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Mar 29 2023

SC Court of Appeals

Preston F. McDaniel
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March 29, 2023

VIA EMAIL ONLY - ctappfilings@sccourts.org

Jenny Kitchings, Clerk of Court
SC Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

**RE: Pamela Cartee v. SCJD (Preston F. McDaniel) (2)
Appellate Case No. 2023-000187**

Dear Ms. Kitchings:

Enclosed please find for filing with the Court our **RETURN TO MOTION TO DISMISS RESPONDENT SC WORKERS' COMPENSATION COMMISSION AND MOTION FOR RELIEF OF COUNSEL** and **AFFIDAVIT OF PRESTON F. MCDANIEL** in the above-referenced matter. By copy of this letter, I am serving opposing counsel with a copy of same.

I hope this is sufficient for filing but should you need any additional information, please let us know.

Sincerely yours,



Preston F. McDaniel

PFM/kth
Enclosure

cc: John M. Milling, Esquire (Via email only)
Keith Roberts, Esquire (Via email only)
Kristen McRee, Esquire (Via email only)

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
SC Workers' Compensation Commission
Appellate Panel

Appellate Case No. 2023-000187

Pamela Cartee, Claimant

v.

SC Judicial Department, Employer, and State Accident Fund,
Carrier, Defendants,

IN RE:

Preston F. McDaniel, Esquire, and
John M. Milling, Esquire,Appellants,

v.

SC Workers' Compensation Commission,Respondent.

**RETURN TO MOTION TO DISMISS RESPONDENT SC WORKERS' COMPENSATION
COMMISSION AND MOTION FOR RELIEF OF COUNSEL**

By way of reply to the Motion to Dismiss and to be relieved
as Counsel, the Appellants would submit to the Court that:

1. The caption of this matter as set out above is incorrect
and is currently under review pursuant to the Motion to change the

caption. This Motion points out again the reason that this matter needs to be recaptioned because this Motion and the appeal arise out of the Petition of the Appellants to the Commission requesting approval of their attorneys' fees by the Commission, not the underlying workers' compensation case to which neither the Commission nor the Appellants were parties. As set forth hereinafter, both are the appropriate parties to this appeal. The Commission is the party to whom the Appellants and all attorneys in any workers' compensation case are required to submit their separate Petition for approval; and who is the party under the Act charged with the responsibility for approving their fees in accordance with law; and thus is the party Respondent to this appeal as to whether their decision on the Fee Petition is in accordance with law and fact.

2. While the Appellants will set forth a substantive reply hereinafter, the Appellant Preston F. McDaniel, who is filing this Return for both Appellants, verily believes that this is probably the most frivolous pleading that he has ever seen in his 46 years of practicing law. Apparently Counsel for the Respondent is unaware of the multiple cases wherein the Commission has been before this Court as a party in reference to matters of fact and law in reference to its authority to administer the Workers'

Compensation Act. See for example, and almost identical and on all fours with this appeal, is the case and the decision of the Supreme Court in SC Ambulatory Surgery Center Assoc. v. SC Workers' Compensation Commission, Respondent, 389 S.C. 390 699, S.E.2d 146 (2010). (That decision involved questions of law under the Commission's authority granted to it by statute under SC Code §42-15-90 as the party charged with regulating the medical fees charged claimants by physicians and hospitals and their authority to approve those fees and charges. That decision interestingly cites as a basis for its decision in reference to the fact that the Commission may not exceed the authority granted to it by statute; the case of Bazzle v. Huff, 319 S.C. 443, 462 S.E.2d 273 (1995), holding an administrative agency has only such powers as has been conferred by law and must act within the authority granted for that purpose.)

By way of specific response to the Commission being a party and the party to this appeal, SC Code §42-15-90 specifically grants the Commission as noted above the authority to approve attorney's fees. Subsection (A) specifically provides and starts with, "Attorney's Fees ... under this Title are subject to the approval of the Commission" The General Assembly has further limited the Commission's authority to regulate fees by not only

requiring implementation of Regulations promulgated in accordance with the Administrative Procedure Act but also requiring that any proposed Regulations

"shall have before promulgation received approval of the Judiciary Committees of the Senate and House of Representatives and also by concurrent resolution of the General Assembly."

The Supreme Court after determining in Bazzle v. Huff, supra, that prior to the implementation of Regulations by the Commission in accordance with both of these sections, that the Commission had no statutory authority, even though they were requiring attorneys to seek approval of fees, to regulate the fees of attorneys; the Court noted that during the pendency of that appeal that the Commission had adopted Regulations in accordance with the statutes giving it the authority to regulate attorney's fees; i.e., the party responsible for approval.

3. Of course, the freedom of contract guaranteed by both the US Constitution and the SC Constitution is not unlimited and is generally subordinate to public policy. See for example: Nationwide Mutual Ins. Co. v. Rhoden, 398 S.C. 393, 728 S.E.2d 477 (2012). In reference to attorney fee contracts, they are further limited on an ethical basis and must be in compliance with the Supreme Court Rules in determining a reasonable fee, Rule 1.5, RPC, Rule 407, SCACR, and in the matter of attorneys fees in a

workers' compensation case that freedom is further limited by being subject to the approval of the SC Workers' Compensation Commission. Thus, the Commission is the party charged with the responsibility under Act for reviewing and approving attorney's fees. This appeal involves an issue of law and fact as to whether or not the fee requested was in accordance with law and whether or not the Commission erred by not approving the fee as submitted. Therefore, again and being intentionally redundant, the Commission is the party Respondent, and the Appellants are the party Appellants having filed the Attorney Fee Petition requesting approval of their fees in the underlying workers' compensation action to which neither they nor the Commission are a party.

