THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley H. Price, Circuit Court Judge
Charleston County

Case No. 2018-CP-10-04377
Appellate Case No. 2020-001160

Christine Nelson.....Respondent,

v.

Medical University Hospital Authority .....Petitioner.

PETITION FOR WRIT OF CERITORARI

Caroline W. Cleveland
Bob J. Conley
CLEVELAND & CONLEY, LLC
171 Church Street, Suite 310
Charleston, SC 29401
(843) 577-9626
ccleveland@clevelandlaborlaw.com
bconley@clevelandlaborlaw.com
Attorneys for Petitioner

Other Counsel of Record:
Donald Gist
Gist Law Firm, P.A.
P.O. Box 30007
Columbia, SC 29203
(803) 771-8007
dtommygist@yahoo.com
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

CERTIFICATE OF COUNSEL

Counsel for Petitioner Medical University Hospital Authority certifies they filed a Petition for Rehearing on September 28, 2020, and the South Carolina Court of Appeals denied the Petition for Rehearing on November 16, 2020.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in ruling the denial of Petitioner's Motion to Dismiss is not a "ruling on the merits," to the extent it is based upon res judicata, and, therefore, is not subject to immediate appeal?

2. Did the Court of Appeals err in ruling the denial of Petitioner's Motion to Dismiss is not a "ruling on the merits," to the extent it is based upon judicial estoppel, and, therefore, is not subject to immediate appeal?

3. Does the denial of a motion to dismiss effect a "substantial right," subject to immediate appeal, when the motion to dismiss is based upon res judicata in a lawsuit where there is no factual dispute that the case involves the same parties and the same cause of action previously litigated in a prior lawsuit?

INTRODUCTION

Respondent filed successive lawsuits, the first in federal court and the second in state court, each containing a claim that Petitioner breached an employment contract between Respondent and Petitioner. Respondent concedes the second lawsuit, *this lawsuit*, involves the exact same breach of employment contract claim she previously asserted in federal court. Consequently, as to the defense of res judicata there is no factual dispute that impacts, the application of the defense in this matter. The application of the defense of res judicata is a matter of law only.

Recognizing the absence of a factual dispute as to the application of res judicata, the circuit court, in ruling on Petitioner's Motion to Dismiss, made *findings of law* and denied Petitioner's Motion to Dismiss on those *findings of law* alone. As result, and in an instance like this case, a party, including Petitioner, should be allowed to immediately appeal the circuit court's ruling that the defense of res judicata is unavailable.

In South Carolina "[t]he determination of whether a trial court's order is immediately appealable is governed by statute." Morrow v. Fundamental Long–Term Care Holdings, LLC, 412 S.C. 534, 537, 773 S.E.2d 144, 145 (2015) (citing S.C. Code Ann. § 14-3-330). *Generally*, the denial of a motion to dismiss, such as Petitioner's Motion to Dismiss, is not immediately appealable. *See* FOC Lawshe Ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 413, 574 S.E.2d 228, 231 (Ct. App. 2002) ("We note the denial of a motion to dismiss pursuant to Rule 12(b)(6) is generally not immediately appealable."). But, as further recognized in Morrow, "[b]y its nature, the question of whether an order is immediately appealable is *determined on a case-by-case basis*." Morrow at 538, 773 S.E.2d at 146 (emphasis added). The Court of Appeals' order dismissing Petitioner's appeal is wrong and Petitioner's appeal should be considered for several, general reasons.

First, the circuit court's Order denying Petitioner's Motion to Dismiss the Respondent's lawsuit ruled on issues involving the *merits* of the case as to the application of res judicata because to salient facts are not in dispute. Second, the circuit court's Order resulted in effectively striking the Petitioner's affirmative defenses of res judicata and judicial estoppel and, thereby, materially affected issues closely related to the mode of trial. The particular circumstances in this case, consistent with Morrow, require this Court conclude Petitioner's appeal is proper for review and consideration now.

Additionally, the Court of Appeals' reliance *solely* upon *Levi v. N. Anderson Cty. EMS*, 409 S.C. 374, 762 S.E.2d 44 (Ct. App. 2014) in dismissing Petitioner's appeal is misplaced and in err for several reasons. First, Levi did not involve the assertion of res judicata or judicial estoppel, and the Levi court discussed neither doctrine in the context of the opinion. Second, and more salient to Petitioner's appeal, a plain readying of Levi shows the court in Levi recognized there were underlying *factual disputes* that impacted the salient, central defense raised by the defendant and that served as the central basis of the defendant's motion to dismiss. Unlike Levi, there is *no factual dispute* as to Petitioner's assertion of res judicata because Respondent conceded the state law breach of employment contract claim asserted in this lawsuit and her prior federal lawsuit are *factually* identical.

