

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge
Appellate Case No. 2018-000092

RECEIVED

OCT 05 2018

SC Court of Appeals

Stokes-Craven Holding Corp. d/b/a Stokes-Craven Ford Appellant

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Does Rule 3.7 of the South Carolina Rules of Professional Conduct prohibit an attorney who may be a testifying witness at the trial of the case from continuing to represent the client during pretrial proceedings?
2. Does Rule 3.7 of the South Carolina Rules of Professional Conduct prohibit the law firm of an attorney who may be a testifying witness at the trial of the case from continuing to represent the client during pretrial proceedings?
3. Does Rule 3.7 of the South Carolina Rules of Professional Conduct prohibit the law firm of an attorney who may be a testifying witness at the trial of the case from continuing to represent the client during trial?
4. Did the lower court err in ordering Mr. Epting to withdraw as counsel for Appellant five months prior to commencement of any trial?
5. Did the lower court err in ordering Mr. Epting's law firm to withdraw as counsel for Appellant five months prior to commencement of any trial?

STATEMENT OF THE CASE

This legal malpractice case was originally commenced by the filing of a Complaint on August 16, 2010. The malpractice alleged involves the professional conduct of the Respondents Scott L. Robinson and Johnson, McKenzie & Robinson, LLC while representing the Appellant Stokes-Craven's Ford dealership in a 2004 lawsuit alleging Stokes-Craven defrauded one of its customers, Donald Austin, when it sold Mr. Austin a used pickup truck in 2002.

A three day jury trial in 2006 resulted in a verdict for Mr. Austin and against Stokes-Craven in the amount of \$242,971.10 actual and punitive damages. During a lengthy series of appeals, the verdict was affirmed and substantial attorneys fees, costs, and interest were added to the verdict amount.¹

When the Supreme Court affirmed the jury verdict, Andrew K. Epting, Jr. and his law firm were retained to serve as counsel for Stokes-Craven. Mr. Epting made various efforts to resolve the dispute between the dealership and Mr. Austin by, among other things, vouching in the professional liability insurance carrier for Mr. Robinson and Johnson, McKenzie & Robinson, LLC. When the Supreme Court affirmed the award of attorneys fees to Mr. Austin's counsel, Stokes-Craven faced a motion to appoint a receiver to assist Mr. Austin in collecting his final judgment. In late December 2013, Stokes-Craven paid Mr. Austin \$1,060,000.00² and the Ford dealership was sold.

The instant legal malpractice action underwent a statute of limitations challenge which was not resolved until 2016.³ In August 2017, the lower court entered a scheduling order

¹ The facts and procedural history of Mr. Austin's case are detailed in Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 691 S.E.2d 135 (2010)(affirming the verdict in favor of Mr. Austin); and Austin v. Stokes-Craven Holding Corp., 406 S.C. 187, 750 S.E.2d 78 (2013)(affirming an award of attorneys fees to Mr. Austin's counsel).

² See, Stokes-Craven's Objections to Defendants' Proposed Order, Exhibits A and B (R. at pp. 102 and 104)

³ The lower court granted a motion for summary judgment on the statute of limitations, but was subsequently reversed by the South Carolina Supreme Court in Stokes-Craven Holding Corp. v. Robinson, 416 S.C. 517, 787 S.E.2d 485 (2016).

which, among other things, required Stokes-Craven to “name all experts it intends to use as witnesses at trial” on or before October 2, 2017.⁴ The scheduling order also set the case for jury trial “not before” April 30, 2018.

