

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE FULL COMMISSION OF THE SOUTH CAROLINA WORKERS'
COMPENSTION COMMISSION

WCC FILE NO.: 1206355
Appellate Tracking No.: 2013-002666

FRANCES BARON,

EMPLOYEE
CLAIMANT/APELLANT,

V.

SANCTUARY HOSPICE

EMPLOYER,

AND

GUARANTEE
INSURANCE COMPANY C/O
PATRIOT NATIONAL
INSURANCE GROUP,

CARRIER,
RESPONDENTS.

REPLY BRIEF OF APPELLANT

William G. Jenkins, Jr. (SC Bar No.: 02982)
JENKINS & ESQUIVEL, P.A.
P.O. Box 6855
Hilton Head, SC 29938
Phone: (843) 785-8800
Fax: (803)785-5811
Attorney for Appellant

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ARGUMENT

Respondent's principal argument against compensability comes from language cited in *Broughton v. South of the Border*, 336 S.C. 488, 520 S.E.2d 634 (Ct. App. 1999) wherein, it was set forth that in an analysis of the "arising out of" requirement of §42-1-160(A):

"the injury arises out of" the employment when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

This language was first adopted by the South Carolina Courts in *Eargle v. S. C. Electric and Gas*, 205 S.C. 423, 32 S.E.2d 240 (1944) wherein the Court expounded on the above language by quoting *Cudahy v. Parramore*, 263 U.S. 418, 44 S.Ct. 153, 68 L.Ed. 366, 30 A.L.R. 532; as follows;

The fact that the accident happens upon a public road or street, and that the danger is one to which the general public is likewise exposed, is not conclusive against the existence of a causal relationship, if the danger be one to which the employee, by reason of and in connection with his employment, is subjected peculiarly or to an abnormal degree.

The *Eargle* case involved an employee traveling to work by boat, having had two other employer sanctioned methods of ingress rendered too dangerous. The employee suffered a mishap, and died during the course of his voyage across a lake to his place of employment, a steam plant. The Court discussed the "common to the neighborhood" language as follows,

Here, the location of the plant was at a place so situated as to make the two customary ways of immediate ingress impracticable on the morning of the accident. In any real and practical sense, can it be said that Eargle unnecessarily increased the risk of injury to himself by

using his boat, beyond that contemplated in his contract of employment, or by an implied requirement in the contract of employment? We do not think so. The danger he incurred was not that of an ordinary member of the public, or a risk common to the neighborhood, but was the subjection of the employee to that danger by the conditions of his employment.

The Court next revisited the *Eargle* “arising out of” language in *Douglas v. Spartan Mills*, 245 S.C. 265, 140 S.E.2d 173 (1965). *Douglas* involved a claimant, who was employed as a doffer in a textile mill, being involved in an automobile accident in route to a Workers Compensation hearing. The Court, in denying compensation, found that claimant’s attendance at a Workers Compensation hearing was a personal errand, for his own benefit, and not connected with his employment. Using the *Eargle* analysis, claimant’s employment failed to subject him to the particular harm which caused his injury.

Gray v. Club Group, 339 S.C. 173, 528 S.E.2d 435 (Ct. App. 2000) involved a claimant who had been hired to drive information, using his personal vehicle, from Savannah to Hilton Head Island and back being killed in an automobile accident while in route to his first stop in Savannah. He was paid mileage for the trip, including mileage from his home in Savannah to his first stop, and then on to Hilton Head. The Court of Appeals found the case compensable in that, the accident was directly attributable to his duties as a courier in that, had he not been hired as a courier, he would have been in route to Hilton Head instead of in route to pick up the items he was to deliver. In so doing the Court of Appeals utilized the *Eargle* “arising out of” language cited in *Douglas*. This result is clearly consistent with *Eargle* in that claimant’s employment subjected him to the hazards of highway travel.

Shuler v. Gregory Electric, 366 S.C. 435, 622 S.E.2d 569 (Ct. App. 2005) involved a claimant who was fatally injured while returning from a physical therapy visit necessitated by a previous work-related injury in her personal vehicle. The Court distinguished *Douglas* by explaining that the *Shuler* claimant was required by law to attend her physical therapy sessions,

as to fail to do so would result in a loss of benefits. It is of special note that the employer in *Shuler* made the identical argument Respondent is making in support of the non-compensability of the present claim, specifically, that claimant was operating her personal vehicle at the time of the accident, and that claimant was exposed to only those dangers of driving a vehicle on a public road.

