

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5860 (S.C. Ct. App. Filed September 8, 2021)

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

vs.

South Carolina Workers' Compensation Commission Respondent

APPENDIX

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S.C. SUPREME COURT

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The South Carolina Court of Appeals

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

v.

South Carolina Workers' Compensation Commission,
Respondent.

Appellate Case No. 2018-001265

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James E. Seales

C.J.

Thomas C. Huff

J.

3d L. H.

J.

Columbia, South Carolina

cc:

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FILED
Sep 30 2021

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The Honorable Benjamin H. Culbertson

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

v.

South Carolina Workers' Compensation Commission,
Respondent.

Appellate Case No. 2018-001265

Appeal From Horry County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5860
Heard February 2, 2021 – Filed September 8, 2021

AFFIRMED

Gene McCain Connell, Jr., of Kelaher Connell &
Connor, PC, of Surfside Beach, for Appellant.

Douglas Charles Baxter, of Richardson Plowden &
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Ganjehsani, of Richardson Plowden & Robinson, PA of
Columbia; Chelsea Lane Monroe, of Motley Rice, LLC
of Mount Pleasant; and James Keith Roberts, of the
South Carolina Workers' Compensation Commission, of
Columbia, all for Respondent.

LOCKEMY, C.J.: In this negligence action, Kelaher, Connell & Conner, P.C. (KCC) appeals the circuit court's order granting the South Carolina Workers' Compensation Commission's (the Commission's) motion to dismiss under Rule

12(b)(6) of the South Carolina Rules of Civil Procedure. On appeal, KCC argues the circuit court erred in (1) granting the Commission's motion to dismiss based on the South Carolina Tort Claims Act¹ (the Act), (2) finding the Commission's actions were a judicial act, (3) failing to find the Commission was grossly negligent for its failure to notify KCC of the hearing, and (4) failing to hold KCC had a constitutional right to be heard. We affirm.

FACTS/PROCEDURAL HISTORY

In its complaint, KCC alleged the following set of facts. On July 31, 2007, Bruce Nadolny retained KCC to represent him in a worker's compensation claim against AVX Corporation and Liberty Mutual Insurance Company. KCC, on behalf of Nadolny, entered into mediation on his claim. From that mediation, Nadolny agreed to accept a \$120,000 settlement. The day after mediation, Nadolny informed KCC he no longer needed its representation, and KCC was relieved as counsel. KCC informed Nadolny that it had expended multiple hours and expenses working on his case and would file a claim for attorney's fees.

KCC asserted it filed a Form 61 fee petition on August 29, 2012, which it alleged the Commission denied receiving. KCC alleged it filed additional fee petitions on September 11, 2012, and September 18, 2012. On November 9, 2012, KCC requested the Commission place a lien on the settlement. On December 13, 2012, the Commission informed KCC it would need to file another Form 61 to put a lien on the case. KCC filed an alleged fourth Form 61 on December 28, 2012. In 2016, Nadolny died. On November 3, 2016, the Commission approved the settlement to Nadolny's widow without notifying KCC of the hearing. KCC alleged Nadolny's widow moved out of South Carolina after receiving the settlement.

KCC asserts the Commission was negligent, reckless, and willful in the following:

- a. In failing to notify Plaintiff of a hearing;
- b. In failing to recognize and protect Plaintiff's lien;
- c. In mishandling documents including a Fee Petition which was in fact forwarded to the Commission on four occasions;
- d. In failing to follow generally accepted practices in notifying Plaintiff after he had been relieved;

¹ S.C. Code Ann. §§ 15-78-10 to -220 (2005 & Supp. 2020).

- e. In failing to send written notice to the Plaintiff;
- f. In failing to handle notice to the Plaintiff on a potential hearing in a businesslike manner;
- g. In failing to abide by its employees' emails and notes which indicated that if Plaintiff filed a Form 61 with an Order and cost sheet they would hold until the end of the case.

The Commission filed a motion to dismiss, arguing the circuit court lacked subject matter jurisdiction and that the Commission was immune under the Act. Specifically, the Commission asserted it was immune under section 15-78-60(2)-(3) of the South Carolina Code (2005). The circuit court ruled it had jurisdiction to hear this action but that the Commission was immune from suit based on the exception found in section 15-78-60(2). The circuit court stated that, because a government entity was not liable for administrative actions or inactions of quasi-judicial nature, the Commission was immune from suit for the alleged acts of negligence regarding the fee petition. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by granting the Commission's motion to dismiss on the grounds it was immune pursuant to the Act because its actions were ministerial?
2. Did the circuit court err by finding the Commission's actions or inactions were quasi-judicial because they were ministerial acts?
3. Did the circuit court err by failing to hold the Commission's failure to notify KCC of the hearing was grossly negligent?
4. Did the circuit court err by failing to hold KCC had a constitutional right to be heard?

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the [circuit] court." *Grimsley v. S.C. Law Enft Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (quoting *Rydde v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). "That standard requires the [c]ourt to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the

pleadings would entitle the plaintiff to relief on any theory of the case." *Id.* (quoting *Rydde*, 381 S.C. at 646, 675 S.E.2d at 433). "If the facts alleged and inferences deducible therefrom would entitle the plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper." *Id.*

LAW/ANALYSIS

I. Immunity

KCC argues the circuit court erred in finding the Commission was immune under the Act. KCC asserts the Commission's failure to notify KCC of the hearing was a ministerial act and therefore neither the Act nor judicial immunity immunized the Commission. We find the issue of whether the Commission's alleged action or inaction was ministerial is not preserved for appellate review.

In its response to the Commission's motion to dismiss, KCC asserted the Commission was not immune because the Commission's act was not a judicial or quasi-judicial act because it was simple negligence. KCC did not raise the issue of whether the Commission's act was a ministerial act—and thus an exception to the Act's immunity—until its Rule 59(e), SCRCP, motion. Because KCC failed to raise this issue at the hearing or in its response to the Commission's motion to dismiss, we find this issue is unpreserved for appellate review. *See Portman v. Garbade*, 337 S.C. 186, 189-90, 522 S.E.2d 830, 832 (Ct. App. 1999) (holding an issue not raised to the circuit court in a Rule 12(b)(6), SCRCP, motion, was not preserved for appellate review). Thus, KCC failed to preserve this issue for appellate review. *See Patterson v. Reid*, 318 S.C. 183, 185, 456 S.E.2d 436, 437 (Ct. App. 1995) ("A party cannot for the first time raise an issue by way of a Rule 59(e) motion which could have been raised at trial.").

II. Gross Negligence

KCC asserts the court should extend a gross negligence standard to the exceptions relied on by the Commission because the Commission asserted it was immune under section 15-78-60(12) of the South Carolina Code (2005). KCC argues the Commission's gross negligence was evidenced by their failure to document the fee petition four times. We disagree.

Section 15-78-60(12) states:

The governmental entity is not liable for a loss resulting from . . . licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner.

Our supreme court has held that "when an *applicable* exception to the waiver of immunity contains a gross negligence standard, that gross negligence standard must be read into all other applicable exceptions that do not contain a gross negligence standard." *Repko v. County of Georgetown*, 424 S.C. 494, 504, 818 S.E.2d 743, 749 (2018). However, "the immunity provision containing the gross negligence standard must actually *apply* to the case before it can be read into another immunity provision." *Id.* If a particular immunity exception does not apply to the facts of the case, "the gross negligence standard contained in that immunity is not to be read into applicable immunity subsections that do not contain a gross negligence standard." *Id.* at 507, 818 S.E.2d at 750.

The substance of section 15-78-60(12) is inapplicable here. *See* § 15-78-60(12). The record shows this case did not deal with licensing powers found in section 15-78-60(12) but instead with the Commission's alleged failure to notify KCC of a hearing. Because section 15-78-60(12) does not apply to this case, the circuit court did not err in failing to extend the gross negligence standard to the exceptions that did apply.

III. Right to be Heard

KCC argues constitutional law requires that the Commission allow KCC to be heard and by failing to provide notice of the hearing, the Commission failed to provide sufficient due process. We disagree.

Here, KCC did not allege a violation of its constitutional due process rights in its complaint. Although KCC's complaint mentioned the failure to provide notice, it only raised the failure to provide notice as a claim of the tort of negligence. KCC did not argue a constitutional deprivation in its complaint. *See Charleston Cty. Sch. Dist. v. Harrell*, 393 S.C. 552, 559, 713 S.E.2d 604, 608 (2011) ("It is a well-settled principle that in resolving a Rule 12(b)(6) motion to dismiss, the court is limited to a consideration of the allegations contained within the four corners of

the complaint."). Because KCC did not allege a constitutional violation of due process in its complaint and the circuit court was limited to allegations as contained in the complaint, the circuit court did not err in granting the Commission's Rule 12(b)(6) motion to dismiss.

CONCLUSION

For the foregoing reasons, the circuit order granting the Commission's Rule 12(b)(6) motion is

AFFIRMED.

HUFF and HEWITT, JJ., concur.

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

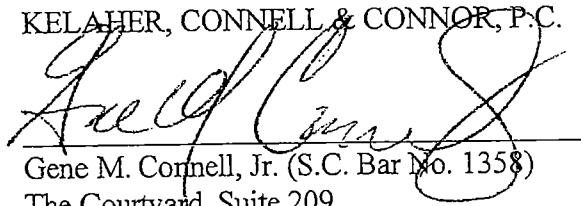
APPELLANT'S PETITION FOR REHEARING

The Appellant, Kelaher, Connell & Connor, P.C., pursuant to Rule 221 of the South Carolina Appellate Court Rules, petitions this Court for a rehearing of its Opinion No. 5860 filed September 8, 2021 and received by Appellant's attorney on September 8, 2021. The basis of Appellant's request for rehearing is set forth in the attached Memorandum of Law.

Respectfully submitted,

(Signature on following page)

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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 SCRCR 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.¹

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)

¹ 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.

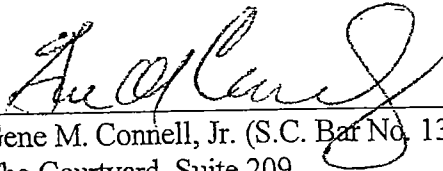
CONCLUSION

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,

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RECORD ON APPEAL

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Kelaher, Connell & Connor, P.C.,

Plaintiff,

vs.

South Carolina Workers' Compensation
Commission,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) C/A No. 2017-CP-26-07775

)
)
)
) ORDER PARTIALLY GRANTING AND
) PARTIALLY DENYING PLAINTIFF'S
) MOTION FOR RECONSIDERATION
)
)
)
)
)
)
)
)

Before the court is the plaintiff's Motion for Reconsideration of this court's order dated 4/9/2018 granting the defendant's Motion to Dismiss in this case. Pursuant to Rule 59(f), SCRCP, this motion is decided on briefs without oral arguments.

Based upon the plaintiff's motion filed 4/16/2018, plaintiff's brief in support of its motion filed 6/8/2018, and defendant's brief filed 6/21/2018 in opposition to the motion, the plaintiff's Motion for Reconsideration is granted to the extent that the court granted the defendant's Motion to Dismiss on the grounds that the court lacked jurisdiction in this case. However, the court denies the plaintiff's motion to the extent that it seeks reconsideration of the court's dismissal of this action pursuant to the *South Carolina Tort Claims Act*.

The defendant's Motion to Dismiss was argued 3/1/2018 at the Horry County Judicial Center before the undersigned judge. Defendant was represented by Douglas Charles Baxter, Esquire and J. Keith Roberts, Esquire. Plaintiff was represented by Gene Connell, Esquire. Defendant moved for an Order granting its Motion to Dismiss pursuant to Rule 12 of the *South Carolina Rules of Civil Procedure*.

Plaintiff filed a negligence claim against the Defendant, South Carolina Workers' Compensation, alleging in the Complaint that Defendant was negligent in the following particulars: (a) failing to notify Plaintiff of a hearing; (b) failing to recognize and protect Plaintiff's lien; (c) mishandling documents including a Fee Petition which was in fact forwarded to the Commission on four occasions; (d) failing to follow generally accepted practices in notifying Plaintiff after he had been relieved; (e) failing to send written notice to the Plaintiff; (f) failing to handle notice to the Plaintiff of a potential hearing in a businesslike manner; and (g) failing to abide by its employees' emails and notes which indicated that if Plaintiff filed a Form 61 with an Order and cost sheet they would hold until the end of the case. Complaint ¶ 16.

In the case at hand, the defendant argues that the Plaintiff is disputing the payment of attorney's fees for legal work performed for a claimant in a South Carolina Workers' Compensation case (*Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Company*, WCC No. 0708860) and that such disputes are within the exclusive jurisdiction of the South Carolina Workers' Compensation Commission. To the contrary, the Plaintiff does not dispute its entitlement or the payment of attorney fees. Rather, it asserts and argues that employees of the South Carolina Workers' Compensation Commission were negligent in failing to protect Plaintiff's lien and in failing to notify Plaintiff of the hearing so that Plaintiff could assert a claim for attorney's fees. Plaintiff argued that failing to provide an opportunity for it to be heard was a violation of its constitutional rights.

All attorney's fees resulting from claims within the *South Carolina Workers' Compensation Act* are subject to the approval of the Commission as it has original jurisdiction over such claims. S.C. Code Ann. § 42-15-90. However, the plaintiff's claim in this lawsuit is not for attorney fees arising pursuant to a workers' compensation claim under the *South Carolina Workers'*

Compensation Act as contemplated by Code § 42-15-90. It is a negligence action against the Workers' Compensation Commission itself. Certainly the commission does not have exclusive jurisdiction to hear and determine actions against itself. Therefore, the plaintiff's Motion for Reconsideration should be granted to the extent that this court's order dated 4/9/2018 granted the defendant's Motion to Dismiss on the grounds that this court lacks jurisdiction in this case and such jurisdiction is exclusively with the South Carolina Workers' Compensation Commission.

Notwithstanding this court's denial of the defendant's Motion to Dismiss on jurisdictional grounds, the Defendant is immune in this lawsuit based on the *South Carolina Tort Claims Act* ("SCTCA") which governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. Flateau v. Harrelson, 584 S.E.2d 413, 416 (Ct. App. 2003) (emphasis added). "Governmental entity" is defined as the State and its political subdivisions, and includes its offices, agencies, authorities, departments, commissions, boards, divisions, and instrumentalities. S.C. Code Ann. § 15-78-30. The South Carolina Workers' Compensation Commission is a government entity as contemplated by the SCTCA.

A governmental entity is immune from liability in several enumerated instances. S.C. Code Ann. §15-78-60; see also Hawkins v. City of Greenville, 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct. App. 2004) (holding the exceptions found in §15-78-60 "significantly limit the tort liability of government entities"). S.C. Code Ann. §15-78-60 states: "the governmental entity is not liable for a loss resulting from (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature."

Here, the South Carolina Workers' Compensation Commission is a governmental entity, and therefore, any claims that Plaintiff has against the Commission are subject to the SCTCA. As

stated in S.C. Code Ann. §15-78-60, a governmental entity is not liable for any loss resulting from an administrative action or inactive of a legislative, judicial, or quasi-judicial nature. Here, the Commission, as set forth by the General Assembly, is a judicial and administrative department of the State (S.C. Code Ann. §42-3-10) and the allegations of negligence in the Complaint all involve administrative actions and/or inactions. As such, the Commission cannot be held liable for any alleged losses as set out in the Complaint. As to any alleged constitutional violations, the South Carolina Workers Compensation Commission has not waived its Eleventh Amendment immunity.

Therefore, it is hereby

ORDERED, ADJUDGED AND DECREED, that the Plaintiff's Motion for Reconsideration is GRANTED to the extent that this court's order dated 4/9/2018 granted the defendant's Motion to Dismiss on the grounds that this court lacks jurisdiction in this case and such jurisdiction is exclusively with the South Carolina Workers' Compensation Commission; it is further

ORDERED; ADJUDGED AND DECREED that, upon reconsideration, the defendant's Motion to Dismiss on the grounds that this court lacks jurisdiction in this case is DENIED; it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for Reconsideration is DENIED to the extent that it seeks reconsideration of this court's order dated 4/9/2018 granting the defendant's Motion to Dismiss on the grounds that the defendant is immune in this lawsuit pursuant to the *South Carolina Tort Claims Act*, said ruling as set forth in this court's order dated 4/9/2018 remaining as the order of this court.

AND IT IS SO ORDERED, ADJUDGED AND DECREED.



Horry Common Pleas

Case Caption: Kelaher Connell & Connor PC VS Workers Compensation
Commission South Carolina
Case Number: 2017CP2607775
Type: Order/Other

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2018-06-29 12:32:23 page 5 of 5

ELECTRONICALLY FILED - 2018 Jun 29 1:27 PM - HORRY - COMMON PLEAS - CASE#2017CP2607775

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) C/A No. 2017-CP-26-07775

Kelaher, Connell & Connor, P.C.,

Plaintiff,

vs.

South Carolina Workers' Compensation
Commission,

Defendant.

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS**

This matter came before the Court by Motion of the Defendant, South Carolina Workers' Compensation Commission, and was argued March 1, 2018 at the Horry County Judicial Center before the Honorable Benjamin H. Culbertson. Defendant was represented by Douglas Charles Baxter, Esquire and J. Keith Roberts, Esquire. Plaintiff was represented by Gene Connell, Esquire. Defendant moved for an Order granting its Motion to Dismiss pursuant to Rule 12 of *the South Carolina Rules of Civil Procedure*.

Plaintiff filed a negligence claim against the Defendant, South Carolina Workers' Compensation, alleging in the Complaint that Defendant was negligent in the following particulars: (a) failing to notify Plaintiff of a hearing; (b) failing to recognize and protect Plaintiff's lien; (c) mishandling documents including a Fee Petition which was in fact forwarded to the Commission on four occasions; (d) failing to follow generally accepted practices in notifying Plaintiff after he had been relieved; (e) failing to send written notice to the Plaintiff; (f) failing to handle notice to the Plaintiff of a potential hearing in a businesslike manner; and (g) failing to

abide by its employees' emails and notes which indicated that if Plaintiff filed a Form 61 with an Order and cost sheet they would hold until the end of the case. Complaint ¶ 16.

A motion to dismiss shall be granted if the Court lacks subject matter jurisdiction. Rule 12(b)(1), SCRCP. The proper procedure to raise a Court's lack of subject matter jurisdiction is through a motion to dismiss. Edens v. Bellini, 359 S.C. 433, 440, 597 S.E.2d 863, 867 (Ct. App. 2004). Additionally, a motion to dismiss shall be granted if the party asserting the claim has failed to state facts sufficient to constitute a cause of action. Rule 12(b)(6), SCRCP. "In considering a motion to dismiss a Complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on the allegation set forth in the complaint." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The trial court is to construe the complaint in a light most favorable to the non-moving party and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. Freemantle v. Preston, 398 S.C. 186, 192, 728 S.E.2d 40, 43 (2012).

The right to workers' compensation is wholly statutory, not existing except under the circumstances provided in the South Carolina Workers' Compensation Act (§ 42-1-10 *et. seq.* of the Code of Laws of South Carolina, as amended). Price v. Peachtree, 721 S.E.2d 461 (Ct. App. 2011). Section 42-3-180 of the Code of Laws of South Carolina, as amended, provides that all questions arising under the Workers' Compensation Act, if not settled by agreement of the parties interested thereof with the approval of the Commission, shall be determined by the Commission. James v. Anne's, Inc., 701 S.E.2d 730 (2010). Attorney's fees for claims under this Act are subject to the approval of the Commission. S.C. Code Ann. § 42-15-90.

While the trial court has subject matter jurisdiction over tort claims, certain cases may be taken from the trial court's original jurisdiction by the General Assembly. Sabb v. South Carolina

State University, 350 S.C. 416 (2002) (holding that the circuit court has divested original jurisdiction in the South Carolina Workers' Compensation Commission for personal injury claims arising in the course and scope of one's employment). Disputes which are ancillary to the rights to workers' compensation benefits should be determined by the Workers' Compensation Commission. See Price v. Peachtree, 721 S.E.2d 461 (Ct. App. 2011).

Here, Plaintiff is disputing the payment of attorney's fees for legal work performed for a claimant in a South Carolina Workers' Compensation case (*Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Company*, WCC No. 0708860). Plaintiff asserted and argued that employees of the South Carolina Workers' Compensation Commission were negligent in failing to protect Plaintiff's lien and in failing to notify Plaintiff of the hearing so that Plaintiff could assert a claim for attorney's fees. Plaintiff argued that failing to provide an opportunity for it to be heard was a violation of its constitutional rights.

All attorney's fees resulting from claims within the South Carolina Workers' Compensation Act are subject to the approval of the Commission as it has original jurisdiction over such claims. S.C. Code Ann. § 42-15-90. Therefore, any disputes that Plaintiff has with the payment of attorney's fees are within the jurisdiction and approval of the Commission; not the Circuit Court. Furthermore, even if this Court did have jurisdiction, the Defendant is immune based on the South Carolina Tort Claims Act. The South Carolina Tort Claims Act ("SCTCA") (§15-78-10 *et. seq.*) governs all tort claims against governmental entities and is the *exclusive civil remedy* available in an action against a governmental entity or its employees. Flateau v. Harrelson, 584 S.E.2d 413, 416 (Ct. App. 2003) (emphasis added). "Governmental entity" is defined as the State and its political subdivisions, and includes its offices, agencies, authorities, departments, commissions, boards, divisions, and instrumentalities. S.C. Code Ann. § 15-78-30.

A governmental entity is immune from liability in several enumerated instances. S.C. Code Ann. §15-78-60; see also Hawkins v. City of Greenville, 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct. App. 2004) (holding the exceptions found in §15-78-60 “significantly limit the tort liability of government entities”). S.C. Code Ann. §15-78-60 states: “the governmental entity is not liable for a loss resulting from (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature.”

Here, the South Carolina Workers' Compensation Commission is a governmental entity, and therefore, any claims that Plaintiff has against the Commission are subject to the SCTCA. As stated in S.C. Code Ann. §15-78-60, a governmental entity is not liable for any loss resulting from an administrative action or inaction of a legislative, judicial, or quasi-judicial nature. Here, the Commission, as set forth by the General Assembly, is a judicial and administrative department of the State (S.C. Code Ann. §42-3-10) and the allegations of negligence in the Complaint all involve administrative actions and/or inactions. As such, the Commission cannot be held liable for any alleged losses as set out in the Complaint. As to any alleged constitutional violations, the South Carolina Workers Compensation Commission has not waived its Eleventh Amendment immunity.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED, that Defendant's Motion to Dismiss is granted and this action is hereby dismissed with prejudice.

AND IT IS SO ORDERED.

The Honorable Benjamin H. Culbertson
Fifteenth Judicial Circuit

Conway, South Carolina
Dated: _____, 2018



Horry Common Pleas

Case Caption: Kelaher Connell & Connor PC VS Workers Compensation
Commission South Carolina
Case Number: 2017CP2607775
Type: Order/Dismissal

Presiding Circuit Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2018-04-09 13:53:53 page 5 of 5

ELECTRONICALLY FILED - 2018 Apr 09 4:20 PM - HORRY - COMMON PLEAS - CASE#2017CP2607775

BEFORE THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

BRUCE W. NADOLNY,

EMPLOYEE/CLAIMANT

vs.

AVX CORPORATION,

and

LIBERTY MUTUAL INSURANCE,

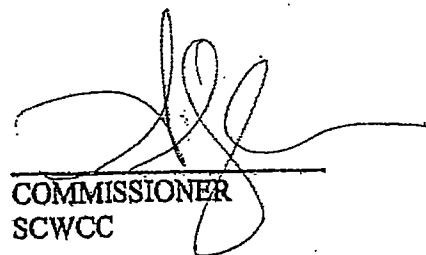
CARRIER/DEFENDANT

ORDER
APPROVING
ATTORNEY'S FEE
WCC File No. 0708860

After review of the record in the above captioned matter and the controlling legal standards for the award of attorney fees and costs in workers' compensation proceedings under S.C. Reg. 1204-1207 and Rule 1.5(a) of the Code of Professional Conduct, I find the attorney's fee of \$20,000.00 and costs of \$2,446.44 in this matter to be reasonable and hereby approve fees and costs as set forth herein.

AND IT IS SO ORDERED.

Date: 8/22/17


COMMISSIONER
SCWCC

RECEIVED

JAN 02 2013

Division of Claims
Claims Administrator
S.C. Workers' Comp. Comm.

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 0708860

Bruce W. Nadolny,

Employee/Claimant,

vs.

AVX Corporation,

Employer,

and

Liberty Mutual Insurance Co.,

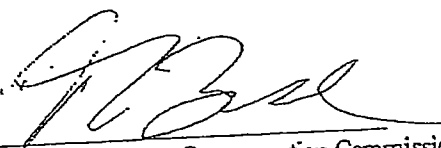
Carrier,
Defendants

ORDER RELIEVING COUNSEL

THIS MATTER COMES BEFORE THE COURT based on the Employee/Claimant's request that Gene M. Connell, Jr. be relieved as counsel. Further, Attorney Connell has advised the Court that he will file a claim for attorney's fees for the work he has done in this matter. Accordingly

IT IS ORDERED that Gene M. Connell, Jr. be relieved as counsel.

AND IT IS SO ORDERED.

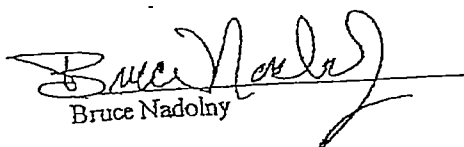

South Carolina Workers' Compensation Commission

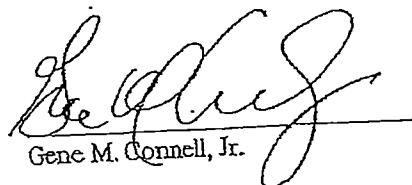
CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereof by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereof, postage paid, in the United States mail addressed to any unrepresented party.

By Amy Bracy on November 9, 2012

WE CONSENT:


Bruce Nadolny


Gene M. Connell, Jr.

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-26 - 07775

Kelaher, Connell & Connor, P.C.,

Plaintiff,

vs.

South Carolina Workers' Compensation
Commission,

Defendant.

SUMMONS

TO: THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said Complaint on the subscriber or subscribers at his or their office at Suite 209, The Courtyard, 1500 U.S. Highway 17 North, Post Office Drawer 14547, Surfside Beach, South Carolina 29587 within thirty (30) days after the service hereof; exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid; the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and judgment by default will be rendered against you for the relief demanded in the Complaint.

KELAHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

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

Attorney for Plaintiff

November 29, 2017
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-26 - 07775

Kelaher, Connell & Connor, P.C.,)
)
Plaintiff,)
)
vs.)
)
South Carolina Workers' Compensation)
Commission,)
)
Defendant.)

COMPLAINT
(Negligence)
JURY TRIAL

The Plaintiff, complaining of Defendant, would respectfully allege unto this Court as follows:

1. The Plaintiff is a corporation organized and existing pursuant to the laws of the State of South Carolina and doing business as a law firm in South Carolina.
2. The Defendant is a governmental entity which is part of the State of South Carolina and which entity is charged with handling and resolving workers' compensation claims in South Carolina.
3. That on or about July 31, 2007, Plaintiff was retained by Bruce Nadolny to represent him a worker's compensation claim against AVX Corporation and Liberty Mutual Insurance Company with WCC File No. 0708860.
4. Thereafter, Kelaher, Connell & Connor, P.C., through Gene M. Connell, Jr., represented Bruce Nadolny through numerous hearings before the South Carolina Workers' Compensation Commission and attended depositions and the file contains almost 3,000 pages of medical records.
5. A mediation was held before former Workers' Compensation Commissioner, Tom Marchant, in which the Claimant agreed to accept \$120,000.00 plus a Medicare Set Aside Trust.

