THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

Case No. 2020-G000720

Marvin Gipson, ... Respondent,

v.

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

RESPONDENT'S RETURN TO PETITION FOR REHEARING

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ARGUMENTS

I. Appellant's contention that the Court's Opinion should be reversed because Respondent failed to present expert testimony at trial to establish the standard of care applicable to a licensed attorney is without merit.

Appellant Coffey & McKenzie, P.A. ("Appellant" or "Appellant Law Firm") first argues that rehearing is appropriate because the Court erred in affirming the Trial Court's determination that Respondent was not required to present expert testimony to establish the standard of care applicable to the facts of this case. This argument fails because it misconstrues Respondent's claim as a legal malpractice action. In fact, Appellant Law Firm breached its duty as a fiduciary, rather than as an attorney, in this matter because its negligence had nothing to do with any act which required the specialized knowledge or training of an attorney.

The scenario presented in this case aligns well with the situation the S.C. Supreme Court considered in *Moore v. Weinberg*, 383 S.C. 583, 681 S.E.2d 875 (2009). In that action, Attorney Weinberg represented Wheeler in litigation regarding the sale of Wheeler's business. *Id.* 681 S.E.2d at 877. Wheeler approached Moore about obtaining a loan and proposed to use $100,000 that had been deposited with the clerk of court's office pending the outcome of his lawsuit as collateral. *Id.* Moore and Wheeler eventually agreed on the terms of the loan, and Weinberg drafted an assignment of the proceeds of the litigation, including the funds held by the clerk of court, to Moore which Wheeler executed. *Id.* Attorney Weinberg eventually settled Moore's lawsuit for $100,000 and the clerk transferred these funds to Weinberg. *Id.* Unfortunately, Weinberg forgot about the assignment to Moore and disbursed the proceeds of the suit to Wheeler. *Id.* Wheeler thereafter failed to repay his debt to Moore, so Moore sued Weinberg for negligence, conversion, and civil conspiracy. *Id.* The trial court granted summary judgment to Attorney Weinberg because, among other reasons, he did not have a "legal relationship" with

Moore. *Id.* This Court reversed, and the S.C. Supreme Court then granted certiorari to review the case. *Id.* 681 S.E.2d at 878.

In analyzing the action, the Supreme Court cited the well-known test for negligence:

> In a negligence action, a plaintiff must show that (1) the defendant owes a duty of care to the plaintiff, (2) the defendant breached the duty by a negligent act or omission, (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) the plaintiff suffered an injury or damages. *Madison ex rel. Bryant v. Babcock Ctr., Inc.,* 371 S.C. 123, 136, 638 S.E.2d 650, 656 (2006).

Id. Attorney Weinberg argued that since he had disbursed the settlement proceeds to his client Wheeler, allowing Moore's action to go forward would "... intrude upon the attorney/client relationship and greatly hinder an attorney's ability to represent his client." *Id.* The Supreme Court disagreed:

> In our view, Weinberg's argument misses the mark. Weinberg acted as **the escrow agent and owed a fiduciary duty to Moore by virtue of this role**. Therefore, it makes no difference that Weinberg was Wheeler's lawyer and represented him in other matters. Under the facts of this case, **the duty arises from an attorney's role as an escrow agent and is independent of an attorney's status as a lawyer** and distinct from duties that arise out of the attorney/client relationship. (emphasis added)

Id.

Obviously, the facts of the current matter are not identical to those presented in *Moore v. Weinberg*, but the principle involved is the same. Appellant Law Firm had a fiduciary duty to disburse the proceeds from the sale of Respondent's real property to him. Appellant failed to do so, and Respondent suffered damages. The fact that Appellant is a law firm had no bearing on this duty. This is easily demonstrated by the fact that if "Coffey & McKenzie, P.A." were a real estate brokerage, accounting firm, or trust company rather than law practice, the issues presented and arguments made in this lawsuit would be identical. So, this case is not a legal malpractice action, it is a negligence action arising from Appellant Law Firm's breach of its fiduciary duty.

