

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

Case No. 2010-CP-28-311

Theresa BrownAppellant

Janet Butcher and the Butcher Law Firm, P.A.Respondents

FINAL APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

DID THE COURT ERR IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT?

STATEMENT OF THE CASE

A Complaint for a legal malpractice was filed on March 12, 2010. An Answer and Counterclaim was filed on April 13, 2010. A Motion for Summary Judgment was filed February 2, 2011. A hearing for Summary Judgment was held September 6, 2011. An Order granting Summary Judgment was signed November 3, 2011. Appellant's counsel received a copy of the filed Order granting Summary Judgment on November 8, 2011. Appellant served Notice of Appeal on Respondent's counsel on December 1, 2011. Appellant's counsel received the Transcript of hearing on January 18, 2012.

STATEMENT OF FACTS

Appellant Theresa Brown alleges a cause of action for legal malpractice against the Respondents. The Appellant's Complaint stems from the Respondent's representation in the handling of Appellant's divorce case.

The divorce case was scheduled for a two-day hearing on the merits in November 2006. On the first day Appellant's husband, Robert Brown, was late in appearing. At the Judge's suggestion, the parties and their attorneys negotiated in an attempt to reach a settlement. However, those negotiations were not fruitful, and on the second day the case was continued because the husband's attorney fell ill and was unable to attend.

The divorce case was re-scheduled for a final hearing on April 16, 2007. On the morning of the hearing, Appellant came to the offices of the Respondent, and helped to carry all the files and trial notebooks to the hearing. Appellant had previously met with the Respondent in preparation for the hearing. Trial notebooks prepared by the Respondent contained sections for each witness the Respondent intended to call in support of Appellant's case, including the Respondent's intended examination subjects and questions, any prior statements or affidavits provided by the witness, and the pertinent documents to be introduced through the witness' testimony. The Respondent had subpoenaed all of the witnesses needed for the hearing, approximately fifteen (15) in number. All subpoenaed witnesses were in attendance pursuant to their subpoenas.

Prior to the call of the case, the Respondent met with the Family Court Judge and Counsel for Mr. Brown in chambers for a pretrial review of the case. **According to the Appellant, the Respondent exited from the Judge's chambers looking stern and advised the Appellant that the Judge did not want to hear her case, and was not going to award the Appellant alimony. Although these assertions are disputed by the Respondent, they must be accepted as true for the purposes of considering this Motion for Summary Judgment. (Emphasis added).**

According to the Appellant, she became visibly upset and went to the ladies room of the courthouse. Over the course of the morning, she remained in the ladies room crying, with her daughter in attendance, while the Respondent left the ladies room and went to speak with opposing counsel. Appellant

recounts that the Respondent came into the ladies room on numerous occasions, and told the Appellant what the Respondent was demanding. The Appellant does not acknowledge that she agreed to the various settlement proposals, or that she had input into the settlement process. Rather, she claims that she was too upset to hear, understand or respond.

Under the terms of the settlement, the Appellant received fifty percent of her husband's state retirement pay and twenty-five percent (25%) of her husband's military retirement. The parties achieved a 50/50 division of property, and each received various automobiles and other personal property, and 50% of the equity in the marital home and furniture. The Court ordered that the house and 32.5 acres upon which it is situated be sold, and the divorce was granted on the ground of one-year separation. **Decree of Divorce (Robert Brown v. Theresa Brown). R.p. 48**

With regard to the marital home, the court allowed Mr. Brown to live in the marital home until it is sold. However, he was required to list it for sale at its fair market value. Likewise, at the time the house is sold, the furniture within the house is to be auctioned off under the divorce decree thirty (30) days after the closing on the sale, with the proceeds divided on a 50-50 basis. **Decree of Divorce (Robert Brown v. Theresa Brown). R.p. 48**

At the time of the malpractice suit was filed, the parties' home had not been sold.

