

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Case No: 2011-CP-40-1998
Court Of Appeals Number: 2012-212744

Jones G. Herring, Respondent,

v.

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

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ARGUMENTS IN REPLY

Without restating the issues or making redundant arguments which have been thoroughly set forth in his opening brief, Appellant offers the following points of clarification and rebuttal to arguments raised by Respondents.

I. The Respondent fails to show how it met the burden of presenting evidence of the value of the underlying claim.

The trial court erred in awarding the Respondent \$504,306.77 based upon the evidence presented. South Carolina law requires that an award for damages be supported by the evidence presented to the court. Despite the entering of a default judgment against the Appellant, Respondent is required to present adequate evidence of the amount of damages suffered. The only evidence presented to the trial court was the testimony of Mr. Herring and a supplemental affidavit submitted in accordance with the Trial Court request to supplement the file. Respondent fails to point to anywhere in the record where adequate evidence for such an award of damages was presented.

The Respondent never presented evidence as to how his ability to bring the action was affected by the Appellants failure to bring the action. While the default of Appellant resulted in a finding that the inaction of Appellants was negligent and resulted in a harm to Respondent, there was inadequate evidence presented as to the extent of harm that resulted from the negligence. The testimony of the Respondent and his later affidavit 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 \$100,000 in damages and treble damages against CitiFinancial, such evidence was speculative. Further, Respondent now excuses the lack of

evidence on a failure of Appellant to produce the files to Defendant in time for use at trial. While a great deal of Respondent's testimony and argument regarding damages centers around the emotional toll resulting from the "sacrifices" he had to make and the "avaricious and rapacious behavior" he endured, South Carolina law does not acknowledge such evidence as pertinent to the damages considered in this action.¹ Thus, the trial court erred in awarding the Respondent damages of \$504,306.77.

A. Without a showing of the value of the alleged claim, Respondent may not rely on inferences to meet its burden.

South Carolina law requires that the Respondent present adequate evidence of the harm suffered. A defendant in default admits liability but not the damages as set forth in the prayer for relief. *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E.2d 290 (1981). The amount of damages in a default action must be proved by the preponderance of the evidence. *Id.*; see *Jackson v. Midlands Human Res. Ctr.*, 296 S.C. 526, 529, 374 S.E.2d 505, 507 (Ct.App.1988) ("A judgment for money damages must be warranted by the proof of the party in whose favor it is rendered."). To recover damages, the evidence must enable the jury to determine the amount of damages with reasonable certainty or accuracy and cannot be left to conjecture, guess or speculation. *Whisenant v. James Island Corp.*, 277 S.C. 10, 13, 281 S.E.2d 794, 796 (1981). Similarly, the determination of damages may depend to some extent on the consideration of contingent events if a reasonable basis of computation is provided, allowing a reasonably close estimate of the loss. *Piggy Park Enter., Inc. v. Schofield*, 251 S.C. 385, 391–92, 162 S.E.2d 705,

¹ See *Caddel v. Gates*, 284 S.C. 481, 484, 327 S.E.2d 351, 353 (Ct. App. 1984)(holding emotional distress and damages relating to legal representation are not recoverable). Citing *McLaughlin v. Sullivan*, 123 N.H. 335, 461 A.2d 123 (1983), the Court of Appeals held that "[a]ttorneys are not trained psychologists or psychiatrists; they cannot be expected to identify latent mental illness or the propensity of a client to lose control of his emotions."

708 (1968). Thus, the Respondent was required to present evidence that would allow a reasonably close estimate as to the harm the negligence of Appellant caused the Respondent by a preponderance of the evidence.

South Carolina law does hold that “when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party.” *Kershaw County Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 394, 396 S.E.2d 369, 372 (1990). The court in *Stokes v. Spartanburg Reg'l Med. Ctr.*, 368 S.C. 515, 522, 629 S.E.2d 675, 679 (Ct. App. 2006), held that when a party fails to preserve material evidence for trial, it is for the jury to determine whether the party has offered a satisfactory explanation for that failure. If the jury finds the explanation unsatisfactory, it is permitted-but not required-to draw the inference that the evidence would have been unfavorable to the party's claim. *Id.*

The Appellant is willing to stipulate that the Trial Court inferred that the file which was not timely produced was exactly as purported by Respondent. Further, Appellant is willing to stipulate that the testimony of Respondent comports with the alleged documents in the file. Such a finding would still leave the evidence wanting. Said documents, apart from many being available to Respondent from their original sources, would still fail to present adequate evidence beyond mere speculation. Had Respondent alleged that the file contained testimony of an expert as to the value of the action against CitiFinancial and the ability to collect said judgment or that there were multiple documents relating to the actual damages suffered by Respondent being greater than the amount actually testified to by Respondent, an award for \$504,306.77 might be considered appropriate under South Carolina law. The testimony of Respondent regarding the

documents, however, do little more than support Appellants argument that the damages awarded grossly exceed any testimony by Respondent and are unjustified.

B. The Respondent fails to acknowledge his ability to present evidence outside of the alleged documents only later produced by Appellant.

