THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

R. FERRELL COTHRAN, JR., Circuit Court Judge

Case No. 2012-CP-14-00024

ANDREAL HOLLAND,

Appellant,

v.

J.C. WITHERSPOON, INC.,
A.K. MULCH, LLC, and
CAPITAL CITY INSURANCE,

Respondents,

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On June 1, 2006, Appellant received an admitted, closed head brain injury when he was struck by the door of a wood chipper on the job . He received intensive and extensive treatment for the closed head brain injury as provided by Respondents. The lower Court has affirmed the Workers Compensation Commission's finding that Appellant should be denied further benefits due to having elected his remedy of pursuing a third party action without notice to Respondents.

FACTS

This is an admitted case of brain injury which occurred on June 1, 2006, and the essential facts of this case are not in dispute. A Third Party liability action was initially filed but not served in October, 2008, then amended and

served upon third party Defendants including, at that time, A&K Mulch, LLC, in February, 2009.

A timeline of this case is as follows:

10-10-08	Third Party Suit Filed (not served)	EX 10
2-18-09	Form 51 Served	WCC file
	No mention of election defense	
3-3-09	Amended Third Party Action Complaint	EX 11
3-10-09	Paula Dyches gets suit	EX 21
4-6-09	Answer of A&K (Employer/Exclusive Remedy/Lien)	EX 12
4-13-09	Motion for Guardian served	WCC File
5-11-09	Form 58 served raises election	WCC File
5-13-09	GAL Appointed in SCWCC case	EX 26
5-14-09	S-2 Served and Filed (A&K not in SCWCC case)	EX 14
5-20-09	Hearing Date- Form 58 election raised dated 5-11-09	
5-31-09	Statute on 3rd party ran	
9-29-09	A&K added to SCWCC as party	Order
10-13-09	S-2 Served/Filed again	EX 15
10-23-09	Hearing set/Postponed	
11-10-09	Form 58 Amended-election	
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8-10-10	Form 21	
8-13-10	Request to admit- A&K Mulch employer	EX 13
8-23-10	Dismissal of A&K from 3rd party suit	EX 26

Appellant was treated extensively and remained under a mental disability as a result of the compensable injury at work but he had no Guardian *Ad Litem* in the Workers Compensation case until May 13th, 2009, when, upon motion pursuant to S.C. Regulation R67-216, a Guardian *Ad Litem* was appointed by the Commission **on the ground of mental incompetence *and without objection of Respondents.***

Respondents never raised the election of remedy defense until May 11, 2009, nine (9) days prior to a scheduled merits hearing on May 20th, 2009, and only upon Carrier's Form 58. The GAL served an S-2, upon Respondents's attorney the day following her appointment. on May 14th, 2009.

At the May 20, 2009, hearing, the Carrier failed to go forward on its claim to add the defense of election. Likewise, the issue was not raised at a later hearing resulting in the Order of September 29, 2009 adding the true Employer, A&K Mulch, LLC. Also, at that hearing Respondents obtained an Order upon their motion to Compel which allowed the deposition of Appellant upon the condition the Guardian could attend and participate.

ARGUMENTS

I APPELLANTS ARE ENTITLED TO REQUEST THE DECLARATION OF §§ 42-1-560, S.C. CODE OF LAWS 1976, AS AMENDED TO BE UNCONSTITUTIONAL

The lower Court found these positions to have been waived for failure to present them to the administrative agency, the S.C. Workers Compensation Commission for decision. However, Appellant poses that agency is without

authority to decide the facial challenge to the statutes and raising these issues to the Circuit Court is proper. Our law is stated as follows:

"Initially, we take this opportunity to clarify our law regarding the power of an ALC to determine the constitutionality of a statute.M It is well settled in this State that ALCs, as part of the executive branch, are without power to pass on the constitutional validity of a statute or regulation. *Video Gaming Consultants, Inc. v. S.C. Dept of Revenue,* **342 S.C. 34,** 38, **535 S.E.2d 642,** 644 (2000). In *Video Gaming Consultants,* we said those challenges present an exception to our preservation rules and should be raised for the first time on appeal to the circuit court. *Id.* at 39, 535 S.E.2d at 345. [391 S.C. 109] However, the legislature has since amended the process for appeals from the ALC, providing for a direct appeal to the court of appeals instead of the circuit court. S.C.Code Ann. § 1-23-610(A) (Supp.2009). This procedural change results in a conundrum for litigants bringing " as-applied" constitutional challenges to a statute or regulation: they must first bring an inherently factual issue before a tribunal generally not suited to make factual determinations. While we have not addressed this issue, the court of appeals, in a case arising before the change in the governing statutes, said, " While it is true that AL[C]s cannot rule on a facial challenge to the constitutionality of a regulation or a statute, AL[C]s can rule on whether a law as applied violates constitutional rights." *Dorman v. Dept of Health & Envtl. Control,* **350 S.C. 159,** 171, **565 S.E.2d 119,** 126 (Ct.App.2002) (citing *Ward v. State,* **343 S.C. 14,** 18, **538 S.E.2d 245,** 247 (2000)).

