

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appellate Case No.: 2015-001702

Opinion No. 5548
Heard February 8, 2017 - Filed March 28, 2018

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SEP 16 2019
SC Court of Appeals

Julie Dent, Widow/Dependent/Movant

IN RE: Appeal/Opinion:

James Dent, Employee, Appellant,

v.

East Richland County Public Service
District, Employer, and State Accident Fund,
Carrier, Respondents.

REPLY TO THE RETURN TO MOVANT'S
MOTION TO RECALL THE REMITTITUR

By way of Reply, the Movant would respectfully show unto the Court:

1. MOVANT HAS STANDING

Ab initio Movant does not actually understand this argument because it is an agreed fact as stated by Respondents, "Julie Dent, ... is the widow of the Employee James Dent." Therefore, since it is agreed Mrs. Dent is Mr. Dent's widow

under S.C. Code §42-9-110 as his surviving spouse she is, "conclusively presumed to be wholly dependent" on and a statutory dependent of Mr. Dent.

As to her not being substituted as a party for him during the pendency of the appeal, there is no mandatory requirement for substitution of parties; for example, just like McMahan vs. the Department of Education-Transportation, 417 S.C. 481, 790 S.E.2d 393 (S.C. App. 2016), where the widow filed for payment of the Award and a dependency hearing was set, there was never a substitution throughout that entire Appeal process. Also, Movant presumes Respondents are aware that SCACR Rule 265(b) is permissive and not mandatory as to substitution of a party.

Finally, Ms. Dent filed for payment of the Award. Respondents make no argument Ms. Dent is not a proper party or that she did not properly file for payment of the Award before the Commission. Ms. Dent has standing. This is a specious argument.

2. BACKGROUND

As an initial point, in paragraph one the Respondents are simply wrong. The Hearing was not set under S.C. Code §42-9-280; that Code Section is the defense being raised by the Respondent insurance carrier as a basis for

refusal to pay the Award. Ms. Dent requested payment of the Award and as in McMahan, supra, the case was set for a dependency hearing under S.C. Code §42-9-110 through S.C. Code §42-9-140.

Next, in reference to this argument, while much of it is inaccurate as to the procedural history and findings and orders that were made, Respondents:

A. Do not contest that the, "Findings of Fact" in the Commission's Orders that the Award was to be paid in a, "lump sum" were not appealed and are thus the law of the case.

B. Respondents after actually setting out the same quotation as the Movant from this Court's Opinion that;

"Dent also contends that the Appellate Panel erred in failing to find PTD under subsection 42-9-30 (21). Given that resolution of the prior issue is dispositive of this Appeal, the Court need not address this issue." (emp. added).

However, Respondents then state that Ms. Dent is asking that the Remittitur be Recalled "because" she now contends the Court, "did not consider §42-9-30 but then make the totally contradictory statement that the Court, "did consider §42-9-30" (Return p. 5, 11.7-8).

The Court clearly did not reach, and it was an unreached/unresolved issue that was appealed by the Appellant initially that as to as a matter of law under S.C. Code §1-23-380 the substantial evidence in the Record is, and there is no

substantial evidence to the contrary on "loss of use", just as in Clemmons, other than, that Mr. Dent had lost 50% or more of the use of his back to do work requiring the use of his back.

While the Movant agrees that this Court's Ruling that Mr. Dent was totally and permanently disabled under §42-9-10, is the Law of the Case, there has been no decision as to whether or not under the reliable, probative and substantial evidence in the Record as a matter of law, Mr. Dent is also entitled to an Award for total and permanent disability based on §42-9-30(21). That issue has simply not been reached.

As set forth in the Motion, one of the reasons for the submission of this Motion requesting the Court provide the extraordinary relief of Recalling the Remittitur is that as a matter of judicial economy and to prevent years of litigation the Court should Recall the Remittitur and address this unreached issue. At some point, some court will have to make a Ruling under S.C. Code §1-23-380 as a matter of law. If based on a review of and the Record establishes the Claimant had lost 50% or more of the use of his back to do work requiring the use of the back, Mr. Dent is entitled to an Award as a matter of law for total and permanent disability. Under the Clemmons decision and all of the decisions of this Court and the Supreme Court in reference to that issue, that being loss of use of the back, which is the only essential issue involved in an Award under S.C. Code §42-9-30 case the back under sub-Section (21), the Record is set in this case and issue is one of law.

It is in both parties' interest to have as quick, efficient and economical decision on this issue as is

possible. In whose best interest is it to not get a decision if this Court could advise the parties of its decision based on a review of the substantial evidence as a matter of law, not to seek that opinion versus the years of litigation and all of the hours and expense involved of hearings, appeals and Appeals to the Court of Appeals and even possibly to the Supreme Court. Movant actually does not understand why the Respondent is opposed to asking this Court for its opinion.

Finally, Movant will make no further response to this argument, except to point out that there is absolutely no reference to McMahan in the Respondent's Return. Respondent's Counsel well knows that McMahan is the case directly on point.

3. THE COURT OF APPEALS DOES NOT LACK JURISDICTION

The Court of Appeals does not lack Jurisdiction to hear the Motion.

After making the statement that the Court lacks jurisdiction to hear the Motion to Recall the Remittitur, the Respondents launches into numerous cases where a Motion to Recall the Remittitur had been considered by our Appellate Court.

This Court has the same jurisdiction to consider a Motion to Recall the Remittitur as it does in reference to any case currently not pending before the Court. This Court under S.C. Code §14-8-10 et. seq. has the same exact jurisdiction as the Supreme Court has, as to any cases over which it has jurisdiction, including the authority to issue Writs and entertain Motions. The Court has the same jurisdiction over a Motion to Recall the Remittitur as it

does when a Notice of Intent to Appeal is filed. In other words, the filing of the Motion under the Appellate Court Rules confers jurisdiction to the Court the same as the Notice of Intent to Appeal confers jurisdiction to hear the Appeal.

