

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

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SC Court of Appeals

DARRELL EDWARDS,Appellant,

v.

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

INITIAL SUR-REPLY BRIEF OF RESPONDENTS

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ARGUMENT

Respondents/Defendants E. Paul Gibson, Reisen Law Firm, and E. Paul Gibson PC hereby present their Sur-Reply Brief to address new arguments raised in Appellant/Plaintiff Darrell Edwards' Reply Brief.

This appeal arises out of the dismissal of Plaintiff Edwards' claims against the Defendants on summary judgment. Edwards claimed that he had a viable claim under the Longshore Act but lost the claim because Defendant Gibson did not file it prior to the expiration of the statute of limitations. The trial court granted summary judgment on three grounds, all of which sever any causal connection between the acts of Defendant Gibson and any loss of Plaintiff Edwards. The trial court found that:

1) Edwards never had a Longshore Act claim to begin with because he did not satisfy the "situs" and "status" requirements of the Longshore Act, Respondents' Brief, Pages 14-18.

2) Any Longshore Act claim that Edwards did have still existed when Edwards fired Defendant Gibson because the statute of limitations had been tolled and had not expired at the time, Respondents' Brief, Pages 10-12.

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), Respondents' Brief, pages 12-14.

After the current appeal was noticed, but before Plaintiff Edwards filed his initial appellate brief, the Benefits Review Board issued an order partially reversing the order of the Administrative Law Judge dismissing Edwards' Longshore Act claim and remanding

the matter to the Administrative Law Judge for additional findings. BRB Order, R. pp. ___-___. In his Reply Brief, Edwards implies that the BRB Order somehow warrants a wholesale reversal of the trial court in this matter. The BRB Order does no such thing.

As an initial matter, the BRB Order did not address or reverse the findings of the Claims Examiner that 1) Plaintiff Edwards' Longshore Act claim was not time barred, and 2) Plaintiff Edwards did not meet the "situs" and "status" requirements of the Longshore Act. Both of these holdings from the Claims Examiner support the trial court's ruling in the current matter that Plaintiff Edwards' Longshore Act claim was still viable and could have been pursued (and indeed was pursued) after Edwards fired Defendant Gibson, see Respondents' Brief, Pages 10-12, and that Edwards never had a Longshore Act claim to begin with because he did not meet the "situs" and "status" requirements. Respondents' Brief, Pages 14-18. In other words, there is still no causal connection between the acts of Defendant Gibson and any loss to Plaintiff Edwards. The trial court's ruling can be affirmed on either of these grounds regardless of anything in the BRB Order.

More to the point, the BRB Order does not contradict the trial court's third basis for summary judgment, namely that Edwards' Longshore Act claim was lost due to his failure to provide notice of a third party settlement to his employer as required by Section 33(g). 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), not Section 33(g)(2). BRB Order, Pages 4, 6 n. 4, and 7, R. pp. __, __, and __. The Benefits Review Board agreed with the lower tribunals, and the trial court in

this matter, that Section 33(g)(1) did in fact require employees to give prior notice of a third party settlement to their employer to preserve their rights under the Longshore Act. Id. Failure to do so results in a loss of the employee's Longshore Act Claim. 33 U.S.C. § 933(g)(1). Consequently, if Edwards' third party settlement was less than what he would be entitled to receive under the Longshore Act, all of the courts have concluded that he lost his Longshore Act claim. Moreover, since Defendants had nothing to do with this failure, the trial court's dismissal for lack of causation was appropriate.

However, the Benefits Review Board has read Section 33(g)(2) differently from all the other courts to consider this issue. The Benefits Review Board held that the notice requirements of Section 33(g)(2), not Section 33(g)(1), applies if the employee obtains a judgment against a third party or if the third party settlement is greater than or equal to the employer's liability under the Longshore Act. BRB Order, Page 4, R. p. __. According to the BRB Order, Section 33(g)(2) only requires notice of a third party settlement to the employer before the employer makes any payments of compensation, as opposed to prior to the settlement itself. BRB Order, Pages 4-6, R. pp. __-__. Since Edwards eventually did provide notice of the settlement to his employer and did so before the payment of any compensation, the Benefits Review Board held that he had complied with Section 33(g)(2), but not Section 33(g)(1).

