

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Doyet A. Early, III, Circuit Court Judge

Case No.: 2009-CP-02-2460  
Appellate Case No. 2012-211915

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**RECEIVED**

SEP 25 2014

**SC Court of Appeals**

73667

Julie Tuten,

Respondent,

v.

David Charles Joel, individually, and doing  
business as Joel & Associates, P.A. and/or  
Joel & Associates; and Heather Glover

Defendants,

of whom

David Charles Joel, individually, and doing  
business as Joel & Associates, P.A. and/or  
Joel & Associates, are

Appellants.

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**PETITION FOR REHEARING**

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Appellants (hereinafter "Appellants" or "Joel") respectfully petition the Court for rehearing pursuant to Rule 221(a), SCACR. This petition is submitted on the grounds that this Court may have overlooked or misapprehended important law and evidence applicable in this matter, and based its ruling in part on evidence outside the factual record forming the record on appeal. Based on the reasons set forth below, Appellants respectfully ask this Court to grant this Petition for Rehearing, reverse the directed verdict granted by the trial court below against Appellants, and remand the matter for further proceedings.

## PROCEDURAL AND FACTUAL BACKGROUND

The underlying matter was an action for legal malpractice filed on or about October 16, 2009. In November, 2011, the corporate defendant David C. Joel, Attorney at Law, PC (hereafter “the bankrupt defendant”), was placed into involuntary bankruptcy in the bankruptcy court for the Northern District of Georgia. In the Matter of David C. Joel, Attorney at Law, P.C., Case No. 11-083090-pwb (Bankruptcy M.D.Ga).

Trial proceeded against the remaining defendants on January 23, 2012. Because the bankruptcy proceedings, trial did not proceed against the bankrupt defendant. (ROA 00099, lines 8 – 25). The jury returned a verdict in favor of the plaintiff Julie Tuten (hereinafter “Tuten”) in the amount of \$250,000.00 against David Charles Joel, individually and doing business as Joel & Associates P.A. and/or Joel & Associates and Heather Glover. (ROA 000002). Timely post-trial motions were filed and were denied by order dated April 10, 2012. (ROA 000001; ROA 000005). This appeal followed.

By order of this Court issued August 27, 2014, this Court affirmed the trial court’s directed verdict and upheld the jury verdict. Appellants timely filed a motion to extend the deadline for filing of a petition for rehearing on September 11, 2014. Even though no order has been received as to that motion, Appellants are filing this petition in a good faith effort to expedite consideration of this petition, and avoid further delay even if that motion for an extension is granted. Appellants thus now submit this petition for rehearing from that August 27, 2014 Court decision.

## OVERLOOKED OR MISAPPREHENDED MATTERS

A petition for rehearing shall “state with particularity the points supposed to have been overlooked or misapprehended by the court.” Rule 221, SCACR. Accordingly, Appellant

respectfully submits that in affirming the trial court's directed verdict and denial of Appellants' post-trial motions, this Court overlooked or misapprehended certain material matters as follows:

**I. SUFFICIENT EVIDENCE EXISTED TO PRECLUDE DIRECTED VERDICT ON ISSUE OF WHETHER THE ATTORNEY-CLIENT RELATIONSHIP HAD TERMINATED.<sup>1</sup>**

- A. Joel's evidence, with reasonable inferences related thereto drawn in his favor, were sufficient to justify a potential jury determination that the attorney-client relationship had ended.

The Court's opinion states "An attorney may not end an attorney-client relationship, and thus relieve himself of the duties arising under it, by unilaterally deciding to allow another attorney to take responsibility for fulfilling those duties. Rather, at a minimum, an attorney must communicate to his client his desire to withdraw from their attorney-client relationship in such a manner that the client understands her attorney will no longer represent her." (emphasis added). Appellant submits, however, that characterizing the withdrawal from representation by Joel as "unilateral" is premised upon an improper disregard for the evidence available in the record and the inferences to be drawn in Joel's favor for purposes of the directed verdict motion.

