THE LAW OF
LEGAL MALPRACTICE
IN SOUTH CAROLINA

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INTRODUCTION

While it is not clear exactly when South Carolina courts first recognized a client’s malpractice cause of action against his attorney, the legal malpractice claim in our state dates back to at least the early- to mid-1800s. In Johnson v. Monro, decided by the Court of Appeals in 1835, the plaintiff retained the defendant-attorney to assist in the collection of an unpaid note held by the plaintiff. The attorney, on behalf of his client, exchanged the note for another note held by a third party whom the attorney understood to have greater assets than the original defendant. The new debtor, in fact, was insolvent and the plaintiff was not able to collect on the note. The plaintiff sued his attorney in negligence. The Court of Appeals held that “the legal undertaking of an attorney is to discharge the professional business committed to him, with a reasonable degree of care, skill and diligence.” When applied to the facts before it, the court held that the attorney-defendant had not committed any breach that had caused damage to his client.

In the more than 180 years since the court decided Monro, there have been significant developments in the law of legal malpractice in South Carolina. As is evident from the cases discussed in this book, much of that development has taken place in the last twenty years and, based upon trends in legal malpractice cases across the country, it is likely that appellate courts will continue to be called upon to decide issues relating to attorney malpractice. While it is difficult to determine with any precision the complete scope of legal malpractice claims, the American Bar Association Standing Committee on Lawyer’s Professional Liability began conducting a survey every four years on legal malpractice claims in 1985. These surveys compile information about malpractice claim activity using data received from surveyed legal malpractice insurance carriers.

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1 21 S.C.L. 8 (S.C. App. L. & Eq. 1835). We must note that the balance owed to the plaintiff under the note totaled $366.
2 Id.
3 Id.
4 Id.
5 Id.
6 Id.
INTRODUCTION

The most recent survey conducted by the ABA Standing Committee addresses claims filed between 2012 and 2015. The study found that 44,185 legal malpractice claims were filed in the United States between 2012 and 2015. The survey noted that “[w]hile the number of claims . . . is up only slightly from [the 2011 study], there is a precipitous drop in the number of claims on which zero dollars in expense or indemnity were paid.” While legal malpractice claims arising from real estate transactions were most common in the 2011 study, the 2015 study found that plaintiff’s personal injury cases were the primary source of legal malpractice claims, with real estate and family law taking the second and third spots, respectively. The study also concluded that claims arising from estate planning, bankruptcy, and family law are expected to increase, as are claims relating to transactional errors. Additionally, claims arising from administrative errors (such as calendaring mistakes) are expected to fall, while claims relating to substantive errors are expected to rise.

For better or worse, it appears legal malpractice claims—both in South Carolina and across the nation—are here to stay. This book covers the law of legal malpractice in South Carolina. It is our hope that this book will serve as a useful and accessible resource for attorneys and insurance claims professionals addressing issues related to legal malpractice in South Carolina.

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8 Id. at 11.
9 Id. at 26.
10 Id. at 11.
11 Id. at 26-27.
12 Id. at 27.
CHAPTER 1

Elements of a Claim for Legal Malpractice

Under South Carolina law, an attorney is required to render services with “the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession.” A plaintiff in a legal malpractice action must prove 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. A plaintiff’s failure to prove any of these elements will render its cause of action insufficient. Chapters 2 through 6 will address each of these elements in detail.


2 For a discussion of the limited exceptions to this requirement, see Chapter 2.


CHAPTER 2

The Attorney-Client Relationship

A. Generally

With one exception, a plaintiff asserting a legal malpractice claim under South Carolina law must establish the existence of an attorney-client relationship between the attorney defendant and the plaintiff.\(^1\) Stated differently, South Carolina courts have historically required privity between the plaintiff and the defendant in order for a legal malpractice cause of action to stand.\(^2\) For example, in *Moore, Taylor, & Thomas, P.A. v. Banks*, the Court of Appeals affirmed the dismissal of the plaintiff’s legal malpractice claim on the ground that the plaintiff’s complaint failed to allege that an attorney-client relationship ever existed.\(^3\) In that case, the plaintiff claimed the closing attorney for the sale of the real property breached a duty owed to the plaintiff by failing to withhold attorney’s fees from the proceeds which were distributed to the law firm’s client.\(^4\) The court held that the plaintiff, who had not been a client of the law firm, could not state a claim for legal malpractice.\(^5\)

*Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions* provides an additional example of the application of the attorney-client relationship requirement.\(^6\) In *Argoe*, a father and son entered into an attorney-client relationship with an attorney in an effort to protect their wife/mother from her own erratic behavior.\(^7\) The son held a power of attorney with respect to his mother.\(^8\) The

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\(^1\) See cases cited in note 3, Chapter 1, *supra*, setting forth the elements of a legal malpractice cause of action under South Carolina law, including the existence of an attorney-client relationship.


\(^3\) No. 2014-000135, 2015 WL 9080386, at *1 (Ct. App. 2015). Note that this is an unreported decision of the Court of Appeals and thus does not have precedential value.

\(^4\) *Id.*

\(^5\) *Id.*


\(^7\) *Id.* at 398, 697 S.E.2d at 553.

\(^8\) *Id.*
Chapter 2

attorney assisted the father and son in transferring a piece of property from the mother to a trust. The mother subsequently filed a legal malpractice action against the attorney, alleging the attorney had wrongfully assisted the father and son in transferring her property to the trust. The Supreme Court found that the mother was not the attorney’s client and therefore could not establish the first element of a legal malpractice cause of action.

The exception to the requirement of an attorney-client relationship that has been recognized by South Carolina courts arises in the context of an intended beneficiary of a will. Distinguishing its prior decision in Rydde v. Morris, in which the court held that “an attorney owes no duty to a prospective beneficiary of a nonexistent will,” in Fabian v. Lindsay, the Supreme Court recognized “a cause of action, in both tort and contract, by a third-party beneficiary of an existing will or estate planning document against a lawyer whose drafting error defeats or diminishes the client’s intent.” With respect to a tort cause of action, the court adopted a balancing test to determine whether an attorney may be liable to a third party not in privity with the attorney. The balancing test requires the court to consider “the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury, and the policy of preventing future harm.”

With respect to a contract cause of action, the court recognized that a third-party beneficiary to a contract “may enforce the contract if the contracting parties intended to create a direct, rather than

9 Id.
10 Id. at 399, 697 S.E.2d at 554.
11 Id. at 400, 697 S.E.2d 555. Whether the attorney could be liable to the mother under a different theory concerns an attorney’s liability to a third party, discussed infra in Chapter 7.
14 Id. at 491, 765 S.E.2d at 141.
15 Id. at 485, 765 S.E.2d 137.
The Attorney-Client Relationship

an incidental or consequential, benefit to such third person.”\textsuperscript{16} The court determined that a named beneficiary in a will should be permitted to recover against an attorney under a third-party beneficiary to a contract theory.\textsuperscript{17}

The exception to the requirement of an attorney-client relationship as articulated by the \textit{Fabian} court is limited to an intended beneficiary of an existing estate planning document. To date, South Carolina courts have specifically declined to extend an exception to other areas. For example, in \textit{Rydde v. Morris}, as discussed above, the Supreme Court held that an attorney does not owe a duty to a prospective beneficiary of a non-existent will.\textsuperscript{18}

In \textit{Argoe}, the court affirmed summary judgment in favor of the attorney-defendant because the plaintiff failed to show that she had formed an attorney-client relationship with her son’s attorney, even though the son was acting as his mother’s power of attorney.\textsuperscript{19} The \textit{Argoe} majority “vehemently oppose[d]” the dissent’s belief that an attorney may be liable to “those in privity with his or her client.”\textsuperscript{20}

In \textit{Spence v. Wingate}, the Supreme Court recognized that a former client may have a claim for breach of fiduciary duty against an attorney, but did not recognize a legal malpractice claim arising from an incident that occurs after the attorney-client relationship has ended unless a new attorney-client relationship had been formed.\textsuperscript{21}

\textsuperscript{16} \textit{Id.} at 488, 765 S.E.2d at 139.

\textsuperscript{17} \textit{Id.} at 492, 765 S.E.2d at 141. In so holding, the court cited the \textit{Restatement (Second) of Contracts} § 302 which states that the grant of standing to a narrow class of third-party beneficiaries is appropriate “where the intent to benefit the plaintiff is clear and the promise (testator) is unable to enforce the contract.” \textit{Id.} at 489, 765 S.E.2d at 140.

\textsuperscript{18} 381 S.C. at 645, 675 S.E.2d at 432.

\textsuperscript{19} 388 S.C. at 398-401, 697 S.E.2d at 553-55.

\textsuperscript{20} \textit{Id.} at 405, 697 S.E.2d at 556.

Because South Carolina has recognized that a named beneficiary in a will may be able to recover against the drafting attorney under a third-party beneficiary to a contract theory, it is possible that South Carolina courts could extend this theory to permit other third-party beneficiaries in addition to those named in wills and other estate planning documents to pursue claims against attorneys. For example, the majority of states that have addressed the issue have permitted an insurer to sue a negligent attorney it retained to represent the insured.\textsuperscript{22} Of the states that have addressed the issue, only Michigan and Texas have declined to grant the insurer standing.\textsuperscript{23} It is unclear, however, how a South Carolina court would rule on this issue.\textsuperscript{24}

B. Forming the Attorney-Client Relationship

Given the importance of the existence of an attorney-client relationship in a legal malpractice action, it is critical to understand both the formation and the termination of the attorney-client relationship. In South Carolina “[a] person attains the status of ‘client’ when that person seeks legal advice by communicating in confidence with an attorney for the purpose of obtaining such advice.”\textsuperscript{25} The client must seek the advice with the intention of possibly employing the attorney in

\textsuperscript{22} See, e.g., Hartford Ins. Co. of Midwest v. Koeppel, 629 F. Supp. 2d 1293, 1301 (M.D. Fl. 2009) (citing cases from other jurisdictions holding that an insurer has standing to sue an attorney hired to represent an insured).

\textsuperscript{23} Id. at 1299 (citing Atlanta Int’l Ins. Co. v. Bell, 475 N.W.2d 294, 29 (Mich. 1991) and Safeway Managing Gen. Agency, Inc. v. Clark & Gamble, 985 S.W.2d 166, 168 (Tex. App. 1998)).

\textsuperscript{24} On February 9, 2017, the Supreme Court held oral arguments on whether an insurance company may bring a legal malpractice claim against an attorney it hired to represent an insured. At the time of the publication of this book, the court has not issued a ruling in that matter. Sentry Select Ins. Co. v. Maybank Law Firm, LLC, No. 2016-001351 (S.C.).

the future, regardless of whether the attorney is actually hired. When determining whether an attorney-client relationship has been formed, a court will examine the facts of the particular case at hand. Although a signed retainer agreement can serve as evidence of an attorney-client relationship, it is not essential to the formation of such a relationship.

When determining whether an attorney-client relationship has been formed, the court applies the subjective standard of whether the potential client has placed “a special confidence” in the attorney. In Hotz v. Minyard, for example, a daughter brought a lawsuit for breach of fiduciary duty against the attorney who drafted her father’s will. The father had requested that the attorney not disclose to anyone the existence and contents of his second will, which was less favorable to the daughter than his first will. Subsequently, the daughter met with the attorney on a few occasions to discuss her father’s will and the attorney allegedly misled her into believing the first will was still operative. The attorney had performed legal services for the family’s businesses in which the daughter played a significant role. The Supreme Court held that although the attorney did not represent the daughter individually, he had formed an attorney-client relationship with the daughter through his work for the family’s businesses and his personal interactions with the daughter. The court held the attorney owed a duty to the father not to disclose the second will, but also owed a duty to the daughter to “deal with her in good faith and not actively misrepresent the first will.”

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26 Id. (citing People v. Canfield, 12 Cal. 3d 699, 527 P.2d 633 (1974)).


30 Id. at 229, 403 S.E.2d at 636-37.

31 Id. at 227-28, 403 S.E.2d at 635-36.

32 Id. at 228, 403 S.E.2d at 636.

33 Id. at 227, 403 S.E.2d at 635.

34 Id. at 230, 403 S.E.2d at 637.

35 Hotz, 304 S.C. at 230, 403 S.E.2d at 637.
Chapter 2

*Ellis v. Davidson* provides another instructive example. In *Ellis*, the plaintiff entered into an agreement to form a surveying corporation with a lawyer who had previously been a partner in the defendant law firm. The agreement stated that in addition to investing in the corporation, the lawyer and his firm would also be responsible for handling all the legal aspects of the corporation. Sometime after the formation of the corporation, the lawyer retired from practicing law and sold his interest in the corporation to his law partners. The plaintiff and the new shareholders soon had disagreements about how to run the corporation, which led the plaintiff to attempt to buyout their shares. During the buyout negotiations, the lawyers effectively shut down the original corporation and formed a new surveying corporation on their own. The plaintiff testified to his belief that the firm was representing both him and the original corporation in the buyout negotiations. The court found there was sufficient evidence that an attorney-client relationship existed between the law firm and the original corporation to survive the law firm’s motion for summary judgment. The holding in *Ellis* exemplifies how courts will look subjectively at the plaintiff’s entrustment and confidence in the lawyer when deciding whether an attorney-client relationship exists. Although it may have seemed evident to the lawyers that they were not representing the adverse party in the buyout negotiations, the lawyers still should have notified the plaintiff that they would not be representing him in that particular matter and informed him about the advisability of consulting other counsel.

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37 *Id.* at 514-15, 595 S.E.2d at 820.

38 *Id.*

39 *Id.* at 515, 595 S.E.2d at 820.

40 *Id.* at 516, 595 S.E.2d at 820.

41 *Id.* at 516, 595 S.E.2d at 820-21.

42 *Ellis*, 358 S.C. at 520, 595 S.E.2d at 823. The new shareholders and the law firm had also filed corporate documents for the original corporation after they had acquired an interest and had advised the original corporation on a workers’ compensation issue.

43 *Id.* at 521, 595 S.E.2d at 823.
Real estate transactions are fertile ground for confusion surrounding the existence of attorney-client relationships.\textsuperscript{44} In McNair v. Rainsford, two parties to a real estate transaction originally agreed that the attorney, who had done work for the seller in the past, would “close it for both of [them].”\textsuperscript{45} However, the purchaser eventually hired his own attorney to represent him at the closing.\textsuperscript{46} The purchaser testified that he believed the attorney who was originally to close the transaction for both parties had been representing the seller during the real estate transaction.\textsuperscript{47} The purchaser brought a legal malpractice action against that attorney. The attorney, in defending the claim, argued he had only acted as a scrivener to the real estate closing and, therefore, had not formed an attorney-client relationship with either party.\textsuperscript{48} The court found a factual dispute concerning whether an attorney-client relationship existed, finding that if the purchaser’s allegations were true, an attorney-client relationship had been formed.\textsuperscript{49}

C. Terminating the Attorney-Client Relationship

The attorney-client relationship exists until the relationship has been terminated.\textsuperscript{50} Thus, to avoid ongoing duties to his client, an attorney must properly terminate the attorney-client relationship.\textsuperscript{51} The South Carolina Rules of Professional Conduct present a number of scenarios in which an attorney may terminate his representation of a client.\textsuperscript{52} The Rules also provide that a lawyer must comply with any laws which require him to give notice to or obtain permission from the appropriate court when terminating a relationship with a client.\textsuperscript{53} If a court orders a lawyer to continue representing a client, then the lawyer is compelled

\textsuperscript{44} See, e.g., Rainsford, 330 S.C. at 350, 499 S.E.2d at 497 (holding there was a factual dispute concerning whether the attorney had formed an attorney-client relationship or simply acted as a scrivener). For additional discussion on this topic, see C. Joseph Roof, Who Speaks for the Seller? Ethical Obligations at the Residential Closing, S.C. Law., NOV/DEC 1993.

\textsuperscript{45} Id. at 338, 499 S.E.2d at 491.

\textsuperscript{46} Id. at 339, 499 S.E.2d at 492.

\textsuperscript{47} Id. at 344, 499 S.E.2d at 494.

\textsuperscript{48} Id. at 348, 499 S.E.2d at 496.

\textsuperscript{49} Id. at 350, 499 S.E.2d at 497.


\textsuperscript{51} Id.

\textsuperscript{52} S.C. App. Ct. R. 407, Rule 1.16(b).

\textsuperscript{53} S.C. App. Ct. R. 407, Rule 1.16(c).
to do so despite a good reason to terminate the relationship. Additionally, a lawyer may not terminate an attorney-client relationship unilaterally, for example, by letting another lawyer handle the case. In *Spence v. Wingate*, the Supreme Court recognized that duties owed to former clients are not limited to those stated in the Rules of Professional Conduct and that additional duties may be owed based upon the facts of each particular case.

