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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
COURT OF COMMON PLEAS

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APR 06 2016

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

SC Court of Appeals

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
FILE A SUR-REPLY BRIEF

Carl E. Pierce, II
Joseph C. Wilson, IV
Pierce, Hems, Sloan, & Wilson, LLC
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Attorneys for Respondents

Other Counsel of Record:

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Attorney for Appellant

Respondents/Defendants E. Paul Gibson, Reisen Law Firm, and E. Paul Gibson PC hereby petition the Court to allow Respondents to file a Sur-Reply Brief.¹ 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

¹ This petition is nearly identical to a prior petition filed to strike Appellant's Reply Brief or, in the alternative, to file a Sur-Reply Brief, filed on March 7, 2016.

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, already filed with the prior motion to strike, 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,² 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

² 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.

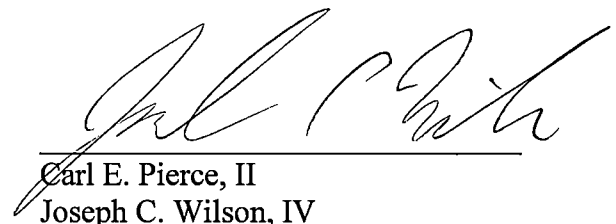
Furthermore, as pointed out in Respondent's Petition to Supplement the Record, the Benefits Review Board recently reversed its holding that Plaintiff Edwards complied with Section 33(g)(2) and remanded that issue for further consideration by the lower tribunal. Thus, the only language in the original BRB Order that was cited and relied upon by Plaintiff Edwards was struck in a subsequent ruling by the Benefits Review Board.

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.

Despite all this, if the Court of Appeals is going to consider the arguments presented in Edwards’ Reply Brief, Defendants would ask that the Court of Appeals 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. In the alternative, Defendants can submit a new Sur-Reply Brief that also addresses the most recent ruling of the Benefits Review Board, which was issued after Defendants’ initial motions were submitted.

Respectfully submitted,



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4/4, 2016
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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Markley Dennis, Jr., Circuit Court Judge

Case No. 2014-CP-10-2954

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DARRELL EDWARDS, Appellant,

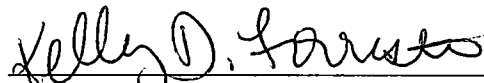
v.

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 Respondents' Petition to File a Sur-Reply Brief, on this the 4th day of April, 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

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SC Court of Appeals

April 4, 2016

The Honorable V. Clair Allen
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P.O. Box 11629
Columbia, SC 29211

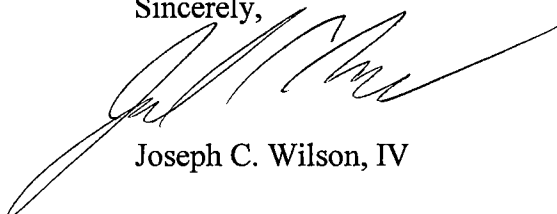
Re: *Darrell Edwards v. E. Paul Gibson, Reisen Law Firm and E. Paul Gibson PC and
John Does 1-5*
C/A No. 2014-CP-10-2954
Appellate Case No. 2015-001930
PHSW File No. D2529.01

Dear Ms. Allen:

Enclosed for filing please find the original and six (6) copies of Respondents' Petition to File a Sur-Reply Brief, including a Certificate of Service and check for \$25.00 for the filing fee. If you have any questions, please do not hesitate to contact me.

With kind regards,

Sincerely,


Joseph C. Wilson, IV

Enclosure

cc: Chauntel Demetrius Bland, Esquire

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