STATEMENT OF THE CASE

1. Respondent's Federal Lawsuit.

Prior to filing her lawsuit in the circuit court ("Underlying Lawsuit"), Respondent filed a lawsuit in federal district court ("District Court") against Petitioner on January 20, 2017 ("Federal

Lawsuit"). (PFR Appendix, p. A-068 – A075.)[1] Respondent's Federal Lawsuit alleged, among other claims, a state law cause of action alleging breach of an employment contract.[2] The claims Respondent alleged in the Federal Lawsuit arose from her employment with Petitioner. The Federal Lawsuit, among other allegations, asserted the alleged employment contract between the parties was based on Petitioner's anti-discrimination and anti-retaliation policies.

At the conclusion of discovery in the Federal Lawsuit, Petitioner moved for summary judgment. On April 18, 2018, the federal magistrate judge issued a Report and Recommendation ("R&R") to the Honorable David Norton, the District Court judge assigned to the Federal Lawsuit. (PFR Appendix, p. A-076 – A-098.) The R&R recommended the District Court grant Petitioner's motion for summary judgment as to all Respondent's causes of action, including her state law breach of employment contract cause of action.

Subsequently, on May 7, 2018, Respondent filed Plaintiff's Objections to the Report and Recommendation of the Magistrate Judge ("Objections to the R&R"). (PFR Appendix, p. A-099 – A-109.) In her Objections to the R&R, Respondent stated, "the [magistrate judge] issued a Report and Recommendation recommending that [the District Court] grant [Petitioner's] Motion for Summary Judgment with regard to [Respondent's] claims." (PFR Appendix, p. A-100.) In her Objections to the R&R, Respondent did not assert the R&R did not recommend summary judgment as to all Respondent's causes of action, including her cause of action alleging the breach of an employment contract. (PFR Appendix, p. A-099 – A-109.)

[1] "PFR Appendix" refers to the appendix provided with and as a part of Petitioner's Petition for Rehearing in the Court of Appeals.

[2] The Federal Lawsuit also alleged Petitioner engaged in discrimination and retaliation based on Respondent's race and disability in violation of federal law.

On August 7, 2018, the District Court adopted the R&R and granted summary judgment to Petitioner (the "District Court Order"). (PFR Appendix, p. A-110 – A-112.) The District Court Order adopted the R&R and concluded:

> [a] *de novo* review of the record indicates that the magistrate judge's report accurately summarizes this case and the applicable law. Accordingly, the magistrate judge's report and recommendation is incorporated into this Order. For the reasons articulated by the magistrate judge, defendant's motion for summary judgment is **GRANTED**. (emphasis in original.)

The District Court Order does not state the District Court is making an exception in regard to Respondent's breach of employment cause of action and, therefore, excluding that cause of action from the District Court Order granting summary judgment. Further, and correspondingly, the District Court Order does not state the District Court is declining to exercise supplemental jurisdiction over Respondent's state law cause of action for breach of an employment contract. Subsequently, the District Court entered a judgment granting Petitioner summary judgment. (PFR Appendix, p. A-113 – A-114.)

Respondent did not seek clarification, modification, or an amendment of the District Court Order under the Federal Rules of Civil Procedure ("FRCP"). *See* Rule 52, FRCP ("upon motion of a party made not later than 10 days after receipt of written notice of entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly..."); Rule 59(e), FRCP ("[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order."). Instead, on September 5, 2018, Respondent notified the District Court of her intent to appeal the District Court Order. (PFR Appendix, p. A-115 – A-116.)

Thereafter, Respondent filed her appeal and, subsequently, her appellate brief with the Fourth Circuit Court of Appeals on October 31, 2018 ("Appellate Brief"). (PFR Appendix, p. A-

117 – A-160.) In her Appellate Brief, Respondent expressly requested the Fourth Circuit Court of Appeals reverse the District Court Order in its *entirety*, including the District Court's grant of summary judgment as to Respondent's state law breach of employment contract claim. In the "Conclusion" section of the Appellate Brief, Respondent made her appeal clear:

> [b]ased on the foregoing, this Court should reverse the district court's *grant of summary judgment* on [Respondent's] race discrimination **and** *contract causes of action* because the district court erred in failing to determine that there are no genuine issues of material fact to be tried by a fact finder. (emphasis added.) (PFR Appendix, p. A-159.)

