

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 APPELLANT

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of the Issues on Appeal.....	iv
Statement of the Case.....	1
Statement of Facts.....	10
Arguments	
I. THE CIRCUIT COURT ERRED BY GRANTING THE STATE'S RULE 12(C), SCRCF, MOTION AND DISMISSING THE DECLARATORY JUDGMENT ACTION CHALLENGING THE CONSTITUTIONALITY OF THE STOP PAYMENT WITHOUT A HEARING PROVISIONS OF SC CODE §42-9-260(B) (1-6) ON THE BASIS OF CONSTITUTIONAL ESTOPPEL.....	15
II. THE CIRCUIT COURT ERRED BY ORDERING <u>EX MERO</u> <u>MOTU</u> THAT THE STATE BE ADDED AS A PARTY WHERE THAT ISSUE WAS NOT BEFORE THE COURT AND WHERE THE STATE HAD BEEN PREVIOUSLY PROPERLY SERVED AND CHOSE NOT TO APPEAR; AND SUBSEQUENT THERETO BY NOT DISMISSING THE STATE AS A PARTY BASED ON THE MOTION OF THE PLAINTIFF AND THE POSITION OF THE STATE IN REFERENCE TO THE MOTION.....	22
III. WHERE THE COURT HELD A HEARING ON ALL REMAINING MOTIONS AND ON THE DECLARATORY JUDGMENT ACTION; TOOK THE MATTERS UNDER ADVISEMENT; AND THEN DID NOT ISSUE NOTES FOR DECISION UNTIL FIFTEEN (15) MONTHS LATER, THE COURT ERRED BY NOT GRANTING A REHEARING AND THE DELAY IN RENDERING A DECISION DENIED THE PLAINTIFF DUE PROCESS OF LAW.....	25
Conclusion.....	27

TABLE OF AUTHORITIES

Cases

<u>Ashwander v. Tennessee Valley Authority,</u> 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936).....	18
<u>Banc Ohio National Bank v. Neville,</u> 310 S.C. 323, 426 S.E.2d 773 (1993).....	23
<u>Buck v. Kuykendall,</u> 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623 (1925).....	16,17,18
<u>Fahey v. Mallonee,</u> 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947).....	19
<u>Gamble v. Clarendon County, et. al.,</u> 188 S.C. 250, 198 S.E.2d 857 (1938).....	18
<u>Marley v. Kirby,</u> 271 S.C. 122, 245 S.E.2d 604 (1978).....	23
<u>Ramey v. Ramey,</u> 273 S.C. 680, 258 S.E.2d 883 (1979).....	23
<u>Thomas v. Hammond,</u> 299 S.C. 116, 382 S.E.2d 900 (1989).....	23
<u>Williamsburg County v. Graham,</u> 190 S.C. 233, 196 S.E.2d 547 (1938).....	18

Statutes, Rules and Regulations

SC Code Ann. §42-1-100.....	20
SC Code Ann. §42-1-120.....	10,21
SC Code Ann. §42-9-10.....	10,20
SC Code Ann. §42-9-260(B) (1-6).....	1,7,8,10,15,21,22,25,27
SC Code Ann. §42-15-60.....	10,20
SC Code Ann. §42-17-10.....	10,20
Rule 4(d)(4)(B) SCRCF.....	22

Rule 12, SCRCP.....	2
Rule 12(b)(6), SCRCP	3
Rule 12(b)(7), SCRCP.....	3,4,5,22,23
Rule 12(c), SCRCP.....	7,13,15
Rule 19, SCRCP.....	5,6,23
Rules 19(a), SCRCP.....	23
Rule 59, SCRCP.....	3,4,6,9,10
Rule 59(e), SCRCP.....	3,15
Rule 65, SCRCP.....	1

STATEMENT OF ISSUES ON APPEAL

- I. DID THE CIRCUIT COURT ERR BY GRANTING THE STATE'S RULE 12(C), SCRCP, MOTION AND DISMISSING THE DECLARATORY JUDGMENT ACTION CHALLENGING THE CONSTITUTIONALITY OF THE STOP PAYMENT WITHOUT A HEARING PROVISIONS OF SC CODE §42-9-260(B) (1-6) ON THE BASIS OF CONSTITUTIONAL ESTOPPEL?

- II. DID THE CIRCUIT COURT ERR BY ORDERING EX MERO MOTU THAT THE STATE BE ADDED AS A PARTY WHERE THAT ISSUE WAS NOT BEFORE THE COURT AND WHERE THE STATE HAD BEEN PREVIOUSLY PROPERLY SERVED AND CHOSE NOT TO APPEAR; AND SUBSEQUENT THERETO BY NOT DISMISSING THE STATE AS A PARTY BASED ON THE MOTION OF THE PLAINTIFF AND THE POSITION OF THE STATE IN REFERENCE TO THE MOTION?