6. The Claimant the next day advised Kelaher, Connell & Connor he no longer needed my assistance and Kelaher, Connell & Connor advised the Claimant that Kelaher, Connell & Connor had expended countless hours handling this claim including going to hearings and expending \$2,446.44 for a mediation.

7. Kelaher, Connell & Connor, P.C. was relieved as counsel on November 9, 2012, but pursuant to the Order relieving counsel, Attorney Connell advised the Court that Kelaher, Connell & Connor will file a claim for attorney's fees for the work that he has done in this matter.

8. Kelaher, Connell & Connor, P.C. had previously filed a Form 61 Fee Petition on August 29, 2012 whereupon the Commission advised Attorney Connell that they had not received it.

9. Kelaher, Connell & Connor, P.C. then refiled the Fee Petition on September 11, 2012 whereupon the Commission advised attorney Connell they had not received it.

10. Kelaher, Connell & Connor, P.C. filed the Fee Petition for the third time on September 18, 2012.

11. Thereafter Attorney Connell wrote a letter on November 9, 2012 advising that he was requesting a lien be placed on the file and requesting that Kelaher, Connell & Connor, P.C. be notified.

12. An employee of the Commission, Greg Lyons, wrote back a note which stated "You will need to file a Form 61 with Order & cost sheet & we will hold."

13. Thereafter Attorney Connell received an email from Amy Bracy of the Workers' Compensation Commission on December 13, 2012 indicating Kelaher, Connell & Connor needed to file yet another Fee Petition and it would act as a lien on the file.

14. Thereafter on December 28, 2012, Kelaher, Connell & Connor, for the fourth time filed a Fee Petition asking for attorney's fees of \$20,000.00 and costs of \$2,446.44.

15. The Claimant Bruce Nadolny died in 2016 and the South Carolina Workers' Compensation Commission approved a settlement to his widow on November 3, 2016 without notifying Kelaher, Connell & Connor, P.C.

16. That the South Carolina Workers' Compensation Commission, through its officers, agents and/or employees, was negligent, reckless and willful in one or more of the following particulars:

- a. In failing to notify Plaintiff of a hearing;
- b. In failing to recognize and protect Plaintiff's lien;
- c. In mishandling documents including a Fee Petition which was in fact forwarded to the Commission on four occasions;
- d. In failing to follow generally accepted practices in notifying Plaintiff after he had been relieved;
- e. In failing to send written notice to the Plaintiff;
- f. In failing to handle notice to the Plaintiff of a potential hearing in a businesslike manner;
- g. In failing to abide by its employees' emails and notes which indicated that if Plaintiff filed a Form 61 with an Order and cost sheet they would hold until the end of the case.

17. That as a direct and proximate result, Plaintiff suffered damages in that Plaintiff's fees were \$20,000.00 and costs of \$2446.44.

18. The Plaintiff brings this cause of action against the Defendant for negligence and requests judgment against the Defendant for actual damages in the sum of \$22,446.44.

KELAHHER, CONNELL & CONNOR, P.C.

s/ Gene M. Connell, Jr.

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

Attorney for Plaintiff

November 29, 2017

Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) C/A No. 2017-CP-26-07775

Kelaher, Connell & Connor, P.C.,

Plaintiff,

vs.

South Carolina Workers' Compensation
Commission,

Defendants.

**DEFENDANT'S NOTICE
OF MOTION AND MOTION
TO DISMISS**

TO: PLAINTIFF AND ITS ATTORNEY GENE M. CONNELL, JR., ESQUIRE:

YOU WILL PLEASE TO TAKE NOTICE that Defendant, South Carolina Workers' Compensation Commission, hereby moves for an Order dismissing this action on the grounds that the Circuit Court does not have jurisdiction to hear this matter, and additionally, the South Carolina Tort Claims Act provides immunity to the Commission for such claims. Further, Plaintiff has failed to state facts sufficient to constitute a cause of action. This Motion is made pursuant to Rule 12 of the *South Carolina Rules of Civil Procedure* and is more fully set out in the Memorandum submitted with this Motion.

[Signature page to follow]

Respectfully submitted,

RICHARDSON, PLOWDEN & ROBINSON, P.A.

s/ Douglas Charles Baxter

Douglas Charles Baxter, Esquire, SC Bar No. 6272
Chelsea Lane Monroe, Esquire, SC Bar No. 102636
2103 Farlow Street, Myrtle Beach, SC 29577
Post Office Box 3646, Myrtle Beach, SC 29578
(843) 448-1008 Main; (843) 448-1533 Fax
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dbaxter@richardsonplowden.com
cmonroe@richardsonplowden.com

South Carolina Workers' Compensation Commission
J. Keith Roberts, Esquire, SC Bar No. 100735
1333 Main St., Suite 500
PO Box 1715
Columbia, SC 29202-1715

Attorneys for Defendant, South Carolina
Workers' Compensation Commission

January 15, 2018

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A No. 2017-CP-26-07775
Kelaher, Connell & Connor, P.C.,	)	
	)	
	)	
	)	
Plaintiff,	)	DEFENDANT'S MEMORANDUM
	)	IN SUPPORT OF ITS
vs.	)	MOTION TO DISMISS
	)	
South Carolina Workers' Compensation	)	
Commission,	)	
	)	
Defendants.	)	

This matter is before the Court upon Motion of the Defendant, the South Carolina Workers' Compensation Commission ("Commission"), requesting that this action be dismissed.

Allegations/Facts

In the Complaint, the Plaintiff alleges that on or about July 31, 2007, Plaintiff was retained by claimant, Bruce Nadolny, to represent him in a worker's compensation action claim against AVX Corporation and Liberty Mutual Insurance Company, WCC File No. 0708860. Plaintiff alleges that at some point in 2012, prior to the final resolution of the claim, Mr. Nadolny informed Plaintiff that he no longer needed Plaintiff's legal assistance.

In September 2012, Plaintiff filed a Form 61 Fee Petition with the Commission for attorney's fees and costs. [Exhibit A, Form 61 dated September 18, 2012] A hearing regarding the Petition was set for November 8, 2012 before the Honorable T. Scott Beck; however, subsequently, Plaintiff withdrew the Petition at the time of the hearing. Commissioner Beck issued an Order relieving Counsel dated November 9, 2012 that stated "[f]urther Attorney Connell has advised the Court that he will file a claim for attorney's fees for the work he has

done in the matter.” [Exhibit B, Order Relieving Counsel] On December 13, 2012, Amy Bracy, Administrative Assistant to Commissioner Beck, sent an email to Gene Connell’s office requesting a new fee petition be sent by Mr. Connell. [Exhibit C, Email dated December 13, 2012] On December 28, 2012, Mr. Connell sent a letter to the Commission’s Claims Department that stated he was filing a new fee petition. [Exhibit D, Letter from Gene Connell dated December 28, 2012 and Form 61 dated September 18, 2012] However, the fee petition attached to his December 28th letter was the same fee petition dated September 18, 2012 that had been withdrawn and disposed of by the Order of Commissioner Beck dated November 9, 2012.

Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Company, WCC No. 0708860 was fully and finally resolved by a Decision and Order by the Honorable Aisha G. Taylor of the South Carolina Workers’ Compensation Commission on November 1, 2016; however, the Order did not address the attorney’s fees. On August 22, 2017, the Commissioner of the South Carolina Workers’ Compensation Commission signed an Order Approving Attorney’s fees to Plaintiff in the amount of \$20,000.000 and costs of \$2,446.44.

Plaintiff filed a Summons and Complaint in this Court, alleging negligence against the Defendant, South Carolina Workers Compensation Commission for failure to protect Plaintiff’s lien. Defendant files this Motion to Dismiss, requesting that this action be dismissed on the grounds that the Circuit Court does not have jurisdiction to hear this matter, and additionally, the South Carolina Tort Claims Act provides immunity to the Commission for such claims.

Argument

The right to workers’ compensation is wholly statutory, not existing except under the circumstances provided in the South Carolina Workers’ Compensation Act (§ 42-1-10 *et. seq.* of the Code of Laws of South Carolina, as amended). Price v. Peachtree, 721 S.E.2d 461 (Ct. App.

2011). Section 42-3-180 of the Code of Laws of South Carolina, as amended, provides that all questions arising under the Workers' Compensation Act, if not settled by agreement of the parties interested thereof with the approval of the Commission, shall be determined by the Commission. James v. Anne's, Inc., 701 S.E.2d 730 (2010). Attorney's fees for claims under this Act are subject to the approval of the Commission. S.C. Code Ann. § 42-15-90

While the trial court has subject matter jurisdiction over tort claims, certain cases may be taken from the trial court's original jurisdiction by the General Assembly. Sabb v. South Carolina State University, 350 S.C. 416 (2002) (holding that the circuit court has divested original jurisdiction in the South Carolina Workers' Compensation Commission for personal injury claims arising in the course and scope of one's employment). It is apparent that the General Assembly intended for employees to seek a remedy from their employers for their work-related injury only through the Workers' Compensation Commission and not through the trial courts. Posey v. Property Mold, 661 S.E.2d 395 (Ct. App. 2008). Disputes which are ancillary to the rights to workers' compensation benefits should be determined by the Workers' Compensation Commission. See Price v. Peachtree, 721 S.E.2d 461 (Ct. App. 2011).

Here, Plaintiff is disputing the payment of attorney's fees for legal work performed for a claimant in a South Carolina Workers' Compensation case (*Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Company*, WCC No. 0708860). Mr. Nadolny made a claim for injuries sustained in the course and scope of his employment, and as such, the South Carolina Workers' Compensation Commission had original jurisdiction over his claim. As stated in S.C. Code Ann. § 42-15-90, all attorney's fees resulting from claims within the South Carolina Workers' Compensation Act are subject to the approval of the Commission as it has original

jurisdiction over such claims. Therefore, any disputes that Plaintiff has with the payment of attorney's fees is within the jurisdiction and approval of the Commission; not the Circuit Court.

Furthermore, even if this Court determines that it does have jurisdiction to hear this action, the Defendant has immunity pursuant to the South Carolina Tort Claims Act. It is worth noting that in a similar fact pattern, a South Carolina District Court case held that South Carolina has not waived Eleventh Amendment immunity. See Richardson v. S.C. Workers' Comp. Comm'n, No. CIV.A.2:07-1914-PMD, 2007 WL 2477312, at *4 (D.S.C. Aug. 28, 2007) (holding in a suit against the South Carolina Workers' Compensation Commission that South Carolina has not waived Eleventh Amendment immunity and has not consented to suit in a federal district court).

The South Carolina Tort Claims Act ("SCTCA") (§15-78-10 et. seq.) governs all tort claims against governmental entities and is the *exclusive civil remedy* available in an action against a governmental entity or its employees. Flateau v. Harrelson, 584 S.E.2d 413, 416 (Ct. App. 2003) (emphasis added). "Governmental entity" means the State and its political subdivisions and the State includes its offices, agencies, authorities, departments, commissions, boards, divisions, and instrumentalities. S.C. Code Ann. § 15-78-30 "The SCTCA must be liberally construed in favor of the governmental defendant." Doe ex rel. Johnson v. S.C. Dep't of Soc. Servs., 597 F.3d 163, 178 (4th Cir. 2010).

A governmental entity is immune from liability in several enumerated instances. S.C. Code Ann. §15-78-60; see also Hawkins v. City of Greenville, 358 S.C. 280, 293, 594 S.E.2d 557, 564 (Ct. App. 2004) (holding the exceptions found in §15-78-60 "significantly limit the tort liability of government entities"). S.C. Code Ann. §15-78-60 states:

"The governmental entity is not liable for a loss resulting from...

- (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;
- (3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process;”

Here, the South Carolina Workers’ Compensation Commission is a governmental entity as it is a State commission, and therefore, any claims that Plaintiff has against the Commission are subject to the SCTCA. As stated in S.C. Code Ann. §15-78-60, a governmental entity is not liable for any loss resulting from an administrative action or inactive of a legislative, judicial, or quasi-judicial nature. Here, the Commission, as set forth by the General Assembly, is a judicial and administrative department of the State. See S.C. Code Ann. §42-3-10. Failure to protect a lien for attorney’s fees is an administrative action or inaction that is quasi-judicial in nature. As such, the Commission cannot be held liable for any alleged loss that stems from attorney’s fees directly associated with a claim governed by the Commission.

Even if the Court finds that it has jurisdiction over the action, and the Commission is not immune, Plaintiff’s claim still fails pursuant to Rule 12(b)(6) of the *South Carolina Rules of Civil Procedure* because Plaintiff has failed to state facts sufficient to constitute a cause of action. In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

Here, viewing the facts in the light most favorable to the Plaintiff, Plaintiff's claim fails as it failed to state facts sufficient to constitute a cause of action. Defendant has failed to identify a duty that Defendant owes to the Plaintiff and therefore, there is no valid claim for relief.

Conclusion

Based upon the foregoing, Defendant, the South Carolina Workers' Compensation Commission requests that this action be dismissed with prejudice.

Respectfully submitted,

RICHARDSON, PLOWDEN & ROBINSON, P.A.

s/ Douglas Charles Baxter

Douglas Charles Baxter, Esquire, SC Bar No. 6272
Chelsea Lane Monroe, Esquire, SC Bar No. 102636
2103 Farlow Street, Myrtle Beach, SC 29577
Post Office Box 3646, Myrtle Beach, SC 29578
(843) 448-1008 Main; (843) 448-1533 Fax
(843) 443-3580 DCB-Direct
(843) 443-3583 CLM-Direct
dbaxter@richardsonplowden.com
cmonroe@richardsonplowden.com

South Carolina Workers' Compensation Commission
J. Keith Roberts, Esquire, SC Bar No. 100735
1333 Main St., Suite 500
PO Box 1715
Columbia, SC 29202-1715

Attorneys for Defendant, South Carolina
Workers' Compensation Commission

January 15, 2018

South Carolina Workers' Compensation
Commission
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
803-737-5723



WCC File #: 0708860
Carrier File #: WC550-567678
Carrier Code #: **RECEIVED**
Employer FEIN #: _____

MAY 15 2017

Claimant's Name: Bruce W. Nadolny Employer's Name: AVX Corporation
Address: 613 Mammie Drive Address: PO Box 867
City: Myrtle Beach State: SC Zip: 29588 City: Myrtle Beach State: SC Zip: 29578
Home Phone: (843) 293-8649 Work Phone: () - - Insurance Carrier: Liberty Mutual Insurance Co.
Preparer's Name: Gene M. Connell, Jr. Law Firm: Kelahr, Connell & Connor, PC Preparer's Phone #: (843) 238-5648

Date Attorney Was Hired: 07/31/07

Date of Injury: 06/30/07

Compensation Rate: _____

Does this conclude the case? ☐ Yes ☒ No

PLEASE CHECK AND COMPLETE ONLY ONE: (A, B, C or D)

☐ A. R.67-1205C does not apply to the facts of this case. A _____ % fee of the award or settlement (excluding medical costs) and the costs of this action, as shown by the attached Settlement of Costs, are requested for approval.

☐ B. The subsection of R.67-1205C applicable to this claim is (C) _____. A fee of \$ _____ is requested for approval based on the following:

Date of first Impairment rating or offer of settlement: _____

Impairment Rating given and/or Settlement amount offered prior to date attorney hired: _____

Impairment Rating given and/or Settlement amount offered after date attorney hired: _____

Authorized Health Care Provider's Name: _____

☐ C. Admitted Death Claim - \$2,500.

☐ D. Admitted Lifetime Compensation Claim - \$2,500.

I certify that this form and the attached Statement of Costs are accurate.

[Signature]
Attorney for the Claimant
9/18/2007
Date

Summary	
Total Amount of Compensation	\$ 120,000.00
Attorney's Fee	\$ 20,000.00
Costs	\$ 2,446.44
Total Fees and Costs	\$ 22,446.44
Client Will Receive	\$ _____

I agree to pay my attorney the fee and costs stated. I understand the fee and costs are paid out of my compensation and I understand how much money I will receive after I pay my attorney.

Client _____

Date _____

A Statement of Costs must be attached before costs may be approved. File this form in duplicate with the Claims Department. Enclose a self-addressed, stamped envelope. For further information, refer to R.67-1203, R.67-1204, R.67-1205, R.67-1206 and Rule 1.5(a), RPC Rule 407, SCACR.

02/02/2012

Tab3 Detail Work-In-Process Report
Kedler, Conant & Connor, P.C.

Page: 1

Primary Timekeeper: S Gene M. Connell, Jr., Esquire

Secondary Timekeeper: Bruce Nadolny/Bruce Nadolny

Contact: Bruce Nadolny
Business: 902-1978
Home: 293-8649
Mobile: 902-0808

Category: 3 WORKERS' COMPENSATION
Draft Template: 00000001 Rate Code: 1
Final Template: 00000001 Date Opened: 09/25/2007
Initial Balance: 0.00

File	Total	Cal	Sta	H P	T X	B C	R G	Code	Ref #	Rate	Units	Hours Worked	Hours to Bill	Write-Up Downs Hrs	Amount	Write-Up Downs Amt	Description
2008	5 GMC	A						22	1						38.99		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
1/20/2008	5 GMC	A						22	2						17.50		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
1/12/2009	5 GMC	A						22	3						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
1/18/2008	5 GMC	A						22	4						60.00		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
1/30/2009	5 GMC	A						22	5						144.00		Stenotype Reporting Service, LLC FOR DEPOSITION
2/11/2009	5 GMC	A						22	6						42.75		FLOWERS & ASSOCIATES FOR TRANSCRIPT
1/10/2009	5 GMC	A						22	7						49.77		Healington FOR MEDICAL RECORDS
1/15/2009	5 GMC	A						22	8						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
1/30/2010	5 GMC	A						22	9						15.00		GRAND STRAND UROLOGY FOR MEDICAL RECORDS
1/30/2010	5 GMC	A						22	10						18.00		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
1/23/2011	5 GMC	A						22	11						38.08		(258.00) TRASK & HOWELL, LLC for copies
1/31/2011	5 GMC	A						22	12						167.50		(34.00) Veritext Corporate Services, Inc. for transcript
1/12/2011	5 GMC	A						22	14						164.75		(34.00) Veritext Corporate Services, Inc. FOR TRANSCRIPT
1/24/2011	5 GMC	A						22	15						1,625.00		(894.00) MARCHANT SOLUTIONS FOR MEDIATION
1/27/2012	5 GMC	A						22	17						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
															2,446.44		

1 Billable Advances

Fees:	0.00	Previous Balance:	0.00		
Expenses:	0.00	Payments/Credits:	0.00		
Advances:	2,446.44	Balance Due:	0.00	Total:	2,446.44
Total WIP:	2,446.44				
A/R:	1-30	31-60	61-90	91-120	121-180
	0.00	0.00	0.00	0.00	0.00

RECEIVED

MAY 15 2017

S. C. WORKERS' COMP. COMM.
EXECUTIVE DIRECTOR

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 0708860

RECEIVED

MAY 15 2017

S. C. WORKERS COMP COMM
EXECUTIVE DIRECTOR

Bruce W. Nadolny,

Employee/Claimant,

vs.

AVX Corporation,

Employer,

and

Liberty Mutual Insurance Co.,

Carrier,
Defendants

ORDER RELIEVING COUNSEL

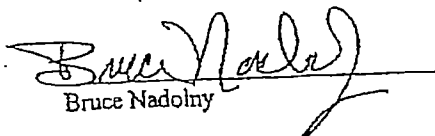
THIS MATTER COMES BEFORE THE COURT based on the Employee/Claimant's request that Gene M. Connell, Jr. be relieved as counsel. Further, Attorney Connell has advised the Court that he will file a claim for attorney's fees for the work he has done in this matter. Accordingly

IT IS ORDERED that Gene M. Connell, Jr. be relieved as counsel.

AND IT IS SO ORDERED.

11/9, 2012
_____, South Carolina.

WE CONSENT:

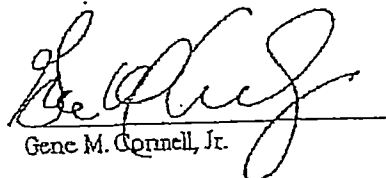

Bruce Nadolny


South Carolina Workers' Compensation Commission

CERTIFICATE OF SERVICE

This is to certify the undersigned has this date served this order in the above entitled action upon all parties to this cause by sending an electronic copy hereto by electronic mail addressed to the attorney or attorneys for said parties or by depositing a copy hereto, postage paid, in the United States mail addressed to any unrepresented party.

By Amy Bracy on November 9, 2012


Gene M. Connell, Jr.

Frankie O'Donnell

From: Bracy, Amy <abracy@wccsc.gov>
Sent: Thursday, December 13, 2012 2:09 PM
To: Frankie O'Donnell
Cc: Bost, Mary
Subject: RE: Naddiny WC 0708860
Attachments: copies re form 61.pdf.pdf

1/7/13 - per Mrs.
Gene M. Connell
The by order
w/ State Sign-off
Se WCC - a
Se only 61 f
The to total
30

I pulled the file and the documents that you attached were sent in September and are in the file. This was treated as a motion and set for a hearing in front of Commissioner Wilkerson. Gene later withdrew the motion. I think that we need another fee petition sent in, to Mary Bost, as a lien since the once in the file was treated as a motion and does not seem to have the order approving attorney's fee. Amy

From: Frankie O'Donnell [mailto:modonnell@classactlaw.net]
Sent: Friday, December 07, 2012 10:57 AM
To: Bracy, Amy
Subject: Naddiny WC 0708860

RECEIVED

MAY 15 2017

WORKERS' COMP COMM
EXECUTIVE DIRECTOR

Amy

I need help!!! We have been relieved as counsel and have received a clocked copy of that Order. However, we have sent the Form 61 Attorney Fee Petition, Motion for Attorney Fees, Affidavit of Gene M. Connell, Jr., Cost Statement and Proof of Service three (3) times and have not received a clocked copy of those documents. We sent those documents on August 29, 2012, September 11, 2012 and September 18, 2012. Also, Gene sent a follow up letter just to be certain that our lien will be protected and the letter was sent back to us stating that we needed to file a form 61. This morning I called to be sure that our form 61 had been filed and I was told that the only document they see is our Order to be Relieved as Counsel. I am attaching a copy of each letter with the form 61, etc., for your information. I have also attached a copy of our letter with the note that we need to file a form 61. I can understand one being lost in the mail but not three (3). Please advise me if our letters are maybe in Judicial and haven't been processed.

Thank you in advance for any help you can give me in this matter.

Frankie O'Donnell
Legal Assistant to Gene M. Connell, Jr.

Kelahr, Connell & Connor, PC
P. O. Drawer 14547
Sulphur Beach, S.C. 29587
(843) 238-5648 fax # (843) 238-5050

ATTORNEY-CLIENT PRIVILEGED; DO NOT FORWARD WITHOUT PERMISSION

This message is intended only for the named recipient. If you are not the intended recipient you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited.

CONFIDENTIALITY NOTE: THIS E-MAIL HAS BEEN SENT FROM A LAW FIRM. IT MAY CONTAIN PRIVILEGED AND CONFIDENTIAL INFORMATION AND IS INTENDED SOLELY FOR THE USE OF PERSONS OR PERSONS NAMED ABOVE. IF YOU ARE NOT AN INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION OR DUPLICATION OF THIS E-MAIL IS PROHIBITED AND THAT THERE SHALL BE NO WAIVER OF ANY PRIVILEGE.

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

EDWARD T. KELAHER

GENE M. CONNELL, JR.

L. SIDNEY CONNOR, IV

LISA POE DAVIS

OF COUNSEL

AREA CODE 843

238-5648

FAX 238-5050

December 28, 2012

RECEIVED

MAY 15 2017

S. C. WORKERS' COMP. COMM.
EXECUTIVE DIRECTOR

Greg Lyons
Claims Department
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

Re: Employee: Bruce Nadolny
Employer: AVX Corporation
Date of Accident: 06/30/07
WCC File Number: 0708860
Our File Number: 2007-0332C

Dear Mr. Lyons:

Enclosed please find the Attorney Fee Petition I am this date submitting in duplicate in the above captioned matter. Pursuant to my conversation with you today, I would ask that you hold this form pending settlement of this case.

With best regards, I am

Sincerely yours,


Gene M. Connell, Jr.

GMC Jrms
Enclosures

ELECTRONICALLY FILED - 2018 Jan 16 4:21 PM - HARRY COMMON PLEAS - CASE#2017CR260775

South Carolina Workers' Compensation
Commission
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
803-737-5723



WCC File #: 0708860
Carrier File #: WC550-567678
Carrier Code #:
Employer FEIN #:

RECEIVED

MAY 15 2017

Claimant's Name: Bruce W. Nadolny
Address: 613 Mainline Drive
City: Myrtle Beach State: SC Zip: 29588
Home Phone: (843) 293-8649 Work Phone: () Insurance Carrier: Liberty Mutual Insurance Co.
Employer's Name: AVX Corporation
Address: PO Box 857
City: Myrtle Beach State: SC Zip: 29578
Preparer's Name: Gene M. Connell, Jr. Law Firm: Kelaher, Connell & Connor, PC Preparer's Phone #: (843) 238-5648

Date Attorney Was Hired: 07/31/07

Date of Injury: 06/30/07

Compensation Rate:

Does this conclude the case? ☐ Yes ☒ No

PLEASE CHECK AND COMPLETE ONLY ONE (A, B, C or D)

☐ A. R-67-1205C does not apply to the facts of this case. A % fee of the award or settlement (excluding medical costs) and the costs of this action, as shown by the attached Settlement of Costs, are requested for approval.

☐ B. The subsection of R-67-1205C applicable to this claim is (C) () A fee of \$ is requested for approval based on the following:

Date of first Impairment rating or offer of settlement:

Impairment Rating given and/or Settlement amount offered prior to date attorney hired:

Impairment Rating given and/or Settlement amount offered after date attorney hired:

Authorized Health Care Provider's Name:

☐ C. Admitted Death Claim - \$2,500.

☐ D. Admitted Lifetime Compensation Claim - \$2,500.

I certify that this form and the attached Statement of Costs are accurate.

Attorney for the Claimant

Date

Summary

Total Amount of Compensation	\$ 120,000.00
Attorney's Fee	\$ 20,000.00
Costs	\$ 2,446.44
Total Fees and Costs	\$ 22,446.44
Client Will Receive	\$

I agree to pay my attorney the fee and costs stated. I understand the fee and costs are paid out of my compensation and I understand how much money I will receive after I pay my attorney.

Client

Date

A Statement of Costs must be attached before costs may be approved. File this form in duplicate with the Claims Department. Enclose a self-addressed stamped envelope. For further information, refer to R-67-1203, R-67-1204, R-67-1205, R-67-1206 and Rule 1-5(a), RPC Rule 407, SCACR.

Contact Bruce Nardolone
Business: 902-1978
Home: 253-8649
Mobile: 902-0808

Fees	0.00						
Expenses	0.00						
Advances	2,448.44						
Total WIP	2,448.44						
Previous Balance	0.00						
Payments/Credits	0.00						
Balance Due	0.00						
Total	2,448.44						
ATC	0-30	31-60	61-90	91-120	121-180	181-240	241-300
	0.00	0.00	0.00	0.00	0.00	0.00	0.00

RECEIVED

MAY 15 2017
S. G. WORKERS' COMP. COMM.
EXECUTIVE DIRECTOR

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-26-07775

Kelaher, Connell & Connor, P.C.,

Plaintiff,

vs.

South Carolina Workers' Compensation
Commission,

Defendant.

