

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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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, PETITIONER,

v.

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

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RESPONDENT'S RETURN TO THE  
PETITION FOR CERTIORARI

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This Court should deny Perez's Petition for Certiorari. None of the factors in Rule 242(b), SCACR exist to justify the issuance of the writ. There is no novel question of law, no dissenting opinion at the Court of Appeals, no conflict with this Court's precedent, no substantial constitutional issues, and no conflict with the United States Supreme Court on any question of federal law. In an attempt to make this matter appear to be worthy of certiorari, Perez attempts to argue that the Court of Appeals did not properly apply the law to the facts of this action. This is not accurate.

As explained below, however, the Court of Appeals correctly applied the well-established precedent of this Court to the issues raised in Appellant's appeal. This Court should thus deny the Petition for Certiorari.

COUNTER-STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals correctly disregard Perez's immigration status when holding that Gino's the King of Pizza, LLC did not regularly employ four (4) or more people, and is therefore not subject to the Act?
2. Did the Court of Appeals correctly consider all evidence in the record in holding that Gino's the King of Pizza, LLC is not subject to the Act?

COUNTER-STATEMENT OF THE CASE

The Appellant, Esvin Leonel Lopez Perez, initiated this Workers' Compensation claim by filing a Form 50 in which he alleged that he suffered a compensable injury which arose out of his employment on May 22, 2013. {See Form 50}. Gino's the King of Pizza, LLC filed a Form 51 contesting jurisdiction and argued that it did not maintain the requisite number of employees to be subject to the Workers' Compensation Act. {See Form 51}.

Gino's the King of Pizza, LLC is the business entity that owns and operates a pizza restaurant located at 532 Highway 17 N., North Myrtle Beach, South Carolina 29582. {Transcript of Hearing Before Single Commissioner; R. p. 133, lines 4-10}. While there are other unrelated business entities conducting business under similar trade names, Gino's the King of Pizza, LLC only owns and operates that one location and is unrelated to any other business entities. {Transcript of Hearing Before Single Commissioner; R. p. 133, lines 11-22}.

The Gino's entity is a limited liability company with two members; Francesco Sorce and Nancy Sorce. {Transcript of Hearing Before Single Commissioner; R. p. 134, lines 8-13}. As a small business, the restaurant typically required only two or three people to operate the location. {Transcript of Hearing Before Single Commissioner; R. p. 142, lines 20-22}. On a normal day, Francesco Sorce, Nancy Sorce, and the claimant would be the people working at the restaurant. {Transcript of Hearing Before Single Commissioner; R. p. 152, line 19-p. 153, line 5}. Infrequently, if additional help was needed, Edwin Molina would be allowed to work at the

restaurant. {Transcript of Hearing Before Single Commissioner; R. p. 154, lines 13-19}. However, Mr. Molina would only work on a very limited, sporadic basis on days that he would call or randomly stop in the restaurant and ask if he could help and only if needed by the restaurant. {Transcript of Hearing Before Single Commissioner; R. p. 135, line 23-p. 136, line 8}. In addition, if needed, friends and family members of the Sorce family would provide assistance to the restaurant on a very limited, irregular, and/or voluntary, unpaid basis. {Transcript of Hearing Before Single Commissioner; R. p. 138, lines 10-20 (discussing the voluntary nature of Gino Sorce's relationship with the restaurant)}; {Transcript of Hearing Before Single Commissioner; R. p. 141, line 16-p. 142, line 2 (discussing the voluntary nature of Katrina Sorce's employment)}; {Transcript of Hearing Before Single Commissioner; R. p. 134, lines 14-25, R. p. 139, lines 4-19 (discussing the fact that Katrina Sorce's brother, Hipolito Rivera, helped out at the restaurant only five (5) or six (6) days in 2013)}; {Transcript of Hearing Before Single Commissioner; R. p. 139, line 20-p. 140, line 14 (discussing the voluntary nature of Francesco Sorce's friend Alan's employment)}; {Transcript of Hearing Before Single Commissioner; R. p. 136, line 16-p. 137, line 6 (discussing the limited and sporadic nature of work performed by Ernesto Hernandez)}. While Lopez testified that several other people worked at Gino's the King of Pizza, LLC that testimony was based upon speculation and hearsay and proved to be erroneous. {Transcript of Hearing Before Single Commissioner; R. p. 137, line 22-p. 138, line 5 (discussing how Carlos Perez-Perez was unknown to and never worked for Gino's the King of Pizza, LLC contrary to Appellant's position)}; {Transcript of Hearing Before Single Commissioner R. p. 142, lines 3-19 (discussing the fact that Katrina Sorce's brother-in-law, Carlo Sorce, lived in New York and did not work at Gino's the King of Pizza, LLC contrary to Appellant's assertion)}.

A hearing was held in Horry County, South Carolina on April 23, 2014. All parties were duly notified of the date, time and place of the hearing, and all parties and their representatives appeared at the scheduled hearing. Commissioner Aisha Taylor presided at the hearing and received testimony and other evidence from the parties' witnesses for the sole purpose of determining the jurisdictional issue. Perez was the sole witness to testify on behalf of his position. No other people alleged by the claimant to have been regularly employed by Gino's the King of Pizza, LLC were present. Gino's the King of Pizza, LLC presented one of its bookkeepers, Katrina Sorce, to testify as to the number of employees maintained by the business entity.

