THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2013-CP-10-4450
Appellate Case No. 2016-000432

Linda A. Gibson, individually and in capacity as
Trustee of the Paul William Gibson Family Trust;
Heritage Seven, LLC; Seven Oaks Apartments, LLC;
and 3205 Palm Boulevard, LLC, ... Appellants,

v.

Andrew K. Epting, Jr., LLC; Andrew K. Epting, Jr.;
George J. Kefalos, P.A.; George J. Kefalos;
Gedney M. Howe, III, P.A.; Gedney M. Howe, III;
John S. West, Attorney-At-Law, LLC; and John S. West, ... Respondents.

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TABLE OF CONTENTS

Table of Authorities.......... ii

Summary.......... 1

Reply Statement of Facts.......... 2

Argument in Reply.......... 8

I. A genuine issue of disputed fact exists for the jury to determine whether $1.7 million is a reasonable basis to determine the Lawyers' $566,666 fee.......... 8

A. The Lawyers' own documents show $1.7 million is an inflated basis to determine the fee.......... 8

B. Evidence before the trial court showed the Lawyers failed to credit Ms. Gibson for the set-off value of her counterclaims against the $1.7 million "deficiency" they based their fee.......... 10

II. A genuine issue of fact for the jury exists as to whether the Lawyers' disclosed to Ms. Gibson all information necessary for her to grant informed consent to the $566,666 fee.......... 11

A. The Lawyers had a non-delegable duty to disclose all information relevant to the nature of the deficiency.......... 11

B. Mr. Tecklenburg was engaged to advise Ms. Gibson about a fee mortgage, not the reasonableness of the fee.......... 13

III. A genuine fact issue exists as to whether avoided costs, risk and impossibility of performance (changed circumstances) resulted in an excessive fee.......... 14

A. The 33% contingent rate imposed by the Lawyers for the reverse contingent fee was unreasonable.......... 16

IV. Expert testimony before the trial court established the standard of care and the Lawyers' breach of their fiduciary and professional duty.......... 16

V. The trial court erred in making factual findings that Mr. Papa was Ms. Gibson's agent to negotiate the reverse contingent fee agreement.......... 19

Conclusion.......... 21

TABLE OF AUTHORITIES

Cases **Page**

Anderson v. Kenelly, 547 P.2d 260 (Colo. Ct. App. 1975)... 15

Brown & Strum v. Frederick Rd. Ltd. Pshp., 768 A.2d 62 (Md. Ct. App. 2000)................ 15

Doe v. American Red Cross Blood Servs., S.C. Region, 297 S.C. 430, 377 S.E.2d 323,326 (1989).. 19

Frasier v. Palmetto Homes of Florence, Inc., 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996).. 20

Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 226, 317 S.E.2d 748, 751 (Ct. App. 1984).. 25

In re Kutner, 399 N.E.2d 963 (Ill. 1979)... 15

In re Samaha, 399 S.C. 2, 731 S.E.2d 277 (2012)... 15

In re Sullivan, 494 S.W.2d 329 (Mo. 1973).. 15

Mortgage Recovery Fund-Riverbend, Ltd. v. Heritage Clipper Riverbend Trust, 327 S.C. 491, 489 S.E.2d 655 (1997).. 7

Norris v. Alexander, 246 S.C. 14, 142 S.E.2d. 214, 217 (1965)................................ 18

Spence v. Wingate, 395 S.C. 148, 716 S.E.2d 920 (2011).. 12

Wade v. Clemmons, 377 N.Y.S.2d 415 (N.Y. Sup. Ct. 1975).................................... 15

Wunschel Law Firm, P.C. v. Clabaugh, 291 N.W.2d 331 (Iowa 1980)........................... 15

Rules **Page**

Rule 38, SCRCP.. 7

Rule 1.5, RPC, Rule 407, SCACR.. 4, 7

Rule 1.4, RPC, Rule 407, SCACR.. 11, 12

Other Authorities **Page**

73 Am.Jur.2d Summary Judgment §49 (2015)... 9

73 Am.Jur.2d Summary Judgment §50 (2015)... 9

Restatement (Third) of the Law Governing Lawyers §34.................................... 14, 15

SUMMARY

This is an excessive fee case. The matter before the Court is whether the appellants met their applicable burden of a "mere scintilla" of evidence to survive summary judgment. Evidence before the trial court showed the Lawyers' $566,666 fee was excessive because (i) the $1.7 million "deficiency" the Lawyers used as the basis to compute their fee was indeterminate given lender counterclaims existed in the mortgage foreclosure action; (ii) the Lawyers avoided labor, costs and risks (impossibility of performance) when the lender sold her note to a non-holder in due course thirty (30) days after filing the foreclosure action; and, (iii) the uncustomary *reverse* contingency fee was taken without her fully informed consent.

The grounds for this appeal are the trial court (a) erred in finding the fee document(s) clear, constituting a *reverse* contingent fee; (b) did not consider the totality of circumstances surrounding the fee in determining the reasonableness of the $566,666 fee; and, (c) did not consider the evidence showing the Lawyers did not disclose to Ms. Gibson the true value of her set-off claim(s), their nominal work, nor the inchoate nature of the deficiency, that together substantially reduced, or otherwise eliminated, the deficiency resulting in an excessive fee.

REPLY STATEMENT OF FACTS

The gravamen of the Respondents' Brief is that no evidence exists to support her claims. They contend the evidence shows Ms. Gibson was aware of the *straight* and *reverse* contingency fee deal and now simply has buyer's remorse. The inadequacy of their response is apparent in the very documents and circumstances on which Lawyers rely to justify the large fee.

Any inquiry of the source of the fee misunderstanding necessarily begins with the fee document trilogy - *namely,* (i) the February 4th email; (ii) April 7th letter; and, (iii) November 18th document, none of which contemplates a straight and reverse "dual" contingent fee, in the Ameris matter.[1]

I. The Fee Document Trilogy

Turning first to the February 4th email, this document winds-up with *"please consider this"* - *i.e.,* fee proposal; not, with Ms. Gibson's signature accepting the terms of a fee agreement. (ROA____, February 4th email). This evidence shows the February 4th email is a mere fee proposal, nothing more. Remarkably, Ms. Gibson was not copied, nor ever given, or even aware, of the February 4th email until this litigation. (ROA____, Gibson Dep. 153:1-7; 262:21-23; 263:1-4).