PLAINTIFF'S RESPONSE TO
DEFENDANT'S MOTION TO DISMISS

I. BACKGROUND FACTS

This is an action filed pursuant to the South Carolina Tort Claims Act (S.C. Code § 15-78-10, et seq.). The Plaintiff, Kelaher, Connell & Connor, P.C., and its lawyers represented Bruce W. Nadolny in a worker's compensation claim (WCC File No. 0708860). Plaintiff's counsel represented Bruce W. Nadolny after he was seriously injured in an accident which crushed parts of his body on July 31, 2007. The representation lasted over five years and included depositions, at least three court hearings and a mediation before former South Carolina Workers' Compensation Commissioner, Thomas Marchant. At that mediation, the Plaintiff and Defendant AVX Corporation and its insurer, Liberty Mutual Insurance Company, agreed to settle the case for \$120,000.00. Thereafter, Nadolny changed his mind and refused to consummate the settlement. Plaintiff was discharged as counsel by Order dated November 9, 2012 signed by Workers' Compensation Commissioner Beck. The Order provided "Attorney Connell has advised the Court that he will file a claim for attorney's fees for the work he has done in this matter."

The facts of the case can best be described as follows:

- Plaintiff filed a South Carolina approved Form 61 Fee Petition for the first time on August 29, 2012.

- Plaintiff contacted the South Carolina Workers' Compensation Commission and was told that the Commission had not received the petition.
- Plaintiff resent the Fee Petition on September 11, 2012.
- Plaintiff thereafter contacted the South Carolina Workers' Compensation Commission and was again told the fee petition had not been received; and Plaintiff, for a third time, resent the Fee Petition on September 18, 2012.
- Plaintiff sent a letter on November 9, 2012 to the South Carolina Workers' Compensation Commission advising the Commission the Plaintiff was making a claim for attorney's fees. On that same letter, a handwritten note was returned to counsel which stated: "Gene, you will need to file a Form 61 with order & cost sheet & we will hold. Thanks G. Lyons."
- On December 13, 2012 Plaintiff's assistant received an email from Amy Bracy of the South Carolina Workers' Compensation Commission indicating that "the documents that you attached were sent in September and are in the file." Bracy advised "we need another fee petition sent in, to Mary Bost, as a lien since the one in the file was treated as a motion and does not seem to have the order approving attorney's fees."
- Plaintiff thereafter on December 28, 2012 sent the fee petition for a fourth time asking for attorney's fees of \$20,000.00 and costs of \$2,446.44. Plaintiff was told by Greg Lyons that the Form 61 required by the South Carolina Workers' Compensation would be held and a lien would attach to the file.

Plaintiff's counsel heard nothing else about the case until Plaintiff contacted the South Carolina Workers' Compensation and was informed that a hearing had been held and a settlement approved by the South Carolina Workers' Compensation Commission on November

3, 2016. The Insurer then disbursed all the money to Bruce W. Nadolny's widow and Plaintiff was not notified by the staff of the Workers' Compensation Commission of a hearing nor was its lien protected.

Plaintiff filed a notice of verified claim for damages on May 9, 2017 which was denied by the South Carolina Workers' Compensation Commission. The instant lawsuit was filed thereafter.

Plaintiff asserts and alleges that employees of the South Carolina Workers' Compensation Commission were negligent in failing to protect Plaintiff's lien and in failing to notify Plaintiff of the hearing so that Plaintiff could assert a claim for attorney's fees. Interestingly, after Plaintiff's lawsuit was filed, the same Workers' Compensation Commissioner who approved the settlement approved the attorney's fees in an Order. However, Plaintiff cannot collect any attorney's fees since the monies were disbursed by the insurance carrier to the widow and she has left the state. Defendant has filed a motion to dismiss which is now before the court.

II. STANDARD OF REVIEW

It is well settled in South Carolina that the circuit court in evaluating a motion to dismiss for failure to state facts sufficient to constitute a cause of action must view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff. If the facts and inferences would entitle the plaintiff to relief on any theory, then a dismissal for failure to state a claim is improper. *Benedict College v. National Credit Systems, Inc.*, 400 S.C. 538, 735 S.E.2d 518 (S.C. App. 2012).

Further, novel issues should never be dismissed under SCRCP 12(b)(6). Plaintiff asserts that SCRCP 12(b)(6) is inappropriate for this case and that the court should deny the motion.

III. APPLICABLE LAW

This is a simple negligence case brought against the South Carolina Workers' Compensation Commission for failure to notify the Plaintiff of a hearing on a settlement. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (Due process requires an opportunity to be heard.) Thus, South Carolina Code § 15-78-10, also known as the South Carolina Tort Claims Act, was enacted on June 3, 1986 with the General Assembly declaring "it to be the public policy of the State of South Carolina that the State and its political subdivisions, are only liable for torts within the limitations of the Act and in accordance with the principals established therein." See S.C. Code Ann. § 15-78-20(a) (Supp. 1991).

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. 90, 406 S.E.2d 340 (1991) (notice and opportunity to be heard is required before an administrative agency makes a final decision). See, also, *South Carolina Ambulatory Surgery Center v. South Carolina Workers' Compensation Commission*, 289 S.C. 386, 699 S.E.2d 143 (2010); and *Ross v. MUSC*, 328 S.C. 51, 492 S.E.2d 62 (1997) (S.C. Code § 1-23-320 requires a notice and opportunity to be heard). See, also, *Fuentes v. Shevin*, 407 U.S. 67 (1972); (Sheriff seized Fuentes stove after she didn't pay. Court ruled due process requires an opportunity and notice to be heard); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (Georgia garnishment procedure struck down since no notice was given to debtor.)

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 that such failure of the staff is a negligent act which implicates the South Carolina Tort Claims Act.¹ Thus, this is not a dispute under the Workers' Compensation Act by an employee, but a dispute because of a negligent act of an employee of the South Carolina Workers' Compensation Commission. South Carolina Workers' Compensation Regulation 67-607 requires a hearing notice be provided to each party and each party be afforded at least thirty days' notice of a hearing. South Carolina Regulation 67-1203(3) provides that an attorney's fee will be considered upon the final resolution of the claim and South Carolina Regulation 67-1204(f) provides that the Commission upon receiving a Form 61 and an order shall immediately schedule a hearing to consider the fee agreement of counsel.

Finally, no attorney's fee may be allowed by the South Carolina Workers' Compensation Commission unless first approved. See South Carolina Regulation 67-1204(a) (an attorney shall report and obtain approval of any fee for services rendered in a worker's compensation claim).

It should also be noted that Defendant in this case argues that exceptions apply under the South Carolina Tort Claims Act pursuant to S.C. Code § 15-78-60(2) which provides that a governmental entity was not liable for an administrative action or inaction of a legislative judicial or quasi-judicial nature.² Plaintiff asserts that based on the attached affidavit of Virginia Crocker and the case law that this issue this section is not applicable. See *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 743 S.E.2d 109 (S.C. App. 2002) (denying a new trial after verdict regarding licensing decision by the City of Orangeburg concerning the tearing down of a house. The court held S.C. Code § 15-78-60(2) is not a bar to recovery for administrative action.)

¹ In essence, a mistake was made by employees of the Commission.

² This is a simple negligence act by failing to give Plaintiff notice.

In this case, Plaintiff asserts a simple error caused this loss to the Plaintiff. Specifically, the failure to notify Plaintiff of the hearing resulted in a loss of Plaintiff's ability to collect lawfully earned attorney's fees and costs. Plaintiff points to the Affidavit of Virginia Crocker attached hereto as an additional example why this matter is covered under the South Carolina Tort Claims Act and accordingly, the motion to dismiss should be denied.

KELAHHER, CONNELL & CONNOR, P.C.

s/Gene M. Connell, Jr.

Gene M. Connell, Jr. (S.C. Bar No. 1358)

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Attorney for Plaintiff

February 27, 2018

Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-26-07775

Kelaher, Connell & Connor, P.C.,

Plaintiff,

vs.

South Carolina Workers' Compensation
Commission,

Defendant.

NOTICE OF MOTION AND MOTION
FOR RECONSIDERATION

TO: DOUGLAS CHARLES BAXTER, ATTORNEY FOR DEFENDANT:

YOU WILL PLEASE TAKE NOTICE, the Plaintiff will, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, move this Court for an Order reconsidering the Order of the Honorable Benjamin H. Culbertson dated and filed April 9, 2018 granting the Defendant's Motion to Dismiss pursuant to SCRCP 59(e) based on the following issues:

1. The Court ruled that it does not have jurisdiction over this matter. The error being that the Worker's Compensation Commission cannot decide claims against itself.
2. The Court failed to consider the Defendant's motion based on SCRCP 12(b)(6) which requires that all inferences be construed in favor of the Plaintiff.
3. The Court ruled that the Defendant is immune from suit under S.C. Code § 15-78-60(2). The error being that the Court cannot make such a ruling without evidence and under a SCRCP 12(b)(6) motion.
4. The Court failed to rule on Plaintiff's argument that notice is required to the Plaintiff under the United States Constitution and the Administrative Procedures Act before its claim can be heard and denied.

5. The Court failed to consider that statutory notice is required by the South Carolina Workers' Compensation Commission to the Plaintiff similar to what is required by a hearing officer to decide a case.

6. The Court failed to hold that the acts of the Defendant in failing to give notice were ministerial and negligent acts and thus covered under the South Carolina Tort Claims Act.

7. The Court failed to rule under S.C. Code § 1-23-320 that all parties must be afforded an opportunity for a hearing of not less than thirty days and that the failure to provide such hearing was negligent as a matter of law.

8. The Court failed to rule that S.C. Code § 15-78-60(2) is not applicable to a clerical mistake.

9. The Court failed to hold that the Plaintiff was entitled to notice of a hearing in the *Nadolny* worker's compensation case to assert its right to attorney fees.

10. The Court failed to hold that the Workers' Compensation Commission was required to give notice to the Plaintiff of a hearing on its property rights (i.e., attorney's fees) and that such does not impact the Eleventh Amendment.

11. The Court failed to hold that a lien attached to the *Nadolny* worker's compensation case and that the Plaintiff had given proper notice on four separate occasions to the Commission.

12. The Court failed to hold that the Defendant's own rules and regulations required it give notice to all interested parties prior to approving a settlement and that the failure to do so violates the South Carolina and United States Constitutions.

WHEREFORE, Plaintiff requests the Court reconsider its Order Granting Defendant's Motion to Dismiss and for such other and further relief as the Court may deem just, necessary and proper.

KELAHHER, CONNELL & CONNOR, P.C.

s/Gene M. Connell, Jr.

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Attorney for Plaintiff

April 16, 2018

Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	C/A No. 2017-CP-26-07775
Kelaher, Connell & Connor, P.C.,	)	
	)	
	)	
	)	
Plaintiff,	)	DEFENDANT'S RESPONSE IN
	)	OPPOSITION TO PLAINTIFF'S
vs.	)	MOTION FOR RECONSIDERATION
	)	
South Carolina Workers' Compensation	)	
Commission,	)	
	)	
Defendants.	)	

Defendant, South Carolina Workers' Compensation Commission, previously moved for an Order granting its Motion to Dismiss pursuant to Rule 12 of the *South Carolina Rules of Civil Procedure*. Said Motion was argued before the Honorable Benjamin H. Culbertson on March 1, 2018. On April 9, 2018, Judge Culbertson signed an Order granting the Motion and dismissing the action with prejudice. Subsequently, on April 16, 2018, Plaintiff filed a Motion for Reconsideration pursuant to Rule 59(e) of the *South Carolina Rules of Civil Procedure* based on the Court failing to consider and rule on certain issues. Defendant submits this Response in Opposition to Plaintiff's Motion for Reconsideration.

Pursuant to *South Carolina Rule of Civil Procedure* 59(e), "a motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Motions made pursuant to Rule 59 are within the discretion of the Circuit Court: Brinkley v. S.C. Dep't of Corr., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to

reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In its ruling and Order granting Defendant’s Motion to Dismiss, the Court fully considered and ruled on all issues Plaintiff raised in its Motion for Reconsideration.

As previously argued by counsel for the Defendant, and as stated in the Order, this Court does not have jurisdiction over this action. All attorney’s fees resulting from claims within the South Carolina Workers’ Compensation Act are subject to the approval of the Commission as it has original jurisdiction over such claims. S.C. Code Ann. § 42-15-90. Therefore, any disputes that Plaintiff has with the payment of attorney’s fees are within the jurisdiction and approval of the Commission; not the Circuit Court.

Furthermore, even if this Court did have jurisdiction, the Defendant is immune based on the South Carolina Tort Claims Act (§15-78-10, *et. seq.*) because the Defendant, the South Carolina Workers’ Compensation Commission, is a governmental entity, and therefore, any claims that Plaintiff has against the Commission are subject to the South Carolina Tort Claims Act. As stated in S.C. Code Ann. §15-78-60, a governmental entity is not liable for any loss resulting from an administrative action or inactive of a legislative, judicial, or quasi-judicial nature. Here, the Commission, as set forth by the General Assembly, is a judicial and administrative department of the State (S.C. Code Ann. §42-3-10) and the allegations of negligence in the Complaint all involve administrative actions and/or inactions. As such, the Commission cannot be held liable for any alleged losses as set out in the Complaint.

Because the Court previously considered and ruled on all issues raised by Plaintiff, Defendant respectfully requests that the Court deny Plaintiff’s Motion for Reconsideration.

Respectfully submitted,

RICHARDSON, PLOWDEN & ROBINSON, P.A.

s/ Chelsea Lane Monroe

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Attorneys for Defendant, South Carolina
Workers' Compensation Commission

May 2, 2018

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-26-07775

Kelaher, Connell & Connor, P.C.,)
)
Plaintiff,)
)
vs.)
)
South Carolina Workers' Compensation)
Commission,)
)
Defendant.)

PLAINTIFF'S BRIEF ON
RECONSIDERATION OF THE
ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS

I. BACKGROUND

The Plaintiff is a corporation organized and existing pursuant to the laws of the State of South Carolina and doing business as a law firm in South Carolina. The Defendant is a governmental entity which is part of the State of South Carolina and which entity is charged with handling and resolving workers' compensation claims in South Carolina.

On or about July 31, 2007, Plaintiff was retained by Bruce Nadolny to represent him for a worker's compensation claim against AVX Corporation and Liberty Mutual Insurance Company with WCC File No. 0708860. Thereafter, Kelaher, Connell & Connor, P.C., through Gene M. Connell, Jr., represented Bruce Nadolny through numerous hearings before the South Carolina Workers' Compensation Commission and attended depositions and the file contains almost 3,000 pages of medical records. A mediation was held before former Workers' Compensation Commissioner, Tom Marchant, in which the Claimant agreed to accept \$120,000.00 plus a Medicare Set Aside Trust. The Claimant the next day advised Kelaher, Connell & Connor he no longer needed my assistance and fired the Plaintiff. Kelaher, Connell & Connor advised Nadolny it had expended countless hours handling this claim including going to hearings and expending \$2,446.44 for a mediation.

Kelaher, Connell & Connor, P.C. was relieved as counsel on November 9, 2012, but pursuant to the Order relieving counsel, Attorney Connell advised the Court that Kelaher, Connell & Connor would file a claim for attorney's fees for the work that he has done in this matter. Kelaher, Connell & Connor, P.C. had previously filed a Form 61 Fee Petition on August 29, 2012, whereupon the Commission advised Attorney Connell that they had not received it. Kelaher, Connell & Connor, P.C. then refiled the Fee Petition on September 11, 2012, whereupon the Commission advised attorney Connell they still had not received it. Kelaher, Connell & Connor, P.C. filed the Fee Petition for the third time on September 18, 2012. Thereafter Attorney Connell wrote a letter on November 9, 2012 advising that he was requesting a lien be placed on the file and requesting that Kelaher, Connell & Connor, P.C. be notified. An employee of the Commission, Greg Lyons, wrote back a note which stated: "You will need to file a Form 61 with Order & cost sheet & we will hold." Thereafter Attorney Connell received an email from Amy Bracy of the Workers' Compensation Commission on December 13, 2012, indicating Kelaher, Connell & Connor needed to file yet another Fee Petition and it would act as a lien on the file. On December 28, 2012, Kelaher, Connell & Connor, for the fourth time filed a Fee Petition asking for attorney's fees of \$20,000.00 and costs of \$2,446.44.

The Claimant, Bruce Nadolny, died in 2016 and the South Carolina Workers' Compensation Commission approved a settlement to his widow on November 3, 2016, without notifying Kelaher, Connell & Connor, P.C.¹ South Carolina Workers' Compensation Commission, through its officers, agents and/or employees, was negligent, reckless and willful in one or more of the following particulars:

- a. In failing to notify Plaintiff of a hearing;
- b. In failing to recognize and protect Plaintiff's lien;

¹ Since this litigation was commenced Plaintiff received an Order of the Commission approving its attorney's fees; however, the settlement has been paid to Nadolny's widow and she has left the state.

- c. In mishandling documents including a Fee Petition which was in fact forwarded to the Commission on four occasions;
- d. In failing to follow generally accepted practices in notifying Plaintiff after he had been relieved;
- e. In failing to send written notice to the Plaintiff;
- f. In failing to handle notice to the Plaintiff of a potential hearing in a businesslike manner;
- g. In failing to abide by its employees' emails and notes which indicated that if Plaintiff filed a Form 61 with an Order and cost sheet they would hold until the end of the case.

That as a direct and proximate result, Plaintiff suffered damages in that Plaintiff's fees were \$20,000.00 and costs of \$2446.44.

The Plaintiff brought this cause of action against the Defendant for negligence, which was filed on November 29, 2017, and requested judgment against the Defendant for actual damages in the sum of \$22,446.44. On January 16, 2018, Defendant filed a motion to dismiss pursuant to Rule 12 of the *South Carolina Rules of Civil Procedure*, supplemented by a memorandum in support of its motion to dismiss. Thereafter, on February 27, 2018, plaintiff filed his response to Defendant's motion to dismiss. On April 9, 2018, The Court of Common Pleas, Fifteenth Judicial Circuit submitted an Order granting Defendants motion to dismiss. Following the Court's grant of Defendant's motion to dismiss Plaintiff timely filed its Notice of Motion and Motion for Reconsideration on April 16, 2018.

II. ISSUE

1. Does Defendant, South Carolina Workers' Compensation Commission, have proper jurisdiction to decide a case against itself?
2. Is the Commission liable for failing to notify the Plaintiff of the hearing?

III. DISCUSSION

The Defendant, Workers' Compensation Commission (Commission), contends that they are immune from liability under the South Carolina Tort Claims Act for the negligent acts of their employee, and that the circuit court does not have subject matter jurisdiction over the current claim of negligence in (1) failing to protect Plaintiff's lien and (2) failing to notify Plaintiff of the hearing so that Plaintiff could defend his interest regarding attorney's fees.

A. Opportunity to be Heard

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. The fundamental requirements of due process include notice and an opportunity to be heard in a meaningful way. Tant v. S.C. Dep't of Corr., 408 S.C. 334, 340, 759 S.E.2d 398, 401 (2014). Determining whether a person has been denied due process requires that the individual be denied an interest that can be defined as liberty or property under the Due Process Clause. Id. A person's property interests' extend well beyond actual ownership of real estate, chattels, or money. Bd. of Regents v. Roth, 408 U.S. 564, 571-572, 92 S. Ct. 2701 (1972). Furthermore, pursuant to S.C. Code Regs. 67-1204(F), "[i]f the Form 61 and Order do not comply with R.67-1205, the Commissioner reviewing the Form 61 and Order shall immediately schedule a hearing to consider argument of counsel and testimony, if any."

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.²

B. Subject Matter Jurisdiction

The Commission claims that it has original jurisdiction over this matter pursuant to Section 42-3-108 of the Code of Laws of South Carolina, which provides that all questions arising under this title, if not settled by agreement of the parties interested therein with the approval of the Commission, shall be determined by the Commission, except as otherwise provided in this title. S.C. Code Ann. 42-3-180. The dispute in question here is not one arising under the Workers' Compensation Act, but rather arises under the common law of South Carolina. Laboureur v. Harleysville Mut. Ins. Co., 302 S.C. 540, 542, 397 S.E.2d 526 (1990). Additionally, the Commission does not have the power to adjudicate this dispute in a meaningful way. Id. at 543. The Commission cannot award damages to Plaintiff if Plaintiff is successful in demonstrating that the Defendants were negligent in their failure to notify and protect Plaintiff's lien. Id.

Here, this is a simple negligence case brought against the Commission for failure to notify the Plaintiff of the hearing and protect Plaintiff's lien. "[O]nly disputes ancillary to an employee's right to compensation arise under the Act." Price v. Peachtree, 396 S.C. 403, 409, 721 S.E.2d 461 (2011). "Claims not affecting the employee's rights to compensation are within the purview of the circuit court, not the Commission." Id. In Laboureur, the court found that "when the employee's rights are not involved, an employer/insured must present all such issues to the circuit court." Id. at 529. The question at issue – negligence in notifying the Plaintiff of the hearing and failure to protect his lien – does not affect Mr. Nadolny's right to compensation. This is not a dispute of payment, but rather concerns the negligence of an employee of the

² Also, motions to dismiss are disfavored and the Court does not consider the Affidavit of Virginia Crocker submitted by the Plaintiff (attached).

Commission in failing to notify the Plaintiff of the hearing. The Commission does not have jurisdiction over tort claims committed by its employees. Thus, the Commission should not have subject matter jurisdiction over this claim and the court should find that the circuit court has proper jurisdiction to hear this claim and this court erred in so ruling in this case. (See page 3 of this Court's Order dismissing this case).

C. South Carolina Tort Claims Act – Government Entity

The Commission argues that because it is a government entity, and therefore subject to the South Carolina Tort Claims Act, it is not liable for any loss resulting from administrative action or inaction of a legislative, judicial, or quasi-judicial nature. *S.C. Code Ann. §15-78-60(2)*. Although it is limited, “[t]he Tort Claims Act waives sovereign immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties.” *Proctor v. Dep’t of Health & Envtl. Control*, 368 S.C. 279, 291, 628 S.E.2d 496 (Ct. App. 2006). South Carolina Code Ann. Section 15-78-60(1)(2) provides: a “government entity is not liable for a loss resulting from (1) legislative, judicial, or quasi-judicial action or inaction” or (2) “administrative action or inaction of a legislative, judicial, or quasi-judicial nature.” The Court in *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004), addressed Section 15-78-60(1)(2) and instructed that:

The determination of immunity from tort liability turns on the question of whether the acts in question were discretionary rather than ministerial. A finding of immunity under the Act “is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards.

Wooten ex rel. Wooten v. South Carolina Dep’t of Transp., 333 S.C. 464, 468 511 S.E.2d 355, 357 (1999).

In the case *sub judice*, the Commission did not have a discretionary decision as whether to notify Plaintiff of the hearing held on November 3, 2016. Per the South Carolina Workers’ Compensation Commission regulations, the Commission is required to notify all interested

parties. Therefore, this was a ministerial act rather than a discretionary act and the Commission should not be found to be immune from tort liability. Thus, the Court erred in holding the Commission was immune from suit.

South Carolina also recognizes three exceptions to judicial or quasi-judicial immunity at common law. *Proctor*, 368 S.C. 279, 300 (2006). Judicial immunity is not appropriate for judges and other officials if: “(1) they did not have jurisdiction to act; (2) the act did not serve a judicial function; or (3) the suit is for prospective, injunctive relief only.” *Id.* The second exception, which focuses on the importance of the act itself, rather than the actor, is applicable here. *Id.* Under this exception, even judges are not protected by judicial immunity when they act in an administrative capacity. *Id.* To determine if an act is judicial, the court must look to the nature and function of the act itself. *Id.*

Here, the acts or the failure to act, by officers, agents, and/or employees of the Commission (giving proper notice and failing to protect Plaintiff’s lien) was a ministerial and negligent act rather than a judicial act. A “duty is ‘ministerial’ when it is absolute, certain, and imperative, involving merely execution of a specific duty arising from fixed and designated facts.” *Id.* at 308 citing *Jensen v. Anderson County Dep’t of Soc. Servs.*, 304 S.C. 195, 403 S.E.2d 615 (1991). Chapter 67 of South Carolina Workers’ Compensation Regulation 67-210 directs who the Commission shall serve and Regulation 67-213 directs how the Commission shall serve hearing notices. The regulations set forth above establish that there was no judicial nature involved in the act itself, but rather it was a ministerial act, which was “absolute, certain, and imperative,” and involved the execution of a specific duty set forth by Chapter 67 of the South Carolina Workers’ Compensation Commission. Thus, the Court erred in finding the Commission was immune from suit in this case.

D. S.C. Code Ann. § 15-78-60 Exceptions

Additionally, “section 15-78-60(20) provides that a governmental entity is not liable for a loss resulting from the act or omission of a person other than an employee.” *Greenville Memorial Auditorium v. Martin*, 301 S.C. 242, 246, 391 S.E.2d 546 (1990). In *Greenville Memorial Auditorium*, 301 S.C. 242, the plaintiff alleged that defendant, a government entity, was negligent in securing the premises during a concert and created an unreasonable risk of harm that proximately caused the plaintiff’s injury. *Id.* The court held that Section 15-78-60(20) would not preclude the government entity of liability for its own conduct. *Id.* at 247. Similarly, in the present case, Plaintiff alleges that the Commission, through one of its employees, was negligent in failing to notify Plaintiff of the hearing, which caused the Plaintiff injury in the amount of \$22,446.44. The Commission should not be precluded from liability for its own conduct/negligence, which proximately caused injury to the Plaintiff.

Furthermore, S.C. Code Ann. section 15-78-60(12) states that a governmental entity is not liable for a loss resulting from certain events including “licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner.” (emphasis added). A potential injured third-party may seek relief under this exception. *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 317, 743 S.E.2d 109 (2013). Gross negligence is defined as “the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.” *Id.* citing *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275 (2000). “Gross negligence has also been defined as a relative term, and means the absence of care that is necessary under the circumstances.” *Id.*

Here, the Court asserts that the Commission is immune under section 15-78-60(2). Although the exception relied on by the Court does not expressly contain a gross negligence standard, the court in Chakrabarti held that when the exception of gross negligence applies to a case, the gross negligence standard is read into any other applicable exceptions. Id. at 319. Therefore, this Court should have held section 15-78-60(12) is applicable to the current case, which would extend the gross negligence standard to the additional exceptions relied on by the Commission. Id.

The intentional conscious failure of the Commission is evidenced by its failure to properly document the fee petition on four separate occasions, protect the Plaintiff's lien, failure to notify Plaintiff of the hearing, as well as the affidavit of Virginia Crocker, who was a South Carolina Workers' Compensation Commissioner for eight years and the Judicial Director at the Commission for an additional eight years. This repeated failure to properly secure the lien coupled with the affidavit of a former Workers' Compensation Commission Employee demonstrates the intentional conscious failure to do something which it is incumbent upon a government entity. Thus, the Court erred in dismissing this case.

IV. CONCLUSION

This is a negligence case brought against the South Carolina Workers' Compensation Commission for their failure to notify Plaintiff of the hearing and failure to protect Plaintiff's lien. The circuit court has proper jurisdiction to hear this claim and the Commission is not immune from liability under the South Carolina Tort Claims Act. Accordingly, Plaintiff requests the Court vacate its prior ruling and set this case for trial.

KELAHHER, CONNELL & CONNOR, P.C.

s/Gene M. Connell, Jr.

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Attorney for Plaintiff

June 7, 2018
Surfside Beach, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Kelaher, Connell & Connor, P.C.,

Plaintiff,

vs.

South Carolina Workers' Compensation
Commission,

Defendant.

) IN THE COURT OF COMMON PLEAS
) FIFTEENTH JUDICIAL CIRCUIT
) C/A No. 2017-CP-26-07775

**DEFENDANT'S REPLY BRIEF
IN OPPOSITION TO PLAINTIFF'S
BRIEF ON RECONSIDERATION
OF THE ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS**

Defendant, South Carolina Workers' Compensation Commission, hereby submits this Reply Brief in Opposition to Plaintiff's Brief on Reconsideration of the Order Granting Defendant's Motion to Dismiss.

