

STATE OF SOUTH CAROLINA)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

RECEIVED

JAN 25 2018

SC Court of Appeals

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)

Plaintiff,

CERTIFIED TRUE COPY
OF ORIGINAL FILED IN THIS OFFICE
DATE } 1/17/18

v.

Scott L. Robinson and, Johnson)
McKenzie & Robinson, LLC,)
Defendants.)

Beulah L. Roberts
CLERK OF COURT
CLARENDON COUNTY, SC
MOTION FOR RECONSIDERATION

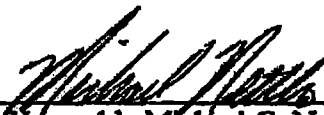
Plaintiff's Rule 59(e) Motion for Reconsideration of this Court's Order filed November 30, 2017 ordering Andrew K. Epting, Jr. and the firm Andrew k. Epting, Jr., LLC, to withdraw from their representation of Plaintiff came before the Court for hearing on Thursday, December 21, 2017 in the Florence County Courthouse after due notice to all parties. Present at the hearing for Plaintiff were Robert C. Ransom, Esquire, and Jaan G. Rannik, Esquire; and for Defendants Warren C. Powell, Jr., Esquire. Counsel for Defendant Scott L. Robinson, Susan Taylor Wall, Esquire, was not present due to a death in the family. Mr. Powell had authority from Ms. Wall to speak on her behalf at the hearing.

After taking into consideration the arguments of and submittals by counsel, and all other matter before the Court, this Court denies Plaintiff's Motion for Reconsideration.

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CLARENDON COUNTY, SC
CLERK OF COURT
BEULAH L. ROBERTS



The Honorable Michael G. Nettles
Presiding Judge
Third Judicial Circuit

~~December~~ ^{Jan} 3, 2018

STATE OF SOUTH CAROLINA)
)
COUNTY OF CLARENDON)

IN THE COURT OF COMMON PLEAS
FOR THE THIRD JUDICIAL CIRCUIT
Civil Action No. 2010-CP-14-457

Stokes-Craven Holding Corp, d/b/a)
Stokes-Craven Ford,)

Plaintiff,)

vs.)

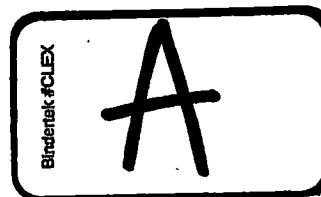
Scott L. Robinson and, Johnson)
McKenzie & Robinson, LLC,)

Defendants.)

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SC Court of Appeals
ORDER
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BEULAH
CLERK OF COURT
CLARENDON COUNTY, SC
RIS

Defendants' discovery and scheduling order related motions came before this Court for hearings, after due notice, on October 13, 2017 in Florence County; on October 17, 2017 via telephone conference; on October 19, 2017 in Florence County; and, on November 2, 2017 in Florence County. Participating at each hearing for the Plaintiff were Andrew K. Epting, Jr., Esquire, and Jaan G. Rannik, Esquire; for Defendant Scott L. Robinson, Susan Taylor Wall, Esquire; and for Defendant Johnson, McKenzie & Robinson, LLC, (hereafter "JMR") Warren C. Powell, Jr., Esquire.

This lawsuit has been pending since August 2010. The current matter in dispute began with the Plaintiff's response to the Court's scheduling order's October 2, 2017 deadline to respond to the following: "Plaintiff shall name all experts it intends to use as witnesses at trial". The Plaintiff responded by naming its counsel of record, Andrew K. Epting, Jr., as an expert witness. The Plaintiff has not withdrawn or altered this response notwithstanding argument of counsel suggesting otherwise and despite this Court's multiple invitations to do so. In response, Defendants filed a Joint Motion to Exclude Expert Witness, or, in the Alternative, to Disqualify Plaintiff's Counsel and Compel



Discovery. After several hearings, this dispute, as framed by the Plaintiff on the record, concerns the timing of the withdrawal, that is, when must the Plaintiff's counsel withdraw as Plaintiff's counsel, not if he and his firm must withdraw.

