

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)
)
 DARRELL EDWARDS,)
)
 Plaintiff,)
)
 v.)
)
 E. PAUL GIBSON, REISEN LAW FIRM, E.)
 PAUL GIBSON PC, and JOHN DOES 1-5,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT
 CIVIL ACTION NO.:2014-CP-10-2954

ORDER GRANTING
 SUMMARY JUDGMENT
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 SC Court of Appeals

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 JULIE J. ARMSTRONG
 CLERK OF COURT

This matter came before the Court on Defendant E. Paul Gibson, the Riesen Law Firm, and E. Paul Gibson, P.C.'s Motion for Summary Judgment as to all of Plaintiff's claims against E. Paul Gibson, the Riesen Law Firm, and E. Paul Gibson P.C. (hereinafter "Defendant" or "Paul Gibson") pursuant to Rule 56 of the South Carolina Rules of Civil Procedure.

Plaintiff brought suit to recover damages for Defendants alleged negligence and legal malpractice. Defendants moved for summary judgment based upon Plaintiff's failure to present any evidence supporting his claims of negligence and legal malpractice. Plaintiff then filed a Motion for Extension of Time to Retain an Attorney, or in the alternative, that his case be placed in abeyance during the pendency of his Longshore claim with the Office of Administrative Law Judges in Norfolk, Virginia. Defendants replied to Plaintiff's motion, noting that Plaintiff was already provided one hundred and seventy-seven (177) days to find a new attorney. This Court denies any additional continuances.

After the written submissions by both parties to the Court, arguments were heard on January 15, 2015. Upon due consideration of the written submissions, arguments of counsel and

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parties, and absence of any genuine issue of material fact, I find summary judgment in favor of the moving Defendants is warranted and proper at this time.

FACTUAL BACKGROUND

Plaintiff in this lawsuit, Mr. Darrell Edwards, was a member of the Mechanics' Union and an employee of Marine Repair Services, Inc. working at the Wando Welch Terminal of the South Carolina Ports Authority in Mount Pleasant, South Carolina.

This lawsuit stems from a motor vehicle accident occurring on June 10, 2010, in which Mr. Edwards' vehicle was tapped from behind at the main gate of the Wando Welch Terminal. On June 11, 2010, the day after the accident, Mr. Edwards retained attorney Paul Gibson to represent him. Mr. Gibson had previously represented Mr. Edwards in a 2008 claim with regard to a left hand and wrist injury that occurred when Mr. Edwards was employed at Container Mechanic, Inc.

After reviewing the facts and circumstances of Mr. Edwards' motor vehicle accident, Mr. Gibson determined that Mr. Edwards lacked the status and/or situs requirements for coverage under the Longshore Act and that Mr. Edwards was not acting in the course and scope of employment as required for coverage under the South Carolina Workers' Compensation Act. Instead, Mr. Gibson determined that it was in his client's best interest to file a personal injury claim against Atlantic Trucking Co. as employer of the at-fault driver. The Complaint was filed in United States District Court on December 1, 2011. Prior to settlement of the personal injury claim, Mr. Edwards dismissed Paul Gibson as his attorney.

Mr. Edwards' successor attorney, Mr. John Austin (a North Carolina solo practitioner at the Austin Law Firm, PLLC located in Raleigh, North Carolina), filed a longshore claim under the Longshore and Harbor Workers' Compensation Act. The United States Dept. of Labor's Claims

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Examiner determined on November 28, 2012, that the longshore claim was not time barred and that Mr. Edwards did not meet the situs requirement for coverage.

Mr. John Austin next settled the personal injury claim. The personal injury claim was dismissed by Order of the United States District Court dated April 29, 2013.

On May 9, 2014, attorney Mr. Eduardo Curry, on behalf of Mr. Edwards, filed this action against Paul Gibson, claiming legal malpractice in that Mr. Gibson allegedly should have filed a claim under the Longshore Act and under the South Carolina Workers' Compensation Act instead of or in supplement to the personal injury claim.