Pursuant to the scheduling order, on October 2, 2017 Stokes-Craven served the Plaintiff’s Expert Disclosure listing Mr. Epting as a witness.⁵ A supplemental disclosure was served on October 16, 2017 providing limited details about the information known to Mr. Epting.⁶ In response to the Plaintiff’s Expert Disclosure, Mr. Robinson and Johnson, McKenzie & Robinson, LLC quickly filed a joint motion asking the lower court to exclude Mr. Epting from serving as an expert witness or, alternatively, to immediately disqualify him from serving as counsel for Stokes-Craven.⁷

The lower court held a series of hearings on this motion, including proceedings transcribed on the record on October 13, 2017, October 19, 2017, and November 2, 2017. The parties submitted a variety of memoranda and evidentiary materials for the lower court to consider. Proposed orders were also submitted, resulting in a series of motions objecting to their contents. These proceedings culminated in the lower court’s November 30, 2017 order ruling that Mr. Epting and his law firm must withdraw as counsel for Stokes-Craven within five days.⁸ This ruling required Mr. Epting and his law firm to cease all representation of Stokes-Craven approximately five months before any trial date.

On December 11, 2017, Stokes-Craven served a Rule 59 motion asking the lower court to reconsider its ruling.⁹ Mr. Robinson and Johnson, McKenzie & Robinson, LLC served a joint

⁴ Scheduling Order Subsequent to Remittitur time-stamped on August 18, 2017 (R. at p. 18).

⁵ Plaintiff’s Expert Disclosure electronically filed on November 3, 2017 (R. at p. 56).

⁶ Plaintiff’s Supplemental Answers to Defendant Johnson, McKenzie & Robinson’s First Set of Interrogatories electronically filed on November 3, 2017 (R. at p. 194).

⁷ Defendants’ Joint Motion to Exclude Expert Witnesses or, in the Alternative, to Disqualify Plaintiff’s Counsel and Compel Discovery electronically filed on October 4, 2017 (R. at p. 48).

⁸ November 30, 2017 Order (R. at pp. 35 - 36).

⁹ Stokes-Craven Holding Corp.’s Motion to Reconsider Pursuant to Rule 59(e), SCRPC (ROA at p. 163 *et seq.*)

response on December 14, 2017.¹⁰ The lower court held a hearing on the motion on December 21, 2017. An order denying the motion was filed on January 12, 2018.¹¹ Stokes-Craven served its notice of appeal from this order on January 17, 2018.

¹⁰ Defendants' Response to Plaintiff's Motion to Reconsider Pursuant to Rule 59(e), SCRCP (R. at p. 191 *et seq.*)

¹¹ Order on Plaintiff's Motion for Reconsideration (R. at p. 37 *et seq.*)

STANDARD OF REVIEW

A trial court's decision to disqualify counsel is generally reviewed for abuse of discretion. Brooks v. S.C. Commission on Indigent Defense, 419 S.C. 319, 797 S.E.2d 402 (Ct. App. 2017). An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence. *Ibid.*

However, if a trial court's decision involves an interpretation of a rule of professional conduct, the issue is one of law and the standard of review is *de novo*. F.D.I.C. v. U.S. Fire Insurance Co., 50 F.3d 1304 (5th Cir. 1995); see also, Brown & Pipkins, LLC v. Service Employees International Union, 846 F.3d 716 (4th Cir. 2017)(interpretation of a rule of procedure is reviewed *de novo*); CFRE, LLC v. Greenville County Assessor, 395 S.C. 67, 716 S.E.2d 877 (2011)(statutory interpretation is reviewed *de novo*).

In a case raising a novel question of law, the appellate court is free to decide the question with no particular deference to the trial court. Hagood v. Sommerville, 362 S.C. 191, 607 S.E.2d 707 (2005). No South Carolina appellate court has specifically addressed the issue of when an attorney must withdraw as counsel due to disqualification under the witness advocate rule.

ARGUMENT

The lower court based its decision to disqualify Mr. Epting and his law firm five months before trial on the “witness advocate rule,” found in Rule 3.7 of the South Carolina Rules of Professional Conduct, Rule 407 SCACR:

RULE 3.7. LAWYER AS WITNESS

- (a) **A lawyer shall not act as advocate at a trial** in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.
- (b) **A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness** unless precluded from doing so by Rule 1.7 [Conflict of Interest: Current Clients] or Rule 1.9 [Duties to Former Clients].

