

REPLY BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Robert Hood, Circuit Court Judge

Case No. 2012-CP-40-8310

LINDA CAMPBELL, M.D.,

Appellant,

v.

ALLEN S. GUIGNARD AND
ASHLIN POTTERFIELD,

Respondent.

REPLY BRIEF OF APPELLANT

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ARGUMENT

RESPONDENT'S CLAIM THAT THE MALPRACTICE ACTION IS BARRED MUST FAIL DUE TO THE MENTAL INCAPACITY OF APPELLANT.

As stated in Appellant's initial brief, Respondent Potterfield undertook legal representation of Appellant in the month of May, 2003 with regards to a divorce. Appellant filed this legal malpractice action alleging that, among other things, Potterfield failed to respond to discovery or conduct discovery, or to communicate; with Respondent.

The Respondent also provided advice and took actions which directly resulted in serious financial loss for Appellant. She advised Plaintiff that she would have no input in the process by which issues would be resolved, excluding her from the negotiations by design. Campbell, who was in serious mental distress, was in no condition to challenge her.

She then inexplicably advised Appellate to surrender the former marital home to her husband, in spite of Dr. Campbell's wishes to the contrary, and a clear opportunity to retain the property at mediation.

Appellate was emotionally exhausted and besieged on all fronts. She had virtually abandoned her medical practice, and was facing a Complaint filed against her with the South Carolina Medical Board alleging breach of duty. She was attempted to care for a terminally ill father with no attending physician to assist her, and little other help. She had been advised by Potterfield that her estranged husband was a danger to her and her children, and told to go into hiding. It is not surprising that she began to exhibit signs of mental illness, recognized the fact and sought treatment.

The record in this appeal includes the Affidavit of her psychologist, Dr. Albert Gonzales. It states in relevant part 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)

Respondent seeks to attack the statement of Dr. Gonzales as "self-serving." By definition, his affidavit cannot be, as he is not a party to this action and has no interest to serve.

Having no medical evidence with which to rebut Dr. Gonzales, Respondent instead attempts to make a circumstantial argument regarding the issue of competence. This is done by reciting certain facts as to the activities of Dr. Campbell at the time, and noting her academic and professional standing. Appellant presents no medical evidence to refute Dr. Gonzales' opinion. There is no other expert opinion and Appellant declined the opportunity to have an independent medical examiner weigh in.

Respondent further makes a great deal of the fact that no treating physician had expressly advised Dr. Campbell to stop practicing medicine, despite the fact that she had essentially done so. Respondent concludes by attempting to define and quantify problems with which Dr. Campbell was dealing at the time, and more or less define her condition as mere “stress,” stating as follows: “Acknowledging the seriousness of **stress** in having to deal with divorce and a sick parent, these circumstances nevertheless do not constitute a mental condition a mental condition sufficient to invoke mental disability and toll the statute.”

With all due respect, mental illness is a complex phenomenon which of its nature must be diagnosed by a trained professional. Dr. Campbell fortunately had the insight and resources which allowed her to do so. It would be profoundly unfair to Dr. Campbell, and still more importantly, to other South Carolinians suffering from mental illness should this position be rewarded and endorsed. The Court would essentially be holding that a person can be determined to be free of mental illness based upon nothing more than his or her attempting to maintain essential life activities, as opined by the lay opinion of adverse counsel or a trial judge.

The law has long progressed past such rash assumptions. “The test for mental capacity is generally said to be whether an individual lacks sufficient mental capacity to understand in a reasonable manner the nature of the transaction in which he or she is engaging, and to understand its consequences and effect upon his or her rights and interests.” (53 Am Jur 2d, Mentally Impaired Persons Section 156).

Several years ago, this Honorable Court heard the case of **Shepard vs. First American Mortgage Company, 289 S.C516, 347 S.E.2d 116 (1986).** That case involved the signature of a deed by a person who allegedly suffered from mental incapacity.

