

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison R. Lee, Circuit Court Judge

APPELLATE CASE NO.: 2018-000335
TRIAL CASE NUMBER 2011-CP-40-1998

RECEIVED

MAR 15 2018

S.C. SUPREME COURT

Jones G. Herring, Respondent,

v.

Gilbert S. Bagnell and Bagnell and Eason, LLC, Defendants,
Of Whom Gilbert Bagnell is Petitioner

RETURN TO PETITION

Counterstatement of questions presented:

- I. Whether a Writ of Certiorari should be granted as a threshold matter.
- II. Whether the Court of Appeals erred in affirming *per curiam*, the Circuit Court's Order findings and conclusions that Appellant/Petitioner harmed Respondent.

COUNTER-STATEMENT OF THE CASE

This matter involves gross misconduct by a (now disbarred) attorney (Appellant/Petitioner, hereinafter "Bagnell") and his (former) law firm in their prior representation of Respondent Jones G. Herring (hereinafter "Herring"). From an award of damages in favor of Herring, Bagnell and

his law firm appealed. In an unpublished, *per curium* decision, filed December 6, 2017, the Court of Appeals affirmed the decision of the Circuit Court. Bagnell and his law firm's Motion for Reconsideration was denied by Order dated January 18, 2018. On February 20, 2018, Bagnell mailed to Herring's counsel a *pro se* Petition for Writ of Certiorari.^{1 2 3}

STATEMENT OF THE CASE

Respondent ("Herring") commenced a legal malpractice case against Bagnell on March 24, 2011. In his complaint, Herring alleged causes of action for negligence, fraud, constructive fraud, breach of fiduciary duty and misrepresentation. Essentially, Herring alleged that he had a meritorious creditor case, which he had engaged Bagnell to pursue; that he would have been successful, but for the fact that Bagnell did not timely pursue the case, while continually and falsely representing to Herring that his case was actively being pursued; then repeatedly refusing to provide Herring with his file(s) so that he could otherwise pursue his case. At the same time, Bagnell allowed the pertinent statute of limitations to expire.⁴

¹ Bagnell and his former law firm were represented by counsel at the time. Their counsel did not Petition for a Writ of Certiorari. Bagnell filed a Petition for Writ of Certiorari *pro se*. On February 28, 2018, the Supreme Court advised Bagnell that his Petition was, *inter alia*, defective in that, as a non-lawyer, he was not allowed to represent his former law firm, an LLC. Bagnell's former law firm's time to Petition for a Writ of Certiorari has now expired. The judgment against it is presumed to be final and is therefore a non-issue for these purposes.

² Bagnell's Certificate of Service reflects his Petition was mailed to an incorrect address for Herring's counsel. This was not the first time Bagnell engaged in similar oversights. Regardless, Herring has received Bagnell's Petition of Writ of Certiorari and accordingly responds.

³ Per Bagnell's cover letter to the Court and counsel, it appears that he is not in compliance with Rule 242(e) as a threshold matter, which may result in denial of Bagnell's Petition for Writ of Certiorari by the Court, *sua sponte*.

⁴ After first being suspended on other grounds, Bagnell was permanently disbarred from the practice of law on July 18, 2011. His disbarment arose out of the common nucleus of facts alleged in Herring's ODC complaint against Bagnell. Essentially, Herring complained to ODC that Bagnell would not return his file so that he could independently pursue his claims. Bagnell failed

To Herring's civil complaint, Bagnell defaulted, and still did not provide Herring with his file.

Pursuant to the terms of the Order of Default, Herring was to be awarded damages in an amount to be determined at a subsequently scheduled hearing. A non-jury damages hearing was set for October 31, 2011. Bagnell appeared through counsel. Bagnell made no motion to set aside the default order, nor did he provide Herring with his file.

By Order dated November 23, 2011, the lower court found that Herring had proven his case for damages. The lower court awarded actual damages of \$254,306.77. Punitive damages of \$250,000 were also awarded. The case was appealed by Bagnell. While the precise reasons were unclear, the Court of Appeals remanded the case to the lower court for another hearing as to damages. In the subsequent damages hearing, Herring was awarded \$11,147 in actual damages and \$100,000 in punitive damages. Bagnell appealed once more. His appeal was denied on December 6, 2017. Bagnell's Motion for Reconsideration was denied January 18, 2018. Bagnell's *pro se* Petition for Writ of Certiorari has followed.

