

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM AIKEN COUNTY

Doyet A. Early, III, Circuit Court Judge  
Case No. 2009-CP-02-2460  
Appellate Case No.: 2012-211915

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RECEIVED  
MAY 28 2013  
SC Court of Appeals

Julie Tuten, ..... Respondent,

v.

David Charles Joel, individually  
and doing business as  
Joel & Associates P.A., and/or  
Joel & Associates,  
and Heather A. Glover, ..... Defendants,

of whom

David Charles Joel, individually  
and doing business as  
Joel & Associates P.A., and/or  
Joel & Associates, ..... Appellants.

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**BRIEF OF RESPONDENT**

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**STATEMENT OF ISSUES ON APPEAL**

- I. THE TRIAL JUDGE DID NOT ERR IN DIRECTING A VERDICT AGAINST THE JOEL DEFENDANTS ON THE ISSUE OF LIABILITY.
- II. THE TRIAL JUDGE DID NOT ERR IN FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF THE JOEL DEFENDANTS, ON THE PROFESSIONAL NEGLIGENCE CLAIM.
- III. THE TRIAL JUDGE DID NOT ERR IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL *NISI*.

## STATEMENT OF THE CASE

This matter involves a legal malpractice action against:

- i) attorney David Charles Joel, individually and d/b/a “Joel & Associates,”  
and d/b/a “Joel & Associates, P.A.,”
- ii) David Charles Joel, Attorney at Law, P.C. (a Georgia professional  
corporation); and
- iii) attorney Heather A. Glover.

The Georgia professional corporation “David Charles Joel, Attorney at Law, P.C.,” was placed into involuntary bankruptcy, by its creditors in November of 2011. This Chapter Seven bankruptcy was subsequently converted into a Chapter Eleven business re-organization by its sole shareholder, David Charles Joel. Because of the bankruptcy of the corporate defendant, trial went forward against the Joel defendants, specifically excluding the Georgia corporate defendant “David Charles Joel, Attorney at Law, P.C.” (R.p. 99, Tr. p. 165, lines 8-25.)

The defendant Heather A. Glover, although properly served with the Summons and Complaint in this action, never filed any responsive pleadings or motions. She was properly notified of the trial date, time and place, and did not appear, nor did any counsel appear on her behalf.

A jury trial was held in this matter, before the Honorable Doyet A. Early, III, Resident Judge of the Second Judicial Circuit. The trial began on January 23, 2012. At the close of the case, on January 24, 2012, counsel for plaintiff renewed the motion for directive verdict on the issue of legal malpractice. This renewed motion was granted by

the trial court.<sup>1</sup> The sole issue for the jury, was the amount of actual damages to which the plaintiff was entitled. The jury returned with a verdict for the plaintiff in the amount of Two Hundred and Seventy Five Thousand (\$275,000.00) Dollars. (R.p. 2)

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<sup>1</sup> Respondent had the following causes of actions in her Complaint:  
a) Attorney Negligence; b) Breach of Fiduciary Duty; c) Breach of Contract;  
d) Fraud; e) Unfair Trade Practices; and, f) Partnership and *Respondeat Superior*.  
Because the granting of the renewed motion for directed verdict on the issue of legal malpractice, the remaining causes of actions were rendered moot.

## STATEMENT OF FACTS

This is a legal malpractice action. The underlying action, involved an automobile accident, which occurred on October 18, 2003, in Aiken County, South Carolina. Joel & Associates, was contracted to represent the plaintiff in this accident. The day before the expiration of the statute of limitations, on October 17, 2006, an action was filed against Mr. Still, by attorney Heather A. Glover. This lawsuit was filed with the Court of Common Pleas for Aiken County, at civil action number 2006-CP-02-1466; thereafter, on November 20, 2007, the case was administratively dismissed (pursuant to SCCA Form 4) for "failure to prosecute;" apparently, this action was never served. During this time, Heather Glover absconded from South Carolina, and allegedly stole money from the Joel defendants. (R.pp. 227-230, Plaintiff's Exhibit 15, Defendants' Exhibit C.)

As to the underlying automobile accident, the plaintiff was a passenger in a vehicle driven by Clifford Still, and Mr. Still drove off the roadway and down a steep embankment. As a result of the wreck, respondent suffered a broken vertebrae, a collapsed lung, three broken ribs and a concussion. Additionally, respondent spent six days in the trauma unit at the Medical College of Georgia. (R.p. 44-45, Tr. p. 63, lines 9-25, p. 64, lines 1-11.) As a direct result of this accident, respondent is now totally disabled, and draws Social Security disability. (R.p. 42, Tr. p.61, lines 9-15.)

