

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2005-CP-26-2710

RECEIVED

MAY - 3 2012

S.C. Supreme Court

Dr. Brad R. JohnsonPetitioner;

v.

Lewis W. Hall, Lewis V. Hall, L.W. Hall Enterprises, LLC,
and Cold Air AC Services, Inc. Respondents.

**RETURN TO PETITION FOR WRIT OF CERTIORARI
ON BEHALF OF RESPONDENT LEWIS V. HALL**

Brent M. Boyd, Esquire
Timothy J. Newton, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Respondent
Lewis V. Hall

May 3, 2012

TABLE OF CONTENTS

Table of Authoritiesii

Statement of the Issues on Appeal 1

Statement of the Case..... 1

Argument5

 I. Consideration Governing Review of a Petition for Writ of Certiorari5

 II. This Court should grant Appellant’s Petition because none of the facts
 identified in Rule 242(b) are present in this case.....5

 III. Appellant’s procedural due process arguments are not properly preserved
 for appeal.5

 IV. No novel questions of law exist for the same reasons.7

 V. Appellant’s arguments in support of his Petition are without merit.8

Conclusion9

TABLE OF AUTHORITIES

Page Number

Cases

Faith Holiness Church v. Church of God, 282 S.C. 487,
319 S.E.2d 348 (Ct. App. 1984).....7

Johnson v. Hall, Op. No. 2011-UP-447 (Ct. App. filed Oct. 11, 2011)4

Paschal v. Causey, 309 S.C. 206, 420 S.E.2d 863 (Ct. App. 1992)..... 7, 8

Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006).....6

Sea Island Comprehensive Healthcare Corp v. U.S. Dep’t
of Health & Human Servs., 79 Fed. Appx. 563 (4th Cir. 2003)..... 5-6

Smith-Hunter Constr. Co., Inc. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005)8

State v. Carlson, 363 S.C. 586, 611 S.E.2d 283 (Ct. App. 2005)5

Other Authorities

Rule 40(b), SCRCP 6-8

Rule 220(b), SCACR8

Rule 242(b), SCACR5, 8

In re Memorandum Decisions by Court of Appeals,
322 S.C. 53, 471 S.E.2d 456 (1993)8, 9

STATEMENT OF THE ISSUES ON APPEAL

The issue in this appeal is whether the trial court erred in denying Appellant's motion for a continuance based on Rule 40(b), SCRCP. Appellant moved for a new trial after a defense verdict, asserting that the trial court improperly denied his verbal motion for a continuance on the day the case was called to trial because 180 days had not yet elapsed since service of process on the last parties added to the case.

STATEMENT OF THE CASE

This is an appeal from the administrative denial of Appellant Dr. Brad R. Johnson's motion for a new trial pursuant to Rule 59, SCRCP. In the Complaint, which was originally filed May 31, 2005, Appellant alleged that the Respondents conspired to commit an assault and battery against him. Appellant asserted numerous common law claims against Respondents.

After almost 18 months of discovery conducted by all parties, Appellant moved to amend his Complaint to add two new parties, Respondents L.W. Hall Enterprises, LLC and Cold Air AC Services, Inc. Appellant's motion was made on November 22, 2006. The trial court granted Appellant's motion at a pre-trial hearing held February 16, 2007 with the provision that Appellant had 10 days to decide whether to add new parties and notify the Court of Appellant's intent. (See R. pp. 148; Supp. R., p. 2, 21.) Appellant failed to comply with that Order and filed an Amended Complaint adding Respondents L.W. Hall Enterprises and Cold Air AC Services on May 18, 2007, which was three months after the Order. (R. pp. 50, 148-49.) Service was accomplished the same day. (R. p. 149.)

On May 3, 2007, Rule 40(b) of the South Carolina Rules of Civil Procedure was amended to increase the time before which a case could not be called for trial from 120 days to 180 days after service of the last pleading which adds a new party to the action. The Court of Common Pleas for Horry County also issued an order entitled "NEW RULES FOR JURY CASES" which became effective on July 1, 2007. (R. p. 193.) Because of these rule changes, a master roster meeting was held on August 20, 2007. At the master roster meeting, there was a discussion and an agreement was reached that the trial would be called not before October 1, 2007. (R. p. 161-62.) Counsel for Appellant did not ask for a continuance or assert the 180-day rule based on Rule 40(b). (Id.; Supp. R., p. 2.) Accordingly, the case was set for the October 1, 2007 term of court.

On September 17, 2007, Brent M. Boyd, Esquire filed a Notice of Appearance as additional counsel for Respondent Lewis V. Hall.¹ (See Supp. R. p. 7.) Attorney Boyd also filed a Motion for a Continuance on the same date. (See Supp. R. p. 11.) The basis of the motion was that counsel was filing a Notice of Appearance and needed time to prepare for trial. (Id.)

