

18

78859

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Markley Dennis, Jr., Circuit Court Judge
Case No. 2014-CP-10-2954

RECEIVED

MAR 07 2016

SC Court of Appeals
Appellant,

Appellate Case No. 2015-001930

DARRELL EDWARDS, Appellant,

v.

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

RESPONDENTS' PETITION TO STRIKE
APPELLANT'S REPLY BRIEF OR, IN THE ALTERNATIVE,
TO FILE A SUR-REPLY BRIEF

Carl E. Pierce, II
Joseph C. Wilson, IV
Pierce, Hems, Sloan, & Wilson, LLC
P.O. Box 22437
Charleston, SC 29413
(843) 722-7733
Attorneys for Respondents

Other Counsel of Record:

Chauntel Demetrius Bland
463 Regency Park Dr.
Columbia, SC 29210
(803) 319-6262
Attorney for Appellant

Respondents/Defendants E. Paul Gibson, Reisen Law Firm, and E. Paul Gibson PC hereby petition the Court to strike the Reply Brief filed by Appellant/Plaintiff Darrell Edwards or, in the alternative, allow Respondents to file a Sur-Reply Brief. The petition is made on the grounds that Appellant's Reply Brief is based entirely on an argument that 1) was not presented to or ruled upon by the lower court, 2) was not presented or argued in Appellant's Initial Brief, and 3) is not supported by any matter that has been designated in the record on appeal.

This appeal arises out of the dismissal of Plaintiff Edwards' claims against the Defendants on summary judgment. Edwards claimed that he had lost the right to proceed under the Longshore and Harbor Workers' Compensation Act (the "Longshore Act"), 33 U.S.C. §§ 902, 903, because the statute of limitations had expired while Defendant Gibson was representing Edwards. Gibson argued, and the lower court agreed, that 1) Edwards never had a Longshore Act claim to begin with, 2) any Longshore Act claim that Edwards did have still existed when Edwards fired Defendant Gibson, and 3) Edwards lost any potential Longshore Act claim because Edwards' subsequent attorneys failed to provide appropriate notice of a third-party settlement to Edwards' employer, as required by Section 33(g) of the Longshore Act, 33 U.S.C. § 933(g). As explained in Respondents' Brief, these holdings are all supported by the clear terms of the Longshore Act.

In addition to relying on the Longshore Act's clear provisions in finding no causal connection between the actions of Defendants and any loss suffered by Plaintiff Edwards, the trial court also relied upon rulings by the various tribunals that heard and ultimately dismissed Edwards' Longshore Act claim. The Claims Examiner for the U.S. Department

of Labor and the Administrative Law Judge, which initially heard an appeal in the underlying matter, concluded:

1. Edwards Longshore Act claim was not time barred, so the claim still existed when Edwards terminated Gibson;

2. Edwards lost his Longshore Act claim when his later attorneys failed to provide proper notice of a settlement to his employer, as required by Section 33(g). Respondents' Brief, Pages 4-6.

On September 30, 2015, after this appeal was noticed but before the first brief was filed, the Benefits Review Board of the U.S. Department of Labor partially reversed the order of the Administrative Law Judge. BRB Order, Exhibit No. 1. As explained in further detail in Respondents' proposed Sur-Reply Brief, filed and served contemporaneously herewith, even though the Benefits Review Board reversed the Administrative Law Judge in part and remanded for further findings, its holding that Edwards complied with Section 33(g)(2) of the Longshore Act does not impact this matter. The Benefits Review Board actually confirmed that if Plaintiff Edwards received *less* in his third party settlement than he would be entitled to in compensation under the Longshore Act, his Longshore Act claim is governed by the notice requirements of Section 33(g)(1) (as opposed to Section 33(g)(2)). The Benefits Review Board agreed with the lower tribunals in finding that Edwards did not comply with the notice requirement of Section 33(g)(1) and, therefore, lost his right to proceed under the Longshore Act. BRB Order, Pages 4, 6 n. 4, and 7, attached as Exhibit No. 1.

