

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARION COUNTY
Court of Common Pleas

William H. Seals, Jr., Circuit Court Judge

Case No. 2010-CP-33-931

Celeste Hemmingway, as Personal Representative
of the Estate of Ronnie Earl Davis; and David
Brown.....Appellants,

v.

Marion County and Marion County Prison
Camp.....Respondents.

FINAL BRIEF OF APPELLANTS

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SC Court of Appeals

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STATEMENT OF JURISDICTION

This appeal arises out of an Order of the Circuit Court granting Respondents' Motion for Summary Judgment and dismissing Appellants' causes of action with prejudice.

The trial court's final judgment was entered on July 17, 2012 and disposed of all claims of all parties. Appellants filed an Amended Notice of Appeal on August 6, 2012. This Court has jurisdiction to entertain the appeal and correct errors of law pursuant to S.C. Code Ann. § 14-3-330.

STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err in finding that Appellants' injuries and resulting claims arose out of an accident covered by the personal comfort doctrine and were therefore barred by the exclusivity provision of the Workers' Compensation Statute?

STATEMENT OF THE CASE

Appellant, Ronnie Earl Davis (herein referred to as "Davis"), drowned on June 15, 2010. Appellant David Brown (herein referred to as "Brown") suffered physical and emotional injuries while attempting to rescue Davis. Brown and Davis were second cousins. At the time, both Appellants were incarcerated at the Marion County Prison Camp (herein referred to collectively with Respondent Marion County as "County" or "Marion County"¹). Appellants were assigned to trash detail and the incident occurred while the inmates were on a clearly defined break from the day's work.

¹ In the same July 17, 2012 Order now on appeal, the Trial Court, with the consent of all parties, Dismissed Defendant "Marion County Prison Camp" holding the Camp itself was not a legal entity to be sued and that Plaintiffs' claims could appropriately be maintained against Marion County alone. Appellants do not dispute this and are **not appealing** this specific portion of the ruling. Appellants initially served a notice of appeal naming only "Marion County" as the respondent. However, the caption was never amended at

Following the drowning, Marion County initiated an admitted claim with the Worker's Compensation Commission alleging that Davis' drowning occurred within the course and scope of his employment with Marion County. Davis' Estate denies this is a Worker's Compensation claim and contends that his drowning occurred during a non-covered recreational activity as a result of the gross negligence of Marion County and its employees. Davis filed the present action against Respondents in the Marion County Court of Common Pleas on November 19, 2010 alleging, among other things, gross negligence. Davis filed a Motion to Postpone and Stay the Workers' Compensation Action pending a determination by the Circuit Court as to subject matter jurisdiction.

The Worker's Compensation Commission heard Davis' Motion to Stay on January 4, 2011. The Commission granted Davis' Motion and ordered that the Workers' Compensation action be stayed until such time as the Circuit Court could rule on whether subject matter jurisdiction properly rested in the Circuit Court or whether the action was barred by the exclusivity doctrine of the Workers' Compensation Act and should be reset upon the Commission's docket.

The Circuit Court Complaint was amended to name Respondent Davis as an additional Plaintiff. Respondent Defendants thereafter filed a Motion for Summary Judgment in the Circuit Court. Respondents alleged that Appellants' claims were barred by the exclusivity doctrine of the Workers' Compensation Act. By Order filed July 17, 2012, the Circuit Court Granted Respondents' Motion for Summary Judgment and dismissed Appellants' claims with prejudice.

the lower court level and there was some confusion among the Court and the parties as to how best to proceed. Therefore, within the 30 day limit, Appellants served an Amended Notice of Appeal naming both "Marion County" and "Marion County Prison Camp" as Respondents out of an abundance of caution.

It is from that Order that Respondents appeal. Appellants' Amended Notice of Appeal was served on Respondents on August 6, 2012.

STATEMENT OF FACTS

Appellants Davis and Brown were inmates at the Marion County Prison Camp on June 15, 2010. Davis was serving a 30 day sentence. (R. p. 56). Brown was serving a 60 day sentence. (R. p. 99, lines 13-14). Davis and Brown were second cousins (R. p. 97, lines 17-19). Inmates at the Marion County Prison Camp are afforded good time credit for participating in a prison work program that can reduce the length of a prisoner's sentence. (R. p. 101, line 15-p. 103, line 25). As part of this program, Davis and Brown were assigned to "the bus." Inmates assigned to bus duties performed various tasks including picking up litter from the sides of county roads, removing beaver dams, cleaning ditches, cutting up trees, cleaning off property lines, painting, and moving furniture and supplies for county schools and agencies. (R. p. 157, lines 18-24). John Reichardt was the prison official in charge of driving the bus and supervising the inmates. (R. p. 143, lines 6-8).

