

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

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W.C.C. File No. 1104304

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Kerry Levi, .....Appellant,

v.

Northern Anderson County EMS and  
Berkshire Hathaway Homestate Insurance  
Company, .....Respondents.

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**BRIEF OF RESPONDENTS**

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SC Court of Appeals

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**STATEMENT OF ISSUES ON APPEAL**

ISSUE I

MAY APPELLANT RAISE NEW ISSUES FOR THE FIRST TIME ON APPEAL?

ISSUE II

WHETHER APPELLANT ELECTED HER REMEDY PURSUANT TO SECTION 42-1-560

## Statement of the Case

This is a Workers' Compensation case in which the Full South Carolina Workers' Compensation Commission determined Appellant, Kerry Levi, elected her remedy by accepting a settlement from a third party insurance carrier. As a result the Full Commission dismissed her Workers' Compensation claim.

The sole issue before the court in this case is whether there is substantial evidence on the whole record which supports the determination of the Commission that Kerry Levi settled her claim with a third party carrier and, thereby, elected her remedy.

Appellant suffered two workers' compensation injuries while an employee of Northern Anderson County EMS. The first injury occurred on or about March 10, 2011. Levi was working as a paramedic for Northern Anderson County EMS when she was moving a large patient from a bed to a wheelchair. She and another paramedic were using a sliding board to move the patient. The patient started to fall from the board and Appellant grabbed the patient and felt a "pop" in her back. Medical records indicate Appellant received a brief period of treatment from Doctors Care and Dr. Newsom at the Greenville Memorial Hospital Center for Health and Occupational Services (CHOS). She was released back to light duty and fully released by Dr. Newsom on March 22, 2011. Appellant never had any compensable lost time as a result of the first accident.

On or about March 29, 2011, Appellant was in an ambulance driven by a co-employee, Josh Thomas, when she and Thomas were rear-ended by another driver. This accident severely exacerbated her pre-existing condition from her earlier injury, and since that time she has received on going medical care and treatment.

Through investigation, Respondents subsequently determined the owner of the vehicle which struck Thomas and Levi was owned by Donald Proell. Proell was insured by Allstate Insurance Company. During discovery, Respondents realized Appellant had elected her remedy. When her deposition testimony was taken on August 3, 2011 attorney for Appellant admitted she had already settled the third party claim without the required notice to Respondents.

It became clear by early September 2011, Levi had settled with Allstate Insurance Company in the amount of Five Hundred Fifty Dollars (\$550.00) on April 10, 2011. That check was cashed by her on April 19, 2011. Levi never filed any forms with the South Carolina Workers' Compensation Commission or the Carrier and never advised the Commission, the Employer or the Carrier of the settlement. After receiving confirmation from Allstate Insurance Company that Appellant had indeed accepted a Five Hundred Fifty Dollar (\$550.00) settlement for her claim, Respondents filed a South Carolina Workers' Compensation Commission Form 21 requesting a hearing on the issue of whether Claimant had elected her remedy pursuant to South Carolina Code of Laws Ann. § 42-1-560 and established case law.

The matter was heard on Respondents' Form 21 on January 3, 2012 and an order issued on January 20, 2012 by Commissioner Avery Wilkerson, finding Appellant had not elected her remedy. After the initial hearing, in which Commissioner Wilkerson refused to dismiss Levi's claim, Respondents immediately appealed to the full South Carolina Workers' Compensation Commission.

Oral argument was held before a three member panel of the Full South Carolina Workers' Compensation Commission on May 22, 2012. During oral argument, Levi, by

and through her attorney, Chad Pye of Spartanburg, South Carolina, conceded had she taken a settlement for the automobile accident she would have elected her remedy. However, it was Levi's contention the claim was still open and she had never settled the claim at all. Rather, she urged, the injuries she was compensated for by Allstate were not covered by Title 42 and defendants remain free to seek additional recovery from Allstate.