We find the principle enunciated in *Dorman* and *Ward* to be sound and hold that ALCs are empowered to hear as applied challenges to statutes and regulations. ALCs are better suited for making the factual determinations necessary for an as applied challenge, and finding a statute or regulation unconstitutional as applied to a specific party does not affect the facial validity of that provision. We wish to reiterate that our decision today does not affect the ALC's inability to decide facial challenges to a statute or regulation; those are legal questions that are properly raised for the first time on appeal or in a declaratory judgment action before the circuit court. "

Travelscape, LLC v. S.C. Dept of Revenue,
391 SC 89, 705 SE 2D 28, (S.C. 2011)

A) § 42-1-560 is unconstitutional as being vague, ambiguous:

An ambiguity exists within § 42-1-560, so this court's inquiry must continue. In its provisions the statute provides for who has the right to sue the

third party tortfeasor. The ambiguity exists in the procedure that arises between the provisions of sub-sections b, c and d.

Sub-section (b) clearly provides for procedure within the first (1st) year after an on the job injury. However, the procedure, at least as far as the Order in this case is concerned, becomes murky at best. It would appear that the Carrier is required to give notice of the right of action and that only the Carrier has the right to bring the third party action.

Question: What if they Employer/Carrier do not bring the third party action?

Question: Are Employer/Carrier required to give the subsection C notices whether they bring suit or not?

Question: Who has the right to sue if Carrier and Employer do nothing in the second and third years after an accident and prior to the right to do so being returned to the injured Employee?

Question: Who has the duty to file an S-1, 2 or 3 during the second and third years after an accidental injury, but before the right of action magically reverts to the injured Employee?

"Procedure , , should not be written or interpreted to create a trap for the unwary lawyer or party," and "should not be construed in manner which operates as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition." *Elam v. SC Department of Transportation,* 361 S.C. 9, 25, 602 S.E. 2d 772, 780 (2004). Clearly § 42-1-560 has created traps and has been so interpreted where in one instance an Employee is required to dismiss an

action so that she can re-file just to serve an administrative form S-1. Specifically, § 42-1-560 (c) is vague in its meaning such that "a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State,* 345 S.C. 557, 572, 549 S.E.2d 591, 598. It is vague regarding the dates when the injured Employee and the Employer/Carrier have the right to file suit against a third party responsible for an accident.

"The constitutional standard for vagueness is whether the law gives fair notice to those persons to whom the law applies." *In re Amir XS.,* 371 S.C. 380, 391-92, 639 S.E.2d 144, 150 (2006). "The void-for-vagueness doctrine rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *State v. Houey,* 375 S.C. 106, 113, 651 S.E.2d 314, 318 (2007). "A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application." *Curtis v. State,* 345 S.C. 557, 572, 549 S.E.2d 591, 598 (2001).

Claimant would also point out that the ambiguities of the provisions of Section 42-1-560, have previously been recognized by the Supreme Court in *Callahan,* when it observed it would then:

> *.....leave it to the Legislature to amend and define its ambiguities."*

Unfortunately, the Legislature has not cured the ambiguous defects of the statute and the same should therefore be held unconstitutional.

b) 42-1-560 is unconstitutional as failing to provide equal protection of the law:

Disparate treatment of members of the same class in same or similar circumstances, should be found to violate of the equal protection clause of the 14th Amendment. In *Hanvey v.* Oconee *Memorial Hospital.,* the South Carolina Supreme Court held that a statute disparately treating charitable hospitals and other charitable organizations violated equal protection. *Hanvey v. Oconee Mem. Hosp.,* 308 S.C. 1, 416 S.E.2d 623 (1992). In *Hanvey,* the South Carolina Supreme Court ruled that charitable hospitals were in the same class as other charitable organizations and it was violative of the equal protection clause to limit a charitable hospitals liability to $100,000 while all other charitable organizations were subject to a liability limit of $200,000.

