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-33-941

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

v.

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

FINAL BRIEF OF RESPONDENTS

D. Malloy McEachin, Jr.
McEachin & McEachin, Jr.
2117-C West Palmetto Street
Florence, South Carolina 29501
(843) 665-0135
Attorney for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

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

Final judgment was entered on July 17, 2012 and disposed of all claims of the Plaintiffs'. 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. §14-8-200.

STATEMENT OF ISSUES ON APPEAL

I. Were Appellant's activities within the scope of the personal comfort doctrine as currently applied in South Carolina?

II. Was the Court correct in its application of the personal comfort doctrine to encompass the Appellant's activity in this action?

STATEMENT OF THE CASE

Inmates at the Marion County Prison Camp reduce jail time by voluntarily engaging in various work activities at the Marion County Prison Camp (R. p. 101, lines 15-25; R. p. 102, lines 1-25). An inmate receives one (1) day off of his sentence for each day he works on a prison work project (R. p. 103, lines 22-25)

On June 15, 2010, the Appellants were working on the trash detail for the Marion County Prison Camp. They were picking up trash on Highway 501 in Marion County (R. p. 106, lines 10-19). They received good time credit for this activity (R. p. 103, lines 6-25, R. p. 104, lines 1-25). Their engagement in this activity was voluntary on their part (R. p. 105, lines 22-25, R. p. 106, lines 1-5).

While the Appellants, as well as the other inmates at the Marion County Prison Camp, were working on Highway 501, the temperature was extremely hot (R. p. 104, lines 24-25, R. p. 105, lines 1-4). An inmate requested that all of the workers be allowed to jump

in the Little Pee Dee River to cool off (R. p. 107, lines 22-25, R. p. 108, lines 1-8). John Reichardt was the bus driver of the work detail. He inquired of the Appellants if they knew how to swim (R. p. 163, lines 11-14, R. p. 180, lines 2-12). He was advised that they did (R. p. 122, lines 12-16, R. p. 180, lines 2-12). Mr. Davis advised Mr. Reichardt that he was a good swimmer (R. p. 181, line 25, R. p. 182, lines 1-25, R. p. 183, lines 1-5).

The Appellants as well as other inmates went into the river to cool themselves. Appellant Davis encountered difficulty and drowned. Appellant Brown also encountered difficulty but was pulled back to the bank by Mr. Reichardt with a fishing line (R. p. 195, lines 15-25). A Worker's Compensation action was initiated on behalf of the statutory beneficiaries of Mr. Davis (R. p. 245-266). At the time of the events relating to the Appellants' action, Marion County had in effect a Resolution providing for Worker's Compensation coverage for inmates at its jail (R. p. 240-242).

The inmates went into the river during a work break as respit from their labors (R. p. 106, lines 24-25, R. p. 107, lines 1-25). The inmates were to continue working after they took this break (R. p. 107, lines 19-23).

Mr. Reichardt gave the inmates permission to go into the river to cool off after he inquired if they knew how to swim (R. p. 108, lines 2-8).

The Respondents filed a Motion for Summary Judgment which was granted on July 9, 2012. This appeal is from the Order of Judgment in favor of the Respondents.

STANDARD OF APPELLATE REVIEW

This Court reviews the granting of Summary Judgment under the same standard applied by the trial Court. George v. Fabri, 345 S.C. 440, 548 S.E. 2d 868 (2001).

ARGUMENTS

I. THE TRIAL COURT WAS CORRECT IN FINDING THAT APPELLANT'S INJURIES AND RESULTING CLAIMS AROSE OUT OF

AN ACCIDENT COVERED BY THE EXCLUSIVITY PROVISION OF THE WORKER'S COMPENSATION STATUTE

The standard of review which applies is found in the Rules of Court and Case Law pursuant Rule 56 (c), of the South Carolina Rules of Civil Procedure. Summary Judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Osborne v. Adams, 346 S.C. 4, 550 S. E. 2d 319 (2001). The standard applicable is that in determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the non-moving party. Summer v. Carpenter, 328 S.C. 36, 492 S.E. 2d 55 (1977).

