THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE
WORKERS' COMPENSATION COMMISSION

Court of Appeals Case No. 2012-206507
Op. No. 5171, filed September 4, 2013

Carolyn M. Nicholson, Claimant, ... Petitioner,

vs.

S.C. Dep't of Social Services, Employer, and
State Accident Fund, Carrier, Defendants, ... Respondents.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals on January 24, 2014.

QUESTION PRESENTED

I. Whether the Court of Appeals erred in ruling Nicholson's fall did not arise out of her employment and in introducing fault into a no-fault system?

STATEMENT OF THE CASE

Carolyn Nicholson fell when her shoe stuck on the carpet as she was walking to a meeting while working for the South Carolina Department of Social Services. The Department of Social Services ("DSS") and its insurance carrier, State Accident Fund, admit Nicholson fell at work but deny that the fall constitutes a compensable injury by accident under the Workers' Compensation Act.

By order dated April 26, 2011, the single Commissioner determined that Nicholson fell when her shoe scuffed the carpet as she was walking to a meeting with a stack of files in her hands; however, he found that the claim was not compensable. (R. pp. 17-26) The Appellate Panel of the Full Commission reversed and found the claim compensable. (R. pp. 1-16)

DSS appealed to the Court of Appeals. In a split decision, the Court reversed the Commission and found Nicholson's injuries did not arise out of her employment since "the carpet on which [she] tripped and fell was not a hazard, a special condition, or peculiar to her employment." (Appendix, pp. 54-67)

Nicholson petitioned for rehearing and suggested a rehearing *en banc*. (Appendix, pp. 68-86) However, again in split decisions, the Court of Appeals denied both the petition for rehearing and the suggestion for rehearing *en banc*. (Appendix, pp. 91-94)

This case involves a question of exceptional importance because the Court of Appeals' decision introduces fault into the no-fault system fundamental to workers' compensation. Nicholson also draws the Court's attention to another case currently pending before the Court involving substantially similar issues, Judy Marie Barnes v. Charter 1 Realty, Appellate Case No. 2012-212389. The Court granted the Petition for Writ of Certiorari in that case on November 20, 2013, and the case remains in the briefing process. This Court may wish to expedite this case and hear it with Barnes.

STATEMENT OF FACTS

Nicholson was employed by DSS for about 20 years and worked in the child protective services area as a supervisor of investigations. (R. p. 49, lines 4-23) On February 26, 2009 she was preparing for an in-house audit of her files. She left her office carrying a stack of files for the meeting and was walking down the hall when "the friction from my foot caught me and I fell, files and all, [onto] my left side." (R. p. 51, line 4-p. 52, line 13) She stated that her leg did not give way, that she is in good health, and had not any previous problems with her legs giving way. (R. p. 52, lines 14-19) Nicholson was asked specifically what she thought caused her to fall, and she answered as follows:

Q. So, what is it that you think caused you to fall?

A. Friction from the carpet.

Q. Did your foot get stuck?

A. Yes, from the friction. As I went to walk, the friction from the carpet just grabbed me and I fell.

(R. p. 52, lines 20-24)

ARGUMENT

I. The Court of Appeals erred in ruling Nicholson's fall did not arise out of her employment.

The Workers' Compensation Act provides that "[i]n order to be entitled to workers' compensation benefits, the employee must show he or she sustained 'injury by accident arising out of and in the course of employment.'" Owings v. Anderson Co. Sheriff's Dep't, 315 S.C. 297, 299, 433 S.E.2d 869, 871 (1993); S.C. Code Ann. § 42-1-160 (2009). The dispute here centers on whether the injury arose out of employment.

> The phrase 'arising out of' refers to the origin of the cause of the accident. 'An 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."

Clade v. Champion Lab., 330 S.C. 8, __, 496 S.E.2d 856, 857 (1998).

The Court of Appeals focused on definitions of "arising out of" that exclude injuries from a hazard to which a worker "would be equally exposed apart from the employment" and require the source of the injury to be a risk "peculiar to the work and not common to the neighborhood." These definitions appeared in South Carolina case law in 1944 when this Court quoted at length from a 1913 decision by the Supreme Judicial Court of Massachusetts defining the "arising out of" requirement. See Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423,

32 S.E.2d 240 (1944), quoting In Re Employers' Liability Assurance Corp., 102 N.E. 697 (Mass. 1913)(also known as McNicol's Case).

> It (the injury) arises "out of" the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be 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. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

Eargle, 32 S.E.2d at 242-43. While the Eargle decision did not turn on this language from the Massachusetts court, it introduced the language into South Carolina's jurisprudence.

