

RECEIVED**Sep 20 2021****S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM
THE SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Jr., Commissioner
R. Michael Campbell, II, Commissioner
T. Scott Beck, Commissioner

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

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. and American Zurich Insurance Co. are Petitioners.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Joseph DuBois
South Carolina Bar No. 71192
Liberty Oak Law Firm, LLC
71 Lighthouse Road, Suite 220
Hilton Head Island, SC 29928
(843) 671-5550
Attorney for Respondent
Francisco Cedeno Ramirez

Other counsel of record:

Lee E. Dixon, Esquire
Hedrick Gardner Kincheloe & Garofalo, LLP
1230 Main Street, Suite 325
Columbia, SC 29201
Attorney for Petitioners
May River Roofing, Inc., and American Zurich Insurance Co.

TABLE OF CONTENTS

Table of Cases and Rules2

Statement of Issues2

Statement of Facts.....3

Standard4

Argument5

Conclusion11

Table of Cases and Rules

Chavis v. Watkins, 256 S.C. 30, 180 S.E.2d 648 (1971)7

Jamison v. Morris, 385 S.C. 215, 684 S.E.2d 168 (2009)7

Lewis v. L.B. Dynasty, 411 S.C. 637, 770 S.E.2d 393 (2015)8

Marlow v. E. L. Jones & Son, Inc., 248 S.C. 568, 151 S.E.2d 747 (1966)6

Shatto v. McLeod Reg’l Med. Ctr., 406 S.C. 470, 753 S.E.2d 416 (2013)7

South Carolina Workers' Compensation Com'n v. Ray Covington Realtors, Inc.,
459 S.E.2d 302, 318 S.C. 546 (S.C. 1994)8

Watkins v. Mobile Oil Corp., 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986)7

Wilkinson v. Palmetto State Transp. Co., 382 S.C. 295, 676 S.E.2d 700 (2009)5

Rule 242(b), SCACR.....4

Statement of Issues

1. Whether the Court of Appeals erred in finding that Respondent Ramirez (hereinafter “Ramirez”) was a direct employee of Petitioner May River Roofing (hereinafter “May

River Roofing”) by disregarding that the parties did not consider their relationship to be that of employer-employee.

2. Whether the Court of Appeals erred in finding that Ramirez was a direct employee of May River Roofing based on facts that have no bearing on the tests established by prior precedent and do not rise to the level of preponderance of the evidence, including:

- a. in apparently inferring a right to control over the manner and means of doing a contracted piece of work based solely on the frequency with which the worker is contracted to perform it;
- b. in misconstruing and conflating the supply of materials to Ramirez with the supplying of equipment to Ramirez; and
- c. in determining that the method of payment and right to fire factors either supported an independent contractor relationship or did not favor either side despite Petitioners’ allegations regarding the method of payment and right to fire.

Statement of Facts

Ramirez earned a living as a roofer in Beaufort County and was the sole proprietor of Cedano Roofing. Ramirez began working with May River Roofing approximately one (1) year after he started Cedano Roofing and worked continuously and exclusively with May River Roofing for approximately three (3) years.

In January 2016, Ramirez was working in Beaufort County on a job for May River Roofing when he fell approximately sixteen (16) feet from the roof to the ground below. Ramirez sustained significant injuries to his back, neck, shoulders, chest, ribs, lungs, and upper extremities because of his fall.

Ramirez filed two workers' compensation claims arising from the accident, including one in which he claimed he was May River Roofing's direct and statutory employee and another in which he claimed he was covered under an insurance policy he purchased personally from Travelers Insurance.

The Single Commissioner found Ramirez was not covered under the Travelers Insurance policy because he elected not to cover himself. The Single Commissioner also found Ramirez was not May River Roofing's direct or statutory employee because he was an independent contractor. The Single Commissioner further found the parties stipulated as to Ramirez's average weekly wage.