(emphasis added)

The lower court erred in applying Rule 3.7 to disqualify Mr. Epting and his law firm from participating in pretrial proceedings, thereby depriving Stokes-Craven of the counsel it had worked with for almost eight years. The lower court also erred in applying Rule 3.7 to disqualify Mr. Epting’s law firm from representing Stokes-Craven at trial.

1. **There has been no trial from which to be disqualified**

The express language of Rule 3.7 makes clear that it only regulates a lawyer’s conduct “*at a trial*” or “*in a trial*.” The prohibitions set forth in Rule 3.7 simply do not apply to conduct occurring before a trial (e.g., during discovery) or after a trial (e.g., during an appeal). Because the lower court’s order disqualifies Mr. Epting and his firm from representation as much as five months before trial, it exceeds the scope of Rule 3.7’s express terms and constitutes a reversible error of law.

As Comment 2 to Rule 3.7 explains, the witness advocate rule is designed to protect “the trier of fact” from becoming “confused or misled” by the dual role of a lawyer who serves as both witness and advocate at trial. The rule therefore necessarily implies the presence of a

jury during a trial. Comment 3 to Rule 3.7 further explains that the prohibited confusion arises when a lawyer serves as witness and advocate “simultaneously,” thereby again implying the circumstance of a trial.

The South Carolina Bar’s Ethics Advisory Committee has made the following observation about the operation of the witness advocate rule contained in Rule 3.7:

While disqualified as counsel at trial, however, the lawyer may continue to assist in the representation to a limited extent, including participation in pre-trial proceedings, so long as the matter on which the lawyer is to testify is not at issue in the proceeding.

Ethics Advisory Op. No. 90-27.

The accuracy of the Ethics Committee’s observation is evident from the opinion of the South Carolina Court of Appeals in Collins Entertainment, Inc. v. White, 363 S.C. 546, 611 S.E. 2d 262 (Ct. App. 2005), wherein the trial court ruled, apparently “at the start of trial,” that one of the lawyers could not serve as both attorney and witness. The Collins case thus stands for the proposition that implementation of Mr. Epting’s disqualification could appropriately await the very eve of trial.

This is clearly the rule in Georgia, where the Court of Appeals has held that under Rule 3.7, “concerns about possible juror confusion are not relevant to pre-trial proceedings.” Clough v. Richelo, 274 Ga.App. 129, 616 S.E.2d 888 (2005). It is also the rule in North Carolina, where the Court of Appeals has ruled that a lawyer disqualified from being trial counsel under Rule 3.7 may nevertheless continue to represent the client in other capacities. Cunningham v. Sams, 161 N.C.App. 295, 588 S.E.2d 484 (2003). It is also the rule in Florida, where it has been held that “the fact that counsel may be a witness at trial does not disqualify counsel from participating in pretrial proceedings.” Cerillo v. Highley, 797 So.2d 1288, 1289 (Fla. 4th DCA 2001); accord, Lieberman v. Lieberman, 160 So.3d 73 (Fla. 4th DCA 2014).

The great weight of authority is that a lawyer disqualified due to his status as a witness may nevertheless continue to represent his client up until the time of trial. The lower court erred in failing to follow the rule laid down by multiple appellate courts addressing the scope of Rule 3.7’s witness advocate rule.

2. Mr. Epting's role as a rebuttal witness

In the lower court, Mr. Epting framed the issue of his withdrawal as a matter of timing.¹² Conceding that he would not act as both witness and advocate at trial,¹³ Mr. Epting sought leave to continue serving as counsel for Stokes-Craven up until the time of trial.¹⁴ At the hearings, Mr. Epting also sought to make clear that his role as a testifying witness was at all times contingent upon how the proof developed at trial.¹⁵

The Respondents seemed to struggle with the concept of a rebuttal witness whose testimony comes in reply to evidence presented at trial by a party opponent. Their argument on the motion to exclude/disqualify conflated the issue of whether Mr. Epting would be a witness with the determination of when he should withdraw:

We still need this hearing because Mr. Epting now tells us, oh, no, no, no, even though Your Honor's order says that he must name by — he must name all expert witnesses he intends to call at trial . . . Well, now he's going to tell Your Honor, oh, gosh, no. . . . * * * [H]e's still, as of this moment, the lawyer for the plaintiff.¹⁶

Depending upon what is presented to the jury, rebuttal testimony may or may not be necessary or prudent. If at trial the Respondents attack Stokes-Craven's conduct in grappling with Mr. Austin's verdict — in essence, challenging decisions made upon advice of counsel — in what other manner can such an attack be met than by testimony from the lawyer whose advice is implicated? If a lawyer's conduct is placed in issue, who else can explain it?

The underlying case possessed the unusual quality that the harm to Stokes-Craven continued to evolve long after the verdict was rendered. Attorneys fees were imposed in

¹² See, October 16, 2017 letter from Mr. Epting to Judge Nettles (R. at p. 177).

¹³ A Notice of Appearance was entered on the record by Mr. Ransom on October 17, 2017. See, Cleary v. Burlington Industries, Inc., 193 Ga. App. 81, 387 S.E.2d 36 (1989)(court approved conduct of party who retained new attorney and listed its original attorney as one of its witnesses for trial).

¹⁴ Transcript of October 13, 2017 hearing (R. at p. 203, lines 1-8).

¹⁵ Transcript of October 13, 2017 hearing (R. at p. 213, lines 15-17); Stokes-Craven's Objections to Defendants' Proposed Order (R. at p. 72).

¹⁶ Transcript of October 13, 2017 hearing (R. at p. 204, lines 11-18; and R. at p. 213, lines 3-4).

substantial amounts, appeals caused judgment interest to mount, and the final judgment placed the business on the verge of receivership.¹⁷ At each turn during this process, Stokes-Craven sought to both limit the damage and vouch in the Respondents, on the theory that their poor judgment exposed the dealership to the jury's verdict in the first place.

If the Respondents make no effort at trial to argue or prove that decisions taken during this time amounted to a failure of mitigation, then Mr. Epting will not need to testify in reply. If, on the other hand, the Respondents seek to undermine Stokes-Craven's conduct, acting by and through Mr. Epting, then who else besides Mr. Epting can effectively respond?

Importantly, as with all cases, the decision whether to call certain witnesses and present certain evidence is often a "game-day" decision. It may happen, it may not, it all depends on what develops before the jury. Weighing these considerations, Mr. Epting clearly stated his intention to "be a witness" rather than "counsel at trial,"¹⁸ and sought to limit his participation to ensuring "a smooth transition" to new counsel by assisting with the completion of discovery, then stepping aside to await the game-day decision whether to take the witness stand and provide rebuttal testimony if necessary.

When Mr. Epting said that he may or may not testify¹⁹ — preferring not to usurp the game-day decisions of trial counsel — this was taken as suggesting the Respondents would not be permitted to know Mr. Epting's role at trial until he either stood up from counsel table or sat down in the witness stand:

[H]e would continue on I take it as plaintiff's counsel and then at some unknown time a week before trial at the pretrial, during the — in the middle of the case decide to put himself on the stand and another lawyer take it from there.²⁰

* * *

Now Mr. Epting wants it sort of both ways. Well, he doesn't really know if he's an expert. He might be a fact witness, but he's going to hedge his steps on when

¹⁷ Transcript of October 13, 2017 hearing (R. at p. 12, lines 2-24).

¹⁸ See, October 16, 2017 letter from Mr. Epting to Judge Nettles (R. at p. 87).

¹⁹ Transcript of October 13, 2017 hearing (R. at p. 214, lines 3-5).

²⁰ Transcript of October 19, 2017 hearing (R. at pp. 239-240).

he's going to let us know and it may be boom right in the middle of trial at which point we would get a mistrial.²¹

These remarks are an opportunistic distortion of Mr. Epting's intentions. Mr. Epting clearly stated his decision to turn the trial of the case over to new counsel, whom Mr. Epting proposed to assist in completing discovery. Mr. Epting further proposed that other members of his firm would assist new counsel in preparing the case for trial. Mr. Epting never proposed nor sought an opportunity to ambush Respondents by changing his mind at trial.