The disparate treatment workers receive with regard to the length of the statute of limitations workers have to file suit after being injured by a third party while on the job, compared with the length of the statute of limitation of private individual for a similar accident is violative of the workers' 14th Amendment right to equal protection. Section 42-1-560 provides that workers are limited to "one year after the carrier accepts liability for the payment of compensation" to file suit against a third party for injuries caused by the third party to the worker while on the job. S.C. Code Ann. § 42-1-560 (1976). While anyone injured in an identical accident, but not on the job, would have three years to file suit per § 15-3-530. S.C. Code Ann. § 15-3-530 (1988). As a result this court should hold that § 15-1-560 is unconstitutional.

In South Carolina, provided no fundamental right has been violated, "the Equal Protection Clause is satisfied if: (1) the classification bears a reasonable

relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis." Boiter v. SC Dept. of Transp., 2001 WL 2183582, at *4 (June 6, 2011). The disparity between the length of time given to a worker injured in an accident by § 42-1-560 and another individual injured in an identical accident by § 15-3-530 causes § 42-1-560 to fail prong two of the three-prong test used by the Supreme Court of this state in *Bolter.* Under the current laws, the worker would have only one year (and potentially thirty (30) additional days just prior to the statute of limitations expiration) to file suit, while the individual injured while not on the job would have three years to file suit if involved in the exact same accident. Both the worker and the individual not on the job make up a class of victims, and "under similar circumstances and conditions" the worker is denied equal protection of the law by the application of § 42-1-560. Boiter v. SC Dept. of Transp., 2001 WL 2183582, at *4 (June 6, 2011) (citing *Samson v. Greenville Hosp. System,* 295 S.C. 359, 368 S.E.2d 665 (1998)).

Additionally, § 42-1-560 should be held to have been repealed by implication by § 15-3-530. In *S.C. Coastal Conservation League v. S.C. Dept. of Heath and Envtl. Control,* the South Carolina Court of Appeals stated that "the most recent legislation will take precedence over earlier enactments." *S.C. Coastal Conservation League v. S.C. Dept. of Heath and Envtal. Control,* 380 S.C. 349, 368, 669 S.E.2d 899, 909 (S.C.App.,2008) (citing *I'On, L.L.C. v. Town of Mount Pleasant,* 338 S.C. 406, 412, 526 S.E.2d 716, 719 (2000); *Lloyd v.*

Lloyd, 295 S.C. 55, 57-58, 367 S.E.2d 153, 155 (1988); *Duke Power Co. v. S.C. Pub. Serv. Comm'n,* 284 S.C. 81, 88, 326 S.E.2d 395, 399 (1985)). The South Carolina Supreme Court has ruled when statutes are "incapable of any reasonable reconcilement, the last statute passed will prevail, so as to impliedly repeal the earlier statute to the extent of the repugnancy." The Court ruled that an earlier statute was in "direct conflict" with a later statute and the earlier was thus repealed by implication. *Chris J. Yahnis Coastal, Inc. v, Stroh Brewery* Co., 295 S.C. 243, 247, 368 S.E.2d 64, 66 (1988).

Section 42-1-560, amended in 1978, is in "direct conflict" with § 15-3-530, which was amended ten (10) years later, in 1988, to provide a three (3) year, tort statute of limitations. The earlier, upon the authority of *Yahnis,* should be repealed by implication. Section 42-1-560 provides a worker injured on the job will have only one year (and maybe thirty (30) days) to file suit against a party that injured him. These sections, 42-1-560 and 15-3-530, are at irreconcilable odds with regard to the length of time an injured victim has to file his suit against the party at fault and as a result the earlier of the two, § 42-1-560, should be repealed by implication.

I DISMISSAL OF THE APPELLANT'S CLAIM UPON THE GROUND OF ELECTION OF REMEDIES IS IMPROPER BECAUSE THE APPEALED ORDER IMPROPERLY APPLIES *Callahan v. Beaufort* and/or § 42-1-560.

Erroneously the Order provides in essence that failure to file an S-2 within thirty (30) days of Claimant's commencement of a third party action acts as an

election of remedies so as to bar the Claimant from receiving further Workers Compensation benefits. This ignores the specific facts of this case that, unlike in *Callahan,* suit was ***not filed within one (1) year after the accident*** **thus.**

FACTS:

A) *If* the Third Party suit had been commenced within one (1) year of the accident, Carrier's contention might be viable but that is not what happened in this case. The Third Party action was not commenced (filed *and* served) until well into the third year after the date of accident.