The causes of action set forth in the Complaint are guided by the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-10, et. seq. They are also governed by the South Carolina Worker's Compensation Act. S.C. Code Ann. §42-1-500 provides that a County may elect by Resolution to cover its prisoner's under Worker's Compensation insurance. As demonstrated by the Affidavit of the Marion County attorney, Marion County passed a Resolution prior to the events set forth in this action, covering its inmates under Worker's Compensation insurance (Affidavit of Charles McLain with Resolution attached as Exhibit "A" to the Affidavit). Under South Carolina law, the Worker's Compensation Act is the exclusive remedy against an employer for an employee's work related accident or injury. Phillip v. Blanchard, 358 S.C. 536, 595 S.E. 2d 831, 833.

On the day in question it was extremely hot. A group of inmates of the Marion County Prison Camp had elected to engage in work to reduce their jail time. This was a benefit to the inmates as well as to the County. On an extremely hot day, during a break period, the inmates requested permission to swim in the Little Pee Dee River. A number of inmates waded in the river and a number of the inmates swam in the river. The Appellants

were in the group of inmates that swam in the river. The inmates were accustomed to taking breaks during their work day and the events which gave rise to this action occurred during a break.

The Appellants were never instructed not to go swimming and in fact were given permission to swim with the other inmates by Mr. Reichardt (R. p. 107, lines 23-25, R. p. 108, lines 1-8). It was extremely hot on this day and the cooling effect of the swim was an aid to the inmates as well as the County for the work to be done during the balance of the day.

Though the Appellant's act of swimming was not directly related to the work they were doing on that day, it was to seek cooling from the heat during a work break.

The South Carolina Courts have recognized that there are circumstances that even though they do not occur during actual work activity give rise to being compensable under the Worker' Compensation Act. The personal comfort doctrine provides that an employee who is seeking relief from discomfort, though not actually engaged in the scope of his employment, is still covered under the Worker's Compensation Act. Mack v. Branch 12, Post Exchange, 207 S.C. 258, 35 S.E. 2d 838 (S.C. 1945). Ostene v. Greenville County School District, 33 S.C. 43, 508 S.E. 2d 21 (S.C. 1998).

This doctrine establishes that activity while not in the direct pursuit of an employer's business, are covered under the South Carolina Worker's Compensation Act. The following cases in this State have held that activities such as eating, drinking, smoking, seeking warmth, shelter, or medication are compensable under the personal comfort doctrine. Latoy v. Easley Cotton Mills, 218 S.C. 350, 62 S.E. 2d 772 (1950). Mack v. Branch 12, Post Exchange, 207 S.C. 258, 35 S.E. 2d 838 (S.C. 1945).

Professor Larson recognizes the personal comfort doctrine in his treatise. In examples given by Professor Larson, swimming to relieve the discomfort of heat while working is recognized as a circumstance which satisfies the "arising out of" and the "in the course of" requirement of the Worker's Compensation Act. Larson §21.05(2). The personal comfort doctrine is also recognized in Corpus Juris Secundum. "Acts necessary to the likes, comfort, or convenience of an employee while at work, although personal to him and not technically acts of service, or incidental to the service, and an injury occurring while in the performance of such acts is compensable as 'arising out of,' and 'in the course of, the employment.' " 99 CJS Workman's Compensation §220.

Professor Larson and Corpus Juris Secundum analyzed the Personal Comfort Doctrine and made the distinction between an activity that is for the accommodation of a personal need of an employee versus the accommodation that is incidental to his employment. The facts in this case are indisputable that it was an extremely hot day, the inmates were overheated, and they requested permission to go into Little Pee Dee River to cool off so that they could continue their work. This act by the employees of going into the Little Pee Dee River was incidental to the work they were doing on the day in question. At the time of their injuries, the Appellants were under the direction and control of the Respondents. They went into the river to cool their body temperature.

South Carolina's Worker's Compensation statutory scheme was adopted from the State of North Carolina. The decisions by the North Carolina Appellate Courts have precedential value in interpreting the South Carolina Worker's Compensation statutes. In Dayal v. Provident Life, 71 N.C. App. 131, 321 S.E. 2d 454, the North Carolina Court held:

> "An employee, while about his employer's business, may do those things which are necessary to his own health and comfort, even though personal to himself, and such acts are regarded as incidental to the employment."

