

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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S.C. Supreme Court

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Opinion No. 5268 (S.C. Ct. App. filed August 27, 2014)

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..... Petitioners.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing on the merits issue was made and finally ruled on by the Court of Appeals on December 17, 2014.

QUESTIONS PRESENTED

- I. Was failure to grant new trial nisi remittitur an abuse of discretion given the verdict that was grossly excessive with respect to evidence regarding amount of damages allegedly sustained by respondent?

- II. Was directed verdict for respondent improper given the lack of evidence of collectability of any anticipated recovery in underlying claim?

STATEMENT OF THE CASE

The underlying matter was an action for legal malpractice filed on or about October 16, 2009. Defendants David Charles Joel, individually, and doing business as Joel & Associates P.A. and/or Joel & Associates, David C. Joel, Attorney at Law, P.C., doing business as Joel & Associates (collectively “the Joel defendants”) filed an Amended Answer and Cross-Claim (against co-defendant Heather Glover) on November 15, 2010. Defendant Heather Glover defaulted on the cross-claim.

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).

Because of the pendency of bankruptcy proceedings, trial did not proceed against the bankrupt defendant at the time it went forward as to all other defendants. (R. p. 99, lines 8 – 25). Prior to submission to the jury, the trial court granted a directed verdict in favor of the plaintiff Julie Tuten (hereinafter “Tuten” or “Respondent”) on the issue of liability, and the jury ultimately returned a verdict in the amount of \$275,000.00 against David Charles Joel, individually and doing business as Joel & Associates P.A. and/or Joel & Associates and Heather Glover. (R. p. 2). Timely post-trial motions were filed and were denied by order dated April 10, 2012. (R. p. 1; 5).

An appeal was filed by Defendants David Charles Joel, individually, and doing business as Joel & Associates, P.A. and/or Joel & Associates (herein Petitioners). By order of the Court of Appeals issued August 27, 2014 (Opinion No. 5268), the Court of Appeals affirmed the trial court's directed verdict and upheld the jury verdict. Petitioners filed a petition for rehearing which was subsequently denied by order dated December 17, 2014. By order of this Court dated January 23, 2015, Petitioners' deadline for filing a Petition for Writ of Certiorari and Appendix pursuant to Rule 242, SCACR was extended until January 27, 2015.

Accordingly, Petitioners now move for such an order granting a writ of certiorari to the Court of Appeals regarding their decision and denial of a rehearing. It is respectfully submitted that the Court of Appeals' opinion is governed by errors of law, including those addressing a novel legal issue, and is thus appropriate for review and correction by this Court upon grant of certiorari.

ARGUMENT

I. Failure to grant new trial nisi remittitur was an abuse of discretion given the capricious, grossly excessive verdict returned by the jury.

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. When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000). When the award is the product of such factors, yet there was a failure of the trial judge to grant a new trial, it amounts to an abuse of discretion that will be reversed and requires the granting of a new trial absolute.” O’Neal at 527, 431 S.E.2d at 556.

Petitioners’ post-trial motions included a request for a new trial nisi remittitur. (R. p. 3). That motion was denied. (R. p. 1). On appeal, Petitioners addressed this error by the trial court in its submitted briefs to the Court of Appeals. (See Final Brief Issue III). The Court of Appeals attempted to address that alleged error in its opinion (See section IV of opinion), but failed to address the basis for Petitioners’ argument.

The Court of Appeals discussed Tuten's severe injuries sustained in her car wreck. Those injuries are the basis for damages that could have been claimed against the defendant driver in the underlying litigation that was initiated by Glover and then abandoned. The relevant "damages" to be considered and the evidence thereof, however, are any damages allegedly incurred as the proximate result of any act or failure to act by the Joel defendants. While those are related to the underlying damages sustained in the wreck, they are not identical and interchangeable, but instead necessarily derivative under the "case within a case" structure for malpractice actions in South Carolina.

