

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENWOOD COUNTY  
*Court of Common Pleas*

*Frank R. Addy, Jr., Circuit Court Judge*

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**Case No. 2009-CP-24-1181**  
**Tracking Number 2011-186586**

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Anjay Patel, Mani Investments, LLC  
d/b/a Cornerstop Stores and Mani  
One, Inc.,

*Appellants,*

v.

The Garrett Law Firm PC, Carson  
M. Henderson, and Billy J. Garrett,  
Jr., T. Scott Ward, One Stop Marina,  
Inc., Greenwood Realty, Inc., Renee  
Simchon,

*Defendants,*

Of Whom The Garrett Law Firm, PC,  
Carson M. Henderson, and Billy J. Garrett, Jr.,  
are,

*Respondents.*

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**FINAL BRIEF OF RESPONDENTS**

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SC Court of Appeals

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## STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS BASED UPON APPELLANTS' FAILURE TO RAISE A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER ANY ALLEGED NEGLIGENCE ON THE PART OF RESPONDENTS HAD BEEN THE CAUSE IN FACT OR THE PROXIMATE CAUSE OF APPELLANTS' CLAIMED DAMAGES WHERE A PREVIOUS ORDER OF THE COURT HELD THAT THE SOLE PROXIMATE CAUSE AND CAUSE IN FACT OF APPELLANTS' CLAIMED DAMAGES HAD BEEN APPELLANTS' FAILURE TO EXERCISE PROPERLY AN OPTION TO PURCHASE REAL PROPERTY.
  
- II. WHETHER THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS ON THE GROUNDS THAT THE DOCTRINES OF WAIVER AND ESTOPPEL BAR ANY EQUITABLE RECOVERY ON BEHALF OF APPELLANTS WHERE APPELLANTS FAILED TO SEEK AND PERFECT AN EQUITABLE REDEMPTION, FAILED TO SECURE A SET ASIDE FUND, AND FAILED TO SEEK SPECIFIC PERFORMANCE.

## STATEMENT OF THE CASE

On May 17, 2004, T. Scott Ward (“Ward”) and Appellant Mani Investments, LLC (“Mani Investments”) entered into an Option to Purchase Real Property for Mani Investments to purchase property located at 5201 Old Laurens Road and 5119 Old Laurens Road, Greenwood, South Carolina 29646 (“Option”). On that date, Appellant Mani Investments also entered into an agreement to lease (“Lease”) this same property from Ward for three years. The lease contained a right to renew.

After Appellant Mani Investments failed to exercise the Option according to the terms of the agreement, on August 27, 2007, Ward sent correspondence to Appellant Anjay R. Patel (“Patel”) informing him as the representative of Mani Investments that Ward was exercising his right under the Lease to require Appellant Mani Investments to vacate the subject property.

On September 18, 2007, Appellant Mani Investments filed, inter alia, a breach of contract action against Ward and a legal malpractice action against Respondents the Garrett Law Firm, PC, Carson M. Henderson, and Billy J. Garrett, Jr. (collectively “Respondents Garrett”). On September 29, 2008, the Honorable Wyatt T. Saunders, Jr., Circuit Court Judge, filed an Order dismissing Appellant Mani Investment’s claims against Respondents Garrett and giving Mani Investments leave to file a second amended complaint if it obtained an affidavit to satisfy the requirements of Section 15-36-100 of the South Carolina Code of Laws. Appellant Mani Investments, however, never moved to file a second amended complaint. On October 2, 2008, Judge Saunders also filed an Order dismissing Appellant Mani Investments’ claims against Ward.

On August 13, 2009, Mani Investments, together with Appellant Patel and Appellant Mani One, Inc. (“Mani One”), filed this action against Respondents Garrett, as well as Ward, One Stop Marina, Inc., Greenwood Realty, Inc., and Renee Simehon. On May 18, 2010, the Honorable Eugene C. Griffith, Circuit Court Judge, filed a Final Order Dismissing the Complaint Against Defendants T. Scott Ward and One Stop Marina, Inc., With Prejudice.

On August 20, 2010, Respondents Garrett filed the Motion for Summary Judgment giving rise to this appeal. After considering the memoranda and oral arguments of the parties, on November 11, 2010, the Honorable Frank R. Addy, Jr., issued an Order Granting Summary Judgment in favor of Respondents Garrett. On November 24, 2010, Appellants filed a Motion for Reconsideration of the Order granting summary judgment in favor of Respondents Garrett. On January 28, 2011, Judge Addy issued an Order denying that motion. On February 23, 2011, Judge Addy executed a revised, but substantially similar, Order again denying Appellants’ Motion for Reconsideration of the Order granting summary judgment in favor of Respondents Garrett.

