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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION
APPELLATE PANEL

W.C.C. File No. 0725187
Appellate Tracking No. 2012-211392

George W. Thomas, Employee,.....Respondent,

v.

5 Star Transportation, Employer, and S.C. Uninsured Employers Fund, Carrier,

Of whom 5 Star Transportation is the.....Appellant.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Appellant 5 Star Transportation (hereinafter "5 Star") hereby petitions this Court for rehearing and suggests rehearing *en banc*, pursuant to Rules 219, 221 and 240 of the South Carolina Appellate Court Rules, of its Order filed February 18, 2015. *Thomas v. 5 Star Transportation*, Op. No. 5298 (S.C.Ct.App. filed Feb. 18, 2015) (Shearouse Adv. Sh. No. 7 at 31) That Order affirmed the award of benefits to Emily Thomas (hereinafter "Thomas") as the putative spouse of George W. Thomas (hereinafter "Decedent"). Specifically, the Court affirmed the award of benefits for injuries sustained after George Thomas suffered an aneurysm that bore no causal connection to his employment. Additionally, the Court determined Emily Thomas was the common law wife of George

Thomas because she married with a "good faith" belief that George Thomas was free to enter into a contract of marriage even though he was already married to another.

FACTUAL AND PROCEDURAL BACKGROUND

Thomas, proceeding as Decedent's putative surviving spouse, alleged Decedent sustained an accidental death arising out of and in the course and scope of his employment with 5 Star in a fatal collision that occurred November 19, 2007. (R. p. 67) Following compliance proceedings, the South Carolina Uninsured Employer's Fund (hereinafter "UEF") was joined as a party. 5 Star and the UEF denied the claim on the bases that Decedent's death did not arise from any condition arising out his employment and that Thomas lacked standing to pursue her claim inasmuch as her bigamous union with Decedent was void *ab initio*.

On March 30, 2009, the single commissioner granted the motion to dismiss by 5 Star and the UEF on the basis that Thomas lacked standing to pursue this action because her marriage to George Thomas was void *ab initio* inasmuch as Decedent was already married to another at the time of his ostensible union with Thomas. (R. p. 53, ¶ 3) Further, the single commissioner determined the union between Thomas and Decedent did not thereafter ripen into a valid marriage or common law marriage once the impediment (Decedent's prior marriage) was removed. (R. p. 54, ¶¶ 8-12) In light of this ruling, the single commissioner did not reach the issue of whether Decedent's injuries and death were compensable under the Workers' Compensation Act.

By Order dated January 20, 2010, the Appellate Panel vacated and remanded for a *de novo* hearing because, in its view, the single commissioner's March 30, 2009 Order was issued in violation of S.C. Code Reg. 67-215(B)(1) ("The Commission will not

address a motion involving the merits of the claim, including, but not limited to, a motion for dismissal."). (R. pp. 42-46) Following a hearing on December 18, 2010, the next single commissioner concluded Decedent's death was compensable and that Thomas was his common law wife at the time of his death. (R. pp. 17-41) Alternatively, the single commissioner determined Thomas was entitled to benefits pursuant to the "putative marriage doctrine." (*Id.*) 5 Star sought timely review, and the matter was heard by the Appellate Panel on December 19, 2011. The Appellate Panel affirmed via Order dated March 15, 2012. (R. pp. 3-14)

This Court heard oral argument October 6, 2014. In its Opinion No. 5298 filed February 18, 2015, the Court determined Decedent's death arose out of and in the course and scope of his employment "because he was placed in an increased danger by driving a bus at a high rate of speed" and because 5 Star did not refute the medical examiner's conclusion that Decedent's death resulted from injuries sustained in the motor vehicle collision and not from the aneurysm. Further, while the Court agreed the Appellate Panel erred in finding Thomas was Decedent's surviving common law spouse or, alternatively, that the putative spouse doctrine applied, it nevertheless found Thomas' claim compensable in light of a "good faith exception" to the general rule that a bigamous marriage is void *ab initio*. For the reasons set forth with particularity herein, these findings are erroneous, and 5 Star's petition and suggestion for rehearing *en banc* should be granted.

