

THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

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Appellate Case No. 2012-212258

S.C. Supreme Court

STEPHEN C. WHIGHAM.....PETITIONER,

v.

JACKSON DAWSON COMMUNICATIONSRESPONDENTS.
AND THE HARTFORD

BRIEF OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED FOR REVIEW BY THE SUPREME COURT	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
ARGUMENT.....	12
I. STANDARD OF REVIEW	12
II. THE COURT OF APPEALS DID NOT APPLY STANDARDS SET FORTH BY THIS COURT FOR DETERMINING WORKERS' COMPENSATION COVERAGE AND, THUS, ERRED BY FINDING PETITIONER'S INJURY WAS NOT COMPENSABLE, THOUGH IT OCCURRED AT A "TEAM- BUILDING" EVENT THAT EMPLOYER EXPRESSLY WANTED HIM TO PLAN, ORGANIZE, PROMOTE, AND EXECUTE FOR EMPLOYER'S BENEFIT.	12
A. This Court has never limited workers' compensation coverage only to injuries that occur while an employee is working within a written job description.....	12
B. The fact that Petitioner's injury occurred at a recreational or social event does not remove his claim from coverage.	17
1. Employer made Ballad Ball part of Petitioner's services or impliedly required Petitioner's participation, thus bringing Ballad Ball within the orbit of his employment.....	18
a. Employer made Ballad Ball part of Petitioner's services.....	18
b. Employer impliedly required Petitioner to participate in Ballad Ball.	20
2. Employer derived substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation.	21
3. Other jurisdictions have extended workers' compensation coverage in factually similar cases.	23
CONCLUSION	27

TABLE OF AUTHORITIES

Cases

Barbara Ludwinski v. National Courier, 873 S.W. 2d 890 (MO. App. E.D. 1994).. 24, 25, 26, 27

Engle v. Thompson Murray, Inc., 239 S.W. 3d 561 (Ark. App. 2006)..... 25, 26, 27

Fountain v. Huntsville Oil Mill, 207 S.C. 119, 32 S.E. 2d 11 (1945)..... 21

Grant v. Grant Textiles, 361 S.C. 188, 603 S.E. 2d 858 (S.C. App. 2004) 12, 13, 17, 20

Hall v. Desert Aire, Inc., 376 S.C. 338, 656 S.E. 2d 753 (S.C. App. 2007)..... 14, 15

Howell v. Kash & Karry, 264 S.C. 298, 214 S.E. 2d 821 (1975)..... 13

Leopard v. Blackman-Uhler, 318 S.C. 369, 458 S.E. 2d (S.C. 1995) 17

Pelfrey v. Oconee County, 207 S.C. 433, 440, 36 S.E. 2d 297, 300 (1945) 14

Pierre v. Seaside Farms, Inc., 386 S.C. 534, 689 S.E. 2d 615 (S.C. 2010)..... 14

Other Authorities

1A Arthur Larson and Lex Larson, *The Law of Workers' Compensation* § 22.00 (1994) 17, 26

1A Arthur Larson and Lex Larson, *The Law of Workers' Compensation* § 22.21(a) (1994) 18

1A Arthur Larson, *The Law of Workers' Compensation* §22.21 (a) (1993) 24

QUESTIONS PRESENTED FOR REVIEW BY THE SUPREME COURT

- I. Did the Court of Appeals fail to apply standards set forth by this Court for determining workers' compensation coverage and, thus, err by finding Appellant's injury was not compensable, though it occurred at a "team-building" event that Employer expressly wanted him to plan, organize, promote, and execute for Employer's benefit.

STATEMENT OF THE CASE

This case will clarify South Carolina law relating to when a recreational or social event and, more specifically, employment that includes planning, organizing, promoting, and executing such event, arises out of and in the course of employment. Here Petitioner sustained injury to his right knee on October 6, 2007, resulting in permanent impairment/disability to the right lower extremity. The injury occurred during the Employer-sponsored "team building" event. Petitioner contends his injury arose out of and in the course of employment. Employer contends the opposite.

The case was heard by the Single Commissioner on January 4, 2010. The Single Commissioner found the Petitioner's injury did not arise out of and in the course of employment. Petitioner appealed to the Commission, which heard the case on May 18, 2010 and fully affirmed the Single Commissioner by Order dated July 21, 2010.

Petitioner appealed to the Court of Appeals, which heard the case on March 20, 2012 and affirmed the Commission by Order dated April 11, 2012. Petitioner then filed a Motion for Rehearing on April 25, 2012, which was denied.

Petitioner filed a Petition for Writ of Certiorari with this Court on July 17, 2012. The Petition was granted by Order dated September 19, 2013.

STATEMENT OF FACTS

This Court will find that Petitioner relies exclusively on evidence provided by Employer, except where Petitioner and Employer take consistent factual positions. In that instance, Petitioner also relies on his evidence.

The undisputed material facts will lead to these conclusions:

1. Petitioner was injured while undertaking duties in good faith to advance Employer's interest, i.e. he knew Employer wanted him to plan, organize, promote, and execute a "team-building" event at which he was injured;
2. Employer impliedly required Petitioner to participate in the "team-building" activity or made the activity part of Petitioner's services, thereby bringing the activity within the orbit of his employment; and
3. Employer derived substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

Petitioner's injury occurred at an event that he and other members of Employer's management reported on their time sheets. (R. p. 76, lines 1-6; 113, lines 4-17; 196-197). At the end of the year, Employer included the event in Petitioner's annual evaluation. (R. p. 87, line 14 – p. 88, line 13; pp. 191-193).