STATEMENT OF FACTS

In 1998 and 1999, Herring was experiencing significant financial problems. Herring owed substantial consumer debts, in excess of \$10,000. He was a wage earner, with a limited income and few assets. He was divorced, paying child support and was facing the specter of costs associated with a college education for his son with interest on his debts at onerous rates. Herring seemingly had no way to repay his debts. He was essentially insolvent. With a bankruptcy, Herring

to honor ODC's subpoena for Herring's file and that led to the expiration of the statute of limitations against the creditor and to Bagnell's disbarment.

could avoid repaying his consumer debts, be debt free, have his debt history ultimately expunged and start his life anew. Admirably, Herring wanted to meet his obligations if there were a viable alternative. To that end, Herring sought help from United Way Consumer Credit Counseling. With the United Way's assistance, Herring was able to reach an agreement with his creditors to restructure his consumer debt payments. By the terms of his debt restructuring agreement, Herring was provided more time to pay his consumer debts, but at a reduced rate of interest and over a longer period of time. Upon full compliance (i.e. repayment of all the debts) by Herring, the creditor(s) agreed that Herring's future credit would not be adversely reported or affected by them.

Relying on his debt restructuring agreement, and without filing for bankruptcy, but through tremendous sacrifice, Herring was able to honor his agreement. By late 2005, Herring had paid off all his debt obligations and was in full compliance with his debt consolidation and repayment agreement. However, one of Herring's major creditor(s) did not honor its concomitant commitments that were fundamental and material components of Herring's debt restructuring agreement. After Herring had met all his debt obligations in 2005, the creditor(s) then put derogatory marks against Herring's credit and reported ostensible interest rate reductions to the IRS as "loan forgiveness" income for Herring. It continued to dun him for repayment of debts that were not due. The net result was that Herring was damaged by the creditor's wrongdoing. Herring's damages included: the extraordinary efforts he had expended to pay his consumer debts, along with a reduced, significantly altered lifestyle associated with repayment, plus interest (that simply could have been avoided with a bankruptcy); extra taxes; loss of financial eligibility for favorable treatment for certain of his son's college expenses, and/or repayment of debt at a more advantageous rate; loss of eligibility for a lower interest rate associated with his desire to purchase his family's home place that was in probate; ineligibility for consumer credit, except at oppressive

interest rates; being placed in a higher income tax bracket; repeatedly and continually receiving the creditor(s)' dunning letters and repeated telephone calls, both at work and at home seeking repayment for the debts already fully paid; and, other avaricious and rapacious behavior.

Herring had maintained a file(s) containing detailed documentation and logs of his debt restructuring agreement, the wrongful collection practices and errors of his creditor, as well as checks, receipts, letters, etc., proving that he had, in fact, met his obligations to repay his consumer debt, that the creditor(s) had violated the agreement and detailing how he was damaged as a proximate result of the creditor wrongdoing. Herring had substantial proof that the creditor engaged in egregious, prohibited, predatory conduct, thereby damaging him. Evidence of same included letters from the local branch of the creditor attesting that Herring was correct, that he had paid his debt in full and that the creditor was in the wrong. In fact, on subsequent analysis, Herring was able to show that he had been overcharged, and hence he had actually overpaid, the creditor. Herring attempted to resolve the creditor issues on his own, but was essentially ignored by the creditor. He continued to be pressed for payment of consumer debts he did not then owe, as well as continuing to have his ability to borrow at reasonable interest rates impaired, and he was otherwise being damaged, as was detailed.

Herring thereafter sought the assistance of the South Carolina Department of Consumer Affairs. Consumer Affairs diligently attempted to assist Herring. It was likewise rebuffed and ignored by the creditor. It recommended that Herring engage an attorney. A local attorney recommended that Herring consult with Bagnell, who was reported to be experienced in the field of law involved.

In February 2006, Herring met with Bagnell regarding legal representation. There were follow up meetings. A contract of employment was entered into. In conjunction with their meeting(s), Bagnell insisted that Herring provide him with his complete, original file(s) establishing both liability and damages. Herring did so. The file(s) provided to Bagnell by Herring were detailed. They were Herring's only copies. Bagnell represented that he would make copies of Herring's file(s) and return them to Herring. The files were not thereafter returned to Herring, despite his repeated requests.

Bagnell had repeatedly encouraged Herring to sue the creditor. Bagnell stated that the errors by the creditor(s) and Herring's consequent damages were serious, substantial, well documented and proximately caused. Bagnell represented that he was extremely well qualified and capable of undertaking the creditor lawsuit on Herring's behalf. Bagnell repeatedly represented that he had obtained a large settlement in a similar case, and that his fee alone in yet another similar case exceeded \$10,000,000. Bagnell repeatedly represented to Herring that he (Herring) had an excellent case, both as to liability and damages. Bagnell made those representations, presumably based in large part on the documentation Herring had prepared, reviewed with, and entrusted to Bagnell.

