

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable Tanya Gee, Circuit Court Judge

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Case No. 2016-001064

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DEC 19 2016

SC Court of Appeals

Thomas Jackson, Christopher Mitchell.....Appellants

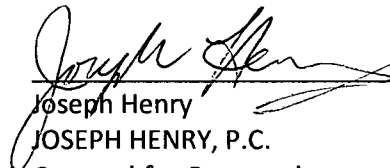
v.

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

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**INITIAL BRIEF OF RESPONDENT**

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## **STATEMENT OF ISSUES ON APPEAL**

1. DID THE TRIAL COURT ERR IN FINDING THAT APPELLANTS/PLAINTIFFS WERE REQUIRED TO PROVIDE AN EXPERT WITNESS AFFIDAVIT TO ESTABLISH A BREACH OF THE STANDARD OF CARE FOR ATTORNEYS WHEN ALLEGING PROFESSIONAL NEGLIGENCE AGAINST RESPONDENT FOR NOT RESTORING THE CLIENTS' CASE UNDER SCRPC 40(J).
  
2. DID THE TRIAL COURT ERR OR ABUSE ITS DISCRETION IN DENYING APPELLANTS/PLAINTIFFS AN OPPORTUNITY TO PROVIDE AN AFFIDAVIT WHEN RESPONDENT'S ANSWER CONTAINED A MOTION TO DISMISS PURSUANT TO RULE 12(B)(6) SCRPC AND APPELLANTS WERE BEYOND THE APPLICABLE TIMEFRAME TO AMEND THEIR PLEADINGS OR PROVIDE A SUPPLEMENTAL EXPERT AFFIDAVIT TO SUPPORT A CLAIM FOR PROFESSIONAL NEGLIGENCE AGAINST AN ATTORNEY

## **STATEMENT OF THE CASE**

This matter is a legal malpractice case alleging that the attorney entered into a SCRPC 40(j) Motion and Consent Agreement and did not restore the case pursuant to the Rule of Procedure and Consent Agreement ending Plaintiffs' case. Respondents filed an Answer to Plaintiffs' complaint containing a Motion to Dismiss pursuant to Rule 12(b)(6) for failure to state a claim for which relief could be granted. The Circuit Court heard the motion to dismiss during the week in which trial was to occur. After hearing arguments from both sides and reviewing the pleadings and applicable law, the Court dismissed the case based upon the determination that Plaintiffs' allegations did not meet the requirements of South Carolina Code Ann. § 15-36-100(C) as Plaintiffs did not file the required affidavit of an expert witness to establish breach of the standard of care necessary to prove legal malpractice.

The Plaintiffs/Appellants were clients of Respondents in a civil action involving employment safety issues. After initiating the underlying litigation and guiding Plaintiffs/Appellants through the administrative review process with OSHA, Respondents consulted with Appellants and an agreement was reached to dismiss the case pursuant to the provisions of SCRPC 40(j). The consent agreement was reached after OSHA did not find that the actions of Plaintiffs/Appellants' employer rose to the level of a health and safety violation under the provision of state laws and regulations governing occupational health and safety issues. Appellants agreed to place the case on 40(j) status in order to attempt resolution by

mediation as it was agreed by Appellants and Respondents that this action may make the mediation process more palatable to their employer enhancing the chances for favorable resolution. The agreement stated that Plaintiffs would need to restore the case/s within one year or they would be dismissed. All provisions of the agreement and Rule 40(j) were explained to Appellants prior to execution of the agreement. Appellants agreed to place their respective cases on 40(j) status and proceed with the mediation. Upon execution of the agreement, Appellants were provided with copies of the same. The cases were then unsuccessfully mediated and Appellants did not initiate the process of having the cases restored by paying the costs for the same and requesting that Respondent file the necessary paperwork. Thereafter, the cases were dismissed pursuant to the terms and conditions of the Consent 40(j) Agreement. The Appellants (Plaintiffs) brought this legal malpractice action.

### **FACTS:**

Appellants (Plaintiffs) employed Respondent/Defendants (Attorney and Law Firm) to represent them in cases involving issues related to their employment. The representation was undertaken pursuant to a written contingency fee agreement. Respondents brought suit on Appellants' behalf by filing a summons and complaint in Circuit Court (Richland County) and serving the same. The Defendants answered the complaint and limited discovery was conducted. During the course of the litigation, the parties conferred and agreed to place the case on a Consent 40(j) Agreement. Appellants discussed this option in detail with Respondent and agreed to have Respondent execute the agreement understanding that Mediation would be conducted during the pendency of the 40(j). The parties stipulated in the 40(j) that if the case was not restored within (1) year of the date the agreement was filed, the 40(j) would also serve as a dismissal. A mediation conference was conducted in the case but no resolution was reached. Appellants did not initiate the process of having the cases restored by paying the filing fees and requesting that the necessary paperwork be prepared and filed to accomplish this task. The cases were not restored and the remaining time on the statute of limitations expired. Appellants were aware of the necessity to request that the cases be restored and the necessity to pay the filing fees through their prior discussions with Respondent. In addition, Appellants had been given copies of the 40(j) Agreement prior to filing during their meeting with Respondent at his office to discuss the 40(j) and have it explained in detail.

