

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

MAY 9 2012

S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY

The Honorable J. Michael Baxley, Circuit Court Judge

Case No.: 05-CP-26-2710

Dr. Brad R. Johnson.....Appellant

v.

Lewis W. Hall, Lewis V. Hall,
L.W. Hall Enterprises, LLC, and
Cold Air A/C Service, Inc.Respondent.

RETURN TO PETITION FOR WRIT OF CERTIORARI

Jay R. Lee, Esquire
Aiken, Bridges, Elliott, Tyler, & Saleeby, P.A.
P.O. Drawer 1931
Florence, SC 29503
(843) 669-8787

Attorney for Respondent Cold Air A/C Service, Inc.

OTHER COUNSEL OF RECORD

Brad R. Johnson, Ph.D., J.D.
111 S.E. 14th Street
Oak Island, NC 28465
Petitioner, Pro-Se

Brent M. Boyd, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
Attorneys for Lewis V. Hall

Forrest Truett Nettles, II, Esquire
The Nettles Law Firm, LLC
P.O. Box 699
Charleston, SC 29402
Attorney for Lewis V. Hall

G. Michael Smith, Esquire
Thompson & Henry, P.A.
P.O. Box 1740
Conway, SC 29528
Attorney for Lewis W. Hall

TABLE OF CONTENTS

Table of Authorities..... 2

Issue Presented for Review..... 3

Counter Statement of the Case..... 4

Statement of the Facts..... 6

Argument:

I. The Appellant has waived any protection rights he may have had
under SCRC 40(b)..... 7

Conclusion.....12

TABLE OF AUTHORITIES

CASES

Ellie, Inc. v. Miccichi, 358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004).....10

Paschal v. Causey, 309 S.C. 206, 420 S.E.2d 863, (Ct. App. 1992).....7

Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970)7

State v. Black, 319 S.C. 515, 462 S.E.2d 311 (Ct. App. 1995), reh’g denied (9/20/1995).....10

Sullivan Co., Inc. v. New Swirl, Inc., 313 S.C. 34, 437 S.E.2d 30 (1993).10

Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct App. 2000), reh’g denied (11/4/2000)12

Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983).....7

OTHER AUTHORITIES

Rule 40, South Carolina Rules of Civil Procedure.....7

ISSUE PRESENTED FOR REVIEW

1. Did the circuit court err in denying Appellant's pre-trial motion for continuance under SCRCP 40(b) based on Appellant's failure to comply with continuance procedure and by the Appellant's consent to the trial date at a previous master roster meeting?

COUNTER STATEMENT OF THE CASE

On May 31, 2005, the Appellant filed a Complaint against the Defendant, Lewis W. Hall and Lewis V. Hall alleging assault, battery, malicious prosecution, defamation, premises liability and conspiracy. In November 2006, the Appellant moved to amend his Complaint to add two additional Defendants: L.W. Hall Enterprises, LLC and Cold Air A/C Service, Inc. The Appellant's Motion to Amend Complaint was heard on February 16, 2007 by the Honorable J. Michael Baxley who granted authority to add the additional corporate Defendants. While he received authority to name the additional corporate Defendants by Order dated February 16, 2007, the Appellant did not file and serve his Amended Complaint on L.W. Hall Enterprises, LLC and Cold Air A/C Service, Inc. until May 18, 2007. Cold Air A/C Service, Inc. timely filed its Answer to the Amended Complaint on June 25, 2007.

On Monday, August 20, 2007, J. Michael Baxley, Chief Administrative Judge for the Fifteenth Judicial Circuit, held a master roster meeting for Horry County. At that time, all counsel of record for the case appeared before Judge Baxley and advised at that time that there was no objection to the case being called for trial on or after October 1, 2007.

This action appeared on the trial roster for the term of court beginning October 1, 2007. On September 28, 2007, the Friday before the term of court, Appellant filed a Motion for Continuance on the basis that additional discovery was needed to adequately prepare to defend against a summary judgment motion previously filed by Cold Air A/C Service, Inc. There was no mention in the September 28, 2007 motion of a continuance request on the basis of South Carolina Rule of Civil Procedure 40(b).

On October 1, 2007, the Appellant made a verbal motion for continuance at the beginning of the trial proceedings. The verbal motion for continuance was based on South Carolina Rules of Civil Procedure 40(b). The Appellant's previous September 28, 2007 motion for continuance on the basis of Defendant Cold Air A/C Services, Inc.'s motion for summary judgment was disposed of due to the fact that Cold Air A/C Service, Inc. withdrew its motion for summary judgment. The Court denied the Appellant's verbal motion for continuance on October 1, 2007.