On the morning of June 15, 2010, the bus crew, led by Mr. Reichardt and including Davis and Brown, set out to begin the day's work. (R. p. 173, lines 22-23). The crew's sole task for the day was to pick up litter from off the sides of the road. (R. p. 175, lines 7-10).

During a clearly defined break, Mr. Reichardt allowed some of the inmates to jump into the Little Pee Dee River, which was close in proximity to where the inmates had been working.² (R. p. 179, line 25-p. 180, line 12). As Davis jumped in, he was

² Although it is important to note that the inmates were not picking up trash in the river and had no reason to be in the river for any reason directly related to their work.

caught in a strong current and dragged out towards the middle of the river. (R. p. 112, line 22-p. 113, line 1). As Davis began to struggle, Brown swam to Davis and attempted to help him. (R. p. 109, lines 3-8). At some point, Brown became overwhelmed himself and began to have an asthma attack. (R. p. 111, lines 5-8). Brown nearly drowned and was eventually forced to give up and return to shore. He began throwing up and felt weak. (R. p. 124, lines 1-8). Brown ultimately had to seek medical attention and suffered physically, mentally and emotionally. (R. p. 17, lines 9-13). Davis Drowned. (R. p. 17, lines 2-5).

Brown brought this action, along with Davis' Estate for and on behalf of Davis' beneficiaries, alleging against Respondents gross negligence in the training, supervision and retention of prison personnel.

Upon Respondents' Motion for Summary Judgment, the Trial Court ruled that Appellants' accident and resulting injuries and death occurred as a result of work-related activities subject to the personal comfort doctrine and were, therefore, barred by the exclusivity provisions of the Workers' Compensation Act.

STANDARD OF REVIEW

Summary judgment is "an extreme remedy to be cautiously invoked." Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). When reviewing the grant of summary judgment, the Appellate Court applies the same standard that governs the trial court. Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C 334, 340, 611 S.E.2d 485, 488 (2005). An appellate court may decide questions of law with no particular deference to the trial court. Verenes v. Alvanos, 387 S.C. 11, 690 S.E.2d 771 (2010). "On appeal from an order granting summary judgment, the appellate court will review all

ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below.” Osborne v. Adams, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). This Court therefore has the authority to review this question presented *De Novo*.

ARGUMENT

The South Carolina Workers’ Compensation Act (herein referred to as “The Act”) provides the exclusive remedy for employees injured or killed in accidents that are covered by the Act. S.C. Code Ann. § 42-1-540. Furthermore, pursuant to the South Carolina Tort Claims Act, governmental entities such as Respondents retain Sovereign Immunity for claims covered by the South Carolina Worker’s Compensation Act. S.C. Code Ann. § 15-78-60(14). Therefore, under either theory, Appellants’ claims would be barred **only** if their alleged injuries were covered by The Act.

“To be compensable under The Workers’ Compensation Act, an injury by accident must both ‘arise out of’ and ‘in the course of’ employment.” Gibson v. Spartanburg School Dist. #3, 388 S.C. 510, 518, 526 S.E.2d 725, 729 (Ct. App. 2000)(Citing S.C. Code Ann. § 41-1-160.). “The phrase ‘arising out of’ refers to the injury’s origin and cause. Whereas, ‘in the course of’ refers to the time, place and circumstances under which the injury occurred. Gibson, 388 S.C. at 518 (Citing Baggott v. Southern Music, Inc., 330 S.C. 1, 496 S.E.2d 852 (1988)).

It is undisputed that Appellants were not engaged in the activity of picking up trash when they entered the river. See e.g., (R. pp. 50-56); (R. pp. 4-7). The Trial Court also correctly acknowledges that the Workers’ Compensation Act does not apply to the recreational activity of prisoners. (R. p. 6, lines 3-4).

The Trial Court nonetheless concludes that the injuries sustained by Appellants' are subject to Workers' Compensation under the personal comfort doctrine. (R. pp. 6-7).

I. The Trial Court erred in finding that Appellants' injuries and resulting claims arose out of an accident covered by the personal comfort doctrine and were therefore barred by the exclusivity provision of the Worker's Compensation Statute.

Generally, the personal comfort doctrine "was developed to cover situations in which an employee is injured while taking a *brief pause* from his or her labors to minister to the various necessities of life." 82 Am. Jur. 2d Workers' Compensation § 29 (*emphasis added*). South Carolina adopted the personal comfort doctrine in Mack v. Post Exchange, 207 S.C. 258, 35 S.E.2d 838 (1945). In Mack, an employee, who had arrived at work approximately one-half hour before his shift, was accidentally burned while smoking a cigarette prior to clocking in. *Id.* In adopting the personal comfort doctrine, the Mack Court re-iterated the general rule that "acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment. A man must breathe and occasionally drink water at work." *Id.* at 264 (quoting Whiting Mead Company v. Industrial Accident Comm., 178 Cal. 505, 173 P. 1105, 1106, 5 A.L.R. 1518).

