THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Roger M. Young, Sr., Circuit Court Judge

Court of Appeals Case No. 2020-000232

Case No. 2017-CP-10-3768

Charleston Laboratories, Inc. ..... Appellant,

v.

Womble, Carlyle, Sandridge & Rice, LLP ..... Respondent.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

This is an appeal by Charleston Laboratories, Inc. ("Appellant" or "Charleston Labs") from an Order granting summary judgment in favor of Womble Carlyle Sandridge & Rice, LLP ("Womble") in a legal malpractice action. Appellant filed the complaint against Womble in the Court of Common Pleas for Charleston County on July 24, 2017. **(R. pp. 11-22).** Womble filed an answer denying all liability and asserting affirmative defenses, including collateral estoppel, judicial estoppel, failure to state a claim, lack of proximate cause, and the statute of limitations. **(R. pp. 44-64).**

On August 24, 2018, the action was transferred to the Business Court, with exclusive jurisdiction granted to the Honorable Roger M. Young, Sr. **(R. p. 1).** On August 19, 2019, Womble filed a motion for summary judgment, arguing that (1) the action was barred by the statute of limitations; (2) there was no breach of any duties owed by Womble to Appellant as a matter of law; (3) the action was barred by the doctrine of collateral estoppel as a result of a prior judgment entered in favor of Appellant in the United States District Court for the Southern District of Florida ("the Florida Action"); (4) Appellant was judicially estopped from alleging facts that would support any claim against Womble because of the factual positions and representations Appellant made in the Florida Action; and (5) Womble was not the proximate cause of Appellant's damages. **(R. pp. 3502-3503, 3036-37; Def. Reply PowerPoint slides 35-37).**

The trial court heard the motion on September 27, 2019. On October 22, 2019, the trial court denied the motion for summary judgment. **(R. pp. 2-3).** On October 31, 2019, Womble moved for reconsideration. **(R. pp. 3566-3568).** On December 5, 2019, the trial court ordered the parties to submit supplemental briefs limited to the applicability of the statute of limitations. **(R. pp. 4-5).** On January 6, 2020, the parties submitted supplemental briefs **(R. pp. 3580-3695)**,

and on January 30, 2020, the trial court granted Womble's motion to reconsider and awarded summary judgment to Womble. **(R. pp. 6-9).**

STATEMENT OF FACTS[1]

In this legal malpractice action, Appellant seeks to recover $1.9 million it expended in bringing, pursuing, and winning a declaratory judgment action against a former employee involving the interpretation of two shareholders' agreements. In that action, a federal district court determined that the agreements that Womble prepared were unambiguous and Appellant had properly and successfully used those agreements to repurchase all shares of stock from the former employee.

In 2007, Paul Bosse—the majority shareholder, acting CEO, and sole member of the board—formed Charleston Labs to manufacture and sell a new pharmaceutical drug. **(R. p. 12).** Bosse engaged Womble to incorporate the business and prepare its by-laws. **(R. pp. 3044-48).** Two attorneys at Womble, partner Dean Rutley and associate David Baddour, performed this work. **(R. pp. 12-13).** Thereafter, Rutley and Baddour did additional legal work as requested by Bosse. **(*Id.*).** This work included assisting Charleston Labs with raising capital and preparing additional corporate documents. **(*Id.*).**

At the time of its founding, Charleston Labs had three shareholders. **(R. p. 12).** Shortly after its formation, the company hired three new employees, including Dr. Raymond Takigiku ("Dr. T"). **(*Id.*).** In 2008, Bosse consulted with Womble regarding compensating these new employees by giving them shares of stock in Charleston Labs. **(R. p. 13).** Specifically, Appellant

[1] In an attempt to distract this Court from these undisputed, dispositive facts, Appellant spends twenty-six pages of its initial brief reciting a lengthy factual background that refers to numerous matters wholly irrelevant to the issues on appeal. This section contains the facts necessary to address the issues raised on summary judgment.

wanted to "extend ownership to its newest shareholders . . . while at the same time restricting the marketability and transferability of their shares until such time as they achieved sufficient tenure with the company or in the event that their employment with [Appellant] terminated." **(*Id.*).**

To achieve this objective, Womble suggested Appellant require each new employee to sign a Stock Restriction Agreement ("the SRA"). **(*Id.*).** The SRA permitted Charleston Labs to repurchase shares given to the employee for a nominal value of $.01 per share if the employee quit or was terminated for cause. **(R. pp. 3103-07).** Under the SRA, the shares were subject to a vesting schedule that provided that the longer the employee was with the company, more of his shares would become "vested" and not subject to repurchase for nominal value. **(R. p. 3107).**

Around this same time, a potential investor sent Bosse a proposed Stockholder Agreement ("the SHA") as part of the discussions regarding its possible investment in Charleston Labs. **(R. pp. 3051-65).** The SHA addressed corporate governance issues and included restrictions on the sale of shares by all shareholders. Bosse sent this proposed SHA to Womble. **(R. p. 3089-3102).** At Bosse's request, Womble modified the SHA and advised Bosse of Appellant's options with respect to the SRA and the SHA. **(R. pp. 3066-80).**

The SHA and SRA had different parties, purposes, and objectives. The SHA was an agreement among all the shareholders of Charleston Labs, including both the original shareholders and the new employees. Charleston Labs, itself, was not a signatory to this agreement. **(R. pp. 3089, 3099-3100).** The SHA governed the relationship among all the shareholders and contained provisions addressing a number of corporate governance issues, including (1) management, (2) composition of the board of directors, (3) restrictions on the ability of all shareholders to sell their shares to third parties, and (4) the rights of shareholders and the company to purchase the shares held by other shareholders under certain circumstances. **(R. pp. 3089-99).** The SHA permitted

Appellant to repurchase "any or all" of any shareholder's shares for "Fair Value" if his employment with Appellant ended for any reason, or if he attempted to transfer his shares to a third party. **(R. p. 3093).**

The SRA, on the other hand, was an agreement between Charleston Labs and each new employee. **(R. pp. 3103, 3106).** The SRA only permitted Appellant to purchase back "unvested" shares from the three new employees for a nominal value—$.01 per share—if the employee resigned or was terminated "for cause" within three years. **(R. pp. 3103-04).** As the employee's tenure with the company increased, fewer of his shares could be repurchased for nominal value under the SRA, although they remained subject to repurchase for Fair Value under the SHA. **(R. p. 3107).**

The two agreements operated concurrently and accomplished Appellant's objective of controlling the ownership of shares in the company by (1) providing for the repurchase of the unvested shares of a new employee for a nominal value if he quit or was terminated for cause during the first three years; and (2) permitting Appellant to repurchase all of the shares of any departing shareholder at any time for Fair Value. **(R. pp. 3103-04, 3093).** When the SHA and SRA were presented to the shareholders, no shareholder objected or otherwise indicated any confusion in how the documents operated.

