THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM SOUTH CAROLINA COURT OF APPEALS

Opinion Number 5369 (S.C. Ct. App. filed December 9, 2015)

Brian Wofford, deceased
Employee, by and through Boisha
Wofford, surviving spouse,

Petitioner,

v.

City of Spartanburg,

Employer and Self-Insurer,

and

South Carolina Municipal Insurance Trust Carrier,

Respondents.

PETITIONER'S REPLY TO RETURN AS TO PETITION FOR A WRIT OF CERTIORARI

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I. INSTANT CASE PRESENTS A CLASSIC EXAMPLE OF THE "GOING AND COMING RULE"

At oral argument before the Court of Appeals, Petitioner cited the following example: Assume a judge's law clerk is preparing to leave for work one morning. Before she departs, she receives a call from the office and is asked to go by another courthouse to pick up a box of printer paper. On her way to that office, the clerk is injured in a motor vehicle accident.

This is a classic example of an exception to the "going and coming" rule. The law clerk is not simply commuting to work, she is executing a task or errand for her employer.[1] Why is this example different from the facts of the present case?

Respondent seems to say that it is different because (1) the duty or task was not given to Brian Wofford by his supervisor and (2) Brian sometimes worked out of the C.C. Woodson Center, to which he was traveling to pick up the keys for his co-worker. Yet neither of these elements comes from case law and Respondent cites no authority for these "requirements."

In the law clerk example, above, consider if the courthouse was one in which the clerk had worked before, such as while her judge was acting as a visiting judge. This does not change the analysis. The fact remains that the clerk was not simply commuting to work, she was executing a duty or task for her employer. In the instant case, all of the evidence shows that Brian Wofford's only reason for traveling to the C.C. Woodson Center on the morning he was killed was to execute the task of retrieving the keys for his co-worker and delivering them to her.

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[1] Respondent makes much of the fact that Petitioners have argued an exception under both the duty or task and special errand exception. The case law on these exceptions simply is not clear as to any meaningful distinction and is often overlapping. Nonetheless, at all levels of this litigation and appeal, the courts and Respondent have clearly understood the question at hand. Respondents' continued commentary on this point is simply a straw man.

In short, on the undisputed facts as applied to the law, Brian Wofford did not die while simply commuting to work, but while engaged in carrying out a duty or task for the benefit of his employer. The facts of his case are no different than those of the example above.

II. Going and Coming Rule

This case boils down to this simple question: When Brian Wofford, rather than traveling to his physical office, instead traveled to the C.C. Woodson Center for the purpose of picking up keys at the request of Tracy Ballew and then delivering them to Ms. Ballew at the Swim Center, was he merely going to work or was he executing a work-related task?[2] If the former, then Brian's resulting death is not compensable. If the latter, then the claim is certainly compensable.

In arguing that Brian was simply going to work, Respondents point out (1) that he agreed to take on the task and (2) that the person who requested the task was a subordinate. See Respondents' Return, p.17-18. Yet these facts are unrelated to the ultimate question and Respondents cite no precedent to suggest that these are factors to be considered in analysis of the "going and coming rule." In fact, it is difficult to imagine a situation where an employee executes a task he did not agree to. To exclude all such scenarios would be to eviscerate all exceptions to the "going and coming" rule. With regard to the rank of the person requesting the task, Courts have not found any importance in such qualifications and instead have inquired whether the task was of value to the employer. See Beam v. State Workmen's Compensation

[2] It should be noted that, on multiple occasions in their Return, Respondents seem to analyze the instant case based on Brian's travel from his apartment to his mother's house. See, e.g., Respondents' Return, p. 2, 4.. Appellant agrees that Brian's trip from his apartment to his mother's house was not work-related and, had the accident occurred during that portion of his travel, no claim could be made under workers' compensation. The portion of travel which is of importance to the case is the travel after Brian left his mother's home and was traveling "directly" to the C.C. Woodson Center to retrieve the keys.

Fund, 261 S.C. 327, 332, 200 S.E.2d 83, 86 (1973) (employees "were about the performance of an act, incidental to and recognized as of value by their [employer]").

Respondents fault Appellant for asserting the factors of control, lack of personal discretion, and lack of personal purpose in analyzing whether the "going and coming" rule applies, yet each of these factors is derived from South Carolina caselaw on the "going and coming" rule and was cited by South Carolina courts in analysis, as set forth in Appellant's initial brief. See, e.g., Gallman v. Springs Mills, 201 S.C. 257, 265, 22 S.E.2d 715, 718-19 (1942) (upholding denial of claim because at the time of the injury, employee "was in no sense under the control of his employer" and had personal discretion); Beam, 261 S.C.at 332, 200 S.E.2d at 86 (analyzing whether employees were "exercising a personal privilege"). These were logical factors for a court to consider as they shed light on the ultimate question – was the employee simply going to work, or executing a task?

In attempting to characterize the action in question as simply Brian going to work, Respondents note that Brian sometimes worked at the C.C. Woodson Center. See Respondents' Return, p. 13-14. **But importantly, there is no evidence in the Record to suggest that Brian was planning to work out of an office at C.C. Woodson that morning or that he had a meeting at the Center.** Instead, all of the evidence shows that Brian's only reason for traveling to the C.C. Woodson Center on the morning of his death was to take care of the task given him by Tracy Ballew. Had he not been given this task, Brian would not have traveled to the C.C. Woodson Center and would presumably have traveled to his physical office at 100 North Liberty Street in downtown Spartanburg. That Brian did not go directly to his office demonstrates that his travel that morning was an exception to his morning commute and that he was instead executing a specific task.

