

**THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS**

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APPEAL FROM HORRY COUNTY  
COURT OF COMMON PLEAS  
THE HONORABLE BENJAMIN H. CULBERTSON  
CIRCUIT COURT JUDGE

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

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Kelاهر, Connell & Conner, P.C.,

**APPELLANT,**

versus

South Carolina Workers' Compensation Commission,

**RESPONDENT.**

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**REPLY TO APPELLANT'S RETURN TO THE  
MOTION FOR COSTS OF RESPONDENT  
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

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Appellant, Kelاهر, Connell & Conner, P.C., has submitted a Return to the Motion for Costs of Respondent South Carolina Workers' Compensation Commission. In that Motion, the Commission requested that it be awarded \$2,632.36 in costs and fees as allowed pursuant to Rule 222, SCACR.

Appellant has not disputed the validity of the amount of costs and fees incurred by the Commission, nor has Appellant argued that the Commission has moved to be awarded any costs and fees not properly authorized by Rule 222(b).

Instead, Appellant contends that this Court should deny the Commission's Motion for Costs because: (1) it would have prevailed in its case against the Commission but for

procedural defects; (2) the case raised novel issues of whether the Commission employees were protected by the South Carolina Tort Claims Act; and (3) this Court enlarged the gross negligence exceptions to the Tort Claims Act which it had never previously done.

Appellant's arguments are each misguided. Appellant brought this case alleging that the Commission failed to protect Appellant's purported lien for attorneys' fees and failed to notify Appellant of a hearing so Appellant could assert a claim for attorneys' fees in a case it had handled before the Commission. The critical issue before the lower and appellate courts was whether Appellant's sole claim against the Commission for negligence was barred by the provisions of the Tort Claims Act.

The Commission moved before the circuit court to dismiss Appellant's complaint, arguing the Commission was immune from liability under the various provisions of the Tort Claims Act, including immunity from loss arising from an "(2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature." The circuit court agreed with the Commission and dismissed Appellant's complaint.

In its Return, Appellant argues that the facts show the Commission clearly failed to perform its duties and further states that the Commission did not challenge the facts of its complaint. Appellant distorts the record. The case never proceeded to the merits at the circuit court level because the facts as alleged by Appellant clearly showed that the Commission was immune from suit under the Tort Claims Act. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009) (observing a motion to dismiss requires a court "to construe the complaint in a light most favorable to the nonmovant and

determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case”) (internal citation omitted).

No court has therefore ever found or made any ruling that the Commission failed to fulfill its duties. Because the Commission was immune from suit, it was not required to challenge the facts of Appellant’s complaint. That does not mean that the Commission agreed with the facts as depicted by Appellant.

There is also no indication in the record that Appellant would have prevailed in this case but for procedural defects. The circuit court specifically found that the Commission was not liable for loss resulting from “administrative action or inaction of a legislative, judicial, or quasi-judicial nature.” That ruling was left undisturbed by this Court and the Supreme Court. See Court of Appeals’ Op. No. 5860 (Sept. 8, 2021); Supreme Court Order Denying Petition for Writ of Certiorari (May 17, 2023).

This Court did not address other arguments raised by Appellant, finding such arguments unpreserved because Appellant did not raise those arguments to the circuit court until its Rule 59(e) motion. In doing so, this Court cited well-settled South Carolina law that an issue may not be raised for the first time in a motion to reconsider for the issue to be preserved for appellate review. Additionally, this Court properly refused to address Appellant’s argument as to the right to be heard where Appellant did not raise any constitutional violations in its complaint. This Court did not signal in its Opinion that it would have ruled in Appellant’s favor had these deficiencies been absent.

There is also nothing in the record or anything said by this Court that suggests the issues and the application of the Tort Claims Act was particularly novel here. This case

rather involved a straightforward application of the language of South Carolina's Tort Claims Act to the facts as alleged by Appellant.

Lastly, this Court did not enlarge the gross negligence exceptions of the Tort Claims Act as claimed by Appellant; rather, this Court determined no such exception even applied. See Court of Appeals' Op. No. 5860 (Sept. 8, 2021).

Appellant urges this Court to deny the allowable costs and fees under Rule 222 to the Commission because it would be "inequitable and unfair" to grant costs since the merits of the case were never reached and its arguments on appeal to this Court were rejected in part due to Appellant's procedural failures in stating its claims in the complaint and in preserving issues for the appeal.

To accept Appellant's arguments would create bad policy and encourage frivolous appeals. First, the merits of this case were never reached because the circuit court granted the Commission's motion to dismiss. Appellant appealed that dismissal which was affirmed by the appellate courts. To deny the Commission the costs and fees it is entitled to recoup under Rule 222 simply because the merits of Appellant's case were never reached punishes the Commission for rightfully prevailing on its motion to dismiss.

Second, awarding costs and fees to the prevailing party on appeal deters an opposing party from filing procedurally defective claims and appeals. This Court should not reward parties for bringing procedurally defective claims and appeals and raising issues which are clearly not preserved under well-established appellate procedure by releasing such parties from liability for the prevailing party's costs and fees on appeal. Doing so only incentivizes parties to bring procedurally defective appeals where there are no consequences.

The Commission was required to defend against Appellant's claim in the circuit court by seeking a dismissal under the unambiguous terms of the Tort Claims Act and then subsequently defend against a Rule 59(e) motion which improperly raised new issues. The Commission then had to defend Appellant's appeal in this Court in which Appellant pursued unpreserved issues and continued to pursue a claim which it had not alleged in its complaint. After this Court affirmed the dismissal of Appellant's complaint, the Commission had to defend against Appellant's petition seeking a writ of certiorari from the Supreme Court. The Commission prevailed at every level in the case.

In defending this case for over the past five years, the Commission expended substantial taxpayer money in defense of Appellant's complaint. The Appellate Court Rules specifically allow the Commission, as the prevailing party, to recoup some of these costs expended. See Rule 222(a), (b). Accordingly, the Commission requests that this Court grant its Motion for Costs and award it \$2,632.36 in costs and fees pursuant to Rule 222.

Respectfully submitted,

s/ Carmen V. Ganjehsani

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**ATTORNEYS FOR RESPONDENT  
SOUTH CAROLINA WORKERS'  
COMPENSATION COMMISSION**

June 22, 2023.

**RECEIVED**

**Jun 22 2023**

**SC Court of Appeals**

**CERTIFICATE OF SERVICE**

I, the undersigned, attorney for the Respondent South Carolina Workers' Compensation Commission, do hereby certify that I have this date served the foregoing Reply to Appellant's Return to the Motion for Costs, dated June 22, 2023, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

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A copy of the sent email is enclosed with this Certificate of Service.

s/ Carmen V. Ganjehsani  
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Dated: June 22, 2023.

**From:** [Carmen Ganjehsani](#)  
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**Cc:** ["Roberts, Keith"](#)  
**Subject:** 2018-001265 Kelaher, Connell & Conner v. SCWCC  
**Date:** Thursday, June 22, 2023 2:31:00 PM  
**Attachments:** [2018-001265 Kelaher v. SCWCC \(Reply to Rtn to Mtn for Costs\) \(2957044\).pdf](#)

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Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the Reply to the Return to the Motion for Costs on behalf of the Respondent South Carolina Workers' Compensation Commission.

Thank you,  
Carmen Ganjehsani

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