

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM AIKEN COUNTY

Doyet A. Early, III, Circuit Court Judge
Case No. 2009-CP-02-2460

Appellate Case No.: 2015-000128

RECEIVED

FEB 26 2015

S.C. Supreme Court

Julie Tuten, Respondent,

v.

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

of whom

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

RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

- I. THE TRIAL JUDGE DID NOT ERR IN DENYING PETITIONERS' MOTION FOR A NEW TRIAL *NISI*.

- II. COLLECTABILITY IS NOT AN ISSUE IN A LEGAL MALPRACTICE CLAIM IN THE STATE OF SOUTH CAROLINA.
 - A. South Carolina does not require any showing of collectability in the underlining claim.

 - B. Even in the event this Court did determine collectability of the underlying claim should become a requirement in a legal malpractice action in South Carolina, the Defendant should be required to plead uncollectability as a defense.

STATEMENT OF THE CASE

This matter involves a legal malpractice action against: 1) attorney David Charles Joel, individually and d/b/a “Joel & Associates,” and d/b/a “Joel & Associates, P.A.,” 2) David Charles Joel, Attorney at Law, P.C. (a Georgia professional corporation); and 3) attorney Heather A. Glover. The Georgia professional corporation “David Charles Joel, Attorney at Law, P.C.,” was placed into involuntary bankruptcy, by its creditors in November of 2011. This Chapter Seven bankruptcy was subsequently converted into a Chapter Eleven business re-organization by its sole shareholder, Georgia attorney David Charles Joel. Because of the bankruptcy of the corporate defendant, the trial went forward against the Joel petitioners, specifically excluding the Georgia corporate defendant “David Charles Joel, Attorney at Law, P.C.” (R. p. 99, Tr. p. 165, lines 8-25.)

The defendant Heather A. Glover, although properly served with the Summons and Complaint in this action, never filed any responsive pleadings or motions. She was properly notified of the trial date, time and place, and did not appear, nor did any counsel appear on her behalf.

A jury trial was held in this matter, before the Honorable Doyet A. Early, III, Resident Judge of the Second Judicial Circuit. The trial began on January 23, 2012. At the close of the case, on January 24, 2012, counsel for plaintiff renewed the motion for directive verdict on the issue of legal malpractice. This renewed motion was granted by the trial court.¹ The sole issue for the jury, was the amount of actual damages to which

¹ Respondent had the following causes of actions in her Complaint: a) Attorney Negligence; b) Breach of Fiduciary Duty; c) Breach of Contract; d) Fraud; e) Unfair Trade Practices; and, f) Partnership and *Respondeat Superior*. Because the granting of the renewed motion for summary judgment, the remaining causes of actions were rendered moot.

the plaintiff was entitled. The jury returned with a verdict for the plaintiff in the amount of Two Hundred and Seventy Five Thousand (\$275,000.00) Dollars. (R.p. 2)

The underlying action to this legal malpractice case, involved an automobile accident, which occurred on October 18, 2003, in Aiken County, South Carolina. Joel & Associates, was contracted to represent the plaintiff in this accident. The day before the expiration of the statute of limitations, on October 17, 2006, an action was filed against the at fault driver Mr. Still, by attorney Heather A. Glover. This lawsuit was filed with the Court of Common Pleas for Aiken County, at civil action number 2006-CP-02-1466; thereafter, on November 20, 2007, the case was administratively dismissed (pursuant to SCCA Form 4) for "failure to prosecute;" apparently, this action was never served. During this time, attorney Heather Glover absconded from South Carolina, and attorney David Joel indicated that attorney Heather Glover allegedly stole money from the Joel petitioners. (R.pp. 227-230, Plaintiff's Exhibit 15, Defendants' Exhibit C.)

