

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA WORKERS COMPENSATION  
COMMISSION APPELLATE PANEL

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WCC File No.: 08-16090  
Appellate Case No.: 2017-001135

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**RECEIVED**

SEP 28 2017

SC Court of Appeals

Jacob Tisdale, deceased employee/claimant..... Appellant,

vs.

Williamsburg County Department of Special Needs  
and State Accident Fund..... Respondents.

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**INITIAL BRIEF OF APPELLANT**

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September 25, 2017

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**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE APPELLATE PANEL ERR IN FINDING THAT THE APPELLANT'S CLAIM FOR DEATH BENEFITS WAS BARRED BY THE DOCTRINE OF LACHES INASMUCH AS THE DELAY IN PROSECUTING THE CASE WAS NOT PER SE UNREASONABLE AND THE RESPONDENTS DID NOT PROVE THAT THEY WERE PREJUDICED BY THE DELAY?

## STATEMENT OF THE CASE

This action arises out of the death of Jacob Tisdale while he was working for the respondent Williamsburg County Department of Special Needs on October 16, 2008. Mr. Tisdale was killed in a single car accident while driving a van belonging to his employer. Edna Tisdale (“claimant”), the wife of Jacob Tisdale, brought a claim against the respondents for death benefits under the South Carolina Workers Compensation Act. Following a hearing before the single commissioner on January 14, 2016, the claimant was awarded death benefits, including five hundred (500) weeks of compensation and \$2,500 for funeral expenses. Respondents timely filed an appeal to the appellate panel, which later reversed the decision of the single commissioner based solely on the affirmative defense of laches.

This appeal follows the April 7, 2017 judgment of the appellate panel.

## FACTS

Jacob Tisdale, the decedent, was employed in a salaried position as a residential director for respondent Williamsburg County Department of Special Needs (“DSN”). As director, Mr. Tisdale was subject to be on call twenty-four hours a day and was responsible for supervising the residential program for persons with disabilities. His position required him to, among other things, oversee and supervise other employees, inspect and maintain the residential facilities, and to visit with clients at those facilities. He transported goods and merchandise from the one facility to another for delivery to the clients at their residential facilities. Mr. Tisdale was also required to meet with prospective clients at their homes to assess them in order to determine if they were qualified to receive residential training or other services provided by the agency. His ability to drive a motor vehicle was a condition of his employment and DSN provided a van it owned to Tisdale to drive for work-related purposes. The undisputed evidence was that Mr. Tisdale drove his personal vehicle to work every day, parked it at his office site, and then drove the agency vehicle for work-related errands within Williamsburg County. In addition, the employees used their own vehicles to run personal errands and during their lunch break (trial transcript, pp. 29-31). At the end of each work day, Tisdale left his employer’s vehicle at the work site and then drove his personal vehicle back home (trial transcript, pp. 20-24; p. 27, lines 17-22; p. 28, lines 10-21).

On the day of the accident, Mr. Tisdale drove car to work and parked it

at the office in Kingstree. Clara Faye Dozier, DSN's executive director, testified before the hearing commission that Mr. Tisdale normally took his lunch break between 11:30 a.m. and 12:00 p.m. each day (trial transcript, p. 28, lines 6-9). Decedent's wife, Edna Tisdale, spoke with him around 11:15 a.m. on the day of the accident, and he told her that he was going to get lunch (trial transcript, p. 70, lines 4-24). A receipt later found by Mrs. Tisdale in her husband's personal vehicle indicate that he also used his lunch hour to run an errand to pay a bill at 12:17 p.m. on the day of the accident (trial transcript, p. 73, lines 11-25; p. 74, lines 1-19). Tisdale returned to the office about an hour later and parked his vehicle. Shortly thereafter, he got into the employer-owned vehicle, a seven passenger van, and left the office for reasons unknown to Ms. Dozier, who was attending a meeting in Florence. Ms. Dozier testified that although she couldn't say exactly what the claimant was doing at the time of the accident, "as far as [she] knew, he was on the job" (Claimant's APA #9, p. 27).

At 12:52 p.m., a report was made of a single-vehicle accident in or near the Town of Greeleyville, Williamsburg County, South Carolina. Tisdale was discovered by EMS entrapped and unconscious inside the same van he drove from the office just moments earlier. There are no known witnesses to the accident. The South Carolina Highway Patrol concluded from its investigation that while Tisdale was driving west on Highway 521, he ran off the right side of the roadway, struck a mailbox and overturned in a ditch, causing the vehicle to strike a utility pole (defendants' APA#4, p. 21).

