THE STATE OF SOUTH CAROLINA

In The Supreme Court

APPEAL FROM CLARENDON COUNTY

Court of Common Pleas

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Jun 21 2024

S.C. SUPREME COURT

The Honorable Kristi F. Curtis, Circuit Court Judge

Unpublished Opinion No.: 2023-UP-324 (S.C. Ct. App. Filed October 4, 2023)

Marvin Gipson.....Respondent

v.

Coffey & McKenzie, P.A.....Petitioner

PETITION FOR A WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for the Petitioner certifies that the Petition for Rehearing was made and finally ruled upon by the Court of Appeals and filed on November 9, 2023.

QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS ERR IN HOLDING THE DISBURSEMENT OF FUNDS IN A REAL ESTATE CLOSING TO BE WITHIN THE COMMON KNOWLEDGE OF LAYPERSONS?

2. DID THE COURT OF APPEALS ERR WHEN IT FOUND THAT MONEY COLLECTED BY THE PETITIONER FOR THE RESPONDENT WAS A COLLATERAL SOURCE?

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. 52-61). During the motion hearing on February 3, 2020, the Petitioner 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 Petitioner moved for a Judgment Notwithstanding the Verdict for the Petitioner based upon the failure of the Respondent to provide by expert testimony the applicable standard of care for professional legal malpractice. (R. p. 243, lines 13-25)[1]. That motion was denied by the Court (R. p. 245, lines 1-2). Also, after the verdict was returned, the Petitioner raised an additional issue regarding the amount of the verdict (R. p. 245 lines 1-13). The Petitioner 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).

[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).

On February 14, 2020, the Petitioner 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 Petitioner's basis for the Motion was that the Respondent; (1) failed to establish through expert testimony the applicable standard of care for an attorney in a real estate closing; (2) that the Petitioner was entitled to a setoff for $1,516.89 and (3) the Petitioner 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).

The Petitioner then filed its appeal to the South Carolina Court of Appeals. On October 4, 2023, the South Carolina Court of Appeals handed down its decision in Appellate Unpublished Case No. 2020-000720. The Court of Appeals found that the Law Firm's failure to follow Gipson's instructions to send the sales proceeds in the form of a check instead of wire transfers fell within the common experience of laypersons and did not require specialized knowledge to establish the standard of care. Also, the Court of Appeals found that the monies recovered by the Petitioner for the Respondent were a collateral source and the verdict should not be reduced. The Court of Appeals filed the denial for Petitioner's request for a rehearing on November 9, 2023.

ARGUMENT

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 Petitioner 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., Petitioner 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., Petitioner 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).

The Petitioner did not receive instructions from the Respondent to mail his proceeds in a check. The only instruction that was given was to wire it per the compromised email address. The Petitioner wired the money at 3:20 p.m. per the wiring instructions (R. pp. 248, 249, 250, and 251). The Petitioner did not hear from the Respondent again until 11 days later, on Monday, June 27, 2016, asking where his check had been mailed. The Petitioner responded with an email again

[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.

sending him the wire confirmation. Respondent said that he did not ask for a wire, and had not received the funds. Petitioner 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 (R. p. 91, lines 1-25). He did state that the Petitioner was able to recover $1,516.00 and that the net amount of money 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 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

Q. 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 testify for the Respondent was the Respondent (R. p. 129, lines 17-25), At the conclusion of the Respondent's case, the Petitioner moved to dismiss the cause of action for negligence brought by Respondent against the Petitioner because of the Respondent's failure to prove by expert testimony that the Petitioner 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 Petitioner 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 Petitioner 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 Petitioner's and found no breaches in the computer systems used by the Petitioner (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" also known in the industry as a "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 computers from the Petitioner'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 the Petitioner'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 the Petitioner'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 Petitioner had not breached its duty to the Respondent nor had the Petitioner's 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 Petitioner's case and with no rebuttal from the Respondent, the Petitioner again renewed its motion for a directed verdict as to the negligence of the Petitioner(R. p 210, lines 2-25 and p. 211, lines 1-25). The Petitioner again raised the issue that there was no evidence of a breach of the applicable standard of care by the Petitioner 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 Petitioner(R. p. 213, lines 6-18).