### **ARGUMENT:**

- I. APPELLANTS FAILED TO PLEAD FACTS SUFFICIENT TO ALLEGE A PROFESSIONAL NEGLIGENCE CAUSE OF ACTION AGAINST AN ATTORNEY AT LAW AND PROCEED WITHOUT AN EXPERT WITNESS AFFIDAVIT WHEN THE FACTS ALLEGING THE PROFESSIONAL NEGLIGENCE INVOLVE SUBJECT MATTER THAT DOES NOT LIE WITHIN

THE AMBIT OF COMMON KNOWLEDGE AND EXPERIENCE, SO THAT NO SPECIAL LEARNINIGN IS NEEDED TO EVALUATE THE ALLEGED BREACH OF THE STANDARD OF CARE.

Appellants correctly argue in their brief that the standard for dismissal pursuant to Rule 12(b)(6) is that the judge must base the ruling upon a review of the allegations contained in the complaint and the reasonable inferences from the allegations to make the determination that Plaintiff would not be entitle to recover under any theory of the case. In the instant case, the judge did make the inquiry required by the provisions of Rule 12(b)(6) and determined that Plaintiff/Appellant could not recover under any theory of the case. In their complaint, Plaintiff/Appellants assert that Respondents committed malpractice when their cases were not restored following dismissal pursuant to Rule 40(j) SCRPC. Appellants further assert that the time to re-file their cases expired thereby forever forestalling them from further pursuit of the claims raised therein. Respondents do not dispute this fact in that the remainder of the applicable statute of limitations expired approximately ten (10) days after the Consent 40(j) Agreement expired. However, Appellants did not seek to have Respondents restore the cases to the active trial roster by making the necessary arrangements to pay the filing fees and having Respondents prepare the necessary paperwork to restore the cases. Appellants were aware of the necessity to take action to restore the cases if they wished to further pursue the same from their discussions with Respondent regarding strategy. It was the decision of Appellants to attempt further settlement negotiations after the mediation rather than seeking to restore the cases.

It appears from the argument contained in their brief, that Appellants are seeking to assert that Respondents are guilty of legal malpractice for allegedly failing to restore their cases after the expiration of the Consent Agreement pursuant to Rule 40(j). However, Appellants conspicuously omit from their assertion that they failed to seek initiation of the restoration process pursuant to the provision of their fee agreement with Respondents during the remainder of the time on the applicable statute of limitations. The crux of Appellants' claim is that Respondents, through oversight or some other negligent conduct, wrongfully failed to restore the cases after the Consent Agreement pursuant to Rule 40(j) expired. Appellants further argue that this conduct falls below the standard of care for attorneys and does not require the requisite expert witness affidavit referenced in South Carolina Code Ann. § 15-36-100(C) as knowledge of the application of the provisions of Rule 40(j) SCRPC falls within the ambit of common knowledge and does not require special learning to establish a breach of the standard of care for an attorney's professional conduct. The argument that Respondents' conduct falls below the standard of care is premised upon the assertion by Appellants that Respondents had "a duty of due care to prosecute Plaintiffs' case in a proficient and careful

manner in addition to an affirmative duty to protect Plaintiffs' 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. The Legislature enacted S.C. Code Ann. § 15-36-100(B) to discourage frivolous litigation by imposing the duty upon Plaintiffs asserting claims of 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."

In the instant case, Appellants failed to provide the requisite affidavit to specify the basis upon which they assert that Respondents breached their duty of due care to "prosecute Plaintiffs' case in a proficient and careful manner in addition to an affirmative duty to protect Plaintiffs' common law and statutory rights after filing a 40(j)." This is the type of claim that the legislature was seeking to prohibit by enactment of S.C. Code Ann. § 15-36-(B). In order to begin the necessary factual and legal analysis to unravel the obligations of an attorney in a claim of this nature one must not only understand the legal implications of Rule 40(j) but also what constitutes "a duty of due care" and what "common law and statutory rights of Plaintiff" were at issue after the filing of a 40(j). This analysis is clearly not within the "ambit of common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant." Therefore, Appellants' assertions of a professional negligence claim on this basis fails to meet the standard of S.C. Code Ann. Section 15-36-(B) requiring an expert affidavit to establish the breach of the standard of care for attorneys. As the Appellants failed to provide the requisite affidavit, their complaint was facially deficient and failed to state a claim for which relief could be granted thereby making dismissal pursuant to Rule 12(B)(6) appropriate. S.C. Code Ann. § 15-36-100(C)(1) (If the plaintiff fails to file an expert affidavit, the complaint is subject to dismissal for failure to state a claim.).

