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SC Court of Appeals

**BRIEF OF APPELLANT**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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Case No. 2012-CP-40-8310

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LINDA CAMPBELL, M.D.,

Appellant,

v.

ALLEN S. GUIGNARD AND  
ASHLIN POTTERFIELD,

Respondent.

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BRIEF OF APPELLANT

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## STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO FIND THAT THE ACTIONS OF DEFENDANT TOLLED THE STATUTE OF LIMITATIONS ?
2. DID THE TRIAL COURT ERR IN FINDING THAT THE DEFENDANT WAS ESTOPPED FROM INTERPOSING THE STATUTE OF LIMITATIONS AS A DEFENSE IN THIS CASE?
3. DID THE TRIAL COURT ERR IN FINDING THAT THE STATUTE OF LIMITATIONS IN THIS CASE WAS TOLLED DUE TO THE MENTAL INCAPACITY OF PLAINTIFF?

## STATEMENT OF THE CASE

Linda Campbell, M.D. brought this action on December 17, 2012, alleging that Defendant Potterfield wrongfully deprived her of her property, in the form of her case file. The Complaint also alleged legal malpractice, and fraud against Ashlin B. Potterfield and Allen S. Guignard. There was an additional allegation that Defendant failed to see that Plaintiff's mortgage was paid off in a timely fashion as required by the divorce decree. Both parties filed answers denying Campbell's claim, and alleging it to be time barred. A motion for summary judgment was heard on August 6, 2013. The motion was granted by Order issued on September 24, 2013.

## FACTS

The Defendant Potterfield undertook the legal representation of Plaintiff Campbell on or about the month of May, 2003. This representation was with regards to an action filed by Defendant Guignard seeking the termination of his marriage to Campbell.

The Plaintiff alleges in her Complaint that the Defendant Potterfield failed to represent her competently. She alleges specifically that Potterfield failed to respond to discovery, to conduct discovery, or to communicate with Plaintiff.

She further alleges that the Defendant Potterfield provide information and advice which was highly inaccurate, intentionally false, and intended to be relied upon by Plaintiff. She advised the Plaintiff that she would have no input into the process by which her marriage would

be dissolved, and would have to passively accept the result, whatever this might be. She advised Plaintiff at the mediation of the case on July 1, 2004, to surrender the former marital home to Defendant Guignard. Disturbingly, prior to her final hearing on July 23, 2004, she instructed the Plaintiff to keep silent and question nothing. This was done in spite of her being aware of the fact that the results of the settlement brokered by Potterfield were unnecessarily harsh on Plaintiff, and also in spite of her awareness of the frail physical and mental health of Campbell.

At the time, Plaintiff was in an overwhelming state of crisis as to both her personal and professional life. She was preoccupied with caring for her terminally ill father, who was in an extreme state of suffering, with no attending physician to assist her. At this same time, her mother was also suffering a health crisis, as she was developing congestive heart failure. She was also the sole caregiver for children aged nine and twelve years, whom Potterfield had advised her were in danger from Defendant Guignard.

Her professional life was also in a state of crisis. A complaint had been filed against her and was pending in the South Carolina Medical Board alleging breach of duty in the care of a patient. Faced with all of this, the Plaintiff was in a state of emotional paralysis throughout the time of the dissolution of her marriage.

She was being treated at the time by Dr. Albert Gonzalez, M.D., a psychiatrist currently practicing in Orangeburg, South Carolina His affidavit is attached as an Exhibit to this brief. It addresses the mental and emotional state of the Plaintiff at the time as follows: "Linda June Campbell is a patient of mine and I am familiar with her and the circumstances attending her divorce. Based on that familiarity, it is my opinion, to a reasonable degree of medical certainty; that she was during that period of time emotionally imbalanced to the point of being unable to understand and process what was going on; and that this should have been obvious to any professional working in her interests at that time. And that because of her emotional state, she was not able to look after her own interests and was therefore taken advantage of at a particular low point in her life." (Gonzales Affidavit, pg 1).

In her condition, Campbell was able to do little but defer to her counsel with abject passivity. The result was catastrophic, resulting in among other things, the loss of her house.

Following treatment, she began to question the propriety of events surrounding her divorce. Having obtained no satisfaction from Defendant Potterfield, she requested a complete copy of her file, first doing so around September of 2010. At first, these requests were made informally. Over time, it became clear that Defendant Potterfield did not intend to comply with the request.