Bagnell told Herring that, in consideration and in consequence of the circumstances and Herring's thorough documentation of events, he believed Herring's damages were in excess of \$100,000, and that the value of his case was independently valued by him (Bagnell) at in excess of \$100,000. Bagnell stated that, while he could not guarantee it, Herring was likely to be awarded treble damages and substantial legal fees as well. Bagnell further, but fraudulently, indicated that he was initiating a "class action" lawsuit on behalf of Herring, wherein Bagnell would be the lead

attorney. Bagnell advised Herring to be patient; that the process was a slow one but that he would contact Herring as significant events unfolded.

Herring and Bagnell had entered into a written contract of employment on May 17, 2006. As a component term of the contract of employment, Bagnell fraudulently represented that he had associated a well-known, experienced, and reputable law firm to assist; however, Bagnell stressed that all of Herring's contact was to be with Bagnell alone.

Many months went by thereafter. Herring did not hear from Bagnell. Herring called Bagnell and was fraudulently assured that the lawsuit was progressing in a timely and positive fashion. Bagnell sent Herring a copy of a letter he (Bagnell) had purportedly sent to Herring's consumer creditor, ostensibly to demonstrate how diligently, vigorously and aggressively Bagnell was working on his case. As more time went by, Herring did not hear from or receive anything meaningful from Bagnell. As more time elapsed with Herring hearing nothing meaningful from Bagnell, Herring again called Bagnell's law office to inquire about the case and return of his damages documentation. He left messages. His calls were not returned. He then wrote to Bagnell. His letters were not answered. Herring repeatedly requested meetings with Bagnell. None of Herring's requests were honored and otherwise were simply ignored. Bagnell was dismissive. Thereafter, Herring sought the assistance of a separate attorney for the sole purpose of obtaining a case status report from Bagnell and/or a meeting. Those efforts evoked no update, no case status report and no response relative to a requested meeting. Despite repeated requests, Bagnell would not return to Herring any of his detailed damages documentation, much less the critical portion of his file that he would need so that he could seek other legal representation and pursue his creditor's case.

When Bagnell continued to ignore all of Herring's efforts to meet, to obtain a status report, a meeting and/or simply to return a copy of his file(s), Herring contacted the law firm whom Bagnell had represented he had associated on Herring's behalf with the lawsuit. At that time, Herring was informed, not only had that law firm not been engaged or associated by Bagnell, but also that it had previously and expressly advised Bagnell that it would not agree to be associated with Bagnell in particular. Bagnell had again actively misled and defrauded Herring to his distinct prejudice.

At that point, Herring enlisted the services of an attorney for the purpose of more formally attempting to assist in obtaining a copy of his file(s). Herring's file(s) were critical, in that Herring wanted to pursue his case and needed the return of his proof of damages in particular. By that time, Consumer Affairs document retention time had expired and needed documents could not be located elsewhere. Herring discovered at that point in time that a lawsuit had never been filed by Bagnell, despite Bagnell's repeated assurances that Herring's lawsuit had been filed and that the case was actively progressing. Herring wrote a series of certified letters, to Bagnell in an attempt to obtain his file so that he could independently pursue his creditor case. Bagnell did not respond; he did not provide any of Herring's file to him.

Thereafter, Herring learned that, after Bagnell had apparently realized his reported \$10,000,000 fee in a separate matter, Bagnell had sold his residence and permanently left the State of South Carolina, never to return. However, both Bagnell's telephone answering service and office secretary indicated that Bagnell was simply "out of town", but that he was actively practicing law.⁵ Further, Bagnell maintained an office in Columbia and received certified mail at that

⁵ Prior to this point in time, Bagnell had apparently been suspended from the practice of law for failure to meet CLE mandates.

location. Herring's letters and telephone calls to Bagnell were once again ignored. Neither Bagnell nor his (former) law firm would provide Herring with his documented proof of creditor liability and damages.

Having received no cooperation or response from Bagnell or his law firm, Herring sought the assistance of the South Carolina Bar. Bagnell did not respond to the South Carolina Bar, nor did Bagnell produce Herring's file(s) pursuant to its subpoena. (See In the Matter of Gilbert S. Bagnell, 393 S.C. 382, 713 S.E.2d 304). Essentially, Bagnell ignored the South Carolina Bar, and ODC in particular, the same as Bagnell had ignored Herring and independent counsel who attempted to assist in obtaining Herring's files and proof of damages as an intermediary. Not only had Bagnell engaged in thoroughly unprofessional and deceptive practices, but Bagnell had allowed the time to expire in which to sue the consumer creditor(s) who had harmed Herring. At the trial of the case, Herring provided detailed testimony and affidavits regarding damages. A verdict for actual damages of \$11,147.99 and punitive damages of \$100,000 was rendered.

ARGUMENT

I. Whether a Writ of Certiorari should be granted as a threshold matter.

A Writ of Certiorari to the Court of Appeals is not a matter of right. It is discretionary. Rule 242 (b) of the South Carolina Appellate Court Rules lists five (5) situations where issuance of the writ is appropriate.