As to the underlying automobile accident, the plaintiff was a passenger in a vehicle driven by Clifford Still, and Mr. Still drove off the roadway and down a steep embankment. As a result of the wreck, respondent suffered a broken vertebrae, a collapsed lung, three broken ribs and a concussion. Additionally, respondent spent six days in the trauma unit at the Medical College of Georgia. (R.p. 44-45, Tr. p. 63, lines 9-25, p. 64, lines 1-11.) As a direct result of this accident, respondent is now totally disabled, and draws Social Security disability. (R.p. 42, Tr. p.61, lines 9-15.)

Upon respondent's release from the hospital following the accident, she went to her residence in North Augusta, South Carolina, and her mother came to stay with her. (R.p. 46, Tr. p. 67, lines 15-22.). She looked in her local BellSouth telephone book for an

attorney, and the largest ad was for Joel & Associates. The ad had a local phone number, and photographs of David Charles Joel. No other attorney was listed in the ad other than the Georgia attorney David Charles Joel, and there was no indication “Joel & Associates” was any type of corporate entity. Respondent was impressed with the ad, and believed to have recalled seeing his advertisements on television. The ad also stated, “Settlements and Trials.” The advertisement also stated they would come to her if she was unable to come to them, and this impressed her because of her physical limitations. She contacted Joel & Associates. (R.pp. 47-52, Tr. pp. 68-73). Thereafter, Joel & Associates sent a ‘runner’ to ‘sign her up.’² (R.pp. 52-53, Tr. p.73, lines 10-25, Tr. p.74, lines 1-24).

At the time the respondent retained the petitioners, Joel & Associates blanketed advertising in the BellSouth yellow pages in South Carolina, and had approximately one and one-half million yellow page ads in South Carolina, for the BellSouth advertising year 2002-2003. (R.p. 217, Plaintiff’s Exhibit 16.) They also had a local phone number for most locations, so the potential client would not have long distance charges. (R.p. 123, Tr. p. 208, lines 5-18.)

The petitioner David Charles Joel, is not licensed to practice law in the state of South Carolina.³ The petitioners however, did practice law under the name “Joel & Associates,” and at one time was incorporated in the state of South Carolina. The South Carolina corporation, incorporated as Joel & Associates, P.A., was administratively dissolved by the South Carolina Secretary of State, on September 24, 1997. (R.p. 207,

² The runner who ‘signed up’ the plaintiff, was not a lawyer.

³ According to the testimony of the petitioner David C. Joel, he did take the South Carolina Bar exam on one occasion; however, he did not pass this exam, and never attempted to take the exam again. (R.p. 133, Tr. p. 231, lines 1-25.)

Plaintiff's Exhibit 11.) The petitioners also practiced law in Georgia, also under the name of "Joel & Associates," and was incorporated under the name "David C. Joel, Attorney at Law, P.C."

Heather A. Glover, was a lawyer licensed to practice in South Carolina.⁴ She was hired by David Charles Joel, for his South Carolina office, which was based in Columbia. This office originally opened in 1996, and was ultimately closed in the spring of 2006. At the time the office was closed, the Joel petitioners and Heather A. Glover entered into an agreement where Glover, "would continue handling representation of Joel & Associates remaining South Carolina cases with an agreement to split fees with Joel & Associates." This language is taken directly from page two, paragraph five, of the Verified Complaint, sworn to by David Charles Joel on August 5, 2008, in Joel v. Wachovia Bank. (R.pp. 210-216, Plaintiff's Exhibit 15).

Also, it is noted, the Joel petitioners maintained computer software, specifically a 'Needles software program,' which provided him with a listing of cases, and could also be sorted by the dates of the statute of limitations.

When respondent would attempt to contact Joel & Associates, she would usually end up talking to Ann Weaver, who was an employee of Joel & Associates. Respondent indicated she only spoke with Heather Glover on one occasion, and when she asked about her case, she was told by Ann Weaver, that David Charles Joel was getting all of her paperwork and everything was fine. Respondent testified there was never any doubt in

⁴ The defendant Heather A. Glover, was disbarred by Order of the South Carolina Supreme Court, dated January 7, 2011, In the Matter of Heather Anne Glover, 390 S.C. 643, 704 S.E.2d 347 (2011).

her mind, her attorney was David Charles Joel. (R.pp. 55-56, Tr., p. 78, lines 6-25, p. 79, lines 1-22.)

