SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

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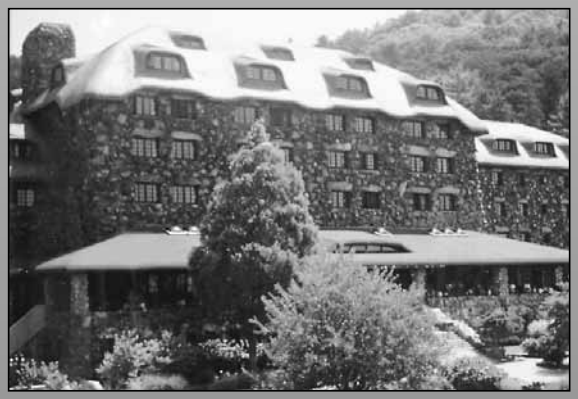
Spring

TRIAL ACADEMY

May/June, 2005
Columbia, SC

Summer



JOINT MEETING

July 28 - 30, 2005
Grove Park Inn Asheville, NC

Fall

ANNUAL MEETING

November 3 - 6, 2005
Pinehurst Resort Pinehurst, NC

SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS' ASSOCIATION

THE DefenseLINE

SCDTAA Newly Elected Officers - *Seated* - Donna S. Givens, Secretary *Standing left to right* - Elbert S. Dorn, Treasurer; Samuel W. Outten, Immediate Past President; James R. Courie, President; G. Mark Phillips,President-Elect

President's Letter

by James R. Courie

As I write this letter, I have just begun to think about the challenges we face in 2005. I have enjoyed my time both on the Executive Committee and as an Officer; however, I am now faced with the reality that it's my turn to shape the look of our organization - - at least for one year.

To me, it all comes down to making membership and participation in our organization invaluable to defense attorneys in South Carolina. Our Presidents and leadership over the last few years have all recognized the importance of increasing our membership and adding services to our members. We have made progress, but there is still much work to be done.

As I try to formulate my priorities for the coming year, I realize that every single goal goes toward making your membership in the SCDTAA the most important professional decision you make as a defense attorney. We compete against other organizations for both your time and your dollars. We have to bring our organization and the benefits we offer to a level you simply can't ignore.

Last year, we changed our by-laws to include lawyers practicing in in-house law departments in South Carolina. I believe that decision was a critical one for our organization. Duncan McIntosh has led the effort to bring more corporate counsel members into our Association. I would like very much to increase that aspect of our membership. I truly believe that we provide opportunities for all lawyers who practice in the state and federal courts of South Carolina, including educational opportunities, networking, and opportunities to interact and develop better relationships with our state and federal judges.

Our membership has passed two separate resolutions endorsing our participation in this year's tort reform efforts. In the past, we have played an advisory role to many of the groups trying to lead tort reform efforts. Although our expertise has benefited other groups, we believe it is time to increase our level of participation and leadership. If we are going to provide a true service to our members, we must get off the sidelines and into the game. We look forward to working with other business and industry leaders as we work to eliminate inequities in our civil justice system.

Former President, Mills Gallivan, has agreed to lead a committee of past Presidents in an effort to establish a SCDTAA Foundation. We believe that a Foundation can provide much-needed resources to help us provide greater benefits to our members. In this world of competing dollars, we want our seminars to be relevant to our members and as good as any other seminar in the country. We believe that planting the seed and beginning to raise money for a Foundation will make our Association strong for years to come.

Having just returned from our meeting at Château Élan, I can honestly say we continue to have excellent educational programs. This year, we had over 30 state court judges in attendance at our meeting. We have received very positive feedback from both the judges and the lawyers in attendance. If you did not have an opportunity to attend this year's Annual Meeting, I would urge you to mark your calendar now for next year's meeting to be held at Pinehurst on November 3 - 6, 2005. There is no better opportunity to earn CLE credits relevant to your practice and enjoy outstanding speakers with an emphasis on the most relevant legal topics. The annual meeting also provides a great opportunity to enjoy the company of your fellow defense attorneys, as well as many state and federal judges.

I offer many thanks and gratitude to Sam Outten. Sam was an outstanding President last year and was a tireless advocate for our organization. I look forward to continuing his efforts.

Finally, my congratulations to this year's Officers and Executive Committee. Mark Phillips moves up to the President-Elect position, Elbert Dorn, Treasurer, and Donna Givens, Secretary. I look forward to leading this group of talented and dedicated Officers and Board Members. Together we will work hard to make the SCDTAA an organization "you just can't refuse."

Attention Members:

The Expert Witness database on the Website is now available to submit information.

Please visit www.scdtaa.com for more details.

SCDTAA Holds 37th Annual Meeting

November 11 - 14, 2004 • Château Élan

by T. David Rheney

The 37th Annual Meeting of the South Carolina Defense Trial Attorneys' Association was recently held at Château Élan in Braselton, Georgia November 11 – 14, 2004. The meeting was well attended by the membership and the Judiciary.