In this legal malpractice action, the Appellant complains that she only entered into the settlement agreement as a result of the Respondents'

recommendation. She claims she should have received alimony. Although she was awarded one half of the marital home and furniture, she asserts that she will not receive it because her husband is still living in the home and will thwart efforts to sell it.

The Appellant complains that the Respondent was negligent and breached the standard of care by:

- a) Failure to consider the Appellant's desires for a full hearing on the merits;
- b) Informing the Appellant prior to the hearing on the merits that the judge had stated she would not award alimony;
- c) Failing to request a continuance based on her extreme emotional and distraught condition;
- d) Advising the Appellant that she was not entitled to alimony, or, in the alternative, that she would benefit from a settlement that did not include alimony;
- e) Advising or instructing the Appellant that it was in her best interests to accept a settlement which denied her the ability to receive any portion of the equity in the marital residence and an appropriate division of other marital properties;
- f) Failing to use due care.

Appellant claims she was extremely distraught and emotionally upset throughout the process, as a result of which she did not hear or understand the terms of the settlement agreement. She attributes her emotional state to the

statements the Respondent made to the effect that the court did not want to hear her case, and the court was not going to award her alimony.

ARGUMENT

THE COURT ERRED IN GRANTING RESPONDENTS' MOTION FOR SUMMARY JUDGMENT.

Appellant agrees Summary Judgment is appropriate when there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011); *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.* 386 S.C. 108, 687 S.E.2d 29 (2009), *David v. McLeod Reg'l Med.Ctr.*, 367 S.C. 242, 626 S.E.2d 1 (2006), *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (S.C.App 1998) in determining whether any follow issues of fact exist, the court must view the evidence and all reasonable and since that may be drawn from the evidence in the light most favorable to the nonmoving party.

Because summary judgment is a drastic remedy, it should be cautiously invoked to insure that a litigant is not improperly deprived of a trial. *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (2011); *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004).

A Plaintiff in a legal malpractice action must generally establish the standard of care by expert testimony. *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (S.C.App 1998). In the present case, violations of the standard of

care have been shown by the Affidavit of Susan Edwards, Esq., the deposition testimony of Susan Edwards, Esq., and the deposition testimony of Ann Stirling, Esq., the Respondent's expert witness. The specific violations of the standard of care by the Respondent are delineated herein.

In particular, the Respondent advised the Appellant to accept a settlement that did not include alimony. Also, the Appellant was too distraught to make a decision. And, a continuance should have been requested. **Affidavit of Susan Edwards, R.p. 55, Deposition of Susan Edwards (1-20-11) R.p. 112, ll. 8-24, Deposition of Theresa Brown, R.p. 154, ll. 12-25, p. 207, ll. 5-25.**

There is not a requirement of a plaintiff in a malpractice action to have an affidavit from a judge, nor to file a declaratory judgment action prior to the initiation of the malpractice action.

The Appellant submits that she submitted to the trial court more than 20 allegations of the Respondents' negligence and breach of the standard of care, based upon the Affidavits, including Appellant's expert witness, and excerpts from depositions of witnesses, including the expert witnesses from each of the parties.

The said allegations are more fully discussed herein below.

In order to prevail in a cause of action for legal malpractice, the Appellant must prove: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client damages by the breach. *Rydde v. Morris*, 381 S.C. 643, 675 S.E.2d 431

(2009), *Sims. V. Hall*, 357 S.C. 288, 592 S.E.2d 315 (S.C.App 2003), *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (S.C.App 1998) in South Carolina attorneys are required to render services with a degree of skill, care, knowledge and judgment usually possessed and exercised by members of professions. *Holy Loch Distribs. Inc. v. Hitchcock*, 340 S.C. 20, 531 S.E.2d 282 (2000). Finally, generally, a Plaintiff in a legal malpractice action must establish the standard of care expert testimony.

