In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Tanya A. Gee, Circuit Court Judge

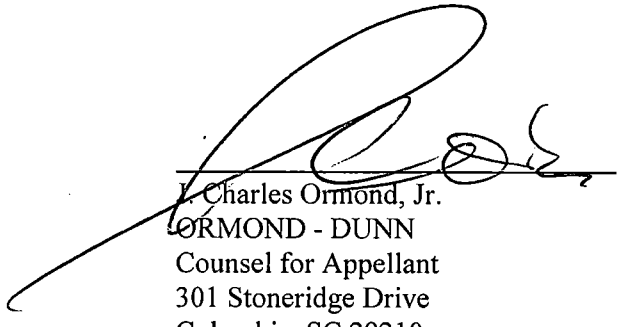
Case No. 2015-CP-40-01449

Thomas Jackson, Christopher Mitchell..... Appellants

v.

Joe Henry, Esq., Law Firm of Joe Henry ..... Respondents.

INITIAL BRIEF OF APPELLANTS



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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING THAT THE APPELLANTS/PLAINTIFFS WERE REQUIRED TO PROVIDE AN EXPERT WITNESS AFFIDAVIT WHEN ALLEGING RESPONDENT FAILED TO RESTORE THE CLIENTS' CASE UNDER A SCRCP 40 (J) AGREEMENT AND ORDER HE ENTERED INTO ON BEHALF OF HIS CLIENTS.

2. DID THE TRIAL COURT ERR OR ABUSE ITS DISCRETION IN DENYING APPELLANTS/PLAINTIFFS AN OPPORTUNITY TO PROVIDE AN AFFIDAVIT SINCE THERE WAS NEVER A MOTION TO DISMISS FILED AND THE CASE WAS UP FOR TRIAL ON THE DAY OF THE HEARING.

STATEMENT OF THE CASE

This matter is a legal malpractice case alleging that the attorney entered into a SCRCP 40 (j) Motion and Agreement and then did not restore the case pursuant to the Rule of Procedure and Consent Agreement ending the Plaintiffs' case. Respondents did not file a motion to dismiss or a summary judgment motion. The Circuit Court heard the motion to dismiss during the week in which trial was to occur when requested by the Defendants' attorney in a pre-trial conference. The resulting Court Order dismissed the case based on its determination that the Plaintiffs were required to file an expert affidavit with the Court at the time of filing stating that the Defendant breached the standard of care based on the allegations of the Complaint.[1] S.C. Code Ann. §15-36-100 (C)

The Appellants (Plaintiffs) were clients of Respondents (Defendants - Attorney and Law Firm) in a civil action. After initiating the underlying litigation in 2007, Defendant Attorney motioned for and signed a consent agreement under SCRCP 40 (j), without informing his clients

[1]Respondent/s did not file a motion for dismissal under SCRCP 12 (b) (6) or a motion to dismiss based on failure to comply with the provisions of S.C. Code Ann. §15-36-100(C)(2)

(Appellants). The Agreement required, and stated on its face, that the Plaintiffs would need to restore the case/s within one year or they would be dismissed. The Respondent/s (Defendant/s) failed to restore the case, resulting in its dismissal and the inability to ever bring them again in light of the applicable statute of limitations. The Appellants (Plaintiffs) brought this legal malpractice action.

FACTS:

The relevant facts of this matter are simple. The Appellants (Plaintiffs) employed the Respondent/Defendant/s (Attorney and Law Firm) through a written representation agreement to undertake or represent them in cases, which related to issues with their employment. Respondent/s (Defendant/s) brought suit on their behalf by filing a complaint in Circuit Court (Richland County) and serving same. The Defendant in the underlying matter answered. Respondent/s, a little less than one year from the date of filing, filed a motion with a Consent Agreement attached to the motion, to remove the case from the roster, SCRCP 40 (j) or "40 (j)"). Such Consent Agreement was also signed by the opposing counsel. (40 j Document P. 1)

The 40 (j) agreement, signed by the attorney and filed on March 10, 2008, specifically stated that "...(t)he parties further agree that if no motion to restore this case is made within one (1) year of the date this agreement is filed, this Agreement shall operate as a dismissal of the action." (SCRCP 40 (j) Motion/agreement) Appellants (Plaintiffs) were never made aware of the "40(j)" Agreement specifically or told of any suspension of the case going to trial at any time during the litigation or afterward. A mediation occurred approximately one week to ten days prior to the date in which the case would need to be restored under the 40 (j) Agreement or the

applicable statute of limitations would forever bar the case. (40 j Agreement P. 1, 2)

