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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity and Special Circuit Court Judge

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Appellate Case No. 2017-000242

Robert E. Feldman and Lois J. Feldman. . . . . Appellants,

vs.

Gary P. Coggin, ... Respondent.

INITIAL BRIEF OF APPELLANTS

PENDARVIS LAW OFFICES, P.C.
Thomas A. Pendarvis (SC Bar # 064918)
Christopher W. Lempesis, Jr. (SC Bar #77012)
710 Boundary Street, Suite 1-A
Beaufort, SC 29902
843.524.9500 Tel.
Thomas@PendarvisLaw.com
Chris@PendarvisLaw.com

Counsel for Appellants, Robert E. Feldman and Lois J. Feldman

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Did the trial court err in granting summary judgment:

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B. despite evidence in the record creating genuine issues of material fact in dispute, including genuine issues of material fact concerning proximate cause on Appellants' legal malpractice claim?

C. despite an affidavit filed pursuant to Rule 56(f), SCRCP, providing multiple reasons flowing from the incomplete discovery why Appellants were not able to present by affidavit or other testimony facts essential to justify Appellants' opposition to the motion?

D. when the two-sentence Order granting summary judgment omitted any reference to evidence in the record creating disputed questions of fact on whether Respondent's professional errors proximately causing a diminution the settlement value of Appellants' underlying UIM claims?

E. despite the deposition testimony of Respondent admitting that he did not possess and did not submit evidence in the underlying case to establish service of process on the defendant before the expiration of the statute of limitations?

F. despite the sworn testimony contained in the allegation of fact in the Verified Complaint creating disputed questions of fact on causation issues?

G. despite the affidavit of an expert filed with the Verified Complaint opining on negligent acts on behalf of Respondent that proximately caused damages to Appellants?

H. when the two-sentence Order granting summary judgment omitted any findings of fact and specific conclusions of law forming the basis for the judgment?

STATEMENT OF THE CASE

This is an appeal from an order granting summary judgment in favor of Respondent, Gary P. Coggin ("Mr. Coggin") and an order denying the motion to alter or amend the order granting summary judgment on legal malpractice claims brought by Appellants, Robert E. Feldman and Lois J. Feldman ("the Feldmans"). Those claims are based on Mr. Coggin's errors in handling the Feldmans' underinsured motorist claims against an at-fault driver who caused substantial personal injuries to the Feldmans.

On May 19, 2015, the Feldmans filed a Summons and Verified Complaint with an expert affidavit alleging legal malpractice on the part of Mr. Coggin arising from Mr. Coggin's representation of the Feldmans in the case styled *Robert Feldman & Lois Feldman vs. Sarah Dickenson*, C.A. # 2012-CP-07-3800 ("the Underlying Lawsuit"). (R. ___, Verified Compl., ¶¶ 45, 52). The Verified Complaint filed in this legal malpractice suit stated claims for damages in excess of $500,000, the policy limits of the Feldmans' UIM policy, and the pleadings were based on the information available and "by other such particulars as the evidence in this case may demonstrate."

On August 20, 2015, Mr. Coggin filed and served an Answer to the Verified Complaint. (R. ___, Answer). On March 9, 2016, Mr. Coggin filed a Request for a Scheduling Order. (R. ___, Resp. Request for Scheduling Order). On March 18, 2016, the Feldmans filed a Response to the Request for a Scheduling Order. (R. ___, App. Response to Request for Scheduling Order). On March 25, 2016, Mr. Coggin filed a reply to the Response to the Request for a Scheduling Order. (R. ___, Resp. Reply to Response to Request for Scheduling Order).

On May 16, 2016, Mr. Coggin filed a Motion for Summary Judgment, based on "the pleadings, *depositions*, answers to interrogatories, and admissions on file show that there is no

genuine issue as to any material fact . . ." and " . . . on the . . . pleadings and *discovery in this action* . . .." Mr. Coggin's motion argued that, as a matter of law, there was no proximate cause of damage based on the Feldmans' *pleadings* of Mr. Coggin's negligence in the Verified Complaint. (R. ___, Motion for Summary Judgment ("MSJ"), dated May 16, 2016).

On June 8, 2016, the Feldmans took the deposition of Mr. Coggin. (R. ___, Coggin Depo. dated June 8, 2016, with exhibits).

On June 17, 2016, the trial court entered a Scheduling Order requiring discovery to be completed not later than December 1, 2016, and a trial date not before January 1, 2017. (R. ___, Scheduling Order).

On June 22, 2016, Mr. Coggin filed a Memorandum in Support of his Motion for Summary Judgment. (R. ___, Memorandum in Support of Motion for Summary Judgment). Mr. Coggin's memorandum in support of the motion for summary judgment argued that if Mr. Coggin "did in fact fail to serve the at-fault driver, such failure would not have affected the underlying UIM case in any way . . .." (R. ___, Memorandum in Support of Motion for Summary Judgment, p.2). Mr. Coggin's argument for summary judgment was centered on the concept that "...even if Attorney Coggin did breach the standard of care by failing to serve the at-fault driver, that breach did not proximately cause the Plaintiffs to suffer any damages. (R. ___, Memorandum in Support of Motion for Summary Judgment, pp.1-2).

On June 27, 2016, the Feldmans filed and served a Memorandum in Opposition to Mr. Coggin's Motion for Summary Judgment. (R. ___, Memorandum in Opposition to Motion for Summary Judgment), referring to the Rule 56(f), SCRCP, Affidavit of Thomas A. Pendarvis, which itself was filed on June 28, 2016. (R. ___, Rule 56(f), Affidavit). The Rule 56(f) affidavit explained

the status of discovery, the plans for additional depositions well within the deadlines set in the Scheduling Order, and requested the hearing on Mr. Coggin's motion be delayed until discovery was completed as per the Scheduling Order. (R. ___, Rule 56(f), Affidavit).

The Rule 56(f) affidavit specifically noted that the "question of proximate cause of the damages suffered by Plaintiffs is in dispute, as Plaintiffs contend that Defendant Coggin's failures to properly serve the at-fault driver, and to properly prepare the case for settlement, mediation and trial, resulted in Plaintiffs losing valuable rights, ..." (R. ___, Rule 56(f), Affidavit, ¶15). The Rule 56(f) affidavit also stated, "Depending on the outcome of pending discovery, the Plaintiffs may seek to amend their Verified Complaint to include additional specific allegations of legal malpractice, based on Defendant Coggin's failures to secure a life care plan expert, a vocational expert and an expert to reduce the damages to present value, which separately and/or together resulted In Plaintiffs losing valuable rights, including diminution in the settlement value of the case. (R. ___, Rule 56(f), Affidavit, ¶17).

On June 29, 2016, Mr. Coggin's Motion for Summary Judgment was heard before the Honorable Marvin H. Dukes, III. During the hearing, counsel for the Feldmans explained what was expected to be developed during discovery as follows:

> In May of '14, the parties participated in mediation. We believe there is going to be testimony based on the beginnings of discovery with Mr. Coggin and others that the case was not prepared for settlement. They went into -- and we believe that Julian Allen is going to testify that had the case been properly prepared there would have been a substantially greater settlement offer at the mediation.
>
> So even if – even if Liberty Mutual's defense was invalid or improper or wouldn't have been successful as a matter of law, they hadn't filed the motion. They went to a mediation with authority to settle. And we believe Julian Allen is going to say had Mr. Coggin presented a life care plan that he admitted he didn't do, and other information to

> substantiate wage loss, incapacity or damage from the connection causally linking the medical expenses to the car wreck that he brought, you know, the reason for the case, the testimony had not been developed by the doctors or a life care plan person or anyone of that sort that could quantify and put a settlement value on the Feldmans' claims.
>
> Going into the mediation there were demands for policy limits by Mr. Coggin. And what we believe that discovery will reveal from Mr. Julian Allen is the case would have settled or a substantially greater amount of money would have been put on the table at a mediation nine months before any hearing on the motion.
>
> And so under the *Sims* case and some other authority I'm happy to provide the Court, there is a claim on the settlement value of the case that is factually related regardless of whether at a hearing on the merits of the legal matter the Plaintiffs would have lost or won.
>
> And so, you know, as to settlement value and what we also expect, there were lawyers – Sam Bauer and Rob Metro. Their deposition haven't been taken yet, but we believe they are going to say based on the age of the case when they took it over and the matter was on a trial docket and there was communications with Mr. Coggin to the Feldmans before he moved to be relieved that this case was coming up for trial.
>
> And we believe the testimony from Mr. Bauer and Mr. Metro is going to be there wasn't sufficient time to get the case ready. The statute had already run. They couldn't dismiss it and refile it, so they recommended that the Feldmans take the 25,000 to settle.
>
> And so the real essence of the malpractice was failure to prepare the case. It would have settled at mediation. And so we believe that those factual issues are going to preclude any ruling as a matter of law on whether or not Liberty's Motion for Summary Judgment would have been successful.