On or around July 22, 2014, Mr. Curry filed a Motion to be Relieved as Counsel, citing an apparent conflict of interest. On July 22, 2014, an Order was entered granting Mr. Edwards ninety (90) days to find a new attorney to represent him in his claims against Paul Gibson. No attorney has appeared for Mr. Edwards. The time in the Order granting Mr. Edwards ninety (90) days to find a new attorney in his claim against Mr. Gibson expired on October 20, 2014. Counsel for Paul Gibson did not have any contact from Mr. Edwards or any attorney claiming to represent Mr. Edwards at the time of Defendants filing its Motion for Summary Judgment.

Meanwhile, Marine Repair Services, Inc. (Mr. Edwards' employer at the time of his injury) discovered Mr. John Austin and Mr. Edwards' settlement of the personal injury claim. Marine Repair Services, Inc. was not notified of the settlement of the personal injury claim as required by Section 33(g)(2) of the Longshore Act and did not approve settlement of the personal injury claim as required by Section 33(g)(1) of the Longshore Act.

Marine Repair Services then filed a Motion for Summary Decision regarding claims under the Longshore Act. On September 23, 2014, an Order was entered granting Marine Repair

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Services, Inc.'s Motion for Summary Decision on the sole basis that Section 33(g) of the Longshore Act barred Mr. Edwards' claim under the Longshore Act.

SUMMARY JUDGMENT STANDARD OF REVIEW

A court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rule 56(c), S.C.R.C.P. The party seeking judgment has the initial burden of demonstrating the absence of a genuine issue of material fact. Boone v. Sunbelt Newspapers, Inc., 347 S.C. 571, 578-79, 556 S.E.2d 732, 736 (Ct. App. 2001); Regions Bank v. Schumauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003). However, when a motion for summary judgment is made and supported as provided by the rule, an adverse party may not rest upon the mere allegations or denials of his pleadings. Rather, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. Regions Bank, 582 S.E.2d at 438.

Because "... a complete failure of proof concerning an essential element of a non-moving party's case necessarily renders all other facts immaterial," there can be no genuine issue as to any material fact where, "a party fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial." Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537, 545 (1991). When plain, palpable and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993).

LAW AND ANALYSIS

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To recover for legal malpractice, a plaintiff must prove the following: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. As to damages, the plaintiff must show that he "most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." *Id.* at *Howe*, citing *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

The existence of an attorney-client relationship is not in dispute. Plaintiff did not present any evidence regarding the remaining three requisite factors of breach of duty, damage to the client, and proximate cause. Summary judgment is appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). As discussed in detail below, Plaintiff has failed to present any evidence that he would have been successful in a claim under the Longshore Act or under the South Carolina Workers' Compensation Act. Unlike Plaintiff Darrell Edwards, Defendant Paul Gibson has presented Affidavits of numerous attorneys supporting his defenses to Plaintiff's claims.

I. MR. PAUL GIBSON ACTED REASONABLY AND DILIGENTLY IN DETERMINING NOT TO FILE A CLAIM UNDER THE LONGSHORE ACT.

Prior to 1972, coverage under the Longshore Act was determined by the traditional "locality" test of maritime tort jurisdiction. Coverage was limited to workers injured on navigable waters and excluded those injured on adjoining land, pier, or wharf.

In 1972, Congress amended the Longshore Act to protect "amphibious workers" by adding the status and situs requirements. *Humphries v. Director, Office of Workers Compensation Programs, U.S. Dept. of Labor*, 834 F.2d 372 (1987). The Supreme Court of the United States has held that both the status and situs requirements of the Longshore Act must be met independently

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for there to be coverage under the Longshore Act. Herb's Welding, Inc. v. Gray, 470 U.S. 414, 426-27, 105 S.Ct. 1421, 1428-29, 84 L.Ed.2d 406 (1985). In other words, failure to meet either status *or* situs results in failure of coverage under the Longshore Act.

In evaluating the facts and circumstances surrounding Mr. Edwards' motor vehicle accident, attorney Paul Gibson determined that Mr. Edwards failed to meet the "status" and/or "situs" requirements under the Longshore Act. Because of this, Mr. Gibson rightfully determined that filing a claim under the Longshore Act would be unsuccessful.

A. Mr. Edwards did not meet the status requirement.

Mr. Edwards did not meet the status requirement for coverage under the Longshore Act as amended by Congress in 1972. The status requirement extended landward coverage to workers "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder, and ship-breaker." 33 U.S.C.A. § 902(3) (2009).