On April 11, 2019, the Fourth Circuit Court of Appeals filed an unpublished opinion ("Fourth Circuit Opinion") affirming summary judgment and the decision of the District Court. Like the District Court Order, the Fourth Circuit Opinion does not state it is making an exception in regard to Respondent's state law breach of employment cause of action and, therefore, declining to affirm summary judgment as to that cause of action. Further, like the District Court Order, the Fourth Circuit Opinion does not state the Fourth Circuit Court of Appeals is declining to exercise supplemental jurisdiction over Respondent's state law cause of action for breach of an employment contract. (PFR Appendix, p. A-161 – A-163.)

Respondent neither requested reconsideration of the Fourth Circuit Opinion by the Fourth Circuit Court of Appeals nor petitioned the U. S. Supreme Court for certiorari. Therefore, Respondent's Federal Lawsuit reached its conclusion. Accordingly, the District Court Order granting of summary judgment as to Respondent's Federal Lawsuit, including her state law breach of employment contract claim, became final.

2. Respondent's State Lawsuit.

On September 6, 2018, the day after Respondent filed her Notice of Appeal with the Fourth Circuit Court of Appeals, Respondent filed the Underlying Lawsuit. The Underlying Lawsuit

asserts a single cause of action alleging breach of an employment contract by Petitioner based on factual allegations that are identical to the breach of employment contract claim previously reviewed and addressed by way of summary judgment by the District Court on August 7, 2018, and subsequently affirmed by the Fourth Circuit Court of Appeals. For example, the Federal Lawsuit, previously dismissed by way of summary judgment, alleged:

> [Petitioner], and its agents, had a responsibility to ensure that [Respondent] would not be subjected to discrimination. [Petitioner], through its agents, instead chose to fail to protect [Respondent] on the basis of her race, retaliated against [Respondent] when she informed a colleague of the anti-harassment policy, and failed to administer the same punishment to [Respondent] as it did the Caucasian counterparts when it came to filing complaints with the [Petitioner]. (PFR Appendix, p. A-074.)

Likewise, the Underlying Lawsuit alleges:

> [Petitioner], and its agents, had a responsibility to ensure that [Respondent] would not be subjected to discrimination. [Petitioner], through its agents, instead chose to fail to accommodate [Respondent] for her disability, retaliated against [Respondent] when she informed a colleague of the antiharassment policy, and failed to administer the same punishment to [Respondent] as it did the Caucasian counterparts when it came to filing complaints with the [Petitioner]. These actions were done in violation of [Respondent's] employment contract with [Petitioner]. (PFR Appendix, p. A-005 – A-006.)

Respondent, at a hearing regarding Petitioner's Motion to Dismiss the Underlying Lawsuit, acknowledged the breach of employment contract claim in the Underlying Lawsuit is, in all material respects, the same, identical claim asserted by Respondent in the Federal Lawsuit. (Appendix, p. A-209 – A-231.)

3. Petitioner's Motion to Dismiss.

On October 4, 2018, Petitioner moved to dismiss the Underlying Lawsuit based on res judicata and/or judicial estoppel. (PFR Appendix, p. A-050 – A-055.) As it relates to res judicata,

the sole issue before the circuit court was whether the District Court's grant of summary judgment in Respondent's prior lawsuit was an adjudication "on the merits" as to Respondent's state law breach of employment contract claim.

The parties briefed the issues and the circuit court held a hearing on Petitioner's Motion to Dismiss on May 27, 2020. (PFR Appendix, p. A-056 – A-188; A-189 – A-195; and A-196 – A-231.) On June 16, 2020, the circuit court issued the Underlying Order and concluded res judicata does not apply because "there has been no final adjudication on the merits [as to the breach of breach of employment contract claim in the Federal Lawsuit] in this case." Further, the circuit court concluded judicial estoppel does not serve as a bar to the Underlying Lawsuit.

