THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Markley Dennis, Jr., Circuit Court Judge

Case No. 2014-CP-10-2954

DARRELL EDWARDS, ... Appellant,

v.

E. PAUL GIBSON, REISEN LAW FIRM, E. PAUL GIBSON PC, and JOHN DOES 1-5,..... Respondents.

INITIAL BRIEF OF RESPONDENTS

Carl E. Pierce, II
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STATEMENT OF THE CASE

Respondents/Defendants E. Paul Gibson, Reisen Law Firm, and E. Paul Gibson PC would note that Appellant/Plaintiff Darrell Edwards has omitted a number of facts related to the procedural history of this matter. First, Defendants filed a Memorandum in Opposition to Plaintiff's Motion for an Extension of Time on December 29, 2014. Defendants' Memorandum in Opposition to Motion for Extension, Record on Appeal ("R.") pp. __-__.

Second, Plaintiff failed to file any response to Defendant's Motion for Summary Judgment prior to the scheduled hearing on January 15, 2015. At the January 15, 2015 hearing, the judge indicated that he was not willing to continue the matter and granted the Defendants' Motion for Summary Judgment. January 15, 2015 Hearing Transcript, p. 10, lines 6-11, R. p. _, line __. *After the hearing was held and after the judge granted Defendants' Motion for Summary Judgment from the bench*, Plaintiff filed a letter to The Honorable R. Markley Dennis captioned "Motion to Continue Hearing 60 days or Motion to Dismiss without Prejudice. Reference rule 41(a)(2)." Plaintiff's January 15, 2015 Letter to Judge Dennis requesting Continuance, R. pp. __-__. As the title indicates, the letter sought a 60 day continuance to respond to Defendants' Motion for Summary Judgment or, in the alternative, sought to dismiss the action without prejudice pursuant to Rule 41(a)(2) of the South Carolina Rules of Civil Procedure. The majority of Plaintiff's appellate arguments center on this Letter Motion and the attached Exhibits, which were all filed after the Judge granted Defendant's Motion for Summary Judgment from the bench.

Third, the trial court not only granted Defendants' Motion for Summary Judgment, but also specifically denied Plaintiff's Motions for a another Continuance in two Form 4 Orders. January 21, 2015 Form 4 Order, R. p. __; January 23, 2015 Form 4 Order, R. p. __ (specifically referencing Plaintiff's December 10, 2015 Motion for Additional Time). The court's denial of "any additional continuances" by the Plaintiff was reiterated in the formal order issued by the court also granting Defendants' Motion for Summary Judgment. January 27, 2015 Summary Judgment Order, Page 1, R. p. __.

On January 26, 2015, Plaintiff filed another letter to Judge Dennis captioned "Motion responding to order of Mr. Pierce (defense counsel) to dismiss my summary Judgment." Plaintiff's January 22, 2015 Filing, R. p. __-__. This filing also 1) complained that the trial court had not addressed Plaintiff's motion to dismiss without prejudice, 2) provided additional argument for a continuance of Defendant's Motion for Summary Judgment, and 3) attached additional material in opposition to Summary Judgment. This motion was originally set to be heard on April 8, 2015.

On April 1, 2015, Plaintiff filed yet another letter again seeking a continuance of the April 8, 2015 hearing and also seeking to recuse The Honorable R. Markley Dennis, Jr., on the grounds that Plaintiff "think[s] you're friends with [Defendant] Paul Gibson and are biased towards him." Plaintiff's April 1, 2015 Filing, R. p. __. After an initial appeal by Plaintiff was dismissed, the lower court did finally hear the "motions" filed on January 26, 2015 and April 1, 2015 at a hearing on August 11, 2015. Plaintiff's new counsel argued for a motion to reconsider the summary judgment order relying upon the affidavit filed with the verified complaint. August 11, 2015 Hearing Transcript, p. 3,

lines 16-23, R. p. __. Judge Dennis again denied the motion to reconsider. August 11, 2015 Form 4 Order, R. __. This appeal followed.

FACTS

Plaintiff Edwards was involved in a motor vehicle accident on June 10, 2010 when his vehicle was hit from behind at the main gate of the Wando Welch Terminal. Traffic Collision Report, Exhibit A to Defendants' Memorandum in Support of Summary Judgment, R. p. __. Plaintiff Edwards was an employee of Marine Repair Services, Inc. and working at the Terminal. At the time of the accident, he was returning from lunch. Plaintiff does not dispute that he was at the gate when the accident occurred.

Plaintiff retained Defendant Gibson as his attorney on June 11, 2010. Retainer Agreement, Exhibit B to Defendants' Memorandum in Support of Summary Judgment, R. p. __. Defendant Gibson determined that Plaintiff Edwards did not meet the "status" and "situs" requirements for coverage under the Longshore and Harbor Workers' Compensation Act (the "Longshore Act"), 33 U.S.C. §§ 902, 903. Gibson also determined that Plaintiff Edwards was not acting in the course and scope of employment as required for coverage under the South Carolina Workers' Compensation Act. Consequently, Defendant Gibson did not file either of these claims. On December 1, 2011, Gibson did file a "third party" personal injury claim on behalf of Plaintiff Edwards against Atlantic Trucking Co., the owner of the vehicle that struck Plaintiff's car. Atlantic Trucking Complaint, Exhibit C to Defendants' Memorandum in Support of Summary Judgment, R. p. __.