It was the contention of Appellant, because she did not settle her claim with Allstate involving her workers compensation accident, her settlement does not affect the defendants' rights. It was, and remains the position of Respondents, however, that Levi's theory is not supported by the case law, and there is a "bright line" rule in South Carolina law regarding settlement of third party claims which was designed to protect defendants' liens and right to subrogation. Respondents now have no right to collect against Allstate without the filing of a lawsuit against them in Circuit Court, the very situation which the notice requirements of § 42-1-560 were designed to avoid. The likelihood of success of such a lawsuit is unknown, but the expense of such a suit, even if successful was occasioned by the legal error of Levi. Further, the evidence presented before the Commission, submitted by Appellant herself, shows the settlement, in the amount of Five Hundred Fifty Dollars (\$550.00), was for a full and final settlement of Appellant's injury claim.

On July 2, 2012 the full Commission issued a unanimous order reversing the determination of Commissioner Wilkerson and finding Claimant had elected her remedy. This order was based on well established South Carolina case law. This appeal by Levi followed.

The court should also note the parties attempted resolution of the matter through mediation and Appellant, without objection from Respondents, requested several extensions to determine if mediation would be practical.

In December 2012 Respondents finally advised Appellant that mediation would be of no value and the matter was then assigned for briefing. However, before the initial brief of Appellant was filed Appellant made a separate motion to hold the appeal in abeyance pending filing of a civil suit against the third party. This motion was subsequently denied by the court.

## **ISSUE I**

### **MAY APPELLANT RAISE NEW ISSUES FOR THE FIRST TIME**

#### **ON APPEAL?**

First, all portions of Appellant's Issue I have never been raised at any level prior to this appeal. In her memorandum to the full South Carolinas Workers' Compensation Commission, Appellant raised the issue of whether she had notified the employer and carrier of her acceptance of a Five Hundred Fifty Dollar (\$550.00) settlement. In that memorandum the attorney for Appellant at the time of the appeal, Chad Pye, mentions an affidavit from Ms. Levi. However no such affidavit exists, it was never entered into evidence and was never mentioned at Oral Argument. (ROA pp. 90-95; pp. 111-116) Further, there is no record of the initial hearing because Commissioner Wilkerson never opened the record. There was no testimony taken and the Appellant did not testify at the initial hearing.

At oral argument Mr. Pye only argued whether a release was ever signed by Levi for Allstate and whether the letters in evidence were sufficient to show Claimant had settled her claim. (ROA pp. 111-115) He further questioned whether the settlement involved issues not covered by the workers' compensation act. (ROA p. 113)

As to the arguments in Appellant's brief, none of the issues now argued were raised to the Single Commissioner or the Full Commission. In fact, there is not one argument contained in Appellant's brief which was raised to the Single Commissioner or Full Commission. Consequently the entire appeal should be dismissed.

It is axiomatic that issues not presented to the tribunal below are not preserved for appeal. Drake v. Raybestos Manhattan, Inc. 241 SC 116, 127 SE2d 288 (1962); Holston v. Allied Corp. 300 SC 174, 386 SE2d 793 (Ct. App. 1989); See also, Busillo v. City of North Charleston (Ct. App., Opinion Number 5155 filed 7/3/2013) (Issues not adequately presented or not presented at all are not preserved for appellate review); Wilder Corp. v. Wilke, 330 SC 71, 497 SE2d 731 (1998) (An issue can not be raised for the first time on appeal but must have been raised and ruled upon by the lower tribunal to be preserved for appellant review).

Further, the issue of lack of ripeness was raised to this Court by way of a motion to hold the appeal in abeyance, and the issue was dismissed by this Court (ROA p.24; pp. 90-105).

As such, the appeal of Kerry Levi should be dismissed under SCACR Rule 220 (b) (2) as manifestly without merit, and pursuant to the established case law, cited above, should be dismissed.

## **ISSUE II**

**WHETHER APPELLANT ELECTED HER REMEDY PURSUANT  
TO SECTION 42-1-560.**

The underlying dispute in this matter, which Appellant has scrupulously avoided discussing in her brief, involves whether she elected her remedy by accepting a settlement in the amount of Five Hundred Fifty Dollars (\$550.00) from Allstate Insurance Company. This determination is governed by the “substantial evidence” rule.

