THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CLARENDON COUNTY

Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

Case No.: 2016-GS-14-0098

Marvin Gipson.....Respondent

v.

Coffey & McKenzie, P.A.....Appellant

Brief of Appellant

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Statement of the Case

This matter was heard in the Clarendon County Court of Common Pleas commencing on February 3, 2020 (R. p. 41, lines, 1-25). The jury was selected on February 3, 2020 and pretrial motions were also heard that day (R. pp. 39-62). During the motion hearing on February 3, 2020, the Appellant moved pursuant to South Carolina Rule of Civil Procedure Rule 12(b)(7) (failure to join a necessary party) (R. p. 52, lines 13-25). That motion was denied by the Court. (R. p. 56, lines 1-25).

The actual trial (testimony) commenced on February 5, 2020 (R. p. 67, lines 1-25).

The Defendants Clyde and Betsy Williamson were dismissed as party Defendants in the case after the close of the Plaintiff's case leaving only the law firm of Coffey & McKenzie, P.A. as the sole Defendant (R. p. 142, lines 8-25, p. 143, lines 1-25, p. 144, lines 1-25).

The jury was charged and began deliberations at 4:04 p.m. (R. p. 239, lines 20-25). At approximately 4:46 p.m., the jury came back with a verdict for the Plaintiff against the Defendant, Coffey & McKenzie, P.A. in the amount of $10,306.00 (R. p. 243, lines 5-25 and p. 242, lines 1-25).

After the jury returned its verdict, the Appellant moved for a Judgment not withstanding the Verdict for the Appellant based upon the failure of the Respondent to provide by expert testimony the applicable standard of care for professional malpractice through expert testimony. (R. p. 243, lines 13-25)[1]. That motion was denied by the Court (R. p. 245, lines 1-2). Also, after

[1] Coffey & McKenzie, P.A. moved for a directed verdict at the close of the Plaintiff's case-in-chief on the failure by the Plaintiff to provide the applicable standard of care by expert testimony with regards to a real estate closing in South Carolina (R. p. 132 lines 15-25, p. 133, lines 1-25 , p.134 lines 1-25, p.135, lines 1-25, p.136, lines 1-25, p.137, lines 1-14, p. 140, lines10-25 and p. 141, lines 1-22). That motion was denied by the Court (R. p. 141, lines 23-25).

the verdict was returned, Appellant raised an additional issue regarding the amount of the verdict (R. p. 245 lines 1-13). The Appellant was asking the Court to reduce the amount of the verdict by $1,500.00 (R. p. 245, lines 3-13). The Court denied the request for an offset (R. p. 245, lines 22-25).

On February 14, 2020, the Appellant filed a Motion for a New Trial , Alter, Amend the Judgment Pursuant to South Carolina Rules of Civil Procedure Rule 59 (R. pp. 5-6). The Appellant's basis for the Motion was that the Respondent; (1) failed by to establish through expert testimony the applicable standard of care for an attorney in a real estate closing; (2) that the Appellant was entitled to a setoff in the amount of $1,516.89 and (3) the Appellant established through expert testimony that was unrebutted that the superseding criminal acts of a third-party was the cause of the damages of the Respondent. Said Motion was denied by the Court (R. pp. 2-4).

Statement of the Facts

On May 25, 2016, Coffey & McKenzie, P.A. was emailed a Contract of Sale between Clyde Williamson and Betsy Williamson, as Purchasers, and Nemark Marvin Gipson, as Seller for the property located at 3766 Rowe Drive, Summerton, SC 29148 by Betsy Brown of ReMax by the Lake, the dual agent in this transaction (R. p. 84, lines 14-25, p. 85, lines 1-25). Respondent did not attend the closing and participated via mail, email and telephone (R. p. 86, lines 1-25).

During the time frame from the signing of the contract of sale of the property until the date of the closing, the Respondent was moving from Yonkers, New York to Missouri City, Texas (R. p. 112, lines 21-24, p.1131, lines 1-25).

The Respondent signed a statement regarding email usage by the Appellant and Respondent to complete the transaction (R. p. 185, lines 1-21 and R. p. 280).

