

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND
IN THE COURT OF COMMON PLEAS

CASE NUMBER: 2011CP4001998

Jones G Herring

Gilbert S Bagnell

Bagnell and Eason LLC

DEFENDANT(S)

RECEIVED

APR 14 2016

SC Court of Appeals

FILED
JANUARY 14 10:30 AM
J. S. G. S. CLERK

Submitted by: _____

Attorney for : Plaintiff Defendant or Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol Nonset); Rule 43(k), SCRPC (Settled); Other _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order: _____

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge _____ Judge Code _____ Date _____

For Clerk of Court Office Use Only

This judgment was entered on the 4 day of Feb, 2016 and a copy mailed first class or placed in the appropriate attorney's box on this 4 February 2016 to attorneys of record or to parties (when appearing pro se) as follows:

Douglas Neal Truslow

Richard R. Gleissner

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter _____

Clerk of Court Jeanette W. McBride

STATE OF SOUTH CAROLINA)
 COUNTY OF RICHLAND)
)
 Jones G. Herring,)
)
 Plaintiff,)
)
 vs.)
)
 Gilbert S. Bagnell and)
 Bagnell & Eason, LLC,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 FIFTH JUDICIAL CIRCUIT

CASE NO. 2011-CP-40-01998

RECEIVED

APR 14 2016

SC Court of Appeals

ORDER

FILED
 RICHLAND COUNTY
 FEB -4 AM 10:17
 CHARLOTTE W. NICBRIDE
 C.C.P. & G.S.

Plaintiff Jones G. Herring (“Plaintiff”) brought this action on March 24, 2011, seeking damages for negligence, fraud, constructive fraud, breach of fiduciary duty, and misrepresentation. Defendant Gilbert S. Bagnell (“Bagnell”) and Defendant Bagnell & Eason, LLC, (“Bagnell & Eason”) (collectively, “Defendants”) failed to answer Plaintiff’s complaint in a timely fashion, and as a result, a default judgment was entered on June 14, 2011. On October 31, 2011, the trial court held a hearing to determine damages in accordance with Rule 55(b)(2), SCRCF. The only evidence presented at the hearing was testimony from Plaintiff. Following the hearing, the trial court took the matter under advisement and left the record open to allow for the presentation of supplemental evidence. Thereafter, Plaintiff submitted an affidavit concerning his damages, and the Court signed an order in favor of the Plaintiff on November 23, 2011, awarding Plaintiff \$254,306.77 in actual damages and \$250,000.00 in punitive damages. Defendants appealed the trial court’s order to the South Carolina Court of Appeals.

The Court of Appeals remanded this matter for a determination of damages based on the evidence presented. *Herring v. Bagnell*, 2014 WL 2968929 at *1 (Ct. App. June 30, 2014). The parties waived any right to have the damages hearing before a jury. On August 26, 2015, the Court held a damages hearing on Plaintiff’s claims against Defendants. Present at the hearing were Douglas Neal Truslow, Esquire, counsel for Plaintiff, and Richard R. Gleissner, counsel for Defendants. Based upon the testimony, evidence, and the record before the Court, the Court makes the following findings of fact and conclusions of law.

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FINDINGS OF FACT

1. By late 1998 or early 1999, Plaintiff had incurred consumer debt around \$100,000.00, a substantial portion of which was with Citibank/CitiFinancial and/or its affiliates ("Citi"). At that time, Plaintiff's consumer debt carried an interest rate of 24% or higher, plus additional costs for late fees and penalties. Plaintiff acknowledged that he was insolvent. Plaintiff, however, wanted to avoid bankruptcy if possible. Accordingly, Plaintiff sought assistance through Consumer Credit Counseling Service ("CCCS"). CCCS assisted Plaintiff, as well as his creditors, by negotiating and restructuring Plaintiff's consumer debt obligation by extending the payment time at a reduced rate of interest. Plaintiff and his consumer debt creditors, including Citi, reached a formal written agreement ("Agreement") by which Plaintiff was to repay all of his then existing debt at a lowered interest rate. Under the Agreement, Plaintiff would make payments to CCCS, who would then make the payments to the holders of the respective debt obligations. The debt was to be paid in full by 2005. Pursuant to the Agreement, Plaintiff's consumer creditors, including Citi, agreed that upon full payment, Plaintiff's debt would not be adversely reported on his credit. This Agreement allowed Plaintiff to realize the benefits of credit at lower interest rates, avoid taxes associated with loan forgiveness, avoid letters and phone calls at work and at home demanding repayment, and ultimately, be able to purchase a home.

