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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

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

Jones G. Herring, ... Respondent,

v.

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

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

Whether the circuit court in a damages hearing after a default erred in ordering damages without evidence supporting the proximate relation of the damages to the negligence of the Appellants?

STATEMENT OF THE CASE

Jones G. Herring (the "Respondent" or "Mr. Herring") brought this action seeking damages for the alleged legal malpractice of Gilbert S. Bagnell ("Mr. Bagnell") and Bagnell and Eason, LLC ("Mr. Bagnell's Law Firm", collectively "Appellants") on March 24, 2011. (R. p. 17). Appellant failed to answer Mr. Herring's complaint in a timely fashion and as a result a default judgment was entered on June 14, 2011. (R. pp. 22-29) On October 31, 2011, the Circuit Court held its first hearing for determination of damages in an action at law without a jury in accordance with 55(b)(2) SCRCP (the "First Damages Hearing"). The only evidence presented at the hearing was the testimony of Mr. Herring. After the hearing, the Circuit Court took the decision under advisement and left the record open so as to allow for supplemental evidence to be presented and supplement the file. After the submission of an affidavit by the Respondent and Appellant's brief objecting to the alleged damages on several grounds, the Court signed an order in favor of the Respondent on November 23, 2011 (the "First Damages Award") (R. pp. 54-61).

Appellant received notice of the First Damages Award on December 5, 2011 and timely filed a motion to reconsider. The appeal of the First Damages Award was filed on August 16, 2012 and later refiled on January 17, 2013. This Court set aside the First Damages Award and remanded the matter back to the Circuit Court for a new hearing on damages, giving the Respondent another opportunity to present evidence supporting damages. On August 25, 2015, the Circuit Court held a second hearing for determination of damages in an action at law without

a jury in accordance with 55(b)(2) SCRCP (the "Second Damages Hearing"). After the hearing, the Circuit Court took the decision under advisement. The Circuit Court signed an order in favor of the Respondent on February 4, 2016 (the "Second Damages Award") (R. pp. 1-13), the Appellants received the Order on February 6, 2016 and timely filed a motion to reconsider (R. pp. 302-310). The Motion was denied by an Order signed on March 14, 2016, entered on March 16, 2016 (the Order Denying Motion to Reconsider") (R. pp. 14-16).

Appellant received notice of the order on March 18, 2016 and timely filed this appeal on April 14, 2016 (R. pp. 314-331).

STANDARD OF REVIEW

In an action at law, on appeal of a case tried without a jury, the findings of fact of the judge will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings. *Townes Associates, Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976). The rule is the same whether the judge's findings are made with or without a reference. *Id.* The judge's findings are equivalent to a jury's findings in a law action. *Chapman v. Allstate Ins. Co.*, 263 S.C. 565, 211 S.E.2d 876 (1974). The order Appellate seeks to have overturned was on a Second Hearing for determination of damages in an action at law without a jury in accordance with 55(b)(2) SCRCP. Further, South Carolina has "recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action." *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 567, 274 S.E.2d 290, 292-93 (1981)(reversing Circuit Court's finding holding the amount recoverable was not based on the proof). Thus, this Court must closely scrutinize whether the Circuit Court's order was based upon evidence which

reasonably supported the findings. Further, the appellate court must examine the Circuit Court's post-award review to determine whether the Circuit Court abused its discretion to such a degree as to amount to an error of law. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991).

FACTS

Jones G. Herring (the "Respondent" or "Mr. Herring") brought this action seeking damages for the alleged negligence, fraud, constructive fraud, breach of fiduciary duty, and misrepresentation of Mr. Bagnell and Mr. Bagnell's Law Firm on March 24, 2011. The Appellants failed to answer Mr. Herring's complaint in a timely fashion and as a result a default judgment was entered on June 14, 2011.

The complaint, affidavits and testimony show that in or around March of 1998, Mr. Herring approached Consumer Credit Counseling Service, a division of Family Service Center of South Carolina, ("Family Service Center") for the purpose of refinancing several debt obligations (R. p. 1¶1). One of perhaps several of these obligations was an obligation with Commercial Credit, later assigned to CitiFinancial, Inc., that was in an amount never testified to with an interest rate perhaps in excess of 24% (the "Knox Abbott Account") (R. p. 1¶3). Another of perhaps several of these obligations was an obligation with Associates Financial Services, later assigned to CitiFinancial, Inc., that was in an amount never testified to with an interest rate perhaps in excess of 24% (the "Charlotte Account", jointly with the Knox Abbot Account the "accounts"). (R. p. 1¶3). In or around this same time, Mr. Herring entered into an agreement with Associates Financial Services, Commercial Credit, and Family Service Center for the repayment of the outstanding debt in reduced monthly payments and a reduced interest rate perhaps of

around 8%. (R. p. 1¶4). In the agreement, Mr. Herring would make payments to Family Service Center, who would in turn make payments to the holders of the debt obligation. (R. p. 1¶1). The total indebtedness Mr. Herring had to make payments with Family Service Center was $22,523.42. (R. p. 166 ¶22-23).

