

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. Supreme Court

Larry B. Hyman, Jr., Circuit Judge for The Fifteenth Judicial Circuit

Case No. 2012-213156
Appellate Case No: 2012-213156

Scott Lemons and Gold Coast Resorts, LLC.....Petitioners

v.

The McNair Law Firm, P.A.....Respondent

PETITION FOR A WRIT OF CERTIORARI

Other Counsel of Record
Robert E. Stepp
Roland M. Franklin, Jr.
William H. Jordan
Sowell Gray Stepp & Laffitte, LLC
1310 Gadsden St
Columbia, SC 29201
(803) 929-1400
Attorneys for Respondent

Mark W. Hardee
Hardee Law Firm
2231 Devine Street Suite 202
Columbia, South Carolina 29205
(803) 799-0905
Attorney for Petitioners

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CROWLEY V. HARVEY & BATTEY AND LINCOLN V.
AETNA INS. CO. AND ERRED IN ITS
INTERPRETATION AND APPLICATION OF THOSE
CASES.**

**II. THE COURT ERRED IN FINDING THAT THE MCNAIR
LAW FIRM CAN LIE TO ITS CLIENTS ABOUT A
DOCUMENT, AND THEN RELY ON THAT DOCUMENT
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CERTIFICATE OF COUNSEL

Counsel for Appellants certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 25, 2014

QUESTIONS PRESENTED

- I. Did the Court of Appeals misapprehended *Crowley v. Harvey & Battey* and *Lincoln v. Aetna Ins. Co.* and Erred in its interpretation and application of those cases?**

- II. Did the Court erred in finding that the McNair Law Firm can lie to its clients about a document, and then rely on that document as protection by release or ratification?**

STATEMENT OF THE CASE

Appellants filed a Complaint against the McNair Law Firm and its former partner Mark McAdams on September 27, 2010. (R. pp. 63) The McNair Law Firm answered on January 3, 2011.

Mr. McAdams was unable to be served and the Appellants proceeded against McNair. When the case came to trial on May 14, 2012 before the Hon. Steven John. In the middle of the Appellants' case, counsel for Appellants informed Judge Johns that Mark McAdams was not a party to the case, as he had never been served and never filed an answer. Even though McNair had never inquired about the status of Mr. McAdams, and had never included him on any notices of depositions or any other matters, claimed that they were surprised by this information and moved for a mistrial. Judge John granted a mistrial on May 15, 2012.

Subsequent to the mistrial, for the first time, McNair Law Firm moved for Summary Judgment with a shotgun motion listing four grounds. (R. pp. 21) The case was assigned to Hon. Larry B. Hyman who heard the motion on July 30, 2012 and allowed the parties to submit additional information.

On September 4, 2012 Judge Hyman issued a Summary Judgment Order granting Summary Judgment on every ground raised by McNair. (R. pp. 1) The Appellant received the Order on September 18, 2012 filed a Notice of Appeal on October 12, 2012. The Court of Appeals affirmed the judgment of the circuit court Scott Lemons and Gold Coast Resort v. McNair Law Firm (Opinion No. 2014-UP-117 (S.C) Ct. App. Filed March 19, 2014). Petitioner seeks a Writ of Certiorari to review that accession.

FACTS

The Summary Judgment Order does not set forth facts in the light most favorable to Lemons. The facts in the light most favorable to the Appellants are:

McNair Law Firm, represented the Appellants, Scott Lemon and Gold Coast Resorts Inc. (hereinafter Lemons) in several matters between 2006-2008. In the fall of 2006 Mr. Lemons held an option to purchase a piece of property on the intercoastal waterway in Horry County. Mr. Lemons was approached by a buyer named Kenny Hyatt, who purchased this property from him, for a sale price of 1.5 million dollars more than Mr. Lemons' option. (R. pp. 356) The contract signed by Mr. Hyatt was a no conditions contract. (R. pp. 367)

