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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS
THE HONORABLE ROGER M. YOUNG, SR.

Appellate Case No.: 2020-000232

Charleston Laboratories, Inc.,
Appellant,

vs.

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

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STATEMENT OF ISSUE ON APPEAL

DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT AGAINST A CLIENT IN A LEGAL MALPRACTICE ACTION BASED ON THE EXPIRATION OF THE STATUTE OF LIMITATIONS BY FINDING THAT THE CLIENT SHOULD HAVE KNOWN THAT HIS ATTORNEY HAD COMMITTED ERRORS IN THE EXECUTION OF AN OPTION TO REPURCHASE SHARES OF A CORPORATION EVEN THOUGH THE ATTORNEY CONTINUED TO REPRESENT THE CLIENT THROUGHOUT THE LIMITATIONS PERIOD, NEVER DISCLOSED AN ERROR AND MAINTAINED THROUGHOUT THE LIMITATIONS PERIOD AND TO THIS DAY THAT NO ERROR HAD BEEN COMMITTED IN THE STOCK REPURCHASE?

WHEN DID CHARLESTON LABS SUFFER COGNIZABLE LEGAL DAMAGES SO AS TO CREATE A CAUSE OF ACTION FOR LEGAL MALPRACTICE?

STATEMENT OF THE CASE

“What do you people not understand about a scintilla of evidence?” Whether true or not, local legend attributes this observation to the Honorable Roger M. Young, Sr., as a caution to attorneys regarding the standards applicable to a motion for summary judgment. When Womble, Carlyle, Sandridge & Rice, LLP (hereinafter “Womble” or “Respondent”) sought summary judgment in this legal malpractice action based on the statute of limitations, Judge Young reviewed the many thousands of pages submitted in the record, the extensive briefing of the parties and the hours of oral argument before ruling correctly that “there is a genuine issue of material fact as to when the Plaintiff knew or should have known they were on notice of a potential claim by Dr. T that was caused by the Defendant’s representation.” Order Denying Summary Judgment, October 22, 2019, (ROA p. 2).

Following additional briefing, Judge Young reversed himself based on the exact same evidentiary record and did so on the eve of a jury trial. In doing so, the Court did not find that the client knew it had claims against its legal counsel for a period greater than the statute of limitations,

but found that based on two communications which occurred over a span of years in a very complex commercial transaction and which were part of the original record before the Court, the communications “should have put Charleston Labs on notice, that there was a possibility of a claim against Womble.” Order Granting Defendant’s Motion to Reconsider Motion Denying Summary Judgment, January 30, 2020, (ROA p. 6). What could better demonstrate a scintilla of evidence that Charleston Laboratories, Inc. (hereinafter “Charleston Labs” or “Appellant”) should **not** have known that it had potential claims against its legal counsel than the reasoned order of the trial judge himself? This is not simply a situation in which two reasonable people disagree. This is the unique situation in which a very reasonable person having reviewed the same evidence twice arrived at two opposite results. This alone demonstrates that summary judgment is improper in that the Plaintiff is entitled to the benefit of the facts and inferences which resulted in the outcome which was favorable to the Plaintiff.

This is a legal malpractice case in which Charleston Labs contends that it was forced to engage in expensive litigation in order to clarify the ownership structure of its company as a direct result of errors committed by Womble in the drafting of a Shareholder’s Agreement (“SHA”) and a Stock Redemption Agreement (“SRA”) which pertained to the ownership of shares in the company by its former employee / shareholder, Dr. Raymond Takigiku (“Dr. T”), and more importantly in the negligent advice of Womble surrounding the redemption of Dr. T’s stock upon his departure from the company. The Complaint is factually rich and supported in part by the affidavit of expert witness, Dr. Greg Adams. The summary judgment record before the Court consisted of thousands of pages of exhibits, hundreds of pages of deposition testimony, extensive power point presentations and voluminous briefing. Oral arguments lasted for several hours.

Charleston Labs appeals the decision of the trial court in holding ultimately that two communications out of the thousands of pages in the record somehow placed Charleston Labs on notice of potential claims against its legal counsel and did so despite the fact that Womble was in an ongoing attorney / client relationship with Charleston Labs, that Womble never advised its client of its potential errors and that other communications from Womble assured their client that, in fact, no errors were committed. The holding of the lower court quite literally conferred upon the client the knowledge and sophistication of its legal counsel and ignored the duty of candor owed by attorneys to their clients.

STANDARD OF REVIEW

On appeal from an order granting judgment on the pleadings, the appellate court applies the same standard of review applied by the circuit court. *Hambrick v. GMAC Mortgage Company*, 370 S.C. 118, 634 S.E.2d 35 (Ct. App. 2006). As a result, the appellate court reviews the trial court's order by construing all evidence and facts in favor of the non-moving party. *Waters v. Southern Farm Bureau Life Ins.*, 365 S.C. 519, 687 S.E.2d 385 (Ct. App. 2005). "Even if there is no dispute as to evidentiary facts, but only as to the conclusions to be drawn from them, summary judgment is improper." *Id.* "Summary judgment is a **drastic remedy**, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Doe v. Batson*, 345 S.C. 316, 321-22, 548 S.E.2d 854, 857 (Ct. App. 2001) (citing *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991)). Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Montgomery v. CXS Transp., Inc.*, 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008). In determining whether a genuine issue of fact exists; a court must assume as true the evidence of the nonmoving party and **draw all reasonable inferences in favor of that party.** *Id.*

In cases where the applicable burden of proof is preponderance of the evidence, "the non-moving party is only required to submit **a mere scintilla of evidence in order to withstand a motion for summary judgment.**" *Hancock v. Mid-South Mgt. Co., Inc.*, 381 S.C. 326, 330-1, 673 S.E.2d 801, 803 (2009). (Emphasis supplied).

STATEMENT OF FACTS^{1,2}

Charleston Labs is entitled to the following facts and all reasonable inferences to be drawn therefrom in finding that a) it did not appreciate that its legal counsel committed professional errors in assisting Charleston Labs to repurchase the shares of a departing shareholder in March, 2010, and b) Charleston Labs should not have known about its counsel's errors until it engaged new counsel following the return of its long-since departed shareholder who was asserting rights as a shareholder:

- a. Charleston Labs engaged Womble as its legal counsel on June 6, 2007, for the purpose of providing "general corporate legal advice, venture capital financing, and other matters that [it] may request from time to time." Womble Engagement Letter, (ROA p. 3044).
- b. Dean Rutley ("Rutley"), a partner at Womble, formed Charleston Labs as a privately-held Delaware corporation on June 27, 2007. Charleston Labs was

¹ Further, because this matter was decided on a motion for judgment on the pleadings, the facts alleged in the complaint are assumed to be true. *Home Builders Association of South Carolina v. School District No. 2 of Dorchester County*, 405 S.C. 458, 748 S.E.2d 230 (2013).