Ramirez filed a Form 30 requesting review of the Single Commissioner's decision. After oral argument, an appellate panel affirmed the Single Commissioner's findings with little to no changes.

Ramirez filed an appeal requesting review of the appellate panel's decision. After oral argument, the Court of Appeals affirmed the appellate panel's finding that Ramirez was not covered under the Travelers Insurance policy because he elected to exclude himself, affirmed the appellate panel's finding that Ramirez was not a statutory employee of May River Roofing, but unanimously reversed the appellate panel's finding that Ramirez was not a direct employee of May River Roofing and that the parties had stipulated to the compensation rate. The Court of Appeals further remanded the case to the Workers' Compensation Commission for further proceedings consistent with its opinion.

Following denial of their Petition for Rehearing by the Court of Appeals, Petitioners May River Roofing and American Zurich Insurance Co. filed a Petition for Certiorari with the South Carolina Supreme Court. Ramirez here responds in opposition to same.

Standard

Rule 242(b), SCACR, *Certiorari to the Court of Appeals*, provides that

... a writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. The following, while neither controlling nor fully measuring the Supreme Court's discretion or power to grant review in general, indicate the character of reasons which will be considered:

- (1) Where there are novel questions of law.
- (2) Where there is a dissent in the decision of the Court of Appeals.
- (3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court.
- (4) Where substantial constitutional issues are directly involved.
- (5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.

Notably, none of the reasons for granting the writ of certiorari listed above are present in the Petition: The Petition contains no novel questions of law, there is no dissent in the decision of the Court of Appeals, the Court of Appeals is not in conflict with a prior decision of the Supreme Court, there are no substantial constitutional issues directly involved, and there are no federal questions included in the decision.

Argument

Petitioners argue that the Court of Appeals erred in unanimously reversing the appellate panel of the Workers' Compensation Commission's determination that Ramirez was an independent contractor and not a direct employee of May River Roofing.¹

¹ Petitioners do not challenge the determination of the Court of Appeals that the Appellate Panel of the South Carolina Workers' Compensation Commission erred in finding that the parties stipulated to the compensation rate.

1. The Court of Appeals did not err in finding that Ramirez was a direct employee of May River Roofing despite Petitioners' allegations regarding the parties view of their relationship.

Petitioners argue that the Court of Appeals erred in finding that Ramirez was a direct employee because the parties did not consider their relationship to be that of employer-employee.² In support of this argument, Petitioners cite facts relating to Ramirez's work as a roofer in the years leading up to his subject accident, including that he personally purchased workers' compensation insurance as required by May River Roofing.

However, under the relevant South Carolina precedent, such being the employment test described in *Wilkinson v. Palmetto State Transp. Co.*, 382 S.C. 295, 676 S.E.2d 700 (2009), whether the parties considered their relationship to be that of employer-employee is irrelevant. The Court of Appeals analyzed the issue of whether Ramirez was an employee or an independent contractor of May River Roofing by correctly utilizing the employment test set forth in *Wilkinson*, which the Court of Appeals described in its opinion as the "modern bellweather case" for such determination.

The Court of Appeals examined each of the four factors at length, concluding that the right or exercise of control factor weighed in favor of an employment relationship, the furnishing of equipment factor weighed in favor of an employment relationship, the method of payment factor weighed in favor of an independent contractor relationship, and that the right to fire factor did not favor either form of relationship.

The Court of Appeals also considered a previous appellate case concerning roofers, *Marlow v. E. L. Jones & Son, Inc.*, 248 S.C. 568, 151 S.E.2d 747 (1966), and found such case to

² Ramirez expressly disputes he did not consider the relationship to be that of employer-employee.

be “easily distinguishable,” stating “[a]lthough there are some similarities between *Marlow* and the present case, we believe the control May River exercised by being the exclusive provider of work in his full time profession and by controlling Ramirez’s appearance while working distinguishes this case from that one.”

