

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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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.

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REPLY OF APPELLANT

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### **STATEMENT OF THE CASE**

This matter is before the South Carolina Court of Appeals from the Court of Commons Pleas pursuant to the appeal and designations of matter filed by Appellants David Charles Joel, individually, and doing business as Joel & Associates, P.A. and/or Joel & Associates, ("Joel") on December 11, 2012. Respondent Julie Tuten filed her initial response brief and designations on January 7, 2013.

Joel thereafter filed a Motion to Strike certain arguments contained in Respondent Tuten's brief, as well as certain of her designations of matter, because Joel believes Respondent addressed matters not pertinent to this appeal. This Court denied Appellants' motion in its one sentence order, filed March 22, 2013.

Therefore, Joel offers his reply to respondent's brief, and hereby incorporates herein the Statement of Issues on Appeal, Statement of the Case, and Statement of Facts contained within Appellants' initial brief. Further, Joel denies any such statement by Respondent that contradicts Joel's allegations.

### **ARGUMENT**

Appellants raised three issues on appeal: (1) whether the trial court erred by directing verdict on the issue of liability when factual issues remained that should have been decided by the jury, (2) whether it was an error to deny Joel's motion for directed verdict after Tuten had failed to introduce necessary evidence showing that she could have won and collected money in her accident case, and (3) whether a new trial should have been awarded following the unwarranted damages verdict in favor of Tuten returned by the jury.

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I. RESPONDENT OBSCURES THE RELEVANT ISSUES ON APPEAL BY REFERENCE TO MATTERS AND EVIDENCE NOT PROPERLY CONSIDERED AS PART OF THIS APPEAL.

In the response brief, Tuten alleged facts and presented argument regarding Joel's use of phone directory advertisements in South Carolina. (Resp. Br. p 7; 12). Tuten's counsel also designated for inclusion in the record some examples of Joel's advertisements, claiming that because they were exhibits in the trial court, they should therefore be included in the record on appeal. Respondent included information about Joel's advertising methods in her brief and designations, in violation of Rule 209(c), SCACR, as Joel's use of advertisements is not germane to the issues presented as part of this appeal.

In the trial court, Respondent Tuten introduced the advertisements as on the basis that "[t]he relevance is to show the advertising that Joel and Associates was doing throughout the State of South Carolina by advertising in what is in excess of 1.5 million telephone books." (SROA 000035, lines 8-11). The only reason the court allowed Tuten to introduce these exhibits into evidence was so she could attempt to establish an element of her unfair trade practices claim (i.e. evidence of the potential for repetition of an alleged unfair trade practice). (Id, lines 16-18). The ads were not admitted for purposes of the negligence cause of action.

The unfair trade practices issue was not given to the jury; at the conclusion of the evidence, the jury was tasked only with finding the amount of damages to be paid to Ms. Tuten as a result of the judge's directed verdict on the issue of negligence.

The advertisement documentation attached to Tuten's response brief was not presented to the jury for its consideration, and therefore Appellant sought those to be stricken from this record. The Court has denied Joel's motion to strike the portions of the brief

containing reference to this issue, but Joel nevertheless respectfully submits that this irrelevant side issue should not detract from consideration and analysis of relevant issues before this Court.

II. THE PLEADING FROM THE *WACHOVIA* CASE DOES NOT NEGATE THE QUESTION RAISED BY THIS APPEAL: WHETHER LIABILITY SHOULD LIE WITH THE APPELLANTS WAS A QUESTION OF FACT FOR THE JURY.

Respondent argues that directed verdict on the issue of negligence was proper because there was no question that Joel was liable to Tuten. (Resp. Br. p. 14). In her effort to prove liability at trial, Tuten argued that if Joel received, or was supposed to receive, a division of attorney fees earned as a result of Tuten's personal injury litigation after the South Carolina office closed in 2006, then Joel must have also shared joint responsibility for her case. That assertion is faulty in two respects:

A. There was a genuine dispute as to whether an agreement to divide fees existed.

Joel disputes the existence of an agreement for division of fees. There was actually a great deal of testimony produced at trial tending to establish that there had been no actual agreement between Glover and Joel as to division of fees after the Columbia office closed down. (ROA p. 000143, line 10- p. 000144, line 8; ROA p. 000176, lines 3-1). The evidence suggesting there was a possibility of such an arrangement was an email to Joel from his former associate, Glover, in which Glover states she might take some cases with her and would be willing to share the fees. (ROA p. 000209). That document itself merely references a proposed division of fees.

In support of her factual contention, Tuten introduced into evidence a pleading filed by Joel in a lawsuit completely separate and distinct from the underlying litigation that forms

the basis for this appeal. That pleading against Wachovia states that the South Carolina office closed in 2006, and that Joel and Glover had a fee sharing arrangement.