² If a "fact" below is expressly disputed by the defense, effort has been made to flag the fact as "DISPUTED" and to explain the nature of the dispute. Charleston Labs maintains, nonetheless, that it is entitled to its version of the facts and references to be derived therefrom which are beneficial to Charleston Labs' position.

authorized to issue up to 3000 common shares of stock at a par value of \$0.001. Delaware Certificate of Incorporation, (ROA p. 3048).

- c. The three original founders of Charleston Labs were G. Paul Bosse III (“Bosse”), Ryan Baker (“Baker”), and Chris Goodwin (“Goodwin”). (ROA p. 12).
- d. At the time of the formation of Charleston Labs, Womble prepared no agreement that controlled the relationship between the owners. Deposition of George Scott,³ Charleston Labs 30(b)(6), (ROA p. 1201, lines 8-12). (**NOTE:** Womble drafted By-laws, but did not prepare or recommend a shareholder’s agreement or other similar document to control the relationship between the owners of the company).
- e. As a start-up pharmaceutical company, Charleston Labs’ initial research was dedicated to the development of drugs which reduce opioid induced nausea and vomiting in opioid pharmaceuticals. (ROA p. 12, ¶ 6).
- f. Rutley focused his early efforts with Charleston Labs on seeking venture capital for the upstart company in order to fund the launch of its developmental CL-108 analgesic opioid drug. Rutley had previously assisted “dozens and dozens of clients on venture capital transactions” which ranged from “\$500,000.00 to 20 million, 30 million.” Deposition of Dean Rutley, (ROA p. 96, line 22-p. 97, line 7).
- g. Rutley prepared for distribution to his venture capital contacts a “Charleston Laboratories Executive Summary” that lauded Charleston Labs’ leadership team and which forecasted that upon FDA approval of its CL-108 drug, Charleston Labs’ projected revenues would range from \$600,000,000.00 in Year 1 to

³ Prior to his role as in-house counsel for Charleston Labs, attorney George Scott was employed as an associate attorney with Womble. It was in this role that he was first introduced to Charleston Labs and Paul Bosse. Following his employment with Womble, Scott was briefly employed with Greenberg Traurig before accepting his current post as in-house counsel to Charleston Labs.

\$1,209,000,000.00 in Year 5. December 10, 2007, email with attached Executive Summary, (ROA p. 3049).

- h. As Charleston Labs continued in its efforts to develop CL-108, it hired three new employees in 2008, each of whom was promised an ownership interest in the Company: Dr. T., Bernard Schachtel (“Schachtel”) and John Ameling (“Ameling”). (ROA p. 12, ¶12).
- i. **DISPUTED:** Bosse was resistant to Rutley’s early efforts to continue to attempt to raise capital through venture financing because he did not want to saddle his fledgling company with debt and/or to give up a great deal of early equity. When Bosse pushed back against Rutley’s efforts to obtain venture capital, Bosse perceived that he and Charleston Labs were “passed off” from Rutley to attorney David Baddour (“Baddour”). Deposition of Paul Bosse, (ROA p. 2378, lines 2-14). (Womble disputes that Charleston Labs was “passed off” from Rutley to Baddour).
- j. At the time, Baddour was an associate with Womble in its Raleigh, NC office. Baddour was first admitted to practice law in 2002.
- k. In or around April, 2008, Charleston Labs was approached by a venture capital firm known as Landmark Pegasus (“Landmark”). As a condition of any investment in Charleston Laboratories, Landmark recognized that Charleston Labs had no contract controlling the relationship between shareholders and provided Charleston Labs with a proposed Stockholder Agreement. See April 9, 2008, email from Landmark to Bosse, (ROA p. 3051).
- l. While no deal was made with Landmark, Bosse liked the idea of a Stockholder’s Agreement and forwarded the proposed agreement to Baddour for the purpose of

- adopting a similar agreement for Charleston Labs. See April 9, 2008, email from Bosse to Baddour, (ROA, p. 3066).
- m. Prior to Bosse raising the issue with Baddour Womble had never recommended to Charleston Labs that it adopt an agreement to regulate the relationship between its shareholders.
 - n. Having received no reply from Baddour, Bosse again emailed Baddour on May 20, 2008, inquiring about the status of a shareholder agreement. See May 20, 2008, email from Bosse to Baddour, (ROA p. 3081).
 - o. In response to Bosse's email, Baddour forwarded a proposed Stock Restriction Agreement ("SRA") (as opposed to a Shareholder's Agreement). See May 20, 2008, email from Baddour to Bosse, (ROA p. 3082).
 - p. Unlike the proposed Stockholder's Agreement ("SHA") that originated from Landmark, the SRA began as a Womble template document. Deposition of Baddour, (ROA p. 658, lines 14-24).
 - q. Rather than having one document to control the relationship between shareholders (SRA or SHA), Womble recommended that Charleston Labs have the new shareholders (T, Schachtel and Ameling) sign an SRA and that all shareholders sign a SHA. To that end, Womble made 150 changes to the SHA which was first drafted by Landmark. See May 22, 2008, Redline Report, (ROA p. 3088).
 - r. Both the SRA and the SHA defined the right of Charleston Labs to repurchase the shares of an owner upon their departure from employment with Charleston Labs. See the SHA, (ROA p. 3089) and the SRA, (ROA p. 3103).

- s. In the event of a separation from employment, the SHA provided Charleston Labs the right to repurchase **ALL SHARES** at the then prevailing fair value as determined by the Board of Directors.
- t. In the event of a separation from employment, the SRA provided Charleston Labs the right to repurchase **UNVESTED SHARES** at the price of \$0.001 per share based upon a vesting schedule.
- u. The SHA does not make reference to the SRA.
- v. The SRA does not make reference to the SHA.
- w. The SHA provides that it is the “entire agreement” between the parties on the “subject matter” and that it “supersedes and renders null and void all other prior oral or written agreements.” (ROA p. 3099, ¶5.9).
- x. The SRA provides that it is the “entire agreement” between the parties on the “subject matter” and that it “supersedes and renders null and void all other prior oral or written agreements.” (ROA p. 3105, ¶5).
- y. The SHA and SRA provide different and conflicting rights on the same subject matter.
- z. On May 30, 2008, Dr. T executed the SHA.
- aa. On May 30, 2008, Dr. T also executed the SRA.
- bb. On May 30, 2008, Charleston Labs issued Share Certificate Number 12 to Dr. T evidencing his ownership of 210 shares in Charleston Labs. Share Certificate Number 12, (ROA p. 3108).
- cc. On the back of Share Certificate Number 12 restrictive language makes reference to both the SHA and the SRA. (ROA p. 3109).

