THE STATE OF SOUTH CAROLINA
In the South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Brooks P. Goldsmith, Circuit Court Judge

Case No. 2019-000953

Joe Henry and Joe Henry Law Firm....., ... Appellants.

V.

Thomas Jackson and Christopher Mitchell,. . . . . Respondents.

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This matter is a legal malpractice case alleging that the attorney entered into a SCRP 40(j) Motion and Consent Agreement and did not restore the case pursuant to the Rule of Procedure and Consent Agreement ending Plaintiffs' case. The Plaintiffs/Respondents were clients of Appellants/Defendants in a civil action involving employment safety issues. After initiating the underlying litigation and guiding Plaintiffs/Respondents through the administrative review process with OSHA, Appellants consulted with Respondents and an agreement was reached to place the case on the inactive case roster pursuant to the provisions of SCRCP 40(j). The consent agreement was reached after OSHA did not find that the actions of Plaintiffs/Respondents' employer rose to the level of health and safety violations under the provisions of state laws and regulations governing occupational health and safety issues. Respondents agreed to place the case on 40 (j) status in order to attempt resolution by mediation as it was agreed by Appellants/Defendants and Respondents/Plaintiffs that this action may make the mediation process more palatable to their employer enhancing the chances for favorable resolution. The agreement stated that

Respondents/Plaintiffs would need to restore the cases within one year or they would be dismissed. All provisions of the agreement and the Rule 40 (j) were explained to Respondents/Plaintiffs prior to execution of the agreement. Respondents agreed to place their respective cases on 40 (j) status and proceed with mediation. Upon execution of the agreement, Respondents were provided with copies of the same. The cases were then unsuccessfully mediated and Respondents did not initiate the process of having the cases restored by paying the costs for the same and requesting that Appellant file the necessary paperwork. Thereafter, the cases were dismissed pursuant to the terms and conditions of the Consent 40(j) Agreement. Respondents initiated their action for malpractice thereafter.

FACTS:

Respondents (Plaintiffs) employed Appellants/Defendants (Attorney and Law Firm) to represent them in cases involving issues related to their employment. The representation was undertaken pursuant to a written contingency fee agreement which detailed the respective duties of the parties. Appellants brought suit on Respondents' behalf by filing a summons and complaint in Circuit Court (Richland County) and serving the same. The Defendants answered the complaint and limited discovery was conducted. During the course of the litigation, the parties conferred and agreed to place the case on a Consent 40(j) Agreement. (ROA, 113) Respondents discussed this option in detail with Appellants and agreed to have Appellants execute the agreement understanding that Mediation would be conducted during the pendency of the 40(j). The parties stipulated in the 40(j) that if the case was not restored within (1) year of the date the agreement was filed, the 40(j) would also serve as a dismissal. (ROA, 113) A mediation conference was conducted in the case but no resolution was reached. Respondents did not initiate the process of having the cases restored by paying the filing fees and requesting that the necessary paperwork be prepared and filed to accomplish this task. (ROA, 130) The cases were not restored and the remaining time on the statute of limitations expired. Respondents were aware of the necessity to request that the cases be restored and the necessity to pay the filing fees through their prior discussions with Appellants and the costs provision of their contract with Appellants. In addition, Respondents had been given copies of the 40(j) Agreement prior to filing during their meeting with Appellant at his office to discuss the 40(j) and have it explained in detail.

ARGUMENT:

1. RESPONDENTS/PLAINTIFFS FAILED TO PLEAD FACTS SUFFICIENT TO ALLEGE PROFESSIONAL NEGLIGENCE BY AN ATTORNEY WHEN THEY ALLEGE THAT THEY WERE DAMAGED BY REJECTING THE ONLY SETTLEMENT OFFERS MADE BY THEIR EMPLOYER AND FAILED TO ADVANCE COSTS FOR REINSTATEMENT OF THEIR CASE AS REQUIRED BY THEIR ATTORNEY ENGAGEMENT CONTRACT AFTER PLACING THE SAME ON THE INACTIVE CASE ROSTER BEFORE EXPIRATION OF THE REMAINING TIME ON THE STATUTE OF LIMITATIONS