In May 2008, Dr. T executed both the SRA and the SHA on the same day. **(R. pp. 1276, 1294).** At the time Dr. T executed the agreements, Womble gave Dr. T. a stock certificate that Womble prepared. **(R. pp. 3108-09, 3112-13).** The back of the stock certificate stated Dr. T's shares were subject to repurchase under both the SRA and the SHA. **(R. pp. 3109, 3113).** Neither Dr. T nor any other new employee questioned whether both agreements applied to their shares.

In March 2010, Charleston Labs decided to terminate Dr. T's employment because it

learned he had gone to work for a competitor. **(R. pp. 3127-28).** Appellant wanted to terminate Dr. T, repurchase his shares, and enter into a severance agreement with him in which he released any claims he had against Appellant. **(R. p. 3127).** At that time, some of Dr. T's shares had become "vested," and were therefore no longer subject to repurchase under the SRA for the nominal price of $.01 per share, but Charleston Labs could repurchase those shares under the SHA for Fair Value. **(R. pp. 3103-04, 3107, 3093).** To accomplish his objectives, Bosse drafted a termination letter, which Baddour reviewed. **Tr. pp. 3127-28).** On March 19, 2010, Charleston Labs sent the letter to Dr. T, which informed him that he was "terminated with cause, effective immediately." **(R. p . 3127).** This letter also stated that Charleston Labs would provide Dr. T a severance payment of $70,000 in exchange for Dr. T signing a release of any claims Dr. T may have had against Appellant. **(*Id.*).**

A few days later, on March 22, 2010, Bosse, acting as sole member of Appellant's board, held a special meeting at which he determined the Fair Value for repurchasing the shares under the SHA to be $.01 per share.[2] **(R. p. 2694).** Thus, as determined solely by Bosse, the "Fair Value" of Dr. T's shares, including those that had "vested," was the same as the nominal repurchase price for unvested shares under the SRA. **(*Id.*).** Therefore, whether Appellant repurchased the shares under the SRA or the SHA, the repurchase price was the same: $2.10 for all of Dr. T's shares.

Shortly after the special meeting, on March 25, 2010, Baddour emailed Bosse, warning that unless Dr. T accepted the settlement package and signed the corresponding release, there

[2] On September 25, 2008, the 210 shares of common stock of Charleston Labs issued to Dr. T were converted into and automatically became 420,000 shares of common stock of Charleston Labs upon consummation of a 2,000 to 1 forward split. **(R. p. 3222).** Accordingly, the value assigned to Dr. T's shares was actually "$0.000005 per share" to reflect this stock split, which was the same value that Charleston Labs could repurchase unvested shares under the SRA.

would be no guarantee he would not try to make a claim on the shares at some future date. **(R. pp. 3139-46).** In this email, Baddour states:

> if [Dr. T] doesn't agree to the package (and the $70k contingent payment) it is likely that he'll have a claim on the vested portion of his stock. If [Appellant] does nothing to change the status quo, it is likely that [Dr. T] will simply sit tight and do nothing, until such time as the stock becomes worth something which is when he'll file suit.

(R. p. 3139).

On March 26, 2010, Charleston Labs sent Dr. T a second letter, stating: "On Friday, March 19, your employment was terminated for cause. Please find enclosed a check in the amount of $2.10, which the company hereby tenders as payment in full for your equity." **(R. pp. 3147-54).** The letter also included copies of a proposed Redemption and Settlement Agreement that Appellant asked Dr. T to sign in order to receive the $70,000 severance package referenced in his termination letter. **(R. pp. 3149-54).** The March 26 letter concludes with a demand that Dr. T sign the Redemption and Settlement Agreement by April 5, or "we will assume that you do not intend to cooperate and we will pursue all other legal remedies at our disposal." **(R. p. 3147).**

In April 2010, Dr. T retained lawyer David Willbrand to contest his termination. Willbrand and Baddour exchanged several emails and had a telephone conference regarding the repurchase of Dr. T's shares. **(R. pp. 3642, 3683).** While most of those emails dealt with Dr. T's effort to negotiate a better severance agreement, Willbrand questioned Appellant's right to repurchase all of Dr. T's shares, and in an email dated May 18, 2010, advised Baddour that Dr. T still claimed to own 4.25% of Charleston Labs.[3] **(R. p. 3642).** Negotiations with Willbrand failed to reach any agreement, however, and as predicted by Baddour, communications from or on behalf of Dr. T

[3] Appellant incorrectly represents in its brief that Appellant was not aware of this email. **(App. Br. p. 18).** Baddour immediately forwarded the email to Bosse. **(R. p. 3646).**

ceased. Dr. T never signed the Redemption and Settlement Agreement, never returned his stock certificate to the company, and never cashed the $2.10 check. **(R. pp. 3182-83).**

In 2011, Appellant hired a new attorney, Mitchell Ryan, to help the company prepare its books and records for its auditors. **(R. pp. 3652-53).** One of the outstanding issues was the status of Dr. T's shares and how those shares should be reflected on Appellant's books. **(*Id.*).** Ryan prepared a demand letter to go to Dr. T in which Appellant threated to sue Dr. T unless he signed a settlement agreement acknowledging that Appellant had repurchased all of his shares in 2008. **(R. pp. 3655-57).** Additionally, Baddour and Ryan discussed what Appellant should tell potential investors about the status of Dr. T's shares, the possibility that Dr. T might claim to still own at least some of them, and whether Appellant could "get [Dr. T's] shares back." **(R. pp. 3652-53).** Baddour copied Bosse on this email exchange. **(R. p. 3652).**

In August 2014, Charleston Labs announced a partnership with a Japanese company, Daiichi Sankyo. **(R. pp. 2958, 2963, 2974-75, 3565).** The press release stated the deal "could net [Appellant] up to $650 million." **(R. p. 3965).** In September 2015, Dr. T reappeared through a new lawyer, again claiming he was still a shareholder of Appellant and demanding to inspect Appellant's books and records. **(R. pp. 3182-83).** In that demand letter, Dr. T's lawyer argued that Dr. T was still a shareholder because he "refused to accept the tender of $2.10" and because his termination for cause was "wrongful." **(R. p. 3183).** The letter made no mention of the SRA or the SHA and did not claim that either agreement was ambiguous or in conflict with the other. **(R. pp. 3182-83).** Appellant responded to the letter, stating Dr. T was not a shareholder and that all his shares had been repurchased in 2010. **(R. p. 3687).** Rather than wait to see if Dr. T would file suit or otherwise pursue a claim to establish his putative status as a shareholder,[4] Appellant

[4] Appellant had moved its offices from Charleston to Jupiter, Florida, but was still incorporated in

hired a law firm in Florida, which immediately brought the Florida Action seeking a declaration that Dr. T was no longer a shareholder because Appellant had repurchased his shares in 2010. **(R. pp. 3186-3219).**

