

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

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SC Court of Appeals

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.

RECORD ON APPEAL
VOLUME II OF II

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1 THE COURT: Clarence Winfrey vs. American Fire
2 Insurance Casualty. Let's see I got four motions on this
3 roster. A motion to dismiss and a motion for summary
4 judgment kind of unusual and a motion to dismiss
5 counterclaim. Are you the moving party, McDaniel?

6 MR. MCDANIEL: Not on those three motions. I'm
7 the moving party on a motion for granting a dismissal of a
8 counterclaim.

9 THE COURT: All right. Mr. Bayne, you're up.

10 MR. BAYNE: Which one you like to start with,
11 Your Honor?

12 THE COURT: I don't know anything about the
13 case, so you might as well educate me a little bit tell me
14 logically the first one.

15 MR. BAYNE: Yes, Your Honor. This claim is a
16 workers' compensation claim. It arises out of electrical
17 shock suffered by Mr. McDaniel's client on May 22nd 2013.
18 At some point after that day, he suffered a myocardial
19 infarction. The dispute that we have currently in
20 Workers' Compensation Commission is whether or not the
21 electrical shock caused that myocardial infarction. In
22 September of 2013 ---

23 THE COURT: Did he die?

24 MR. BAYNE: He did not die. He is still alive.
25 He had open heart surgery on May 28th 2013 and he is

1 presently I believe still receiving some treatment, some
2 physical therapy and that type of thing. In September of
3 2013, within 150 days from the date of accident pursuant
4 to South Carolina code 42-9-260, we terminated benefits
5 because we believe that Mr. Winfrey had not proven that he
6 had a compensable claim, that was based on a good faith
7 investigation that revealed information that lead us to
8 believe that the heart attack was not caused by the
9 electrical shock but was rather caused by another
10 situation.

11 THE COURT: The shock you don't deny the shock,
12 do you?

13 MR. BAYNE: He definitely got a shock. He had
14 some preexisting family conditions. He had some ongoing
15 health issues and the gap in time between when the shock
16 occurred and when we believe myocardial infarction
17 occurred led us to believe that it was not actually caused
18 by electrical shock but was rather unfortunate
19 coincidence. Following our denial of benefits,
20 Mr. McDaniel filed a declaratory judgment action in the
21 circuit court alleging that 42-9-260 is unconstitutional.
22 He also got a temporary restraining order signed by Judge
23 Lee that ordered us to pay benefits in this case and
24 ordered us to provide medical care in this case as well.

25 THE COURT: Continuing?

1 MR. BAYNE: And continuing on, yes. We
2 challenge that restraining order that was on October the
3 2nd I believe she issued it. On October 8th, she
4 conducted a hearing in which following that she issued an
5 order dismissing the temporary restraining order because
6 she found that the Commission has the sole authority of
7 reinstatement if it's appropriate and that she did not
8 have the authority to order us to reinstate benefits in
9 this claim.

10 Since that time, we've had a hearing before the
11 Workers' Compensation Commission on our denial of
12 benefits. We were found to have been in good faith when
13 denied the claim. Mr. McDaniel has appealed that order.
14 Just this last week, we had a hearing before the
15 Commission on the compensability of the claim, that order
16 has not yet been issued by the Workers' Compensation
17 Commission, but I would expect it in the next three to
18 five weeks from the Commission. So all of that is out
19 there in either -- in the interim because there was a
20 complaint filed and a summons served. We were required to
21 file an answer and a counterclaim which we had as well as
22 file a responsive pleadings, file any motions, that is
23 what we done. We had filed a motion to -- a summary
24 judgment motion. We filed a motion for cost and fees
25 related solely to the temporary restraining order. We

1 also filed a motion to dismiss pursuant to Rule 12(b)(7)
2 for failure to join any necessary party.

3 THE COURT: Who would that be?

4 MR. BAYNE: We believe that the Workers'
5 Compensation Commission or the South Carolina Legislature
6 should be added to the party. The Commission specifically
7 because they have acted under the act. They're the ones
8 at this point that is denying Mr. McDaniel's client any
9 rights and they should be a party to this to defend the
10 statute.

11 The summary judgment motion, Your Honor, is
12 couched simply the fact that the statute itself is not
13 unconstitutional. There's case law that has been
14 published in the last -- this year and last several years
15 that explicitly references 42-9-260 by the Court of
16 Appeals and by the Supreme Court, none of which found it
17 unconstitutional or they refuse to apply the law as it
18 sits and then ---

19 THE COURT: You say he sued -- September 27th
20 the summons says Clarence Winfrey vs. American Fire and
21 Casualty.

22 MR. BAYNE: Correct.

23 THE COURT: Where does the Legislature come in?

24 MR. BAYNE: Our position is that we should not
25 be in this court defending the constitutionality of a

1 statute, but we're not charged with upholding the fact
2 that the Workers' Compensation Commission has acted under
3 that statute either they or the Legislature should be a
4 party to this case to defend the constitutionality of
5 their statute.

6 MR. MCDANIEL: So, Your Honor, I guess, we're
7 going to deal with the 12(b)(7) motion to dismiss for
8 failure to join an indispensable party I assume. Your
9 client's due process rights.

10 THE COURT: Well, I'm reading complaint and I
11 see now even though you did not sue anybody that could
12 give you any relief to bring a claim saying that the
13 provisions of the statute are unconstitutional and violate
14 your client's due process rights and the APA.

15 MR. BAYNE: And, Your Honor, that's essentially
16 what our motion and the memorandum order we submitted to
17 you is couched is the fact that even if -- kind of moving
18 to just the summary judgment or the continuation of this
19 case even if the statute is found unconstitutional, there
20 is no relief that can be granted to this client.

21 THE COURT: Just on that issue alone, how can
22 American Fire and Casualty give you relief for this
23 unconstitutional claim? It's a claim of
24 unconstitutionality.

25 MR. MCDANIEL: Well, Your Honor, the relief

1 we're requesting under the declaratory judgment action
2 **isn't** declaration that the act is in fact unconstitutional
3 in reference to the section of the challenge. According
4 to the Supreme Court -- and Judge Lee previously related
5 to that. Mr. Bayne misspoke as far as some of the facts
6 that I think are relevant to your knowledge about this --
7 how this declaratory judgment action came to be about.
8 Would you like me address those?

9 THE COURT: Sure.

10 MR. MCDANIAL: Okay. All right. Mr. Winfrey
11 had the accident. It was reported to his employer
12 immediately. Mr. Winfrey then went to the hospital. And
13 after that, the carrier accepted the claim and paid --
14 instituted temporary total disability benefits and
15 instituted medical care.

16 THE COURT: After his heart problem?

17 MR. MCDANIAL: Yes, as a result of his heart
18 problem because what happened is he experienced the
19 electrical shock and then he -- which was a shock to his
20 left hand, running up his left arm, into his heart or into
21 his shoulder and he was experiencing hand, arm, shoulder
22 pain in reference to the electrical shock. Although, it's
23 not relevant to your decision, all three of the
24 authorizing treating physicians have stated that in their
25 opinion that this electrical shock caused the myocardia

1 infarction, which caused the ventricular defect.

2 THE COURT: That's an issue for another court?

3 MR. BAYNE: Correct.

4 MR. MCDANIEL: Correct, Your Honor. They
5 instituted -- they accepted the case and began temporary
6 total disability benefits and instituted medical care,
7 authorized medical care through Lexington Medical Center.
8 Subsequent to that, while paying about 111 days after
9 accepting the claim ---

10 THE COURT: You said 150?

11 MR. MCDANIEL: The statute was amended years ago
12 to provide that within the first 150 days with paying
13 benefits, they can stop benefits from five specifically
14 numerated reasons. One is the person's return to work.
15 Another one is he's been released to light duty and light
16 duty's been offered, but one of them is that based on a
17 good faith investigation they are denying benefits. Now,
18 so on the September 13th, we verbally advised. And on
19 September 16th we received a form what is referred to as
20 form 15-2 notifying us that based on a good faith
21 investigation they were denying benefits.

22 THE COURT: Which they can do?

23 MR. MCDANIEL: Which they can do under the
24 statute. Prior to that, the Supreme Court has determined
25 and has stated in two opinions that the claimants has a

1 property interest in a due process property interest in
2 his right to -- appraise total disability benefits. The
3 United States Supreme Court and our Supreme Court has
4 ruled that where there's property interest involved, the
5 claimant has a right or an individual has a right or party
6 has a right to notice and an opportunity to be heard
7 before those property rights can be extinguished.

8 So immediately upon them terminating benefits, I
9 filed for a hearing with the Workers' Compensation
10 Commission over whether or not they had conducted a good
11 faith investigation. They granted that hearing 60 days.
12 They have to hold a hearing within 60 days and held one on
13 the 60th -- basically the 60 day. However, all of a
14 sudden I have a client that is totally disabled, has
15 absolutely no income coming in, has no medical care and so
16 I filed for a declaratory judgment action that the statute
17 violates his due process rights to hearing an opportunity
18 to be heard before those benefits are cut off. Prior to
19 that, the adoption of that 150 day window was certain
20 specific enumerated exceptions, they couldn't -- once they
21 accepted the case, it was over. They accepted the case
22 and that was it. There's a thousand cases to hold that,
23 but everybody agrees on that, but this 150-day window
24 involved allows them to stop payment without a hearing.
25 And therein lies my constitutional challenge and I

1 brought -- and the Supreme Court has ruled that the
2 administrative agencies nor the administrative law courts
3 have jurisdiction and cannot decide as a matter of law on
4 constitutionality. And it's cited in Judge Lee's order on
5 the temporary restraining order. It says challenges of
6 the statute that are facially challenges a statute of
7 regulations. Those are legal questions which are properly
8 raised for the first time on appeal or in a declaratory
9 judgment action for the circuit court. Now, what I have
10 if you'll look at my prayer for relief, what I have asked
11 is that the Court declare the act -- that provision of the
12 act unconstitutional and remanded to the -- ordering the
13 course since it was stopped based on unconstitution of the
14 statute reinstating benefits and or return it to the
15 Commission to order them to reinstate benefits.

16 THE COURT: There need to be a finding that the
17 act was unconstitutional before any of that could take
18 place.

19 MR. MCDANIEL: Exactly. Commission can't make a
20 finding that the statutes unconstitutional. They can only
21 address the law that is in it. So what I did was as I
22 stated, I instituted this declaratory judgment action and
23 Mr. Bayne glossed over this fact. Judge Lee issued a
24 temporary restraining order without notice until we could
25 have a hearing. At the hearing, she then lifted the

1 temporary restraining because she said actually
2 instituting is within -- she first took one position and
3 change that after I filed the motion for reconsideration.
4 She said that she couldn't provide any -- not remedially,
5 that's not what I want to say retroactive. In other
6 words, she could only stop action. She could not require
7 them to act under the temporary restraining order because
8 if you look at also at the declaratory judgment action
9 what I did was is that asking the Court to find it
10 unconstitutional and order them to conduct -- Commission
11 to conduct a due process hearing where we have notice and
12 opportunity to be heard and reinstitute those until that
13 can be heard.

14 Now, so what Judge Lee list -- and to be honest
15 with you, there's another a little provision that I did
16 not look at in the temporary restraining order. I'm
17 trying just to get benefits reinstated to my client. And
18 there's a requirement of a bond, a surety and he can't
19 afford a bond. And there's actually an exception in the
20 federal rule. I tend address this with the Supreme Court.
21 I think we need to adopt our rules that says that where --
22 it's relation between employee or employer and then
23 certain benefits that there's no surety bond required, but
24 ours right now requires that and the Supreme Court rules
25 the minimus bond won't do either. So Judge Lee took that

1 into consideration in lifting the temporary restraining
2 order and also said that her first opinion was that she
3 couldn't order them to do something. She could order them
4 to stop from doing something under a temporary restraining
5 order. Now, as to the indispensable party aspect -- then
6 after that, yes, we did have to have a hearing. Of
7 course, that's not an issue before you.

8 THE COURT: At the comp commission?

9 MR. MCDANIEL: At the comp commission, yes, Your
10 Honor, but what's before you we actually have a hearing
11 date, a trial date set on the declaratory judgment action
12 before Judge Manning ---

13 MR. BAYNE: It's January 29th.

14 MR. MCDANIEL: It's January 29th.

15 THE COURT: You have a what?

16 MR. MCDANIEL: We have a hearing on the
17 declaratory judgment action before Judge Manning on the
18 29th.

19 MR. BAYNE: We have a trial date.

20 MR. MCDANIEL: A trial date.

21 THE COURT: On the declaratory judgment action?

22 MR. MCDANIEL: Yes, on the declaratory judgment
23 action. Of course, depending on Your Honor's decision on
24 these last set of motions.

25 MR. BAYNE: They've set them fairly rapidly

1 after this motion hearing.

2 MR. MCDANIEL: And that's one reason I want to
3 go forward today.

4 THE COURT: All right. Well, then what's in
5 front of me today somebody explain that because ---

6 MR. MCDANIEL: You mean, why they bifurcated
7 them? In other words, am I holding the motion the same
8 time?

9 THE COURT: No, let's just take the motion. I
10 thought you -- I thought you were asking me to declare the
11 act unconstitutional.

12 MR. MCDANIEL: No.

13 THE COURT: You're saying that's set in front of
14 Manning.

15 MR. MCDANIEL: That's set before Judge Manning.

16 THE COURT: All right, so what are we here today
17 for?

18 MR. MCDANIEL: Okay. They have filed three
19 motions. And after they filed three, I filed one in
20 reference to their counterclaim first.

21 THE COURT: What's their counterclaim.

22 MR. MCDANIAL: They're counterclaim is for
23 sanctions against me for bringing a frivolous action.

24 THE COURT: Okay.

25 MR. BAYNE: We also have a motion on that same

1 issue, so there's the counterclaim and the motion are
2 actually fairly identical.

3 THE COURT: Isn't that a decision for the trial
4 judge?

5 MR. BAYNE: It can be made upon motion pursuant
6 to the act.

7 MR. MCDANIEL: Your Honor but...

8 THE COURT: Normal procedure would be for the
9 trial judge to determine whether indeed it's a frivolous
10 action.

11 MR. MCDANIEL: Exactly. As a matter of fact, of
12 course, unfortunately, I was very much involved in the
13 drafting of that act when I was -- had to go over to the
14 legislature every day back in 2005 under the tort reform
15 bill, but, Your Honor, as Your Honor appropriately noted
16 that is not separate cause of action. It's not a
17 counterclaim. It is an action that's brought only after
18 there has been a determination that a frivolous -- that
19 you rule against me. And so the very basis for me saying
20 that that motion should be denied is that exactly that.

21 THE COURT: All right, just hold on a minute.

22 MR. MCDANIEL: And also the -- the same things
23 on the counterclaim. The counterclaim was based purely on
24 the same statute that ---

25 MR. BAYNE: Your Honor, if I may address that.

1 THE COURT: Yeah, please.

2 MR. MCDANIEL: I'll be glad when Mr. Bayne
3 address it. The only thing I like to address further on
4 that while we're on that subject is the actual statute. I
5 had this in sort of order where I could grab it if I
6 could. Of course, the best way to plan is when mice and
7 men go astray, but that statute specifically provides as
8 Your Honor just noted is that has ---

9 THE COURT: Well, that's my practice that it
10 would be taken up by the trial judge.

11 MR. MCDANIEL: I'll let Mr. Bayne look for that
12 statute. I like to read it to the Court. I think it's
13 the ---

14 THE COURT: All right. Well, let me look just a
15 minute. You got five motions up here. All right, Mr.
16 Bayne, you got a motion under 12(b)(7) to join
17 indispensable parties; is that correct?

18 MR. BAYNE: Correct, Your Honor, that's what we
19 talked about.

20 THE COURT: All right. Tell me why they're --
21 explain that.

22 MR. BAYNE: As, Your Honor, said there's no
23 relief that we can grant even if the statute's found to be
24 unconstitutional. There's no relief that can be granted
25 to his client. I find the statute unconstitutional as

1 Judge Lee stated in her order as the law states even if
2 the statute is unconstitutional that Your Honor or Judge
3 Manning or Judge Lee cannot order the Workers'
4 Compensation Commission to provide benefits. They cannot
5 order us to provide benefits. There is no relief that we
6 can possibly grant to his client in the event it's
7 unconstitutional. I'm not certain if there's any relief
8 that the Workers' Compensation Commission or the
9 Legislature to grant, but if were a party, there's a
10 possibility they could be directed to amend the statute or
11 to comply with the order of this court, but an order ---

12 THE COURT: Why can't the Court declare a
13 statute unconstitutional in any case?

14 MR. BAYNE: It can. And I was going to get to
15 that when we get to the summary judgment part, but this
16 statute has never been declared unconstitutional and
17 there's been several cases in 2013 where they direct a
18 reference to the statute. They complied with statute and
19 so they've certainly had the opportunity to find the
20 statute unconstitutional.

21 THE COURT: All right. Have you briefed that
22 issue?

23 MR. BAYNE: Yes, Your Honor, that's within my
24 summary judgment. I believe that's in my summary
25 judgment. I also got cases to hand up to you. They don't

1 address the constitutionality of the statute. They simply
2 address the fact they've cited to that statute. They've
3 used that statute in reaching conclusions and issued
4 orders. As far as ---

5 THE COURT: Just hold on a minute.

6 MR. BAYNE: Okay.

7 THE COURT: Do I have that memorandum?

8 MR. BAYNE: They were submitted, Your Honor, but
9 I have copies.

10 THE COURT: Well, I probably don't need to
11 explain to you the process in the clerk of court's office.

12 MR. BAYNE: I believe -- I don't know if there's
13 a memorandum on summary judgment. There's an order ---

14 THE COURT: Well, I had the chance to review
15 this entire file. It may be that it's filed. There's an
16 order filed in October providing the temporary
17 restraining. It's a counterclaim in October. This must
18 be the order Lee ---

19 MR. BAYNE: Your Honor, it would been submitted
20 around November 26th of 2013.

21 MR. MCDANIEL: Your Honor, I have Mr. Bayne's
22 original motion to dismiss.

23 THE COURT: I got that.

24 MR. MCDANIEL: My reply?

25 THE COURT: I got that. I'm looking for his

1 memorandum in support.

2 MR. BAYNE: In reference to a motion to dismiss
3 for failure to join party indispensable party.

4 MR. MCDANIEL: Yeah. Can I just hand this up to
5 the Court? It's a case Charleston County Parents Public
6 School Inc. vs. Mosely.

7 THE COURT: That's 12(b)(7) motion and you
8 replied to it. I don't have your memorandum.

9 MR. MCDANIEL: I think this question -- this
10 case is sort of -- I just like to know the answer.

11 MR. BAYNE: I can certainly give you all my
12 copies. I have one copy, but it doesn't -- if you like
13 it.

14 THE COURT: You sent it to the Court?

15 MR. BAYNE: I sent them to -- I thought I sent
16 them the law clerk e-mail address, but they were sent on
17 ---

18 THE COURT: How long ago?

19 MR. BAYNE: They were sent on November 26th
20 2013. And they were sent -- I believe they were mailed to
21 you is the -- so they were sent by e-mail. It was before
22 -- obviously, the new year when this was original set in
23 December and we had to continue it. You had a conflict
24 and we had to continue this on. So I'm certain that they
25 probably ended up somewhere and we didn't resubmit them.

1 THE COURT: It might have end up in some
2 other -- we'll see if we got it. I don't have it in front
3 of me. What's your date?

4 MR. BAYNE: November 26th of 2013.

5 LAW CLERK: Kimberly T. Hinkle (sic).

6 MR. MCDANIEL: Which one?

7 THE COURT: From your office.

8 LAW CLERK: I got three e-mails from one on the
9 21st, one on the 25th and one on the 26th.

10 THE COURT: Hinkle (sic) is your paralegal?

11 MR. MCDANIEL: Yes, Your Honor.

12 LAW CLERK: And then an e-mail on the 14th from
13 Andrea Ham (sic) also from your office.

14 MR. MCDANIAL: Yes.

15 THE COURT: All right. Well ---

16 MR. BAYNE: I got to give you my copy right now.

17 THE COURT: Well, you can supplement the record
18 as they say.

19 MR. MCDANIEL: You can have mine. Mr. Bayne ---

20 MR. BAYNE: I'll have them e-mail this
21 afternoon.

22 THE COURT: Let's follow some kind of procedure.
23 Okay.

24 MR. MCDANIEL: Your Honor, I think when they
25 filed a motion alleging that there's an indispensable

1 party that I didn't join, I think I have a right to notice
2 of who that party is. I think Your Honor would agree.
3 And if you look at the motion, of course, the caption
4 change, but it doesn't -- I don't see where ---

5 THE COURT: I got the motion in front of me,
6 just says failure ---

7 MR. BAYNE: To join the necessary party pursuant
8 to Rule 19.

9 THE COURT: He says that's why it should be
10 dismissed.

11 MR. MCDANIEL: I understand, but first off I
12 think one my arguments that I made in reply is I can't
13 tell who the -- is alleged to be indispensable party and
14 as of memorandum or whatever is when -- and now really is
15 now is when I found out that they're alleging we should
16 have join the Workers' Compensation Commission.

17 THE COURT: Well, paragraph -- Mr. Bayne, you
18 read his reply to your motion?

19 MR. BAYNE: I have, Your Honor.

20 THE COURT: Number five says that subsection C
21 of the rule -- I don't have the rule right in front of me,
22 shall state the names if known to the pleader of any
23 person described who are not joined. So ---

24 MR. BAYNE: Frankly, Your Honor, there's not a
25 name or place in the motion. We're not really certain who

1 should be a party to this. I mean, that's where we're at
2 in this.

3 MR. MCDANIEL: But they're an indispensable
4 party.

5 MR. BAYNE: We know it's not us, that's our
6 position.

7 THE COURT: That's true. Well, I agree with
8 that.

9 MR. BAYNE: And so it's someone else that needs
10 to be here. It's not us.

11 THE COURT: Okay. I'll rule on that. You give
12 me whatever memorandum you want to submit in reply -- I
13 mean in support of your motion.

14 MR. BAYNE: I'll have all that e-mailed this
15 afternoon.

16 THE COURT: Great. Now, what's this 59(e)
17 motion is that -- what is that? I just pick the motions
18 off the top of the file. It was a 59(e) motion in here
19 directed to finding of a case on October 9th, so that's
20 not...

21 MR. BAYNE: That had to do with the temporary
22 restraining order.

23 THE COURT: That's not me. I'm just moving
24 through them.

25 MR. MCDANIEL: The next motion ---

1 THE COURT: I got a motion for summary judgment.

2 MR. MCDANIEL: That's one of the three that
3 Mr. Bayne we're here on today about.

4 THE COURT: I don't have any memorandum on that.
5 Tell me about it. I hate to go back through it, but
6 what's the basis for the motion for summary judgment.

7 MR. BAYNE: The basis for the motion for summary
8 judgment, Your Honor, is simply that the statute that is
9 being challenged is not unconstitutional and so therefore
10 there is no genuine issue of material fact remaining. So
11 therefore ---

12 THE COURT: So that's dependent upon the
13 12(b)(7)?

14 MR. BAYNE: It's both dependent upon the 12(b)
15 (7) and frankly that a finding that the statute down there
16 is not unconstitutional, which is not what's occurring
17 here today. We have the case law that was referenced a
18 minute ago that I was going to hand up that simply shows
19 this statute has been referenced ---

20 THE COURT: Billy, hand that up to Mr. Bayne.

21 MR. BAYNE: Each of those cases ---

22 MR. MCDANIEL: Your Honor, one thing I got no
23 objection to the testimony -- I mean, those cases being
24 handed up to the Court, but I was listening to Mr. Bayne
25 and I believe -- I just want to make sure this isn't

1 glossed over. He's not saying that any of those cases
2 have determined that case to be constitutional. They're
3 just cases that cite that.