In *Tuten v Joel*, an attorney licensed in Georgia opened an office in South Carolina and hired an attorney who was licensed in South Carolina to handle cases in that office. The Georgia attorney later decided to close his South Carolina office while several cases handled by that office were still ongoing. The South Carolina attorney sent a letter to a client informing the client that the Georgia attorney would no longer be maintaining an office in South Carolina. The letter stated that the ongoing case would not be affected because the South Carolina attorney had been handling the case the entire time. The letter also notified the client that the Georgia attorney would receive 1/3 of the fees for the case. The Court of Appeals held that the Georgia attorney had not properly terminated the attorney-client relationship and therefore still owed a duty of care to the client. The court held that an attorney must, at the very least, communicate his desire to terminate the attorney-client relationship in a way that the client understands that the attorney will no longer represent him. Furthermore, the attorney must take affirmative action to put the client on notice and may not put the client on notice by simply discontinuing to provide legal services.

54 S.C. App. Ct. R. 407, Rule 1.16(c).
56 395 S.C. at 161, 716 S.E.2d at 927.
57 410 S.C. at 106-07, 763 S.E.2d at 55-56.
58 *Id.* at 107, 763 S.E.2d at 56.
59 *Id.* at 108, 763 S.E.2d at 56.
60 *Id.*
61 *Id.*
62 *Id.* at 109-10, 763 S.E.2d at 57.
63 *Tuten*, 410 S.C. 110, 763 S.E.2d at 57.
64 *Id.* at 114-115, 763 S.E.2d at 60.
An attorney also must be careful when delegating tasks to other attorneys or limiting the scope of his involvement in a case. In *Johnson v. Alexander*, the Supreme Court held that an attorney was liable for malpractice to a client whom the attorney represented in a real estate closing. In that case, the attorney relied on an improperly performed title search given to him by the client’s previous attorney. The court held that the second attorney was responsible for ensuring that the title search he received from the previous attorney was done properly.

If an attorney decides to withdraw from representing his client, it is important for him to be mindful about the negative impact this might have on the client. “An attorney who undertakes the representation of a client in a cause impliedly agrees to see the case through to its termination and is not at liberty to abandon it without reasonable cause.” Some commentary suggests that if an attorney withdraws from a case without allowing the client ample time to find alternative counsel, the attorney could be liable for malpractice based solely on the withdrawal.

Although an attorney has properly terminated the attorney-client relationship, the attorney continues to owe some duties to the former client. While a claim for legal malpractice will not arise from conduct occurring after the termination of the attorney-client relationship, a former client may attempt to sue under a related theory, such as breach of fiduciary duty.

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66 *Id.* at 199, 775 S.E.2d at 698.
67 *Id.* at 203, 775 S.E.2d at 700-01.
71 Similar claims to legal malpractice, such as breach of fiduciary duty, are discussed *infra* in Chapter 6.
CHAPTER 3

Breach of Duty

A. Generally

An attorney owes his client a duty of care, namely to render services with “the degree of skill, care, knowledge, and judgment usually possessed and exercised by members of the profession.”1 The breach of this duty is a necessary element of a legal malpractice claim.2 The plaintiff has the burden of proving that the defendant breached the standard of care.3 In South Carolina, the standard of care applicable to attorneys is consistent state-wide and the Supreme Court has rejected a “locality rule,” which would allow for different applicable standards of care for different locales.4

South Carolina lawyers are not expected to be able to guarantee results in order to meet the relevant standard of care.5 The Supreme Court has specifically refused to recognize a claim for breach of express warranty to achieve a specific result as a basis for liability in a legal malpractice claim.6 In *Holy Loch Distributors, Inc. v. Hitchcock*, the court determined that it would be detrimental to the legal

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2 See cases cited in note 3, Chapter 1, supra, setting forth the elements of a legal malpractice cause of action under South Carolina law, including the breach of a duty.


4 *Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 437, 472 S.E.2d 612, 614 (1996) (holding that there is not a ‘locality rule’ as it relates to the standard of care for legal malpractice).

5 In fact, the South Carolina Rules of Professional Conduct expressly caution attorneys against communications to clients or prospective clients that suggest a particular result. See Rule 7.1(b), RPC. For a discussion of the interplay between the standard of care and the Rules of Professional Conduct, see Section E infra.

profession to create a strict liability claim because it might deter attorneys from discussing potential results with clients.\(^7\) A malpractice claim against an attorney who failed to achieve a guaranteed result must still be analyzed as a breach of the duty of care.\(^8\)

B. The Requirement of Expert Testimony

S.C. Code Ann. § 15-36-100 requires a plaintiff to present expert evidence regarding the alleged “negligent act or omission” at the time the claim is filed.\(^9\) The contemporaneous filing requirement does not apply in cases where the plaintiff has a good faith belief that he would be unable to prepare the expert affidavit before the statute of limitations for the claim expires.\(^10\)

The defendant may move to dismiss the plaintiff’s complaint for failure to state a claim if the defendant alleges, with specificity, that the plaintiff’s expert affidavit is defective.\(^11\) The court must allow the plaintiff to cure, or respond to, the alleged defect in the expert affidavit within thirty days of service of the motion to dismiss, or longer if the court finds that justice so requires.\(^12\) If the plaintiff fails to cure or respond within the allotted time, the plaintiff’s complaint is not subject to renewal.\(^13\)

\(^7\) Id.

\(^8\) Id.

\(^9\) See Chase v. LOP Capital, LLC, 2014 WL 4955267, *8 n.4 (D.S.C. 2014) (stating that typically the expert affidavit must be attached to the original filing in a legal malpractice case.).


\(^12\) Id.

\(^13\) S.C. Code Ann. § 15-36-100(F).
Importantly, the defendant must file a motion to dismiss based on an alleged defect with the expert affidavit contemporaneously with their initial responsive pleading. Courts in South Carolina are reluctant to allow the defendant to raise such a motion at a later stage in the litigation, even in situations where the defendant does not discover the alleged defect until after they have filed their initial responsive pleading. For example, in *First Reliance Bank v. Romig*, the defendants moved to dismiss the plaintiff’s legal malpractice claim based on a defect in the expert affidavit, alleging that the plaintiffs had given their expert the wrong insurance policy. In that case, the plaintiffs conceded that they were not covered under an insurance policy created in 2009, however, they brought a claim for legal malpractice based on coverage under an insurance policy from 2006. The plaintiffs mistakenly gave their expert a copy of the 2009 insurance policy, upon which he formed his opinion that the defendants had breached the standard of care. The defendants later discovered the defect in the plaintiffs’ expert affidavit during the discovery phase of the litigation, after they had filed an answer to the plaintiffs’ complaint. The court refused to create an exception to the contemporaneous filing requirement for defendants, and concluded that the legislature did not intend to

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**PRACTICE POINTER:**

To avoid a motion to dismiss, the expert affidavit filed with the complaint should be as specific as is reasonably possible with regard to the negligent conduct. Notably, in the context of a medical malpractice case, the Supreme Court has held that the expert affidavit does not have to contain an opinion regarding proximate causation. *Grier v. AMISUB of S.C., Inc.*, 397 S.C. 532, 538, 725 S.E.2d 693, 697 (2012). The plaintiff is not restricted to the initial opinions, however, and the theories upon which the plaintiff ultimately relies may be changed during the course of discovery. Still, generic assertions of negligence should be avoided. It is also wise for the expert affidavit to indicate that the opinions contained therein are subject to amendment or supplementation as discovery proceeds.

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15 See *First Reliance Bank v. Romig*, No. 4:14-cv-00084-BHH, 2014 WL 5644602 (D.S.C. Nov. 4, 2014) (refusing to create an exception in instances where discovery of the alleged defect did not occur until a later date.).

16 Id. at *1.

17 Id. at *7.

18 Id.

19 Id. at *8.
allow discovery prior to the filing of the initial responsive pleading. Therefore, a motion to dismiss for failure to state a claim, based on an alleged defect in the plaintiff’s expert affidavit, must be limited to defects that exist on the face of the affidavit.

With limited exceptions, the plaintiff in a legal malpractice action also is required to offer expert testimony in order to prove his claim. The specific elements of the legal malpractice cause of action that the plaintiff must prove using expert testimony is somewhat unclear. Several South Carolina cases have held that the plaintiff “must generally establish the standard of care by expert testimony.” However, in Holmes v. Haynsworth, Sinkler & Boyd, P.A., the Supreme Court held that “a claimant must rely on expert testimony to establish both the standard of care and the deviation by the defendant from such standard.” The Holmes court went on to say the plaintiff “must establish, through expert testimony, the following: (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 plaintiff’s damages by the breach.” Further complicating the issue is the courts’ recognition that the success

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20 Id.

21 Id.

22 See discussion of exceptions in following section.


25 Id. (emphasis added) (citing Hall, 349 S.C. at 174, 561 S.E.2d at 656). Earlier in the same year that the Supreme Court decided Holmes, the Court of Appeals found “[t]here is no South Carolina precedent setting forth a per se requirement for expert evidence on the elements of causation or damages.” Powell v. Potterfield, No. 2014-UP-114, 2014 WL 2582765, at *2 (Ct. App. Mar. 19, 2014).
of the underlying case is a matter of law,\textsuperscript{26} for which expert testimony typically is not required or appropriate.\textsuperscript{27} Thus, whether it is required (or even permissible) for an expert witness to testify concerning what should have happened in the underlying case is an unresolved issue in South Carolina. While \textit{Manning v. Quinn} would suggest it is not, the Supreme Court’s decision in \textit{Holmes} would suggest it is. \textit{Doe v. Howe} contains language that could support either position.\textsuperscript{28} Additionally, in \textit{Hall v. Fedor}, the Court of Appeals affirmed the trial court’s order granting summary judgment in favor of the attorney-defendant in which the trial court relied heavily on expert testimony concerning what result he would have obtained in the underlying case.\textsuperscript{29} Because the legal malpractice plaintiff has the burden of proving each element of his cause of action, it likely is advisable for the plaintiff to at least attempt to proffer expert testimony on the issue of proximate causation.

\section*{C. Exceptions to the Requirement of Expert Testimony}

One exception to the expert testimony requirement is based on “common knowledge.”\textsuperscript{30} This exception applies when the subject matter of the breach of duty is something of common knowledge to laypersons.\textsuperscript{31} However, the applicability of this exception depends on the facts of each particular case, and “the plaintiff must offer evidence that rises above mere speculation or conjecture.”\textsuperscript{32} For example, the

\begin{footnotesize}
\begin{enumerate}
\item See \textit{Doe v. Howe}, 367 S.C. 432, 444 n.18, 626 S.E.2d 25, 31 (Ct. App. 2005) (“Under the case-within-a-case concept, the test is objective. Therefore, the test is not what the outcome \textit{would have been}, but rather what it \textit{should have been.}”) (quoting Wilburn Brewer, Jr., \textit{Expert Testimony in Legal Malpractice Cases}, 45 S.C. L. Rev. 727, 766 (1994)); see also \textit{Manning v. Quinn}, 294 S.C. 383, 386, 365 S.E.2d 24, 25 (1988) (“The likelihood of success of the proposed actions is a question of law...”).
\item Compare the following language from the \textit{Doe} opinion: “The question of the success of the underlying claim . . . is a question of law” and “Notably absent from the record in this case . . . is any mention of settlement value from Flowers or any other expert that was brought to the trial judge’s attention.”
\end{enumerate}
\end{footnotesize}
Chapter 3

common knowledge exception might apply when an attorney fails to comply with the applicable statute of limitations. But even then, a court may determine that, due to the complexity of the facts in the case, expert testimony is necessary to establish the standard of care regarding compliance with the statute of limitations. Based upon court precedent, the common knowledge exception is narrowly construed and should be cautiously invoked.

For example, in Cianbro Corp. v. Jeffcoat and Martin, the South Carolina District Court held that the common knowledge exception did not apply when an attorney allowed the applicable statute of limitations in a mechanic’s lien foreclosure action to run as a result of his misinterpretation of the statute. In an appeal of the underlying action, the Supreme Court held that the attorney’s interpretation of the statute was incorrect and the statute of limitations had already lapsed. Nonetheless, in the subsequent legal malpractice action, the court found that the attorney’s reliance on his own interpretation of the statute could have been reasonable, especially given the differing interpretations of the statute and held that expert testimony was necessary to establish how a competent attorney should have acted under the same circumstances.

In Hall v. Esquire, the Court of Appeals held that expert testimony was necessary to establish the standard of care regarding the statute of limitations, despite the plaintiff’s argument that the case fell within the common knowledge exception. The court determined that many considerations were involved in the filing of a lawsuit including, “what type of suit to file, when it was most beneficial to file suit, and against whom the suit could be filed.” Therefore, the court held

33 Id. (stating that as a general rule it is considered negligence for an attorney not to commence an action within the statute of limitations).
34 Id.
35 Id.
36 Id. at 789 (citing the ruling in Preferred Savings and Loan Association whereby the majority, over a strong dissent, held that the statutory limit for filing a mechanic’s lien was six months; indicating that the law was unclear at the time the underlying action was commenced.).
37 Id.
39 Id. at *3.
that expert testimony was necessary to establish the standard of care owed by the attorney, particularly because the statute of limitations had run on only one of multiple different potential claims that the plaintiff could have brought.\textsuperscript{40}

In \textit{Southeastern Housing Foundation v. Smith}, the Court of Appeals was not convinced by the plaintiff’s argument that the defendant’s conduct was a clear violation of the statute related to conflicts of interest for housing authority employees and, thus, fell within the common knowledge exception.\textsuperscript{41} The plaintiff in that case was a nonprofit corporation that provided housing to lower income families.\textsuperscript{42} The defendant was the former executive director and attorney for the nonprofit who helped it purchase and finance affordable housing properties.\textsuperscript{43} During the course of his employment, the defendant violated a statute which expressly forbids employees of a housing authority from acquiring an interest in any properties that are affiliated with the housing authority.\textsuperscript{44} The court held that although the defendant may have been liable to some extent for violating the statute, expert testimony was still necessary to show that the defendant had breached a fiduciary duty owed to the plaintiff as the result of an attorney-client relationship.\textsuperscript{45}

The common knowledge exception is not governed by a bright line rule because even the most apparently obvious acts of negligence must be assessed in light of the facts of the particular case.\textsuperscript{46} Consequently, even when an attorney’s conduct appears to be egregious, a court is likely to require expert testimony to establish the standard of care if the underlying claim involves a technical area of law.\textsuperscript{47} For example, in \textit{Weil v. Killough}, the defendant-attorney failed to notify the plaintiff about a maintenance fee, thereby causing the plaintiff to lose his patent for

\begin{itemize}
\item \textsuperscript{40} See \textit{id.} at *4.
\item \textsuperscript{42} \textit{Id.} at 628.
\item \textsuperscript{43} \textit{Id.} at 630.
\item \textsuperscript{44} \textit{Id.} (holding that the defendant had clearly violated S.C. Code Ann. § 31–3–360 (Supp. 2007)).
\item \textsuperscript{45} \textit{Id.}
\item \textsuperscript{46} See Brewer, \textit{supra} note 26 at 739 (listing different types of cases that typically fall within the common knowledge exception).
\item \textsuperscript{47} See \textit{Weil v. Killough}, No. 2:12-cv-00856-DCN, 2012 WL 3260395, at *4-5 (D.S.C. Aug. 8, 2012) (holding that federal patent law is an area so foreign to laypersons that expert testimony is necessary).
\end{itemize}
an outdoor grill.\textsuperscript{48} Although this may seem to clearly deviate from the standard of care, the South Carolina District Court held that, due to the complexity of federal patent law, expert testimony was necessary to establish the standard of care.\textsuperscript{49} Additionally, the Supreme Court has suggested that legal malpractice cases that arise from an underlying issue of federal anti-trust law will almost always require expert testimony to establish the standard of care.\textsuperscript{50} Furthermore, bankruptcy law is considered an area of law that is “beyond the common knowledge and experience of most lawyers, let alone laypersons.”\textsuperscript{51} Due to the difficulties of discerning the exact scope of the common knowledge exception, it is advisable for the legal malpractice plaintiff to prepare to offer expert testimony regarding the attorney-defendant’s alleged deviation from the applicable standard of care.

Another scenario in which the expert testimony requirement can be avoided is when the defendant-attorney admits to the standard of care owed to the plaintiff.\textsuperscript{52} However, admission to the standard of care does not equate to an admission of wrongdoing.\textsuperscript{53} The Court of Appeals has held that “the purpose of establishing the appropriate standard of care is simply to arm the finder of fact with the appropriate criteria by which to judge the defendant’s conduct.”\textsuperscript{54} In \textit{Mali v. Odom}, the defendant admitted that he owed the plaintiff a duty. Expert testimony was, therefore, not necessary to establish the standard of care.\textsuperscript{55} In \textit{Sims v. Hall}, the defendant admitted that “counsel of record” owed a duty to the plaintiff but denied that he was the plaintiff’s “counsel of record.”\textsuperscript{56}

\textsuperscript{48} Id. at *1.

\textsuperscript{49} Id. at *5.


\textsuperscript{53} \textit{Sims}, 357 S.C. at 297.

\textsuperscript{54} Id.

\textsuperscript{55} \textit{Mali}, 295 S.C. at 81.

