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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

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Case No: 2011-CP-40-1998
Court Of Appeals Number: 2012-212744

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Jones G. Herring, ..... Respondent,

v.

Gilbert S. Bagnell and Bagnell and Eason, LLC, ..... Appellants.

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# FINAL BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

*Whether the trial court erred in ordering damages in an amount not in accord with the evidence presented?*

A. *Whether a default judgment in a legal malpractice action precludes the need for a showing of the value of potential success on the underlying action?*

B. *Whether the Trial Court erred in awarding damages where Respondent failed to show any actual, quantifiable loss for failure to pursue an action under the Fair Credit Reporting Act?*

*Whether the Trial Court's order was in accord with South Carolina law regarding the awarding of punitive damages?*

## STATEMENT OF THE CASE

Jones G. Herring (the "Respondent" or "Mr. Herring") brought this action seeking damages for the alleged legal malpractice of Gilbert S. Bagnell ("Mr. Bagnell") and Bagnell and Eason, LLC ("Mr. Bagnell's Law Firm", collectively "Appellant") on March 24, 2011. See Record at Page 12. Appellant failed to answer Mr. Herring's complaint in a timely fashion and as a result a default judgment was entered on June 14, 2011. See Record at Page 1. On October 31, 2011, the Trial Court held a hearing for determination of damages in an action at law without a jury in accordance with 55(b)(2) SCRCP. The only evidence presented at the hearing was the testimony of Mr. Herring. After the hearing, the Trial Court took the decision under advisement and left the record open so as to allow for supplemental evidence to be presented and supplement the file. After the submission of an affidavit by the Respondent and Appellant's brief objecting to the alleged damages on several grounds, the Court signed an order in favor of the Respondent on November 23, 2011.

Appellant received notice of the order on December 5, 2011 and timely filed a motion to

reconsider on the very grounds they now appeal. This appeal was filed on August 16, 2012 and later refiled on January 17, 2013.

## STANDARD OF REVIEW

In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The rule is the same whether the judge's findings are made with or without a reference. *Id.* The judge's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E.2d 876 (1974). The order Appellate seeks to have overturned was on a hearing for determination of damages in an action at law without a jury in accordance with 55(b)(2) SCRCP. Further, South Carolina has "recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action." *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 567, 274 S.E.2d 290, 292-93 (1981)(reversing trial court's finding holding the amount recoverable was not based on the proof). Thus, this Court must closely scrutinize whether the trial court's order was based upon evidence which reasonably supported the findings. Further, the appellate court must examine the trial court's post-award review to determine whether the trial court abused its discretion to such a degree as to amount to an error of law. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991).

## FACTS

In or around March of 1998, Mr. Herring approached Consumer Credit Counseling Service, a division of Family Service Center of South Carolina, ("Family Service Center") for the

purpose of refinancing several debt obligations. See Record at Page 23. One or perhaps several of these obligations was an obligation with Associates Financial Services, later assigned to CitiFinancial, Inc., that was in an amount never testified to with an interest rate of 24%. See Record at Page 23. In or around this same time, Mr. Herring entered into an agreement with Associates Financial Services and Family Service Center for the repayment of an outstanding debt in reduced monthly payments and a reduced interest rate. See Record at Page 23. In the agreement, Mr. Herring would make payments to Family Service Center, who would in turn make payments to the holder of the debt obligation. See Record at Page 112 ¶ 15-19.

