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

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, LL; and John S. West,

Respondents.

FINAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES ON APPEAL 1

COUNTERSTATEMENT OF THE CASE 2

I. PROCEDURAL HISTORY 2

II. FACTUAL BACKGROUND 4

A. Gibson filed action against Re/Max. 4

B. Gibson defaulted on the Ameris Bank loan, and Mr. Richter moved to withdraw. 4

C. Gibson retained attorney Robert Papa who referred her to Attorney Kefalos. 5

D. Gibson retained the Attorneys to defend the foreclosure action, pursue counterclaims, and pursue other actions. 7

E. Ameris Bank filed the foreclosure action against Gibson and transferred the loan to Galt Valley. 7

F. Galt Valley pursued foreclosure before reaching a settlement with Gibson that included allowing her to proceed with counterclaims against Ameris Bank. 9

G. Gibson memorialized application of the April fee agreement with respect to the foreclosure litigation in a November agreement. 12

H. Gibson settled the claims against Re/Max, tried the Ameris Bank counterclaims, and obtained a judgment in excess of $2.9 million. 13

STANDARD OF REVIEW 14

ARGUMENTS 16

I. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEY'S MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE ATTORNEYS BREACHED ANY FIDUCIARY OR PROFESSIONAL DUTY.
..... 16

A. Gibson did not present expert testimony related to the standard of care.
..... 18

B. Gibson presented no evidence of any breach of the standard of care by the Attorneys.
..... 19

C. The fee earned by the Attorneys pursuant to the April agreement is reasonable in light of the facts and circumstances surrounding its entry.
..... 23

II. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE ATTORNEYS BREACHED ANY FEE AGREEMENT WITH GIBSON.
..... 28

A. The Attorneys represented Gibson in the foreclosure litigation pursuant to the April agreement and performed all work necessary in that action to obtain a "home run" result for her.
..... 28

B. The November 18, 2010, agreement was an application of the April fee agreement and not a new fee agreement.
..... 29

C. The April fee agreement is unambiguous and demonstrates the clear intent of Gibson and the Attorneys to enter into a contingent fee arrangement.
..... 30

III. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE ATTORNEYS MISREPRESENTED ANY FACTS RELATED TO THE FEE AGREEMENT. 33

IV. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE ATTORNEYS WERE UNJUSTLY ENRICHED BY THE FEE AGREEMENT OR CONVERTED GIBSON'S MONIES. 36

V. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT THERE WAS NO EVIDENCE THAT THE ATTORNEYS VIOLATED THE UNFAIR TRADE PRACTICES ACT. 39

VI. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE FEE AGREEMENT BETWEEN GIBSON AND THE ATTORNEYS WAS VOID OR UNENFORCEABLE. 40

CONCLUSION 42

TABLE OF AUTHORITIES

CASES

AMA Mgt. Corp. v. Strasburger,
309 S.C. 213, 420 S.E.2d 868 (Ct. App. 1992) 33

Bates v. Lewis,
311 S.C. 158, 427 S.E.2d 907 (Ct. App. 1993) 30, 31

Baughman v. Am. Tel. & Tel. Co.,
306 S.C. 101, 410 S.E.2d 537 (1991) 14

Campbell v. Robinson,
398 S.C. 12, 726 S.E.2d 221 (Ct. App. 2012) 36, 37

Dema v. Tenet Physician Servs. – Hilton Head, Inc.,
383 S.C. 115, 678 S.E.2d 430 (2009) 36

Dyer v. Moss,
284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1989) 14, 15

Ellie, Inc. v. Miccichi,
358 S.C. 78, 594 S.E.2d 485 (Ct. App. 2004) 28

Felts v. Richland County,
299 S.C. 214, 383 S.E.2d 261 (Ct. App. 1989) 40, 41

Fleming v. Rose,
350 S.C. 488, 567 S.E.2d 857 (2002) 14

Fuller v. E. Fire & Cas. Ins. Co.,
240 S.C. 75, 124 S.E.2d 6021962) 28

Germann v. New York Life Ins. Co.,
286 S.C. 34, 331 S.E.2d 385 (Ct. App. 1985) 15

Global Prot. Corp. v. Halbersberg,
332 S.C. 149, 503 S.E.2d 483 (Ct. App. 1998) 39

Grant v. Mount Vernon Mills, Inc.,
370 S.C. 138, 634 S.E.2d 15 (Ct. App. 2006) 15, 36

Gruber v. Santee Frozen Foods, Inc.,
309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992) 33

Hansen v. DHL Laboratories, Inc.,
316 S.C. 505, 450 S.E.2d 624 (Ct. App. 1994) 30

Harrington v. Mikell,
321 S.C. 518, 469 S.E.2d 627 (Ct. App. 1996) 33

Harvey v. South Carolina Dep't of Corrections,
338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000) 41

Lindsay v. Lindsay,
328 S.C. 329, 491 S.E.2d 583 (Ct. App. 1997) 31

Main v. Corley,
281 S.C. 525, 316 S.E.2d 406 (1984) 15, 36

McLaughlin v. Williams,
379 S.C. 451, 665 S.E.2d 667 (Ct. App. 2008) 33

Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc.
296 S.C. 530, 374 S.E.2d 507 (Ct. App. 1988) 36, 37

Noisette v. Ismail,
299 S.C. 243, 384 S.E.2d 310 (Ct. App. 1989) 40, 41

O'Shea v. Lesser,
308 S.C. 10, 416 S.E.2d 629 (1992) 16, 17

Quail Hill, LLC v. County of Richland,
387 S.C. 223, 692 S.E.2d 499 (2010) 33

Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime,
329 S.C. 206, 494 S.E.2d 465 (Ct. App. 1997) 41

RFT Management Co., LLC v. Tinsley & Adams, L.L.P.,
399 S.C. 322, 732 S.E.2d 166 (2012) 16, 17

Rydde v. Morris,
381 S.C. 643, 675 S.E.2d 431 (2009) 17

Sauner v. Pub. Serv. Auth. of SC,
354 S.C. 397, 581 S.E.2d 161 (2003) 14, 36

S.C. Dep't of Transp. v. Revels,
411 S.C. 1, 766 S.E.2d 700 (2014) 23

S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co.,
303 S.C. 74, 399 S.E.2d 8 (Ct. App. 1990) 28

Shupe v. Settle,
315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) 14, 15

Sides v. Greenville Hosp. Sys.,
362 S.C. 250, 607 S.E.2d 362 (Ct. App. 2004) 14

Southeastern Housing Foundation v. Smith,
380 S.C. 621, 670 S.E.2d 680 (Ct. App. 2008) 17

Spence v. Wingate,
395 S.C. 148, 716 S.E.2d 920 (2011) 17

SSI Med. Servs., Inc. v. Cox,
301 S.C. 493, 392 S.E.2d 789 (1990) 38

Suttles v. Wood,
280 S.C. 272, 312 S.E.2d 574 (Ct. App. 1984) 31

Taylor v. Medenica,
324 S.C. 200, 479 S.E.2d 35 (1996) 39

Taylor by Taylor v. Taylor,
291 S.C. 261, 353 S.E.2d 156 (Ct. App. 1987) 31

United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc.,
307 S.C. 102, 413 S.E.2d 866 (Ct. App. 1992) 30, 31

Visual Graphics Leasing Corp., Inc. v. Lucia,
311 S.C. 484, 429 S.E.2d 839 (Ct. App. 1993) 31

West v. Gladney,
341 S.C. 127, 533 S.E.2d 334 (Ct. App. 2000) 33

Woodson v. DLI Properties, LLC,
406 S.C. 517, 753 S.E.2d 428 (2014) 14

Worley v. Yarborough Ford, Inc.,
317 S.C. 206, 452 S.E.2d 622 (Ct. App. 1994) 30

RULES

Rule 56, SCRCP 14

Rule 1.5, RPC, Rule 407, SCACR 23, 24, 25

STATUTES

S.C. Code Ann. § 39-5-140 (1976) 39

S.C. Code Ann. § 15-53-10 (1976) 40

SECONDARY SOURCES

ABA Op. 93-373 ..... 23, 24

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly grant summary judgment when there was no evidence that the Attorneys breached any fiduciary or professional duty to Appellants?

2. Did the trial court properly grant summary judgment when there was no evidence that the Attorneys breached the terms of any fee agreement with Appellants?

3. Did the trial court properly grant summary judgment when there was no evidence that the Attorneys misrepresented any facts related to the fee agreement with Appellants?

4. Did the trial court properly grant summary judgment when there was no evidence that the Attorneys were unjustly enriched by the fee agreement or converted Appellants' monies?

5. Did the trial court properly grant summary judgment when there was no evidence that the Attorneys violated the Unfair Trade Practices Act?

6. Did the trial court properly grant summary judgment when there was no evidence to justify rendering the fee agreement between Appellants and the Attorneys void or unenforceable?

COUNTERSTATEMENT OF THE CASE

I. PROCEDURAL HISTORY

This is an action to avoid fees owed pursuant to an attorneys' retention agreement. The agreement provided that Appellants would pay the Defendant Attorneys a percentage of the amount that they were able to save them off a defaulted commercial loan related to the purchase of an apartment complex.

On July 30, 2013, Appellants (sometimes collectively referred to hereinafter as "Gibson") filed the initial Summons and Complaint against the various law firms of Andrew K. Epting, Jr., George J. Kefalos, Gedney M. Howe, III, and John S. West (hereinafter collectively referred to as the "Attorneys"). (R.pp. 5 – 46). The initial Summons and Complaint alleged thirteen (13) causes of action against the Attorneys, including breach of contract and breach of fiduciary duty, related to the Attorneys' fee agreement and representation of Gibson in a commercial foreclosure action.[1] (R.pp. 5 – 46). As part of the Complaint, Gibson sought to have her fee agreement with the Attorneys rescinded or set aside and to be reimbursed for the contingent fee paid to the Attorneys pursuant to that fee agreement. (R.pp. 42 – 43). On October 1, 2013, the Attorneys filed an Answer and Affirmative Defenses denying Gibson's allegations. (R.pp. 181 – 207).