On July 25, 2016, Appellant moved for summary judgment in the Florida Action. **(R. pp. 3186-3219).** Fifty days later, without the necessity of a hearing, a federal district court entered a fifteen-page order granting Appellant's motion. **(*Id.*).** The district court found and ruled that (1) the SRA and the SHA were not ambiguous **(R. p. 3226)**; (2) the agreements were intended to and did create concurrent rights in Appellant **(*Id.*)**; (3) Appellant had properly exercised it rights under the SHA **(R. Pp. 3228-34)**; and (4) none of the arguments raised by Dr. T in support of his claim to still be a shareholder had any merit **(R. p. 3227)**. The district court's findings were based on the terms of the SRA and SHA themselves and did not rely on extrinsic evidence. **(R. pp. 3220-34).** Dr. T appealed the order, and while his appeal was pending, Appellant paid Dr. T $250,000 to settle his claims. **(R. pp. 3235-48).**

Almost immediately after concluding the settlement with Dr. T in the Florida Action, Appellant filed the present case against Womble. **(R. pp. 10-43).** Appellant brought this suit nine years after the SRA and SHA were drafted and seven years after the repurchase of Dr. T's stock. Womble filed a motion for summary judgment and after a hearing and supplemental briefing on a motion for reconsideration, the trial court held that the action was barred by the statute of limitations. **(R. pp. 3502-04, 3580-3695, 2945, 6-9).** This appeal followed. **(R. pp. 66-67).**

Delaware and subject to the Delaware Corporate Code. Under Delaware law, a person who claims to be a shareholder of a Delaware corporation is required to file an action in the Delaware Chancery Court in which he has the burden of proof to establish his status as a shareholder. 8 Del. C. § 202(c).

STANDARD OF REVIEW

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). Summary judgment is proper when no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Ellis v. Davidson*, 358 S.C. 509, 517, 595 S.E.2d 817, 821 (Ct. App. 2004); Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a factfinder." *S. Glass & Plastics Co. v. Duke*, 367 S.C. 421, 427, 626 S.E.2d 19, 22 (Ct. App. 2005).

"In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt. Co., Inc.*, 381 S.C. 326, 329-30, 673 S.E.2d 801, 802 (2009). "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *BPS, Inc. v. Worthy*, 362 S.C. 319, 326, 608 S.E.2d 155, 159 (Ct. App. 2005). Although "[a] court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony . . . , summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *M&M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008) (quoting *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)).[5]

[5] Appellant's reference to the law applicable to allegations for purposes of motions for judgment on the pleadings is inapposite. **(App. Br. p. 9 n.1).** This is an appeal from an order granting summary judgment.

ARGUMENT

This case is an effort by Womble's former client to recover almost $2 million in voluntarily incurred legal fees and costs for a case that determined as a matter of law that the agreements prepared by Womble were clear and unambiguous, worked exactly as they were intended to work, and exactly as Appellant understood that they worked. Despite the ruling in the Florida Action, Appellant now claims that Womble breached the standard of care in preparing those documents because Womble somehow failed to preclude Dr. T from asserting a claim to ownership of the stock—a claim that was unsupported in fact or in law. Moreover, although this malpractice action is predicated on the resulting "uncertainty" regarding Dr. T's shares, Appellant waited until seven years after Womble advised it of that very uncertainty before filing this action. The trial court therefore correctly found that Appellant's claim is barred by the statute of limitations.

In advancing the defense of the statute of limitations, however, Womble does not concede that Appellant ever stated any valid claim. As discussed later in this brief, Womble disagrees that the standard of care requires lawyers to draft documents in ways that prevent third parties from making unsupported claims about their interpretation. *See* Argument Section II, infra. No one can prevent a third party from bringing an unfounded lawsuit. However, assuming *arguendo* that there is such a claim, this action is barred by the statute of limitations because Appellant was aware of this possibility more than three years before bringing this action.

Moreover, Womble was not negligent in its representation, did not breach any duty, or cause any damage to Appellant. To the contrary, as the federal district court in the Florida Action found, Womble prepared unambiguous documents that worked exactly as they were intended to work. Appellant conceded—and indeed, forcefully argued—as much in the Florida Action and is bound by the decision of the district court, a decision that was entirely in Appellant's favor. The

fact that Dr. T made spurious arguments unsupported by the facts and the law, and which the district court outright rejected, does not make Womble responsible for Appellant's costs in bringing that lawsuit.

This Court should also affirm for additional reasons,[6] including that Appellant's claim is barred by collateral and judicial estoppel because Appellant cannot now allege or attempt to establish facts, relitigate issues, or assert positions that are contrary to the district court's findings. Those findings preclude any claim for legal malpractice as a matter of law.

I. The trial court correctly granted summary judgment to Womble because the action is barred by the statute of limitations.

The uncontested facts establish that in 2010, seven years prior to Appellant filing this case, Appellant was aware that it had suffered the alleged injury that it contends was proximately caused by Womble's alleged breach of the standard of care. Because Appellant did not file this legal malpractice lawsuit within three years, the action is barred by the statute of limitations.

In South Carolina, the statute of limitations for legal malpractice is three years. S.C. Code Ann. § 15-3-530; *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 525, 787 S.E.2d 485, 489 (2016). The statute of limitations begins to run when "the person knew or by the exercise of reasonable diligence should have known that he had a cause of action." S.C. Code Ann. § 15-3-

[6] "[A] respondent . . . may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or relied on by the lower court." *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 509 n.7, 596 S.E.2d 67, 73 n.7 (Ct. App. 2004) (quoting *I'On, L.L.C. v. Town of Mount Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000)). "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *I'On, L.L.C.*, 338 S.C. at 419, 526 S.E.2d at 723; *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record."); Rule 207(b)(2), SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

535; *see also Dean v. Ruscon*, 321 S.C. 360, 363, 468 S.E.2d 645, 647 (1996). "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim against another party might exist." *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 406, 680 S.E.2d 778, 782 (Ct. App. 2009). "The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery is developed." *Id*.