\textsuperscript{56} Id. (Focusing on whether defendant was the “counsel of record” because defendant admitted that counsel owed a duty).
D. Qualifications of Experts

An expert in a legal malpractice case must have knowledge or experience about the legal profession. Pursuant to S.C. Code Ann. § 15-36-100(A), courts will look to the qualifications of an expert with respect to the specific area of law involved in the case when determining whether to admit the expert’s testimony. The plaintiff in a legal malpractice case may be permitted to testify as an expert, but only if he satisfies the requirements of Rule 702 of the South Carolina Rules of Evidence.

South Carolina courts have not been consistent when determining whether an offered expert is qualified to testify. For example, in Holmes v. Haynsworth, Sinkler & Boyd, P.A., the Court of Appeals held that the plaintiff was not qualified as an expert on the standard of care for anti-trust lawyers. Although the plaintiff in that case was a licensed attorney, she had not practiced law in over thirty years and had never handled a federal anti-trust case.

The Supreme Court reached a different conclusion in Smith v. Haynsworth, Marion, McKay & Geurard. In that case, the court held that the trial court had erred in excluding the testimony of the plaintiff’s expert witness, despite the fact that the expert was not licensed to practice law in the state and was not an expert.

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57 For example, the Court of Appeals of South Carolina has held that non-lawyer title abstractors are not qualified to testify as to the standard of care required by real estate attorneys. Cummings v. Newby, Pridgen, & Sartip, No. 2004-UP-058, 2004 WL 6248970, at *2 (Ct. App. Jan. 29, 2004).


59 Holmes, 408 S.C. at 635.

60 The rules provide that: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Rule 702, SCRE.

61 Holmes, 408 S.C. at 635.

62 Id.
in real estate law.\textsuperscript{63} The court reached its holding by concluding that the offered expert’s knowledge of legal ethics was sufficient for him to form an expert opinion about how a real estate lawyer should interact with his clients.\textsuperscript{64}

Nonetheless, even if an expert possesses the requisite qualifications, a court may determine that his testimony fails to adequately establish the standard of care for an attorney in a similar situation to the defendant-attorney in the malpractice case.\textsuperscript{65} For example, in \textit{Harris Teeter, Inc. v. Moore & Van Allen, PLLC}, the Supreme Court held that the testimony of the plaintiff’s two expert witnesses was too generalized, and, therefore, it failed to show that the defendant had breached the duty of care.\textsuperscript{66} The court specifically rejected the experts’ testimony because the testimony focused on how the defendant could have acted differently in hindsight, rather than focusing on how a competent attorney should have acted at the time the events were unfolding.\textsuperscript{67}

The trial court has discretion to determine whether an expert is qualified and whether the expert’s testimony should be admitted.\textsuperscript{68} An appellate court will overturn a lower court on this issue only if there is a finding that the lower court abused its discretion.\textsuperscript{69} “An abuse of discretion occurs when the [lower] court’s rulings ‘either lack evidentiary support or are controlled by an error of law.’”\textsuperscript{70} To reverse a trial court’s ruling on the admissibility of expert testimony, the court must find error as well as prejudice resulting from the error.\textsuperscript{71} The Court of Appeals has

\textsuperscript{63} \textit{Smith}, 322 S.C. at 438.

\textsuperscript{64} See id.

\textsuperscript{65} See \textit{Harris Teeter, Inc. v. Moore & Van Allen, PLLC}, 390 S.C. 275, 289, 701 S.E.2d 742, 749 (2010) (holding that the plaintiff’s expert did not adequately establish the standard of care before jumping to the conclusion that the defendant had breached their duty.).

\textsuperscript{66} \textit{Id.}

\textsuperscript{67} \textit{Id.}


\textsuperscript{69} \textit{Id.} at 635.

\textsuperscript{70} \textit{Id.} (quoting \textit{Graves v. CAS Med. Sys., Inc.}, 401 S.C. 63, 735 S.E.2d 650 (2012)).

found that the plaintiff in a legal malpractice case was prejudiced by the trial court’s exclusion of expert testimony because such testimony typically is critical to the plaintiff’s claim.\(^{72}\)

When a plaintiff has introduced expert testimony to establish the standard of care, the defendant may introduce expert testimony to counter the plaintiff’s evidence.\(^{73}\) If both sides in a legal malpractice case present conflicting testimony and a jury determines that the defendant’s expert made a stronger case for conformity to the standard of care than the plaintiff’s expert did for nonconformity, the plaintiff’s claim will fail for lack of showing a breach of duty.\(^{74}\) In *RFT Management Co., v. Tinsley & Adams L.L.P.*, a significant issue was competing expert testimony.\(^{75}\) In that case, the plaintiff argued on appeal that the trial court erred in denying its motion for JNOV on its legal malpractice claim citing two specific instances in which the defendant had not acted in accordance with the applicable standard of care.\(^{76}\) The first basis for the plaintiff’s claim was that there was an unwaivable conflict of interest and the second basis was that the defendant failed to disclose material information, provided false and misleading documents, and assisted in closing a “flip transaction.”\(^{77}\) The Supreme Court, however, refused to consider the arguments presented in the second basis for the malpractice claim because these arguments were raised for the first time on appeal. Because the parties had previously agreed that whether there was an unwaivable conflict of interest was a question of fact as opposed to a question of law,\(^{78}\) the Supreme Court held that the trial court had not abused its discretion and upheld the jury determination that the defendant had conformed with the applicable standard of care.\(^{79}\)

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\(^{72}\) See *id.* at 526 (holding that the trial court’s error in excluding expert testimony prejudiced the plaintiff’s case because it was crucial to proving the breach of duty element).


\(^{74}\) See *RFT Mgmt Co.*, 399 S.C. at 335 (showing that jury agreed with defendant’s expert witness that defendants’ conduct conformed with the applicable standard of care).

\(^{75}\) *Id.* at 335.

\(^{76}\) *Id.* at 331.

\(^{77}\) *Id.*

\(^{78}\) *Id.*

\(^{79}\) *Id.* at 335.
E. Relevance of the Rules of Professional Conduct to an Alleged Breach of Duty

South Carolina has adopted Rules of Professional Conduct that are substantially similar to the Model Rules of Professional Conduct. Generally, there are four different approaches that jurisdictions have taken regarding the extent to which the Rules should affect liability in legal malpractice cases. First, some jurisdictions have held that the Rules establish a duty of care and that violation of a rule is negligence per se. Second, a smaller number of courts have decided that a violation of the Rules creates a rebuttable presumption of legal malpractice. Third, very few courts have held that ethical standards are inadmissible in a legal malpractice action. Finally, a majority of jurisdictions allow an expert to discuss the Rules but only if the violation of a rule would also constitute a breach of duty.

The preamble to the South Carolina Rules specifically states that “[v]iolation of a rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.” Although the rules are silent on the matter, the Supreme Court has joined the majority of jurisdictions in holding that “the RPC may be relevant and admissible in assessing the legal duty of an attorney in a malpractice action.” In Smith v. Haynsworth, Marion, McKay & Geurard, the Supreme Court expressly adopted the position of the Supreme Court of Georgia in Allen v. Lefkoff, Duncan, Grimes & Dermer:

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80 See Model Rules of Prof’l Conduct; SC Rules of Prof’l Conduct.


82 Id. (citing Greenough, The Inadmissibility of Professional Standards in Legal Malpractice After Hizey v. Carpenter, 68 Wash.L.Rev. 395, 398-401 (1993)).

83 Id.

84 Id.

85 Id.

86 SCRPC [Scope][7].

87 See id.

88 Smith, 322 S.C. at 437.
“This is not to say, however, that all of the Bar Rules would necessarily be relevant in every legal malpractice action. In order to relate to the standard of care in a particular case, we hold that a Bar Rule must be intended to protect a person in the plaintiff’s position or be addressed to the particular harm.”

Thus, in South Carolina, a violation of the Rules of Professional Conduct does not automatically give rise to legal malpractice liability. Similarly, compliance with the Rules is not always equivalent to conformity with the applicable standard of care. The Supreme Court has held that the duties owed to a former client are not limited to those stated in the Rules and that additional duties can arise based on the facts of each particular relationship. Likewise, the Court of Appeals has held that an attorney’s fee can be reasonable despite the fact that it does not conform precisely to the requirements of the Rules.

The Rules of Professional Conduct are particularly relevant in cases involving alleged conflicts of interest. For example, in McNair v. Rainsford, an attorney who had previously performed legal services for the seller of a piece of property agreed to draft a contract for the buyer and seller for the sale of that property, for which the parties agreed to split the attorney’s fee. The parties had agreed that the buyer would pay $264,000 for the property and grant the seller the option to acquire two other properties in exchange. The buyer hired a separate attorney to represent him at the closing. The closing document reflected the sales price of $264,000 but neglected to mention the two option contracts. Both the buyer and the seller testified that they believed the attorney who drafted the initial contract was acting on behalf of the seller at closing, despite the attorney’s contention that he had been acting as a neutral scrivener. Rules 1.7 and 1.8 of the South Carolina Rules govern the conduct of an attorney who appears to act

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89 Id. (quoting Allen v. Lefkoff, Duncan, Grimes & Dermer, 265 Ga. 374, 453 S.E.2d 719 (1995)).
93 Id. at 339.
94 Id.
95 Id.
96 Id. at 344-48.
as an intermediary, particularly when the two parties share the attorney’s fees. Ultimately, relying in part on the Rules, the Court of Appeals held that it was error to grant summary judgment to the attorney on the legal malpractice cause of action and remanded that issue for trial.

**PRACTICE POINTER:**

It is very important that the identity of the client(s) for whom the attorney is acting be established in writing at the outset of the engagement. If the attorney will have multiple clients, there is a risk of a conflict and the attorney should address that issue at the outset with a proper waiver signed by the clients.

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97 Rule 1.7 SCRPC; Rule 1.8 SCRPC.

CHAPTER 4

Proximate Causation

This chapter will discuss the main elements of proximate causation – cause in fact and legal cause/foreseeability. The chapter will illuminate proximate cause with discussion of the role of expert testimony, issues of collectability, and finally malpractice in criminal matters.

A. Generally

In a legal malpractice action, the plaintiff must show that the attorney’s negligence was a proximate cause of the plaintiff’s injury.\(^1\) Proximate cause is ordinarily a question for the jury.\(^2\) However, the court may decide proximate cause as a matter of law “when the evidence is susceptible to only one inference.”\(^3\)

In order to prove proximate cause, the plaintiff must show both causation in fact and legal cause.\(^4\) “Causation in fact is proved by establishing the plaintiff’s injury would not have occurred ‘but for’ the defendant’s negligence.”\(^5\) “Legal cause is proved by establishing foreseeability.”\(^6\) “When the injury complained of is not reasonably foreseeable, in the exercise of due care, there is no liability.”\(^7\) “Although foreseeability of some injury from an act or omission is a prerequisite to establishing proximate cause, the plaintiff need not prove that the actor should have

\(^1\) See cases cited in note 3, Chapter 1, supra, setting forth the elements of a legal malpractice cause of action under South Carolina law, including proximate cause.


\(^3\) Id.


\(^5\) Id.

\(^6\) Id.

\(^7\) Id. (citing Stone v. Bethea, 251 S.C. 157, 161, 161 S.E.2d 171, 173 (1968)).
Chapter 4

contemplated the particular event which occurred.” Furthermore, proximate cause does not necessarily mean the sole cause. However, to be the proximate cause of the plaintiff’s injury, the defendant’s action must be “at least one of the direct, concurring causes of the injury.”

B. Cause-in-Fact

To satisfy the “but for” component of proximate causation, a plaintiff must present evidence that makes it more likely than not that the unfavorable result would not have occurred in the absence of the attorney’s negligence. This requires proof that he “most probably would have been successful in the underlying suit if the attorney had not committed the alleged malpractice,” or at least that he would have achieved a more favorable result. Thus, when the plaintiff claims that he accepted, on the advice of the attorney-defendant, a settlement of the underlying claim that he subsequently asserts was too low, “the legal malpractice plaintiff must show that he lost a valuable right (e.g., the settlement value of the underlying case) although he is not necessarily required to show that he would have won the case.” In at least one case, the court allowed the plaintiff to show either that he most probably would have won at trial or would have received a larger settlement. However, evidence that merely demonstrates a plaintiff’s opponent below was willing to

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9 Id. at 299, 592 S.E.2d at 320 (citing Bishop v. South Carolina Dep’t of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998); Hurd v. Williamsburg County, 353 S.C. 596, 613, 579 S.E.2d 136, 145 (Ct. App. 2003)).


11 See, e.g., Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 288, 701 S.E.2d 742, 748-49 (2010) (finding plaintiff’s claim failed for lack of proximate cause where plaintiff could not offer evidence that the result of the underlying case would have been different in the absence of the attorney’s alleged negligence).


14 Id. at 446, 626 S.E.2d at 32.

15 Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002) (“In the case sub judice, Hall could satisfy the ‘most probably’ requirement and defeat Fedor’s summary judgment motion by establishing he ‘most probably’ would have received a larger settlement than $30,000 or that he ‘most probably’ would have prevailed on the underlying claim at trial.”).
settle, without more, cannot serve as evidence that the plaintiff most probably would have been successful at trial.\textsuperscript{16} Therefore, it appears that South Carolina courts may determine on a case-by-case basis what the plaintiff must show to establish that he most probably would have gotten a more favorable result.

In \textit{Harris Teeter, Inc. v. Moore & Van Allen, PLLC}, the Supreme Court upheld the trial court’s grant of summary judgment to the defendant, in part, because the plaintiff failed to show that the defendant was the proximate cause of the plaintiff’s damages.\textsuperscript{17} In reaching its decision, the court noted that a bad outcome in the underlying claim is not evidence of a breach of the standard of care or that the attorney’s conduct was the proximate result of the alleged damage.\textsuperscript{18} Citing the Rules of Professional Conduct, the court also acknowledged the benefits associated with an attorney exercising discretion and making strategic decisions that are meant to benefit his client.\textsuperscript{19} However, the Supreme Court specifically refused to adopt a judgmental immunity rule that would eliminate “liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment.”\textsuperscript{20}

\textbf{C. Case-Within-The-Case Doctrine}

The Court of Appeals has acknowledged that “[g]iven the burden of the plaintiff in a legal malpractice action to prove the probability of success of the underlying claim, the requisite analysis of the underlying claim that accompanies this burden requires, in essence, a trial within a trial.”\textsuperscript{21} This issue is generally referred to as the “case-within-the-case” doctrine. Although the general standard for establishing proximate cause in a legal malpractice action is that the plaintiff “most probably” would have obtained a better outcome but for the attorney’s

\textsuperscript{16} See \textit{id.} at 177, 561 S.E.2d at 658 (noting that defendants settle claims for a “plethora of reasons,” not simply because they will most probably lose at trial).

\textsuperscript{17} \textit{Harris Teeter}, 390 S.C. at 288-89, 701 S.E.2d at 748-49.

\textsuperscript{18} \textit{id.} at 291, 701 S.E.2d at 750.

\textsuperscript{19} \textit{id.} at 292-93, 701 S.E.2d at 751 (citing S.C. App. Ct. R. 407, Rule 1.3, cmt. 1).

\textsuperscript{20} \textit{id.} at 291, 701 S.E.2d at 750 (quoting \textit{Woodruff v. Tomlin}, 616 F.2d 924, 930 (6th Cir. 1980)). In her concurring opinion, Justice Hearn reasoned that creating the immunity rule would be superfluous, because if the facts show that the attorney conformed with the standard and acted in good faith, then the legal malpractice elements will shield him from liability. \textit{id.} at 302-03, 701 S.E.2d at 756 (Hearn, J., concurring).

alleged negligence, the case-within-the-case is generally decided as a matter of law based on what the result should have been, rather than what it most likely would have been.

“The question of the success of the underlying claim . . . is a question of law.”22 In some cases, therefore, this issue may be decided at summary judgment.23 As explained by the Court of Appeals in Doe v. Howe, “[u]nder the case-within-a-case concept, the test is objective. Therefore, the test is not what the outcome would have been, but rather what it should have been.”24 In Howe, the court found as a matter of law that the plaintiff could not have succeeded in the underlying action, and therefore could not prove the element of proximate cause in the legal malpractice case.25 Similarly, in Manning v. Quinn, the Supreme Court stated “[w]e find as a matter of law that the likelihood of success [of the underlying claim] was practically nonexistent.”26 In that case, the Supreme Court determined that the issue before it in the legal malpractice case had already been decided adversely to the legal malpractice plaintiff in the underlying case.27 However, it is often necessary to resolve questions of fact before a court can decide the case-within-the-


23 See, e.g., Manning, 294 S.C. at 386, 365 S.E.2d at 25 (“The likelihood of success of the proposed actions is a question of law here and decision of that question on summary judgment motion is appropriate.”); Floyd v. Kosko, 285 S.C. 390, 394, 329 S.E.2d 459, 461 (Ct. App. 1985) (affirming summary judgment on the ground that the question of the success of the underlying case was a matter of law); Powell v. Potterfield, No. 2014-UP-114, 2014 WL 2582765, at * (Ct. App. 2014) (recognizing that in some instances a factual issue exists as to the success of the underlying case, whereas other times the question may be answered as a matter of law).

