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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

RECEIVED

JAN 17 2017

SC Court of Appeals

Thomas Jackson, Christopher Mitchell.....

Appellants

v.

Joe Henry, Esq., Law Firm of Joe Henry

Respondents.

RECORD ON APPEAL

J. Charles Ormond, Jr.
ORMOND - DUNN
Counsel for Appellant
301 Stoneridge Drive
Columbia, SC 29210
(803) 933-9000

Joseph Henry
1708 B Richland St.
Columbia SC 2901
(803)929-3484
Josephhenry929@bellsouth.net

Date: January 17, 2017

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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

RECEIVED

MAY 20 2016

SC Court of Appeals

2016 APR 20 PM 3:23
JAMES H. LORANGE
CLERK & SRS

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.

SCANNED

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. ¶16)
- The employment action filed on behalf of Plaintiffs by Defendants was removed from the roster by consent order pursuant to Rule 40(j), SCRPC. (¶17)
- 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. (¶18)
- 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. (¶19)
- 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)

SCANNED

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."

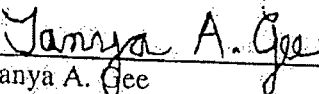
SCANNED

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. SCRPC 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.

SCANNED

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.

Law Firm of Joe Henry

DEFENDANT(S)

PLAINTIFF(S)

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

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,)
)
 Plaintiff/s,)
)
 vs.)
)
 Joe Henry, Esq. Law Firm of Joe Henry)
)
 Defendant/s)
)
 _____)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

Civil Action No.: 15 CP 40 _____

**COMPLAINT
 (JURY TRIAL DEMANDED)**

Plaintiffs, Thomas Jackson, Christopher Mitchell, by and through their undersigned attorney, complains of Defendant/s and avers as follows:

PARTIES AND JURISDICTION

1. Plaintiffs are current residents and citizen of the State of South Carolina and, during the relevant time period were residents of Richland County, South Carolina.
2. Defendants, Joe Henry, Esq. Law Firm of Joe Henry (hereinafter referred to collectively as Defendant/s or Henry) is/are residents of South Carolina. Upon information and belief Defendant Law Firm is a sole proprietorship or legal entity organized and existing in South Carolina with offices in Richland County and Joe Henry is an individual residing in Richland County, South Carolina.
3. Upon information and belief, the tort alleged was committed in Richland Counties.
4. Defendant/s is/are subject to the jurisdiction of the Court. Venue is proper in Richland County pursuant to Section 15-7-10 et seq. of the Code of Laws for South Carolina.
5. 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 th ambit of common knowledge and experience, and requires no special learning or expertise to evaluation the

alleged conduct of the Defendant/s.

FACTS

6. 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.
7. 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.
8. 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.
9. 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.
10. 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.
11. 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.

FIRST CAUSE OF ACTION PROFESSIONAL NEGLIGENCE/RECKLESSNESS

12. Plaintiff incorporates by reference paragraphs 1 through 10 as though fully set forth herein.

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.
14. Defendant negligently and/or recklessly breached that duty by failing to restore the matter within the one year period as set forth in the Rule, SCRC 40(j)
15. Defendants' negligent and (possibly) reckless behavior directly and proximately caused Plaintiffs to lose significant legal rights to continue their civil action against their Employer. Such negligence on the part of Defendant.
16. As a direct and proximate result of Defendant's negligent and reckless acts and omissions, Plaintiff has suffered actual and compensatory damages including a loss of potential settlement or judgment damages.

WHEREFORE, Plaintiff requests that this Court:

- A. Award Plaintiff actual damages.
- B. Award Plaintiff compensatory damages
- C. Award Plaintiff, if appropriate after factual inquiry, punitive damages.
- D. Award Plaintiff the costs and disbursements of this action and any such other and further relief as this Court may deem just and proper.

**FOR A SECOND CAUSE OF ACTION
BREACH OF CONTRACT**

17. Plaintiff incorporates by reference paragraphs 1 through 16 as though fully set forth herein.
18. The Defendant/s and Plaintiffs entered into a written agreement for legal services and received valuable consideration for such agreement. A contract was formed and existed between the Defendants and Plaintiffs.
19. This contract included the handling of the employment matter and the timely filing of a lawsuit in an appropriate court and restoration of a consent agreement under SCRC 40(j).
20. The failure of Defendant to timely restore the lawsuit against the liable party (employer) was a material breach of this contract.
21. As a direct and proximate result of Defendants' breach of contract with Plaintiffs,

Plaintiffs have suffered actual and compensatory damages.

WHEREFORE, Plaintiff requests that this Court:

- A. Award Plaintiff actual and compensatory damages, including damages recoverable in the lawsuit against Employer, in an amount to be determined by the jury;
- B. Award Plaintiff the costs and disbursements of this action;
- C. Award Plaintiff such other and further relief as this Court may deem just and proper.

Attorney for Plaintiff:

March 5, 2015

Holler Garner Corbett Ormond Plante & Dunn
(J. Charles Ormond, Jr.)
Attorney for Plaintiff

By: _____
J. Charles Ormond, Jr.

1777 Bull Street,
Columbia, SC 28201
(803) 765-2968 fx. 252-8290

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Thomas Jackson, Christopher Mitchell,)
)
 Plaintiffs,)
)
 vs.)
)
 Joe Henry, Esq. / Law Firm of Joe Henry,)
)
 Defendant(s))

COMMON PLEAS COURT
 FIFTH JUDICIAL CIRCUIT

Civil Action No.: 2015-CP-400-1

2015 APR 17 PM 2:01
 ANNETTE S. MCBRIDE
 CLERK OF COURT
 RICHLAND COUNTY

**ANSWER TO COMPLAINT
 (JURY TRIAL REQUESTED)**

The defendant, Joe Henry, Esq., / Law Firm of Joe Henry, answering the Complaint of the plaintiff, as follows:

1. That any and all allegations herein that are not explained, qualified or otherwise modified, are denied and will require strict proof thereof.
2. That upon information and belief, the allegation in paragraph one (1) are admitted.
3. That Joe Henry Esq., Law Firm of Joe Henry are incorrectly identified as Joe Henry, also Joseph Henry, P.C. are incorrectly identified as Joe Henry Law Firm, and then admits that Joseph Henry, P.C. and Joseph Henry is in Richland County, South Carolina.
4. The defendant is without sufficient information to admit or deny the allegations in paragraph three (3) and the same is therefore denied and strict proof is demanded thereof.
5. Defendant is without sufficient information to admit or deny the allegations in paragraph four (4) and the same is therefore denied and strict proof is demanded thereof.
6. The defendant denies the allegations in paragraph five (5) and strict proof is demanded thereof.
7. The defendant admits paragraph six (6) of the Complaint.