The Benefits Review Board parted from the holdings of the Administrative Law Judge in finding that, if Edwards' third party recovery was *greater* than his compensation

amount under the Longshore Act, his notice requirements are governed by Section 33(g)(2), which he complied with by giving his employer notice after the settlement but before benefits were paid. The Benefits Review Board remanded the matter to determine if the third party settlement exceeded or was less than Edwards' potential compensation under the Longshore Act, as that will determine which Sub-Section will apply, and whether his claim is still viable.

Plaintiff Edwards would have this Court believe that 1) his third party recovery was greater than his compensation amount,¹ 2) his Longshore Act claim was, therefore, not barred by the notice requirements of Section 33(g), and 3) Defendants are somehow responsible for the loss of Plaintiff Edwards' Longshore Act, even though they continue to pursue it to this day.

However, Plaintiff Edwards' analysis of the BRB is incomplete. If Edwards' third party settlement exceeded his potential compensation and is therefore not barred by Section 33(g)(2) under the BRB Order, his Longshore Act claim would be reduced to zero due to the set off provisions contained in Section 33(f) of the Act. 33 U.S.C. § 933(f). Pursuant to Section 33(f), any entitlement to compensation is reduced by third party recoveries. If Edwards' third party recovery exceeds his compensation (bringing Section 33(g)(2) into play), he still has no claim of value because the recovery will completely set off the compensation. In other words, Plaintiff Edwards cannot point to any loss caused by Defendants regardless of how much he received in his third party settlement.

Moreover, the Benefits Review Board's ruling did not impact the other grounds for dismissal of this action, namely that the Longshore Act claim was not time barred when

¹ There is no evidence on the record that this is the case, and Defendants highly doubt that the settlement was more than the potential award under the Longshore Act.

Edwards terminated Defendant Gibson, Respondents' Brief, Pages 10-12, and that Edwards presented no evidence he had a claim under the Longshore Act in the first place. Respondents' Brief, Pages 14-18.

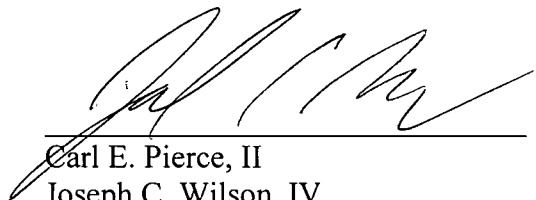
Even though Edwards' Initial Appellate Brief was not filed until January 11, 2016, more than three months after the BRB Order, Edwards' counsel did not mention the BRB Order, did not argue the legal position expressed by the Benefits Review Board (even though he presumably advocated for it before the Benefits Review Board months before the appeal) either at the trial court level or in his initial appellate brief, and did not add the BRB Order to the Designation of Matter to Be Included in the Record on Appeal. Instead, Edwards' counsel inexplicably decided to wait until his Reply Brief to mention the BRB Order, depriving Defendants of the opportunity to explain how the BRB Order has no impact on this appeal. Moreover, Edwards' counsel failed to even attach the BRB Order to his Reply Brief or otherwise seek to include it in the Record on Appeal. Instead, he opted to quote two sentences from the BRB Order that grossly misrepresent the scope of Benefits Review Board's holding and its impact on the present matter.

Plaintiff Edwards has breached almost every rule governing issue preservation. Appellants cannot raise new arguments on appeal that were not raised and ruled on by the trial court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 733 (1998) ("It is "axiomatic that an issue cannot be raised for the first time on appeal."). "[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief." Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 557 S.E.2d 689, 692 (Ct.App. 2001). The argument presented in Edwards' Reply Brief was not included in the Statement of Issues on Appeal in violation of Rule 208(b)(1)(B), SCACR. Finally,

210(h), SCACR, does not allow for consideration of any fact not included in the Record on Appeal. Plaintiff Edwards did not seek to supplement the record on appeal pursuant to Rule 212(b), SCACR.

Based on the foregoing, Defendants would ask that the Court of Appeals either strike Plaintiff's Reply Brief in its entirety and not consider any argument or evidence presented therein or, in the alternative, accept Defendants' proposed Sur-Reply Brief to address the new arguments and evidence presented by Plaintiff in his Reply Brief and further allow the referenced Benefits Review Board Order to be included in the record on appeal.