On November 18, 2013, Gibson filed a Motion to Amend Complaint and attached a proposed First Amended Complaint. By way of the motion, Gibson sought to add the individual attorneys as defendants to the action. At the same time, Gibson filed an Affidavit of Desa Ballard. (R.pp. 809 – 812). In the Affidavit, Ms. Ballard stated that she "was asked to assume, and [has] assumed, the facts as set forth in the verified complaint and proposed amended complaint are accurate." (R.p. 810, ¶ 8). Based on this assumption, Ms. Ballard stated that she

[1] Gibson's initial Complaint did not include a cause of action for legal malpractice and did not include an affidavit in support of any legal malpractice claim.

believed the verified complaint and proposed amended complaint set forth a viable claim for professional negligence. (R.p. 810, ¶ 7). However, Ms. Ballard did not review any documents other than the Complaint and proposed Amended Complaint to form this opinion. (R.p. 811, ¶ 12).

On January 3, 2014, Gibson filed a second motion seeking to amend the Complaint and attached a proposed Second Amended Complaint. The Attorneys consented to this motion, and the trial court granted the Consent Motion to Amend Complaint by an Order filed on January 13, 2014. (R.p. 3). On January 13, 2014, Gibson filed the Second Amended Complaint. (R.pp. 109 – 144). This Second Amended Complaint alleged ten (10) causes of action against the Attorneys, including breach of contract and breach of fiduciary duty, but removed the fraud causes of action that were alleged in the initial Complaint.[2] (R.pp. 109 – 144). Gibson continued to seek to have her fee agreement with Attorneys rescinded or set aside and to be reimbursed for the contingent fee paid to Attorneys pursuant to that fee agreement. (R.pp. 143 – 144). On January 28, 2014, the Attorneys filed an Answer and Affirmative Defenses to the Second Amended Complaint and again denied Gibson's allegations. (R.pp. 208 – 233).

After engaging in extensive discovery, the Attorneys filed a Motion for Summary Judgment on July 31, 2015.[3] (R.pp. 297 – 298). The Attorneys filed a Memorandum in Support of their Motion for Summary Judgment, including numerous exhibits and deposition excerpts. (R.pp. 299 – 581). The Honorable R. Markley Dennis, Jr., heard oral arguments from counsel on

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[2] Gibson's Second Amended Complaint did not include a cause of action for legal malpractice either.

[3] Gibson subsequently filed a Motion to Amend Complaint and a proposed Second Amended Complaint on August 14, 2015. The new proposed Second Amended Complaint included new causes of action for legal malpractice, rescission, and cancellation of mortgage, and reinserted causes of action based on fraud. At the hearing on the Attorneys' Motion for Summary Judgment, the Attorneys argued that they were entitled to summary judgment regardless of the causes of action asserted by Gibson in either Complaint. (R.pp. 269 – 270, 4:17 – 5:2). The trial court granted the Motion to Amend Complaint, and after the hearing on the Motion for Summary Judgment, Gibson filed the new Second Amended Complaint on October 22, 2015. (R.p. 4; R.pp. 145 – 180). The Attorneys filed an Answer and Affirmative Defenses and again denied Gibson's allegations. (R.pp. 234 – 265).

October 20, 2015. (R.pp. 266 – 296).

By Order filed on January 5, 2016, the trial court granted the Attorneys' Motion for Summary Judgment based upon the arguments set forth in the Attorneys' Memorandum in Support and on the "entire record before the court." (R.p. 1). Gibson subsequently moved the trial court to reconsider its ruling on the Motion for Summary Judgment, and the trial court denied the motion to reconsider by Order filed on February 5, 2016. (R.pp. 728 – 803; R.p. 2). Gibson served the Notice of Appeal on February 29, 2016.

II. FACTUAL BACKGROUND

A. Gibson filed action against Re/Max.

On July 28, 2008, Gibson, then represented by J. Kevin Holmes, Esquire, filed a lawsuit against Re/Max Professional Realty and Rolando V. Villavicencio (Civil Action No. 2008-CP-10-4282). Gibson purchased an apartment complex in North Charleston, South Carolina sometime in 2007, through Re/Max and Mr. Villavicencio. Gibson alleged that Mr. Villavicencio, as an agent of Re/Max, agreed to oversee the renovation of the apartment complex and to manage the rental units in exchange for a management fee. Gibson further alleged that Re/Max and Mr. Villavicencio breached their agreement by embezzling rents and funds devoted to the renovations. Over the next four (4) months following the filing of the lawsuit against Re/Max and Mr. Villavicencio, Gibson moved to substitute her counsel from Kevin Holmes to Charles S. Altman, Esquire, and then to Lawrence E. Richter, Jr, Esquire.

B. Gibson defaulted on the Ameris Bank loan, and Mr. Richter moved to withdraw.

By late 2009, Gibson defaulted on the note and mortgage with Ameris Bank related to the apartment complex purchase. (R.pp. 342 – 354). At the time of the default, Gibson owed $2,796,466.75 plus interest at 6% per annum from September 2, 2009, to October 2, 2009, and at

16% per annum thereafter. (R.pp. 350 – 351, ¶ 21). As the lawsuit against Re/Max moved forward, evidence arose to suggest that Gibson might have a lender liability claim against Ameris Bank related to the purchase of the apartment complex and enticement into the loan. (R.pp. 357 – 361). Mr. Richter, who also served as the personal attorney for Karl Zerbst, Market President for Ameris Bank at the time, informed Gibson that he would need to withdraw as counsel due to a conflict of interest. (R.pp. 500 – 501).

C. Gibson retained attorney Robert Papa who referred her to Attorney Kefalos.

After Gibson defaulted on the loan from Ameris Bank and Mr. Richter informed her about his need to withdraw as counsel in the Re/Max lawsuit, Gibson retained Robert L. Papa, a Charleston attorney who practiced in the area of bankruptcy and debtor litigation. (R.p. 438, 17:1 – 17:6). After advising Gibson that she was not a bankruptcy candidate, Mr. Papa began communicating with Ameris Bank in an effort to work out a possible deferral agreement on the bank loan. (R.pp. 498 – 501).

When Mr. Papa could not reach an agreement with Ameris Bank, he sent an e-mail to Attorney Kefalos seeking to refer Gibson to him in regard to a "$2.8 million dollar issue/case." (R.p. 335). Mr. Papa stated in the e-mail that the case involved pending litigation filed by Gibson against Re/Max and a realtor for alleged false representations by the agent regarding the value of rental property purchased by Gibson. (R.p. 335). Mr. Papa informed Attorney Kefalos that Gibson had been previously represented by Mr. Richter but that Mr. Richter developed a conflict with a potential additional defendant, Ameris Bank, and could no longer represent Gibson. (R.p. 335).

Attorney Kefalos expressed interest in representing Gibson but requested that Attorney Epting, an attorney with considerable experience dealing with banks, assist in the case to handle

the "banking aspect of the case." (R.p. 336). Attorney Kefalos also informed Mr. Papa of the following:

> [S]ince the most significant benefit to be had from the case might be limited to a forgiveness of the $2 mil + loan, there would be no corpus from which to calculate a fee. Under these circumstances we would have to work out a contingency fee arrangement with the client, that would provide for a fee in a percentage of the savings and be secured by a mortgage on property.

(R.p. 336). From the very outset of possible representation, Attorney Kefalos informed Gibson's attorney, Mr. Papa, that the fee arrangement may require a reverse contingency fee secured by a mortgage on real property. (R.p. 336).

On December 11, 2009, after several meetings with Attorneys Kefalos and Epting and Mr. Papa, including one the day before, Gibson retained Attorney Kefalos to represent her in the pending action against Re/Max and retained Attorney Epting on an hourly basis to represent her in negotiation with Ameris Bank related to forgiveness of the Ameris Bank loan. (R.p. 337). The fee arrangement with Attorney Epting was limited to negotiation with Ameris Bank and did not include litigation services. (R.p. 337). If Ameris Bank filed a foreclosure action or it became "more provident than not to bring the bank into either the existing litigation or a separate lawsuit," Mr. Papa stated that Gibson would enter into a separate fee agreement with Attorney Epting "based on the contingency discussion we had yesterday." (R.p. 337) (emphasis added). Attorneys Kefalos and Epting agreed to this representation, but Attorney Epting cautioned that if negotiations did not gain any traction, Gibson would be "in a protracted battle with no result certain and she may benefit by a contingency" in the foreclosure action. (R.p. 338). Again, from the outset of the representation, Gibson, through her attorney, Mr. Papa, stated that she would enter into a contingency fee agreement should negotiations with Ameris Bank fail and a foreclosure action be filed against Gibson.

D. Gibson retained the Attorneys to defend the foreclosure action, pursue counterclaims, and pursue other actions.

On February 4, 2010, in an e-mail from Attorney Epting to Mr. Papa, Attorney Epting memorialized the parties' fee agreement. (R.p. 339). The e-mail stated that all litigation except for the Ameris Bank case would be handled on a contingency of 33%, 40% if placed on the active trial roster, and 50% if the case has an appeal filed. (R.p. 339). With regard to the Ameris Bank case, "the same percentages will apply for any recovery or any savings (defined as a settlement at less than the amount due to Ameris)." (R.p. 339). However, Attorney Epting agreed that he would work for the next sixty (60) days on an hourly basis to see if an early resolution with Ameris Bank was possible. (R.p. 339). During this time, Attorneys Epting and Kefalos continued negotiations with Ameris Bank, stating they had one fruitful meeting with Ameris representatives. (R.p. 508, 18:25 – 21:7). Then, suddenly, Ameris cut off communication. (R.p. 508, 18:25 – 21:7). Attorneys Kefalos and Epting also conversed with Attorneys Howe and West regarding strategy (i.e., whether to join Ameris in the pending suit against Re/Max, where to file suit against Ameris, jury vs. non-jury, when to file suit, etc.). (R.p. 476, 125:1 – 125:12).