Sometime in or around September of 2004, Mr. Herring and CitiFinancial, Inc. agreed that the remaining balance on the Knox Abbott Account was $1,810. (R. p. 1¶5). Sometime in or around May of 2005, Mr. Herring paid the outstanding balance for the Knox Abbot Account in full. (R. pp. 1-2¶5). Nevertheless, Mr. Herring testified, Family Service Center continued to make payments to CitiFinancial, Inc. in excess of $1,200. (R. p. 2¶5). After the Knox Abbot Account debt was satisfied, CitiFinancial made reports to credit reporting agencies that Mr. Herring was delinquent on some obligation. (R. p. 2¶5). Mr. Herring began receiving demands for payment on the alleged delinquent amount. (R. p. 2¶5). After unsuccessfully attempting to resolve the dispute with CitiFinancial, Inc. as to whether the accounts were paid in full, Mr. Herring contacted the State of South Carolina Department of Consumer Affairs ("SCDCA") about the inappropriate actions of CitiFinancial, Inc. in an effort to resolve the dispute regarding the amount owed and any overpayments. (R. p. 3¶6). Mr. Herring testified that SCDCA was unable to get a response from CitiFinancial. (R. p. 2¶5). According to Mr. Herring, SCDCA recommended that Mr. Herring retain an attorney as he had a meritorious statutory claim against them to recover money damages. (R. p. 2¶5).

At some time in early 2006, Mr. Herring received an IRS form 1099-C for a forgiveness of debt in 2005 of $7,238.34. (R. p. 3¶7). This amount was later corrected to the lesser amount of $3,619.17. (R. p. 3¶7). As a result of the additional income Mr. Herring claimed on his taxes, Mr.

Herring testified that his taxable income was at a higher level and as a result his son was unable to receive an educational tax credit. (R. p. 3¶7). The excess income resulted in Mr. Herring not realizing $1,805.00 in a tax refund in 2006 and having to pay an additional $800.00 in his son's college tuition. (R. p. 3¶7).

Sometime in spring of 2006, Mr. Herring contacted Mr. Bagnell and Mr. Bagnell's Law Firm regarding the previously stated series of events. (R. p. 4¶10). On or around May 17, 2006, Mr. Herring entered into an agreement with Mr. Bagnell and Mr. Bagnell's Law Firm to represent Mr. Herring in a class action lawsuit against CitiFinancial, Inc. for improper actions such as the improper issuance of the 1099-C, the improper reporting to credit agencies, and the overpayment of $1,200 from Mr. Herring to CitiFinancial, Inc. (R. p. 4¶10). While the testimony of Mr. Herring was that he hired the Appellants to "get back all his money," including the money paid to unrelated creditors of Mr. Herring, the evidence presented regarding the representation limited the scope of the Appellants' representation to the bringing of a class action against CitiFinancial, Inc. where Mr. Herring was the class representative, and possibly bringing an action against CitiFinancial for its breach of the Fair Credit Reporting Act and Fair Debt Collection Practices Act. (R. pp. 152-153).

During the representation Mr. Bagnell requested several documents so as to support the causes of action against CitiFinancial. (R. p. 4¶11). On several occasions, Mr. Herring testified that Mr. Bagnell told Mr. Herring that he believed that Mr. Herring would be entitled to $100,000 in damages in addition to any legal fees. (R. p. 4¶11). The purported cause of action was to be brought as a class action, wherein Mr. Herring would be the class representative. Mr. Herring testified that Mr. Bagnell also continually made representations as to previous awards he

was able to attain for prior clients in similar class actions. (R. p. 4¶11).