4 MR. BAYNE: That's correct. They don't make a
5 ruling one way or the other. What they do is they refer
6 and rely on that statute at the Supreme Court and Court of
7 Appeals level, which contains within it implicit finding
8 of constitutionality.

9 THE COURT: I think understand now.

10 MR. BAYNE: That's the basis for our motion for
11 summary judgment.

12 THE COURT: As far as we got, I think I'm with
13 you. Now, I think on your Rule 65 motion I can dispense
14 with that.

15 MR. MCDANIEL: That has already been decided.

16 THE COURT: By whom?

17 MR. MCDANIEL: That was as to I believe,
18 Brett, that was to the original hearing.

19 MR. BAYNE: That had to do with the restraining
20 order.

21 MR. MCDANIEL: That one was ruled on at the time

22 ---

23 THE COURT: I'm sorry. Where is the
24 frivolous...

25 MR. MCDANIEL: The next one will be their motion

1 for sanctions against me for bringing a frivolous action
2 -- bringing a declaratory judgment action.

3 THE COURT: Okay.

4 MR. BAYNE: And, Your Honor, if I can clarify,
5 but the motion for cost it's title to I believe the motion
6 for fees and costs and other relief this court deems
7 appropriate, that is limited in scope only to the
8 temporary restraining order. Mr. McDaniel has referenced
9 and I believe his filings in just a moment ago that it has
10 to do with bringing a declaratory judgment action that's
11 not -- it has only to do with the fact that there was a
12 temporary restraining order sought and issued. It was
13 improper, that Judge Lee has acknowledged that she had no
14 jurisdiction to issue that restraining order, that she had
15 no jurisdiction to order what she ordered in that
16 restraining order that was requested by the plaintiff,
17 that we had to expend cost and fees associated with
18 defending the temporary restraining order and that we're
19 asking for reimbursement for those costs and fees
20 associated with the improper restraining. It has nothing
21 to do with the declaratory judgment action itself. We
22 haven't filed anything related to that for sanctions. We
23 don't intend to file anything for that because we do agree
24 with Judge Lee that a declaratory judgment action can be
25 brought in circuit court, that's our position.

1 THE COURT: Judge Lee what?

2 MR. BAYNE: Judge Lee in her -- and I touched on
3 it and Mr. McDaniel touched on it in her order resending
4 the temporary restraining order. She stated that the
5 Court agrees the restraining order should be dismissed,
6 that the Court cannot acquire affirmative action by
7 ordering reinstatement of benefits, that a hearing is
8 scheduled before the Workers' Compensation Commission and
9 that the commission has sole authority of reinstatement of
10 benefits if appropriate. They have originals -- exclusive
11 originals subject matter jurisdiction over relief of work
12 related injuries and the Court must defer to that
13 authority, that is ground in law that is well established
14 principle. She goes on to find as we had asked for that
15 and dismissal of the declaratory judgment. She goes on to
16 find as Mr. McDaniel pointed out that a declaratory
17 judgment action can be properly before the circuit court.
18 What Mr. McDaniel has indicated is that we're asking for
19 sanctions for the declaratory judgment action, that is
20 not what we're asking for. We're asking for our fees and
21 costs associated only with temporary restraining order
22 that Judge Lee had ruled on.

23 THE COURT: All right. Mr. McDaniel.

24 MR. MCDANIEL: Your Honor, first off, you have
25 find that that was a frivolous action. Judge Lee simply

1 agreed with them. She took the position -- first off, she
2 took the position she couldn't grant affirmative relief
3 meaning order reinstatement. Then I point out a case of a
4 doctor up in Spartanburg County where they terminated her
5 employment and the temporary restraining order reinstated
6 her to that -- to that position, so it was affirmative
7 relief. And Judge Lee then agreed with me but said in
8 this case that she could not order them to reinstate
9 benefits, but as part of that also, she argued that she in
10 reference to the requirement of a bond, but the only
11 temporary restraining order was issued was a temporary
12 restraining order without notice. Then based on I
13 requested a temporary restraining order, based on
14 restraining them from stopping benefits and I think
15 there's good faith argument. As far as me being
16 sanctioned for bringing some kind of frivolous action, I
17 don't know cases ever decided that that's wrong. There
18 been numerous cases in declaratory judgment actions where
19 the Court grants temporary restraining order or doesn't
20 grant temporary restraining order, that doesn't mean --
21 that doesn't make the action frivolous. I think I have
22 good faith grounds under existing law to request that.

23 MR. BAYNE: And, Your Honor, if I may, our
24 position is what makes it frivolous, what makes it
25 compensable to our client is that the law is very clear .

1 that this court does not have any jurisdiction to deal
2 with the reinstatement of benefits, to deal with the
3 payment of benefits or to deal with orders of Workers'
4 Compensation Commission or to a defendant in a workers'
5 compensation case to pay benefits in the memorandum that I
6 filed that I will send to you I cited a case that is
7 called Cook vs. Mack's Transfer & Storage. And it talks
8 about if the dispute concerns an alleged wrongful denial
9 of a statutory benefits, the Commission has exclusive
10 jurisdiction to adjudicate the controversy whether denial
11 is willful and in bad faith, negligent or the result of a
12 good faith difference is immaterial of the question of the
13 commission's exclusive jurisdiction. That case is right
14 on point with what occurred here as far as a temporary
15 restraining order. Mr. McDaniel had no authority under
16 law to come into court on a temporary restraining order
17 required us to pay benefits or to require us to come in
18 and defend the temporary restraining order, that's the
19 basis for our request that we retrieved our cost
20 associated with replying to that temporary restraining
21 order and appearing before Judge Lee.

22 THE COURT: All right. I'm going to deny the
23 motion. What's next?

24 MR. BAYNE: I believe all that's left is
25 Mr. McDaniel's motion to dismiss the counterclaim.

1 MR. MCDANIEL: And the counterclaim just the
2 same thing as the motion ---

3 MR. BAYNE: It's ---

4 MR. MCDANIEL: --- to the motion for sanctions
5 against me for bringing frivolous action. It just couched
6 in both the counterclaim. And the reason I requested this
7 is the same reason that I asked you to deny their motion
8 for attorney's fees and costs.

9 THE COURT: Is denial of the motion satisfy
10 that?

11 MR. BAYNE: I believe it would, Your Honor,
12 because it's the same relief as being requested.

13 THE COURT: All right. Then your motion is
14 granted.

15 MR. MCDANIEL: Thank you.

16 THE COURT: Now, the only thing I got is a
17 motion for summary judgment?

18 MR. BAYNE: We discussed that a few minutes ago
19 that it has to do with the fact that the statute has been
20 used is not found unconstitutional on our basis for that
21 motion is that there's no issue of material fact
22 remaining.

23 THE COURT: All right. What's left for this
24 court then is the 12(b)(7) issue?

25 MR. BAYNE: Correct.

1 THE COURT: Is that it?

2 MR. BAYNE: And summary judgment of the 12(b)(7)
3 have not received a ruling on.

4 THE COURT: All right. What was your motion,
5 Mr. McDaniel?

6 MR. MCDANIEL: To dismiss the counterclaim,
7 that's the one you just granted.

8 THE COURT: It was just a string of motions up
9 here that were not cataloged in the file, so I'm just
10 searching for these motions. All right. Mr. Bayne, you
11 going submit that -- your support in memorandum?

12 MR. BAYNE: Yes, Your Honor, all that will be
13 submit this afternoon.

14 THE COURT: Anything else?

15 MR. MCDANIEL: No, Your Honor, except that I
16 would hand up two cases in reference to summary judgment
17 in reference to a declaratory judgment action just in
18 support of my position, you know, because they allege that
19 there was not a material issue ---

20 THE COURT: I assume you want some reply before
21 your -- what date's your trial?

22 MR. MCDANIEL: The 29th.

23 MR. BAYNE: Verify that, Your Honor. I'm sorry
24 it's January 27th.

25 THE COURT: You mean next week?

1 MR. BAYNE: Yes.

2 MR. MCDANIEL: I want get to see you next week
3 assuming ---

4 MR. BAYNE: Actually that is Monday, January
5 27th, so it's about ten days.

6 THE COURT: I got nothing else to do.

7 MR. BAYNE: Your Honor, I have -- can I just
8 give you my copies of material and all the reprint in my
9 file?

10 THE COURT: Sure. Thank you.

11 MR. MCDANIEL: If you haven't got anything else
12 to do, Your Honor, as long as you allow me to avail myself
13 of the three P's, I'll be glad to do for you tomorrow.

14 THE COURT: You want to work on my list?

15 MR. MCDANIEL: No, no. Your Honor, stated you
16 didn't have anything. Maybe, that was in reference to
17 next week.

18 THE COURT: No, it wasn't in reference to -- my
19 tongue was firmly entrenched in my cheek.

20 MR. BAYNE: I can submit digital copies of all
21 that.

22 MR. MCDANIEL: Here's the -- I submitted before
23 it's over here's that order granting the dismissal of a
24 counterclaim and also order denying defendant's motion for
25 fees cost. It's all in pdl file.

1 THE COURT: I hate pdl.

2 MR. BAYNE: I'll send the Word version. Thank
3 you, Your Honor.

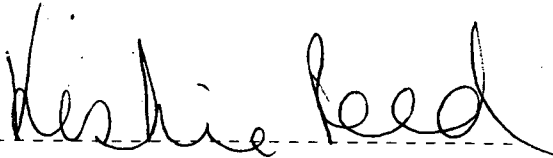
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
)
COUNTY OF FLORENCE)

I, Keshia Reed, Court Reporter and Notary Public
in and for the State of South Carolina At Large, do hereby
certify that the above-entitled cause was heard as
hereinafter set out; that I was authorized to and did
transcribe the said proceedings; and that the foregoing
and annexed paged, numbered 1 through 33, inclusive,
constitute a true and accurate transcription of my
stenographic report of the said cause taken during the
said hearing. In the Court of Common Pleas for Richland
County, South Carolina, on the 3rd day of March, 2010.

I do further certify that I am neither of kin,
counsel nor interest to any party hereto. In witness
whereof, I have hereunto affixed my signature this 5th day
of July 2016.


Keshia Reed, Court Reporter

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) COURT OF COMMON PLEAS
2013-CP-40-05888

Clarence Winfrey,)
Plaintiff,)
vs.) TRANSCRIPT OF RECORD
American Fire & Casualty Co.)
and State of South Carolina,)
Defendants.)

September 9, 2014
Columbia, South Carolina

B E F O R E:
THE HONORABLE DEANDREA G. BENJAMIN, JUDGE.

A P P E A R A N C E S:
PRESTON F. MCDANIEL, ESQ.
Attorney for the Plaintiff
BRETT H. BAYNE, ESQ.
Attorney for the Defendant Archway
T. PARKIN HUNGER, SENIOR ASSISTANT ATTORNEY GENERAL
J. EMORY SMITH, ASSISTANT DEPUTY ATTORNEY GENERAL
Attorneys for the Defendant State of South Carolina

DEBORAH M. McCURDY, RPR
Official Court Reporter

I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called
during these proceedings.)

E X H I B I T S

(WHEREUPON, no exhibits were introduced
during these proceedings.)

1 SEPTEMBER 9, 2014

2 THE COURT: All right. This is the case of
3 Clarence B. Winfrey, Jr., versus American Fire &
4 Casualty Insurance Company and the State of South
5 Carolina.

6 This is -- actually, I'm not sure what
7 motion -- well, I am -- I saw we had motions, but
8 the only thing that the docket says is non-jury
9 trial. So have you all been able to resolve any of
10 the motions? I know that there are quite a few
11 from my reading over the documents.

12 MR. HUNTER: Your Honor, I am Parkin Hunter,
13 with the Attorney General's Office. I believe they
14 are still all pending, unless Mr. McDaniel is not
15 trying to kick us out of the case anymore.

16 MR. MCDANIEL: Well, I had a motion to dismiss
17 the State, Your Honor. Preston McDaniel,
18 representing the claimant -- the plaintiff in this
19 action. So, no, they are all pending, so.

20 THE COURT: You have a motion to dismiss the
21 State?

22 MR. MCDANIEL: The State of South Carolina,
23 yes, ma'am.

24 MR. BAYNE: Judge Benjamin, my name is Brett
25 Bayne. I represent American Fire. And I have a

1 motion to dismiss American Fire, so.

2 THE COURT: What is your last name?

3 MR. BAYNE: Bayne, B-A-Y-N-E, Your Honor. So
4 if you want to dismiss both of us, we can just walk
5 out.

6 THE COURT: I didn't know how to spell it.

7 All right. And then Mr. Smith?

8 MR. SMITH: Your Honor, I am Emory Smith, with
9 the Attorney General's Office. Parkin Hunter is
10 going to be arguing the motions for the State, but
11 I am here to give whatever assistance is needed.

12 And we have with us today a new intern in our
13 office, Dallas Meacham, on the back row, and he is
14 a student at Carolina and is considering law
15 school.

16 THE COURT: Okay. All right, let's see.

17 MR. HUNTER: And with Your Honor's permission,
18 may I give my card to the court reporter?

19 THE COURT: Sure.

20 MR. BAYNE: I left mine in the office.

21 MR. MCDANIEL: I will do the same.

22 (All comply.)

23 MR. HUNTER: And, Your Honor, as another
24 preliminary matter, I filed a sur-reply memorandum
25 yesterday and e-mailed it out, and I don't know if

1 it reached your desk. I have some hard copies.

2 THE COURT: I have a copy.

3 MR. HUNTER: Thank you.

4 THE COURT: We did receive it today, I
5 believe.

6 (Pause.)

7 THE COURT: Okay. All right, whenever you all
8 want to get started.

9 MR. MCDANIEL: Your Honor --

10 THE COURT: Who wants to go first?

11 MR. MCDANIEL: Let me say to the Court, I
12 think -- for example, I have a motion to dismiss
13 the State of South Carolina. Of course -- and then
14 the State of South Carolina has a motion for
15 judgment on the pleadings. And then I have a
16 motion to dismiss Mr. Bayne's counterclaim to the
17 amended complaint. So -- and then after that we
18 have the complaint and the answers of both parties
19 and the actual real issue that we hope we'll be
20 able to get to today.

21 To me -- we are here at Your Honor's pleasure,
22 but it looks like, to me, that the first motion
23 should be the motion to dismiss the State, because
24 if that goes away, if that is granted, then Parkin
25 and them can all go home. And then we will go next

1 to my motion to dismiss Mr. Bayne's counterclaim.

2 MR. BAYNE: Probably my motion to dismiss
3 American Fire should be somewhere in there, or my
4 request to dismiss American Fire as part of the
5 answer, because if we're dismissed, then we go
6 away.

7 MR. MCDANIEL: Well, Your Honor, that is the
8 reason I asked Mr. Bayne, I did not have a separate
9 motion filed to dismiss. Mr. Bayne served a bunch
10 of motions to dismiss me on all kind of grounds
11 back in the fall that were all decided and heard.
12 And I would not disagree that maybe that they want
13 to be dismissed as a party in the counterclaim, but
14 that would be -- I think that would be heard as
15 part of the complaint and counterclaim. But if you
16 want to hear it up front, fine with me.

17 MR. BAYNE: We are not a proper party at all
18 to this. I don't know if we want to -- if we get
19 into defending it, then it becomes -- before we
20 address that issue.

21 THE COURT: All right. We'll hear the motion
22 to dismiss the State, and then I'll hear the motion
23 to dismiss American Fire & Casualty, I guess. And
24 then after that we'll hear the motion to dismiss
25 the counterclaim.

1 MR. BAYNE: And on the counterclaim, Your
2 Honor, it may -- in the filing that I made and on
3 the record today I was going to amend that to be an
4 affirmative defense. So that may solve that
5 problem in and of itself. If there is no longer a
6 counterclaim -- it is a request for sanctions for a
7 frivolous filing, so if it is an affirmative
8 defense, then it is permissible and it would
9 resolve that issue entirely, so.

10 THE COURT: And I'm guessing you are not going
11 to consent to that; is that correct, Mr. McDaniel?

12 MR. MCDANIEL: I'm sorry?

13 THE COURT: There is no consent to that; is
14 that correct?

15 MR. MCDANIEL: None, Your Honor.

16 THE COURT: All right. So you would have to
17 file a motion.

18 MR. BAYNE: That's fine. And we can just file
19 a motion for sanctions after the hearing is over
20 too.

21 THE COURT: You can file a motion for -- to
22 amend your answer, I guess.

23 MR. BAYNE: Well, we'll just -- we'll file
24 that motion. We have also filed a motion for costs
25 related to the temporary restraining order that is

1 properly before the Court and can be decided, so we
2 can proceed just on that. We'll withdraw our
3 counterclaim and proceed on that before you today.

4 THE COURT: So you are withdrawing the
5 counterclaim?

6 MR. BAYNE: We will just withdraw the
7 counterclaim and we will proceed on the motion for
8 costs which is permissible under the act.

9 THE COURT: All right. So he's withdrawing
10 the counterclaim. So that takes care of your
11 motion to dismiss the counterclaim.

12 MR. MCDANIEL: Okay.

13 THE COURT: Okay.

14 MR. MCDANIEL: And he is proceeding on just
15 the motion for costs --

16 THE COURT: As to the temporary injunction.

17 MR. BAYNE: Correct.

18 THE COURT: Or restraining order that was
19 issued by Judge Lee.

20 MR. MCDANIEL: All right.

21 THE COURT: All right. So if somebody can
22 give me a little bit of background. I have read
23 over the stuff earlier today and yesterday, but if
24 someone can give me a little bit of history as to
25 what is going on regarding this case.

1 MR. HUNTER: I'll be glad to do that,
2 unless --

3 MR. MCDANIEL: Well, that will be fine, or I
4 can -- since I'm the Plaintiff, Your Honor, I'll be
5 glad to.

6 THE COURT: Go ahead. You are the Plaintiff.
7 Yes, sir.

8 MR. MCDANIEL: Mr. Clarence Winfrey was
9 injured in a work-related accident on May 22nd.

10 Subsequent to that, as is set out in the
11 pleadings -- and we have agreed that all the
12 documents up through the time that Form 15 was
13 filed -- and I will explain the 15 in just a
14 moment, Your Honor -- but that all those are just
15 going to be put and made part of the record by
16 agreement.

17 But basically what happened after that is the
18 carrier -- it was reported to the employer, the
19 employer reported it to the carrier, and the
20 carrier started temporary total disability benefits
21 and authorized medical care.

22 They paid benefits from that date when they
23 were started through September the 13th -- actually
24 through the 16th. On the 13th verbally we were
25 advised that they were now denying the claim. And

1 on the 16th we filed a Form -- received a Form 15.

2 Form 15 is a document that was created by the
3 Workers' Compensation Commission under the act,
4 which provides first you are supposed to file a
5 Section I when you start benefits. It is required
6 by the act. And then if you stop benefits, you
7 fill out Section II of the act, of the Form 15,
8 advising during the first 150 days that you are
9 stopping benefits.

10 Then, after that, the claimant has a right to
11 request a hearing. After that, once benefits have
12 been terminated -- they have the right to terminate
13 the benefits without a hearing for the first --
14 during the first 150 days.

15 And that is the reason we are here, as to
16 whether or not that statute is constitutional under
17 the South Carolina and federal constitutions.

18 Now, so what happened was, is on
19 September 16th they stopped benefits pursuant to
20 filing the form, notifying us that they were
21 stopping benefits, and stopping those benefits
22 without a hearing.

23 The alleged reason for that was that, based on
24 the good faith investigation, they had found
25 grounds to deny the benefits.

1 Thereafter, two things occurred. We filed for
2 a hearing to reinstate benefits; and in addition to
3 that, we filed a Form 50, now that they were
4 denying benefits, that he had sustained compensable
5 injury, and we then went to a hearing later on
6 that.

7 So, as soon as they filed the Form 15-II
8 stopping my client's benefits, I then filed an
9 action in this court, a declaratory judgment
10 action, to have the statute declared
11 unconstitutional as violating my client's due
12 process rights, in violation of the Administrative
13 Procedures Act, and also in violation of the Equal
14 Protection Clause of the state and federal
15 constitutions.

16 In addition -- that is the relief we are
17 requesting, and also we requested that benefits be
18 reinstated or that the case be remanded to the
19 commission to reinstate benefits because the act is
20 unconstitutional.

21 We also filed for a temporary restraining
22 order without hearing, and that was granted. We
23 then went to a hearing, and Judge Alison Lee denied
24 the temporary restraining order going forward.

25 And then after that we have had numerous

1 motions, but that is basically the gravamen of the
2 case.

3 We were ordered in response to a 12(b)(5)
4 motion that Mr. Bayne filed alleging that we had
5 failed to add an indispensable party and should be
6 kicked out of court, which was denied by Judge
7 Cooper. Mr. Bayne and the Defendant, American Fire
8 at that time, said they weren't sure who the
9 indispensable party was, but I should be kicked out
10 of court because we weren't -- we didn't have them.
11 And he alleged that there were two possible
12 indispensable parties: One being the State of
13 South Carolina, and the other being the State
14 Workers' Compensation Commission.

15 Now -- but, however, as part -- under that
16 order, Judge Cooper ordered that we add the State
17 of South Carolina as a party, which we did, and
18 filed an amended complaint adding the State of
19 South Carolina as a party.

20 Also, Your Honor, just for purposes of where
21 we are, when I initially filed the declaratory
22 judgment action, I properly -- in accordance with
23 the circuit court rules and with the declaratory
24 judgment statute, Served the Attorney General with
25 a copy of the pleadings so that they could

1 participate if they so chose.

2 And we heard nothing until after I was ordered
3 to file the amended complaint, and the Attorney
4 General's Office then replied to the amended
5 complaint.

6 So the gravamen of the case is this: We filed
7 a declaratory judgment action asking you to declare
8 this part of 42-9-260 unconstitutional on the basis
9 of a violation of procedural due process, right to
10 hearing, and a right to confront witnesses prior to
11 the termination of benefits, property interest that
12 the claimant has. We have asked for a declaratory
13 judgment action as to who has the burden of proof
14 in a Form 15 hearing, to make a declaration of
15 rights of the parties under the statute in that
16 regard.

17 And also, of course, the issue of the
18 declaratory judgment -- I mean, excuse me, the
19 temporary restraining order has already been
20 decided. So that is basically the facts in
21 controversy and the facts that led to us being here
22 today.

23 I'll let Mr. Parkin -- if any party wants to
24 add anything.

25 THE COURT: All right.

1 MR. HUNTER: Yes. May it please the Court?

2 One thing that is kind of ironic is, we are
3 in this case because of the summons and complaint
4 served by the person who is now moving to dismiss
5 us from this case. I'm not sure if that means
6 anything, but it seems an irony.

7 Judge Cooper ordered us in this case. I would
8 put forth that that is the law of the case. That
9 has been determined. Nothing was challenged on
10 that.

