NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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LETTER OPINION

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Re: *New South Insurance Company v. Susana Carrillo Lopez, et al.*
Case No. CL-2021-3635

OPINION LETTER

Dear Counsel:

This cause is before the Court on Plaintiff New South Insurance Company's ("New South") Motion for Summary Judgment. New South seeks a declaration that it is not liable for an automobile collision injury caused by its insured, Defendant Susana Carrillo Lopez ("Lopez"). New South argues that the incident is excluded from coverage under Lopez's motor vehicle insurance policy (the "Policy") because the injury to Lopez's employee, Defendant Negris Lorena Lopez Otero ("Otero"), is within the scope of the Virginia Workers' Compensation Act ("VWCA"). In the alternative, New South argues that an implied contract exists between Lopez's customers and her workers, making the customers the true employers of Lopez, Otero, and Lopez's second worker. At issue is (1) whether the Court should count a working owner of an unincorporated business as an employee under the VWCA and (2) whether the Court should consider the customers of said business as the employers of the business's workers.

While there is no genuine dispute of material fact, the Court nevertheless finds that Plaintiff is not entitled to judgment as a matter of law because Lopez is the sole proprietor of her unincorporated cleaning business and has not elected coverage as an employee under the VWCA. Therefore, Lopez is not considered an employee of her business, which as a result, employed less than three individuals. The same conclusion is reached when considering New South's alternative argument because Otero is not an employee of Lopez's customers since that result is inconsistent with the VWCA's purpose, and the facts alleged only show an employment relationship between Otero and Lopez. Thus, Lopez and her workers are not within the scope of the VWCA, and New South's Policy

exclusion does not apply to Otero's injury. Accordingly, this Court denies New South's Motion for Summary Judgment.

BACKGROUND

Lopez purchased the Policy from New South in June 2017. The Policy states the following exclusions:

> Th[e] insurance does not apply to . . . [a]ny obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation . . . law or any similar law. [An exception also exists for any] "[b]odily [i]njury to . . . an "employee" of the "insured" arising out of and in the course of employment by the "insured" . . . . [T]his exclusion does not apply to "bodily injury" to "employees" not entitled to workers' compensation benefits.

Lopez cleaned homes for a living and actively solicited customers by creating business cards bearing the name "Susana's Cleaning Service." Susana's Cleaning Service did not have an office or other business location. Lopez filed a single set of personal tax returns each year (including income derived from her cleaning business) but maintained a separate bank account for Susana's Cleaning Service, where she deposited all proceeds from her business. However, Lopez never filed any paperwork in Virginia establishing Susana's Cleaning Service as an LLC, corporation, or other formal business entity, nor did her business have a separate tax identification number.

Lopez hired two individuals, including Otero, to assist her in cleaning houses three days a week. Lopez's customers paid her with checks payable to Susana's Cleaning Service, and Lopez would then, in turn, pay Otero and her co-worker. Lopez transported her workers to the homes they cleaned, provided all cleaning supplies, and supervised them in cleaning the houses. Lopez paid the two workers for the time spent cleaning each

home, not for any time spent transporting them to the houses. Despite prior inquiries, Lopez did not purchase workers' compensation insurance.

On December 13, 2017, Lopez was involved in a car accident while transporting her workers to a customer's home. Otero later filed a Complaint seeking compensation for her injury sustained in the collision, alleging that Lopez was negligent in her operation of the motor vehicle. Lopez requested that New South defend and indemnify her in the lawsuit, and New South filed this separate action seeking a declaratory judgment to determine New South's coverage obligations.

ANALYSIS

Summary judgment is intended to allow courts to "bring litigation to an end at an early stage, when it clearly appears that one of the parties is entitled to judgment within the framework of the case." *Carwile v. Richmond Newspapers, Inc.*, 196 Va. 1, 5 (1954). Nevertheless, the Supreme Court of Virginia has repeatedly indicated that summary judgment is considered a drastic remedy and is strongly disfavored. *See, e.g.*, *Smith ex rel. Rosen v. Smith*, 254 Va. 99, 103 (1997). Accordingly, a trial court considering a motion for summary judgment must "accept[] as true 'those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason.'" *Klaiber v. Freemason Assocs., Inc.*, 266 Va. 478, 484 (2003) (quoting *Dudas v. Glenwood Golf Club, Inc.*, 261 Va. 133, 136 (2001)). However, when there is no material fact genuinely in dispute, and when the moving party is entitled to judgment as a matter of law, the court shall enter judgment in that party's favor. Va. Sup. Ct. R. 3:20. Otero does not contest the factual history outlined in New South's Motion for Summary

Judgment. Thus, there is no genuine dispute of material fact, and this Court will interpret all reasonable inferences from these agreed facts in Otero's favor. *See Klaiber*, 266 Va. at 484.