Another way to demonstrate this distinction is to contrast the facts of this case with an actual legal malpractice action. In *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010), the S.C. Supreme Court considered a claim by Harris Teeter, Inc., that the respondent law firm had breached the applicable standard of care in its representation of the grocery chain in the arbitration of a lease dispute. *Id.* 701 S.E.2d at 744-45. The Supreme Court considered numerous matters in its opinion, including the following:

> Respondents made an informed judgment in their approach to the arbitration hearing. Respondents made a tactical and strategic decision to focus on whether Harris Teeter actually breached the lease and the materiality of the alleged breach. Respondents, specifically Howell Morrison, made a tactical decision not to emphasize the precise value (in dollar terms) of the under-market lease because the attorneys believed this could work to Harris Teeter's detriment: "In my judgment it would not have helped the presentation of the case to emphasize the under market lease that Harris Teeter held ... and in my view then, and still in my view, if we had spent time showing the Arbitrator emphasizing that we had a submarket lease, it was very much a two-edged sword that could have easily worked to our detriment."
>
> Morrison made a judgment call concerning the presentation of the *Kiriakides* factors—a judgment call that was not unreasonable as a matter of law. Because the judgment call was reasonable as a matter of law (and consequently no question of fact is presented), there is no viable claim of malpractice. Morrison's judgment call falls squarely in the category of a "professional judgment made with reasonable care and skill." *Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 666.

Id. 701 S.E.2d 750-51. In this passage, the Supreme Court analyzes the decisions made by Attorney Morrison and discusses his thinking before determining that his judgments were reasonable as a matter of law. No such discussion is possible in the present case because there were no judgment calls requiring the knowledge or training of a licensed attorney. Instead, Respondent's case involves the negligence of a fiduciary that happens to be a law firm.

Further, the current test applied by our courts to determine legal malpractice verifies the failure of Appellant's attempt to recast this matter as a professional malpractice action. In one of

our state's most recent legal malpractice opinions, *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016), the S.C. Supreme Court stated the test for proving attorney negligence as follows:

> A claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. Furthermore, a claimant is required to demonstrate that "he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.' "

Id. 787 S.E.2d at 489 (internal citations omitted). The second part of this test, which requires a claimant to show that he "most probably would have been successful in the underlying suit" absent the alleged malpractice, demonstrates the futility of Appellant Law Firm's attempt to fit the square peg of a negligence action in the round hole of professional malpractice because there was no "underlying suit" or matter in this case.

Therefore, Respondent did not, and could not, fail to establish the applicable standard of care for an attorney because this case is not a legal malpractice action. There was no act requiring the application of legal judgment which Appellant Law Firm performed on Respondent's behalf. Instead, the evidence presented at trial showed that Respondent instructed Appellant to mail his proceeds check, Appellant then received a fraudulent email instructing that the proceeds should instead be wired, and rather than following up with Respondent, Appellant sent the wire to the account of "W.M International Enterprise Inc." (ROA p. 186, lns 1-25) The jury found that in performing these ministerial acts, Appellant Law Firm breached its fiduciary duty to Respondent and he was thus entitled to a damage award. The Trial Court was thus correct in denying Appellant Law Firm's motion to dismiss Respondent's negligence cause of action for failure to present an expert witness because a legal expert was unnecessary and the handling of

the proceeds was within the knowledge of the jury. (ROA pp. 141, ln 23 – 142, ln 7) Therefore, Appellant Law Firm's argument that that this Court erred in upholding the determination of the Trial Court must fail.

Finally, even if this action were to be analyzed through the lens of legal malpractice, Appellant Law Firm's argument still fails. As this Court stated in *Mali v. Odom*, 295 S.C. 78, 80-81, 367 S.E.2d 166, 168 (Ct. App. 1988):

> A plaintiff in a legal malpractice case must ordinarily establish by expert testimony the standard of care, **unless the subject matter is of common knowledge to laypersons**. (internal citations omitted) (emphasis added).

