

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

APPELLATE CASE NO.: 2012-212744

CIVIL ACTION NO.: 2011-CP-40-1998

Gilbert S. Bagnell and Bagnell and Eason, LLC,

Appellants,

v.

Jones G. Herring,

Respondent.

BRIEF OF RESPONDENT

Douglas N. Truslow
Truslow & Truslow
P.O. Box 1465
Columbia, South Carolina 29202
(803) 256-6276
Fax: (803) 256-7659
douglastruslow@truslowlaw.com
Attorney for Respondent

RECEIVED

NOV 19 2013

SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Issues on Appeal	1
Statement of the Case.....	1
Standard of Review.....	4
Facts.....	5
Arguments	
1.	
A. May a finder of fact draw adverse inferences from a party's unethical withholding of evidence supporting the opposing litigant's claims? (Spoliation of Evidence).....	10
B. Did the lower court err in determining that Respondent met his burden of proof regarding damages? (Proof of Damages).....	15
2. Whether punitive damages may be imposed when an at-fault party has engaged in gross misconduct and fraud.....	17
Conclusion.....	21

TABLE OF AUTHORITIES

CASES

<u>Armstrong v. Weiland</u> , 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976).....	5
<u>BMW of North America v. Gore</u> , 517 U.S. 559.....	21
<u>Daisy Outdoor Advertising Co., Inc. v. Dean Abbott</u> , 317 S.C. 14, 16, 451 S.E.2d 394, 395 (Ct. App. 1993).....	17
<u>Executors of Blake and Lowe</u> , 1811 WL 319 (S.C. Ct. App) 1811.....	11
<u>Gordon v. Colonial Ins. Co.</u> , 342 S.C. 152, 536 S.E.2d 376 (Ct.App.2000).....	5
<u>Halyburton v. Kershaw</u> , 1810 WL 298 (S.C. Ct. App. 1810).....	11
<u>Hanna v. Palmetto Homes, Inc.</u> , 300 S.C. 535, 537, 389 S.E.2d 164, 165 (Ct. App. 1990).....	5
<u>Holy Loch Distributors, Inc. v. Hitchcock</u> , 340 S.C. 20, 531 S.E.2d 282.....	11,17
<u>Howard v. Holiday Inns, Inc.</u> , 271 S.C. 238, 246 S.E.2d 880 (1978).....	15
<u>In the Matter of Gilbert S. Bagnell</u> , 393 S.C. 382.....	1,9,10
<u>Judy v. Judy</u> , 383 S.C. 1, 6, 677 S.E.2d 213, 216 (Ct. App. 2009).....	4
<u>Kershaw County Board of Education v. United States Gypsum Co.</u> , 396 S.E.2d 369, 372 (S.C. 1990).....	11
<u>Limehouse v. Hulsey</u> , (Opinion no. 27279, Filed June 26, 2013).....	15
<u>Mayes v. Paxton</u> , 313 S.C. 109, 114, 437 S.E.2d 66, 69 (1993).....	17
<u>Midlands Utility, Inc. v. S.C.D.H.E.C.</u> , 313 S.C. 210, 437 S.E.2d 120, 121 (Ct. App. 1993).....	17

<u>Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C.</u> , 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2004).....	4
<u>Pamettonet, Inc. v. S.C. Tax Comm.</u> , 318 S.C. 102, 456 S.E.2d 385, 387(1995)	17
<u>Parsons v. Georgetown Steel</u> , 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995)...	5
<u>Silvestri v. General Motors Corp.</u> , 271 F.3d583 (4 th Cir. 2001).....	12
<u>State Farm Mutual Automobile Insurance Company v. Campbell</u> , 538 U.S. 408.....	21
<u>Stokes v. Spartanburg Regional Medical Center</u> , 629 S.E.2d 675 (S.C. Ct. App. 2006).....	11
<u>Roche v. Young Bros, Inc.</u> , 332 S.C. 75.....	17
<u>Waites v. South Carolina Windstorm and Hail Underwriting Ass’n</u> , 279 S.C. 362.....	15
<u>Whaley v. CSX Transp., Inc.</u> , 362 S.C. 456, 609 S.E.2d 286.....	11

STATUTES

Not applicable

OTHER AUTHORITIES

<i>Citi to Settle Suit for \$590 Million</i> , Wall Street Journal (August 30, 2012).....	8
---	---

STATEMENT OF ISSUES ON APPEAL

I.

A. May a finder of fact draw adverse inferences from a party's unethical withholding of evidence supporting the opposing litigant's claims? (Spoliation of Evidence)

B. Did the lower court err in determining that Respondent met his burden of proof regarding damages? (Proof of Damages)

II. Whether punitive damages may be imposed when an at-fault party has engaged in gross misconduct and fraud.

STATEMENT OF THE CASE

Respondent ("Herring") commenced the within action on March 24, 2011. In his Complaint, he alleged causes of action against Appellants for negligence, fraud, constructive fraud, breach of fiduciary duty and misrepresentation. Moreover, Herring alleged that he had a meritorious creditor case and that he would have been successful, but for the fact that Appellants had allowed the relevant statute of limitations to expire, and that Appellants had not provided him with any of his file(s) so that he could otherwise pursue his case. Herring alleged he was damaged as a proximate result of Appellants' misconduct.¹ Herring sought actual and punitive damages. Appellants were duly served. Appellants did not respond to or otherwise plead or answer the lawsuit. Accordingly, Appellants were found in default by Order dated June 14, 2011.

¹ Bagnell was permanently disbarred from the practice of law on July 18, 2011. His disbarment arose in significant part out of a common nucleus of facts alleged in Herring's Complaint. Bagnell did not respond to, nor did he otherwise actively participate in his disbarment proceedings. Bagnell did not honor a subpoena issued by the Office of Disciplinary Counsel (ODC) for return of Herring's file(s). (See In the Matter of Gilbert S. Bagnell, 393 S.C. 382). Further, Herring was not advised by Bagnell, much less by Bagnell and Eason, LLC, that Bagnell had been suspended and then disbarred. Bagnell and Eason, LLC essentially ignored Herring, while continuing to represent that it remained as a viable law firm and that Bagnell continued to practice law. Bagnell has admitted that he maintained a law office and staff after his disbarment.