Petitioner filed a Motion to Alter or Amend on June 24, 2020, and Respondent filed a response. (PFR Appendix, p. A-013 – A-033; and A-034 – A-038.) On July 30, 2020, the circuit court denied Petitioner's Motion to Alter or Amend. (PFR Appendix, p. A-009 – A-012.)

4. Court of Appeals.

On August 18, 2020, Petitioner filed its Notice of Appeal requesting the Court of Appeals review the Underlying Order. On August 27, 2020, the Court of Appeals dismissed Petitioner's appeal, finding the issue is not immediately appealable. Petitioner filed a Petition for Rehearing on September 28, 2020, and the South Carolina Court of Appeals denied the Petition for Rehearing on November 16, 2020.

ARGUMENT

I. THE CIRCUIT COURT'S DENIAL OF PETITIONER'S MOTION TO DISMISS IS APPROPRIATE FOR IMMEDIATE APPEAL.

1. The Underlying Order Makes Specific Rulings "Involving the Merits" of the Underlying Lawsuit and is Immediately Appealable Pursuant to S.C. Code Ann. § 14-3-330(1).

The Underlying Order concludes the Underlying Lawsuit is not barred by res judicata because the Federal Lawsuit did not result in a judgment on the merits as to Respondent's state law breach of employment contract claim. Additionally, the Underlying Order concludes Respondent's breach of employment contract claim is not barred by judicial estoppel. In so holding, the Underlying Order has the effect of finally determining whether Petitioner may assert the doctrines of res judicata and judicial estoppel as affirmative defenses. For these reasons, Petitioner's appeal is appropriate.

"The Supreme Court shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal: (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas and general sessions, brought there by original process or removed there from any inferior court or jurisdiction, and final judgments in such actions; provided, that if no appeal be taken until final judgment is entered the court may upon appeal from such final judgment review any intermediate order or decree necessarily affecting the judgment not before appealed from." S.C. Code Ann. § 14-3-330(1). "An order which involves the merits is one that 'must finally determine some substantial matter forming the whole or a part of some cause of action or defense.'" Ex parte Wilson, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005) (emphasis added) (quoting Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993)). The Underlying Order finally

determines a "substantial matter forming the whole or a part of" Petitioner asserting the defenses of res judicata and judicial estoppel.

First, the Underlying Order finds the District Court's grant of summary judgment in the Federal Lawsuit was *not* an adjudication "on the merits" as to Respondent's breach of employment contract claim. Second, the Underlying Order finds Respondent's breach of employment contract claim is not barred by judicial estoppel. Even though, Respondent expressly and unequivocally appealed the District Court Order in respect to the employment contract claim to the Fourth Circuit Court of Appeals.

Because the Underlying Order is based on the circuit court's *legal* interpretation of the District Court Order granting summary judgment in the Federal Lawsuit – in particular as to the breach of employment contract claim - the Underlying Order issued by the circuit court involves the *merits* of the case. For example, in denying Petitioner's Motion to Dismiss, the Underlying Order states:

> [Petitioner] also alleges that Plaintiff's Complaint should be dismissed based on the legal theories of *res judicata*, claim preclusion and issue preclusion. All of these claims require an adjudication on the merits. This [c]ourt *holds* that *there has been no final adjudication* [in the Federal Lawsuit] *on the merits* in this case [as to the breach of employment contract claim]. (emphasis added.) (PFR Appendix, p. A-044.)

Because the circuit court held the District Court Order was not, *as a matter of law*, an adjudication "on the merits" as to Respondent's breach of employment contract claim, S.C. Code Ann. 14-3-330(1) applies and the Underlying Order is immediately appealable.

2. The Underlying Order Affects a Substantial Right and is Immediately Appealable Pursuant to S.C. Code Ann. § 14-3-330(2)(c).

This Court "shall have appellate jurisdiction for correction of errors of law in law cases, and shall review upon appeal [...] (2) [a]n order affecting a substantial right made in an action

when such order [...] (c) strikes out an answer or any part thereof or any pleading in any action [...]." S.C. Code Ann. § 14-3-330. "South Carolina case law has established what constitutes an interlocutory appeal." Mid-State Distributors, Inc. at 335, 426 S.E.2d at 780.