Mr. Hyatt was introduced to Mr. Lemons by a real estate agent Mr. Naomi. Mr. Lemons was ready willing and able to close on the property and anticipated a simultaneous closing. (Sup.R.pp.1-3; 17-18) Mr. Hyatt testified in his deposition that he did not have the funds to close on the closing date, and that if Mr. Lemon's had closed on his property, Mr. Hyatt would not have been able to close. (R. pp. 346-347; 349-351; 354-355). Mr. Hyatt failed to close on the property, and Mr. Lemons contacted the McNair Law Firm to represent him for this Breach of Contract. Before the action could be filed, Mr. Lemons was sued by the real estate agent for the commission regarding sale of the property. (R. pp. 356) Mark McAdams, a partner with the McNair Law Firm at the time, filed a Third Party Complaint against Mr. Hyatt for failure to close on the no conditions contract. (R. pp. 373) The McNair Law Firm researched Mr. Lemon's case and concluded that Mr. Lemon had a viable case against Hyatt. (R. pp. 456; 458) Mr. McAdams told Mr. Lemons that he should not settle his claims for under one million dollars. (Sup. R. pp.6)

The case proceeded to go through normal discovery, and the case was mediated in May 2008. Mr. Lemons did not know of the mediation, and it is undisputed that he did not attend. (R. pp. 214-221, Sup. R. pp. 13-14) Mark McAdams signed a settlement agreement of the 1.5 million dollar Breach of

Contract case against Kenny Hyatt, on behalf of, and without the authority of, Mr. Lemons, in the amount of five thousand dollars (\$5,000). (R. pp. 392) It's undisputed that Lemons never saw the settlement document.

Several days later, Mr. Lemons was called by Mr. McAdams to come to his office to sign some paper work. At this time Mr. Lemons had never seen the release. (R. pp. 212-213, Sup. R. pp. 7-12; R. pp. 214-221) It is unconstructed that Mr. Lemons was told by Mr. McAdams that Mr. Lemons needed to sign a release of the earnest money in the case, and that Mr. Lemons would receive five thousand dollars of it. (R. pp. 395) Mr. Lemons was told that the case against Mr. Hyatt would go forward. In other words, Mr. McAdams lied to his client Mr. Lemons. (R. pp. 214-221; Sup. R. pp. 13-15; Sup. R. pp. 15-16; R. pp. 233) Mr. Lemons later learned that Mr. McAdams had settled the case without his knowledge for five thousand dollars (\$5,000), and that the paper work that he had Mr. Lemons sign was a complete release of the claims.

The case by the real estate agent Mr. Naomi proceeded to trial against Mr. Lemons, who was represented by Mark McAdams, which resulted in a judgment against Mr. Lemons in excess of two hundred thousand dollars (\$200,000). (R. pp. 400) Mark McAdams was fired by The McNair Law Firm just after the trial of that case, and the file was transferred to attorney

Tommy Brittain, who was able to have the judgment overturned. (R. pp. 419) Mr. Lemon's failure to close on his contract was not an issue at trial or on appeal.

Mr. Lemons is claiming malpractice by the McNair Law Firm, for settling a valuable claim worth 1.5 million dollars, for \$5000, without his knowledge or consent. (R. pp. 442) Mr. Lemons alleges that the reason Mr. McAdams would do such a thing is that, at the same time this was going on, Mr. McAdams secretly replaced Mr. Lemons as a partner in a business deal, that at the time, everyone involved thought was worth millions of dollars. (R. pp. 212-213; Sup. R. pp 7-12; R. pp. 231-232; Sup. R. pp 15) This "business deal", named Global Holdings, was a deal put together by the McNair Law Firm. It has since proven to have been a fraudulent scheme, and is being investigated by the SEC and the FBI.

Mr. McAdams became extremely hateful of Mr. Lemons during this time period because of this conflict of intent. (R. pp. 455) Mr. Lemons has alleged legal malpractice, claiming that the McNair Law Firm, while representing the Plaintiff, breached the standard of care, and was negligent by settling a valuable claim for less than it was worth without the knowledge or permission of their client. Mr. Lemon's expert witness in this regard is attorney John Freeman. (R. pp. 442)

