

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
CIRCUIT COURT

Daniel D. Hall, Circuit Court Judge

Civil Case No.: 2017-CP-46-01964
Appellate Case No. 2020-000027

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SC Court of Appeals

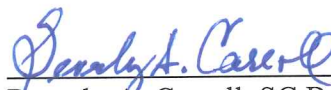
Winston Shell.....Respondent,

v.

Nathaniel Shell..... Appellant.

FINAL BRIEF OF RESPONDENT

September 8, 2020



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STATEMENT OF THE ISSUE

- I. **The trial judge did not abuse his discretion in proceeding with the trial of this case after the parties were notified that the case would be tried during the term and no motion for continuance was made.**

STATEMENT OF THE CASE

The trial of this case was scheduled after the parties had engaged in substantial discovery, including written discovery that produced numerous documents and the depositions of the two parties.

This case was scheduled for trial for the “week of December 9th,” by the Honorable Dan D. Hall (“Judge Hall”), Administrative Judge for the Sixteenth Judicial Circuit on September 26, 2019. **R. p. 46.** On October 9, 2019, Lynn Strait (“Strait”), the Court Coordinator for the Court of Common Pleas in York County Clerk of Court’s Office sent an email saying that this case “appears for trial on the Monday, December 9, 2019 York County CP Jury Roster before Judge Hall.” **R. p. 47.** In that email, counsel in this case were directed to appear in Court at 9:00 am on Monday, December 9, 2019, for the roster meeting. On November 25, 2019, Strait sent an email with an attached roster, to all counsel who had cases “for the December 9th trial terms before Judge Dan Hall and Judge William McKinnon.” **R. pp. 48-52.** Neil Phillips (“Phillips”), Appellant’s then attorney, is listed in the email addresses. This case was listed as the fifth case on the roster. On December 4, 2019, Strait sent out another email; that email had a direct message to Phillips and Respondent’s counsel, to attend the roster meeting to discuss this matter as well as another case Phillips had on the rosters. **R. pp. 53-54.** Both attorneys met with Judge Hall on Monday; December 9, 2019. **R. p. 82 ll. 12-16.** Judge Hall made clear that the case would be tried that week and the only issue was when the trial would begin. The Judge told the attorneys they would be informed when the case would be called to trial. At 2:10 p.m. on Monday, Phillips sent an email to inquire about the possibility of Judge McKinnon trying the case “tomorrow,” which was Tuesday, December 10, 2019. **R. pp 55-57.** After being reminded by Respondent’s counsel in a responsive email that Judge McKinnon was involved in another trial, Phillips said he would

“regroup with my client.” 20 minutes later, Strait emailed both counsel stating that trial would proceed on December 10, 2020 at 9:30 a.m. **R. Pp 58-60.** In addition, consistent with the Judge’s direction, the Judge’s law clerk called counsel by telephone at approximately 2:52 p.m. to notify them the case would start at 9:30 a.m. the next day, Tuesday, December 10, 2019. Phillips previously acknowledged that the law clerk would be the one contacting him and Respondent’s counsel. **R. p. 56.**

On Tuesday, December 10, 2019, the case was called to trial. At the opening of the case, Judge Hall said

[T]his case is set for a bench trial this week and the court did meet with the attorneys yesterday which was Monday to discuss our docket and the order in which cases would be called this week.

The Court indicated to the lawyers, Mr. Phillips and Ms. Carroll, that is this bench trial would be subject to being called at that time probably in front of Judge McKinnon. However, the jury trial that was scheduled in front of Judge Hall yesterday in front of this court resolved and so we have moved the case to be heard today in front of me.

Yesterday the Court was able to or got information from both the attorneys via their cell phones how to get in touch with them and let them know about the change. And also let them know yesterday that this case would be called this morning.

Mr. Phillips did indicate this morning that he did not read his emails or check his messages until this morning; he is here, however his client is not here. With that the Court is ready to proceed.

R. p. 82 l. 13 to p. 83 l. 7. When asked if he was ready, Phillips responded “Yes, your Honor, without my client.” **R. P. 83 l.12** At no time was there was a motion for a continuance by Phillips. After the direct and cross examination of Plaintiff, the Court asked Phillips if he had witnesses to call to which he replied “I have no witnesses to call.” Judge Hall then announced that he was not going to rule on the case at that time, but would take a lunch break and that if Appellant showed up, Phillips could “make a decision about whether to call him or not.” **R. p. 153 ll. 18-23.** When

the Court reconvened after lunch, the Judge asked Phillips if he was going to call a witness to which Phillips replied “No, your Honor. My client is not going to appear today.” **R. p. 154 ll. 21-23.** The Court announced the verdict, which was affirmed by a Form 4, Judgment in a Civil Case.