FACTS/PROCEDURAL BACKGROUND

On November 29, 2017, Plaintiff filed a Summons and Complaint in this Court, alleging negligence against the Defendant, South Carolina Workers' Compensation Commission for failure to protect Plaintiff's lien. In response, Defendant filed a Motion to Dismiss, requesting that this action be dismissed on the grounds that the Circuit Court does not have jurisdiction to hear this matter, and additionally, the South Carolina Tort Claims Act (§15-78-10, *et. seq.*) provides immunity to the Commission for such claims. Defendant submitted a Memorandum in Support of its Motion. [Exhibit A: Defendant's Motion to Dismiss and Supporting Memorandum] On February 27, 2017, Plaintiff filed a Response Memorandum. [Exhibit B: Plaintiff's Response to Defendant's Motion to Dismiss]

The motion was heard by the Honorable Benjamin H. Culbertson on March 1, 2018, and after listening to oral arguments, reviewing the memorandums, exhibits, and considering the law, on April 9, 2018, Judge Culbertson signed an Order granting Defendant's Motion to Dismiss. [Exhibit C: Order Granting Defendant's Motion to Dismiss] Plaintiff filed a Motion for Reconsideration asking this Court to reconsider its ruling pursuant to Rule 59(e) of the *South Carolina Rules of Civil Procedure*. [Exhibit D: Plaintiff's Notice of Motion and Motion for Reconsideration] Defendant responded and submitted a Response in Opposition on May 2, 2018, arguing that the Court fully considered and ruled on all issues Plaintiff raised in its Motion for Reconsideration. [Exhibit E: Defendant's Response in Opposition to Plaintiff's Motion for Reconsideration]

Pursuant to Judge Culbertson's request, on June 8, 2018, Plaintiff filed a Brief on Reconsideration of the Order Granting Defendant's Motion to Dismiss, alleging the same arguments in his previous memorandums that this Court has already ruled on. [Exhibit F: Plaintiff's Brief on Reconsideration of the Order Granting Defendant's Motion to Dismiss] Defendant submits this Response in Opposition and herein incorporates all arguments made in its previous filings as attached hereto.

LEGAL STANDARD

Pursuant to *South Carolina Rule of Civil Procedure* 59(e), "a motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order." Motions made pursuant to Rule 59 are within the discretion of the Circuit Court. Brinkley v. S.C. Dep't of Corr., 386 S.C. 182, 185, 687 S.E.2d 54, 56 (Ct. App. 2009). "A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to

reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.” Elam v. S.C. Dep’t of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004); see also Southeastern Housing Foundation v. Smith, 380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008).

A motion to alter or amend a judgment may be granted; “(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice.” Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir.1993). Mere disagreement with how the law is applied does not support a Rule 59(e) motion. McCall v. Williams, 59 F. Supp. 2d 556, 558 (D.S.C. 1999). Although “a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented,” Elam v. S.C. DOT, 361 S.C. 9, 21, 602 S.E.2d 772 (2004), a Rule 59(e) motion should not be used merely to repeat verbatim arguments previously raised and rejected by the Court. See Quality Trailer Prods. v. CSL Equip. Co., 349 S.C. 216, 221 (S.C. 2002) (ruling that a Rule 59(e) motion which merely recited arguments previously raised and previously ruled upon by the trial court was not appropriate).

Here, Plaintiff’s motion fails to identify a change in law, account for new evidence, or correct a clear error of law. Instead, Plaintiff recites nearly verbatim the same arguments presented in its previous written memorandums and oral arguments. Defendant has already addressed all issues raised by the Plaintiff in its written memorandums or oral arguments. Furthermore, the Court has already fully considered and ruled on all of the issues that the Plaintiff submits before the Court. Plaintiff merely attempts to rehash its same arguments and attempts to re-litigate issues because the Court has ruled in favor of the Defendant. Therefore,

because the Court previously considered and ruled on all of the issues raised by Plaintiff, Defendant respectfully requests that the Court deny Plaintiff's Motion for Reconsideration.

Respectfully submitted,

RICHARDSON, PLOWDEN & ROBINSON, P.A.

s/ Chelsea Lane Monroe

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Attorneys for Defendant, South Carolina
Workers' Compensation Commission

June 21, 2018

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
C/A NO. 2017-CP-26-07775

Kelaher, Connell & Connor, P.C.,)
))
Plaintiff,)
))
vs.)
))
South Carolina Workers' Compensation)
Commission,)
))
Defendant.)

AFFIDAVIT OF
VIRGINIA CROCKER

PERSONALLY APPEARED BEFORE ME, Virginia Crocker, who first being duly sworn, deposes and states as follows:

1. My name is Virginia Crocker and I currently reside in Columbia, South Carolina.
2. I was a South Carolina Workers' Compensation Commissioner for eight years from the period 1984 to 1992. Thereafter, I served as Judicial Director at the South Carolina Workers' Compensation Commission for another eight years. I am currently a retired State employee.
3. I have been asked to review the claim of Kelaher, Connell & Connor, P.C. for attorney's fees which is currently pending against the South Carolina Workers' Compensation Commission.
4. I have reviewed a letter submitted to me by Kelaher, Connell & Connor, P.C. along with documents concerning an attorney's fee petition filed by them in the case of *Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Co.* (WCC File No. 0708860). The May 9, 2017 letter details that Kelaher, Connell & Connor, P.C. filed the same fee petition with the South Carolina Workers' Compensation Commission on four separate occasions.

5. 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 hearing notices. (See 67-213(B). The Commission serves hearing notices and Form 31, Review Hearing Notices, electronically or by deposit in the United States Postal Service first class postage, addressed to the parties according to R. 67-210. Service is deemed complete upon mailing.)

6. It is also worth noting that all attorneys' fees in workers compensation claims must be approved by the Commission. See Regulation 67-1202, 67-1203, 67-1204 and 67-1205.

7. It is my understanding that Bruce Nadolny died and that his widow was claiming benefits. A hearing was set in 2016, but Kelaher, Connell & Connor, P.C. was not notified of the hearing despite the fact that the South Carolina Workers' Compensation Commission was aware of the lien on the proceeds.

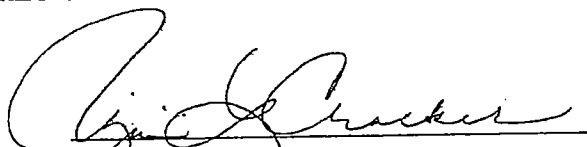
8. An Administrative Assistant of the South Carolina Workers' Compensation Commission made an error in failing to provide Kelaher, Connell & Connor with notice of the settlement hearing between Bruce Nadolny and the AVX Corporation. The Administrative Assistant is required by the South Carolina Workers'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

8. It is my opinion that this was really a mistake to attention to detail by a Commission employee.

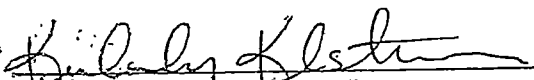
9. The South Carolina Workers' Compensation Commission has original jurisdiction of workers' compensation claims in this state. The South Carolina Workers' Compensation Commission and its Commissioners do not have jurisdiction over torts claims committed by its

employees or staff. The question of whether an employee was negligent in failing to send a notice to the Plaintiff is not the type of dispute that the South Carolina Workers' Compensation Commission or any Commissioner would ever hear. In my years on the Commission and as the Judicial Director, I am not aware of any case in which the South Carolina Workers' Compensation Commission has heard a claim such as this case. The sole issue here is the notification by mail by an employee to the Plaintiff of a hearing to approve benefits in a case in which Plaintiff had performed extensive work.

FURTHER AFFIANT SAYETH NOT.


Virginia Crocker

SWORN AND SUBSCRIBED before me,
this 27 day of February, 2018.


Notary Public for South Carolina
My Commission Expires: 11-13-25

1
2 State of South Carolina) Court of Common Pleas
3 County of Horry) 2017-CP-26-07775
4
5 Kelaher, Connell &)
6 Connor, PC) Transcript of Record
7 vs.)
8 South Carolina Workers')
9 Compensation Commission)
10
11 March 1st, 2018
12 Conway, South Carolina
13 BEFORE:
14 Honorable Benjamin H. Culbertson, Judge.
15
16 APPEARANCES:
17 Gene M. Connell, Esq.
18 Attorney for the Plaintiff
19
20 Douglas C. Baxter, Esq.
21 J. Keith Roberts, Esq.
22 Attorneys for the Defendant
23
24 Teresa J. F. Bautz, RPR
25 Official Court Reporter

E X H I B I T S

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NO.

DESCRIPTION

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No exhibits submitted.

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Exhibits retained by Clerk of Court.

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1 (WHEREUPON, the hearing commenced at approximately
2 9:41 a.m.)

3 THE COURT: All right. We'll skip on down,
4 2017-CP-26-7775, Kelaher, Connell and Connor versus
5 South Carolina Workers' Compensation Commission.
6 According to my roster the matter is before the Court
7 on a motion to dismiss. If you would please give the
8 court reporter your name and who you represent.

9 MR. CONNELL: Your Honor, Gene Connell, represent
10 Kelaher Connell and Connor.

11 MR. BAXTER: Doug Baxter here on behalf of the
12 South Carolina Workers' Compensation Commission.

13 MR. ROBERTS: And Keith Roberts here on behalf of
14 the Workers' Compensation Commission.

15 THE COURT: All right. Mr. Baxter and
16 Mr. Roberts, this is a defense motion. Who's going to
17 argue it?

18 MR. BAXTER: Your Honor, I will be arguing it.

19 THE COURT: Okay.

20 MR. BAXTER: We have filed a motion to dismiss
21 based upon a couple of grounds. We've submitted a
22 memorandum in support of -- I don't know if you've had
23 an opportunity to review it or not, but it's -- from
24 our standpoint it's relatively simple. First of all,
25 this case involves a lawsuit brought by Kelaher and

1 Connell alleging that the Commission failed to give him
2 notice of a hearing whereby the widow of a previous
3 client of theirs requested a lump sum payment as to
4 remaining disability benefits, and that they're
5 alleging that as a result of that they were unable to
6 fully protect their lien for attorney's fees.

7 The money was paid to the widow of their client,
8 and she has moved to California. And they have an
9 order awarding them the attorney's fees, but it's my
10 understanding that the allegations are that it's now
11 going to be very difficult to collect. And if they had
12 been given notice of the hearing, then their lien would
13 have been properly protected.

14 They bring this lawsuit not looking for any kind
15 of injunctive relief, it's not an appeal of an order.
16 They are suing for damages saying that because of the
17 workers' compensation failing to give them notice,
18 failing to properly protect their lien, that they have
19 been damaged in that they -- it's now going to be very
20 difficult to collect the attorney's fees.

21 We have filed a motion to dismiss, first of all,
22 based upon jurisdiction. The law is clear that matters
23 involving the circuit court does not have jurisdiction
24 over matters involving workers' comp. Any matters that
25 are contained within the workers' comp statute are in

1 the exclusive jurisdiction of the South Carolina
2 Workers' Compensation Commission. The only way it
3 would trigger the circuit court to have jurisdiction
4 would be if there was an appeal of a ruling.

5 In this case they are not appealing the ruling --

6 THE COURT: So excuse me for interrupting, but
7 you're saying lawsuits against the Commission is only
8 within the jurisdiction of the Commission to decide?

9 MR. BAXTER: Well, the questions under the Act are
10 only within the jurisdiction. And this is a -- this is
11 a -- they are saying we violated -- that we didn't
12 follow the procedure under the Act, and therefore they
13 want a circuit court to step in and say, you didn't do
14 it right under the Act.

15 THE COURT: So who do you say is the proper forum
16 for them to get an answer to that question?

17 MR. BAXTER: Well, the proper -- if there is an
18 issue with regards to a ruling or with regards to -- it
19 would be up to the Commission. I mean, here they're --
20 I don't think they are -- they're saying, we're not
21 contesting the ultimate ruling, we're just contesting
22 the fact that you didn't give us proper notice.

23 Now, and the -- so it's our position is that the
24 circuit court does not have jurisdiction to come --
25 basically they are asking you to come in and tell the

1 Workers' Compensation Commission how they should do
2 things.

3 THE COURT: Well, no. I mean, I guess the
4 question is for the sake of argument or viewing the
5 evidence in the light most favorable to the Plaintiff,
6 they do have a claim, if you will, against the Workers'
7 Compensation Commission. What is the proper forum
8 where that is to be brought, according to you?

9 MR. BAXTER: Well, as we'll discuss here in a
10 minute, we don't think they have a claim.

11 THE COURT: I understand that. But for the sake
12 of argument, let's say they do?

13 MR. BAXTER: Well, it's not the circuit court. I
14 mean, I think if you look at the law in South Carolina
15 and the rulings, they are -- I mean, you could argue
16 that maybe the Supreme Court. But it's not in the
17 circuit court.

18 I mean, you don't have jurisdiction. I mean, from
19 now on anybody could say, well, I don't like what they
20 did, so I'm just going to -- I'm going to sue the
21 Workers' Compensation Commission in circuit court. I
22 mean, this is not a -- this is basically you failed to
23 give us notice, you failed to follow what we think
24 should have been the proper procedure. Now, they're --
25 you know, we're disputing that.

1 But for purposes of this hearing we are conceding
2 everything in the claim as far as the facts go. But
3 the circuit court does not have jurisdiction to step in
4 and play that role. And, yeah, it may be unfair, but
5 that's what the law says.

6 THE COURT: So has there ever been a lawsuit
7 against the South Carolina Workers' Compensation
8 Commission by an individual?

9 MR. BAXTER: There have been.

10 THE COURT: And what forum was that?

11 MR. BAXTER: Well, ones that -- there are -- I
12 don't think there have been any in state court, and
13 Keith can correct me on this, where they have sued for
14 damages. Now, again, they are not coming in asking,
15 we're disputing or we should have been given notice or
16 we want to set aside the order. They are suing for
17 damages. I'm unaware of any state circuit court
18 lawsuits against the Commission seeking damages.

19 And part of it is, this indicates where, well,
20 this issue has never -- you know, our position is the
21 reason is you don't have jurisdiction to do that. You
22 don't have jurisdiction to award damages against the
23 South Carolina Workers' Compensation Commission.

24 But there have not been -- there have been a
25 handful of cases in federal court where they have

1 brought action. I'm aware of one. There's been a
2 couple lawsuits in federal court seeking damages. And
3 the outcome of those were that the Workers'
4 Compensation Commission enjoys immunity under the
5 Eleventh Amendment of the US Constitution and cannot be
6 sued for damages.

7 THE COURT: Well, that's a different argument.
8 And that might be right, I don't know. But you're
9 saying that the state circuit court does not have
10 jurisdiction to hear a lawsuit against the Commission.

11 Is there any appellate decision that affirms that?
12 Or is there anything that says you bring a lawsuit
13 against the Commission for damages, you've got to bring
14 it in original jurisdiction of the Supreme Court,
15 federal court, state circuit court has no jurisdiction?

16 MR. BAXTER: Well, Your Honor, there have been a
17 number of cases in which there have been lawsuits in
18 state court for various matters and disagreements, and
19 they're saying we want it heard in circuit court. And
20 all of those -- and we have referenced and cited those
21 cases where they have said no. Anything confined
22 within the Act in any type of dispute within the Act is
23 the exclusive jurisdiction of the South Carolina
24 Workers' Compensation Commission.

25 And here they are saying, well, you didn't follow

1 the procedure as contained within the Act, as contained
2 within the Administrative Procedures Act. So we --
3 it's our position that the circuit court does not have
4 jurisdiction over this kind of case.

5 THE COURT: And I want to make sure I'm
6 understanding your argument. Your argument is that the
7 South Carolina Workers' Compensation Commission has
8 exclusive jurisdiction to decide whether in this case
9 the South Carolina Workers' Compensation Commission
10 followed the proper procedure?

11 MR. BAXTER: And caused damages.

12 THE COURT: And caused damages.

13 MR. BAXTER: Right.

14 THE COURT: So they have to decide, it's a self --
15 you're saying that they self-judge themselves. Did we
16 follow the procedure, and do we owe them damages for
17 not doing it?

18 MR. BAXTER: Well, it would be comparable to the
19 we're suing the circuit court. I mean, and again, it
20 is -- I understand what you're saying is, well, gee,
21 that seems unfair. But that's what the law is.

22 THE COURT: Okay. If that's the law.

23 MR. BAXTER: And sometimes it's not fair.

24 THE COURT: Well, and I don't know, if the law
25 says that, if -- is there any appellate decision that

1 says that's the law, or is that just your
2 interpretation of the South Carolina Workers'
3 Compensation Act?

4 MR. BAXTER: Well, that's my interpretation of the
5 Act. And that's my interpretation of appellate, Court
6 of Appeals and Supreme Court cases saying any issue
7 arising out of or involving the Workers' Compensation
8 Act are within the jurisdiction of the South Carolina
9 Workers' Compensation Commission.

10 THE COURT: But did any of those cases involve
11 lawsuits against the South Carolina Workers
12 Compensation Commission?

13 MR. BAXTER: Not that I'm aware of.

14 THE COURT: Okay.

15 MR. BAXTER: And, again, there are none.

16 THE COURT: All right.

17 MR. BAXTER: I mean, and that would support our
18 position. We think that the fact that there are none
19 supports that.

20 THE COURT: Okay.

21 MR. BAXTER: Yeah, this isn't a case, you know,
22 where it's a -- so, that's the first one. And, again,
23 this is the -- the money, the attorney's fees were owed
24 by the claimant and/or the insurance company, the
25 carrier. Their damages are that we didn't get paid or

1 it's going to be difficult for us to get paid by
2 someone else.

3 THE COURT: They are saying that these people owed
4 them money, they had a lien against these proceeds --

5 MR. BAXTER: Right.

6 THE COURT: -- that there is a notice requirement
7 under the Act, and the purpose of that notice
8 requirement is so that they can come in and protect
9 their lien and that they didn't get noticed?

10 MR. BAXTER: Right.

11 THE COURT: Okay.

12 MR. BAXTER: And, Your Honor, it would be
13 comparable to, you know, there is a minor settlement
14 here, and some lawyer was representing them was
15 relieved of counsel, they still have a lien against
16 that. They are saying, well, gee, the Court didn't
17 notify us of this hearing, and they gave the check to
18 the Plaintiff. And if we had been -- if we'd have
19 known about the hearing, we could have been there, and
20 we could have somehow gotten some of that money. Now
21 we have to sue the Plaintiff to get our money. And so
22 we're going to sue the Court because we didn't collect
23 our attorney's fees.

24 THE COURT: Well, they would be suing the Clerk of
25 Court or whoever was supposed to give them notice that

1 they didn't give them notice.

2 MR. BAXTER: Right. But, again, if you look at
3 the law, I've seen that happen and they're null
4 lawsuits because -- and that gets to the second part.
5 In their petition they raise, I mean, their memorandum
6 in opposition which we don't think it's time, but
7 again, consider that as much as you want, it doesn't
8 affect our argument.

9 The -- they are raising due process which we don't
10 think this is a due process situation because that's
11 when the State takes something from them. In this case
12 we didn't say, you can't get attorney's fees, you can't
13 get paid. It's just more difficult for them to collect
14 it. So it's not a -- they've not -- we have not taken
15 a property right from them which triggers due process.
16 They are just saying, well, we should get notice of the
17 hearing, and therefore that's due process.

18 I mean, that's kind of blurring the lines. I
19 mean, it sounds good when you say it, but really due
20 process under the state and federal constitution talks
21 about when the State can't -- State action to deprive
22 someone of a property interest, they have to have --
23 there has to be proper process to protect that. That's
24 not what happened here, we didn't take anything. We're
25 just saying, you know, we're going to have a difficult

1 time collecting our money from our client as a result
2 of this.

3 And, in fact, the other reason is the -- as
4 indicated, and we, you know, quoted those cases about
5 the -- where they were sued in federal court. The
6 State actors still enjoy, or state agencies, the State
7 of South Carolina Circuit Court, are protected by the
8 Eleventh Amendment which says you cannot be sued. So
9 the South Carolina Workers' Compensation cannot be sued
10 for federal claims including due process because of
11 eleventh -- the Eleventh Amendment immunity enjoyed by
12 the State.

13 Second of all, and we quote this, under the -- if
14 you're going to bring a lawsuit for damages, you got to
15 do it one of two ways, again, a State agency. One
16 would be a 1983 action for federal claims. And as
17 indicated earlier, we are protected by the Eleventh
18 Amendment immunity.

19 And second of all, if you're going to do it, you'd
20 bring it under the Tort Claims Act. And as Your Honor
21 is aware, the Section 15-78-60 sets out those instances
22 wherein the immunity enjoyed by the State have not been
23 waived. And specifically there is section two, which
24 is administrative action or inaction of a legislative
25 judicial or quasi judicial nature.

1 And three, execution, enforcement, implementation
2 of the order's been to court or execution, enforcement,
3 etcetera, etcetera, clearly giving notice by a Court or
4 judicial -- or quasi judicial agency is within the
5 exceptions to the waiver of immunity. And therefore,
6 we, the South Carolina Workers' Compensation, cannot be
7 sued for failing to give notice of a hearing.

8 Just like I don't think a circuit court could be
9 sued for failing to give notice now for money. I mean,
10 you can come in and say, well, I want to set aside the
11 judgment, or I want the -- you know, I wasn't given
12 proper notice, therefore I'm contesting the ruling.
13 But you can't sue for damages. Just like the example I
14 gave, I don't think you can sue the Clerk of Court and
15 say, well, you didn't give me notice, and therefore,
16 I've now got a difficult time, because they would be
17 protected under the 15-78-60.

18 So we think either, A, you don't have jurisdiction
19 to hear it. If you do have jurisdiction because this
20 is a claim for monetary damages, then the Workers'
21 Compensation Commission has immunity under both the US
22 Constitution as well as under the Tort Claims Act.

23 THE COURT: All right. Mr. Connell.

24 MR. CONNELL: Your Honor, little bit of a
25 background. I represented Mr. Donnelly for

1 approximately six years in this workers' compensation
2 claim. And it was mediated before a former
3 commissioner and a settlement was agreed to. And
4 Mr. Donnelly decided that he did not want to go
5 forward. So I did what the Act provided, I filed a fee
6 petition. And not one fee petition, I filed four
7 separate fee petitions because the Commission kept
8 asking me to file them again and again and again. And
9 you'll see that in the memorandum.

10 And after filing the four fee petitions, I heard
11 nothing for approximately a year and a half until I
12 learned that the Commission had had a hearing, the
13 gentleman had died and his widow had gotten the money
14 and moved to California. And so, Your Honor, I view
15 this case to be a simple tort claims case, South
16 Carolina tort claims case, like any other governmental
17 agency.

18 I have an affidavit from a former commissioner
19 which is attached to the motion that says simply, this
20 was a negligent act, a clerical negligence act. It was
21 not a judicial act, it was not a legislative act. It
22 was a mistake that was made by the, if you would for
23 want of a better word, the clerk of the Workers'
24 Compensation Commission.

25 THE COURT: So how is it not prohibited by

1 15-78-62, administrative action of a quasi judicial
2 nature?

3 MR. CONNELL: Well, if you look at Ms. Crocker's
4 affidavit, she said that was not a judicial act. It
5 was just a clerical act. It was not --

6 THE COURT: It's an administrative act where
7 you've got to send out a notice.

8 MR. CONNELL: If you look at the case law that's
9 been cited, there's a case from Orangeburg County about
10 a licensing and permit issue, and it says that's a jury
11 issue. And so, Your Honor, we argue that this is a
12 motion to dismiss, and all inferences must be in favor
13 of the non-moving party. And the question here is --
14 not the ultimate question, but have I stated enough
15 facts to have a cause of action against the Workers'
16 Compensation Commission.

17 And we argue, Your Honor, that based upon the case
18 law from Orangeburg that I've cited in my brief and
19 Ms. Crocker's affidavit which clearly sets out what
20 happened in this case, and how they -- what they did
21 was fail to notify us.

22 And then the final thing I would notice, Your
23 Honor, this is interesting, after the lawsuit was filed
24 and it was -- it had probably been four or five months,
25 then I get an order from the Workers' Compensation

1 Commission approving the attorney's fee. Of course
2 that was way after they should have given me notice and
3 way after the monies were paid to the widow and moved
4 to California.

5 So, Your Honor, I argue that under the motion to
6 dismiss standard that we have shown enough, more than
7 enough to have a cause of action against them at this
8 point. Thank you, Your Honor.

9 THE COURT: All right. Anything in reply?

10 MR. BAXTER: Your Honor, just a couple of things.
11 It kind of got -- the case, just so you understand --
12 it got sideways because Mr. Connell did not want a --
13 didn't want a hearing on the attorney's fees until
14 there was a, later on, I'm assuming, a lump sum
15 payment. So it wasn't -- it wasn't your normal, you
16 know, this is what we always do. It was a little bit
17 different.

18 Ms. Crocker is also, she's not currently employed,
19 she was formerly employed or affiliated with the
20 Commission. But, again, clearly the case he cites, the
21 Orangeburg case, involves a situation where the State
22 actually went in and took something or depriving them
23 of a property right or interest. It has to do with a
24 licensing situation which is different.

25 I don't know, you know, giving notice and filing

1 and things like that, if that's not an administrative
2 action or inaction of a legislative judicial or quasi
3 judicial nature, I don't know what is.

4 THE COURT: All right.

5 MR. BAXTER: I mean, clearly, that is contemplated
6 and clearly the -- you know, right, wrong, fair or
7 unfair, the -- you know, without the Tort Claims Act we
8 could not be sued, period. We can only be sued because
9 the Tort Claims Act allows us to be sued. And if
10 you're suing us under the Tort Claims Act, then we're
11 still protected by that particular provision with
12 the -- there has not been a waiver of immunity as to
13 administrative action or inaction of a legislative
14 judicial or quasi judicial nature.

15 And as far as the facts of what happened or
16 whatever, you know, it's interesting and you could
17 point fingers, and maybe somebody did screw up or
18 didn't screw up, none of that matters because we are
19 either, A, you don't have jurisdiction. If you do have
20 jurisdiction, we're protected under the workers'
21 comp -- I mean, excuse me.

22 THE COURT: Okay.

23 MR. BAXTER: Under the Tort Claims Act.

24 THE COURT: All right. Mr. Baxley [sic], if you
25 would prepare the order, I'm going to grant the motion.

1 I think the Court does have jurisdiction. I don't
2 follow your argument that the workers' comp has
3 exclusive jurisdiction to decide whether or not they
4 did anything improper and whether or not they have
5 advantages.

6 But I do think the Tort Claims Act specifically
7 excludes, government entity is not liable for any loss
8 resulting from administrative action or inaction. And
9 I think this was they were supposed to send notice,
10 they didn't send notice, that's an administrative
11 inaction by a quasi judicial nature.

12 So I think that it follows under the Tort Claims
13 Act, exclusion or immunity. So that's the reason for
14 my ruling. All right.

15 Now, having said that, I don't know what posture
16 this is going to go. Do you want me to grant it on
17 jurisdictional issues, so if you appeal it then that
18 issue can be decided as well?

19 MR. CONNELL: Yes, sir.

20 THE COURT: All right.

21 MR. CONNELL: I would.

22 THE COURT: Well, then, rather than that, let's go
23 ahead. And then I'll say, put it in there the same
24 thing you want, that I don't have jurisdiction based
25 upon your arguments and your grounds. That way you can

1 appeal both issues. Rather than having it go up, come
2 back, go back up on another issue, we'll just go ahead
3 and I'll rule that way on both issues. That way you
4 can address both issues.

5 MR. CONNELL: Can I also ask for a ruling on the
6 standard for a motion to dismiss, you know, all the --
7 the complaint is supposed to be in the light most
8 reasonable to the Plaintiff.

9 THE COURT: Yeah.

10 MR. CONNELL: So I need some ruling on that also.

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

18 And it just seems wrong, I agree with you, but
19 South Carolina Tort Claims Act says that they are not
20 liable for any loss resulting from that inaction. So
21 all right?