The jury returned its verdict against the Petitioner 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 Petitioner

moved for a Judgment Notwithstanding the Verdict for the Petitioner 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 Petitioner (R. p. 244, lines 10-25). That motion was denied by the Court (R. p. 245, lines 1-2). Also, after the verdict was returned, the Petitioner raised an additional issue regarding the amount of the verdict (R. p. 245, lines 1-13). The Petitioner 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 Petitioner 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 Petitioner's basis for the Motion was that the Respondent; (1) failed to establish through expert testimony the applicable standard of care for an attorney in a real estate closing; (2) that the Petitioner was entitled to a setoff in the amount of $1,516.89 and (3) the Petitioner 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).

1. THE COURT OF APPEALS SHOULD HAVE FOUND THAT THE RESPONDENT FAILED TO ESTABLISH THE STANDARD OF CARE IN A LEGAL MALPRACTICE CASE.

In its opinion in *Gipson v. Coffey & McKenzie*, Appellate Case No. 2020-000720 the Court of Appeals states as follows: "Here, Law Firm's alleged failure to follow Gipson's instructions to send the sales proceeds in the form of a check instead of a wire falls within the common knowledge of laypersons and does not require specialized knowledge to establish a standard of care." The Court of Appeals analysis that the disbursement of funds in a real estate closing is within the common knowledge of laypersons is incorrect. In this matter, the money that

was disbursed was from an attorney real estate trust account with Synovus Bank. Whether the money was sent via wire or check, the money came from a real estate closing from the real estate trust account of Coffey & McKenzie, P.A. The Petitioner would show that the handling of money through an attorney trust account is not within the knowledge of laypersons. In *Doe v. Richardson*, 371 S.C. 14, 636 S.E. 2d 866 (2006), the South Carolina Supreme Court answered this exact question and found that the disbursement of funds in a residential real estate transaction is part and parcel of the practice of law and the disbursement of funds cannot be separated from the real estate closing process. In *Doe v. Richardson*, the Supreme Court stated as follows:

> Viewed in isolation, it cannot be said that the disbursement of loan proceeds in and of itself "entail[s] specialized legal knowledge and ability," such that it constitutes the practice of law. Buyers Service, 292 S.C. at 430, 357 S.E.2d at 17. In our view, however, the disbursement of funds in the context of a residential real estate loan closing cannot and should not be separated from the process as a whole. Accordingly, we hold that the disbursement of the funds must be supervised by an attorney. We do not specify the form that supervision must take, nor do we require that the funds pass through the supervising attorney's trust account. Rather, we hold that the attorney's obligation to both his clients if he represents the buyer and the lender, and to his individual client if he represents only one party, includes overseeing this step of the closing process. As explained above, we delay the effective date of this opinion until January 22, 2007, in order to afford persons with ongoing business relationships the opportunity to adjust their practices and procedures to conform to this new rule."
> Doe v. Richardson, 371 S.C. 14, 636 S.E. 2d 866 (2006).

In this case, the closing attorney, 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).

The Respondent failed to establish the applicable legal standard of care to the jury or that the Petitioner 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 Petitioner'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.

The Respondent provided no expert testimony as to the applicable standard of care. In fact, the Petitioner offered the only evidence of the standard of care when Joseph Coffey testified that "double verification" of identity was the standard and that the Petitioner 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 in 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 the standard was breached.