Appellants filed notice of this appeal on February 24, 2011. After Judge Addy’s subsequent Order denying Appellants’ Motion for Reconsideration was filed in the Eight Judicial Circuit on August 8, 2011, Appellants filed at the direction of this Court an amended notice of appeal on October 21, 2011.

## STATEMENT OF THE FACTS

On May 17, 2004, Ward and Appellant Mani Investments entered into the Option to Purchase Real Property for Mani Investments to purchase the property located at 5201 Old Laurens Road and 5119 Old Laurens Road, Greenwood, South Carolina 29646 in exchange for consideration of One Hundred Thousand (\$100,000.00) Dollars. (R. pp. 171-77). The Option contained the following pertinent provisions:

This Option to Purchase Real Property shall be binding on and shall inure to the benefit of the parties and their heirs, successors, and assigns. Nothing in this Option to Purchase Real Property, expressed or implied, is intended to or shall confer upon any person or business entity other than the Optionor and the Optionee, and their respective heirs, legal representatives, personal representatives, successors, and permitted assigns, any rights, remedies, obligations, or liabilities.

(R. p. 173, lines 36-40), and

This Option to Purchase Real Property shall be binding upon, and shall inure to the benefit of, and shall be enforceable by and against the Optionor and the Optionee and their respective heirs, legal representatives, personal representatives, successors, and permitted assigns. Nothing in this Option to Purchase Real Property, expressed or implied, is intended to or shall confer upon any person or business entity other than the Optionor and the Optionee, and their respective heirs, legal representatives, personal representatives, successors, and permitted assigns, any rights, remedies, obligations, or liabilities.

(R. p. 176, lines 6-12).

On the same day, Appellant Mani Investments entered into the Lease of the same property from Ward for three years. (*See* R. pp. 159-70). The Lease provided, in part, that Mani Investments had a right to renew. (R. p. 160, lines 19-23). Under the terms of the Option, Mani Investments, as the Optionee, was to receive credit upon exercise of the Option for payments made under the Lease as long as it fully complied with terms of the Lease. (R. p. 173, lines 3-11).

In order to exercise the Option, Mani Investments would have to provide written notice to Ward by May 17, 2007, of its intent to exercise the Option. (R. p. 172, line 15-p. 173, line 11). According to the agreement, Appellant Mani Investments' written notice also had to specify the medium of payment and the suggested date for closing the purchase transaction, which had to occur not sooner than 30 days and not later than 90 days subsequent to the date of written notice. (R. p. 172, lines 24-27).

On May 10, 2007, Appellant Patel and Appellant Mani One allegedly sent correspondence to Ward in which they requested an extension of the Lease and attempted to exercise the Option. (*See* R. p. 204). In addition to not being sent on behalf of Appellant Mani Investments, this correspondence also failed to specify a suggested date for closing within 90 days of the date of the correspondence. (R. p. 204). On May 17, 2007, Appellant Patel again allegedly sent correspondence for Appellant Mani One to Ward concerning an extension of the Lease. (*See* R. p. 203). Again, this correspondence had not been sent on behalf of Appellant Mani Investments and failed to specify a suggested date for closing within 90 days of the date of the correspondence. (R. p. 203). Accordingly, neither of these documents exercised the Option or modified the Option in a manner permitted by its terms.

On August 27, 2007, Ward sent correspondence to Appellant Patel informing him as the representative for Appellant Mani Investments that Ward was exercising his right under the Lease to require Appellant Patel to vacate the subject property by September 17, 2007, because of Mani Investments' failure to exercise the Option. (R. p. 216).

On September 18, 2007, Appellant Mani Investments filed, inter alia, a breach of contract action against Ward and a legal malpractice action against Respondents Garrett.

(R. pp. 329-427). After considering the memoranda and oral arguments of the parties, (*see* R. pp. 443-72), on September 29, 2008, the Honorable Wyatt T. Saunders, Jr., Circuit Court Judge, issued an Order dismissing Appellant Mani Investments' claims against Respondents Garrett and giving Mani Investments leave to file a second amended complaint if it obtained an affidavit to satisfy the requirements of Section 15-36-100 of the South Carolina Code. (R. pp. 473-75). Appellant Mani Investments, however, never moved to file a second amended complaint. On October 3, 2008, Judge Saunders also issued an Order dismissing Appellant Mani Investments' claims against Ward "because the allegations of the complaint reveal that the legal entity which was granted the option under the parties' contract clearly did not exercise the option in writing at any time." (R. pp. 206-07).