During 2007, Petitioner was a member of upper management at Employer. Employer is a marketing, advertising, and communications company that helps other companies amplify their messages and build brand value. (R. p. 89, lines 1-7) Petitioner's title was Director of Creative Services. (R. p. 90, lines 2-3) His direct

supervisor was Kevin Johnson, Employer's Executive Vice President. (R. p. 88, lines 17-20; p. 90, lines 4-8) Petitioner answered directly to Mr. Johnson. (R. p. 90, lines 7-8).¹

Both Petitioner and Mr. Johnson attended upper management meetings on a regular basis. Prior to 2007, Employer testified it had been "a non-typical employer" with an emphasis on "being different" and "having fun" and "making it a fun place to work." (R. p. 63, lines 10-19) Employer's upper management saw such an atmosphere as a business benefit, and accordingly upper management began discussing the need for "team-building" events to "bring back the fun." It is undisputed that the consensus in upper management was that "team-building" events, such as the one at which Petitioner was injured, were desired and should occur. (R. p. 61, lines 17-24; p. 105, lines 6-10, lines 21-25) (Per Mr. Johnson: "Yes. [W]e needed to do things or wanted to do things that would promote fun within the business, break the stress." R. p. 61, lines 22-24) ("Team building is something extremely important to the health of the company" R. p. 109, lines 1-2) "[A]ll upper management was concerned about [team building]." (R. p. 108, lines 18-21) As a member of upper management, Petitioner knew that Employer wanted more "team-building" events to occur that year.² (R. p. 62, lines 1-7; p. 105, lines 6-10)

Here is a significant aside. Employer promotes and encourages its own clients to use "team-building" events and markets its services in staging such "team-building"

¹ As Mr. Johnson was the highest ranking and sole executive who appeared for Employer at the hearing, the terms "Mr. Johnson" and "Employer" will at times be used interchangeably. Though Petitioner reported to Mr. Johnson, he was in effect "Employer" himself in that he was also a member of upper management.

² Petitioner was responsible for two team-building events in 2007. The first was "Afternoon Delight – Salute to the One-Hit Wonders", which was a cookout during normal business hours. Employees ate grilled spam (among other things), and played Name that Tune. Additionally, Employee played numerous "one-hits" by otherwise obscure music groups, e.g. "Afternoon Delight" by Starland Vocal Band, "Safety Dance" by Men Without Hats, "Mickey" by Tony Basil, "Whip It" by Devo, "Puttin on the Ritz" by Taco, etc.

events. (R. p. 105, lines 11-20) At the time of the hearing, Employer's website specifically promoted its services in staging "team-building" events (R. p. 105, lines 11-20).

According to Employer, "team-building" events serve the following business purposes:

- "Promote fun within the business" (R. p. 61, line 24)
- "Break the stress" (R. p. 61, line 24)
- "Promote creativity" (R. p. 63, lines 7-9)
- "Being different" (R. p. 63, lines 10-11)
- "Being a non-typical employer" (R. p. 63, lines 14-15)
- "Helps us retain good employees and keep people happy" (R. p. 63, lines 16-19)
- "Needed for [Employer] to succeed as a marketing agency" (R. p. 64, lines 1-4)
- "Get better work out of your employees" (R. p. 64, lines 14-23)
- "Promote a better working relationship between members of different departments" (R. p. 65, line 25-p. 66, line 5)
- "Promote employee loyalty to [Employer]" (R. p. 66, line 6-8)

According to Petitioner, team-building events serve the following business purposes:

- "Instill fun" (R. p. 106, line 7)
- "Increase communication pathways between departments" (R. p. 106, lines 7-8)

- Help with hiring – “people we try to hire are looking for a creative place to work” (R. p. 106, lines 10-11)
- Helps specifically in hiring “young artists, writers, and web developers” (R. p. 106, lines 15-24)
- Promotes “better working relationships between employees” (R. p. 106, line 25-p. 107, line 3)
- Promotes “better working relationships between departments” (R. p. 107, lines 4-20), specifically between creative service department and account service department in 2007
- “Create loyalty to [Employer]” (R. p. 107, lines 21-24)

Approximately one month before Petitioner’s injury, he proposed a “team-building” event to Mr. Johnson. (R. p. 67, lines 1-5) This event was a kickball game – “Ballad Ball” – that “paid tribute to the rock ballads of the eighties.” (R. p. 110, lines 6-9) Mr. Johnson authorized Ballad Ball and specifically authorized Petitioner to organize, plan, and execute Ballad Ball. (R. p. 68, lines 18-21; p. 70, lines 7-9)

Still, many of the details for Ballad Ball were ironed out between Petitioner and Mr. Johnson. According to Mr. Johnson: “I had to be part of the pre-discussions, when are we going to do it, where are we going to do, how much is it going to cost, all of that.” (R. p. 70, lines 19-21) Among other things, Mr. Johnson approved when and where Ballad Ball would be held, rental of a field at the YMCA, and the expenditure of money, including a budget. (R. p. 68, lines 12-14, lines 22-24; p. 70, lines 19-24) (R. pp. 150-171) Mr. Johnson’s involvement continued: “We had regular meetings, and we would talk briefly about it.” (R. p. 73, lines 19-23).

