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THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE
CLARENDON COUNTY COURT OF COMMON PLEAS

The Honorable R. Ferrell Cothran, Jr., Circuit Court Judge

Case No.: 2013-000276

Andreal Holland,.....Appellant,

v.

J.C. Witherspoon, Jr., Inc., A&K Mulch, Employers, and Capital City Insurance Company, Carrier,.....Respondents.

PETITION FOR REHEARING

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J.C. Witherspoon, Jr., Inc., A&K Mulch, LLC, Employers, and Capital City Insurance Company hereby file this Petition for Rehearing in the above matter pursuant to Rule 221 SCACR. These petitioners request rehearing in the above captioned case from the Memorandum Opinion of the Supreme Court in this matter, (2014-MO-031) issued on July 23, 2014, which reversed the ruling of the Circuit Court. The Petitioner would respectfully assert that this Court overlooked or misapprehended the application of the doctrine of waiver to the facts and circumstances of this claim and the election of remedies by Claimant/Appellant Holland under S.C. Code Ann. §42-1-560: (a) In finding that the Employer/Carrier's prior knowledge of "intent" of the Claimant to someday file a third party law suit would effectively waive the right to raise an election of remedies defense under S.C. Code Ann. §42-1-560, when the Court has previously ruled that failure to provide appropriate statutory notices implicated a viable election

of remedies defense where an Employer/Carrier even had 'actual knowledge' of the third party suit; (b) In finding this pre-emptive implied waiver by the Petitioners as to the issue of election of remedies, the Court has essentially made factual findings as to the actions of the parties, in contradiction to the standard of review; (c) To the degree that the Courts' determination relied, in whole or in part, on certain remarks by opposing counsel during rebuttal at oral argument – namely that the workers' compensation adjuster received the third party complaint at issue in 2008 – when such remarks were categorically incorrect and demonstrable false, and; (d) By finding that the Petitioners impliedly waived the election of remedies defense under S.C. Code Ann. §42-1-560 premised upon actions taken by the Petitioners in 2006, in that the defense did not arise and become a viable until November of 2008, and did not become known to the Petitioners' until 2009.

ARGUMENT

I. The Court Misapprehended or Overlooked the Correct Application of S.C. Code Ann. §42-1-560 by Holding that Employer/Carrier's Prior Knowledge of "Appellants intent to file a third-party lawsuit" in the Future Waived the Right to Raise an Election of Remedies Defense under S.C. Code Ann. §42-1-560, when the Court has Previously Held that Failure to Provide Appropriate Statutory Notices Implicated a Viable Election of Remedies Defense even where an Employer/Carrier had 'Actual Notice' of the Third Party Suit's Existence.

In the July 23, 2014 opinion, the Supreme Court stated in part:

> "Appellant contends that the Respondents waived the election of remedies defense because the carrier knew of the Appellant's intent to file the third-party lawsuit and initially took action indicating joint pursuit of the third-party lawsuit, yet did not raise the election of remedies defense until more than two years later."

Memorandum Opinion No. 2014-MO-031 at para. 1, (S.C. Sup. Ct.)

The Court went on to find that this prior knowledge by the carrier, in 2006, of the Claimant's intent to later file a third party law suit at some point in the future, effectively

constituted a pre-emptive waiver by the Respondents of their right to assert an election of remedies in 2009. The Claimant had filed a third party lawsuit in October of 2008, but failed to provide actual notice, or required statutory notice to the Defendants of this 2008 filing within 30 days of the commencement of that suit, as required under S.C. Code Ann. §42-1-560.

In addition to the other arguments outlined hereinabove and below, the Defendants would simply argue that the Employer/Carrier's actions or prior knowledge of a Claimant's intent to file a third party action at some point in the future, would not somehow waive the carrier's right to raise an election of remedies defense at some point in the future. Furthermore, such knowledge by the carrier would not relieve the Claimant of his statutory notice obligations under §42-1-560 for an action filed by the Claimant over two years into the future. More to the point, the Supreme Court previously determined that: "a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit." (*Callahan v. Beaufort Co. Sch. Dist.* 375 S.C. 92, 651 S.E.2d 311, at fn. 2)(emphasis supplied)(internal citation omitted).