After sixty days passed and a resolution was not reached on the foreclosure action, on April 7, 2010, Attorney Epting drafted a letter fee agreement. (R.p. 340). The letter stated that "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." (R.p. 340). Gibson signed the fee agreement on April 26, 2010. (R.p. 340).

E. Ameris Bank filed the foreclosure action against Gibson and transferred the loan to Galt Valley.

On June 14, 2010, Ameris Bank beat Gibson to the courthouse and filed suit in Berkeley

County, seeking foreclosure of the apartment complex, foreclosure of the additional real property pledged as collateral, and a deficiency judgment for the balance owed on the note after sale of the properties. (R.pp. 346 – 347, ¶ 3; R.pp. 352 – 353). Ameris Bank alleged that Appellant Heritage Seven borrowed the principal sum of $2,810,164.50 from Ameris Bank and provided as security a mortgage on the apartment complex as well as an assignment of rents and leases. (R.pp. 347 – 349, ¶ 8 and ¶¶ 13 – 14). Ameris Bank further alleged that Appellant Gibson individually guaranteed the payment of the loan and provided a mortgage on certain real property that she owned in Berkeley County. (R.pp. 348 – 350, ¶¶ 9 – 12 and ¶¶ 18 – 19).

On July 9, 2010, Attorney Epting sent an e-mail to Gibson regarding the filing of the foreclosure action (also sent via U.S. Mail). (R.pp. 355 – 356). Attorney Epting requested that he be allowed to associate Attorneys Howe and West, explaining that it would not cost Gibson any additional fee but that the Attorneys would split the fee among themselves. (R.pp. 355 – 356). Attorney Epting then explained the existing fee agreement, providing Gibson with an example of how the fee might be calculated. (R.pp. 355 – 356). In the example, Attorney Epting supposed that the balance of the loan was $3 million and the collateral properties were worth $1.5 million. Based upon this example, Attorney Epting stated that the "contingency [would be] on the $1.5MM savings." (R.pp. 355 – 356). He explained to Gibson that she did not have any funds coming to her to pay that fee but reminded her that she may have funds coming to her at the conclusion of the Re/Max lawsuit and that the Attorneys would not seek to collect a fee in the foreclosure action until the Re/Max action was concluded. (R.pp. 355 – 356).

Attorney Epting then filed an Answer and Counterclaim on behalf of Gibson against Ameris Bank in the foreclosure action. (R.pp. 357 – 361). Subsequently, Ameris Bank sold the note on the apartment complex to Galt Valley, and Galt Valley was substituted as the Plaintiff in

the foreclosure action. (R.p. 713, ¶¶ 3 – 4). Ameris Bank remained a defendant in the counterclaim, and the action received a split caption for the two different actions under the same case number (Galt Valley vs. Gibson, et al.; Gibson, et al., vs. Ameris Bank, Civil Action No. 2010-CP-08-2134).

F. Galt Valley pursued foreclosure before reaching a settlement with Gibson that included allowing her to proceed with counterclaims against Ameris Bank.

Following the purchase of the note, Galt Valley's counsel, Ian McVey, wrote a letter to Attorney Epting stating that there were "some problems" with Gibson simply tendering a deed to the apartment complex to Galt Valley; namely that Galt Valley "has not accepted said deed and, at this point, I would not recommend it do so until we work out a resolution." (R.p. 363). Mr. McVey then demanded that his client be afforded access to the apartment complex for inspection purposes and that all rent payments be forwarded to Galt Valley pursuant to the underlying Mortgage and Assignment of Rents and Leases. (R.pp. 363 – 364).

Two weeks later, Galt Valley moved for the appointment of a receiver. (R.pp. 365 – 368). Even though Attorney Epting was out of the country at the time, Mr. McVey scheduled the hearing for the Motion for Appointment of Receiver for September 29, 2010, "due to the rapidly deteriorating condition of the Charleston property." (R.p. 369). After some back and forth, Mr. McVey and Attorney Epting agreed to reschedule the hearing for October 13, 2010, after Attorney Epting's return. At the hearing, the Attorneys vigorously opposed the appointment of a receiver, presenting a law review article to the court discussing the appropriateness of a deed in lieu/reduction rather than appointing a receiver. (R.p. 470, 86:20 – 88:21). They stated that Gibson was prepared to deed the property to Galt Valley immediately. (R.p. 470, 86:20 – 88:21). The Attorneys also presented e-mail communications among Ameris Bank

representatives conceding some "culpability" in the loan to Gibson for the apartment complex. (R.p. 470, 86:20 – 88:21). The Court then asked the parties to submit proposed orders.

On October 18, 2010, Mr. McVey faxed a letter to Attorney Epting stating that he had been discussing with his client the "proposal to deed over the property." (R.p. 372). However, Mr. McVey stated that he kept getting hung up on what to do with the remainder of the debt owed by Gibson. (R.p. 372). He then stated that he is going to put it on Attorney Epting and Gibson to try to resolve the matter and that he would recommend to his client accepting the deeds for the real property but "cannot recommend that until such time as you provide me a proposal as to what to do with the remainder of the debt after the collateral is liquidated." (R.p. 372). In other words, Mr. McVey wanted to know how Gibson intended to pay the outstanding loan deficiency after deeding the collateral to Galt Valley, and there was no indication Galt Valley intended to waive the deficiency against Gibson.

On October 25, 2010, Mr. McVey sent a settlement demand to Attorney Epting. (R.pp. 373 – 375). In the letter, he broke down the total outstanding debt, stating that Gibson owed over $3 million on the loans and assigning value to the collateral properties of $1,338,000, even though there was a dispute over the accuracy of the appraisals performed on the properties. (R.pp. 373 – 375). Mr. McVey stated after Gibson deeded over both properties to Galt Valley as part of the settlement that she would owe a deficiency of $1,697,678.10. (R.pp. 373 – 375). He stated that his clients would accept a promissory note from Gibson for $1.5 million with monthly payments of $9,899.34 for twenty (20) years to resolve the deficiency and foreclosure action. (R.pp. 373 – 375). Under the terms of this settlement demand, Galt Valley still intended to collect the loan deficiency from Gibson.

At this time, there was another foreclosure matter involving Gibson for which the bank

(First Citizens) was also seeking a deficiency judgment. (R.p. 473 – 474, 112:9 –114:5). As Gibson was negotiating with First Citizens and considering giving First Citizens a mortgage on certain property to prevent a judgment, the Attorneys discussed with Gibson the need to secure their fee in the foreclosure litigation with a mortgage on property. (R.p. 473 – 474, 112:9 – 114:5). They discussed the benefits of beating First Citizens to the RMC office to file their mortgage, thereby putting a friendly lender in priority position. (R.p. 473 – 474, 112:9 –114:5). The Attorneys informed Gibson that she needed to seek the advice of independent counsel with regard to the entry of a mortgage and the calculation of the potential fee owed in the foreclosure litigation in the event that a resolution was reached. (R.p. 473 – 474, 112:9 –114:5). Gibson contacted Paul Tecklenburg, an attorney who represented her and her husband previously, and sought counsel from him regarding the fee arrangement and the appropriateness of a mortgage to secure the fee. (R.pp. 536 – 537, 28:13 – 30:3; R.p. 377).

Mr. Tecklenburg communicated with Attorneys Epting and Kefalos regarding the potential mortgage in favor of the Attorneys and the calculation of the potential fee owed in the event the foreclosure litigation settled. (R.p. 379). During this time, Mr. Tecklenburg reviewed a draft mortgage, reviewed documents relating to the underlying foreclosure action, and negotiated the calculation of the contingency fee owed to the Attorneys. (R.p. 379).

On November 3, 2010, Attorney Epting wrote to Mr. McVey and rejected the October 25, 2010, settlement demand from Galt Valley. (R.pp. 512 – 513, 64:3 – 68:17). The next day, Mr. McVey wrote, "I must say that I am disappointed that your client does not want to attempt to negotiate a resolution in this matter." (R.p. 381). He continued on to say, "I will discuss the issue of a deed with my client; however, if your client does not want to negotiate, I am not sure why my client would accept a deed to the property." (R.p. 381).

On November 8, 2010, while the parties were still awaiting the court's ruling on the motion to appoint a receiver, Mr. McVey sent a new demand to Attorney Epting wherein Galt Valley agreed to accept the deeds to the collateral properties and forgive the deficiency owed by Gibson. (R.pp. 382 – 384). Gibson accepted this settlement demand. As a part of the settlement, Galt Valley agreed that Gibson would not need to release Ameris Bank for their counterclaims alleged against the bank. Instead, Gibson would retain those actions, and the settlement would strictly be between Galt Valley and Gibson. In other words, Gibson settled the foreclosure action by giving up the two properties mortgaged under the terms of the note to Galt Valley, did not have to pay the roughly $1.7 million deficiency, and retained her counterclaims against Ameris Bank. Her attorney, Mr. Papa, would later describe this result as a "home run" for Gibson. (R.p. 454, 86:6 – 87:12).

G. Gibson memorialized application of the April fee agreement with respect to the foreclosure litigation in a November agreement.

