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

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FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Statement of Facts 2

Standard of Review 4

Argument 5

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. 5

II. THE TRIAL COURT ERRED IN HOLDING THE COMMISSION'S ACTIONS WERE JUDICIAL. 7

III. THE TRIAL COURT ERRED IN NOT HOLDING THE FAILURE TO NOTIFY APPELLANT OF THE HEARING WAS GROSSLY NEGLIGENT. 8

IV. THE TRIAL COURT ERRED IN FAILING TO HOLD THE APPELLANT HAD A CONSTITUTIONAL RIGHT TO BE HEARD. 10

Conclusion 11

TABLE OF AUTHORITIES

Cases

Antoine v. Byers & Anderson, Inc., 508 U.S. 429, 436, 113 S. Ct. 2167, 124 L. Ed. 2d. 391 (1993) 8
Bd. of Regents v. Roth, 408 U.S. 564, 571-572, 92 S. Ct. 2701 (1972 10
Chakrabarti v. City of Orangeburg, 403 S.C. 308, 317, 743 S.E.2d 109 (2013 9
Desoto County v. Dennis, 160 So. 3d 1154 (Miss. 2015) 8
Etheredge v. Richland Sch. Dist. One, 341 S.C. 307, 310, 534 S.E.2d 275 (2000) 9
Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 332, 566 S.E.2d 536, 544 (2002) 7, 9
Fuentes v. Shevin, 407 U.S. 67 (1972) 11
Hawkins v. City of Greenville, 358 S.C. 280,594 S.E.2d 557 (Ct. App. 2004) 5
Imbler v. Pachtman, 424 U.S 409, 423, 96 S. Ct. 984, 47 L. Ed. 2d. 128 (1976)) 8
Jones v. Flowers, 547 U.S. 220 (2006) 11
Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 628 S.E.2d 496 (Ct. App. 2006) 5, 7
Riddle v. Morris, 381 S.C. 643, 675 S.E.2d 431 (2009) 4
Rives v. Bulsa, 325 S.C. 287, 478 S.E.2d 878 (Ct. App. 1996) 11
Stiles v. Onovato, 318 S.C. 297, 457 S.E.2d 601 (1995) 4
Tant v. S.C. Dep't of Corr., 408 S.C. 334, 340, 759 S.E.2d 398, 401 (2014) 10
Wooten ex rel. Wooten v. South Carolina Dep't of Transp., 333 S.C. 464, 468 511 S.E.2d 355, 357 (1999) 5

Statutes

S.C. Code Ann. § 15-78-40 7
S.C. Code Ann. § 15-78-60(2) 5, 7
S.C. Code Ann. § 15-78-60(12) 8, 9

Rules

SCRCP 12(b) 4

Other Authorities

Black's Law Dictionary 6
Bouvier Law Dictionary 6

Constitutional Provisions

S.C. Const. art I, §3. 10
U.S. Const. amend. XIV, § 1 10

Regulations

S.C. Code Regs. 67-607 6
S.C. Code Regs. 67-1205 10
S.C. Code Regs. 67-1204(F) 10

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, 468 511 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

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[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.

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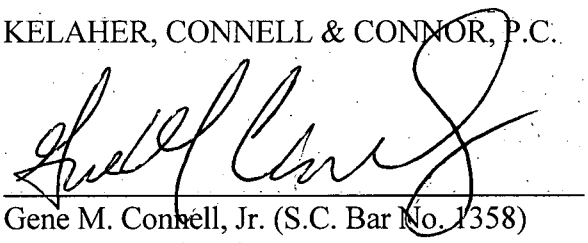
[5] This Court has found in the area of tax sales notice must be given. *Rives v. Bulsa*, 325 S.C. 287, 478 S.E.2d 878 (Ct.App. 1996) (failure to give the required notice of a tax sale is a fundamental defect).

[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.



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CERTIFICATE OF COUNSEL

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

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