In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No. 2019-000953

Thomas Jackson and Christopher Mitchell — Respondents,

v.

Joe Henry and Joe Henry Law Firm, — Appellants

RESPONDENTS' BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO DISMISS THE CASE WHEN PLAINTIFFS/RESPONDENTS PRODUCED SUBSTANTIAL EVIDENCE OF LEGAL MALPRACTICE AND DEFENDANT/RESPONDENT DID NOT PROPERLY PRESERVE THIS ISSUE?

2. DID THE TRIAL JUDGE ABUSE HIS DISCRETION OR ERR IN ALLOWING INTO EVIDENCE SETTLEMENT OFFERS MADE IN THE UNDERLYING CASE TO PLAINTIFFS BOTH DURING AND SUBSEQUENT TO THE UNDERLYING MEDIATION?

3. DID THE TRIAL JUDGE ERR OR ABUSE HIS DISCRETION IN REFUSING TO ADDRESS AN ALLEGATION BY DEFENDANT/APPELLANT THAT THE PLAINTIFFS/RESPONDENTS TESTIFIED IN A MANNER THAT HE BELIEVED TO BE FALSE?

4. DID THE TRIAL COURT ERR OR ABUSE HIS DISCRETION IN FAILING TO DISMISS PLAINTIFF/RESPONDENT MITCHELL BECAUSE MITCHELL WAS ABSENT DURING VOIR DIRE EVEN THOUGH MITCHELL WAS ANNOUNCED TO THE JURY IN VOIR DIRE AS A PARTY AND WITNESS, ARRIVED DURING THE FIRST DAY, AND TESTIFIED AT TRIAL?

STATEMENT OF THE CASE

This matter was a legal malpractice case alleging that Attorney Joseph Henry, Esq. and his Firm, herein "Defendants," represented two Plaintiffs (Respondents) in litigation against the South Carolina Budget and Control Board, "underlying case." During the underlying litigation, Plaintiffs' attorney (Appellant/s) entered into a SCRCP 40 (j) consent order without the knowledge or understanding of Defendants' clients. The consent agreement tolled the statute of limitations for one year and removed the case from the roster and did so explicitly within the Order itself which was signed by the attorney. The record is undisputed that the consent order expired on March 10, 2009, after which the case would be dismissed and could not be restored. Failing to restore the case prior to this date would leave the case outside of the statute of

limitations period, disallowing any further prosecution of the case. After mediation and offers were made to Plaintiffs from the underlying defendant, South Carolina Budget and Control Board, a week prior to the Order's expiration, Defendant attorney failed to restore the case pursuant to the 40 (j) Order resulting in the final termination of the Plaintiffs' cases.

The case was tried on May 13th and 14th, 2019. Defendants proceeded pro se. Plaintiffs testified as well as Frank Potts, formerly of the South Carolina Budget and Control Board, as well as Mr. Henry. The jury returned a verdict in favor of the Plaintiffs for $2,500 for Thomas Jackson and $13,000 for Christopher Mitchell. (Verdict) Defendant/Respondent presented post trial motions and such motions were denied. Defendants appealed the verdict.

FACTS:

The relevant facts of this matter are simple. The Respondents (Plaintiffs) employed the Appellants (Defendant/s: Joe Henry and the Henry Law Firm) through written agreements to represent them in cases, which related to issues including retaliation related to their employment. (R. p. 000040-000043) Appellants brought suit on their behalf by filing a complaint in Circuit Court in Richland County and serving same. The Defendant in the underlying matter, South Carolina Budget and Control Board, answered. Appellant Henry conducted no discovery and, approximately one year from the date of filing, filed a motion, with a consent agreement attached to the motion, to remove the case from the roster, SCRCP 40 (j). Such Consent Agreement was also signed by the opposing counsel. (R. p. 000027)

The 40 (j) agreement, signed by Henry and the opposing attorney was filed on March 10, 2008. The Order specifically stated that "...(t)he 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." (R. p. 000027) Plaintiffs/Appellants both testified that they were never made aware of the "40(j)" Agreement, or told of any suspension of the case going to trial at any time during the litigation or afterward.[1] (R. p. 00028-287 P. 000167, 168) A mediation in the underlying case occurred approximately one week prior to the date on which the case would need to be restored under the 40 (j) Agreement or the applicable statute of limitations would forever bar the reinstatement of the case. (R. p. 000027)(R. p. 000029, 30)