There was evidence proffered by Tuten via her expert witness, regarding alleged damages directly sustained and related to alleged failures by Joel. Ms. Tuten's *own legal expert* established the value of her claims when he testified the claims were worth \$150,000. (S.R. p. 23, lines 18-22). Tuten's legal counsel referenced and confirmed that amount during closing argument. (S.R. p. 37, lines 3-8, 18-21, 22-24).¹ Petitioners did not object to that evidence or repeated references thereto since it rightly constitutes, as the only evidence of the value of the case lost (as distinguished from theoretical value of damages sustained in that underlying wreck which the Court of Appeals wrongly focused on), a specific amount and an effective cap on damages proffered and affirmed by Tuten as

¹ "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. Again, I wish I could say it's worth more, but it's not."; "There's been one expert that's testified as to the value of the case. That is the value of the case." *Id.*

related to claims against the Joel defendants. There was no evidence of any other “value” of Tuten’s loss.

The eventual jury award was far in excess of that evidence, nearly doubling the precise calculation submitted by Ms. Tuten’s own expert as part of her case. There was no evidence at all to sustain a verdict in that amount. As such, the amount of the verdict 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 and later Court of Appeals amounted to an abuse of discretion, and warrants a reversal and grant of a new trial.

II. Collectability should be addressed, clearly identified and confirmed as a separate component of existing required elements of damages and proximate causation in a legal malpractice claim.

In presenting her case, Tuten introduced evidence of involvement in a wreck, sustained injuries and medical bills related thereto. (S.R. p. 1, line 11 – p. 2 line 24; S.R. p. 3, line 9 – p. 4, line 21). Nevertheless, she failed to present any evidence that she would have actually or potentially recovered or collected any settlement or judgment amount but for the defendants alleged negligence. She offered no evidence that the at-fault driver had insurance, that she had insurance, or that the at-fault driver had assets against which a judgment could have been collected. The gist of her argument was “I had a claim, it was lost, and therefore I was damaged.”

Petitioner submits that absence of relevant evidence that Tuten could have made a recovery, even potentially, in the underlying case was a failure to satisfy the damages and proximate causation elements for a legal malpractice claim in South Carolina. Tuten's expert said the value of her case against Joel was \$150,000.00. However, he offered no explanation as to how Tuten could have realized or recovered any such amount in the underlying motor vehicle case.

The distinct element of "collectability" as a prerequisite for a *prima facie* legal malpractice case has not yet been clearly expressed by this Court, and thus presents a novel issue justifying the grant of certiorari in this matter.

A. Requirement for showing of collectability is a natural extension of current law that incorporates notions of collectability within its current structure.

The Court of Appeals opinion accurately states that the distilled, direct question of whether collectability is a valid consideration has not been expressly addressed in South Carolina. Generally, however, to recover in a legal malpractice action under South Carolina law, the claimant must prove four elements: (1) the existence of an attorney-client relationship; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435 n. 2, 472 S.E.2d 612, 613 n. 2 (1996). Stated alternatively, "a plaintiff must show she most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice." Summer v Carpenter, 492 S.E.2d 55, 58, 328 S.C. 36, 42 (S.C. 1997). In denying Petitioners' directed verdict motion,

the trial court noted the “success” portion of that standard had not been defined. (R. p. 181).

Petitioners submit that the requirement that a legal malpractice plaintiff prove collectability involves elements of both the “damages” and “proximate cause”, and absence of proof on those issues necessarily invalidates her claim for legal malpractice. She failed to sustain her burden of proof on both elements.

A requirement for a showing of collectability is a natural extension of the requirement that the underlying claim allegedly mishandled by the lawyer must have been a claim that could have led to a recovery. Summer v Carpenter, 492 S.E.2d 55, 328 S.C. 36 (S.C. 1997) (affirming summary judgment for lawyer against allegation that he was negligent for failing to assert a claim for negligent design, since the proposed defendant state agency was immune from such a claim under the SC Tort Claims Act, S.C.Code § 15-78-60(15)). Other cases have stated that the former client's burden of establishing proximate cause in a legal malpractice action “requires that he prove that he would have obtained a better result in the underlying matter if the attorney had exercised reasonable care. See Doe v. Howe, 626 S.E.2d 25, 367 S.C. 432, 446 (S.C.App. 2005).

Under the case-in-a-case model therefore, it was incumbent upon Tuten to prove that her opportunity “success” was lost as a result of the acts or omissions of the Petitioners. Petitioners respectfully submit that collectability should be clearly identified as a component and defined aspect of “success.” Otherwise Tuten stands to recover a windfall because her “success” is *actually realized*, not lost, by the commission of negligence by her legal counsel. Tuten failed to show that her motor

vehicle claim would have recovered any money at all, because she failed to introduce any evidence of what resource would have been used to pay her damages in that claim. Tuten's case was completely silent on that issue.