That is, in prior opinions, this Court has held that actual knowledge of the third-party suit by the carrier was not enough to negate the statutory obligation of the Claimant to provide proper notice under §42-1-560. Yet, in the instant case, the opinion of the Court has negated this obligation, and the resultant defense of election of remedies, based on the carrier's knowledge of the Claimant's intent to file a third party claim at some point in the future. As outlined below, and in prior briefs by the Respondents, the carrier in the instant case did not have actual knowledge of the third party filing (See Argument Section III). Respondents respectfully submit that it would be logically antithetical to hold that a Claimant must comply with the statutory

notice requirements under S.C. Code Ann. §42-1-560, yet at the same time rule that prior knowledge by a carrier of a Claimant's mere intent to file a third party law suit at some point in the future relieves the Claimant of that statutory obligation. Such a determination would in theory, and actuality, be enough to obliterate and emasculate the notice requirement of the statute entirely. It is also in contradiction to prior rulings by the Court on this issue, in that it creates a *lower* standard of notice. Whereas previously, the court held "actual knowledge" of the third-party suit was not enough to forgo the notice requirements of §42-1-560. However, in the case *sub judice*, the carrier simply having knowledge in 2006 of the Claimant's potential intent to file a third-party action at some point in the future, has effectuated an implied waiver of the requirement of notice under the statute, as well as the election of remedies defense – which did not arise until the end of 2008 at the earliest.

II. The Court Misapprehended or Overlooked the Appropriate Standard of Review in Finding an Implied Waiver by the Employer/Carrier, which would Require a Factual Determination, Created a Waiver of an Otherwise Viable Election of Remedies Defense?

In its ruling of July 23, 2014, the Court reversed the ruling of the Circuit Court, which had affirmed the prior rulings of the Single Commissioner and Appellate Panel of the Full Commission. The Supreme Court found that there was an "implied waiver" of the election of remedies defenses under S.C. Code Ann. §42-1-560 "[b]ased on the circumstances of this case..." Memorandum Opinion No. 2014-MO-031 at para. 2, (S.C. Sup. Ct.).

Of particular note, no prior Commissioner, tribunal or court had made a finding that the waiver argument of the Claimant as to the election of remedies defense by the Employer/Carrier was supported by the greater weight of the evidence in the record. Also, it is abundantly clear, and consistent, from the jurisprudence of this state that the issue of whether an assertion of waiver will lie in a particular claim is most certainly a question that is factual in nature.

"We look instead to the facts in the record to divine the parties' intentions. *Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E.2d 33, 34 fn. 1 (1991) (discussing whether the defendant had waived his right to assert a statute of limitations defense). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384, 388 (1992). "Waiver is a question of fact for the finder of fact. *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994) (internal citations omitted). "The determination of whether [the parties] actions constituted waiver is a question of fact." *Madren v. Bradford*, 378 S.C. 187, 194, 661 S.E.2d 390, 394 (Ct. App. 2008). "Likewise, the determination of whether one's actions constitutes waiver is a question of fact. The trial court's factual findings will not be disturbed on appeal unless there is no evidence in the record that would reasonably support the findings." *Laser Supply & Servs., Inc. v. Orchard Park Associates*, 382 S.C. 326, 337, 676 S.E.2d 139, 145 (Ct. App. 2009) (emphasis added). "The determination of whether one's actions constitute waiver is a question of fact." *Sanford v. S. Carolina State Ethics Comm'n*, 385 S.C. 483, 497, 685 S.E.2d 600, 607 opinion clarified, 386 S.C. 274, 688 S.E.2d 120 (2009) (internal citations omitted). "The determination of whether one's actions constitute waiver is a question of fact." *King v. James*, 388 S.C. 16, 30, 694 S.E.2d 35, 42 (Ct. App. 2010) (internal citations). "Waiver is a question of fact." *Yelsen Land Co., Inc. v. State*, 397 S.C. 15, 23, 723 S.E.2d 592, 596 (2012) (internal citations omitted). "Waiver is a question of fact for the finder of fact." RWE NUKEM Corp. v. ENSR Corp., 373 S.C. 190, 197, 644 S.E.2d 730, 734 (2007)(citing Parker v. Parker, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). Even as early as the very first South Carolina Reporter, the Court has held that the question of waiver was, under