ARGUMENT

5 Star seeks rehearing, and suggests rehearing *en banc*, because the Court's decision results from misapplication of applicable precedent, as well as from a mis-characterization of the facts appearing in the record. The dispositive issue in this case – whether South Carolina will recognize a second, bigamous marriage under any circumstances – has been answered firmly in the negative. Nevertheless, the Court in its Opinion has fashioned a "good faith exception" that is ill-considered, is likely to have far reaching and unintended consequences, and is a radical departure from established marital law in this State. Further, even if a "good faith exception" exists, the Court misapplied applicable law and mischaracterized facts to supports its determination that Decedent's injury arose out of his employment.

I. THE COURT ERRONEOUSLY FASHIONED AND APPLIED A 'GOOD FAITH EXCEPTION' IN VIOLATION OF THE LONGSTANDING RULE THAT A BIGAMOUS MARRIAGE IS VOID *AB INITIO*.

In Section II of its Opinion, the Court correctly concludes the Appellate Panel erred in finding Thomas and Decedent were common law spouses because Decedent was already married at the time of their union. After noting that the existence of a common law marriage is a question of fact, the Court correctly summarizes Thomas' testimony that she was not aware of the impediment to a valid, legal marriage with Decedent (his existing marriage to another at the same time he purported to marry Thomas) until after his death. Further, the Court observed "because [Thomas] did not know of the impediment to marriage, she could not recognize it and agree to continue the relationship once it was removed." Similarly, in Section III of its Opinion, the Court correctly notes the South Carolina Supreme Court has "decline[d] to adopt the putative spouse doctrine,

as it is contrary to South Carolina's statutory law and marital jurisprudence." Op. No. 5298 ((Shearouse Adv. Sh. No. 7 at 42), quoting *Hill v. Bell*, 405 S.C. 423, 426, 747 S.E.2d 791, 792-793 (2013))

After reaching these two conclusions that are entirely consistent with well-established precedent, the Court inexplicably concludes Thomas nevertheless is entitled to benefits pursuant to a "good faith exception" to the general rule that a bigamous marriage is void at its inception. Compounding its error, the Court improperly shifted the burden to 5 Star to present evidence that Decedent was unaware he could not marry at the time of his purported union with Thomas.

The Court's "good faith exception" stands in stark contrast with its earlier quotation of authority that expressly forecloses this precise conclusion. Op. No. 5298 ((Shearouse Adv. Sh. No. 7 at 40) (quoting *Callen v. Callen*, 365 S.C. 618, 624, 620 S.E.2d 59, 62 (2005) ("When, however, there is an impediment to marriage, such as one party's existing marriage to a third person, no common-law marriage may be formed, ***regardless whether mutual assent is present***. . . . For the relationship to become marital, ***there must be a new mutual agreement either by way of civil ceremony or by way of recognition of the illicit relation and a new agreement to enter into a common law marriage.***") (emphasis added)). It was immaterial whether Decedent was served with papers when no one disputes he was already married at the time of his ostensible union with Thomas and, contrary to the Court's Opinion, it was incumbent on Decedent and Thomas, and not 5 Star, to know whether they could marry legally.

The Court's reliance on *Davis v. Whitlock*, 90 S.C. 233, 73 S.E. 171 (1911), and extraterritorial authority notwithstanding, this Court and the South Carolina Supreme

Court have consistently held for more than sixty years that bigamous marriage is void *ab initio* and that additional steps are required once the impediment to a legal union has been removed. *Hill*, *supra*, citing S.C. Code Ann. § 20-1-80 (Supp. 2012) ("All marriages contracted while either of the parties has a former wife or husband living shall be void."); *Lukich v. Lukich*, 368 S.C. 47, 56, 627 S.E.2d 754, 758 (Ct. App. 2006) ("Even if Wife was acting under a good faith belief, South Carolina will not South Carolina will not recognize her bigamous second marriage because to do so would violate public policy."); *Day v. Day*, 216 S.C. 334, 338, 58 S.E.2d 83, 85 (1950) ("A mere marriage ceremony between a man and a woman, where one of them has a living wife or husband, is not a marriage at all. Such a marriage is absolutely void, and not merely voidable."); *Howell v. Littlefield*, 211 S.C. 462, 466, 46 S.E.2d 47, 48 (1947) ("[H]usband's existing marriage in North Carolina incapacitated him . . . to contract another marriage. . ."); *Prevatte v. Prevatte*, 297 S.C. 345, 349, 377 S.E.2d 114, 117 (Ct. App. 1989) (recognizing that an illicit union may be transformed into a valid common law union provided "the parties . . . agree to enter into a common law marriage ***after*** the impediment is removed.") (emphasis added).

