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SC Court of Appeals

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

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PETITION FOR WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on September 30, 2021.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in failing to apply the correct standard for a motion under 12(b)(6)?

2. Did the Court of Appeals err in holding that Petitioner had not raised the issue of constitutional notice in its Complaint?

3. Did the Court of Appeals err in holding that the Petitioner failed to properly raise the issue that the South Carolina Workers' Compensation Commission employee's action in this case was ministerial?

4. Did the Court of Appeals err in holding that the South Carolina Workers' Compensation Commission was not grossly negligent?

STATEMENT OF THE CASE

On July 31, 2007, Kelaher, Connell & Connor, P.C. (hereinafter "KCC') was retained by Bruce Nadolny to represent him in a worker's compensation claim against AVX Corporation and Liberty Mutual Insurance Company. KCC, through attorney Gene M. Connell, Jr., represented Nadolny through multiple hearings before the Commission and also attended depositions and other Commission mandated requirements. The file is voluminous and contains almost 3,000 pages of medical records. A mediation was held before a former Workers' Compensation Commissioner in which Nadolny agreed to accept a settlement in the amount of $120,000.00 plus a Medicare Set Aside Trust. The day after the mediation, Nadolny advised KCC he no longer needed their assistance and fired them as counsel of record. KCC advised Nadolny it had expended countless hours handling his claim, including going to hearings, and paying $2,446.44 in out-of-pocket costs for a mediation.

KCC was relieved as counsel on November 9, 2012 and pursuant to the Order Relieving Counsel, Connell immediately advised the Commission that KCC would file a claim for attorney's fees for the work that it had performed in this case. (R. p. 12). KCC had previously filed a Form 61 Fee Petition on August 29, 2012, whereupon Commission employees advised KCC that they had not received it. (R. p. 83). KCC then refiled a second Fee Petition on September 11, 2012, whereupon Commission employees again advised KCC they still had not received it. (R. p. 91). KCC then 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 the Commission he was requesting a lien be placed on the file and requesting that KCC be notified of any settlement hearings in the case. (R. p. 107). An employee of the Commission, Greg Lyons, wrote back a handwritten 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 KCC needed to file a fourth Fee Petition and it would act as a lien on the file. (R. p. 110). On December 28, 2012, KCC 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 Commission approved a clincher agreement with his widow (who was *pro se*) after a hearing on November 3, 2016.

KCC was not notified of the hearing and KCC's attorney's fee lien was not protected by the Commission despite the fact that KCC had filed the fee petition four times and requested notice of the hearing. Once KCC learned of the settlement it immediately filed a lawsuit in circuit court against the Commission through its officers, agents and employees arguing they were negligent, reckless and willful in failing to notify KCC of the hearing. KCC specifically raised the failure of the Commision to notify it of the hearing and also presented an Affidavit of a former Commissioner indicating this

was a lack of attention to detail by a Commission employee. The Commission filed a motion to dismiss this lawsuit pursuant to SCRCP 12(b)(6). A hearing on the motion to dismiss was held on April 9, 2018 before the Honorable Benjamin H. Culbertson. The trial court granted the Commission's motion to dismiss. Thereafter, KCC filed its motion for reconsideration on April 16, 2018.

On June 29, 2018, the trial court issued an order partially granting and partially denying KCC's motion for reconsideration. The trial court 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 subject matter jurisdiction. The court denied plaintiff's motion for reconsideration on all other grounds in its order dated April 9, 2018. Specifically, the court found that defendant is immune in this lawsuit pursuant to the South Carolina Tort Claims Act. Petitioner filed its Notice of Appeal on July 6, 2018 The Court of Appeals issued its opinion on September 8, 2021 and denied Plaintiff's Petition for Rehearing on September 30, 2021.

REASONS FOR GRANTING CERTIORARI

This case involves issues of statewide importance to South Carolina citizens. Specifically, is an administrative agency required to give notice to interested parties of a hearing? Second, if the administrative agency fails to give notice is that agency liable for the failure to provide notice? The opinion by the Court of Appeals ignores centuries of precedence of this Court and the United States Supreme Court which hold it is a violation of the Constitution to fail to provide notice and an opportunity to be heard when a litigant's rights are impacted. Finally, the Court of Appeals decision imposes a new standard in deciding a case under SCRCP 12(b)(6). The Court of Appeals fails to decide this appeal in conformity with established case law that provides a plaintiff's complaint is

viewed in the most favorable to the non-moving party and that all the allegations in a complaint are deemed true for purposes of the motion.