The Appellant is not asserting a position which is inconsistent with, or in conflict with one the Appellant has previously asserted in the same or similar related proceeding. The Appellant in this action asserts that when she entered into the courtroom and entered into an agreement during the divorce hearing, she was under coercion and undue duress caused by the Respondent. The emotional distress of the Appellant was caused by the Respondent, who stated to the Appellant that the judge did not want to hear the case, would not award the Appellant any alimony, would cause the court to order the Appellant to pay the Respondent's attorney's fees, and receive less in equitable division. **Deposition of Theresa Brown, R.p. 171, I. 22-173, I.24.** The Appellant felt threatened and coerced, as is shown in her deposition.

- A. She threatened me with if I made the judge listen to my case she would be made at me and that I would have to pay all the attorney fees including my ex's. She did everything she could to coerce me.
- Q. Did she threaten you in any other way?
- A. That's it. I mean, besides if I made the judge mad, I would get far less by going to court.
- Q. If you made the judge mad you'd far less?

A. If I went to court.

Deposition of Theresa Brown, R. p. 172, II. 8-16.

Although these assertions are disputed, they must be accepted as true for the purposes of considering the Motion for Summary Judgment.

In a similar fact situation, the South Carolina Supreme Court held that where a client alleges his former attorney was negligent in advising him to accept a settlement, that alleged negligence is not a ground for attacking the settlement itself, but rather is a matter left for a malpractice suit between the client and his attorney. To hold otherwise would be to absolve the client of the duty to mitigate damages, and to require her to forego whatever benefit she is entitled to under the settlement in order to maintain a suit against her attorney. *Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 488 S.E.2d 334 (1997), *Shelton v. Bressant*, 312 S.C. 183, 439 S.E.2d 833 (1993).

The Appellant has clearly and repeatedly represented the above stated factual situation in sworn deposition testimony, which is cited herein, and in her affidavit.

The Appellant admits that she represented to the Family Court in the settlement hearing that she understood the agreement and that she was not forced, pressured, coerced or made to enter into it. The Appellant has shown that she was coerced, and under undue duress, by the Respondent to enter into the agreement. **Deposition of Theresa Brown, R.p. 207, I. 7-p. 213, I. 11.**

Further, the Respondents' expert witness, Ann Stirling, could not tell which of the statements would be true--the statement concerning the agreement, which was made in open court, or, the statements, which the Appellant has consistently made since the court hearing, indicating that the Appellant was coerced and under duress at the time of the court hearing. **Deposition of Ann Stirling, R.p. 230, ll. 10-19, Deposition of Theresa Brown, R.p. 172, l.1-p. 174, l. 24, p. 212, l. 7-p. 213, l. 11.**

The Appellant submits that the common sense approach should be used. If the Appellant was too emotional, under undue duress, and felt coerced to agree to the terms of the recited agreement and to answer the court's questions appropriately, that her statements at that time would not be binding upon her in a case against the Respondent.

The South Carolina Supreme Court has held that where a client alleges his former attorney was negligent in advising him to accept a settlement, that alleged negligence is not a ground for attacking the settlement itself but rather is a matter left for a malpractice suit between the client and his attorney. *Crowley v. Harvey & Battey, P.A.*, 327 S.C. 68, 488 S.E.2d 334 (1997), *Shelton v. Bressant*, 312 S.C. 162, 337 S.E.2d 209 (1985).

The Appellant's action against the Respondent in this case did not involve the same parties as the divorce case. The Appellant and her ex-husband, Robert Brown, were the parties in the divorce action. The Appellant had retained the Respondent in this case to represent the Appellant in this case and the prior

divorce action. The Appellant had retained the Respondent as a professional.

Deposition of Theresa Brown, R.p. 207, II.16-25, p. 211, I. 25-p. 212, I. 17.

The Respondent was to represent the Appellant and to appropriately advise the Appellant throughout the process. The alleged coercion and undue influence of the Respondent toward the Appellant was not intimately intertwined with the divorce action.

If the court agrees with the Respondent that the Appellant should be barred from bringing an action against the Respondent because the actions are intimately intertwined, then a Plaintiff would never be able to bring an action for legal malpractice against their attorney. The Respondent has not cited any statutory or case law, which eliminates legal malpractice actions.