22 MR. BAXTER: And I'll include the language in the
23 order for that as well.

24 THE COURT: Okay. Thank you.

25 MR. BAXTER: Thank you.

1 (WHEREUPON, the hearing concluded at approximately
2 10:04 a.m.)

3 (End of Transcript of Record)
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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

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

* OF COUNSEL

AREA CODE 843
238-5648
FAX: 238-5050

August 29, 2012

Claims Department
S. C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202-1715

Re: Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Co.
WCC File No. 0708860
Our File No. 2007-0332C

Dear Sir or Madam:

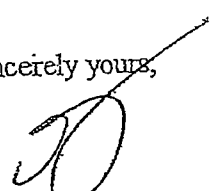
Enclosed please find an original and two copies of the following documents for filing in the above-referenced case:

- Order Relieving Counsel
- Form 61 Attorney Fee Petition
- Motion for Attorney Fees
- Affidavit of Gene M. Connell, Jr.
- Cost Statement
- Proof of Service

I also enclose a check in the amount of \$25.00 for the filing fee. Please file the documents and set a hearing on the attorney fees at your convenience. Please also return a filed copy of the documents to this office in the self-addressed, stamped envelope enclosed for your convenience.

I am, by copy of this letter, serving a copy on Roy A. Howell, III, attorney for the Employer/Carrier, and on Bruce W. Nadolny.

Sincerely yours,


Gene M. Connell, Jr.

GMC, Jr.:sm
Enclosures

cc w/enc.: Roy A. Howell, III, Esquire
Mr. Bruce A. Nadolny

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION.

W.C.C. FILE NO.: 0708860

Bruce W. Nadolny,

Employee/Claimant,

vs.

AVX Corporation,

Employer,

and

Liberty Mutual Insurance Co.,

Carrier,
Defendants

ORDER RELIEVING COUNSEL

THIS MATTER COMES BEFORE THE COURT based on the Employee/Claimant's request that Gene M. Connell, Jr. be relieved as counsel. Further, Attorney Connell has advised the Court that he will file a claim for attorney's fees for the work he has done in this matter. Accordingly

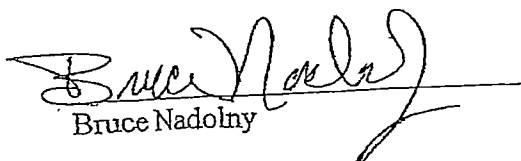
IT IS ORDERED that Gene M. Connell, Jr. be relieved as counsel.

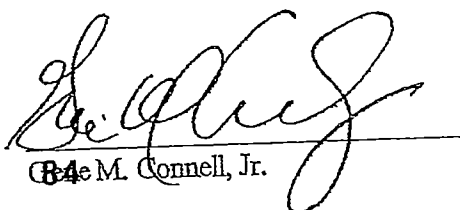
AND IT IS SO ORDERED.

South Carolina Workers' Compensation Commission

_____, 2012
_____, South Carolina.

WE CONSENT:


Bruce Nadolny


Gene M. Connell, Jr.

South Carolina Workers' Compensation
Commission
3 Main Street, Suite 500
Office Box 1715
Columbia, South Carolina 29202-1715
803-737-5723



WCC File #: 0708860
Carrier File #: WC550-567678
Carrier Code #:
Employer FEIN #:

Claimant's Name: Bruce W. Nadolny

Address: 613 Mammie Drive

City: Myrtle Beach State: SC Zip: 29588

Home Phone: (843) 293-8649 Work Phone: () -

Preparer's Name: Gene M. Connell, Jr.

Law Firm: Kelaher, Connell & Connor, PC

Employer's Name: AVX Corporation

Address: PO Box 867

City: Myrtle Beach State: SC Zip: 29578

Insurance Carrier: Liberty Mutual Insurance Co.

Preparer's Phone #: (843) 238-5648

Date Attorney Was Hired: 07/31/07

Date of Injury: 06/30/07

Compensation Rate:

Does this conclude the case? ☐ Yes ☒ No

EASE CHECK AND COMPLETE ONLY ONE: (A, B, C or D)

A. R.67-1205C does not apply to the facts of this case. A _____ % fee of the award or settlement (excluding medical costs) and the costs of this action, as shown by the attached Settlement of Costs, are requested for approval.

B. The subsection of R. 67-1205C applicable to this claim is (C) _____. A fee of \$ _____ is requested for approval based on the following:

Date of first impairment rating or offer of settlement:

Impairment Rating given and/or Settlement amount offered prior to date attorney hired:

Impairment Rating given and/or Settlement amount offered after date attorney hired:

Authorized Health Care Provider's Name:

C. Admitted Death Claim - \$2,500.

☐ D. Admitted Lifetime Compensation Claim - \$2,500.

I certify that this form and the attached Statement of Costs are accurate.

Attorney for the Claimant

Date

Summary	
Total Amount of Compensation	\$ 120,000.00
Attorney's Fee	\$ 20,000.00
Costs	\$ 2,446.44
Total Fees and Costs	\$ 22,446.44
Client Will Receive	\$

I agree to pay my attorney the fee and costs stated. I understand the fee and costs are paid out of my compensation and I understand how much money I will receive after I pay my attorney.

Signature

Date

Statement of Costs must be attached before costs may be approved. File this form in duplicate with the Claims Department. Enclose a self-addressed, stamped envelope. For further information, refer to R.67-1203, R.67-1204, R.67-1205, R.67-1206 and Rule 1.5(a), RPC Rule 407, SCACR.

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0708860

Bruce W. Nadolny,

Employee/Claimant,

vs.

AVX Corporation,

Employer,

and

Liberty Mutual Insurance Co.,

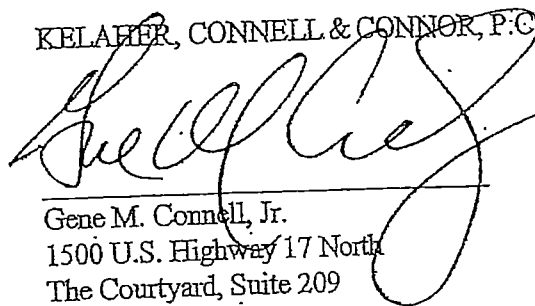
Carrier,

Defendants.

MOTION FOR ATTORNEY FEES

YOU WILL PLEASE TAKE NOTICE the undersigned moves the Court to approve attorney's fees pursuant to the Form 61 and the attached Affidavit along with the costs in the amount of \$2,446.44.

KELAFER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
1500 U.S. Highway 17 North
The Courtyard, Suite 209
P.O. Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
Attorney for Claimant

August 28, 2012
Surfside Beach, South Carolina

W.C.C. FILE NO. 0708860

Defendants.

87

6. I convinced Mr. Nadolny to have a mediation with a former workers' compensation commissioner, Tom Marchant.

7. At the mediation, the claimant was offered \$120,000.00 (One Hundred Twenty Thousand Dollars) plus a Medicare Set Aside Trust which was refused by him.

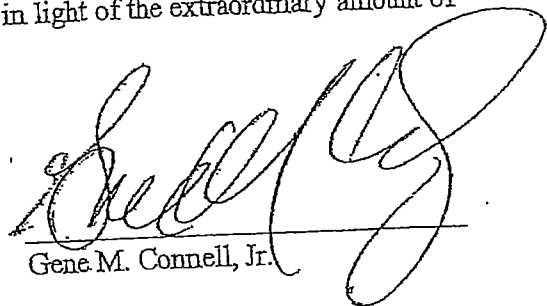
8. I have continued to assist Mr. Nadolny with his ongoing medical treatment. I was informed by Defendant's counsel that they were going to send Mr. Nadolny to Brooks Rehabilitation in Florida. Mr. Nadolny first refused and then said he would go. I was fired the next day for the second time since July 2012.

9. I request that the court award me \$20,000 (Twenty thousand dollars) in attorney's fees plus costs of \$2,446.44 (Two thousand four hundred forty six and 44/100 dollars); the costs of mediation, medical records, and filing fees. A cost statement is attached.

10. The requested fee is much less than the fee agreement of 33 1/3 percent because I believe Mr. Nadonly will need another attorney to help him settle this claim and I want to do everything for his best interest.

11. I have spent countless hours talking to Mr. Nadolny, defense counsel and the insurer. I believe the fee of \$20,000.00 is very reasonable in light of the extraordinary amount of work performed on this case by me.

12. Further the Affiant sayeth not.


Gene M. Connell, Jr.

SWORN TO BEFORE ME THIS
29 day of August, 2012


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 8-10-21

08/02/2012

Tabs3 Detail Work-In-Process Report Kelaher, Connell & Connor, P.C.

Page: 1

ary Timekeeper: 5 Gene M. Connell, Jr., Esquire

200903320000 Nadolny/Bruce Nadolny/Bruce

Contact: Bruce Nadolny
Business: 902-1976
Home: 293-8649
Mobile: 902-0808

Category: 3 WORKERS COMPENSATION
Draft Template: 00000001 Rate Code: 1
Final Template: 00000001 Date Opened: 09/25/2007
1 ETK
1 ETK
0.00

	Trkr	Cal	Src	H P	T X	B C	R G	Tcode	Ref#	Rate	Units	Hours Worked	Hours to Bill	Write-Up/ Down Hrs	Amount	Write-Up/ Down Amt	Description
ince's 12/27/2008	5	GMC	A					22	1						38.99		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
12/20/2008	5	GMC	A					22	2						17.60		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
11/2/2009	5	GMC	A					22	3						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
11/9/2009	5	GMC	A					22	4						50.00		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
130/2009	5	GMC	A					22	5						144.00		Stenotype Reporting Service, LLC FOR DEPOSITION
11/12/2009	5	GMC	A					22	6						42.75		FLOWERS & ASSOCIATES FOR TRANSCRIPT
11/10/2009	5	GMC	A					22	7						49.77		Healthport FOR MEDICAL RECORDS
11/5/2009	5	GMC	A					22	8						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
130/2010	5	GMC	A					22	9						15.00		GRAND STRAND UROLOGY FOR MEDICAL RECORDS
130/2010	5	GMC	A					22	10						18.00		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
128/2011	5	GMC	A					22	11						38.08		(859.00) TRASK & HOWELL, LLC for copies
104/2011	5	GMC	A					22	12						157.50		(34.00) Veritext Corporate Services, Inc. for transcript
112/2011	5	GMC	A					22	14						184.75		(34.00) Veritext Corporate Services, Inc. FOR TRANSCRIPT
124/2011	5	GMC	A					22	15						1,525.00		(894.00) MARCHANT SOLUTIONS FOR MEDIATION
127/2012	5	GMC	A					22	17						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
															2,446.44		

1 Billable Advances

Fees:	0.00	Previous Balance:	0.00		
Expenses:	0.00	Payments/Credits:	0.00		
Advances:	2,446.44	Balance Due:	0.00	Total:	2,446.44
Total WIP:	2,446.44				
A/R:	0-30	31-60	61-90	91-120	121-180
	0.00	0.00	0.00	0.00	0.00

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0708860

Bruce W. Nadolny,
Employee/Claimant,
vs.
AVX Corporation,
Employer,
and
Liberty Mutual Insurance Co.,
Carrier,
Defendants

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., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

Roy A. Howell, III, Esquire
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465

Bruce A. Nadolny
1613 Mammie Drive
Myrtle Beach, SC 29588

DOCUMENTS: Order Relieving Counsel; Form 61 Attorney Fee Petition; Motion for Attorney Fees; Affidavit of Gene M. Connell, Jr.; Cost Statement.

DATE: August 30, 2012

Shelia Y. McCumbee
Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 30th day of August, 2012.

Sharon M. Ryew
Notary Public for South Carolina
My Commission Expires: 2-25-19

KELAHIER, 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

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 11, 2012

Claims Department
S. C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202-1715

Re: Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Co.
WCC File No. 0708860
Our File No. 2007-0332C

Dear Sir or Madam:

Enclosed please find an original and two copies of the following documents for filing in the above-referenced case:

- Order Relieving Counsel
- Form 61 Attorney Fee Petition
- Motion for Attorney Fees
- Affidavit of Gene M. Connell, Jr.
- Cost Statement
- Proof of Service

I also enclose a check in the amount of \$25.00 for the filing fee. Please file the documents and set a hearing on the attorney fees at your convenience. Please also return a filed copy of the documents to this office in the self-addressed, stamped envelope enclosed for your convenience.

I am, by copy of this letter, serving a copy on Roy A. Howell, III, attorney for the Employer/Carrier, and on Bruce W. Nadolny.

Sincerely yours,


Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Roy A. Howell, III, Esquire
Mr. Bruce W. Nadolny (Via Certified Mail)

BEFORE THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO.: 0708860

Bruce W. Nadolny,
Employee/Claimant,

vs.

AVX Corporation,

Employer,

and

Liberty Mutual Insurance Co.,

Carrier,
Defendants

ORDER RELIEVING COUNSEL

THIS MATTER COMES BEFORE THE COURT based on the Employee/Claimant's request that Gene M. Connell, Jr. be relieved as counsel. Further, Attorney Connell has advised the Court that he will file a claim for attorney's fees for the work he has done in this matter. Accordingly

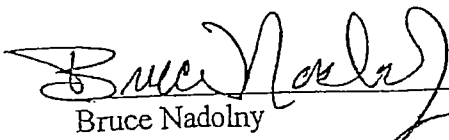
IT IS ORDERED that Gene M. Connell, Jr. be relieved as counsel.

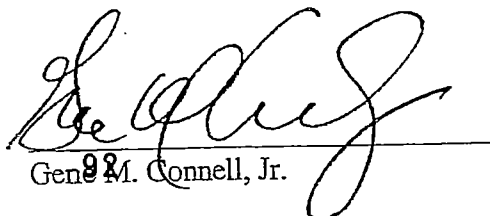
AND IT IS SO ORDERED.

South Carolina Workers' Compensation Commission

_____, 2012
_____, South Carolina.

WE CONSENT:


Bruce Nadolny


Gene M. Connell, Jr.

South Carolina Workers' Compensation
Commission
33 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
3-737-5723



WCC File #: 0708860
Carrier File #: WC550-567678
Carrier Code #:
Employer FEIN #:

Claimant's Name: Bruce W. Nadolny
Address: 613 Mammie Drive
City: Myrtle Beach State: SC Zip: 29588
Home Phone: (843) 293-8649 Work Phone: () -
Employer's Name: AVX Corporation
Address: PO Box 867
City: Myrtle Beach State: SC Zip: 29578
Insurance Carrier: Liberty Mutual Insurance Co.
Preparer's Name: Gene M. Connell, Jr. Law Firm: Kelaher, Connell & Connor, PC
Preparer's Phone #: (843) 238-5648

Date Attorney Was Hired: 07/31/07 Date of Injury: 06/30/07

Compensation Rate: Does this conclude the case? ☐ Yes ☒ No

EASE CHECK AND COMPLETE ONLY ONE: (A, B, C or D)

A. R.67-1205C does not apply to the facts of this case. A % fee of the award or settlement (excluding medical costs) and the costs of this action, as shown by the attached Settlement of Costs, are requested for approval.

B. The subsection of R. 67-1205C applicable to this claim is (C) (). A fee of \$ is requested for approval based on the following:

Date of first impairment rating or offer of settlement:

Impairment Rating given and/or Settlement amount offered prior to date attorney hired:

Impairment Rating given and/or Settlement amount offered after date attorney hired:

Authorized Health Care Provider's Name:

C. Admitted Death Claim - \$2,500.

D. Admitted Lifetime Compensation Claim - \$2,500.

I certify that this form and the attached Statement of Costs are accurate.

Gene M. Connell, Jr.
Attorney for the Claimant
8-29-12
Date

Summary	
Total Amount of Compensation	\$ 120,000.00
Attorney's Fee	\$ 20,000.00
Costs	\$ 2,446.44
Total Fees and Costs	\$ 22,446.44
Client Will Receive	\$

I agree to pay my attorney the fee and costs stated. I understand the fee and costs are paid out of my compensation and I understand how much money I will receive after I pay my attorney.

Signature

Date

Statement of Costs must be attached before costs may be approved. File this form in duplicate with the Claims Department. Enclose a self-addressed, stamped envelope. For further information, refer to R.67-1203, R.67-1204, R.67-1205, R.67-1206 and Rule 1.5(a), RPC Rule 407, SCACR.

**BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION**

W.C.C. FILE NO. 0708860

Bruce W. Nadolny,

Employee/Claimant,

vs.

AVX Corporation,

Employer,

and

Liberty Mutual Insurance Co.,

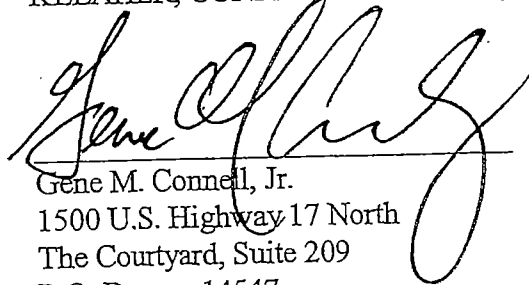
Carrier,

Defendants.

MOTION FOR ATTORNEY FEES

YOU WILL PLEASE TAKE NOTICE the undersigned moves the Court to approve attorney's fees pursuant to the Form 61 and the attached Affidavit along with the costs in the amount of \$2,446.44.

KELAHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
1500 U.S. Highway 17 North
The Courtyard, Suite 209
P.O. Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
Attorney for Claimant

August 28, 2012
Surfside Beach, South Carolina

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0708860

Bruce W. Nadolny,

Employee/Claimant,

vs.

AVX Corporation,

Employer

and

Liberty Mutual Insurance Co.,

Carrier,

Defendants.

AFFIDAVIT OF
GENE M. CONNELL, JR.

PERSONALLY APPEARED BEFORE ME, Gene M. Connell, Jr., who, being duly sworn,
deposes and states as follows:

1. My name is Gene M. Connell, Jr. and I was the attorney for the Plaintiff in the above captioned matter until I was discharged by him on August 8, 2012.
2. I was hired by Bruce Nadolny after he was involved in an accident on July 31, 2007.
3. Mr. Nadolny had a severe bilateral crush injury to his arms.
4. My representation includes several hearings before the South Carolina Workers' Compensation Commission regarding home modifications which were settled for \$35,000.00 (Thirty Five Thousand Dollars).
5. I have attended two depositions of him and the file contains approximately 3000 pages of medical records.

6. I convinced Mr. Nadolny to have a mediation with a former workers' compensation commissioner, Tom Marchant.

7. At the mediation, the claimant was offered \$120,000.00 (One Hundred Twenty Thousand Dollars) plus a Medicare Set Aside Trust which was refused by him.

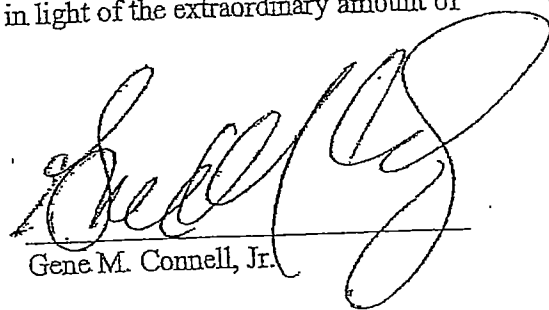
8. I have continued to assist Mr. Nadolny with his ongoing medical treatment. I was informed by Defendant's counsel that they were going to send Mr. Nadolny to Brooks Rehabilitation in Florida. Mr. Nadolny first refused and then said he would go. I was fired the next day for the second time since July 2012.

9. I request that the court award me \$20,000 (Twenty thousand dollars) in attorney's fees plus costs of \$2,446.44 (Two thousand four hundred forty six and 44/100 dollars); the costs of mediation, medical records, and filing fees. A cost statement is attached.

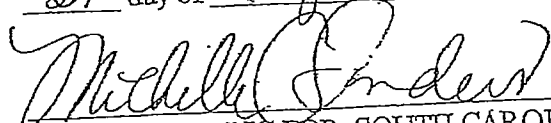
10. The requested fee is much less than the fee agreement of 33 1/3 percent because I believe Mr. Nadolny will need another attorney to help him settle this claim and I want to do everything for his best interest.

11. I have spent countless hours talking to Mr. Nadolny, defense counsel and the insurer. I believe the fee of \$20,000.00 is very reasonable in light of the extraordinary amount of work performed on this case by me.

12. Further the Affiant sayeth not.


Gene M. Connell, Jr.

SWORN TO BEFORE ME THIS
29 day of August, 2012


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 8-10-21

ry Timekeeper: 5 Gene M. Connell, Jr., Esquire

20070332.000: Nadolny/Bruce: Nadolny/Bruce
 X
 y Timekeeper: 5 GMC Category: 3 WORKERS' COMPENSATION
 dary Timekeeper: 1 ETK Draft Template: 00000001 Rate Code: 1
 ating Timekeeper: 1 ETK Final Template: 00000001 Date Opened: 09/25/2007
 us Balance: 0.00

Contact: Bruce Nadolny
 Business: 902-1976
 Home: 293-8649
 Mobile: 902-0808

	Tmkr	Cat	Src	H P	T X	B C	R C	Tcode	Ref #	Rate	Units	Hours Worked	Hours to Bill	Write-Up/ Down Hrs	Amount	Write-Up/ Down Amt	Description
nces																	
27/2008	5	GMC	A					22	1						38.99		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
20/2008	5	GMC	A					22	2						17.60		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
12/2009	5	GMC	A					22	3						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
19/2009	5	GMC	A					22	4						50.00		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
30/2009	5	GMC	A					22	5						144.00		Stenotype Reporting Service, LLC FOR DEPOSITION
11/2009	5	GMC	A					22	6						42.75		FLOWERS & ASSOCIATES FOR TRANSCRIPT
10/2009	5	GMC	A					22	7						49.77		Healthport FOR MEDICAL RECORDS
15/2009	5	GMC	A					22	8						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
30/2010	5	GMC	A					22	9						15.00		GRAND STRAND UROLOGY FOR MEDICAL RECORDS
30/2010	5	GMC	A					22	10						18.00		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
28/2011	5	GMC	A					22	11						38.08		(859.00) TRASK & HOWELL, LLC for copies
04/2011	5	GMC	A					22	12						167.50		(34.00) Veritext Corporate Services, Inc. for transcript
12/2011	5	GMC	A					22	14						164.75		(34.00) Veritext Corporate Services, Inc. FOR TRANSCRIPT
24/2011	5	GMC	A					22	16						1,625.00		(894.00) MERCHANT SOLUTIONS FOR MEDIATION
27/2012	5	GMC	A					22	17						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
															2,446.44		

Billable Advances

R-E-C-A-P						
Fees:	0.00	Previous Balance:	0.00			
Expenses:	0.00	Payments/Credits:	0.00			
Advances:	2,446.44	Balance Due:	0.00	Total:	2,446.44	
Total WIP:	2,446.44					
A/R:	0-30	31-60	61-90	91-120	121-180	181+
	0.00	0.00	0.00	0.00	0.00	0.00

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0708860

Bruce W. Nadolny,)
Employee/Claimant,)
)
vs.)
)
AVX Corporation,)
)
Employer,)
)
and)
)
Liberty Mutual Insurance Co.,)
)
Carrier,)
Defendants)

PROOF OF SERVICE

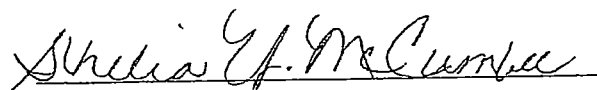
PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P. C., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

Roy A. Howell, III, Esquire
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465

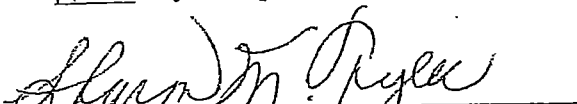
VIA CERTIFIED MAIL
Bruce W. Nadolny
613 Mammie Drive
Myrtle Beach, SC 29588

DOCUMENTS: Order Relieving Counsel; Form 61 Attorney Fee Petition; Motion for Attorney Fees; Affidavit of Gene M. Connell, Jr.; Cost Statement.

DATE: September 11, 2012


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 11th day of September, 2012.


Notary Public for South Carolina

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

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

* OF COUNSEL

AREA CODE 843
238-5648
FAX: 238-5050

Copy
September 18, 2012

Original Sent
September 11, 2012

Claims Department
S. C. Workers' Compensation Commission
Attn: Amanda M. Young
Post Office Box 1715
Columbia, SC 29202-1715

Re: Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Co.
WCC File No. 0708860
Our File No. 2007-0332C

Dear Sir or Madam:

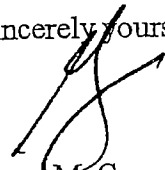
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- Order Relieving Counsel
- Form 61 Attorney Fee Petition
- Motion for Attorney Fees
- Affidavit of Gene M. Connell, Jr.
- Cost Statement.
- Proof of Service

I also enclose a check in the amount of \$25.00 for the filing fee. Please file the documents and set a hearing on the attorney fees at your convenience. Please also return a filed copy of the documents to this office in the self-addressed, stamped envelope enclosed for your convenience.

I am, by copy of this letter, serving a copy on Roy A. Howell, III, attorney for the Employer/Carrier, and on Bruce W. Nadolny.

Sincerely yours,


Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: Roy A. Howell, III, Esquire
Mr. Bruce W. Nadolny (Via Certified Mail)

W.C.C. FILE NO.: 0708860

Carrier,
Defendants

ORDER RELIEVING COUNSEL

THIS MATTER COMES BEFORE THE COURT based on the Employee/Claimant's request that Gene M. Connell, Jr. be relieved as counsel. Further, Attorney Connell has advised the Court that he will file a claim for attorney's fees for the work he has done in this matter. Accordingly

IT IS ORDERED that Gene M. Connell, Jr. be relieved as counsel.

AND IT IS SO ORDERED.

South Carolina Workers' Compensation Commission

_____, 2012
_____, South Carolina.

WE CONSENT:


Bruce Nadolny


Gene M. Connell, Jr.
100

South Carolina Workers' Compensation
Commission

1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
803-737-5723



WCC File #: 0708860

Carrier File #: WC550-567678

Carrier Code #:

Employer FEIN #:

Claimant's Name: Bruce W. Nadolny

Employer's Name: AVX Corporation

Address: 613 Mammie Drive

Address: PO Box 867

City: Myrtle Beach State: SC Zip: 29588

City: Myrtle Beach State: SC Zip: 29578

Home Phone: (843) 293 - 8649 Work Phone: () - -

Insurance Carrier: Liberty Mutual Insurance Co.

Preparer's Name: Gene M. Connell, Jr.

Law Firm: Kelaher, Connell & Connor, PC

Preparer's Phone #: (843) 238 - 5648

Date Attorney Was Hired: 07/31/07

Date of Injury: 06/30/07

Compensation Rate:

Does this conclude the case? ☐ Yes ☒ No

PLEASE CHECK AND COMPLETE ONLY ONE: (A, B, C or D)

☐ **A.** R.67-1205C does not apply to the facts of this case. A _____ % fee of the award or settlement (excluding medical costs) and the costs of this action, as shown by the attached Settlement of Costs, are requested for approval.

☐ **B.** The subsection of R. 67-1205C applicable to this claim is (C) (____). A fee of \$ _____ is requested for approval based on the following:

Date of first impairment rating or offer of settlement: _____

Impairment Rating given and/or Settlement amount offered prior to date attorney hired: _____

Impairment Rating given and/or Settlement amount offered after date attorney hired: _____

Authorized Health Care Provider's Name: _____

☐ **C.** Admitted Death Claim - \$2,500.

☐ **D.** Admitted Lifetime Compensation Claim - \$2,500.

I certify that this form and the attached Statement of Costs are accurate.

Attorney for the Claimant

Date

Summary

Total Amount of Compensation	\$ 120,000.00
Attorney's Fee	\$ 20,000.00
Costs	\$ 2,446.44
Total Fees and Costs	\$ 22,446.44
Client Will Receive	\$

I agree to pay my attorney the fee and costs stated. I understand the fee and costs are paid out of my compensation and I understand how much money I will receive after I pay my attorney.