ARGUMENT

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

The Court of Appeals in its opinion affirmed the trial judge in granting the dismissal pursuant to SCRCP 12(b)(6). The Court of Appeals opinion violates longstanding legal principles governing SCRCP 12(b)(6) and sets forth a new rigid standard. This Court has 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, 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.

This Court has 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). Our case law specifically asks one central 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 of Appeals' opinion does not correctly or appropriately apply the standard for a 12(b)(6) motion as set down by this Court. The Court of Appeals' opinion applies a rigid and formalistic view towards deciding this case and affirming the trial judge on his granting of the motion to dismiss under 12(b)(6). The record shows, contrary to the Court of Appeals' opinion, that all issues were properly raised and preserved for appellate review and that the Court of Appeals violated long-standing principles set down by this Court in dismissing this case since if the plaintiff's

complaint shows any claim for relief, the case must not be dismissed. Petitioner invites the Court to review the citation to the record set forth below which proves this contention.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER 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 understood that the failure to give notice by the South Carolina Worker's Compensation Commission was the seminal issue in the case. KCC in its Response to Defendant's Motion to Dismiss specifically raised that issue. Petitioner noted in its initial memorandum to the circuit court 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 KCC's circuit court memorandum was filed, even defense counsel understood that 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[1] that they are not liable for any loss resulting from that inaction. (R. p. 81).

[1] Of course, the Tort Claims Act cannot trump the Constitution.

On reconsideration, Petitioner again raised the issue of notice. In Petitioner's Brief on Reconsideration of the Order Granting Defendant's Motion to Dismiss, KCC again raised the issue of notice and the opportunity to be heard. KCC stated in its 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, Petitioner first raised the failure of notice in its Complaint in which it indicated the Commission failed to notify Petitioner of a hearing and failed to send written notice to the Petitioner. (R. p. 16). Petitioner continued to press this issue from the time the complaint was filed and when it filed its Response to Defendant's Motion to Dismiss, the issue of notice was again raised. (R. p. 36). Third, the trial court and defense counsel both understood that notice was the 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 KCC 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, Petitioner asserts that not only was the constitutional issue preserved in the Complaint, but it was continually argued throughout the hearings including the briefs and affidavit of Crocker.[2]

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[2] In fact, Petitioner, on October 6, 2020, sent additional authorities to the Court of Appeals. In a letter to that Court, Petitioner attached a recent decision of this Court, *Halsey v. Simmons*, Opinion No. 27997, filed 9/30/2020, which held: "The Due Process Clause requires all parties be given 'an opportunity to be heard in a meaningful way.'" The Court of Appeals makes no mention of that submission in its opinion.

As a result, the Court of Appeals erred as a matter of law in holding that KCC did not allege a constitutional violation in its Complaint. The reason being that complaints are to be liberally construed to promote justice and the Court of Appeals restrictive view of the complaint, of the arguments and of the briefing compounds the violation of Petitioner's constitutional right to be notified of a hearing so it could defend its interest. In *Stono River EPA v. DHEC*, 305 S.C. 905, 406 S.E.2d 340 (1991), this Court found that notice and opportunity to be heard is required before an administrative agency makes a final decision. In this case, KCC was deprived of its constitutional right to be heard and its property, i.e., its fee, was taken without due process. See *Kurschner v. City of Camden Planning Comm'n.*, 376 S.C. 165, 656 S.E.2d 346 (2008) (fundamental requirement of due process includes notice and opportunity to be heard in a meaningful way with judicial review). All of this was detailed before the circuit court in the briefs, the oral argument and by the Affidavit of Virginia Crocker. Further, the notice issue was argued before the circuit court and ignored. On reconsideration it was argued again and ignored. The Court of Appeals in making its ruling also ignored the notice argument which was laid out at two circuit court hearings and in Petitioner's Complaint. In this case, fundamental fairness was ignored by both the circuit court and the Court of Appeals. Thus, this Court should grant Petitioner's Petition for a Writ of Certiorari to protect the constitutional rights of Appellant.