The Appellant did not receive any extra benefit from the settlement in the divorce action. The Appellant was already receiving a portion of the husband disability and retirement pensions. The husband obtained a divorce on the grounds of separation for more than a year, instead of a divorce on the grounds of adultery or physical cruelty. The Appellant had rejected an agreement, with less restrictions and greater benefits, prior to the April 4 hearing.

It must be noted that the Appellant's ex-husband, Robert Brown, has had possession of the real property and the parties' personal properties since the parties separated in August 2005. Even though Mr. Brown, at a temporary hearing, was ordered to list and sell the real property, the property has not been sold.

The Respondent was aware of Mr. Brown's contentiousness and lack of cooperation at the time of the divorce hearing. **Deposition of Susan Edwards (1-20-11), R.p. 125, II. 1-3.** The Respondent was aware that Mr. Brown would never enter into a fair agreement with Mrs. Brown, the Appellant herein.

Deposition of Janet Butcher, R.p. 224, I. 17-p. 225, I. 3.

The Appellant has made certain assertions, which may appear to be inconsistent with her statements at the divorce hearing. However the statements and assertions made in this action are not an intentional effort to mislead the court. As stated herein above, the assertions made in this action are deemed to be true for the purpose of considering the motion for summary judgment.

The Respondent has asserted that the Appellant did not suffer any duress because she had a reasonable alternative to succumbing and failed to avail herself of the alternative. The Respondent is indicating that Appellant could have tried the case (without the Respondent). The Appellant had retained the Respondent to represent her in the divorce action. The Appellant and (the Appellant assumes) the Respondent were ready to proceed with a trial in April 2007. The Respondent had indicated to the Appellant that the parties in the divorce action, Mr. and Mrs. Brown, would not be able to reach a settlement after the failed negotiations in November 2006, and that a trial would have to be held. **Deposition of Theresa Brown, R.p. 170, II. 4-7, Deposition of Janet Butcher, R.p. 224, I. 17-p. 225, I. 13.**

It was obvious to the Appellant on April 16, 2007 that the Respondent would not provide appropriate representation for the Appellant, if the divorce case went to trial. As indicated herein above, the Respondent had told to the Appellant that the judge did not want to hear her case, would not order the Appellant to receive any alimony, would hold it against the Appellant, if the Appellant proceeded with the trial and would grant the Appellant less in property division and would order the Appellant to pay her ex-husband's attorney fees. The Respondent stated to the Appellant that we are going to settle the (divorce) case. The Appellant was not given an alternative to settling the case--trying the case or postponing the case until the agreement could be placed in written form or to allow the Appellant to regain her emotional composure and train of thought. **Affidavit of Theresa Brown, R.p. 59, Deposition of Theresa Brown, R.p. 167, I. 8-p. 168, I. 2, p. 168, II. 15-24, p. 171, I. 2-p. 172, I. 24, p. 174, II. 11-18, p. 180, II. 2-24, p. 188, II. 7-17.**

Even though the Appellant requested the Respondent to fight for her (Appellant), the Respondent did not respond, other than to walk away. **Deposition of Theresa Brown, R.p. 167, I. 8-p. 170, I. 7. P. 178, I. 10-18** The Defendant told the Plaintiff that these items/provisions were going to be ordered (even if they were not fair to the Plaintiff). **Deposition of Theresa Brown, R.p. 178, II. 10-18.**

The Respondent was aware of the Appellant's emotional state. The Respondent did not do anything to assuage the Appellant's emotional state. The Respondent only made the Appellant's condition worsen by making statements

and demands to the Appellant and did not offer any explanation as to how the proceedings would proceed, except that the judge did not want to hear the trial.

See S.C. Rules of Professional Responsibility, Rule 1.4.