2. THE COURT OF APPEALS SHOULD HAVE FOUND THAT THE VERDICT SHOULD BE REDUCED BY $1,516.89.

The Petitioner is entitled to a setoff of the monies it recovered for the Respondent. The Respondent testified that the net monies Respondent 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 Petitioner and from the Petitioner (R. p. 110, lines 19-25, R. p. 111, lines 1-10, R. p. 116, lines 11-20, R. p. 245, lines 6-25). The Petitioner would show that the jury awarded the Respondent $10,306.00 (R. p. 243, lines 5-17). The Petitioner would further show that the Respondent was out of pocket $8,789.11, not $10,306.00. The Petitioner should have received credit from the Trial Court and the Court of Appeals of $1,516.89 or the amount the Petitioner was able to recover for the Respondent from Synovus Bank. The Petitioner was able to recover this amount for the Respondent because the money was wired from the Petitioner's trust account with Synovus Bank to EastWest Bank (R. p. 189, lines 4-25, R. p. 190, lines 1-25, R. p. 276 and R. p.277). The $1,516.89 was returned to the Petitioner in the form of a cashier's check from EastWest Bank (R. p. 276 and R. p.277). The Petitioner then returned the $1,516,89 to the Respondent (R. p. 110, lines 19-25, R. p. 111, lines 1-10, R. p. 116, lines 11-20, R. p. 245, lines 6-25). The Petitioner moved after the verdict was rendered by the jury for the Court to reduce the award by $1,516.89 (R. p. 245, lines 3-25). The Motion was denied by the Court (R. p. 183, lines 3-25,). The Court of Appeals stated in their opinion that "The collateral source rule provides 'that

compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the damages owed by the wrongdoer." *Marvin Gipson v. Coffey & McKenzie, P.A.* Opinion No.: 2023-UP-324 citing *Covington v. George*, 359 S.C. 100, 103, 597 S.E.2d 142, 144 (2004).

The Court of Appeals committed an error when it found in its opinion that the $1,516.89 received by the Respondent was a collateral source. "The only requirement for qualification as a collateral source is that the source be wholly independent of the wrongdoer." *see Mount v. Sea Pines Co.*, 337 S.C. 355, 357, 523 S.E.2d 464, 465 (Ct. App. 1999). A source is wholly independent and therefore collateral when the wrongdoer has not contributed to it and when payments to the injured party were not made on behalf of the wrongdoer. *see Mount,* 337 S.C. at 357, 523 S.E.2d at 465. In this matter, the retrieval of the $1,516.89 was a result solely of the efforts of the Petitioner and through the Petitioner's real estate trust account with Synovus Bank (R. p. 189, lines 4-25, R. p. 190, lines 1-25). The cashier's check for $1,516.89 was made payable to Coffey & McKenzie, P.A., and that money was promptly given to the Respondent by the Petitioner (R. p. 189, lines 4-25, R. p. 190, lines 1-25, R. pp. 276 and 277). Here, the only way the $1,516.89 was recovered was through the Petitioner and then to the Respondent. Therefore, the $1,516.90 could not be a collateral source. To find any other way would result in a windfall to the Respondent. The collateral source rule acts to prevent a benefit directed to the injured party from resulting in a windfall for the tortfeasor. Dixon v. Besco Eng'g, Inc., 320 S.C. 174, 182, 463 S.E.2d 636, 640 (Ct. App. 1995).

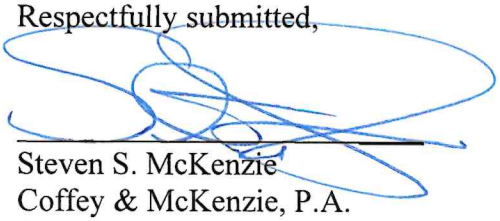
The Petitioner believes that the judgment should be reduced by the amount of money the Plaintiff failed to recover from the closing or $8,789.11. Any other results would see the Respondent recover a total of $11,822.89 when his actual damages were only $10,306.00 (net

funds to be received at closing less the monies recovered for the Respondent by the Petitioner in the amount of $1,516.89). The Petitioner would ask this Court to reduce 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 Respondent and would not reflect the actual damages incurred.

CONCLUSION

The Petitioner 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 a 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 Petitioner breached that standard of care. Also, the Petitioner 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.

Respectfully submitted,



December 9, 2023

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