**STANDARD OF REVIEW**

If the substantial evidence on the whole record supports the determinations of the Commission, particularly as it relates to settlement of the Claimant’s claim with Allstate, then this court is bound by those findings. Under the Administrative Procedures Act, an appellate court may not substitute its judgment on factual determinations for that of the agency, as to the weight and credibility of the evidence . S.C. Code of Laws, Ann., § 1-23-380(5)

The courts will not overturn a decision of the Commission unless the determination is unsupported by substantial evidence. Jones v. Georgia-Pacific Corp. 355 SC 413, 586 SE2d 111 (2003); Lark v. Bi-Lo, Inc 276 SC 130, 276 SE2d 304 (1981).

Substantial evidence is that evidence which, considering the record as a whole, would allow reasonable minds to reach the same conclusion as the administrative agency reached. Lark; Howell v. Pacific Columbia Mills 291 SC 469, 354 SE2d 384 (1987).

**ARGUMENT**

The sole issue before the court is whether the acceptance of the Five Hundred Fifty Dollar (\$550.00) settlement in April 2011 by Appellant constitutes an election of remedy under § 42-1-560 and the case law attendant thereto. As noted above, at oral argument Appellant conceded had she taken the settlement for the automobile accident she would have elected her remedy. However, it was the Levi's contention the claim was still open and that she never settled the claim. Rather she argued the injuries she was compensated for by Allstate are not covered by Title 42 and the defendants are free to seek additional recovery from Allstate. This argument flies in the face of the statutory scheme set up for resolution of third party workers' compensation claims set up by the legislature in §42-1-560, which will be discussed further, below.

Appellant actually had two injuries. Her first injury occurred on March 10, 2010. She was working as a paramedic for Northern Anderson County EMS when she was moving a large patient from a bed to a wheelchair. She and another paramedic were using a sliding board to move a patient. The patient started to fall from the board and Appellant grabbed the patient and felt a "pop" in her back.

The medical records, in evidence, indicate Appellant received a brief period of medical treatment from Doctors Care and Dr. Newsom at the Greenville Memorial Hospital CHOS. (ROA pp. 34-38; pp. 57-59). She was released to light duty by Dr. Newsom and was fully released on March 22, 2011 to full duty with no restrictions. (ROA p. 35; p. 57).

On March 29, 2011 Appellant was in an ambulance driven by a co-employee, Josh Thomas, when she and Thomas were rear-ended by another driver. (ROA p.82). This accident severely aggravated the pre-existing condition for which she had previously

been released. (ROA p.42; p.58). Through investigation, Respondents subsequently determined the owner of the vehicle which struck Thomas and Levi was Donald Proell. (ROA p.82). Proell was insured by Allstate Insurance Company. Respondents also subsequently determined Levi had settled with Allstate for her automobile accident in the amount of Five Hundred Fifty Dollars (\$550.00) on April 12, 2011 and that check was cashed by her on April 19, 2011. (ROA pp.83-84) Appellant never filed any forms with the South Carolina Workers' Compensation Commission or the Carrier and never advised the commission, the employer or the carrier of the settlement as required by § 42-1-560.

By way of background, § 42-1-560 provides the framework for the recovery of benefits when a workers' compensation injury is caused as a result of the acts of a third party, as occurred here. Section 42-1-560 gives three options to the employee. First, the employee may proceed solely against the third party and waive workers' compensation benefits. Second, the employee may seek workers' compensation benefits, and in the event he/she does so the third party claim may be pursued by the carrier. Third, and most commonly, the employee may proceed against both the workers' compensation carrier and the carrier for the third party *provided the notice provision of the section are complied with*. See, Callahan v. Beaufort County School District, 375 SC 92, 651 SE2d 311 (2007). It is uncontested in this case that the notice requirements were not complied with.

The case law on the issue of settlement of a third party action in Workers' Compensation practice is completely clear: The acceptance of a settlement without the knowledge and consent of the employer and carrier is invalid and results in an election of

remedy on the part of the Claimant, who then may not proceed against the Workers' Compensation carrier for further benefits.