By way of background, the Court's Scheduling Order required Plaintiff to disclose all experts it intended to call at trial by October 2, 2017. On that date, Plaintiff listed 3 names, including the name of Plaintiff's counsel of record, Andrew K. Epting, Jr., as stated above. As a result, Defendants filed Joint Motions described above and the Court set a hearing date for October 13, 2017. In response to the Court's inquiries at the hearing on October 13 as to Plaintiff's complete list of experts, Plaintiff's counsel responded on the record that the complete list of expert witnesses Plaintiff intended to call at trial was follows:

1. Steve Luoma, CPA
McGregor & Company
3830 Forest Dr.
Columbia SC 29204
803-787-0003
2. John Flack
2601 Paxville Hwy.
Manning SC 29102
803-433-5400
3. Andrew K. Epting, Jr.
46-A State St.
Charleston SC 29401
843-377-1871
4. Ronald L. Richter, Jr., Esquire
Bland & Richter, LLP
18 Broad Street
Charleston SC 29401
803-256-9664

This list, therefore, is the definitive list of Plaintiff's experts. Plaintiff's counsel requested until Monday, October 16, 2017 to confirm that Plaintiff would continue to name Mr. Epting as an expert witness. The Court granted the request, allowing Plaintiff until October 16, 2017 to definitively advise the Court as to Mr. Epting's status as an expert witness for Plaintiff in this case.

At the October 13 hearing, and after taking into consideration the arguments of counsel, submittals by way of memoranda, case law, the Rules of Professional Conduct and the Rules of Civil Procedure, this Court advised Plaintiff that its counsel, Mr. Epting, could serve either as an expert witness or as counsel for Plaintiff, but could not do both. Plaintiff's counsel represented to the Court that in anticipation of the need to withdraw as Plaintiff's counsel, he had been in touch with another lawyer to serve as Plaintiff's counsel in this case.

On Monday, October 16, 2017, the Plaintiff supplemented its answers to Defendant JMR's First Set of Interrogatories and, again, named its attorney (Epting) as an expert witness, in response to "... list the name and addresses of any and all expert witnesses whom you propose to use as a witness at the trial of this case." Plaintiff's counsel's October 16, 2017 letter to the Court stated, "Your Honor instructed me to inform the Court by "high noon" today whether I would elect to be counsel at trial or a witness in this case. To answer this Court's question, I would be a witness." Further in Mr. Epting's October 16, 2017 letter he states, "I expressed at the hearing that I viewed this as a matter of timing."

The Plaintiff attempted in this answer to interrogatories dated October 16 to add an additional expert witness, contrary to counsel's representation to the Court on October 13, 2017 that Plaintiff's experts would come from the four individuals listed at the hearing.

The listing of this additional witness is untimely as it is after the scheduling order deadline of October 2, 2017. Plaintiff also filed objections to the proposed order submitted by Defendants and submitted a separate proposed order wherein, *inter alia*, he argued that another lawyer in Mr. Epting's law firm could continue to act as Plaintiff's counsel. As the Plaintiff's counsel stated, he had been in touch with another attorney, and a notice of appearance of counsel for the Plaintiff was in fact filed on October 17, 2017 by Robert B. Ransom, Esquire, an attorney in Columbia not practicing with Mr. Epting's law firm. Mr. Ransom is, as the Plaintiff acknowledges, attorney of record for the Plaintiff.

Thereafter, on Tuesday, October 17, 2017, this Court held a conference call with all counsel during which the Court again stated its opinion, subject to being persuaded otherwise, that, given Plaintiff's decision to continue to list Mr. Epting as an expert witness, it would not be appropriate for Mr. Epting to serve in both capacities, that is, as an expert witness for the Plaintiff and as Plaintiff's counsel and that, given the Plaintiff's reaffirmed decision to designate Mr. Epting as an expert witness, Mr. Epting and his firm must now withdraw as the Plaintiff's counsel. The Court further stated that Plaintiff would be given the opportunity to persuade the Court otherwise. The Court scheduled a hearing for October 19, 2017, to provide Plaintiff another opportunity to fully set forth its position.

On Thursday, October 19, 2017, a hearing was held in the Florence County Courthouse on Defendants' Joint Motion with Attorneys Epting and Wall participating by telephone and Attorney Powell participating in person. Plaintiff's counsel then announced during the hearing that he insisted on 10 days' notice before a hearing concluding the issue could be held. The Court thus continued the hearing until November 2, 2017 at 11:00 am in the Florence County Courthouse.

On November 2, 2017, all parties, through their counsel, appeared and were heard on the record. Plaintiff's counsel conceded that he did not believe he could be an advocate and an expert at trial. Despite argument that Mr. Epting would withdraw when he concluded it was time to do so, Plaintiff's counsel stated when he used the term "appropriate time" for his withdrawal he meant the time the Court thought would serve to move this case forward and that he was not suggesting that Plaintiff's counsel would be in control of that decision. Plaintiff's counsel, however, sought the Court's leave for him to stay in his dual capacity until it "appeared" to be time to withdraw. The Court asked Plaintiff's counsel if he had a suggestion as to when the appropriate time would be and Mr. Epting declined to answer, "in terms of time." In fact, it is for the Court to determine the appropriate time for withdrawal and the trial court is vested with broad discretion to order the timing of such withdrawal. 81 Am.Jur. 2d Witnesses, Sec. 262.