On September 18, 2012, while the personal injury action against Atlantic Trucking was still pending, Plaintiff Edwards dismissed Defendant Gibson as his

attorney. Edwards Letter and John Austin Notice of Retainer, Exhibit D to Defendants' Memorandum in Support of Summary Judgment, R. p. __--__. One of Plaintiff Edwards' new attorneys, Bradley Marshall[1] filed a claim under the Longshore Act against Plaintiff Edwards' employer, Marine Repair Services, Inc.

On October 23, 2012, the Claims Examiner for the U.S. Department of Labor issued a Memorandum of Informal Conference arising from Plaintiff's Longshore Act claim. Memorandum of Informal Conference, Exhibit L to Defendants' Memorandum in Support of Summary Judgment, R. p. __. The Recommendations in this Memorandum included preliminary findings that:

1. "[T]o date Mr. Edwards has failed to introduce any medical evidence in support of his allegation with respect to undergoing surgeries."

2. "To date there is no evidence of record to support Mr. Edwards reporting the alleged injury of June 10, 201 to the employer/carrier in a timely manner."

[1] Mr. Marshall has been disbarred by the U.S. Supreme Court, In re Bradley R. Marshall, 131 S.Ct. 855 (2010), the Supreme Court of the State of Washington, In re Bradley R. Marshall, 167 Wash.2d 51, 217 P.3d 291 (2009) (en banc), is not licensed to practice law in South Carolina, March 20, 2014 Marshall Letter, attachments to Plaintiff's December 10, 2014 Filing Requesting Additional Time, R. p. __, and was denied the authority to appear in even a representative capacity before the United States Department of Labor, Office of Administrative Law Judges, Marshall v. Purcell, 2012 WL 6139379 (D.S.C. Dec. 11, 2012), aff'd 521 Fed.Appx. 200 (2013), so he cannot represent Plaintiff Edwards, or anyone else, on Longshore Act claims. Despite these facts, he is plainly involved in this case, Report of Plaintiff's Expert Joseph Reinhardt, Page 3, attached to the Complaint, R. p. __ (relying on materials provided by Chartman's, Inc., Mr. Marshall's company), and in the underlying Longshore Act claim for Mr. Edwards. March 20, 2014 Marshall Letter, attachments to Plaintiff's December 10, 2014 Filing Requesting Additional Time, R. p. __. Indeed, it would appear that Mr. Marshall is the person that decided not to provide expert Reinhardt with the orders from the underlying Longshore Act claim that essentially absolved Defendants from any wrongful acts. This is in keeping with Mr. Marshall's repeated efforts to instigate frivolous malpractice claims and disciplinary actions against Defendant E. Paul Gibson. Finally, Mr. Marshall has also been criminally charged in Charleston County with practicing law without a license. State of South Carolina v. Bradley Rowland Marshall, 2013A1011100200 (Charleston County, June 28, 2013).

3. "Mr. Edwards has failed to provide the necessary medical evidence as required under the Act to the employer to the employer/carrier in support of his June 10, 2010 injury; therefore, I recommend the entitle to medical benefits be denied."

4. "Furthermore, Mr. Edwards has failed to provide timely notice of injury and to date has not provided a credible account of the circumstances under which the alleged injuries occurred."[2]

On November 28, 2012, the Claims Examiner issued an Addendum to the Initial Memorandum to attorney Marshall. Memorandum of Informal Conference, Exhibit L to Defendants' Memorandum in Support of Summary Judgment, R. p. __. The Addendum reversed the prior finding that Edwards had failed to timely provide notice of injury:

> With respect to timely notice, it is agreed that the employer failed to file a report of injury as required by Section 30(a), the Section 13 statute of limitations is tolled. 33 U.S.C. § 930(a), (f). Section 30(f) states that where employer or carrier has notice or knowledge of an injury and fails to file the injury report required by Section 30(a), the Section 13 time period does not begin to run. *See* Section 30 of the desk book for a complete discussion; some representative cases are digested. Therefore, my previous recommendation is reconsidered and **not time barred** in accordance to Section 30(f) of the Act.

(emphasis in original).

In the Addendum, the Claims Examiner also determined that Plaintiff Edwards did not meet the "situs" requirement for coverage under the Longshore Act because he "was not within the boundaries of his employer's shipyard" at the time of the accident. Based on the foregoing, the Claims Examiner recommended that the Administrative Law Judge deny Plaintiff Edwards' Longshore Act claim. It would appear that this Addendum

[2] Edwards has blamed this failure to timely file the Longshore Act claim on Defendants. All the other failures listed are undoubtedly the responsibility of Edwards' new attorney who filed the Longshore Act claim, Mr. Marshall.

was not provided to Plaintiff's expert, who has never addressed the impact of these findings on the current malpractice allegations.