Sometime in or around 2008, Mr. Herring sought to purchase a house from the estate of his father. (R. p. 3¶8). As a result of his poor credit score he was unable to qualify for favorable interest terms or a waiver of closing costs. (R. p. 3¶10). As a result, Mr. Herring testified that he will likely pay an additional $7,342.99 in closing costs and interest over the term of the loan. After a period of time, Mr. Herring began asking Mr. Bagnell for a status update as to his case. (R. p. 5¶14). Mr. Bagnell assured Mr. Herring that the case was being actively pursued. (R. p. 5¶14). After several assurances, Mr. Herring believed he would be better off getting another attorney to handle his matter. (R. p. 3¶10). The only documents Mr. Bagnell provided to Mr. Herring were those returned after the First Hearing on Damages in this action. Mr. Herring testified that the documents returned were incomplete. (R. p. 6 ¶¶ 19-20). He testified to a "banker's box" of documents given to Bagnell and only around 300 pages were returned. (R. p. 6 ¶ 20).

The Appellants never filed a class action against CitiFinancial on behalf of Mr. Herring nor did the Appellants file any action on behalf of Mr. Herring individually. (R. p. 5¶17). Mr. Herring filed a complaint with the South Carolina Bar sometime in early 2011 and several months later filed this action. (R. p. 5¶14).

On October 31, 2011, the Circuit Court held a hearing for determination of damages in an action at law without a jury in accordance with 55(b)(2) SCRCP. The only evidence presented at the hearing was the testimony of Mr. Herring. After the hearing, the Circuit Court took the decision under advisement and left the record open so as to allow for supplemental evidence to be presented and supplement the file. After the submission of an affidavit by the Respondent, the

Court signed an order in favor of the Respondent on November 23, 2011 awarding Respondent $254,306.77 in actual damages and $250,000.00 in punitive damages. The Appellants successfully appealed the order based upon the award of damages not being supported by evidence before the Circuit Court.

On August 26, 2015, the Second Hearing on Damages, pursuant to the remand, was held. At the Second Hearing, the only evidence presented in addition to the testimony and affidavit previously provided to the court in the First Hearing was the additional testimony provided on the cross-examination of Mr. Herring and the documents admitted into evidence used to refresh Mr. Herring's recollection of the events. After the hearing, the Circuit Court took the decision under advisement. On February 4, 2016, the Court signed an order in favor of the Respondent awarding $11,147.99 in actual damages and $100,000.00 in punitive damages (the "Order").

LEGAL ARGUMENT

The effect of Appellants' default did not remove the burden of the Respondent to present evidence of the value of his underlying claim.

The circuit court erred in awarding the Respondent $111,147.99 based upon the evidence presented at the hearing. South Carolina law requires that an award for damages resulting from a default judgment be supported by the evidence presented to the court. Despite the entering of a default judgment against the Appellant, Respondent is required to present adequate evidence of the amount of damages proximately suffered. The Respondent, again, failed to present such evidence. The Appellants admitted, by way of their default, that they committed legal malpractice and were responsible for the loss of any value the Respondent had in his claims against CitiFinancial. The Respondent failed, however, to present adequate evidence as to the value of

the claims he lost. In so doing, the Respondent in no way addressed the proximate relation of the alleged damages to the harm admitted. While testimony was presented that the Respondent believed he may be entitled to damages against CitiFinancial, such evidence was speculative. Further, no evidence as to the likelihood of success or the collectability of such a judgment was presented. Thus, the Circuit Court erred in awarding the Respondent damages of $111,147.99.

A claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). Furthermore, a claimant is required to demonstrate that "he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.'" *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct.App.2005) (quoting *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997)). As a result of the Appellants' default in this case, the Appellant has conceded liability, but has not conceded the amount of the liability. See *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241–42, 246 S.E.2d 880, 882 (1978). Thus, the Appellants have only conceded the necessary elements of a claim for legal malpractice, including that the Respondent was harmed. The Appellants did not concede, however, the extent of that harm.

In a default case, the Respondent must prove by competent evidence the amount of his damages, and such proof must be by a preponderance of the evidence. *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct.App.1988). Although the Appellant is in default as to liability, the award of damages must be in keeping not only with the allegations of the complaint and the prayer for relief, but also with the proof that has been

submitted. Id. To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). According to the complaint, Appellants were negligent in allowing the statute of limitations to expire on the claims Respondent had against CitiFinancial. According to the testimony, Respondent's claims included claims under the Fair Credit Reporting Act and Fair Debt Collection Practices Act.