A. Appellant knew on March 25, 2010, that Womble breached what Appellant alleges is the standard of care.

In this case, Appellant contends that Womble is liable because it failed to preclude Dr. T's ability to claim to still own shares in Charleston Labs and that it was injured by the resulting uncertainty regarding Dr. T's shares. Specifically, Appellant argues

- "Womble's malpractice placed Charleston Labs in a precarious legal position requiring the institution of legal action to clarify rights that would have been made clear but for Womble's malpractice." **(R. pp. 3527, 3004).**

- "The legal uncertainty surrounding the ownership of the shares and the subsequent declaratory judgment action ARE the injuries suffered by Charleston Labs as a direct and proximate cause of Womble's negligence." **(R. p. 3540; App. Br. p. 21 ¶ lll).**

- "Just as there was darkness before there was light, in the matter of Charleston Labs and its post-employment relationship with Dr. T, there was disharmony before there was harmony. In this case, harmony required judicial intervention . . . ." **(R. p. 3546).**

- "The ownership of Charleston Labs was evidenced by its stock . . . . Womble's negligence in drafting the corporate control documents created a cloud on the 'title' to the stock . . . . A dispute between the parties ensued which was nothing more than a suit to quiet title to the contested shares." **(R. p. 3554; App. Br. p. 30).**

- "Charleston Labs availed itself of the judicial process solely because the transfer of shares was contestable." **(R. p. 3555).**

- "Charleston Labs . . . was lost in a sea of uncertainty and . . . was exposed to contingent liabilities following the botched Dr. T redemption . . . ." **(R. p. 3560).**

- "[T]he filing of the Florida declaration action itself was an act in mitigation of the damage that had been inflicted and was to be inflicted on Charleston Labs as a direct and proximate result of Womble's conduct." **(R. p. 3528).**

But on March 25, 2010, David Baddour sent an email to Paul Bosse (the president, sole director, and majority shareholder of Charleston Labs) that expressly warned that Dr. T might make such a claim, and that the very uncertainty of which Appellant now complains would result:

> As we've discussed, if [Dr. T] doesn't agree to the package (and the contingent $70k payment) it is likely that he'll have a claim on the vested portion of his stock. If [Appellant] does nothing to change the status quo, it is likely that [Dr. T] will simply sit tight and do nothing, until such time as the stock becomes worth something, which is when he'll file suit.

(R. p. 3139). At that point, Charleston Labs was aware that a) Dr. T could still claim to own his shares; b) Dr. T might file a lawsuit to assert that purported ownership; and c) there was therefore uncertainty regarding Dr. T's shares. Any such uncertainty could only exist as a result of Womble's work. Appellant consistently maintained that it relied entirely on Womble to prepare the agreements and to provide advice as to how to utilize the agreements to preclude Dr. T's ability to contest the repurchase. **(R. pp. 16, 3003, 3013-14).** Appellant also alleged that it was "placed here" because it gave Womble a "clear directive, we want [all the shares] back . . . ." **(R. p. 3027).** Finally, Appellant claims that it was required to file a declaratory judgment action "to resolve the dispute." **(R. p. 19).** All of this information was known to Appellant in March 2010. The statue of limitations began to run on that date.

"If, on the date of injury, a plaintiff knows or should know that he had some claim against someone else, the statute of limitations begins to run for all claims based upon that injury." *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994) (internal citations omitted). The statute begins to run when a party should realize his injury may be attributable to some other party's action. *Republic Contracting Corp. v. S.C. Dep't of Highway & Pub. Transp.*, 332 S.C.

197, 209, 503 S.E.2d 761, 767 (1998). The date on which a plaintiff should have discovered the facts giving rise to a cause of action is an objective question. *Graham v. Welsh, Roberts & Amburn, LLP*, 404 S.C. 235, 239, 743 S.E.2d 860, 862 (Ct. App. 2013). Whether the particular plaintiff actually knew he had a claim is not the test. "Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." *Bayle v. S.C. Dep't of Transp.*, 344 S.C. 115, 123, 542 S.E.2d 736, 740 (Ct. App. 2001).

In its brief, Appellant attempts to re-define its claim by focusing its argument on whether Baddour's statements to Bosse were correct or incorrect and whether Baddour suggested Dr. T's claim would be frivolous. **(App. Br. pp. 29-30).** However, the basis of Appellant's legal malpractice suit against Womble is not that Dr. T had legitimate claims against Appellant—the Florida Action clearly determined that he did not. Instead, Appellant's claim is simply that Dr. T *could* make such a claim because of Womble's work. Likewise, the determination of when the statute of limitations began to run is not a function of whether Womble's work and advice were correct or incorrect. The statute began to run when Appellant was aware that the injury it now claims—the uncertainty regarding the ownership of Dr. T's shares—was attributable to Womble. Therefore, this Court should disregard Appellant's argument that the statute of limitations did not begin to run because Womble suggested that Dr. T's claim would be frivolous. **(App. Br. p. 30).** Dr. T's claims were indeed frivolous, but that has not stopped Appellant from trying to make Womble responsible for the cost to resolve the uncertainty.

Even if the alleged breach was not clear to Appellant in March 2010 when Baddour told Bosse that Dr. T may make a claim, it should have been clear at the latest on May 18, 2010, when Baddour notified Bosse that Dr. T actually claimed to own 4.25% of Appellant. **(R. pp. 3642,**

3646). Moreover, in the same email, Dr. T also threatened to sue Appellant regarding the shares, stating

> "[Dr. T] realizes that the Company could stir the pot with the threat of a lawsuit, or the filing of one, and that's a cost and distraction he doesn't want. *But similarly, he could do the same vis-a-vis the Company and can't imagine the Company would want that cost or distraction either, especially while raising money.*"

(R. p. 3642) (emphasis added).

So, if Appellant's direction to Womble was to get all of Dr. T's shares back and make sure Dr. T did not have a claim to the shares, Appellant was on notice that its "rights" had been invaded and that it therefore had a claim against Womble as soon as Appellant subsequently became aware that there was a question as to whether it had repurchased all the shares and that Dr. T was claiming to still own them. At that point, Appellant was inarguably aware of circumstances that "would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist." *Bayle*, 344 S.C. at 123, 542 S.E.2d at 740; *see also Christensen v. Mikell*, 324 S.C. 70, 73, 476 S.E.2d 692, 694 (1996) (affirming summary judgment in a legal malpractice action, finding the statute of limitations barred the action because the client was on inquiry notice that he may have a potential claim against the attorney several years before bringing the action). Appellant's failure to file suit within three years of 2010 bars any claims based upon those facts.[7]

[7] Although Appellant repeatedly references Womble's suggestion to wait before suing Dr. T, Appellant never made any tolling or equitable estoppel arguments to the trial court; therefore, any argument now is untimely and was not preserved. *Wilder Corp.*, 330 S.C. at 76, 497 S.E.2d 731, 733. Moreover, Womble's advice to Appellant to wait before pursuing a claim against Dr. T does not toll the statute of limitations or create any type of estoppel. Womble did not advise Appellant not to sue Womble or attempt to dissuade Appellant in any way from taking any action for the alleged breach of duty.

B. Appellant was aware in 2010 that it had suffered an actual injury resulting from what it considered to be Womble's breach of the standard of care.

1. Appellant's arguments attempting to distinguish "actual injury" and "speculative harm" are not preserved for review and are inconsistent with established South Carolina law.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Under our preservation rules, a "losing party must first try to convince the lower court it has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred." *I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). "This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments." *Id*.

