THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case Number 2011-CP-40-1998
Opinion Number: (S.C. Ct. App. Filed December 6, 2017)

Jones G. Herring,
.....Respondent,

v.

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

GILBERT S. BAGNELL'S PETITION FOR WRIT OF CERTIORATI

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CERTIFICATE

Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on January 18, 2018.

QUESTION PRESENTED

Whether a default excuses a plaintiff in a legal malpractice case, in a damages hearing, from presenting expert or other competent testimony showing the amount of recovery that would have been possible pursuant to those claims.

STATEMENT OF THE CASE

Plaintiff Jones Herring brought this case alleging legal malpractice and Defendants defaulted, thereby admitting the facts alleged, but requiring proof of damages. Following an initial damages hearing, the Court of Common Pleas entered a judgment, which Defendants appealed successfully, and the Court of Appeals returned the matter to the lower court. The court conducted a second damages hearing, and the judgment was affirmed by the Court of Appeals.

Although the testimony at the damages hearing was detailed, the underlying facts are relatively simple. Prior to any interaction with the Defendants, Herring had accumulated substantial debt and successfully paid off the underlying debt over time, together with a reduced amount of interest. He received a 1099-C that reported "imputed" income from cancelation of debt resulting from the reduction of interest. Apparently this 1099-C was shortly thereafter corrected, and he received a corrected version.

Thereafter, Herring paid taxes based on the original 1099-C, and his credit history also impacted his ongoing credit.

In his testimony, Herring said that he wanted his "$125,000", but he was unable to demonstrate how he had actually lost such an amount. Questioning by Bagnell revealed that the only funds Herring had expended were 1) those he had already used to retire his debt, together with reduced interest; 2) possibly increased taxes; and 3) Mortgage insurance payments on a house he purchased.

Herring stated that he did not engage Bagnell to provide tax advice – which might have corrected overpayments, if any, resulting from the 1099-C (assuming that has been misreported). Herring also stated that in retrospect, instead of paying off his debt he would have done better to have filed for bankruptcy. However, he did not engage Bagnell for bankruptcy advice either. Herring stated that he engaged Bagnell to pursue claims under the Fair Credit Reporting Act and the Fair Debt Collection Act (hereinafter, the "Credit and Debt Collection Acts").

Finally, Herring admitted that he did not know what the elements of these claims were, or how damages would be calculated or awarded under these acts. R 173 ll. 1-11.

ARGUMENT

A. The Plaintiff presented evidence of damages he had suffered in the past due to third parties, but he did not present any evidence that he would have recovered those damages absent malpractice.

This case is unusual, and should be reviewed by the Supreme Court, because it involves the question of the requirements for proving damages in a malpractice case where the underlying

facts are deemed admitted because of default. Logically, the plaintiff must not just show that he was damaged, but also that the damage flowed from the defendant's acts – proximate cause. In South Carolina, a plaintiff in a legal malpractice case must show evidence of proximate cause. *Hall v. Fedor,* 349 S.C. 169, 177, 561 S.E.2d 654, 658 (Ct. App. 2002). In a malpractice case for failing to bring a lawsuit, the plaintiff should be held to the same standard of proof of damages, regardless of default and should be required to show his damages are those that were proximately caused by the negligence. In this case, where Herring's claim is for loss of damages in a lawsuit under the Fair Credit Reporting and Fair Debt Collection Practices Acts, he should have presented competent testimony – probably expert testimony – as to what those damages might have been, and how they might have been calculated.

In this case, the underlying harm to Herring was his treatment by his creditors. The trial court found that Herring was harmed by an overpayment to CitiFinancial of $1,200, a possible tax refund of $1,805 based on the erroneous 1099-C, $800 extra tuition resulting from imputed income from the 1099-C, and $7,342.99 in extra closing costs and interest resulting from negative reports on his credit. Order, R. p. 9, Paragraph 8. This was harm caused by a third party, not by Bagnell.

Herring's damages against Bagnell would not be for any losses caused by Herring's creditors, but for the extent to which Bagnell failed to recover those losses for Herring – assuming that they could have been recovered. In fact, Herring admitted that he did not seek tax or bankruptcy advice from Bagnell, and only expected Bagnell to bring an action under the federal Fair Credit and Debt Collection acts.