During the meeting the Executive Committee unanimously adopted a resolution, which was also unanimously adopted during the general membership meeting, outlining its position on tort reform in South Carolina. The resolution urges the establishment of a level playing field in civil litigation by passage of bills to curtail venue shopping in South Carolina, to reform joint and several liability law, to shorten the time limitation in the statute of repose and create a new frivolous lawsuit law. The Association has pledged its support in these specific areas of tort reform. You may review the resolution in this edition of The Defense Line.

The CLE and social programs were once again a big success. Former South Carolina Circuit Court judges Gary Clary, William Howard and John Hamilton Smith, and former Governor James Hodges chaired a panel discussion regarding the challenges and changes in returning to private practice from public life. Chief Justice Jean Toal discussed the current state of the judiciary, and particularly her continuing efforts to bring the entire judicial department of South Carolina online, as well as her ongoing efforts to ensure proper funding of the judicial department. David Dukes, a partner at Nelson Mullins Riley & Scarborough and the president-elect of Defense Research Institute spoke regarding DRI's nationwide efforts in support of the defense bar. The Association extends its congratulations to David, who will be inaugurated as president of DRI during its annual meeting next October, and would like to encourage as many of our members as possible to attend that meeting in support of David.

Glenn Elliott of Aiken Bridges in Florence, John Wilkerson of Turner, Padget, Graham & Laney in Charleston, and Thom Salane of Turner Padget's Columbia office spoke to the membership regarding several recent opinions that have raised practical problems in civil defense litigation, including Crawford v. Henderson, Ollie's Seafood Grille & Bar, LLC v. Selective Insurance Company of South Carolina, and Twin City Fire Ins. Co. and Hartford Cas. Ins. Co. v. Ben Arnold – Sunbelt Beverage Company of South Carolina, LP, Sunbelt Beverage Company, LLC, Harvey Belson and William Tovell. These opinions have already had far reaching consequences on the defense practice and Glenn and Tom's remarks, as well as John's comments on recent developments on first-party and third-party bad faith cases were most insightful. Kay Crowe moderated a panel discussion including Speaker David Wilkins, Senator Paula Short, Representative James Harrison and Representative Thayer Rivers, Jr. regarding the failed tort reform effort in 2004 and plans and expectations for 2005. The Association again encourages all members to contact their local representatives and senators to provide input in this area. Judge James Lockemy and Lake Summers presented a very interesting slide show regarding their service in the United States military in Kosovo and Iraq.

Finally, we were privileged to have Robert Alexander of Oklahoma City speak during the meeting. Bob is a defense lawyer who represents numerous Fortune 500 companies and was fresh off obtaining summary judgment based upon exclusion of expert testimony under Daubert in the first Oxycontin case to reach trial. Had summary judgment not been granted, trial would have started the week of our meeting but Bob was still willing to speak to our Association. Bob's speech, entitled Trying Cases to People Who Don't Look Like You, focused on the principles common to us all, which have enabled him, as a minority lawyer to succeed in the practice of law. His comments were well received and appreciated by everyone.

The Annual Meeting officially kicked off on Thursday night with the Presidential Reception in Honor of outgoing President Sam Outten. Under Sam's leadership the Association has continued to gain new membership and influence. Sam will continue to serve on the Executive Committee as Immediate Past President. On Friday evening the Association hosted a heavy hors d'oeuvres and wine tasting, and the meeting culminated on Saturday evening with a black tie dinner and dance.

During the annual business meeting on Saturday, the nominating committee presented its list of candidates for 2005. Jay Courie of McAngus, Goudelock & Courie was unanimously elected President. Mark Phillips of the Charleston office of Nelson Mullins Riley & Scarborough will serve as Vice President while Elbert Dorn of the Columbia office of Turner, Padget, Graham & Laney and Donna Givens of Woods & Givens of Columbia will serve as Treasurer and Secretary, respectively.

Legislative Update

by Gray T. Culbreath

As January approaches and the General Assembly prepares to return to Columbia, one of the principal agenda items for both the General Assembly and the Governor is Tort Reform. As you will recall, the Association passed a Resolution at the July meeting endorsing venue reform. A subsequent resolution has been passed, which is found on the adjacent page which embraces not only venue but also joint and several liability, which is there for your review. Consistent with the SCDTAA's objective of improving the civil justice system, we believe that the support of reforms of venue and joint and several liability contribute to the reform of the system to give defense lawyers an even playing field in which to represent clients. As we go forward in this legislative session, our goal is to not only support those reforms which will improve the system but also serve as a resource to the General Assembly to keep the debate honest about all of the issues associated with tort reform. While we may not take a position on issues such as caps, we will remain involved to the extent that we can provide information to the decision makers to help shape a reasoned and informed debate and decision on issues that affect our daily lives.