If "an issue has not been ruled upon by the trial [court] nor raised in a post-trial motion, such issue may not be considered on appeal." *Caldwell v. Wiquist*, 402 S.C. 565, 576, 741 S.E.2d 583, 589 (Ct. App. 2013) (quoting *Pelican Bldg. Ctrs. of Horry-Georgetown, Inc. v. Dutton*, 311 S.C. 56, 60, 427 S.E.2d 673, 675 (1993)). "Although a Rule 59(e)[, SCRCP,] motion may effectively seek a reconsideration of issues and arguments, this type of motion is often required for issue preservation purposes." *Home Med. Sys., Inc. v. S.C. Dep't of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009). Indeed, our supreme court has long recognized that "[a]n appellate court may not . . . reverse for any reason appearing in the record." *I'On, LLC*, 338 S.C. at 421-22, 526 S.E.2d at 724. "Put simply, Rule 59(e) motions serve a vital purpose for proper issue preservation." *Home Med. Sys., Inc.*, 382 S.C. at 562, 677 S.E.2d at 586. Thus, when a "losing party has raised an issue in the lower court, but the court fails to rule upon it, the party

must file a motion to alter or amend the judgment . . . to preserve the issue for appellate review." *I'On, LLC*, 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). "Without an initial ruling by the [trial] court, a reviewing court simply would not be able to evaluate whether the [trial] court committed error." *S.C. Dep't of Transp. v. M&T Enters. of Mount Pleasant, LLC*, 379 S.C. 645, 658-59, 667 S.E.2d 7, 15 (Ct. App. 2008).

Here, Appellant spends a significant portion of its argument section attempting to distinguish "actual injury" from "speculative harm" based on California law. **(App. Br. pp. 33-35).** Appellant never presented this argument in any of its briefing related to summary judgment. **(R. pp. 3527-63, 3580-3615).** Further, the order granting summary judgment does not include *any* discussion or conclusions regarding "actual injury" versus "speculative harm." **(R. pp. 6-9).** Thus, this argument was never presented to or ruled upon by the trial court, and Appellant did not file a motion for reconsideration. Instead, Appellant sent the trial court a letter chastising the court for granting summary judgment on the eve of trial and stating Appellant's intent to seek appellate review unless "an additional hearing with oral argument could provide a different result." **(R. pp. 3696-97).** Because Appellant failed to bring this issue to the trial court's attention, it has waived the right to raise it for the first time on appeal. Accordingly, the Court should decline to address Appellant's argument concerning when Appellant incurred an "actual injury." *I'On, LLC*, 338 S.C. at 422, 526 S.E.2d at 724.

Even if the argument were preserved, Appellant's reliance on California law in *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal. 4th 739, 958 P.2d 1062 (1998), is misplaced.[8] The law relating to the statute of limitations in South Carolina is well settled, leaving

[8] In fact, the holding in *Jordache* supports the finding that Appellant's claim is barred by the statute of limitations. The Court in *Jordache* concluded that "the particular facts of each case must be examined in light of the wrongful act or omission the plaintiff alleges against the attorney" when

it unnecessary to look to California for guidance. And contrary to Appellant's position, the injury it asserts—the uncertainty regarding the status of Dr. T's shares—was more than sufficient to start the statute of limitations under South Carolina law. This Court's decision in *Binkley v. Burry*, 352 S.C. 286, 296, 573 S.E.2d 838, 844 (Ct. App. 2002), directly disposes of this issue. In *Binkley*, the clients in a legal malpractice action argued that there was a question of fact as to when they were put on notice that they had a claim against their attorney. *Id*. at 296, 573 S.E.2d at 844. The clients had purchased real property, and during the closing, their attorney advised them of a flood impoundment easement, which was a cloud on the title. *Id*. at 296-98, 573 S.E.2d at 844-45. The clients did not ask any questions regarding the easement at the closing. *Id*. Five years after closing, the property flooded, and the client then sued the closing attorney for failing to explain the consequences of the easement. *Id*.

The trial court granted summary judgment to the defendant law firm, and this Court affirmed, holding that the clients knew or by the exercise of reasonable diligence should have known that they had a cause of action when the attorney advised them by letter of the easement. *Id*. at 297, 573 S.E.2d at 844. This Court held the clients were put on inquiry notice of a possible claim against the attorney when they received the letter. *Id*. Of even more relevance to the present case, however, this Court found the clients' knowledge of the existence of the easement was sufficient to provide them with notice that they had suffered an injury. *Id*. This Court held that "the requirement of reasonable diligence to investigate this information further takes precedence

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determining whether attorney error has caused actual injury. 18 Cal. 4th at 764, 958 P.2d at 1078-80. The Court held the client had suffered an actual injury in the form of increased costs to defend the coverage litigation, a decrease in the settlement value of its claims, and lost profitable alternative uses for the money it paid in defense costs. *Id*. at 764-65, 958 P.2d 1062, 1071-72, 1080. Similarly, here, as discussed in Subsection C below, Appellant paid Womble to negotiate and attempt settlement with Dr. T; it paid another attorney, Mitchell Ryan, to work on the same issue, and Appellant no doubt "lost profitable alternative uses for the money it paid."

over the inability to ascertain the amount of damages or even the possibility that damages may be forthcoming at all." *Id.* at 298, 573 S.E.2d at 845.

Here, as in *Binkley*, the "cloud on the title" to Dr. T's shares represented an infringement of rights claimed by Appellant, necessarily starting the clock on the statute of limitations. Just as the clients in *Binkley* could not wait until a flood occurred before bringing their legal malpractice claim, Appellant could not wait indefinitely to see whether Dr. T would actually assert a claim to the shares. The law required Appellant to investigate the issue with reasonable diligence and make its claim against Womble for allegedly permitting the cloud on the title to exist.

2. Appellant knew of the "uncertainty" regarding Dr. T's shares in 2010 and that injury was sufficient to start clock for the running of the statute of limitations.

Appellant's late blooming effort now to disclaim the uncertainty as its injury and replace it with the incurrence of fees and costs in the Florida Action is unavailing. First, the assertion of the fees and costs as its only injury is contrary to the position it has taken from the outset of the case. As previously discussed, Appellant has consistently alleged that it was injured by the "uncertainty" regarding the status of Dr. T's shares following his termination and the repurchase of those shares in 2010. *See* Argument Section IA, supra. **(R. pp. 3527, 3540, 3546, 3554-55, 3560, 3010; App Br. pp. 21, 30).** Second, as *Binkley* teaches, to the extent that the uncertainty was an invasion of Appellant's rights, it was itself sufficient to start the statute of limitation clock, even if no monetary damage had yet ensued. 352 S.C. at 298, 573 S.E.2d at 845.