The Respondent was required, under South Carolina law, to present evidence that would allow a reasonably close estimate as to the harm the negligence of Appellant caused the Respondent by a preponderance of the evidence. In this case, the harm admitted through the default was the loss of several claims against CitiFinancial due to the running of the statute of limitations. The determination of damages may depend to some extent on the consideration of contingent events if a reasonable basis of computation is provided, allowing a reasonably close estimate of the loss. *Piggy Park Enter., Inc. v. Schofield*, 251 S.C. 385, 391–92, 162 S.E.2d 705, 708 (1968). "While neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation, proof with mathematical certainty of the amount of loss or damage is not required." *Id.* Thus, the Circuit Court was permitted to rely, to an extent, on reasonably close estimates as to the value of the claims lost by Respondent as a result of the Appellants' negligence. The Circuit Court was not, however, permitted to award the damages without any supporting evidence as to its value.

In the present matter, the Circuit Court held that Respondent was entitled to the actual damages caused by CitiFinancial to Respondent. The Order fails in any respect to address the value of the claim against CitiFinancial, and instead discusses the evidence of harm by

CitiFinancial. The Circuit Court found:

> "[Respondent's] uncontroverted testimony and supporting affidavits prove, by the preponderance of the evidence, that Citi[Financial]'s breach of the underlying Agreement caused [Respondent] to suffer the following actual damages: (1) at least $1,200.00 in overpayment to Citi[Financial]; (2) $1,805.00 in a tax refund [Respondent] would have received had Citi[Financial] not improperly reported to the IRS that [Respondent] had incurred income when, in fact, [Respondent] had not; (3) $800.00 in additional tuition expenses [Respondent] incurred because of his putative "increased income" causing him to not qualify for an education tax credit; and (4) $7,342.99 in additional closing costs and interest that [Respondent] has, and will continue to have, to pay because of negative reports on his credit."

Order at (R. p. 9¶8). In South Carolina, the Respondent is not entitled to the harm caused by the third party, CitiFinancial, but, instead, are only entitled to the harm caused by the Appellants. Were there any evidence showing that the damages caused by CitiFinancial were correlated or directly equal to the value of the claims Respondent lost due to Appellants malpractice, this analysis would be pertinent. Without this correlation, it serves no purpose.

While perhaps a subtle distinction in the analysis, this subtle difference has lead States across the United States, including South Carolina, to require that in most actions for legal malpractice this type of specific evidence regarding damages be presented. As in any negligence action, the Respondent in a legal malpractice action must establish proximate cause. *Hall v. Fedor*, 349 S.C. 169, 177, 561 S.E.2d 654, 658 (Ct. App. 2002)("the Respondent must show he or she '***most probably***' would have been successful in the underlying suit if the attorney had not committed the alleged malpractice."), see also *Brown v. Theos*, 345 S.C. 626, 550 S.E.2d 304 (2001); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988); *Floyd v. Kosko*, 285 S.C. 390, 329 S.E.2d 459 (Ct.App.1985). Normally, proximate cause is a question of fact for the jury, and it may be proved by direct or

circumstantial evidence. *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972). Proximate cause requires proof of: (1) causation-in-fact, and (2) legal cause. *Bramlette v. Charter–Medical–Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation-in-fact is proved by establishing the injury would not have occurred "but for" the Appellant's negligence, and legal cause is proved by establishing foreseeability. *Id.* Generally, expert testimony is required to establish proximate cause in a malpractice case. *Green v. Lilliewood*, 272 S.C. 186, 249 S.E.2d 910 (1978)("Since many malpractice suits involve [issues] outside the realm of ordinary lay knowledge, expert testimony is generally necessary."). Expert testimony is not required, however, to prove proximate cause if the common knowledge or experience of laypersons is extensive enough to determine the presence of the required causal link between the negligence and the harm. *Pederson v. Gould*, 288 S.C. 141, 341 S.E.2d 633 (1986); *King v. Williams*, 276 S.C. 478, 279 S.E.2d 618 (1981); see *Armstrong v. Weiland*, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976)("When the testimony of an expert witness is not relied upon to establish proximate cause, it is sufficient for Respondent to put forth some evidence which rises above mere speculation or conjecture....").

The evidence necessary to establish proximate cause may sometimes be confused with the testimony necessary to establish the standard of care. This confusion is typically caused by the principle that the harm must have been foreseeable in order for the action or inaction to be considered negligent. In cases such as legal malpractice, however, the standard of care is typically not necessarily tied to the foreseeability of the harm to the claimant. See *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010)(A bad result from legal representation is not evidence of the breach of the standard of care, for purposes of a legal

malpractice action; the exercise of a professional's judgment and accompanying acts and omissions must be considered at the time the professional service is rendered and not through the lens of hindsight.) Thus, an attorney may breach the standard of care and be considered negligent without causing a compensable harm to a claimant. This is the reason when describing the elements of legal malpractice the court has added "[f]urthermore, a claimant is required to demonstrate that "he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.'" *Doe, supra* (quoting *Summer*). Generally, the value of a claim is directly tied to the success of the underlying suit.