"If there is some further act which must be done by the court prior to a determination of the rights of the parties, then the order is interlocutory." *Id.* (citing Adickes v. Allison & Bratton, 21 S.C. 245 (1884)). However, "[i]f a judgment determines the applicable law while leaving open questions of fact, it is not a final judgment." *Id.* (citing Good v. Hartford Accident and Indemnity Co., 201 S.C. 32, 21 S.E.2d 209 (1942) (emphasis added)). The Underlying Order determines the applicable law as to res judicata and judicial estoppel and leaves open *no question of fact* as to either. Consequently, the Underlying Order, as to res judicata and judicial estoppel, is a final judgment as to those two issues and results in both doctrines being struck as affirmative defenses available to Petitioner.

A. The Underlying Order Strikes Defenses Available to Petitioner.

The Underlying Order has the direct effect of striking the defenses of res judicata and judicial estoppel without any need for further determination by the court or the trier of fact as to *questions of fact*. *See* Thornton v. S.C. Elec. & Gas Corp., 391 S.C. 297, 304, 705 S.E.2d 475, 479 (Ct. App. 2011) ("an appellate court should look to the effect of an interlocutory order to determine its appealability under section 14–3–330(2)(c). An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial."). The Underlying Order definitively rules both res judicata and judicial estoppel do not apply to the Underlying Lawsuit and, consequently, strikes both as affirmative defenses available to Petitioner.

Because the circuit court made these express rulings in the Underlying Order, there is no "further act which must be done by the court [circuit court]" as it relates to the determination of the availability of res judicata and judicial estoppel as affirmative defenses. Further, the Underlying Order does not "leave open any question of fact" to be determined by the circuit court as to whether either res judicata or judicial estoppel apply. The clear, real impact of the Underlying Order is it directly and effectively bars Petitioner from asserting or otherwise pursuing the affirmative defenses of res judicata and judicial estoppel. Therefore, the Underlying Order is immediately appealable.

i. The Underlying Order Establishes the Law of the Case.

The Underlying Order effectively establishes the law of the case by making a specific finding that the District Court Order was not an adjudication "on the merits" as to Respondent's breach of employment contract claim. Moreover, the Underlying Order effectively establishes the law of the case by concluding Respondent's appeal of the District Court Order, including as to the breach of employment contract claim, to the Fourth Circuit Court of Appeals does not judicially estop Respondent from now asserting there was no adjudication on the merits as to that claim in the Federal Lawsuit.

Applicable South Carolina law indicates the Underlying Order, unless reviewed by way of interlocutory appeal to this Court, cannot be reconsidered at any later stage by the circuit court because, in general, one circuit court judge cannot rescind or modify the order of another. *See* Spencer v. Nat'l Union Bank of Rock Hill, 189 S.C. 197, ___, 200 S.E. 721, 723 (1939) (generally recognizing a circuit judge cannot rescind or modify another such circuit court judge's orders and proper method to challenge ruling is to appeal); In re Doran, 129 S.C. 26, ___, 123 S.E. 501, 504 (1924) ("obviously, one circuit judge has no power to review, reverse, or modify the action of

another circuit judge as to matters which are res judicata"); Robert Harmon & Bore, Inc. v. Jenkins, 282 S.C. 189, 195, 318 S.E.2d 371, 375 (Ct. App. 1984) (a party is bound by ruling that becomes the law of the case when party chooses not to appeal ruling).

Granted, generally the denial of a motion to dismiss does not establish the law of the case and all issues can be raised again at a later stage of the proceedings. *See* Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) ("The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict."); McLendon v. S.C. Dep't of Highways and Pub. Transp., 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 n.2 (1994) ("[L]ike 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 can be raised again at a later stage of the proceedings."). However, the Underlying Order does not merely deny of the motion to dismiss.

To the contrary, the Underlying Order establishes the law of the case by specifically ruling the District Court Order was not an adjudication "on the merits" as to Respondent's breach of employment contract claim. *See* Underlying Order ("This [c]ourt holds that there has been no final adjudication on the merits in this case.") (PFR Appendix, p. A-044.) Additionally, the Underlying Order establishes the law of the case by specifically ruling judicial estoppel is not a defense available to Petitioner, despite Respondent expressly appealing the District Court Order to the Fourth Circuit Court of Appeals, including the breach of employment contract claim.

Therefore, if the Underlying Order is not immediately appealable and the Underlying Order is treated as the law of the case, Petitioner cannot raise or otherwise assert the defenses of res judicata or judicial estoppel at any stage because the circuit court has already ruled, as a matter of

law, that neither defense applies. In summary, the Underlying Order strikes affirmative defenses otherwise available to Petitioner and is subject to immediate appeal.