As noted by the *Lukich* Court, the anti-bigamy "statute speaks to the status quo at the time the marriage was contracted, and does not contemplate either a prospective or a retroactive perspective. Any other construction of § 20-1-80, including the "good faith exception" employed by the Court, would lead to uncertainty and chaos. 379 S.C. at 593, 666 S.E.2d at 907. Here, no evidence refutes the ultimate conclusion that Decedent was married to another when he purported to marry Thomas. Thomas' own testimony makes clear that while the impediment may have been removed prior to Decedent's death,

neither party acknowledged the impediment ever existed or consciously agreed to enter into a valid union once the impediment was removed. To hold differently, and to apply the "good faith exception" fashioned by the Court, stands in stark contrast to the public policy of South Carolina, upends decades of settled case law, and casts a wide net of uncertainty across a wide range of litigated matters[1].

II. DECEDENT'S INJURIES DID NOT ARISE OUT OF HIS EMPLOYMENT.

Decedent's ruptured aneurism and the events that followed were not related to the conditions of his employment. Neither are they compensable because of an alleged "increased danger" associated with Decedent's employment as a bus driver. In reaching the opposition conclusions, the Court misapprehended applicable law, mischaracterized the facts, and improperly shifted the burden of proof to 5 Star.

5 Star does not dispute Decedent sustained a ruptured aneurysm, which is clear from the report of the medical examiner. (R. p. 76 (p. 6, line 21 - p. 7, line 6)) At the same time, however, Dr. Schandel cannot state to any reasonable degree of medical certainly that the aneurysm resulted from a degenerative process or congenital defect unrelated to Decedent's employment versus a condition of the employment itself. Indeed, it appears the Court overlooked the facts that Dr. Schandel confirmed Decedent's aneurysm was a condition in existence prior to the time of the accident, that she found no indication that it was caused by trauma, and that he was observed slumping over prior to the collision. (*Id.* (p. 6, lines 13-19; p. 8, lines 19-22)) Most critically, Dr. Schandel, the

[1] Consider, for example, the likelihood the Court's holding in this case will lead to similar disputes in litigated matters involving marital or probate assets, insurance and pension funds, wrongful death and survival actions, and a host of other claims brought in the state and federal courts of South Carolina.

only medical professional to testify in this matter, was unable to testify with any certainly about what caused the aneurism to rupture. (*Id.* (p. 8, lines 1-3)) Inasmuch as she was not able to testify within a reasonable medical certainty as to causation as required by S.C. Code Ann. § 42-1-160(E), it was error to for this Court to affirm the Full Commission's conclusion that Decedent sustained a compensable injury.

The South Carolina Supreme Court's recent decision in *Nicholson v. South Carolina Department of Social Services*, Op. No. 27478 (S.C.Sup.Ct. filed Jan. 14, 2015) (Shearouse Adv.Sh. No. 2 at 18) (pet. for reh'g pending), is instructive on the "arising out of" analysis. Specifically, the Court clarified that in order to be compensable, a claimant must demonstrate a causal connection between conditions under which the work is performed and the injury. The Court also determined that *Bagwell v. Ernest Burwell, Inc.*, 227 S.C. 444, 88 S.E.2d 611 (1955), was inapplicable as the claimant in *Nicholson* did not allege the carpet upon which she fell made her injuries worse. Instead, she sustained a non-idiopathic fall during the course of her duties. The court was not presented with, and did not consider, whether some hazard in the workplace made her injuries worse, and it did not set aside the general rule that an idiopathic injury will not be compensable. Here, 5 Star argues Decedent's injuries followed an idiopathic, internal breakdown. Thus, this case falls more within the *Bagwell* analysis because there was nothing about Decedent's employment that made the effect of the injuries any greater than if he had been driving his own vehicle along the interstate.