2. After entering into the Agreement in 1999, Plaintiff sold his home, lived frugally, rented a cheap apartment, often ate only one meal per day, and took a second job to earn money to pay off his debt. Plaintiff was able to pay off his entire consumer debt by 2005 as required by the Agreement. Thereafter, however, Citi failed to honor the Agreement by continuing to seek payment from Plaintiff.

3. Plaintiff's disputes with Citi involved two credit obligations: (1) a credit account Plaintiff maintained at Citi's location on Knox Abbott Road in Cayce, South Carolina ("Knox Abbott Account"); and (2) a credit account Plaintiff had at Citi's location in Charlotte, North Carolina ("Charlotte Account").

4. Plaintiff testified that these accounts originally had interest rates about 24%. Pursuant to the Agreement, however, these accounts' interest rates were reduced to about 8% while Plaintiff paid off the remaining balances.

5. Sometime in, or around, September of 2004, Plaintiff and Citi agreed that the remaining balance on the Knox Abbott Account was \$1,810.00. In, or around, May of 2005, Plaintiff paid

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the outstanding balance for the Knox Abbott Account in full. Nonetheless, CCCS continued to make payments on the Knox Abbott Account in excess of \$1,200.00. Although the Knox Abbott Account was satisfied in full, Citi placed negative marks against Plaintiff's credit. Citi also had its collection personnel, and at least one of its lawyers, seek out payments from Plaintiff that were not due. Furthermore, Citi reported "income" for Plaintiff for 2005 on the IRS Form 2009-C. Apparently, the "income" was the amount of the debt Plaintiff did not pay because of the negotiations with CCCS referred to as loan forgiveness. Plaintiff, however, had, by this point, paid his debt in full.

6. Plaintiff eventually sought the assistance of the South Carolina Department of Consumer Affairs ("SCDCA") in an effort to resolve his dispute with Citi regarding the amount owed and any overpayments. SCDCA was unable to obtain any response from Citi. Accordingly, SCDCA recommended that Plaintiff obtain an attorney as he possibly had a meritorious claim against Citi.

7. In the beginning of 2006, Plaintiff received an IRS Form 1099-C for a forgiveness of debt in 2005 of \$7,238.34. This amount later was corrected to a lesser amount of \$3,619.17. As a result of this putative additional income, Plaintiff's taxable income was at a higher level. As a result, he was unable to receive an educational tax credit on behalf of his son. The excess income resulted in Plaintiff not realizing \$1,805.00 in a tax refund in 2006 and having to pay an additional \$800.00 in his son's college tuition.

8. Sometime in, or around, 2008, Plaintiff sought to purchase a home from the estate of his father. As a result of Plaintiff's poor credit score caused, in part, by Citi placing negative marks on his credit, Plaintiff was unable to qualify for favorable interest terms or waiver of closing costs. As a result, Plaintiff testified that he will likely pay an additional \$7,342.99 in closing costs and interests over the term of the loan.

9. Plaintiff testified that from 2006 through 2009, he had a viable complaint against Citi related to unfair consumer debt and collection practices, and that his actual damages were at least \$100,000.00, plus \$28,000.00 of other consequential damages. Plaintiff testified that in 2006, he had at least a "banker's box" of detailed documentation. The documentation included: 1) Plaintiff's original consumer debt; 2) the Agreement; 3) a detailed log of activities; 4) Citi's activities related to continually seeking payment from Plaintiff after his debt had been satisfied; and 5) credit reports, checks, and other related records evidencing the Agreement and his

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consequential damages of at least \$28,000.00. Plaintiff also had letters from a local branch of Citi proving that Plaintiff had paid his debts in full and that none of his debt actually forgiven was taxable income. Plaintiff, moreover, testified that he had documented information reflecting that Citi was engaged in predatory lending and collection practices nationally. Plaintiff, furthermore, had documentation showing that he could not acquire the available lower rates (at less than 24%) on consumer credit because of Citi's inaccurate reports that Plaintiff had not paid his debt and therefore, was a bad credit risk.

