RECEIVED
MAR 03 2017
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Robin B. Stilwell, Circuit Court Judge

DARRELL EDWARDS,

Plaintiff/Appellant

v.

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

Respondent.

MEMORANDUM OF LAW OPPOSING RESPONDENTS' PETITION TO DISMISS APPEAL AND FOR SANCTIONS

Chauntel Demetrius Bland, Esquire
463 Regency Park Drive
Columbia, SC 29210
(803) 319-6262
Attorney for the Appellant

Plaintiff/Appellant has move the Court, pursuant to Rule 260 of the South Carolina Rules of Appellate Procedure and Rule 60 of the South Carolina Rules of Civil Procedure, to reinstate the above-captioned Appeal, for good cause, or in the alternative, for the Court to reconsider its judgment in light of on the following grounds:

PROCEDURAL HISTORY

On May 9, 2014, Plaintiff Darrell Edwards filed a Verified Complaint in the Court of

Common Pleas in the County of Charleston against Defendants E. Paul Gibson, Reisen Law Firm, and E. Paul Gibson, PC, alleging professional negligence, misrepresentation and breach of contract in that Defendants failed to assert claims on behalf of Mr. Edwards under the Longshore and Harbor Workers Compensation Action ("LHWCA") and the South Carolina Workers Compensation Act ("SCWCA"), thereby prejudicing and damaging Mr. Edwards. The action was filed by Mr. Edwards' attorney, Eduardo Curry of Curry & Housey, PA of Charleston, South Carolina. In addition to being a verified complaint, the Complaint also incorporated the Affidavit of Joseph H. Reinhardt, Esq., Plaintiff's Trial Expert Witness, which in turn incorporated his expert report. Attorney Reinhardt opined that Defendants had committed professional negligence.

On or about July 22, 2014, after receiving a letter from Defendants' counsel threatening Rule 11 sanctions, Mr. Curry filed a Motion and Order to be Relieved as Counsel, citing a "conflict of interest." That same day, the Court entered an Order allowing Attorney Curry and his firm to withdraw as counsel and instructing Mr. Edwards to retain new counsel within 90 days. Since that date, Mr. Edwards diligently searched to retain new counsel.

On December 5, 2014, Defendants filed a Motion for Summary Judgment, a Memorandum of Law in Support of the Motion of Summary Judgment. In support of their Motion for Summary Judgment, Defendants attached a number of affidavits, opining that Defendants did not commit professional malpractice.

On or about December 10, 2015, Mr. Edwards filed a letter with the Court, addressed to Judge Dennis. In the letter, Mr. Edwards, proceeding pro se despite efforts to hire substitute counsel, informed the Court, "I have been diligently searching for new counsel." He represented to the Court that he had to look for counsel outside the Charleston area, and in fact, was talking

to counsel "in the West Coast." Later in the letter, Mr. Edwards requests that the action be stayed pending a determination of his LHWCA claim or, in the alternative, he be awarded another 60 days to respond. The Court did not respond to the letter.

On January 15, 2015, the parties appeared before Judge Dennis on the hearing on Defendants' Motion for Summary Judgment. Mr. Edwards, both verbally and through a letter dated the same date, moved to continue the case, or in the alternative, for leave to dismiss under Rule 41(a). The judge denied both motions. Mr. Edwards also sought to supplement the Affidavit of Attorney Reinhardt. The Court did not consider the supplemental affidavit or the additional evidence attached to the Letter to Judge Dennis, filed with the Court on or about January 15, 2015. At the conclusion of the hearing, Judge Dennis ordered Defendants' counsel to draft an Order allowing Summary Judgment.

On or about January 16, 2015, counsel for Defendants provided a copy of the proposed Order on Mr. Edwards. Mr. Edwards again wrote Judge Dennis, objecting to the language of the proposed Order and asking for Judge Dennis to reconsider. Judge Dennis signed the Order as proposed by Defendants. The Court of Common Pleas is presently considering the letter as a Motion for Reconsideration to be calendared before Judge Dennis.