11 Plus, I think the attorney --

12 THE COURT: So he wants to dismiss you all,
13 and you all don't want to be dismissed?

14 MR. HUNTER: Right. We want to stay in the
15 case to defend the constitutionality of the
16 statute, which --

17 THE COURT: Usually it is the other way
18 around.

19 MR. HUNTER: Right. But, you know, the
20 Attorney General is responsible for defending the
21 constitutionality of the statutes, and I think that
22 we clearly - we clearly have the right to do that.
23 The Rules of Civil Procedure, Rule 4, provides that
24 we have to be given notice. And when declaratory
25 relief is sought on these issues, all persons have

1 to be given notice.

2 THE COURT: Okay.

3 MR. HUNTER: And have a right to appear. So
4 we think we have a right to be here and we want to
5 be here and would like to stay here.

6 THE COURT: All right. Let me hear from you
7 as to the motion to dismiss the A.G.'s Office.

8 MR. MCDANIEL: Well, actually, in the Attorney
9 General's answer, the Attorney General responded
10 that they were not a proper party and should be
11 dismissed from the action, that they did not want
12 to participate.

13 So I, in part, filed the motion to give -- you
14 know, to provide the Attorney General be removed
15 because of that reason.

16 The other reason is that -- I don't know how
17 things are handled at the Attorney General's Office
18 now. We have Emory Smith, who is also with the
19 Attorney General's Office. And I had the pleasure
20 to serve as Assistant Attorney General with
21 Mr. Smith at one time. But when -- at that point
22 in time, when complaints came in that alleged
23 unconstitutionality, or whatever, the Attorney
24 General reviewed the situation and made the
25 decision as to whether or not he needed to

1 participate, or whatever.

2 Now, and in that regard, we properly filed it.
3 We heard nothing. They chose not to participate in
4 deciding whether or not the statute was
5 unconstitutional until in a motion to dismiss --
6 and I'm not alleging that Judge Cooper did not have
7 the jurisdiction and authority to -- under the
8 rules, he can add anybody a party at any time he
9 deems necessary. But, we actually went over on a
10 motion to dismiss my cause of action because I
11 failed to add an indispensable party. All right?
12 And then as part of that motion, then Judge Cooper
13 went outside of the motion -- and, here again, I'm
14 not saying he did not have the authority, because
15 he does -- but he added the Attorney General's
16 Office, and then the Attorney General's Office, in
17 part of their reply, reply and take the position
18 that they don't want to be a party, that they
19 should not be a party, that they are not a proper
20 party to this action.

21 So, you know, so based on their assertion in
22 their pleadings, I think they should be -- and
23 because they were given the opportunity, according
24 to statute, we did everything we were supposed to
25 do, they chose not to participate. I don't think

1 now they ought to come into court and be allowed to
2 participate, Number One. And, Number Two, after we
3 have gone through -- for example, we're here --
4 part of this clogging up today of the court is
5 based on a judgment on the pleadings, when we have
6 already been through this round of all these
7 motions. I faced about six or seven or eight
8 motions back in the fall through Mr. Bayne, and now
9 we have got to come in here when it is finally my
10 client's day in court and we have got to face
11 another judgment on the pleadings motion.

12 And, Your Honor, I just ask you to dismiss
13 them. They said they wanted out. I think you
14 ought to let them out.

15 THE COURT: All right. I'll give you a second
16 to reply.

17 MR. HUNTER: Thank you, Your Honor.

18 In our answer, it is quoted: The Defendant
19 denies that the State of South Carolina is a
20 necessary party in the action.

21 We didn't deny that we were a proper party.
22 And if we hadn't been named, we could have moved to
23 intervene down the road as long as there would have
24 been no prejudice to any party for delayed
25 intervention. I think we clearly had the right to

1 intervene. We answered to all the issues in the
2 complaint that we answered, and we think we
3 preserved our rights and want to be heard.

4 THE COURT: All right. I'm going to deny the
5 motion to dismiss the State. I am going to allow
6 them to stay in. I think under the rules they have
7 a right to represent the State in this matter. So,
8 for that reason, I am going to deny the motion to
9 dismiss the State.

10 All right. What is the next motion?

11 MR. BAYNE: Your Honor, I think it would be my
12 motion to dismiss American Fire would probably be
13 the next chronological to take up before we get
14 into the merits of the constitutionality of this
15 statute.

16 THE COURT: All right.

17 MR. BAYNE: If that is okay with you.

18 THE COURT: That's fine. Do you have some
19 others?

20 MR. MCDANIEL: Well, Your Honor, you know,
21 Mr. Bayne didn't file a separate motion. He filed
22 a counterclaim and then in addition to that he --
23 in addition to the filing of the counterclaim, he
24 now comes in here and says, Well, wait a minute,
25 Your Honor, I didn't mean that to be a

1 counterclaim, I wanted it to be a, you know, an
2 affirmative defense, which is not what it was pled
3 as.

4 So, Your Honor, you know, we might as well go
5 ahead and take it up now, you know, because I
6 understand that the basis of this motion at this
7 time, even though we had all these other motions,
8 is that they are now claiming they are not a proper
9 party to the action. Is that the limitation of the
10 motion?

11 THE COURT: That is what I read.

12 MR. BAYNE: Paragraph Number 3 of our answer,
13 Your Honor, states that American Fire & Casualty
14 is -- if you deny that we are a proper party to
15 this action, that is something that needs to be
16 taken up before we get into the merits of the case,
17 because if we're not a proper party --

18 THE COURT: All right. You can go ahead.

19 MR. BAYNE: Your Honor, this is, as
20 Mr. McDaniel has stated at length, a declaratory
21 judgment action. It is challenging -- it is
22 facially challenging the constitutionality of a
23 statute. It is not ancillary to a matter. It is
24 not an appeal from a lower court case. It is not
25 an appeal from the Workers' Compensation

1 Commission. This is a separate declaratory
2 judgment action alleging that 42-9-260 is
3 unconstitutional.

4 He has not alleged that it is unconstitutional
5 as applied to his client. He is using this case as
6 a vehicle to get this declaratory -- or he has used
7 the workers' compensation case as a vehicle to get
8 this challenge before the Court.

9 But the underlying facts of the case before
10 the Workers' Compensation Commission are irrelevant
11 for whether or not his constitutional challenge
12 stands up. It is a facial challenge that is before
13 this Court today.

14 So what we have, Your Honor, is the Plaintiff
15 in this case has picked a Defendant to sue to
16 challenge the constitutionality of a statute in a
17 non-ancillary matter.

18 It would be no different than if I walked in
19 and I said, I'm going to sue Mr. Hunter or
20 Mr. McDaniel because I don't like the sales tax in
21 this state. They are not the proper party to
22 defend this action.

23 American Fire & Casualty is not the proper
24 party to come in and defend the constitutionality
25 of a statute and a facial challenge to the law of

1 the State of South Carolina.

2 Mr. McDaniel cited two cases that kind of
3 rebut our position. He cited Marley v. Kirby and
4 Last v. MSI Construction. They are in one of his
5 responses. They are also in my memorandum that I
6 filed addressing those issues.

7 Marley is a case involving a challenge to a
8 comparative negligence jury instruction. It was an
9 appeal from a trial to the Court of Appeals in
10 which the proper party was a private entity because
11 that was the original underlying court case.

12 Last v. MSI Construction was a workers'
13 compensation case. It involved an appeal of the
14 constitutionality of a statute to the Court of
15 Appeals as to how the statute was applied in the
16 underlying workers' compensation case.

17 It was not a declaratory judgment action. It
18 was not a facial challenge to the constitutionality
19 of a statute brought in circuit court under the
20 Declaratory Judgment Act.

21 If you look at the memorandum that I filed,
22 Your Honor, towards the end, and I put it in big
23 bold and underlined type, there is not one case in
24 the history of this state where a private entity
25 has been called to defend the constitutionality of

1 a statute in a declaratory judgment action. And
2 that is because the proper entity to defend the
3 statutes and the constitution of the State of South
4 Carolina is the State of South Carolina, the City
5 of Richland -- the City of Columbia, the County of
6 Richland, the City of Lexington. Whoever it is
7 that is applying the law is the one that is
8 required to defend its constitutionality. And a
9 private entity cannot and should not ever be called
10 as an individual to defend the constitutionality of
11 a statute.

12 And that's all I have on that, Your Honor.

13 THE COURT: All right. Yes, sir?

14 MR. MCDANIEL: Your Honor, first off, Raney v.
15 Raney, an action between two private parties, in
16 which case the private party was called upon to
17 defend the constitutionality of the guest
18 statute -- the passenger statute, as to whether or
19 not it was constitutional as creating a different
20 standard. Equal protection.

21 In the case of Marley v. Kirby, it was an
22 action between two private parties in which a
23 different standard and burden of proof was applied
24 to contributory negligence in a motor vehicle
25 accident as compared to all other torts. Private

1 party. Action between two private parties. A
2 private party called upon to defend the
3 constitutionality.

4 In reference to -- so I would assert there is
5 numerous cases in which the constitutionality of a
6 statute is -- a private party is called upon to
7 defend because that party took the benefit of that
8 statute to deny claimant's rights under the
9 constitution.

10 Now, we have the same thing here. 42-9-260,
11 which is commonly referred to as the stop payment
12 statute, was amended years ago to provide that
13 during the first 150 days that they could stop
14 benefits without a hearing.

15 We are alleging that that violates my client's
16 constitutional rights to due process of law.

17 Now, they chose to take the action under the
18 statute. They are called upon -- they are not
19 somebody we just picked out of the -- that is
20 the -- well, they are not somebody we just picked
21 out of the blue. They are the party that took the
22 affirmative action to deny my client's entitlement
23 to compensation benefits under the Workers'
24 Compensation Act.

25 Now, that leads me to another issue -- not

1 issue, but it is really -- there is a reason that
2 there is very few declaratory judgment actions
3 involving a private party in reference to
4 constitutionality under a declaratory judgment
5 action, because, if you think about it, there is
6 almost no other statute that creates in a -- that
7 requires a private party -- state law has been
8 passed, Workers' Compensation Act, and they have
9 been passed nationwide -- but they are almost
10 totally unique. I've been trying to think of
11 another statute wherein the State of South Carolina
12 or any state or the federal government passes a
13 statute that says, Okay, private party, you are
14 required to pay benefits or damages, whatever you
15 want to call them, to an individual, another
16 private party, based on that state law ordering you
17 to pay those benefits. There is almost none out
18 there.

19 I found one that we will refer to a lot later
20 wherein under the state law Wisconsin, in the
21 Sniadach case, which I am going to argue
22 extensively later on to Your Honor, but in the
23 Sniadach case, Wisconsin had a statute whereby if a
24 finance company brought a -- and it is almost
25 unique in federal, United States constitutional

1 law, but Sniadach, they had a pre-garnishment
2 statute that provided that when a finance company
3 or somebody filed an action against somebody, a
4 Defendant, that they could go in and simply
5 pre-garnish, if that person was working, file a
6 notice of garnishment with the employer and that
7 employee and take his money, without a hearing.

8 And so that is one of the -- the only one I
9 have been able to find specifically on point to
10 whereby you have a deprivation of property interest
11 without due process of law. I don't know of
12 another one.

13 Now, and so I would submit that for all those
14 reasons -- obviously there are numerous cases
15 wherein a private party is called upon to defend
16 the constitutionality of a statute. There is a lot
17 more than just the ones I have cited.

18 But, Number Two, that they are not just a
19 party chosen out of the blue, they are a proper
20 party, because they are the ones who took the
21 benefit of statute and stopped my client's
22 benefits.

23 And, Number Three, the uniqueness of the
24 situation explains why there is not any other
25 declaratory judgment action. There is just very

1 rarely a situation that this would come up.

2 I would ask you to leave them in.

3 MR. BAYNE: Your Honor, if I may briefly
4 respond to that.

5 THE COURT: Yes, sir.

6 MR. BAYNE: As I said at the beginning, every
7 case Mr. McDaniel has cited, and every case that
8 you want to look up that involves an appeal of the
9 constitutionality of a statute as applied to a
10 party, involves a private party. We don't dispute
11 that. Every case he cites is a trial, a hearing
12 occurred, a statute was applied, the party that was
13 aggrieved said, That is unconstitutional, I'm going
14 to appeal that.

15 This is a case where before we even had a
16 hearing in the Workers' Compensation Commission, he
17 filed a facial challenge to the constitutionality
18 of a statute. He picked us as a Defendant because
19 we were involved in an ongoing case with it, but it
20 doesn't make us a proper party.

21 What is a proper party is an entity that can
22 resolve that situation: The State of South
23 Carolina, the Workers' Compensation Commission, the
24 City of Columbia, whoever it is, it is an entity
25 that enforces the law.

1 None of the requested relief that Mr. McDaniel
2 sought, if you look at his complaint, can be
3 granted by this Court or can be granted by us. I
4 believe there were about five or six. I think five
5 of them the Court doesn't even have jurisdiction to
6 grant. That is the reinstatement of benefits, the
7 ordering of benefits, those things. There is
8 established case law that the circuit court cannot
9 grant those findings.

10 And then the other was a declaration of what
11 the burden of proof is, which would be an advisory
12 opinion. And then a finding that the statute is
13 unconstitutional, which would be a finding that it
14 is facially unconstitutional based on his
15 presentation, which, again, would not involve
16 American Fire & Casualty Insurance. That is
17 something he is challenging. And he is not
18 challenging it as applied to his client at the
19 Workers' Compensation Commission.

20 And that is the distinction between the cases
21 he is citing where it was applied and appealed and
22 this case where it wasn't applied to his client and
23 he has just filed to have it found
24 unconstitutional.

25 That is the gist of our argument, Your Honor.

1 THE COURT: You can speak.

2 MR. MCDANIEL: I'm sorry?

3 THE COURT: Anything else you wanted to add?

4 MR. MCDANIEL: Yes, Your Honor. I was trying
5 to rapidly find it, but you will find -- and I know
6 it is cited when Mr. Bayne challenged our right to
7 bring a declaratory judgment action. You will find
8 that there is a case, there is a Travelscape case
9 and a whole line of cases that hold that the way to
10 challenge the constitutionality of a statute, you
11 have got two options: One, challenge it by way of
12 appeal; or, Number Two, by bringing a declaratory
13 judgment action.

14 This Court has the total jurisdiction to
15 declare this statute unconstitutional. That goes
16 nothing to them being the proper party. They are
17 the proper party because they are the ones that
18 chose to take the action under state law. But,
19 however, Mr. Bayne didn't address that, and feel
20 free to address it, but that is exactly what the
21 line of Travelscape says is that the commission
22 can't address constitutionality.

23 THE COURT: What is the name of that case
24 again?

25 MR. MCDANIEL: Travelscape v.--

1 MR. BAYNE: Your Honor, I agree a hundred
2 percent that case says the circuit court or the
3 Circuit of Appeals on appeal are the two places you
4 can go to challenge constitutionality. That
5 doesn't touch on whether or not the party you sue
6 is the proper party. That case just says the
7 vehicle for doing it is either declaratory judgment
8 in the circuit court or going to the Court of
9 Appeals on appeal.

10 We all agree that the commission itself cannot
11 invalidate a statute. I don't think that is --
12 that is not even in dispute here. What our issue
13 is, is that we don't think a private party can be
14 sued in a declaratory judgment action to find a
15 statute facially unconstitutional when it hasn't
16 been applied to the claimant in the underlying
17 workers' compensation case. And it hasn't been
18 applied. We had invoked the statute, but the
19 commission had not acted.

20 If he wanted to appeal after the commission
21 invoked the statute against his client, he can do
22 that. If he wanted to file a declaratory judgment
23 action against somebody after the act had been
24 applied to him unconstitutionally, he could do
25 that. But in this case he is asking for an

1 advisory opinion that the statute is
2 unconstitutional. Not that it is unconstitutional
3 as applied to his client, that it is
4 unconstitutional. And a private party is not the
5 right entity for that lawsuit, Your Honor.

6 THE COURT: Well, let me ask you this,
7 Mr. McDaniel. What relief can be brought from
8 American Fire & Casualty in your declaratory
9 judgment action? I mean, because that is the issue
10 that is before the Court today; right?

11 MR. MCDANIEL: Correct. Correct. I believe
12 that, Your Honor, there -- first off, this Court
13 can declare the statute under which they took
14 action -- and I listened very carefully to what
15 Mr. Bayne said -- we instituted this action, we
16 caused this action because of our action taken
17 under the guise of 42-9-260.

18 So, first off, they took the action against my
19 client to deprive him of the benefits in violation
20 of the constitutional rights, the due process of
21 law, equal protection, and violation of the
22 Administrative Procedures Act.

23 Now, what relief can you grant? Number One,
24 you can declare the statute unconstitutional. This
25 is argued in another part of the brief. But,

1 however, in answer to Your Honor's question is
2 this: The South Carolina Court of Appeals and the
3 Supreme Court readily, all the time, reverse and
4 remand cases to the -- reverse cases straight out
5 or remand cases to the South Carolina Workers'
6 Compensation Commission to enter an order
7 consistent with the ruling of the Court. You can
8 declare this action unconstitutional, and I believe
9 that, one, you can order reinstatement of benefits
10 because the statute under which the action was
11 taken is unconstitutional, or; two, at a minimum
12 you can remand it to the commission for further
13 proceedings, or to enter an order not inconsistent
14 with the decision of this Court.

15 You know, I know Your Honor, you have very
16 seldom opportunity to address worker's comp because
17 we moved it and taken it straight to the Court of
18 Appeals, but I cite it in my brief. I think it is
19 in response to the State of South Carolina's
20 memorandum that the Supreme Court and Court of
21 Appeals regularly, as a matter of law, declare a
22 statute like something to be as a matter of law an
23 injury by accident or as a matter of law the
24 person's compensation rate should be changed, and
25 they remand it to the commission for the entry of a

1 judgment consistent with the Court's opinion.

2 I have another case wherein the Court of
3 Appeals ordered the commission to reinstate -- or,
4 excuse me, the circuit court ordered the commission
5 to find this to be a compensable accident as a
6 matter of law and remand it to the commission to
7 enter an order not inconsistent.

8 So what I think you can do is, Number One, is
9 declare it unconstitutional. I think you can go
10 ahead and, if you find it unconstitutional, remand
11 it to the commission for them to order the benefits
12 be reinstated or you can remand it for them to
13 enter an order not inconsistent reinstating
14 benefits.

15 Now, the second thing is, is that one of the
16 reliefs we requested -- of course, one of the
17 reliefs we requested in and of itself is
18 constitutionality of the statute. That is the
19 relief we're requesting. That alone is enough.
20 But, however, the other thing that we requested is
21 this. We requested that this Court review the
22 statute and issue an opinion as to who has the
23 burden of proof in this situation.

24 I believe this Court has -- of course,
25 obviously that is the whole purpose of a

1 declaratory judgment action is to declare the
2 rights and responsibilities of the parties -- and
3 in this case the constitutionality, but also for
4 the Court to enter a judgment in that regard.

5 So I believe there is several things this
6 Court can do in granting us relief.

7 MR. BAYNE: And I'll be very brief, Your
8 Honor, I promise.

9 First -- I'll start from the back and go
10 forward -- the burden of proof issue is an appeal.
11 If the burden of proof is improperly applied at the
12 commission level, you appeal that. You appeal that
13 to the Court of Appeals. You don't have a
14 mechanism to form a declaratory judgment when you
15 should -- you should file an appeal to the Court of
16 Appeals. Instead, what Mr. McDaniel is saying is
17 that, If I don't want to do that, I can just file a
18 declaratory judgment action to get an advisory
19 opinion from the Court as to whether the burden of
20 proof was properly applied in this case. That is
21 not proper.

22 Additionally, Your Honor, you had asked the
23 question, What relief can be granted? And the
24 answer Mr. McDaniel gave was that you could remand
25 this case for findings not inconsistent with your

1 opinion, but case law expressly forbids that. Your
2 Honor cannot issue any order that either reinstates
3 benefits, orders benefits, provides benefits, when
4 the dispute is over denial of benefits.

5 THE COURT: Well, he is not saying -- he is
6 saying that I can issue an order -- if I were --
7 because, of course I have not reached a decision --
8 he is saying that I can issue an order remanding it
9 back to the Workers' Comp Commission -- and correct
10 me if I'm wrong -- remand it back to the Workers'
11 Comp Commission with the ruling as to the
12 constitutionality of the statute, and at that point
13 he is saying they can make a decision -- that
14 basically it would be remanded it back. And I
15 understand that you are saying that that is not --

16 MR. BAYNE: Well, Your Honor, what he is
17 challenging -- well, first of all, one of his
18 prayers for relief is to reinstate the benefits, so
19 he is asking you to reinstate those benefits. The
20 problem with parsing out some of those and saying,
21 I just want it remanded, is -- and before I get
22 into that, benefits are being paid. He has already
23 won compensability on this. His client is
24 receiving benefits. So I'm not sure what, you
25 know, further going forward what relief can be

1 granted. Whatever you order is already moot anyway
2 because the commission has ordered benefits to be
3 paid in a hearing before the commission in early
4 2014.

5 So any order you were to issue would be
6 ignored, I guess, because there is no mechanism for
7 them to even remand the hearing. But an order that
8 invalidated 42-9-260 would result in, if we take a
9 step back all the way to October when this was
10 filed before there had been any hearing before the
11 commission, that order that invalidated the statute
12 would result in us being required to immediately
13 resume benefits and pay because there is no longer
14 a stop pay statute under the act. So the result of
15 that order would be that we would be required to
16 immediately pay benefits and pay all back-owed
17 benefits and pay benefits. So whether you ordered
18 it directly or not, your order would result in the
19 resumption of benefits, which is expressly
20 forbidden by case law.

21 And I cited Cook v. Mack's Transfer & Storage,
22 which directly goes into that and states that: Any
23 dispute over the denial of benefits, whatever it
24 is, whether it is a denial, a lack of
25 investigation, bad faith, unconstitutionality,

1 whatever it is, Cook v. Mack's Transfer & Storage
2 says that the circuit court cannot rule on that
3 issue as far as the reinstatement of benefits is
4 concerned.

5 So the only thing that Your Honor could do
6 that is in the request for relief from Mr. McDaniel
7 is find the statute unconstitutional. And there is
8 nothing that you can grant against the Defendant
9 American Fire that would be any relief for
10 Mr. McDaniel.

11 And, again, the issue is moot anyway, which is
12 something that we were going to cover in a little
13 bit, but all benefits have been reinstated, he is
14 receiving medical care, he is receiving weekly
15 checks, he is receiving his prescriptions. The
16 case is on appeal.

17 So I'm not sure what -- even if you were to
18 grant this -- what the benefit is that Mr. McDaniel
19 is getting, what the relief is, because the relief
20 he has requested has already been given.

21 THE COURT: All right.

22 MR. MCDANIEL: First off, of course, Mr. Bayne
23 went way outside the record. But, however, Brett,
24 have y'all paid us the benefits from September
25 through --

1 MR. BAYNE: We have paid you the benefits that
2 that were required by law, yes.

3 MR. HUNTER: Have you paid us the benefits --

4 MR. BAYNE: We have paid you benefits required
5 by law.

6 THE COURT: Well, I'm not concerned about -- I
7 mean, because I can't rule on that today.

8 MR. MCDANIEL: They haven't.

9 MR. BAYNE: We have, Your Honor. We have paid
10 the benefits required by law.

11 THE COURT: All right.

12 MR. BAYNE: As ordered by the commission.

13 THE COURT: If y'all have not, that will be
14 for the commission to deal with.

15 MR. MCDANIEL: Correct. However, going back
16 to my -- Mr. Bayne keeps trying to go back to Cook
17 and he fails to separate the two.