Other jurisdictions have more succinctly held that if the malpractice charged is related to the prosecution of an underlying action, it is generally held that where there is a "trial within a trial" the claimant in the legal malpractice action has the burden of proof to establish that proper handling of the matter would have resulted in recovery of a judgment, and that the judgment would have been fully or partially collectible. *Williams v. Bashman*, 457 F. Supp. 322, 326 (E.D. Pa. 1978), See Also *Christy v. Saliterman*, 288 Minn. 144, 150, 179 N.W.2d 288, 294 (1970), *Sitton v. Clements*, 257 F. Supp. 63 (E.D. Tenn. 1966), aff'd, 385 F.2d 869 (6th Cir. 1967); *Duke & Co. v. Anderson*, 275 Pa. Super. 65, 418 A.2d 613 (1980); *Sherry v. Diercks*, 29 Wash. App. 433, 628 P.2d 1336 (1981), *McDow v. Dixon*, 138 Ga. App. 338, 226 S.E.2d 145 (1976), *Moore v. Moyle*, 405 Ill. 555, 566, 92 N.E.2d 81, 87 (1950), *Hoppe v. Ranzini*, 158 N.J. Super. 158, 385 A.2d 913 (Super. Ct. App. Div. 1978). "The Respondent in a legal malpractice action must prove a 'case within a case,' as he or she must prove the merits of the underlying case as part of the proof of the malpractice case." 7A C.J.S. Attorney & Client § 331 (citations omitted). The question of what should have happened in the underlying action is a question of law. See, e.g.,

Doe v. Howe, 626 S.E.2d 25, 31, n. 18 (S.C. Ct. App. 2007)("Under the case-within-a-case concept, the test is objective. Therefore, the test is not what the outcome would have been, but rather what it should have been."); *Manning*, 356 S.E.2d 24, 25 (holding that the likelihood of success of underlying case was a question of law).

This approach and analysis is perhaps made clearer if the harm suffered by the claimant is described as being the loss of some property. In other words, the harm suffered by the Respondent, as admitted by the Appellants through their default, was the loss of certain "property." That "property" being the potential claim against CitiFinancial for the actual damages CitiFinancial caused to Respondent. By couching the damages in this way, there is a necessary proximate relation of the value of the "property" to the harm caused by the Appellants. If there is no legal remuneration for the harm caused by the third party, there can be no harm caused by the attorney hired to seek such remuneration. See *Watson v. Am. Colony Ins. Co. of New York*, 179 S.C. 149, 183 S.E. 692, 693–94 (1936)("It is a truism that the law endures no injury, from which damage has ensued, without some remedy; but directs the application of principles already established to every new combination of circumstances that may be presented for decision.") This can be seen in this case. While CitiFinancial was found to have harmed the Respondent in an amount of $11,147.99, an expert ***may*** have opined that the ability to recover such damages under the Fair Debt Collection Practices Act and the Fair Credit Reporting Act would result in discounting the value of such claims. The expert ***may*** have opined in the opposite, that such a claim has such a great likelihood of recovery and an allowance for treble damages that the value of the claims are greater than the damages caused by CitiFinancial.

Ordinarily, courts require expert testimony as to the value of such "property." See 7A

C.J.S. Attorney & Client § 331. In South Carolina an owner of property is qualified by the fact of ownership to give his or her estimate as to the value of his or her property unless the owner's "want of qualification is so complete that his or her testimony is entirely worthless." *Seaboard Coast Line R.R. v. Harrelson*, 262 S.C. 43, 202 S.E.2d 4 (1974). This is, in fact, the same approach the Supreme Court has used in other legal malpractice decisions. See *Gould*, supra (Expert testimony is not required, however, to prove proximate cause ***if*** the common knowledge or experience of laypersons is extensive enough to determine the presence of the required causal link between the negligence and the harm.); *King*, supra; and *Weiland*, supra. Thus, any testimony by Respondent must be considered worthless without some qualifications supporting it. This was precisely the case before the Circuit Court. The Respondent testified over twenty (20) times that he was unqualified to give such an opinion as he was not an attorney. This should not be surprising particularly in the context of "a comprehensive and complex federal statute such as the FDCPA" *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 587, 130 S. Ct. 1605, 1615, 176 L. Ed. 2d 519 (2010). Most attorneys would not be comfortable opining on the value of such a claim.