Appellant filed a Motion for New Trial with a supporting Affidavit from Appellant on January 3, 2020. In turn, Respondent filed a Memorandum in Opposition to the Motion for New Trial with seven exhibits that were referenced therein. The motion was heard by Judge Hall on February 5, 2020; at the hearing, Appellant submitted a Brief in Reply to Defendant’s Motion for New Trial. The Court denied Appellant’s Motion as evidenced by Form 4, Judgment in a Civil Case, which was filed on February 6, 2020. This Court consolidated Appellant’s several Notices of Appeal into this matter.

ARGUMENT

Appellant has failed to set forth all of the facts surrounding the scheduling of this case for trial and has made several misleading statements about what is clearly shown in the transcripts from the trial and the hearing held on Appellant’s Motion for New Trial. In fact, Appellant has premised this appeal on a claimed abuse of discretion by the trial judge dealing with a motion for continuance under Rule 40(i), SCRCP, when such motion was never made.

In his Initial Brief, Appellant makes mention of one notice regarding the trial, when there were actually four different notices before the December 9, 2019 term of Court. In the last notice of December 4, 2019, Strait made several points: (1) the term of Court was for the week, (2) that the term involved both judges, Judge McKinnon and Judge Hall, and (3) that while both judges had a case set, the attorneys in this case were expected to discuss when the case was being tried that week. **R. p. 53**

In his Initial Brief, sets out statements that Phillips allegedly made and references the trial transcript. **Initial Brief of Appellant, p. 7.** . However, Phillips' comments were not as alleged. Instead, Phillips told the Court

[Y]esterday morning my client was prepared for trial and he had a witness that had traveled many miles to be here. I went back to my office after the meeting that we had in your chambers and I informed him that we're gonna have to see when this case can actually be heard; there are a lot of moving pieces.

Your Honor, after that I got involved in preparation for another case and I have spoken to my client since yesterday.

R. p. 83 l. 18-21, p. 7 ll. 1-3

The only evidence that Appellant submitted in support of his motion and this appeal is his Affidavit, which was attached to his Motion for New Trial. **R. pp. 176-177.** That Affidavit is also clearly in conflict with Phillips' statement. In his Affidavit, Appellant claims that he was told by his attorney, based on an alleged conversation between Phillips and the clerk that "it would be highly unlikely for the case to be called that week." There is absolutely no evidence that the Court, the Clerk, or anyone, said this to his attorney or that Phillips said that to the Court. In addition, the Appellant did nothing to verify this assertion. He did not seek an affidavit from his former attorney or seek any avenue to determine if the Clerk had ever made such a statement. Instead, Appellant continues to make excuses and now claims some unjust treatment.

He also states that Strait failed to call Phillips on his cell phone, suggesting the Court was at fault. **Initial Brief of Appellant, p. 8.** Such a claim rings hollow; first it was clear the Judge's law clerk called to notify counsel when the trial would start, but more importantly, Phillips acknowledge he never bothered to listen to his voicemail. To characterize the scheduling of the trial "last minute" (**Initial Brief of Appellant, p.5**) clearly ignores all the steps taken by the Clerk and the Court to schedule for trial that week. Finally, Appellant again mischaracterizes the transcript from the day

of the trial, claiming that “despite [Phillips’] complaints about needing additional time to contact his client and not being able to present his case without him” (**Initial Brief of Appellant, p. 5**). However, the transcript shows, that never happened, and Appellant’s counsel vigorously participated in the defense of the case through cross-examination and closing arguments to the Court. See **R. p. 83 ll. 18-21, p. 84 ll. 1-3**

Regarding his availability, Appellant says “I made plans for Tuesday and was not available to appear in trial when the case was called on Tuesday.” Appellant has never explained his whereabouts. It is not good enough for a party to claim that he “made plans for Tuesday.” **R. pp. 176-177** As counsel for Respondent pointed out at the hearing on Appellant’s Motion for New Trial, Appellant lives in Rock Hill and talked with his attorney about appearing in Court on the day of the trial. **R. p. 170 ll. 6-10** Respondent asserts it is not acceptable for a party to decide that he is “not available” when the facts show the Court made quite clear that case would be tried the week of December 9, 2019. Defendant’s Affidavit does not assert that he was unaware of trial on December 10, 2019, only that he made “other plans on that day.” It is to be noted that Appellant’s attorney, in fact, sought to have the case tried on December 10, 2019 in his email on December 9th. **R. p. 55-57** Nothing should have prevented Appellant to be ready to try the case the week of December 9, 20219. Particularly telling is that when Phillips was asked if Appellant was present in the Courtroom after lunch on December 10, 2019, the day of the trial, Phillips did not say that he could not reach his client, but instead said, “My client is not going to appear today.” **R. p. 154 ll. 21-23** Certainly, it is reasonable to conclude that Appellant was informed of the ongoing case and chose not to attend.