In Osteen v. Greenville Co. School Dist., 333 S.C. 43, 508 S.E.2d 21 (1998), our Supreme Court refused to extend the doctrine to cover a school volunteer who injured her back while filling a cooler with ice during work hours and attempting to lift it into her car for personal use over the weekend. The Osteen case is regarded as having narrowed the application of the personal comfort doctrine in South Carolina. *See, e.g., Gibson* 388 S.C. at 519-520 ("In Osteen, the Court significantly narrowed the application of the

personal comfort doctrine...”); James H. Lichty, Accidental History: Expansion of the Meaning of “Accident” as Contemplated by the Act (“One of the more contemporary interpretations of the personal comfort doctrine is the explanation provided in [Osteen] restricting the doctrine to apply only to *imperative* acts...).

Therefore, as set forth in Osteen and reiterated by Gibson, the personal comfort doctrine in South Carolina “has consistently been limited to imperative acts such as eating drinking, smoking, seeking relief from discomfort, preparing to begin or quit work, and resting or sleeping” Gibson 388 S.C. at 520.

A. Appellants’ activities fall outside the scope of the personal comfort doctrine as currently applied in South Carolina.

The personal comfort doctrine does not extend to the activity of swimming. As stated in Osteen, application of the personal comfort doctrine must be limited to “*imperative* acts.” Although Osteen seems to contemplate “relief from discomfort” as one such act, there is no precedent in South Carolina applying such relief so broadly as to encompass swimming. Indeed, looking back to Mack, for an action to be considered under the personal comfort doctrine, it must not only be necessary to an employee’s comfort and convenience, but also necessary to his life.³

Here, although Appellants went swimming for the stated purpose of cooling off or seeking relief from the heat, there is no indication that the physical act of swimming was imperative or necessary to life.

Indeed, the inmates had been working for only about 2 hours prior to the break that led to Davis’ drowning. Although Brown and Reichardt remember a different timeline of events, both accounts paint essentially the same picture. Mr. Reichardt

³ The statement set forth in Mack is subjunctive rather than conjunctive. See Mack 207 S.C. at 264 (“acts as are necessary to the life, comfort, and convenience of the servant...”)

testified that he follows the same schedule every day. The morning starts at 7:30 a.m. (R. p. 175, lines 5-6). The prisoners break for 10-15 minutes around 9:30 or 10:00 a.m. then work until 11:30 when they break for lunch. (R. p. 176, line 24-p. 177, line 24). After lunch, the inmates return to work until sometime between 2:00 and 3:00 p.m. when they take another break. *Id.* Brown recalls the drowning having occurred just before lunch. (R. p. 107, lines 17-25). Mr. Reichardt recalls that it happened during the afternoon break. (R. p. 177, lines 23-24). In either case, the inmates would have been coming off either a morning or lunch break and would not have been working continuously for any extended length of time prior to the drowning such that swimming would have been required to seek immediate much less imperative relief.

More importantly, Mr. Reichardt testified that the County was conscious of the heat and afforded multiple opportunities for the inmates to seek comfort from the same. Each inmate was given salt tablets to prevent dehydration and, on hot days, were allowed to take additional breaks. (R. p. 174, lines 1-3). Mr. Reichardt testified that one of his job responsibilities was to make sure the inmates didn't get overheated and that, if the men came to him when they got hot, he would let them "go sit on the bus or go get some water." (R. p. 160, line 22-p. 161, line 3). Mr. Reichardt stated that there were fans on the bus. (R. p. 164, lines 8-10). In fact, Mr. Reichardt testified that prisoners have access to water "all day long" and can take a break from work at any time to get water. (R. p. 215, line 22-p. 216, line 14). Although Brown remembers the water having run out on the day of the drowning (R. p. 106, lines 21-22), Mr. Reichardt was adamant that on June 15, 2010, anyone could have taken a break to get water at any time. (R. p. 216, lines 10-14).

The frequency, or instead, lack of frequency with which the inmates participated in swimming activities also speaks to the non-imperative nature of the action. The inmates on bus detail certainly encounter numerous days of extreme heat throughout the year. However, according to Mr. Reichardt, the men under his watch only worked near the Pee Dee River two or three days out of every year. (R. p. 169, lines 10-14). The inmates would occasionally swim in ponds or other bodies of water but, on most days, did not have access to any water for purposes of swimming.