With the foreclosure action resolved and the deficiency judgment against Gibson waived, Gibson and the Attorneys needed to calculate the fee owed pursuant to the terms of their April fee agreement. In this regard, the Attorneys and Gibson needed to agree upon the total savings from the debt owed by Gibson to Ameris Bank, and subsequently to Galt Valley. As Gibson had engaged Mr. Tecklenburg to advise her on the issue of the mortgage and fee calculation, the Attorneys discussed with Mr. Tecklenburg the appropriate calculation of the fee based upon the April 7, 2010, fee agreement. (R.p. 538, 33:25 – 34:13). Mr. Tecklenburg tried to negotiate for a reduction in the fee percentage and for an increase in the values of the mortgaged properties. (R.p. 548, 141:16 – 142:4). Ultimately, these discussions culminated in the execution of the November 18, 2010, agreement and then a mortgage to Attorneys West and Howe. (R.pp. 385 – 386). The November 18, 2010, agreement specified the total savings to be $1.7 million,

approximately the deficiency amount claimed by Mr. McVey in his October 25th letter. (R.pp. 385 – 386). This amount reflected the deficiency claimed by Ameris Bank, and later by Galt Valley when it purchased the note. Gibson then executed a mortgage to the benefit of the Attorneys in the amount of $566,666.66. (R.pp. 387 – 398).

H. Gibson settled the claims against Re/Max, tried the Ameris Bank counterclaims, and obtained a judgment in excess of $2.9 million.

After the Re/Max matter settled for a total of Eight Hundred Fifty Thousand Dollars ($850,000.00), Gibson and the Attorneys agreed to pay to the Attorneys the outstanding costs and expenses owed in the Re/Max matter as well as the $566,666.66 fee owed in the Galt Valley foreclosure matter. (R.p. 399). Attorneys Kefalos and Epting each received one-third of the fee, and Attorneys Howe and West evenly split the remaining third. Gibson then received the remaining funds from the Re/Max litigation, leaving the fee still being owed in the Re/Max litigation ($297,500.00).[4] (R.p. 399). Gibson also still had the Ameris Bank counterclaim pending. At that time, the Attorneys assigned the mortgage from Attorneys West and Howe, who were paid in full, to Attorneys Epting and Kefalos and reduced the mortgage amount to Two Hundred Ninety-Seven Thousand Five Hundred Dollars ($297,500.00). (R.p. 400 – 417).

The Attorneys tried Gibson's counterclaims against Ameris Bank and received a judgment in her favor in excess of $2.9 million in August 2013. Ameris Bank has since appealed this judgment. Gibson terminated the Attorneys' representation and retained new counsel, Desa Ballard, to represent her in the appeal. Final briefs have been filed in the Ameris Bank appeal and oral arguments heard, but the Court of Appeals has not yet issued its opinion.

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[4] Recall that the April 7, 2010, fee agreement signed by Gibson allowed for a 40% contingency fee on the Re/Max matter once it was placed on the active roster. (R.p. 340). The Re/Max matter settled at mediation after being placed on the active trial roster, and therefore, Attorneys Kefalos and Epting were entitled to a 40% contingency fee on that recovery. However, Attorneys Kefalos and Epting agreed to a 35% contingency fee, thereby saving Gibson Forty-Two Thousand Five Hundred Dollars ($42,500.00).

STANDARD OF REVIEW

"In reviewing a grant of summary judgment, our appellate court applies the same standard as the trial court under Rule 56(c), SCRCP." Woodson v. DLI Properties, LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). "Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Rule 56(c), SCRCP; Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Rule 56(c), SCRCP, provides that a trial court may grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the non-moving party. Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). "Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." Baughman v. Am. Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. Id.

"Once the moving party carries its initial burden, the opposing party must come forward with specific facts that show there is a genuine issue of fact remaining for trial." Sides v. Greenville Hosp. Sys., 362 S.C. 250, 255, 607 S.E.2d 362, 364 (Ct. App. 2004). "When a plaintiff is faced with a defendant's motion for summary judgment that is supported by evidence,

the plaintiff cannot defeat the motion by relying upon the mere allegations of his complaint, but must disclose the facts he intends to rely on by affidavit or other proof." Shupe v. Settle, 315 S.C. 510, 516, 445 S.E.2d 651, 655 (Ct. App. 1994); Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1985). "A conclusory statement as to the ultimate issue in a case is not sufficient to create a genuine issue of fact for purposes of resisting summary judgment." Shupe, 315 S.C. at 516-17, 445 S.E.2d at 655; Germann v. New York Life Ins. Co., 286 S.C. 34, 39, 331 S.E.2d 385, 388 (Ct. App. 1985).

Of particular importance in this case, the court is "not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." Grant v. Mount Vernon Mills, Inc., 634 S.E.2d 15, 370 S.C. 138 (Ct. App. 2006), quoting Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). As will be shown below, Gibson raises insubstantial issues of fact by claiming that she did not understand the fee agreement that she signed, that she does not remember whether she authorized her attorney, Mr. Papa, to negotiate and enter into the fee agreement on her behalf, and that she does not remember the agreement being explained to her in multiple ways, despite clear evidence that it was.

ARGUMENTS

The trial court properly granted the Attorneys' Motion for Summary Judgment, for the following reasons: (I) no evidence existed that the Attorneys breached any fiduciary or professional duty owed to Gibson; (II) no evidence existed of any breach of any fee agreements by the Attorneys; (III) no evidence existed of any misrepresentations by the Attorneys to Gibson related to the fee agreement; (IV) no evidence existed to support Gibson's claims for unjust enrichment, equitable indemnity, conversion, or demand for an accounting against the Attorneys; (V) no evidence existed to support a claim that the Attorneys violated the Unfair Trade Practices Act; and (VI) no evidence existed to support Gibson's action to declare the Attorneys' fee agreement with her void or unenforceable.

I. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE ATTORNEYS BREACHED ANY FIDUCIARY OR PROFESSIONAL DUTY.

Regardless of whether Gibson styles her first cause of action as one for breach of fiduciary duty or legal malpractice, there is no evidence to support her claim, and as a result the trial court properly granted summary judgment on this cause of action. Gibson voices no complaint about the quality of the legal work provided, the fidelity with which the Attorneys provided it, or the results obtained by the Attorneys. Rather, she charges them with malpractice and breach of fiduciary duty in the formation of the attorney-client relationship. To prove a breach of fiduciary duty, a plaintiff must prove three elements: (1) the existence of a fiduciary relationship; (2) a breach of the fiduciary duties owed; and (3) damages proximately resulting from the wrongful conduct. RFT Management Co., LLC v. Tinsley & Adams, L.L.P., 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in

good faith and with due regard to the interests of the one reposing confidence." O'Shea v. Lesser, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992). "Our courts have long recognized that an attorney-client relationship is, by its very nature, a fiduciary relationship." RFT, 399 S.C. at 336, 732 S.E.2d at 173, quoting Spence v. Wingate, 395 S.C. 148, 158, 716 S.E.2d 920, 926 (2011). However, the plaintiff must still prove a breach of the fiduciary duty by the attorney that proximately caused damages. See id.

In a legal malpractice action, a plaintiff must prove 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. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "Typically, a plaintiff in a legal malpractice case must establish the standard of care through expert testimony, unless the subject matter is of common knowledge to laypersons." Southeastern Housing Foundation v. Smith, 380 S.C. 621, 648, 670 S.E.2d 680, 694 (Ct. App. 2008). When a fiduciary duty arises out of the same relationship created by the attorney-client relationship and is based on the same material facts, a plaintiff's claim for breach of fiduciary duty should be dismissed as duplicative of the legal malpractice claim. See id. at 647, 670 S.E.2d at 694 n. 18; see also RFT, 399 S.C. at 336-37, 732 S.E.2d at 173-174. In other words, to the extent the breach of fiduciary duty and the legal malpractice fall within the same capacities as attorney, the breach of fiduciary duty claim is duplicative. Id. Because Gibson has asserted her first cause of action as one for breach of fiduciary duty and legal malpractice in the new Second Amended Complaint and she relies upon the same facts to support both causes of action, the Court should evaluate the Attorneys' Motion for Summary Judgment under the elements of a legal malpractice claim. In this case, Gibson did not establish the standard of care for entering into an attorney-client relationship, or specifically a fee agreement, by expert

testimony, did not present evidence of any breach of the standard of care, and put forth no evidence to demonstrate that the fee was anything but reasonable.

A. Gibson did not present expert testimony related to the standard of care.

Gibson did not put forth any expert testimony to establish the standard of care for entering into an attorney-client relationship or, specifically, a fee agreement. Gibson identified Harry S. Swagart, III, Esquire, as an expert on or about December 18, 2014. During his deposition, Mr. Swagart testified that his testimony was limited to enforceability of the fee agreements between the Appellants and the Attorneys and the reasonableness of the fee earned by the Attorneys. (R.p. 419 – 420, 40:20 – 41:22). Mr. Swagart did not testify regarding any standard of care related to the actions by the Attorneys. Rather, Mr. Swagart limited his testimony to his legal opinion that there was not an enforceable fee agreement between Gibson and the Attorneys.

Further, to the extent the Court considers Ms. Ballard's affidavit filed on November 18, 2013, Ms. Ballard stated in her affidavit that she "was asked to assume, and [has] assumed, the facts as set forth in the verified complaint and proposed amended complaint are accurate." (R.p. 810, ¶ 8). In other words, Ms. Ballard did not review any documents or verify the accuracy of the facts alleged in Gibson's proposed Amended Complaint. (R.p. 811, ¶ 12). As a result, Gibson has failed to put forth any expert testimony to establish the standard of care as it relates to the Attorneys' action in this case.[5]

[5] Gibson also identified Ms. Ballard as an expert on or about August 11, 2015, but Ms. Ballard did not provide a new affidavit at that time. In fact, when Gibson moved to amend her complaint for the third time on August 14, 2015, and sought to add a claim for legal malpractice, she attached Ms. Ballard's November 18, 2013, affidavit in support. Further, Gibson filed an affidavit by Ms. Ballard on January 14, 2016, after the trial court had granted the Attorneys' Motion for Summary Judgment. (R.pp. 792 – 795). Because this affidavit was not presented to the trial court before its ruling on the Attorneys' Motion for Summary Judgment, the Court should disregard it.