Having heard the testimony and reviewed the evidence presented, Commissioner Taylor issued an Order on July 7, 2014 wherein she found that Gino's the King of Pizza, LLC did not regularly employ four (4) or more employees at all times relevant to this action. {See Order and Award for Employer}. The Commissioner also found that it became clear upon cross-examination that Perez had no actual knowledge as to the working relationship of any other persons he testified about, that his beliefs were based on speculation and hearsay, and that the only credible testimony was presented by Gino's the King of Pizza, LLC. {Id.} The Commissioner further found that Gino's the King of Pizza, LLC only owns and operates one pizza restaurant location and while there are several other business entities operating under the trade name Gino's Pizza, they are not related to the employer in this case. {Id.} Finally, the Commissioner held that, because it did not regularly employ four (4) or more employees, Gino's the King of Pizza, LLC was not subject to the South Carolina Workers' Compensation Act and, therefore, denied all of the claimant's claims for benefits. {Id.}

The Perez appealed the decision of the single Commissioner to the Appellate Panel of the Full Commission. A hearing was conducted before the Appellate Panel on October 27, 2014

which was comprised of Commissioner T. Scott Beck, Commissioner Melody L. James, and Commissioner R. Michael Campbell, II. On January 6, 2015, following the hearing and a review of all documents presented, the Appellate Panel affirmed the Order of the single Commissioner including all findings of fact and conclusions of law. {See Order of Full Commission}.

Perez appealed the Full Commission's Order. The Court of Appeals received briefing and, on February 24, 2016, in an unpublished opinion affirmed the Full Commission's Order that Gino's the King of Pizza, LLC did not regularly employ four (4) or more people and, therefore, was not subject to the Act. Perez's subsequent Petition for Rehearing was denied. Perez petitioned this Court for a writ of certiorari.

#### ARGUMENT

Perez's petition incorrectly claims certiorari is warranted on several bases. Specifically, he asserts the Court of Appeals' ruling did not correctly consider Perez's immigration status or all of the evidence provided for in the record in rendering its opinion. (See Pet. For Cert. at 3-4). As explained below, Perez's assertions are incorrect. His appeal does not raise a single question of law nor does it conflict with binding precedent. Rather, the Court of Appeals' well-reasoned opinion decided each issue in accordance with the long-standing, binding precedent of this Court and in concord with the precedent of every court to confront the issues raised in this suit.

- A. *The Court of Appeals correctly disregarded Perez's immigration status and held that Gino's the King of Pizza, LLC did not regularly employ four (4) or more people and, therefore, is not subject to the Act.*

Perez argues that the Court of Appeals did not properly consider Perez's immigration status when rendering its decision. In support of this argument, Perez cites to this Court's

opinion in *Curiel v. Environmental Management Services*, 376 S.C. 23, 655 S.E.2d 482 (2007) holding that workers' compensation benefits are available to undocumented immigrants. However, the immigration status of Perez was not at issue in this action. No consideration was given to the immigration status of Perez or any other alleged employee by the Court of Appeals. The analysis of the Court of Appeals correctly focused on whether Gino's the King of Pizza, LLC regularly employed four (4) or more people regardless of any person's immigration status. No argument was made that immigration status should serve to exclude any person from the analysis and, therefore, that issue was not in front of the Court of Appeals.

*B. The Court of Appeals correctly reviewed all evidence in the record and determined that, based on that evidence, Gino's the King of Pizza, LLC did not regularly employ four (4) or more people and, therefore, is not subject to the Act.*

Perez argues the Court of Appeals did not correctly consider all evidence in the record in determining whether Gino's the King of Pizza, LLC regularly employed four (4) or more people. Specifically, Perez argues that the Court of Appeals erred in failing to shift the burden of proof to Gino's based upon a lack of payroll records. In support of this position, Perez cites to this Court's opinion in *Andersen v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946). In *Andersen*, this Court was determining whether the plaintiff had been properly compensated for his overtime. However, the payment of wages is not at issue in this action and *Andersen* is not applicable in determining whether Gino's is subject to the Workers' Compensation Act. Even if wage records were relevant to the analysis, Gino's the King of Pizza, LLC provided its bookkeeper to testify about the employment relationship and work history of each alleged employee. While Perez could have called each person he asserted was regularly employed to testify in support of his position, he did not offer one other person to testify about their

employment relationship with Gino's The King of Pizza, LLC. Perez cannot now insist the appellate courts speculate as to what those other people may have testified. The Court of Appeals correctly analyzed all evidence in the record and held that Gino's the King of Pizza, LLC did not regularly employ four (4) or more people.

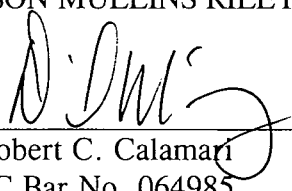
CONCLUSION

None of the factors in Rule 242(b), SCACR exist to justify the issuance of the writ and the Court of Appeals' opinion is consistent with existing law. Based on the above, this Court should deny the Petition for Certiorari. A denial is also supported arguments and briefs presented to the courts below as included in the Appendix.

Respectfully Submitted,

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Oct. 14, 2016

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

APPEAL FROM THE SOUTH CAROLINA WORKER'S COMPENSATION COMMISSION

Opinion No. 2016-UP-084 (S.C. Ct. App. Filed February 24, 2016)

Case No. 2016-001970

Esvin Leonel Lopez Perez,..... Employee, PETITIONER

v.

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

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Gino's The King of Pizza, Employer, Respondent, do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Pleadings: Respondent's Return to the Petition for Certiorari

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Deia Patsel  
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Oct 14

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