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Jun 15 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2017-CP-26-07775
APPELLATE CASE NO. 2018-001265

Kelaher, Connell & Connor P.C.....Appellant

vs.

South Carolina Workers' Compensation CommissionRespondent

APPELLANT'S RETURN TO RESPONDENT'S MOTION FOR COSTS

The Appellant respectfully offers the following response to Respondent's Motion for Costs.

I. AN AWARD OF COSTS IS DISCRETIONARY.

Appellant concedes that generally awards of costs are granted routinely. However, Rule 222(a), SCACR allows this Court to decline to award costs. Appellant suggests that awarding costs in this case based on the facts would be pouring salt on the wounds.

While Appellant concedes that this Court ruled against it, Appellant would note that the facts clearly show that the South Carolina Workers' Compensation Commission failed to perform its duty and but for a procedural defect by Appellant this Court would have granted Appellant relief. As the Court will remember, Appellant KCC had filed an attorney's fee petition with the South Carolina Workers' Compensation Commission on four separate occasions (August 29, 2012, September 11,

2012, September 18, 2012 and December 28, 2012). Unbeknownst to Appellant KCC, the Claimant Nadolny had died, and his widow had requested a hearing to close out his worker's compensation case. Appellant KCC had significant fees involved but was never provided a notice of the hearing by the Commission and Nadolny's wife left the jurisdiction with all of the settlement funds. After this occurred, KCC learned for the first time that the Commission had failed to provide notice to it of the hearing on fees.

This Court in ruling against KCC based its ruling on procedural grounds and not the merits of the case. The underlying facts were unchallenged by the Workers' Compensation Commission. Appellant KCC submits that an award of attorney's fees and costs in this case should not be granted for the following reasons:

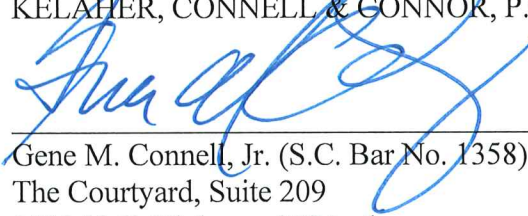
1. This Court's decision was based primarily on procedural grounds and not on the merits of the case.
2. The Workers' Compensation Commission employees were protected by the Tort Claims Act which was a novel issue and had not yet been decided in this jurisdiction. Further, KCC had presented case law from around the country which held that clerical employees could be liable for their negligent acts.
3. This Court enlarged the gross negligence exceptions under the Tort Claims Act which previously it had not done.
4. This Court held that KCC had not adequately plead a constitutional violation in its pleading which also was not directed at the merits.

In sum, while this Court denied Kelaher, Connell & Connor's appeal, it did not address overarching merits of the case. Thus, it would be inequitable and unfair to grant attorney's fees

against KCC. This Court can order and should order that in this unique case with the unique facts along with this Court's decision on procedural grounds that attorney's fees should not be awarded.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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June 15, 2023
Surfside Beach, South Carolina

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The Honorable Benjamin H. Culbertson, Circuit Court Judge

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APPELLATE CASE NO. 2018-001265

Kelaher, Connell & Connor, P.C. Appellant

vs.

South Carolina Workers' Compensation Commission Respondent

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of the **Appellant's Return to Respondent's Motion for Costs** on the Respondent, on the 15th day of June, 2023, by depositing a copy of same in the United States Mail, postage prepaid, to:

Carmen V. Ganjehsani, Esquire
Richardson Plowden & Robinson, P.A.
P. O. Drawer 7788
Columbia, SC 29202

J. Keith Roberts, Esquire
South Carolina Workers' Compensation Commission
P. O. Box 1715
Columbia, SC 29202-1715

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 15th day of June, 2023.

Donna H. Hand
Notary Public for South Carolina
My Commission Expires: 3-28-26

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June 15, 2023

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Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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Re: Appellate Case No. 2018-001265
Kelahr, Connell & Connor, P.C. v. South Carolina Workers' Compensation Commission
C/A No. 2017-CP-26-07775
Our File No. 2018-0069C

Dear Ms. Kitchings:

Enclosed please find Appellant's Return to Respondent's Motion for Costs and Proof of Service in the above-captioned matter.

By copy of this letter, we hereby serve the above document on counsel of record.

Should you have any questions or need anything further at this time, please do not hesitate to contact me.

Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Carmen V. Ganjehsani, Esquire
J. Keith Roberts, Esquire