The Summary Judgment Order misrepresents the facts in several instances including: By insinuating that Lemons agreed to settle his Hyatt case, (R. pp. 2) when the uncontested facts are that Lemons was lied to by McAdams, and that Lemons never intended to settle that claim. (R. pp. 214-221; Sup. R. pp 13-14), by stating that McNair mailed the release to Lemons (R. pp. 2) when Lemons testified that he did not receive it (R. pp. 214-221; Sup. R. pp 13-14), by stating on p.3 of the Order that Lemons “claims not to have read” the release, when it is uncontested that Lemons was not allowed to read it, but was lied to by McNair as to its contents (R. pp 214-221; Sup. R. pp 13-14; R. pp. 231-233; Sup. R. pp 15-16), and by stating in a footnote on pg.5 of the Summary Judgment Order that Lemons has not complained of any other aspect of McNairs representation, when Lemons complained, and presented evidence, that McNair had a conflict of interest with him regarding the Global Holdings Business deal while they were representing him in this contract matter, which influenced their actions. (R. pp. 69, R. pp. 212-213; Sup. R. pp 7-12; R. pp. 455)

ARGUMENT

I. THE COURT OF APPEALS MISAPPREHENDED CROWLEY V. HARVEY & BATTEY AND LINCOLN V. AETNA INS. CO. AND ERRED IN ITS INTERPRETATION AND APPLICATION OF THOSE CASES.

Nowhere in the Complaint does the Petitioner allege that the advice given to him by the Respondent to sign the settlement agreement was fraudulent, and the Respondent law firm has never alleged or argued that the advice was fraudulent. The Trial Court found that this case was barred by ratification, but made no finding of any fraudulent act, alleged or proven, by the Respondent law firm. However, the Court of Appeals, reviewing this case decided at Summary Judgment, for the first time, made a finding of fact that without any support on the record Respondent law firm committed fraud in this matter, and erroneously concluded that this fraudulent behavior protects the Respondent from being sued in this matter. The Court of Appeals erred in finding that this case is outside the settled case law in South Carolina, that a client is bound by the actions of his attorney, and of the sound public policy of finality of judgments. The Court of Appeals did not

cite what evidence in the record supported each of the elements of fraud clearly and convincingly as requested by S.C. law. *Hansen v. DHL Lab Inc.* 319 S.C. 79, 459 SE 2d 850 (1995)

South Carolina has a strong public policy of finality of judgments, even upholding judgments involving intrinsic fraud. (see *Chewing v. Ford Motor Comp.* 354 S.C. 72, 86, 579 S.E.2d 605, 316 (2003)

SRCP 41 sets out the requirements for a final settlement between parties, including that a case is deemed settled upon the parties signing a written agreement which clearly sets out the settlement terms.

In the case at hand, Mr. Lemons did sign such a settlement agreement. He is now claiming his signature was based on the wrongful advice from the Respondent law firm. It is well settled law in South Carolina that his only recourse in such a matter would be to accept the benefits of the agreement, in an effort to mitigate his damages, and bring a suit against his attorney for malpractice. (*Crowley v. Harvey & Battey* 237 S.C. 68, 488, S.E.2d 334(1997); *Shelton v. Bressant* 312 S.C. 183, 439 S.E.2d 833(1993); *Poore v. Poore* 105 S.C. 206 89 S.E.2d 569 (1916); *Arnold v. Yarbrough* 281 S.C. 570 316 S.E.2d 416 (ct.ap.1984)

The law in South Carolina is very clear that “if the attorney has an appearance of authority to confess or consent to judgment, it is ordinary

binding and conclusive on the client, notwithstanding an actual lack of authority unknown to the court or the opposing party. The sole remedy in such a case being against the attorney” (*Lord Jeff Knitting v. Mills* 281 S.C. 374, 377, 315 S.E.2d 377,379(ct.app.1974) (see also *Crowley* at 335)

As stated above, there is no allegation of even intrinsic fraud in this matter, and certainly not extrinsic fraud, which would have been the only way Mr. Lemons would have been able to attack the settlement he agreed to based on his attorney’s advice. Mr. Lemons’ sole remedy was to accept the benefits of the settlement, upon learning of the true facts of this case, and bring the action that he has currently has brought against the Respondent law firm.

Ratification has three elements 1. Acceptance of benefits. 2. Full knowledge of facts. 3. Affirmative election. (*Lincoln v. Aetna Causality Ins. Comp.* 300 S.C. 88, 386 S.E.2d 801 (ct.app.1989) There is at least a question of fact as to whether or not Mr. Lemons had full knowledge of the facts before signing the settlement agreement and accepts the benefits.

