THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Jr., Circuit Court Judge

Case No. 2016-000432

Linda A. Gibson, individually and in capacity as Trustee of the PAUL WILLIAM GIBSON FAMILY TRUST; HERITAGE SEVEN, LLC; SEVEN OAKS APARTMENTS, LLC; and 3205 PALM BOULEVARD, LLC, ... Appellants,

v.

ANDREW K. EPTING, JR., LLC; Andrew K. Epting, Jr.; GEORGE J. KEFALOS, P.A.; George J. Kefalos; GEDNEY M. HOWE, III, P.A.; Gedney M. Howe, III; JOHN S. WEST, ATTORNEY-AT-LAW, LLC; and John S. West, ... Respondents.

BRIEF OF APPELLANTS

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STATEMENT OF THE ISSUES ON APPEAL

I. Did the circuit court err in granting summary judgment in favor of the Lawyers when there was evidence in the record that the Lawyers–in breach of the professional and fiduciary duties– withheld from their Client information about the inchoate nature of the deficiency claim forming the basis of the Lawyers' $566,666 fee calculation?

II. Did the circuit court err in granting summary judgment in favor of the Lawyers when there was evidence showing that the Lawyers' $566,666 reverse contingent fee was excessive and unreasonable based on the lack of any true foreclosure deficiency "saved" where thirty days after filing the foreclosure lawsuit the lender sold the Client's note to a friendly creditor that wanted the property and had agreed to waive the deficiency claim before November fee document with a reverse contingency provision was signed?

III. Did the circuit court err in granting summary judgment in favor of the Lawyers when there was evidence showing an ambiguity in the fee documents drafted by the Lawyers raising disputed questions of material fact whether the fee documents obligated the Client to pay both a reverse contingency fee and straight contingent fee?

IV. When viewed in the Client's favor, did the evidence before the circuit court raise disputed questions of material fact supporting each of the claims alleged in the Client's pleadings?

V. Did the circuit court err in denying the Client's motion for summary judgment on the basis that as a matter of law and undisputed fact the Lawyers' $566,666 reverse contingent fee was excessive and unreasonable?

STATEMENT OF THE CASE

This is an appeal from an order entering summary judgment against Appellants, Linda A. Gibson ("Ms. Gibson), individually and in her capacity as Trustee of the PAUL WILLIAM GIBSON FAMILY TRUST; HERITAGE SEVEN, LLC; SEVEN OAKS APARTMENTS, LLC; and 3205 PALM BOULEVARD, LLC (collectively "the Client") in favor of Respondents, ANDREW K. EPTING, Jr., LLC; Andrew K. Epting, Jr.; GEORGE J. KEFALOS, P.A.; George J. Kefalos; GEDNEY M. HOWE, III, P.A.; Gedney M. Howe, III; JOHN S. WEST, ATTORNEY-AT-LAW, LLC; and John S. West (collectively "the Lawyers") on causes of

action for, among other things, breach of fiduciary duty, legal malpractice, aiding and abetting breach of fiduciary duty, negligent misrepresentation, and unjust enrichment.

On July 30, 2013, the Client filed a lawsuit against the Lawyers alleging, among other things, that the Lawyers' claim for a $566,666 reverse contingent fee was grossly excessive for the limited legal services the Lawyers provided in a foreclosure lawsuit and the deed-in-lieu transaction under the facts of this case. (Compl., R. 5).[1] On January 14, 2014, the Client amended her complaint to withdraw the fraud count. (Amend. Compl., R. 109). On August 14, 2015, the Client amended her complaint again (second amended complaint) adding causes of action for money had and received, cancellation of mortgage, rescission of the fee agreement and implied equity indemnity to the already existing causes of action. (Second Amend. Compl., R. 145).

The Lawyers answered the complaints denying the allegations and asserting affirmative defenses. (Ans., R. 181, 208, and 234). The parties exchanged thousands of pages of discovery and concluded fourteen depositions and twenty mediation hours.

On July 31, 2015, the parties filed cross-dispositive motions for summary judgment. (Apps. Motion for Summary Judgment, R. 582; Resps. Motion for Summary Judgment, R. 297 and 299). On October 20, 2015, the circuit court heard oral argument on the motions. (Trans., R. 266).

On January 5, 2016, the Honorable R. Markley Dennis, Jr., entered judgment for the Lawyers on all causes of action. (Ord. Form 4, R. 1). The Form 4 Order stated, "Defendant's Motion for Summary Judgment, filed on 7/31/2015, is GRANTED for the reasons stated in the Defendants' Memorandum in Support–based on the entire record before the court (pleadings, affidavits, memoranda, and papers)."

On January 15, 2016, the Client timely filed a motion pursuant to Rule 59(e), SCRCP, for reconsideration. (Motion to alter or amend, R. 728). On February 5, 2015, the Circuit Court denied the Client's Rule 59(e) motion without oral argument. (Ord., R. 2).

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[1] Ms. Gibson filed her first Complaint July 30, 2013 (R. 5); filed an amended complaint (mismarked "second amended complaint") on January 13, 2014 (R. 109); and, following discovery, filed a second amended complaint (correctly marked) on October 22, 2015 (R. 145).

On February 29, 2016, the Client timely filed and served the Lawyers the notice of appeal. On March 23, 2016, the South Carolina Court of Appeals granted the Client's first request for extension to file their initial brief until April 27, 2016. (Ord.).

STATEMENT OF FACTS

This case arises out of a $566,666 reverse contingent fee dispute. (Compl., R. 5) The Lawyers claim they "saved" the Client a $1.7 million mortgage deficiency, the basis of their $566,666.00 fee. (Epting Dep. 145:1-11, R. 479). The Client claims that when Galt Valley forgave the mortgage deficiency the deficiency claim became inchoate, and later as the result of its own business practices only, the deficiency was forgiven in exchange for a deed-in-lieu of foreclosure. (Gibson Dep. 199:15-16, R. 674).

A. Linda Gibson.

Linda Gibson is a 66 year old widow. Her husband of twenty-seven years died in 2003. She is a high school graduate, and she took some college courses. Ms. Gibson's parents worked very hard with physical labor all their life, and the result of their hard work is that they were able to buy some real estate, back then worth pretty much nothing. (Gibson Aff. ¶ 2, R. 813). She inherited this real estate from her parents, which is their legacy to their family. (Gibson Aff. ¶ 2, R. 813). Today, the land is more valuable. Other than the land holdings, Ms. Gibson lives on a fixed income from a land lease and a commercial lease. Appellants, THE PAUL WILLIAM THE CLIENT FAMILY TRUST, SEVEN OAKS APARTMENTS, LLC, and 3205 PALM BOULEVARD, LLC, (collectively "Gibson Entities"), are non-income producing (shell) entities without assets. HERITAGE SEVEN, LLC, formerly held property related to the underlying Ameris action.

Ms. Gibson trusted her lawyers testifying

> *... and I did probably everything they asked me to do, I did. Every suggestion. And if they told me to sign something, I signed it, and I didn't really question – I left a lot of things to their judgment because I felt like they knew what they were doing as lawyers in a lawsuit where I didn't. So if they told me to sign something, I signed it.*

(Gibson Dep. 171:8-20, R. 671).

B. The April Fee Agreement.

In late 2009, Ms. Gibson was in default on a $3 million note and mortgage ("Note") with Ameris Bank ("Ameris"). Ms. Gibson anticipated Ameris would foreclose on her Note and seek a deficiency against her as personal guarantor on the Note. (Ameris Complaint, R. 346). Ms. Gibson met with Attorney Rob Papa to discuss bankruptcy. (Gibson Aff. dated Oct. 15, 2015, at ¶ 3, R. 813). Ms. Gibson signed a fee agreement with Mr. Papa on November 6, 2009. (Papa Dep. 13:1-25, R. 437). Mr. Papa advised Ms. Gibson that she was not a bankruptcy candidate and he referred her to Mr. Epting and Mr. Kefalos to represent her in the anticipated Ameris foreclosure. (Gibson Aff. dated Oct. 15, 2015, at ¶ 3, R. 813).

When Ms. Gibson first met Mr. Epting and Mr. Kefalos, Mr. Papa accompanied her to Mr. Epting's Charleston office. (Gibson Aff. dated Oct. 15, 2015 at ¶ 3, R. 813). Leaving that initial meeting, Ms. Gibson fell ill and was hospitalized for appendicitis. Unbeknownst to Ms. Gibson, during her hospital stay and following, Mr. Epting and Mr. Kefalos conceived of a reverse contingent fee arrangement for their representation in the anticipated foreclosure action. Under the reverse contingent fee arrangement, Mr. Epting's and Mr. Kefalos' fee would be based on thirty-three (33%) of any "savings" on her Ameris Note. (Epting to Papa email, dated Feb. 4, 2010, R. 593). On February 4, 2010, Mr. Epting emailed Mr. Papa the terms of his proposed reverse contingent fee idea. (Epting to Papa email, dated Feb. 4, 2010, R. 593).

The record does not show Mr. Papa having acknowledged or responded to the February 4th email. (Epting to Papa email, dated Feb. 4, 2010, R. 593). Mr. Epting did not copy Ms. Gibson on the February 4th email. (Epting to Papa, February 4, 2010 email, R. 593). Ms. Gibson never received the February 4th email until discovery in this fee dispute action. (Gibson Aff. dated Oct. 15, 2015 at ¶ 8, R. 815).

On April 26, 2010, Ms. Gibson signed a contingent fee document ("April Agreement") at Mr. Epting's office. (April 7, 2010 fee agreement, R. 594). The April Agreement is the first fee document that the Client signed with Mr. Epting. (April 7, 2010 fee agreement, R. 594). The April Agreement states "George [Kefalos] and I will handle the existing case against Re/Max, Rolando, Moore & Ameris on a contingency, as set forth in our agreement of February 4, 2010." (April 7, 2010 fee agreement, R. 594).