However, some years after the In Re Employers' Liability Assurance Corp. decision, the Massachusetts court itself abandoned this language. In Caswell's Case, the court held that "[a]n injury arises out of the employment if it arises out of the nature, conditions, obligation or incidents of the employment; in other words, out of the employment looked at in any of its aspects." Caswell's Case, 26 N.E.2d 328, 330 (Mass. 1940):

> Unquestionably, the injury was received in the course of his employment. The only other requirement is that the injury be one "arising out of" his employment. **It need not arise out of the nature of the employment. An injury arises out of the employment if it arises out of the nature, conditions,**

> **obligations or incidents of the employment; in other words, out of the employment looked at in any of its aspects.** Thom or Simpson v. Sinclair, [1907] A.C. 127, 142, 143. An employee who, in the course of his employment, is hurt by contact with something directly connected with his employment, receives a personal injury arising out of his employment, even though the force that caused the contact was not related to his employment. Thom or Simpson v. Sinclair, [1917] A.C. 127, 134-136. Lord Atkin, in Brooker v. Thomas Borthwick & Sons (Australasia), Ltd. [1933] A.C. 669, 677, stated the principle thus: "If a workman is injured by some natural force such as lightning, the heat of the sun, or extreme cold, which in itself has no kind of connection with employment, he cannot recover unless he can sufficiently associate such injury with his employment. This he can do if he can show that the employment exposed him in a special degree to suffering such an injury. **But if he is injured by contact physically with some part of the place where he works, then, apart from questions of his own misconduct, he at once associates the accident with his employment and nothing further need be considered. So that if the roof or walls fall upon him, or he slips upon the premises, there is no need to make further inquiry as to why the accident happened.**"

Id. (emphasis added)

This Court embraced this change by quoting approvingly from Caswell's Case in its decision in Jordan v. Dixie Chevrolet, 218 S.C. 73, 61 S.E.2d 654 (1950). The Court noted that this was "the more modern" view and that Caswell's Case

> is a landmark in Massachusetts law as it avoided the paralyzing effect of the earlier decision in McNicol's Case requiring 'peculiar' exposure, and 'denial of compensation for common risks.' . . . 'Under such a broad definition, as well as under narrower rules, it is not necessary that the injury be one which ought to have been foreseen or expected. Even unusual or extraordinary consequences of the employment may well be compensable. The risk insured is not only the foreseeable one, but the risk which, after the event, can be seen to have its origin the nature, conditions, obligations, or incidents of the employment.'

Jordan, 61 S.E.2d at 657. It is apparent from Jordan that the purpose in moving away from the more restrictive definition of "arising out of" was that workers' compensation laws were intended to be free of the fault-based determinations of tort law and that the "peculiarity" requirement of In Re Employers' Liability Assurance Corp. improperly required this search for fault. See Jordan, 61 S.E.2d 657-660.

The reason for the shift in definitions is that the "peculiar to the work and not common to the neighborhood" language sounds reasonable but proves unworkable and restrictive. Under the Court of Appeals' reasoning, a happenstance injury—a scuffed trip-and-fall—on a level floor is not compensable because level floors are common outside the workplace. By the same reasoning, a fall down stairs will not be compensable; stairs exist outside of the workplace and are common to the neighborhood. Similarly, a chef or restaurant worker who accidentally cuts herself while working will not be compensated because knives exist outside the workplace and are common to the neighborhood. The possibilities are endless, and such outcomes are contrary to the purpose of the Workers' Compensation Act, as the courts noted in Caswell's Case and Jordan. It does not matter that the injury is not the employer's fault. What matters is that the injury has a reasonable and rational connection to the employee's work. That connection exists here. Ms. Nicholson was injured while she was trying to do her work.

While the case on which the Court of Appeals relies in its underlying decision, Douglas v. Spartan Mills, 245 S.C. 265, 140 S.E.2d 173 (1965), refers to In Re Employers' Liability Assurance Corp. and does not mention the change in the law found in Caswell's Case or Jordan, neither the language quoted in Jordan nor the broadening of the "arising out of" requirement found therein has been reversed or expressly disfavored by any subsequent South Carolina decision. And, as noted in Jordan, it is this broader definition that fits within the stated purposes

of our Workers' Compensation Act.

Under this broader language of Caswell's Case and Jordan, the injury in the present case is compensable, as the fall occurred well within the conditions, obligations or incidents of the employment. Walking across the carpet and scuffing her shoe on the carpet were natural incidents of the work and a result of the exposure occasioned by the employment. As in Jordan, it is not necessary that the more remote cause of the injury, the carpet, be peculiar to the work under South Carolina law following Jordan. The focus should not be on whether something caused the fall but rather on whether the fall was connected to employment. The risk here clearly had its origin the nature, conditions, obligations, or incidents of the employment. The employment brought Nicholson in contact with the risk. The Commission's determination that the injury here was compensable should have been affirmed.