How can Tuten be said to have suffered any "damages" if her underlying case could not have resulted in recovery? Stated differently, Tuten failed in her proof by failing to prove that her "damages" from the motor vehicle accident could have been recompensed. Absent such evidence, Tuten's position is ultimately improved by allowing her a recovery in this claim when she failed to prove that she could have recovered anything at all in the underling claim. The evidence introduced by her was that she had an accident that was someone else's fault and she sustained personal injuries. There is no evidence that any source of payment was available to compensate her for her injuries from the motor vehicle accident. Thus, she failed to establish proximate cause and damages.

Rejection of collectability as a mandatory element of proof in a legal malpractice case leads to an absurd result of turning straw into gold, chilling access to legal representation since lawyers would be creating multiples of actual claim value in potential exposure against themselves by accepting representation. Stated differently, Tuten's case (as established by her evidence) showed no ability to collect; an ability to pursue a claim that had no opportunity for collection has no value and has failed to establish elements of necessary proof.

In making the motion for directed verdict at trial, counsel for Petitioners² argued that for Tuten to establish that the Joel defendants proximately caused her damages, she must necessarily offer proof or at least some evidence that she could have recovered *something*. (R. p. 107, line 11 – p. 108, line 10; p. 108, line 21 – p. 109, line 2.). Tuten failed to put up any evidence that there was insurance coverage, that there were recoverable assets, or that there was any ability to recover whatsoever. The motor vehicle defendant was not produced or shown to even be alive. She accordingly failed to prove that failure to obtain any relief for injuries sustained in the underlying wreck was a proximate result of anything that the Joel defendants, or even Glover, did or failed to do.

As discussed supra, Tuten introduced expert testimony of John Freeman, valued the wreck claims at \$150K.³ (S.R. p. 6 – 7). That purported value was not supported by any investigation as to whether there was insurance coverage, whether the underlying defendant Mr. Still had any assets that could be recovered or even encumbered. (S.R. p. 22, line 8 – 23, line 11; R. p. 101). There was no proof Mr. Still was even alive to support a presumption that he could possibly accumulate assets (i.e. a “one day he may win the lottery”) to provide for potential future recovery.

² Ms. Ballard, trial counsel for the Joel defendants, is incorrectly identified as “Mr. Buchanan” on page 186 of the trial transcript (R. p. 107).

³ Petitioners’ counsel purposefully did not cross examine Mr. Freeman on this issue, because to do so would have introduced evidence of a missing element in Tuten’s case. Had the Joel defendants raised the issue of collectability with Mr. Freeman, they would have assisted Tuten by pointing out the deficiency in her case, thereby reminding her to introduce evidence on that issue.

B. Collectability burden initiated and remained with plaintiff, and was not met with evidence appropriately contained within the record on appeal.

Other jurisdictions have discussed the issue of collectability at length, so much so that the *Restatement (Third) of The Law Governing Lawyers* § 53 cmt. b addresses the issue, with the reference list cites cases interpreting collectability in different ways. Comment (b) itself includes the statement that “the lawyer’s misconduct will not be the legal cause of loss to the extent that the defendant lawyer can show that the judgment or settlement would have been uncollectible” even if a plaintiff can show she “would have recovered through trial or settlement” in the underlying action. *Id.* Other scholars has noted that “issues of collectability of a judgment... concern the characteristics of the actual defendant in the underlying case, not a hypothetical reasonable defendant.” Mallen and Smith, *Legal Malpractice*, 5th Edition, §33.8 at page 70: West Group, 2000.

Further, the Restatement § 53 states “the burden of persuading the jury as to collectibility remains upon the plaintiff.” § 53 cmt. (b). That make sense, as otherwise the defendant would have to prove the negative, i.e. the absence of collectibility. And 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.

As stated *supra*, repeatedly, Tuten produced no evidence of collectability. At oral argument at the Court of Appeals, there was discussion regarding the lack of evidence within the Record on Appeal with respect to potential automobile insurance policy coverage that may have been a source of potential recovery and

evidence of collectability. The Court of Appeals 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 is disputed by Petitioner and his counsel.