I. New South's Policy Exclusion Does Not Apply to Otero's Claim Because Lopez Is a Sole Proprietor Who Has Not Elected to Be Covered by Workers' Compensation Insurance and, Therefore, Her Business Had Less Than Three Qualifying Employees Under the VWCA

New South argues that any claims based on its insurance Policy for Lopez are subject to a Policy exclusion because Otero can pursue a workers' compensation claim since her injury occurred during the course of her employment with Lopez. However, Otero argues that the Policy's exclusion does not bar her claim because Lopez could not have been held liable under the VWCA as the statute only applies to employers with three or more employees. The first issue is, thus, whether Lopez is an employee of her unincorporated business and, as a result, qualifies as the third employee under the VWCA.

Employers and employees in Virginia are "conclusively presumed to have accepted the provisions of [the VWCA]." Va. Code § 65.2-300(A). This presumption does not include "[e]mployees of any person, firm or private corporation . . . that has regularly in service less than three employees in the same business within this Commonwealth. . . ." *Id.* § 65.2-101. Thus, "[i]f an employer has fewer than three employees 'regularly in service,' it is not subject to the [VWCA] and has no obligation to provide its employees with workers' compensation benefits." *Hoffman v. Carter*, 50 Va. App. 199, 210 (2007) (quoting § 65.2-101). Consequently, an employer can defeat a claim for workers' compensation if fewer than three employees are regularly in its service. *Id.*

Viewing the record in the light most favorable to Otero, Lopez only had two employees regularly in service.[1] Lopez employing less than three individuals would mean that she is not automatically subject to the VWCA, and Otero could not bring a viable workers' compensation claim against her. New South nevertheless maintains that the Court must consider whether Lopez *herself* is an employee of Susana's Cleaning Service.

The VWCA defines employees as persons "in the service of *another* under any contract of hire or apprenticeship." § 65.2-101 (emphasis added). Under the statute's plain language, a proprietor of an unincorporated business does not fit neatly within such a definition. Lopez was neither under a contract of hire to Susana's Cleaning Service nor was she an apprentice of her own business. The VWCA includes specific guidance for circumstances where one individual is wholly responsible for a business; for example, sole proprietors, shareholders of a stock corporation having only one shareholder, and members of a limited liability company having only one member. *Id.* The statute states that these individuals must "elect[] to be included as an employee under the workers' compensation coverage of such business [and notify] the insurer . . . of this election." *Id.*

Courts have defined sole proprietorships as "'a form of business in which one person owns all the assets of the business . . . [and] is solely liable for all of the debts of the business.'" *E.g.*, *Metro. Cleaning Corp. v. Crawley*, 12 Va. App. 1167, 1171 n.1 (1991) (quoting Black's Law Dictionary), *rev'd en banc on other grounds*, 14 Va. App. 261 (1992).

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[1] In its first argument, New South does not dispute that Otero is Lopez's employee. Neither party asserts that Otero could be an independent contractor. Therefore, the Court will dispense with analyzing whether Otero is Lopez's employee or if she is an independent contractor under the common law. *Hann v. Times-Dispatch Publ'g Co.*, 166 Va. 102, 105 (1936) ("Whether the existing status is that of an employee or that of an independent contractor is governed, not by any express provision of the workmen's compensation law, but by common-law.").

Virginia courts have found individuals who worked out of their homes and did business under various trade names to be sole proprietors. *See Intermodal Servs., Inc. v. Smith*, 234 Va. 596, 598 (1988) ("[Plaintiff] operated from his home in the Northern Virginia area as a sole proprietor under the name, 'Smith's Fleet Service.'"); *Whitlock v. Whitlock Mech./Check Servs.*, Inc., 25 Va. App. 470, 472 (1997) ("At the time of his injury, claimant was a sole proprietor, trading as 'Whitlock Mechanical,' who engaged in the business of providing heating and air conditioning services."). In the most analogous case, the parties stipulated that "a domestic, day worker . . . [who] 'cleaned, dusted, swept, mopped and vacuumed in addition to cleaning windows and washing cabinets'" at various private homes for part of the week was a sole proprietor. *Metro. Cleaning Corp. v. Crawley*, 14 Va. App. 261, 263, 265 (1992).

Lopez never formally created a legal business entity but informally conducted business under the name Susana's Cleaning Service. Because Susana's Cleaning Service did not have an office, the Court can infer that Lopez conducted her business from her home. She owned all the assets of this business, including a bank account under the business's name, and there is nothing in the record suggesting anyone else was liable for the business's debts. Additionally, her business involved cleaning private homes for only part of the week. This Court finds that Lopez is a sole proprietor based on the undisputed evidence.