During the mediation, the Plaintiffs were offered settlement terms from the Defendant Budget and Control Board in the underlying action in return for dismissal and a release. (R. p 000029, 30) Henry advised his clients (Respondents), during the mediation, that they should not agree to the terms of settlement offered although Henry stated in his testimony that he did not advise his clients in one way or the other. (R. p. 000286) The offers were rejected at that time and the mediation, therefore, did not resolve the case. At least one offer, the offer to Jackson, (Id) was left open formally and was extended after the mediation. Defendant/Appellant, however, did not restore the matter pursuant to the Rule 40 (j) Order by March 10, 2009 resulting in a dismissal of the case. (R.p. 000259) This left the Plaintiff/s (Respondents) time barred from again bringing the matter or continuing the suit. (R. p. 000029, 30) Appellants' clients were not informed that the case had been dismissed by their attorney and only learned of such dismissal on their own by going to the Court on their own. (R. p. 000312, 315, 316)

The trial was held on the week of May 13,th 2019. During voir dire and during the opening morning of the trial, Christopher Mitchell was unable to appear during that portion of

[1]Appellant Henry disputed this at trial.

the trial. Such information was provided to the Judge and Defendant/Appellant prior to the beginning of the trial. Plaintiffs, through counsel, requested that the trial begin as scheduled. Christopher Mitchell was announced to the larger panel and also announced to the subsequently empaneled jury prior to trial as a party Plaintiff and as a witness. Christopher Mitchell was also introduced by his attorney during opening. The trial lasted approximately two days and Mr. Mitchell did appear in Court later on the first day and testified on the second day. Defendant Henry cross examined the Plaintiffs' witnesses including Mr. Mitchell. Plaintiff rested and Defendant, Joseph Henry, testified for the Defense. Appellants have provided only the Defendants' version of the facts in their brief and omit Plaintiffs' versions of the facts and, in some cases, provides facts not evident in the record.

During the trial, Mr. Jackson, Mr. Mitchell and Mr. Potts as well as Defendant Henry, testified that settlement offers were made to both Plaintiffs during the underlying case and prior to the deadline for restoring the case. These offers were from the S.C. Budget and Control Board, the Defendant in the underlying case, and such offers were discussed between the attorney (Appellant Henry) and his clients (Plaintiffs/Respondents) both during and after the mediation of the underlying case. (R. p. 000286) Mr. Jackson was offered $5,000 and Mr. Mitchell was offered $25,000. (R. p. 000036,37)

Appellant/Defendant did object to the introduction of any discussions which may have occurred during the underlying mediation, citing mediation confidentiality provisions. The mediation occurred approximately one week prior to the SCRCP 40 (j) Consent Order expiration deadline. Both Plaintiffs (Respondents), Mitchell and Jackson, testified that attorney Henry

advised that they not accept such offers, although this testimony was disputed.[2] There were many disputed items of fact during the evidentiary phase of the trial.

During the cross examinations of Plaintiffs (Respondents) by Defendant (Appellant), Defendant produced documents which were described to be receipts from his Firm for fees/costs each Plaintiff had paid the Firm for initial costs to file the matter. Neither Plaintiff recalled paying such costs in their testimony. (R. p. 000289-298) The relevance of such alleged cost payments was apparently to support the Defendants' contention that he did not restore the case after the mediation and prior to the deadline in the Consent Order because the Plaintiffs had not requested and paid to make such restoration as he alleged was the Firm's practice.[3] Henry then requested, during trial of the matter, that the Circuit Judge find that the Plaintiffs had committed perjury in not specifically agreeing in their testimony that they had paid such initial costs.[4] The Judge indicated that such a motion was not proper and the remedy would be to send such an issue to the Solicitor.

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[2]Attorney Henry testified that he did not advise his clients either way when such offers were made. (R. p. 000253, 254)

[3]Plaintiffs testified that they had no knowledge of the 40 (j) Order nor were they asked for any funds to re-file or restore the case and each testified that he would have paid any required cost to continue the case. (R. P. 000162, 000285, 286)

[4]Appellants, as part of their argument, take a position that their former clients perjured themselves and point to the fact that a witness, Frank Potts, Esq., an attorney for the S.C. Budget and Control Board stated he learned in mediation of the 40 (j) Order. (R. p. 000221, 222) As Mr. Potts was on the underlying defendant's side at all times and certainly during the mediation, the apparent implication that Mr. Henry's clients (Respondents) also must have learned of this during mediation is without any factual support.

ARGUMENT:

I. PLAINTIFFS/APPELLANTS PRODUCED SUBSTANTIAL EVIDENCE OF LEGAL MALPRACTICE AND APPELLANTS DID NOT PRESERVE THIS ISSUE FOR APPEAL.

