

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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OCT 01 2019

SC Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1516717

Gary Clark, Jr., Claimant, Appellant,

vs.

Horry County, Employer, and SC Association of
Counties, Carrier, Respondents.

MEMORANDUM ADDRESSING APPEALABILITY

STEPHEN J. WUKELA
ATTORNEY FOR APPELLANT
WUKELA LAW FIRM
PO BOX 13057
FLORENCE SC 29504
843-669-5634

BACKGROUND

This matter was argued before the Workers' Compensation Commission on the Appellant's Motion to Set-aside the Employer's Claim for Subrogation pursuant to S.C. Code §42-1-560.

On June 27, 2015 the Appellant, Gary Clark, Jr, was employed by Horry County as a firefighter/paramedic and was in the back of an ambulance headed Southbound on Highway 17 Bypass traveling through the intersection of Highway 17 Bypass and Grand Dunes Boulevard when the ambulance was struck by a vehicle driven by Richard Kenneth Richards. Claimant filed a Workers' Compensation Claim which was resolved on October 1, 2018 by a Release.

Appellant also, pursuant to S.C. Code §42-1-560, filed a third-party action captioned Gary Clark, Jr. v. Richard Kenneth Richards, Civil Action No. 2017-CP-26-07892, in the Court of Common Pleas; alleging that Mr. Richards' negligence caused Mr. Clark's injuries. In his Amended Answer, Mr. Richards raised an allegation that the accident was caused by the negligence of the ambulance driver, Claimant's co-employee of Horry County, Scott Burkhardt.

On January 29, 2019 Claimant filed a Motion for Partial Summary Judgment in the Court of Common Pleas; seeking a finding that there was insufficient evidence of the ambulance driver's fault to present that defense to the jury at trial. The third-party Defendant filed an opposing brief.

A hearing was held on April 23, 2019 before the Honorable Benjamin Culbertson. Judge Culbertson denied Claimant's Motion for Summary Judgment; holding there was sufficient evidence of Mr. Burkhardt's fault to allow the question to go to the jury.

Thereafter, the Appellant filed a Motion with the Workers' Compensation Commission to set-aside the Respondent's claim for subrogation in light of the Circuit Court's ruling. There,

Appellant argued to the Commission that Workers' Compensation liens, pursuant to S.C. Code §42-1-560, are based in equity. See Kirkland v. Allcraft Steel Co., 329 S.C. 389, 394 (1998)(citing S.C. Code §42-1-560 provisions that lien "reduction shall be based on a determination by the Commission that such reduction would be equitable to all parties' interests and serve the interests of justice."). It is a well-established principle of equity that equitable relief, (such as the allowance of an equitable lien), should be denied where the party seeking the relief comes with "unclean hands." That is to say, he who comes into equity must come with clean hands. See Cherry v. Thomasson, 276 S.C. 524 (S.C. 1981).

Appellant further argued to the Commission that, pursuant to the equitable doctrine of "unclean hands", where a workers' compensation lien petitioner, like the employer, seeks the equitable relief of a lien on a third-party action, the Commission should refuse that equitable relief where the employer does not have clean hands. That is to say, the Appellant argued that where Horry County's conduct, (or that of their employee), prejudiced the Claimant's third-party recovery, Horry County cannot, in equity, seek a lien against that recovery.

The Appellant argued to the Commission that the third-party Defendant, Richards, points at Horry County as a responsible party for this accident via the conduct of the ambulance driver, Scott Burkhardt. By virtue of Workers' Compensation exclusivity, Horry County cannot be made a party to the third-party action. However, the law will allow, pursuant to the order of Judge Culbertson, the third-party Defendant Richards to argue the fault of Horry County, via the ambulance driver, as a defense to the Claimant's lawsuit against Mr. Richards. Claimant will have to contend with that defense at trial. Such defense will prejudice the Claimant's effort to obtain a recovery from Mr. Richards for Claimant's injuries. Thus, Horry County cannot, in equity, seek reimbursement out of the recovery which has been prejudiced by their own conduct.

Therefore, the Appellant requested that the Workers Compensation Carrier's claim for reimbursement out of the third-party action be denied.