As set forth in the Motion, the Movant is well aware and noted to the Court that the granting of a Motion to Recall the Remittitur is granted on a very very limited basis and is only granted in exceptional circumstances and Ms. Dent knows that there is a requirement of a very strong showing of the need to grant that relief. However, there is absolutely no case involving issues that were presented on Appeal to the Court that were not reached on Appeal and then after Remittitur where a decision on an unreached issue became of paramount importance on remand or in further proceedings in the action.

A REVERSAL by the Court based on this unreached issue ends this litigation. Can there be a more extraordinary reason or stronger showing to Recall the Remittitur?

The Respondents cite Mickle vs. Blackmon, 255 S.C. 136, 177 S.E.2d 548 (1970) as supporting the argument that the Motion to Recall the Remittitur should not be granted. However, in actuality, a review of the factual situation that occurred in Mickle supports why the Motion should be granted. In Mickle, the Court decided the issues in the Opinion in the first appeal and the mandate settling those issues was applied by the Circuit Court. The Opinion cited by Respondents is the second appeal wherein the Supreme Court stated that the subsequent Appeal was not an appropriate occasion for us to, "re-examine" as to relief to be granted.

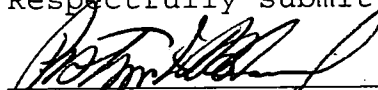
While there was no Motion to Recall the Remittitur filed in Mickle concerning issues that were presented to the Court for decision, but which were not reached, the Court simply stated as to its first decision it would not "re-examine" its Opinion. Here, the Court has not examined the issue at all.

Further, the allegation that the Movant is attempting to, "circumvent a hearing" before the S.C. Workers' Compensation Commission is simply not true. The Movant would ask the Court to take specific note of this, that the Movant presented to and asked for the opportunity to file this Motion before the Commission to get a determination on this issue that was not reached by the Court and/or to file a Declaratory Judgment Action to get a determination by a Court under law and as a matter of law on this issue. In two separate Orders the Hearing Commissioner granted and then reaffirmed that she was granting the Claimant the right after hearing her arguments seeking to have a Court reach determination as a matter of Law based on §1-23-380 to file this Motion and to file the Declaratory Judgment Action to make other Rulings of Law that would apply in the event that the Commissioner had to hear this case. Those requests were granted. Obviously, the Commissioner agreed with and joined in the request to get a determination. The Commission is a quasi-judicial body that is required to hear cases and Award benefits to injured workers as provided for under the S.C. Workers' Compensation Act and under the interpretation of the law by this Court and the SC Supreme Court. The Movant simply asked for a decision to be made as a matter of law and the Commission granted that request and granted a continuance until this Court renders a decision and/or until such time as

a decision is rendered by this Court and/or a decision is rendered by the Circuit Court based on the Declaratory Judgment Action that has also been filed. The accusation that the Movant is trying to avoid a hearing before the Commission is simply not true and the Movant's position is supported by the very Rulings and Orders issued by the S.C. Workers Compensation Commission.

It is the Movant who is trying, under the concept of Judicial economy, to get a decision on issues of law from this Court and/or the Circuit Court, which will hopefully prevent years of litigation and tremendous expense on behalf of both parties. Neither party will benefit from years of litigation and the expense that that involves and the Movant would simply ask Respondents' counsel as to who would benefit from years of litigation versus an economical and immediate/quick judicial decision by this Court based on the Motion to Recall the Remittitur or in the alternative to address the issues of Law sought to be addressed through a determination by a Circuit Court Judge under the Declaratory Judgment Action resolving the issues of Law that apply in this matter?

Respectfully submitted,



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Widow/Dependent/Movant of
Appellant, James Dent, Deceased

September 12, 2019

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PROOF OF SERVICE

I certify that I have served the **REPLY TO THE RETURN TO MOVANT'S MOTION TO RECALL THE REMITTITUR** by depositing a copy of it in the United States Mail, postage prepaid, on September 12, 2019, addressed to Counsel of Record as follows:

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September 12, 2019

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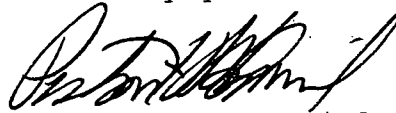
RE: Julie Dent, Widow/Dependent/Movant
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James Dent, Employee, Appellant, v. East Richland County
Public Service District, Employer, and State Accident
Fund, Insurance Carrier, Respondents
Appellate Case No. 2015-001702

Dear Ms. Kitchings:

Please find attached the original and seven (7) copies of the
REPLY TO THE RETURN TO MOVANT'S MOTION TO RECALL THE REMITTITUR
in the above-referenced matter. I would appreciate your
returning the clocked-in copy in the enclosed self-addressed
stamped envelope.

By copy of this letter I am hereby serving Counsel of Record
with a copy of these documents.

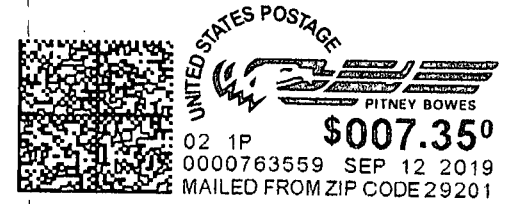
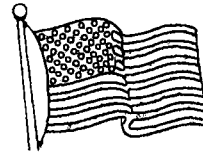
Sincerely yours,



Preston F. McDaniel

PFM/abh
Enclosures

cc: Page Snyder Hilton, Esquire
Erin Farthing, Esquire
David H. Keller, Esquire
Evelyn A. Norton, Esquire



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