

ORIGINAL

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY

Doyet A. Early, III, Circuit Court Judge

Appellate Case No: 2014-000135

Moore Taylor & Thomas, P.A. Plaintiff/Appellant

v.

Marsha Banks and Mary Guynn.....Defendants

Of Whom Mary Guynn is the..... Respondent

RECORD ON APPEAL

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Moore Taylor & Thomas, P.A*

September 10, 2014

RECEIVED

SEP 10 2014

SC Court of Appeals

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STATE OF SOUTH CAROLINA

COUNTY OF AIKEN

Moore, Taylor, & Thomas, P.A.,

Plaintiff,

VS.

Marsha Banks and Mary Guynn,

Defendants.

) IN THE COURT OF COMMON PLEAS

) SECOND JUDICIAL CIRCUIT

) Civil Action No. 2013-CP-02-02032

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

I, Liz Godard, Clerk of Court of Common Pleas and General
Sessions for Aiken County, South Carolina do hereby certify
that the foregoing constitutes a true and correct copy of the
original documents which have been filed in my office this

ORDER

DEC 19 2013

Liz Godard
C.C.C.P. & G. A., Aiken County, S.C.

Deputy Clerk

This matter appeared before the Court on a Rule 12(b)(6) Motion to Dismiss filed by Defendant Mary Guynn, Esquire, seeking dismissal of the claims asserted against her by Plaintiff Moore, Taylor, & Thomas, P.A. For the reasons that follow, this Motion is GRANTED.

ALLEGED FACTS

The underlying dispute involves Plaintiff's former client, Susan Cain, who failed to pay Plaintiff a disputed legal fee. (Complaint ¶¶ 18-20). The Complaint alleges that Defendant Banks initially represented Cain in the underlying suit but "contacted Plaintiff to retain Plaintiff for representation of Ms. Cain." (Complaint, ¶¶ 4, 6) Plaintiff then undertook the representation of Ms. Cain and represented her until the case settled. (Complaint, ¶¶ 9-13). Throughout the time Plaintiff represented Cain, she did not pay Plaintiff even though Plaintiff billed Cain on a monthly basis (Complaint, ¶ 11).

Following settlement, "property in dispute in the case was sold with the proceeds from the sale of the property to be divided between Cain and the opposing party. (Complaint, ¶ 14). Defendant Mary Guynn was the closing attorney (Complaint, ¶ 15).

Plaintiff requested that Cain pay her attorney's fees from the proceeds of the sale, but

FILED 12.19.2013

Liz Godard
C.C.C.P. & G. A.

Deputy Clerk
2:45pm

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Cain disputed the fees that Plaintiff claimed and refused to pay. (Complaint, ¶ 18). As a result, Guynn did not withhold the fees requested by Plaintiff from the proceeds of the sale. (Complaint ¶ 21).

Plaintiff Moore, Taylor, & Thomas, P.A brought this action as a legal malpractice claim against Mary Guynn and Marsha Banks.¹ Cain is not named in this suit. The only allegations directed to Mary Guynn are that she "refused to recognize Plaintiff's interest in the closing" (Complaint, ¶ 21) and did not "protect Plaintiff's interest in the proceeds of the closing." (Complaint, ¶ 28).

Other facts are either undisputed or not alleged: (1) Guynn did not have an attorney-client relationship with Plaintiff; (2) Plaintiff did not have a secured interest in the property that was the subject of the closing, (3) there is no assignment made by Cain to Plaintiff from the proceeds of the sale of property, and (4) Cain disputes the attorney's fee she allegedly owes Plaintiff. There is no allegation that the underlying settlement contemplated attorney's fees from the proceeds or that the Court directed the parties in any way on the issue of attorney's fees.

STANDARD

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would not entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is proper. *Id.*

¹ Plaintiff also asserted a claim for misrepresentation against Marsha Banks, but these claims are not at issue in this Motion.

LEGAL CONCLUSION

The cause of action against Defendant Mary Guynn was originally brought as a legal malpractice case. At the hearing, however, Plaintiff's counsel acknowledged that the cause of action asserted against Defendant Guynn is not a legal malpractice claim. Regardless, the Complaint does not allege that Plaintiff and Guynn ever had an attorney-client relationship.² The lack of an attorney-client relationship is fatal to the cause of action for legal malpractice, and Plaintiff cannot correct this fatality by amending the Complaint. *See Rydde v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009) ("Before a claim for malpractice may be asserted, there must exist an attorney-client relationship."). Therefore, to the extent the cause of action against Guynn is a legal malpractice claim, it is defective and must be dismissed.

While not alleged, Plaintiff argued at the hearing that Guynn breached a duty to Plaintiff as escrow agent in the real estate transaction by failing to withhold attorneys' fees from the sale proceeds. However, there is no allegation in the Complaint that Plaintiff had any written assignment rights or security interest in the sale proceeds. Thus, the statute of frauds may be implicated in a matter involving the sale of lands. Pursuant to S.C. Code Ann. § 32-3-10, "to charge any person upon any contract or sale of lands" (such as the interest asserted by the Plaintiff) "or any interest in or concerning them," the agreement must be in writing and signed by the party against whom it is seeking to be enforced.

² A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach. *Rydder v. Morris*, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009).

Plaintiff claims that it is entitled to a portion of the proceeds of sale of the property to pay the disputed legal fees; however, the Plaintiff's only proof of such entitlement is Plaintiff's oral assertion of this interest. Cain, as the party against whom the claim was asserted, disputes the claim and did not sign any documents verifying the claim or validating it as a lien against the property. This problem illustrates one of the reasons that Guynn's duty as a real estate lawyer is to satisfy recognized liens in writing which properly secure the property at issue. This Court is simply not aware of any South Carolina statutory or case law that requires Guynn to withhold a disputed and unsecured debt that is, at most, based solely on an oral representation.³

While the Complaint alleges that such a duty exists, the mere allegation is not sufficient when such a duty does not exist. Instead, the question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). Because no such duty exists in South Carolina, however, the Complaint cannot state a valid claim for relief.

The authority Plaintiff points to is *Moore v. Weinberg*, 383 S.C. 583, 681 S.E.2d 875 (2009), but the facts of *Weinberg* are very different. There, Weinberg represented Clarence Wheeler in a lawsuit. Weinberg settled the lawsuit for \$100,000 and the settlement funds were deposited in Weinberg's trust account. Wheeler then borrowed money from Moore on the condition that the loan from Moore was secured by the

³If this were the law, closing attorneys would be placed in an impossible position of determining the existence, extent, and validity of a seller's unsecured and disputed oral debts.

\$100,000 settlement funds held by Weinberg in his trust account. Moore's loan to Wheeler was secured by a written assignment which stated:

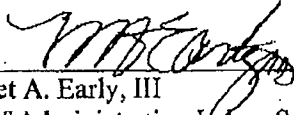
Clarence Wheeler does by this instrument assign to Joseph Moore so much of any recovery that he may make from the debt owed to him by [the music business] and the escrow account, which is pending as a result of said litigation, unto Joseph Moore.

Weinberg, however, overlooked the written assignment and disbursed the settlement funds to Wheeler in violation of the written assignment. Given the written assignment, the Court found that Weinberg owed a duty to Moore as escrow agent but "independent of an attorney's status as a lawyer and distinct from duties that arise out of the attorney/client relationship."

In this case, however, there is no written assignment, no secured interest, and the seller (Plaintiff's former client, Cain) disputes the amount Plaintiff claims it is owed in attorney's fees. Furthermore, Plaintiff does not allege that the Court in the underlying case made any findings or instructions related to attorney's fees. *Moore v. Weinberg* addresses facts which simply do not exist in this case.