Ms. Gibson testified Mr. Epting did not show her the February 4th email at execution of the April Agreement. (Gibson Aff. dated Oct. 15, 2015 at ¶ 8, R. 815). Mr. Epting testified "*[Ms. Gibson] and I never had a discussion about whether she saw this [February 4th] email.*" (Epting Dep. 52:9-13, R. 462). Mr. Epting testified also *"I do not recall if I gave her a copy of the February 4th email.*" (Epting Dep. 57:5-11, R. 463).

Mr. Epting and Mr. Kefalos claim they relied on Mr. Papa to explain their February 4th email to Ms. Gibson. Mr. Kefalos testified, "*like say you represent Alcoa Aluminum [] you've [Papa] made the arrangement on behalf of Alcoa...*" (Kefalos Dep. 27:10-28:20, R. 682; Epting Dep. 35:1-7, R. 460; 43:1-5, R. 653). Ms. Gibson testified, "*[w]ell, I did not hire Rob Papa to negotiate any kind of deal with other lawyers. I did not hire him to do that.*" (Gibson Dep.156:15-18; 157:1-25, R. 668-69).

The April Agreement does not contain any requirement that Ms. Gibson grant to her Lawyers mortgages on her property to secure the Lawyer's fee arrangement. (April 7, 2010 fee agreement, R. 594).

On June 15, 2010, Ameris filed the anticipated foreclosure action against the Client. (Ameris Complaint, R. 346). Ameris' foreclosure action sought to foreclose Ms. Gibson's $3 million Note and mortgage, and collect any deficiency remaining after the sale of the mortgage premises. (Ameris Complaint, R. 346). A month after filing the foreclosure action, Ameris sold Ms. Gibson's Note to GALT VALLEY, LLC ("Galt Valley"). (McVey letter to Epting, dated Aug. 12, 2010, R. 363).

C. GALT VALLEY, LLC.

Galt Valley is in the business of acquiring and rehabilitating distressed real estate assets. (Danhour Aff. ¶2, dated Aug. 21, 2015, R. 713). On July 14, 2010, Galt Valley purchased a portfolio of non-performing notes from Ameris Bank, including the Client's Note. (Danhour Aff. ¶ 3, R. 713). Galt Valley purchased Ameris' non-performing notes to get fee simple ownership of the underlying property, rehabilitate the property and sell it for a profit. (Danhour Aff. ¶ 5, R. 713). Galt Valley expedites getting ownership of the property from the debtor-borrowers by offering a friendly foreclosure by deed-in-lieu, even sometimes by offering "cash [to borrowers] for keys" as an inducement to expedite the deed-in-lieu transaction. (Danhour Dep. 22:1-23:25, R. 644).

Galt Valley does not seek to collect the deficiency against debtor-borrowers of its asset purchases. (Danhour Aff. ¶8, R. 714). Galt Valley did not seek a deficiency from any of the Ameris debtor-borrowers, or any guarantor, including Ms. Gibson. (Danhour Dep. 26:1-15, R. 645). Galt Valley desired a friendly deed-in-lieu of foreclosure and forgiveness of debt from each of the Ameris debtor-borrowers. (Danhour Aff. ¶8, R. 714). Galt Valley's ordinary and usual practice is simply to seek a settlement conference with the distressed borrower to "break down the barriers – the barriers that are put up through litigation and try to reach something amicably." (Danhour Dep. 25:1-25, R. 645).

In August 2010, Galt Valley was not seeking a deficiency judgment against the Client. Mr. Danhour testified, "*...[n]o, that's not our [Galt] general business practice. Our – we would have been the most happy with the next day executing a deed in lieu of foreclosure and being able to get fee simple control of the real estate.*" (Danhour Dep. 30:1-20, R. 646). Galt Valley did not expressly tell Mr. Epting that Galt Valley would accept a deed-in-lieu for debt, Mr. Danhour of Galt Valley testified, "*I just don't think that's how you do it.*" (Danhour Dep. 202:1-25, R. 577).

On August 12, 2010, Galt Valley solicited Mr. Epting proposed the parties "work out a solution." (McVey letter to Epting, dated Aug. 12, 2010, R. 363). The Lawyers did not ask Galt Valley if they would accept a deed-in-lieu of foreclosure. (Kefalos letter to West, Sept. 23, 2010, R. 780). On October 18, 2010, Galt Valley solicited Mr. Epting again for "you and your client [the Client] for a proposal to try and resolve this [deficiency] matter. (McVey letter to Epting dated Oct. 18, 2010, R. 372). The Lawyers again did not ask Galt Valley if they would accept a deed-in-lieu of foreclosure. (Danhour Aff. ¶¶ 11-13, R. 714-15); (Kefalos letter to West dated Sep. 23, 2010, R. 780).

In October 2010, Galt Valley, through its lawyer, Ian McVey, sought a settlement conference with the Client's counsel, Mr. Epting. (Danhour Aff. ¶ 10, R. 714). Again, the Lawyers did not ask Galt Valley if they would accept a deed-in-lieu of foreclosure. (Danhour Aff. ¶ 13, R. 715).

Mr. Epting rejected a settlement conference with Galt Valley stating "*Ian, our client [Ms. Gibson] is not going to be involved in any discussion with you. If you want to talk with me and George this afternoon then please let us know what number to use to call you and*

what time". (Epting email to McVey dated Oct. 22, 2010, R. 723). McVey replied, "*Drew, perhaps you misunderstand. I am suggesting a settlement conference between the parties under the supervision of counsel. Does that interest you? Ian.*" (Epting email to McVey dated Oct. 22, 2010, R. 723). The Lawyers again did not ask Galt Valley if they would accept a deed-in-lieu of foreclosure. (Kefalos letter to West dated Sep. 23, 2010, R. 780).

Mr. Epting replied, "*...[] there is nothing to talk about unless you want the property... [] ...could I suggest we talk about the deed in reduction.*" (Epting email to McVey dated Oct. 22, 2010, R. 723). Mr. Epting proposed that Galt Valley tender a "deed-in-reduction" of debt proposal to reduce the deficiency.[2] (Epting email to McVey dated Oct. 21, 2010, R. 598).

Responding to Mr. Epting's request that Galt Valley make a "deed-in-reduction" offer, on October 25, 2010, Galt Valley tendered Epting his "deed-in-reduction" settlement proposal suggesting that the Client (a) "execute a non-merger deed-in-reduction for both properties in favor of Galt Valley, LLC;" and, "execute a new promissory note in the total amount of $1.5 million in favor of Galt Valley, LLC." (McVey letter to Epting dated Oct. 25, 2010, R. 49-50).

On November 3, 2010, Mr. Epting wrote to McVey and rejected the "deed-in-reduction" settlement proposal. (Epting letter to McVey dated Nov. 3, 2010, R. 60). The Lawyers again did not ask Galt Valley if they would accept a deed-in-lieu of foreclosure. (Epting letter to McVey dated Nov. 3, 2010, R. 60); (Danhour Aff. ¶ 13, R. 715).

The next day McVey wrote "*I must say that I am disappointed that your client does not want to attempt to negotiate, if your client does not want to negotiate, I'm not sure why my client would accept a deed to the property.*" (McVey letter to Epting dated Nov. 4, 2010, R. 381). The Lawyers did not ask Galt Valley to accept a deed-in-lieu of foreclosure. (Danhour Aff. ¶ 13, R. 715).

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[2] A "deed-in-reduction" (according to the Florida "Law Review" article) is an equitable remedy whereby a debtor conveys its mortgaged property to the bank without condition whereby the bank retains all legal rights to collect the deficiency against the debtor.

Ms. Gibson was not aware Galt Valley sought a settlement conference with her to discuss a deed-in-lieu. (Gibson Aff. ¶ 7, R. 815). Ms. Gibson was also not aware the Lawyers were not offering a Galt Valley a deed-in-lieu of foreclosure. (Gibson Aff. ¶ 5, R. 814). No settlement conference ever took place between the Client's and Galt Valley's lawyers. (Danhour Dep. 92:1-25; 94:1-25, R. 647-48).

On November 8, 2010, Galt Valley demanded the Client accept a deed-in-lieu of foreclosure, or face litigation. (McVey letter to Epting dated Nov. 8, 2010, R. 62).

Mr. Epting testified that he and Mr. Kefalos were "surprised" Galt Valley decided to waive the deficiency. (Epting Dep. 110:24; 111:1-4, R. 473); (Kefalos Dep. 71:1-5, R. 514).

D. The November Fee Agreement.

On November 18, 2010, the Lawyers asked the Client to sign another fee document entitled "Attorney-Client Contract." (November 18, 2010 fee document, R. 67). The November document states in relevant part as follows:

> ...for their [lawyers] services, in the defense of *and* pursuit of a counterclaim... LAW FIRM shall receive a fee based upon the *total* recovery according to the following schedules:
>
> a. One-third (1/3) of all sums saved CLIENT from the deficiency amount claim by Ameris, in the amount of $1,700,000.00.
>
> in addition to the fees above, CLIENT will be responsible for paying the costs and expenses reasonably necessary and incurred by LAW FIRM. LAW FIRM will advance these costs during the prosecution of the case but will deduct them at the conclusion of the case from CLIENT'S portion of the proceeds following the payment of attorney fees.
>
> The obligation of CLIENT under this Contract shall be secured by a Mortgage to Gedney Mr. Howe III and John Mr. West on that certain real estate in Berkeley County, identified on Exhibit A attached hereto.
>
> LAW FIRM shall be entitled to enforce the obligations under the Contract by foreclosure of the Mortgage only after the expiration of twelve (12) months from the later of (i) the date of final judgment (including final appeal) entered in a case

> pending in Charleston County Court of Common Pleas, captioned Linda A. Ms. Gibson, et al v. Rolando V. Villavicencio, et al., Case No. 2008-CP-10-4282, or (ii) the date of final judgment (including final appeal) entered in a case pending in Berkeley County Court of Common Pleas, captioned Galt Valley, LLC v. Linda A. Ms. Gibson, et al, Case No. 2010-CP-08-2134.