Upon respondent's release from the hospital following the accident, she went to her residence in North Augusta, South Carolina, and her mother came to stay with her. (R.p. 46, Tr. p. 67, lines 15-22.) She looked in her local BellSouth telephone book for an attorney, and the largest ad was for Joel & Associates. The ad had a local phone number,

and photographs of David Charles Joel. No other attorney was listed, and there was no indication "Joel & Associates" was any type of corporate entity. Respondent was impressed with the ad, and believed to have recalled seeing his advertisements on television. The ad also stated, "Settlements and Trials." She was also pleased, the ad stating they would come to her is she was unable to come to them. She contacted Joel & Associates. (R.pp. 47-52, Tr. pp. 68-73). Thereafter, Joel & Associates sent a 'runner' to 'sign her up.'<sup>2</sup> (R.pp. 52-53, Tr. p.73, lines 10-25, Tr. p.74, lines 1-24).

At the time the respondent retained the appellants, Joel & Associates were advertising in the BellSouth yellow pages in South Carolina, and had approximately one and one-half million yellow page ads in South Carolina, for the BellSouth advertising year 2002-2003. (R.p. 217, Plaintiff's Exhibit 16.) They also had at local phone number for most locations, so the potential client would not have long distance charges. (R.p. 123, Tr. p. 208, lines 5-18.)

The appellant David Charles Joel, is not licensed to practice law in the state of South Carolina.<sup>3</sup> The appellants however, did practice law under the name "Joel & Associates," and at one time was incorporated in the state of South Carolina. The South Carolina corporation, incorporated as Joel & Associates, P.A., was administratively dissolved by the South Carolina Secretary of State, on September 24, 1997. (R.p. 207, Plaintiff's Exhibit 11.) The appellants also practiced law in Georgia, also under the name

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<sup>2</sup> The runner who 'signed up' the plaintiff, was not a lawyer.

<sup>3</sup> According to the testimony of the appellant David C. Joel, he did take the South Carolina Bar exam on one occasion; however, he did not pass this exam, and never attempted to take the exam again. (R.p. 133, Tr. p. 231, lines 1-25.)

of “Joel & Associates,” and was incorporated under the name “David C. Joel, Attorney at Law, P.C.”

Heather A. Glover, was a lawyer licensed to practice in South Carolina.<sup>4</sup> She was hired by David Charles Joel, for his South Carolina office, which was based in Columbia. This office originally opened in 1996, and was ultimately closed in the spring of 2006. At the time the office was closed, the Joel defendants and Heather A. Glover entered into an agreement where Glover, “would continue handling representation of Joel & Associates remaining South Carolina cases with an agreement to split fees with Joel & Associates.” This language is taken directly from page two, paragraph five, of the Verified Complaint, sworn to by David Charles Joel on August 5, 2008, in Joel v. Wachovia Bank. (R.pp. 210-216, Plaintiff’s Exhibit 15).

Also, it is noted, the Joel defendants maintained computer software, specifically a ‘Needles software program,’ which provided him with a listing of cases, and could also be sorted by the dates of the statute of limitations.

When respondent would attempt to contact Joel & Associates, she would usually end up talking to Ann Weaver, who was an employee of Joel & Associates. Respondent indicated she only spoke with Heather Glover on one occasion, and when she asked about her case, she was told by Ann Weaver, that David Charles Joel was getting all of her paperwork and everything was fine. Respondent testified there was never any doubt in

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<sup>4</sup> The defendant Heather A. Glover, was disbarred by Order of the South Carolina Supreme Court, dated January 7, 2011, In the Matter of Heather Anne Glover, 390 S.C. 643, 704 S.E.2d 347 (2011).

her mind, her attorney was David Charles Joel. (R.pp. 55-56, Tr., p. 78, lines 6-25, p. 79, lines 1-22.)