During the mediation, the Plaintiffs were offered settlement terms from the Defendant in the underlying action in return for dismissal and a release. Respondent/Defendant attorney advised,[2] during the mediation in consult with his clients (Appellants), that they should not agree to the terms of settlement offered and therefore the mediation did not resolve the case. The attorney, however, did not restore the matter pursuant to the Rule 40(j) Agreement (Order) by March 10, 2009 serving to dismiss the case leaving Plaintiffs time barred from bringing the matter again. Appellants were not told the case had been dismissed by their attorney, Respondent/s.

ARGUMENT:

I. APPELLANTS PLEAD SUFFICIENT FACTS TO ALLEGE A NEGLIGENCE CAUSE OF ACTION AND PROCEED WITHOUT AN EXPERT WITNESS AFFIDAVIT AS THE FACTS ALLEGING NEGLIGENCE DO NOT REQUIRE EXPERT TESTIMONY TO ESTABLISH A BREACH OF THE STANDARD OF CARE

A ruling on a motion to dismiss under SCRCP Rule 12(b)(6) must be based solely on the allegations contained in the complaint and viewing the allegations and reasonable inferences from the allegations in the light most favorable to the Plaintiff. *Newton v. S.C. Public Railways Comm.*, 439 S.E.2d 285, 287 (SC Ct. App. 1993) A motion to dismiss may not be sustained if the allegations and reasonable inferences from the allegations would entitle the Plaintiff to relief on any theory of the case. *Camp v. Springs Mortgage Corp.*, 414 S.E.2d 784, 785 (SC Ct. App. 1991); See Also: *Dye v. Gainey*, 463 S.E.2d 97 (SC Ct. App. 1995); *Benson v. United Guaranty*

[2]Plaintiffs alleged this in their complaint. (Complaint P. 2)

Residential Ins. of Iowa, 445 S.E.2d 441, 446 (SC 1994) Even where the allegations of the complaint give rise to competing inferences, dismissal of the case is inappropriate under Rule 12(b)(6). *Jenson v. Conrad*, 377 S.E.2d 102, 108 (SC Ct. App. 1989) A litigant is required to prove the ultimate facts which must be proved at trial but is not required to allege the evidence which will be used to prove the facts alleged. *Clark v. Clark*, 361 S.E.2d 328 (SC 1987) In this case, the Court used SCRCP 12 (b) (6) to dismiss the Plaintiff's complaint based on the Plaintiffs' alleged failure to comply with S.C. Code Ann. §15-36-100 (C).

In this case, the Plaintiffs alleged initial facts within their Complaint as follows:

1. Plaintiffs and Defendant entered into a representation agreement for a case involving their employment. Defendant/s indicated that the facts of the case made out a legal cause of action and filed a complaint. The State (employer) answered and litigation ensued.
2. Defendant and opposing counsel, upon information and belief, entered into a consent order to remove the case from the roster pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure. Under such rule, the case is taken from the roster and either party may restore it through motion within one year of the initial Order as the statute of limitations is tolled for up to a one year period. If the case is not restored within this time period and the matter is otherwise time barred, the case is dismissed without the ability to re-file.
3. Toward the end of the one year period, the parties engaged in mediation. Settlement offers were made by the Employer to Plaintiffs. Defendant attorney suggested that the Plaintiff's not settle and continue litigation. Plaintiffs agreed.
4. Defendant/s then failed to restore the case pursuant to the rule and the matter was then dismissed after the one year period had run, therefore missing the statute of limitations.
5. Defendant did not inform Plaintiffs that the case was not continuing to move forward and, in fact, informed the Plaintiffs that he (Defendant) was working the case for several years.
6. Plaintiff Mitchell was concerned about the lack of progress and went to the Court. The Court personnel provided paperwork indicating that the case had been dismissed. Plaintiff Mitchell informed Plaintiff Jackson.