Respondents/Plaintiffs assert that they were damaged when Appellants/Defendants did not restore their case to the active trial roster upon expiration of the Consent 40(j) agreement within the remaining time on the statute of limitations. (ROA, 26) However, this assertion by Respondents conspicuously omits the fact that pursuant to their Attorney Engagement Contract with Appellants/Defendants they agreed to pay the costs for prosecution of their respective cases. (ROA, 35,36,46, 47, 48) Respondent Jackson, upon direct examination by attorney for Respondents, was asked about the costs provision of the Attorney Engagement Agreement and was directed to clause four of the contract which spells out this responsibility. (ROA, 36) However, he emphatically denied ever being asked to pay any costs in the case which will be discussed in greater detail later. (ROA, 43, 62, 51, 53, 80) It is important to consider the facts leading up to Respondents' seeking to prosecute a claim for legal malpractice in this case. Prior to entering into the 40(j) Agreement, Respondents, at Appellants' urging, exhausted all administrative avenues available to them by requesting review of their complaint against their employer for requiring them to perform duties that are regulated by state law and require either special licensure or certification that they did not possess. (ROA, 45) Upon investigation, the regulatory bodies did not make the findings hoped for by Appellants and Respondents and the implications of that fact were explained to Respondents. Thereafter the decision was made by Appellants and Respondents to attempt resolution by mediation with the case being placed on 40(j) status. In accordance with the provisions of the rule, Respondents were called to Appellants' office and the process was explained to them and their consent was obtained prior to execution of the agreement. Respondents were provided a copy of the agreement and given instructions on the necessity to pay the filing fee for reinstatement should the case not settle at mediation.

The matter proceeded to mediation and settlement offers were made to Respondents which they rejected. As a result of the rejected settlement offers, the case did not settle. Appellants obtained an agreement from the mediator to keep the offers open for a brief period subsequent to conclusion of the mediation. During this period of recess, Appellant consulted with Respondents to gage their desires in regard to the settlement offers and they proposed to make counteroffers as the mediator indicated a willingness to take any reasonable offers to the opposing side. Respondents insisted on making demands for settlement that Appellant did not believe were reasonable in light of the facts and law governing the matter. (ROA,83, 86) The counteroffers were rejected and no other offers were made. Although Respondents were in communication almost daily and were reminded of the need to bring in the filing fee if they wanted to reinstate the case; they never did and the cases were not restored. As stated earlier, Respondents exercised their right to reject the only offers made in the case and ceased advancing cost as required by their retainer agreements. The right to cease pursuit of a civil matter is within the province of the client as well as the right to accept or reject offers. Likewise, the parties to a contingency agreement are allowed to define and limit their respective duties and responsibilities. Rule 1.2 SCRPR (Scope of Representation) While Respondents attempt to

assert a claim for malpractice premised upon Appellants' failure to advance costs that they agreed by contract to pay, this claim lacks merit as it does not establish the elements of legal malpractice enunciated in *Holy Loch Distributors, Inc. v. Hitchcock*, 340 S. C. 20,531 S.E. 2d 282 (2000). In the instant case, an attorney-client relationship existed, but no duty to advance costs existed and there were no damages proximately caused to Respondents caused by an alleged breach of duty. Therefore, the verdict for Respondent should be reversed.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING RESPOINDENTS/PLAINTIFFS' COUNSEL TO INTRODUCE INTO EVIDENCE CONFIDENTIAL SETTLEMENT PROPOSALS MADE DURING A MEDIATION CONFERENCE AND ALLOWING RESPONDENTS'/PLAINTIFFS' COUNSEL TO ARGUE THE SETTLEMENT PROPOSALS TO THE JURY AS PROOF OF DAMAGES.

Prior to commencement of the presentation of evidence in the case, Appellants/Defendants made a Motion to Strike from the pleadings all references to information concerning matters discussed in mediation. In addition, the motion sought to prohibit Respondents/Plaintiffs from making reference to mediation settlement negotiations. (ROA, 6,7,8) After a brief discussion concerning the propriety of introducing mediation conference negotiations in trial and citation of the prohibition of introducing this type of negotiation in court contained in Rule 8 SCRADR, the trial judge took a brief break to review the rule and allowed the confidential information to be introduced by Respondents/Plaintiffs. Counsel for Respondents/Plaintiffs represented to the Court that it was appropriate to admit mediation conference negotiations in trial and that the mediator could be called as a witness to discuss settlement offers to help prove the value of the case. (ROA, 9) In addition, Respondents/Plaintiffs' counsel represented that he had been called to testify in court as a mediator in the past. (ROA, 9) Appellants/Defendants requested that the court take judicial notice of the provisions of Rule 8. (ROA, 12) In addition to the prohibition of introducing mediation conference negotiations at trial contained in the rules of Alternative Dispute Resolution, settlement negotiations are also protected by the provisions of Rule 408 SCRCP. See Also, *Woodward v. Southern Railway*, 88 S.C. 453, 70 S.E.1060 (1911). The rule is also explicit in its prohibition of introduction of conduct or statements made in compromise negotiations. (Emphasis Added).