Like the claimant in *Douglas*, Employer points out that *Shuler* was operating her personal vehicle at the time of the accident, and was exposed only to the dangers of driving an automobile on a public road. However, unlike the claimant in *Douglas*, *Shuler* was traveling from a medical visit, albeit unplanned, that was necessitated by her previous compensable injury.

Shuler, 366 S.C. 435, 622 S.E.2d 569,572. This argument is obviously made in an attempt to correlate the claimant's driving of an automobile to a "hazard to which the workman would have been equally exposed apart from the employment," or a "causative danger not common to the neighborhood." The *Shuler* Court failed to undertake a discussion of this argument which it apparently found to be unpersuasive and, instead, focused on the fact that claimant's attendance at a medical provider visit was a requirement of her employment.

The "common to the neighborhood" and "equally exposed to apart from employment" language of *Eargle* was again used as a basis for analysis in *Hall v. Desert Aire*, 376 S.C. 338, 656 S.E.2d 753 (Ct. App. 2007). This case involved a sales manager on a business trip to Arkansas who had dinner at the home of a customer; after consuming alcohol and discussing the employer's business over dinner, claimant and the customer walked outside and decided to continue their business discussions while riding in the customer's jeep. While riding in the jeep with the customer driving, and the claimant in the passenger seat, the jeep overturned and caused serious injuries to the claimant. Desert Aire contended that Hall's employment did not

proximately cause his injuries. This Court focused on analysis of whether the employment was a proximate cause of claimant's injuries; in doing so this Court decided the "arising out of" prong of S.C. Code Ann. § 42-1-460 by focusing on claimant's *raison d'être*, and concluded that the entire reason for the business trip and dinner accompanied by alcohol consumption was attributable to claimant's employment, and that but for these employment activities Hall would not have traveled to the customer's home, attended a business dinner, and continued his discussions of business into the evening. There is no mention in the opinion as to whether the act of traveling as a passenger in a jeep is one "common to the neighborhood" or to which claimant could have been "equally exposed apart from employment."

The North Carolina Court of Appeals decided the case of *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 616 S.E.2d 403 (2005) which is remarkably similar to the present case in that in the present case Appellant was a registered nurse required to use her automobile to visit patients incident to her employment. Appellant was a traveling nurse who was traveling from Beaufort, South Carolina, where she had seen a patient, to her home office where she was to pick up medicine for delivery to her next patient at the time of her vehicular accident. February 27, 2013 Hearing Transcript, page 12, lines 15-25. In *Chavis*, the claimant was employed as a certified nurse assistant who, like Appellant, traveled to the homes of various patients incident to her employment. Claimant was paid mileage for her travel. Claimant traveled to her first patient's home on the day of the accident, and was informed by the patient that she needed to go out to take care of some personal errands for about twenty minutes. Claimant was not allowed to stay at a patient's home while the patient was not there, and had been previously instructed by her superior to go out and get something to eat during these periods of time. Claimant dropped off her father's wallet and proceeded back to the patient's home to meet her after her twenty

minute personal errand. On the way back to the patient's home, claimant was injured when she ran off the road after an idiopathic event, and ran into a church. Employer argued that the accident did not "arise out of" claimant's employment but was caused by her idiopathic condition. The Court, using the precise language set forth in *Eargle* and subsequent South Carolina cases employed the following analysis,

The words arising out of the employment refer to the origin or cause of the accidental injury. *Roberts*, 321 N.C. at 354, 364 S.E.2d 420. A contributing proximate cause of the injury must be a risk inherent or incidental to the employment, and must be one to which the employee would not have been equally exposed to apart from the employment." *Culpepper*, 93 N.C. App. At 248, 377 S.E.2d at 781. Under this "increased risk" analysis, the "causative danger must be peculiar to the work and not common to the neighborhood." *Gallimore*, 292 N.C. at 404, 233 S.E.2d at 532. Where a plaintiff's job requires him or her to travel from his or her place of work to various places in the community, the job exposes the plaintiff to the risk of travel. *Warren v. City of Wilmington*, 43 N.C. App 748, 750, 259 S.E.2d 786, 788 (1979).

