

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

WORKERS' COMPENSATION COURT
APPELLATE DIVISION

THE BEACON MUTUAL INSURANCE COMPANY)

)

VS.

)

W.C.C. 2016-05724

)

PAINT & COLOR, LLC)

FINAL DECREE OF THE APPELLATE DIVISION

This matter came on to be heard before the Appellate Division upon the claim of appeal of the respondent, Paint & Color, LLC, from the order of the trial judge granting summary judgment in favor of the petitioner, the Beacon Mutual Insurance Company. Upon consideration thereof, the respondent's appeal is granted, and in accordance with the Decision of the Appellate Division, the following findings of fact are made:

1. That the trial judge clearly erred in granting summary judgment as genuine issues of material fact exist.

It is, therefore

ORDERED, ADJUDGED, AND DECREED:

1. That the order entered by the trial judge on October 17, 2017 granting summary judgment is hereby vacated.

2. That the matter is remanded to the trial level for such further proceedings as may be necessary.

3. That due to the retirement of the judge who heard the summary judgment motion, the matter shall be reassigned by the Chief Judge to a sitting judge to conduct such further proceedings.

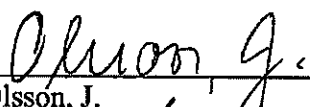
Entered as the final decree of this Court this 29th day of April 2019.

PER ORDER:

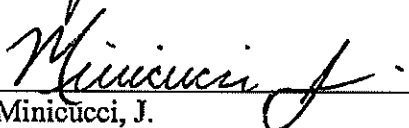


Nicholas DiFilippo, Administrator

ENTER:



Olsson, J.

Conte, J.

Minicucci, J.

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

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PAINT & COLOR, LLC)

DECISION OF THE APPELLATE DIVISION

MINICUCCI, J. The employer, Paint & Color, LLC (Paint & Color), appeals the trial judge's pretrial grant of summary judgment pursuant to Rule 56 of the Superior Court Rules of Civil Procedure which is applicable to matters pending in the Rhode Island Workers' Compensation Court. *Bostitch Division of Textron vs. Blackmar*, W.C.C. No. 1993-04040 (R.I. App. Div. March 1, 1994). Summary judgment was granted in favor of the insurer, The Beacon Mutual Insurance Company (Beacon Mutual), on its Petition for Determination of a Controversy thus finding that the employer, Paint & Color, knowingly and intentionally deceived Beacon Mutual into retroactively reinstating a cancelled workers' compensation insurance policy erasing a so-called "gap period" in coverage so as to cover a claimed workers' compensation injury by an employee of Paint & Color during what would have been the "gap period."

The trial judge found that the employer knowingly misrepresented to Beacon Mutual that there were no losses that occurred during the period after cancellation, or during the "gap period," thus finding the reinstatement of Beacon Mutual Policy No. 75530 issued to Paint & Color void due to fraud. In granting the motion for summary judgment on October 16, 2017, the trial judge ordered Paint & Color to reimburse Beacon Mutual for all payments made pursuant to

Policy No. 75530 after January 25, 2016, plus any costs associated with the handling and defense of the workers' compensation claim made by employee Carlos Saavedra (Saavedra) upon proof of said costs, including attorney's fees.¹ Paint & Color was further ordered to reimburse Beacon Mutual for the costs of bringing this instant petition, including attorney's fees, upon proof of said costs.

This case subsequently came before the Appellate Division for oral argument on September 26, 2018, pursuant to an order directing the parties to appear and show cause why the issues raised in this appeal should not be summarily decided. After considering the arguments of counsel and examining the memoranda filed on behalf of the parties, we conclude that cause has not been shown and that this case may be decided without further briefing or argument. For the reasons set forth herein, we find that summary judgment was improperly granted, and we therefore vacate the order of the trial judge and remand this matter for further proceedings.

