THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Andreal Holland, Appellant,

Versus

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

Appellate Case Number: 2013-000276

Appeal from Clarendon County

R. Ferrell Cothran, Jr., Circuit Court Jr.

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REVISED RETURN TO PETITION FOR REHEARING

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Thomas K. Fowler, Jr.
S.C. Bar # 2102
Attorney for Appellant
Peake and Fowler Law Firm, P.A.
9357 Two Notch Road
P.O. Box 23601
Columbia, SC 29224
(803) 788-4370

August 18, 2014

AS TO ALL ARGUMENTS OF RESPONDENTS:

The Appellant responding to the Petition for Rehearing filed by the Respondents would address their various arguments as follows:

a) **488days: April 10th, 2009, through August 10, 2010:**

That is the length of time Respondents (meaning A&K Mulch and the Carrier) continued to pay benefits after they (via Ms. Dyches) had actual knowledge of and Answered the Third Party action filed on behalf of Appellant until A&K filed a Form 20 to stop payment of those benefits and also raised the defense of Election of Remedies.

b) **A&K Mulch, LLC, is the legal employer in this case** and what J.C. Witherspoon knew or did not know about the third party action is irrelevant.

These are the undisputable facts the lower Court failed to recognize resulting in a ruling "clearly erroneous in view of the reliable , probative and substantial evidence on the whole record." *Houston, infra,* as cited by Respondents in the Petition , page 6.

Additional undisputable facts are:

1) The legal, true Employer in this case is A&K Mulch, LLC;

2) A&K via the Carrier knew of the potential Third Party claim on August 28, 2006, (see ROA page page 312, Dyches email "I have put the claimant's attorney on notice for a potential 3rd party claim");

3) A&K knew of and ***was a named defendant*** in the March, 2009, Third Party action and answered claiming to be the Employer on April 6, 2009;

4) A&K answered the suit and claimed to be the Employer but was never named in the Workers Compensation case. Rather all were lead to believe

that J.C. Witherspoon, Inc. was the employer until the owner's his deposition stated otherwise;

5) On September 29, 2009, A&K was made an Employer party to the SCWCC case;

6) 14 days later, an S-2 was timely filed and served on A&K on October 13, 2009;

7) A&K Mulch, LLC filed a Form 21 to Stop Payment of benefits on August 10, 2010;

J.C. Witherspoon, Inc. is a separate company from A&K and whatever notice Witherspoon did or did not receive is irrelevant. As for the legal employer, timely and proper notice was given of the third party suit once A&K became a party to the SCWCC case. The Carrier waived the defense by its own actions as held by this Court previously.

Respondents' 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.)

This is not a new ground or topic and was thoroughly argued previously. It also appears to completely ignore the Court's reliance upon prior authority for waiver.

Respondents plainly knew of the Third Party action and there was to be a joint prosecution of that claim to both parties benefit. Also, Respondents knew of the suit when the adjuster received the amended Complaint. Likewise, Respondents mention nothing of their own failure to comply with the mandates of §42-1-560, SC Code of Laws, 1976, as amended.

Respondents overlook the subsequent ruling of *Jervery v. Martinit Environmental, Inc. and General Casualty Insurance Company,* 396 SC 442, 721 SE2 469, (SC App. 2012) setting forth wavier where the Employer/Carrier waited 450 days to assert a defense. In this case, the Respondents waited even longer than that as found by this Honorable Court.

Additionally, once the actual employer, A&K Mulch was made a party to the Workers Compensation case, the proper notice of the Third Party action as required by §42-1-560, was given by Appellant.

Respondents' Argument 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?

Appellant agrees with the citation made by Respondents that:

"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)). (Petition for Rehearing page 6)

There is no dispute in the facts as to the unnecessary and extended delay Respondents caused before raising the Election defense. Benefits continued to be paid and no Stop Payment request was made timely.

Respondents' Argument 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.

In the course of the cited colloquy, what Respondents plainly failed to include is the discussions conclusion wherein Justice Beattie stated he had and would review the entire record to obtain the answer to the question he was asking. There is no evidence in the opinion or otherwise that the same relied upon any statement of counsel but rather upon well reasoned application of the law in this case.[1]

Apparently what Justice Beattie was attempting to have answered in the colloquy cited by Respondents is whether the third Party lawsuit was given to the Carrier without service of an S-2. That seems to be exactly what he asked.

Ms. Dyches had admitted in her deposition that she had received the Third Party lawsuit, had a copy in her claim file and gave it to Respondents counsel (ROA page 392, line 25):

> "Mr. Cauthen was sent that complaint and to – for the file"

In the conversation with Justice Beattie, Appellant's counsel clearly stated, "if I recall correctly" so there was no intent to misstate anything. Secondly, Appellant's counsel is quoted as saying:

> "So it wasn't until (sic) of March that is was amended, they knew it from the jump start because they were partners in the thing or so we thought".

Additionally, discussing Ms. Dyches knowledge of the third Party action Respondents quote:

> 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.

[1] Appellant's counsel has not heard the audio tape referenced by Respondent's counsel and must assume the statements are being reported accurately in the Petition.

The quoted discussion is regarding the amended Complaint clearly. If there was confusion it was not intentional on anyone's part.

Even more importantly the true Employer, A&K, was a party to the Third Party litigation so it clearly had actual knowledge of and was served with that suit.

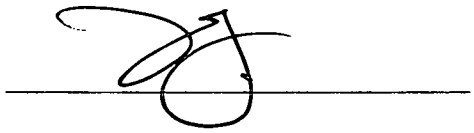
Respondents' Argument IV. The Court Misapprehended or Overlooked the Applicability of the Equitable Doctrine of Implied Waiver by Finding that Actions taken by the Petitioners in 2006 Constituted a Waiver of the Election of Remedies Defense which First Arose in 2008, and was not Known to, nor Raised,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

This is simply erroneous. The ruling of the Court is based upon the inequitable actions of the Respondents in relation to the Third Party action, not what it did or did not do in 2006.

CONCLUSION

The Appellants respectfully request that the Petition be denied.

Respectfully submitted,



Thomas K. Fowler, Jr.
S.C. Bar # 2102
Attorney for Appellant
Peake and Fowler Law Firm, P.A.
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August 19, 2014

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CERTIFICATE OF SERVICE

I, the undersigned, of the Law Offices of Peake, Fowler & Associates, P.A., attorneys for the claimant do hereby certify that I have served counsel of record, and Claimant, Andreal Holland, in this action with a copy of the pleading herein below specified by mailing a copy of same in the United States mail, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

SERVED: Mark Cauthen, Esquire
Peter P. Leventis, IV
McKay Law Firm
PO Box 7217
Columbia, SC 29202

PLEADINGS: Appellant's Revised Return to Petition for Rehearing

DATE: August 19, 2014

Thomas K. Fowler, Jr.
S.C. Bar # 2102
Attorney for Appellant
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