B. Protection from Suit by of Res Judicata is a Substantial Right.

It does not appear South Carolina courts have squarely addressed whether denial of a motion to dismiss based on res judicata affects a "substantial right." However, in Brown v. Pechman, 55 S.C. 555, ___, 33 S.E. 732, 737 (1899) this Court held that where the parties to an action have entered into a stipulation of facts in a prior proceeding, a ruling of the trial court that the stipulation is not binding as res judicata and requiring a trial by jury is an interlocutory order affecting the merits and immediately appealable. Granted, Brown was decided by this Court in 1899, prior to the codification of S.C. Code § Ann. 14-3-330. Nonetheless, in Brown, this Court concluded the lower court's order granting a trial based on a previously decided issue [i.e. there was no issue of fact in dispute] affected the merits of the case and subject to immediate appeal.

Other jurisdictions, however, have specifically found that denial of motions to dismiss where res judicata is asserted are immediately appealable. For example, Alabama, Arkansas, Connecticut, New Mexico, and North Carolina have each concluded the denial of a motion to dismiss where res judicata is asserted is immediately appealable. *See* Ex parte Ocean Reef Developers II, LLC, 84 So. 3d 900, 905 (Ala. Civ. App. 2011) ("One benefit of the doctrine of res judicata is that it prevents a defendant from being subject to repeated litigation over the same subject matter. That benefit would, in large part, be lost if the defendant could seek review of an order denying a motion to dismiss based on the doctrine only by way of an appeal after the entry of a final judgment. If such a motion has been erroneously denied, an appeal would not be an adequate remedy because, by the time the defendant could appeal, the defendant would have already incurred the time and expense of litigation, which are specifically intended to be avoided

by application of the doctrine."); Shaver v. State, 2018 Ark. App. 242, ___, 548 S.W.3d 222, 225 (2018) (recognizing existence of right to an immediate appeal from a trial court denying a motion to dismiss where res judicata is raised); Cayer v. Komertz, 91 Conn. App. 202, 203, 881 A.2d 368, 370 (2005) ("We note that although the denial of a motion for summary judgment ordinarily is not appealable because it is not a final judgment, the denial of a motion for summary judgment on the basis of a claim of res judicata is a final judgment for purposes of appeal because it invokes the right not to go to trial on the merits."); State Sav. & Loan Ass'n v. Rendon, 103 N.M. 698, 699, 712 P.2d 1360, 1361 (1986) ("The court denied [appellant's] motion for summary judgment; we granted an interlocutory appeal to decide whether res judicata applied."); Heritage Operating, L.P. v. N.C. Propane Exch., LLC, 219 N.C. App. 623, 627, 727 S.E.2d 311, 314 (2012) (the denial of a motion for summary judgment, where one basis raised is the defense of res judicata, a substantial right may be impacted causing the order to be immediately appealable).

Massachusetts, Texas, and Virginia courts have held orders denying motions where res judicata is asserted are not subject to an interlocutory appeal. *See* Mooney v. Warren, 87 Mass. App. Ct. 137, 138-39, 26 N.E.3d 206, 207-08 (2015); Max Adler, M.D., P.A. v. Lindsey, No. 05-20-00148-CV, 2020 WL 4880166, at *1 (Tex. App. Aug. 20, 2020); Whitaker v. Day, 32 Va. App. 737, 742, 530 S.E.2d 924, 926 (2000). However, none of these cases appear to involve lawsuits similar to Respondent's lawsuit because none involve a matter where the plaintiff, like Respondent in this matter, concedes they are asserting the same claims against the same party as asserted in a prior lawsuit.

In prior matters, South Carolina has looked to the courts in North Carolina on matters of first impression and guidance. *See* Lenz v. Walsh, 362 S.C. 603, 608, 608 S.E.2d 471, 473 (Ct. App. 2005) (looking to North Carolina caselaw regarding a specific contractual matter); Pierre v.