Another new attorney retained by Plaintiff Edwards, John Austin, settled Plaintiff Edwards' third party personal injury claim, which was dismissed on April 29, 2013. Order of Dismissal, Exhibit E to Defendants' Memorandum in Support of Summary Judgment, R. p. __. Neither Mr. Marshall nor Mr. Austin notified or sought approval for the personal injury settlement from his employer Marine Repair Services as required by Section 33(g)(2) of the Longshore Act, 33 U.S.C. § 933(g)(1)-(2). Consequently, Marine Repair Services filed a Motion for Summary Decision in Edwards' Longshore Act claim.

On September 23, 2014, Administrative Law Judge Kenneth A. Krantz granted employer Marine Repair Services' Motion for Summary Decision for failure to notify the employer of the settlement of the third party personal injury claim, as required by Section 33(g)(2) of the Longshore Act. Order Granting Respondent's Motion for Summary Decision, Exhibit I to Defendants' Memorandum in Support of Summary Judgment, R. p. __--__. Thus, Plaintiff Edwards' Longshore Act claim was dismissed due to his new attorneys' failure to put Edwards' employer on notice of the settlement of the third party personal injury claim. Again, Defendant Gibson was not Plaintiff Edwards' attorney at the time of this settlement. Plaintiff Edwards' expert was apparently not provided with this Order, and he did not address the impact of this ruling on Edwards' negligence claim against Defendants.

ARGUMENT

I. PLAINTIFF IS NOT ENTITLED TO DISMISSAL WITHOUT PREJUDICE AFTER JUDGMENT AGAINST HIM HAS BEEN RENDERED.

Plaintiff's January 15, 2015 Filing sought to dismiss the action without prejudice pursuant to Rule 41(a)(2), SCRCP. Plaintiff's January 15, 2015 Filing, R. p. __. The "motion" was filed minutes *after* the hearing on Defendant's Motion for Summary Judgment and after this court indicated that the Defendants' Motion for Summary Judgment was granted, and the case was dismissed. At no point during the hearing did Plaintiff's counsel indicate that he wanted to dismiss the action voluntarily.

The dismissal of an action upon request of the plaintiff is within the discretion of the court when legal prejudice is shown. S. Carolina Dep't of Soc. Servs. v. Pritcher, 329 S.C. 242, 495 S.E.2d 242, 245 (Ct.App. 1997). The court may refuse to allow a dismissal where to grant it would result in legal prejudice to the defendant. Harmon v. Harmon, 257 S.C. 154, 184 S.E.2d 553, 555 (1971).

A voluntary dismissal of an action without prejudice *after* the grant of summary judgment to the defendant will plainly prejudice the defendant. A plaintiff cannot take a voluntary non-suit or dismissal after verdict or after the defendant has received a decree against the plaintiff. Shelton v. Southern Ry., 80 S.C. 74, 61 S.E. 220 (1908); Forrest v. City Council of Charleston, 65 S.C. 500, 43 S.E. 952, 953 (1903) ("The rule is well settled that a plaintiff may be granted leave, upon payment of costs, to discontinue his suit before verdict, in an action at law, and before decree, in a suit in equity, where the cause has not so far progressed as to entitle defendant to a decree against plaintiff or a codefendant, and where no intervening party has acquired a right to a retention of the

cause."); 27 C.J.S. Dismissal and Nonsuit § 25 ("After a final judgment has been rendered, it is generally too late to dismiss or take a nonsuit."). To hold otherwise would perpetuate litigation indefinitely as plaintiffs could file a non-suit following any adverse decision.

Similarly, Rule 56(c), SCRCP, governing the procedure for summary judgment, states in part that "The judgment sought shall be *rendered forthwith* if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issues as to any material fact and that the moving party is entitled to a judgment as a matter of law." (emphasis added).

Although the issue has not been directly addressed in South Carolina, numerous other courts have recognized that a voluntary dismissal without prejudice is not available to a plaintiff after the court has indicated that it is going to grant summary judgment in favor of the defendant. Wong v. Smith, 961 F.2d 1018, 1020 (1st Cir. 1992) ("[C]ourts in other jurisdictions with similar rules regarding the availability of voluntary dismissals have decided that a plaintiff may not resort to voluntary dismissal or nonsuit once the court has granted summary judgment to the defendant, or announced its intention to do so."); Radiant Tech. Corp. v. Electrovert USA Corp., 122 F.R.D. 201, 203 (N.D. Tex. 1988) ("Outright dismissal should be refused, however, when a plaintiff seeks to circumvent an expected adverse result."); Smith v. Hartford Fire Ins. Co., 162 Ga.App. 26, 289 S.E.2d 520, 522 (1982) (announcement of intention to grant summary judgment precluded filing of voluntary dismissal, even though plaintiff filed notice of dismissal before judgment was actually entered); Garrison v. Cook, 280 Or. 205, 570 P.2d 646, 649 (1977) (voluntary nonsuit not available following adverse summary judgment); Beritich

v. Starlet Corp., 69 Wash.2d 454, 418 P.2d 762, 764 (1966) ("The summary judgment procedure, at least from the defendant's viewpoint, would become a virtual nullity if a plaintiff can 'exit stage left' upon hearing an adverse oral decision of the trial judge on the summary judgment motion.").

Allowing a non-suit after summary judgment has been orally granted from the bench would plainly prejudice the Defendants. Accordingly, the trial court was acting within its discretion in not granting a dismissal without prejudice pursuant to Rule 41(a)(2) after granting Defendants summary judgment, and that ruling should be upheld on appeal.