B. Gibson presented no evidence of any breach of the standard of care by the Attorneys.

Gibson also did not put forth any evidence of a breach of the standard of care by the Attorneys. Rather, all the evidence in this case demonstrates that when Gibson executed the April agreement on April 26, 2010, the Attorneys entered into a simple fee agreement with her wherein they would receive a contingency fee on any savings realized by her from the debt owed to Ameris Bank on the apartment complex loan. No evidence whatsoever suggests that Gibson was at a bargaining disadvantage in negotiating this retainer agreement. Her lawyer, Mr. Papa, sought Attorney Kefalos out to represent her. (R.p. 335). Mr. Papa accompanied her when she met with the Attorneys, and he proposed the terms of retention that the parties ultimately agreed to after consulting with Gibson. (R.p. 337). There is nothing unusual or oppressive about the agreement itself. If the Attorneys were negligent or breached their fiduciary duties in entering into this fee agreement, it is impossible for any attorney to safely negotiate an agreement with a client.

After Mr. Richter withdrew his representation of Gibson, she contacted Mr. Papa about possible bankruptcy issues and financial matters. Prior to referring Gibson to Attorneys, Mr. Papa advised her on possible bankruptcy but reached the conclusion that bankruptcy was not a viable option. Mr. Papa described a financial disaster about to befall Gibson. (R.p. 442, 38:22 – 39:6). As a result of the apartment complex loan, Gibson faced possible foreclosure actions by Ameris Bank on the apartment complex and by First Citizens on her beach house with sufficient unencumbered assets to cover any deficiency judgments in those two foreclosure actions. (R.pp. 458 – 459, 22:1 – 25:14). At that time, Mr. Papa believed it was best to put together a team of lawyers to assist Gibson with her financial situation, and he did so by referring her to Attorney Kefalos, who in turn sought the assistance of Attorney Epting with his expertise in banking

matters. (R.p. 442, 38:22 – 39:6).

From the very outset of possible representation, Attorney Kefalos informed Gibson's attorney, Mr. Papa, that the fee arrangement may require a reverse contingency fee secured by a mortgage on real property. (R.p. 336). Specifically, Attorney Kefalos informed Mr. Papa that "since the most significant benefit to be had from the case might be limited to a forgiveness of the $2 mil + loan, there would be no corpus from which to calculate a fee." (R.p. 336). Attorney Kefalos again informed Gibson, through her attorney, that "[u]nder these circumstances we would have to work out a contingency fee arrangement with the client, that would provide for a fee in a percentage of the savings and be secured by a mortgage on property." (R.p. 336). From the very beginning of the possible representation, Gibson understood that the representation by Attorneys Kefalos and Epting would involve a fee based upon the percentage on the deficiency savings secured by a mortgage, and her attorney, Mr. Papa, acknowledged such in his e-mail to Attorney Epting on December 11, 2009. (R.pp. 336 – 337).

After Gibson met with Attorneys Kefalos and Epting and Mr. Papa, she, through Mr. Papa, retained Attorney Epting on an hourly basis to represent her in negotiations with Ameris Bank related to possible forgiveness of the loan. (R.p. 337). At this time, the fee arrangement with Attorney Epting was limited to negotiation with Ameris Bank and did not include litigation services. (R.p. 337). However, if Ameris Bank filed a foreclosure action or it became "more provident than not to bring the bank into either the existing litigation or a separate lawsuit," Mr. Papa stated that Gibson would enter into a separate fee agreement with Attorney Epting "based on the contingency discussion we had yesterday." (R.p. 337). Mr. Papa wrote that this option had been agreed to by Gibson after he spent time reviewing the various options with her. (R.p. 337).

On February 4, 2010, as Attorney Epting initiated settlement discussions with Ameris Bank on behalf of Gibson, he memorialized the fee agreement in an e-mail to Mr. Papa. (R.p. 339). The e-mail stated that all litigation except for the Ameris case would be handled on a contingency of 33%, 40% if placed on the active trial roster, and 50% if the case has an appeal filed. (R.p. 339) (emphasis added). Attorney Epting agreed that he would work for the next sixty (60) days on an hourly basis to see if an early resolution with Ameris Bank was possible, but thereafter, if resolution was not possible, Gibson would enter into a contingency fee agreement based upon the savings from any possible deficiency judgment and consistent with Mr. Papa's e-mail of December 11, 2009. (R.p. 339).

When it appeared a resolution would not be forthcoming with Ameris Bank and after sixty days passed, on April 7, 2010, Attorney Epting sent Gibson the contingency fee agreement discussed in the February 4, 2010, e-mail to Mr. Papa and consistent with Mr. Papa's e-mail of December 11, 2009. (R.p. 340). The letter stated that "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." (R.p. 340). Gibson signed the fee agreement on April 26, 2010. (R.p. 340). During this time, Attorneys Kefalos and Epting also conversed with Attorneys Howe and West regarding strategy (i.e., whether to join Ameris in the pending suit against Re/Max, where to file suit against Ameris, jury vs. non-jury, when to file suit, etc.). (R.pp. 475 – 476, 124:23 – 125:12).

At the conclusion of the foreclosure action, Gibson and the Attorneys executed the November 18, 2010, fee agreement and then a mortgage to Attorneys West and Howe. (R.pp. 385 – 386). The November 18, 2010, fee agreement specified the total savings to be $1.7 million, approximately the deficiency amount claimed by Mr. McVey in his October 25th

letter. (R.p. 385). Contrary to Gibson's arguments, the November 18, 2010, fee agreement merely memorialized application of the prior fee agreement entered into by Gibson on April 26, 2010, for a contingency fee based on the savings realized by Gibson from the alleged deficiency, by assigning a specific value to the savings. It was not a new fee agreement. Because the April 26, 2010, agreement required a calculation of the savings (which continued to increase due to interest and required valuation of two pieces of collateral), the Attorneys informed Gibson that she would need to seek the advice of independent counsel, and Gibson selected Mr. Tecklenburg. Mr. Tecklenburg advised Gibson that she had entered into a "simple but likely enforceable agreement with Drew Epting, providing that one-third of any savings in the litigation with Ameris would be considered a fee earned by your counsel of record." (R.pp. 481 – 482). Mr. Tecklenburg further advised Gibson that they "negotiated the total amount of the fee earned in the Ameris deficiency litigation to be limited to $567,000.00." (R.pp. 481 – 482).

The evidence clearly demonstrates that the Attorneys dutifully informed Gibson about the fee arrangement from the very beginning, offering to work on an hourly basis for a period of time before converting to a contingency fee. Gibson clearly understood the fee arrangement, as Gibson's attorney, Mr. Papa, confirmed the fee arrangement in writing on December 11, 2009, and informed the Attorneys that this option had been selected after reviewing the various options with Gibson. When it came time to apply the fee agreement to the settlement reached in this case, the Attorneys informed Gibson that she needed the advice of independent counsel, allowed Gibson to select her own counsel, and allowed the independent counsel to negotiate the amount of actual savings realized by Gibson (and thereby, the amount of the fee earned). The only evidence in this case shows that the Attorneys dutifully and properly advised Gibson with regard to the fee agreement, and as a result, the trial court properly granted the Attorneys' Motion for

Summary Judgment.

C. The fee earned by the Attorneys pursuant to the April agreement is reasonable in light of the facts and circumstances surrounding its entry.

Contrary to Gibson's argument, there is no evidence to suggest the fee earned by the Attorneys is anything but reasonable given the facts and circumstances surrounding its entry and in line with exactly what the parties agreed to from the outset of the representation. Indeed, though Gibson professes confusion over the terms of her engagement of Attorneys, she does not say what she thought the fee arrangement was, or should have been. Rule 1.5(c) of the Rules of Professional Conduct state that a "fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law." Rule 1.5(c), RPC, Rule 407, SCACR. Rule 1.5(d) prohibits a contingency fee in domestic relations matters and in criminal matters. Rule 1.5(d), RPC, Rule 407, SCACR. Rule 1.5(c) requires that a contingent fee agreement be in a writing signed by the client and state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial, or appeal, and the issue of expenses. Rule 1.5(c), RPC, Rule 407, SCACR. At the conclusion of a contingent fee matter, Rule 1.5(c) requires that the lawyer "provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination." Rule 1.5(c), RPC, Rule 407, SCACR. The Supreme Court has said, "We recognize that the use of these agreements is a legitimate and well-established practice for attorneys throughout our state." S.C. Dep't of Transp. v. Revels, 411 S.C. 1, 11, 766 S.E.2d 700, 705 (2014).

The American Bar Association has addressed the validity of reverse contingency fee agreements under the Model Rules of Professional Conduct. "[W]hen reasonably determinable

civil damages between private parties are at issue, there is no similar basis in public policy for prohibiting a fee arrangement based on a percentage of the amount saved a defendant, so long as the reasonableness and informed consent requirement of Rule 1.5 are satisfied." ABA Op. 93-373, p. 2-3. In calculating the specific damage figure saved when there is no specified amount, "it is up to negotiation between the lawyer and the client defendant to establish a fair dollar figure to attribute to plaintiff's claim." ABA Op. 93-373, p. 4-5. "Needless to say, the lawyer negotiating with the unsophisticated client will have a significantly greater burden of demonstrating fairness in this process than the lawyer, for example, who negotiates a reverse contingent agreement with an experienced in-house counsel." ABA Op. 93-373, p. 5. "The propriety of a contingent fee must be judged upon the facts of each case, and no per se rule applies." ABA Op. 93-373, p. 6. "It is evident that the reasonableness of a fee contingent on the savings or reduction of financial losses of a client necessarily depends upon the reasonableness of the percentage as well as the reasonableness of the setting of the benchmark figure from which savings will be calculated." ABA Op. 93-373, p. 6. "In each case, reasonableness should be judged on the basis of the way the engagement looked at the time the reverse contingent fee arrangement was set." ABA Op. 93-373, p. 6 (emphasis added). The ABA concluded that "the Model Rules do not prohibit contingent fee agreements for representation of defendants in civil cases based on the amount of money saved a client--provided the amount of the fee is reasonable under the circumstances, and the client has given fully informed consent." ABA Op. 93-373, p. 6.