Sometime in or around May of 2005, Mr. Herring paid the outstanding balance in full. See Record at Page 23. Though the debt was satisfied, Family Service Center continued to make payments on the debt in excess of $1,200. See Record at Pages 108 ¶ 13-14, 112 ¶ 19-21. Similarly, after the debt was satisfied, CitiFinancial made reports to credit reporting agencies that Mr. Herring was delinquent on his debt. Sometime in the late 2005, Mr. Herring contacted the State of South Carolina Department of Consumer Affairs ("SCDCA") about the inappropriate actions of CitiFinancial in an effort to have the dispute regarding the overpayments and report resolved. See Record at Page 133 ¶ 1-14. SCDCA was unable to get a response from CitiFinancial and recommended that Mr. Herring retain an attorney. See Record at Pages 133 ¶ 10-14, p. 137 ¶ 5-10. At some time in early 2006, Mr. Herring received an IRS form 1099-C for a forgiveness of debt in 2005 of $7,243. See Record at Pages 109-112. This amount was later corrected to a lesser amount. See Record at Pages 24, 113 ¶ 6-8. As a result of the additional income Mr. Herring claimed on his taxes, his taxable income was taxed at a higher income level and he was unable to receive an educational tax credit. See Record at Page 112 ¶ 7-12. The

excess income resulted in Mr. Herring not realizing $1,805.00 in a tax refund in 2006. See Record at Pages 30-31.

Sometime in spring of 2006, Mr. Herring contacted Mr. Bagnell and Mr. Bagnell's Law Firm regarding the previously stated series of events. See Record at Page 124 ¶ 24-25. On or around May 17, 2006, Mr. Herring entered into an agreement with Mr. Bagnell and Mr. Bagnell's Law Firm to represent Mr. Herring in an action against CitiFinancial for the improper issuance of the 1099-C, the improper reporting to credit agencies, and the overpayment of $1,200 from Mr. Herring to CitiFinancial. See Record at Page 89, 122-123. During the representation Mr. Bagnell requested several documents so as to support the cause of action against CitiFinancial. See Record at Pages 95-100. Specifically qualifying his assurance so as to not guarantee a result, Mr. Bagnell told Mr. Herring that he believed that Mr. Herring would be entitled to $100,000 in damages in addition to any treble damages and legal fees. See Record at Page 24 and See Record at Page 92 ¶ 6-8. The purported cause of action was to be brought as a class action. See Record at Page 24. Mr. Bagnell also continually made representations as to previous awards he was able to attain for prior clients. See Record at Pages 86, 87-88, 92, 100, 102.

Sometime in or around 2008, Mr. Herring sought to purchase a house from the estate of his father. See Record at Page 125 ¶ 6-10. As a result of his poor credit score he was unable to qualify for favorable interest terms or a waiver of closing costs. As a result, Mr. Herring will likely pay an additional $18,812.59 in closing costs, interest, and personal mortgage insurance over the term of the loan. See Record at Page 28. While Mr. Herring later discovered that under the tax code he would be able to amend his taxes to correct the improperly qualified income from

the 1099 issued by CitiFinancial, Mr. Herring failed to do so prior to the running of the statute allowing for amending his return. See Record at Page 124 ¶ 5-20. Mr. Bagnell never filed a class action against CitiFinancial on behalf of Mr. Herring. See Record at Page 99 ¶ 18-25. Further, Mr. Bagnell did not return the documents provided by Mr. Herring prior to the hearing on this matter. See Record at Pages 95-98. Mr. Herring filed a complaint with the South Carolina Bar sometime in early 2011 and several months later filed this action. See Record at Page 98 ¶ 6-14.

## LEGAL ARGUMENT

I. *The Respondent had the burden of presenting evidence of the value of the underlying claim, regardless of the default judgment against Appellant, for purposes of determining the amount of damages.*

The trial court erred in awarding the Respondent $504,306.77 based upon the evidence presented at the hearing and in the supplemental affidavit. South Carolina law requires that an award for damages be supported by the evidence presented to the court. Despite the entering of a default judgment against the Appellant, Respondent is required to present adequate evidence of the amount of damages suffered. The Respondent failed to present any evidence as to his ability to successfully bring an action on the alleged acts of CitiFinancial. Similarly, the Respondent never presented evidence as to how his ability to bring the action was affected by the Appellants failure to bring the action. While the default of Appellant resulted in a finding that the inaction of Appellants was negligent and resulted in a harm to Respondent, there was inadequate evidence presented as to the extent of harm that resulted from the negligence. The testimony of the Respondent and his later affidavit in no way addressed the proximate relation of the alleged damages to the harm admitted. While testimony was presented that the Respondent believed he

may be entitled to $100,000 in damages and treble damages against CitiFinancial, such evidence was speculative. Further, no evidence as to the likelihood of success or the collectability of such a judgment was presented. Thus, the trial court erred in awarding the Respondent damages of $504,306.77.