The pertinent facts and procedural history of this case are as follows. On Wednesday, February 17, 2016, just prior to noon, an alleged employee of Paint & Color, Carlos Saavedra, walked into the Carney Hospital Steward Satellite Emergency Facility in Quincy, Massachusetts, with a left-hand wound in need of stitches. While in the emergency room, the employee reported that he lacerated his hand just before arriving while using a box cutter, but according to the records submitted at the motion hearing by Beacon Mutual's attorney, Saavedra did not indicate that his injury occurred at work at that time, nor on a follow-up visit to remove stitches at the same facility on February 26, 2016. Furthermore, those initial medical records indicated that the injury had no tendon involvement and Saavedra was cleared for resumption of work activities as of March 4, 2016. Within a matter of days of the injury on February 17, 2016, Paint & Color,

¹ The appellate panel notes references to Carlos Saavedra and Carlos Saavedre in the record and defers to the spelling of the name used in the pleadings without intending any disrespect to the employee.

through its insurance agent Rafael Pacheco Insurance, contacted its workers' compensation insurer, Beacon Mutual, to inquire about reinstating its lapsed workers' compensation insurance policy retroactively to January 25, 2016. The policy had been cancelled by Beacon Mutual on January 25, 2016 due to nonpayment of premiums.

Upon request, and as a condition precedent to such retroactive reinstatement, Beacon Mutual received a letter from Mauricio Cardona of Paint & Color dated February 19, 2016, certifying that Paint & Color "did not have any kind of [covered] loss" during the time its coverage was lapsed (i.e. during the "gap period"). A second letter dated March 2, 2016 was sent to Beacon Mutual as well stating that Paint & Color had no losses from December 25, 2015 through March 2, 2016. The letters bear the signature of Mauricio Cardona who by all accounts is the owner and manager of Paint & Color. Beacon Mutual, having received the requested letters affirming the absence of any known claims during the "gap period," retroactively reinstated the policy of Paint & Color effectively erasing any gaps in coverage and so notified Paint & Color in a letter dated March 4, 2016.

At Saavedra's initial visit to Rhode Island Hospital on February 29, 2016, the medical records submitted by Beacon Mutual for the motion hearing seem to indicate that there was a question by the hospital personnel as to whether the injury was a workers' compensation claim. However, it was not until March 5, 2016, while at Rhode Island Hospital for an occupational therapy appointment, that records first reflect that Saavedra himself reported a history that on February 19, 2016, while putting up wallpaper at work, he cut his dorsal left hand. Subsequently, at a March 8, 2016 follow-up occupational therapy visit, he reported that he was at work and cut the back of his left hand with a blade, but on this occasion provided February 17, 2016 as the onset date. On May 5, 2016, Saavedra, through counsel, filed an employee's petition

for compensation benefits, W.C.C. No. 2016-02683, against Paint & Color alleging that his February 17, 2016 injury indeed was a work-related injury. Saavedra sought workers' compensation benefits and listed in his petition that his supervisor at Paint & Color, Juan Cardona, was a witness to the claim. He would later allege in a statement given to a Beacon Mutual investigator and attorney at some point after the petition was filed, that Juan Cardona drove him to the hospital and directed him to say he was injured at home because they were having issues with insurance. Beacon Mutual maintains that the filing of this petition on May 5, 2016 was their first notice of the alleged work injury of Saavedra.

Beacon Mutual, by way of a "reservation of rights letter" dated May 16, 2016, notified Paint & Color and their insurance agent, Rafael Pacheco Insurance, that it would be seeking a determination that the retroactively reinstated policy of workers' compensation insurance was null and void due to fraudulent and intentional misrepresentations made by Paint & Color. Beacon Mutual also procured separate counsel in the person of attorney Michael Schwartz to represent Paint & Color in the original petition filed by Saavedra. With the original petition still pending on September 29, 2016, Beacon Mutual filed this instant Petition for Determination of a Controversy against its insured Paint & Color without providing continued representation of Paint & Color by Attorney Schwartz in this matter. In fact, Juan and Mauricio Cardona of Paint & Color were subsequently each deposed by Beacon Mutual's counsel with the assistance of a Spanish-language interpreter and with the Cardonas having their own new counsel present. During the depositions they each invoked their Fifth Amendment right against self-incrimination to every question posed by Beacon Mutual's counsel except for their names, dates and places of birth, and with only Mauricio further conceding that he speaks Spanish and a bit of English.

Beacon Mutual went on to relinquish its opposition to the original petition filed by Saavedra which was pending before the same trial judge who had this petition for Determination of a Controversy, by voluntarily withdrawing its claim for trial in the original petition on October 19, 2016. Beacon Mutual then unilaterally decided to settle the entirety of Saavedra's claim in January 2017 by way of a commutation lump sum settlement with the final decree entering on March 30, 2017.