You may ask why the SCDTAA has taken this role. Earlier in the year, members of the Executive Committee met with our legislative team, Steve Bates and Jeff Thordahl to discuss the upcoming session. As that discussion evolved into meetings with the leadership of the Judiciary Committees as well as the Governor, it was patently obvious that all of those groups wanted to hear from us. I was asked point blank by a significant decision maker in this process "why the defense attorney's don't care about changes to the tort system that may affect them." That comment was a startling reminder that our silence and non-action is being judged as much as our action.

At the Annual Meeting two weeks ago, every member of the Legislative Panel including the Chairman of the House Judiciary Committee, Jim Harrison, and the Speaker of the House, David Wilkins, made the comment that they needed the input of the Defense Trial Attorneys Association. As your Legislative Chair for this year, I am committed to providing that input to the General Assembly and the Governor. Obviously, in order to do this, I need your input. As the session goes forward in January, there will most likely be two bills. The business bill will address venue, joint and several liability, statute of repose, frivolous lawsuits and the seat belt law. As versions of these bills come out, I will be forwarding them to the Executive Committee and any member who wishes to review them. My goal is to get input from the association that we can provide back to the General Assembly. Obviously, many of the efforts that will be part of this business bill are consistent with our mission of civil justice reform. The second bill, commonly referred to as the medical bill, will address a number of issues most notably caps on actual and punitive damages. Consistent with the will of our membership, we do not have a position on caps but remain committed to review those bills and provide input as to practical problems that may exist. As I have told others and share with you, I view caps much like a football game. Caps keep the score down but neglect to address the issue of why the score gets high in the first place. We will be looking at the underlying text of the cap bills to make sure that to the extent that evidentiary matters are covered in these bills, that they are consistent and fair to those of us who try cases.

I look forward to this year as your Legislative Chair. If you have any questions or have any concerns, please do not hesitate to contact me at 803-256-2660 or my email at gculbreath@collinsandlacy.com.

Recent Order

South Carolina District Court • Columbia Division

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

C/A No. 3:03-1367-24
American Fidelity Assurance Company,
Plaintiff,
vs.
Ladonna Boyer and Combined Insurance Company of America,
Defendants.

C/A No. 3:03-1434-24
American Fidelity Assurance Company,
Plaintiff,
vs.
Todd Bidwell and Combined Insurance Company of America,
Defendants.

ORDER

Plaintiff American Fidelity Assurance Co. Brings this action against two former employees, Defendants Todd Bidwell and Ladonna Boyer, and their current employer, Defendant Combined Insurance Company of America. Plaintiff alleges that Defendants Boyer and Bidwell breached a covenant not to compete contained in their employment contract. Plaintiff asserts causes of action for breach of contract, civil conspiracy, and intentional interference with contractual relations.

This matter came before the court for a hearing on Friday, July 2, 2004, with respect to various motions to compel filed by both Plaintiff and Defendants. Among other things, Defendants moved to compel the following information with respect to Plaintiff's retained experts, Phillip G. Brimer and A. Joy McDonald:

> 1) Any and all documents, notes or records relating to the above captioned case and Expert's report dated January 28, 2004 [of Mr. Brimer, or January 29, 2004, in the case of Ms. McDonald] including correspondence, electronic correspondence and information provided by Plaintiff's counsel.
>
> 2) Any and all other materials used, referred to or consulted in preparing the Expert's Report . . . to include any draft reports.

I. DISCUSSION

Defendants contend that the information sought is discoverable pursuant to Rule 26(a)(2)(B), FRCP, which provides that an expert report must "contain a complete statement of all opinions to be expressed and the basis and reasons therefor [and] the data or other information considered by the witness in forming the opinions . . . ." Plaintiff objects on the grounds that Defendants seek materials containing non-discoverable attorney opinion work product. *See* Rule 26(b)(3), FRCP (requiring the court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation"). The court has made an in camera review of the materials at issue.

Courts are split regarding the discoverability of communications between attorneys and expert witnesses. The commentary to Rule 26 provides:

> Rule 26(a)(2)(B) does not preclude counsel from providing assistance to experts in preparing the reports, and indeed, with experts such as automobile mechanics, this assistance may be needed . . . . the report is to disclose the data and other information considered by the expert and any exhibits or charts that summarize or support the expert's opinions. Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions–whether or not ultimately relied upon by the expert–are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.

