

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

---

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

---

CASE NO. 2017-CP-26-07775  
APPELLATE CASE NO. 2018-001265

---

Kelaher, Connell & Connor P.C.....Appellant

vs.

South Carolina Workers' Compensation Commission.....Respondent

---

APPELLANT'S MEMORANDUM OF LAW IN  
SUPPORT OF PETITION FOR REHEARING

---

On September 8, 2021 this Court issued its Opinion No. 5860 affirming the Order of the Circuit Court. The Appellant, in response to this Court's Opinion, respectfully offers the following points this Court overlooked or misapprehended pursuant to SCACR 240.

I. THE OPINION OF THE COURT OF APPEALS VIOLATES THE STANDARD OF REVIEW FOR A 12(B)(6) MOTION.

The Court in its Opinion affirming the trial judge violates long standing principles and rules concerning SCRCP 12(b)(6). South Carolina courts and more particularly the Supreme Court have long recognized that the plaintiff's complaint is to be viewed in the light most favorable to the non-moving party. See *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Further, if the

facts alleged and inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case, the motion under SCRCP 12(b)(6) must be denied.

Our courts have also held that the South Carolina Rules of Civil Procedure were enacted with the idea that “substantial justice to the parties must be done and the pleadings must be liberally construed.” See *Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991). The case law specifically asks the question: Does the complaint state any valid claim for relief? If so, the motion to dismiss must be denied. See *Gentry v. Yonce*, 337 S.C. 1, 522 S.E.2d 137 (1999).

In this case, the Court’s Opinion does not apply the standard set down by the Supreme Court and this Court in deciding a motion to dismiss. This Court’s Opinion applies a rigid and formalistic view towards deciding this case and affirming the trial court judge on his granting of the motion to dismiss under 12(b)(6). The court repeatedly states that certain issues were not preserved for appellate review. Petitioner will show that the record and the argument both in the trial court and in the pleadings and briefings have preserved all of the issues which this court has declined to address.

## II. IMMUNITY OF THE SOUTH CAROLINA WORKERS’ COMPENSATION COMMISSION.

This court notes in its opinion that “KCC asserts the Commission’s failure to notify KCC of the hearing was a ministerial act and therefore neither the Act nor judicial immunity immunize the Commission. We find the issue of whether the Commission’s alleged action or inaction was ministerial is not preserved for appellate review.”

Appellant disagrees with this assessment as not consistent with the record, the briefs in the circuit court or the oral arguments. Appellant timely raised the issue of whether or not the Commission’s Act in notifying KCC of a hearing was ministerial at the outset of the case.

As an example, Appellant cites to Appellant's original brief in opposition to Defendant's motion to dismiss, not the brief filed on Appellant's motion for reconsideration under SCRCP 59.

See Record on Appeal, pages 33-38. Appellant noted:

In this case, Plaintiff's petition for attorney's fees was not heard in the normal course. Plaintiff asserts that the staff of the South Carolina Workers' Compensation Commission simply neglected to send Plaintiff a notice and such failure of the staff is a negligent act which implicates the South Carolina Tort Claims Act. (R. p. 37)

This fact was further borne out when Appellant attached to its response in opposition to the motion to dismiss the Affidavit of Virginia Crocker, a former Commissioner of the South Carolina Workers' Compensation Commission. This Affidavit was filed prior to argument in the trial court on Defendant's motion to dismiss on February 27, 2018. The Crocker Affidavit was filed with Appellant's Response to Defendant's Motion to Dismiss. In that Affidavit, Crocker stated:

Once the fee petition was filed with the Commission, a Commission employee was required to give notice of any hearing to Kelaher, Connell & Connor, P.C. South Carolina Workers' Compensation Regulation 67-210 designates who the Commission shall serve as does South Carolina Regulation 67-211. Finally, South Carolina Workers' Compensation Regulation 67-213 directs how the Commission shall serve notices. (See 67-213(B). (R. p. 60).

Crocker's Affidavit further states:

An Administrative Assistant of the South Carolina Workers' Compensation Commission made an error in failing to provide Kelaher, Connell & Connor with notice of the settlement hearing between Bruce Nadolny and the AVX Corporation. The Administrative Assistant is required by the South Carolina Workers' Compensation Commission regulations to notify all interested parties either by mail or electronically.

