THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Maite D. Murphy, Circuit Court Judge

Case No. 2013-000820

Lauren L. Kyle, Appellant,

v.

Dorchester County Chapter SPCA,
a/k/a Francis R. Willis SPCA, Respondent,

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN FINDING THAT APPELLANT, LAUREN KYLE, WAS COMPENSATED FOR HER COMMUNITY SERVICE PERFORMED AT THE RESPONDENT SPCA AND IN FINDING THAT AN EMPLOYMENT RELATIONSHIP EXISTED BETWEEN KYLE AND THE RESPONDENT?

II. DID THE TRIAL COURT ERR IN FINDING THAT KYLE WAS THE STATUTORY EMPLOYEE OF THE RESPONDENT?

III. DID THE TRIAL COURT ERR IN FINDING THAT PUBLIC POLICY DEMANDED THAT RESPONDENT BE SHIELDED FOR KYLE'S INJURIES?

STATEMENT OF FACTS

The Appellant, Lauren Kyle, was sentenced to one year probation which included the requirement of performing forty (40) hours of community service. R. p. 55, line 2. She was given the choice of doing it either at the city dump in Summerville or at the Defendant, the Dorchester County Chapter SPCA (SPCA). R. p. 55, lines 2-4. She chose to do this compulsory work at the latter facility. R. p. 55, line 5.

On November 20, 2007, she was seriously injured by a cat which was known to be dangerous. R. p. 13, line 13-p. 15, line 2. Her medical expenses associated with the cat attack came to a total of $24,299.73. R. p. 55, line 6. The pain associated with the injuries themselves and the treatment was beyond excruciating. And, Ms. Kyle has been left permanently impaired and disfigured as a result.

In January 2010, Ms. Kyle filed and properly served a civil action against the SPCA. R. pp. 11-17. On November 7, 2012, this action was dismissed for lack of subject matter jurisdiction by Order of the trial court pursuant to the court's hearing on the Defendant's Motion to Dismiss. R. p. 3, lines 1-5. Ms. Kyle timely filed her Motion to Reconsider on November 19, 2012. R. p. 59. Ms. Kyle's Motion to Reconsider was heard on February 8, 2012, and denied by Order dated March 6, 2013. R. pp. 9-10. Ms. Kyle timely filed this appeal on April 2, 2013.

ARGUMENT

Standard of Review

The court dismissed Ms. Kyle's Summons and Complaint pursuant to Rule 12(b)(1), SCRP for lack of subject matter jurisdiction. In arriving at its dismissal, the court below ruled as a matter of law that Ms. Kyle was a covered employee of the Department of Probation, Parole, and Pardon Services ("Department") during her public service pursuant to §42-1-505, S.C. Code Ann. R. p5, lines 1-3. The court below further ruled as a matter of law that Ms. Kyle was a statutory employee of the Respondent during her public service pursuant to §42-1-400, S.C. Code Ann. R. p. 5, lines 6-12. In

reviewing the determination of the court below that Ms. Kyle was a covered employee of the Department and a statutory employee of the Respondent, this court is to consider the question *de novo* without deference to the court below as the Supreme Court of South Carolina directed in State ex rel. Wilson v. Town of Yemassee, 391 S.C. 565,707 S.E.2d 402,405 (2011):

> The construction of a statute is a question of law, which this Court may resolve without deference to the circuit court. Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("The issue of interpretation of a statute is a question of law for the court. We are free to decide a question of law with no particular deference to the circuit court." (internal citation omitted).

Where, as in the case now before the court, the appellate court is reviewing the grant of a motion for summary judgment in a suit for declaratory judgment, it is to apply the same standard as the trial court under Rule 56, SCRP as to the summary judgment, and where the review involves the interpretation of a statute, the interpretation is a matter of law, and may be decided without deference to the court below. Sloan v. Greenville Hospital System, 388 S.C. 152,694 S.E.2d 532,534 (2010).

I. KYLE WAS NOT COMPENSATED FOR HER COMMUNITY SERVICE PERFORMED AT THE SPCA AND NO EMPLOYMENT RELATIONSHIP EXISTED BETWEEN KYLE AND THE SPCA.

In construing the Workers' Compensation Act ("Act") to define an employee, this Court held that coverage depends on the existence of an employment relationship. Shuler v. Tri-County Elec. CO-OP, Inc., 374 S.C. 516, 520, 649 S.E.2d. 98, 100 (Ct. App. 2007) aff'd 385 S.C. 470, 684 S.E.2d 765 (2009) (citing Edens v. Bellini, 359 S.C. 433, 439, 597 S.E.2d 863, 866 (Ct. App. 2004). The "contract of employment" is the jurisdictional factor used to determine if an employment relationship exists. Alewine v. Tobin Quarries, 206 S.C. 103, 109, 33 S.E.2d. 81, 83 (1945). Furthermore, the *most essential*

