Firm, LLC (the “Ortner Defendants”), by and through their undersigned counsel, and file this Return to Motion to Dismiss Appeal:

### **INTRODUCTION**

The Order in this case is immediately appealable because it affects the substantial rights of the Defendants by improperly determining the mode of trial and by deciding the merits of a key defense to the Plaintiff’s claim—that Plaintiff’s claim has already been decided by the Workers’ Compensation Commission—effectively striking that defense.

#### **A. Background**

In this lawsuit, Plaintiff/Respondent Cary E. Fechter, M.D. (“Dr. Fechter”) asserts claims for breach of contract, fraud, breach of contract with fraudulent intent, unfair trade practices, and pre-judgment interest. Dr. Fechter’s claims arise from allegations that Dr. Fechter should be further compensated—beyond what he had already been paid—for medical examinations and the issuance of medical reports for claimants involved in a workers’ compensation proceeding captioned *Sadie Adams, et al., v. International Paper Company and Nevamar Company, LLC* (WCC File No. 0326995) (“Workers’ Compensation Action”).<sup>1</sup> Dr. Fechter alleges that, in 2002, the Ortner Defendants—who represented claimants in the Workers’ Compensation Action—retained Dr. Fechter to perform certain medical examinations and provide reports. Gerald Rosenthal and Rosenthal, Levy, Simon and Ryles (the “Rosenthal Defendants”), who are not parties to this appeal, also represented claimants in the Workers’ Compensation Action and assumed responsibility for payment of expenses.

Dr. Fechter filed the instant lawsuit seeking to recover additional payments. Dr. Fechter alleged that he was to be paid: (a) \$500 for the initial medical examination and report for each claimant; (b) \$150 for second examinations and reports; and (c) \$100 for subsequent/third

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<sup>1</sup> The Workers Compensation Action involved the settlement of workers’ compensation claims by individuals alleging injuries from exposure to toxic chemicals while working at the Nevamar plant in Hampton County, South Carolina.

examinations and reports. He claims that he did initial examinations and reports for 450 claimants. Dr. Fechter concedes that the Rosenthal Defendants paid him \$25,000 for his work. Dr. Fechter claims that this was for his work on the first 50 claimants. The Complaint does not allege the existence of any written agreement between Dr. Fechter and the Ortner Defendants.

On April 1, 2014, the *Nevamar* claimants collectively settled their workers' compensation claims. Pursuant to the settlement agreement, the *Nevamar* defendants deposited the settlement funds into a qualified fund to be administered by a special referee, from which all attorneys' fees and costs were to be distributed upon approval of the South Carolina Workers' Compensation Commission ("Commission"). On November 13, 2015, the special referee held in trust \$500,000 in approved costs, pending instructions regarding final disbursement or an order from the Commission. On December 10, 2015, Commissioner Aisha Taylor approved the decisions made by the special referee with regard to disbursement of the proceeds of settlement.

In accordance with the Initial Report of the Special Referee, on November 18, 2015, the Rosenthal Defendants filed a motion before the Commission to release funds for the reimbursement of approved costs incurred on behalf of the *Nevamar* claimants, serving the same upon Dr. Fechter.<sup>2</sup> In that motion, the Rosenthal Defendants sought the release of the totality of the funds to the Rosenthal Defendants. The motion specifically asserted that the Commission should deny any claims to the funds made by Dr. Fechter on the grounds that he could not establish any contractual right to further payment. On November 30, 2015, the Ortner Defendants submitted a reply to the motion, again serving Dr. Fechter, asking the Commission to inquire into Dr. Fechter's claims to additional payment and issue an order determining the rights of all concerned parties to the funds held in trust. The Ortner Defendants made no claim to the funds. The Ortner Defendants simply sought a complete adjudication of the rights and responsibilities of all parties with regard to any monies owed to Dr. Fechter.

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<sup>2</sup> Prior to the filing of the motion, Dr. Fechter responded to a subpoena for any documents supporting his claims to further compensation and provided deposition testimony regarding the claims on November 2, 2015.