18 The commission is the trier of fact in any
19 workers' compensation case. This Court and the
20 Court of Appeals and the Supreme Court are higher
21 courts. They are the finders of the law. It has
22 been that way -- and I can cite you -- if you look
23 at Page 7 of my brief in reply to the State of
24 South Carolina's -- the Attorney General's Offices'
25 brief, you are going to find that I just -- I

1 simply pulled out a couple. And that is, I pulled
2 out Sturkie v. Ballenger, one from the Supreme
3 Court, then I pulled out Grayson v. Gulf Oil.

4 In those cases, where the issue -- if you find
5 that the constitutionality of the statute is a
6 matter of law -- and, of course, we have already --
7 they have already agreed with that the Supreme
8 Court has already ruled in Travelscape and its
9 progeny of cases, it is not the only one, there is
10 tons of them, but that the commission cannot
11 declare a statute unconstitutional. That is a
12 matter for decision by the courts.

13 All right, now, in both Sturkie and in
14 Grayson, one before the Supreme Court and one the
15 Court of Appeals, I just cited these, if Your Honor
16 will look at them, you are going to find at least,
17 at least a hundred, you know, where the
18 commission -- where the Supreme Court or Court of
19 Appeals have ruled that they have reviewed the law
20 and as a matter of law this -- the person has
21 sustained the injury binding, as a matter of law,
22 the employer is found to have more than four
23 employees, as a matter of law the employee is found
24 to have sustained injury by accident.

25 And I cite that, and then it says -- then what

1 the Court did is what I'm asking the Court -- Your
2 Honor asked me what relief can be granted. In that
3 case where they found that the -- as a matter of
4 law under the facts the claimant had sustained an
5 injury by accident.

6 They remanded -- For the reasons stated, the
7 appeal order is reversed and remanded with the
8 direction that judgment be entered for the
9 Plaintiff. Travelscape says I've got two ways we
10 can go. Number One, we can challenge the appeal,
11 or; Number Two -- and at the time that I brought
12 this action and even now, I'm asking for a
13 declaration as to whether or not that statute is
14 unconstitutional. And if you find it
15 unconstitutional, for you to remand it to the
16 commission to enter an order not inconsistent with
17 this order ordering the reinstatement of benefits,
18 because that is what this Court can do. The
19 Supreme Court does it all the time, the Court of
20 Appeals does it all the time. I really don't even
21 understand the argument, Your Honor.

22 MR. BAYNE: Finally, Your Honor, with one
23 sentence. In the order from Judge Lee rescinding
24 the restraining order she found that the circuit
25 court does not have the authority to reinstate

1 benefits, that the only thing they have
2 jurisdiction over is the declaratory judgment
3 action because it was properly filed here. She
4 didn't weigh on the merits of that, so.

5 THE COURT: So you are saying that the Court
6 doesn't even have -- if I were to -- and I, once
7 again, have not decided anything - find that this
8 statute is unconstitutional and remand it back
9 to -- you are saying that this Court doesn't have
10 jurisdiction to remand it back to the Worker's Comp
11 Commission?

12 MR. BAYNE: What I am saying, Your Honor, is
13 that you have no jurisdiction to remand it to the
14 commission because this case before you today is
15 not from the Workers' Compensation Commission.
16 This is not an appeal from the commission. This is
17 a separately filed declaratory judgment action
18 challenging the facial constitutionality of a
19 statute. Nothing you do in this case would affect
20 the underlying workers' compensation case directly.
21 You couldn't issue an order to the commission
22 telling them to do anything in this case because it
23 is not an appeal from the commission from a
24 decision they made, this is a separately filed
25 declaratory judgment action.

1 If Mr. McDaniel wanted to raise the
2 constitutionality at the commission level, which
3 they couldn't rule on, but he could have raised it,
4 he could have then appealed to the Court of Appeals
5 on that issue. Certainly they could have ruled
6 there and remanded it back for further proceedings.
7 But this is a separately filed declaratory judgment
8 action before the Workers' Compensation Commission
9 did anything in this case. It is a functional
10 advisory opinion to find a statute
11 unconstitutional.

12 So, Your Honor, to answer your question, yes,
13 our opinion is you couldn't even remand anything to
14 the commission, you couldn't send directions to
15 them because this isn't anything that grows
16 organically out of that case. It is a separate
17 case entirely.

18 THE COURT: All right.

19 MR. HUNTER: Excuse me. May I say something,
20 Your Honor?

21 THE COURT: Sure.

22 MR. HUNTER: Is that I will be addressing some
23 of these issues. In our arguments we won't be
24 addressing whether or not the insurance carrier
25 should be in the case or not, but we will be

1 addressing these issues about the
2 constitutionality.

3 THE COURT: All right.

4 MR. BAYNE: And that is all I have, Your
5 Honor.

6 THE COURT: All right. I'm going to take a
7 look at the cases, and then I'll let you know.

8 MR. BAYNE: Thank you, Your Honor.

9 THE COURT: Unfortunately, you have to sit in
10 here.

11 MR. BAYNE: That's fine with me.

12 THE COURT: I'll look at the cases and then
13 get something back to you on the issue as to the
14 motion to dismiss the carrier.

15 All right, so the next motion before we get to
16 the -- the motion to dismiss the counterclaim was
17 withdrawn.

18 MR. BAYNE: Your Honor, would you like a
19 proposed order -- proposed orders on that motion to
20 dismiss, or do you want to just wait until after
21 you tell us?

22 THE COURT: You can send me a proposed order.

23 MR. BAYNE: Thank you, Your Honor.

24 MR. MCDANIEL: I am beginning more and more,
25 Your Honor, to wish I was a time billing attorney.

1 Do you want one from me, or is it okay if I wait
2 for your decision on that issue?

3 THE COURT: Whatever suits you.

4 MR. MCDANIEL: Thank you, Your Honor.

5 THE COURT: All right. So now the only issue
6 we have left is the declaratory judgment?

7 MR. MCDANIEL: Their motion for judgment on
8 the pleadings.

9 THE COURT: Okay. I will be glad to hear it.

10 MR. MCDANIEL: Which are joined by the
11 constitutionality, but however you want to do it.

12 MR. HUNTER: May it please the Court?

13 THE COURT: Yes.

14 MR. HUNTER: As I say, we represent South
15 Carolina. Our only interest in this case -- our
16 only interest in this case -- is the
17 constitutionality of 42-9-260, which has been
18 raised. We have not been a party, participated in,
19 had anything to do with any of the proceedings in
20 the Workers' Compensation Court or the appeal, but
21 I would like to state for the record that there
22 have been two separate orders issued by the
23 commission in this case, and so there are already
24 two separate appeals pending in this case with
25 regard to the merits and the compensation case.

1 THE COURT: And do those appeals challenge the
2 constitutionality of the -- the appeals challenge
3 the constitutionality of the statute?

4 MR. HUNTER: They do not, the way I have read
5 the notices of appeal. As I say, we are not
6 directly involved in the appeal, but they do not
7 appear to do so to me.

8 MR. MCDANIEL: No.

9 THE COURT: All right. They don't, Mr.
10 McDaniel?

11 MR. MCDANIEL: I think he is correct on that.

12 THE COURT: All right.

13 MR. BAYNE: Yes, Your Honor, neither of the --
14 we had filed just a notice of appeal. We didn't
15 file a constitutional claim. Mr. McDaniel has not.

16 THE COURT: And I'm guessing you are not
17 questioning the constitutionality?

18 MR. BAYNE: No, Your Honor. Not yet.

19 THE COURT: All right.

20 MR. HUNTER: And as this goes on, Mr. McDaniel
21 and Mr. Bayne have much more knowledge about any
22 issues in the appeal, if there are any issues you
23 want to know about and the underlying workers' comp
24 case.

25 But what I'd like to point out in this case --

1 and this is the key to this case, I think -- is
2 42-9-260 is a voluntary statute. It says the
3 company/carrier may pay. "May" is a big word
4 there. They "may" pay benefits. It says: Quite a
5 public policy reason to allow them to have that
6 option. When somebody gets hurt they can
7 immediately begin to pay the benefits and they
8 don't lose their right to challenge whether or not
9 they would ultimately be legally obligated to pay
10 the benefits. Therefore, workers that are injured
11 are able to get, in many cases, benefits faster
12 because of that statute. So there is a strong
13 public policy behind that statute.

14 And under that statute, for the first 150
15 days, the employer, pursuant to those rights, can
16 do an investigation, and if they decide that they
17 are not going to be obligated to pay the benefits,
18 they can stop the benefits. That is what happened
19 in this case. Then there was a subsequent hearing
20 and the benefits were reinstated.

21 But the main issue is that the carrier
22 voluntarily paid the benefits and that is how it
23 happened.

24 And another key thing in this case is there is
25 no state action in this case. The carrier acted

1 under the statute. It made its own independent
2 decision. And it had the right to stop the
3 benefits without any action whatsoever by the
4 State.

5 So they voluntarily paid the benefits. They
6 did the investigation in accordance with the
7 statute. And they exercised their rights
8 independent of any action by the State. So these
9 are all private actions as far this goes at this
10 point in time.

11 There was no agreement to pay, there was no
12 order from the commission to pay until after the
13 benefits were stopped, then there was a hearing in
14 accordance with the proceedings.

15 So up until the time there was an order by the
16 commission, there was no obligation to pay the
17 benefits, there was no entitlement to receive the
18 benefits, none of that would have happened until
19 after the passage of 150 days or if the parties had
20 entered into an agreement to pay the benefits. So
21 that is critical in this case is to keep that in
22 mind.

23 And we think that you don't even need to reach
24 the constitutionality in this case. As it has been
25 discussed somewhat already, Mr. Winfrey will not

1 receive any benefits from the Court's ruling. And
2 the law in South Carolina is pretty clear law that
3 even if it were a declaratory judgment, there has
4 to be a justiciable reason to bring the declaratory
5 judgment. The Court should not issue an advisory
6 opinion, which is what -- if you reach the
7 constitutionality in this case is in effect what
8 you are doing because ruling on the
9 constitutionality will not affect Mr. Winfrey's
10 benefits. All of that is before the Workers'
11 Compensation Commission.

12 The only thing that I gather that is not
13 before the Compensation Commission is the
14 constitutionality of the statute.

15 Now, our position, that should have been
16 preserved. The commission couldn't declare it
17 unconstitutional, but it should have been preserved
18 for the appeal, and the Court of Appeals would be
19 able to declare it constitutional or
20 unconstitutional as that goes up the system, which
21 is the same court it will get to in this case if
22 there are any appeals.

23 But we think that is what should have been
24 done. There is no justiciable controversy before
25 this Court because he does not have standing to

1 raise the constitutionality of a statute.

2 He is also estopped from raising the
3 constitutionality of a statute because it is the
4 very statute under which he is getting his
5 benefits. The statute is clear. The
6 carrier/company, however you want to refer to them,
7 "may" pay benefits. They voluntarily elected to
8 pay benefits and paid the benefits. So he is --
9 under any way you look at it, he got his benefits
10 under the statute, he was receiving them under the
11 statute.

12 And the law is if you are receiving benefits
13 under a statute, you can't challenge the
14 constitutionality of the statute, which makes
15 perfect sense. You can't take away the ground that
16 is providing you what you are getting.

17 And then also with regard to
18 constitutionality, a court in this state should
19 avoid making constitutional decisions if it is
20 possible for it to avoid making the decision.

21 And as we all know, statutes are presumed
22 constitutional. There is a high burden to declare
23 them unconstitutional, and where possible the Court
24 should make every reasonable effort not to rule on
25 the statute if it doesn't need to. It is not

1 necessary in this case. We would submit that it is
2 improper in this case because there is really no
3 justiciable controversy as to the statute. Per
4 Mr. Winfrey, everything he gets is tied up in the
5 appeal process of his workers' comp case.

6 If you will bear with me for a second.

7 (Pause.)

8 MR. HUNTER: And for that reason, we don't
9 think that, you know, there is any reason to even
10 reach this case, the constitutionality.

11 Now, the burden of proof issue, those sorts of
12 things, they are in the worker's comp case. South
13 Carolina is not arguing about the burden of proof.
14 We are just arguing about the constitutionality of
15 the statute.

16 And if you were to reach the constitutionality
17 of the statutes, we think it is pretty clear that
18 the statutes are constitutional.

19 There is a lot of issue in the brief all about
20 whether or not there is a property right in
21 receiving these benefits. And for there to be a
22 due process claim, you have to have a right to
23 benefits. Just to receive them, they can't be a
24 speculative right. And under this case, under
25 42-9-260, the language is clear. They "may" pay.

1 That's what they did, "may" pay them. They didn't
2 have to pay them. And pursuant to the statute,
3 within the first 150 days they can do the
4 investigation and they can stop them and say that
5 is purely up to the company. No state action. He
6 has no right to a continuance of those benefits.
7 No agreement has been entered into and there has
8 been no ruling by the commission at that point in
9 time. There was a later ruling after the hearing,
10 but at that point things had changed and gone down
11 the road.

12 And so if you reach the due process issue, we
13 think it is pretty clear that that is not going
14 to -- even if you reach the issue, it meets due
15 process. No state interest, no real interest.

16 Equal protection is the same. For a rational
17 basis, equal protection analysis, you know, the
18 courts give deference to legislative
19 classification. If there is a rational reason for
20 them. I put forward that, as we said, and I can't
21 speak for insurance companies in general, but for
22 the purpose of that statute, it is clear from the
23 face it is to provide an incentive for the
24 insurance companies to start giving workers relief
25 right after they are hurt on the job. So there is

1 clearly a rational basis for that classification or
2 a rational basis for the statute.

3 And, for that reason, if you reach, you know,
4 equal protection, it is a rational basis for the
5 way it is set up.

6 And as far as the Administrative Procedures
7 Act goes, that applies to decisions that are made
8 by state agencies. There was no state action in
9 this case. That is simply not a contested case
10 under the Administrative Procedures Act.

11 If you will bear with me a second.

12 THE COURT: Yes, sir.

13 (Pause.)

14 MR. HUNTER: And I am going to mention -- and
15 I can pass this up. If you will flip through this.
16 Mr. McDaniel relies on the last case as the basis
17 for -- one of the bases for his property rights
18 argument, but I'd like to point out the last case
19 was in 1991. The current rendition of 42- -- this
20 is not in my brief -- the current rendition of
21 42-9-260 was in 1998, I believe.

22 MR. MCDANIEL: 1996 -- no, 8.

23 MR. HUNTER: 8. But, anyway, the original
24 version did not have a provision where the company
25 would voluntarily make payments. And so the last

1 case is decided under a different version of
2 42-9-260, and so we would submit that the last case
3 was not relevant in this discussion. It doesn't
4 cite the statute anyway. I can pass up, if you
5 would like to see it, the prior version of
6 42-9-260.

7 (Complies.)

8 MR. HUNTER: The property interest would have
9 to be defined by law. And in this case there is no
10 property interest. There is no law that defines it
11 because it is a voluntary action between two
12 private parties.

13 Your Honor, that is the basic gist of our
14 argument. I think the keys you have to keep in
15 mind are, 42-9-260, the payments were voluntary.
16 There is no state action. All matters related to
17 the worker's comp case are being litigated out of
18 the commission, being litigated at the Court of
19 Appeals. This is a collateral -- an attempted
20 collateral attack on the constitutionality of the
21 statute by a person who has no interest in the
22 result. Your ruling, one way or the other, will
23 not have any impact on Mr. Winfrey.

24 THE COURT: All right.

25 MR. HUNTER: Thank you.

1 THE COURT: Thank you.

2 MR. MCDANIEL: First off, I have a much better
3 copy of this from the statute. As a matter of
4 fact, workers' compensation manuals have various
5 sections of the act as they are amended, and I have
6 a copy, but danged if I can find it right now. I
7 have got a couple of things over here, Your Honor,
8 I apologize. But, in any event, counsel did note
9 that that was -- I was wondering if they were going
10 to raise that about that -- when the last case was
11 decided. However, the Supreme Court decided
12 that -- I'm having a little bit of problem in
13 responding because I thought I was responding to a
14 motion for judgment on the pleadings and -- in
15 reference to a declaratory judgment action.

16 And, you know, let me just try to start by
17 going to judgment on the pleadings. And I am going
18 to pass this up to Your Honor. It is one of the
19 cases I cited, Russell v. City of Columbia. And
20 give counsel a copy of the case too. I cite it in
21 my brief. And I hate to read.

22 (Complies.)

23 MR. MCDANIEL: Now, this is a declaratory
24 judgment action. And, of course, as you know,
25 under the declaratory judgment action statute, it

1 is in addition to any other remedies that the
2 claimant may have. You can look at 15-53-20, -30
3 -60, -70, -80, -90.

4 Now, judgment on the pleadings against the
5 Plaintiff is not proper if there is issue of fact
6 raised by complaint which is resolved in favor of
7 the Plaintiff would entitle him to judgment.
8 Complaint is sufficient if it states any cause of
9 action or it appears that the Plaintiff is entitled
10 to any relief whatsoever.

11 The very purpose of the declaratory judgment
12 action is to -- I'm sorry, Mr. Bayne, I didn't hand
13 you a copy. I will hand you a copy of that real
14 quick.

15 (Complies.)

16 MR. MCDANIEL: And also I cite it in my brief
17 in reply to -- let me make sure I am referring to
18 the correct brief. You'll find all that quoted on
19 Page 2 under "Standard of review." And also, if
20 any properly pleaded facts or allegations are
21 deemed admitted for purposes of consideration of
22 the demurrer. When a fact is well pleaded, any
23 reference of law or conclusions of fact that may
24 properly arise therefrom are to be regarded as
25 embraced in the averment. Moreover, a complaint is

1 sufficient to state any cause of action or if it
2 appears that the Plaintiff is entitled to any
3 relief whatsoever. Our courts have held the
4 pleadings in the case should be liberally construed
5 so that substantial justice is done between the
6 parties. Further, a judgment on the pleading is
7 considered to be a drastic proceeding by our court.

8 Now, I would submit to you that I have filed a
9 declaratory judgment action on behalf of my client,
10 and I have alleged that that statute is
11 unconstitutional and in violation of the
12 Administrative Procedures Act, both equal
13 protection and on the basis of due process of law.

14 So I would submit in that alone this Court has
15 jurisdiction over that. They keep wanting to refer
16 back to Judge Lee's order. Judge Lee said that
17 this Court has jurisdiction. They tried to get me
18 kicked out on that same basis way back when, and
19 Judge Lee said, No, wait a minute, not judgment on
20 the pleadings on this one. You know, it is not --
21 you are not entitled to judgment on the pleadings,
22 back then.

23 I would ask you to find the same today, you
24 know.

25 Now, I believe the issues that the State has

1 raised under the guise of a motion for judgment on
2 the pleadings as to due process, equal protection,
3 and state agency are all appropriate in the
4 argument on the complaint.

5 I don't believe that those are proper, but if
6 you want me to I'll address them now, but I think
7 that that doesn't go to the pleadings. What they
8 have asked for is judgment on the pleadings. And
9 that is on the face of the pleadings we don't state
10 a cause of action. And I didn't hear them at all
11 say that at any point in time.

12 Now, I will go through some other issues they
13 raised, such as standing, and that kind of thing,
14 but they did not state that I did not have a -- did
15 not state a cause of action, a declaratory judgment
16 action.

17 As a matter of fact, there is a separate rule,
18 I think it is Rule 60 that addresses a declaratory
19 judgment action, but, anyway. It is Rule 57,
20 procedure in obtaining a declaratory judgment
21 action shall be in accordance of these rules.
22 There is a separate rule that just applies to
23 declaratory judgment actions actually in
24 reference -- and it refers to the statute that --
25 now, this might be a good point for me to hand up

1 just the declaratory judgment action so Your Honor
2 will have it right in front of Your Honor just so
3 we can -- I'll hand you up a copy, Your Honor, give
4 your law clerk one. I know Your Honor has this
5 before it. I will give counsel a copy of that.

6 (Complies.)

7 MR. MCDANIEL: Now, let's start with any
8 argument -- of course, the brief is written a
9 little differently, so -- but I'm going to address
10 these. I'll try to address them in accordance with
11 the -- the lack of standing argument -- I tell you
12 what, let me first address this. I was going to
13 address this later on, but now is as good a time as
14 ever.

15 Let's talk about benefits under the Workers'
16 Compensation Act. Now, if you rule -- first off,
17 benefits are not paid under 42-9-260. That is not
18 the basis of the benefit. What you'll find is, is
19 that there are two types of benefits under the
20 Workers' Compensation Act: Compensation benefits
21 and medical benefits.

22 Now, benefits are paid for disability. Now,
23 42-9-260 refers to disabilities. But actually the
24 statutes under which they are paid are three -- or
25 four, actually.

1 Number One, disability is defined. The very
2 first page I handed up to Your Honor is the
3 definition of disability under the act. To be
4 entitled to benefits for disability, you have to be
5 disabled under the provisions of the act. That is
6 42-1-120.

7 The second statute I have handed up to the
8 Court is 42-9-10. And 42-9-10 says that when the
9 incapacity for work is total, the claimant shall be
10 paid -- injury is total -- the employer shall pay
11 as provided in this chapter to the injured employee
12 during such total disability weekly compensation
13 equal to so-and-so.

14 So, under 42-1-120, there has to be a
15 determination or agreement -- very important -- or
16 agreement that you are disabled. Number Two, under
17 42-9-10, there has to be an agreement or an order
18 that you are entitled to disability, those weekly
19 benefits.

20 Then, let's go to the next section. So
21 benefits are paid for disability in 42-1-120 as
22 provided for in 42-9-10. They are not paid under
23 42-9-260.

24 Now, I referred to earlier, there is two ways
25 you get benefits under the act. One, is by

1 agreement. Two, is by order. So you are not
2 entitled to benefits unless the parties agree you
3 are disabled or you are ordered or found to be
4 disabled.

5 42-9-10 -- excuse me, 42-17-10 -- which is
6 also included in this -- Your Honor, you know, the
7 Attorney General just doesn't deal in this area a
8 lot, so I can understand why they are a little bit
9 confused, but 42-17-10 provides for what?
10 Agreement to pay compensation.

11 The first way you get benefits is where, under
12 42-17-10, you are entitled to them. By the way,
13 Your Honor, for the record, I would like to ask, if
14 we don't mind, is there anybody other than the
15 parties in this room? I notice some notes being
16 passed up. I'd like to see if we could have
17 identified anybody else in the room.

18 MR. SMITH: Your Honor, I don't know that
19 anybody needs to be identified other than people
20 who are making an appearance in here, but certainly
21 we will do whatever Your Honor wants. I think
22 everybody has already been introduced who is here.

23 MR. MCDANIEL: Well, Your Honor, I
24 understand --

25 THE COURT: The gentleman right behind you.

1 MR. MCDANIEL: If you don't mind.

2 AUDIENCE MEMBER: Yes, ma'am. My name is
3 James Keith Roberts.

4 THE COURT: All right. And who are you with?

5 AUDIENCE MEMBER: I represent the South
6 Carolina Workers' Compensation Commission. We
7 filed a brief amicus curiae in this matter. He was
8 making references to specific statutes under the
9 Workers' Compensation Act, and I happen to have a
10 copy of Title 42 that has those statutes listed in
11 it, so I was offering it to them for their benefit.

12 THE COURT: All right.

13 MR. MCDANIEL: Thank you, Your Honor. I just
14 want to make sure that was identified for the
15 record, because Mr. Roberts has come over, so I
16 thought they had been dismissed from the action,
17 but, however, I may be wrong.