Respectfully submitted,



Carl E. Pierce, II
Joseph C. Wilson, IV
Pierce, Hems, Sloan, & Wilson, LLC
P.O. Box 22437
Charleston, SC 29413
(843) 722-7733

Attorneys for Respondents

3/4, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Markley Dennis, Jr., Circuit Court Judge
Case No. 2014-CP-10-2954

Appellate Case No. 2015-001930

RECEIVED

MAR 07 2016

SC Court of Appeals

DARRELL EDWARDS, Appellant,

v.

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

RESPONDENTS' PETITION TO STRIKE
APPELLANT'S REPLY BRIEF OR, IN THE ALTERNATIVE,
TO FILE A SUR-REPLY BRIEF

Carl E. Pierce, II
Joseph C. Wilson, IV
Pierce, Hens, Sloan, & Wilson, LLC
P.O. Box 22437
Charleston, SC 29413
(843) 722-7733
Attorneys for Respondents

Other Counsel of Record:

Chauntel Demetrius Bland
463 Regency Park Dr.
Columbia, SC 29210
(803) 319-6262
Attorney for Appellant

Respondents/Defendants E. Paul Gibson, Reisen Law Firm, and E. Paul Gibson PC hereby petition the Court to strike the Reply Brief filed by Appellant/Plaintiff Darrell Edwards or, in the alternative, allow Respondents to file a Sur-Reply Brief. The petition is made on the grounds that Appellant's Reply Brief is based entirely on an argument that 1) was not presented to or ruled upon by the lower court, 2) was not presented or argued in Appellant's Initial Brief, and 3) is not supported by any matter that has been designated in the record on appeal.

This appeal arises out of the dismissal of Plaintiff Edwards' claims against the Defendants on summary judgment. Edwards claimed that he had lost the right to proceed under the Longshore and Harbor Workers' Compensation Act (the "Longshore Act"), 33 U.S.C. §§ 902, 903, because the statute of limitations had expired while Defendant Gibson was representing Edwards. Gibson argued, and the lower court agreed, that 1) Edwards never had a Longshore Act claim to begin with, 2) any Longshore Act claim that Edwards did have still existed when Edwards fired Defendant Gibson, and 3) Edwards lost any potential Longshore Act claim because Edwards' subsequent attorneys failed to provide appropriate notice of a third-party settlement to Edwards' employer, as required by Section 33(g) of the Longshore Act, 33 U.S.C. § 933(g). As explained in Respondents' Brief, these holdings are all supported by the clear terms of the Longshore Act.

In addition to relying on the Longshore Act's clear provisions in finding no causal connection between the actions of Defendants and any loss suffered by Plaintiff Edwards, the trial court also relied upon rulings by the various tribunals that heard and ultimately dismissed Edwards' Longshore Act claim. The Claims Examiner for the U.S. Department

of Labor and the Administrative Law Judge, which initially heard an appeal in the underlying matter, concluded:

1. Edwards Longshore Act claim was not time barred, so the claim still existed when Edwards terminated Gibson;

2. Edwards lost his Longshore Act claim when his later attorneys failed to provide proper notice of a settlement to his employer, as required by Section 33(g). Respondents' Brief, Pages 4-6.

On September 30, 2015, after this appeal was noticed but before the first brief was filed, the Benefits Review Board of the U.S. Department of Labor partially reversed the order of the Administrative Law Judge. BRB Order, Exhibit No. 1. As explained in further detail in Respondents' proposed Sur-Reply Brief, filed and served contemporaneously herewith, even though the Benefits Review Board reversed the Administrative Law Judge in part and remanded for further findings, its holding that Edwards complied with Section 33(g)(2) of the Longshore Act does not impact this matter. The Benefits Review Board actually confirmed that if Plaintiff Edwards received *less* in his third party settlement than he would be entitled to in compensation under the Longshore Act, his Longshore Act claim is governed by the notice requirements of Section 33(g)(1) (as opposed to Section 33(g)(2)). The Benefits Review Board agreed with the lower tribunals in finding that Edwards did not comply with the notice requirement of Section 33(g)(1) and, therefore, lost his right to proceed under the Longshore Act. BRB Order, Pages 4, 6 n. 4, and 7, attached as Exhibit No. 1.