On August 13, 2009, Appellants Mani Investments, Patel, and Mani One filed this action against Respondents Garrett, as well as Ward, One Stop Marina, Inc., Greenwood Realty, Inc., and Renee Simehon. (R. pp. 1-14). After considering the memoranda and oral arguments of the parties, (*see* R. pp. 227-50), on May 28, 2010, the Honorable Eugene C. Griffith, Circuit Court Judge, filed a Final Order Dismissing the Complaint Against Defendants T. Scott Ward and One Stop Marina, Inc., With Prejudice, (R. pp. 208-15). In that Order, Judge Griffith ruled in pertinent part:

This Court concludes that the language of Judge Saunders' Order of October 2, 2008, was not challenged by Plaintiff Mani Investments, LLC in any way. As an unappealed final ruling, right or wrong, all parties are bound by it because it is the "law of the case."

Judge Saunders' final Order adjudicated the contractual rights of the parties under their option contract adversely to the Plaintiff Mani Investments, Inc. Judge Saunders' Order now effectively bars all of the Plaintiffs' new lawsuit against T. Scott Ward and One Stop Marina, Inc. for two reasons. First, the doctrine of *res judicata* precludes Mani

Investments, Inc. under the circumstances of this case, from filing a new complaint.

When claims arising out of a particular transaction or occurrence are adjudicated, *res judicata* bars the parties to that suit from bringing subsequent actions on either the adjudicated issues or any issues that might have been raised in the first suit. \* \* \*

Second, the Plaintiffs, in an unsuccessful attempt to avoid the application of *res judicata*, joined new Plaintiffs and Defendants. \* \* \* [T]he doctrine of collateral estoppel prohibits the Court from adjudicating an issue that was actually litigated and determined by a valid and final judgment in a prior lawsuit.

(R. p. 211, line 15-p. 212, line 5, R. p. 212, lines 13-19) (citations omitted).

On August 20, 2010, Respondents Garrett filed a Motion for Summary Judgment on the ground, *inter alia*, that the Court's previous order, which had adjudicated the parties' contractual rights and which had declared the Option unenforceable, stands as the law of the case and, therefore, bars this action. (R. pp. 476-80). After considering the memoranda and oral arguments of the parties, (*see* R. pp. 252-79), on November 11, 2010, the Honorable Frank R. Addy, Jr., issued an Order Granting Summary Judgment in favor of Respondents Garrett in which the Court determined that Appellants had failed to raise a question of fact regarding the proximate causation element of their legal malpractice claim and that Appellants had waived and were equitably estopped from seeking recovery. (R. pp. 280-92). In that Order Judge Addy ruled in pertinent part:

[I]n the 2007 case, Judge Sanders issued an Order dismissing the claims of Mani Investments against Ward and One Stop. Because Mani Investments failed to appeal the dismissal, the October 2, 2008 ruling stands as the "law of the case" and continues to bind the present parties. Judge Griffith applied the "law of the case" in granting the Rule 12(b)(6) motion filed by the Defendants Ward and One Stop, requesting the court to dismiss the Plaintiffs' Complaint against them. \* \* \* Because the October 2, 2008 Order as a matter of law assigned to Mani Investments the sole responsibility for the improper exercise of the Option, Judge Griffith ruled

that the 2009 Complaint against Ward and One Stop should be dismissed with prejudice. \* \* \* In short, the issue of whether any alleged negligence of the Garrett Defendants was the cause in fact or the proximate cause of the Plaintiffs' alleged damages has been litigated and been determined adversely to the Plaintiffs. Therefore, Mani Investments is estopped from relitigating the issue of the cause of the alleged damage.

(R. p. 288, lines 6-14, R. p. 289, lines 15-18) (citations omitted). Judge Addy further ruled that “[b]ecause the Plaintiffs have failed to (1) seek and perfect an equitable redemption, (2) secured the \$100,000.00 set aside fund, and (3) seek specific performance, the Plaintiffs are barred from recovery by both the doctrines of waiver and estoppel.” (R. p. 292, lines 11-13).

