THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Doyet A. Early, III, Circuit Court Judge

Case No.: 2009-CP-02-2460
Appellate Case No. 2012-211915

Julie Tuten,

Respondent,

v.

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

Defendants,

of whom

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

Appellants.

Final ~~INITIAL~~ BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an action for legal malpractice. The complaint was filed on or about October 16, 2009. Defendants David Charles Joel, individually, and doing business as Joel & Associates P.A. and/or Joel & Associates, David C. Joel, Attorney at Law, P.C., doing business as Joel & Associates (hereafter "the Joel defendants") filed an Amended Answer and Cross-Claim (against co-defendant Heather Glover) on November 15, 2010. Defendant Heather Glover defaulted on the cross-claim.

In November, 2011, the corporate defendant David C. Joel, Attorney at Law, PC (hereafter "the bankrupt defendant"), was placed into involuntary bankruptcy in the bankruptcy court for the Northern District of Georgia. In the Matter of David C. Joel, Attorney at Law, P.C., Case No. 11-083090-pwb (Bankruptcy M.D.Ga).

Trial in this matter was held before Judge Doyet A. "Jack" Early and a jury beginning on January 23, 2012. Because the bankruptcy proceedings continued at the time this case was called for trial, trial did not proceed against the bankrupt defendant. (ROA 00099, lines 8 – 25). The jury returned a verdict in favor of the plaintiff Julie Tuten in the amount of $250,000.00 against David Charles Joel, individually and doing business as Joel & Associates P.A. and/or Joel & Associates and Heather Glover. (ROA 000002). Timely post-trial motions were filed and were denied by order dated April 10, 2012. (ROA 000001; ROA 000005). This appeal followed.

STATEMENT OF FACTS

Appellant David Joel is a lawyer admitted to practice law in Georgia. He was admitted to the Georgia Bar in 1981. (ROA 000132, lines 6–20). For the most recent period of approximately 20 years, his firm practiced personal injury law. (ROA 000132, lines 12-20).

In 1996, Mr. Joel's law firm opened an office in South Carolina. (ROA 000133, line 1–8). The South Carolina office closed in 2006. (ROA 000141, lines 3– 22).

The South Carolina office employed South Carolina licensed attorneys "from day one." (ROA 000133, lines 19–25). During the time the firm maintained a South Carolina office, it employed several South Carolina lawyers who operated the office and handled all South Carolina cases. (ROA 000134, line 1-12). Heather Glover was the firm's South Carolina attorney for approximately seven or eight years before the South Carolina office was closed in 2006. (ROA 000134, lines 8-12).

Mr. Joel and his Atlanta office handled the "business management" end of the South Carolina office, and they received reports from Ms. Glover about how the office was progressing. (ROA 000134, line 13 – 23). Joel Defendants made no decisions about what cases to accept, nor did they provide oversight of Ms. Glover's work. (ROA 000135 lines 9–14; ROA 000137, line 17 –000138, line 19). Since she was licensed in South Carolina, the Joel firm deferred to Ms. Glover on all matters related to handling the cases in South Carolina. (ROA 000140, lines 3-14).

Respondent (Plaintiff) Julie Tuten retained the firm's South Carolina office, via attorney Heather Glover, to represent her to seek damages for injuries she sustained in an automobile accident in October, 2003. (ROA 000191). During the time the South

Carolina office was in operation, Ms. Tuten dealt exclusively with either Heather Glover or the firm's paralegal in South Carolina, Anne Weaver. (ROA 000012 at paragraph 13-14; ROA 000204). Mr. Joel never personally represented Ms. Tuten, and never knew anything about her case. (ROA 000140, lines 3-13; ROA 000145, lines 3-14; ROA 000120 lines 20-24).

When the South Carolina office closed, Heather Glover was the sole attorney operating the office. Ms. Glover agreed that she would undertake responsibility for all cases that remained in South Carolina. (ROA 000063 line 25 – 000064, line 6; ROA 000118; ROA 000142) She offered to pay the Joel firm some percentage of the fees that may eventually be recovered in the cases. (ROA 000143, line 10 – 000144, line 8). The Joel firm did not require Ms. Glover to promise to pay any future fees to the firm and it never received any fees from Ms. Glover on any cases. (Id.). *There was never an agreement regarding fee sharing with Ms. Glover.* (Id.; ROA 000176, lines 3-9). The firm never received any fees from Ms. Glover for any case that transferred to her. (ROA 000176, lines 10-13; ROA 000150, lines 12-17).

