

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Paula H. Thomas, Court Judge
and
James E. Lockemy, Circuit Judge

Case No. 2002-CP-22-00998

Employers Insurance of Wausau,..... RESPONDENT,

vs.

Eric C. Hansen,APPELLANT,

AND

Robert J. Moran, RESPONDENT,

AND

Eric C. Hansen (Third Party Plaintiff)APPELLANT,

vs.

Caldwell's Diving Co., Inc. (Third Party Defendant) RESPONDENT.

**RESPONDENT EMPLOYERS INSURANCE OF WAUSAU'S
RETURN TO THE PETITION FOR REHEARING**

Employers Insurance of Wausau makes the following return to the Appellant's Petition for Rehearing:

1. Rule 22, SCACR, governs petitions for rehearing. Rule 221(a) provides

that the petition shall state "with particularity the points supposed to have been overlooked or misapprehended". In other words, the Rule allows a party to raise arguments previously raised but overlooked or misapprehended. The Rule does not allow for new arguments or arguments not previously made.

The Appellant's first argument is titled "It is plain error to not reverse the Order dismissing Hansen's counterclaim of breach of contract based on the statute of limitations" was not previously raised. The Appellant did not raise any such issue or make any such argument in his Appellant's Brief. Thus, this new argument should not be considered.

The same is true as to his second issue involving the grant of summary judgment on the Unfair Trade Practices Act claim. In his Appellant's Brief, Appellant argued that the motion was not properly before the Court on June 4, 2008 and that Judge Thomas had previously ruled on the issue. Appellant has made a new argument in his petition, asserting that there was a contractual arrangement between the parties and a first party relationship. This new argument should not be considered.

Finally, as to the Appellant's third issue regarding the Trial Court's failure to compel the Respondent to comply with a discovery order, Appellant has failed to "state with particularity the points supposed to have been overlooked or misapprehended". This Court obviously did not overlook or misapprehend this issue. This Court ruled as follows:

"As to Issue III: *Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003) (affirming the grant of summary judgment despite a claim it was premature where further discovery was 'unlikely to create any

genuine issue of material fact'); *Cox*, 290 S.C. at 248, 349 S.E.2d at 94 (noting an appellant has the burden of showing that any alleged error is prejudicial)."

Thus, Appellant's third argument should not be considered.

2. If the Court considers the merits of Appellant's first and second issues, his Petition should be denied. Rule 220 (c), SCACR, authorizes the appellate court to affirm any decision upon any grounds appearing in the record. The record here establishes that there is no genuine issue of material fact to Wausau's entitlement to summary judgment in its favor on the claims for breach of contract accompanied by a fraudulent act and for violation of Unfair Trade Practices Act. The statute of limitations bars these claims. The same evidence that this Court found barred Hansen's claim against Moran bars Hansen's claims against Wausau. Since Hansen's alleged contract with Wausau required Wausau to waive its lien and since the funds were not disbursed to Hansen in 1996 because Wausau was asserting its lien, a reasonable person knew or should have known that Wausau had breached its alleged contract in 1996. This is confirmed by Hansen's own letter dated May 20, 1996, threatening suit. Hansen's attempt to parse the words of his letter should be rejected. Since Hansen did not bring suit until 2003, his claims as this Court found are barred by the statute of limitations pursuant to Rule 220(c), SCRCP. His Petition for Rehearing based upon these issues should be denied.

3. If the Court considers Appellant's third argument relating to compelling discovery, his Petition should be denied. Hansen has simply argued again that the Trial Judge erred in failing to compel the discovery that was

outstanding. He has failed to identify by affidavit or otherwise any discovery that would have impacted the rulings on summary judgment. Rule 56 provides a means by which a party can obtain a continuance of a hearing on a motion for summary judgment. Rule 56(f) provides as follows:

“(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavit to be obtained or depositions to be taken or discovery to be had or may make such order as is just.”

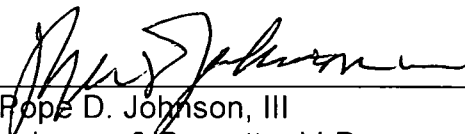
Here, Hansen submitted no affidavit pursuant to Rule 56(b). Moreover, Hansen made no other showing that would justify postponing the hearing on the motions for summary judgment for discovery.

Hansen has failed to point out anything that the Court overlooked or misapprehended related to this issue. This Court addressed this issue directly:

“As to Issue III: *Dawkins v. Fields*, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003) (affirming the grant of summary judgment despite a claim it was premature where further discovery was ‘unlikely to create any genuine issue of material fact’); *Cox*, 290 S.C. at 248, 349 S.E.2d at 94 (noting an appellant has the burden of showing that any alleged error is prejudicial).”

As a result, his Petition on this issue should be denied.

Respectfully submitted,



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Columbia, South Carolina
August 8, 2013

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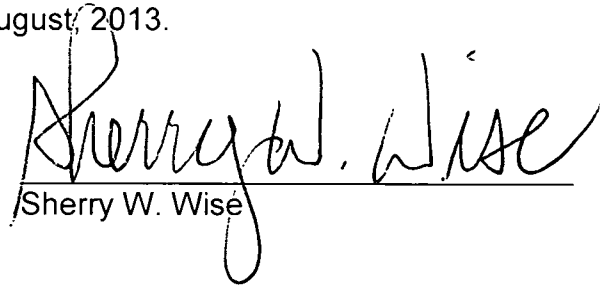
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PROOF OF SERVICE

I, Sherry W. Wise, of Johnson & Barnette, LLP, hereby certify that a copy of **Respondent Employers Insurance of Wausau's Return to Petition For Rehearing** in the above entitled matter was served on **Appellant Eric C.**

Hansen, 389 South Green Street, Tuckerton, NJ 08087, Respondent Robert J. Moran and his attorney, John S. Wilkerson of Turner Padgett Graham & Laney, P.O. Box 22129, Charleston, SC 29413, and Respondent Caldwell's Diving Co., Inc. and its attorney, Mary Bass Lohr of Howell, Gibson & Hughes, P.A., P.O. Box 40, Beaufort, SC 29901-0040, by mailing a copy of same, postage prepaid and return address clearing indicated, to them at the following addresses on the 8th day of August, 2013.


Sherry W. Wise