



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

CATHERINE S. HARRISON
CHIEF DEPUTY CLERK

POST OFFICE BOX 11629
COLUMBIA, SOUTH CAROLINA 29211
1220 SENATE STREET
COLUMBIA, SOUTH CAROLINA 29201
TELEPHONE: (803) 734-1890
FAX: (803) 734-1839
www.sccourts.org

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Mr. Ian D. Maguire, Esquire
Maguire Law Firm
1600 N. Oak Street, Suite B
Myrtle Beach SC 29577

Mrs. P. Brooke Eaves Wright, Esquire
1600 North Oak Street, Suite B
Myrtle Beach SC 29577

Mr. David Starr Cobb, Esquire
PO Box 22129
Charleston SC 29413-2129

Ms. Katherine Ann Walker, Esquire
1100 Queensborough Blvd.
Suite 200
Mount Pleasant SC 29464

Mr. Robert Michael Ethridge, Esquire
1100 Queensborough Blvd.
Suite 200
Mount Pleasant SC 29464

Mr. Christopher H. Pearce, Esquire
1314 Professional Drive
Myrtle Beach SC 29577

Mr. Laurence Raymond Wells, IV, Esquire

1314 Professional Drive
Myrtle Beach SC 29577

Mr. Karl Stephen Brehmer, Esquire
PO Box 7966
Columbia SC 29202

Mr. Edward Glenn Elliott, Esquire
Aiken Bridges
PO Drawer 1931
Florence SC 29503

Mrs. Christina Agnes Bisset, Esquire
PO Box 1349
Myrtle Beach SC 29578

Mr. James Donald Floyd, Esquire
1201 Main Street
Ste. 1930
Columbia SC 29201

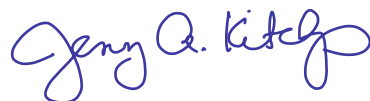
Mr. Thomas J. Rode, Esquire
15 Mid Atlantic Wharf
Charleston SC 29401

Re: Evarista Lorenzo v. Port City Elevator
Appellate Case No. 2021-000325

Dear Counsel:

Enclosed is the decision of the Court. The remittitur will be sent as provided by Rule 221(b) of the South Carolina Appellate Court Rules.

Very truly yours,

A handwritten signature in blue ink that reads "Jenny A. Kitzel". The signature is cursive and fluid.

CLERK

cc: The Honorable Michael G. Nettles

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Evarista Juan Lorenzo, Appellant,

v.

Port City Elevator, Inc; Alan Topper d/b/a All
Construction; 2020 Custom Contractors a/k/a 2020
Custom Contractors, LLC; Citadel Site Management,
LLC; DVBT Construction a/k/a DVBT Construction,
LLC; DVBT Multiservices, LLC; Beverly Construction
Group, LLC; Beverly Homes, LLC; Beverly
Homebuilders, LLC; Strand Paint Contractors, LLC;
Depaz Painting, LLC; Enhanced Heating & Air
Conditioning, LLC; Carlton Pender, and Joan Pender,
Defendants,

Of Which,

Alan Topper d/b/a All Construction; Citadel Site
Management, LLC; Beverly Homes, LLC; Beverly
Homebuilders, LLC; Strand Paint Contractors, LLC;
Depaz Painting, LLC and Enhanced Heating & Air
Conditioning, LLC are the Respondents.

Appellate Case No. 2021-000325

Appeal From Georgetown County
Michael G. Nettles, Circuit Court Judge

Unpublished Opinion No. 2024-UP-111

Heard March 13, 2024 – Filed March 27, 2024

REVERSED AND REMANDED

Thomas J. Rode, of Thurmond Kirchner & Timbes, P.A., of Charleston; Ian D. Maguire, of Maguire Law Firm, of Myrtle Beach; and Brooke Eaves Wright, of Wright Injury Law LLC, of Myrtle Beach; all for Appellant.

David Starr Cobb, of Turner Padgett Graham & Laney, PA, of Charleston, for Respondent Beverly Homes, LLC.

Christopher H. Pearce, of The Pearce Law Group, P.C., of Myrtle Beach, for Respondent Beverly Homebuilders, LLC.