The Joel firm's experience was that Heather was a good attorney; they never had any complaints, and she generated considerable income for herself and the firm. (ROA 000140, line 15 – 000141, line 2). Mr. Joel believed Ms. Glover to be "totally capable" of assuming the cases on her own and completing them. (ROA 000141; lines 20-22).

Ms. Glover provided the Joel firm with a list of the files for which she assumed sole responsibility. (ROA 000124 line 2-14; ROA 000231). Ms. Glover wrote letters to all of the clients of the South Carolina office, including Ms. Tuten, and advised that the Joel firm was closing its South Carolina office but she would continue to handle the

clients' cases. (ROA 000224-000226). Ms. Glover's letter provided her new contact information as well as a business card with her new contact information. (Id.) Ms. Tuten acknowledged receiving the letter and the business card. (ROA 00063, line 7- 00064, line 6). Ms. Glover did state that fees would be shared when the case was concluded. (ROA 00064, lines 10-12).

Approximately a year after Ms. Glover assumed sole representation for Ms. Tuten's (and other) case(s), Ms. Tuten wrote a letter to Ms. Glover inquiring about the status of her case. (ROA 000242; ROA 121, lines 1-10). After receiving no response, Ms. Tuten discharged Ms. Glover as her attorney; the undated letter was delivered to the Joel firm's Atlanta office on June 5, 2007. (ROA 206). There is no evidence whether Ms. Tuten also mailed a letter to Ms. Glover at the address at which they had been corresponding since Ms. Glover assumed sole responsibility for the case.

Unbeknownst to anyone, Ms. Glover had, in fact, filed suit on Ms. Tuten's behalf on or about October 16, 2006. (ROA 000227). The summons and complaint listed Ms. Glover's address as the same address she had provided to Ms. Tuten in her letter to Ms. Tuten in which she advised Ms. Tuten that she was taking over her file. (ROA 0000224; ROA 000228-230).

Also unbeknownst to anyone, Ms. Glover had apparently abandoned the case after filing it. (ROA 000012). Ms. Tuten's suit against the at-fault defendant was dismissed for failure to prosecute by order dated November 20, 2007. (Id.).

Heather Glover was placed on interim suspension from the practice of law by the South Carolina Supreme Court on October 1, 2008. Matter of Glover, 380 S.C. 22, 667 S.E.2d 728 (2008).

Ms. Tuten brought this action against David Joel, individually and d/b/a several company names, and against Ms. Glover. (ROA 000009). Mr. Joel and his firm cross-claimed against Ms. Glover. (ROA 000030). Ms. Glover defaulted in the instant action, both as to the primary claim as well as on the cross claims.

Ms. Glover was disbarred by order of the Supreme Court in 2011. In re: Glover, 390 S.C. 643, 704 S.E.2d 347 (2011). Among the matters for which she was disciplined was her failure to diligently pursue cases after taking them over from her former employer.

ISSUE ONE

I. THE TRIAL JUDGE ERRED IN DIRECTING VERDICT AGAINST THE JOEL DEFENDANTS ON THE ISSUE OF LIABILITY BECAUSE THERE WERE FACTUAL ISSUES IN DISPUTE WHICH SHOULD HAVE BEEN DECIDED BY THE JURY AND IN FAILING TO GRANT JUDGMENT NOTWITHSTANDING THE VERDICT ON THE SAME GROUNDS.

Ms. Tuten was injured in an automobile accident on October 18, 2003. (ROA 000042, lines 17-19). She, and a friend, had been "at my house partying a little bit" and then they went to a club. (ROA 000042 line 20 – ROA 00043, line 3). Ms. Tuten's friend dropped Ms. Tuten off at a club and proceeded to a different club. (ROA 00042, line 24 – 000043, line 3).