8. The defendant admits only so much of the allegations in paragraph seven (7) as may reasonably be read to say the defendant, with the consent of the plaintiff and opposing counsel all agreed to a Rule 40(J) dismissal. Further it was agreed that the case would be mediated in the interim and the same was completed without a successful resolution. All remaining portions of this allegation are inconsistent with the foregoing are denied.

9. The defendant denies the allegations in paragraph eight (8) and further moves to strike the same as being in violation of the Rules involving mediation as agreed to by all parties involved in mediation.

10. The defendant admits only so much of paragraph nine (9) as may reasonably be read to state that the case was not restored to the trial roster pursuant to Rule 40(J) as the plaintiff never paid the required fee and cost to restore the case to the roster and all other allegations inconsistent with the same are denied.

11. The defendant denies the allegations in paragraph ten (10) as stated.

12. The defendant is without sufficient information to admit or deny the allegations in paragraph eleven (11) and would therefore deny the same and require strict proof thereof.

13. The defendant denies all of the allegations in paragraphs thirteen (13), fourteen (14), fifteen (15) and sixteen (16) and prayer for relief in the first cause of action.

14. Defendant is without sufficient information to admit or deny the allegations as stated and as a result will require that the allegations be made more definite and certain.

15. The defendant admits only so much of nineteen (19) that the agreement might result in a lawsuit and all remaining allegations inconsistent with the same are denied.

16. The defendant denies all of the allegations in paragraph twenty (20) and strict proof is demanded thereof.

17. The defendant denies the entirety of the allegations in paragraph twenty-one (21) and strict proof is demanded thereof, as well as the plaintiff prayer for relief in its second cause of action.

**FOR A FIRST DEFENSE AND BY WAY
OF A FIRST COUNTERCLAIM**

18. The allegations of the foregoing are incorporated herein as if the same is repeated verbatim;

19. That the defendant moves the court to strike the plaintiff's Complaint for failure to state a cause of action under Rule 12(b)(6) of the SCRPC.

**FOR A SECOND DEFENSE AND BY WAY
OF SECOND COUNTERCLAIM**

20. The allegations of the foregoing are incorporated herein as if the same is repeated verbatim;

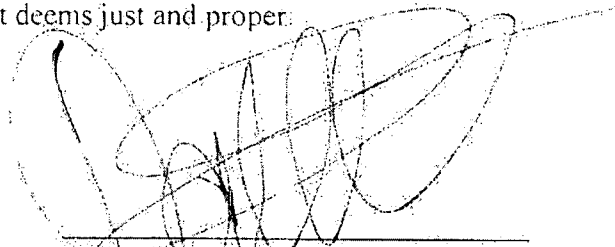
21. That this action is so frivolous and without merit as to violate 15-36-10 of the 1976 South Carolina Code of Laws as amended and the court should impose the appropriate sanction as set forth in Section 15-36-10(G).

**FOR A THIRD DEFENSE AND BY WAY
OF A THIRD COUNTERCLAIM**

22. The allegations of the foregoing are incorporated herein as if the same is repeated verbatim;

23. That all references to the activity of mediation be stricken from plaintiffs' complaint because such reference to mediation is strictly forbidden in mediation legislation and the agreements therein applies to all parties in the mediation proceeding.

WHEREFORE, the defendant, having fully answered the Complaint herein, demands the court inquire into the matters raised in the Complaint, demands all relief requested therein be dismissed with prejudice, that he have judgment on his counterclaims and the costs, including reasonable attorneys fees associated with the defense of his action, for appropriate sanctions, and such other and further relief as this court deems just and proper.



Nathaniel Roberson
Attorney for Defendant
1708 Richland Street
Columbia, S.C. 29201
(803) 252-4449

Columbia, South Carolina
4-17, 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Thomas Jackson, Christopher Mitchell,)
)
 Plaintiffs,)
)
 v.)
)
 Joe Henry, Esq. / Law Firm of Joe Henry,)
)
 Defendant.)

COMMON PLEAS COURT
 FIFTH JUDICIAL CIRCUIT

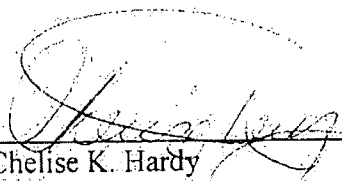
Case No.: 2015CP4001449

CERTIFICATE OF SERVICE

RICHLAND COUNTY
 FILED
 2015 APR 17 PM 2:01
 JEANNETTE M. MCBRIDE
 C.C.P. CLERK

This is to certify that I, Chelise K. Hardy, have this day served the foregoing Answer to Complaint, in connection with the above-captioned case, by placing said document in the United States mail with proper postage affixed thereto, upon the following person(s) at the following address(es):

J. Charles Ormond, Jr.
 Attorney at Law
 Holler, Garner, Corbett, Ormond, Plante & Dunn
 1777 Bull Street
 Columbia, S.C. 28201


 Chelise K. Hardy
 Legal Assistant to Nathaniel Roberson, Esq.

Columbia, South Carolina
April 17, 2015

STATE OF SOUTH CAROLINA)
)
 COUNTY OF RICHLAND)
)
 Thomas Jackson, Christopher Mitchell,)
)
 Plaintiff/s,)
)
 vs.)
)
 Joe Henry, Esq. Law Firm of Joe Henry)
)
 Defendant/s)
)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

Civil Action No.: 15 CP 40 1449

**REPLY
 (JURY TRIAL DEMANDED)**

JEANNE E. MOSENFELDER
 C. 209.8 & G.S.
 2015 APR 21 AM 11:46
 RICHLAND COUNTY
 FILED

Plaintiff, by and through THEIR undersigned attorney, RESPONDS to Defendants' Counterclaim/s and avers as follows:

1. Plaintiff need not respond to paragraphs one through seventeen of Defendant's Answer to Plaintiff's Complaint) as such are responses to Plaintiff's allegations.
2. Plaintiff need not respond to the affirmative defenses set forth by Defendant, items or paragraphs one through nineteen.