Because Lopez is a sole proprietor, she may elect to be deemed an employee under the VWCA by obtaining insurance from a commercial insurer, a licensed group self-insurance association, a registered professional employer organization, or by qualifying as an authorized self-insurer. §§ 65.2-101, 65.2-801. A sole proprietor may still have

employees subject to the VWCA's provisions, even if they have failed to elect coverage for themselves. *See Metro. Cleaning Corp.*, 14 Va. App. at 265. However, "[i]n determining the number of employees a sole proprietor has 'regularly in service,' a sole proprietor is excluded from the calculus unless an election is made to be included as an employee under workers' compensation coverage and the insurer is notified of the election." *Osborne v. Forner*, 36 Va. App. 91, 95-96 (2001) (quoting § 65.2-101). In the instant case, the record is clear that Lopez did not elect to be considered an employee. She had not purchased workers' compensation insurance[2] for her business and consequently could not notify an applicable insurer of any such election. *See Whitlock*, 25 Va. App. at 477 n.4 (rejecting a sole proprietor's argument that "he was not responsible for notifying [the insurer] of his election for coverage [as an employee] and that he was not responsible for 'directly apply[ing] to the insurance company for coverage'" under § 65.2-305). Thus, Lopez is not deemed the third employee of Susana's Cleaning Service, and Otero's injury remains outside the scope of the VWCA.

II. Otero Cannot Be Considered the Employee of Lopez's Customers Under a Plain Reading of the Statutory Scheme and Based on the Common Law Understanding of an Employment Relationship

New South alternatively posits that "in the service of another under any contract of hire" can encompass workers in service of *customers* rather than just to their employer. § 65.2-101. New South's argument implies that the true employers could also be the customers of Susana's Cleaning Service and, consequently, that New South would not

[2] If Lopez had purchased workers' compensation insurance, Otero's injury would be subject to the VWCA's provisions regardless of the number of individuals Lopez employed. § 65.2-305(B) ("Every employer taking out a workers' compensation insurance policy . . . shall be subject to all the provisions of this title, regardless of the number of employees . . .").

be liable for Otero's injury under its Policy with Lopez. However, this interpretation is a strained construction inconsistent with the statutory scheme. The record does not indicate that Otero is under a contract of hire to any customers of Susana's Cleaning Service but rather performs services as directed by Lopez. To the extent that any employment contract for Otero exists in this case, the contract is between Otero and Lopez. The scope of the VWCA encompasses the relationship between an employer and its employees rather than between the employees and the employer's customers.

Additionally, courts have analyzed alleged employment relationships through common law definitions. *Hann*, 166 Va. at 105. In general, "a person is an employee if he works for wages or a salary and the person who hires him reserves the power to fire him and the power to exercise control over the work to be performed." *Richmond Newspapers, Inc. v. Gill*, 224 Va. 92, 98 (1982). The most significant indication of an employment relationship is the power of control. *Id.* The power of control includes the ability to specify the desired results and "the means and methods by which the result is to be accomplished." *Id.* There is nothing in the record to indicate *any* interaction whatsoever between the customers and Otero. It is undisputed that the customers pay Lopez, who, in turn, pays Otero. Lopez exercises control over the work Otero performs by transporting her to the homes to be cleaned, providing cleaning supplies, and supervising the cleaning. While there is no information about the hiring or firing process in the record, New South concedes that Lopez is the one who hired both Otero and her other worker.

As the record currently stands, there is no evidence of any employment relationship between the customers and Otero. This forecloses an assertion that the customers have amassed the three employees necessary for the VWCA to apply to

Otero's injury. For these reasons, Otero cannot be considered the employee of the customers and, thus, the liability for her injury still rests with Lopez and, by extension, New South.[3]

CONCLUSION

The Court has considered New South's Motion for Summary Judgment seeking a declaration that it cannot be held liable for the injury to its insured's worker because Otero can bring a claim under the VWCA. There is no genuine dispute of material fact in this case, and the Court finds that New South is not entitled to judgment as a matter of law because Lopez is a sole proprietor and never elected workers' compensation coverage as an employee. Moreover, Otero cannot be considered an employee of Lopez's customers based on the purpose of the VWCA and the common law definition of an employment relationship. Therefore, neither of New South's arguments persuade the Court that Lopez or her customers employed three or more individuals. Thus, Lopez and her employees are not within the scope of coverage afforded by the VWCA.

Consequently, this Court holds that Otero cannot recover for her injury under the VWCA; thus, the Policy exclusions asserted by New South do not apply to the incident and do not exclude New South from any potential liability under its automobile insurance

[3] New South did not address how the Policy exclusion would apply even if the Court accepted its argument that the customers were Otero's employers under the VWCA. The Policy exclusion only protects New South from indemnification if a workers' compensation statute applies to an injury of its *insured's* employee. If the Court determined that Lopez's customers were the true employers of Otero, this exclusion is inapplicable to the incident in question. Because Lopez, as the vehicle's driver, can be held liable as an individual for an injury to her passengers, New South could still face liability under its alternative argument.

contract with Lopez.[4] Accordingly, the Court shall enter an Order denying New South's Motion for Summary Judgment and incorporating its ruling herein, and this cause continues.

Sincerely,

[redacted]

David Bernhard
Judge, Fairfax Circuit Court

[4] This Court did not determine whether Lopez and her employees might also be exempt from the VWCA under its exception for domestic servants, § 65.2-101, as neither party argued that this exemption was applicable herein.