As noted in the Petition for Writ of Certiorari, the facts of this case are very similar to the facts of Gray v. Club Group, Ltd., 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000). Respondents attempt to distinguish Gray by noting that the Court found that the reimbursement exception to the "going and coming" rule applied. This is true, but the Court did not hold that other exceptions were inapplicable and, in fact, the Court provided separate analysis as to whether the accident arose out of and in the course and scope of employment. In finding that the accident arose out of and in the course and scope of employment, the Court noted that "Gray was required to pick up his deliveries in the morning, and but for his employment he would not have been traveling to Henderson." See Gray, 339 S.C. at 187. Similarly, in the case at hand, Brian Wofford was traveling to C.C. Woodson to pick up and deliver the keys to Tracy Ballew and, but for this task or errand, would not have been traveling to the C.C. Woodson Center.

III. The Court of Appeals Utilized an Incorrect Standard of Review

Respondents claim that the Court of Appeals properly considered this case under the substantial evidence standard of review. First, Respondents seem to reverse the position they took in their brief and at oral argument that the case centers on undisputed facts. Now, Respondents claim that, while the facts may be undisputed, difference *inferences* may be drawn from the facts, such as whether Mr. Wofford intended to start his day at the C.C. Woodson Center, or elsewhere.[3]

This misses the point. The question of whether the facts of this case, as applied to the law, meet an exception to the going and coming rule is not a finding of fact. It is the ultimate question of the case and is therefore a conclusion of law. Consequently, the Court's statement

[3] Incidentally, this "inference" played no role in the Court of Appeal's opinion and was not referenced by the Court.

that it found that "substantial evidence supports the Appellate Panel's ***finding*** that Wofford's accident did not met an exception to the going and coming rule" is in error. (emphasis added). It is clear from this statement, as well as the following citation to Lark v. Bi-Lo, Inc., which references affirming findings of fact, that the Court treated the ultimate question as one of fact rather than law. 276 S.C. 130, 276 S.E.2d 304 (1981).[4] This was error.

Where the relevant facts are undisputed, the question is one of law. See Whitworth v. Window World, Inc., 377 S.C. 637, 640, 661 S.E.2d 333, 335 (2008). At oral arguments, Respondents conceded that the relevant facts are, indeed, undisputed. And in its brief to the Court of Appeals, Respondent stated, "[i]t is . . . undisputed that [Brian] agreed/volunteered to pick up a key from . . . the C.C. Woodson Center . . . and deliver it to a subordinate at another location (the Swim Center)." (App. 197-198). Respondents cannot now, in an attempt to uphold the standard of review, reverse course and claim issues of fact.

Petitioner respectfully submits that Whitworth is directly on point on this issue and the Court of Appeals erred in analyzing the question as a finding of fact, and therefore giving deference to the Full Commission's ruling on the matter.[5]

CONCLUSION

Applying the proper standard of review, the evidence makes clear that, at the time of his death, Brian Wofford was not merely commuting to work, but was about the completion of a task

[4] Respondents attempt to buttress the standard of review utilized by the Court of Appeals by noting that the Court "set forth the proper standard of review in its opinion." See Respondents' Return, p.8. However, the fact that the Court of Appeals cited the correct standard for an error of law is of little importance when the Court plainly analyzed the ultimate issue as a finding of fact.

[5] The application of Whitworth was discussed more fully in Petitioner's Brief in Support of the Petition for Writ of Certiorari.

or errand. For the reasons set forth above, Petitioner respectfully requests that this Court grant its Petition for Writ of Certiorari and consider the opinion of the Court of Appeals.

Respectfully Submitted,

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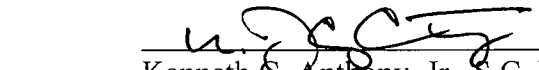

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PROOF OF SERVICE

I certify that on March 10, 2016, I served the Petitioner's Reply to Return as to Petition for a Writ of Certiorari on Respondents counsel, Stephanie Lamb Pugh and Helen Hiser, by depositing a copy of same in the United States mail, postage prepaid, at the following addresses:

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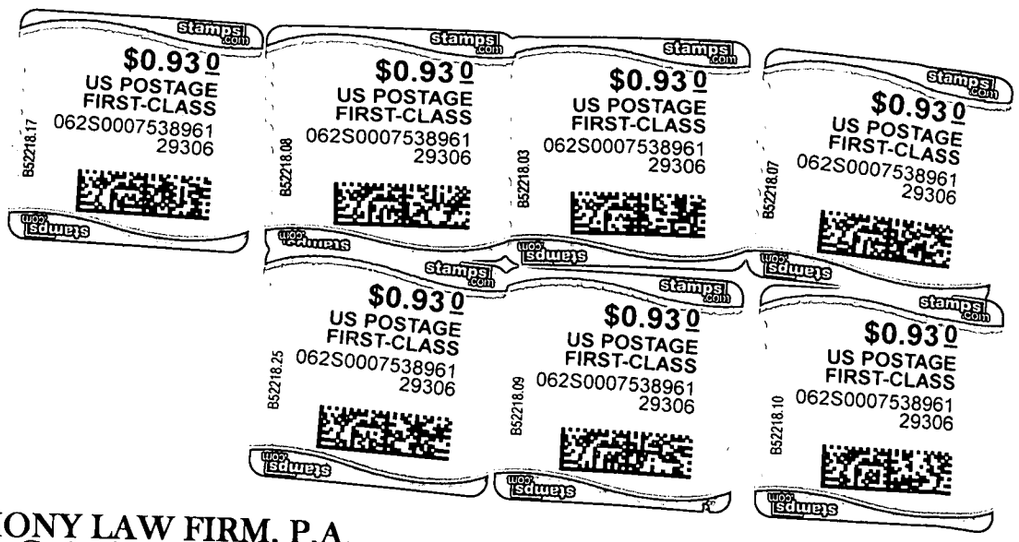

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