In *Musselman v. Phillip*s, 176 F.R.D. 194 (D. Md. 1997), the court noted that a number of courts and commentators have concluded that, under Rule 26(a)(2)(B), "if an attorney provides work product to an expert who considers it in forming opinions which he or she will be testifying to at trial, this information is no longer privileged and must be disclosed." *Id*. at 197. The *Musselman* court cited with approval to *Karn v. Rand*, 168 F.R.D. 633, 639-

Continued on page 8

41 (N.D. Ind. 1996), as follows:

> [In *Karn*,] the court held that Rule 26(a)(2)(B) requires disclosure of any information considered by a testifying expert in reaching his or her opinion, which means anything reviewed by an expert who will testify, including written or oral lawyer-expert communications, even though such information may constitute opinion work product. the court noted that this is a "bright line" rule which promotes the following policies: (1) it enables effective cross-examination of expert witnesses, which is essential to the "integrity of the truth-finding process" because "useful cross-examination and possible impeachment can only be accomplished by gaining access to all of the information that shaped or potentially influenced the expert witness's opinion"; (2) such disclosure does not "violate the core precepts of the work product doctrine, which, at bottom, is intended to allow counsel unfettered latitude to develop new legal theories or conduct factual investigation, because, when an attorney provides work product to an expert retained to offer testimony at trial, this does not result in counsel developing new legal theories or enhance the conduct of fact investigation," since "the work product either informs the expert as to what counsel believes are relevant facts, or seeks to influence him to render a favorable opinion"; and (3) the bright line test" actually preserves the work product privilege, because "there is no lingering uncertainty as to what documents will be disclosed. Counsel can easily protect a genuine work product by simply not divulging it to the expert."

Musselman, 176 F.R.D. at 198.

The *Musselman* court found that disclosure was appropriate because expert testimony has added significance in a trial, and can be both powerful and misleading because it involves specialized knowledge about which, by definition, the factfinder has little understanding. Therefore, effective cross-examination is critical to expose weaknesses in the expert's testimony. According to the *Musselman* court, it is essential during pretrial discovery that the parties be able to discover "not only what an opposing expert's opinions are, but also the manner in which they were arrived at, what was considered in doing so, and whether this was done as a result of an objective consideration of the facts, or directed by an attorney advocating a particular position." *Id.* at 200. The court observed that "'[a]n attorney, consciously or unconsciously, may have shared certain legal theories or conclusions about a case which may have shaped an expert's opinion. Given the significance which jurors may attach to expert testimony and the increasing occurrence of "battle of the experts," a jury is entitled to know everything that influenced an expert's opinion in order to assess his credibility.'" *Id.* (quoting *Barna v. United States,* 1997 WL 417847, at *2 (N.D. Ill. July 28, 1997)); *see also Lamonds v. Gen. Motors Corp.*, 180 F.R.D. 302, 305-06 (W.D. Va. 1998) (observing that "[i]t can be important for the trier of fact to know whether the expert arrived at his opinion after an independent review of all relevant facts or whether he relied on 'facts' chosen and presented by an attorney advocating a particular position. This information can only surface on cross examination where an opposing party has been able to discover the material provided to the expert by the lawyer who retained him."). The court finds the reasoning articulated in *Musselman* to be persuasive.

II. CONCLUSION

For the reasons stated, Defendants' motions to compel (Docs. 47, 44) are granted.

IT IS SO ORDERED.

Margaret B. Seymour
United States District Judge
Columbia, South Carolina
August 24, 2004

Recent Order

Order Granting Comcast Motion for Summary Judgment

STATE OF SOUTH CAROLINA
IN THE COURT OF COMMON PLEAS
COUNTY OF BERKELEY
CASE NO. 03-CP-08-1759

TIMOTHY GRAY, Plaintiff,
v.
CABLEVISION OF GA/SC, INC.'s
COMCAST CORP., and
BERKELEY ELECTRIC CO-OP,
Defendants.
and
COMCAST CABLEVISION OF GA/SC, INC.,
Third-Party Plaintiff,
v.
UNITED CABLE CONSTRUCTION, INC.,
Third-Party Defendant.

This case came before the Court on August 23, 2004, on the Defendant Comcast Cablevision of Ga/SC, Inc.'s ("Comcast") Motion for Summary Judgment. Participating in the hearing were Plaintiff's counsel Ellison Smith, Comcast's attorney Joseph D. Thompson, III, and United Cable Construction, Inc.'s ("UCC") attorney Robert Achurch. The Defendant Berkeley Electric Co-op did not participate in the hearing.

After considering the submissions of the parties, including memoranda from the Plaintiff and Comcast, the affidavit of Timothy Horn, and the arguments of counsel, it is concluded that the Plaintiff Timothy Gray was the statutory employee of the Defendant Comcast at the time of his accident, and therefore, Plaintiff is barred from a tort recovery against Comcast given the exclusivity of the South Carolina Workers' Compensation Act. Accordingly, Comcast's Motion for Summary Judgment is granted.