- III. WHERE THE COURT HELD A HEARING ON ALL REMAINING MOTIONS AND ON THE DECLARATORY JUDGMENT ACTION; TOOK THE MATTERS UNDER ADVISEMENT; AND THEN DID NOT ISSUE NOTES FOR DECISION UNTIL FIFTEEN (15) MONTHS LATER, DID THE COURT ERR BY NOT GRANTING A REHEARING AND DID THE DELAY IN RENDERING A DECISION DENY THE PLAINTIFF DUE PROCESS OF LAW?

STATEMENT OF THE CASE

The Declaratory Judgment action was instituted based on the Respondent American Fire & Casualty Insurance Company (hereinafter "American Fire", the employer's insurance carrier in the workers' compensation claim), after having accepted, authorized and paid workers' compensation benefits for 115 days after the work-related accident including paying the Claimant, Clarence B. Winfrey, Jr., weekly temporary total workers' compensation benefits and authorizing medical care, stopping benefits without a hearing pursuant to the exception provisions of SC Code §42-9-260, subsection (B)(1-6) and specifically subsection (B)(3). (R., pp. 59-93). The Plaintiff, the Appellant in this appeal and the Claimant in the workers' compensation action, sought a declaration under the Uniform Declaratory Judgment Act that the provisions of Code §42-9-260(B)(1-6), which allows for the stopping of benefits without a hearing during the first 150 days that benefits have been paid, are unconstitutional as violating both due process and equal protection. The Complaint alleged that since the Respondent, American Fire, after having accepted, authorized and paid benefits was allowed to stop those benefits without a hearing during the first 150 days and since the Claimant had a protected property right in those benefits under the decisions of the South Carolina Supreme Court that as to due process, this violated his rights to a hearing, an opportunity to be heard and to cross-

examination before stopping benefits; and as to equal protection since after the 150 day period benefits for any Claimant cannot be stopped before a hearing is held before the SC Workers' Compensation Commission and a ruling is made that the Defendants are allowed to stop benefits under the Act, that the 150 day provision allowing benefits to be stopped without a hearing violates the equal protection clauses of both our United States and State Constitutions (R., pp. 59-93). The Complaint also requested a Temporary Restraining Order Without Notice ordering the Respondent American Fire to reinstate benefits pending a determination of the Declaratory Judgement Action. The Appellant also filed a Motion for a Temporary Restraining Order. (R., pp. 94-96). After review of the verified Complaint and Affidavit of Counsel, the Circuit Court issued its Order granting a Temporary Restraining Order Without Hearing (R., pp. 10-12). American Fire, filed Motions under Rule 12 and Rule 65 seeking to dissolve the Restraining Order issued without notice (R., pp. 97-102). The Plaintiff filed Affidavits of Service with the Court pursuant to Court Rule confirming: service on American Fire through its Counsel and by filing with the SC Department of Insurance pursuant to State statute; and filing an Affidavit of Service on the South Carolina Attorney General's office via Certified Mail, Return Receipt Requested with Return Receipt being filed with the Court from the South Carolina Attorney General's office on 10/01/13.

(R., pp. 103-107). After Hearing on October 10, 2013, the Court issued an Order lifting the Temporary Restraining Order on the basis that the Temporary Restraining Order requested required the Court to take an affirmative action of "reinstatement" of benefits rather than "restraining" any behavior. The Court also found that the Court had exclusive jurisdiction over the Declaratory Judgement action as to whether or not the challenged subsections of that statute were facially unconstitutional. (R., pp. 13-16). The Plaintiff filed a Rule 59(e), SCRCF, Motion to the Order. (R., pp. 108-123).

American Fire, filed a Rule 12(b)(7) Motion, a Motion for Summary Judgment, a Motion for Fees, Costs and Other Relief the Court Deemed Appropriate and that same day also filed a Motion under Rule 59 as to the Order of the Court dated October 9, 2013 (R., pp. 124-126; 127-129; 130-134; 145-147). In addition, American Fire filed an Answer and Counter-Claim alleging as a counter-claim an entitlement to attorney's fees and costs and other damages under the Frivolous Proceedings Act (R., pp. 135-144). The Plaintiff filed a Motion to Dismiss the Counter-Claim under 12(b)(6), SCRCF, on October 31, 2013 and filed Replies to the Motions for Summary Judgment, the Motion for Fees, Costs and Other Relief and to the Motion to Dismiss for failure to add an indispensable party pursuant to Rule 12(b)(7); and a Reply to American Fire's Motion to Alter or Amend. (R., pp. 146-153; 154-

155; 156-159; 160-164; 165-168). On November 6, 2013, Judge Lee, denied both the Plaintiff's and the Defendant American Fire's Rule 59 Motions. (R., pp. 17-20).