- dd. At or near the same time that Dr. T executed his SRA and SHA, shareholder Schachtel had engaged attorney Charles Kaufman (“Kaufman”) to review the documents. Kaufman was confused by the operation of the two documents and emailed questions to Rutley.
- ee. By email dated June 16, 2008, Rutley explained to Kaufman in part that: “The simple structure is that ALL vested shares are for the employee to KEEP and the unvested shares are paid over time for service in the vesting period. Thus, termination of the employment relationship for ANY reasons will result in the employee keeping ALL shares that are vested and just a stoppage of any further vesting.” Rutley email, June 16, 2008, (ROA p. 3110 through ROA p. 3111, ¶2 in red) and emphasis supplied.
- ff. **DISPUTED:** Rutley’s explanation is incorrect above in that it does not explain that the company retains the right to repurchase ALL shares under the SHA. **NOTE:** Plaintiff contends that this is direct evidence of Womble’s misunderstanding of the operation of the documents which later manifests itself at the time of the attempted repurchase of Dr. T’s ownership. This contention is disputed.
- gg. On September 25, 2008, Charleston Labs issued a forward stock split of 2,000:1, as a result of which Dr. T’s Share Certificate Number 12 for 210 shares was retired in exchange for Share Certificate Number 14 for 420,000 shares. Stock Split and Share Certificate Number 14, (ROA p. 3112).
- hh. After September 25, 2008, the relationship between Charleston Labs and Dr. T soured.

- ii. Dr. T was absent for approximately 10 months and had associated with a competitive company known as SIDIS. Furthermore, Charleston Labs feared that Dr. T had transferred or attempted to transfer his ownership in the company to SIDIS. Deposition of George Scott, (ROA p. 1139, line 18-p. 1143, line 6).
- jj. In or around March, 2010, Charleston Labs made the decision to separate with Dr. T.
- kk. On or about March 16, 2010, Bosse called Baddour to explain the situation and to ask for legal assistance in terminating Dr. T and reacquiring his ownership in the company.
- ll. Following the conversation, Baddour emailed Rutley, attaching only the SRA, and relayed the conversation. In part, Baddour reported: “They need to get rid of Ray T, their COO, but they want to take all of his stock back (vested and unvested).” See Email, Baddour to Rutley, March 16, 2010, (ROA p. 3120).
- mm. As of March 16, 2010, the only document which would have permitted the reacquisition of **ALL OF DR. T’s STOCK was the SHA**. Dr. T was partially vested under the SRA.
- nn. Charleston Labs sought Womble’s legal advice in drafting the letter terminating Dr. T’s employment. See Bosse Email to Baddour, March 17, 2010, (ROA p. 3126).
- oo. On March 17, 2010, Bosse drafted an initial rough draft of the termination letter which he shared with Baddour seeking legal advice with regard to the “Severance section as it relates to the stock” and on “other sections as you see fit.” (ROA p. 0546).

- pp. After receiving advice and modifications from legal counsel, Charleston Labs issued a termination letter to Dr. T on March 22, 2010. In part, the letter explained that Dr. T's shares were going to be repurchased for \$2.10, in what appears to be an attempted reference to the SRA. **NOTE:** Again, only the SHA would have permitted a repurchase of all shares at the time, as Dr. T was partially vested under the SRA. Termination Letter, (ROA p. 550).
- qq. Also, on March 25, 2010, Womble prepared for Charleston Labs a draft letter and a Redemption and Release Agreement for Charleston Labs to send to Dr. T in order to redeem his shares. (ROA p. 564).
- rr. The letter does not reference the SHA or the SRA.
- ss. The letter does reference the enclosed Redemption and Release Agreement.
- tt. The Redemption and Release Agreement references the SRA but does not reference the SHA.
- uu. On March 25, 2010, Baddour advised Bosse that "if Ray (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." See Email from Baddour to Bosse, March 25, 2010, (ROA p. 3139).
- vv. **DISPUTED:** Charleston Labs points to the above email as further evidence that Womble did not understand or appreciate at the time that only the SHA permitted the repurchase of all shares at any time following separation and that through the correct exercise of rights under the SHA, Dr. T would have no legitimate claims whatsoever. **NOTE:** It is important to note that this email communication forms the Court's basis for finding that Charleston Labs knew or should have known that

Womble committed malpractice. This is true despite the fact that Womble never explained to its client why Dr. T may have a future claim, what Womble did or didn't do in order to create Dr. T's potential claim and/or that it was Womble's lack of precision and malpractice were the basis of the claim. Moreover, this single communication lies in contrast to several other communications in which Womble advised its client to ignore Dr. T and to carry on business as usual, all of which communicated that Dr. T's claim (if any) was frivolous.

- ww. On March 26, 2010, Charleston Labs sent a final version of the draft redemption letter and Redemption and Settlement Agreement. Like the draft version, the letter does not make reference to the SRA or the SHA. Like the draft version, the Redemption and Settlement Agreement makes reference to the SRA, but not the SHA. The Redemption and Settlement Agreement refers to Dr. T's employment being terminated "for cause" which features only in the SRA. Final copies of the letter and Redemption and Settlement Agreement, (ROA p. 3147).
- xx. Baddour testified that he orally recommended to Bosse to include a reference in the letter to the SHA as it would have been the "best practice," although reference was not required. Charleston Labs denies having received any such advice. Deposition of David Baddour, (ROA p. 0716, line 12- p. 717, line 3).
- yy. Dr. T did not accept the Redemption and Release Agreement.
- zz. Having received no reply from Dr. T, Baddour advised Charleston Labs that it should "sit tight." Womble further advised Charleston Labs to continue raising money. See Baddour to Bosse Email, April 27, 2010, (ROA p. 3155). See also Baddour to Bosse Email, May 6, 2010, (ROA p. 3156): "Dean's strong

recommendation is to just ignore Ray and focus on closing your next round. If you want to fight with Ray once you have funding, that would be a different story.”