18 THE COURT: Have they been dismissed, the
19 Workers' Comp Commission?

20 MR. HUNTER: Your Honor, I don't believe the
21 commission was ever a party to this particular
22 action.

23 AUDIENCE MEMBER: No, Your Honor, we were
24 never a party. We made an appearance amicus
25 curiae.

1 MR. MCDANIEL: The judge asked that -- I think
2 somebody asked for them to submit it. And
3 Mr. Bayne had referred to it as one of the two
4 indispensable parties was either the State of South
5 Carolina or the South Carolina Workers'
6 Compensation Commission. I think after hearing
7 that motion and receiving the amicus curiae brief
8 Mr. Roberts submitted that the judge determined
9 that they were not a proper party to the action.
10 He denied the motion, so --

11 THE COURT: Judge Cooper?

12 MR. MCDANIEL: Yes, Judge Cooper, uh-huh, yes.

13 Now, as I said, 42-17-10 is the way benefits
14 are paid if there is an agreement to pay benefits,
15 which there was in this case.

16 Now, 42-17-20 -- 42-17-20 -- provides that if
17 they don't agree to pay them the benefits, then the
18 claimant has a right to request a hearing. Both
19 parties actually have a right to request a hearing.

20 Now, so that is the way the act has been ever
21 since the beginning of the act. And,
22 unfortunately, I can't find that copy of the ways
23 that 42-9-260 was amended, but what you are going
24 to find is, is that the last sentence of 42-9-260,
25 which is currently (A), is identical to the way it

1 read beforehand. And I tell you that because if I
2 started off at the very beginning way back when, is
3 that 42-9-260 is commonly referred to as the stop
4 payment statute. And --

5 THE COURT: Let me interrupt. Now, you are
6 arguing the -- you are arguing in response to the
7 judgment on the pleadings, or have you moved on to
8 the --

9 MR. MCDANIEL: Well, I'm actually -- Your
10 Honor, that is the reason I said I was a little
11 confused. Judgment of the pleadings, they argued
12 this underneath there that we don't have standing
13 because -- and they also -- they allege
14 constitutional -- let's see, constitutional
15 estoppel -- which I had to go back and think about
16 that, and I haven't heard that one in a long time,
17 I think it was back since I was with the A.G.'s
18 Office -- but, however, constitutional estoppel on
19 the basis that we sought benefits under that
20 42-9-260. We didn't do that. We requested --
21 we -- they agreed to pay disability benefits under
22 the act. We agreed to receive those. We requested
23 benefits -- would have requested benefits under
24 those statutes that I have just referred the Court
25 to.

1 So in reference to their argument that we are
2 constitutionally estopped because we sought
3 benefits under 42-9-260, no, we didn't request
4 benefits under that.

5 What happened was, is that they agreed that
6 Mr. Winfrey was entitled to benefits. And looking
7 at the amendment of the act what you are going to
8 find is that it used to be if you accepted the case
9 you could never after that deny it. You could
10 never at any point say, Wait a minute, whoa, we
11 found a ground. There is not a valid contract of
12 employment, there wasn't any accident, something we
13 didn't know.

14 What 42-2-260 did was it simply provided that
15 during the first 150 days of benefits they had a
16 right to investigate the case and to file a denial
17 of benefits.

18 With that part, 42-9-260(A), I have no
19 problem. I have no problem. And they are entitled
20 to it. However, they sought the benefit of the
21 statute under Subsection (B), 42-9-260(B)(1)
22 through (6), and specifically under (3). And I
23 have included a copy of that statute I think on the
24 back end. Yes, I did. You'll find 42-9-260(B),
25 all of 42-9-260, in that copy of the various

1 statutes involved. I sent you a copy of all of
2 those.

3 Now, so they are the ones that sought the
4 benefit of the statute. Excuse me, when I say
5 "they" --

6 THE COURT: So you are challenging
7 42-9-260(A)?

8 MR. MCDANIEL: (B).

9 THE COURT: (B).

10 MR. MCDANIEL: Our challenge is to (B)(1)
11 through (6), and specifically (3), which is the one
12 that they chose to stop benefits on, alleging that
13 they had conducted a good faith investigation and
14 having found the grounds to deny benefits.

15 And they are allowed under (B), 42-9-260(B),
16 first -- during the first 150 days to stop an
17 injured worker, who is out there without any funds,
18 benefits without a hearing. And that is where I've
19 got a problem. And that is where I think that the
20 United States Supreme Court and the South Carolina
21 Supreme Court, and I hope this Court, will also
22 have a problem of the procedural due process denial
23 for a right to hearing and confront and be told
24 what the basis is for that denial. And none of
25 that was accomplished in this case. And there are

1 no procedural safeguards in that statute. None in
2 that statute before they stop them. They can just
3 cut them off and say, We've conducted a good faith
4 investigation. Then my client is out there like
5 the person was in Goldberg to try to figure out how
6 they are going to eat and feed their family.

7 Now, but my -- in response to their argument
8 that we sought benefits under that statute, we did
9 not.

10 THE COURT: Okay.

11 MR. MCDANIEL: Therefore, the State is wrong
12 in that regard. Now --

13 THE COURT: All right. So as to the -- I'll
14 take a look at the judgment on the pleadings also,
15 but let me hear from you as to the
16 constitutionality of the -- yes, sir?

17 MR. BAYNE: Your Honor, if I can respond just
18 very briefly to the estoppel argument. It will be
19 less than a minute. I just wanted to point
20 something out.

21 THE COURT: All right.

22 MR. BAYNE: Mr. McDaniel did seek benefits
23 under 42-9-260. If you flip to the next page of
24 that, 42-9-260(C) says that, When benefits are
25 terminated or suspended under the statute, you may

1 request a hearing with the commission and it has to
2 be heard within 60 days. That is what Mr. McDaniel
3 did.

4 Under 42-9-260(B) we suspended or terminated
5 the benefits because his client did not sustain a
6 compensable injury, which is what our investigation
7 revealed. And then under 42-9-260(C) he sought a
8 hearing and held a hearing and the commissioner.
9 held one and issued an order on that hearing. So
10 he did seek benefits under 42-9-260(C). He did
11 seek the benefit of that statute. And now he is
12 sitting here saying that it is unconstitutional
13 after he went to the commission and sought the
14 benefits that should be awarded under that statute.
15 And that is where the constitutional estoppel
16 argument comes from. It has nothing to do with
17 42-110 and 42-720 and the total disability statute.
18 It is 42-9-260(C) is what Mr. McDaniel proceeded
19 under to request a hearing from the commission,
20 which it was within 42-9-260, which means he
21 asserted the benefits of the statute in order to
22 get benefits for his client while at the same time
23 asserting the statute he was seeking benefits under
24 is unconstitutional. That is why he is estopped
25 from seeking those benefits here today.

1 MR. MCDANIEL: I love being double-teamed,
2 Your Honor. But, however -- even though Mr. Bayne
3 didn't ever raise that; however, let me reply.

4 First, they sought the benefit of the statute.
5 Once they sought the benefit of the statute, we
6 asserted our rights under the statute to ask for a
7 hearing.

8 But the problem is, is that really my problem
9 with the statute and the problem I think with the
10 constitutionality of the statute is that first --
11 before you even get to what rights we have under
12 the statute after that is that they have sought the
13 benefit of the statute. And it is that part of the
14 statute that I think is unconstitutional. I will
15 argue that later.

16 Do you want to hear from me on anything else
17 on any of the other specific issues they --

18 THE COURT: What other issues, I mean, other
19 than --

20 MR. MCDANIEL: In the motion.

21 THE COURT: I want us to get to the actual I
22 guess declaratory judgment. I mean, it seems like
23 we have already heard some of the issues that --

24 MR. MCDANIEL: They have already argued some,
25 yes.

1 THE COURT: All right. Yes, sir?

2 MR. HUNTER: May I say something in response
3 to what we have just been doing?

4 THE COURT: Sure. All right.

5 MR. HUNTER: But I would just like to point
6 out too, under 42-9-260(G), there is a 25 percent
7 penalty that is levied against the insurance
8 carrier if they are found to have acted in bad
9 faith. And that penalty is paid to the worker.
10 That issue is right now, as I understand it, that
11 is before the Workers' Compensation Commission --
12 before the Court of Appeals.

13 THE COURT: On this case?

14 MR. HUNTER: On this case. And if I misspeak,
15 these people familiar with the appeals can tell me,
16 but the commission has already ruled that the
17 carrier acted in good faith. So that penalty
18 wouldn't be -- and that is on appeal to the Court
19 of Appeals.

20 So procedurally there is built into the
21 statute an incentive for the carrier to do this.
22 And, as I said, there is no state action here.
23 This is just between the carrier.

24 And if there is any notion of severing this,
25 which it kind of sounded like from Mr. McDaniel, I

1 don't think that -- that won't work because, (A)
2 would not be as it is. I mean, they "may" pay.

3 THE COURT: All right.

4 MR. HUNTER: Just a second, please.

5 THE COURT: All right. But I do want to move
6 on to the declaratory judgment action.

7 MR. MCDANIEL: Okay.

8 (Pause.)

9 MR. HUNTER: Your Honor, Mr. McDaniel is
10 arguing -- and this is an agreement under 42-17-10,
11 which is an agreement between the employer and the
12 carrier. Yes, and the employee. No such agreement
13 has ever been issued -- been entered. If an
14 agreement had been entered, a hearing would be
15 required before they were terminated. That has not
16 happened. This is clearly under 260.

17 THE COURT: I thought that he was paying him
18 already. I mean, doesn't he have to sign a form
19 saying what they are paying him and how much it is
20 going to be, his average weekly wage, from the
21 beginning?

22 MR. HUNTER: Well, he --

23 MR. BAYNE: Usually, yes, but I don't think
24 that was actually done in this case. What happened
25 was he went in the hospital and had surgery right

1 away and benefits were instituted because he was
2 out of work under 42-9-260. And then we invoked
3 our 150 days to investigate the claim and received
4 medical records from the doctors. And it was about
5 85 days later is when we issued the denial of those
6 benefits.

7 THE COURT: So there was an agreement to
8 initially pay?

9 MR. BAYNE: Well, I think there is a
10 constructive agreement, I guess, if you want to put
11 it that way. But we received notice of the injury,
12 we began paying. So there was not any agreement
13 reached between the carrier and Mr. Winfrey that
14 says, You are making \$410 a week and we are going
15 to pay you that while you are out of work. It was,
16 He is in the hospital, he is out of work, okay, we
17 need to institute benefits. We paid him benefits.

18 So it wasn't an agreement per se between --
19 under 42-17-10 there was not. Under 42-9-260, when
20 you look at it in that first (A) section, it says:
21 When an employee is out of work for a period of
22 time for a reported work injury, not for
23 disability, not for a compensable injury, but for a
24 reported work injury, then we are to institute
25 benefits. We "may" institute benefits. And that

1 is what we did in this case.

2 If we had said from the outset, This is
3 denied, we are not paying a dime, Mr. McDaniel
4 could have filed for a hearing immediately and gone
5 and gotten benefits. So that is why 260 exists is
6 to let us -- instead of on Day One we get a call
7 from our employer, our client, that says, Jim fell
8 on the floor, and we say, We're not paying him
9 anything, this statute is to let us pay him
10 benefits so that we can investigate that claim and
11 then within 150 days make a determination as to
12 whether it is compensable. And that is what
13 happened in this case. We paid it under
14 42-9-260(A), but we denied it under 42-9-260(B).
15 Mr. McDaniel sought a hearing under 42-9-260(C).
16 And now we're here.

17 THE COURT: Which leads us to the
18 constitutional issue.

19 MR. BAYNE: Which leads us to that, Your
20 Honor.

21 THE COURT: Yes, the declaratory judgment as
22 to constitutionality of 42-9-260(B)(1) through (6),
23 and specifically (3).

24 MR. MCDANIEL: (3).

25 THE COURT: All right. And it is your

1 position that before they can deny the claim within
2 that 150 days, it is your position, Mr. McDaniel,
3 that there should be a hearing before -- that there
4 should not -- that there should be a hearing before
5 that denial occurs. Is that right?

6 MR. MCDANIEL: Correct.

7 THE COURT: Okay. I will be glad to hear from
8 you as to that.

9 MR. MCDANIEL: All right. Some of my argument
10 under due process, the Administrative Procedures
11 Act, and the Worker's Comp -- excuse me, the Equal
12 Protection Clause of both the state and federal
13 constitution has already been addressed. I'm going
14 to try to just summarize that.

15 And I want to hand up one more group of
16 documents to the Court. And that is a copy of the
17 regulations that apply to the payment of benefits
18 that were adopted by the commission pursuant to the
19 statute.

20 (Complies.)

21 MR. MCDANIEL: And I'll be referring to those
22 because there are some things that -- by the way,
23 one last thing in response to the judgment on the
24 pleadings. They have alleged that this was --
25 well, no, excuse me, they also allege that to the

1 Administrative Procedures Act, so I will address
2 that under that argument later on.

3 Now, we finally get there. We've been waiting
4 on this day for a long time. I'm not going to -- I
5 have already been through the various statutes
6 under which disability benefits are paid. And you
7 are going to see in reference to those statutes the
8 difference between the -- you will see differences
9 in our statute in reference to the United States
10 Supreme Court decisions that are very important,
11 where I believe that the Supreme Court would have
12 gone right along with us and would have declared
13 this statute to be unconstitutional.

14 Now, first off, I'm going to hand up to the
15 Court two cases.

16 (Complies.)

17 MR. MCDANIEL: One is the Coakley case. And
18 this is basically just the -- this is something
19 that we need to keep in mind that so many times
20 people forget. When workers' compensation came out
21 of the 1920s and 30s in the sweatshops and they --
22 it was actually a compromise in favor of the
23 industry. A lot of people think it was a
24 compromise in favor of the injured worker. But the
25 injured worker began to crack through what was

1 referred to as the three wicked sisters. And the
2 three wicked sisters were usually used to kick them
3 out of court, and that was: Contributory
4 negligence, assumption of the risk, and the
5 fellow-servant rule.

6 Well, the courts began to let crack through,
7 and so the industry wanted some protection. So
8 they got a limitation of lawsuits by a passage
9 across the nation of workers' compensation laws
10 that were based on the model created in England in
11 the 1880s, 1890s. But we first need to start
12 with -- and the reason I cite Coakley is just
13 simply -- and it is quoted in my brief -- and that
14 is that the compensation acts are a form of social
15 legislation, and they are supposed to be liberally
16 interpreted in favor of benefits to the injured
17 worker. So we start with that premise.

18 We then go to Ham, a 1941 case. And I'm
19 not -- like I said, I'm not going to bore -- it is
20 cited in the complaint and all that -- but Ham is
21 really a wonderful case. And it really just sets
22 the underfire of why we are here today. And I'm
23 going to refer to -- in the Ham case I'm going to
24 refer to Page 2. And I have highlighted it for
25 everybody. But in other words, in Page 2 -- and I

1 just love listening to the old judges speak, Your
2 Honor -- not to say I don't love to listen to
3 you -- but in that case what you are going to find
4 is, is that if there is such a thing as due process
5 of law, under it a litigant is entitled to notice
6 of the issues to be met on trial, hearing, or
7 appeal.

8 Then on the next page it quotes from Powell v.
9 Alabama, a United States Supreme Court case, and it
10 cites other cases. And it is quoted in my brief,
11 but I just want to cite it to the Court just
12 because it never has been doubted by this court or
13 any other as far as we know that notice and hearing
14 are preliminary -- preliminary -- steps essential
15 to the passing of an enforceable judgment. And
16 that they together with a legally competent
17 tribunal have the jurisdiction of the case
18 constitute basic elements of constitutional
19 requirements of due process of law.

20 The words of Webster, so often quoted, that by
21 the law of the land is intended a law that hears
22 before it condemns.

23 The necessity of due process and an
24 opportunity of being heard is described as among
25 the immutable principles of justice, which inhere

1 in the very idea of free government, which no
2 member of the union may disregard. Said that the
3 rule that no one shall be personally bound until he
4 has had his day in court was an old -- and it meant
5 that he must be cited to appear and afforded an
6 opportunity to be heard.

7 Now, let's go next to, the Supreme Court was
8 not ruling on -- in the South Carolina Supreme
9 Court -- when it ruled on Last, it was not ruling
10 on benefits of any particular period of time. It
11 was ruling on a claimant's entitlement to
12 disability benefits.

13 42-9-10, 42-1-120 have not been altered or
14 changed. It is under those statutes that my
15 client, either by agreement or by court order, is
16 determined to be entitled to benefits. And the
17 South Carolina Supreme Court has said, in a
18 specific case involving the payment of temporary
19 total benefits that a claimant has a property right
20 protected under due process to benefits --
21 disability benefits. That is a -- he has a
22 property interest, specific property interest.
23 That meets the first prong of the test of due
24 process of law. And that is that he must establish
25 under Roth, and the other cases cited, that the

1 claimant has a protected property interest.

2 Now, the next group of cases that we want to
3 talk about is the the preeminent case of Goldberg
4 v. Kelly. And I think this is really, really
5 important to point out this distinction because
6 Goldberg v. Kelly applied to the termination of
7 welfare benefits without a hearing and without
8 other procedural due process protection.

9 And I want to point that out because, in
10 agreement with -- if you want to say agreement, you
11 know, this is governmental benefits. And I think
12 that is -- I think that is important because I know
13 that somebody is going to argue somewhere along the
14 line, Well, yes, those were governmental benefits.
15 But that is why I think it is so important. So I
16 am going to hand up to the Court the Goldberg v.
17 Kelly, because it is the preeminent case as far as
18 the right to pre-termination benefits in cases, you
19 know, across due process grounds in the United
20 States.

21 (Complies.)

22 MR. MCDANIEL: Now, I am going ask the Court
23 to flip to Page 267. I have actually got it
24 capped, Your Honor. It is Page 267, 268. It is
25 highlighted.

1 Fundamental requirement of due process of law
2 is an opportunity to be heard. The hearing must be
3 at a meaningful time and in a meaningful manner.
4 In the present context these principles require
5 that a recipient have timely and adequate notice
6 detailing the reasons for a proposed termination --
7 meaning notice -- and an effective opportunity to
8 defend by confronting any adverse witnesses and by
9 presenting his own arguments and evidence orally.

10 Our law is a law that does not condemn until
11 after an opportunity to be heard. My client had an
12 entitlement to property rights. And he was --
13 those rights were cut off.

14 As in Kelly, the Supreme Court said, One of
15 the reasons we are requiring a pre-termination
16 hearing notice and opportunity to be heard is
17 because of what happens to that poor individual.
18 This is an individual that is, for whatever reason,
19 living off of welfare benefits. And in my case,
20 you just heard Mr. Bayne talk about how my client
21 was in the hospital and disabled and he couldn't
22 even sign the agreement he was in such bad
23 condition, and I'll agree with that. And they
24 agreed to start benefits. And so here he is out
25 there. And as set forth on that -- I mean,

1 attached to the complaint, the doctor said the
2 deprivation of these benefits so that he doesn't
3 have medical care and he doesn't have benefits
4 coming in could wind up serious consequences up to
5 and including his death.

6 So we've got a gentleman that is totally
7 disabled out there. They agree that he is
8 disabled. And then without a hearing and an
9 opportunity to decide, he is denied benefits.

10 Now, our Supreme Court specifically followed
11 the decision in Kelly and in other cases, but
12 specifically in the case of Brown v. State Board of
13 Education. I am going to hand that case up to Your
14 Honor. And I have highlighted it for the Court's
15 review.

16 (Complies.)

17 MR. MCDANIEL: And that can be found -- and it
18 is just a recitation of Kelly and how that applies.
19 Where important decisions turn on questions of
20 fact, due process requires an opportunity to
21 confront and cross-examine adverse witnesses.
22 Procedural due process often requires confrontation
23 and cross-examination of one whose word deprives a
24 person of his or her livelihood.

25 This is exactly what we have got here.

1 This -- them being able to stop those benefits
2 under color of state law without a hearing denies
3 my client due process of law.

4 You know, going further, Your Honor, remember
5 I said earlier that -- and one of the arguments you
6 are going to hear from the other side is, is that,
7 Wait a minute, state action, you know, this is
8 private parties.

9 Well, the United States Supreme Court has
10 addressed that also. They expanded on Kelly in a
11 case called Sniadach v. Family Finance Corporation.
12 And this is the case I referred earlier. As I
13 said, I'm sorry to repeat myself, but I had to
14 defend those issues, Your Honor. But in the
15 Sniadach case, this is a specific action between
16 private parties under state law. It is -- I would
17 submit to Your Honor it is on all fours with the
18 situation we have here.

19 And in Sniadach what happened was is that a
20 man borrowed some money from a finance company.
21 And the finance company filed an action to get that
22 money back. In other words, because he wasn't
23 making payments, or whatever. But in that case,
24 the Wisconsin law provided that pre-termination
25 garnishment proceedings -- didn't require a

1 proceeding, they simply filed a complaint, they
2 filed a 15-II saying that they found grounds to
3 deny benefits.

4 In Sniadach, as soon as that happened, they
5 sent a copy of it to -- the pre-termination
6 garnishment proceedings to the employer, told them
7 to start sending his pay directly to them. They
8 withheld the pay in this case. And then my
9 client -- the client in Sniadach tried to find a
10 way to feed his family when he had never been
11 adjudged to be responsible for the payment. There
12 was never a judgment in this case that my client,
13 prior to the time that they -- under that
14 statute -- stopped my client's benefits. There has
15 never been, nor was there any determination made by
16 any court of competent jurisdiction where we had a
17 chance to go into court and say, Wait a minute.
18 You know, I don't want to get into the facts,
19 although it seems to be a total diss, so I'm not
20 going to do it but as far as like what the evidence
21 would hold, and all that good stuff.

22 But if you will look at the last, you know, if
23 you look under -- right before Justice Harlan, it
24 is on Page 3 of the Sniadach decision, about three
25 paragraphs down: Apart from these collateral

1 consequences, it appears that in Wisconsin the
2 statutory exemption granted the wage earner is
3 generally insufficient to support the debtor for
4 any one week. The result is that prejudgment
5 garnishment of Wisconsin type may, as a practical
6 matter, drive a wage-earning family to the wall.
7 Where the taking of one's property is so obvious it
8 needs no extended argument to conclude that absent
9 notice and a prior hearing, the prejudgment
10 garnishment procedure violates the constitutional
11 fundamental principle of due process.

12 I don't think -- here, by agreement, they
13 agreed my client was disabled and started
14 disability benefits. They paid him for actually
15 110 days. And then at that point in time they
16 stopped benefits without a hearing alleging they
17 had conducted a good faith investigation.

18 In my opinion, Your Honor, and I ask the Court
19 find that that violates due process of law.

20 Now, I want to thank the Attorney General for
21 citing another case, because it also goes right in
22 line with my argument. And that is the case of
23 American Manufacturing Mutual Insurance v.
24 Sullivan. That actual case was a 1983 action
25 brought on behalf of a large group of people that

1 the procedures violated due process of law, among
2 other things, in reference to Pennsylvania's -- the
3 provision of medical benefits under the Workers'
4 Compensation Act.

5 But that is really, really important. And I
6 have taken the liberty -- you are going to find,
7 this is the first page, and then you are going to
8 find, I pulled out the pages concerning due process
9 and put them at the front and then highlighted so
10 that you would know where the case all went
11 through, because the third section is the one that
12 deals with due process. I tried to save the Court
13 a little bit of time. And I have highlighted for
14 everyone in reference to that.

