

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

S.C. SUPREME COURT

OPINION NO: 2017-UP-379 (S.C. Ct. App., FILED October 18, 2017)

Appellate Case No. 2018-000076

Johnny Tucker, Employee, Respondent,

v.

S.C. Department of Transportation, Employer,
And State Accident Fund, Carrier, Petitioners.

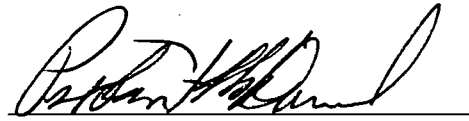
NOTICE OF AND MOTION TO DISMISS AND/OR STRIKE
FROM PETITION FOR WRIT OF CERTIORARI

To: David H. Keller, Attorney for Petitioners

You will please take Notice that Pursuant to SCACR Rule 240, the Respondent hereby moves for an Order of the Court dismissing the Petition for a Writ of Certiorari for failure to comply with the South Carolina Appellate Court Rules and specifically Rule 242 (d) (2), and Rule 210 (h), or in the alternative, to strike various questions, sections and arguments

from the Petition. Said Motion is based upon the Memorandum attached hereto and incorporated herein by reference.

WE SO MOVE.



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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
AND/OR TO STRIKE
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The Respondent would respectfully show unto the Court in support of the Motion to Dismiss the Petition for a Writ of Certiorari and/or to Strike from the Petition:

1. That the Petition for Writ of Certiorari filed in this matter is from the Unpublished Opinion of the South Carolina Court of Appeals filed in this matter as OPINION NO.: 2017-UP-379 (S.C. Ct. App., FILED October 18, 2017). Upon information

and belief, an Appendix has been timely filed with the Court which would contain the Record on Appeal, the Briefs of the parties filed with the South Carolina Court of Appeals, the Decision of the Court and the Petition for Rehearing and the Decision on the Petition for Rehearing denying that Petition. In the Petition for a Writ of Certiorari, the Petitioners set forth the following Questions:

- I. DID THE COURT OF APPEALS ERR IN CITING THE CASE OF WILSON V. CHARLESTON COUNTY SCHOOL DISTRICT, OPINION NO. 4575, 419 S.C. 442, 798 S.E.2d 449, (S.C. CT. APP. FILED MARCH 22, 2017) IN VIOLATION OF THE SOUTH CAROLINA APPELLATE COURT RULES?

- II. DID THE COURT OF APPEALS ERR IN CITING WILSON V. CHARLESTON COUNTY SCHOOL DISTRICT, WHILE A PETITION TO VACATE THAT COURT OF APPEALS' OPINION WAS PENDING?

- III. DID COURT OF APPEALS ERR IN ITS INTERPRETATION OF S.C. CODE ANN. §42-17-90?

2. That as to Question I presented to the Court in the Petition, the Court will find pursuant to a review of the Appendix that that Question or issue was not submitted to the South Carolina Court of Appeals for review either originally or in the Petition for Rehearing. SCACR Rule 242(d)(2) in pertinent part provides:

" ...Only those questions raised in the Court of Appeals and in the Petition for Rehearing shall be included in the Petition for Writ of Certiorari as a question presented to the Supreme Court".

Having not been presented to the Court of Appeals for Decision, the Petition as to this Question should be dismissed and/or this Question should at a minimum be stricken from consideration by the Court.

3. That as to Question II the same facts and argument applies as made hereinabove as to Question I in the Petition for Writ of Certiorari. The Petition should be dismissed as to this Question and/or this Question should be stricken from further consideration of the Petition.

4. That as to Question III presented by the Petitioners, the Respondent would submit that the Court will find that the issues raised in the Petition were simply not presented to the Court of Appeals for consideration and in particularly in reference to the Petition for Rehearing. The Petition for Rehearing sets forth that Rehearing was requested based upon:

"I. The Court misapprehended or overlooked the evidence, law, or arguments involving requirement that an application for review must be made within twelve (12) months from date of last payment of compensation as statutorily mandated by S.C. Code Ann. §42-17-90."

The argument made and the issue presented to the Court of Appeals under that Question was in reference to the interpretation of the statute and specifically the word,

"application". Based upon review of the Petition for Rehearing as filed in the Court of Appeals and the Respondent would submit that the Court will not find arguments concerning; the doctrine of res judicata; competing opinions regarding the issue of a change of condition versus lack of maximum medical improvement; or that the Court of Appeals had ignored the Krell v. S.C. Hwy. Dept., 237 S.C. 584, 118 S.E.2d 322 (1961).