In determining the reasonableness of a fee, Rule 1.5(c) lists eight (8) factors to be considered:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

Rule 1.5(c), RPC, Rule 407, SCACR. As suggested by the ABA Opinion, these reasonableness factors should be considered at the outset of the representation. Applying these factors, there is no question the Attorneys' fee agreement with Gibson in this case was reasonable. At the beginning of the representation, the Attorneys agreed to represent Gibson on an hourly basis to determine if a quick resolution with Ameris Bank was possible. When a quick resolution was not achieved, Gibson executed a reverse contingency fee agreement wherein the Attorneys' fee would be based upon any savings from the alleged deficiency. Gibson had previously agreed to this course of action through Mr. Papa, on December 11, 2009. In this case, there is no question that the savings could be readily calculated by determining the total debt owed (principal, interest, and fees) to Ameris Bank (and subsequently Galt Valley) less the value of any collateral used to offset the total debt. As recommended by the ABA Opinion, the Attorneys and Gibson could then negotiate a fair dollar figure to attribute to the collateral and thereby calculate the net debt owed by Gibson. From the net debt owed, the Attorneys and Gibson could calculate the total savings by subtracting any remaining deficiency owed by Gibson to Ameris Bank at the

conclusion of the foreclosure action, either by reason of settlement or by trial. In this case, Gibson had independent counsel to negotiate the fee agreement in the beginning and separate independent counsel to negotiate the calculation of the fee at the end. Further, this arrangement shifted the risk of protracted litigation with uncertain results on the Attorneys rather than on Gibson.

Shortly into the representation, it became clear that the foreclosure action could not be resolved short of litigation. In fact, Ameris Bank filed a foreclosure action on June 14, 2010, seeking a deficiency judgment against Gibson. It was not clear the amount of time that would be required to defend the foreclosure action. As Attorney Epting wrote when Mr. Papa agreed to the hourly representation on behalf of Gibson, Gibson could be involved in protracted litigation if the foreclosure action is not resolved early. Contrary to Gibson's assertions, it was not just a simple foreclosure action because Gibson had guaranteed the apartment complex loan, mortgaged real property in her individual name as collateral for the loan, and had sufficient assets to satisfy a deficiency judgment. Further, as raised at the hearing on the motion to appoint a receiver, issues existed concerning possible wrongful conduct by Ameris Bank in initiating the loan to Gibson that might serve as affirmative defenses in the action. Given the financial storm Gibson faced, Mr. Papa believed it was in her best interest to put together the best team of attorneys possible to navigate the complexities of the legal and financial issues involved. (R.p. 442, 38:22 – 39:6).

Further, as evidenced by the demands from Mr. McVey on behalf of Galt Valley, Gibson faced the possibility of a deficiency judgment in excess of One Million Seven Hundred Thousand Dollars ($1,700,000.00). (R.pp. 373 – 375). Gibson had significant liability exposure on the loan, and Galt Valley had undertaken steps to prosecute those claims by filing a Motion to

Appoint Receiver, serving Requests to Admit upon Gibson seeking to have her admit the validity of the debt, and demanding that Gibson give a promissory note in the amount of $1.5 million to cover the deficiency in settlement discussions. (R.pp. 483 – 497). To her great disadvantage, Gibson was not "judgment proof", and the bank was well aware of this. Gibson had sufficient equity in her real property holdings to satisfy a deficiency judgment exceeding one million dollars. (R.pp. 458 – 459, 22:1 – 25:14). This deprived her of the greatest leverage that most debtors have in negotiating their bank debts -- the threat that the debt will be uncollectible.

As a result, for the Attorneys to obtain a result wherein the lender waived the entire deficiency amount despite Gibson's other assets was a "home run." (R.p. 454, 86:6 – 87:12). In addition to the waiver of the deficiency, Galt Valley also did not tender Gibson a Form 1099, thereby limiting the tax exposure Gibson incurred as a result of the waiver. (R.p. 454, 86:6 – 87:12). Further, Galt Valley did not require Gibson to provide a release for its predecessors, and as a result, Gibson could still pursue her counterclaims against Ameris Bank. The results obtained by the Attorneys on behalf of Gibson were nothing short of a miracle.

For these reasons, when evaluating the reasonableness of the reverse contingency fee agreement between the Attorneys and Gibson, there is only one conclusion: the fee agreement provided for a reasonable reverse contingency fee based upon the savings from any alleged deficiency owed to the lender. Because Gibson has failed to establish the standard of care with expert testimony and there is no other evidence to show that the Attorneys breached the standard of care in negotiating the fee agreement or that they recovered an excessive fee from Gibson, the trial court properly granted the Attorneys' Motion for Summary Judgment as to Gibson's legal malpractice causes of action.

II. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE ATTORNEYS BREACHED ANY FEE AGREEMENT WITH GIBSON.

Because the Attorneys performed the services agreed to under the terms of the fee agreement with Gibson and obtained the result desired by Gibson, Gibson has failed to put forth any evidence of a breach of the fee agreement by the Attorneys. The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id. Rescission is an undoing of a contract from the beginning, as if the contract had never existed. Ellie, Inc. v. Miccichi, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990). In this case, the Attorneys performed the work required under the terms of the unambiguous fee agreement, obtained the desired results for Gibson, and applied the calculation terms consistent with Gibson's executed fee agreement, and as a result, the trial court properly granted summary judgment.

A. The Attorneys represented Gibson in the foreclosure litigation pursuant to the April agreement and performed all work necessary in that action to obtain a "home run" result for her.

The evidence presented in this case demonstrates only that the Attorneys performed the services required under the fee agreement and obtained a tremendous result for Gibson. The Attorneys researched issues related to the non-jury nature of the lender's claims, tendering the deed to the lender, the best venue for Gibson's defenses and claims against the lender, the costs

and benefits of adding the lender to the existing Re/Max litigation, and many more issues. They reviewed thousands of pages of documents from the loan file, communicated with the lender's attorneys, and filed counterclaims against the lender. They also researched and opposed the lender's Motion to Appoint Receiver. They negotiated with Galt Valley after it purchased the loan and continued to pressure Galt Valley toward the best settlement possible by demonstrating their ability to prolong and obfuscate the litigation. That Gibson now believes, in hindsight, that Galt Valley was not serious about collecting a deficiency judgment from her is irrelevant. Galt Valley had a strong legal claim to a deficiency against Gibson, pursued legal action to collect it, and gave all outward indication that it insisted on having it. Only after the Attorneys vigorously resisted the appointment of a receiver and showed Galt Valley that it was in for a long, difficult legal fight did it relent in its pursuit of Gibson's assets. Recall that Attorney Kefalos insisted on retaining Attorney Epting because of Attorney Epting's understanding of the banking industry. Knowing how to negotiate with the bank was critical to achieving the success that the Attorneys did for Gibson.

Ultimately, as a result of the work performed by the Attorneys in the foreclosure litigation, they were able to obtain a result wherein the lender waived the entire deficiency amount despite Gibson's other assets. As Mr. Papa, Gibson's former attorney, stated, this result was a "home run." (R.p. 454, 86:6 – 87:12). There is simply no question that the Attorneys performed all litigation services related to the foreclosure action as required by the April fee agreement.

B. The November 18, 2010, agreement was an application of the April fee agreement and not a new fee agreement.

Contrary to Gibson's characterization, the November 18, 2010, agreement was not a change in the parties' fee agreement but rather an application of the existing fee agreement. Mr.

Tecklenburg, Gibson's attorney for purposes of calculating the fee and negotiating the mortgage, confirmed this interpretation of the November 18, 2010, agreement by stating that he believed that Gibson had entered into a "simple but likely enforceable agreement with Drew Epting, providing that one-third of any savings in the litigation with Ameris would be considered a fee earned by your counsel of record." (R.pp. 481 – 482). Attorney Epting executed the April 7, 2010, fee agreement while all the Attorneys executed the November 18, 2010, agreement. It is clear that Mr. Tecklenburg was referring to the enforceability of the April 7, 2010, fee agreement. This is the same fee agreement the parties previously agreed to in December 2009 at the outset of the representation and subsequently in an executed fee agreement on April 26, 2010. It called for the Attorneys' fees in the foreclosure action to be one-third of any savings from the lender's alleged deficiency. The terms of the fee agreement were explained to Gibson by the Attorneys, Mr. Papa, and again by Mr. Tecklenburg at the conclusion of the foreclosure action.

C. The April fee agreement is unambiguous and demonstrates the clear intent of Gibson and the Attorneys to enter into a contingent fee arrangement.

Further contrary to Gibson's assertions, the terms of the April fee agreement between Gibson and the Attorneys are unambiguous, and as a result, the April fee agreement expresses the clear intent of the parties to establish a contingency fee on any savings the Attorneys obtained on behalf of Gibson on the debt owed to Ameris Bank. When a contract is unambiguous, there is no need to admit extrinsic evidence to ascertain the parties' intention because the contract terms themselves evidence the parties' clear intent. Worley v. Yarborough Ford, Inc., 317 S.C. 206, 209, 452 S.E.2d 622, 624 (Ct. App. 1994); Hansen v. DHL Laboratories, Inc., 316 S.C. 505, 508, 450 S.E.2d 624, 626 (Ct. App. 1994), reh'g denied, (Dec. 6, 1994) and cert. granted, decision aff'd, 319 S.C. 79, 459 S.E.2d 850 (1995); Bates v. Lewis,

311 S.C. 158, 161, 427 S.E.2d 907, 909 n.1 (Ct. App. 1993); United Dominion Realty Trust, Inc. v. Wal-Mart Stores, Inc., 307 S.C. 102, 105, 413 S.E.2d 866, 868 (Ct. App. 1992). In other words, when there is no ambiguity in the language, the court will find that the contract expresses the entire and exact meaning of the parties, and the court will presume that every material part of the agreement has been expressed in the four corners of the contract. Suttles v. Wood, 280 S.C. 272, 274, 312 S.E.2d 574, 576 (Ct. App. 1984). Courts must confine their interpretation of an unambiguous provision of an agreement to the language contained within the four corners of the instrument itself. Lindsay v. Lindsay, 328 S.C. 329, 340, 491 S.E.2d 583, 589 (Ct. App. 1997). Extrinsic evidence of contemporaneous statements, allegedly made by the parties to the agreement, are inadmissible if they contradict or vary the terms of the written agreement or give a perfectly clear agreement a different meaning or effect than that indicated by the plain language of the agreement. Visual Graphics Leasing Corp., Inc. v. Lucia, 311 S.C. 484, 488, 429 S.E.2d 839, 841 (Ct. App. 1993); Taylor by Taylor v. Taylor, 291 S.C. 261, 264, 353 S.E.2d 156, 158 (Ct. App. 1987).