The Circuit Court correctly held in its Order denying reconsideration that "the only issue before the Court was the amount of damages caused by Appellants' failure to bring an action against Citi[Financial] on behalf of Respondent." (R. p. 15). Erroneously, however, the Circuit Court then conflates the harm caused by this failure and the harm caused by CitiFinancial. The Circuit Court Order Denying the Motion to Reconsider states:

> "[Appellants] argue that through their default they admitted only their negligence in allowing [Respondents] statute of limitations to expire on his underlying causes of action against Citi[Financial], they did not admit that [Respondent]'s damages were compensable. [Appellants] then cite several cases in support of their

> contention that 'adequate evidence [must be] presented establishing the harm to [Respondent] caused by Citi would have been recovered 'but for' the negligence of Appellant.' [Appellants]' Motion at 2. The cases cited by [Appellants], however, all involved defendant attorneys who did not default on the claims brought against them. Those cases, therefore, are not dispositive on the issues presented in the instant matter. In this case, [Respondent], in his complaint, alleged, among other things, that [Appellants] were negligent in not bringing a cause of action within the requisite statute of limitations, and because of [Appellants]' negligence, [Respondent] lost his ability to successfully bring a claim against Citi[Financial]. Since [Appellants] defaulted on [Respondent]'s claims against them, they admitted the veracity and underlying success of [Respondent]'s claims against Citi[Financial]. Accordingly, Appellants have conceded that "but for" their negligence, Respondent "most probably" would have been successful on his underlying claims against Citi."

(R. p. 15). Again, this Order errs in that it mistakes the admission that the Respondent lost any value he had in a claim against CitiFinancial and the need for evidence as to what the value of that claim was. Were the claims of the nature of a simple breach of contract, perhaps the testimony of the Respondent would have been enough to support the value of the claim attributed by the Circuit Court. Given the complex nature of the claims lost by Respondent, however, additional testimony is required.

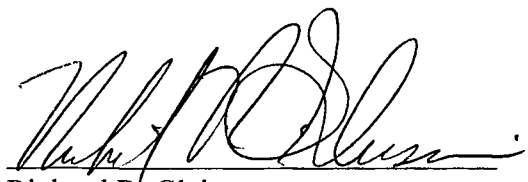
On the record before it, the Circuit Court could not have awarded damages without impermissibly resorting to speculation. The Respondent failed to present any supporting evidence as to the value of the claims lost. No expert witness testified. No one rendered an opinion on the likelihood of success. No one testified as to the collectability of any damages. Simply, the Respondent failed to present adequate evidence to support the Circuit Court's order for damages against the Appellant. The Respondent at no time presented evidence as to the ability to bring an action on the alleged actions of CitiFinancial. Similarly, the Respondent never presented evidence as to how his ability to bring the action was affected by the Appellants failure to bring

the action. The testimony of the Respondent in no way addressed the proximate relation of the alleged damages to the harm admitted. The Circuit Court acknowledged that the testimony presented by Respondent that he believed he may be entitled to 100,000 in damages and treble damages was mere speculation or conjecture as to information that is outside the realm of ordinary lay knowledge. (R. pp. 8-9). ("Mere testimony from a party ... concerning a case's worth is insufficient to satisfy the preponderance of the evidence standard.") Finally, no evidence as to the likelihood of success or the collectability of such a judgment was presented. The Circuit Court erred in awarding the Respondent $111,147.99 based upon the evidence presented at the hearing. Such evidence could, at best, be described as speculative and conjecture.

Thus, the Court's order must be reversed and these issues must be properly addressed on remand.

CONCLUSION

The Circuit Court erred 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 Circuit 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. Thus, the Circuit Court has made errors in its granting Respondent damages not supported by the evidence before it and must be reversed and this matter remanded back to the Circuit Court to make a proper determination of actual damages.

By: 

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CERTIFICATE OF COUNSEL

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

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December 16, 2016

(6)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No: 2011-CP-40-1998
Appellate Case No.: 2016-000772

Jones G. Herring, ... Respondent,

v.

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

PROOF OF SERVICE

I certify that I have served a copy of the Appellant's Final Brief by depositing a copy of it in the United States Mail, postage prepaid, on December 19, 2016, addressed to its attorney of record as follows:

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Dated: December 19, 2016