A plaintiff, to prevail in a cause of action for legal malpractice, must prove with substantial evidence; 1) the existence of an attorney-client relationship; 2) a breach of duty by the attorney; 3) damage to the client; and 4) evidence of proximate cause. *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005). The first element is not disputed in the record as the Plaintiffs/Respondents entered into a representation agreement with Defendant/Appellant and the case was filed by Henry, as record attorney. (R. p. 000040-43) It was further not disputed that Henry entered into a Consent Order pursuant to SCRCP 40 (j) on March 10, 2008. Although disputed, there is substantial evidence in the record that the underlying Plaintiffs (Mitchell and Jackson) were never told that the case had been "dismissed" pursuant to the 40 (j) Order or by any other mechanism.[5] (R. p. 000164, 000286-288) In fact, Mitchell and Jackson testified that they were never told the case had been dismissed after the fact and were consistently told that the matter was still pending after the actual dismissal. (R. p. 000169, 170, 287-289) This testimony is corroborated by a letter sent to the opposing attorney in the underlying case well after the dismissal of the case. (R. p. 000039, 40) Failing to restore a case pursuant to an explicit Order and process defined in the South Carolina Rules of Civil Procedure, is the kind of professional

[5]Failing to inform a client of a 40 (j) order is not likely, in and of itself, negligent. However, Appellant argues that his clients did or should have known that they were required to pay the restoration cost and the case was not restored by the attorney because the costs were not provided by his clients. His clients, Plaintiffs/Respondents, testified that they never heard about an Order and, if asked, would have gladly paid to restore the case.

negligence a jury, using its own knowledge and common sense, could determine was professional negligence.[6] It was not disputed at trial that, by not restoring the case pursuant to the Order, the case was in fact dismissed and was then time limited.[7] (See: Appellant's Brief P. 5) Therefore the proximately caused damages were the loss of the Plaintiffs' cases.

The Plaintiffs both testified as to the nature of the underlying case and the actions taken and not taken by the underlying defendant, S.C. Budget and Control Board. As the Plaintiffs were offered settlements in the underlying case, prior to the dismissal, such settlements are evidence of the value of the underlying case and, more importantly, evidence of the ability to settle with the underlying Defendant. A reasonable jury could determine that a reasonable Plaintiff who was made an offer would not affirmatively allow his case to be dismissed after rejecting the offer. The Respondents were precluded, after the dismissal, from continuing the litigation and, were not informed of the dismissal even after it occurred by operation of the Order. In sum, by failing to restore the case, Plaintiffs/Respondents lost the ability to settle or try the case and the settlement offers were reliable evidence of the existence of value and the range of value of the underlying case.

Respondents presented substantial evidence of each and every element of the cause of action of professional (legal) negligence. Based on the evidence presented by Respondents at

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[6]S.C. Code Ann. §15-36-100 (C) *Brouwer v. Sisters of Charity Hosps.* 409 S.C. 514 2, 763 S.E.2d 200, 204 (2014).

[7]The central dispute in the matter as presented by Appellants is whether the Respondents, as underlying Plaintiffs, failed to affirmatively request and provide costs of the reinstatement of the case subsequent to mediation and just prior the expiration of the 40 (j) Order. Mitchell and Jackson both testified that they did not know of the Order (40 (j)) and, had they been asked to provide the costs of reinstatement, they would have. (See Appellants' Brief)

trial, including both disputed and undisputed evidence, a reasonable jury could easily reach the conclusion that Respondents were never told of a 40(j) Order of Dismissal and then, one week prior to the deadline for that Order, were advised not to take offers of settlement during and after the mediation. An appellate court, in reviewing direct verdict motions or post trial motions, must consider the facts presented in the light most favorable to the non moving party. *Jones v. General Electric Co.*, 331 S.C. 351, 503 S.E.2d 173, 176 (Ct. App. 1998)(in reviewing the grant of a directed verdict, the appellate court should not ignore facts unfavorable to the opposing party. Rather, it must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor). Either Appellant Henry forgot about the deadline or intentionally did not restore the case in the week after the mediation resulting in the loss of any potential settlement or their right to proceed to a trial. Further, this issue was not specifically argued in directed verdict or in post trial motions. The Trial Judge did not err in allowing the jury to determine the facts of the case in the cause of action for legal malpractice.

II. THE TRIAL COURT DID NOT ERR BY ADMITTING SETTLEMENT OFFERS MADE TO PLAINTIFFS BY THE DEFENDANT IN THE UNDERLYING CASE.

