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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

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W.C.C. File No. 1308837

Appellate Case No. 2015-000191

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Esvin Leonel Lopez Perez, Employee, Appellant,

v.

Gino's The King of Pizza, Employer, Respondent.

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INITIAL REPLY BRIEF OF APPELLANT

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## ARGUMENT

In his recitation of facts counsel for the Respondent again asserts that Respondent is “unrelated” to any other business entities, an erroneous assertion treated in Appellant’s initial brief. (Brief of Respondent p.4) The record clearly reflects that all three (soon to be four) Gino’s Pizzas in Horry County are closely related.

Similarly, in his recitation of facts Respondent’s counsel’s assertion that “as a small business, the restaurant basically required only two or three people to operate the location” (Id.) would seem incongruous with an eighty-four hour per week schedule and sales of pizzas of one thousand dollars per day (net of the illegal alien payroll, which was cash deducted from the deposits). Indeed the bulk of Respondent’s recitations of fact are sharply disputed.

While on page 8 of his brief Respondent asserts that it “provided credible witnesses” the record reflects a lone, single witness, not more. Further, this witness displayed a remarkable lack of knowledge of the issue at hand. As the person in charge of payroll she would be directly responsible for the host of statutory violations in Respondent’s employment practices.

Aside from records required under the Payment of Wages Act, Section 41-10-10, et seq. Code of Laws of South Carolina (1994), Respondent was required to maintain payroll records under the provisions of the Income Tax Withholding Act, Section 112-8-10, et seq., Code of Laws of South Carolina (1995). The Department of Revenue has promulgated regulations regarding recordkeeping requirements (Reg.117-200, et seq., Code of Regulations of South Carolina) which Respondent has also disregarded.

Similarly, the Respondent is required under federal law to maintain payroll records for four (4) years including dates and amounts of all wages paid. This is aside from the duty to match contributions to medicare and social security.

Respondent's statement that Appellant "has asserted that Gino's The King of Pizza, LLC owns and operates multiple locations" (Brief p. 8) misrepresents and mischaracterizes Appellant's position. Appellant contends that just as Respondent cannot evade liability under the Act by creating multiple sub-contractors it likewise cannot do so by creating multiple LLCs, all engaged in the identical business under the same name. Respondent's sole witness confirmed the relationship. Again, Respondent's characterization (and that of the hearing Commissioner) of the entities as "unrelated" is contradicted by the record, specifically by its sole witness.

Respondent objects to the mention of an employee, Hipolito Rivera, working at two locations of Gino's (Brief p.12). Respondent's sole witness established that he worked two days per week at the North Myrtle Beach location and otherwise at the Forestbrook location. (Sorce Deposition Transcript p.62).

Respondent argues that Appellant failed to present evidence as to how many days various others worked in the restaurant and criticizes Appellant's attempt to "guess" (Brief p. 17) when the statutorily mandated records had been subpoenaed from Respondent, which failed or refused to produce them. When a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party. Kershaw County Bd. of Ed. v. U.S. Gypsum Co., 302 S.C. 390, 395, 396 S.E. 2<sup>nd</sup> 369, 372 (1990).

Respondent asserts (Brief p. 17) that its sole witness "assisted in the restaurant" when she in fact testified to precisely the opposite on direct examination:

"Q.: ... What is your work relationship with Gino's Pizza?

A.: I just help out in the store. Like, not in the store, but with some things for the store." (Hearing Transcript p. 55 ll. 18-21).

Nothing in the record suggests that she ever worked even one day in the restaurant prior to the explosion. Since there are no payroll records for most of the employees and she was

not physically present it is left to speculation as to how she might even know the substance of much of her testimony.

Respondent's contention that "South Carolina case law does not look to the amount of wages paid... or whether an employer keeps proper wage records in determining whether an employer ...[is] subject under the Act" (Sic.) (Brief p.20) is quite remarkable. Regardless of the state of the common law the statutory scheme is clear. The effect of Respondent's manifold statutory violations is covered in Appellant's initial brief.

Respondent on pages 20 and 21 again asserts its sole witness worked "in" the restaurant, contradicted by her own testimony, supra.

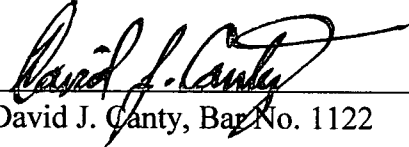
Respondent misapprehends the significance of Appellant's enumerating the array of illegal acts by Respondent. By 1.) evading payment of payroll taxes, social security, medicare; 2.) refusing to comply with multiple aspects of the Payment of Wages Act; and 3.) knowingly continuing to employ undocumented aliens Respondent has made clear its disregard of and disrespect for the law. Further, the person responsible (apparently) for these unlawful omissions is none other than Respondent's sole witness, upon whose credibility it now urges this Court to rely. Respondent's argument that "... these issues were addressed and discarded by Commissioner Taylor" (Brief p. 21) seems less than legally compelling.

### **CONCLUSION**

Respondent fails to substantively address the glaring misconduct it has perpetrated. Its sole witness' credibility must be weighed in light of the fact that she never worked a day in the restaurant and unlawfully failed to maintain or produce the records which would have decided the issue. The court must find jurisdiction under the Act and remand for appropriate proceedings.

May 1, 2015

Respectfully submitted,

A handwritten signature in black ink, reading "David J. Canty". The signature is written in a cursive style with a long horizontal flourish extending to the right. It is positioned above a solid horizontal line.

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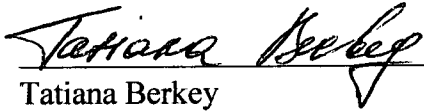
I certify that I have served the Initial Reply Brief of Appellant and Designation of Matter to be included in the Record on Appeal by depositing a copy of it in the United States Mail, postage prepaid, on May 1, 2015, addressed to the following counsel:

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**Hon. Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 116929  
Columbia, S.C. 29211**

Re: Esvin Leonel Lopez Perez v. Gino's The King of Pizza  
Appellate Case No.: 2015-000191

Dear Madam Clerk,

Enclosed please find our Initial Reply Brief of Appellant and Designation of Matter to be included in the Record on Appeal in this matter, together with proof of service upon opposing counsel.

Thanking You and With Best Wishes,  
Yours Very Truly,



David J. Canty

cc.: clt.

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