The initial case involving an election of remedy was decided under a previous statute with somewhat different wording. In the case of Stroy v. Millwood Drug Store, Inc., 235 SC 52, 109 SE2d 706 (1959), the Supreme Court held the acceptance of a settlement under similar circumstances to those in this case, resulted in an election of remedy. The statute in effect at the time of the Stroy case had similar provisions as the current statute concerning election of remedy. However, the statute in 1958 specifically held the "filing" of a tort claim and the prosecuting of the claim by the employee, represented an election of remedy. Important to the understanding of the current case before this court is the Supreme Court's determination that a settlement has the same effect as a trial because the seeking and collection of a settlement without notice deprives the defendants of their subrogation rights against the third-party insurance carrier and tort-feasor.

The Supreme Court, citing Professor Larson stated "Since the object of the third party statute is to effect an equitable adjustment of the rights of all the parties, it would defeat this objective to allow the employee to demand compensation from the employer after having destroyed the employer's normal right to obtain reimbursement from the third-party." 109 SE2d @ 709.

The other significant holding in Stroy is that the violation of the notice provisions of the third-party statute deprived the South Carolina Workers' Compensation Commission of further jurisdiction over the claim.

Under the current statute, amended by the legislature in 1978, partly to codify the Stroy holding, the Claimant has the opportunity to seek a judgment against a third party, seek a workers compensation award, or to pursue both. § 42-1-560. However, should the employee decide to proceed against both the third-party and the workers' compensation carrier it is necessary for her to place the employer, carrier and Commission on notice of the potential claim. Id. Further, the employee may not settle the third party claim without approval of the employer and carrier. Section 42-1-560(f).

The settlement of the third-party case without proper notices and consent of the employer and carrier constitutes an election of remedy. Fisher v. South Carolina DMR, 277 SC 573, 291 SE2d 200 (1982); Kimmer v. Murata, Inc., 372 SC 39, 640 SE2d 507(Ct. App. 2006); cert. den. 10/18/2007.

In the Fisher case, the Claimant, Bluette Fisher was injured at Sears Roebuck while shopping for clothing for her employer, the Department of Mental Retardation. The injuries she sustained were completely admitted by the defendants, the DMR and the South Carolina State Accident Fund. However, without the knowledge of the employer or carrier, the Claimant settled with Sears Roebuck. Justice Ness, writing for the Court affirmed the finding of the single Commissioner, Full Commission and Circuit Court that the failure of the Claimant to comply with the notice provision in § 42-1-560, consistent with the Stroy holding, deprived the Workers Compensation Commission of jurisdiction over the claim.

It is important to note both in Fisher and the remainder of the cases to be cited in this brief, the action which elects the remedy is not the acceptance of a settlement in and

of itself, but the failure of the Claimant to comply with the *notice provisions* of § 42-1-560.

In Fisher the court unanimously held §42-1-560 sets forth the terms and conditions which *must* be met by an employee in order for an employee to maintain both a workers' compensation claim and a liability claim. The Court further held while the Code Section does not specifically state the Claimant may not settle his third party case without the carrier's consent, nonetheless "it is clear from a reading of the statute that the legislature did not intend for a Claimant to settle his third-party case without regard to the employer's right for subrogation...and still maintain a workmens' (sic) compensation claim." 291 SE2d @ 201. The court further held the Claimant's non-compliance with the statutory notice procedures, and her disregard of the rights and remedies of the carrier violated § 42-1-560 and the holding in Stroy, which it noted remained good law even though the statute had been amended. Therefore, Fisher had elected her remedy and waived any rights she may have had under the South Carolina Workers' Compensation Act to request further benefits Id.

Justice Ness cited Stroy in the Fisher case for the proposition that allowing an employee to accept compensation from the third party tort-feasor without regard to the defendants' rights, defeated the objectives of § 42-1-560. The Court specifically held "Appellant's noncompliance with the statutory procedure and disregard for the rights and remedies of the carrier violates the spirit of the act. It is clear Mrs. Fisher made an election and has waived any rights she may have had under the South Carolina Workmens' (sic) Compensation Law." 291 SE2d @201.

