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Jul 23 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON

J. Derham Cole, Circuit Court Judge

Case No. 2017-CP-10-04371

APPELLATE CASE NO 2021-000446

Cary E. Fechter, MD

Appellant,

v.

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

Respondents.

**RETURN TO APPELLANT'S
DOCUMENTS OF JUNE 24, 2021, AND JULY 13, 2021**

Respondents, Gerald Rosenthal, and Rosenthal, Levy, Simon and Ryles, PA (collectively, "Respondents") submit this Return to Appellant's documents provided to the Court of Appeals on June 24, 2021, and July 13, 2021.

BACKGROUND¹

On or about June 24, 2021, Appellant Cary E. Fechter, MD, himself (not through counsel, "Fechter") provided this Court with the following documents:

1. Letter to the Honorable Jenny Abbott Kitchings, dated June 24, 2021 ("Fechter Letter");
and
2. Letter to Melvin Banister, Esq., dated June 24 ("Banister Letter," with Fechter Letter,

¹ See Affidavit of Michael E. Kozlarek, Esq., sworn July 22, 2021, attached to this Return as Exhibit A.

collectively, “June 24 Documents”).

In the Fechter Letter, Fechter listed the undersigned as a “Cc:” “via email to michael@kozlareklaw.com.” No contemporaneous service (by email or otherwise) was made on the undersigned. Rather, when the Clerk of this Court sent Fechter a deficiency letter on June 29 (“Deficiency Letter”) and copied the undersigned, Respondents were alerted to the June 24 Documents’ existence and retrieved them from the C-Track System.

Fechter relayed that he “discharged” his counsel (as of June 24) and was “already diligently seeking specific appellate counsel.” Fechter Letter, ¶ 1; *see also* Banister Letter, ¶ 1 (“. . . I am discharging you as my attorney effective immediately.”). Fechter requested this Court “grant [him] thirty days to find the [replacement] attorney and stay proceedings pending [his] retaining of the new attorney.” *Id.* at ¶ 3. Fechter also requested the extraordinary relief of providing an entirely new brief and new designation of matters on appeal. *Id.*

The Deficiency Letter provided Fechter with 10 days to correct deficiencies. Nineteen days later, Fechter sent \$50.00 and provided a “Proof of Service of a Notice of Appeal” (“POS”).²

Twenty-nine days have passed since Fechter requested 30 days to find replacement counsel. According to the C-Track System, a notice of appearance for replacement counsel has not been entered.

SUBSTITUTE COUNSEL

Despite substantive misstatements in Fechter’s documents, Respondents have no objection to Fechter’s desire to change counsel or Fechter’s desire to have 30 days to do so. However, Respondents *do oppose* Fechter’s request if it extends beyond July 26. According to the Fechter Letter, Fechter knew or should have known of his dispute with Banister, and need to seek alternate

² As with the Fechter Letter, the POS claims that the undersigned was “served the motion to relieve counsel [] on the day of dissolution [June 24] . . .” And, as noted above, no such service was made on June 24.

counsel, from as early as June 18. Further, this is not the first time Fechter (a) has disagreed with Banister’s approach to the representation or (b) has expressed his desire to represent himself. *See, e.g.,* Exhibit B, Tr. p. 21, l. 16 – p. 23, l. 10 (excerpt of January 27, 2020, Hearing on Motion to Dismiss)). As a result, as early as January of 2020 (more than 18 months ago), Fechter could have begun the process of seeking replacement counsel.

REBRIEFING

Respondents object to any attempt to “rebrief” the issues presented in this appeal. The issues involved in this dispute have been the same issues since 2006, and certainly no later than the (a) Motion to Dismiss before the Circuit Court in 2020, (b) Appellants’ two subsequent motions to reconsider, (c) Respondents’ Motion to Dismiss this appeal, and (d) Appellants’ Return to that Motion. In response to Appellant’s initial brief, Respondents have already performed substantive work, including substantial researching and drafting. Respondents have never had anything to do with the apparent dispute between Fechter and Banister. However, were this Court to grant Fechter’s requested relief of “rebriefing,” it is Respondents who would bear the sole prejudice. If Fechter and Banister have some dispute, then that dispute can be handled between them in a different forum—one in which Respondents are not parties.

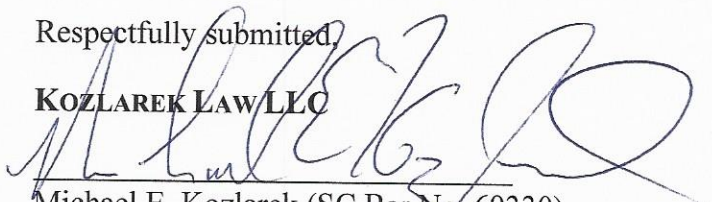
CONCLUSION

WHEREFORE, for the reasons stated above, Respondents do not oppose Fechter’s desire to change counsel and Fechter’s desire to have until July 26, 2021, to have new counsel engaged and notice of the same filed with this Court, but *do* oppose to all other relief requested.