Less than a week after the final decree approving the commutation settlement with the employee was entered, Beacon Mutual filed the motion for summary judgment at issue in the instant matter prior to the scheduled pretrial conference. After the July 5, 2017 pretrial conference hearing, the trial judge entered a pretrial order indicating that Beacon Mutual's Petition for Determination of a Controversy was being "passed for trial" with no indication of any hearing or decision of the summary judgment motion. However, despite the "passed for trial" notation on the pretrial order, the trial judge also marked the petition as "Granted" in the body of the order as well (a checkmark was placed on the line next to the phrase "Petition Granted"). The appellate panel interprets such contrary action as perhaps an inadvertent error. While only Paint & Color timely claimed a trial from the pretrial order, Beacon Mutual has never taken any steps to enforce and/or collect upon that pretrial order with the "Petition Granted" notation which would have remained in effect after entry. Following that entry of the pretrial order, Paint & Color in addition to its claim for trial, filed an objection and opposition memorandum to the yet undecided motion for summary judgment.

On the morning of October 16, 2017, in support of Beacon Mutual's motion for summary judgment, but apparently only moments prior to the motion hearing, counsel for Beacon Mutual electronically filed with the Court and supplied copies to the trial judge and Paint & Color's

counsel a large package of documents including medical records and an undated, unsigned statement purporting to be a transcription of a recorded interview of the employee, Carlos Saavedra (hereinafter the “interview transcript”). The statement was taken by one of Beacon Mutual’s agents, Walt Lang, and only one of Beacon Mutual’s attorneys, an interpreter and Saavedra’s girlfriend were apparently present. No one, including Attorney Schwartz, was invited, noticed, nor present at the interview representing the interests of Paint & Color. Furthermore, the purported statement was not in affidavit or deposition form even though it was apparently taken after the original petition was filed and with litigation pending before the Court. This panel is mindful of the requirement under Rule 56(c) to provide sufficient notice of materials relied upon by the moving party of at least ten (10) days prior to hearing. Also, while the rule contemplates that the party adverse to the motion for summary judgment may serve opposing affidavits on the day prior to the motion hearing, this late “day of” filing of a myriad of documents including this interview transcript by Beacon Mutual, did not satisfy the rule. The filings by Beacon Mutual, the moving party, were tardy and not in affidavit form. Conversely, we also note that while counsel for Paint & Color made ample protestations at the appellate level of this late filing by Beacon Mutual, the record is silent as to any request by Paint & Color for a continuance or an objection to the tardy filings being considered at the motion hearing.

Notwithstanding the untimeliness and non-sworn nature of the interview transcript, the employee within the body of the purported transcription states that on February 17, 2016, Juan Cardona, his Paint & Color work supervisor, drove him to the hospital after he was injured at a Massachusetts job site where he exclusively worked and thus knew of his work injury, but directed Saavedra not to report at the emergency room that the injury occurred at work because there was an insurance issue. He stated that Juan Cardona had promised payment for the

remainder of the week from Mauricio Cardona, though he was never paid, and neither were his medical bills, because Mauricio Cardona later told him the injury was his own fault and he was not entitled to anything. The interview transcript was undoubtedly offered to show that the principals of Paint & Color both had actual knowledge of the work-related nature of Saavedra's injury yet fraudulently lied about having any such knowledge in the letters from Mauricio Cardona to Beacon Mutual to induce the retroactive reinstatement of the policy of insurance.²

After presentation of the interview transcript by Beacon Mutual's counsel, the trial judge proceeded to hear the parties' arguments on the motion for summary judgment regarding the ultimate issue of whether Paint & Color made fraudulent and intentional misrepresentations to obtain the retroactive reinstatement of its workers' compensation insurance to cover the "gap period." The prayer for relief in Beacon Mutual's petition for determination of a controversy requests that the reinstated insurance policy be declared null and void on and after January 25, 2016 together with Paint & Color being ordered to reimburse Beacon Mutual for all payments made under said policy since that date together with interest, costs, attorney fees, punitive damages, and other relief deemed appropriate by the Court. It is not entirely clear to this appellate panel exactly what authority was cited, or is being relied upon, if any, by Beacon Mutual to substantiate the basis for the measure of damages the instant petition seeks.