24 367 S.C. at 444, 626 S.E.2d at 31, n.18 (citing Wilburn Brewer, Jr., Expert Testimony in Legal Malpractice Cases, 45 S.C. L. REV. 727, 766 (1994) (emphasis in original)).

25 Id. at 443, 626 S.E.2d at 30.

26 294 S.C. at 386, 365 S.E.2d at 25.

27 Id.
Proximate Causation

This is particularly common in cases where competing expert testimony is offered regarding proximate cause, or when there is a dispute as to the size of a settlement.

**PRACTICE POINTER:**

Jury or Non-jury? If questions of fact must be resolved to determine whether the plaintiff most probably would have obtained a better result in the underlying case, who decides those facts? There is no discussion of this issue in the S.C. cases. The jury in the legal malpractice action might also serve as the factfinder for purposes of the underlying case, but what if the underlying case was a non-jury matter to which no right to a jury existed? In that case, the trial court may have to sit as factfinder for the case-within-the-case, although the jury might be asked to make findings to guide the court. What if the underlying matter was in a specialty forum, however, such as bankruptcy court or tax court? Referral to those tribunals from a state trial court is not procedurally possible, which probably leaves the trial court in the difficult position of resolving factual issues and applying legal principles with which it has no experience. Can the trial court entertain expert testimony on what the result should have been, even though that issue is regarded as a question of law?

A plaintiff’s legal malpractice claim based on an unfavorable result in an underlying case will not be dismissed for failure to show proximate cause and damages simply because the plaintiff’s expert witness failed to specifically state that the plaintiff “most probably” would have been successful had the attorney not acted negligently. For example, in *Hatfield v. Van Epps*, the Court of Appeals held that although the plaintiff’s expert had not specifically stated that the plaintiff “most probably” would have been successful, the expert had presented sufficient evidence to create a jury question as to whether the defendant was one of the proximate

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28 See, e.g., *Hatfield v. Van Epps*, 358 S.C. 185, 191-92, 594 S.E.2d 526, 529-30 (Ct. App. 2004) (“[E]vidence was sufficient to create a jury issue as to whether the alleged breach of the standard of care proximately caused damage to [the plaintiff].”); *Hall*, 349 S.C. at 176-77, 561 S.E.2d at 657-58 (considering evidence submitted by both parties concerning merit of underlying claim and settlement value of same).


30 See *Hatfield*, 358 S.C. at 191-92, 594 S.E.2d at 529-30 (reversing trial court’s finding that plaintiff had not proven proximate cause and damages because plaintiff’s expert did not use the specific phrase “most probably”) (citing *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 543 (1991)).
causes of the plaintiff’s damages. The Hatfield court reversed the trial court’s grant of summary judgment to the defendant and remanded the case for further inquiry into the question of proximate causation and damages.

The Supreme Court also addressed this issue in an unpublished opinion in Estate of Brown v. Calhoun, where the lower court’s decision to grant summary judgment to the defendant was reversed on the question of proximate cause. In that case, the plaintiff sued his attorney relating to the attorney’s representation of the plaintiff in an underlying medical malpractice case. The trial court granted summary judgment to the defendant because it found that the plaintiff’s expert had testified that the plaintiff would have been able to successfully recover under the “loss of chance” doctrine, which is not recognized in South Carolina. Ultimately, the Supreme Court held that the plaintiff’s expert had testified that the deceased most probably would have survived had the doctors not acted negligently, as opposed to testifying that the deceased most probably would have had a chance at survival. This case illustrates that if the plaintiff’s argument is based on a theory of law not recognized in South Carolina, the defendant will be entitled to summary judgment on the legal malpractice claim. However, it also indicates that if the plaintiff offers expert testimony that the plaintiff most likely would have been successful on a valid claim under South Carolina law, the plaintiff has likely presented enough evidence to withstand summary judgment on that issue and the question of proximate cause will become a question of fact to be determined by a jury. Nevertheless, a plaintiff’s claim will fail, as a matter of law, if a court finds that no juror could reasonably infer that the defendant’s conduct was the proximate cause of the plaintiff’s injury.

31 Id.
32 Id. at 192, 594 S.E.2d at 530.
34 Id. at *1.
35 Id. at *3.
36 Id. at *4.
37 “Generally, issues of foreseeability and proximate cause are questions for a jury. However, to survive a motion for summary judgment the plaintiff must offer some evidence that a genuine issue of material fact exists as to each element of the claim unless the element is either uncontested or agreed to by stipulation; otherwise, the plaintiff cannot meet his burden of proof and the claim may be determined as a matter of law.” Eadie, 381 S.C. 55, 63, 671 S.E.2d 389, 393, n.5.
D. Foreseeability

The foreseeability requirement of proximate cause in legal malpractice actions is generally governed by the same principles that apply in other torts. For example, lost profits may be an element of damage in a legal malpractice action, but the plaintiff must demonstrate that the lost profits were foreseeable in order to recover them against the legal malpractice defendant.

Intervening acts of third parties directly affect the foreseeability component of proximate causation. An intervening act shields the defendant from liability when it is unforeseeable and it breaks the causal chain. But, “[t]he intervening negligence of a third person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury.” An intervening act is said to be foreseeable if “[i]t is a natural and probable consequence of the original actor’s conduct.” Whether an intervening act severs the causal chain typically is a question of fact for the jury.

The foreseeability of an intervening act was a central issue in Manios v. Nelson Mullins. In that case, the defendant failed to discover an existing lien on a piece of property that was used to secure a loan. The commitment for the title policy and the policy itself did not reveal the existence of the lien, and the defendant did not conduct any further title examination. The plaintiff introduced expert testimony that a competent attorney would have looked behind the title

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39 See, e.g., Eadie, 381 S.C. at 64-65, 671 S.E.2d at 393-94 (citing automobile tort case in describing foreseeability component of proximate cause).
41 Id.
43 Id. at 282, 659 S.E.2d at 247 (quoting Bishop v. S.C. Dep’t of Mental Health, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998)).
44 Id. at 283, 659 S.E.2d at 248 (citing cases).
45 Id. at 281, 659 S.E.2d at 247 (citing Dixon v. Besco Eng’g, Inc., 320 S.C. 174, 180, 463 S.E.2d 636, 640 (Ct. App. 1995)).
46 389 S.C. at 132, 697 S.E.2d at 647.
47 Id.
commitment and policy to ensure there were no existing liens on the property.\footnote{Id. at 135-36, 697 S.E.2d at 649.}
The defendant introduced expert testimony that the attorney did not breach a duty of care by relying on the title company documents as proof that no other liens existed.\footnote{Id.} Ultimately, the Court of Appeals held that a jury issue existed as to whether the intervening act on the part of the title company should have been foreseeable by the defendants.\footnote{Id. at 141-42, 697 S.E.2d at 652-53.}

Moreover, although unforeseeable intervening acts can absolve the defendant from liability, “the primary wrongdoer is nevertheless liable if his actions alone ‘would have caused the loss in natural course.’”\footnote{Mellen, 377 S.C. at 284, 659 S.E.2d at 248 (quoting Young v. Tide Craft, Inc., 270 S.C. 453, 463, 242 S.E.2d 671, 676 (1978)).} For example, in Shealy v. Walters, the defendant-attorney argued that the plaintiff’s failure to appeal a trial judge’s order was an intervening act that caused the plaintiff’s injury.\footnote{273 S.C. 330, 337, 256 S.E.2d 739, 743 (1979).} In that case, the Supreme Court held that the defendant’s negligence led to the trial judge’s order, and that the attorney’s actions would have caused the plaintiff’s injuries regardless of the alleged intervening act.\footnote{Id. at 337-38, 256 S.E.2d at 743.}

One unusual scenario in which foreseeability can be an issue in a legal malpractice case is when the underlying claim contains a choice of law issue. For example, in Eadie v. Krause, the plaintiff argued that the defendant’s negligence in failing to timely and properly commence a workers’ compensation claim caused the plaintiff to be injured.\footnote{381 S.C. at 60-61, 671 S.E.2d at 391.} Although the underlying claim would not have been successful in South Carolina, the plaintiff argued that the attorney defendant was liable for failing to foresee that certain affirmative actions taken in South Carolina would bar recovery on a similar claim in Tennessee.\footnote{Id. at 64, 671 S.E.2d at 393.} The Court of Appeals held that the defendant could not have reasonably foreseen that the Supreme Court of Tennessee would depart from its common law requirement that the affirmative actions occur in a “venue that has jurisdiction,”\footnote{Id. at 67, 671 S.E.2d at 395.} and thus found that the plaintiff had not established proximate cause.
E. Expert Testimony

As stated above, the requirement or admissibility of expert testimony on the issue of proximate causation in a legal malpractice case is unsettled under South Carolina law. While the Court of Appeals has recognized “[t]here is no South Carolina precedent setting forth a per se requirement for expert evidence on the elements of causation or damages,” the Supreme Court has indicated that expert testimony must be offered to support each element of a legal malpractice cause of action. There is an inherent conflict between the cases holding that the success of the underlying case is a question of law governed by an objective standard, and those cases that permit expert testimony on the question of whether the plaintiff “most probably” would have been successful or obtained a better outcome in the underlying matter. If it is the duty of the trial court to determine what the result of the underlying case should have been, it is difficult to understand the role of expert testimony as to what the outcome “most probably would” have been. Perhaps the tension stems from the nature of the underlying dispute. If the underlying matter turns on a pure question of law, expert testimony on causation might be unnecessary. For example, a lawyer who misses the deadline to file a notice of appeal may be able to defend a subsequent malpractice claim on the ground that the client should have lost the appeal anyway. If causation is directly at issue, however, expert testimony establishing a causal link between a breach of duty and injury may be necessary. No case has directly explained or resolved this apparent inconsistency, although the courts have been quick to find expert testimony lacking.

57 See Chapter 3, Section B, supra.
58 Powell, 2014 WL 2582765 at *2.
60 See, e.g., Hall v. Fedor, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) (relying heavily on expert testimony concerning what result would have obtained in the underlying case).
61 See, e.g., Sartin v. McNair Law Firm PA, 756 F.3d 259, 267 (D.S.C. 2014) (holding that an attorney’s missed deadline to file an appeal did not proximately cause injury to the plaintiff because, as a matter of law, the appeal would not have been successful).
62 See, e.g., Harris Teeter, 390 S.C. at 288, 701 S.E.2d at 748-49 (2010) (finding plaintiff’s claim failed for lack of proximate cause where plaintiff’s experts could not offer sufficient evidence that the result of the underlying case would have been different in the absence of the attorney’s alleged negligence).
Chapter 4

There is South Carolina case law supporting the conclusion that plaintiffs may introduce expert testimony regarding proximate causation if they wish.\textsuperscript{63} In any event, “the burden of showing causation and damages remains the same whether the evidence is generated by expert or not.”\textsuperscript{64}

The Supreme Court has held that “it is not necessary that the expert actually use the words ‘most probably.’”\textsuperscript{65} It is sufficient that the testimony is such “as to judicially impress that the opinion . . . represents his professional judgment as to the most likely one among the possible causes.”\textsuperscript{66} But, if a plaintiff introduces expert testimony to show that he “most probably” would have been successful in the underlying case, the testimony must specifically address the basis for the likelihood of the more favorable outcome.\textsuperscript{67} This is easier said than done, however. Courts have also found expert testimony to be insufficient when the testimony speaks too much in generalizations or relies too much on hindsight.\textsuperscript{68} In \textit{Harris Teeter, Inc. v. Moore \& Van Allen, PLLC}, for example, one expert for the plaintiff testified that if the attorney had taken a different course of action, “the percentage of success would have been greater,” while another expert for the plaintiff opined that the plaintiff would have won had the attorney not been negligent, but then conceded that “[o]bviously, it’s speculation.”\textsuperscript{69} The Supreme Court affirmed the grant of summary judgment to the defendant and held that the plaintiff’s experts had failed to show that the attorneys’ actions were the “but for” cause of the plaintiff’s unfavorable result in the underlying case.

The Supreme Court held the expert testimony offered by the plaintiff in \textit{Doe v. Howe} to be inadequate. That case illustrates the importance of presenting fact-specific evidence when attempting to show proximate cause.\textsuperscript{70} In \textit{Doe}, the

\begin{itemize}
\item \textsuperscript{64} \textit{Powell v. Potterfield}, 2014 WL 2582765 (Ct. App. 2014).
\item \textsuperscript{65} \textit{Hatfield v. Van Epps}, 358 S.C. 185, 594 S.E.2d 526 (Ct. App. 2004).
\item \textsuperscript{66} \textit{Id}., (quoting \textit{Norland v. Washington General Hospital}, 461 F.2d 694, 697 (8th Cir. 1972)).
\item \textsuperscript{67} \textit{Id}.
\item \textsuperscript{68} \textit{Harris Teeter}, 390 S.C. at 290-91, 701 S.E.2d at 750.
\item \textsuperscript{69} \textit{Id}. at 290.
\item \textsuperscript{70} See \textit{Doe}, 367 S.C. 36, 626 S.E.2d 25 (holding that the expert failed to address the specific facts of the underlying case that would support a finding that the plaintiff most probably would have been successful.).
\end{itemize}
plaintiff’s expert stated that the plaintiff most probably would have won had the case gone to trial. The expert highlighted the fact that the defendant had since agreed to give similar plaintiffs significantly larger settlements than the one accepted by the plaintiff in the underlying case, and suggested that by doing so, the defendant had recognized the legitimacy of claims such as the plaintiff’s. The Court of Appeals held that the plaintiff failed to show that he most probably would have been successful in the underlying case because the expert did not address the specific facts of the plaintiff’s case or use “objective criteria” as the basis for his opinion. The holding in Doe emphasizes that evidence of more favorable outcomes in similar cases does not create a prima facie case that every potential plaintiff would have obtained a more favorable result because many factors, such as the statute of limitations, are considered when making a settlement offer to each particular plaintiff.

Expert testimony will almost always be necessary to show proximate cause in legal malpractice cases that arise from underlying professional malpractice cases. In order to show that the plaintiff most probably would have been successful on the underlying claim, expert testimony will likely be required to show that the professional in the underlying claim deviated from the requisite standard of care. For example, in Brown ex rel. Estate of Brown v. Calhoun, the Supreme Court held that a question of fact existed as to whether the plaintiff most probably would have been successful in the underlying medical malpractice case but for the attorney’s negligence and, therefore, summary judgment should not have been granted to the defendant-attorney. In that case, the plaintiff’s son, who had asthma, had died as a result of “acute cardio-respiratory arrest due to cocaine ingestion.” The plaintiff introduced expert testimony stating that the plaintiff’s son had died as a direct result of the negligence of medical authorities who failed to give the son prompt medical attention. The defense produced conflicting testimony of an expert in cocaine-

71 Id.
72 Id.
73 See id. (holding that many factors influence a settlement offer and determining that circumstances differ as to each potential plaintiff).
74 Id.
77 Id. at *1.
78 Id.
related deaths who opined that the son would have died despite receiving prompt medical attention. Therefore, the court in that case determined that the competing expert testimony offered by each side created a genuine issue of material fact as to the proximate causation component of the legal malpractice claim.

F. Collectability

South Carolina has not, to date, required a legal malpractice plaintiff to establish that the judgment he would have received if successful in the underlying case would have been collectable. Some jurisdictions, however, have such a requirement. The Court of Appeals discussed collectability of the underlying judgment in Tuten v. Joel. In that case, the defendant-attorney argued that he did not proximately cause the plaintiff’s injuries because the plaintiff would not have been able to collect on a judgment against the uninsured driver that hit her. Ultimately, the court rejected the defendant’s argument because it determined that the plaintiff could have collected at least some of the underlying judgment. In rejecting the defendant’s argument, the court noted that South Carolina has never required a legal malpractice plaintiff to show collectability of the underlying claim. The Tuten court noted that it did not have to decide the collectability issue to decide the case before it.

79 Id.
80 See id.
83 Tuten, 410 S.C. at 117, 763 S.E.2d at 61.
84 Id.
85 Id.
86 Id. at 117, 763 S.E.2d at 61, n.9.
The majority of other jurisdictions make collectability of the underlying judgment a necessary component in a legal malpractice case. Likewise, the Restatement (Third) of the Law Governing Lawyers provides that “the lawyer’s misconduct will not be the legal cause of loss to the extent that the defendant lawyer can show that the judgment or settlement would have been uncollectable.” Of the states that have addressed the issue, a majority impose the burden on the plaintiff of showing collectability, while a slightly smaller number place the burden of showing that the judgment is uncollectable on the defendant as an affirmative defense. North Carolina has placed the burden of showing collectability on the plaintiff. Georgia, Florida, and Tennessee have all placed the burden on the plaintiff as well. Virginia recently joined the “growing trend” of jurisdictions that place the burden of collectability on the defendant as an affirmative defense. The Restatement also indicates that the burden is on the defendant.

It is unclear how South Carolina ultimately will decide this issue and, if it decides that collectability is a necessary component of a legal malpractice claim, whether it would impose the burden of proof on the plaintiff or defendant. Arguably, the court’s indication in Eadie v. Krause that “where a plaintiff alleging legal malpractice fails to show that the underlying claim would have been successful, defendant is entitled to judgment as a matter of law” supports the conclusion that the collectability of the underlying judgment is a necessary component to a legal malpractice claim in so far as an uncollectable judgment would not provide a plaintiff with “success” in the underlying matter.