On November 24, 2010, Appellants filed a Motion for Reconsideration of the Order granting summary judgment in favor of Respondents Garrett Defendants. (R. pp. 293-95). After considering the memoranda and oral arguments of the parties, (*see* R. pp. 296-317), on January 28, 2011, Judge Addy issued an Order denying that motion, (R. pp. 320-24). On February 23, 2010, Judge Addy executed a revised, but substantially similar, Order Denying Motion of Plaintiffs to Reconsider or to Alter or Amend, (R. pp. 325-28), in which Judge Addy addressed, *inter alia*, “Plaintiff[’s] . . . issue with labeling this Motion to Reconsider as a ‘Rule 59(e)’ motion, as well as references to the Federal Rules of Civil Procedure in this Order[,]” (R. p. 325 n.2).

Appellants filed notice of this appeal on February 24, 2011. After Judge Addy’s subsequent Order denying Appellants’ Motion for Reconsideration was filed in the Eighth Judicial Circuit on August 8, 2011, (R. p. 325), Appellants filed at the direction of this Court an amended notice of appeal on October 21, 2011.

## STANDARD OF REVIEW

An appellate court reviews a grant of summary judgment under the same standard applied by the trial court. *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). Accordingly, a grant of summary judgment should be affirmed where “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c), *SCRCP*.

While the party seeking such a judgment carries the initial burden of demonstrating the absence of any genuine issue of material fact, *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)), and “all evidence and inferences drawn from the evidence must be viewed in the light most favorable to the non-moving party[.]” *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004) (citing *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)), an appellate court should affirm a trial court’s grant of summary judgment “against a party who has failed to make a showing sufficient to establish the existence of an essential element of the party’s case.” See *Harris v. Rose’s Stores, Inc.*, 315 S.C. 344, 346, 433 S.E.2d 905, 906 (Ct. App. 1993).

## ARGUMENT

The Honorable Frank R. Addy, Jr., Circuit Court Judge, granted summary judgment in favor of Respondents Garrett and dismissed with prejudice Appellants' legal malpractice claims against Respondents Garrett because Appellants "failed to produce even a mere scintilla of evidence that [Respondents Garretts'] alleged negligence proximately caused [Appellants'] alleged damages." (R. p. 291, lines 7-8). Judge Addy based his determination upon finding that, as a matter of law, no alleged negligence on the part of Respondents had been the cause in fact or the proximate cause of any of Appellants' claimed damages. (R. p. 290, line 14-p. 291, line 6). Furthermore, Judge Addy determined that a ruling in previous litigation by the Honorable Wyatt T. Saunders, Circuit Court Judge, which held that the sole proximate cause and cause in fact of Appellants' claimed damages had been Appellants' failure to exercise properly an option to purchase property, stands as the law of the case and bars Appellants from re-litigating the issues of the proximate cause and cause in fact of Appellants' claimed damages. (R. p. 288, line 1-p. 290, line 14). Judge Addy also concluded that Appellants are barred from recovery on their legal malpractice claims against Respondents Garrett by the doctrines of waiver and estoppel because Appellants failed to seek and to perfect an equitable redemption, to secure a set aside fund, or to seek specific performance. (R. p. 291, line 10-p. 292, line 13). Accordingly, this Court should affirm the circuit court's grant of summary judgment in favor of Respondents Garrett and dismiss with prejudice Appellants' legal malpractice claims against Respondents Garrett because Judge Addy properly held that Appellants failed to make a showing sufficient to establish the existence of an essential element of Appellants' case.

**I. BECAUSE APPELLANTS FAILED TO RAISE ANY ISSUE OF MATERIAL FACT REGARDING THE CAUSATION ELEMENT OF THEIR LEGAL MALPRACTICE CLAIM, THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.**

In order to recover in a legal malpractice action, a plaintiff must prove the following elements: “(1) the existence of an attorney–client relationship;<sup>1</sup> (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client’s damages.” *McNair v. Rainsford*, 330 S.C. 332, 341, 499 S.E.2d 488, 493–94 (Ct. App. 1998) (citing *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612 (1996)).

In *Eadie v. Krause*, 381 S.C. 55, 671 S.E.2d 389 (Ct. App. 2008), the South Carolina Court of Appeals interpreted the proximate cause element as follows:

Proximate cause requires proof of causation in fact and legal cause. . . . Causation in fact is proved by establishing the plaintiff’s injury would not have occurred “but for” the defendant’s negligence. . . . Legal cause is proved by establishing foreseeability. . . . When the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability. . . . In the context of a legal malpractice action, the plaintiff bears the burden of proving the alleged malpractice proximately caused damage to the plaintiff and the defendant may be held liable for anything which appears to have been a natural and probable consequence of his negligence.

