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S.C. SUPREME COURT

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

APPELLATE CASE NO. 2021-001236
CIVIL ACTION NO. 2017-CP-26-07775

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

Kelaher, Connell & Conner, P.C.,

PETITIONER,

versus

South Carolina Workers' Compensation Commission,

RESPONDENT,

RETURN TO PETITION FOR WRIT OF CERTIORARI

Douglas C. Baxter, S.C. Bar No. 6272
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 3646
Myrtle Beach, South Carolina 29578
(843) 448-1008
dbaxter@richardsonplowden.com

Carmen V. Ganjehsani, S.C. Bar No. 73515
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com

J. Keith Roberts, S.C. Bar No. 100735
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
P.O. Box 1715
Columbia, SC 29202-1715
(803) 737-5701
keroberts@wcc.sc.gov

ATTORNEYS FOR RESPONDENT
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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COUNTERSTATEMENT OF THE CASE

This case arises out of allegations by Petitioner 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. The critical issue is whether the Law Firm's sole claim against the Commission for negligence is barred by the South Carolina Tort Claims Act.

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.] The Law Firm alleged that on or about July 31, 2007, it 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.] The Law Firm asserted that it represented the Claimant through numerous hearings before the Commission. [R.p. 14.] 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.]

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.] 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.]

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.] The Law Firm allegedly filed a third Form 61 Fee Petition on September 18, 2012. [R.p. 15.] 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.]

A Commission employee 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.] 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.] The Law Firm claimed that on December 28 ,2021 it filed a fourth Fee Petition requesting attorneys' fees of $20,000.00 and costs of $2,446.44. [R.p. 16.]

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.]

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.] 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.]

On January 16, 2018, the Commission filed a Motion to Dismiss the Law Firm's suit 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 was

immune from the allegations of the suit under the South Carolina Tort Claims Act. [R.pp. 18-19; 20-32.] 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 (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]. The Motion to Dismiss was thereafter heard on March 1, 2018 before The Honorable Benjamin H. Culbertson. [R.pp. 62-82.]

The Trial Court granted the motion to dismiss on April 9, 2018, ruling that it did not have jurisdiction over the Law Firms' claim against the Commission 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.]

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

On June 29, 2018, the Trial Court subsequently issued an Order Partially Granting and Partially Denying the Motion for Reconsideration. [R.pp. 1-4.] 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.] 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.] The Law Firm appealed to the Court of Appeals on or about July 5, 2018.

On September 8, 2021, the Court of Appeals affirmed the Trial Court's dismissal of the Law Firm's negligence claim against the Commission. [App. 3-8.] The Law Firm filed a Petition for Rehearing with the Court of Appeals on September 13, 2021 which was denied September 30, 2021. [App. 1-2; 9-19.] The Law Firm has now filed this Petition for Writ of Certiorari with this Court seeking review of the Court of Appeals' decision.

ARGUMENT

The Law Firm brought a single claim of negligence seeking damages 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. The alleged failure of the Commission to issue a hearing notice to the Law Firm or otherwise comply with the hearing procedures is precisely the type of claim the Legislature intended to bar under the South Carolina Tort Claim Act. This intent is evidenced in the unambiguous language set forth in the three exceptions to the Legislature's waiver of immunity applicable to this case which must be liberally construed to limit the liability of the Commission. These three exceptions provide that the Commission is not liable for loss resulting from:

1. administrative action or inaction of a judicial or quasi-judicial nature;
2. the execution of any process; or
3. the failure to enforce any law, rule, regulation, or written policy.

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

As it has done throughout this case, the Law Firm disregards these clear and controlling statutory exceptions to the waiver of immunity which apply as a matter of law. As shown further herein, the Trial Court correctly applied the South Carolina Tort Claims Act to bar the Law Firm's claim of negligence against the Commission. There are no special or important reasons for this Court to review the straightforward application of the Tort Claims Act to the facts of this case.

I. The Law Firm's negligence 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 is barred under the South Carolina Tort Claims Act pursuant to the exception to the waiver of immunity providing that a governmental entity is not liable for loss resulting from administrative action or inaction of a judicial or quasi-judicial nature.

The Trial Court properly dismissed the Law Firm's sole claim of negligence 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); 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).

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;

S.C. CODE ANN. §§ 15-78-60(2).

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 squarely within this above exception;

therefore, the Commission is not liable as a matter of law for any alleged loss claimed by the Law Firm.

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 brief before the Court of Appeals, 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.

This exception expressly adds the term "administrative" as a qualifier. Therefore, any administrative action or inaction which is integral to and intertwined with the judicial process cannot be the source of tort liability. The addition of the term "administrative" captures those clerical type of acts related to the judicial process and which carry forward the judicial process.

Administrative actions of a court include filing, docketing, scheduling, and issuing notices – all actions which relate to the administration of the judicial or quasi-judicial process and are integral to that process. If these actions are not considered administrative acts in support of the judicial or quasi-judicial process, then it would be difficult to discern any acts which would qualify

under the exception to the waiver of immunity found in Subsection (2) of § 15-78-60 of the Tort Claims Act.