On or about September 20, 2007, Respondent Cold Air AC Service, Inc. filed a motion for summary judgment. Respondent Cold Air AC Service was one of the defendants added by the First Amended Complaint. At that time, the only outstanding discovery was Cold Air's interrogatories and requests for production to the Appellant, which were due on October 8, 2007. (See R. p. 137.)

¹ Attorney Boyd was retained by Hartford Fire Insurance Company under Cold Air AC Service's policy as co-counsel to defend Lewis V. Hall to the extent of its coverage under the policy.

In response to Respondent Cold Air AC Service's motion for summary judgment, Appellant filed a motion for a continuance on September 28, 2007. (R. p. 114). On its face it was clear that the motion was made in response to the pending summary judgment motion, and the motion did not mention Rule 40(b). (R. pp. 114-19, 137, 150, 160.)

When the case was called for trial on October 1, 2007, Lewis V. Hall's motion for a continuance, Cold Air AC Service's motion for summary judgment, and Appellant's motion for a continuance in response were pending. On that date, Lewis V. Hall and Cold Air AC Service withdrew their motions. (See Supp. R. at 2; R. p. 137, 151, 159.) Before trial, the trial judge asked counsel for Cold Air AC Service whether he requested a continuance and counsel responded that Cold Air AC Service was ready for trial. (R. p. 150.) Counsel for appellant then made a verbal motion for a continuance based on Rule 40(b). (R. pp. 151, 160-61.) The trial judge denied this motion for the following reasons:

- (a) The only properly filed motion for a continuance made by Appellant was the motion for a continuance in response to Cold Air AC Service's motion for summary judgment, which was mooted when Cold Air AC Service withdrew its motion.
- (b) Cold Air AC Service was not prejudiced by proceeding with trial because its counsel waived any objection and stated in open court that Cold Air AC Service was ready for trial.
- (c) The trial court's ruling on Appellant's motion to amend was made on February 16, 2007, well outside the 180-day window, and Appellant simply failed to comply with the order and filed the Amended Complaint several months later.

(d) Appellant's attempt to use the 180-day requirement as a sword to force a continuance was prohibitive of the trial court's ability to administer the docket in an orderly fashion.

(e) Appellant did not object and agreed to set the case for trial not before October 1, 2007 at the master roster meeting.

(R. p. 160-62.)

A two-day trial was held on October 3 and 4, 2007. At the close of Appellant's case, the trial court directed a verdict for Respondents Lewis W. Hall, L.W. Hall Enterprises, and Cold Air AC Services and dismissed them from the case. (R. pp. 189-90.) The trial court dismissed all claims except the assault and battery claim against Lewis V. Hall with prejudice. (Supp. R. at 16, 19, R. p. 190.) The trial then proceeded against Lewis V. Hall only. The jury returned a verdict for Lewis V. Hall. (R. pp. 134-35.)

Appellant filed a motion for a new trial pursuant to Rule 59 on October 7, 2008. (R. pp. 136-38.) Respondent Lewis V. Hall filed a written objection on or about October 23, 2008. (Supp. R. p. 1-5.) Appellant's motion for a new trial was denied by Form 4 Order on December 9, 2007. (R. p. 139.) The Order was served on February 1, 2008.

Appellant filed a Notice of Appeal on February 29, 2008. (R. p. 140.) The Court of Appeals affirmed pursuant to Rule 220(b)(1), SCACR in an unpublished opinion. See Johnson v. Hall, Op. No. 2011-UP-447 (Ct. App. filed Oct. 11, 2011). The Court of Appeals denied Appellant's petition for rehearing by order dated January 30, 2012. This Petition for Writ of Certiorari follows.

ARGUMENT

I. Consideration Governing Review of a Petition for Writ of Certiorari.

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. In reviewing a petition for a writ of certiorari this Court considers the following:

- (1) Whether there is a novel question of law;
- (2) Whether there is a dissent in the decision of the Court of Appeals;
- (3) Whether there is a conflict between the Court of Appeals’ decision and a prior decision of this Court;
- (4) Whether substantial constitutional issues are involved;
- (5) Whether a federal question is involved and the Court of Appeals’ decision conflicts with a United States Supreme Court decision. Id.

II. This Court should grant Appellant’s Petition because none of the factors identified in Rule 242(b) are present in this case.