PER CURIAM: This matter concerns a negligence action arising from injuries Evarista Lorenzo sustained while working at a residential construction site. Lorenzo appeals the circuit court's order dismissing Beverly Homes, LLC (Beverly Homes) from the action. We reverse and remand.

1. Lorenzo argues the circuit court erred by finding Beverly Homes was entitled to immunity under the South Carolina Worker's Compensation Act's exclusivity provision. We agree that the circuit court erred in finding the exclusivity provision applied to Beverly Homes because no employment relationship existed. *See* S.C. Code Ann § 42-1-540 (2015) ("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."); *Poch v. Bayshore Concrete Prods./S.C., Inc.*, 405 S.C. 359, 367, 747 S.E.2d 757, 761 (2013) ("The exclusivity provision of the Act applies both to 'direct' employees and to those

termed 'statutory employees' under [section] 42-1-400 [of the South Carolina Code (2015)]." (quoting *Edens v. Bellini*, 359 S.C. 433, 445, 597 S.E.2d 863, 869 (Ct. App. 2004)); *Gray v. Club Grp., Ltd.*, 339 S.C. 173, 184, 528 S.E.2d 435, 441 (Ct. App. 2000) ("Before provisions of the Workers' Compensation Act can apply, an employer-employee relationship must exist; this is an initial fact to be established."); *Posey v. Proper Mold & Eng'g, Inc.*, 378 S.C. 210, 216, 661 S.E.2d 395, 398 (Ct. App. 2008) ("Workers' Compensation awards are authorized only if an employer-employee relationship exists at the time of the injury."); *id.* ("Whether or not an employer-employee relationship exists is a jurisdictional question."); *id.* ("The determination of whether a worker is a statutory employee is jurisdictional and, therefore, the question on appeal is one of law."); *id.* at 216, 661 S.E.2d at 399 ("As a result, this court has the power and duty to review the entire record and decide the jurisdictional facts in accord with its view of the preponderance of the evidence."); *Sellers v. Tech Serv., Inc.*, 421 S.C. 30, 37, 803 S.E.2d 731, 735 (Ct. App. 2017) ("South Carolina's policy is to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the Workers' Compensation Act." (quoting *Spivey v. D.G. Constr. Co.*, 321 S.C. 19, 21, 467 S.E.2d 117, 119 (Ct. App. 1996))); *Keene v. CNA Holdings, LLC*, 436 S.C. 1, 13, 870 S.E.2d 156, 162 (2021) ("The applicable public policy . . . is to ensure that workers are covered under the Workers' Compensation Law."). Based on the record in this case, no employment relationship existed between Beverly Homes and Lorenzo; therefore, the circuit court erred by finding it lacked subject matter jurisdiction based on the exclusivity provision of the Worker's Compensation Act.

2. Lorenzo argues the circuit court erred in finding it had the authority to *sua sponte* grant summary judgment when ruling on a 12(b)(1), SCRCP, motion. We agree. Although South Carolina law states a circuit court judge may convert a Rule 12(b)(6), SCRCP, motion into a Rule 56, SCRCP, motion, there is no similar provision for converting a Rule 12(b)(1) motion into a Rule 56 motion. *See* Rule 12(b), SCRCP ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."); *see also Posey*, 378 S.C. at 217, 661 S.E.2d at 399 (citation omitted) ("The proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, rather than a motion for summary judgment pursuant to Rule 56, SCRCP. If a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the trial court should treat the motion

as if it were a Rule 12(b)(1) motion to dismiss."). Lorenzo was not provided proper notice that the circuit court would convert Beverly Homes' 12(b)(1) motion into a summary judgment motion; therefore, we reverse and remand this case to the circuit court. *See* Rule 56(c) (providing that a moving party shall serve its summary judgment motion "at least 10 days before the time fixed for the hearing"); *see also Baird v. Charleston County*, 333 S.C. 519, 528 n.6, 511 S.E.2d 69, 74 n.6 (1999) ("Providing notice prior to the hearing is essential under Rule 56(c) . . .").

3. We need not address Lorenzo's remaining arguments because the resolution of the above issues is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address remaining issues on appeal when its determination of a prior issue is dispositive).

REVERSED AND REMANDED.

MCDONALD, VINSON, and VERDIN, JJ., concur.