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88 Restatement (Third) of the Law Governing Lawyers § 53, cmt. b.

89 See id. (noting that as of 2014, 11 jurisdictions have placed the burden on the defendant and 17 jurisdictions impose the burden on the plaintiff).


93 Restatement (Third) of the Law Governing Lawyers § 53, cmt. b (concerning collectability, “[t]he defendant lawyer bears the burden of coming forward with evidence that [the underlying judgment was not collectable]”).
G. Malpractice Claims Arising from Criminal Matters

Jurisdictions have taken different approaches regarding what a plaintiff must show in order to prove proximate causation in malpractice cases that arise in the context of criminal defense. Some jurisdictions require that a plaintiff show “legal innocence,” such as exoneration of the original criminal conviction, as an element of a legal malpractice claim. In those jurisdictions, the plaintiff must prove that he actually obtained post-conviction relief and not merely that he would have been successful in obtaining such relief. Other jurisdictions require that a plaintiff show “actual innocence,” meaning that he did not actually commit the underlying crime, as an element of a legal malpractice claim. In those jurisdictions, the plaintiff must show actual innocence by a preponderance of the evidence. Furthermore, some jurisdictions require that a plaintiff show both legal and actual innocence. Some of the jurisdictions that require both have carved out an exception to the actual innocence requirement if the plaintiff claims that his attorney’s negligence led to a sentencing error for which he has obtained post-conviction relief. Finally, a minority of states have no requirement that the plaintiff show innocence before proceeding with a malpractice action.

In South Carolina, if a malpractice case arises out of a criminal conviction, the plaintiff generally must show innocence of the underlying crime. Brown v. Theos is the only appellate level South Carolina opinion that has addressed the proof-of-innocence requirement in any detail and while Brown does not say so

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96 Id.

97 Id.

98 Id.

99 Id.


101 See Bennardo, supra note 95.

102 Brown v. Theos, 345 S.C. 626, 550 S.E.2d 304 (2001) (holding “in an action for legal malpractice based on conviction of a crime, the general standard is the plaintiff must show innocence of the crime in order to establish liability”).
explicitly, it appears to require proof of actual innocence. In Brown, the Supreme Court discussed both the legal innocence and actual innocence requirements of other jurisdictions, but declined to adopt either of these standards.\textsuperscript{103} The court did hold, however, that if a plaintiff in a legal malpractice case later makes a plea of no contest to the underlying crime, the malpractice claim is barred as a matter of public policy.\textsuperscript{104} The court supported its decision by quoting the following language from the Georgia Court of Appeals in Gomez v. Peters: “In other words, a client who has acknowledged guilt cannot assert that his attorney’s poor performance caused his incarceration.”\textsuperscript{105} Based on Gomez and another case cited with approval\textsuperscript{106} in Brown, it is likely that South Carolina will require at least a showing of exoneration,\textsuperscript{107} and might require that a plaintiff additionally show actual innocence.\textsuperscript{108}

\textsuperscript{103} Id. at 629-30.
\textsuperscript{104} Id. at 630-31.
\textsuperscript{105} Id. (quoting Gomez v. Peters, 221 Ga. App. 57, 470 S.E.2d 692 (1996)).
\textsuperscript{106} Fleming v. Gardner, 658 A.2d 1074 (Me. 1995).
\textsuperscript{107} As adopted, for example, by the Georgia Court of Appeals in Gomez v. Peters, 221 Ga. App. 57, 470 S.E.2d 692 (1996).
\textsuperscript{108} As alluded to by the court’s decision in Brown, 345 S.C. at 629-30.
CHAPTER 5

Damages

A. Generally

Damages in a legal malpractice case are based on what the client lost as a result of the attorney’s malpractice. Thus, in legal malpractice cases arising out of litigation, damages are calculated by determining the amount the client should have received, or should not have lost, had the attorney not acted negligently.\(^1\) This is an objective standard. Thus, the damages are determined by calculating what the client should have received, not what they would have received.\(^2\) Of course, if a plaintiff has since recovered, by some other means, the amount he claims to have lost as a result of the malpractice, he may not also recover damages from the defendant.\(^3\)

Because South Carolina allows a legal malpractice plaintiff to bring his claim as a tort action or a breach of contract action,\(^4\) damages must be analyzed under the specific theory that the plaintiff elects.\(^5\) “In a breach of contract action, a party may recover for those injuries that the defendant had reason to foresee as a

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\(^2\) Powell, 2014 WL 2582765, at *1.

\(^3\) Id. at *4 (holding that plaintiff could not recover damages for malpractice regarding attorney’s failure to obtain permanent alimony, because plaintiff received substantial value from the divorce settlement through other means).

\(^4\) See Chapter 2, Attorney-Client Relationship in privity materials.

probable result of his breach when the contract was made.”6 “The proper measure of damages for breach of contract is the loss that was actually suffered as the result of the breach.”7

In a legal malpractice case that involves a claim of attorney negligence in an underlying civil matter, the damages are calculated by determining what the result of the underlying case should have been but for the attorney’s negligence.8 As is discussed elsewhere in this book, while there is authority in South Carolina recognizing that the plaintiff may introduce expert testimony to show damages,9 South Carolina courts also recognize that the “question of the success of the underlying claim . . . is a question of law.”10

In a legal malpractice case that arises in the estate planning context, damages may be measured by the amount that a third-party beneficiary lost as the result of being disinherited from a will or other estate planning document.11 Another way damages can arise in this context is when the plaintiff is subjected to higher tax liability due to the attorney’s negligent handling of his estate.12

In a legal malpractice case that arises from patent law issues, the plaintiff may establish damages by showing that he either lost business as a result of the lost patent or that someone else was profiting from the same product for which the plaintiff should have had a patent.13

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6 Manios, 389 S.C. at 146 (citing Benford v. Berkeley Heating Co., 258 S.C. 357, 188 S.E.2d 841 (1972)).
7 Id.
11 See Fabian v. Lindsay, 410 S.C. 475, 765 S.E.2d 132 (2014) (plaintiff incurred damages as a result of being disinherited from her uncle’s trust).
12 See Sims v. Hall, 357 S.C. 288, 294, 592 S.E.2d 315, 318 (Ct. App. 2003) (attorney failed to advise client of “qualified disclaimer” causing plaintiff to be subjected to $190,000 in additional tax liability).
B. The Payment Rule

Jurisdictions differ as to when damages occur in cases where the plaintiff has a judgment entered against him in the underlying case.\(^4\) Although South Carolina has yet to adopt a specific rule, there are two approaches adopted by other jurisdictions: the “payment” rule and the “judgment” rule.\(^5\) The payment rule requires that the plaintiff in a malpractice case pay the judgment against him in the underlying case before he can assert damages for legal malpractice.\(^6\) Conversely, the judgment rule allows a plaintiff to initiate a legal malpractice claim as soon as an adverse judgment is entered against him in the underlying litigation.\(^7\) Virginia, the only jurisdiction in the fourth circuit to have once adopted the payment rule, has since adopted the judgment rule.\(^8\) Therefore, if South Carolina addresses the issue, it is likely to follow the rest of the jurisdictions in the fourth circuit and adopt the judgment rule.

C. Attorneys’ Fees and Damages

The impact of attorneys’ fees on damages in legal malpractice cases is somewhat unclear under South Carolina law. Courts in other jurisdictions have addressed a few separate issues regarding attorneys’ fees and damages in the legal malpractice context. For example, courts in some jurisdictions have held that an attorney fee that would have been paid pursuant to a contingent fee agreement should be deducted from the amount of the judgment that the plaintiff should have received in deciding damages in a legal malpractice case.\(^9\) These courts reason that the plaintiff contracted for the attorney’s fee and that the fee would have been deducted if the attorney had not been negligent.\(^{10}\) However, a growing number of

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\(^5\) Id.

\(^6\) Id.

\(^7\) Id.

\(^8\) See Shipman v. Kruck, 267 Va. 495, 509, 593 S.E.2d 319, 326-27 (2004) (overturning a previous case which held that payment was necessary before damages occurred).


\(^{10}\) Id. at 538 (citing Childs v. Comstock, 74 N.Y.S. 643 (App. Div. 1902)).
jurisdictions reject the deduction theory.\textsuperscript{21} These courts reason that the attorney should not be rewarded a reduction of damages due to his negligence and that the larger judgment could help offset the cost of the legal malpractice case.\textsuperscript{22} Courts in some jurisdictions deduct attorneys’ fees from the judgment, but allow the plaintiff to recover some or all of the attorneys’ fees accumulated during the legal malpractice action.\textsuperscript{23} Other courts allow for full recovery of both the underlying judgment value and the attorneys’ fees incurred in the legal malpractice case.\textsuperscript{24} Lastly, some courts require the defendant-attorney to forfeit some or all of the attorneys’ fees paid by the plaintiff in the underlying case.\textsuperscript{25}

South Carolina law on this issue is not well-developed. Generally, in South Carolina, “the authority to award attorney’s fees can come only from statute or be provided for in the language of the contract.”\textsuperscript{26} Therefore, because there is no statute in South Carolina specifically allowing the award of attorneys’ fees to the prevailing party in a legal malpractice case, it is unlikely a court will award the attorneys’ fees in a legal malpractice case, absent a contract or other conduct by one of the parties that warrants such an award.\textsuperscript{27}

\textbf{D. Non-Pecuniary Damages}

Damages in legal malpractice cases generally are limited to the pecuniary losses which the plaintiff incurred and, as a result, a plaintiff typically cannot recover damages for emotional distress in a legal malpractice action.\textsuperscript{28} “Under South Carolina law, it is a general rule that damages for emotional injuries are not recoverable if they are a consequence of other damages caused by the attorney’s

\begin{footnotesize}
\begin{enumerate}
\item Id. at 539.
\item Id. (citing Andrews v. Cain, 406 N.Y.S.2d 168, 169 (App. Div. 1978); Kane, Kane & Kritzer, Inc. v. Altagen, 165 Cal. Rptr. 534, 535 (Ct. App. 1980)).
\item Id. at 542.
\item Id. (citing Saffer v. Willoughby, 670 A.2d 527, 534 (N.J. 1996)).
\item Id. at 546-7.
\item The SCRCP also provide several scenarios in which awarding attorneys’ fees is permissible. (See, e.g., Rules 11, 30, 37, 45, 54, 56).
\end{enumerate}
\end{footnotesize}
Damages

negligence or a fiduciary breach that was not an intentional tort. However, South Carolina allows for a plaintiff to seek damages for emotional distress in instances in which the alleged conduct rises to the level of a separate and independent tort. However, the alleged conduct must be “so ‘extreme and outrageous’ so as to exceed ‘all possible bounds of decency’ and must be regarded as ‘atrocious and utterly intolerable in a civilized community.”

Although South Carolina has not addressed what specific type of conduct will give rise to emotional damages in the legal malpractice context, the court has addressed specific instances in which the attorney’s conduct did not rise to the “extreme and outrageous” standard. In In re Steinmetz, the United States Bankruptcy Court for the District of South Carolina held that the defendant-attorney’s failure to inform the plaintiff about a hearing, as well as his advice about selling certain property which actually caused damage to the plaintiff, did not result in an independent tort giving rise to damages for emotional distress. In Caddel v. Gates, the Court of Appeals held that an attorney’s failure to discover an easement or other title encumbrance when searching public title records did not support an award of damages for emotional distress.

While South Carolina has not specifically addressed the issue, some jurisdictions allow the plaintiff in a legal malpractice case to recover damages for injury to his reputation that is caused by the attorney’s negligence. However, if South Carolina adopts a similar approach as it has for emotional distress, then it will likely require the attorney’s conduct to directly damage the plaintiff’s reputation, rather than it simply being a consequence of the attorney’s negligence.

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29 In re Steinmetz, at *5.
30 Id. (citing Timms v. Rosenblum, 713 F. Supp. 948 (E.D. Va. 1989)).
31 Id. at *5.
32 Id.
34 See Ronald E. Mallen & Allison Martin Rhodes, Consequential Damages – Injury to Reputation, 3 Legal Malpractice § 21:21 (2016 ed.).
E. Punitive Damages

In South Carolina, a legal malpractice plaintiff may seek to recover punitive damages whether he is asserting a negligence or a breach of contract cause of action.\(^{36}\) Punitive damages may be awarded in a breach of contract case if the breach is accompanied by some fraudulent act.\(^{37}\) In a negligence case, punitive damages are limited to circumstances in which the attorney’s actions are deemed grossly negligent.\(^{38}\) In South Carolina, gross negligence occurs when “[a] defendant . . . is so indifferent to the consequences of his conduct as not to give slight care to what he is doing”.\(^{39}\) Furthermore, “[g]ross negligence involves a conscious failure to exercise due care”.\(^{40}\) Additionally, the plaintiff in a legal malpractice action must support any claim against the attorney for punitive damages with clear and convincing evidence, whereas actual damages may be shown by a preponderance of the evidence.\(^{41}\)

In *Samuel v. Dickey*, the South Carolina District Court upheld an award of $700,000 in punitive damages due to the defendant-attorney’s complete lack of care in handling the client’s underlying medical malpractice claim.\(^{42}\) In that case, the court held that the attorney was grossly negligent due to his: numerous failures to show up to court; failure to properly request continuances if he was unable to attend court; failure to keep his client properly informed about the status of the case; failure to comply with discovery requests; and dishonesty towards the lower


\(^{38}\) See *Samuel*, at *8 (awarding punitive damages due to attorneys’ complete disregarding of the underlying case.).


\(^{40}\) Id. at 126-27.

\(^{41}\) *Samuel*, at *8.

\(^{42}\) Id.
The defendant-attorney was given multiple opportunities to explain why he failed to perform certain necessary tasks in the case, yet he failed to show up or explain himself even after being given second and third chances.

Another issue that has arisen in the legal malpractice context, which has yet to be addressed in South Carolina, is whether the plaintiff should be able to recover for lost punitive damages that he would have received in the underlying case. Initially, the majority of jurisdictions that addressed the issue held that lost punitive damages from the underlying claim are recoverable as compensatory damages in the legal malpractice case. The courts in the majority jurisdictions acknowledge that allowing the recovery of underlying punitive damages against an attorney does not serve the traditional punishment function of punitive damages. Nonetheless, they still allow recovery of these damages as a way to deter attorneys from negligently pursuing claims where the defendant’s conduct may warrant punitive damages. However, a growing number of courts are adopting the alternative view that a plaintiff may not recover for lost punitive damages. Courts adopting this approach tend to focus on the societal goals of punitive damages as opposed to the individual goals. For example, the Supreme Court of California held that punitive damages were essentially an “undeserved windfall” for the plaintiff, and further held that lawyers have strong financial incentives to pursue underlying claims that may warrant an award of punitive damages.

43 Id. at *5-6.
44 Id. at *4.
46 Id. at 71.
47 Id.
49 Id.
50 Id. (citing Ferguson v. Lieff, Cabraser, Heimann & Bernstein, LLP, 135 Cal. Rptr. 2s 46 (2003)).
CHAPTER 6

Relationship to Other Causes of Action

A. Breach of Fiduciary Duty

South Carolina courts have recognized that the attorney-client relationship is a fiduciary one.\(^1\) The Supreme Court has stated that “[t]he relationship between an attorney and a client is highly fiduciary in its nature and of a very delicate, exacting and confidential character, requiring a high degree of fidelity and good faith.”\(^2\) It is therefore unsurprising that a client may seek to sue his attorney under a breach of fiduciary duty theory.

Although similar, a claim for breach of fiduciary duty is distinguishable from a claim for legal malpractice because it can arise with or without the existence of an attorney-client relationship.\(^3\) A claim for breach of fiduciary duty and a claim for legal malpractice will be deemed duplicative, and thus merged into one claim, however, if the claim for breach of fiduciary duty arises from a duty owed because of the existence of an attorney-client relationship and arises out of the same factual allegations.\(^4\) Therefore, to avoid merger of a claim for breach of fiduciary duty with an existing legal malpractice claim, the plaintiff must show that the breach of fiduciary duty claim arises from a duty separate from those resulting from the attorney-client relationship, or that it is based on materially different facts than the malpractice claim.\(^5\) But when both claims are based on the same facts or arose out of the same duty, South Carolina courts have held that the claim for breach of fiduciary duty is duplicative and have limited the plaintiff to pursuing its legal malpractice claim.\(^6\) Similarly, the South Carolina District Court has stated that

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\(^2\) *Id.* (citing *Weatherford v. Price*, 340 S.C. 572, 532 S.E.2d 310 (Ct. App. 2000)).


\(^4\) *Id.*

\(^5\) *Id.*

\(^6\) *Id.*
“[w]here claims of negligence, breach of contract, breach of fiduciary duty, negligent misrepresentation, or fraudulent misrepresentation are premised on the same facts and seek identical relief as a claim for legal malpractice, those claims are duplicative and must be dismissed.”