(November 18, 2010 fee document, R. 67) (emphasis added).

The Lawyers computed their Ameris fee as the difference between the Note principal ($3 million) and value of the Note collateral ($1.3 million) to arrive at a $1.7 million deficiency "saved" and resulting $566,666.00 fee. (November 18, 2010 fee document, R. 67). The November Agreement specifies the total deficiency "savings" to be $1.7 million. (November 18, 2010 fee document, R. 67). The record does not show the Lawyers negotiated the principal down or the collateral up. The November Agreement specifies the total deficiency "savings" to be $1.7 million. (*Id.*)

To secure the Lawyers' fee, they asked Ms. Gibson to sign a mortgage against property to Mr. Howe, individually, and to Mr. West, individually, in the amount of $566,666.00. (November 18, 2010 fee document, R. 67).[3]

The Lawyers claim that the November Agreement is a memorialization of part one of the dual-fee arrangement under the April fee document – *i.e.*, the reverse contingent fee. (Epting Dep. 78:21-25; 79:15, R. 468); (Kefalos Dep. 24:23, R. 509). Ms. Gibson claims she agreed to pay a single-fee – *i.e.*, contingent fee in the Ameris matter testifying, "*...like a lawyer takes a case, and if he recovers something, then I pay.*" (Gibson Dep. 108:2; 109:8-25; 110:13-20, R. 662-64). A disputed fact exists as to whether the November agreement constitutes a dual fee obligation (reverse and straight fee) or a single contingent fee. (Gibson Aff. dated Oct. 15, 2010 at ¶ 6, R. 815).

Prior to executing the November Agreement, Mr. Epting advised the Client to get a

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[3] On December 8, 2010, Gedney Howe and John West ("Mortgagees") recorded mortgages against separate and several of Ms. Gibson's real properties, bearing TMS Nos. 271-00-01-003; 263-00-01-032; 248-00-02-042; 271-00-01-037; 271-00-01-040; 271-00-01-084; 271-00-01-185; and, 271-00-02-030 in the amount of $566,666.66. (Mortgages, R. 83-95).

second opinion of counsel respecting the reasonableness of their fee; and, the Client chose Attorney Paul Tecklenburg. (Epting Dep. 81:1-25, R. 469).

On October 29, 2010, Mr. Kefalos wrote Mr. Tecklenburg stating relevant part:

> Paul, I am writing to explain that I need a few minutes of your time to review a fee arrangement I have with Linda Ms. Gibson...
>
> [] The second action involves the defense of a foreclosure action brought against Linda Gibson by First Citizens Bank. This case is pending before Judge Scarborough and there are no defenses to it. *This is being handled on an hourly basis* and we are simply trying to work out a payment plan for the $450,000.00 deficiency judgment."
>
> [] The third case involves the defense of a $3.5 million foreclosure action brought against Ms. Linda Gibson by Ameris Bank. The case is pending before Judge Watson in Berkeley County and there are significant defenses to it as we have evidence Ameris was involved in considerable wrongdoing. We have associated Mr. Gedney Howe and Mr. John West to help on this case. The property is only worth $750,000 and Ameris is claiming a $2.8 million deficiency. We believe we have a good chance of reducing or eliminating any deficiency due Ameris.
>
> Would you be so kind as to review this fee arrangement with Linda and give her your opinion whether you believe it is fair and reasonable under the circumstances. I enclose for your review, a copy of the proposed mortgage and fee agreement.

(Kefalos e-mail to Tecklenburg dated Oct. 29, 2010, R. 57-8) (emphasis added).

Mr. Tecklenburg replied by email to Mr. Epting, "*Drew, I did not get the February contingency agreement. Since it needs to be amended, sending it in Word would be helpful.*" (Gibson Dep. 262:16-25, R. 675).

The record does not show Ms. Gibson was aware the Lawyers were handling the First Citizens foreclosure having no defenses on and hourly basis, and Ameris' foreclosure on a contingency. The record does not show the Lawyers disclosed to Mr. Tecklenburg the unperfected nature of Galt Valley's deficiency claim, nor that the Lawyers never offered Galt Valley a deed-in-lieu of foreclosure. Ms. Gibson was not aware that Galt Valley had

offered to forgive the deficiency in exchange for a deed-in-lieu, and that as a result of the deficiency claim had become inchoate. (Gibson Aff. dated Oct. 15, 2015 ¶ 3, R. 813-14).

E. After November 2010.

After signing the November Agreement, Ms. Gibson went back to the North Charleston apartment complex to meet with Mr. Michael Danhour of Galt Valley to "hand over the apartment keys". (Gibson Aff. dated June 25, 2013 at ¶ 7, R. 806). At that meeting, Mr. Danhour told Ms. Gibson that Galt Valley had attempted to reach her; and, that her lawyers' got in the way of Galt Valley's attempts to complete a deed-in-lieu transaction. (Gibson Aff. dated June 25, 2013 at ¶ 7, R. 806); (Danhour Aff. ¶19, R. 715-16). Mr. Danhour told the Client that *"her lawyers cost her a lot of money when she could have just cooperated with Galt Valley in the deed-in-lieu process."*[4] (Danhour Aff. ¶20, R. 716).

F. The Expert Testimony (S.C. CODE ANN. §15-36-100).

1. Affidavit of Harry A. Swagart.

Attorney Harry Swagart delivered an expert opinion in support of the Client. (Swagart Aff. dated Oct. 13, 2015, R. 696-712). Mr. Swagart's sworn testimony states in part that "the involvement of Mr. Papa and Mr. Tecklenburg in no way relieves Defendants from liability for charging and seeking to collect an unreasonable attorney's fee" citing to *Johnson v. Alexander*, 413 S.C. 196, 775 S.E.2d 697 (2015). Mr. Swagart states further that, "based on the *Johnson* case, the mere fact that Defendants obtained an opinion from another lawyer that the "Attorney/Client Contract" of November 18, 2010, may have been reasonable, did not relieve them of their duty of care not to impose upon Plaintiff a fee arrangement which was, in fact, not reasonable. Subjective opinions by attorneys that unreasonable agreements are reasonable do not, ipso facto, make those agreements reasonable and enforceable. As a result, it is my opinion that the Defendants are at fault, and that the opinions of other attorneys do not and cannot relieve them from liability." (Swagart Aff. dated Oct. 13, 2015, at ¶ 12, R. 701). The record does not show Mr. Tecklenburg was aware of unperfected nature of Galt's deficiency claim, nor the hours Mr. Epting and Mr.

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[4] Galt's legal bills for the deed-in-lieu transaction with Callison and Tighe and Rosen Hagood were approximately $30,000, but in all events less than $50,000. (Danhour Aff. ¶20, R. 716).

Kefalos, or Mr. Howe and Mr. West, expended to earn a $566,666.00 fee.

2. Affidavit of Desa Ballard.

Attorney Desa Ballard delivered an expert opinion of "[t]he standard of care in South Carolina in an attorney malpractice actions is that lawyers are required to render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession; this standard is statewide." (Ballard Amend. Supp. Aff. ¶ 2, R. 792). Ms. Ballard provided her opinion that "the [L]awyers, each individually and severally, breached the South Carolina professional standard of care by not disclosing to the Client (i) the inchoate (unliquidated) nature of the deficiency; (ii) the $1.7 million dollar "deficiency," if any, would be set off by any lender claim recovery. (Ballard Amend. Supp. Aff. ¶ 3, R. 792).

Ms. Ballard stated further that "[a] lawyer exercising professional judgment commensurate with the standard of care would have made certain that Linda was aware of the inchoate (unliquidated) nature of the deficiency, and that therefore the base line value to compute the fee was something less than $1.7 million dollars. The defendants neglect to fully disclose the nature of the deficiency falls substantially below the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of South Carolina bar standing in the lawyers' place at the time of non-disclosure, and therefore is a breach of the standard of care." (Ballard Amend. Supp. Aff. ¶ 3, R. 792).

Ms. Ballard stated also that a "South Carolina lawyer exercising professional judgment commensurate with the standard of care would not have accepted a $566,666.00 fee under the facts of this case, but rather adjusted (reduced) their fee commensurate with like-kind deed-in-lieu transactional work, and the time involved, as guided by Rule 1.5, RPC, Rule 407, SCRAP." (Ballard Amend. Supp. Aff. ¶ 3, R. 793-94).

G. Summary facts.

Several months after signing the April 7th fee document, Mr. Epting explained his reverse contingent fee arrangement to Ms. Gibson on July 9, 2010. (Epting letter to Gibson dated July 9, 2010, R. 355).