On the record before it, the trial court could not have awarded any damages without impermissibly resorting to speculation. While the Respondent contends to an inability to present evidence that would enable the jury to determine the amount of damages with reasonable certainty or accuracy without the complained of “file”, South Carolina decisions are replete with evidence sufficient for an appropriate award of damages. 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.”). While expert testimony is not required to prove proximate cause, plaintiff must put forth some evidence which rises above mere speculation or conjecture 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. *Armstrong v. Weiland*, 267 S.C. 12, 16, 225 S.E.2d 851, 853 (1976); see also *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). Thus, Respondent was required to present some testimony in regards to the resulting harm of Mr. Bagnell’s negligence and the resulting harm which rose above mere speculation or conjecture of what he believed he was entitled to.

Respondent fails to cite anywhere in the record were even some evidence to this effect was presented to the trial court. Instead, Respondent relies on Appellants inability to produce the

bank statements, credit reports, hand written notes regarding telephone calls with Citifinancial and the tax documents Respondent gave Appellant. Respondent contends that without these files, “there was little else [Respondent] could do.” In this case, not only was there a lack of adequate evidence, there was a complete lack of evidence of any kind. No expert witness testified. No one rendered an opinion on the likelihood of success. No one testified as to the collectability of any damages. More importantly, no one even testified that the statute of limitations had run on bringing the claim. Respondent, instead, now relies on testimony as to the value of the documents allegedly withheld by Appellant. No documents generated by third parties, including a credit report, tax filings, or credit statements from CitiFinancial were presented. Many, if not all, of these methods of evidence were within the power of Respondent.

Simply, the Respondent failed to present adequate evidence to support the Trial Court’s order for damages against the Appellant. The evidence pointed to in the record by Respondent could only be described as mere speculation or conjecture as to information that is outside the realm of ordinary lay knowledge. Respondent now claims to have testified as to the value of possessing his physical “file” being of some value. A value unidentified or uncertain. A value, presumably, contingent on the value of an underlying claim based on that “file”. Though, as stressed earlier, many of the documents in the file could likely have been reproduced upon Respondent’s requests directly to the original intuitions which created them. Finally, no evidence as to the likelihood of success or the collectability of such a judgment was presented. The trial court erred in awarding the Respondent \$504,306.77 based upon the evidence presented at the hearing and in the supplemental affidavit. Such evidence could, at best, be described as speculative and conjecture.

II. Respondent fails to address the Trial Court's error in granting punitive damages in accordance with South Carolina law.

In determining if a punitive damages award comports with due process, trial court *must* consider:

“(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or concealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and (8) ‘other factors’ deemed appropriate.”

Welch v. Epstein, 342 S.C. 279, 536 S.E.2d 408 (Ct. App. 2000).

The trial court failed to consider the necessary elements in determining whether the punitive damages awarded were appropriate. In the trial court's order, there is no evidence of the existence of similar past conduct, no evidence that the award is related to the harm suffered and no evidence that there is a likelihood that this defendant will engage in similar conduct in the future. In fact, the Appellant no longer practices law and no longer has a license to practice law. Thus, there is no chance that this defendant will engage in similar conduct in the future. The record is abounding in the failures of Appellant to act as Respondents fiduciary. Similarly, Respondent went to great lengths to discuss an alleged home in New York owned by Appellant. Such evidence and considerations may cover the Trial Court's responsibility to consider the Appellants degree of culpability and ability to pay, but in no way comport with the requirements of due process granted by the South Carolina courts.

Therefore, the Trial Court's Order needs to be reversed and this matter remanded to allow the trier of fact to make the appropriate determinations as to whether punitive damages are appropriate and how much the punitive damages should be.

CONCLUSION

The Respondent's failure to point to any evidence in the record alludes to the Trial Court error in ordering damages in an amount not in accord with the evidence presented. A default judgment in a legal malpractice action requires a showing of the value of potential success on the underlying action by a preponderance of the evidence. Thus, the Trial Court erred in awarding damages where Respondent failed to show any actual, quantifiable loss for failure to pursue an action under the Fair Credit Reporting Act. Finally, the Trial Court's order was not in accord with South Carolina law regarding the awarding of punitive damages and failed to set forth the evidence of those elements required in determining whether to award punitive damages and in what amount to award punitive damages. Thus, the Trial Court has made errors in its granting Respondent damages not supported by the evidence before it and must be reversed and this matter remanded back to the trial court to make a proper determination of actual damages and whether to award any punitive damages.

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellant on the Respondent by depositing a copy of it in the United States Mail, postage prepaid, on November 25, 2013, addressed to its attorney of record as follows:

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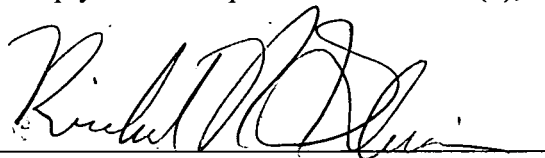
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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Reply Brief complies with Rule 211(b), SCACR.



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