Respondent did acknowledge receiving a letter similar to Defendant's Exhibit A, which indicated that Mr. Joel "was retiring from his South Carolina practice,"⁵ but would still be receiving one-third of the attorney's fees generated. (R.p. 57, Tr., p. 80, lines 20-25.) Thereafter, respondent attempted to contact both Mr. Joel and Heather A. Glover, but was never allowed to speak to either of them. (R.p. 59, Tr. p. 82, lines 14-25.) At that time, respondent was under the belief David Charles Joel was still her attorney. (R.p. 59, p.82, lines 9-13.) In June of 2007, after not being able to contact either Heather A. Glover or David Charles Joel, respondent sent a certified letter to the Atlanta office. Copies of this letter, and the certified mail receipt and United States Postal Service return post card, are attached as Plaintiff's Exhibit No. 9. (R.pp. 60-61, Tr. p.84, line 25, Tr. p. 85, lines 1-19.) (*Also*, R.p. 206.) Respondent never received any response from that letter. At this point the statute of limitations had expired, and this fact would have been known to David Charles Joel, as he had a listing of the statute of limitations dates in his software program, as well as a listing of cases his South Carolina office had. (R.pp. 218-223.) The only logical conclusion, would be Mr. Joel abandoned his client, at this point.

John Patrick Freeman was called as respondent's expert witness at trial, on the issue of legal malpractice. Mr. Freeman is a former professor at the University of South Carolina School of Law, and specialized in the area of legal ethics. (R.pp. 73-76, Tr. p. 105, lines 8-25, p. 106, lines 1-25, p. 107, lines 1-25, p. 108, lines 1-15.) Professor

⁵ It is noted again, Mr. Joel was never licensed to practice law in South Carolina.

Freeman also testified as to the law of agency, joint venture and partnership, in the state of South Carolina. (R.pp. 76-77, p. 108, lines 16-25, p. 109, lines 1-5.)

Professor Freeman was qualified as an expert by the trial court, on the areas of legal ethics, including the areas where lawyers advertise for clients, where lawyers are withdrawing from representation, and where lawyers act or purport to act as employees of law firms. This expert qualification was without objection by counsel for the Joel petitioners. (R.pp. 79-80, Tr. p. 118, lines 18-25, p. 119, lines 1-8.) Professor Freeman, then testified as to the 'client abandonment' by both Heather A. Glover and David Charles Joel. (R.pp. 80-83, Tr. p. 119, lines 13-25, p. 120, lines 1-25, p. 121, lines 1-25, p. 122, lines 1-24.) Professor Freeman also discussed the South Carolina Rules of Professional Conduct, and in commenting on Rule 1.5 (dealing with the division of fees), and noted,

“ ...if you are going to share a fee with a lawyer you allocated that fee either based on the work that is done ..., but, each lawyer who is sharing in the fee has to have joint responsibility for he work that's being done. In other word, no free lunch. You don't take a fee and have no responsibility for what happens...”.

(R.p. 78, Tr. p. 115, lines 18-25.)

When questioned about the Joel petitioners' apparent theory they were not accountable for what happened in South Carolina, because David Charles Joel was not ever licensed in South Carolina, Professor Freeman indicated he had taken that into account, and, “that is a ridiculous argument.” (R.p. 86, Tr. p. 131, lines 3-25.)

When Professor Freeman was asked about the fraudulent activity of the Joel defendants, he responded he believed there was fraud. (R.pp. 87-88, Tr. p. 134, lines 1-25, p. 135, lines 1-25.) The Joel defendants did not offer any expert testimony at trial.