15 But in Wisconsin -- I mean, excuse me, in
16 Pennsylvania, you'll find at Page 3 that the Court
17 found that there was a fundamental difference in
18 the type of property interest in that case versus
19 in the Goldberg case and in the other cases decided
20 by the Supreme Court.

21 And what it was is that where a claimant is
22 entitled to benefits, both compensation and
23 medical, they add the provision that in reference
24 to medicals, where the medicals are in dispute,
25 they can submit them to -- they cannot pay them and

1 submit them to a board to have a determination made
2 as to whether or not they are in dispute. However,
3 the key word there is "dispute" medicals, in other
4 words, where the carrier doesn't agree with the
5 medicals, that the carrier doesn't agree that these
6 are disputed medicals as to whether or not they are
7 entitled to these medical benefits.

8 And the Court specifically on Page -- and I'm
9 trying to -- I highlighted that section as well.
10 But the Court specifically stated -- and I quoted
11 this in my brief -- it said, Unlike Goldberg, it
12 says, first he must prove that a an employer is
13 liable for work-related injury. Okay? And,
14 second, he must establish particular medical
15 treatment at issue is reasonable and necessary
16 where they have been disputed. Only then does the
17 employee's interest parallel that of the benefit of
18 welfare assistance in Goldberg and the recipient of
19 disability benefits in Matthews.

20 And I quoted the same section that the
21 Attorney General quoted in my brief in the trial,
22 and that case specifically supports the Court's
23 decision in reference to due process.

24 Now -- and you'll find that in my brief at
25 Page 6. In Goldberg v. Kelly, we held that an

1 individual receiving federal welfare assistance has
2 a statutorily created property interest in the
3 continued -- in the continued -- receipt of those
4 benefits. Likewise, in Matthews, we recognize that
5 the same was true for an individual receiving
6 social security disability benefits.

7 In both cases an individual entitlement to
8 benefits had been established. That is the
9 specific difference. Just like in the Goldberg
10 case and the Matthews case, my client had been
11 determined to be entitled to -- in other words, by
12 agreement, that he was disabled. If they want to
13 cut them off, they can do that, but they have got
14 to do that only after due process.

15 Now, in reference to one of the justice's
16 dissent -- not dissent, excuse me, concurring
17 opinions, because a lot of them concur -- they want
18 to say, Well, now, wait a minute, we are talking
19 about this. But we also want to make sure that in
20 reference to this case that we -- in reference to
21 due process, we're not backing off of what we
22 previously said as far as where there is a property
23 interest involved. In other words, in that case
24 they are going to find that there was an
25 entitlement to the benefits and there had to be a

1 pre-termination hearing.

2 Now, one of the cases cited in that case also
3 is the case of Zimmerman Brush Company. And I'm
4 going to hand a copy of that case up to the Court
5 as well.

6 (Complies.)

7 MR. MCDANIEL: And in that case, as the Court
8 will find again, private parties -- private
9 parties -- involved in the constitutionality of
10 something that happened under state law.

11 And in it, the hallmark of property is an
12 individual entitlement grounded in state law which
13 cannot be removed except for cause and appellant's
14 right shares this characteristic.

15 Now, in that case they said that they were
16 entitled to due process of law because in that case
17 this man claimed to be disabled, filed a claim for
18 disability that he was discriminated against based
19 on his disability, and the board had to rule within
20 120 days, and within 120 days they didn't hold a
21 hearing for some reason until 125 days. The
22 defense raised it, then the Supreme -- the actual
23 board denied it, but then the Supreme Court of
24 Illinois said, Oh, no, wait a minute, you know,
25 outside the 120 days, and denied any opportunity to

1 file suit.

2 And in Zimmerman the Court went back to Kelly
3 and went back to all those pre-termination
4 decisions and it said on Page 2 of that decision --
5 and this is a very short opinion -- it said: The
6 availability of a post-termination tort action does
7 not provide appellant due process. It is the state
8 system itself that destroys the complainant's
9 property interest by operation of law. When the
10 commission failed to convene a timely conference,
11 appellate is challenging not the commission's error
12 but the established state procedure that destroys
13 his entitlement without affording him proper
14 procedural safeguards.

15 So, here again, I don't think -- you know,
16 okay, so they constantly -- they want to argue that
17 it is adequate for us to have a post-termination
18 hearing.

19 The Supreme Court has said -- the United
20 States Supreme Court has said time and time again
21 that that is not what due process requires. If you
22 have a property interest before you decide to
23 terminate or limit that property interest, you have
24 a responsibility to afford them a notice and
25 opportunity to be heard prior to termination.

1 Every case calls for that. Every one. Every time
2 the court, the United States Supreme Court, has
3 been called upon to decide.

4 Now, I'm not going to really get into Matthews
5 other than -- the difference is here -- and I will
6 hand up a copy to the Court because I know that
7 Matthews has been cited.

8 (Complies.)

9 MR. MCDANIEL: I cited Matthews. As a matter
10 of fact, you have heard them refer to it time and
11 time and time again. But the Matthews Court, in
12 the Matthews Court, they said, Based on the
13 procedures -- and I have just outlined those -- the
14 pre-termination procedures, due process was met
15 without a hearing because of all the innumerable
16 procedures. There is actually -- and I think
17 you'll find it on Page -- you'll find on Page 9
18 there -- and I cite it meticulously in my brief,
19 but, in other words, just you have got to go
20 through about five levels and have notice and give
21 specific notice of exactly why they are saying what
22 the grounds are for -- that they are going to stop
23 your social security benefits. And you are
24 entitled to a review by the state agency, then by
25 the federal agency, then back by the state agency.

1 And then after you do all that, then you have a
2 right to appeal. So, in other words, all these
3 procedural safeguards.

4 In this there are none. There is absolutely
5 none under the statute. There is just simply, We
6 filed a 15-II saying we found good grounds to deny
7 benefits. You are cut off. There are no
8 safeguards.

9 Your Honor, on that basis -- I finally found a
10 copy of 42-9-260. Since I do so much work in the
11 area of workers' compensation, they publish a
12 manual annually, West does. And what this is, is
13 this is just for the Court. I know Emory and them
14 cite a copy of it, but this is the way the statute
15 has been amended since 1988. It will just verify
16 everything I have been saying.

17 THE COURT: All right.

18 MR. MCDANIEL: Do you want me to proceed to
19 the other two arguments, or would you like to hear
20 from them on the due process?

21 THE COURT: What are your other two arguments?

22 MR. MCDANIEL: The Administrative Procedures
23 Act, violation of the Administrative Procedures
24 Act, and the other one is the equal protection.

25 THE COURT: Well, I'm going to let you make

1 the arguments. And I am trying not to rush you all
2 because I know you are trying to make a record, but
3 I have got to give them an opportunity to speak
4 also, and it is 4:06. And so --

5 MR. MCDANIEL: I'll make it very quick.

6 THE COURT: All right. And then I think my
7 court reporter probably needs a break because we
8 have been going about two hours.

9 MR. MCDANIEL: Sounds good to me.

10 THE COURT: So let's take about a five minute
11 break. I will let you finish those arguments. And
12 then we will hear from the State. All right.

13 MR. MCDANIEL: I can use a break myself, Your
14 Honor.

15 (WHEREUPON, a break was taken.)

16 THE COURT: You said due process, equal
17 protection, and the administrative --

18 MR. MCDANIEL: Procedures Act. The
19 Administrative Procedures Act -- I know Your Honor
20 is -- it is getting late in the afternoon, so I'll
21 try to make both of these last two arguments as
22 fast as possible, because they really are not near
23 as complicated -- not complicated, but, in other
24 words, they are very, very straightforward.

25 First of all, I want to hand -- even though I

1 cite them in my brief, I just want to hand you up a
2 copy of Section 1-23-310 of the South Carolina
3 Administrative Procedures Act.

4 (Complies.)

5 MR. MCDANIEL: And in reference to Number 3 it
6 says: Contested case means proceeding including,
7 but not restricted to rate making, price fixing,
8 and license in which the legal rights, duties, or
9 privilege of the parties are required by law to be
10 determined by an agency after an opportunity for
11 hearing.

12 In other words, a contested case and other
13 provisions of the Administrative Procedures Act
14 require that you get notice of 30 days before a
15 contested hearing.

16 Now, the State of South Carolina has argued
17 this. And the other side, the other thing is that
18 the South Carolina Supreme Court has ruled in
19 Pringle v. Builders Transport that when there is a
20 conflict between the provisions of the Workers'
21 Compensation Act and the Administrative Procedures
22 Act, the provisions of the Administrative
23 Procedures Act control.

24 Now, we not only have that conflict, because
25 clearly this section says you have got to have --

1 you can only take action in a contested case after
2 an opportunity for hearing. Okay? So they can't
3 stop our client's benefits -- that is a contested
4 case -- they can't stop benefits until after a
5 hearing. That is what the APA provides.

6 Now, the other thing is, is that there is a
7 conflict within the statute. Like I said, for 60
8 something years 42-17-20 provided that whenever
9 there is a disagreement as to the continuation of
10 temporary total disability benefits, either party
11 may request a hearing before the commission. And
12 it is the same thing in 42-17-10, where they agree
13 by agreement that they are entitled to benefits,
14 they begin to pay benefits by agreement. And there
15 was an agreement in this case. It is set out in
16 the complaint, and all that. So I don't want to
17 quibble with words, it is an agreement. And, you
18 know, after that, that section provides that you
19 can only -- you have got to apply to the commission
20 for a hearing. And there is numerous case law
21 decisions that the claimant is entitled to a
22 hearing under that statute.

23 Now, so I would tell you that 42-9-260, that
24 section that we are referring to as being
25 unconstitutional, conflicts with the requirements

1 of 42-17-10 and -20 and under the liberal
2 construction you are supposed to interpret that in
3 favor of benefits to the injured worker. And, more
4 importantly, if there is a conflict between the
5 APA, the APA controls.

6 Now, and I just want to mention one other
7 thing to you. And this goes back to the Attorney
8 General's Office has said that doesn't apply
9 because this is not a contested case. Okay?

10 Here is -- I have already handed it up to you,
11 but I am just going to ask you to look at that and
12 I can ask them to look at the copies of their
13 regulations. Hearings under 42 -- I mean, under
14 15-II are held under the hearing provisions of the
15 workers' compensation regulations, and the title of
16 42- --

17 MR. HUNTER: Excuse me, can you identify --

18 MR. MCDANIEL: Oh, Regulation 67-601 through
19 615. Are entitled -- and, Your Honor, I wouldn't
20 mind if you read the caption of that particular
21 section of the regulation. Its says, Contested
22 proceedings.

23 THE COURT: You can go ahead.

24 MR. MCDANIEL: So -- Contested case
25 proceedings.

1 And also in reference to the burden of proof,
2 I'd ask the commission -- the Court to construe --
3 one of the remedies I requested was as for a
4 declaration as to who has the burden of proof in
5 15-II, under 42-9-260(B)(1) through (6), I asked
6 you for declaration as to who has the
7 responsibility or burden of proof in that case.

8 And in addition to --

9 THE COURT: You are saying the burden of proof
10 and if it is unconstitutional and a hearing was to
11 be held, who has the burden of proof, is that --

12 MR. MCDANIEL: Correct. Well, if it is
13 unconstitutional, you know, it really goes by the
14 wayside. But one of the other reliefs that I asked
15 you is for declaration of who has the burden of
16 proof. And what I wanted --

17 THE COURT: On the burden of proof, I am not
18 following you on that.

19 MR. MCDANIEL: Okay. In other words, they
20 take action by stopping benefits.

21 THE COURT: Okay.

22 MR. MCDANIEL: Okay? So they are the moving
23 party, meaning they are the moving party as far
24 as -- and, as you know, the moving party has the
25 burden of proof or burden of persuasion in any

1 motion. So they are the moving party by stopping
2 benefits under 42-9-260. So I would ask you simply
3 for a declaration that they have the burden of
4 proof to prove that they are alleging --

5 MR. HUNTER: Can I ask who "they" is?

6 MR. MCDANIEL: Oh, I'm sorry. The Defendant.

7 THE COURT: The carrier.

8 MR. MCDANIEL: Yes, the carrier. Correct.
9 I'm sorry.

10 MR. HUNTER: Thank you. I'm sorry for the
11 interruption.

12 MR. MCDANIEL: And in that regard, I cited one
13 of the regulations that goes along with, I would
14 submit to you that it is clear that they are the
15 moving party and that they have the burden of proof
16 and the commission is charged with adopting
17 regulations consistent with the statute. And under
18 67-612(B), Subsection (4), The carrier shall be
19 deemed the moving party in all hearings scheduled
20 pursuant to a request under Rule 67-504(C). And
21 that is the rule that provides that the claimant
22 may request a hearing where his benefits have been
23 stopped.

24 So, in other words, the carrier is declared by
25 regulation, and I would submit to you under a clear

1 reading of the statute, as being the moving party.

2 So that is the conclusion of the
3 Administrative Procedures Act. And actually that
4 last part was just simply on that other issue. I
5 wanted to get that in before I -- all right.

6 Now, equal protection is -- I think it is
7 clear, or if not clearer, than the situation in
8 reference to -- and I will hand up to the Court the
9 case of Raney v. Raney, and I will hand up to the
10 Court the case of Marley v. Kirby, which I think
11 really, Your Honor, is more on point than even
12 Raney v. Raney. And then I'm going to hand up
13 another case that addresses the same issues in a
14 different context. And that is the case of United
15 States Fidelity & Guaranty Company v. City of
16 Newberry.

17 (Complies.)

18 MR. MCDANIEL: And all three of those -- and
19 the reason I cited that last one is it involves
20 governmental action, but the reason I cite it is
21 because all three of those cases were to the same
22 point. And that is that, yes, the State has the
23 right, the legislature has the right to make
24 reasonable classifications of persons and property
25 for public purpose, but the classification must not

1 be purely arbitrary and must rest on some
2 reasonable basis.

3 Now, 42-9-260(B)(1) through (6), if you look
4 at those, and you look at -- they are almost
5 identical to the ones that apply after 150 days.
6 So when a claimant has been declared disabled, one
7 standard applies to him before 150 days, but if he
8 makes it to 150 days another standard.

9 There is simply no rational basis for treating
10 a person's, you know, right to a hearing -- in
11 other words, after 150 days they can't stop
12 benefits without a hearing. Before 150 days, they
13 can. There is absolutely -- it is just like the
14 case in Marley v. Kirby where they applied to just
15 motor vehicles accidents. So if you are a claimant
16 -- a Plaintiff in a motor vehicle accident, you
17 have to meet the higher burden of proof in
18 reference to contributory negligence as to any
19 other tort action.

20 And the Supreme Court said there is just
21 simply no rational or reasonable basis for treating
22 a tort plaintiff in one type of tort differently
23 from a tort in another type of tort action.

24 By the way, would you mind keeping that in
25 mind whenever they finally get the medical

1 malpractice argument over here to Your Honor from
2 one of my brethren of the trial bar. But, you
3 know, the other, Raney v. Raney, you know, they
4 treated a guest riding in a motor vehicle accident
5 who was requesting damages differently than anybody
6 else. And the Supreme Court said there is just no
7 rational basis for that.

8 Now, in the United States Fidelity & Guaranty
9 Company case v. City of Newberry, what they did
10 there was they said, Okay, to operate a business in
11 the City of Newberry you have got to have a
12 business license. And they cut out -- I thought it
13 was really interesting -- the three classifications
14 that they cut out.

15 One, I just have visions of somebody being on
16 City Council that operated these businesses or
17 something. I have, you know -- or in the county.
18 But in that case, they excluded these three types
19 of businesses or required them to pay a higher tax
20 burden than any other business that wanted a
21 business license. It was this. They required a
22 higher license fee for a life health accident and
23 hospital insurance company; another being companies
24 that delivered without prior order crackers, cakes,
25 and tobacco; and the other was a fire and casualty

1 insurance company.

2 And the Supreme Court said there is just no
3 logical rational or reasonable basis for treating
4 this classification of people differently from all
5 other businesses. And the same applies here.

6 To be entitled to benefits under the act, you
7 have to -- it has to be agreed or it has to be
8 ordered that you are entitled to benefits.

9 All right. You are entitled to disability
10 benefits for Week One. You are entitled to
11 disability benefits for Week 15. You are entitled
12 to disability benefits for Week 20. It is an
13 entitlement to weekly compensation benefits until
14 you have reached maximum medical improvement.

15 Tell me where there is a logical rational or
16 reasonable reason for treating people differently
17 in reference to, one, you are entitled to a
18 hearing. Now, this is what we are talking about is
19 entitlement to a hearing. But in the other one you
20 are not entitled to a hearing.

21 I'm not talking about, you know, anything
22 that -- we're talking about entitlement to a
23 hearing. That part. There is just no rational or
24 logical reason for that classification that can
25 receive benefits for two weeks versus receiving

1 benefits for 20 weeks.

2 With those remarks, Your Honor, I will sit
3 down and shut up and allow opposing counsel to --

4 THE COURT: All right.

5 MR. HUNTER: May it please the Court?

6 THE COURT: Yes, sir. Respond to due process
7 argument and APA and then the equal protection
8 argument.

9 MR. HUNTER: I will do this quickly. And I
10 would like to put forth a -- some of it we may deal
11 with, if you will allow us, to submit a proposed
12 order.

13 THE COURT: Yes, sir.

14 MR. HUNTER: So that we can move more quickly.
15 May I do them in reverse order from what he just
16 said?

17 THE COURT: Whatever order you choose.

18 MR. HUNTER: On equal protection, I think when
19 Mr. McDaniel talked about those earlier sort of
20 historical cases that set forth the reasons for
21 worker's comp in favor of a worker, and all that, I
22 think that is the purpose of the rational basis for
23 the way the statute works, because the way the
24 statute works is it allows the employer to
25 immediately start paying medical benefits so if a

1 person needs surgery tomorrow, they can get surgery
2 tomorrow. And that is a rational basis for having
3 the first 150 days and the second 150 days.

4 And also Mr. McDaniel has shown no evidence of
5 a less restrictive way to accomplish that result.
6 I mean, that is all in favor of the employee, the
7 way I see it, it lets them get compensated earlier.

8 And also, you know, what I realize, all of
9 this gets, I think, lost in the cases Mr. McDaniel
10 has presented is the payment of the benefits during
11 the first 150 days is discretionary. The language
12 is "may." They don't have to pay it. They could
13 not pay it and wait for the wheels to grind and
14 then have a hearing and the employee be found
15 entitled to them. But during this first period
16 when the carrier elects to pay, there is no right
17 to receive the benefit. No right whatsoever. He
18 is electing, pursuant to the statute, to pay the
19 benefits.

20 And when you look at all these cases that Mr.
21 McDaniel has cited, they are just in a different
22 universe. They all involve welfare benefits,
23 social security benefits, some sort of benefits
24 that have been ordered to be provided or that are
25 vested in some way under law.

1 For example, in *Goldberg v. Kelly*, the front
2 page held: Where benefits are a matter of
3 statutory entitlement. We do not have that here.
4 We have language that says "may." There is no
5 statutory entitlement to receive those benefits.
6 And, you know, we can distinguish all of those
7 cases on that basis.

8 And unless you would like to go into any more
9 detail, you know, I would submit under our position
10 that the language is made, there is no property
11 interest, there is no due process violation. There
12 is a rational basis for the classification under
13 the Equal Protection Clause and it doesn't apply to
14 the Administrative Procedures Act. There is no
15 agency action here. It is an action by the
16 employer or the carrier. And so that is where we
17 stand.

18 Right. And it is not a contested case until
19 Section (C) of the statute is invoked. And then if
20 there is an order it becomes property rights, there
21 is a benefit.

22 And also on property rights, even if there is
23 a property right -- and we don't concede there is a
24 property right -- you know, the post-deprivation
25 hearing gives protection of due process.

1 THE COURT: Let me ask you something. And
2 there is so many cases up here. I did see the
3 case, I looked at it ahead of time, where it
4 said -- where it talked about property rights and
5 what -- and a court spoke to what is considered a
6 property right.

7 And so it is your position that his right to
8 compensation regarding employment is not a property
9 right?

10 MR. HUNTER: In the first 150 days, there has
11 been no determination. We know he was hurt. We
12 don't know if it was a compensable injury. The
13 first 150 days, he has no entitlement to receive
14 the benefit. The carrier can elect to pay the
15 benefits while it is determined whether he is
16 entitled to receive the benefits.

17 At some point he may be determined to be
18 entitled to receive the benefits. Then he has a
19 property right and those benefits, and from that
20 point on, you know, we'll need a hearing and all
21 the due process rights. But they also -- excuse
22 me --

23 THE COURT: No, go ahead.

24 MR. HUNTER: But it also determined that he is
25 not entitled to a benefit, in which case the

1 carrier pays nothing and he gets nothing.

2 And the interesting thing is, which is why
3 this is a rational basis and why deference should
4 be given to legislation on equal protection is when
5 the carrier elects to pay these benefits, if it is
6 later found that the carrier doesn't have to pay
7 the benefits, the worker does not have to return.
8 Everything here is in favor of the worker.

9 THE COURT: All right. Let me ask a question.
10 And you may -- I understand you don't do worker's
11 comp. He gave the scenario earlier, somebody did,
12 if the claimant -- if the carrier refused payment
13 on Day One, unlike in this case, Mr. McDaniel would
14 have the opportunity at that point to request a
15 hearing. Is that correct?

16 MR. BAYNE: That's correct. And a hearing is
17 required to be held within 60 days.

18 THE COURT: All right. So --

19 MR. MCDANIEL: Wait a minute, wait a minute..
20 Let me make -- that -- okay, if they deny benefits
21 from the get-go.

22 THE COURT: From Day One.

23 MR. MCDANIEL: From the very beginning, you
24 have a right to request a hearing, and, no, there
25 is no 60-day requirement on that.

1 MR. BAYNE: I apologize.

2 THE COURT: The 60-day requirement is --

3 MR. MCDANIEL: In reference to stop payment.

4 THE COURT: After the 150 days?

5 MR. BAYNE: Yes, Your Honor. If it began
6 under 260 and ended within 150, like we did in this
7 case, then the commission is required to set a
8 hearing within 60 days if requested by
9 Mr. McDaniel.

10 MR. MCDANIEL: Yes. And then as to all stop
11 payments, whether it is before 150 days or after
12 150 days, they are required to set a hearing within
13 60 days.

14) THE COURT: All right. And then as to equal
15 protection argument, as to the -- if it was beyond
16 the 150 days -- and I think he said it was 110 --
17 that before the carrier could stop payment, a
18 hearing would have to be had after that 150 days?

19 MR. BAYNE: Yes, Your Honor.

20 THE COURT: I was just interested to see what
21 position you all take regarding that.

22 MR. BAYNE: We agree that that is proper. If
23 we had passed that 150 window and we find, in a
24 hypothetical sense, that it was just outright
25 fraud, we still have to file for a hearing and a

1 hearing has to be had. And we have to keep paying
2 those benefits and we have to wait for the
3 commission to tell us we can terminate those
4 benefits.

5 THE COURT: All right. Mr. McDaniel's point
6 is equal protection as to classification of a
7 person, let's say who was at 149 days versus
8 classification at someone that is at 151 days, that
9 person with 151 days would have a prehearing
10 determination before, and a person with 149 days
11 would not. How is that not a violation of equal
12 protection?

13 MR. BAYNE: Well, they have got to pick a date
14 somewhere and they have got to set it somewhere.
15 And the reason the statute exists, Your Honor,
16 is -- what Mr. Hunter said is before this statute
17 came into being, there was no free window to pay
18 benefits. It was either you get notice of the
19 injury and you either accept it or you deny it.
20 There was no pre-investigation period.