Ms. Gibson testified Mr. Papa was not her agent for purposes of negotiating any fee arrangement. (ROA____, Gibson Dep. 154:1-25;155:1-25;156:1-25). Rather, she testified she and Mr. Epting spoke directly, and often, about her fee arrangement with the lawyers. (Gibson Dep. 165:7). Further, there is no evidence, whatever, Ms. Gibson held out Mr. Papa to the lawyers as possessing authority to negotiate her fee. (ROA____, Record on Appeal). In fact, she testified she sought Mr. Papa's advice regarding bankruptcy, and after advising she was not a bankruptcy candidate, Mr. Papa referred her to the Lawyers. (ROA___Gibson Dep. 154:16-23). The Lawyers were well aware Ms. Gibson was introduced them by a referral from Mr. Papa. (ROA____, Gibson Dep. 154:1-25;155:1-25;156:1-25). There simply is no evidence showing Ms. Gibson held Mr. Papa out to the Lawyers as her agent. (ROA____, Record on Appeal).

[1] Separately, before the trial court was, inter alia, the question of whether a direct and reverse contingent fee on the same loan document results in an excessive fee where, as here, the Lawyers' work product to defeat, or reduce, the deficiency claim is the same, or substantially the same, work product to prosecute the lender claim for which the Lawyers are also being paid? In other words, is Ms. Gibson entitled to a credit for, and to the extent of, duplicative work product; or, are the Lawyers entitled to be paid twice for the same work?

Notably, the evidence shows the Lawyers never received any written response from Ms. Gibson, not a single reply, acknowledging she received the February 4th email fee proposal. (ROA____, Record on Appeal). That is, after Mr. Epting jettisoned the terms of the February proposal into the ethersphere, he received no reply - silence - on his proposed fee terms. Furtherstill, the Lawyers did not disclose the February 4th email to Ms. Gibson in April when she met with Mr. Epting to sign the April fee document, despite the April document's perishable reference to the February proposal. (ROA____, Record on Appeal). The consequence of not disclosing the February document at execution of the April agreement is Ms. Gibson was unaware of and did not agree to any *reverse*-contingent fee when she signed the April agreement. (ROA____, Record on Appeal). On these facts, the February 4th email does not constitute a legally binding and enforceable agreement, at law, or in equity; whether, as the Lawyers suggest, "incorporated-by reference" or "adopted by agency". (ROA____, Tecklenburg Dep. 53:15-25; 54:1-25; 55:1-25; 56-1-25). The Lawyers are aware of this fact; yet, *self*-evidently, they persist that this February email proposal is the basis of a *reverse*-contingent fee entitlement of over a half-million dollars. (ROA____, Defendants' Mem. Of Law in Support of Summary Judgment).

Turning next to the April 7th letter, this document is unenforceable *as to the deficiency claim fee* given there is no written term, let alone clause or paragraph, evidencing any explanation or disclosure of a *reverse*-contingent fee obligation. (ROA____, April 7th Letter Agreement).

The April 7th letter *prima facie* sets forth a *straight* contingent fee agreement of the kind commonly understood by the public, and as per the testimony of Ms. Gibson. This document expressly states, unequivocally, *"George and I will handle the existing case against Re/Max, Rolando, Moore & Ameris on a contingency, as set forth in our agreement of February 4, 2010"* (ROA____, Letter from Epting to Gibson dated April 7, 2010). Without the benefit of disclosure of the February 4th email, Ms. Gibson viewed, and could only view, a straight (common) contingent fee arrangement from the express terms of the April document. In fact, she testified, and the Lawyers testified, that Ms. Gibson understood at execution of the April agreement that she would owe a 33% fee obligation out of any recovery – *i.e.,* cash received, from the defendants Re/Max, Rolando, Moore & Ameris, as lay persons commonly grasp a "contingent fee". (ROA____, Gibson Dep. 176:2-8).

Given that the lawyers did not disclose the February 4th email to Ms. Gibson back on

February 4th or on April 27, 2010, it is *a priori* impossible Ms. Gibson could have been aware at engagement she would have to pay "out-of-pocket" a half-million dollars, or more, *in addition to* 33% of any actual cash recovery. In other words, the April document reflecting a *straight* contingent fee is the first fee agreement Ms. Gibson is aware exists. (ROA____, Record on Appeal). Ms. Gibson's testimony (and Lawyers' testimony) that she understood the April document to mean the Lawyers would be paid out of any *actual* cash received from Ameris is the reasonable, if not obvious, *sole* interpretation of the April agreement. (ROA____, Gibson Dep. 108:2;109:8-25;110:10). Ms. Gibson's testimony is reasonable, and credible, given also the April letter composition gathers and strings together four *straight* contingent fee arrangements in one sentence, *"Re/Max, Rolando, Moore & Ameris on a contingency...,"* all of which constitute a *straight* contingent fee obligation paid from cash recovered, but omits to disclose the imponderable fifth fee, the disputed *reverse* contingent fee. (ROA____, April 7th letter agreement).

Fatefully, this fifth *reverse*-contingent fee is notably of the greatest legal consequence to their client as it obligates Ms. Gibson to pay "out-of-pocket" several hundred thousands of dollars to the Lawyers – yet the *reverse* fee, and the consequences of the *reverse* fee, is not disclosed. More revealing, discovery shows the Lawyers never bid, and cannot produce, any writing acknowledged by Ms. Gibson purporting a *reverse* contingent fee, or two contingent fee obligations, in the Ameris matter, let alone one signed by Ms. Gibson. (ROA____, Record on Appeal).

The April and November documents also do not disclose the method by which the Galt fee was determined or the division of fee; and, no disbursement schedule was provided at the November settlement. (ROA____, April 7th and November 18th documents). Setting aside these omissions diverge from the standard of care guided by Rule 1.5(c) RPC, Rule 407, SCACR, the magnitude of these omissions is relevant admissible evidence bearing on the inquiry of who is responsible for this mistake. On these facts, the Lawyers' hypothesis (adopted by the trial court) that Ms. Gibson, a layperson, *sans* legal training, should have attributed a different meaning than the plain terms of the April letter – *i.e.,* a *reverse* fee obligation, constituting a half-million dollar fee, defies common sense: a person cannot agree to that they have never seen, heard, held or were even aware, and is otherwise not supported by the evidence.

Notwithstanding, the Lawyers persist, and the trial court ruled, that Ms. Gibson agreed to

pay a *reverse* contingent fee resulting in two fees in the Ameris matter, even against the weight of the documentary evidence and oral testimony. Once the mind is awaken to the unassailable fact Ms. Gibson never saw the February email and the April letter does not contemplate a *reverse* fee, Ms. Gibson's view the April agreement is a (straight) contingent fee is clear, as is the trial court's error.

General contract law construes ambiguous terms against the drafter, particularly within the context of a tender fiduciary attorney-client relation. It is a fact question for the jury as to who had the better opportunity to understand the reverse fee obligation. Who had the keener power of perception to appreciate the weight and consequences of these important omissions? Who had the duty to explain the unconventional fee terms in clear, unambiguous language?

