THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Case No: 2011-CP-40-1998
Court Of Appeals Number: 2016-000772

Jones G. Herring, ... Respondent,

v.

Gilbert S. Bagnell and Bagnell and Eason, LLC,.....Appellants.

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ARGUMENTS IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to arguments raised by Respondents.

The Respondent fails to show how it met the burden of presenting evidence of the value of the underlying claim.

The evidence before the Circuit Court was inadequate for purposes of awarding the Respondent $111,147.99 in damages. The Appellants agree with Respondent that Appellants cannot be held immune from the consequences of their bad acts. The Appellants simply ask that they not be held liable for harms that their acts have not been shown to have caused. The Respondent maintains that the evidence supports the Circuit Court's Order based upon the assertions that (a) Appellants failed to produce the documents necessary to prove Respondent's damages and (b) the Respondent adequately testified to the extent to which he was harmed. These arguments are unsupported by South Carolina law and the Circuit Court's Order should, therefore, be overturned.

A. Any argument regarding inferences to be drawn on behalf of the Respondent is misplaced.

In response to this appeal, the Respondent asserts that any lack of evidence is immaterial as the Circuit Court is allowed to draw inferences based upon the Appellants' failure to return the Respondent's complete file (the "lost documents"). In South Carolina, "when a party loses or destroys evidence, an inference may be drawn that the destroyed or lost evidence would have been adverse to that party." *Gathers By & Through Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C.

81, 83, 427 S.E.2d 687, 689 (Ct. App. 1993)(citing *Kershaw County Board of Education v. United States Gypsum Co.*, 302 S.C. 390, 396 S.E.2d 369 (1990)). As an initial matter, however, "the party seeking the inference must be prepared to make a showing that the document or evidence might reasonably have supported whatever presumption is being requested of the fact finder." *Pringle v. SLR, Inc. of Summerton*, 382 S.C. 397, 405, 675 S.E.2d 783, 787 (Ct. App. 2009)(citation omitted). This makes logical sense, as any inference must necessarily be related to the documents that are lost or destroyed. A party may not make his case based purely upon missing documents. This legal principal was succinctly expressed in *Collins v. Merrimack Mut. Fire Ins. Co.*:

> The courts have gone no further than to hold that, when the circumstances in proof tend to fix a liability on a party who has it in his power to offer evidence peculiarly within his knowledge of all the facts as they existed and rebut the inferences which the circumstances in proof tend to establish, and he fails, without satisfactory explanation, to offer such proof, the presumption is that the proof, if produced, would support the inferences against him. But the presumption or inference arising from the failure of a party to produce available evidence will not supply a missing link in an adversary's case and cannot be treated as independent evidence of a fact otherwise unproved.

Collins v. Merrimack Mut. Fire Ins. Co., 210 S.C. 207, 212–13, 42 S.E.2d 67, 70 (1947).

The Respondent is now requesting that the lost documents be presumed to have evidenced the value of the claim Respondent lost as a result of the negligence and inappropriate actions of the Appellants. As a matter of law, the lost documents could not have supported such a presumption. As discussed at length in the initial brief of the Appellants, the evidence and information before the Circuit Court, while illustrative of the underlying history of the claims, do not give a layman the ability to determine the value of the claim. *Green v. Lilliewood*, 272 S.C. 186, 249 S.E.2d 910 (1978). Such a valuation is only within the providence of an expert witness.

Id. Because expert testimony was not before the Circuit Court, an award of damages was improper.