In comparison, court clerks may perform other administrative actions not related to the judicial process, such as office administration, employee management, and internal organization matters. These type of acts would not be subject to immunity under Subsection (2) of § 15-78-60 for administrative actions or inactions of a judicial or quasi-judicial nature.

In this case, the alleged actions or inactions of the Commission are akin to the former and relate to the judicial or quasi-judicial process of awarding attorneys' fees. The Commission functions as both a judicial and administrative department. S.C. CODE ANN. § 42-3-10. The Commission's administrative department consists of three divisions: The Division of Coverage and Compliance; the Division of Claims and Statistics; and the Division of Medical Services. S.C. CODE ANN. § 42-3-90. The Coverage Division is responsible for maintaining, monitoring, and enforcing the various requirements which hold employers responsible for maintaining workers' compensation insurance coverage; the Compliance Division is responsible for the investigation of and, if necessary, the requests for prosecution of an employer who refuses or neglects to comply with the insurance provisions; the Claims Division administers and monitors accident reports and any resulting claims and resolves conflicts of a non-judicial nature; and the Medical Services Division establishes and monitors billing and payment policies for medical services rendered to workers' compensation claimants and publishes the Medical Services Provider Manual. S.C. CODE REGS. 67-202 (A)(4), (5), (6), (11). These are each administrative and non-judicial functions of the Commission.

On the other hand, the judicial department of the Commission handles all contested

workers' compensation claims. S.C. CODE REGS. 67-202 (A)(10). Falling under this umbrella is the approval of all attorneys' fees by 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. § 42-15-90; 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 clerk of the Commission supports this judicial process through the scheduling of motions and issuance of notices.

Therefore, the Law Firm's claim 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 are each administrative actions or inactions intertwined with the Commission's authority to approve of and award attorneys' fees in its judicial capacity. The explicit language of the Tort Claims Act, prohibiting suits for administrative actions or inactions of a judicial or quasi-judicial nature, applies to bar the Law Firm's claims against the Commission.

Despite this unambiguous bar to its claim against the Commission, the Law Firm urges this Court to find that clerks do not "enjoy the benefit of judicial immunity and are liable for their negligent acts." The Law Firm's argument, however, is based not on the language of the Tort Claims Act but rather upon the doctrine of common law judicial immunity which is not applicable here. See DeSoto, 160 So.3d at 1157-58 (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).

Section 15-78-60(2) of the Tort Claims Act expands the doctrine of common law judicial immunity and embraces and encompasses more acts than traditional common law judicial immunity. This is because this specific exception to the waiver of immunity includes not only judicial acts or inactions, but also those administrative actions or inactions of a judicial or quasi-judicial nature.

The cases cited by the Law Firm do not compel a different result. In DeSoto, the Supreme Court of Mississippi noted that other jurisdictions which had found a clerk's actions or inactions not immune from liability did so based upon law different from the language in Mississippi's Tort Claims Act:

> For instance, in City of Bayou La Batre v. Robinson, [785 So.2d 1128 (Ala. 2000)], the Alabama Supreme Court applied common-law judicial immunity, rather than statutory provisions similar to those found in our Tort Claims Act. The same is true of Mauro v. County of Kittitas,[613 P.2d 195 (Wash. App. 1980)], Connell v. Tooele City, [572 P.2d 697 (Utah 1977)], Pierson v. Ray, 386 U.S. 547 (1967], Stine v. Shuttle, [186 N.E.2d 168 (Ind. App. Ct. 1962)], Calhoun v. City of Providence,[390 A.2d 350 (R.I. 1978)], and Dalton v. Hysell, [381 N.E.2d 955 (Ohio Ct. App. 1978) In fact, in Blankenship v. Enright, [586 N.E.2d 1176 (Ohio Ct. App. 1990)], the Ohio Court of Appeals recognized that Dalton's holding that a clerk enjoyed no immunity had been superseded because Ohio had enacted an immunity statute.
>
> And in Franklin v. Dayton Probation Services Department,[672 N.E.2d 1039 (Ohio Ct. App. 1996)], the Court of Appeals of Ohio found that a municipal clerk's action was not immune because it fell within a reckless and wanton exception to immunity, a provision that is not at issue here. In Pittman v. Lower Court Counseling,[871 P.2d 953 (Nev. 1994)], the Nevada Supreme Court applied a statute that granted immunity for discretionary acts, not judicial actions. In Smith v. Lewis,[669 S.W.2d 558 (Mo. Ct. App. 1983), the Missouri Court of Appeals applied common-law immunity.

DeSoto, 160 So.3d at 1157; cf. also Cook v. City of Topeka, 654 P.2d 953 (Kan. 1982) (applying Kansas Tort Claims acts which only excepted from liability damages resulting from "judicial function" and not administrative actions or inactions of a judicial function or nature as is the case here).

