THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Full Commission Decision

Appellate Case No. 2018-000652
Workers Compensation Claim No.: 1600686

RECEIVED
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SC Court of Appeals

Francisco Cedano Ramirez, Employee, Appellant,

v.

May River Roofing, Inc., Employer, and American Zurich Insurance Co., Carrier, and Cedano Roofing, Employer, and Traveler's Property & Casualty Co., Carrier,

Of which May River Roofing, Inc. American Zurich Insurance Co., and Travelers Property & Casualty Co. are Respondents.

FINAL BRIEF OF APPELLANT

Joseph DuBois
South Carolina Bar No. 71192
Naert and DuBois, LLC
22 New Orleans Road
Hilton Head Island, SC 29928
(843) 686-5500
ATTORNEY FOR APPELLANT
Francisco Cedeno Ramirez

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1. Whether the Commission erred in concluding factually that Claimant purchased a 'ghost policy' from Travelers Insurance and that Claimant elected not to cover himself on such policy, as well as in concluding as a matter of law that Claimant was not included under such Travelers' policy;

2. Whether the Commission erred in concluding factually that the weight of evidence is on the side of Claimant being an independent contractor who carried valid workers' compensation coverage, as well as concluding as a matter of law that Claimant is not an employee of May River Roofing;

3. Whether the Commission erred in concluding as a matter of law that Claimant cannot recover as a statutory employee of May River Roofing; and

4. Whether the Commission erred in finding that the parties stipulated as to Claimant's applicable compensation rate and in ordering same without analysis of the issue.

Background Facts

Appellant/Claimant Francisco Cedeno Ramirez is a 39-year-old resident of Beaufort County, South Carolina where he earns his living as a roofer. On January 18, 2016, while performing roofing work atop the roof of a home located in Beaufort, South Carolina[1], Claimant fell from the roof to the ground below, a drop of approximately sixteen (16) feet. Claimant was treated at the scene by the Beaufort County EMS and thereafter transported to Beaufort Memorial Hospital. As set forth in a medical questionnaire completed by treating physician Dr. Leland Stoddard, M.D., Claimant suffered injuries including to his back, neck, both shoulders, chest, ribs, lungs, and bilateral upper extremities as a result of the fall.

Statement of the Case

This appeal concerns two consolidated workers' compensation claims brought by Claimant subsequent to his above-described fall against Respondents May River Roofing, American Zurich Insurance, and Travelers Insurance.

On March 3, 2016, Claimant filed a Form 50 hearing request against May River Roofing and American Zurich Insurance seeking workers' compensation benefits including medical treatment and temporary total disability benefits pursuant to Claimant being a direct employee of

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1 The home was owned by John Attridge, who contracted with Eddie Powell of Anchor Construction to manage the project and May River Roofing, Inc. for roofing work in the amount of $12,298.00. (R. pp. 343-346). May River Roofing paid Claimant $1,500.00 for the roofing work. (R. p. 303, line 3).

May River Roofing pursuant to the applicable four-factor right to control test or, alternatively, Claimant being a statutory employee of May River Roofing pursuant to S.C. Code § 42-1-410 and May River Roofing not strictly meeting the requirements for exemption from same set forth in S.C. Code § 42-1-415. By Form 51, dated March 9, 2018, May River Roofing and American Zurich Insurance denied this claim based upon their denial that an employment relationship existed between Claimant and May River Roofing at the time of the accident.

On June 17, 2016, Claimant filed an additional claim relating to the same accident and injuries against Travelers Insurance seeking workers' compensation benefits including medical treatment and temporary total disability benefits pursuant to the plain language of a workers' compensation policy issued to Claimant by Travelers Insurance. By Form 51, dated July 26, 2016, Travelers Insurance denied this claim, asserting that it did not have coverage for Claimant due to Claimant electing to exclude himself from coverage under such Travelers' Insurance policy.