On June 16, 2016 at 12:03 a.m., Appellant received an email from mail4marvin@gmail.com with his Social Security Number, which Respondent said he had omitted from the documents. At 12:14 a.m., Respondent forwarded a copy of his driver's license (also from mail4marvin@gmail.com). Then at 3:09 a.m., Appellant received the email from mail4rnarvin@gmail.com,[2] with copies of all of the signed documents in a pdf file along with the FedEx tracking number, along with the same wiring instructions as provided previously. (R. pp. 248, 249, 250 and 254).

Per the email, the Respondent signed and had the documents notarized on June 15, 2016. (R. pp. 248, 249, 250 and 280).

Appellant did not receive instructions from Respondent to mail his proceeds in a check. The only instruction that were given was to wire it per the compromised email address. Appellant wired the money at 3:20 p.m. per the wiring instructions (R. pp. 248, 249, 250, and 251)

Appellant did not hear from respondent again until 11 days later, on Monday, June 27, 2016, asking where his check had been mailed. Appellant responded with an email again sending him the wire confirmation. Respondent said that he did not ask for a wire, and had not received the funds. Appellant then started investigating this matter (R. p. 183, lines 11-25).

At trial the Respondent testified regarding the fact that he did not receive the wire transfer (Tr. p. 91, lines 1-25). He did state that the appellant was able to recover $1,516.00 and that the net amount of monies he was due was $8,789.00 (R. p. 104, lines 10-25).

When asked under cross-examination the following exchange took place:

Q: I understand you're not and expert, Mr. Gipson, but when

[2] The difference in the two email accounts is found after the number "4". The correct email is mail4marvin@gmail.com. The hacker replaced the "m" in Marvin with an "r" and a n". when you combine the letters "r" and "n" in the email address those letters combines together "rn" gives the almost undetectable appearance as the correct email, but the email addresses are completely different and allowed the hacker to interject himself/herself into the email chain.

You don't get your money and it was supposed to come to you
And WM Enterprises, Inc. has your money and we all know
that, they stole your money did they not:

A: The money is gone, sir.
Q: I am sorry?
A: I said the money is gone.
Q: The money is gone and WM Enterprises has
You're money?
A: Because of the flawed process of the closing.
Q: The flawed process of the closing?
A: Yes.
Q: And that's your testimony today that the process of the
Closing was flawed and that's part of the real estate

Transaction; is that correct?
A: The closing is part of the process, yes.

(R. p. 118, lines 1-25)

Also at trial, the only witness called to testified for the Respondent was the Respondent (R. p. 129, lines 17-25), At the conclusion of the Respondent's case, Appellant moved to dismiss the cause of action for negligence brought by Respondent against the Appellant because of the Respondent's failure to prove by expert testimony that the Appellant breached the standard of care of a real estate closing attorney (R. pp. 132, lines 15-25, p.133, lines 1-25, p. 134, lines 1-25, p. 135, lines 1-25, p. 136, lines 1-25, p. 137, lines 1-14, 139, lines 10-25, and p. 140, lines 1-22). The Court denied the motion of the Appellant citing that the handling of the closing was within the common knowledge of the jury (R. pp. 141, lines 23-25 and 132, lines 1-7) .

After being denied a directed verdict on the negligence issue by the Court, the Appellant called to testify Joe Pedalino (R. p. 152, lines 21-24). Mr. Pedalino was qualified by the Court as an expert in cybersecurity (R. p. 155, lines1-25). Mr. Pedalino testified that he investigated the entirety of the Appellant's cybersecurity and found no breaches in the computer systems used by the Appellant (R. p. 155, lines 1-25). Mr. Pedalino went on to conclude that the email used by the Respondent had been compromised due to a "man in the middle attack" or also known in the

industry as "phishing attack" (R. p. 159, lines 11-25). Mr. Pedalino testified that the original email that was sent from the Respondent was correct and, at some point, the Respondent's email or the real estate agent's email was breached due to the "phishing" attack (R. p 162, lines 23-25, p. 163, lines 1-25 and p. 164, lines 1-25). Mr. Pedalino testified that based upon a reasonable degree of certainty that the breach of security was from a source other than the email or computer's from the Appellant's office (R. p. 155, lines 1-25, p. 156, lines 1-25, p.157, lines 1-25, p.158, lines 1-25, p. 159, lines 1-25, p.160, lines 1-25, p.161, lines 1-25, p. 162, lines 1-25, p. 163, lines 1-25., p. 164, lines 1-25 and p. 165, lines 1-23).