- aaa. While Womble maintains in this action that the filing of a declaratory judgment to clarify the rights of Charleston Labs vis a vis Dr. T’s shares was unnecessary, as early as May 7, 2010, Womble told Dr. T’s legal counsel that “Charleston Labs is willing to file suit and take any actions necessary to make this situation right, from their perspective.” See Baddour to Willbrand Email, May 7, 2010, (ROA p. 3158).
- bbb. Rutley’s advice was further emphasized in a subsequent email, in which he advised his client: “... my strong advice is to leave this issue alone until AFTER you have raised your next round.” Rutley to Baddour (cc to Bosse) Email, May 18, 2010, (ROA p. 3160).
- ccc. Also, on May 18, 2010, Willbrand emailed Baddour asking him to explain the basis on which Charleston Labs believed it was entitled to repurchase all of the shares and observing that by Willbrand’s math and per the SRA, Dr. T still owned 4.25% of the fully-diluted equity. (ROA p. 3161, ¶2). **NOTE:** This communication also served as a legal malpractice statute of limitations trigger for the lower court in granting summary judgment. **NOTE:** This communication was not copied to Charleston Labs.
- ddd. The uncertainty of Dr. T’s shares persisted following the attempted redemption. In fact, on March 10, 2011, Baddour emailed that “Clearly there is uncertainty about the legal status of those shares.” Baddour to Ryan (cc to Bosse) Email, March 10, 2011, (ROA p. 3166). In his deposition in this action, Baddour later denied that

there was ever uncertainty as to the status of Dr. T's shares. Deposition of David Baddour, (ROA p. 750, lines. 3-9).

eee. On March 15, 2011, Womble assisted Charleston Labs in revising its cap table in order to clear up any uncertainty regarding the ownership of the company. In the Common Stock Transfer Ledger, Womble referred to Dr. T's shares as having been "Repurchased by the Corporation." See March 15, 2011, Cap Table, (ROA p. 3169).

fff. **DISPUTED:** Womble points to these early communications as possible trigger dates for the running of the statute of limitations. To point to these communications as potential triggers is to misunderstand the nature of the present case in its entirety. Even if the emails suggest that Charleston Labs was on notice that it had potential claims against Dr. T (and we do not believe that the emails so indicate), it is fundamentally different to suggest that the emails would also place a reasonable and active client of Womble's on notice that its counsel had committed legal malpractice. This is discussed in greater detail in the argument below.

ggg. In or around May, 2011, the responsibility for Charleston Labs as a client of Womble was once again passed internally between lawyers, this time from David Baddour to attorney Karl Knoll ("Knoll").

hhh. After Bosse asked Knoll questions about the status of the stock and the new cap table, Knoll called Baddour and left a voicemail in which he told Baddour that:

- i. As it related to Charleston Labs, Knoll's goal was to keep "defending the team" (referring to Womble);

- ii. Knoll believed the best strategy going forward was to “hang in there and protect our reputation” and to “protect each other;”
 - iii. “I got your back;”
 - iv. Knoll had “written them off as a client;” and
 - v. Knoll didn’t believe “their crap [was] worth worrying about.” A Native audio file of the voicemail has been exchanged during discovery, (ROA Volume VIII NATIVE FILES, see 2011-05-26 - WBD_CHLAB0008175.WAV) and will be presented at the time of hearing; therefore, it is hereby incorporated by reference if transcribed herein verbatim.
- iii. **DISPUTED:** Womble had a duty to advise its client of its own errors and/or of the client’s right to review their conduct for potential legal malpractice. Womble and its attorneys decided instead on a strategy of protecting one another. Suffice it to say, no Womble attorney ever suggested to Charleston Labs that the legal uncertainty regarding the status of Dr. T’s shares had anything to do with their own potential legal malpractice.
- jjj. When Bosse continued to express confusion and to seek Womble’s advice, internally, Charleston Labs was referenced as the “worst kind of client” and the firm planned to “distance ourselves before something bad happens.” Knoll to Baddour Email, May 26, 2011, (ROA p. 3171).
- kkk. In July, 2012, Womble assisted Charleston Labs in preparing a Disclosure Statement in conjunction with the proposed issuance of securities. Knoll recommended that the Disclosure Statement include the following statement: “The

company is presently considering pursuing a declaratory judgment action as to the aforementioned 280,000 shares.” (NOTE: Referencing Dr. T’s vested shares). See Redline Draft Disclosure Statement, (ROA p. 3174).

- iii. **DISPUTED:** Again, Womble insists in defense of this legal malpractice action that it gave appropriate advice in the drafting of the SHA and the SRA, that it gave appropriate advice in the redemption of Dr. T’s shares and that the documents it prepared worked exactly as intended such that there was never uncertainty about the legal status of Dr. T’s shares. Womble further takes the position that the filing of a declaratory judgment action was unnecessary and was ultimately confirmatory of its position that it acted within the standard of care at all times. However, it was Womble who first suggested that a declaratory judgment action may be necessary to clarify the rights in Dr. T’s shares and it is the central contention of this lawsuit that no such action would have been necessary with a properly documented exercise of rights at the time of the repurchase of Dr. T’s shares. 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. The fact that Charleston Labs “won” after expending nearly \$2,000,000.00, does not negate the fact of its injury. It merely mitigates against the scope of the loss.
- mmm. Charleston Labs continued to work hard and to progress its CL-108 drug through the FDA approval process.
- nnn. On or about August 6, 2014, Charleston Labs entered into a \$650,000,000.00 distribution deal for its developmental drug. (ROA p. 3179).

- ooo. On September 22, 2015, Dr. T resurfaced with legal counsel asserting his ownership and demanding the rights of a shareholder. See Bray & Long Letter, September 22, 2015, (ROA p. 3182).
- ppp. Having received a communication from Dr. T's legal counsel, George Scott attempted to communicate with Womble in order to obtain the file and relevant documents related to the 2010 attempted repurchase of the Dr. T shares.
- qqq. On December 1, 2015, George Scott emailed Dean Rutley asking for all correspondence between Womble and Dr. T regarding the exercise of the right to repurchase. (ROA p. 3184).
- rrr. When Scott's requests for assistance went unanswered, he decided to stop by Rutley's office (which was nearby his home) and to ask Rutley personally for help in obtaining the file as they were prior professional colleagues.
- sss. **DISPUTED:** When Scott visited Rutley's office, Rutley threatened to call security if Scott did not leave the office. Deposition of George Scott, (ROA p. 122, line 7-p. 1225, line 17).
- ttt. Charleston Labs then hired Greenberg Traurig ("GT") to assist in addressing the issue with Dr. T. GT's team was led by attorney Bridget Berry ("Berry").
- uuu. Charleston Labs expressed many concerns and issues regarding the possibility that Dr. T had a valid claim of ownership, including:
- i. The potential that Charleston Labs would make misrepresentations regarding its ownership to government agencies or others;
 - ii. Potential securities violations;
 - iii. Concern among other shareholders; and