Following the two claims being consolidated by the Commission on July 27, 2016, a hearing was held before Commissioner Gene McCaskill on November 17, 2016. Following such hearing Commission McCaskill denied Claimant's claims by order dated May 23, 2017, with service upon Claimant being made that day. By Form 30 dated June 5, 2017, Claimant sought review of Commissioner McCaskill's order by the Full Commission, which held oral arguments on January 22, 2018. By Order dated March 30, 2018, served upon Claimant the same day, the Full Commission denied Claimant's claims, and by Notice of Appeal dated April 6, 2018, Claimant commenced this appeal.

Standard of Review

Judicial review of a Commission decision is directed by the substantial evidence standard under the Administrative Procedures Act, S.C. Code Ann. § 1-23-380(5) (Supp. 2015); Lark v. Bi-Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). A reviewing court should affirm the decision of the Full Commission unless it is clearly erroneous in view of the substantial evidence of the whole record. Lark, 276 S.C. at 136, 276 S.E.2d at 307. The reviewing court may not substitute its own judgment for that of the Full Commission as to the weight of the evidence on a question of fact, but may reverse if the decision is affected by an error of law. S.C. Code § 1-23-380(5); Etheredge v. Montsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (a reviewing court should reverse, remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law).

In addition, "[a] reviewing court may reverse or modify a decision of an agency if the findings, inferences, conclusions, or decisions of that agency are 'clearly erroneous in view of the reliable, probative and substantial evidence on the whole record.'" Bass v. Isochem, 365 S.C. 454, 467, 617 S.E.2d 369, 376 (Ct. App. 2005), *quoting* Bursey v. South Carolina Dep't of Health & Envt'l Control, 360 S.C. 135, 600 S.E.2d 80 (Ct. App. 2004). "Substantial evidence is not a mere scintilla of evidence, nor the evidence viewed blindly from one side of the case, but is evidence which, considering the record as a whole, would allow reasonable minds to reach the conclusion the administrative agency reached in order to justify its action." Frame v. Resort Services, Inc., 357 S.C. 520, 527-28, 593 S.E.2d 843, 845 (1999).

"We construe workers' compensation law liberally in favor of coverage to further the beneficent purpose of the Workers' Compensation Act; accordingly, only exceptions and

restrictions are strictly construed." Lewis v. L.B. Dynasty, 411 S.C. 637, 641 (2015), citing James v. Anne's Inc., 390 S.C. 188, 198 (2010).

1. Coverage under the plain language of the Traveler's policy
Argument

Claimant asserts that the Commission's

- Finding of Fact No. 8. "[Ms. Isabelle Diaz] testified that the Claimant purchased what is commonly referred to as a 'ghost policy.' In other words, it is a policy that covers no one because the Claimant has no employees. Ms. Diaz testified that the Claimant did not select coverage for himself,"
- Finding of Fact No. 22. "Unfortunately, the Claimant elected not to cover himself on his own policy," and
- Conclusion of Law No. 1. "Under S.C. Code Ann. § 42-1-130, Claimant was a sole proprietor who was not included under Cedano Roofing's workers compensation policy"

are controlled by an error of law and should be reversed, the error of law being the Commission's consideration of evidence outside of the Traveler's Insurance policy itself in the form of the testimony of Ms. Isabelle Diaz and APA submissions relating to Claimant's application for the subject Travelers' Insurance policy.

As the Commission stated in its order, it is uncontroverted that Claimant suffered an injury by accident while performing work on January 18, 2016, when he fell from a roof as described above. (R. p. 10, line 3). Thus, the Commission found that Claimant's accident met the requirements under the Workers Compensation Act for compensability.

At hearing the Claimant asserted that his subject accident was covered by the plain language of the workers' compensation insurance policy issued to him by Traveler's Insurance. (R. pp. 282-300).

As set forth in such policy, Claimant is insured as an individual.

> 1.
>
> INSURED:
> CEDENO RAMIREZ, FRANCISCO DBA
> CEDENO ROOFING & WOODWORKING
> 90 DILLON RD APT D1
> HILTON HEAD SC 29926-3792
>
> Insured Is AN INDIVIDUAL

(R. p. 282, line 9).

Further, such policy provides:

> **B. Who Is Insured**
>
> You are insured if you are an employer named in Item 1 of the Information Page. If that employer is a partnership, and if you are one of its partners, you are insured, but only in your capacity as an employer of the partnership's employees.