With Employer's full knowledge and blessing, Petitioner started "the hype machine" company-wide. (R. p. 69, lines 1-3) (See generally R. pp. 150-171 – Emails regarding Ballad Ball) Per Mr. Johnson, Petitioner "can hype with the best of them..." (R. p. 70, line 14) Ballad Ball was "hyped up" for about thirty (30) days (R. p. 111, lines 11-13). With Employer's full knowledge and blessing, Petitioner did the following:

- Used Employer's intranet (R. p. 69, lines 7-9; p. 110, lines 23-24) to encourage *all* employees to participate in Ballad Ball (R. p. 69, lines 10-21; p. 70, lines 7-9)
- Used Employer's email to plan, organize, and execute Ballad Ball (R. p. 73, lines 2-5; p. 110, line 23-p. 111, line 1). Emails were sent to *all* employees for the purpose of encouraging them to attend/participate (R. p. 73, lines 10-18)
- Put flyers in employee's boxes (R. p. 111, lines 2-7)

In addition, Mr. Johnson promoted Ballad Ball at a staff meeting (R. p. 111, lines 2-7)

Petitioner's efforts were successful. As Ballad Ball approached, it was "widely discussed throughout the company" (R. p. 74, lines 7-9). There was a "substantial amount" of "trash talk" going back and forth between employees via Employer's email (R. p. 74, lines 18-21). (For *some* examples – see R. pp. 157, 170-171) As Petitioner continued to "organize, and plan, and execute this event", he continued to report back to Mr. Johnson. (R. p. 73, lines 19-23) Mr. Johnson testified that Petitioner was doing everything he expected him to do in terms of planning, organizing, and executing Ballad Ball (R. p. 76, lines 17-20)

Petitioner divided the employees into two (2) teams and requested that Employer produce t-shirts for the teams. He sent the proposed designs to Mr. Johnson (R. p. 75, lines 5-9). (R. pp. 162-164) Employer paid for the t-shirts (R. p. 75, lines 16-17). The t-shirts were designed and created by another employee, who created and designed the t-shirts while on company time (R. p. 75, lines 10-15). The t-shirts displayed team names, which were based upon professional acronyms, i.e. PETEY-O's (PTO = paid time off) and ELOISE'S (LOE - Letter of estimate). (R. p. 75, lines 18-24) (R. pp. 163-164)

With Employer's knowledge, Petitioner worked on Ballad Ball during his work day, i.e. on company time (R. p. 76, lines 1-6; p. 113, lines 4-7; 13-16). Petitioner recorded the time he spent on Ballad Ball as "administrative time" on his time sheets. (R. p. 113, lines 8-9) Petitioner was never admonished by Employer not to spend "work" time on Ballad Ball (R. p. 113, lines 8-12). Nor was he told that it was inappropriate to record the time he spent on his time sheets (R. p. 114, lines 14-17). The day of his injury, Petitioner again recorded the time he spent on Ballad Ball as administrative time (R. p. 114, lines 6-13). (R. p. 196) Likewise, Employer's CFO recorded "kick ball" on his time sheet. (R. p. 197)

Ballad Ball was scheduled to begin at 3:00 p.m. on Friday, October, 7, 2007 (R. p. 70, lines 22-24), though employees were encouraged to get their "kickball playing patooti[s] out there before 3:00 p.m." (R. p. 70, line 25 – p. 71, line 12). Normal working hours at Employer were 8:30 a.m. to 5:30 p.m. Employer's phones, however, were answered from 8:00 a.m. to 6:00 p.m. (R. p. 77, line 15-p. 78, line 2). Like other members of upper management, Petitioner typically and routinely worked about fifty (50) hours per week (R. p. 78, lines 3-11; p. 116, lines 5-7). Accordingly, Petitioner typically

and routinely worked until 5:30 p.m. on Friday (R. p. 78, line 12 – p. 79, line 1; p. 116, lines 8-10). If Petitioner had not been at Ballad Ball, he would have been in his office (R. p. 234, lines 1-4 – see Appendix).

Though attendance at Ballad Ball was not explicitly required, Employer wanted “as many as could” to attend and participate in it (R. p. 71, lines 7-12). It was Mr. Johnson’s “hope that everyone would come.” (R. p. 72, lines 19-22). It was Mr. Johnson’s “expectation that those who were not tied up with client work would be there.” (R. p. 72, lines 23-25). All employees were encouraged more than once to attend (R. p. 112, line 25 – p. 113, line 3). Mr. Johnson made at least one announcement about Ballad Ball at a staff meeting. (R. p. 111, lines 2-7) A roster of participants was circulated before the event via company email (R. p. 100, lines 6-10), and in the email those who were not on a team roster were described as “holdouts.” (R. p. 100, lines 11-13) (R. p. 154) In the end, Mr. Johnson estimates that 50 or 60% of employees attended. (R. p. 84, lines 10-15; p. 236, lines 12-14 – see Appendix). Not all employees were in town. Some stayed back and worked, and some may have gone home at 3:30 p.m. if their work and time sheets were completed. (R. p. 80, line 20 – p. 81, line 8; p. 83, lines 8-19)

Salaried employees were paid for their time at Ballad Ball. They were not required to use vacation time (R. p. 76, line 24 – p. 77, line 8). All salaried employees received a full week’s pay. As noted previously, the time sheets for Petitioner and Employer’s CFO show they recorded their time for Ballad Ball (R. pp. 196-197). Though no other time sheets are part of the record, Employer acknowledges other employees recorded their time at Ballad Ball on their time sheets. (R. p. 101, lines 8-13).