10. In January and/or February 2006, and upon recommendation by an acquaintance, Plaintiff met with Bagnell. Bagnell represented to Plaintiff that he possessed considerable experience and skill in trying unfair debt collection cases and that he had investigated the matter. According to Bagnell, Citi was engaged in dual record keeping and had otherwise engaged in extensive illegal, predatory lending and collection practices. Defendants encouraged Plaintiff to engage them to initiate lawsuits both personally and as a class action representative against Citi. On May 17, 2006, Plaintiff and Defendants entered into a written contract of engagement. Bagnell informed Plaintiff that the law firm of McGowan, Hood and Felder, LLC ("McGowan Hood"), was co-counsel on the case. McGowan Hood is listed as co-counsel on the contract.

11. In conjunction with Plaintiff having entered into a formal contract of legal representation with Defendants, Bagnell required Plaintiff to provide all of his original documents in the banker's box detailing the transactions related to Plaintiff's debt since 1998, as well as documentation concerning Citi's wrongful acts and his resulting damages. The documents Plaintiff provided to Bagnell were Plaintiff's only copies. Bagnell explained that he would return the copies to Plaintiff but failed to do so despite repeated requests. Bagnell opined that Plaintiff had at least \$100,000.00 in actual damages. Plaintiff was inexperienced in the law and relied upon Bagnell's advice, as his attorney.

12. On October 13, 2006, Bagnell wrote a letter to an attorney who had been demanding money from Plaintiff for payment of an alleged Citi debt. Bagnell referred to 15 U.S.C. § 1692(e) concerning abusive, deceptive and unfair debt collections practices in the letter. Bagnell stated specifically that "[o]ur investigation suggests that CitiFinancial maintains a double set of books." In this letter, Bagnell appears to support and corroborate the historical, underlying facts and claims asserted by Plaintiff.

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13. In 2007 and 2008, Bagnell assured Plaintiff that he had filed a lawsuit on Plaintiff's behalf and that he and McGowan Hood were actively pursuing the case on Plaintiff's behalf. Bagnell orally asserted that Plaintiff's damages were at least \$100,000.00 independent of other consequential damages of \$28,000.00.

14. Between 2008 and 2011, Plaintiff made repeated attempts to meet with Bagnell to obtain legal updates concerning his case and a copy of the files and documents that he previously had provided Bagnell. Plaintiff also associated other counsel in an attempt to retrieve his files from Defendants, but to no avail. Plaintiff, furthermore, attempted to obtain the documents from Citi but similarly was unsuccessful. Thereafter, Plaintiff attempted to obtain his documents from the United Way and SCCPA but, again, was unsuccessful. Plaintiff eventually sought the assistance of the South Carolina Bar in an attempt to obtain his file and pursue his case with other counsel.

15. In 2009, when the Bar's efforts proved unsuccessful, Plaintiff filed a grievance against Bagnell with the Office of Disciplinary Counsel (ODC). Bagnell failed to respond to a subpoena from ODC for Plaintiff's documents and Defendants' file. Bagnell did not cooperate with ODC or Plaintiff. Without his necessary documents, Plaintiff could not find another attorney to take his case. Plaintiff, thus, could not proceed in his claims against Citi without his files. Plaintiff contacted McGowan Hood and learned that it never had been involved in Plaintiff's case despite Bagnell's assurances to the contrary.

16. Plaintiff then learned that Bagnell had been suspended from the practice of law on October 9, 2009. In an Opinion filed July 18, 2011, the Supreme Court found that: (a) Bagnell committed numerous acts of misconduct that harmed Plaintiff; (b) Bagnell's conduct undermined the administration of justice and harmed the legal profession; and (c) Plaintiff was financially prejudiced by Bagnell's actions. *See In re Bagnell*, 393 S.C. 382, 713 S.E.2d 304 (2011). Bagnell was disbarred. *Id.* at 386, 713 S.E.2d at 306.