For these reasons, the Motion to Dismiss filed by Defendant Mary Guynn, Esquire, seeking dismissal of the claims asserted against her by Plaintiff Moore, Taylor, & Thomas, P.A. is GRANTED.

IT IS SO ORDERED.


Doyet A. Early, III
Chief Administrative Judge, Second Judicial Circuit

December 18, 2013

Bamberg, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2013 CP-02-02032

Moore, Taylor & Thomas, P.A.

Marsha Banks and Mary Guynn

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: Motion to Reconsider, Alter, or Amend Order Granting Defendant Guynn's Motion to Dismiss is DENIED.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.

Additional Information for the Clerk : _____

1.10 and 4
L. J. Anderson
SCCP & S.
Anita Smoother
Deputy Clerk

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

0136

Judge Code

1/9/14

Date

For Clerk of Court Office Use Only

This judgment was entered on the 10 day of Jun, 2014 and a copy mailed first class or placed in the appropriate attorney's box on this 10 day of Jun, 2014 to attorneys of record or to parties (when appearing pro se) as follows:

Peter Protopapas

J. Calhoun Watson

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CIVIL ACTION NO: 2013-CP-02-02032

Moore, Taylor, & Thomas, P.A.

Plaintiff,

v.

Marsha Banks and Mary Guynn,

Defendants

COMPLAINT
(Jury Trial Demanded)

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SEP 09 2013
8:30 am

AIKEN COUNTY
CLERK OF COURT

Plaintiff, complaining of Defendants Marsha Banks and Mary Guynn, respectfully
shows unto the Court as follows:

PARTIES AND JURISDICTION

1. Plaintiff is a Professional Association organized and existing under the laws of the State of South Carolina providing legal services.
2. Defendants are attorneys in South Carolina with their primary place of business Aiken, South Carolina.
3. This Honorable Court has jurisdiction over the parties hereto and the subject matter herein.

FACTS

4. Defendant Banks represented Susan Cain in a dispute between Ms. Cain and Warren Martha.
5. The dispute devolved in active litigation in the Federal District Court in Aiken, captioned Matha v. Cain, C/A 1:09-1366 where Martha asserted claims in excess of \$800,000.00.

6. Upon filing of litigation, Defendant Banks contacted Plaintiff to retain Plaintiff for representation of Ms. Cain.
7. Upon being contacted, Plaintiff advised Defendant Banks that it was concerned that it would not get paid for its time.
8. Defendant Banks ensured that Plaintiff would get paid for its services and that she would ensure payment.
9. Based on Defendant Banks' representations and promises, Plaintiff undertook the representation of Ms. Cain.
10. Plaintiff represented Ms. Cain in the federal litigation and periodically billed Ms. Cain for their services.
11. Ms. Cain failed to pay the bills during the litigation. Plaintiff provided bills to Ms. Cain on a monthly basis.
12. Upon Ms. Cain's failure to pay the bill, Plaintiff contacted Defendant Banks. Once again Defendant Banks promised payment to Plaintiff. Plaintiff relied upon that promise of payment in proceeding forward with representation.
13. Ultimately, a settlement was reached in the federal litigation.
14. As part of the settlement, property in dispute between Ms. Cain and Mr. Matha was sold with the proceeds from the sale of property to be divided between Ms. Cain and Mr. Matha.
15. The closing attorney for the sale was Mary Guynn.
16. Prior to the closing both Defendants were aware that significant monies were

owed to Plaintiff and that Plaintiff was to be paid out of the closing.

17. Prior to closing, Ms. Cain stopped communicating directly with Plaintiff. Ms.

Banks took it upon herself to talk on behalf of Ms. Cain.

18. The day before closing, Plaintiff contacted Defendant Banks and was advised by Ms. Banks that Ms. Cain disputed some portion of the legal bill.

19. The day before closing was the first time that Plaintiff became aware that there was dispute with its bills.

20. Though Ms. Cain never spoke with Plaintiff regarding the bill for legal services, Ms. Guynn confirmed that there was a dispute regarding the bill and Plaintiff's claims.

21. Further, Ms. Guynn, in breach of her responsibilities as a closing agent, refused to recognize the disputed amount at closing and withhold the money from distribution.

22. Pursuant to S.C. Code Ann. 15-36-100, Plaintiff has retained the services of Michael Virzi, Esq., as an expert witness in this matter. Mr. Virzi's affidavit is attached as Exhibit 1 and incorporated by reference.

FOR A FIRST CAUSE OF ACTION
(Negligence)

23. The above paragraphs are reiterated and realleged as if set forth verbatim.

24. Defendants, acting as attorneys had direct obligations to the Plaintiff.

25. The obligations arose, inter alia, from their roles as soliciting attorney and closing attorney respectfully.

26. Defendant Banks was negligent and breached her duties, including the standard of care for attorneys by *inter alia*: failing to advise Plaintiff that Plaintiff would never get paid; that Ms. Cain was disputing the bills; and that Ms. Cain and Ms. Banks would not pay the bill.

27. Defendant Guynn was negligent and breached her duties, including the standard of care for attorneys by *inter alia* refusing to recognize Plaintiff's interest in the closing.

28. Both Defendants breached their duties, including the standard of care for attorneys by failing to protect Plaintiff's interest in the proceeds of the closing.

29. Plaintiff suffered damages directly and proximately caused by the above described breaches by the Defendants in the amount of \$55,653.45 plus prejudgment interest.

FOR A SECOND CAUSE OF ACTION
(Misrepresentation as to Defendant Banks)

30. Plaintiff repeats and realleges each and every previous paragraph above as though fully set forth here at length.

31. Defendant Banks owed a duty of care to Plaintiff to communicate truthful information.

32. Banks was negligent, grossly negligent, willful, wanton, reckless, and acted in violation of the duties owed to Plaintiff in one or more of the following acts of omission or commission by:

- a. failing to communicate honestly with the Plaintiff regarding Ms. Cain's actions and position.
- b. advising Plaintiff that she would protect Plaintiff's payment of fees and

would ensure payment.

c. promising that Cain intended to pay Plaintiff and that she would ensure that Plaintiff got paid.

d. Failing to communicate Ms. Cain's intention not to honor her obligations to Plaintiff.

33. The above representations were false and material to Plaintiff.

34. Banks had a pecuniary interest in making the false representations as she benefited from her attorney client relationship with Cain.

35. Banks owed a duty of care to make truthful representations and breached that duty.

36. Plaintiff did not know of the falsity of the representations.

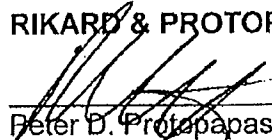
37. Plaintiff reasonably relied on the false representations made by Banks and had a right to rely upon them.

38. As a direct and proximate result of the negligence, carelessness, willfulness, wantonness, gross negligence, and recklessness by Banks, Plaintiff has suffered and will continue to suffer damages and is entitled to an award of actual and compensatory damages in an amount to be determined by a jury in this matter.

WHEREFORE, Plaintiff respectfully prays for an award from this Court as to each cause of action in an amount to be determined at trial and such further relief as the court deems just and appropriate.

[SIGNATURE PAGE TO FOLLOW]

RIKARD & PROTOPAPAS, LLC


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Columbia, South Carolina 29201

Telephone: 803.978.6111

Facsimile: 803.978.6112

Attorneys for Plaintiff

September 4, 2013
Columbia, SC

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

)
)
)

AFFIDAVIT

NOW COMES Michael J. Virzi, and states, under oath, the following:

1. I am offering this affidavit, pursuant to S.C. Code Ann. § 15-36-100(b), as an expert witness on behalf of the plaintiff, Moore, Taylor & Thomas, P.A., (hereinafter "Plaintiff") to support its Complaint against defendants Marsha Banks and Mary Guynn (hereinafter "Defendants"), for professional negligence.