III. THE COURT OF APPEALS ERRED IN FINDING THAT PETITIONER HAD NOT RAISED A CONSTITUTIONAL CLAIM.

As can be seen by the briefs in the circuit court, the arguments before the trial judge and the motion for reconsideration, at each stage, KCC raised that it had not been provided the required notice of the hearing. The Court of Appeals in its ruling applies a rigid standard by holding that KCC did

not assert a constitutional claim.[3] In fact, under the liberal standard for pleading, KCC did assert the failure of the Workers' Compensation Commission to notify KCC of a hearing. Further, KCC argued this issue before the circuit court, briefed it before the circuit court, and addressed it again in its motion for reconsideration. KCC was deprived of the right to attend the hearing on its fee petition because the South Carolina Workers' Compensation Commission employees did not send it notice. Notice and an opportunity to be heard are the hallmark of our system. If a litigant does not receive notice of a hearing his constitutional rights have been violated and that hearing is *void ab initio*. This Court and the United States Supreme Court have on multiple occasions stated that constitutional rights are violated when a litigant is not provided notice of a hearing. See U.S. Constitution, amend. XIV, § 1 and South Carolina Constitution, art. 1, § 3. *Mullane v. Central Hanover Bank and Trust*, 339 U.S. 306 (1950) (litigant entitled to notice and right to be heard).

It is a fundamental rule of law in the United States that notice and opportunity to be heard in a meaningful way be provided to a litigant. Due process is denied when an individual has not been provided notice. See, *Tant v. S.C. Dept. Corrections*, 408 S.C. 344, 759 S.E.2d 398 (2014) and *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972). See also *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 requiring new hearing).

In this case, the notice of a hearing and the right to be heard was not a judicial function but a clerical function. There is no judicial decision making in this case by the Commission. It was simply a clerical or ministerial error by an employee of the Commission.

[3] The Court of Appeals does not discuss what a constitutional claim would look like or why Petitioner's Complaint which is to be liberally construed and lists the failure to notify as a specification of negligence is not enough to pass muster.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION HAD IMMUNITY.

The Court of Appeals noted 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. The Court of Appeals further stated, "We find the issue of whether the Commission's alleged action or inaction was ministerial is not preserved for appellate review."

Petitioner disagrees and will show that the record is consistent with Petitioner's request as are the briefs and the oral arguments before the circuit court. Petitioner 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, Petitioner's original circuit court brief in opposition to Defendant's motion to dismiss, not the brief filed on Petitioner's motion for reconsideration under SCRCP 59, clearly stated as follows:

> 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).

Further, while Petitioner did not have to, it attached an Affidavit in response in opposition to the motion to dismiss signed by Virginia Crocker, a former Commissioner of the South Carolina Workers' Compensation Commission. This Affidavit was filed prior to argument in the circuit court on Defendant's motion to dismiss on February 27, 2018. The Crocker Affidavit was filed with Petitioner'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 portion of the transcript and the Affidavit of Crocker clearly show that Petitioner was asserting that a Commission employee had failed to notify KCC of a hearing and had made a mistake in performing a clerical not a judicial 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 a strict code pleading requirement. All the inferences from the Crocker Affidavit and the Complaint along with the Petitioner's brief in opposition to the motion to dismiss clearly show that Petitioner was complaining a Commission employee, not a judicial employee, had made a clerical mistake, i.e., a ministerial act is not a judicial act.

As a result, the Court of Appeals' opinion that this issue is unpreserved for appellate review is erroneous. In fact, KCC in its response in opposition to the motion to dismiss and in its affidavit clearly provided its position that a Commission employee had failed to perform a clerical act. In fact, 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, the South Carolina Workers' Compensation Commission employee was required to comply with South Carolina Workers' Compensation Regulation 67-213(B) and provide notice to all parties.

The transcript of the circuit court hearing specifically notes Petitioner's argument that this was a ministerial act and it had been given no notice of the hearing. The following portions of the trial court transcript show Petitioner's position:

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).

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 case 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.

Accordingly, the record and the case law amply support Petitioner's position that it did not abandon the issue of whether or not the action or inaction by a Commission employee was ministerial. In fact, the circuit court clearly understood in its ruling that Petitioner was arguing about a "clerical issue with the Commission." The trial court judge's ruling and questions at the hearing clearly show that to be the case and Petitioner properly and clearly preserved this issue for review.