On January 15, 2015, the parties appeared before Judge Dennis on the hearing on Defendants' Motion for Summary Judgment. Mr. Edwards, both verbally and through a letter dated the same date, moved to continue the case, or in the alternative, for leave to dismiss under Rule 41(a). The judge denied both motions. Mr. Edwards also sought to supplement the Affidavit of Attorney Reinhardt. The Court did not consider the supplemental affidavit or the additional evidence attached to the Letter to Judge Dennis, filed with the Court on or about January 15, 2015. At the conclusion of the hearing, Judge Dennis ordered Defendants' counsel to draft an

Order allowing Summary Judgment.

On or about January 16, 2015, counsel for Defendants provided a copy of the proposed Order on Mr. Edwards. Mr. Edwards again wrote Judge Dennis, objecting to the language of the proposed Order and asking for Judge Dennis to reconsider. Judge Dennis signed the Order as proposed by Defendants. The Court of Common Pleas is presently considering the letter as a Motion for Reconsideration to be calendared before Judge Dennis.

On or about January 16, 2015, counsel for Defendants provided a copy of the proposed Order on Mr. Edwards. Mr. Edwards again wrote Judge Dennis, objecting to the language of the proposed Order and asking for Judge Dennis to reconsider. Judge Dennis signed the Order as proposed by Defendants. The Court of Common Pleas considered the letter as a Motion for Reconsideration and was calendared before Judge Dennis on August 11, 2015.

Meanwhile, Mr. Edwards, again proceeding pro se, filed a Notice of Appeal to preserve his case for appeal.

On August 11, 2015, the court heard Plaintiff's Motion for Reconsideration, Judge Dennis denied Plaintiff's Motion for a New Trial. In the August 11, 2015 hearing, the court states the reason for granting summary judgment and its denial of the Motion to Reconsideration:

> Where in the affidavit does he state the proximate cause for the damage? That's the problem. He's got an affidavit, but he doesn't connect the action with the loss and we know a professional negligence case it has to be. It's not like other cases where that's generally – proximate cause is generally a jury issue. It's not here. So I don't find anywhere in the affidavit where he even suggests it. So that therein lies the problem. The motion to reconsider summary judgment is respectfully denied.

Plaintiff/Appellant timely filed an Initial Brief of Appellant on January 11, 2016, regarding the dismissal of his case against Defendants for malpractice. Plaintiff claims Defendants failed to timely file suit under the Longshore and Harbor Workers Claims Act

("LHWCA claim"). Defendants/Appellees argued and the lower court agreed that Plaintiff's claims were unsubstantiated and barred under the Act.

Defendants/Appellees timely filed an Initial Brief of Appellees on February 9, 2016. In their initial brief, Defendants/Appellees relied on an order by an Administrative Law Judge ("ALJ") denying benefits to Plaintiffs, in part for failing to timely notify the employer's insurer of a third party settlement.

Plaintiff/Appellant timely filed a Reply Brief on February 19, 2016. The Reply Brief addressed a ruling by the Benefits Review Board of the U.S. Department of Labor, dated September 30, 2015, overturning the decision of the lower ALJ, denying benefits to Plaintiff. See Edwards v. Signal Mutual Indemnity Association Ltd., BBR No. 15-0112.

Defendants' experts relied on the ruling of the ALJ in their Motion for Summary Judgment, and the Court's Order granting Summary Judgment relied on these Affidavits. On March 4, 2016, Defendants/Appellees filed a Motion to Strike Plaintiff's Reply Brief. On March 10, 2016, the Benefits Review Board entered an Order on Motion for Reconsideration, which modified the September 30, 2015 in some respects but still remanded an issue central to this case to the ALJ.

On March 15, 2016, Defendants/Appellees filed a Petition to Supplement the Record, based in part on the recent rulings of the Benefits Review Board. On March 28, 2016, Plaintiff/Appellant filed a Motion for Extension of Time to File Record on Appeal, requesting an additional thirty days to file the record. Plaintiff/Appellant filed the extension in part to obtain a ruling from the Court regarding the inclusion of two previous Orders from the Benefits Review Board that had not been considered by Defendants' experts nor the lower court. Consequently, it was not part of the record but subject to Defendants/Appellees' pending motion.

