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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeal

APPEAL FROM THE
SOUTH CAROLINA WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Commissioner
R. Michael Campbell, II, Commissioner
Gene McCaskill, Commissioner

SCWCC File No. 1521141

Appellate Case No. 2018-000939

Calvin Felder, Claimant

v.

Central Masonry Inc. & Arnold Construction Co., Employer, and AmGuard Insurance Co./Old Republic Insurance Co., and South Carolina Uninsured Employers Fund, Carriers, Defendants,

Of which AmGuard Insurance Co. is the Appellant and Central Masonry Inc. and South Carolina Uninsured Employers Fund are the Respondents.

PETITION FOR REHEARING

APPELLANTS PETITION FOR REHEARING

Pursuant to South Carolina Appellate Court Rules (SCACR) 221 and 240, Appellant hereby petitions the Court for a rehearing of this matter. Appellant respectfully submits the Court overlooked and/or misapprehended significant factual and legal issues. SCACR 221 (a), *See* Kennedy v. S.C. Retirement Systems, 349 S.C. 531, 564 S.E.2d 322 (2011). As such, Appellants request further oral arguments and/or submit that the Court's Opinion filed on September 1, 2021 should be vacated, substituted, and refiled, and/or amended accordingly to find in favor of the Appellants, based on the foregoing grounds.

The Court's Opinion Overlooks Facts and Law Regarding the Reliance Element of Estoppel Thereby Failing to Address the Crux of the Case.

Regarding the reliance element, the Court's Opinion states it is a "straightforward" matter, noting that "Central hired Mr. Felder believing it had worker's compensation coverage and did not seek coverage elsewhere." Appellants do not dispute that Central believed it had applicable coverage in South Carolina and acted accordingly in reliance thereon. However, the relevant inquiry is a simple matter of cause and effect- whether Central's belief to that effect was actually induced by Guard's words or conduct, specifically, the September 2, 2015 call between Guard's and Central's agent's respective representatives. The Court's Opinion does not addresses this fundamental crux of the case.

Assuming *arguendo* that Guard's representative made a misleading statement regarding South Carolina coverage to Central's agent during the September 2, 2015 call, it is elementary that Central must still prove it relied to its detriment on that conversation for its belief. The elements of equitable estoppel essentially mirror those of coverage by estoppel set forth in Pitts v. New York Life Ins. Co., 247 S.C. 545, 148 S.E.2d 369 (1966). As to the party claiming the estoppel are as

follows: 1) lack of knowledge and means of knowing the truth as to the fact in question; 2) reliance upon the representations or conduct of the estopped party; and 3) a prejudicial change in position. Dozier v. American Red Cross, 411 S.C. 274, 768 S.E.2d 222 (Ct. App. 2014). As to the party being estopped, the elements are as follows: 1) conduct by the estopped party amounting to a false representation or concealment; 2) *an intention that such action be acted upon by the other party*; and 3) actual or constructive knowledge of the true facts. *Id.* Reading these elements in conjunction, the party claiming estoppel clearly must have relied upon the alleged misrepresentation or misleading statement of the party being estopped. The party asserting estoppel carries the burden of proving these elements. Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965).

In the instant case, there is no evidence in the Record connecting the dots between the September 2, 2015 call and Central's belief that it had South Carolina coverage. Any alleged misleading statement in the call is immaterial in a vacuum. [*See* Appellant's Brief pp. 14-15]. The evidence in the Record conclusively establishes that Central's belief that it had South Carolina coverage was based on Lloyd's actions, including issuance of the certificate of insurance to the general contractor on the job in question. Both witnesses for Central (Max Gallardo and Sandra Sturkie) testified they relied exclusively upon its agent Lloyd and the issuance of the certificate of insurance to the general contractor on the Kroger job for their belief that Central was covered in South Carolina. [R. p. 157 ll. 14-18; R. p. 161 ll. 10-13; R. p. 93 ll. 19-23]. Email correspondence between Lloyd and Central on August 19, 2015- *three weeks before the call-* indicating "we should be all good at this point" [R. p. 385] is further evidence of the basis for Central's reliance. In sum, here is no evidence whatsoever that Central had knowledge at all of the September 2, 2015, much less that the call was the basis of its reliance that it had coverage in South Carolina.