17. In its disbarment Order, the South Carolina Supreme Court found that Bagnell abandoned Plaintiff and caused him prejudice. *Id.* The clear and convincing evidence in this matter convinces the Court of the same.

18. Bagnell sold his home for a significant amount of money, left the State of South Carolina and moved to New York after realizing a substantial settlement in an unrelated case. Despite Bagnell's suspension from the practice of law, Bagnell and Eason continued to hold itself out as being an active law firm, and Mr. Eason failed to advise Plaintiff that Bagnell had been

suspended from the practice of law. Furthermore, Bagnell and Eason maintained no record of the case and asserted that it had no obligation to assist Plaintiff.

19. Following his disbarment, Bagnell claimed that he provided Plaintiff with all of his documents. Plaintiff denies that Bagnell provided the documentation and avers that the statute of limitations governing his claim has expired.

20. On November 21, 2011, Bagnell filed a Memorandum Regarding Damages that included an affidavit wherein Bagnell explained that "Herring provided me [an] electronic file [of his documents] in disc form when he first discussed the matter with me."¹ Bagnell also stated that "in January 2011, when my files were delivered to me out of storage (where I had not been able to access them), I promptly forwarded the electronic records to Mr. Herring and he acknowledged receipt of those records."² Bagnell admitted that he did not provide Plaintiff the original paper files because he was unable to locate them.³ Bagnell attached the disc to his Memorandum Regarding Damages. This electronic file contains about 280 pages of documents.⁴ Although it is unclear whether Plaintiff received this electronic file in January 2011, the memorandum and disc were filed with the Richland County Clerk of Court on November 21, 2011. Plaintiff, thus, did receive an electronic copy of at least some of his files (if not all). Although Plaintiff was provided with a substantial amount of original documents (in electronic

¹ *Affidavit of Gilbert Bagnell* attached to *Defendant's Memorandum Regarding Damages* (November 18, 2011).

² *Id.*

³ *See id.*

⁴ Numerous documents were included on this disc, including, but not limited to: a 1099-C showing cancellation of \$7,238.34 in debt, dated November 9, 2005; a corrected 1099-C showing cancellation of \$3,619.17 in debt, dated November 9, 2005; a fax, dated November 6, 2006, sent by Herring to a representative with Citi contesting the 1099-C cancellation of debt; various statements showing amounts due; documents related to the underlying agreement between Herring and CCCS; disclosure statements/agreements with Commercial Credit Corporation; letters from the South Carolina Department of Consumer Affairs to Citi concerning complaints filed by Herring against Citi; Herring's complaint against Citi filed with the Department of Consumer Affairs; a letter Herring sent to a representative of Citi indicating that he had overpaid on his accounts; the respective response from that representative; a Citi account balance statement showing that Herring's account was paid in full; various Citi account statements; a CCCS credit information sheet; a CCCS family budget sheet; various faxes Herring sent to Citi contesting remaining balances; periodic reports sent by CCCS to Herring; and an Equifax Credit Report.

form), it was not until he spent at least three years trying to obtain them directly from Bagnell and over five years since Plaintiff entered into the legal representation agreement with Bagnell.⁵

21. Plaintiff provided credible testimony concerning damages related to: (a) an excess amount Plaintiff paid to Citi; (b) Plaintiff's inability to receive a certain tax refund; (c) additional expenses Plaintiff paid in tuition; and (d) additional closing costs and interest Plaintiff paid.