This judicial preference for legal malpractice as the required cause of action is significant because a plaintiff is not required to prove as much to succeed in a breach of fiduciary duty claim as in a claim for legal malpractice. For example, the plaintiff in a breach of fiduciary duty case is not required to show the existence of an attorney-client relationship and is not required to establish a breach of the standard of care through expert testimony. In South Carolina, whether a fiduciary duty exists is a question of law for the court, while the question of whether that duty is breached can be submitted to a jury.

B. Violation of the South Carolina Unfair Trade Practices Act

The South Carolina Unfair Trade Practices Act (UTPA) declares unlawful “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” “To recover in an action under the UTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant’s unfair or deceptive act(s).” “A trade practice is ‘unfair’ when it is

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8 Id. (citing Lighthouse Group, 2016 WL 562100).
9 Id.
offensive to public policy or when it is immoral, unethical, or oppressive; a practice is ‘deceptive’ when it has a tendency to deceive.”¹³ “An impact on the public interest may be shown if the acts of practices have the potential for repetition.”¹⁴

The UTPA exempts certain practices and transactions from its coverage, including matters subject to regulatory authority.¹⁵ This exemption provides that the UTPA does not apply to “[a]ctions or transactions permitted under laws administered by any regulatory body or officer acting under statutory authority of this State or the United States or actions or transactions permitted by any other South Carolina State law.”¹⁶ In *RFT Management*, the trial court held that this exception applied to the legal profession as a regulated industry and, as a result, an attorney acting in that capacity is not subject to a UTPA claim. The Supreme Court overruled the trial court, noting that the exception was intended to exclude from the UTPA “those actions or transactions which are allowed or authorized by a regulatory agency or other statutes.”¹⁷ Thus, a claim for violation of the UTPA may be brought against members of the legal profession.¹⁸


¹⁸ Id. (rejecting trial court’s finding that members of the legal profession should be exempt from the UTPA based on the exemption for matters subject to regulatory authority.)
CHAPTER 7

Third-Party Claims

A. Attorney Immunity

In some situations, a third party with no attorney-client relationship may attempt to sue a lawyer for negligence in the course of the lawyer’s professional duties to his client. Generally, however, “an attorney is immune from liability to third persons arising from the attorney’s professional activities on behalf of and with the knowledge of the client, absent an independent duty to the third party.”

The purpose of the doctrine of attorney immunity is “to encourage zealous representation of clients without fear of lawsuits by disgruntled opposing parties.” As the Court of Appeals observed in Gaar v. N. Myrtle Beach Realty Co., “[i]n his professional capacity, the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities.” To bring suit within the “independent duty” exception, a plaintiff must “plead facts from which a duty can be inferred.”

South Carolina courts have addressed the circumstances under which an independent duty may arise in two contexts. In the first case, the Court of Appeals found that an attorney owes a duty to a third party to which his client has assigned

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3 Gaar, 339 S.E.2d at 889. See also Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 509-10; Douglass, 344 S.C. at 10; Stiles, 318 S.C. at 298–99; Hunt, 522 F. Supp. 2d at 758 (granting law firm’s motion to dismiss pursuant to principles announced in Gaar and Onorato); Fleming v. Asbil, 42 F.3d 886, 890 (4th Cir. 1994) (“So long as an attorney acts in his client’s interests, and not for personal or malicious reasons, he is immune from suit to an opposing party.”).

an interest in an escrow account. In *Moore v. Weinberg*, the plaintiff, a creditor, sued the debtor’s attorney alleging that he was negligent in handling funds in an escrow account. The debtor retained the attorney to represent him in litigation regarding the sale of a business he owned. During the course of that litigation, the debtor and the creditor entered into an agreement pursuant to which the creditor agreed to lend the debtor $80,000. The debtor then assigned the creditor his right to money which was being held in an escrow account until the litigation was resolved. The debtor’s attorney drafted the assignment to the creditor. When the litigation eventually settled, the attorney disbursed the entire amount in the escrow account to the debtor. The attorney claimed he had overlooked the assignment. The creditor eventually received a portion of what he was owed, but was unable to recover the full amount. The trial court granted summary judgment to the attorney, finding that no duty existed between the attorney and the creditor. The Court of Appeals, however, disagreed and held that the attorney owed a duty to the third-party creditor who had been assigned an interest in the escrow account.

The Court of Appeals addressed a similar issue in a different context in *Moore, Taylor, & Thomas, P.A. v. Banks*. In *Banks*, the court held that a closing attorney did not owe a duty to a third-party law firm to ensure that the law firm was paid legal fees from the sale of property of one of its former clients. In that case, the law firm’s former client reached a settlement in which certain real property owned by the client would be sold and the proceeds would be split between the client and her adversary. The third-party law firm alleged that it had an oral agreement with the client to receive a portion of its legal fees from the sales proceeds and alleged

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6 *Id.* at 215.

7 *Id.* at 214.

8 *Id.*

9 *Id.* at 215.

10 *Id.*

11 *Id.* at 229.


13 *Id.* at *1.

14 *Id.*
that the closing attorney was aware of this agreement.\textsuperscript{15} After the proceeds were disbursed with no payment to the third-party law firm, the law firm sued the closing attorney, alleging that the closing attorney was negligent in failing to recognize the law firm’s interest in the sales proceeds or in failing to hold the funds in escrow. The trial court dismissed the suit on the ground that no duty existed between the law firm and the closing attorney. In an unpublished decision, the Court of Appeals held that the closing attorney did not owe any independent duty to the law firm and affirmed the lower court’s dismissal of the negligence claim.\textsuperscript{16}

In the context of accounting, the Supreme Court has adopted the standard for negligent misrepresentation set forth in Section 552 of the \textit{Restatement (Second)} of \textit{Torts} in determining whether an accountant may be liable to a non-client. The Restatement provides that “\[o\]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.”\textsuperscript{17} No South Carolina court has addressed Section 552 in the legal context, however.

\section*{B. Aiding and Abetting}

South Carolina case law suggests that an attorney may also be liable to non-clients (as well as to clients) for aiding and abetting a breach of fiduciary duty by another, including his client.\textsuperscript{18} “The elements for a cause of action of aiding and abetting a breach of fiduciary duty are: (1) a breach of fiduciary duty owed to the plaintiff; (2) the defendant’s knowing participation in the breach; and (3) damages.”\textsuperscript{19} “The gravamen of the claim is the defendant’s knowing participation in the fiduciary’s breach.” In \textit{Gordon v. Busbee}, the beneficiaries of an estate brought suit against the personal representative of the estate and his attorney for breach of

\begin{itemize}
  \item \textsuperscript{15} Id.
  \item \textsuperscript{16} Id.
  \item \textsuperscript{18} \textit{Gordon v. Busbee}, 397 S.C. 119, 133-34, 723 S.E.2d 822, 830 (Ct. App. 2011).
  \item \textsuperscript{19} Id. at 133 (quoting \textit{Vortex Sports & Entm’t, Inc. v. Ware}, 378 S.C. 197, 662 S.E.2d 444 (2008)).
\end{itemize}
fiduciary duty and aiding and abetting breach of fiduciary duty respectively. In that case, the Court of Appeals held that while the attorney might have become aware of a potential breach of fiduciary duty had the attorney further investigated the assets of the estate, the attorney did not have actual knowledge of the potential breach. Therefore, the court held that because there was only constructive knowledge, and no actual knowledge, the defendant-attorney did not knowingly participate in the breach.

C. Claims by Beneficiaries of Wills

As is discussed in detail in Chapter 2, Section A, supra, an intended beneficiary of an existing will has “a cause of action, in both tort and contract,” against an attorney “whose drafting error defeats or diminishes the client’s intent.”

D. Claims by Officers and Directors of Corporate Clients

While no South Carolina appellate court has directly addressed the issue, a majority of jurisdictions adhere to the rule that an attorney acting as counsel for a corporation owes a duty of care solely to the corporation and not to its individual shareholders, officers, or directors. For example, in Bovee v. Gravel, the Supreme Court of Vermont held that shareholders are barred from bringing a malpractice action against corporate counsel because shareholders lack the privity necessary to maintain such an action. In reaching its decision, the Bovee court cited other jurisdictions that refuse to allow such claims on the ground that doing so may create “almost unlimited liability” for corporate counsel to individual shareholders.

20 Id. at 131.
21 Id.
22 See id. at 133-34 (holding that because the plaintiffs did not present evidence of actual knowledge, the circuit court did not err in granting a directed verdict in the defendant-attorney’s favor.)
25 Id. at 488-89.
26 Id. (quoting Gamboa v. Shaw, 956 S.W.2d 662, 665 (Tex. App. 1997)).
A few courts recognize an attorney’s duty of care to the shareholders of a closely held corporation.\(^{27}\) However, those courts will often look at the specific relationship between the attorney and the individual shareholders,\(^{28}\) and typically only recognize a duty to the individuals when there are very few shareholders. Many other courts refuse to recognize a duty even in closely held corporations with very few shareholders.\(^{29}\) The rationale for refusing to recognize a duty in those situations is the conflict between the interests of individual shareholders and the interest of the corporation as a whole.\(^{30}\)

The United States District Court for the Western District of North Carolina recently addressed the issue of whether an attorney owes a duty to a shareholder of a closely held corporation.\(^{31}\) In *Anderson v. Derrick*, the court identified the following factors as relevant in determining whether an attorney-client relationship has been formed between corporate counsel and a stockholder:

1. Whether the stockholder was separately represented by other counsel when the corporation was created or in connection with its affairs;
2. Whether the stockholder sought advice on and whether the attorney represented the stockholder in particularized or individual matter, including matters arising prior to the attorney’s representation of the corporation;
3. Whether the attorney had access to the stockholder’s confidential or secret information that was unavailable to other parties;
4. Whether the attorney’s services were billed to and paid by the corporation or the stockholder;
5. Whether the corporation is closely held;
6. Whether the stockholder could reasonably have believed that the attorney was acting as his individual attorney rather than as the corporation’s attorney;
7. Whether the attorney affirmatively assumed a duty of representation to the stockholder by either express agreement or implication;
8. 


\(^{28}\) Id.


\(^{30}\) See *Felty*, 523 N.E.2d at 557.

whether the matters on which the attorney gave advice are within his or her professional competence; (9) whether the attorney entered into a fee arrangement; and (10) whether there was evidence of reliance by the stockholder on the attorney as his or her separate counsel or of the stockholder’s expectation of personal representation.\textsuperscript{32}

One situation in which some courts have recognized that an attorney may be liable to an individual shareholder is when the attorney knowingly participates in the squeezing out of a minority shareholder by the majority shareholders.\textsuperscript{33} For example, in \textit{Granewich v. Harding}, an attorney allegedly helped the majority shareholders amend the corporate bylaws to exclude the plaintiff from the corporation and to dilute the plaintiff’s interest by issuing new shares of stock to themselves.\textsuperscript{34} In that case, the Supreme Court of Oregon held that an attorney may be liable for aiding and assisting in the tort of breach of fiduciary duty if the alleged facts in the case were determined to be true.\textsuperscript{35}

While South Carolina has not directly addressed this issue, it is likely that a South Carolina court would join the majority of other jurisdictions and hold that, in general, a shareholder or officer of a corporation cannot bring a legal malpractice action against the corporation’s attorney because the corporation and not the individual is the attorney’s client and, as a result, the attorney does not owe a specific duty to the individual. This comports with Rule 1.13(a) of the Rules of Professional Conduct, which recognizes that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”\textsuperscript{36}

\begin{center}
\textbf{PRACTICE POINTER:}

An attorney undertaking to represent a corporation or other legal entity should make clear in the engagement letter whether he is undertaking duties to the shareholders or other principals in addition to duties owed to the entity itself.
\end{center}


\textsuperscript{33} See \textit{Granewich v. Harding}, 329 Or. 47, 59, 985 P.2d 788, 795 (Or. 1999) (holding that an attorney may be liable for participating in a scheme to “squeeze out” minority shareholder).

\textsuperscript{34} \textit{Id.} at 50, 985 P.2d at 790.

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} Rule 1.13(a), SCRPC.
CHAPTER 8

Defenses

A. Generally

As is discussed in previous chapters, a legal malpractice claim may sound in contract or in tort. In defending a legal malpractice claim, an attorney generally has available to him all defenses available in a typical contract or tort case. This chapter is not an exhaustive review of all defenses available in legal malpractice actions. Instead, it is an overview of defenses that appear frequently in South Carolina legal malpractice case law.

B. Statute of Limitations

The statute of limitations for a legal malpractice cause of action is three years.\(^1\) Under the discovery rule, “the statute of limitations accrues at the time of the negligence or when the facts and circumstances would put a person of common knowledge on notice that there might be a claim against another party.”\(^2\) “[T]he statute of limitations begins to run from the date the injured party either knows or should know, by the exercise of reasonable diligence, that a cause of action exists for wrongful conduct.”\(^3\) “The ‘exercise of reasonable diligence’ means the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist.”\(^4\) Moreover, “the statute of

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\(^3\) Id.; see also S.C. CODE ANN. § 15-3-535 (1976).

\(^4\) Id. (citing Dean v. Ruscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996)).
limitations is triggered not merely by knowledge of an injury but by knowledge of facts, diligently acquired, sufficient to put an injured person on notice of the existence of a cause of action against another.”

Ignorance that the attorney was responsible for the injury will not delay the commencement of the running of the statute of limitations if, upon gaining knowledge of the injury, the plaintiff could have determined that the attorney caused the injury by diligently investigating the matter. “The important date under the discovery rule is the date that a plaintiff discovers the injury, not the date of discovery of the identity of another alleged wrongdoer.”7 Thus, “[i]f, 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 on that injury.”8 For instance, in *Peterson v. Richland County*, the plaintiff discovered that a confession of judgment had not been properly indexed, and subsequently sued the clerk of court.9 Later, when the clerk answered the plaintiff’s complaint, the plaintiff realized that her attorney may have been negligent in failing to ensure that the judgment was properly indexed.10 In that case, the Court of Appeals held that a reasonable person, acting diligently, should have discovered that her attorney was negligent at the time she realized that the judgment was not indexed properly.11

The standard for determining when the statute of limitations begins to run is objective rather than subjective.12 However, when applying the discovery rule, a court in South Carolina may look to the specific facts of the case before it, as well as the sophistication level of the specific plaintiff, to determine when a person in

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5 *Id.* at 120 (emphasis added).

6 *See Peterson v. Richland County*, 335 S.C. 135, 139-140, 515 S.E.2d 553, 555 (Ct. App. 1999) (holding that plaintiff was put on inquiry notice of an error by her attorney, and thus a potential claim, more than three years before filing malpractice suit).


8 *Id.* (emphasis added).

9 *Peterson*, 335 S.C. at 137, 515 S.E.2d at 554.

10 *Id.* at 138, 515 S.E.2d at 554.

11 *Id.* at 140, 515 S.E.2d 555-56.

the plaintiff’s position should know that a claim against another party might exist.\textsuperscript{13} For example, in \textit{Holmes v. Haynsworth, Sinkler & Boyd, P.A.}, the Supreme Court held that the statute of limitations began to run on the plaintiff’s claim on the date when the plaintiff, who was herself an attorney, was openly critical of her attorney in a pro se filing with the district court.\textsuperscript{14}

A court may determine the date a plaintiff’s legal malpractice claim accrued as a matter of law based on the undisputed facts of the case.\textsuperscript{15} If there is a dispute about a material fact that would have put the plaintiff on notice of the potential malpractice claim, however, the court may allow a jury to determine which party’s version of the facts is more credible.\textsuperscript{16} In \textit{True v. Monteith}, the Supreme Court held that if the defendant-attorney disclosed, as he claimed to have, his dual representation to the plaintiff, then the plaintiff would have been on notice of her potential claim on that date and the plaintiff’s case would have been barred by the statute of limitations.\textsuperscript{17} However, because the plaintiff claimed that the defendant had never disclosed his dual representation to her, the court remanded the case for the jury to decide the date on which the plaintiff was on notice of the potential claim.\textsuperscript{18}

South Carolina courts have recognized situations in which the statute of limitations may be tolled or delayed. For example, the Supreme Court’s decision in \textit{Stokes-Craven Holding Corp. v. Robinson} recognizes that the statute for a legal malpractice claim arising from litigation may not commence to run until

\textsuperscript{13} See \textit{Holmes v. Haynsworth, Sinkler & Boyd, P.A.}, 408 S.C. 620, 632-33, 760 S.E.2d 399, 405 (2014) (holding that, as an attorney, plaintiff clearly should have known by a certain date that she had a potential malpractice claim).

\textsuperscript{14} Id. at 632-34.


\textsuperscript{17} Id. at 119, 489 S.E.2d at 616.

\textsuperscript{18} Id.
the underlying case is resolved on appeal. However, “the statute is not delayed until the injured party seeks advice of counsel or develops a full-blown theory of recovery; instead, reasonable diligence requires a plaintiff to ‘act with some promptness.’” Therefore, a plaintiff will not likely be successful in arguing that the statute of limitations did not begin to run until they consulted with independent counsel about the possibility of a claim.