Because the April fee agreement expressly states that the Attorneys would be entitled to a one-third fee calculated on any savings in the foreclosure matter, the trial court properly held as a matter of law that there was no ambiguity in the fee agreement. In the February 4, 2010, e-mail from Attorney Epting, the percentages for calculation of the Attorneys' fees are clearly set forth. The e-mail stated that all litigation except for the Ameris case would be handled on a contingency of 33%, 40% if placed on the active trial roster, and 50% if the case has an appeal filed. (R.p. 339). With regard to the Ameris litigation, "the same percentages will apply for any recovery or any savings (defined as a settlement at less than the amount due to Ameris)." (R.p. 339). However, Attorney Epting agreed that he would work for the next sixty (60) days on an

hourly basis to see if an early resolution with Ameris was possible. (R.p. 339). After sixty days passed, on April 7, 2010, Attorney Epting drafted a subsequent contingent fee agreement in accordance with the February 4, 2010, e-mail. (R.p. 340). The letter stated that "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." (R.p. 340).

Gibson attempts to create an ambiguity by arguing that there was no "existing case" against Ameris Bank, but her emphasis is misplaced. While Ameris Bank did not file suit against Gibson until June 14, 2010, there were existing claims against Gibson that Ameris had been actively pursuing since November 2009. (R.pp. 498 – 502). Gibson defaulted on the apartment complex loan when she failed to make the October 2, 2009, payment due under the terms of the note. (R.pp. 350 – 351, ¶ 21). Prior to the Attorneys' involvement, Mr. Richter had withdrawn as counsel because a conflict of interest in bringing Ameris Bank into the Re/Max litigation. Mr. Papa had been negotiating a workout with Ameris Bank on the apartment complex loan and deficiency. (R.pp. 498 – 502). While no formal lawsuit or foreclosure action was pending, Ameris Bank had an existing claim it was actively pursuing against Gibson and.

A contract is ambiguous only if it can be reasonably construed in more than one way. Though professing general confusion about the meaning of the fee agreement, Gibson does not propose a viable alternative construction. Because there is no ambiguity in the April fee agreement executed by Gibson, the trial court properly granted the Attorneys' Motion for Summary Judgment on the breach of contract cause of action.

III. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE ATTORNEYS MISREPRESENTED ANY FACTS RELATED TO THE FEE AGREEMENT.

The trial court properly granted the Attorneys' Motion for Summary Judgment because there is no evidence of any misrepresentation made to Gibson regarding the fee agreement between the parties. Under the law of negligent misrepresentation, "There is no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." AMA Mgt. Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (Ct. App. 1992). "[W]hile issues of reliance are ordinarily resolved by the finder of fact, 'there can be no reasonable reliance on a misstatement if the plaintiff knows the truth of the matter.'" McLaughlin v. Williams, 379 S.C. 451, 457-58, 665 S.E.2d 667, 671 (Ct. App. 2008) (quoting Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 800 (Ct. App.1992)). "Thus, if the undisputed evidence clearly shows the party asserting reliance has knowledge of the truth of the matter, there is no genuine issue of material fact." Id. at 458, 665 S.E.2d at 671. "A determination of justifiable reliance involves the evaluation of the totality of the circumstances, which includes the positions and relations of the parties." Quail Hill, LLC v. County of Richland, 387 S.C. 223, 241, 692 S.E.2d 499, 508 (2010); West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000). Courts will find reliance justifiable in a negligent misrepresentation claim "only if the relationship of the parties is such that the defendant occupies a superior position to the plaintiff with respect to knowledge of the truth of the statement made." Harrington v. Mikell, 321 S.C. 518, 522, 469 S.E.2d 627, 629 (Ct. App. 1996) (citing Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 20, 419 S.E.2d 795, 799–800 (Ct. App. 1992)). Gibson's claims for misrepresentation failed as a matter of law because there was no evidence of any misrepresentation by the Attorneys and because Gibson

understood the nature of the fee agreement entered into between the parties.

First, there simply was no evidence of any misrepresentation by the Attorneys. As outlined in detail above, the notion of a contingency fee based upon any savings of the deficiency amount claimed by the lender started from the very outset of Mr. Papa's referral to the Attorneys. Attorney Kefalos discussed the nature of the likely fee arrangement in his reply to Mr. Papa's initial inquiry about possible representation. (R.p. 336). From the very outset of possible representation, Attorney Kefalos informed Gibson's attorney, Mr. Papa, that the fee arrangement may require a reverse contingency fee secured by a mortgage on real property. After several meetings with Attorneys Kefalos and Epting during which the parties discussed the possibility of a contingency fee arrangement, on December 11, 2009, Gibson, through Mr. Papa, retained Attorney Kefalos to represent her in the pending action against Re/Max and retained Attorney Epting on an hourly basis to represent her in negotiations with Ameris Bank related to forgiveness of the loan. (R.p. 337). Gibson, through Mr. Papa, agreed to enter into a separate reverse contingency fee agreement if Ameris Bank filed a foreclosure action or it became "more provident than not to bring the bank into either the existing litigation or a separate lawsuit." (R.p. 337).

The parties then operated under the terms of this fee agreement. Attorney Epting proceeded to attempt to resolve the foreclosure action short of litigation, but when it became clear that a resolution could not be reached, the parties entered into a reverse contingency fee agreement. (R.p. 340). The Attorneys made no misrepresentations about the nature of the fee agreement or the need to enter into a contingency fee arrangement should negotiations fail. The agreement was for the benefit of Gibson. In the event a resolution could be reached quickly, Gibson would only be liable for the hourly work performed. However, if a resolution could not

be reached and litigation ensued, rather than risk the possibility of a protracted litigation that could incur hundreds of hours and hundreds of thousands of dollars in fees with completely uncertain results, Gibson and the Attorneys would enter into a contingency fee arrangement. There is simply no evidence of any misrepresentations by the Attorneys inducing Gibson into the April 7, 2010, agreement, but instead, the events occurred as initially set forth by the Attorneys in November and December 2009.

Second, as Mr. Papa conveyed Gibson's assent to the fee agreement in December 2009, it is clear that Gibson understood the nature and truth about the fee agreement and how it worked. In the December 11, 2009, e-mail, Mr. Papa wrote "we would like to hire you initially on an hourly basis at $400/hr with a $5,000 retainer to begin negotiations with Ameris Bank." (R.p. 337) (emphasis added). The hourly services were limited to negotiation and did not involve litigation services. (R.p. 337). If the negotiation failed or circumstances dictated that switching to a contingency fee was in Gibson's best interests, they would "enter into a separate retainer agreement with Drew based on the contingency discussion we had yesterday." (R.p. 337) (emphasis added). Mr. Papa stated that this plan was the result of discussing Gibson's various options with her for "a while" and confirming the plan with her that morning. (R.p. 337). Based upon this e-mail, it is impossible to suggest that Gibson did not understand that her retainer of Attorney Epting was on an hourly basis for a period of time and would move to a contingency fee in the event a lawsuit was filed, it was necessary to add the lender to the lawsuit against Re/Max, or it became in Gibson's best interest to do so. Gibson's attorney at the time confirmed this course of action in writing and indicated that Gibson chose this course of action after carefully reviewing her options and sleeping on it. Gibson's claim that she does not now remember her conversations with the Attorneys or Mr. Papa, their explanations of her options, or

her assent to the fee agreement, is precisely the type of insubstantial question of fact that cannot defeat summary judgment. Gibson's amnesia is not a scintilla of evidence of the existence of a genuine issue of material fact; the court is "not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to create an issue of fact that is not genuine." Grant v. Mount Vernon Mills, Inc., 634 S.E.2d 15, 370 S.C. 138 (Ct. App. 2006), quoting Main v. Corley, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984). Because there is no evidence that the Attorneys made any misrepresentations to Gibson about the nature of the fee agreement and because Gibson, as evidenced by her attorneys' communications, understood the terms of the fee agreement, the trial court properly granted Attorneys' Motion for Summary Judgment as to Gibson's misrepresentation causes of action.

IV. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE ATTORNEYS WERE UNJUSTLY ENRICHED BY THE FEE AGREEMENT OR CONVERTED GIBSON' MONIES.

Because the Attorneys performed the services agreed to under the terms of the fee agreement with Gibson and obtained a reduction in the debt owed by Gibson in the amount of One Million Seven Hundred Thousand Dollars ($1,700,000.00), Gibson has failed to put forth any evidence of any unjust enrichment or conversion of funds by the Attorneys. "A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another." Dema v. Tenet Physician Servs. – Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). The remedy for unjust enrichment is restitution. See Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003) ("Restitution is a remedy designed to prevent unjust enrichment."). To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant

realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. Campbell v. Robinson, 398 S.C. 12, 24, 726 S.E.2d 221, 228 (Ct. App. 2012); Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App. 1988).