It is my opinion that this was really a mistake to attention to detail by a commission employee. (R. p. 60)

This evidence raised by Appellant clearly shows Appellant was asserting that a Commission employee had made a mistake in performing a ministerial duty. The fact that the term ministerial duty or ministerial act is not mentioned in the complaint or in the Affidavit of Crocker is of no

consequence since South Carolina's courts have never required strict pleading requirement. All the inferences from the Crocker Affidavit and the Complaint along with the Appellant's brief in opposition to the motion to dismiss clearly show that Appellant was complaining a Commission employee, not a judicial officer, had made a clerical mistake, i.e., a ministerial act not a judicial act. As a result, this Court's opinion that this issue is unpreserved for appellate review is incorrect. In fact, KCC in its response in opposition to the motion to dismiss and in its affidavit clearly stated its position that a Commission employee had failed to perform a clerical act.<sup>1</sup>

The transcript itself specifically reveals Appellant's argument that this was a ministerial act.

The following portions of the trial court transcript show:

Argument of Connell:

I have an affidavit from a former Commissioner which is attached to the motion that says simply, this was a negligent act, a clerical negligent act. It was not a judicial act; it was not a legislative act. It was a mistake that was made by the, if you would for want of a better word, the clerk of the Workers' Compensation Commission. (R. p. 76).

Further, Connell stated:

Well, if you look at Ms. Crocker's affidavit, she said that was not a judicial act. It was just a clerical act. (R. p. 77).

In fact, the court clearly agreed this was the issue because it said the following in the transcript.

The Court:

Right, right. And, I mean, to me, I guess my interpretation is this is an administrative action by quasi judicial -- or it's an administration inaction by a quasi judicial agency. Administratively they are to notify all parties of a hearing. They didn't do it. So that's an administrative inaction by the Workers' Compensation Commission.

And it just seems wrong, I would agree with you, but South Carolina Tort Claims Act says they are not liable.... (R. p. 81)

---

<sup>1</sup> A ministerial act is defined as an act performed in a prescribed manner and in obedience to a legal authority without regard to one's own judgment or discretion. In this case, South Carolina Workers' Compensation Regulation 67-213(B).

Accordingly, it is Appellant's position that the record amply supports Appellant did not abandon the issue of whether or not the action or inaction was ministerial. In fact, the circuit court clearly understood in its ruling that Appellant was arguing about a "clerical issue with the Commission." The trial court judge's ruling clearly holds that to be the case and Appellant properly and correctly preserved this issue for review. Accordingly, this Court should reverse its ruling.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT APPELLANT DID NOT RAISE THE ISSUE OF CONSTITUTIONAL NOTICE IN ITS COMPLAINT.

It is well-settled in South Carolina that pleadings are to be liberally construed. See *Keiger v. Citco Coastal Petroleum, Inc.*, 326 S.C. 369, 373, 482 S.E. 2d 792-794 (Ct. App. 1997) (Pleadings are to be construed liberally and any conclusion of fact that may properly arise from a well pleaded fact is to be regarded as contained in the allegation).

In this case, all parties clearly understood that the failure to give notice by the South Carolina Worker's Compensation Commission was the issue in the case. Appellant in its response to Defendant's motion to dismiss specifically raised that issue in its brief. Appellant noted in its brief as follows:

Under both our state and federal due process clauses no person shall be deprived of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1; S.C. Const. art. I, §3. Our courts have noted "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way and judicial review." *State v. Binnarr*, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012). See also *Stono River EPA v. DHEC*, 305 S.C. 905, 406 S.E.2d 340 (1991) (notice and opportunity to be heard is required before an administrative agency makes a final decision). (R. p. 36).

After Appellant's brief was filed, even defense counsel understood the lack of notice was a problem. He stated at the hearing:

They are raising due process which we don't think is a due process situation because that's when the State take something from them... (R. p. 73).

The Judge also recognized the issue and stated as follows:

And it just seem wrong, I agree with you, but, South Carolina Tort Claims Act says that they are not liable for any loss resulting from that inaction. (R. p. 81).

On reconsideration, Appellant again raised the issue of notice. In Appellant's brief on reconsideration of the order granting Defendant's motion to dismiss, Appellant again raised in its brief the opportunity to be heard. Appellant stated in his brief as follows:

In the present case, Plaintiff was not notified of the hearing on November 3, 2016, and thus, was unable to protect his interest and lien on attorney's fees, which was established on December 28, 2012, after submitting his Fee Petition for the fourth time. The Plaintiff's attorney's fees constitute a constitutionally protected property interest, and but for the negligent acts or omissions of the Commission's officers, agents, and/or employees, Plaintiff would have been notified of the settlement hearing and would have had the opportunity to properly defend his claim. (R. pp. 48-49).