Ms. Gibson testified the she did not understand the concept of a reverse contingent fee, stating:

> Q. M. DAWES COOKE: Right. But I want to try to take you back to 2009 and figure out what you were capable of understanding then. And I now you've explained you did not get this email, but did you understand that the end goal of retaining a lawyer to help you with the Ameris situation would be to reduce the debt or eliminate the debt that you owed to Ameris, not to – not to get money from Ameris like you did with Re/Max—or were trying to do from Rolando or Re/Max. Did you understand that difference?
>
> A. MS. GIBSON: *Well, what I understood was that Re/Max and this agent had done a lot of things wrong and that – and had gotten me into this deal and the bank went along with it. So I felt that the bank – all of them were at fault. All of them made money off of me. All of them profited from my decision to buy these apartments. And I felt they were in the wrong and that – it didn't even enter my mind that I would have to come up with money. So you're saying – I'm not quite—when I went—when I talked to a lawyer, it was like I was expecting to get money back from what people had taken from me and overcharged me and I had been paying monthly interest from all avenues that I had income. And this – it was wrong what these people had done to me. So, no, it never entered my mind that I was going to have to come up with money other than paying either like and hourly wage or contingency, as I know contingency is like a lawyer takes a case and if he recovers something, then I pay –you know, he takes a third of it. That's my conception of contingency. That's how I –I mean I have never been in a situation like this. So I've never had to have a lawyer to do that.*

(Gibson Dep. 109:11-110:22, R. 663-64).

On the foregoing facts, Mr. Howe collected $94,444 for "*agree[ing] to join a team of lawyers representing this lady to use our best efforts to extricate her from a very bad situation...*" (Howe Dep. 9:1-15, R. 677). Mr. West collected $94,444 for attending a "*motion for receiver hearing.*" (West Dep. 12:1-13:25, R. 686). Mr. Kefalos collected $188,888, and Mr. Epting collected $188,888. (Epting Dep. 148:1-25, R. 479).

Ms. Gibson paid $566,666 to the Lawyers for the representation in the defense of the foreclosure action. Galt paid $25,821 on the other side of this deed-in-lieu transaction. (Callison & Tighe and Rosen Hagood Invoices dated Nov. 2010 through Jan. 4, 2011, R.

606-41).

STANDARD OF REVIEW

A. Summary Judgment Standard.

In reviewing a grant of summary judgment, our appellate court applies the same standard as the circuit court under Rule 56(c), SCRCP. *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 753 S.E2d 428 (2014). Summary judgment is proper if, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions and affidavits, if any, show that there is no genuine issue of material fact and it is clear the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; *Id.* at 528.

Our Supreme Court directs that cases applying the preponderance of the evidence burden of proof require the non-moving party submit only "a mere scintilla of evidence in order to withstand a motion for summary judgment." *Betty J. Hancock v. Mid-S Mgmt. Co., Inc.*, 381 S.C. 236, 673 S.E.2d 801 (2009).

In determining whether any triable issues of fact exists, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1984). 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); *Koester v. Carolina Rental Ctr.*, 313 S.C. at 493, 443 S.E.2d at 394. To defeat a motion for summary judgement, the nonmoving party need not produce all of its evidence or prove its case but instead must only show the existence of a genuine factual dispute. 73 AM. JUR. 2d., Summary Judgment §29 (2015).

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).

B. Lawyer Fees Standard.

A lawyer shall not make an agreement for, charge, or collect an unreasonable fee.

Rule 1.5, RPC, Rule 407, SCACR. Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule. Rule 1.5 cmt. [3], RPC, Rule 407, SCACR. For reverse contingent fees, reasonableness is not so readily determinable. ABA Commission on Ethics and Professional Responsibility, Formal Opinion 93-373 admonishes that the fact straight contingent fees typically range from 25% to 35% does not necessarily mean that the same percentage is reasonably applied to the potential savings of a defendant. Even assuming a fair percentage could be set, reverse contingent fees have the added complication of calculating the amount saved the client. A plaintiff's demand may be overstated, not specifically enumerated, or as here, inchoate; and, thus, "the amount demanded cannot automatically be the number from which the savings resulting from a judgment or settlement can be reasonably calculated." *See, e.g.*, ABA Commission on Ethics and Professional Responsibility, Formal Op. 93-373 (citations omitted).

In determining whether a particular contingent fee is reasonable, or whether it is reasonable to charge any form of contingent fee, a lawyer must consider the factors that are relevant under the circumstances. Rule 1.5 cmt. [3], RPC, Rule 407, SCACR.

The "'beneficial results' obtained factor to be considered in awarding attorney fees, merely aids in determining whether award is appropriate when considering whether services of lawyer facilitated favorable result and does not endorse percentage of award." *Glasscock v. Glasscock*, 304 S.C. 158, 403 S.E.2d 313 (1991).

All of the circumstances surrounding the attorney-client relationship must be considered when determining a reasonable fee to be paid by a client, and the failure to consider these circumstances is error. *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (2000); *Royal Crown Bottling Co. v. Chandler*, 226 S.C. 94, 83 S.E. 2d 745 (1954).

ARGUMENTS

"Attorneys occupy a trust relationship to their clients and agreements between them, as between trustees and cestuis, are examined with utmost care by the courts in order to avoid any improper advantage to the attorney." *Royal Crown Bottling Co. v. Chandler*, 226 S.C. at105, 83 S.E.2d at 750. The essence of this appeal focuses on the circuit court's errors in resolving–in favor of the Lawyers who drafted the fee documents–disputed questions of fact concerning the terms of the fee agreement. According to the circuit court and the

Lawyers, the Client should pay an out-of-pocket fixed fee of over $560,000 for defending a mortgage foreclosure (by delivering a deed in lieu) and a 40% contingent fee out of any recovery on counterclaims in that same foreclosure case. The testimony and evidence shows the Client did not understand the fee documents called for such excessive fees, and that enforcing the ambiguous fee documents as interpreted by the Lawyers and by the circuit court would result in an "improper advantage" to the Lawyers.

I. The circuit court erred in granting summary judgment based on evidence in the record showing the Lawyers–in breach of the professional and fiduciary duties–withheld from their Client information about the inchoate nature of the deficiency claim forming the basis of the Lawyers' $566,666 fee calculation.

There were disputed questions of fact as to whether the Lawyers disclosed the information to the Client revealing Galt Valley's willingness to accept a deed in lieu to satisfy all claims under the $3M note, including claims for personal deficiency. In other words, there was evidence before the circuit court showing the Lawyers' failed to disclose and explain to the Client the inchoate nature of the personal deficiency claims once Galt Valley acquired the note and mortgage, which the Lawyers were required to do under their professional and ethical duties. (Gibson Aff., filed July 30, 2013, R. 804-08); (Gibson Aff., dated January 12, 2015, R. 783-84) ("The lawyers never disclosed to me (i) Galt's inchoate deficiency claim, (ii) the lawyers' "deed-in-reduction" versus "deed-in-lieu" strategy, (iii) the lawyers' unwillingness to meet with Galt; (iv) that Galt requested a lawyer-supervised settlement conference; (v) that the lawyer's (sic.) rejected (on [the Client's] behalf) Galt's written request to meet with [the Client] by lawyer-supervised settlement conference; and, (vi) that [the Client's] set off claims and the lawyers' duplicative work make $1.7 million an unreasonable base line valuation to determine the fee. Had I known all this information, I would never have agreed to pay my lawyers $566,666.00."); (Amend. Supp. Affidavit of Desa Ballard, dated January 14, 2016, ¶ 3(iv), R. 793) ("[The Lawyers] failed to disclose to [the Client] that they were having her sign [the November] fee agreement done after an agreement to waive the deficiency judgment had been made by counsel for Galt Valley."); (Amend. Supp. Affidavit of Desa Ballard, dated January 14, 2016, ¶ 3(v), R. 793) ("[The Lawyers'] computation of the $566,666.00 fee based on the (maximum) $1.7 million dollar 'deficiency' is a breach of the standard of care because the lawyers knew that they did very

little work for the large fee, and the lawyers knew, or should have known, that they didn't disclose to [the Client] the inchoate (unliquidated) nature of the deficiency."). *See also, Johnson v. Alexander,* 413 S.C. 196, , 775 S.E.2d 697, 700 (2015); *Stokes-Craven Holding Corp. v. Robinson,* ___ S.C. ___, 787 S.E.2d 485, 489 (2016) (summary judgment standard).

The Client was unaware of the nature of the deficiency claim when she executed the November fee document. The propriety of the terms in a proposed reverse contingency fee agreement, and in particular the benchmark value for the contingency calculation, are subject to particular scrutiny in light of the lawyer's professional and fiduciary duties to the client and the potential for overreaching.

For example, in *Brown & Sturm v. Frederick Road Ltd. Partnership*, 137 Md.App. 150, 768 A.2d 62 (Md. App. 2001), the Maryland Court of Appeals upheld the trial court's ruling after a nine-day bench trial that a law firm's *reverse* contingency fee agreement was not enforceable based on a finding of a failure to disclose material facts necessary for its clients to make an informed payment decision based on the lawyers' errors in a *reverse* contingent fee arrangement. The clients had been assessed $60 million in tax liability, but the matter was eventually settled for $20 million. *Id.* at 70, 72. Choosing $60 million as the baseline exposure, the law firm demanded some $4.8 million pursuant to a reverse contingent fee agreement. *Id.* at 72. The appellate court, affirming judgment for the clients, held the fee unreasonable based on the facts developed during the nine-day trial showing that the law firm knew or should have known that the initial tax liability assessment was inflated, and that actual potential liability was much lower. *Id.* at 87-89. This case illustrates the trial court's error in this case in summarily concluding the facts in favor of the Lawyers that the $1.7 million deficiency was an appropriate baseline of liability considering Galt Valley's desire to secure the property and forego pursuing any deficiency judgment against the Clients.

The amount demanded by a plaintiff in a lawsuit does not automatically determine the benchmark amount for a *reverse* contingency as that plaintiff's original claim may be unrealistic or may change based on later developments:

> A plaintiff may sue defendant for $1,000,000, but the fact that sum is named in the complaint does not necessarily mean that plaintiff's claim can fairly be said to be for that amount.