The doctrine of equitable estoppel can prevent the defendant from raising the statute of limitations as a defense in a legal malpractice case. To establish equitable estoppel, the party claiming estoppel must prove that he or she (1) lacked knowledge and means of obtaining knowledge of the truth of the facts in question; and (2) relied upon the conduct of the party to be estopped. Furthermore, “[t]he party claiming estoppel must also establish that the party to be estopped (1) acted in a way amounting to a false representation or concealment of material facts; (2) intended such conduct to be acted upon by the other party; and (3) possessed knowledge, either actual or constructive, of the true facts.”

Additionally, the plaintiff must be aware of the potential suit at the time the defendant induces him to delay filing suit. For example, in Clearwater Trust v. Wyche, Burgess, Freeman & Parham, P.A., the district court held that the plaintiffs could not argue equitable estoppel because they had previously argued, albeit unsuccessfully, that they were not aware of the possible claim at the point at which they claimed defendant had induced their delay.

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19 Stokes-Craven, 416 S.C. 517, 537, 787 S.E.2d 485, 496. This decision is discussed in detail later in this section.


21 Id. at 638, 682 S.E.2d at 7.


24 Id. (citing Ingram v. Kasey’s Assocs., 340 S.C. 98, 107 n.2, 531 S.E.2d 287, 292 n.2 (2000)).

25 Id. at 639-40, 682 S.E.2d at 8.

“The inducement to delay in filing suit may come in the form of an express representation by the defendant that a claim will be settled without litigation or by other conduct suggesting a lawsuit is unnecessary.”27 However, “[e]quitable tolling does not require a showing that the defendant has made a misrepresentation to the plaintiff.”28 The Supreme Court has stated that equitable tolling “should be used sparingly and only when the interests of justice compel its use.”29

In *Vieira v. Simpson*, the plaintiff argued that the statute of limitations should be equitably tolled because the defendant-attorney had induced him to delay filing suit by not disclosing that he was vice president of the corporation from which he had advised the plaintiff to accept a loan, and because he failed to advise the plaintiff to seek independent legal counsel regarding whether to waive a conflict of interest.30 However, in that case, the district court held that the withholding of this information did not give rise to equitable tolling, particularly because the plaintiff knew the corporation was owned by the defendant-attorney’s wife, and the plaintiff had consented to the waiver of this “huge conflict of interest.”31

Until recently, *Epstein v. Brown* was the controlling case in South Carolina with regard to the tolling of the statute of limitations in legal malpractice cases in which the plaintiff appealed a judgment in the underlying case.32 In that case, the Supreme Court refused to adopt a “continuous-representation” rule and held that the statute of limitations was not tolled by the attorney’s representation of the plaintiff during the plaintiff’s appeal of the underlying case.33 The *Epstein* court held that the statute of limitations on a legal malpractice claim arising out of litigation begins to run on the date the adverse verdict is entered against the plaintiff and not on the date the appellate court affirmed the decision on appeal and issued a remittitur.34 In his dissenting opinion in *Epstein*, Justice Pleicones agreed with the majority’s rejection

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27 *Kelly*, 383 S.C. at 640, 682 S.E.2d at 8.


30 *Id.*

31 *Id.*


33 *Id.* at 381-83, 610 S.E.2d at 821.

34 *Id.* at 380, 610 S.E.2d at 820.
of the continuous-representation rule, but argued that the attorney should have been estopped from asserting the statute of limitations as a defense because the attorney’s advice about appealing the case is what led to the plaintiff’s delay in filing his legal malpractice claim. Alternatively, in her dissenting opinion, Chief Justice Toal stated that she “would adopt a bright-line rule that the statute of limitations does not begin to run in a legal malpractice action until an appellate court disposes of the action by sending a remittitur to the trial court.”

In Stokes-Craven Holding Corp. v. Robinson, the Supreme Court considered the continued efficacy of its Epstein decision. The Supreme Court overruled Epstein and held “that the statute of limitations for a legal malpractice cause of action may be tolled if the client appeals the matter in which the alleged malpractice occurred.” The court “adopt[ed] a position that is analogous to the remittitur rule but is strictly based on existing appellate court rules.” The court found that Epstein should be overruled “because the holding in that case is contrary to Rules 205 and 241, SCACR” which divest the trial court of jurisdiction pending an appeal. Thus, in Stokes-Craven, as in Epstein, the court addressed a specific factual scenario: a legal malpractice lawsuit that arises out of an attorney’s allegedly negligent conduct in the course of underlying litigation that results in an adverse verdict against the client and which the client appeals. The Stokes-Craven court expressly affirmed the discovery rule and affirmed that the “knew or should have known” standard is objective. It therefore appears that the Stokes-Craven opinion only impacts the specific factual scenario at issue in that case.

C. The Judgmental Immunity Rule

South Carolina has not officially adopted the judgmental immunity rule, which provides that “there can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional

35 Id. at 384, 610 S.E.2d at 822 (Pleicones, J., dissenting).
36 Id. at 383-84, 610 S.E.2d at 822 (Toal, C.J., dissenting).
38 Id. at 532, 787 S.E.2d at 493 (emphasis added).
39 Id. at 535, 787 S.E.2d at 495.
40 Id. at 525-26, 787 S.E.2d at 489-90.
However, the Supreme Court has expressly “reject[ed] as a matter of law any suggestion that a bad result is evidence of the breach of the standard of care” and has recognized 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.” In *Harris Teeter*, the plaintiff alleged that the attorney-defendants breached the standard of care, in part, by failing to introduce certain evidence at the underlying arbitration hearing. The court noted that the attorney-defendants “made a judgment call concerning the presentation of [the evidence]” and that the judgment call was not unreasonable as a matter of law. Noting that “[t]he practice of law is not an exact science [and it] involves the exercise of judgment based on the circumstances known and reasonably ascertainable at the time the judgement is rendered,” the court held the attorney-defendants did not breach the standard of care and affirmed summary judgment in their favor.

D. Comparative Fault

Appellate courts in South Carolina have not addressed in detail whether a defendant-attorney may assert the affirmative defense of comparative or contributory negligence in a legal malpractice case. In *Shealy v. Walters*, the Supreme Court acknowledged that the defendant had alleged contributory negligence on the part of the plaintiff, and while the court did not address this allegation further in its opinion, it did not suggest that such a defense could not be raised.

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42 Id.

43 Id. at 281, 701 S.E.2d at 745.

44 Id. at 292, 701 S.E.2d at 751.

45 Id. at 292-94, 701 S.E.2d at 751.

The vast majority of jurisdictions that have considered the availability of comparative fault as a defense to a legal malpractice action have held that the defense is available. Based on the court’s mention of comparative fault in *Shealy* and the overwhelming majority of courts that recognize comparative fault as a defense in a legal malpractice action, it appears certain that South Carolina courts would recognize this defense.

If South Carolina courts allow comparative negligence as a defense in legal malpractice cases, the issue becomes what conduct by the plaintiff will lead to a successful assertion of this defense. Comparative negligence has been recognized as a proper defense in other jurisdictions “where the client has withheld or misrepresented information that is essential to the attorney’s representation of the client.” Courts have also recognized the applicability of the defense in instances where the client has chosen to disregard the legal advice which the attorney provided to the client or has violated the instructions of the attorney. However, courts in other jurisdictions typically do not recognize contributory negligence on the part of the client for “relying on a lawyer’s erroneous legal advice or for failing to correct errors of the lawyer which involve professional expertise.”

**E. Assumption of the Risk**

Although courts in South Carolina have not addressed the issue to any great extent, the Court of Appeals has indicated that assumption of risk may be raised as an affirmative defense in legal malpractice cases. In *Mali v. Odom*, clients sued their former closing attorney alleging that he knew of their intention to operate a school on the property they purchased, yet failed to inform them of restrictive covenants on the lots that would prevent them from building a school on the site.

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49 Id.

50 Id. (quoting Tarleton v. Arnstein & Lehr, 719 So.2d 325, 331 (Fla. App. 1998)).


52 Id. at 80, 367 S.E.2d at 168.
The attorney testified that he informed the plaintiffs about the restrictive covenants on the property and explained the significance of those covenants. The Court of Appeals held that the question of plaintiffs’ assumption of the risk constituted a jury question in light of the conflicting testimony. Thus, assumption of risk may be raised as an affirmative defense in legal malpractice cases in South Carolina.

F. Waiver and Estoppel

1. Waiver

“Waiver is a voluntary and intentional abandonment or relinquishment of a known right.” A party claiming the defense of waiver “must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended.” It is not a requirement that the party asserting waiver has been prejudiced. The determination of whether a waiver has occurred is typically a question of fact. Waiver “may be expressed or implied by a party’s conduct, and it may be applied to bar a party from relying on a statute of limitations defense.” “An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable.”

53 Id. at 81, 367 S.E.2d at 169.
54 Id. at 82, 367 S.E.2d at 169.
57 Id.
58 Parker at 487, 443 S.E.2d at 391.
59 Id. (citing Mende v. Conway Hospital, Inc., 304 S.C. 313, 404 S.E.2d 33 (1991)).
Chapter 8

PRACTICE POINTER:

Waiver v. Estoppel: The “distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations, so that it is difficult to determine the exact point where one doctrine ends and the other begins.” However, both waiver and estoppel “are protective only, and are to be invoked as shields, and not as offensive weapons.”

Waiver can be asserted as a defense in a legal malpractice case although South Carolina appellate courts have rarely addressed the issue. In a recent district court case, the defendant-attorney’s waiver defense was based on a written agreement. In Vieira v. Simpson, the court held that the plaintiff had waived any argument that the defendant-attorney was negligent with regard to the dual representation of adverse parties because the plaintiff had signed a written waiver of the conflict of interest.

2. Collateral Estoppel

Collateral estoppel is available as a defense to a legal malpractice action. “Where the plaintiff has had a full and fair opportunity to litigate the question of an attorney’s negligence or effectiveness in a particular case, he should be collaterally estopped to adjudicate the same issue in a subsequent legal malpractice action.” The party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment. Additionally, for purposes of asserting collateral estoppel, it is not necessary for the defendant in a legal malpractice case to have also been a party to the previous litigation in which the issue was decided.

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61 Parker, 313 S.C. at 487, 443 S.E.2d at 391.
64 Id.
67 See Irby, 278 S.C. at 486, 298 S.E.2d at 454 (rejecting plaintiff’s argument that defendant was barred from asserting collateral estoppel because they had not been a party to the previous litigation).
In *Irby v. Richardson*, the plaintiff sued his divorce attorney for negligence, alleging that he did not consent to his wife having custody of their children and that his wife was not fit to have custody and, therefore, he would not have lost custody but for the defendant-attorney’s negligence. However, the plaintiff had previously consented to his wife having custody at a family court hearing. The Supreme Court held that the plaintiff’s legal malpractice claim was barred by collateral estoppel because the plaintiff voluntarily consented to his wife having custody of their children.

More recently, in *Smith v. Hastie*, the Court of Appeals held that the plaintiff in a legal malpractice case was not collaterally estopped from bringing her legal malpractice claim because she could not have raised certain issues during prior family court proceedings. In that case, the plaintiff alleged that her attorney had misled her and given her bad advice about placing assets into a family limited partnership because of his close connection with the plaintiff’s ex-husband. Before filing her legal malpractice claim, the plaintiff had reached a settlement with her ex-husband regarding her interest in the family limited partnership. Unlike in *Irby v. Richardson*, the issue in *Smith v. Hastie* concerned legal advice relating to the formation of the partnership and not misconduct in the underlying divorce case. The Court of Appeals specifically distinguished the facts before it from those in *Irby v. Richardson* and held that although some issues created by the attorney’s alleged negligence had been resolved in the family court proceedings, the plaintiff could not have litigated the alleged negligent actions of the attorney that had caused her to be at a disadvantage in the first place.

It is not necessary for the plaintiff to have been a party to the previous litigation for collateral estoppel to apply. In *Patel v. Garrett Law Firm*, the plaintiff brought a legal malpractice suit against his former lawyers alleging that they were negligent in drafting lease and option contracts. However, in a previous breach of contract lawsuit brought by a company co-owned by the plaintiff in the

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68 Id.
69 Id.
71 Id. at 415, 626 S.E.2d at 15.
72 Id.
73 Id. at 420, 626 S.E.2d at 18 (distinguishing the facts from those in *Irby v. Richardson*).
75 Id.
malpractice suit, the court found that the company’s damages were a result of plaintiff’s failure to exercise the option, not the drafting of the contracts.\(^\text{76}\) In Patel, the Court of Appeals held that the plaintiff’s legal malpractice claim was barred by collateral estoppel because the plaintiff, as co-owner of the company, had a full and fair opportunity to litigate causation in the previous litigation, and, therefore, he would not be able to prove proximate cause in the malpractice suit.\(^\text{77}\)

### 3. **Res Judicata**

South Carolina courts have recognized res judicata as a defense to a legal malpractice action. The doctrine of res judicata bars an action by the same parties arising from the same transaction or occurrence that was litigated in a previous action between the parties.\(^\text{78}\) Under res judicata, “a litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.”\(^\text{79}\) Res judicata applies when the following factors are met: “1) the prior judgment was final and on the merits, and rendered by a court of competent jurisdiction in accordance with the requirements of due process; 2) the parties are identical, or in privity, in the two actions; and, 3) the claim[] in the second matter [is] based upon the same cause of action involved in the earlier proceeding.”\(^\text{80}\)

In Grausz v. Englander, the plaintiff sued the law firm that had represented him in a bankruptcy proceeding.\(^\text{81}\) The plaintiff argued that he had not been a party to a previous fee application proceeding in bankruptcy court between his estate and the law firm because his estate was represented by a trustee, not himself.\(^\text{82}\) The Fourth Circuit held that the plaintiff’s legal malpractice claim was barred by res judicata because the plaintiff was a party of interest to the previous action due to

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76 Id.

77 Id.


79 Id. (quoting Hilton Head Center of South Carolina, Inc. v. Public Service Comm’n of South Carolina, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)).

80 Grausz v. Englander, 321 F.3d 467, 469 (4th Cir. 2003) (quoting In re Varat Enters., Inc., 81 F.3d 1310, 1315 (4th Cir.1996)).

81 Id. at 472.

82 Id. at 472-73.
his pecuniary interest in the outcome of the fee application proceeding. Thus, the court concluded that the plaintiff had an opportunity during the prior proceedings to litigate whether his attorneys had been incompetent.  

Likewise, in Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guerard, the plaintiff sued its former attorneys based on the attorneys’ allegedly untimely withdrawal from representation in an anti-trust suit.  

However, during the underlying anti-trust litigation, the federal court permitted the defendant-attorneys to withdraw, despite the client’s “vehement objections.” Consequently, the Supreme Court held that the plaintiff was barred by res judicata from subsequently filing a civil suit in state court based upon the withdrawal.  

4. Judicial Estoppel  

No South Carolina appellate court has addressed judicial estoppel as an affirmative defense to a legal malpractice action. However, if the facts warrant its application, a South Carolina court would likely recognize the doctrine as a viable defense. “Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.” The doctrine typically applies only to inconsistent statements of fact and not to conclusions of law or assertions of alternative legal theories. The specific elements necessary for judicial estoppel to apply are as follows: “(1) two inconsistent positions taken

83 Id.


85 Id. at 245, 513 S.E.2d at 96.

86 Id. at 245-46, 513 S.E.2d at 97.

87 The Court of Appeals addressed a legal malpractice plaintiff’s attempt to use judicial estoppel in Binkley v. Burry, 352 S.C. 286, 295, 573 S.E.2d 838, 843 (Ct. App. 2002). In that case, the plaintiffs argued that judicial estoppel should apply to prevent the defendant-attorneys, who had previously claimed that the plaintiffs and other homeowners did not have notice of an easement on their property, from later claiming that plaintiffs should have been aware of a potential claim on a certain date. The court held that judicial estoppel was inapplicable because the defendant-attorneys’ previous position that the easement document was vague and ambiguous was more like an alternative legal theory that did not prevent the defendant-attorneys from later arguing about when the plaintiffs should have had notice of a potential claim.


89 Id. at 296, 573 S.E.2d 844.
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 mislead the court; and (5) the two positions must be totally inconsistent.”

G. Ratification

Ratification is available as an affirmative defense to a legal malpractice action. Ratification is “the express or implied adoption and confirmation by one person of an act or contract performed or entered into on his behalf by another who at the time assumed to act as his agent.” One asserting ratification must establish the following three elements: (1) acceptance by the principal of the benefits of the agent’s acts, (2) the principal’s full knowledge of the facts, and (3) circumstances or an affirmative election demonstrating the principal’s intent to accept the unauthorized arrangements.” In order to understand how the law of ratification impacts legal malpractice cases, it is important to consider the facts of two cases decided by the Supreme Court of South Carolina: Crowley v. Harvey & Battey, P.A. and L.F.S. Corp. v. Kennedy.

In L.F.S. Corp. v. Kennedy, a corporation sued its former law firm for malpractice alleging that the firm exceeded its authority during settlement negotiations and permitted summary judgment to be entered against the plaintiff corporation on the basis of the unauthorized settlement agreement. The law firm had represented the plaintiff in a dispute with the Town of Kershaw regarding the town’s obligation to supply water to a subdivision developed by the corporation. Following entry of summary judgment, the corporation demanded and accepted a

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92 Id. (quoting Stiltner v. USAA Cas. Ins. Co., 395 S.C. 183, 191, 717 S.E.2d 74, 78 (Ct. App. 2011)).