A legal malpractice claim requires the plaintiff to establish four basic elements; (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damages to the client, and (4) proximate causation of the client's damages by the breach. *Holy Loch Distributors, Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E. 2d 282 (200). Appellants have failed to state facts sufficient to prove the elements of the cause of action for legal malpractice as an expert affidavit would be required to establish the breach of duty element of the claim as specific legal knowledge (*special learning*) would be required to explain any assertion of the duty alleged to have been breached by the cases not having been restored. Therefore, Appellants' claim for legal malpractice must was properly dismissed and the ruling should be affirmed.

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

## THE TIME FOR AMENDMENT OF THE PLEAINGS AND SUBMISSION OF AN EXPERT AFFIDAVIT HAD EXPIRED.

The Court did not abuse its discretion by disallowing Appellants to amend their pleadings to provide the required expert witness affidavit when more than thirty days had elapsed since the case was filed. In keeping with the standards of Rule 15(a) SCCP, the Court exercised its discretion in a reasonable and prudent manner by maintaining control of the proceedings to disallow Plaintiffs in a civil action the opportunity to unduly burden defendants with unfettered case theory changes on the eve of trial. Appellants assert that courts are to freely allow amendments to pleadings absent prejudice to the other party as the basis for their amendment request. However, it should be noted that Appellants made a calculated decision not to seek the advice and input of an expert before filing the underlying case (i.e. the choice not to obtain the affidavit was intentional and deliberate, Complaint p.1, ¶ 5). Therefore, Appellant should not be allowed to make a calculated risk in an attempt to obtain a tactical advantage (saving time and money on an expert) and then be allowed to use their mistake in judgment to have a second change at prolonging a case to the disadvantage of the opposing side when the risk does not pay off. This is not what was intended by the decision in *Berry v. McLeod*, 328 S.C. 435, 492 S.E. 2d 794 (Ct. App. 1997) allowing Courts, in the interest of justice to freely allow amendments to pleadings absent prejudice to the other party.

Prejudice to the other party would certainly be present in the instant case should Appellants' late stage request for an amendment be granted. The fact that Appellants made a conscious decision not to obtain an expert witness affidavit, more than one year had elapsed before the amendment was requested, no assertion had been made that the exception to obtaining the affidavit anticipated in S.C. Code § 15-36-100(C)(1) applied (danger of statute of limitations expiring before affidavit could be obtained), both the ten (10) day and 45 day extensions allowed by S.C. Code § 15-36-100(C)(1) had expired, and more than thirty days had elapsed since Appellants' case was originally filed, discovery was closed, and the case was scheduled for trial are all relevant to the determination that the opposing side would be prejudiced by the requested amendment. Appellants' failure to meet the requirements for stating a claim under the provisions of S.C. Code § 15-36-100(B) makes dismissal pursuant to the provisions of Rule 12(b)(6) an appropriate remedy as the pleadings were inadequate to state a claim for legal malpractice as required by the statutory provisions prohibiting frivolous litigation. Although Appellants attempt to assert that no motion was made requesting

dismissal of their complaint, they fail to recognize that the motion was contained within Respondents' answer.


Although Appellants assert that Respondent signed an agreement that "required that he restore the case by motion within one year" this is a simple misreading of the 40(j) agreement. The agreement did not impose a duty on Respondent to do anything, it merely stated to Appellants that the agreement would serve as a dismissal if the cases were not restored within one year after the agreement was filed. This was simply a provision that placed the parties on notice of the operation of the provisions of the agreement if no motion was filed within the prescribed time.

Appellants' underlying case is premised upon allegations of alleged wrongdoing by Respondents which is inextricably linked to conversations and actions allegedly stemming from the contents of a mediation conference (Complaint p. 2, ¶ 8). The attempt by Appellants to incorporate allegations concerning these matters into the crux of their claim of legal malpractice is a violation of Rule 8 SCRADR which provides that communications during a mediation conference shall be confidential. In order to make proper inquiry into the substance of Appellants' claims the Court would be required to violate the confidentiality requirement of the mediation conference and permit derogation of the sanctity of the Alternate Dispute Resolution system.

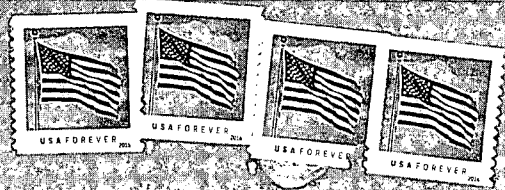
## CONCLUSION

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

Dated: December 16, 2016



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