21 The purpose of this statute is to allow an
22 employer and an insurance company to receive notice
23 of an injury, to begin paying benefits on that
24 injury because the worker is out of work, and to
25 spend the next 150 days receiving the medical

1 reports, conducting investigation, talking to the
2 employer, talking to the employee, and figuring out
3 if this is a work-related incident or if this is
4 something that is not related to work at all, and
5 then make a determination to suspend benefits.

6 If this statute was not in place, the
7 implication is, and the reason the statute came
8 into being, is my understanding, is that we had a
9 problem where insurance companies would just deny
10 benefits. They would say, it is unwitnessed so we
11 are going to deny it, and you are going to have to
12 go to court and prove it.

13 Now we can presume -- we can start the
14 benefits, we can pay the benefits, and we can make
15 a determination with a full view of the case as to
16 whether or not it is a compensable injury. And
17 that is why it is a rational basis. There is not a
18 less restrictive way, other than maybe reducing the
19 number of days or reducing the way in which you do
20 it, but this is in place because it is the least
21 restrictive way of allowing an employer to
22 investigate a claim without just denying it
23 outright.

24 THE COURT: Last question. And I don't know,
25 y'all may have answered it. So just on the, I

1 guess on his classification, the person that -- if
2 you all were to deny the claim straight-up, Day
3 One, would his client have gotten a hearing --
4 gotten a hearing quicker than if you deny it on Day
5 110?

6 MR. BAYNE: He will give them the exact same
7 amount of time. I mean, unless the commission
8 delayed it for some reason. But when you file for
9 a hearing, it goes to the hearing cue and they set
10 it for a hearing. So unless there was some
11 docketing issue, I guess, that pushed it past 60
12 days, the hearing request is a hearing request.
13 They set them and you go. So, you know, if it is
14 Day One we denied, in theory by Day 61 we have a
15 hearing. If we deny Day 100, in theory by Day 160
16 we have a hearing, assuming the hearing notice is
17 filed. So the timeframe for that hearing should be
18 the same across the board.

19 THE COURT: So the 60 days applies in both
20 situations?

21 MR. BAYNE: Preston, do you disagree with
22 that?

23 MR. MCDANIEL: Yes, I disagree with that.

24 MR. BAYNE: There is not a 60-day
25 requirement --

1 THE COURT: Except.

2 MR. BAYNE: -- except under 260. So the
3 statute doesn't require it be set within 60, but in
4 practice it is set within 45.

5 MR. MCDANIEL: Right now the commission are
6 setting Form 50, which is what we are talking
7 about, if they deny the case from the get-go. It
8 is setting commission hearings about -- we are
9 getting about 90 days. It was at one point almost
10 a year, year and a half, and they have cut that
11 down a lot because of various reasons.

12 But, no, see, when I file for benefits and
13 they denied the case, I file a 50, they are allowed
14 to file a responsive 50-I. And then they have 30
15 days to do that. And so then after that the case
16 cannot go on the docket. So, in other words, it
17 winds up about -- like I said, they shortened the
18 time a lot, but it is about 90, 95 days.

19 THE COURT: I guess what I was asking is that
20 there is no difference between this request and
21 request at 110 days?

22 MR. BAYNE: Technically, yes.

23 THE COURT: They both have to be scheduled?

24 MR. BAYNE: Yes, Your Honor. What we are
25 looking at -- we are not looking at a 60-day versus

1 2-year gap like you would maybe civil court
2 versus --

3 MR. MCDANIEL: But it is 60 days in reference
4 to stop -- if they file -- if they file after 150
5 days to stop payment, that hearing must be set
6 within 60 days.

7 MR. BAYNE: Correct.

8 MR. MCDANIEL: If they file -- if they stop
9 payment and we request a hearing to get those
10 reinstated or ask those be reinstated, that hearing
11 must be held within 60 days. And this one was held
12 exactly 60 days after we filed Form 50-II.

13 MR. BAYNE: Right. But if there is no payment
14 ever started, if we just -- we get the report of
15 injury and we say, We are not paying for that, then
16 there is not a 60-day, but it is about 90. We can
17 agree to that?

18 MR. MCDANIEL: Yes.

19 MR. BAYNE: It is about 90 days when it gets
20 set.

21 MR. MCDANIEL: Here again, these are both stop
22 payment situations.

23 THE COURT: Okay. All right. That was just
24 my question regarding classifications under the
25 equal protection.

1 MR. BAYNE: Yes, Your Honor. And under 260 it
2 is -- if you are denying under 260, whether it is
3 before or after 150, it always 60 days. So it
4 would be non 60 days only if you ever started
5 payments under 260 and you just denied the claim.

6 THE COURT: Okay. All right. And then I had
7 a question about the -- where is the case -- what
8 is the case -- I had it -- the case where the
9 Court -- I know that it is your position,
10 regardless of -- Mr. Hunter's position, regardless
11 of whether or not it is a property right or not,
12 that the due process is still not violated because
13 it is a voluntary action by the carrier. Is that
14 correct?

15 MR. HUNTER: The determination of the first
16 150 days is a matter between the carrier and the
17 employer and the worker. No state action. No
18 involvement. The statute allows that to be done
19 that way, and that is how it is. Because the
20 carrier doesn't really know at that point in time
21 if there is going to be a finding that he has to
22 pay.

23 THE COURT: All right. All right. Anything
24 else? Anyone else?

25 All right, I'll give you -- do you need five

1 minutes to reply?

2 MR. MCDANIEL: That is about all I need.

3 THE COURT: All right.

4 MR. MCDANIEL: First off, I think the Court
5 honed in on the equal protection issue. And I want
6 to tell you how much I appreciate your -- because I
7 started to put that in my brief, 149 versus 151.
8 How can it -- the term was used that -- less
9 restrictive way. Okay? I have no problem with
10 42-9-260, Subsection(A), which says that for the
11 first 150 days they have a right to conduct a good
12 faith investigation and deny benefits.

13 If they had not put in (B), we wouldn't be
14 here, because what would happen is they could start
15 benefits, they have a good faith reason to deny it,
16 they file for a hearing, and they get a hearing,
17 and then a decision made as to whether or not that
18 decision was proper.

19 That is exactly what happens after 150 days if
20 they decide to stop payment of benefits. For
21 example -- and we haven't talked about these
22 because in reference to this one we're talking
23 about Subsection(C), but there are five other
24 reasons under the act that they can stop benefits.

25 One is where the claimant has returned to

1 work. During the first 150 days, he doesn't get a
2 hearing. Okay? The second 150 -- after 150 days,
3 he gets a hearing. He agrees that he is able to
4 return to full duty work. Doesn't get a hearing
5 first 150 days. After the second 150 days, he gets
6 a hearing. He is released to return to light duty
7 work. Doesn't get a hearing for the first 150
8 days. After 150 days, he gets a hearing.

9 Tell me the logic between that. Those are --
10 there are five other provisions, other than the one
11 we are talking about here today, that all deny a
12 worker under Subsection (B) a hearing before they
13 get the right to stop benefits. But after 150
14 days, there is simply no -- and that even, I think,
15 makes our case more, that there is absolutely no
16 logical reason not to give them a hearing under
17 equal protection, much less under due process.

18 So, and I think, I'm not sure -- and Madam
19 Court Reporter, I was really remiss in not helping
20 you with the assistance of giving you some of these
21 case names, but I believe you were looking for the
22 case of Sniadach v. Family Finance Corporation,
23 that United States Supreme Court case. And that is
24 S-N-I-A-D-A-C-H, Madam Court Reporter.

25 THE COURT: We have the cases and we'll share.

1 MR. MCDANIEL: I believe that is the one that
2 the Court was referring to. And, of course, that
3 is the one where two private parties,
4 pre-garnishment.

5 THE COURT: All right.

6 MR. MCDANIEL: And I won't make any further
7 argument.

8 THE COURT: All right. If you all want to get
9 me proposed orders. I can't do it before 30 days
10 because I have another case that Mr. Smith is aware
11 of that is going to take some time. So I will try
12 to get you something as soon as possible, but y'all
13 are like Number 3 on my list.

14 MR. SMITH: How much time, Your Honor, for
15 proposed orders?

16 THE COURT: Y'all can take 20, 30 days.
17 Twenty days?

18 MR. HUNTER: How about 30, Your Honor?

19 MR. MCDANIEL: I would sincerely appreciate 30
20 days, Your Honor.

21 THE COURT: Not a problem. I probably won't
22 be able to get to it.

23 MR. HUNTER: We agree.

24 MR. MCDANIEL: We agree, see.

25 THE COURT: I have another case with the

1 Attorney General's Office from yesterday that is
2 going to take my time up the next 20 days.

3 All right, so we look to hear from you. You
4 can e-mail it to my law clerk.

5 MR. HUNTER: Thank you, Your Honor.

6 MR. BAYNE: Thank you, Your Honor.

7 MR. MCDANIEL: And that is a proposed order on
8 the complaint?

9 THE COURT: On the --

10 MR. MCDANIEL: Declaratory judgment action?

11 THE COURT: On the actual declaratory judgment
12 action. And then you were going to get me a
13 proposed order.

14 MR. BAYNE: Your Honor, I also have a motion
15 for costs outstanding. Do you want to just let
16 that run to the next docket, whenever that goes?

17 THE COURT: Yes, you probably have to wait --

18 MR. BAYNE: I filed a brief on it.

19 THE COURT: You may want to wait until you get
20 a ruling, I guess, on --

21 MR. MCDANIEL: And, Your Honor, just to point
22 out that, it is in my brief, but that has already
23 been decided by the Court, and under Rule 43 I --
24 Mr. Bayne probably forgot about that. It has
25 already been decided.

1 MR. BAYNE: Not --

2 THE COURT: Judge Cooper or Judge Lee decided
3 one of them about costs.

4 MR. BAYNE: He dismissed an issue related to
5 sanctions for costs related to the complaint. This
6 is related only to the temporary restraining order,
7 which was improperly granted. And then it was
8 dismissed by Judge Lee, which she found she didn't
9 have jurisdiction to grant it in the first place.
10 And we incurred costs and fees associated with
11 having to defend that on an emergency basis.

12 THE COURT: I might let y'all take that to
13 Judge Lee.

14 MR. BAYNE: That's fine.

15 MR. MCDANIEL: Well, I think, as a matter of
16 fact --

17 THE COURT: She knows more about it than I do
18 about the temporary -- I mean, what happened.

19 MR. BAYNE: Yes, ma'am.

20 MR. MCDANIEL: And I think that is also very
21 apropos, because he filed it under the Frivolous
22 Proceedings Act, which is the only place he can
23 file it.

24 MR. BAYNE: Not the motion for costs. It has
25 been filed under a different issue.

1 MR. MCDANIEL: Well, tell me under what
2 statute you are filing that.

3 MR. BAYNE: Under case law.

4 MR. MCDANIEL: For attorney fees?

5 MR. BAYNE: Yes.

6 MR. MCDANIEL: Case law?

7 THE COURT: Well, I think you are going to
8 have different attorney fees regarding the
9 temporary injunction. I think you might have to
10 take that to Judge Lee anyway.

11 MR. BAYNE: I will send her an e-mail. I
12 wasn't suggesting you hear it right now.

13 THE COURT: I just don't know if I can hear it
14 if it is costs related to the case, the part she
15 heard.

16 MR. HUNTER: And, Your Honor, clarification,
17 if you don't mind. Mr. McDaniel mentioned that the
18 order will be on the complaint. I want to be sure
19 I understand, because my order is going to resolve
20 everything to do with South Carolina. I want to be
21 sure of that.

22 THE COURT: That's fine. Send what you have.
23 If you e-mail it, if I need to delete, add, I can
24 do that.

25 All right, thank you.

1 MR. SMITH: Thank you, Your Honor.

2 MR. MCDANIEL: I will try to address all the
3 issues of cost, Your Honor.

4 THE COURT: On the pleadings, judgment on the
5 pleadings, and the declaratory judgment.

6 All right, thank you.

7 MR. MCDANIEL: Thank you, Your Honor.

8 MR. HUNTER: Thank you, Your Honor.

9 (WHEREUPON, the proceedings were concluded.)
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25 (END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)

COUNTY OF RICHLAND)

I, Deborah M. McCurdy, Official Court Reporter for the FIFTH Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 9th day of September, 2014.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

May 20, 2016

s/Deborah M. McCurdy, RPR

Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND) COURT OF COMMON PLEAS
2013-CP-40-05888

Clarence Winfrey,)
Plaintiff,)
vs.) TRANSCRIPT OF RECORD
American Fire & Casualty Co.)
and State of South Carolina,)
Defendants.)

January 25, 2016
Columbia, South Carolina

B E F O R E:

THE HONORABLE DEANDREA G. BENJAMIN, JUDGE.

A P P E A R A N C E S:

PRESTON F. MCDANIEL, ESQ.
Attorney for the Plaintiff

BRETT H. BAYNE, ESQ.
Attorney for the Defendant Archway
T. PARKIN HUNTER, SENIOR ASSISTANT ATTORNEY GENERAL
J. EMORY SMITH, ASSISTANT DEPUTY ATTORNEY GENERAL
Attorneys for the Defendant State of South Carolina

DEBORAH M. McCURDY, RPR
Official Court Reporter

I N D E X O F W I T N E S S E S

(WHEREUPON, no witnesses were called
during these proceedings.)

E X H I B I T S

(WHEREUPON, no exhibits were introduced
during these proceedings.)

JANUARY 25, 2016

THE COURT: Clarence Winfrey v. American Fire
& Casualty.

All right. This is case 2013-CP-40-5888. And
this is -- I guess there was an issue regarding --
there was a Form 4 issued on December 22nd by the
Court, specifically as to South Carolina Code
Section 42-9-260, in which the Court granted the
Defendant's motion for judgment on the merits and
asked the Defendants to prepare a formal order.

There was several e-mails and letters sent
back and forth by Mr. McDaniel as to I think the
drafter of the order, as to the content of the
order, and that is why we scheduled this today in
regards to -- I believe Mr. McDaniel, while he did
not file a motion for reconsideration, did ask for
a hearing as to the order. And that is why we have
placed this on the docket for today.

MR. BAYNE: And, Your Honor, Brett Bayne, for
Archway. Liberty Mutual is the insurance company.
Just one, I guess, clarification on that is the two
letters that Mr. McDaniel sent, I think you had
said he objected to the content of the order.
There is not a single objection contained in those
letters to anything contained in the order. His

1 objection is that you didn't rule in his favor.
2 But he doesn't actually -- if you look at the
3 letters, he doesn't actually raise a single
4 objection to anything contained within the order,
5 other than he wants it decided differently.

6 So I think that is kind of an important
7 distinction that -- we're here for this hearing,
8 obviously, but there hasn't been any specific
9 objection raised to any content of the order, other
10 than I'm the one that happened to draft it versus
11 somebody -- I'm the one that sent it via e-mail to
12 your office rather than somebody from the Attorney
13 General's Office sending it to your office.

14 And I would object, I guess before we get
15 started, to any sort of reargument of this entire
16 trial we had 14 months ago related to that. If
17 there is something specifically objectionable in
18 the order, obviously, if that is proper for a
19 motion for reconsideration -- which hasn't been
20 filed yet, but I understand Your Honor is hearing
21 it under that format -- but any retrial of these
22 issues I don't think is proper under a Rule 59
23 motion, which I think is how we're proceeding here
24 today.

25 THE COURT: Well, I think he also said that

1 there were some issues that were not ruled on,
2 so --

3 MR. BAYNE: Well, and maybe that is, but as I
4 understand it there hasn't yet been an objection --
5 maybe there will be -- to anything contained within
6 the order itself.

7 In other words, maybe there needs to be -- we
8 need to add additional content to that order that
9 states "considered the other arguments raised, they
10 are also denied for these reasons," but the actual
11 content dismissing it or constitutional estoppel
12 hasn't really been objected to or challenged. And
13 I'm sure that is what is coming, but I just wanted
14 to put that on the record before we get started
15 here today that that is sort of where we are at
16 after those two letters and e-mails going back and
17 forth.

18 THE COURT: All right. Yes, sir?

19 MR. HUNTER: Your Honor, I'm Parkin Hunter,
20 with the Attorney General's Office. I just wanted
21 to put on the record that we reviewed and
22 participated in the drafting of the order that was
23 submitted by Mr. Bayne. We are in full agreement
24 with that order. That is the issue that seems to
25 have been raised in the letters.

1 There also has been no final order signed, so
2 to proceed as a Rule 59 motion at this point in
3 time I think is not proper.

4 THE COURT: And I know that is probably why he
5 has not filed one, but there was some question
6 regarding some issues that he stated were not
7 addressed in the Form 4 order, or proposed order.
8 So we will be glad to hear from Mr. McDaniel.

9 MR. MCDANIEL: Your Honor, first off, I'm glad
10 Mr. Hunter made his comments because Your Honor on
11 December 22nd in the proposed -- you requested that
12 the Defendants draft a formal order. So you have
13 not issued your order yet.

14 I believe, for a better term, the wrong box
15 was checked in reference to the Form 4. These are
16 simply notes for decision. However -- and that is
17 the purpose of me being here.

18 As Mr. Hunter appropriately noted, I think
19 Mr. Bayne did also, 14 months ago we came over here
20 before -- on our declaratory judgment action, and
21 we argued mounds -- actually my file now in the
22 circuit court is a banker box in and of itself, but
23 now I am going to hand up to the Court -- I know
24 Parkin and them are aware of this, but any order
25 before your final order -- this is not a motion for

1 reconsideration, you are correct. I had questions
2 about the order. And I also really, after this
3 period of time, was requesting maybe even a
4 complete rehearing of the matter before this Court
5 or another judge because of the fact of it taking
6 14 months.

7 I'm going to hand up too just one copy of one
8 case that says that your final decision prior to
9 you actually issuing it is subject to
10 reconsideration completely without a Form 59, but I
11 am here again not to reargue. If you decide to
12 issue this order after hearing me today, then I
13 will file -- but I would respectfully request that
14 when I file that, it is totally within your
15 discretion, if you decide to go ahead and issue
16 your order, as to whether or not I get a hearing.

17 And because of the numerous issues that were
18 before you before and my feelings going out of that
19 hearing of where your concerns were, I remember
20 Your Honor making the distinct -- after arguing all
21 these preliminary matters -- which Mr. Bayne and I
22 argued many, many months before that, all types of
23 motions. The Attorney General's Office, when we
24 filed the original complaint, did not get involved.
25 They did not file a complaint or return. They did

1 not file an answer. Pardon. I ask the Court to
2 forgive me. I am suffering from a little cold
3 today, so I am a little raspy. But, anyway, there
4 were all kind of motions filed at that time. Then
5 one of those the judge directed that the Attorney
6 General be added as a party. And as a result of
7 that, without any request for that to be done, but
8 in any event, he ordered it, and then I gave them
9 an extension to answer the complaint.

10 When they answered the complaint, I fully
11 expected an answer to the complaint as to whether
12 or not the statute is constitutional, but instead I
13 get an addition to the answer and get all these
14 additional motions. Now, one of those was heard
15 that day. Now -- all of those were heard that day,
16 the motion, and then also the pleadings, and
17 everything else, our request for declaratory
18 judgment action that part of the statute is
19 unconstitutional.

20 Now, as Mr. Hunter appropriately noted to the
21 Court, this was heard 14 months ago. It amounts to
22 that -- the comment I remember the Court making
23 from the bench specifically that day was you
24 saying, How in the world is it -- well, you did not
25 use those terms.

1 THE COURT: I was going to say, I know I
2 didn't use those terms.

3 MR. MCDANIEL: No. You asked, How is it
4 appropriate or how is it constitutional and not
5 inviolate of equal protection for a man that has
6 been out of work or a claimant that has been out of
7 work for 149 days to then be able to stop his
8 benefits without a hearing, but yet he has been out
9 151 days. I don't know if the Court remembers that
10 or not, but you were gravely concerned about it. I
11 remember very little concern about the pleadings.

12 Then when I -- we got these proposed notes for
13 decision -- as I said, it had been 14 months since
14 that hearing. In addition, the only party that
15 raised that -- and Your Honor that day asked us to
16 prepare proposed orders. Mr. Hunter prepared a
17 proposed order in reference to a motion on the
18 pleadings. And that was filed within 30 days. He
19 also prepared a general motion -- so did Mr.
20 Bayne -- in reference to the overall -- whether or
21 not the statute was constitutional.

22 Now, 14 months later we get a decision on the
23 motion for pleading. And one of the things in
24 there, there was no specific reference to any of
25 the statutes under which my client was actually

1 being paid benefits, which he is actually paid
2 under a separate section. There was also reference
3 to that we were only challenging a specific
4 subsection of the statute, which was 42-9-260(B), 1
5 through 6, which are the specific in limine grounds
6 which a Defendant must come into court and prove in
7 order to be able to stop a man's or a claimant's
8 benefits, an injured worker's benefits, without a
9 hearing.

10 Because of that -- then, in addition to that,
11 the note said on down in there, it said that I
12 am -- you know, it says: I am not the law clerk
13 who originally worked on this case, so if I left
14 anyone out of it, please let me know. It just
15 raised grave concern. We've got a case with mounds
16 of information, mounds of United States Supreme
17 Court cases, mounds of all this was presented to
18 this Court. Then it takes -- it is 14 months
19 later. We get a decision based on one of the
20 limited motions, one of -- I consider to be one of
21 preliminary -- one of -- not preliminary issues,
22 side issues, almost boilerplate type defenses that
23 are raised by the Attorney General's Office. And
24 then my client is kicked out of court on that
25 basis. And then, in addition, we have a comment

1 that: I was not the law clerk. And I'm not --

2 THE COURT: I think that comment was for the
3 purposes of which attorneys are still involved in
4 the case. I don't think that -- that comment has
5 nothing to do with whether or not the issues
6 were --

7 MS. MCDANIEL: It just raised concern in my
8 mind as to, you know, when the decision was made,
9 and that kind of thing.

10 And so the only cases I can find directly on
11 point, I think we are here today, totally
12 discretionary, if you decide to proceed and issue
13 this opinion, I would respectfully ask -- I will
14 file a motion for reconsideration, and I would ask
15 for a hearing on that. It is totally within your
16 discretion at that time.

17 The second thing is, is that most of the cases
18 that deal with long delay or in reference to
19 pre-indictment where somebody is indicted but then
20 they don't get a trial for a long period of time.
21 There is one case, and there are several other
22 cases that deal with this, but the only case I
23 could find anywhere close on point was actually a
24 workers' compensation case in which it took
25 almost -- a total of almost two years to get a

1 decision. But in that case the Court said that did
2 not constitute a denial of due process because
3 there were numerous things that went on that caused
4 that delay within that 2-year period of time. It
5 was actually a period of like four years.

6 Here, because of the complexity -- when I say
7 the complexity of the issues -- and it really is a
8 complex matter. We presented the Court, Your
9 Honor, with a lot that day. This case is very
10 important to not only my client, but I think the
11 overall body of the claims bar, this section. But,
12 anyway, I would just specifically ask either -- you
13 know, I would ask the Court to consider withdrawing
14 the notes and granting us a full hearing on that
15 issue alone. And, if not -- because if I have to
16 take this issue up, then -- and I get a decision
17 reversing the decision on the motion on the
18 pleadings, that the Attorney General's Office filed
19 well over six months, almost a year later, then we
20 have got to then come back down and argue the
21 constitutionality of the statute. This has been
22 delayed long enough.