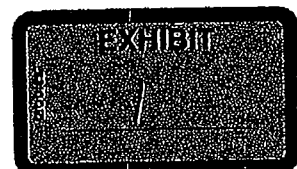
2. My qualifications to give expert testimony include the following:

- A. I am a lawyer licensed to practice law in South Carolina, and my practice focuses exclusively on matters of legal malpractice, ethics, and lawyer discipline.
- B. I am a former Assistant Disciplinary Counsel to the South Carolina Supreme Court, I serve on the South Carolina Bar's Ethics Advisory and Professional Responsibility Committees, and I served a three-year term as Chair of the Ethics Advisory Committee.
- C. I have authored three published articles, numerous Ethics Advisory Opinions, and a book chapter on matters involving lawyer ethics and malpractice. I have provided expert testimony on matters involving lawyer ethics and malpractice, including conflicts-of-interest on more than 50 occasions either in court, in deposition, or by affidavit;
- D. I teach full-time at the University of South Carolina School of Law, including courses in Professional Responsibility and Fundamentals of Law Practice and Professionalism, and I am a frequent CLE speaker and law school guest lecturer on the topics of lawyer malpractice, ethics, and lawyer discipline. I am also one of six instructors for the South Carolina Bar and Supreme Court's ongoing Legal Ethics and Practice Program.

E. I am a member of the South Carolina Association of Ethics Counsel, the Association of Professional Responsibility Lawyers, the National Institute for

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SEP 09 2013
8:30am
AIKEN COUNTY
CLERK OF COURT



Teachers of Ethics and Professionalism, and the ABA Center for Professional Responsibility.

E. I am familiar with the standard of care applicable to lawyers in the circumstances involved in this case.

3. My opinion is based on review of the Complaint in this matter, captioned Moore, Taylor, & Thomas, P.A., Plaintiff, v. Marsha Banks and Mary Guynn, Defendants, along with a series of emails among Defendants and Will Edwards, Bates labeled RP 38-41.

4. These factual and legal materials are of the type reasonably relied upon by experts in the field of legal malpractice in forming their opinions.

5. Based on my experience, education, training, knowledge of the standard of care for lawyers, and on my review of the above complaint, it is my opinion that Defendants engaged in negligent acts and omissions and that their conduct fell below the standard of care and breached duties owed to Plaintiff.

6. In particular, it appears Defendant Banks hired plaintiff to assist her in representing Susan Cain in litigation. It appears Defendant Banks initially assured Plaintiff that she would ensure payment for Plaintiff's legal services to Cain. It further appears that Defendant Banks again later assured Plaintiff that she would pay Plaintiff's bill for legal services when Cain had failed to do so. Defendant Banks had a duty of honesty and truthfulness in her communications with Plaintiff. See Rules of Professional Conduct 4.1 & 8.4(d), SCACR 407. Defendant Banks also had a duty to pay Plaintiff because she engaged plaintiff and promised to do so. See In re Longtin, 393 S.C. 368, 713 S.E.2d 297 (2011). By failing to do so, Defendant Banks breached duties owed to Plaintiff.

7. Furthermore, it appears Defendant Guynn represented Cain in the closing of a real estate sale transaction that resulted from the above-referenced litigation. It appears that Guynn was

aware that, because of Cain's failure to pay Plaintiff's legal bill, Plaintiff claimed in interest in any proceeds of that transaction that were otherwise payable to Cain. It appears that, despite this knowledge, Guynn failed to protect Plaintiff's interest in the sale proceeds by holding the funds until any dispute between Cain and Plaintiffs was resolved; instead it appears Guynn paid the sale proceeds directly to Cain in derogation of Plaintiff's rights. Upon taking possession of the closing funds, Defendant Guynn had duties to notify Plaintiff of the funds, to promptly deliver to Plaintiff any funds to which Plaintiff was entitled, and to hold in trust any portion of such funds that was in dispute until the dispute between Cain and Plaintiff was resolved. See Rule of Professional Conduct 1.15(d), SCACR 407. By failing to pay funds to Plaintiff or hold them until resolution of any dispute over Plaintiff's entitlement to them, Defendant Guynn breached a duty owed to Plaintiff. See Moore v. Weinberg, 373 S.C. 209, 644 S.E.2d 740 (Ct. App. 2007), aff'd on other grounds, 383 S.C. 583, 681 S.E.2d 875 (2009).

8. As a result, it is my opinion that Defendants' conduct fell below the standard of care, expected of lawyers, and they breached duties owed to Plaintiff.

9. The opinions in this affidavit are given to a reasonable degree of certainty and are specifically based on the evidence listed above. I reserve the right to alter, amend, modify, reduce, or expand these opinions if and when additional information is presented.

Further affiant sayeth naught.

Michael J. Virzi
Michael J. Virzi, Esq.

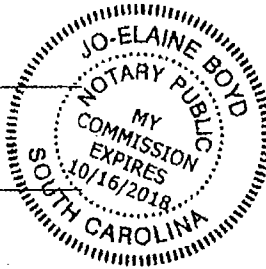
State of South Carolina
County of Richland

Sworn and subscribed before me

This 28 day of Aug, 2013

Jo-Elaine Boyd
Notary Public

My Commission Expires : _____



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF AIKEN	)	SECOND JUDICIAL CIRCUIT
Moore, Taylor, & Thomas, P.A.,	)	Civil Action No. 2013-CP-02-02032
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	<u>MOTION TO DISMISS OF</u>
Marsha Banks and Mary Guynn,	)	<u>DEFENDANT MARY GUINN,</u>
	)	<u>ESQUIRE</u>
Defendants.	)	
	)	

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Defendant Mary Guynn, Esquire moves to dismiss the Complaint filed against her by Plaintiff Moore, Taylor, & Thomas, P.A. The grounds for this motion are that Plaintiff lacks standing to sue Mary Guynn because Plaintiff is not – and never has been – a client of Mary Guynn or her firm, Smith Massey Brodie Guynn & Mayes, and therefore cannot state a claim for legal malpractice. See *Rydde v. Morris*, 381 S.C. 643, 675 S.E.2d 431 (2009) (“Before a claim for malpractice may be asserted, there must exist an attorney-client relationship.”).

In short, the Complaint alleges that Mary Guynn had a duty to withhold certain disputed legal fees from the proceeds of a real estate closing she handled involving one of Plaintiff’s former clients in an unrelated case. The fact that Plaintiff and a third party are engaged in a fight over a disputed and unsecured bill for Plaintiff’s legal fees in an unrelated action falls far short of creating the required attorney-client relationship between Plaintiff and Guynn. Moreover, an unrelated dispute over unsecured legal fees does not meet Guynn’s obligation as a real estate lawyer *to satisfy only recognized liens properly secured by the property at issue*. For these reasons, this Motion to Dismiss

should be granted because Guynn has no current or former relationship with Plaintiff and the legal fees Plaintiff claims that Guynn should have withheld were unrelated, disputed, and unsecured.