all the circumstances in evidence, one of fact for the jury. *Madsden v. Phoenix Fire Ins. Co.*, 1 S.C. 24 (1868).

The standard of review in this case, for the appellate courts beyond the ruling of the Appellate Panel of the full Commission is the substantial evidence standard. The judicial review of the appellate panel's factual findings is governed by the substantial evidence standard. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 221, 628 S.E.2d 262, 266 (Ct. App. 2006). The appellate panel's decision must be affirmed if supported by substantial evidence in the record. *Shuler v. Gregory Elec.*, 366 S.C. 435, 440, 622 S.E.2d 569, 571 (Ct. App. 2005) (internal citations omitted). A reviewing court may not substitute its judgment for the judgment of the Commission as to the weight of the evidence on questions of fact. S.C. Code Ann. § 1-23-380(A)(5) (Supp. 2006). However, a reviewing court may reverse or modify a decision of the appellate panel if the findings of the panel are, "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record." S.C. Code Ann. § 1-23-380(A)(5)(e) (Supp. 2006); (*Houston v. Deloach & Deloach*, 378 S.C. 543, 550; 663 S.E.2d 85, 88) (S.C. Ct. App. 2008)).

In the instant case, no prior finding of fact, that is the single Commissioner, nor the Appellate Panel of the Full Commission found for the Claimant on the argument of waiver. The question of waiver is a factual question. Therefore Respondents respectfully submit that, without finding the lower tribunals' factual rulings as to waiver were unsupported by substantial evidence, the Court would be in error to supplant the factual findings of the Commission for its own.

III. To the extent the Court may have Relied, in Whole or in Part, on Certain Remarks by Appellant's Counsel During Rebuttal at Oral Argument – Stating the Adjuster for the Workers' Compensation Carrier was Served with the Third Party Complaint at Issue in 2008 – Petitioners would Respectfully Assert that such Remarks were Categorically Incorrect and Demonstrably False.

As pointed out previously in the prior briefs of the Employer/Carrier to the Court (See Final Brief of the Respondent's at pp. 23-24). The carrier did not have actual knowledge or actual notice of the October 2008 third-party suit by the Claimant until several months later when they received a copy of the amended complaint which was filed in February of 2009. Moreover, the Claimant did not actually file a form S-2 notice to the carrier, until several months after the October 2008 complaint had been filed. The first S-2 was filed on May 14, 2009 (R.O.A. at p. 135). This was well in excess of 30 days after the required statutory notice under §42-1-560. The Record on Appeal is absolutely devoid of any evidence that the carrier had any knowledge – via an S-2 or from actual notice – of the October 2008 third-party claim having been filed, until they received a copy of the amended third-party Complaint which was filed on February 29, 2009. (R.O.A. p. 90).

That is, under the facts and evidence of this case, it cannot be demonstrated, that Defendants even became aware of the third party actions' filing until several months after it took place. And as noted above, South Carolina Courts have held, "previously [] that a claimant had elected a remedy, thus forgoing workers' compensation benefits, by settling a third-party claim without complying with the notice requirements of § 42-1-560, even though the carrier had actual knowledge of the third-party suit." (*Callahan v. Beaufort Cnty. Sch. Dist.*, 375 S.C. 92, 651 S.E.2d 311 (2007) at Footnote 2) (internal citations omitted) (emphasis added).