All of the other Motions came before the Honorable Thomas H. Cooper for hearing on January 15, 2014. (R., pp. 455-487). In reference to the 12(b)(7) Motion, which is addressed to the addition of an indispensable party, as set out in the Motion American Fire did not seek to add an indispensable party but sought to dismiss the Plaintiff's Complaint on the basis that the Plaintiff had failed to add an indispensable party. As is set out in the Reply to the 12(b)(7) Motion, the Plaintiff in part responded that American Fire in their Motion failed to list who the indispensable party was that was not made a party to the action. At the hearing in response to a question by the Court as to who the indispensable party was, Counsel for American Fire responded that it was either the SC Workers' Compensation Commission or the State of South Carolina. Subsequent to the January 15, 2014 hearing, Judge Cooper issued a Form 4 Order denying the Defendants' Motion for Fees, Costs and Other Relief and granting the Plaintiff's Motion to Dismiss the counter-claim filed by American Fire and took the Defendants' Motion to Dismiss under Rule 12(b)(7) and the Motion for Summary Judgement under advisement. (R., p. 21).

Subsequently on January 21, 2014, the SC Workers'

Compensation Commission filed a Motion for Leave to file an amicus curiae Brief on the indispensable party issue and recited American Fire's unusual position at the hearing as to who the indispensable party was and that the SC Workers' Compensation Commission, "should be considered as a possible party to be added as a Defendant." The Commission Brief asked the Court not consider it as an appropriate party and noted that the Defendants had mentioned the Commission as, "a potential party" to the action for the first time at the hearing (R., pp. 188-198). Subsequent to that filing, American Fire, filed a Reply to the Commission's amicus curiae Brief. (R., pp. 199-206). Judge Cooper then issued an Order denying American Fire's Motion to Dismiss under Rule 12(b)(7) noting in part that the Motion failed to allege who the, "indispensable party" was and that it was thus facially deficient. The Court further noted that the purpose of Rule 19, SCRCF, was to make sure that all parties that needed to be before the Court were and that the Rule contemplated that a party claiming non-joinder of a necessary party must set forth both, "the name of that party and the reason why that party was not originally joined." In addition, the Court denied American Fire's Motion for Summary Judgment. The Court specifically found and held that having heard the arguments of Counsel and having considered the parties' pleadings and the Memorandums of Law, that the Court determined,

"Plaintiff has raised significant issues of law and/or fact concerning Plaintiff's claim that §42-9-260 of the SC Code of Law is unconstitutional."

The Court then added a separate ruling under Rule 19 that the Court was of the opinion that the State of South Carolina and/or the State Legislature should be named as a necessary party; that the Plaintiff had to amend his Complaint to add the State of South Carolina or the State Legislature as a party to the action; and had to serve the South Carolina Attorney General's office with the Amended Complaint within 30 days of the date of the Order. (R., pp. 22-25).

American Fire, filed a Rule 59 Motion to Judge Cooper's Order to which a Reply was made and after which, an Order was issued by Judge Cooper denying that Motion.

The Plaintiff on February 18, 2014, filed and served a Summons and Amended Complaint adding the State of South Carolina as a party to the action pursuant to the Order of Judge Cooper and served the Amended Complaint on both American Fire and the South Carolina Attorney General's office. (R., pp. 207-239). American Fire filed an Answer and Counter-Claim to the Amended Complaint listing the same identical counter-claim that had been previously listed as to the first Complaint filed. (R., pp. 240-252). The Plaintiff again filed a Motion to Dismiss the Counter-Claim filed by American Fire.

After Plaintiff's Counsel granted the Attorney General's

office an extension to, "Answer", the Attorney General's office on behalf of the State of South Carolina (hereinafter "State") filed its Answer in Reply to the Amended Summons and Complaint on April 21, 2014. (R., pp. 253-260).

In addition, on that same date, the State filed a Motion for Judgment on the Pleadings under Rule 12(c), SCRCP, and, for the first time, as part of the basis for that Motion under Paragraph 3, the State alleged that the Plaintiff was barred from challenging the constitutionality of §42-9-260(B)(1-6) under the doctrine of constitutional estoppel. The State also filed a Memorandum in Support of its Motion. (R., p. 263; pp. 265-281)

Subsequent to the filing of the Answer of the State, the Plaintiff filed a Motion to Dismiss the State as a party Defendant. (R., pp. 282-289).

American Fire filed a Memorandum in Support of its Answer, Counter-Claim and Motion to which the Plaintiff filed a Responsive Memorandum (R., pp. 290-303; 304-312).

The Plaintiff then filed a Reply to the Memorandum of the State as to the Motion for Judgment on the Pleadings and filed a Memorandum in Support of the Amended Complaint, to which the State filed a Sur-Reply Memorandum (R., pp. 313-332; 333-351; 352-362).