FACTS

The case arises out of an accident that occurred on October 9, 2002, when the Plaintiff Timothy Gray came into contact with energized power lines while installing fiberoptic cable on and between utility poles owned and maintained by the Defendant Berkeley Electric Co-Op on Foster Creek Road in Hanahan, South Carolina. At the time of the accident, Gray was employed by United Cable Construction, Inc. ("UCC") as a lineman.

Comcast contracted with UCC to install fiberoptic cable to connect a new neighborhood to Comcast's cable services. At the time of the accident, Gray was installing a solid steel stranded uninsulated wire, which would be used to support fiberoptic cable. Comcast provided the cable to be installed, and Comcast owned the cable that was attached to the Berkeley Electric utility poles.

It was undisputed that Comcast would not be able to deliver its communication services without the cable that was installed by UCC, which was being installed by the Plaintiff at the time of his accident. In fact, it was conceded by the Plaintiff during oral argument that the work performed by the Plaintiff at the time of his accident was part of Comcast's trade, business, or occupation and that the Plaintiff's work was a necessary, essential, and integral part of Comcast's business. In short, the importance of UCC and the Plaintiff's work in furtherance of Comcast's business activities was unchallenged.

As a result of the accident and his injuries, the Plaintiff filed a claim for benefits pursuant to the South Carolina Workers' Compensation Act with UCC's insurance carrier, Bituminous Insurance Company. The Plaintiff conceded that he received benefits pursuant to the Workers' Compensation Act for his accident and resulting injuries. It was undisputed that before UCC began working, Comcast required UCC to demonstrate proof that UCC's workers were insured for workers' compensation claims. Not only did UCC provide Comcast proof of insurance, but UCC's insurer has paid the Plaintiff benefits as required under the Workers' Compensation Act.

SUMMARY JUDGMENT STANDARD [1]

The determination of the employer-employee relationship for workers' compensation purposes is jurisdictional, and therefore, the "statutory employer" issue is one for the Court's consideration. *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201-02, 482 S.E.2d 49, 51 (1997); *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 320, 523 S.E.2d 766, 769 (1999); *Lake v. Reeder Constr. Co.*, 330 S.C. 242, 247, 498 S.E.2d

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Recent Order

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650, 654 (Ct. App. 1998). The existence or absence of an employment relationship is a jurisdictional fact that the Court must determine based on a review of the evidence in the record. *Saab v. S.C. State Univ.*, 350 S.C. 416, 423, 567 S.E.2d 231, 234 (2002).

Significantly, it is South Carolina's policy to resolve jurisdictional doubts in favor of the inclusion of employers and employees under the South Carolina Workers' Compensation Act. *Dawkins v. Jordan*, 341 S.C. 434, 439, 534 S.E.2d 700, 703 (2000); *Riden v. Kemet Elecs. Corp.,* 313 S.C. 261, 263-64, 437 S.E.2d 156, 158 (Ct. App. 1993). The fact that a defendant asserts statutory employment as a shield does not change the Court's review in favor of coverage. *Olmstead v. Shakespeare*, 354 S.C. 421, 427, 581 S.E.2d 483, 486 (2003) ("This Court has not previously adopted a different standard of review for cases in which the workers' compensation statute is used as a shield to liability under another theory, and declines to do so now.").

LEGAL ANALYSIS

At the time of the accident on October 9, 2002, the Plaintiff Timothy Gray was the statutory employee of the Defendant Comcast, and therefore, the Plaintiff's exclusive remedy, as it pertains to Comcast, is through the South Carolina Workers' Compensation Act. In other words, the Plaintiff is barred from maintaining the subject suit in tort against Comcast.

The South Carolina Workers' Compensation Act provides the exclusive remedy against an employer for an employee's on-the-job accident or injury. S.C. Code Ann. Section 42-1-540 (2003 Cum. Supp.); *Saab*, 350 S.C. at 422, 567 S.E.2d at 234 ("Because Saab's claims, as employee of University, arose out of and in the course of her employment, the Workers' Compensation Act .... provides the exclusive remedy for her."); *see also Edens v. Bellini*, 359 S.C. 433, 440-41, 597 S.E.2d 863, 867 (Ct. App. 2004) ("The exclusivity provision of the Act precludes an employee from maintaining a tort action against an employer where the employee sustains a work-related injury."); *Tatum v. Univ. of S.C.*, 346 S.C. 194, 202-03, 552 S.E.2d 18, 23-24 (2001).

In addition to direct employees, the Workers' Compensation Act extends coverage to an employer's "statutory employees." S.C. Code Ann. Section 42-1-400 (2003 Cum. Supp.). Therefore, just as an employer is immune from suit by its direct employees for work-related injuries, the employer is also immune from suit by its "statutory employees." *Edens*, 359 S.C. at 445, 597 S.E.2d at 869 ("If a worker is properly classified as a statutory employee, his sole remedy is to seek relief under the Workers' Compensation Act."); *Hancock v. Wal-Mart Stores, Inc.*, 355 S.C. 168, 173, 584 S.E.2d 398, 400 (Ct. App. 2003). "The exclusivity provision of the Act applies both to 'direct' and to those termed 'statutory employees' under 42-1-400." *Edens*, 359 S.C. at 445, 597 S.E.2d at 869.