Regardless of whether attendance at Ballad Ball was required or voluntary for *other* employees, Petitioner considered *his* attendance at Ballad Ball to be part of his job (R. p. 234, lines 14-15 –see Appendix). Petitioner believed he would have upset a lot of people had he not shown up; “it would have been a poor reflection on management if [he] would have not shown up.” (R. p. 234, lines 9-13 – see Appendix)

Employer’s expectations of Petitioner were consistent with his belief: he was *expected* to be at the event. Mr. Johnson indicated he “would have been surprised and shocked” if Petitioner had not shown up at the team-building event because he “spent all the time planning the thing.” (R. p. 102, lines 5-8) Mr. Johnson could not imagine Petitioner not showing up. “[H]e wouldn’t do that. I’ll just say that. He wouldn’t do that.” (R. p. 102, lines 15-18) According to Mr. Johnson, had Petitioner failed to show up at the event, it “would have been unexpected, unbelievable. I mean, you don’t plan something and then not show up to it.” (R. p. 102, lines 19-22)

In addition to paying to rent the field, paying for snacks, paying for t-shirts, and paying salaried employees for their time, Employer also provided the following equipment: chairs, coolers, a megaphone, “other equipment” (R. p. 85, lines 10-17), cones, a “big ball”, and extension cords (R. p. 115, lines 1-6).

The morning of Ballad Ball, Petitioner went to the YMCA early, met with people at the YMCA, set up the field, and set up speakers and music. This occurred during normal work hours. (R. p. 115, lines 14-16) Ballad Ball itself began during normal work hours (R. p. 115, lines 17-19). Petitioner got the event started at about 3:00 p.m. (R. p. 118, lines 11-13). He and other upper management proceeded to hype it up during Ballad Ball, thus keeping enthusiasm at a high level. (R. p. 118, line 21- p. 119, line 1) (See R.

pp. 172-187) At about 4:15 p.m., while participating in Ballad Ball, Petitioner was injured. (R. p. 119, lines 12-16) (R. pp. 28-31)

Even after the event, Ballad Ball was fully embraced by Employer. Photographs of Ballad Ball were taken. (R. p. 85, lines 24-25) (R. pp. 172-187) These photographs, which portray Petitioner in a leadership role, were posted on Employer's intranet for a period of time (R. p. 86, lines 1-3). Further, these photographs were displayed at Employer's 2007 Christmas party (R. p. 86, lines 4-5; p. 125, lines 7-10). The context for showing the photographs at the Christmas party was part of a "review of the year". The event was "one of the big events of the year we wanted to place emphasis on. ...[We] were just showing all the great things that had happened through the year. That made the list." (R. p. 125, lines 11-17)

In February 2008, Petitioner underwent a 2007 employee performance evaluation. This included a self-evaluation (R. pp. 188-190) and an evaluation by Mr. Johnson (R. pp. 191-193). When Petitioner evaluated himself, he listed Ballad Ball as a major accomplishment that had a "very positive lift to the working culture at [Employer]." (R. p. 86, line 15 – p. 88, line 4) (R. pp. 188-190) Mr. Johnson's response to Petitioner's self-evaluation confirms that Ballad Ball was part of Petitioner's employment. (R. p. 87, lines 5-13). More importantly, when Mr. Johnson evaluated Petitioner, he also referred to Ballad Ball. Mr. Johnson indicated that Petitioner was a "team player" and brought back "a couple of fun events" and specifically referred to Ballad Ball. (R. p. 87, line 14 – p. 88, line 13) (R. pp. 191-193) Accordingly, Mr. Johnson gave Petitioner one of the highest ratings possible under the category "Effective Team Player/Engages in Team Efforts." (R. pp. 191-193).

ARGUMENT

I. STANDARD OF REVIEW

In *Grant v. Grant Textiles*, 361 S.C. 188, 603 S.E. 2d 858 (S.C. App. 2004), then-Chief Justice Hearn pointed out in her dissent that, while the question of whether an accident arises out of and in the course of employment is largely one of fact, it becomes a matter of law where there are no material facts in dispute. 603 S.E. 2d at 860. When reviewing the Court of Appeals' decision and reversing its ruling on that question, this Court agreed. "There were no disputed material facts in this case. Where there are no disputed facts, the question of whether an act is compensable is a question of law." *Grant v. Grant Textiles*, 641 S.E. 2d 869, 372 S.C. 196 (S.C. 2007). Accordingly, this Court can apply the undisputed underlying facts in this case and find that the Court of Appeals reached an incorrect conclusion of law.

II. THE COURT OF APPEALS DID NOT APPLY STANDARDS SET FORTH BY THIS COURT FOR DETERMINING WORKERS' COMPENSATION COVERAGE AND, THUS, ERRED BY FINDING PETITIONER'S INJURY WAS NOT COMPENSABLE, THOUGH IT OCCURRED AT A "TEAM-BUILDING" EVENT THAT EMPLOYER EXPRESSLY WANTED HIM TO PLAN, ORGANIZE, PROMOTE, AND EXECUTE FOR EMPLOYER'S BENEFIT.

A. This Court has never limited workers' compensation coverage only to injuries that occur while an employee is working within a written job description.

The Court of Appeals erred by setting a very narrow standard for extending workers' compensation coverage. It affirmed an Order in which the Commission focused

on whether Petitioner's written job description³ explicitly required him to plan, organize, promote, and execute the "team-building" event. The Commission found:

"13. If Petitioner had been required to plan the event as part of his job description/duties, I might well have reached a different conclusion. However, such is not the case." (R. p. 24)

This Court has held that the standard for extending workers' compensation coverage is not nearly so narrow. In *Grant v. Grant Textiles*, 372 S.C. 196, 641 S.E. 2d 869 (S.C. 2007), this Court placed the focus on the employee's motivation, i.e. whether the employee undertook his duties to advance the employer's interest, not on whether the employee's acts were part of a job description. All that need exist is a causal connection between the job and the injury. *Id.* at 876.

"There are circumstances when injuries arising out of acts outside the scope of an employee's regular duties may be compensable. (citations omitted)...An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interest, whether or not the employer's assigned work is thereby furthered, is within the course of employment." *Id.* at 871-872, citing *Howell v. Kash & Karry*, 264 S.C. 298, 214 S.E. 2d 821 (1975) (grocery store employee who was injured while chasing two purse-snatchers was found to have suffered a compensable injury.)

