

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM COLLETON COUNTY
Court of Common Pleas

SEP 02 2015

SC Court of Appeals

J. Ernest Kinard, Jr., Judge

Case No. 2014-002733

Samuel Washington, Jr.....Respondent,

v.

South Carolina Electric and Gas Company; and Emerson Electric Company d/b/a
Emerson Network Power, and/or Emerson Network Power, Defendants,

Of Whom South Carolina Electric and Gas Company.....Appellant.

APPELLANT'S FINAL BRIEF

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the trial court err in not finding Appellant immune from suit under the statutory employer doctrine, when the court below should have construed all factual doubts in favor of such a finding, and when the facts show Respondent was an electrician, working at Appellant's electrical plant, on an electrical panel that controlled Appellant's generator used by Appellant to generate electricity that is vital to its business.
2. Alternatively, did the trial court err in finding that Respondent was not a statutory employee while at the same time finding genuine issues of material facts as to that defense which should be decided at trial?

STATEMENT OF THE CASE

On May 28, 2013, Respondent Samuel Washington ("Mr. Washington") filed this lawsuit against Appellant South Carolina Electric and Gas ("SCE&G") and Emerson Electric Company d/b/a Emerson Network Power, and/or Emerson Network Power ("Emerson") alleging that SCE&G's and Emmerson's negligence caused him injuries from an electric shock. (R. pp. 19-24). Emerson removed the case to the United States District Court, but it was subsequently remanded to the Colleton County Court of Common Pleas. Thereafter, SCE&G filed its Answer on November 6, 2013. (R. pp. 25-29). In its Answer, SCE&G denied the claims and asserted various affirmative defenses including the statutory employer defense. *Id.* SCE&G filed for summary judgment on November 6, 2013 based on the statutory employer defense. (R. pp. 30-43).

On February 6, 2014, the Court issued an Order Continuing the Motion for Summary Judgment until the Parties could conduct discovery on the limited issues raised

in SCE&G's summary judgment motion. (R. p. 3). Thereafter, the Parties conducted discovery on this issue and filed supplemental memoranda on the same. (R. pp. 119-157; R. pp. 158-196; R. pp. 197-243; R. pp. 244-288; R. pp. 308-315; R. pp. 316-321; R. pp. 44-48). On September 4, 2014 the Parties appeared again before the same trial judge for a hearing on SCE&G's previously continued Motion for Summary Judgment. (R. p. 3; R. pp. 4-18).

On October 28, 2014, Judge Kinard signed an Order denying SCE&G's Motion for Summary Judgment, which SCE&G received electronically on November 20, 2014. (R. pp. 4-18). On December 19, 2014, SCE&G filed and served its Notice of Appeal to this Court. (R. pp. 103-106). The Motion for Summary Judgment was directed solely at SCE&G's immunity under the statutory employer doctrine, and so the issues of liability, causation, and damages, if any, have yet to be decided.

STATEMENT OF FACTS

SCE&G is in the business of providing electricity to customers in the State of South Carolina. (R. p. 150, line 14-p. 151, line 17; R. p. 188, line 7-p. 189, line 16; R. p. 231, line 22-p. 232, line 9; R. p. 236, line 2-p. 238, line 17; R. p. 283, line 10-p. 284, line 18). During the fall of 2011, as part of its maintenance, SCE&G began the process of updating one of its turbines at its power plant in Canadys, South Carolina. Id. SCE&G contracted with Emerson to manage this work, and in turn, Emerson contracted with Applied Control Technology. Id. Mr. Washington was employed by Applied Control Technology and assigned by the International Brotherhood of Electrical Workers to perform some of this work. (R. pp. 19-24).

Mr. Washington alleges that he was injured while performing electrical work on a turbine that powers the generator SCE&G utilizes to produce electricity. Id. All witnesses testified that SCE&G is in the business of producing power, that the work Mr. Washington was performing was an important part of SCE&G's business, and that the work was necessary, essential, and integral to SCE&G's business of producing power. (R. p. 150, line 14-p. 151, line 17; R. p. 188, line 7-p. 189, line 16; R. p. 231, line 22-p. 232, line 9; R. p. 236, line 2-p. 238, line 17; R. p. 283, line 10-p. 284, line 18). Additionally, SCE&G's electrical and instrumentation technician testified that SCE&G maintains the equipment that Mr. Washington was working on a routine basis, and that he had worked on it several times in the past. (R. p. 129:20-24). SCE&G witnesses also testified that SCE&G could have performed the work itself but chose to contract out the work, and that in contracting out the work, SCE&G ultimately bore the costs of Mr. Washington's workers' compensation coverage in what it paid for the work to be done at its plant. (R. p. 150, line 14-p. 151, line 17; R. p. 188, line 7-p. 189, line 16; R. p. 231, line 22-p. 232, line 9; R. p. 236, line 2-p. 238, line 17; R. p. 283, line 10-p. 284, line 18). In fact, SCE&G's procurement manager for the work at issue in this case testified in his deposition that SCE&G has previously performed the exact same work as it contracted with Emerson in the instant case at a different plant. (R. p. 216, line 6-p. 217, line 12; R. p. 239, line 19-p. 241, line 14).