Turning next to the November 18th document *styled* "Attorney-Client Contract," itself an obscure forward-looking document, this document is a forcible illustration of the magnitude of the fee misunderstanding – *to wit:* at execution of the November 18th document, the Lawyers believed the document was a memorialization of part one of the *dual*-fee – *i.e.,* the *reverse* contingent fee (undisclosed) on the basis of the February and April documents (ROA___, Epting Dep. 78:21-25; 79:15; Kefalos Dep. 24:23; 96:9-10); on the other hand, Ms. Gibson believed the document was a *straight* contingent fee (disclosed) in the Ameris matter *"...like a lawyer takes a case, and if he recovers something, then I pay."* (ROA____, Gibson Dep. 108:2; 109:8-25; 110:13-20). The parties' own testimony about the (Ameris) fee arrangement show their minds were nowise connected at engagement; and thus, the November document only perpetuated the parties' continuing misunderstanding of the Ameris fee arrangement.

How is this possible? Well, Ms. Gibson, unaware of the February 4th email, and believing April began a *straight*-contingent fee arrangement, understood the November 18th "Attorney-Client Contract" for that which the document *prima facie* unambiguously contemplates: a sum-certain fixed fee arrangement.

The November document expressly states:

> *"...for their [Lawyers] services, in the defense of <u>and</u> pursuit of a counterclaim... LAW FIRM shall receive a fee based upon the <u>total</u> recovery according to the following schedules:*
>
> *a. One-third (1/3) of all sums saved CLIENT from the deficiency amount claim by Ameris, in the amount of $1,700,000.00.*

> *"...in addition to the fees above, CLIENT will be responsible for paying costs and expenses reasonably necessary and incurred by LAW FIRM [lawyers]."*

(ROA____, November 18th document) (Emphasis added)

The November document makes no reference, whatever, to two "contingency fees" or both a *straight* and *reverse* "contingent fee arrangement", but rather presents a fixed-fee arrangement. In fact, the document never uses the word "contingency." There are no terms stating, or making any reference, to Ms. Gibson owing, in addition to $566,666.00, an additional 33% fee for the *"pursuit of a counterclaim"*. There is no language in the November document suggesting it "memorializes" or "restates" a prior April agreement, from which Ms. Gibson might deduce this document as memorializing (as the Lawyers testified) prior fee documents. (ROA____, November 18th document; Tecklenburg Depo. 53: 15-25; 54:1-25)

Notably, even if the Lawyers had disclosed the February 4th email and April agreement to Ms. Gibson at execution of the November document, the February and April documents rocker-switch the (Ameris) fee obligation between Ms. Gibson's view and the Lawyers' view dependent by whether *"on a contingency"* means paid out of *"recovery defined as a settlement at less than the amount due Ameris"* (February), or *"any actual cash recovery,"* (April); and, now the Lawyers are seeking both a straight and reverse fee on the same loan documents.[2] (ROA____, April and November documents).

On these facts, the Lawyers each knew, or should have known, of the latent ambiguities in the February and April (Ameris) fee terms, and disclosed the same to Ms. Gibson; particularly, whereas, the Lawyers were seeking $566,666, plus 40% of any lender claim recovery, from Ms. Gibson's foreclosure action. Without these disclosures, and with the terms of the November agreement (above) *expressly* contemplating a fixed fee, Ms. Gibson's view at execution of the November agreement was the Ameris fee obligation would be $566,666.00, no more, to be paid (eventually) out of the Ameris cash recovery earned from the lender claim, if any. Given the bald terms of the November document, and benefit of the independent advice of lawyers explaining same, Ms. Gibson's testimony is not only reasonable, but makes it hard to imagine that at execution she could have *read*-into the terms of November document any other meaning.

[2] On May 15, 2014, the Lawyers sought and were granted an Order placing 40% of the proceeds of any lender claim recovery by judgment (or settlement) into a constructive trust to satisfy lawyer fees and costs in the prosecution of the lender claim.

Summarily stated, at execution of the November agreement, Ms. Gibson believed she was agreeing to pay the Lawyers $566,666.00 out of any *actual* Ameris (cash) recovery, as a contingent fee is commonly grasped by the public; *conversely,* the Lawyers (apparently) believed they were getting paid two contingent fees, both a *straight* and a *reverse* fee. (ROA____, Gibson Dep. 110:1-25; Record on Appeal).

Furtively, inadvertent or not, the Lawyers never disclosed their global dual-fee intention to Ms. Gibson. In this regard, there was no "meeting of the minds" at execution of the April fee agreement, or the November agreement. On these facts alone, evidence was before the trial court giving rise to disputed questions of material fact on each of Ms. Gibson's claims on the contract construction and interpretation, breach of fiduciary duty claim, and other tort claims as against the Lawyers. She is entitled to equitable restitution and, a jury trial on the (law claim) merits.

II. The Excessive Fee

Discovery revealed the Lawyers spent nominal time on a non-complex deed-in-lieu transaction, and that $566,666 far exceeds customary fees for deed-in-lieu transactions. Tellingly, Galt's lawyers, Callison & Tighe, and Rosen Haygood, *together* charged Galt less than $30,000 to represent and transact the other side of this deed-in-lieu. (ROA____, Galt invoices).

Despite the Lawyers' protestations and the trial court's rulings to the contrary, the evidence shows Ms. Gibson first learned the Lawyers sought to structure a $566,666.00 *reverse* fee arrangement after the November 2010 "miracle meeting" during which Mr. Epting disclosed Galt was "waiving the deficiency", or as Mr. Kefalos then said *"yeah, they [Galt] just threw in the towel".* (ROA____, Gibson Dep. 181:5-16). If indeed Galt *unilaterally* waived its deficiency – *i.e.,* never intended to prosecute its inchoate, unperfected, deficiency claim, a material fact question arises weighing on the reasonableness of the fee, for which Ms. Gibson is entitled to a jury trial on the merits (see, *e.g., Mortgage Recovery Fund-Riverbend, Ltd. v. Heritage Clipper Riverbend Trust,* 327 S.C. 491, 489 S.E.2d 655 (1997); Rule 38(a) SCRCP). A contingent fee is subject to the same reasonableness standard of Rule 1.5, RPC, Rule 407, SCACR, as any other fee arrangement – *i.e.,* a lawyer shall not charge or collect a clearly excessive fee. Even if the Lawyers had a valid enforceable fee agreement with Ms. Gibson, genuine issues of disputed fact were raised by the evidence before the trial court as to whether the Lawyers owed and breached their duty to reduce their fee commensurate with customary fees for like-kind deed-in-lieu transactions to ensure the fee was reasonable.