A hearing was held on the Declaratory Judgment action and all remaining Motions on September 9, 2014 at the conclusion of which Judge Benjamin asked for proposed Orders from all parties within

30 days of the date of the Hearing and filed a Form 4 Order noting that the matter was taken under advisement (R., p. 601, ll. 8-22).

Pursuant to the direction of the Court, a Proposed Order was submitted by American Fire (R., pp. 386-391). The State filed Proposed Orders and in its Proposed Order granting the State's Motion for Judgment on the Pleadings, the State set forth that the Court was assuming without deciding that the Plaintiff had standing to bring the action and that he was not constitutionally estopped from bringing the action both of which had been set forth as bases for the granting of a Motion on the Pleadings. That Proposed Order does not further address the issue of constitutional estoppel (R., pp. 392-404; 405-413).

The Plaintiff submitted one Proposed Order to the Court addressing all issues as to all pending motions, some of which were ruled on at the Hearing, the Motion for Judgment on the Pleadings, and for a decision on the Declaratory Judgment action declaring §42-9-260(B)(1-6) unconstitutional, all of which were argued at the Hearing (R., pp. 414-440).

Following the Hearing held on September 9, 2014, on December 22, 2015, the Court issued an Email and Order Instructions granting the State's Motion for Judgment on the Pleadings as filed by the Attorney General's office (R., p. 631). On December 23, 2015, Counsel for the Plaintiff expressed concerns to the Court in reference to the length of time and as to certain references and

requested a hearing on those issues prior to the issuance of any formal Order. (R., pp. 635-636). Thereafter, a Proposed Order was not submitted by the Attorney General's office but was submitted by Counsel for American Fire.

After additional concerns were raised by the Plaintiff as to American Fire preparing the Proposed Order instead of the Attorney General's office, who had raised the issue on behalf of the State, and after being advised by the Attorney General's office that the Order, "was a joint effort between Mr. Bayne and the Attorneys for the State", the Court set a hearing for the Plaintiff to express his concerns as to the Proposed Order prior to its issuance. (R., p. 637; 638). A Hearing was held with the stated purpose only being to go over the concerns of the Plaintiff in reference to the Order Instruction Notes, including the length of time between the hearing and the Decision and in reference to the issue upon which the Court decided the case which had been raised by the State in its Motion for Judgment on the Pleadings whereas the Proposed Order had been prepared and submitted by American Fire (R., pp. 601-629).

Thereafter, the Order of the Court was issued granting the State's Motion for Judgment on the Pleadings on the basis of constitutional estoppel. (See: R., pp. 49-56). A Rule 59 Motion was filed on February 26, 2016 on which no hearing was granted. However, the Court noted in its Form 4 Order denying the Motion

that the Court considered the "January 25, 2016 hearing" to have been to consider the issues raised in the Rule 59 Motion. (R., p. 57). From the decision of the Court, this Appeal follows.

STATEMENT OF FACTS

The Appellant, the injured worker and Claimant before the Workers' Compensation Commission, sustained an electrocution injury on or about May 22, 2013. Following the report of the accident, it is uncontested that American Fire, the insurance carrier for the employer in the workers' compensation matter, accepted and began paying temporary total disability benefits and authorized and provided medical care for the accepted injury pursuant to the provisions of SC Code §42-17-10 (provision of benefits by agreement), §42-9-10 and §42-1-120 (temporary weekly compensation) and §42-15-60 (medical care). After providing weekly compensation and medical care for approximately 115 days, the Defendants by letter containing a WCC Form 15 (II) notified the Claimant that they were immediately stopping payment of benefits without a hearing pursuant to the provisions of §42-9-260(B)(1-6) and specifically on the alleged basis of having conducted a "good faith" investigation. See subsection (B)(3).

After the electrocution injury on May 22, 2013, the Plaintiff obtained Counsel and Counsel contacted the adjuster as managing agent for the Employer's workers' compensation insurance carrier, American Fire, about benefits who after

review of the file, authorized and started temporary compensation benefits under the Workers' Compensation Act. (R., pp. 84-88) Thereafter the Plaintiff began receiving weekly compensation benefits in the amount of \$426.69 and continued to receive medical care which had been previously authorized, paid for and provided through Dr. Lide and Dr. Travis and a rehab nurse was assigned for local handling of the claim.

On September 13, 2013, Counsel for the Plaintiff was notified by the Plaintiff that his assigned rehab nurse, Ms. Kristy L. Thompson, RN, BA, BSN had been advised to close her file as the case was being denied. On September 16, 2013, by letter dated September 12th, Counsel for the Plaintiff, received a letter and a SCWCC Form 15 stating that the Defendant had stopped temporary compensation benefits and medical care and had denied the claim based on the grounds of, "a good-faith investigation." (R., pp. 80-92.

According to the Complaint Affidavit, Plaintiff was at home recuperating and was totally disabled from gainful employment. His medical situation was extremely tenuous, wherein any slight fluctuation in his physical and/or mental condition (stress) could result in irreparable harm up to and including the death of Plaintiff. (R., pp. 80-92).

