THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

W.C.C. File No. 0725187
Appellate Tracking No. 2012-211392

George W. Thomas, ...Respondent,

v.

5 Star Transportation,.....Appellant,

and

S.C. Uninsured Employers' Fund.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Respondent Emily Thomas ("Thomas"), proceeding as the putative spouse of Decedent George Thomas ("Decedent"), initiated these proceedings with the filing of her Form 52, Request for Hearing, on June 26, 2008. (Request for Hearing dated June 26, 2008) In her Form 52, Request for Hearing, Thomas alleged George Thomas sustained an accidental death arising out of and in the course and scope of his employment with Appellant 5 Star Transportation, LLC ("5 Star") on November 19, 2007. She further alleged that as the wife of the deceased employee, she is presumed to be totally dependent upon her Decedent and, therefore, entitled to benefits pursuant to S.C. Code Ann. § 42-9-290. Following compliance proceedings, the South Carolina Uninsured Employer's Fund ("UEF") was joined as a party. In their timely filed Forms 53, Employer's Answer, 5 Star and the UEF denied George Thomas' death arose out of and in the course and scope of his employment, denied Thomas was his wife, and denied that she was dependent upon him for support. (Forms 53 dated July 30 and August 7, 2008)

Subsequent to oral argument on December 19, 2008, the single commissioner granted a motion to dismiss by 5 Star and the UEF based upon Thomas' lack of standing to pursue this action via Decision and Order entered March 30, 2009. (March 30, 2009 Decision and Order) Specifically, the single commissioner determined that Thomas' marriage to George Thomas was void *ab initio* because George Thomas was already married to another at the time of his ostensible marriage to Thomas. (*Id.*, Finding of Fact 3, p. 7) Further, the single commissioner found as fact that the relationship between Thomas and her Decedent did not thereafter ripen into a valid marriage or common law married once the impediment was removed and, therefore, Thomas had no standing to

pursue her claim. (*Id.*, Findings of Fact 8-12, p. 8)

By Order filed January 20, 2010, the Appellate Panel vacated and remanded for a *de novo* hearing. (January 20, 2010 Decision and Order) After hearing argument on December 18, 2010, the single commissioner issued his May 3, 2011 Decision and Order in which he concluded that George Thomas' death was compensable and that Thomas was his common law wife at the time of his death. (May 3, 2011 Decision and Order) Alternatively, the single commissioner determined Thomas was entitled to benefits pursuant to the "putative marriage doctrine." 5 Star sought timely review of the May 3, 2011 Decision and Order via its Form 30, Request for Commission Review, filed May 17, 2011. (May 17, 2011 Form 30, Request for Commission Review)

Following oral argument on December 19, 2011, the Appellate Panel of the Full Commission issued its March 15, 2012 Decision and Order affirming the May 3, 2011 Decision and Order of the single commissioner in its entirety. (March 15, 2012 Decision and Order) This appeal followed.

STATEMENT OF THE FACTS

At all times relevant to this appeal, Decedent was employed by 5 Star as a tour bus driver. Prior to the events giving rise to this claim, Decedent was married to Gloria Thomas, and they had two children, Cassandra Thomas Bennett and Terri Lynn Thomas. (March 15, 2012 Decision and Order, p. 6) Both Cassandra and Terri had reached the age of majority prior to Decedent's death, and neither was financially dependent on their father. (*Id.*) George Thomas married a second time, to Barbara Thomas, and they had one child together, Keturah Hodges. (*Id.*) Like Ms. Bennett and Ms. Thomas, Keturah Hodges was over the age of 18 and not financially dependent on her father at the time of his death. (*Id.*) Decedent married a third wife, Cynthia Whaley, on February 9, 1995; however, no children were born of this union. (*Id.*) A dependency investigation conducted by agents employed by 5 Star and the UEF found no evidence of any other children, that any of Decedent's known children were minors, or that they were financially dependent upon him. (*Id.*)

Decedent and Thomas participated in a marriage ceremony on September 19, 2006. (March 15, 2012 Decision and Order, p. 6) At the time of his attempted marriage to Thomas, however, Decedent had not yet obtained a divorce from Cynthia Whaley. (*Id.*) Decedent did not obtain a divorce from Cynthia Whaley until February 9, 2007, nearly five months after his attempted union with Thomas. (*Id.*) Thomas testified that she did not become aware of this fact until after Decedent's death. (*Id.*)

On November 19, 2007, Decedent was driving a 5 Star bus in the west bound lanes of Interstate 26 when he became unresponsive, lost control of the bus, and ran off of the paved surface of the roadway before striking a tree. (Mach 15, 2012 Decision and

Order, p. 4) The collision occurred at approximately 1:00 a.m., and Decedent was pronounced dead on the scene by emergency response personnel at1:12 a.m. (*Id.*) The Dorchester County Coroner's Office responded to the accident scene at approximately 2:22 a.m., after which time fire department personnel extricated Decedent from the bus wreckage. (*Id.*)

ARGUMENT

I. THE COMMISSION ERRED IN DETERMINING THAT RESPONDENT'S DECEDENT'S INJURIES AROSE OUT OF AND IN THE COURSE AND SCOPE OF HIS EMPLOYMENT.