On April 1, 2016, the Clerk of Court of the South Carolina Court of Appeals issued a letter rejecting Defendants/Appellees' "Initial Sur-Reply Brief of Respondents". It did not rule on Defendants/Appellees' Petition to Supplement the Record nor Plaintiff/Appellant's Motion for Extension of Time. On April 4, 2016, Plaintiff/Appellant filed a Reply to Appellee's Motion to Strike Appellant's Reply Brief or in the alternative to File a Sur-Reply Brief and Reply to Respondent's Petition to Supplement the Record on Appeal. To date, Plaintifff/Appellant is unaware of any ruling on this motion or the previous motions. Without such rulings, Plaintiff/Appellant could not discern whether to include the Orders from Benefits Review Board and awaited a response from the Court on the various pending motions.

On or about May 9, 2016, the Clerk of Court, acting *sua sponte*, entered an Order dismissing the case. Although the Order was purportedly mailed to undersigned counsel, counsel did not receive the Order. On or about May 25, 2016, undersigned counsel received the Remittitur issued by the Court, notifying the lower court that the appeal had been dismissed. The Remittitur is the first notice undersigned counsel received regarding the dismissal of appeal.

On September 9, 2016, Plaintiff filed a Motion to Reinstate Appeal and Motion for Relief, providing new evidence, including the rulings of the Benefits Review Board and affidavits from Plaintiff's expert witness, addressing how the rulings would impact this case. At all times, Plaintiff and undersigned counsel have employed good faith.

On December 14, 2016, the Circuit Court denied Plaintiff's Motion to Reinstate Appeal and Motion for Relief. On January 17, 2017, Plaintiff filed a Notice of Appeal.

ARGUMENT

Plaintiff/Appellant submits that, given the new evidence in this case (e.g. the Order of the Benefits Review Board), its Motion for Relief was not only proper but should have been granted.

The circuit court may relieve a party from a final judgment where "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Rule 60(b)(2), SCRCP. "A party seeking to set aside a judgment pursuant to Rule 60(b) has the burden of presenting evidence entitling him to the requested relief." *Perry v. Heirs at Law of Gadsden,* 357 S.C. 42, 46, 590 S.E.2d 502, 504 (Ct.App.2003). To obtain a new trial based on newly discovered evidence, a movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching. *Lanier v. Lanier,* 364 S.C. 211, 217, 612 S.E.2d 456, 459 (Ct.App.2005) (citation omitted). Courts have found evidence is not newly discovered evidence for the purposes of Rule 60(b)(2) where the evidence was (1) known to the party at the time of trial, and (2) in the party's possession. *Id.* at 218, 612 S.E.2d at 459. In addition, Rule 60(b)(2) allows the court to grant a new trial only if the newly discovered evidence could not have been discovered by due diligence prior to trial. *Black's Law Dictionary* defines "due diligence" as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation." 468 (7th ed. 1999). Furthermore, exclusion of testimony that would be merely cumulative or impeaching does not constitute error. *See Gamble v. International Paper Realty Corp. of South Carolina,* 323 S.C. 367, 474 S.E.2d 438 (1996) (ruling that where excluded testimony was merely cumulative there was no error).

In examining the five criteria outline in Lanier, Plaintiff/Appellant asserts it meets every one. First, according to their affidavits, the Defendant's experts relied upon the ruling of the Administrative Law Judge, a ruling which was subsequently overturned. This new evidence

would have changed the result in the case. Second, the Benefits Review Board ruling came after the order granting summary judgment. Third, the ruling of the Benefits Review Board could not have been discovered or even known prior the summary judgment hearing. Fourth, the ruling is very material not only to the affidavits of Defendant's experts but also to the opinion of Plaintiff's expert, Attorney Reinhardt. Fifth and finally, the newly discovered evidence is not cumulative or impeaching; instead, its strikes at the heart of the case.

Plaintiff/Appellant asserts there is good cause for the reinstatement given the posture of the appeal and that Defendants/Appellees will not be prejudiced. *See Matute v. Baptist,* 391 S.C. 291, 705 S.E.2d 472 (S.C. App., 2011) (administrative appeal reinstated); *Limehouse v. Hulsey,* 397 S.C. 49, 723 S.E.2d 211 (S.C. App., 2011) (applying to S.C.R.C.P. 55(c), "good cause" is a less stringent standard than excusable neglect, serves the interests of justice and encompasses a degree of reasonableness) (citing *Sundown Operating Co. v. Intedge Indus. Inc.,* 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009) and *Richardson v. P.V., Inc.*, 383 S.C. 610, 618–19, 682 S.E.2d 263, 267 (2009)).