² We also note that the interview transcript raises what may have been a possible viable defense for Beacon Mutual to the now settled original petition. The issue surfaces as to whether Saavedra was in fact a Massachusetts employee who was hired and worked exclusively there as he states, and that Rhode Island jurisdiction may have been lacking. Such failure to raise this potential defense in the original petition may undercut Beacon Mutual's claim that they had an obligation under the reinstated policy to pay any workers' compensation to Saavedra pursuant to the original petition previously filed in this court. The interview transcript does not indicate that Attorney Michael Schwartz, who was contracted by Beacon Mutual to represent Paint & Color, was present, received a copy or knew of its existence while he was defending Paint & Color, in the original petition. This issue may be important since Beacon Mutual is claiming all the payments it made, as well as the commutation settlement funds paid to Saavedra form the basis of its damage claims against Paint & Color in this instant petition.

In a bench decision, the trial judge, relying upon the employee's statement presented in the interview transcript that morning, found that there was no genuine issue of material fact in dispute. The trial judge noted that there was a lot of evidence presented by the insurer, but no evidence was presented by Paint & Color. The trial judge referenced that the interview transcript explains why Carlos Saavedra initially told the hospital that his injury occurred at home. Notably, there is nothing in the record in this matter to support the premise that he actually told the hospital emergency room personnel that he was injured "at home" despite numerous references to this in the hearing transcript.³ Nevertheless, Saavedra clearly did not provide any history on his first two (2) to three (3) medical visits following his injury that he was injured while at work. There would seem to be a stark discrepancy between what Saavedra initially stated to the hospital emergency room personnel about his injury occurring at home, and the history he provided on subsequent hospital visits that his injury occurred at work. Despite this discrepancy, the trial judge went on to rely upon the unsworn, undated interview transcript to make a credibility determination that Saavedra was in fact injured in the course of his employment with Paint & Color notwithstanding the contents of the medical records offered by Beacon Mutual in connection with their motion.

Those medical records raise a credibility issue as to why Saavedra failed to offer such important information about his injury being work-related during his first two (2) to three (3) medical visits following the injury. The trial judge apparently resolved the credibility issue at the summary judgment motion stage by choosing to accept the reason offered in the interview transcript by Saavedra that he was told by his supervisor, Juan Cardona, not to mention he was

³ The complete records of the Carney Hospital Steward Emergency Facility were submitted for the pretrial conference in W.C.C. No. 2016-02683, Saavedra's petition for benefits, and reflect that on February 17, 2016, Saavedra stated that he cut his hand with a knife while working in his house. A complete set of these records were not submitted in the present matter by either party.

injured at work due to insurance issues. Accordingly, the trial judge granted the Beacon Mutual's motion for summary judgment and entered an order granting Beacon Mutual all the damages enumerated within their petition's prayer for relief save for punitive damages which were not awarded.

A timely appeal from the trial judge's order granting summary judgment was taken by Paint & Color. It also appears that despite the lack of any stay, Beacon Mutual has not to date taken any steps to attempt to enforce the damages granted under the pretrial order granting their petition or the trial judge's grant of summary judgment.

The Rhode Island Supreme Court has deemed summary judgment to be a remedy so extreme that it "should not be used as a substitute for trial or as a device intended to impose a difficult burden" upon the nonmoving party. *N. Am. Planning Corp. v. Guido*, 110 R.I. 22, 25, 289 A.2d 423, 425 (R.I. 1972). "[A] court must be very cautious in granting a summary-judgment motion and must provide a party with full opportunity to show that there is a genuine issue of fact involved in the litigation." *Gallo v. Nat'l Nursing Homes, Inc.*, 106 R.I. 485, 488, 261 A.2d 19, 21 (1970) (citing *Mill Factors Corp. v. L.S. Building Supplies, Inc.*, 103 R.I. 675, 240 A.2d 720 (1968)). In short, the Court must view the evidence in a light most favorable to the nonmoving party, which in the instant case is the respondent-appellant, Paint & Color, and summary judgment may only be granted if the Court concludes that no genuine issue of material fact exists. *Alves v. Hometown Newspapers, Inc.*, 857 A.2d 743, 750 (R.I. 2004); *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1225 (R.I. 1996). Furthermore, under Rule 56 of the Superior Court Rules of Civil Procedure, this Court is limited to determining only whether there exist issues of fact to be resolved and cannot pass upon the weight and credibility of the evidence. *Doyle v. State*, 122 R.I. 590, 593-94, 411 A.2d 907, 909 (1980).