The Commission erred in affirming the single commissioner's award of benefits because substantial evidence does not support the conclusion that the underlying accident arose out of Decedent's employment. While 5 Star does not contest the accident occurred in the course of Decedent's employment, Thomas also must demonstrate it arose out of his employment. Pursuant to the Workers' Compensation Act, arising out of the employment specifically refers to the origin and cause of the injury. *See, e.g., Radcliffe v. Southern Aviation School*, 208 S.C. 411, 422, 40 S.E.2d 626, 631 (1946) ("The word 'accident' . . . has been defined as the cause of the injury. . . .") (internal quotation and citation omitted).

More recently, this Court has explained the "arising out of" requirement, noting that "[a]n injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury." *Crosby v. Wal-Mart Stores, Inc.*, 330 S.C. 489, 493, 499 S.E.2d 253, 255 (Ct. App. 1998) (quoting *Owings v. Anderson County Sheriff's Dept.*, 315 S.C. 297, 433 S.E.2d 869 (1993)). Only where the injury results as the "natural incident of work and as a result of the exposure occasioned by the nature of the employment" does it arise out of employment. *Id.* (quoting *Holley v. Owens Corning Fiberglass Corp.*, 301 S.C. 519, 392 S.E.2d 804 (Ct. App. 1990), *aff'd* , 302 S.C. 518, 397 S.E.2d 377 (1990)). "Excluded from the Act, however, is an injury which cannot be fairly traced to the employment as a contributing proximate cause and

which comes from a hazard to which the workmen would have been equally exposed apart from the employment." *Id.* (citing *Jones v. Hampton Pontiac*, 304 S.C. 440, 405 S.E.2d 395 (1991)).

In *Crosby*, claimant fell while walking through her place of employment but could not identify what, if anything, caused her to stumble. 330 S.C. at 490, 499 S.E.2d at 254. On appeal, the court affirmed the denial of compensation benefits given claimant's failure to establish a causal connection between her idiopathic fall and her employment. *Id.* at 496, 499 S.E.2d at 257. Going further, the court noted that absent special conditions or circumstances, compensation for idiopathic level-floor falls will be denied. *Id.* (citing *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 88 S.E.2d 611 (1955)). Further, the "denial of compensation based on some internal breakdown of the body has also been extended by our courts to a situation that did not involve a level-floor fall." *Id.* (citing *Miller v. Springs Cotton Mills*, 225 S.C. 326, 82 S.E.2d 458 (1954)).

In *Miller*, claimant injured her knee when she arose from a cafeteria table but was denied benefits because the "failure of claimant's knee to function normally was the cause of her near-fall and not the near-fall the cause of the injury to the knee." 82 S.E. at 459. As noted by the court:

> It would be wholly conjectural to say under the evidence . . . that claimant's employment was a contributing cause of her injury. ***To sustain an award of compensation in the instant case would necessitate opening the floodgates and holding that every internal failure suffered by an employee in the course of his employment becomes an accident just because it happens.***

Id. (emphasis added) The court reached the same result in *Burnett v. Appleton Co.*, 208 S.C. 53, 37 S.E.2d 269 (1946). There, claimant injured his leg while pushing a truck of cloth up a slight incline onto an elevator. *Id.* at 269. The court determined that evidence

showing claimant experienced pain and swelling in his leg while pushing the cart up an incline was insufficient to show that he sustained an injury by accident within the meaning of the Act.

Applying this precedent to the facts of the present case, it becomes clear that the injuries sustained by Thomas' Decedent are not compensable as a work-related injuries. First, the Decedent's injuries do not satisfy the "arising out of " test stated in *Crosby*, which specifically precludes compensation for injuries wherein the employment cannot be established as a contributing proximate cause and where the injury stems from a common hazard to which the claimant would be exposed outside the employment. In this instance, sustaining an aneurysm is a "risk" to which the Decedent would have been exposed regardless of the nature of his employment.