In South Carolina, the personal comfort doctrine includes actions arising from smoking and self medication and medication by others. Portee v. South Carolina State Hospital, 234 S.C. 50, 106 S.E. 2d 670 (1959). The Courts in North Carolina have stated that the provisons of the Worker's Compensation Act are to be construed liberally in favor of coverage for an employee. Stevenson v. City of Durham, 281 N.C. 300, 188 S.E. 2d 281 (1972). In South Carolina, S. C. Code Ann. §42-1-540 provides that Worker's Compensation Act is the exclusive remedy for an employee injured while at work.

The South Carolina Tort Claims Act removed the doctrine of sovereign immunity in certain instances. Sovereign immunity is retained by governmental entities under certain circumstances. One of those is found in S.C. Code Ann. §15-78-60 (14) which provides that sovereign immunity is not waived as a result of:

> Any claimed covered by the South Carolina Worker's Compensation Act, except claims by or on behalf of an injured employee who recovered damages from any person other than the employer, South Carolina Unemployment Compensation Act, or the South Carolina Employee's Grievance Act.

Under this provision of the Tort Claims Act, Marion County retains sovereign immunity in regards to any claim against it by the Appellants.

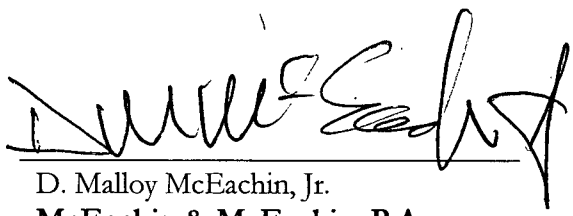
In analyzing the provisions of S.C. Code Ann. §42-1-500 and the provisions of the South Carolina Tort Claims Act, the Appellants were exclusively covered under the South Carolina Worker's Compensation Act. Therefore, Marion County retains sovereign immunity under the facts of this appeal.

There is a pending Worker's Compensation action brought on behalf of Ronnie Earl Davis. The injuries of both Appellants are governed by the terms of the South Carolina Worker's Compensation Act and the South Carolina Tort Claims Act retains immunity for the County of Marion and therefore bars the Appellants' claim against Marion County.

CONCLUSION

In viewing all the facts in the light most favorable to the Appellants, it is indisputable that the injuries of the Appellants arose out of and in the course of their employment. The course of employment is not broken by their acts of swimming which were for their personal comfort and incidental to the work they were doing on the date in question. On the day in question, it was of extreme heat and the cooling effect of the swim during a permitted work break would improve the efficiency of the inmates of the Marion County Prison Camp. Under these circumstances, the Appellants were covered under the South Carolina Worker's Compensation Act and it is the Appellants' exclusive remedy for any injuries suffered. It is respectfully submitted that the decision of the lower Court be sustained.

Respectfully submitted,



D. Malloy McEachin, Jr.
McEachin & McEachin, P.A.
2117-C West Palmetto Street
Florence, South Carolina 29501
(843) 665-0135
Attorney for Respondents

Florence, South Carolina

November 19, 2012

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-33-941

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

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 207(b)(1), SCACR.

D. Malloy McEachin, Jr.
McEachin & McEachin, P.A.
2117-C West Palmetto Street
Florence, South Carolina 29501
(843) 665-0135
Attorney for Respondents

Florence, South Carolina

November 19, 2012

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-33-941

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

v.

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

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Final Brief of Respondents in the above-referenced matter was served on all counsel today by placing a copy in the United States mail, postage prepaid, addressed to:

Eric M. Poulin, Esq.
Anastopoulo Law Firm, LLC
2850 Ashley Phosphate Rd., Ste. B
North Charleston, SC 29418
843-614-8888

Tiffany D. Munn

Tiffany D. Munn
McEachin & McEachin, P.A.
2117-C West Palmetto Street
Florence, SC 29501
843-665-0135

Florence, SC
November 19, 2012