THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas
DeAndrea G. Benjamin, Circuit Court Judge
Trial Court Case No. 2013-CP-40-05888

Appellate Case No.: 2016-000788

Clarence B. Winfrey, Jr., ...Appellant,

V.

American Fire & Casualty Insurance Company
c/o Liberty Mutual Group.....Respondent,

and

State of South Carolina.....Respondent.

FINAL BRIEF OF RESPONDENT STATE OF SOUTH CAROLINA

Respectfully Submitted,

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STATEMENT OF THE CASE

The following chronology provides a history of the proceedings:

May 22, 2013: Appellant suffered an accident at his workplace (Amended Complaint Paragraph 2, R. p. 210).

June 1, 2013 through September 14, 2013: Carrier elected to pay and paid temporary total benefits to Appellant. (Amended Complaint Paragraph 3, R. p. 211).

September 12, 2013: Payments were stopped by Carrier pursuant to a Form 15, Section II, on the basis of an investigation whereby Carrier determined that there were grounds for denial of the claim. (R. p. 211).

September 27, 2013: Complaint filed that did not name the State or the Commission (R. p. 63).

January 31, 2013: Judge Cooper issued his order requiring the State to be named as a party. (R. p. 25).

February 18, 2014: Amended Summons and Complaint that named the State. (R. p. 207).

February 27, 2014: Temporary benefits restored. (R p.45-46).

April 21, 2014: The State filed its Motion for Judgment on the Pleadings. (R p. 262).

August 1, 2014: Appellant filed a Motion to dismiss the State. (R. p. 283).

February 17, 2016: Judge Benjamin granted the State's Motion for Judgment on the Pleadings. (R. p. 49).

February 26, 2016: Appellant filed a Motion for New Trial/Rehearing/Reconsideration and/or to Alter or Amend Judgement Pursuant to Rule 59. (R. p. 442).

March 17, 2016: Judge Benjamin denied Appellant's Motion for New Trial/Rehearing/Reconsideration and/or to Alter or Amend Judgement Pursuant to Rule 59. (R. p. 57).

The State was not a party to any of these proceedings until the Amended Complaint was filed on February 18, 2014. The State was named because of Judge Cooper's order. No

affirmative relief of any kind has been sought against the State. As discussed more fully *infra*, the State was not a necessary or indispensable party but a finding on this issue is not necessary because of the right given to the Attorney General to participate in matters involving constitutional issues. When he was named a party pursuant to the Amended Complaint by order of Judge Cooper, the Attorney General elected to participate in the case to protect the constitutionality of § 42-9-260, as was his right. See SCRCP 24 and § 15-53-80, discussed more fully *infra*.

STATEMENT OF FACTS

This matter is before this Court pursuant to the State's Motion for Judgment on the Pleadings (R. p. 262) which was granted by Judge Benjamin on February 17, 2016. (R. p. 49). The origin of this case is a heavily litigated, ongoing Workers' Compensation matter. The State only became involved by order of Judge Cooper to defend the constitutionality of § 42-9-260. As this case has developed, it has become apparent that (1) Appellant does not have standing because this Court is not able to grant him any relief and (2) even if Appellant did have standing, as the result of constitutional estoppel, the constitutionality of the statute is not properly before this Court.

Much of Appellant's brief discusses and addresses matters that are of no consequence to the constitutionality issue and many of the matters Appellant has included in the record are not relevant to the issues in this appeal and occurred before the State became a party. The State was not involved in the underlying case. All issues with regard to the merits of the underlying Workers' Compensation claim have been before the Workers' Compensation Commission pursuant to its statutory processes and are presently under direct appeal to the South Carolina Court of Appeals by both Respondent American Fire & Casualty Insurance Company (the

"Carrier") and Appellant (jointly, the "Appeals"). See appellate cases 2014-001815, 2014-001816, and 2014-001788. The State takes no position on and has no interest in the merits or ultimate resolution of the Appeals, the disputes between the Carrier and Appellant, or the ultimate results of the resolution of the workers' compensation matters and is not involved in those cases.

The Commission is not a party to this action. The State is a party because of the Amended Complaint ordered by Judge Cooper. The State elected to participate because of the constitutionality issue rather than challenge Judge Cooper's order. The State has appeared solely to defend the constitutionality of § 42-9-260.