(R. ___, Hearing transcript, dated June 29, 2016, 11:12-13:20).

On July 11, 2016, the Feldmans filed a Supplemental Memorandum in Opposition to Mr. Coggin's Motion for Summary Judgment. (R. ___, Supplemental Memorandum in Opposition to Motion for Summary Judgment). On July 19, 2016, the Feldmans filed a Motion for Leave to File

Verified Amended Complaint. (R. ___, Motion for Leave to File Verified Amended Complaint) (hereinafter "Motion to Amend"). On July 28, 2016, Mr. Coggin filed a Reply to Appellant's Supplemental Memorandum in Opposition to the Motion for Summary Judgment. (R. ___, Resp. Reply to Supplemental Memorandum in Opposition to the Motion for Summary Judgment). On August 1, 2016, the Feldmans filed a sur-reply to Mr. Coggin's Reply to Appellant's Supplemental Memorandum in Opposition to the Motion for Summary Judgment. (R. ___, App. Sur-Reply to Supplemental Memorandum in Opposition to the Motion for Summary Judgment). On September 7, 2016, Mr. Coggin filed a Memorandum in Opposition to Appellant's Motion to Amend. (R. ___, Resp. Memorandum in Opposition to Motion to Amend). On September 8, 2016, Appellant's Motion to Amend was heard before the Honorable Carmen T. Mullen, wherein the trial court acknowledged that leave to amend should be freely given. At the hearing, however, the trial court refused to rule or to issue an order on the Motion to Amend.

The next day, on September 9, 2016, the Honorable Marvin H. Dukes, III, issued a two-sentence Order granting Mr. Coggin's motion for summary judgment, which is the subject of this appeal. (R. ____, Order Granting Motion For Summary Judgment) (hereinafter "Summary Judgment Order"). Even if the fully developed factual record was available after discovery was complete, which it was not, for the trial court to grant summary judgment on the proximate cause issue, there could be not even a scintilla of evidence to support an inference that Mr. Coggin's actions and/or omissions resulted in damages to the Feldmans. As discussed throughout this brief, the Feldmans raised evidence to the trial court's attention that suggested directly and supported interferences that Mr. Coggin's actions and inactions diminished the settlement value of the case. Despite clear evidence and inferences that should have been drawn from such evidence, even where

discovery was incomplete, the trial court committed errors of law by granting summary judgment to Mr. Coggin and failing to alter or amend the order granting summary judgment.

On September 13, 2016, counsel for the Feldmans requested an Order from the trial court as to the Motion to Amend. (R. ____, Email to trial court clerk). This request for an Order was renewed on September 14, 2016. (R. ____, Second Email to trial court clerk).

On September 19, 2016, the Feldmans filed a Motion to Alter or Amend Judgment as to the Summary Judgment Order. (R. ___, Motion to Alter or Amend Judgment) (hereinafter "Motion to Reconsider).

On September 22, 2016, via email the trial court again declined to issue a ruling on the Motion to Amend. (R. ____, Reply Email from trial court clerk).

On October 3, 2016, Mr. Coggin filed a Memorandum in Opposition to Appellant's Motion to Alter or Amend. (R. ___, Memorandum in Opposition to Motion to Reconsider).

On December 12, 2016, the Feldmans' Motion to Alter or Amend Judgment was heard before the Honorable Marvin H. Dukes, III. On January 6, 2016, Appellant forwarded a proposed Order to the trial which, if issued, would have granted the Motion to Alter or Amend Judgment. (R. ___, App. letter to Judge Dukes with proposed Order). On January 10, 2017, Mr. Coggin filed a Supplemental Memorandum in Opposition to the Motion to Alter or Amend, addressing the January 6, 2016 proposed order forwarded to the trial court. (R. ___, Supplemental Memorandum in Opposition to the Motion to Alter or Amend).

On January 27, 2017, the trial court issued an Order denying the Feldmans' Motion to Alter or Amend. (R. ___, Order denying Motion to Alter or Amend, dated January 27, 2017) (hereinafter "Order Denying Motion to Reconsider").

On February 1, 2017, the Feldmans timely filed and served their Notice of Appeal, seeking reversal of the trial court's Summary Judgment Order, the Order Denying Motion to Reconsider, and the trial court's refusal to issue an order on Appellant's Motion to Amend. (R. ____, Notice of Appeal). On March 14, 2017, the Feldmans filed and served an Amended Notice of Appeal seeking reversal of the Summary Judgment Order and the Order Denying Motion to Reconsider. (R. ____, Amended Notice of Appeal).

STATEMENT OF FACTS

The Feldmans' legal malpractice claims are based on Mr. Coggin's errors in handling the Feldmans' underinsured motorist claims against the at-fault driver who caused substantial personal injuries to the Feldmans. According to the sworn testimony of Appellant's expert, Mr. Coggin's failures directly caused Mr. and Mrs. Feldman to lose the $500,000 in available UIM coverage. Disputed questions of fact were also in the record to show that Mr. Coggin's failures directly caused Mr. and Mrs. Feldman to lose *at least* all but $25,000 of the settlement value of their claims in the Underlying Lawsuit. This legal malpractice case seeks damages from Mr. Coggin as compensation for the lost settlement value Mr. and Mrs. Feldman suffered as a result of Mr. Coggin's negligence.

On October 9, 2010, the at-fault driver, Sarah Dickenson, failed to control her vehicle, colliding with Mr. Feldman's vehicle and causing Mr. Feldman to sustain substantial personal injuries, medical expenses, lost wages, pain and suffering; and giving rise to loss of consortium claims in favor of Mr. Feldman's wife, Appellant, Lois J. Feldman. (R. ___, Verified Compl., ¶¶9-10); (R. ___, Complaint in *Feldman and Feldman v. Dickenson*, 2012-CP-07-3800, filed on October 29, 2012) (hereinafter " Underlying Complaint). Four days later Mr. Coggin came to the Feldmans' home and entered a contract to represent the Feldmans on their personal injury and loss of

consortium claims against Sarah Dickenson. (R. ___, Verified Compl., ¶8).

During the representation Mr. Coggin sent demand letters to Dickenson's carrier making demands for payment of $1,550,000, which Mr. Coggin stated as being "very reasonable" based on Mr. Feldman's medical bills, financial losses, and loss of enjoyment of life. (R. ___, Coggin letter to carrier, dated Oct. 17, 2011, Ex. 4 to Coggin Depo. dated June 8, 2016).

Although Dickenson's liability was never disputed, although Coggin later admitted that Mr. Feldman's medical special damages exceeded $100,000. (R. ___, Coggin Depo., dated June 8, 2016, 94:3-4); (R. ___ Coggin letter to mediator, dated May 5, 2014, Ex. 9 to Coggin Depo. dated June 8, 2016), and although Dickenson had $100,000 in liability coverage, in September of 2012, Coggin settled the Feldmans' claims with Dickenson's carrier for only $85,000. (R. ___, Verified Compl., ¶15); (R. ___, Coggin Depo. dated June 8, 2016, 39:1-7). To get the Feldmans' consent to settle for only $85,000 of Dickenson's $100,000 liability coverage, Mr. Coggin assured the Feldmans that he would recover the available $500,000 in UIM coverage under the Feldmans' policy issued by Liberty Mutual Insurance ("Liberty"). (R. ___, Verified Compl., ¶14).

On October 29, 2012, approximately two years into the representation, Mr. Coggin filed the Underlying Lawsuit against Dickenson to pursue the Feldmans' underinsured coverage. (R. ___, Complaint in *Feldman and Feldman v. Dickenson*, 2012-CP-07-3800, filed on October 29, 2012); (R. ___, Verified Compl., ¶6); (R. ___, Coggin Depo. dated June 8, 2016, 43:13-19). On November 29, 2012, Mr. Coggin provided copies of the suit papers to the Department of Insurance, which in turn provided those documents to Liberty. (R. ___, Verified Compl., ¶17); (R. ___, Coggin Depo. dated June 8, 2016, 44:4-14).

