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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

South Carolina Workers' Compensation Commission Appellate Panel

Appellate Case No. 2016-002148

Jose Martinez, Respondent,

v.

Jose Efrain Henriquez Salgado; Farley Construction; Auto-Owners Insurance Company; and Builders Mutual Insurance Company,

Of whom Jose Efrain Henriquez Salgado and Auto-Owners Insurance Company are the Appellants,

And

Farley Construction Co. and Builders Mutual Insurance Company are the Respondents.

APPELLANT'S FINAL REPLY BRIEF

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POINTS OF CLARIFICATION

Appellants must take issue with some of the representations made in the Respondent's Brief regarding the facts of the case and the Appellant's position on some issues. First, Respondents state that Mr. Salgado has intentionally evaded participation in the case. (Resp. Brief at 5). This is pure speculation, as there is no proof that Mr. Salgado intentionally failed to appear for his deposition and/or the original Hearing. Further, Mr. Salgado was not subpoenaed to attend the hearing, and a motion to compel was not filed by Respondents seeking a court order for Mr. Salgado to attend another deposition.

Respondents state in their brief that "[i]t is undisputed that the Claimant worked for Salgado leading up to his accident." (Resp. Brief at 8). This is not correct, as Appellants have maintained throughout litigation that the Claimant worked for many different people, albeit Salgado was one of them. (R. p. 46, lines 16-23; p. 50, lines 1-5, *see also* R. p. 157, lines 24-25; p.158, lines 1-4).

Respondents also state that "Salgado pulled the Claimant off another job that his company was performing in order to direct the Claimant to work on the Petty Street job." (Resp. Brief at 8). This is untrue, and is not reflected in the hearing transcript as cited in Respondent's brief. There is no evidence that the Claimant was working on another one of Salgado's jobs at the time of the referral. In fact, the Claimant testified that the day prior to the injury, he was not working for Salgado. (R. p. 157, lines 24-25; p. 158, lines 1-4)

Respondents argue that "Salgado was responsible for determining how much money he paid the Claimant for his work on December 12, 2014." (Resp. Brief at 8). However, Michael Farley was involved in determining an adequate amount to pay the Claimant for the work he performed (R. p. 89, lines 17-19; p. 90, lines 12-24), and added "$100 for Jose's time on the Petty Street job" to a pre-existing invoice provided by Salgado. (R. p. 79, lines 1-7).

ARGUMENT

1. The Court of Appeals erred in applying the four factor test to determine a direct employment relationship in Porter.

Respondents rely on Porter, in their contention that the Single Commissioner did not err in applying the four factor test to determine the existence of a direct employment relationship. Porter v. Labor Depot, 643 S.E.2d 96, 372 S.C. 560 (2007). Appellants admit that the Court of Appeals used the four factor test in Porter to determine a direct employment relationship, which is in direct contradiction to Appellants' position. Appellants argue against this precedent.

In McLeod v. Starnes, the Supreme Court discussed arguing against a "single precedent case":

> When the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated. There are three elements that enter into the authority of a case claiming to stand as a leading case on the general principles of law: First, the unanimity with which its judgment was pronounced; second, the fact that it has been followed; and, third, the duration of time during which it has been openly followed or tacitly assented to. As, then, the authority of such a case is

> distinctly fortified by the next succeeding case, it is obvious that in the decision of the latter the solidity of the grounds of the former conclusion should be inquired into, for it is only where resort is had to the original sources and a concurring result obtained that the first decision can be said to be fortified by that which follows it. An original case could not possibly gain authority by a mere perfunctory following on the principle of stare decisis.

McLeod v. Starnes, 396 S.C. 647, 723 S.E.2d 198 (2012), *citing* State v. Williams, 13 S.C. 546 (1880). The Court in McLeod further stated that "stare decisis is far more a respect for a body of decisions as opposed to a single case standing alone." *citing* Langley v. Boyter, 284 S.C. 162, 180, 325 S.E.2d 550, 560 (Ct.App.1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985) ("The doctrine of stare decisis says that where a principle of law has become settled by a series of court decisions, it should be followed in similar cases."). "Stare decisis should be used to foster stability and certainty in the law, but not to perpetuate error." Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n, 277 S.C. 1, 282 S.E.2d 230 (1981), *superseded by statute on other grounds*, S.C. Code Ann. § 33-55-200 *et seq.* (2006).

