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**Proudly representing injured workers  
for over 35 years**

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November 8, 2023

**VIA EMAIL ONLY - [ctappfilings@sccourts.org](mailto:ctappfilings@sccourts.org)**  
Jenny Kitchings, Clerk of Court  
SC Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

**RECEIVED**  
**Nov 08 2023**  
**SC Court of Appeals**

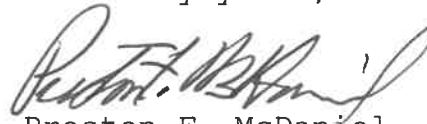
**RE: Pamela Cartee v. SCJD (Preston F. McDaniel) (2)**  
**Appellate Case No. 2023-000187**

Dear Ms. Kitchings:

Enclosed please find for filing with the Court our **RETURN TO RESPONDENT SC WORKERS' COMPENSATION COMMISSION'S MOTION FOR JUDICIAL NOTICE** 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)  
John L. Warren, III, Esquire (Via email only)  
Greg Harris, Esquire (Via email only)

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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Nov 08 2023

SC Court of Appeals

APPEAL FROM SOUTH CAROLINA  
SC Workers' Compensation Commission  
Appellate Panel

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Appellate Case No. 2023-000187

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Pamela Cartee, Claimant,

v.

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

In Re:

Attorney's Fee Petition of Preston F. McDaniel,  
Esquire, and John M. Milling, Esquire, .....Appellants,

v.

SC Workers' Compensation Commission, .....Respondent.

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**RETURN TO RESPONDENT SC WORKERS' COMPENSATION  
COMMISSION'S MOTION FOR JUDICIAL NOTICE**

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First, a query: how much more taxpayer money will be spent by the Commission on Motions and special proceedings instead of addressing the simple issue presented by this appeal? If the

Court agrees with Appellants' interpretation of the wording of the Regulations applying our Appellate Court decisions and the Statutory requirements of the Act, then the Appellants are entitled to the remainder of the fee originally requested in the Fee Agreement. If the Court agrees with the Commission's interpretation, then they are not and the money which is in Trust will be returned to Ms. Cartee.

By way of Return to the Motion, the Appellants would respectfully submit and show unto the Court:

1. That the Motion is yet another veiled attempt to remove the SC Workers' Compensation Commission as the Respondent in this appeal. The Respondent first states in the Motion that the Appellants "unilaterally and improperly" named the SC Workers' Compensation Commission as a party Respondent to the appeal. If that is in fact true, both this Court and the Supreme Court have "improperly" held the Commission is the party Respondent. They then go on to say that the "Commission has never been a party in this case" and try to allege joinder as a basis.

Again, this veiled attempt to remove the Workers' Compensation Commission as the Respondent is "without substantial justification" and is in fact frivolous and should be dismissed for the following reasons:

a. Since the inception of this dispute back in 2018 until the filing of the Motion to Dismiss the Commission as the Respondent filed with this Court on March 21, 2023, the Respondent has never, again has never, alleged to any Court that it was not the proper Respondent in this supplemental proceeding, i.e., approval of a Fee Petition, to the underlying workers' compensation case as referenced in the caption of the appeal. As referenced time, and time, and time again by the Judges of this Court and the Supreme Court, that failure to raise the issue is called "issue preservation".

b. The Respondent has already filed a specific Motion to be removed as the party Respondent in this supplemental proceeding, i.e., approval of an Attorney Fee Petition to the underlying workers' compensation case on March 21, 2023 and that Motion to Dismiss the Respondent as a party was denied by Order of this Court on May 26, 2023.

c. The Respondent then filed a Motion for Certification in the Supreme Court and as part of the argument in that case, the Respondent alleged that the Appellants have "now named" the Commission as a party-Respondent .... and then goes on to state that "the Commission cannot be a party to this appeal, as it served in a judicial capacity as the Administrative Tribunal before whom the underlying dispute was decided." They then go on to argue that the Commission cannot be a party in defending the

judicial decision. That may be correct if it were true; which it is not.

In response to both of those Motions, the Appellants pointed out that this is not a challenge to a judicial determination but it is in fact a challenge to the Commission's decision based on its administrative responsibility under the Act under §42-15-90, and §42-3-185 and Commission Regulations 67-1201 through 1207 to review and approve attorney's fees. This is an ancillary proceeding to the underlying workers' compensation claim involving the Petition filed by the Appellants with the Commission for approval of their attorney's fees. Irrespective of having not raised this issue until March of this year in reference to that Motion to Dismiss the Commission as a party that Motion was denied by this Court. Then the Supreme Court on October 24<sup>th</sup> denied the Motion for Certification filed by the Respondent in which they again, again, alleged that they were not the proper party Respondent in this matter now on appeal.