- iv. Dr. T's possible alignment with competitors, including Nigel Ferry; Deposition of Bridget Berry, (ROA p. 2084, line 11-p. 2085, line 16).
- vvv. Berry devised a plan and strategy to resolve the "many, many issues raised by the [SHA and SRA]". Most significantly, Berry came up with the legal strategy to argue that the documents were concurrent, as a result of which each did not cancel the other by virtue of the competing "entireties clauses" in the SRA and SHA. Deposition of Bridget Berry, (ROA p. 2053, lines 2-15).
- www. Rutley and Womble were not helpful to Berry and GT. Deposition of Bridget Berry, (ROA p. 2054, lines 2-9).
- xxx. Berry advised Charleston Labs to bring the declaratory judgment action, which is also what Womble had recommended. Deposition of Bridget Berry, ROA p. 2098, line 19-p. 2099, line 5).
- yyy. The declaratory judgment action was necessary because Charleston Labs was exposed to damages in the form of a) potential securities issues; b) potential issues related to the relationship with its other stockholders; c) potential issues related to Dr. T's right of access to books and records, including proprietary and confidential information; and e) the potential that proprietary information could be released to SIDIS, a competitor of Charleston Labs. Deposition of Bridget Berry, (ROA p. 2099, line 19-p. 2100, line 16).
- zzz. On the issue of ambiguity in the SRA and SHA, Bridget Berry offered the following testimony:
 - i. "And so, for example, if there had been a provision in the stockholders agreement -- and these are just examples and just based upon my

recollection, not having reviewed all of the documents that you have, only what you have provided to me in this binder today, to refresh my recollection -- for example, if the stockholders agreement had been drafted with a place for Charleston to sign and Charleston had signed, that would have taken care of one issue. If the stockholders agreement had had a sentence, for example, that said, some stockholder -- some stockholders or founding stockholders may also be entering into a separate stock restriction agreement on this date, and these two documents shall be read together, and that the company and/or that the company has rights to repurchase all stock for fair value under this stockholders agreement and concurrently the right to repurchase some shares for whatever the amount was that was stated, which was a nominal amount, that would have resolved those issues and there would not have been a bona fide dispute, and, therefore, no need for the litigation or at least no need for the litigation on those issues.” Deposition of Bridget Berry, (ROA p. 2124, line 18-p. 2126, line 15).

- ii. “There clearly was an issue relating to the stockholders agreement and the stock restriction agreement and who was the rightful owner of what once had been Dr. T’s shares. So, yes, I, on behalf of Greenberg Traurig, conducted a lot of investigation on that. Yes, I did. Deposition of Bridget Berry, (ROA p. 2141, lines 10-15).
- iii. “When I got the order granting summary judgment, I was very happy. And until I got that order, it could have, you know – I mean, we all know as litigators, it could go – we – the – we fought very, very, very hard to win

that litigation. There were many issues raised by the documents.”

Deposition of Bridget Berry, (ROA p. 2094, lines 9 -14).

- aaaa. Charleston Labs filed a Declaratory Judgment Action in United States District Court in Florida. Third Amended Complaint in the Florida action, (ROA p. 3186).
- bbbb. After full discovery and briefing, the Court issued an Order Granting Summary Judgment in favor of Charleston Labs. (ROA p. 3220).
- cccc. Dr. T vowed to appeal the Order. Subsequently, Charleston Labs entered into a settlement with Dr. T in which it paid the sum of \$250,000.00 in order to avoid the continued cost and risk of appeals and further litigation. Settlement Agreement, (ROA p. 3235).
- dddd. Over the course of the litigation Charleston Labs paid \$1,569,462.43 in attorneys’ fees and costs. Copies of the GT invoices are (ROA p. 3249-3501).
- eeee. This legal malpractice action was commenced on July 24, 2017.

ARGUMENT

DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT AGAINST A CLIENT IN A LEGAL MALPRACTICE ACTION BASED ON THE EXPIRATION OF THE STATUTE OF LIMITATIONS BY FINDING THAT THE CLIENT SHOULD HAVE KNOWN THAT HIS ATTORNEY HAD COMMITTED ERRORS IN THE EXECUTION OF AN OPTION TO REPURCHASE SHARES OF A CORPORATION EVEN THOUGH THE ATTORNEY CONTINUED TO REPRESENT THE CLIENT THROUGHOUT THE LIMITATIONS PERIOD, NEVER DISCLOSED AN ERROR AND MAINTAINED THROUGHOUT THE LIMITATIONS PERIOD AND TO THIS DAY THAT NO ERROR HAD BEEN COMMITTED IN THE STOCK REPURCHASE?

A. Statutes of limitations in legal malpractice actions.

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 causation of the client's damages by the breach. *Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 636, 760 S.E.2d 399, 407 (2014). The statute of limitations for a legal

malpractice action is three years. S.C. Code Ann. § 15-3-530(5) (2005). Under the discovery rule, the limitations period commences when 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. *Burgess v. Am. Cancer Soc’y, S.C. Div., Inc.*, 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct.App.1989) (Emphasis supplied.) “This standard as to when the limitations period begins to run is **objective rather than subjective.**” *Burgess*, 300 S.C. at 186, 386 S.E.2d at 800. (Emphasis supplied). “Therefore, the statutory period of limitations begins to run when a person *could or should have known*, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of the facts giving rise thereto.” *Id.* A cause of action does not accrue until all elements of the cause of action are present. “Under the discovery rule, the statutory limitations 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.” *Gillman v. City of Beaufort*, 368 S.C. 24, 27, 627 S.E.2d 746, 748 (Ct. App. 2006). As explained by our Court in *Stokes–Craven Holding Corp. v. Robinson*, 416 S.C. 517, 532, 787 S.E.2d 485, 492 (2016):

Thus, a claimant seeking recovery for a legal malpractice claim is constrained by two constants: (1) filing the claim within the statute of limitations, and (2) establishing the four requisite elements of his or her claim. Because a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. *See* 3 Ronald E. Mallen & Allison Martin Rhodes, *Legal Malpractice* § 23:14 (2015) (“Since a statute of limitations operates on remedies, the limitation period cannot start until the client has a cause of action that has accrued. Thus, ‘accrual’ means the existence of a legally cognizable cause of action.”).

Therefore, the true inquiry is when should Charleston Labs, which remained an ongoing and active client of Womble, have known that a) Womble breached the standard of care in its representation and that b) Womble’s actions were the cause of injury to Charleston Labs? The trial

court incorrectly concluded based upon an email that foreshadowed the possibility of a future and frivolous claim that had not yet come that Charleston Labs should have known that it had a cause of action against its attorneys.