This Motion is based on the allegations in the Complaint, the law of this State, and any other documents that may be served upon the Plaintiff prior to a hearing.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

By: _____

J. Calhoun Watson

cwatson@sowellgray.com

1310 Gadsden Street

Post Office Box 11449

Columbia, South Carolina 29211

(803) 929-1400 Telephone

(803) 929-0300 Fax

Attorneys for Defendant Mary Guynn

Columbia, South Carolina
October 11, 2013

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF AIKEN	)	SECOND JUDICIAL CIRCUIT
Moore, Taylor, & Thomas, P.A.,	)	Civil Action No. 2013-CP-02-02032
	)	
Plaintiff,	)	
	)	
vs.	)	<u>MEMORANDUM IN SUPPORT OF</u>
	)	<u>MOTION TO DISMISS OF</u>
Marsha Banks and Mary Guynn,	)	<u>DEFENDANT MARY GUINN,</u>
	)	<u>ESQUIRE</u>
Defendants.	)	

Pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, Defendant Mary Guynn, Esquire has moved this Court for an Order dismissing the Complaint filed against her by Plaintiff Moore, Taylor, & Thomas, P.A. Although Plaintiff brings this action as a legal malpractice claim against Mary Guynn, the underlying quarrel involves Plaintiff's former client who failed to pay Plaintiff a disputed legal fee. For unknown reasons, Plaintiff's former client – Ms. Susan Cain -- is not named in this suit. Regardless, this claim fails because Plaintiff is not – and never has been – a client of Mary Guynn or her firm, Smith Massey Brodie Guynn & Mayes nor does Guynn owe Plaintiff any duties as escrow agent in the real estate transaction. For the reasons set forth below, the Complaint as to Defendant Mary Guynn must be dismissed.

FACTS

Plaintiff and Susan Cain are engaged in a fight over a disputed and unsecured bill for Plaintiff's legal fees incurred in an unrelated lawsuit to which Mary Guynn has no connection. Instead of suing Cain, Plaintiff sued Marsha Banks, Esquire, for negligent misrepresentation because she originally referred Cain to Plaintiff. Plaintiff also sued

Mary Guynn because she did not withhold – and give to Plaintiff -- an amount equal to the disputed attorney's fees from the closing proceeds of a transaction she handled for the purchaser of Cain's property. The only allegations directed to Mary Guynn are that she "refused to recognize Plaintiff's interest in the closing" (Complaint, ¶ 21) and did not "protect Plaintiff's interest in the proceeds of the closing." (Complaint, ¶ 28).

Certain facts are either undisputed or not alleged: (1) Guynn did not have an attorney-client relationship with Plaintiff; (2) Plaintiff did not have a secured interest in the property that was the subject of the closing, (3) there is no assignment made by Cain to Plaintiff from the proceeds of the sale of property, and (4) Cain disputes the attorney's fee she allegedly owes Plaintiff. Moreover, there is no allegation that the Court in the underlying case made any findings related to attorney's fees or that the Court directed the parties in any way on the issue of attorney's fees.

STANDARD

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would not entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is proper. *Id.*

LAW

A plaintiff in a legal malpractice action must establish four elements: (1) the existence of an attorney-client relationship; (2) a breach of duty by the attorney; (3) damage to the client; and (4) proximate cause of the client's damages by the breach.

Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). Accordingly, “[b]efore a claim for malpractice may be asserted, there must exist an attorney-client relationship.” Id. See also *Am. Fed. Bank, FSB v. Number One Main Joint Venture*, 321 S.C. 169, 4677 S.E.2d 439 (1996) (same).

South Carolina law protects attorneys from being sued by someone other than the client. In general, “an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client.” *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010); *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006). Further, “an attorney owes no duty to a non-client unless he ‘breaches some independent duty to a third person or acts in his own personal interest outside the scope of his representation of the client.’” *Argoe*, 388 S.C. at 400, 697 S.E.2d at 554 (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). South Carolina courts strictly adhere to the requirement that the plaintiff in a legal malpractice case be the client and are reluctant to find that an attorney owes duties to anyone other than the client.

ARGUMENT

The cause of action against Defendant Mary Guynn is brought as a legal malpractice case. However, the first and most essential element to a cause of action for legal malpractice is missing in this case. The Complaint fails to allege the existence of an attorney-client relationship between Plaintiff and Mary Guynn because none existed. The lack of an attorney-client relationship is fatal to the cause of action for legal malpractice, and Plaintiff cannot correct this fatality by amending the Complaint. See *Rydde v.*

Morris, 381 S.C. 643, 675 S.E.2d 431 (2009) (“Before a claim for malpractice may be asserted, there must exist an attorney-client relationship.”).

Plaintiff’s cause of action against Guynn alleges that she should have withheld the attorneys’ fees from the sale proceeds, even though Plaintiff had no assignment rights or security interest in the sale proceeds and even though Cain disputes the amount of fees she owes Plaintiff. However, Guynn’s obligation as a real estate lawyer is to *satisfy recognized liens properly secured by the property at issue*. There is no South Carolina statutory or case law that requires Guynn to withhold a disputed and unsecured debt. If this were the law, closing attorneys would be placed in an impossible position of determining the existence, extent, and validity of a seller’s unsecured and disputed debts. A disagreement over disputed and unsecured legal fees does not – and cannot – meet this standard.

The only authority Plaintiff points to is *Moore v. Weinberg*, 383 S.C. 583, 681 S.E.2d 875 (2009), but the facts of *Weinberg* are very different. There, Weinberg represented Clarence Wheeler in a lawsuit. Weinberg settled the lawsuit for \$100,000 and the settlement funds were deposited in Weinberg’s trust account. Wheeler then borrowed money from Moore on the condition that the loan from Moore was secured by the \$100,000 settlement funds held by Weinberg in his trust account. Moore’s loan to Wheeler was secured by a written assignment which stated:

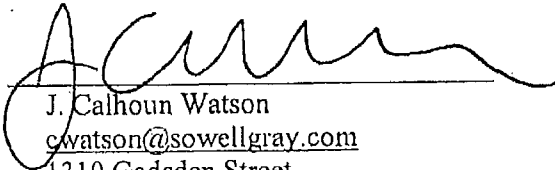
Clarence Wheeler does by this instrument assign to Joseph Moore so much of any recovery that he may make from the debt owed to him by [the music business] and the escrow account, which is pending as a result of said litigation, unto Joseph Moore.

Weinberg, however, overlooked the written assignment and disbursed the settlement funds to Wheeler in violation of the written assignment. Given the written assignment, the Court found that Weinberg owed a duty to Moore as escrow agent but "independent of an attorney's status as a lawyer and distinct from duties that arise out of the attorney/client relationship."

In the case at bar, however, there is no written assignment, no secured interest, and the seller (Plaintiff's former client, Cain) disputes the amount Plaintiff claims it is owed in attorney's fees. Furthermore, Plaintiff does not allege that the Court in the underlying case made any findings or instructions related to attorney's fees. *Moore v. Weinberg* addresses facts which simply do not exist in this case.

For all of these reasons, Plaintiff fails to state a claim against Defendant Mary Guynn. The Complaint against Mary Guynn must be dismissed.

SOWELL GRAY STEPP & LAFFITTE, L.L.C.

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Attorneys for Defendant Mary Guynn

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November 6, 2013

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CIVIL ACTION NO:2013-CP-02-02032

Moore, Taylor, & Thomas, P.A.

Plaintiff,

v.

Marsha Banks and Mary Guynn,

Defendants

**MEMORANDUM IN OPPOSITION TO
DISMISSAL**

This matter is before the Court by way of Defendant Guynn's Motion to Dismiss for Failure to State a Claim. Ms. Guynn's Motion should be denied as: (1) Plaintiff has pled the facts necessary for a cause of action for negligence and (2) taking the allegations of the Complaint as true, Defendant Guynn breached her duties to the Plaintiff.