Ms. Gibson testified *"I didn't see it that the lawyers saved me [from a deficiency], I see it that Galt forgave me the debt."* (ROA____, Gibson Dep. 199:15-16). If Galt forgave the debt, the result of Galt's own business practices, as Galt avers, then Ms. Gibson has a valid claim – even non-lawyers, like Ms. Gibson, know the mere occurrence of the event – *i.e., the results obtained* (debt forgiveness), is not the sole dispositive element of the benefit of the bargain, but one element in the analysis of the excessiveness of a fee. Moreover, the evidence before the trial court reveals Ms. Gibson agreed, if at all, that the Lawyers would be entitled to a (contingent fee) risk premium of 33% out of recovery in consideration of long hours and extensive legal work – *i.e., pleadings, discovery, depositions, hearings and trial, settlement or judgment*; not, that the Lawyers get $566,666.00 if Galt unilaterally forgave its purported deficiency. (ROA____, Record on Appeal). If that were so, Ms. Gibson, at engagement, issued a lottery ticket, not a fee contract.

On the foregoing evidence, before the trial court were two opposite interpretations of the meaning of a fee agreement. The parties' differing interpretations, while plausibly honest in intention when viewed from behind their respective lenses, resulted in a $566,666 legal consequence, from which arises a valid legal claim that Ms. Gibson might not be solely responsible for the parties' fee misunderstanding.

ARGUMENT IN REPLY

It was reversible error for the trial court to make factual determinations whether (i) the amount "saved" was reasonably determinable; (ii) the fee was reasonable under the circumstances; and, (iii) Ms. Gibson granted informed consent to the Lawyers' fee arrangement where the very documents the Lawyers' rely show the fee is excessive.

I. A genuine issue of disputed fact exists for the jury to determine whether $1.7 million is a reasonable basis to determine the Lawyers' $566,666 fee.

a. The Lawyers' own documents show $1.7 million is an inflated basis to determine the fee.

Before the trial court was Galt's October letter proposing a promissory note (not confession of judgment) for $1.5 million in stark contrast to the Lawyers' claim that they "saved" Ms. Gibson $1.7 million, the basis of their $566,666 fee. (ROA ___, McVey letter to

Epting, dated Oct. 25, 2010). The Lawyers' own documents show Ms. Gibson's deficiency liability, at most, was $1.5 million, not $1.7 million. That is, even assuming Galt were demanding a $1.5 million deficiency, which they were not, the amount "saved" at most was $1.5 million. The Lawyers' $200,000 increase in the amount "saved" cost Ms. Gibson an additional $66,666 in legal fees. This October 25th letter is a scintilla of evidence in support of an excessive fee, and the trial court's reversible error in granting summary judgment.

Mr. Tecklenburg admits so much stating in deposition:

> A. "No. Because in the October 25th letter, they're [Galt] asking her to sign a note for $1.5 million, so – from Galt's point of view the deficiency was $1.5 million that they wanted her to sign at the time. I took the deficiency calculation of $1.7 million from my conversations with Linda on the value of the land, as well as Galt's letter that gave a value of what they thought the land was. And frankly, did some very simple math. Took $3 million [note value] and subtracted $1.3 million for the land value."

(ROA ___, Tecklenburg depo, 139:3-13)

Here, the evidence before the trial court shows the Lawyers computed the basis of their fee on the difference between the note and land value, $1.7 million; not on the basis of any "savings" off the purported deficiency. The Lawyers helped themselves to the $1.7 million basis for the fee without the press and weight of litigation, hostile negotiation, or even meeting with Galt; and, despite Galt's $1.5 million "offer", computed their fee based on the worst case (maximum) deficiency, $1.7 million.

A factual issue – whether $1.7 million is an inflated basis – is considered to be genuine if it has a real basis in the record. (see, e.g., 73 Am. Jur. 2d Summary Judgment §49 (2015)). It has also been held that "genuine" in this context means that the evidence is such that a reasonable jury could resolve the fact in a manner urged by the nonmoving party. Id. A fact is material if it affects the rights or liabilities of the parties, or might affect or determine the outcome of the suit ...[] if the dispute over it is resolved favorably to the nonmovant. (73 Am. Jur. 2d Summary Judgment §50 (2015)).

Here, the factual issue is whether the basis to determine the fee is reasonable. The reasonableness of the Lawyers' $1.7 million basis to determine their fee bears directly on the amount of the fee, the dispute in this litigation. A jury could agree with Ms. Gibson that $1.7

million is not a reasonable basis to determine the fee on the evidence before the trial court showing the deficiency from Galt's point of view was $1.5 million, if any.

Evidence before the trial court showed the Lawyers knew at execution of their November 18, 2010 fee agreement that Galt had proposed $1.5 million, yet they lured Ms. Gibson to believe they "saved" her $1.7 million. But for the Lawyers' conduct, Ms. Gibson would have saved at least $66,666 in fees. This extra $66,666.00 increase in the Lawyers' fee was unreasonable.

Thus, there was more than a scintilla of evidence before the trial court supporting Ms. Gibson's claims for breach of fiduciary duty and the other tort claims; and, therefore, the trial court erred in granting summary judgment in the Lawyers' favor. Here, a jury could agree with Ms. Gibson that the Lawyers engaged in self-dealing and overreaching, in breach of their fiduciary duty, by charging an unreasonable fee; and, therefore, the trial court's rulings should be reversed.

b. Evidence before the trial court showed the Lawyers failed to credit Ms. Gibson for the set-off value of her counterclaims against the $1.7 million "deficiency" they based their fee.

Evidence was before the trial court showing the value of Ms. Gibson's counterclaims against Ameris Bank exceeded $2.9 million, well in excess of the supposed $1.7 million deficiency. (ROA____, McVey letter to Epting dated October 25, 2010). Thus, lawyers' own evidence raises a genuine, material, fact question whether any deficiency existed at all, let alone $1.7 million.

Logically, a mortgage deficiency is reasonably determinable only after determining Ms. Gibson's lender claim recovery, appraisals, and foreclosure sale, all a set off against the deficiency, if any. Here, the Lawyers pre-supposed $1.7 million to be deficient for the purposes of computing their reverse fee, without giving Ms. Gibson any credit for the set-off value of her lender claims. The Lawyers were aware Ms. Gibson held valuable counterclaims, as they admit they had "email communications among Ameris Bank representatives conceding some "culpability" in the loan to Ms. Gibson. (ROA____, Initial Brief of Respondents p.10, ¶2). Even assuming no lender claim recovery, the mere existence of lender counterclaims had some value given determining, liquidating and collecting any deficiency against Ms. Gibson would

have been impossible, at law and in equity, until after the lender claim litigation was resolved, entirely.

Notwithstanding, the Lawyers attributed no monetary credit against their $1.7 million basis for Galt's deficiency impasse. Rather, the Lawyers declared an unqualified $1.7 million "saved" to be the basis to determine their fee. (ROA____, November 18th document).