AS TO COUNTERCLAIMS SET FORTH BY DEFENDANT

GENERAL DENIAL:

1. Plaintiff, hereby denies each and every allegation of the Defendant's Complaint/Counterclaim and any allegation of fact or law not herein admitted, is/are denied.
2. Plaintiff denies the allegations of paragraph 19 and such allegations do not constitute a Counterclaim or cause of action.
3. Plaintiff denies the allegations of paragraph 21.

PLAINTIFF'S FIRST DEFENSE:

4. Defendant's counterclaims fails to state a cause of action.

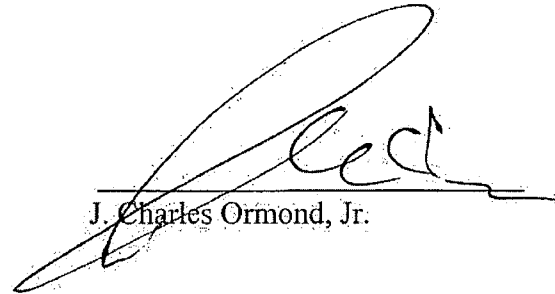
WHEREFORE, Plaintiff prays that this Court:

- A. Dismiss Defendant's Counterclaim against Plaintiffs in this action and award Plaintiffs the costs incurred in defending this action and judgment for Plaintiffs in their complaint.
- B. Award such other remedies as may be just and proper.

April 21, 2015

Attorney for Plaintiff

Holler Garner Corbett Ormond Plante & Dunn
1777 Bull Street
Columbia, SC 29201
(803) 765-2968 (933-9000)
Facsimile 803-252-8290



J. Charles Ormond, Jr.

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Christopher Mitchell
 Plaintiff

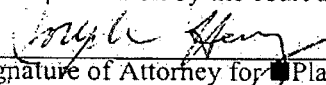
v.

South Carolina Budget and Control Board, Tim Martin,
individually and in his official capacity, and Dan Marlow,
individually and in his official capacity
 Defendants

IN THE COURT OF COMMON PLEAS

CASE NO. 2007-CP-40-2706

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

Plaintiff's Attorney: Joseph Henry, Bar No. _____ Address: Joseph Henry, P.C., Attorney at Law 1708-B Richland Street Columbia, SC 29201 phone: (803) 929-3484/ fax: (803) 929-3485 e-mail:	Defendant's Attorney: Vance J. Bettis, Bar No. 689 Address: Gignilliat, Savitz & Bettis, LLP 900 Elmwood Avenue, Suite 100 Columbia, SC 29201 phone: (803) 799-9311/ fax: (803) 254-6951 e-mail: vbettis@gsblaw.net
<input type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and II) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input checked="" type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: _____ Estimated Time Needed: _____ Court Reporter Needed: <input type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input checked="" type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order: <div style="display: flex; justify-content: space-between;"><div>Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendants </div><div>Date submitted 3/10/08</div></div>	
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: (check reason) <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other:	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE: _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: <u> mth </u>	Date Filed: <u> 3/10 </u>
<input type="checkbox"/> MOTION FEE COLLECTED <input checked="" type="checkbox"/> <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____	

BARBARA A. SCOTT
C.C. & G.S.
2008 MAR 10 PM 3:28
RICHLAND COUNTY

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

Thomas Jackson,)
)
Plaintiff,)

C.A. No. 2007-CP-40-2708

v.)

**AGREEMENT STRIKING
CASE FROM DOCKET
[Rule 40(j), S.C.R.C.P.]**

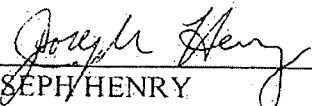
South Carolina Budget and Control Board,)
Tim Martin, individually and in his official)
capacity, and Dan Marlow, individually and in)
his official capacity,)

Defendants.)

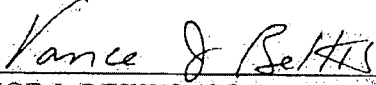
2008 MAR 10 PM 3:26
BARBARA A. STOTT
C.C.C. & G.S.
RICHLAND COUNTY
FILED

Pursuant to Rule 40(j), S.C.R.C.P., Plaintiff, with the consent of Defendants, hereby strikes his complaint from the docket. The parties agree that if the case is restored upon motion made within one (1) year of the date this case is stricken from the docket, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken. The 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.

SO AGREED:



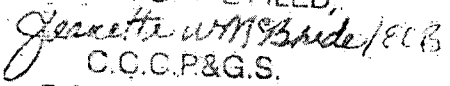
JOSEPH HENRY
JOSEPH HENRY, P.C., ATTORNEY AT LAW
1708-B Richland Street
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SOUTH CAROLINA

I N D E X

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-- NO EXHIBITS ENTERED --

1 THE COURT: All right. This is the case of 15-CP-40-
2 1449, the case of *Jackson vs. Henry*. We were on the trial
3 roster for this week. It looks like we have some issues
4 with regard to beginning a jury trial this week, but there
5 was a matter of a pre-trial motion that needed to be
6 disposed of. And the parties agreed to hear the pre-trial
7 motion this afternoon, and I appreciate their willingness
8 to do that.

9 In the Defendant's answer, he alleged that the
10 Plaintiff failed to state a cause of action pursuant to a
11 Rule 12(b)(6). And I will hear from the Defendant on that
12 motion, sir.

13 MR. ROBERSON: If Your Honor, please. Your Honor, I'm
14 sharing with Mr. Osmond [sic] -- it's the 40(j) dismissal,
15 and I'm also sharing with the Court dismissal of the
16 underlying cause of action that gives rise to the lawsuit.

17 Mr. Henry was representing these two gentlemen who
18 were employees of state government. They were -- they had
19 specific job descriptions that they performed. Their
20 supervisors would sometime call them after hours or give
21 them a cell phone just in case some things went awry that
22 they needed checked on. They would call these people, and
23 it would be their responsibility to go out there and check
24 on it, I guess, calling the appropriate person to take care
25 of those things.

1 There were no physical injuries involved in the case,
2 but it was brought more in the nature of correcting the
3 supervisory authority to get them to do things beyond their
4 job descriptions that might somehow cross over into other
5 areas that would be troublesome for them personally and for
6 the State.