The opinion noted the “ancient” rule that a grantee to a deed was not allowed to allege mental incapacity when he or she has done a solemn deed by which he would otherwise be legally bound. However, the court disposes of this argument, tellingly choosing to cite the 1817 case which referred to the theory as “**a relic of barbarism.**”

As the opinion clearly states, “It is now settled doctrine in this State that the courts of equity take special charge of persons non compos mentis. Persons of unsound mind, like infants, are under the special protection of the courts of equity with respect to their persons, property, and legal transactions.”

The Affidavit of Dr. Gonzales is definitive to the issue of Dr. Campbell’s competence at the time of the relevant transactions and up to the time of its signature. The evidence of Appellants’ impairment cannot be simply swept aside and ignored, however convenient this might appear.

The impairment of Appellant had the effect of tolling the statute of limitations in this action at least until the time of the Gonzales affidavit. Thus, the case was filed on a timely basis.

ARGUMENT:

RESPONDENT'S CLAIM THAT THE MALPRACTICE ACTION AGAINST HER IS BARRED MUST FAIL DUE TO HER INTENTIONAL ACTIONS

Few particulars of state or federal appellate law are more familiar than the applicable standard as to a summary judgment motion. In reviewing the grant of a summary judgment motion, the Appellate Court "applies the same standard as the trial court under Rule 56(c) SCRCP 'summary judgment is proper when "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law. In determining whether summary judgment is appropriate, the evidence and its reasonable inferences must be viewed in the light most favorable to the nonmoving party." **Epstein vs. Brown, 363 S.C. 372, 610 S.E.2d 816 (2005).**

In Respondent's Brief, it is acknowledged that the insanity of Appellant would substantially extend the time limit in which Appellant might file her action. While Respondent reiterates his argument that Appellant was competent at all times relevant to this action, the brief acknowledges that legal effect on tolling of the statute of limitations which would occur *should* the Appellant be found to suffer from mental incapacity.

The Respondent notes that S.C.Code Ann. Section 15-3-40 (2) (a) provides a five year limit on the disability. Thus, in the opinion of counsel, the outside limit within which a suit must be brought, assuming continuous insanity, is eight years- three years under Section 15-3-530, plus five years under Section 15-3-40.

This argument makes one incorrect assumption, and ignores an additional factor. First of all, it adopts a single, catchall date for "accrual" of the cause of action, this being the date of the family court hearing and date of approval of the agreement.

However, the issue of when and how the attorney-client relationship between Appellant and Respondent ended is more nebulous. The Divorce Decree required additional actions to be taken by both parties, many of which required follow up and affirmative action by counsel. Campbell herself testified at her deposition that she believed that Respondent was continuing to represent her well past this point, as she continued to require representation to enforce certain provisions of the decree.

Certainly, nothing in the record indicates that Respondent formally ended her professional relationship with Dr. Campbell. It would certainly have been prudent to do so, inasmuch as there was still work to be done, such as insuring that Campbell's former husband paid the mortgage and household expenses. This would be especially true in the context of a client such as Dr. Campbell, who was suffering from a severe case of what Respondent would characterize as "stress."

At least one cause of action persisted as ongoing tortious activity long past the time of the final

hearing. The Complaint alleges that the Respondent refused to provide Dr. Campbell with a copy of her file. Dr. Campbell first requested her file in September of 2010. Respondent concludes in her brief that this “was long after the statute of limitations expired.” Apparently, this is based upon the assumption, offered without expert support or medical evidence, that Dr. Campbell was mentally competent throughout this period of time. It also assumes, wrongly, that Respondent no longer owed Appellant a duty respecting providing Appellant her file.

The Respondent not surprisingly fails to discuss the embarrassing fact that Dr. Campbell finally obtained her file by contacting the South Carolina Bar. This occurred shortly prior to the time at which the action was filed.

It is a given that, without possession of the file, Appellant had no recourse against Respondent. There would be no possibility of retaining an attorney for an action as complex and sensitive as a legal malpractice case absent an opportunity to review the file, let alone for the requisite expert to evaluate the standard of care.