Pursuant to the terms of the Order of Default, Herring was to be awarded damages in an amount to be determined at a subsequently scheduled hearing. Thereafter, a non-jury damages hearing was set for October 31, 2011. Until that time, Appellants neither made any appearance, nor did they ever provide Herring's file(s) to him, to any intermediary(ies), or to ODC. Appellants were duly notified of the hearing and, once again, Appellants did not respond. Given Appellants' default as to liability, their continued non-cooperation, non-participation, and non-appearance, a short, straightforward damages hearing was anticipated; a maximum of fifteen minutes had been set aside for the hearing. (R. p. 117, lines 6-8). Herring presented the court with a proposed Order. (R. p. 68, line 23 -- p. 13, line 4).

At the call of the case for the damages hearing, a previously undisclosed attorney announced that he had been contacted by Bagnell approximately 1.5 hours beforehand, declared that he was appearing on behalf of Appellants, and indicated that Appellants were ready to proceed. Appellants made no motions; did not seek to set aside, alter or amend the terms of the Order of Default; did not object to the procedure to be followed relative to the damages hearing; and, did not personally appear. (R. p. 59, line 4 – p. 61, line 12).

Although Appellants' counsel appeared very well prepared, Appellants produced none of Herring's file(s) or records. Thereafter Herring testified as to his damages. Herring testified that Appellants had withheld and continued to withhold his file and that the documentation therein would serve to further corroborate and prove the substance of his claims, his testimony and his damages. Regardless of Appellants' failure to and/or refusal to return Herring's file(s), Herring testified credibly and concisely relative to his damages. (R. p. 63, line 24 – p. 64, line 21; R. p. 74, lines 10-17; R. p. 75, lines 14 – p. 76, line 5; R. p. 77, lines 2 -12; R. p. 86, lines 1-25; R. p. 87, lines 7 – p. 91, line 5; R. p. 92, lines 21-25; R. p. 100, lines 2-16; R. p. 103, lines 4 – p. 104, line 7; R. p. 106, lines 22 – p. 107, line 2; R. p. 108, lines 22 – p. 109, line 8; R. p. 112, lines 9 – p. 113, line 20; and R. p. 114, lines 8-16). Additionally, the lower court took judicial notice of the terms of Bagnell's disbarment.

Although the damages hearing had been set for a limited period, Appellants were scrupulously accommodated by the lower court. Appellants were provided time for extensive, thorough cross-examination. In conjunction, and as a further accommodation to Appellants in the interim, the lower court held the record open until November 18, 2011 for the submission of an affidavit by Herring, concisely detailing his damages (especially in the event Appellants were to promptly return Herring's file(s)). Appellants did not produce Herring's file. Thereafter and without objection, Herring timely submitted his affidavit to the lower court. (R. p. 22-25; R. p. 115, lines 8-16; R. p. 117, lines 21 – p. 118, line 4).

On November 18, 2011, and only after having received Herring's affidavit, Appellants mailed to Herring a memorandum and an affidavit signed by Bagnell (filed on November 21, 2011). Although in default, Appellants submitted the affidavit of Bagnell, ostensibly as evidence to counter Herring's testimony and affidavit. In his affidavit, Bagnell purported to dispute certain of the claims, testimony and affidavit of Herring. Appellants were not entitled to submit, and the lower court was not required to consider, Bagnell's Affidavit; however, the lower court considered Bagnell's affidavit in context and gave it the appropriate weight warranted and/or otherwise required. (R. p. 5, Footnote 3).^{2, 3}

Appellants did not move that the damages hearing be kept open or reopened for the taking of further testimony and evidence, for cross-examination or that extra time be granted to the parties in consideration of the submission of affidavit(s).

On November 22, 2011, the lower court filed a Form 4 Order awarding Respondent actual damages and punitive damages. (R. p. 2). It was followed by a formal Order dated November 23, 2011, finding that Herring had proven his case for damages.

² Bagnell's affidavit and submission were internally inconsistent and, in significant part, diametrically opposed to what the Supreme Court previously found in disbarring Bagnell.

³ Although not necessary, the timing of Bagnell's affidavit made it virtually impossible for Herring to respond to it.

(R. pp. 4-9). The lower court awarded actual damages of \$254,306.77. Punitive damages of \$250,000.00 were awarded.⁴

On December 15, 2011, Appellants claim to have mailed a Motion(s) to Reconsider to the clerk of court and Respondent.⁵ Appellants failed to copy the lower court, as required by SCRCP 59(g).

On July 10, 2012, the lower court denied Appellants' Motion(s) for Reconsideration.⁶

On August 15, 2012, Appellants filed a Notice of Intent to Appeal. Appellants claim to have re-filed their appeal on January 17, 2013.

STANDARD OF REVIEW

Herring agrees with Appellants that the appropriate standard of review is the "abuse of discretion" standard.

"An action in tort for damages is an action at law." Judy v. Judy, 383 S.C. 1, 6, 677 S.E.2d 213, 216 (Ct. App. 2009). In an action at law, tried without a jury, the appellate court standard of review extends only to the correction of errors of law. Okatie River, L.L.C. v. Southeastern Site Prep, L.L.C., 353 S.C. 327, 577 S.E.2d 468 (Ct. App. 2004).

⁴ In addition to detailed egregious conduct, evidence regarding Appellants' apparent financial worth was presented that included fees previously earned, as well as the fact that Bagnell had sold his house in South Carolina (which had no mortgage) for \$750,000.00 and now owns a Tudor mansion in the Catskills of New York.