The Fisher case, a South Carolina Supreme Court case, was cited directly in Kimmer by the Court of Appeals. In Kimmer the Claimant was seriously injured in an automobile accident. He subsequently settled for the policy limits of the third party driver's policy, in the amount of Fifteen Thousand Dollars (\$15,000.00). This settlement was undertaken without the knowledge, permission or consent of the employer and workers' compensation carrier and was unknown to the Commission. The Single Commissioner and Full Commission dismissed Kimmer's claim for failure to comply with the notice provisions of § 42-1-560, as applied in Fisher.

The Circuit Court reversed and awarded the Claimant total and permanent disability giving the defendants a credit of Ten Thousand Dollars (\$10,000.00), the actual amount of the settlement received by Kimmer after attorney fees. The Circuit Court reasoned since it was giving a \$10,000 credit to the employer and carrier they had suffered no prejudice.

The Court of Appeals reversed and reinstated the determination of the Full Commission on several grounds. First, the Court held the settlement of a third party claim without following the notice requirements violated § 42-1-560. Second, the Court ruled the acceptance of the settlement by the employee without the consent of the employer and carrier is a "per se" violation of § 42-1-560 and results, automatically, in an election of remedy, without regard to any other factors. The Court specifically stated because Kimmer resolved his third-party claim against the tort-feasor without *notice* to Murata, his actions automatically resulted in an election of remedy. The Court specifically noted taking a settlement without notice is clearly forbidden by the code section and Fisher, and any such settlement automatically constitutes an election of remedy on the part of the

Claimant. The Court further held prejudice is not an issue under § 42-1-560. The Court reasoned prejudice cannot be an issue when the statute itself lays out specific requirements but does not mention prejudice.

The Court concluded “...that the settlement of the third-party claim without notice to the employer and carrier bars a workers’ compensation action. We hold that prejudice is **NOT** an element to be considered in regard to the failure to give the mandated statutory notice...”640 SE2d @513-514. (emphasis in original).

However, the court also specifically held prejudice is implicit and assumed within the terms and provisions of the act when the employer and carrier are denied the right to participate in litigation or effect the full and final release of the Claimant. The carrier, further, by virtue of the Claimant’s settlement without notice, has no opportunity to investigate whether there are other assets or other coverages available to the Claimant from the third-party. Id.

The Kimmer decision cites three other South Carolina Workers’ Compensation cases which further support the automatic election of remedy in a case such as this one. First, the Court cited Johnson v. Pennsylvania Millers Mut. Ins. Co. 292 SC 33, 354 SE2d 791 (Ct. App. 1987). In Johnson, the Claimant prosecuted a case to a full and final, but adverse, conclusion. Because neither the Single Commissioner nor the Full Commission had determined whether the notice requirements of § 42-1-560 had been met, the Court remanded the case back for such a determination. However, the court noted if the notice and consent provision of § 42-1-560 had not been complied with, then Claimant would have elected his remedy under Fisher.

The Court further cited Hudson v. Townsend Sawchain Co., 296 SC 17, 370 SE2d 104 (Ct. App. 1988), in which the Claimant also prosecuted the claim to a full but adverse conclusion. However, in Hudson the Commission had specifically found as a fact the Claimant had *not* put the employer and carrier on notice of the third-party claim and the court held the Claimant had, therefore, elected his remedy under Fisher. The court also noted in Hudson, had the Claimant settled the case during litigation process without notice and consent, the Supreme Court holding in Fisher would have still barred him from pursuing a workers' compensation claim thereafter.

Another South Carolina Supreme Court case decided in a different context nonetheless affirms the necessity of notice as it relates to election of remedy. In Talley v. John-Mansville Sales Corp. 285 SC 117, 328 SE2nd 621 (1985) the Court held it could not carve out an exception to the election of remedy/notice provisions in the statute. As such, any exception was a matter for the legislature, not the Courts. In Talley, a group of asbestos plaintiffs found themselves in a legal predicament caused by two different statutes. It was necessary for the asbestos plaintiffs to file claims within the statute of limitations in the Circuit Court. However, because they suffered no disability under Chapter 11 of Title 42, they could not yet file a workers' compensation claim. The court would not allow them to put the employer and carrier on notice because there was no current workers' compensation claim. However because the Court could not carve out an exception to the notice requirement, it ordered the defendants be allowed to file their claims in Circuit Court with the claims being held in abeyance until such time as the employees suffered disability and could put the workers' compensation employer and carrier on notice pursuant to the terms of § 42-1-560.