Ms. Tuten wanted to leave that bar and go to another, so she asked "Cliff" if she could ride with him. (ROA 000043, lines 9-10). Cliff wanted to finish his beer, so Ms. Tuten waited for him to finish his beer and then got into his car as a passenger. (ROA 000043, lines 9-13). Cliff elected to take a short cut on Power House Road. (ROA 000043, lines 12-13). Ms. Tuten described the road as "curvy" and, said that Cliff was driving real fast and she asked him to slow down. (ROA 00043, lines 15-22). Cliff lost control of the car and went over a "drop-off" of approximately six (6) feet into some trees. (ROA 000044, lines 9-20). Ms. Tuten was injured.

In response to her lawyer's question about whether she had been "drunk" at the time she entered Cliff's car, Ms. Tuten acknowledged that she had ingested sufficient alcohol that evening to be "buzzing I would say, yes." (ROA 000045, lines 18-21). She didn't know whether Cliff was drunk, but she acknowledged he had been drinking before she elected to get in his car. (ROA 000043 lines 9-13; ROA 00045 lines 22-24; S.ROA 000004 line 18- 000005, line 9).

Ms. Tuten located the Joel Law Firm using the yellow pages. (ROA 000050, lines 10-11). Ms. Tuten hired Joel & Associates on a contingency basis. (ROA 000053, lines 2-7). Ms. Tuten's dealings were with Heather Glover and Anne Weaver. (ROA 000054, lines 8-16). She dealt primarily with Anne Weaver. (ROA 000055, lines 6-12; ROA 000071, lines 1-4).

Anne Weaver, n/k/a Clark, worked as a paralegal for the Joel firm's South Carolina office for about three (3) years, until it closed. (ROA 000114, line 8 –000115, line 3). Heather Glover was the attorney who operated the South Carolina office while Ms. Clark was there. (ROA 000115, lines 14-25). Mr. Joel did not exercise any supervisory control over the cases that were handled in South Carolina; however, his Atlanta office paid the expenses of the South Carolina office. (ROA 000116, lines 1-13). No calls were ever received for Mr. Joel at the South Carolina office during Ms. Clark's employment. (ROA 000117, lines 1-8).

Ms. Clark regularly spoke with Ms. Tuten and described Ms. Tuten as being "really good" about communicating with the office and providing information about her case. (ROA, 000126 line 12 –000127, line 15). Ms. Clark remembered speaking with Ms. Tuten about her case, and those conversations would have occurred before Ms. Glover assumed sole responsibility for the files because Ms. Clark did not continue employment after the South Carolina office closed. (ROA 000119, line 17 – 000121, line 23). Ms. Tuten never requested to speak with Mr. Joel when she called the South Carolina office. (ROA 000119, lines 22-24).

According to Ms. Glover, in August 2006, she had consulted with John Freeman and Jill Rothenbury to find out how to properly notify the clients that she was assuming

responsibility for their files. (ROA 000071, line 19- 000072 line 5). In accordance with that advice, Ms. Glover sent "confirmation letters to all the clients which included new business cards and a magnet with my new contact information on it." (ROA 000072, lines 3-5). She said her letter to the clients also gave the clients the option to go with another attorney. (ROA 000232; ROA 000072, lines 1-3).

Ms. Tuten acknowledged receiving the letter in which Ms. Glover took-over sole responsibility for her file. (ROA 000056, line 23 –000059, line 25; ROA 000064, lines 1-6 and line 17; ROA 000158). She also received the business card which indicated Ms. Glover was at a different address for purposes of handling her case. (ROA 000065, lines 1-16). In conversations before the closing of the South Carolina office, Ms. Tuten understood that Ms. Glover worked for Mr. Joel. (ROA 000054, lines 8-25). Even after receiving Ms. Glover's letter, Ms. Tuten simply assumed Mr. Joel remained her lawyer and claims she never looked at the business card Ms. Glover enclosed with her letter. (ROA 000062, line 11- 000063, line 6; ROA 000065, lines 4-14).