Here, a jury could agree with Ms. Gibson imposing a $1.7 million basis was not a reasonable benchmark to determine the fee on the above evidence the value of Ms. Gibson's counterclaims against Ameris Bank exceeded $2.9 million. Thus, the trial court's rulings to the contrary were error; and, therefore, this Court should reverse.

II. A genuine issue of fact for the jury exists as to whether the Lawyers' disclosed to Ms. Gibson all information necessary for her to grant informed consent to the $566,666 fee.

The Lawyers' fiduciary duty to Ms. Gibson included candid disclosure of all information necessary for Ms. Gibson to make an informed judgment of her legal matters, inclusive of the fees charged for legal services. (Rule 1.4(b), RPC, Rule 407, SCACR).

Ms. Gibson relied on the Lawyers to disclose to her all information relevant to deciding the course of her litigation with Ameris, and Galt, in a reasonably efficient, economical, and prudent manner, including costs of litigation. (ROA__ Gibson Dep. 171:8-20).

a. The Lawyers had a non-delegable duty to disclose all information relevant to the nature of the deficiency.

The Lawyers' fiduciary duty of candor and disclosure, pursuant to Rule 1.4(b), RPC, Rule 407, SCACR, included disclosing to Ms. Gibson that (i) Galt's "deficiency" was subject to set-off claims; (ii) Galt's deficiency was inchoate, unperfected, and unliquidated until a foreclosure sale to determine the debt; (iii) the Lawyers had not negotiated a reduction of the "debt" with Mr. McVey, or Galt; (iv) the Lawyers had no intention of offering a deed-in-lieu of foreclosure for debt forgiveness; (v) the Lawyers had nominal time and effort involved in the matter; (vi) Galt's acquisition of Ms. Gibson note and mortgage substantially changed the likelihood Ms. Gibson would be liable for the maximum $1.7 million (purported) debt; (vii) $566,666.00 is not a customary fee for routine deed-in-lieu work; (viii) transaction deed-in-lieu work is customarily charged by the hour, not on a contingency; (ix) the $1.7 million basis was

merely the difference between the principal face of the note and value of the collateral, not the amount "saved," and therefore is not a reasonable basis against which to compute the Lawyers' fees; (x) Mr. Howe's involvement in her matter consisted of a "few hours," entirely; (xi) Mr. West's involvement consisted of less than thirty hours, entirely; (xii) Galt's *unilateral* waiver of its deficiency claim was not the result of the Lawyers' work, but Galt's own business practice; (xiii) the Lawyers sought a *dual*-fee arrangement; and, inter alia, (xiv) the Lawyers' proposed "deed-in-reduction" strategy was directly against Ms. Gibson's interests, nearly guaranteeing she would pay a deficiency – to the point of triggering Galt to seek a deficiency against Ms. Gibson (ROA____, McVey letter to Epting dated October 25, 2010; Danhour Dep. 68:1-25; 69:1-25).

The Lawyers failed to disclose the foregoing material facts to Ms. Gibson. (ROA___ Gibson Aff. at ¶5). Had the Lawyers fully disclosed the true nature of Galt's inchoate deficiency, the Lawyers' nominal time and effort, and the excessiveness of a $566,666.00 fee for same, Ms. Gibson would not have agreed to pay the $566,666.00 fee. (ROA____, Gibson Aff. at ¶6). Had the Lawyers disclosed at execution of any of the fee documents that the Lawyers sought a dual-fee in the Ameris matter, Ms. Gibson would not have agreed to pay the $566,666.00. (ROA____, Gibson Aff. at ¶7).

The Lawyers stand on the mere occurrence of an event (debt forgiveness) that the Lawyers had no, or nominal part, and an evolution of three "fee documents" as the basis to collect a half-million dollar fee. Without more, South Carolina law simply does not support the mere occurrence of the event to guarantee a fee obligation. The law requires much more, including among other obligations, the obligation to act in a manner not adverse to her interests in matters substantially related to the underlying action, inclusive of any fee arrangement. See, e.g., *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011). The law requires a lawyer to fully disclose all material facts with candor, such as, here, the true, genuine and accurate nature of the deficiency claim, including reasonable rates and fees for like kind work, for the client to grant informed consent. (Rule 1.4(b), RPC, Rule 407, SCACR).

Here, a trier of fact could reasonably infer on the above facts that the Lawyers failed to disclose, or otherwise concealed, the true nature of Galt's (unperfected), claim, Mr. McVey's communications (seeking a settlement conference), and the excessiveness of the Lawyers accepting hundreds of thousands of dollars for nominal effort and time.

b. Mr. Tecklenburg was engaged to advise Ms. Gibson about a fee mortgage, not the reasonableness of the fee.

Further, the evidence before the trial court shows Mr. Tecklenburg was not retained to advise Linda about the reasonable of the Lawyers' fee, but rather for the purposes to advise Linda whether she should grant to the Lawyers a mortgage security interest in her property to secure her contingent fee.

Mr. Tecklenburg testified so much stating:

> Q. "So to summarize what… [t]he attorney work-product that you [Mr. Tecklenburg] had to review and assess with respect to determine the reasonableness of the $566,666 fee was the hearing, or a hearing, a letter, the October 25th letter, and your understanding that Mr. Epting and the lawyers had been in negotiation with Galt to resolve the deficiency claim. Is that Correct?"
>
> A. "No. Because as I testified previously, I didn't find my primary role to be to advise Linda on the reasonableness of the fee. She had already agreed to the fee. I was retained to advise her on getting a mortgage."

(ROA____ Tecklenburg Depo. 140:9-22)

On these facts, a trier of fact could infer no one, other than her lawyers, was focused on determining a reasonable basis, if any, to determine their reverse fee.

Fully informed consent in this case required the Lawyers to disclose to all the information she needed to grant fully informed consent to the fee agreement, including, among other things, that the deficiency was subject to, and mitigated by, her lender claims; that the deficiency amount was not a liquidated judgment, but rather an inchoate claim; that Galt might not even elect to pursue the deficiency, as turned out to be the case; and that Ms. Gibson might have to pay the Lawyers $800,000, or more, out-of-pocket, depending on the amount "saved". (ROA___, Tecklenburg Dep. 141:1-25). Informed consent required also disclosure that the actual deficiency amount "saved" would not be known, calculable, or collectable, until resolution of the lender claim; that the actual deficiency "saved" is not yet due and payable, if at all, until resolution of the lender claim given Galt occupied non-holder-in-due-course status; and, that there exists alternative payment options to contingent fee arrangements.