II. The Court of Appeals erred in introducing fault into the no-fault system fundamental to workers' compensation.

The Court of Appeals' decision in this case introduces fault and premises liability concepts into a system where fault has no place. The express purpose of workers' compensation is the absence of such fault-based determinations. It is vitally important to distinguish a "causal connection" to employment from the concept of causation as developed and applied in tort law.

Professor Larson in his treatise, Workers' Compensation Law, § 3.06 (2005), discusses this important distinction at length. Larson reminds us that, "[i]t is instantly apparent that 'arising out of the employment' does not mean exactly the same thing as 'legally caused by the employment." Id. He distinguishes the phrases by noting, "proximate cause or legal cause is out of place in compensation law, because, as developed in tort law, it is a concept that is itself thoroughly suffused with the idea of fault; that is, it is a theory of causation designed to bring

about a just result when starting from an act containing some element of fault." Id.

"One of the purposes of the Workmen's Compensation Act is to protect and partially compensate employees who are injured while engaged in the regular course of their employment irrespective of mishap, independent of the injury itself, and/or negligence on the part of either the employee or employer." Layton v. Hammond-Brown-Jennings Co., 190 S.C. 425, 3 S.E.2d 492, 496 (1939). "The American concept of workmen's compensation is founded upon recognition of the advisability, from the standpoint of society as well as of employer and employee, of discarding the common law idea of tort liability in the employer-employee relationship and of substituting therefor the principle of liability on the part of the employer, regardless of fault ...." Case v. Hermitage Cotton Mills, 236 S.C. 515, 115 S.E.2d 57, 65 (1960). Negligence and contributory negligence are of no consequence in workers' compensation cases. Jordon, *supra.* at 656; Allsep v. Daniel Const. Co., 216 S.C. 268, 57 S.E.2d 427 (1950).

> The right to compensation benefits depends on one simple test: Was there a work-connected injury? Negligence, and, for the most part, fault, are not in issue and cannot affect the result. **Let the employer's conduct be flawless in its perfection, and let the employee's be abysmal in its clumsiness, rashness and ineptitude; if the accident arises out of and in the course of the employment, the employee receives an award. Reverse the positions, with a careless and stupid employer and a wholly innocent employee and the same award issues.** Thus, the test is not the relation of an individual's personal quality (fault) to an event, but the relationship of an event to an employment. **The essence of applying the test is not a matter of assessing blame, but of marking out boundaries.**

Larson, Workers' Compensation Law, § 1.03 (2005).

Here, the Court has introduced fault into the equation by erroneously requiring some fault or hazard in the flooring in order to find a trip or fall on a level floor compensable. To the

contrary, as often stated in workers' compensation law, it is the unexpected result of work activity that is the compensable injury. Pee v. AVM, Inc., 352 S.C. 167, 573 S.E.2d 785 (2002). This Court in Pee specifically stated:

> Under § 42-1-160, a claimant is entitled to benefits for an "injury by accident arising out of and in the course of employment." In Layton v. Hammond-Brown-Jennings Co., 190 S.C. 425, 3 S.E.2d 492 (1939), we interpreted for the first time the meaning of "injury by accident" under the newly enacted Workman's Compensation Act. We noted that two lines of cases had evolved in other jurisdictions: some jurisdictions, including North Carolina upon which our Act is modeled, held there must be some unusual or unlooked-for mishap resulting in injury to constitute an accident; other jurisdictions held no mishap was required for an accident so long as there was an unexpected injury occurring while the employee was performing his usual duties in his customary manner. **We chose the latter definition, focusing on the unexpected nature of the *injury* rather than requiring that the event causing the injury be unexpected**. This definition of accident as an unexpected injury has been reiterated in a long line of cases. See, e.g., Colvin v. E.I. DuPont De Nemours Co., 227 S.C. 465, 88 S.E.2d 581 (1955) (injury by accident is an injury occurring unexpectedly without the prior occurrence of any external event of an accidental nature); Hiers v. Brunson Const. Co., 221 S.C. 212, 70 S.E.2d 211 (1952) (injury by accident is an injury that is accidental in that it is unforeseen and unexpected).[3]
>
> 3 In Hiers, we noted the policy reason for adopting such a definition: **If [the injury] results from the conditions under which the work is carried on, there is no reason why it should not be held compensable**. In such case, it is one of the casualties of business; and it is the purpose of the compensation statutes to place the burden of casualties upon the business and not upon the unfortunate employee. [Hiers,] 70 S.E.2d at 221.
>
> As we more recently stated, "in determining whether something constitutes an injury by accident the focus is not on some specific event, but rather on the injury itself." Stokes v. First Nat'l Bank, 306 S.C. 46, 50, 410 S.E.2d 248, 250 (1991). Further, an injury is unexpected, bringing it within the category of accident, if the *worker* did not intend it or expect it would result from what he was doing. Colvin, 227 S.C. at 468-69, 88 S.E.2d at 582 (emphasis

> added). Therefore, if an injury is unexpected from the worker's point of view, it qualifies as an injury by accident.