Seaside Farms, Inc., 386 S.C. 534, 543, 689 S.E.2d 615, 619 (2010) (South Carolina courts frequently look to North Carolina rulings with regard to workers' compensation laws due to the statutes' similarities); F & D Elec. Contractors, Inc. v. Powder Coaters, Inc., 350 S.C. 454, 462, 567 S.E.2d 842, 845 (2002) (finding the reasoning of North Carolina, Connecticut, and Georgia is persuasive caselaw persuasive when interpreting mechanics lien statute). Unlike South Carolina, North Carolina has extensively considered whether a denial of a motion to dismiss where a defendant raises res judicata is immediately appealable. In doing so, for purposes determining whether an order in such a circumstance is immediately appealable, North Carolina courts determined the principle of res judicata may affect a "substantial right" when:

> [t]he denial of summary judgment based on collateral estoppel, like *res judicata,* may expose a successful defendant to repetitious and unnecessary lawsuits. Accordingly, we hold that the denial of a motion for summary judgment based on the defense of collateral estoppel may affect a substantial right, and that defendants' appeal, although interlocutory, is properly before us [...] Denial of a summary judgment motion based on *res judicata* raises the possibility that a successful defendant will twice have to defend against the same claim by the same plaintiff, in frustration of the underlying principles of claim preclusion.

McCallum v. N. Carolina Co-op. Extension Serv. of N.C. State Univ., 142 N.C. App. 48, 51, 542 S.E.2d 227, 231 (2001). Like South Carolina, North Carolina courts determine whether an order is immediately appealable on a case-by-case basis. *See* Wells Fargo Bank, N.A. v. Corneal, 238 N.C. App. 192, 194, 767 S.E.2d 374, 376 (2014) (adopting a "'restrictive" view of the substantial right exception and adopting a case-by-case approach).

North Carolina courts have not concluded all denials of motions to dismiss where res judicata is raised are immediately appealable. Instead, North Carolina courts established a two-prong test to determine whether denial of a motion where res judicata is asserted will affect a "substantial right" and is, therefore, subject to immediate appeal.

First, the party moving for immediate appeal must show "the same factual issues would be present" in both the previous proceeding and the lawsuit at issue. Heritage at 627, 727 S.E.2d at 315. Second, the moving party must show the existence of "the possibility of inconsistent verdicts on those [factual] issues." *Id.*

Here, Petitioner's appeal of the Underlying Order meets North Carolina's two-pronged test for immediate review, if South Carolina adopted the North Carolina test. First, in the Underlying Lawsuit, the sole issue in controversy before the circuit court as to the application of res judicata was a *question of law not fact*: whether the District Court Order granting summary judgment was a judgment "on the merits" as to Respondent's breach of employment contract claim. Indeed, there was no dispute before the circuit court, and there is none now, as to whether the factual allegations Respondent made in her Federal Lawsuit as to her breach of employment contract claim are identical to the factual allegations she makes in the Underlying Lawsuit about the same claim.[3]

Moreover, there was no dispute before the circuit court whether Respondent's breach of employment contract claim in both the Federal Lawsuit and the Underlaying Lawsuit are the same in all material respects. Finally, there was no dispute before the circuit court whether the parties in both lawsuits are the same.[4] To the contrary, Respondent conceded as to all of these issues.

Consequently, the *factual* elements of res judicata are not in dispute and the only element at issue is the *legal* determination whether the District Court's grant of summary judgment is binding as to Respondent's breach of employment contract claim. No additional facts are required

[3] Compare PRF Appendix, p. A-068 – A-075, at Paragraphs 8-21, with PFR Appendix, p. A-001 – A-008 at Paragraphs 8-20. Paragraph 12 of the Underlying Lawsuit does not exist. However, the factual allegations in both lawsuits are identical.

[4] *See* Appendix, p. A-222 – A-223. ("The only real issue that I think is before the court as it relates to the res judicata claim and the issue preclusion arguments and the claim preclusion arguments is whether or not there has been an adjudication on the merits.").

to make this determination and delaying an appeal to "final judgment" will deprive Petitioner of the protections of res judicata.

Second, the possibility of inconsistent verdicts on the factual issues is present in the Underlying Lawsuit. In her Federal Lawsuit, Respondent alleged Petitioner's employee handbook contains anti-discrimination and antiretaliation policies that constitute an employment contract. Respondent makes the identical factual allegations in the Underlying Lawsuit.

Further, the District Court ruled Respondent's breach of employment contract claim was not supported by the evidence in the Federal Lawsuit. In adopting the R&R, the District Court expressly stated Respondent "failed to raise an issue of material fact as to the existence of a policy or custom that is fairly attributable to the defendant that proximately caused the alleged underlying race discrimination and/or retaliation." (PFR Appendix, p. A-088.) Further the District Court concluded Respondent failed "to create an issue of fact that the conduct the [Respondent] complains of was based on racial or retaliatory animus" and "[t]here is no genuine issue of material fact as to whether the [Respondent] was aware that she was expected to attend the meeting and that she could not tape record the meeting or bring a witness." (PRF Appendix, p. A-094.)