⁵ Bagnell claimed that he had mailed a SCRCP 59(e) motion on behalf of himself and Bagnell and Eason, LLC because Appellants had not heard from their counsel by December 15, 2011 (ostensibly the last day's date in which to file timely). Bagnell's claim was thereafter proven to be false, as evidenced by an exchange of emails between Bagnell and Appellants' counsel. In addition, although Bagnell represented that he had timely placed Appellants' SCRCP 59(e) motion in the mail on December 15, 2011, the postmark on the envelope clearly established that claim likewise was not true. Further, given that Appellants' original SCRCP 59(e) motion was transmitted to Herring, it does not appear that it was filed; it was merely sent to Herring's counsel. (See envelope containing Bagnell's motion, Bagnell's motion and letter of transmittal located at Supp R. pp. 61-65). Whether a disbarred attorney may file legal pleadings on behalf of an LLC appears to be a moot issue.

⁶ Because Appellants failed to copy the lower court with their Motion(s) to Reconsider, as required by SCRCP 59(g), there was a delay of more than six months time between Appellants' SCRCP 59(e) motions, and the lower court's Order denying reconsideration.

The trial judge's findings of fact will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or controlled by an erroneous conception of the application of the law. Gordon v. Colonial Ins. Co., 342 S.C. 152, 536 S.E.2d 376 (Ct. App. 2000).

“In a law case, the credibility and weight to be accorded evidence is solely for the fact finder to determine.” Hanna v. Palmetto Homes, Inc., 300 S.C. 535, 537, 389 S.E.2d 164, 165 (Ct. App. 1990); see Parsons v. Georgetown Steel, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995) (stating the credibility and weight of testimony is for the trier of fact). See also 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....”).

STATEMENT OF FACTS

In 1998 and 1999, Herring was experiencing significant financial problems. Herring owed consumer debts in excess of \$100,000.00; he was a South Carolina State employee earning a modest income. He was divorced, paying child support and was facing the specter of a college education for his son. His debts were growing, and accumulating compound interest at high rates. Herring seemingly had no way to repay his debts. He was essentially insolvent. With a bankruptcy, Herring could avoid repaying the \$100,000.00 consumer debts, be debt free and start his life anew; however, he wanted to meet his obligations if there was a viable alternative.

Herring sought help from United Way Consumer Credit Counseling. With the United Way's assistance, Herring was able to reach an agreement to restructure his consumer debt payments. By the terms of his debt restructuring agreement, Herring was provided more time to pay his consumer debts at a reduced rate of interest. Upon full compliance by Herring, the creditor(s) agreed that Herring's future credit was not to be adversely reported or affected; his income being realized was not to be adversely affected; and, his eligibility for commonly accepted credit terms was not to be adversely affected.

Relying on his debt restructuring agreement and through tremendous sacrifice⁷ (and getting a second job), Herring was able to honor all his commitments. By 2005, Herring had paid off his consumer debt obligations and was in full compliance. However, one of Herring's major creditor(s) did not honor concomitant commitments that were fundamental and material components of Herring's debt restructuring agreement.⁸

Among other misconduct, the creditor(s) put derogatory marks against Herring's credit and reported interest rate reductions to the IRS for tax purposes (for Herring) as loan forgiveness income. The net result was that Herring was damaged by the creditor wrongdoing. Herring's damages included: the extraordinary efforts expended and a reduced, significantly altered lifestyle associated with repaying the \$100,000.00, plus interest (that simply could have been avoided with a bankruptcy)⁹; extra taxes; loss of financial eligibility for favorable treatment for certain of his son's college expenses, and/or repayment at a more advantageous rate; loss of eligibility for a lower interest rate associated with the purchase of his family's home place that was in probate; ineligibility for consumer credit except at oppressive interest rates; being placed in a higher income tax bracket; repeatedly receiving dunning letters and repeated telephone calls, both at work and at home seeking repayment for the debts already paid; and, other avaricious and rapacious behavior set forth in the record. (R. p. 108, line 1 – p. 132, line 10; R. pp. 22-31).

Herring had maintained a file(s) containing detailed documentation and logs of wrongful creditor collection practices and errors, as well as checks, receipts, letters, etc., proving that he had, in fact, met his obligations to repay his consumer debt, and that he was damaged as a proximate result of the creditor wrongdoing. Herring had developed proof that one creditor in particular had engaged in prohibited, predatory conduct. Evidence of same included letters from the local branch of that creditor attesting that Herring was correct, that he had paid his debt in full and that the creditor was in the

⁷ By way of example, living in an apartment so abysmal and cheap that he was embarrassed to let his son visit him there. (R. p. 5, footnote 3).

⁸ According to Appellants, the motivation of the creditor to act illegally was that it had kept two sets of financial books. (Supp R. pp. 75-76; Memorandum [sic] Affidavit R. pp. 22-31)

⁹ Had Herring filed for bankruptcy in 2000, the consequences of the same would have been completely extinguished well before the time of the filing of the within lawsuit.

wrong.¹⁰ In fact, on subsequent analysis, Herring was able to show that he had been overcharged, and hence overpaid, what was due. (R. p. 86, lines 13-14). Herring attempted to resolve the creditor issues on his own, but was essentially ignored; he got no satisfaction from the creditor. He continued to be pressed for payment of consumer debts he did not owe, as well as continuing to have his ability to borrow at reasonable interest rates impaired. Moreover, Herring's reputation was being wrongfully disparaged.

Herring sought the assistance of the South Carolina Department of Consumer Affairs. Consumer Affairs diligently attempted a just resolution, but it was likewise rebuffed and ignored; it obtained no suitable or reasonable response from the creditor. In conjunction, and in consideration of its retention practices, it provided Herring with a copy of its unsuccessful efforts to resolve the matter fairly and properly. It recommended that Herring engage an attorney and sue. A local attorney recommended that Herring consult with Bagnell.

In February, 2006, Herring met with Bagnell regarding legal representation. Bagnell was an attorney practicing in a law firm by the name of Bagnell and Eason, LLC. Herring's dealings were initially with Bagnell alone. Bagnell emphasized that all Herring's conduct was to be with him alone – the reasons ultimately became apparent.

In conjunction with their meeting(s), Bagnell insisted that Herring provide him with his complete file(s), including all original documents, proving his case of creditor wrongdoing and consequent damages. Herring complied – the file(s) provided to Bagnell from Herring were voluminous and detailed and the documents contained therein included extensive proof of both creditor wrongdoing and Herring's consequent damages. Bagnell represented that he and his law firm would make copies of Herring's file(s) and return them to Herring.