Rule 3.7, RCP, Rule 407, SCACR (hereafter "Rule 3.7") states that a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness. Plaintiff contends Mr. Epting is a necessary witness for the Plaintiff in this action. Although the Rule then cites several exceptions, which under narrow circumstances would allow an advocate to testify, none apply in this case.

The Plaintiff asserts in its supplemental answers to Defendant's interrogatories that Mr. Epting's expected testimony as expert witness is: "...as to those matters related to the plaintiff Austin's efforts to collect interest and fees, close the business, and decisions made and actions taken by Stokes-Craven following the Supreme Court's decision in *Austin v. Stokes-Craven* up to the resolution of the Austin matter in order to protect Stokes-Craven's interest." Plaintiff offers no affidavit or argument that this expected testimony involves

uncontested issues in this litigation. (*See*, Rule 3.7(a)(1)). Rather, it appears from the Plaintiff's description of the anticipated expert testimony of Mr. Epting that the issues presented relate to post verdict damages and the handling of appeals, neither of which can reasonably be termed uncontested issues in this case. Accordingly, even as a fact witness, neither Mr. Epting nor his firm could continue as counsel for the Plaintiff under the Rule 37 (a)(1) exception.

Further, it may be argued that Rule 3.7, SCRCP has no application to the facts of this case as that rule does not address "expert witnesses." Defendants point out that Rule 3.7 applies to necessary witnesses and that an expert witness is not, by definition, a necessary witness. Taking this line of argument, the Court recognizes additional reasons why an advocate cannot also serve as an expert witness, which roles are inconsistent. These reasons include the concern that an expert witness must not hold a fee agreement that is tied to the outcome of the case in which he/she is testifying to avoid an impetus to lie or bend testimony in order to increase the chances of earning a fee. In this case, Mr. Epting has admitted that he/his firm has a contingency payment agreement with Plaintiff. In addition, while an attorney for a party can and must invoke the protections afforded by the attorney-client privilege and has the right to assert the work product doctrine, an expert witness has no such ability or protection. The implications to the maintenance of these protections for the benefit of a client when an attorney takes on a dual role are troubling.

In addition, it is clear under the authorities that in this case, the Defendants have proper objection to such a dual role continuing because of the obvious prejudice to Defendants if the Court were to allow such activity. As an advocate, Plaintiff's counsel has a role in the litigation that is not compatible with the role of an expert witness. An

advocate's role is to zealously state his client's position both in pretrial proceedings and at trial; an expert witness has no client and no agenda to pursue, instead, an expert is tasked with providing his objective opinions based on the facts provided to him and his specialized knowledge.

This Court is also mindful of the negative implications and resulting taint to the judicial system and to the public's perception of the judicial system by allowing Plaintiff's counsel to remain as Plaintiff's advocate while also serving as a designated expert witness. The dignity of the judicial system and of this Court as well as the public's interest in fair, open and appropriate proceedings further compels the Court to find that Plaintiff's counsel and his law firm must withdraw at this time from continuing to serve as Plaintiff's counsel in this case. Allowing Mr. Epting to serve in the dual capacity would be improper and prejudicial.

It is appropriate to consider the hardship, if any, which the Plaintiff might suffer as a result of Mr. Epting's pretrial withdrawal from this case as counsel for the Plaintiff. At the outset, the Plaintiff certainly considered and made the choice between Mr. Epting serving as Plaintiff's advocate/counsel or as an expert witness as evidenced by its letter and discovery responses of October 2, 2017 and October 16, 2017 and as reiterated at the hearings. Plaintiff's own decision outweighs any harm it might sustain by Mr. Epting and his firm's withdrawal from the suit as advocate. In addition, an independent attorney not affiliated with Mr. Epting's law firm has entered an appearance, the same being solicited by Mr. Epting personally. Therefore, the Plaintiff will not be without counsel in any event. Mr. Epting argues he requires time to confer with the Plaintiff's new attorney in order to provide him information that Mr. Epting perceives he will need and for that reason seeks

the Court's delay of his withdrawal. The Plaintiff, however, offers no reason why Mr. Epting, as expert witness, cannot provide the same data and information to the Plaintiff's new attorney in any less efficient manner than if Mr. Epting continued as counsel of record. Finally, Plaintiff has submitted no affidavits nor advanced any argument setting forth any "substantial hardship" it may suffer by Mr. Epting's assumption of the sole role of expert witness as of November 2017 with trial anticipated in the Spring of 2018. Having demonstrated no "substantial hardship", neither Mr. Epting nor his firm may continue in the dual role of advocate and expert or fact witness.