Client

Date

A Statement of Costs must be attached before costs may be approved. File this form in duplicate with the Claims Department. Enclose a self-addressed, stamped envelope. For further information, refer to R.67-1203, R.67-1204, R.67-1205, R.67-1206 and Rule 1.5(a), RPC Rule 407, SCACR.

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0708860

Bruce W. Nadolny,

Employee/Claimant,

vs.

AVX Corporation,

Employer,

and

Liberty Mutual Insurance Co.,

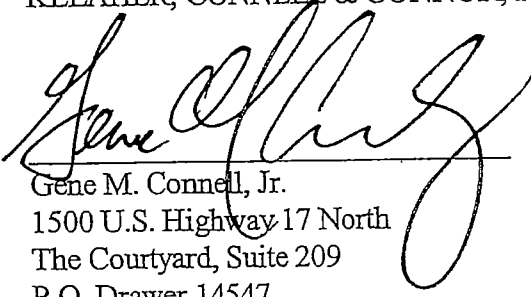
Carrier,

Defendants.

MOTION FOR ATTORNEY FEES

YOU WILL PLEASE TAKE NOTICE the undersigned moves the Court to approve attorney's fees pursuant to the Form 61 and the attached Affidavit along with the costs in the amount of \$2,446.44.

KELAHHER, CONNELL & CONNOR, P.C.



Gene M. Connell, Jr.
1500 U.S. Highway 17 North
The Courtyard, Suite 209
P.O. Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
Attorney for Claimant

August 28, 2012
Surfside Beach, South Carolina

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0708860

Bruce W. Nadolny,

Employee/Claimant,

vs.

AVX Corporation,

Employer

and

Liberty Mutual Insurance Co.,

Carrier,

Defendants.

AFFIDAVIT OF
GENE M. CONNELL, JR.

PERSONALLY APPEARED BEFORE ME, Gene M. Connell, Jr., who, being duly sworn,
deposes and states as follows:

1. My name is Gene M. Connell, Jr. and I was the attorney for the Plaintiff in the above captioned matter until I was discharged by him on August 8, 2012.
2. I was hired by Bruce Nadolny after he was involved in an accident on July 31, 2007.
3. Mr. Nadolny had a severe bilateral crush injury to his arms.
4. My representation includes several hearings before the South Carolina Workers' Compensation Commission regarding home modifications which were settled for \$35,000.00 (Thirty Five Thousand Dollars).
5. I have attended two depositions of him and the file contains approximately 3000 pages of medical records.

6. I convinced Mr. Nadolny to have a mediation with a former workers' compensation commissioner, Tom Marchant.

7. At the mediation, the claimant was offered \$120,000.00 (One Hundred Twenty Thousand Dollars) plus a Medicare Set Aside Trust which was refused by him.

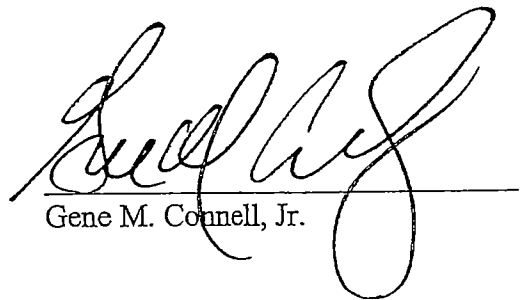
8. I have continued to assist Mr. Nadolny with his ongoing medical treatment. I was informed by Defendant's counsel that they were going to send Mr. Nadolny to Brooks Rehabilitation in Florida. Mr. Nadolny first refused and then said he would go. I was fired the next day for the second time since July 2012.

9. I request that the court award me \$20,000 (Twenty thousand dollars) in attorney's fees plus costs of \$2,446.44 (Two thousand four hundred forty six and 44/100 dollars); the costs of mediation, medical records, and filing fees. A cost statement is attached.

10. The requested fee is much less than the fee agreement of 33 1/3 percent because I believe Mr. Nadonly will need another attorney to help him settle this claim and I want to do everything for his best interest.

11. I have spent countless hours talking to Mr. Nadolny, defense counsel and the insurer. I believe the fee of \$20,000.00 is very reasonable in light of the extraordinary amount of work performed on this case by me.

12. Further the Affiant sayeth not.


Gene M. Connell, Jr.

SWORN TO BEFORE ME THIS
18 day of September, 2012


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 8-10-21

ary Timekeeper: 5 Gene M. Connell, Jr., Esquire

15200703320005 Nadolny/Bruce
 Primary Timekeeper: 5 GMC Category: 3 WORKERS' COMPENSATION
 Secondary Timekeeper: 1 ETK Draft Template: 00000001 Rate Code: 1
 Maturing Timekeeper: 1 ETK Final Template: 00000001 Date Opened: 09/25/2007
 Unpaid Balance: 0.00

Contact: Bruce Nadolny
 Business: 902-1976
 Home: 293-8649
 Mobile: 902-0808

Date	Tmkr	Cat	Src	H P	T X	B C	R G	Tcode	Ref #	Rate	Units	Hours Worked	Hours to Bill	Write-Up/ Down Hrs	Amount	Write-Up/ Down Amt	Description
1/27/2008	5 GMC	A						22	1						38.99		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
1/20/2008	5 GMC	A						22	2						17.60		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
1/12/2009	5 GMC	A						22	3						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
1/19/2009	5 GMC	A						22	4						50.00		STRAND REGIONAL SPECIALTY ASSOCIATES LLC FOR MEDICAL RECORDS
1/30/2009	5 GMC	A						22	5						144.00		Stenotype Reporting Service, LLC FOR DEPOSITION
1/11/2009	5 GMC	A						22	6						42.75		FLOWERS & ASSOCIATES FOR TRANSCRIPT
1/10/2009	5 GMC	A						22	7						49.77		Healthport FOR MEDICAL RECORDS
1/15/2009	5 GMC	A						22	8						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
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1/28/2011	5 GMC	A						22	11						38.08		(859.00) TRASK & HOWELL, LLC for copies
1/04/2011	5 GMC	A						22	12						167.50		(34.00) Veritext Corporate Services, Inc. for transcript
1/12/2011	5 GMC	A						22	14						164.75		(34.00) Veritext Corporate Services, Inc. FOR TRANSCRIPT
1/24/2011	5 GMC	A						22	16						1,625.00		(894.00) MARCHANT SOLUTIONS FOR MEDIATION
1/27/2012	5 GMC	A						22	17						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
Billable Advances															2,446.44		

Fees:	0.00	Previous Balance:	0.00
Expenses:	0.00	Payments/Credits:	0.00
Advances:	2,446.44	Balance Due:	0.00
Total WIP:	2,446.44	Total:	2,446.44

A/R:	0-30	31-60	61-90	91-120	121-180	181+
	0.00	0.00	0.00	0.00	0.00	0.00

BEFORE THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

W.C.C. FILE NO. 0708860

Bruce W. Nadolny,	)	
Employee/Claimant,	)	
	)	
vs.	)	
	)	PROOF OF SERVICE
AVX Corporation,	)	
	)	
	)	
Employer,	)	
	)	
and	)	
	)	
Liberty Mutual Insurance Co.,	)	
	)	
	)	
Carrier,	)	
Defendants	)	

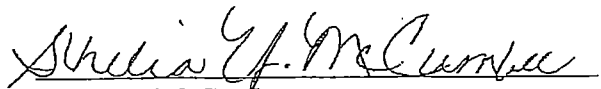
PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P. C., Attorneys at Law, and that she has mailed, on the date set forth below, a copy of the document described below, in the above entitled action to the following with proper postage affixed thereto:

Roy A. Howell, III, Esquire
Trask & Howell, L.L.C.
P.O. Box 2167
Mt. Pleasant, SC 29465

VIA CERTIFIED MAIL
Bruce W. Nadolny
613 Mammie Drive
Myrtle Beach, SC 29588

DOCUMENTS: Order Relieving Counsel; Form 61 Attorney Fee Petition; Motion for Attorney Fees; Affidavit of Gene M. Connell, Jr.; Cost Statement.

DATE: September 11, 2012


Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 11th day of September, 2012.


Notary Public for South Carolina

KELAHHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

SUITE 209

THE COURTYARD

1500 U.S. HIGHWAY 17 NORTH

P.O. DRAWER 14547

SEASIDE BEACH, SOUTH CAROLINA 29587

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

* OF COUNSEL

AREA CODE 843

238-5648

FAX: 238-5050

November 9, 2012

Claims Department
S. C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202-1715

Re: Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Co.
WCC File No. 0708860
Our File No. 2007-0332C

Dear Sir or Madam:

I am writing you this letter in regard to the above-referenced case in that I am making a claim for attorney's fees on this matter and request that this letter be placed in the file as a lien against the case should a settlement occur. I would ask that I be notified as soon as possible. The attorney's fee that I claim in this matter is \$20,000.00 plus costs of \$2,446.44 for mediation and other miscellaneous costs.

Sincerely yours,


Gene M. Connell, Jr.

GMC,Jr.:sm

cc: Roy A. Howell, III, Esquire
Bruce Nadolny

KELAHER, CONNELL & CONNOR, P.C.

ATTORNEYS AT LAW

SUITE 209

THE COURTYARD

1500 U.S. HIGHWAY 17 NORTH

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* OF COUNSEL

AREA CODE 843
238-5648
FAX: 238-5050

November 9, 2012

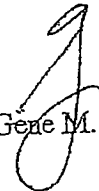
Claims Department
S. C. Workers' Compensation Commission
Post Office Box 1715
Columbia, SC 29202-1715

Re: Bruce W. Nadolny v. AVX Corporation and Liberty Mutual Insurance Co.
WCC File No. 0708860
Our File No. 2007-0332C

Dear Sir or Madam:

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Sincerely yours,


Gene M. Connell, Jr.

GMC, Jr.:sm

cc: Roy A. Howell, III, Esquire
Bruce Nadolny

*Gene,
you will need to file
a Form 61 with order
& cost sheet & we will
hold.
Yeh
B. Connell*

South Carolina Workers' Compensation Commission

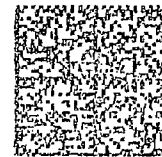
1333 MAIN STREET, SUITE 500

P.O. Box 1715

COLUMBIA, SOUTH CAROLINA 29202-1715

RETURN SERVICE REQUESTED

PRESORTED
FIRST CLASS



UNITED STATES POSTAGE

02 1R
0006559493

\$ 00.424

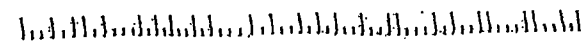
NOV 27 2012

MAILED FROM ZIP CODE 29201

11/29/12

ATTY Gen Cornell
P.O. Drawer 14547
Surfside Beach, SC
29587

295874547



Frankie O'Donnell

From: Bracy, Amy <abracy@wcc.sc.gov>
Sent: Thursday, December 13, 2012 2:09 PM
To: Frankie O'Donnell
Cc: Bost, Mary
Subject: RE: Nadolny WC 0708860
Attachments: copies re form 61.pdf.pdf

1/7/13 - per ms -
Gene M. Connell
this by opening
w/ Sean Lyons to
Se WCC - d
sentry 61 for
the to total.
30

I pulled the file and the documents that you attached were sent in September and are in the file. This was treated as a motion and set for a hearing in front of Commissioner Wilkerson. Gene later withdrew the motion. I think that we need another fee petition sent in, to Mary Bost, as a lien since the once in the file was treated as a motion and does not seem to have the order approving attorney's fee. Amy

From: Frankie O'Donnell [mailto:modonnell@classactlaw.net]
Sent: Friday, December 07, 2012 10:57 AM
To: Bracy, Amy
Subject: Nadolny WC 0708860

Amy:

I need help!!! We have been relieved as counsel and have received a clocked copy of that Order. However, we have sent the Form 61 Attorney Fee Petition, Motion for Attorney Fees, Affidavit of Gene M. Connell, Jr., Cost Statement and Proof of Service three (3) times and have not received a clocked copy of those documents. We sent those documents on August 29, 2012, September 11, 2012 and September 18, 2012. Also, Gene sent a follow up letter just to be certain that our lien will be protected and the letter was sent back to us stating that we needed to file a form 61. This morning I called to be sure that our form 61 had been filed and I was told that the only document they see is our Order to be Relieved as Counsel. I am attaching a copy of each letter with the form 61, etc., for your information. I have also attached a copy of our letter with the note that we need to file a form 61. I can understand one being lost in the mail but not three (3). Please advise me if our letters are maybe in Judicial and haven't been processed.

Thank you in advance for any help you can give me in this matter.

Frankie O'Donnell
Legal Assistant to Gene M. Connell, Jr.

Kelaker, Connell & Connor, PC
P. O. Drawer 14547
Surfside Beach, S. C. 29587
(843)238-5648 fax # (843-238-5050)

ATTORNEY-CLIENT PRIVILEGED; DO NOT FORWARD WITHOUT PERMISSION

This message is intended only for the named recipient. If you are not the intended recipient you are notified that disclosing, copying, distributing or taking any action in reliance on the contents of this information is strictly prohibited.

CONFIDENTIALITY NOTE: THIS E MAIL HAS BEEN SENT FROM A LAW FIRM. IT MAY CONTAIN PRIVILEGED AND CONFIDENTIAL INFORMATION AND IS INTENDED SOLELY FOR THE USE OF PERSON OR PERSONS NAMED ABOVE. IF YOU ARE NOT AN INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION OR DUPLICATION OF THIS E MAIL IS PROHIBITED AND THAT THERE SHALL BE NO WAIVER OF ANY PRIVILEGE

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

EDWARD T. KELAHER*

GENE M. CONNELL, JR.

L. SIDNEY CONNOR, IV.

LISA POE DAVIS

* OF COUNSEL

AREA CODE 843

238-5648

FAX: 238-5050

December 28, 2012

Greg Lyons
Claims Department
S.C. Workers' Compensation Commission
P.O. Box 1715
Columbia, SC 29202-1715

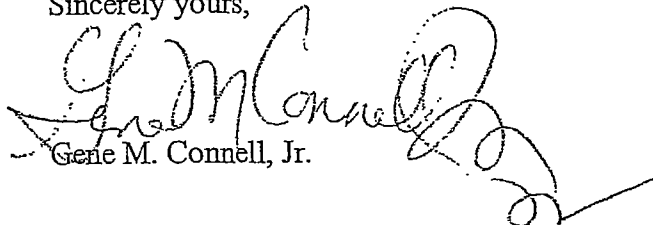
Re:	Employee:	Bruce Nadolny
	Employer:	AVX Corporation
	Date of Accident:	06/30/07
	WCC File Number:	0708860
	Our File Number:	2007-0332C

Dear Mr. Lyons:

Enclosed please find the Attorney Fee Petition I am this date submitting in duplicate in the above captioned matter. Pursuant to my conversation with you today, I would ask that you hold this form pending settlement of this case.

With best regards, I am

Sincerely yours,


Gene M. Connell, Jr.

GMC,Jr.ms

Enclosures

South Carolina Workers' Compensation
Commission
1333 Main Street, Suite 500
Post Office Box 1715
Columbia, South Carolina 29202-1715
803-737-5723



WCC File #: 0708860
Carrier File #: WC550-567678
Carrier Code #: _____
Employer FEIN #: _____

Claimant's Name: Bruce W. Nadolny Employer's Name: AVX Corporation
Address: 613 Mammie Drive Address: PO Box 867
City: Myrtle Beach State: SC Zip: 29588 City: Myrtle Beach State: SC Zip: 29578
Home Phone: (843) 293 - 8649 Work Phone: () - - Insurance Carrier: Liberty Mutual Insurance Co.
Preparer's Name: Gene M. Connell, Jr. Law Firm: Kelagher, Connell & Connor, PC Preparer's Phone #: (843) 238 - 5648

Date Attorney Was Hired: 07/31/07

Date of Injury: 06/30/07

Compensation Rate: _____

Does this conclude the case? ☐ Yes ☒ No

PLEASE CHECK AND COMPLETE ONLY ONE: (A, B, C or D)

☐ A. R.67-1205C does not apply to the facts of this case. A _____ % fee of the award or settlement (excluding medical costs) and the costs of this action, as shown by the attached Settlement of Costs, are requested for approval.

☐ B. The subsection of R. 67-1205C applicable to this claim is (C) (____). A fee of \$ _____ is requested for approval based on the following:

Date of first impairment rating or offer of settlement: _____

Impairment Rating given and/or Settlement amount offered prior to date attorney hired: _____

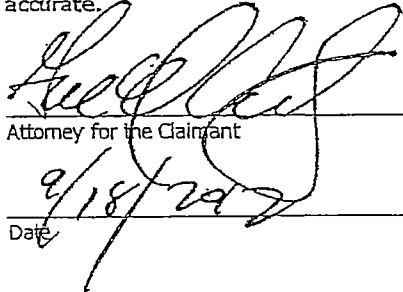
Impairment Rating given and/or Settlement amount offered after date attorney hired: _____

Authorized Health Care Provider's Name: _____

☐ C. Admitted Death Claim - \$2,500.

☐ D. Admitted Lifetime Compensation Claim - \$2,500.

I certify that this form and the attached Statement of Costs are accurate.



Attorney for the Claimant
9/18/2007

Date

Summary	
Total Amount of Compensation	\$ 120,000.00
Attorney's Fee	\$ 20,000.00
Costs	\$ 2,446.44
Total Fees and Costs	\$ 22,446.44
Client Will Receive	\$

I agree to pay my attorney the fee and costs stated. I understand the fee and costs are paid out of my compensation and I understand how much money I will receive after I pay my attorney.

Client

Date

A Statement of Costs must be attached before costs may be approved. File this form in duplicate with the Claims Department. Enclose a self-addressed, stamped envelope. For further information, refer to R.67-1203, R.67-1204, R.67-1205, R.67-1206 and Rule 1.5(a), RPC Rule 407, SCACR.

ary Timekeeper: 5 Gene M. Connell, Jr., Esquire

Nadolny/Bruce

Contact: Bruce Nadolny
Business: 902-1978
Home: 293-8649
Mobile: 902-0808

any Timekeeper: 5 GMC Category: 3 WORKERS' COMPENSATION
 ndary Timekeeper: 1 ETK Draft Template: 00000001 Rate Code: 1
 ating Timekeeper: 1 ETK Final Template: 00000001 Date Opened: 09/25/2007
 ous Balance: 0.00

ite	Tmkr	Cat	Src	H P	T X	B C	R G	Tcode	Ref#	Rate	Units	Hours Worked	Hours to Bill	Write-Up/ Down Hrs	Amount	Write-Up/ Down Amt	Description
ances																	
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5/12/2011	5 GMC	A						22	14						184.75		(34.00) Veritext Corporate Services, Inc. FOR TRANSCRIPT
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5/27/2012	5 GMC	A						22	17						25.00		S.C. WORKERS COMPENSATION COMMISSION FOR FILING FEE
Billable Advances															2,446.44		

Fees:	0.00	Previous Balance:	0.00		
Expenses:	0.00	Payments/Credits:	0.00		
Advances:	2,446.44	Balance Due:	0.00	Total:	2,446.44
Total WIP:	2,446.44				
ARC:	5-30	31-60	61-90	91-120	121-180
	0.00	0.00	0.00	0.00	0.00

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

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

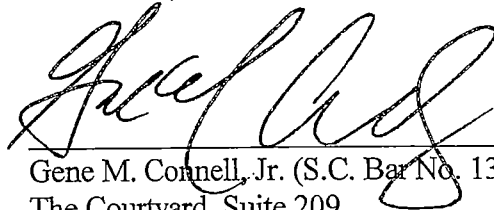
vs.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all materials proposed to be included by any of the parties and not any other material.

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
Attorney for Appellant

February 1, 2019
Surfside Beach, South Carolina

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

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

vs.

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

FINAL BRIEF OF APPELLANT

Gene M. Connell, Jr. (S.C. Bar No. 1358)
KELAHER, CONNELL & CONNOR, P.C.
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
Attorney for Appellant

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STATEMENT OF ISSUES ON APPEAL

This case is before the court based on the trial court's grant of Defendant's motion to dismiss on all causes of action. The issues are as follows:

- I. DID THE TRIAL COURT ERR IN GRANTING RESPONDENT'S MOTION TO DISMISS ON THE GROUNDS THAT THE RESPONDENT IS IMMUNE PURSUANT TO THE *SOUTH CAROLINA TORT CLAIMS ACT*?
- II. DID THE TRIAL COURT ERR IN FINDING RESPONDENT'S NEGLIGENT ACTIONS AND/OR INACTIONS WERE IN AN ADMINISTRATIVE CAPACITY?
- III. DID THE TRIAL COURT ERR IN FINDING RESPONDENT'S NEGLIGENCE DID NOT VIOLATE APPELLANT'S CONSTITUTIONAL OPPORTUNITY TO BE HEARD?
- IV. DID THE TRIAL COURT ERR IN FINDING THAT THE RESPONDENT IS NOT LIABLE FOR FAILING TO NOTIFY APPELLANT OF THE HEARING?

STATEMENT OF THE CASE

This matter involves a civil lawsuit by Kelaher, Connell & Connor, P.C. against the South Carolina Workers' Compensation Commission (Commission). Kelaher, Connell & Connor brought this lawsuit alleging the Commission, through its officers, agents and/or employees, was negligent, reckless and willful in failing to protect plaintiff's lien and in failing to notify it of the hearing so that plaintiff could assert a claim for attorney's fees.

Kelaher, Connell & Connor brought this lawsuit against the Commission for negligence of its employees on November 29, 2017, and requested judgment against the Commission for actual damages in the sum of \$22,446.44. On January 16, 2018, the Commission filed a Motion to Dismiss pursuant to Rule 12 of the *South Carolina Rules of Civil Procedure*, supplemented by a Memorandum in Support of its Motion to Dismiss. Thereafter, on February 27, 2018, Kelaher, Connell & Connor filed its response to the Commission's Motion to Dismiss. On April 9, 2018, The Honorable Benjamin H. Culbertson issued an Order granting the Commission's Motion to

Dismiss. Following the Court's grant of the Commission's Motion to Dismiss, Kelaher, Connell & Connor timely filed its Notice of Motion and Motion for Reconsideration on April 16, 2018.

On June 29, 2018, Judge Culbertson issued an Order partially granting and partially denying Kelaher, Connell & Connor's Motion for Reconsideration. The Judge granted Plaintiff's Motion for Reconsideration to the extent the Court's Order dated April 9, 2018 granted the Defendant's Motion to Dismiss on the grounds that the court lacked jurisdiction. The court denied the Plaintiff's Motion for Reconsideration on all other grounds in an order dated April 9, 2018. Specifically, the Court found that the Defendant is immune in this lawsuit pursuant to the *South Carolina Tort Claims Act*. Appellant timely filed its Notice of Appeal on July 6, 2018.

STATEMENT OF FACTS

On July 31, 2007, Kelaher, Connell & Connor, P.C. was retained by Bruce Nadolny to represent him in a serious worker's compensation claim against AVX Corporation and Liberty Mutual Insurance Company with WCC File No. 0708860. Thereafter, Kelaher, Connell & Connor, P.C., through Gene M. Connell, Jr., represented Nadolny through multiple hearings before the South Carolina Workers' Compensation Commission and also attended depositions; the file is voluminous and contains almost 3,000 pages of medical records. A mediation was held before former Workers' Compensation Commissioner, Tom Marchant, in which the Claimant agreed to accept a \$120,000.00 cash settlement plus a Medicare Set Aside Trust. The day after the mediation, the Claimant advised Kelaher, Connell & Connor he no longer needed their assistance and fired them as counsel. Kelaher, Connell & Connor advised Nadolny it had expended countless hours handling this claim, including going to hearings, and paying \$2,446.44 out-of-pocket for a mediation.

Kelaher, Connell & Connor, P.C. was relieved as counsel on November 9, 2012, but pursuant to the Order relieving counsel, Attorney Connell advised the Commission that Kelaher, Connell & Connor, P.C. would file a claim for attorney's fees for the work that had been performed in this case. (R. p. 12). Kelaher, Connell & Connor, P.C. had previously filed a Form 61 Fee Petition on August 29, 2012, whereupon Commission employees advised Attorney Connell that they had not received it. (R. p. 83). Kelaher, Connell & Connor, P.C. then refiled a second Fee Petition on September 11, 2012, whereupon Commission employees advised attorney Connell they still had not received it. (R. p. 91). Kelaher, Connell & Connor, P.C. filed the Fee Petition for the third time on September 18, 2012. (R. p. 99). Thereafter Attorney Connell wrote a letter on November 9, 2012, advising that he was requesting a lien be placed on the file and requesting that Kelaher, Connell & Connor, P.C. be notified of any settlement hearings. (R. p. 107). An employee of the Commission, Greg Lyons, wrote back a note which stated: "You will need to file a Form 61 with order & cost sheet & we will hold." (R. p. 108). Thereafter Attorney Connell received an email from Amy Bracy of the Workers' Compensation Commission on December 13, 2012, indicating Kelaher, Connell & Connor needed to file yet another Fee Petition and it would act as a lien on the file. (R. p. 110). On December 28, 2012, Kelaher, Connell & Connor, for the fourth time filed a Fee Petition requesting attorney's fees of \$20,000.00 and costs of \$2,446.44. (R. p. 111). The Claimant, Bruce Nadolny, died unexpectedly in 2016 and the South Carolina Workers' Compensation Commission approved a clincher settlement with his widow after a hearing on November 3, 2016, without notifying Kelaher, Connell & Connor, P.C. of the hearing or protecting its attorney's fee lien on file at the Commission.

Kelaher, Connell & Connor, P.C. then filed this lawsuit in circuit court and contends that the South Carolina Workers' Compensation Commission, through its officers, agents and/or employees, was negligent, reckless and willful in one or more of the following particulars:

(a) failing to notify Appellant of a hearing; (b) failing to recognize and protect Appellant's lien; (c) mishandling documents including a Fee Petition which was in fact forwarded to the Commission on four occasions; (d) failing to follow the law in notifying Appellant after he had been relieved; (e) failing to send written notice to the Appellant; (f) failing to handle notice to the Appellant of a potential hearing in a businesslike manner; and (g) failing to abide by its employees' emails and notes which indicated that if Appellant filed a Form 61 with an Order and cost sheet the Commission would hold the fee request until the end of the case. (R. p. 16).

In addition to the negligence cause of action Kelaher, Connell & Connor, P.C. alleged the Commission was in violation of the South Carolina and the United States Constitution for denying Kelaher, Connell & Connor, P.C. an opportunity to be heard prior to releasing the settlement funds to the widow of Nadolny. After this litigation was commenced, Appellant received (out of the blue) an approval order of the Commission granting the requested attorney's fee and costs. (R. p. 11). Unfortunately, the widow of Nadolny had already had a hearing and obtained all of the settlement funds and moved out of state.

STANDARD OF REVIEW

The trial court decided this case under SCRCP 12(b)(6). Thus, the standard of review is whether, in the light most favorable to Plaintiff and with every doubt resolved on his behalf, does the Complaint states any valid claim for relief on any theory of the case. The law is clear a motion to dismiss is disfavored. *Stiles v. Onovato*, 318 S.C. 297, 457 S.E.2d 601 (1995); *Riddle v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009). Plaintiff asserts the trial court erred in granting the motion in light of this standard and the facts of this case.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS ON THE GROUNDS THAT RESPONDENT IS IMMUNE IN THIS LAWSUIT PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT.