II. PLAINTIFF HAS PRESENTED NO EVIDENCE THAT DEFENDANTS BREACHED THEIR DUTY OF CARE OR CAUSED PLAINTIFF ANY LOSS.

Plaintiff Edwards has presented no evidence that Defendants breached their duty of care to Edwards or that some action taken by Defendants caused Plaintiff a loss. Because Plaintiff has failed to create a genuine issue of material fact on the issues of breach and causation, Defendants are entitled to summary judgment in this matter.

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, 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).

In this matter, Plaintiff Edwards has failed to present any evidence showing a causal connection between Defendant Gibson's actions and the loss of any potential claims under the Longshore Act or the South Carolina Workers' Compensation Act. Rather, the evidence conclusively shows that Edwards never had any such claim and, if he did, it was lost due to the failure of other attorneys to provide his employer with notice of settlement of third party personal injury claims.

A. PLAINTIFF EDWARDS' LONGSHORE ACT CLAIM WAS NOT TIME BARRED WHEN HE TERMINATED DEFENDANTS' REPRESENTATION OF HIM.

Plaintiff Edwards' and his expert, Joseph H. Reinhardt, assert that the one-year statute of limitations on Plaintiffs' Longshore Act claim expired while Defendants were representing Edwards. Complaint, Paragraph 10, R. p.__; Reinhardt Affidavit and Report, attached to Complaint, Page 1, R. p. __. Mr. Reinhardt specifically claims that

Edwards had viable claims under both the Longshore Act and South Carolina Workers' Compensation Act, and those claims were lost when the statute of limitations expired while Defendants were still representing Edwards. Reinhardt Affidavit and Report, Pages 4-6, attached to Complaint, R. p. __. Reinhardt claims that an April 12, 2013 email from a claims administrator, which is not part of the record and has not been produced, denied Edwards' Longshore Act claim due to untimeliness. Reinhardt Report, Page 6, R. p. __. Reinhardt does not address the impact of the subsequent Memoranda issued by the claims administrator or the ruling by the Administrative Law Judge (all of which are part of the record) that the statute had not run on the Longshore Act claim.

Although the first Memorandum of Informal Conference arising from Plaintiff's Longshore Act claim opined that Plaintiff Edwards had failed to provide timely notice of injury to his employer, an Addendum to that Memorandum dated November 28, 2012, reversed this conclusion and found that Edwards' claim was not time barred. Addendum to Memorandum of Informal Conference, Exhibit L to Defendants' Memorandum in Support of Summary Judgment, R. p. __ (emphasis in original).

Section 13 of the Longshore Act, 33 U.S.C. § 913(a), does provide for a one year statute of limitations running from the date of injury in most cases. However, the time limit in Section 13 is tolled if the employer does not provide an appropriate "report of injury" to the Secretary of Labor regarding the accident. 33 U.S.C. § 930(a) & (f). As noted by the Department of Labor Claims Examiner, Marine Repair Services acknowledged that it failed to file such a report. Addendum to Memorandum of Informal Conference, Exhibit L to Defendants' Memorandum in Support of Summary Judgment, R. p. __. Consequently, the statute on the Longshore Act claim was tolled, and whatever

rights Plaintiff Edwards had under the Longshore Act still existed well after he terminated Defendant Gibson as his attorney.

Because Plaintiff's new attorneys could have brought his Longshore Act claim, if it existed at all, there is no causal connection between the actions of Defendant Gibson and any loss that the Plaintiff may have suffered. Plaintiff Edwards was fully entitled to pursue his claim under the Longshore Act after he fired Gibson, and he did just that. Moreover, in the pursuit of the Longshore Act, it was determined that the claim was not barred by the statute. Plaintiff's expert was apparently not informed of this ruling and did not address it, so his affidavit does not create any issue of fact with regards to the total lack of evidence on causation. The lower court's ruling can be affirmed on this ground alone.

B. PLAINTIFF EDWARDS' LONGSHORE ACT CLAIM IS BARRED DUE TO HIS CURRENT ATTORNEY'S FAILURE TO NOTIFY PLAINTIFF'S EMPLOYER OF THE SETTLMENT OF PLAINITFF'S PERSONAL INJURY CLAIM.

As noted above, on September 18, 2012, while the personal injury action against Atlantic Trucking was still pending, Plaintiff Edwards dismissed Defendant Gibson as his attorney. Edwards Letter and John Austin Notice of Retainer, Exhibit D to Defendants' Memorandum in Support of Summary Judgment, R. p. __--__. Several months later, Plaintiff Edwards' new attorney, John Austin, settled Plaintiff Edwards' personal injury claim, which was dismissed on April 29, 2013. Order of Dismissal, Exhibit E to Defendants' Memorandum in Support of Summary Judgment, R. p. __. However, Mr. Austin failed to notify or seek approval for the personal injury settlement from employer Marine Repair Services as required by Section 33(g)(2) of the Longshore Act, 33 U.S.C.

§ 933 (g)(1)-(2). Consequently, Marine Repair Services filed a Motion for Summary Decision seeking to dismiss Edwards' Longshore Act claim.