The Appeals address the merits of the entire workers' compensation matter including such things as whether the investigation performed by the Carrier prior to terminating Appellant's benefits was in good faith, the burden of proof, and other matters pertaining to the findings and the merits. The Appeals also cover the gamut of relief and the merits and make it clear that there is nothing for this Court to address in this case in terms of providing relief to Appellant. Any relief for Appellant is properly before the South Carolina Court of Appeals on direct appeal from the awards of the Commission.

The pertinent facts are straightforward and are not disputed. Disputed facts with regard to the compensation issues are not relevant here and are not properly before this Court in this matter.

On or about June 6, 2014, Appellant initiated a claim for workers compensation benefits with the Commission, alleging he suffered a work-related injury on May 22, 2013. (Amend. Comp. p. 2, R. p. 210). Appellant requested temporary total disability benefits applicable under the South Carolina Workers Compensation Act, but declined to request a hearing. (Amend.

Comp. p. 3, R. p. 211). Carrier voluntarily paid temporary total benefits from July 11, 2013, to September 12, 2013, at which time Carrier terminated benefits, citing a good faith investigation which revealed, in the Carrier's opinion, that the claim was not compensable. (Amend. Comp. p. 3, R. p. 211), On or about September 18, 2013, Appellant filed a Form 15 Temporary Compensation Report requesting a hearing to determine entitlement to further temporary compensation benefits. (R at p. 387). Commissioner Beck found, in an Order dated December 5, 2013, that Carrier properly terminated temporary total benefits pursuant to a good faith investigation. (R. p. 387). On December 18, 2013, Appellant filed a Form 30, Request for Commission Review of all Findings of Fact challenging the Commission's finding that Carrier conducted a good faith investigation. On or about January 13, 2014, a hearing was held to determine whether Appellant sustained an injury by accident arising out of and in the course of his employment resulting in compensable disability. The Commission ultimately found that Appellant sustained a compensable injury and reinstated temporary total benefits from September 15, 2013. (R. pp. 45-46). Upon information and belief, the December 12, 2013, Order and the Order on the merits were appealed to the full Commission.

SUMMARY

Appellant challenges the constitutionality of § 42-9-260. Section 42-9-260(A) allows an employer to start payment of temporary benefits to an employee who has been out of work due to a reported work-related injury or occupational disease for eight days. The payments may be continued for up to 150 days from the date of the report of the injury "without any waiver of grounds for good faith denial." § 42-9-260(A). If the employer continues to pay temporary benefits past 150 days, the benefits may not be terminated without an evidentiary hearing and approval of the Commission. § 42-9-260(F). Subsection (B) provides the grounds upon which an

employer may terminate benefits prior to the 150 days, and does not require a pre-termination hearing, but does allow the employee to request a hearing upon termination of benefits, which must be held within 60 days of the request for the hearing. § 42-9-260 (C). Moreover, an employee may request a hearing prior to the termination of temporary benefits, or at any time. § 42-17-20. Section 42-17-20 provides that "[i]f the employer and the injured employee or his dependents fail to reach an agreement in regard to compensation under this Title within fourteen days after the employer has knowledge of the injury...either party may make application to the commission for a hearing in regard to the matters at issue and for a ruling thereon." Appellant argues that the termination of temporary benefits paid at the discretion of the employer within the 150 days, and prior to a hearing, constitutes a deprivation of a property interest without due process and equal protection under the law.

The Appellant's claims fail as a matter of law, and Judge Benjamin properly granted the State's motion for judgment on the pleadings. However, as pointed out, the constitutionality issue is not properly before this Court because of constitutional estoppel and Appellant has no standing because this Court is not able to grant him any relief. If Appellant is found to have standing, then this Court may rule on the constitutional issue since no facts are in dispute. There is no reason to remand for further proceedings below.

While the State believes Appellant's recitation of matters going back to the initial complaint filed September 27, 2013, are accurate, they are of no relevance to this appeal which is limited to the constitutionality issue, predate the State's participation, and it is doubtful that Appellant even has standing to bring this action because he can be afforded no relief in this matter.

As set forth more fully herein, the State believes that there is no need for a hearing. This is purely a matter of law that has been fully briefed and argued more than once. There are no factual disputes and nothing has changed.

ARGUMENT

I.