According to the Affidavit, the Defendant had stopped compensation to the Plaintiff and that due to his disabled

condition he had no alternative economic means of paying his bills and supporting himself other than his temporary compensation. According to the communication from the rehab nurse, she had closed her file at the direction of the adjuster, robbing the Claimant of all support and assistance in securing medical care and benefits. Also, while to the knowledge of Counsel, his doctors continued to treat the Plaintiff, they were doing so without guarantee of payment on the basis of the denial of the Defendant and some necessary medical was being delayed. Therefore, based upon the possible irreparable harm that may have come from the stoppage of benefits without a hearing, pursuant to SC Code §42-9-260, the Declaratory Judgment Action and Relief requested was filed.

It is an undisputed fact that the Respondent American Fire filed an Answer and Counter-claim and filed numerous Motions. The State of South Carolina through the Attorney General's Office filed no response and took no action in the proceeding nor filed any communication or response on behalf of the State of South Carolina.

It is an undisputed fact that without any Motion to add the State as a party the Court ordered that the State of South Carolina through the Attorney General's Office be added as a party and subsequently the Amended Complaint was duly and properly served on both the Respondent American Fire and

Respondent State of South Carolina through the Attorney General's office. Affidavits of Service were properly filed and the Respondent American Fire filed an Answer to the Amended Complaint.

It is undisputed that after an extension of time to, "answer" was granted by the Appellant to the Attorney General's Office representing the State, the Attorney General's Office filed an Answer to the Amended Complaint but also filed a Rule 12(c) Motion for Judgment on the Pleadings. In that Motion and as part of the Motion, the Respondent State of South Carolina raised for the first time the issue of constitutional estoppel. It is an undisputed fact that prior to the filing of this Motion that the issue of constitutional estoppel had not been raised by the Respondent American Fire.

After responsive Memorandums as to all Motions and to the Complaint and the Answer and Counterclaim were filed including Memorandum in Support of the various Motions, Complaint, Answer and Counterclaim, a hearing was held on September 9, 2014 on all remaining Motions and the Declaratory Judgment action.

At the hearing, all issues were argued including the issue of constitutional estoppel with that issue being argued by the Appellant and the Attorney representing the State. Also during that Hearing, Counsel for the State conferred with an individual beyond the rail who was subsequently identified as Counsel for

the SC Workers' Compensation Commission. Objection was made to that consultation. (R., p. 546, l. 11 - p. 548, l. 10). At the Hearing, the Court ruled on certain Motions and then took the remaining Motion including the Motion for Judgment on the Pleadings and the Declaratory Judgment action under advisement and requested proposed Orders from all parties - American Fire, the State, and Plaintiff. Proposed Orders were appropriately and timely filed with the Court. Among the proposed Orders was a proposed Order filed by the State granting the State's Motion for Judgment on the Pleadings.

Subsequent to the Hearing and after the proposed Orders were submitted, fifteen (15) months later, the Court issued Notes for the Decision granting the State's Motion for Judgment on the Pleadings on the basis of constitutional estoppel and requesting that the Order be submitted by the, "Defendants".

It is undisputed the proposed Order originally submitted by the State was not based on constitutional estoppel. It is undisputed that after the Notes were issued by Judge Benjamin, a proposed Order was submitted by Counsel for the Respondent American Fire who had not raised the issue of constitutional estoppel and that the Attorneys representing the Respondent State advised the Court that,

"the preparation of this Order was a joint effort between Mr. Bayne and the Attorneys for the State of South Carolina."

It is uncontested as a fact that the proposed Order submitted by the Respondent American Fire was signed by the Court; a Rule 59(e) Motion was filed requesting another hearing specifically on the issues of constitutional estoppel and on the basis for the Court's Decision to which no further Hearing was granted and to which the Court responded that the previous hearing which was supposed to be limited to the, "concerns" that had been raised by the Appellant as to the delay and as to the request for a Hearing and as to the preparation of the Notes for Decision was noted as being supposed to be a hearing on all issues in reference to the Order. (See: R., p. 638).

ARGUMENTS

I. THE CIRCUIT COURT ERRED BY GRANTING THE STATE'S RULE 12(C), SCRCF, MOTION AND DISMISSING THE DECLARATORY JUDGMENT ACTION CHALLENGING THE CONSTITUTIONALITY OF THE STOP PAYMENT WITHOUT A HEARING PROVISIONS OF SC CODE §42-9-260(B) (1-6) ON THE BASIS OF CONSTITUTIONAL ESTOPPEL.