Appellant argues that the introduction of the settlement offers made to his clients (Respondents) during the mediation in the underlying case, in which he was the record attorney for Respondents, were inadmissible. Although discussion of the settlement offers between the Plaintiffs/Respondents and their attorney (Appellant) also occurred after the mediation, the offers themselves were admissible whether during mediation or otherwise. Appellant cites the Rule 8 (Order) from South Carolina Supreme Court. The Rule provides as follows:

Rule 8: Confidentiality

> (a) Confidentiality. Any mediation communication disclosed during a mediation, including, but not limited to, oral, documentary, or electronic information, shall be confidential, and shall not be divulged by anyone in attendance at the mediation or participating in the mediation, except as permitted under this rule or by statute. Additionally, the parties, their attorneys and any other person present or participating in the mediation must execute an Agreement to Mediate that protects the confidentiality of the process. The parties and any other person present or participating shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial or other proceeding, any mediation communication disclosed in the course of a mediation, which shall include, but not be limited to:
>
> (1) Views expressed or suggestions made by another party or any other person present with respect to a possible settlement of the dispute;
>
> (2) Admissions made in the course of the mediation proceeding by another party or any other person present;
>
> (3) Proposals made or views expressed by the mediator;
>
> (4) The fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; and
>
> (5) All records, reports or other documents created solely for use in the mediation or received by a mediator while serving as a mediator.
>
> (b) Waiver of Confidentiality. Upon the signing by the parties of an agreement reached during mediation, confidentiality is waived as to the terms of the agreement, unless otherwise agreed to by the parties.

The instant case is a legal malpractice case in which the Plaintiffs/Respondents were offered a settlement through mediation in the underlying case.[8] Their attorney in the underlying case advised against accepting such offers and then failed to restore the case which resulted in a dismissal. The underlying proceeding is and was separate and distinct from this proceeding. The admission of the undisputed settlement offers were relevant to both professional negligence and damages. Such events relate specifically to a dispute between the attorney and his clients and Rule 8 specifically excepts such disclosures. The Rule provides exceptions as follows:

> 8(c) Limited Exceptions to Confidentiality. There is no confidentiality attached to

[8]A settlement offer made is not specifically limited by the Rule although such would clearly be inadmissable in the actual litigation of the underlying matter. Certainly, a settlement offer accepted in mediation but then not performed would be admissible in a following contract action or proceeding to compel the agreement.

information that is disclosed during a mediation: ....

(3) offered to report, prove, or disprove professional malpractice occurring during the mediation, solely for the purpose of the professional malpractice proceeding;

The facts presented in this case demonstrated that the Plaintiff/Respondent clients retained the Defendant/Appellant to represent their interests and then failed to reinstate the case after a Rule 40 (j) Consent Order. The Plaintiff/Respondents were never informed the case was dismissed and only learned of it when contacting the Court to determine why the matter was taking so long. (R. p. 000315, 316) The result of the dismissal was that the Respondents lost the ability to pursue their case in court after March 10, 2009. The fact that settlement offers were made just prior to the deadline to restore the case/s is relevant to the existence of damages, the underlying value of the case, and relevant to the alleged breach of the standard of care by the attorney as these offers in mediation, at a minimum, demonstrate that the attorney was aware of and should have reviewed all items associated with the case, including a deadline to restore the case or lose it, approximately one week after the mediation.

The settlement offers were admissible both under the Rule cited by Appellants and were admissible in light of their relevance to the breach of the standard of care and damages. The case cited by Appellant, *Woodward v. Southern Railway*, 70 S.E. 1060 (SC 1911), stands for the proposition that settlement discussions are not generally admissible in the case being litigated. The Trial Judge did not err in allowing this testimony.

III. THE TRIAL COURT DID NOT ERR IN REFUSING TO ADDRESS DURING TRIAL, AN ALLEGATION, BY THE DEFENDANT/APPELLANT, THAT TESTIMONY OF PLAINTIFF/S WERE FALSE IN HIS VIEW.