There was no dissenting opinion in the decision of the Court of Appeals. Furthermore, Appellant has not identified any conflict between the Court of Appeals’ decision and any prior decision of this Court or the United States Supreme Court. Thus, the only relevant factors are whether substantial constitutional issues are involved and whether this appeal involves a novel question of law. Both of these issues have been waived, and in any case, fail on the merits.

III. Appellant’s procedural due process arguments are not properly preserved for appeal.

Procedural due process rights may be waived. State v. Carlson, 363 S.C. 586, 595-96, 611 S.E.2d 283, 287-88 (Ct. App. 2005); Sea Island Comprehensive Healthcare

Corp. v. U.S. Dep't of Health & Human Servs., 79 Fed. Appx. 563, 565 (4th Cir. 2003). The Court of Appeals found that Appellant's arguments concerning constitutional violations were not properly preserved for appeal. Johnson, Op. No. 2011-UP-447 at n.1. No evidence exists in the record that Appellant ever raised any constitutional arguments to the trial court. (R. pp. 146-62.)

Appellant waived any constitutional arguments in at least three ways. First, Circuit Court Judge J. Michael Baxley personally recalled that at a master roster meeting held in August 2007, the parties discussed the matter and agreed to a trial date not before October 1, 2007, and Appellant's counsel did not object at that time. (R. p. 161-62.)

Second, Appellant failed to timely file his motion for continuance. Judge Baxley found that any motion for continuance of trial must be filed no later than five o'clock the Wednesday before the Monday for which the trial was set, and no motion for a continuance was filed by that time. (Id. at 160-61.) The unsigned and unfiled copy of a motion for a continuance in the record is dated October 3, 2007, which was two days after the trial proceedings began. (Id. at 121-23, 142.) Other parties objected to Appellant's untimely motion for a continuance on the ground that it violated their procedural right to proper notice. (Id. at 150.)

Thirdly, even if Appellant's untimely motion for a continuance is considered, Appellant never argued to the trial judge that denial of his request for a continuance violated his constitutional rights. The trial judge did not rule upon this issue. See Pye v. Estate of Fox, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (holding that "an issue must be raised to and ruled upon by the circuit court to be preserved"). The arguments addressed by the trial judge concern only the administrative order and Rule 40(b),

SCRCP. (R. p. 160-61.) Accordingly, Appellant has failed to preserve any constitutional issues for appeal.

Finally, even if Appellant's constitutional arguments are considered on the merits, they still fail because constitutional violations may be waived. Even assuming the trial court violated Appellant's due process rights by setting the trial date within the 180-day period prescribed by Rule 40(b), Appellant waived this argument by agreeing to the trial date without objection.

IV. No novel questions of law exist for the same reasons.

The only potential novel issue of law in this appeal is Appellant's assertion that the updated language in Rule 40(b), SCRCP is mandatory. The Court of Appeals found that Appellant waived this argument by failing to object to the trial and affirmatively agreeing to a designated trial date. See Faith Holiness Church v. Church of God at Scranton, 282 S.C. 487, 489, 319 S.E.2d 348, 349 (Ct. App. 1984).

Furthermore, the Court of Appeals found on the merits that the 180-day period in Rule 40(b) is a procedural right that may be waived. See Paschal v. Causey, 309 S.C. 206, 209, 420 S.E.2d 863, 865 (Ct. App. 1992). In Paschal, the court held that substantially similar language in a predecessor of Rule 40(b) deals with a procedural right which may be waived. 309 S.C. at 209, 420 S.E.2d at 865. The only relevant change in the current version is that the amount of time has been increased from 120 to 180 days. Rule 40(b), SCRCP. This does not change the procedural character of the rule. Rule 40(b) is a Rule of Civil Procedure. The form Rule 40(b)(2) also contained the requirement that trial not be held within the 120-day window unless all parties certify in writing that the case is ready for trial. See Paschal, 309 S.C. at 209, 420 S.E.2d at 865.

Therefore, Paschal remains relevant and is directly controlling over the issues on appeal in this case. Thus, no novel issue of law exists which would merit this Court's consideration.

V. Appellant's arguments in support of his Petition are without merit.

This Court should deny Appellant's Petition because his arguments lack merit. As the trial judge found, Appellant created his own dilemma by failing to inform the court of his intentions within 10 days as required by the order granting leave to amend and by failing to serve the additional parties until over three months after Appellant's motion for leave to amend was granted. (R. pp. 147-49, 161.) A construction of Rule 40(b) requiring a continuance under these circumstances would be prohibitive of the trial judge's ability to administer the docket in an orderly fashion. (R. p. 161.)