In this particular instance, Mr. Edwards was not engaged in maritime employment at the time of his injury; he was returning from lunch with a coworker. He therefore lacked status under the Longshore Act and no viable claim could have been brought under the Longshore Act. This Court finds that Mr. Gibson did not breach any duty to his client, Mr. Edwards, by determining not to file a claim under the Longshore Act.

B. Mr. Edwards did not meet the situs requirement.

Mr. Edwards did not meet the situs requirement for coverage under the Longshore Act as amended by Congress in 1972. The situs requirement extended coverage under the Longshore Act to include "any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other

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adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.” 33 U.S.C.A. § 903(a) (1996).

The United States Court of Appeals for the Fourth Circuit held that, “The ‘other area’ annexed to navigable waters by the Act must again be ‘adjoining’ the water and must again be linked to the traditional longshoremen’s work on the water. The ‘other area’ must be for the loading or unloading of cargo onto ships in navigable waters or for the ‘repairing, dismantling, or building’ of those ships.” Jonathan Corp. v. Brickhouse, 142 F.3d 217 (1998). The area outside the terminal gate, where Mr. Edwards’ accident occurred, therefore, does not qualify as this “other area.”

Mr. Edwards was injured outside the gate of the Wando Welch Terminal after clocking out of work to leave the premises for lunch with a coworker. In order for Mr. Edwards’ to have met situs at the time of the accident, he would have had to pass through the main gate, travel the roughly one mile to employee parking, be picked up in employee parking by a van and transported to his worksite, and clock back in to work. Not a single one of these factors had occurred at the time of the accident.

The United States Court of Appeals for the Fourth Circuit has held that when a longshoreman moved out of coverage, even momentarily, leaving a shoreside facility in a car to pick up food, he was not covered by the Longshore Act when injured during that departure. See Humphries, 834 F.2d at 375.

The determination that Mr. Edwards lacked situs at the time of the accident was made by six local attorneys practicing in the areas of longshore claims, as well as by the leading national expert on longshore claims, Mr. Thomas C. Fitzhugh, III.

Additionally, the Claims Examiner for the U.S. Dept. of Labor, Office of Workers Compensation Claims, Division of Longshore and Harbor Workers’ Compensation, concluded that

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Mr. Edwards' failed to meet the situs requirement as Mr. Edwards "was not within the boundaries of the employer's shipyard" at the time of the accident.

This failure to meet situs as determined by U.S. Dept. of Labor Claims Examiner was also noted in the Affidavit of an eighth attorney, Mr. Hubert Wood. Mr. Wood was the attorney defending Marine Repair Services, Inc. / Container Maintenance Corp. and its insurer in a claim brought by Mr. Darrell Edwards for benefits under the Longshore Act as a result of his motor vehicle accident. As Mr. Wood's Affidavit clearly states, "the situs requirement for jurisdiction under the LHWCA was not satisfied due to the location of the motor vehicle accident on June 10, 2014, *sic*." In supporting his conclusion, Mr. Wood cites the opinions of the U.S. Dept. of Labor Claims Examiner.

This Court finds that Mr. Edwards did not meet the situs requirement of the Longshore Act. The sole reason for denial of the longshore claim was failure to meet the situs requirement as exhibited by the Ruling on the Longshore Case. Therefore, Mr. Edwards has not presented any evidence that he would have been successful had Mr. Gibson filed a claim under the Longshore Act. In fact, there is substantial evidence that Mr. Edwards would have been *unsuccessful* had Mr. Gibson filed a claim under the Longshore Act.

This Court finds that Mr. Paul Gibson did not breach any duty to his client, Mr. Edwards, by determining not to file a claim under the Longshore Act.

C. Mr. Edwards' Longshore claim was not time barred.

Plaintiff's Complaint alleges that Mr. Gibson failed to file the "...federal workers' compensation claim within one year statute of limitations called for by law, resulting in Plaintiff [Mr. Edwards] sustaining substantial economic loss."

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Mr. Edwards' Longshore claim was not time barred as evidenced by the Ruling on the Longshore Case denying the longshore claim for the sole reason of failure to meet the situs requirement. Even more blatant, the Ruling on the Longshore Case states that the Longshore claim was "**not time barred.**" The claim not being time barred was also noted in the Affidavit of Mr. Hubert Wood.