In *Mali*, Attorney Odom argued that the trial court erred in failing to grant his motions for directed verdict and judgment notwithstanding the verdict because the Mali's did not establish the standard of care he owed through expert testimony. *Id.* 367 S.E.2d at 168. This Court disagreed:

> Here, additional expert testimony was not required because Odom himself, a practicing lawyer, established the applicable standard of care. *See Stallings v. Ratliff*, 292 S.C. 349, 356 S.E.2d 414 (Ct.App.1987) (expert testimony in a medical malpractice case regarding whether a physician breached a duty to disclose a particular risk was not required to create a jury question where an expert testified and the defendant physician himself admitted there was a duty to disclose and a conflict in testimony existed regarding whether the physician disclosed the risk). In published responses to the Malis' interrogatories, Odom conceded he had the "duty to disclose to the [Malis] the restrictions on the subject property" and the "duty to explain to [them] the impact of the restrictions on the subject property;" and in a published portion of his deposition, Odom agreed "it was incumbent upon [him] to disclose to [THE MALIS] ... COVENANTS OR REStrictiONs on [the] property."

Id. 367 S.E.2d 168–69.

In the present case, Respondent averred in Para. 16 of his Complaint that Appellant Law Firm "... had a duty to exercise due care in handling all monies involved in the transaction,

including those proceeds due to [Respondent]." (ROA p. 11) In Para. 19 of its Answer, Appellant Law Firm "... admits the allegations of Paragraph Sixteen." (ROA p. 28) Further, Joseph Coffey, Esquire, an attorney licensed to practice in South Carolina and a partner in Appellant Law Firm, testified as to his opinion of the standard of care owed in a real estate closing and emphasized the need to "double verify" the identity of parties receiving funds prior to disbursement. (ROA pp. 188, lns 1-25 & 195, lns 1-25) Having heard this evidence, the jury was fully equipped to determine that Appellant Law Firm's actions violated the standard of care.

II. This Court correctly refused to reduce the damages awarded by the Trial Court.

There is likewise no basis for Appellant's second argument that this Court erred in failing to reduce Respondent's damage award. At trial, the jury awarded Respondent $10,306.00. (ROA pp. 243, ln 5 – p. 244, ln 25) The jury clearly understood that Appellant Law Firm was able to recover $1,516.89 of Respondent's funds which were incorrectly wired to "W.M International Enterprise Inc.". (ROA pp. 276-77, Exh. 7) Nevertheless, after hearing all the evidence the jury concluded that Respondent's damages were properly assessed as $10,306.00. This determination is entitled to "substantial deference." *Pelican Bldg. Ctrs. of Horry–Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993). Further, this verdict is not "grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence... ." *Harrison v. Bevilacqua*, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (internal quotation marks omitted). Therefore, this Court correctly determined that Appellant Law Firm was not entitled to a reduction in the verdict amount.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that this Court deny Appellant's petition for rehearing.

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PROOF OF SERVICE

I certify that on the date stated below I served the Respondent's Return to Petition for Rehearing on the Appellant by mailing a copy to Appellant's Attorney of Record:

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October 26, 2023

VIA HAND DELIVERY
The South Carolina Court of Appeals
Attn: Jenny Abbott Kitchings, Clerk
1220 Senate Street
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Re: *Marvin Gipson v. Coffey & McKenzie, P.A.*
Case No. 2020-G000720

Dear Ms. Kitchings:

Per the Court's correspondence of October 20th, please find attached an original and six copies of Respondent's Return to Appellant's Petition for Rehearing in the above referenced appeal. By copy of this letter, I am serving a copy of this Return on counsel for the Appellant.

Sincerely,

Benjamin A. Dunn, II

Attachments
cc/w attach: Steven S. McKenzie, Esquire