October 9, 2013 was the statute of limitations date that applied the Feldmans' claims against

Dickenson. (R. ___, Coggin Depo. dated June 8, 2016, 63:11-25). Mr. Coggin admitted that the Underlying Lawsuit would not have been commenced per the Rules of Civil Procedure was process not served on Dickenson prior to October 10, 2013. (R. ___, Coggin Depo. dated June 8, 2016, 64:1-8, 64:20-25).

Mr. Coggin testified at length about his efforts to have Dickenson served with process in the Underlying Lawsuit. (R. ___, Coggin Depo. dated June 8, 2016, 47:2-61:22).

Notwithstanding his knowledge of the Rules of Civil Procedure that require filing of proof of service, Mr. Coggin admitted that he did not ever file an affidavit of service or any other documents showing Dickenson had been served with process in the Underlying Lawsuit. (R. ___, Coggin Depo. dated June 8, 2016, 61:8-22; 63:7-10).

On January 7, 2013, counsel for Liberty filed an Answer including an affirmative defense that "... Plaintiff has failed to effectuate proper service under Rule 12(b)(4) and Rule 12(b)(5)." (R. ___, Liberty Answer in *Feldman and Feldman v. Dickenson*, 2012-CP-07-3800, filed on January 7, 2013); (R. ___, Coggin Depo. dated June 8, 2016, 53:14-18, 54:4-6, 62:18-63:10).

Although the parties attended mediation on or around May 7, 2014, (R. ___, Coggin Depo. dated June 8, 2016, 71:18-19), during which the Feldmans' opening offer was $525,000. (R. ___, Coggin Depo. dated June 8, 2016, 72:14-21). The Feldmans rejected Liberty's highest offer of $25,000, and the mediation concluded with the parties at an impasse. (R. ___, Coggin Depo. dated June 8, 2016, 74:19-77:3).

Apparently, in or around September of 2014, defense counsel in the Underlying Lawsuit advised Mr. Coggin of plans to file a motion to dismiss based on Mr. Coggin's failure to serve Dickenson with process, and extended on behalf of Liberty a $25,000 offer to settle. (R. ___,

Verified Compl., ¶ 31). On or around September 15, 2014, Mr. Coggin sent the Feldmans a letter advising them to settle the matter for $25,000.00 and seek other counsel. (R. ___, Coggin letter to Feldman, dated Sept. 15, 2014, 2014, Ex. 10 to Coggin Depo. dated June 8, 2016). On September 16, 2014, Mr. Coggin filed a Motion to Withdraw As Counsel. (R. ___, Verified Compl., ¶ 32); (R. ___, Coggin Depo. dated June 8, 2016, 130:9-13). The Feldmans were able to find substitute counsel who attempted to secure an affidavit of service on Dickenson from Mr. Coggin, however, Mr. Coggin could not and has never been able to provide an affidavit of service for Dickenson. (R. ___, Verified Compl., ¶ 35-36); (R. ___, Coggin Depo. dated June 8, 2016, 120-121, 127:17-23, 132:9-11, 142:14-18).

On October 8, 2014, Liberty filed a motion to dismiss pursuant to Rule 12(4) and (5), SCRCP. (R. ___, Liberty Motion to Dismiss, Ex. 13 to Coggin Depo. dated June 8, 2016). Although he had been relieved as counsel for the Feldmans, Mr. Coggin appeared at the January 6, 2015, hearing on Liberty's motion to dismiss, argued The Honorable Earnest Kinard, Jr., on behalf of the Feldmans to oppose the motion, and filed an affidavit in opposition to the motion. (R. ___, Coggin Affidavit, Ex. 16 to Coggin Depo. dated June 8, 2016); (R. ___, Coggin Depo. dated June 8, 2016, 130:19-131:19). In response, the trial court directed Mr. Coggin to get an affidavit from someone with personal knowledge that service had been accomplished, and specifically, the process server, in order to oppose the motion to dismiss. (R. ___, Coggin Depo. dated June 8, 2016, 133:22-134:4); (Transcript from hearing on Jan. 6, 2015, Ex. 19 to Coggin Depo. dated June 8, 2016).

The Underlying Lawsuit settled shortly thereafter for $25,000.00 and the legal malpractice case followed. (R. ___, Verified Complaint, ¶ 37).

STANDARD OF REVIEW

1. Standard of review trial court's order granting summary judgment.

When reviewing the grant of a summary judgment motion, this court applies the same standard of review as the trial court under Rule 56, SCRCP. *Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 496, 662 S.E.2d 606, 607 (Ct. App. 2008), *aff'd*, 387 S.C. 280, 692 S.E.2d 523 (2010); *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 753 S.E2d 428 (2014).

2. Standard for Summary Judgment.

Pursuant to Rule 56(c), SCRCP, summary judgment is proper only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991). Under Rule 56(c), SCRCP, the party seeking summary judgment has the burden of demonstrating the absence of a genuine issue of material fact. *Baughman*, 306 S.C. at 102, 410 S.E.2d at 539. In determining whether any triable issues of fact exist, all the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party. *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997); *City of Columbia v. American Civil Liberties Union*, 323 S.C. 384, 387, 475 S.E.2d 747, 748 (1996); *Lattie v. SHS Enterprises, Inc.*, 300 S.C. 417, 418, 389 S.E.2d 300, 301 (Ct. App. 1990) (summary judgment standard of review is to liberally construe the record in favor of the nonmoving party and give the nonmoving party the benefit of all favorable inferences that might reasonably be drawn therefrom); *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App.1986). "At the summary judgment stage of the proceedings, it is only necessary for the non-moving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." *Hill v. York County Sheriff's Department*, 313 S.C. 303, 308, 437 S.E.2d

179, 182 (Ct. App. 1993), *cert. denied* (1994). **[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.**" *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (citations omitted) (emphasis added).

Even when there is no dispute as to the evidentiary facts, but only as to the conclusions and inferences to be drawn from them, summary judgment should not be granted. *Rice v. School Dist. of Fairfield*, 317 S.C. 87, 452 S.E.2d 352 (Ct. App. 1994). Summary judgment is a drastic remedy and should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Hooper v. Ebenezer Senior Svcs. & Rehabilitation Ctr.*, 377 S.C. 217, 226-27, 659 S.E.2d 213, 217 (Ct. App. 2008).

3. Standard for this Court's review of an order issued in response to a Motion to Alter or Amend.

Generally, an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved. *See Holy Loch Distribs., Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000); *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). However, an exception to this rule exists where a party raises an issue pursuant to a Rule 59, SCRCP, motion and the trial court does not rule upon the issue; and in such a situation, the issues raised in the Rule 59 motion are preserved for appellate review. *See Pye v. Estate of Fox*, 369 S.C. 555, 564–66, 633 S.E.2d 505, 510–11 (2006).

The Feldmans filed a motion to alter or amend pursuant to Rules 52 and 59, SCRCP, requesting an order as to whether the trial court's grant of summary judgment: was proper considering the evidence in the record and in the opposition briefs submitted; was premature where discovery was not complete as averred in a Rule 56(f), SCRCP, affidavit; overlooked or

misapprehended the law concerning proximate cause; overlooked or misapprehended the law and the evidence before the Court concerning loss of settlement value for the proximate cause and damage elements of the professional negligence claim; should have contained findings of whether there are disputed issues of material fact as to proximate cause; was limited to review of only the allegations raised in the Verified Complaint and expert affidavit filed therewith, instead of the additional information in the record before the court, as argued by the Feldmans in response to the motion for summary judgment filed by Mr. Coggin. As discussed below, the trial court did not provide factual findings and/or conclusions of law concerning any of the issues raised in opposition to the motion for summary judgment nor those raised in the motion to alter or amend, and for these reasons, pursuant to *Pye v. Estate of Fox*, 369 S.C. 555, 564–66, 633 S.E.2d 505, 510–11 (2006), the points raised in opposition to the motion for summary judgment and the points raised in the motion to alter or amend are preserved for this Court's review.

ARGUMENTS

I. It Was Reversible Error for the Trial Court to Grant Summary Judgment Based on the Genuine Issues of Material Fact in the Record, the Rule 56(f) Affidavit, and Incomplete Discovery.