The case was tried beginning October 3, 2007. At the close of the Appellant's case, the Court directed a verdict in favor of defendants Cold Air A/C Service, Inc., L.W. Hall Enterprises, LLC and Lewis W. Hall. At the close of the trial, the jury returned a verdict in favor of the only remaining defendant, Lewis V. Hall.

Following the trial, the Appellant made a motion for new trial, alleging error by the trial court in failing to grant his pre-trial continuance request. The Appellant's motion for new trial was denied. Thereafter, the Plaintiff filed his Notice of Appeal, serving it upon counsel for the Defendants on February 29, 2008.

On October 11, 2011, the Court of Appeals filed an unpublished opinion affirming the decision of the trial court. Thereafter, the Plaintiff filed a Petition for Rehearing on December 27, 2011. The Petition was denied by Order of the Court of Appeals dated January 30, 2012. On April 4, 2012, the Plaintiff filed a Petition for Writ of Certiorari with the South Carolina Supreme Court.

STATEMENT OF THE FACTS

This action arises out of a neighbor dispute in Horry County, South Carolina. In March, 2005, the Appellant, Dr. Brad R. Johnson (hereinafter, "Johnson") owned property located at 8669 Laurel Woods Drive, Myrtle Beach, South Carolina. Respondent L.W. Hall Enterprises, LLC (hereinafter, "Enterprises") owned property located at 8664 Laurel Woods Drive, Myrtle Beach, SC, which is across the street from the Johnson residence. (R.p. 167, lines 2-9). Respondent Lewis W. Hall (hereinafter, "Father") is the principal of Enterprises and allowed his son, Respondent Lewis V. Hall (hereinafter, "Son") to live at the residence located at 8664 Laurel Woods Drive, Myrtle Beach, South Carolina (hereinafter, "Hall residence"). (R.p.167, lines 2-17). In addition to using the property as his residence, Son operated his business, Respondent Cold Air A/C Service, Inc., (hereinafter, "Cold Air"), out of the Hall residence. (R.p.167, lines 6-17).

On March 26, 2005, Johnson was blocking Laurel Woods Drive with his vehicle while doing some work on his property. (R.p.168, lines 8-25; R.p.169, lines 12-16). Father and Son were preparing to leave their residence in a vehicle owned by Cold Air. (R.p.169, lines 7-11). A verbal confrontation took place between Father, Son and Johnson when Son took exception to the fact that Johnson was blocking the street. (R.p.170, lines 7-22; R.p.171, lines 1-4). Johnson and Son made obscene gestures to each other as Son drove past Johnson. (R.p.171, lines 10-23).

Approximately ten minutes later, Father, without having Son in vehicle, drove back and parked in the driveway at the Hall residence. (R.p.172, lines 8-11). Johnson then entered onto the Hall property after being motioned over by Father. (R.p.172, lines

15-25; R.p. 173, lines 1-3). Johnson was unable to testify what occurred in the driveway of the Hall property. (R.p.177, lines 1-6). Johnson testified at trial that he believes he was knocked unconscious but does not know how that occurred or who or what struck him. (R.p.177, lines 1-6) Johnson was subsequently arrested and convicted for “entering onto the property of another.” (R.p. 175, lines 7-17).

ARGUMENT

I. THE APPELLANT HAS WAIVED ANY PROTECTION RIGHTS HE MAY HAVE HAD UNDER SCRCP 40(B).

Administration of the jury roster is the responsibility of the trial judge. See Small v. Mungo, 254 S.C. 438, 175 S.E.2d 802 (1970) (*Holding that arrangement of trial roster and time set by trial judge for trial of cases are binding on litigants and their counsel, and the trial judge has the authority to enforce compliance therewith. Therefore, the trial judge should be allowed broad discretion in arranging and calling cases for trial and only in cases of manifest injustice will the Supreme Court interfere.*)

Rule 40, *South Carolina Rules of Civil Procedure*, deals with a procedural right rather than subject matter jurisdiction. Paschal v. Causey, 309 S.C. 206, 209, 420 S.E.2d 863, 865 (Ct. App. 1992), *reh'g denied* (Sept. 15, 1992). As such, this procedural right can be waived if not properly asserted. *Id.* (*Court held that appellant waived the procedural protection of Rule 40 when they failed to object or seek a continuance*). Once the procedural right of Rule 40 is waived, a party will be estopped to pursue the issue. See Windham v. Honeycutt, 279 S.C. 109, 110, 302 S.E.2d 856 (1983) (“The record reveals appellant not only failed to object, but affirmatively agreed to the hearing date; she has thus waived and is estopped to pursue this issue”).