With regard to its procurement of insurance, SCE&G is a wholly-owned subsidiary of SCANA Corporation and is the principal subsidiary for SCANA. (R. pp. 107-118). SCANA provides payment of workers' compensation insurance for SCE&G, and has been approved as "self-insured" by the South Carolina Worker's Compensation

Commission, since June 18, 1949. Id. SCE&G provided a valid employer's workers' compensation insurance coverage verification that indicates coverage was in effect on the date of the incident that gives rise to this action. Id. In addition to its approved self-insured status, SCANA, on behalf of SCE&G and certain other subsidiaries, additionally procured two excess worker's compensation policies of insurance coverage that were in effect on the date of the accident that would have provided coverage for any contract employees of SCE&G, had their direct employer, for any reason, not provided adequate coverage. Id.

STANDARD OF REVIEW

The determination of the employer-employee relationship for workers' compensation purposes is jurisdictional. Glass v. Dow Chem. Co., 447 S.E.2d 209 (S.C. Ct. App. 1994). The issue of whether an injured workers' claim is subject to the South Carolina Workers' Compensation Act ("the Act") S.C. Code Ann. § 42-1-10 *et. seq.* is a matter of law for court including finding of facts that relate to jurisdiction. Adams v. Davison-Paxon Co., 230 S.C. 532, 535 (S.C. 1957). Consequently, on appeal this Court has the power and duty to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence. Glass, 447 S.E.2d 209 (S.C. Ct. App. 1994). Each case must be determined on its own facts. Id. In making such a determination, courts must resolve all doubts about whether a worker is a statutory employee in favor of including the worker under the jurisdictional reach of the Act. Neese v. Michelin Tire Corp., 478 S.E.2d 91 (S.C. Ct. App. 1996).

ARGUMENT

- I. The trial court erred in not finding Appellant immune from suit under the statutory employer doctrine, when the court below should have construed all**

factual doubts in favor of such a finding, and when the facts show Respondent was an electrician, working at Appellant's electrical plant, on an electrical panel that controlled Appellant's generator used by Appellant to generate electricity that is vital to its business.

The Act provides the exclusive remedy for employees who sustain work related injuries. S.C. Code Ann. § 42-1-540. Although coverage under the Act is generally dependent upon the existence of an employer-employee relationship, S.C. Code Ann. § 42-1-400 provides that the Act is also the sole remedy for a worker who is not directly employed by the owner but rather is employed by a person or entity that is performing work for the owner. McLeod v. Piggly Wiggly Carolina Co., 313 S.E.2d 38 (S.C. Ct. App.1984). The rationale for this statutory provision is that costs incurred by the person or entity securing workers' compensation insurance coverage is ultimately borne by the owner as part of the contract costs regardless of whether the contract explicitly states it. See Parker v. Williams & Madjanik, Inc., 267 S.E.2d 524 (S.C. 1980) (noting "[t]he owner who obtains the benefit of the work inevitably absorbs the costs of providing protection for the workers"). Courts must resolve all doubts about whether a worker is a statutory employee in favor of including the worker under the Act since the essential purpose of the Act is the inclusion of employers and employees. Adams, 96 S.E.2d 566 (S.C. 1957); Neese, 478 S.E.2d 91 (S.C. Ct. App.1996).

Only one of the following three conditions must be satisfied for the Act to apply: the activity performed by the injured worker (1) must be an important part of the owner's trade or business; (2) must be a necessary, essential, and integral part of the owner's business; or (3) the owner's employees must have previously performed the activity. Harrell v. Pineland Plantation, Ltd., 494 SE 2d 123 (S.C. Ct. App 1997). The three-part disjunctive Harrell inquiry focuses on the services performed by the subcontractor.

Carter v. Florentine Corp., 423 S.E.2d 112 (S.C. 1992). Importantly, again, only 1 of the 3 Harrell elements need be present to defeat a claim per the statutory employer doctrine. Glass, 447 S.E.2d 209 (S.C. Ct. App. 1994).