The essence of the trial court's error in granting summary judgment[1] finds its heart in the flawed substance of Mr. Coggin's motion for summary judgment. The central flaw in Mr. Coggin's motion for summary judgment was that it focused exclusively on a portion of the allegations in the Verified Complaint, excluding from the analysis other language in the *verified* pleadings, the general

[1] The trial court's two-sentence Order granting summary judgment leaves this Court with virtually nothing for the appellate court to ascertain the basis for the trial court's rulings, findings of fact or conclusions of law supporting the ruling. See *Porter v. Labor Depot*, 372 S.C. 560, 568, 643 S.E.2d 96, 100 (Ct. App. 2007) ("detailed order" not necessary where "the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal.").

conclusions in the expert testimony contained in the expert affidavit, and maybe most importantly, the testimony of Mr. Coggin in his deposition, and the absence of the testimony of other key witnesses whose depositions had not been taken in a case where the Scheduling Order had trial set some seven months after the hearing on the motion. Motions for summary judgment require an examination of facts, not just the pleadings. The order granting summary judgment misapplied the general standard where "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." *See Lord v. D & J Enters., Inc.*, 407 S.C. 544, 553, 757 S.E.2d 695, 699 (2014). Here, the Feldmans did set forth multiple specific facts showing genuine issues for trial, and the fact that was discovery was incomplete. It was error to grant the motion for summary judgment.

A. The trial court erred when it granted summary judgment despite genuine issues of material fact.

The question of the proximate cause of the damages suffered by the Feldmans is in dispute. (R. ___, Supplemental Memorandum in Opposition to Motion for Summary Judgment, filed July 11, 2016, pp. 2-7). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *USAA Property and Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (2008) (rehearing denied). The clients' burden of establishing proximate cause in a legal malpractice action requires that proof that the clients would have obtained a better result in the underlying matter if the attorney had exercised reasonable care. The burden does not necessarily compel the clients to demonstrate that they would have won the underlying case. Rather, it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; *e.g.*, the

settlement value of the underlying case. *Doe v. Howe*, 367 S.C. 432, 446, 626 S.E.2d 25, 32 (Ct. App. 2005). "Ordinarily, the question of proximate cause is one of fact for the jury . . .." *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998).

The Feldmans presented evidence establishing that Mr. Coggin's failure to file an affidavit showing service of process within the statue limitations devalued the settlement value of the case; and arguments and evidence that Mr. Coggin failed to secure a life care plan expert, a vocational expert and an expert to reduce the damages to present value, separately and/or together resulted in the Feldmans losing valuable rights, including significant diminution in the settlement value of the case. (R. ___, Coggin Depo. dated June 8, 2016); (R. ___, Hearing transcript, dated June 29, 2016, 11:12-13:20); (R. ___, Rule 56(f) affidavit); (R. ___, Supplemental Memorandum in Opposition to Motion for Summary Judgment, pp. 3-4); (R. ___, Rule 56(f) affidavit). The trial court failed to consider or failed to properly construe the evidence where Mr. Coggin was making $1.55 M settlement demands early in the representation, and strongly urging the Feldmans to accept only $25,000 after Liberty had raised the defense focusing on Mr. Coggin's failure to file the affidavit of service and after Mr. Coggin had not adequately prepared the case for trial. The record is replete with disputed issues of genuine fact concerning proximate cause and settlement value.

The trial court was made abundantly aware that the Feldmans and Mr. Coggin disagree as to whether Mr. Coggin's failures were the proximate cause of diminution in the value of the Feldmans' underlying claims. Whether Mr. Coggin's professional errors caused diminution in settlement value of the underlying case must be determined by a jury and for these reasons, the Motion for summary judgment should have been denied.

B. The trial court erred when it granted summary judgment despite the Rule 56(f) affidavit.

Appellants submitted a Rule 56(f) Affidavit to the trial court, to indicate that Appellants could not present by affidavit facts which are essential to justify their opposition to the Motion because the Motion itself does not provide enough information and/or notice as to the bases of the Motion; and because, despite pursuit of discovery by Appellants, discovery that would provide information for affidavits in opposition has not yet occurred. (R. ___, Rule 56(f) affidavit). "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment . . .." Rule 56(f), SCRCP.

The Feldmans' Rule 56(f) Affidavit set forth the reasons why additional time was needed to obtain the evidence necessary to oppose the motion for summary judgment. *See Savannah Bank, N.A. v. Stalliard*, 400 S.C. 246, 734 S.E.2d 161 n.4 (2012). It was error for the trial court to ignore the affidavit, and the fact that discovery is not complete, when it issued the order granting Mr. Coggin's motion for summary judgment. For these reasons, the Motion for Summary Judgment should have been denied.

C. The Trial Court erred when it granted summary judgment despite incomplete discovery.

The trial court entered a Scheduling Order on June 17, 2016, requiring discovery to be completed not later than December 1, 2016, some six plus months after the hearing on Mr. Coggin's motion for summary judgment was filed May 16, 2016. (R. ___, Motion for Summary Judgment). Weeks prior to his filing the motion for summary judgment, Mr. Coggin argued, in his "Response to Request for a Scheduling Order" that "[d]iscovery in this case will be extensive and will likely

require over a year to complete" and that

> This legal malpractice action is not ready to be placed on the trial roster. It was filed less than eleven months ago and discovery has not even been open for seven months. The early mediation, which officially failed less than one month ago, caused the parties to delay taking depositions such that none have been taken or even noticed. The remaining discovery necessary to get this case ready for trial will likely take over a year to complete.

(R. ___, Coggin Response to Request for Scheduling Order).

Prior to the trial court's order granting summary judgment, two depositions were scheduled, with one moving forward and a second awaiting confirmation as to the schedule of Mr. Coggin and his counsel. (R. ___, Rule 56(f) affidavit). During this period of time, on July 29, 2016, the Feldmans identified expert witnesses, including a second legal malpractice expert, a life care planning expert, and a vocational rehabilitation expert, yet no depositions of such experts had been requested by Mr. Coggin and none were conducted; and the Feldmans specifically argued that expected testimony from the pending deposition of Julian Allen, J.D., the lawyer representing Liberty in the underlying case, would show "that had [Mr. Coggin] prepared and developed the causation and damages aspects of [the Feldmans'] underlying claims, it would have been more likely than not that Liberty Mutual would have offered substantially more than $25,000 to resolve the [The Feldmans'] claims." (R. ___, Supplemental Memorandum in Opposition to Motion for Summary Judgment, pp. 3-4); (R. ___, Rule 56(f) affidavit); (R. ___, Hearing transcript, dated June 29, 2016, 13-16). The Feldmans argued to the trial court and pointed to evidence in the record before the trial court to support inferences that Mr. Coggin's professional errors lowered the settlement value of the case, with evidence of early demands of $1.55M with evidence from Mr. Coggin's own testimony of actual medical expenses of at least $100,000, and lost income of over $200,000, as compared to

the actual settlement of the case at $25,000. (R. ___, Supplemental Memorandum in Opposition to Motion for Summary Judgment, p. 5).

It is clear in Mr. Coggin's own arguments, as well as the Feldmans' arguments, that at the time of Mr. Coggin's filing of the motion for summary judgment, discovery was progressing but was not and could not have been completed, that the Feldmans have not had a full and fair opportunity to complete discovery, that the Feldmans are actively engaged in discovery, and that the results of which were necessary to respond to the motion for summary judgment. *See Baughman,* 306 S.C. at 112, 410 S.E.2d at 543; (R. ___, Exhibit 2, Rule 56(f) affidavit).

Mr. Coggin argued that none of his failures caused any diminution in settlement value of the Feldmans' claims. In order for the trial court to grant summary judgment, Mr. Coggin had the burden of demonstrating the absence facts material to the question of whether Mr. Coggin's negligence resulted in a diminution of the value of the Feldmans' claims. *Baughman*, 306 S.C. at 102, 410 S.E.2d at 539. This brief clearly shows before the trial court: disputed facts as to whether or not Mr. Coggin diminished settlement value; that certainly inferences could be drawn from available evidence to support that conclusion; and that discovery not yet complete was expected to support that conclusion. For all of these reasons, the motion for summary judgment should have been denied.

II. The Trial Court Erred in Ignoring the Allegations of the Verified Complaint and the Existence of Disputed Causation Issues Concerning Diminution of Settlement Value.

It is clear that "... it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case. *Doe v. Howe*, 367 S.C. 432, 446, 626 S.E.2d 25, 32 (Ct. App. 2005) (quoting David A. Barry, *Legal Malpractice in Massachusetts: Recent Developments*, 78 Mass. L.Rev. 74, 79 (1993). The legal malpractice plaintiff need not

demonstrate that he would have one the underlying case, but instead need only show loss of settlement value, which can be shown by demonstrating that the legal malpractice plaintiff would have "most probably" received a larger settlement. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002). Legal malpractice cases require the legal malpractice plaintiff to meet the preponderance of evidence burden of proof for eventual success, however, at the summary judgment stage, "...the nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "[T]he client need not show a perfect claim. But the client must show at least that he has lost a probability of success as a result of the attorney's negligence." *Doe*, 367 S.C. at 446, 626 S.E.2d at 32 (Ct. App. 2005) (quoting David A. Barry, *Legal Malpractice in Massachusetts: Recent Developments*, 78 Mass. L.Rev. 74, 79 (1993) as having "aptly stated" the "most probably" standard as applied in legal malpractice cases.).