Joseph Coffey (closing attorney) testifying for the Appellant, stated that funds from the closing had been wired to WM International Enterprises, Inc. (R. p 186, lines 1-25). He also testified that he saw nothing unusual in the fact that the funds were being wired to an out-of-state bank (R. p. 187, lines 1-25). Mr. Coffey further testified that the Respondent did not contact the office until eleven (11) days after the funds had been wired out of Appellant's trust account (R. p. 189, lines 5-11). Mr. Coffey testified that nothing in the email from the Respondent appeared to be unusual (R. p. 195, lines 18-25).

Mr. Coffey testified to the standard of care in a "mail-away" closing (R. p. 185, lines 1-25). Mr. Coffey also testified as to the standard of care regarding the handling of a client's funds held in escrow and that the standard was to "double verify" the identity information before disbursement (R. p. 195, lines 1-25). Mr. Coffey went even further and testified that the rules of professional responsibility require him to disburse the funds from a real estate closing to the seller as quickly as possible (R. p. 195, lines 7-17).

Mr. Coffey testified as to his attempts to help the Respondent recover the funds (R. p. 189, lines 1-25, p. 190, lines 1-25, p. 191, lines 1-25, p. 192, lines 1-25, p. 193, lines 1-25, p. 194, lines

1-25, p. 195, lines 1-25, p. 196, lines 1-25, p. 197, lines 1-25, and p. 198 lines 1-25). Mr. Coffey was able to retrieve for the Respondent $1,516.89 of the $10,360.00 that was wired out of Appellant's account (R. p. 276 and 278).

Mr. Coffey's testimony was to the standard of care in a real estate closing and his testimony was clear that the Appellant had not breached its duty to the Respondent nor had Appellant actions fell below the standard care for a real estate closing (R. p. 187, lines 1-25 and p. 195, lines 1-25).

At the close of the Appellant's case and no rebuttal from the Respondent, the Appellant again renewed its motion for a directed verdict as to negligence of the Appellant (R. p 210, lines 2-25 and p. 211, lines 1-25). The Appellant again raised the issue that there was no evidence of a breach of the applicable standard of care by the Appellant during a residential real estate closing offered by the Respondent (R. p. 211, lines 1-25, p. 212, lines 1-25, and p. 213, lines 1-5). The Court again denied the motion of the Appellant (R. p. 213, lines 6-18).

The jury returned its verdict against the Appellant and in favor of the Respondent for the amount of $10,306.00 (R. p. 243, lines 1-17). After the jury returned its verdict, the Appellant moved for a Judgment notwithstanding the Verdict for the Appellant based upon the failure of the Respondent to provide by expert testimony the applicable standard of care for professional malpractice through and a breach of that standard by the Appellant (R. p. 244, lines 13-25). That motion was denied by the Court (R. p. 245, lines 1-2). Also, after the verdict was returned, Appellant raised an additional issue regarding the amount of the verdict (R. p. 245, lines 1-13). The Appellant asked the Court to reduce the amount of the verdict by $1,516.08 (R. p. 245, lines 3-13). The Court denied the request for an offset (R. p. 245, lines 22-25).

Finally, on February 14, 2020, the Appellant filed a Motion for a New Trial , Alter, Amend the Judgment Pursuant to South Carolina Rules of Civil Procedure Rule 59 (R. pp. 5-60). The

Appellant's basis for the Motion was that the Respondent; (1) failed by to establish through expert testimony the applicable standard of care for an attorney in a real estate closing; (2) that the Appellant was entitled to a setoff in the amount of $1,516.89 and (3) the Appellant established through expert testimony, that was unrebutted, that the superseding criminal acts of a third-party was the cause of the damages of the Respondent. Said Motion was denied by the Court (R. pp. 2,3, and 4).