B) Carrier never filed or served an S-1, as required by 42-1-560 (c); (see APA 30, deposition of Fennell)

C) At the time of the Third Party action, the duty was actually upon the Carrier to serve and file notices which it has failed to do.

D) The true Employer, A&K Mulch, LLC, was not a party to the Workers Compensation case until September 29, 2009 and it was served timely on October 13, 2009, with the S-2. Thus, it was impossible to serve an S-2 upon A&K until it became a party and the statute did apply to it until then,

This was a case of the Carrier asking for relief without itself complying with the mandatory provisions of § 42-1-560. Our Supreme Court said:

> *"Because workers' compensation statutes provide an exclusive compensatory system in derogation of common law rights, we strictly construe the requirements of §42-1-560 and leave it to the Legislature to amend and define its ambiguities."*
>
> *Callahan v. Beaufort County School District*
> 375 SC 92, 651 SE2d 311, (2007) at page 3

The Carrier failed to comply with the notice and filing requirements of the statute, and doing so in this case meant the Carrier should have been denied the relief requested.

Further, in *Callahan, supra* the Claimant was allowed to cure the error of failing to file and serve the S-2, timely by being permitted to dismiss the Third Party Action without prejudice. Due to the actions of the Carrier herein, Claimant Holland was denied this opportunity if it was even necessary as it was too close to the expiration of the Statute of Limitations to play with dismissal and re-filing the third party claim. As set forth above:

> "Procedure . . . should not be written or interpreted to create a trap for the unwary lawyer or party," and "should not be construed in manner which operates as a trap for the unwary or deprive an applicant of the adjudication on the merits of his original petition." *Elam, infra*

The majority of the cases decided on the issue of election of remedy by a Claimant involved settlements or finalized third party claims without notice to the Carrier. Such is not the case here as the Third Party claim was ongoing and being pursued by joint agreement of the Claimant and Carrier.

STATUTORY REQUIREMENTS OF §42-1-560:

Specifically, after the first year following an accident, the law requires:

> *...the carrier **shall give** the Industrial Commission, the injured employee..... notice , upon a form prescribed by the Industrial Commission, that action has been or will be commenced against the third party."* [emphasis added/portion of 42-1-560 (c)]

At the time the Third Party action was commenced, the notice duties were upon

the Carrier who failed to abide them, Simply put, the Carrier in this case failed to perform and satisfy its statutorily mandated duties and was therefore not entitled to the relief requested.

There are essentially two (2) distinct time and notice requirements set forth in Section 42-1-560.

1) Sub-section B:

If the Third Party action is commenced within the first year after the injury, Claimant has the right to do so and must file and serve an S-2 within 30 days of commencement of the action; but

2) Sub-section C:

If Claimant does *not* commence the Third Party action in the first year, the right is assigned to the Carrier and it *must:*

a) serve notice of claim within 20 days; **and**

b) file and serve an S-1 within the following 90 days.

The Third Party action was not commenced within one (1) year so Carrier's contention as to election is without merit. At the time of suit, the duty was upon the Carrier to provide notices.

The relevant statute, section B, plainly states that *if the action is brought within one (1) year of the date of accident,* the S-2 must be served and filed within thirty (30) days of the commencement of the action. If not commenced within the first year, the right of action becomes assigned to the Carrier.

In this case, suit was not commenced, meaning filed and served, within the first year so the subsection upon which the Single Commissioner relies is

inapplicable. This is a vast factual difference between this case and *Callahan* In *Callahan,* following dates applied:

Date of Injury	50 filed	Party filed	S-2
November 14, 2002	Jan. 17, 2003	Jan. 24, 2003	July 16, 2003

Suit was filed *within the first year.*

In this case the action was not commenced in year one (1) but rather year three (3) and the Carrier never served or filed any notice as required As a result, the Carrier was not entitled to the relief requested.

In the second year and thereafter, Section C places the burden for notice and action upon the Carrier. Paragraph C, Section 42-1-560, S.C. Code of Laws, 1976, transfers the right to a third party action to the Carrier and ***requires*** it to

1) notify the injured employee (or his personal representative) that Claimant's failure to file a suit will operate as an assignment to the Carrier; ***and,***

2) file and serve an S-1,

The Carrier failed to do so. As quoted from *Callahan* we must *"strictly construe the requirements of §42-1-560",* against the Carrier as well.