The Respondent's expert witness and the Appellant's expert witness agree that a client should be the individual to make the decision to settle a case. **Deposition of Ann Stirling, R.p. 229, II. 15-17, Deposition of Susan Edwards (2-28-11), R.p. 142, II. 2-5. Also, see S.C. Rules of Professional Responsibility, Rule 1.4.**

A client should be an appropriate state of mind to enter into an agreement. The client should not be under undue duress, should not be coerced, not too emotional to enter into an agreement. **Affidavit of Susan Edwards, R.p. 55, Deposition of Susan Edwards (1-20-11), R.p. 112, II. 13-20 126, II. 5- 8, p. 127, II.7-23, p. 128, II. 6-19, p. 129, I. 15-p. 130, I. 21, Deposition of Theresa Brown, R.p. 154, II. 12-20, p. 169, 10-p. 170, I. 7, p. 175, I. 13-p. 177, I. 25, p. 180, I. 2-p. 181, I. 13,p. 212, II. 4-24, p. 214, II. 2-24, p. 218, II. 1-4, Also see S.C. Rules of Professional Responsibility, Rule 1.14.**

In the courtroom the Appellant heard bits and pieces. The Appellant was bawling, sobbing, or crying the entire time and not able to comprehend everything that was said. **Deposition of Theresa Brown,R. p. 175, I. 13-p. 176, 9, p. 176, II. 18-23.**

The Appellant submits that the Respondent knew that the Appellant was emotionally unable to understand and emotionally unable to go into the courtroom. The Respondent denied this knowledge, however when questioned:

Q. Did you discuss the terms of any prospective agreement with Crystal?

A. I think I did with both girls, especially when Theresa was getting ready to settle. And I said, "I think your mother wants to settle the case." I said, "Do you think she's in any—that she's capable of settling this case? Do you think that she knows what she is doing?"

Deposition of Janet Butcher, R.p 226, ll. 2-9.

It should be noted, the Respondent did not receive any response to her questions to the daughters about the Appellant's mental/emotional condition.

Further, it should be noted, the Defendant did not explain the "settlement" terms to the daughters. (No alimony, no attorney's fees, husband gets property until it is sold and he controls, if it will ever be sold, no divorce on the grounds of husband's adultery.)

Based upon the statutory 13 factors, the Appellant was entitled to receive alimony from her ex-husband. Included in the 13 factors would be the approximate \$3000 difference in incomes of the parties favoring the husband.

Affidavit of Susan Edwards. R.p. 55. Although the ex-husband was receiving a payment for partial disability, he was working full-time. **Affidavit of Theresa Brown. R.p. 59**The remaining statutory factors would be in favor of the Appellant receiving alimony.

The actual amount of Appellant's damages from the lack of alimony can only be determined by a trial on the merits.

The Respondent did not advise that the Appellant probably would not be awarded alimony. The Respondent stated to the Appellant that the judge would not award the Appellant any alimony. (emphasis added)
Deposition of Theresa Brown, R.p. 155, l. 8-p. 101, l. 9, p. 156, 22-p. 167, l. 15, p. 173, ll. 13-23, p. 174, ll. 12-18, p. 188, ll. 7-17, p. 207, ll. 7-9, p. 214, ll. 3-16. To make such a statement to the Appellant, and without advising the Appellant that the judge could change her mind after hearing testimony and receiving evidence, is malpractice and a violation of the Rules of Professional Conduct.

The Court of Appeals held in *Sims v. Hall*, 357 S.C. 288, 592 S.E.2d 315 (S.C.App. 2003) that it was professionally negligent in failing to inform and advise the client of her rights.

The Appellant agrees that if Mr. Brown had proved the Appellant had committed adultery, the Appellant would not be entitled to receive alimony from Mr. Brown. The testimony of Mr. Brown and a corroborating witness, Mr. Christiansen, given by deposition and affidavit were not credible, according to the Respondent. **Deposition of Janet Butcher, R.p. 220, l. 14-p. 221, l. 4.**

If the witnesses alleging adultery on the part of the Appellant were not believed by the trial judge, there would not be an absolute bar of alimony to the Appellant. Considering this factor in a light most favorable to the Appellant, the

Appellant and Respondent should have tried the case. They had nothing to lose by doing so.