94 Id.
$900 check from the town for tap fees as required by the settlement agreement. The Supreme Court held that because the plaintiffs believed their attorneys had exceeded their authority, yet accepted the benefits of the unauthorized agreement, the plaintiff corporation had clearly ratified its attorneys’ actions. Therefore their malpractice claim was barred as a matter of law.

By contrast, in *Crowley v. Harvey & Battey, P.A.*, a client sued her former attorneys for legal malpractice alleging that they were negligent in advising her regarding the settlement of property issues in a divorce action. The Supreme Court distinguished the facts in *Crowley* from those in *L.F.S Corp. v. Kennedy*, recognizing a significant difference between a client accepting the benefits of an agreement that was known to be unauthorized and accepting a settlement based on apparently sound advice that later proved to be incorrect. The court further supported its decision by citing its own precedent holding that “where a client alleges his former attorney was negligent in advising him to accept a settlement, that alleged negligence is not a ground for attacking the settlement itself but rather is a matter left for a malpractice suit between the client and his attorney.” The court also discussed the idea that not allowing a client to accept the settlement in such a situation would effectively absolve the client of the duty to mitigate damages, because the client would typically seek to recover from the attorney the difference between the settlement amount accepted and the amount the client should have received.

Thus, if a client alleges that he accepted an unfavorable settlement upon the attorney’s negligent advice, a legal malpractice claim against the attorney is not barred based on the doctrine of ratification. On the other hand, if a client accepts an unauthorized settlement, the client’s legal malpractice claim is barred as a matter of law.

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95 Id.
96 Id.
98 Id. at 70-71, 488 S.E.2d at 335.
99 Id.
100 Id. (citing *Shelton v. Bressant*, 312 S.C. 183, 439 S.E.2d 833 (1993)).
101 Id.
H. Failure to Mitigate

South Carolina law recognizes that a plaintiff has a duty to mitigate his damages. “A party injured by the acts of another is required to do those things a person of ordinary prudence would do under the circumstances, but the law does not require him to exert himself unreasonably or incur substantial expense to avoid damages.”

“[T]he party who claims damages should have been minimized has the burden of proving they could reasonably have been avoided or reduced.” Additionally, the party who claims damages should have been minimized has the burden of establishing that actions the other party could have taken to minimize damages would have been feasible and cost-effective.

South Carolina law recognizes that a legal malpractice plaintiff, just as any other plaintiff, has a duty to mitigate his damages. Other jurisdictions have also recognized this obligation on legal malpractice plaintiffs.

“The scope of a party’s duty to mitigate depends on the particular facts of the individual case.” “A duty to mitigate encompasses only what a ‘reasonably prudent man’ would have done to lessen his damages, given the facts known to him at the time and avoiding the temptation to view the case through hindsight.” While “a client has a duty to mitigate damages caused by his attorney’s malpractice, such a duty cannot require the client to undertake measures that are unreasonable,

References:


105 See, e.g., Crowley, 327 S.C. at 71, 488 S.E.2d at 335 (basing its holding on the fact that “[t]o hold otherwise would be to absolve the client of the duty to mitigate damages”).


108 Id.
impractical, or disproportionately expensive considering all of the attendant circumstances.”\(^\text{109}\) As stated in one legal malpractice treatise, for example, if an “appeal provided an opportunity for the client to mitigate damages, then the issue is whether the abandonment of the appeal was reasonable under the circumstances.”\(^\text{110}\)

I. Election of Remedies

“The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury.”\(^\text{111}\) The doctrine is used to prevent a plaintiff from double recovery for the same injury.\(^\text{112}\)

In *Cowart v. Poore*, the plaintiff in a legal malpractice case had previously brought a claim against the defendant-attorney before the Resolution of Fee Disputes Board, alleging that the defendant-attorney had not earned the fees paid to him in a mortgage foreclosure action.\(^\text{113}\) The Board dismissed the claim and found that the defendant-attorney had earned the fees paid to him.\(^\text{114}\) The Court of Appeals ruled that “a party may not bring a case before the Resolution of Fee Disputes Board, receive a final judgment, and then relitigate the claim, even under different theories” because to allow the case to proceed “would permit a double recovery on the same set of facts.”\(^\text{115}\)

\(^{109}\) Id.


\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Id. at 365, 523 S.E.2d at 185.

\(^{115}\) Id.
CHAPTER 9

Law Firm and Partner Vicarious Liability

South Carolina courts appear to recognize that a law firm and its partners may be held vicariously liable for the legal malpractice of another partner. For example, in *Tuten v. Joel*, the Court of Appeals noted that “[a] principal attorney, typically an owner or managing attorney, is responsible for the conduct of employed attorneys.” This is consistent with the South Carolina Rules of Professional Conduct which, for example, impute conflicts of interest to lawyers “associated in a firm.” The question that often arises is what constitutes a firm or partnership for purposes of vicarious liability and whether actions are committed within the scope of the “business of the partnership.”

*Tuten v. Joel* provides an example of attorney vicarious liability. In that case, a Georgia attorney closed his South Carolina office and reached an agreement with an attorney licensed and working in South Carolina to handle his cases still pending in the state. After the Georgia lawyer was sued for malpractice, the Court of Appeals concluded that the Georgia lawyer was liable for legal malpractice based on the negligence of the attorney who handled his cases in South Carolina. The court held this because the Georgia attorney had marketed his name and the name of his firm to clients in South Carolina and remained the plaintiff’s attorney even after he closed his South Carolina office.

In *Cianbro Corp. v. Jeffcoat & Martin*, the plaintiff brought a legal malpractice action against its attorney alleging the attorney failed to timely file a suit to foreclose a mechanic’s lien. The plaintiff also sued the attorney’s law firm
and his partners individually on the basis of vicarious liability. The district court granted summary judgment in favor of the defendants on the basis that the plaintiff failed to introduce expert testimony to support his legal malpractice claim. The court mentioned the vicarious liability claim, but did not discuss it in depth.

Other jurisdictions have considered the issue in greater detail. For example, in *Dresser Industries, Inc. v. Digges*, the United States District Court of Maryland determined that “the test of partnership liability turns on whether a partner’s wrongful act was committed within the scope of the business of the partnership and for its benefit.” *Dresser* involved an attorney who had previously represented a company in a series of asbestos related claims brought against it by employees. The attorney later formed his own firm with two partners and agreed with the company that his new firm would continue to handle the asbestos litigation. Later, the company discovered that the attorney, on behalf of his new firm, had billed them for hours and services that were never performed. Ultimately, the court found that although the two partners were unaware of the fictitious billing, the actions were done within the scope of the partnership and for the benefit of the partners and thus the partners could be held liable for malpractice.

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7 *Id.*

8 *Id.* at 793 (affirmed by the Fourth Circuit in *Cianbro Corp. v. Jeffcoat & Martin*, 10 F.3d 806 (4th Cir. 1993)).


10 *Id.* at *1.

11 *Id.*

12 *Id.*

13 *Id.* at *6.*
CHAPTER 10

Assignability of Legal Malpractice Claims

Until relatively recently, South Carolina courts had not addressed the assignability of legal malpractice claims. However, in Skipper v. ACE Property and Cas. Ins. Co. the Supreme Court adopted the majority rule and held that assignment of claims between adversaries in the litigation in which the alleged legal malpractice arose is prohibited as against public policy.¹

In Skipper, the underlying case involved a motor vehicle accident between an individual and a logging truck.² The insurance company retained lawyers to represent the logging company and the driver of the truck. Subsequently, the insurance company offered to settle the claim for $50,000, which was well below the policy limits.³ The plaintiff declined the settlement offer.⁴

Later, unbeknownst to the insurance company or the defense attorneys, the plaintiff and defendants entered into an agreement in which the defendants admitted liability.⁵ In return, the defendants agreed to pursue a legal malpractice action against the insurance company and its attorneys, and assigned the predominant interest in that malpractice claim to the plaintiff in the underlying litigation.⁶

The Supreme Court recognized that “'[t]he majority rule in other jurisdictions is to prohibit the assignment of legal malpractice claims between adversaries in the litigation in which the alleged malpractice arose.’” The court noted “'[t]he

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² Id. at 34-35, 775 S.E.2d at 37.
³ Id.
⁴ Id.
⁵ Id. at 35, 775 S.E.2d at 38.
⁶ Id.
⁷ Skipper, 413 S.C. at 36, 775 S.E.2d at 38.
most common reason other courts have declined to permit assignments of legal malpractice claims is to avoid the risk of collusion between the parties."8 The Supreme Court joined the majority of other jurisdictions and held that the defendants in the underlying case could not assign their interest in the later malpractice claim to the original plaintiff.9

South Carolina appellate courts have not addressed whether a legal malpractice cause of action may be assigned in a context other than between adversaries in the underlying litigation. Most courts that have addressed this issue have held, however, that legal malpractice causes of action are not assignable.10

Similar to the Supreme Court’s determination that the assignment of a legal malpractice claim to an adversary is against public policy, courts in other jurisdictions have recognized several policy reasons for barring the assignment of legal malpractice claims in general. “Most courts view the unique personal nature of the relationship between an attorney and his client to be the most compelling

8 Id.
9 Id. at 38, 775 S.E.2d at 39.
Assignability of Legal Malpractice Claims

public policy reason for prohibiting the assignment of legal malpractice claims."\(^{11}\) This concern was expressed in the seminal case of Goodley v. Wank & Wank, Inc.,\(^ {12}\) in which the court stated as follows:

It is the unique quality of legal services, the personal nature of the attorney’s duty to the client and the confidentiality of the attorney-client relationship that invoke public policy considerations in our conclusion that malpractice claims should not be subject to assignment.\(^ {13}\)

Courts adopting the majority view have also recognized that the assignment of legal malpractice claims is incompatible with the duties of loyalty and confidentiality attorneys owe to their clients.\(^ {14}\) “An attorney’s loyalty is likely to be weakened by the knowledge that a client can sell off a malpractice claim, particularly if an adversary can buy it.”\(^ {15}\)

As for the duty of confidentiality, once the case is assigned, the client loses control over the disclosure of confidential information, which the attorney may reveal as reasonably necessary to establish a defense.\(^ {16}\) “The client is relegated to observing from the sidelines as the assignee pursues the attorney,” which “erodes the principles fostered by the duty of confidentiality.”\(^ {17}\) Assigning a legal malpractice claim could certainly lead to similar problems with the duty of loyalty.

\(^{11}\) Delaware CWC Liquidation Corp. v. Martin, 584 S.E.2d 473, 477 (W. Va. 2003).


\(^{13}\) Id.; see also Gurski v. Rosenblum & Filan, LLC, 885 A.2d 163, 169 (Conn. 2005) (stating that “the unique and personal nature of the relationship between attorney and client and the need to preserve the sanctity of that relationship” are reasons for prohibiting the assignment of malpractice claims).

\(^{14}\) Gurski, 885 A.2d at 169-70; see also Picadilly, Inc. v. Raikos, 582 N.E.2d 338, 343 (Ind. 1991) (stating that assignments of legal malpractice claims “would weaken at least two standards that define the lawyer’s duty to the client: the duty to act loyally and the duty to maintain client confidentiality”).

\(^{15}\) Picadilly, 582 N.E.2d at 343.

\(^{16}\) Id.; see also Rule 1.6(b)(6), SCRPC (allowing attorneys to reveal confidential information reasonably necessary to establish a defense).

\(^{17}\) Id.
In addition to the loyalty and confidentiality concerns, courts have recognized that assignments of legal malpractice claims “relegate the legal malpractice action to the market place and convert it to a commodity to be exploited and transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty, and who have never had any prior connection with the assignor or his rights.”

Finally, courts have held that such assignments “place an undue burden on not only the legal profession but the already overburdened judicial system, restrict the availability of competent legal services, embarrass the attorney-client relationship and imperil the sanctity of the highly confidential and fiduciary relationship existing between attorney and client.” Allowing such assignments “would make attorneys hesitant to represent insolvent, underinsured or judgment proof defendants for fear that the malpractice claims would be used as tender.”

A minority of jurisdictions have declined to adopt a bright-line rule that legal malpractice claims are not assignable and instead consider such assignments on a case-by-case basis. Additionally, some states have allowed the assignment of a legal malpractice claim when the claim is transferred to an assignee in a commercial transaction, along with other business assets and liabilities.

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18 Goodley, 133 Cal. Rptr. at 87.
19 Id.
20 Id.
While South Carolina appellate courts have not yet considered—outside the context of an assignment between adversaries in litigation—whether a legal malpractice cause of action is assignable, a South Carolina court would likely hold that such an assignment is prohibited. The Supreme Court adopted the majority position in holding that an assignment between adversaries is void as against public policy. It is therefore reasonable to assume that a South Carolina court would adopt the majority position on assignments of legal malpractice claims in general and conclude that such assignments are prohibited.
CHAPTER 11

Federal Jurisdiction

A cause of action for legal malpractice is a state law claim and, therefore, a federal court will not have subject matter jurisdiction to hear such a case except in certain scenarios.1 The two primary ways that a district court will have such jurisdiction are: (1) diversity of the parties;2 or (2) the presence of a federal question.3 Barring certain exceptions, a federal court may also have supplemental jurisdiction for legal malpractice claims that form part of the same case or controversy as a civil action for which the district court has original jurisdiction.4

A. Diversity Jurisdiction

An action for legal malpractice is cognizable in federal court under the federal diversity statute if the statute’s requirements are met. 28 U.S.C.A. § 1332 requires complete diversity of the parties and an amount in controversy in excess of $75,000.5 “Complete diversity” of the parties means that no party on one side may be a citizen of the same state as any party on the other side.6 For example, a district court would have jurisdiction over a legal malpractice state law claim if the client was from South Carolina, the attorney was from Florida, and more than $75,000 was in controversy.


4 28 U.S.C.A. § 1367(a) (see § 1367(b) and (c) for exceptions to this rule).

5 28 U.S.C.A. § 1332(a) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States.”). See also Cianbro Corp. v. Jeffcoat and Martin, 804 F.Supp. 784, 788-91 (D.S.C. 1992).

Often, in legal malpractice cases in federal court based on diversity, it can be difficult to determine what law should be applied. Matters can become complicated when the law of one jurisdiction is applied to the legal malpractice case and the law of a different jurisdiction is applied to the underlying case. If the parties in a legal malpractice action previously agreed to a choice of law provision in a contract, then that choice of law provision will apply to the later malpractice case for both substantive and procedural matters. For example, in *Interclaim Holdings Ltd. v. Ness, Motley, Loadholt, Richardson & Poole*, the two parties agreed to a choice of law provision stating that the contract would be subject to South Carolina law. The plaintiff filed the legal malpractice claim in the United States District Court of the Northern District of Illinois. The defendants argued that while South Carolina law should govern the breach of contract aspect of the malpractice claim, the court should bar the award of punitive damages against the law firm based on an Illinois statute barring the award of punitive damages against attorneys. Ultimately, the court concluded that South Carolina law governed all aspects of the case and upheld the award of punitive damages against the defendant because such an award is not barred by statute in South Carolina.

### B. Federal Question Jurisdiction

The other type of federal subject matter jurisdiction is called “federal question jurisdiction.” Pursuant to 28 U.S.C.A. § 1331, “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” The presence or absence of federal question jurisdiction is governed by the “well-pledged complaint rule,” which provides that federal question jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint. “The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.”

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8 *Id.* at 759.

9 *Id.* at 758.

10 *Id.* at 762.


and determine whether a federal question exists. “[F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.”¹⁴

A claim related to federal patent law is one area where a federal court may have subject matter jurisdiction over a legal malpractice claim.¹⁵ A district court will have jurisdiction over such a claim if “the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal patent law, in that patent law is a necessary element of one of the well-pleaded claims.”¹⁶ In Weil v. Killough, the district court denied the plaintiff’s motion to remand the case to state court finding that the district court had original jurisdiction.¹⁷ In that case, the plaintiff lost a patent due to his failure to pay a maintenance fee, which he alleged was the result of his attorney’s negligence.¹⁸ The court determined that a substantial federal question was presented because establishing the applicable standard of care would require interpretation of the Patent and Trademark Office Code of Professional Responsibility and the Code of Federal Regulations.¹⁹ Additionally, the causation and damages elements of the malpractice claim would require an inquiry into whether the scope of the patent, had it been valid, would have been broad enough to bring action against infringers.²⁰


¹⁶ *Id.* (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 108 S. Ct. 2166 (1988); but see *Gunn v. Minton*, 133 S. Ct. at 1065-66 (holding that although “resolution of a federal patent question is ‘necessary’ to [the plaintiff’s] case,” the plaintiff failed to meet the substantiality requirement and the district court did not have original jurisdiction.).

¹⁷ *Id.* at *4.

¹⁸ *Id.* at *1.

¹⁹ *Id.* at *3.

²⁰ *Id.* at *4.
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