CONCLUSIONS OF LAW

1. The Court possesses both subject matter and personal jurisdiction. Venue is proper in Richland County.

2. Defendants are in default, and thus, are deemed to have admitted the truth of Plaintiff's allegations and to have conceded liability on Plaintiff's claims of negligence, fraud, constructive fraud, breach of fiduciary duty, and misrepresentation. *See Roche v. Young Bros., Inc., of Florence*, 332 S.C. 75, 81, 504 S.E.2d 311, 314 (1998). By defaulting, Defendants, however, have not admitted the *amount* of liability in damages. *See Renney v. Dobbs House, Inc.*, 275 S.C. 562, 566, 274 S.E.2d 290, 292 (1981) ("a defendant in default admit[s] liability but [does] not admit the damages as set forth in the prayer for relief."). Plaintiff must prove his damages by the preponderance of the evidence. *See Jackson v. Midlands Human Resources Ctr.*, 296 S.C. 529, 529, 374 S.E.2d 505, 506 (Ct. App. 1988). During the damages hearing, defense counsel is entitled to cross-examine witnesses and object to evidence presented. *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241, 246 S.E.2d 880, 882 (1978). The issue before the Court is the amount of Plaintiff's actual and, if applicable, punitive damages.

3. To recover damages, "the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy." *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). Accordingly, "the existence or amount of damages cannot be left to conjecture, guess or speculation." *Piggy Park Enterprises, Inc. v. Schofield*, 251 S.C. 385, 391, 162 S.E.2d 705, 708 (1968). Plaintiff, thus, is required to prove by the preponderance of the evidence, and with reasonable certainty, the amount of damages caused by Defendants' negligence.

4. Under South Carolina law, the liability for negligence and breach of fiduciary duty against an attorney and law firm acting within their scope of practice is most properly defined as an action for legal malpractice. *See Smith v. Hastie*, 367 S.C. 410, 412-13, 626 S.E.2d 13, 14

⁵ Herring and Bagnell entered into the legal representation agreement on May 17, 2006.

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(Ct. App. 2005). “A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client’s damages by the breach.” *RFT Mgmt. Co., L.L.C. v. Tinsley & Adams, L.L.P.*, 399 S.C. 322, 331, 732 S.E.2d 166, 170 (2012). Although, through their default, Defendants have admitted the facts giving rise to Plaintiff’s legal malpractice claim, Plaintiff must still prove, by the preponderance of the evidence, his amount of damages.

5. Defendants argue that Plaintiff has been unable to establish his damages. Specifically, Defendants allege that the damage caused to Plaintiff by the Defendants’ fraud, constructive fraud, and misrepresentation appears to be none. The Court disagrees.

6. Defendants argue that Plaintiff failed to present adequate evidence that Defendants’ failure to bring an action against Citi, as either a class action or as one for the breach of the Fair Credit Reporting Act or Fair Debt Collection Practices Act resulted in any quantifiable harm. Defendants specifically contend that Plaintiff failed to present evidence as to the ability to bring an action on his causes of actions against Citi. Defendants, however, fail to recognize that by defaulting on Plaintiff’s cause of action against Defendants, they admitted that Plaintiff possessed the ability to bring a cause of action against Citi. In other words, Plaintiff alleged, among other things, that Defendants were negligent in not bringing a cause of action within the requisite statute of limitations, and because of Defendants’ negligence, Plaintiff lost his ability to successfully bring a claim against Citi. Accordingly, since Defendants defaulted on Plaintiff’s claims against them, they admitted the veracity and underlying success of Plaintiff’s claims against Citi. As such, the only issue before the Court is the amount of damages caused by Defendants’ failure to bring an action against Citi on behalf of Plaintiff.

7. Plaintiff contends that since Bagnell asserted that Plaintiff’s claim was worth at least \$100,000.00 in actual damages and \$28,000.00 in other consequential damages, Plaintiff is entitled to such damages in this matter. The record, however, fails to reflect how Plaintiff, and through his counsel, Bagnell, arrived at such numbers. Unfortunately, Plaintiff no longer has possession of the documents that allegedly supported such damages. Nonetheless, damages awarded may not be speculative. Accordingly, Plaintiff is not entitled to \$100,000.00 in actual damages and \$28,000.00 in other consequential damages simply because Bagnell, his attorney, stated his claim was worth that much. Mere testimony from a party or his attorney concerning a

case's worth is insufficient to satisfy the preponderance of the evidence standard. *See Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548, 559, 671 S.E.2d 79, 85–86 (Ct. App. 2008) (“[I]n order for damages to be recoverable[,] the evidence should be such as to enable the court or jury to determine the amount thereof with reasonable certainty or accuracy.”); *Lewis v. Congress of Racial Equality and/or C.O.R.E., Inc.*, 275 S.C. 556, 561, 274 S.E.2d 287, 289 (1981) (“Whether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount of damages based on the proof, and such proof must be by preponderance of the evidence.”); *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 240, 246 S.E.2d 880, 881 (1978) (“[I]n a tort action[,] the amount stated in the prayer for relief often bears little relation to the amount which the plaintiff is entitled to recover. The prayer in an action may not serve as a substitute of proof. The plaintiff must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence.”).