Appellants are unaware of any other case that uses this test to determine the existence of an employment contract, and find no case citing Porter as an authority for this particular issue. The Court in Porter cited the following cases in support of their ruling of law: Nelson v. Yellow Cab Company, 349 S.C. 589, 564 S.E.2d 110 (S.C., 2002); Gray v. Club Group, Ltd, 339 S.C. 173, 528 S.E.2d 435 (S.C. App 2000); Young v. Warr, 252 S.C. 179, 165 S.E.2d 797 (S.C. 1969); and Fuller v. Blanchard, 358 S.C. 536, 595 S.E.2d 831 (Ct. App. 2004); all of which use the four factor test to

determine whether or not the Claimant is an employee or independent contractor, and not for the determination of a direct employment relationship. Appellants also note that, if the Court was found to be in error in Porter, such error would be harmless as the same result would have been reached had the Court applied the employment contract test.

Appellants maintain their position that, even if the four factor test used in Porter is the correct test for establishing a direct employment relationship, the South Carolina Workers' Compensation Commission erred in the application of that test by finding that Salgado was the Claimant's direct employer. Farley Construction admitted that they provided the tools (R. p. 83, lines 12-13), told the Claimant what to do and when to do it (R. p. 85, lines 8-11), had the right to eject the Claimant from their jobsite (R. p. 82, lines 24-25; p. 83, lines 1-2), and paid the claimant based on the hours he worked (R. p. 90, lines 21-24). The Claimant thought that he was working for Farley Construction Company on the day in question (R. p. 50, lines 14-15; p. 53, lines 16-22). Under either test, it is clear that the South Carolina Workers' Compensation Commission findings are not supported by substantial evidence and are clearly erroneous.

2. The "missing witness rule" referenced in Respondent's Brief is not applicable to the case at hand.

The missing witness rule explained in In re Gonzalez is not applicable to the case at hand, and thus no inference should be made. In re Gonzalez, 409 S.C. 621, 763 S.E.2d 210 (S.C. 2014). The Court in In re Gonzalez discussed Davis v. Sparks, in which the Supreme Court recognized the general rule that "a party is not to be

prejudiced by his failure to call a witness who is equally available to the other party." In re Gonzalez, 409 S.C. 621, 763 S.E.2d 210 (S.C. 2014) *citing* Davis v. Sparks, 235 S.C. 326, 111 S.E.2d 545 (1959). Mr. Salgado was not subpoenaed to appear for the original Hearing. Opposing counsel did not move for a continuance at the Hearing, nor file a motion to compel the Salgado to attend his deposition after he failed to appear initially. The witness was just as available to Respondents as he was to the Appellants. More importantly, the Supreme Court explained:

> Generally, the [missing witness] rule is applied when the uncalled witness is an agent, employee, relation, or associate of the party failing to call him, or within some degree of control of said party. Davis, 235 S.C. at 333, 111 S.E.2d at 549. Moreover, the unfavorable inference may be drawn only from a party's failure to call an available, material witness where under all the circumstances, the failure to produce such witness creates suspicion of a willful attempt to withhold competent evidence. Baker v. Port City Steel Erectors, Inc., 261 S.C. at 475–76, 200 S.E.2d at 683. A party need not produce every witness who might testify in his favor, and a failure to do so does not necessarily imply an attempt on his part to suppress the truth. Davis, 235 S.C. at 334, 111 S.E.2d at 549. "Such suspicion is generally held not warranted where the material facts assumed to be within the knowledge of the absent witness have been testified to by other qualified witnesses." Id.