> Plaintiff's counsel often overstate the amount to which their client is entitled, and indeed have little incentive for restraint. Thus, the amount demanded cannot automatically be the number from which the savings resulting from a judgment or settlement can reasonably be calculated.... Whether or not a specific ad damnum figure is mentioned, for an unliquidated claim, it is incumbent on the defendant's lawyer fairly to evaluate the plaintiff's claim and set a reasonable number as the amount from which the plaintiff's recovery will be subtracted to determine defendant's savings. *The sensitivity of this exercise becomes apparent when it is recognized that to the extent defendant's lawyer exaggerates the value of plaintiff's claim, defendant's lawyer enhances his or her prospect of recovering on the contingent arrangement.*

ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 93-373 at 1001:181-82 (1993) (emphasis added).

ABA Commission's Opinion recognizes that though no *per se* rule applies and each case must be judged on its own facts, "the reasonableness of the amount of a 'reverse' contingent fee does depend on the degree to which savings from liability is reasonably ascertainable rather than a purely speculative one, which in turn may well depend on the character of the damages claim on which it is based." *Id.* at 1001:182.

This *reverse* contingent fee based on the Lawyers' predetermined baseline of $1,700,000 was of the greatest legal consequence to the Client as it would obligate her to pay "out-of-pocket" over five hundred thousand of dollars to the Lawyers – yet the Lawyers chose not to disclose the inchoate nature of the benchmark for calculating the *reverse* contingent fee, or the consequences of over a half million dollar fee versus a possible $40,000 or so total fee if paid on an hourly fee basis. The guidelines summarized in the ABA Commission on Ethics and Professional Responsibility, Formal Opinion 94-389, elaborate on the ethical and professional duties of lawyers to ensure not only that a contingent fee agreement is appropriate and that the client is generally disposed toward such an agreement, but also to ensure the proposed terms of the contingent fee agreement are appropriate for the particular client and for the particular case. *See also*, (Amend. Supp. Affidavit of Desa Ballard, dated January 14, 2016, p. 2, R. 793). Formal Opinion 94-389 outlines topics for discussion with the prospective client including the following topics

relevant to this matter:

a. The likelihood of success;
b. The likely amount of recovery or savings, if the case is successful;
c. The possibility of an award exemplary or multiple damages and how that will affect the fee;
d. practices of the other side with respect to settlement;
e. The likelihood of ... collecting any judgment;
f. The availability of alternative dispute resolution as a means of achieving an earlier conclusion to the matter;
g. The amount of time that is likely to be invested by the lawyer;
h. The likely amount of the fee if the matter is handled on a non-contingent basis;
d. The attitude and prior matter is handled on a non-contingent basis;
I. The client's ability and willingness to pay a non-contingent fee;
j. The percentage of any recovery that the lawyer would receive as a contingent fee ...;

- - -

l. Whether the jurisdiction in which the claim will be pursued has any rules or guidelines for contingent fees [Rule 1.5, RPC, Rule 407, SCACR]; . . ..

ABA Comm. on Ethics and Prof. Responsibility, Formal Op. 94-389 at p. 5 (1994).

In this matter, there is no evidence the Lawyers discussed any of these terms with the Client as to any proposed *reverse* contingent fee, especially the "attitude of the other side with respect to settlement."

It was error for the circuit court to grant summary judgment when there was evidence and testimony in the record showing the Lawyers withheld from the Client critical information about the inchoate nature of the deficiency claim forming the basis of the Lawyers' $566,666 fee calculation and the fact that Galt Valley had agreed to waive the deficiency claim before the Lawyers presented the November fee document containing the *reverse* contingency provision.

II. The circuit court erred in granting summary judgment in favor of the Lawyers and not granting the Client's motion when there was evidence showing that the Lawyers' $566,666 reverse contingent fee was *Excessive* and *Unreasonable* based on the lack of any true foreclosure deficiency "saved."

The circuit court's statements concerning the Client's motion for summary judgment reveal why it was error, to grant the Lawyers' motion:

THE COURT: To me, if I deny the defendants' [summary

> judgment], there's no question it's a matter of I would deny the plaintiffs'. And I'm not going to grant the plaintiffs' motion for summary judgement because I think there are too many issues from that standpoint.

(Hearing Tr. 27:21-25, R. 292).

The circuit court did not consider "all of the circumstances surrounding the attorney-client relationship when determining a reasonable fee to be paid by a client, and the failure to consider these circumstances is error." *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (2000); *Royal Crown Bottling Co.*, 226 S.C. at 105, 83 S.E.2d at 750.

It was error for the circuit court to disregard or sufficiently consider the circumstances addressed in the following subsections.

A. The Lawyer's $566,666 reverse contingent fee is excessive as a result of Galt Valley's purchase of the Client's note and mortgage eliminated the risk of substantial lawyer time and costs.

The parties' bargained-for-consideration at initial engagement was the Lawyers were to risk long hours and considerable work in exchange for 33% of "savings" on the personal deficiency claim initially asserted by Ameris that was achieved through their legal services. That is not what happened. Here, Galt Valley purchased the Client's note thirty (30) days after Ameris filed suit. (Ameris Foreclosure Complaint, dated June 14, 2010, R. 342); (August 12, 2010, McVey Letter to Epting, R. 362). Galt Valley testified they initially were not seeking a deficiency judgment against the Client at all.

> No, that's not our general business practice. Our - we would have been the most happy with the next day executing a deed in lieu of foreclosure and being able to get fee simple control of the real estate.

(Danhour Dep. 30:1-20). Unable to reach the Lawyers for a settlement conference, Galt Valley sought appointment of receiver. (Notice of Motion and Motion for Appointment of Receiver, R. 365) (September 17,2010, McVey E-mail to Epting, R. 369).

On September 23, 2010, after returning from Europe, Mr. Epting, called on Mr. West and Mr. Howe to "assist" with the receiver hearing. The Lawyers did not offer or attempt to negotiate a deed-in-lieu with Galt Valley, but instead offered a risky deed-in-reduction, opposite the Client's interest, but comporting with their views on the fee terms (fee) terms

"less amount due Ameris." (Kefalos to West and Epting to Watson letters, dated September 23, 2010, R. 780). Galt Valley then became frustrated with the Lawyers' unwillingness to meet for a settlement conference, awkward "deed-in-reduction" theories, and general unreasonable posture. On November 8, 2010, Galt Valley made one last attempt to resolve the deficiency by deed-in-lieu-for-debt before retaining litigation counsel, out of frustration. (Danhour Dep. 140:1-141:25, R. 773-74; and, generally, Danhour Dep., R. 563-581, 642-48, 771-79).[5]

Particularly relevant to the circumstances as they existed at the time the November fee document was executed was the monumental change in the nature of the personal deficiency claim. The parties had not contemplated at the time of the initial engagement that Galt Valley, a non-adversarial buyer, would buy the Client's note and prefer a deed-in-lieu thereby eliminating any risk that the Lawyers would be committing a substantial amount of time in responding to the foreclosure claims and asserted counterclaims to gain a negotiating advantage. Galt Valley's debt purchase fundamentally changed the terms and reasonableness of the original lawyer-client fee arrangement given the Client bargained to pay her lawyers a 33% risk premium for long hours ended when Galt Valleybought the note The Lawyers response that Galt Valley was "substituted for Ameris" in the foreclosure action, and assumed Ameris' "aggressive"assault ignores the testimony of the Galt Valley members and the reality that a mere party substitution does not equate to "hostile" substitution.

The circuit court failed to consider the circumstances surrounding the true nature of Galt's intentions and inchoate deficiency claim between July 15, 2010 to November 18, 2010. All of these circumstances had a direct bearing on whether actions and events outside of the Lawyers' control eviscerated the risks of substantial legal work resulting in a true windfall fee for the Lawyers and an excessive fee. In other words, it was not the Lawyers' legal services that resulted in the elimination of the deficiency claims. In other words, there was evidence that it was not the Lawyers' services that brought the elimination of the

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[5] One of Galt Valley's members, Danhour, used the word "frustration" in reference to the Lawyers ten (10) times in his deposition.

deficiency. There was also evidence that the deficiency claim was effectively eliminated–without the Client's knowledge–prior to the Client signing the November fee document. Under these circumstances, the Lawyers' motion for summary should have been denied.

B. Whether a straight and reverse contingent fee on the same loan transaction results in an excessive fee.

The Lawyers' dual-contingent fee arises out of the same loan transaction. The Lawyers' work to defeat the deficiency claim was inherently embedded in the work to prosecute the lender claim against Ameris, for which the Lawyers were already being paid a contingency.[6] Without requiring the Lawyers to provide a credit for duplicate work product would effectively result in the Lawyers being paid twice for the same legal work.

Evidence was before the circuit court that the deficiency claim work product and the lender claim work product merged or would have merged to defeat the deficiency. In other words, the measure of the degree to which the Lawyers prosecuted the lender claim is the same, or substantially the same, as the measure of the degree to which they reduce, or defeat, the deficiency claim. In fact, Mr. Epting admitted so stating "is there a crossover? Sure, there's crossover [of work product]." (Epting Dep. 178:17-25, R. 763). Evidence was before the circuit court of circumstances showing the Lawyers would be paid twice for duplicative work resulting in an unenforceable excessive fee, or at a minimum, requiring the Lawyers to provide a set-off credit for the crossover work.

The reasonableness of a fee must be assessed based on all the facts and surrounding circumstances of the representation, as they exist both at the beginning and the end of the representation. *See*, Contingent Fees, ABA/BNA Lawyers' Manual on Professional Conduct, 41:901, at 18 (2004) (fee terms considered to be reasonable at the outset of the representation may become excessive as measured by the outcome of the client's case). Here, evidence exists the inchoate, unliquidated, deficiency claim (from July 15, 2010 to November 18, 2010), and duplicative work, bears directly on whether avoided costs, risk, impossibility of performance resulted in an excessive fee. Thus, the Lawyers' motion for

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[6] This, of course, ignores the reality that the deficiency claim effectively evaporated when Galt Valley purchased the note.

summary judgment should have been denied.