As set out above, there is no doubt that Appellant knew of that uncertainty and the possibility that Dr. T might claim that he continued to own his shares of stock in 2010. In fact, Appellant itself notes this "uncertainty" was raised six years before it filed suit, in an email dated March 10, 2011, from Baddour to Ryan, copying Bosse, in which Baddour states, "Clearly there

is uncertainty about the legal status of [Dr. T's] shares."[9] **(App. Br. pp. 18-19; R. p. 3020).** Because Appellant did not file this action within three years from the time it discovered or reasonably should have discovered this injury, Appellant's claim is barred by the statute of limitations. *Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 370-71, 597 S.E.2d 27, 29 (Ct. App. 2004) ("[T]he statutory period begins to run from the date when the injury resulting from the wrongful conduct either is discovered or may be discovered by the exercise of reasonable diligence."); *Young v. S.C. Dep't of Corr.*, 333 S.C. 714, 720, 511 S.E.2d 413, 416-17 (Ct. App. 1999) (holding the statute of limitations barred a claim because it was not brought within the statutory period from the time the person discovered or should have discovered the injury).

C. Appellant incurred monetary damages in 2010.

Even if this Court were to determine that the uncertainty surrounding the ownership of Dr. T's shares by itself was not a sufficient injury to start the statute of limitations, the record includes undisputed evidence that Appellant incurred economic losses that were, in Appellant's view, proximately caused by Womble's alleged breach of the standard of care long before Dr. T demanded to inspect the books in September 2015.

First, Appellant incurred compensable monetary injuries in 2010—more than seven years prior to filing suit against Womble in July 2017—that were sufficient to begin the running of the statute of limitations. In South Carolina, fees and costs incurred by a client for legal services that are regarded as beneath the standard of care are recoverable as damages in a legal malpractice action. *See*, *e.g., Verenes v. Alvanos*, 387 S.C. 11, 16-17, 690 S.E.2d 771, 773 (2010) (holding

[9] As previously noted, whether Baddour was correct or later disputed the uncertainty is not relevant to whether the statute of limitations began to run based upon the injury asserted in Appellant's malpractice claim. The relevant inquiry is when Appellant discovered or could have discovered by exercise of reasonable diligence the injury it now claims. *Cline*, 359 S.C. at 370-71, 597 S.E.2d at 29.

that restitution and disgorgement are remedies for a claim of breach of fiduciary duty). Appellant paid Womble to (1) do the allegedly substandard work on the SRA and the SHA in 2008 and advise Appellant about how to exercise its right to repurchase Dr. T's shares in 2010; (2) deal with Dr. T's lawyer when Dr. T's lawyer appeared in 2010 claiming he still owned 4.25% of Appellant as a "worst case" situation; (3) advise Appellant as to how to deal with Dr. T after Dr. T refused to sign the settlement agreement containing a release; and (4) prepare the disclosure statement that it sent to investors regarding whether Appellant had repurchased all of Dr. T's shares. **(R. p. 18).**

Additionally, Appellant incurred compensable monetary injuries for fees it paid other counsel. Appellant engaged Mitchell Ryan in 2011—six years before filing this suit—to look at the issues regarding the status of Dr. T's shares in connection with preparing its books for its auditors and to "explore and pursue any and all available avenues of legal recourse" against Dr. T. **(R. p. 3655);** *see also* **(R. p. 3666)** (email from Bosse to Frederic Smith stating "[w]e ultimately tried to reach a mutual position with [Dr. T.]—that Womble handled unsuccessfully—and then a 2nd outside counsel [Mitchell Ryan] we hired to look further into the situation agreed that the Company repurchased [Dr. T]'s stock that vested per the executed shareholder's Agreement section 2.2.(v)"). At the hearing on Womble's motion for summary judgment, Appellant conceded that "a client's injury [in a legal malpractice action] may be the expense of retaining another lawyer." **(R. pp. 3009, 3553).**

In addition to a claim for money damages, Appellant could have brought a suit seeking equitable indemnification by Womble as a remedy for Womble's alleged breach of duty. All the elements necessary for a claim of equitable indemnification in favor of Appellant were present in 2010. "Indemnity is that form of compensation in which a first party is liable to pay a second party for a loss or damage the second party incurs to a third party." *Town of Winnsboro v. Wiedeman-*

Singleton, Inc., 303 S.C. 52, 56, 398 S.E.2d 500, 502 (Ct. App. 1990), *aff'd*, 307 S.C. 128, 414 S.E.2d 118 (1992) (citation omitted). "A right to indemnity may arise by contract (express or implied) or by operation of law as a matter of equity between the first and second party." *Id*.

Appellant could have alleged that it was exposed to costs, expenses, and potential liabilities because of Dr. T's "bona fide" claim which resulted from Womble's alleged negligence and through no fault of its own. The attorney/client relationship between Womble and Appellant and its attendant duties would satisfy the requirement of a relationship creating an obligation to indemnify. In fact, Appellant's present claim is an after the fact claim for equitable indemnification as to its costs and expenses in dealing with Dr. T. Appellant could have filed suit against Womble within the period of limitations without any prejudice to its ability to recover for all its costs and expenses resulting from Dr. T's legal position.

II. As an additional sustaining ground, this Court should affirm the grant of summary judgment because the undisputed facts demonstrate Womble did not breach any duties owed to Appellant.

As previously noted, Womble did not breach its duty of care to Appellant. To prevail in a cause of action for legal malpractice, the plaintiff must prove: (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. *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010). In South Carolina, the standard of care for attorneys only requires that attorneys "render services with the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession." *Johnson v. Alexander*, 413 S.C. 196, 775 S.E.2d 697, 790 (2015). An attorney is not an insurer of the outcome of a case, nor a warrantor of specific results. *See Holy Loch Distributors v. Hitchcock*, 340 S.C. 20, 27, 531 S.E.2d 282, 286 (2000) (holding lawyers are not warrantors of specific results); *Harris Teeter*, at

291, 701 S.E.2d at 750 (holding an attorney is not an insurer of the outcome of a case). Furthermore, attorneys have no control over what a third party may do or whether that third party may file a law suit. All an attorney can do is make sure his work product is sufficient for his client to prevail if the work product is challenged, which is what happened in this case.

Appellant's claim is based on a theory that because Dr. T made a claim, Womble *must* have breached the standard of care. This theory is necessarily grounded in hindsight. In contending Womble breached its duty of care, Appellant suggests that additional or different language in the SHA and SRA could have somehow eliminated the risk of litigation by Dr. T. In Appellant's assertion of the lawyer's duty, the lawyer, with the benefit of hindsight, should have anticipated the spurious arguments that were subsequently raised and drafted the document in a way that avoided them.

Appellant's argument is flawed because South Carolina appellate courts have expressly rejected this use of hindsight to determine a beach of standard of care for lawyers. In *Harris Teeter, Inc.*, the South Carolina Supreme Court explicitly stated:

> Of course, any professional negligence claim involves a bad result. We reject as a matter of law any suggestion that a bad result is evidence of the breach of the standard of care. To do so would change the landscape of our malpractice law, for all professionals. We adhere to the principle that the exercise of a professional's judgment (and accompanying acts and omissions) must be considered at the time the professional service is rendered and not through the lens of hindsight.