During trial of the matter, Defendant/Appellant argued that the case was not restored

because his clients, Plaintiffs/Respondents, failed to pay for the costs of restoration. This issue in the case was disputed and the Plaintiffs (Respondents) testified that they did not know of the SCRCP 40 (j) Order and would have paid for restoration if they had knowledge at any time of the issue. (R. p. 000162, 284) The facts, as presented by Mitchell and Jackson, demonstrate that Respondents had no knowledge of the Order, had no knowledge of any requirement of reinstatement to preclude dismissal and were not given any information as to how and how much they needed to pay in costs. (R. p. 000162)

During the trial of the case, in cross examinations of both Mitchell and Jackson (Respondents) by Henry, Defendant produced documents which were described to be receipts from his Firm for fees/costs each Plaintiff had paid the Firm for initial costs to file the matter. (R. p. 000044,46) Neither Plaintiff recalled paying such costs in their testimony. (R. p. 000190-193) The relevance of such alleged cost payments was apparently to support the Defendants' contention that the case was intentionally not restored after the mediation and prior to the deadline in the Consent Order because the Plaintiffs had not affirmatively requested restoration and paid to make such restoration. The receipts were, apparently, evidence of the cost practice during this case and the Firm's practice.[9] After Mitchell and Jackson testified that they did not recall a cost payment or the receipts, Henry requested, during trial of the matter, that the Circuit Judge find that the Plaintiffs had committed criminal perjury. The requested perjury charge was leveled because Mitchell and Jackson did not specifically agree in their testimony that they had paid such initial costs and had notice of the receipts. The Judge indicated that such a motion was not proper and the remedy would be for Henry to send such an issue to the Solicitor.

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[9]Plaintiffs testified that they had no knowledge of the 40 (j) order nor were they asked for any funds to re-file or restore the case and each testified that he would have paid any required cost to continue the case. (R. p. 000288)

Although it is not apparent that Appellant/s present this issue specifically in a directed verdict motion or in post trial motions, there is neither a requirement or a mechanism for a trial judge to initiate criminal proceedings or make a determination of fact. The Trial Judge did not err in failing to undertake or initiate criminal proceedings for perjury as the facts were in dispute between the two parties in this lawsuit.

IV. THE TRIAL COURT DID NOT ERR IN FAILING TO DISMISS THE CASE IN POST-TRIAL MOTIONS BECAUSE PLAINTIFF MITCHELL WAS ABSENT DURING VOIR DIRE AND THE INITIAL STAGE OF THE TRIAL.

The trial began in this matter on the week of May 13th, 2019. Initially, Chris Mitchell (Plaintiff/Respondent) was unable to attend the initial stage of trial, including voir dire. The Court was advised of his absence and the reason for his absence, however, Plaintiffs requested that the case move forward as scheduled. (R. p. 000141-143) Christopher Mitchell was announced to the larger panel and also announced to the subsequently empaneled jury prior to trial as a party Plaintiff and as a witness. (Id.) Christopher Mitchell was also introduced by his attorney during the opening statement of the case. The Jury trial was two days long and Mr. Mitchell did appear in Court, and sat at the Plaintiffs' table later the first day.[10] Mitchell testified on the second day during the Plaintiffs' case in chief. Defendant Henry cross examined the Plaintiffs' witnesses including Mr. Mitchell. Plaintiff rested and Defendant, Joseph Henry, testified for the Defense.

There does not appear to be any applicable case law suggesting that the absence of a

[10]Appellant indicates that Mitchell was not at the trial for any portion of the first day and the record does not reflect this issue either way. Mitchell did, however, appear later during the first day of trial.

witness or party for a portion of the trial requires a dismissal of the case. Appellant appears to argue that Defendants were prejudiced by Mr. Mitchell in his delay, however, the Plaintiffs actually requested that the trial go forward so as not to delay[11] and the trial continued as scheduled. Appellant further indicates a juror issue, again, not well developed in the record, and links such issue to Mr. Mitchell's delay on the first day.[12] A witness is not required to be present for the entire trial, especially if the Judge in his discretion allows the case to go forward. Defendant/Appellants were in no way prejudiced by the fact that Mitchell was delayed on the first day of trial.

CONCLUSION

THEREFORE, for the reasons stated above, this Court should Affirm the Jury Verdict and Order and Judgment of the Circuit Court.

Date: September 23, 2020

RESPECTFULLY

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[11]In fact, Appellant Henry requested another delay for this jury week due to conflicting medical therapy sessions.

[12]Mitchell, during trial, indicated to his attorney on the second day that he may have recognized a witness from his neighborhood. Plaintiffs' attorney, in an abundance of caution, provided this information to the Judge and opposing counsel, Henry.

In The Court of Appeals

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Honorable Brooks P. Goldsmith, Circuit Court Judge

Case No. 2019-000953

Thomas Jackson and Christopher Mitchell — Respondents

v.

Joe Henry and Joe Henry Law Firm — Appellants

CERTIFICATION

The below signed attorney certifies that the Final Brief of Respondents Complies with 210(b) and Rule 211(b), SCARC.

September 30, 2020

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