In sum, Appellant first raised the failure of notice in its complaint in which it indicated the Commission failed to notify Appellant of a hearing and failed to send written notice to the Appellant. (R. p. 16). Appellant continued to press this issue from the time the complaint was filed and when it filed its response to Defendant's motion to dismiss and the issue of notice was again raised. (R. p. 36). Third, the trial court and defense counsel both realized that notice was an issue and addressed it during the hearing. (See Baxter due process argument, R. p. 79). (See trial court's appreciation of issue, R. p. 81). Finally to fully protect its interest Appellant also provided an affidavit of a Commissioner who was retired from the Workers' Compensation Commission. That Commissioner, Virginia Crocker, in an affidavit (R. p. 59) stated that the Commission was required to serve notice on all interested parties of any hearing. (R. p. 60).

Thus, Appellant asserts that not only was the constitutional issue preserved in the complaint, but it was argued throughout the hearings including the briefs and affidavit of Crocker. As a result

this Court erred as a matter of law holding that KCC did not allege a constitutional violation in the complaint, the reason being that complaints are to be liberally construed to promote justice and this Court's restrictive view of the complaint, of the arguments and of the briefing compounds the violation of Appellant's right to be notified of a hearing so it could defend its interest. See *Stono River EPA v. DHEC*, 305 S.C. 905, 406 S.E.2d 340 (1991) (notice and opportunity to be heard is required before an administrative agency makes a final decision). The second reason being that the notice issue was argued and briefed by both parties and recognized as an issue by the trial court.

IV. THIS COURT ERRED IN FAILING TO HOLD THAT THE COMMISSION WAS GROSSLY NEGLIGENT.

The Court in failing to find that the Commission was not grossly negligent misunderstands the Appellant's position. It is without dispute that Appellant was not notified of a hearing in violation of South Carolina Workers' Compensation rules and regulations. See South Carolina Workers' Compensation Regulations 67-213(b) and 67-210 (the Commission serves hearing notices and Form 31 Review Hearing Notices, electronically, or by deposit in United States first class postage addressed to the parties according to Regulation 67-210. See also Commissioner Crocker's affidavit (R. pp. 59-61).

Gross negligence has been defined as the absence of due care. The failure to follow the South Carolina Workers' Compensation Rules and Regulations in providing notice was grossly negligent. The South Carolina Tort Claims Act and the case law interpreting it have held that an exception which does not contain a grossly negligent standard requires that the gross negligence standard be read into those exceptions. The gross negligence in this case is the repeated failure by Commission employees to properly document the fee petition and their failure to protect the Appellant's lien along with their failure to notify Appellant of the hearing. *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 317, 743

S.E.2d 109 (2013) makes clear that gross negligence may be read into any of the exceptions listed in the South Carolina Tort claims Act.

The Court, however, does not distinguish *Chakrabarti* nor does it recognize that a gross negligent standard must be read into all applicable exceptions that do not contain a gross negligence standard. In this case, S.C. Code Ann. § 15-78-60(2) is the applicable South Carolina Tort Claims exception. It does not have a gross negligence standard in the text of the statute, but under the prevailing case law it must be read into that statute. Thus, this Court failed to apply the gross negligence standard to S.C. Code § 15-78-60(2). This is Appellant's point. Appellant agrees that S.C. Code § 15-78-60(12) does not apply, only that the gross negligence standard must be read into S.C. Code § 15-78-60(2) based on South Carolina law.

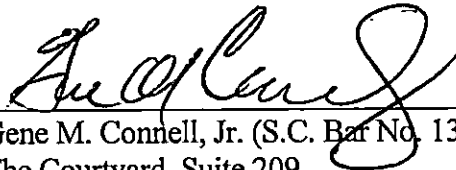
#### CONCLUSION

Appellant asserts that the opinion in this case opposes rigid rules on pleadings in the trial court. Under this Court's view, Appellant had to present a constitutional cause of action in order to have this Court determine whether notice was required of a hearing. This is not the law. Our courts have always held pleadings must be liberally construed. Second, this Court holds that failing to provide notice of a hearing to Appellant was not presented at the trial court. The record and the excerpts of the record provided in this petition clearly show that not only did Appellant raise the issue, but Respondent raised the issue, and the trial court recognized the issue. Further, when the trial court failed to rule on the issue, Appellant moved for reconsideration under SCRCP 59. Appellant presented an affidavit of a retired Workers' Compensation Commissioner who stated that the Commission was required by law to serve notice consistent with South Carolina law and the South Carolina Workers' Compensation regulations. All of this evidence and argument was before the trial court when it made its decision and thus Appellant strenuously objects to this Court's finding that

these issues were not preserved for review. If this Court affirms its decision, it will forever change South Carolina Supreme Court case law which requires all pleadings be liberally construed in favor of the nonmoving party and essentially abolish our current pleading requirements for a restrictive view of pleadings. Petitioner requests this Court address each issue raised and not dodge the significant legal and constitutional issues raised in this case.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr. (S.C. Bar No. 1358)  
The Courtyard, Suite 209  
1500 U. S. Highway 17 North  
Post Office Drawer 14547  
Surfside Beach, South Carolina 29587-4547  
(843) 238-5648 (phone)  
(843) 238-5050 (facsimile)  
[gconnell@classactlaw.net](mailto:gconnell@classactlaw.net)  
**Attorney for Appellant**

