

# **EXHIBIT A**

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	ELEVENTH JUDICIAL CIRCUIT
COUNTY OF LEXINGTON	)	CASE NO. 2016-CP-32-02419
Hawi Kebede, Mekilit A. Lemu, and	)	
Shewangiz K. Moses,	)	
	)	
Plaintiffs,	)	
v.	)	
Amick Farms, LLC and OSI Group,	)	
Defendants.	)	

**RECEIVED**

**ORDER**

DEC 27 2017

SC Court of Appeals

This matter came before the Court for a hearing on August 2, 2017. The Defendants filed a Motion to Dismiss the Plaintiffs' Complaint pursuant to Rule 12(b)(1), SCRCF. Representing the Plaintiff was Cooper Wilson, Esquire. Representing the Defendants was Roopal Ruparelia, Esquire. For the following reasons, Defendants' Motion is hereby DENIED.

The Defendants Amick Farms, LLC and OSI Group (collectively "Amick Farms") own and operate a chicken plant that produces a line of chicken products for their foodservice, industrial, and retail customers. In 2013, Amick Farms entered into a contract with Employer Solutions Staffing Group ("ESSG"), a temporary staffing company. The contract stated that ESSG would provide "supplemental labor" to Amick Farms for use at their chicken plant. The Plaintiffs are refugees from Ethiopia who were hired by ESSG to perform supplemental labor at Amick Farms under the terms set forth in the contract.

The contract stated that the employees of ESSG – to include the Plaintiffs – "are and will be employed solely by [ESSG]." The contract also stated "under no circumstances shall an employee of [ESSG] or its subcontractors be deemed or construed to be an employee of Amick Farms."



The underlying case involves an automobile accident that occurred on July 8, 2013. The Plaintiffs were injured when the driver of their passenger van fell asleep behind the steering wheel and drove the van into an embankment. The Plaintiffs had worked an overnight shift at Amick Farms and were on their way home at the time of the accident. The Plaintiffs filed a Workers' Compensation claim against the Defendants and ESSG based on this incident. On May 12, 2015, the Defendants sent correspondence to the South Carolina Workers Compensation Commission ("the Commission") regarding the proper parties to the claim. In their letter, the Defendants stated "initially, there was some confusion about which employer was connected to which claimant, but we have now aligned the parties properly." The Defendants attached a Consent Order to their correspondence which provided that ESSG was the Plaintiffs' "sole employer" and that the Defendants should be dismissed from the Workers' Compensation claim. The Commission accepted the representations made by the Defendants and signed the Consent Order dismissing the Defendants. The Plaintiffs apparently resolved their Workers' Compensation claim with ESSG.

The Plaintiffs then filed the instant case against Defendants based on their failure to monitor and supervise Mr. York. In response to the Plaintiffs' allegations, the Defendants filed an Answer with corresponding affirmative defenses. The Defendants did not plead the affirmative defense of exclusivity based on the South Carolina Workers' Compensation Act ("the Act") in their original Answer. The Defendants subsequently amended their Answer and asserted this defense based on their new averment that they are the Plaintiffs' statutory employer. The Defendants then filed the current Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction. They now claim they are the statutory employer of the Plaintiffs and are immune from the Plaintiffs' lawsuit based on the exclusivity provision of the Act.

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### LAW

Initially, the Court acknowledges generally that the South Carolina Workers' Compensation Act (the Act) provides the legal framework to compensate employees who are injured in accidents arising out of and in the course of their employment. Parker v. Williams and Madianik, Inc., 275 S.C. 65, 71 (1980). The Act, and thus the Workers' Compensation forum, provides the exclusive remedy against an employer for an employee's work-related accident or injury. Fuller v. Blanchard, 358 S.C. 536, 595 S.E.2d 831, 833 (2004). More specifically, the exclusivity provision of the Act prevents an employee from maintaining a tort action against an employer where the employee sustains a work-related injury. Edens v. Bellini, 359 S.C. 433, 441-43, 597 S.E.2d 863, 867-68 (Ct. App. 2004). This exclusivity provision also extends to workers not directly employed by the Defendant if the worker can be classified as a statutory employee. Edens, 359 S.C. at 445, 597 S.E.2d at 869. A worker is a statutory employee if the activity he performed for the owner satisfies one of the following three (3) tests: (1) Is the activity an important part of the owner's business or trade; (2) Is the activity necessary, essential, and integral part of the owner's trade, business, or occupation; or (3) Has the identical activity previously been performed by the owner's employees. See Riden v. Kemet Elecs. Corp., 313 S.C. 261, 263-264, 437 S.E.2d 156, 157-158 (Ct. App. 1993).