In *Grant*, the employee went to a hunting preserve, Clinton House, to meet his employer's customers. While at Clinton House, he took it upon himself to remove debris from the road, and he was struck by an automobile. *Id.* 870. This Court found that a causal connection existed because "the accident wouldn't have happened but for Petitioner's trip to the Clinton House to meet his employer's customers." *Id.* 872. Even though picking up debris was outside Grant's regular duties, it was "undertaken in good faith to advance his employer's interest..." in that "...he chose to remove the hazard to benefit himself, his co-worker father, and his customers." *Id.*

³ There is no evidence that Petitioner had a written job description.

Citing the policy reasons behind the workers' compensation system, this Court again emphasized a broader standard for extending coverage in *Pierre v. Seaside Farms, Inc.*, 386 S.C. 534, 689 S.E. 2d 615 (S.C. 2010). This Court found that "an injured employee should not be excluded from the benefits of the law upon the ground that the accident did not arise out of and in the course of his employment when there is substantial doubt arising from the proven facts of the propriety of such conclusion." *Id.* 689 S.E. 2d at 618, citing *Pelfrey v. Oconee County*, 207 S.C. 433, 440, 36 S.E. 2d 297, 300 (1945). "These words are construed broadly and should continue to be so construed." *Id.* "Common sense indicates that a compensation law passed to increase workers' rights (because their common law rights were too narrow) should not thereafter be narrowly construed." *Id.* 689 S.E. 2d at 619.

The very narrow standard applied by the Court of Appeals here conflicts not only with the policy reasons behind the worker's compensation system but also with the broader standard it enunciated in *Hall v. Desert Aire, Inc.*, 376 S.C. 338, 656 S.E. 2d 753 (S.C. App. 2007). ("The general policy in South Carolina is to construe the Workers' Compensation Act in favor of coverage, and any reasonable doubts as to construction should be resolved in favor of the claimant." 656 S.E.2d at 759.) There Hall enjoyed a meal and alcoholic beverages at the home of a business associate. 656 S.E. 2d at 756. Later that evening, while riding around the block in a jeep owned by his host, Hall was injured. *Id.* Hall claimed he was still discussing business during the jeep ride. *Id.* at 761. The employer contended the jeep ride was personal recreation and had nothing to do with Hall's employment.

Finding that Hall's injury arose out of his employment, the Court of Appeals stated that the employment need merely be "a contributing proximate cause of the accident." (Citations omitted) Id. at 759. To meet that requirement, "the injury must be fairly traced to the employment..." (Citations omitted) Id. The Court of Appeals found Hall's injury was covered because his activities "were consistent with and logically related to Hall's employment responsibilities." Id. at 761.

Specifically as to whether an employee must be working within his job description, the Court of Appeals stated:

"An employee need not be in the actual performance of the duties for which he was expressly employed in order for his injury to be in the course of employment... An act outside an employee's regular duties which is undertaken in good faith to advance the employer's interest, whether or not the employee's own assigned work is thereby further, is within the course of employment." (Citations omitted) (Emphasis provided) 656 S.E. 2d at 762.

It is enough to show that the activity was "consistent with and logically related to [Petitioner's] employment responsibilities." Id. at 761. So *Hall* also specifically undermines Employer's contention, which was accepted by the Commission and the Court of Appeals in this case, that Petitioner's job description must have included the planning, organizing, promoting, and executing of "team-building" events.

Here the Court of Appeals ignored long recognized standards for determining coverage in workers' compensation cases. Petitioner's injury is clearly compensable under the standards this Court set forth in *Grant* and *Pierre* and the Court of Appeals set forth in *Hall*. The following testimony by Mr. Johnson alone leads to that legal conclusion:

Q: "...there was consensus in upper management that these events, these team-building events, were wanted...by upper management."

A: "Yes. We wanted to have – we needed to do things or wanted to do things that would promote fun within the business, break the stress."

Q: "And as a member of upper management, of course, Steve [Petitioner] would have known this."

A: "Oh, yes."

(R. pp. 61-62)

Employer "wanted" Petitioner to plan, organize, promote, and execute a "team-building" event, so that Employer could obtain the benefits outlined by Employer itself. (See the ten (10) business purposes identified by the Employer itself). Petitioner knew Employer wanted him to plan, organize, promote, and execute "team-building" events. Petitioner's clearly believed in good faith that he was advancing Employer's interest. Though his subjective belief would be enough to meet this standard, his belief was not subjective. The Employer explicitly authorized the event in an email to Petitioner, monitored Petitioner's progress at meetings between Mr. Johnson and Petitioner, threw its full support behind Petitioner and the "team-building" event by making financial contributions, allowing the use of Employer's equipment, announcements on the Employer's intranet and at staff meetings, etc. Further, Employer embraced the event by posting photographs relating to it on the Employer intranet and at the 2007 Christmas party. Any doubt about whether Petitioner thought he was advancing the Employer's interest and that his belief was not subjective is eviscerated by Petitioner's 2007 Employee Performance Evaluation. In his self-evaluation, Petitioner mentioned Ballad Ball as one of his accomplishments. His Employer also mentioned Ballad Ball as one of Petitioner's accomplishments, and based upon Petitioner's contribution as "a team player" gave Petitioner one of the highest ratings possible under the category "Effective Team Player/Engages in Team Efforts."