APPELLANT DID NOT HAVE STANDING TO BRING THIS ACTION SINCE NO RELIEF CAN BE GRANTED TO APPELLANT IN THIS PROCEEDING.

A. No Relief May be Granted to Appellant

To have standing, there must be a justiciable injury. *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 146, 568 S.E.2d 338, 350 (2002). It must be likely, and not merely speculative, that the injury will be redressed by a favorable decision. *Sea Pines Ass 'n for Protection of Wildlife, Inc. v. South Carolina Dept. of Natural Resources*, 345 S.C. 594, 550 S.E.2d 289 (2001).

No ruling by this Court on the constitutionality of § 42-9-260 will have any impact on the resolution of Appellant's workers' compensation claim. Any concerns about future terminations of Appellant's benefits without a hearing are purely speculative, have not happened, and are not ripe for adjudication. Appellant is receiving his benefits. No issue with regard to Appellant's benefits is before this Court in this appeal. Therefore, any opinion with regard to matters related to Appellant's benefits would be an advisory opinion. See, *Power v. McNair*, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970) ("It is uniformly held that the Declaratory Judgments Act does not require the court to give a purely advisory opinion as to the issues sought to be raised.").

B. The Constitutionality Issue Need Not Be Reached

This Court does not need to reach and should not reach the constitutionality issue. This Court is not in a position to grant any relief to Appellant. Nothing pertaining to the merits of his compensation claim is justiciable before this Court in this matter. Therefore, this Court should not reach the constitutional issue. The Supreme Court has stated that "It is this Court's firm

policy to decline to rule on constitutional issues unless such a ruling is required." *Riverwoods, LLC v. Cty. of Charleston*, 349 S.C. 378, 387, 563 S.E.2d 651, 656 (2002). See *In re McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001) ("Further, it is this Court's firm policy to decline to rule on constitutional issues unless such a ruling is required."); *Fairway Ford, Inc. v. County of Greenville*, 324 S.C. 84, 476 S.E.2d 490 (1996) ("In keeping with our firm policy of declining to reach constitutional issues unnecessary to the resolution of the case before us, we do not address the circuit court's alternative ruling that the ordinance fee violated equal protection."). No relief can be granted to Appellant so there is no need to reach the issue.

C. The Merits as to Appellant's Compensation Case are Pending Before this Court on Direct Appeal from the Commission.

The merits of the workers' compensation claims are before the Court of Appeals on direct appeal. Furthermore, the temporary benefits have been restored by Commission order and Appellant is receiving temporary benefits. The only temporary benefits that Appellant has not received are those from September 14, 2013, through February 27, 2014, and his entitlement to those benefits is before the Court of Appeals in the direct appeals from the Commission. The Commission has the sole authority to order reinstatement of benefits. The Court of Common Pleas does not have authority to award Appellant benefits and this issue is not before you. The issues of Appellant's continuing entitlement to receive these benefits and his entitlement to receive the back benefits for the period of time the benefits were suspended are before the Court of Appeals pursuant to the direct appeals. A ruling from this Court on the constitutionality of § 42-9-260, whether constitutional or unconstitutional, will play no role in the resolution of Appellant's entitlement to receive benefits. Appellant will continue to receive those benefits

regardless of this Court's ruling on the constitutionality. Furthermore, this action is directed towards Appellant only and does not purport to assert the rights of others similarly situated.

D. The Workers' Compensation Claim Has been Fully Litigated

The Workers' Compensation claim has been fully litigated before the Commission and is under appeal to the Court of Appeals. There is no justiciable matter before this Court.

Judge Lee in a previous order (the "Lee Order") (R. p. 15) dated October 9, 2013, ruled that:

> The Commission has the sole authority to reinstate benefits if appropriate. Because Plaintiff [Appellant] already has a mechanism for a remedy with the workers' Compensation Commission, who has exclusive original subject matter jurisdiction over relief to work-related injuries, this Court must defer to their authority on the issue of reinstating the benefits.

Note that Judge Lee declined to dismiss the facial challenge to the constitutionality. However, she did not address the standing issue.

D. The constitutionality of 42-9-260 is not subject to collateral attach in this case.

The issue of the constitutionality of § 42-9-260 has not been raised before the Court of Appeals in the direct appeals and is therefore not preserved for review in this case. Appellant does not have standing to raise it as a collateral matter in this action.