At the stage where the trial court granted summary judgment, there was abundant evidence before the trial court on the issue of diminution in settlement value, satisfying the scintilla standard. Also, there was abundant evidence before the trial court that supported directly or by inference that Mr. Coggin's negligence was the cause of loss of value of the settlement, thus satisfying the "most probably" standard.

Looking simply to the most basic point of this legal malpractice case, it is clear that evidence before the trial court demonstrated or at least suggested that Mr. Coggin took on a case that he was not trained, equipped or prepared to handle; and that Mr. Coggin's actions and inactions greatly diminished settlement value of the underlying claims. The record before the trial court clearly showed that the Feldmans received $25,000 in settlement of their under insured claims, where there

was a total of approximately $500,000.00 in insurance coverage, actual medical expenses alone of over $100,000.00, additional claims of lost wages; and many demands from Mr. Coggin even exceeding the $500,000 in under insured coverage. (R. ____, Coggin Depo. dated June 8, 2016,18:17-19:7; 94-96; Ex. 3 at p. 2); (R. ___, Supplemental Memorandum in Opposition to Motion for Summary Judgment, p. 5). In addition to the letters from Mr. Coggin establishing the value of the claims, Mr. Coggin's own deposition testimony clearly shows that the case settled for far less than the actual medical expenses, lost wages that Mr. Coggin claimed were damages, and the insurance coverage available. Further, there was other evidence before the trial court that pointed to inferences that could reasonably be drawn that Mr. Coggin's actions and inactions resulted in diminution in value of the claim, including: the allegations of the Verified Complaint; the letters from Mr. Coggin included as exhibits to Mr. Coggin's deposition; and the Rule 56(f), SCRCP, Affidavit of Thomas A. Pendarvis, which demonstrated expected testimony from the defense lawyer in the under insured case, Mr. Julian Allen, that Mr. Coggin's negligence directly caused diminution in settlement value because Mr. Coggin was not even prepared at the mediation of the case that occurred well before the Motion to Dismiss was filed. (R. ___, Rule 56(f), Affidavit); (R. ___, Hearing transcript, dated June 29, 2016, 13-16).

A. The trial court erred in granting summary judgment considering the allegations of the Verified Complaint.

Pursuant to S.C. CODE ANN. § 15-36-100(B), the expert affidavit filed with the Verified Complaint includes expert testimony establishing at least one act of professional negligence based on available evidence at the time of filing, which centered on Mr. Coggin's failure to timely serve the at-fault driver and/or file proof of service. In addition, the Verified Complaint also contains language, which, in addition to the failure to serve and/or the to file service issues, clearly places

Mr. Coggin on notice of the existence of potential additional alleged professional errors. The Verified Complaint contains the following factual averments:

> 45. Coggin failed to meet the minimum standard of care thereby breaching his professional duties to the Feldmans by other such particulars as the evidence in this case may demonstrate.
>
> 46. As a direct and proximate result Coggin's breach of his professional duties by the actions and omissions as specified herein, the Feldmans sustained actual, consequential, and incidental damages in an amount to be determined by the jury at the trial of this case.
>
> 52. Coggin failed to meet the minimum standard of care thereby breaching his contractual duties to the Feldmans by other such particulars as the evidence in this case may demonstrate.
>
> 53. As a direct and proximate result of Coggin's breach of his contractual duties by the actions and omissions as specified herein, the Feldmans sustained actual, consequential, and incidental damages in an amount to be determined by the jury at the trial of this case.

(R. ___, Verified Compl., ¶¶45-46, 52-53).

These allegations in the Verified Complaint clearly placed Mr. Coggin on notice of the Feldmans' allegation that–in addition to the failure to timely serve the at-fault driver and/or file proof of service issues–they were seeking evidence to show that Mr. Coggin failed to meet the minimum standard of care by *"other such particulars as the evidence in the case may demonstrate."*

After Mr. Coggin's deposition, the Feldmans filed a motion to amend the Verified Complaint, and in doing so, provided both the trial court and Mr. Coggin clear notice of additional particulars that the deposition of Mr. Coggin confirmed: Mr. Coggin had done little to nothing to prepare the case for settlement, mediation and/or trial. (R. ___, Motion to Amend); (R. ___, Memorandum in Opposition to Appellant's Motion to Amend, filed September 7, 2016). The trial court was aware of the motion to amend and also had a copy of Mr. Coggin's deposition transcript.

Even if Mr. Coggin is correct regarding the motion to dismiss in the underlying case (which is disputed), Mr. Coggin's failure to prepare the underlying case greatly reduced its settlement value. (R. ___, Supplemental Memorandum in Opposition to Motion for Summary Judgment). As to this argument, the Feldmans were and are entitled all reasonable inferences concerning the allegations of the Verified Complaint, the Motion to Amend, and from the deposition of Mr. Coggin; and the record should have been liberally construed in favor of the Feldmans, to clearly indicate that the Feldmans provided the trial court a scintilla of evidence mandating denial of the motion for summary judgment. *Summer v. Carpenter*, 328 S.C. at 42, 492 S.E.2d at 58; *City of Columbia v. American Civil Liberties Union*, 323 S.C. at 387, 475 S.E.2d at 748; *Lattie v. SHS Enterprises, Inc.*, 300 S.C. at 418, 389 S.E.2d at 301; *Gilmore v. Ivey*, 290 S.C. at 58, 348 S.E.2d at 183; *Hill v. York County Sheriff's Department*, 313 S.C. at 308, 437 S.E.2d at 182.

B. The trial court erred in granting summary judgment and taking from a jury the question of proximate cause, considering the existence of disputed issues as to whether Mr. Coggin's failure to prepare the underlying case caused diminution of settlement value.

The Feldmans were and are entitled all reasonable inferences concerning the impact of Mr. Coggin's actions and omissions on settlement value and remain entitled to present this question to a jury. The record in this case, including Mr. Coggin's initial demands of $1.55M, his deposition testimony establishing actual medical damages in excess of $100,000, and evidence of the actual settlement for only $25,0000, all directly support an inference that Mr. Coggin's professional errors negatively impacted the settlement value of the underling case. *Summer v. Carpenter*, 328 S.C. at 48, 492 S.E.2d at 61 (evidence of lawyer's failure to include specific party in lawsuit filed resulted in lower settlement value and thereby sufficient to establish genuine issue of fact as to causation and damages for legal malpractice claim); *McNair v. Rainsford*, 330 S.C. at 349, 499 S.E.2d at 497

("Ordinarily, the question of proximate cause is one of fact for the jury . . .."). The record should have been liberally construed in favor of the Feldmans. Evidence concerning each element of the professional negligence and breach of contract cause of action was before the trial court, establishing more than the scintilla of evidence necessary to defeat a motion for summary judgment and allow determination by a jury concerning the settlement value diminution issue. *Gilmore v. Ivey*, 290 S.C. at 58, 348 S.E.2d at 183; *Hill v. York County Sheriff's Department*, 313 S.C. at 308, 437 S.E.2d at 182. The trial court's grant of summary judgment where such clear inferences existed in favor of the Feldmans was reversible error. This case should be remanded to the trial court for further findings and/or with instructions directing the denial of Mr. Coggin's motion for summary judgment.

C. The trial court erred in granting summary because loss of settlement value caused by a lawyer's negligence can be recovered in a legal malpractice action.

It is clear that the Feldmans needed only a scintilla of evidence that they most probably lost settlement value or would have received a larger settlement to withstand a motion for summary judgment. *Doe v. Howe*, 367 S.C. at 446, 626 S.E.2d at 32 ("... it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; e.g., the settlement value of the underlying case."); *Hall v. Fedor*, 349 S.C. at 175, 561 S.E.2d at 657 (legal malpractice plaintiff can "satisfy the 'most probably' requirement and defeat [a] summary judgment motion by establishing he 'most probably' would have received a larger settlement . . . or that he 'most probably' would have prevailed on the underlying claim at trial.").