The two most recent cases involving election of remedy only collaterally touch on the issues in this case, but are consistent with the previous holdings of the Supreme Court and Court of Appeals. In Callahan v. Beaufort County School District, 375 SC 92, 651 SE2d 311 (2007) the Supreme Court cited Fisher as good law. The Claimant, Callahan, filed a third party suit in state court which was removed to federal court. Claimant then voluntarily dismissed her third-party suit pursuant to Rule 41 FRCP. The Supreme Court held a voluntary dismissal leaves the situation as though no suit had ever been filed. The Court reasoned, therefore, Claimant could go forward with her third party claim because of the voluntary non-suit if she filed the notices with the employer, carrier and Commission required by Title 42. The Court, nonetheless, specifically held the notice provisions of § 42-1-560 “must be strictly followed in order for a Claimant to preserve her right to proceed against both an employer and the third-party.” 651 SE2d @314. This is precisely the holding of Fisher and Kimmer.

In the case of Wise v. Wise d/b/a Wise Services, 394 SC 591, 716 SE2d 117 (Ct. App. 2011) the Court affirmed the prior election of remedy cases. The Wise case, once again, arises under a slightly different scenario than the case at bar. The issue is Wise is whether evidence of the election of remedy could be admitted after a Commission hearing had previously taken place. However, the court in Wise assumed the election of remedy would have taken place without the required notice, thus fully affirming the holdings of Fisher and Kimmer. The court specifically stated “Further, because Claimant did not *strictly comply* with the notice provisions in filing suit against a third party, he is barred from recovering under the Act.” (emphasis added) 716 SE2d @122.

Consequently, the only issue that the Court needs to currently address is whether the notice requirements of § 42-1-560 were complied with by Levi. There is no testimony or evidence in this record that the Claimant complied with or ever attempted to comply with the notice requirement. Further, contrary to the argument of Appellant, there is more than substantial evidence to support Commissions' finding Levi settled her third party claim without notice. At the initial hearing, Levi submitted a letter dated April 10, 2011 from Cynthia Anderson-Weisbireh at Allstate which states "As we agreed, I will be sending a check to you in a separate letter in the amount of \$550.00 for full and final settlement of your injury claim. Please understand that signing and cashing this check settles your claim for the above accident." (ROA p.50). Respondents submitted a document subpoenaed from Allstate Insurance Company dated April 19, 2011 indicating a payment was made and accepted in the amount of Five Hundred Fifty Dollars (\$550.00) for "full and final settlement of any and all claims for bodily injury arising from loss of 3/29/2011." (ROA pp.21-22). Appellant also submitted a letter dated May 9, 2011 which states "It appears that your client has accepted the sum of Five Hundred Fifty Dollars (\$550.00) for his (sic) general damages from this auto accident." (ROA p.54). Appellant also submitted a letter from Allstate dated December 29, 2011 stating Appellant settled her claim for bodily injury with in the sum of Five Hundred Fifty Dollars (\$550.00) with medicals to be referred to the Berkshire Hathaway. (ROA p.52).

Appellant has previously raised the issue of whether this settlement was sufficient to rise to the levels required under § 42-1-560. Commissioner Wilkerson apparently felt a small settlement was not enough to trigger the notice requirements. However, the

settlement has clearly cut off Respondents' right to recovery for indemnity payments from Allstate, and may have cut off recovery of medical payments.

First, at the time of the original hearing in this matter defendants had already paid Appellant over Seventeen Thousand Dollars (\$17,000.00) in temporary disability compensation payments with permanency yet to be determined or awarded. Levi was, at the time, seeking total and permanent disability. Even under the best argument Appellant has, even if her release to Allstate covered only the indemnity/disability portion of the claim, respondents would be unable to recoup somewhere between Seventeen Thousand (\$17,000.00) to over Two Hundred Thousand (\$200,000.00) Dollars in indemnity payments, depending on the final result had the case gone to trial.