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<sup>1</sup> Although Appellants argue that a genuine issue of material fact exists regarding whether the first element necessary to recover under a legal malpractice theory has been satisfied, (Appellant’s Initial Br. 11–15), the issue of whether an attorney–client relationship existed has been mooted for the purposes of this appeal because, while Respondents deny that an attorney–client relationship existed, Respondents conceded for the purposes of the circuit court’s consideration of the motion for summary judgment that Appellants’ submission of the Affidavit of C. Joseph Roof raised an issue of material fact regarding whether an attorney–client relationship existed, (R. p. 258, line 17–p. 259, line 13, R. p. 273, line 6–p. 274, line 8). Accordingly, there was no need for Judge Addy to address the existence of an attorney–client relationship. Instead, Judge Addy’s Order is predicated upon Appellants failure to produce even a mere scintilla of evidence that Respondents’ alleged negligence and breach of the standard of care proximately caused Appellants’ alleged damages. (R. p. 287, line 1–p. 291, line 9).

*Id.* at 65, 671 S.E.2d at 393. Accordingly, in order to survive a motion for summary judgment, a plaintiff must establish that a genuine issue of fact exists regarding whether the plaintiff suffered an injury and whether the defendant's alleged negligence proximately caused that injury.

***A. South Carolina Law Precludes Appellants from Establishing the Existence of a Genuine Issue of Material Fact Regarding the Issue of Proximate Causation.***

A party cannot establish the existence of a genuine issue of material fact as to a matter where an unchallenged final ruling in prior litigation established that matter as the law of the case. *King v. James*, 388 S.C. 16, 25, 694 S.E.2d 35, 40 (2010) (citing *ML-Lee Acquisition Fund, LP v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling, right or wrong, becomes the law of the case)). Nor can a party re-litigate “an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.” *Carolina Renewal, Inc. v. South Carolina Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (2009) (citing *Judy v. Judy*, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009)).

**1. A Previous Ruling of the Court Determined that Appellants' Failure to Exercise the Option to Purchase Had Been the Sole Proximate Cause and Cause in Fact of Appellants' Claimed Damages.**

The failure to appeal a court's ruling on an issue establishes the ruling as the law of the case. *Charleston Lumber Co. v. Miller Housing Corp.*, 338 S.C. 171, 174–75, 525 S.E.2d 869, 871–72 (2000) (citing *ML-Lee Acquisition Fund*, 327 S.C. at 241, 489 S.E.2d at 472 (unappealed ruling is law of the case); *Buckner v. Preferred Mut. Ins. Co.*, 255 S.C. 159, 161, 177 S.E.2d 544, 544 (1970) (an unchallenged ruling, “right or wrong, is the law of this case and requires affirmance.”)). Accordingly, an unchallenged final

ruling in prior litigation establishes the law of the case and precludes a party in subsequent litigation from re-litigating the matter. *King*, 388 S.C. at 25, 694 S.E.2d at 40 (citing *ML-Lee Acquisition Fund*, 327 S.C. at 241, 489 S.E.2d at 472).

The issue of the proximate causation of Appellants' claimed damages has been litigated and adjudicated. (R. p. 288, lines 1-14). On October 3, 2008, the Honorable Wyatt T. Saunders issued an Order dismissing the claims of Appellant Mani Investments against Ward because "the allegations of the complaint reveal that the legal entity which was granted the option under the parties' contract clearly did not exercise the option in writing at any time[.]" (R. p. 207, lines 6-8). Appellant Mani Investments failed to appeal the dismissal of the action upon these grounds; therefore, Judge Saunders' ruling established the law of the case. Accordingly, Judge Griffith subsequently relied upon Judge Saunders' ruling in granting Ward's and One Stop Marina, Inc.'s ("One Stop") motions to dismiss, in part, on the ground that Judge Saunders' ruling had established Mani Investments' failure to exercise properly the Option as the sole cause of Appellants' alleged damages. (R. p. 210, lines 4-17, R. p. 214, lines 6-8).

Appellants failed to challenge Judge Saunders' ruling at the appropriate time and cannot now establish the existence of a genuine issue of material fact regarding whether Respondents Garretts' alleged negligence proximately caused Appellants' alleged injury. Judge Addy, like Judge Griffith, properly held that Appellants failed to make a showing sufficient to establish the existence of an issue of material fact regarding an essential element of Appellants' case because an unchallenged final ruling in prior litigation established as the law of the case that the sole proximate cause and cause in fact of Appellants' alleged injury had been Mani Investments' failure to exercise properly the

Option. (*See* R. p. 207, lines 7-11). As a result, this Court should affirm the circuit court's grant of summary judgment in favor of Respondents Garrett and dismiss with prejudice Appellants' legal malpractice claims against Respondents Garrett.