The Commission is claiming statutory immunity under the Tort Claims Act for administrative action or inaction of a judicial or quasi-judicial nature. S.C. CODE ANN. § 15-78-60(2). It is not claiming immunity under the doctrine of common law judicial immunity. The Legislature determined that all administrative actions or inactions of a judicial or quasi-judicial nature should be entitled to immunity under the Tort Claims Act. Accordingly, under the plain language of the exception found in § 15-78-60(2), the Commission enjoys immunity for the alleged negligence in this case. The Trial Court therefore properly dismissed as a matter of law the Law Firm's action against the Commission.

II. The Law Firm's negligence claim against the Commission is also barred under the South Carolina Tort Claims Act pursuant to the exceptions to the waiver of immunity providing that a governmental entity is not liable for loss resulting from the (1) execution of any process or (2) failure to enforce any law or regulation.

Pursuant to the Tort Claims Act, the Commission is further immune from the Law Firm's claim under subsection (3) of S.C. CODE ANN. § 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 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 S.C. CODE ANN. § 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 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.

These 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 and each constitute a separate, independent basis for affirmance of the Trial Court's dismissal of the Law Firm's claim. 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

[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").

Commission under these separate exceptions to waiver of immunity under the Tort Claims Act.

III. The immunity granted to the Commission under subsections (2), (3), and (4) of S.C. CODE ANN. § 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.] In the initial response to the Motion to Dismiss, the Law Firm simply argued that the clerk's alleged actions were not judicial or quasi-judicial. [R.p. 37.] It was not until the Law Firm's Brief on Reconsideration that the Law Firm raised its contention that the clerk's purported action or inaction was ministerial. [R.p. 51.] 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, regardless of whether the argument was preserved or not, the Law Firm's contention 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 this 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. This 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." This 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), (4)).

This 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. 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 county claimed 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 the two immunities).

IV. 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 a gross negligence standard into the exceptions to the waiver of immunity under the Tort Claims Act cited by the Commission. First, 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.] 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, this 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 Court also 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).

While the Law Firm does not even point to any other exception which might apply in its Petition for Writ of Certiorari, before the Court of Appeals it argued that that 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), should have been incorporated 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 Court has rejected the incorporation of the gross negligence standard contained in the licensing exception when such exception is not applicable. 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). Plyler, 373 S.C. at 651-62, 647 S.E.2d at 195-96. This 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.

This 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. This Court found the plaintiff misconstrued the role of the probate court in issuing the certificate and "erroneously stretche[d] the intention of the statute." This 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, this Court concluded this exception did not apply to the plaintiff's case and the gross negligence standard was inapplicable. The trial court in 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); cf. Chakrabarti v. City of Orangeburg, 403 S.C. 308, 319-20, 743 S.E.2d 109, 155 (Ct. App. 2013) (finding that because the licensing exception to the waiver of immunity applied to the facts of the case, its gross negligence standard would be incorporated into the other exceptions which the defendant relied upon under the Tort Claims Act).

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) 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.] The Trial Court therefore did not err in declining read the gross negligence standard of subsection (12) of § 15-78-60 or of

any other exception into the other exceptions under which the Commission is entitled to immunity.

V. 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 argues that the "seminal issue" in this case is the Commission's purported failure to give notice. The Law Firm only raised this issue, however, in the context of its negligence claim. Its Complaint alleged only one claim against the Commission – a sole claim for negligence. [R.p. 16.] 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.] Pursuant to its negligence claim, the Law Firm sought an award of monetary damages and no other relief. [R.p. 16, ¶ 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 Court of Appeals 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. See Crocker v. Crocker, 281 S.C. 154, 158, 314 S.E.2d 343, 346 (Ct. App. 1984) (observing a court may not grant relief on a theory not pleaded).

Second, the Law Firm 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. See Palmer v. State, 427 S.C. 36, 44-46, 829 S.E.2d 255, 260-61 (Ct. App. 2019), cert. denied (May 28, 2021)

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 and the Court of Appeals did not err in finding no viable state or federal constitutional violations

asserted by the Law Firm in its Complaint.

CONCLUSION

For the reasons set forth herein, Respondent, the South Carolina Workers' Compensation Commission, respectfully requests this Court to deny the Petition for Writ of Certiorari filed by the Law Firm.

Respectfully submitted,

/s Carmen V. Ganjehsani
Douglas C. Baxter, S.C. Bar No. 6272
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 3646
Myrtle Beach, South Carolina 29578
(843) 448-1008
dbaxter@richardsonplowden.com

Carmen V. Ganjehsani, S.C. Bar No. 73515
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com

J. Keith Roberts, S.C. Bar No. 100735
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION
P.O. Box 1715
Columbia, SC 29202-1715
(803) 737-5701
keroberts@wcc.sc.gov
ATTORNEYS FOR RESPONDENT SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

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