Ms. Tuten acknowledged that she directed communication solely to Ms. Glover after the Joel firm's South Carolina office was closed. (ROA 000067, line 11 –000068, line 18). Ms. Tuten stated that she just assumed Mr. Joel was her lawyer because "[t]hey never told me any different." (ROA 000056, lines 20-22). However, she never talked to Mr. Joel. (ROA 000069, lines 10-18). Ms. Tuten's conduct after she received Ms. Glover's letter (in attempting to reach Ms. Glover, and not Mr. Joel), clearly creates an issue of fact as to whether or not her stated belief that Joel was still her lawyer was reasonable in light of Ms. Glover's letter informing her the South Carolina office closed and that Ms. Glover was assuming full responsibility for Ms. Tuten's case. (ROA

000206). Furthermore, Ms. Tuten acknowledged that when Ms. Glover finally filed suit on her behalf, the pleadings did not mention the Joel firm in any way. (ROA 000065, line 25 –000066, line 7). She reluctantly acknowledged that she communicated with Ms. Glover only at addresses in South Carolina. (ROA 000067, line 11 – 000068, line 19).

When Ms. Glover assumed responsibility for the South Carolina cases, she advised Mr. Joel via email that she would generate a document to be executed by herself and the Joel firm agreeing to a fee split on cases for which Ms. Glover assumed sole responsibility. (ROA 000209). It is undisputed that no such document was ever generated. (ROA 000143, lines 16 – 000144, line 8). It is also undisputed that the Joel firm never received any fees from Ms. Glover after the South Carolina office closed. (Id.; ROA 000150, lines 16-17)[1].

Ms. Glover prepared a list of cases that she took with her and for which she assumed responsibility when the Joel South Carolina office closed. (ROA 000124; ROA 000231). Ms. Tuten's case was one of the cases. (Id.)

Ms. Clark confirmed that Ms. Glover took all of the files from the South Carolina office with her to complete on her own after the Joel firm closed its South Carolina office. (ROA 000117, line 18 – 000118, line 8; ROA 000121, lines 2-10). Ms. Clark actually assisted in loading the files into Ms. Glover's car. (Id.) Ms. Clark assisted Ms. Glover in creating a "mail merge" to send letters to all the clients notifying them that she

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[1] Ms. Tuten introduced into evidence pleadings from Georgia litigation involving the bankrupt corporate defendant, wherein that entity sought to collect from a bank the money that Ms. Glover had misappropriated from the Joel law firm. (ROA 000210-216). Those pleadings refer to an agreement between the bankruptcy defendant and Ms. Glover to share fees. (ROA 000211, at paragraph 5). However, the suit makes clear the shared fees in question came from cases that had been referred out to other law firms, not cases which Ms. Glover retained to handle herself.

was taking their files with her, and also showed Ms. Glover how to use the postage machine to send the letters out. (ROA 000118, lines 15- – 24).

Ms. Glover was a "wonderful" person who did volunteer work for the Department of Social Services, taking in and caring for foster children. (ROA 000121, lines 12- 17). She did a good job as a lawyer and, Ms. Clark never had any reason to be concerned about Ms. Glover's job performance; she never sought out Mr. Joel or anyone else to assist with the files because Ms. Glover's work was fine. (ROA 000121, lines 18-23).

In February 2008, the Joel firm became concerned about whether Ms. Glover had, in fact, continued to handle the cases for which she had assumed responsibility. (ROA 000157, line 16 – 000158, line 1). Using the information that remained in its computer system from its former South Carolina office, the firm generated letters to the former clients from the South Carolina office who had become Ms. Glover's clients, advising them of the statute of limitations period which was evident from the information entered by Ms. Glover when she was an employee of the law firm. (Id; ROA 000220-000222). Ms. Tuten was not one of those to whom letters were sent. (ROA 000221-000222; ROA 000159, lines 10-19)).

At trial, the Joel defendants asserted that an issue of fact existed as to whether or not its relationship with Ms. Tuten ended when Ms. Glover assumed sole responsibility for the case. Ms. Tuten's expert, John Freeman, testified that Ms. Glover violated her obligations to Ms. Tuten by abandoning Ms. Tuten's case. (ROA 000081, line 18 – 000083, line 6). Mr. Freeman also opined that the Joel firm's expectation of receipt from any fees that might be generated on Ms. Tuten's case indicated that the Joel firm

continued to have responsibility for Ms. Tuten's case even after Ms. Glover assumed sole responsibility for handling the case. (ROA 000091, line 20- 000092, line 5).