Pee v. AVM, Inc., 352 S.C. 167, 170-71, 573 S.E.2d 785, 787 (2002). Stated succinctly, "no slip, fall or other fortuitous event or accident in the cause of the injury is required; the unexpected result or industrial injury is itself the compensable accident." Sigmon v. Dayco Corp., 316 S.C. 260, 262, 449 S.E.2d 497, 498 (1994). See also Sturkie v. Ballenger Corp., 268 S.C. 536, 235 S.E.2d 120 (1977); Creech v. Ducane Co., 320 S.C. 559, 467 S.E.2d 114 (Ct. App. 1996); Clade v. Champion Lab., 330 S.C. 8, 496 S.E.2d 856 (1998); Pee v. AVM, Inc., 344 S.C. 162, 543 S.E.2d 232 (Ct. App. 2001). In these cases and Jordan, the law is clear: so long as 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, the injury arises out of the employment. The focus should not be on the cause of the fall but on the connection of the fall to the employment.

Here, Nicholson was clearly undertaking her work activities at the time she tripped and fell. Her activities at the time of her trip and fall were incidental to and consistent with her employment and arose from an aspect of her job, specifically the requirement that she attend her meeting. When all the circumstances here are considered, the causal relationship between the work Nicholson was performing and her injury is abundantly apparent. Her injury arose out of her employment. Fault – whether on her part, the employers part, or even in the flooring – is not relevant.

The illogical result of the Court's decision in this case is perhaps best illustrated by the comparison with our appellate court decisions regarding the personal comfort doctrine. This doctrine has been consistently used to supply the "arising out of" requirement to bring such

activities as eating, drinking, seeking relief from discomfort, and even smoking within the purview of workers' compensation. See e.g. Mack v. Post Exchange, 207 S.C. 258, 35 S.E.2d 838 (1945); Osteen v. Greenville Co. School Dist., 333 S.C. 43, 508 S.E.2d 21 (1998). Under the Court's opinion in this case, we are left with the unjustifiable result that had Nicholson been on her way to the bathroom at the time of her injury, compensation would have been allowed under the personal comfort doctrine; but since she was engaged in actual productive work activity, compensation is denied.

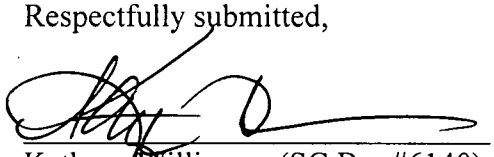
The Court of Appeals' decision reversing the Workers' Compensation Commission's ruling is contrary to previous decisions of this Court. The Court should grant the Petition for Writ of Certiorari.

CONCLUSION

The Court of Appeals' decision reversing the Workers' Compensation Commission's ruling overlooks or misapprehends settled law concerning the "arising out of" employment requirement and erroneously introduces fault into the no-fault workers' compensation system. The Court of Appeals' decision is contrary to previous decisions of this Court. This is a matter of exceptional importance as the Court of Appeals' published decision will be used by the members of the Workers' Compensation Commission, workers' compensation defense attorneys, and workers' compensation insurance adjusters to deny benefits for any and all falls at work and demand proof of some fault on the part of the employer or employer's premises. Further, it is not difficult to see how this decision could be used to argue for a showing of fault in a wide number of situations beyond falls where the injury could arguably have occurred in some setting outside the place of employment. The importance of this issue to the workers' compensation bar

cannot be overstated due to the significant change in the law it represents. The Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that the undersigned did cause the **PETITION FOR WRIT OF CERTIORARI** to be served upon the below-named by mailing a copy as addressed by U.S. Mail, proper postage paid, on the 19th day of February, 2014.

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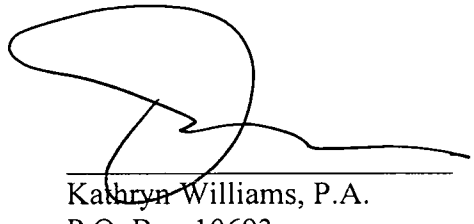

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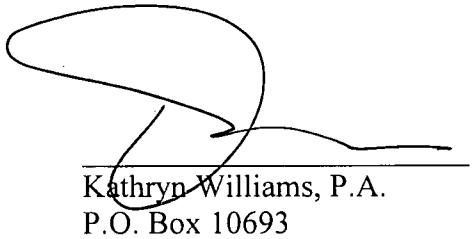

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