In this case Ms. Chavis' job required her to travel to and from different patients' homes, exposing her to the risk of travel. This increased travel time is an "increased risk" inherent to the employment. *Culpepper*, 93 N.C. App. at 248, 377 S.E.2d at 781.

Since Ms. Chavis' work required her to face the increased risk of constant road travel on her job, we hold that the car accident "arose out of" her employment, even though her idiopathic condition may have been a contributing cause. *Vause*, 233 N.C. at 96, 63 S.E.2d at 179.

Respondent next argues that some cases cited by Appellant do not support her position:

The first case cited by Respondent is *Kennecott v. Industrial Commission of Utah*, 675 P.2d 1187, 1983 Utah LEXIS 1238 (1983). This case was cited by Appellant for purposes of showing that the state of Utah has adopted the language contained in *Larson* setting forth the exceptions, including traveling in a moving vehicle, to the rule of injuries initially precipitated by idiopathic events being non-compensable as was *Koehler v. Wills*, 608 N.W.2d 1, 2000 Iowa Sup. LEXIS 42 (IOWA 2000), *Flanner v. Tulsa*, 2002 OK 8, 41 P.3d 972 (2002), *Ware v. State Workman's Compensation Comm.*, 160 W. Va. 382, 234 S.E.2d 778 (W. Va. 1977), *Burdette v. Perlman*, 954 N.E.2d 925, 2011 Ind. App. LEXIS 1984 (Ind. Ct. App. 2011), *Workman v. Wesley Manor*,

462 S.W.2d 898, 1971 Ky. LEXIS 555 (Ky. Ct. App. 1971). The case of *Irby v. Republic Creosoting*, 228 F.2d 195 (5th. Cir. 1955) was cited to show that the state of Alabama has adopted the rule that an idiopathic fall, and the injuries therefrom, are compensable where the employment contributed to the severity of the injuries.

Respondent next argues that there should be a distinction with respect to what type of moving vehicle claimant is traveling. As Respondent notes in its brief, *Larson* makes no distinction as to what type vehicle claimant is traveling in provided the severity of the injuries is exacerbated by the fact that the claimant is traveling in a moving vehicle. Nor do any reported cases make such a distinction. Many reported cases including *Chavis*, alluded to above, involve the use of personal vehicles while experiencing an idiopathic event. Appellant would submit that as long as the moving vehicle exacerbates the injury, it fits within the widely established rule. There is likewise no reported case which makes a distinction based on the type highway on which the claimant is traveling on. The South Carolina cases cited above simply undertake an analysis of whether the employment required claimant to travel in a moving vehicle incident to his or her employment.

Respondent cites cases which are factually distinct from the present case in support of its position. *Youngblood v. Fallston*, 180, Md. App 389, 951 A.2d 118 (Md. App. 2008), *Nottoway v. Thompson*, 1995 Va. App. LEXIS 341 (Va. App. 1995), and *Elliott v. Industrial Comm.*, 153 Ill. App. 3d 238, 505 N.E.2d 1062 (Ill. App. Ct. 1987) all involve step or stairway falls which are separate, and distinct from idiopathic episodes suffered while driving a moving vehicle, and have been so treated in the reported cases of other states.

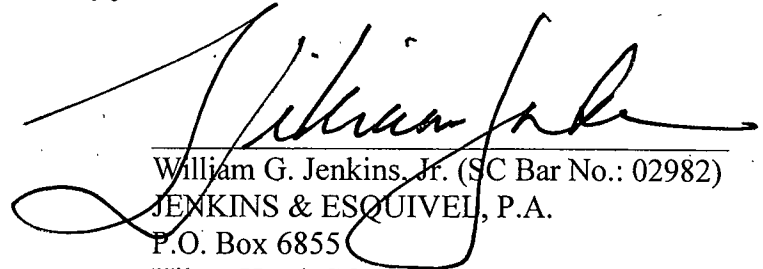
Respondent next cites two Virginia cases which are worthy of discussion. The first is *Virginia Department of Transportation v. Mosebrook*, 13 Va. App. 536, 413 S.E.2d 350 (Va. Ct.