7 But they went through this entire process, Your Honor,
8 and eventually the Plaintiffs agreed to dismiss under
9 40(j). And I believe I handed the Court a certified copy
10 of the 40(j) motions.

11 The 40(j) was filed March 10, 2008. In order for it
12 to be revived, they would have had to file -- pay the fees
13 to reinstate it no later than March 10, 2009.

14 THE COURT: But isn't that exactly what the Plaintiff
15 is arguing about here, that -- that Mr. Henry entered into
16 this 40(j) agreement without the Plaintiff -- according to
17 the complaint, if I were to believe the facts of the
18 complaint, which I must do on a motion to dismiss, that
19 yes, this 40(j) was entered into and it was without the
20 Plaintiff's knowledge. And next thing he knew he was
21 talking to Mr. Henry about the case, was never told that
22 the one year had elapsed since the time of the 40(j), and
23 he only learned through court personnel much later that his
24 case, in fact, no longer existed.

25 MR. ROBERSON: In Mr. Henry's contract with them, they

1 would be required to pay all costs and fees. They never
2 paid a dime to have this action reinstated.

3 THE COURT: Okay. And so now we're getting beyond the
4 pleadings ---

5 MR. ROBERSON: Okay ---

6 THE COURT: So ---

7 MR. ROBERSON: Okay. All right. Well, Your Honor,
8 but accepting that, the -- it still had to be filed by
9 March 10, 2009, alleging that Mr. Henry failed to act and
10 was negligent in so doing, which is the basis for the
11 lawsuit. And -- and my motion along that line is, Your
12 Honor, if you accept that, they're bringing an action
13 against him for professional negligence under Statute 15-
14 36-100.

15 THE COURT: They needed to have an expert affidavit or
16 it needed to be within the common knowledge of jurors.

17 MR. ROBERSON: And ---

18 THE COURT: And the allege that it's in the common
19 knowledge.

20 MR. ROBERSON: Our argument is that the statute
21 specifically says "attorneys at law." For common
22 knowledge, it's something that you may want to argue
23 otherwise and it has a criteria for common knowledge.

24 But the statute requires that there be an affidavit if
25 an attorney at law is the person who's alleged to have ---

1 THE COURT: Okay. And that's 15-36-100. And where
2 are you reading from?

3 MR. ROBERSON: 15-36-100, from Section -- Section G.
4 It has ---

5 THE COURT: Okay. Sure. And it lists the -- the --
6 the professionals to whom this statute would apply to.

7 MR. ROBERSON: Yes..

8 THE COURT: But going up to subsection C that requires
9 that there be a -- an expert affidavit filed
10 contemporaneously with the lawsuit, if you look at
11 subsection 2, there is a -- there is an exception and that
12 is (as read): "When the subject matter of the lawsuit lies
13 within the ambit of common knowledge and experience, so
14 that no special learning is needed -- needed to evaluate
15 the conduct of the defendant." And that would apply to any
16 of the professionals listed in subsection G.

17 And in the complaint, that is what the Plaintiff
18 alleges. The Plaintiff acknowledges that this is a
19 professional negligence cause of action, but specifically
20 alleges that it's within the common knowledge.

21 MR. ROBERSON: But there has to be someone who signs
22 an affidavit saying that this is within the common
23 knowledge or it has to comply strictly with the statute.
24 None of that has been filed with the summons and complaint
25 in this matter.

1 THE COURT: Okay.

2 MR. ROBERSON: And it is deficient.

3 THE COURT: All right. And I don't see where the
4 statute requires that there be an expert affidavit to say
5 there doesn't need to be an expert affidavit.

6 MR. ROBERSON: Well, Your Honor, if -- if it didn't
7 intend for there to be a professional affidavit, if you
8 allege pro -- professional negligence against certain
9 professions, they would not have specifically spelled it
10 out. It would -- everything would be just within common
11 knowledge.

12 They want -- the statute require [sic] that if you
13 allege professional negligence on the part of these
14 particular professions, it overrides the common knowledge;
15 otherwise, the general assembly will say "but for."

16 THE COURT: Well -- okay. I -- I see what you're
17 arguing. And we've got a case, though, and that's *Brewer*
18 *vs. Sisters of Charity Providence Hospitals*. And Judge Lee
19 dismissed a case against medical personnel for that very
20 reason because there was not an expert affidavit and relied
21 on the statute.

22 And Justice Beattie issued an opinion that reversed
23 Judge -- Judge Lee and explained that, in that particular
24 case, it involved a patient that was allergic to latex and
25 the medical personnel used latex gloves. And Justice

1 Beattie said using latex on a person for whom you know has
2 a latex allergy, you don't need an expert affidavit to say
3 that wasn't the right thing to do.

4 There is an exception in this statute that is -- that
5 even though there's no expert affidavit, so long as the
6 subject matter lies within the ambit of common knowledge.

7 And that would be -- I'm sure there may be more
8 examples, but that's the example I know of from a Supreme
9 Court opinion saying that something that was a professional
10 negligence action doesn't need an expert affidavit, so long
11 as it's in the common knowledge of the -- of the -- of a
12 typical juror.

13 MR. ROBERSON: Your Honor, typical juror, there's -- I
14 hate to say it, but there's some lawyers who really don't
15 understand the full ambit of negligence actions as it
16 relates to certain causes of actions. So therefore, if
17 some lawyers don't know, you certainly don't expect the
18 jurors to know who only have just common knowledge.

19 THE COURT: So your argument is the subject matter of
20 this particular complaint is not within the common
21 knowledge. Even though they say it is, that the ins and
22 outs of a 40(j) in restoring a case, that's not -- that --
23 that might be something I know my law clerk knows, you
24 know, but we're -- we happen to be trained in the law,
25 jurors wouldn't know that.

1 MR. ROBERSON: A -- a juror walks in here, who gets up
2 and goes to work at eight o'clock, come home at five, slops
3 his hog, washes his car, fusses at his neighbors, doesn't
4 know anything about a 40(j) has to be filed within one
5 year. He doesn't even know what a 40(j) is.

6 THE COURT: Uh-huh.

7 MR. ROBERSON: I mean, Your Honor, if you're suing an
8 attorney at law, there are certain quantum knowledges [sic]
9 of skills and talents an attorney has to have. I believe
10 that the General Assembly would allow for those persons who
11 are deficient in doing those things be punished.