I. DID RESPONDENT FAIL TO PROVE THE STANDARD OF CARE FOR AN ATTOENEY IN A REAL ESTATE CLOSING?

The Respondent failed to establish the applicable standard of care for legal malpractice and that the Appellant breached that standard of care. The Appellant would show that a plaintiff alleging legal malpractice arising out of a real estate closing must establish the standard of care for the particular situation and prove the attorney breached the standard of care (*See Harris Teeter, Inc. v. Moore & Van Allen, PLLC,* 390 S.C. 275, 282, 701 S.E.2d 742,745 (2010)).

On September 23, 2009, then Chief Justice Jean Hoefer Toal issued a Memorandum to members of the South Carolina Bar. The Memorandum was in response to The South Carolina Bar Task Force on Closing Responsibilities (Task Force) that developed guidelines or "best practices" for attorneys conducting residential or commercial real estate closings in South Carolina. Chief Justice Toal stated as follows regarding real estate closings in South Carolina:

> The Task Force, upon reconvening, unanimously agreed that the suggested guidelines should be explicitly limited to residential real estate closings because it appears, from the majority of opinions issued by this Court regarding closings, that it is residential closings that are overwhelmingly the professional concern. However, the Task Force noted that commercial real estate transactions are extremely important and it remains steadfast in its unanimous belief that State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), remains highly relevant and of great importance to all real estate transactions, whether residential or commercial, in this state. (See Memorandum To Members of the South Carolina Bar dated September 23, 2009).

The Respondent failed to establish the applicable legal standard of care to the jury or that the Appellant even breached that care. When asked on direct examination as to how this could have possibly happened, the Respondent could only "surmise" (R. p. 101, lines 4-15). The following exchange took place between the Respondent and his attorney:

Q. All right. And if you could, read me what the email says?

A: It says: Marvin, I still need clarification as to how the FedEx tracking number for the of the closing documents and the wiring instructions were sent from the incorrect email address.

Q: Okay. And what's the date of this email?

A. This is July 5th, 2016.

Q. Okay now, you were—you were talking a minute ago about FedEx. You—I Believe you said you sent the signed documents back to Coffey & McKenzie; is that correct?

A. Right. The signed originals were packaged and sent by FedEx.

Q. All right. Okay. So in this email, Mr. Coffey is asking about how the FedEx tracking number—how it came from the incorrect email address. What explanation do you have for that, Mr. Gipson?

A: I don't have an explanation for that. I don't--- I don't know. I can only surmise what happened is that the email that was sent to me from Monica that I responded to had a fake email address that looked—that comes from them. That was the Monica at gmail.com that we determined later that I replied to that. And that's where those instructions would've gotten inserted and sent on to them.

(R. p. 100, lines 15-25 and p. 101, lines 1-15).

It is clear from the testimony of the Respondent that his (Respondent) email was breached by a third-party and that fact was later confirmed in the Appellant's case in chief when the only expert called in the trial to testify confirmed that the email was breached. The reason that we know the Respondent's email was breached is because the FedEx tracking number and pdf documents could only have come from the Respondent through his email. The Respondent was the only one who had access to that information because he was the person responsible for returning the signed original closing documents via FedEx and copies of those documents via email. This email sent by the Respondent contained the FedEx tracking number and pdf copies of the closing documents. (R. pp. 248, 249, 250, 251 and 252). As a result, the only conclusion to be drawn was that Respondent's email was hacked.

As testified to by the Respondent in direct testimony as recited above, Mr. Coffey, in his direct testimony, identified the FedEx tracking number as one of two ways that the request to wire the money to the Respondent was verified by the Appellant. In essence, the funds were wired per email instructions of the Respondent as found in the fraudulent email.

As previously stated, the Appellant called to testify Joe Pedalino (R. p. 152, lines 21-24). Mr. Pedalino was qualified by the Court as an expert in cybersecurity (R. p. 155, lines1-25). Mr.