[SIGNATURE PAGE, TWO EXHIBITS, AND PROOF OF SERVICE FOLLOW]
[REMAINDER OF PAGE INTENTIONALLY BLANK]

Respectfully submitted,

KOZLAREK LAW LLC



Michael E. Kozlarek (SC Bar No. 69330)

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*Counsel for Gerald Rosenthal, and Rosenthal, Levy,
Simon and Ryles. PA*

July 23, 2021
Greenville, South Carolina

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Case No. 2017-CP-10-04371

APPELLATE CASE NO 2021-000446

Cary E. Fechter, MD..... Appellant,

v.

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

Respondents.

AFFIDAVIT OF MICHAEL E. KOZLAREK, ESQUIRE

1. My name is Michael E. Kozlarek. I am over the age of 18, am competent to make this Affidavit, and make this Affidavit of my own personal knowledge.

2. In the captioned matter, I am the attorney of record for Respondents Gerald Rosenthal, and Rosenthal, Levy, Simon and Ryles, PA.

3. To the best of my knowledge, on or about June 24, 2021, Appellant Cary E. Fechter, MD, himself (not through counsel, "Fechter") provided the South Carolina Court of Appeals with the following documents:

1. Letter to the Honorable Jenny Abbott Kitchings, dated June 24, 2021 ("Fechter Letter"); and
2. Letter to Melvin Banister, Esq., also dated June 24 ("Banister Letter," with Fechter Letter, collectively, "June 24 Documents").

4. In the Fechter Letter, Fechter lists me as a “Cc:” “via email to michael@kozlareklaw.com.”

5. However, no service (by email or otherwise) of the June 24 Documents was contemporaneously made on me.

6. Rather, when the Clerk of Court sent Fechter a deficiency letter on June 29 (“Deficiency Letter”), which the Clerk provided to me by email, I was alerted to the existence of the June 24 Documents.

7. Following receipt of the Deficiency Letter, I retrieved the June 24 Documents from the Court’s C-Track Appellate Case Management System.

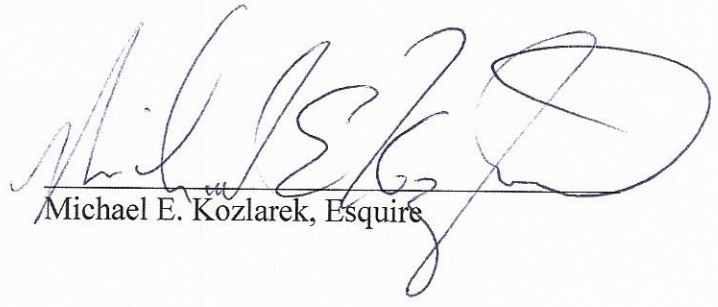
8. I performed a diligent search of email transmittals, including “junk” and “spam” folders, and do not see where any service was made on June 24.

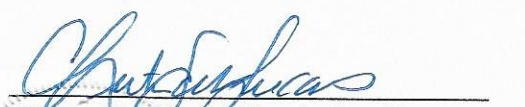
9. To the best of my knowledge, the “carbon copy” information contained in the June 24 Documents, as it relates to me and the initial date of service as June 24, is false.

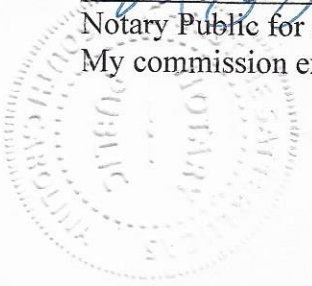
Further Affiant sayeth not.

[SIGNATURE PAGE FOLLOWS]
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Subscribed and sworn to before me,
July 22, 2021.


Michael E. Kozlarek, Esquire


Notary Public for South Carolina
My commission expires: 4/30/2031



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STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF CHARLESTON

-----x

CARY E. FECHTER, M.D.)

Plaintiff,)

vs.)

LEON MARTIN ORTNER,)

Defendant.)

Transcript of Record
2017-CP-10-04371

-----x

January 27, 2020

B E F O R E:

The Honorable J. Derham Cole, Presiding Judge

A P P E A R A N C E S:

Melvin Dean Bannister, Esq.
Attorney for the Plaintiff

Michael Enrico Kozlarek, Esq.
Justin Paul Novak, Esq.
Attorney for the Defendant

Transcribed by Bobbi Fisher, RPR, CET, for DCRP,
Digital Courtroom Recorder Project

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16 MR. BANNISTER: Thank you, Your Honor.