More importantly, Mr. Reichardt testified, following Davis' drowning, that "[t]hey ain't going in the water again." (R. p. 198, lines 22-24). "I wouldn't do it again." (R. p. 210, line 15). Clearly, then, it can be inferred that the act of swimming is not necessary or imperative to the work of picking up litter or seeking relief from the discomfort of heat. Juxtaposing the current scenario with those to which the personal comfort doctrine is typically applied, such a statement would be akin to an employer declaring his employees would never eat or drink water again while on the job.

Because Appellants' were not engaged in an activity that constituted either a brief pause or imperative act at the time of their injuries, this claim should not be subject to the personal comfort doctrine and should not be barred pursuant to the exclusivity provision of the Workers' Compensation Act.

B. The Court should not extend the application of the personal comfort doctrine to encompass the Appellants' activities in this action.

The body of Workers' Compensation law in South Carolina must be applied to a much broader range of issues than simply those facts presented by this action. For the reasons stated above, Appellants contend that the personal comfort doctrine, as it currently exists, does not apply to Appellants' accident. Appellants would further argue,

as set forth more fully below, that strong and compelling public policy considerations should discourage this Court from expanding the applicability or scope of the doctrine.

As our Supreme Court noted in Osteen the personal comfort doctrine has “consistently been limited.” Osteen, 333 S.C. at 47. This is important because the doctrine, by its very nature, runs counter to the plain language of the Workers’ Compensation Act that requires covered accidents to arise out of and in the course of employment. S.C. Code Ann. § 41-1-160. Although the doctrine, when narrowly construed, makes sense and may, indeed, even promote the purpose of the act, if taken too far, it could subvert the act altogether.

Swimming is an action so far outside the realm of normal everyday necessities that it should not and cannot reasonably be construed as imperative in seeking relief from discomfort. To do so could potentially open Pandora’s box and overwhelm the Workers’ Compensation Commission with claims clearly not arising out of or in the course of employment.

By way of example, suppose the air conditioner malfunctioned at the Court of Appeals in the middle of a hot Columbia summer. One might reasonably expect that court staff and officials would bring fans to work, take extended breaks for water and other refreshments, or possibly even retire to the restroom to splash cold water on their faces. An injury or accident during any one of these acts would reasonably fall under the personal comfort doctrine. However, one would not expect these individuals to jump into the Broad River during lunch. To do so would surely constitute more than a brief pause from work related activities.

It is true, of course, that regardless of job type, most employees probably would not start swimming at work simply because this Court expanded the personal comfort doctrine. Indeed, the precedent is worrisome not so much for its potential impact on work related drownings but in how such a broad expansion might be cited and argued for application in any number of other scenarios.

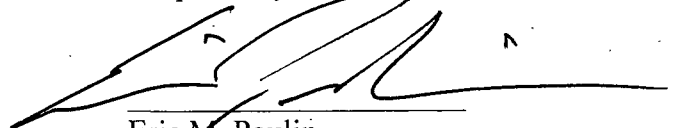
For these reasons, Appellants would argue that Respondents' preferred interpretation of the Act, and that set forth by the Trial Court, would negatively impact the policies of this state, frustrate justice, and should be avoided.

CONCLUSION

For the reasons stated, the Order of the trial court should be reversed. This action should be remanded to the Circuit Court for a trial and final determination on the merits.

November 11, 2012

Respectfully submitted,



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William H. Seals, Jr., Circuit Court Judge

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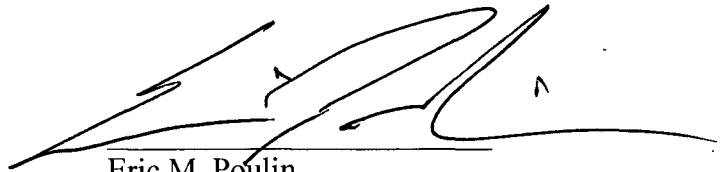
Marion County and Marion County
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Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b),
SCACR.

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William H. Seals, Circuit Court Judge

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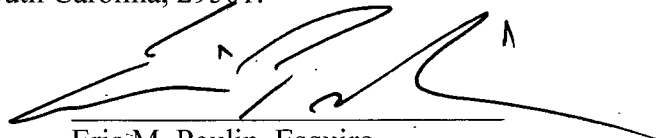
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Marion County and Marion County Prison
Camp.....Respondents.

PROOF OF SERVICE

I certify that I have served a copy of Appellants' Final Brief on Marion County and Marion County Prison Camp by depositing a copy of it in the United States Mail, postage prepaid, on November 13, 2012, addressed to their attorney of record, D. Malloy McEachin, 2117 W. Palmetto Street, Suite C, Florence, South Carolina, 29501.

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