The Wachovia case pleading is not dispositive of the issue here, however, as the paragraph contained within the pleading referenced by Tuten is merely evidence of in-artful pleading. As the whole of Wachovia complaint makes clear, Joel had filed the lawsuit in Georgia against Wachovia to seek reimbursement of funds embezzled by Glover. During the operation of the South Carolina office, fees were split, a process which took time to wind down, even after the office closed. Accordingly, checks earned prior to the closing of the office continued to arrive to the vacated business resulting in the checks being forwarded to Ms. Glover's new address. Upon receipt, the checks were fraudulently endorsed by Ms. Glover. The \$100,000+ in fees disputed in the Wachovia litigation were fees generated, and thus subject to division, while Ms. Glover was still under Joel's employ via an open office. Clearly that pleading and the assertions made by Joel therein were regarding a separate and distinct period of time wholly inapplicable to fees earned after the office closed, such as those that would have been earned on Tuten's matter.

The trial court, when dismissing Tuten's claim for punitive damages, actually recognized the evidence of disputed facts as to when the Joel defendants ceased any obligations to Ms. Tuten. (Initial brief).

- B. Joint responsibility may be a required element to share fees between lawyers to avoid committing misconduct, but the sharing of fees does not establish joint responsibility for purposes of this matter.

Lawyers may decide to divide fees between themselves. However, Rule 1.5(e) sets forth certain additional requirements for the manner in which they may do so if they wish to comply with the Rules of Professional Conduct. Rule 1.5(e), RPC, Rule 407, SCACR. One

means by which lawyers may share fees without misconduct is by having both lawyers maintain joint responsibility for the client matter. *Id.* The rule, however, does not state that sharing of fees creates joint responsibility, as Tuten and her expert argue.

By analogy, consider that a person can operate a motor vehicle legally if they have a valid driver's license. But if they drive a car without a license, no one would logically argue that they have created a driver's license. Accordingly, even if it was shown that Joel had an agreement to share legal fees with Glover after the South Carolina office closed, (which he denies as stated above), he could have done so in a manner to avoid creating joint responsibility over files such as Ms. Tuten's.

III. ISSUE TWO OF APPELLANTS' BRIEF DOES NOT ARGUE THAT "COLLECTABILITY" IS A "FIFTH ELEMENT TO A LEGAL MALPRACTICE CASE".

Appellants Joel appealed the directed verdict against them for professional negligence in part because Tuten failed to prove at trial that she suffered damages as a proximate result of Joels' action, or inaction; in other words, Joel would show that Tuten did not establish, as a matter of law, the fourth element of a legal malpractice claim. (See, Holy Loch Distributors v. Hitchcock, 340 S.C. 20, 531 SE 2d 282 (2000)). Appellant asserts that in order to satisfy the burden of establishing the elements of a negligence claim, Respondent would have had to prove that "she would have collected a settlement or judgment" (Rep. Br. P. 15). In her own brief, Respondent cites to case law that agrees with that position when she states "[R]espondent must show he or she 'most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice'". (Rep. Br. Pg.16, quoting Doe v. Howe, 367 S.C. 432, 626 S.E.2d 25 (Ct.App. 2005).



In South Carolina, in order to win on legal malpractice and professional negligence, the injured party has to prove the “case within the case”; they have to prove they would have either won at trial or received compensation from the purported at-fault defendant in the underlying matter. (*See, generally*, Appellant’s Initial Brief). In this case, Tuten, who was drunk, got in the car with a person who was also drunk, and they were in a wreck. If Tuten’s accident case had gone to trial, she would have to overcome the law of comparative negligence.

The court erred in ruling as a matter of law, and charging, that the Appellants Joel were negligent because Tuten “most probably would have been successful in the underlying suit.” (SROA. 000045). Tuten failed to put up any evidence showing that there was insurance coverage or that the driver had assets she could have taken had she won a verdict. The point Appellants Joel are trying to make, which is somewhat novel in South Carolina, is that if you have not lost something, you have not been damaged. If a person has a lottery ticket for a drawing that has not taken place, it cannot be fairly argued the person has been damaged by millions of dollars because the damages are speculative and no vested interest other than the token value of the paper ticket was lost. Had Tuten established both there was an insurance policy or that the driver had assets, and that she would have most likely prevailed against the driver, then she might have been able to establish damages.

### **CONCLUSION**

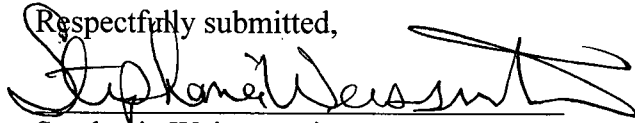
For the reasons set forth herein, in the initial brief, and the Record, the Joel Appellants seek an order vacating the verdict against them. If this court determines that directed verdict should have been made in favor of the appellants, then a reversal would end

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the case. Similarly, 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 uphold the trial judge's decisions on the motions for 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

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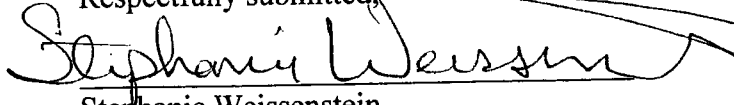
David Charles Joel, individually, and doing  
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Joel & Associates, are

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**

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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:

**Tom G. Woodruff, Jr., Esquire**  
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July 29, 2013  
West Columbia, South Carolina

  
Terrie Stafford, Paralegal