As a threshold matter, it suggests that Tuten’s failure to prove her case at trial can be fixed by a stipulation of counsel of evidence outside the record. The Joel defendants purposefully did not introduce evidence of insurance or collectability because they would have then assisted Tuten in proving a missing element of her case. Just because counsel for the Joel defendants personally knew information relevant to the collectability issue did not relieve Tuten of her duty to prove it at trial.

The limited discussion had at oral argument, whatever it was, cannot cure Tuten’s failure of proof. The issue on appeal, *i.e.*, whether the trial judge should have granted a directed verdict in favor of the Joel defendants for Tuten’s failure of proof, focused on what Tuten did, or did not, introduce into evidence in her case. It is error, in retrospect, to delve into the knowledge of trial or appellate counsel to supply a missing element of Plaintiff’s proof. Joel’s counsel saw Tuten’s counsel fail to fill the basket of proof in Tuten’s own case. Affirming the judgment based on the knowledge of counsel is equivalent to affirming a judgment based on the content of a deposition that was not introduced into evidence, and would be equally unlawful.

The appellate court’s review of the issue presented, *i.e.*, a legal issue regarding sufficient evidence to avoid directed verdict, cannot be resolved by

probing the recollection of counsel of matters outside the record. Counsel at oral argument was clear that his recollection was limited given the passage of time since those events. But the trial had a transcript of the proceedings that is immune to the vulnerabilities of personal recollection, and as was pointed out during oral argument at the Court of Appeals, there is zero reference or evidence to any such insurance policy contained within the Record on Appeal because there was zero evidence or reference made at the trial below.⁴ The issue on appeal is not what counsel knew; it was what Tuten proved or failed to prove.

Thus any concession by counsel at oral argument was, upon information and belief, expressed with full reservation of Petitioners' legitimate, appropriate contention that because such information was not actually part of the trial record below, or resulting record on appeal, it was not appropriate for consideration or a proper basis for any analysis of the issues presented on appeal. See Rule 210(h), SCACR ("the appellate court will not consider any fact which does not appear in the Record on Appeal"). Thus Petitioners respectfully submit that the determination by the Court of Appeals that "Tuten conclusively proved she could collect at least some portion of a judgment against Still" was based on improper consideration of statements from counsel at oral argument and review of information outside the relevant record on appeal, neither of which are appropriate bases for the Court of Appeals' decision.

⁴ This deficiency was pointed out to the trial court below during argument at trial. (R. p. 101, lines 22-25).

CONCLUSION

It is respectfully submitted that the discussion and citation of authority set forth herein has shown that it would be appropriate for this Court to grant certiorari to address the novel legal issue of collectability as it relates to legal malpractice claims. Further, it is respectfully submitted that the errors set forth regarding the Court of Appeals opinion as to evidence of the amount of damages is based upon legal error and is thus appropriate for review and correction by this Court upon grant of certiorari.

Based on the foregoing, Petitioners pray for an order granting the petition for a writ of certiorari.

Respectfully submitted by



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CERTIFICATE OF SERVICE

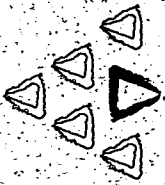
I, Beth Cogan, an employee of Ballard & Watson, Attorneys at Law, do hereby certify that on January 27, 2015, I served a copy of the **Petition for Writ of Certiorari** in the above-captioned case on the following individuals by electronic mail and by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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January 27, 2015

Via Hand-Delivery

Honorable Daniel E. Shearouse
Supreme Court of South Carolina
Post Office Box 11330
Columbia, South Carolina 29211

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

Dear Mr. Shearouse:

Please find enclosed an original and seven copies of the Petition for a Writ of Certiorari. Please file the original and return the copy in the enclosed self-addressed stamped envelope. Also enclosed, please find one original bound and one copy unbound of the Appendix. Enclosed is our check for the \$100.00 filing fee associated with this petition.

Please do not hesitate to contact me with any questions. We greatly appreciate your assistance in this matter.

With warm personal regards, I am,

Sincerely yours,

Harvey M. Watson III
harvey@desaballard.com

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JAN 27 2015

S.C. Supreme Court

cc: (Petition only)
Honorable Jenny Abbott Kitchings, Court of Appeals (via hand-delivery)
Tom Woodruff, Esquire (via email and U.S. mail)
David Joel (via email)



The Supreme Court of South Carolina

Ballard Watson Weissenstein

01/28/2015

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