

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM CHEROKEE COUNTY

MAR 25 2014

J. Mark Hayes, II, Circuit Court Judge

SC Court of Appeals

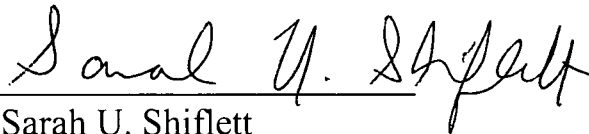
Case No.: 2011-CP-11-123

Russell D. Moore..... Appellant

v.

Usha J. Bridges..... Respondent

RESPONDENT'S INITIAL BRIEF



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OTHER AUTHORITIES

U.S. Const. amend. VI 9

STATEMENT OF ISSUES ON APPEAL

- I. Did the lower court properly uphold the grant of Summary Judgment?
- II. Did the lower court properly exercise its discretion in denying Appellant's Motion to Alter or Amend the prior Order granting Summary Judgment?
- III. Did the lower court properly exercise its discretion in hearing the case?

STATEMENT OF THE CASE

In the underlying criminal matter, Appellant pled guilty to several charges of robbery in the Cherokee County General Sessions Court on September 20, 1996. At the guilty plea hearing, Appellant was represented by an attorney employed by the Cherokee County Public Defender Corporation. At the time, Respondent was also employed by the Cherokee County Public Defender Corporation, but did not represent Appellant at the guilty plea hearings. Appellant filed two post conviction relief petitions in regard to his convictions.

Subsequently, Appellant filed a Complaint in the Cherokee County Court of Common Pleas against Respondent on March 1, 2011. Attached to Appellant's Complaint as Exhibits were Orders of Appointment directing that Respondent was appointed as Appellant's attorney on one of the robbery charges and that another Public Defender was appointed to represent Appellant on the other robbery charges. In response to Appellant's requests for admission, Respondent stated that she never received an Order appointing her to represent Appellant in regard to the indictment against him for robbery. The fact that Respondent was represented on all charges to which he pled guilty by another attorney employed with the Public Defender Corporation was undisputed.

Respondent filed a Motion for Summary Judgment as to Appellant's Complaint for legal malpractice, gross negligence and fraud. Summary judgment

was granted to Respondent by Order dated October 4, 2013 and filed October 9, 2013. Appellant filed a Rule 59 Motion dated October 24, 2013 and requested that the Court alter or amend its Order granting Summary Judgment to Respondent. Respondent's Motion was denied by Order dated December 2, 2013 and filed December 4, 2013. This appeal followed.

ARGUMENT

I. STANDARD OF REVIEW

On appeal from an order granting summary judgment, the appellate court applies the same standard which governs the trial court under Rule 56(c) and 59(e) SCRPC: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Gauld v O’Shaughnessy Realty Co., 380 S.C. 548, 671 S.E. 2d 79 (S.C. App. 2008).

“The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder.” Id., 380 S.C. at 558, 671 S.E. 2d at

85. “Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent’s case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings.”

Id., 380 S.C. at 558-559, 671 S.E. 2d at 85. The nonmoving party must present specific facts showing a genuine issue for trial. Id.

In the Motion for Summary Judgment, Respondent met the initial burden of showing an absence of evidentiary support for Appellant’s case. In its Order granting Summary Judgment, the Court specifically determined whether any triable issues of fact existed, by viewing the evidence and all reasonable inferences in the light most favorable to Plaintiff. The Court cited the cases of Helms Realty, Inc. v. Gibson-Wall Co., 363 S.C. 334, 611 S.E.2d 485 (2005); Med. Univ. of S.C.

v. Arnaud, 360 S.C. 615, 602 S.E.2d 747 (2004); Hackworth v. Greenville County, 371 S.C. 99, 637 S.E.2d 320 (Ct. App. 2006); Rife v. Hitachi Constr. Mach. Co., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005) in this regard. Further, the Court specifically found that Respondent had met the burden of establishing the absence of a genuine issue of material fact and cited Wogan v. Kunze, 366 S.C. 583, 591, 623 S.E.2d 107, 112 (Ct. App. 2005) (citing McCall v. State Farm Mut. Auto. Ins. Co., 359 S.C. 372, 597 S.E.2d 181 (Ct. App. 2004)); see also Singleton v. Sherer, 377 S.C. 185, 197, 659 S.E.2d 196, 203 (Ct. App. 2008) in this regard.

Respondent would submit that the Order granting Summary Judgment reveals that the Court considered the entire court file, including Appellant's Complaint and all other pleadings, the discovery responses, all Motions and oral arguments, in the light most favorable to Appellant. Having done so, the Court determined that there were no fact issues to be determined and that Respondent was therefore entitled to summary judgment. The grant of Summary Judgment was a complete ruling on all of Appellant's claims and causes of action and Motions. Therefore, the circuit court properly granted summary judgment to Respondent and properly denied Respondent's Rule 59 Motion to alter or amend.