The Appellant, at the prior scheduled hearing in November 2006 and at the scheduled trial in April 2007, had witnesses to prove that she had not committed adultery, as Mr. Brown had alleged. **Deposition of Theresa Brown, R.p. 158, ll. 1-5, p. 159, l. 3-p. 160, l. 1.**

Our appellate courts have held that the failure to call witnesses, other than the party, may be an element of malpractice and would be evidence of the deviation from the standard of care. *Hatfield v. Van Epps*, 358 S.C. 185, 594 S.E.2d 526 (S.C.App 2004), *Yarborough v. Rogers*, 306 S.C. 260, 411 S.E.2d 424 (1991).

Per the terms of the divorce decree Mr. Brown was given the use and possession of the real property until it was sold. Further, Mr. Brown was given the right of first refusal in purchasing the real property. Even after Mr. Brown was held in contempt, he has refused to cooperate and has been contentious in his dealings with the Appellant. He has listed the property for sale at exorbitant sales prices. Therefore, insuring that the property will not sell. **Decree of Divorce. R.P. 48, Deposition of Susan Edwards (1-20-11), R.p. 135, 1-p. 136, l. 25, Deposition of Theresa Brown, R.p. 164, ll. 3-14, p. 198, ll. 14-17, p. 199, ll. 3-21, p. 209, ll. 11-22.** The divorce action was filed in August 2005. It has been more than six years since the commencement of the action and real property has not been sold. Further, the Appellant has been without her share of the personal

properties of the marriage, which have been depreciated, damaged, are destroyed. **Deposition of Theresa Brown, R. p. 202, I. 2-p. 203, I. 25.** Mr. Brown continues to sabotage any sale. **Deposition of Theresa Brown, R. p. 200, II. 1-20.**

The Appellant will never receive her share of the real properties and personal properties. **Deposition of Theresa Brown, R. p. 209, II. 11-19, Affidavit of Susan Edwards, R.p. 55, Deposition of Susan Edwards(1-20-11), R.p. 133, I. 1-p. 134, I. 9.**

The actual amount of Appellant's damages for her interest in the real and personal properties can only be determined by a trial in this matter.

Rule 1.2 of the Rules for Professional Conduct states in part:

- (a) subject to paragraphs (c) and (d), a lawyer shall abide by a client in decisions concerning the objectives of representation and, as required Rule 1.4, shall consult with the client has to be named always they are to be pursued... A lawyer shall abide by a client's decision whether to make or accept an offer of settlement of a matter.

In the present case, the Appellant desired to go forward with a trial in the divorce case. The Appellant requested the Respondent to "fight for" her.

Deposition of Theresa Brown, R.p. 169, I. 10-p. 170, I. 7. The Respondent ignored the Appellant's instructions and "walked away". **Deposition of Theresa Brown, Deposition R.p. 167, I. 8-p. 168, I. 2. p. 178, I. 10-18.**

Comment 1 of the aforementioned Rule states in part:

Paragraph (a) recognizes that the client has the ultimate authority to determine the purposes the serve legal representation, within the limits imposed by law and the longest professional obligations.

Rule 1.3 of the Rules for Professional Conduct states:

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment 1 of the aforementioned Rule states in part:

- (1) A lawyer should pursue a matter on behalf of a client despite opposition, structure and personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. The lawyer must also act with commitment and dedication to the interest of the client and with zeal in advocacy upon the client's behalf...

Rule 1.4 of the Rules for Professional Conduct states in part:

- a) A lawyer shall
 - (1) promptly inform the client of any decision or circumstance with respect to which the clients informed consent...is required by these Rules;
 - (2) reasonably consult with the client about the means by which client's objectives are to be accomplished;
 - (4) promptly comply with reasonable requests for information; ...
- (b) A lawyer shall explain matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment 5 of the aforementioned Rule states in part:

The client should have sufficient information to participate intelligently in decisions concerning the objectives of representation and the means by which they are being pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement... The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the

duty to act in the client's best interests, and the client's over all requirements as to the character of representation...