Evidence was before the trial court from Mr. Coggin's deposition from which a jury could conclude that the settlement value of the Feldmans' claims in the underlying case were as high as the highest demand that Mr. Coggin made, $1.55M, (R. ____, Coggin Depo. dated June 8, 2016, 18:17-19:7); (R. ___, Coggin letter to carrier, dated Oct. 17, 2011, Ex. 4 to Coggin Depo. dated June

8, 2016); that Mr. Feldman's actual medical expenses were at least $100,000 to $130,000, (R. ____, Coggin Depo. dated June 8, 2016, 94-96); and that Mr. Feldman's condition rendered him unable to work for at least two more years, resulting in lost income of over $200,000. (R. ___, Coggin letter to carrier, dated Oct. 10, 2011, Ex. 3 to Coggin Depo. dated June 8, 2016, at p. 2). *See also,* (R. _____, Supplemental Memorandum in Opposition to Motion for Summary Judgment, pp.4-5).

The Underlying Case was settled for only $25,000.00, (R. ___, Verified Compl., ¶37), far below the $100,000 to $1.55M settlement value range shown by the other evidence before the trial court. The expert opinion in the affidavit filed with the Verified Complaint concluded that Mr. Coggin "failed to meet the minimum standard of care thereby breaching his professional duties to the Feldmans" and that had Mr. Coggin met the standard of care "It is more likely than not that the Feldmans would have recovered all or almost all of the $500,000 UIM policy coverage." (R. ___, Expert Affidavit attached to Verified Compl., ¶¶14, 15). The expert also opined that "the Feldmans would have recovered and Liberty with have paid all or almost all of the $500,000 in UIM coverage, based on the amount of Mr. Feldman's medical expenses incurred in the future medical expenses his physicians are advising he will, more likely than not, incur as a result of the accident, and his loss wages." (R. ___, Expert Affidavit attached to Verified Compl., ¶ 16).

Despite the fact that "[o]rdinarily, the question of proximate cause is one of fact for the jury...," *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998), the trial court took this question away from the jury and concluded that as a matter of law, Mr. Coggin was entitled to summary judgment, thus preventing a jury from deciding the proximate cause of the greatly reduced settlement value. This was despite the fact that at least, if not more, than a scintilla of evidence that Mr. Coggin's professional errors proximately caused the greatly reduced value of the

case in settlement. Based on all of the foregoing, Mr. Coggin's motion for summary judgment, premised entirely on proximate cause issues, should have been denied.

Mr. Coggin argued to the trial court that the Feldmans only asserted one legal theory for recovery and that a second theory of liability, that Mr. Coggin's legal malpractice diminished settlement value, was not properly before the trial court. (R. ___, Resp. Reply to Appellant's Supplemental Memorandum in Opposition to the Motion for Summary Judgment, filed July 28, 2016). Yet, Mr. Coggin's motion for summary judgment and its supporting memoranda argue that Mr. Coggin's failures did not cause the Feldmans to suffer **any** damages. (R. ___, Memorandum in Support of Motion for Summary Judgment, pp.1-2) (*emphasis supplied*).

In contrast to previous arguments, Mr. Coggin later argued that the issue of diminution in settlement value was not properly before the trial court. Yet, Mr. Coggin initially argued that his negligence did not cause any damage at all, and the issue of diminution in settlement value was briefed by the Feldmans with citation to facts and evidence in the record before the trial court, not only in pleadings filed in response to the motion for summary judgment, but also in the Feldmans' motion to amend, with such motion having been provided to the trial judge who issued the Orders that are subject of this appeal. Thus, the issue of whether Mr. Coggin's actions and/or inactions proximately resulted in diminished settlement value was clearly before the Court, was clearly argued with citation to the record, including factual basis within the deposition testimony of Mr. Coggin himself; and Mr. Coggin clearly argued that his negligence did not cause diminution in settlement value. In that discovery was not complete, it was reversible error for the trial court to conclude that summary judgment was proper. The trial court's implicit adoption of a "snapshot" view of this case at the time the initial pleading was filed that Mr. Coggin argues is proper, is not

supported by the South Carolina Rules of Civil Procedure, nor decisional law on point. The trial court was required to consider the entire record when making a determination as to summary judgment. South Carolina law and the Rules of Civil Procedure do not force a trial court and parties to a lawsuit to wear blinders to the remainder of the available record. This is certainly true when the pleadings are not challenged under Rule 12(b)(6), SCRCP, but the claims are instead challenged under Rule 56, SCRCP, as they were when Mr. Coggin moved for summary judgment. Rule 56, SCRCP, requires the trial court to look beyond simply the allegations in the Verified Complaint.

Mr. Coggin was on notice of the existence of claims for damages occasioned by Mr. Coggin's professional errors that resulted in a diminution in settlement value of the Feldmans' UIM claims. In fact, in addition to Mr. Coggin arguing that his negligence did not cause ***any*** damages to the Feldmans, Mr. Coggin briefed against the Feldmans' motion to amend, thus clearly the trial court and Mr. Coggin were well aware of the damages claims premised on diminution in settlement value. (R.___, Resp. Reply to Appellant's Supplemental Memorandum in Opposition to the Motion for Summary Judgment, pp. 7-8). Yet Mr. Coggin did not provide the trial court any citation whatsoever to support his contention that a new affidavit must be submitted in order to support amendment of a Verified Complaint for legal malpractice. Thus Mr. Coggin initiated the motion for summary judgment arguing that there was no damage of any sort from Mr. Coggin's legal malpractice, and when confronted with clear evidence in the record of diminution in settlement value, including the deposition of Mr. Coggin himself and the contents of the Rule 56(f) Affidavit of Thomas Pendarvis regarding the expected testimony of Julia Allen, J.D., Mr. Coggin attempted to pivot to an argument concerning S.C. CODE ANN. § 15-36-100(B), which is not supported by citation to any decisional law whatsoever. Neither Mr. Coggin's motion for summary judgment, nor

the memorandum in support of the motion for summary judgment even mention, even once, the sufficiency of the exert affidavit or an argument that a new expert affidavit is required once the Feldmans show that there is evidentiary support that Mr. Coggin's actions and/or inactions diminished the settlement value of the claims.

III. The trial court committed reversible error when it failed to alter or amend an order granting summary judgment where the summary judgment order was in error, and contained no factual findings and no conclusions of law.

A. It was an error for the trial court not to alter or amend the order granting summary judgment were discovery was not complete.

The Feldmans' motion to alter or amend sought a corrective ruling concerning their Rule 56(f) affidavit explaining that discovery in this matter has not yet been completed and on such basis, affidavits in response to the Motion for Summary Judgment cannot be procured and filed. While this issue was before the trial court, the trial court refused to alter or amend the order granting summary judgment. Additionally, the trial court did not address whether the Rule 56(f) Affidavit raised sufficient basis so as to require the trial court's denial of Mr. Coggin's motion for summary judgment, despite the fact that the Feldmans raised and requested a ruling on this issue in response to the motion for summary Judgment and later in their motion to alter or amend. It was reversible error for the trial court first, not to alter or amend the grant of summary judgment; and second, to simply not rule as to the issue of whether or not the Rule 56(f) Affidavit raised sufficient basis so as to require the Court's denial of the Motion for Summary Judgment.

B. It was error for the trial court not to alter or amend the order granting summary judgment that ruled as a matter of law, that Mr. Coggin's negligence did not proximately cause diminution in settlement value of the underlying case.

The trial court's order failed to address and otherwise misapprehended the law concerning proximate cause. Whether a defendant's acts or omissions proximately caused harm to a plaintiff

is almost always a question of fact for a jury. *See Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006); *Oliver v. South Carolina Dept. of Highways & Pub. Transp.*, 309 S.C. 313, 318, 422 S.E.2d 128, 131 (1992) (causation issues generally present questions of fact for the jury). The Order granting Mr. Coggin's motion for summary judgment based on an alleged lack of causation was error. The trial court's unstated ruling on this point should have been altered and amended, such that Mr. Coggin's motion should be denied; or at the very least, the trial court should have ruled as to this issue where the Feldmans specifically filed a motion to alter or amend to seek clarification on this point.

C. It was error for the trial court not to alter or amend the order granting summary judgment, despite the law and evidence in the record concerning loss of settlement value.