The opinion states "We find no evidence Joel took any action to end his attorney-client relationship with Tuten. To the contrary, the only communication Tuten received came from Glover." Nevertheless, in Section II.B of the Court's opinion, the Court makes the clear determination that Glover was Joel's agent. Although that determination is disputed by Joel, if she was his agent for purposes of imposing liability, Glover should also be deemed his agent for purposes of communicating Joel's desire to terminate the attorney-client relationship. Joel should receive the benefit of all inferences to be drawn from the content of that letter, which includes

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<sup>1</sup> These matters were addressed in Appellant's Brief in Argument as to Issue I.

notice that Joel is “retiring” and reference to “this change” in the relationship with Tuten. (ROA. 224).

Further, a full, and proper, consideration of all the evidence yields more than the “unilateral” action in the writing of the letter by Glover. The Court has overlooked or dismissed all inferences to be drawn from Tuten’s absence of contact or interaction with Joel, or any further action that would indicate anything other than knowledge and acceptance of the termination of Joel’s relationship with her. Even when Tuten became fed up with the manner in which her case was proceeding, it was Glover that was sent letters telling her she had been fired, without reference or address to Joel. (ROA. p. 242-43). A lawyer may not simply abandon a client without notice, but a client always retains the authority to terminate the relationship, and such termination may take different forms.

B. Court misapprehended evidence presented by Tuten’s expert regarding the purported fee sharing agreement and its relevance as to whether the attorney-client relationship between Joel and Glover persisted.<sup>2</sup>

Joel disputes the existence of an agreement for division of fees. There was actually a great deal of testimony produced at trial tending to establish that there had been no actual agreement between Glover and Joel as to division of fees after the Columbia office closed down. (ROA p. 000143, line 10- p. 000144, line 8; ROA p. 000176, lines 3-1). Nevertheless, Tuten’s expert testimony from Mr. Freeman is quoted in part in the Court’s opinion, in particular the portion during which Mr. Freeman alleged that sharing fees in an action was linked with maintained responsibility for an action.

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<sup>2</sup> This issue is addressed in Appellant’s Reply Brief, Argument Section II.

However, the Court appears to have overlooked Mr. Freeman's other relevant testimony, including his refusal to recognize the alternative basis for fee division set forth in Rule 1.5(e) of the Rules of Professional Conduct, Rule 407, SCACR, which states that a lawyer can receive a portion of a fee for work already done in a case before it is concluded by someone else. (ROA 000090, lines 5-17). As was also pointed out during cross-examination, Comment 8 to Rule 1.5 makes the fee division rules inapplicable where lawyers were previously associated in a law firm, as was the case with Joel and Glover. (ROA 000089, lines 7 – 25.). Mr. Freeman did concede that the Joel firm's representation of Ms. Tuten may have ended in June, 2006. (ROA 000095, lines 4 – ROA 000095, line 15). He opined that it did not, but he acknowledged that it could have. Mr. Freeman's own testimony, then, created an issue of fact which precluded directed verdict against the Joel defendants as to the existence of the attorney-client relationship. (ROA 000096, line 2 - ROA 000098, line 7).

Further, Joel respectfully submits that the majority of the Court misapprehended the nature and effect of Joel's collateral litigation against Wachovia bank for monies misappropriated by Glover. The concurring opinion by Judge Geathers discusses the basis and extent of that misapprehension leading to the conclusion drawn by the majority, that this collateral litigation was premised on the existence of Joel's agreement with Glover. The concurring opinion's explanation of that misapprehension is incorporated herein by reference to avoid unnecessary duplication.

Finally, as stated in the Reply Brief, joint responsibility may be a required element to share fees between lawyers to avoid committing misconduct under Rule 1.5(e) of the Rules of Professional Conduct, Rule 407, SCACR, but the sharing of fees does not establish joint responsibility for purposes of this matter. Joel repeats his analogy provided in that reply brief. Consider that a person can operate a motor vehicle legally if they have a valid driver's license. But

if they drive a car without a license, no one would logically argue that they have created a driver's license. Accordingly, even if it was shown that Joel had an agreement to share legal fees with Glover after the South Carolina office closed, (which he denies as stated above), he could have done so in a manner to avoid creating joint responsibility over files such as Tuten's.