Bagnell encouraged Herring to sue the creditor. Bagnell stated that the errors by the creditor(s) and Herring's consequent damages were serious, substantial and well

¹⁰ By the time of suit, the local branch of the creditor had shut down its business. Prohibited collection activities had been pursued by its national chain.

documented.¹¹ Bagnell represented that he and his law firm were extremely well qualified and capable of undertaking the lawsuit on Herring's behalf. Bagnell repeatedly represented that he had obtained a settlement in a similar case for a sum in excess of \$120,000,000.00, and that his fee alone in yet another similar case exceeded \$10,000,000.00. He invited Herring to confirm his qualifications and successes on his website. (R. p. 65, line 24 – p. 66, line 17).

Bagnell represented to Herring that he (Herring) had an excellent case, both as to liability and damages. Bagnell made those representations based in large part on the documentation Herring had prepared, reviewed with, and entrusted to Appellants.

Bagnell told Herring that, in consideration and in consequence of the circumstances and Herring's thorough documentation of events, Herring's damages were in excess of \$100,000.00, and that the value of his case was independently valued in excess of \$100,000.00. (R. pp. 22-31; R. pp. 70, 77, 112, 113 and 114). Bagnell stated that, while he could not guarantee it, Herring was likely to be awarded treble damages and substantial legal fees as well. (R. pp. 70, 77, 109). Bagnell further indicated that he was initiating a "class action" lawsuit on behalf of Herring, wherein Bagnell would be the lead attorney. (R. pp. 22-31). Bagnell advised Herring to be patient; that the process was a slow one but that he would contact Herring as significant events unfolded.

Herring and Appellants entered into a contract of employment on May 17, 2006. As a component term of the contract of employment, Bagnell represented that he had associated an experienced, reputable law firm to assist (R. pp. 22-31); however, Bagnell again stressed that all of Herring's contact was to be with him and him alone.

Months went by and Herring did not hear from Bagnell. Herring called Bagnell and was assured that the lawsuit was progressing slowly but positively. Bagnell sent Herring a copy of a letter he (Bagnell) had sent to one of Herring's consumer creditors, ostensibly to demonstrate how diligently, vigorously and aggressively Bagnell was

¹¹ The creditor in question recently settled a deceptive practices class action lawsuit for \$590,000,000.00 (See *Citi to Settle Suit for \$590 Million*, Wall Street Journal, August 30, 2012).

working on the case. (Supp R. pp. 75-76). However, as more time went by, Herring did not hear from or receive anything meaningful from Bagnell.

Herring called Appellants' office to inquire about the case and left messages. His calls were not returned. He then wrote to Appellants. His letters were not answered. Herring repeatedly requested meetings with Appellants. None of Herring's requests were honored and otherwise simply were ignored and/or Appellants were dismissive. (See In the Matter of Gilbert S. Bagnell, 393 S.C. 382). Thereafter, Herring sought the assistance of a separate attorney for the sole purpose of obtaining a case status report from Appellants and/or a meeting. Those efforts evoked no update, no case status report and no response relative to a requested meeting. Further, and despite repeated requests, Appellants would not return to Herring any of his documentation (R. p. 80, lines 5-21), much less any portion of his file.

When Appellants continued to ignore all of Herring's efforts to meet, to provide a status report and/or simply to return a copy of his file(s), Herring contacted the law firm whom Appellants had represented they had associated on Herring's behalf. At that time, Herring was informed, not only had that law firm not been engaged or associated by Appellants, but also that it had previously and expressly advised Appellants that it would not agree to be associated with Appellants, and Bagnell in particular. Appellants did not inform Herring of that fact and further mislead him.

At that point, Herring enlisted the services of an attorney for the purpose of more formally attempting to assist in obtaining a copy of his file(s). Herring's file(s) were critical, in that Herring wanted to pursue his case. Herring discovered that a lawsuit had never been filed by Appellants, and that he had not otherwise been made a part of any lawsuit – that fact was despite Appellants' repeated assurances that Herring's lawsuit had been filed and that the case was progressing. Herring wrote a series of letters (sent via certified mail) to Appellants in an attempt to obtain his file and to try to be informed as to what was going on in his case. (Supp R. p. 77).

Thereafter, Herring learned that Bagnell had sold his residence and permanently left the State of South Carolina. However, both Appellants' telephone answering service

and office secretary indicated that Bagnell was simply “out of town”, but that he was actively practicing law. Further, Appellants maintained an office in Columbia and received certified mail at that location. (Supp R. pp. 77-78). Herring’s letters and telephone calls to Appellants were once again ignored. Bagnell would not deign to call Herring.

Having received no cooperation or response from Appellants, Herring sought the assistance of the South Carolina Bar. Bagnell did not respond to the South Carolina Bar, nor did Appellants produce Herring’s file(s) pursuant to subpoena. (R. p. 76, line 11 – p. 77, line 5; In the Matter of Gilbert S. Bagnell, 393 S.C. 382; R. pp. 54-56). Essentially, Bagnell ignored the South Carolina Bar, and ODC in particular, the same as Appellants had ignored Herring and independent counsel who attempted to assist as an intermediary. Not only had Bagnell engaged in thoroughly unprofessional and deceptive practices, but Appellants had allowed the time to expire in which to sue the consumer creditor(s) who had wronged Herring. Herring was damaged as a result of Appellants’ multiple errors, and his detailed testimony and affidavit were presented to the Court for consideration regarding a determination of damages.

LEGAL ARGUMENTS

ADDRESSING APPELLANTS’ ARGUMENT 1:

I.