B. Charleston Labs did not know, nor should it reasonably be expected to know, that it may have had claims against its attorneys prior to September 22, 2015.⁴

On March 16, 2010, Charleston Labs reported to Womble that “[t]hey need to get rid of Ray Takigiku, their COO, but they want to take all of his stock back (vested and unvested).” (ROA p. 3120). As of March 16, 2010, Dr. T was subject to both the SHA and the SRA. As of March 16, 2010, only the SHA would have permitted Charleston Labs to “take all of his stock back.” As a result, it was critical that Womble utilize the correct agreement and proceed according to its terms. Womble did not. When reporting the client’s directive to his supervising attorney, Womble attorney David Baddour forwarded for Rutley’s consideration a copy of the SRA only. (ROA p. 3121). In editing Dr. T’s employment termination letter for Charleston Labs, Baddour referenced neither the SRA, nor the SHA, but he indicated that the company would pay “\$2.10 for repurchase of your original 210 common stock shares at 0.0001” in a clear and erroneous reference to the SRA which provided for a buy back at the predetermined par value (as opposed to under a fair value approach in the SHA).

In the separation of Dr. T’s employment and in the redemption of his ownership, it is clear that Baddour desired for his client that Dr. T sign a release agreement. To that end, Baddour prepared a Redemption and Release Agreement and on Baddour’s advice, Charleston Labs offered a severance package to Dr. T. In explaining the situation to his client on March 25, 2010, Baddour provided the incorrect legal advice that “if Ray doesn’t agree to the package (and the contingent

⁴ The Complaint in this matter was filed on July 24, 2017, well within the three-year statute of limitations period.

\$70k payment) it is likely that he'll have a claim on the vested portion of his stock.... Again the worst case scenario seems to be that he'll ultimately be entitled to the vested portion of his stock.” (ROA p. 3139). It is important to note that it is this communication that the trial court focused upon in determining that Charleston Labs should have known it had a claim against its attorney on March 25, 2010. This advice was incorrect in that Baddour ignored the fact that under the SHA Charleston Labs had the absolute right to buy back all of Dr. T's shares at any time and for any reason. Significantly, this advice was never questioned by Charleston Labs who continued justifiably to follow the advice of its legal counsel to the letter. Baddour's errors did not end there. On March 26, 2010, Charleston Labs sent Dr. T a letter which had been edited by Baddour along with Baddour's Redemption and Settlement Agreement. (ROA p. 3147). The letter made no mention of either the SHA, nor the SRA, but instead it simply announced that the company was purchasing “your equity” for the sum of \$2.10. (ROA p. 3147). The enclosed Redemption and Settlement Agreement made reference only to the SRA. When Dr. T did not execute the Redemption and Settlement Agreement, Womble's advice was again crystal clear: “I recommend we sit tight, at least for now” (ROA p. 3155) and “Dean's strong recommendation is to just ignore Ray and focus on closing your next round.” (ROA p. 3156).⁵ In short, Womble communicated to its client either directly or by implication that Dr. T may have a “claim” against a portion of his shares, but the claim would be frivolous and should not hinder Charleston Labs' ongoing operations (ie. we can't stop someone from suing a ham sandwich).

There is a wide chasm between finding that Charleston Labs was advised that Dr. T may have a future but frivolous claim of ownership in the company, versus Charleston Labs knew or should have known that its then present and active legal counsel had committed legal malpractice.

⁵ See also (ROA p. 3160), “my strong advice is to leave this issue alone until AFTER you have raised your next round.” Rutley email to Baddour and Baker, cc to Bosse, May 18, 2010.

The lower court's order places a level of sophistication on a client in this complex corporate setting which rivals that of its learned counsel. If the logic of the lower court's order is to be followed, Charleston Labs lost the right to rely on its counsel after March 25, 2010, when Charleston Labs should have deduced for itself that Womble's errors had clouded the title to the shares it sought to recover from Dr. T. No reasonable person should be expected to deduce from these facts that attorney error was involved, especially when in the context of an ongoing fiduciary relationship the attorney is suggesting that someone (Dr. T) is asserting frivolous rights and frivolous claims which are best ignored. While we have refused to adopt the continuous representation rule in legal malpractice,⁶ it remains important to consider that Womble continued in its role as legal counsel subject to the Rules of Professional Conduct, subject to its duties of candor and communication with its client and subject to a fiduciary responsibility to report even its own errors to its client.

More importantly, Charleston Labs is entitled to the benefit of all inferences from the facts. Even if Womble told Charleston Labs that in the "worst case scenario" Dr. T "may" have a claim, Charleston Labs is entitled to the reasonable inference that Dr. T does not have a claim and/or that Dr. T will not assert a claim. This is consistent with Womble's advice to "sit tight" and do nothing about the situation involving Dr. T's shares. In this regard, Womble's argument at summary judgment was fueled in part by its misconception of the Plaintiff's claim. Womble argues that Charleston Labs expected "litigation proof" documents. As a result, when Charleston Labs was told that Dr. T may have a claim of ownership after the redemption, Charleston Labs knew or should have known that it did not receive what it expected. Absent in the record, however, is any assertion from Charleston Labs that it expected anything from Womble other than its discharge of the standard of care in the advice that it offered. Womble's smoke screen position seems to have

⁶ *Epstein v. Brown*, 363 S.C. 372, 610 S.E.2d 816 (2005); *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 787 S.E.2d 485 (2016).

misdirected the trial court into adopting the fictitious “litigation proof” argument in finding that notice of the prospects of a potential future claim was the equivalent of notice that Womble had failed in its charge. Nothing could be further from the truth. Again, the inference that Charleston Labs was entitled to at summary judgment was the inference that no claim existed and that no claim was forthcoming. This inference appeared correct for five years before Dr. T re-appeared with legal counsel on September 22, 2105.

Furthermore, if Womble believed that it committed malpractice in the drafting of the SHA and SRA **in 2008** and/or in the handling of the redemption of Dr. T’s shares **in 2010**, its fiduciary duties to Charleston Labs would have required Womble to advise its client a) of the potential conflict of interest, b) of the potential error or claim, and c) of the advisability of having Womble’s conduct reviewed by an independent attorney. Not only did Womble fail to give any such advice, it advised Charleston Labs to do nothing vis a vis Dr. T, to continue raising money and to wait and see what, if anything, Dr. T chose to do in the future. *If a well-respected law firm such as Womble did not believe it did anything wrong in 2008 or 2010, why would the law require a lay client, such as Charleston Labs’, CEO Paul Bosse to suspect legal malpractice?* The simple answer is it doesn’t.

C. Charleston Labs did not suffer any legal cognizable damage so as to create a cause of action for legal malpractice prior to September 15, 22, 2015.