component of an employment relationship is the employee's right to demand payment from the employer for work the employee has performed for the employer. Kirksey v. Assurance Tire Co., 311 S.C. 255, 257, 428 S.E.2d. 721, 723 (Ct. App. 1993), aff'd, 314 S.C. 43, 443 S.E.2d. 803 (1994). In Doe v. Greenville Hospital Systems, 323 S.C. 33, 39-40, 448 S.E.2d. 564, 567-68 (Ct. App. 1994), this court held that a candy striper who received classroom credit, job training, and free lunches and uniforms, was unpaid volunteer. Even though she received credits and other benefits for her service as a candy striper, the Court found that the classroom credits, job training, and other items received by the candy striper did not constitute the payment for services or compensation required to establish an employment relationship. Id. Similarly, in McCreery v. Covenant Presbyterian Church, the Court held that an employee is one who works for wages or salary and has the right to demand payment for services. 299 S.C. 218, 383 S.E.2d 264 (1989), rev'd on other grounds, 303 S.C. 271, 400 S.E. 2d 130 (1990). See also Kirksey, 311 S.C. at 257,428 S.E.2d at 723 (finding unpaid daughter of store owner not an employee). See generally 3 Larson's Workers' Compensation Law § 65.01 (2006). In McCreery, the Plaintiff donated his construction services to the church. Id. at 267. He was not paid any wages nor did he have any right to demand payment of any wages. Id. The Court found that there was no evidence of a tithing agreement whereby the Plaintiff in that case would provide work in exchange for, or in lieu of, a reduction in, or payment towards, the monetary tithe obligation that he owed to the church. Id. The Court found that the Plaintiff was not hired by the church and there was no evidence of employment. Id. The Plaintiff was found to be a volunteer. Id.

The trial court erred in finding that Ms. Kyle was compensated or was paid for the services she performed, because Ms. Kyle was given "credit to satisfy her probationary sentence." In McCreery, the Court contemplated a scenario by which an individual might be considered an employee where that individual provided services in order to payoff a monetary obligation that was owed to the church. Here, in this case, the Ms. Kyle owed no such debt or obligation to the Respondent and thus cannot be considered an employee. Further, in Doe v. Greenville Hospital Systems, the Plaintiff received credits and training while performing services at the hospital, but the Court held that those items did not constitute payment of wages that would invoke an employment relationship. Here Ms. Kyle's "credit", that was found by the trial court to be the equivalent of paid wages, was in reality time served towards her probationary sentence. Ms. Kyle's credit towards time served does not constitute the monetary compensation required by South Carolina law and statute to establish an employment relationship.

Ms. Kyle is not suing the Department, which had the workers' compensation liability, in a torts action; she is suing the SPCA. Under Shuler, the Plaintiff was not and could not have been an employee of the SPCA. 374 S.C. at 520, 649 S.E.2d. at 100. She was made to do the chores at the SPCA, because that is what judge-ordered community service is. In no way was she in a position to demand payment for her services to the SPCA which as Shuler stated, "is essential to the establishment of an employment relationship." 374 S.C. at 520, 649 S.E.2d. at 100 (citing Kirksey, 311 S.C. at 257, 428 S.E.2d. at 723). For the purposes of workers' compensation benefits, there is only one employer, and in this case it is clearly the Department. Ms. Kyle had no employment

relationship with the SPCA, therefore she had and has a right to sue them in tort for negligence.

Finally, each and every case cited by the trial court in support of its finding that Ms. Kyle, was an employee of the Defendant is significantly different in that every Plaintiff in those cases *received* wages or monetary compensation for the services rendered by that individual. Ms. Kyle was not paid for the chores she performed at the SPCA and was in no position to demand payment for doing those chores. Therefore, no employment relationship existed between Ms. Kyle and the Respondent at the time of her injury. Under the given facts, the trial court clearly erred in finding that Ms. Kyle was an employee of the Respondent and was compensated by the Respondent for her services.

II. KYLE WAS NOT THE STATUTORY EMPLOYEE OF THE SPCA.

S.C. Code Ann. § 42-1-505 states, "[f]or purposes of this section, [providing workers' compensation benefits] the Department is considered the employer for those persons under its custody or supervision performing public service employment." As a person who was on probation and having to do community service, the Ms. Kyle was supervised and under the custody of the Department. For the sole purpose of receiving workers' compensation benefits her employer was deemed by statute to be the Department. Inasmuch as the Respondent would like to claim that it was Ms. Kyle's employer and thus shielded in a suit for negligence in tort, there can be only one employer. Furthermore, legal counsel for the Department testified that "the Department is considered the employer of the offender for the purposes of workers' compensation benefits," (R. p. 36, lines 13-14), and that "Lauren J. Kyle was under the Department's supervision." R. p. 36, lines 5-6.

