

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

George C. James, Circuit Court Judge

Case No. 2000-CP-36-00236

Daniel Rendelman,

Appellant,

v.

P. Communications, DBA Wireless
Communications, and Krish V. Patel,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Did the trial court err in considering comity among jurisdictions in denying a motion for trial continuance while orders for the production of probative out-of-state evidence were in place and pending?

STATEMENT OF THE CASE

This action was commenced by Daniel Rendelman, Plaintiff Appellant Employee, when he filed a summons and complaint on May 10, 2011 [Complaint] against P. Communications, Inc. DBA Wireless Communications and Krish V. Patel, Defendant Respondent Employer. Employer filed an answer and counterclaim on May 16, 2011 [Answer and Counterclaim]. Employee filed a reply on June 27, 2011 [Reply]. The complaint arose out of an alleged breach of employment contract, seeking common law and statutory remedies for damages. The complaint also alleged tortious interference with contractual relations arising out of terminated access to a telephone line. Employer denied any breach of contract or tortious interference with contractual relations and alleged that employee had actually been overpaid and that employer was entitled to recover the overpayment from employee. Employee filed a motion to compel discovery responses September 19, 2011 [Motion to Compel]. On November 21, 2011 the Court granted employee's motion to compel discovery responses dated September 19, 2011 [Order granting Motion to Compel]. The Circuit Court entered a "Consent Protective Order" June 7, 2012 requiring, *inter alia*, employer to be available for their deposition August 8 and 9, 2012 [Consent Protective Order]. On August 22, 2012 employer filed a motion to quash subpoena issued to Cellco Partnership D/B/A Verizon Wireless [Motion to Quash]. Filed on October 26, 2012 was the Circuit Court's order dated October 23, 2012 for writ of commission for out-of-state subpoena *duces tecum* [Order for Writ of Commission]. On November 21, 2012 employee filed a motion for continuance to obtain, *inter alia*, the out-of-state evidence pursuant to the

Circuit Court's order filed October 26, 2012 [Motion to Continue]. This motion was denied by the Court's e-mail November 26, 2012 [E-mail denying]. On November 28, 2012 the Superior Court in New Jersey entered its order for issuance of subpoena and the witness, Verizon, produced there, *inter alia*, the requested evidence [New Jersey Order]. On November 28 and 29 the matter was tried before a Jury with the Honorable George C. James, Jr. presiding, and the Jury, in its verdict, returned no damages award for either employee or employer [Verdict]. The proceedings in the New Jersey Courts were presented to the South Carolina Circuit Court Judge by way of motion for reconsideration of denial of continuance filed December 5, 2012 [Motion for Reconsideration] and was also incorporated into a motion for new trial filed December 10, 2012 [Motion for New Trial]. The Honorable George C. James, Jr. denied both of these motions [Both Orders denying filed December 28, 2012]. The notice of appeal was filed December 31, 2012.

FACTS

The Plaintiff Appellant Employee, Daniel Rendelman, entered into a written employment contract with the Defendant Respondent Employer P. Communications, Inc., Wireless Communications, and Krish V. Patel dated June 18, 2010 [Contract Plaintiff's Exhibit 1]. The employment contract was drafted by Krish V. Patel on behalf of the employer [Holston transcript p. 89 line 7]. The employment contract provided employee with a fixed salary plus bonuses related to store performance as a district manager [Contract Plaintiff's Exhibit 1]. The contract was accepted by employee, signed and returned, and accepted by employer [Holston transcript p. 89 lines 12-13]. Within 3 weeks of the commencement of employment by the employee, on July 19, 2010 a telephone conversation took place between employee and employer [Holston

transcript p. 94 lines 23-25]. There is a dispute as to whether or not an oral modification of the written contract was offered and accepted within that telephone conversation of July 19, 2010. Employer's version of the telephone conversation is that the employer had already evaluated the employee and found him to be unsuitable as a district manager and the employer was calling to notify the employee of this decision [Holston transcript p. 175 lines 2-5]. Employer also asserts that during this conversation, in reaction to the notification that employee would be removed as district manager, the employee asked to be kept on as a store manager at the Newberry store and to be primarily paid on a commission basis only [Holston transcript p. 175 lines 20-23] [Holston transcript p. 177 lines 6-11 and lines 17-21]. Employee's version is that during this telephone conversation there was no discussion of demotion or change of pay [Holston transcript p. 95 lines 24-25]. From the employee's trial testimony, it was apparent that employee was relying upon the contract, which required any changes to be made in writing, to be modified had he known any changes were to take place which related to his position or change of pay, and that such changes were never noted in writing [Holston transcript p. 96 lines 3-7]. Employee testified that in the telephone conversation, the employer said, "... well, we have got this Newberry store opening and we really want to focus on that because we believe that is going to be our biggest store and best opportunity that we have." [Holston transcript p. 95 lines 18-21], and therefore, employee continued employment under the assumption that he was to operate as store manager for the Newberry store while being paid according to the written contract [Holston transcript p. 96 line 24 – p. 97 line 2]. The evidence discovered pursuant to the pretrial discovery orders filed October 26, 2012 [Order for Writ of Commission] in South Carolina and November 28, 2012 [New Jersey Order] in New Jersey shows that on July 12, 2010 approval was Federal Expressed by Verizon to employer authorizing employer to open a store in Newberry, South Carolina

[Evidence attached to Motion for New Trial]. Significantly, the Verizon authorization was not produced in employer's discovery to employee [Affidavit in support of Motion for New Trial].