12 That is why if -- if common knowledge wasn't a
13 requirement for these professionals, which require some
14 special skills, talents, and knowledge and experiences, the
15 General Assembly would not have spelled them out.

16 Not if -- if -- if -- if a nurse is providing ---

17 THE COURT: But we can disagree that there is an
18 exception for common knowledge. That is -- there is an
19 exception for common knowledge.

20 MR. ROBERSON: Okay.

21 THE COURT: But what I think you are arguing is that,
22 in this particular case, what is alleged is not common
23 knowledge.

24 MR. ROBERSON: It is not common knowledge.

25 THE COURT: Okay.

1 MR. ROBERSON: Beg -- beg the Court's indulgence for a
2 minute, Your Honor?

3 THE COURT: Sure.

4 (Mr. Roberson confers with the defendant.)

5 MR. ROBERSON: Your Honor, I was just listening at my
6 client.

7 THE COURT: Go ahead.

8 MR. ROBERSON: And -- and to try and answer some of
9 what Judge Beattie may well have been saying, a nurse
10 looking at these medical records, could have seen that this
11 patient was allergic to whatever substance it was ---

12 THE COURT: Latex in that --

13 MR. ROBERSON: Latex.

14 THE COURT: Yes.

15 MR. ROBERSON: And she looked at the box and see latex
16 gloves, allergic to latex. You can take common knowledge
17 and say, yeah. You don't need to be a nurse to say I can't
18 use this.

19 THE COURT: And that's what Judge Beattie ---

20 MR. ROBERSON: Those underlying skills and talents
21 that's required of lawyers is not within the common
22 knowledge of people. I believe that they specifically
23 wanted -- people who [sic] bringing out allegations of
24 negligence against these particular professions require a
25 person with knowledge and skill to give an affidavit in

1 order for them to be a jurisdictional matter that the case
2 shouldn't be heard. And I definitely want it dismissed
3 because this failed to state a cause of action.

4 THE COURT: Okay. Thank you. Mr. Ormond, I'll hear
5 from you.

6 MR. ROBERSON: Your Honor, and additionally --

7 THE COURT: Oh. I'm sorry, Mr. Roberson.

8 MR. ROBERSON: -- the action at the end of the year,
9 it would have been March 10, 2009, which means the three
10 year statute of limitation would have run March 11, 2012.

11 This action was brought -- it was filed April 10,
12 2015.

13 THE COURT: Okay.

14 MR. ROBERSON: So it's two years beyond the three year
15 statute of limitation on negligence actions.

16 THE COURT: And where did you raise that in your
17 motion ---

18 MR. ROBERSON: That's why ---

19 THE COURT: --- the statute of limitations?

20 MR. ROBERSON: That's the stated cause of action.

21 THE COURT: All right.

22 THE COURT REPORTER: I'm sorry?

23 MR. ROBERSON: I said that's stated -- stated a cause
24 of action. The statute of limitations is jurisdiction,
25 Your Honor. They can always be raised.

1 THE COURT: So you don't think that's an argument that
2 can be waived?

3 MR. ROBERSON: All my readings about statute of
4 limitations, Your Honor, is jurisdictional. It can be
5 overlooked, but you -- you can always raise it because if
6 the Court doesn't have jurisdiction to decide an issue and
7 it's beyond the statute of limitation, then you can raise
8 it somewhere beyond what would technically be the statute;
9 and if the Court didn't have jurisdiction, whatever ruling
10 it come [sic] down with is unlawful.

11 THE COURT: All right. Thank you.

12 MR. ROBERSON: Uh-huh.

13 THE COURT: Sir, I'll hear from you in reply.

14 MR. ORMOND: Thank you, Your Honor. From my mind it's
15 a pretty simple case. In May of 2007 -- well, actually
16 prior to that, Mr. Henry was hired by my two clients. A
17 lawsuit was filed, an answer was filed. There was very
18 limited discovery taken, none on the side of the
19 Plaintiffs. They agreed to a 40(j).

20 A jury, and anybody who can read, can read what the
21 40(j) says. And it is -- it says what the rule says. Not
22 only do we have the rule, we also have the order itself and
23 that is (as read): "The parties further agree that if no
24 motion to restore the case is made within one year after
25 the date the agreement is filed, the agreement shall

1 operate as a dismissal."

2 Mr. Henry signed it. I understand there's a dispute
3 between the parties as to whether or not the Plaintiffs
4 ever knew that there was a quote, unquote "40(j)." I
5 understand Mr. Henry -- there's been one deposition in this
6 case and that has been of Mr. Henry -- that Mr. Henry
7 believes and recalls that he talked to them about this in
8 March 10, 2008, or thereabouts; and they gave their
9 permission to enter into the 40(j).

10 My clients do not recall that. They believe that
11 didn't happen, never heard of 40(j) until they found it in
12 the courthouse. Actually, one of the clients found it in
13 the courthouse and reported it to the other.

14 A mediation occurred on February 27, 2009, which is,
15 in essence, 10 days, maybe 11, before the -- the case
16 needed to be restored. The Plaintiffs were offered some
17 money, but they were -- they didn't accept it. They say --
18 I understand there's a dispute there also -- that they were
19 told that it wasn't acceptable, it wasn't something they
20 should take.

21 MR. ROBERSON: Your Honor, I believe he's ---

22 MR. ORMOND: They ---

23 MR. ROBERSON: --- getting a little bit beyond ---

24 THE COURT: That's in the -- that's in the complaint.

25 MR. ROBERSON: Okay.

1 THE COURT: Go ahead.

2 MR. ORMOND: March 10th came and went. They had no
3 idea there was a deadline. I have a letter in the file, I
4 agree that would be not appropriate, but it's -- wasn't
5 written by Mr. Henry way after March 10, 2009, which is the
6 date of the actual dismissal. And my clients tell me that
7 they were told for years, two, three years, that this case
8 was going forward still ---

9 THE COURT: Okay.

10 MR. ORMOND: --- they --- they ---

11 THE COURT: Well, let's -- let's kind of stick to the
12 motion to dismiss --

13 MR. ORMOND: Well, that's ---

14 THE COURT: And -- and there are two things that I
15 think Mr. Roberson raised. Number 1, he's arguing that the
16 failure to have an expert affidavit requires me to dismiss
17 this case because, despite your claim in the complaint this
18 is within the jurors' common knowledge, that this is not
19 something that folks without a law degree would -- would
20 know about; and therefore, you needed to have an expert
21 file an affidavit.

