STATE OF SOUTH CAROLINA
In the Court of Appeals

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

W.C.C. File No.: 1413115
Appellate Case No. 2020-000053

Ex Parte: C. Daniel Veg of Chappell, Smith & Arden, PA.,.....Appellant,

v.

Kevin M. Barth of Barth, Ballenger, & Lewis LLP, ...Respondent.

In re: Stephen Evans, Employee,.....Claimant,

v.

Nan-ya Plastics Corp. America, Employer and New Hampshire Insurance Company, Carrier, ... Defendants.

INTIAL REPLY BRIEF OF APPELLANT

Desa Ballard
Harvey M. Watson III
BALLARD & WATSON
P.O. Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

ATTORNEYS FOR APPELLANT

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STANDING

For the first time, Barth asserts that Vega has no standing to appeal the award of an attorney's fee awarded to another lawyer. Not only did Barth not raise this issue during the trial court proceedings, he is simply wrong.

1. ISSUE NOT PRESERVED

Barth argues Vega's lack of standing vigorously, overlooking the fact that Barth himself has just brought the issue up for the first time. Standing is not jurisdictional. Standing can be waived, and it is waived if not presented to and ruled on by the trial court. Both appellate courts have so stated repeatedly.

The Chief Justice expressly addressed standing in the context of an appeal from an order of the Workers Compensation Commission in *James v. Anne's Inc.*, 390 S.C. 188, 701 S.E.2d 730 (Ct.App. 2010[1]). In *James* three *amici* asserted that the Respondent lacked standing to raise the issue on appeal, asserting Respondent "cannot show any injury from" the award of the Commission.

In doing so, the Court affirmed the long-standing principle that an issue cannot be raised for the first time on appeal when the lower tribunal has not had an opportunity to address the issue:

> … [w]hen a party belatedly attempts to raise the issue of standing, courts have applied error preservation principles and held that the matter as not preserved for review where the trial court was not given an opportunity to first rule on the issue.

Id. 390 S.C. at 193.

[1] The Supreme Court issued an earlier order affirming the circuit court, but on rehearing the earlier opinion was withdrawn and this opinion substituted. *James v. Anne's Inc.*, 386 S.C. 326, 688 S.E.2d 562 (2010).

In reaffirming this principle, the Supreme Court cited to a decision of its own which was appealed from a post-conviction relief order of the circuit court, as well as cases from this Court which were on appeal from the family court and from a master in equity. *Kolie v. State*, 386 S.C. 578, 690 S.E.2d 73 (2010) (post-conviction relief); *Michael P. v. Greenville County Dep't of Social Services*, 385 S.C. 407, 413 n. 4, 684 S.E.2d 211, 214 n 4 (Ct.App. 2009) (appeal from family court); *A Fast Photo Express Inc. v. First Nat'l Bank of Chicago*, 369 S.C. 80, 630 S.E.2d 285 (Ct.App. 2006) (appeal from master-in-equity).

More specifically, on appeal of a circuit court order the Supreme Court applied this principle in a situation in which the appealing party was not personally named as a party at the time the order on appeal was issued. *Narruhn v. Alea London Ltd.*, 404 S.C. 337, 745 S.E.2d 90 (2013).[2]

Barth did not assert before the Single Commission or the Full Commission any argument concerning Vega's right to seek to recover an attorney's fee in this action.

2. STANDING OF COUNSEL TO APPEAL

In a dissenting opinion in an earlier case, Justices Hearn and Kittredge cited the "three-part test to determine whether an individual… has standing" to raise an issue. *Georgetown County League of Women Voters v. Smith Land Co., Inc.*, 393 S.C. 350, 713 S.E.2d 287 (2011).

> First, the [party] must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not 'conjectural' or 'hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly traceable to the challenged action . . . and not . . .the result of the independent

[2] In a 3-2 option, the majority held that an insurer did not have standing to seek to set aside a special referee's order which sought relief under Rule 60(b), SCRCP, citing Rule 60(b) and its standard that permits "a party or his legal representative" to seek relief from the order. The cases cited in the opinion analyze the issue as one where an insurer stands in the shoes of an insured, and concludes that it does not have standing in that scenario, not applicable here.

> action of some third party not before the court. Third, it must be 'likely,' as opposed to merely speculative' that the injury will be 'redressed by a favorable decision.'