The Court will find upon close reading of all the cases decided and cited to the Circuit Court under the concept of constitutional estoppel which served as the basis for the Court's Decision granting the State's Motion for Judgment on the Pleadings and dismissing the Declaratory Judgment action, that it has seldom actually been applied especially alone (note: generally coupled with severability) to prevent a litigant from challenging the constitutionality of a statute. Constitutional estoppel as a general concept and as a general principle applied

in a general fashion is that a party cannot both challenge the constitutionality and validity of a statute and at the same time rely upon it and/or avail himself of the benefits conferred by a statute. Buck v. Kuykendall, 267 U.S. 307, 45 S.Ct. 324, 69 L.Ed. 623 (1925). Herein lies the problem both with the State's argument and the Circuit Court's reliance on this principle.

Specifically, in this case the Appellant did not request and did not receive benefits under the challenged statute and the Respondent American Fire did not agree to provide benefits under the challenged statute. The statute the Appellant challenged as being unconstitutional is a subsection of the stop payment statute, SC Code §42-9-260, subsection (B)(1-6) which was created for the benefit of and which allows for employers and/or their insurance carriers to stop payment of benefits without a hearing during the first 150 days; i.e., the Respondent American Fire in this case.

The United States Supreme Court, our Federal Courts and our SC Supreme Court have all made it perfectly clear that there is no prohibition against and the concept of constitutional estoppel does not apply to a litigant where the litigant is receiving benefits under one section of a statute or under a separate statute and is challenging the constitutionality of another section of the statute or another statute as part of the Act; as in this case.

While this principle as to the right to challenge one section of an Act while receiving benefits under another part of the Act has been set out repeatedly by the US Supreme Court, our Federal Courts and the SC Supreme Court, it is probably no better stated than in the case of Buck v. Kuykendall, supra.

Quoting from Buck, supra:

"By motion to dismiss filed in this Court, the State makes the further contention that Buck is estopped from seeking relief against the provisions of 4. The argument is this: Buck's claim is not that the Department's action is unconstitutional because arbitrary or unreasonable. It is that 4 is unconstitutional because use of the highways for interstate commerce is denied unless the prescribed certificate shall have been secured. Buck applied for a certificate. Thus he invoked the exercise of the power which he now assails. One who invokes the provision of law may not thereafter question its constitutionality. The argument is unsound. It is true that one cannot in the same proceeding both assail a statute and rely upon it. Hurley v. Commissioner of Fisheries, 257 U.S. 223, 225; compare Wall v. Parrott Silver and Copper Co., 244 U.S. 407, 411. Nor can one who avails himself of the benefits conferred by a statute deny its validity. St. Louis v. Prendergast Co., 260 U.S. 469, 472. But, in the case at bar, Buck does not rely upon any provision of the statute assailed, and he has received no benefit under it. He was willing, if permitted to use the highways, to comply with all laws relating to common carriers. But the permit sought was denied. The case presents no element of estoppel." Buck v. Kuykendall, supra, at pp. 316-317.

In Buck, Buck sought a permit for a public conveyance between the State of Washington and the State of Oregon, or in other words, to establish a bus service. The permit was denied in Washington and one of the subsections, 4, provided that the

State could refuse the permit where there was already permits granted and there was sufficient bus service or sufficient means of public transportation. Buck specifically challenged subsection 4 of the Washington Law. In finding that the concept of constitutional estoppel did not apply, the Court noted that Buck was challenging that specific provision, subsection, of the statute and that he had received, "no benefit under it". Thus, as in this case the Appellant was challenging a subsection of one section (statute) of the Act in question under which he was not receiving any benefits.

As another example, in the case of Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936), a power company who was receiving benefits under one part of the Tennessee Valley Authority's Act was not precluded from challenging the constitutionality of another part of the Act. The Supreme Court of South Carolina Decisions are in accord with this application of the constitutional estoppel principle. The SC Supreme Court specifically in the cases of Gamble v. Clarendon County, et. al., 188 S.C. 250, 198 S.E.2d 857 (1938) and Williamsburg County v. Graham, 190 S.C. 233, 196 S.E.2d 547 (1938) has held that where a party is receiving or receives benefits under one part of an Act but claims that another section of the Act is unconstitutional, that party is not barred from challenging the constitutionality of that other section.

The Court upon review will also find upon reading any case cited or referred to that this is the application of the concept of constitutional estoppel that has been applied by the Courts and where a litigant is challenging a section of an Act or law or is challenging a specific provision of the law under which he is not receiving benefits, the concept of constitutional estoppel has not been applied. The Court will find as discussed hereinafter that the concept has only been applied as either specifically "stated" or as actually "applied" in the Opinion where the section in question is not "severable" from the challenged Act or from the remaining provisions of the Act.

In reference to the application of the concept of constitutional estoppel as a basis for the various Federal and State Court decisions and it being linked with the application of the concept of severability, 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. Where the part of the Act is not severable, the Court has applied constitutional estoppel coupled with severability.