Eventually, Plaintiff Campbell was forced to contact the South Carolina Bar and hire an attorney to assist in obtaining a copy of her files. The Bar contacted Defendant Potterfield by e mail on July 8, 2011, reminding Potterfield that the file was Ms. Campbell's property and instructing her to provide it to Campbell. This *still* had not occurred as late as fall of 2010, when

Plaintiff hired attorney Jim Nance to assist her in obtaining a copy of the file. Plaintiff did not receive a copy of her files until July 2011.

The Plaintiff then began the process of seeking counsel to review the recovered documents and advise her as to her rights. This was made additionally difficult due to the fact that her principle claims involved allegations of legal malpractice, making it difficult to find counsel who would even discuss the mater with her.

This action was filed on December 17, 2012. The procedural history from that point on is as set forth elsewhere herein.

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ARGUMENTS

I. BECAUSE RESPONDENT CONTINUED TO REPRESENT PLAINTIFF AS TO ENFORCEMENT OF CERTAIN PARTICULARS OF THE DECREE, THE STATUTE OF LIMITATIONS WAS TOLLED AS TO ANY MALPRACTICE CLAIM AGAINST HER DURING THAT TIME.

As discussed elsewhere, the divorce decree provided that that the Defendant Guignard was to continue paying the mortgage on the former marital home. Against the wishes of Plaintiff, Defendant Potterfield had insisted that Campbell surrender the former marital home to her husband. Logically, this left him with the responsibility of paying the mortgage, taxes, and other expenses on the property.

Guignard failed or refused to do so. These payments were vital to the financial well being of Plaintiff, who intended to use the funds to assist in reopening her medical practice. She believed that the Defendant Potterfield was required, based upon their professional relationship and due to compensation paid, to monitor this situation and enforce the decree. She receive no notice or communication disputing her understanding of the duties and responsibilities of Potterfield in this regard.

Thus, there were services still owed to Campbell, and yet to be rendered, up until the date of filing of this action and beyond. These would include monitoring the payment of the mortgage and possibly filing an enforcement action in family court, communicating with Campbell as to her rights and responsibilities with regards to these issues, and providing Campbell with documents and materials from the file necessary to her interests.

In *Corpus Juris Secundum, Limitation of Actions*, Section 249, it is stated that:

“Although there is some authority to the contrary, the limitations period normally is tolled during the time the attorney continues to represent the Plaintiff regarding the specific subject matter in which the malpractice occurred. For the purposes of tolling, an attorney is

p.3

considered to be acting as a client's representative so long as there are unsettled matters tangential to a case and the attorney assists in these matters.

II. BECAUSE FRAUD IS ALLEGED IN THIS ACTION, AND BECAUSE OF THE INTENTIONAL ACTS OF DEFENDANT POTTERFIELD IN WITHHOLDING THE FILE, THE DOCTRINE OF FRAUDULENT CONCEALMENT IS APPLICABLE TO THIS CASE AND HAS THE EFFECT OF TOLLING THE STATUTE OF LIMITATIONS.

Plaintiff Campbell was and remains an intelligent woman and a trained professional. However, in the matter of the dissolution of her marriage, she was in an alien field, unfamiliar and uncomfortable. The Defendants successfully argued at the trial court level that she did, or should have, know that malfeasance and malpractice had occurred without the benefit of reviewing her files.

This is a specious argument. Ms. Campbell continued to be in a fragile emotional and physical state for several years following the events which are the basis of her claim. She had suspicions that something had gone wrong, but these were balanced by her need to trust her chosen counsel, and also the instinct of a trained professional to give another such individual the benefit of the doubt.

Even had she been so foolhardy as to file an action with benefit of access to her file, it would have been doomed to summary dismissal. Certainly, no responsible attorney would have signed his or her name to a pleading without benefit of review of the file. Likewise, no expert witness would have been willing to provide the necessary affidavit without access to anything more than the first person narrative of an individual without legal training who had an unfortunate experience in court.

To require Ms. Campbell to file an action under these circumstances would be unreasonable and inequitable in the extreme. This is why the law provides protection to those who are otherwise entitled to justice, but find that the smoking gun is locked away in the safe of the shooter.

The protection comes at two levels. First is through the doctrine of promissory estoppel. In South Carolina, promissory estoppel may arise "from the making of a promise even though without consideration, if it was intended that the promise should be relied upon, and if a refusal to enforce it would be virtually to sanction the perpetration of fraud or would otherwise result in injustice. *Higgins Construction Company, Inc. vs. S. Bell Tel. & Tel. Co.*, 281 S.E. 2D 469, 470 (S.C. 1981).