22 And then No. 2, they -- he seems to be arguing that
23 you missed the statute of limitations.

24 MR. ORMOND: Right. And -- and -- and that last
25 little diatribe was about the statute of limitations.

1 Obviously, there's a discovery rule associated with the
2 statute of limitations, and my clients state that they were
3 not told that the case was dismissed for two to three years
4 after. That's when they learned and they learned it from
5 court personnel. That is when they knew it, that is when
6 they discovered the negligence.

7 THE COURT: Well, and there's - has there ever, from
8 your perspective, been an argument that the statute of
9 limitations has been missed? From my reading of the
10 complaint ---

11 MR. ORMOND: Your Honor ---

12 THE COURT: --- there's a 12(b)(6) motion, but that's
13 why sometimes we get into facts beyond the complaint with
14 regard to the statute of limitations because we do have a
15 discovery rule.

16 MR. ORMOND: I believe statute of limitations would
17 need to be raised as an affirmative defense and it was not.

18 In addition to that, there's a discovery rule that was
19 clearly a private, both contract and negligent. And it
20 would be a fact question as to when the Plaintiffs
21 discovered the negligence in this case. And that's why I
22 indicated to the Court what -- what ---

23 THE COURT: What those facts were.

24 MR. ORMOND: And -- and -- and those facts were within
25 the complaint.

1] The issue about whether or not this professional
2 negligence action, the issue involved, goes beyond common
3 knowledge, all a juror would be able to do -- would need to
4 be able to do would to be able to read, to read the order
5 that Joe Henry signed and understand.

6 As a matter of fact, it's admitted in the complaint
7 that the -- that the case was not restored, and therefore,
8 it was dismissed; therefore, the clients lost the ability
9 to bring this action 10 days after they had been given
10 offers to settle.

11 I understand there's a factual dispute as to whether
12 or not they were told they needed to pay to have it
13 restored. My clients suggest otherwise. But that is a
14 dispute that would be -- that would require a factual
15 determination by a jury.

16 THE COURT: So it's a dispute of fact as to whether or
17 not your clients even knew whether this 40(j) was entered
18 into ---

19 MR. ORMOND: Yes.

20 THE COURT: --- to begin with? Okay.

21 MR. ORMOND: But we have the 40(j) as part as the
22 Court record. I know this is a 12(b)(6), he's already
23 handed this up, but it would probably take -- the Court can
24 take judicial notice of the 40(JUROR:).

25 But the 40(j) doesn't need to be explained. It's ---

1 it's a written order, a written agreement that Joe Henry
2 signed and Mr. Best, the other lawyer, the lawyer on the
3 other side signed, stating specifically that if you don't
4 bring it back in a year, i.e. March 10, 2009, one year
5 after the date of the entry of this order, then the case is
6 dismissed. There's -- a jury would simply need to be able
7 to read that to understand that that was not done.

8 And it's the same thing as missing a statute of
9 limitations and that's been held -- I didn't bring the case
10 -- to certainly be within the ambit of common knowledge.
11 If a statute of limitations is three years for a wreck case
12 or something like that and the lawyer misses it, that's not
13 something a lawyer -- an expert lawyer needs to say that
14 falls below the standard of care.

15 THE COURT: Here's - here's my trouble with the common
16 knowledge: If you look at paragraph 13 of your complaint,
17 it says (as read): "Defendants had a duty of care to
18 prosecute Plaintiff's case in a proficient and careful
19 manner, in addition to an affirmative duty to protect the
20 Plaintiff's common law and statutory rights after the
21 filing of a 40(j) motion."

22 Now, that seems a heck of a lot more complicated when
23 I'm picturing trying to explain to my parents about a case.
24 If I have to explain that cause of action against an
25 attorney, that's a lot more complicated than explaining the

1 facts of the case in -- in *Brewer* where you say medical
2 personnel used latex when they knew that the patient was
3 allergic to latex. That's straightforward. I wouldn't
4 even need to go further than that.

5 I don't think that if I were to read paragraph 13,
6 which is the crux of your complaint against the Defendant,
7 that people know what an affirmative duty is, what common
8 law and statutory rights after filing a 40(j) motion.
9 Heck, I'm not sure how many new attorneys would quite
10 understand the ins and outs of that.

11 MR. ORMOND: Well, I would disagree with -- I mean, a
12 40(j) is simply the removal of the case from the roster.
13 In this case, the facts are -- at least on our side of the
14 equation -- they didn't even know it was -- it was
15 dismissed or ---

16 THE COURT: But that's ---

17 MR. ORMOND: --- removed.

18 THE COURT: But that -- it doesn't seem to me like
19 that's your allegation against him, that he dismissed the
20 case without their knowledge. That's not one of your
21 allegations. It's that after having entered into a 40(j)
22 motion, he never restored the case, which to me is more
23 complicated.

24 MR. ORMOND: Well, Your Honor, I don't think -- here's
25 my -- my take ---

1 THE COURT: Sure.

2 MR. ORMOND: --- on that. I don't know whether a
3 lawyer would need to tell his client that they have done a
4 40(j), probably should. But if you're taking somebody's
5 case -- it really is pretty simple. If you're taking
6 somebody's case and you've filed a complaint and you've
7 told your clients, "We filed this complaint," and then --
8 and then it's dismissed for whatever reason, either missing
9 the statute of limitations or failing to re-file a 40(j).

10 It -- it is extremely simple. They thought they had a
11 case and then they didn't have a case. And it really isn't
12 anything -- it has nothing to do with proficiency at trial
13 or whether or not, you know, certain evidence should have
14 been admitted. Of course, that would require an expert.
15 But 40(j)s are entered all the time. And maybe -- whether
16 or not entering into a 40(j) without client's knowledge is
17 right or wrong, I -- I don't know. But if you're not going
18 to restore it and you're not going to tell them they need
19 to restore or it needs to be restored or simply do it after
20 they've had offers on the table, that's per -- be honest,
21 the simplest case I've ever had.

22 THE COURT: Sure.

23 MR. ORMOND: So I don't think an -- and "duty of care
24 to prosecute" may be the terms were a little bit legalese,
25 but essentially, to continue to represent under their

1 agreement in a proficient and careful manner, essentially,
2 you need to keep the case alive.