Mr. Freeman's testimony linking the Joel defendants to the continued obligations to Ms. Tuten after the cases were assumed by Ms. Glover is based solely on his misunderstanding that there was an agreement by Joel to share fees after Ms. Glover assumed sole responsibility for the cases. (S.ROA 000025, lines 2- 000026, line -20; ROA 000030, lines 3-15). Mr. Freeman testified that Mr. Joel and/or his firm had actually requested a fee from the Tuten case, when the evidence (e.g. lack thereof) establishes otherwise.

Mr. Freeman refused to recognize the alternative basis for fee division set forth in Rule 1.5(e) of the Rules of Professional Conduct, set forth in Rule 407, SCACR, which states that a lawyer can receive a portion of a fee for work already done in a case before it is concluded by someone else. (ROA 000090, lines 5-17). He also disagreed that Comment 8 to Rule 1.5 makes the fee division rules inapplicable where lawyers were previously associated in a law firm. (ROA 000089, lines 7 – 25.). When pressed, though, Mr. Freeman agreed that the Joel firm's representation of Ms. Tuten may have ended in June, 2006. (ROA 000095, lines 4 – ROA 000095, line 15). He opined that it did not, but he acknowledged that it could have. Mr. Freeman's own testimony, then, created an issue of fact which precluded directed verdict against the Joel defendants. (ROA 000096, line 2 - ROA 000098, line 7).

With regard to the fee split, the evidence establishes that Ms. Glover offered to share fees on the transferred cases (which would have included Ms. Tuten's file) with the Joel firm after she assumed sole responsibility for the cases, but never did. (ROA 00209;

ROA 000143, lines 16 – 000144, line 8). In fact, Ms. Glover offered to prepare an agreement to be executed by herself and Mr. Joel (Plaintiff's Exhibit 14), but that never occurred. (ROA 209; ROA 000143, line 10 –000144 line 8; ROA 000150, lines 12-17).

Since Mr. Freeman's testimony was based on the assumption that an agreement existed, which is refuted by the evidence, there was clearly a question of fact as to whether there was, in fact, an agreement, to share fees. Mr. Freeman's testimony does not implicate the Joel defendants at all unless there was a fee splitting arrangement.

At the conclusion of Ms. Tuten's case, the Joel defendants moved for directed verdict on the issue of whether the superseding and intervening negligence of Ms. Glover interrupted any causation link between any negligence that might have existed on the part of the Joel defendants. (ROA 000100, lines 6-24). Ms. Tuten's counsel acknowledged there was negligence by Ms. Glover, but he claimed that the Joel defendants were "the conductor of the train." (ROA 000103, lines 5- 17). The trial judge ruled that "the question of whether or not Glover's negligence was the intervening – intervened and cut off any negligence of [the Joel defendants] is a factual issue for the jury to determine." (ROA 000109, lines 18-22).

The trial judge actually recognized the evidence of disputed facts as to when the Joel defendants ceased any obligations to Ms. Tuten when dismissing the claim for punitive damages against the Joel defendants. "He turned the case over. Whether or not he turned it over properly and whether or not he contends he could get fees out of that's all one thing, but she's the one who after it was turned over to her . . .[Ms. Glover] is the one who just up and left and left your client hanging high and dry." (ROA 000104, lines 4-21).

At the conclusion of the testimony, the trial judge volunteered that he was going to direct a verdict against the Joel defendants on the issue of liability under the negligence cause of action, but he allowed the Joel defendants to oppose the motion. He ruled, as a matter of law that Ms. Glover had been and remained the agent of the Joel defendants at all times Ms. Glover represented Ms. Tuten, and therefore when the ball was dropped, Joel was still responsible. (ROA 000183, lines 1-4; ROA 000186, lines 23-24). Outside the presence of the jury, the trial judge said "the whole scenario of events is almost despicable. . ." (ROA 000188, lines 15-17).

Following a verdict against the Joel defendants, the trial judge permitted written post-trial motions. (ROA 000003). The motions were denied. (ROA 000001).

The trial judge erred in directing a verdict of liability against the Joel defendants, both as to negligence and as to the agency status of Ms. Glover. Clearly, there were factual issues in dispute which required the jury to decide them:

A. Whether or not the Joel defendants continued to owe any obligation to Ms. Tuten after the South Carolina office was closed in 2006 and Ms. Glover accepted full responsibility for Ms. Tuten's file, with knowledge to Ms. Tuten that she was doing so.