B. The fact that Petitioner's injury occurred at a recreational or social event does not remove his claim from coverage.

This case involves a novel question of law in that it involves injury at a recreational or social event. While the Court of Appeals' decision is in conflict with the general standards enunciated in *Grant* and *Pierre*, it is also in conflict with this Court's decision in *Leopard v. Blackman-Uhler*, 318 S.C. 369, 458 S.E. 2d (S.C. 1995), an opinion dealing specifically with workers' compensation coverage arising from recreational or social events. As to whether an injury at a recreational or social event falls within the course and scope of employment, this Court has adopted an analysis proposed by Professor Larson. *Id.* 458 S.E. 2d at 41-42. The analysis includes two factors that support a finding that Petitioner's injury at Ballad Ball arose out of and in the course of his employment:

...

(2) The employer, by...impliedly requiring participation or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or

(3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.

1A Arthur Larson and Lex Larson, *The Law of Workers' Compensation* § 22.00 (1994).

The Court of Appeals erred in its analysis of these factors. At oral argument, the court associated this case with the "softball league" line of cases, of which *Leopard* is representative.

1. Employer made Ballad Ball part of Petitioner's services or impliedly required Petitioner's participation, thus bringing Ballad Ball within the orbit of his employment.⁴

a. Employer made Ballad Ball part of Petitioner's services.

Clearly Employer made Ballad Ball part of Petitioner's services. The fact that Ballad Ball was a recreational event does not mean Petitioner wasn't working both before and during the event. As Professor Larson explains, "A certain amount of work has to be done to keep the play going." 1A Arthur Larson and Lex Larson, *The Law of Workers' Compensation* § 22.21(a) (1994). An employee who performs *some* duty in connection with an employer sponsored recreational event is acting within the course and scope of employment. Id.

Petitioner knew Employer wanted "team-building" events, such as Ballad Ball. Mr. Johnson approved Ballad Ball in general concept and in specifics. Petitioner then planned, organized, and executed Ballad Ball with the full knowledge and blessing of Employer. All of Petitioner's work with regard to Ballad Ball was done during normal work hours. Petitioner reported his efforts to Mr. Johnson and even had meetings with Mr. Johnson at which the event was discussed. Petitioner recorded all of his Ballad Ball time on his time sheets. Other employees, including the company CFO, associated the

⁴ Although a strong argument can be made that *all* employees who attended ballad ball were impliedly required to attend, given the promotion by upper management, including both Petitioner and Mr. Johnson, the "hope" and "expectation" of Employer, the numerous messages on Employer's intranet and email systems urging participation, the description of those who were not signing up as "holdouts", and the fact that attending ballad ball allowed employees to leave work early, such a determination is irrelevant to whether *Petitioner* was impliedly required to attend ballad ball or whether ballad ball was part of *his* services as an employee, thus bringing ballad ball within the orbit of Petitioner's employment.

activity with their employment in that they recorded on their time sheets that they were at Ballad Ball the day and time of Petitioner's injury. Ballad Ball occurred during normal business hours. Finally, Petitioner's injury occurred at 4:15 p.m., more than an hour before he normally ended his work day.

Lest there be any doubt as to whether Employer made Ballad Ball part of Petitioner's services, there is Exhibit 4 (R. pp. 191-193). Exhibit 4 (R. pp. 191-193) is an admission *per se* by Employer that it made Ballad Ball a part of Petitioner's services. In Exhibit 4 (R. pp. 191-193), Petitioner's performance as an employee was evaluated. Ballad Ball was mentioned in his evaluation and formed the basis for a high score in the category "Effective Team Player/Engages in Team Efforts". It is disingenuous to now assert that Ballad Ball was just a clever idea that bore no relation to Petitioner's employment.

The Commission focused on whether Petitioner's written job description included planning, organizing, promoting, and executing such an event. That issue is beside the point. He, like most upper level employees, does what Employer desires and expects him to do. And it is undisputed that Employer desired and expected Petitioner to plan, organize, promote, and execute Ballad Ball. His work is not limited to a written job description. In that regard, the Commission mistakenly relied on the fact that Employer didn't attend softball games involving Employer's sponsored team. These games involved competition during softball season against other company softball teams. (R. p. 93, lines 17-22). Accordingly, even Mr. Johnson questioned whether there was any correlation between attendance at these games and attendance at Ballad Ball. (R. p. 94, lines 1-2).

Here again the Commission also focused on the fact that Petitioner wasn't

explicitly commanded to organize or execute the team-building event, i.e. that Petitioner proposed Ballad Ball to Mr. Johnson. Under *Grant, Pierre* and *Hall* that fact is irrelevant.

Employer in this case had maintained a tradition of holding team-building events. According to Employer, the whole point of holding these events in 2007 was “to return the fun to Jackson Dawson.” (R. p. 61, lines 14-16) Petitioner was working to advance Employer’s interest, i.e. obtaining numerous benefits Employer itself recognized. Employer admitted as much at the hearing.

b. Employer impliedly required Petitioner to participate in Ballad Ball.

It is clear that Employer expected Petitioner to plan, organize, promote, and execute Ballad Ball (R. p. 86, lines 8-10), “execute” being the operative word with regard to this issue. In that regard, it was absolutely unimaginable that he would not see Ballad Ball through to the end, including making sure the field was picked up and Employer’s equipment returned afterward. After all, Petitioner believed Ballad Ball was part of his job on the day of his injury (R. p. 234, lines 14-15 – see Appendix). Thus, he also believed that a lot of people would have been upset and that it would have been a very poor reflection on management had he decided not to show up. (R. p. 234, lines 9-13)

Employer’s expectations regarding Petitioner’s participation were similar. Mr. Johnson simply could not imagine that Petitioner would fail to show up for Ballad Ball. He would have been “surprised and shocked” had Petitioner not been there. (R. p. 102, lines 5-8) “He wouldn’t do that. I’ll just say that. He wouldn’t do that.” For Petitioner to skip Ballad Ball “would have been just unexpected, unbelievable. I mean, you don’t

plan something and then not show up to it.” (R. p. 102, lines 15-22)

Whether Petitioner was threatened with having his pay docked or with suspension or termination for not participating is irrelevant and beside the point. Likewise, it is irrelevant and beside the point whether Petitioner was explicitly told: “You *must* show up.” Responsible people, such as executive level employees, do not need to be commanded to do their jobs. Executive level employees are even more likely than other employees to do what is expected of them.