**II. APPELLANT'S ARGUMENT AS TO THE REASON THE DAMAGES AWARDED WERE GROSSLY EXCESSIVE WAS NOT ADDRESSED IN THE COURT'S OPINION.<sup>3</sup>**

For damages to be recoverable, the evidence "should enable the jury to determine the amount thereof with reasonable certainty or accuracy." Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010). The existence, causation, nor the amount of damages can be left to conjecture, guess, or speculation, even though proof with mathematical certainty is not required. Id. The Court's opinion addresses the argument that the award was excessive by reference to Tuten's alleged injuries sustained in her wreck, but fails to address the basis for Joel's argument that there was no evidence to support the grossly excessive award of damages.

Appellant's basis for his post-trial motion to request a new trial nisi remittitur was not premised on the lack of sufficient injury sustained by Tuten. (ROA 3; Appellant's Brief p. 22). Instead, it focuses on evidence regarding a certainty of one aspect of Tuten's damages, their upper limit. Tuten's *own legal expert* established the cap in value of her claims when he testified the claims were worth \$150,000. (S.ROA 23, lines 18-22). Tuten's counsel referenced that cap during closing argument. (S.ROA 37, lines 3-8, 18-19, 22-24).<sup>4</sup> Mr. Joel did not object to that evidence or its repeated reference since it rightly constitutes a cap on damages proffered by Tuten. (Id.)

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<sup>3</sup> This issue is addressed in Appellant's Brief as to Issues II and III.

<sup>4</sup> "There's only been one person who has testified as to the value of the case and that was the expert witness that testified that the case is worth exactly \$150,000. When I say the case I'm talking about the underlying case. It's not worth more. It's not worth less."; "There is no dispute over what the value of the case is. The value of the case is \$150,000."; "There's been one expert that's testified as to the value of the case. That is the value of the case."

The eventual jury award far in excess of that amount, nearly doubling the max calculation submitted by Ms. Tuten's own expert as part of her case, clearly indicates passion, caprice, or prejudice given the absence of any evidence that could have sustained such an award. Failure to acknowledge and rectify that award's excessiveness by the trial court amounted to an abuse of discretion, and warrants a reversal and grant of a new trial. This argument was not addressed as part of the Court's opinion regarding the excessive award argument in favor of reversal.

**III. COLLECTIBILITY BURDEN REMAINED ON PLAINTIFF, AND NOT MET WITH EVIDENCE APPROPRIATELY CONTAINED WITHIN THE RECORD ON APPEAL AND THUS AVAILABLE FOR CONSIDERATION.<sup>5</sup>**

The Court's opinion accurately states that the distilled, direct question of whether collectibility has not been directly addressed in South Carolina. First, that is why Appellant used general authority from the Restatement, specifically RESTATEMENT OF THE LAW (THIRD) Vol. 1, Chpt 4, §53, p 391. Appellants would concede that that portion of the restatement references some authority that requires a defendant provide evidence of uncollectibility. However, that section also states "the burden of persuading the jury as to collectibility remains upon the plaintiff." *Id.* That make sense, as otherwise the defendant would have to prove the negative, i.e. the absence of collectibility. Rather, if the ultimate burden is on the plaintiff, then there must be some initial showing or evidence of collectibility to shift a burden to the defendant to produce any evidence to the contrary and refute that evidence.

Secondly, Joel did provide substantial argument for his position that collectibility was a natural component of South Carolina jurisprudence regarding the "case within a case" structure for legal malpractice claims. See App. Br. pp. 17-21, App. R. Br. pp. 6-7.

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<sup>5</sup> This issue is addressed extensively in Appellant's Brief, Argument as to Issue II, and Reply Brief, Argument Section III.

Tuten produced no evidence of collectibility. At oral argument, there was reference to automobile insurance policies that Tuten alleges were in place and could have provided coverage. The Court's opinion asserts that "Joel conceded at oral argument that Tuten had an automobile insurance policy with uninsured and underinsured coverage." Respectfully, that assertion regarding a concession<sup>6</sup> is disputed by Joel. As was pointed out during oral argument, there is zero reference or evidence to any such policy contained within the Record on Appeal because there was zero evidence submitted at the trial below<sup>7</sup> regarding any such policy. Review by this court is confined to the Record on Appeal. Rule 210(h), SCACR ("the appellate court will not consider any fact which does not appear in the Record on Appeal").

