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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No: 2011-CP-40-1998
Court Of Appeals Number:

Jones G. Herring, ... Respondent,

v.

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

APPELLANT'S PETITION FOR REHEARING

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Gilbert S. Bagnell ("Mr. Bagnell") and Bagnell and Eason, LLC ("Mr. Bagnell's Law Firm", collectively "Appellants"), by and through their undersigned counsel, do hereby move before the South Carolina Court of Appeals, pursuant to Rule 221 of the South Carolina Appellate Court Rules (the "Rules") requesting that the Court rehear and reconsider its Ruling in the above-captioned matter as provided for in its unpublished opinion dated December 6, 2017 (the "Opinion"). The Opinion affirms the trial court's decision pursuant to Rule 220(b). The Opinion then sites several cases. These same cases were sited by the Appellants in their brief. The Appellant believes that the Court overlooked and misapprehended the following issues:

1. *This Order stems from a Second Hearing on Damages and in that Hearing the Plaintiff failed to present evidence that this Court stated was lacking in reversing the first Order granting damages.*

The order Appellate seeks to have overturned was on a Second Hearing for determination of damages in an action at law without a jury in accordance with 55(b)(2) SCRCP. Further, South Carolina has "recognized that courts should closely scrutinize default judgments to prevent harsh results and drastic action." *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 567, 274 S.E.2d 290, 292-93 (1981)(reversing Circuit Court's finding holding the amount recoverable was not based on the proof). The exact same errors of law that caused the Court of Appeals to reverse the first Order granting damages exist in this award of damages. This Court is required to closely scrutinize whether the Circuit Court's order was based upon evidence which reasonably supported the findings. Further, the appellate court must examine the Circuit Court's post-award review to determine whether the Circuit Court abused its discretion to such a degree as to amount to an error of law. *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991).

2. *The fact that Appellants' defaulted does not remove the burden of the Respondent to present evidence of the value of his underlying claim.*

Despite the entering of a default judgment against the Appellant, Respondent is required to present adequate evidence of the amount of damages proximately suffered. The Respondent, again, failed to present such evidence. The Appellants admitted, by way of their default, that they committed legal malpractice and were responsible for the loss of any value the Respondent had in his claims against CitiFinancial. The Respondent failed, however, to present adequate evidence as to the value of the claims he lost. In so doing, the Respondent in no way addressed the proximate relation of the alleged damages to the harm admitted. While testimony was presented that the Respondent believed he may be entitled to damages against CitiFinancial, such evidence was speculative. Further, no evidence as to the likelihood of success or the collectability of such a judgment was presented.

A claimant in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship, (2) a breach of duty by the attorney, (3) damage to the client, and (4) proximate causation of the client's damages by the breach. *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). Furthermore, a claimant is required to demonstrate that "he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.'" *Doe v. Howe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30 (Ct.App.2005) (quoting *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997)). As a result of the Appellants' default in this case, the Appellant has conceded liability, but has not conceded the amount of the liability. See *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 241–42, 246 S.E.2d 880, 882 (1978). Thus, the Appellants have only conceded the necessary

elements of a claim for legal malpractice, including that the Respondent was harmed. The Appellants did not concede, however, the extent of that harm.

To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). According to the complaint, Appellants were negligent in allowing the statute of limitations to expire on the claims Respondent had against CitiFinancial. According to the testimony, Respondent's claims included claims under the Fair Credit Reporting Act and Fair Debt Collection Practices Act. No evidence was ever presented as to what damages are recoverable under the Fair Credit Reporting Act or the Fair Debt Collection Practices Act. Simply, no evidence was presented as to the extent of the harm cause by the Appellants.

3. *The Circuit Court awarded damages caused by a Third Party and had no evidence that these damages were caused by the Appellants.*

In the present matter, the Circuit Court held that Respondent was entitled to the actual damages caused by CitiFinancial to Respondent. The Order and this Court's Opinion fails in any respect to address the value of the claim against CitiFinancial, and instead discusses the evidence of harm by CitiFinancial. The Circuit Court found:

> "[Respondent's] uncontroverted testimony and supporting affidavits prove, by the preponderance of the evidence, that Citi[Financial]'s breach of the underlying Agreement caused [Respondent] to suffer the following actual damages: (1) at least $1,200.00 in overpayment to Citi[Financial]; (2) $1,805.00 in a tax refund [Respondent] would have received had Citi[Financial] not improperly reported to the IRS that [Respondent] had incurred income when, in fact, [Respondent] had not; (3) $800.00 in additional tuition expenses [Respondent] incurred because of his putative "increased income" causing him to not qualify for an education tax credit; and (4) $7,342.99 in additional closing costs and interest that [Respondent] has, and will continue to have, to pay because of negative reports on his credit."

Order at (R. p. 9¶8). In South Carolina, the Respondent is not entitled to the harm caused by the third party, CitiFinancial, but, instead, are only entitled to the harm caused by the Appellants. Were there any evidence showing that the damages caused by CitiFinancial were correlated or directly equal to the value of the claims Respondent lost due to Appellants malpractice, this analysis would be pertinent. Without this correlation, it serves no purpose.