Evidence was in the record showing Mr. Coggin's handling of the Feldmans' UIM claim, in terms of 1) failing to file an affidavit of service providing the UIM carrier with the basis to file a dispositive motion, or 2) failing to prepare the case for trial causing the UIM carrier to offer virtually nothing to settle the case at the mandatory mediation held months before the dispositive motion, or 3) a combination of 1 and 2. Collectively, evidence giving rise to disputed questions of material fact was before the Court showing Mr. Coggin's handling of the Feldmans' underlying case substantially reduced its settlement value; and this is all highlighted by the fact that Mr. Coggin argued the point concerning reduced settlement value where he asserted his negligence did not cause ***any*** harm and when he opposed the Motion to Amend the Verified Complaint.

The clients' burden of establishing proximate cause in a legal malpractice action can be satisfied with evidence showing or supporting an inference that the clients lost a valuable right; e.g., the settlement value of the underlying case. *Doe v. Howe*, 367 S.C. at 446, 626 S.E.2d at 32. A

legal malpractice plaintiff can defeat a motion for summary judgment with evidence establishing that he most probably would have received a larger judgment. *Hall v. Fedor*, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002).

In this case, Mr. Coggin argues that his negligence in failing to serve the at-fault driver, did not, in any way compromise the value of the Plaintiffs' claims in the Underlying Lawsuit; and that the issue of diminution in the value of settlement of the underling suit was not properly before the Court. Yet, the expert affidavit filed with the Verified Complaint specifically states that '[h]ad Coggin met the standard of care by performing his professional duties to ... protect the Feldmans' claims, it is more likely than not that the Feldmans would have recovered all or almost all of the $500,000 UIM policy coverage." (R. ___, Verified Compl., Exhibit 2).

The record before the trial court also included Mr. Coggin's deposition, with specific reference to various other failures in preparation of the Underlying Lawsuit for settlement, mediation and trial – all of which when take in the light most favorable to the Feldmans creates a disputed issues of material fact as to whether or not the negligence of Mr. Coggin devalued the settlement value of the case. Further, the Feldmans raised these arguments and these factual disputes as to the impact of Mr. Coggin's negligence in briefs filed response to Mr. Coggin's motion for summary judgment, in their motion to amend, and in the motion to alter or amend judgment. Evidence was before the Court showing that during the more than 2 ½ years while representing the Feldmans, Mr. Coggin did not obtain the testimony of any physician causally linking Mr. Feldman's injuries to the automobile accident, did not obtain any reports from a vocational rehabilitation specialist, did not obtain a life care plan, and did not get any medical evidence or testimony establishing Mr. Feldman's future medical needs prior to the mediation held in May 2014, which was many months

before the UIM carrier filed the motion to dismiss in the Underlying Lawsuit. Again, the expert affidavit filed on behalf of the Feldmans stated, based on evidence available at the time of the filing of the Verified Complaint, that '[h]ad Coggin met the standard of care by performing his professional duties to ... protect the Feldmans' claims, it is more likely than not that the Feldmans would have recovered all or almost all of the $500,000 UIM policy coverage."

Despite clearly controlling South Carolina law that diminution of settlement value and proximate cause of damages based on the same are questions of fact and matters to be proven at trial; and that the evidence and all inferences which can be reasonably drawn must be viewed in the light most favorable to the Feldmans as the nonmoving parties in this case, the trial court issued an order granting the Mr. Coggin's motion for summary judgment, and declined to correct those errors when presented with the Feldmans' motion to alter or amend judgment. The Summary Judgment Order effectively rules that, *as a matter of law*, Mr. Coggin's negligence could not compromise the value of the Feldmans' claims in the Underlying Lawsuit. Notably, Mr. Coggin cited *Doe v. Howe*, 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005) in his briefs to the trial court. Essentially, the trial court erroneously accepted Mr. Coggin's arguments that the question on the proximate cause is limited to the ultimate success at trial, and is solely a matter of law – excluding any consideration of the defendant lawyer's acts or omissions that had a detrimental effect on settlement value. This proposition, however, overlooks or misapprehends the South Carolina Supreme Court's holdings in *Madison ex rel. Bryant v. Babcock Center, Inc.*, 371 S.C. at 147, 638 S.E.2d at 662 (whether a defendant's acts or omissions proximately caused harm to a plaintiff is almost always a question of fact for a jury) and the Court of Appeals' holdings in *Doe v. Howe*, 367 S.C. at 446, 626 S.E.2d at 32 (proximate cause in a legal malpractice case is satisfied by evidence of a diminution in settlement

value).

Disputed evidence of material fact was before the trial court as to whether the acts and omissions of Mr. Coggin were the proximate cause of the damages sustained by the Feldmans. For these reasons, the Summary Judgment Order should have been altered or amended to deny Mr. Coggin's motion for summary judgment; and/or to include findings of fact and conclusions of law to support the granting of summary judgment.

D. It was error for the trial court not to alter or amend the order granting summary judgment, despite the law and disputed issues of material fact as to proximate cause.

The trial court did not rule on the Feldmans' arguments that there are disputed issues of material fact concerning proximate cause, including whether Mr. Coggin's failure to file the affidavit of service, or failure prepare the Feldmans' Underlying Lawsuit, or a combination of both proximately resulted in a diminution of the settlement value of the Feldmans' claims. Similarly, the trial court did not make any rulings on the Feldmans' argument that loss of settlement value caused by a lawyer's negligence can be recovered in a legal malpractice action. In response to Mr. Coggin's motion for summary judgment, the Feldmans put evidence in the record before the trial court creating disputed questions of material fact as to the proximate cause of the diminution in settlement value of the Feldmans' UIM claims asserted in the Underlying Lawsuit. The Feldmans also showed that such allegations were properly raised in the Verified Complaint, the expert affidavit filed with the Verified Complaint, the deposition of Mr. Coggin filed with the trial court, and the motion to amend; and that the expert affidavit complied with S. C. CODE ANN. § 15-36-100(B). The orders granting summary judgment and denying the motion to alter or amend make no findings of fact or conclusions of law regard to these disputed question of fact. The Feldmans requested that

the trial court modify and amend the order granting summary judgment to make findings of fact and conclusions of law as to these factual disputes and arguments, pursuant *Elam v. S. Carolina Dep't of Transp.*, 361 S.C. 9, 602 S.E.2d 772 (2004). Yet, still, the order denying the motion to alter or amend was silent. It was error for the trial court not to alter or amend the order granting summary judgment, despite the law and disputed issues of material fact as to proximate cause and this case should be remanded.

IV. The Trial Court Committed Procedural Error in Both Granting Summary Judgment in Favor of Mr. Coggin and Denying the Feldmans' Motion to Alter or Amend Judgment.

The trial court granted Mr. Coggin's motion for summary judgment with one sentence that indicated: "After hearing from the parties, I hereby grant the motion for Summary Judgment." (R. ____, Summary Judgment Order). The trial court denied the Feldmans' motion to alter or amend, filed pursuant to Rules 52 and 59, SCRCP, with one sentence: "After hearing from parties, I hereby deny the motion." (R. ___, Order Denying Motion to Reconsider).

Rule 52(a), SCRCP, explicitly requires that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon ..."

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon. However, the rule is directorial in nature so where a trial court substantially complies with Rule 52(a) and adequately states the basis for the result it reaches, the appellate court should not vacate the trial court's judgment for lack of an explicit or specific factual finding. We do not require a lower court to set out findings on all the myriad factual questions arising in a particular case. But the findings must be sufficient to allow this Court, sitting in its appellate capacity, to ensure the law is faithfully executed below.

Church v. McGee, 391 S.C. 334, 345–46, 705 S.E.2d 481, 487 (Ct. App. 2011) (internal citations

and quotations omitted). *See also, Bryson v. State*, 328 S.C. 236, 236, 493 S.E.2d 500 (1997) (holding that an order dismissing a post-conviction relief application without factual findings was insufficient and subjected the case to remand).

The Summary Judgment Order does not comply with Rule 52(a), SCRCP, or the clear indications of *Church* concerning what is required of its contents.

The Order Denying Motion to Reconsider does not comply with Rule 52(a), SCRCP, or the clear indications of *Church* concerning what is required of its contents.

On these bases, at the very least, this case should be remanded with direction that the trial court set out findings sufficient to allow the Court of Appeals to ensure the law is faithfully executed as to both the motion for summary judgment and the motion to alter or amend judgment.