Respondent did acknowledge receiving a letter similar to Defendant's Exhibit A, which indicated that Mr. Joel "was retiring from his South Carolina practice,"<sup>5</sup> but would still be receiving one-third of the attorney's fees generated. (R.p. 57, Tr., p. 80, lines 20-25.) Thereafter, Respondent attempted to contact both Mr. Joel and Heather A. Glover, but was never allowed to speak to either of them. (R.p. 59, Tr. p. 82, lines 14-25.) At that time, Respondent was under the belief David Charles Joel was still her attorney. (R.p. 59, p.82, lines 9-13.) In June of 2007, after not being able to contact either Heather A. Glover or David Charles Joel, Respondent sent a certified letter to the Atlanta office. Copies of this letter, and the certified mail receipt and United States Postal Service return post card, are attached as Plaintiff's Exhibit No. 9. (R.pp. 60-61, Tr. p.84, line 25, Tr. p. 85, lines 1-19.) (*Also*, R.p. 206.) Respondent never received any response from that letter. At this point the statute of limitations had expired, and this fact would have been know to David Charles Joel, as he had a listing of the statute of limitations dates in his software program, as well as a listing of cases his South Carolina office had. (R.pp. 218-223. The only logical conclusion, would be Mr. Joel abandoned his client, at this point.

John Patrick Freeman was called as respondent's expert witness on the issue of legal malpractice. Mr. Freeman is a former professor at the University of South Carolina School of Law, and specialized in the area of legal ethics. (R.pp. 73-76, Tr. p. 105, lines 8-25, p. 106, lines 1-25, p. 107, lines 1-25, p. 108, lines 1-15.) Professor Freeman also

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<sup>5</sup> It is noted again, Mr. Joel was never licensed to practice law in South Carolina.

testified as to the law of agency, joint venture and partnership, in the state of South Carolina. (R.pp. 76-77, p. 108, lines 16-25, p. 109, lines 1-5.)

Professor Freeman was qualified as an expert by the trial court, on the areas of legal ethics, including the areas where lawyers advertise for clients, where lawyers are withdrawing from representation, and where lawyers act or purport to act as employees of law firms. This expert qualification was without objection by counsel for the Joel defendants. (R.pp. 79-80, Tr. p. 118, lines 18-25, p. 119, lines 1-8.) Professor Freeman, then testified as to the 'client abandonment' by both Heather A. Glover and David Charles Joel. (R.pp. 80-83, Tr. p. 119, lines 13-25, p. 120, lines 1-25, p. 121, lines 1-25, p. 122, lines 1-24.) Professor Freeman also discussed the South Carolina Rules of Professional Conduct, and in commenting on Rule 1.5 (dealing with the division of fees), and noted,

“...if you are going to share a fee with a lawyer you allocated that fee either based on the work that is done ..., but, each lawyer who is sharing in the fee has to have joint responsibility for the work that's being done. In other words, no free lunch. You don't take a fee and have no responsibility for what happens...”.

(R.p. 78, Tr. p. 115, lines 18-25.)

When questioned about the Joel defendants' apparent theory they were not accountable for what happened in South Carolina, because David Charles Joel was not ever licensed in South Carolina, Professor Freeman indicated he had taken that into account, and, “that is a ridiculous argument.” (R.p. 86, Tr. p. 131, lines 3-25.)

When Professor Freeman was asked about the fraudulent activity of the Joel defendants, he responded he believed there was fraud. (R.pp. 87-88, Tr. p. 134, lines 1-25, p. 135, lines 1-25.) The Joel defendants did not offer any expert testimony at trial.

Anne Weaver was the only employee, other than Heather A. Glover, at the Columbia office. She was hired at an interview where David Charles Joel was present, and she testified he had the right to fire her. (R.p. 125, Tr. p. 220, lines 5-10.) She testified at trial, that the Columbia office would bring in about one hundred and eighty (180) cases each year. (R.pp. 128-129, Tr. p. 225, lines 12-25, p. 226, lines 1-21.) Anne Weaver also testified, that during the time she worked at the Columbia office, there were approximately four hundred to five hundred cases, and no case was ever tried. (R.pp. 129-130, Tr. p. 226, lines 20-25, p. 227, line 1.)

At trial, David Charles Joel testified. He acknowledged he opened the South Carolina office of Joel & Associates in 1996. (R.p. 133, Tr. p.231, lines 1-8.) Mr. Joel also testified that paid Heather A. Glover a salary of \$100,000.00 per year, and then he and Heather A. Glover would equally divide all the remaining fees, after first deducting the office expenses for the South Carolina office. (R.pp. 135-137, p. 233, lines 15-25, p. 234, lines 1-4.)

Mr. Joel also testified as to having the Needle software system in his office, so that he could monitor all cases. He also testified he selectively sent letter to the South Carolina clients in about February of 2008, but only sent letters to the clients who had cases that were not barred by the statute of limitations. (R. 153-160, Tr. p. 260, lines 11-25, p. 261, lines 1-25, p. 262, lines 1-25, p. 263, lines 1-25, p. 264, lines 1-25, p. 265, lines 1-25, p. 266, lines 1-25, p. 267 lines 1-24.)