The Benefits Review Board parted from the holdings of the Administrative Law Judge in finding that, if Edwards' third party recovery was *greater* than his compensation

amount under the Longshore Act, his notice requirements are governed by Section 33(g)(2), which he complied with by giving his employer notice after the settlement but before benefits were paid. The Benefits Review Board remanded the matter to determine if the third party settlement exceeded or was less than Edwards' potential compensation under the Longshore Act, as that will determine which Sub-Section will apply, and whether his claim is still viable.

Plaintiff Edwards would have this Court believe that 1) his third party recovery was greater than his compensation amount,¹ 2) his Longshore Act claim was, therefore, not barred by the notice requirements of Section 33(g), and 3) Defendants are somehow responsible for the loss of Plaintiff Edwards' Longshore Act, even though they continue to pursue it to this day.

However, Plaintiff Edwards' analysis of the BRB is incomplete. If Edwards' third party settlement exceeded his potential compensation and is therefore not barred by Section 33(g)(2) under the BRB Order, his Longshore Act claim would be reduced to zero due to the set off provisions contained in Section 33(f) of the Act. 33 U.S.C. § 933(f). Pursuant to Section 33(f), any entitlement to compensation is reduced by third party recoveries. If Edwards' third party recovery exceeds his compensation (bringing Section 33(g)(2) into play), he still has no claim of value because the recovery will completely set off the compensation. In other words, Plaintiff Edwards cannot point to any loss caused by Defendants regardless of how much he received in his third party settlement.

Moreover, the Benefits Review Board's ruling did not impact the other grounds for dismissal of this action, namely that the Longshore Act claim was not time barred when

¹ There is no evidence on the record that this is the case, and Defendants highly doubt that the settlement was more than the potential award under the Longshore Act.

Edwards terminated Defendant Gibson, Respondents' Brief, Pages 10-12, and that Edwards presented no evidence he had a claim under the Longshore Act in the first place. Respondents' Brief, Pages 14-18.

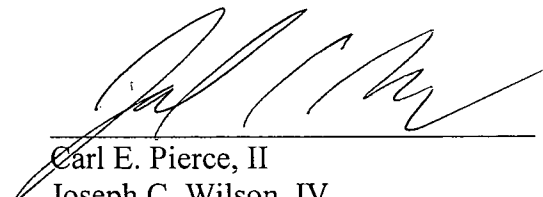
Even though Edwards' Initial Appellate Brief was not filed until January 11, 2016, more than three months after the BRB Order, Edwards' counsel did not mention the BRB Order, did not argue the legal position expressed by the Benefits Review Board (even though he presumably advocated for it before the Benefits Review Board months before the appeal) either at the trial court level or in his initial appellate brief, and did not add the BRB Order to the Designation of Matter to Be Included in the Record on Appeal. Instead, Edwards' counsel inexplicably decided to wait until his Reply Brief to mention the BRB Order, depriving Defendants of the opportunity to explain how the BRB Order has no impact on this appeal. Moreover, Edwards' counsel failed to even attach the BRB Order to his Reply Brief or otherwise seek to include it in the Record on Appeal. Instead, he opted to quote two sentences from the BRB Order that grossly misrepresent the scope of Benefits Review Board's holding and its impact on the present matter.

Plaintiff Edwards has breached almost every rule governing issue preservation. Appellants cannot raise new arguments on appeal that were not raised and ruled on by the trial court. Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731, 733 (1998) ("It is "axiomatic that an issue cannot be raised for the first time on appeal."). "[A]n argument made in a reply brief cannot present an issue to the appellate court if it was not addressed in the initial brief." Glasscock, Inc. v. U.S. Fid. & Guar. Co., 348 S.C. 76, 557 S.E.2d 689, 692 (Ct.App. 2001). The argument presented in Edwards' Reply Brief was not included in the Statement of Issues on Appeal in violation of Rule 208(b)(1)(B), SCACR. Finally,

210(h), SCACR, does not allow for consideration of any fact not included in the Record on Appeal. Plaintiff Edwards did not seek to supplement the record on appeal pursuant to Rule 212(b), SCACR.