Consideration of the statutory employee issue begins with Section 42-1-400 of the South Carolina Code of Laws, which states the following:

> When any person, in this section and Sections 42-1-420 and 42-1-430 referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person (in this section and Sections 42-1-420 to 42-1-450 referred to as "subcontractor") for the execution or performance by or under such subcontractor of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him.

S.C. Code Ann. Section 42-1-400 (Supp. 2003). In the subject case, Comcast would be considered the "owner" [2] while UCC, the Plaintiff's employer, would be considered the "subcontractor."

The purpose of the statutory employee provision is to afford the benefits of compensation to those individuals who are exposed to the risks of the owner's business and to place the burden of paying compensation upon the organizer of the enterprise. Consequently, both the owner and the contractors with whom. the owner engages to do the owner's work are subjected to the requirements of the South Carolina Workers' Compensation Act giving the workers double protection. It prevents employers from escaping liability by doing through independent contractors what they would otherwise do through their own employees. *Marchbanks v. Duke Power Co.*, 190 S.C. 336, 2 S.E.2d 825, 836 (1939); *Adams v. Davison-Paxon Co.*, 230 S.C. 351, 354-55, 96 S.E.2d 566, 572 (1957).

In determining whether an employee is engaged in an activity that is part of the principal contractor's trade, business, or occupation as required under Section 42-1-400, the South Carolina Supreme Court has identified three tests to be applied to the facts of the case including:

1. Is the activity an important part of the principal contractor's business or trade;
2. Is the activity a necessary, essential, and integral part of the principal contractor's business; or
3. Has the activity previously been performed by the principal contractor's employees.

Olrnstead v. Shakespeare, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003); *Glass v. Dow Chem. Co.*, 325 S.C. 198, 201, 482 S.E.2d 49, 50 (1997). Significantly, if the activity at issue meets even one of the three criteria, the injured employee qualifies as the statutory employee of the principal contractor. *Id.* The overriding issue is whether the work being

performed by the injured worker is part of the general trade, business, or occupation of the principal contractor.

It is undisputed that Comcast hired the Plaintiff's employer UCC to install certain fiberoptic cable between utility poles owned and maintained by Berkeley Electric.[3] It is also undisputed that Comcast delivers services to its customers through cable, which is either hung on utility poles or installed underground. It goes without saying that Comcast, a cable company, would not be in business unless it was connected to its customers via cable. Therefore, UCC's work in installing fiberoptic cable was and continues to be an integral part of Comcast's principle trade or business. Moreover, UCC's work is undeniably necessary and essential to Comcast's ability to conduct its business of delivering communication systems through cable to its customers.

The Plaintiff's primary, if not only, argument in opposition to Comcast's motion was the assertion that Comcast had not complied with Section 42-1-415 of the South Carolina Workers' Compensation Act, and therefore, was not entitled to the exclusivity shield of the Act. However, the evidence in the record did not support the Plaintiff's argument. It was uncontradicted that Comcast requested and received confirmation from UCC that UCC had workers' compensation insurance before UCC began work. It was also uncontradicted that the Plaintiff made a claim pursuant to the Workers' Compensation Act and that UCC's insurer has paid, or is paying, the Plaintiff benefits pursuant to the Act. The record revealed that Comcast complied with the relevant provisions of S.C. Code Ann. Section 42-l-215, and therefore, is entitled to immunity from tort liability. See S.C. Code Ann. Section 42-1-415(D) (Cum. Supp. 2003) ("[N]othing in this section shall be considered to abrogate the immunity to tort liability of any subcontractor under this title or any higher tier subcontractor, contractor, or project owner who may be considered a statutory employer as provided by Sections 42-1-400, 42-1-410, 42-1-420, 42-1-430, and 42-1-450."); *Harrell*, 337 S.C. at 330, 523 S.E.2d at 775 ("[A] statutory employer need not secure the payment of compensation to avail itself of tort immunity under the Act, if the requirements of section 42-1-415 are met.").

CONCLUSION

Based on the materials received by the Court, the arguments of counsel, and the relevant statutory and case law, it is

ORDERED, ADJUDGED AND DECREED that the Plaintiff was the statutory employee of the Defendant Comcast at the time of his accident on October 9, 2002, and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant Comcast is entitled to immunity from suit in tort pursuant to the relevant exclusivity provisions of the South Carolina Workers' Compensation Act, and it is further

ORDERED, ADJUDGED AND DECREED that the Defendant Comcast's Motion for Summary Judgment/Motion to Dismiss pursuant to SCRCP 12(b)(1) be, and it hereby is, granted.