The trial court properly held that Gibson's cause of action for unjust enrichment failed as a matter of law because the Attorneys performed legal services in exchange for the fees promised by Gibson and those services provided tremendous value to her. First, Gibson has not conferred a non-gratuitous benefit upon the Attorneys by paying the fees earned by the Attorneys in the foreclosure action. Instead, the Attorneys performed legal work and services in exchange for the fees paid. The Attorneys researched issues related to the non-jury nature of the lender's claims, tendering the deed to the lender, the best venue for Gibson's defenses and claims against the lender, the costs and benefits of adding the lender to the existing Re/Max litigation, and many more issues. (R.pp. 476, 125:1 – 125:12). They reviewed thousands of pages of documents from the loan file, communicated with the lender's attorneys, and filed counterclaims against the lender. (R.pp. 357 – 361). They organized Gibson's financial affairs as they related to the management of the apartment complex and the loan from Ameris Bank. (R.p. 459, 27:2 – 27:23). They also researched and opposed the lender's Motion to Appoint Receiver, drafted proposed orders, and negotiated with the lender's attorney. (R.p. 470, 86:20 – 88:21). The fee paid by Gibson to the Attorneys does not represent a non-gratuitous payment but instead represents payment in exchange for legal services rendered by the Attorneys.

Second, the legal services rendered by the Attorneys conferred a tremendous benefit upon Gibson, namely the waiver of the deficiency judgment sought by the lender. Ameris Bank filed the foreclosure action seeking over One Million Seven Hundred Thousand Dollars

($1,700,000.00) in a deficiency judgment beyond the value of the security. When the lender waived the deficiency judgment as part of the settlement after legal services rendered by the Attorneys, Gibson received the benefit of that waiver. In other words, Gibson was no longer obligated to pay the remainder of the debt owed to the lender beyond the value of the security, even though she had signed a note and mortgage making her personally responsible for the entire debt. The lender waived the right to seize other assets owned by Gibson to satisfy the deficiency. As a result, the legal services performed by the Attorneys conferred a tremendous benefit on Gibson, and the fee paid by Gibson was in exchange for this benefit and the work performed. For these reasons, the trial court properly determined that Gibson's claim for unjust enrichment failed as a matter of law.

Conversion is defined as the unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another to the exclusion of the owner's rights. SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 498, 392 S.E.2d 789, 792 (1990). Money may be the subject of conversion when it is capable of being identified and there may be conversion of determinate sums even though the specific coins and bills are not identified. Id. As Gibson and the Attorneys entered into a fee agreement wherein the Attorneys would provide certain legal services in exchange for a contingent fee on any savings from the deficiency alleged by the lender, there can be no action for conversion related to the fee. Gibson paid the fee as set forth in the fee agreement between the parties, and Gibson had representation both at the outset in the negotiation of the fee (Mr. Papa) and in the calculation of the fee at the conclusion of the foreclosure action (Mr. Tecklenburg). Pursuant to the fee agreement between Gibson and the Attorneys, the fee belonged to the Attorneys, and as a result, the Attorneys did not exercise ownership over money belonging to Gibson. For these reasons, the trial court properly held that

Gibson's cause of action for conversion failed as a matter of law.

V. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE ATTORNEYS VIOLATED THE UNFAIR TRADE PRACTICES ACT.

The trial court properly granted the Attorneys' Motion for Summary Judgment because there was no evidence the Attorneys violated the South Carolina Unfair Trade Practices Act. Under the South Carolina Unfair Trade Practices Act ("UTPA"), "[a]ny person who suffers any ascertainable loss of money or property ... as a result of the use or employment by another person of an unfair or deceptive method, act or practice ... may recover actual damages." S.C. Code Ann. § 39-5-140 (1976). The UTPA allows for the recovery of actual damages. See Global Prot. Corp. v. Halbersberg, 332 S.C. 149, 159, 503 S.E.2d 483, 488 (Ct. App. 1998) (citing S.C.Code Ann. § 39-5-140(a) (1976)). "Actual damages under the UTPA include special or consequential damages that are a natural and proximate result of deceptive conduct." Id. (citing Taylor v. Medenica, 324 S.C. 200, 219, 479 S.E.2d 35, 45 (1996)).

As outlined above, Gibson has not put forth any evidence of any misrepresentation or deceptive practice to substantiate her UTPA cause of action. The notion of a contingency fee based upon any savings of the deficiency amount claimed by the lender started from the very outset of Mr. Papa's referral of Gibson to the Attorneys. Attorney Kefalos discussed the nature of the likely fee arrangement in his reply to Mr. Papa's initial inquiry about possible representation. (R.p. 336). Based upon Mr. Papa's e-mails to the Attorneys, it is clear that Gibson understood the nature and truth about the fee agreement and how it worked. In the December 11, 2009, e-mail, Mr. Papa wrote, "We would like to hire you initially on an hourly basis at $400/hr with a $5,000 retainer to begin negotiations with Ameris Bank." (R.p. 337) (emphasis added). If the negotiations failed or circumstances dictated that switching to a

contingency fee was in Gibson's best interests, they would "enter into a separate retainer agreement with Drew based on the contingency discussion we had yesterday." (R.p. 337). Mr. Papa stated that this plan was the result of discussing Gibson's various options with her for "a while" and confirming the plan with her that morning. (R.p. 337). Based upon this e-mail, it is impossible to suggest that Gibson did not understand her retainer of Attorney Epting was on an hourly basis for a period of time and would move to a contingency fee in the event a lawsuit was filed, it was necessary to add the lender to the lawsuit against Re/Max, or it became in Ms. Gibson's best interest to do so. Gibson's attorney at the time confirmed this course of action in writing and indicated that Gibson chose this course of action after carefully reviewing her options and sleeping on it. Because Gibson failed to put forth any evidence of any misrepresentation or deceptive act by the Attorneys, the trial court properly granted the Attorneys' Motion for Summary Judgment related to Gibson's cause of action for a violation of the South Carolina Unfair Trade Practices.

VI. THE TRIAL COURT PROPERLY GRANTED THE ATTORNEYS' MOTION FOR SUMMARY JUDGMENT BECAUSE THERE WAS NO EVIDENCE THAT THE FEE AGREEMENT BETWEEN GIBSON AND THE ATTORNEYS WAS VOID OR UNENFORCEABLE.

Because Gibson and Attorneys entered into an enforceable fee agreement between December 2009 and April 2010, the trial court properly held Gibson's cause of action for declaratory judgment to rescind the fee agreement failed as a matter of law. The Uniform Declaratory Judgments Act "does not create substantive rights or duties." Felts v. Richland County, 299 S.C. 214, 216, 383 S.E.2d 261, 262-63 (Ct. App. 1989), aff'd, 303 S.C. 354, 400 S.E.2d 781 (1991); see S.C. Code Ann. §§ 15-53-10 to -140 (1977). Rather, it authorizes an action to establish a party's entitlement to a pre-existing right. Noisette v. Ismail, 299 S.C. 243, 247 n.1, 384 S.E.2d 310, 312 n.1 (Ct. App. 1989), rev'd in part by 304 S.C. 56, 403 S.E.2d 122

(1991).

"A declaratory judgment action is neither legal nor equitable per se." Harvey v. South Carolina Dep't of Corrections, 338 S.C. 500, 506, 527 S.E.2d 765, 768 (Ct. App. 2000). "Rather, its character is determined by the nature of the underlying issue." Id. at 506, 527 S.E.2d at 768-69; Felts v. Richland County, 303 S.C. 354, 356, 400 S.E.2d 781, 782 (1991); Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime, 329 S.C. 206, 210, 494 S.E.2d 465, 467 (Ct. App. 1997). Courts "look to the kind of action in which the issue involved would have been decided if there were no declaratory judgment procedure." Felts, 299 S.C. at 216, 383 S.E.2d at 263. Because Gibson's underlying issue sounds in legal malpractice and breach of contract, the Court must evaluate the declaratory judgment cause of action under the elements to those causes of action. For the reasons addressed above in Section I and Section II, the trial court properly found there exist no genuine issue of material fact regarding the existence of an enforceable fee agreement between Gibson and the Attorneys. As a result, the trial court properly granted the Attorneys' Motion for Summary Judgment as to Gibson's declaratory judgment cause of action.

CONCLUSION

Because the Attorneys entered into an unambiguous and reasonable contingency fee agreement with Gibson, performed the work and services required under the agreement related to the foreclosure litigation, and obtained a "home run" result for Gibson, the trial court properly granted the Attorneys' Motion for Summary Judgment. When Gibson was first referred to the Attorneys, the Attorneys informed Gibson, and Gibson agreed, that the Attorneys would work on the foreclosure litigation for a period of sixty (60) days on an hourly basis while they attempted to convince the lender into an early resolution and then the fee would convert to a contingency based upon any savings obtained on the debt. Gibson and the Attorneys memorialized their fee agreement in the unambiguous April 7, 2010, agreement that Gibson signed on April 26, 2010. Through the Attorneys' work performed in the foreclosure litigation, the Attorneys were able to convince the lender to waive the entire deficiency, simply accept deeds-in-lieu, not pursue additional properties or deficiency judgments, and not require a release of Gibson's counterclaims against Ameris Bank. Gibson and the Attorneys calculated the fee earned based upon the savings recognized by Gibson through the waiver of the deficiency. Gibson had representation both at the outset in the negotiation of the fee (Mr. Papa) and in the calculation of the fee at the conclusion of the foreclosure action (Mr. Tecklenburg). Gibson and the Attorneys memorialized the calculation of fee in the November 18, 2010, agreement signed by Gibson after she consulted with Mr. Tecklenburg. The fee earned by the Attorneys was reasonable in light of the facts and circumstances facing Gibson at the time. For these reasons, this Honorable Court should affirm the trial court's Order granting the Attorneys' Motion for Summary Judgment.

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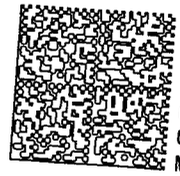

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