FACTUAL BACKGROUND

From the allegations contained in the Complaint, the facts are as follows:

1. Defendant Banks represented Susan Cain in a dispute between Ms. Cain and Warren Matha. Complaint at ¶ 4.
2. The dispute devolved in active litigation in the Federal District Court in Aiken, captioned Matha v. Cain, C/A 1:09-1366 where Matha asserted claims in excess of \$800,000.00. Complaint at ¶ 5.
3. Upon filing of litigation, Defendant Banks contacted Plaintiff to retain Plaintiff for representation of Ms. Cain. Complaint at ¶ 6.
4. Upon being contacted, Plaintiff advised Defendant Banks that it was concerned that it would not get paid for its time. Complaint at ¶ 7.

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AIKEN COUNTY
CLERK OF COURT

5. Defendant Banks ensured that Plaintiff would get paid for its services and that she would ensure payment. Complaint at ¶ 8.
6. Based on Defendant Banks' representations and promises, Plaintiff undertook the representation of Ms. Cain. Complaint at ¶ 9.
7. Plaintiff represented Ms. Cain in the federal litigation and periodically billed Ms. Cain for their services. Complaint at ¶ 10.
8. Ms. Cain failed to pay the bills during the litigation. Plaintiff provided bills to Ms. Cain on a monthly basis. Complaint at ¶ 11.
9. Upon Ms. Cain's failure to pay the bill, Plaintiff contacted Defendant Banks. Once again Defendant Banks promised payment to Plaintiff. Plaintiff relied upon that promise of payment in proceeding forward with representation. Complaint at ¶ 12.
10. Ultimately, a settlement was reached in the federal litigation. Complaint at ¶ 13.
11. As part of the settlement, property in dispute between Ms. Cain and Mr. Matha was sold with the proceeds from the sale of property to be divided between Ms. Cain and Mr. Matha. Complaint at ¶ 14.
12. The closing attorney for the sale was Mary Guynn. Complaint at ¶ 15.
13. Prior to the closing both Defendants were aware that significant monies were owed to Plaintiff and that Plaintiff was to be paid out of the closing. Complaint at ¶ 16.
14. Prior to closing, Ms. Cain stopped communicating directly with Plaintiff. Ms. Banks took it upon herself to talk on behalf of Ms. Cain. Complaint at ¶ 17.

15. The day before closing, Plaintiff contacted Defendant Banks and was advised by Ms. Banks that Ms. Cain disputed some portion of the legal bill. Complaint at ¶ 18.

16. The day before closing was the first time that Plaintiff became aware that there was dispute with its bills. Complaint at ¶ 19.

17. Though Ms. Cain never spoke with Plaintiff regarding the bill for legal services, Ms. Guynn confirmed that there was a dispute regarding the bill and Plaintiff's claims. Complaint at ¶ 20.

18. Further, Ms. Guynn, in breach of her responsibilities as a closing agent, refused to recognize the disputed amount at closing and withhold the money from distribution. Complaint at ¶ 21.

In addition to the above facts from the Complaint, Plaintiff's expert opined in his Affidavit incorporated into the Complaint that Defendant Guynn failed to follow her duties as the closing agent for the real estate transaction. As a result of the above actions, Plaintiff properly brought a cause of action for negligence against Defendant Guynn.

**ARGUMENT: DEFENDANT GUYNN HAD A DUTY
TO PLAINTIFF WHICH SHE BREACHED**

Plaintiff has properly pled its negligence action. In order to prevail in a negligence cause of action, the Plaintiff must establish: (1) the Defendant owed a duty of care to the Plaintiff; (2) the Defendant breached the duty by a negligent act or omission; (3) the Defendant's breach was the actual and proximate cause of the Plaintiff's injury; and (4) the Plaintiff suffered an injury or damages. *Steinke v. S.C. Dep't of Labor, Licensing & Regulation*, 336 S.C. 373, 387, 520 S.E.2d 142, 149 (1999); see also *Thomasko v. Poole*, 349 S.C. 7, 561 S.E.2d 597 (2002). "An essential element in a

cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff. Without a duty, there is no actionable negligence." *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998) (citing *Rogers v. S.C. Dep't of Parole & Cmty. Corr.*, 320 S.C. 253, 464 S.E.2d 330 (1995)).

Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another. *Murray v. Bank of America, N.A.*, 354 S.C. 337, 343, 580 S.E.2d 194, 197 (Ct.App.2003) (citing *Shipes v. Piggly Wiggly St. Andrews, Inc.*, 269 S.C. 479, 483, 238 S.E.2d 167, 168 (1977)). The South Carolina Supreme Court has recognized the relevance and admissibility of the South Carolina Rules of Professional Conduct, Rule 407, SCACR, in assessing the legal duty of an attorney in a malpractice action. *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612, 613 (1996).

In order to relate to the standard of care in a particular case, the Rule of Professional Conduct must be intended to protect a person in the Plaintiff's position or be addressed to the particular harm. *Id.* at 437, 472 S.E.2d at 613 (quoting *Allen v. Lefkoff, Duncan, Grimes Dermer*, 265 Ga. 374, 453 S.E.2d 719, 721-22 (1995)).

Here, the South Carolina Rules of Professional Conduct are clear; Defendant owed a duty to the Plaintiff pursuant to Rule 1.15. *Moore v. Weinberg*, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007) (finding that Rule 1.15 can inform the duty of a lawyer acting as an escrow agent) aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009). Rule 1.15, entitled Safekeeping Property, subsections (d) and (e) provide in pertinent part:

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or

third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

The Rule instructs an attorney to hold funds that more than one party claims an interest in rather than to disburse those funds. The comments to Rule 1.15 re-enforce the obligation to hold funds and further prohibits a lawyer from arbitrating any dispute over the funds. Comment 4 to the Rule provides:

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. **A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.**

The facts in this matter clearly demonstrate: (1) Ms. Guynn was the closing agent for a transaction; (2) there was a dispute as to the funds being dispersed to Ms. Cain; (3) Plaintiff claimed an interest in the funds to be dispersed; (4) Ms. Cain claimed an interest in the same funds as Plaintiff; (5) Ms. Guynn was aware of the dispute; and (6) Ms. Guynn selected to disperse the funds to Ms. Cain rather than hold them in escrow as she was obligated to do. Ms. Guynn became the arbiter of the dispute between her client and a third party in direct contravention to her obligations.

CONCLUSION

The law of South Carolina places duties on lawyers to hold funds in which there is a dispute and also requires that the attorney not act as arbiter of the dispute. *Moore v. Weinberg*, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007) (finding that Rule 1.15 can inform the duty of a lawyer acting as an escrow agent) aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009). Here both duties were allegedly breached by Defendant Guynn.

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Attorneys for Plaintiff

November 11, 2013
Columbia, SC

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

CIVIL ACTION NO:2013-CP-02-02032

Moore, Taylor, & Thomas, P.A.

Plaintiff,

v.

Marsha Banks and Mary Guynn,

Defendants

NOTICE OF MOTION AND MOTION
PURSUANT TO RULE 59 TO
RECONSIDER, ALTER OR AMEND P Y
ORIGINAL FILED

12.11.13 DEC 30 2013

AIKEN COUNTY
CLERK OF COURT

You will please take notice that the undersigned attorney for the Plaintiff will move before Judge Early for an Order reconsidering, altering or amending his Order filed December 19, 2013 and received by the undersigned on December 23, 2013. The bases for said motion are as follows:

Respectfully, the Court committed clear error and misapprehended the law and the facts in its Order. In particular the Circuit Court improperly held:

1. That this negligence action was pled as a "legal malpractice action" even though the words "legal malpractice" do not appear anywhere in the complaint (see Order at p.3);
2. That Plaintiff has not pled that Defendant owed a duty to the Plaintiff (see Order at p.2) although Plaintiff:
 - a. Pled: "[Defendant] in breach of her responsibilities as a closing agent, refused to recognize the disputed amount at closing and withhold money from distribution." Complaint at ¶ 21; and,
 - b. Attached and incorporated an expert opinion as to the duties of closing attorneys which set forth the applicable standard of care. See exhibit

A to the Complaint.