HONORABLE DEADRA JEFFERSON
Ninth Judicial Circuit Court Judge
October 8, 2004
Charleston, South Carolina

Footnotes

1 Although the Defendant Comcast's motion was filed as a motion for summary judgment pursuant to Rule 56 SCRCP, the issue raised, i.e., lack of subject matter jurisdiction, should be treated as a motion to dismiss pursuant to SCRCP 12(b) (1). *Edens v. Bellini*, 359 S.C. 433, 440-41, 597 S.E.2d 863, 867 (Ct. App. 2004) ("If a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the trial court should treat the motion as if it were a. Rule 12(b) (1) motion to dismiss.

2 While the statute uses the term "owner," South Carolina Courts have consistently equated the term "owner" with "principal contractor." Therefore, stated in the context of the subject case, Section 42-1-100 provides "that any contractor for whom a subcontractor undertakes to perform a part of the contractor's trade, business or occupation, shall be liable to an injured employee of the subcontractor engaged in the principal contractor's work, worker's compensation in the same manner as if the employee had been employed by the principal contractor." *Murray v. Aaron Mizell Trucking Co.*, 286 S.C. 351, 354-55, 334 S.E.2d 128, 130 (Ct. App. 1985).

3 Whatever Comcast and UCC called their relationship by contract or otherwise is not controlling in a statutory employment analysis. *Harrell v. Pineland Plantation, Ltd.*, 337 S.C. 313, 322, 523 S.E.2d 766, 770 (1999); *Wilson v. Daniel Int'l Corp.*, 260 S.C. 548, 552, 197 S.E.2d 686, 688 (1973).

Recent Order

STATE OF SOUTH CAROLINA
COUNT OF GEORGETOWN
IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NUMBER: 04-CP-22-0493

Charles T. Newton, Employee
vs.
Georgetown Steel Corporation, Employer
and
Capital City Insurance Company, Carrier

ORDER

This case is an appeal to the circuit court from an order of the South Carolina Workers' Compensation Commission ("commission"). The Employer/Carrier appeal an order from the commission chairman[1] administratively dismissing the Employer/Carrier's petition for full commission review of a decision by the single commissioner.[2] In the order now under appeal, the chairman ruled that the Employer/Carrier sought full commission review of an interlocutory decision by the single commissioner and, therefore, was not entitled to a full commission review.

In this appeal, the Employee has filed a Motion for Summary Judgment alleging that the Employer/Carrier's appeal to the circuit court is, likewise, interlocutory and should be dismissed as a matter of law.

The undisputed facts relevant to this appeal are as follows:

1. The Employee filed a claim against the Employer/Carrier for workers' compensation benefits.
2. In response to the Employer/Carrier's refusal to authorize certain medical treatment, the Employee filed a Form 40 motion with the commission asking that the Employer/Carrier pay for the medical treatment.
3. The Employee's Form 40 motion was heard and decided by a single commissioner.
4. The Employer/Carrier petitioned for full commission review of the single commissioner's decision.
5. The commission chairman administratively dismissed the Employer/Carrier's petition for full commission review on the grounds that such petition constituted an interlocutory appeal to the full commission.

The primary issue in this appeal is whether the commission chairman can administratively dismiss a petition for full commission review of a single commissioner's decision.

Code of Laws of South Carolina Section 42-3-20 states, in relevant part, as follows:

> The commissioners shall hear and determine all contested cases, conduct informal conferences when necessary, approve settlements, hear applications for full Commission review and handle such other matters as may come before the department for judicial disposition. **Full Commission review shall be conducted by six commissioners only**,

> with the original hearing commissioner not sitting at such reviews. When one commissioner is temporarily incapacitated or a vacancy exists on the Commission, **review may be conducted by the five remaining commissioners** but in such cases decisions of the hearing commissioner shall not be reversed except on the vote of at least four commissioners; provided, however, that effective July 1, 1981 **full Commission reviews may be conducted by three-member panels composed of three commissioners** appointed by the chairman excluding the original hearing commissioner. The chairman, with unanimous approval of the other commissioners, shall determine which full commission reviews shall be assigned to panels. The decisions of such panels shall have the same force and effect as non panel full commission reviews. (emphasis added).

Further, *Code* Section 42-17-50, as amended, states in relevant part as follows:

> If an application for review is made to the Commission within fourteen days from the date when notice of the award shall have been given, **the Commission shall review the award**...(emphasis added).