(R. p. 286, line 22).

Claimant asserts that he is listed specifically as an individual insured on item 1, and thus he is insured individually by Travelers Insurance for this accident. Claimant further asserts that Cedeno Roofing is not a partnership but rather a sole proprietorship, so the remaining language in this paragraph is inapplicable to the analysis of this claim.

Further, pursuant to the language of the policy "[T]he only agreements relating to this insurance are stated in this policy."

> **A. The Policy**
>
> This policy includes at its effective date the Information Page and all endorsements and schedules listed there. It is a contract of insurance between you (the employer named in Item 1 of the Information Page) and us (the insurer named on the Information Page). The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived except by endorsement issued by us to be part of this policy.

(R p. 286, line 11). Therefore, Claimant asserts that any and all information outside of the subject written policy are subsumed by such policy and are therefore not relevant to the analysis of Claimant's coverage for his claim pursuant to said policy, and should be excluded from evidence in this case.

As set forth in its Order, however, the Commission did consider such extrinsic evidence, including the testimony of insurance agent Isabella Diaz and the application for the Traveler's Insurance policy, finding that "Claimant opted not to cover himself in order to have a less expensive premium." (R. p. 7, line 14). Claimant asserts that consideration of such extrinsic evidence in light of the plain language of the subject policy, including the merger clause, is error, and that such error was controlling in the Commission denying this claim.

Claimant asserts that:

> Insurance policies are subject to general rules of contract construction. Gambrell v. Travelers Ins. Companies, 280 S.C. 69, 310 S.E.2d 814 (1983). Terms of an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. McCracken v. Government Employees Ins. Co., 284 S.C. 66, 325 S.E.2d 62 (1985); Kraft v. Hartford Ins. Companies, 279 S.C. 257, 305 S.E.2d 243 (1983).

Standard Fire Co. v. Marine Contracting and Towing Co., 301 S.C. 418, 392 S.E.2d 460 (S.C., 1990).

It is undisputed that Claimant's January 18, 2016 work accident is compensable. Insofar as Claimant is individually insured for a workers' compensation claim arising from same pursuant to the plain language of the Travelers Insurance policy, the Commission erred as a matter of law in considering evidence extrinsic to the policy and denying Claimant's claim based upon same.

Insofar as such error controlled the Commission's determination as to this claim, such ruling should be reversed. Etheredge v. Montsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (a reviewing court should reverse, remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law). Insofar as plain language of the subject Travelers' Insurance policy is controlling as to the issue of Claimant's coverage in his favor, remanding to the Commission for further inquiry as to same is unnecessary.

2. Coverage under the American Zurich policy pursuant to S.C. Code § 42-1-410

Claimant asserts that the Commission's

- Finding of Fact No. 11, "When we consider the controlling factors as to whether an individual is an employee or an independent contractor, the weight of the evidence is clearly on the side of the Claimant being an independent contractor,"
- Finding of Fact No. 22, "When the evidence is viewed as a whole, we must conclude that the Claimant was a sub-contractor who carried valid workers' compensation coverage," and
- Conclusion of Law No. 2, "Under S.C. Code Ann. § 42-1-130, Claimant is not an employee of May River Roofing or Cedano Roofing; instead, he is the sole proprietor of Cedano Roofing,"

are clearly erroneous in view of the substantial evidence of the whole record applied to the four-factor right to control test as set forth in Lewis v. L.B. Dynasty, 411 S.C. 637 (2015).

As set forth above, at hearing it was uncontroverted that Claimant suffered an injury by accident while performing work on January 18, 2016, when he fell from a roof. (R. p. 10, line 3). The Commission found that Claimant's accident met the requirements under the Workers Compensation Act for compensability. (R. p. 10, line 3).

Claimant asserted that he was a direct employee of May River Roofing and is therefore covered by the American Zurich Insurance policy.

Claimant asserts that, regardless of whether he is deemed an independent contractor by May River Roofing, Claimant is a direct employee pursuant to the applicable four-factor right to control test and, therefore, is covered by May River Roofing's workers compensation policy with American Zurich Insurance.