III DISMISSAL OF APPELLANT'S CLAIMS UPON THE ELECTION OF REMEDY THEORY IS IMPROPER BECAUSE THE APPEALED ORDER DID NOT PROPERLY CONSIDER APPELLANT'S LEGAL INCAPACITY PRIOR TO THE APPOINTMENT OF A GUARDIAN *AD LITEM.*

This is an admitted case of brain injury and Claimant was under a disability until a Guardian *Ad Litem* was appointed on May 13, 2009. The GAL filed and served an S-2 2 the next day after her appointment on May 14,

2009.

On May 13th, 2009, pursuant to the provisions of R67-216, and upon motion of Claimant's attorney **upon the ground of mental incompetence *and without objection of Carrier,* the Commission appointed a Guardian *Ad Litem*** for Claimant. The GAL served an S-2, upon Carrier's attorney the next day on May 14th, 2009. At that time, the Commission had not ruled Carrier could raise the defense of election. (see APA 9)

Due to his brain injury, Claimant was under a legal disability until May 13, 2009, when the Commission appointed a Guardian Ad Litem for him. (See exhibit 26, Order appointing GAL) It was further Ordered that the GAL should be present and participate in the deposition the Carrier wished to take of Claimant. To this the Carrier did not object and thereby recognized the disability of Claimant. (See APA, 33, Order Compelling Deposition of Claimant)

Thus, he could not be held to the requirements of the statute until the disability had been removed. It is the position of Claimant that the appointment of the GAL and her prompt action to comply with Section 42-1-560, are further grounds upon which the Order should be reversed.

IV. DISMISSAL OF THE APPELLANT'S CLAIMS UPON THE BASIS OF ELECTION OF REMEDY IS IMPROPER BECAUSE THE APPEALED ORDER FAILED TO RECOGNIZE THAT RESPONDENTS HAD WAIVED THE DEFENSE

FACTS:

E) The Carrier filed its Form 51, on February 19, 2009, and did not raise the defense of election of remedies *although it knew of the*

third party action in October, 2008, according to the testimony of the adjuster, Ms. Dyches, cited above. The findings of the Order are erroneous in this regard as well because the Carrier did know of the action. The Carrier waived the defense, (see APA exhibit 31). In that answer, Carrier raised seven (7) statutory and one regulation defense but omitted the defense of election, (see APA 31, Form 51).

F) The original Form 51, served February 19, 2009, was never amended nor any other Form 51 served.

G) The Carrier failed to raise the election claim timely and only then upon a Form 58,

H) With unreasonable delay, the election of remedy defense was never raised until May 11, 2009, nine (9) days prior to the scheduled hearing on May 20th, 2009, and only upon Carrier's Form 58. This was untimely and should not now be considered. (See APA 32, Carrier's Form 58, undated with accompanying Certificate of Service dated May 11, 2009);

I) Carrier never raised the defense of election by Form 51.

J) At the May 20, 2009, hearing, the Carrier failed to go forward on its claim to add the defense of election. The parties attended a hearings and Orders issued on September 29, 2009 added the true Employer, A&K Mulch, LLC. (Record Tab 8, Order) and allowed the deposition of Claimant upon the condition the

Guardian could attend and participate (see APA 33, Order for deposition of Claimant).

The Carrier did not pursue its request to be allowed to allege the defense of election.

K) Carrier never requested a subsequent hearing upon its request to be allowed to allege election. Instead, Carrier has improperly attempted to raise the issue by Form 21, in complete derogation of §42-1-705.

L) The Carrier failed to pursue the election at a hearing set for May 20, 2009. The defense was waived.

In other words, despite the agreement of the parties, the Carrier attempted to ignore their contract and with unclean hands asked the Commission to award relief upon a defense it previously waived. Likewise, it gave no notice of claim as required by statute and regulation and has thus again **waived** any claim if may have otherwise had.

The Order herein finding "Defendants were not even aware of this defense, election of remedies, until receipt of the S-2 notification several months later", (Order, page 14, last sentence, second paragraph) ignores the testimony of Ms. Dyches that she had the complaint and gave it to the Carrier's attorney.