The Appellant desired for the Respondent to fight for the Appellant.

Further, the Respondent had assured the Appellant after the failed attempt to negotiate in November 2006 that there would have to be a trial for the Appellant to get a reasonable settlement from Mr. Brown. The Respondent knew what the Appellant wanted from the divorce trial and that Mr. and Mrs. Brown would not be able to settle the case. In particular the Respondent stated in her deposition:

Q. Did you ever tell Theresa that you would not ever be able to settle this case?

A. After the work we did in November, and the case was continued, and we negotiated, I think I told Theresa I didn't see how it was going to settle. We were fully prepared for trial the next time we went court.

Q. And in November, you were prepared, in then in April, you were prepared. What were you going to be asking for on behalf of Theresa?

A. I had a very long list I was working from, and it was--we were there for--we were fighting for everything.

Q. Equitable division?

A. Of everything.

Q. Yes.

A. There were lot of details involved--

Q. including--

A. --alimony.

Q. I'm sorry, I didn't mean to interrupt you.

A. Alimony, the divorce on adultery, attorney's fees--all of that. We went in for everything. We had testimony ready for everything.

Deposition of Janet Butcher, R.p. 224, l. 17-p. 225, l. 13.

The Honorable G. Thomas Cooper, Jr. is correct in his ruling that the Appellant did not make a claim of a conflict of interest in her Complaint. However, the conflict of interest or potential conflict of interest is not only an element of negligence, it is a possible reason that the Respondent violated the standard of care by other means, i.e. failure to properly advise the Appellant, coercion of the Appellant, failure to request a continuance of the divorce hearing, failure to follow Appellant's instructions, failure to try the divorce case, etc.

Rule 1.7 of the Rules for Professional Conduct states in part:

(a) except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest...

Comment 10 of the aforementioned Rule states in part:

The lawyer's own interests should not be permitted to have an adverse that representation of the client... Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client...

In the present case, the Respondent was acting as co-counsel with Mr. Speedy in the representation of the Respondent's son. Mr. Speedy was representing Mr. Brown in the divorce case against the Appellant herein.

Deposition of Janet Butcher, R.p. 222, l. 8-p. 223, l. 20.

According to the Appellant the Respondent had not informed the Appellant of the conflict of interest or potential conflict of interest. Therefore, the Respondent had not received written confirmation that the Appellant had no

objections to the Respondent proceeding with the Appellant's representation. In her deposition, the Respondent made conflicting statements as to whether she told the Appellant of Mr. Speedy was co-representing (with the Respondent), the Respondent's son. **Affidavit of Theresa Brown, Deposition of Janet Butcher, R.p. 222, l. 8-p. 223, l. 20**

According to the Respondent, the Respondent had informed the Appellant of the conflicts of interest or potential conflicts of interest. **Deposition of Janet Butcher, R.p. 222, l. 1-p. 223, l. 20.**

Since the Appellant and Respondent have different versions of the facts, a trial in this matter should be held.

The failure to comply with a Rule of Professional Conduct is a circumstance that, along with other facts and circumstances (enumerated herein), may be considered in determining whether the Respondent acted with reasonable care in fulfilling her legal duties to the Appellant. *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (S.C.App 1998).

Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client, the functions being performed the lawyer, the likelihood actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (S.C.App 1998).

There was no written documentation showing that Appellant was informed of the conflict of interest or potential conflict of interest of the Respondent.

The Appellant submits that there is a factual dispute between the parties herein which should be determined at trial.