The bottom line is this. Petitioner was doing what his Employer wanted and expected him to do at the time of his injury. What an employer desires or expects an employee to do is an implied requirement.

2. Employer derived substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation.

A “key factor” in determining whether an injury is in the course and scope of employment is whether the activity “benefited the employer.” *Hicks v. Piedmont Cold Storage, Inc.*, 335 S.C. 46, 515 S.E. 2d 532, 533 (S.C. 1999), citing *Fountain v. Huntsville Oil Mill*, 207 S.C. 119, 32 S.E. 2d 11 (1945) (benefits denied because the employee’s activity provided no benefit to the employer.)⁵

In typical cases involving recreational events, most of which involve company softball teams, this factor has typically resulted in a negative outcome for the employee.

⁵ In *Hicks*, the employee was killed while repairing the personal vehicle of the plant manager on a Saturday. The majority found the employee’s work did not benefit his employer. In her dissent, Justice Toal opined that “the majority disregards this Court’s trend in awarding compensation.” Id. 515 S.E. 2d at 533. “[W]e have awarded compensation in a variety of circumstances where the employee was acting outside his normal duties, and the benefit to the employer was only slight or indirect.” (citations omitted) Id. 515 S.E. 2d at 534.

Not surprisingly, Commissioners and courts typically find that participation by an employee in a softball league does not provide a substantial direct benefit to the employer. The value to the employer of having the employee play softball is nominal. Likewise, playing in a softball league is something an employee may do regardless of his work for the employer. He will play for his church or another entity. His play has little or nothing to do with whether he works for a particular employer or who buys the t-shirts. There is no connection to his employment. Though he may experience an improvement in health and morale, it is no more than if he plays tennis or racquetball or goes hunting; thus Professor Larson's qualifier "that is common to all kinds of recreation and social life."

Ballad Ball was an entirely different matter. The following testimony by Employer alone should satisfy the requirement that Employer derived substantial benefit from team-building activities, including Ballad Ball.

- Q: "In your opinion, is there a business benefit to these team-building activities?"
- A: "The benefit is frankly about what we are talking about here, promoting fun, promoting – JD is a place people want to come to work. They look forward to coming to work today. Maybe there's not an event today, but they are coming to work today. They enjoy it, because the atmosphere creates something that they enjoy being there. "
- Q: "And the fact that they enjoy being there also allows you to get better work out of your employees, does it not?"
- A: "That's the idea."
- Q: "So that's the idea behind these team-building events?"
- A: "A happy employee is generally a better performing employee."
- Q: "To be specific, these team-building events hopefully lead to getting better work out of your employees?"
- A: "Yes."

(R. p. 64)

Employer promotes the business benefit of “team-building” events to its clients. In this era, “sophisticated” employers use events like Ballad Ball, ropes courses, “trust falls”, and other unconventional methods to achieve a desired corporate culture, employee cohesion, better communication, loyalty to their employer, etc. Employer was using just such a team-building event at the time of Petitioner’s injury.

It is undisputed that Employer desired to create a certain atmosphere and chose to use Ballad Ball to do it. That is why both Employer and Petitioner himself were able to list numerous substantial, direct benefits to Employer. Clearly it is important to Employer for people from different departments to be able to work together. Clearly it is important to Employer for upper management and rank and file employees to have a working relationship. Clearly attracting and retaining creative talent is important to Employer. Clearly it is important to create loyalty to Employer. These benefits were recognized by Petitioner.

But whether these benefits are recognized by Petitioner or to outsiders is less important than this: these substantial, direct benefits were recognized, valued, and desired by Employer. That is why everyone in upper management supported Ballad Ball (R. p. 109, lines 17-20). That is why Employer invested so much of its resources in it, i.e. Petitioner’s time, other employees’ time, money, and equipment. That is why Employer embraced the event by displaying photos on its company intranet and at its 2007 Christmas party. And that is why Petitioner received accolades from Employer when it evaluated his 2007 performance as an employee.

3. Other jurisdictions have extended workers’ compensation coverage in factually similar cases.

Where there is a dearth of South Carolina cases addressing compensability under these circumstances, this Court may of course look to other jurisdictions. In factually similar cases, employees who were injured while “keeping the play going” were found to be acting in the course and scope of their employment.

In *Barbara Ludwinski v. National Courier*, 873 S.W. 2d 890 (MO. App. E.D. 1994), the employer planned a company picnic at a local park facility, i.e. away from the place of employment. *Id.* at 891. The purpose of the picnic was to “develop good relationships between the employees and management and to boost morale within the company.” *Id.* The picnic was promoted by the employer, and the employer paid for the event, including food. *Id.*

Ludwinski was not in charge of the picnic. However, she asked the person who was in charge of the picnic “if there was anything she could do to assist in coordinating the picnic.” *Id.* Ludwinski was asked to meet the ice truck at the park between 10:00 and 10:30 in the morning, though she had originally planned to arrive at the picnic at around 1:00 p.m. *Id.* Ludwinski met the ice truck. Then, before the picnic began, she fell and seriously injured her ankle while attempting to walk on stilts. *Id.* The court found that the picnic coordinator had delegated one of her duties to Ludwinski. *Id.* at 893. The delegation of that duty required Ludwinski to arrive at the park at a particular time and deliver a company check for the ice. *Id.* (Incidentally, she didn’t end up delivering the check.) The court quoted Larson for the proposition that “‘a certain amount of work has to be done to keep the play going’ and if an employee performs some duty in connection with an employer-sponsored recreational activity, any resulting injury is compensable.” *Id.*, citing 1A Arthur Larson, *The Law of Workers’ Compensation* §22.21 (a) (1993).