On September 23, 2014, Administrative Law Judge Kenneth A. Krantz granted Marine Repair Services' Motion for Summary Decision for failure to comply with Section 33(g)(2). Order Granting Respondent's Motion for Summary Decision, Exhibit I to Defendants' Memorandum in Support of Summary Judgment, R. p. __--__.

Section 33(g) of the Act provides:

> **(g) Compromise obtained by person entitled to compensation**
>
> (1) If the person entitled to compensation (or the person's representative) enters into a settlement with a third person referred to in subsection (a) of this section 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 as determined under subsection (f) of this section 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 (or the person's representative). The approval shall be made on a form provided by the Secretary and shall be filed in the office of the deputy commissioner within thirty days after the settlement is entered into.
>
> **(2) If no written approval of the settlement is obtained and filed as required by paragraph (a), 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, regardless of whether the employer or the employer's insurer has made payments or acknowledged entitlement to benefits under this chapter.**

33 U.S.C. § 933(g)(1) & (2) (emphasis added).

It is undisputed that Plaintiff Edwards' new attorney failed to provide appropriate notice to employer Marine Repair Services of the third party settlement, and that Marine

Repair Services did not approve the settlement of Plaintiff Edwards' third party claim. As a result of this failure to provide the statutorily required notice, which occurred after Defendant Gibson was fired, Plaintiff Edwards lost any right he had to make a claim under the Longshore Act. Order Granting Respondent's Motion for Summary Decision, Exhibit I to Defendants' Memorandum in Support of Summary Judgment, R. p. __--__. Plaintiff Edwards' expert, Joseph Reinhardt, failed to address this issue or this ruling in his Initial Affidavit and Report filed with the Complaint, Reinhardt Affidavit and Report, attached to Complaint, R. pp. __-__, or in his Supplemental Affidavit and Report, filed after Defendants raised this issue. Reinhardt 1st Supplemental Affidavit and Report, attached to Plaintiff's January 15, 2015 Motion to Continue, R. p. __-__.

So, again, Plaintiff has failed to present any evidence showing a causal connection between the actions of Defendants and the loss of Plaintiff's Longshore Act claim. As determined by the Administrative Law Judge, Plaintiff's claim was lost due to his current attorney's failure to provide a statutorily required report of a third party settlement. Defendant Gibson had no involvement in that settlement, as he had already been dismissed by Edwards. As such, this is another ground supporting the trial court's summary judgment in favor of Gibson.

C. PLAINTIFF EDWARDS NEVER HAD A CLAIM UNDER THE LONGSHORE ACT BECAUSE HIS ACCIDENT DID NOT MEET THE "SITUS" AND "STATUS" REQUIREMENTS OF THE ACT.

Finally, there is no evidence that Plaintiff Edwards ever had a claim under the Longshore Act to begin with. Put another way, the record conclusively shows that Defendant Gibson acted reasonably and diligently in deciding not to pursue a claim under the Longshore Act for Plaintiff Edwards.

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" who moved back and forth from ship to land during their maritime activities. Two amendments to the Longshore Act accomplished this purpose. First, Congress extended the Act's coverage landward by including "any adjoining pier, wharf, drydock, terminal, building way, marine railway, *or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.*" 33 U.S.C. § 903(a) (emphasis added). This so-called "situs requirement" not only expanded the Longshore Act's coverage spatially but also created potential coverage for many workers whose occupations had never before been covered. Congress therefore added a parallel "status requirement," limiting the landward coverage to those 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. § 902(3). See also Humphries v. Dir., Office of Workers Comp. Programs, U.S. Dep't of Labor, 834 F.2d 372, 373 (4th Cir. 1987). The U.S. Supreme Court has held that both the status and situs requirements of the Longshore Act must be met independently 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 (1985).

In evaluating the facts and circumstances surrounding Plaintiff Edwards' motor vehicle accident, Defendant Gibson determined that Mr. Edwards failed to meet the "status" and "situs" requirements under the Longshore Act and was not in the course and

scope of his employment at the time of the accident. 33 U.S.C. § 902(2). All evidence before the court, indicates this was the correct decision.

1. The Status Requirement

The status requirement of the Longshore Act extends 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. § 902(3).

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. Employees injured while going to and from lunch are generally not deemed to be acting in the course and scope of their employment unless they are controlled at the time by the employer or their transportation has been furnished by the employer. See, e.g., Voehl v. Indem. Ins. Co. of N. Am., 288 U.S. 162, 169, 53 S.Ct. 380, 382, 77 L.Ed. 676 (1933) ("The general rule is that injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment."); Shivers v. Navy Exchange, 144 F.3d 322, 324 (4th Cir. 1998).

Plaintiff Edwards, therefore, lacked status under the Longshore Act, and no viable claim could have been brought under the Longshore Act. Defendant Gibson did not breach any duty to his former client, Plaintiff Edwards, by determining not to file a claim under the Longshore Act.

