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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable R. Keith Kelly
Circuit Court Judge

Appellate Case Number 2023-000969

Terence Sullivan, ……Appellant,

v.

Ocean 22 Vacation Owners' Association, Inc., …… Respondent.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE

Respondent is in the business of owning, developing, managing, maintaining, marketing, selling, and operating a vacation ownership resort and rooms/units within the resort for use by owners and short-term rental customers. (*See* Compl. ¶2). On August 9, 2019, Appellant was working at Respondent's resort as an employee of Hilton Grand Vacations, Inc. While walking along a paved sidewalk on the property, Appellant slipped and fell after stepping in a low spot on the sidewalk in which a small amount of water had pooled and very slick algae/mold had also formed. (*Id.* ¶5). On August 16, 2021, Appellant filed a summons and complaint alleging that he was injured, permanently and temporarily, because of Respondent's negligence as a property owner and manager. (*Id.*).

Thereafter, on September 1, 2021, Defendant filed a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, arguing Appellant's exclusive remedy was the South Carolina Worker's Compensation Act (the "Act"), and that because Appellant was a statutory employee of Respondent, Appellant's claims were barred. (*See* Resp.'s Mot. to Dismiss). At the hearing in this matter, Appellant contended he was not a statutory employee because his employer's trade, business, or occupation was distinctly different from Respondent's. Furthermore, Appellant also argued that Respondent failed to provide evidence that it carried worker's compensation insurance, which would preclude dismissal. On September 2, 2021, the Court granted Defendant's motion finding that Appellant was a statutory employee, but not addressing his remaining arguments. (*See* Sep. 2, 2022 Order).

On September 12, 2022, Plaintiff filed a Motion to Reconsider, Alter, or Amend pursuant to Rule 59(e), SCRCP. On May 16, 2023, the Court denied Plaintiff's motion to reconsider. On June 15, 2023, Appellant timely filed a Notice of Appeal.

STANDARD OF REVIEW

In reviewing a motion for summary judgment, the appellate court applies the same standard of review as the trial court under Rule 56(c), SCRCP; *Cowburn v. Leventis*, 366 S.C. 20, 30, 619 S.E.2d 437, 443 (Ct. App. 2005) (citing *Trousdell v. Cannon*, 351 S.C. 636, 639, 572 S.E.2d 264, 265 (2002)). Summary judgment should be affirmed if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Id.* "[The Court's] standard of review in evaluating a motion for summary judgment is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom." *Estes v. Roper Temp. Servs., Inc.*, 304 S.C. 120, 121, 403 S.E.2d 157, 158 (Ct. App. 1991).

ARGUMENT

I. The trial court erred in holding Respondent was a "statutory employee" under the Workers' Compensation Act.

"The Workers' Compensation Act is the exclusive remedy against an employer for an employee's work-related accident or injury." *Edens v. Bellini*, 359 S.C. 433, 441, 597 S.E.2d 863, 867 (Ct. App. 2004). "The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury." *Id.* at 441–42, 597 S.E.2d 863. This exclusivity provision states:

> The rights and remedies granted by this Title to an employee when he and his employer have accepted the provisions of this Title, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin as against his employer, at common law or otherwise, on account of such injury, loss of service or death.
>
> *Provided, however*, this limitation of actions shall not apply to injuries resulting from acts of a subcontractor of the employer or his employees or bar actions by an employee of one subcontractor against another subcontractor or his employees when both subcontractors are hired by a common employer.

S.C. Code Ann. § 42–1–540 (1985) (emphasis added). "The exclusivity provision of the Act applies both to 'direct' employees and to those termed 'statutory employees' under § 42–1–400."[1] *Edens*, 359 S.C. at 445, 597 S.E.2d at 869.

To determine whether an employee is engaged in an activity that is part of the owner's trade, business, or occupation as required under § 42-1-400, the South Carolina Supreme Court has applied the following three (3) tests: "(1) is the activity an important part of the owner's business or trade; (2) is the activity a necessary, essential, and integral part of the owner's business; or (3) has the activity previously been performed by the owner's employees?" *Meyer v. Piggly Wiggly No. 24, Inc.*, 338 S.C. 471, 473, 527 S.E.2d

[1] Section 42–1–400 provides:

> When any person, in this section and §§ 42–1–420 and 42–1–430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and §§ 42–1–420 to 42–1–450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. § 42–1–400 (1985).

761, 763 (2000). "Only one of these three tests need be met but there is no easily applied formula and each case must be decided on its own facts." *Id.* "[T]he guidepost is whether or not that which is being done is or is not a part of the general trade, business or occupation of the owner." *Hopkins v. Darlington Veneer Co.*, 208 S.C. 307, 311, 38 S.E.2d 4, 6 (1946).

In this case, the trial court held Appellant was a statutory employee of Respondent because Respondent hired Hilton to manage, operate, and administer the resort. However, the trial court's determination of this factual issue was erroneous. Respondent is in the timeshare ownership and vacation suite ownership business. The resort business – for which Hilton was hired to manage – is wholly separate and distinct from the ownership of timeshares.