Anne Weaver was the only employee, other than Heather A. Glover, at the Columbia office. She was hired at an interview where David Charles Joel was present, and she testified he had the right to fire her. (R.p. 125, Tr. p. 220, lines 5-10.) She testified at trial, that the Columbia office would bring in about one hundred and eighty (180) cases each year. (R.pp. 128-129, Tr. p. 225, lines 12-25, p. 226, lines 1-21.) Anne Weaver also testified, that during the time she worked at the Columbia office, there were approximately four hundred to five hundred cases, and no case was ever tried. (R.pp. 129-130, Tr. p. 226, lines 20-25, p. 227, line 1.)

At trial, David Charles Joel testified. He acknowledged he opened the South Carolina office of Joel & Associates in 1996. (R.p. 133, Tr. p.231, lines 1-8.) Mr. Joel also testified that paid Heather A. Glover a salary of \$100,000.00 per year, and then he and Heather A. Glover would equally divide all the remaining fees, after first deducting the office expenses for the South Carolina office. (R.pp. 135-137, p. 233, lines 15-25, p. 234, lines 1-4.)

Mr. Joel also testified as to having the Needle software system in his office, so that he could monitor all cases. He also testified he selectively sent a letter to the South Carolina clients in about February of 2008, but only sent letters to the clients who had cases that were not barred by the statute of limitations. (R. 153-160, Tr. p. 260, lines 11-25, p. 261, lines 1-25, p. 262, lines 1-25, p. 263, lines 1-25, p. 264, lines 1-25, p. 265, lines 1-25, p. 266, lines 1-25, p. 267 lines 1-24.)

David Charles Joel also testified as to his lawsuit against Wachovia Bank, and he acknowledged in his lawsuit, he had an agreement with Heather Glover to split fees for the Joel & Associates' South Carolina cases (after the closing of the South Carolina office). (R.pp. 161-162, Tr., p. 269, lines 16-25, p.270, lines 1-25.) Mr. Joel further admitted he settled his lawsuit against Wachovia Bank for, he believed, One Hundred and Ten Thousand (\$110,000.00) Dollars. (R.p. 163, Tr. p. 272, lines 12-20.)

Mr. Joel also testified Heather A. Glover never tried any cases while she was an attorney for Joel & Associates in South Carolina. (R. pp. 164-165, Tr. p.277, lines 20-25, p. 278, lines 1-5.) Mr. Joel further testified he had probably not tried a case in the last twenty years. (R.p. 166, Tr. p. 282, lines 8-15.)

Mr. Joel also testified his office had been sued in Georgia for unfair business practices and for fraud, relating to an employee who was arrested for the unauthorized practice of law. (R. pp. 167-170, Tr. p. 284, lines 18-25, p. 285, lines 1-25, p. 286, lines 1-25, p. 287, lines 1-17.) Mr. Joel acknowledged the Georgia Court of Appeals had upheld the ruling against him. (R.pp. 234-241.)

Mr. Joel acknowledged he advertised in more than twenty-one (21) individual BellSouth phone books, in the state of South Carolina, for the advertising year 2002 to 2003. (R.pp. 171-172, Tr. p. 290, lines 2-25, p. 291, lines 1-18.) He also admitted in his advertising, his name and picture was the only one present. (R.p. 173, Tr. p.292, lines 15-25) (*Also*, R.pp. 196-201.)

Mr. Joel further testified he, like Heather Glover, also drew a salary of One Hundred Thousand (\$100,000.00) Dollars, each year, from the South Carolina office. (R.p. 174, Tr., p. 295, lines 1-12.) Mr. Joel additionally testified, at least one year, the

South Carolina office paid both Mr. Joel and Heather Glover, over Five Hundred Thousand (\$500,000.00) Dollars, in addition to their salary of One Hundred Thousand (\$100,000.00) each. Mr. Joel also testified, the South Carolina office always made enough money to pay both his and Heather A. Glover's salary, and to pay all office expenses, and a bonus. (R.p. 174, Tr. p. 295, lines 13-25.)

After the Aiken County Common Pleas jury returned a verdict in favor of Julie Tuten in the amount of Two Hundred and Seventy-Five Thousand (\$275,000.00) Dollars, the Joel defendants appealed to the South Carolina Court of Appeals on the following issues:

Issue One: The trial judge did err in directing a verdict against the Joel defendants on the issue of liability.