8. Plaintiff, however, as part of his legal malpractice claim against Defendants, is entitled to the actual damages caused by Citi in its failure to follow the terms of the Agreement it entered into with Plaintiff. As admitted by Defendants' default, Plaintiff would have been successful in seeking those damages from Citi.⁶ Defendants' failure, moreover, to bring such a cause of action against Citi prevented Plaintiff from receiving those damages. Plaintiff's uncontroverted testimony and supporting affidavits prove, by the preponderance of the evidence, that Citi's breach of the underlying Agreement caused Plaintiff to suffer the following actual damages: (1) at least \$1,200.00 in overpayment to Citi; (2) \$1,805.00 in a tax refund Plaintiff would have received had Citi not improperly reported to the IRS that Plaintiff had incurred income when, in fact, Plaintiff had not; (3) \$800.00 in additional tuition expenses Plaintiff incurred because of his putative “increased income” causing him to not qualify for an education tax credit; and (4) \$7,342.99 in additional closing costs and interest that Plaintiff has, and will continue to have, to pay because of negative reports on his credit.

9. Plaintiff also is entitled to punitive damages because of the egregious manner in which Bagnell conducted himself as an attorney of the State of South Carolina. Bagnell undermined the pursuit of justice and tarnished the esteem of the legal profession. Punitive damages may be awarded when a plaintiff proves by “clear and convincing evidence the defendant's misconduct

⁶ Although Defendants believed that Plaintiff also would have received a much higher amount of damages because of Citi's unfair collection practices.

was willful, wanton, or in reckless disregard of the plaintiff's rights." *Welch v. Epstein*, 342 S.C. 279, 301, 536 S.E.2d 408, 419 (Ct. App. 2000). "Punitive damages are allowed in the interest of society in the nature of punishment and as a warning and example to deter the wrongdoer and others from committing like offenses in the future." *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 396, 134 S.E.2d 206, 210 (1964). "The trial judge is vested with considerable discretion over the amount of a punitive damages award[.]" *Lister v. NationsBank of Delaware, N.A.*, 329 S.C. 133, 149, 494 S.E.2d 449, 458 (Ct. App. 1997). Although courts "possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416, 123 S. Ct. 1513, 1519 (2003).

10. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574, 116 S. Ct. 1589, 1598 (1996), the United States Supreme Court held that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Gore* established three guideposts "that indicate whether the due process requirement of fair notice has been met." *Mitchell, Jr. v. Fortis Ins. Co.*, 385 S.C. 570, 585, 686 S.E.2d 176, 184 (2009). Under *Gore*, courts are to consider: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm, or potential harm, suffered by the plaintiff and the amount of the punitive damages award; and (3) the difference between the punitive damages award and civil penalties authorized or imposed in comparable cases. See *Gore*, 517 U.S. at 574-75, 116 S. Ct. at 1598-99.

11. *Mitchell, Jr.* articulated a new test courts are to use in determining whether, and how much, to award in punitive damages. 385 S.C. at 587, 686 S.E.2d at 185. Under *Mitchell, Jr.*, courts are to consider the following factors: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the amount of punitive damages award; and (3) the difference between the punitive damages awarded and the civil penalties authorized or imposed in comparable cases. *Id.* at 587-88, 686 S.E.2d at 185-86.

12. "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575, 116 S. Ct. at 1599. "This principle reflects the accepted view that some wrongs are more blameworthy than

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others.” *Id.* In determining the reprehensibility of a defendant’s conduct, the court should consider whether:

- (1) the harm caused was physical as opposed to economic;
- (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
- (3) the target of the conduct had financial vulnerability;
- (4) the conduct involved repeated actions or was an isolated incident; and
- (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident.