(Emphasis provided) The court noted that the principles applied in recreational injury cases are “closely analogous to those...of lunch-time injuries, coming and going, and personal comfort cases;...” Id. In Ludwinski’s particular case, the court found that “Petitioner’s business and personal purposes were concurrent, combined at employer’s request and at its convenience.” Id. at 894. Of great significance is the fact that the concurrent purpose doctrine rendered it insignificant whether Ludwinski’s “work” had ended and her play begun. Id. Thus, the court found Ludwinski’s claim to be compensable.

Likewise, in *Engle v. Thompson Murray, Inc.*, 239 S.W. 3d 561 (Ark. App. 2006), the employer planned an offsite event at the lake. Engle was in charge of the event, and she was injured at the event. According to the employer, the event was held “to recharge” and “most importantly have fun” Id. at 563. After a brief meeting at employer’s office on the morning of the event, a group of employees went to a lake to rent a pontoon boat and wave runners. Engle led the group to cliffs or rocks, where the group of employees jumped from the cliffs into the lake. Id. at 563. While attempting such a jump, Engle fell from the edge, striking the rocks protruding from the ledge below. Id.

The employer argued that Engles’ injury was not covered because “it occurred when employment services were not being performed.” Id. at 564. The commission had found that Engle was not “expressly directed by her employer to attempt to jump from the cliff” and further that it was “obvious that this activity was neither directly nor indirectly necessary for her to perform her job duties.” Id.

The court disagreed, noting that its analysis did not merely require determination of whether the worker was performing a “job task” when the accident occurred. *Id.* It stated that a determination of “‘employment services’ must be made within the context of individual cases, employments, and working relationships, not generalizations made devoid of practical working conditions.” *Id.* The court found that, because Engle had planned and facilitated the events, her job duties required an even more active, participatory role. *Id.* It found further that Engle “was engaging in conduct permitted and anticipated by the employer” and accordingly that she was engaged in “employment services”, despite the fact that “employer did not expressly direct appellant to jump from the cliff.” *Id.* at 565.

The concurring opinion quoted liberally from Larson regarding many of the recreational and social activities, including company retreats, that raise questions about whether an injury is within the course and scope of employment, including the statement by Larson: “As employment-related recreation and teams become more elaborately organized, a certain amount of work has to be done to keep the play going.” *Id.* at 565. The concurring opinion described Engles’ activities as follows:

“Appellant was facilitating her employer’s interest while at the retreat; she was engaged in an activity that was an expected part of her employment; the activity constituted a known (in fact, planned) departure from her work activities; she was compensated while at the retreat; and she would have been expected to cease what she was doing to advance employment objectives. In other words, Petitioner was clearly engaged in employment services at the time of her injury.” *Id.*

Ludwinski, Engle, and other cases discussed by Larson also squarely address Employer’s distinction that Petitioner was injured by participating in the Ballad Ball event rather than planning the Ballad Ball event. Such a distinction is insignificant in light of the fact that Employer expected Petitioner to plan, organize, and execute the


Ballad Ball event. (R. p. 73, lines 19-23; p. 76, lines 17-20; p. 86, lines 8-10; p. 102, lines 5-9 and 15-22) Regardless of whether playing kickball was personally gratifying to Petitioner, he, like Ludwinski and Engle, was also concurrently working at the team-building event. 873 S.W. 2nd at 894. (In addition to testimony, see R. pp. 172-187). It is equally insignificant that Employer did not expressly direct Petitioner to participate in the event or more specifically to run around the bases after kicking the ball, just as it was insignificant in *Engle* that the employee was not expressly told to jump off a cliff. 239 S.W. 3rd 565.

Essentially everything that can be said about the employees in *Ludwinski* and *Engle* can be said about Petitioner in this case. But Petitioner's case is stronger yet because, unlike the employees in *Ludwinski* or *Engle*, Petitioner was positively evaluated in his annual review for leading the event. Employer's Ballad Ball event was elaborately organized, and Petitioner was the organizer who "kept the play going", to meet Employer's expectations.

CONCLUSION

For the foregoing reasons, the Petitioner requests that this Court reverse the Court of Appeals' decision and rule as a matter of law that Petitioner's injury occurred within the course and scope of his employment and remand the case to the Commission for a hearing on disability and other benefits.

Date: 11/13/13



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THE STATE OF SOUTH CAROLINA
In The SUPREME COURT

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Appellate Case No. 2012-212258

S.C. Supreme Court

STEPHEN C. WHIGHAM.....PETITIONER,

v.

JACKSON DAWSON COMMUNICATIONSRESPONDENTS.
AND THE HARTFORD

PROOF OF SERVICE

I hereby certify that I have this 14 day of November, 2013 served **BRIEF OF
PETITIONER AND APPENDIX** on Respondent, by depositing a copy of it in the United States Mail,
postage prepaid, addressed to his attorney of record, Benjamin Mason Renfrow, Esq., Willson Jones
Carter & Baxley, PA, 872 S. Pleasantburg Drive, Greenville, SC 29607.

Date

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