In the event of a default the plaintiff is still required to present proof of damages. Rule

55(b)(2) SCRCP. In fact, "courts should closely scrutinize default judgments to prevent harsh results and drastic action." *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 267, 274 S.E.2d 290, 292-3 (1981). Review of the lower court's finding looks for abuse of discretion to a degree amounting to an error of law. *Gamble v. Stevenson*, 305 S.C. 104, 405 S.E.2d 350 (1991).

The testimony in this case was somewhat convoluted, but as it related to damages it consisted essentially of Herring going through records of what he had paid out in the past to take care of his debts.[1] His testimony also was inconsistent between the initial damages hearing and the second one, following remand from the Court of Appeals. A good example of the confusion is his testimony concerning the 1099-C he received, and then the subsequent corrected one he received. In fact, Herring admitted that he found out about the possibility of correcting any errors in his 1099-C but elected not to do so, even though it was within the time limits to file an amended return. R 265-273. The key point is not so much that Herring's testimony may have been inaccurate, however, but the fact that he lacked the expertise to show what, if any losses resulted from the facts on which the complaint was based.

In short, Herring testified that he did not know whether he had any colorable claims under either the Fair Debt Collections Act or the Fair Credit Reporting Act, and what the damages for either might have been. But in a legal malpractice case, a claimant is required to demonstrate that he "probably would have been successful in the underlying suit". *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct. App. 2005). Although as a result of default Bagnell has conceded liability he has not conceded the amount of liability. *See Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241-42, 246 S.E.2d 880, 882 (1978). Herring's damages, if any, are limited to

1 Herring's testimony was complicated because some of his file had been lost due by a moving company when Bagnell was moving, although much of the file was later recovered.

those that he would have recovered through the specific lawsuit he asked Bagnell to bring under the Fair Debt Collection and Fair Credit Reporting Acts.

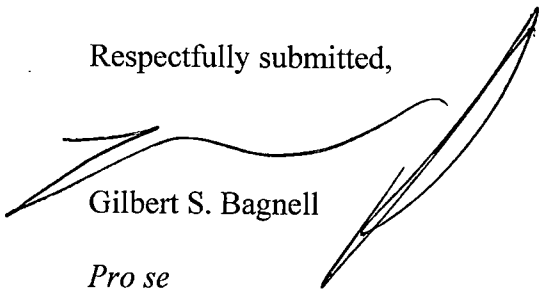
The entire record is bare of any evidence as to what damages might have been available under the federal acts, or to what extent Herring could have recouped his losses under those acts. Not only did Herring fail to adduce such evidence, it is also clear that he did not have the expertise to testify as to the extent of such losses, or as to how they were the proximate cause of negligence. In most cases, of course, proximate cause in a malpractice case must be shown by expert testimony. *Green v. Lilliewood*, 272 S.C. 186, 249 S.E.2d 910 (1978). (It should be noted that Herring also failed to file an expert affidavit along with the complaint pursuant to SC Code Section 15-36-100. The case thus would have been dismissed had it not been for default of the Defendant.)

This case presents a unique situation that appears not to have been previously addressed in South Carolina. On one hand, because of default, liability is admitted. Likewise, at the damages hearing, Herring testified and the court found that he had suffered damages in the range of $10,000 as a result of the actions of third parties. On the other hand, Herring accuses Bagnell of failing to recover that money specifically through an action under the Fair Credit Reporting and Fair Debt Collection Acts, but was unable to testify what damages he might have recovered though such an action, and more important, failed to adduce expert testimony. Both the courts and the legislature have articulated a policy requiring expert testimony in professional malpractice cases – as a requirement for commencing such cases and as a requirement demonstration proximate cause and damages.

CONCLUSION

The lower court and the Court of Appeals both erred in failing to require Herring to present testimony as to the causation and extent of damages actually resulting from malpractice, and further erred by failing to require the necessary expert testimony necessary to prove those damages. For this reason, Bagnell respectfully petitions the Court for a writ of Certiorari to the Court of Appeals.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned certifies that he served a copy of Appellant's Petition for Writ of Certiorari on Respondent this day, February 20, 2018, by placing a copy in the United States Mail, first class postage affixed, addressed as follows:

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