II. THE LOWER COURT PROPERLY CONSIDERED APPELLANT'S MOTION FOR SUMMARY JUDGMENT.

The appellant filed his action on March 1, 2011. The court heard respondent's Motion for Summary Judgment on September 9, 2013. During the

approximately two and one-half years this case was pending the parties engaged in discovery. The appellant complains that additional discovery was necessary before the court could consider the summary judgment motion. The respondent would assert that at the time Respondent's Motion for Summary Judgment was heard the case had been placed on the trial docket and no additional time for discovery was needed. A party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact. Guinan v. Tenet Healthsystems, 282 SC 48, 677 SE 2d 32 (Ct. App. 2009). In the present case the appellant asserts no good reason to extend discovery. The only reason given is his need to get an affidavit from the former clerk of court. However, as will be addressed below, such an affidavit would not change the outcome. Therefore, the court properly considered the motion for summary and no additional time for discovery was warranted.

III. THE LOWER COURT WAS CORRECT IN GRANTING
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT.

The relevant facts of this case are undisputed. It is undisputed that appellant was charged with multiple counts of robbery. It is undisputed that appellant plead guilty to multiple counts of robbery. It is undisputed that appellant received the services of competent counsel at his guilty plea. The gravamen of appellant's

action is a complaint that he did not receive the services of a particular attorney to represent him. The law is clear that an indigent criminal defendant is entitled to appointed counsel but he is not entitled to appointment of counsel of his choice.

The Sixth Amendment mandates that in all criminal proceedings, the accused shall have the right to the assistance of counsel for his defense. U.S. Const. amend. VI. Furthermore, an indigent criminal defendant is entitled to have an attorney appointed by the court to represent him. Gideon v. Wainwright, 372 U.S. 335, 344, 83 S.Ct. 792, 796-97, 9L.Ed.2d (1963). The erroneous deprivation of a defendant's fundamental right to the assistance of counsel is *per se* reversible error. Chapman v. California, 386 U.S. 18, 23 N. 8, 87 S.Ct. 824, 828 n. 8, 17 L.Ed.2d 705 (1967). The right of an accused to effective assistance of counsel, however, does not extend to the appointment of counsel of choice, or to special rapport or even a meaningful relationship with appointed counsel. Morris v. Slappy, 461 U.S. 1, 13-14, 103 S.Ct. 1610, 1617-18, 75 L.Ed.2d 610 (1983).

In the present case attorney Donald G. Letteer represented the appellant at his guilty plea on all charges. Mr. Letteer was working for the Cherokee County Public Defender Corporation and represented appellant as a public defender. At this same time, respondent was also employed by Cherokee County Public Defender Corporation and would from time to time represent indigent defendants in General Sessions although most of her work was representing indigent juveniles

in Family Court. It just so happens that respondent was appointed by the Clerk to represent the appellant on one of his charges and Donald G. Letteer was appointed to represent appellant on the remainder of his charges. Rather than two (2) public defenders representing the appellant Donald G. Letteer represented appellant on all charges.

The appellant brought this case several years after the fact when he apparently learned that the clerk of court's appointment on one of his charges listed respondent as the attorney appointed. Respondent has asserted that she never received this appointment from the clerk as it was simply transmitted to the public defender's office where Donald G. Letteer was assigned to all charges. The appellant asserts that if he was provided more time the former clerk of court would attest that the appointment was transmitted to respondent. Although respondent asserts she never received the appointment, for purposes of summary judgment respondent would assert that this dispute is not relevant to the matter at hand. Assuming, *arguendo*, that respondent received the appointment, nothing changes. The appellant still received competent counsel at his guilty plea. In fact, it is not unusual for lawyers in the public defender's office to assign one attorney to a defendant with multiple charges. Neither is it unusual for private counsel appointed to represent an indigent defendant to obtain the services of another

attorney to take the appointment. It is simply clear that an indigent criminal defendant has no right to choose a particular attorney to represent him.

Therefore, there are no issues of material fact in dispute and the appellant's claim fails as a matter of law. Summary judgment was properly granted to respondent.

IV. THE LOWER COURT PROPERLY EXERCISED ITS DISCRETION
IN HEARING THE CASE.

Appellant argues that the lower court erred and abused its discretion, thereby prejudicing Appellant, in that the Honorable J. Mark Hayes failed to recuse himself. Appellant argues that Judge Hayes had previously ruled against Appellant in a former post conviction relief proceeding and therefore should have declined to hear Appellant's case. Respondent would submit that there was no abuse of discretion and also that this issue was not raised to the lower court and therefore has not been preserved by Appellant as a ground for relief.

CONCLUSION

Respondent respectfully requests that this Court affirm the Order of the Circuit Court.