Pedalino testified that he investigated the entirety of the Appellant's cybersecurity and found no breaches in the computer systems used by the Appellant (R. p. 158, lines 1-25). Mr. Pedalino went on to conclude that the email used by the Respondent had been compromised due to a "man in the middle attack" or also known in the industry as "phishing attack" (R. p. 159, lines 11-25).

The Appellant would show that Respondent failed to prove that the Appellant was negligent and, in fact, only proved that his (Respondent) email was breached by an intervening third party.

The Respondent provided no expert testimony as to the applicable standard of care. In fact, the Appellant offered the only evidence of the standard of care when Joseph Coffey testified that "double verification of identity was the standard and that Appellant did double verify the Respondent's identity prior to disbursement (See the testimony of Joseph Coffey wherein Mr. Coffey testified to the standard of care in a "mail-away" closing (R. p. 188, lines 1-25). Mr. Coffey also testified as to the standard of care regarding the handling of a client's funds held in escrow and that the standard was to "double verify" the identity information before disbursement (R. p. 195, lines 1-25).

A plaintiff is a legal malpractice action is required to offer expert testimony in order to prove his claim. The specific elements of the legal malpractice cause of action that the plaintiff must prove using expert testimony is somewhat unclear. Several South Carolina cases have held that the plaintiff "must generally establish the standard of care by expert testimony." However, in *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014) (quoting Gilliand v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990)). The Supreme Court held that "a claimant must rely on expert testimony to establish both the standard of care and the deviation by the defendant from such standard." The *Holmes* court went on to say the plaintiff "must establish, through expert testimony, the following: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the plaintiff's damages by the breach."

Here, the only testimony as to the standard of care was offered by the Respondent and as previously stated the standard was to double verify the identity of the seller by email when the Respondent sent the FedEx tracking number along with the signed documents in a pdf attachment prior to disbursement. That was the established standard of care that was testified to by Joseph Coffey and the Respondent offered no evidence that standard was breached.

II. **IS THE APPELLANT ENTITLED TO A REDUCTION OF THE JURY AWARD BY THE AMOUNT OF MONIES COLLECTED BY THE APPELLANT FOR THE RESPONDENT.**

The Appellant is entitled to a setoff of the monies it recovered for the Respondent. The Respondent testified that the net monies he was to receive at closing was $10,306.00 (R. p. 245, lines 6-25). The Respondent also testified that he did receive $1,516.89 through the efforts of the Appellant (R. p. 245, lines 6-25). The Appellant would show that the jury awarded the Respondent $10,306.00 (R. p. 243, lines 5-17).

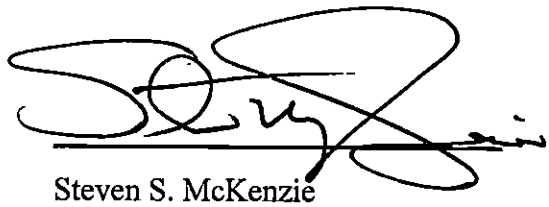
The Appellant should have received credit by the Court of $1,516.89 or the amount the Appellant was able to recover for the Respondent. The Appellant moved after the verdict was rendered by the jury for the Court to reduce the award by $1,516.89. The Motion was denied by the Court (R. p. 183, lines 3-25).

The Appellant believes that the judgment should be reduced by the amount of monies the Plaintiff actually failed to recover from the closing to $8,789.11. In other result, would see the Plaintiff's recovery total recovery of $11,822.89 when his actual damages were only $10,306.00 (net funds to be received at closing less the monies recovered for the Respondent by the Appellant in the amount of $1,516.89. the Appellant would ask this Court to deduce the jury award to the actual losses incurred by the Respondent to $8,789.11. Any other result would result in a windfall to the Repsondent and would not reflect the actual damages incurred.

CONCLUSION

The Appellant would ask this Honorable Court for an Order reversing the Trial Court in this matter as a result of the Trial Court failing to find as matter of law that the Respondent failed to provide proof through expert testimony as to the applicable standard of care for a real estate closing in South Carolina and that the Appellant breached that standard of care. Also, the Appellant would ask for a reduction of the jury verdict to $8,789.11 or the actual damages incurred by the Respondent should the Court not reverse and remand the case.

April 2, 2021



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