Here, the evidence before the trial court showed none of these disclosures were made to Ms. Gibson. To the contrary, all the way through the entire course of the representation the

Lawyers guided Ms. Gibson to believe she was liable to her lender, Ameris Bank, for $1.7 million, when in fact Galt owned the note and was willing to substantially reduce and compromise the claim, as well as the fact that Galt's claims were subject to set-off claims. And, Ameris Bank had no legal deficiency claim at all. Specifically, the evidence before the trial court showed the Lawyers presented Ms. Gibson their November 18th fee document that *expressly* states *"Ameris [Bank]... []...seeks a deficiency judgment against client"* and *"from the deficiency amount claimed by Ameris, in the amount of $1,700,000.00"*, as if the deficiency amount were a liquidated debt, due and payable on demand, to Ameris Bank. (ROA____, November 18th document). These representations were false, misleading, and constitute evidence in support of Ms. Gibson's claim she did not have the information she needed to grant informed consent to the fee. Thus, the trial court's ruling was in error, and therefore this Court should reverse.

III. A genuine fact issue exists as to whether avoided costs, risk and impossibility of performance (changed circumstances) resulted in an excessive fee.

The parties' bargained-for-consideration at engagement was the Lawyers were to risk long hours and considerable work for 33% of "savings" for achieving a result. That's not what happened. Here, Galt purchased Ms. Gibson's note thirty (30) days after Ameris filed suit. Galt testified they initially were not seeking a deficiency judgment against Linda at all, *"...[n]o, that's not our general business practice. Our – we would have been the most happy with the next day executing a deed in lieu of foreclosure and being able to get fee simple control of the real estate."* (ROA____, Danhour Dep. 30:1-20).

The Lawyers ask this Court to isolate the analysis on the reasonableness of their $1.7 million basis for their legal fee on a snapshot in time when the three-part fee agreement was first formed early in 2010, well before Galt's acquisition of the note, and well before Galt proposed Ms. Gibson sign a $1.5 million promissory note. The reasonableness of a lawyer's fee is not determined at a static, freeze-frame, moment in time when the contract is formed. Subsequent events and developments in the circumstances make the fee originally contemplated unreasonable.

The Restatement (Third) of the Law Governing Lawyers §34 states "a lawyer may not charge a fee larger than is reasonable in the circumstances or that is prohibited by law."

Comment c to that Rule provides:

> [W]as there a subsequent change in circumstances that made the fee contract unreasonable? Although reasonableness is usually assessed as of the time the contract was entered into, later events might be relevant. ... Finally, events not known or contemplated when the contract was made can render the contract *unreasonably favorable to the lawyer* or, occasionally, to the client. ... To determine what events client and lawyer contemplated, their contract must be construed in light of its goals and circumstances and in light of the possibilities discussed with the client ... .

Restatement (Third) of the Law Governing Lawyers §34, comment c. (Emphasis added).

Courts around the country have recognized that developments and circumstances arising after a client entered into a fee agreement with the lawyer rendered the fee originally contemplated unreasonable. *See In re Samaha,* 399 S.C. 2, 731 S.E.2d 277 (2012) (charging client 25% fee for "marshaling" assets of an estate when lawyer did nothing more than what a personal representative would do for a 5% statutory fee did not comply with the reasonableness standard of 1.5(a), RPC); *Anderson v. Kenelly*, 547 P.2d 260 (Colo. Ct. App. 1975) (after fee contract was entered lawyer learned that insurance company's refusal to pay was based on readily demonstrable factual error); *In re Kutner*, 399 N.E.2d 963 (Ill. 1979) (flat fee of $5,000 in criminal-defense representation unreasonable under DR 2-106 when prosecuting witness asked for and got dismissal of criminal prosecution at first court hearing); *In re Sullivan*, 494 S.W.2d 329 (Mo. 1973) (after fee contract was entered lawyer learned that charges against client had been dismissed before lawyer was retained); *Wade v. Clemmons*, 377 N.Y.S.2d 415 (N.Y. Sup. Ct. 1975) (when obtaining client's consent to settlement, lawyer did not disclose that because of lawyer's fee and hospital lien, client would receive nothing).

Ms. Gibson is not aware of any South Carolina appellate court having considered the validity of a reverse contingency fee coupled with a straight contingent fee in a mortgage foreclosure action on the same note. At least two courts in other jurisdictions have found reverse contingency fee agreements to be unenforceable, regardless of circumstances. *Wunschel Law Firm, P.C. v. Clabaugh*, 291 N.W.2d 331 (Iowa 1980); *Brown & Strum v. Frederick Rd. Ltd. Pshp.*, 768 A.2d 62 (Md. Ct. App. 2000).

Even if it could be argued that Ms. Gibson entered into an enforceable *reverse* contingent fee agreement by April 2010, it was reversible error for the trial court to make factual findings as to the reasonableness of the $566,666 fee based on later events and developments (above),

including Galt's October 25, 2010 letter proposing a $1.5 million note.

A jury could conclude that the actual amount of savings to Ms. Gibson was not the full amount of the original $1.7 million deficiency claimed by Ameris, but some lesser amount the result of the above changed circumstances. Thus, this Court should reverse the trial court.

a. The 33% contingent rate imposed by the Lawyers for the reverse contingent fee was unreasonable.

The trial court erred in summarily reaching the factual conclusion that the 33% contingency rate was reasonable based upon the circumstances. Before the trial court was testimony showing Ms. Gibson retained Paul Tecklenburg to advise her about the mortgage the Lawyers sought to secure their "contingency" fee during which he suggested that the Lawyers lower the proposed percentage from 33% down to 20% or 25%, (ROA ___, Tecklenburg Depo., 64:1-8 and 65:21-25). But the Lawyers rejected that proposal even though Galt turned out to be (i) a friendly creditor, non-adversarial to Ms. Gibson, (ii) occupying non-holder-in-due-course legal status; and, (iii) Ameris had admitted a degree of culpability in the lending transactions with Ms. Gibson. (ROA ___, Danhour Dep. 30:1-20; Resps. Memorandum in Support of Motion for Summary Judgment, pp. 5-6).

Like Mr. Tecklenburg, a jury could conclude that based upon the facts and circumstances, a reverse contingency fee percentage of 33% resulting in a $566,666 fee was unreasonable. It was reversible error for the trial court to make those factual determinations; and, therefore, this Court should reverse the trial court.

IV. Expert testimony before the trial court established the standard of care and the Lawyers' breach of their fiduciary and professional duty.

It is disingenuous for the Lawyers to claim, as they did on pp. 19 - 24 of their Brief, that Ms. Gibson did not present to the trial court <u>any</u> testimony related to the standard of care or the Lawyers' breach of the standard of care. In trying to make this point, the Lawyers make a modest reference to only one page of testimony from the deposition of one of Ms. Gibson's experts, Harry A. Swagart, III, claiming that his opinion was limited to whether the fee agreement was enforceable. The fact is, however, in addition to Mr. Swagart's deposition testimony before the trial court was Mr. Swagart's 13 page affidavit that was filed with Ms. Gibson's motion for summary judgment and opposition to the Lawyers' motion for summary

judgment. Mr. Swagart's affidavit contains expert opinions with regard to the standard of care for lawyers and concludes that the Lawyers' breached fiduciary and professional duties owed to Ms. Gibson.