In ruling on a motion for summary judgment, an appellate court must apply the same standard as a trial court, which is to not evaluate the credibility or weight of the evidence, but to consider the pleadings, affidavits and other materials in a light most favorable to the nonmoving party. *Boucher v. McGovern*, 639 A.2d 1369, 1373 (R.I. 1994) (citing *Palmisciano v. Burrillville Racing Ass'n*, 603 A.2d 317, 320 (R.I. 1992)). Therefore, in considering the motion, a court should refrain from passing upon the credibility of the witnesses. The Supreme Court has also held that a failure to afford the nonmoving party reasonable opportunity to rebut materials relied upon by the movant constitutes reversible error. See *Napier v. Epoch Corp.*, 896 A.2d 739, 741 (R.I. 2006); *St. James Condo. Ass'n v. Lokey*, 676 A.2d 1343, 1345 (R.I. 1996); *Salvadore v. Major Elec. & Supply, Inc.*, 469 A.2d 353, 356 (R.I. 1983).

In its appeal, Paint & Color argues that the trial judge committed reversible error in granting summary judgment by relying on the statements by Carlos Saavedra within the interview transcript without allowing it the opportunity to rebut the statements in accordance with Rule 56(c). As noted, the Supreme Court has indeed said that an adverse party must be given an opportunity to respond to items presented in a summary judgment motion pursuant to Rule 56(c). A nonmoving party is entitled to ten (10) days to respond and the failure to comply with the ten-day notice requirement is reversible error. *Salvadore v. Major Elec. & Supply, Inc.*, 469 A.2d 353, 356 (R.I. 1983) (citing 1 Kent R.I. Civ. Prac. §12.12 at 118 (1969) and *Enochs v. Sisson*, 301 F.2d 125, 126 (5th Cir. 1962)).

Additionally, the employer argues that the trial judge erred because the medical records offered at the motion hearing by Beacon Mutual presented a genuine issue of material fact as to whether the employee was injured while working for Paint & Color or not. The records reveal Saavedra's failure to state the injury occurred at work in his first two (2) to three (3) medical

visits. Whether Beacon Mutual was knowingly and intentionally deceived by Mauricio Cardona of Paint & Color turns upon whether he was aware of any injuries during the “gap period” of coverage.

At the hearing, the trial judge elected to accept the statement made in the unsworn, undated interview transcript to conclude that Saavedra was injured while working for Paint & Color and more importantly, that Mauricio Cardona was aware of the nature of the injury being work-related. This leap may have been fatally flawed in that it constitutes rank totem pole hearsay as to an out of court statement attributed to Mauricio Cardona through Saavedra to suggest Mr. Cardona had knowledge contrary to that which he suggested in his letters to Beacon Mutual. In the interview transcript Saavedra claims that Mauricio Cardona advised him that his injury was not compensable because he was at fault. If in fact Mauricio Cardona believed that to be true, as erroneous as that may be, it would not render the statements he made to Beacon Mutual in his two (2) letters “knowing and intentional misrepresentations” as the trial judge concluded. Procedurally, this panel finds the trial judge erred by ruling without affording the counsel for Paint & Color an opportunity to develop a rebuttal to the interview transcript opposing counsel shared mere moments before the motion hearing began. This is a clear violation of subsection (c) of Rule 56 and alone would be a sufficient basis for reversal.

Nevertheless, this panel is further persuaded by the arguments of Paint & Color as to a substantive error in the trial judge’s determination that no genuine issue of material fact exists. When considering a summary judgment motion, all issues of credibility must be resolved in favor of the nonmoving party which in this case is Paint & Color. In hearing the motion for summary judgment, the trial judge is not at liberty to make credibility determinations but must only determine if genuine issues of fact exist when all issues of credibility are resolved in favor

of the nonmoving party. When applying that analysis to this case, we find that genuine issues of material fact do remain which cannot be resolved at a motion hearing.