The case of Orangeburg Sausage Co. v. Cincinnati Insurance Co., 316 S.C. 331, 450 S.E.2d 66 (Ct. App. 1994) involved a similar situation. A party's former lawyer was identified as a potential witness "but only in rebuttal, for the purpose of contradicting words and actions attributed to" the client by the opposing party. The trial court ruled Rule 3.7 did not prohibit the former lawyer from testifying and the South Carolina Court of Appeals affirmed. 316 S.C. at 348, 450 S.E.2d at 75.

The Georgia appellate courts have also recognized that a lawyer is more likely to be allowed to serve as both witness and advocate at trial — a dual role not being sought by Mr. Epting here — when his or her testimony is made in rebuttal. Martin v. State, 298 Ga. 259, 779 S.E.2d 342 (2015).

3. Characterization of Mr. Epting as an "expert" witness

Rule 702, SCRE controls the admissibility of evidence from witnesses who seek to testify as experts:

If scientific, technical, or otherwise specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In professional liability cases, it is common to present expert opinion testimony to establish the standard of care and the defendant's breach of that standard. Mr. Epting was not

²¹ Transcript of October 19, 2017 hearing (R. at p. 246).

identified to serve in this role. Standard of care testimony will instead be provided in this case by Ronald L. Richter, Jr.²²

Unlike a witness who reviews records and deposition testimony in order to provide opinions relative to compliance with professional standards of care, Mr. Epting is instead someone whose education and training as a lawyer, and whose personal participation in handling Mr. Austin's verdict, will enable him to help lay jurors understand how and why Mr. Austin's judgment against Stokes-Craven was resolved as it was.²³ Mr. Epting is uniquely able to testify about this because of his first-hand involvement in the events themselves. Mr. Epting's testimony is intended to be factual rather than opinion in nature, although it may well involve technical or specialized details.²⁴

Time and time again, Mr. Epting informed the lower court that his designation as an "expert" witness was made in this light, in an abundance of caution.²⁵ Mr. Epting explicitly said, "I don't think I would be an expert. I think I would be a fact witness."²⁶ Yet before the lower court, the Respondents simply ignored this nuance, perceiving a greater chance for victory in characterizing Mr. Epting as a "voluntary expert witness" (as opposed to a necessary fact witness). The Respondents sought to up the ante by demanding access to "all of his file materials," contending that because Mr. Epting was now a retained expert who would provide opinion testimony, none of his client file could be protected by any privilege.²⁷

In the Matter of Crews, 389 S.C. 322, 698 S.E.2d 785 (2010) involved an analogous situation in which a lawyer for the Office of Disciplinary Counsel served as an investigator on a

²² Transcript of October 13, 2017 hearing (R. at p. 205, lines 8-9 and 15-16).

²³ See, Stokes-Craven's Objections to Defendants' Proposed Order (R. at p. 182); Transcript of October 13, 2017 hearing (R. at p. 208).

²⁴ See, Transcript of October 19, 2017 hearing (R. at p. 244).

²⁵ Transcript of October 19, 2017 hearing (R. at pp. 233-234; and at pp. 244-245).

²⁶ Transcript of November 2, 2017 hearing (R. at pp. 273-274).

²⁷ See, October 16, 2017 letter from Ms. Wall to Judge Nettles (R. at pp. 89-91); and Defendants' Joint Memorandum in Response to Plaintiff's Objections to Proposed Order and in Support of Updated Proposed Order (R. at p. 81).

grievance filed against a Bar member. The lawyer/investigator was later permitted to testify at a disciplinary hearing despite a Rule 3.7 challenge from the Bar member. Her testimony was characterized as “limited to presentation of facts, documents, and statements by [the Bar member] obtained during the course of the investigation.” Mr. Epting’s testimony is expected to be similarly limited in the instant case.