Second, Appellant's statement of the proceedings is factually incorrect. The trial judge personally recalled the master roster meeting at which Appellant agreed to the trial date. (R. p. 161-62.) The trial judge expressly stated that this was one of the grounds upon which Appellant's motion for a continuance was denied. (Id.) As discussed above, the record also supports the trial judge's finding that a motion for a continuance based on Rule 40(b) was not timely filed. (Id. at 121-23, 142, 160-61.)

Appellant's argument that the Court of Appeals violated his constitutional rights by affirming in a memorandum opinion is also meritless. This Court has expressly held that the format used by the Court of Appeals complies with South Carolina law. In re Memorandum Decisions by Court of Appeals, 322 S.C. 53, 471 S.E.2d 456 (1993). This Court has affirmed in part based on this format. See Smith-Hunter Constr. Co., Inc. v. Hopson, 365 S.C. 125, 616 S.E.2d 419 (2005). Furthermore, the cases and explanatory

language in the Court of Appeals' opinion are sufficient to set forth the grounds for its holding.

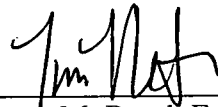
In closing, the fact that the Court of Appeals affirmed by memorandum opinion evidences its view that Appellant's arguments are manifestly without merit. See In re Memorandum Decisions, 322 S.C. at 54, 471 S.E.2d at 457 (holding that the Court of Appeals may affirm pursuant to Rule 220(b)(1) when the issue is manifestly without merit). This severely undercuts Appellant's argument that this appeal involves "special or important reasons" for this Court's review. See Rule 242(b), SCACR.

CONCLUSION

For the reasons set forth above, Respondent Lewis V. Hall respectfully opposes Appellant's Petition for a Writ of Certiorari and requests that Appellant's Petition be denied.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



Brent M. Boyd, Esquire
Timothy J. Newton, Esquire
Murphy & Grantland, P.A.
Post Office Box 6640
Columbia, South Carolina 29260

Attorneys for Respondent Lewis V. Hall

Columbia, South Carolina
May 3, 2012

IN THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

J. Michael Baxley, Circuit Court Judge

Case No. 2005-CP-26-2710

Dr. Brad R. JohnsonPetitioner;

v.

Lewis W. Hall, Lewis V. Hall, L.W. Hall Enterprises, LLC,
and Cold Air AC Services, Inc. Respondents.

PROOF OF SERVICE

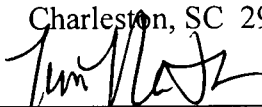
I certify that I have served the **Return to Petition for Writ of Certiorari on behalf of Respondent Lewis V. Hall**, by depositing a copy of it in the United States Mail, postage prepaid, on May 3, 2012, addressed to:

Brad R. Johnson, Ph.D., J.D.
111 SE 14th Street
Oak Island, NC 28465

Jay R. Lee, Esquire
Aiken, Bridges, Nunn, Elliott & Tyler
P.O. Drawer 1931
Florence, SC 29053

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

F. Truett Nettles, II, Esquire
The Nettles Law Office, LLC
P.O. Box 699
Charleston, SC 29402



Brent M. Boyd, Esquire
Timothy J. Newton, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorneys for Respondent Lewis V. Hall



MURPHY & GRANTLAND, P.A.

Timothy J. Newton
Direct dial 803-454-1242
tnewton@murphygrantland.com

May 3, 2012

Via Hand Delivery

Daniel E. Shearouse, Clerk of Court
Supreme Court Building
1231 Gervais Street
Columbia, South Carolina 29201

Re: Dr. Brad R. Johnson vs. Lewis W. Hall, Lewis V. Hall, L.W. Hall Enterprises, LLC & Cold Air AC Service, Inc.
Civil Action No.: 2005-CP-26-2710
Claim No.: YHG KL 83496.
Date of Loss: 03-26-2005
Our File No.: 1350-0259

Dear Mr. Shearouse:

Enclosed please find herewith for filing with the Court the original and eleven (11) copies of Respondent Lewis V. Hall's Return to Petition for Writ of Certiorari in the above-referenced matter. I would appreciate your filing the original and returning eleven (11) clocked copies to me by individual delivering same.

By copy of this letter I am serving same on all counsel of record.

Sincerely,

Timothy J. Newton

TJN/mwt
Enclosure

cc: Brad R. Johnson, Ph.D., J.D.
Jay R. Lee, Esquire
G. Michael Smith, Esquire
F. Truett Nettles, II, Esquire
Dotty Jolla (via e-mail)

RECEIVED

MAY - 3 2012

S.C. Supreme Court

Telephone 803-782-4100 • Facsimile 803-782-4140 / 803-454-1258
4406-B Forest Drive, Columbia, South Carolina 29206 • Post Office Box 6648, Columbia, South Carolina 29260