Mr. Epting's law firm must also withdraw as counsel. It is uncontested that the Plaintiff has a contingency fee contract with Mr. Epting and his firm. Expert witnesses in most jurisdictions are prohibited from having an economic interest in the outcome of the lawsuit. Restatement of the Law, Third, The Law Governing Lawyers, §117; Person v. Association of the Bar of the City of New York, 554 F.2d 534, 538 (2d Cir.) (Contingent expert witness fee is void), cert. denied, 434 U.S. 924, 98 S. Ct. 403, 54 L.Ed.2d 282 (1977); Belfonte v. Miller, 243 A.2d 150 (Pa. Super. Ct. 1968) (same); In re Schapiro, 128 N.Y.S. 852 (N.Y. App. Div. 1911) (disbarment for paying contingent fees to witnesses); Cresswell v. Sullivan & Cromwell, 922 F.2d 60, 72-73 (2d Cir. 1990), cert. denied, 505 U.S. 1222, 112 S. Ct. 3036, 120 L.Ed. 905 (1992) (lawyer disqualified from representing plaintiffs in suit against law firm, *inter alia*, because lawyer was necessary witness and had entered contract to receive one-sixth of funds recovered from law firm). Mr. Epting is named as an expert witness and he has an economic interest in the outcome of the case; were his law firm to continue as Plaintiff's counsel, Mr. Epting would still have an

economic interest in the outcome of the case under his firm's contingency fee contract because he is the owner of the law firm and its partner in charge.

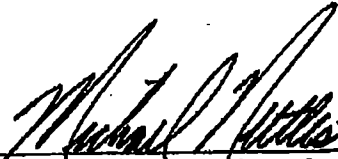
Furthermore, Defendants would be prejudiced by any delay in withdrawal for a number of reasons. First, a delay would increase the likelihood that the opportunity for a timely trial is missed. This case is already seven years old and a decision to unnecessarily push back a trial date should be avoided. Second, a delay in ending the "dual role" runs a high risk of confusing the jury who would hear that the expert witness continued as the Plaintiff's advocate during the discovery phase of this case and it would prove difficult for the Court to explain why such a prejudicial situation was allowed to continue, and why the Court qualified this expert to testify at trial while allowing him to continue as the Plaintiff's advocate before trial. Third, the qualification by the Court of an expert witness adorns the expert as possessing superior knowledge, which could lead the jury to conclude that the Court favors the Plaintiff by allowing such dual role where Defendants' counsel are not serving in a dual role. Again, the issue before the Court is not if the Plaintiff's expert must withdraw as Plaintiff's counsel but when the withdrawal should take place. The timing and process of such issue is within the sound discretion of this Court.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED and DECREED that:

Considering all the facts and circumstances presented, the age of this case, Plaintiff's disclosures and admissions, the Rules of Professional Conduct, the Rules of Court, legal authorities, this Court's Scheduling Order, the Court concludes and rules that the appropriate time for Mr. Epting and the Epting Law Firm to withdraw as Plaintiff's counsel is on the filing of this Order and Mr. Epting, individually and for his law firm, shall file notice of withdrawal as counsel of record within five days thereafter. The Court makes

this ruling for the reasons set forth above as well as to preserve the dignity of this Court and the public interest, to avoid prejudice to the Defendants, and to allow all parties to engage in fair litigation practice. It is well within the Court's discretion to manage its docket and cases, including the scheduling of key events and the appropriate time for withdrawal of counsel comes within its case management authority. In addition, and as noted, Plaintiff's experts will be limited at trial to the four individuals named by Plaintiff as listed above. Given the significant time spent by the parties and the Court on the withdrawal issues, the Defendants' deadline to name experts shall be continued to 40 days after the signing and filing of this Order.

IT IS SO ORDERED.



The Honorable Michael G. Nettles
Presiding Judge
Third Judicial Circuit

Florence, South Carolina
11-22-, 2017

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January 23, 2018

Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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JAN 25 2018
SC Court of Appeals

Re: Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford v. Scott L. Robinson and Johnson, McKenzie & Robinson, LLC
Civil Action No. 2010-CP-14-475

Dear Ms. Kitchings:

In supplementation to my correspondence last week, I enclose pursuant to Rule 203(d)(B), SCACR a copy of the orders to be challenged on appeal, filed on November 30, 2017 and January 12, 2018.

Thank you for your attention to this matter. Please call me if you have any questions or comments.

Very truly yours,



Robert B. Ransom

Enclosures

c: Warren C. Powell, Jr., Esq.
Susan Taylor Wall, Esq.
Andrew K. Epting, Jr., Esq.

LEVENTIS & RANSOM

ATTORNEYS AT LAW

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