David Charles Joel also testified as to his lawsuit against Wachovia Bank, and he acknowledged in his lawsuit, he had an agreement with Heather Glover to split fees for the Joel & Associates' South Carolina cases (after the closing of the South Carolina office). (R.pp. 161-162, Tr., p. 269, lines 16-25, p.270, lines 1-25.) Mr. Joel further admitted he settled his lawsuit against Wachovia Bank for, he believed, One Hundred and Ten Thousand (\$110,000.00) Dollars. (R.p. 163, Tr. p. 272, lines 12-20.)

Mr. Joel also testified Heather A. Glover never tried any cases while she was an attorney for Joel & Associates in South Carolina. (R. pp. 164-165, Tr. p.277, lines 20-25, p. 278, lines 1-5.) Mr. Joel further testified he had probably not tried a case in the last twenty years. (R.p. 166, Tr. p. 282, lines 8-15.)

Mr. Joel also testified his office had been sued in Georgia for unfair business practices and for fraud, relating to an employee who was arrested for the unauthorized practice of law. (R. pp. 167-170, Tr. p. 284, lines 18-25, p. 285, lines 1-25, p. 286, lines 1-25, p. 287, lines 1-17.) Mr. Joel acknowledged the Georgia Court of Appeals had upheld the ruling against him. (R.pp. 234-241.)

Mr. Joel acknowledged he advertised in more than twenty-one (21) individual BellSouth phone books, in the state of South Carolina, for the advertising year 2002 to 2003. (R.pp. 171-172, Tr. p. 290, lines 2-25, p. 291, lines 1-18.) He also admitted in his advertising, his name and picture was the only one present. (R.p. 173, Tr. p.292, lines 15-25) (*Also*, R.pp. 196-201.)

Mr. Joel further testified he, like Heather Glover, also drew a salary of One Hundred Thousand (\$100,000.00) Dollars, each year, from the South Carolina office. (R.p. 174, Tr., p. 295, lines 1-12.) Mr. Joel additionally testified, at least one year, the

South Carolina office paid both Mr. Joel and Heather Glover, over Five Hundred Thousand (\$500,000.00) Dollars, in addition to their salary of One Hundred Thousand (\$100,000.00) each. Mr. Joel also testified, the South Carolina office always made enough money to pay both his and Heather A. Glover's salary, and to pay all office expenses, and a bonus. (R.p. 174, Tr. p. 295, lines 13-25.)

### **ISSUE ONE**

I. THE TRIAL JUDGE DID NOT ERR IN DIRECTING A VERDICT AGAINST THE JOEL DEFENDANTS ON THE ISSUE OF LIABILITY.

The Joel defendants attempt to argue the trial court erred, when it directed a verdict on the matter of legal malpractice against the Joel. Apparently, the Joel defendants are attempting to claim he (they) had no liability for the South Carolina office, and the only duty was to collect money from the office.

Joel's business model appeared to be one of massive advertising in the BellSouth yellow pages, and having large numbers of local phone numbers. In the BellSouth yellow pages for the year 2002-2003, the Joel defendants had advertising in South Carolina phone book in excess of one and one-half million phone books this one year period. The name of no attorney, other than David Charles Joel, ever appeared in any of this advertising.

In the appellants agreements, counsel for the Joel defendants lists three issues she claims remained for a jury to decide, as follows:

- A. Whether or not the Joel defendants continued to owe any obligation to Respondent after the South Carolina office closed in 2006;

- B. Whether Glover remained an agent of the Joel defendants after the South Carolina office closed; and
- C. Was there a fee-sharing arrangement between Glover and the Joel defendants.

The exclusive answer to all of the above questions, is answered by simply referring to the lawsuit of the Joel defendants filed against Wachovia, originally filed with the Superior Court of Gwinnett County, State of Georgia, at civil action number 08A-07530-1, and removed to the United States District Court for the Middle District of Georgia, at case number 1:08-cv-02992-TCB. In the verified Complaint, signed by David Charles Joel, he swore under oath the contents of the Complaint were true. In paragraph five (5) of that Complaint, it is stated,

“In or about May 2006, Joel & Associates closed its Columbia office and entered into an agreement with Ms, Glover under which she would continue handling representation of Joel & Associates’ remaining South Carolina cases with an agreement to split fees with Joel & Associates.”

Mr. Joel testified he settled this case with Wachovia for in excess of One Hundred Thousand (\$100,000.00) Dollars.