**2. The Doctrine of Collateral Estoppel Prohibits Appellants from Establishing the Existence of a Genuine Issue of Material Fact Regarding the Issue of Proximate Causation.**

“Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.” *Carolina Renewal*, 385 S.C. at 554, 684 S.E.2d at 782 (citing *Judy*, 383 S.C. at 7, 677 S.E.2d at 217). A party asserting collateral estoppel must demonstrate that the issue has been “(1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment.” *Id.* (citing *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189–90 n.1 (Ct. App. 1984)). “While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues.” *Snavely v. AMISUB of S.C., Inc.*, 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008).

As discussed above, the issue of whether Respondents Garretts' alleged negligence proximately caused Appellants' alleged damages has been actually litigated and directly determined adversely to Appellants in a ruling which necessitated the issue's determination. According to Appellants' Complaint, “[Appellants] suffered damages as a proximate result of attorney negligence in an amount of the \$100,000.00 down payment, the loss of the subject property, unnecessary legal fees, and any further amount to be

determined by a trier of fact.” (R. p. 8, lines 18-20). However, Judge Saunders’ Order of October 2, 2008, had previously predicated the dismissal of the prior action of Appellant Mani Investments against Ward on the ground that “the legal entity which was granted the option under the parties’ contract clearly did not exercise the option in writing at any time.” (R. p. 207, lines 7-11). Thus, Appellant Mani Investments actually litigated the issue of proximate causation before Judge Saunders, whose dismissal of Mani Investments’ claims against Ward relied upon his determination that Mani Investments’ failure to exercise the Option had been the sole proximate cause and cause in fact of Appellants’ alleged injury. (R. p. 207, lines 4-11). As a result, Judge Addy, like Judge Griffith, determined that Judge Saunders’ ruling barred Appellants from re-litigating the issues of proximate cause and cause in fact of Appellants claimed damages because “the issue of whether any alleged negligence of the Garrett Defendants was the cause in fact or the proximate cause of the [Appellants’] alleged damages has been litigated and been determined adversely to the [Appellants].” (R. p. 289, lines 7-18).

The addition to this subsequent action of Appellant Patel and Appellant Mani One fails to open the door to the re-litigation of the proximate cause issue because Appellant Mani One and Appellant Patel also had a full and fair opportunity to litigate the proximate cause issue before Judge Saunders. Appellant Patel had been a third party defendant in the original action, (*see* R. pp. 331, 206), and had been a co-owner of both Appellant Mani Investments and Appellant Mani One during the litigation in which Judge Saunders established as the law of the case that the failure of Appellant Mani Investments to exercise properly the Option had been the sole cause of Appellants’ alleged damages, (R. p. 71, lines 17-18, R. p. 76, line 25-p. 22, line 1). Appellant Patel,

therefore, had every opportunity to fully and fairly litigate the proximate cause issue both on his own behalf and on behalf of Appellant Mani One.

Judge Griffith applied similar reasoning in dismissing Appellants' claims against Ward and One Stop. (*See* R. p. 212, line 13-p. 214, line 4). Appellants alleged that Ward and One Stop breached their agreement with Appellants and that the breach proximately caused them to lose their interest in the subject property and the down payment. (*See* R. p. 11, line 13-p. 12, line 10). However, Judge Griffith found that Appellants were collaterally estopped from re-litigating the proximate cause issue because Judge Saunders' Order had previously determined that that the sole cause of Appellants' alleged damages had been established as the failure of Appellant Mani Investments to exercise properly the Option. (*See* R. p. 210, lines 4-17, R. p. 214, lines 5-8). As a result, Judge Griffith granted Ward's and One Stop's motions to dismiss the Complaint against them in this action. (R. p. 214, lines 5-8).

Like Judge Griffith, Judge Addy also properly held that Appellants could not make a showing sufficient to establish the existence of an issue of material fact regarding an essential element of Appellants' case because Appellants could not re-litigate Judge Saunders' adverse ruling. Accordingly, this Court should affirm the circuit court's grant of summary judgment in favor of Respondents Garrett and dismiss with prejudice Appellants' legal malpractice claims against Respondents Garrett.