STATUTORY REQUIREMENTS OF FORM 51 ANSWER AND DEFENSES and PROPER METHOD TO REQUEST TO PRESENT DEFENSE OMITTED FROM FORM 51:

The Carrier's Form 51 was to contain all known defenses and the controlling statute, § **42-1-705, entitled *"Employer's Answer to Request for Hearing (Form 51); specificity as to possible defenses"*, mandates that:**

(A) The *commission's Employer's Answer to Request for Hearing form, hereinafter referred to as Form 51, must describe with as much specificity as possible the defenses to be relied upon by the defendants. A Form 51 shall not state that "all defenses apply" or other similar language, unless such is actually the case. A Form 51 which does not conform to the requirements of this subsection shall not be considered at a hearing.*

(B) Nothing in this section prohibits a commissioner from considering a defense not listed on a Form 51 ***if:***

(1) *it is proven to the satisfaction of the commissioner that the defendants* ***had no knowledge*** *of the facts supporting the defense on the date of the completion of the Form 51;* **and**

(2) *in the case of represented defendants, the defense omitted on the Form 51 is set forth on the commission's Pre-Hearing Brief form, and such* ***brief is timely filed with the commission and timely served upon the parties.***

(C) A Form 51 must be signed by an attorney, verifying that the contents of the form are accurate and true to the best of the attorney's knowledge. If the employer is unrepresented and completes a Form 51, the employer must sign the form, verifying that the contents are accurate and true to the best of the employer's knowledge. (emphasis added)

There is a two pronged test before a defense omitted from a Form 51, may be considered or raised later. Carrier failed to pass the test of Subsections B(1) and B(2).

1) Carrier must have no knowledge of the facts supporting the defense. As set forth above, Carrier had knowledge of the Third Party action and that no S-2, had been served upon it and could have alleged the defense but failed to do so. All subsequent attempts to raise the issue by additional Forms 58 served by Carrier, fail upon the same basis.

2) The Form 58 must be served and filed timely. The Carrier's initial Form 58, wherein election is first raised, was undated but the certificate of service confirms it being served on May 11th, nine (9) days prior to the scheduled hearing on May 20th. Thus, Carrier failed to serve the Form 58 timely as Rules 67-611 and 67-211, require the same be served *at least ten (10) days before the hearing"* required by Rule 67-611 and/or 67-211.

Due to these failures, §42-1-705 would bar the consideration of the defense of election of remedies.

Further, Rule 67-610, requires that:

"A. After a Request for Hearing and Answer are filed with the Commission, an 'Amended" form must be filed to indicate a change in the nature of the claim, relief requested, ***or another defense."*** (emphasis added)

"B. A party may amend a form once as a matter of course at any time before or within thirty days after it is served. Otherwise, a party may amend a form no later than ten days prior to the hearing and only by leave of the Commissioner or by written consent of the adverse party." The Carrier never served an Amended Form 51 nor any motion or other document asking for leave to do so. Further, Carrier waived and abandoned the defense and any rights to request leave to raise the defense by not pursing the same at any scheduled hearing.

The Order should be reversed as it completely ignores the requirements of

set forth above.

COMMON LAW AS TO WAIVER OF DEFENSE/AFFIRMATIVE DEFENSE

As it has developed, the election of remedy defense in the workers compensation arena is in the nature of an affirmative defense and a defense or affirmative defense not raised is waived. The Carrier further waived the affirmative defense of election of remedies by not pursuing it at the hearing set for May 29th, 2009, just prior to the expiration of the statute of limitations.

A waiver is an intentional relinquishment of a known right. *Bonnette v. State,* 277 S.C. 17, 282 S.E.2d 597 (1981). It may be either **express or implied.** *Lawrimore v. American Health and Life Insurance* Co., 276 S.C. 112, 276 S.E.2d 296 (1981). **An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable.** *Pitts v. New York Life Insurance Company,* 247 S.C. 545, 148 S.E.2d 369 (1966). (emphasis added)

Lyles v. BMI, Inc., at at
292 S.C. 153355 S.E.2d 282 at 285
(S.C.App,1987)

Defendant further waived the defense of election for failure to raise it timely.

"[A]ffirmative defenses to a cause of action in any pleading must generally be asserted in a party's responsive pleading."

Strickland v. Strickland,
375 S.C. 76, 85, 650 S.E.2d 465, 470 (2007)

"Statutory prohibition is in the nature of an **affirmative defense** precluding enforcement of a contract and should be pled." Madren v. Bradford, 378 S.C. 187, 193, 661 S.E.2d 390, 393 (Ct.App.2008) (citing Costa and Sons Constr. Co. v. Long, 306 S.C.
465, 469, 412 S.E.2d 450, 453 (Ct.App.1991)); see also Skiba, 374 S.C. at 210, 648
S.E.2d at 606 (noting that section 40-11-370 is an **affirmative defense).** "The failure to
plead an **affirmative defense** is deemed a waiver of the right to assert it."

