

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE APPELLATE PANEL OF THE SOUTH
CAROLINA WORKERS' COMPENSATION COMMISSION

RECEIVED
APR 10 2018
SC Court of Appeals

Appellate Case No. 2016-000601

SCOTT LEDFORD, Employee, Appellant,

—vs.—

DEPARTMENT OF PUBLIC SAFETY, Employer,
and STATE ACCIDENT FUND, Carrier, Respondents.

**RESPONDENTS' RETURN TO APPELLANT'S MOTION
TO ARGUE AGAINST PRECEDENT**

Pursuant Rules 240(e) and 217, SCACR, Respondents respectfully request this Court deny Appellant's motion to argue against precedent. Appellant's motion asks this Court to adopt a *de novo* review under an objective standard when determining whether judicial recusal is required. The South Carolina Supreme Court has held that *de novo* review is the broadest form of appellate review, as it "permits the appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." Lewis v. Lewis, 392 S.C. 381, 709 S.E.2nd 650 (S.C. 2011). In most cases, despite the appellate court's ability to find facts in accordance with its view of the preponderance of the evidence, the appellate court will not disregard the findings below or ignore the fact that the trial judge is in a better position to assess the credibility of the witnesses." Pinckney v. Warren, 344 S.C. 382, 544 S.E.2nd 620 (S.C. 2001). Respondents argue that Appellant's request for this court to adopt a *de novo* standard of review and objective standard is erroneous and inconsistent with the holdings of the South Carolina Supreme Court.

In workers' compensation cases, the South Carolina Workers' Compensation Commission is the trier of fact. Hunter v. Patrick Constr. Co., 289 S.C. 46, 344 S.E.2d 613 (1986). The South Carolina Administrative Procedures Act, S.C. Code Ann. §1-23-380(5)(1976), establishes the "substantial evidence" rule as the proper standard for judicial review of a decision of the Commission.

In support of its argument, Appellant cites the United States Supreme Court case Caperton v. A.T. Massey, which dealt with a recusal that was decided upon due process grounds. In Caperton, the United States Supreme Court stated "the due process clause incorporated the common-law rule requiring recusal when a judge has "a direct, personal, substantial, pecuniary interest in a case, but this court has also identified additional instances which, as an objective matter, require recusal where 'the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.'" 129 S.Ct. 2252, 173 L.E.2nd 1208, 556 U.S. 868 (2009). The Court went on to state, "because the objective standards implementing the due process clause do not require proof of actual bias, this Court does not question Justice Benjamin's objective findings of impartiality and propriety and need not determine whether there was actual bias." Id.

This is not a case appropriately invoking the due process clause, since the Commissioner did not have any direct, personal, substantial, pecuniary interest in the case, and the probability of actual bias did not reach the level a constitutionally intolerable. In Caperton, the United States Supreme Court suggested their deference to a state's own rules, stating "because the states have codes of conduct with more rigorous recusal standards than due process requires, most recusal disputes will be resolved without resort to the Constitution, making the constitutional standards application rare." Id.

The South Carolina Supreme Court has heard the exact argument set forth by Appellant in Patel v. Patel, when they granted a party's motion to argue against precedent on the issue of judicial recusal. Like Appellant in this case, the party in Patel urged the Supreme Court to adopt a *de novo* standard of review on the issue of recusal and allow finding a bias or impartiality without the requirement of evidence. In its decision, the Supreme Court set forth several well-settled principles of law. The Court stated, "under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal." (citing Roche v. Young Bros., Inc. 332 S.C. 75, 504 S.E.2nd 311 (S.C. 1998)). The Court went on to state, "it is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice." (citing Mallett v. Mallett, 323 S.C. 141, 473 S.E.2nd 804 (S.C.Ct. App. 1996)). Finally, the court held if there is no evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal." (citing Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 433 S.E.2nd 865 (S.C. 1993)).

Our Supreme Court entertained arguments identical to Appellant's pending motion, and the Court even referenced the same United States Supreme Court case of Liljeberg v. Health Services Acquisition Group, cited by Appellant for the principle that a recusal is appropriate when the impartiality might reasonably be questioned. In Patel, the South Carolina Supreme Court declined to accept the argument that Liljeberg imputes an objective test and does not warrant evidence of judicial prejudice to warrant disqualification. The Court specifically stated there was no evidence in the record leading an objective observer to question the impartiality of the factfinder in question. Patel at 524. The Supreme Court noted the importance of requiring evidence since, a judge's impartiality might reasonably questioned when his factual findings are not supported by the record. Id.