In fact, that is exactly what Respondent's Declaration of Covenants, Conditions, and Restrictions stated:

> **Management of the Hotel Interests shall be independent of the management of the other Vacation Ownership Interests to the greatest extent practically and economically feasible**, provided, however, this requirement does not contemplate any prohibition or restriction on the use of personnel hired to regularly furnish materials and services for the Hotel Interests in the Project and to furnish the same or similar services to the other Vacation Ownership Interests. **Such use of common personnel shall not imply that the Hotel Interests and Vacation Ownership Interests are under common management.**

(*See* Resp.'s Mot. Dismiss, Ex. 3, p. 10). Furthermore, Hilton's "Timeshare Management Agreement Ocean 22" with Respondent explicitly stated, "[Respondent] shall employee, compensate and supervise all persons necessary to manage, maintain, administer and operate the Project. Such persons shall be employees of Management Firm and not of [Respondent]." (*See* Resp.'s Mot. Dismiss, Ex. 5, p. 5).

Because of these facts, Respondent's business – which was in the timeshare ownership business – was wholly distinct and separate from the resort operation business. In fact, Respondent's exhibits, declarations, and timeshare management contract with Hilton all explicitly confirmed the same. For those reasons, Appellant submits the Court erred in determining Appellant was a statutory employee, and the Court's Order should be reversed and remanded for an opinion consistent with these arguments.

II. The trial court erred in holding *Harrell* controlled and ignoring the Supreme Court's precedent in *Poch v. Bayshore Concrete Products/South Carolina, Inc.,* which requires statutory employers to procure worker's compensation insurance.

In its order denying Appellant's motion to reconsider, the trial court held:

> While Appellant is correct that there is precedent to this effect, *that precedent is out of date and is no longer good law*, because of the legislature's enactment and subsequent amendment of S.C. Code Ann. § 42-1-415, as our Supreme Court made expressly clear in *Glover v. U.S.*, 337 S.C. 307, 523 S.E.2d 763 (1999)[.]….. As a practical matter, no further analysis is necessary at this point, because [Appellant] staked the entirety of his argument here on the false premise that the Association needed to secure the payment of workers' compensation to avail itself of tort immunity, without addressing the change in the law effected by the enactment and amendment of § 42-1-415 and, thus, without arguing that the requirements of § 42-1-215 are not met.

(Order denying Mot. Reconsider, p. 10).

Unfortunately, the trial court's holding entirely misinterpreted *Glover*. In fact, the Supreme recently analyzed *Glover* and its progeny, *Harrell v. Pineland Plantation, Ltd. See Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 405 S.C. 359, 747 S.E.2d 757 (2013). In *Poch*, in discussing *Harrell*, the Supreme Court stated that although Pineland was Harrell's statutory employer, the *Harrell* Court analyzed whether Pineland could claim immunity under the Act even though it did not provide any form of workers'

compensation insurance. 337 S.C. 313, 325, 523 S.E.2d 766, 772 (1999). Because Pineland failed to secure the payment of compensation as prescribed by sections 42–5–10 and –20 of the Act, the *Harrell* Court held that Pineland could not avail itself of tort immunity under the Act's exclusive remedy provision. *Id.* at 331, 523 S.E.2d at 775. In reaching this conclusion, the *Harrell* Court explained that "an employer who fails to secure the payment of compensation as prescribed in section 42–5–20 loses its immunity under the Act's exclusive remedy provision" and becomes liable either under the Act or in an action at law pursuant to section 42–5–40. *Id.* at 327, 523 S.E.2d at 773 (emphasis added).

Next, the *Poch* Court noted the *Glover* Court reaffirmed its decision in *Harrell*, explaining that:

> Under the Act, the basic duty of any employer, whether it be the direct employer or statutory employer, is the obligation to secure the payment of compensation as prescribed by section 42–5–20. Compliance with this obligation is the quid pro quo exacted from the employer in exchange for immunity. Thus, a statutory employer who fails to secure the payment of compensation as prescribed by section 42–5–20 may not claim immunity under the Act.

Id. at 310–11, 523 S.E.2d at 764. Turning to the case before it, the *Poch* Court held that based on *Harrell* and its progeny, the petitioners were correct that the direct ***and statutory employer*** could have lost their tort immunity had they failed to procure workers' compensation coverage for the petitioners at the time of hiring. *Poch*, 405 S.C. at 373, 747 S.E.2d at 767. Without dispute, evidence of compliance with section 42–5–20 is required of every employer subject to the provisions of the Workers' Compensation Act. *Id.* Furthermore, the *Poch* Court also addressed the trial court's misplaced reliance on section 42–1–415 because that provision "applies only in cases involving reimbursement

from the Uninsured Employer's Fund and neither corporation in the instant case sought to transfer liability to the Fund." *Id.*, 747 S.E.2d at 768. (citing *Hopper v. Terry Hunt Constr.*, 383 S.C. 310, 315, 680 S.E.2d 1, 3 (2009) (interpreting section 42–1–415 and stating, "Liability may only be transferred from the higher tier contractor to the Fund after the higher tier contractor has properly documented the lower tier contractor's claim that it retains workers' compensation insurance")).

Thus, the trial court's holding that Appellant's argument was based on the "false premise" that Respondent "needed to secure the payment of workers' compensation to avail itself of tort immunity" was erroneous and warrants reversal and remand.

CONCLUSION

For the reasons stated, this Court should reverse the decision of the Court of Common Pleas dated May 16, 2023, and remand this matter back to the Court of Common Pleas for an opinion consistent with these arguments.

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