For example, in the case of Fahey v. Mallonee, 332 U.S. 245, 67 S.Ct. 1552, 91 L.Ed. 2030 (1947), this was a stockholder's derivative action in which the Court specifically noted that one of the specific reasons the Court would not

strike down the provision challenged was because it was not "severable" from the other provisions of the Act under which the Association existed. In other words, the stockholders, as Plaintiffs, right to sue was based specifically on the Association's right to exist under the entire Act and the specific provisions of the Act which they wanted declared unconstitutional were not severable from the other provisions. Obviously this has nothing to do with reaping benefits under the Act and in addition to that, the provisions were not severable. Severability is a specific constitutional concept that applies in every constitutional challenge.

In this case, following the work-related electrocution injury the Respondent American Fire accepted and agreed to pay both temporary total disability benefits and medical benefits. SC Code §42-17-10 provides for the payment of benefits by agreement and it is under that section that benefits, both "compensation" and "medical", were started and paid. SC Code §42-9-10 and §42-1-120 provide for the payment of weekly temporary total disability compensation payments (compensation is defined under §42-1-100) and it is under those sections that the Claimant was receiving, by agreement, his weekly workers' "compensation" benefits. SC Code §42-15-60 provides for the provision of, "medical" care after injury and after a case is accepted and it is under that section that the Claimant was

receiving "medical" benefits. Therefore, the Claimant/Appellant was receiving weekly temporary total disability compensation benefits and was receiving medical care as accepted by American Fire under those Code Sections.

The challenged subsection is a part of SC Code §42-9-260(B)(1-6), commonly referred to as the stop payment statute, and as referenced in the Title of that Code section, and subsection (B)(1-6) is the subsection of that Code section that specifically allows for an employer and/or its insurance carrier, the Respondent American Fire in this case, the entitlement to stop compensation and medical benefits without a hearing during the first 150 days. This subsection was only challenged and there was no challenge to any of the rest of SC Code §42-9-260 and specifically not including the provisions of subsection (A). Therefore, the Appellant was not challenging any section under which he was receiving "benefits" by his constitutional challenge and the section of the stop payment statute which was challenged is completely severable from even the remainder of the provisions of that Code section. The Appellant would also point out to the Court that all of the provisions of SC Code §42-9-260 other than subsection (B)(1-6) require a hearing before benefits can be stopped. Subsection (B)(1-6) is the only subsection of that Code section that allows

for stopping of benefits without a hearing and is thus completely severable.

II. THE CIRCUIT COURT ERRED BY ORDERING EX MERO MOTU THAT THE STATE BE ADDED AS A PARTY WHERE THAT ISSUE WAS NOT BEFORE THE COURT AND WHERE THE STATE HAD BEEN PREVIOUSLY PROPERLY SERVED AND CHOSE NOT TO APPEAR; AND SUBSEQUENT THERETO BY NOT DISMISSING THE STATE AS A PARTY BASED ON THE MOTION OF THE PLAINTIFF AND THE POSITION OF THE STATE IN REFERENCE TO THE MOTION.

When the original Declaratory Judgment Action Complaint challenging the constitutionality of SC Code §42-9-260(B)(1-6) was filed, the Appellant pursuant to Rule 4(d)(4)(B), SCRCF, since the constitutionality of a statute was asserted, properly served, Alan T. Wilson, SC Attorney General, with a copy of the Complaint. The Affidavit of Service of Process on the Attorney General was duly and properly filed with the Court thereafter. Subsequent to the service of the Summons and Complaint upon the Attorney General, no Answer or Reply or other pleading was filed by the Attorney General's Office on behalf of the State to the original Summons and Complaint. Thereafter the Respondent American Fire filed a Rule 12(b)(7) Motion with the Court seeking not to add an indispensable party but seeking to dismiss the Appellant's Complaint for failing to join an indispensable, but unnamed, party. Therefore, the issue before the Court at the time of the Motion Hearing was whether or not to dismiss the Declaratory Judgment Action Complaint. The Court subsequently

dismissed the Rule 12(b)(7) Motion but as part of that Order dismissing the Motion, added the State as a party.

As to this Order of the Court, the Appellant does not challenge the discretionary authority of the Court to add a party that is "indispensable" to a resolution of the action before the Court. There is simply no basis for the State being an indispensable party under Rule 19(a), SCRCP, in this case.

First the Appellant would submit that the State is not indispensable to a constitutional challenge as there are numerous cases involving private parties alone as both the Plaintiff and Defendant. See for example: Marley v. Kirby, 271 S.C. 122, 245 S.E.2d 604 (1978) and Ramey v. Ramey, 273 S.C. 680, 258 S.E.2d 883 (1979). Further, the State has no property interest in the benefits which are payable under the Workers' Compensation Act. See: Banc Ohio National Bank v. Neville, 310 S.C. 323, 426 S.E.2d 773 (1993). Thus, the State was not an indispensable party to the action under Rule 19 criteria.