390 S.C. at 291, 701 S.E.2d at 750.

Moreover, unlike the client in *Harris Teeter, Inc.*, Appellant has not sustained a "bad result." Instead, the Florida Action ended with the best possible result when Appellant prevailed on summary judgment. If, as explained in *Harris Teeter, Inc*., a bad result itself does not establish conduct beneath the standard of care, then a good result certainly cannot. The fact that Appellant

obtained a good result in the Florida Action is completely inconsistent with a breach of the standard of care and inconsistent with the holding in *Harris Teeter, Inc*.

There is no case in South Carolina holding the duty of care requires lawyers to produce documents that will avoid all future disputes, especially when the documents are clear, unambiguous, work as intended, and are the very reason the client prevailed. Here, the Florida Action already established as a matter of law that Womble had (1) prepared documents that were clear, unambiguous, and worked as intended, and (2) properly advised Appellant on how to exercise its rights under the documents. **(R. pp. 3226, 3228-34).** Womble did not breach the standard of care simply because Dr. T took unfounded, unsubstantiated positions and made an unsupportable claim that was not based on the SRA and SHA.

III. As an additional sustaining ground, this Court should affirm because the doctrine of collateral estoppel binds Appellant as a matter of law to the findings and rulings in the Florida Action.

As an additional sustaining ground, this Court should affirm the trial court's decision because the doctrine of collateral estoppel bars Appellant's legal malpractice claim. In the Florida Action, Appellant contended—and the district court determined—the SRA and the SHA were not ambiguous and created concurrent rights, and that Appellant validly exercised its right to repurchase all of Dr. T's shares pursuant to the SHA. **(R. pp. 1393, 1398-99, 1408, 3191, 3226, 3228-34).** The doctrine of collateral estoppel precludes a finding of liability in this case because appellant is bound by the district court's findings and conclusions, which are completely inconsistent with a claim that Womble breached the standard of care either in the preparation of the agreements or in advising Appellant how to exercise its rights under those agreements.

Collateral estoppel bars "relitigation of the same facts or issues necessarily determined" in a prior proceeding. *Liberty Mut. Ins. Co. v. Employers Ins. of Wausau*, 284 S.C. 234, 237, 325

S.E.2d 566, 568 (Ct. App. 1985). "[W]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *S.C. Prop. & Cas. Ins. Guar. Ass'n v. Wal-Mart Stores, Inc.*, 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991).

Appellant argued below that because the Florida Action was not a legal malpractice action and the district court did not make a finding regarding the standard of care, this action is not barred by collateral estoppel. **(R. pp. 2962, 2981, 3552).** This argument ignores the well-recognized distinction between issue preclusion and claim preclusion. Our appellate courts have long recognized that the doctrine of collateral estoppel applies if the underlying issues are litigated even if the asserted causes of action are different. *See Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 556, 684 S.E.2d 779, 783 (Ct. App. 2009) ("The doctrine of collateral estoppel prevents the relitigation of issues, not claims, necessarily determined in a former proceeding regardless of whether the identity of the causes of action in successive lawsuits are the same."); *see also Pye v. Aycock*, 325 S.C. 426, 437, 480 S.E.2d 455, 460 (Ct. App. 1997) (holding a party was collaterally estopped from relitigating whether he had insurance coverage in a personal injury action after the insurance company had already filed a separate declaratory judgment action seeking a declaration as to whether the party was excluded from coverage); *In Re Estate of Brown*, 424 S.C. 589, 600, 818 S.E.2d 770, 776-79 (Ct. App. 2018) (holding that in a probate action contesting a will, the appellants were collaterally estopped from relitigating the findings of fact and conclusions of law in an annulment order voiding a marriage in separate family court action).

Here, each issue on which the legal malpractice claim is premised—whether the SHA and SRA were ambiguous and in conflict, and whether Womble properly advised Appellant of how to

exercise its rights thereunder—was actually litigated in the Florida Action. The district court's order disposed of all the issues underlying the legal malpractice claim by finding the agreements were not ambiguous, worked as intended, created concurrent rights, and that Appellant properly exercised its right to repurchase Dr. T's shares using Womble's advice. **(R. pp. 3226-34).** Those findings of fact and conclusions of law in the Florida Action are decisive in this legal malpractice action. It is more than ironic that in this case, these findings were exactly what Appellant argued to the district court in Florida. Accordingly, Appellant cannot not now contend there is anything wrong with the agreements or that Womble breached its duty of care.

Further in response to this argument below, Appellant suggested the district court's order in the Florida Action creates a genuine issue of material fact regarding whether Womble breached the standard of care because the district court stated it had to "harmonize" the SRA and SHA. **(R. pp. 2962-63, 3004, 3546).** However, contrary to Appellant's contention, the district court simply applied familiar legal principles to the unambiguous contracts to determine their force and effect as written. "The construction of a written contract is a matter of law to be determined by the court." *City of Orlando v. H. L. Coble Const. Co.*, 282 So. 2d 25, 26 (Fla. Dist. Ct. App. 1973); *see also* **(R. p. 3225)** (citing 11 Williston on Contracts § 30:26 (4th ed.)). The district court could not have granted summary judgment if it found the agreements to be ambiguous. *See Landin, Ltd. v. Loxahatchee River Envtl. Control Dist.*, 416 So. 2d 482, 483 (Fla. Dist. Ct. App. 1982) (holding that it was error for the trial court to grant summary judgment with respect to an ambiguous contract). Moreover, in entering summary judgment for appellant, the district court was simply agreeing with the argument that Appellant made to the that court:

> [Dr. T] identified no ambiguity between the Company's rights to repurchase only some of the Shares for Nominal Value under the []SRA, but any and all Shares for Fair Value under the SHA. In fact

> there was, and is, no ambiguity. The two documents are meant to be and under Delaware law must be read together.

(R. p. 1415). The district court simply used established rules of construction to determine the effect of unambiguous contracts. The district court's findings do not create any genuine issue of material fact.[10]

IV. As an additional sustaining ground, this Court should affirm the grant of summary judgment because the doctrine of judicial estoppel bars Appellant's legal malpractice claim.

"Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding." *City of N. Myrtle Beach v. E. Cherry Grove Realty Co., LLC*, 397 S.C. 497, 725 S.E.2d 676, 680 (2012) (quoting *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004)). A party seeking judicial estoppel must show the following:

> (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to

[10] The district court applied universal principles of contract construction. The principles are the same under South Carolina law. *See Ellie, Inc. v. Miccichi*, 358 S.C. 78, 92, 594 S.E.2d 485, 492 (Ct. App. 2004) ("[T]wo contracts executed at different times relating to the same subject matter, entered into by the same parties, are to be construed as one contract and considered as a whole."); *id.* at 93, 594 S.E.2d at 493 ("Where an agreement is clear and capable of legal interpretation, the court's only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it." (quoting *Heins v. Heins*, 344 S.C. 146, 158, 543 S.E.2d 224, 230 (Ct. App. 2001))); *Heins*, 344 S.C. at 158, 543 S.E.2d at 230 ("To discover the intention of a contract, the court must first look to its language—if the language is perfectly plain and capable of legal construction, it alone determines the document's force and effect."); *Middleborough Horizontal Prop. Regime Council of Co-Owners v. Montedison S.p.A.*, 320 S.C. 470, 477, 465 S.E.2d 765, 770 (Ct. App. 1995) ("[I]f a contract is ambiguous, or capable of more than one construction, the question of what the parties intended becomes one of fact, and should therefore be decided by the jury.").