Representations by Respondents/Plaintiffs' counsel regarding the propriety of introducing confidential mediation negotiations at trial are a clear and blatant violation of Rule 8 SCRADR , Rule 408 S.C.R.C.P., and invoke the provisions of S.C. A.C. R. 407, § 3.3 regarding candor to the tribunal. The above cited rules directly prohibit what counsel so emphatically represented to the court and did not correct even after the provisions of Rule 8 were made a part of the record. (ROA, 101,102) Respondents/Plaintiffs' counsel persisted in offering this inadmissible evidence throughout the trial of this case over the objection of Appellants/Defendants' counsel. The improperly introduced inadmissible evidence was argued to the jury in Respondents/Defendants' closing argument and convinced the jury to enter a verdict

for Respondents/Plaintiffs which appears to award half of the respective offers made to each of them at mediation. The information improperly introduce into evidence was material, highly prejudicial, and outcome determative and amounts to an abuse of discretion on the part of the trial judge. The verdict should be reversed and the judgment set aside.

3. THE TRIAL JUDGE ABUSED HIS DISCRETION WHEN HE REFUSED TO ADDRESS PERJURY COMMITTED IN HIS PRESENCE BY RESPONDENTS/PLAINTIFFS AND CALLED TO THE COURT'S ATTENTION BY APPELLANTS/DEFENDANTS.

During the course of Respondents/Plaintiffs' case in chief, they continually denied having advanced any costs including filing fees. (ROA, 43, 62, 51, 53,80, 158, 162, 164). However, this statement was patently false as indicated by the receipts introduced into evidence by Appellants/Defendants. (ROA, 205, 213,) Despite clear evidence to the contrary, Respondents/Plaintiffs and their counsel continued to advance the position that they did not pay the filing fees to file their cases against Respondents/ Plaintiffs' employer. It should be noted that during Respondent/Appellant Mitchell's testimony, Appellants/Plaintiffs' counsel requested a five minute recess to confer with opposing counsel and presented him copies of the receipts to remind him that his clients were responsible for paying costs in the case despite their sworn testimony to the contrary. (ROA, 164, 165,) Respondents/Plaintiffs' counsel was aware of this fact as he had deposed Appellants/Defendants three years prior to the trial date and was informed of the terms of the representation at that time and provided a copy of the contract.

After the conference, the cross examination of Respondent Mitchell resumed and he was confronted with the receipt after being given the opportunity to clarify his testimony in light of potential serious penalties for testifying falsely. He continued to deny having paid any money despite being shown the receipt and stringently denied ever having seen the receipt although it was a carbon copy of the receipt he had been given at the time of payment. (ROA, 165,168,169,170, 189) Respondents/Defendants also testified that they were not aware of the Consent 40(j) although they had been consulted before the execution and filing of the same and had been given copies. The only other witness called by Respondents/Defendants at trial admitted that he learned of the 40(j) at the mediation although Respondents testified that it was not mentioned. (ROA, 96, 97) Respondent/Plaintiff Jackson was confronted about his letter to Disciplinary Counsel which made a number of unfounded and groundless allegations which he admitted he made "because he was angry."(ROA, 6263) This simple statement reveals the entire underlying reason for the lawsuit, anger at having rejected the only settlement offer in the case and ending up with nothing. However, the anger of Respondents/Plaintiffs does not obviate the necessity for their counsel to perform his due diligence investigation pursuant to Rule 11 SCRCP (i.e. read the contract).