A. May a finder of fact draw adverse inferences from a party’s unethical withholding of evidence supporting the opposing litigant’s claims? (Spoliation of Evidence)

B. Did the lower court err in determining that Respondent met his burden of proof regarding damages? (Proof of Damages)

Appellants assert that they are immune from the consequences of their repeated and multiple bad acts. The essence of Appellants’ argument is that, although conceding liability and despite the fact that Herring presented evidence as to his damages:

- An attorney and/or a law firm is entitled, without consequence, to repeatedly deceive a client and the court(s); commit gross negligence, fraud, misrepresentation and breach of fiduciary duties;
- An attorney and/or a law firm is entitled, without consequence, to withhold from a client and the courts(s) valuable documents and other evidence establishing both the serious degree of culpability and extent of damages caused by the attorney; and
- Without any adverse inference ever being drawn, an attorney and his law firm are entitled to withhold from their (former) client his files containing proof of damages proximately caused by the attorney and the law firm.

Appellants' argument is without merit for two primary reasons.¹²

A. Spoliation of Evidence

No litigant should be allowed to engineer or achieve an advantage and/or realize a more favorable result by willfully withholding documentary evidence designed to establish and/or support the legitimacy, truth and integrity of what an opposing party asserts. This is especially true where the at-fault parties are/were an attorney and his law firm who are withholding evidence from their client.

Appellants are to be charged with legal and ethical obligations to their client and the legal system itself. Appellants, and Bagnell in particular, should not be allowed to benefit by ploys to hide the truth and subvert the ends of justice, to Herring's prejudice. Halyburton v. Kershaw, 1810 WL 298 (S.C. Ct. App. 1810); Executors of Blake v. Lowe, 1811 WL 319 (S.C. Ct. App. 1811); Kershaw County Board of Education v. United States Gypsum Co., 396 S.E. 2d 369, 372 (S.C. 1990); Stokes v. Spartanburg Regional

¹² While arguably a third point, the terms of the Order of Default suggested that at least nominal damages were appropriate, with the only remaining issues relating to the amounts. Appellants have not reserved any argument or claim that the Order of Default was defective or not lawful. See Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286, citing Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court).

Medical Center, 629 S.E.2d 675 (S.C. Ct. App. 2006); Silvestri v. General Motors Corp., 271 F.3d 583 (4th Cir. 2001).

Herring testified relative to his file(s) being withheld by Appellants, the significance, the consequences and his file(s)' value (for the underlying case as well as its independent value). Without objection, the lower court took judicial notice of the terms of Bagnell's disbarment. Appellants wrongfully and unethically withheld Herring's property/evidence. Considerable, credible and compelling testimony and an affidavit with detailed damages were presented to the lower court proving the file(s)' importance and that Appellants continued to withhold same. Further, Herring presented evidence that his creditor case would have been successful had it ever been filed by Appellants. Herring also presented evidence of his damages. Regardless of the existence of evidence supporting his claims, and having deceived Herring, Appellants would now proposed that they are entitled to withhold evidence that would prove both the extent of their wrongdoing, as well as the extent of damages caused thereby. Appellants' argument is without merit and ignores both the weight of evidence and the inferences to be drawn.

Appellants ignored certified letters from Herring seeking his file(s). (See by way of example Supp R. pp. 77-78). Appellants also ignored intermediaries who sought to assist. Appellants were otherwise dismissive of Herring. They further failed to heed the significance of the lower court's exceedingly generous offer to allow them even more time to provide Herring with his file subsequent to the damages hearing on October 31, 2011. Otherwise, Appellants deliberately ignored the good faith intent and import of the lower court's proposal. Appellants are not to be rewarded by their inattention to detail, their failure to act responsibly or their additional misconduct.

The record is replete with references that Appellants, and Bagnell specifically, withheld important evidence and property from their client, as well as refusing to turn the file(s) over to ODC. Bagnell refused to honor ODC's subpoena for Herring's file(s). It was unfortunate, but predictable that Appellants would attempt to further toy with Herring and not honor the generous offer of the lower court. After all, Bagnell had failed and/or refused to produce Herring's property for disbarment proceedings.

Appellants have acted in a duplicitous, disingenuous fashion. Aside from being internally inconsistent, Appellants' excuses are not plausible. In consideration of the passage of time and with retention periods having expired, Herring's logs of activities prepared in conjunction with Bagnell, as well as his other documents, were even more valuable and significant. Given Herring's unsuccessful attempts to acquire his file(s) from Appellants through the channels detailed herein, there was little else Herring could do. Appellants knew this, and continued as they had before. Their scheme has been blatant and overt.. It has been dishonest and clearly calculated, designed and intended by Appellants to further harm Herring, as well as to hide the extent of their misconduct in an attempt to escape the consequences of their misdeeds. Such thoroughly shameful activity by an attorney and a law firm should not be approved, condoned or allowed by the courts.

It is noteworthy that, despite prior and repeated unethical conduct, the lower court provided Appellants with yet another opportunity to comply with their obligations and to otherwise assist the lower court in discerning the truth of the matter and the extent of damages in context, *to wit*: by providing the file(s). If all documentation of actual damages were produced and determined to be less than the amount to which Herring testified, he would be in a position to so advise the lower court by way of affidavit. It is hard to imagine that the lower court could have been any more conscientious and fair to Appellants. Appellants have not reciprocated, but *arguendo*, what they presented was simply not credible in context.

Due process was afforded Appellants. Appellants were provided extra time after the damages hearing to produce Herring's file(s). Appellants did not thereafter timely produce Herring's file after the hearing.¹³ Appellants' repeated defalcations should not be without consequence, and Herring should not be further prejudiced by Appellants' actions.

¹³ Bagnell claimed in his affidavit to have produced the file (allegedly produced to Herring after both his disbarment and the time in which to supplement the record had expired). Notably, all Bagnell's claims were and are disputed by Herring except to the appalling and limited degree that Bagnell disingenuously and duplicitously purported to comply at such a time as was obviously calculated to prevent a further response by Herring, if indeed one were required.