Mr. Tisdale sustained massive head and neck trauma, and died early the next morning at the Medical University of South Carolina in Charleston of injuries he sustained in the accident on October 16, 2008.

Following the death of Mr. Tisdale, the respondents hired Paul Jefferson to conduct a dependency investigation. On November 5, 2008, Mr. Jefferson spoke with Ms. Dozier, who suggested that he contact Karen Hudson, the decedent's direct supervisor. Five days later, Mr. Jefferson took a statement from Ms. Hudson, who said that the decedent "handled all aspects of a residential supervisor" and "there is no reason to doubt that he was on the job" (*see* claimant's APA #9, page 27).

The record reflects initially respondents were represented in 2009 by G. Murrell Smith, Jr., an attorney and member of the South Carolina House of Representatives. Respondents' current counsel of record, George D. Gallagher, did not assume his representation of them until January 26, 2015. Appellant has at all times been represented by Ronnie A. Sabb, an attorney and member of the South Carolina Senate who was first elected to the South Carolina House of Representatives in November 2010. The case was originally scheduled for a hearing on May 22, 2009, but was continued. Mr. Smith and Mr. Sabb, as attorney legislators, were afforded protection from court appearances during the legislative sessions of each calendar year. The respondents filed a Form 19 on December 16, 2010 and the Commission "closed" the case on January 15, 2011. Subsequent thereto, the claimant's counsel issued subpoenas to the decedent's healthcare providers from 2012

through 2014 (see subpoenas for medical records of decedent). On December 31, 2014, the claim was reopened by the Commission (see South Carolina Workers Compensation Commission Case Status). Respondents noticed the claimant's deposition, which was taken on March 5, 2015 (see notice of deposition of Edna Tisdale and transcript, pp. 1-3).

On January 5, 2015, claimant filed a Form 52, seeking a hearing on her request for an award of death benefits representing 500 weeks of compensation and \$2,500 for funeral expenses as allowed by §42-9-290 of the South Carolina Code of Laws. The respondents filed a Form 53. In it, they deny that the decedent was acting within the scope and course of his employment with DSN and further allege that the claim was barred by the affirmative defense of laches. Claimant filed a motion on April 27, 2015 to appoint a mediator. The mediation conference was held on September 15, 2015, and an impasse was declared. The matter came before the hearing commissioner on January 14, 2016. Curiously, the substance of the investigator's interviews with Clara Dozier and Karen Hudson did not appear anywhere in the respondents' pre-hearing brief and APA submissions, which were made a part of the record before the hearing commission. Moreover, respondents did not identify Karen Hudson as a witness on their Form 58.

The hearing before the single commission was held on January 14, 2016. Commissioner Taylor rejected the respondents' laches argument, finding that although there was a substantial delay between the time of the accident and the hearing, the respondents cannot show that they suffered any

actual prejudice as they continued to engage in discovery even after the claim was closed in January 2011 with the filing of a Form 19. The single commissioner found that Mr. Tisdale was acting within the scope and course of his employment at the time of the accident that resulted in his death, and awarded statutory death benefits to the claimant.

Respondents timely appealed the decision of the single commission to the full commission. In their appeal, respondents argued that the claimant did not meet her burden of proving that Tisdale's death occurred in the course of his employment. Respondents further asserted that the claim should be barred by the doctrine of laches. Following a hearing before the full commission on December 12, 2016, the appellant panel reversed the decision of the full commission based solely on its finding that the claim was barred based on the doctrine of laches.

Appellant timely served its notice of appeal.

## ARGUMENTS

- I. THE APPELLATE PANEL ERRED IN FINDING THAT THE APPELLANT'S CLAIM FOR DEATH BENEFITS WAS BARRED BY THE DOCTRINE OF LACHES INASMUCH AS THE DELAY IN PROSECUTING THE CASE WAS NOT PER SE UNREASONABLE AND THE RESPONDENTS DID NOT PROVE THAT THEY WERE PREJUDICED BY THE DELAY.