In re Gonzalez, 409 S.C. 621 (S.C. 2014). Here, the suspicion and inference mentioned *supra*, are not warranted in this claim as the facts have been testified to by other witnesses, e.g., the Claimant, Ron Farley, and Michael Farley. Again, the Appellant's arguments are based solely on the evidence in the record, and not based on any out-of-court statements made by Salgado.

3. Respondent's reference to the rule of liberal construction, resolving doubt in favor of coverage, is not applicable to the case at hand.

Respondents are attempting to apply the rule of liberal construction for their benefit by arguing that "to the extent there is doubt as to whether the Claimant was employed by Salgado, this Court should resolve that doubt in favor of coverage so as to effectuate the intent of the act." (Resp. Brief at 8, 9). The rule of liberal construction is that "Workers' Compensation statutes are construed liberally in favor of **coverage**, and South Carolina's policy is to resolve **jurisdictional** doubts in favor of the inclusion of employees within workers' compensation coverage." Porter, 643 S.E.2d 96 (emphasis added). The Supreme Court discussed the common misapplication of this rule in Cross v. Concrete Materials, in which Chief Justice Stukes admitted to misapplying the rule himself in a decision he wrote in 1949. Cross v. Concrete Materials, 114 S.E.2d 828 at 832, 236 S.C. 440 at 447 (S.C. 1960) *discussing* Elrod v. Wellington Mills, Inc., 214 S.C. 171, 51 S.E.2d 620 (S.C. 1949). The Court stated in Cross that the applicable rule is as follows:

> Under other authority, the rule of liberal construction of the compensation acts in favor of the employee, * * * does not dispense with the necessity of evidence to support the award, or of making proof prerequisite to recovery, does not permit a court to award compensation where the requisite proof is lacking, and does not make the rule as to the measure of proof or the sufficiency of evidence different from the rule in ordinary cases or in other civil suits, so that, despite such liberality, the facts relied on must be proved with the same certainty as in other civil cases. So, the rule of liberal construction has been held not to apply to the evidence offered, or required, to establish the claim, or to the function of the commission in hearing evidence or in resolving conflicts in the testimony, and does not operate to distort the proofs or to make the facts other than as they are. A liberal construction of the evidence cannot be substituted for failure of proof of any

> essential element of the claim; and the preponderance of evidence rule has been held not to require, as a matter of law, that doubts arising from the evidence be resolved in favor of one party or the other.

Cross, 114 S.E.2d 828, *citing* 100 C.J.S. Workmen's Compensation § 547(7), pp.602, 603. As the rule of liberal construction applies only to jurisdictional coverage and not the sufficiency of evidence, it is not applicable to the issue of who the Claimant's direct employer was at the time of the accident. The Claimant would be covered under the South Carolina Workers' Compensation Act no matter who his direct employer was at the time of the injury.

CONCLUSION

Appellants acknowledge that the Court in Porter used the four factor test to determine a direct employment relationship, but maintain their position that the Court of Appeals erred in that decision. The issue in all of the cases cited by Porter was whether or not the Claimant was an independent contractor, not the existence of an employment contract. All cases citing Porter as an authority are in reference to other issues. Additionally, the missing witness rule is not applicable to the case at hand as the material facts assumed to be within the knowledge of Salgado have been testified to by other qualified witnesses. Lastly, the rule of liberal construction is not applicable to the claim at hand as that rule deals with jurisdiction, and should not be used to establish the sufficiency of evidence to prove a matter in contention.

For the reasons stated above, Appellants respectfully request that the Appellate Panel issue an Order finding Farley Construction to be the Claimant's

direct employer, finding Farley Construction and Liberty Mutual liable for Claimant's benefits under the Act for the injury sustained on December 12, 2014, and dismissing Salgado and Auto-Owners from this matter with prejudice.

Respectfully Submitted,

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March 8, 2017

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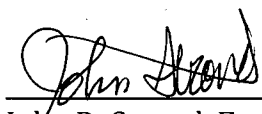
CERTIFICATE OF COUNSEL

The Undersigned hereby certifies that the Appellant's Final Brief and Appellant's Final Reply Brief both comply with Rule 211(b), SCACR.

March 8, 2017



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