Second, the Full Commission addressed this issue directly, and correctly, in their order of July 2, 2012. The Commission noted, as the Court did in Kimmer and Wise that Levi's theory that she did not settle her claim with Allstate and somehow the settlement did not affect the rights of defendants, is not supported by the facts or the case law. The Commission stated "Rather the very purpose for the strict, bright line rule of South Carolina case (law) was to protect the Defendants' lien and subrogation. The Defendants now have no right to collect against Allstate without having to file a lawsuit against them in Circuit Court, and the likelihood that such a lawsuit would be successful is unknown." (ROA p.10). The Commission further found the two letters from Allstate of April 10<sup>th</sup> and December 29, 2011 were sufficient proof "by preponderance of the evidence" that Claimant settled her claim and the settlement constituted an election of remedy because of failure to follow the *notice provisions* of Title 42. Levi settled without regard to the rights of the defendants to be reimbursed for indemnity benefits already paid to Appellant

and for additional indemnity benefits she might be seeking “even if additional benefits might be available to her” from Allstate. (ROA p.11)

The Commission further, in detail, listed fourteen (14) Findings of Fact as to why Levi had elected her remedy and what evidence that that was based on. (ROA pp 20-21) The Commission specifically found Appellant settled her claim for Five Hundred Fifty Dollars (\$550.00) based on the letter of April 10, 2011; that the Five Hundred and Fifty Dollars (\$550.00) payment was for settlement of her personal injury claim pursuant to the letter of April 10<sup>th</sup>; that Appellant cashed the settlement check; and that she did not notify the employer, carrier or workers’ compensation commission of the settlement of the third-party claim pursuant to §42-1-560 or any of the case law cited hereinabove. (ROA p.21)

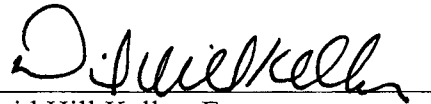
In fact it is undisputed Appellant settled with Allstate on or about April 10, 2011 some two weeks after her accident. It is further undisputed she did not follow the notice requirements of § 42-1-560. The case law cited herein is unquestionably clear that Appellant’s actions constituted an election of remedy. There has never been any holding to the contrary in South Carolina and as recently as 2011 the court confirmed that the *notice provisions* of section 42-1-560 must be strictly followed in order for a workers’ compensation Claimant to preserve her right to proceed against both employer and third party. Callahan; Wise.

### **CONCLUSION**

*It is therefore respectfully submitted* that this case should be dismissed under SCACR Rule 220(b)(2), as manifestly without merit.

*In the alternative, it is respectfully submitted* the order of the Full Workers' Commission is fully supported by the substantial evidence on the whole record and the law, and should be affirmed.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "D. Hill Keller", written over a horizontal line.

David Hill Keller, Esq.

Bar # 003345

Constangy, Brooks & Smith, LLP

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APPELLATE PANEL, WORKERS' COMPENSATION COMMISSION

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**CERTIFICATE OF COUNSEL**

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The undersigned certified that this Final Brief complies with Rule 211(b),  
SCACR.

September 25, 2013



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Kerry Levi, .....Appellant,

v.

Northern Anderson County EMS and  
Berkshire Hathaway Homestate Insurance  
Company, .....Respondents.

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**CERTIFICATE OF SERVICE**

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I, Caroline Anders, say that I am the legal assistant for David H. Keller, attorney for Respondents Northern Anderson County EMS and Berkshire Hathaway Homestate Insurance with CONSTANGY, BROOKS & SMITH, LLP in Greenville, South Carolina; and on the 27<sup>th</sup> day of September, 2013, I mailed in a sealed envelope, postage prepaid, a copy of the Final Brief of The Respondents with Certificate of Counsel to the following person(s) at the following address:

Blake Hewitt  
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**RECEIVED**  
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**SC Court of Appeals**

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