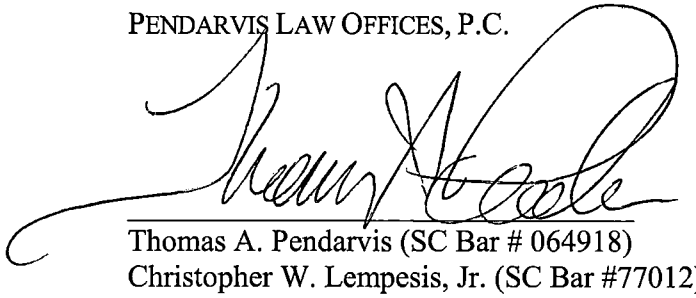
CONCLUSION

The trial court erred in granting summary judgment despite evidence that created genuine issues of material fact, including genuine issues of fact as to whether Mr. Coggin's errors proximately caused a diminution in the settlement value of the Feldmans' UIM claims; despite the Rule 56(f) affidavit stating why the Feldmans were not able to respond to the summary judgment; and despite the fact that discovery was incomplete. To grant summary judgment, the trial court ignored the record before it, including countless pleadings and arguments presented by the Feldmans and by Mr. Coggin; and despite the sworn factual allegations of the Verified Complaint and the existence of disputed causation issues concerning diminution of settlement value. South Carolina law establishes that loss of settlement value caused by a lawyer's negligence can be recovered in a legal malpractice action. In granting summary judgment in favor of Mr. Coggin and denying the Feldmans' motion to alter or amend judgment with effectively one-sentence orders, the trial court

committed procedural error. The procedural error was compounded by the trial court's errors to alter or amend the order granting summary judgment because the grant of summary judgment was based on errors and omissions in factual findings and conclusions of law. For all of the foregoing reasons, the trial court's Summary Judgment Order and the Order Denying Motion to Reconsider should be reversed.

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.



Thomas A. Pendarvis (SC Bar # 064918)
Christopher W. Lempesis, Jr. (SC Bar #77012)
710 Boundary Street, Suite 1-A
Beaufort, SC 29902
843.524.9500 Tel.
Thomas@PendarvisLaw.com
Chris@PendarvisLaw.Com

Counsel for Appellants, Robert E. Feldman and Lois J. Feldman

Beaufort, South Carolina

May 5, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-In-Equity and Special Circuit Court Judge

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Appellate Case No. 2017-000242

Robert E. Feldman and Lois J. Feldman. . . . . Appellants,

vs.

Gary P. Coggin, ... Respondent.

PROOF OF SERVICE

I, Thomas A. Pendarvis, a lawyer with PENDARVIS LAW OFFICES, P.C., certify that I have served one (1) copy of the INITIAL BRIEF OF APPELLANTS and one (1) copy of APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL on counsel for Respondent, by depositing a copy of the same in the United States Mail, postage prepaid, on the 5th day of May, 2017 addressed to:

M. Dawes Cooke, Jr., J.D.
Jeffery M. Bogdan, J.D.
BARNWELL, WHALEY, PATTERSON & HELMS, LLC
PO. Drawer H
Charleston, SC 29402
mdc@barnwell-whaley.com
Jbogdan@barnwell-whaley.com

Counsel for Respondent, Gary P. Coggin

Respectfully submitted,

PENDARVIS LAW OFFICES, P.C.

Thomas A. Pendarvis (SC Bar # 064918)
Christopher W. Lempesis, Jr. (SC Bar #77012)
710 Boundary Street, Suite 1-A
Beaufort, SC 29902
843.524.9500 Tel.
Thomas@PendarvisLaw.com
Chris@PendarvisLaw.com

Counsel for Appellants, Robert E. Feldman and Lois J. Feldman

Beaufort, South Carolina

May 5, 2017

PENDARVIS LAW OFFICES, PC

May 5, 2017

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VIA US MAIL
The Honorable Jenny A. Kitchings
Clerk, South Carolina Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Robert E. Feldman and Lois J. Feldman vs. Gary P. Coggin
Appellate Case No.: 2017-000242

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of the INITIAL BRIEF OF APPELLANTS, APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL, and PROOF OF SERVICE in regard to the above-referenced matter.

Kindly file the originals and return the clocked copies in the stamped, self-addressed return envelope enclosed for your convenience.

With kind regards, I remain

Sincerely,

PENDARVIS LAW OFFICES, P.C.

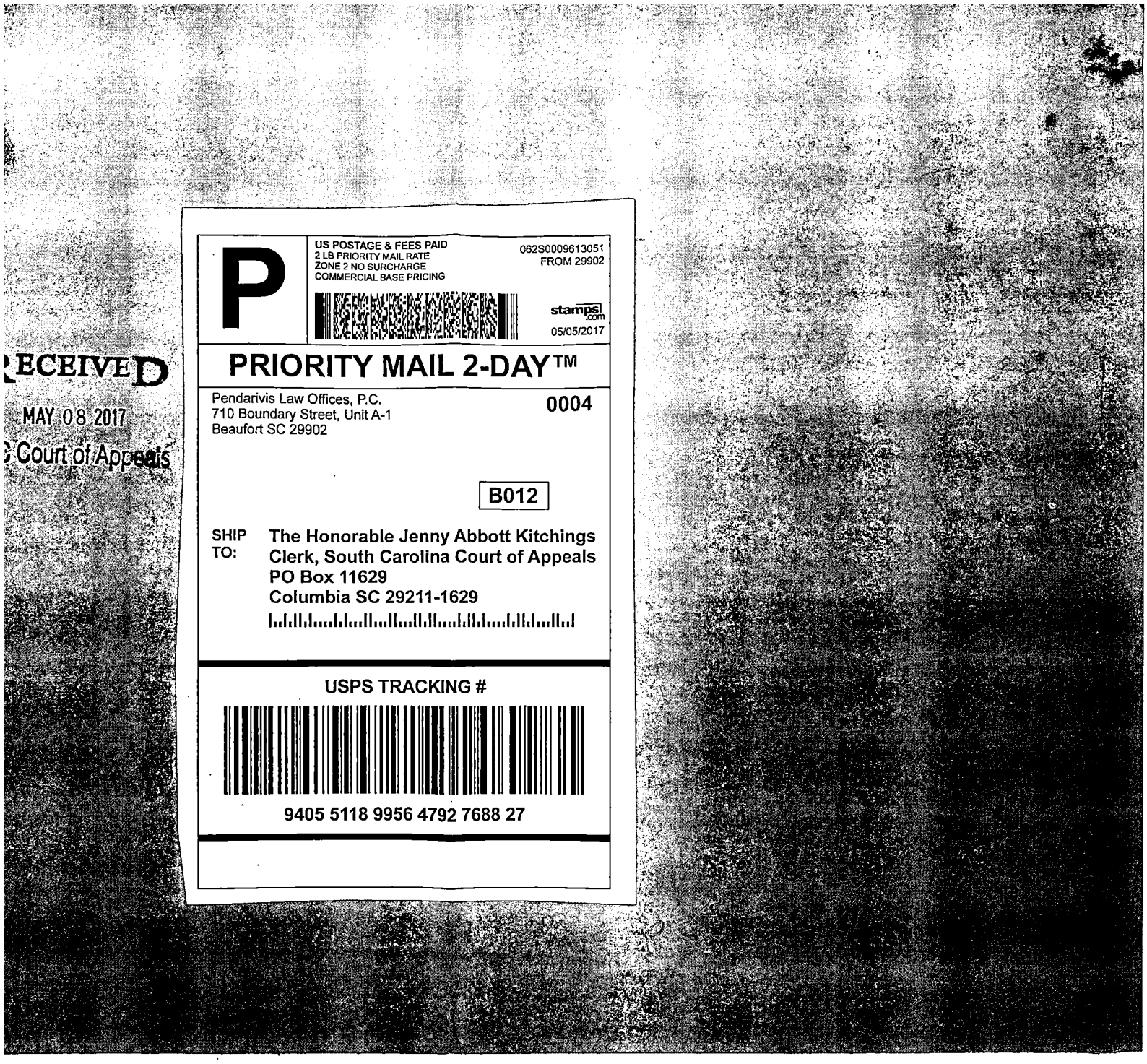
Thomas A. Pendarvis

TAP/ses
Enclosures
cc w/encls: M. Dawes Cooke, Jr., J.D.
Jeffery M. Bogdan, J.D.
ec w/encls: Mr. & Mrs. Robert E. Feldman

THOMAS A. PENDARVIS, J.D.
Admitted in SC and GA
Thomas@PendarvisLaw.com
Board Certified in Legal Malpractice
by the American Board of
Professional Liability Attorneys

710 BOUNDARY STREET, UNIT A1
BEAUFORT, SC 29902-4188
PendarvisLaw.com
843.524.9500

CHRISTOPHER W. LEMPESIS, JR.
Juris Doctor and Master of Laws
Chris@PendarvisLaw.com



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