V. THE COURT OF APPEALS ERRED IN FAILING TO HOLD THAT THE COMMISSION WAS GROSSLY NEGLIGENT.

The Court of Appeals failed to hold that the Commission was grossly negligent. It is without dispute that Petitioner was not notified of a hearing in violation of South Carolina Workers' Compensation rules and regulations and the Constitutions of both South Carolina and the United States. 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 mail, 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 in South Carolina as an absence of due care. The failure of the South Carolina Workers' Compensation Commission employees to follow its own rules and regulations and not provide notice to KCC was grossly negligent. The South Carolina Tort Claims Act and the case law interpreting it have held that an exception in the Act 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 was the repeated failure by Commission employees to properly document the Petitioner's fee petition and their failure to protect the Petitioner's lien along with their failure to notify Petitioner of the hearing date and time. See *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 317, 743 S.E.2d 109 (2013) which makes clear that gross negligence must be read into any of the exceptions listed in the South Carolina Tort Claims Act.

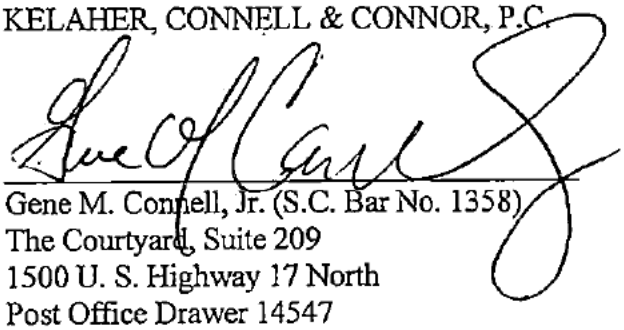
The Court of Appeals, however, failed to distinguish *Chakrabarti* nor does it recognize that a gross negligence standard must be read into all applicable exceptions that do not contain a gross negligence standard. In this case, S.C. Code Ann. § 15-78-60(2) is the applicable South Carolina Tort Claims exception. There is no gross negligence standard in the text of the statute, but under the prevailing case law it must be read into that statute. Thus, the Court of Appeals failed to apply the gross negligence standard to S.C. Code § 15-78-60(2). This is Petitioner's point and the Court of Appeals failed to make a ruling on this point.

CONCLUSION

This case involves the violation of KCC's constitutional rights. It also involves a grievous error by the Court of Appeals. It sets a dangerous precedent in that the opinion of that Court set a new standard for SCRCP 12(b)(6) – one which this Court has never sanctioned. In sum, the Court of Appeals committed a constitutional error when it failed to hold KCC had a right to a hearing on its claim after filing four separate requests with the Commission. KCC can only pray that this Court will see the violation of its due process rights and grant this Petition for a Writ of Certiorari to review the decision of the Court of Appeals.

Respectfully submitted,

KELAHER, CONNELL & CONNOR, P.C.



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October 26, 2021
Surfside Beach, South Carolina

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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 **Petition for Writ of Certiorari** on the Respondent, on the 26th day of October 2021, 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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Richardson Plowden & Robinson, P.A.
1900 Barnwell Street
Columbia, SC 29201

Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 26th day of October, 2021.

Barbara A. Smith
Notary Public for South Carolina
My Commission Expires: 3-12-24

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RECEIVED
OCT 28 2021
SC Court of Appeals

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October 26, 2021

Patricia A. Howard, Clerk
South Carolina Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: Opinion No. 5860 (Court of Appeals; September 8, 2021)
Appellate Case No. 2018-001265
Kelaher, Connell & Connor, P.C. v. South Carolina Workers' Compensation Commission
Our File No. 2018-0069C

Dear Ms. Howard:

Enclosed for filing, please find:

- Original Petition for Writ of Certiorari and Proof of Service;
- One (1) unbound copy of the Appendix;
- Our check for $250.00 for the filing fee.

It is our understanding that no additional copies of the Petition or Appendix are required at this time.

By copy of this letter, we are also filing the Petition for Writ of Certiorari with the South Carolina Court of Appeals.

Also by copy of this letter, we hereby serve attorneys for Respondent with the Petition for Writ of Certiorari.

A self-addressed, stamped envelope is also enclosed for return of a filed copy of the Proof of Service of the Petition.

With best regards, I am

Sincerely yours,

Gene M. Connell, Jr.

GMCJr:sm
Enclosures

cc w/enc.: Jenny A. Kitchings, Clerk
South Carolina Court of Appeals

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

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To

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