

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM THE  
WORKERS' COMPENSATION COMMISSION

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

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

vs.

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

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**REPLY TO RETURN TO  
PETITION FOR WRIT OF CERTIORARI**

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## ARGUMENT

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

DSS argues that the rule espoused by petitioner in this case would essentially remove the “arising out of” requirement, “abandon the requirement that an accident bear some logical causal relationship to the employment,” and render compensable any injury that occurs while a worker is on the employer’s premises and “on the clock.” To the contrary, the rule espoused by petitioner would be the same as it always has been, even prior to this Court’s decision in Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944). Specifically, “[a]n injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal relationship between the conditions under which the work is to be performed and the resulting injury.” Clade v. Champion Lab., 330 S.C. 8, \_\_\_, 496 S.E.2d 856, 857 (1998). This rule retains the requirement of a reasonable and rational connection between the injury and the employee’s work, without the unworkable and overly restrictive requirement that the source of the injury be a risk “peculiar to the work and not common to the neighborhood.”

As this Court in Jordan v. Dixie Chevrolet, 218 S.C. 73, 61 S.E.2d 654 (1950) noted, the reason for this is that the restrictions and exceptions noted in Eargle v. South Carolina Elec. & Gas Co., 205 S.C. 423, 32 S.E.2d 240 (1944) and In Re Employers’ Liability Assurance Corp., 102 N.E. 697 (Mass. 1913)(also known as McNicol’s Case) have the effect of swallowing the rule. Plus, workers’ compensation laws were intended to be free of the fault-based determinations of tort law but the “peculiarity” requirement of McNicol’s Case improperly required a search for fault. See Jordan, 61 S.E.2d 657-660. The Jordan court noted that the less

restrictive definition of “arising out of” found in Caswell’s Case avoids “the paralyzing effect of the earlier decision in McNicol’s Case requiring ‘peculiar’ exposure, and ‘denial of compensation for common risks’” in favor of making the compensable injury one in which the risk “can be seen to have its origin the nature, conditions, obligations, or incidents of the employment.”” Jordan, 61 S.E.2d at 657. In other words, an injury arises out of employment when there is “a causal connection between the conditions under which the work is required to be performed and the resulting injury,” when “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.”

While this Court in Jordan did state that the injury in that case “arose from a danger which was part of the work environment and not common to the neighborhood,” it went on to review current case law, including the Federal case pointed out by DSS, and noted that the earlier, restrictive definitions from which that language had come had more recently been rejected in favor of a requirement that the cause be “incidental to employment.” In so doing, this Court clearly acknowledged and brought into South Carolina’s jurisprudence the less restrictive definition of “arising out of” discussed in Caswell’s Case.

In practice, this less restrictive definition has been the rule in South Carolina, though the more restrictive definition of McNicol’s Case and Eargle has frequently been repeated in rote recitations of the definition of the “arising out of” requirement. Consider for example, the obvious fact that the risk of being involved in a motor vehicle accident while driving or being hit by a motor vehicle while removing debris from the roadway is not peculiar to work, is in every way common to the neighborhood, and could just as easily occur while someone is not working. Nevertheless, the fatal motor vehicle accident in Gray v Club Group, Ltd., 339 S.C. 173, 528

S.E.2d 435 (Ct. App. 2000) was determined to have arisen out of employment because the deceased was traveling to pick up payroll materials as a part of his job and but for his employment he would not have been traveling to that place at that time. Also, in Grant v. Grant Textiles, 372 S.C. 196, 641 S.E.2d 869 (2007), the injured worker traveled to another site for a business meeting and was struck by a car while removing debris from the roadway near the entrance to the meeting place. Though his job duties did not involve such tasks, his injury was determined to have arisen out of his employment because the accident would not have happened but for the trip to the meeting site.

As stated previously, under the Court of Appeals' reasoning in this case, a fall down stairs will not be compensable, as 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 whether the injury is anyone's fault. What matters is that the injury has a reasonable and rational connection to the employee's work. That connection exists in the case at issue here. Ms. Nicholson was injured when she tripped and fell while she was going about her work, walking down the fall to her meeting. Her injury would not have happened but for the fact that her employment caused her to walk down that hallway. That work purpose and contact with the workplace supplies the rational connection to her employment, and her injury should be deemed to have arisen out of her employment. 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.**

DSS stated that this issue raised by Nicholson is nothing but a “red herring,” and then it proceeded to restate the Court of Appeals’ holding that the injury did not arise from a hazard in DSS’s building and the carpet was free from defect and its own contention that the sole reason for the fall was that Nicholson did not pick up her feet when walking. All of these arguments are improper and are clear error.

“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). As Professor Larson stated, “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. Larson, Workers’ Compensation Law, § 1.03 (2005). As stated previously, 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.

DSS's argument that the "personal comfort" doctrine has nothing to do with the "arising out of" requirement but only addresses the "in the course of" requirement is curious. It is difficult to see how the actions undertaken to smoke a cigarette could ever arise out of employment. What could be more common to the neighborhood or less peculiar to the work than smoking a cigarette? Yet, injuries sustained during that activity have been deemed to have arisen out of employment in previous decisions of this Court. See e.g. Mack v. Post Exchange, 207 S.C. 258, 35 S.E.2d 838 (1945). In Osteen v. Greenville County Sch. Dist., 508 S.E.2d 21, 23 (S.C. 1998), this Court specifically noted that "[t]he personal comfort doctrine aids a court in determining whether, and under what circumstances, entirely personal activities engaged in by an employee at work *may be considered incidental to employment*," and "[s]uch acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, *and injury sustained in the performance thereof is deemed to have arisen out of the employment*." Osteen, 508 S.E.2d at 23 (emphasis added). The point is that 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 and the clear purpose of the Act. 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.

Petitioner also reiterates her request to hear this case with another similar case currently pending before the Court, Judy Marie Barnes v. Charter 1 Realty, Appellate Case No. 2012-212389. The Court granted the Petition for Writ of Certiorari in Barnes on November 20, 2013, and the case remains in the briefing process. Similar to the Court of Appeals' decision here, the Workers' Compensation Commission in Barnes determined that Barnes' injuries did not arise out of her employment since "[t]here was no substance, no object, no debris, or anything else over which the [c]laimant tripped." Due to the similarity in these cases, it seems sensible that Nicholson's case should be argued along with Barnes' case in order to conserve Court resources and avoid duplication of efforts.

Respectfully submitted,



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3/21/14

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**CERTIFICATE OF SERVICE**

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This is to certify that the undersigned did cause the **REPLY TO RETURN TO 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 31<sup>st</sup> day of March, 2014.

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