As is alleged and argued under Question III of the Petition further there is simply no argument made as to the burden of proof to prove a change of condition that was presented to the Court of Appeals. There is no presentation of the issue of the application of the doctrine of res judicata. There is no presentation of any issue concerning, "two arguably competing opinions regarding the issue of change of condition versus lack of maximum medical improvement". Those arguments or anything close to those were simply not presented to the Court of Appeals for ReHearing. For example, Krell is not cited anywhere to the Court of Appeals.

Finally, the Petition for Rehearing, as the Court will find, was based upon the interpretation of the word "application" in the statute and as compared to the

argument made for a Writ of Certiorari in the Petition, that is not the basis of the argument nor is the Certiorari Argument in any way contemplated within the argument made for Rehearing.

5. That finally, the Petition violates several principles of law established by the South Carolina Appellate Court Rules and specifically in reference to SCACR Rule 210(h) wherein the Appellate Court will not consider any fact that does not appear in the Record on Appeal. Additionally, in SCACR Rule 242, the Appendix is limited to the specified items to be included except under 242(e)(4) where documents are added pursuant to that subsection. Woven into the, "Introduction" and into all three of the Arguments are facts that are not within the Record on Appeal or the Appendix and/or which are not supported by the facts. For example, in the, "Introduction" part and as precatory to all three Arguments, the Petitioners allege that the Court of Appeals decision in this matter was based upon an Unpublished Opinion of the South Carolina Court of Appeals in Wilson v. Charleston County School District whereas the Wilson case is in fact a Published Opinion: See 419 S.C. 442 798 SE2d 449 (S.C. App 2017). Further the Petition sites to a conflict to the decision in Krell v South Carolina Highway

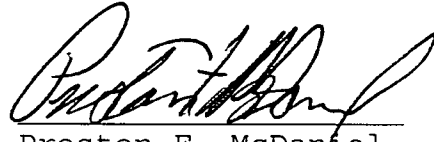
Department 237 S.C. 584, 118 S.E.2d 322 (1961), whereas the Court will see this case is not referred to or cited in either the Petitioners' original Respondent's Brief in the Court of Appeals or in the Petition for Rehearing.

Also, predatory to all three is the reference to facts outside of the Record and specifically quoting from the Petition under Question II, the Petitioners make the statement that, "however, counsel for Petitioner was advised by the attorney for the Charleston County School District, on Friday, January 12, 2018 that the Wilson case has been settled." This is totally outside of the Record. In reference to Question III the fundamental requirement of South Carolina Appellate Court Rules in that the Court of Appeals must be given the opportunity in reference to the Writ of Certiorari to address the issues raised. The parties are also required to stay within the Record and the Petitioners have violated both of these principles and Rules.

Wherefore the Petition being in violation of the South Carolina Appellate Court Rules and particularly the failure to present these issues to the Court of Appeals by way of Petition for Re-Hearing so that the Court would have the opportunity to address those, this Petition should be dismissed. Because of this blatant failure of the

Petitioners to have these Questions addressed, in reference to the "**Introduction**," at a minimum that section and the Questions and Arguments made thereunder should be stricken for failure to comply with this fundamental requirement. Further in reference to Question III, all arguments not presented to the Court of Appeals for Rehearing should be stricken and the Respondent, as movant, would submit that they are so inter-woven into the arguments under that argument that they cannot be severed. If those are severable, in the Opinion of the Court, the "Introduction", Questions I and II, and the arguments under Question III not fairly encompassed in the argument/issues presented to the Court of Appeals along with any statements of facts made in the Petition which are outside of or are not part of the Record, should be stricken. If the Petition is not dismissed, as to the remaining Petition, the Petitioners should be required to refile the Petition with citation to the Record on Appeal and/or the Appendix to support all statements made.

Respectfully Submitted,



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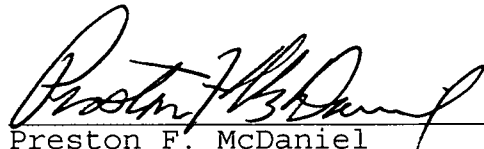
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PROOF OF SERVICE

I certify that I have served the RESPONDENT'S NOTICE OF
AND MOTION TO DISMISS AND/OR STRIKE FROM THE PETITION FOR
WRIT OF CERTIORARI by depositing a copy of it in the United
States Mail, postage prepaid, on February 16, 2018 addressed
to:

David H. Keller
TURNER PADGET GRAHAM & LANEY, P.A.
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Greenville, South Carolina 29601



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