Herring's file(s) and documentation were valuable to him on a number of levels. Indeed an adverse inference should be drawn from Appellants' non-production and concealing of Herring's file(s). If Appellants had nothing to hide, and had they not harmed Herring, Appellants would have benefitted by promptly providing the file(s) to Herring, the intermediaries who attempted to assist and independently to ODC. Bagnell opted to be disbarred from the practice of law in this State, rather than simply to return to Herring his file(s), or offer any reasonable or plausible explanation for non-production. Further, a law firm possessing due concern for its client's welfare would have certainly acted diligently in locating the file(s) and reporting to all concerned the attendant circumstances, especially with Bagnell leaving the State, being suspended from the practice of law and later being disbarred. The fact that Appellants acted as they did speaks volumes about the issues and inferences that were properly to have been drawn by the lower court.¹⁴ Moreover, there was evidence produced (both through live testimony, and later through an affidavit with attachments) establishing Herring's claims and supporting the findings of the lower court.

Finally, and at the risk of being redundant, Appellants' secreting of Herring's file(s) deprived Herring, *inter alia*, of a reasonable opportunity to pursue his case against the creditor, utilizing professional services of a law firm and attorney more attuned to ethical and practical, common sense considerations. The evidence before the lower court established that Herring's file(s) would corroborate Herring's averments relative to the underlying claims against Herring's creditor(s), as well as further corroborate the gross wrongdoings of Appellants and further detail the damages they proximately caused.

Herring's file(s) were relevant to both actual and punitive damages. It was not inappropriate for the lower court to consider all the facts and circumstances in context, and to draw an adverse inference from Appellants' gross misconduct and withholding of evidence.

¹⁴ While it is not incumbent upon Herring to prove motive, Appellants' misconduct appears to be a mixture of unmitigated arrogance, greed and unbridled stupidity. Otherwise, it would be mere conjecture and an exercise in futility to assign motive to Appellants, the same as it would be a waste of time to wonder why one who embezzles from a bank does not appreciate that he is likely to be caught and then have to suffer the consequences.

B. Proof of Damages

In addition to, and independent of the inference to be drawn from Appellants' withholding of Herring's file, Herring provided the lower court with a thoughtful, detailed and compelling description and summary of his damages and losses, both through live testimony and through an affidavit with attachments. The lower court handled the matter in accordance with the principles set forth in Howard v. Holiday Inns, Inc., 271 S.C. 238, 246 S.E.2d 880 (1978) and Limehouse v. Hulsey, (Opinion no. 27279, Filed June 26, 2013). Appellants were given an eminently fair hearing. Evidence supporting the claims of Herring and the findings of the lower court exist in the record.

The lower court gave due weight to the evidence and it would be inapposite to now second guess the lower court. Herring pointedly testified regarding the sacrifices he had made to pay a \$100,000.00 consumer debt that he could have otherwise avoided by way of bankruptcy. He testified regarding the value of his property (i.e. his file(s))¹⁵ and other damages he had sustained. Appellants were provided with an opportunity to thoroughly cross-examine Herring. Appellants were not prejudiced by the procedure followed. Appellants conceded Herring could have simply and easily avoided both the \$100,000.00 consumer debt and the considerable sacrifices he had made to pay it, by way of bankruptcy. Appellants expressly conceded that Herring acted "admirably". (R. pp. 33-38). Without objection, and in addition to his testimony, Herring presented to the lower court affidavit evidence that was credible and reasonably detailed under the circumstances, especially considering Appellants had defaulted, conceded liability and did not personally appear or produce Herring's file(s). Appellants strategically opted not to seek to reopen the case or to further cross-examine Herring relative to the content of his affidavit detailing damages. Their reasons for not doing so remain obvious.

The timing of events relative to the submission of Herring's affidavit evidence is also noteworthy in context. Only after receipt of Herring's affidavit did Bagnell attempt to submit a self-serving affidavit. It was, in context, clearly established to be even more disingenuous, incongruent and dishonest than Appellants' misconduct detailed elsewhere

¹⁵ Waites v. South Carolina Windstorm and Hail Underwriting Ass'n, 279 S.C. 362 (An owner may testify as to value of ... personal property).

herein.¹⁶ The lower court gave Appellants' submission(s) the consideration and weight warranted. Again, the lower court guarded and protected Appellants' due process rights. Appellants were proven again and again to have failed to honor their ethical and legal obligations to Herring. Even to the extent defaulting Appellants had any right to present affidavit evidence, it established in context that Appellants were duplicitous, disingenuous and that their submissions were not credible.

Herring, on the other hand, presented the lower court with testimony and an affidavit thoroughly describing damages, a timeline an explanation of events, and an Excel spreadsheet of damages. As well, Herring confirmed that he had an additional \$28,000.00 of losses (that had been submitted to ODC and addressed in Bagnell's disbarment Order). Simply stated, the evidence presented by Herring had weight properly evaluated by the lower court. It had even more weight to the degree and to the extent it was properly juxtaposed against Appellants' submission(s).

The lower court found Herring's evidence credible, persuasive and compelling. The record reflects that Bagnell told Herring that he had an excellent case, and that his case and his file(s) were each worth at least \$100,000.00. In addition, Appellants concede that Bagnell had told Herring that, while he (Bagnell) could not guarantee it, he (Bagnell) held the opinion that Herring would be entitled to treble damages and fees as well as actual damages. One irony is that had the lower court trebled those sums, considered the other proof of damages as well giving consideration of the personal sacrifices Herring had made to honor his commitments the damages likely would have been even greater than the sums awarded.

In essence, the lower court carefully considered all that was properly before it, and supported in the record. The lower court utilized a conservative approach that was thoughtful, well reasoned, persuasive and seemingly beneficial to Appellants, given the totality of the circumstances. Herring received no special treatment from the lower court;

¹⁶ Notable for its absence is what Bagnell obviously did not present to the lower court as a component of or attachment to his affidavit: there was absolutely no contract of employment, no law firm intake record or client contact information, no correspondence addressed to anyone by Appellants, no certified letters from Herring to Appellants, no documentation reflecting any investigative efforts by Appellants, no legal research, etc.

the sums awarded were less than the amount Herring sought.¹⁷ There was ample, credible evidence as well as reasonable inferences presented to support the decision rendered. The findings of fact are to be given deference. Daisy Outdoor Advertising Co., Inc. v. Dean Abbott, 317 S.C. 14, 16, 451 S.E.2d 394, 395 (Ct. App. 1994); Palmettonet, Inc. v. S.C. Tax Comm., 318 S.C. 102, 456 S.E. 2d 385, 387 (1995); Mayes v. Paxton, 313 S.C. 109, 114, 437 S.E.2d 66, 69 (1993). There was no abuse of discretion by the lower court. Midlands Utility, Inc. v. S.C.D.H.E.C., 313 S.C. 210, 437 S.E.2d 120, 121 (Ct. App. 1993). Given the proof and circumstances, the findings of actual damages must be affirmed.¹⁸ No legal or factual error was made by the lower court.