Id. 713 S.E.2d at 291, *citing Sea Pines Ass'n for the Protection of Wildlife Inc. v. S.C. Dep't of Natural Resources*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (citations omitted).

This Court has similarly addressed the elements of standing, "Standing refers to a party's right to make a legal claim or seek judicial enforcement of a duty or right. [citation omitted]… to have standing, a litigant must have a personal stake in the subject matter of the litigation." *Michael P. v. Greenville County DSS*, 385 S.C. 407, 684 S.E.2d 211, 216 (Ct.App. 2009). "Standing is a legal concept concerning whether each particular person may raise legal arguments or claims." *Id. citing* Blacks Law Dictionary (9th Ed. 2009).

Rule 202(a), SCACR provides that "[t]he party appealing shall be known as the appellant and the adverse party as the respondent."

Barth's argument that Vega lacks standing, if accepted, would require Vega to mislead this Court as to who has been injured by the order on appeal. Vega is the only person injured by the order on appeal. Vega's claimant has received his net proceeds, and other than serving as a witness in the proceedings below, he has no interest on the outcome of this appeal. It would be anathema for Vega to pursue this appeal in his claimant's name when his claimant has no interest in the outcome of this case.

The regulations of the Workers Compensation Commission specifically afford "party" status of an attorney who represents a claimant in connection with a settlement by agreement. Reg. 67-803(B)(2) provides that a settlement agreement and final release must be signed by the claimant's attorney when the claimant is represented by counsel.

The General Assembly specifically afforded "party" status to attorneys who represent a claimant in a Workers Compensation case by vesting the Commission with the authority to approve an attorney's fee paid to an attorney representing an injured employee. S.C. Code Ann. Section 42-1-560(b).

If any party to this appeal lacks standing to seek remedial relief in this action, it is Barth. As discussed in Appellant's brief, Barth was relieved as counsel in 2016, and filed nothing advising the Commission that he was or would be asserting a lien at the time he was relieved. (App.Br. p. 7). Barth did not notify Vega he was or would be asserting a lien. (App.Br. p. 8). Barth remained silent for two years, more than a month after Vega settled claimant's case, and only after Vega filed a Form 61 and settlement ledger signed by claimant on October 1, 2018. (App.Br. p. 8).

Moreover, the order relieving Barth as claimant's counsel did more than relieve Barth as counsel. It affirmed claimant's desire to "no longer . . . use the services of . . . Barth" and relieved Barth of any further responsibility for the matter before the Commission. (ROA 29-2). Barth's role in claimant's case ended then and there.

As more fully discussed in the Appellant's brief, Barth failed to comply with Reg. 67-1203(C) in that he did not assert a lien at the time he was relieved as counsel. (App.Br. p. 10). While not required, Barth's status as a relieved counsel afformed him no standing at the time he filed his motion to enforce his lien. Most importantly, the claimant did not agree to the fee, which is a prerequisite the Commission addressing the issue Reg. 67-1205(B)(2). Quite the opposite, claimant strenuously objected to Barth receiving any fee.

As evidence of the Single Commissioner's confusion over her authority, she "granted" both Barth's and Vega's motions regarding attorney's fees. (App.Br. pp. 8-9).

Barth is precluding from arguing Vega's lack of standing on appeal because he did not raise the issue below. Doing so would have been laughable, because only Vega recovered any money for the claimant, and only Vega has the claimant's permission to recover an attorney's fee.

Barth's citation to *Powell v. Bank of America*, 379 S.C. 437, 665 S.E.2d 237 (Ct.App. 2008 is inapplicable. In *Powell*, the bank which was holding interpleaded funds was found to lack standing because the decision in the case would not affect its rights. The bank admitted it had no interest in the funds it was holding. Here, Vega is directly affected by the ruling of this Court, as he was by the ruling of the Commission. Any money that goes to Barth reduces the amount of fee which Vega receives, even though his claimant approved the amount of fee that Vega requests.

Powell does, however, analyze the three-prong test for determining standing as follows:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Id. 379 S.C. at 444 (citations omitted).

Among the applicable precedent cited in *Powell* is *Smiley v. South Carolina Dep't of Health & Envt'l Control*, 374 S.C. 326, 329, 649 S.E.2d 31, 32–33 (2007) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)).

Analyzing Vega's position under the Lujan standard, Vega's standing is clear.