3. That the statute of frauds applies to bar a negligence action (Order p. 3) even though the defense of the statute of frauds only applies to contract actions not tort actions like this one:

The statute is not applicable to tort actions, such as actions for negligent misrepresentation, negligence, conversion, or trespass. However, a plaintiff should not be permitted to do indirectly what is directly forbidden by the statute of frauds; thus, the statute of frauds bars those tort claims that require an oral contract as an essential element to maintaining the claim.

37 C.J.S. Frauds, Statute of § 154. Interestingly, the Circuit Court in *Moore v. Weinberg* made the same mistake by applying the contractual defense of novation to a negligence claim. The Court of Appeals in *Moore* overturned the Circuit Court and held:

While Moore may have a cause of action in contract against Wheeler, his causes of action for conversion, negligence, and civil conspiracy against Weinberg sound in tort. **Tort causes of action are not transformed into actions in contract simply because they arise out of circumstances involving a contract. As a matter of law, the trial court erred in granting summary judgment on the ground of novation.**

Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (Ct. App. 2007) *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009) (emphasis added). The same above paragraph from *Moore v. Weinberg* can be written about this Court's decision:

While Moore Taylor and Thomas may have a cause of action in contract against Cain, its cause of action for negligence against Guynn sounds in tort. Tort causes of action are not transformed into actions in contract simply because they arise out of circumstances involving a contract. As a matter of law, the trial court erred in granting dismissal on the ground of statute of frauds.

Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (Ct. App. 2007) *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009). Clearly the Court misapprehended the law when it held that a contract defense stands against a tort claim.

4. The Circuit Court erred by finding that a closing attorney does not have a duty to hold disputed funds separate.

The Circuit Court held that "no such duty exists" for a closing attorney to hold disputed funds from distribution. The Circuit Court is incorrect as South Carolina law is clear as to the obligation of an attorney to withhold disputed funds in her possession. The duty is found, among other places, in the South Carolina Rules of Professional Conduct, Rule 407, SCACR.¹

Here, Rule 1.15 of the South Carolina Rules of Professional Conduct sets forth that Defendant owed a duty to the Plaintiff. *See also Moore v. Weinberg*, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007) (finding that Rule 1.15 can inform the duty of a lawyer acting as an escrow agent) *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009). Rule 1.15, entitled Safekeeping Property, subsections (d) and (e) provide in pertinent part:

(d) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

(e) When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

¹ The Rules of Professional Conduct are relevant in assessing the legal duty of an attorney in a malpractice action or a third party tort action. *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 472 S.E.2d 612, 613 (1996); *Moore v. Weinberg*, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (Ct. App. 2007) *aff'd*, 383 S.C. 583, 681 S.E.2d 875 (2009). In order to relate to the standard of care in a particular case, the Rule of Professional Conduct must be intended to protect a person in the Plaintiff's position or be addressed to the particular harm. *Smith*, at 437, 472 S.E.2d at 613 (quoting *Allen v. Lefkoff, Duncan, Grimes Dermer*, 265 Ga. 374, 453 S.E.2d 719, 721-22 (1995)).

The Rule instructs an attorney to hold funds that more than one party claims an interest in rather than to disburse those funds. Comment 4 to Rule 1.15 re-enforces the obligation to hold funds and provides:

[4] Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. **In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved.** A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

The facts in this matter clearly demonstrate: (1) Ms. Guynn was the closing agent for a transaction; (2) there was a dispute as to the funds being dispersed to Ms. Cain; (3) Plaintiff claimed an interest in the funds to be dispersed; (4) Ms. Cain claimed an interest in the same funds as Plaintiff; (5) Ms. Guynn was aware of the dispute; and (6) Ms. Guynn selected to disperse the funds to Ms. Cain rather than hold them in escrow as she was obligated to do. Ms. Guynn became the arbiter of the dispute between her client and a third party in direct contravention to her obligations.

5. The Circuit Court impermissibly altered the duty found in Rule 1.15

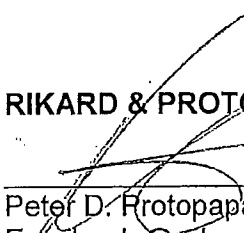
The Circuit Court held that only a validated lien is entitled to protection from a closing attorney. See Order at p. 4. The Circuit Court's conclusion is incorrect and contra the comments to Rule 1.15 which do not allow a closing agent to determine whether a lien is valid. Rather, the rule forbids a closing attorney from making the "validation" that the Circuit Court finds is the "law": "A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party...."

CONCLUSION

The Circuit Court's Order granting dismissal is incorrect, contra the facts pled, and contra the law of the State of South Carolina. As a result, the Order should be altered, modified, and amended to deny Defendant's Motion to Dismiss.

Respectfully submitted,

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Attorneys for Plaintiff

December 27, 2013
Columbia, SC

1 STATE OF SOUTH CAROLINA

2 COUNTY OF AIKEN

CIRCUIT COURT
2013-CP-02-02032

3
4 MOORE TAYLOR & THOMAS, P.A.,
5 Plaintiff,

6 -vs-

TRANSCRIPT OF RECORD

7 MARSHA BANKS and MARY GUYNN,
8 Defendant.

9 Heard on Wednesday, November 13, 2013

10 Aiken, South Carolina

11
12 BEFORE:

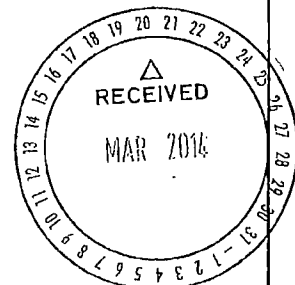
13 THE HONORABLE DOYET A. EARLY, III

14
15
16 APPEARANCES:

17 Counsel on Behalf of the Plaintiff:
18 Peter D. Protopapas, Esq.

19 Counsel on Behalf of the Defendant:
20 J. Calhoun Watson, Esq.

21
22
23 Cheri L. Young, RPR
24 Circuit Court Reporter
25 P O Box 5232
Aiken, SC 29804-5232



1 ON NOVEMBER 13, 2013 AT 9:53 A.M.:

2 THE COURT: The next case I'm going to hear, I'm
3 trying to help my out of state -- out of state, my out-of-
4 county lawyers, out of town. Number 34 on the roster,
5 Moore, Taylor and Thomas versus Banks et al.
6 Mr. Protopapas and Mr. Watson.

7 This is a motion to dismiss the Defendant Guynn.
8 Mr. Protopapas, is this a legal malpractice case?

9 MR. PROTOPAPAS: Your Honor, Peter Protopapas for the
10 Plaintiff. It is not a legal malpractice case. It is the
11 question of when do the lawyers owe duties to third
12 parties case.

13 And it's a situation that has arisen once before in
14 South Carolina. And it is --

15 THE COURT: Well, you've just cited the Wineberg case;
16 is that correct?

17 MR. PROTOPAPAS: Yes, Your Honor.

18 THE COURT: In the Wineberg case there was a written
19 assignment; is that correct?

20 MR. PROTOPAPAS: That was, Your Honor.

21 THE COURT: There's none in this case; is that
22 correct?

23 MR. PROTOPAPAS: There is no assignment, Your Honor.

24 THE COURT: Mr. Watson, be glad to hear from you.

25 MR. WATSON: Your Honor, Cal Watson. I'm appearing

1 for the Defendant, Mary Guynn.