Overall and finally, Appellants have confused, ignored and improperly intermingled the standard of proof required to establish damages with proof necessary to establish liability. Appellants' liability was conceded and previously determined by virtue of the Order of Default. Again, it is emphasized that Appellants have not argued or asserted error relative to the Order of Default. Any such claims of error in that Order have not been preserved, and thus waived, in any event. See Whaley v. CSX Transp., Inc., 362 S.C. 456, 609 S.E.2d 286, citing Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 531 S.E.2d 282 (to preserve an issue for appellate review, the issue must have been raised to and ruled upon by the trial court).

ADDRESSING APPELLANT'S ARGUMENT 2:

II. Whether punitive damages may be imposed when an at-fault party has engaged in gross misconduct and fraud.

Herring alleged in his complaint that Appellants had engaged in gross misconduct, including fraud. Appellants defaulted. Accordingly, liability for their gross bad acts was conceded. Roche v. Young Bros., Inc., 332 S.C. 75 (By suffering a default, the defaulting party is deemed to have admitted the truth of the plaintiff's allegations and

¹⁷ Herring had sought \$1,500,000.00 in punitive damages.

¹⁸ Appellants assert that the amount of damages awarded was \$504,306.77. That is misleading in context – actual damages were \$254,306.77. Punitive damages are a separate and distinct assessment, as ultimately acknowledged by Appellants in their Statement of Issues on Appeal.

to have conceded liability). Herring presented clear and convincing evidence establishing Appellants' fraud and other gross misconduct. The record, the facts, as well as all the cases cited support the findings and conclusions of the lower court relative to actual damages and independently relative to punitive damages. Aside from causing significant actual damages to Herring, the record reflects that Appellants' conduct was so egregious as to warrant the imposition of punitive damages, *to wit* and *inter alia*:

First, Appellants' conduct in misrepresenting to Herring that a lawsuit had been filed and was proceeding was substantially much worse than a mere prevarication. Appellants lied about critical legal proceedings directly involving Herring. Appellants knew that they were being deceitful. Appellants were mendacious. Appellants knew they were continuing to mislead Herring. Appellants knew or should have known that their acts were certain to irreparably prejudice their client. Appellants intentionally misled their client, such that Herring's statute of limitations in which to sue the creditor was confirmed to have passed. Further, without his file, Herring's ability to ever initiate a case against the at-fault creditor was thwarted completely. Herring so testified. (R. p. 74, lines 8 – 17). For an attorney, Bagnell remained dishonest and unethical at one of the worst levels of unprofessionalism. Having apparently achieved financially rewarding results in other cases in close proximity to the time of the representation of Herring, the conclusion drawn is that Appellants were greedy and did not care about their client's welfare. Appellants did nothing to protect Herring, his property or his legal rights. Appellants, by their actions and inactions must have felt that Bagnell was privileged to abandon Herring, leave the State of South Carolina, abscond with Herring's file, and simply discard Herring as if he were a piece of trash. Simply stated, the award of punitive damages in these circumstances was not inappropriate, especially given the outrageous conduct of Appellants and Bagnell in particular.

Second, Appellants specifically misrepresented to Herring that they had associated a well-respected law firm to assist. Appellants knew that what they represented to their client was entirely false and unequivocally fraudulent. Appellants' misrepresentations were not accidental, nor were they insignificant. Appellants' misrepresentations were particularly disturbing because they had received a letter from

that law firm expressly declining to be involved with Appellants, and Bagnell in particular. Most notably, the letter declining involvement or association was received by Appellants before the May 17, 2006 attorney-client contract was signed. Appellants acted deceptively and continued to mislead Herring thereafter, as documented in Bagnell's own affidavit.

Third, Appellants refused to return Herring's file(s) so that he could otherwise pursue an action. In that vein and without his file(s), Appellants appear to have calculated that Herring could not pursue a case against them. Bagnell's disdain for Herring and the legal system has been so utterly complete that Bagnell permitted his law license to be stripped from him. He allowed himself to be publically exposed and branded as unfit and unethical. The reasons for him to do so have been obvious – the file(s) would further establish the degree(s) of Appellants' duplicity.

Herring's file(s) had independent value. Herring so testified (and it is perfectly understandable that it would be extraordinarily difficult if not impossible for him to pursue his underlying case without adequate documentation). Herring's evidence was found to be credible, and Herring contends that the lower court correctly was entitled to draw an adverse inference relative to Appellants' spoliation of evidence. Appellants' conduct is and was inexcusable and indefensible for, *inter alia*, the reasons set forth in Bagnell's Disbarment Order. It appears clear that Appellants have not produced Herring's file(s) to anyone because doing so would establish unequivocally not only the extent Bagnell's dishonesty, but also the extent of Herring's actual damages caused as a proximate result of Appellants' defalcations. That would in turn translate to the imposition of punitive damages. To conclude on this point, Herring submits that Appellants' gross misconduct is exacerbated by the fact that Bagnell's law firm did not take reasonable steps to assist Herring in procuring his file as required by the Rules of Professional Conduct. It is also perhaps noteworthy in passing that neither of the Appellants ever disclosed to Herring that Bagnell had been suspended from the practice of law.¹⁹

¹⁹ According to the evidence, Appellants still maintain an office in South Carolina.