State Farm, 538 U.S. at 419, 123 S. Ct. at 1521.

13. In determining the appropriate ratio between the actual or potential harm to plaintiff and the amount of a punitive damages award, courts may consider: “the likelihood that the award will deter the defendant from like conduct; whether the award is reasonably related to the harm likely to result from such conduct; and the defendant’s ability to pay.” *Mitchell, Jr.*, 385 S.C. at 588, 686 S.E.2d at 185. “[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” *State Farm*, 538 U.S. at 425, 123 S. Ct. at 1524.

14. In considering the difference between the amount of punitive damages awarded and civil penalties authorized or imposed in comparable cases, courts may consider: “the type of harm suffered by the plaintiff or plaintiffs; the reprehensibility of the defendant’s conduct; the ratio of actual or potential harm to the punitive damages award; the size of the award; and any other factors the court may deem relevant.” *Id.* at 588–89, 686 S.E.2d at 186.

15. Defendants’ conduct has been manifestly reprehensible. Defendants represented to Plaintiff that they would bring a cause of action against Citi on Plaintiff’s behalf. Defendants also represented that they had associated local counsel to help pursue Plaintiff’s claim. Plaintiff provided Defendants his file of documents in hopes of pursuing such claim. Defendants informed Plaintiff that Plaintiff would receive copies of his documentation. Plaintiff, however, after repeated attempts, never received such documentation. Plaintiff attempted to contact Defendants numerous times in person, via telephone, email, and mail, including certified mail. Defendants, however, failed to respond to Plaintiff. The statute of limitations governing Plaintiff’s claims against Citi eventually ran. Plaintiff is now unable to bring his causes of action against Citi. Plaintiff first contacted Defendants in early 2006. Plaintiff, thus, has spent the past nine years seeking a resolution in this matter. The duration of Defendants’ egregious conduct in

this matter is troubling. Defendants' conduct reflects poorly on the legal profession's reputation. The harm resulting from Defendants' conduct largely is unquantifiable. Due to Defendants' failure to return Plaintiff's documents and Defendants allowing the statute of limitations to run, Plaintiff now is unable to bring any causes of action against Citi.

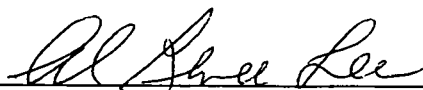
16. A punitive damages award in this matter will discourage other attorneys from acting in a similarly egregious manner. Plaintiff testified in the previous October 31, 2011, damages hearing that Defendants had informed him that, in 2005 or 2006, Defendants realized a fee in excess of thirty million dollars in an unrelated case.⁷ Thus, it appears that Defendants are jointly and severally capable of paying a sum of \$100,000.00 in punitive damages. An award of \$100,000.00, moreover, has a single digit ratio (8.97:1) between Plaintiff's punitive damages award and Plaintiff's actual damages award. Plaintiff, thus, is entitled to punitive damages against Defendants, jointly and severally, equaling \$100,000.00.

17. The Court is deeply troubled by Defendants' behavior and its impact upon the public's perspective of the legal profession. As determined by the South Carolina Supreme Court in Bagnell's disbarment proceedings, Bagnell "abandoned the practice of law, prejudicing [Plaintiff] and the administration of justice." *In re Bagnell*, 393 S.C. 382, 386, 713 S.E.2d 304, 306 (2011).

ORDER

For the reasons stated above, it is therefore **ORDERED** that Plaintiff is entitled to actual damages in the amount of \$11,147.99 and punitive damages in the amount of \$100,000.00.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
February 1, 2016

⁷ Plaintiff admitted into evidence, as Plaintiff's Exhibit 5, the Transcript of Record from the previous damages hearing. During the previous hearing, as noted in its Transcript of Record, Plaintiff was asked whether Bagnell left South Carolina "[a]fter telling [Plaintiff] he had gotten a \$30 million fee and a \$10 million fee on some related cases," to which Plaintiff responded, "[m]y understanding." Transcript of Record at 22:7-9 (October 31, 2011).

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