

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS
Thomas Jackson, Christopher Mitchell

FORM 4
JUDGMENT IN A CIVIL CASE

CASE NUMBER: 2015-CP-40-01449
Joe Henry, Esq.

RECEIVED

Law Firm of Joe Henry
DEFENDANT(S)

MAY 20 2016

PLAINTIFF(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

SC COURT OF APPEALS

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other Dismissed without prejudice
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : Defendants' Motion to Dismiss is Granted

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge Janyia A. Gee Judge Code 2756 Date April 20, 2016

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 22 day of April, 2016 to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Thomas Jackson, Christopher Mitchell,

Plaintiffs,

vs.

Joe Henry Esq. Law Firm of Joe Henry,

Defendants.

) IN THE COURT OF COMMON PLEAS
) FIFTH JUDICIAL CIRCUIT
) CASE NO.: 2015-CP-40-01449

ORDER OF DISMISSAL
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MAY 20 2016

SC Court of Appeals

2015 APR 20 PM 3:23
JENNIFER A. TORRICE
CLERK P. & R.S.

Hearing Date: April 18, 2016
Court Reporter: Bonnie Kelly
Plaintiffs' Attorney: J. Charles Ormond, Jr.
Defendants' Attorney: Nathaniel Roberson

The above matter came before the Court on Defendants' motion to dismiss based on two grounds: (1) Plaintiffs' failure to file an affidavit of an expert as required by section 15-36-100(C)(1) of the South Carolina Code, and (2) the expiration of the statute of limitations. Plaintiffs opposed the motion, arguing the negligence specified in their Complaint involved a subject matter that lay within the ambit of common knowledge and did not require an expert affidavit pursuant to section 15-36-100(C)(2) and arguing that the statute of limitations had been waived when the Defendants failed to assert it as an affirmative defense. At the hearing, the Plaintiffs were represented by J. Charles Ormond, Jr., and the Defendants were represented by Nathaniel Roberson. After careful consideration, I agree that an expert affidavit was required in this matter and grant Defendants' motion to dismiss on that ground.

Background

Plaintiffs filed a Complaint against Defendants on March 6, 2015, alleging professional negligence and breach of contract. Taking the facts alleged in the Complaint as true, as this Court must for a motion to dismiss, the Complaint alleges:

- Defendants represented Plaintiffs in an employment law matter. (Comp. ¶6)
- The employment action filed on behalf of Plaintiffs by Defendants was removed from the roster by consent order pursuant to Rule 40(j), SCRPC. (¶7)
- The parties in the underlying employment action engaged in mediation, but upon the advice of their attorney (Defendant Joe Henry), the Plaintiffs did not settle. The terms of any offered settlement are not specified in the Complaint. (¶8)
- Defendant Henry, without consulting his clients (the Plaintiffs in this action), did not restore the Plaintiffs' employment action to the roster. (¶9-10)
- At some unknown date at least one year after the employment action was removed from the roster, the action was dismissed. (¶9)
- Defendant Joe Henry told Plaintiffs he was working on the case for several years. (¶10)
- At some unknown date, Plaintiff Mitchell learned from court personnel that the employment action had been dismissed. (¶11)

Based on these facts, Plaintiffs allege professional negligence. Specifically, Plaintiffs allege: "Defendant/s had a duty of due care to prosecute Plaintiffs' case in a proficient and careful manner in addition to an affirmative duty to protect Plaintiff's common law and statutory rights after the filing of a 40(j) motion." (¶13) Plaintiffs go on to allege "Defendant" breached this duty "by failing to restore the matter withing [sic] the one year period as set forth in the Rule." (¶14) Plaintiffs also assert a breach of contract cause of action, arguing the parties entered into a written agreement for legal services, which was breached when the "Defendant" failed to restore the employment action. (¶20)

Law/Analysis

To establish a cause of action for legal malpractice, a plaintiff must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012). Furthermore, in its effort to discourage frivolous lawsuits, the Legislature requires plaintiffs asserting claims for professional negligence to file an expert affidavit specifying "at least one negligent act or omission claimed to exist and the factual basis for each claim based on available evidence at the time of the filing of the affidavit." S.C. Code Ann. § 15-36-100(B). If the plaintiff fails to file an expert affidavit, the complaint is subject to dismissal for failure to state a claim. S.C. Code Ann. § 15-36-100(C)(1). However, an expert affidavit is not required when the professional negligence pleaded involves "subject matter that lies within the ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." S.C. Code Ann. § 15-36-100(C)(2); *see also Brouwer v. Sisters of Charity Hosps.*, 409 S.C. 514, 522, 763 S.E.2d 200, 204 (2014) (finding the plaintiff's allegation that the "negligent exposure of a patient to latex with a known allergy can result in an allergic reaction" was a matter within common knowledge such that no expert affidavit was necessary).

Here, the Court finds that Plaintiffs were required to file an expert affidavit because the subject matter pleaded is not within the ambit of common knowledge. Rather, a juror seated on this case would need special learning to determine whether the Defendants breached "a duty of due care to prosecute Plaintiffs' case in a proficient and careful manner in addition to an affirmative duty to protect Plaintiff's common law and statutory rights after the filing of a 40(j) motion ...by failing to restore the matter within [sic] the one year period as set forth in the Rule."

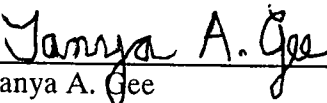
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Because the subject matter is not common knowledge and the Plaintiffs failed to file an expert affidavit, the Defendants' motion to dismiss is granted.

Similarly, Plaintiffs' claim for breach of contract arises out of the same factual allegations underpinning their claim for professional negligence, and just like the negligence cause of action, their cause of action for breach of contract hinges on whether Defendants breached their professional duty to restore the employment action. Thus, the breach of contract claim is duplicative of the allegations for professional negligence and must also be dismissed. *Cf. RFT Mgmt. Co.*, 399 S.C. at 336-37, 732 S.E.2d at 173 (finding no error in the trial court's merging the plaintiff's first cause of action for legal malpractice with its second cause of action for breach of fiduciary duty where the facts underlying both claims were the same).

Accordingly, the Plaintiffs claims are dismissed in their entirety.¹ Despite this dismissal, I specifically find Plaintiffs' current counsel filed this Complaint with a good faith belief that the matter fell within the common knowledge exception such that an expert affidavit was not necessary; thus, the above-captioned lawsuit, though dismissed, was not filed frivolously.

IT IS SO ORDERED.


Tanya A. Gee

April 20, 2016

¹ At the hearing, Plaintiffs made an oral motion to amend their Complaint. As more than 30 days have passed since the Complaint in this matter was filed, whether to allow the Plaintiffs leave to amend their Complaint is within the Court's discretion. SCRCF 15(a). The Court denies the request and finds that allowing the Plaintiffs to amend their Complaint more than a year after it was filed (and after discovery has closed) would unfairly prejudice the Defendants.

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