In support, the Appellant offered one thousand thirty-two (1,032) pages of evidence, including:

Exhibit A, Answer of Defendant;

Exhibit B, Plaintiff's Motion for Partial Summary Judgment, (including seven (7) depositions of witnesses to the accident);

Exhibit C, Memorandum of Defendant in Opposition to Plaintiff's Motion for Partial Summary Judgment;

Exhibit D, Reply to Defendant's Opposition to the Plaintiff's Motion for Partial Summary Judgment;

Exhibit E, Order Denying Plaintiff's Motion for Partial Summary Judgment.

In response to the Appellant's Motion, the Single Commissioner issued an Order finding:

The motion is not ripe. The motion is, at least in part, theoretical and would require me to speculative[sic] which I cannot do.
(Order 06/28/19).

The Order contained no further findings of fact or conclusions of law to provide basis or explanation. The Appellant appealed to the Workers' Compensation Commission's Appellate Panel which issued an even more summary order indicating that "IT IS, THEREFORE, ORDERED the pending appeal of the Administrative Order of the Commission is hereby; √ Dismissed as Interlocutory."

This Appeal followed.

The Court requested the parties file Memorandums addressing the issue of appealability. The Appellant responds herein.

ARGUMENT

1. THE WORKERS' COMPENSATION COMMISSION APPELLATE PANEL'S ORDER DENYING THE APPEALABILITY OF THE SINGLE COMMISSIONER'S ORDER IS APPEALABLE ON THE ISSUE OF APPEALABILITY.

The Appellant is cognizant of the Supreme Court's ruling in Bone v. United States Food Serv., 399 S.C. 566 (2012); wherein, the Court held that S.C. Code §14-3-330 which allows appeals from interlocutory orders in certain instances has no applicability in matters, such as this one, that are subject to the Administrative Procedures Act. See Bone at 575. The Appellant is further aware that the Bone Court held that, pursuant to the Administrative Procedures Act, §1-23-390, appeals are limited to those orders that are "final judgments". Furthermore, the Appellant recognizes that the Supreme Court in Bone held:

A "final judgment" is defined in this context as was stated in Charlotte-Mecklenburg, i.e., the order must dispose of the whole subject matter of the action or terminate the action, leaving nothing to be done but to enforce what has already been determined.
Bone v. United States Food Service, 399 S.C. 566 (2012).

The Appellant notes, however, that the Supreme Court in Bone accepted and ruled upon the issue of the case's appealability. See also, Russell v. Wal-Mart Stores, 426 S.C. 281 (2019) (also deciding a question of appealability and reversing the Court of Appeals' holding that a Workers' Compensation decision was not immediately appealable).

Of course, decisions by lower appellate tribunals regarding appealability must be appealable, else we would have no decisions from higher appellate tribunals establishing the law of appealability in the first place. Further, the appealability of orders deciding the question of

appealability follows from the Administrative Procedures Act. S.C. Code §1-23-380 provides:

A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

S.C. Code Ann. §1-23-380 (1976).

Of course, the question of whether a decision is immediately appealable must itself be appealable; because, if an appeal is dismissed by a lower appellate tribunal, the appealability of that order would be moot upon review of the final agency decision, and the Appellant would have no remedy to the damage suffered if the tribunal incorrectly denied the appealability of the first order.

Here, the Workers' Compensation Commission Appellate Panel decided the Appellant's Appeal was interlocutory; and thus, presumably, it found the underlying Single Commissioner's Order unappealable. The question of whether the Appellate Panel's ruling that the Single Commissioner's Order was not appealable must, as argued above, be appealable. If it is not, there can be no remedy to the damage suffered by the Appellant if that ruling was in error, as argued herein.

2. A REVIEW OF THE FINAL AGENCY DECISION WOULD NOT PROVIDE AN ADEQUATE REMEDY.

The Single Commissioner found that the Appellant's motion is not ripe. S.C. Code §1-23-380 provides:

A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

S.C. Code Ann. §1-23-380 (1976).

In the recent case of Russell v. Wal-Mart Stores, 426 S.C. 281 (2019), the Supreme Court, (relying on the “adequate remedy” provision of §1-23-380), found that the Commission’s delays and repeated remands of a Workers’ Compensation claim were unnecessary and resulted in the Commission’s failure to make a decision in a timely manner; leaving the Claimant with no adequate remedy on appeal from a final decision. Thus, the Russell Court reasoned the Commission’s decision was immediately appealable pursuant to the “adequate remedy” provision of S.C. Code §1-23-380.