2. The Situs Requirement

Similarly, in order to meet the situs requirement, Plaintiff Edwards must show that the main gate of the Wando Welch Terminal is an "adjoining area customarily used

by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a). The Claims Examiner who presided over the underlying claim concluded that "[e]vidence of record supports that Mr. Edwards was not within the boundaries of the employer's shipyard, which satisfy [sic] maritime 'situs' requirement when he was injured on June 10, 2010." Addendum to Memorandum of Informal Conference, Exhibit L to Defendants' Memorandum in Support of Summary Judgment, R. p. __. She therefore recommended that the claim be denied.

Plaintiff 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. The law is clear that employees on a lunch break outside of a terminal do not satisfy the situs requirement. Humphries, 834 F.2d at 375.

The claims administrator's finding that Edwards' accident did not satisfy the situs requirement of the Longshore Act is supported by affidavits from eight separate attorneys attached to Defendants' Memorandum in Support of Summary Judgment. Affidavits of attorneys Thomas Fitzhugh, III, Charles H. Raley, Elizabeth Luzuriaga, S. Scott Bluestein, Carl H. Jacobson, Malcolm Crosland, Jr., Frank Reid Warder, Jr., and J. Hubert Wood, III, Exhibits J, K, and M, Defendants' Memorandum in Support of Summary Judgment, R. p. __-__.

Mr. Fitzhugh is a nationally recognized expert on the Longshore Act, serves as President of the Longshore Institute, Inc., has authored several national publications on the Longshore Act, and is an adjunct professor of Maritime Law at Texas A & M University. Affidavit of Fitzhugh, Exhibit J, Defendants' Memorandum in Support of Summary Judgment, R. p. __-__. Upon review of the full record, he concluded that

Plaintiff Edwards did not meet the situs requirement for coverage under the Longshore Act, that his injury was not within the course and scope of his employment, and that no reasonable attorney would pursue a claim under the Longshore Act for Plaintiff Edwards.

The other affiants are all members of the South Carolina Bar who regularly handle Longshore Act claims in South Carolina for both plaintiffs and defendants. Mr. Wood represented Marine Repair Services, Inc. in Plaintiff Edwards' Longshore Act claim. Each of those attorneys also concluded, like Mr. Fitzhugh and like the Department of Labor Claims Examiner, that Plaintiff Edwards' injuries did not occur within a situs covered by the Longshore Act and that a reasonable attorney would not pursue a claim under the Longshore Act. Affidavits, Exhibits K and M, Defendants' Memorandum in Support of Summary Judgment, R. p. __-__.

All evidence before the trial court indicated that Plaintiff Edwards had no claim to begin with under the Longshore Act. This conclusion is supported by the decisions in the underlying case and by eight different attorneys, all with extensive experience in pursing claims under the Longshore Act. The C.V. submitted by Plaintiff's expert, Mr. Reinhardt, shows no such experience. Reinhardt C.V., attached to Complaint, R. pp. __-__. As such, the Court of Appeals can affirm the trial court's rulings on this ground alone.

D. DEFENDANT GIBSON ACTED REASONABLY IN DECIDING NOT TO FILE A CLAIM FOR PLAINTIFF EDWARDS UNDER THE SOUTH CAROLINA'S WORKERS' COMPENSATION ACT.

Plaintiff Edwards also claims that Defendant Gibson failed to pursue a viable South Carolina Workers' Compensation Act claim on behalf of Edwards. This argument fails as well.

The South Carolina 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. S.C. Code Ann. § 42-1-160 (2015). 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, 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, 496 S.E.2d 856, 857 (1998).

Under the "going and coming rule," an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment. Therefore, an injury sustained by accident at such time is not compensable under the Workers Compensation Act because it does not arise out of and in the course of his employment. Whitworth v. Window World, Inc., 377 S.C. 637, 661 S.E.2d 333, 336 (2008).

There is no dispute that, at the time of the underlying accident, Plaintiff Edwards was returning from lunch, and no longer in the performance of his duties. As such, under the "going and coming rule," the accident is not covered by the South Carolina Workers' Compensation Act.

Given this clear law, Defendant Gibson acted reasonably in deciding not to bring a claim for Plaintiff Edwards under the South Carolina Workers' Compensation Act. This determination is supported by Attorneys Luzuriaga, Bluestein, Jacobson, Crosland,

Warder, and Kenneth W. Harrell, all of whom are highly experienced in handling claims under the South Carolina Workers Compensation Act, and all of whom opined that Plaintiff Edwards was not in the scope and work of his employment at the time of the accident. Affidavits, Exhibit K, Defendants' Memorandum in Support of Summary Judgment, R. p. __-__.

Since all the evidence before the court indicates that Plaintiff Edward's injury did not occur while he was working, the Court of Appeals should affirm the trial court's conclusion that Plaintiff Edwards had no claim under the South Carolina Workers' Compensation Act, and that Defendant Gibson acted reasonably in not pursuing such a claim.

E. NEITHER PLAINTIFF'S EXPERT AFFIDAVIT NOR THE OTHER MATERIAL SUBMITTED BY PLAINTIFF CREATES AN ISSUE OF FACT.

The Affidavit and Report of Plaintiff's expert, Joseph H. Reinhardt, fails to create an issue of fact that Plaintiff ever had a claim under the Longshore Act or Workers' Compensation Act or that any such claim was lost while Defendant Gibson represented Plaintiff. Reinhardt Affidavit and Report, attached to Complaint, R. p. __-__.