4. The Commission was properly served with this appeal as the Respondent to the appeal, SCACR Rule 203(d)(2)(B)(i) and the two attorneys listed are the General Counsel and Staff Counsel for the Commission. General Counsel and Staff Counsel were Counsel for the Commission below and both wrote Orders for the Commission at its request that are the subject of this appeal. General Counsel and Staff Counsel must be unaware of SCACR Rule 264(a) which provides that the attorneys for the parties below, "shall be deemed" the attorneys of the same parties in the Appellate Court, "until removal is approved" and notice is given as provided for in

that Rule. While generally all appeals in agency matters are handled by the Counsel of the agency, whether or not the Commission seeks to employ outside Counsel in accordance with Regulations requiring approval by the SC Attorney General's Office where an agency has internal staff and whether or not Counsel is substituted is not an issue for the Court at this time.

5. Generally, as to the allegations set forth in #4, #5, #6, #7, #9 and #9, first the Appellants would point out that there are numerous factual allegations contained in the Motion, but yet there is no Affidavit attached to the Motion to support those factual allegations as required by SCACR Rule 240(c)(3). Again, this matter is an appeal concerning the Appellants' Petition requesting approval of their attorney's fees, which they filed under law with the Commission as the party charged with the responsibility of approving attorney's fees under law in a workers' compensation matter in all underlying workers' compensation claims. More importantly and as Counsel knows the issue of the Commission being the Respondent has already been litigated in the dispute between the Appellants and the "current" Commission as the party charged under law with the responsibility of approving attorney's fees in a workers' compensation matter. Pursuant to the Affidavit attached to this Return concerning this

factual allegation in the matter of Preston F. McDaniel and John Milling, as Appellants in this matter and the Commission as the Respondent party in this matter was mediated under the Circuit Court Rules. In support of both the recaptioning of this matter before the Court and that the Commission is the party Respondent to this matter, as part of the Mediation Settlement Agreement, the Appellants agreed to dismiss their Declaratory Judgment Action seeking the same relief as this appeal that they had filed with the Circuit Court and agreed to proceed with an appeal before the Commission and this Court on those issues. The caption of that Declaratory Judgment Action was as follows:

"Preston F. McDaniel and John Milling, Plaintiffs v. SC Workers' Compensation Commission, Defendant."

The Motion is cavil and beyond belief.

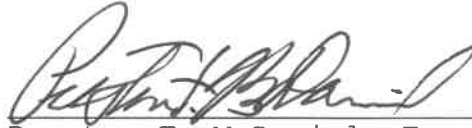
WHEREFORE, the Appellants would ask that the Motion be dismissed; and

The Appellants would further ask that the Court to review and determine whether there is any substantive basis for the Motion, and if finding none, make a determination as to whether or not appropriate referral should be made under the Frivolous Proceedings Act and the Rules of this Court; and

Would request such further relief as the Court deems just and appropriate. Obviously from a review of the Record before the

Court and the amounts involved and the time expended by Appellants, this appeal by the Appellants involves more than money and involves a matter of principle to the Appellants.

Respectfully submitted:



Preston F. McDaniel, Esquire
SC Bar #3770
McDaniel Law Firm
1315 Elmwood Avenue
Columbia, SC 29201
(803) 771-7211

and

John M. Milling, Esquire
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Attorneys and Appellants

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John M. Milling, Esquire,Appellants,

v.

SC Workers' Compensation Commission,Respondent.

AFFIDAVIT OF PRESTON F. McDANIEL

I, Preston F. McDaniel, having been DULY AND PROPERLY
SWORN, do depose and state the following:

1. That he is one of the two Appellants in this matter
and was lead Counsel before the SC Workers' Compensation
Commission and submitted the Attorney Fee Petition that is the
basis for this appeal before the Court.

2. That as part of the attempt to resolve the dispute over the fee as requested for approval by the Appellants and the Respondent's refusal to approve part of the fee as requested, the Appellants filed a Declaratory Judgment Action in the Darlington County Circuit Court with the caption of that document being as follows:

"Preston F. McDaniel and John M. Milling,
Plaintiffs, v. SC Workers' Compensation Commission,
Defendant.

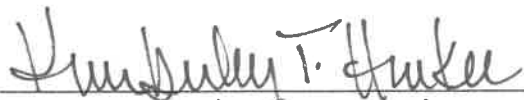
3. That subsequently the parties to that action pursuant to the Circuit Court Rules attended mediation and as part of the mediation agreement, the Plaintiffs agreed to dismiss that declaratory judgment action and to proceed with the appeal process through the normal appellate process in reference to that action and the dispute over the fee to be awarded to the Appellants in the underlying workers' compensation case.

FURTHER THE AFFIANT SAYETH NOT.



Preston F. McDaniel

SWORN TO BEFORE ME this
29th day of March, 2023.



Notary Public for South Carolina L.S.
My Commission Expires: 6-19-30

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Milling, Esquire,Appellants,

v.

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PROOF OF SERVICE

I certify that I have served the **RETURN TO MOTION TO DISMISS RESPONDENT SC WORKERS' COMPENSATION COMMISSION AND MOTION FOR RELIEF OF COUNSEL** and **AFFIDAVIT OF PRESTON F. MCDANIEL** on March 29, 2023 addressed as follows:

VIA EMAIL ONLY:

keroberts@wcc.sc.gov & kmcree@wcc.sc.gov

Keith Roberts, Esquire, General Counsel

Kristen McRee, Esquire, Staff Attorney

SC Workers' Compensation Commission

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March 29, 2023