Appellants ultimately argue that punitive damages are not justified because Bagnell's ability to engage in further misconduct now is limited by virtue of his disbarment. Such reasoning ignores other compelling reasons to impose punitive damages. In essence, Appellants' contention in this regard is circular and much akin to the argument used by a criminal defendant who, upon having been convicted of murdering his parents, pleads for sympathy because he is now an orphan. Appellants are entitled to no sympathy, nor are they entitled to special treatment.²⁰ Punitive damages were awarded considering all factors required to be assessed and given the totality of the circumstances.

Finally and overall, a proper request for punitive damages was made at the inception of the lawsuit. Appellants deliberately chose to ignore the lawsuit, the same as Bagnell had ignored ODC. They defaulted as to liability; they made no appearance when notified of the date of the damages hearing. The timing of Appellants' appearance appears to have been calculated. It was interjected only at the actual call of the damages hearing. That fact can hardly be considered as coincidental. Proof of an entitlement to punitive damages was established by clear and convincing evidence. The lower court's findings and awards were just and appropriate. Appellants' conduct was outrageous, deliberate, and repeated. It was designed and calculated to thwart proper resolution.²¹ Appellants' actions and arguments appear to have been irreconcilably disingenuous and asserted solely to prevent fair financial recourse. Appellants continue to dissemble in a transparent attempt to further delay the administration of justice. In context and considering their gross misconduct, juxtaposed against Appellants' prior financial success, the punitive damages awarded were modest. The punitive damage award was not designed to bankrupt. It was in part designed as a deterrent. It was not at all disproportionate to actual damages and was not at all disproportionate to the severity of the misconduct exposed and found to have occurred. Appellants' gross misconduct commenced in 2006. It was pervasive, repeated and continued unabated. Punitive

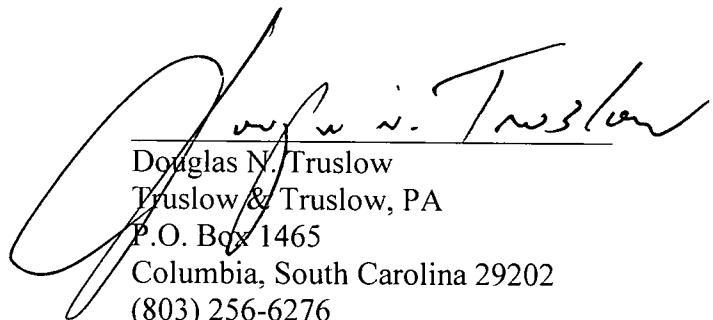
²⁰ The evidence demonstrated that, despite being permanently disbarred from the practice of law, Bagnell continues to represent himself as a member of a law firm.

²¹ Why, upon Bagnell leaving the State of South Carolina and then being suspended and then disbarred from the practice of law, his law firm and law partner did not insist on the file being provided to it and then Herring remains unexplained.

damages may be imposed to further a state's legitimate interests in punishing unlawful conduct and deterring its repetition. (See BMW of North America v. Gore, 517 U.S. 559; State Farm Mutual Automobile Insurance Company v. Campbell, 538 U.S. 408). It is inconceivable, in a profession as honorable and fundamental to the administration of justice as the law, that Appellants could conduct themselves as they did and not expect there to be an award of punitive damages. Appellants' distain is so complete and their remorse is so lacking that it is difficult to imagine an award of punitive damages ever being justified if this is not a case mandating it.

CONCLUSION

For the reasons set forth herein, Respondent urges this Court to affirm the decision of the lower court.



Douglas N. Truslow
Truslow & Truslow, PA
P.O. Box 1465
Columbia, South Carolina 29202
(803) 256-6276
Attorney for Respondent Jones G. Herring

Columbia, South Carolina

November 14, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

APPELLATE CASE NO.: 2012-212744

CIVIL ACTION NO.: 2011-CP-40-1998

Gilbert S. Bagnell and Bagnell and Eason, LLC,

Appellants,

v.

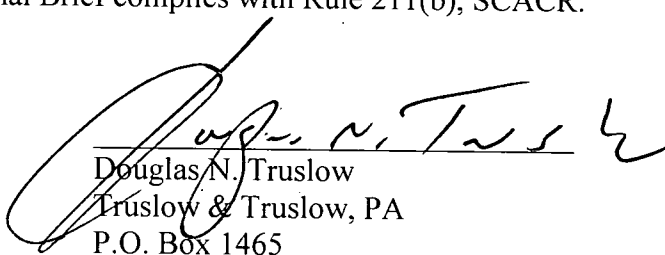
Jones G. Herring,

Respondent.

CERTIFICATE OF COUNSEL

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

November 18th, 2013


Douglas N. Truslow
Truslow & Truslow, PA
P.O. Box 1465

Columbia, South Carolina 29202
(803) 256-6276
Attorney for Respondent Jones G. Herring

RECEIVED
NOV 19 2013
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

APPELLATE CASE NO.: 2012-212744

CIVIL ACTION NO.: 2011-CP-40-1998

RECEIVED

NOV 19 2013

SC Court of Appeals

Gilbert S. Bagnell and Bagnell and Eason, LLC,

Appellants,

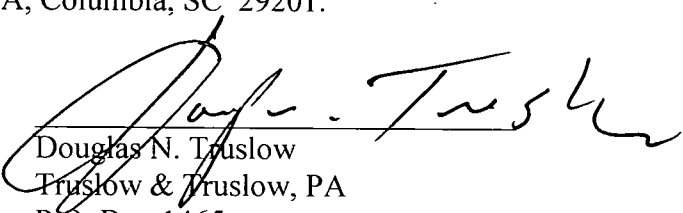
v.

Jones G. Herring,

Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on Gilbert Bagnell and Bagnell and Eason, LLC by depositing a copy of them in the United States Mail, postage prepaid, on November 18th, 2013, addressed to their attorney of record, Richard R. Gleissner, 1237 Gadsden Street, Suite 200A, Columbia, SC 29201.


Douglas N. Truslow
Truslow & Truslow, PA
P.O. Box 1465

Columbia, South Carolina 29202
(803) 256-6276

Attorney for Respondent Jones G. Herring

Columbia, South Carolina

Nov 18th, 2013