There is a genuine issue as to whether Saavedra was injured at work, as evidenced by his statements within the unsworn interview transcript that his injury did happen at work, which conflicts with his failure to indicate on two (2) or three (3) of his first post-injury medical visits that he was hurt at work. For purposes of the motion, the trial judge must resolve that credibility determination in favor of Paint & Color in accepting that Saavedra was truthful in not indicating his injury was work-related at the emergency room of Carney Hospital Steward Satellite Emergency Center, in Quincy, Massachusetts. His failure at the hospital to state he was hurt at work, conflicts with his statements later at Rhode Island Hospital and in the much later in time, albeit undated, interview transcript. The interview transcript relates to an interview taken by a Beacon Mutual agent after Beacon Mutual claims to have first become aware of the alleged work injury with the filing of the original petition, which would therefore have to be sometime after May 4, 2016. Consequently, such credibility dispute must, for purposes of the motion, be resolved in favor of Paint & Color, which means for the motion it should be assumed that Saavedra did not state at the emergency room that he was injured at work for Paint & Color.

There are additional issues of fact including whether Mauricio Cardona had knowledge that Saavedra claimed to be injured at work at the time he was executing the two (2) letters for Beacon Mutual to facilitate retroactive reinstatement of the workers' compensation insurance policy for Paint & Color. Also, the record is not complete with regard to what, if any, ownership interest the work supervisor, Juan Cardona, had in Paint & Color and whether any knowledge he may have had about Saavedra's alleged work injury may be imputed to the employer and/or whether he relayed his supposed knowledge to Mauricio Cardona prior to him executing the

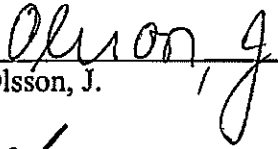
letters to Beacon Mutual. All the credibility determinations on these points for purposes of the motion for summary judgment must at this time be resolved in favor of the nonmoving party. As the petition at issue sounds in allegations of intentional and knowing fraud by Paint & Color, this appellate panel finds that issues remain requiring sworn testimony and a full opportunity for cross-examination so that credibility and what knowledge Mauricio Cardona had when executing his two (2) letters to Beacon Mutual may be properly assessed.

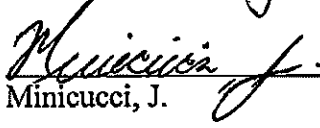
Accordingly, this panel is satisfied that Paint & Color, the appellant, has shown cause that genuine issues of material fact exist and therefore the trial judge's grant of summary judgment constitutes reversible error.

For the reasons set forth herein, the appeal of Paint & Color is granted. We hereby vacate the order of the trial judge entered on October 16, 2017 and remand the papers in this matter to the trial court for further proceedings. Due to the retirement of the trial judge who heard this matter, the Chief Judge shall assign the matter to a sitting judge for such further proceedings as are necessary. In accordance with Rule 2.20 of the Rules of Practice of the Workers' Compensation Court, a final decree, a copy of which is enclosed, shall be entered on **April 29, 2019.**

Olsson, J., concurs in the majority opinion.

ENTER:


Olsson, J.


Minicucci, J.

Conte, J., concurring separately. Though I join in the reasoning of the majority, I respectfully disagree with stopping the analysis and holding short of a dismissal for lack of subject matter jurisdiction. It is no secret that workers' compensation is a creature of statute that requires a party to establish "a jurisdictional peg upon which to act affirmatively" for its claim to proceed through the outlines of the Workers' Compensation Act. *See BIF v. Des Roches*, 355 A.2d 404, 405 (R.I. 1976). The trial judge clearly relied upon Rhode Island General Laws § 28-33-17.3, entitled "Fraud and abuse," as the basis of her decision. A careful reading of this statute does not reveal *any* language authorizing this court to grant the remedies the insurer seeks, and I am unaware of any case law holding the contrary. Thus, from a judicial efficacy standpoint, this matter could be dismissed because there is no statutory or legal precedent upon which this court can grant the relief requested by the insurer in this matter, and thus there is no justiciable issue before this court. However, assuming *arguendo* that there is a justiciable issue before us, I am unable to reconcile the majority's holding with *Chaves v. Derecktor of Rhode Island, Inc.*, 569 A.2d 1063 (R.I. 1990). This matter could also be dismissed as a matter of law because there is a real question as to whether the trial judge at the pretrial conference ever granted the insurer the relief it had sought, yet the insurer failed to perfect its own claim for trial in this matter. It is the obligation of counsel to assemble the best record for its client, and the employer should not now be forced to part a sea that may not even exist.



Conte, J.