Second, 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. Thomas v. Hammond, 299 S.C. 116, 382 S.E.2d 900 (1989).

Third, the issue of joinder was not before the Court and the State was not asked to respond as to whether or not it

should be joined as a party. The Motion made by the Respondent American Fire was to dismiss the Appellant's Declaratory Judgment Action on the basis that he had failed to include an indispensable party, not to join any party. Therefore, the issue was not before the Court. Further, the SC Workers' Compensation Commission filed a Brief and was allowed to respond and took the position that it was not a party to the action and should not be made a party to the action. There is no reference to the State being contacted and given an opportunity to respond as to whether or not it should be joined as a party. For all these reasons, while the Court has discretionary authority to add a party, the State should not have been added as a party to this action.

As to the failure of the Court to dismiss the State as a party, again as pointed out in the Motion, the State had been properly served with the original Summons and Complaint and it chose not to appear or take a position. Further, when the State answered the Amended Complaint making them a party to the action, in paragraph 6 of that Answer and Reply, the State of South Carolina specifically denied that,

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

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 Motion to Dismiss.

Since the challenge to the Plaintiff's action was based on constitutional estoppel and was raised only by the State in its pleadings and in its Motion, the Decision of the Circuit Court granting the State's Motion for Judgment on the Pleadings and dismissing the Appellant's Declaratory Judgment Action challenging the constitutionality of SC Code §42-9-260(B)(1-6) should be reversed.

III. WHERE THE COURT HELD A HEARING ON ALL REMAINING MOTIONS AND ON THE DECLARATORY JUDGMENT ACTION; TOOK THE MATTERS UNDER ADVISEMENT; AND THEN DID NOT ISSUE NOTES FOR DECISION UNTIL FIFTEEN (15) MONTHS LATER, THE COURT ERRED BY NOT GRANTING A REHEARING AND THE DELAY IN RENDERING A DECISION DENIED THE PLAINTIFF DUE PROCESS OF LAW.

After the Hearing on the Motions and the Declaratory Judgment Action, the Court requested proposed Orders and took the matter under advisement. Proposed Orders from all parties were timely filed, including a proposed Order from the Attorney General's Office on behalf of the State granting its Motion for Judgment on the Pleadings. Fifteen (15) months after that hearing the Court issued Notes for Decision and in the email from the Judge's law clerk, the clerk specifically noted that the law clerk was not the law clerk, "who originally worked on this case". Further, there is no reference as to the previously

submitted Order from the Attorney General's Office, its Memorandum, or its Motion.

Whether or not to grant a hearing as requested by the Appellant in this matter due to the long delay between the hearing and the Decision rendered is addressed to the sound discretion of the Trial Court. This Court may review the Decision made and may render a Judgment as to whether or not it was an abuse of discretion in failing to grant the Motion for a new hearing.

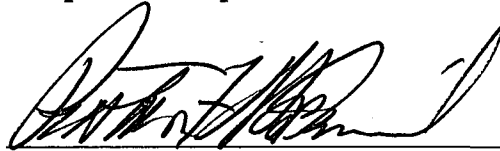
In this case, the evidence and Record establishes that there was a fifteen (15) month delay that was unexplained, that the Court when it took the matter under advisement had requested proposed Orders which were submitted within sixty (60) days of the date of that Hearing and there is reference to the Memorandum, Motion, or those Orders. The evidence establishes further that multiple law clerks worked on this case and apparently the law clerk who was assigned to advise the parties of the Notes for Decision had no knowledge of the previously submitted proposed Order granting of the Motion for Judgment on the Pleadings filed by the Attorney General's Office on behalf of the State. There is no explanation as to why the Court decided to base its Decision on an issue that the State did not even think enough of to base its proposed Order on that issue. Under these circumstances the Appellant would submit that the

Court abused its discretion in not granting a new hearing on the constitutional issues presented by the Declaratory Judgment Action.

CONCLUSION

For all the forgoing reasons, the Decision of the Circuit Court should be reversed, the State should be dismissed as a party and this matter remanded for a de novo hearing on the Declaratory Judgment action. In the alternative, to remand and as a matter of judicial economy, the Court should take direct jurisdiction over the constitutional challenge to SC Code §42-9-260(B)(1-6), set a Briefing Schedule based on the Record before the Court, and enter a decision on the constitutional challenge.

Respectfully submitted,



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7/25, 2017

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,

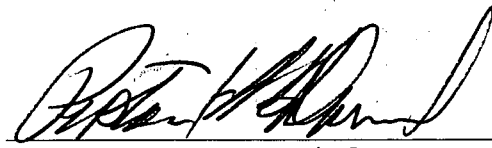
and

State of South Carolina.....Respondent.

CERTIFICATE OF COUNSEL

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

Dated: 7/25, 2017


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