4. *The Circuit Court and this Court failed to require evidence of proximate cause.*

In South Carolina, the Courts require that in actions for legal malpractice evidence of proximate cause be presented. *Hall v. Fedor*, 349 S.C. 169, 177, 561 S.E.2d 654, 658 (Ct. App. 2002)("the Respondent must show he or she '***most probably***' would have been successful in the underlying suit if the attorney had not committed the alleged malpractice."), see also *Brown v. Theos*, 345 S.C. 626, 550 S.E.2d 304 (2001); *Summer v. Carpenter*, 328 S.C. 36, 492 S.E.2d 55 (1997); *Manning v. Quinn*, 294 S.C. 383, 365 S.E.2d 24 (1988); *Floyd v. Kosko*, 285 S.C. 390, 329 S.E.2d 459 (Ct.App.1985). Normally, proximate cause is a question of fact for the jury, and it may be proved by direct or circumstantial evidence. *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972). Proximate cause requires proof of: (1) causation-in-fact, and (2) legal cause. *Bramlette v. Charter–Medical–Columbia*, 302 S.C. 68, 72, 393 S.E.2d 914, 916 (1990). Causation-in-fact is proved by establishing the injury would not have occurred "but for" the Appellant's negligence, and legal cause is proved by establishing foreseeability. *Id.* Generally, expert testimony is required to establish proximate cause in a malpractice case. *Green v. Lilliewood*, 272 S.C. 186, 249 S.E.2d 910 (1978)("Since many malpractice suits involve [issues] outside the realm of ordinary lay knowledge, expert testimony is generally necessary."). Expert testimony is not required, however, to prove proximate cause if the common knowledge or

experience of laypersons is extensive enough to determine the presence of the required causal link between the negligence and the harm. *Pederson v. Gould*, 288 S.C. 141, 341 S.E.2d 633 (1986); *King v. Williams*, 276 S.C. 478, 279 S.E.2d 618 (1981); see *Armstrong v. Weiland*, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976)("When the testimony of an expert witness is not relied upon to establish proximate cause, it is sufficient for Respondent to put forth some evidence which rises above mere speculation or conjecture...."). But, in legal malpractice cases, sometimes expert testimony is required, especially when the legal malpractice action involves the failure of an attorney to bring a case. This is the reason when describing the elements of legal malpractice the court has added "[f]urthermore, a claimant is required to demonstrate that "he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice.'" *Doe, supra* (quoting *Summer*). Generally, the value of a claim is directly tied to the success of the underlying suit.

Other jurisdictions have more succinctly held that if the malpractice charged is related to the prosecution of an underlying action, it is generally held that where there is a "trial within a trial" the claimant in the legal malpractice action has the burden of proof to establish that proper handling of the matter would have resulted in recovery of a judgment, and that the judgment would have been fully or partially collectible. *Williams v. Bashman*, 457 F. Supp. 322, 326 (E.D. Pa. 1978), See Also *Christy v. Saliterman*, 288 Minn. 144, 150, 179 N.W.2d 288, 294 (1970), *Sitton v. Clements*, 257 F. Supp. 63 (E.D. Tenn. 1966), aff'd, 385 F.2d 869 (6th Cir. 1967); *Duke & Co. v. Anderson*, 275 Pa. Super. 65, 418 A.2d 613 (1980); *Sherry v. Diercks*, 29 Wash. App. 433, 628 P.2d 1336 (1981), *McDow v. Dixon*, 138 Ga. App. 338, 226 S.E.2d 145 (1976), *Moore v. Moyle*, 405 Ill. 555, 566, 92 N.E.2d 81, 87 (1950), *Hoppe v. Ranzini*, 158 N.J. Super. 158, 385

A.2d 913 (Super. Ct. App. Div. 1978). "The Respondent in a legal malpractice action must prove a 'case within a case,' as he or she must prove the merits of the underlying case as part of the proof of the malpractice case." 7A C.J.S. Attorney & Client § 331 (citations omitted). The question of what should have happened in the underlying action is a question of law. See, e.g., *Doe v. Howe*, 626 S.E.2d 25, 31, n. 18 (S.C. Ct. App. 2007)("Under the case-within-a-case concept, the test is objective. Therefore, the test is not what the outcome would have been, but rather what it should have been."); *Manning*, 356 S.E.2d 24, 25 (holding that the likelihood of success of underlying case was a question of law).

On the record before it, the Circuit Court could not have awarded damages without impermissibly resorting to speculation. The Respondent failed to present any supporting evidence as to the value of the claims lost. No expert witness testified. No one rendered an opinion on the likelihood of success. No one testified as to the collectability of any damages. Simply, the Respondent failed to present adequate evidence to support the Circuit Court's order for damages against the Appellant. The Respondent at no time presented evidence as to the ability to bring an action on the alleged actions of CitiFinancial. Similarly, the Respondent never presented evidence as to how his ability to bring the action was affected by the Appellants failure to bring the action. The testimony of the Respondent in no way addressed the proximate relation of the alleged damages to the harm admitted.

CONCLUSION

In failing to consider the complete failure of evidence in the Second Hearing for Damages, in failing to consider the complete failure to present evidence of the value of the Plaintiff's claim, in failing to consider that the damages awarded were the damages caused by a

third party and not caused by the Appellant, and in failing to consider the complete lack of evidence of proximate cause, this court misapprehended this appeal and should reconsider its Opinion and provided for the rehearing of this matter.

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PROOF OF SERVICE

I certify that I have served a copy of the Appellant's Petition for Rehearing by depositing a copy of it in the United States Mail, postage prepaid, on December 15, 2017, addressed to its attorney of record as follows:

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Dated: December 15, 2017