2 Your Honor, this is a motion to dismiss on behalf of

3 --

4 THE COURT: And I have to restrict myself this morning
5 to the four corners of the pleadings; do I not?

6 MR. WATSON: Yes, sir. You do, Your Honor.

7 THE COURT: And, even if it is not a legal malpractice
8 case, does he not set out sufficient allegations to
9 preclude dismissal on the pleadings?

10 MR. WATSON: Your Honor, he does. And here is the
11 reason. If it's a legal malpractice case which I now
12 understand that it's not, there's no existence of --

13 THE COURT: It sort of sounded like it.

14 MR. WATSON: And it looked like it from the way it was
15 pled. Your Honor, but there is no allegation that there's
16 an attorney-client relationship which as you know is a --

17 THE COURT: Which is required for a legal malpractice.

18 MR. WATSON: So if it's not that, then it has to be
19 some breach of a duty of an escrow agent as Ms. Guynn was
20 a closing attorney.

21 THE COURT: And he's alleged in his memorandum and I
22 assume backing up his complaint that there was, alleging
23 some violations of the cannons of ethics dealing with when
24 there's some dispute about money it's to be escrowed, what
25 the duty of -- if she is in fact an escrow agent what her

1 duties are. It's sort of --

2 MR. WATSON: Well --

3 THE COURT: -- maybe there's enough in the four
4 corners to preclude dismissal at this time, but tell me
5 why I should dismiss it.

6 MR. WATSON: Because he must allege that for that duty
7 to exist it has to be a secured interest by writing or
8 assignment or something, like it was in the Moore versus
9 Wineberg case, because without that part of the allegation
10 there is no duty and the case should be dismissed within
11 the pleadings.

12 THE COURT: What do you rely on that? Where do you
13 come up with that, it has to be in writing? What if she
14 was alleged that, according to the pleadings, aware that
15 there was a dispute between a third party?

16 MR. WATSON: Your Honor, if that were the case, if
17 that were the law that a closing attorney had to be aware
18 of disputed, unsecured liens or claims --

19 THE COURT: You never could close anything, could
20 you?

21 MR. WATSON: You could never close anything because,
22 you think about credit card debt or family loans or
23 something else, that's why we have written, secured
24 assignments and liens. And that's the duty of the closing
25 attorney.

1 THE COURT: So it's your position absent the written
2 documentation as it was in Wineberg, that there's no duty
3 on the escrow agent when there's an alleged dispute
4 concerning the proceeds from the sale.

5 MR. WATSON: As long as there's no written assignment
6 or lien or secured interest in the proceeds of that
7 closing. Ms. Guynn as closing attorney can't have the
8 opportunity to go out and find all these unsecured
9 disputed debts, and it just wouldn't work for a lot of
10 reasons.

11 THE COURT: Well, when you went to search the title, I
12 mean, there's recorded judgments and recorded mortgages
13 and recorded mechanics liens, but there's certainly not
14 the recording between Jack Early and Janna Watson, we're
15 disputing how the proceeds are going to be dispersed so --

16 MR. WATSON: Right.

17 THE COURT: -- you don't have notice of anything. So,
18 that's your position.

19 MR. WATSON: Right, Your Honor. There was nothing in
20 writing. And it can't be alleged because it didn't
21 happen. There was no -- there should have been an
22 allegation in the complaint that there was a secured
23 interest or the Court directed it or the parties have
24 their agreement in writing, but in this case there was
25 nothing. There was no secured interest. There was no

1 Court order. There was no -- I mean, Your Honor, this
2 isn't a motion for summary judgment but there's a reason
3 there's no written direction from the Court because the
4 transcript speaks for itself which, you know, if we go
5 past today we'll use, but, Your Honor, there should have
6 been an allegation in the complaint that it was secured.

7 THE COURT: So when the Plaintiff settled the lawsuit
8 that they were handling on behalf of the lady who's not
9 named in this lawsuit, there was nothing in that
10 settlement that addressed the attorney's fees that were
11 allegedly owed?

12 MR. WATSON: Correct. And like I said --

13 THE COURT: Do you have a case on that? Is there any
14 law on that that says it has to be in writing other than
15 just common sense?

16 MR. WATSON: Well, I would think it would be just
17 common sense because if you think about it, Your Honor,
18 that would put Ms. Guynn in the position of going out and
19 finding any disputed, unsecured debt that might be out
20 there.

21 Remember, she represented the purchaser of the
22 property not the seller, the former client, so that would
23 put her in the position of going to the other side of the
24 transaction and finding out or looking and then making a
25 judgment about whether it's really disputed or not.

1 THE COURT: And as the purchaser's lawyer she's under
2 an obligation to satisfy all liens that are of record,
3 i.e., judgments, mortgages, et cetera, et cetera.

4 MR. WATSON: Correct.

5 THE COURT: And there's no duty upon her to go out and
6 try to learn of the existence of any liens that were not
7 recorded.

8 MR. WATSON: Correct. That's exactly right.

9 THE COURT: Mr. Protopapas, how can I make her liable
10 for not at least escrowing these funds so your client
11 would have some funds available when he settled his fee
12 dispute?

13 MR. PROTOPAPAS: Your Honor, the duty here arises --
14 we could find the duty in essentially three places.

15 THE COURT: All right.

16 MR. PROTOPAPAS: First is rule 1.15. And the phrase
17 used in rule 1.15, Your Honor, isn't writing. It isn't
18 security interest. It isn't assignment. The rule says
19 claim.

20 So what's a claim? A claim has been recognized in our
21 law as any time someone asserts he is owed some
22 obligation. That's the word that's used, claim. When in
23 the course of representation a lawyer's in possession of
24 property in which two or more persons claim an interest,
25 it's not writing, it's not -- if it said writing, I would

1 agree with it.

2 THE COURT: Well, let me ask you this. How is she
3 supposed to know about claims?

4 MR. PROTOPAPAS: Because as set forth in the complaint
5 she was told prior to the closing that Moore Taylor Thomas
6 was to get a check for \$60,000 out of the closing. The
7 day before the closing the client advised her or she said
8 --

9 THE COURT: The client being?

10 MR. PROTOPAPAS: The seller. Mr. Moore's client, the
11 seller in this transaction.

12 THE COURT: Cash. Is that her name? Cash? It
13 started with C.

14 MR. WATSON: Cain.

15 MR. PROTOPAPAS: It was Cain. That Ms. Cain directed
16 the closing agent do not disperse \$60,000 to Mr. Moore.

17 Now, Your Honor, at that point what the closing agent
18 has to do when a claim has been made for the money which
19 was done by Moore Taylor Thomas, and it is disputed by the
20 other person who claims an interest, Ms. Cain, the rule
21 specifically tells a lawyer what to do.

22 You cannot arbitrate, you cannot mediate this dispute,
23 cannot decide this dispute. You must step back, hold the
24 funds separate and either plead them into court or advise
25 the parties that the money is there until there's a

1 resolution.

2 That's specifically stated in our rules. And Moore V
3 Wineberg acknowledges that obligation. And in that case
4 which is a case that my prior law firm handled, I handled
5 when I was there, the assignment was the claim.

6 THE COURT: Well --

7 MR. PROTOPAPAS: Here the claim is --

8 THE COURT: -- Wineberg knew about the assignment. He
9 just ignored it in that one. I mean, obviously knew about
10 it. He drafted it up or he was aware of it and it was in
11 writing, out of a \$100,000 settlement that he failed to
12 acknowledge the assignment which is a little different
13 than here.