Issue Two: The trial judge did err in failing to grant a directed verdict in favor of the Joel defendants, on the professional negligence claim.

Issue Three: The trial judge erred in denying petitioners motion for a new trial *nisi*.

The South Carolina Court of Appeals issued its opinion on August 27, 2014.

David Charles Joel has now filed his Petition for Writ of Certiorari with this Court. In their petition, the Joel petitioners now argue:

Issue One: Failure to grant new trial *nisi remittitur* as an abuse of discretion; and

Issue Two: Seeking to have the Court now add to the requirements of a legal malpractice claim, the matter of collectability as a "separate component" of existing required elements of damages an proximate causation."

It now appears the Joel petitioners have now abandoned their attempt to argue the trial court erred, when it directed a verdict on the matter of legal malpractice against the Joel petitioners, and are apparently no longer attempting to claim the Joel petitioners are had no liability for the South Carolina office (and the only duty was to collect money from the South Carolina office).

Joel's business model was one of massive advertising in the BellSouth yellow pages, and having large numbers of local phone numbers. In the BellSouth yellow pages for the year 2002-2003, the Joel defendants were placing advertising in one and one-half million South Carolina phone books, during this one year time period. The name of no attorney, other than David Charles Joel, ever appeared in any of this advertising.

In the petitioners' arguments to the South Carolina Court of Appeals, counsel for the Joel petitioners lists three issues she claims remained for a jury to decide, as follows:

- A. Whether or not the Joel petitioners continued to owe any obligation to Respondent after the South Carolina office closed in 2006;
- B. Whether Glover remained an agent of the Joel petitioners after the South Carolina office closed; and
- C. Was there a fee-sharing arrangement between Glover and the Joel petitioners.

The exclusive answer to all of the above questions, is answered by simply referring to the lawsuit the Joel petitioners filed against Wachovia, originally filed with the Superior Court of Gwinnett County, State of Georgia, at civil action number 08A-07530-1, and removed to the United States District Court for the Middle District of Georgia, at case number 1:08-cv-02992-TCB. In the verified Complaint, signed by David

Charles Joel, he swore under oath the contents of the Complaint were true. In paragraph five (5) of that Complaint, it is stated,

“In or about May 2006, Joel & Associates closed its Columbia office and entered into an agreement with Ms, Glover under which she would continue handling representation of Joel & Associates’ remaining South Carolina cases with an agreement to split fees with Joel & Associates.”

Mr. Joel testified he settled this case with Wachovia for in excess of One Hundred Thousand (\$100,000.00) Dollars.

Rule 1.5(e), SCACR Rule 407, provides,

“A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing, and (3) the total fee is reasonable.”

To quote Professor Freeman, “You don’t take a fee and have no responsibility for what happens...”. (R.p. 78, Tr. p. 115, lines 18-25.)

ISSUE ONE

I. THE TRIAL JUDGE DID NOT ERR IN DENYING PETITIONERS’ MOTION FOR A NEW TRIAL *NISI*.

In O’Neal v. Bowles, 314 S.C. 525, 526, 431 S.E.2d 555, 556 (1993), the South Carolina Supreme Court held, “The trial judge alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive. The

denial of a motion of a new trial *nisi* is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion."

In the present case, respondent received injuries rendering her totally disabled as a direct result of the underlying automobile accident. As such, it is certainly reasonable for a jury to have awarded her the amount of Two Hundred and Seventy Five Thousand (\$275,000.00) Dollars, particularly in light of the extensive injuries sustained by respondent, and her hospitalization and partial recovery after the accident.

Additionally, the petitioners argue the value of the case should have been only One Hundred and Fifty Thousand (\$150,000.00) Dollars. The petitioners fail to note, it was certainly reasonable for a jury to infer the plaintiff in this case, had a valid action against the at fault driver in this single car wreck as of the date of the wreck -- which occurred on October 18, 2003. Then, the client was abandoned by her counsel - who would not even return phone calls and letters sent to him. The present case was tried in late January of 2012, over eight (8) years from the date the plaintiff sustained her injuries. It was certainly reasonable to award her the amount of Two Hundred and Seventy Five Thousand (\$275,000.00) Dollar.