(Complaint P. 1-2)

The central factual allegations of this lawsuit are simply that the Attorney (Respondent/s

/Defendant/s) entered into and signed an Agreement during the litigation (40 (j) Agreement P. 1, 2) to remove the case from the trial roster and such agreement expressly required that the matter be restored within one year of the date or the case would be dismissed. The Appellants (Plaintiffs) allege, and such is admitted by Respondent/s, that their Attorney (Defendant/s - Respondent/s) did not restore the case as required by the Agreement and this resulted in the dismissal of the case as stated in the Agreement and underlying rule. SCRCP 40 (j) The Plaintiffs further allege, and such is not denied, that the dismissal forever barred the bringing of this lawsuit in the future as the applicable statute of limitations had run thus causing Plaintiffs (Appellants) damages. The legal question is whether a fact finder would require an expert opinion to determine whether a breach of the standard occurred , and therefore be required to file a contemporaneous expert affidavit with the lawsuit.

S. C. Code Ann. §15-36-100 (B) requires that a Plaintiff alleging professional negligence file an expert affidavit along with the Complaint specifying "at least one negligent act or omission claimed to exist" and the factual basis for each claim. S. C. Code Ann. §15-36-100 (C) provides that the Complaint is subject to dismissal if an affidavit is not filed with the Complaint (S. C. Code Ann. §15-36-100 (C)(1)) unless 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) Appellants plead in their Complaint that the issues involved in the matter required only common knowledge to determine negligence in paragraph 5 of their complaint.

> An affidavit of an expert attorney, testifying that such conduct below falls below the applicable standard of care (pursuant to SC Code Ann §15-79-100 et seq.) is not required in this matter as the specific allegations of negligence lies within the ambit of common knowledge and experience, and requires no special learning or expertise to evaluation (sic) the alleged conduct of the Defendant/s.

(Complaint P. 1 Para. 5)

If the facts alleged relating to a claim of professional negligence are within the ambit of common

knowledge and do not require specialized knowledge, no affidavit would be required. *Brouwer v. Sisters of Charity Hosps.* 409 S.C. 514, 522, 763 S.E.2d 200, 204 (2014).

The Court in *Brouwer* found that a jury could determine, without expert testimony, that a claim of negligence for exposing the Plaintiff to latex with evidence that the Defendant had or should have had knowledge that the patient had an allergy to latex was determinable without expert testimony. In other words, the Court determined that a reasonable lay person (juror) could put the two sets of facts together without expert assistance; she had a latex allergy, they used latex with knowledge of that allergy and that caused the Plaintiff damages. The facts here are similarly easy for anyone to determine. The attorney undisputedly signed an agreement which required that he restore the case by motion within one year[3] and if he failed to do so the Agreement would act as a case dismissal and the statute of limitations would not be tolled. To determine these facts, the lay person needs only to know how to read. The facts, as alleged, state that the attorney signed an agreement that required he file a motion to restore the case (assuming the matter did not settle) within one year of the date of the agreement. The attorney simply did not do what his own agreement stated or what the Court Rule (SCRCP 40(j)) required. Effectively, the attorney missed the applicable statute of limitations,[4] but, in this case, the attorney (Respondent/s) had complete control of the case as it had been filed but then was removed from the roster by the attorney himself.

The document itself gave the attorney (Respondent/s) notice of the effective limitations period and the clients (Appellants) had no knowledge or control over the need for restoration of

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[3]Respondent/s allege that the Plaintiffs were told they needed to pay the costs to stop the dismissal but the Plaintiff's deny this. (Answer)(Complaint)

[4]See: Valentine v. Watters, 896 So. 2d 385 (AL 2004)(Court described generally: Missing the statute of limitations is a classic example of negligence that any layperson can understand. Failure to timely file an action is a matter within the common knowledge of the average layperson.)

the case. There are no subtle tactical errors, complex causes of action or difficult areas of law in this matter which require expert knowledge. An expert, if required, would testify in essence that it is outside of the standard of care to ignore one of the Rules of Procedure and fail to do what the attorney had agreed to do in his own written Motion and Agreement which resulted in a Court Order, knowing that dismissal and inability to ever bring the case in the future would result from failing to restore the case. In this case, the issue is further simplified by the fact that the Appellants (Plaintiffs) had been offered specific settlement terms approximately a week prior to the deadline under the 40 (j) Agreement/Order and these were declined pursuant to the attorney's advice. (Complaint P. 2)

The Order focuses on language within the Plaintiff's Complaint in paragraph 13 within the "Negligence" cause of action. (Order P.3) The paragraph reads as follows:

> 13. Defendant/s had a duty of due care to prosecute Plaintiff's 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.