Therefore, the Court of Appeals was in error finding that he is estopped in this matter by ratification. The contradicted testimony by Mr. Lemons, is that he did not have knowledge of the facts prior to signing the settlement document. Once the settlement document was signed, South

Carolina's public policy of finality of judgments, made it futile for Mr. Lemons to attack the judgment. By accepting the benefits of the settlement, and seeking judicial enforcement, the ruling in *Crowley* makes it very clear that this did not constitute ratification.

II. THE COURT ERRED IN FINDING THAT THE MCNAIR LAW FIRM CAN LIE TO ITS CLIENTS ABOUT A DOCUMENT, AND THEN RELY ON THAT DOCUMENT AS PROTECTION BY RELEASE OR RATIFICATION.

The Summary Judgment Order finds that Mr. Lemon's claims fail based on Mr. Lemon's signing a mutual release and accepting money in the underlying case, and finds that signing of the release and accepting the money was a ratification of that claim. Ratification has three elements: 1) acceptance of benefits 2) full knowledge of facts 3) affirmative election. *Lincoln v. Aetna Cas. & Surety Co.* 300 S.C. 88,386 S.E.2d 801 (Ct. App.1989). It is clear from facts, taken in the light most favorable to Lemons, that he did not have full knowledge of the facts of the Release. Mr.

Lemons testified that his lawyer from McNair Law Firm lied to him about the contents of the release.

The Summary Judgment Order found that Lemons did not challenge findings that the case against Hyatt settled for \$5,000. In fact, as to Hyatt; It had settled. *Crowley v. Harvey & Battey* 237 S.C. 68, 488, S.E.2d 334(1997) sets out that if a client signs a release based on negligent advice from his attorney, although he cannot collaterally attack the Release as to the third party, he can maintain a malpractice against his attorney, and is allowed to keep the proceeds from that underlying matter in an effort to mitigate his damages.

In this case, Mr. Lemons claims the McNair Law Firm, lied to him, by advising him that the Mutual Release was only releasing the earnest money in this matter, and that it did not stop his lawsuit against Mr. Hyatt for damages from moving forward. Based on that advice, Mr. Lemons signed the Release.

The Summary Judgment Order finding that Lemon's claims are barred by Judicial Estoppel is in error, because at the time Lemons took the position in Court filings, that his case against Hyatt had been settled, they in fact were settled as to Hyatt. Mr. Lemon's sole remedy at that time was against his attorney. Crowley Id.

CONCLUSION

For the reason stated, Appellant asks the Court to grant the petition for a writ of certiorari.

May 22, 2014

Respectfully submitted,



Mark W. Hardee
2231 Devine St Suite 202
Columbia, SC 29205
(803)799-0905
Attorney for Petitioners

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM Horry COUNTY
COURT OF COMMON PLEAS

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S.C. Supreme Court

Scott Lemons and Gold Coast Resorts)
LLC,,)
)
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Plaintiffs,)
)
vs.)
)
The McNair Law Firm, P.A.,)
)
)
Defendants.)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2014, I served, via U.S. Postal Service, at the address below, a copy of the Petition for a Writ of Certiorari pertaining to the above-referenced action.

Robert Stepp
1310 Gadsden St
Columbia, SC 29201



Vicky McCarter
Assistant to Mark W. Hardee
The Hardee Law Firm

Columbia, South Carolina

Date: 5-22-14

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT
APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS

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S.C. Supreme Court

Scott Lemons and Gold Coast Resorts)
LLC,,)
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)
Plaintiffs,)
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vs.)
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The McNair Law Firm, P.A.,)
)
)
Defendants.)
_____)

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of May, 2014, I served, via Hand Delivered, at the address below, a copy of the Petition for a Writ of Certiorari and Petitioner's Appendix pertaining to the above-referenced action.

Court of Appeals
1015 Sumter St
Columbia, SC 29211



Vicky McCarter
Assistant to Mark W. Hardee
The Hardee Law Firm

Columbia, South Carolina

Date: 5-22-14