As set forth in Lewis:

> We construe workers' compensation law liberally in favor of coverage to further the beneficent purpose of the Workers' Compensation Act; accordingly, only exceptions and restrictions to coverage are strictly construed. James v. Anne's Inc., 390 S.C. 188, 198, 701 S.E.2d 730, 735 (2010). The burden of proving the relationship of employer and employee is upon the claimant, and this proof must be made by the greater weight of the evidence. Marlow v. E.L. Jones & Son, Inc., 248 S.C. 568, 570, 151 S.E.2d 747, 748 (1966). Whether a claimant is an employee or independent contractor is a jurisdictional question and therefore the Court may take its own view of the preponderance of the evidence. Wilkinson ex rel. Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 299, 676 S.E.2d 700, 702 (2009). The crux of this determination is the purported employer's right to control the claimant in the performance of his work. Id. In analyzing the nature of a work relationship the Court examines four factors: (1) direct evidence of the right or exercise of control; (2) furnishing of equipment; (3) method of payment; (4) right to fire. Shatto v. McLeod Reg'l Med. Ctr., 406 S.C. 470, 475–76, 753 S.E.2d 416, 419 (2013). Each factor is considered with equal force and the mere presence of one factor indicating an employment relationship is not dispositive of the inquiry. Id.

Direct Evidence of the Right to or Exercise of Control

Claimant first became associated with May River Roofing approximately three (3) years prior to the subject accident after its owner, Antonio Sandoval, met Claimant while he was working at another company and invited him to work with May River Roofing. (R. p. 95, line 16).

Antonio Sandobal, owner of May River Roofing, would typically assign particular residential roofing jobs to Claimant, potentially up to five (5) per day, although some jobs were two or three days. (R. p. 133, line 2; R. p. 96, ln. 15). Antonio Sandobal supervised Claimant's work. (R. p. 96, line 21; R. p. 51, line 21). Antonio Sandobal would sometimes give Claimant directions or indications. (R. p. 114, line 4). Occasionally May River Roofing would send Claimant to a job where it would have to be done on a certain day. (R. p. 114, line 14; R. pg. 117, line 8). Notable was that Antonio required Claimant to work only for May River Roofing. (R. p. 96, line 3; R. p. 62, line 16). Further, Antonio required Claimant to wear May River Roofing T-shirts and use May River Roofing's vehicle-signage while on the projects. (R. p. 96, line 3).

Claimant asserts that he was he was working on the subject construction job because he was assigned to the job by May River Roofing after other employees of May River Roofing could not complete the job. (R. p. 256, line 20; R. p. 98, line 5). Claimant asserts that Antonio Sandobal, owner of May River Roofing, supervised the work Claimant performed, including upon its completion. (R. p. 265, line 2). Claimant asserted that May River categorizes Claimant as a subcontractor solely for its own business purposes, irrespective of the actual relationship between the parties. (R. p. 267, line 13).

May River Roofing provided the shingles, nails, and other roofing materials for Claimant's roofing work from its account with suppliers such as Espy Lumber. Claimant provided his own automobile, nail gun and compressor (without nails), pouch and its contents, and a ladder, although

May River Roofing would lend Claimant its ladder. (R. p. 104, line 2). May River Roofer also supplied Claimant with a blower. (R. p. 105, line 18).

During his tenure with May River Roofing it identified Claimant as an independent roofing sub-contractor. However, May River Roofing used to classify its roofers as employees but made a change to using subcontractors for business reasons. (R. p. 122, line 19). May River Roofing's office manager, Leslie Sandobal, testified that "We went from only having roofers to having subcontractors." (R. p. 134, line 8).

The Furnishing of Equipment

Claimant asserts that May River Roofing provides the materials used in the roofing jobs through its account at ESPY Lumber ("We provide all the materials for all of our subcontractors."). (R. p. 269, lines 10-11).