In the case at bar, the Single Commissioner denied the Appellant’s Motion as unripe. The Commissioner was required by S.C. Code §1-23-350 of the Administrative Procedures Act to set out “findings of fact and conclusions of law ... accompanied by a concise and explicit statement of the underlying facts supporting the findings” sufficiently detailed to enable a reviewing tribunal to determine whether those findings are supported by substantial evidence and whether the Commission properly applied the law to those findings. See, Campbell v. La-Z-Boy East, 294 S.C. 384 (1988).

The Single Commissioner’s decision did not make such findings to support the conclusion that the issue was not ripe, nor did it explain the circumstances under which Appellant’s Motion might be ripe for determination, or when a final decision on the question presented might be appropriate. The Commission’s order simply found the motion unripe and gave the parties no means of determining when the question might be ripe.

Furthermore, the question before the Single Commissioner was whether or not, given the Circuit Court’s finding that there was adequate evidence to present the question of the Employer’s fault to the jury, the Employer should be allowed any lien against the Appellant’s third-party action; currently pending in the Court of Common Pleas. Naturally, the allowance or

disallowance of such a lien, (which the Respondent claims in the amount of Two Hundred Thousand Nine Hundred Forty-Two and 81/100 (\$200,942.81) Dollars), has a determinative effect on the Appellant's decision-making as to whether to refuse or accept offers of settlement made by the third-party Defendant. For example, it may be that the Appellant would accept the third-party Defendant's offer of settlement, but for the lien. However, given the Commission's refusal to rule on the issue, the Appellant and third-party Defendant have no way of determining the lien's allowance or disallowance prior to the trial. Therefore, the Appellant is forced to try the third-party case and suffer the risk that he may recover less than an offer made by the Defendants, only to learn later that he was correct in his Motion, and the Respondents' lien is disallowed as a matter of law.

CONCLUSION

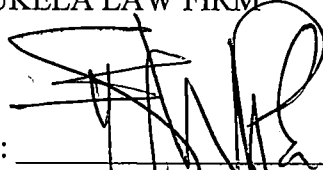
The parties are scheduled to mediate this case by Order of the Court of Common Pleas on October 3, and are expected to move to trial on the matter shortly thereafter. A determination of the allowance or disallowance of the Employer's lien in this case turns on over one thousand pages of evidence already presented to the Commission. A decision in that matter, naturally, has a determining effect on the potential settlement or trial of the third-party case; such that awaiting a decision by the Commission at some later undefined date does not provide adequate remedy.

For the foregoing reasons, the Appellant contends that the matter is immediately appealable.

Respectfully submitted,

September 30th, 2019

WUKELA LAW FIRM



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APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1516717

Gary Clark, Jr., Claimant, Appellant,

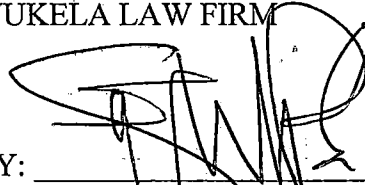
vs.

Horry County, Employer, and SC Association of
Counties, Carrier, Respondents.

PROOF OF SERVICE

I certify that I have served the Memorandum Addressing Appealability on the Respondents, by depositing a copy of it in the United States Mail, postage prepaid, on September 30, 2019, addressed to their attorney of record, William H. Lyon, Esquire, Attorney at Law, 421 Wando Park Boulevard, Suite 100, Mt. Pleasant SC 29464.

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SC Court of Appeals

Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia SC 29211

Re: Gary Clark, Jr. vs. Horry County and SC Association
of Counties
Workers' Compensation File No. 1516717

Dear Ms. Kitchings:

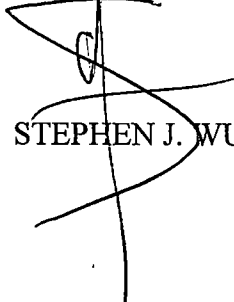
Pursuant to the Court's request, enclosed for filing please find the Appellant's Memorandum Addressing Appealability, along with Proof of Service.

By copy of this letter, I am serving Respondents with a copy of the Memorandum.

With kind regards, I am

Yours truly,

WUKELA LAW FIRM


STEPHEN J. WUKELA

SJW:jpb

Enclosure

cc: William H. Lyon, Esquire



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