*A. The Court is only allowed to grant damages with a showing by Respondent of the value of the alleged underlying claim.*

South Carolina law requires that the Respondent present adequate evidence of the harm suffered. A defendant in default admits liability but not the damages as set forth in the prayer for relief. *Renney*, 275 S.C. 562, 274 S.E.2d 290. The amount of damages in a default action must be proved by the preponderance of the evidence. *Id.*; see *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct.App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered.").

> "[T]here is a difference between a defendant being declared in default and subsequently having judgment entered against him for damages. By defaulting, a defendant forfeits his "right to answer or otherwise plead to the complaint." In essence, the defaulting defendant has conceded liability. However, a defaulting defendant does not concede the [a]mount of liability.

*Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241–42, 246 S.E.2d 880, 882 (1978)(citations omitted).

> In a default case, the plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. Although the defendant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been submitted.

*Jackson*, 296 S.C. at 529, 374 S.E.2d at 506 (citations omitted). To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or

accuracy. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Id.* Similarly, the determination of damages may depend to some extent on the consideration of contingent events if a reasonable basis of computation is provided, allowing a reasonably close estimate of the loss. *Piggy Park Enter., Inc. v. Schofield*, 251 S.C. 385, 391–92, 162 S.E.2d 705, 708 (1968). Thus, the Respondent was required to present evidence that would allow a reasonably close estimate as to the harm the negligence of Appellant caused the Respondent by a preponderance of the evidence.

The evidence required to be shown in an action for legal malpractice has been more specifically narrowed. As in any negligence action, the plaintiff in a legal malpractice action must establish proximate cause. *Hall v. Fedor*, 349 S.C. 169, 177, 561 S.E.2d 654, 658 (Ct. App. 2002)("the plaintiff must show he or she '***most probably***' would have been successful in the underlying suit if the attorney had not committed the alleged malpractice."), see also *Brown v. Theos*, 345 S.C. 626, 550 S.E.2d 304 (2001); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988); *Floyd v. Kosko*, 285 S.C. 390, 329 S.E.2d 459 (Ct.App.1985). Normally, proximate cause is a question of fact for the jury, and it may be proved by direct or circumstantial evidence. *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972). Proximate cause requires proof of: (1) causation-in-fact, and (2) legal cause. *Bramlette v. Charter–Medical–Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation-in-fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence, and legal cause is proved by establishing foreseeability. *Id.* Generally,

expert testimony is required to establish proximate cause in a malpractice case. *Green v. Lilliewood*, 272 S.C. 186, 249 S.E.2d 910 (1978)("Since many malpractice suits involve [issues] outside the realm of ordinary lay knowledge, expert testimony is generally necessary."). Expert testimony is not required, however, to prove proximate cause if the common knowledge or experience of laypersons is extensive enough to determine the presence of the required causal link between the negligence and the harm. *Pederson v. Gould*, 288 S.C. 141, 341 S.E.2d 633 (1986); *King v. Williams*, 276 S.C. 478, 279 S.E.2d 618 (1981); see *Armstrong v. Weiland*, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976)("When the testimony of an expert witness is not relied upon to establish proximate cause, it is sufficient for plaintiff to put forth some evidence which rises above mere speculation or conjecture...."). Thus, Respondent was required to present some testimony in regards to the resulting harm of Mr. Bagnell's negligence and the resulting harm which rose above mere speculation or conjecture of what he believed he was entitled to.