Simply put, by holding onto the file, Respondent effectively held Appellant in check. That Respondent would obtain a benefit by wrongfully withholding Dr. Campbell’s property to protect her from civil and professional liability would be the height of inequity. It is inconceivable that the law of this state would be silent as to such situations.

Fortunately, they are not. The Respondent cites the case of **Epstein vs. Brown 363 S.C 372, 610 SE 2D 816 (2005)** with regards to issues related to the tolling of statute of limitations. However, that case addresses a much different factual situation than the one at issue here. Epstein was not mentally impaired, nor did the Defendant in that case have the ability to stiff arm his capacity to file suit by his own lack of cooperation.

More significant to the case at hand are the dissenting opinions. Justice Pleicones wrote as follows: “In my opinion Brown should be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute has been induced by the Defendant’s conduct.” (citing **Kleckly vs. N.W.Nat.Case.Co. 338 S.C. 131, 526 S.E.2d 218 (20000)**).

In **Kleckly**, the South Carolina Supreme Court actually *suggests* that appellate counsel should have raised the issue in an appeal...”Kleckly could have argued that Northwestern should be estopped from asserting the statute of limitations defense. Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by defendant’s conduct.”

Such conduct may involve inducing the plaintiff to believe that an amicable adjustment of the claim will be made without suit or to forebear exercising the right to sue. (***Ibid***)

Dr. Campbell relates in her deposition how Potterfield dictated the terms of her settlement, and advised her that “nothing else could be done.” Later, when Campbell had begun her long process of recovery, she had questions. Rather than answer them, Respondent ignored Dr. Campbell. She would only begin to get answers after a South Carolina Bar employee intervened on her behalf.

Respondent now seeks to win her case based upon these delaying tactics.

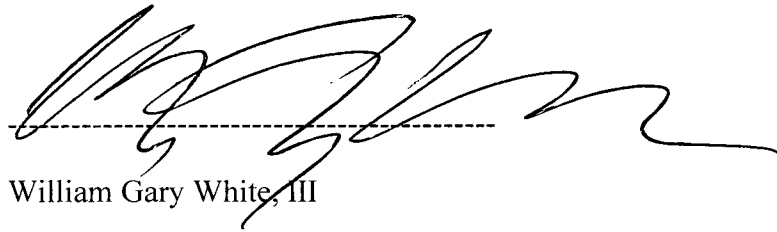
The Court must find that the statute of limitations has been tolled due to the intentional conduct of Respondent in deny Dr. Campbell the contents of her file.

CONCLUSION

For all of the reasons stated herein, Appellant Linda Campbell submits that the arguments and supporting authority presented to the Court conclusively proves that she is entitled to an order of this Honorable Court reversing the trial judge as to the issue of summary judgment.

The Appellant has presented conclusive evidence of her mental impairment at all times relevant to this action, and for a substantial time thereafter. Further, she has shown that under South Carolina law, Respondent should be estopped from raising the statute of limitations as a bar to her action.

RESPECTFULLY SUBMITTED.

A handwritten signature in black ink, appearing to read "William Gary White, III", written over a horizontal dashed line.

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Date: May 8, 2014

**CERTIFICATE OF SERVICE OF
REPLY BRIEF**

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G. Thomas Cooper, Jr., Circuit Court Judge

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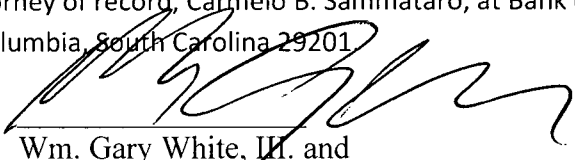
v.

ALLEN S. GUIGNARD AND
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Respondent

**CERTIFICATE OF SERVICE OF
REPLY BRIEF**

I certify that I have served the Final Brief on Ashlin Potterfield by hand delivering three (3) copies on May 9, 2014, addressed to her attorney of record, Carmelo B. Sammataro, at Bank of America Plaza, 17th Floor, 1901 main Street, Columbia, South Carolina 29201


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