A lawyer should always be honest with a client. A lawyer should inform a client of conflicts of interest, potential conflicts of interest, and the appearance of a conflict of interest. **Deposition of Susan Edwards (2-28-11), R.p. 142, I. 19-p. 143. I. 2.**

The Respondent did not inform the Appellant that George Speedy was representing (or co-representing with the Respondent) the Respondent's son. It was only after the divorce hearing that the Appellant learned of the conflict of interest on the part of the Respondent. **Affidavit of Theresa Brown. R.p. 59.**

Concerning the references and citations to the Rules of Professional Conduct, the South Carolina Supreme Court has held that, although the Rules of Professional Conduct do not, in themselves, create a cause of action or establish evidence of negligence *per se*, they are relevant in assessing the legal duty of an attorney in a malpractice action. In order to relate to the standard of care in a particular case, ... a Bar rule must be intended to protect the person in the plaintiff's position or be addressed to the particular harm, it is the breach of a duty, not the breach of a rule, that is of determinative import. *Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920 (S.C. 2011), *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (1996).

Even in the absence of unethical conduct, the Respondent should have fulfilled her fiduciary duties to the Appellant and exercised due care. When the

Respondent failed to act appropriately within the standard of care, the Appellant's sole recourse was to bring the current law suit. *Smith v. Hastie*, 307 S.C. 414, 626 S.E.2d 13 (S.C.App 2005).

Further, as to the damages of the Appellant, which were caused by the Respondent, the courts have long held lawyers liable in tort for malpractice. Also, the law in South Carolina has been recognized tort actions when the damages are purely economic. *Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc.*, 320 S.C. 49, 463 S.E.2d 85 (1995).

Our appellate courts have held that a client should be informed of conflicts of interest and potential conflicts of interest. The Supreme Court held in *Smith v. Hastie*, 367 S.C. 410, 626 S.E.2d 13 (S.C.App 2005), in an action for negligence and there was a question of a potential conflict of interest, that the Plaintiff presented adequate evidence on the merits of her claim. Appellant was not informed of the conflict of interest. **Affidavit of Theresa Brown. R.p. 59.**

Since credibility of a witness is always an issue, the Appellant must present the last argument. The Appellant is loathe to bring forth the following information; however, the Appellant is compelled to do so. The Respondent at the time of and during her deposition made false statements. During a break near the end of the deposition the Respondent stated to the court reporter that the marital home had not been sold and that Mr. Brown was currently residing in it. When the deposition resumed shortly after the break, the Respondent was asked if the property had been sold? She responded that he did not know. She was

also asked, if Mr. Brown still resided in the home? She responded that she did not know. The Respondent was then questioned as to whether she had made a statement earlier in the day that Mr. Brown was living house? She responded that she did not remember. **Affidavit of Bernice Powell, R.p. 67, Deposition of Respondent, Janet Butcher, R.p. 227, Il. 1-23.**

CONCLUSION

The Appellant submits that there are disputed issues of fact regarding the negligence of the Respondent, the Respondent's breach of the standard of care, the Respondent's breach of her fiduciary duties, and the amount of damages, which the Appellant has suffered and will continue to suffer. By taking the facts and evidence in a favorable light to the Appellant, the case should be reversed and remanded to the trial court for trial.

Respectfully submitted.



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October 25, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

G. Thomas Cooper, Circuit Court Judge

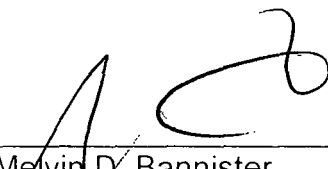
Case No. 2010-DR-28-311

Theresa BrownAppellant

Janet Butcher and the Butcher Law Firm, P.A.Respondents

CERTIFICATE OF COUNSEL

I hereby certify that the Appellant's Final Brief complies with SCACR Rule 211(b).



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October 26, 2012

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM KERSHAW COUNTY
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Submittal Appeals

Theresa BrownAppellant

Janet Butcher and the Butcher Law Firm, P.A.Respondent

Certificate of Service

I certify that I have served three (3) copies of the Final Appellant's Brief on William L. Howard, Sr. and Russell G. Hines, by regular mail, on November 15, 2012.

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