Claimant also asserts that he is required to wear a May River Roofing shirt while performing his work. (R. p. 260, line 10). Claimant asserts that May River Roofing also provides magnets displaying the name May River Roofing for use on his work truck. R. p. 264, line 20. May River Roofing provided the shingles, nails, and other roofing materials for Claimant's roofing work from its account with suppliers such as Espy Lumber. Claimant provided his own automobile, nail gun and compressor (without nails), pouch and its contents, and a ladder, although May River Roofing would lend Claimant its ladder. (R. p. 104, line 2). May River Roofer also supplied Claimant with a blower. (R. p. 105, line 18).

Method of Payment

Claimant asserts that he is paid by the job but that he does not know how much he will be paid for a job beforehand. (R. 254, line 23). Claimant asserts that he is paid $60 per roofing square (10 square feet of shingles) and $25 per hour by May River Roofing for extra repair work. (R. p.

258, line 24; R. 254, line 8). Claimant is paid via payroll the week following his completion of a job. (R. p. 97, lines 5-6). Claimant is paid $25.00 per hour for repair work, and $60.00 per square for roofing work[2]. Following completion of the roofing work Claimant would report to May River Roofing how many squares the job required and how long Claimant was on the job. (R. p. 113, line 13). Claimant asserts that his average weekly wage from May River Roofing was approximately $1,200.00. (R. p. 101, line 4).

Right to Fire

Claimant asserts that May River Roofing retains the right to hire or fire him for any particular job. (R. p. 101, lines 6-9).

Based upon a review of the substantial evidence in the whole of the record, including the foregoing, Claimant asserts that the Commission was clearly erroneous in failing to find that Claimant's was a direct employee of May River Roofing pursuant to the four-factor right of control test set forth in Lewis.

Further, insofar as a proper review of the substantial evidence in the record of this case results in the preponderance of the evidence weighing being in favor of Claimant being an employee of May River Roofing, and thus covered under May River Roofing's policy with American Zurich Insurance, remanding to the Commission for further inquiry as to this issue is not necessary to reverse the Commission and in favor of Claimant being a direct employee of May River Roofing.

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2 A square is 100 square feet of shingles of roofing material. (R. p. 102, line 22).

3. Coverage under the American Zurich policy pursuant to S.C. Code § 42-1-410

Claimant asserts that the Commission's

- Conclusion of Law No. 3, "Under S.C. Code Ann. § 42-1-400 to -450, Claimant cannot recover as a "statutory employee" of May River Roofing,"

is both controlled by an error of law and clearly erroneous in view of the substantial evidence of the whole record.

As set forth above, at hearing it was uncontroverted that Claimant suffered an injury by accident while performing work on January 18, 2016, when he fell from a roof. (R. p. 10, line 2). The Commission found that Claimant's accident met the requirements under the Workers Compensation Act for compensability. (R. p. 10, line 2).

Claimant asserts that he was a statutory employee of May River Roofing pursuant to S.C. Code § 42-1-410, and is therefore covered by the American Zurich Insurance policy.

S.C. Code § 42-1-410 provides that when any person... referred to as "contractor," contracts to perform or execute any work for another person... the contractor shall be liable to pay to any workman employed in the work any compensation under this title which he would have been liable to pay if that workman had been immediately employed by him. Further, S.C. Code § 42-1-420 provides when a subcontractor in turn contracts with still another person... referred to as a "subcontractor"... the liability of the owner or contractor shall be the same as the liability imposed by S.C. Code § 42-1-400 and S.C. Code § 42-1-410.

Claimant asserts that insofar as he was a subcontractor of May River Roofing, which was a subcontractor to Anchor Construction[3], he is a statutory employee of May River Roofing pursuant to the foregoing statutes.

However, S.C. Code § 42-1-415 provides that upon the submission of documentation to the Commission that a contractor or subcontractor has represented himself to a higher tier subcontractor, contractor, or project owner as having workers' compensation insurance at the time the contractor or subcontractor was engaged to perform work, the higher tier subcontractor, contractor, or project owner must be relieved of any and all liability (emphasis added).

