THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

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SC Court of Appeals

CASE NO. 2017-CP-26-07775

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

vs.

South Carolina Workers' Compensation Commission .... Respondent

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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.

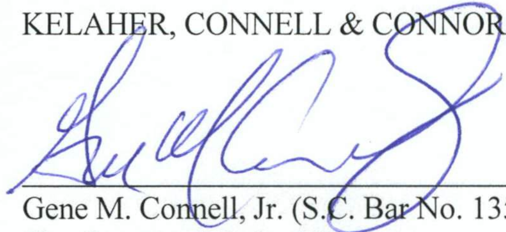
As has been stated above, Appellant had a constitutional right to be notified of the workers' compensation hearing in this case. The statutes and rules and regulations of the South Carolina Workers' Compensation Commission require that the Commission give notice to all interested parties of a hearing 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,

KELAHER, CONNELL & CONNOR, P.C.



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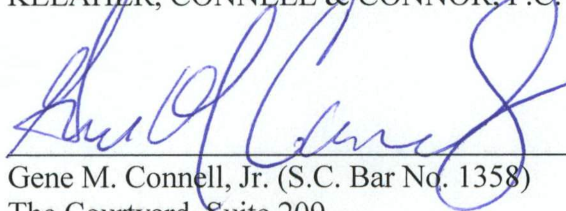
CERTIFICATE OF COUNSEL

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

KELAHER, CONNELL & CONNOR, P.C.



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