Based on the arguments set forth above, Respondent asserts that the South Carolina Supreme Court has already confirmed the well-settled principle that absent any actual evidence of judicial bias or prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Appellant's pending motion is a last minute argument that could have been briefed and directly contradicts Appellant's own arguments in its final brief which acknowledges that a party seeking disqualification must show evidence of impartiality. As such, Respondents respectfully request this Court deny Appellant's motion to argue against precedent and follow the long-standing principles on judicial recusal as established by the appellate courts of South Carolina.

Respectfully submitted,



Sarah C. Sutusky, Esquire
S.C. Bar No.: 78645
Willson, Jones, Carter, & Baxley, P.A.
3600 Forest Drive
Suite 204
Columbia, South Carolina 29204
(803) 227-2885
Attorney for the Respondents

April 9, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

Appellate Case No.: 2016-000601

RECEIVED
APR 10 2018
SC Court of Appeals

Scott Ledford, (Employee).....Appellant,

v.

Department of Public Safety, (Employer), and
State Accident Fund, (Carrier).....Respondents.

PROOF OF SERVICE

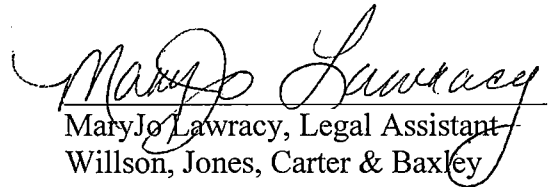
I certify that I, MaryJo Lawracy, have properly served **Respondents' Return Appellant's Motion to Argue Against Precedent**, by mailing an original and six (6) copies of the same by United States Mail with first class postage prepaid to the following address on April 9, 2018:

The Honorable Jenny Abbott Kitchings
The South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

and a copy of the same by United States Mail with first class postage prepaid to the following addresses on April 9, 2018:

E. Hood Temple, Esquire
Hatfield Temple, LLP
Post Office Box 1770
Florence, SC 29503-1770

J. Kevin Holmes, Esquire
The Steinberg Law Firm, LLP
Post Office Box 9
Charleston, SC 29402

A handwritten signature in cursive script that reads "MaryJo Lawracy". The signature is written in black ink and is positioned above the printed contact information.

MaryJo Lawracy, Legal Assistant
Willson, Jones, Carter & Baxley
3600 Forest Drive
Suite 204
Columbia, SC 29204
(803) 227-2821
mjlawracy@wjlaw.net

April 9, 2018
Columbia, South Carolina

WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE CHARLESTON COLUMBIA CHARLOTTE RALEIGH ATLANTA

Sarah C. Sutusky
Direct (803) 227-2885
Fax (803) 782-2527
scsutusky@wjlaw.net

3600 Forest Drive, Suite 204
Columbia, SC 29204
www.wjclaw.com

April 9, 2018

Ms. Jenny Abbott Kitchings
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Scott Ledford vs. Department of Public Safety
WCC File No.: 1202545 DOI: 3/10/2012
Carrier: State Accident Fund - Claim No.: 2012-000722
WJC&B File No.: 0385.00804
Appellate Case No. 2016-000601

RECEIVED
APR 10 2018
SC Court of Appeals

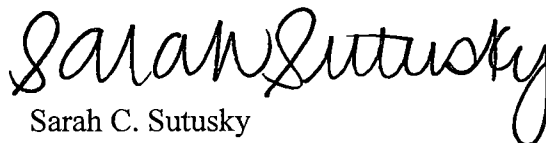
Dear Ms. Kitchings:

Pursuant to Rule 240(e), SCACR, please find enclosed for filing the original and six (6) copies of **Respondent's Return to Appellant's Motion to Argue Against Precedent**, along with proof of service for the same.

In addition, I have also enclosed an additional copy that I would respectfully request that you have your staff clock in and return the extra copy of that I have provided in the enclosed self-addressed stamped envelope. If you have any questions or concerns, please do not hesitate to contact my office.

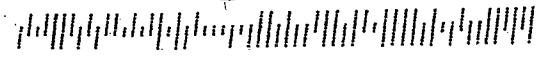
With kindest regards,

WILLSON JONES CARTER & BAXLEY, P.A.


Sarah C. Sutusky

Enclosure(s)

cc: J. Kevin Holmes, Esquire (w/enclosure)
E. Hood Temple, Esquire (w/enclosure)
Jessica Backman (via email & w/enclosure)



mjl

WILLSON JONES CARTER & BAXLEY, P.A.
ATTORNEYS AT LAW
3600 FOREST DRIVE, SUITE 204
COLUMBIA, SC 29204

NEOPOST

FIRST-CLASS MAIL

04/09/2018

US POSTAGE

\$002.47⁰



ZIP 29209

041L10252175

RECEIVED
APR 10 2018
SC Court of Appeals

JENNY ABBOTT KITCHINGS, THE HONORABLE
SOUTH CAROLINA COURT OF APPEALS
1220 SENATE STREET
COLUMBIA, SC 29201