***B. Regardless of Whether South Carolina Law Precludes Appellants from Establishing the Existence of a Genuine Issue of Material Fact Regarding the Issue of Proximate Causation, Appellants Failed to Establish the Existence of a Genuine Issue of Material Fact Regarding the Issue of Proximate Causation.***

As discussed above, a trial court's grant of summary judgment should be affirmed where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56, *SCRPC*. Although South Carolina courts require only a scintilla of evidence to withstand a motion for summary judgment, the evidence in opposition to the grant of summary judgment must be probative rather than speculative, theoretical, or hypothetical. *See Bass v. Gopal, Inc.*, 384 S.C. 238, 246 n.6, 680 S.E.2d 917, 921 n.6 (Ct. App. 2009) ("[W]e must assume any evidence, even a scintilla, that is useful to withstand a summary judgment motion must meet the prerequisite of being probative.").

In this case, Respondents Garrett had no causal role in Appellant Mani Investments' failure to exercise the Option. Moreover, regardless of whether the transaction should have been structured to incorporate into the lease agreement the terms and provisions of the option to purchase in order to effect a "single transaction" as contended by Appellants, the sole cause in fact and sole proximate cause of Appellants' alleged damages is Appellants' failure to exercise the Option or to seek equitable redemption as discussed below in Section II. In fact, Judge Addy's Order granting summary judgment rejected Appellants' "single transaction" theory by expressly concluding that the failure to exercise properly the Option was not the result of any act, error, omission, or conduct by Respondents Garrett. (R. p. 290, lines 17-19).

According to Appellant Patel's deposition testimony, Appellant Patel admitted that he had failed to review properly either the Lease or the Option. (*See* R. p. 111, line 25-p. 113, line 7). Appellant Patel also admitted that he never sought any legal advice from Respondents Garrett prior to May 17, 2007, which was the final date for exercising the Option. (R. p. 126, lines 4-24). Appellant Patel's belief that his correspondence to Ward effectively exercised Appellant Mani Investments' Option resulted solely from his own determination, not from any advice from, or failure to render advice by, Respondents Garrett.

Although neither Judge Saunders nor Judge Griffith required such testimony to reach their decisions, Appellant Patel's deposition testimony fortifies their final rulings that the extinguishment of Appellant Mani Investments' rights in the Option resulted solely from Appellant Mani Investments' inaction and not from any act or omission by Respondents Garrett. Accordingly, this Court should affirm the circuit court's grant of summary judgment in favor of Respondents Garrett and dismiss with prejudice Appellants' legal malpractice claims against Respondents Garrett.

**II. BECAUSE THE DOCTRINES OF WAIVER AND ESTOPPEL BAR ANY EQUITABLE RECOVERY ON BEHALF OF APPELLANTS, THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF RESPONDENTS.**

Although South Carolina courts may employ equitable principles to alter the terms of a contract, *see, e.g., Lewis v. Premium Investment Corp.*, 351 S.C. 167, 171-74, 568 S.E.2d 361, 363-64 (2002), option contracts are strictly construed in favor of the optionor and against the optionee. *Cotter v. James L. Tapp Co.*, 267 S.C. 647, 653, 230 S.E.2d 715, 717 (1976). Exact compliance with the terms of an option contract is required where the option mandates performance in a certain manner. *Cotter*, 267 S.C. at 653, 230

S.E.2d at 717–18. In the instant case, Appellants, even after having retained counsel when advised of their default, failed to seek and perfect an equitable redemption, failed to secure a set aside fund, failed to seek specific performance, and failed to take any other action to assert a right to redemption; therefore, Appellants have waived any potential equitable right of redemption. (R. p. 291, line 10-p. 292, line 13; *see also* R. pp. 428-42). In fact, Appellants never tendered the money required by the Option to purchase the property. (R. p. 291, line 20-p. 292, line 3). Nor have Appellants sought to secure a \$100,000.00 set aside fund or asserted a claim for specific performance of the Option. (R. p. 292, lines 1-3).

Where a party might otherwise have a right of equitable redemption, the party cannot invoke the equitable principle of the right of redemption where he has not asserted the right to redemption by payment of the principal with interest and costs or where he has waived the right of redemption, or where he is estopped from asserting the right of redemption. *See generally Bartles v. Livingston*, 282 S.C. 448, 455, 319 S.E.2d 707, 711–12 (Ct. App. 1984) (discussing the common law equitable right of redemption in the context of mortgages).