Rule 1.5(e), SCACR Rule 407, provides,

“A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the

arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing, and (3) the total fee is reasonable.”

To quoted Professor Freeman, “You don’t take a fee and have no responsibility for what happens...”. (R.p. 78, Tr. p. 115, lines 18-25.)

## ISSUE TWO

### II. THE TRIAL JUDGE DID NOT ERR IN FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF THE JOEL DEFENDANTS, ON THE PROFESSIONAL NEGLIGENCE CLAIM.

Legal malpractice is ordinarily considered a negligence action. Floyd v. Kosko, 285 S.C. 390, 391, 329 S.E.2d 459, 460, n.1 (Ct.App. 1985). The prevailing view is also that it embraces and any professional misconduct whether breach of the standard of (negligence) or of fiduciary obligations. See, Holy Loch Distributors, Inc. v. Hitchcock, 340 S.C. 20, 26, 531 S.E.2d 282, 285 (2000) (mentioning malpractice based on fiduciary duty).

The elements required to prove a claim of legal malpractice, are: 1) the existence of an attorney-client relationship; 2) breach of duty by the attorney; 3) proximate causation; and 4) damage to the client, Holy Loch, *supra*, at 340 S.C. 20, 531 S.E.2d 282. Smith v. Haynesworth, Marion, McKay & Geurard, 322 S.C. 433, 472 S.E.2d 612 (1996).

In the present case, the appellant is attempting to make an argument, it was necessary to prove, “she would have collected a settlement or judgment.” Collectability of the underlying judgment is not an element of a legal malpractice case in this state. In Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct.App. 2005), this Court held that the

failure to show likelihood of success in an underlying action may be considered and inability to meet the element of proximate cause, as to the damages element, “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.’” “The question of success of the underlying claim if suit had been brought, is a question of law.” *See: Doe*, 367 S.C. 432, 442, 626 S.E.2d 25, 30. In the present case, the lawsuit was filed, it appears it was never served.

In this case, the appellant is attempting to add to South Carolina law, a fifth element to a legal malpractice case, that being ‘collectability.’

### ISSUE THREE

#### III. THE TRIAL JUDGE DID NOT ERR IN DENYING APPELLANTS’ MOTION FOR A NEW TRIAL *NISI*.

In *O’Neal v. Bowles*, 314 S.C. 525, 526, 431 S.E.2d 555, 556 (1993), the South Carolina Supreme Court held, “The trial judge alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to merely inadequate or excessive. The denial of a motion of a new trial *nisi* is within the trial judge’s discretion and will not be reversed on appeal absent an abuse of discretion.”

In the present case, respondent received injuries rendering her totally disabled. As such, it is certainly reasonable for a jury to have awarded her the amount of Two Hundred and Seventy Five Thousand (\$275,000.00) Dollars, particularly in light of the extensive injuries sustained by Respondent, and her hospitalization after the accident.

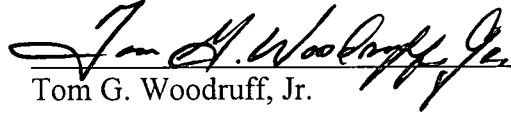
**CONCLUSION**

For the reasons set forth herein, this appeal should be dismissed, with costs assessed to the Appellants.

Respectfully submitted,

WOODRUFF LAW OFFICES, LLC

May 24, 2013



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THE STATE OF SOUTH CAROLINA  
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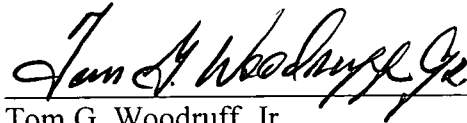
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**CERTIFICATE OF COUNSEL**

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



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APPEAL FROM AIKEN COUNTY  
Circuit Court

Honorable Doyet A. Early, III, Circuit Court Judge, 2<sup>nd</sup> Judicial Circuit

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Case No. 2009-CP-02-2460

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Julie Tuten, ..... Respondent,

v.

David Charles Joel, individually  
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Associates P.A., and/or Joel  
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and Heather A. Glover, ..... Defendants,

of whom

David Charles Joel, individually  
and doing business as Joel &  
Associates P.A., and/or Joel  
& Associates, ..... Appellants.

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**PROOF OF SERVICE**

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I certify that I have served the Final Brief of Respondent, by depositing three (3) copies in the United States Mail, postage prepaid, on May 28, 2013, addressed to the Appellants' attorneys of record, Desa Ballard, Harvey Watson and Stephanie Weissenstein, 226 State Street, West Columbia, South Carolina 29169.

May 28, 2012



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