- First prong: Vega's injury is concrete and particularized because Barth's recovery defeats Vega's ability to receive the attorney fees he earned, as well as the costs he

advanced. Additionally, Vega's injury is imminent and actual, since Vega, not Barth, provided the legal work required to gain claimant's benefits under the Act.

- Second prong: Under Barth's theory, even an unreasonable offer vests some right in the discharged attorney, regardless of the reasonableness of the offer. The Court need not address this analysis, however, since Barth did not procedurally present the issue and the contractual analysis is beyond the authority of the Commission to adjudicate.
- Third prong: Reversal of the order on appeal will deny and dismiss Barth's motion, and the result by this Court will redress the injury sustained by Vega, in that he will be able to recover the fee that he earned, and that he and the claimant agreed upon.

Lastly, the Commission's analysis regarding reasonableness was shallow at best, because it considered the merits of Barth's argument in a vacuum, ignoring the effect its decision would have on Vega, the lawyer who obtained the result for Claimant. It is doubtful the fee awarded to Barth under the Commission's order could survive a reasonableness analysis that considers the value of the work done by the two lawyers and the benefits obtained for claimant.

3. DEFECTS IN BARTH'S PETITION

In Barth's response to Appellant's brief, he argues (again for the first time) that it is not necessary for him to show that claimant accepted the offer made by the opposing side, only that the offer was made. (Resp.Br. p. 6-7). Fortunately, this ridiculous argument is not before the Court.

Barth's motion was to enforce his lien. That's all he asked for. Nothing more. The Single Commissioner and the Full Commission ruled that Barth's lien was enforceable.

Barth did <u>not</u> ask the Single Commissioner or the Full Commission to interpret the language of his fee agreement with claimant. Instead, he assumed the enforceability of the fee agreement he had with claimant, and asked for the lien to be enforced. Vega argued that the Single

Commissioner and Full Commission could not address the merits of Barth's petition because of the procedural defects in Barth's filings.

As a result, Barth argues that his lien is a contract obligation. Neither the Single Commissioner nor the Full Commission have authority to enforce a contract between a claimant and his former lawyer. The Commission's authority is limited to awarding an attorney's fee pursuant to the statutes and regulations of the Workers Compensation Act.

An administrative agency only has such authority as is expressly granted by the General Assembly, and no inherent powers accompany that grant. *Rabon of South Carolina v. Medical University of South Carolina*, 334 S.C. 270, 513 S.E.2d 352 (1999).

Vega's argument on appeal is that Barth did not comply with the applicable statutes and regulations to properly bring the contract issue before the Commission. Barth did not follow the mandatory procedures for seeking <u>any</u> award of attorney's fee from the Commission. Whether or how the Single Commissioner or the Full Commission construed Barth's fee agreement is <u>not</u> the issue on appeal. The issue is whether Barth complied with the procedural steps necessary to submit his claim to the Commission at all. As set forth in Appellant's brief, he did not.

Appellant's brief at p. 10 focuses the Court's attention on the Regulations which spell out the proper procedure for bringing an issue regarding an attorney's fee before the Commission. Vega presented a detailed analysis of Barth's failure to make any effort to comply with Reg. 67-1203, 67-1204 and 67-1205. These very issues were argued before the Single Commissioner, and each of the defects in Barth's submission was pointed out by Vega. (Response to Motion to Enforce Attorney Fee, pp. 11-13). Neither the Single Commissioner nor the Full Commissioner paid the slightest attention to the procedural defects in Barth's filing.

Put simply, Barth did not present his claim properly. While the Single Commissioner and Full Commission purported to determine if Barth did, in fact, have a lien as a result of the fee agreement between him and claimant, that is not the issue on appeal. The enforceability or interpretation of Barth's lien is not before this Court. The merits of Barth's lien should never have been addressed.

Barth's motion was one to "enforce charging lien." (Motion dated November 13, 2018). Nothing in the applicable statutes or regulations permit the Commission to grant that relief. Both the single commissioner and the Full Commission purported to do so, going through a legal analysis of how a lien arises and whether it is enforceable.

When Barth filed his Motion, Vega was the only counsel of record for claimant. The issues presented to the Single Commissioner were framed by Vega's Form 61, which requested a fee reduced by $9,000.00. Hence the fee which the Commission was addressing was a total fee of $40,000.00, and costs of $7,291.65 (ROA 37-3). Those amounts were the only amount of fee and costs submitted to the Commission's jurisdiction. Vega's request for fees and costs were the only fee and costs authorized by claimant in the Form 61.