Laches is defined as neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Muir v. C.R. Bard, Inc., 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct.App.1999) (citations omitted). If a party who knows his rights does not timely assert them, and by his delay, causes another party to incur expenses or otherwise detrimentally change his position, then equity steps in and refuses to enforce those rights. *Id.* at 296, 519 S.E.2d at 599. Here, the delay in prosecuting the claim was neither unreasonable nor unexplained. Until January 2015, the lawyers representing both sides were members of the South Carolina General Assembly and were unavailable for court appearances during at least the first six months on each calendar year since this claim was filed. One of the commissioners on the appellate panel was cognizant of the demands posed to attorney legislators and noted that “maybe we can kind of forget about what happened between 2008 and 2011 because whether they were legislative prerogatives.....” (appeal transcript, p. 7, lines 1-7). The respondents conceded that the attorneys’ service in the general assembly was the cause of the delay between the filing of the claim and the time the case was administratively closed in 2011 (*id.* at p. 8, lines 5-12; p. 3-8). Inexplicably, although both Mr. Smith and

Mr. Sabb have served uninterrupted in the general assembly since at least January 2011, neither the full commission nor the respondents seem to allow that their continued service in the House and the Senate would result in additional delay in the case past 2011. The respondents denied that the decedent died within the scope and course of his employment. During the interim between the time the case was closed and later reopened in December 2014, claimants continued to engage in discovery by issuing subpoenas to the decedent's employer and health care provider. Moreover, it is clear that once Mr. Gallagher was substituted as counsel for the respondents in January 2015, the claim proceeded at a quicker pace, with the claimant's deposition being held in March 2015, mediation in September 2015, and the hearing before the single commissioner in January 2016. Accordingly, there are legitimate reasons by which the prosecution of the claim was delayed.

More importantly, even if this Court finds that the delay in bringing the case to a hearing was unreasonable, the respondents have failed to establish that the delay was unreasonable. *The party asserting laches has the burden of showing negligence, the opportunity to act sooner, and material prejudice* [emphasis added]. *Id.* at 297, 519 S.E.2d at 599; Kelley v. Kelley, 368 S.C. 602, 606; 629 S.E.2d 388, 391 (Ct. App. 2006). Here, full commission found that the respondents suffered actual prejudice because Karen Hudson, the decedent's direct supervisor, had more knowledge of the accident but was no longer employed at DSN. This finding, however, ignores the fact that the respondents never offered *any* evidence that Ms. Hudson would testify favorably to them and

that they could not secure her attendance at trial. First, respondents were aware when their investigator interviewed Ms. Hudson on November 5, 2008 that she would offer testimony, if called to trial, that established liability on the part of the respondents. The relevant portion of her statement is as follows:

“I don’t know what he was doing. He was driving a state vehicle. He handled all aspects of residential services. There is no reason to doubt that he was on the job. He was by himself. We have four community training homes. He did all the plans and paperwork, all aspects of intake and discharge and day-to-day needs and activities of the residents” (trial transcript, p. 40, lines 11-14 and Claimant’s APA submissions, p. 27).

Evidence of this statement was offered by the appellant and was admitted without objection (trial transcript pp. 39-43). According to testimony from Ms. Dozier, Ms. Hudson remained employed with DSN for *six years* after the fatal accident involving the decedent. During that time, respondents had unfiltered access to her. Despite this, respondents never attempted to depose her to commit her testimony to record. The respondents did not produce a subpoena reflecting that they attempted to secure Ms. Hudson’s attendance at the hearing. There is no evidence whatsoever in the record that they ever attempted to reach her to determine if she was willing and able to come to the hearing. Ms. Dozier did not testify that Ms. Dozier *lived* out-of-state but that “she’s out of state (trial transcript, p. 32, lines 18-21). She did not testify that she was unaware of Ms. Hudson’s current address or of how to contact her. Even if Ms. Hudson was in fact living out-of-state, there are legal means by which respondents could have taken her deposition, which would have then been admissible at the hearing under Rule 32(a)(3), South Carolina Rules of Civil Procedure. Respondents did not

identify Ms. Hudson as a witness on their pre-hearing brief nor did they allege in that document that she was an unavailable witness. In fact, when respondents initially argued the issue of laches at the beginning of the hearing before the single commissioner, they only asserted that they were prejudiced by the delay because they would've lost any rights of subrogation, presumably against a third party tortfeasor, based on the expiration of an applicable statute of limitations (trial transcript, pp. 12-13). It was not until claimant's direct examination of Ms. Dozier that the respondents asserted for the first time that Ms. Hudson was an unavailable witness and they were prejudiced by her absence (Id at p. 43, lines 1-7). Respondents did not seek a continuance of the hearing in an attempt to locate her. Even at the conclusion of the hearing, the respondents did not request that the record be left open to allow them to schedule her deposition.