Despite the Respondent’s efforts to cast him in a misleading light, Mr. Epting is not an expert witness retained by a party specially for the purpose of formulating Rule 702, SCRE opinion testimony.

4. There is no evidence of a contingency agreement for expert services

The lower court’s order expresses concern about allowing expert opinion testimony from a witness whose compensation for that testimony would be contingent upon the outcome of trial. It was in order to seize on this concern that the Respondents were at such pains to characterize Mr. Epting as an “expert” witness before the lower court.

Pointedly, there is no evidence anywhere in the record that Mr. Epting has a prohibited contingency fee expert witness agreement with Stokes-Craven.²⁸ The lower court’s reliance upon a prohibited contingency fee agreement for expert services is therefore error. See, Citizens & Southern National Bank v. Hodnett, 139 Ga. App. 839, 229 S.E.2d 792 (1976) (refusing to disqualify lawyer for having an interest in the outcome of the case).

5. Disqualification of Mr. Epting’s firm

The Respondents’ original written motion did not seek to force withdrawal or disqualification of Mr. Epting’s law firm. Nevertheless, by the time of the November 2, 2017 hearing, the Respondents were pursuing this additional ruling, too. Yet a legal basis for this expanded relief is completely lacking.

Comment 5 to Rule 3.7 explains that the evil the witness advocate rule seeks to avoid is absent whenever “another lawyer in the lawyer’s firm” is the witness at trial. This principle has been applied by the South Carolina courts.

²⁸ Transcript of November 2, 2017 hearing (R. at p. 266).

The federal district court first addressed the issue in Brown v. Daniel, 180 F.R.D. 298 (D.S.C. 1998), wherein Judge Haden explicitly allowed Mr. Aiken to continue serving as trial counsel even though Mr. Collins, the senior partner of Mr. Aiken's law firm, was listed as the first witness who would be called to testify at trial. In so doing, Judge Haden noted that Rule 3.7 rejects a "bright-line rule" prohibiting a law firm from continuing representation when a member of the firm acts as a witness.

In Hagood v. Sommerville, *supra*, the South Carolina Supreme Court observed that "a lawyer may testify as a witness in a case handled by a lawyer from the same firm," remarking that "[T]his is permissible" 362 S.C. at 199, 607 S.E.2d at 711. The South Carolina Supreme Court later applied the witness advocate rule in State v. Inman, 395 S.C. 539, 720 S.E.2d 31 (2011), wherein a criminal defendant sought to call as a witness in a sentencing proceeding the solicitor and members of his staff, in order to elicit evidence of intentional prosecutorial misconduct. The Supreme Court observed, "[E]ven if a prosecutor is called as a witness by the defense, it is not always necessary for a trial judge to recuse the prosecutor or the prosecuting office in its entirety." 395 S.C. at 558, 720 S.E.2d at 42.

The rule is the same in Georgia, McLaughlin v. Payne, 295 Ga. 609, 761 S.E.2d 289 (2014)(disqualification under witness advocate rule is not imputed to other attorneys in the lawyer's office); Cunningham v. Sams, *supra* (finding abuse of discretion in disqualification of law firm); and also in Florida, In Re: Estate of Gory, 570 So.2d 1381 (Fla. 4th DCA 1990)(one lawyer in firm could be called as witness while another acted as advocate).

CONCLUSION

The authorities in South Carolina, Georgia, North Carolina, and Florida all appear to be in uniform agreement that a lawyer who is disqualified from serving as trial counsel under Rule 3.7's witness advocate rule may nevertheless continue to represent his client during pretrial proceedings. These authorities are also in uniform agreement that the disqualification of one lawyer under Rule 3.7 is not imputed to members of the disqualified lawyer's firm.

It was therefore error for the lower court to immediately and completely disqualify Mr. Epting and his firm from all further representation of Stokes-Craven more than five months before trial. The November 30, 2017 order of the lower court should therefore be reversed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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