These statutes mandate that all petitions for full commission review in workers' compensation cases must be heard by either: 1) six commissioners, excluding the commissioner whose decision is under review; 2) five commissioners, excluding the commissioner whose decision is under review, when a commissioner is incapacitated or a vacancy exists on the commission; or 3) a panel of three commissioners, excluding the commissioner whose decision is under review, when the chairman assigns such review to the panel. Nowhere under state law or regulations governing the Workers' Compensation Commission does the commission chairman, acting alone, have authority to administratively dismiss a petition for full commission review.

In the case at hand, even if the Employer/Carrier seeks review of a single commissioner's order that is ultimately held to be interlocutory, the decision that the Employer/Carrier's petition is not ripe for review must come from the full commission and not the single chairman alone.[3] By administratively dismissing the Employer/Carrier's petition without full commission participation, the commission chairman exceeded his authority. That being the case, the Employee is not entitled to summary judgment as a matter of law and the Employer/Carrier is entitled to remand of his petition for review by the full commission.

NOW, THEREFORE, based upon the above findings of fact and conclusions of law, it is hereby

ORDERED that the Employee's Motion for Summary Judgment is denied; it is further

ORDERED that the Order of the Honorable J. Alan Bass, Chairman of the South Carolina Workers' Compensation Commission, dated May 24, 2004, is vacated, and the Employer/Carrier's petition for full commission review of the Decision and Order of the Honorable J. Michelle Childs, Commissioner, dated February 3, 2004, is remanded to the South Carolina Workers' Compensation Commission for review in accordance with this order.

AND IT IS SO ORDERED.

Benjamin H. Culbertson
Special Circuit Court Judge
September 30, 2004
Georgetown, South Carolina

Footnotes

1 Order of J. Alan Bass, Chairman, South Carolina Workers' Compensation Commission dated May 24, 2004.

2. Decision and Order of J. Michelle Childs, Commissioner, dated February 6, 2004.

3. Nothing herein should be interpreted as a decision by this court that the single commissioner's decision for which the Employer/Carrier seeks full commission review is interlocutory and, thus, not ripe for review. That decision is left to the full commission.

United States District
District of South Carolina

To Attorneys Practicing Before the Federal Bench:

During the past few months, the District Court has been in the process of implementing Case management/Electronic Case Filing (CM/ECF) software in the District of South Carolina. CM/ECF is a new automated case management and electronic docketing system which allows the Court to accept filings electronically.

The time has come! The United States District Court anticipates "going live" in January 2005. Once we are "live", the District Court will accepts electronic filings from ECF - trained and registered attorney.

- For training on Electronic Case Filing, please visit the Court's website at www.scd.uscourts.gov and register on-line for CM/ECF training classes being held statewide.
- To register for Electronic Case Filing, please complete the "ECF Attorney Registration Form" available on our website. Within six months after the effective start date of Electronic Filing, all filings thereafter will have to be done using the electronic filing system unless an attorney is excused from doing so by the court upon a showing of good cause.

To learn more about electronic filing in the District Court, please visit the District's website at www.scd.uscourts.gov. The District Court's Electronic Case Filing Policies and Procedures, as well as the ECF Attorney User Manual, will be available on the website in the near future.

We understand that there will be many questions regarding CM/ECF. We highly encourage you, and your support staff, to visit our website.

Larry W. Propes, Clerk
U.S. District Court

Visit www.scd.uscourts.gov for more information















A Resolution

Whereas the mission of the South Carolina Defense Trial Attorneys' Association is to promote justice, professionalism and integrity in the civil justice system; and

Whereas it is time to review and address several legal issues that have, over time, led to inconsistency and unfairness in the civil justice system; and

Whereas venue of a legal action, the application of joint and several liability, the time limitation of the statute of repose and frivolous lawsuit laws can affect the actual or perceived procedural fairness of a trial, the ultimate outcome of a case, and the integrity of the entire civil justice system; and

Whereas proper venue is a fundamental question of fairness, reasonableness, and justice and the existing civil venue laws in South Carolina are unbalanced and inequitable; and

Whereas the complete abolition of joint and several liability, with limited exceptions, would not only be fair, but also prevent confusion in the civil justice system which would result from a complicated formula designed primarily to preserve joint and several liability; and

Whereas more reasonable and balanced laws in these areas would improve the South Carolina civil justice system and promote integrity and fairness, and engender greater faith in the judicial process; and

Whereas there will be additional debate in the General Assembly over limitations on non-economic damages, punitive damages and medical malpractice issues.

Therefore, be it resolved that the South Carolina Defense Trial Attorneys' Association supports and actively advocates amending the existing civil venue laws in South Carolina, reforming the joint and several liability law, shortening the time limitation in the statute of repose and creating a new frivolous lawsuit law to ensure the fair and equitable treatment of all parties.

Furthermore, the South Carolina Defense Trial Attorneys' Association will provide practical and credible information on the issue of limitations on damages as the issue is debated.

South Carolina Defense Trial Attorneys' Association
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Address Service Requested