App. 1992) which involved a claimant, who was operating a dump truck, and crashed into a tree. Claimant was treated at the Emergency Room, and found to have suffered a cerebral hemorrhage. The evidence failed to determine whether the hemorrhage occurred before or after the claimant crashed into a tree. The only testimony adduced in this regard, was that it was “possible” that the aneurism ruptured, causing severe bleeding and further causing Mosebrook to run off the road, and crash into a tree. The Court found that there was no credible evidence that the conditions of employment caused or contributed to claimant’s cerebral hemorrhage or contributed to Mosebrook’s injuries because the only injury Mosebrook was found to have suffered was a cerebral hemorrhage. This case presents a rather unique set of facts which are separate and distinct from the present case. *Mosebrook* therefore involves a case which is unexplained, in that, given the established evidence it was impossible to determine whether the injury resulted from an idiopathic event or not. The other case cited is *Hill v. Southern Tank Transp.*, 44 Va. App. 725, 607 S.E.2d 730 (Va. Ct. App. 2005). *Hill* involved a tractor/trailer driver on route from Kimbalton, Virginia to Bennettsville, South Carolina. Hill left Kimbalton at midnight, and drove to Ashboro, North Carolina arriving at between 4:30 and 5:00 a.m. where he performed a routine tire check. Claimant got back in his truck, and remembers nothing after this point. Claimant was severely injured when his vehicle ran off the road and overturned. Claimant testified at the hearing that he had no recollection of the event, including, how it happened and when it happened. Claimant further offered no evidence as to the cause of the accident. The Court found this to be an unexplained, non-fatal accident, and because of this there was no presumption that the injuries sustained arose out of the employment. This was not an idiopathic case involving an exacerbation of injuries due to the claimant operating a moving vehicle, but rather was an unexplained case, in which the cause of the accident is unknown. This type case is

not compensable under Virginia law. This case, like *Mosebrook*, gives us no guidance as to how the present case would be decided under Virginia law. It is worthy of note that the Virginia Courts have carved out an exception to the rule that excludes coverage for unpeculiar risks, or risks common to everyone, and has adopted the position that such an exclusion for ordinary risks do not necessarily apply to vehicle accidents caused by ordinary street risks. The exception to the rule, that the risk of employment must be a risk to which the common neighborhood is not exposed is referred to as the “street risk” doctrine. This principal recognizes compensable injuries that occur in vehicular collisions while an employee is on his or her master’s business. See *Marketing Profiles v. Hill*, 17 Va. App. 431, 435, 437 S.E.2d 727,730(Va. Ct. App. 1993). See also *Lawrence J. Pascal, Workers Compensation Practice in Virginia* ¶ 2.401, at 58 (8th ed. 2011). The Virginia Courts have thus taken the position that risks to which the general public is “equally exposed” are compensable in vehicle accident cases. In sum, Virginia has carved out an exception to the “arising out of” definition set forth in *Eargle* for motor vehicle accidents, while South Carolina has adopted the view that the terms “common to the neighborhood” and “equally exposed apart from employment” are not dispositive, or controlling in the analysis of whether an injury “arises out of” employment. In either case the result is the same. Should the rule be otherwise, it would render all injuries sustained in motor vehicle collisions while working non-compensable as they would fail to meet the “arising out of” prong of the analysis. The effect of such a ruling by this Court would be to overrule all Workers Compensation cases found compensable which arose out of vehicular collisions. Finally, Appellant would point out that Respondent has not cited one case from any jurisdiction in her brief in which a proven idiopathic occurrence taking place in a motor vehicle involving injuries sustained in the ensuing accident was not found compensable. Should this Court find the present case non-compensable it would

constitute the first finding of non-compensability of a vehicular accident precipitated by a proven idiopathic episode with injuries exacerbated by the fact that the claimant was traveling in a moving vehicle at the time of the accident in any jurisdiction.

April 23, 2014



William G. Jenkins, Jr. (SC Bar No.: 02982)

JENKINS & ESQUIVEL, P.A.

P.O. Box 6855

Hilton Head, SC 29938

Phone: (843) 785-8800

Fax: (843) 785-55811

Attorney for Appellant