The question of laches is largely a factual one, so each case must be judged on its own merits. Richey v. Dickinson, 359 S.C. 609; 598 S.E.2d 307 (Ct. App., 2004); Mid-State Trust, II v. Wright, 323 S.C. 303, 307; 474 S.E.2d 421, 423, 424 (1996). The responsibility lied not only with appellant, but respondents and the Commission to request a hearing once notice of the claim has been filed. Presumably, respondents, unlike claimant, had advance notice in 2014 that Ms. Hudson intended to leave their employ, but they never requested a hearing or scheduled her deposition. Laches is an equitable remedy. Hallums v. Hallums, 296 S.C. 195, 198; 371 S.E.2d 525, 527 (1988). As such, the appellant submits that the doctrine should be invoked as a shield only in cases of manifest harm to the party asserting it. The respondents chose not to depose Karen Hudson, not to

subpoena or attempt to subpoena her for trial, and not to request that the record remain following the hearing. During the six-year period of time following the accident, Ms. Hudson remained employed with DSN. It does not appear that respondents sought clarification from her regarding what she meant when she stated that there was no doubt that decedent was “on the job” at the time of the accident. It is doubtful that these acts of omission on behalf of the respondents were inadvertent. Rather, it is reasonable to conclude that had further clarification from Ms. Hudson been sought by the respondents, she would have offered testimony that did not insulate them from liability. Consequently, this Court could and should infer from the respondents’ failure to depose Ms. Hudson or attempt to subpoena her for trial that she would have offered evidence adverse to the respondents.

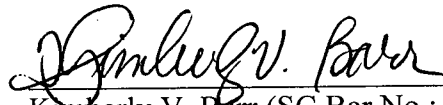
It would be manifestly unjust to the claimant to deny death benefits to her and her children based solely on the respondents’ failure to call their own former employee, who gave a statement that corroborates the appellant’s claim. Jacob Tisdale was the primary breadwinner to his wife and two minor stepdaughters at the time of his death (trial transcript; p. 76, lines 1-10). He was a hardworking and dedicated employee, whose employer honored him posthumously by dedicating a residential home in his name (Id at p. 46, lines 20-25). The conclusion reached by the full commission that respondents suffered actual prejudice because a witness, their former employee whose statement was admitted into evidence with objection, became unavailable during the pendency of the case is not supported the evidence in the record. The prejudice to the respondents, if

any, did not result from the delay in this case, but rather perhaps from their failure to depose their own employee or from the simple undisputed facts of the case.

### CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the full commission and reinstate in full the order and decision of the hearing commissioner.

RESPECTFULLY SUBMITTED:



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Attorneys for Appellant

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APPEAL FROM THE SOUTH CAROLINA WORKERS COMPENSATION  
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Jacob Tisdale, deceased employee/claimant..... Appellant,

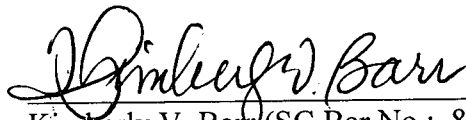
vs.

Williamsburg County Department of Special Needs  
and State Accident Fund..... Respondents.

**PROOF OF SERVICE**

I hereby certify that I served the initial brief of the appellant and designation of matter to be included in the record on appeal on the respondents, by depositing a copy of it in the United States Mail, postage prepaid, on September 25, 2017 and addressed to their attorney of record, George D. Gallagher, at his mailing address of Post Office Box 11669, Columbia, South Carolina 29211.

September 25, 2017



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SC Court of Appeals

The Honorable Jenny Abbott Kitchings  
Clerk of South Carolina Court of Appeals  
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Columbia, South Carolina 29211

RE: Jacob Tisdale, Jr. vs. Williamsburg County DSN  
WCC File No.: 0816090  
Appellate Court Case No.: 2017-001135

Dear Ms. Kitchings:

In connection with the matter referenced above, please find enclosed for filing the initial brief of the appellant, the designation of matter to be included in the record on appeal, and the proof of service.

By copy of this letter, I am serving these documents on George Gallagher, counsel for the respondents.

With kindest regards, I

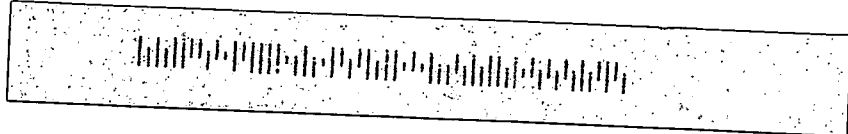
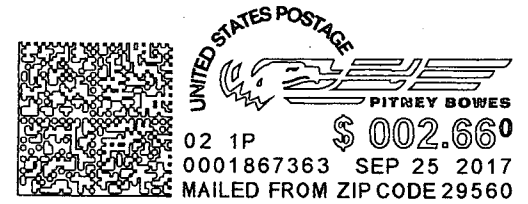
Very truly yours,

Kimberly V. Barr

KVB:dm

enclosures

cc: George D. Gallagher, Esquire (w/ enclosures)



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**SC Court of Appeals**

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