14 But your allegations in your complaint say that she
15 allegedly knew about the claim and under the DR or
16 whatever you're looking at, the cannons that requires her
17 to at least escrow it until that claim is resolved.

18 MR. PROTOPAPAS: Correct. And we allege, Your Honor,
19 that the Defendant here knew about this claim. And that
20 the Defendant and, I mean, I'm more than happy to make my
21 complaint more specific if they want to see the exact
22 e-mail where she wrote, I can't do anything for you on
23 giving the money to Ms. Cain on the day of the closing.
24 That's -- I'm fine to do that. In fact, my expert which
25 his report is attached to my complaint who sets the

1 standard for closing agents states, she knew and she could
2 not arbitrate that dispute.

3 Just like in Moore V Wineberg where we had a claim for
4 negligence with an expert witness who's a lawyer, it's the
5 same complaint as in Moore V Wineberg without the civil
6 conspiracy claim. It's the same thing. The question is,
7 Your Honor, is a claim required to be in writing? And
8 it's not. Not under our rules, and not under this duty.

9 And if she can prove she did not know about the claim
10 despite the evidence I have, then I will lose. If she
11 doesn't know about the claim at the time of closing I will
12 lose this case on summary judgment.

13 THE COURT: Whose job is that?

14 MR. PROTOPAPAS: I apologize, Your Honor?

15 THE COURT: I said you acknowledge that.

16 MR. PROTOPAPAS: I acknowledge if she did not know
17 about the claim.

18 THE COURT: If she didn't.

19 MR. PROTOPAPAS: Right. I have her e-mails that say
20 she does and I plead that she does.

21 So at this stage I will accept the burden at summary
22 judgment and show she did indeed know about the claim.

23 THE COURT: Thank you. Mr. Watson?

24 MR. WATSON: If I could just mention this rule of
25 unprofessional conduct. That's the trust account rule and

1 it's basically if you look at comment four, the first
2 sentence which was outlined in --

3 THE COURT: Hold on a second. You've got it in your
4 memorandum?

5 MR. WATSON: I don't have it in mine, but I do have a
6 copy that I'll be happy to hand up.

7 THE COURT: Please do.

8 MR. WATSON: (Hands document to Judge.)

9 THE COURT: Well, thank you. Mr. Protopapas has it in
10 his, comment four.

11 MR. WATSON: Right. But if you look at the first
12 sentence it's talking about secured lien. An example they
13 give is a secured lien. That's what they're talking
14 about. It says an interest in property and until it's
15 secured --

16 THE COURT: Mr. Watson, direct me to where you're
17 reading, please.

18 MR. WATSON: It's comment four on -- it's not, the
19 pages aren't numbered, Your Honor, but it's the next-to-
20 the-last page.

21 THE COURT: Four?

22 MR. WATSON: Comment four. The -- actually the
23 second-from-the-last page. It says, Paragraph E also
24 recognizes that third parties may have lawful claims
25 against specific funds for other property in a lawyer's

1 custody such as a client's creditor who has a lien on
2 funds recovered in a personal injury action.

3 That's not the case here. That is the trust account
4 rule of professional conduct and basically it's designed
5 for, if I represented Ms. Guynn, and she -- I recovered
6 money for her, I can't hold -- and she disputes my fee, I
7 can't hold all the money as leverage for the fee.

8 THE COURT: Mr. Edwards, does that sound familiar?

9 UNIDENTIFIED SPEAKER: No comment, Your Honor.

10 THE COURT: We've got that same case coming up in a
11 few minutes.

12 MR. WATSON: But unless there's something -- unless
13 there's a secured interest or something in writing that
14 gives absolutely no direction to people like Ms. Guynn,
15 what if the mother-in-law calls and says so-and-so owes me
16 money. Is she under an obligation then to stop the
17 closing and withhold claims on an unsecured debt that
18 opposing party may dispute?

19 It doesn't -- it can't be the law that that's how
20 closings will work because there would never be a closing
21 that could be completed.

22 Your Honor, I will say one other thing. Just, I know
23 due process is often thrown around but if this case does
24 go forward we'll be in a position that Ms. Guynn will have
25 to have discovery as to what was done in the underlying

1 case, what wasn't done, why there was a dispute, what
2 amount was in dispute.

3 And they can't produce that because there's no
4 attorney-client privilege that can be -- that she has the
5 ability to waive. That's why these cases typically are
6 against the person who actually owes the fee and so that
7 that person can then waive the fee, waive the privilege
8 automatically. But we'll be in a position we can't do
9 discovery. We can't defend the case because we can't --
10 Ms. Cain won't be in a position --

11 THE COURT: All right. Thank you.

12 MR. WATSON: -- to waive that privilege for us.

13 THE COURT: All right. Gentlemen, I'm going to take
14 it under advisement. I would like proposed orders within
15 30 days, please.

16 MR. WATSON: Thank you, Your Honor.

17 THE COURT: Thank you.

18 END OF PROCEEDINGS: 10:08 A.M.

19 ***

20 CERTIFICATE OF REPORTER

21 STATE OF SOUTH CAROLINA)

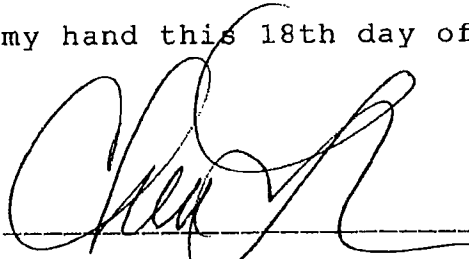
22 COUNTY OF AIKEN)

23 I, Cheri L. Young, Registered Professional Reporter
24 and Official Court Reporter for the State of South
25 Carolina, Second Circuit-At Large, do hereby certify that

1 the foregoing proceedings were written stenographically by
2 me using computer-aided translation; further, that the
3 foregoing is a true, accurate and complete record, to the
4 best of my skill and ability, of all the proceedings had
5 and evidence introduced in the hearing of the captioned
6 case, relative to appeal, in the Court of Common Pleas for
7 Aiken County, on the 13th day of November, 2013.

8 I do further certify that I am neither of kin,
9 counsel, nor interest to any party hereto.

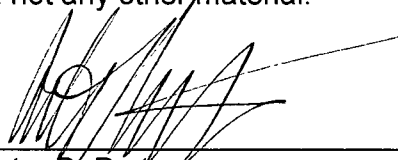
10 I have hereunder set my hand this 18th day of March,
11 2014.

12
13 

14 Cheri L. Young, RPR
15 Official Court Reporter
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Certificate of Counsel

The undersigned certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



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September 10, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY

Doyet A. Early, III, Circuit Court Judge

Appellate Case No: 2014-000135

Moore Taylor & Thomas, P.A. Plaintiff/Appellant

v.

Marsha Banks and Mary Guynn.....Defendants

Of Whom Mary Guynn is the..... Respondent

PROOF OF SERVICE

I, Jo-Elaine Boyd, a paralegal at Rikard & Protopapas, certify that I have served a true and correct copy of:

- ***Record on Appeal***

and upon all parties involved on the 10th day of September 2014, by mailing same by regular US Mail to:

**J. Calhoun Watson, SOWELL GRAY STEPP & LAFFITTE, 1310 Gadsden Street,
PO Box 11449, Columbia, SC 29211, Attorneys for Respondent, Mary Guynn**

And to other counsel of record:

**James D. Mosteller, III, Post Office Drawer 328 Aiken, South Carolina 29801,
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RECEIVED

September 10, 2014

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SC Court of Appeals