The Court of Appeals then further considered the Supreme Court’s examination of the *Wilkinson* defendant trucking company’s entire operation in its finding that there was no employment relationship in *Wilkinson*. The Court of Appeals stated:

We see this case as meaningfully different from *Wilkinson*, especially for the reasons noted above. If the record—as in *Wilkinson*—contained a detailed independent contractor agreement requiring [Ramirez] to protect himself against the cost of being hurt at work, we would likely feel differently. As it stands, we lean in favor of coverage based on the facts of this case and in order to serve the Act’s beneficent purpose.

Thus, the Court of Appeals did not err in determining that Ramirez was a direct employee of May River Roofing.

2(a). The Court of Appeals did not err in finding that Ramirez was a direct employee of May River Roofing despite Petitioners’ allegations regarding the parties’ exclusive relationship and controlling Ramirez’s clothing.

Petitioners argue that the Court of Appeals, in determining that Ramirez was a direct employee, erred in inferring a right to control based upon May River Roofing controlling Ramirez’s clothing and the exclusive relationship of Ramirez’s work for May River Roofing. Petitioners argue that the use of branded items does not give rise to an inference of control, citing *Jamison v. Morris*, 385 S.C. 215, 684 S.E.2d 168 (2009) and *Wilkinson*, *Id.* Petitioners further argue that the right to determine whether the working relationship continues has no relevance to the “right to control,” citing *Shatto v. McLeod Reg’l Med. Ctr.*, 406 S.C. 470, 753 S.E.2d 416 (2013).

However, the Court of Appeals squarely addressed Petitioners' arguments, stating:

These features – an exclusive relationship and controlling Ramirez's clothing – may seem trivial, but we think they are not. An independent contractor is someone who is hired “to do a piece of work according to his own methods” and is not subject to anyone's control except as to the result of his or her work. *Chavis v. Watkins*, 256 S.C. 30, 32, 180 S.E.2d 648, 649 (1971). There is no disputing May River directly exercised control over Ramirez's appearance and, thus, was controlling more than would be found in a true independent contract relationship. The exclusivity of this arrangement also suggests Cedano Roofing was less of an “independent” business, and more an extension of May River. Cf. *Watkins v. Mobile Oil Corp.*, 291 S.C. 62, 352 S.E.2d 284 (Ct. App. 1986) (agency between oil company and service station employee not established when employee was permitted to wear clothing with oil company's emblem, when service station merely sold oil company's products, and when there was no evidence oil company controlled station operations).

The Court of Appeals determined that these facts, including that May River Roofing required all subcontractors like Ramirez to wear May River Roofing shirts while at a jobsite and that either Ramirez was not allowed to work with any other roofing companies or that May River Roofing preferred workers like Ramirez to only accept jobs from May River, suggests a right to control.

Thus, the Court of Appeals did not err finding that Ramirez was a direct employee of May River Roofing by inferring a right to control based upon an exclusive relationship and May River Roofing controlling Ramirez's clothing.

2(b). The Court of Appeals did not err in finding that Ramirez was a direct employee of May River Roofing despite Petitioners' allegations regarding conflation of materials and equipment

Petitioners argue that the Court of Appeals erred in finding that Ramirez was a direct employee of May River Roofing by conflating the supply of materials to Ramirez with supplying him equipment.

Petitioners argue that the materials provided by May River Roofing to Ramirez were the necessary components of the job that Ramirez was hired to install as part of a larger construction project, and that such materials are not of the type to be considered "equipment" for purposes of analysis. Petitioners cite *Lewis v. L.B. Dynasty*, 411 S.C. 637, 770 S.E.2d 393 (2015) and *South Carolina Workers' Compensation Com'n v. Ray Covington Realtors, Inc.*, 459 S.E.2d 302, 318 S.C. 546 (S.C. 1994) in support of such argument.

Regarding the furnishing of equipment factor, the Court of Appeals opinion stated:

The furnishing of equipment prong weighs in favor of an employment relationship. May River provided Ramirez with all of the materials he used for roofing jobs. While Ramirez provided his own tools and vehicle, May River's complete assumption of the material costs suggests May River retained the right to direct how the materials were used and is direct evidence of control over Ramirez.