The statutory prohibitions provided by §42-1-540, *at seq,* should have been

plead. A review of the Form 51 clearly shows Carrier plead virtually every statutory defense known to man and certainly indicates it knew how, but clearly chose not to assert election of remedies. This was a voluntary omission based upon facts actually known to Carrier at the time,

A Form 21, was not the proper manner in which to raise a defense, As stated above all defenses are to be raised by Form 51. Carrier failed to pursue the issue at *any* prior scheduled hearing.

Finally, decided since this case began, in *Jervey v. Martinit Environmental, Inc and General Casualty Insurance Company,* 396 S.C. 442, 721 S.E. 2d 469 (S.C. App. 2012),the Court of Appeals determined that by waiting 450 days waive a defense the Employer and Carrier attempted to rely upon to deny benefits to the Employee after the same had been paid for over 150 days. Very similar facts exist in this case,

Here the Respondents knew of the third party lawsuit in the fall of 2008, per the testimony of Ms. Dyches and that no S-2 had been served upon them. Again Respondents were aware of the amended third party action in which A&K was a party at the time and this was served in March, 2009.

Respondents knew full well of the election defense as shown by their attempt to raise it in their Form 58 dated May 11, 2009. However, they did nothing to obtain a hearing on that matter and continued to pay benefits for another 485 days before raising the issue again for hearing on August 10th, 2010. In addition to having raised the defense improperly via a Form 20, it is

Appellant's position in reliance upon *Jervey, supra* that the election of remedies defense was waived.

V. DISMISSAL OF THE APPELLANT'S CLAIMS UPON THE BASIS OF ELECTION OF REMEDY IS IMPROPER BECAUSE THE RESPONDENTS SHOULD BE BARRED FROM ASSERTING THE DEFENSE OF ELECTION OF REMEDY UPON THE BASIS OF *LACHES*

FACTS:

M) Carrier unreasonably delayed raising the issue of election until less than 20 days prior to the expiration of the statute of limitations thus forcing the Claimant to pursue the Third Party action instead of being able to dismiss without prejudice as in *Callahan.*

N) Carrier was represented and well aware of the defense but delayed raising the issue of election to the detriment of Claimant and while allowing him to pursue The Third Party at great expense of time and money for discovery.

0) The Carrier waited until May 11, 2009, after the agreement was consummated and suit commenced to first mention the issue of the S-2 and then did so by way of a an untimely served Form 58. This was within three (3) weeks of the expiration of the statute of limitations forcing the Claimant to continue the action rather than being able to elect to dismiss without prejudice as in *Callahan.* Claimant relied upon the agreement of the parties to

pursue the Third Party action jointly to its own prejudice.

When the Carrier delays unreasonably in raising an issue causing the Claimant prejudice or to incur expenses or obligations or change his position then the relief requested should be denied. The Carrier failed to raise election in its answer and only mentioned the same 20 days prior to the expiration of the statute of limitations in an untimely filed Form 58 and did not pursue the issue at the hearing set prior to the expiration of the statute of limitations. Instead it permitted Claimant to expend considerable time and money in the prosecution of the Third Party action when, had timely notice of the claim of election been made, Claimant could have cured the defect, if any, by voluntarily dismissing the Third Party action without prejudice as in *Callahan, supra.*

" Courts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the fullest extent possible." *Jones v. Leagan*, 384 S.C. 1, 19, 681 S.E.2d 6, 16 (Ct.App.2009). The equitable doctrine of laches is defined as " neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done." *Hallums v. Hallums*, 296 S.C. 195, 198, 371 S.E.2d 525, 527 (1988). " Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary **to incur expenses or enter into obligations or otherwise detrimentally change his position,** then equity will ordinarily refuse to enforce those rights." *Chambers of S.C., Inc. v. County Council for* Lee *County*, 315 S.C. 418, 421, 434 S.E.2d 279, 280 (1993). The party seeking to establish laches must show: (1) a delay, (2) that was unreasonable under the circumstances, and (3) prejudice. *Hallums*, 296 S.C. at 199, 371 S.E.2d at 528. (emphasis added)

Robinson v. The Estate of Bois Pinckney Harris,
388 SC 616, 698 S.E.2d 214 at 221, (S.C. 2010)

