

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM CLARENDON COUNTY
Court of Common Pleas

The Honorable Kristi F. Curtis, Circuit Court Judge

Case No. 2023-001880

Opinion No.: 2023-UP-324 (Filed October 4, 2023)

Marvin Gipson, Respondent,

v.

Coffey & McKenzie, P.A., Petitioner.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

Benjamin A. Dunn, II
ORMOND | DUNN
301 Stoneridge Drive
Columbia, South Carolina 29210
(p) (803) 933-9000
(f) (803) 828-7404
Ben@OrmondDunn.com
SC Bar No. 12036
Attorney for Respondent

RECEIVED
JAN 04 2024
S.C. SUPREME COURT

INDEX

Statement of the Case..... 1

Standard of Review..... 2

Facts..... 3

Arguments

I. THE RESPONDENT PRESENTED SUFFICIENT EVIDENCE OF THE
PETITIONER’S NEGLIGENCE..... 4

II. THE PETITIONER IS NOT ENTITLED TO A REDUCTION OF THE
JURY AWARD..... 9

Conclusion..... 10

STATEMENT OF THE CASE

Respondent Marvin Gipson initiated this case with the filing of the Summons & Complaint in the Court of Common Pleas for Clarendon County on August 30, 2017. (ROA pp. 7-20) The initial defendants were Clyde Williamson, Betsy Williamson (hereinafter “Williamsons”), and Petitioner Coffey & McKenzie, P.A. (hereinafter “Petitioner”). Petitioner Law Firm filed its Answer on September 25, 2017 and the Williams filed their Answer and Cross Claims against Petitioner on October 18, 2017. Petitioner filed its Reply on November 14, 2017. The case was called for trial before the Honorable Kristi F. Curtis the first week of February 2020. On February 3, 2020, the jury was selected and pretrial motions were heard. The trial commenced on February 5, 2020. At the close of Respondent’s case, the Williams were dismissed as defendants. (ROA pp. 142, ln 8 – 144, ln 25) At the conclusion of the trial, the jury returned a verdict for Respondent against Petitioner in the amount of \$10,306.00. (ROA pp. 243, ln 5 – 244, ln 25) Petitioner then made motions for judgment notwithstanding the verdict and to reduce the jury award which the Trial Court denied. (ROA pp. 244, ln 13 – 245, ln 25) On February 14, 2020, Petitioner filed a motion for a new trial which was denied by Order dated March 19, 2020. (ROA p. 2) Petitioner then filed its Notice of Appeal to the SC Court of Appeals on May 5, 2020. Oral arguments were conducted on April 6, 2023 and the SC Court of Appeals issued its (unpublished) opinion on October 4, 2023 as Opinion No. 2023-UP-324. Petitioner then filed request for rehearing which was denied by the Court of Appeals on November 9, 2023. Petitioner then filed its Petition for Writ of Certiorari with this Court on December 11, 2023.

STANDARD OF REVIEW

The standard of review applicable to this case is clear:

In an action at law, on appeal of a case tried by a jury, the jurisdiction of this Court extends merely to the correction of errors of law, and a factual finding of the jury will not be disturbed unless a review of the record discloses that there is no evidence which reasonably supports the jury's findings. *Odom v. Weathersbee*, 225 S.C. 253, 81 S.E.2d 788 (1954).

Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

Regarding Petitioner's claim that it is entitled to a reduction in the jury's verdict

The grant or denial of new trial motions rests within the discretion of the trial judge, and his decision will not be disturbed on appeal unless his findings are wholly unsupported by the evidence or the conclusions reached are controlled by error of law. The trial court alone has the power to grant a new trial nisi when he finds the amount of the verdict to be merely inadequate or excessive. However, compelling reasons must be given to justify invading the jury's province by granting a new trial nisi remittitur. The consideration for a motion for a new trial nisi remittitur requires the trial judge to consider the adequacy of the verdict in light of the evidence presented. Great deference is given to the trial judge "who heard the evidence and is more familiar with the evidentiary atmosphere at trial," and who thus "possesses a better-informed view of the damages than this Court."

Proctor v. Dep't of Health & Envtl. Control, 368 S.C. 279, 319–22, 628 S.E.2d 496, 518–19 (Ct.

App. 2006) (internal citations omitted). Further, the standard for courts to alter verdicts is quite

high:

If the amount of the verdict is grossly inadequate or excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, the trial judge must grant a new trial absolute.

Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003) (internal quotation

marks omitted) (quoting *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993)). This

is because:

The jury's determination of damages, however, is entitled to substantial deference. *See, e.g., Pelican Bldg. Ctrs. of Horry–Georgetown, Inc. v. Dutton*, 311 S.C. 56, 427 S.E.2d 673 (1993).

Harrison v. Bevilacqua, 354 S.C. 129, 140, 580 S.E.2d 109, 115 (2003).