The issue becomes whether the work in which a plaintiff was engaged in was a part of the trade, business, or occupation of the Owner. Marchbanks v. Duke Power Co., 2 S.E.2d 825 (S.C.1939). The Act recognizes that work done at the behest of the owner is owner's work. MacMullen v. South Carolina Electric & Gas Co., 312 F.2d 662 (4th Cir. S.C.1963). Where the work is the sort that the employer is equipped to handle with its own work force, the work is part of the business. Glass, 482 S.E.2d 49 (1997). Courts also consider whether a particular skill or special equipment is necessary for the work in question. Marchbanks, 2 S.E.2d 825 (S.C. 1939).

The case of Bell v. South Carolina Electric & Gas Co., 109 S.E.2d 441 (S.C. 1959) is most instructive on the issues before the Court. In Bell, the Court sustained SCE&G's demurrer to the Plaintiff's negligence complaint. The Bell Court held as a matter of law that the power company was the deceased workman's statutory employer because Plaintiff's intestate was killed while employed by a contractor who was transferring lines of the power company from one set of poles to another. Id. The Bell court stated, "[t]he defendant Power Company is a public utility engaged in the manufacture and transmission of electricity and uses poles and wires in its business and the repair and maintenance of such poles and wires or the transferring of such from one set of poles to another are part of its business, trade and occupation." Compare Id. with R. pp. 19-24 ¶ 5 (making very similar allegation as noted in Bell).

In the case at bar, there is no dispute SCE&G is in the business of producing and selling power. (R. p. 150, line 14-p. 151, line 17; R. p. 188, line 7-p. 189, line 16; R. p. 231, line 22-p. 232, line 9; R. p. 236, line 2-p. 238, line 17; R. p. 283, line 10-p. 284, line 18). The location where Mr. Washington was injured was a power plant SCE&G utilizes to generate electricity it then provides to its customers. Id. The equipment Mr. Washington was working on when he was injured is a turbine that powers the generator SCE&G utilizes to produce the electricity it then provides to its customers. Id.

Like in Bell, Mr. Washington was performing work (the maintenance/updating of a turbine) that was an important, necessary, essential, and integral part of SCE&G's business of providing power to customers in the State of South Carolina. Id. SCE&G's own electrical and instrumentation technician testified that SCE&G maintains the equipment that Mr. Washington was working on a routine basis, and that he had worked on it several times in the past. (R. p. 129, lines 20-24). SCE&G witnesses also testified that SCE&G could have performed the work itself but chose to contract out the work, and that in contracting out the work, SCE&G ultimately bore the costs of Mr. Washington's workers' compensation coverage in what it paid for the work to be done at its plant. (R. p. 150, line 14-p. 151, line 17; R. p. 188, line 7-p. 189, line 16; R. p. 231, line 22-p. 232, line 9; R. p. 236, line 2-p. 238, line 17; R. p. 283, line 10-p. 284, line 18). Finally, SCE&G's procurement manager for the work at issue in this case testified in his deposition that SCE&G has previously performed the exact same work as it contracted with Emerson in the instant case at a different plant. (R. p. 216, line 6-p. 217, line 12; R. p. 239, line 19-p. 241, line 14).

The trial court's reliance on Glass and Raines v. Gould 343 SE2d 655 (S.C. Ct.

App. 1986) is misplaced. In those cases, the plaintiffs were performing construction work that was not a critical part of the defendants' the trade, business, or occupation (a chemical company in Glass and a battery company in Raines). Id. This is quite to the contrary in the case at bar where Mr. Washington is an electrician, working on SCE&G's electrical panel, on SCE&G's turbine, which produces electricity, that SCE&G is in the business of selling to its customers.

The statutory employee doctrine is applicable to this case, and therefore, SCE&G should be immune from Respondent's claims. The facts are undisputed that the maintenance/updating of SCE&G's turbine was an important part of its work, that it was an essential part of its trade or business, and that such maintenance work was performed by defendant's regular employees. (R. p. 150, line 14-p. 151, line 17; R. p. 188, line 7-p. 189, line 16; R. p. 216, line 6-p. 217, line 12; R. p. 231, line 22-p. 232, line 9; R. p. 236, line 2-p. 238, line 17; R. p. 239, lines 19-241; R. p. 283, line 10-p. 284, line 18). The updating of these turbines was a part of SCE&G's necessary maintenance work. Id. In connection with said work, it was necessary to work on the electrical panel where Mr. Washington was working at the time of his accident, which had previously been performed by SCE&G's regular employees. Id.

Mr. Washington's sole relief is through the Act. SCE&G should be granted summary judgment in its favor as to Respondent's claim for negligence against it. Therefore, SCE&G is entitled to an Order reversing the denial of summary judgment, and additionally, is entitled to an Order from this Court granting it summary judgment pursuant to the Statutory Employer Doctrine.

