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 & Conner, P.C.,

APPELLANT,

versus

South Carolina Workers' Compensation Commission,

RESPONDENT.

FINAL BRIEF OF RESPONDENT

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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.

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

[1]While 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.

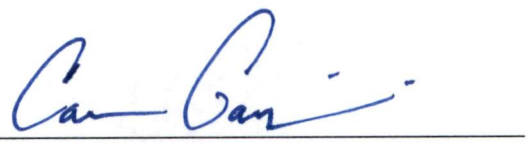
As an agency and arm of the State, the Commission also cannot be sued for monetary damages under § 1983 for any purported federal constitutional deprivations because it is not a "person" within the meaning of § 1983. See S.C. CODE ANN. § 1–23–10(1) ("agency" defined as "each state board, commission, 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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