Other jurisdictions have more succinctly held that if the malpractice charged is related to the prosecution of an underlying action, it is generally held that where there is a "trial within a trial" the client-plaintiff in the legal malpractice action has the burden of proof to establish that proper handling of the matter would have resulted in recovery of a judgment, and that the judgment would have been fully or partially collectible. *Williams v. Bashman*, 457 F. Supp. 322, 326 (E.D. Pa. 1978), See Also *Christy v. Saliterman*, 288 Minn. 144, 150, 179 N.W.2d 288, 294 (1970), *Sitton v. Clements*, 257 F. Supp. 63 (E.D. Tenn. 1966), aff'd, 385 F.2d 869 (6th Cir. 1967); *Duke & Co. v. Anderson*, 275 Pa. Super. 65, 418 A.2d 613 (1980); *Sherry v. Diercks*, 29 Wash. App. 433, 628 P.2d 1336 (1981), *McDow v. Dixon*, 138 Ga. App. 338, 226 S.E.2d 145 (1976), *Moore v. Moyle*, 405 Ill. 555, 566, 92 N.E.2d 81, 87 (1950), *Hoppe v. Ranzini*, 158 N.J.

Super. 158, 385 A.2d 913 (Super. Ct. App. Div. 1978). "The plaintiff in a legal malpractice action must prove a 'case within a case,' as he or she must prove the merits of the underlying case as part of the proof of the malpractice case." 7A C.J.S. Attorney & Client § 331 (citations omitted). The question of what should have happened in the underlying action is a question of law. See, e.g., *Doe v. Howe*, 626 S.E.2d 25, 31, n. 18 (S.C. Ct. App. 2007)("Under the case-within-a-case concept, the test is objective. Therefore, the test is not what the outcome would have been, but rather what it should have been."); *Manning*, 356 S.E.2d 24; 25 (holding that the likelihood of success of underlying case was a question of law).

*B. A court's order granting damages without supporting evidence as actual and quantifiable was not in accord with South Carolina law.*

On the record before it, the trial court could not have awarded any damages without impermissibly resorting to speculation. In this case, not only was there a lack of adequate evidence, there was a complete lack of evidence of any kind. No expert witness testified. No one rendered an opinion on the likelihood of success. No one testified as to the collectability of any damages. More importantly, no one even testified that the statute of limitations had run on bringing the claim. In fact, whether the claim could be brought today is still an issue.

Simply, the Respondent failed to present adequate evidence to support the Trial Court's order for damages against the Appellant. The Respondent at no time presented evidence as to the ability to bring an action on the alleged actions of CitiFinancial. Similarly, the Respondent never presented evidence as to how his ability to bring the action was affected by the Appellants failure to bring the action. While the default of Appellant resulted in a finding that the inaction of Appellants was negligent and resulted in a harm to Respondent. There was no finding, however,

as to the extent of harm that resulted from the negligence. The testimony of the Respondent and his later affidavit in no way addressed the proximate relation of the alleged damages to the harm admitted. While testimony was presented that the Respondent believed he may be entitled to 100,000 in damages and treble damages, such evidence could only be described as mere speculation or conjecture as to information that is outside the realm of ordinary lay knowledge. Finally, no evidence as to the likelihood of success or the collectability of such a judgment was presented. The trial court erred in awarding the Respondent $504,306.77 based upon the evidence presented at the hearing and in the supplemental affidavit. Such evidence could, at best, be described as speculative and conjecture.

Thus, the Court's order must be reversed and these issues must be properly addressed on remand.

*II. The Trial Court erred in granting punitive damages without clear and convincing evidence of a harm resulting from wilful, wanton, or reckless conduct.*

Without a showing of harm resulting from wilful, wanton, or reckless conduct by clear and convincing evidence, the trial court erred in granting punitive damages. Under South Carolina law, "[p]unitive damages may be awarded only if the plaintiff proves by clear and convincing evidence that his harm was the result of the defendant's wilful, wanton, or reckless conduct." S.C. Code Ann. § 15-32-520. Similarly, in determining the amount of punitive damages, the court is to consider all relevant evidence, including, but not limited to:

> "(1) the defendant's degree of culpability; (2) the severity of the harm caused by the defendant; (3) the extent to which the plaintiff's own conduct contributed to the harm; (4) the duration of the conduct, the defendant's awareness, and any concealment by the defendant; (5) the existence of similar past conduct; (6) the profitability of the conduct to the defendant; (7) the defendant's ability to pay; (8) the likelihood the award will deter the defendant or others from like conduct; (9) the awards of punitive damages against the defendant in any

> state or federal court action alleging harm from the same act or course of conduct complained of by the plaintiff; (10) any criminal penalties imposed on the defendant as a result of the same act or course of conduct complained of by the plaintiff; and (11) the amount of any civil fines assessed against the defendant as a result of the same act or course of conduct complained of by the plaintiff."

*Id.* There is some uncertainty about the amount of discretion allowed a judge acting as a jury in awarding punitive damages following a United States Supreme Court decision in *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991). In evaluating *Haslip*, the Supreme Court of South Carolina provided three due process protections for defendants at three different stages of a case: 1. The jury instructions must explain the nature, purpose and basis for an award of punitive damages; 2. After an award is made, the trial court must scrutinize the award to determine whether it is grossly disproportionate to the severity of the offense and shall set forth the findings resulting from its review; and 3. The appellate court must examine the trial court's post-award review to determine whether the trial court abused its discretion to such a degree as to amount to an error of law. *Gamble*, 305 S.C. 104, 406 S.E.2d 350, *Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835 (1993), reh'g denied, (Aug. 17, 1993). In determining if a punitive damages award comports with due process, trial court ***must*** consider:

> "(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) 'other factors' deemed appropriate."

*Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).

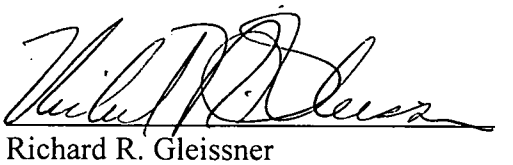
The trial court failed to consider the necessary elements in determining whether the punitive damages awarded were appropriate. In the trial court's order, there is no evidence of the existence of similar past conduct, no evidence that the award is related to the harm suffered and

no evidence that there is a likelihood that this defendant will engage in similar conduct in the future. In fact, the Appellant no longer practices law and no longer has a license to practice law. Thus, there is no chance that this defendant will engage in similar conduct in the future.

Therefore, the Trial Court's Order needs to be reversed and this matter remanded to allow the trier of fact to make the appropriate determinations as to whether punitive damages are appropriate and how much the punitive damages should be.

## CONCLUSION

The trial court erred in ordering damages in an amount not in accord with the evidence presented. A default judgment in a legal malpractice action requires a showing of the value of potential success on the underlying action by a preponderance of the evidence. Thus, the Trial Court erred in awarding damages where Respondent failed to show any actual, quantifiable loss for failure to pursue an action under the Fair Credit Reporting Act. Finally, the Trial Court's order was not in accord with South Carolina law regarding the awarding of punitive damages and failed to set forth the evidence of those elements required in determine whether to award punitive damages and in what amount to award punitive damages. Thus, the Trial Court has made errors in its granting Respondent damages not supported by the evidence before it and must be reversed and this matter remanded back to the trial court to make a proper determination of actual damages and whether to award any punitive damages.

By: 

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## CERTIFICATE OF COUNSEL

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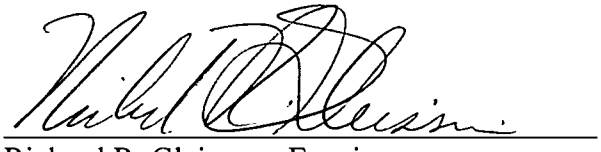
The undersigned hereby certifies that this Final Brief complies with Rule 211(b), SCACR.



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**PROOF OF SERVICE**

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I certify that I have served the Final Brief of Appellant on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on November 25, 2013, addressed to its attorney of record as follows:

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