Mr. Swagart's sworn testimony, "having read the pleadings, discovery, historical documents, available depositions and exhibits thereto," states the following expert opinion of the standard of care and the Lawyers' breach thereof:

> 1. [The Lawyers] knew before the [November 18, 2010] fee agreement was signed that the lender, Galt, had agreed to accept a deed in lieu with no deficiency.
>
> 2. [N]one of the documents which [the Lawyers] euphemistically characterize as fee agreements differentiate between the lender case in which [the Lawyers] sought a standard contingency fee and the foreclosure case and its reverse contingency fee. With litigation simultaneously taking place in two different courts and with constantly metamorphosing fee arrangements and given the lack of disclosure by [the Lawyers] , it would indeed have been surprising if [Ms. Gibson] had the same understanding of her fee obligations as did [the Lawyers]. As she testified, she did not share their understanding.
>
> 3. [The Lawyers] had a non-delegable duty of care to insure that the fee agreements complied with RPC 1.5(a), which they did not do.
>
> 4. [The Lawyers] violated to (sic.) non-delegable duties of care to provide to [Ms. Gibson] all material information regarding the case (something outside attorneys could not do) and the fee arrangement and to insure that the arrangement was fair to, and fully understood by, [Ms. Gibson].
>
> 5. [The Lawyers] were subject to a duty of care to insure that [Ms. Gibson] was correctly advised by Papa and Tecklenburg, which was impossibility given their limited knowledge.
>
> 6. [T]he involvement of Papa and Tecklenburg in no way relieves [the Lawyers] from liability for charging and seeking to collect an unreasonable attorney's fee...[]
>
> 7. [T]he mere fact that [the Lawyers] obtained an opinion from another lawyer that the 'Attorney/Client Contract' of November 18, 2010, may have been reasonable, did not relieve them of their duty of care not to impose upon [Ms. Gibson] a fee arrangement which was, in fact, not reasonable.
>
> 8. As a result, it is my opinion that that (sic.) [the Lawyers] are at fault, and that opinions of other attorneys do not and cannot relieve them from liability.
>
> 9. I am incredulous that [the Lawyers] never asked for such a resolution of the debt, even though under a duty of care to do so.

10. These indisputable facts are of extreme relevance because they establish that [the Lawyers] did not satisfy the condition precedent to their earning the reverse contingency fee - that their services actually caused the elimination of the debt.

11. [The Lawyers] did nothing which would have justified any fee.

12. [The Lawyers]' first offer to Galt was for a 'deed in reduction,' . . ., had it been accepted, would have pretty much guarantied (sic.) that there would be a deficiency in some amount against which [the Lawyers]' fees would be assessed. In these circumstances, the deed in reduction offer violated Defendants' duty of care.

13. One possible, if not strong, inference from the above facts is that [the Lawyers]' were purposefully delaying the settlement in order to draft what they mistakenly believed would be an enforceable reverse written contingency fee agreement and then to have it signed by [Ms. Gibson].

14. [The Lawyers] did not comply with their duties to discuss with [Ms. Gibson] the general likelihood of recovery by the bank, even if they had a proper basis for believing that there probably would be a recovery; to disclose to her the likely size of the recovery; to disclose the availability of alternative fee arrangements and their implications. Indeed, they refused [Ms. Gibson]'s request to pay on an hourly basis even though payment would be secured by the mortgage on unencumbered properties.

15. [The Lawyers] repeatedly violated their duty of care by engaging in conduct which was selfishly designed to further their own interests at the expense of [Ms. Gibson]'s interests...[]

16. Based upon the facts and circumstances of this case, it is my opinion to a reasonable degree of certainty that [the Lawyers]' violations of their duty of care were the sole and indisputable causes of [Ms. Gibson]'s losses in that they constituted the means by which [Ms. Gibson] was induced to pay an unreasonable exorbitant fee and excess unearned fees resulting from [the Lawyers]' error-filled fee calculations, as well as the losses of pre-judgment interest and other investment returns.

(ROA___, Swagart, Aff. dated October 13,2015).

On the foregoing expert testimony establishing the standard of care, and breach thereof, the trial court erred by disregarding this evidence.

Moreover, the South Carolina Supreme Court has said:

> An attorney, who contracts to prosecute an action on behalf of his client, impliedly represents ...[] that he will exert his best judgment in the prosecution of the litigation entrusted to him; and that he will exercise reasonable and ordinary care and diligence in the use of his skill and in the application of his knowledge <u>to the cause of his client</u>."

Norris v. Alexander, 246 S.C. 14, 142 S.E.2d. 214, 217 (1965). (emphasis added).

The core of Ms. Gibson's legal malpractice claim is the Lawyers used their skill and applied their knowledge predominately to their cause to collect $566,666, contrary to Ms. Gibson's cause to expedite resolution for a reasonable fee.

The standard of care that the plaintiff must prove is that the professional failed to conform to generally recognized and accepted practices of profession. *See, e.g., Doe v. American Red Cross Blood Servs., S.C. Region,* 297 S.C. 430, 377 S.E.2d 323,326 (1989).

Here, Mr. Swagart and Ms. Ballard's expert testimony, together with Galt's sworn affidavits and deposition testimony, and Ms. Gibson's sworn testimony, reveal more than a scintilla of evidence in support of Ms. Gibson's breach of fiduciary duty claim and legal malpractice claim, bearing on whether the Lawyers put their interests in earning a large fee foremost, ahead of their client's cause. The trial court's ruling erroneously ignored this testimony and therefore should be reversed.

V. The trial court erred in making factual findings that Mr. Papa was Ms. Gibson's agent to negotiate the reverse contingent fee agreement.

A fact issue exists as to whether Mr. Papa was Ms. Gibson's agent, and authorized, to bind her to the $566,666 reverse fee obligation, material to determine the parties' rights in dispute. The existence of agency is relevant as to the reverse contingent fee because the April fee document makes no reference to a reverse fee, but rather relies on a February 4th email between the Lawyers and Mr. Papa. The Lawyers did not disclose their February 4th email to Ms. Gibson at execution of the April agreement; and, consequently, at execution of the April agreement, Ms. Gibson was unaware of the reverse fee. Thus, whether Mr. Papa was Ms. Gibson's agent *as to the reverse fee* is not only relevant, but dispositive of her obligation under the fee agreement.