Thus, as noted above, this appeal turns on whether Thomas sustained her burden of establishing Decedent's rupture of the saccular aneurysm, and therefore the accident, arose out of the conditions of his employment. The medical examiner's report makes clear Decedent in fact sustained a ruptured aneurysm. (Schandl Dep., p. 6, line 21 - p. 7, line 6) That much is undisputed. What is subject to dispute, and the reason Thomas cannot sustain her burden of proving a compensable injury, is the fact that Dr. Schandl could not state to any degree of medical certainty whether the aneurysm resulted from a degenerative process or congenital defect unrelated to Decedent's employment or from a condition of the employment itself. (*Id.*, p. 5, lines 11-17) Instead, she confirmed that Decedent's aneurysm was in fact a condition in existence prior to the time of the accident and found no indication that it was caused by trauma. (*Id.*, p. 6, lines 13-19)

Adding to Thomas' critical inability to demonstrate a causal relationship between Decedent's medical condition and his employment, she cannot demonstrate[1] with medical evidence that the injury arose in the course of his employment. *See* S.C. Code Ann. § 42-1-160 (E) ("In medically complex cases, an employee shall establish by medical evidence that the injury arose in the course of employment. . . . 'medically complex cases' means sophisticated cases requiring highly scientific procedures or techniques for diagnosis or treatment excluding MRIs, CAT scans, x-rays, or other similar diagnostic techniques."). Going further, Thomas was required to proffer medical evidence consisting of "expert opinion or testimony stated to a reasonable degree of medical certainty, documents, records, or other material that is offered by a licensed health care provider." *See* S.C. Code Ann. § 42-1-160(G). Because she could not meet this burden, it was error for the Commission to conclude her Decedent sustained a compensable work-related injury.

The testimony of Dr. Schandl, the only medical professional to offer testimony in these proceedings, is instructive. When asked to state her opinion within a reasonable degree of medical certainty with regard to the cause of the ruptured aneurysm, she testified "***I don't know what caused the aneurysm to rupture*** because I don't know when it ruptured." (Schandl Dep. p. 8, lines 1-3) (emphasis added) It necessarily follows that inasmuch as Dr. Schandl was unable to opine with certainty as to the cause of the rupture, Thomas has not met her burden of establishing that the injury arose out of her Decedent's employment. 5 Star is, therefore, entitled to reversal of the Commission's order.

[1] It is beyond argument that the claimant in any case for worker's compensation benefits bears the burden of proof. *Smith v. Union Bleachery/Cone Mills*, 276 S.C. 454, 280 S.E.2d 52 (1981).

The single commissioner, affirmed by the Commission, erred in finding as fact that Decedent may have had a chance to survive. (May 3, 2011 Decision and Order, p. 15) The question of survival from the ruptured aneurysm simply was not relevant to the determination of compensability where the critical threshold question is the reason Decedent became unresponsive and ran off of the roadway in the first instance. On this point, Dr. Schandl agreed that the history provided to her by the coroner was consistent with that of an individual suffering from a ruptured aneurysm. (Schandl Dep., p. 8, lines 16-17)

The Commission compounded its error when it affirmed the single commissioner's application of the "increased danger rule" to award benefits, relying specifically upon this Court's holding in *Crosby*. (May 3, 2011 Decision and Order, p. 20) The Commission's reliance on *Crosby*, however, is misplaced as that decision involved the denial of a claim for benefits arising from an unexplained, idiopathic fall. Indeed, nowhere in that opinion did this Court adopt any sort of "increased danger rule." Rather, it discussed unexplained falls in terms of those which are "unwanted or purely unexplained." *Id.*, 330 S.C. at 495. Going further, the Commission's reliance on *Bagwell*, actually militates in favor a finding that the instant claim is not compensable. (May 3, 2011 Decision and Order, p. 21) The worker in *Bagwell* fell for unexplained reasons and suffered a subdural hematoma that lead to this death two days later. The *Crosby* Court, in *dicta*, noted that Bagwell's "***fall*** was due to some apparent internal failure or weakness" and that it would amount to conjecture or speculation to find any cause for the fall attributable to the decedent's work. *Crosby*, 330 S.C. at 493, 499 S.E.2d at 256.

Where, as here, there is no expert medical evidence to assist Thomas in meeting her burden to establish that the injury arose out of Decedent's employment, the claim is not compensable. The Commission erred in ruling to the contrary and should be reversed.