23 So I would respectfully request the Court to
24 consider whether or not to withdraw the notes and
25 not issue a form order and grant us a full hearing

1 on this issue alone.

2 In the alternative, I would -- I actually -- I
3 thought about this over the weekend as I went back
4 and forth on this. Actually, if the Court decides
5 to issue the order, leave it as it is in reference
6 to there is no citation of 42-9-10 under which my
7 client is paid benefits. There is no reference to
8 he 42-17-20, which is the other statute under which
9 I claimed benefits. There is no reference to the
10 fact that 42-9-260 did not even exist until 1988.
11 And the provision that I'm challenging did not even
12 exist until 1998. You know.

13 And then in reference to the case, I went back
14 and read all the cases they cited, I'll be glad to
15 go over them with this Court because somebody
16 didn't read the cases they were citing.

17 But, anyway, I appreciate the Court's granting
18 me -- I truly appreciate this opportunity because,
19 I mean, for me to get up here and express a hearing
20 on this, give me a hearing at this informal state.
21 And, thank you, Your Honor. I'm not going to say
22 anything more.

23 THE COURT: All right. Thank you.

24 Any response?

25 MR. BAYNE: Yes, Your Honor. I'll just kind

1 of piecemeal it together for you real quick. And
2 I'll start with the delay of 14 months.

3 The cases Mr. McDaniel talks about involving
4 prisons and people sitting at the Richland County
5 jail, that kind of thing, those involve significant
6 other deprivation of their freedom, deprivation of
7 property rights, that type of thing.

8 Here there is no remedy at law that Mr.
9 McDaniel is seeking for his client he would obtain.
10 In other words, if, in a hypothetical world, the
11 statute was declared unconstitutional, nothing
12 happens to Mr. Winfrey. Nothing changes as far as
13 his ongoing workers' comp, the underlying workers'
14 compensation case. So there is no prejudice to Mr.
15 Winfrey related to any type of delay, whether it is
16 14 months or 14 years. There is just not any issue
17 related to the period of time in which you took to
18 review all documents and to reach a conclusion
19 related to the complaint and the pleadings and the
20 motions that were filed.

21 In regards to what was discussed at the
22 hearing 14 months ago, you did express a lot of --
23 or we did have a lot of discussion about the equal
24 protection issue and the deadline of 150 days, but
25 that is because that is almost all Mr. McDaniel

1 talked about for two hours. So that necessarily
2 resulted in a situation where that is kind of all
3 we talked about at the hearing because that is how
4 it got steered that way, but that doesn't mean that
5 everything else that was talked about peripherally
6 at the hearing, everything else that is contained
7 in the motions and memorandums can't be considered
8 and can't be ruled upon.

9 And so when you stepped back and you looked at
10 it, you looked at the constitutional estoppel
11 issues and made the conclusion -- and rightfully
12 so -- that Mr. Winfrey has obtained the benefits of
13 the statute he is seeking to invalidate. He filed
14 for a hearing that is provided for under the
15 42-9-260 statute. He got his hearing. He got his
16 benefits. So he has exercised his rights
17 underneath that statute at the Workers'
18 Compensation Commission and then came in here and
19 said, But it is unconstitutional.

20 Constitutional estoppel, which was raised,
21 yes, by the Attorney General, but constitutional
22 estoppel prevents him from doing that. And it is a
23 threshold issue. It is a standing issue. So
24 everything else that is raised in the complaint Mr.
25 McDaniel talked about today, equal protection,

1 violation, and all this stuff, we never get there
2 if he doesn't have standing to raise the suit in
3 the first place. That is what constitutional
4 estoppel does is it cuts the legs out from
5 underneath it because he doesn't have the standing
6 to come in here and raise those issues before you.

7 So your order, an order granting the dismissal
8 on that constitutional estoppel theory, doesn't
9 need to address those other issues. We would
10 submit that if Mr. McDaniel wants them addressed,
11 we would be happy to amend that order and add those
12 in there and make a ruling that you rule on that,
13 but we never get to those issues and you never have
14 to rule on those issues. It is similar when you
15 read a Court of Appeals order that reverses on the
16 first issue, they don't address anything else,
17 because you don't need to.

18 And, finally, as far as the reference to any
19 statutes contained in the order, all this other
20 stuff raised, the complaint is to dismiss or find
21 unconstitutional 42-9-260, 1 through 6. Nothing
22 else. That is what he is seeking through his
23 complaint. That is the relief he wants.

24 So, necessarily, your determination is, What
25 is the statute? What has he done below? And you

1 looked at it and said, He has obtained the benefits
2 afforded to him under that statute; therefore, he
3 can't challenge the constitutionality. There
4 doesn't need to be any addressing of these other
5 statutes that are kind of on the outside, on the
6 periphery of the workers' compensation claim. It
7 has already been through to the full commission and
8 it is now up to the Court of Appeals on separate
9 issues over there.

10 So all of that is sort of how we get to the
11 trial we had, or the motions hearings we had 14
12 months ago. But they are not really raised in the
13 complaint as far as what he is challenging. He is
14 challenging 42-9-260. That is all that needs to be
15 addressed within the construct of your order, or
16 your requested order, your notes and proposed order
17 that we submitted.

18 So we would submit that there is no prejudice
19 with the 14-month delay, that you made the correct
20 decision, obviously, that unconstitutional
21 estoppel -- that the order is sufficient, but that
22 we would be happy to add in the additional concerns
23 Mr. McDaniel has as far as what he believes wasn't
24 addressed and we can add that in there and that he
25 can file his motion to reconsider.

1 And so we'll await your instruction on that.
2 I don't know if Mr. Hunter has anything to add. I
3 put you on the spot.

4 MR. HUNTER: May I have a minute to talk to my
5 co-counsel?

6 THE COURT: Yes, sir.

7 (Pause.)

8 MR. HUNTER: We agree with everything
9 Mr. Bayne said, and we don't have anything else to
10 add. Thank you.

11 THE COURT: All right. Thank you.

12 I will acknowledge that it did take 14 months
13 to get you all a decision. I also acknowledge, as
14 Mr. McDaniel says, that there was a lot of cases
15 cited and that the file in this case was quite
16 voluminous.

17 However, this file has been in my office on my
18 desk, and I have read through the cases. And I did
19 change law clerks, as we normally do, but both of
20 my law clerks have provided research on the issues
21 in the case, in addition to the Court reviewing
22 everything and reviewing the case law and all the
23 documents in the case.

24 I will take a look at the issues that Mr.
25 McDaniel states that there has not been a ruling as

1 to, and I will either rule on it or -- I will
2 either give you a ruling as to those, or I will --
3 yes, sir?

4 MR. MCDANIEL: Your Honor, I want to make sure
5 I did not confuse the Court, you know, with
6 Mr. Bayne and I between arguments. I understand
7 your ruling is based on that motion alone. I'm not
8 asking you to address all those other issues at
9 this point in time. If I in some way indicated
10 that, I did not. What I was trying to simply point
11 out was is that within the order's notes -- and I
12 am going to refer to them as the order notes, or
13 the order instructions -- you did not -- there was
14 no reference to 42-9-10 and 4-17-20, which are the
15 statutes under which benefits were paid. They are
16 not paid under 42-9-260. However, that was part of
17 the argument. I just simply was saying it would
18 suit me fine just to leave them like they are if
19 you decide to issue the order. I was not asking
20 you to go back and address equal protection or due
21 process. And I argue, I believe firmly, the due
22 process argument by far as much as I do the equal
23 protection. But, however, I just want to clarify
24 that for the Court. And I, again, sincerely
25 appreciate your -- and another thing too, I am not

1 trying to -- I did not mean to insinuate in any
2 way, shape, or form, it is just, you know, a
3 14-month period, many eyes looking at it, and when
4 the order -- and, you know, another thing too --
5 here we go again. You know, Parkin Hunter is an
6 outstanding attorney. There are many of them over
7 at the Attorney General's Office. And I had the
8 great pleasure to serve with the gentleman sitting
9 behind him, Emory Smith. We served together years
10 at the Attorney General's Office. And what I'm
11 saying is they chose to raise this. And then now
12 we have -- I had to face the power and the wealth
13 of Liberty Mutual to start with, and now I have got
14 to face the power and wealth of Liberty Mutual and
15 the outstanding expertise of the Office of the
16 Attorney General. And if they decide to make the
17 motion, I will sincerely appreciate it if they
18 draft the order. And I would have appreciated it
19 if they had argued their reply to -- instead of
20 Mr. Bayne, who did not raise this issue at any time
21 for nine months and now he has become a scholar on
22 constitutional estoppel.

23 THE COURT: Well, now, they are saying that
24 they worked on the order also, I believe is what --

25 MR. MCDANIEL: No, I think they said they

1 looked over the order.

2 MR. HUNTER: We participated, Your Honor, in
3 the drafting of the order with Mr. Bayne, and we
4 agree with what is in the order.

5 MR. SMITH: Your Honor, if I may, because
6 there are two fine attorneys in front of me, and
7 another one who just spoke to you, Mr. McDaniel.
8 But if I may just add that the order is Your
9 Honor's when you sign it, whatever you sign. It
10 doesn't matter whether Parkin Hunter wrote it or
11 Mr. Bayne wrote it or I wrote it or Preston wrote
12 it, whoever. You are the one who signs the order,
13 it is your order. It doesn't matter who wrote it.

14 THE COURT: All right.

15 MR. MCDANIEL: I agree with you one hundred
16 percent, Emory.

17 THE COURT: Well, I will get something to you
18 all in short order.

19 All right. Thank you.

20 MR. MCDANIEL: Thank you, Judge. Judge, thank
21 you very much for giving me the opportunity.

22 THE COURT: No problem.

23 MR. SMITH: Thank you, Judge Benjamin.

24 THE COURT: All right. Thank you.

25 MR. HUNTER: Yes, thank you.

1 MR. BAYNE: Thank you, Judge.

2 (WHEREUPON, the proceedings were concluded.)

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(END OF TRANSCRIPT)

CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

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}

I, Deborah M. McCurdy, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Richland County, South Carolina, on the 25th day of January, 2016.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

May 16, 2016

s/Deborah M. McCurdy, RPR

Deborah M. McCurdy, RPR
Fifth Circuit Court Reporter

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Preston F. McDaniel

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October 10, 2014

VIA EMAIL - dbenjaminlc@sccourts.org

Imani Newborn
Richland County Courthouse
Post Office Box 2766
Columbia, South Carolina 29202-2766

Granted
10-13-14

RE: Clarence B. Winfrey v. American Fire and Casualty Co.
and State of South Carolina
C/A No.: 2013-CP-40-05888

Dear Ms. Newborn:

In reference to your prior email (with which I agree) and Mr. Hunter's submission of his proposed orders, I did not remember and do not recall the Judge setting a specific date.

In reference to the submission of my proposed order I had actually set aside a day to go to the Law School and did work on my proposed order for half of that day. While I believe I can possibly get the Order to the Judge by the 17th, I would ask for a tentative date of October 24th for submission of the Order.

At the Hearing I actually believe we discussed with Judge Benjamin the fact that I had a very heavy schedule in the month of September and I thought I asked for approximately 60 days to submit the Order. I may be wrong, but again I will try my best to get it to the Judge as soon as possible and would appreciate it, (while you have already responded that there was no set deadline) if you would confirm that would be agreeable with the Judge to follow the tentative timeline I have proposed. By copy of this email I am notifying opposing counsel of this communication. Please convey to Judge Benjamin, that I appreciate all the courtesies and kindnesses shown to me by the Court and her understanding in this matter.

Sincerely yours,

Preston F. McDaniel
Preston F. McDaniel

PFM/rmt

cc: Brett H. Bayne, Esquire
(Via Email & US Mail - brett.bayne@mgclaw.com)
T. Parkin Hunter, Assistant Attorney General
(Via Email & US Mail - phunter@scag.gov)

Kim Hinkle

From: Parkin Hunter <phunter@scag.gov>
Sent: Wednesday, December 23, 2015 2:22 PM
To: Brett Bayne; Benjamin, DeAndrea G. Law Clerk (Stacy A. Williams)
Cc: kim@pfmcdlaw.com; mcdaniellaw@hotmail.com; Keith Roberts; Emory Smith
Subject: RE: Winfrey v. America Fire and Casualty Co. FORM 4

Deputy Solicitor General J. Emory Smith, Jr. (ESmith@scag.gov) is also counsel for the Commission. Thank you.

Parkin

T. Parkin Hunter
Senior Assistant Attorney General
Office of the South Carolina Attorney General
(803)734-6151

From: Brett Bayne [<mailto:brett.bayne@mgclaw.com>]
Sent: Wednesday, December 23, 2015 2:13 PM
To: Benjamin, DeAndrea G. Law Clerk (Stacy A. Williams)
Cc: kim@pfmcdlaw.com; mcdaniellaw@hotmail.com; Keith Roberts; Parkin Hunter
Subject: Re: Winfrey v. America Fire and Casualty Co. FORM 4

I also left off Keith Roberts with sc wcc. Sorry!

Brett H. Bayne
Attorney
O: 803-227-2281
C: 214-405-8175

Sent from my iPhone

On Dec 22, 2015, at 4:35 PM, Benjamin, DeAndrea G. Law Clerk (Stacy A. Williams) <dbenjaminlc@sccourts.org<<mailto:dbenjaminlc@sccourts.org>>> wrote:

Good Afternoon,

Attached, please find the Form 4 regarding the Defendants Motion for Judgment on the Pleadings that was heard before Judge Benjamin in September of 2014. The Defendants are to prepare a formal order. Once all parties agree to the proposed order, please send the proposed order back to me within 30 days so any changes may be made. I was not the law clerk who originally worked on this case, so if I left anyone out of the email, please let me know. Conversely, if I added someone who was not supposed to be added, please let me know. Thank you, and have a wonderful holiday season!

Stacy A. Williams, Esq.
Law Clerk to the Honorable DeAndrea Gist Benjamin
Richland County Judicial Center

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<FORM 4 Winfrey v. American Fire and Casualty Co..pdf>



**Brett Bayne, Attorney**  
[brett.bayne@mgclaw.com](mailto:brett.bayne@mgclaw.com)  
1320 Main Street, 10th Floor  
Columbia, SC 29201  
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STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND  
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2013-CP-40-05888

Clarence Winfrey, Jr.

American Fire and Casualty Co.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: \_\_\_\_\_

Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC; ☐ Rule 43(k), SCRPC (Settled); ☐ Other \_\_\_\_\_
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other \_\_\_\_\_
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other \_\_\_\_\_

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk :

The motion for judgment on the pleadings is granted. The Plaintiff received temporary disability benefits awarded by his employer in accordance with the statute that allows employers the choice to immediately dispense and continue these payments for up to 150 days. S.C. Code Ann. § 42-9-260(A). Once the employer terminated those benefits within the 150 days after completing a good faith investigation in accordance with S.C. Code Ann. § 42-9-260(B), the Plaintiff exercised his right to a hearing with the Commission **after** the termination of his temporary disability benefits. S.C. Code Ann. § 42-9-260(C). Plaintiff then challenges the constitutionality of the same statute, arguing it violates the Due Process Clauses of the United States and South Carolina Constitutions as it allows an employer to initiate temporary disability benefits without a hearing **before** the termination. Because the Plaintiff received not one, but two benefits of the statute (the temporary benefits and the post termination hearing), the Plaintiff is estopped from challenging the constitutionality of the statute. The Supreme Court of the United States has long held that "[o]ne who invokes the provisions of law may not thereafter question its constitutionality." *Buck v. Kuykendall*, 267 U.S. 307, 316, 45 S. Ct. 324, 326 (1925). Additionally, because the Plaintiff claims a property interest in temporary disability payments, he is subjected to the language of S.C. Code Ann. § 42-9-260. The statute clearly states that "an employer may start temporary disability payments immediately, and may continue those payments for up to 150 days." S.C. Code Ann. § 42-9-260(A). Furthermore, the statute allows employers to "terminate or suspend the temporary disability benefits immediately at any time within the 150 days." S.C. Code Ann. § 42-9-260(B). The employer chose to terminate the temporary disability payments to the Plaintiff within the 150 days after completing a good faith investigation. This investigation served as the basis for terminating the benefits, and this action was done in accordance with the statute.

Based on the statute and fact that Plaintiff is entitled to judgment on the merits, and therefore judgment on the pleadings is appropriate. Defendants will prepare a formal order.

#### INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of (List name(s) below) | Judgment Against (List name(s) below) | Judgment Amount To be Enrolled |
|-------------------------------------------|---------------------------------------|--------------------------------|
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |
|                                           |                                       | \$                             |

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

*h/B*

Judge Code

*2161*

Date

*12-22-15*

#### For Clerk of Court Office Use Only

This judgment was entered on the 31 day of Dec, 2015 and a copy mailed first class or placed in the appropriate attorney's box on this 31 day of Dec, 2015 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter

Clerk of Court

*Jeanette W. McBride*

**McDANIEL LAW FIRM**  
ATTORNEYS AND COUNSELORS AT LAW  
1315 ELMWOOD AVENUE  
COLUMBIA, SOUTH CAROLINA 29201

Proudly representing injured workers  
for over 30 years

Preston F. McDaniel

Telephone (803) 771-7211

Matthew Robertson

Facsimile (803) 252-0709

December 23, 2015

VIA EMAIL - [dbenjaminlc@sccourts.org](mailto:dbenjaminlc@sccourts.org)  
AND US MAIL

Stacy A. Williams, Esquire  
Law Clerk to the  
Honorable DeAndrea G. Benjamin  
Richland County Courthouse  
Post Office Box 2766  
Columbia, South Carolina 29202-2766

RE: Clarence B. Winfrey v. American Fire and Casualty Co.,  
and State of South Carolina  
C/A No.: 2013-CP-40-05888

Dear Ms. Williams:

While I am upset to say the least by the receipt of your email, I am more importantly totally confused. Fourteen (14) months ago Judge Benjamin requested proposed Orders from all of the parties. The only Motion on the pleadings that was pending was from one party, the Attorney General's office, and they sent two proposed Orders to the Judge at that time. The only party to raise a constitutional estoppel issue was the Attorney General's office who had been added as a party.

There is no reference in the Order Instructions to the specific provisions of §42-9-260 that we were challenging which were just subsection (b)(1-6). There is also no reference to the fact that the Claimant receives no benefits under §42-9-260 as it is only a stop payment statute. The Claimant receives benefits under §42-17-10 or 20 and under §42-9-10 and §42-1-120. From reading the Instructions, it is as if fifteen (15) months after we argued this case before Judge Benjamin, none of the key issues involved in those arguments are anywhere reflected in the notes.

I am also very concerned with your statement in the email that, "I was not the law clerk who originally worked on this case, so if I left anyone out of the email, please let me know." I am trying to figure out when Judge Benjamin made her review, who was involved and/or when this decision was made.

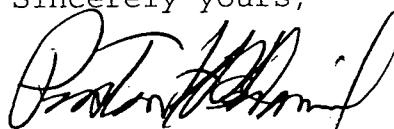
Without citing case law before it is issued, any Judge's preliminary Decision is subject to Reconsideration and I would respectfully request that or at least a hearing before Judge Benjamin even at Chambers since it has taken 15 (fifteen) months to get a ruling and based upon the notes issued. I think justice requires that but would respectfully make that request. Quite frankly I was stunned by the basis for the Court's Decision in light of the Court's comments from the Bench during the hearing.

Stacy A. Williams, Esquire  
Law Clerk to the  
Honorable DeAndrea G. Benjamin  
December 23, 2015  
Page 2

By copy of this email, I am notifying all parties involved of this communication. I do know that there have been some changes at the Attorney General's office but I will forward this to the Attorneys of Record.

I look forward to hearing from Judge Benjamin.

Sincerely yours,



Preston F. McDaniel

PFM/kth

cc: Brett H. Bayne, Esquire  
(Via Email & US Mail - [brett.bayne@mgclaw.com](mailto:brett.bayne@mgclaw.com))  
T. Parkin Hunter, Assistant Attorney General  
(Via Email & US Mail - [phunter@scag.gov](mailto:phunter@scag.gov))

**Kim Hinkle**

---

**From:** Parkin Hunter <phunter@scag.gov>  
**Sent:** Friday, January 08, 2016 11:29 AM  
**To:** Benjamin, DeAndrea G. Law Clerk (Stacy A. Williams); dbenjaminj@sccourts.org  
**Cc:** preston@pfmcdlaw.com; Emory Smith; brett.bayne@mgclaw.com; Kim Hinkle (kim@pfmcdlaw.com)  
**Subject:** RE: Clarence Winfrey v. Archway Services (Claim No.: 22209963)

Honorable DeAndrea Benjamin  
Circuit Judge

Honorable Stacy Williams  
Law Clerk to Judge DeAndrea Benjamin

RE: Clarence Winfrey v. American Fire & Casualty Co. and State of South Carolina; C/A No. 2013-CP-40-05888

Dear Judge Benjamin and Ms. Williams:

The purpose of this email is to respond to the letter dated January 7, 2016, from Preston McDaniel, Esquire. Mr. McDaniel raises questions about the preparation of the proposed order requested by the Court.

Mr. Brett Bayne, counsel for the insurance company in this case, transmitted the requested, proposed order to the Court. The preparation of this order was a joint effort between Mr. Bayne and the attorneys for the State of South Carolina. As we understood the email dated December 22, 2015, with regard to the request to prepare an order, the "Defendants" and not a particular defendant were asked to prepare the order. This is what was done and the State of South Carolina agrees with the proposed order transmitted by Mr. Bayne.

T. Parkin Hunter  
Senior Assistant Attorney General  
Office of the Attorney General  
State of South Carolina  
Columbia, SC 29211-1549  
(803)734-6151

## Kim Hinkle

---

**From:** Benjamin, DeAndrea G. Law Clerk (Stacy A. Williams) <[dbenjaminlc@sccourts.org](mailto:dbenjaminlc@sccourts.org)>  
**Sent:** Wednesday, January 13, 2016 10:20 AM  
**To:** Parkin Hunter; Benjamin, DeAndrea G.  
**Cc:** [preston@pfmcdlaw.com](mailto:preston@pfmcdlaw.com); Emory Smith; [brett.bayne@mgclaw.com](mailto:brett.bayne@mgclaw.com); Kim Hinkle ([kim@pfmcdlaw.com](mailto:kim@pfmcdlaw.com))  
**Subject:** RE: Clarence Winfrey v. Archway Services (Claim No.: 22209963)

Good Morning All,

The purpose of this hearing is to address issues regarding the proposed Order. Mr. McDaniel has expressed his concern with the proposed Order, and Judge Benjamin would like to give the opportunity to address those issues on the record.

I am still waiting for confirmation of the Monday, January 25, 2016 at 11:00am date and time from Mr. McDaniel.

Please let me know of any other issues or concerns. Thank you!

Stacy A. Williams, Esq.  
Law Clerk to the Honorable DeAndrea Gist Benjamin  
Richland County Judicial Center  
P.O. Box 192  
1701 Main Street, Suite 215  
Columbia, SC 29201  
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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

**RECEIVED**

JUN 23 2017

**SC 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 hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other materials.

Dated: June 23, 2017

\_\_\_\_\_  
Preston F. McDaniel  
SC Bar #3770  
MCDANIEL LAW FIRM  
1315 Elmwood Avenue  
Columbia, SC 29201  
(803) 771-7211  
Counsel for Appellant

P639