VI. **DISMISSAL** OF THE APPELLANT'S CLAIMS UPON THE BASIS OF ELECTION OF REMEDY IS IMPROPER BECAUSE THE RESPONDENTS SHOULD BE BARRED FROM ASSERTING THE DEFENSE OF ELECTION OF REMEDY UPON THE BASIS OF EQUITABLE ESTOPPEL

Facts:

1) Carrier and the Employer maintained a pattern of deceptive and uncooperative conduct throughout the course of this claim: (see APA 29, Deposition of Jonas)

a) The Carrier has maintained since the First Report was filed that J.C. Witherspoon, Inc, was Claimant's employer at the time of the injury. This is untrue though it took considerable time and expense in discovery between the Third Party action and this case to determine the true employer was A.K. Mulch, LLC. A&K is a distinct legal entity with its own Federal 1.D. number (see APA 16, 17 and 18, A&K filing with Sec of State and Letter of company attorney Billy Cook) The two companies perform different jobs. A.K. is a warehouse type, non-mobile mulching operation.

J.C. Witherspoon is a logging operation. (See APA 24, Witherspoon deposition). He also testified, despite the representations of the Carrier in this case, that Claimant:

1) was always an A&K employee (not J.C. Witherspoon, Inc.) page 7, lines 21-.25, page 16, lines 21-23;

2) working on A&K premises when hurt, page 10, lines 13-17;

3) That A&K was a separate operation from Witherspoon, Inc., page 5, line 14 through page 7, line 3;

b) Not until September 29, 2009, was the true employer, A& K Mulch, LLC, made a party to the workers compensation case. This was the result

of Claimant's efforts through discovery in the Third Party action. (see APA 8, Order Adding Party)

c) Once A&K was made a party, an S-2 was promptly served for the second time on October 13, 2009, within thirty (30) days. (See APA 15)

d) In its answer to the Amended Complaint, A&K first raised its status as Employer and noticed the lien of the Carrier. (see APA 12, Answer of A&K)

e) Finally, on August 13th, 2010, Responses to Requests to Admit in the Third Party action confirmed that at the time of injury Claimant was an employee of A&K. (see APA 13)

0 Ultimately, A&K was dismissed from the Third Party action on August 23, 2010, due to its status as the true Employer. (See APA 26, Order of Dismissal)

g) Even when A&K raised the defense in the Third Party action that it was the Employer, avowed itself entitled to the employer immunity and claimed the lien of the Carrier, the Carrier never admitted as much in this case but pursued the position that J. C. Witherspoon, Inc. was the employer.

h) In fact, the Carrier asserted its lien by way of the Employer's counterclaim but failed to notify Claimant by service of the S-1.

In South Carolina, a defendant may be estopped from claiming the benefit of a statute if some conduct or representation by the defendant has induced the

plaintiff to delay or forego action in a timely manner *Hedgepath v. Am. Tel. & Co.*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (. Ct.App.2001). The Carrier failed to raise election until 20 days prior to the expiration of the statute of limitations and did not pursue the issue at the hearing set prior to the expiration of the statute of limitations.

The Carrier did not disclose the name of the true employer and forced the Claimant to discover the truth through discovery.

"An inducement for delay may consist of either an express representation that the claim will be settled without litigation or other conduct that suggests a lawsuit is not necessary." Id. An intentional misrepresentation is not required for the application of equitable estoppel. Id. at 361, 559 S.E.2d at 339. " It is sufficient if the plaintiff reasonably relied upon the ***words or conduct*** *of the defendant in allowing the limitations period to expire." Id.*

The " elements of equitable estoppel as to the party estopped are: (1) ***conduct*** *by the party estopped which amounts to a* ***false representation or concealment of material facts,**** *(2) the intention that such conduct shall be acted upon by the other party; and (3) knowledge, actual or constructive, of the true facts." Zabinski v. Bright Acres Assocs., 346 S.C. 580, 589, 553 S.E.2d 110, 114 (2001).(emphasis* added)

> *Logan v. Cherokee Landscaping and Grading* Co., et *al,* 389 S.C. 611, 698 S.E.2d 879 at 883(Ct. App. 2010)

The Order herein failed to apply the law properly and should be reversed.

CONCLUSION

For the many reasons set forth above, Claimant requests that the Full Commission reverse the Order of the Single Commissioner and reinstate the benefits to which he is entitled.

Respectfully submitted,

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