II.

IF APPELLANT HAD STANDING, THE CIRCUIT COURT DID NOT ERR BY APPLYING THE DOCTRINE OF CONSTITUTIONAL ESTOPEL AND GRANTING THE STATE'S RULE 12(C), SCRCP, MOTION DISMISSING THE DECLARATORY JUDGMENT ACTION CHALLENGING THE CONSTITUTIONALITY OF §42-9-260(B) (1-6) THAT ALLOWS CARRIERS TO TERMINATE CERTAIN PAYMENTS WITHOUT A HEARING.

The doctrine of constitutional estoppel prevents Appellant from challenging the constitutionality of § 42-9-260. Appellant is challenging the very statute under which his

temporary benefits were paid. Appellant disputes that this statute is the source of his benefits. However, the language is clear:

> (A) When an employee has been out of work due to a reported work-related injury or occupational disease for eight days, an employer may start temporary disability payments immediately and may continue these payments for up to one hundred fifty days from the date the injury or disease is reported without waiver of any grounds for good faith denial. Upon making the first payment, the employer immediately shall notify the commission, in accordance with a form prescribed by the commission, that payment of compensation has begun.

§ 42-9-260.

After his temporary benefits were terminated, Appellant exercised his right to request a hearing pursuant to § 42-9-260(C). He may not take the benefits of the statute and simultaneously attack its constitutionality. "A party invoking the provisions of a statute is not in a position to raise the question as to its constitutionality." *Ross v. Lipscomb*, 83 S.C. 136, 65 S.E. 451 (1909).

Appellant, having sought and received benefits pursuant to Section 42-9-260, is estopped from now challenging its constitutionality. The United States Supreme Court and South Carolina Courts have recognized the doctrine of constitutional estoppel, and have refused to allow litigants to challenge statutes under which they have voluntarily received benefits. "The Supreme Court has refused to allow litigants to challenge statutes under which they have voluntarily received benefits." *Strickland v. Flue-Cured Tobacco Co-op. Stabilization Corp.*, 643 F. Supp. 310, 319 (D.S.C. 1986) citing *United States v. City & County of San Francisco,* 310 U.S. 16, 60 S.Ct. 749, 84 L.Ed. 1050 (1940) and *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936). "In *Fahey v. Mallonee,* 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947), the Supreme Court held that "[i]t is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its

important conditions.' And that '[t]he Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits.' " *Id.* at 255, 67 S.Ct. at 1556 (citations omitted). *Strickland* at 319. See also, *Ross v. Lipscomb,* 83 S.C. 136, 65 S.E. 451, 456 (1909) ("[a] party invoking the provisions of a statute is not in a position to raise the question of its constitutionality.") and *Federal Deposit Ins. Corp. v. American Bank Trust Shares, Inc.*, 460 F. Supp. 549, 556 (D.S.C. 1979), ("one who utilizes an Act to gain advantages... is estopped from questioning the validity of its vital conditions.")

Appellant argues that "the Court will find that where the section that is being challenged is not a section under which the party is receiving benefits and where that section is severable, the Courts have generally not applied constitutional estoppel." Brief at 20. However, the law as stated by Appellant is "It is true that one cannot in the same proceeding both assail a statute and rely upon it." citing *Hurley v. Commissioner of Fisheries*, 257 U.S. 223, 225. Brief at 18. Appellant makes the argument throughout that he is not relying on § 42-9-260. However, Carrier clearly relied on this statute to pay the temporary total benefits so the Carrier could start paying benefits shortly after the accident without being prejudiced in its compensation defense.

III.

EVEN IF THE CONSTITUTIONAL ISSUE WERE BEFORE THE COURT, THE STATUTE IS CONSTITUTIONAL

There is no standing, no relief can be granted by this Court to Appellant, and there is no justiciable issue that can provide relief to Appellant so this Court should not proceed to the issue of constitutionality. However, should this Court desire to inquire into the constitutionality of § 42-9-260, there is no doubt as to its constitutionality.

1. § 42-9-260 does not violate Due Process under the Constitutions of the State or of the United States.

The initial inquiry in a due process analysis is whether the Appellant has been deprived of a protected property or liberty interest. In order to have a property interest in a benefit, one must have "more than a unilateral expectation of it;" one must have "a legitimate claim of entitlement to it." *Hamilton v. Board of Trustees of Oconee County School Dist.*, 282 S.C. 519, 525, 319 S.E.2d 717, 721 (1984).