B. Whether Ms. Glover remained an agent of the Joel defendants after the South Carolina office closed and she assumed sole responsibility for the cases.

C. Was there was a fee-sharing arrangement between Ms. Glover and the Joel defendants, which was the entire premise of Mr. Freeman's testimony regarding the negligence of the Joel defendants?

ISSUE TWO

II. THE TRIAL JUDGE ERRED IN FAILING TO GRANT A DIRECTED VERDICT IN FAVOR OF DEFENDANTS ON THE PROFESSIONAL NEGLIGENCE CLAIM AGAINST THESE DEFENDANTS AND IN GRANTING A DIRECTED VERDICT AGAINST THESE DEFENDANTS, BASED ON THE PLAINTIFF'S FAILURE TO INTRODUCE ANY EVIDENCE THAT A JUDGMENT IN THE UNDERLYING CASE WAS COLLECTIBLE.

In order to recover in a legal malpractice action, the claimant must prove four elements: (1) the existence of an attorney-client relationship; (2) breach of a duty by the attorney; (3) damage to the client; and (4) proximate causation of the client's damages by the breach. Smith v. Haynsworth, Marion, McKay & Geurard, 322 S.C. 433, 435 n. 2, 472 S.E.2d 612, 613 n. 2 (1996). In presenting her case, Ms. Tuten introduced evidence of the crash, medical bills, and she described her injuries (S.ROA 000001, line 11- 000002 line 24; S.ROA 000003, line 9 – 000004, line 21). She did not present any evidence that she would have collected a settlement or judgment, other than Mr. Freeman's testimony about the "value" of the case. *See infra.*

In making the motion for directed verdict, counsel for Mr. Joel[2] argued that in order for Ms. Tuten to establish that the Joel defendants proximately caused her damages, she must necessarily offer proof or at least some evidence that the she could have recovered something; by virtue of Ms. Tuten's failure to put up any evidence that there was insurance coverage, that there were recoverable assets, or that there was any ability to recover whatsoever, she failed to prove that were damages caused to her as a proximate result of anything that the Joel defendants, or even Ms. Glover, did or did not do. (ROA 000107, line 11- 000108, line 7- 000109, line 2.).

[2] The transcript inaccurately refers to Ms. Ballard as "Mr. Buchanan" in at least one place.

Ms. Tuten introduced the expert testimony John Freeman, who said Joel was negligent and the value of the case was $150K. (S.ROA 000006-000007). All Mr. Freeman testified to was the purported value of Ms. Tuten's case; he didn't testify that he had done any investigation as to whether there was insurance coverage or as to whether the underlying defendant Mr. Still had any assets that could be recovered. (S.ROA 000022, line 8- 000023, line 11; ROA 000101). Under the case-in-a-case theory, it was incumbent upon Ms. Tuten to prove that that money could have been recovered in the underlying action, and thus she lost something by Ms. Glover's failure to file the lawsuit timely.

In *Kimmer v. Wright*, the Court ruled that the question of the success of the underlying claim, if suit had been brought, is a question of law. Kimmer v. Wright, 719 S.E.2d 265, 269, 396 S.C. 53 (S.C.App. 2011). Thus, as a matter of law, since Ms. Tuten provided no evidence that a verdict could have been won or that settlement was possible, the trial should have denied its own motion against the Joel defendants and should have instead granted the Joel defendant's motion for directed verdict based on Ms. Tuten's failure to prove all the elements of her case.

Furthermore, the trial court erred in denying Mr. Joel's motion for directed verdict, ruling that whether Ms. Tuten would have had success in the lower court is a question of the jury and that "success" is something that has not been defined by our courts. (ROA 000181, lines 8-18). The trial court in denying Joel's directed verdict cited Summer v Carpenter, 492 S.E.2d 55, 328 S.C. 36 (S.C. 1997), and Floyd v. Kosko, 329 S.E.2d 459, 285 S.C. 390 (S.C. App. 1985) for the proposition that a plaintiff in a malpractice case must establish that she would have been successful in the underlying

matter, but that nowhere do either cases define what is "success". (ROA 000181). Appellant Joel would show that these cases are inapposite to his point about Ms. Tuten's burden of proof as to damages and recovery.