III. The circuit court erred in granting summary judgment when it accepted the Lawyers' interpretation of ambiguous terms in the fee documents they created as an agreement for a dual (*reverse* and *direct*) contingency fee when a jury could find the Client's interpretation of a single (*direct*) contingency fee was reasonable in determining the intent of the parties.

A. It was an error of law not to recognize the ambiguous terms in the fee documents.

The April fee document states, "[Mr. Kefalos] and [Mr. Epting] will handle the existing case against [] Ameris on a contingency, . . ."[7] (April 7, 2010 fee document, R. 47). The November fee document states that for their services "in the defense of and pursuit of a counterclaim in a foreclosure action brought by Ameris . . ." the Lawyers' fee will be " based upon the total recovery [of] One-third (1/3) of all sums saved Client from the deficiency amount claimed by Ameris, in the amount of $1,700,000.00." (November 18, 2010 fee document, R. 67).

The fee term "on a contingency [for] defense and pursuit of a counterclaim" is capable of more than one meaning in determining the fee amount. The Lawyers interpret the terms "on a contingency" to mean a dual-fee constituting both a *reverse* and a *direct* contingent fee resulting in a fee of $566,666, plus 40% of any recovery on the lender claim against Ameris. (Epting Dep. 65:1-25, R. 655). Conversely, the Client interprets "on a contingency" to mean 33% percent of "recovery", as the *direct* contingency commonly grasped by the lay people and the public, " . . . like a lawyer takes a case, and if he recovers something, then I pay." (Gibson Dep. 108:2; 109:8-25; 110:13-20, R. 662-64).

The fee terms "for their services" is capable of more than one meaning in determining the basis for applying the contingency fee percentage. The term "services" inherently means "scope of the representation." The Lawyers argue there were two separate "services" to be performed– the defense of deficiency claim and the prosecution of the

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[7] Client disputes ever seeing the February 4, 2010, email referenced in the April fee document until after this lawsuit was commenced, disputes that Mr. Papas was her agent for the purposes of retaining a lawyer, and disputes the February 4 email ever served as a part of any fee agreement with the Lawyers. (Gibson Dep., 153:12-154:23, 155:1-157:25, 165:7, R. 665-70).

lender counterclaim–resulting in two separate contingent fees. Conversely, the Client viewed the engagement for one "service" to be performed in representing their interests in the lawsuit. Terms of the fee documents are unclear and are capable of more than on meaning.

The terms "agreement of February 4, 2010" in the April fee document is ambiguous given no February agreement existed. It was simply an email that was never provided to the Client[8]. The April fee document attempts to cobble together four *direct* contingent fee arrangements in one sentence: "Re/Max, Rolando, Moore & Ameris on a contingency . . . ," all on a *direct* contingency paid from any cash recovered with no mention whatsoever of the phantom fifth *reverse* contingent fee. The Client never saw the February 4th email until this litigation, and thus aptly interpreted the "agreement of February 4, 2010" to mean the hourly fees the Client had been paying, which were then modified in April by the April fee document to include a single, *direct* contingency fee agreement. Conversely, the Lawyers interpret the term "agreement of February 4, 2010" to mean a dual, *reverse* contingency fee and *direct* contingency fee obligation. Even if the Client had seen the February 4 email before this lawsuit began, it contains a patent ambiguity: the Lawyers' closing sentence stated, "Please *consider* this." (February 4, 2010 email, R. 593) (emphasis added). Any reasonable reader of this email would be constrained to conclude that the preceding terms were being offered for consideration in anticipation of a future agreement. The parties' reasonable, but opposite, interpretations of the terms "in our agreement of February 4, 2010" is evidence of ambiguity.

The November fee document provides in relevant part as follows:

> For their services, LAW FIRM shall receive a fee based upon the total recovery according to the following schedules:
>
> a. One-third (1/3) of all sums saved CLIENT from the deficiency amount claimed by Ameris, in the amount of $1,700,000.00.

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[8] According to expert testimony before the circuit court, the Lawyers' failure to provide the Client with a copy of the February 4, 2010 email at the time of the execution of the April the document was below the standard of care. (Amend. Supp. Affidavit of Desa Ballard, dated January 14, 2016, p. 2, R. 793).

The November fee document makes no reference, whatever, to two "contingency fees" or both a *direct* contingent fee and a *reverse* contingent fee, but rather unequivocally states a single flat fee for all services, which was $566,666. The Lawyers interpret their November document as providing for to two contingent fees, both a *direct* contingent fee and *reverse* contingent fee. Conversely, the Client interprets the November document as one single flat fee. It was judicial error by the circuit court when it adopted the Lawyers' interpretation of the November document. The circuit court, in granting the Lawyers' motion, augmented the terms of November fee document by adding a subparagraph b. effectively stating as follows:

> b. Forty percent (40%) of any recovery obtained on the lender claim against Ameris.

The actual November fee document does not include any terms providing for additional fees of "40% of any recovery against Ameris" and does not contain a merger clause incorporating any prior fee documents. Adding these terms without extrinsic evidence of the parties' intent was judicial error.

In sum, the testimony and evidence before the circuit court presented multiple material facts in dispute concerning the parties' intent behind the fee documents. The Lawyers failed to obtain a clear and unambiguous contingent fee agreement as it related to the Galt Valley claim and Ameris counterclaim as required under Rule 1.5, RPC, Rule 407, SCACR, setting forth, among other things, the specific method by which the fee was to be determined. (Amend. Supp. Affidavit of Desa Ballard, dated January 14, 2016, p. 1, R. 792). Whether the terms mean a dual *reverse* contingency and *direct* contingency fee (the Lawyers' view) or a single *direct* contingency fee obligation (the Client's view), were all matters for the jury. The opposing interpretations of these terms are evidence of an ambiguity in the terms of the fee document(s), how the fee was to be calculated, and the amount of the fee amount. It was legal error for the circuit court to grant summary judgment.

B. It was error when the circuit court "determined" the Client's intent as to the ambiguous terms in the fee documents.

The fee documents were ambiguous. If a contract is ambiguous, the jury must

determine the intent of the parties, which is a question of fact. *HK New Plan Exchange Prop. v. Coker*, 375 S.C. 18, 649 S.E.2d 181 (Ct. App. 2007); *Ecclesiastes Production Ministries v. Outparcel Associates, LLC*, 374 S.C. 483, 694 S.E.2d 494 (Ct. App. 2007) (when a written contract is ambiguous in its terms, parole and other extrinsic evidence will be admitted to determine the intent of the parties; the intent of the parties is then a question of fact for the jury to determine). Here, the parties closest to the fee documents, and the transactions contemplated thereby, sworn testimony show the meaning of "on a contingency", "[for] defense and pursuit of a counterclaim", "for their services", and "agreement of February 4, 2010" are capable of more than one interpretation. As a matter of black letter law, the circuit court should have denied the Lawyers' motion for summary judgment based on the ambiguities in the fee documents, precluding any findings of fact on a motion for summary judgment as to the intent of the parties to these fee documents.

C. It was error when the circuit court construed the ambiguous terms in the fee documents in favor of the Lawyers who drafted those documents.

It is well settled under South Carolina contract law that a circuit court is to construe ambiguous terms in a contract against the drafter, particularly when the drafters were lawyers drafting fee documents they contend obligates their client to pay in excess of $500,000 in out-of-pocket legal fees. A question of fact exists whether the Client understood and agreed to the dual fee arrangements. The Lawyers, as drafters of the fee documents and as lawyers licensed in this State with obligations under Rule 1.5, RPC, had professional and ethical obligations to ensure the terms used in the fee documents specifically and expressly stated, among other things, "the method by which the fee [was] to be determined," as well as other terms reflecting their intent and what they understood to be the Client's intent. As fiduciaries and legal professionals, the Lawyers were in a superior position to employ specific words to ensure the Client understood the proposed dual-fee obligation. The ambiguities in the fee documents result from the Lawyers' choices on how the documents were crafted.

"A contract is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages, and

terminology as generally understood in the particular trade or business." *Hawkins v. Greenwood Dev. Corp.*, 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997).

"Ambiguous language in a contract should be construed liberally and most strongly in favor of the party who did not write or prepare the contract and is not responsible for the ambiguity; and any ambiguity in a contract, doubt, or uncertainty as to its meaning should be resolved against the party who prepared the contract or is responsible for the verbiage." *Myrtle Beach Lumber Co., Inc. v. Willoughby*, 276 S.C. 3, 8, 274 S.E.2d 423, 426 (1981). *See also, Mathis v. Brown & Brown of S. Carolina, Inc.*, 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010). "The reason for the rule of strict construction against the party preparing the contract is that one who speaks or writes can, by exactness of expression, more easily prevent mistakes in meaning more than one with whom he is dealing, and that he who has brought the agreement into existence and is thus primarily responsible for its inadequacy should justly suffer for its shortcomings." *Myrtle Beach Lumber Co., Inc.*, 395 S.C. at 8, 716 S.E.2d at 426. *Cf., Blakeley v. Rabon*, 266 S.C. 68, 73, 221 S.E.2d 767, 769 (1976) (any ambiguity in contract for sale of partnership interest would be construed against sellers whose lawyers drafted the initial agreement and who had benefit of legal advice before signing agreement).