Dr. Fechter did not respond to the motion or the Ortner Defendants' reply and failed to take the opportunity to litigate any contractual claims for further payment and claims to the funds held in trust. Subsequently, on January 26, 2016, Commissioner Taylor granted the Motion to Release Funds and ordered the release of all funds held in trust to the Rosenthal Defendants. In the order, Commissioner Taylor found that (1) Dr. Fechter was properly served with the Motion to Release Funds and the Ortner Defendants' Reply, (2) Dr. Fechter failed to establish entitlement to any further payment, (3) Dr. Fechter could not establish any contract between himself and the Ortner or Rosenthal Defendants that would entitle him to any additional payments, (4) no agreement existed obligating the Ortner or Rosenthal Defendants to pay for any additional services that Dr. Fechter performed, and (5) Dr. Fechter was not deprived of any payment due. Plaintiff was served with the Order Granting Motion to Release Funds on January 27, 2016. Plaintiff did not appeal that order.

**B. Procedural History**

On January 5, 2018, the Ortner Defendants filed a Motion to Dismiss Dr. Fechter's claims against them in this lawsuit, arguing in relevant part:

The Ortner Defendants first move to dismiss Plaintiffs Complaint on the grounds that the South Carolina Workers' Compensation Commission previously exercised exclusive original jurisdiction over the subject matter of the causes of action asserted in the Complaint. As a result, the Circuit Court has been divested of jurisdiction to hear and determine the claims. Moreover, Plaintiffs failure to seek review of the prior administrative determinations of the material facts and legal issues in question constitute a bar to further litigation of the claims. Plaintiff is further barred from re-litigating the claims because the South Carolina Workers' Compensation Commission actually and necessarily directly determined the material facts and issues of law sought to be litigated. In addition, Plaintiff failed to assert the claims in a timely manner and failed to plead facts sufficient to constitute the causes of action asserted. As a result, this Court should dismiss the entire Complaint with prejudice.

(See Jan. 5, 2018 Mot. to Dismiss, at 1-2). On April 4, 2019, the trial judge entered an Order Denying [the Ortner Defendants'] Motion to Dismiss ("Order"), stating that:

- (a) The court possessed subject matter jurisdiction over this matter, because the Commission did not have exclusive jurisdiction to decide the amount of fees

to which Dr. Fechter was entitled for his work on the Workers' Compensation Action;

- (b) Dr. Fechter did not have a meaningful ability to exhaust his administrative remedies in the Workers' Compensation Action;
- (c) Dr. Fechter's claims were not barred by collateral estoppel, because he did not have a meaningful opportunity to adjudicate his claims in the Workers' Compensation Action; and
- (d) Dr. Fechter's complaint stated a claim upon which relief could be granted under the South Carolina Unfair Trade Practices Act.

On April 18, 2019, the Ortner Defendants filed a Motion to Reconsider, Alter, or Amend the Order. On June 26, 2019, the trial court entered an Order Denying Defendants' Motion to Reconsider, Alter or Amend ("Reconsideration Order") stating (in part): "The Defendants have not highlighted any portions of the record this Court may have misunderstood, failed to fully consider, or perhaps failed to rule on."

On or about July 22, 2019, the Ortner Defendants filed the instant Notice of Appeal, seeking review of the Order and the Reconsideration Order. The Ortner Defendants' Initial Appellants' Brief and Designation of Matter for Inclusion in the Record on Appeal would be due on September 20, 2019. On August 21, 2019, Dr. Fechter filed the instant Motion to Dismiss Appeal, arguing that the Order and Reconsideration Order are not immediately appealable. For the reasons that follow, this Court should deny the Motion to Dismiss Appeal and review the trial judge's Order and Reconsideration Order in this matter.

### ARGUMENTS

"The first consideration in any appeal is the appealability of the order. Appealability is controlled by statute." *See* 15 S.C. Jur., Appeal and Error § 70. This Court possesses appellate jurisdiction over the following types of orders—in addition to final judgments disposing of cases in their entirety:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas . . . and final judgments in such actions; . . .

(2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action.

See S.C. Code § 14-3-330(1) & (2). Additionally, the Ortner Defendants note that, in an action before a state agency, “[a] party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review.” See S.C. Code § 1-23-380.

In his Motion to Dismiss Appeal, Dr. Fechter argues that the Order is not appealable because it is merely the denial of a motion to dismiss. The Ortner Defendants recognize that the Supreme Court has “held that the denial of a motion to dismiss for lack of subject matter jurisdiction is not immediately appealable.” See *Deskins v. Boltin*, 319 S.C. 356, 357, 461 S.E.2d 395, 396 (1995); *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012) (“An order denying a motion to dismiss for lack of subject matter jurisdiction is also not directly appealable.”). For the reasons that follow, notwithstanding that general rule, the Order here is, in fact, immediately appealable to this Court.