Appellant has waived Rule 40 (b) protection in two specific ways: (1) by disregarding an administrative order establishing local rules for filing motions to continue; and (2) by affirmatively agreeing to a trial date as soon as October 1, 2007 at an August 20, 2007 master roster meeting.

1. *The Appellant waived SCRCP 40(b) protection by failing to comply with Horry County Local Rules as to continuance procedure.*

On July 1, 2007, The Honorable J. Michael Baxley became the Chief Administrative Judge for civil court in the Fifteenth Judicial Circuit. Judge Baxley implemented a list of new local rules for jury cases by way of an open letter which was served on all attorneys and pro se parties with cases pending on the Horry County Jury Roster. (R.p.193-196). The new local rules set forth by Judge Baxley were effective as of July 1, 2007. (R.p.193).

Rule 4 of Judge Baxley's open letter dealt specifically with how continuance requests were to be made. (R.p.194). This Rule provided in part: "Continuance requests must be in the form of a filed motion, and can no longer be considered based upon a phone call or a letter. Attorneys / parties requesting a continuance should send the request by fax, together with a copy of the filed motion bearing the Clerk's stamp, no later than 5:00 p.m. Wednesday prior to the scheduled trial term ..." (R.p.194).

Under the local rule for continuance procedure cited above, all motions for continuance for the October 1, 2007 term of Court in Horry County were due on or before September 26, 2007 at 5:00 p.m. The Appellant failed to file a motion for continuance which complied with Horry County Local Rules as to continuances. The

only motion for continuance filed by the Appellant prior to the case being called for trial was filed on September 28, 2007. This motion, however, was based on a motion for summary judgment that was filed by Respondent Cold Air A/C Service, Inc. There was no mention in the September 28, 2007 motion for continuance of any issue or protection based on SCRCP 40(b). In any event, the September 28, 2007 motion for continuance was not filed timely under the Horry County Local Rules.

On October 1, 2007, when the case was called for trial, the Appellant made a verbal pre-trial motion for continuance based on SCRCP 40(b). This motion was improper under the Horry County Local Rules which require a timely written motion for continuance. In order to attempt to comply with the written motion requirement of the Horry County Local Rules, the Appellant filed a written motion for continuance based on SCRCP 40(b) on October 2, 2007. This motion was not filed timely and was properly denied by the trial court.

2. *The Appellant waived SCRCP 40(b) protection by affirmatively agreeing to the trial date at an August 20, 2007 master roster meeting.*


A master roster meeting was held in Horry County on August 20, 2007 to set cases for trial for the remainder of the year. The master roster meeting was presided over by The Honorable J. Michael Baxley, as Chief Administrative Judge of the Fifteenth Circuit. On August 20, 2007, when the parties came before Judge Baxley at the master roster meeting, there was an agreement that this case could be called for trial not before October 1, 2007 and there was no objections by any party. (R.p.161, lines 21-25; R.p.162, lines 1-4) On August 20, 2007, when he agreed to the case being called for trial

on October 1, 2007, the Appellant knew that there were less than 180 days between the day the Amended Complaint was filed and the October 1, 2007 trial date. Therefore, the Appellant waived any SCRCP 40(b) protection afforded to him by entering no objection at the August 20, 2007 master roster meeting and should be estopped from arguing this issue on appeal.

CONCLUSION

The trial court did not abuse its discretion by denying the Appellant's pre-trial motion for continuance or in denying the Appellant's post-trial motion for a new trial. As an initial matter, the Appellant abandoned all appellate arguments by failing to fully argue his position in his brief. Even if not abandoned, the Appellant waived any protection afforded to him under SCRCP 40(b) by failing to timely file his written pre-trial motion for continuance in accordance with local rules of procedure. In addition, the Appellant further waived any SCRCP protection by affirmatively agreeing to the trial date at the August, 2007 master roster meeting. Accordingly, the Court of Appeals was correct in their decision affirming the decision of the Trial Court. The Plaintiff's Petition for Writ of Certiorari should be denied.