Perhaps the most flagrant incorrect assertion made in Appellant’s Initial Brief is the claim that the trial judge “abused his discretion” in denying a motion for continuance and referencing Rule

40(i)(2), SCRCRCP At no time during the trial was a motion for continuance made on any ground. Even if such a motion had been made, there must be “good and sufficient cause” shown Rule 40(i)(1), SCRCRCP. As to a witness, “the testimony of the witness is material to the support of the action or defense” and “there has been due diligence to procure the testimony of the witness.” Rule 40(i)(2), SCRCRCP. As previously discussed, nothing was presented to satisfy the standard even if the motion has been made, which was not the case.

Appellant cites a 1919 case to support his claim, but it is apparent that Ilderton v. Charleston Consol. Ry. & Lighting Co., 113 S.C. 91, 101 S.E. 282 (1919) differs dramatically from the case at hand. Ilderton centered on plaintiff’s claim for damages due to injuries caused by defendant’s trolley, which was operated by Robert O’Quinn (“O’Quinn”) who was serving in the United States Army in France at the time of the trial obviously during World War I. In that case, defendant’s attorney attempted to depose O’Quinn before he left the United States for France, but three days before the scheduled deposition, O’Quinn’s “regiment was ordered to leave and did leave.” 101 S.E. at 283. Affidavits were presented from two persons setting out what O’Quinn would say, and plaintiff’s counsel acknowledged that O’Quinn would have so testified. Id. However, the Court ordered the case to trial and a verdict was rendered against defendant. The South Carolina Supreme Court noted that defense counsel attempted to take the deposition of O’Quinn, but he was unexpectedly shipped out. The Court also noted that the case was subject to the protection of the Soldiers’ and Sailors’ Relief Act which was specifically adopted to deal with facts like the one before the Court. There is absolutely nothing similar between the case before this Court and Ilderton.

Even if the face of facts that show that Appellant himself caused the issue about which he now claims prejudice, the Court should dismiss the motion because clients are bound by the actions

of their attorneys. It is well settled in South Carolina that “[i]n the attorney-client relationship, clients are generally bound by their attorneys’ acts or omissions during the course of the legal representation” Koutsogiannis v. BB & T, 365 S.C. 145, 149, 616 S.E.2d 425, 428 (2005). Throughout, Appellant claims that his then attorney told him the case was not going to be tried that week, or even in 2019. There is absolutely no doubt that Phillips had more than adequate notice of the case being tried during the December 9th term of court based on notices from the judge and the clerk’s office. The trial judge met with both counsel, outlining that he would schedule the case that week and that the attorneys would be notified. That is exactly what happened, that is, the judges law clerk called, and the court clerk emailed that the trial would be tried on Tuesday. Phillips acknowledges he did not check either his email or his voicemail. Appellant is thus bound by the actions, or in this case the non-action, of his attorney.

Two cases from Georgia offer some additional guidance. The Georgia Supreme Court determined that a party’s motion to set aside a final order because his attorney had failed to notify him of the trial was not a “meritorious reason for granting the motion to set aside a judgment.” Arkwright v. Arkwright, 284 Ga. 545, 546, 668 S.E.2d 709, 710 (2008). In Drain Tile Mach., Inc. v. McCannon, 80 Ga. App. 373, 56 S.E.2d 165 (1949), plaintiff brought suit to collect an alleged indebtedness. However, when the case was called to trial, neither plaintiff nor his attorney appeared. While the facts of that case reveal that that plaintiff might have had a viable basis for a continuance, namely that plaintiff was on reserve duty, neither plaintiff or his attorney notified the Court beforehand of such even though it was known. Plaintiff’s counsel did not show up to the trial. The Court determined that the explanations offered by plaintiff and his attorney “simply show that the plaintiff and his counsel were lacking in due diligence” 56 S.E.2d at 168. Even if Appellant

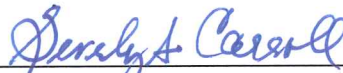
is to be believed that his attorney told him the case was not going to be tried this week, which version is not supported by the evidence, Appellant is bound by the actions of his counsel.

CONCLUSION

It is clear that this Court should affirm the trial court's decision not to grant Appellant a new trial and must affirm the Judgment entered in this case.

September 8, 2020

Respectfully submitted,



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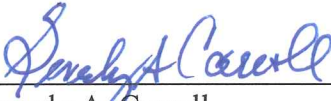
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CERTIFICATE OF COMPLIANCE

The undersigned as attorney for Respondent, certifies the Final Brief of Respondent complies with Rule 211 (b), South Carolina Appellate Court Rules.



Beverly A. Carroll