3 To me, the latex issue would be much more complicate -
4 - complicated than, you know, you signed an agreement
5 saying okay, we'll -- we'll take this off the roster for a
6 year; and then don't even tell the clients that it's --
7 it's gone for three years.

8 That's why I'm in this. I mean, it's obviously not a
9 big case, but that's -- it's not appropriate. I think that
10 by -- that -- it may fall below the standard of care as a
11 matter of law.

12 They've admitted they didn't restore it, and they said
13 the reason why we didn't is because they didn't pay for it.
14 I'm not sure that matters even if that was true. I think
15 the answer possibly files as a matter of law. It's
16 negligent. What the -- what the damages are might be an
17 issue, but you -- you can't take a case off the roster --
18 certainly a client can't say, "Well, you know, gee, I
19 wonder what's going on? Let me go see if I need to restore
20 a 40(j) motion or to re-file the case."

21 It says what it says. The -- the agreement is -- the
22 40(j) is clearly the most important document in the case.
23 It wasn't part of the complaint. I didn't add it, but
24 essentially a jury needs to determine whether or not it was
25 restored. And there's no issue about what professional

1 reasonably of not restoring it was. They -- he didn't.

2 THE COURT: I -- and -- and again, with a motion to
3 dismiss, I'm going to give you all of the facts that you
4 allege as though they're true. So obviously if what you
5 allege is true, then I do think there is a cause of action
6 in that respect.

7 However, what I'm having trouble with is the issue of
8 whether or not an expert affidavit is necessary. Because
9 if everything that you allege is true, seems like almost a
10 part of your allegation is that your clients could have no
11 idea what was going on because they put their faith in a
12 professional who was supposed to understand what a 40(j)
13 was, was supposed to understand when to restore the case,
14 and he didn't do that; and they were none the wiser because
15 they are not lawyers.

16 And then we're sort of in this Catch 22 for you if you
17 don't have an expert affidavit because isn't that what
18 makes it not common knowledge?

19 MR. ORMOND: It would be -- it would be no different
20 than missing a statute of limitations. And the statute of
21 limitations may not be common knowledge, but it will become
22 common knowledge to a fact finder once the judge tells them
23 it's common knowledge.

24 This is a 40(j) motion. That's in the rules, number
25 one, even if the motion itself didn't say what -- what

1 happens if you don't restore it. No -- no necessity to
2 understand what we're restoring. That's what a
3 professional expert, a lawyer would have to come up and say
4 that -- this is what he would say ---

5 THE COURT: But do -- do -- does a jury know that a
6 lawyer has that duty, after the case is dismissed, to
7 continue -- they filed an action. They 40(j)'d it. We,
8 because of our knowledge of ethical rules about zealously
9 protecting our clients, et cetera, know what should happen
10 next.

11 But why on earth would that be in the common knowledge
12 of the jurors? For all they know, lawyers at that point
13 are out of it or not out of it or -- and -- and at that
14 point, you're proving your case; but -- but I still don't --
15 -- I'm -- I'm still having a lot of trouble seeing how
16 that's part of someone's common knowledge.

17 MR. ORMOND: I don't see how it's any different than
18 missing a statute of limitations. A client may not know
19 what the statute of limitations is or know how long it is.
20 Neither might a juror, but what it is is a matter of law.

21 In this case, what it is is a matter of not only an
22 order signed by the specific attorney involved, but it's
23 also a matter of the South Carolina Rules of Civil
24 Procedure.

25 THE COURT: Uh-huh.

1 MR. ORMOND: They may not know it now, but they don't
2 need a lawyer to tell them because it's a matter of law.
3 The judge will tell them this.

4 Or I this -- this particular -- in this case, rather
5 than a statute of limitations being missed, this would be a
6 piece of evidence in the -- in the case, and if they -- and
7 it's also judicial -- probably judicially recognized is a
8 matter of court record in the court below.

9 All a -- all an expert witness could do, all an
10 attorney would say is yes, you can't dismiss a case without
11 your client's knowledge or even with the client's
12 knowledge, it doesn't really matter, and not restore it.
13 You're losing your ability to go forward. You're -- it's
14 no different than missing the statute of limitations.

15 And if the limitations had continued, he could have --
16 if -- if they -- if the 40(j) didn't miss the two year, in
17 this case, statute of limitations to where they could have
18 re-brought the case. There wouldn't have been any damages,
19 but that's not the case here. It was after that.

20 To me, it's -- it's -- maybe it's because I'm a
21 lawyer, but I don't think an expert explaining that if you
22 sign something as a lawyer that says you're going to do
23 something that you need to do it. And if you're not going
24 to do it ---

25 THE COURT: Well, but that's not what your lawsuit

1 alleges. And that's a little bit -- that -- so I would
2 agree that if your lawsuit was that Mr. Henry signed this
3 without your client's knowledge -- I asked you that
4 question because that wasn't clear from the lawsuit. You
5 just said "upon information and belief, the -- the case was
6 removed from the roster pursuant to Rule 40(j)," not that
7 that happened and the client had no knowledge of that. So
8 ---

9 MR. ORMOND: That's true. That's not in the
10 complaint. That's -- it's not ---

11 THE COURT: So the question then becomes, okay, there
12 was a 40(j) entered, why, the reasons behind it, that --
13 none of that is really in your -- in your complaint for me
14 to say okay, I'm going to believe the facts as you say
15 them. That piece of it isn't about the common knowledge of
16 the jury.

17 So I do think if a lawyer agrees to dismiss a case
18 without consulting a client, that most likely would be in
19 the common knowledge. But now, we've got this additional
20 wrinkle where that's not what you're arguing about. It's
21 the question of whether the lawyer has a duty to restore a
22 case after an agreement to dismiss has been entered into.

23 And to me, that is not something jurors talk about at
24 the water cooler. That's not -- there would be a lot of
25 things that -- that are foreign to a jury in talking about.

1 that. And I do think it's difficult for us to parse out.
2 because we all are legally trained and so that does make it
3 difficult.

