

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SOUTH CAROLINA WORKERS COMPENSATION COMMISSION
FULL COMMISSION

Case No.: 2018-002152

Willie Carroll Powell, Employee

RECEIVED

MAR 18 2019

SC Court of Appeals

Appellant,

v.

Johnsonville Mechanical Contractors, Inc., Employer,
and
Bridgefield Casualty Insurance Company c/o Summit, Carrier,

Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT I

THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING APPLIES TO THE CONTRACT BETWEEN THE APPELLANT AND THE RESPONDENTS

The Respondents devote a substantial portion of their brief attempting to debunk the idea that the Appellant had the right to be treated with "good faith and fair dealing" in connection with the treatment of his injuries. The cases cited by the Respondents do correctly hold that in order to pursue an action for bad faith against an insurance company one must be a party to the contract upon which the action is based.

It is certainly understandable that the Respondents would not want their adjuster's behavior towards the Appellant judged by this standard. Everything the adjuster did or didn't do with reference to Appellant's medical care was calculated to deprive him of an opportunity to fully develop the extent of his injuries and her behavior fails miserably to meet the standard of "good faith and fair dealing."

However, as Paul Harvey used to say, "and now, for the rest of the story". In *Hammond Construction Company v. Banks Construction Company et.al.*, 312 S.C. 422, 440 S.E.2d 890, 891 (1994) the South Carolina Court of Appeals said, "Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract and any damage resulting from the breach of contract between the defendant and the third party is not, as such, recoverable by the plaintiff. However, if a contract is made for the benefit of a third person, that person may enforce the contract if the contracting parties intended to create a direct, rather than an incidental or consequential, benefit to such third person." (Emphasis added) In *North Carolina v. Interstate Casualty Insurance Company*

(Emphasis added) In *North Carolina v. Interstate Casualty Insurance Company et.al.* 120 N.C.App. 743, 464 S.E.2d 73,76 (1995) the Court said, "It is well settled a claimant is a third-party beneficiary if he can establish, '(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; [and] that the contract was entered into for his direct, and not incidental, benefit.'" A claimant is a direct beneficiary if 'the contracting parties intended that the third party should receive a benefit which might be enforced in the courts.'" The position of an injured worker with reference to his or her employer and his or her insurance carrier is best explained by the Texas Supreme Court in the case of *Aranda v. Insurance Co. Of North America*, 748 S.W. 2d 210,212 (1988), "The Workers' Compensation Act sets forth a compensation scheme that is based on three-party agreement entered into by the employer, the employee, and the compensation carrier... The constitutionality of the Workers' Compensation Act rests on the contractual nature of this agreement... As between the compensation carrier and the employee, there is a promise for a promise: the carrier agrees to compensate the employee for injuries sustained in the course of employment, and the employee agrees to relinquish his common-law rights against his employer... The employee is thus a party to the contract and therefore entitled to recover in that capacity."

In *Texas Mutual Insurance Company v. Ruttiger*, 55 Tex. Sup. Ct. 912, 381 S.W. 2d 430,433 (Tex.2012) the Supreme Court of Texas reversed the decision in *Aranda* stating, "In 1989 the Legislature enacted major amendments to the Workers' Compensation Act. The amendments included significant reforms, among which were changes in how to calculate income benefits for injured workers, the

amount of income benefits workers could recover, the dispute resolution process, the addition of an ombudsman program to provide assistance for injured workers who had disputes with insurers, and increasing sanctions for violations of the Act.” The Court said that in view of these changes it was no longer necessary to, “enraft an extra statutory cause of action for breach of duty of good faith and fair dealing onto the workers’ compensation system.” The Court did not repudiate its analysis of the relative position of the parties to a workers’ compensation contract that make the covered employee a third-party beneficiary.

Appellant clearly fits the definition of a third-party beneficiary who is entitled to, “good faith and fair dealing” by the workers’ compensation insurance company, Bridgefield Casualty Insurance Company c/o Summit.

The Respondents adjuster, as described in Appellant’s brief, did everything within her power to deprive the Appellant of the benefits and protection to which he was entitled under the South Carolina Workers’ Compensation Act.

ARGUMENT II

RESPONDENTS INCLUSION IN ITS BRIEF OF CERTAIN PORTIONS OF THE BACK-AND-FORTH CONVERSATION IN WHICH APPELLANT’S COUNSEL AND COMMISSIONER BECK ENGAGED ARE NOT RELEVANT OR CONTROLLING AS FAR AS THE LANGUAGE OF THE ORDER DATED MAY 2, 2017.

The Order stated that “Claimant is entitled to authorized causally – related medical treatment with Dr. Stickler and Dr. Denton”. Both doctors in the quest to determine the origin of Appellant’s pain in his lower extremity and back ordered test and procedures to help identify the source of those problems which the adjuster refused to honor or approve.

CONCLUSION

It has been almost 3 years since Appellant's injury and, notwithstanding the fact that multiple doctors have recommended physical therapy and epidural injections, the Appellant has received absolutely no treatment to lessen his disability or to give him relief from his pain. It is respectfully requested that this Court find that the adjuster in this case is in violation of Section 42-3-175 and that in addition her interference in the medical treatment of the Appellant is in violation of the covenant of good faith and fair dealing can only be rectified by reversing the decision of the Appellant Panel of the Full Commission.

RESPECTFULLY SUBMITTED



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March 14, 2019

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PROOF OF SERVICE

The undersigned employee of Greene Law Firm, at PO Box 688, Johns Island, South Carolina, 29457, does hereby certify that the following named individual(s) were served with a copy of the pleading(s) indicated below via facsimile & by mailing a copy of same to said person(s) in the United States Postal Service, with sufficient postage affixed thereto and return address clearly marked on the date indicated below:

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J. Brandon Hylton, Esquire
McAngus Goudelock & Courie
PO Box 7489
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PLEADINGS:

Appellant's Reply Brief

A handwritten signature in cursive script that reads "Melanie D. Tice". The signature is written in black ink and is positioned above a horizontal line.

Melanie D. Tice

Charleston, South Carolina

March 14, 2019

THOMAS W. GREENE

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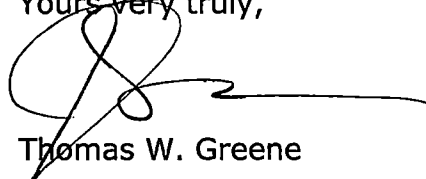
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Dear Mr. Hylton and Ms. Hiser:

I have enclosed 2 copies of Appellant's Reply Brief which I, hereby, serve upon each of you.

I have enclosed a Certificate of Mailing as proof of service.

Yours very truly,



Thomas W. Greene

TWG/mdt

Enclosure(s)

cc: Carroll Powell

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The Hon. Jenny Abbott Kitchings, Clerk
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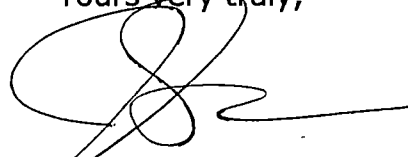
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Dear Ms. Kitchings:

Please find enclosed Appellant's Reply Brief in the above case.

I have also enclosed a certificate of mailing as proof of service upon opposing counsel.

Yours very truly,



Thomas W. Greene

TWG/mdt

cc: J. Brandon Hylton, Esquire
Helen F. Hiser, Esquire
Carroll Powell