Based on this interpretation of Section 33(g), the Benefits Review Board remanded the matter to the Administrative Law Judge to determine whether the third party settlement was less than Edwards' potential compensation under the Longshore Act, in which case Section 33(g)(1) would bar any compensation, or was more than his

potential compensation under the Longshore Act, in which case Section 33(g)(2) would apply and possibly not bar compensation.

Although Defendants do not agree with the legal reasoning of the Benefits Review Board and this perceived dichotomy between Sections 33(g)(1) and 33(g)(2), this Court need not delve into that issue. If Plaintiff Edwards' third party settlement is in excess of his entitlement to benefits under the Longshore Act and his notice to employer is potentially timely per the BRB Order's interpretation of Rule 33(g)(2), Plaintiff Edwards claim under the Longshore Act would be reduced to nothing due to the setoff provision of Section 33(f), which states:

(f) Institution of proceedings by person entitled to compensation

If the person entitled to compensation institutes proceedings [against third party tortfeasors] within the period prescribed in subsection (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys' fees).

33 U.S.C.A. § 933(f). Under this set off provision, if Plaintiff Edwards has recovered more from a third party than he is entitled to under the Longshore Act, his Longshore Act claim will be completely set off, reducing the value of the claim to nothing.

Due to the setoff of third party recoveries under the Longshore Act, Plaintiff Edwards cannot connect Defendants' actions to any loss. If Plaintiff Edwards and his other attorneys settled his third party claim for less than his compensation amount, he has lost his Longshore Act claim pursuant to Section 33(g)(1). If Plaintiff Edwards settled his third party claim for more than his compensation amount, his Longshore Act claim

would be completely set off by the recovery under Section 33(f). Either way, Plaintiff Edwards does not have a valuable claim under the Longshore Act. In other words, Plaintiff Edwards still cannot connect the actions of Defendants to any loss of a potential claim under the Longshore Act.

Consequently, the Benefits Review Board ruling does not alter the finding of the trial court that Plaintiff Edwards has failed to present any evidence of a causal connection between the actions of Defendants and a loss. Edwards' Longshore Act claim was lost due to the actions of Edwards' other attorneys or because Edwards was fully compensated by the third party settlement he entered, not because of anything that Defendants did. Because the BRB Order does not create an issue of fact regarding causation, the trial court's summary judgment order should be affirmed.

CONCLUSION

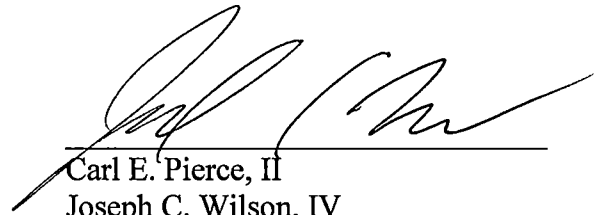
Based on the foregoing, Defendants would ask this Court to affirm the trial court's order granting Defendants summary judgment on all claims by Plaintiff Edwards. The partial reversal and remand of the underlying Longshore Act claim by the Benefits Review Board does not alter the lower court's conclusions that:

1. Any Longshore Act claim that Plaintiff Edwards had remained intact after he fired Defendant Gibson. This should be obvious since Plaintiff Edwards is indeed pursuing his Longshore Act claim.
2. Plaintiff Edwards has never presented evidence that he met the "situs" and "status" requirements of the Longshore Act.

3. Any claim Plaintiff Edwards had under the Longshore Act was either lost due to failure to comply with the notice requirements of Section 33(g)(1) or entirely set off by his third party recovery under Section 33(f).

Because Defendants cannot be connected to any loss suffered by Plaintiff Edwards, the trial court properly granted Defendants summary judgment, and that ruling should be affirmed.

Respectfully submitted,



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CONCLUSION

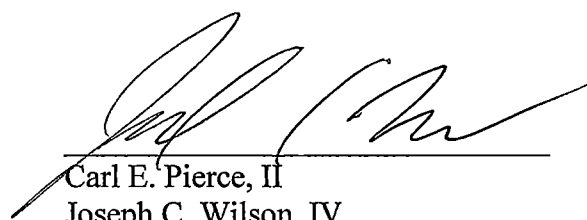
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