South Carolina also recognizes the doctrine of judicial estoppel. See Hayne Federal Credit Union v. Bailey, 327 S.C. 242 (1997). The doctrine precludes a party from adopting a position in conflict with one previously taken in the same or related litigation. See Quinn v. Sharon Corp., 343 S.C. 411, 414, 540 S.E.2d 474, 476 (2000). A party cannot assert one set of facts in litigation and then change those facts in subsequent litigation "when the initial version no longer suits him." Hayne, 327 S.C. at 252. Judicial estoppel may be properly applied to prevent a party from asserting



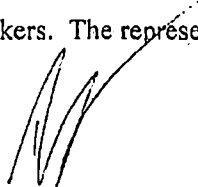
a legal position regarding their employment relationship with another when that position contradicts the legal position they previously asserted regarding their employment status. *See Allen v. Zurich Ins., Co.*, 667 F.2d 1162 (4<sup>th</sup> Cir. 1982). This is because the purpose of the doctrine is to protect the integrity of the judicial process and the courts. *Quinn*, 343 S.C. at 414, 540 S.E.2d at 475. The doctrine punishes those who take the truth-seeking function of the system lightly. *Hayne*, 327 S.C. at 252. Judicial estoppel is an equitable concept and the application of the doctrine is discretionary. *Hawkins v. Bruno Yacht Sales, Inc.*, 353 S.C. 31 (2003).

To determine the applicability of judicial estoppel, South Carolina courts analyze the following five elements:

1. two inconsistent positions must be taken by the same party or parties in privity with each other;
2. the two inconsistent positions were both made pursuant to sworn statements;
3. the positions must be taken in the same or related proceedings involving the same parties in privity with each other;
4. the inconsistency must be part of an intentional effort to mislead the court; and
5. the two positions must be totally inconsistent; that is, the truth of one position must necessarily preclude the veracity of the other position.

*See Cothran v. Brown*, 357 S.C. 210, 214, 592 S.E.2d 629, 632 (2004).

This Court finds that the Defendants' actions meet the elements of judicial estoppel set forth in *Cothran*. The Defendants represented to the Workers' Compensation Commission that ESSG was the "sole employer" of the workers. According to the Defendants, this representation was made based on the contract which stated that ESSG was the sole employer of the Plaintiffs and that "under no circumstances" would the Defendants ever be deemed the employer of the Plaintiffs. This representation meets all five of the elements of judicial estoppel as the Defendants now claim they are the employer of the workers. The representation was:




1. Inconsistent with their current position;
2. Made in the form of a Consent Order which was sworn to by the Defendants;
3. Made during related proceedings with the same parties and the same facts;
4. Submitted as part of the Defendants' plan to either mislead the Commission or this Court regarding the employment status of the workers;
5. Totally inconsistent with their current claim that they are the Plaintiffs' employer.

CONCLUSION

The Court finds these Defendants are judicially estopped from asserting that they are the employer of the Plaintiffs, statutory or otherwise, based on their prior assertions to the contrary. The Defendants represent that ESSG is the sole employer of the Plaintiffs to suit their needs in the Workers' Compensation forum. Now, they assert that they are the employer of the Plaintiffs in this forum to avoid liability. This Court will not allow the Defendants to change their position regarding the Plaintiffs' employment in an effort to avoid liability.

WHEREFORE, the Defendants' Motion to Dismiss the Plaintiffs' Complaint under the exclusive remedy provisions of the South Carolina Workers' Compensation Act is DENIED.

It is so Ordered.

  
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The Honorable R. Knox McMahon  
Circuit Court Judge

This 28 day of August, 2017  
Lexington County, South Carolina  