Nevertheless, it was not even previously asserted, until rebuttal at oral argument by counsel for Appellant, that the Defendant did indeed have actual notice of the third party law suit when it was originally filed October of 2008. Before the Supreme Court at oral argument on April 3, 2014, the following colloquy transpired on rebuttal by Claimant's counsel:

> Attorney Thomas Fowler (Counsel for Andreal Holland): "You asked, one of the - - or Peter [Leventis, counsel for the Respondents] was talking about the notice that they had of the suit, the original suit being filed and Ms. Dyches the adjuster **if I recall correctly we provided her deposition she said that she had that suit in October of '08 and gave it to their lawyer**. So it wasn't until of March that it was amended, **they knew it from the jump start** because they were partners in this thing or so we thought."
>
> Justice Donald W. Beatty: **So your argument now is that you gave them a copy of Complaint even though you didn't file the S2, is that what you are saying?**
>
> Thomas Fowler: **Yes sir. She said she had a copy of the Complaint and gave it to their lawyer in her deposition because we asked her when she got it**. I think there was a mark on it or something or a receive thing but I don't know exactly how she found out but she said that.
>
> Oral Argument before the Supreme Court, April 3, 2014 – Audio CD at 33:37 – 34:25 mins. (emphasis supplied)

To the degree that the Court may have relied on such statements by Appellant's counsel during oral argument, in ultimately applying the equitable remedy of implied waiver to the facts of this claim, the Respondents would point out that this representation, that Mrs. Dyches was

supplied and sent a copy of the October 2008 complaint back in 2008 when it was filed, or that she received and forwarded a copy of it to her attorneys – and also that Mrs. Dyches testified to such in her deposition – ***it is categorically and demonstrably false***. (See Depo. Trans of Mr. Paula Dyches in its entirety, R.O.A. Tab No. 42). To that end, the Respondents would ask the Court to consider in rehearing or reconsidering the case, that the implication and representation of notice to the carrier at the time of the original filing in October of 2008, asserted at oral argument by Appellant Holland's counsel outlined above, **was completely inaccurate and utterly without support in the Record on Appeal.**

IV. The Court Misapprehended or Overlooked the Applicability of the Equitable Doctrine of Implied Waiver by Finding that Actions taken by the Petitioners in 2006 Constituted a Waiver of the Election of Remedies Defense which First Arose in 2008, and was not Known to, nor Raised, by the Employer and Carrier until 2009.

After the original accident in 2006, the parties did jointly consider whether or not to file a third party claim in this matter. As asserted by the Claimant Holland, an expert was consulted about a potential products liability claim in 2006 as well. (R.O.A. p. 311a). However, when the claim was actually filed in October of 2008, over two years later, the workers' compensation carrier was neither consulted or notified. That is the carrier was not notified of the action informally, or formally as statutorily mandated on a Form S-2, within 30 days of that filing. (R.O.A. p. 78). The first time the workers' compensation carrier, Capital City Insurance, became aware of this claim was when it received a copy of the amended third-party action in March of 2009, which had been filed on February 29, 2009 (R.O.A. p. 90). No S-2 notification was actually even made in this claim until May of 2009. (R.O.A. 134). All of these dates were well after the 30 day time period prescribed for notice to the carrier under S.C. Code Ann. §42-1-560.