- 1) Where there are novel questions of law;
- 2) Where there is a dissent in the decision of the Court of Appeals;
- 3) Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court;

- 4) Where substantial constitutional issues are directly involved;
- 5) Where a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court. Rule 242(b), SCACR.

A proper question is whether the issues raised in this appeal rise to that level. Here, there is no novel question of law, rather the Court is asked to reexamine well-established points of law in light of a distressing fact pattern; and, both parties have briefed those points before the Circuit Court and Court of Appeals, per the Appendix and Record in those Courts, and continue to advocate for the positions expressed therein. Likewise, there is no dissent in the decision of the Court of Appeals. The Court of Appeals' decision conflicts with no prior Supreme Court decisions. There is no substantial Constitutional issue involved. No federal questions are involved. Issues such as those above might warrant treatment by the State's highest court in order to avoid or resolve conflict in the law or to resolve a question that would certainly become fodder for a number of appeals on the same issue. In re: Breast Implant Prod. Liab., 331 S.C. 540, 503 S.E. 2d 445 (1998). However, the issues in this case do not rise to that level.

There are not those types of issues on this appeal or in the Petition. No question or issue presented qualifies as an exceptional circumstance or as a point of law so significant that the highest court of our State should need to resolve it. The Writ of Certiorari is unwarranted in this case. The Petition for Writ of Certiorari should be denied.

II. Whether the Court of Appeals erred in affirming per curiam, the Circuit Court's Order findings and conclusions that Appellant/Petitioner harmed Respondent.

The issues argued by Bagnell, *pro se* herein are redundant and superfluous. The matter was thoroughly briefed by his former counsel. The Court of Appeals thoroughly addressed the

issues raised and rendered the proper decision under the circumstances. Nothing new, unique or overlooked has now been raised by Bagnell. The Court of Appeals rendered a proper decision for correct reasons.

Herring appropriately established his damages under the circumstances. Bagnell now seems to assert that Herring's claim should have proceeded against his creditor(s). Bagnell's argument is both moot and misplaced in that a) Herring hired Bagnell to pursue the case, and (b) Bagnell deceived Herring by falsely asserting that the case was proceeding and falsely representing that he (Bagnell) had associated another law firm to assist, and (c) Bagnell let the statute of limitations against the creditor expire, and (d) Bagnell and his law firm refused to return to Herring his proof of damages documentation so that he could ever pursue claims by utilizing competent, honest counsel.

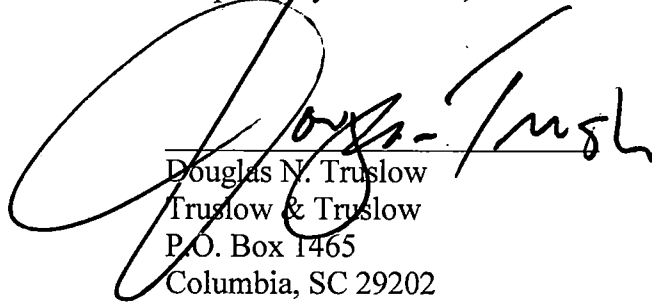
Bagnell's argument now seems to be that it is acceptable for an attorney to deceive his client and then withhold the needed documentation of damages from the client in an effort to hide the truth and subvert the ends of justice to a client's distinct prejudice. In essence, Bagnell urges that, in the face of a malpractice lawsuit, all an attorney would have to do to avoid responsibility would be to destroy the evidence. That cannot be just or the law.

Substantial, credible evidence of damages was presented by Herring. Herring incorporates by reference, the matters set forth in his Final Brief to the Court of Appeals, as well as the arguments previously submitted by Bagnell's prior counsel.

CONCLUSION

Bagnell's Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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Mar 13 date

STATE OF SOUTH CAROLINA
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Alison R. Lee, Circuit Court Judge

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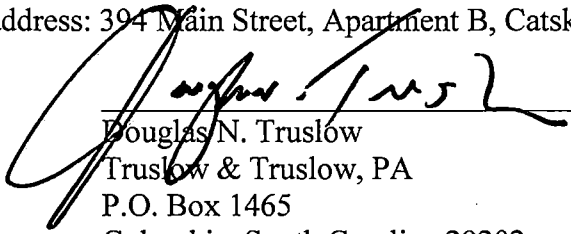
Jones G. Herring, Respondent,

v.

Gilbert S. Bagnell and Bagnell and Eason, LLC, Defendants,
Of Whom Gilbert Bagnell is Petitioner

PROOF OF SERVICE

I certify that I have served the **Return to Petition** on Gilbert Bagnell by depositing a copy in the United States Mail, postage prepaid, on March 13, 2018, addressed to Gilbert Bagnell, as he is appearing *pro se* at the following address: 394 Main Street, Apartment B, Catskill, NY 12414.



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March 13, 2018