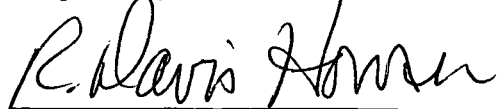
Under South Carolina law, “[w]aiver is a voluntary and intentional abandonment or relinquishment of a known right.” *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994). On the other hand, “[e]quitable estoppel occurs where a party is denied the right to plead or prove an otherwise important fact because of something which he has done or failed to do.” *Id.* at 487, 443 S.E.2d at 391. As the South Carolina Supreme Court has observed, “the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations.” *Id.*

Judge Addy properly held that the doctrines of waiver and estoppel bar Appellants from any equitable recovery because Appellants “failed to (1) seek and perfect an equitable redemption, (2) secure the \$100,000.00 set aside fund, and (3) seek specific performance[.]” (R. p. 292, lines 11-13). For this additional reason, the Court should affirm the circuit court’s grant of summary judgment in favor of Respondents Garrett and dismiss with prejudice Appellants’ legal malpractice claims against Respondents Garrett.

**CONCLUSION**

For the reasons discussed above, this Court should fully affirm the circuit court’s grant of summary judgment in favor of the Garrett Law Firm PC, Carson M. Henderson and Billy J. Garrett, Jr.

Respectfully submitted,



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March 27, 2012

ORIGINAL

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY  
*Court of Common Pleas*

*Frank R. Addy, Jr., Circuit Court Judge*

**Case No. 2009-CP-24-1181**  
**Tracking Number 2011-186586**

Anjay Patel, Mani Investments, LLC  
d/b/a Cornerstop Stores and Mani  
One, Inc.;

*Appellants,*

v.

The Garrett Law Firm PC, Carson  
M. Henderson, and Billy J. Garrett,  
Jr., T. Scott Ward, One Stop Marina,  
Inc., Greenwood Realty, Inc., Renee  
Simchon,

*Defendants,*

Of Whom The Garrett Law Firm, PC,  
Carson M. Henderson, and Billy J. Garrett, Jr.,  
are,

*Respondents.*

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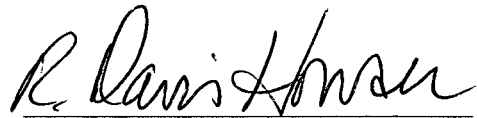
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MAR 27 2012

**SC Court of Appeals**

I, the undersigned employee of Howser Newman & Besley, LLC, hereby certify that pursuant to Rules 209(a) and 233(b), *SCACR*, I have served *Final Brief of Respondents* in this matter on Appellants Anjay Patel, Mani Investments, LLC d/b/a Cornerstop Stores and Mani One, Inc., by depositing a copy of them in the United States Mail, postage prepaid, on March 27, 2012, addressed to their counsel of record, Thomas A. Belenchia and John C. Strickland, A Business Law Firm, LLC, Post Office Box 3421, Spartanburg, South Carolina 29304.



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March 27, 2012

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In The Court of Appeals

APPEAL FROM GREENWOOD COUNTY  
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*Frank R. Addy, Jr., Circuit Court Judge*

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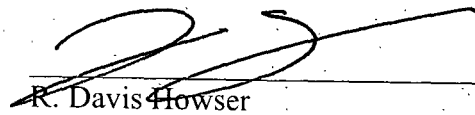
*Respondents.*

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**CERTIFICATE OF COUNSEL**

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The undersigned certify that *Final Brief of Respondents* complies with Rule 211(b), SCACR.



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October 15, 2012

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM GREENWOOD COUNTY  
*Court of Common Pleas*

*Frank R. Addy, Jr., Circuit Court Judge*

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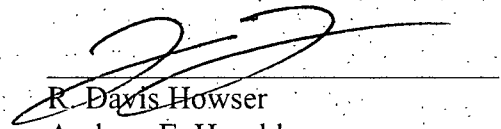
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OCT 17 2012

**SC Court of Appeals**

I, the undersigned employee of Howser Newman & Besley, LLC, hereby certify that pursuant to Rule 211, SCACR, I have served *Respondents' Certificate of Counsel* in this matter on Appellants Anjay Patel, Mani Investments, LLC d/b/a Cornerstop Stores and Mani One, Inc., by depositing a copy in the United States Mail, postage prepaid, on October 15, 2012, addressed to their counsel of record, Thomas A. Belenchia and John C. Strickland, A Business Law Firm, LLC, Post Office Box 3421, Spartanburg, South Carolina 29304.



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October 15, 2012