Even if one were to accept that Charleston Labs should have known that Womble committed errors in the redemption of Dr. T’s shares (which proposition is vehemently rejected by Charleston Labs), “[u]nder the discovery rule, the statutory limitations 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.” *Gillman v. City of Beaufort*, 368 S.C. 24, 27, 627 S.E.2d 746, 748 (Ct. App. 2006). Thus, the question is begged: what was Charleston Labs’

injury and when did Charleston Labs know or when should it have known it was injured? The answer to the question begins with the obvious proposition that Charleston Labs did not know what it did not know. It did not know that Womble committed error and even the lower court did not find otherwise. It did not know that it was harmed, if one accepts that it was harmed at all in March, 2010. What Charleston Labs knew is that its former shareholder “may” have a future claim which he may or may not ever assert and that it should continue to operate business as usual in accordance with the advice of its counsel. What Charleston Labs further knew was that Womble did everything correctly – or so they were told and had no basis to question otherwise.

So then, what was the injury and when was it know. While Charleston Labs complains in part that it was harmed in the sense that it was lost in a sea of uncertainty and that it was exposed to contingent liabilities following the botched Dr. T redemption, it was unaware of the uncertainty at the time of the redemption of Dr. T’s shares based upon the reassurances of its counsel. Uncertainty and contingent liabilities are not legally cognizable damages. In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.4th 739, 958 P.2d 1062 (1998), the California Supreme Court explored the meaning of “actual injury” in the application of the discovery rule in legal malpractice. Like South Carolina, a cause of action for legal malpractice (as with other torts) in California requires injury. Like South Carolina, a cause of action for legal malpractice in California recognizes the discovery rule. Unlike South Carolina, the cause of action in California is statutorily tolled until “actual injury” occurs. Regardless of the mechanism, whether statutory tolling or a required element of the cause of action, the principle remains the same: a cause of action for legal malpractice does not accrue without injury.

In distinguishing “actual injury” for the purpose of triggering the running of the statute of limitations from “speculative” harm, *Jordache* offers the following discussion:

Therefore, as we have noted, the Legislature's choice of “actual injury” for the tolling provision plainly was intended to invoke *Budd*. (See, e.g., *Adams, supra*, 11 Cal.4th at p. 588, 46 Cal.Rptr.2d 594, 904 P.2d 1205 (lead opn. of Arabian, J.); *Laird, supra*, 2 Cal.4th at p. 612, 7 Cal.Rptr.2d 550, 828 P.2d 691.) The import of the change from “significant” to “actual” injury also is reasonably clear: The Legislature used the term “actual” to focus inquiry on the fact of damage; it omitted other qualifiers to preclude digressions into whether various quantities of damage trigger the limitations period. (See *Laird, supra*, 2 Cal.4th at p. 613, 7 Cal.Rptr.2d 550, 828 P.2d 691; *Foxborough v. Van Atta, supra*, 26 Cal.App.4th at p. 226, 31 Cal.Rptr.2d 525; see also 2 *Mallen & Smith, Legal Malpractice, supra*, Statute of Limitations, § 21.11, pp. 784–785.)

Budd's basic premise was that a plaintiff could not assert a cause of action for legal malpractice, and hence the limitations period should not commence, until the plaintiff sustained some damage occasioned by the attorney's negligence. (*Budd, supra*, 6 Cal.3d at pp. 200–201, 98 Cal.Rptr. 849, 491 P.2d 433.) *Budd* recognized that “actual loss or damage resulting from the professional's negligence” was an essential element of a cause of action in tort for professional negligence. (*Id.* at p. 200, 98 Cal.Rptr. 849, 491 P.2d 433.) Thus, *Budd* held that the statute of limitations began to run when the plaintiff sustained loss or damage from the attorney's negligence that allowed the plaintiff to assert a malpractice cause of action. (*Id.* at pp. 200–201, 98 Cal.Rptr. 849, 491 P.2d 433.) In section 340.6's terms, the one-year limitations period that commences when the plaintiff actually or constructively discovers the attorney's wrongful act or omission is no longer tolled after the plaintiff sustains actual injury, i.e., when the plaintiff can plead a legal malpractice cause of action.

Budd remains instructive on the test for actual injury: “If the allegedly negligent conduct ***757 **1070 does not cause damage, it generates no cause of action in *750 tort. [Citation.] The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. [Citations.] Hence, until the client suffers appreciable harm as a consequence of [the] attorney's negligence, the client cannot establish a cause of action for malpractice.” (*Budd, supra*, 6 Cal.3d at p. 200, 98 Cal.Rptr. 849, 491 P.2d 433, fn. omitted.) “The cause of action arises, however, before the client sustains all, or even the greater part, of the damages occasioned by [the] attorney's negligence. [Citations.] *Any appreciable and actual harm flowing from the attorney's negligent conduct establishes a cause of action upon which the client may sue.*” (*Id.* at p. 201, 98 Cal.Rptr. 849, 491 P.2d 433, italics added.)

Budd's discussion of the possible damages the plaintiff there incurred further illuminates the nature of actual injury. In *Budd*, the defendant attorney failed to allege a crucial defense in a third party's suit against the plaintiff and the corporation of which he was president. (*Budd, supra*, 6 Cal.3d at p. 198, 98 Cal.Rptr. 849, 491 P.2d 433.) New counsel tried unsuccessfully to rectify the defendant's omission; the trial court entered judgment against the plaintiff personally. (*Id.* at pp. 198–199, 98 Cal.Rptr. 849,

491 P.2d 433.) *Budd* said the facts presented after remand could demonstrate the plaintiff suffered damage when he paid the defendant attorney's fees, if the attorney's negligence caused these payments to exceed the value of the legal services. (*Id.* at pp. 201–202, 98 Cal.Rptr. 849, 491 P.2d 433.) The court also observed *751 that the plaintiff might have had a viable tort damage claim for the fees paid to the second attorney to untangle the defendant's error. (*Id.* at p. 202, 98 Cal.Rptr. 849, 491 P.2d 433.) In characterizing the latter fees as a type of damage that allows a malpractice cause of action to accrue, *Budd* simply recognized the established rule that attorney fees incurred as a direct result of another's tort are recoverable damages. (See *Brandt v. Superior Court* (1985) 37 Cal.3d 813, 817–818, 210 Cal.Rptr. 211, 693 P.2d 796; *Prentice v. North Amer. Title Guar. Corp.* (1963) 59 Cal.2d 618, 620, 30 Cal.Rptr. 821, 381 P.2d 645; cf. 2 Mallen & Smith, *Legal Malpractice, supra*, Damages, § 19.10, at pp. 610–612 [attorney fees as mitigation expenses recoverable in malpractice action].)⁷

***758 4 **1071 The “actual injury” provision in section 340.6, subdivision (a)(1), effectively continues the accrual rule *Budd* established. Under *Budd*, the cause of action could not accrue until the plaintiff suffered actual loss or damage resulting from the allegedly negligent conduct. (*Budd, supra*, 6 Cal.3d at pp. 200–201, 98 Cal.Rptr. 849, 491 P.2d 433.) After sustaining damages compensable in a negligence action, the plaintiff could establish a cause of action for professional negligence, and the limitations period commenced. (*Ibid.*) Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence.