A. The acts of the Defendant's employees were ministerial rather than administrative.

The trial court found that because the Commission is a governmental entity it is subject to the *South Carolina Tort Claims Act*, and therefore is not liable for any loss resulting from administrative action or inaction of a legislative, judicial, or quasi-judicial nature. *S.C. Code Ann. §15-78-60(2)*. However, in some instances “[t]he Tort Claims Act waives sovereign immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties.” *Proctor v. Dep’t of Health & Envtl. Control*, 368 S.C. 279, 291, 628 S.E.2d 496 (Ct. App. 2006). The lower court found that *S.C. Code Ann. § 15-78-60(2)* is applicable to the case at hand. South Carolina Code Ann. Section 15-78-60(2) provides: a “government entity is not liable for a loss resulting from . . . administrative action or inaction of a legislative, judicial, or quasi-judicial nature.”

The Court of Appeals of South Carolina addressed several applicable exceptions from the Tort Claims Act in *Hawkins v. City of Greenville*, 358 S.C. 280, 594 S.E.2d 557 (Ct. App. 2004). Specifically, the Court discussed *S.C. Code Ann. Sections* 15-78-60 (1), (2), (4), (5), and (13). The Court of Appeals stated that for each of these provisions:

The determination of immunity from tort liability turns on the question of whether the acts in question were discretionary rather than ministerial. A finding of immunity under the Act “is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards.”

citing *Wooten ex rel. Wooten v. South Carolina Dep’t of Transp.*, 333 S.C. 464, 468 S.E.2d 355, 357 (1999).

A “ministerial act” is defined as:

any action within an official's non-discretionary routine. Ministerial acts are the acts of an official within the scope of office that do not require the official to exercise independence of thought or responsibility of judgment. The official carrying out a ministerial role is usually doing so as a matter of routine. Officials and the governments that employ them enjoy only qualified immunity from suit for harm done by ministerial acts of officials.¹

Bouvier Law Dictionary, 3rd Revision (8th Edition by Francis Rawle West Publishing 1914 3 Volumes).

In the case *sub judice*, the Commission did not make a discretionary decision to notify Plaintiff of the hearing held on November 3, 2016. Per the South Carolina Workers' Compensation Commission regulations, the Commission is required to notify all interested parties. (Thus a ministerial duty). See South Carolina Workers' Compensation Regulation 67-607.² At the time of the hearing, Plaintiff was an interested party and had filed four separate Fee Petitions requesting attorney's fees. (R. pp. 83, 91, 99, 111). Plaintiff was informed via email from Amy Bracy of the Workers' Compensation Commission on December 13, 2012, that if Plaintiff filed another Fee Petition (Plaintiff's fourth) it would act as a lien on the file. (R. p. 110). Plaintiff complied with this request, but due to the simple negligence of the Commission employees was never notified of the hearing. The Commission employees had no discretion as to whether they could refuse to notify Plaintiff or any other interested parties of a hearing. Per the Commission's own regulations, it was the Commission's mandatory duty to notify all interested parties. This is a ministerial act, not a discretionary act. Moreover, the Commission did not use generally accepted professional standards when they negligently failed to protect plaintiff's lien on four separate occasions and failed to notify Plaintiff of the hearing. Thus, this Court should reverse the judgment of the lower court and find

¹ Notice of a hearing is clearly a ministerial act. See *Black's Law Dictionary* which defines ministerial as “Of or relating to an act that involves obedience to instructions or laws instead of discretion, judgment, or skill.”

² S.C. Workers Compensation Commission Reg. 67-607(B). The Commission issues a hearing notice to the parties which includes the date, place, time and purpose of the hearing.

that the Commission is not immune from tort liability for failure to notify the Plaintiff of the hearing – a simple negligent act.

Furthermore, a government entity is liable for their torts in the same manner and to the same extent as a private individual under like circumstances, subject to exemptions from liability and damages, contained in the Act. S.C. Code Ann. § 15-78-40. As stated above, the trial court found that S.C. Code Ann. § 15-78-60(2) is applicable to the case at hand, which states: “the government entity is not liable for loss resulting from (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature.” Therefore, a government agency is only immune if the loss was the result of an administrative action or inaction and that action or inaction was of a legislative, judicial, or quasi-judicial nature. In the present case, the actions or inactions of the employees of the Commission were not in an administrative capacity, rather, the employees failed in performing mere ministerial activities (simply providing notice to Appellant), and therefore the Commission is subject to the *South Carolina Tort Claims Act*.

II. THE TRIAL COURT ERRED IN HOLDING THE COMMISSION’S ACTIONS WERE JUDICIAL.

Additionally, the trial court improperly concludes that because the Commission is a judicial department of the State it necessarily follows that the actions and/or inaction of its employees are automatically of a judicial or quasi-judicial nature. To determine if an act is of judicial nature the court must look to the nature and function of the act itself. *Proctor v. Dep’t of Health & Envtl. Control*, 368 S.C. 279, 300, 628 S.E.2d 496 (Ct. App. 2006). South Carolina recognizes three exceptions to judicial or quasi-judicial immunity. *Id.* Judicial immunity is not appropriate for judges and other officials if: “(1) they did not have jurisdiction to act; (2) the act did not serve a judicial function; or (3) the suit is for prospective, injunctive relief only.” See *Faile v. S.C. Dept. of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536 (2002) (even judges are not insulated by judicial

immunity when they act in an administrative capacity.) *Id.* The second exception, which focuses on the importance of the act itself, rather than the actor, is applicable here. *Id.* Under this exception, even judges are not protected by judicial immunity when they act in an administrative capacity. *Id.* Therefore, it must be determined whether the employee's failure to protect plaintiff's lien and notify plaintiff of a hearing had the nature and function of a judicial act.

In the case *sub judice*, the acts or inaction by the officers, agents, and/or employees of the Commission were ministerial (simple paperwork) and negligent acts rather than judicial acts. To determine whether the act is "judicial in nature" the act must involve an element of judicial discretion and not be merely ministerial. See *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436, 113 S. Ct. 2167, 124 L. Ed. 2d. 391 (1993) (stating that "when judicial immunity is extended to officials other than judges, it is because their judgments are 'functional[ly] comparab[le]' to those of judges—that is, because they, too, 'exercise a discretionary judgment' as a part of their function") (quoting *Imbler v. Pachtman*, 424 U.S. 409, 423, 96 S. Ct. 984, 47 L. Ed. 2d. 128 (1976)). *Desoto County v. Dennis*, 160 So. 3d 1154 (Miss. 2015). The employees of the Commission are afforded no discretion in carrying out of their duty to notify all interested parties of upcoming hearings – the law mandates notice to parties. The Commission employees must legally notify parties to a hearing of their right to attend and be heard. The United States Constitution and the South Carolina Constitution require it and there are no exceptions. If there is one core requirement in the United States it is notice of a hearing and opportunity to be heard.

III. THE TRIAL COURT ERRED IN NOT HOLDING THE FAILURE TO NOTIFY APPELLANT OF THE HEARING WAS GROSSLY NEGLIGENT.

Furthermore, S.C. Code Ann. § 15-78-60(12) states that a governmental entity is not liable for a loss resulting from certain events including "licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue,

deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner.” (emphasis added).³ A potential injured third-party may seek relief under this exception. *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 317, 743 S.E.2d 109 (2013). Gross negligence is defined as “the intentional conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do.” *Id.* citing *Etheredge v. Richland Sch. Dist. One*, 341 S.C. 307, 310, 534 S.E.2d 275 (2000). “Gross negligence has also been defined as a relative term, and means the absence of care that is necessary under the circumstances.” *Id.* In most cases, gross negligence is factually controlled and its determination best rests with the jury.” *Faile v. South Carolina Dep’t of Juvenile Justice*, 350 S.C. 315, 332, 566 S.E.2d 536, 544 (2002).

Here, the Commission asserts that it is immune under S.C. Code § 15-78-60(12). Although the exception relied on by the Commission does not expressly contain a gross negligence standard, in *Chakrabarti* the Court of Appeals of South Carolina held that when the exception of gross negligence applies to a case, the gross negligence standard is read into any other applicable exceptions. *Id.* at 319. As stated above, a third party may seek relief under section 15-78-60(12). Therefore, this Court should find S.C. Code § 15-78-60(12) is applicable to the current case and it should extend the gross negligent standard to the additional exceptions relied on by the Commission. *Id.*

The gross negligence of the Commission employees is evidenced by their repeated failure to properly document the fee petition (on four separate occasions), their failure to protect the Plaintiff’s lien, their failure to notify Plaintiff of the hearing, as well as the Affidavit of Virginia Crocker, who was a South Carolina Workers’ Compensation Commissioner for eight years and the Judicial Director at the Commission for an additional eight years stating notice was required and customary

³ It should be noted this section makes no mention of the notice requirement because it would not be constitutional.

for the Commission. (R p. 59). This repeated failure of Commission employees to properly secure the lien of the Plaintiff coupled with the affidavit of a former Workers' Compensation Commissioner demonstrates the conscious failure to provide proper legal notice. It is incumbent upon the Commission to protect Appellant's rights by providing the statutory notice.⁴

IV. THE TRIAL COURT ERRED IN FAILING TO HOLD THE APPELLANT HAD A CONSTITUTIONAL RIGHT TO BE HEARD.

Furthermore, 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. The fundamental requirements of due process include notice and an opportunity to be heard in a meaningful way. *Tant v. S.C. Dep't of Corr.*, 408 S.C. 334, 340, 759 S.E.2d 398, 401 (2014). Determining whether a person has been denied due process requires that the individual be denied an interest that can be defined as liberty or property under the Due Process Clause. *Id.* A person's property interests' extend well beyond actual ownership of real estate, chattels, or money. *Bd. of Regents v. Roth*, 408 U.S. 564, 571-572, 92 S. Ct. 2701 (1972). Furthermore, pursuant to S.C. Code Regs. 67-1204(F), "[i]f the Form 61 and Order do not comply with R. 67-1205, the Commissioner reviewing the Form 61 and Order shall immediately schedule a hearing to consider argument of counsel and testimony, if any."

The trial court also found that the Eleventh Amendment protected the Commission from suit. However, this argument begs the question in this case that a governmental entity is always liable if it takes action against a citizen without providing notice and an opportunity to be heard.

⁴ As an example, this case is no different than if a Commission employee driving a Commission car failed to yield the right of way and caused a wreck. Both this case and the car wreck example involve a violation of a statutory law.

Due process is not satisfied unless a person is given notice.⁵ This is the core principle of the Constitution – one should not be deprived of property without a hearing. Notice is a fundamental and elementary requirement of due process. The purpose of course is that the government follow a fair process of decision making when it acts to deprive a person of its property rights. *Jones v. Flowers*, 547 U.S. 220 (2006); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (seizure without notice and hearing violates procedural due process).

In the present case, Plaintiff was not notified of the hearing on November 3, 2016 and thus, was unable to protect its interest and lien for attorney's fees, which was established on December 28, 2012, after submitting his Fee Petition for the fourth time.⁶ The Appellant'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 its claim.⁷

CONCLUSION

For the reasons set forth above, Appellant requests that this Court reverse the trial court's Order partially Denying Appellant's Motion for Reconsideration and find as a matter of law the Commission is liable for failure to provide Appellant notice of the hearing.

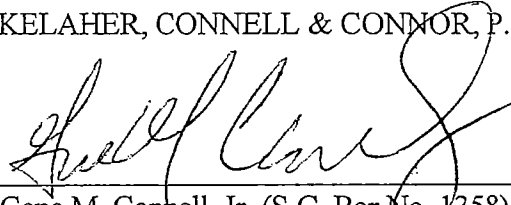
⁵ This Court has found in the area of tax sales notice must be given. *Rives v. Bulsa*, 325 S.C. 287, 478 S.E.2d 878 (Ct.App. 1996) (failure to give the required notice of a tax sale is a fundamental defect).

⁶ It is interesting that the Commission approved the attorney's fees months after the hearing with Nadolny's widow after the Appellant made the Complaint. (R. p. 11).

⁷ Further, motions to dismiss are disfavored in this state and the Court did not consider the Affidavit of Virginia Crocker submitted by the Plaintiff which essentially turned this case into one for summary judgment.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.

A handwritten signature in black ink, appearing to read "Gene M. Connell, Jr.", written over a horizontal line.

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February 13, 2019

Surfside Beach, South Carolina

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

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

vs.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b)
SCACR.

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February 13,, 2019
Surfside Beach, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE 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

Kelaher, Connell & Connor, P.C. Appellant

vs.

South Carolina Workers' Compensation Commission Respondent

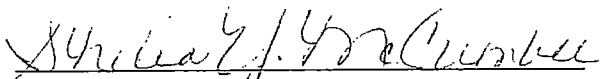
PROOF OF SERVICE

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 **Final Brief of Appellant** on the Respondent, on the 13th day of February 2019, by depositing a copy of same in the United States Mail, postage prepaid, to:

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Chelsea Lane Monroe, Esquire
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Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 13th day of February, 2019.


Notary Public for South Carolina
My Commission Expires: 3-12-24

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

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

vs.

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

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

I. THE ACTS OF THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION WERE NOT OF A JUDICIAL NATURE.

The Respondent argues repeatedly throughout its brief that the actions of a clerk of the South Carolina Workers' Compensation Commission in failing to notify Appellant of a hearing are of a judicial nature. The Respondent cites the Mississippi Supreme Court case of *Desoto County v. T.D.*, 160 So. 3d 1154 (Miss. 2015) for the proposition that it is entitled to complete immunity. However, Respondent fails to show why a clerk failing to notify someone of a hearing is of a judicial nature. The record is replete with evidence that Appellant on numerous occasions notified Respondent Workers' Compensation Commission of its lien. There is also an Affidavit of a former Workers' Compensation Commissioner in the record which clearly shows that this was a ministerial function and not a judicial function. The issue is not about the approval of the fee, but about the negligence of a clerk to give notice to Appellant of an opportunity to present its claim for a fee.

There is a consistent line of cases from many jurisdictions throughout the country that clerks do not enjoy the benefit of judicial immunity and are liable for their negligent acts. In *Pittman v. Lower Court Counseling*, 110 Nev. 359, 871 P.2d 953 (1994), *overruled on other grounds*, *Nunez v. City of North Las Vegas*, 116 Nev. 535, 1 P.3d 959, 960 (2000), a defendant decided to perform community service rather than pay a fine for a driving violation. He performed his required service and returned to court with a signed letter attesting to his completion. He gave a letter to the clerk of court, but the clerk never recorded it in the proper case file. A warrant was issued for Pittman's arrest, and two years later he was arrested on the outstanding warrant and spent two days in jail. The Nevada Supreme Court held that clerks are required to attend to official court documents and that the clerk was not entitled to immunity for negligent performance of a ministerial act.

In *Smith v. Lewis*, 660 S.W. 2d 558 (Mo. App. 1983), a woman was arrested pursuant to a bench warrant that had been previously discharged. She sued the clerk of court and others. The Missouri Court of Appeals held that her allegations were sufficient to withstand a motion to dismiss and remanded the cause for the trial court to make a factual determination as to whether the clerk's actions were judicial or ministerial.

In *Cook v. City of Topeka*, 232 Kan. 334, 654 P. 2d 953 (1982), the court held that a clerical error that resulted in the failure to properly recall an arrest warrant did not constitute a judicial act, but rather a ministerial act, and, thus, that the clerk of court was not entitled to judicial immunity.

In *Mauro v. County of Kittitas*, 26 Wash. App. 538, 613 P.2d 195 (1980), Mauro failed to pay a speeding ticket and a bench warrant was issued for his arrest. He later paid the ticket and received a receipt reflecting his payment. For unknown reasons, the warrant was never recalled, and Mauro was later arrested on the warrant. The court held that the clerk who neglected to recall the warrant was not entitled to judicial immunity, because the required act of recalling the warrant was not discretionary, but purely ministerial.

In *Dalton v. Hysell*, 56 Ohio App. 2d 109, 381 N.E.2d 955 (1978), superseded by statute as stated in *Blankenship v. Enright*, 67 Ohio App. 3d 303, 586 N.E.2d 1176 (1990), the Court held that a clerk who negligently fails to record a defendant's payment of a traffic fine is not immune from an action for damages. The court stated that because the act was neither a discretionary act nor one done at the instruction of a judge, public policy provided no basis for granting immunity.

In *Calhoun v. City of Providence*, 120 R.I. 619, 390 A.2d 350 (1978), Calhoun was arrested on a warrant for which the underlying charge had been dismissed some months before. He sued the State and various employees of the court system, alleging a negligent failure to recall the arrest warrant. The court held that the trial court must make the factual determination whether the failure

to properly recall the warrant rested with the judge, who would be entitled to immunity, or rather with the clerk of court, who would have been negligent in performing a ministerial task and thus not entitled to immunity.

In *Connell v. Tooele City*, 572 P.2d 697 (Utah 1977), the court found no basis in public policy to extend immunity to a clerk who negligently failed to record the payment of a traffic fine in the proper case file. Because of this oversight, the person who had paid the fine was later arrested and jailed.

In *Stine v. Shuttle*, 134 Ind. App. 67, 186 N.E.2d 168 (1962), the court held that a court clerk could be found liable for false imprisonment based upon his negligence in issuing a warrant for the arrest of a person who had paid his traffic fine.

Finally, in *City of Bayou La Batre v. Robinson*, 785 So.2d 1128 (2000), the Supreme Court of Alabama found that Robinson who paid a fine and received a receipt was entitled to bring an action when a warrant had not been recalled.

In sum, all these cases show that the government is liable for a ministerial act of its employee. Here, the South Carolina Workers' Compensation Commission employee had responsibility to provide Appellant notice of a hearing. This is not a judicial act, but a ministerial act required by workers' compensation rules and regulations. Further holding the Workers' Compensation Commission employees liable is in keeping with the South Carolina Tort Claims Act which provides in pertinent part that "governmental entities are liable for their torts in the same manner and to the same extent as a private individual under like circumstances." See S.C. Code § 15-78-40.

II. APPELLANT HAD A CONSTITUTIONAL RIGHT TO BE NOTIFIED OF THE HEARING.

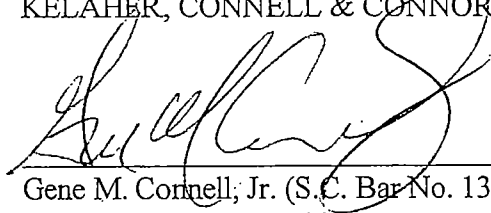
As has been stated above, Appellant had a constitutional right to be notified of the workers' compensation hearing in this case. The statutes and rules and regulations of the South Carolina Workers' Compensation Commission require that the Commission give notice to all interested parties of a hearing prior to the hearing being held. There certainly can be no argument that Appellant should have been notified of the hearing. In fact, the Commission recognizes that it should have given Appellant notice of the hearing since the Commission approved the attorney's fee months after the hearing had been held without Appellant's knowledge.

CONCLUSION

Appellant spent a significant amount of time and effort on the workers' compensation claim which is the subject of this case. After the law firm was relieved as Claimant's counsel, it properly filed Form 61 Fee Petitions with the Commission on August 29, 2012 (R. p. 83), September 11, 2012 (R. p. 91), September 18, 2012 (R. p. 99) and December 28, 2012 (R. p. 111). The Commission and its employees had ample notice that Appellant was requesting a fee. The Form 61 Fee Petition had been sent four times to the Commission. Appellant on multiple occasions advised the Commission of its lien and on multiple occasions Appellant filed the proper documentation to protect its lien. Appellant did everything right in requesting that it be notified of any settlement hearing. Accordingly, under the laws of the State of South Carolina, including the South Carolina Tort Claims Act, and the Constitutions of South Carolina and the United States, Appellant had a right to be notified of the hearing and its constitutional rights were violated by the failure of the Commission's employees to perform a ministerial act and notify Appellant. Accordingly, the judgment should be reversed.

Respectfully submitted,

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February 13, 2019

Surfside Beach, South Carolina

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

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

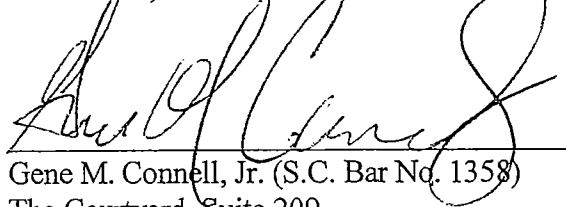
vs.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief of Appellant complies with Rule 211(b) SCACR.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
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The Honorable Benjamin H. Culbertson, Circuit Court Judge

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Kelaher, Connell & Connor, P.C. Appellant

vs.

South Carolina Workers' Compensation Commission Respondent

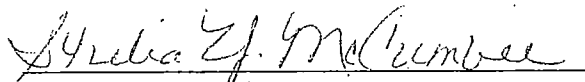
PROOF OF SERVICE

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 **Final Reply Brief of Appellant** on the Respondent, on the 13th day of February 2019, by depositing a copy of same in the United States Mail, postage prepaid, to:

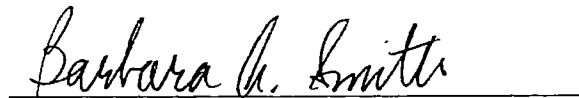
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Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 13th day of February, 2019.


Notary Public for South Carolina
My Commission Expires: 3-12-24

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
THE HONORABLE BENJAMIN H. CULBERTSON
CIRCUIT COURT JUDGE

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

Kelaher, Connell & Connor P.C,

APPELLANT,

versus

South Carolina Workers' Compensation Commission

RESPONDENT

FINAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. The Trial Court properly dismissed the Law Firm's claim against the Commission arising out of the Commission's purported failure to protect the Law Firm's alleged attorneys' fee lien and failure to notify the Law Firm of any applicable hearings because the Commission is immune from liability pursuant to the exceptions to the waiver of immunity under the South Carolina Tort Claims Act providing that a governmental entity is not liable for loss resulting from (1) administrative action or inaction of a judicial or quasi-judicial nature; (2) execution of any process; and (3) failure to enforce any law or regulation.
 - A. The immunity granted to the Commission under subsections (2), (3), and (4) of § 15-78-60 of the South Carolina Tort Claims Act does not depend upon whether the Commission's alleged actions or inactions were ministerial or discretionary.
 - B. The immunity granted to the Commission under subsections (2), (3), and (4) of § 15-78-60 of the South Carolina Tort Claims Act is separate from the common law doctrine of judicial immunity; therefore, the doctrine of judicial immunity has no application to the analysis of whether the Commission is entitled to immunity under the South Carolina Tort Claims Act.
 - C. The Trial Court did not err in declining to incorporate a gross negligence standard into the exceptions to the waiver of immunity of the South Carolina Tort Claims Act relied upon by the Commission.
- II. The Law Firm did not assert any claim for violation of state or federal constitutional rights in its Complaint and is further prohibited from seeking monetary damages from the Commission for alleged violations of the state and federal constitutions because (1) the South Carolina Constitution does not provide a private right of action for civil damages arising from state constitutional violations; and (2) the Commission cannot be sued for violations of the federal constitution pursuant to 42 U.S.C. § 1983 because it is not a "person" within the meaning of § 1983.

COUNTERSTATEMENT OF THE CASE

This case arises out of allegations by Appellant Kelaher, Connell & Connor, P.C. (the "Law Firm") that Respondent South Carolina Workers' Compensation Commission (the "Commission") allegedly failed to protect the Law Firm's purported lien for attorneys' fees and failed to notify the Law Firm of a hearing so it could assert a claim for attorneys' fees in a case the Law Firm had handled before the Commission.

On November 29, 2017, the Law Firm filed a Complaint against the Commission in the Court of Common Pleas for Horry County. [R.pp. 14-17; Compl.] The Complaint alleged that on or about July 31, 2007, the Law Firm was retained by Bruce Nadolny (the "Claimant") to represent him in a worker's compensation claim against AVX Corporation and Liberty Mutual Insurance. [R.p. 14; Id. at ¶ 3.] The Law Firm asserted that it represented the Claimant through numerous hearings before the Commission. [R.p. 14; Id. at ¶ 4.] A mediation was held before the former Commissioner, Tom Marchant, in which the Claimant tentatively agreed to accept \$120,000.00 plus a Medicare Set Aside Trust. [R.p. 14; Id. at ¶ 5.]

The Claimant advised the Law Firm the day after the mediation that he no longer needed the Law Firm's assistance. The Law Firm advised the Claimant that it had expended many hours handling the claim and had expended \$2,446.44 in mediation costs. [R.p. 15; Id. at ¶ 6.] The Law Firm was relieved as the Claimant's counsel on November 9, 2012 by the Commission. The Commission's Order relieving the Law Firm as counsel noted that the Law Firm had advised the Commission that it would file a claim for attorneys' fees for the work done in the matter. [R.p. 15; Id. at ¶ 7.]

The Law Firm alleged that it filed Form 61 Fee Petitions with the Commission on August 29, 2012 and September 11, 2012 whereupon in both cases the Commission advised the Law Firm that it had not received the forms. [R.p. 15; Id. at ¶¶ 8-9.] The Law Firm allegedly filed a third Form 61 Fee Petition on September 18, 2012. [R.p. 15; Id. at ¶ 10.] The Law Firm alleged that it advised the Commission via letter on November 9, 2012 that it was requesting a lien be placed on the file and requesting the Law Firm be notified. [R.p. 15; Id. at ¶ 11.]

An employee of the Commission allegedly responded to the Law Firm that it would need to file a Form 61 Fee Petition and cost sheet for a lien to be held. [R.p. 15; Id. at ¶ 12.] On December 13, 2012, the Law Firm was allegedly further advised by the Commission that it would need to file a Fee Petition to act as a lien on the file. [R.p. 14; Id. at ¶ 13.] The Law Firm claimed that it then filed on December 28, 2012 a fourth Fee Petition requesting attorneys' fees of \$20,000.00 and costs of \$2,446.44. [R.p. 16; Id. at ¶ 14.]

The Claimant died in 2016. The Law Firm alleged that the Commission approved a settlement to the Claimant's widow on November 3, 2016 without notifying the Law Firm. [R.p. 16; Id. at ¶ 15.]

The Law Firm brought a single cause of action for negligence against the Commission, requesting total damages in the sum of \$22,446.44 for the amount of its attorneys' fees earned and costs. [R.p. 16; Id. at ¶ 18.] The Law Firm alleged that the Commission was "negligent, reckless and willful" through the following ways:

- a. In failing to notify [the Law Firm] of a hearing;
- b. In failing to recognize and protect [the Law Firm's] lien;

- c. In mishandling documents including a Fee Petition which was in fact forwarded to the Commission on four occasions;
- d. In failing to follow generally accepted practices in notifying [the Law Firm] after [it] had been relieved;
- e. In failing to send written notice to the [Law Firm];
- f. In failing to handle notice to the [Law Firm] of a potential hearing in a businesslike manner; [and]
- g. In failing to abide by its employees' emails and notes which indicated that if [the Law Firm] filed a Form 61 with an Order and cost sheet they would hold until the end of the case.

[R.p. 16; Id. at ¶ 16.]

On January 16, 2018, the Commission filed a Motion to Dismiss the Law Firm's suit against the Commission pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure on the basis that the Circuit Court did not have jurisdiction to hear the matter and because the Commission is immune from the allegations of the suit under the South Carolina Tort Claims Act. [R.pp. 18-19; 20-32; Mtn. to Dismiss; Memo. in Support.] In particular, the Commission argued it was immune under the provisions of the Tort Claims Act providing that a governmental entity is not liable for loss resulting from:

(2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature; [and]

(3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process.

[R.pp. 23-24; Memo. in Support, pp. 4-5. (citing S.C. CODE ANN. §§ 15-78-60(2), (3).)]

The Law Firm filed a Response to the Motion to Dismiss on February 27, 2018 [R.pp. 33-38; Response]. The Motion to Dismiss was thereafter heard on March 1, 2018 before The Honorable Benjamin H. Culbertson. [R.pp. 62-82; Hearing Tr.]

The Trial Court issued an Order Granting the Motion to Dismiss on April 9, 2018, ruling that it did not have jurisdiction over the claim asserted against the Commission by the Law Firm and further ruling that the Commission was immune under the Tort Claims Act, in particular pursuant to subsection (2) of § 15-78-60 which provides that a governmental entity is not liable for any loss resulting from an administrative action or inaction of a judicial or quasi-judicial nature. [R.pp. 6-9; Order.]