Payment under § 42-9-260 is voluntary by the carrier/company during the first 150 days from the injury. Furthermore, as happened in this matter, a post deprivation [termination of benefits] hearing is required within sixty days if the carrier suspends or terminates payments. § 42-9-260(C). "[A] claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Mathews v. Eldridge*, 424 U.S. 319, 331, 96 S.Ct. 893, 900 (1976).

Furthermore, for there to be a due process violation, Appellant must have had a property interest in the temporary payments. There was no such property interest in this case.

§ 42-9-260(A) provides:

> (A) When an employee has been out of work due to a reported work-related injury or occupational disease for eight days, an **employer may start** temporary disability payments immediately and may continue these payments for up to one hundred fifty days from the date the injury or disease is reported without waiver of any grounds for good faith denial. Upon making the first payment, the employer immediately shall notify the commission, in accordance with a form prescribed by the commission, that payment of compensation has begun.

Id., (emphasis added).

Carrier took advantage of the "may" language and voluntarily started paying the temporary benefits. Then Carrier, after the performance of a good faith investigation[1] pursuant to § 42-9-260(B) (3), stopped paying the temporary benefits. Appellant did not have any right to the temporary benefits in the first 150 days absent a ruling by the Commission after Carrier terminated the benefits. Appellant was vested with a property interest in the temporary payments after the Commission ordered the benefits reinstated but not before. Regardless, Plaintiff was protected under the South Carolina Worker's Compensation process by exercising his rights to a post termination hearing pursuant to § 42-9-260(C) which he did request and the benefits were restored.

2. § 42-9-260 does not violate Equal Protection under the Constitutions of the State or of the United States.

Where, as here, the classification does not implicate a suspect class or abridge a fundamental right, the rational basis test applies. *City of Beaufort v. Holcombe,* 369 S.C. 643, 647-48, 632 S.E.2d 894, 897 (Ct. App. 2006). In *State v. Thompson*, 349 S.C. 346, 353, 563 S.E.2d 325, 329 (2002), the court found that the right to protect property [real property in *Thompson*] is not a fundamental right deserving strict scrutiny. Equal protection is satisfied if: (1) the classification bears a reasonable relation to the legislative purpose; (2) the members of the class are treated alike under similar circumstances; and (3) the classification rests on some reasonable basis. *Skyscraper Corp. v. Cnty. of Newberry,* 323 S.C. 412, 417, 475 S.E.2d 764, 766 (1996). "The fact that the classification may result in some inequity does not render it unconstitutional." *Davis v. County of Greenville,* 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994).

[1] Commissioner Beck's by Order filed December 5, 2013, found that Carrier properly terminated the benefits as the result of a good faith investigation. (R.p.184-185).

Workers' compensation laws were intended by the Legislature to relieve workers of the uncertainties of a trial for damages by providing sure, swift recovery for workplace injuries regardless of fault. *Peay v. US Silica Co.,* 313 S.C. 91, 94, 437 S.E.2d 64, 65 (1993), citing *Cokeley v. Robert Lee, Inc.,* 197 S.C. 157, 14 S.E.2d 889 (1941). "It is the established law of this State that any reasonable doubt as to the construction of a Workmen's Compensation Law must be resolved in favor of the claimants, its provisions reconciled if possible, its purposes effectuated and its presumptions and penalties directed toward the end of providing coverage rather than non-coverage." *Cokeley*, 14 S.E.2d at 894.

South Carolina courts may analyze legislative intent without legislative history. In *Cokeley*, without citation to an outside source of legislative history, the Court stated "we do not feel that it was the intention of the Legislature to make the decision as alleged by the appellants." *Id.* at 894. In *Thompson, supra* (trapping beaver out of season), the court found, without citing any legislative history, that two statutes survived scrutiny and stated "Clearly, the purpose of these laws is to protect wildlife." *Id.*, 349 S.C. at 355, 563 S.E.2d at 330. As part of its justification as to intent, the *Thompson* court cited *Rice Hope Plantation v. South Carolina Pub. Serv. Auth.,* 216 S.C. 500, 59 SE 2d 132 (1950) (overruled on other grounds *McCall v. Batson* 329 SE 2d 741, 285 SC 243 (1985)) for the proposition that preservation of game and fish is a matter of public interest. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Ferguson Fire and Fabrication, Inc. v. Preferred Fire Protection, L.L.C.*, 409 S.C. 331, 344, 762 SE 2d 561, 567 (2014). In the instant case, *Peay* and *Cokeley* provide a basis for determining the legislative intent for the Workers' Compensation laws.