567 The test for actual injury under section 340.6, therefore, is whether the plaintiff has sustained any damages compensable in an action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services. This interpretation is consistent with the plain language of the statute and the Legislature's manifest intent in enacting section 340.6. As the lead and concurring opinions in *Adams* emphasized, determining when actual injury occurred is predominantly a factual inquiry. (*Adams, supra*, 11 Cal.4th at p. 588, 46 Cal.Rptr.2d 594, 904 P.2d 1205 (lead opn. of Arabian, J.); *id.* at p. 595, 46 Cal.Rptr.2d 594, 904 P.2d 1205 (conc. opn. of Kennard, J.)) When the material facts are undisputed, the trial court can resolve the matter as a question of law in conformity with summary judgment principles. (*Id.* at pp. 592, 46 Cal.Rptr.2d 594, 904 P.2d 1205 (lead opn. of Arabian, J.))

Charleston Labs followed the advice of its attorneys and ignored Dr. T. In doing so, Charleston Labs suffered no actual harm, even if a cloud of uncertainty regarding the legal status of Dr. T's shares existed. It appeared for a time that Womble's advice was well-placed, as Dr. T

seemed to disappear from the radar screen. However, on or about August 6, 2014, it was announced publicly that Charleston Labs had secured a \$650,000,000.00 distribution deal for the new medication that had been in the research pipeline for years. (ROA p. 3179). It would seem that the news woke up the sleeping Dr. T, who soon thereafter arrived on the scene with an attorney demanding his rights as a shareholder of Charleston Labs. (ROA p. 3182). It was no longer possible to just ignore Dr. T. Charleston Labs was forced to respond to the demands of its long-departed shareholder.

Charleston Labs' first response after having learned of Dr. T's re-emergence was to reach out once again to its trusted counsel at Womble for legal assistance. By the time Dr. T resurfaced, Charleston Labs had hired attorney George Scott as in-house legal counsel. As a former Womble attorney, Scott emailed his former colleague Rutley seeking "all correspondence between Womble and Ray ... specifically, any around March of 2010 regarding any proposed settlement agreement and the Company's exercise of its right to repurchase his stock." (ROA p. 3184). After a period of non-cooperation, Scott visited Rutley at Womble's offices to request the file. Rutley threatened to call security if Scott did not leave his office. Deposition of George Scott, (ROA p. 1224, line 7-p. 1125, line 17). Charleston Labs was first damaged when Womble refused to assist it in responding to Dr. T's renewed claims of stock ownership. As a result, Charleston Labs was forced to engage other legal counsel to respond to Dr. T's position and it was through other counsel that the decision was made to undertake the declaratory judgment action. To that end, Charleston Labs hired attorney Bridget Berry ("Berry") of the Greenberg Traurig law firm.

Berry advised Charleston Labs to bring the declaratory judgment action, which is also what Womble had recommended. Deposition of Bridget Berry, (ROA p. 2098, line 19-p. 2099, line 5). The declaratory judgment action was necessary because Charleston Labs was exposed to damages

in the form of a) potential securities issues; b) potential issues related to the relationship with its other stockholders; c) potential issues related to Dr. T's right of access to books and records, including proprietary and confidential information; and e) the potential that proprietary information could be released to SIDIS, a competitor of Charleston Labs. Deposition of Bridget Berry, (ROA p. 2099, line 19-p. 2100, line 16). On the issue of ambiguity in the SRA and SHA, it was Berry who first advised Charleston Labs that "[t]here clearly was an issue relating to the stockholders agreement and the stock restriction agreement and who was the rightful owner of what once had been Dr. T's shares. So, yes, I, on behalf of Greenberg Traurig, conducted a lot of investigation on that. Yes, I did." Deposition of Bridget Berry, (ROA p. 2141, lines 10-15).

In order to clarify the legal uncertainty that surrounded the title to the disputed shares after Dr. T re-emerged with a renewed claim of entitlement, Charleston Labs filed a Declaratory Judgment Action in United States District Court in Florida. A copy of the Third Amended Complaint in the Florida action can be found at (ROA p. 3186). It was only after engaging Berry that Charleston Labs for the first time a) learned that it had been placed in a precarious legal position by the errors of its prior counsel and b) suffered legally cognizable harm such that all elements of the cause of action for legal malpractice were present.

CONCLUSION

What did Charleston Labs know and when did it know it? The lower court's finding that Charleston Labs knew or should have known that its attorneys committed error in the redemption of a departed shareholder's stock in the company presumes that Charleston Labs should have figured out for itself that its lawyers erred and do so at the very time that its lawyers were assuring Charleston Labs that everything was done correctly. Moreover, the holding suggests that a communication from counsel advising that the departed shareholder may have some future, albeit

frivolous, claim should have served somehow as a discovery trigger for the running of the statute of limitations. However, the order granting summary judgment fails to explain exactly how the communication would have caused a reasonable person to suspect malpractice, places the onus on the client to determine the nature of the defect in the transaction, if any, and deprives the client of the right to rely on its legal counsel's assurances that everything was done properly. Additionally, the lower court erred by finding that the statute of limitations had begun to run years before any actual injury was occasioned.

The record in the present case is crystal clear: Charleston Labs entrusted the repurchase of Dr. T's shares in the company to Womble; through imprecision and drafting errors, Womble created legal uncertainty as to the status of Dr. T's shares; Womble consistently maintained to its client that it had done nothing wrong and continues to maintain that position to this day; Womble advised its client to ignore Dr. T; Charleston Labs followed the advice; it became impossible to ignore Dr. T after to re-surfaced with legal counsel five years later; and Charleston Labs was harmed through the expense of the legal action and settlement which were made necessary in order to clear the title to Dr. T's shares. A cause of action does not exist without injury. Charleston Labs' injury did not begin until September 22, 2015, which is well within the statute of limitations period for this action.

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Respectfully submitted,

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September 16, 2020

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY COURT OF COMMON PLEAS
THE HONORABLE ROGER M. YOUNG, SR.

Appellate Case No.: 2020-000232

Charleston Laboratories, Inc.,

Appellant,

vs.

Womble, Carlyle, Sandridge & Rice, LLP,

Respondent.

CERTIFICATE OF COUNSEL

I, Ronald L. Richter, Jr., Esquire, attorney for Appellant Charleston Laboratories, Inc., certify that the Final Brief of Appellant Charleston Laboratories, Inc. complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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September 16, 2020