ARGUMENT

Because the trial court failed to consider comity among jurisdictions, it erred in denying a motion for a trial continuance while orders for the production of probative out-of-state evidence were in place and pending.

Employee argues that the July 12, 2010 letter from Verizon authorizing employer Krish Patel of Wireless Communications, which is authorized to operate and sell CMRS services for Verizon Wireless, to open a store in Newberry was highly probative evidence, especially because it was not produced by employer in discovery [Evidence attached to motion for New Trial]. Employee argues that this evidence is highly probative because the authorization by Verizon tends to show that the real reason for the disputed conversation of July 19, 2010 was that employer was authorized to open the store just 6 days before the conversation. Employee further argues that this evidence contradicts the employer's claim that employee suddenly needed to be terminated as a district manager because of his poor performance. Considering the Jury found for neither party, one would be strongly persuaded that neither side tipped the scales so that this one piece of probative evidence, never produced to employee by employer or available as evidence to the Jury, if presented to the Jury should have tipped the scales of justice in employee's favor and, therefore, a new trial should be granted.

As a matter of law, it is generally accepted that the Appellate Courts will not lightly reverse the denial of a motion for continuance pursuant to Rule 40(i), SCRPC before a Trial Court in South Carolina. However, in this case, employee argues that once order's for the discovery of probative evidence in South Carolina and a foreign jurisdiction are in process,

principles of comity should be considered by the Trial Court as good cause to grant a continuance.

A question of comity arises when there is tension between courts and/or agencies having concurrent jurisdiction over the same matter. Under the doctrine of comity, one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter. Thus, the doctrine of comity is one of deference and respect among tribunals of overlapping jurisdiction; in accordance with comity, the courts of one state or jurisdiction give effect to the laws and judicial decisions of another, not as a matter of obligation but out of deference and respect. 16 Am. Jur. 2d Conflict of Laws §11(2009)

South Carolina recognizes that in a proper case deference to other jurisdictions should be considered. Mutual Aid Loan & Investment Co. of Atlanta, Ga. v. Logan, 33 S.E. 372, 55 S.C. 295 (S.C. 1899)

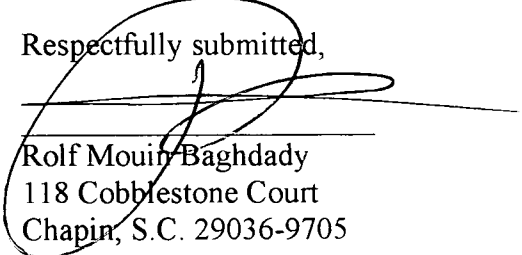
In this case, employee argues that the Trial Court erred by failing to grant deference to the Courts' orders [S.C. Order and N.J. Order] that were in process of discovering probative material evidence that could reasonably have changed the result which was discovered, but not presented to the Jury. Because a written pretrial continuance request was denied, the matter was brought again to the attention of the Court by motion for reconsideration and motion for new trial, which were also denied. Employee argues that the evidence discovered by Court order in New Jersey should have been presented to the Jury and the Court should have granted employee's motion for a new trial. Accordingly, employee argues that the Court of Appeals should correct this unjust result and allow this evidence to be presented to the fact finder and order a just and fair result in this case by determining and establishing a rule that good cause for a continuance exists while discovery orders are in process to obtain evidence in foreign jurisdictions as a matter of comity.

CONCLUSION

As a matter of comity, the Circuit Court should have continued the trial until the next term so as to allow the discovery of the probative evidence that was the subject of discovery orders in South Carolina and a foreign jurisdiction. Accordingly, the Trial Court's denial of a new trial should be reversed and a new trial ordered.

July 8, 2013

Respectfully submitted,



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DESIGNATION OF MATTER TO BE
INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Order Denying Plaintiff's Motion to Reconsider Order Denying Continuance filed December 28, 2012;
2. Order Denying Plaintiff's Motion for New Trial filed December 28, 2012;
3. Verdict dated November 30, 2012;
4. Complaint;
5. Answer and Counter Claim;
6. Reply;
7. Motion to Compel;
8. Order granting Motion to Compel;
9. Consent Protective Order;
10. Motion to Quash;
11. Order for Writ of Commission;
12. Motion to Continue;

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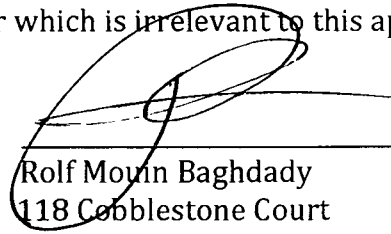
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13. E-mail denying Motion to Continue;
14. New Jersey Order;
15. Motion for Reconsideration;
16. Motion for New Trial;
17. Plaintiff's Exhibits 1, 2, 5, 6, 7, 8, 9, 13, and 18;
18. Defendant's Exhibits 1, 2, 3, and 4;
19. Court's Exhibit 1;
20. Holston Transcript pp. 6 - 29 line 13; p. 40 line 10 - p. 66 line 18;
p. 75 line 15 - p. 216;
21. Pantsari Transcript p. 20 line 13 - p. 83 line 11;
22. Deposition of Krish V. Patel pp. 83-86.

I certify that this designation contains no matter which is irrelevant to this appeal.

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PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be included in the Record on Appeal on Respondents P. Communications, Inc. DBA Wireless Communications and Krish V. Patel by depositing a copy of it in the United States Mail, postage prepared, on July 8, 2013, addressed to their attorney of record, James G. Carpenter, 819 East North Street, Greenville, South Carolina 29601.



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