II. THE COMMISSION ERRED IN ITS DETERMINATION THAT THOMAS IS A SURVIVING SPOUSE WHO IS ENTITLED TO BENEFITS.

The Commission erred in finding Thomas is a surviving spouse who is entitled to collect workers compensation benefits. There is no dispute that Decedent was married to another woman, Cynthia Whaley ("Whaley"), on the date he purported to enter into a marital relationship with Thomas. It also is undisputed that Decedent was not legally divorced from Whaley until February 9, 2007. (May 3, 2011 Decision and Order, Finding of Fact No. 8, p. 15; Claimant's APAs, Ex. A) Therefore, pursuant to South Carolina law, the attempted marriage between Thomas and her Decedent was bigamous and void at its inception. *See* S.C. Code Ann. § 20-1-80 (" All marriages contracted while either of the parties has a former wife or husband living shall be void.").

Thomas forthrightly conceded from the outset of these proceedings that her marriage to Decedent was bigamous in the eyes of the law. (May 3, 2011 Decision and Order, p. 4) Nevertheless, the Commission erroneously concluded that her relationship with Decedent was transformed into a common law marriage, disregarding the fact that the two cohabitated without ever: (1) recognizing the legal impediment to the existence of a valid marriage; (2) acknowledging at any time the removal of the legal impediment to a valid marriage; and (3) agreeing either to enter into a new, lawful union or to live together as a common law husband and wife.

5 Star acknowledges that a bigamous, illicit marriage may be converted into a common law marriage. What the law requires, and what is missing in this case, however, is an acknowledgement of the impediment to a legal marriage, the removal of the impediment, and an agreement thereafter that man and woman intend to remain together as common law husband and wife. *Lovett v. Lovett*, 329 S.C. 426, 432, 494 S.E.2d 823, 826 (Ct.App. 1997) (*citing* Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 Tul. L. Rev. 1, 6 (1985)). In contravention of these clear rules, the Commission relied upon a misreading of this Court's decision in *Prevatte v. Prevatte*, 297 S.C. 345, 377 S.E.2d 114 (Ct.App. 1989), to find the illicit marriage was transformed into a common law marriage without any recognition by Thomas or Decedent of the legal impediment presented by his prior marriage to Whaley. The *Prevatte* Court, relying on a number of earlier cases, stated that an illicit union may be transformed into a valid common law marriage with one important caveat: "the parties must ***agree*** to enter into a common law marriage ***after*** the impediment is removed." *Id.*, 297 S.C. at 349, 377 S.E.2d at 117. The Court also noted that the agreement to enter into a common law marriage after the impediment is removed may be "gathered" by the conduct of the parties. *Id.*

In order to establish a conversion or transformation of an illicit union into a valid common law marriage, Thomas was required to prove she became aware of Decedent's marital status (*i.e.*, his prior marriage to Cynthia Whaley) and that she later learned the impediment was removed (*i.e.*, the February 9, 2007 divorce decree). This she has failed to do. In fact, Thomas testified that she was not aware until after Decedent's death that he was not divorced from Whaley until February 9, 2007. (December 18, 2008 Hr'g Trans., p. 21, lines 4-10) Thus, the conduct of the parties during the period between

February 9, 2007, and November 19, 2007, amounts to nothing more than a couple holding themselves out as a legally married couple who never ***agreed*** to enter into a common law marriage once the impediment to Decedent's legal union with another was removed. There simply was no evidence from which the Commission could "gather" that a valid common law marriage existed between Thomas and Decedent at the time of his death.

The witnesses Thomas presented at the hearing before the single commission did nothing to change the required outcome in this case for one simple reason. Not one of them testified that Thomas was aware that Decedent was legally married to another woman at the time of his attempted marriage to Thomas or that the couple agreed to continue as common law husband and wife once that impediment was removed. Indeed, such testimony would have been in direct contravention of Thomas' own testimony that she was unaware of Decedent's marital status at the time of her attempted union with him. All their testimony establishes is that Thomas and Decedent attempted to, but did not succeed in, establishing a valid, legal marital relationship.

III. THE COMMISSION ERRED IN RECOGNIZING AND APPLYING THE PUTATIVE MARRIAGE DOCTRINE TO THE FACTS OF THIS CASE.

As noted above, the South Carolina Legislature has expressly refused to recognize bigamous marriages, and no South Carolina court has ever adopted the putative marriage doctrine upon which Thomas relies. The Commission's reliance on the decision in *Lovett*, in applying the doctrine is misguided error. In *Lovett*, this Court did not adopt the putative marriage; rather, it merely recognized "that some jurisdictions have adopted the 'putative marriage doctrine.'" The Court did not, however, recognize the doctrine as the law of South Carolina or apply it to afford the plaintiff in that action an elective share in a

probate proceeding.