Section 42-9-260 treats all employees whose benefits are terminated within 150 days the same: they all have the opportunity to request a post-termination hearing to seek the reinstatement of benefits, which hearing must be held in 60 days. Section 42-9-260 treats all employees who receive temporary disability benefits for more than 150 days the same: the benefits may not be terminated without an evidentiary hearing and Commission approval. The Act through § 42-9-260(B) provides a limited period of time (150 days) in which the employer can make provisional payment of benefits without being estopped from denying liability if the investigation turns up grounds for denial. This allows the employee to begin immediately receiving benefits, while at the same time allowing the employer an adequate, limited time period (150 days) in which he can conduct a thorough investigation to enable him to make an informed decision on whether or not to terminate payment of benefits.

The reason for the 150 day distinction is to place a limitation on the period of time in which the employer enjoys the protection of being able to pay benefits, but not having to worry about being estopped from denial based on the findings of his investigation. Choosing the fixed number of 150 days allows a certain time period in which the employer knows he must complete his investigation or be forced to admit or deny coverage. Section 42-9-260 encourages the prompt payment of temporary disability benefits to injured workers. It allows an injured worker to receive temporary benefits without establishing the employer's liability for the injury. It allows the employer to mitigate any potential damages by starting payments and medical treatment, and allowing the employer to terminate those benefits if the employee is able to return to work, refuses medical treatment, or if the employer's investigation reveals good faith grounds for the denial of the claim. Allowing the employer to terminate discretionary disability payments within 150 days for the reasons set forth in § 42-9-260(B) provides an incentive for the employer to

start disability payments to the injured worker immediately. Moreover, the 150 day period allows the employer to conduct an investigation of the claim while paying temporary benefits without prejudice to the employer's legal position.

As set forth in *Cokeley supra*, "it is the established law of this State that any reasonable doubt as to the construction of a Workmen's Compensation Law must be resolved in favor of the claimants." When § 42-9-260 was amended in 1996 by Act No. 424, § 13, the law was changed to encourage carriers to start payments before a hearing to determine whether an injured employee was entitled to compensation benefits; therefore, encouraging carriers to provide needed funds to the injured employee earlier in the process in the first 150 days. It certainly cannot be said based on the policies behind the Workers' Compensation system and the history of the enactment of the current version of § 42-9-260 that there is not a rational basis for the classification based on before and after 150 days from injury.

Plaintiff states in his Memorandum of Law in Support of the Complaint that "There is no difference between a worker who is disabled under the Act before 150 days versus after 150 days." (R. p. 349). This misses the point. The law was specifically changed to allow carriers to voluntarily pay benefits in the first 150 days without waiving their rights. This allows the payments to be made before entitlement is established, therefore encouraging carriers to start paying. The Legislature clearly had a rational basis for this classification and, furthermore; the law is clear that classifications do not have to be perfect and great deference will be given to legislative classifications.

A declaration of unconstitutionality requires Appellant to meet a high burden. "This Court is directed by the constitution, and our precedent, to make every effort to find acts of the

General Assembly constitutional." *Joytime Distrib. and Amusement Co., Inc. v. State*, 338 S.C. 634, 653, 528 S.E.2d 647, 657 (1999). For the above reasons the statute is constitutional.

IV.

THE STATE HAD A RIGHT TO PARTICIPATE IN THIS CASE

The State was not a party to the case below until Judge Cooper ordered an amended complaint and Appellant served its amended complaint.[2] When the constitutionality of a statute is at issue, the Attorney General has the right to be heard. See Rule 4(d)(4)(B) (notification of the Attorney General when a statute's constitutionality is challenged and State, officer or agency is not a party.). As set forth in § 15-53-80: "If the statute, ordinance or franchise is alleged to be unconstitutional the Attorney General shall also be served with a copy of the proceeding and be entitled to be heard." The fact of a constitutional challenge is the source of the authority, not who raises a defense or when. There cannot be an issue of timeliness. Judge Cooper ordered the State to appear and the State, represented by the Attorney General, made a timely response after service of the Amended Complaint.