The potential and viability for an election of remedies defense did not even arise until 30 days after the original third party complaint had been filed on October 10, 2008. That is, there was no viable election of remedies defense even available to be raised until the failure of the Claimant to serve the S-2 notification within 30 days of that date. So the first time the election of remedies could have even been raised was November 9, 2008 (provided Defendants had been provided with the original Complaint in 2008). The Defendants did not even know about the viability of this defense, until they found out about the third party filing several months later in the Spring of 2009. The Defendants subsequently raised the election of remedies defense, first for a hearing that had been requested by the Claimant, and that hearing request was subsequently withdrawn. When that hearing did not go forward, the Defendant Employer and Carrier raised the election of remedies defense in a hearing request of their own. That hearing, and determination by the Commission, Appellate Panel, and the Circuit Court, that the Claimant had elected his remedy, was the subject of this appeal that was determined by the Supreme Court in its ruling on July 23, 2014. In that ruling, this Court found that actions taken by the Defendants in 2006 to jointly evaluate the viability third-party claim with the Claimant, pre-emptively and impliedly waived the Employer/Carrier's right to assert the defense of election of election of remedies, after the Claimant, *unknown to the Defendants*, filed a third-party products liability claim, and an amended complaint, over two years later in 2008 and 2009. The third party action that the Claimant ultimately instituted, and amended his third party suit on, without the knowledge or the cooperation of the Defendants was dismissed via a motion for summary judgment, which was recently affirmed by the Court of Appeals. See *Holland v. Morbark, Inc.*, 407 S.C. 227, 754 S.E.2d 714 (Ct. App. 2014). Of note, among other deficiencies found by the

Circuit Court and affirmed by the Court of Appeals, was that the Claimant was not permitted to amend his complaint a second time.

These Petitioners submit respectfully that actions in 2006, taken two years prior to the actual existence and viability of the election of remedies defense, should not, and cannot reasonably be considered to constitute a waiver, impliedly or otherwise, of a defense that only came about as of November of 2008 and only became known to the Defendant Employer/Carrier in 2009. If indeed waiver is:

> ...a voluntary and intentional abandonment or relinquishment of a known right." *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009). [That may] may be expressed or implied by a party's conduct." *Parker*, 313 S.C. at 487, 443 S.E.2d at 391. "An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable." *Lyles v. BMI, Inc.*, 292 S.C. 153, 158-59, 355 S.E.2d 282, 285 (Ct. App. 1987).
>
> July 23, 2014 Memorandum Opinion No. 2014-MO-031 para. no. 2, (S.C. Sup. Ct.)

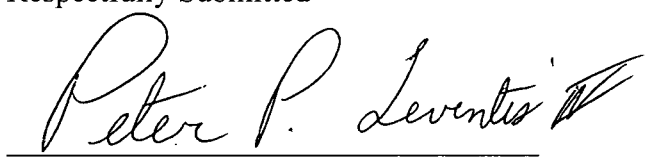
then it cannot be reasonably said, that the carrier, impliedly or otherwise, took actions in 2006, to knowingly and/or intentionally waive a 'known right' to assert an election of remedies defense under §42-1-560, when the circumstances and occurrences from which the defense arose and attained viability only came about in the years 2008 and 2009. This would take uncanny foresight indeed. The fact that the parties took initial steps to jointly evaluate the third party claim in 2006, does not give the Claimant *cart blanche* to go off on his own in 2008 and file and action, without any notice – actual or formally statutorily – to the Defendants of such action until March and May of 2009 respectively. But for the Claimant's failure to file the proper statutory notice, and to inform the Employer/Carrier of his actions on the third-party suit, as required under S.C. Code Ann. §42-1-560, the election of remedies defense would not have been at issue. The Defendants/Petitioners took no action during the relevant time periods involved from 2008

to 2009, which could be construed as a waiver of their right to assert this defense, which arose solely from the Claimant's lack of compliance with the statute.

CONCLUSION

For the reasons set forth above, the Respondents respectfully submit that this Court has either misapprehended or overlooked the issues and aspects of the claim as outlined above. They would respectfully request the Court withdraw or vacate its prior Opinion of July 23, 2014 in this matter and affirm the ruling of the Circuit Court, or permit rehearing in this case to consider the contentions argued herein.

Respectfully Submitted



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PROOF OF SERVICE

I certify that I have served the **Respondents' Petition for Rehearing** on Andreal Holland by depositing a copy of it in the United States mail, postage prepaid, on **August 7, 2014,** addressed to his attorney of record, Thomas K. Fowler, Jr., Peake & Fowler Law Firm, P.A., 9357 Two Notch Road, Suite 103, Columbia, SC 29224.

August 8, 2014

Respectfully submitted,

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