In *Floyd,* the court determined that "in order for Floyd to recover he must show that an appeal of Judge Cobb's order refusing to vacate the default judgment most probably would have been successful. In determining whether the appeal would have been successful, the trial court examined the merits of the appeal and found that there was no evidence to establish "a question of fact as to the alleged negligent failure to appeal." Floyd v. Kosko, 329 S.E.2d 459, 285 S.C. 390 (S.C.App. 1985).

In determining whether Appellant had a valid claim for legal malpractice against Carpenter for failing to bring litigation against the Highway Department, the Supreme Court considered Appellant's claim, via her attorney's affidavit, that "[t]he presence of the [Highway Department] would have most likely resulted in a much higher settlement or verdict for [appellant]." Summer v Carpenter, 492 S.E.2d 55, 328 S.C. 36 (S.C. 1997). But, the court determined that, "based on the evidence presented, if suit had been filed against both Lineberger and the Highway Department. . . the Highway Department would have been immune from suit under the design immunity provision of the [Tort Claims] Act." *Id.* at 48. Thus, the Court ruled "even if [appellant] had preserved the issue of negligent maintenance for the Court's consideration, appellant would not have had a successful action for negligent maintenance and, therefore, she has failed to establish any prejudice by respondent's failure to file suit against the Highway Department." *Id.* at 48.

Rather, the point is that a party may establish he could have won a verdict for a million dollars, but if it's not recoverable, the party has not suffered any damages by his

attorney's negligence. (ROA 000101, line 1 – 000102, line 5). This issue of collectability, on information and belief, has not been directly discussed in detail by South Carolina's courts. (Id.)

Our courts have, however, hinted at the theory, using the case-within-a-case application to malpractice issues. For example, in *Doe v. Howe*, it was determined that the former client's burden of establishing proximate cause in a legal malpractice action "requires that he prove that he would have obtained a better result in the underlying matter if the attorney had exercised reasonable care. Doe v. Howe, 626 S.E.2d 25, 367 S.C. 432, 446 (S.C.App. 2005). The burden does not necessarily compel the client to demonstrate that he would have won the underlying case. Rather, it is enough for the legal malpractice plaintiff to show that he has lost a valuable right; *e.g.,* the settlement value of the underlying case." *Id.* Stated otherwise, the client has to establish that he has lost a probability of success as a result of the attorney's negligence." *Id.* (citing, David A. Barry, *Legal Malpractice in Massachusetts: Recent Developments,* 78 MASS. L.REV. 74, 79 (1993)(internal citations omitted).

More to the point, the *Doe v. Howe* Court held that "as far as we can tell, the record contains only a "Gross Distribution" list showing that various claimants represented by other counsel each received approximately $2 million dollars following the initial verdict against the school. But this list does nothing more than set forth factual information. Most certainly, the list does not constitute an opinion that *Doe* should have made a recovery similar to the other claimants. At best, it could serve, if at all, only as evidence that could have supported an opinion regarding the settlement value of *Doe's* claim." Doe v. Howe, 367 S.C. at 446. In other words, *Doe* could not recover in his

malpractice claim damages when he failed to establish such damages would have been recovered in the underlying case.

Other jurisdictions have discussed the issue of collectability at length. The Restatement[3] says that "the lawyer's misconduct will not be the legal cause of loss to the extent that the defendant lawyer can show that the judgment or settlement would have been uncollectible" even if a plaintiff can show she "would have recovered through trial or settlement" in the underlying action. *Id.*

Similarly, the purpose of the "trial within a trial" practice in legal malpractice cases is because the plaintiff must prove what the result in the underlying case should have been, but for the attorney's negligence. But while the "should have been" result might be objective, there are always subjective issues to consider too. For example, "issues of collectability of a judgment or the adequacy of settlement concern the characteristics of the actual defendant in the underlying case, not a hypothetical reasonable defendant". Mallen and Smith, *Legal Malpractice,* 5th Edition, §33.8 at page 70: West Group, 2000.

In this case, Ms. Tuten offered no evidence that her case would have likely actually recovered her any money; she offered no evidence of whether settlement was possible, and offered no evidence as to what verdict could have been achieved and collected, but for negligence against the named defendants. Therefore, the Joel defendants assert that the trial court erred, as a matter of law, in denying their motion for directed verdict against the plaintiff the legal malpractice claim (and in granting a directed verdict against them on the same issue).