First and foremost, Mr. Reinhardt's report failed to address the rulings in the underlying Longshore Act claim filed on Plaintiff Edwards' behalf. The primary focus of Mr. Reinhardt's report is a conclusory allegation that Defendant Gibson failed to meet the standard of care because he let the one year statute of limitations run on Plaintiff Edwards' potential claim under the Longshore Act. Reinhardt Affidavit and Report, attached to Complaint, Pages 1-3, R. p. __-__. He specifically claims that "Both [the

Longshore Act and Workers Compensation] claims were denied on the basis of untimeliness." Reinhardt Affidavit and Report, attached to Complaint, Page 4, R. p. __.

This statement is false and directly contradicted by the Addendum from the Department of Labor Claims Examiner, Exhibit L, Defendants' Memorandum in Support of Summary Judgment, R. p. __-__, and by the fact that the Longshore Act claim was, in fact, pending at the time Mr. Reinhardt offered his affidavit and report. Mr. Reinhardt makes no mention of these facts. Rather, he relies on an alleged email that is not part of the record and has never been produced. In short, Mr. Reinhardt's Affidavit is either willfully false, or Plaintiff's counsel consciously decided to not provide the rulings from the claims administrator hearing Edwards' Longshore Act to his expert in order to generate a false affidavit.

In addition, Mr. Reinhardt's Affidavit and Report simply offer conclusory allegations, unsupported by any facts or law, that Plaintiff Edwards satisfied the status and situs requirements of the Longshore Act. Reinhardt Affidavit and Report, attached to Complaint, Page 6, R. p. __. Again, this conclusion is not supported by anything on the record and is directly contradicted by the Addendum from the Department of Labor Claims Examiner and the affidavits submitted by Defendants.

Moreover, Mr. Reinhardt's Affidavit does not meet the requirements of South Carolina Code § 15-36-100(B) (2015), which requires that an affidavit filed in support of a malpractice claim "must specify at least one negligent act or omission claimed to exist *and the factual basis for each claim.*" Mr. Reinhardt has failed to identify the factual basis for his claim that the subject accident meets both the "status" and "situs" requirements of the Longshore Act and the "course and scope" requirement of the South

Carolina Workers' Compensation Act even though Edwards was on a lunch break at the time of the accident.

Finally, there is no evidence in any of Plaintiff's submissions that Mr. Reinhardt is qualified to testify as an expert regarding handling claims under the Longshore Act or the South Carolina Workers Compensation Act. Reinhardt C.V., attached to Complaint, Page 2, R. p. __. South Carolina Code § 15-36-100(A) specifically requires that an expert providing an affidavit in support of a professional negligence claim meet certain qualifications:

> (A) As used in this section, "expert witness" means an expert who is qualified as to the acceptable conduct of the professional whose conduct is at issue and who:
>
> (1) is licensed by an appropriate regulatory agency to practice his or her profession in the location in which the expert practices or teaches; and
>
> (2)(a) is board certified by a national or international association or academy which administers written and oral examinations for certification in the area of practice or specialty about which the opinion on the standard of care is offered; or
>
> (b) has actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
>
> (i) the active practice of the area of specialty of his or her profession for at least three of the last five years immediately preceding the opinion;
>
> (ii) the teaching of the area of practice or specialty of his or her profession for at least half of his or her professional time as an employed member of the faculty of an educational institution which is accredited in the teaching of his or her profession for at least three of the last five years immediately preceding the opinion; or
>
> (iii) any combination of the active practice or the teaching of his or her profession in a manner which meets the requirements of subitems (i) and (ii) for at least three of the last five years immediately preceding the opinion.

S.C. Code Ann. § 15-36-100

Mr. Reinhardt's C.V. and Report do not comply with S.C. Code Ann. § 15-36-100(A)(2)(b) because they do not identify any experience in handling claims under the Longshore Act or any workers compensation claims in South Carolina. Reinhardt C.V., attached to Complaint, R. p. __-__. A search of his name in the database maintained by the United States Department of Labor, Office of Administrative Law Judges,[3] turns up no results, indicating he has never appeared before an Administrative Law Judge for the Department of Labor. In short, he has no qualifications to address the legal requirements of either the Longshore Act or the South Carolina Workers Compensation Act. As such, Mr. Reinhardt does not meet the requirements of S.C. Code Ann. § 15-36-100(A)(2)(b), because there is no evidence that he has practical or teaching experience in these areas.

Mr. Reinhardt's Supplemental Report introduces nothing new or informative regarding the situs requirement other than making conclusory claims that there is an issue of fact regarding same, without citing to any evidence or law that supports this conclusion. The one case he cites on the situs issue, Newport News Shipbuilding & Dry Dock Co. v. Graham, 573 F.2d 167, 169 (4th Cir. 1978), does not support the conclusion that a worker injured outside of a shipyard gate (or even next to a shipyard gate) was in situs. Indeed, the word "gate" does not appear in the opinion.