Both the Underlying Lawsuit and the Federal Lawsuit are based on Respondent's allegation that Petitioner's employment policies created an employment contract. Further, both lawsuits allege Petitioner breached the alleged employment contract by discriminating and retaliating against Respondent.

The District Court specifically ruled Respondent did not present an issue of fact as to these issues. A finding inconsistent with the District Court Order is necessary if the Underlying Lawsuit is to be tried in the circuit court. If Respondent's claim is allowed to continue beyond the motion to dismiss stage, inconsistent decisions as to the factual issues addressed in the Federal Lawsuit

and the Underlying Lawsuit may occur. Therefore, for this reason as well, the Underlying Order is immediately appealable.

C. Res Judicata Affects the "Mode of Trial" Respondent is Entitled to as a Matter of Right.

"Pursuant to § 14–3–330(2), [this Court] has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable." Flagstar Corp. v. Royal Surplus Lines, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Moreover, "[f]ailure to immediately appeal such an order forever bars appellate review." *Id. See also* Foggie v. CSX Transp., 313 S.C. 17, 23, 431 S.E.2d 587, 590 (1993) ("Issues regarding mode of trial must be raised in the trial court at the first opportunity, and the order of the trial judge is immediately appealable."). Notably, "[r]es judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." S.C. Pub. Interest Found. v. Greenville Cty., 401 S.C. 377, 385, 737 S.E.2d 502, 506 (Ct. App. 2013) (citing Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011)).

Granted, the South Carolina Supreme Court has held the "avoidance of a trial is not a 'substantial right' entitling a party to immediate appeal." Shields v. Martin Marietta Corp., 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991). However, in Shields and unlike this matter, the issue was whether a party can immediately appeal a decision to restore a case to the active docket for trial.

North Carolina has also addressed this issue. Like South Carolina, the North Carolina Supreme Court held "the right to avoid a trial is generally not a substantial right." N. Carolina Dep't of Transp. v. Page, 119 N.C. App. 730, 735, 460 S.E.2d 332, 335 (1995) (emphasis added). However, the court in Page further noted the "the right to avoid two trials on the same issue" may be a "substantial right." Id.

Here, the protection of res judicata is Petitioner's right to avoid two trials on the same issue and the same facts, including the right to avoid all duplicative aspects of litigation such as deciding the mode of trial, filing responsive pleadings, and conducting discovery. In Hagood v. Sommerville, 362 S.C. 191, 198, 607 S.E.2d 707, 710 (2005), this Court held an order granting a motion to disqualify a party's attorney is "closely related to the right to a particular mode of trial, a well-established substantial right." Id. In making its determination, this Court recognized, "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification." Hagood 362 S.C. at 198.

Similar to Hagood, Petitioner's interest will not be adequately protected if it is required to appeal the Underlying Order beyond the motion to dismiss stage because it would "be twice sued for the same cause of action [and facts]," thereby defeating the purpose and fundamental protections of res judicata. By holding res judicata, *as a matter of law not fact*, does not apply to the Underlying Lawsuit, the Underlying Order affects the mode of trial because the *same Petitioner* is subject to a lawsuit brought by the *same Respondent* on the *same claim and the same facts* for the second time.

Because the circuit court made this specific, *legal* ruling in respect to Petitioner's Motion to Dismiss, the circuit court will seemingly be bound by the Underlying Order at each stage of litigation, including motions for judgment on the pleadings, summary judgment, directed verdict, and post-trial motions. In this particular instance, the protections afforded by the doctrine res judicata can only be preserved by immediate review of the Underlying Order.

CONCLUSION

Petitioner respectfully requests this Court grant its Petition for Writ of Certiorari.

Respectfully submitted,

s/ Bob J. Conley
Caroline W. Cleveland
Bob J. Conley
CLEVELAND & CONLEY, LLC
171 Church Street, Suite 310
Charleston, SC 29401
(843) 577-9626
ccleveland@clevelandlaborlaw.com
bconley@clevelandlaborlaw.com
Attorneys for Petitioner

Charleston, South Carolina
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