Respectfully submitted,



May 7, 2012

Jay R. Lee, Esquire
Aiken, Bridges, Elliott, Tyler & Saleeby, P.A.
P.O. Drawer 1931
Florence, SC 29503
(843) 669-8787

Attorney for Respondent Cold Air A/C Service, Inc.

RECEIVED

MAY 9 2012

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM HORRY COUNTY

The Honorable J. Michael Baxley, Circuit Court Judge

Case No.: 05-CP-26-2710

Dr. Brad R. Johnson.....Appellant

v.

Lewis W. Hall, Lewis V. Hall,
L.W. Hall Enterprises, LLC, and
Cold Air A/C Service, Inc.Respondent.

CERTIFICATE OF SERVICE

I, the undersigned employee of Aiken Bridges, do hereby certify that the foregoing **RETURN TO PETITION FOR WRIT OF CERTIORARI**, has this day been served by mailing copies thereof, postage prepaid, to the following person(s), this 7th day of May, 2012.

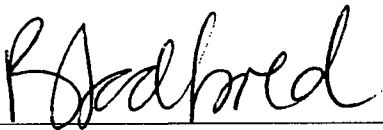
Brad R. Johnson, Ph.D., J.D.
111 S.E. 14th Street
Oak Island, NC 28465
Myrtle Beach, SC 29577

G. Michael Smith, Esquire
Thompson & Henry, P.A.
P.O. Box 1740
Conway, SC 29528

Brent M. Boyd, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260

F. Truett Nettles, II, Esquire
The Nettles Law Office, LLC
67 Broad Street, 2nd Floor
Charleston, SC 29401

The South Carolina Supreme Court
The Honorable Daniel E. Shearouse
P.O. Box 11330
Columbia, SC 29211

By: 
Bridgette D. Godbold
Paralegal to Jay R. Lee, Esquire

J. Boone Aiken, III •
Saunders M. Bridges, Jr. •+
E. Glenn Elliott •
Matthew N. Tyler •
James M. Saleeby, Jr.
J. David Banner
Samuel F. Arthur, III
Jay R. Lee
Preston B. Dawkins
Bradford C. Andrews
Carrie A. Fox
J. Rufus Bratton, III

Aiken Bridges Attorneys at Law

JRL@AIKENBRIDGES.COM
843-669-8787, ext. 318
Facsimile: 843-664-0097

Alvin A. Coleman (1930-1995)

May 7, 2012

RECEIVED

MAY 9 2012

S.C. SUPREME COURT
pm 5-7-12

•Certified Mediator/Arbitrator
+Also Admitted District of Columbia

The South Carolina Supreme Court
Daniel E. Shearouse, Clerk of Court
P.O. Box 11330
Columbia, SC 29211

RE: Dr. Brad R. Johnson vs. Lewis W. Hall, Lewis V. Hall, L. W. Hall Enterprises, LLC
and Cold Air AC Service, Inc.
C/A No.: 2005-CP-26-2710
Our File No.: 26692

Dear Mr. Shearouse:

I am enclosing an original and six (6) copies of Respondent Cold Air A/C Services, Inc.'s Return to Petition for Writ of Certiorari in connection with the above-referenced matter along with proper proof of service. Upon filing, please return the clocked copies to me in the enclosed self-addressed, stamped envelope provided for your convenience. By copy of this letter, I am enclosing and serving copies of the same upon opposing counsel.

Please contact my office with any questions or concerns.

With kind regards, I remain

Most sincerely yours,

JAY R. LEE

JRL:bdg
Enclosure

Aiken, Bridges, Elliott, Tyler & Saleeby, P.A.

181 East Evans St. Suite 409
Florence, South Carolina 29506

www.aikenbridges.com

Post Office Drawer 1931
Florence, South Carolina 29503

Aiken
Bridges
Attorneys at Law

May 7, 2012

Page 2

Cc:

Brad R. Johnson, Ph.D., J.D.
111 S.E. 14th Street
Oak Island, NC 28465
Petitioner, Pro-Se

Brent M. Boyd, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
Attorneys for Lewis V. Hall

Forrest Truett Nettles, II, Esquire
The Nettles Law Firm, LLC
P.O. Box 699
Charleston, SC 29402
Attorney for Lewis V. Hall

G. Michael Smith, Esquire
Thompson & Henry, P.A.
P.O. Box 1740
Conway, SC 29528
Attorney for Lewis W. Hall