2. While this Motion is actually nothing more and nothing less than another Motion to try to remove the Respondent as a party to the action, they make this Motion under the guise of a request to take judicial notice of certain Orders in a 1995 Supreme Court decision. Then based on those Orders, which they seek to make a part of the Record which were issued in a totally

different situation which the Court will readily discern and distinguish, they allege that the Commission was not joined below as a party. Then because of that they allege that since the Commission was not joined as a party below, the filings and documents in this case cannot be included in the Record on Appeal. Thus, again, this is all based on the assertion/basis of the Commission not being a party.

The Appellants would ask the Court to simply look at the Return to the Motion to Dismiss the Commission as a party and it will show the Court beyond cavil that this current Motion is not only an act by the Agency that is, "without substantial justification" but is in fact frivolous as having no basis in law or fact; and res judicata under the Court's previous ruling. The Commission is the party charged with the responsibility to review attorney fee petitions submitted for approval pursuant to the Statutes and Regulations, and it is in that administrative capacity that it is required to perform that act under the Statutes and Regulations. Again, §42-15-90 specifically provides that the Commission shall approve all attorney's fees the same as it does in reference to all physicians and medical providers fees under the Fee Schedule. SC Code §42-3-185 provides and mandates that to implement the provisions of §42-15-90 those policies and procedures shall become effective only when such implementation is accompanied by Regulations promulgated in

accordance with the Administrative Procedures Act and further restrictions contained in that Act before the Commission can review and approve attorney's fees. In fact, in Bazzle v. Huff cited in the Appellants' Memorandum to the Motion to Dismiss, the Commission was told by the Courts that they could not regulate attorney's fees until they adopted those Regulations pursuant to §42-3-185. So the submission of a Petition for the approval of attorney's fees is an ancillary proceeding to the underlying workers' compensation case and claim giving rise to the entitlement to attorneys' fees.

3. Further, it must be noted that the only law and Regulations that the Respondent cites in support of its smokescreen Motion to take judicial notice is SC Code §1-23-340(4) and SC Rules of Evidence, Rule 201, and then that the documents cannot be made a part of the Record under Rule 210(c), SCACR. Neither one of those Statutes or Rules is applicable. SC Code §1-23-330(4) provides for an administrative agency to take judicial notice in proceedings before it. It has absolutely nothing to do with this Court taking judicial notice after an appeal has been filed from that administrative proceeding. The same is true about Rule 201 of the Rules of Evidence, SCRE. Rule 201 is subservient to and controlled by the overall scope of the Rules under Rule 101, which provides that except as otherwise provided by Rule or by Statute, these Rules govern proceedings

in the Courts of South Carolina to the extent and with the exceptions stated in Rule 1101, SCRE. Rule 1101 states that the premise that except as otherwise provided by Rule or Statute, these Rules apply to the Court of South Carolina. In reference to this Court taking "judicial notice" of these two decisions issued in the proceedings below in a 1995 case and using those to try to in some way argue that the Respondent is not the appropriate party and that the documents presented below cannot be submitted as part of the Record on Appeal, Rule 210(c), SCACR, provides specifically that:

"the Record shall not, however, include matter which was not presented to the lower court or tribunal".

There is nothing to establish either or both of these decisions were presented below. So, not only was the actual decision not cited to the Court below by any party, it was actually only first cited by the Appellants in their response to the Respondent's first attempt in the Motion to Dismiss to say that it was not a proper party before the Court and again these documents were never submitted to the Commission in the proceedings below. So for those reasons alone, the Court cannot take judicial notice of those decisions.

4. Further, while the Appellants do not challenge what those Orders say, the Respondent attempts to take those documents out of context and in some way assert that the

Appellants were required to join the Respondent as a party below. Thus, they are trying to ask for judicial notice of facts not considered below and then to use that to challenge the fact of the Commission being a party under a totally different scenario and case.

5. Finally, the Court will note that conspicuously absent from the continuing attempt to remove the Respondent as a party to the underlying supplement proceeding requesting approval of attorney's fees by the Commission to the underlying workers' compensation case referenced in the appeal, the Respondent has consistently asked the Court and Courts to ignore the other case decided specifically under the Commission's responsibility to regulate attorney's fees and medical provider fees under SC Code §42-15-90. That case is here again cited for the Court's edification. SC Ambulatory Surgery Center Assn. v. SC Workers' Compensation Commission, Respondent, 389 S.C. 390, 699 S.E.2d 146 (2010).

#### CONCLUSION

For the foregoing reasons, the Motion seeking the Court to take judicial notice, which in fact is simply another Motion to dismiss the Respondent as a party to this action, should be denied.

Respectfully submitted:



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Attorneys and Appellants

November 7, 2023

**RECEIVED**

**Nov 08 2023**

**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA**  
In the Court of Appeals

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**APPEAL FROM SOUTH CAROLINA**  
SC Workers' Compensation Commission  
Appellate Panel

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Appellate Case No. 2023-000187

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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.

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**PROOF OF SERVICE**

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I certify that I have served the **RETURN TO RESPONDENT SC WORKERS' COMPENSATION COMMISSION'S MOTION FOR JUDICIAL NOTICE** on November 8, 2023 addressed as follows:

**VIA EMAIL ONLY:**  
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November 8, 2023