Statutory employment exists where an "owner undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person for the execution or performance by or under such subcontractor or the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him." S.C. Code Ann. § 42-1-400. The trial court in this case supported its finding that Ms. Kyle was the statutory employee of the SPCA with a series of cases that apply South Carolina's commonly accepted tests for determining whether an employee is engaged in an activity that was part of the owner's trade, business, or occupation as required by the statutory employee statute. In each and every case offered, the "owner" is an entity that has contracted with a second entity for that second entity to provide services to the owner. Those second entities are in essence subcontractors, and they provide services to the "owner" via the work performed by their paid employees. The owner is not the direct employer but is rendered the statutory employer of the subcontractor's employees (this is so in Bailey v. Owens, Carter v. Florentine Corp., Inc., Voss v. Ramco, Inc., and Olmstead v. Shakespeare as cited in the trial court's Order dated November 7, 2012). R. p. 5, lines 6-12. By finding that Ms. Kyle was a statutory employee of the SPCA, the trial court also deemed the SPCA to be the "owner" as set forth in § 42-1-400. This is an incorrect application of the statute and the facts of this case. If it were correct, according to the case law cited by the trial court, the SPCA would have to have contracted with the Department for the Department to provide services to the SPCA. There were no facts or evidence presented that indicates the SPCA contracted with the Department for the

Department to provide services to the SPCA. On the contrary, the contractual relationship that existed, as evidenced by the Exhibits C and D of the Defendant's Memorandum in Support of Motion to Dismiss (R. pp. 40-41), is one based upon the Department contracting with the SPCA to place certain qualifying offenders in the SPCA's facilities, so that those offenders can perform their court-ordered community service. Based upon the facts of this case, the Department, *not the SPCA,* would be the "owner" and thus the statutory employer as contemplated by the statutory employee statute and the supporting case law. However, the entire analysis is unnecessary. S.C. Code Ann. § 42-1-505 states, "[f]or purposes of this section, [providing workers' compensation benefits] the Department is considered the employer for those persons under its custody or supervision performing public service employment." For the sole purpose of receiving workers' compensation benefits Ms. Kyle's employer was deemed by statute to be the Department; not the SPCA.

Furthermore, because the Department is deemed to be the Ms. Kyle's employer for the purpose of coverage under the S.C. Workers' Compensation Act, the SPCA had no workers' compensation liability to the Plaintiff. This Court held that in cases where an entity has no workers' compensation liability to an injured person, it has no tort immunity regarding lawsuits for those injuries. Boone v. Huntington & Guerry Elec. Co., 307 S.C. 529,416 S.E.2d 212 (Ct. App. 1992) aff'd 311 S.C. 550, 430 S.E.2d 507 (1993).

The statutory employer statute, and the cases construing it, provide protection, in the form of making workers' compensation benefits available to injured employees, in situations where their direct employers, usually subcontractors, do not offer such protection/coverage. S.C. Code Ann. § 42-1-400. Should the particular circumstances

exist to allow it to apply, an injured employee can go to, i.e., seek to claim against, an entity positioned on a higher rung of the ladder, some say "go upstream", in order to obtain workers' compensation benefits. This higher positioned entity, very often includes general contractors and owners of plants and businesses. It was noted in Marchbanks v. Duke Power Co., 190 S.C. 336, 343-44 2 S.E.2d 825, 828 (1939), that regarding those on lower rungs of the ladder oftentimes greater financial irresponsibility exists or those lower entities employ so few employees that they are not required under the Workers' Compensation Act to carry compensation insurance. If the Respondent, the SPCA, properly applied the statutory employer statute it would be to try to tag the Department with having to pay workers' compensation benefits and not the entity for which the Plaintiff did chores directly, the SPCA. To analogize, the Department is positioned like the general contractor, the SPCA is the subcontractor, and the Plaintiff did chores directly for the subcontractor whose work benefited the general contractor.

III. SOUND PUBLIC POLICY DEMANDS THAT THE SPCA NOT BE SHIELDED FROM RESPONSIBILITY FOR ITS NEGLIGENCE THAT RESULTED IN THE INJURIES SUFFERED BY MS. KYLE.

The trial court offered no legal foundation for its finding that public policy supports shielding the SPCA from responsibility for the injuries suffered by Ms. Kyle. The court stated that failure to shield the SPCA would "harm the criminal justice system in general." R. p. 5, lines 18-19. The public policy position of the court directly contradicts long-established principles of tort law whereby negligent individuals or entities can and should be held accountable for the harm they cause to others. In this case, because no employment relationship existed between Ms. Kyle and the SPCA, Ms. Kyle is not bound by the exclusivity provision of the South Carolina Workers' Compensation

Act. Ms. Kyle has the right to hold the SPCA accountable for her injuries and sue them for negligence.

CONCLUSION

Based on the forgoing and any other ground apparent in the record, the Appellant respectfully requests that the trial court's Orders in this matter be reversed, and the Appellant's Summons and Complaint be reinstated.

Respectfully submitted,

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April 20, 2015.

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CERTIFICATE OF COMPLIANCE

I certify that I have complied with SCACR 211(b) in the preparation and the submission of the Brief of Appellant.

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CERTIFICATE OF SERVICE

I, Waring S. Howe, Jr., Counsel for Appellant, hereby certify that on April 20, 2015, I mailed, first class, postage prepaid via the United States Postal Service, three copies of the Brief of Appellant in the above-captioned action to:

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