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[3] RESTATEMENT OF THE LAW (THIRD) Vol. 1, Chpt 4, §53, p 391.

ISSUE THREE

THE TRIAL JUDGE ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL *NISI* WHEN THE VERDICT WAS UNSUPPORTED BY EVIDENCE.

"The trial judge alone has the power to grant a new trial *nisi* when he finds the amount of the verdict to be merely inadequate or excessive. The denial of a motion for a new trial *nisi* is within the trial judge's discretion and will not be reversed on appeal absent an abuse of discretion." O'Neal v. Bowles, 314 S.C. 525, 526, 431 S.E.2d 555, 556 (1993). When a party moves for a new trial based on a challenge that the verdict is either excessive or inadequate, the trial judge must distinguish between awards that are merely unduly liberal or conservative and awards that are actuated by passion, caprice, or prejudice. Becker v. Wal-Mart Stores, Inc., 339 S.C. 629, 635, 529 S.E.2d 758, 761 (Ct. App. 2000). When the award is the product of such factors, yet there was a failure of the trial judge to grant a new trial, it amounts to an abuse of discretion that will be reversed and requires the granting of a new trial absolute." O'Neal at 527, 431 S.E.2d at 556.

There was no evidence to support the grossly excessive award of damages, so Mr. Joel's post-trial motions included a request for a new trial nisi remittitur. (ROA 000003). For damages to be recoverable, the evidence "should enable the jury to determine the amount thereof with reasonable certainty or accuracy." Austin v. Stokes-Craven Holding Corp., 387 S.C. 22, 43, 691 S.E.2d 135, 146 (2010). The existence, causation, nor the amount of damages can be left to conjecture, guess, or speculation, even though proof with mathematical certainty is not required. *Id.* Here, there was evidence regarding a certainty of one aspect of damages, their upper limit. Ms. Tuten's *own legal expert*

established the cap in value of her claims when he testified the claims were worth $150,000. (S.ROA 000023, lines 18-22).

Mr. Joel did not object to that evidence, since it fortunately, and rightly, constitutes a cap on damages proffered by Ms. Tuten, herself. (Id.; S.ROA 000038, line 19.)

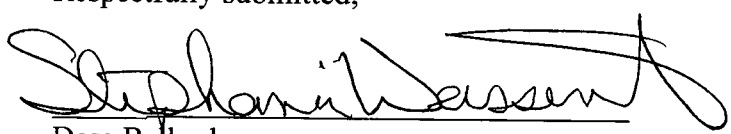
The eventual jury award far in excess of that amount, nearly doubling the max calculation submitted by Ms. Tuten's own expert as part of her case, clearly indicates passion, caprice, or prejudice given the absence of any evidence that could have sustained such an award. Failure to acknowledge and rectify that award's excessiveness by the trial court amounted to an abuse of discretion, and warrants a reversal and grant of a new trial.

CONCLUSION

For the reasons set forth herein, the Joel defendants seek an order vacating the verdict against them in this case. Should the Court agree that the trial judge should have granted the motion for directed verdict made by the Joel defendants, a reversal would end the case. Should the Court agree that the trial judge erred in granting a directed verdict of liability against the Joel defendants, the case would be remanded for a new trial.

In the alternative, should the Court disagree on the issues related to directed verdict, it is respectfully submitted that this Court should find error in the trial judge's failure to grant a new trial *nisi remittitur*, and should remand this matter to the trial court for entry of judgment of $150,000.00.

Respectfully submitted,



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July 29, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Doyet A. Early, III, Circuit Court Judge

Case No.: 2009-CP-02-2460
Appellate Case No. 2012-211915

Julie Tuten,

Respondent,

v.

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

Defendants,

of whom

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

Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that Appellants' Final (Initial) Brief and Final Reply brief comply with Rule 211(b), SCACR.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Terrie Stafford, an employee with the Law Offices of Ballard Watson Weissenstein, do hereby certify that on July 29, 2013, I served a copy of the **Supplemental Record on Appeal, Appellants' Final Brief and Final Reply Brief** in the above-captioned case on the following individuals by United States Mail, with sufficient first-class postage affixed, addressed as follows:

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July 29, 2013
West Columbia, South Carolina