This Court finds that Mr. Edwards' claim that Mr. Gibson missed the statute of limitations is false. As previously stated, Mr. Gibson determined not to file the longshore claim for the same reasons that the longshore claim was denied by the Claims Examiner- Mr. Edwards' failure to meet the requirements under the Longshore Act.

D. Section 33(g) additionally barred Plaintiff's claims under the Longshore Act.

Plaintiff's claim under the Longshore Act was barred by Mr. Edwards own actions, wholly independent of any action by Paul Gibson. Negligence is not actionable unless it is a proximate cause of the injury. McNair v. Rainsford, 330 S.C. 332 (1998), citing Vinson v. Hartley, 324 S.C. 389, 477 S.E.2d 715 (Ct.App.1996). Proximate cause is the efficient or direct cause of the injury. Id.

Prior to settlement of the personal injury lawsuit against Atlantic Trucking Co., Mr. Edwards substituted Mr. John Austin (of Raleigh, North Carolina) as counsel in place of Mr. Gibson. Mr. Austin then settled Mr. Edwards' personal injury claim. Mr. Gibson was not involved in any way in the settlement of the personal injury claim against Atlantic Trucking Co.

Mr. Edwards' employer, Marine Repair Services, Inc. was not notified of the settlement as required by Section 33(g)(2) of the Longshore Act and did not approve settlement of the personal injury claim as required by Section 33(g)(1) of the Longshore Act.

Section 33(g)(1) provides, in pertinent part:

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If the person entitled to compensation (or the person's representative) enters into a settlement with a third person for an amount less than the compensation to which the person (or the person's representative) would be entitled under this chapter, the employer shall be liable for compensation only if written approval of the settlement is obtained from the employer and the employer's carrier, before the settlement is executed, and by the person entitled to compensation.

Section 33(g)(2) provides, in pertinent part:

If no written approval of the settlement is obtained and filed as required by paragraph (1), or if the employee fails to notify the employer of any settlement obtained from or judgment rendered against a third person, all rights to compensation and medical benefits under this chapter shall be terminated.

Section 33(g) acted as a complete bar to Mr. Edwards' claims pursuant to the Longshore Act as evidenced by the Order Granting Respondent's Motion for Summary Decision issued on September 23, 2014.

The Judge issuing the September 23, 2014 Order did not rule on timeliness or jurisdiction when granting the motion since the claim was completely barred by the actions or inactions of Mr. Edwards under Section 33(g). The opinion of the U.S. Dept. of Labor Administrative Law Judge was also cited by attorney Mr. Hubert Wood in his Affidavit denying benefits under the Longshore Act.

This Court finds that no action or inaction of Paul Gibson in any way contributed to Mr. Edwards' claim being barred under the Longshore Act. No evidence was presented by the Plaintiff that suggested a genuine issue of material fact.

II. MR. GIBSON ACTED REASONABLY AND DILIGENTLY IN DETERMINING NOT TO FILE A CLAIM UNDER THE SOUTH CAROLINA WORKERS' COMPENSATION ACT.

In addition to claiming that Mr. Gibson failed to file a claim under the Longshore Act, Mr. Edwards claimed that Mr. Gibson failed to file a claim under the South Carolina Workers' Compensation Act ("Workers' Compensation Act"), resulting in substantial economic loss.

This Court finds this claim to be unsupported. The Workers' Compensation Act provides for compensation for personal injury or death by accident arising out of and in the course of the employment. "Arising out of" refers to the injury's origin and cause whereas "in the course of" refers to the injury's time, place and circumstances. Both elements of the statute requiring injury to arise out of and in the course of employment must exist simultaneously before a person can recover under the Workers' Compensation Act. Osteen v. Greenville County Sch. Dist., 333 S.C. 43, 49, 508 S.E.2d 21, 24 (1998). It is the claimant's burden to prove facts rendering the injury compensable under the Workers' Compensation Act. Clade v. Champion Lab., 330 S.C. 8, 11, 496 S.E.2d 856, 857 (1998).