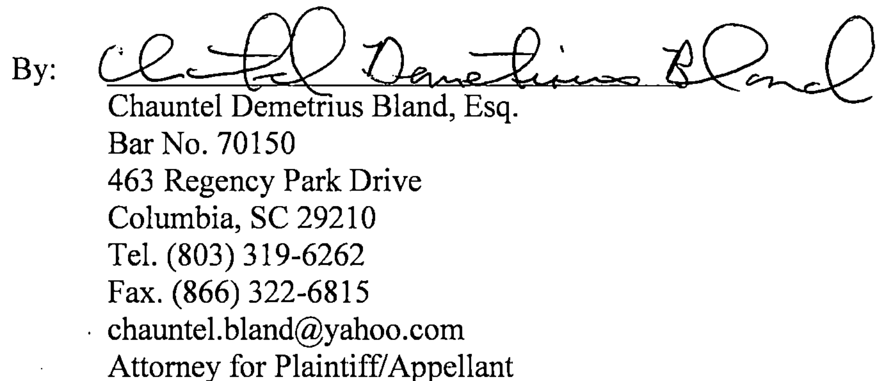
Plaintiff/Appellant has not been neglectful or dilatory throughout this appeal but has timely file briefs and responses when due. Plaintiff/Appellant submits that it was reasonable for counsel of the Plaintiff/Appellant to await direction from the court regarding the contents of the Record on Appeal. Specifically, both parties had moved the Court for an order to allow the Benefits Review Board orders to be included in the record. Plaintiff/Appellant did not want to include those Orders if the Court was going to strike the references within Plaintiff/Appellant's initial brief. Plaintiff/Appellant submits the interest of justice is preserved by the parties reaching the merits of the appeal, rather than an administrative dismissal.

In sum, at this juncture, this appeal is proper and should be heard by this Court. It should not be dismissed.

Addressing Defendants' Motion for Sanctions, under Rule 11, an attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. See Link v. School Dist. of Pickens County, 302 S.C. 1, 393 S.E.2d 176 (1990). The attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith (i.e., to cause unnecessary delay) whether or not there is good ground to support it. See Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995). In this case, Plaintiff has not filed any frivolous motion or appeal. He certainly has not filed any pleading in bad faith. He simply wants to have the court reach the merits of his case. In addition, "a person is entitled to notice and an opportunity to respond before the imposition of sanctions. *Burns v. Universal Health Servs. Inc.*, 340 S.C. 509, 514, 532 S.E.2d 6, 9 (Ct. App. 2000) ("We hold that a signing party or attorney is entitled to notice and an opportunity to respond prior to imposition of sanctions under Rule 11, SCRCP.") In this case, no such notice has been provided.

WHEREFORE Plaintiff respectfully moves the Court to deny Defendants' Motion to Dismiss the Appeal and Motion for Sanctions.

This 3rd day of March, 2017.

By: 

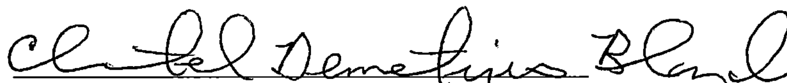
Chauntel Demetrius Bland, Esq.
Bar No. 70150
463 Regency Park Drive
Columbia, SC 29210
Tel. (803) 319-6262
Fax. (866) 322-6815
chauntel.bland@yahoo.com
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via U.S. Mail on this 3rd day of March 2017, postage prepaid to

Carl E. Pierce, II
Pierce, Herns, Sloan & Wilson
The Blake House
321 East Bay Street
Charleston, SC 29401
P.O. Box 22437
Charleston, SC 29413
Tel. (843) 722-7733
Fax. (843) 722-7732
Attorney for Defendants/Respondents
E. Paul Gibson, Reisen Law Firm, E. Paul Gibson PC

RECEIVED
MAR 03 2017
SC Court of Appeals

By: 

Chauntel Demetrius Bland, Esq.
Bar No. 70150
463 Regency Park Drive
Columbia, SC 29210
Tel. (803) 319-6262
Fax. (866) 322-6815
chauntel.bland@yahoo.com
Attorney for Plaintiff/Appellant