Mr. Reinhardt's Supplemental Report also fails to address the problems in his original Affidavit and Report, namely that it was based on inaccurate facts. For instance, Mr. Reinhardt was apparently told that the statute of limitations barred the Longshore Act claim, which is directly contradicted by the actual ruling on that claim finding that the

[3] http://www.oalj.dol.gov/

statute did not bar the claim. Nor does Mr. Reinhardt address the lack of a causal connection between Defendant Gibson's actions and Plaintiff Edwards' alleged injuries, which also formed the basis for the grant of summary judgment. Nothing in his affidavits addresses the tolling of the statute of limitations, which means the potential claim did not die on Defendant Gibson's watch, or the loss of the potential Longshore Act claim when Plaintiff Edwards' other attorneys failed to put the employer on notice of their third party settlement.

Similarly, the late witness statements submitted by Plaintiff Edwards do not create an issue of fact. Plaintiff's January 22, 2015 Letter, R. __-__. They merely reiterate Plaintiff Edwards' claim that the accident occurred at the shipyard gate, which was nowhere near his worksite. Mr. Ford's statement is not even signed. Mr. Pinckney's statement simply proffers hearsay testimony that he was told by someone else that the accident occurred at the gate.

The material proffered by Plaintiff does not address two grounds for summary judgment, namely that the statute had not run on Mr. Edwards' imagined Longshore Act claim, and that the ultimate dismissal of the Longshore Act claim was due to the failure by another attorney to seek approval of the settlement of Plaintiff Edwards' third party claim. Thus, even if Plaintiff Edwards has managed to create an issue of fact as to the situs requirement, he has not created an issue of fact as to the many other failings of his claims against Defendants. Accordingly, the Court of Appeals should affirm the lower court's grant of summary judgment and dismissal of this matter.

CONCLUSION

Plaintiff Edward's malpractice claims against Defendants fail to present a genuine issue of material fact regarding causation, a necessary element of any such malpractice claim. Specifically, no evidence contradicts the trial court's conclusions that:

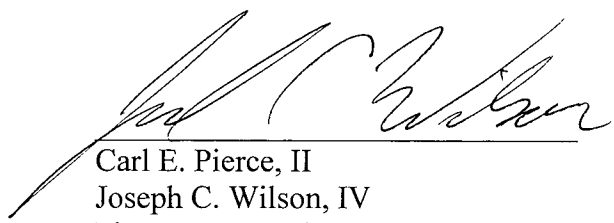
1. Plaintiff Edwards did not have a claim under the Longshore Act or the South Carolina Workers' Compensation Act due to the fact that he was injured on his lunch break;

2. Any potential claim Plaintiff had was still in existence when he fired Gibson; and

3. Any potential claim that Plaintiff Edwards had was lost, not by Gibson's actions, but by the actions of Plaintiff's subsequent attorneys who failed to provide notice of their third party settlement to Plaintiff's employer.

For all of these reasons, Plaintiff has presented no evidence linking the actions of Gibson with any alleged loss suffered by Plaintiff. As such, the Court of Appeals should affirm the trial court's grant of summary judgment.

Respectfully submitted,



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Attorneys for Respondents

2/9, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Markley Dennis, Jr., Circuit Court Judge

Case No. 2014-CP-10-2954

DARRELL EDWARDS, ... Appellant,

v.

E. PAUL GIBSON, REISEN LAW FIRM, E. PAUL GIBSON PC, and JOHN DOES 1-5, ... Respondents.

PROOF OF SERVICE

I, Sherry Manning, an employee of Pierce, Herns, Sloan & Wilson, LLC, attorneys for the Respondents, do hereby certify that I have served a copy of the Initial Brief of Respondents and Respondents Designation of Matter to be Included in the Record on Appeal and Proof of Service, on this the 9th day of February, 2016, by U.S. Mail and Electronic Mail to the attorneys identified below:

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February 9, 2016

The Honorable V. Clair Allen
Deputy Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: *Darrell Edwards v. E. Paul Gibson, Reisen Law Firm and E. Paul Gibson PC and John Does 1-5*
C/A No. 2014-CP-10-2954
Appellate Case No. 2015-001930
PHSW File No. D2529.01

Dear Ms. Allen:

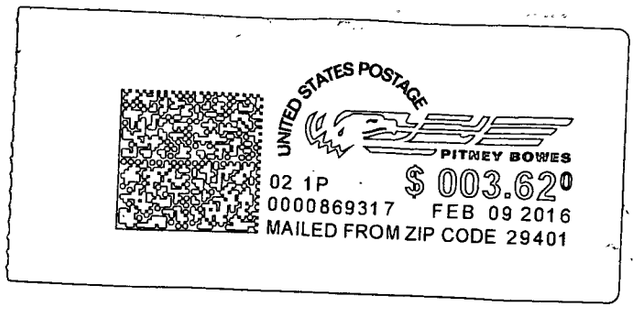
Enclosed for filing please find the original and one (1) copy of the Initial Brief of Respondents, Respondents' Designation of Matter to be Included in the Record on Appeal, and Proof of Service. Please return a filed copy to my attention in the envelope provided. By copy of this letter to all counsel of record, and as indicated in the Proof of Service, all counsel of record are hereby served.

With kind regards,

Sincerely,

Joseph C. Wilson, IV

Enclosure
cc: Chauntel Demetrius Bland, Esquire *(via U.S. Mail and E-mail)*



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