

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM THE SOUTH CAROLINA  
WORKERS' COMPENSATION COMMISSION

Avery B. Wilkerson, Appellate Panel Chairman, Commissioner

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WCC File No.: 0818219

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JOE OSMANSKI, EMPLOYEE,

APPELLANT,

v.

WATKINS & SHEPARD TRUCKING, INC.,  
EMPLOYER, AND ZURICH NORTH AMERICAN  
INSURANCE COMPANY, CARRIER,

DEFENDANTS,

OF WHOM, ZURICH NORTH AMERICAN  
INSURANCE COMPANY, CARRIER, IS THE

RESPONDENT:

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APPELLANT'S FINAL REPLY BRIEF

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**TABLE OF AUTHORITIES**

**Cases:**

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## ARGUMENT

### I. ONE CANNOT RELY UPON A MISSTATEMENT OF FACTS IF THE TRUTH IS EASILY WITHIN ITS REACH.

Our courts have long held that in cases alleging fraudulent statements, the aggrieved party cannot rely upon a misstatement of facts if the truth is easily within its reach. O'Shields v. Fountain Mobile Homes, Inc., 262 S.C. 276, 282, 204 S.E.2d 50, 52 (1974). In our Initial Brief, the Appellant raised this issue and demonstrated the truth was clearly within the Respondents' reach.

The thrust of the Appellant's argument concerning reliance is essentially this: The alleged misstatements come from a highly suspect form which the Appellant did not sign or complete. The Respondent claims they called him while he was already at their office and asked him these questions. Although the Appellant has always questioned the validity of this form, the Respondents chose not to present the person who supposedly asked the questions and completed the form. However, even if such a highly suspect form (produced only after surgery was recommended) can be taken to say the Appellant misrepresented his condition, the Respondents had enough information to know this was false.

The Appellant had long, raised, clearly visible scars on both elbows when he was examined by the Respondents' doctor, Albert Osbahr. Dr. Osbahr made notes on his forms that the Appellants had impairment and decreased supination in his left arm.<sup>1</sup> Matthew Grandy, the Respondents' witness, testified that he was aware supination refers

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<sup>1</sup> Although the Respondents claim they are not sure if they received Dr. Osbahr's note, the testimony of Matthew Grandy reveals otherwise. Mr. Grandy was asked: "All right. And this form that Osbahr completes, this was contained in Mr. Osmanski's personnel file?" Mr. Grandy responded, "Yes." (r. P. 274, Grandy Dep, p. 29, lines 19-22). Moreover, Dr. Osbahr specifically stated, "This information was sent to Watkins Shepard Trucking, LLC." (R. p. 331).


to the movement of the arm in one direction or another. (R. p. 275, Grandy Dep, p. 31, lines 15-23). He further testified that the findings of the company doctor of impairment and loss of motion in the Appellant's arm would be serious enough that someone should have followed up with the doctor. (R. p. 276, Grandy Dep, p. 35, lines 14-23). No one followed up with Dr. Osbahr. No one followed up with the Appellant. He worked for nearly two (2) years without issue.

The Respondents take issue with the qualifying statement in Mr. Grandy's deposition where he stated someone should have followed up on Dr. Osbahr's note. The question asked Mr. Grandy to assume 180 degrees is normal supination. Dr. Osbahr reported to them that the Appellant had "decreased supination, only 90 degrees" in his left arm. (R. p. 345). Under the case law contained above, the question remains, was the truth easily within the Respondents' reach? Mr. Grandy clearly admits that had he known what normal supination was, someone should have followed up with either the Appellant or the company doctor, or both. (R. pp. 275-276, Grandy Dep. p. 31, lines 15-23, p. 35, lines 14-23).

First of all, Mr. Grandy did not need to know what normal supination was in order to know the Appellant had problems using his left arm. The fact that Dr. Osbahr indicated his supination was *decreased* was enough to know it was less than normal. And, if Mr. Grandy exercised any diligence after being informed the Appellant had a less than normal range of motion, all he really had to do was do a Google search for "what is normal arm supination?" This would have revealed the Appellant had only half of the normal range of motion in his left arm. Dr. Osbahr testified he was willing to speak with the Respondent if they had any questions. (R. p. 317, Osbahr Dep, pp. 16-17). Mr.

Grandy could have asked Dr. Osbahr to explain normal supination. The question is, was the fact that the Appellant had problems moving his arm within the Respondents' reach? Was the fact the he had only half the normal range of motion also within their reach given that all they had to do was either ask their own company doctor or simply look it up?

Respectfully Submitted



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6 day of July, 2012

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RESPONDENT.

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CERTIFICATE OF COMPLIANCE

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The undersigned certifies that the Appellant's Final Reply Brief complies with Rule 211(b) SCACR. The undersigned further certifies that the Appellant's Final Reply Brief complies with the South Carolina Supreme Court's August 13, 2007 Order regarding Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Findings.



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July 6, 2012

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July 6, 2012

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The Honorable Tanya Gee  
Clerk of Court  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

RE: Joe A. Osmanski v. Watkins & Shepard Trucking, Inc., and Zurich North  
American Insurance Company  
Case No.: 2011196087  
SCWCC File No.: 0818219

Dear Ms. Gee:

Enclosed please find the original, unbound documents as follows: (1) Appellant's Final Reply Brief and (2) Final Brief of the Appellant in the above-referenced matter, together with fifteen (15) bound copies of each. I have also included a Proof of Service and ask that you file-stamp this document and return to me in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter to Jason Lockhart, we are hereby serving the Defendants/Respondents with a copy of same.

With kind regards, I am

Sincerely,

  
Kevin B. Smith

KBS/jhd

Enclosures

cc: Joe Osmanski  
Jason Lockhart, Esquire  
David T. Pearlman, Esquire  
Paula Amick, Esquire