Secondly, because of the absence of any policy as part of the trial record and resulting Record on Appeal, Appellant was not allowed to explore the content of those policies or make a showing as to their irrelevance in the inquiry into collectibility. Insurance policies are carefully worded, and full of exclusions and qualifications, even beyond the most basic limitation that all policies have, a monetary cap on liability for the insurer. Without any policy in evidence, Tuten failed to show any evidence of potential recovery via an insurer that would have shifted the responsibility to Joel to provide evidence to the contrary. Likewise, Tuten failed to produce Mr. Still for trial, so he could not be examined directly regarding any insurance or assets.

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<sup>6</sup> The undersigned does not have a copy of the transcript of the oral argument. However, the only "concession" that the undersigned recalls having made upon questioning by the Court at oral argument is that counsel vaguely recollected some reference, years prior during the discovery process in which he was only partially involved, to the alleged existence of insurance policies for the driver of the vehicle in which Tuten was a passenger. No such policies were ever produced in discovery by Tuten, nor later at trial. Thus any concession by counsel at oral argument was, upon information and belief, expressed with full reservation of Joel's argument that as such information was not part of the trial record below, or resulting record on appeal, and thus was not an appropriate matter for consideration during any appellate proceeding pursuant to Rule 210, SCACR.

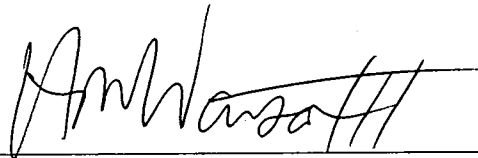
<sup>7</sup> This deficiency was pointed out to the trial court below during argument at trial. (ROA 101, lines 22-25).

Thus Joel respectfully submits that the determination that “Tuten conclusively proved she could collect at least some portion of a judgment against Still” was based on a misapprehension of the relevant record available for the Court’s review and to be used as a basis for the Court’s decision.

**CONCLUSION**

WHEREFORE, for the foregoing reasons, the Appellants respectfully ask this Court to grant this Petition for Rehearing, reverse the directed verdict granted by the trial court below against Appellants, and remand the matter for further proceedings.

Respectfully submitted,



Desa Ballard  
Harvey M. Watson III

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September 25, 2014

**ATTORNEYS FOR APPELLANTS**

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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APPEAL FROM AIKEN COUNTY  
Doyet A. Early, III, Circuit Court Judge

SC Court of Appeals

Case No.: 2009-CP-02-2460  
Appellate Case No. 2012-211915  
Opinion No. 5268 (filed 8-27-2014)

Julie Tuten,

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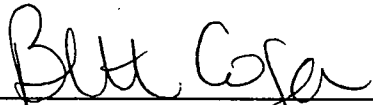
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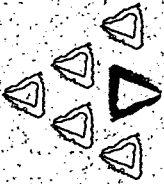
CERTIFICATE OF SERVICE

I, Beth Cogan, an employee of Ballard & Watson, Attorneys at Law, do hereby certify that on September 25, 2014, I served a copy of the **Petition for Rehearing** in the above-captioned case on the following individuals by electronic mail and by United States Mail, with sufficient first-class postage affixed, addressed as follows:

**Tom G. Woodruff, Jr., Esquire**  
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September 25, 2014

Via Hand-Delivery

Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

Re: *Julie Tuten v. David C. Joel*  
Appellate Case No.: 2012-211915

Dear Ms. Kitchings:

Appellant has a pending motion for extension of time in which to file and serve his petition for rehearing. That motion was filed on September 11, 2014, and set forth Appellant's good cause for seeking an extension. Appellant has not yet been notified whether that extension request was granted. Nevertheless, in an effort to help avoid further delay in this matter if that pending motion were granted, Appellant is submitting his enclosed Petition for Rehearing. Appellant respectfully requests that this enclosure be deemed filed properly of record as part of any order granting the pending motion for an extension.

Accordingly, please find enclosed for filing an original and six copies of a Petition for Rehearing pursuant to Rule 221, SCACR for the above-referenced matter. Also enclosed is our check for the \$25.00 filing fee associated with this petition.

Please contact our office if you should have any questions about this submitted petition. With warm personal regards, I am,

Sincerely yours,

Harvey M. Watson III  
[harvey@desaballard.com](mailto:harvey@desaballard.com)

cc: Via U.S. Mail and Email  
Tom Woodruff, Jr., Esquire  
David C. Joel (via email only)

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**SC Court of Appeals**