17 MR. NOVAK: Thank you, Your Honor.

18 DR. FECHTER: Sir, am I not allowed to correct some of
19 the things they said? Or is that at a later date?

20 THE COURT: Sir?

21 DR. FECHTER: If their facts are not correct and dates,
22 times, fees, how do I approach that, when they told you things
23 that are not accurate?

24 THE COURT: Your lawyer will have to address that.

25 DR. FECHTER: So we could still respond to you at a later

1 date about what they just said?

2 THE COURT: Well, no. Now would be the time to respond.

3 DR. FECHTER: Well, am I -- I know my own case extremely
4 well.

5 THE COURT: I understand that.

6 DR. FECHTER: I can do it in four minutes. Am I allowed
7 to --

8 THE COURT: But you have a lawyer. You're not permitted
9 to represent yourself when you have a lawyer. We don't have
10 hybrid representation here.

11 DR. FECHTER: Well, can he just say this one paragraph?

12 THE COURT: Do you need to talk to him about that? Y'all
13 can discuss it.

14 DR. FECHTER: Just stress this one. Say it again.

15 MR. BANNISTER: I did. I showed him that.

16 DR. FECHTER: Say it again. Just say it. Because it --
17 you want substantial justice.

18 MR. BANNISTER: Yes.

19 DR. FECHTER: Say that.

20 MR. BANNISTER: We do want substantial justice, Your
21 Honor.

22 DR. FECHTER: Under the *Unisom vs. Haskins* --

23 MR. BANNISTER: Hawkins.

24 DR. FECHTER: Hawkins.

25 THE COURT: He addressed that.

1 DR. FECHTER: Okay. Because justice should be part of
2 this proceeding.

3 THE COURT: Oh, I understand.

4 DR. FECHTER: Okay.

5 THE COURT: That's why we have rules.

6 DR. FECHTER: Thank you very much.

7 THE COURT: All right.

8 MR. NOVAK: Thank you, Your Honor.

9 MR. KOZLAREK: Thank you, Your Honor.

10 (The above proceeding concluded at 3:30 p.m.)

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Case No. 2017-CP-10-04371

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Cary E. Fechter, MD..... Appellant,

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

Respondents.

PROOF OF SERVICE

The undersigned hereby certifies that on July 23, 2021, he caused to be served a copy of the foregoing **Return to Appellant's Documents of June 24, 2021, and July 13, 2021**, with Exhibit A and Exhibit B, on all parties of record via electronic mail containing the above-referenced document to the Appellant, himself, as well as each counsel's individual AIS email address pursuant to SC Supreme Court COVID Order 2020-05-29-01 as follows:

Appellant Cary E. Fechter, MD:

Cary E. Fechter, M.D.
427 West 20th Street, Suite 602
Houston, Texas 77008
caryfechter@gmail.com

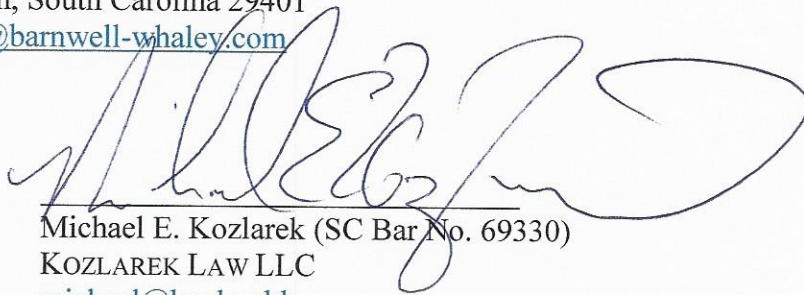
to which an additional copy was also provided by federal express with tracking number
7743 4285 8172

Counsel for Cary E. Fechter, MD:

Melvin D. Bannister, Esq.
Post Office Box 811
Columbia, South Carolina 29202
sctriallawyer@bellsouth.net

Counsel for Leon Martin Ortner, The Ortner Law Firm, LLC:

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jnovak@barnwell-whaley.com



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Simon and Ryles. PA*



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michael@kozlareklaw.com

July 23, 2021

BY E-MAIL CTAPPFILINGS@SCCOURTS.ORG

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 1169
Columbia, South Carolina 29211

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Jul 23 2021

SC Court of Appeals

**Re: Cary E. Fechter v. Leon Martin Ortner, et al.
Appeal from Court of Common Pleas (Charleston County)
Civil Action No.: 2017-CP-10-04371
Appellate Case No. 2021-000446**

Dear Mrs. Kitchings:

Enclosed please find Return to Appellant's Documents of June 24, 2021, and July 13, 2021, Exhibit A, Exhibit B, and Proof of Service. By copy of this correspondence, we are serving all parties of record with a copy of the attached documents.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Michael E. Kozlarek

Enclosures

cc: Melvin D. Bannister, Esquire (*via email*)
Justin Novak, Esquire (*via email*)
Cary E. Fechter, M.D. (*via email & Federal Express*)