The only place where the phrase "putative spouse" appears is S.C. Code Ann. § 62-2-802, which addresses the effect of divorce, annulment, decrees of separate maintenance, and orders terminating parental rights. The section defines "'surviving spouse' . . . in the negative as not including one who is divorced from the decedent or whose marriage to the decedent has been annulled." *Lovett*, 329 S.C. at 432, 494 S.E.2d at 826. In *Lovett*, the only published South Carolina decision addressing the putative marriage doctrine, appellant challenged the probate court's order denying her an elective share of husband's estate. Appellant had been married on numerous prior occasions, and it was unclear she had divorced at least one of her prior spouses prior to marrying the decedent. On that basis, this Court agreed[2] the record did not support her assertion that she was husband's surviving spouse as that term is defined by South Carolina law - a holding that supports 5 Star's contention that Thomas does not qualify for survival benefits in the instant action.

Thomas' persistent efforts to secure application of the putative marriage doctrine also seriously undermine her contention that she was Decedent's common law wife. For example, in support of her argument that the putative marriage doctrine should be applied to the facts of her case, Thomas argued below that she was "completely unaware"

[2] Addressing appellant's argument, the Court acknowledged, but declined to apply as not preserved, the putative marriage doctrine in light of her prior, unresolved marriages, as well as her failure to seek a finding that she married decedent "in good faith." "We recognize that some jurisdictions have adopted the 'putative marriage doctrine.' Under this theory, a spouse who believed in good faith that he or she was validly married, and who had participated in a ceremonial marriage, is allowed the civil effects of a valid marriage event though the marriage is found to be void due to an impediment." *Lovett*, 329 S.C. at 432, 494 S.E.2d at 826 (*citing* Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 Tul. L. Rev. 1, 6 (1985)). Of note, Louisiana has adopted the doctrine via legislative enactment. *See Jones v. Powell Lumber Company*, 156 La. 767, 101 So. 135 (La. 1924).

Decedent was married at the time of their wedding ceremony and that she was unaware of the actual date of Decedent's divorce until after his death. As set forth above, this is consistent with the prevailing law in South Carolina that an illicit marriage is void *ab initio* and cannot be converted into a valid marriage absent a showing of circumstances not presented in this case; to wit, the impediment to a valid marriage is removed and that is mutual assent to either become legally wed or to live together as husband and wife in a common law marriage. Inasmuch as Thomas and her Decedent never agreed to marry or to live as common law husband and wife following Decedent's divorce from another, no legally marriage existed as between Thomas and her Decedent at the time of his death. Thomas is, therefore, absolutely barred from recovery.

CONCLUSION

For all of the reasons stated herein, Respondent 5 Transportation respectfully submits that the Commission erred in determining that Thomas' Decedent sustained a compensable injury and that she is entitled to benefits pursuant to the Act and that it is entitled to an order reversing the Commission's Decision and Order.

July 8, 2013

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APPELLANT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following to be included in the Record on Appeal:

1. Decision and Order dated March 15, 2012 (Full Commission);
2. Decision and Order dated May 3, 2011 (Commissioner Wilkerson);
3 Decision and Order dated January 20, 2011 (Full Commission);
4. Decision and Order dated March 30, 2009 (Commissioner Beck);
5. Claimant's APAs and Exhibits to APAs;
6. May 17, 2011 Form 30 of 5 Star, Request for Commission Review;
7. April 6, 2009 Form 30 of Thomas, Request for Commission Review;
8. August 7, 2008 Form 53 of SC Uninsured Employers' Fund;

9. July 30, 2008 Form 53, Employer's Answer, of 5 Star;

10. July 16, 2010, Form 53 of SC Uninsured Employers' Fund;

11. June 26, 2008 Form 52, Employee's Notice of Claim and/or Request for Hearing, Death Case, by Thomas;

12. December 19, 2011 hearing transcript (Appellate Panel);

13. October 28, 2010 Hearing Transcript (Commissioner Wilkerson);

14. December 18, 2008 hearing transcript (Commissioner Beck); and

15. December 30, 2010 deposition transcript for Cynthia A. Schandl, M.D.

Counsel for Appellant certifies that this Designation contains no matter that is irrelevant to this appeal.

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PROOF OF SERVICE

I certify this 8th day of July 2013 that I have served a copy of the Initial Brief Of Appellant and Appellant's Designation Of Matter To Be Included In The Record On Appeal upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

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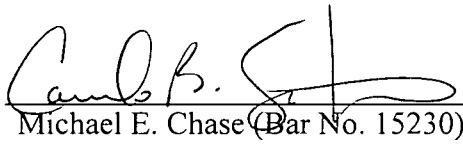
By: 

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