In *Barnes v. Charter 1 Realty*, decided the same day as *Nicholson*, the Court again clarified the idiopathic exception to compensation under the Workers Compensation Act. Like the claimant in *Nicholson*, the claimant in *Barnes* tripped and fell at work, and there

was "no evidence that her fall was precipitated by an internal condition -- such as her legs giving out or her fainting . . . ." Op. No. 27479 (Shearouse Adv.Sh. No. 2 at 27) Thus, both of these cases make clear that "an idiopathic fall arises from an internal breakdown personal to the employee, thus negating any causal connection." *Id.*

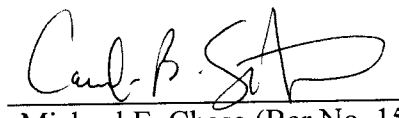
The idiopathic rationale applies to the facts of this case where these is no causal connection between Decedent's aneurism and the conditions of his employment with 5 Star. Here, there is no dispute as to the critical operative facts. Decedent suffered a pre-collision ruptured aneurysm, veered off of the roadway, and sustained life ending injuries resulting from the collision. Just as in *Bagwell*, the cause of the rupture, Decedent's slumping into his seat, and the setting the unfortunate events that followed into motion, are unexplained. Indeed, the only medical professional to testify in this case could not explain why the aneurysm ruptured or establish the required link between the medical condition and the conditions of Decedent's employment as a bus driver. In keeping with the holding of *Bagwell*, and more recently *Nicholson* and *Barnes*, this Court should reject Thomas's contention that driving a bus along an interstate highway is a special condition that would afford compensation benefits to a claimant who sustains an otherwise unexplained condition that bears no relationship to the nature of his employment.

In the absence of medical evidence supporting a connection between the conditions of Decedent's employment (driving a bus) and the condition (a ruptured aneurysm), it was error to affirm an award of benefits, and rehearing is warranted.

CONCLUSION

For all of the reasons stated herein, this Court should therefore permit rehearing.

March 3, 2015

By: 

Michael E. Chase (Bar No. 15230)
Carmelo B. Sammataro (Bar No. 69746)
TURNER PADGET GRAHAM & LANEY P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR APPELLANT

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify this 3rd day of March 2015 that I have served copies of APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC* upon other counsel of record, by mailing same, postage prepaid in the United States mail, addressed to the following:

Malcolm M. Crosland, Jr., Esquire
The Steinberg Law Firm
P. O. Box 9
Charleston, SC 29402-00009

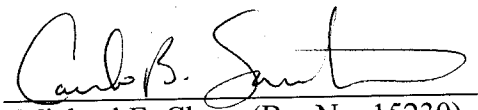
ATTORNEYS FOR RESPONDENT

Lisa C. Glover, Esquire
State Accident Fund
P. O. Box 210039
Columbia, SC 29221-0039

COUNSEL FOR DEFENDANT SOUTH CAROLINA UNINSURED EMPLOYERS' FUND

Amy Bracy, Judicial Director
S.C. Workers' Compensation Commission
P. O. Box 1715
Columbia, SC 29202-1715

March 3, 2015

By: 

Michael E. Chase (Bar No. 15230)
Carmelo B. Sammataro (Bar No. 69746)
TURNER PADGET GRAHAM & LANEY P.A.
Post Office Box 1473
Columbia, SC 29202
Phone: (803) 254-2200
Fax: (803) 799-3957

ATTORNEYS FOR APPELLANT

Turner | Padget

Carmelo B. Sammataro
E-mail: SSammataro@TurnerPadget.com
Writer's Direct Dial: (803) 227-4253
Writer's Direct Fax: (803) 400-1532

March 3, 2015

VIA HAND DELIVERY:

The Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

Re: George W. Thomas v. 5 Star Transportation and S.C. Uninsured Employers Fund
Appellate Case No. 2012-211392
WCC File No.: 0725187
TPGL File No.: 12337.101

Dear Ms. Kitchings:

Enclosed please find the original and seven copies of Appellant's Petition for Rehearing And Suggestion For Rehearing *En Banc* regarding the above-referenced matter. Also enclosed are the original and one copy of the Proof of Service and our check for the filing fee. Please file the original documents and return clocked copies to me via our office courier. Thank you for your assistance with this matter, and please contact me if you have any questions.

With kind regards, I am

Very truly yours,

TURNER, PADGET, GRAHAM & LANEY, P.A.

Carmelo B. Sammataro

CBS/tj
Enclosures
cc: Malcolm M. Crosland, Jr., Esquire
Lisa C. Glover, Esquire
Amy Bracy, Judicial Director
(w/enc.)