4 And I under -- I think I understand your position and
5 I'll let you argue more, but I don't want to belabor ---

6 MR. ORMOND: Well, I ---

7 THE COURT: --- the point ---

8 MR. ORMOND: --- guess I know where you're going ---

9 THE COURT: --- but I think we both are arguing and
10 under -- understand.

11 MR. ORMOND: You know, these -- these facts were, you
12 know, done when the claims came to the office.

13 THE COURT: Sure.

14 MR. ORMOND: Certainly facts have been developed
15 later. It turns out, although -- it turns out that -- and
16 I would ask at least you allow me to amend in light of
17 this situation.

18 It does turn out that, in fact, the clients do say
19 they weren't ever told about -- never heard of 40(j) until
20 they found it in the courtroom, which was four years later
21 or whenever it was. At least allow -- allow me that.

22 And then secondly, to me -- and again, I understand
23 Your Honor. Entering into a 40(j) without your client's
24 decision doesn't end the case.

25 THE COURT: Uh-huh.

1 MR. ORMOND: It just gives you a year to restore it.
2 I don't think you've done anything necessarily wrong, or
3 certainly not that wrong, even if you don't tell your
4 clients about it. It's a way to extend the case without
5 coming up on the roster. It's done all the time. The
6 issue is ---

7 THE COURT: Well, you haven't done anything
8 irretrievably wrong on behalf of your clients, at least,
9 because you -- they still have this opportunity to have
10 their case heard.

11 And you're -- what you're saying is there were two
12 points at which things happened. Maybe when he entered
13 into the 40(j), that was okay even without the client's
14 knowledge; but when he then didn't restore it and spoke to
15 the clients, according to you, if I'm to believe the
16 complaint, about the case as though it was still ongoing
17 when it had been dead.

18 MR. ORMOND: I think the only issue -- after it's
19 dismissed, the only issue about -- the -- the discussions
20 of the case afterwards, after it's dismissed, is if there
21 was any action to take, it wasn't taken after the actual
22 dismissal. And number two, for the statute of limitations
23 issue.

24 Obviously, if a client comes into me and something
25 happened in 2010 and it's already 2013 or '14, then I have

1 to ask what happened. And in this case, that is -- that
2 was really the first thing he said.

3 THE COURT: Sure.

4 MR. ORMOND: I understand that's off -- off the topic,
5 but it seems -- whether or not entering into a 40(j)
6 without your client's permission to me would be more
7 complex. If that caused any damages in -- in -- in timing,
8 for example, that seems to be the only thing it would cause
9 --

10 THE COURT: Uh-huh.

11 MR. ORMOND: -- assuming you don't restore it. If you
12 don't restore it, then it is certainly a -- a difficult
13 issue if the clients never knew that it was placed. I
14 mean, I suppose if they did, they could have said, "Hey,
15 you know, didn't you say that it was about a year and we
16 needed to do this?"

17 THE COURT: Okay.

18 MR. ORMOND: So to me, it's -- again, it could be
19 because I'm a lawyer. I'm not suggesting that I'm not
20 wrong. But to me, this was the simplest case I've ever
21 gotten as far as you've written something, you said it will
22 be restored in a year or it's dismissed. Essentially, a --
23 a -- a lawyer, either erroneously or -- or it maybe from
24 the answer intentionally, simply didn't re-file it without
25 telling his clients and they lose the case. That is

1 nothing different than a statute of limitations issue,
2 which has been held a number of times, at least at the
3 trial level, to not require anything more than common
4 knowledge.

5 THE COURT: Okay. All right. Any response?

6 MR. ROBERSON: Your Honor, the lack of the ability to
7 explain what common knowledge is to people who come sit in
8 this jury box with all of the exchanges we have is
9 indicative of why the General Assembly says in these
10 professional areas, we need an expert affidavit to talk
11 about the standards, the breach of the standards, what they
12 are, what the requirements are, so they won't have to sit
13 there and imagine that this is why we sitting here today.

14 THE COURT: All right. Well, I appreciate your
15 arguments. I have the luxury of being able to think about
16 this without just making a ruling right off my cuff. I
17 will attempt to get an order out to you, if not by
18 tomorrow, by Wednesday. We will -- do we have good email
19 addresses? We'll file it here, but I'd like to email it to
20 you in light of the fact that we would like to start trial
21 on this case on Monday. Can y'all give me an email
22 address?

23 (The law clerk confers with the Court.)

24 THE COURT: Okay. My law clerk just lets me know that
25 she has emailed both of you so she -- she's got your email

1 addresses. I think I've got it.

2 MR. ORMOND: Thank you, Judge.

3 THE COURT: Thank you very much.

4 MR. ROBERSON: You have a good day.

5 THE COURT: Y'all, too.

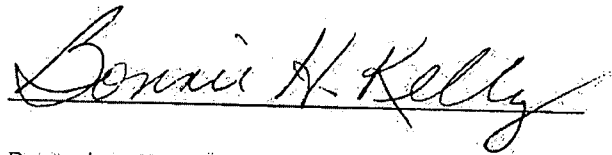
6 MR. ORMOND: Thank you, Your Honor.

7
8 -- END OF TRANSCRIPT RECORD --

CERTIFICATE

I, the undersigned Bonnie H. Kelly, Official Court Reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fifth Circuit Court for Richland County, South Carolina, on the 18th day of April, 2016.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.



Bonnie H. Kelly, CVR

Official Court Reporter

Columbia, South Carolina

August 31, 2016

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Honorable Tanya A. Gee, Circuit Court Judge

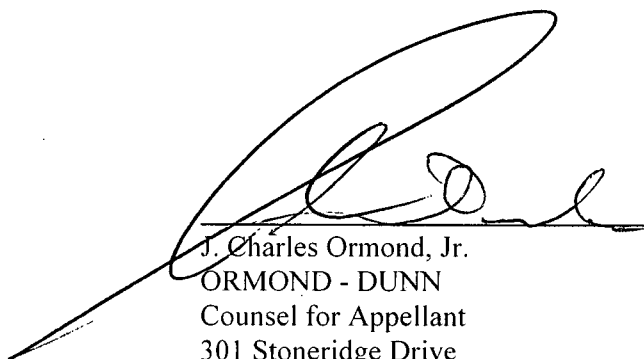
Case No. 2015-CP-40-01449

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JAN 17 2017
SC Court of Appeals

Thomas Jackson, Christopher Mitchell..... Appellants
v.
Joe Henry, Esq., Law Firm of Joe Henry Respondents.

CERTIFICATION

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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Date: January 17, 2017