> mislead the court; and (5) the two positions must be totally inconsistent.

Cothran, 357 S.C. at 215-16, 592 S.E.2d at 632.

Under the doctrine of judicial estoppel, Appellant is barred from taking any position in conflict with the positions it took in the Florida Action. Thus, Appellant is judicially estopped from asserting in this case that the agreements are ambiguous, are in conflict, did not create concurrent rights, and that Appellant did not effectively exercise its rights under the agreements. Without any such factual premises, there is no basis for a claim of legal malpractice, and the case fails as a matter of law.

In responding to this argument below, Appellant contended its arguments were not barred because judicial estoppel only estops inconsistent factual positions and its positions regarding Womble's work are legal positions. **(R. pp. 3004-05, 3549-51).** However, the "ambiguity" position as presented by Appellant is a mixed question of law and fact, and under South Carolina law, mixed questions are subject to the rules of judicial estoppel. *See e.g.*, *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1168 (4th Cir. 1982) (holding a plaintiff's claim was barred by judicial estoppel because he was estopped from taking different positions as to whether he was a joint venturer or an employee); *Quinn v. Sharon Corp.*, 343 S.C. 411, 540 S.E.2d 474 (Ct. App. 2000) (affirming summary judgment in favor of the defendant, holding judicial estoppel barred the plaintiff incorporator in action against the corporation from taking inconsistent positions regarding whether he had authority to bind a corporation or ownership of the corporation). Courts in South Carolina and the Fourth Circuit have barred similar allegations which were mixed questions of fact and law in subsequent actions. *See e.g.*, *Hindman v. Greenville Hosp. Sys.*, 947 F. Supp. 215, 221 (D.S.C. 1996), *aff'd,* 133 F.3d 915 (4th Cir. 1997) (affirming summary judgment in favor of the defendant, holding judicial estoppel barred the plaintiff employee in an action against an employer from

taking inconsistent positions on whether she was totally disabled or a qualified person under the American with Disabilities Act); *Bank of Am., N.A. v. Bethea*, Op. No. 2017-UP-261 at *2 (S.C. Ct. App. June 28, 2017) (affirming grant of summary judgment, holding judicial estoppel barred homeowner from taking insistent positions as to whether a mobile home was real or personal property); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Manufacturers & Traders Tr. Co.*, 137 F. App'x 529, 531 (4th Cir. 2005) (affirming the grant of summary judgment, holding judicial estoppel barred the plaintiff's claim because the plaintiff could not take inconsistent positions as to whether entities were "real entities" or "fictitious persons").

Appellant's positions in this litigation are completely contrary to the positions it took in the related Florida Action. **(R. pp. 3001-02)**; *see also* **(R. pp. 3512-14)** (outlining Appellant's inconsistent positions). This Court should affirm because Appellant is judicially estopped from trying to re-write the facts to support its malpractice claim.

V. As an additional sustaining ground, this Court should affirm because Appellant cannot establish that Womble was the proximate cause of any of Appellant's alleged damages.

A claim for legal malpractice requires that damages be proximately caused by a breach of duty by the attorney. *Stokes-Craven Holding Corp.*, 416 S.C. at 525, 787 S.E.2d at 489. To prove proximate cause, Appellant must show both causation in fact and legal cause. *Eadie v. Krause*, 381 S.C. 55, 64, 671 S.E.2d 389, 393 (Ct. App. 2008) (citing *Sims v. Hall*, 357 S.C. 288, 298, 592 S.E.2d 315, 320 (Ct. App. 2003)). "Causation in fact is proved by establishing the plaintiff's injury would not have occurred 'but for' the defendant's negligence." *Id*.

In order to prove proximate cause based upon Appellant's arguments as to the standard of care, Appellant must show that but for some act or omission by Womble, Dr. T would never had made a claim. However, the record—which as Appellant notes includes thousands of pages of

exhibits and hundreds of pages of deposition testimony—does not include any evidence that Dr. T would not still have made the same claims even if the documents had been drafted differently. Furthermore, the record does not include any evidence that Dr. T would have agreed to sign the agreements if they had been drafted differently. Accordingly, Appellant cannot establish Womble was the proximate cause of its damages. *See*, *e.g.*, *Hazel & Thomas*, *P.C. v. Yavari*, 251 Va. 162, 166, 465 S.E.2d 812, 815 (1996) (holding the client failed to prove proximate cause in a legal malpractice action when the client failed to show the vendor in the commercial contract would have agreed to a different provision in the contract or that client would not have signed the contract without those provisions had attorneys insisted on them and the vendor refused to agree to them); *Blackhawk Bldg. Sys., Ltd. v. Law Firm of Aspelmeier, Fisch, Power, Warner & Engberg*, 428 N.W.2d 288, 291 (Iowa 1988) (finding the trial court erred in failing to direct a verdict in favor of the defendant attorney, holding the attorney's negligent failure to include a non-competition clause in an employment agreement was not the proximate cause of injury because the plaintiff did not prove the employee would have agreed to that clause had the agreement been drafted differently); *Jenkins v. Bakst*, 95 Mass. App. Ct. 654, 660, 130 N.E.3d 199, 205 (2019) (holding the client in a legal malpractice case where the alleged attorney was negligent in negotiating a stock buy-back clause in an employment agreement failed to prove proximate cause because he failed to show the other party likely would have agreed to a different version of the agreement); *Lamb v. Barbour*, 188 N.J. Super. 6, 13, 455 A.2d 1122, 1125 (App. Div. 1982) (holding the plaintiffs failed to prove proximate cause because "[i]f plaintiffs were not at least prepared to say that they would have been deterred from the undertaking or that the consequences would have been materially different had they been properly advised, it cannot be concluded that defendant's failures substantially contributed to their loss"); MALLEN AND SMITH, LEGAL MALPRACTICE, § 23.5, at 469 (2006)

("Proof of causation requires analysis of the consequences of proper advice. Thus, the client needs to prove what should have been achieved had the 'proper' advice been given. If the alleged error is the failure to obtain or advise of a provision, concession or benefit, the client must prove that the other party would have agreed. It is not sufficient to show that the other party 'might have' agreed.").

CONCLUSION

For the foregoing reasons, this Court should affirm the order granting summary judgment to Womble.

Respectfully,

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