The Law Firm filed a Motion to Reconsider the Trial Court's Order Granting the Motion to Dismiss on April 16, 2018. [R.pp. 39-41; Mtn. to Reconsider.] The Commission responded in opposition to the Motion to Reconsider on May 2, 2018. [R.pp. 42-44; Response.] The parties both filed briefs on the Motion to Reconsider. [R.pp. 45-54; 55-58; Brief on Reconsideration; Brief in Opposition.]

On June 29, 2018, the Trial Court subsequently issued an Order Partially Granting and Partially Denying the Motion for Reconsideration. [R.pp. 1-4; Order.] The Trial Court determined that it did have jurisdiction over the claim asserted by the Law Firm against the Commission and reversed its previous ruling that it lacked jurisdiction. [R.pp. 2-3; Id. at pp. 2-3.] The Trial Court affirmed its prior ruling that the Commission was immune under the Tort Claims Act for the claim asserted against it by the Law Firm and pursuant to this ruling dismissed the suit. [R.pp. 3-4; Id. at pp. 3-4.]

The Law Firm filed and served its Notice of Appeal on or about July 5, 2018.

STANDARD OF REVIEW

“On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.” Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). The appellate court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and reasonably deducible inferences in the complaint would entitle the plaintiff to relief on any theory of the case. Id. The court may sustain the dismissal when the facts alleged in the complaint do not support relief under any theory of law. Flateau v. Harrelson, 355 S.C. 197, 202, 584 S.E.2d 413, 416 (Ct. App. 2003).

ARGUMENT

- I. **The Trial Court properly dismissed the Law Firm’s claim against the Commission arising out of the Commission’s purported failure to protect the Law Firm’s alleged attorneys’ fee lien and failure to notify the Law Firm of any applicable hearings because the Commission is immune from liability pursuant to the exceptions to the waiver of immunity under the South Carolina Tort Claims Act providing that a governmental entity is not liable for loss resulting from (1) administrative action or inaction of a judicial or quasi-judicial nature; (2) execution of any process; and (3) failure to enforce any law or regulation.**

The Trial Court properly dismissed the Law Firm’s claim against the Commission pursuant to the immunity provisions of the South Carolina Tort Claims Act. The Trial Court found the alleged actions or inactions of the Commission in allegedly failing to protect the Law Firm’s attorneys’ fees lien or in failing to notify the Law Firm of any hearing concerning the fees or the alleged lien were administrative actions or inactions of a judicial or quasi-judicial nature for which a governmental entity is not liable for under S.C. CODE ANN. § 15-78-60(2).

The Tort Claims Act governs all tort claims in South Carolina against

governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. See Murphy v. Richland Mem'l Hosp., 317 S.C. 560, 562, 455 S.E.2d 688, 689 (1995); Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct. App. 1998); S.C. CODE ANN. § 15-78-20(b) ("The remedy provided by [the Tort Claims Act] is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)."); S.C. CODE ANN. § 15-78-70(a) ("[The Tort Claims Act] constitutes the exclusive remedy for any tort committed by an employee of a governmental entity."). "The provisions of [the Act] establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be *liberally construed* in favor of limiting the liability of the State." S.C. CODE ANN. § 15-78-20(f) (emphasis added).

In this case, the Law Firm's claim against the Commission invokes the provisions and immunities of the Tort Claims Act. The General Assembly created the Commission and designated that it would be composed of a "judicial and administrative department." S.C. CODE ANN. § 42-3-10. The Commission is a governmental entity as defined in the Tort Claims Act. The Act defines "governmental entity" as "the State and its political subdivisions." See S.C. CODE ANN. § 15-78-30(d). The term "political subdivision" under the Act includes any agency of the State. § 15-78-30(h). The term "agency" under the Act includes any "commission." § 15-78-30(a). Thus, the Commission as an agency of the State is a governmental entity subject to the Tort Claims Act.

While the Tort Claims Act provides that the State, its agencies, political subdivisions, and other governmental entities are "liable for their own torts in the same

manner and to the same extent as a private individual under like circumstances,” the Act also provides certain limitations and exceptions to liability. S.C. CODE ANN. §§ 15-78-40, -60. In particular, governmental entities are not liable for loss resulting from:

(2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature;

(3) execution, enforcement, implementation of the orders of any court or execution, enforcement, or lawful implementation of any process; [and]

(4) adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies.

S.C. CODE ANN. §§ 15-78-60(2), (3), and (4).

The Law Firm’s claim against the Commission arising out of its purported failure to protect the Law Firm’s alleged attorneys’ fees lien and failure to notify the Law Firm of any hearing so the Law Firm could assert its claim for attorneys’ fees falls within the above enumerated exceptions to the waiver of governmental immunity; therefore, the Commission is not liable for any alleged loss.

First, the alleged actions or inactions of the Commission clearly qualify as administrative actions or inactions of a judicial or quasi-judicial nature. In DeSoto Cnty. v. T.D., 160 So.3d 1154 (Miss. 2015), a case cited by the Law Firm in its Appellant’s Brief, the Supreme Court of Mississippi held that a county was entitled to immunity under the Mississippi Tort Claims Act for a justice court clerk’s failure to cancel an arrest warrant. In that case, a domestic dispute led a justice court judge to issue an arrest warrant to the arrestee. The judge then canceled the warrant after the arrestee complied with the judge’s order to attend an anger management course. However, because the

justice court clerk failed to send a cancellation notice to the local sheriff's office, county deputies later arrested the arrestee and held her in jail until the mistake was discovered. The arrestee sued the county for the clerk's negligence. The county moved for summary judgment, claiming immunity under the Mississippi Tort Claims Act. Id. at 1155.

The Mississippi Tort Claims Act contains a similar grant of statutory immunity to that of South Carolina's Act, providing that the governmental entity shall not be liable for any claim "[a]rising out of a . . . judicial action or inaction, or administrative action or inaction of a . . . judicial nature." Id. at 1156. Interpreting and applying the statute according to its clear, plain, and unambiguous meaning, the Mississippi Supreme Court found that the "Legislature could not have chosen language that more precisely and clearly provide[d] immunity to the clerk." Id. The court observed that the statute used "no words of limitation" and provided immunity for all claims that arise from a "judicial action or inaction, *or administrative . . . inaction of a . . . judicial nature . . .*" Id. (emphasis in original).

The Mississippi Supreme Court explained why the negligence claim against the county arising out of the clerk's failure to cancel the arrest warrant constituted a judicial action and an administrative inaction of a judicial nature entitling the county to immunity:

This claim arises from both a judicial action and an administrative inaction of a judicial nature. Once the parties appeared, the justice court judge should not have left the arrest warrant outstanding. Then, after the parties complied with the judge's instructions and he remanded the charges, the clerk should have notified the local sheriff's office that the warrants were cancelled. So the authority to cancel the warrant lay with the judge. And the clerk had an administrative duty to issue notice of the cancelled warrant—clearly an act of a "judicial nature"—which related to and derived from the judge's decision. Black's Law Dictionary defines "judicial" as "[o]f, relating to, or by the court or a judge." So, clearly, the

clerk's administrative duty was judicial in nature and is within the purview of [the statute].

Id. at 1156-57.

As in DeSoto, the language of § 15-78-60(2), providing that a governmental entity is not liable for a loss resulting from an “administrative action or inaction of a . . . judicial, or quasi-judicial nature,” could not be more clear that it applies to the actions or inactions of the Commission in allegedly failing to protect the Law Firm’s lien and in failing to notify the Law Firm of any hearing. The Commission functions as both a judicial and administrative department. S.C. CODE ANN. § 42-3-10. All attorneys’ fees are subject to the approval of the Commission, and attorneys must report and obtain approval of any fee for services rendered in a worker’s compensation claim. See S.C. CODE ANN. § 42-14-90; S.C. CODE REGS. 67-1204. If a claimant refuses to agree to the attorneys’ fee and will not sign the required Form 61 Fee Petition, the attorney must file an unsigned Form 61 and motion requesting a hearing from the Commission to be awarded an attorneys’ fee. S.C. CODE REGS. 67-1205(D). Therefore, to obtain an award of attorneys’ fees from the Commission in a case where the claimant has not agreed to the fee, as the case is here, the Commission, acting in its judicial capacity, must approve the fee.

The Law Firm claims that the Commission failed to take administrative actions to protect the Law Firm’s attorneys’ fee lien, including the mishandling of the Form 61 Fee Petitions, and failed to notify the Law Firm of any hearing affecting its attorneys’ fees. These alleged acts are each administrative actions or inactions intertwined with the Commission’s authority to approve of and award attorneys’ fees in its judicial capacity. Therefore, the administrative actions or inactions taken by the Commission as alleged by

the Law Firm derive from judicial functions of the Commission and thus are indisputably administrative actions or inactions of a judicial or quasi-judicial nature for which the Commission is immune under § 15-78-60(2).

The Commission is further immune from the Law Firm's claim under subsection (3) of § 15-78-60 which provides the governmental entity is not liable for any loss resulting from the "execution . . . of any process." The Law Firm alleged that the Commission failed to follow the proper procedure and process pertaining to the Law Firm's purported attorneys' fee lien. Under § 15-78-60(3), the Commission is not liable for any loss arising from the alleged failure to properly execute that process.¹

Furthermore, the Law Firm argues in its Appellant's Brief that the Commission did not enforce or comply with Commission regulations regarding the notification to all interested parties of hearing dates. See S.C. CODE REGS. 67-607. The Law Firm's allegation that the Commission did not enforce or comply with its regulations concerning the alleged attorneys' fee lien and notice of hearing falls within subsection (4) of § 15-78-60 providing for no liability resulting from the Commission's alleged failure to enforce any law or regulation. Repko v. Cnty. of Georgetown, 424 S.C. 494, 818 S.E.2d 743 (2018) (in negligence action by landowner against county after county allegedly negligently and grossly negligently failed to comply with or enforce its rules, regulations, and written policies governing its handling of financial guarantees posted by developer, the county was immune from the action under the Tort Claim Act's exception for the

¹While the Trial Court did not rule upon this ground in granting the Commission's motion to dismiss, "[t]he appellate court may affirm any ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR; see also I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 527 S.E.2d 716, 723 (2000) (holding "respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court").

failure to enforce any law, regulation, or written policy). Therefore, the Commission is also immune from liability under this subsection of § 15-78-60 as well.

- A. The immunity granted to the Commission under subsections (2), (3), and (4) of § 15-78-60 of the South Carolina Tort Claims Act does not depend upon whether the Commission's alleged actions or inactions were ministerial or discretionary.**

In its appeal, the Law Firm argues that the alleged acts of the Commission were ministerial rather than administrative and thus not subject to immunity. First, this argument is not preserved for appellate review because the Law Firm did not raise this argument to the Trial Court in its initial response to the Motion to Dismiss or at the hearing on the Motion to Dismiss, but rather did not raise this argument until its Motion for Reconsideration and Brief on its Motion for Reconsideration of the initial Order Granting the Motion to Dismiss. [R.pp. 33-38; 62-82; 39-41; 45-54; Response; Hearing Tr.; Mtn. to Reconsider; Brief on Reconsideration.] It is well-settled that an issue may not be raised for the first time in a motion to reconsider for the issue to be preserved for appellate review. Repko v. Cnty. of Georgetown, 424 S.C. 494, 502, 818 S.E.2d 748, 749 (2018).

Second, the Law Firm's argument that the Commission's alleged actions or inactions were not discretionary acts subject to immunity, but rather ministerial acts, is misguided. The Commission is not asserting Tort Claims Act immunity under the separate subsection (5) of § 15-78-60 which provides that a governmental entity is not liable for a loss resulting from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee." Rather, the Commission asserts immunity under subsections (2), (3), and (4) of § 15-78-

60 as argued above.

A plaintiff made a similar argument to that of the Law Firm's which was rejected by the South Carolina Supreme Court in Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013). In Health Promotions, a company that provided preventative dental care to children in school and which employed dental hygienists who contracted with supervising dentists brought an action against the Board of Dentistry, seeking damages resulting from the Board's regulation imposing restrictions on hygienists' work in schools. The Trial Court granted summary judgment in favor of the Board, in part finding that the Board was immune from suit under the Tort Claims Act. Id. at 626-31, 743 S.E.2d at 809-812.

On appeal, the plaintiff argued that the Board did not prove it was entitled to discretionary immunity as there was no evidence that the Board "weighed competing considerations and then made a conscious choice to act." Id. at 634, 743 S.E.2d at 814. The Supreme Court held that the plaintiff's reliance on an alleged failure to prove entitlement to discretionary immunity was "misplaced." "Rather, at issue [was] the propriety of the Board's legislative action." The Supreme Court found that subsections (1), (2), and (4) of § 15-78-60 granted per se immunity to the Board for its promulgation of the regulation which constituted a legislative or quasi-legislative act. These subsections provided the governmental entity would not be liable for loss resulting from:

(1) legislative, judicial, or quasi-judicial action or inaction;

(2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature; [and]

....

(4) adoption, enforcement, or compliance with any law or failure to adopt

or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies.

Health Promotions, 403 S.C. at 634-37, 743 S.E.2d at 814-15 (citing §§ 15-78-60(1), (2), and (4)).

The Supreme Court concluded these subsections contained “an irrefutable presumption of the exercise of discretion.” The Board did not need to prove it acted with discretion in asserting immunity under these subsections. Health Promotions, 403 S.C. at 634-35, 743 S.E.2d at 814.² Likewise, the Commission also does not need to prove its acts were discretionary to assert immunity under subsections (2), (3), and (4) of § 15-78-60. See also DeSoto Cnty. v. T.D., 160 So.3d 1154, 1157-58 (Miss. 2015) (observing that county was claiming immunity under provision of Mississippi Tort Claims Act providing governmental entity not liable for any claim arising out of a judicial action or inaction or administrative action or inaction of a judicial nature and was not claiming discretionary function immunity and noting the distinction between these two types of immunities).

B. The immunity granted to the Commission under subsections (2), (3), and (4) of § 15-78-60 of the South Carolina Tort Claims is separate from the common law doctrine of judicial immunity; therefore, the doctrine of judicial immunity has no application to the analysis of whether the Commission is entitled to immunity under the South Carolina Tort Claims Act.

The Law Firm also contends that the Commission is not entitled to immunity

² The Law Firm cites to dicta in the case of Hawkins v. City of Greenville, 358 S.C. 280, 293-94, 594 S.E.2d 557, 564 (Ct. App. 2004) for the proposition that the determination of immunity from tort liability under the subsections upon which the Commission relies “turns on the question of whether the acts in question were discretionary rather than ministerial.” The Supreme Court’s analysis in the later 2013 case of Health Promotions, that the governmental entity does not have to prove it acted with discretion in order to rely upon those subsections not containing any specific qualification of discretion, eliminates any such requirement.

under the doctrine of common law judicial immunity. The Commission is not asserting immunity under the doctrine of common law judicial immunity but under specific provisions of the Tort Claims Act. See S.C. CODE ANN. §§ 15-78-60(2), (3), and (4); see also DeSoto Cnty. v. T.D., 160 So.3d 1154, 1157-58 (Miss. 2015) (observing that county was claiming immunity, not under common law judicial immunity, but rather under provision of Tort Claims Act providing governmental entity not liable for any claim arising out of a judicial action or inaction or administrative action or inaction of a judicial nature). Moreover, as argued by the Commission herein, see supra pp. 8-11, its alleged administrative actions or inactions were of a judicial or quasi-judicial nature and qualify for immunity under subsection (2) of § 15-78-60 providing immunity for administrative action or inaction or a judicial or quasi-judicial nature.

Furthermore, the exceptions to the waiver of immunity relating to the execution of any process and the failure to enforce any law or regulation, see §§ 15-78-60(3), (4), do not depend upon the judicial or quasi-judicial nature of any action or inaction of the Commission. Because the Commission is entitled to immunity under these subsections as well, the Law Firm's argument that the Commission's actions were not judicial has no bearing upon the immunity afforded to the Commission under these separate exceptions to waiver of immunity under the Tort Claims Act.

C. The Trial Court did not err in declining to incorporate a gross negligence standard into the exceptions to the waiver of immunity of the South Carolina Tort Claims Act relied upon by the Commission.

The Law Firm further argues that the Trial Court erred in not incorporating the gross negligence standard provided in the exception to the waiver of immunity for licensing powers or functions, S.C. CODE ANN. § 15-78-60(12), into the exceptions relied

upon by the Commission for its immunity under the Tort Claims Act. Subsection (12) of § 15-78-60 provides that the governmental entity is not liable for loss resulting from “licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority *except when the power or function is exercised in a grossly negligent manner.*” § 15-78-60(12) (emphasis added).

This argument is not preserved for appellate review because the Law Firm did not raise this argument to the Trial Court until it filed its Brief on its Motion for Reconsideration. [R.pp. 33-38; 62-82; 39-41; 45-54; Response; Hearing Tr.; Mtn. to Reconsider; Brief on Reconsideration.] An issue may not be raised for the first time in a motion to reconsider for the issue to be preserved for appellate review. Repko v. Cnty. of Georgetown, 424 S.C. 494, 502, 818 S.E.2d 748, 749 (2018).

Secondly, the licensing powers or functions exception to the waiver of immunity under the Tort Claims Act has no application to the facts of this case and as such, the gross negligence standard should not be incorporated into the other exceptions upon which the Commission relies for immunity.

The South Carolina Supreme Court has held that “[w]hen a governmental entity asserts an exception to the waiver of immunity and any other *applicable* exception contains a gross negligence standard, the Court must read the gross negligence standard into all of the exceptions under which the entity seeks immunity.” Plyler v. Burns, 373 S.C. 637, 651, 647 S.E.2d 188, 196 (2007) (emphasis added). The Supreme Court recently emphasized that “the immunity provision containing the gross negligence

standard must actually apply to the case before it can be read into another immunity provision.” Repko v. Cnty. of Georgetown, 424 S.C. 494, 504, 818 S.E.2d 743, 749 (2018) (emphasis in original).

In Plyler, the plaintiff beneficiary of a conservatorship brought an action against various entities, including the probate court that established the conservatorship, claiming gross negligence or recklessness in the supervision of her conservatorship, breach of fiduciary duties, and civil conspiracy. Specifically, the plaintiff contended the probate court was liable for negligent supervision of the management of her conservatorship. 373 S.C. at 643-44, 647 S.E.2d at 191-92.

The probate court filed a motion to dismiss based on both immunity under the Tort Claims Act and the doctrine of common law judicial immunity. The trial court granted the motion to dismiss on the grounds the probate court was entitled to immunity under both the common law and the Tort Claims Act, and the plaintiff appealed. Id. at 644, 647 S.E.2d at 192.

The trial court granted immunity to the probate court under the subsections of the Tort Claims Act providing a governmental entity is not liable for a loss resulting from “(1) legislative, judicial, or quasi-judicial action or inaction; (2) administrative action or inaction of a legislative, judicial, or quasi-judicial nature; [or] (3) execution, enforcement, or implementation of the orders of any court or execution, enforcement, or lawful implementation of any process.” Id. at 651-52, 647 S.E.2d at 196 (citing S.C. CODE ANN. §§ 15-78-60(1), (2), and (3)).

The plaintiff argued, however, that the trial court should have applied the gross negligence standard contained in S.C. CODE ANN. § 15-78-60(12).³ Plyler, 373 S.C. at 651-62, 647 S.E.2d at 195-96. The Supreme Court explained that this exception is generally applied where a governmental agency actually engages in licensing functions. Id. at 652, 647 S.E.2d at 196.

The Supreme Court rejected the plaintiff's contention that this exception applied to the plaintiff's case and should be utilized as a means to interject a gross negligence standard into the immunity analysis. The plaintiff contended the exception was applicable to the actions of the probate court because the court issued a "Certificate of Appointment" to the conservator. The Supreme Court found the plaintiff misconstrued the role of the probate court in issuing the certificate and "erroneously stretche[d] the intention of the statute." The Supreme Court noted that a certificate of appointment is only issued after a petition for appointment is filed, and that the petition commences an action where the probate court makes a judicial determination and orders appointment of a conservator. The certificate of appointment is merely the method by which the court effects its order and is not the issuance of a license or similar instrument. Id. at 652, 647 S.E.2d at 196-97.

Therefore, the Supreme Court concluded this exception did not apply to the plaintiff's case and the gross negligence standard was inapplicable. The trial court in

³ The plaintiff in Plyler additionally argued that the trial court should have applied the gross negligence standard contained in S.C. CODE ANN. § 15-78-60(25), which provides an exemption to the waiver of immunity for the "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner," but the Supreme Court also determined that this exemption did not apply. The Law Firm only argues that the gross negligence standard found in § 15-78-60(12) applies to this case.

Plyler accordingly did not err in declining to apply a gross negligence standard in its review of the exemptions to the waiver of immunity under the Tort Claims Act. Id. at 652, 647 S.E.2d at 196-97; see also Repko, 424 S.C. at 497-508, 818 S.E.2d at 745-751 (in negligence action by landowner against county after county allegedly negligently and grossly negligently failed to comply with or enforce its rules, regulations, and written policies governing its handling of financial guarantees posted by developer, the Tort Claims Act exception to waiver of immunity in the context of a governmental entity's licensing function could not be used to interject a gross negligence standard into all of the other exceptions under which the county sought immunity where the county's action did not involve a licensing power or function).

The Law Firm's claim against the Commission does not arise out of any licensing power or function of the Commission. The Commission does not engage in licensing functions. The Commission has never asserted that it is immune from liability under this exception to the waiver of immunity, § 15-78-60(12), as the Law Firm contends in its Appellant's Brief, and the Trial Court did not rule that the Commission was entitled to immunity under this subsection. [R.pp. 18-19; 20-32; 62-82; 6-9; 1-4; Mtn. to Dismiss; Memo. in Support; Hearing Tr.; Initial Order Granting Mtn. to Dismiss; Final Order.] The Trial Court therefore did not err in declining read the gross negligence standard of subsection (12) of § 15-78-60 into the other exceptions under which the Commission is entitled to immunity because subsection (12) is not applicable to the facts of this case.

II. The Law Firm did not assert any claim for violation of state or federal constitutional rights in its Complaint and is further prohibited from seeking monetary damages from the Commission for alleged violations of the state and federal constitutions because (1) the South Carolina Constitution does not provide a private right of action for civil damages arising from state constitutional violations; and (2) the Commission cannot be sued for violations of the federal constitution pursuant to 42 U.S.C. § 1983 because it is not a “person” within the meaning of § 1983.

The Law Firm also asserts in its appeal that the Trial Court erred in failing to find that the Law Firm had a constitutional right to be heard pursuant to the due process clauses of the Fourteenth Amendment of the United States Constitution and Article I, § 3 of the South Carolina Constitution. The Law Firm, however, did not assert any constitutional deprivation claims in its Complaint. Furthermore, the Commission cannot be liable for a claim of monetary damages because of alleged violations of either the state or federal constitutions.

The Law Firm’s Complaint alleged only one claim against the Commission – a sole claim for negligence. [R.p. 16; Compl., ¶¶ 16, 18.] In its Response to the Commission’s Motion to Dismiss, the Law Firm acknowledged that its case is “a simple negligence case brought against the [Commission] for failure to notify the [Law Firm] of a hearing on a settlement.” [R.p. 36; Response, p. 4.] Pursuant to its negligence claim, the Law Firm sought an award of monetary damages and no other relief. [R.p. 16; Compl., ¶ 18.]

In its Complaint, the Law Firm did not allege that any federal or state constitutional right had been violated by the Commission. The Law Firm failed to plead any cause of action for violation of its federal or state due process constitutional rights. Accordingly, the Law Firm’s argument that the Trial Court erred by not recognizing a

constitutional right of the Law Firm to be heard is without merit because the Law Firm never sought any relief for constitutional deprivations in its Complaint.

Second, the Law Firm has only sought relief in the form of monetary damages. It cannot maintain a suit for monetary damages against the Commission for violations of either the state or federal constitutions for the reasons explained below.

There is no private right of action under Article I, § 3 of the South Carolina Constitution. There is no statutory scheme in South Carolina which enables a citizen to bring a private right of action for civil damages under the State Constitution. Because the State Constitution does not provide for a private cause of action for state constitutional violations and because the General Assembly has not enacted a statute enabling this type of action, any claim of the Law Firm seeking monetary damages from the Commission for alleged violations of Article 1, § 3 of the South Carolina Constitution fails as a matter of law.

In comparison, the United States Congress has enacted a statutory scheme to recover civil damages with respect to violations of the United States Constitution. A plaintiff may bring a civil action to recover damages for deprivation of a federally constitutionally protected right pursuant to 42 U.S.C. § 1983. This statute provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress" See also Quillian v. Evatt, 315 S.C. 489, 491, 445 S.E.2d

639, 640 (Ct. App. 1994) (observing claims under 42 U.S.C. § 1983 “are not available for all alleged torts of state officials or injuries allegedly suffered at the hands of state officials;[r]ather, such claims are limited to violations of rights protected by the United States Constitution and federal law.).

The United States Supreme Court, however, has held that neither the state, nor a state official acting in an official capacity, are “persons” within the meaning of § 1983 that can be sued for civil damages pursuant to § 1983. Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989); see also Wyatt v. Fowler, 326 S.C. 97, 101-02, 484 S.E.2d 590, 592-93 (1997); Cone v. Nettles, 308 S.C. 109, 111-12, 417 S.E.2d 523, 524-25 (1992) (holding sheriffs and sheriff’s deputies are state officials against whom a cause of action for monetary damages cannot be brought pursuant to 42 U.S.C. § 1983). Therefore, the state cannot be sued for monetary damages under § 1983 for federal constitutional violations.

As an agency and arm of the State, the Commission also cannot be sued for monetary damages under § 1983 for any purported federal constitutional deprivations because it is not a “person” within the meaning of § 1983. See S.C. CODE ANN. § 1-23-10(1) (“agency” defined as “each state board, commission, department . . . authorized by law to make regulations or to determine contested cases”); S.C. CODE ANN. § 1-23-310(2) (“agency” defined as “each state board, commission, department, or officer . . . authorized by law to determine contested cases”); see also Fla. Dep’t. of State v. Treasure Salvors, Inc., 458 U.S. 670, 684 (1982) (state agencies are arms of the state); Ram Ditta v. Md. Nat’l Capital Park & Planning Comm’n, 822 F.2d 456, 457 (4th Cir. 1987) (same).

Therefore, to the extent the Law Firm did assert any violations of the federal constitution against the Commission in its Complaint, any claim for monetary damages against the Commission pursuant to § 1983 fails as a matter of law because the Commission is not a “person” subject to suit for monetary damages under § 1983. No other relief besides monetary relief was sought by the Law Firm against the Commission. For the reasons as set forth above, the Trial Court did not err in finding no viable state or federal constitutional violations asserted by the Law Firm in its Complaint.

CONCLUSION

The Respondent, the South Carolina Workers’ Compensation Commission, respectfully requests this Court to affirm the dismissal of the Law Firm’s suit against the Commission on the grounds that (1) the Commission is entitled to immunity under the South Carolina Tort Claims Act; (2) the Law Firm did not assert any claim against the Commission for state or federal constitutional deprivations; and (3) the Commission cannot be liable for civil damages for any alleged violation of the state or federal constitutions.

Respectfully submitted,



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February 21, 2019.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Final Brief of Respondent complies
with Rule 211(b), SCACR.

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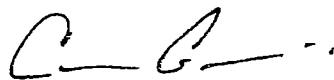
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CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondent, South Carolina Workers' Compensation Commission, do hereby certify that I have this date served the foregoing Final Brief of Respondent, dated February 21, 2019, by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, addressed to counsel of record as indicated below:

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