The testimony discussed above is a violation of South Carolina Code § 16-9-10. Respondents intentionally, deliberately and willfully testified falsely under oath in a court

of law in order to bolster their case. The testimony went to a material issue in the case and was designed to mislead the jury. The trial judge is responsible for ensuring that the rules of court and the applicable laws are fairly and equally applied. Respondents' perjured testimony was called to the Court's attention and the judge declined to enforce the statute or address this direct violation of law committed in his presence and called to his attention. (ROA, 230, 231, 232) Appellants also raised the issue of perjury in their post trial motions and reminded the Court of Respondent Mitchell's absence for jury selection and the first day of trial. The Court was also reminded that it failed to revisit its inquiry into Respondent Mitchell's relationship with the juror he knew which was prejudicial to Appellants' interest as they were unable to challenge the juror's service due to the relationship. The motion for a mistrial on the basis of introduction of inadmissible evidence, perjury, and Mitchell's relationship with the juror (jury irregularity) was denied. (ROA, 276-280, 283, 284) It is an abuse of discretion for the judge in a trial to decline to enforce the laws of the State or to selectively enforce them.

4. THE TRIAL JUDGE ERRED IN FAILING TO DISMISS RESPONDENT/PLAINTIFF MITCHELL'S CASE UPON MOTION OF APPELLANTS/ DEFENDANT FOR FAILURE TO PROSECUTE WHEN RESPONDENT FAILED TO APPEAR TO PROSECUTE THE CASE ON THE APPOINTED TRIAL DATE.

On the date of commencement of the trial, Respondent Plaintiff Mitchell did not appear for jury qualification, jury selection, or the first day of trial. Appellants/Defendants' attorney moved for dismissal of Respondent Mitchell's case for failure to prosecute. (ROA,12,13). The motion to dismiss was denied. However, Appellant/Defendants were not extended the same courtesy as they were required to cancel a therapy appointment that the Court declined to accommodate to attend trial. As the Court appeared to want strict compliance with its summons for trial, as evidenced by its declination to accommodate Appellants/Defendants' physical therapy appointment, the same standard should have been applied to Respondent Mitchell. The Court's failure to require Respondent Mitchell's presence for jury qualification, jury selection, and the first day of trial prejudiced Appellant by allowing a juror who was known by Respondent Mitchell to be seated on the jury and to deliberate on Appellants/Defendants' fate. The Court's failure to pursue the extent of the relationship between Mitchell and the juror deprived Appellants/Defendants the opportunity to make an informed decision as to whether that juror should continue to serve on the jury. It should be noted that during voir dire the juror who knew Respondent Mitchell did not make this fact known to the Court. Had the relationship been disclosed, Appellants/Defendants would have had the opportunity to exercise one of their strikes to prevent the juror from serving or seek to remove the juror and either proceed with 11 jurors or request a mistrial (the alternate had been seated due to illness of another juror.

The case should have been dismissed due to Respondents/Plaintiffs' conscious indifference to the Court's scheduling of the matter. This case had been ongoing for over nine years (well beyond the applicable statute of limitations) and Respondent still

failed to appear on the appointed trial date. Despite the investment of time, effort, and inconvenience incurred by Appellants/Defendants, Respondent Mitchell could not make the time to appear in a timely manner to prosecute his claim. Respondent Mitchell was not required by the Court to explain his whereabouts that made it impossible for him to appear for the beginning of this important proceeding. This conduct is illustrative of his callous disregard for the court's schedule and the schedule of the opposing side. See *Small* v. Mungo, 254 S.C. 438, 175 S.E. 2d 802 (1970) (noting that "it is within the inherent power of the court to dismiss an action for failure to prosecute.").. If Appellants/Defendants were aware that Respondent Mitchell was not going to be required to account for his whereabouts on trial day they would have requested that the matter be carried over to the next day in order that physical therapy would not have been missed. Because our trial court is also a court of equity (fairness), it is reasonable to expect that all parties will be treated the same under the rules of procedure for our court system.

CONCLUSION

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

Dated: May 30, 2020

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June 3, 2020

/s/Joseph Henry

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Ms. Sierra Ritchie

Dear Ms. Ritchie:

Please find attached a corrected title page for Appellants' Initial Brief and Appellants' Designation of Matters to be Included in The Record on Appeal. I have also sent copies of these documents to opposing counsel by U.S. mail as stated in the attached Proof of Service. Because I was not sure if you needed another copy of the brief or just the title page, I am sending the whole thing. If you have any questions, please do not hesitate to contact me.

With kind regards, I am

Sincerely,

Joseph Henry