II. Alternatively, the trial court erred in finding that Respondent was not a statutory employee while at the same time finding genuine issues of material

facts as to that defense which should be decided at trial.

Summary judgment is appropriate where “the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Belton v. Cincinnati Ins. Co., 602 S.E. 2d 389 (S.C. 2004). While the moving party bears the burden of demonstrating that there is not a genuine issue of material fact, once that burden has been met, the nonmoving party may not rest on the mere allegations contained in the pleadings. Regions Bank v. Schmauch, 582 S.E.2d 432 (S.C. Ct. App. 2003). Instead, the nonmoving party must come forward with specific facts showing that evidence exists to support its position, and that there is a genuine issue for trial. SSI Medical Services, Inc. v. Cox, 392 S.E. 2d 789 (S.C. 1990). All evidence must be viewed in the light most favorable to the nonmoving party. Strother v. Lexington County Recreation, 504 S.E. 2d 117 (S.C. 1998). In cases where there are no issues of material fact, a trial court may resolve disputed legal questions on summary judgment. Ellis v. Davidson, 595 S.E. 2d 817 (S.C. Ct. App. 2004). If not, the decision should only be made after trial. Id.

In the case at bar, Respondent did not file a motion for summary judgment. (R. pp. 30-43). The trial court was not deciding cross motions for summary judgment on the issue of whether Mr. Washington was SCE&G’s statutory employee. Id. Rather, it was only deciding whether to grant or deny SCE&G’s motion. Id.

Nonetheless, in several instances the trial court’s order appears to apply the summary judgment standard to reach the substantive conclusion that Respondent was not a statutory employee of SCE&G. For example, the order denying summary judgment

states in part, “[w]hen viewed in a light most favorable to the Plaintiff, an application of the facts of this case to the above-referenced tests reveal that Plaintiff was not a statutory employee.” Later, the order states “[a]s a result, the exclusivity provision of S.C. Code Ann. § 42-1-540 does not apply, and Defendant SCE&G’s Motion for Summary Judgment is hereby DENIED.” If the trial court’s intent was merely to deny summary judgment on the statutory employment issue because disputed issues of fact were presented about Respondent’s status, then it was an error for the court below to conclude definitively that Respondent was not a statutory employee of SCE&G. Conversely, if the trial court intended to reach a substantive conclusion about Respondent’s status as a statutory employee, then the incorrect standard was applied when the evidence was analyzed.

Again, this Court should reverse the trial court’s decision and grant SCE&G summary judgment. If, however, this Court is not inclined to do so, it should recognize that the trial court erred in concluding that Respondent was not a statutory employee of SCE&G and allow that issue to proceed to trial.

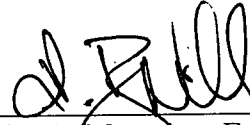
CONCLUSION

For the foregoing reasons as well as argument of counsel at a hearing on this matter the Court of Appeals should reverse The Honorable J. Ernest Kinard, Jr.’s Order Denying SCE&G Summary Judgment and grant SCE&G summary judgment, or in the alternative, allow SCE&G to present the statutory employee defense at trial.

(Signature page to follow)

Respectfully submitted,

September 1, 2015

A handwritten signature in black ink, appearing to read "J. Massalon", written over a horizontal line.

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Of Whom South Carolina Electric and Gas Company is the Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Appellant's Final Brief complies with
Rule 211 (b), SCACR.

August 31, 2015



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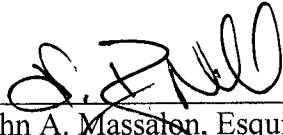
South Carolina Electric and Gas Company; and Emerson Electric Company d/b/a
Emerson Network Power, and/or Emerson Network Power, Defendants,

Of Whom South Carolina Electric and Gas Company.....Appellant.

PROOF OF SERVICE

I certify that Appellant's Final Brief was served on Respondent Samuel Washington, Jr. via United States Mail, postage prepaid, on September 1, 2015, addressed to his attorneys of record, Margie Bright Matthews, Margie Bright Matthews, LLC, Post Office Box 499, Walterboro, SC 29488 and S. Kirkpatrick Morgan, Jr. and Charles T. Slaughter, Walker Morgan, LLC, Post Office Box 949, Lexington, SC 29071, and that the same was also served on Co-Defendant Emerson Electric Company d/b/a Emerson Network Power, and/or Emerson Network Power via United States Mail, postage prepaid, on September 1, 2015 addressed to its attorneys of record, H. Michael Bowers, Esquire, Smith Moore Leatherwood LLP, 25 Calhoun Street, Suite 250, Charleston, SC 29401.

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