**A. The Order Denying the Ortner Defendants’ Motion to Dismiss in the Trial Court Was an Appealable Order Affecting the Mode of Trial.**

As set forth above, South Carolina statute permits appeals from “[a]n order affecting a substantial right made in an action.” See S.C. Code § 14-3-330(2). The South Carolina Supreme Court has “repeatedly . . . held that the denial of a party’s right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2).” *Hagood v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). Caselaw “not only permit[s], but indeed require[s], immediate appeal in the event of denial of a mode of trial to which one is entitled as a matter of right.” See *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) (finding that order granting bifurcation was not immediately appealable as affecting mode of trial).

In this regard, appellate courts have permitted appeals from various types of orders impacting the mode in which a case would be tried. See *Frampton v. South Carolina Dep’t of Transp.*, 406 S.C. 377, 386, 752 S.E.2d 269, 274 (Ct. App. 2013) (order denying motion to transfer

to non-jury roster affected mode of trial and was immediately appealable); *Hagood v. Sommerville*, 362 S.C. 191, 197, 607 S.E.2d 707, 710 (2005) (“[A]n order granting a motion to disqualify a party’s attorney in a civil case affects a substantial right and may be immediately appealed[.]”); *Bateman v. Rouse*, 358 S.C. 667, 674, 596 S.E.2d 386, 389–90 (Ct. App. 2004) (“Orders of the trial judge denying a request for a jury trial involve the mode of trial, affect substantial rights under section 14-3-330(2) . . . and are immediately appealable”); *Creed v. Stokes*, 285 S.C. 542, 543, 331 S.E.2d 351, 352 (1985) (holding that order referring case to master “should have been appealed immediately because it affected the mode of trial, a substantial right.”).

Here, the Order plainly affected the appropriate mode of trial, insofar as Plaintiff’s claims are not properly tried to a jury in common pleas court; rather, these claims (if cognizable at all) may only be tried in the Workers’ Compensation Commission. *See* S.C. Code § 42-3-180 (“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, except as otherwise provided in this title.”); S.C. Code Regs. § 67-1206 (“[A]n attorney may request approval of the actual costs incurred in the prosecution of a claim [including] expenses associated with the evaluation or treatment of the client.”). Thus, if Dr. Fechter has (or had) any claims, they should have been asserted in that forum. “Once the Commission approves a compensation agreement, the agreement becomes as binding as a judicial decree and the facts contained therein are as definitely settled as factual findings incorporated in a decree.” *McCreery v. Covenant Presbyterian Church*, 303 S.C. 271, 273, 400 S.E.2d 130, 131 (1990). If Dr. Fechter is entitled to relief from the Order of the Commission, he should seek it first from the Commission and not be permitted to circumvent the Commission’s process for approval of the actual costs incurred in the prosecution of a claim through a collateral action in the Circuit Court. *Cf. Newberry v. Georgia Department of Industry & Trade*, 286 S.C. 574, 575-76, 336 S.E.2d 464 (1985) (holding that the established policy of giving a party redress for tortious wrongs may be overridden by other considerations such the policy against forum shopping, the potential for creating tension between the states and degrading sovereignty). The Order in this case plainly affects the mode of trial, as it improperly permits

Dr. Fechter to try his claims to a jury in the trial court.

The precedents cited above, *Deskins v. Boltin*, 319 S.C. 356, 357, 461 S.E.2d 395, 396 (1995) and *Burkey v. Noce*, 398 S.C. 35, 37, 726 S.E.2d 229, 230 (Ct. App. 2012) are distinguishable from this case because here there has actually been an adjudication of the Plaintiff's claims in an alternative forum and Plaintiff has not availed himself of the process for obtaining relief from that adjudication. For this reason and for the reasons set forth below, the Ortner Defendants may appeal from the Order pursuant to S.C. Code § 14-3-330(2).<sup>3</sup>

**B. The Order Denying the Ortner Defendants' Motion to Dismiss in the Trial Court Was an Appealable Intermediate Judgment.**

In the alternative, even if the Order is not immediately appealable as an order affecting a substantial right concerning the mode of trial, it, nevertheless, is an immediately appealable intermediate order under S.C. Code § 14-3-330(1) if it addresses the merits of the Ortner Defendants' defense that the commissioner has already disposed of the question of Dr. Fechter's appropriate fees. That statute permits immediate appeal from "[a]ny intermediate judgment, order or decree in a law case involving the merits." "To involve the merits, the order must 'finally determine some substantial matter forming the whole or part of some cause of action or defense.'" *Peterkin v. Brigman*, 319 S.C. 367, 368, 461 S.E.2d 809, 810 (1995) (quoting *Mid-State Distributors, Inc., v. Century Importers, Inc.*, 310 S.C. 330, 426 S.E.2d 777 (1993)).