Summary judgment is inappropriate even if the facts are undisputed, if the uncontested facts support different inferences. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 443 S.E.2d 392 (1994). Here, the terms used in the fee documents support different inferences to be drawn about how the fee or fees were to be calculated and what events triggered the Client's obligation to pay fees. The evidence before the circuit court shows the parties' intentions at the initial engagement and their final intentions on fee terms when the November fee document was executed. The opposing inferences from these facts, when taken in the light most favorable to the Client, should have resulted in the circuit court denying the Lawyers' motion for summary judgment based on the language the Lawyers placed in the November fee document that the Client understood was for one fee, and not a dual fee for 33 1/3% of an inchoate $1.7M deficiency benchmark plus 40% of any lender claim recovery. There simply was no subparagraph b. in the final November fee document.

The Order granting summary judgment should be reversed because the circuit court

accepted the Lawyers' interpretation of ambiguous terms in the fee documents that they had created as imposing an obligation for the Client to pay a dual (*reverse* and *direct*) contingency fee, when a jury could find the Client's interpretation of a single (direct) contingency fee was reasonable in determining the intent of the parties.

IV. The evidence before the circuit court raised disputed questions of material fact supporting each of the claims alleged in the Client's pleadings.

Disputed questions of material fact sufficient to defeat the Client's motion for summary judgment are the same disputed questions of material fact that should have been sufficient to defeat the Lawyers' motion for summary judgment.

A. It was error for the circuit court to grant summary judgment on the legal malpractice claim based on the evidence establishing disputed questions of fact on each element of that claim.

Evidence, fact witness testimony, and expert witness testimony was before the circuit court establishing the Lawyers' professional duties and breach of those duties to the Client causing pecuniary damages. (Amend. Supp. Affidavit of Desa Ballard, dated January 14, 2016, R. 792). Summary judgment on those claims was improper and should be reversed. In order to prevail in a legal malpractice / professional negligence claim, the plaintiff must prove four elements:

1. the existence of a client-lawyer relationship;
2. a breach of duty by the lawyer;
3. damage to the client; and
4. proximate causation of the client's damages by the breach.

Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 472 S.E.2d 612 613 n. 2 (1996); *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 140, 697 S.E.2d 644, 652 (Ct. App. 2010); *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); *Sims v. Hall*, 357 S.C. 288, 592 S.E.2d 315 (Ct. App. 2003); *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002); *Henkel v. Winn*, 346 S.C. 14, 550 S.E.2d 577 (Ct. App. 2001); *McNair v. Rainsford*, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). To demonstrate proximate cause on a legal malpractice claim, a plaintiff must show he most probably would have been successful in the underlying suit if the lawyer had not committed malpractice.

Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E.2d 55,58 (1997).

Here, evidence exists that the Client would have achieved the same result (debt forgiveness) for a reasonable fee, but for the Lawyers' ambiguous fee documents, misrepresenting the $1.7 million "savings", and their non-disclosure of Galt Valley's inchoate deficiency claim, and refusal to credit the Client for duplicative work. (Gibson Aff., filed July 30, 2013, R. 804); (Gibson Aff., dated January 12, 2015, R. 783). Therefor was error for the circuit court to grant summary judgment in light of the evidence and expert testimony establishing the Lawyers' breach of their professional and ethical duties and the Client's losses proximately resulting from the Lawyers' errors and omissions.

B. It was error for the circuit court to grant summary judgment on the breach of fiduciary duty claim based on the evidence establishing disputed questions of fact on each element of that claim.

Evidence, fact witness testimony, and expert witness testimony was before the circuit court establishing the Lawyers' fiduciary and ethical duties and breach of those duties to the Client causing pecuniary damages. (Amend. Supp. Affidavit of Desa Ballard, dated January 14, 2016, R. 792). Summary judgment on those claims was improper and should be reversed.

"A fiduciary relationship is founded on the trust and confidence reposed by one person in the integrity and fidelity of another." *Steele v. Victory Sav. Bank*, 295 S.C. 290, 293, 368 S.E.2d 91, 93 (Ct. App. 1988). "A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence." *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992); *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 599, 358 S.E.2d 150, 152 (Ct. App. 1987). "One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." *Smith v. Hastie*, 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005), *quoting Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004).

Our courts have long recognized that a client-lawyer relationship is, by its very nature, a fiduciary relationship. The relationship of a lawyer with his or her client is 'highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring

a high degree of fidelity and good faith. *See Spence v. Wingate*, 395 S.C. 148, 716 S.E.2d 920, 926 (2011), *reh'g denied* (2011); *Hotz v. Minyard*, 304 S.C. 225, 403 S.E.2d 634 (1991); *In re Green*, 291 S.C. 523, 354 S.E.2d 557 (1987); *Royal Crown Bottling Co. v. Chandler*, 226 S.C. 94, 83 S.E.2d 745 (1954); *Wise v. Hardin*, 5 S.C. 325 (1874); *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310, 315 (Ct. App. 2000). *See also*, 7 AM.JUR.2d Attorneys at Law § 137 (1997).

"One standing in a fiduciary relationship with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation." *Davis v. Greenwood School Dist. 50*, 365 S.C. 629, 620 S.E.2d 65 (2005); *Moore v. Benson*, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010); *Smith v. Hastie,* 367 S.C. 410, 417, 626 S.E.2d 13, 17 (Ct. App. 2005); *Moore v. Moore*, 360 S.C. 241, 253, 599 S.E.2d 467, 473 (Ct. App. 2004). *See also*, RESTATEMENT (SECOND) OF TORTS § 874 (1979) ("One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.").

In this matter, evidence was before the circuit court creating disputed issues of material fact on each element of the breach of fiduciary duty cause of action. The existence of a client-lawyer relationship was undisputed. Evidence and testimony was in the record concerning the Lawyers' failure, among other things, to disclose and explain the inchoate nature of the personal deficiency claim after Galt Valley acquired the note and also before having the Client sign the November fee document, which, if proven at trial would establish the Client's claims for breach of fiduciary duty and resulting damages.

C. It was error for the circuit court to grant summary judgment on the aiding and abetting breach of fiduciary duty claim based on the evidence establishing disputed questions of fact on each element of that claim.

Evidence, fact witness testimony, and expert witness testimony was before the circuit court establishing the Client's claim for aiding and abetting breach of fiduciary duty.

The elements for a cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of a fiduciary duty owed to the plaintiff; (2) the defendant's knowing participation in the breach; and (3) damages. *Vortex Sports & Entm't, Inc. v. Ware*, 378 S.C. 197, 204, 662 S.E.2d 444, 448 (2008). The gravamen of the claim is the defendants' knowing participation in the fiduciary's breach. *Future Group, II v. Nationsbank*, 324 S.C.

89, 99, 478 S.E.2d 45, 50 (1996); *Gordon v. Busbee*, 397 S.C. 119, 133, 723 S.E.2d 822, 830 (Ct. App. 2012).

In this case, evidence was before the circuit court demonstrating that Mr. Howe and Mr. West knowingly participated in the other Lawyers' breach of their fiduciary duty of candor and disclosure owing the Client by accepting nearly $200,000 of the Client's money. Mr. Howe collected $94,444 for "agree[ing] to join a team of lawyers representing this lady to use our best efforts to extricate her from a very bad situation . . .." (Howe Dep. 9: 1-12, R. 677). Mr. West collected $94,444 for attending a forty minute "motion for receiver hearing." (West Dep. 12:21-25, R. 686). On receipt of $188,888, ($94,444 each), Mr. Howe and Mr. West each knew, or should have known, that in addition to their collective $188,888, Mr. Epting and Mr. Kefalos received over $400,000 more of the Client's money, for the Lawyers' collective nominal time, labor, and effort, on the basis of Galt Valley's "surprise" deed-in-lieu offer, for which neither Mr. Howe or Mr. West had any meaningful involvement in bringing about this "result." Mr. Danhour testified Galt Valley was unaware of Mr. Howe and Mr. West. Mr. Danhour's testimony is in direct contradiction with Mr. Howe's testimony that "it was achieved because we worked hard, we're good at what we did, and we gave her everything we had, and it worked." (Howe Dep. 35:11-15, R. 680). Further, Mr. Howe was unable to discern the "novel" legal theories the "team of lawyers" applied to "extricate" the Client from the purported million dollar claim, stating "too novel for me to remember," (Howe Dep. 12:1-13:15, R. 532). Mr. Howe collected $94,000 without even reviewing the pleadings, drafting any documents, conducting discovery, or making an appearance in Court. He was unable to even state the nature of the "novel" theory on which the Lawyers claims they brought about the debt forgiveness "result". (Howe Dep. 8:6-9:25, R. 531). Mr. West collected $94,000 for an appearance at an afternoon appointment of receiver hearing.

A trier of fact could reasonably find, on these facts, Mr. Howe and Mr. West aided and abetted in the other Lawyers' breach of fiduciary duty. The circuit court erred in granting the Lawyers' motion for summary judgment on the Client's aiding and abetting breach of fiduciary duty claim.

D. It was error for the circuit court to grant summary judgment on the negligent misrepresentation claim based on the evidence establishing disputed questions of fact on each element of that claim.

Evidence and testimony was before the circuit court establishing the Client's claim for negligent misrepresentation.

To state a claim for negligent misrepresentation, the plaintiff must allege (1) the defendant made a false representation to the plaintiff, (2) the defendant had a pecuniary interest in making the statement, (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff, (4) the defendant breached that duty by failing to exercise due care, (5) the plaintiff justifiably relied on the representation, and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance on the representation. *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102,439 S.E.2d 283 (Ct. App. 1993); *Hurst v. Sandy*, 329 S.C. 471,481, 494 S.E.2d 847, 852 (Ct. App. 1997).