The Order indicates that the wording of this paragraph would require an expert to explain the legalese within the paragraph to a jury. (Order P. 3) As a Complaint is not part of a trial, it is not this paragraph which would be offered to the jury but the facts as explained and presented by the witnesses and documentary evidence. The jury would need only to determine that the Respondent /s entered into the Motion and Agreement which became a Court Order and subsequently did not abide by it causing damages to the clients.

II. THE COURT ABUSED ITS DISCRETION BY NOT PROVIDING THE APPELLANTS (PLAINTIFFS) AN OPPORTUNITY TO OFFER AN AFFIDAVIT OR AMEND THEIR PLEADINGS PRIOR TO DISMISSING THE CASE

Respondent/s answered the Complaint's paragraph 5 (alleging the issues involved could

be determined using common knowledge) by alleging that the Defendant was "without sufficient information to form a belief..." (Answer P. 1) No motion to dismiss was ever filed with the Court requesting the Court dismiss the case based on the alleged failure to provide a contemporaneous expert affidavit. The case came up on the trial roster and the chief administrative judge assigned a trial judge. During a pre-trial conference, after the Defendants' attorney (Respondent/s) requested a motion hearing to dismiss the case, the Court allowed this motion prior to trial based on the Answer's general paragraph stating that the Plaintiffs had failed to state a cause of action. (Answer P. 3) From a technical standpoint, Plaintiff stated a cause of action but, if an expert is in fact required, they failed to satisfy S.C. Code Ann. §15-36-100 (C) Plaintiff, during the hearing, requested a chance to amend and such was denied. (Transcript P. 26)

Courts, in the interest of justice are to freely allow amendments to pleadings absent prejudice to the other party. *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997)(absent prejudice, Courts should freely allow amendments) In this matter, at the late stage of being called for trial, and without any notice to Plaintiff or his attorney of a motion and what the motion might be based upon, the Court allowed a motion to go forward which related to the issue of whether an expert affidavit should have been filed contemporaneous with the Complaint. In this light, it is an abuse of discretion to disallow Plaintiff the opportunity to amend his pleadings to add an affidavit or more fully expound the facts in order to demonstrate that the allegations do not require an expert witness.

CONCLUSION

THEREFORE, for the reasons stated above, this Court should reverse the Order of the Circuit Court.

Date: Sept. 15, 2016

RESPECTFULLY

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THE STATE OF SOUTH CAROLINA
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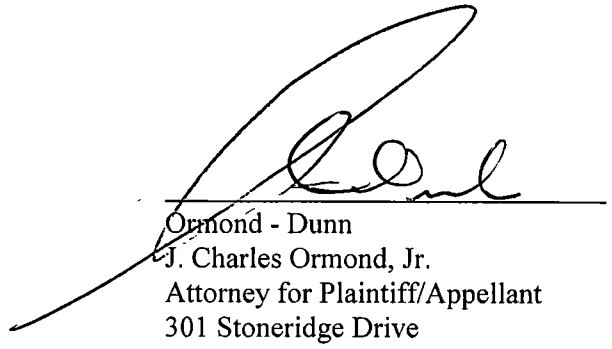
PROOF OF SERVICE

I certify that I have served a copy of the **APPELLANTS' INITIAL BRIEF AND DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** Respondent/s Joe Henry and Joe Henry Law Firm through Nathaniel Roberson, Esq., 1708 Richland St., Columbia, SC 29201 by depositing same in the United States Mail, postage prepaid, on May 20, 2016, addressed to his/their attorney/s of record, Nathaniel Roberson, Esq., 1708 Richland St., Columbia, SC 29201

September 15, 2016



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September 15, 2016

Via Hand Delivery
The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
1015 Sumpter Street
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Columbia, South Carolina 29211

Re: Jackson et al v. Henry Law Firm et al. Case No. 2015-CP-40-01449
Designation of Matter to be Included in Record and Initial Brief.

Dear Ms. Kitchings:

Please find enclosed for filing;
1) one original and proof of service of Appellant's Initial Brief (one copy for return clocked)
2) one original and proof of service of Appellant's Designation of Matter (one copy for return clocked)

I thank you in advance for your kind attention. I am,

Respectfully,

J. Charles Ormond, Jr.

Enclosures / above
cc: Nathanial Roberson, Esq.