A. Mr. Edwards' injury did not "arise out of" his employment.

In order for Mr. Edwards to have coverage under the Workers' Compensation Act, Mr. Edwards injury would have had to "arise out of" his employment. For an injury to arise out of employment, the injury must be proximately caused by the employment. The injury arises out of employment when there is a causal connection between the conditions under which the work is required to be performed and the resulting injury. *Id.* at Osteen. "But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood." Douglas v. Spartan Mills, Startex Div., 245 S.C. at 269, 140 S.E.2d at 175 (1965).

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This Court finds that Mr. Edwards' injury did not arise out of his employment. There is simply no causal connection between the accident and Mr. Edwards' employment.

B. Mr. Edwards was not acting in the course and scope of employment at the time of the accident.

In order for Mr. Edwards to have coverage under the Workers' Compensation Act, Mr. Edwards would have had to be acting in the course and scope of his employment at the time of the accident. An injury occurs in the course of employment when it happens within the period of employment at a place where the employee reasonably may be in the performance of the employee's duties and while fulfilling those duties or engaging in something incidental to those duties. Broughton v. South of the Border, 336 S.C. 488, 498, 520 S.E.2d 634, 639 (Ct.App.1999).

As previously stated, at the time of the accident, Mr. Edwards was returning from lunch and no longer in the performance of his duties. The Supreme Court of South Carolina has held that an employee was not acting in the course and scope of employment when he was killed on his way back to work from his lunch hour, while on his own time, and while performing no duty for his employer. Troutman v. Williams Furniture Co., 224 S.C. 353 (1953).

At the time of the accident, Mr. Edwards was outside the main terminal gate, roughly one mile from his place of employment. Mr. Edwards' clocking out of work and leaving to get lunch with a coworker cannot be interpreted as being in the course and scope of employment. This Court finds that Plaintiff Mr. Edwards did not meet his burden of proving that his claims are compensable under the Workers' Compensation Act.

C. No reasonable attorney would have filed a claim under the South Carolina Workers' Compensation Act.

Mr. Edwards' claim would not have been compensable under the South Carolina Workers' Compensation Act for failure to meet the "arising out of" requirement and/or the "in the course

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of' requirement. Mr. Paul Gibson made this determination early on in his representation of Mr. Edwards. Since that time, numerous other local attorneys have become familiar with the facts of the case and have come to the same conclusion: that Mr. Edwards' was not acting in the course and scope of his employment at the time of his injury and that his claim would therefore not have been compensable under the South Carolina Workers' Compensation Act. Those attorneys include the aforementioned six attorneys with the addition of a seventh local attorney practicing in the area of Workers' Compensation claims.

This Court finds that Mr. Edwards has failed to establish any negligence on part of Mr. Gibson for not filing a claim under the South Carolina Workers' Compensation Act and has failed to present any evidence that he may have had a successful claim under the Workers' Compensation Act.

III. MR. PAUL GIBSON ACTED REASONABLY AND DILIGENTLY IN FILING A PERSONAL INJURY CLAIM IN UNITED STATES DISTRICT COURT.

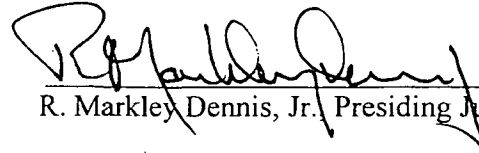
After concluding that Mr. Edwards' claim would not have been compensable under the federal Longshore Act or under the state Workers' Compensation Act, Mr. Gibson proceeded as a reasonable and diligent attorney by filing a personal injury claim in United States District Court against Atlantic Trucking Co. as employer of the at-fault driver.

Prior to settling his third party case, Mr. Edwards dismissed Mr. Gibson as his attorney. Any damage resulting from the settlement of the personal injury claim was based upon the failure of notification and approval of settlement under 33(g).

For the foregoing reasons and because neither party has raised a genuine issue of material fact, Defendant E. Paul Gibson, the Riesen Law Firm, and E. Paul Gibson, P.C.'s Motion for Summary Judgment against Plaintiff Darrell Edwards is granted as to all claims.

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AND IT IS SO ORDERED, this 26th day of January⁽²⁰¹⁵⁾ at Charleston, South
Carolina.


R. Markley Dennis, Jr. Presiding Judge.

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