The Ortner Defendants arguments are not merely procedural. To the contrary, the Ortner Defendants argue that the commissioner properly disposed of the question of Dr. Fechter's appropriate fees, which Dr. Fechter cannot now evade in this forum. While the Ortner Defendants assert that Judge Jefferson's denial of their Motion to Dismiss is not a final adjudication of that argument, the trial court might take the position that the denial of the motion to dismiss

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<sup>3</sup> "[A]n order that is not directly appealable will nonetheless be considered if there is an appealable issue before the Court and a ruling on appeal will avoid unnecessary litigation." See *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 565 564 S.E.2d 94, 98 (2002). Accordingly, if any part of the Order is appealable, this Court may address *all* issues addressed in the Order and the Reconsideration Order for judicial economy.

*affirmatively* determined that “this Court *does not lack* subject matter jurisdiction” *and* that the commissioner’s ruling “has no preclusive effect as the Plaintiff and Defendants were not parties to the underlying Workers’ Compensation action and thereby, have retained their rights to pursue any claims pursuant to common law principles (sic) Contract or otherwise.” (See April 5, 2019 Order Den. Mot. to Dismiss, at 11 (emphasis added)). If, in fact, the Ortner Defendants are not allowed to assert this defense at trial, such ruling would go to the core of the Ortner Defendants’ arguments in this lawsuit and in this appeal. Under such circumstances, which are plausible given the language of Judge Jefferson’s Order Denying Motion to Dismiss, the order would constitute an immediately appealable intermediate order, as it would dispose of a significant defense raised by the Ortner Defendants.

Therefore, this Court should deny Dr. Fechter’s Motion to Dismiss Appeal.

**CONCLUSION**

For the foregoing reasons, the Court should deny Dr. Fechter’s Motion to Dismiss Appeal and review the appealed orders in this case.

September 13, 2019

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By: \_\_\_\_\_

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY

**RECEIVED**

The Honorable Deadra L. Jefferson, Circuit Court Judge

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Case No. 2017-CP-10-4370

**SC Court of Appeals**

Appellate Case No. 2019-001230

Cary E. Fechter, M.D. .... Respondent

v.

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

Of whom Leon Martin Ortner and The Ortner Law Firm, LLC are  
the ..... Appellants  
Petitioner

PROOF OF SERVICE

I certify that I have served the Return to Motion to Dismiss Appeal on the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on ~~August 13,~~ <sup>September</sup> 2019, addressed to his attorneys of record:

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September 13, 2019

**RECEIVED**  
SEP 16 2019  
SC Court of Appeals

The Honorable Jenny Abbot Kitchings  
Clerk, South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

**RE: Cary E. Fechter, MD, Respondent, v. Leon Martin Ortner, The Ortner Law Firm, LLC, Gerald Rosenthal, and Rosenthal, Levy, Simon, and Ryles, Defendants, Of Which Leon Martin Ortner and The Ortner Law Firm, LLC are Appellants**  
Appellate Case No. 2019-001230  
Our Matter No. 4065.001

Dear Ms. Kitchings:

Please find enclosed for service and filing an original and seven (7) copies of *Respondent's Return to Motion to Dismiss Appeal* in the above-referenced matter. Also enclosed is a Proof of Service of the Return on all counsel of record. Please file the original and return a clocked-in copy in the enclosed self-addressed, stamped envelope.

As always, thank you for your assistance in this matter. Please do not hesitate to contact me with any questions or concerns.

Regards,

Justin P. Novak

JPN  
Enclosures

cc: Melvin D. Bannister, Esquire  
Michael E. Kozlarek, Esquire

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REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE.

**BARNWELL  
WHALEY**

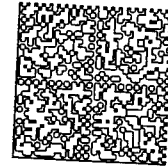
PATTERSON & HELMS LLC

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The Honorable Jenny Abbot Kitchings  
Clerk, South Carolina Court of Appeals  
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