The trial judge summarily dismissed the fact issue of whether agency exists stating:

> MR. DAVIS: *"Well, we've slipped into the dialogue of agency....[]"*
>
> THE COURT: *"I [Trial Judge] would agree with you on agency, except for her signature [on the April agreement]. I don't have agency there. That's her."*

(ROA ___, Hrg. Transcript at 17:1-15).

Ms. Gibson agrees agency is not necessary as to the *straight* contingent fee, as that fee is disclosed in the April document she signed; however, the existence of apparent agency is necessary to establish a binding agreement for the *reverse* contingent fee, as that *reverse* contingent fee was not disclosed in the April document; but rather, as the Lawyers claim and as the trial court ruled, was based on a purported fee negotiation with Mr. Papa. The Lawyers' claim they relied on Mr. Papa, as Ms. Gibson's agent, to negotiate their reverse fee, like *"say you represent Alcoa Aluminum [] you've [Mr. Papa] made the arrangement on behalf of Alcoa..."* we relied on Mr. Papa. (ROA____, Kefalos Dep. 27:10-25; 28:1-20; Epting Dep. 35:1-7; 43:1-5; Tecklenburg Dep. 55:1-25; 56-1-25). Ms. Gibson testified Mr. Papa was not her agent for purposes of negotiating any fee arrangement. (ROA____, Gibson Dep. 155:1-25; 156:1-25; 157:1-25; 165:7). Thus, a genuine fact issue as to whether Mr. Papa was Ms. Gibson's agent for the purpose of negotiating *the reverse fee* exists.

Further, there is no evidence, whatever, Linda held out Mr. Papa to the Lawyers as possessing authority to negotiate her fee; in fact, she testified she sought Mr. Papa's advice regarding bankruptcy, and not a bankruptcy candidate, Mr. Papa referred her to the Lawyers, and no more. (ROA____, Gibson Dep. 154:16-23). On these facts, a trier of fact can reasonably infer Ms. Gibson presented to the Lawyers by a referral from Mr. Papa; not, Ms. Gibson presented Mr. Papa as her agent.

The standard to determine a claim of apparent authority is not on the relationship between the principal and agent, but on that between the principal and the third parties, here, the Lawyers. *See, e.g., Frasier v. Palmetto Homes of Florence, Inc.*, 323 S.C. 240, 245, 473 S.E.2d 865, 868 (Ct. App. 1996). The documents and testimony before the trial court show there is no evidence, that is, no emails, documents, testimony, or otherwise, of any conduct by Ms. Gibson, consciously or impliedly, that would support any reasonable inference that Mr. Papa was her agent to set her fee obligations, or agree to a reverse contingent fee. In all events, under South Carolina law whether agency exists is a fact-question for the jury. *See Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 226, 317 S.E.2d 748, 751 (Ct. App. 1984) ("Agency is a question of fact."). Thus, a material fact question for the jury exists as to whether Mr. Papa was Linda's agent for purposes of negotiating the reverse fee obligation with the Lawyers, which directly bears on the amount of the lawyers' fees.

Even assuming the Lawyers could establish apparent authority, which they cannot, there is no

evidence that Mr. Papa ever accepted, or even acknowledged, in writing or otherwise, the February 4th email, let alone agreed to its terms. (ROA____, Record on Appeal). The evidence reveals the Lawyers never asked Mr. Papa, or Linda, if they accepted, acknowledged, or even received, the February 4th email; and, the Lawyers never discussed the February 4th email with Linda. (ROA____, Gibson Dep. 153:1-7; 262:21-23; 263: 1-4).

Yet remarkably, the Lawyer's brief is replete with evidence the Lawyers relied "through her attorney, Mr. Papa" to justify their position on how and why Ms. Gibson "through Mr. Papa, agreed to enter into a separate reverse contingency fee agreement." (ROA____, Resp. Brief at p. 35). On these facts, the trial court erred making a factual determination as to whether Mr. Papa was Ms. Gibson's agent for the reverse fee obligation.

CONCLUSION

The evidence before the trial court shows that Ms. Gibson might not be solely responsible for the parties' fee misunderstanding; and, therefore, this Honorable Court should reverse the trial court's Order in favor of the Lawyers and remand this case for a trial on the merits.

Respectfully submitted,

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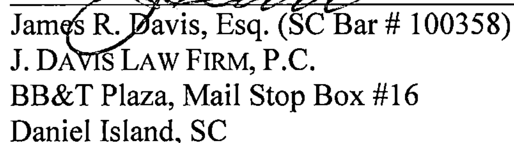

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Dated: July 18, 2016

Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr. Circuit Court Judge

Appellate Case No. 2016-000432

Linda A. Gibson, individually and in capacity as
Trustee of the PAUL WILLIAM GIBSON FAMILY TRUST;
HERITAGE SEVEN, LLC; SEVEN OAKS APARTMENTS, LLC;
and 3205 PALM BOULEVARD, LLC .... Appellants,

vs.

ANDREW K. EPTING, JR., LLC; Andrew K. Epting, Jr.;
GEORGE J. KEFALOS, P.A.; George J. Kefalos;
GEDNEY M. HOWE, III, P.A.; Gedney M. Howe, III;
JOHN S. WEST, ATTORNEY-AT-LAW, LLC; and John S. West .... Respondents.

PROOF OF SERVICE

I, James R. Davis, Esq., a lawyer with J. DAVIS LAW FIRM, P.C., certify that I have served one (1) copy of the INITIAL REPLY BRIEF OF THE APPELLANTS on counsel for Respondents, by electronic mail and by depositing a copy of the same in the United States Mail, postage prepaid, on the 18th day of July, 2016 addressed to:

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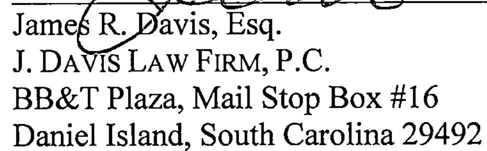

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July 18, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Attention: V. Claire Allen
Post Office Box 11629
Columbia, South Carolina 29211

Re: Linda A. Gibson, et. al., v. Andrew K. Epting, et. al,
Appellate Case No. 2016-000432
Our File No.: 2016057

Dear Ms. Kitchings:

Please find enclosed for filing an original and one copy of the Initial Reply Brief of Appellants, Appellant's Additional Designation of Matter to be Included in Record on Appeal, and Proof of Service in connection with the above referenced matter.

Kindly return the clocked copies in the enclosed pre-paid self-addressed return envelope at your convenience. Thank you in advance for your attention to this matter.

With kind regards, I am

Yours very truly,

James R. Davis

JRD/jrd

cc: M. Dawes Cooke, Jr., Esq., Barnwell Whaley Patterson & Helms, LLC
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Ms. Linda A. Gibson

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