Barth's argument simply torpedoed past the issue framed by claimant's filing, and asked the Commission to enforce his lien. For whatever reason, both the Single Commissioner and Full Commission treated Barth's motion as if it gave them permission to stray into issues such as contract construction, reasonableness of fees under a civil and ethical standard, and other issues over which it lacked jurisdiction.

Notably, Barth did not argue Vega was not entitled to a fee. Instead, his argument was more of a race to claim as much of a fee as possible, leaving Vega with leftovers, if any. That is precisely what the Commission did, by approving Barth's fee and awarding Vega's fee based on

the leftovers. As demonstrated in Appellant's brief, the "award" granted more money to the attorneys than was in the pot to be divided. No one noticed that either.

Claimant/Vega filed an opposition to Barth's motion and argued in detail that Barth had not complied with the statutory and regulatory procedure for bringing his request before the Commission. (App.Br. pp. 11-13). Thus the issues presented on appeal here are fully preserved.

The Single Commissioner's order contains an unappealed finding that is the law of the case. Finding of Fact No. 1 states "[t]he parties to this proceeding are subject to and bound by the South Carolina Workers' Compensation Act." Thus, any request for fee by Barth or Vega had to be made within the confines of the Workers' Compensation Act. An unappealed finding is the law of the case, "whether right or wrong." *First Savings Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994).

Vega presented his request for fees strictly within the confines of the Worker's Compensation Act. Barth did nothing of the sort. Instead, he sought to argue his entitlement to fee based on common law contract rights as between him and claimant, and lured the Single Commissioner and the Full Commission to go along with him. Even if the Single Commissioner and Full Commission's analysis of the contract issue were correct, which Vega disputes, it was error for the issue to be considered, because Barth sought common law relief without following the proper statutory and regulatory procedures for even presenting his claim to the Commission.

CONCLUSION

Barth's brief again postures this case as one within the confines of common law, as if the issues presented were before a court. That's simply not the case. Barth cannot have his issues decided, because he failed to follow the proper procedure to gain access to the Commission. As

Vega pointed out, the claimant and Vega submitted the issue of Vega's fee and costs properly to the Commission. Barth did not.

Even if this Court assumes that the Workers' Compensation Commission has any authority to decide common law issues, the procedural mandates unique to presenting the issue to the Commission would prevent the Commission from considering Barth's argument.

For the reasons set forth above, and in the Appellant's Brief, the order of the Single Commissioner and Full Commission should be reversed, and the matter remanded with directions to dismiss Barth's petition and approve Vega's request for attorneys' fees and costs as approved by the claimant.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard
Harvey M. Watson III

BALLARD & WATSON
Post Office Box 6338
West Columbia, South Carolina 29171
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com
harvey@desaballard.com

ATTORNEY FOR APPELLANTS

September 8, 2020

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PROOF OF SERVICE

I, Beth Cogan, an employee with Ballard & Watson, Attorneys at Law, do hereby certify that on September 8, 2020, I served a copy of the **Appellant's Initial Reply Brief** in the above-captioned case on the following individuals by electronic mail addressed as follows:

South Carolina Workers' Compensation Commission
Facsimile (803) 737-1208

Andrea Roche, Esquire
aroche@mickleandbass.com

Beth Cogan

Beth Cogan, Paralegal

September 8, 2020
West Columbia, South Carolina

Ballard & Watson
Attorneys at Law
PERSISTENT. UNWAVERING.

Desa Ballard
Harvey M. Watson III

Post Office Box 6338 | West Columbia, SC 29171
226 State Street | West Columbia, SC 29169
ph 803.796.9299 | fx 803.796.1066 | desaballard.com

September 8, 2020

Via Email (ctappfilings@sccourts.org)
Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

Re: *Steen Evans v. Nan-Ya Plastics Corp.*
Appellate Case No.: 2020-000053

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the **Appellant's Initial Reply Brief** in the above-referenced matter. After filing, please return the clocked copy to our office.

Please do not hesitate to contact our office if you should have any questions. With warm personal regards, I am,

Sincerely yours,

Desa Ballard

Desa Ballard
desab@desaballard.com

cc: *Via Facsimile*
SC Workers' Compensation Commission
Via Email
Andrea Roche, Esquire
Danny Vega, Esq.