May River would also occasionally lend Ramirez equipment and assisted Ramirez financially when he purchased some of his own equipment. And, as mentioned above, May River provided Ramirez with a branded t-shirt and magnetic decal for his truck. Given that May River provided Ramirez with clothing, marketing materials, and the materials necessary to complete each roofing job, we find the furnishing equipment factor weighs in favor of an employment relationship.

As set forth in its opinion excerpted above, the Court of Appeals correctly determined that May River Roofing provided both the materials and the equipment used by Ramirez in performing the roofing work.

Thus, the Court of Appeals did not err finding that Ramirez was a direct employee of May River Roofing.

2(c). The Court of Appeals did not err in finding that Ramirez was a direct employee of May River Roofing despite Petitioners' allegations regarding the method of payment and right to fire factors

Petitioners argue that the Court of Appeals erred in finding that Ramirez was a direct employee of May River Roofing based in part on its determination that the method of payment and right to fire either supported an independent contractor relationship or did not favor either side. Petitioners argue that, as such, Petitioners simply rely on the evidence cited as supporting the decision of the Appellate Panel that Respondent was an independent contractor.

Regarding the method of payment factor, in its opinion the Court of Appeals stated:

The method of payment factor weighs in favor of an independent contractor relationship. Though Ramirez was paid by the hour for repair work, most of his work was compensated "per roofing square;" as apparently is common in the roofing industry. In other words, for most of his work, Ramirez's compensation depended on how much work he did. It did not depend on the amount of time he spent working.

Regarding the right to fire factor, in its opinion the Court of Appeals stated, in part:

The right to fire prong does not favor either party. Apparently, there were individual contracts for each roofing job. These were typically executed before multi-day projects but after smaller, single day projects. The only sample contract in the record between Ramirez and May River was bare bones and of no help to our review of this issue.

The right to unilaterally and immediately end the relationship without future liability is a hallmark of an employment relationship. *Id.* at 481, 753 S.E.2d at 422. An independent contractor, however, typically has the right to complete the job unless the parties' agreement provides otherwise. *Id.* Nothing in this record points decisively in either direction.

As set forth in its opinion, the Court of Appeals correctly determined that the method of payment and right to fire factors either supported an independent contractor relationship or did not favor either side.

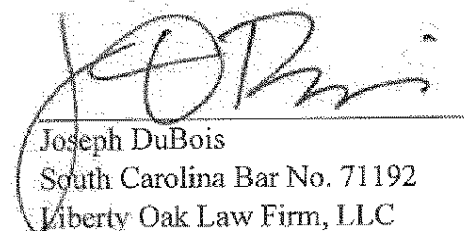
Thus, the Court of Appeals did not err in finding that Ramirez was a direct employee of May River Roofing based, in part, on such determination when utilizing the employment test set forth in *Wilkinson*, Id.

Conclusion

All of the arguments presented by Petitioners were squarely addressed by the Court of Appeals and determined in accordance with applicable precedent and the facts of this case. Lost in Petitioners' arguments is that May River Roofing endeavored to upend South Carolina's laws regarding workers' compensation coverage for its own business purposes, and to the detriment of those persons most likely to be injured in the extremely hazardous occupation of residential roofing.

Based upon the foregoing, Ramirez respectfully requests that the Court deny the Petition for Certiorari, allowing Ramirez the opportunity to receive the workers' compensation benefits that he has been denied for now over five and a half years.

Respectfully submitted,



Joseph DuBois
South Carolina Bar No. 71192
Liberty Oak Law Firm, LLC
71 Lighthouse Road, Suite 220
Hilton Head Island, SC 29928
(843) 671-5550
Attorney for Respondent
Francisco Cedeno Ramirez

September 20, 2021
Hilton Head Island, South Carolina