The Lawyers' statements, representations and omissions to the Client, and to Mr. Tecklenburg, that (i) "Ameris is claiming a $2.8 million deficiency" against Linda; (ii) Mr. Papa was the Client's agent for purposes of negotiating their fees; (iii) the Lawyers' "hard" work brought about the debt forgiveness result; and, that (iv) a $566,666.00 fee is fair, reasonable and customary fee for transactional deed-in-lieu work were all false at the time the Lawyers made those statements and representations. The Lawyers had at least a $566,666 pecuniary interest in facilitating these misleading statements, and a duty of care, as counsel for the Client and as lawyers in South Carolina, to see that truthful information was communicated to the Client, Mr. Tecklenburg, and others. *See* Rules 1.3, 1.4, 1.5, RPC, Rule 407, SCACR. *See also* (Amend. Supp. Affidavit of Desa Ballard, dated January 14, 2016, R. 792-94). The Lawyers were aware the Client was relying, and the Client did justifiably rely, on the Lawyers' statements, representation and omissions. (Gibson Dep. 171: 1-20, R. 671). The Client sustained the loss of over half-million dollars as a result of the Lawyers' negligent non-disclosure of Galt Valley's inchoate deficiency, and charging and collecting a clearly excessive fee. Had the Client retained any of the other lawyers available to represent and protect her interests, and the Client would have most probably realized an expedited result by deed-in-lieu

with Galt, for legal fees of $25,000 to $35,000, not $566,666. (Amend. Supp. Affidavit of Desa Ballard, dated January 14, 2016, R. 792-94).

On these facts, a trier of fact could infer that the Lawyers negligently, or recklessly, misrepresented and omitted material facts bearing on the Client's litigation matter, and on the Lawyers' fee. As a result, it was error for the circuit court to grant the Lawyers' motion for summary judgment on the negligent misrepresentation claim. The circuit court's Order should be reversed.

E. It was error for the circuit court to grant summary judgment on the unjust enrichment claim based on the evidence establishing disputed questions of fact on each element of that claim.

Evidence and testimony was before the circuit court establishing each element of the Client's unjust enrichment claim.

A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belongs to another. *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 123,678 S.E.2d 430, 434 (2009). The remedy for unjust enrichment is restitution. *See Sauner v. Pub. Serv. Auth. of S.C.*, 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003) ("Restitution is a remedy designed to prevent unjust enrichment."). To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. *Campbell v. Robinson*, 398 S.C. 12, 24, 726 S.E.2d 221, 228 (Ct. App. 2012); *Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc.*, 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct. App.1988); *Inglese v. Beal*, 403 S.C. 290, 297, 742 S.E.2d 687, 690-91 (Ct. App. 2013).

Here, the Client conferred a non-gratuitous benefit on the Lawyers of $566,666. The Client would not have paid the Lawyers a fee of $566,666 if the Lawyers had disclosed the true nature of Galt Valley's inchoate deficiency claim, and the Lawyers' dual-fee intentions. (Gibson Aff., filed Oct. 16, 2015, at ¶11, R. 815-16). The Lawyers realized the substantial benefit of hundreds of thousands of dollars in fees, and claims for additional fees by receipt of the Client's $566,666. And, whereas the Lawyers got the money on the basis of the

Lawyers' own wrongful conduct of evolving fee arrangements, ambiguous documents, non-disclosure of material facts (inchoate deficiency claim, dual-fee arrangement), and misrepresentation of facts (Ameris seeking deficiency of $1.7 million dollars), it would be inequitable for the Lawyers to retain the benefit without restoring to the Client the value of $566,666.

On the facts and points and authorities herein, a trier of fact could reasonably find the Lawyers have been unjustly enriched based on their retention of $566,666, which in justice and equity belongs to the Client. As a result, it was error for the circuit court to grant the Lawyers' motion for summary judgment on the unjust enrichment claim. The circuit court's Order should be reversed.

F. It was error for the circuit court to grant summary judgment on the claim for violation of the South Carolina Unfair Trade Practices Act based on the evidence establishing disputed questions of fact on each element of that claim.

Evidence and testimony was before the circuit court establishing each element of the Client's claim under the South Carolina Unfair Trade Practices Act, S.C. CODE ANN. § 39-5-10 *et seq.* (UTPA).

UTPA declares "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are . . . unlawful." S.C. CODE ANN. § 39-5-20(a) (1985). To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive acts. *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). Lawyers are not exempted from claims under the UTPA. *See RFT Mgmt. Co. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 337-38, 732 S.E.2d 166, 174 (2012); *Camp v. Springs Mortgage Corp.*, 307 S.C. 283, 285, 414 S.E.2d 784, 786 (Ct. App. 1991) *aff'd in part, rev'd in part*, 310 S.C. 514, 426 S.E.2d 304 (1993), which held "[t]here is no question but what legal services come within the definition of this statute."

A deceptive act is any act which has a tendency to deceive. *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). "Even a truthful

statement may be deceptive if it has a capacity or tendency to deceive." *Wogan v. Kunze*, 366 S.C. 583, 606, 623 S.E.2d 107, 120 (Ct. App. 2005) (citations omitted). Whether an act or practice is unfair or deceptive within the meaning of the UTPA depends on the surrounding facts and the impact of the transaction on the marketplace. *deBondt*, 342 S.C. at 269, 536 S.E.2d at 407. To be actionable under the UTPA, an unfair or deceptive act or practice must have an impact upon the public interest. S.C. CODE ANN. § 39-5-10(b). A plaintiff proves an adverse effect on public interests if he proves facts that demonstrate the potential for repetition. *See also Crary v. Djebelli*, 329 S.C. 385, 388, 496 S.E.2d 21, 23 (1998) ("The plaintiff need not allege or prove anything further in relation to the public interest requirement."); *Wright v. Craft*, 372 S.C. at 29-30, 640 S.E.2d at 501-02.

No trade or profession impacts the public interest more than the law, the practice of law, and administration of justice. The Lawyers and the Client were in a fiduciary relationship in which the Client expressly reposed trust and confidence in the Lawyers with reference to the subject mortgage foreclosure matters. The Lawyers' "novel" formula of computing reverse-contingent fees on the difference between a note obligation and collateral value has a great possibility of repetition and a direct impact on the public's interest in having access to our courts to defend mortgage foreclosures, particularly if lawyers do not have to disclose the inchoate nature of unliquidated deficiency claims. There is a certain potential for repetition whereas the Lawyers, and like-minded foreclosure counsel in South Carolina, could or would have a greater potential for windfall fees based on a mortgagor's debt. It would lead to an unconscionable result for any distressed borrower, regardless of their financial means, if such unfair and deceptive conduct were allowed, and otherwise not actionable under the UTPA.

On the foregoing, therefore, a trier of fact could find the Lawyers' conduct, as shown in the record before the circuit court, were in violation of the UTPA. As a result, it was error for the circuit court to grant the Lawyers' motion for summary judgment on the Client's claim the Lawyers violated the UTPA. The circuit court's Order should be reversed.

V. The circuit court erred in denying the Client's motion for summary judgment on the grounds that a $566,000 fee was excessive and the fee contract void as a matter of law, undisputed fact, and public policy.

A $566,000 fee for the Lawyers' services in this case and under these circumstances

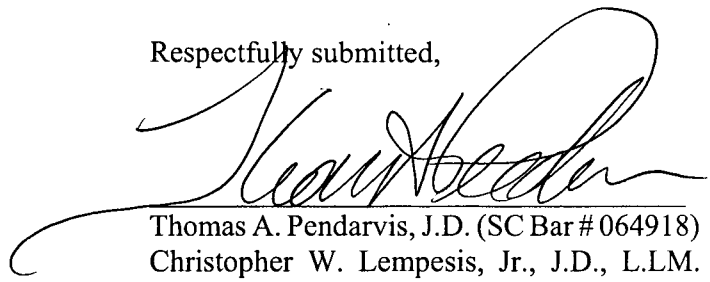
would be excessive. Rule 1.5, RPC, Rule 407, SCACR, and South Carolina law clearly establishes the criteria to determine the reasonableness, or excessiveness, of a lawyer's fee. A lawyer cannot charge or collect a clearly excessive fee. The circuit court had the authority to determine whether the Lawyers' claim for a $566,000 fee was excessive, or otherwise order a jury trial the merits. Based on these circumstances, if the terms of the fee documents were to be construed as requiring payment to the Lawyers of a $566,666 fee, such a fee would be excessive rendering the fee contract(s) void as a matter of public policy. The circuit court should have, as a matter of law, granted the Client's motion for summary judgment on her cross-motion for summary judgment as a matter of law, finding a $566,666 fee excessive and the fee documents void, as well as ordering equitable restitution to restore the Client's losses. Rule 1.5, RPC, Rule 407, SCACR. (Amend. Supp. Affidavit of Desa Ballard, dated January 14, 2016, p. 2, R. 793); (Swagart Aff., at ¶¶ 7-30, R. 697-708).

CONCLUSION

The evidence raises a genuine issue of disputed fact as to whether the Lawyers' half-million dollar reverse contingent fee and deed-in-reduction theory, instead of a reasonable fee for a deed-in-lieu transaction, is a breach of fiduciary duty to Ms. Gibson. The Lawyers mere alignment of their effort with Ms. Gibson's interest is not sufficient where that alignment results in a windfall lawyer fee, at Ms. Gibson's expense. The Lawyers owed Ms. Gibson a duty to diligently and expeditiously initiate an offer of deed-in-lieu of foreclosure for a reasonable fee. The failure to do so, and to disclose the unperfected nature of the deficiency claim, is a breach of fiduciary duty that resulted in a windfall fee over one-half million dollars in the Lawyers' favor.

The circuit court's order should be reversed.

Respectfully submitted,



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