Appellant cites *Thomas v. Hammond*, 299 S.C. 116, 382 S.E.2d 900 (1989) for the proposition that "the State was properly served and chose not to appear or take a position in this matter. Thus, having been properly served and not taking a position, the State should be barred from further participation." Brief at 24. *Hammond* is about an attempt to close a public road by adjacent landowners. The trial court ordered the road closed and interested parties brought a motion under SCRCP 60 for relief from the judgment. The Court ruled that the county was barred from relief but held that the interested landowners were entitled to a new trial. The

[2] In the current case, the Attorney General did not respond to the initial notice of the constitutional challenge, which is not mandatory, it is just a notification requirement. The Attorney General did appear for the State when Judge Cooper ordered the Appellant to file an amended complaint which named the State.

different positions of the county and the other interested parties are critical to understanding this decision. As to the county, it had authorized its attorneys not to oppose the closing and was therefore barred because of the statements county's attorney made in court. The interested landowners followed the steps they believed necessary to show opposition to the road. The landowners were assured that the closing would be opposed by the county. Yet, when the county changed its position, the parties were not notified and were therefore entitled to relief.

In Paragraph 6 of its answer to the Amended Complaint, the State denied the allegation of Paragraph 6 of the Amended Complaint that:

> The State of South Carolina is a necessary party to any action challenging the constitutionality. . .

(R. p. 254).

In their Brief at page 25, the Appellant argues this denial coupled with the States non-intervention when the State was served with the initial complaint means the Court should have granted Appellant's Motion to Dismiss the State. Brief, page 25.

> Therefore, based upon the position of the State in having not replied to the original Summons and Complaint after being properly served and based on its position in its Answer that it was not a necessary party to any action challenging the constitutionality of a statute, the Court should have granted Plaintiff's [Appellant's] Motion to Dismiss.

The State's denial of Paragraph 6 of the Amended Complaint was nothing more than a correct statement of the law. The State is not a necessary party but it does have the right to participate. Paragraph 6 of the Amended Complaint alleged:

> 6. That the Defendant State of South Carolina has been added as a party to this action by the Circuit Court by Order dated 1-31-14 as being a necessary party since this action challenges the constitutionality of a statute.

As has been shown *infra*, the State is entitled to notice pursuant to SCRCP 4 and has the absolute right to participate unless it is untimely.

V.

THE COURT DID NOT DENY APPELLANT DUE PROCESS BY NOT GRANTING A REHEARING AND BY WAITING 15 MONTHS TO ISSUE A DECISION

As discussed *supra*, there is not any relief that can be granted Appellant in this matter. No ruling by this Court in this matter will change the *status quo* as to Appellant. The passage of time has no impact, therefore cannot be a due process violation. It was in the sound discretion of the trial court to decide the SCRCP 59(e) motion on briefs alone. SCRCP 59(f). "Under Rule 59(f), SCRCP, a Rule 59(e) motion "may in the discretion of the court be determined on the briefs filed by the parties *without oral argument.*" (emphasis in opinion). Pollard v. Cty. of Florence, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994).

In her FORM 4 dated March 16, 2016, Judge Benjamin stated "Because this Court granted and held a rehearing on this matter on January 25, 2016 at Plaintiffs request, where he put forth the same argument referenced in the memorandum, the 59(e) motion for reconsideration is denied." (R. p. 57).

The initial inquiry in a due process analysis is whether the party has been deprived of a protected property or liberty interest. In order to have a property interest in a benefit, one must have "more than a unilateral expectation of it;" one must have "a legitimate claim of entitlement to it." *Hamilton,* 282 S.C, at 525, 319 S.E.2d at 721. Appellant has been deprived of nothing as no relief can be granted.

There was a rehearing. There is not relief that can be granted to Appellant, therefore, there cannot be a due process violation.

CONCLUSION

For the reasons set forth herein, this Court should grant the States motion for judgment on the pleadings.

Respectfully submitted,

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RULE 211(b) CERTIFIACTION

I hereby certify that the Final Brief of Respondents complies with Rule 211(b), SCACR and the August 13, 2007 Supreme Court Order regarding personal identifiers.

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