Based on the foregoing, Defendants would ask that the Court of Appeals either strike Plaintiff's Reply Brief in its entirety and not consider any argument or evidence presented therein or, in the alternative, accept Defendants' proposed Sur-Reply Brief to address the new arguments and evidence presented by Plaintiff in his Reply Brief and further allow the referenced Benefits Review Board Order to be included in the record on appeal.

Respectfully submitted,



Carl E. Pierce, II
Joseph C. Wilson, IV
Pierce, Hems, Sloan, & Wilson, LLC
P.O. Box 22437
Charleston, SC 29413
(843) 722-7733

Attorneys for Respondents

3/4, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

Markley Dennis, Jr., Circuit Court Judge

Case No. 2014-CP-10-2954

RECEIVED
MAR 07 2016
SC Court of Appeals

DARRELL EDWARDS,Appellant,

v.

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

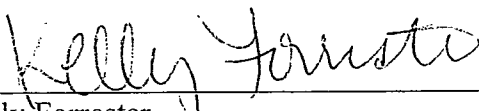
PROOF OF SERVICE

I, Kelly Forrester, an employee of Pierce, Hems, Sloan & Wilson, LLC, attorneys for the Respondents, do hereby certify that I have served a copy of:

1. Respondents' Petition to Strike or, in the alternative, to File a Sur-Reply Brief;
2. Respondents' Sur-Reply Brief; and
3. Respondents' Supplemental Designation of Matter to be Included in the Record

on Appeal and Proof of Service, on this the 4th day of March, 2016, by U.S. Mail to the attorneys identified below:

ATTORNEY FOR APPELLANT:
Chauntel Demetrius Bland, Esquire
463 Regency Park Drive
Columbia, SC 29210



Kelly Forrester

PIERCE, HERNS, SLOAN & WILSON, LLC

ATTORNEYS AND COUNSELORS AT LAW

THE BLAKE HOUSE • 321 EAST BAY STREET
CHARLESTON, SOUTH CAROLINA 29401

POST OFFICE BOX 22437
CHARLESTON, SOUTH CAROLINA 29413

CARL E. PIERCE, II
LOUIS P. HERNS
ALLAN P. SLOAN, III *♦
JOSEPH C. WILSON, IV †
JAMES G. KENNEDY
WILLIAM P. EARLY
SONALY K. HENDRICKS †

M. TODD RAINSFORD
KRISTEN B. FEHSENFELD
CHRISTINA L. PERRIN
RYAN K. MILLER
WHIDBEE S. PERRIN
BENJAMIN C. SMOOT, II

* MEMBER SC & FL BAR
♦ CERTIFIED SC CIRCUIT
COURT MEDIATOR
† MEMBER SC, FL & GA BAR
‡ SPECIAL COUNSEL

(843) 722-7733
(843) 722-7732 FAX
www.phswlaw.com

Direct Dial: 843-725-7705
Email: joewilson@phswlaw.com

March 4, 2016

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

RECEIVED
MAR 07 2016
SC Court of Appeals

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:

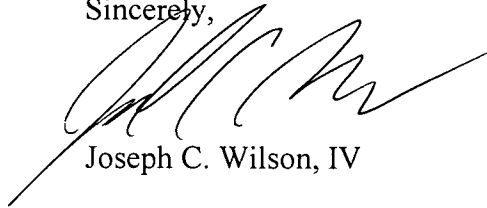
1. the original and six (6) copies of Respondents' Petition to Strike Appellant's Reply Brief or, in the alternative, to File a Sur-Reply Brief;
2. the original and one (1) copy of Respondents' Proposed Sur-Reply Brief;
3. the original and one (1) copy of Respondents' Supplemental Designation of Matter to be Included in the Record on Appeal;
4. a check for \$25.00 covering the filing fee; and
5. 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.

PIERCE, HERNS, SLOAN & WILSON, LLC

With kind regards,

Sincerely,

A handwritten signature in black ink, appearing to read 'J.C. Wilson, IV', written in a cursive style with a long horizontal flourish extending to the right.

Joseph C. Wilson, IV

Enclosure

cc: Chauntel Demetrius Bland, Esquire