There are two additional conspicuous reasons as to why the lost documents do not reasonably support the presumption being requested by the Respondent. First, the Circuit Court very clearly, and rightfully, presumed all of the evidence in favor of the Respondent. The only evidence before the Circuit Court, apart from the affidavit submitted by Appellants after the first hearing, was evidence submitted by the Respondent. The Appellants, likewise, do not ask this Court to read the facts in any light favorable to the Appellants. Instead, the Appellants assert that taking all of the evidence before the Circuit Court, the evidence necessary for awarding damages was still wanting. As previously argued in the initial brief, the Respondents were required to submit expert testimony regarding the value of his claim. The Circuit Court would not have construed the evidence in favor of the Appellants by requiring expert testimony. As a matter of law, expert testimony cannot be presumed. See *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014), reh'g denied (Aug. 5, 2014) abrogated on other grounds by *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016)(citing *Hall v. Fedor*, for proposition that "a claimant must establish, through expert testimony, [...] proximate cause of the plaintiff's damages by the breach." 349 S.C. 169, 561 S.E.2d 654 (Ct.App.2002)). Thus, with all favorable inferences being drawn in favor of the Respondent, the Respondent still failed to prove his damages.

Second, the information necessary to support the Respondent's claim regarding the value of the claim was within the power of the Respondent. The Respondent was in no way precluded from having an expert testify as the value of his claim, nor was the availability of the lost

documents necessarily detrimental to the Respondent. An expert witness may state an opinion based on facts not within his firsthand knowledge. *Ellis v. Oliver*, 323 S.C. 121, 473 S.E.2d 793 (1996). He may base his opinion on information, whether or not admissible, made available to him before the hearing if the information is of the type reasonably relied upon in the field to make opinions. *Halbersberg v. Berry*, 302 S.C. 97, 394 S.E.2d 7 (Ct.App.1990); see also J. Dreher, A Guide to Evidence Law in South Carolina 20 (Thames Rev.1979). "Also, an expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving his opinion of value." *Hundley ex rel. Hundley v. Rite Aid of S.C., Inc.*, 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000)(citing *Halbersberg v. Berry*, supra). An expert could have based his testimony upon both the testimony of the Respondent and his own expert knowledge. Thus, the Respondent's ability to proffer expert testimony was in no way harmed through the unavailability of the lost documents.

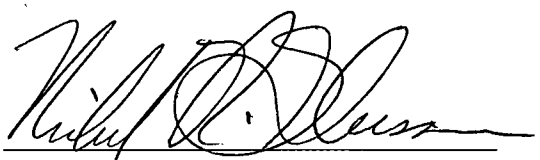
B. The Respondent fails to directly point to evidence presented supporting the value of his damages.

In response to this appeal, the Respondent asserts that "the lower court found [Respondent's] evidence credible, persuasive and compelling." Respondent's Brief p. 12. The Respondent carefully leaves out of its argument two critical facts regarding the Circuit Court's Order. First, the Circuit Court gave no credibility to the testimony regarding his damages alleged in the affidavits and spreadsheets submitted to the court. (R. pp. 8-9 ¶ 7). Second, as previously argued in the Appellants initial brief, the Circuit Court failed to point to competent evidence regarding the value of Respondent's claims. Instead of pointing to the necessary evidence in the record, the Circuit Court applies its own opinion as to the value of the claim based upon the

underlying facts. Such an opinion, without supporting evidence before it, is not within the purview of the judge or jury. This is evidenced by the requirement to have expert testimony. Were a judge or jury able to make such a determination, expert testimony would be superfluous.

CONCLUSION

The Respondent's failure to point to any evidence in the record alludes to the Circuit Court's error in ordering damages in an amount not in accord with the evidence presented. A default judgment in a legal malpractice action requires a showing of the value of potential success on the underlying action by a preponderance of the evidence. Thus, the Trial Court erred in awarding damages where Respondent failed to show any actual, quantifiable loss for failure to pursue an action under the Fair Credit Reporting Act.

By: 

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December 16, 2016

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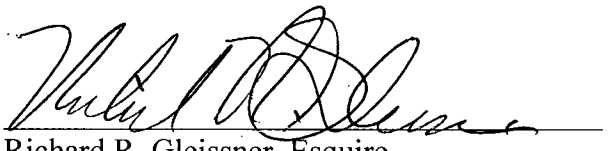
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Reply Brief complies with Rule 211(b), SCACR.



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