ISSUE TWO

II. COLLECTABILITY IS NOT AN ISSUE IN A LEGAL MALPRACTICE CLAIM IN THE STATE OF SOUTH CAROLINA.

Legal malpractice is ordinarily considered a negligence action. Floyd v. Kosko, 285 S.C. 390, 391, 329 S.E.2d 459, 460, n.1 (Ct.App. 1985). The prevailing view is also that it embraces any professional misconduct whether breach of the standard of (negligence) or of fiduciary obligations. See, Holy Loch Distributors, Inc. v. Hitchcock,

340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000) (mentioning malpractice based on fiduciary duty).

A. **South Carolina does not require any showing of collectability in the underlining claim.**

The elements required to prove a claim of legal malpractice, are: 1) the existence of an attorney-client relationship; 2) breach of duty by the attorney; 3) proximate causation; and 4) damage to the client, Holy Loch, *supra*, at 340 S.C. 20, 531 S.E.2d 282. Smith v. Haynesworth, Marion, McKay & Geurard, 322 S.C. 433, 472 S.E.2d 612 (1996).

In the present case, the petitioners are attempting to make an argument, it was necessary to prove, “she would have collected a settlement or judgment.” Collectability of the underlying judgment is not an element of a legal malpractice case in this state. In Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct.App. 2005), this Court held that the failure to show likelihood of success in an underlying action may be considered and inability to meet the element of proximate cause, as to the damages element, “respondent must show he or she ‘most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.’” “The question of success of the underlying claim if suit had been brought, is a question of law.” *See: Doe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30. In the present case, the lawsuit was filed, it appears it was never served.

Additionally, by requiring proof of “collectability,” the following issues would arise:

- a) the unfortunate effect of introducing evidence of liability insurance into every legal malpractice case; as the rules of evidence and the case law generally prohibit introducing evidence of liability insurance in negligence cases;
- b) a delay usually, if not always, ensues between the original injury and the legal malpractice action, and the delay may hinder the client's ability to gather evidence of collectability; it is unfair to place this burden on plaintiffs when the attorney's negligence created the delay in the first place;
- c) clients are further burdened because requiring them to prove collectability ignores the fact that judgments are valid for 10 years after entry (in the state of South Carolina), which is significant because people and entities have financial positions that change over time, and a judgment would not have been immediately collectible against the original defendant, it may have become collectible over time; and
- d) placing the burden of disproving collectability on the negligent attorney, acknowledges the important fiduciary relationship between client and attorney, and it requires the client to prove the existence of a fiduciary relationship, that the attorney did not exercise proper care, that this negligence caused the loss of a judgment, and the amount of that loss.

In this case, the petitioners are attempting to add to South Carolina law, an additional element to a legal malpractice case, that being 'collectability.'

- B. **Even in the event this Court did determine collectability of the underlying claim should become a requirement in a legal malpractice action in South Carolina, the defendant should be required to plead uncollectability as a defense.**

In the present case, petitioners argue that Tuten "failed" to, "...present any evidence ... that she had insurance." (Petitioners' Petition, page six.) However, petitioners were aware that Mrs. Tuten did have extensive underinsured coverage and uninsured coverage on multiple automobiles owned by her. Petitioners had actually contacted and corresponded with Mrs. Tuten's insurance company. This fact was not introduced at the trial level, as there was no need to be introduced at trial. (R. p.101, 1.22-25, p.102, 1.1-8).

Not only were the petitioners aware of the fact of Mrs. Tuten's underinsured and uninsured coverage, the Joel petitioners actually asked in their Answer for a credit for settlement as to any verdict against them.⁶ (Appendix, pp. 37-38).