To establish a claim of promissory estoppel, one must prove 1) the presence of an unambiguous promise, 2) the promisee reasonably relied upon the promise 3) the reliance was expected and foreseeable by the promisor, and 4) the promisee was injured as a result of relying upon the promise. *Davis vs. Greenwood School District* 50, 620 p.4

S.E.2d 65,67 (S.C. 2005).

The Plaintiff was in emotionally distraught and mentally disturbed at the time of mediation and trial of her divorce case. She was incapable of disputing the truth of her situation as represented to her by retained counsel. As such, she relied on the truth of the Defendant's Potterfield's statements when she indicated 1) that the law was unchallengably adverse to Plaintiff's interests.

Potterfield had every expectation that Campbell would rely upon these statements, which she did to her detriment. The attorney client relationship is of the highest fiduciary nature, and required that Potterfield act in good faith to protect the interest of her client. Instead, Plaintiff was counseled to forgo her rights, to her proximate loss and injury.

The same elements justify a tolling of the statute based upon the doctrine of fraudulent concealment. In the case of Harris vs. Sand Canyon Corp. (DSC 2010) 274 F.R.D. 5556 the basic elements of this doctrine are set forth. "Pursuant to the fraudulent concealment tolling doctrine, when the fraud has been concealed or is of such a character as to conceal itself and the plaintiff is not negligent or guilty of laches, the limitations period does not begin to run until the plaintiff discovers the fraud." Supermarket of Marlinton vs. Meadow Gold Dairies, 71 F3d 119 (4<sup>th</sup> Cir. 1995).

It is noteworthy that the Courts of this state have long presumed that wrongfully withheld evidence if presented, would be adverse to the party concealing same.

Where a party fails to produce testimony of an available witness on a material issue in cause, or produce available records, it may be inferred that the testimony, or contents of records, if presented, would be adverse to the party who fails to call witness or produce records. Wisconsin Motor Company vs. Green, 79 S.E. 2D 718 (1954).

III. BECAUSE PLAINTIFF WAS SUFFERING FROM A MENTAL INCAPACITY AT THE TIME OF THE EVENTS WHICH ARE THE BASIS OF THIS ACTION, THE CONSEQUENCES OF INTENTIONALLY WITHHOLDING HER FILES AND FAILING TO PROVIDE COMMUNICATION ARE STILL MORE SEVERE. A TOLLING OF THE STATUTE IS THE ONLY EQUITABLE RESULT.

The affidavit of Dr. Gonzales affirms that, to a reasonable degree of medical certainty, Plaintiff Campbell was unable to effectively protect her interests at the time of her mediation and divorce hearing, and for an extended time thereafter. Further, it

appears that Defendant concedes that Plaintiff's emotional state at all relevant times meets the definition for insanity set forth in Wiggins vs. Edwards, 314 S.C. 126, 442 S.E. 2D 169, 170 (1994).

The South Carolina legislature, in its wisdom, long ago provided that a statute of limitations would be tolled while an individual was impaired in such fashion. Litigation on this topic has been confined to determining precisely how long the impairment lasted and when it came to an end.

Had Ms. Campbell been provided with a copy of her file, which was her property, this could have been accessed and reviewed by any individuals who were assisting her with her affairs. Thus, they would have spoken for her at a time when she was incapable of doing so, and presented some opportunity of acting upon her rights. That this was impossible was by the design of the same individual who stood to be liable for breach of care.

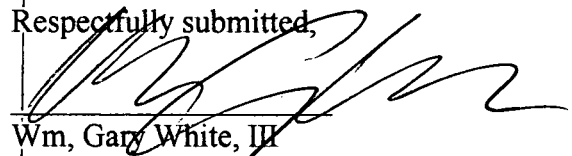
Such an inequitable result cannot withstand scrutiny.

#### CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

February 17, 2014

Respectfully submitted,



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**CERTIFICATE OF SERVICE OF  
INITIAL BRIEF**

THE STATE OF SOUTH CAROLINA  
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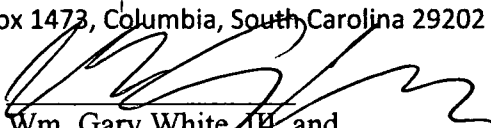
v.

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Respondent

**CERTIFICATE OF SERVICE OF  
INITIAL BRIEF**

I certify that I have served the Notice of Appeal on Ashlin Potterfield by depositing a copy of it in the United States Mail, postage prepaid, on February 8, 2014, addressed to her attorney of record, Carmelo B. Sammataro, Post Office Box 1473, Columbia, South Carolina 29202.

  
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February 14 2014