To reiterate, Central never called a witness from its agent, Lloyd, to testify that it relied on the September 2, 2015 call for the belief on behalf of Central that South Carolina was covered. As noted previously, the only other evidence in the Record addressing Lloyd's knowledge of South Carolina coverage is email correspondence between Lloyd's representative and Central on August 19, 2015 indicating "we should be all good at this point." [R. p. 385]. However, this email exchange occurred the day after the certificate of insurance was issued *and three weeks before* the September 2, 2015 call. The Certificate of Insurance is clearly the star of this saga. As such, the September 2, 2015 call must necessarily be eliminated as the source of Central's alleged belief that it had South Carolina coverage.

Although the Court's Opinion suggests that Claimant's mere hiring demonstrates Central's reliance on the phone call with Guard, there is no evidence in the Record to that effect. This conclusion is simply not a reasonable circumstantial inference when Claimant was hired o on December 9, 2015, over three months after the phone call. [R. p. 154 ll. 9-12]. Again, Central obviously hired Claimant as an employee thinking it had valid coverage in South Carolina. However, there is no evidence in the Record that such belief was actually induced by the September 2, 2015 phone call.

Next, subsequent email correspondence in the Record from Lloyd confirms its belief that South Carolina was NOT added to Central's coverage *as a result of* the September 2, 2015 call. Specifically, Lloyd's manager noted, "phone call between Guard and "the agent" [sic] SC was not added to this policy and will not be added." (emphasis added) [R. p. 263]. There is a reference in the same email correspondence *after Claimant's accident* that Lloyd "believed" South Carolina coverage had been added to the policy. However, there is no testimony from Lloyd explaining the

basis of that belief, much less that such belief was induced by Guard's representations in the September 2, 2015 call. That causal connection is not reasonably inferable either when Lloyd specifically contradicts that premise in the very same document. At most the issue is unclear, which does not meet the necessary burden of proof. *See* McCleod v. Piggly Wiggly, 280 S.C. 466, 313 S.E.2d 38 (Ct. App. 1984)(a worker's compensation award cannot be based on surmise, speculation, or conjecture).

In sum, Central obviously cannot vicariously assert a position or belief via its agency relationship with Lloyd contrary to Lloyd's own belief the relevant time in question. In other words, if Lloyd did not believe that South Carolina was added to the coverage based on the call, then that belief must also be imputable to Central as its principal.

Conclusion

Appellant respectfully submits that the Court overlooked and/or misapprehended the facts of this case pertaining to the reliance element of estoppel issue. Specifically, there is no evidence in the Record connecting the dots between Guard's purported misleading statement in the September 2, 2015 call and Central's alleged reliance on same for its belief that it had valid coverage in South Carolina. As such, Central has failed to meet its burden of proof and Guard cannot be estopped to deny coverage for the underlying claim. If Central cannot point to evidence in the Record proving that its belief it had coverage in South Carolina was actually induced by the September 2, 2015 call in its Return to this Petition, then the Court should have no choice but to reverse is September 1, 2021 Opinion and find in favor of Appellant.

On a final note, Appellant would also like to take another opportunity to remind the Court that Central has a remedy for any harm incurred as a result of the shady action of its agent in this matter- an Errors and Omissions action against Lloyd.

Respectfully submitted,

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9/16, 2021
Columbia, SC

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Central Masonry, Inc. & Arnold Construction Co., Employer, and AmGuard Insurance Co./Old Republic Insurance Co., and South Carolina Uninsured Employers Fund, Carriers, Defendants,

Of which AmGuard Insurance Co. is the Appellant and Central Masonry Inc. and South Carolina Uninsured Employers Fund are Respondents.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing of the Appellant on Central Masonry, Inc., and South Carolina Uninsured Employers Fund by depositing a copy of it in the United States Mail, postage prepaid, on September 16, 2021, addressed to their respective attorneys:

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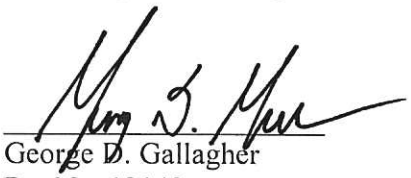
September 16, 2021



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September 16, 2021

The Honorable Jenny Abbott Kitchings
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RE: ***Calvin Felder v. Central Masonry, Inc. et al.***
WCC No.: 1521141
Our File No.: 1700-0555
Appellate Case Number: 2018-000939

Dear Ms. Kitchings:

Please find enclosed our Petition for Rehearing of the Court's Opinion filed September 1, 2021, for filing in the above-referenced matter. The filing fee has been placed in the mail to your office today.

By copy of this letter to all parties of record, I am serving them a copy of this Petition.

Sincerely,

George D. Gallagher

GDG/kgl
Enclosures
cc: Lisa C. Glover, Esq.
Jonathan R. Hendrix, Esq.
Kristie Ozark