September 13, 2021  
Surfside Beach, South Carolina

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

**RECEIVED**

SEP 20 2021

SC Court of Appeals

APPEAL FROM Horry COUNTY  
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2017-CP-26-07775  
APPELLATE CASE NO. 2018-001265

Kelaher, Connell & Connor, P.C. .... Appellant

vs.

South Carolina Workers' Compensation Commission ..... Respondent

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of the **Appellant's Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** on the Respondent, on the 17th day of September 2021, by depositing a copy of same in the United States Mail, postage prepaid, to:

Douglas C. Baxter, Esquire  
Chelsea Lane Monroe, Esquire  
Richardson Plowden & Robinson, P.A.  
P. O. Box 3646  
Myrtle Beach, SC 29578

J. Keith Roberts, Esquire  
South Carolina Workers' Compensation  
Commission  
P. O. Box 1715  
Columbia, SC 29202-1715

Carmen V. Ganjehsani, Esquire  
Richardson Plowden & Robinson, P.A.  
1900 Barnwell Street  
Columbia, SC 29201

Shelia Y. McCumbee  
Shelia Y. McCumbee

**SWORN AND SUBSCRIBED** before me,  
this 17<sup>th</sup> day of September, 2021.

Jan C. Burt  
Notary Public for South Carolina  
My Commission Expires: 1-22-29

KELAHER, CONNELL & CONNOR, P.C.  
ATTORNEYS AT LAW  
SUITE 209  
THE COURTYARD  
1500 U.S. HIGHWAY 17 NORTH  
P.O. DRAWER 14547  
SURFSIDE BEACH, SOUTH CAROLINA 29587

**RECEIVED**  
SEP 20 2021  
SC Court of Appeals

EDWARD T. KELAHER\*  
GENE M. CONNELL, JR.  
L. SIDNEY CONNOR, IV  
LISA POE DAVIS  
\*OF COUNSEL

AREA CODE 843  
238-5648  
FAX: 238-5050

September 17, 2021

**VIA FEDERAL EXPRESS**

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

Re: Appellate Case No. 2018-001265  
*Kelahr, Connell & Connor, P.C. v. South Carolina Workers' Compensation Commission*  
C/A No. 2017-CP-26-07775  
Our File No. 2018-0069C

Dear Ms. Kitchings:

Enclosed please find Appellant's Petition for Rehearing, Memorandum of Law in Support of Petition for Rehearing and Proof of Service of same in the above-captioned matter. I also enclose our check for \$50.00 for the filing fee. It is our understanding no additional copies of the Petition are required at this time.

By copy of this letter, we hereby serve a copy of the above-stated documents on Respondent through counsel of record.

With best regards, I am

Sincerely yours,

  
Gene M. Connell, Jr.

GMC,Jr.:sm  
Enclosures

cc w/enc.: Douglas C. Baxter, Esquire  
Chelsea Lane Monroe, Esquire  
Carmen V. Ganjehsani, Esquire  
J. Keith Roberts, Esquire



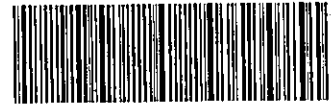
103 1030 0534 0920  
#103  
#Z 104

FedEx  
TRK 8131 4958 8534

MON - 20 SEP AA  
PRIORITY OVERNIGHT

28 USCA

29201  
SC-15  
CAE



00099  
00100  
fedex.com trackorders 1800.463.3235

FedEx Express Package US Airbill 8131 4958 8534

1 From  
To: GENE M. CONNELL JR. Para B43 238-5648  
Company: KELAHER CONNELL & CONNOR PC  
Address: 1500 HIGHWAY 17 N STE 200  
City: CURFSIDE BEACH State: SC Zip: 29375-6070  
2 Your Internal Billing Reference: 2018-0069C  
3 To  
Receiver: Hon. Jemmy Abbott Kitchings Para 603 734-1890  
Company: South Carolina Court of Appeals  
Address: 1220 Senate Street  
City: Columbia State: SC  
4 Express Package Service  
5 Special Handling and Delivery Signature Options  
6 Payment Method  
7 RECEIVED  
8 SEP 20 2021  
9 SC Court of Appeals



RECEIVED  
SEP 20 2021  
SC Court of Appeals

Insert shipping document here.