Significantly, Claimant asserts that May River Roofing may not avoid liability pursuant to S.C. Code § 42-1-415 insofar as Claimant did not represent himself to May River Roofing as having workers compensation insurance as the subject Certificate clearly excluded coverage. (R. p. 301). Further, Claimant did not represent anything to May River Roofing regarding workers compensation insurance ("I don't even think he gave it to me. I think his insurance company automatically send [sic] it to me"). (R. p. 266, line 25). Further, despite that Claimant's job on which he was injured began on January 18, 2016 (R. p. 270, lines 6-8), May River Roofing did not request or receive a Certificate on such date, as is required by S.C. Code § 42-1-415 for May River Roofing to be excluded from liability. (R. p. 267, lines 6-11).

Further, Claimant made no representations whatsoever regarding workers compensation insurance at the time he was engaged to perform work on the subject project where he was injured. ("Q: Does [Claimant] provide the certificate of insurance for every job? A: No."). (R. p. 265, line

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3 R. p. 6, line 22.

18). Rather, May River Roofing received the copy of the certificate of insurance from the insurance carrier. (R. p. 265, line 22).

It is undisputed that Claimant's January 18, 2016 work accident is compensable. Insofar as Claimant met all of the requirements pursuant to S.C. Code § 42-1-410, and insofar as May River Roofing, Inc. did not strictly meet the requirements of S.C. Code § 42-1-415, the Commission's conclusion that Claimant cannot recover as a "statutory employee" of May River Roofing is both controlled by an error of law and is clearly erroneous in view of the substantial evidence of the whole record.

Insofar as such error of law controlled the Commission's determination as to this claim, such ruling should be reversed. Etheredge v. Montsanto Co., 349 S.C. 451, 562 S.E.2d 679 (Ct. App. 2002) (a reviewing court should reverse, remand or modify a decision of the Workers' Compensation Commission if it is affected by an error of law). Insofar as the substantial record of the whole of this case supports such a conclusion, remanding to the Commission for further inquiry as to same is unnecessary.

4. Compensation Rate

Claimant asserts that the Commission's

- Stipulation No. 4, "The parties have stipulated that Claimant's average weekly wage is $769.35 with a resulting compensation rate of $512.93"

is clearly erroneous in view of the substantial evidence of the whole record.

A review of the transcript from the November 17, 2016 hearing reveals the following:

> COMMISSIONER: . . . The date of the accident is January 18, 2016. The parties are also going to speak to average weekly wage and comp rate in your positions, please.
>
> . . .

> CLAIMANT'S COUNSEL: . . . The claimant will testify as to his average weekly wage being $1,250, yielding a comp rate of $833.38.
>
> . . .
>
> DEFENDANTS' COUNSEL: . . . As to average weekly wage, Commissioner, . . . we would look to the tax returns . . . If you take those numbers and divide them by 52, which is consistent with our case law, the number that I came up with is $769.35 as an average weekly wage, $512.93 as a compensation rate.

(R. p. 69, line 18; R. p. 71, line 6).

Claimant asserts that a review of the record indicates that the parties did not stipulate to Claimant's compensation rate as indicated. Accordingly, Claimant respectfully requests the case be remanded to the Commission for consideration and determination of Claimant's compensation rate.

Conclusion

"We construe workers' compensation law liberally in favor of coverage to further the beneficent purpose of the Workers' Compensation Act; accordingly, only exceptions and restrictions are strictly construed." Lewis v. L.B. Dynasty, 411 S.C. 637, 641 (2015), citing James v. Anne's Inc., 390 S.C. 188, 198 (2010).

Based upon the foregoing, Claimant respectfully requests the following:

1. Reversing the Commission's ruling that Claimant was not covered under the plain language of the Travelers' Insurance policy;
2. Reversing the Commission's ruling that Claimant's was a not a direct employee of May River Roofing pursuant to the four-factor right of control test and thereby covered by the American Zurich Insurance policy;

3. Reversing the Commission's ruling that that Claimant cannot recover as a "statutory employee" of May River Roofing under the American Zurich Insurance policy; and
4. Remanding the case to the Commission for consideration and determination of Claimant's compensation rate.

Respectfully submitted,

Joseph DuBois, SC Bar No. 71192
Naert and DuBois, LLC
22 New Orleans Road
Hilton Head Island, SC 29928
(843) 686-5500
ATTORNEY FOR APPELLANT
Francisco Cedeno Ramirez

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Hilton Head Island, South Carolina