The law in South Carolina does not require any showing of collectability. Petitioners conceded at oral argument before the Court of Appeals, in response to questioning by Chief Judge Few, there was uninsured and underinsurance coverage. The Court of Appeals noted such concession in their opinion. Now, petitioners attempt to convince this Court, that petitioners' "trial strategy" involved not discussing collectability until in response to the summary judgment motion. (Petitioners' Petition, footnote 3, p.10). However, petitioners were aware Mrs. Tuten did have an avenue to collect, had the petitioners competently handled Mrs. Tuten's original lawsuit.

⁶ In the present case, the Joel defendants asserted numerous defenses, including: a) general and specific denials; b) statute of limitations; c) intervening negligence and/or deliberate wrongful conduct of others; d) failure to state a claim; e) failure of proximate cause; f) failure to mitigate; g) contributory negligence, contributory recklessness or contributory gross negligence; h) comparative negligence; i) liability limited to equitable and proportionate share; j) indemnity; k) intervening events; l) contributions and credits; m) credit for settlement; n) setoff; and, o) laches; further, the Joel petitioners made cross-claims against Heather Glover for: a) breach of fiduciary duty; and, b) promissory estoppel.

Even should this Court determine to change existing law in this state, and add collectability of the underlying claim as a requirement to a legal malpractice action, the Defendant should have been required to affirmatively plead uncollectability in their Answer. They did not. The position of affirmatively pleading in an Answer the matter of “collectability,” was recently addressed by the state of Washington Supreme Court, in Schmidt v. Coogan, 181 Wn.2d 661, 335 P.3d 424 (2014). There, the court noted that placing the burden of proving collectability on plaintiffs “unfairly presumes that an underlying judgment is uncollectability when the record is silent,” and would unfairly force many plaintiffs to prove collectability long after their initial injury. The Washington state Supreme Court determined that, as compared to plaintiffs, defendant-attorneys are equally, if not better, positioned to discover and prove uncollectability. Attorneys have a duty to investigate collectability at the outset of a case, the court noted. The court further found that placing the burden of proving uncollectability on the negligent attorney recognizes the attorney’s and the client’s “important fiduciary relationship,” by not placing every burden in a malpractice case on the client. The Court did adopt the requirement that an Answer in a legal malpractice case must raise the issue of collectability, and the Washington court specifically stated,

"the negligent attorney is in as good a position, if not better, than the client to discover and prove uncollectibility. If the underlying judgment would have been uncollectibility, the original attorney should have advised his client of this fact. Failing to do so is negligent and, potentially, a breach of the attorney-client fiduciary relationship. Here, Coogan undertook an investigation of whether the slip-and-fall case was a good faith lawsuit when he represented Schmidt. Coogan testified by deposition (in a statement not placed into evidence before the jury) that an insurance company representative for Tacoma Grocery Outlet confirmed insurance coverage on more than one occasion. This suggests that the

attorney is in a better position than the client to establish uncollectibility because the attorney has investigated the underlying claim closer to the time of the accident." Schmidt, supra, at p.667.

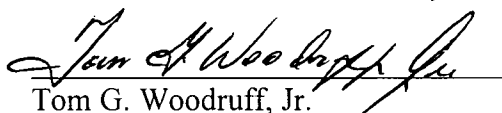
CONCLUSION

For the reasons set forth herein, the petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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February 26, 2015



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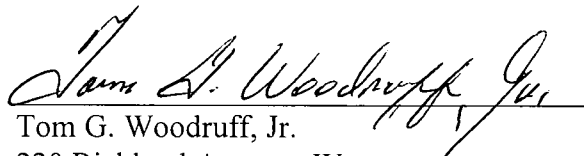
of whom

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

PROOF OF SERVICE

I certify that I have served the **RETURN TO PETITION FOR WRIT OF CERTIORARI**, by depositing a copy in the United States Mail, postage prepaid, on February 26, 2015, addressed to the Petitioners' attorneys of record, Desa Ballard and Harvey Watson, 226 State Street, West Columbia, South Carolina 29169.

February 26, 2015



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