FACTS

The case arises out of the Respondent's sale of the property known as 3766 Rowe Drive, Summerton, South Carolina 29148 to Clyde Williamson and Betsy Williamson on June 13, 2016. The closing was conducted by Joseph Coffey, Esquire, an attorney practicing with Petitioner. The sales price of the property was \$12,000.00 and after paying his closing costs, Plaintiff was to receive \$10,306.00 in proceeds. (ROA p. 268, Settlement Statement, June 13, 2016) Respondent requested Petitioner mail these funds to him in a check. (ROA pp. 89, ln 16 – 90, ln 7) Unfortunately, on, or about, June 16, 2016, a paralegal working for Petitioner received an email from "mail4rnarvin@gmail.com", in which the letter "m" after the numeral "4" was replaced by the letters "r" and "n". (ROA p. 249, Email, June 16, 2016) This email, apparently from an individual or group that had hacked into the email account(s) of one or more of the parties, instructed Petitioner to wire Respondent's proceeds to a specified account. The email contained wiring instructions for an account with East West Bank located in Pasadena, California and stated the name on the account as "W.M International Enterprise Inc.". (ROA pp. 249-50) Petitioner then wired Respondent's proceeds of \$10,306.00 to this account. On or about June 27, 2016, Respondent became concerned that his proceeds check had not arrived, so he contacted Petitioner and learned that his proceeds had been wired on June 16th. (ROA p. 93, ln 10-15) Both Respondent and Petitioner contacted various law enforcement agencies to report the theft, and also worked with East West Bank, and other financial institutions to determine the whereabouts of Respondent's funds. (ROA pp. 98, ln 2 – 99, ln 2) Ultimately, these efforts resulted in the

return of \$1,516.89 from East West Bank, but Respondent never received the remaining \$8,789.11 he was owed from the sale of his property. (ROA p. 104, lns 10-25)

ARGUMENTS

I. THE RESPONDENT PRESENTED SUFFICIENT EVIDENCE OF THE PETITIONER'S NEGLIGENCE.

Petitioner first argues that the decision of the Court of Appeals should be reversed because:

The Court of Appeals analysis that the disbursement of funds in a real estate closing is within the common knowledge of laypersons is incorrect. (Pet. For Cert., p. 9)

Petitioner's argument fails because it misconstrues Respondent's claim as a form of legal malpractice. In fact, Petitioner 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 this 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.* The Court of Appeals reversed, and this Court granted certiorari to review the case. *Id.* 681 S.E.2d at 878.

In analyzing the action, this 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.* This 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. Petitioner had a fiduciary duty to disburse the proceeds from the sale of Respondent's real property to him. Petitioner failed to do so, and Respondent suffered damages. The fact that Petitioner 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 Petitioner'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), this 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. This 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 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.

In addition, the current test applied by our courts to determine legal malpractice further verifies the failure of Petitioner's attempt to recast this matter as a professional malpractice action. In *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016), this 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 Petitioner'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 Petitioner performed on Respondent's behalf. Instead, the evidence presented at trial showed that Respondent instructed Petitioner to mail his proceeds check, Petitioner then received a fraudulent email instructing that the proceeds should instead be wired, and rather than following up with Respondent, Petitioner 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, Petitioner breached its fiduciary duty to Respondent and he was thus entitled to a damage award. The Court of Appeals was thus correct in affirming the Trial Court's denial of Petitioner'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, Petitioner’s argument that that the decision of the Court of Appeals should be reversed must fail.

Finally, even if this action were to be analyzed through the lens of legal malpractice, Petitioner’s argument still fails. As the Court of Appeals 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 Malis did not establish the standard of care he owed through expert testimony. *Id.* 367 S.E.2d at 168. The Court of Appeals 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 Petitioner "... 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, Petitioner "... 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 Petitioner, 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 Petitioner's actions violated the standard of care.

II. THE PETITIONER IS NOT ENTITLED TO A REDUCTION OF THE JURY AWARD.

There is no basis for this Court to reduce Respondent's damage award. At the conclusion of trial, the jury awarded Respondent \$10,306.00. (ROA pp. 243, ln 5 – p. 244, ln 25) The jury clearly understood that Petitioner 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, Petitioner is not entitled to a reduction in the verdict returned by the jury.

CONCLUSION

For the reasons stated herein, Respondent respectfully requests that this Court decline Coffey & McKenzie, P.A.'s Petition for Writ of Certiorari to the SC Court of Appeals.



Benjamin A. Dunn, II
ORMOND | DUNN
301 Stoneridge Drive
Columbia, South Carolina 29210
(p) (803) 933-9000
(f) (803) 828-7404
Ben@OrmondDunn.com
SC Bar No. 12036
Attorney for Respondent

January 4, 2024